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NO CHILD LEFT CONFINED: CHALLENGING THE DIGITAL CONVICT LEASE

CHAZ P. ARNETT*

Abstract

The following is a lightly edited transcript of comments provided at the Journal of Health Care Law & Policy's *Spring Symposium entitled* "Uneasy Alignments: The Mental Health Turn in The American Legal System.*" This event was hosted on March 16, 2023, by University of Maryland Francis King Carey School of Law in collaboration with the University of Maryland School of Social Work's Daniel Thursz Social Justice Lecture Series. The Symposium examined how legal systems, like child welfare and juvenile law institutions, use coercion to force engagement or compliance with often unproven therapeutic interventions. The presentation took on the question of how the negative impacts of this turn manifest in the home. The lecture centers on the use of digital surveillance technologies, like electronic ankle monitors, by juvenile courts as presumed rehabilitative tools and alternatives to incarceration. It argues that not only is electronic monitoring ineffective as a therapeutic intervention toward adequate adolescent development, but also it leads to a marginalization that severs youth from the community ties necessary for growth. The lecture concludes that a critical race and technology approach is useful for understanding how this practice feeds an expanding data economy that exploits poor families of color under the premise of contributing to public health and public safety.*

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So, in late March of 2020, the Massachusetts Supreme [Judicial] Court weighed in on what it was witnessing across the state with juvenile detention centers.[1] Public defenders helped organize, rally, and make arguments to courts across the state that children should be released at the beginning of this historic pandemic, arguing that they were particularly vulnerable in those detention centers that were acting as locales for dangerously rapid transmission and spread.[2]

Now, one of the things that the state prosecutors did at those hearings where the lawyers were asking for kids to be released, they argued that if the minors would be released, they should be subjected to digital surveillance in the form of electronic ankle monitors. And this is what the Massachusetts Supreme [Judicial] Court was wading into. The Supreme [Judicial] Court stepped in and issued an order halting the use of those electronic ankle monitors.[3] The court noted in its order:

> In light of the public health concerns regarding the COVID-19 pandemic and the actions ordered by the Governor in connection therewith, the Supreme Judicial Court, pursuant to its superintendence authority issues the following order to protect public health by reducing the risk of exposure …: Whereas, when a court orders GPS monitoring as a condition of release or of probation; … whereas a GPS bracelet cannot be affixed without Probation Service personnel coming in close physical proximity with the juvenile …; whereas the act of affixing a GPS bracelet cannot be accomplished while simultaneously engaging in "social distancing," …; whereas, the act of affixing a GPS bracelet therefore inherently poses a degree of risk of exposure for both Probation Service personnel and [juveniles]; now therefore, the Supreme Judicial Court, having balanced the public safety needs for GPS monitoring with the potential risk of public health from the act

1. Flint McColgan, *Massachusetts Supreme Judicial Court Lays Out Requirements for Imposing GPS Monitoring for Probationers*, BOSTON HERALD (Oct. 1, 2022, 7:59 PM), https://www.bostonherald.com/2022/10/01/massachusetts-supreme-judicial-court-lays-out-requirements-for-imposing-gps-monitoring-for-probationers/.

2. Press Release, Prisoners' Legal Servs. of Mass., MA Supreme Judicial Court Issues Mixed Ruling in PLS COVID-19 Release Case (June 2, 2020) (on file with author); Pl.'s Resp. to Defs.' Status Report on the Implementation of a Home Confinement Program, Foster v. Comm'r of Corr., Super. Ct., No. 20-00855-D, at 4–5 (Mass. Dec. 4, 2020). Similar petitions were made in other states. *See* Br. for Pet'r's, In re J.B., 226 A.3d 935 (Md. Apr. 2, 2020); Julietta Bisharyan, *SF Public Defender Calls for the Release of Eligible Youth in Juvenile Detention Facilities*, Davis Vanguard (Apr. 2, 2020), https://www.davisvanguard.org/2020/04/sf-public-defender-calls-for- the-release-of-eligible-youth-in-juvenile-detention-facilities/; *Outbreak of COVID-19 in Prisons and Jails*, ORLEANS PUB. DEFS. (Mar. 16, 2020), https://www.opdla.org/news/outbreak-of-covid-19-in- prisons-and-jails.

3. *Supreme Judicial Court Order concerning the imposition of global positioning system (GPS) monitoring as condition of release or of probation*, MASS.GOV (Mar. 24, 2020), https://www.mass.gov/supreme-judicial-court-rules/supreme-judicial-court-order-concerning-the-imposition-of-global-positioning-system-gps-monitoring-as-condition-of-release-or-of-probation.

> of affixing a GPS bracelet, hereby orders that, [on] March 24, 2020 …:
> 1. No court shall order GPS monitoring as a condition of release or of probation unless a judge finds that there is a compelling public safety need.[4]

At the time I came across and read this order, I was admittedly struck by the absurdity of it. Not absurd in the sense that correctional officers could not contract COVID,[5] but rather that this practice of digitally shackling children, which I had fought years against tirelessly as a public defender and argued against its harms and theorized about it as a legal scholar,[6] would temporarily be realized as necessary and justified by the fact that juvenile justice officers could catch COVID; or that it may deepen a public health crisis.

I could not help but think about the 16-year-old that I had represented just a few years prior who was a star football player while managing being a part-time fast-food worker and beloved big brother. He found himself in juvenile court for participating in a cafeteria fight that turned into a brawl. He had been assigned to electronic monitoring, and not long after I watched them connect that device, I watched him disconnect from some of the most important aspects of his young world. He was no longer able to play football because of the supposed danger of having that unit on his leg. He was fired from his job because his manager said he did not want customers seeing it. He drifted in school. When Thanksgiving came up shortly thereafter and most of his family went to spend a day at his grandmother's house in Virginia, he was forced to stay home alone, unable to get ahold of the DHS personnel responsible with giving clearance. And I watched him deteriorate.

I could not help but think of the young girl around the same time I represented who found herself in juvenile court for similar adolescent behavioral issues at school. Her mother believed that she may have been connecting online with older guys who seemed like they were taking advantage of her. Although she was the victim and although the court was failing stupendously to provide services to her, the judge placed her on electronic monitoring for "her own safety."

As I reflected on that Massachusetts Supreme [Judicial] Court order at the height of COVID, I thought, why are these harms we were seeing before with electronic monitoring not enough of a threat? Is this form of electronic surveillance not a prevailing public health crisis in itself?

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4. *Id.*

5. Deborah Becker, *Mass. Youth Detention Centers Report COVID-19 Cases*, WBUR (Apr. 2, 2020), https://www.wbur.org/news/2020/04/02/massachusetts-youth-detention-covid-19-coronavirus.

6. *See generally* Chaz Arnett, *Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts*, 108 J. CRIM. L. & CRIMINOLOGY 399 (2018).

I want to spend my time talking about the rise of e-carceration[7] in the juvenile legal system as a purported progressive tool for positively regulating the behavior of minors, supposedly, without connecting the dangers and harms of being in prison. I want to talk about it and situate it within the larger critical discussion about the intersection of race and technology. If there is time, maybe briefly flag a few areas for further advocacy, research, and thought.

When I speak of e-carceration, I refer to the digital outsourcing of aspects of prison into communities under the guise of carceral humanism[8]—the repackaging and rebranding of corrections and correctional programming as caring and supportive, while they still cling to punitive culture. Electronic ankle monitors are prime examples of e-carceral tools and logics. Electronic monitors are obviously in high use now. They typically operate through ankle units that strap around the leg, for that person to be monitored digitally.[9] Like cell phones, these devices have batteries that need to be charged on bases that connect through electric outlets. When in operation, these devices collect and share information with central computer and data systems, usually maintained by correction departments, but more increasingly today, private corrections affiliates and companies.[10]

The most recent development in electronic ankle monitoring technology is the leveraging of smart phone capabilities to allow online apps to pair with these digital devices.[11] Those placed under surveillance with these upgraded capabilities will now have alerts coming to their phone, indicating when they need to be in the house, indicating when they are going to a location where they are not allowed to be. Even more, there is the prospect of adding additional verification measures along the lines of biometric information, using fingerprints, using facial and voice recognition, as well, to verify those who are monitored.

So, I think it is important here to stress a few things about electronic monitoring of juveniles. First, electronic monitoring emerges out of this movement toward community corrections.[12] This euphemism is quite simply based on the idea of, "we bring the prison to you." However, the state would characterize it as an intermediate sanction, so perhaps you can refer to it as that [sarcastic emphasis]. The earliest forms of community corrections were house arrests, community service, day reporting centers, intensive supervision and probation programs, drug courts, and boot camps. These programs gained popularity in the nineties as the heavily punitive criminal sentencing began to

7. Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641 (2019).
8. *Id.* at 645.
9. *Id.* at 669–74.
10. *Id.*
11. *Id.* at 670.
12. *Id.* at 663–69.

receive a healthy level of rebuke and critique. Their purported appeal is in their seemingly more humane treatment of offenders versus detention, and their potential to provide services that can lead to change within offenders. Keep that in mind. The benefit of these early intermediate sanctions as the state will call them, however, have been questioned.

There are three important aspects of these programs that have been identified as exacerbating the problem of race and class in the criminal justice system: (i) who we see as the typical target population for these intermediate sanctions, (ii) the punitive orientation of the specific sanctions geared towards social control versus rehabilitation, and (iii) "the failure to integrate appropriate treatment strategies into correctional program[ming]."[13]

The programs have been criticized for contributing to net widening of the criminal legal system and extending social control for racial minorities, as they tend to target African American and Latino offenders who are most likely to be released without the need for such programming.[14] The tendency has been to target probation-bound versus prison-bound offenders. Even more, these community correction programs have been scrutinized for their prioritization of controlling offenders by piling on multiple special conditions, which can also contribute to frequent violations. When you have frequent violations and people are brought back into court, additional restrictions are put in place, which keep ratcheting up until the person ultimately ends up back incarcerated.

The focus on controlling offenders has come at the expense of attempts to integrate treatment into implementation of community correction programming and has received wide criticism. The biggest failure here is that most of the programs have stated goals for fostering rehabilitation, specifically in the juvenile context. They say, "These things will contribute to rehabilitation—just trust us." Yet, the programs themselves do not involve treatment or therapeutic types of services at all. They do not even attempt it.

Most recently, the community corrections model has been propelled by a second wave of programming reliant upon technology-driven surveillance. These programs vary and are constantly evolving as the technology advances. This new wave of community corrections is touted as maximizing effectiveness in determining the best supervision and treatment strategies for offenders,[15] (I'm taking this right out of the brochure), minimizing racial biases, and reducing overall recidivism. However, this new wave of "datafied" community corrections programming has been criticized for presenting the same problems

13. James M. Byrne & Faye S. Taxman, *Crime Control Policy and Community Corrections Practice: Assessing the Impact of Gender, Race, and Class*, 17 EVALUATION & PROGRAM PLAN. 227, 230 (1994).

14. *Id.* at 228.

15. PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE CTS., USING OFFENDER RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING: GUIDANCE FOR COURTS FROM A NATIONAL WORKING GROUP 1 (2011).

associated with the first wave: racial discrimination, overemphasis on control versus rehabilitation, and failure to provide treatment services.[16] Yet, you find organizations like the Annie E. Casey Foundation that promote the practices as a viable progressive alternative to detention. I have beef with Annie E. Casey Foundation. I hope they aren't providing funding in any sort of way here [laughs from the crowd].

Second thing to note about electronic monitoring is that it is extremely invasive and restrictive. "People on monitors are subject to anywhere from six to fifty-eight separate rules."[17] These rules are usually contained in a short user agreement or contract that parents and children sign as a part of being placed on the monitor. The agreement generally contains the terms and conditions and often stipulates that any violation of the contract may result in revocation, i.e., the child going back to a cage. As my colleague Kate Weisburd noted in a recent article called *Punitive Surveillance*, "[e]lectronic monitoring conditions often impose significant burdens on friends and family."[18]

So, on this panel, we are sort of thinking about how these processes impact what happens in the home. Some electronic monitoring programs explicitly forbid people from having visitors to their homes, from organizing social gatherings at their house, or allowing anyone to move into the residence without prior permission.[19] Program policies essentially place entire families under regulation and supervision, as agents are permitted to search the entire home of the person on monitoring. Virginia is an example where electronic monitoring programs demand the collection of information from all house residents, including contact information, criminal history, education level, and substance abuse history.[20] Electronic surveillance programs in Alaska deny people on electronic monitors from "babysitting or being a primary caregiver for any person, children, or pets without approval."[21] Even more, in places like San Diego, if you live with a person on a monitor, you must sign a cohabitation acknowledgement form that contains a list of additional rules.[22] In Oakland County, Michigan, the rules go even further and require family and friends to take on the role of police, by agreeing to be responsible for the person being monitored.[23] This requires that responsible family member to report any violation of release conditions to the court, essentially deputizing your siblings, your parents, your grandparents, your uncles and turning family members against

16. Arnett, *supra* note 7.

17. Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 163 (2022).

18. *Id.* at 166.

19. *Id.*

20. *Id.*

21. *Id.* (quoting Kate Weisburd et al., *Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System* (GEO. WASH. U. L. SCH. 2021, at 4)).

22. *Id.*

23. *Id.*

one another.[24] People on monitors also suffer restrictions on social relationships and outings. Rules in Dayne County, Wisconsin, expressly prohibit leaving the home for any social, religious, or family function, like my client.[25]

Beyond limiting outings, some electronic monitoring programs dictate exactly who people on monitors may interact with. In Mississippi, people are prohibited from associating with anyone who may be understood as having a "bad reputation."[26] In Kanawha County, West Virginia, the targeted limitation is for people of "disreputable character."[27] And in New Mexico, not only are those under electronic surveillance prevented from interacting with people on parole or probation, but also anyone that a parole or probation officer deems detrimental to their probation supervision.[28] A lot of discretion there.

Finally, it is also worth noting that there are limitations placed on housing and where people may live. Many electronic monitoring programs restrict where a person may reside, requiring housing to be approved, erecting significant barriers to temporary housing, subsidized government housing, or hotels.[29]

So, to sum it up nicely, I will tell you it like the Department of Corrections tells people who are placed on monitors in York, Pennsylvania:

> When you are wondering whether or not you will be permitted to go somewhere, ask yourself the following question: If I were in jail, would I be able to do this? If the answer is NO, then chances are that you will not be able to do it [while on electronic monitoring].[30]

And this does not even begin to broach the question of cost and finances,[31] levying additional burdens on families. These associated harms and collateral consequences strain a child's connection to their community and family through isolation and marginalization, at a time where it is critical for a child to gain greater connection and investment in their own communities.[32] Social marginalization in this correctional context is defined by what I call a "sever and tether" effect, where electronic ankle monitoring programs act to sever young

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 166–67.

28. *Id.* at 167.

29. *Id.*

30. Arnett, *supra* note 7, at 713.

31. Electronic monitoring programs charge offenders for their own correctional surveillance, ranging anywhere from ten dollars to forty dollars a day, not including initial startup and installation costs, and require those under surveillance to have landline telephone services, and electricity bills paid on time. Not only does this make it more likely that those with means will only be able to participate, but those of lesser means who are able to do so, to the detriment of other areas of their financial lives, are bearing significant costs. The attendant financial demands put incredible strains on families and intrafamilial relationships for those returning home, often creating pressure to reengage in activities that lead to criminal justice contact.

32. Arnett, *supra* note 6, at 436.

folks from their community and families through the erection of significant barriers to reentry, while simultaneously tethering them to a surveillance regime wholly unconcerned with rehabilitation and reintegration.[33] Electronic monitoring programs act to push those under surveillance further on the margins of society, divorcing them from the very things that are necessary for reentry, while at the same time failing to make us any safer, nor significantly reducing prison populations.[34]

In fact, the aim of rehabilitation envisions supposedly putting youth on the track to being healthy, contributing members of their communities and society, yet, such marginalization that comes along with electronic monitoring can lead to even greater anti-social conduct and misbehavior that juvenile courts supposedly attempt to steer kids away from in the first place.[35] This becomes even more vital when considering that life paths set in adolescence can have a major impact later in life. There are reasons to believe that early altering of these trajectories in positive ways can have a larger effect than the same intervention applied later in adulthood.[36] Thus, electronic monitoring may actually be a counterproductive measure that jeopardizes a child's chances at successful life outcomes.[37]

Adolescence is an important time for developing a new sense of self, an identity, along with the cognitive ability to imagine oneself in the future in ways that create positive emotions.[38] It is also a time in which, unfortunately, negative affective appraisals can have great impact. This complex processing of thoughts and images can create strong feelings in adolescents that are capable of altering motivation.[39] When faced with trauma, when faced with stress, when faced with lower self-esteem, adolescents experience deep emotions that they are seldom equipped to deal with in positive ways.[40] Thus, in considering the potential harms of electronic monitoring, effects such as stigma, effects such as shame, can have potentially crippling impacts on healthy youth development. I have seen it. By understanding that adolescence proves to be one of the most difficult periods for youth to develop positive abilities to think strategically, to make long term plans, to set life goals, to learn social rules and navigate complex situations as cognitive and emotional systems are integrated, the punitiveness of electronic surveillance of youth is better understood.[41] It is better assessed. It is better seen.

33. Arnett, *supra* note 7, at 645.
34. *Id.* at 646.
35. Arnett, *supra* note 7, at 436.
36. *Id.*
37. *Id.*
38. *Id.* at 438.
39. *Id.*
40. *Id.*
41. *Id.* at 443.

I don't want to take too much more time here, but I will say a few more things. How do we respond to or think about or navigate this reality, this problem's harm? I could talk for some time about litigation that is taking place against private correctional companies for extorting families in this context, with the expenses charged and using court as a financial whip on families. I could talk about working towards efforts to undo the years of politicization of juvenile offenses. I could talk about communication strategies that challenge this narrative that says being out on an electronic monitor is better than being in jail. But I'll talk to you very briefly about an area that has sort of captured my mind, and where most of my efforts these days lie. And that is in the area of race and tech-informed policy making and legal jurisprudence. Most of my research, as Professor Korey Johnson noted, is in the area of race, technology, law, and surveillance studies. There has been a ton of work happening in the space, which is being referred to as "critical race and digital studies":[42] the intersection of critical race theorizing and critical tech studies and theorizing, as well. There are a couple of things that come out of that body of work in theorizing, of which I am a part of, that I think is relevant in informing policy-making decisions, legislating, and advocacy in this space. First, is the promotion of the idea that technology is sociocultural. The notion that technology does not develop separate and apart from society.[43] There is a tendency in this area, some people talk [about or] refer to "techno-determinism," where there is a belief that technology always progresses in this upward arc, in these utopic ways. I think about—I am not sure if any of my students are here, but just the other day—I teach a class on race, tech, and the law and we watched a Microsoft commercial in which the rapper Common talks about artificial intelligence,[44] and he talks about it as this beautiful tool. He says artificial intelligence is a tool, but the rapper or the musician is the microphone, using these very images and language of trust, like we should trust these technologies. We push back on that and sort of expose the inability of technology to solve large social problems, like mass incarceration. Electronic monitoring is presented as a solution to mass incarceration. It is not. It is techno-solutionism.

Second, I want to elevate the importance of historical context—what is taking place here, with digital monitoring and the promotion and emphasis on surveillance of Black and Brown people in this country, is connected to a long historical arc of surveilling those same communities, surveilling those persons, surveilling those bodies, long before the age of Big Data.

42. *See e.g.* CTR. FOR CRITICAL RACE AND DIGIT. STUD., https://www.criticalracedigitalstudies.com/ (last visited July 19, 2023).

43. *See generally* Chaz Arnett, *Black Lives Monitored*, 69 UCLA L. REV. 1384 (2023).

44. Paul Demarbaix, *Microsoft AI Commercial Featuring Common 720p*, YOUTUBE (Oct. 6, 2018), https://www.youtube.com/watch?v=liNemQ30Kog.

And then lastly, being able to dig into and investigate profit motive in this space. One of the things that is transpiring in this realm is that private correctional corporations are seeing an opportunity to take a hold of and latch on to this idea of community corrections, to hop on some of the pushback and critique of getting people out of prisons. And they come to jurisdictions and they say, "hey, we hear you are releasing or considering reducing your prison populations—how about we monitor them for free and help you with this notion of public safety? And no worries, we will get our profits on the backs of those being monitored." There is an intersection of what we are seeing here as a collision of the concepts of surveillance capitalism and racial capitalism. I have an article, if anyone has a chance to read, a very short article, called *Data, the New Cotton*,[45] which sort of intervenes in this space where there is dialogue about data being the new gold, or the new oil. And I attempt to put a racial lens there to have a better understanding of the history of capitalism, specifically in America, by invoking the image of cotton, and the debt this country's financial status owes to enslavement. Many of the same plantation logics are manifest today in the way big tech companies exploit and extract data for profit.

I think allowing this critical scholarship to guide us in policy making will lead us to better outcomes, and I am thankful to be on the forefront of that. Because it is necessary for us to fully grapple with the digitization of the carceral state. If, like the Massachusetts Supreme [Judicial] Court, we associate the release from incarceration on electronic anklets, watches, or even cell phone apps as a public health boon, as a relief from all of the traditional harms of caging, without reflecting upon how the merger of datafication and corrections has expanded carcerality and confinement beyond prison bars, we will miss not only how these strategies fail to respond to crucial mental health and adolescent developmental needs, exacerbating them in the process, but also the opportunity to truly establish a society where no child is left confined.

Looking forward to your questions, thank you all.

45. *See* Chaz Arnett, *Data, the New Cotton*, U. OF MD. LEGAL STUD. RSCH. PAPER No. 2022-07, 3-5 (2022).