THE *OTHER* STAY-AT-HOME ORDER:

ELECTRONIC MONITORING AND THE EMPLOYABILITY OF CRIMINAL DEFENDANTS AFTER COVID

PAIGE LEHMAN

INTRODUCTION

Electronic monitoring would ideally balance the interest of the state in controlling pretrial criminal defendants with those defendants' personal interests in maintaining a life consistent with their right to presumed innocence. Until proven guilty and incarcerated, a criminal defendant deserves to have a life substantially like that of an unaccused person, including the right to work and live in society. In theory, electronic monitoring as an alternative to pretrial detention enables a criminal defendant to continue working if and until they are sentenced and required to report to a detention institute. However, in practice, the actual statutes, policies, and case law surrounding electronic monitoring create a system that leaves pretrial defendants at home and without employment. This is particularly true when we consider the defendant's experience from the start of electronic monitoring to beyond their final release from supervision, and the impact of their supervision on others around them.

First, this note will discuss the underlying historical and philosophical issues embodied in the use of electronic monitoring as a condition of pretrial release. Next, I will survey five states that collectively represent the majority approach to electronic monitoring but individually have novel or unique aspects. These states are Alaska, Massachusetts, Missouri, New Mexico, and Wisconsin. For each state, I will consider the distinctive statutes creating electronic monitoring as a condition of release and regulations, rules, or policies that govern the application and administration of electronic monitoring. I will also examine any case law or empirical studies related to that state's pretrial conditions of release, along with anecdotal stories of real criminal defendants placed on electronic monitoring. Then, I will adopt a normative approach in determining which state has the most work-enabling electronic monitoring scheme that causes the fewest problems for the criminal defendant, the community at large, and the judicial system.

Finally, I will craft a model regulatory scheme for electronic monitoring to best meet the general goals of pretrial conditions of release—allowing defendants to maintain their residence outside of an institution and ensuring more strict state observation over a defendant of concern to the community—while also ensuring that the defendant can make the most of their employable time. The best scheme will stratify defendants into three categories based on the existing aims of pretrial detention and conditions of release, in furtherance of the principle that only the least restrictive conditions should be employed. Defendants who prove a danger to their communities will be placed in pretrial detention with the ability to earn time served for a shortened sentence—and hence, will be able to return to work faster after their conviction. Defendants with compelling reasons to be relatively confined for their own or the community's good will be placed on a case-specific form of electronic monitoring that actively encourages employment. Lastly, defendants who pose no significant risk upon release should not be monitored beyond standard conditions of release. The model scheme should be ratified directly by the people and drafted in a way to be insulated from changing political tides. It also should not require a defendant to finance their own confinement at a rate that nullifies any income received while awaiting trial. This ideal scheme also keeps the most positive of COVID-induced changes while returning to pre-COVID procedures that are safe and more effective in upholding the goal of maximizing the labor potential of defendants throughout their tenure in the judicial system.

I. AT THE INTERSECTION OF AMERICAN JURISPRUDENCE AND LABOR THEORY

"[D]igital prisons are not an answer.
They're just another way of posing the question."[1]

A. Innocence until proof of guilt is a heavy presumption in the American legal system.

A central tenet of American criminal jurisprudence is that every person facing criminal prosecution is presumed innocent. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the

1. 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 [https://perma.cc/TPV8-6WSF].

administration of our criminal law."[2] This presumption originates with the contention at trial that a person is innocent until the government has met its burden to prove guilt beyond a reasonable doubt,[3] but the presumption of innocence does not apply inherently to pretrial issues of guilt and innocence.[4] Some jurisdictions, such as the District of Columbia, have explicitly recognized the innocence of pretrial defendants.[5] This recognition of innocence does not go so far as to absolutely permit the freedom of a defendant as if they were entirely innocent, though.[6] American courts have placed varying restraints on freedom since adopting English common law, including and up to pretrial detention.

Pretrial restrictions on freedom, such as detention and surveillance, are not a form of punishment and have never been considered such.[7] Pretrial detention is governed by constitutional rights and various statutes. The Constitution guarantees defendants are not held without probable cause[8] or against their right to post bail.[9] A defendant's right to a speedy trial includes their freedom from oppressive pretrial incarceration.[10] Each jurisdiction is free to set its own statutory limits and requirements for pretrial detention, but

---

2. Coffin v. United States, 156 U.S. 432, 453 (1895).

3. Taylor v. Kentucky, 436 U.S. 478, 483 (1978).

4. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 533 (1979) (clarifying that the presumption of innocence "has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun").

5. *See* Campbell v. McGruder, 580 F.2d 521, 527 (D.C. Cir. 1978) ("[P]retrial detainees who fill the District of Columbia Jail are presumed innocent. They are unconvicted of any crime.").

6. *See* Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 258 (2002).

7. William Blackstone described the English doctrine of pretrial custody in the eighteenth century:

> Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol [sic] by the mittimus of the justice, or warrant under his hand and feal, containing the cause of his commitment; there to abide till delivered by due course of law. But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity ; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only: though what are so requisite, must too often be left to the discretion of the gaolers [sic]; who are frequently a merciless race of men, and, by being conversant in scenes of misery, steeled against any tender sensation.

4 WILLIAM BLACKSTONE, COMMENTARIES *293, *298.

8. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause"); Gerstein v. Pugh, 420 U.S. 103, 120 (1975) ("The sole issue [at an adversarial pretrial hearing] is whether there is probable cause for detaining the arrested person pending further proceedings.").

9. U.S. CONST. amend. VIII ("Excessive bail shall not be required"); Stack v. Boyle, 342 U.S. 1, 4 (1951) ("From the passage of the Judiciary Act of 1789, 1 Stat. 73, 91, to the present Federal Rules of Criminal Procedure, Rule 46(a)(1), 18 U.S.C.A., federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.").

10. State v. Urdahl, 2005 WI App 191, ¶ 34, 286 Wis. 2d 476, 704 N.W.2d 324.

generally, pretrial detention is aimed at benefiting society at large.[11] Pretrial detention of criminal defendants ensures the safety of the community and the presence of the defendant at their judicial proceedings.[12] Different jurisdictions have presented additional reasons behind pretrial detention determinations, though, such as the chance of obstructing the integrity of judicial proceedings.[13] These common goals of pretrial detention advance a collective interest in the community, rather than the individual.[14] However, there are ways to put the community first while allowing defendants to maintain their normal lives and stay at home.

Pretrial surveillance is a condition of release designed as an alternative to bail or detention.[15] It allows defendants who do not pose significant threats to their community to remain in the community until trial by wearing an ankle monitor. The system is imperfect. Surveillance supporters argue that electronic monitoring is less expensive for states than pretrial detention,[16] but defendants are often not as free as they would be on standard pretrial release.[17] Further, although electronic surveillance is a great alternative for defendants who could never have obtained standard release due to "dangerousness" findings[18] or other issues, the growth of the electronic

---

11. Schall v. Martin, 467 U.S. 253, 268 (1984). Despite stated intentions that it benefit society, pretrial detention across the country has a disparate impact on people of color and the indigent. *See* Wendy Sawyer, *How Race Impacts Who is Detained Pretrial*, PRISON POL'Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ [https://perma.cc/79SU-SNEP] (finding people of color, specifically black defendants, were more likely to be held in pretrial detention than white defendants), *and* Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar, 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/9JPH-SMLM] (finding that people were detained pretrial because they could not afford bail: the median income of people detained pretrial was half of the income of people released pretrial).

12. *See* Campbell v. McGruder, 580 F.2d 521, 528 (D.C. Cir. 1978).

13. State v. Robinson, 160 A.3d 1, 15 (N.J. 2017) (highlighting that the relevant New Jersey statute adds a purpose to a pretrial detention hearing of assessing obstruction).

14. United States v. Salerno, 481 U.S. 739, 747 (1987).

15. Keith W. Cooprider & Judith Kerby, *A Practical Application of Electronic Monitoring at the Pretrial Stage*, 54 FED. PROB. 28 (1990). Electronic monitoring technology was designed for psychological studies in the 1960s but was first adapted to the criminal justice system in 1983. James Kilgore, ELECTRONIC MONITORING IS NOT THE ANSWER 8 (2015), https://mediajustice.org/wp-content/uploads/2020/01/EM-Report-Kilgore-final-draft-10-4-15.pdf [https://perma.cc/4NCC-FHKD].

16. *See, e.g.*, April Glaser, *Incarcerated at Home: The Rise of Ankle Monitors and House Arrest During the Pandemic*, NBC NEWS (July 5, 2021), https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008 [https://perma.cc/4YNF-BKAX].

17. "But while remaining in the community is certainly preferable to being locked up, the conditions imposed on those under supervision are often so restrictive that they set people up to fail." Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/A6DU-CKQB].

18. Dangerousness hearings typically take place soon after the defendant's first appearance, where both parties present evidence or witnesses and cross-examine the opponent's witnesses. Many jurisdictions consider prior convictions or dropped charges, plea deals entered into or offered, the nature of the crime alleged, testimony of the victim or witnesses, or other factors. *See* MASS. GEN. LAWS ANN. ch. 276, § 58A(4) (West 2018).

monitoring population is accompanied by static pretrial detention numbers: surveillance is being used as an alternative to standard release.[19] As a response to COVID, most jurisdictions across the nation increased electronic monitoring as a condition of pretrial release between April and June of 2020.[20] However, as the aftershocks of COVID closures continue to clog justice systems across the nation, nonviolent pretrial defendants placed on electronic monitoring have stayed under surveillance for longer than ever before.[21] This bidirectional growth of electronic monitoring means that the freedom and labor potential of defendants has become more restricted than without electronic monitoring while still leaving many ineligible defendants in jail without employment.

B. Pretrial conditions of release have a disparate impact on populations made vulnerable to the American justice system.

Electronic monitoring needs to be limited in its application to best serve the interests of the community at large and individual defendants. A state's electronic monitoring system that is too pervasive or too broadly used as a condition of release for pretrial defendants can be a drain on tax dollars. If it is a government-run system, states must pay for the resources and manpower to allow electronic monitoring services to work.[22] Alternatively under a privately run system, states must still pay for a contract with a private vendor to maintain electronic monitoring services.[23] For example, New Mexico's Santa Fe County paid $1,920,000 over the last four years to BI Incorporated for electronic monitoring services.[24]

Defendants must still finance their own monitoring, and payment can be enforced through arrest warrants issued for defendants who fall behind.[25] An

---

19. SARAH STAUDT, CHI. APPLESEED CTR. FOR FAIR CTS., 10 FACTS ABOUT PRETRIAL ELECTRONIC MONITORING IN COOK COUNTY 3 (Stephanie Agnew ed., 2021).

20. Presentation, NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, COVID-19 POLICY RESPONSE SURVEY (June 19, 2020), https://drive.google.com/file/d/1-jkFffQRmTTcqQ0VOEJWlmyyJI--gExB/view [https://perma.cc/UPL6-X5L6].

21. STAUDT, *supra* note 19, at 4, 8.

22. *Id.* at 12 (finding Cook County, Illinois spent $30.7 million on pretrial electronic monitoring in FY 2021); Kilgore, *supra* note 15, at 10.

23. AMEND. NO. 3 TO PRO. SERVS. AGREEMENT BETWEEN SANTA FE CNTY. AND BI INC. (Jan. 28, 2020), https://www.santafecountynm.gov/documents/sunshine_contracts/AmendmentNo.3toAgreementNo.2017-0154-CORRIC.pdf [https://perma.cc/6R5N-XDBG].

24. *Id.*

25. *Electronic Monitoring Fees: A 50-State Survey of the Costs Assessed to People on E-Supervision,* FINES & FEES JUST. CTR. 11–15 (Sept. 2022) (finding 31 states that statutorily allow pretrial fees and only two states that statutorily prohibit such fees); *see* Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants into Debt*, N.Y. TIMES (July 3, 2019), https://www.nytimes.com/2019/07/03/magazine/digital-jail-surveillance.html [https://perma.cc/9HET-EVG5].

arrest warrant in most jurisdictions is an automatic violation of conditions of parole, so that the defendant who appears in court or interacts with law enforcement after the issuance of a warrant will automatically be taken back into pretrial detention.[26] A defendant cannot continue working once they enter pretrial detention, and they thus lose their income and ability to pay off criminal justice debt until they are set free next: after being found capable of release in a pretrial hearing, being found not guilty at trial, or having completed their full sentence after being convicted. Because of these varied concerns, it is important for most criminal defendants to have limited conditions of pretrial release, including use of electronic monitoring.[27]

Due to the discretionary nature of pretrial release[28] and inherent biases of many courtroom actors,[29] people of color and the indigent largely feel a disparate impact from pretrial conditions of release.[30] A court officer who is better able to empathize with a defendant is more likely to be lenient or trusting in sentencing.[31] A determination of appropriate pretrial release is often based on the advisement of a pretrial services agency, along with the advocacy of counsel.[32] During the pandemic, prisons became COVID

---

26. In Massachusetts, for example, probation officers who have probable cause to believe a violation has occurred can place a defendant in custody for up to 72 hours to allow for a hearing before a judge. MASS. GEN. LAWS ANN. ch. 279, § 3 (West 2004).

27. *See* ALASKA CRIM. JUST. COMM'N, JUST. REINVESTMENT REP., at 6 (Dec. 2015), http://www.ajc.state.ak.us/acjc/docs/resources/reinvestment/ak_jri_report_final12-15.pdf [https://perma.cc/A7XK-CB29] ("Targeted use of pretrial conditions is critical because restrictive release conditions such as electronic monitoring and drug and alcohol testing do not improve outcomes for all pretrial defendants. While select restrictive release conditions can decrease the likelihood of pretrial failure (measured as failure to appear or bail revocation due to new arrest) for higher risk defendants, when restrictive conditions are applied to lower risk defendants, they can actually do the opposite.").

28. Appellate courts review a trial court's decision on pretrial release for abuse of discretion. State v. Brown, 2014-NMSC-038, ¶ 43, 338 P.3d 1276, 1290. The American Bar Association recognizes the discretion inherent in a determination on pretrial release. STANDARDS FOR CRIM. JUST.: PRETRIAL RELEASE § 10-5.10 (A.B.A 2022).

29. The implicit racial biases held by prosecutors, judges, sheriffs, and other professions present in criminal courtrooms correlate with perception of guilt, aggression, and morality. L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 882 (2017).

30. Since the 1980s, studies have found that the race or financial resources of a defendant have impacted their conditions of release, with defendants of color or low socioeconomic status less likely to be released purely on their own recognizance. Brian P. Schaefer & Tom Hughes, *Examining Judicial Pretrial Release Decisions: The Influence of Risk Assessments and Race,* 20 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 47, 49–51 (2019).

31. Richardson, *supra* note 29, at 883; JOHN F. DOVIDIO ET AL., *Empathy and Intergroup Relations*, *in* PROSOCIAL MOTIVES, EMOTIONS AND BEHAVIOR 393, 399 (Mario Mikulincer & Phillip R. Shaver eds., 2010). While this study specifically considered the effect of empathy on sentencing, it is likely that this same effect could be observed within orders of pretrial release. In pretrial detention and release, judges are allowed greater deference than in sentencing, and will likely weigh more factors relating to the defendant's future and current responsibilities to family, work or the community at large than they would for considering the impact of lengthy imprisonment on the defendant. *See* U.S. Sentencing Guidelines, 18 U.S.C. § 3553(a) (listing factors which a federal judge could rightfully consider as mitigating or aggravating); *see also* United States v. Booker, 543 U.S. 220 (2005) (striking down the provision of the Sentencing Reform Act giving the Sentencing Guidelines mandatory force in federal courts).

32. STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE §§ 10-1.4, 10-1.10 (A.B.A. 2022).

"hotspots" and many courts used their discretion to remove pretrial detainees from institutions to limit populations.[33] Despite this positive use of judicial discretion, there exists a multitude of negative uses as well. Discretion among conditions of release can look like one judge assigning Secure Continuous Remote Alcohol Monitor ("SCRAM") devices to pretrial defendants at a rate seven times higher than his peer judges, or as a racial bias resulting in a higher rate of black and Latinx defendants being placed on monitoring than white defendants.[34] This discretion is not an easily corrected human error though. Within criminal justice systems that are largely racially biased against people of color,[35] judicial discretion in pretrial hearings is not something that can be fixed with technology. "There's been no evidence that a tool does better than judicial discretion in terms of racial bias…We've spent millions of dollars to evaluate millions of defendants, and we're wasting that money that could be spent on diversion, drug rehabilitation, etc."[36] Discretion can also lead to confusion for defendants and pretrial service agencies, as conditions of release can be so highly particularized for the individual that it is difficult to track which movements are encouraged and which movements lead directly to pretrial detention.[37]

Electronic monitoring has a disparate impact on the indigent because of the silent and high price tag that it carries.[38] A majority of participants in a 2021 study on ankle monitors stated that their electronic monitoring did not

---

33. Glaser, *supra* note 16; Matthew Hendrickson, *Cook County Sheriff's Office Runs Out of Electronic Monitoring Bracelets,* CHI. SUN-TIMES (May 7, 2020), https://chicago.suntimes.com/2020/5/7/21251007/cook-county-sheriff-electronic-monitoring-bond [https://perma.cc/E5CR-HVAB]; Melissa Hanson, *Coronavirus: Massachusetts Supreme Judicial Court Rules Pretrial Inmates Who Have Not Been Charged With Violent Crimes Can Be Released Amid COVID-19 Outbreak*, MASSLIVE (Apr. 3, 2020, 6:07 PM), https://www.masslive.com/coronavirus/2020/04/coronavirus-massachusetts-supreme-judicial-court-rules-pretrial-inmates-who-have-not-been-charged-with-violent-crimes-can-be-released-amid-covid-19-outbreak.html [https://perma.cc/9YVC-2H9S].

34. Maya Dukmasova, *Cook County Judge Vazquez's Heavy Use of Sobriety Monitor Highlights Oversight Gaps*, INJUSTICEWATCH (Dec. 8, 2021), https://www.injusticewatch.org/news/judicial-conduct/2021/judge-vazquez-scram-monitor/ [https://perma.cc/5CQW-NAAB].

35. Black people account for forty percent of people in United States correctional facilities, making black or African American the largest racial group incarcerated, while black people make up only thirteen percent of the entire United States population. Sawyer & Wagner, *supra* note 17.

36. Michaela Paukner, *Supporters, Opponents Argue Racial Preconceptions Skew Pretrial Assessments*, WIS. L.J. (Sept. 21, 2020), https://wislawjournal.com/2020/09/21/supporters-opponents-argue-racial-preconceptions-skew-pretrial-assessments/ [https://perma.cc/H55L-B7ZU].

37. "[P]eople's movements and regulations are 'at the whim of their parole agent.' A former parole agent in Colorado affirmed this stating: 'monitoring of offenders is such a subjective process it seems that I'm not sure that for those on parole there really is a coherent set of guidelines." JAMES KILGORE ET AL., NO MORE SHACKLES: WHY WE MUST END THE USE OF ELECTRONIC MONITORS FOR PEOPLE ON PAROLE 11 (2018).

38. This cost for defendants, estimated to average $3,000 per year across the United States, converts to hundreds of millions in profit for private prison companies like GEO Group. KATE WEISBURD ET AL., GEO. WASH. U. L. SCH., ELECTRONIC PRISONS: THE OPERATION OF ANKLE MONITORING IN THE CRIMINAL LEGAL SYSTEM 16 (2021); *see also id*. at 12; Alexander, *supra* note 1.

allow them to financially provide for themselves or their families.[39] Pretrial services across the nation reduced or stopped collecting service fees as an initial response to COVID, but fees contractually collected by private corporations for electronic monitoring were not included in those policy changes.[40] Despite serving as an alternative to bail, the overall costs of electronic monitoring that are shouldered by pretrial defendants can exceed that of bail.[41] Additionally, electronic monitoring fails to account for the high levels of unemployment that communities faced during the pandemic.[42]

Electronic monitoring as an extension of mass incarceration is ineffective in furthering the goal of invasive or extensive imprisonment;[43] legal scholar Michelle Alexander opines that "digital prisons are to mass incarceration what Jim Crow was to slavery."[44] Surveillance of pretrial defendants is societally compared to post-conviction confinement and justified outside of the law by many of the same principles—though it should not be. It is often argued that electronic monitoring during probation or parole saves the community money for three reasons: first, the price to fund electronic monitoring programs is significantly less than the price to house defendants; second, the community does not help cover the cost of victimization resulting from recidivism; and third, the costs of electronic monitoring are largely passed on to the defendants to pay.[45] However, the American judicial system cannot presume the future guilt of a currently innocent person. The conventional arguments in favor of electronic monitoring for other populations do not apply directly to pretrial defendants. Additionally, when defendants on electronic monitoring are limited in their

---

39. Sixty-one percent of participants felt they were unable to provide enough financially for their families. TOSCA GIUSTINI, ET. AL., BENJAMIN N. CARDOZO SCH. OF L. KATHRYN O. GREENBERG IMMIGR. JUST. CLINIC, FREEDOM FOR IMMIGRANTS & IMMIGRANT DEF. PROJECT, IMMIGRATION CYBER PRISONS 20 (2021).

40. NAT'L ASS'N OF PRETRIAL SERV. AGENCIES, *supra* note 20, at 11.

41. *See* Dukmasova, *supra* note 34, *and* WEISBURD ET AL., *supra* note 38, at 16. Unlike bail payments that are returned to defendants after successful appearance in court, electronic monitoring fees are non-refundable. *See* Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How money bail perpetuates an endless cycle of poverty and jail time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html [https://perma.cc/362Y-K6NC].

42. Glaser, *supra* note 16.

43. "[E]fforts to reduce recidivism through intensive supervision are not working." Jennifer L. Doleac, *Study After Study Shows Ex-Prisoners Would be Better Off Without Intense Supervision*, BROOKINGS (July 2, 2018), https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision/ [https://perma.cc/5EUC-KVUB].

44. Alexander, *supra* note 1.

45. *See* Memorandum to Chief Probation Officers from Matthew G. Rowland, Costs of Community Supervision, Detention, and Imprisonment (Aug. 1, 2018); *see also* JOHN K. ROMAN ET AL., D.C. CRIME POL'Y INST., THE COSTS AND BENEFITS OF ELECTRONIC MONITORING FOR WASHINGTON, D.C. 6 (Sept. 2012); Kofman, *supra* note 25.

ability to work, it is their community that must pay for the defendant's housing, monitoring fees, and other necessities.[46]

When a defendant is not able to work and freely move through society, someone has to assist them in areas that the court does not allow defendants to reach. Therefore, electronic monitoring causes a direct impact on the lives of a defendant's loved ones. A defendant who used to care for a child or disabled person but was not granted movement except to their place of employment and attorney's office, cannot care for that person anymore. Without being in violation of their release order, the defendant cannot drive their spouse to the emergency room, their parent to the dialysis clinic, or pick up their child from school when they miss the bus.[47] The same is true for mundane tasks, such as taking an unscheduled walk with their dog, going to the grocery store to feed their family, or taking a partner to a doctor's appointment.[48] A 2021 survey of people wearing ankle monitors found that seventy-four percent of the participants were prevented from caring for others because of the surveillance.[49] In fact, pretrial defendants on electronic monitoring can be expressly prohibited from serving as the primary caretaker for children, pets, or another person.[50] This bar against the defendant causes electronic monitoring to negatively impact the employability, or at least availability, of other community members.

When a defendant is employed, electronic monitoring can affect their ability to take on certain responsibilities at work.[51] People who wear ankle monitors complain that the charging, beeping, and flashing are distracting to both the wearer and others around them.[52] Electronic monitoring also proves challenging for defendants who work away from home, as the Global

---

46. Consider the stories of Daehuan White and Arianna, whose family and community support systems had to help feed, house, and pay for electronic monitoring fees while they were awaiting trial. *Infra* note 108 and accompanying text; The Bail Project, *The Meaning Behind the Box*, YOUTUBE (May 28, 2020), https://www.youtube.com/watch?v=KRM60eoVZpk&t=415s.

47. Wisconsin policies allow for specific timed activities, if the defendant has been granted such by a judge. For instance,

> If authorized release for church, the client will be allowed to attend worship service once per week for up to four hours (including travel time). If authorized release for grocery shopping, the client will be allowed to go shopping 1x per week for 1 hour in store…If authorized release for laundry, the client will be allowed release to laundromat 1x per week for 2 hours.

WEISBURD ET AL., *supra* note 38 at 7.

48. These struggles have been particularly more prominent for women and single mothers under electronic monitoring. MaDonna R. Maidment, *Toward a "Woman-Centered" Approach to Community-Based Corrections: Gendered Analysis of Electronic Monitoring (EM) in Eastern Canada*, 13 WOMEN & CRIM. JUST. 47, 60 (2002).

49. GIUSTINI ET. AL., *supra* note 39, at 20.

50. *See* WEISBURD ET AL., *supra* note 38, at 12.

51. Finding employment in the first place is also difficult for many pretrial defendants across the nation. In a study from 2011, twenty-two percent of people wearing ankle monitors had been fired or forced to quit because of their electronic monitoring. Kofman, *supra* note 25.

52. GIUSTINI ET. AL., *supra* note 39, at 19.

Positioning System ("GPS") can struggle with tracking people in high-rise buildings and large commercial structures.[53] The physical monitor also causes an impediment to working. This is especially true for careers involving manual labor. One individual subject to electronic monitoring notes, "I cannot do my job safely with the ankle monitor. I do construction and almost fell off of a roof once because of the ankle monitor."[54] If a defendant has a career that requires travel, release with electronic monitoring can prevent them from being able to work. For example, if the conditions of release for a construction worker in New Mexico only included the ability to travel to construction sites in the state, but his employer requires him to work a job in Colorado, he would have to ask the court for the ability to keep his job.

C. Society has a general preference for and interest in her citizens working.

The American legal system has many protections in place to safeguard a person's ability to work in non-criminal contexts. The entirety of the Equal Employment Opportunity Commission and the theory of employment discrimination as a wrong deserving of legal redress show that our nation and legal systems consider the ability to work as important. In addition to protecting the ability to hold a job, legislatures have also instituted vast statutory protections for equitable payment and fair standards for labor, covering minimum wage, the right to overtime pay, wage theft, and misclassification of a worker as an independent contractor.[55] Protecting an individual's labor and employability is a key function of American jurisprudence.

However, these protections are largely missing from laws relating to criminal defendants.[56] Barriers to the employment of pretrial defendants are

---

53. Mario Koran, *Lost Signals, Disconnected Lives*, WIS. WATCH (Mar. 24, 2013), https://wisconsinwatch.org/2013/03/lost-signals-disconnected-lives/ [https://perma.cc/P78B-TLQU] (quoting George Drake, president of corrections consulting company Correct Tech LLC).

54. GIUSTINI ET. AL., *supra* note 39, at 19.

55. *See* Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 (West).

56. The Bureau of Justice Statistics has found that up to sixty-five percent of people four years after their release from prison are unemployed, with thirty-three percent of the released population having found no work at all since release. Formerly incarcerated people who did find work held an average of 3.4 jobs each during those four years, suggesting that the work available to them was not secure or sustainable employment. The data also shows that people of color have higher rates of unemployment and lower wages than white people who, on average, served longer sentences. Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, PRISON POL'Y INITIATIVE, (Feb. 8, 2022), https://www.prisonpolicy.org/blog/2022/02/08/employment/ [https://perma.cc/W5CU-8JW5]. Nationwide campaigns to "ban the box" hope to reduce this joblessness by preventing potential employers from prematurely removing an applicant from consideration for a position solely because of a criminal record. BETH AVERY & HAN LU, NAT'L EMP. L. PROJECT, BAN THE

less explicit than those of formerly incarcerated and convicted defendants.[57] Despite these barriers that make finding a job that accepts or does not ask for details about criminal history difficult, work is consistently used as a technique for post-conviction rehabilitation.[58] However, it is important to distinguish that pretrial detention and conditions of release are not considered a punishment for a crime, so the goal of rehabilitation under modern penal codes is not applicable to a person still presumed innocent and not in need of rehabilitation. Nevertheless, due to the ties between pretrial and post-conviction electronic monitoring—namely that both classes of defendants are monitored by the same agencies, officers, and physical devices[59]—we can compare the two contexts and assume that much of the same information applicable to post-conviction defendants applies to pretrial defendants. The same barriers to employment exist for both groups,[60] and these barriers are a direct result of the state policies, or lack thereof, regarding electronic monitoring.

II. COMPARATIVE ANALYSIS OF STATE ELECTRONIC MONITORING USAGE

In this section, I will examine the statutes, judicial rules, and pretrial service policies that deal with the imposition of electronic monitoring as a pretrial condition of release for defendants. I will then consider the resulting

---

BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES 4 (2021). Laws applying this policy to private employers have been adopted in fifteen states, including Massachusetts and New Mexico. *Id.* at 31. However, these policies do not prevent employers from asking about a defendant's electronic monitoring device during the hiring process if noted, and declining to hire them based on their surveillance status. *See id.* at 9–28.

57. There is no standard question on job applications intended to weed out pretrial defendants like there is for people who have been convicted. Instead, defendants wearing ankle monitors report more nuanced recognitions of their surveillance during job interviews. *See* GIUSTINI, ET. AL., *supra* note 39, at 19; *see also* Kofman, *supra* note 25.

58. *See* BD. OF PROB. AND PATROL, MO. DEPT. OF CORR., RULES AND REGULATIONS GOVERNING THE CONDITIONS OF PROBATION, PAROLE, AND CONDITIONAL RELEASE 4 (2020); *see also* State v. Aqui, 721 P.2d 771 (N.M. 1986), *cert. denied*, 479 U.S. 917 (1986) (recognizing that New Mexico has compulsory labor requirements for convicted prisoners under a theory of rehabilitation, but that pretrial detainees are not subject to that requirement as they have no need for rehabilitation while presumed innocent).

59. Private prison group GEO Group, through their subsidiaries, provides electronic monitoring devices for a majority of jurisdictions in the United States. *See Electronic Monitoring*, GEO GROUP, INC., https://www.geogroup.com/electronic_monitoring (last visited Jan. 27, 2022). GEO Group produces three models of ankle monitors: Alcohol, GPS, and Radio Frequency ("RF"). *Id.* All three ankle monitors communicate with the same BI Agency Assist system that is accessible to local pretrial services agencies. *Id.*; BI, https://bi.com/ (last visited Jan. 27, 2022).

60. Researchers interviewing electronically monitored populations found that individuals had the following issues related to employment: getting "movement" for job interviews, traveling or changing locations for work, including "jobs like house cleaning, landscaping, construction, and delivery;" difficulty accommodating changes to schedules or overtime; and lack of GPS signal in concrete buildings. KILGORE ET AL., *supra* note 37, at 7. "All this is compounded by many employers' reticence to hire someone who is wearing an ankle monitor, especially if they are dealing with customers." *Id.*

case law, empirical studies, and stories from real criminal defendants confined by electronic monitoring. Each of the following five states—Alaska, Massachusetts, Missouri, New Mexico, and Wisconsin—has a distinct approach to electronic monitoring because of the effect of connected judicial issues and the prevailing local societal values related to criminal defendants.

A. Alaska

Alaska's statutes describing pretrial release permit defendants to be released under "the least restrictive condition or conditions that will reasonably ensure the person's appearance and protect the victim, other persons, and the community."[61] Judges are allowed to assign any combination of bond, travel restrictions, or electronic monitoring needed to achieve this purpose.[62] They may consider any number of factors to determine which conditions of release will be most successful, notably including "the person's employment status and history" and "assets available to the person to meet monetary conditions of release."[63]

Electronic monitoring is considered a nonmonetary condition of release in Alaska, and it is overseen by pretrial services officers.[64] However, the classification as nonmonetary does not mean there are no costs associated with electronic monitoring:

> Currently, judges have few options for pretrial supervision, and the options that are available are typically handled by non-state agencies and contingent upon the defendant's ability to pay monitoring fees, including the ordering of a private third-party custodian, the services of a private electronic-monitoring company, and the 24/7 sobriety program. The Commission heard from many judges and magistrates who said they would release more defendants from jail pretrial if there were more options for meaningful supervision in the community to reduce the defendants' risk of committing new crimes or failing to appear for court.[65]

This report generated by the Alaska Criminal Justice Commission implies that a judicial officer's knowledge of the true cost of electronic monitoring for a criminal defendant is the sole factor keeping those defendants incarcerated. This means that electronic monitoring—or rather, a lack of

61. ALASKA STAT. ANN. § 12.30.011(b) (West 2019).
62. *Id.*
63. § 12.30.011(c).
64. § 33.07.030.
65. ALASKA CRIM. JUST. COMM'N, *supra* note 27, at 17.

adequate electronic monitoring systems—is directly frustrating the purpose of pretrial detention under Alaska statute 12.30.011 by pushing a judge's hand towards detention.

On its face, the Alaska surveillance statutory scheme allows convicted persons to use their time on electronic monitoring before trial as credit for time served during sentencing.[66] Alaska statute 12.55.027(c) lists several factors for determining if the defendant's time on electronic monitoring was actually rehabilitative, including any sanctions given, the significance of restriction upon freedom, and the use of technology or an electronic monitoring device for surveillance.[67] In practice, a person convicted may only conditionally use their electronic monitoring as time served.[68] Courts have conservatively interpreted Alaska statute 12.55.027, recognizing that the Alaska legislature's intent was to significantly restrict the applicability of this statute to defendants released on electronic monitoring.[69] If electronically monitored defendants are not allowed credit for time served, they are put at a disadvantage compared to defendants in pretrial detention. In fact, some defendants are refused credit for their time spent on electronic monitoring because their specific conviction immediately disqualifies them, despite otherwise being eligible for electronic monitoring.[70] The restrictions on who qualifies for credit for time served on electronic monitoring requires such limited freedom that few criminal defendants would be employable while awaiting trial.[71]

Additionally, defendants can only be granted a maximum of 365 days credit.[72] Alaskan courts were largely closed to jury trials from March 2020 to December 2021 due to the COVID-19 pandemic.[73] These closures went

66. §12.55.027.

67. §12.55.027(c).

68. State v. Bell, 421 P.3d 128, 133 (Alaska Ct. App. 2018) (determining that legislative intent for the relevant statute was to deny credit for time served if defendant committed a new crime while on electronic monitoring); *cf.* State v. Thompson, 425 P.3d 166, 171 (Alaska Ct. App. 2018) (holding that "the state must be allowed to litigate whether" the defendant committed crimes that would disqualify him from time served, while only violating bail conditions does not disqualify him); Tanner v. State, 436 P.3d 1061, 1063 (Alaska Ct. App. 2018) (holding that electronic monitoring conditions which allowed the defendant to grocery shop were not strict enough to qualify for time served).

69. *Bell*, 421 P.3d at 131.

70. § 12.55.027(g)–(i).

71. The Alaska statutes require that time served be only granted to those people placed on house arrest with conditions similar enough to incarceration after conviction. *See Bell*, 421 P.3d at 131. A defendant would only be able to work if they had a job that was exclusively remote or was willing to allow them to begin working from home. While remote work has become more common since the initial COVID quarantine, many occupations and trades are impossible to do from home still.

72. § 12.55.027(l).

73. "Between March 1 and the end of November [2020], 49 jury trials were held statewide." Daniella Rivera, *Jury Trials Are Suspended but the Alaska Court System Is Still Issuing a Reduced Number of Jury Summons*, ALASKA'S NEWS SOURCE (Dec. 21, 2020), https://www.alaskasnewssource.com/2020/12/22/jury-trials-are-suspended-but-the-alaska-court-system-is-still-issuing-a-reduced-number-of-jury-summons/ [https://perma.cc/9H55-978S]. Alaskan courts

well over 300 days beyond the total possible credit earned, even for those defendants placed on electronic monitoring the day courts first closed.[74] Alaskan courts suspended jury trials for almost two years to mitigate COVID-19 transmission across the state,[75] but in doing so, likely caused many criminal defendants to accrue more time on restrictive electronic monitoring conditions than they would be eligible to receive as credit for time served. Due to the convergence of three separate state policies—the limitation of eligibility for time served to a small subset of pretrial defendants, the release of most pretrial detainees on electronic monitoring at the start of the pandemic, and the recurring closures of Alaskan courts to jury trials since March 2020—Alaska has taken from criminal defendants a significant period of time during which they could have been gainfully employed.

B. Massachusetts

In Massachusetts, electronic monitoring of pretrial defendants must further a greater governmental interest before it can be imposed on a pretrial defendant as a condition of bail.[76] The Supreme Judicial Court determined that electronic monitoring does nothing to ensure the appearance of a defendant in court proceedings; as that is the only rationale given in the Massachusetts statute governing conditions of release, the Court held that lower courts in Massachusetts cannot impose electronic monitoring without

---

could resume in-person jury trials in December of 2021 with judicial discretion, although the Alaskan Supreme Court still withholds the right to close trial courts due to high CDC COVID Community Levels. ALASKA SUPREME COURT ORDER NO. 8352, ORDER PROVIDING FOR IN-PERSON CRIMINAL JURY TRIALS USING MITIGATION MEASURES (Dec. 2, 2021), https://courts.alaska.gov/covid19/docs/socj-2021-8352.pdf [https://perma.cc/B39Y-LKT4]; ALASKA SUPREME COURT ORDER NO. 8441, UPDATE REGARDING COVID-19 AND PRESUMPTIVE JURY TRIAL SITES (Aug. 17, 2022), https://courts.alaska.gov/covid19/docs/2022/socj-2022-8441.pdf [https://perma.cc/K827-AK8X]. As was the case across most of the nation, courts that were closed for in-person trials but conducted limited hearings over video were unwilling to also conduct trials, especially jury trials, over video. This is because of the potential implications of certain constitutional rights to trials in the Fifth and Sixth Amendments of the United States Constitution, as applied to the states by the Fourteenth Amendment. A trial not taking place literally in one room raises specific issues with the defendant's right to confront witnesses and be seen by a jury. In *Maryland v. Craig*, the Supreme Court did allow for one potential avenue of "virtual" witnesses, however the standard is high and might not be satisfied by current limits on courtroom technology. 497 U.S. 836 (1990). A virtual trial also raises prudential concerns about the effectiveness of counsel's advocacy over the screen, and the court's ability to control the jury. *See* Brandon Marc Draper, *Zoom Justice: When Constitutional Rights Collide in Cyberspace*, NULR OF NOTE (May 7, 2020), https://blog.northwesternlaw.review/?p=1395 [https://perma.cc/5A3X-TD2Y].

74. ALASKA SUPREME COURT ORDER NO. 1974, RESETTING, EXTENDING, AND TOLLING CRIMINAL RULE 45 (July 21, 2021), https://courts.alaska.gov/sco/docs/sco1974.pdf [https://perma.cc/7K56-7UD8]; *COVID-19 Response*, ALASKA CT. SYS., https://courts.alaska.gov/covid19/index.htm#first [https://perma.cc/2DRY-6L8J] (last visited Sept. 18, 2022).

75. ORDER NO. 8352, *supra* note 73.

76. Commonwealth v. Norman, 142 N.E.3d 1, 4 (Mass. 2020).

more.[77] This change in case law began in March 2020, at the same time COVID lockdown procedures began to emerge.[78] On their public-facing webpages, Massachusetts courts state only that GPS monitoring will not be ordered as a "condition of release unless a judge finds there is a public safety need for it."[79]

As a result of COVID, the Massachusetts Supreme Judicial Court granted all non-violent pretrial detainees a "rebuttable presumption of release" that allowed many defendants to leave pretrial detention with electronic monitoring conditions of release.[80] However, this order came with the large caveat that social distancing between court personnel and defendants cannot be broken to affix a GPS ankle monitor without a "compelling public safety need."[81] This order has not been repealed or replaced by any other Supreme Judicial Court Order by date of publication.[82] The far-reaching impact of this decision from the court symbolizes that this change will stick in Massachusetts beyond COVID.[83]

Massachusetts also limited the hours and availability of staff for electronic monitoring at the onset of the pandemic. For both GPS and SCRAM programs, afterhours monitoring was reduced due to staffing limitations from March to June of 2020.[84] In the fall of 2020, the

---

77. *Id.* at 9. However, the Pretrial Services Division of the Massachusetts Probation Service Program, which oversees pretrial electronic monitoring, continues to list the likelihood of court appearance as the first factor in determining the least restrictive release condition possible. *About the Pretrial Services Division*, MASS. PROB. SERV. PROGRAMS & INITIATIVES, https://www.mass.gov/info-details/about-the-pretrial-services-division# goals-and-mission- [https://perma.cc/9DCD-CNGW] (last visited Oct. 11, 2022).

78. Massachusetts temporarily closed non-essential businesses and organizations due to COVID beginning on March 24, 2020. Office of Governor Charlie Baker, COVID-19 Order No. 13 (Mar. 23, 2020), https://www.mass.gov/doc/march-23-2020-essential-services-and-revised-gatherings-order/download [https://perma.cc/KFX9-DG4P].

79. *Court System Response to COVID-19*, MASS. CT. SYS. (Aug. 30, 2022), https://www.mass.gov/resource/court-system-response-to-covid-19 [https://perma.cc/2PKB-FQYM]. It is important to note that any difference this might cause at the trial level is not strictly enforced upon or made known to the courtroom actors, as the form used for filing official conditions of release does not require any specific rationale for proscribing certain conditions, such as GPS surveillance. Brief for Defendant-Appellee on Appeal from the Middlesex County Superior Court at 7, *Norman*, 142 N.E.3d 1 (No. SJC-12744).

80. Massachusetts Superior Court Rules, Standing Order 5-20: Protocol Governing Requests for Release from Detention, and Requests to Revise or Revoke or to Stay Sentence, Based on Coronavirus (COVID-19) Risks (Apr. 6, 2020) [hereinafter Standing Order 5-20].

81. Massachusetts Supreme Judicial Court Order in re: COVID-19 (Coronavirus) Pandemic, Supreme Court Judicial Order Concerning the Imposition of Global Positioning System (GPS) Monitoring as Condition of Release or of Probation (Mar. 23, 2020).

82. *See generally* Massachusetts Supreme Judicial Court Orders, Mass. Sup. Jud. Ct., https://www.mass.gov/law-library/massachusetts-supreme-judicial-court-orders [https://perma.cc/9W4F-ZY72] (last visited Sept. 18, 2022).

83. Standing Order 5-20, *supra* note 80.

84. Trial Court Emergency Administrative Order 20-2 Order Concerning Probation Conditions as a Result of COVID-19 (2020).

Massachusetts legislature approved a budget of $350,000 for "increased electronic monitoring capacity" during the next fiscal year.[85] Despite being labeled an "increase," this funding was no more than what had been allotted the previous year.[86] Massachusetts does not receive revenue for electronic monitoring from pretrial defendants, as the state does not statutorily require defendants to finance their own surveillance.[87] Between the static funding from the state legislature, reduced staffing capacity, and stricter limitations on classes of defendants who could be placed on electronic monitoring, Massachusetts courts did not use the pandemic as an immediate excuse to expand their electronic monitoring services to the detriment of defendants.

Massachusetts has recognized that constant GPS surveillance of pretrial defendants impacts their employment.[88] Defendants wearing a GPS ankle monitor must be able to deal with any problem arising around their electronic monitoring status contemporaneously, including handling alerts from their device.[89] When an alert occurs before or during a defendant's shift, they are forced to prioritize the alert over their work duties or face the consequences with the judicial system.

Alerts require defendants to get in contact with an officer to resolve the alert or confirm that they are solving the problem.[90] If that is not possible, the on-call staff can begin the process of issuing an arrest warrant.[91] Pretrial defendant Joseph Bennett reports that every week he is notified that his ankle monitor lost signal.[92] Pre-pandemic, the Massachusetts electronic monitoring program would receive a total number of daily alerts equivalent to if half of all people on GPS monitoring, including pretrial defendants, experienced one alert.[93] An alert is not a quick interruption into the defendant's life, and it is frequently not a one-time occurrence. Fully resolving an alert in Massachusetts can take anywhere between thirty

---

85. *FY2021 Enacted Budget Summary: Commissioner of Probation*, COMMONWEALTH OF MASS., https://budget.digital.mass.gov/summary/fy21/enacted/judiciary/trial-court/03391001 [https://perma.cc/8KH7-KMLU] (last visited Oct. 11, 2022).

86. H.4354, 191st Gen. Ct. (Mass. 2019).

87. FINES & FEES JUST. CTR., *supra* note 25, at 13.

88. Commonwealth v. Norman, 142 N.E.3d 1, 10 (Mass. 2020) ("GPS may require individual 'to leave his [or her] job and walk around outside during work hours, risking potential economic consequences, including loss of employment.") (quoting Commonwealth v. Feliz, 119 N.E.3d 700, 704 (Mass. 2019)).

89. *See id.*

90. *Feliz*, 119 N.E.3d at 706 n.8.

91. *Id.*

92. Jenifer B. McKim, '*Electronic Shackles': Use of GPS Monitors Skyrockets in Massachusetts Justice System*, WGBH (Aug. 10, 2020), https://www.wgbh.org/news/local-news/2020/08/10/electronic-shackles-use-of-gps-monitors-skyrockets-in-massachusetts-justice-system [https://perma.cc/74A6-LYP5].

93. *Feliz*, 119 N.E.3d at 707 n.9.

minutes and six hours.[94] GPS ankle monitors used on pretrial defendants in Massachusetts can only hold twenty-four hours of charge and will give several charging alerts when the battery is low.[95] This results in multiple alerts in succession, which would be disruptive to a defendant and their employer if the alerts occurred while at work. Massachusetts does not recommend charging the device while sleeping because the defendant risks an incomplete charge, meaning that the defendant needs to be able to stay still at home for two consecutive hours every day to charge their GPS device.[96]

Massachusetts has one centralized office for the Electronic Monitoring Program ("ELMO"), located in central Massachusetts, that oversees all pretrial defendants on electronic monitoring across the state.[97] Defendants are released as "pretrial probationers" and, thus, all defendants on conditions of release are overseen by the same infrastructure as convicted defendants out on probation.[98] ELMO works with courts across the state to help manage alerts and scheduling without sending defendants to private companies.[99] ELMO also provides after-hours technical support at the central Massachusetts location and a second location closer to Boston.[100] Although traveling to these locations to resolve a defect with an ankle monitor would be a burden for defendants, it is less of an intrusion into their work and home life when compared to the likely alternative: spending time in custody waiting for a hearing with a judge to discuss any violation of conditions of release.[101]

ELMO is also able to troubleshoot recurring alert issues with defendants because they work so closely with the probation officers overseeing pretrial defendants. For example, if a defendant consistently has connectivity alerts because they work in a warehouse that blocks reception, ELMO is authorized to get a special release for their work location and schedule.[102] Without such an ability, defendants working in warehouses would need to step outside every hour to connect with the GPS satellites. ELMO is given more direct control over defendants' electronic monitoring but is still subject to review by community-elected leaders. Under statute 99G, pretrial services agencies

94. *Id.* at 707.

95. *Id.*

96. McKim, *supra* note 92; *Feliz*, 119 N.E.3d at 707 n. 9.

97. *Learn About the Electronic Monitoring Program*, MASS. PROB. SERV., https://www.mass.gov/info-details/learn-about-the-electronic-monitoring-program#overview- [https://perma.cc/3EWP-XWLY] (last visited Jan. 27, 2022).

98. MASS. DIST./MUN. CT. RULES FOR PROB. VIOLATION PROC. 2.

99. Brief of Massachusetts Probation Service as Amicus Curiae at 25–26, *Feliz*, 119 N.E.3d 700 (No. SJC-12545).

100. *Id.*

101. MASS. GEN. LAWS ANN. ch. 279, § 3 (West).

102. Brief of Massachusetts Probation Service as Amicus Curiae, *supra* note 99, at 15.

must produce an annual report of analytical data, including conditions of release, for the Commissioner of Probation and the Joint Committee on the Judiciary.[103] Massachusetts's organization of electronic monitoring and pretrial services is centralized, directly managed, and responsive to the actual needs of the populations they serve.

C. Missouri

Missouri has a decentralized and privatized approach to pretrial services, with each county contracting their own electronic monitoring company and managing their own cases.[104] Defendants discuss any electronic monitoring issues directly with the private company they pay for their ankle monitor, an approach that Missouri pioneered when it was one of the first states to allow private companies to supervise defendants released on electronic monitoring.[105]

Missouri does not make employment or having a source of income a requirement for release on electronic monitoring,[106] which can be a double-edged sword for pretrial defendants. Because of Missouri's privatized approach to electronic monitoring, there is no direct interreference of the courts in a defendant's employment.[107] Officers do not generally have to meet with employers, ask for a set schedule, or approve any job changes. But this means that judges do not inherently make special provisions or conditions to facilitate a defendant's job search or work schedule.

Still, pretrial defendants like Daehaun White struggle to find employment while on electronic monitoring.[108] Potential employers commented or asked about the ankle monitor he was wearing during interviews.[109] White's midnight curfew limited the number of jobs and shifts he could apply for.[110] If his monitor ever died, White would be escorted back to his home by police to charge the device.[111] Such a disturbance to the defendant's workday would likely cause problems with their employer. The

---

103. MASS. GEN. LAWS ANN. ch. 276 § 99G (West).

104. Presentation, *Pretrial Services*, GREENE CNTY. PRETRIAL SERVS. (Nov. 19, 2019), https://greenecountymo.gov/files/PDF/file.pdf?id=34887 [https://perma.cc/5SKW-BKVK]; Christian Cnty. Comm'n, INVITATION TO BID (2019), https://www.christiancountymo.gov/wp-content/uploads/PreTrial-Services.pdf [https://perma.cc/6RY8-URFK].

105. Kofman, *supra* note 25.

106. MO. REV. STAT. § 544.455. Judges may *consider* employment when designating conditions of release if that information is available. *Id.*

107. *See How the Process Works*, MO. ALT. PRE-TRIAL SERVS., https://www.maptsmo.com/how-the-process-works [https://perma.cc/S8HC-S2KT] (last visited Sept. 19, 2022) (showing that courts hand over day-to-day management of electronic monitoring to private companies).

108. Kofman, *supra* note 25.

109. *Id.*

110. *Id.*

111. *Id.*

accompanying check-ins with electronic monitoring providers also interfere with employment for pretrial defendants. White had to report once a week to the monitoring company's office, which was only open for check-ins in the afternoon on Monday, Tuesday, and Wednesday.[112] Without taking time off work, no pretrial defendant can work a standard forty-hour week and also make the mandatory weekly check-ins. This was true for defendant Juawanna Caves, who lost her job because she asked for too many exceptions to make it to her court appearances and check-ins.[113]

Statutorily, Missouri appears to protect a defendant's right to release by not discriminating based on ability to pay.[114] However Missouri does not consider income or employment when granting conditions of release. On a smaller scale, there are jurisdictions that maintain record of the employment of defendants under surveillance: St. Louis County requires that defendants on electronic monitoring report their income to their supervising agent.[115]

For pretrial defendants released in St. Louis County, the condition of electronic monitoring also comes with an automatic $298.97 bill, and a new installment fee of $225 for every twenty-five days that the monitor remains in place.[116] Under Missouri statute 544.455(6), if a defendant cannot afford the fees associated with electronic monitoring, and the government does not agree to cover those fees, then the judge cannot release that person with electronic monitoring.[117] However, judges in St. Louis do not often inquire into the financial resources of the defendants they place on electronic monitoring. "To release defendants without monitors simply because they can't afford the fee…would be to disrespect the safety of their victims or the community."[118] If a defendant is released on bond but cannot report within the next day to the private electronic monitoring company's office, the company will return the case to the court and allow for the defendant to be held in custody again.[119] By following these electronic monitoring policies,

112. *Id.*

113. *Id.*

114. H.B. 5, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).

115. WEISBURD ET AL., *supra* note 38, at 14.

116. MO. ALT. PRE-TRIAL SERVS., *supra* note 107. Paying by credit card incurs an additional $8.32 processing fee. To avoid this fee, defendants must pay in person at the office, which is only open during normal weekday business hours. Additionally, there are no refunds for any billed days where electronic monitoring was not needed—for example, if a defendant leaves electronic monitoring on their 26th day of the GPS device, they must pay the full $225 for only one day of monitoring. *Make a One Time 25 Day Payment*, MO. ALT. PRE-TRIAL SERVS., https://www.maptsmo.com/25daypayment [https://perma.cc/5LL6-CHVQ] (last visited Jan. 27, 2022). Defendants in Greene County, in contrast, pay $9 a day for GPS or $10 a day for SCRAM to their contracted electronic monitoring company. GREENE CNTY. PRETRIAL SERVS., *supra* note 104.

117. MO. REV. STAT. § 544.455.

118. Kofman, *supra* note 25 (quoting J. Burlison, 22nd Jud. Cir. Ct. of St. Louis City).

119. Letter from Nicholas Buss, Bond Compliance Officer, E. Mo. Alt. Sent'g Servs., to Judge Colbert-Botchway, 22nd Jud. Cir. Ct. of St. Louis City (Sept. 5, 2018),

Missouri neither acts to protect a defendant's employability nor their pretrial release status generally.

D. New Mexico

Protection for pretrial defendants in New Mexico begins with the state constitution. Updated in 2016, the New Mexico Constitution requires:

> [a] person who is not detainable on grounds of dangerousness nor a flight risk in the absence of bond and is otherwise eligible for bail shall not be detained solely because of financial inability to post a money or property bond. A defendant who is neither a danger nor a flight risk and who has a financial inability to post a money or property bond may file a motion with the court requesting relief from the requirement to post bond. The court shall rule on the motion in an expedited manner.[120]

Criminal defendants in New Mexico are constitutionally guaranteed a right to pretrial release, including release on electronic monitoring, unless they pose a danger or a flight risk.[121]

New Mexico statute 31-4-16 allows any defendant, except those charged with "an offense punishable by death or life imprisonment," to be released from detention on bail.[122] Following New Mexico's elimination of the cash bail system through the 2016 constitutional amendment, pretrial defendants are now being held on house arrest and similar electronic monitoring programs instead.[123] Under rule 5-401,[124] judges can only impose the least restrictive means of securing the defendant's appearance in court.[125] The rule includes an exhaustive list of factors that district court judges may, but are not required to, consider:

---

https://www.archcitydefenders.org/wp-content/uploads/2019/07/Exhibit-B-Redacted-EMASS-Letter.pdf [https://perma.cc/UUJ5-QGWD].

120. N.M. CONST. art. II, § 13.

121. *Id.*

122. N.M. STAT. ANN. § 31-4-16.

123. Anita Hassan, *New Mexico Eliminated Cash Bail – But Now One County Locks up More People Without Bond Before Trial*, N.B.C. NEWS (Dec. 8, 2020) https://www.nbcnews.com/news/us-news/new-mexico-eliminated-cash-bail-now-one-county-locks-more-n1250257 [https://perma.cc/T57N-UNG7].

124. This rule is identical to the Rule applicable in Magistrate Courts, N.M. R. CRIM. P. MAG. CT. 6-401.

125. N.M. R. CRIM. P. DIST. CT. 5-401(B).

> **(1)** the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;
> **(2)** the weight of the evidence against the defendant;
> **(3)** the history and characteristics of the defendant, including
>
> > **(a)** the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
> > **(b)** whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;
>
> **(4)** the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;
> **(5)** any other facts tending to indicate the defendant may or may not be likely to appear as required; and
> **(6)** any other facts tending to indicate the defendant may or may not commit new crimes if released.[126]

These conditions are considered in determining which nonmonetary conditions of release would best suit the needs of the defendant and the community, including a requirement of employment.[127] Rule 5-401 does not consider electronic monitoring to be a nonmonetary condition of release, but rather a form of supervision in its own right, overseen by the Pretrial Services Agency.[128] This means that while the court still sets the conditions of release, it is up to electronic monitoring case managers and law enforcement to manage all of the minutiae and determine what conduct specifically must be considered a violation to be brought before a judge.[129] This discretion is not guaranteed to last, though, as the state courts seated in Bernalillo County

126. N.M. R. CRIM. P. DIST. CT. 5-401(C).
127. N.M. R. CRIM. P. DIST. CT. 5-401(D).
128. *Id.*; *accord* N.M. FORM 9-303.
129. *Electronic Monitoring Program*, SANTA FE CNTY. CORR. DEP'T., https://www.santafecountynm.gov/corrections/electronic_monitoring [https://perma.cc/TEP2-H8T8] (last visited Jan. 27, 2022).

announced in September of 2021 a plan to change electronic monitoring to an alert system operating around the clock.[130]

Santa Fe County has contracted with BI Incorporated for electronic monitoring services for over a decade.[131] Despite the partnership's lengthy existence, the company and the county still maintain separate roles and structures. BI and its employees work for the county only as independent contractors, and do not accrue benefits or leave.[132] BI also directly controls the maintenance and operation of a defendant's ankle monitor.[133] Defendants must still coordinate with the Pretrial Services Program through the court that released them. There is no provision in the contract to measure quality control or collect data to prove the effectiveness of electronic monitoring as measured by the goals stated in New Mexico's authorizing statutes.[134] New Mexico's hybrid organization of electronic monitoring, in which defendants rely on a private company for technical needs but keep in constant contact with their county's Pretrial Services, is decentralized and managed by the county government rather than the courts. When combined with the highly discretionary nature of electronic monitoring imposition, the lived experiences of pretrial defendants residing in different parts of the state can look very different.

In contrast, the New Mexico legislature has maintained a more hands-on approach to defining other statutory areas related to electronic monitoring and pretrial confinement. A court's granting of credit for time served prior to conviction is limited only to the most restrictive of electronic monitoring.[135] "A defendant is entitled to presentence confinement credit for time under house arrest pursuant to an electronic monitoring program if the defendant is in constructive custody and can be punished for escape for non-compliance with the house arrest order."[136] A defendant would be

---

130. Olivier Uyttebrouck, *NM Judiciary Set to Expand Pretrial GPS Monitoring*, ALBUQUERQUE J. (Sept. 20, 2021), https://www.abqjournal.com/2431102/courts-announce-plan-to-tighten-pretrial-gps-monitoring.html [https://perma.cc/7A5E-RRL2]. Bernalillo County is the most populous county in the state and comprises almost entirely the Albuquerque metro area. *Bernalillo County, New Mexico*, WIKIPEDIA (Sep. 2, 2022), https://en.wikipedia.org/wiki/Bernalillo_County,_New_Mexico#cite_note-hist-1 [https://perma.cc/S2W5-7JHH].

131. *See* SERVS. AGREEMENT WITH BI, INC. TO PROVIDE ELECTRONIC MONITORING SERVS. (Nov. 18, 2010), https://www.santafecountynm.gov/documents/sunshine_contracts/Services_Agreement_for_Electronic_Monitoring_Services_with_BI_Incorporated.pdf [https://perma.cc/487Z-4F3L].

132. PRO. SERVS. AGREEMENT BETWEEN SANTA FE CNTY. AND BI INC. (Jan. 31, 2017), https://www.santafecountynm.gov/documents/sunshine_contracts/Addendum_BI_Incorporated.pdf [https://perma.cc/Z7QX-NBQX].

133. *Id.*

134. *Id.*

135. N.M. STAT. ANN. § 31-20-12 (LexisNexis 2022).

136. § 31-20-12, Annotations (citing State v. Duhon, 138 N.M. 466, 122 P.3d 50, *cert. quashed*, 139 N.M. 352, 132 P.3d 1038).

sufficiently restricted to qualify under this statute if they were only allowed to leave the house for work, counseling, and religious services.[137] These limitations to receiving credit for time served are constrictive. Still, they show an intent within New Mexico to allow defendants to maximize their ability to work both pretrial and after release from a post-conviction sentence.

E. Wisconsin

The Wisconsin legislature broadly allows convicted defendants to earn credit for time served under confinement prior to conviction, including for alternative programs such as reforestation camps and substance abuse treatment.[138] However, the judiciary has limited the statute so as not to allow credit for time served under house arrest.[139] Because supervision under electronic monitoring is less restrictive than formal house arrest, it is unlikely that any criminal defendant in Wisconsin can earn credit for time served when only confined by an ankle monitor.

Electronic monitoring programs across the state are organized by county, with each county varying greatly in its implementation of pretrial electronic monitoring, or lack thereof.[140] In some counties, courts do not have the power to place defendants on electronic monitoring as a condition of release.[141] Instead, the eligibility of a defendant is solely determined by the Sheriff, with other members of the judicial system and the community only providing recommendations.[142] Milwaukee County, the most populous county in the state, contracts with the nonprofit organization, JusticePoint, to provide alternative pretrial programs, including GPS ankle monitoring.[143]

---

137. State v. Guillen, 2001-NMCA-079, 130 N.M. 803, 32 P.3d 812.

138. WIS. STAT. § 973.155.

139. State v. Pettis, 149 Wis. 2d 207, 441 N.W.2d 247 (Wis. Ct. App. 1989). *See also* State v. Swadley, 190 Wis. 2d 139, 526 N.W.2d 778 (Wis. Ct. App. 1994).

140. Dane County does not offer electronic monitoring for pretrial defendants, while Milwaukee County has two different monitoring programs. *Pretrial Services*, DANE CNTY. CLERK OF CTS., https://courts.countyofdane.com/Alternatives/Pretrial-Services [https://perma.cc/ZXC7-UC5J] (last visited Jan. 27, 2022); *Milwaukee County*, JUSTICEPOINT, https://www.justicepoint.org/mke-county [https://perma.cc/GD4C-7TSG] (last visited Jan. 27, 2022).

141. *Electronic Monitoring Program*, SHEBOYGAN CNTY. SHERIFF'S DEP'T., https://www.sheboygancounty.com/departments/departments-r-z/sheriff-s-department/correctional-division/adult-detention-center/emp [https://perma.cc/R9W6-QMJM] (last visited Jan. 27, 2022); *Electronic Monitoring Program*, PORTAGE CNTY. SHERRIFF'S OFF., https://www.co.portage.wi.us/department/sheriff-s-office/corrections-division/home-detention-electronic-monitoring#:~:text=The%20daily%20fee%20for%20electronic,must%20be%20paid%20in%20advance [https://perma.cc/5YYT-CL4L] (last visited Jan. 27, 2022).

142. *See supra* note 141.

143. *Milwaukee County*, *supra* note 140. In fiscal years 2021 and 2022, Milwaukee County budgeted to pay JusticePoint $326,612 for pretrial GPS supervision and $1,589,423 for general pretrial supervision.

JusticePoint is owned by The Difference Principle, a 501(c)3 nonprofit focusing on reforming social justice and its accompanying administrative services.[144] However, it is still the Milwaukee courts that have full control over the conditions of release or GPS placement of pretrial criminal defendants.[145]

Wisconsin could soon see a greater limitation on the imposition of electronic monitoring for pretrial defendants, following the roll-out of the state's Pretrial Pilot Project.[146] Defendants in the project are only intended to be given a GPS monitor unit if they meet two conditions: (1) they are either (a) charged with a felony other than operating a vehicle while intoxicated, or (b) less than fifty-five percent likely to remain arrest-free; and (2) either (a) they are charged with a violent offense, or (b) there is a concern for victim safety.[147] The SCRAM requirements are even more cumbersome, but are rendered functionally meaningless by the discretion explicitly given to judges in granting release conditions, meaning that defendants who would not qualify for release can still pay for their own SCRAM monitor to be released.[148]

Wisconsin still faces major logistical issues with the infrastructure of electronic monitoring. Many rural defendants in the state have problems with connectivity and dead zones that cause false alerts on their ankle monitors.[149] If a defendant works in or commutes through a dead zone, their employment could be greatly disrupted by a need to keep in contact with their supervising agency. Wisconsin allows for the use of monitors with audio functions, which can cause an even greater disruption in the workplace.[150]

Conditions also fail to improve because those in power lack empathy and understanding when responding to electronic monitoring complaints. Former chairman of the Assembly Committee on Corrections, Representative Garey Bies, stated he does not have "a whole lot of sympathy" over an "inconvenience" for electronic monitoring.[151] Legislators have at least recognized the financial toll that pretrial proceedings put on defendants, and

---

MILWAUKEE CNTY. ADMIN. SERVS., DEPARTMENT OF PRE-TRIAL SERVICES BUDGET 5 (2021); MILWAUKEE CNTY. ADMIN. SERVS., DEPARTMENT OF PRE-TRIAL SERVICES BUDGET 5 (2022).

144. *About Applying Evidence, Achieving Justice*, JUSTICEPOINT, https://www.justicepoint.org/about [https://perma.cc/6AP2-L985] (last visited Jan. 27, 2022).

145. *Frequently Asked Questions*, JUSTICEPOINT, https://www.justicepoint.org/faq [https://perma.cc/7D54-KUFE] (last visited Jan. 27, 2022).

146. WIS. PRETRIAL PILOT PROJECT, OPERATIONAL GUIDE 37 (Oct. 2021), https://www.wicourts.gov/courts/programs/docs/pretrialopguide.pdf [https://perma.cc/LTW6-GTUA].

147. *Id.*

148. *Id.*

149. Consider the story of parolee James Morgan, who consistently fears setting off the alarm because of dead zones in his bedroom, which is well within the boundaries set in his parole. Koran, *supra* note 53.

150. *Id.*

151. *Id.*

they have taken affirmative steps to limit that burden by disallowing the operation of a commercial bail bonds industry.[152]

Wisconsin has a very hands-off approach to electronic monitoring. For the first six years of their program, the Department of Corrections did not audit the system of errors or abuses.[153] Any protections for defendants or policies that affect their lives while on electronic monitoring are left for individual agencies to mandate. Combined with the state's decentralized model of electronic monitoring and the lack of a complex state-wide statutory scheme for pretrial surveillance, Wisconsin defendants are left to individually maximize their employability.

F. Comparison of the selected states

Each of the five states examined above can be compared based on their different components of pretrial electronic monitoring policies. The states vary in population, location, political control, and demographics, but their defendants share many of the same barriers to and burdens from pretrial electronic monitoring. Each component of the general surveillance schemes impacts the employability of a pretrial defendant, and that effect will serve as a benchmark for the analysis.

New Mexico, Wisconsin, and Missouri all employ a decentralized and privatized approach to their organization of electronic monitoring. All three states allow individual counties to contract with private entities to provide electronic monitoring.[154] This is likely to lead to confusion for defendants who have to deal with multiple points of contact for their pretrial surveillance, in addition to separate court dates and case tasks.[155] Additionally, the privatization of electronic monitoring in New Mexico and Missouri has led to high fees for electronic monitoring.[156] An unjust fee schedule that forces a defendant to use the income earned while on electronic

152. Wisconsin banned commercial bail bonds in 1979 and has not allowed their return since. However, the issue has not gone unchallenged. A bill in the 2011-2012 legislative cycle that would allow for commercial bail bonds was passed by the legislature, but so opposed by the Attorney General's office and other judicial interested parties that the Governor struck down the provision by line-item veto. Brendan Fischer, *Gov. Walker Vetoes Bail Bonds, Attacks on Investigative Journalism*, CTR. FOR MEDIA AND DEMOCRACY'S PRWATCH (July, 1 2013, 11:57 AM), https://www.prwatch.org/news/2013/07/12162/gov-walker-vetoes-bail-bonds-attack-investigative-journalism [https://perma.cc/9D5W-CX23].

153. Koran, *supra* note 53.

154. See *supra* note 129 and accompanying text; *supra* note 140 and accompanying text; and *supra* note 104 and accompanying text.

155. *See* Richardson, *supra* note 29, at 878.

156. *See* MO. ALT. PRE-TRIAL SERVS., *supra* note 116 and accompanying text. Defendants in Milwaukee County, Wisconsin work with a nonprofit for their electronic monitoring, which would not need to monetize their services like a private company in New Mexico or Missouri would. *See* JUSTICEPOINT, *supra* note 140.

monitoring to pay for that surveillance leaves defendant no better off than if they were barred from employment by their conditions of release. Massachusetts organizes their pretrial electronic monitoring differently, opting to use one centralized office and not contract with for-profit or private companies.[157] While this structure might require a defendant to travel further to receive one-off technical assistance with an ankle monitor, defendants benefit from an easy-to-understand program with accessible policies and expectations.[158]

Courts implementing Wisconsin's current Pretrial Pilot Program are given specific qualifications for defendants who should be placed on electronic monitoring, with caveats to allow for the court's discretion and the interest of the defendant.[159] New Mexico allows for wide judicial discretion in determining appropriate pretrial supervision, but specifically permits judges to consider employment and characteristics of employability in that determination.[160] Alaska similarly allows for great variance between defendants for the imposition of pretrial release conditions.[161] However, unlike New Mexico, which separates electronic monitoring as its own class of pretrial supervision, Alaska classifies electronic monitoring as a nonmonetary condition of release.[162]

In Alaska and Missouri, pretrial surveillance, and surveillance fees, can be combined with traditional bonds.[163] New Mexico completely eliminated pretrial release for cash bonds six years ago, and Wisconsin has not allowed commercial bail bonds for over forty years.[164] While bonds do not directly affect the employment of a defendant or their support system, they can impact their income in the same way as electronic monitoring fees.

Wisconsin does not allow credit for time served under pretrial house arrest.[165] Alaska does not allow most defendants on pretrial electronic monitoring to receive credit for time served, because courts have narrowly limited the applicability of the state statute authorizing the allowance of credit for time served generally.[166] By contrast, New Mexico has a less restrictive policy of earning credit for time served. Defendants in New Mexico can earn time served if they are only allowed to leave home for very

157. *See* MASS. PROB. SERV., *supra* note 97 and accompanying text.

158. *See supra* note 97 and accompanying text.

159. *See supra* note 146 and accompanying text. This group represents only a small subset of courts in Wisconsin, though it is possible that time will see the program expand across the entire state. *Id.*

160. N.M. R. CRIM. P. DIST. CT. 5-401(D).

161. ALASKA STAT. ANN. § 12.30.011(b) (West 2019).

162. N.M. R. CRIM. P. DIST. CT. 5-401(C).; ALASKA STAT. ANN. § 33.07.030 (West 2018).

163. ALASKA STAT. ANN. § 33.07.030 (West 2018); The Bail Project, *supra* note 46.

164. Hassan, *supra* note 123; Fischer, *supra* note 152.

165. State v. Pettis, 149 Wis. 2d 207, 441 N.W.2d 247 (Ct. App. 1989).

166. *See supra* note 68 and accompanying text.

specific and compelling reasons.[167] Under all of these policies, defendants who would be convicted at trial are limited in their employability for some period during their time under supervision—either while on strict electronic monitoring before trial, or during the final year of their conviction that was not commuted for time served on a less-restrictive electronic monitoring program. New Mexico's statute maximizes defendants' employability more than Alaska's policy, though, by specifically allowing defendants to work while still qualifying for time served.[168]

III. NORMATIVE APPROACH TO PRETRIAL ELECTRONIC MONITORING

No one state has a perfect pretrial release system, especially regarding the employability of criminal defendants. As stated in Section I, the goal of pretrial electronic monitoring is to balance the government's interest in the safety of society with the benefits of allowing a defendant to stay out of pretrial detention. To best serve the diverse interests of a criminal defendant and the community or communities to which they belong, pretrial release conditions must prioritize the ability of the defendant to work.

Massachusetts has the most work-enabling approach for pretrial defendants. Their centralized, easy-to-follow approach presents the least number of problems for a criminal defendant.[169] For defendants who have not interacted with the criminal justice system previously and have no expertise on matters of law, being placed on electronic monitoring can cause stress and confusion.[170] Massachusetts also creates the least number of hoops for a defendant's employer to jump through during electronic monitoring by clearly supplying contact information and updates to the relevant policies online.[171] A common complaint for defendants on electronic monitoring in Massachusetts—that ankle monitors create disruptive and time-consuming alerts—is an issue common to all ankle monitors.[172] Massachusetts created the most practicable solution by organizing and authorizing pretrial agencies

167. *See supra* note 135 and accompanying text.

168. *See supra* note 137 and accompanying text.

169. *See generally supra* Section II.B.

170. This expertise of the law deals with a defendant's personal understanding of the relevant substantive and procedural law, but also with their connection to legal professionals who might be of assistance in understanding their case. An indigent defendant is less likely to have friends or family who are in the legal field and will likely rely on a public defender for their attorney. Statistically, a public defender will likely be unable to explain every intricacy of a case to their client. In places such as Illinois, a public defender may have as many as 4,000 cases they take on in just one year. Richardson, *supra* note 29, at 878; Sean C. Gallagher, *A Judge's Comments*, 42 LITIG. 21 (2016).

171. *See* MASS. PROB. SERV., *supra* note 97.

172. Commonwealth v. Feliz, 119 N.E.3d 700 (Mass. 2019).

to independently modify release schedules to reduce the number of alerts a defendant may receive.[173]

Massachusetts's COVID-friendly modifications are also commendable. They have increased the benefits of the system for the defendant without creating any obviously negative effects for the criminal justice system or the community at large. Considering the current judicial orders in place for the state, there are no policies that would lead to degradation of the pretrial release conditions over time.[174] In fact, Massachusetts's redefinition of the availability of pretrial electronic monitoring will likely improve the employability of pretrial defendants across the state for years to come.[175] As we hopefully enter a post-COVID period—rather than the active stages of pandemic—Massachusetts should continue to facilitate release through the "rebuttable presumption of release" created during COVID, as it has continued to serve the traditional purposes of pretrial conditions of release.[176] Although Massachusetts has a diverse population,[177] it has adopted the most normative approach. Other states could begin to implement their own version of Massachusetts's scheme to better suit their own communities.

Component of Scheme	Source	Specifications
Organization of Electronic Monitoring Programs	Massachusetts	A centralized government organization in control of monitoring defendants and providing devices; it is directly overseen by the judiciary.[178]
Authorization of Pretrial Release	Alaska	The least restrictive conditions that will reasonably ensure the person's appearance and protect the victim, other persons, and the community.[179]
Protection of Pretrial Release	New Mexico	Constitutional right to pretrial release, unless the defendant is extremely dangerous or a flight risk.[180]

173. Brief of Massachusetts Probation Service as Amicus Curiae, *supra* note 99, at 15.
178. *See supra* Section II.B.
179. ALASKA STAT. ANN. § 12.30.011(b) (West 2019).

Factors for finding Conditions of Release	New Mexico	Nature of the offense charged, weight of the evidence, criminal history of defendant, character of defendant—including employment, family, community ties—and their mental/physical condition, danger to community member(s), and further facts tending towards or against restriction.[181]
Fee for Electronic Monitoring	-	Electronic monitoring should be funded entirely by the state mandating such surveillance.[182]
Eligibility for Credit for Time Served	New Mexico	A defendant is eligible for credit for time served if they are restricted to their home except for work, religious services, and court-related duties.[183]

IV. A COMPLETE ELECTRONIC MONITORING SCHEME CAN BE CREATED BY COMBINING THE BEST COMPONENTS OF DIFFERENT STATES' SCHEMES.

Unfortunately, no state seems to sufficiently focus on support, rather than surveillance, of pretrial defendants. Electronic monitoring could be used to support both the defendant and the community, rather than to track a defendant's every move and intrude in their life and work. A system designed with the primary goal of supporting the defendant and their own support systems would not utilize private companies for the monitoring. Defendants would have one point of contact, a case manager or pretrial services agent, that could help with electronic monitoring and other conditions of release or court orders. Pretrial defendants who are subject to

176. *See supra* note 75 and accompanying text; *see supra* Section I.

177. *See generally QuickFacts Massachusetts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/MA [https://perma.cc/BB3Y-VNPE] (last visited Oct. 1, 2022).

178. *See supra* Section II.B.

179. ALASKA STAT. ANN. § 12.30.011(b) (West 2019).

180. N.M. CONST. art. II, § 13.

181. N.M. R. CRIM. P. DIST. CT. 5-401(C).

182. Defendants should not have to pay for a service of the state they have been ordered to participate in. *See* NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, NAT'L STANDARD ON PRETRIAL RELEASE 1.10 (2020).

183. N.M. STAT. ANN. § 31-20-12; State v. Guillen, 2001-NMCA-079, 130 N.M. 803, 32 P.3d 812.

electronic monitoring are likely to have other restrictive conditions of release unrelated to their monitoring.[184] In states like Wisconsin, Alaska, New Mexico, and Missouri, defendants may pay fees to a third-party company, rather than through the court system directly. As noted in the National Association of Pretrial Service Agency's Standards, the ideal state has a sufficient budget to cover all costs and fees related to pretrial services.[185] The chart below illustrates a complete electronic monitoring scheme that combines the policies analyzed in Section II to best reflect the goals of electronic monitoring and allow the greatest number of community members to find gainful employment, free of as many electronic monitoring-induced interruptions and distractions as feasible.

V. CONCLUSION

The ability of a pretrial criminal defendant to work or earn a standard income is not the end-all, be-all terminus of what makes a "good" pretrial release scheme. A defendant, when given the opportunity to live a relatively normal life with work and family at home would not likely volunteer for any conditions of release that would put those things in jeopardy.[186] However, societal and prudential concerns have required variations of pretrial detention or intensive monitoring throughout American legal history. A community's interest in not releasing a potentially dangerous criminal defendant before their innocence is affirmed beyond a reasonable doubt must be balanced with that same community's interest in keeping the relative status quo by returning defendants to their homes and places of work with minimal interruption.

Electronic monitoring is designed as a less-restrictive alternative to pretrial detention, although it inaptly replaces standard conditions of release.[187] While pretrial detention is meant to best serve the community, a release with bond or other conditions best serves the individual defendant by granting quasi-freedom. Electronic monitoring, as a mid-point between the two traditional pretrial statuses, should work for the benefit of both the community and the individual, because the practice of electronic monitoring impacts them both. When pretrial surveillance restricts an individual's movement and autonomy, their support system must directly do for the defendant what their surveillance does not allow. In this way, electronic monitoring interrupts the lives of both the defendant and their communities.

---

184. WEISBURD ET AL., *supra* note 38, at 19.

185. NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, NATIONAL STANDARD ON PRETRIAL RELEASE 1.10 (2020).

186. *See* The Bail Project, *supra* note 46.

187. *See* Staudt, *supra* note 19 and accompanying text.

An interruption caused by electronic monitoring, such as a restriction on movement, a lost signal, or time spent commuting to an agency's office, is likely to be an interruption to the workday.

In the United States, a system that best serves an individual must also best serve their livelihood. Functionally, the pretrial justice system can do this by prioritizing a defendant's ability to work and earn a meaningful living. A system that maximizes the labor potential of a defendant frees their support system from shouldering the tasks that the defendant typically completes and also maximizes their income and long-term wealth. These goals help support the individual defendants, their support systems, and their larger communities. Any strain placed on defendants by the imposition of electronic monitoring is felt in shock waves through the communities that electronic monitoring is intended to serve.

The state that best supports the overall employability of pretrial defendants is Massachusetts. It is evident that Massachusetts has considered the effect on a defendant's employment through their publicly available policies and practices.[188] Massachusetts does not statutorily require a fee from every defendant,[189] which maximizes the paychecks of indigent defendants. ELMO is centrally organized and does not contract with private companies for the imposition or maintenance of ankle monitors,[190] allowing defendants easier access to help and information regarding their ankle monitors. Additionally, Massachusetts has made serious, positive changes to the use of electronic monitoring in response to COVID,[191] a fact uncommon among the states surveyed.

Massachusetts's status as the most normative of the five states surveyed does not mean that they are the gold standard for maximizing the employability of defendants. The best system would be one that: (i) is exclusively a replacement of pretrial detention; (ii) does not impose any fees on the defendant; (iii) does not automatically report unauthorized movements or other violations because they can often be a mistake or misfiring that will leave a defendant in jail for days awaiting a violation hearing; and (iv) ideally connects each defendant who does not have a job or cannot practically continue their current job with a source of employment that will work with the defendant and pretrial services to set the defendant up for success. A better system is possible, as most of these ideas are already in place across the United States. There is no reason that jurisdictions cannot adopt these best practices and allow criminal defendants who are on

188. *See supra* Section II.B.
189. FINES & FEES JUSTICE CENTER, *supra* note 25, at 13.
190. Brief of Massachusetts Probation Service as Amicus Curiae, *supra* note 99, at 25–26.
191. *See supra* notes 79–84 and accompanying text.

electronic monitoring to do what is in the best interest of every party and get to work.