Immigration E-Carceration: A Faustian Bargain

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I. INTRODUCTION

A new wave of federal court litigation has required immigration judges to consider alternatives to immigration detention in bond hearings. Although alternatives to detention can take many forms, the most common is electronic monitoring. Immigration detainees and their advocates now find themselves asking to trade the physical walls of jail for virtual walls, begging for a different type of punishment and control. Electronic monitoring imposes pain, shame, arbitrary rules, and limitation of freedom on persons, causing many to experience it as punitive. Its use also facilitates replacing a regime of over-detention with one of over-supervision and becomes the means by which immigration enforcement authorities surveil immigrant communities. It has become a Faustian bargain—should a detainee remain in jail or request these virtual walls?

The Supreme Court's immigration detention doctrine has set up this tradeoff by succumbing to the plenary power's defenders who believe that noncitizens in removal proceedings have no right to freedom. Instead of outright freedom, the Court has offered release under restrictive supervision policies utilized by the immigration authorities. Supervision through electronic monitoring has come to reside doctrinally in the middle ground between absolute freedom and incarceration. Yet as we have learned from electronic monitoring's use in the criminal legal system, this "middle ground" ceded *too* much ground. This Article explains, for the first time, how the Court's immigration detention doctrine and perverse pull of the plenary power has carved out a doctrinal space where electronic monitoring now resides. The Article is also the first to expose a trend in the immigration context, in which the diminished rights that come with the status of a final order of removal have negatively impacted the rights of those who are pretrial. These trends indicate that electronic monitoring will likely continue, unchecked by the judiciary, in the immigration context. It is thus necessary for the executive branch to not repeat the mistakes of the criminal legal system by substituting virtual walls for real ones.

This topic is timely because the Biden administration has reintroduced prosecutorial discretion into the immigration enforcement system, considering alternatives to detention among other enforcement tools.[1] This presents a reverse from the Trump administration, which prioritized detention of any removable noncitizen.[2] Also, only in recent years have federal courts told immigration courts that the immigration courts have the authority to order alternative conditions of release when deciding bond.[3] Immigration and Customs Enforcement (ICE) has been using electronic monitoring as an alternative to detention since 2004, yet critics have dubbed this program "alternatives to release," since it only has been employed in the cases where detention is not necessary.[4] The Trump administration's "priority-free" enforcement agenda led ICE to request increased funding for alternatives to detention, as the administration had insufficient detention beds to house the number of people it would otherwise detain.[5] The COVID-19 pandemic laid bare how dangerous ICE detention could be, because of the high risk of infection stemming from close quarters, shared meals and showers, and exposure to multiple corrections officers.[6] During the pandemic, release

1. Memorandum, Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Guidelines for Enforcement of Civil Immigration Law (Sept. 30, 2021); Memorandum, Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf't, Interim Guidance: Civil Immigration Enforcement and Removal Priorities (Feb. 18, 2021); Memorandum, David Pekoske, Acting Sec'y, U.S. Dep't of Homeland Sec., Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities 1–2 (Jan. 20, 2021).

2. *Fact Sheet: The End of Enforcement Priorities Under the Trump Administration*, AMERICAN IMMIGRATION COUNCIL (Mar. 7, 2018), https://www.americanimmigration council.org/sites/default/files/research/the_end_of_immigration_enforcement_priorities _under_the_trump_administration.pdf [https://perma.cc/HYD2-8TKQ].

3. *See infra* Part II.

4. Jayashri Srikantiah, *Reconsidering Money Bail in Immigration Detention*, 52 U.C. DAVIS L. REV. 521, 541 (2018); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2164 (2017); *see* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1409 (2014); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 56 (2010).

5. The Department of Homeland Security in 2017 no longer exempted classes or categories of removable aliens from potential enforcement. U.S. IMMIGR. & CUSTOMS ENF'T, DEP'T OF HOMELAND SEC., FISCAL YEAR 2020 CONGRESSIONAL JUSTIFICATION 17 (2020). Congress continued to increase funding each year to ICE to support its alternatives to detention program. *See*, S. REP. NO. 116–125, at 49, 56 (2019).

6. *See, e.g.*, Pimentel-Estrada v. Barr, 458 F. Supp. 3d 1226, 1240–42 (W.D. Wash. 2020); Thakker v. Doll, 451 F. Supp. 3d 358, 366–68 (M.D. Pa. 2020); Castillo v. Barr, 499 F. Supp. 3d 915, 918–20 (C.D. Cal. 2020); Basank v. Decker, 449 F. Supp. 3d 205, 211 (S.D.N.Y. 2020); Coronel v. Decker, 449 F. Supp. 3d 274, 284–87 (S.D.N.Y. 2020).

on electronic monitoring presented an option that allowed a person to live safely at home, while meeting ICE's detention goals.[7]

The Trump administration's intent to detain as many noncitizens as possible came to fruition as arrest numbers increased each year of the Trump presidency.[8] The thirst for more immigration detention was not unique to the Trump administration, however. The number of immigration detainees has been on the rise for decades, bringing the daily number of immigration detainees to a startling 55,654 in 2019.[9] Because of the pandemic, ICE's daily detainee population reached an historic low in the beginning of 2021, although the numbers have crawled up to pre-pandemic levels.[10] Immigration detention is nominally civil,[11] yet the conditions of immigration detention and its seemingly unlimited duration have caused detainees to experience the system as punishment;[12] critics of the system have also branded it as punishment.[13] Given that immigration detention is not likely to go away,[14] it is crucial to explore all alternatives to its use, as well as

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7. *See* TOSCA GIUSTINI ET AL., IMMIGRATION CYBER PRISONS: ENDING THE USE OF ELECTRONIC ANKLE SHACKLES 2 (2021) ("As large numbers of people were released from physical detention [because of the pandemic], often only by court order, ICE immediately imposed electronic ankle shackles on many of them. As of May 2021, 31,069 people were subjected to electronic ankle shackling by ICE." (footnote omitted)); *see also infra* Part III.B (describing how electronic monitoring meets ICE's detention goals).

8. *See* John Gramlich, *How Border Apprehensions, ICE Arrests and Deportations Have Changed Under Trump*, PEW RSCH. CTR. (Mar. 2, 2020), https://www.pewresearch.org/fact-tank/2020/03/02/how-border-apprehensions-ice-arrests-and-deportations-have-changed-under-trump/ [https://perma.cc/TYZ3-CYNW]; *see also* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. ONLINE 237, 239–40 (2019) (discussing Trump administration's policy of detaining as a deterrent to future migration).

9. *ICE Detainees*, TRAC IMMIGR. (2021), https://trac.syr.edu/immigration/detentionstats/pop_agen_table.html [https://perma.cc/UQ23-JXY4].

10. *Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise*, TRAC IMMIGR. (2021) https://trac.syr.edu/immigration/reports/640 [https://perma.cc/2P7D-DSTT] (showing daily detainee population at 13,529 in early 2021); César Cuauhtémoc García Hernández, *ICE Prison Population Returns to Pre-Pandemic Levels*, CRIMMIGRATION (July 21, 2021, 11:35 AM), http://crimmigration.com/2021/07/21/ice-prison-population-returns-to-pre-pandemic-levels/ [https://perma.cc/FN74-TXBR]; César Cuauhtémoc García Hernández, *ICE Prison Population Inching Up*, CRIMMIGRATION (Apr. 23, 2021, 4:00 AM), http://crimmigration.com/2021/04/23/ice-prison-population-inching-up/ [https://perma.cc/2B5M-5GKH] (explaining that the current low ICE population resulted not from a reform of ICE's detention practices, but from the COVID-19 pandemic, with its border closure, Title 42 expulsions, and decrease in arrests by local law enforcement due to health concerns).

11. *See* Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 58 (2014); García Hernández, *supra* note 4, at 1351–52.

12. Emily Ryo, *Fostering Legal Cynicism Through Immigration Detention*, 90 S. CAL. L. REV. 999, 1024–25 (2017).

13. *See, e.g.*, García Hernández, *supra* note 4, at 1349; DANIEL WILSHER, IMMIGRATION DETENTION: LAW, HISTORY, POLITICS, at xxii–xxiii (2012).

14. *See* Kalhan, *supra* note 4, at 44 (considering Obama-era proposed reforms to make the immigration detention more "civil" and concluding, "[w]hile excessive detention

the normative and legal justifications for these alternatives. Yet it is also key to not repeat the mistakes of the criminal legal system, where electronic monitoring has replicated the worst aspects of prison.

Only recently have scholars begun to explore the use of alternatives to immigration detention. Several scholars have advocated for the use of alternatives to detention such as electronic monitoring as normatively a good idea in lieu of immigration detention.[15] Others such as César Cuauhtémoc García Hernández and Anil Kalhan have raised concerns that ICE's alternatives to detention has become an "alternatives to release" program, given that it has operated to detain many people who did not present either a danger or flight risk.[16] García Hernández also has advocated for abolishing immigration prisons, without substituting electronic monitoring for the prison.[17] Fatma Marouf has argued that in light of these concerns, ICE should consider a wide range of alternatives to detention, including bond, parole, release on own recognizance, and community-based programs, without relying solely on electronic monitoring.[18] Robert Koulish has critiqued the nascent case law responding to challenges brought by noncitizens subject to electronic monitoring.[19] Yet no scholarship to date has explored how the Supreme Court's immigration detention doctrine has set up a system

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conditions may well be tempered for many individuals, large-scale immcarceration seems here to stay for the foreseeable future").

15. *See, e.g.*, Catherine Y. Kim & Amy Semet, *Presidential Ideology and Immigrant Detention*, 69 DUKE L.J. 1855, 1897 (2020); Srikantiah, *supra* note 4, at 534–36; Jennifer Blasco, *Immigrant Families Behind Bars: Technology Setting Them Free*, 19 VAND. J. ENT. & TECH. L. 697, 713–14 (2017); Philip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of "Custody*," 48 U. MICH. J.L. REFORM 879, 883, 906–12 (2015); Alina Das, *Immigration Detention: Information Gaps and Institutional Barriers to Reform*, 80 U. CHI. L. REV. 137, 145 (2013); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75, 146–47 (2013).

16. *See, e.g.*, Julie Pittman, Note, *Released into Shackles: The Rise of Immigrant E-Carceration*, 108 CALIF. L. REV. 587, 606 (2020); Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45, 53 (2014); CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 149 (2019); García Hernández, *supra* note 4, at 1406, 1412; Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 197–202 (2016); Kalhan, *supra* note 4, at 56.

17. GARCÍA HERNÁNDEZ, *supra* note 16, at 139–63; César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 256–61 (2017).

18. Marouf, *supra* note 4, at 2155.

19. Robert Koulish, *Spiderman's Web and the Governmentality of Electronic Immigrant Detention*, 11 LAW, CULTURE & HUMANS. 83, 97–98, 102–06 (2012).

whereby electronic monitoring has become a middle ground between absolute freedom and incarceration, which the judiciary has long sought.

In Part II, I describe the advent of alternatives to immigration detention, after giving a brief explanation of the growth of immigration detention in the United States. This part also discusses how electronic monitoring came to be the primary alternative to immigration detention. In Part III, I explore normative arguments that criminal law scholars, prison abolitionists, and some immigration law scholars have made against the use of electronic monitoring and consider how the government meets its goals of immigration detention using electronic monitoring. In Part IV, I review key immigration detention decisions at the Supreme Court, with a focus on how immigration law's plenary power has seeped into detention doctrine, in order to demonstrate how electronic monitoring has become the middle ground between freedom and incarceration. I also demonstrate how detention law and policy has been tested on persons with orders of removal, whose liberty rights are diminished; these policies now impact immigration pretrial detainees. The result is that all immigration detainees are presumed to have a diminished liberty interest, which does not bode well for legal challenges to the use of electronic monitoring. I conclude that instead of forcing immigration detainees into this Faustian bargain, the best policy is one that includes no walls, either virtual or physical.

II. THE RISE OF ALTERNATIVES TO IMMIGRATION DETENTION

This section discusses the rise of alternatives to immigration detention, and specifically, how electronic monitoring came to be the primary alternative to detention. One cannot understand alternatives to detention, however, without some background about the growth of the U.S. detention system itself.

A. The Growth of Immigration Detention

Since the earliest days of federal regulation of immigration in the late 1800s, the need arose for a holding facility where intending migrants would remain while their claims for entry were being processed.[20] Intending immigrants arriving on the East Coast were detained at Ellis Island, and those arriving on the West Coast were detained at Angel Island.[21] Over the years, immigration detention facilitated various restrictionist immigration policies, such as Chinese exclusion and deportation, and social control

20. WILSHER, *supra* note 13, at 8–12, 18–19.
21. *See id.*

deportation of communists and anarchists during the Cold War.[22] In 1954, Attorney General Herbert Brownell announced an official policy that detention would only be used in exceptional circumstances.[23] This continued for a few decades, with detention numbers in the 1970s reaching a daily average of about 2,000.[24] Starting in the 1980s, there was a shift in policy, resulting in the use of immigration detention as the norm instead of the exception.[25] Immigration detention grew exponentially, resulting in a daily number of 55,654 immigration detainees in 2019.[26]

Scholars have offered various explanations of this rapid expansion and normalizing of immigration detention.[27] For example, Jonathan Simon writes about how the new Refugee Act of 1980 gave colorable legal claims to refugees from Central America and the Caribbean, who were racialized as nonwhite.[28] They were "viciously and largely inaccurately stamped from the start with the stigma of dangerousness;"[29] poverty, race, with the added stigma of the belief that many carried AIDS.[30] The government

22. *See id.* at 8–36.

23. Hon. Herbert Brownell, Jr., Att'y Gen. of the U.S., Humanizing the Administration of the Immigration Law, Address Before a Conference Sponsored by American Council of Voluntary Agencies Committee on Migration and Refugee Problems, The American Immigration Conference & National Council on Naturalization and Citizenship (Jan. 26, 1955).

24. *See* MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 7–8 (2004). Elliot Young describes how these numbers can be somewhat misleading to suggest a near abolishment of immigration detention, when, in reality, detentions were likely occurring in hospitals for the mentally ill and similar institutions; also, these numbers do not account for the over one million temporary southwest border detentions during the 1950's. ELLIOT YOUNG, FOREVER PRISONERS: HOW THE UNITED STATES MADE THE WORLD'S LARGEST IMMIGRANT DETENTION SYSTEM 7–10 (2021).

25. García Hernández, *supra* note 17, at 248.

26. *See Immigrant Detention Numbers Fall Under Biden, But Border Book-Ins Rise*, *supra* note 10.

27. For a visual summary of immigration detention's expansion, see Emily Kassie, The Marshall Project, *Detained: How the United States Created the Largest Immigrant Detention System in the World*, GUARDIAN, https://www.themarshallproject.org/2019/09/24/detained [perma.cc/ZQZ7-VL9H].

28. Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 582–83 (1998). He contrasts this with previous migrant flows, primarily from Mexico, and that Mexicans would have been less likely to seek asylum. *Id.*

29. *Id.* at 590–600 (describing this phenomenon particularly for the Mariel Cubans).

30. *Id.* (describing how the stigma of race, poverty, and AIDS impacted Haitian refugees).

responded with expanded detention.[31] García Hernández explains how the rise of immigration detention was part of Congress's war on drugs, because Congress used immigration detention to stigmatize and penalize those who engage in drug activity.[32] He also describes how the growth of immigration detention is founded on racist elements of U.S. immigration policy.[33] Teresa Miller has explained how elements of the severity revolution that took place in criminal law in the 1980s made their way into immigration law; one of these features was overincarceration.[34] Denise Gilman and Luis Romero have discussed the role of the private prison industry in lobbying for and obtaining contracts to detain more immigration detainees.[35] They also have summarized various theories on the growth of immigration detention, and concluded that "economic inequality . . . informs . . . the discourse that supports these factors favoring detention."[36] Emily Ryo has discussed the role of both the private prison industry and local governments in demanding more detention beds.[37]

Scholars also have described various aspects of the ICE and immigration judge decision-making process that explain over-detention.[38] One common

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31. *Id.*

32. García Hernández, *supra* note 4, at 1350.

33. *See* García Hernández, *supra* note 17, at 249.

34. *See* Teresa A. Miller, *Lessons Learned, Lessons Lost: Immigration Enforcement's Failed Experiment with Penal Severity*, 38 FORDHAM URB. L.J. 217, 228–32 (2010).

35. Denise Gilman & Luis A. Romero, *Immigration Detention, Inc*., 6 J. MIGRATION & HUM. SEC. 145, 146–57 (2018); *see also* Torrey, *supra* note 15, at 896–906 (explaining the role of the private prison industry in both the expansion of immigration detention and defeating legalization legislation).

36. Gilman & Romero, *supra* note 35, at 146–47.

37. Emily Ryo, *Understanding Immigration Detention: Causes, Conditions, and Consequences*, 15 ANN. REV. L. & SOC. SCI. 97, 102–03 (2019) (discussing role of the private prison industry and local governments in expanding immigration detention in the United States).

38. *See* Gilman, *supra* note 16, at 171–90 (describing aspects of the ICE and immigration judge bond decision that cause over-detention, such as an overreliance on money bonds; mandatory detention laws; DHS "no bond" policy decisions for other groups of people; the lack of periodic evaluation of the need for detention after an initial decision; the burden of proof being placed on the detainee; the lack of judicial review of detention decisions; immigration judges' lack of independence; and that decisions to detain are made based on the number of available beds); *see also* Mary Holper, *The Beast of Burden in Immigration Bond Hearings*, 67 CASE W. RES. L. REV. 75, 81–90 (2016) (describing development of mandatory detention laws creating presumptions of dangerousness and flight risk for those who were convicted of several crimes and were removable for security reasons, and how the former INS then adopted these laws to presume detention for all detainees); Margaret H. Taylor, Demore v. Kim*: Judicial Deference to Congressional Folly*, *in* IMMIGRATION STORIES 343, 348–54 (David A. Martin & Peter H. Schuck eds., 2005) (describing various legislative versions of statutes authorizing presumptive detention for certain criminal offenders, leading up to the mandatory detention statute, 8 U.S.C. § 1226(c), which Congress adopted in 1996); Stumpf, *supra* note 11, at 61 (arguing that that the administrative agencies charged

theme that I and others have highlighted is the shift in relevant agency case law and regulations that created a presumption of detention.[39] Although this presumption is inconsistent with the Due Process presumption of freedom,[40] the judiciary was unlikely to be an impediment to ICE's treatment of detention as necessary, given its limited role due to the plenary power.[41] Once this presumption was in place, it became easy for everyone, including the government and detainees' advocates, to assume that any alternative to detention must be evaluated against the backdrop of the presumption of detention.[42]

Considering the various contributing factors to the growth of immigration detention, it appears that large scale immigration detention is "here to stay for the foreseeable future."[43] Given this reality, it comes as no surprise that many have sought to find alternatives to immigration detention.

B. The Introduction and Expansion of Immigration Alternatives to Detention

"Alternatives to detention" can be defined quite broadly to include bond, parole, release on own recognizance, and community-based programs.[44] When considering this very broad definition, the use of alternatives to immigration detention in the United States is as old as immigration detention itself. For example, in the late 1800s, limited detention beds on the East Coast led to immigration officials adopting unofficial bonding practices, which included releasing noncitizens to the care of charitable

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with implementing immigration laws have overstepped by expansively interpreting their statutory immigrant detention authority beyond what those statutes intended).

39. *See* Holper, *supra* note 38, at 81–90; Gilman, *supra* note 16, at 175–78; Stumpf, *supra* note 11, at 73–81; Das, *supra* note 15, at 156–58; Taylor, *supra* note 38, at 348–54.

40. *See* Holper, *supra* note 38, at 95–99.

41. *See infra* Part IV. To be sure, there have been several examples of federal courts questioning the executive branch's presumption of detention, as being counter to the Due Process presumption of liberty, although these decisions are on appeal. *See infra* notes 96–101; *see also* Mary Holper, *Taking Liberty Decisions Away from "Imitation Judges"*, 80 MD. L. REV. 1076, 1100–1118 (2021) (offering several examples of how the lower courts in the federal judiciary have vindicated the rights of immigration detainees in a variety of contexts).

42. GARCÍA HERNÁNDEZ, *supra* note 16, at 149 ("Treating ICE's alternatives to detention as a step up is only possible after accepting the agency's premise that everyone deserves confinement.").

43. Kalhan, *supra* note 4, at 44.

44. Marouf, *supra* note 4, at 2155.

organizations.[45] Even on the West Coast, at the outset of Chinese exclusion, release on bond and into the care of mission homes were alternatives used until the immigration authorities settled on unsanitary dockside sheds for detention of the Chinese.[46] During the world wars, when borders shifted, rendering many noncitizens stateless, government officials adopted practices of releasing persons with final orders of deportation on orders of supervision.[47] Leading up to the 1980s, where detention shifted from the exception to the norm, release on parole or bond were regular practices of the immigration authorities.[48]

In the modern era of immigration detention, alternatives to detention have continued to be part of detention policy. In the late 1980s into the 1990s, the Immigration and Naturalization Service (INS), then in charge of immigration enforcement and detention, began experimenting with community supervision by partnering with community organizations.[49] In 1997, the INS funded the Vera Institute of Justice (Vera Institute) to test supervised release as an alternative to immigration detention,[50] focusing first on lawful permanent residents with criminal convictions for its pilot project.[51] Congress's passage of the mandatory detention statute effectively nullified this pilot project by requiring mandatory detention without bond for this population.[52] The Vera Institute redesigned its pilot project, serving those who could be released under the transitional rules in effect while the INS secured more bed space to enact the permanent mandatory detention rule.[53] According to Margaret Taylor, the Vera Institute's pilot alternatives to detention program "showed highly promising results, even though it operated in a turbulent legal environment that thwarted the original program design."[54]

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45. *See* WILSHER, *supra* note 13, at 14.
46. *See id.* at 19.
47. *See id.*; *see also* David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 51–62.
48. *See* Simon, *supra* note 28, at 581–84.
49. *See* Marouf, *supra* note 4, at 2164–65 (discussing partnerships with faith-based organizations such as Catholic Charities and Lutheran Immigration and Refugee Services); CATH. LEGAL IMMIGR. NETWORK, INC., THE NEEDLESS DETENTION OF IMMIGRANTS IN THE UNITED STATES 27–28 (2000) (describing community-based program to assist Mariel Cubans, which included job training, rehabilitation programming, and weekly monitoring, which began in 1987 and was defunded in 1999 as the INS began to contract with halfway houses).
50. *See* Marouf, *supra* note 4, at 2165.
51. Taylor, *supra* note 38, at 351–52.
52. *Id.* at 352.
53. *Id.* at 354.
54. *Id.*; *see also* Christopher Stone, *Supervised Release as an Alternative to Detention in Removal Proceedings: Some Promising Results of a Demonstration Project*, 14 GEO.

The program run by the Vera Institute, like the other community-based alternative to detention programs, did not use electronic monitoring.[55] Rather, it used in-person and telephone check-ins with a case worker, who would also ensure that there were appropriate referrals to legal services and social services programs.[56] However, the Vera Institute's case workers "wielded considerable coercive power."[57] They could recommend redetention by INS if a participant fell out of compliance, and did in fact make such recommendations in fifty-two cases of the five hundred they enrolled.[58] They also escorted persons ordered deported to the airport to ensure actual departure.[59]

During this time period, there was a general assumption within the INS that all detainees were at high risk of fleeing. Margaret Taylor explains how the near total inability to actually deport people was "something of an insider's secret" within the former INS.[60] Statistics showed that 89% of persons with orders of deportation did not report to be deported; when these became public, there was a public shaming to the agency.[61] What was worse, statistics showed that many of the so-called "criminal aliens" committed more crimes while deportation proceedings were pending against them.[62] Congress responded in 1996 by passing the mandatory detention statute, which authorizes detention with no individualized hearing on flight risk and dangerousness for several classes of immigration detainees.[63]

IMMIGR. L.J. 673, 681–83 (2000). The Vera Institute found that ninety-one percent of the people supervised in the Appearance Assistance Program appeared for court, compared to a seventy-one percent appearance rate for those not supervised. EILEEN SULLIVAN ET AL., VERA INST. OF JUST., TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM, at ii (2000). Sixty-nine percent of those supervised complied with final orders of deportation, compared to a thirty-eight percent compliance rate for those not supervised. *Id.*

55. GARCÍA HERNÁNDEZ, *supra* note 16, at 149.

56. Stone, *supra* note 54, at 677–79.

57. MARY BOSWORTH, ALTERNATIVES TO IMMIGRATION DETENTION: A LITERATURE REVIEW 25 (2018).

58. SULLIVAN ET AL., *supra* note 54, at 16–17.

59. *Id.* at 16.

60. *See* Taylor, *supra* note 38, at 347.

61. *Id.* at 347–51.

62. *See* Demore v. Kim, 538 U.S. 510, 518 (2003).

63. *See* Taylor, *supra* note 38, at 345–54.

A white paper completed for the INS by Peter Schuck affirmed a common belief that all noncitizens were likely to flee.[64] He reported that INS employees in the late 1990s were intrigued by the use of electronic monitoring, although many remained skeptical, believing that the ankle bracelets could be broken.[65] There was also concern for how such a program could be managed, since ICE did not have the resources to monitor those released.[66] Schuck's white paper proposed that ICE contract with either a private company or a community-based organization to supervise and monitor those released.[67] He suggested that a private company was preferable, given concerns that community groups would "either be duped by the alien or actually connive with the alien to assist him in absconding and avoiding detection (as occurred in some refugee sanctuary cases during the 1980s)."[68]

The need for more comprehensive alternatives to detention arose in response to the increasing number of detainees who could not be deported because they were either stateless or their countries did not have repatriation agreements with the United States.[69] In 2001, the Supreme Court held that they could not be detained indefinitely and interpreted the statute governing their detention to limit such detention to six months.[70] Some had been ordered removed because of "aggravated felony" convictions—an immigration law term of art that has some of the most dire immigration consequences due to the perceived seriousness of the category of crimes.[71] Concerns over detainees' dangerousness and keeping track of them for a deportation that may happen years in the future required some program to monitor them once released.

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64. Peter H. Schuck, *INS Detention and Removal: A "White Paper,"* 11 GEO. IMMIGR. L.J. 667, 673 (1997); *see also* SULLIVAN ET AL., *supra* note 54, at 43 ("The INS believed that most undocumented workers released on recognizance would abscond.").

65. Schuck, *supra* note 64, at 681.

66. *Id.* at 682.

67. *Id.*

68. *Id.*

69. *See* Nguyen v. B.I., Inc., 435 F. Supp. 2d 1109, 1111–12 (D. Or. 2006); Martin, *supra* note 47, at 57 (discussing the Cuban Review Plan that the INS developed to permit supervised release of Cubans who were ordered excluded, but Cuba would not repatriate them); CATH. LEGAL IMMIGR. NETWORK, INC., *supra* note 49, at 27 (describing a small program, begun in 1999, where INS partnered with Catholic Charities to house detainees who could not be repatriated).

70. Zadvydas v. Davis, 533 U.S. 678, 689 (2001).

71. For example, the two detainees whose cases were at issue in *Zadvydas* were both convicted of aggravated felonies. *See id.* at 684–85; *see also* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 484–85 (2007) (describing aggravated felony as a "colossus" as compared to its original categories, because it now includes twenty-one categories of crimes).

The newly created Immigration and Customs Enforcement (ICE), which took over enforcement and detention responsibilities from the now-abolished INS,[72] established its first formal alternatives to immigration detention program in 2004.[73] There were three sub-programs, each with a separate name, but all used either telephone reporting, radio frequency monitoring, or GPS monitoring.[74] In 2009, in order to contain the risings costs of detention and as part of the Obama administration's efforts to reform the immigration detention system,[75] ICE's alternatives to detention program expanded beyond its first, smaller-scale operation.[76] ICE contracted with Behavioral Interventions, Inc. to manage the program.[77] All three programs would now function under one name, the Intensive Supervision Appearance Program (ISAP).[78] ISAP had two versions: "full-service" and "technology-only."[79] The full-service program involved regular visits to the ICE office, telephone check-ins, unscheduled home visits, and electronic monitoring through a Global Positioning System (GPS) device or telephonic reporting system.[80]

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72. In 2003, the INS ceased to exist; its functions were transferred to the Department of Homeland Security (DHS) pursuant to the Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2135, 2178 (2002).

73. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-26, ALTERNATIVES TO DETENTION: IMPROVED DATA COLLECTION AND ANALYSES NEEDED TO BETTER ASSESS PROGRAM EFFECTIVENESS 1 (2014).

74. *See* DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 20 (2009). The three programs were the Intensive Supervision and Appearance Program (ISAP), the Enhanced Supervision Reporting Program (ESR), and the Electronic Monitoring Program (EM). *Id.* ISAP was the "most restrictive and costly" because it combined electronic monitoring with unannounced home visits, curfew checks, and employment verification. *Id.* ESR also relied on unannounced home visits combined with electronic monitoring. *Id.* EM relied only on electronic monitoring and became the default option for those who did not live within a 50–85-mile radius of an ICE field office. *Id.*

75. *See* RUTGERS SCH. OF L.-NEWARK IMMIGRANT RTS. CLINIC, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 5 (2012).

76. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 73, at 9.

77. *Id.* ICE awarded the contract to Behavioral Interventions, Inc., a company that relied heavily on electronic monitoring, instead of the Vera Institute, which had run the community-based pilot program for alternatives to immigration detention in the 1990's. RUTGERS SCH. OF L.-NEWARK IMMIGRANT RTS. CLINIC, *supra* note 75, at 8.

78. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 73, at 9 n.24.

79. *Id.* at 11.

80. *Id.* at 10. The telephonic reporting system involves regular automated calls to the supervised person. *Id.* at 10 n.26. The supervised person must call back within a certain time frame; the computer then recognizes the person's biometric voiceprint and registers the check-in. *Id.*

The technology-only version did not involve any in-person check-ins or home visits, but only used the GPS monitoring or telephonic reporting.[81]

Today's version of ISAP combines check-ins and home visits with technology.[82] In addition to the GPS monitoring and telephonic reporting, a third technology added is a smartphone application that uses facial recognition software together with GPS monitoring.[83] By June 2019, every person enrolled in ISAP was subjected to some technological monitoring.[84] ISAP has scaled up to monitor 101,568 persons.[85] A 2021 report showed that as of May 2021, the ISAP program was monitoring 96,574 persons, with one-third of them subject to an ankle monitor.[86] This is still quite a small subset of the non-detained population in removal proceedings, which consists of approximately 3 million individuals.[87]

Between January 2016 and June 2017, ICE briefly experimented with a larger community-based alternative to detention program that did not use electronic monitoring.[88] This program, called the Family Case Management Program, included frequent check-ins with ICE, complete with referrals to appropriate social services and legal services programs and access to legal orientation programs.[89] The program was implemented in response to U.S. District Court Judge Dolly M. Gee's order that ICE's family detention practices violated the 1997 settlement in *Flores v. Meese*; ICE created this program to comply with the order in time.[90] ICE then awarded the contract for its management to a subsidiary of GEO Group, a for-profit corporation infamous for its poorly-run private immigration detention facilities where several abuses had occurred.[91] The Trump administration ended this program due to its high costs, leaving ISAP as the only alternative to detention program in place.[92]

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81. *Id.* at 11.

82. AUDREY SINGER, CONG. RSCH. SERV., R45804, IMMIGRATION: ALTERNATIVES TO DETENTION (ATD) PROGRAMS 7 (2019).

83. *Id.* at 8.

84. *See id.* (reporting that 42% of active participants in the ISAP program used telephonic reporting, 46% used GPS monitoring, and 12% used the smartphone application).

85. *Id.* at 7.

86. GIUSTINI ET AL., *supra* note 7, at 7.

87. SINGER, *supra* note 82, at 7.

88. *Id.* at 10; *see also The Real Alternatives to Detention*, AM. IMMIGR. LAWS. ASS'N (June 18, 2019), https://www.aila.org/infonet/the-real-alternatives-to-detention [perma.cc/R5LC-2BKS].

89. SINGER, *supra* note 82, at 11.

90. *See* Marouf, *supra* note 4, at 2166. *See generally* Flores v. Lynch, 212 F. Supp. 3d 907 (C.D. Cal. 2015) (denying government's motion to reconsider July 2015 order that government was in violation of *Flores* settlement).

91. *See* Marouf, *supra* note 4, at 2167–68.

92. *See* SINGER, *supra* note 82, at 10.

C. Immigration Judges' Consideration of Alternatives to Detention

The ISAP Program, by design, has been available only to ICE as a tool in its initial custody determination.[93] Yet, it is not ICE alone who decides whether to release a detainee. An ICE officer's detention decision is reviewable by an immigration judge, in what is commonly known as a "bond hearing."[94] Advocates began to argue to immigration judges that they could order alternatives to detention as well.[95] Such arguments were met with resistance when some judges opined that they had no authority to order ICE to impose these conditions.[96]

Advocates brought this issue to federal district court, arguing that immigration detainees had a Due Process right to a bond hearing where the immigration judge considered alternatives to detention. The government resisted, arguing that there was no such authority for immigration judges to order ICE to impose alternatives to detention and that any such proposal would be impractical because immigration judges were too busy to monitor compliance with conditions.[97] These arguments did not comport with Board

93. *See* Gilman, *supra* note 16, at 165–68 (describing ICE's custody determination process).

94. *See id*. at 169–71. Not all detainees are eligible for bond hearings; "arriving aliens" are ineligible for bonds, as are those detained due to certain criminal convictions or security reasons; also, noncitizens who have final orders of removal are not eligible for a bond hearing before an immigration judge. *See* 8 U.S.C. §§ 1225(b), 1226(c), 1231.

95. Fatma Marouf has argued that judges and ICE officers should consider alternatives to detention in immigration law, basing her analysis in the Fifth Amendment's Due Process and Equal Protection Clauses, the Eighth Amendment's Excessive Bail Clause, federal disability rights statutes, and international human rights. *See* Marouf, *supra* note 4, at 2170–91. Courts have relied primarily on the Due Process arguments. *See, e.g.*, Dubon Miranda v. Barr, 463 F. Supp. 3d 632, 632 (D. Md. 2020); Brito v. Barr, 415 F. Supp. 3d 258, 267–71 (D. Mass. 2019); Reid v. Donelan, 390 F. Supp. 3d 201, 225 (D. Mass. 2019); Abdi v. Nielsen, 287 F. Supp. 3d 327, 337–38 (W.D.N.Y. 2018). For example, a district court, for a class of detainees in California, granted a preliminary injunction, finding that they were likely to succeed on their Due Process, Equal Protection, and Excessive Bail Clause arguments, as well as their statutory arguments. *See* Hernandez v. Lynch, No. EDCV 16-00620-JGB (KKx), 2016 WL 7116611, at *2, *21–28 (C.D. Cal. Nov. 10, 2016). The Ninth Circuit agreed, but upheld the injunction based only on the Fifth Amendment Due Process challenge. Hernandez v. Sessions, 872 F.3d 976, 990–94 (9th Cir. 2017).

96. *See, e.g.*, Doan v. Bergeron, No. 1:15-CV-11725-IT, 2015 U.S. Dist. LEXIS 180568 (D. Mass. Dec. 3, 2015) ("On remand, the Immigration Judge determined that the immigration court did not have the authority to conditionally release Doan [from ICE custody] for mental health treatment.").

97. *See, e.g.*, Rodriguez v. Robbins, 804 F.3d 1060, 1088 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

of Immigration Appeals case law, which had recognized that judges have such authority.[98] Nor did they recognize the reality that an immigration judge need not monitor compliance, but could outsource this task to ICE officials, who already had begun to act as probation officers for those enrolled in ISAP. The government's arguments were rejected, and several courts ordered that immigration judges must consider alternatives to detention in their bond hearings.[99]

Federal courts have found that a trifecta of procedures is necessary to ensure that a immigration detainee's Due Process rights are realized in bond hearings. First, immigration judges must place the burden of proof on the government, not the detainee; second, immigration judges must consider alternatives to detention; and third, immigration judges must consider a detainee's ability to pay.[100] Courts have held that Due Process requires an immigration judge to consider alternatives to detention; without such consideration, an immigration judge's bond amount is not reasonably related to the government's legitimate interests.[101] If a money bond can serve the interest of ensuring a noncitizen's return to court, then, courts have held, an alternative to detention must be considered that ensures that same goal.[102]

Class action litigation has thus guaranteed that immigration judges will consider alternatives to detention for classes of immigration detainees in several immigration courts.[103] Although several of these decisions are on

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98. *See In re* Garcia-Garcia, 25 I.&N. Dec. 93, 93, 98 (B.I.A. 2009) (citing 8 U.S.C. § 1226(a)(2)(A); and then citing 8 C.F.R. § 1236.1(d)(1)).

99. *See, e.g.*, *Hernandez*, 872 F.3d at 990–93; Onosamba-Ohindo v. Barr, 483 F. Supp. 3d 159, 184, 195 (W.D.N.Y. 2020); *Dubon Miranda*, 463 F. Supp. 3d at 647–50; *Brito*, 415 F. Supp. 3d at 267–71; *Reid*, 390 F. Supp. 3d at 225; *Abdi*, 287 F. Supp. 3d at 337–338; *Rodriguez*, 804 F.3d at 1074.

100. *See Dubon Miranda*, 463 F. Supp. 3d at 647–50; *Brito*, 415 F. Supp. 3d at 267–71; *Reid*, 390 F. Supp. 3d at 222–25.

101. *See, e.g.*, *Hernandez*, 872 F.3d at 991.

102. *Id.* at 990.

103. *See, e.g.*, *id.* at 986, 1000 (affirming district court's classwide injunctive relief for class of "all individuals who are or will be detained under [the general immigration detention statute, 8 U.S.C. § 1226(a)] on a bond set by an ICE officer or an immigration judge in the Central District of California"); *Onosamba-Ohindo*, 483 F. Supp. 3d at 195 (ordering immigration judges to consider ability to pay and alternatives to detention in all bond hearings held under Section 1226(a) the Batavia or Buffalo Immigration Courts); *Dubon Miranda*, 463 F. Supp. 3d at 640, 652–53 (granting classwide injunctive relief for noncitizens detained under 8 U.S.C. § 1226(a) who had or will have bond hearings in the Baltimore immigration court and deciding that immigration judges should require the government to bear the burden of proof and consider the detainee's ability to pay and alternatives to detention); *Brito*, 415 F. Supp. 3d at 263, 271 (ordering immigration judges to consider ability to pay and alternatives to detention in all bond hearings held under the general detention statute for a class of detainees who are "held in immigration detention in Massachusetts or are otherwise subject to the jurisdiction of the Boston immigration court"); *Reid*, 390 F. Supp. 3d at 210, 228 (requiring immigration judges to consider ability

appeal,[104] the procedural protections in these bond hearings already have gone into effect, changing how many immigration judges conduct bond hearings.

D. Electronic Monitoring as the Primary Alternative to Immigration Detention

As mentioned above, alternatives to detention, in the immigration context, can and have meant other arrangements than electronic monitoring. In this Article, however, I primarily focus on electronic monitoring, which has been defined as "a form of remote surveillant control, a means of flexibly regulating the spatial and temporal schedules of a [person]'s life."[105] Electronic monitoring includes GPS monitoring through an ankle bracelet, smartphone applications that use GPS monitoring, voice recognition telephone call-in systems, or other location monitoring.[106] These are the alternatives to detention that ICE uses most frequently in recent years.[107] It is not only ICE, though, that equates alternatives to detention with electronic monitoring.

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to pay and alternatives to detention in bond hearings for class of detainees "who are or will be detained within the Commonwealth of Massachusetts pursuant to [the mandatory detention statute, 8 U.S.C. § 1226(c)] for over six months and have not been afforded an individualized bond hearing"); *Abdi*, 287 F. Supp. 3d at 331, 345 (granting motion to clarify injunction to require immigration judges to consider ability to pay and alternatives to detention for class of "[a]ll arriving asylum-seekers who are or will be detained at the Buffalo Federal Detention Facility, have passed a credible fear interview, and have been detained for more than six months without a bond hearing before an immigration judge").

104. *See, e.g.*, Docketing Notice, Miranda v. Garland, No. 20-1828 (4th Cir. July 30, 2020); Notice of Appeal, Brito v. Barr, No. 20-1037 (1st Cir. Jan. 8, 2020); Reid v. Donelan, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018).

105. *See* Mike Nellis, Kristel Beyens & Dan Kaminski, *Making Sense of Electronic Monitoring*, *in* ELECTRONICALLY MONITORED PUNISHMENT: INTERNATIONAL AND CRITICAL PERSPECTIVES 1, 4–5 (Mike Nellis, Kristel Beyens & Dan Kaminski eds., 2013).

106. *See id.* at 4–6 (defining "electronic monitoring" to include radio frequency monitoring, GPS monitoring, and voice verification technology); Pittman, *supra* note 16, at 589 (defining "electronic monitoring" to include an ankle bracelet and telephone check-ins that use voice monitoring); Samuel R. Wiseman, *Pretrial Detention and the Right to be Monitored*, 123 YALE L.J. 1344, 1365–68 (2014) (describing electronic monitoring's various forms, which include GPS tracking and voice verification or other means of providing one's location). *But see* Srikantiah, *supra* note 4, at 541 (distinguishing phone monitoring as a less restrictive form of monitoring than electronic monitoring such as GPS monitoring); Koulish, *supra* note 19, at 101 n.90 (reasoning that the "severity of the liberty interest in question is different with telephonic reporting than with electronic bracelets and house arrest").

107. *See* NAT'L IMMIGR. F., FACT SHEET: ELECTRONIC MONITORING DEVICES AS ALTERNATIVES TO DETENTION 1 (2019).

Some federal courts have specified that in bond hearings, immigration judges must consider "alternatives to detention *such as GPS monitoring*."[108] Even if federal courts do not specifically mention electronic monitoring as the primary alternative to detention envisioned,[109] it is important to note that immigration judges already considered money bond and release on recognizance as alternatives to detention at a bond hearing.[110] Therefore, federal courts would have no reason to mandate that immigration judges consider alternatives to detention if bond or release on recognizance were the only possible alternatives. Clearly, these courts contemplated electronic monitoring as a new alternative to detention to be considered in immigration bond hearings.

The next section takes a critical look at the use of electronic monitoring in the immigration context, drawing from earlier critiques of its use in the criminal legal system. It also explores how the government meets its goals of immigration detention through electronic monitoring.

III. ELECTRONIC MONITORING IN THE IMMIGRATION CONTEXT: A DEAL WITH THE DEVIL

Before being introduced in the immigration system, the use of electronic monitoring in the criminal legal system was well underway. Electronic monitoring technology was first conceived in the 1960s as a progressive alternative to imprisonment.[111] Its use in the criminal legal system expanded in the 1980s, with the advent of radio frequency monitoring,[112] which allowed an offender to be restrained to the home. In the 1990s, electronic monitoring expanded further, with the advent of GPS technology,[113] since

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108. *See Reid*, 390 F. Supp. 3d at 228; *Brito*, 415 F. Supp. 3d at 271; Rodriguez v. Robbins, 2012 WL 7653016, at *1 (C.D. Cal. Sept. 13, 2012) (ordering for members of a subclass that an immigration judge conduct a bond hearing and release each subclass "member on reasonable conditions of supervision, including electronic monitoring if necessary").

109. *See, e.g.*, Hernandez v. Sessions, 872 F.3d 976, 1000 (9th Cir. 2017). The Ninth Circuit did not suggest alternatives to detention that ICE officers and immigration judges must consider, yet the court relied in part on the 99% success rate of using alternatives to detention; that statistic reflects the success of ICE's ISAP program, which relies primarily on electronic monitoring. *Id.* at 991; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 73, at 30.

110. *See* U.S. DEP'T OF JUST., IMMIGRATION JUDGE BENCHBOOK: BOND 3 (2017); *see also* Rivera v. Holder, 307 F.R.D. 539, 543–44, 553 (W.D. Wash. 2015) (interpreting 8 U.S.C. § 1226(a) to require immigration judges to consider release on own recognizance during a bond hearing).

111. MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME 33–34 (2020); Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123, 132–33 (2017).

112. Eisenberg, *supra* note 111, at 133; Wiseman, *supra* note 106, at 1364.

113. *See* Eisenberg, *supra* note 111, at 146.

the technology could now track the offender and create zones of exclusion,[114] akin to a "walking prison."[115] The earliest use of electronic monitoring was for convicted, not pretrial, defendants.[116] At first probationers were electronically monitored, then parolees; finally, pre-trial defendants were subject to electronic monitoring.[117]

Of course, it is necessary to recall that prison was once similarly considered a progressive, humanitarian alternative to the death penalty or corporal punishment.[118] In the immigration system, prisons developed as a humanitarian option to replace unsanitary dockside sheds.[119] As prison abolitionist Angela Davis has written, "[w]hat was once regarded as progressive and even revolutionary represents today the marriage of technical superiority and political backwardness."[120] García Hernández has noted similar trends in the immigration detention system and advocates for the abolition of immigration incarceration.[121] A question that flows from these discussions is whether, like prison, the widespread use of electronic monitoring has become so divorced from its progressive purpose that it is now another form of punishment, just as bad as or worse than the prison it replaced.[122]

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114. *Id.* at 147 (discussing how GPS monitoring allows the government to monitor the whereabouts of a person 24/7 and create zones of exclusion or inclusion, which was an improvement over radio frequency technology, which could only ensure proximity to one's house).

115. J. Robert Lilly & Mike Nellis, *The Limits of Techno-Utopianism: Electronic Monitoring in the United States of America*, *in* ELECTRONICALLY MONITORED PUNISHMENT: INTERNATIONAL AND CRITICAL PERSPECTIVES, *supra* note 105, at 21, 32 (quoting Max Winkler, *Walking Prisons: The Developing Technology of Electronic Controls*, FUTURIST, July–Aug. 1991, at 34, 34–36).

116. Wiseman, *supra* note 106, at 1365.

117. Lilly & Nellis, *supra* note 115, at 28.

118. *See* SCHENWAR & LAW, *supra* note 111, at 12–17; Eisenberg, *supra* note 111, at 180; *see* Marc Renzema, *Evaluative Research in Electronic Monitoring*, *in* ELECTRONICALLY MONITORED PUNISHMENT: INTERNATIONAL AND CRITICAL PERSPECTIVES, *supra* note 105, at 247, 247; ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 40–59 (2003).

119. *See* GARCÍA HERNÁNDEZ, *supra* note 16, at 25–27, 134–44.

120. DAVIS, *supra* note 118, at 50.

121. GARCÍA HERNÁNDEZ, *supra* note 16, at 139–48.

122. *See* GARCÍA HERNÁNDEZ, *supra* note 16, at 149; Eisenberg, *supra* note 111, at 149. *See generally* SCHENWAR & LAW, *supra* note 111, at 8–9.

A. The Normative Case Against Electronic Monitoring

Angela Davis rejects "prisonlike substitutes for the prison, such as house arrest safeguarded by electronic surveillance . . . ."[123] Similarly, Maya Schenwar and Victoria Law do not support the use of alternatives to incarceration that merely replicate the worst aspects of prison–namely, a system whereby the state acts on people—particularly marginalized people—without their consent.[124] Schenwar and Law write about how limited reforms of the prison system weave in new forms of punishment and control,[125] constantly creating a new "'Somewhere Else' to stow away criminalized populations" from the rest of society.[126] They believe that many prison reforms, including electronic monitoring, are based on a belief that society must label, isolate, and dispose of a category of people.[127] Scholars have noted that electronic monitoring is the modern-day version of Jeremy Bentham's panopticon, where offenders know that they may be watched at any given moment and thus will adjust their behavior accordingly.[128] Inherent in this arrangement is a belief that some populations are simply not to be trusted with freedom, and therefore must be under the state's control, watched at all times. Populations who are disproportionately black, brown, and poor feel the effects of such social marginalization.[129]

Intensive supervision under electronic monitoring increases rather than decreases the chance that someone will be arrested or reconvicted, thus creating a circular path back to prison.[130] This is because a person electronically monitored is watched more closely than others; arbitrary rules and vast amounts of discretion vested in those who administer electronic supervision allow for rearrest upon the most minor transgressions. This is one of the primary reasons given by study subjects who express a preference for jail over electronic monitoring or intensive supervision.[131]

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123. DAVIS, *supra* note 118, at 107.
124. See SCHENWAR & LAW, *supra* note 111, at 8–9.
125. *Id.*
126. *Id.* at 17.
127. *See Id.* at 22.
128. *See, e.g.*, Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 753–54 (2020); Koulish, *supra* note 19, at 97; Nellis, Beyens & Kaminski, *supra* note 105, at 5; Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1384–85 (2008).
129. *See* Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 655–56, 675–80 (2019).
130. SCHENWAR & LAW, *supra* note 111, at 35.
131. Brandon K. Applegate, *Of Race, Prison, and Perception: Seeking to Account for Racially Divergent Views on the Relative Severity of Sanctions*, 39 AM. J. CRIM. JUST. 59, 61–62 (2014).

Being attached to an electronic monitor also makes it harder for people monitored to gain or keep employment due to the stigmatization of the monitor.[132] It can have negative impacts on family relationships when it functions to confine a person to the home, limiting a person's abilities to engage in activities in the community.[133] There are certainly accounts of painful aspects of the ankle monitor,[134] in addition to the public shame directed towards a person on an ankle monitor, limitation on employment, and restriction on one's liberty.[135] Add to this the physical reminder on one's body of the government's control over the body, especially if that person is a survivor of government-inflicted or other trauma, as are many noncitizens.[136] And, for many noncitizens, there is trauma that is related

132. SCHENWAR & LAW, *supra* note 111, at 36–37; *see* GIUSTINI ET AL., *supra* note 7, at 19 (describing results from an empirical study in which 78% of the respondents experienced financial hardship to them or families and 67% lost or had difficulty obtaining work because of ICE ankle monitor).

133. SCHENWAR & LAW, *supra* note 111, at 39–40; GIUSTINI ET AL., *supra* note 7, at 17–18 (describing results from an empirical study in which 97% of respondents experienced some sort of social isolation from communities and families because of ICE ankle monitor); *see id.* at 20 (describing results from an empirical study in which 74% reported that the ICE ankle shackle hindered their ability to care for their family or community members).

134. *See* GIUSTINI ET AL., *supra* note 7, at 12–16 (describing results from empirical study in which 90% of respondents experienced some sort of physical harm from wearing an ICE ankle monitor and 88% reported harm to mental health because of the ankle monitor). Physical impacts included aches, pains, and cramps; numbness due to impaired circulation; discomfort related to excessive heat; and sustained swelling/inflammation; one in five individuals reported experiencing electric shocks from the ankle shackle. *Id.* at 12–13. Mental health impacts included anxiety, sleep disruption, social isolation, depression, and thoughts of suicide. *Id.* at 14–17.

135. *See id.* at 17–19; SCHENWAR & LAW, *supra* note 111, at 25–40; Pittman, *supra* note 16, at 601–03 (describing the experience of ICE electronic monitoring via ankle bracelet as "carry[ing] the intense weight of social stigma"); RUTGERS SCH. OF L.-NEWARK IMMIGRANT RTS. CLINIC, *supra* note 75, at 17 (describing shame of ankle monitor and the loud playing of a pre-recorded message that the wearer must report to ICE).

136. GIUSTINI ET AL., *supra* note 7, at 14–15; Pittman, *supra* note 16, at 604; *see also* Koulish, *supra* note 19, at 102.

to the fact of living with a "shackle"[137] when one's ancestors lived in the physical chains of slavery.[138]

Furthermore, although immigration electronic monitoring arrangements typically do not include house arrest, the limitation in movement can mimic house arrest.[139] As criminal law scholars have noted, house arrest—either by design or *de facto*[140]—can be experienced as punitive for those who live in small, cramped spaces that they share with many others. It also can be experienced as punitive for women and domestic violence victims, who may view the home as a place of exploitation.[141] This is particularly important in the context of asylum-seekers, many of whom may have fled domestic violence in their home countries.[142] Teenagers who are used to being out in the community without restriction also may see house arrest as punitive.[143] The COVID-19 pandemic's quarantine requirements could create newfound empathy for those who must endure the house arrest and limited freedom of movement that accompanies electronic monitoring.[144]

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137. GIUSTINI ET AL., *supra* note 7, at 1 (substituting the term "shackle" for euphemisms such as "ankle monitor," "ankle bracelet," or "GPS monitoring device"); Pittman, *supra* note 16, at 589 (noting that while the author uses the term "ankle monitor," in reality, the word "shackles" and its commonly used Spanish translation "grilletes" comes much closer to representing the lived reality of wearing such a device").

138. Pittman, *supra* note 16, at 604; Kyle Barron & Cinthya Santos Briones, *No Alternative: Ankle Monitors Expand the Reach of Immigration Detention*, NACLA (Jan. 6, 2015), https://nacla.org/news/2015/01/06/no-alternative-ankle-monitors-expand-reach-immigration-detention [https://perma.cc/GMB9-7HE6] (quoting Carla Garcia of the Honduran solidarity group OFRANEH: "We the Garífunas were slaves, and we freed ourselves. . . . Just as before they placed the slaves in iron chains, now in the capitalist economy our chains are electronic").

139. *See* Pittman, *supra* note 16, at 602–03 (describing limited mobility of those monitored on ISAP).

140. Mike Nellis describes how even when the monitoring officials create zones of exclusion, such as parks, or a place where the person previously offended, the need to create a zone of exclusion that is broad enough to allow the police to respond if the person goes into the zone can effectively limit the person's movement such that it begins to feel like house arrest to the person monitored. *See* Mike Nellis, *Surveillance, Stigma and Spatial Constraint*, *in* ELECTRONICALLY MONITORED PUNISHMENT: INTERNATIONAL AND CRITICAL PERSPECTIVES, *supra* note 105, at 193, 201–02.

141. *Id.* at 200.

142. *See* Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 830 (2018) (describing domestic violence and sexual abuse as some of the factors that caused high rates of migration from Central America to the United States).

143. *See* Nellis, *supra* note 140, at 200. *But see* Renzema, *supra* note 118, at 250 (anecdotally describing teenagers wearing an ankle monitor to school with pride, as a sign of being "bad").

144. *See* Jennifer Toon, *I Was in Prison for Two Decades – Here's What I Learned About Isolation*, GUARDIAN (Apr. 13, 2020), https://www.theguardian.com/us-news/2020/apr/13/prison-isolation-coronavirus-pandemic [https://perma.cc/9TFP-STK4] ("At least

What about the arguments that electronic monitoring presents a "lesser evil" to prison?[145] All agree that the harms of immigration detention are extensive. Detention causes noncitizens to lose employment, housing, and parental rights.[146] As studies about the impact of criminal pretrial detention have shown, such losses can occur within days of detention.[147] Immigration detention can have a significant impact on mental health, with even short periods of detention causing clinical levels of depression or post-traumatic stress disorder.[148] Yet immigration detention can last years[149] because noncitizens do not have the right to a speedy trial that criminal pretrial detainees can claim.[150] Suffering immigration detention also makes one less likely to obtain legal representation and less likely to win at the ultimate removal hearing.[151] There may be civil and democratic costs to immigration detention as well, since immigration detainees experience legal cynicism about the U.S. legal system that they pass along to their children and transnational networks.[152] The option to be released in order to be electronically monitored can reduce some of these harms.

The notion that electronic monitoring is a "lesser evil" than imprisonment, however, does not reflect the findings of several empirical studies in the criminal legal system. These studies have shown that prison is actually

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living under house arrest and two 10-year stints in prison prophetically prepared me for worldwide lockdown.").

145. *See* Wiseman, *supra* note 106, at 1348, 1375, 1381; Nellis, Beyens & Kaminski, *supra* note 105, at 15; Lilly & Nellis, *supra* note 115, at 32.

146. *See* Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIA. INTER-AM. L. REV. 531, 541–42 (1999); Das, *supra* note 15, at 143–44.

147. *See* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1113–14 (2019).

148. Ryo, *supra* note 37, at 107 (describing empirical research on the mental health of immigration detainees in Canada).

149. *See id.* (describing increase in immigration detention lengths since 1981). For a class of detainees challenging their prolonged detention, detention lengths averaged between 346 to 427 days, with some lasting up to 1,585 days. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1079–80 (9th Cir. 2015), *rev'd sub nom*. Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

150. *See* Kalhan, *supra* note 4, at 49.

151. *See, e.g.*, Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32, 40 (2015) (presenting statistics from an empirical study that demonstrated that detainees were five times less likely to obtain representation than nondetained respondents, and without representation, were more likely to lose their cases and be deported).

152. *See* Ryo, *supra* note 37, at 108.

the lesser of two evils, when comparing it against a variety of alternatives to custody where one is supervised in the community.[153] For example, several studies have found that black offenders perceive alternative sanctions, including electronic monitoring, as more punitive than white offenders.[154] How persons perceive the punitive nature of incarceration versus an alternative sanction can vary, for example, based on the gender of the person[155] and whether that person has a family at home.[156] One author, engaging in a literature review of the various studies on this topic, concluded that the severity of various types of punishment is "in the eye of the beholder."[157] Whereas popular opinion may perceive any sanction outside of jail as less punitive, and scholars have argued that electronic monitoring is a "lesser evil" than jail,[158] the calculation about what is the "lesser evil" does not always accord with the perceptions of those who must endure the sanction.[159]

Nor does the choice between electronic monitoring and jail present a reasonable set of options; indeed, even describing the two choices as "evils" indicates that neither is preferable. As Michelle Alexander stated,

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153. *See, e.g.*, Applegate, *supra* note 131, at 60 (summarizing studies that find black offenders tend to see prison as relatively less onerous compared to white offenders).

154. *See, e.g.*, Yasmiyn Irizarry et al., *Mass Incarceration Through a Different Lens: Race, Subcontext, and Perceptions of Punitiveness of Correctional Alternatives When Compared to Prison*, 6 RACE & JUST. 236, 239 (2015); Peter B. Wood & David C. May, *Racial Differences in Perceptions of the Severity of Sanctions: A Comparison of Prison with Alternatives*, 20 JUST. Q. 605, 628 (2003).

155. Peter B. Wood & Harold G. Grasmick, *Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison*, 16 JUST. Q. 19, 36–37 (1999) (finding that women prefer alternative sanctions to imprisonment, except alternatives such as halfway houses and electronic monitoring and opining that these alternatives may limit their access to children or not permit flexibility in schedules in order to engage in childcare).

156. *See, e.g.*, Irizarry et al., *supra* note 154, at 245–46 (finding that study participants with children are more likely to prefer alternatives to incarceration, one of which is electronic monitoring); Joan Petersilia & Elizabeth Piper Deschenes, *Perceptions of Punishment: Inmates and Staff Rank the Severity of Prison Versus Intermediate Sanctions*, 74 PRISON J. 306, 318 (1994) (study participants who were married or parents reporting that they found prison to be more severe than those participants without family ties).

157. Jamie S. Martin, Kate Hanrahan & James H. Bowers, Jr., *Offenders' Perceptions of House Arrest and Electronic Monitoring*, 48 J. OFFENDER REHAB. 547, 552 (2009) (summarizing studies, stating "the severity of punishment is in the 'eye of the beholder'" because "we must consider how offenders who face the punishment perceive it").

158. *See* Wiseman, *supra* note 106, at 1348, 1375, 1381; Nellis, Beyens & Kaminski, *supra* note 105, at 15; Lilly & Nellis, *supra* note 115, at 31.

159. Martin, Hanrahan & Bowers, *supra* note 157, at 551–52; *see also* Wood & Grasmick, *supra* note 155, at 22 ("Punishments devised by legislators and practitioners are rarely (if ever) based on experiential data; they depend almost exclusively on guesswork by persons with no direct knowledge of serving various sanctions.").

> If you asked slaves if they would rather live with their families and raise their own children, albeit subject to "whites only signs," legal discrimination and Jim Crow segregation, they'd almost certainly say: I'll take Jim Crow. By the same token, if you ask people in prison whether they'd rather live with their families and raise their children, albeit with nearly constant digital surveillance and monitoring, they'd almost certainly say: I'll take the electronic monitor. I would too. But hopefully we can now see that Jim Crow was a less restrictive form of racial and social control, not a real alternative to racial caste systems. Similarly, if the goal is to end mass incarceration and mass criminalization, digital prisons are not an answer. They're just another way of posing the question.[160]

Nascent empirical research is examining how noncitizens subject to electronic monitoring in the immigration context perceive such monitoring. The first study to examine the impact of immigration electronic monitoring, which included 147 responses from those who are wearing or had previously worn immigration ankle monitors, demonstrated that noncitizens subject to an ICE ankle monitor have suffered negative impacts in their physical and mental health, social isolation, financial wellbeing, and family connections.[161] This study focused only on those who were electronically monitored using an ankle monitor and did not focus on those who were monitored using the GPS technology in their phones or telephonic check-ins, which are other forms of ICE electronic monitoring. There are further questions to be explored, such as whether noncitizens perceive electronic monitoring or detention to be more punitive. Emily Ryo has shown, through empirical research with immigration detainees and persons recently released from immigration detention,[162] that they believe immigration detention to be act of penal confinement, not "civil," as it has been classified; they also believe that legal rules are inscrutable by design and that legal outcomes are arbitrary.[163] Do those subject to electronic monitoring by ICE view it as equally punitive, and that its rules are arbitrary and inscrutable?

Those who have experienced immigration detention may not make the same choices as those who have endured criminal incarceration, given that the detainees from Ryo's study described immigration detention as harsher

160. Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html?searchResultPosition=1 [https://perma.cc/6XBP-PR95].

161. *See* GIUSTINI ET AL., *supra* note 7, at 9–10, 12–21.

162. Ryo, *supra* note 12, at 1019–21. Her study involved interviews with both detainees, many of whom had recently lost a bond hearing, and those who had recently been released on bond. *See id.* at 1002–03, 1020.

163. *Id.* at 1024–43.

than criminal incarceration.[164] These immigration detainees listed a variety of factors that made immigration detention worse; at the top of the list was the uncertain end date of immigration detention.[165] Given that many of the subjects in the criminal legal studies were asked to choose between finite terms of prison or supervised release, the results of these studies may not be as relevant to the immigration context.[166] Also of concern for the immigration detainees were guards' ability to arbitrarily report them for misconduct, which could negatively impact their immigration case due to the highly discretionary nature of immigration decisions.[167] Thus the locus of the arbitrary enforcement may look different to criminal versus immigration detainees, thereby reducing the value of these criminal legal studies when compared to the immigration context.

There are also "net-widening" concerns that critics of electronic monitoring cite.[168] Avlana Eisenberg describes how supporters of electronic monitoring tend to assume that it is used as a substitute for incarceration, while opponents focus on its use as an added condition.[169] She argues that this phenomenon, which she labels the "substitution/addition distinction," is key to understanding whether government-imposed electronic monitoring is constitutional or justifiable on public policy grounds.[170] She describes how the advent of GPS technology introduced the use of electronic monitoring as an added condition, instead of substitution for incarceration.[171] In order to understand whether electronic monitoring is a substitute for prison or an added condition, she writes, one would need to know what sanction the offender would have suffered were it not for the availability of electronic monitoring.[172] Yet this can be hard to know; thus it is necessary to examine how electronic monitoring is used more broadly in a particular jurisdiction.[173]

How do the "net-widening" concerns play out in the immigration detention context? As the thirst for detaining more noncitizens increased in the modern era of immigration detention, advocates pushed for alternatives to detention, including electronic monitoring, as a humanitarian option. Yet instead of the immigration authorities detaining fewer noncitizens, the

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164. *Id.* at 1025.
165. *Id.* at 1029–31.
166. *See supra* notes 144–50.
167. *See* Ryo, *supra* note 12, at 1033–34.
168. Nellis, Beyens & Kaminski, *supra* note 105, at 9; *see also* Renzema, *supra* note 118, at 249 (calling for further empirical research on the "net-widening" problem, whereby electronic monitoring allows more people to be dealt with more severely than if it were not in use).
169. Eisenberg, *supra* note 111, at 130–31.
170. *Id.* at 131.
171. *Id.* at 155.
172. *Id.* at 157.
173. *Id.*

immigration detention population steadily increased.[174] Electronic monitoring came to be the means by which ICE monitored those who never would have been in detention in the first place.[175] Indeed, a 2019 Congressional Research Service Report about ICE's alternatives to detention program wrote, "DHS maintains that ATD programs should not be considered . . . a substitute for detention. Instead, according to DHS, these programs have enhanced ICE's ability to monitor more intensively a subset of foreign nationals released into communities."[176]

Applying Eisenberg's substitution/addition analysis, if the technology for electronic monitoring did not exist, noncitizens now being monitored would likely find themselves free.[177] Or perhaps not. The significant rise in detention numbers in the last four decades shows an upward trajectory of immigration detention. In fact, all indicators suggest that were it not for the lack of detention beds, many more of the 3 million persons in removal proceedings who are not in custody[178] would find themselves incarcerated during their removal proceedings.[179] It is too early to tell whether the new Biden administration will drastically curtail immigration detention, as opposed to allowing its increase like in prior Democratic administrations.[180]

Immigration scholars have raised these net-widening concerns. For example, Robert Koulish and Mark Noferi, analyzing whether ICE's newly-introduced risk assessment tool would reduce over-detention, argue that even with a perfectly calibrated tool, ICE was likely to engage in "[c]ounterproductive over-supervision through unnecessary restrictions, such as electronic tracking . . . ."[181] They note the rise in electronic supervision after the introduction of this technology in the criminal legal system; there was an increase in the "supervision of those already on probation," rather than prison diversion.[182] García Hernández, arguing that immigration

174. *See supra* Part II.
175. *See* Marouf, *supra* note 4, at 2164.
176. SINGER, *supra* note 82, at 6.
177. Eisenberg, *supra* note 111, at 157.
178. *See* SINGER, *supra* note 82, at 7.
179. *See* Gilman, *supra* note 16, at 182–83 (describing how bed space has always impacted detention decisions and that in recent years, there are more detention beds for ICE detainees than are needed); *see also id.* at 183–84 (describing the so-called "bed mandate," whereby Congress's mandate that ICE maintain a certain number of detention beds was interpreted by ICE as a mandate to *fill* those beds).
180. *See supra* Part II.A.
181. Noferi & Koulish, *supra* note 16, at 53.
182. *Id.* at 90.

detention is punishment, has expressed concern over the creation of "a large-scale regime of 'alternatives to release,' rather than true 'alternatives to detention.'"[183] He notes that in the criminal legal system, noncustodial supervision alternatives to incarceration expanded the scope of governmental surveillance to people who would otherwise not merit much supervision.[184] Denise Gilman, arguing that immigration law should adopt the criminal legal system's movement away from money bail,[185] does not promote the use of electronic monitoring as a substitute for money bonds, due to the restraint on liberty that may not be necessary in most cases.[186]

There are "slippery slope" arguments against electronic monitoring.[187] Its use invites mutation into an Orwellian society, with the increased use of surveillance of many populations, not just those involved with the criminal legal system.[188] This is largely due to the increased supply of monitoring technologies and cheaper production methods, which decreases the cost to governments and also increases familiarity and acceptance of such programs by both law enforcement and the public.[189] Also, an increased demand for monitoring technology leads to an increase in the financial strength of the companies producing such technologies and a corresponding growth of their power to lobby governments to use these technologies more.[190] Private companies have more incentives to see more defendants in the criminal legal system, which increases the number of people whom they can be paid to monitor.[191] The end result is that entire communities of color come to be placed under supervision.[192]

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183. García Hernández, *supra* note 4, at 1406, 1410–11 (quoting Kalhan, *supra* note 4, at 56).

184. *Id.* at 1410 (citing Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51, 52 (2013)).

185. Gilman, *supra* note 16, at 197–202. She argues that reliance on money bonds remains a key and central component of the immigration bond system, without any recognition of the movement away from money bail in the criminal legal context. *Id.*

186. *Id.* at 219–20. She also argues that there is a lack of empirical evidence regarding whether such alternatives to detention are effective, since the available studies did not isolate electronic monitoring, but paired it with other case management services. *Id.*

187. *See* Wiseman, *supra* note 106, at 1376.

188. *See* Nellis, Beyens & Kaminski, *supra* note 105, at 14–15.

189. *See* Wiseman, *supra* note 106, at 1377–78.

190. *Id.* at 1378–79.

191. *Id. See generally* Craig Paterson, *Commercial Crime Control and the Development of Electronically Monitored Punishment*, *in* ELECTRONICALLY MONITORED PUNISHMENT: INTERNATIONAL AND CRITICAL PERSPECTIVES, *supra* note 105, at 211 (describing the role of private companies in developing electronic monitoring and how a few multinational corporations consolidated all of the electronic monitoring contracts around the world).

192. *See, e.g.*, Carl Takei, *From Mass Incarceration to Mass Control, and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20

In the immigration system, private companies have been in charge of managing electronic monitoring.[193] Yet the private company that runs ISAP, Behavioral Interventions, Inc., is a subsidiary of the GEO Group, which runs many private immigration detention facilities.[194] Thus, to the extent that ICE continues its use of private prisons for immigration detention,[195] the same company benefits whether ICE chooses detention or electronic monitoring.[196] There is no doubt, though, that the GEO Group earns more profits from detention beds than electronic monitoring supervision.[197] There is a financial disincentive, therefore, for the alternatives to detention program to show promising statistics. In other words, the private company in charge of ISAP may have every reason to see to its failure.[198] Thus, at first glance, it seems as though this arrangement would not contribute to more widespread use of electronic monitoring. Yet, to the extent that the GEO Group sees profits with the current level or increased immigration detention, plus monitoring those who would not otherwise be detained, their profits increase. As Denise Gilman and Luis Romero have stated,

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U. PA. J.L. & SOC. CHANGE 125, 177 (2017) ("The more people who are on supervision in any given community, the more confident that police officers would be in freely conducting suspicionless body searches of random people on the streets, warrantless house raids, and mass sweeps in local stores, churches, and other places where people on supervision would congregate.").

193. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 73, at 9.

194. *See* César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1462 (2015).

195. President Biden signed an executive order phasing out the Justice Department's use of private prisons, yet that order does not cover immigration detention. Proclamation No. 14006, 80 Fed. Reg. 7483 (Jan. 26, 2021); *see also* Suzanne Gamboa, *Can Immigrant Rights Advocates Get Biden to End For-Profit ICE Detention?*, NBC NEWS (Jan. 29, 2021, 8:43 AM), https://www.nbcnews.com/news/latino/can-immigrant-rights-advocates-get-biden-end-profit-ice-detention-n1256073 [https://perma.cc/QSK6-2YNS].

196. *See* Gilman & Romero, *supra* note 35, at 17; Noferi & Koulish, *supra* note 16, at 92.

197. *See* THE GEO GRP., INC., 2019 ANNUAL REPORT: PART II 13 (2019) (showing that in 2019, GEO's total revenue from U.S. Secure Services was $1.6 billion, while its revenue from GEO Care, which handles ISAP, was $614 million); *see also* Gilman & Romero, *supra* note 35, at 19–20 (discussing how, during the southern border crisis in 2014, it was only when a federal court prohibited detention that private prison companies operating the jails scrambled to ensure some amount of profit by electronically monitoring those whom they otherwise would have detained).

198. *See* Marouf, *supra* note 4, at 2168 (critiquing ICE's awarding the contract for the Family Case Management Program to a subsidiary of the GEO Group, which also runs ICE jails, since the company has an incentive to have the community-based model fail, "since detention is more lucrative for GEO than community-based supervision").

"[the private prison companies] set up the management of migration as requiring a correctional approach from beginning to end, which allows them to promote detention as a centerpiece and other corrections products as necessary supplemental tools."[199]

The Orwellian concerns that were raised when electronic monitoring was first used in the criminal context are increasingly becoming a reality in the immigration context. For example, there is evidence that ICE has used GPS data in order to arrest other noncitizens or to plan workplace raids that ensnare many more than the person already being monitored.[200] The GPS positioning of those enrolled in ISAP becomes one more piece of data to which ICE has easy access, in an era where large technology companies are assisting ICE in its surveillance, detention, and deportation efforts.[201] Thus, it is not only the GEO Group, but companies such as Amazon and Palantir, regular contractors with ICE, that benefit from increased data points that come with GPS monitoring of more noncitizens.[202]

Avlana Eisenberg argues that electronic monitoring, with its various uses in the U.S. criminal legal context, is punishment.[203] She argues that electronic monitoring serves all the purposes of punishment; it is retributive, expressive, deterrent, and can serve rehabilitative goals.[204] Like Eisenberg's work in the criminal context, it is necessary to ask whether electronic monitoring serves the government's goals in the immigration context. The government's goals of immigration detention are not expressly punitive, as immigration detention is civil.[205] Yet, we see that there are significant overlapping governmental goals with electronic monitoring in both contexts.

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199. Gilman & Romero, *supra* note 35, at 17–18.

200. *See* SCHENWAR & LAW, *supra* note 111, at 32; Arnett, *supra* note 129, at 673; GIUSTINI ET AL., *supra* note 7, at 18.

201. *See generally* McKenzie Funk, *How ICE Picks Its Targets in the Surveillance Age*, N.Y. TIMES (Oct. 2, 2019), https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html [https://perma.cc/N5RK-JAHL]; MIJENTE, IMMIGRANT DEF. PROJECT & NAT'L IMMIGR. PROJECT, WHO'S BEHIND ICE? THE TECH AND DATA COMPANIES FUELING DEPORTATIONS (2018); James Kilgore & Daniel Gonzalez, *How GPS is Playing a Critical Role for ICE*, MEDIUM: #NODIGITALPRISONS (Aug. 30, 2019), https://medium.com/nodigitalprisons/how-gps-is-playing-a-critical-role-for-ice-e86694d4f4d5 [https://perma.cc/N927-5BXA].

202. *See* MIJENTE, IMMIGRANT DEF. PROJECT & NAT'L IMMIGR. PROJECT, *supra* note 201, at 1–2.

203. Eisenberg, *supra* note 111, at 136–45. She does not limit her analysis to the use of such monitoring in the pretrial detention context, as Samuel Wiseman does in arguing that there should be a right to be monitored. *See id.* at 126–27. *See generally* Wiseman, *supra* note 106.

204. Eisenberg, *supra* note 111, at 136–45.

205. *See Zadvydas*, 533 U.S. at 690.

B. Meeting the Government's Goals Through Electronic Monitoring

In considering whether electronic monitoring is normatively good policy, it is important to explore whether electronic monitoring accomplishes the government's goals. The government's primary stated goals of immigration detention are preventing flight risk and protecting the public from dangerous individuals.[206] There are expressive goals as well, some of them unstated, such as demonstrating to the public control over the nation's borders, deterring future illegal migration, and deterring noncitizens from pursuing relief from removal.[207] There is also the unstated goal of containing costs.

1. Flight Risk

Flight risk becomes a non-issue when electronic monitoring can track a noncitizen's every movement, ensuring that this person will return to court and not flee deportation should it be ordered.[208] In the criminal pretrial detention context, many governments seem satisfied that detention is no longer needed to ensure defendants' appearance due to improvements in tracking of defendants through electronic monitoring.[209] ICE's own statistics show the same: 99% of the persons enrolled in the full-service ISAP program appeared for future hearings, with 95% appearing for their final removal hearings.[210] To be fair, there is a selection bias in these numbers, given that ICE had chosen those deemed least likely to flee to monitor under ISAP.[211] Yet it is notable that this figure is almost the complete opposite of the statistic that brought public embarrassment to the former INS, where 89% of noncitizens with final orders of deportation fled—we can assume none of them were electronically monitored, given that ICE

206. *See* Demore v. Kim, 538 U.S. 510, 510 (2003); *Zadvydas*, 533 U.S. at 690.

207. *See, e.g.*, Ryo, *supra* note 8, at 238–39; Mark Noferi, *Mandatory Immigration Detention for U.S. Crimes: The Noncitizen Presumption of Dangerousness*, *in* IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS: STUDIES ON IMMIGRATION AND CRIME 215, 217 (Maria João Guia, Robert Koulish & Valsamis Mitsilegas eds., 2016); Margaret H. Taylor, *Symbolic Detention*, 20 DEF. ALIEN 153, 154–55 (1997).

208. *See* Noferi, *supra* note 207, at 217.

209. *See* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 494 (2018). Samuel Wiseman wrote in 2014 that "electronic monitoring has yet to meaningfully supplant pretrial detention for flight risk." Wiseman, *supra* note 106, at 1364.

210. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 73, at 30.

211. *Cf.* Eisenberg, *supra* note 111, at 176–77 (discussing selection bias critique in studies of states' use of electronic monitoring, which may have been restricted to low-risk populations).

only later utilized such technology.[212] This high rate of no-shows was a major driving factor behind the congressional overexpansion of immigration detention in 1996 and a reason why the Supreme Court upheld the mandatory detention statute.[213] The expansion of electronic monitoring certainly has created a system that can respond to those who are most concerned about the risk that noncitizens will flee if released from detention.[214]

2. Protecting the Community

Protecting the community[215] remains a primary goal for immigration detention. It is hard to know what percentage of immigration detainees are considered by ICE or immigration judges to be a danger. While statistics show that sixty percent of immigration detainees have no prior convictions,[216] dangerousness decisions often result from arrests that did not result in convictions.[217] Indeed, an empirical study by Emily Ryo demonstrates that any involvement in the criminal legal system is the dispositive factor in a bond hearing.[218] It is often overlooked by advocates, the government, and courts that alternatives to detention can ensure the safety of the community *and* protect against flight risk.[219] In the federal criminal pretrial detention

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212. *See* Taylor, *supra* note 38, at 347; OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., THE IMMIGRATION AND NATURALIZATION SERVICE'S REMOVAL OF ALIENS ISSUED FINAL ORDERS 12 (2003).

213. *See* Demore v. Kim, 538 U.S. 510, 518–21; Taylor, *supra* note 38, at 347–54.

214. This concern does not seem to have been eliminated, though, as a Congressional Research Service Report written in 2019 writes, "[o]f primary concern is that the [alternative to detention] programs, in comparison to detention, create opportunities for aliens in removal proceedings to abscond and become part of the unauthorized population who are not allowed to lawfully live or work in the United States." SINGER, *supra* note 82, at 14; *cf.* Nellis, Beyens & Kaminski, *supra* note 105, at 4 (describing how at the dawn of electronic monitoring, the public, aided by the media, viewed electronic monitoring as a "mild and easily evaded form of control . . . worth trying with low-risk, low-seriousness offenders but manifestly not a serious substitute for imprisonment").

215. Protecting the community includes both national security threats and domestic crime threats. *See* Frances M. Kreimer, *Dangerousness on the Loose: Constitutional Limits to Immigration Detention as Domestic Crime Control*, 87 N.Y.U. L. REV. 1485, 1488–98 (2012) (describing evolution of immigration detention to encompass domestic crime control concerns).

216. *See Decline in ICE Detainees with Criminal Records Could Shape Agency's Response to COVID-19 Pandemic*, TRAC IMMIGR. (Apr. 3, 2020), https://trac.syr.edu/immigration/reports/601/ [https://perma.cc/8EQM-A7WU].

217. *See, e.g.*, Rubio-Suarez v. Hodgson, No. 20-10491-PBS, 2020 WL 1905326 (D. Mass. Apr. 17, 2020); *In re* Guerra, 24 I.&N. Dec. 37, 40–41 (B.I.A. 2006).

218. Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117, 144 (2016).

219. Frances Kreimer describes how both ICE and immigrant advocates have focused on using alternatives to detention only as a tool when the concern is flight risk, not dangerousness. *See* Kreimer, *supra* note 215, at 1516; *see also* Jack F. Williams,

context under the Bail Reform Act, judges must consider whether alternatives to detention can "reasonably assure . . . the safety . . . [of] the community" in addition to whether such alternatives will ensure the defendant's future appearance.[220] A good example of this is mob boss Raymond Patriarca's extensive home arrest scheme, complete with electronic monitoring.[221] The First Circuit upheld the district court's finding that the government

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Process and Prediction: A Return to a Fuzzy Model of Pretrial Detention, 79 MINN. L. REV. 325, 388 (1994) (arguing that judges in pretrial detention decisions should shift focus from dangerousness alone to a consideration of "whether there are sufficient release conditions to assure community safety").

220. 18 U.S.C. § 3142(e); *see also id.* § 3142(f). Federal courts that have ordered immigration judges to consider alternatives to detention in bond hearings have borrowed the language of the Bail Reform Act, suggesting that judges should consider alternatives to detention in assessing both flight risk *and* dangerousness. *See, e.g.*, Brito v. Barr, 415 F. Supp. 3d 258, 267 (2019); Reid v. Donelan, 390 F. Supp. 3d 201, 225. Yet when litigants subsequently complained of immigration judges' failure to consider alternatives, federal courts backpedaled, finding that alternatives to detention are only relevant to flight risk, not dangerousness. *See, e.g.*, Massingue v. Streeter, No. 19-CV-30159-KAR, 2020 WL 1866255, at *6–7 (D. Mass Apr. 14, 2020) (rejecting argument that immigration judge failed to consider alternatives to detention, namely, proposal for electronic monitoring, because such a determination was relevant only to a flight risk determination and was therefore not relevant to the immigration judge's dangerousness finding); Ortiz v. Smith, 384 F. Supp. 3d 140, 144 (D. Mass. 2019) (holding that an "immigration judge's determination that [an alien] is dangerous obviate[s] any need for [the immigration judge] to consider conditions of release."). An exception is *Hechavarria v. Whitaker*, in which the District Court in the Western District of New York released an immigration detainee after the immigration judge "never explained why the government's evidence made it highly probable that neither 'electronic monitoring,' nor 'stringent monitoring,' nor 'stringent conditions of supervision' would effectively serve the government's interest" of protecting the public from the detainee. Hechavarria v. Whitaker, 358 F. Supp. 3d 227, 242 (W.D.N.Y. 2019). The court reasoned that the possible conditions of release included monitoring through the use of "an appropriate GPS tracking device," in-person reporting, and substance abuse related conditions. *Id.* at 244 n.13. The court stated that "[b]ecause DHS will monitor these conditions, this Court thinks it best to allow DHS to impose those that it determines are necessary." *Id.*

221. *See* United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991). More recent allowances of such defendant-financed pretrial arrangements have drawn critique as "gilded cage" arrangements, which provide an opportunity for release that the poor could never afford. Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 709–10 (2018) (citing United States v. Dreier, 596 F. Supp. 2d 831, 833 (S.D.N.Y. 2009)); *see also* Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1299–1301 (2012) (describing home arrest and electronic monitoring pretrial detention arrangements for wealthy defendants and contrasting with what happens to a poor defendant).

had not met its burden of proving detention was necessary to protect the public.[222]

There are, of course, less costly versions of electronic monitoring arrangements that can meet the government's goal of protecting the public. For example, electronic monitoring coupled with breathalyzer technology could ensure the safety of the community if the safety concern is driving under the influence.[223] As another example, for someone whose criminal activities stem from addiction, an immigration judge could require daily attendance at a rehabilitation program; attendance can be monitored with an ankle bracelet.[224] If gang membership is a concern, there are groups to assist at-risk youth that rely on regular attendance and communication with a caseworker; such attendance also can be monitored with an ankle bracelet.[225] If the primary concern is the safety of a particular person, such as a domestic partner, GPS monitoring can ensure that the person monitored does not come close to that person's residence or work.[226]

ICE's statistics show that for those monitored under ISAP during the years 2010-2012, at the most, 6.74% had their enrollment in ISAP terminated because of being arrested by another law enforcement agency.[227] These

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222. *Patriarca*, 948 F.2d at 792 ("Essentially, the judge found that although *in theory* a mafia boss was an intimidating and highly dangerous character, the government had not demonstrated that *this Boss* posed a significant danger, or at least not a danger that could not be overcome given appropriate conditions. We cannot disagree with that conclusion.").

223. *See* Nellis, Beyens & Kaminski, *supra* note 105, at 5 (describing forms of electronic monitoring, one of which is radio frequency monitoring coupled with breathalyzer technology and voice or facial recognition so that the offender cannot use a surrogate for the breathalyzer).

224. *See* Eisenberg, *supra* note 111, at 144–45 (describing how electronic monitoring can be a facilitating device to be used as part of a rehabilitation plan). *But see* SCHENWAR & LAW, *supra* note 111, at 63 (citing studies to show that people are much more likely to remain sober if they have entered a treatment plan voluntarily rather than by court order).

225. *See, e.g.*, ROCA, OUTCOMES DASHBOARD FOR MASSACHUSETTS HIGH-RISK YOUNG MEN: FISCAL YEAR 2019, at 2 (2019) (demonstrating that 97% of young people enrolled in a program for at least twenty-four months had no new arrests).

226. *See* Eisenberg, *supra* note 111, at 147 (discussing how GPS monitoring allows the government to monitor the whereabouts of a person 24/7 and create zones of exclusion or inclusion–an improvement over radio frequency technology, which could only ensure proximity to one's house). *But see* Nellis, *supra* note 140, at 201–02 (discussing how creating an exclusion zone around a victim is "not as simple an exercise as it seems" because if it is too small, the police do not have adequate time to respond once they realize the person is within the exclusion zone; if too big, that might make travel too difficult for the person monitored); Renzema, *supra* note 118, at 252 (reporting no credible evaluations of electronic monitoring programs to protect victims of domestic violence, but "there are both lawsuits from its failures and glowing anecdotal reports of its success").

227. *See* OFF. OF INSPECTOR GEN., DEP'T OF HOMELAND SEC., U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED) 6 (2015). The report showed that in 2010, 6.7% of ISAP participants' enrollment was terminated because of a criminal arrest; in 2011, 5.9% were terminated for a criminal arrest; and in 2012, 4% were terminated for a criminal arrest. *Id.*

statistics do not track the outcome of this arrest, or whether there were other arrests once monitoring terminated, but even if all arrests led to convictions, this is still quite a low percentage of those monitored who committed new crimes.[228] This information is revealing,[229] especially because Congress enacted mandatory detention in response to research that a significant percentage of "deportable [criminal] aliens" were arrested for new crimes before their deportation proceedings began.[230] Those statistics, now over thirty years old, reflect a time before the agency had the capacity and funding for the widespread use of electronic monitoring.[231]

3. Expressive Goal – Deterrence

There are also expressive goals of immigration detention. For example, scholars have observed how immigration detention plays the expressive function of deterring future migrants from coming to the United States.[232] The deterrence justification for detention has been publicly stated by U.S. government officials since the 1980s.[233] In the Obama administration, a surge in southern border crossings in 2014 led to an official detention-as-

228. *See id.*

229. *But see id.* at 8 (reasoning that one "cannot accurately determine whether transitory participation in ISAP II reduces the rate at which aliens, who were once in the program, later abscond or are arrested for criminal acts" because ICE terminated participants from the program instead of continuing to monitor them).

230. *See* Demore v. Kim, 538 U.S. 510, 518 (2003) (citing *Hearing on H.R. 3333 before the Subcomm. on Immigr., Refugees, & Int'l L. of the H. Comm. on the Judiciary*, 101st Cong., 1st Sess., 52, 54 (1989)); *see also id.* at 518–19 (discussing this statistic as part of the reason Congress passed 8 U.S.C. § 1226(c), the mandatory detention statute applicable to noncitizens removable for criminal and security reasons).

231. *See supra* Part II.

232. *See, e.g.*, Legomsky, *supra* note 146, at 540. Stephen Legomsky discusses two subvariants of this theory: "Under the first subvariant, the unpleasantness of the detention itself might deter the person from seeking entry. Under the second subvariant, the detention defeats any incentive to travel to the United States in the hope of remaining at large pending the hearing and then going underground." *Id.*

233. *See* Ryo, *supra* note 8, at 238–40 (tracing the history of several presidential administrations' use of immigrant detention to deter migration); Schuck, *supra* note 64, at 670 (stating that INS detention had two goals: preventing flight risk and deterring future illegal immigration to the United States); *see also* Michele R. Pistone, *Justice Delayed Is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum Seekers*, 12 HARV. HUM. RTS. J. 197, 226 (1999) (discussing the Reagan administration's task force that implemented deterrence as a migration policy, specifically targeting Cubans and Haitians who arrived by boat in the 1980s).

deterrence policy.[234] DHS Secretary Jeh Johnson publicly stated: "Frankly, we want to send a message that our border is not open to illegal migration, and if you come here, you should not expect to simply be released."[235] A federal district court enjoined the Obama administration from using detention to accomplish the goal of deterrence.[236] Nonetheless, the Trump administration took up detention-as-deterrence with vigor, taking it one step further by prosecuting persons for illegally crossing the border and separating families in order to send a message to future migrants.[237] The public outrage at family separations caused the Trump administration to discontinue that practice, but the detention-as-deterrence policy remained in effect.[238]

It does not appear that detention actually accomplishes deterrence of future illegal migration. Empirical research has cast doubt on whether detention can achieve this purpose,[239] and Emily Ryo discusses hurdles to the government accomplishing actual deterrence by detaining noncitizens.[240] She describes how deterrence theory assumes knowledge of the laws and procedures, but in the immigration context, intending migrants live in other countries, and for a variety of reasons have imperfect knowledge of ever-shifting immigration laws and procedures.[241] Deterrence theory also requires impacted actors to make rational choices, but migrants may be more prone to underestimate the risks or choose them in lieu of their current traumatic situations in the home country. The stress of intending migrants' current situations and group decision-making around migration choices also interfere with rational, individual cost-benefit analyses that deterrence theorists assume.[242] Finally, Ryo discusses how the benefits generally outweigh the risks of migration, especially for migrants leaving

234. Ryo, *supra* note 8, at 239.

235. Julia Preston, *Detention Center Presented as Deterrent to Border Crossings*, N.Y. TIMES (Dec. 15, 2014), https://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html [https://perma.cc/2S5L-F4UP].

236. *See* R.I.L.-R. v. Johnson, 80 F. Supp. 3d 164, 164, 191 (D.D.C. 2015).

237. *See* Ryo, *supra* note 8, at 239–40.

238. *See id.*

239. *See id.* at 237 (citing Adam Cox & Ryan Goodman, *Detention of Migrant Families as "Deterrence": Ethical Flaws and Empirical Doubts*, JUST SEC. (June 22, 2018), https://www.justsecurity.org/58354/detention-migrant-families-deterrence-ethical-flaws-empirical-doubts/ [https://perma.cc/Q5S6-WELR]; TOM K. WONG, CTR. FOR AM. PROGRESS, DO FAMILY SEPARATION AND DETENTION DETER IMMIGRATION? 1–5 (2018).

240. *See generally* Ryo, *supra* note 8. She applies Paul Robinson and John Darley's theory of deterrence in the criminal law to the deterrence theory of detention in immigration law. *See id.* at 241 (citing Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173 (2004)).

241. *Id.* at 241–44.

242. *Id.* at 244–46.

danger or extreme poverty in their home countries.[243] The government would have to make the sanction for illegal migration so harsh to adjust this cost-benefit analysis, yet doing so requires significant financial costs, not to mention violating moral and legal standards.[244]

Applying this cost-benefit analysis, one would have to know whether the shame, discomfort, restraints, and potential trauma of an ankle monitor is considered by intending migrants to be reasonable price to pay in exchange for living in the United States,[245] if the conditions in a migrant's home country are bad enough. There are other factors at play in the deterrence question. It is relevant that those released on electronic monitoring have their removal cases transferred to the slower non-detained docket.[246] Thus, they are able to live in the United States for perhaps several years, during the pendency of their removal proceedings and related appeals.[247] This factor, however, is a policy choice made by officials who run the immigration court system; docket priorities could shift to ensure that those released on electronic monitoring have their cases move just as quickly as if they had remained in detention.[248] It is also relevant that a future migrant does not know whether detention or electronic monitoring will be used in an individual case, and thus an intending migrant cannot predict *ex ante* what the outcome will be if caught by immigration authorities.[249] Nor does the migrant know what type of electronic monitoring will be used

243. *Id.* at 246–48.
244. *Id.* at 248.
245. *See* GIUSTINI ET AL., *supra* note 7, at 3.
246. *See* SINGER, *supra* note 82, at 15.
247. *See id.* at 1–2 (citing critics of ICE's alternatives to detention program, who state that such a program provides incentives for illegal migration to the United States, since the person may remain for years in the United States during the pendency of removal proceedings).
248. Indeed, there are examples of prioritizing certain cases for adjudication. *See* INNOVATION L. LAB & S. POVERTY L. CTR., THE ATTORNEY GENERAL'S JUDGES: HOW THE U.S. IMMIGRATION COURTS BECAME A DEPORTATION TOOL 19–20 (2019) (describing various circumstances of "fast tracking" non-detained cases for adjudication); Memorandum, James R. McHenry III, Dir., Exec. Off. for Immigr. Rev., Case Priorities and Immigration Court Performance Measures (Jan. 17, 2018).
249. *See* Eisenberg, *supra* note 111, at 142 (discussing whether electronic monitoring serves the criminal law purpose of deterrence and reasoning that it does because an offender cannot know *ex ante* whether a certain crime will lead to jail or electronic monitoring unless some policy is enacted whereby certain crimes are only punished by electronic monitoring).

and for how long its use will continue.[250] This can change, however, if ICE entirely replaces immigration detention with electronic monitoring—although that seems unlikely.[251] Yet the ever-changing nature of the United States government's immigration policies is exactly why deterring future migration with any particular sanction does not work; the shifting nature of the policies and procedures undermine any assumption that an intending migrant truly knows what will happen as a consequence of illegal migration. Thus, it is impossible to assume that an intending migrant can make a rational choice about whether to migrate, given this imperfect knowledge.[252]

Immigration detention can have more than one deterrent effect. While several presidential administrations have a stated policy goal of using detention to deter future migrants, detention can also deter current detainees from pursing legitimate claims for relief.[253] This deterrent effect of detention is less likely to be publicly stated, since, as Emily Ryo notes, "[i]nsofar as detention deters behavior that is protected under the law, the system undermines the basic legitimacy of immigration law and immigration authorities."[254] It is certainly implicitly stated by the government, especially in response to challenges brought by detainees suffering prolonged detention. The government frequently has argued that a detainee holds the key to his own jail cell because he can always give up his claims for relief and agree to deportation in lieu of suffering more detention.[255]

Here again, electronic monitoring in lieu of detention may not serve the expressive goal of causing detainees to give up legitimate claims for relief. It is possible that the shame, discomfort, restraints, and potential trauma of an ankle monitor become insufferable, such that a person being monitored abandons claims for relief.[256] In the context of lifelong electronic monitoring

250. *See* SINGER, *supra* note 82, at 7–8 (explaining in a 2019 report that ICE's practice is to relieve a person of electronic monitoring after as little as one month of compliance). *But see* GIUSTINI ET AL., *supra* note 7, at 7 (explaining, in a 2021 report, that "[i]n 2021, the average length of time people were subjected to ISAP ranged from two to three years, varying across ICE Field Offices nationwide").

251. *See* Kalhan, *supra* note 4, at 44 (reasoning that "large-scale immcarceration seems here to stay for the foreseeable future.").

252. *See* Ryo, *supra* note 8, at 241–44.

253. Ryo, *supra* note 37, at 109. Ryo writes that "[e]xamples of this type of deterrence effect abound in ethnographic accounts of immigration detention," and cites to several studies reporting that immigration detainees gave up legitimate claims to relief in order to avoid suffering the pain of detention. *Id.*

254. *Id.*

255. *See, e.g.*, Singh v. Holder, 638 F.3d 1196, 1204 (9th Cir. 2011); Ly v. Hansen, 351 F.3d 263, 273 (6th Cir. 2003), *abrogated by* Jennings v. Rodriguez, 138 S. Ct. 830 (2018); *see also* Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1970 (2020) ("While respondent does not claim an entitlement to release, the Government is happy to release him—provided the release occurs in the cabin of a plane bound for Sri Lanka.").

256. *See* GIUSTINI ET AL., *supra* note 7, at 3.

of criminal offenders, it has been noted that "what is bearable and even helpful for several months may not be bearable for several (or many) years."[257] This is especially so when electronic monitoring anchors a person to the home for extended periods of time, either by design or by default.[258]

Relevant to this deterrence question is how long a person will be monitored electronically, and what form electronic monitoring will take.[259] As mentioned previously, the immigration system currently views a person released on electronic monitoring as "released" in terms of docketing priorities, so the person may be monitored for many years before a final outcome in the removal case. Also, it is possible that a person may be relieved of electronic monitoring after as little as a month of compliance.[260] However, as stated previously, docket choices and decisions about how long to continue electronic monitoring are policy choices that ICE can change.[261]

4. Expressive Goal – Demonstrating Control Over Borders

Another expressive goal of immigration detention is allowing governments to demonstrate control over their borders.[262] It "convince[s] the general public that something is being done about a particular problem."[263] This was particularly evident in the Trump administration,[264] yet this expressive goal continues into the Biden administration.[265] Balanced against this goal is that governments must respond to concerns that immigration detention,

257. Nellis, *supra* note 140, at 202.
258. *See id.* at 201–02.
259. *See* GIUSTINI ET AL., *supra* note 7, at 7 (describing that one third of ISAP participants were monitored using an ankle monitor instead of other forms of electronic monitoring such as a GPS tracking device on one's phone and telephone check-ins).
260. *See* SINGER, *supra* note 82, at 7–8.
261. *See* RUTGERS SCH. OF L.-NEWARK IMMIGRANT RTS. CLINIC, *supra* note 75, at 24 (recommending that the immigration court system prioritize the adjudication of cases where the noncitizen is subject to ISAP).
262. Ryo, *supra* note 8, at 249–50; Noferi, *supra* note 207, at 217–18; Cetta Mainwaring & Stephanie J. Silverman, *Detention-as-Spectacle*, 11 INT'L POL. SOCIO. 21, 29–31 (2016); Robyn Sampson & Grant Mitchell, *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, 1 J. ON MIGRATION & HUM. SEC. 97, 103, 107 (2013); Taylor, *supra* note 207, at 154–55.
263. Taylor, *supra* note 207, at 155.
264. *See Mainstreaming Hate: The Anti-Immigrant Movement in the U.S.*, ANTI-DEFAMATION LEAGUE (Nov. 2018), https://www.adl.org/the-anti-immigrant-movement-in-the-us [https://perma.cc/3YZZ-GQUD].
265. *See* Pekoske, *supra* note 1, at 2 (describing border security as an immigration enforcement priority in the Biden administration).

especially of vulnerable populations, robs detainees of their dignity and rights.[266] Scholars have thus advocated for alternatives to detention as a way of answering to both sets of concerns. It is thought that by shifting from language of "border control" to "migration management," governments can demonstrate that they are managing migrants in the community using a variety of tools to supervise them and fulfill societal expectations about compliance.[267]

This language of managing migrants through electronic monitoring is in keeping with the writings of Jonathan Simon and Malcom Feeley, who have discussed a "new penology" that arose in the end of the twentieth century.[268] The new penology's focus is primarily managing large groups perceived to be dangerous, rather than punishing individual actors.[269] Electronic monitoring arose as part of this new penology; it created a "soft line method of control."[270] Risk management principles have guided the use of technology to control persons, creating "electronic detention" as a means of control in postmodern governing.[271] The use of electronic supervision in lieu of detention in state criminal legal systems, particularly "tough-on-crime" states, reflects a similar calculus by government actors.[272] Electronic monitoring can supervise a significant number of noncitizens while they await the final resolution of their cases; thus the government can express its control over a porous border or ensure that they are keeping close watch on "criminal aliens."[273]

5. Containing Costs

Containing costs is not normally one of the government's stated purposes behind immigration detention. Yet implicit in the government's use of private prison companies to house immigration detainees is a desire to

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266. *See* Sampson & Mitchell, *supra* note 262, at 106.

267. *Id.* at 107.

268. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and its Implications*, 30 CRIMINOLOGY 449, 452 (1992). They contrast the "new penology" with the "old penology," which was focused on punishing the individual person instead of managing groups of dangerous persons. *Id.* at 451–52.

269. *Id.* at 452.

270. *See* Noferi & Koulish, *supra* note 16, at 92–93; Feeley & Simon, *supra* note 268, at 452; Nellis, Beyens & Kaminski, *supra* note 105, at 3–4 ("[Electronic monitoring] has rightly been seen by a number of analysts as an expression of managerialist tendencies in criminal justice.").

271. Koulish, *supra* note 19, at 97.

272. *See* Fan, *supra* note 15, at 143, 145–46.

273. *See* Taylor, *supra* note 207, at 158 (proposing supervised release to ensure compliance and demonstrate that the government is in control while not depriving people of their liberty).

contain costs.[274] Also, no administration can receive unlimited funds from Congress, and therefore it must be judicious in its use of its limited detention beds.[275] The Trump administration's requests for additional funds for ISAP showed that even the most detention-hungry administration acknowledged that it would never receive adequate funding for its desired detention numbers.[276] This reflects what state and local politicians experienced in the 1990s, where they grappled with the rising costs of incarceration and began to promote electronic monitoring as a cheaper alternative that still maintained a punitive element.[277]

Alternatives to detention are significantly less costly than detention, and thus serve this goal. Detention costs approximately $137 a day; alternatives to detention cost approximately $4 per person per day.[278] Moreover, as the technologies used for electronic monitoring see increased use, i.e. the now widespread use of GPS for navigation, the costs will reduce as the effectiveness of the technology increases.[279] Releasing noncitizens on both bond and electronic monitoring has another potential financial benefit to ICE, because breached bonds become donations to ICE.[280] This added financial benefit would likely be underemphasized by ICE, however, since it cuts against a primary stated goal of detention, which is to ensure

274. *See* Livia Luan, *Profiting from Enforcement: The Role of Private Prisons in U.S. Immigration Detention*, MIGRATION POL'Y INST. (May 2, 2018), https://www.migrationpolicy.org/article/profiting-enforcement-role-private-prisons-us-immigration-detention [https://perma.cc/NG7L-K6VG] ("Proponents of private detention argue that competition improves quality while lowering costs; so far no substantial evidence has corroborated these claims. In fact, cost-saving measures often involve reduction of staffing, training, and programming, which results in poorer facility conditions."); Roxanne Lynne Doty & Elizabeth Shannon Wheatley, *Private Detention and the Immigration Industrial Complex*, 7 INT'L POL. SOCIO. 426, 434 (2013) ("[I]t has been documented that the private prisons and detention centers are not nearly as cost-effective as proponents suggest.").

275. *See, e.g.*, Schuck, *supra* note 64, at 674 (advising the INS about use of limited detention beds and recommending that INS ask for more resources for expansion of detention).

276. U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 5, at 17.

277. *See* Lilly & Nellis, *supra* note 115, at 30. Teresa Miller describes how the budget for immigration enforcement soared after the September 11, 2001, terrorist attacks; thus, while states were being forced to cut the costs associated with incarceration, immigration authorities were being given large amounts of money. *See* Miller, *supra* note 34, at 238.

278. SINGER, *supra* note 82, at 15; *see also* Laurence Benenson, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply*, NAT'L IMMIGR. PROJECT (May 9, 2018), https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-mulitply/ [https://perma.cc/FUB7-75R7].

279. *See* Wiseman, *supra* note 106, at 1373.

280. *See* Gilman & Romero, *supra* note 35, at 155

that noncitizens return to court—thus not breaching their bonds. There is a concern that at some point the cost of supervision may surpass what would have been the cost of detention for a given person, given the long waits on the non-detained docket.[281] Yet, this problem could be resolved by either keeping those supervised on a priority docket as now happens with the detained docket, or hiring more immigration judges to adjudicate the cases more quickly. The cost-savings benefit of electronic monitoring is only born out, of course, if ICE actually employs it as an alternative to detention, instead of an alternative to release.

As this section has demonstrated, the government has mostly been able to meet its goals of immigration detention through electronic monitoring, yet the tradeoff has not been to the benefit of those subjected to it. The immigration system has reproduced most of the harmful impacts of electronic monitoring from the criminal legal system. Immigration detainees now must seek a digital prison as the only means by which they may be free of a physical prison. The next section describes how the Supreme Court's immigration detention doctrine has created this untenable set of options for noncitizens.

IV. HOW WE ARRIVED AT THE FAUSTIAN BARGAIN

In this section, I describe how the Supreme Court's detention doctrine and strong pull of the plenary power has carved out a doctrinal space for electronic monitoring. I also explore a trend in the immigration context, in which the diminished rights that come with the status of a final order of removal have negatively impacted the rights of those who are pretrial. These trends indicate that unless the Executive Branch changes its preference for virtual walls, electronic monitoring will likely continue in the immigration context, unchecked by the judiciary.

A. Immigration Detention and the Plenary Power

To understand how we have arrived at a moment in the doctrine where there is a perceived diminished liberty for all immigration detainees, it is necessary to look back at the late 1800s, when federal courts first began to consider the liberty interests of immigration detainees. Immigration historians have described the role of federal courts as the federal government asserted control over immigration law in the late nineteenth century. Daniel Kanstroom chronicles the development of the plenary power, whereby the

281. *See* U.S GOV'T ACCOUNTABILITY OFF., GAO-18-701T, IMMIGRATION PROGRESS AND CHALLENGES IN THE MANAGEMENT OF IMMIGRATION COURTS AND ALTERNATIVES TO DETENTION PROGRAM (2018).

judiciary refused to second-guess decisions made by the political branches of government.[282] The Supreme Court first introduced this "dramatic overstatement of legislative and executive power" in the context of Chinese exclusion, where decisions concerned who would be admitted to the United States.[283] The Court in the 1889 case of *Chae Chan Ping v. United States*[284] held that the power to regulate immigration was an "incident of sovereignty;" thus, the political branches of government could act with very little oversight by the judiciary.[285] The plenary power created what Stephen Legomsky describes as a "constitutional oddity;"[286] constitutional constraints that ordinarily would restrain the political branches in passing federal legislation had limited applicability in the immigration context.[287] Kanstroom describes how the Court's recognition of a plenary power over exclusion decisions bled into the Court invoking the plenary power when the question was deportation, not exclusion.[288] In the 1893 case of *Fong Yue Ting v. United States*,[289] the Court reasoned that "the right of a nation to expel or deport foreigners . . . rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[290]

There remained an open question of the applicability of the plenary power over immigration detention. Daniel Wilsher has described how federal judges used the "old map" of habeas corpus and the presumption of liberty, notwithstanding the "new world of alien controls" that was emerging in the late nineteenth century.[291] Lucy Salyer similarly observed

282. DANIEL KANSTROOM, DEPORTATION NATION 97 (2007).
283. *Id.* at 96, 113–14 (discussing Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581 (1889)).
284. *The Chinese Exclusion Case*, 130 U.S. 581 (1889).
285. *Id.* at 609.
286. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255; *see also* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 1 (1984) ("Probably no other area of American law has been so radically insulated and divergent from those fundamental norms of constitutional right, administrative procedure, and judicial role that animate the rest of our legal system.").
287. *See* KANSTROOM, *supra* note 282, at 114.
288. *Id.* at 118–21 (discussing Fong Yue Ting v. United States, 149 U.S. 698 (1893)).
289. *Fong Yue Ting*, 149 U.S. 698.
290. *Id.* at 707.
291. WILSHER, *supra* note 13, at 20–22, 33–34.

how federal judges, running what was termed a "habeas corpus mill"[292] in response to the many petitions in the San Francisco district court filed on behalf of Chinese nationals, repeatedly released the Chinese.[293] This was not because the federal judges were partial towards the Chinese; rather, their own personal sentiments reflected the anti-Chinese sentiment that launched the various anti-Chinese immigration legislation.[294] Yet, their understanding of a constitutional right to freedom was repeatedly invoked, even in the face of congressional acts that sought to exclude and deport the Chinese.[295]

Wilsher describes how Congress, once it asserted control over immigration regulation, repeatedly passed laws eviscerating noncitizens' right to be in the United States.[296] Thus, if federal courts permitted them to remain at large in the United States, in keeping with the common law presumption of liberty, this amounted to a federal judge giving to the noncitizen exactly what Congress had taken away—the right to remain in the United States, albeit for a temporary period of time while deportation proceedings and appeals were pending.[297] Governments asserted that decisions on rights to membership are determinative of personal liberty rights.[298] Thus, "[s]ince governments, not judges, have the power to decide on which categories of migrants to admit as members of the community, on this logic, courts should not release unauthorized migrants into the community on 'constitutional' grounds where they fail to meet legislative rules on membership."[299]

The steady expansion of the political branches' plenary power over first admission decisions and then deportation decisions also grew to encompass detention decisions. The Court reasoned in the 1896 case *Wong Wing v. United States*[300] that detention was necessarily a part of the deportation

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292. LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 18 (1995); *see also* Christian G. Fritz, *A Nineteenth Century "Habeas Corpus Mill": The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347, 348 (1998).

293. SALYER, *supra* note 292, at xvi, 18, 21.

294. *Id.* at 18, 21.

295. *Id.*; *see also* WILSHER, *supra* note 13, at 22 (describing a judge's decision to limit detention post-exclusion for a Chinese person whose ship already had departed as a "principled solution showing considerable fortitude, given the hostile political environment").

296. WILSHER, *supra* note 13, at 8–29. *See generally* SALYER, *supra* note 292 (describing various exclusion and deportation laws targeting the Chinese).

297. WILSHER, *supra* note 13, at 20–22, 33–34.

298. *See* Daniel Wilsher, *Whither Presumption of Liberty? Constitutional Law and Immigration Detention*, *in* CHALLENGING IMMIGRATION DETENTION: ACADEMICS, ACTIVISTS AND POLICY-MAKERS 66, 69 (Michael J. Flynn & Matthew B. Flynn eds., 2017).

299. *Id.*

300. Wong Wing v. United States, 163 U.S. 228 (1896).

process.[301] That passage was later repeated in the 1952 case of *Carlson v. Landon*,[302] where the Court upheld a legislative grant of authority to agency officials to make bail decisions.[303] If the political branches' plenary power over exclusion and deportation decisions caused courts to step aside, and detention was necessarily a part of those procedures, then courts should also bow out of reviewing the Executive Branch's detention laws and policies.[304] This logic did not recognize that detention questions could be categorized as claims that impact the rights of noncitizens instead of traditional "immigration law" claims;[305] Hiroshi Motomura has described how the plenary power has less influence in doctrine impacting the former.[306] Daniel Wilsher has written that immigration detention raises separate moral and legal questions not implicated by the questions of whom to exclude

301. *Id.* at 235 (reasoning that deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character"). In *Wong Wing*, the Court assumed that the procedures would involve "temporary confinement" to last just "while arrangements were being made for their deportation." *Id.* In fact, "the government could have deported Wong Wing from Detroit to Canada in thirty minutes." Gerald L. Neuman, Wong Wing v. United States*: The Bill of Rights Protects Illegal Aliens*, *in* IMMIGRATION STORIES, *supra* note 38, at 31, 36.

302. Carlson v. Landon, 342 U.S. 524, 538 (1952) ("Detention is necessarily part of this deportation procedure. Otherwise, aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings.").

303. *Id.* at 531–46.

304. *See* García Hernández, *supra* note 4, at 1352 ("Immigration imprisonment has, in essence, taken on the same legal character as the immigration process and outcome that justify its existence: It is civil confinement because it is part of a civil proceeding to determine whether a civil sanction will be meted out.").

305. Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1092 (1995).

306. Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 574 (1990); *see also* Michael Kagan, *Shrinking the Post-Plenary Power Problem*, 68 FLA. L. REV. F. 59, 64 (2016) ("A case concerning the interpretation of a statutory provision on family sponsorship is a different subject than a constitutional challenge to long-term pre-removal detention of immigrants."). *But see* Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341 (2008) (critiquing the dichotomy courts and scholars use to distinguish between laws regulating immigrant conduct, which receive more judicial scrutiny, and laws regarding the selection of immigrants, which are subject to the plenary power).

or deport.[307] As Wilsher wrote, "[t]his failure to unhinge detention from expulsion decisions has, however, proved to be a crucial omission."[308]

Wilsher's ominous warnings are best illustrated by the Supreme Court's 1953 decision in *Shaughnessy v. United States ex rel. Mezei*.[309] Mr. Mezei was a lawful permanent resident who went abroad and, according to the Court, spent nineteen months "behind the Iron Curtain."[310] Upon his return, he was detained at Ellis Island and ordered excluded on national security grounds.[311] However, efforts to deport him proved fruitless.[312] The Court held that a noncitizen ordered excluded on national security grounds had no right to be free within the boundaries of the United States, even if his detention would be indefinite due to his statelessness.[313] Thus, arguments that his detention violated substantive and procedural Due Process were irrelevant, since he had no right to be free.[314]

Much ink has been spilled by scholars critiquing the *Mezei* decision.[315] Also, federal district courts, considering the reach of the decision half a century later, have limited the *Mezei* decision to its facts in deciding immigration detainee cases.[316] As I have argued elsewhere, this is an example of

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307. *See* WILSHER, *supra* note 13, at 6; *see also* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1038 (2002) (arguing that defenders of unchecked detention as part of the deportation process "have confused the power to deport with the power to detain").

308. WILSHER, *supra* note 13, at 6.

309. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953).

310. *Id.* at 208, 214.

311. *Id.* at 208.

312. *Id.* at 209.

313. *Id.* at 212–16.

314. *Id.* at 212 ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." (quoting United States *ex. rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950))). David Cole has argued that the Court's decision in *Knauff v. Shaughnessy*, cited by the *Mezei* Court, "does not stand for the sweeping proposition that aliens beyond our borders have no rights, or even no due process rights, but establishes only the narrower claim that because non-citizens have no liberty or property interest in entry they have no right to object to the procedures used to exclude them." Cole, *supra* note 307, at 1033. He describes how the *Mezei* Court, "[v]irtually without analysis . . . extended the right-privilege distinction that governed in *Knauff* to the distinct issue of indefinite detention." *Id.*

315. *See, e.g.*, *id.* at 1033–35; David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 166–69, 171 (1983); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1395 (1953).

316. *See, e.g.*, Kouadio v. Decker, 352 F. Supp. 3d 235, 239–40 (S.D.N.Y. 2018) ("*Mezei* was decided in the interest of national security, against a petitioner whose detention was authorized under 'emergency regulations promulgated pursuant to the Passport Act'" and "is limited to the national security context in which it was decided." (quoting Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 215 (1953)) (citing Rosales-Garcia v. Holland, 322 F.3d 386, 413–14 (6th Cir. 2003))).

federal courts using the "old map" of the common law presumption of freedom when faced with arguments founded in the most extreme version of the plenary power.[317] However, both federal courts defying the strongest application of *Mezei* and scholars rejecting its reasoning have agreed that the Due Process Clause does not, for those who are standing at the threshold of entry into the United States, mean absolute freedom.[318] In response to the strongest version of the plenary power, scholars and courts alike have agreed that there are situations where noncitizens have diminished liberty interests, even if they will not concede that such noncitizens have *no* liberty interests.

B. The Plenary Power Over Immigration Detention in the Modern Era

During the modern era of immigration detention, several important questions regarding the reach of the government's powers over immigration detention reached the Supreme Court. How has the plenary power fared in response to consideration of detainees' individual rights claims? Scholars have

317. *See* Holper, *supra* note 41, at 1113.

318. *See, e.g.*, Doe v. Rodriguez, No. 17-1709 (JLL), 2018 WL 620898, at *6–7 (D.N.J. Jan. 29, 2018) (holding that arriving alien has Due Process rights, but that he is not entitled to the same level of Due Process as those who have been admitted to the United States, and therefore his mandatory detention without a bond hearing for just under one year is not unreasonable); Cole, *supra* note 307, at 1037 ("[I]n the balancing approach called for by modern due process jurisprudence, an initial entrant's lack of ties to the community here, and the government's difficulty in obtaining substantial information about initial entrants from abroad, might combine to warrant less substantial procedural safeguards than would be required for detention of aliens residing here. But when the government imposes detention, it should not be able to sidestep the question of due process altogether by asserting that the alien has no liberty interests at stake."); Martin, *supra* note 315, at 210–16, 218–19 (critiquing *Knauff* and *Mezei* decisions and suggesting a framework for assessing the due process claims of different groups of noncitizens); Hart, *supra* note 315, at 1393–94 (asserting that "the Constitution always applies when a court is sitting with jurisdiction in habeas corpus" but that "the requirements of due process must vary with the circumstances").

opined that it has been depleted,[319] although not defeated.[320] Often overlooked is the pragmatic middle ground that was carved out in response to defenders of the plenary power, which arose in the context of deciding immigration detention questions. I argue that this middle ground is a place where electronic monitoring has come to doctrinally reside.

In *Zadvydas v. Davis*,[321] the Court considered whether lawful permanent residents with final removal orders could remain indefinitely detained if the United States could not repatriate them.[322] Justice Scalia, in a classic example of a plenary power theorist, stated in his dissent that because the detainees in question had final orders of removal, they, like Mr. Mezei, had no right to be free in the United States.[323] Justice Breyer, writing for the majority, invoked instead the Court's case law on civil detention, reasoning that indefinite detention for immigration purposes was analogous to indefinite civil detention.[324] The two justices approached the question quite differently: Justice Breyer attaching himself to the common law presumption of liberty, which trumped the plenary power,[325] and Justice Scalia believing that no presumption of liberty applied to an "alien" whose permission to be in the United States was extinguished by the political

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319. *See, e.g.*, David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 596–97 (2017) (describing "fissures in the Court's plenary power doctrine"); Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 757–58 (2015) (noting that "[i]mmigration law is often treated as standing uniquely outside of the realm of constitutional review and, therefore, incomparable with other substantive areas of law," yet, "[w]hile claims of exceptionalism have a doctrinal basis, the exceptionality is often less than meets the eye"); Michael Kagan, *Plenary Power is Dead! Long Live Plenary Power!*, 114 MICH. L. REV. FIRST IMPRESSIONS 21, 24–26 (2015) (describing "recent cracks" in the plenary power doctrine).

320. *See, e.g.*, Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 471 (2020) ("[T]he persistence of the plenary power doctrine explains why civil rights arguments often lose traction."); Rubenstein & Gulasekaram, *supra* note 319, at 614–18 (summarizing scholarly literature describing the state of immigration law's plenary power with respect to noncitizens' rights claims and concluding that "the plenary power doctrine has proven remarkably resilient despite these academic assaults").

321. *See generally Zadvydas*, 533 U.S. 678.

322. *Id.* at 684–86.

323. *Id.* at 703 (Scalia, J., dissenting). Travis Silva has argued that Justice Scalia's rationale does not hold up when one considers that the plenary power has no constitutional foundation, yet the right to liberty and habeas corpus were explicitly mentioned in the constitution. Travis Silva, *Toward a Constitutionalized Theory of Immigration Detention*, 31 YALE L. & POL'Y REV. 227, 250 (2012).

324. *See Zadvydas*, 533 U.S. at 690 (first citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992); then citing United States v. Salerno, 481 U.S. 739, 746 (1987); and then citing Kansas v. Hendricks, 521 U.S. 346, 356 (1997)).

325. *See Zadvydas*, 533 U.S. at 695 (writing that the plenary power "is subject to important constitutional limitations").

branches of government.[326] Justice Breyer resolved the issue by interpreting the statute governing detention to not permit detention beyond six months.[327]

Justice Breyer's response to Justice Scalia's belief that the noncitizens had no right to be free in the United States is key to understanding the doctrinal middle ground that was carved out. Justice Breyer wrote, "[t]he choice. . .is not between imprisonment and the alien 'living at large.' It is between imprisonment and supervision under release conditions that may not be violated."[328] By using these words, Justice Breyer was not granting the right to absolute freedom in the United States. Indeed, Justice Breyer suggested that the plenary power gave the government broad authority to set up supervision programs. He wrote, after discussing limitations on the plenary power's reach, that "we nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions."[329] Justice Breyer's doctrinal middle ground was supervised release. At the time the INS did not use electronic monitoring; rather, it had run a few pilot programs to test supervised release in the community. After *Zadvydas*, however, the INS soon received congressional funding to begin electronically monitoring those who could not be deported yet could not be indefinitely detained.[330]

More echoes of the plenary power's pull on immigration detention were heard in the Supreme Court's 2003 decision in *Demore v. Kim*.[331] In *Demore*, the Court considered a lawful permanent resident's Due Process challenge to the 1996 statute that authorized mandatory detention during removal proceedings for noncitizens convicted of certain crimes.[332] In this case, Mr. Kim and amici argued that Congress could have continued

326. *See id.* at 703 (Scalia, J., dissenting); *see also* WILSHER, *supra* note 13, at 20–22, 33–34.

327. *See Zadvydas*, 533 U.S. at 701; *see also* Cole, *supra* note 307, at 1018 ("While the [*Zadvydas*] decision thus technically rests on statutory grounds, its strained statutory interpretation is plainly driven by constitutional concerns.").

328. *Zadvydas*, 533 U.S. at 696.

329. *See id.* at 695 (first citing 8 U.S.C. § 1231(a)(3) (1994) (granting authority to the Attorney General to prescribe regulations governing supervision of aliens not removed within 90 days); and then citing *id.* § 1253 (imposing penalties for failure to comply with release conditions)).

330. *See supra* Part II.B.

331. Demore v. Kim, 538 U.S. 510 (2003); *see* Koulish, *supra* note 19, at 96 (describing *Demore* decision as "legitimiz[ing] mandatory detention in language that is derived from the immigration exception").

332. *Demore*, 538 U.S. at 513–14.

to permit discretionary release of these noncitizens, especially because a pilot alternative to detention program was underway.[333] This program, run by the Vera Institute, a well-respected criminal legal innovator, presented a lesser restraint on liberty that could still address the flight risk and dangerousness concerns that caused Congress to pass the mandatory detention statute.[334] The dissent considered this project to be highly significant to the constitutional question,[335] yet the majority held that it was irrelevant since Mr. Kim sought a bond hearing, *not* community supervision.[336] This footnote suggests that if Mr. Kim had sought release on an alternative to detention, asking for a diminished form of liberty, he possibly could have prevailed. Or perhaps not. The Court, after all, wrote that when Congress deals with "deportable aliens," it need not "employ the least burdensome means."[337]

Key to the Court's understanding of the presumed diminished liberty rights at stake, and thus the rational basis review of the mandatory detention statute,[338] was the assumption that Mr. Kim had conceded deportability.[339] In Justice Breyer's separate opinion, he viewed such a concession as akin to a final order of removal, although he disputed that Mr. Kim had conceded deportability.[340] The *Demore* Court upheld the mandatory detention statute in a holding that was described as "narrow,"[341] applying only to those who conceded removability under one of the categories of mandatory detention and only for those whose detention was brief.[342]

When it became clear that the mandatory detention at issue in *Demore* was not so brief, the Court considered the issue of prolonged mandatory detention in its 2018 *Jennings v. Rodriguez* decision.[343] The majority bypassed the constitutional issue, rejecting the Ninth Circuit's holding that the statutes at issue could be interpreted to provide bond hearings, and remanded the case back to determine whether the Due Process Clause provided a right to a bond hearing once detention became prolonged.[344]

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333. *Id.* at 520, 528.
334. *See* Taylor, *supra* note 38, at 351–52.
335. *Demore*, 538 U.S. at 565 (Souter, J., dissenting).
336. *Id.* at 520 n.5 (majority opinion).
337. *Id.* at 528.
338. *See* Nguyen v. B.I. Inc., 435 F. Supp. 2d 1109, 1115 (D. Or. 2006) (noting the rational basis review test of government policy that impacts "deportable aliens" (citing *Demore*, 538 U.S. at 528)); Silva, *supra* note 323, at 247 (describing Court in *Demore* as deploying rational basis review).
339. *Demore*, 538 U.S. at 514.
340. *Id.* at 576–77 (Breyer, J., dissenting in part).
341. *Id.* at 526 (majority opinion).
342. *Id.* at 531.
343. *See generally* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).
344. *Id.* at 836, 851.

Justice Breyer, in a dissenting opinion, wrote that he would have confronted the constitutional issue of prolonged mandatory detention and interpreted the statutes to provide a bond hearing in light of the Due Process rights at stake.[345] Again, Justice Breyer sought a middle ground between absolute freedom and incarceration. He interpreted 8 U.S.C. § 1226(c)'s language that "the Attorney General shall take into custody" persons removable for certain crimes or security reasons to mean physical release under restraints.[346] He invoked the meaning of the word "custody" in the habeas corpus context, and stated that "[a] person who is released on bail 'is subject to restraints' 'not shared by the public generally'" and therefore is still in "custody."[347]

This brief history of the Supreme Court's immigration detention doctrine has demonstrated how the Court has had to reconcile polar opposite positions, both of which are grounded in well-established doctrine. One is the constitutional and common law presumption of freedom.[348] The other is the Executive Branch's presumption of detention for noncitizens, coupled with the Court's promise of deference to the Executive via the plenary power.[349] Justice Breyer, seeking to resolve these positions, found release on conditions to be the appropriate middle ground.[350] The immigration authorities, seizing on the opportunity to create such conditions, leaned heavily on electronic monitoring.[351] Once the electronic surveillance system was in place, it was easy to expand its reach to include those who never would have been detained in the first place[352] and utilize the technology to trap other noncitizens in the deportation net.[353]

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345. *Id.* at 862–63, 869–70 (Breyer, J., dissenting).

346. *Id.* at 872–74.

347. *Id.* (quoting Hensley v. Mun. Ct., 411 U.S. 345, 351 (1973)); *see also* Maleng v. Cook, 490 U.S. 488, 491 (1989) ("[A] prisoner who had been placed on parole was still 'in custody' because his release from physical confinement . . . was not unconditional; instead, it was explicitly conditioned upon his reporting regularly to his parole officer, remaining in a particular community, residence, and job, and refraining from certain activities."); Torrey, *supra* note 15, at 906–12 (arguing that ICE could interpret "custody" to encompass other forms of restraint such as alternatives to detention).

348. WILSHER, *supra* note 13, at 20–22, 33–34.

349. *Id.*; Holper, *supra* note 38, at 81–90, 95–99.

350. *See, e.g.*, *Zadvydas*, 533 U.S. at 696.

351. *See supra* Part II.D.

352. *See supra* notes 167–85 and accompanying text (describing how "net-widening" concerns from the criminal legal system's use of electronic monitoring have played out in the immigration system).

353. *See supra* notes 186–201 and accompanying text (describing Orwellian concerns that electronic monitoring will become a means of supervising entire communities and documenting how that concern has played out in the immigration system).

C. What of Immigration "Pretrial" Detainees' Rights?

Important outstanding questions remain that have not been resolved by the Supreme Court's detention doctrine. *Demore* is limited to the context of mandatory detention, where it was assumed that an immigration judge had first considered whether a detainee was actually removable for the reasons the government stated.[354] Justice Breyer would have imported the federal Bail Reform Act standards applicable to convicted criminals on appeal into the immigration detention statute.[355] *Zadvydas* is applicable only to those who are living under a final order of removal, but it cannot be effectuated because the person is either stateless or the United States does not have a repatriation agreement with the person's country.[356] We only know, therefore, how the plenary power's pull over immigration detention has fared in Supreme Court cases involving the immigration law equivalent of a parolee or a post-conviction probationer.[357] Similarly, in the criminal context, the rights of a parolee or a post-conviction probationer are diminished.[358]

What about those who are still in removal proceedings, for whom a removability decision has not occurred? Many immigration detainees fit in this category. ICE makes bond decisions before the immigration judge has the opportunity to consider whether the noncitizen is removable.[359] Bond hearings in immigration court also may occur before any such concession or finding of removability is completed by an immigration

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354. *See* Demore v. Kim, 538 U.S. 510, 513–14 (2003).

355. *Id.* at 578 (Breyer, J., dissenting in part).

356. *Zadvydas*, 533 U.S. 678, 682, 690, 701.

357. Of course, the analogy is imperfect, given that all immigration detainees are civil detainees. *See id.* at 688–91.

358. Persons who are released on parole or post-release supervision typically have similar restrictions on their freedom to those released on probation. Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 435–36 (2011). For example, their Fourth Amendment rights are curtailed, as their homes can be subject to warrantless searches at any point, by any law enforcement officer. *See, e.g.*, United States v. Knights, 534 U.S. 112, 121–22 (2001); Griffin v. Wisconsin, 483 U.S. 868, 876–88 (1987). They frequently must submit to routine drug testing; their travel is limited; they are not free to associate with persons engaged in criminal activity or with felony records; and they may be visited anywhere or anytime by their probation officers. *See* Scott-Hayward, *supra*, at 422, 435–36. Many live with electronic monitoring long after their sentences would have concluded. *See* Eisenberg, *supra* note 111, at 149. Kate Weisburd has argued that while the Supreme Court's Fourth Amendment doctrine has become highly protective of privacy rights in the face of electronic surveillance programs that are broadly applicable, privacy rights are unequally distributed, because courts continue to sanction diminished privacy rights for those who are electronically monitored by the criminal legal system. Weisburd, *supra* note 128, at 722–23.

359. *See* Gilman, *supra* note 16, at 164–68 (describing custody review process).

judge.[360] The rights of these detainees are not diminished in any way by either a finding or concession of removability.[361] To extend the analogy from the criminal law context, these are the "pretrial" detainees of immigration law, whose liberty rights are not diminished in the same way as the parolees or probationers.[362] There has not even been a judicial finding of probable cause to support the government's charges, as is required in the criminal law context.[363]

In the immigration context, there is a trend whereby the diminished rights that come with the status of a final order of removal have negatively impacted the rights of those who are pretrial. Laws and policies that now govern pretrial detention were first used in the context of those who already had been ordered deported, persons whom all could agree had diminished liberty interests. There are three examples of this phenomenon.

The first example is a provision in the immigration detention statute that allows the government to easily rearrest someone who is out on bond or other conditions.[364] Such a provision in the criminal pretrial probation context would violate the Constitution, given that there is no required involvement by a judge[365]—even an immigration judge, who is not arguably "neutral" in the same way as a magistrate or judge in the criminal legal system.[366] This statutory provision in immigration law has not been the

360. It is not necessary to await even the filing of the charging document in immigration court before seeking bond. *See* 8 C.F.R. § 1003.14(a) (2004).

361. *See* Demore v. Kim, 538 U.S. 510, 514 (2003).

362. *See* United States v. Scott, 450 F.3d 863, 871 (9th Cir. 2006) ("[P]retrial releasees are ordinary people who have been accused of a crime but are presumed innocent. We have already noted that Scott's assent to his release conditions does not by itself make an otherwise unreasonable search reasonable."); *see also* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 725–27 (2011).

363. *See* Mary Holper, *Promptly Proving the Need to Detain for Post-Entry Social Control Deportation*, 52 VAL. U. L. REV. 231, 237–38, 241–44, 247 (2018); Michael Kagan, *Immigration Law's Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 166–67 (2015).

364. *See* 8 U.S.C. § 1226(b).

365. Carl Takei describes how typically, a term of pretrial probation is accompanied by a suspended sentence, which allows the judge, upon the request of the probation officer, to impose the original sentence or modify the conditions of release should the probation officer believe that the supervised defendant has violated the conditions. *See* Takei, *supra* note 192, at 137. He also describes how some jurisdictions have experimented with "flash incarceration" programs, which allow a probation officer, without the involvement of a judge, to allow limited periods of detention. *See id.*

366. *See* Mary Holper, *The Fourth Amendment Implications of "U.S. Imitation Judges,"* 104 MINN. L. REV. 1275, 1277, 1306–29 (2020).

subject of constitutional scrutiny by federal courts,[367] likely due to the lack of legal representation and the ease with which such a challenge to pretrial detention can become moot while a detainee awaits a decision by a federal district court on a habeas corpus petition.[368] When first introduced, this statutory provision to rearrest was reviewable for abuse of discretion,[369] yet even that level of review has been eviscerated by the 1996 restriction on judicial review of discretionary decisions to detain.[370]

Today's rearrest authority was first implemented in the context of those with final orders of deportation. During World War I, when shifting borders rendered many noncitizens stateless, the government was unable to effectuate many deportation orders.[371] Upon receiving permission from the immigration agency, a deportable noncitizen could be released and permitted to accept self-supporting employment under conditions set forth in the rules.[372] The noncitizen could be taken back into custody on conclusion of the work, or if he violated conditions of release, misbehaved, or failed to obey the laws.[373] According to Daniel Wilsher, they were "'reauthorized' [having become "unauthorized" by virtue of their deportation orders], but remained virtually at the mercy of the executive in ways that would be unconstitutional if applied to lawful residents or citizens."[374] This statutory limitation on the rights of a detainee crept into the statute governing detention prior to a removal order and has largely gone unchallenged.

A second example is today's congressional delegation of bond determinations to agency actors. Federal courts once held that federal judges had an inherent right to admit a noncitizen to bail; these courts ruled that a prior version of the immigration detention statute granted agency actors no such authority.[375]

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367. A similar provision involving the rearrest of juveniles was challenged, and a federal district court in Washington ordered that an immigration judge decide, within seven days of rearrest, whether the government had probable cause to rearrest the juveniles. *See* Saravia v. Sessions, 280 F. Supp. 3d 1168, 1195–96 (N.D. Cal. 2017), *aff'd*, 905 F.3d 1137 (9th Cir. 2018).

368. *See* Holper, *supra* note 41, at 1128–30 (describing how habeas corpus petitions challenging unlawful immigration detention are either not brought due to a lack of representation or become moot by the conclusion of a noncitizen's removal proceedings).

369. *See, e.g.*, Ocon v. Landon, 218 F.2d 320, 326 (9th Cir. 1954); Rubinstein v. Brownell, 206 F.2d 449, 456 (D.C. Cir. 1953), *aff'd*, 349 U.S. 929 (1954).

370. *See* 8 U.S.C. § 1226(e).

371. *See* WILSHER, *supra* note 13, at 32.

372. *Id.* (citing BUREAU OF IMMIGR., U.S. DEP'T OF LAB., IMMIGRATION LAWS: ACT OF FEBRUARY 9, 1917, at 60–61 (1919)).

373. *Id.* (citing BUREAU OF IMMIGR., *supra* note 372, at 60–62).

374. *See id.*

375. *See, e.g.*, Prentis v. Manoogian, 16 F.2d 422, 424 (6th Cir. 1926) (holding that Congress intended for there to be a right to bail because the statute did not provide for discretionary release decisions by an executive official). *But see* United States *ex rel.* Zapp

With 1950 legislation, the Supreme Court wrote, Congress intended to bestow that discretion to the Attorney General's delegates.[376] The Supreme Court in its 1952 decision in *Carlson v. Landon*[377] upheld the detention statute against a Fifth and Eighth Amendment challenge.[378] Many forget that the 1950 law's drafters were concerned primarily with the detention of those who could not be deported, especially when they posed a danger to the community because of their communist or anarchist beliefs.[379] Pre- and post-order detention were merged together as part of one enforcement project, which was social control of those accused of being communists or anarchists.[380] Those 1950 detention provisions have changed little with revisions of the immigration law.[381] Thus, today's immigration pretrial detention law has undeniably been impacted by beliefs regarding the rights of those who already were ordered deported and thus had diminished liberty interests.

A final example is ICE's alternatives to detention program. Congress funded the program as a way for ICE to monitor the many noncitizens whose deportation orders could not be effectuated, yet they could not be detained

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v. Dist. Dir. of Immigr. & Naturalization, 120 F.2d 762, 765 (2d Cir. 1941) (interpreting statute to permit discretionary release by the Attorney General).

376. *See* Carlson v. Landon, 342 U.S. 524, 527 (1952) (interpreting the detention provisions of the 1950 Internal Security Act).

377. 342 U.S. 524 (1952).

378. *Id.* at 534.

379. *See* FACILITATING DEPORTATION OF ALIENS, S. REP. NO. 81-2239, at 3 (1950) (stating the bill is primarily concerned with aliens who cannot be deported because their countries will not repatriate them). This was the Senate Report for Hobbs Bill (H.R. 10), which did not pass but courts refer to it as legislative history of the statute interpreted in *Carlson*. *See* Carlson, 342 U.S. at 538–39; Flores v. Meese, 934 F.2d 991, 1000 (9th Cir. 1990), *rev'd sub nom.* Reno v. Flores, 507 U.S. 292 (1993).

380. *See* FACILITATING DEPORTATION OF ALIENS, S. REP. NO. 81-2239, at 5 (1950) ("This bill will expressly authorize the Attorney General, in his discretion, to hold arrested aliens in custody, or to release them under bond or on conditional parole, pending final determination of their deportability and for a 6-month period after an order of deportation is issued and while such negotiations take place."); *id.* ("The bill intends that the Attorney General shall have untrammeled authority to impose such conditions or terms as he sees fit in releasing an alien under bond or conditional parole pending final determination of deportability of the alien and for 6 months after an order of deportation has been issued against him.").

381. *See Flores*, 934 F.2d at 999–1002 (tracing legislative history of what was then 8 U.S.C. § 1252, which has been moved into 8 U.S.C. § 1226, back to 1917, and including discussion of the 1950 provisions of the Internal Security Act); Holper, *supra* note 38, at 90–94 (describing evolution of changes to immigration detention statutes, and noting the minimal changes to the general detention statute, except for the increase of the statutory minimum bond amount).

indefinitely because of the *Zadvydas* decision.[382] In challenges brought by persons supervised under ISAP, federal district courts have held that ICE had statutory authority to operate ISAP since the program was not detention due to its lack of physical restraints or surveillance;[383] and even if it is, it is less restrictive than jail.[384] Substantive Due Process challenges have been unsuccessful, as the case were brought by persons living under final orders of removal.[385] Courts reasoned that those living under final orders of removal have a diminished right to liberty, and thus the government program could easily pass the rational basis review, due to the lack of a fundamental liberty interest.[386] For those still in removal proceedings, the BIA has held that it will not consider electronic monitoring to be a form of "custody" for the purposes of allowing an immigration judge to ameliorate

382. *See* Nguyen v. B.I. Inc., 435 F. Supp. 2d 1109, 1111–12 (D. Or. 2006).

383. This is consistent with critiques from the criminal legal system, where courts are slow to recognize virtual restraints as real ones. As criminal law scholar Erin Murphy has written, liberty interests "tend to begin only at the jailhouse door." Murphy, *supra* note 128, at 1352. Murphy writes that courts erroneously treat physical deprivations as the archetypal "paradigm[] of restraint," and thus largely overlook the significant threat to liberty posed by technological measures. *Id.* at 1351–52. For this reason, technological restraints are frequently imposed with insufficient procedures in the criminal legal context. *Id.*; *see also* Arnett, *supra* note 129, at 688–94 (discussing case law concerning electronic monitoring at the state level, where there have been few successes in arguing that electronic monitoring is custody for the purposes of counting towards time served); Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on the Technological Monitoring of Convicted Sex Offenders*, 21 NEW CRIM. L. REV. 379, 419 (2018) (arguing against the tendency to "discount the intrusion" of electronic monitoring by comparing it to searches of prisoners' cells); Eisenberg, *supra* note 111, at 128–29, 160–68 (arguing that electronic monitoring as used in the criminal law as punishment and critiquing courts for failing to recognize this); Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 305 (2015) (noting that electronic monitoring, like other "non-carceral treatment of juveniles," is "rarely subjected to effective legal regulation or rigorous analysis"). Robert Koulish has made similar critiques of federal courts' responses to noncitizens' challenges to ISAP, writing that electronic monitoring in immigration law has become an "extra-legal administrative space[]" of "unchecked power." Koulish, *supra* note 19, at 90.

384. *Nguyen*, 435 F. Supp. 2d at 1114–15; *see also* Diawara v. Sec'y of DHS, No. AW-09-2512, 2010 WL 4225562, at *2 (D. Md. Oct. 25, 2010) (finding ISAP ankle monitors rationally related to the government interest in reducing rate of absconders); Zavala v. Prendes, No. 3-10-CV-1601-K-BD, 2010 WL 4454055, at *2 (N.D. Tex. Oct. 5, 2010).

385. *See* Ahmed v. Tate, No. 4:19-CV-4889, 2020 WL 3402856, at *13–14 (S.D. Tex. June 19, 2020); *Nguyen*, 435 F. Supp. 2d at 1114; *Diawara*, 2010 WL 4225562, at *2; *Zavala*, 2010 WL 4454055, at *2.

386. *See Ahmed*, 2020 WL 3402856, at *13–14; *Nguyen*, 435 F. Supp. 2d at 1114; *Diawara*, 2010 WL 4225562, at *2; *Zavala*, 2010 WL 4454055, at *2; *see also* Lawrence v. Gonzales, No. 12 Civ. 4076 (KBF), 2013 WL 1736529, at *4 (S.D.N.Y. Apr. 19, 2013) (reasoning, for noncitizen monitored under ISAP, "Lawrence is not, however, currently being detained. He is merely subject to supervised release—and lenient supervised release at that").

these conditions.[387] Although federal courts have not yet analyzed constitutional challenges to ICE's use of electronic monitoring for an immigration pretrial detainee, the outcomes of these earlier cases deciding the legality of ICE's electronic monitoring may foreshadow what such challenges will bring. The rights of "immigration parolees" may again slowly infect the rights of "immigration pretrial" detainees, creating a system where *all* immigration detainees are deemed to have diminished rights to liberty.

D. Electronic Monitoring as the "Middle Ground" That Ceded Too Much Ground

The analysis above has demonstrated how for all immigration detainees, there came to be a presumed diminished liberty interest. To be sure, jurists have stated otherwise; for example, the Ninth Circuit wrote in an immigration case that civil detention "for *any* purpose constitutes a significant deprivation of liberty."[388] Yet these voices in defense of immigration detainees' outright freedom are facing significant opposition. Although Justice Scalia has passed away, many defenders of the plenary power are alive and well, working for the government and invoking the plenary power to argue that immigration detainees have lesser liberty interests. The government in its briefing on various detention procedural challenges has portrayed *Zadvydas* as applicable only to the narrow situation where an immigration detainee may not be deported and thus faces indefinite detention.[389] The government

387. *See In re* Aguilar-Aquino, 24 I.&N. Dec. 747 (B.I.A. 2009). In *Aguilar-Aquino*, the BIA considered whether the immigration judge had jurisdiction to ameliorate the terms of custody for someone released from jail on conditions of wearing an ankle monitor and staying in the house from 7:00 p.m. until 7:00 a.m. every day. *Id.* at 748–49. A regulation removed jurisdiction seven days after release from custody. *Id.* at 750 (citing 8 C.F.R. § 1236.1(d)(2) (2008)). The BIA rejected any meaning of "custody" that would accord with the broad definition in habeas corpus case law, confining itself to a meaning of "custody" that only meant jail. *Id.* at 752–53.

388. Singh v. Holder, 638 F.3d 1196, 1204 (9th Cir. 2011) (quoting Addington v. Texas, 441 U.S. 418, 425 (1978)) ("We are not persuaded by the government's argument that we should deviate from this principle and apply the lower preponderance of the evidence standard because the liberty interest at stake here is less than for people subject to an initial finding of removal or other types of civil commitment."). Peter Schuck wrote a similar passage in 1997, in a white paper he wrote to the former INS advising them about their detention policies. *See* Schuck, *supra* note 64, at 669 ("[T]he INS's detention of any individual, even of a removable criminal alien, implicates fundamental constitutional rights and values.").

389. *See, e.g.*, Brief of Respondent-Appellants at 20–30, Doe v. Tompkins, No. 19-1368 (1st Cir. Aug. 15, 2019).

argues that *Demore*, by upholding mandatory detention against a Due Process challenge, can be extended such that no Due Process challenge to any of the government's immigration detention practices will prevail.[390] Immigration detention, the government argues, is a rights-free zone—except where it becomes indefinite or passes into the realm of punishment.[391]

Winning less liberty through release on electronic monitoring has become the trade-off to gain more procedural protections to safeguard one's right to liberty. For example, an immigration pretrial detainee can advocate for the government to bear the burden of proof, which is a bedrock principle in all forms of civil detention,[392] and which can have a significant outcome at the bond hearing.[393] A typical government response is that immigration detention is unique, different, and outside of the realm of civil detention, so the Court's civil detention case law simply does not apply, because immigration detainees have such limited rights to be free.[394] The government, with these arguments, repeats the age-old invocation of the plenary power to suggest that a noncitizen's right to be free is nearly nonexistent. The temptation may be there for courts to take the bait; as David Martin has noted, procedural Due Process can become "the kudzu vine of constitutional law: allow it to take root and it soon takes over the whole hillside."[395] For this reason, Martin writes, "the Supreme Court has been working to find ways to contain the spreading plant," and the strongest version of the plenary power can be invoked, because "[f]or whatever its faults, the doctrine plainly eliminates high-court pruning."[396] Indeed, in its 2020 opinion in *DHS v. Thuraissigiam*[397] the Court invoked the plenary power and, specifically, the *Mezei* line of cases, to hold that a recently-

390. *Id.* at 22–23.

391. *See* Wong Wing v. United States, 163 U.S. 228, 235–37 (1896) (holding that hard labor is punishment, but that detention is a necessary part of the deportation process); *see also Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) (stating the proposition that immigration detention may not be "arbitrary and capricious"); Lynch v. Canatella, 810 F.2d 1363, 1374 (5th Cir. 1987) ("Whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled under the Due Process Clauses of the Fifth and Fourteenth Amendments to be free of gross physical abuse at the hands of state or federal officials.").

392. *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)); United States. v. Salerno, 481 U.S. 739 (1987).

393. *See* Holper, *supra* note 38, at 129–30.

394. *See, e.g.*, Brief of Respondents-Appellants at 19–25, Velasco-Lopez v. Decker, No. 19-2284 (2d Cir. Nov. 5, 2019); Brief of Respondent-Appellants, *supra* note 389, at 27–29.

395. Martin, *supra* note 315, at 188.

396. *Id.* at 188–89. Martin is specifically referencing the *Knauff/Mezei* doctrine, under which a noncitizen who seeks admission to the United States has no right to Due Process because he is legally still standing at the threshold of entry. *See id.*

397. Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959 (2020).

arrived asylum seeker could not invoke the Due Process clause when he complained of insufficient procedures leading up to his order of removal.[398]

The immigration detainee is left arguing that no, he is not asking for outright liberty; he asks instead for virtual restraints on his liberty in the form of electronic monitoring. Therein lies the Faustian bargain. As García Hernández has written, "[t]reating ICE's alternatives to detention as a step up is only possible after accepting the agency's premise that everyone deserves confinement."[399] Electronic monitoring has been presented as a "middle ground" between absolute freedom and incarceration for immigration detainees.[400] But the lessons from the criminal legal system, where electronic monitoring was deemed a "middle ground," or an "intermediate sanction" that was more punitive than traditional probation,[401] have taught us that electronic monitoring gave away *too* much ground.[402] In attempts to placate the plenary power's defenders, advocates of electronic monitoring of immigration detainees have similarly ceded too much ground.

V. CONCLUSION

Electronic monitoring has come to provide, for jurists, a modern solution to a question that has perplexed federal court judges since the earliest days of immigration detention in the United States—how to balance the common law presumption of freedom against what is argued to be the government's broad, plenary powers in immigration law. Since the late 1800s, federal courts deciding immigration detainees' cases have had to make a binary decision between absolute freedom and incarceration. The many restraints that form the hallmark of electronic monitoring have

398. *Id.* at 1982. The Court limited its holding to a person in the noncitizen's position; namely, someone who was caught within 25 yards of the border. *See id.* As the dissent noted, "[w]here its logic must stop, however, is hard to say." *Id.* at 2013 (Sotomayor, J., dissenting).

399. GARCÍA HERNÁNDEZ, *supra* note 16, at 149.

400. *See* Legomsky, *supra* note 146, at 548 (describing release on conditions of supervision, such as the pilot program that was implemented by the Vera Institute, as an effective "middle ground" to avoid the costs of mandatory detention).

401. *See* Lilly & Nellis, *supra* note 115, at 26–29. It became a method of appealing to the "middle ground"—the "get tough" politicians who also were fiscally conservative and the liberals who wanted to leave people in their communities. *Id.* at 26. In an otherwise rehabilitative and reintegrative plan for release of an offender or defendant into the community, electronic monitoring could be added as punitive element. *See* Nellis, Beyens & Kaminski, *supra* note 105, at 2–4.

402. *See supra* Part III.A.

come to reside in the doctrinal middle ground between freedom and incarceration. But in doing so, a Faustian bargain has been forced upon detainees, requiring them to choose between incarceration and an equally harmful "form of custody without walls."[403]

Immigration detention has been on the rise, making the United States the top country for immigration detention.[404] There will come a time when those who thirst for more jailing of noncitizens will run out of political will, funds, or space.[405] At that point, it will require all to take a serious look at smart alternatives to detention. This Article has shown how one type of alternative to detention, electronic monitoring, has dominated the other options. With such monitoring, the government can meet its goals of immigration detention, but those subject to these new virtual walls are no less free.

One is left asking the questions that has perplexed policymakers in the criminal legal arena for years: what works?[406] A comprehensive analysis of other alternatives is outside of the scope of this article, but other scholars have addressed this question. For example, Fatma Marouf and García Hernández have advocated for community-based alternatives, which have a successful track record in the immigration system.[407] Yet even these programs can force those who work in the community-based organizations to become "force multipliers" for ICE,[408] tracking noncitizens' movements and reporting to ICE about missed appointments.[409] Another option, which may be unthinkable to those in the prison mindset, is that for many

403. Feeley & Simon, *supra* note 268, at 457.

404. *See* Ryo, *supra* note 37, at 99–100.

405. *See* Lora Adams, *State and Local Governments Opt Out of Immigrant Detention*, CTR. FOR AM. PROGRESS (July 25, 2019, 9:00 AM), https://www.americanprogress.org/issues/immigration/news/2019/07/25/472535/state-local-governments-opt-immigrant-detention/ [https://perma.cc/56FG-RPPW].

406. *See* Nellis, Beyens & Kaminski, *supra* note 105, at 15. Maya Schenwar, Victoria Law, and Angela Davis have sought to answer the "what works" question in the criminal legal system by exploring other alternatives to incarceration, such as restorative justice, transformative justice, voluntary treatment, and a real social welfare system to root out the poverty that ensnares people in the prison industrial complex. SCHENWAR & LAW, *supra* note 111, at 197–238; DAVIS, *supra* note 118, at 105–15.

407. *See, e.g.*, Marouf, *supra* note 4, at 2155; GARCÍA HERNÁNDEZ, *supra* note 16, at 149–53.

408. *See* Christopher N. Lasch, et al., *Understanding "Sanctuary Cities*,*"* 59 B.C. L. REV. 1703, 1719–23 (2018) (describing the origins of "crimmigration," the interweaving of immigration and criminal law, and noting that one contributing factor was deputizing state and local law enforcement as "force multipliers" for immigration enforcement).

409. *See supra* notes 55–59 and accompanying text (describing the Vera Institute's pilot program as a community-based program wherein the case workers "wielded considerable coercive power" because they could recommend redetention if a participant fell out of compliance and in fact did recommend such redetention in several cases).

situations, the best alternative to incarceration is nothing.[410] Release under no conditions also has a history in the immigration system.[411] As these examples demonstrate, the best replacement for electronic walls can simply be no walls.

410. SCHENWAR & LAW, *supra* note 111, at 198.
411. *See supra* Part II.