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## Correction through Omniscience: Electronic Monitoring and the Escalation of Crime Control

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# Correction through Omniscience: Electronic Monitoring and the Escalation of Crime Control

Molly Carney\*

*“[T]he persons to be inspected should always feel themselves as if under inspection . . . for the greatest proportion of time possible, each man should actually be under inspection.”*

—Jeremy Bentham, *The Panopticon*<sup>1</sup>

## INTRODUCTION

Perusing a tabloid or tuning into a twenty-four-hour news channel during late 2010 would likely provide an update on Lindsay Lohan’s legal situation.<sup>2</sup> The child star turned carousing young actress faced criminal charges for violating the terms of her probation.<sup>3</sup> Subject to continuous monitoring by an alcohol and drug detection bracelet, she was caught drinking alcohol at an awards show afterparty.<sup>4</sup>

Lohan’s legal troubles began in 2007 with two DUI arrests.<sup>5</sup> She took a plea bargain and was placed on probation.<sup>6</sup> The terms of probation included attending alcohol treatment classes, checking in with a probation officer, taking periodic drug tests, and appearing in court for mandatory progress hearings.<sup>7</sup> On May 20, 2010, Lohan

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1. JEREMY BENTHAM, *THE PANOPTICON WRITINGS* 41 (Miran Bozovic ed., Verso 1995) (1995).

2. See, e.g., Victoria Kim & Andrew Blankstein, *Judge Rejects Jail Time for Lohan, Orders Her to Stay in Rehab*, L.A. TIMES, Oct. 23, 2010, <http://articles.latimes.com/2010/oct/23/local/la-me-lohan-20101023>.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Carlin DeGuerin Miller, *Lindsay Lohan Has New Bracelet . . . the Ankle Monitoring Kind*, CBS NEWS, May 24, 2010, [http://www.cbsnews.com/8301-504083\\_162-20005761-504083.html](http://www.cbsnews.com/8301-504083_162-20005761-504083.html).

failed to appear at a mandatory hearing, and a warrant was issued for her arrest.<sup>8</sup> The judge ordered Lohan to wear a SCRAM bracelet, an electronic device that monitors the bloodstream for alcohol and drugs and alerts authorities if prohibited substances are consumed.<sup>9</sup> When the bracelet was triggered, Lohan faced additional legal consequences.<sup>10</sup> For this offense, she was sentenced to ninety days in jail followed by a ninety-day inpatient rehabilitation program.<sup>11</sup>

Lohan's case implicates broad societal attempts to shape and punish criminal behavior through surveillance. Although Lohan's celebrity status may amplify the intrigue of her story, her pattern of misbehavior is not uncommon in the U.S. criminal system.<sup>12</sup> Neither electronic monitoring nor other methods of punishment and treatment appeared to activate behavioral changes in Lohan, at least in the short term.<sup>13</sup> Such results are common among criminal offenders.<sup>14</sup>

This Note focuses upon one of the methods of surveillance and sanctioning used on Lohan, electronic monitoring. Frustrated by offender misbehavior, policymakers and courts regularly turn to electronic monitoring (EM) to supervise suspected, convicted, and prior offenders.<sup>15</sup> Considering EM in the context of the criminal system's "culture of control" demonstrates the danger in continuing to expand the current system with new EM programs and

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8. Lohan had been photographed partying in Cannes, France on the day she was supposed to report to court. *Id.*

9. The judge also ordered Lohan to attend weekly alcohol education classes and submit to random drug testing. *Id.*

10. Jessica Derschowitz, *Lindsay Lohan's SCRAM Bracelet Goes Off*, CBS NEWS, June 8, 2010, [http://www.cbsnews.com/8301-31749\\_162-20007111-10391698.html](http://www.cbsnews.com/8301-31749_162-20007111-10391698.html).

11. Lohan was sentenced for this probation violation on July 6, 2010. TMZ Staff, *Lohan Sentenced to Jail*, TMZ, July 6, 2010, <http://www.tMZ.com/2010/07/06/lindsay-lohan-sentenced-jail-probation-violation-judge-marsha-revel/>. Lohan actually served a total of fourteen days in jail followed by twenty-three days of in-patient rehab. Ken Lee, *Judge: Lindsay Lohan Has Right to Bail*, PEOPLE ONLINE, Sept. 24, 2010, <http://www.people.com/people/article/0,,20429293,00.html>. She was released from jail on September 24, 2010 after winning a habeas corpus appeal for the denial of bail following a failed drug test. *Id.* After failing two drug tests, Lohan returned to court in October for another probation violation hearing. Kim & Blankstein, *supra* note 2. The judge sentenced Lohan to spend additional time in a residential rehabilitation facility, with subsequent drug testing. *Id.*

12. *See infra* note 29 (discussing recidivism).

13. *See supra* note 11.

14. *See infra* note 22.

15. *See infra* notes 52–56 and accompanying text (discussing the recent increase in use of electronic monitoring technologies).

punishments rather than fixing it.<sup>16</sup> The use of EM surveillance forces consideration of a number of significant issues, ranging from costs to the Constitution.

Part I of this Note discusses the development and increased use of EM technologies in the expansive U.S. criminal system. In addition, this Part presents the concept of swift and certain corrections. Part II asks whether EM technologies are ameliorating or simply adding to the current criminal system. The new populations, new industry, and new constitutional concerns institutionalized by EM surveillance, weighed against a lack of clear new results, necessitate caution. Finally, Part III proposes that electronic monitoring only be employed as a true alternative solution to the current U.S. criminal system. The swift and certain paradigm may provide a strong guide in shaping more effective programs. Moreover, the need to assess and reassess the short- and long-term implications of EM surveillance upon individuals and the criminal system is clear. Whether offenders like Lohan, and the system as a whole, will benefit from the growing use of EM surveillance still remains far from certain.

## I. HISTORY

### A. *Criminal System in Crisis*

The reach of the U.S. criminal system is massive. Over 7.3 million adults in the United States are under some form of correctional control.<sup>17</sup> Encompassed in this figure is the highest incarceration rate in the world, totaling over 2.3 million inmates in 2008.<sup>18</sup> An

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16. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

17. "Correctional control" encompasses supervision during incarceration, probation, and parole. PEW CTR. ON THE STATES, *ONE IN 31: THE LONG REACH OF COMMUNITY CORRECTIONS* (2009), [http://www.pewcenteronthestates.org/uploadedFiles/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf).

This statistic amounts to one in every thirty-one adults. *Id.* "That whopping figure is more than the populations of Chicago, Philadelphia, San Diego and Dallas put together, and larger than the populations of 38 states and the District of Columbia." *Id.*

18. PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008* (2008), [http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS\\_Prison08\\_FINAL\\_2-1-1\\_FOR\\_WEB.pdf](http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FOR_WEB.pdf). More than one in one hundred adults in the United States is incarcerated. *Id.* Although the United States contains about 5 percent of the total world population, its prisoners

additional five million or more Americans are under either probation or parole supervision.<sup>19</sup> These figures have increased dramatically in the past twenty-five years; for example, the number of inmates has grown by 274 percent.<sup>20</sup> A high percentage of these offenders, about three-fourths, were convicted of nonviolent crimes such as drug offenses.<sup>21</sup> The majority are repeat offenders.<sup>22</sup>

Incarceration and other forms of criminal surveillance generate high costs to taxpayers and communities.<sup>23</sup> The total cost of corrections nationwide in 2010 was an estimated \$68.7 billion, six times the \$10.4 billion paid in 1983.<sup>24</sup> Furthermore, minority and low-income communities bear the immeasurable costs of disproportionate representation of their members in the criminal system.<sup>25</sup>

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make up approximately 25 percent of the world's incarcerated population. Robert L. DuPont et al., *Leveraging the Criminal Justice System to Reduce Alcohol- and Drug-Related Crime: A Review of Three Promising and Innovative Model Programs*, PROSECUTOR, Mar. 2010, at 38.

19. PEW CTR. ON THE STATES, *supra* note 17, at 6. At the end of 2007, 4.3 million adults were on probation and an additional 824,000 were on parole. *Id.* Although physical incarceration is commonly associated with corrections, "the centerpiece of community corrections is probation and parole." *Id.* "Far more offenders pay for their crimes through community sanctions, including drug courts, home detention and electronic monitoring, residential facilities with treatment, and day reporting centers." *Id.* Probationers, often those committing low-level and/or first-time offenses, while free to live in the community, are supervised by a probation officer and subject to specific conditions. *Id.* Violating conditions or committing another crime will lead to sanctions or a prison sentence. *Id.* A parolee is someone released early from a prison sentence to complete the remainder of the sentence in the community. *Id.* Parolees generally face similar conditions and sanctions to probationers and are supervised by parole officers. *Id.*

20. *Id.*

21. Roger K. Warren, *Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy*, 43 U.S.F. L. REV. 585 (2009). About 75 percent of felony offenders are convicted of nonviolent offenses. *Id.* Over 50 percent of probationers in 2007 were charged with drug or property offenses. PEW CTR. ON THE STATES, *supra* note 17, at 6. Only 17 percent were charged with violent crimes. *Id.* Similarly, 37 percent of parolees were charged with a drug offense. *Id.*

22. Warren, *supra* note 21, at 585. Approximately 75 percent of state felony defendants have a prior arrest record. *Id.* About half of the people released will return to the prison system within three years. Graeme Wood, *Prison Without Walls*, THE ATLANTIC, Sept. 2010, at 88. Some scholars have concluded that prison is often "counterproductive," with tough conditions that make many inmates "more violent and predatory." *Id.*

23. From 1985–2004, state corrections expenditures increased over 200 percent. Warren, *supra* note 21, at 585. This exceeded every other item included in state budgets. *Id.*

24. Wood, *supra* note 22, at 88. The number of inmates has tripled since 1983. *Id.* The cost per inmate in California, for example, is \$50,000 per year. *Id.*

25. Minority communities in particular have suffered. In 2005, 8.1 percent of African

Several factors explain the constant increase in incarceration and surveillance. Mandatory federal and state sentencing guidelines guarantee tough punitive measures while eliminating judicial discretion.<sup>26</sup> The system is overwhelmed by over-incarceration of nonviolent offenders such as drug users.<sup>27</sup> Privatized and politicized industry is increasingly invested in expansion of the system, a phenomenon well known as the prison-industrial complex.<sup>28</sup> Outside of the physical prison system, monitoring of offenders at the pretrial, probation, and parole stages adds to the criminal framework while producing unique challenges.<sup>29</sup> Overall, this expansion suggests the need for lasting solutions that minimize the role of the criminal system in American society.

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American males aged 25–29 were in prison. Warren, *supra* note 21, at 586. An African American male born in 2004 has an estimated 32 percent chance of being incarcerated during his lifetime. *Id.* See also ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 9–26 (2008) (citing the disproportionate impact of U.S. criminal policy upon African American communities); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (asserting that the criminal system functions as the modern, reinvented form of racial control in the United States).

26. See Eric Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 *CARDOZO L. REV.* 1 (2010). Three strikes laws, which first gained notoriety in California, mandate long prison sentences for repeat offenders. See Regents of the University of California, *Coleman/Plata: Highlighting the Need to Establish an Independent Corrections Commission in California*, 15 *BERKELEY J. CRIM L.* 97 (2010). Judges face many difficulties during sentencing. See Warren, *supra* note 21, at 587. The most frequent complaints of sentencing judges included high recidivism rates, the ineffectiveness of probation in reducing recidivism, the lack of alternatives, and a lack of judicial discretion. *Id.*

27. Warren, *supra* note 21, at 585.

28. See, e.g., Marsha Weissman, *Aspiring to the Impracticable: Alternatives to Incarceration in the Era of Mass Incarceration*, 33 *N.Y.U. REV. L. & SOC. CHANGE* 235, 262 (2009) (“surpluses in capital, land, labor, and state capacity made prisons an increasingly attractive investment”).

29. Recidivism is especially clear in this context, as about a third of state felony defendants committing new crimes were on probation, parole, or pretrial release when arrested. *Id.* Ex-convicts, particularly those recently released from prison, face collateral consequences such as challenges re-adjusting and finding jobs. See THOMPSON, *supra* note 25, at 21–22. Many drug and alcohol abusers fall back into old habits. *Id.* at 92–93. Probation and parole officers and judges are often forced to decide whether to ignore the offense or revoke probation. Since the probation and parole systems lack effective accountability measures and uniform standards, inconsistent and unduly harsh penalties often result. *Id.* at 143–45.

### B. Changing the System

The goals and norms of the corrections system transform as it expands. Discussing the evolution of sentencing theories over time, Roger Warren maintains “the goals of retribution, incapacitation, and general deterrence came to supersede the goals of rehabilitation and specific deterrence.”<sup>30</sup> David Garland has appropriately termed the phrase “culture of control” to describe the new systemic norm of surveillance.<sup>31</sup> The Supreme Court’s recent acknowledgment in *Brown v. Plata* of the unconstitutionality and unsustainability of prison overcrowding reflects disapproval of over-incarceration.<sup>32</sup>

At the same time, ever-evolving policy solutions propose to minimize and improve the corrections system. Since the 1970s, advocates of “alternatives to incarceration” have called for the replacement of prisons with community-based programming.<sup>33</sup> Proponents of alternatives to incarceration often clash in a framing debate between the notions of “surveillance and control” and “treatment.”<sup>34</sup> Other scholars stress a broader structural focus upon

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30. Warren, *supra* note 21, at 589. Several parameters, both objective and subjective, may determine whether the goals of EM technologies are achieved. Objectives of the criminal surveillance and punishment structure include deterrence, rehabilitation, preventing recidivism, low costs and high benefits to society, and fulfilling norms of justice and fairness.

31. See generally DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001). Garland analyzes changes in the American and British penal systems over the past forty years. He argues that the most significant departure from the “penal-welfare” structures of the past is “at the level of culture that enlivens these structures, orders their use, and shapes their meaning.” *Id.* at 27, 167. Critiquing current social arrangements from a sociological perspective, Garland maintains that the “crime control field is characterized by two interlocking and mutually conditioning patterns of action: the formal controls exercised by the state’s criminal justice agencies and the informal social controls that are embedded in the everyday activities and interactions of civil society.” *Id.* at 5.

32. *Brown v. Plata*, 131 S. Ct. 1910 (2011) (enforcing population limits in overcrowded California prisons and finding conditions so appalling as to violate the Eighth Amendment’s ban on cruel and unusual punishment).

33. In 1976, a group of citizens called the Prison Research Education Action Project introduced a handbook called “Instead of Prisons.” Weissman, *supra* note 28, at 262. The handbook targeted the recommended “alternatives-to-incarceration” (ATI) programs as a solution to increased incarceration in American society. *Id.* It suggested excarceration rather than incarceration—focusing upon community-based punishments outside of prison within the “larger contexts of poverty, inequality, and racism.” *Id.*

34. See James Byrne & Faye S. Taxman, *Crime Control Strategies and Community Change—Reframing the Surveillance vs. Treatment Debate*, FED. PROBATION 3, June 2006. After examining both sides of the debate, Byrne and Taxman argue that there is a “need to

improving conditions for the individual offenders and communities at stake.<sup>35</sup> On the ground, many criminal courts and probation officers support the use of “intermediate sanctions” to deal with overcrowded dockets, prisons, and client caseloads.<sup>36</sup> This type of sanction substitutes community-based treatment, strict surveillance, or some other method that fits in between incarceration and probation or parole.<sup>37</sup> Electronic monitoring technologies are often touted as an intermediate sanction targeting the expansion of the criminal system.<sup>38</sup>

### *C. The Development of Electronic Monitoring Systems*

Electronic monitoring technologies developed over time as a response to problems with the criminal system.<sup>39</sup> In the 1960s, Harvard researchers invented and assessed a prototype monitoring system to use upon juvenile offenders.<sup>40</sup> The public responded unfavorably on the whole, fearing that the devices were overly intrusive.<sup>41</sup> Twenty years later, in 1983, a New Mexico district court judge first sentenced offenders to electronic monitoring by home

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develop *both* individual, offender-based rehabilitation programs *and* the community-based change strategies targeting the ‘at-risk’ communities where many offenders reside.” *Id.* at 4.

35. Byrne and Taxman conclude that holistically targeting the individual and the community is more important than hashing out this debate. *Id.* “Both models emphasize ‘crime control’ effects, and both models define success in terms of individual ‘desistance’ from crime, rather than changes in the crime rates overall in a particular community.” *Id.*

36. States including Kansas and Texas have implemented programs using a “mix of community-based programs such as day reporting centers, treatment facilities, electronic monitoring systems and community service-tactics.” PEW CTR. ON THE STATES, *supra* note 17, at 6. “Another common intervention, used in Kansas and Nevada, is making small reductions in prison terms for inmates who complete substance abuse treatment and other programs designed to cut their risk of recidivism.” *Id.*

37. *Id.*

38. See, e.g., Weissman, *supra* note 28.

39. See Robert S. Gable, *Left to Their Own Devices: Should Manufacturers of Offender Monitoring Equipment be Liable for Design Defect?*, 2009 U. ILL. J.L. TECH. & POL’Y 333, 335 (2009).

40. *Id.* A “1969 study indicated that the participants either adjusted to the monitoring system within the first few days or rejected it.” *Id.*

41. *Id.* See also *Anthropotelemetry: Dr. Schwitzgebel’s Machine*, 80 HARV. L. REV. 403 (1966).



detention.<sup>42</sup> Within the next few years, the manufacture and use of monitoring systems exploded.<sup>43</sup>

Both prison overcrowding and technological infrastructure advances instigated the rapid expansion of electronic monitoring technologies during the 1980s.<sup>44</sup> The well-publicized use of electronic monitoring on Lohan represents a broader trend, as its use on a variety of offenders is now considered routine throughout the United States.<sup>45</sup> In 2009, almost 100,000 GPS tracking units were in use in the United States, as compared to 230 in 1999.<sup>46</sup> Numerous companies offer not only GPS tracking equipment, but also devices

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42. Gable, *supra* note 39, at 335. The district court judge, Jack Love of New Mexico, sentenced five adults to thirty days of home detention. *Id.* His stated expectation was that the offenders would avoid incarceration while still acknowledging the severity of the offense. *Id.*

43. *Id.* In 1984, the Florida-based Controlled Activities Corporation began manufacturing a device that it tested on twelve local probationers. *Id.* at 336. Another Florida-based company, Digital Products Corporation, created a new system that did not require batteries. *Id.* By 1990, approximately sixteen such equipment manufacturers existed. *Id.* In 1987, over nine hundred offenders in twenty-one states were being monitored. *Id.*

44. Electronic monitoring has been portrayed as a “socially expedient intermediate sanction that is more punitive than traditional probation, but less harsh than incarceration.” Ralph Kirkland Gable & Robert S. Gable, *Electronic Monitoring: Positive Intervention Strategies*, FED. PROBATION 21, June 2005, at 21.

45. See, e.g., GPS MONITORING SOLUTIONS INC., <http://gpsmonitoring.com/blog/>, a blog tracking news items and other developments in the use of electronic monitoring. For example, one of the top monitoring technology manufacture and service centers, BI Incorporated, is responsible for the GPS monitoring anklets of approximately 65,000 offenders. Wood, *supra* note 22, at 88. BI started developing EM technologies in the late 1970s by monitoring cows with automatic feed dispensers. *Id.* By the 1980s, BI had begun to create people-monitoring devices. *Id.* The company now monitors a variety of criminals throughout the United States. *Id.*

Founded in 1978, BI Incorporated supports approximately 900 correctional agencies today in the United States, Canada, Puerto Rico, Guam and Australia. BI provides agencies with innovative compliance technologies, industry-leading monitoring services, and evidence-based supervision and treatment programs for community-based parolees, probationers, and pretrial defendants. BI's solutions help federal, state and local agencies to supervise a range of individuals—from low- to high-risk offender populations. BI combines the latest in technology, expert technical and customer service, ISO-certified manufacturing practices, and evidence-based treatment and counseling programs to assist agencies to curb future crime and conserve scarce local resources.

BI, <http://www.bi.com/> (last visited Jan. 28, 2011).

46. BUREAU OF JUSTICE ASSISTANCE, OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY: COMMUNITY CORRECTIONS RESOURCE (2d. ed. 2009), [http://www.appa-net.org/eweb/docs/APPA/pubs/OSET\\_2.pdf](http://www.appa-net.org/eweb/docs/APPA/pubs/OSET_2.pdf), at 17 (comprehensive corrections-focused resource on electronic supervision). Approximately 20 percent of all community-based supervisees in the United States during 2005 were subject to electronic monitoring. Gable, *supra* note 39, at 21.

such as SCRAM drug and alcohol monitoring ankle bracelets, drug testing software, and hidden cameras.<sup>47</sup> New technologies continue to emerge and become more complex.<sup>48</sup>

In modern practice, EM technologies have numerous applications. An offender may be assigned an EM device during the pretrial release, probation, parole, or supervised release stages.<sup>49</sup> Electronic monitoring is sometimes used as an alternative to incarceration, and often used in conjunction with other conditions and punishments.<sup>50</sup>

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47. There are two main kinds of monitors. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321 (2008). The first tracks location using a GPS system and will alert authorities if the person leaves or enters assigned zones. *Id.* The second type, which monitors alcohol and drug consumption, biometrically tests for chemical substances. *Id.* Examples are ignition interlocks, ankle bracelets (such as that worn by Lohan), and in-home breathalyzer equipment. See PEW CTR. ON THE STATES, *supra* note 17, at 25. These devices are available for purchase by federal, state, and local corrections agencies as well as individual consumers. See, e.g., QUEST GUARD, <http://www.questguard.com/> (last visited Mar. 4, 2012); AMERICAN COURT SERVICES, <http://www.americancourtservices.com/> (last visited Mar. 4, 2012); BRICK HOUSE SECURITY, <http://www.brickhousesecurity.com/government-surveillance-military-equipment-police-gear-law-enforcement.html> (last visited Mar. 4, 2012); ALCOHOL MONITORING SYSTEMS, <http://www.alcoholmonitoring.com/index> (last visited Mar. 4, 2012).

48. New GPS devices “monitor criminals’ real-time locations down to a few meters.” Wood, *supra* note 22, at 88. These devices monitor movements in order “to ensure compliance” with a probation or parole officer’s mandate to stay away from forbidden “exclusion zones” or go to specific “inclusion zones.” *Id.* An alert goes to the call center if instructions are disobeyed. *Id.* The necessary supervisors will then be informed so they can assess punishment. *Id.* A warning to the transgressor may even come straight from the device. *Id.*

49. Supervised release occurs after a prisoner’s formal sentence in prison is completed. For an example of the “world’s largest pretrial monitoring program,” which has an average daily population of about four hundred supervisees, see COOK CNTY. SHERIFF’S OFFICE DEP’T. OF COMMUNITY SUPERVISION AND INTERVENTION ELECTRONIC MONITORING, [http://www.cookcountysheriff.org/departments/departments\\_dcsi\\_electronicmonitoring.html](http://www.cookcountysheriff.org/departments/departments_dcsi_electronicmonitoring.html) (last visited March 4, 2012) (“The monitoring program is utilized as a community-based alternative incarceration concept that allows non-violent, pre-trial and short-time sentenced inmates to remain in the community instead of being incarcerated in jail. The average daily population of this program is approximately 400, of which 85% are pre-trial.”).

50. EM technologies are “becoming more commonly used as an alternative sanction for some offenders and as an adjunct to traditional community supervision practices for others.” PEW CTR. ON THE STATES, *supra* note 17, at 25. Tracking equipment is often used in conjunction with other methods of surveillance, restrictions, and sanctions. *Id.* Diverse requirements of probation include drug tests, meetings with probation officers, work or school requirements. Wood, *supra* note 22, at 88. EM surveillance may test to make sure offenders stay out of restricted zones, which can be as limited as home plans or as broad as only being banned from one place, such as the scene of a crime. *Id.* Various conditions of probation are bundled together as prosecutors make plea deals or judges decide sentences. *Id.* For example, in Lohan’s case, she not only wore a GPS bracelet but also had specific drug testing and meetings with her probation officer. Kim & Blankstein, *supra* note 2.

Generally, an offender's location is actively monitored, with the offender subject to punishment for transgressions.<sup>51</sup> Moreover, EM devices are increasingly used outside of the formal criminal process, even in noncriminal contexts.<sup>52</sup>

A number of states have enacted pilot and permanent programs employing electronic monitoring.<sup>53</sup> The diverse range of targeted groups includes juveniles,<sup>54</sup> aging inmates,<sup>55</sup> sex offenders,<sup>56</sup> suspected gang members,<sup>57</sup> domestic violence offenders,<sup>58</sup> and

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51. "Active" monitoring constantly sends signals to a center, and GPS monitoring may give detailed information on whereabouts and actions. PEW CTR. ON THE STATES, *supra* note 17, at 25. A Chief U.S. Probation Officer maintains, "We can, with reasonable certainty, know where someone has been." *Id.*

52. *See* Murphy, *supra* note 47, at 1332. Technologies have also been translated to other contexts, both criminal and non-criminal, ranging from elderly Alzheimer's patients to immigrants subject to removal. *Id.* The phenomenon of evidence-based interventions has also emerged as technology has developed. *See* Weissman, *supra* note 28, at 238 (referring to "empirically verified behavioral programs that improve an individual's functions in areas of health, mental health, education, employment, and other related areas").

53. Florida, for example, uses EM technologies extensively. *See* DuPont et al., *supra* note 18. Its "community control" program began in the 1980s, with a large-scale study on the effects of monitoring. PEW CTR. ON THE STATES, *supra* note 17, at 25.

54. The District of Columbia's juvenile justice agency recently created a pilot program to put GPS monitors on youth offenders. Freeman Klopott, *D.C. Turns to GPS to Monitor Young Criminals*, WASH. EXAM'R, Sept. 24, 2010, [http://www.washingtonexaminer.com/local/D\\_C\\_turns-to-GPS-to-monitor-young-criminals-986229-103746669.html](http://www.washingtonexaminer.com/local/D_C_turns-to-GPS-to-monitor-young-criminals-986229-103746669.html). This adds to a previous D.C. program targeting adult offenders. *Id.*

One hope is that monitoring can be used as an alternative to juvenile detention centers. *Id.* Case managers verify that the juveniles are attending school, treatment, or staying at home as required. *Id.* They receive email alerts when transgressions occur. *Id.* Approximately two hundred bracelets had been purchased by September 2001. *Id.* Costs for the devices are up to \$12 per day, so the implementing agency is applying for grants. *Id.*

55. Aging Inmate Committee of the Maryland Bar Association, *Aging Inmates: Correctional Issues and Initiatives*, 42 MD. Bar J. 22 (2011) (suggesting cost savings by using community-based EM technologies as an alternative to incarceration of aging prisoners).

56. EM surveillance has been used prominently in recent years upon sex offenders subject to supervised release. Murphy, *supra* note 47, at 1333. In 2008, almost twenty states had statutes authorizing electronic location tracking for sex offenders. *Id.* Provisions are often broadly, categorically drawn (for example, applying equally to all prior sexual offenders) and apply retroactively. *Id.* Many ex-offenders are subject to lifetime monitoring. *Id.* *See also* Sarah Shekhter, *Every Step You Take, They'll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex Offenders*, 38 HASTINGS CONST. L.Q. 1085 (2011).

57. In California's San Bernardino County, a pilot program uses GPS technology to track alleged gang members. *See* Murphy, *supra* note 47, at 1334. A Connecticut program started in 2007 assigns GPS devices to all parolees convicted of violent burglaries. *Id.* Santa Fe, New Mexico is also considering a program for burglars. *See* Gadi Schwartz, *SFPD Wants Burglars Ankle Monitored*, KOB ONLINE, Sept. 28, 2010, <http://www.kob.com/article/stories/S1766089.shtml?cat=504>.

immigrants.<sup>59</sup> Tracking devices are most commonly used on nonviolent offenders.<sup>60</sup> Some EM programs simply track offenders to ensure that they follow the terms of release.<sup>61</sup> Others combine regular monitoring with swift and certain sanctions.<sup>62</sup> On the whole, the demonstrable development of EM technology programs suggests that they will become entrenched in the U.S. corrections system.

#### D. The “Swift and Certain” Paradigm

Key to the adoption of EM technologies is the expectation that offenders subject to monitoring will be encouraged to modify their behavior. The belief that penal surveillance can prompt positive psychological change in offenders has long existed. In the eighteenth century, Jeremy Bentham designed a hypothetical prison called the Panopticon, in which prisoners imagine they are endlessly observed by an all-seeing guard.<sup>63</sup> Many recently established programs draw

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58. Also in Connecticut, a 2010 pilot program targets domestic violence offenders. See Bill Leukhardt, *Program Will Use GPS to Track Domestic Violence Offenders*, HARTFORD COURANT, Apr. 4, 2010, [http://articles.courant.com/2010-04-04/news/hc-domestic-violence-gps-0403\\_1\\_offender-and-victim-high-risk-offenders-criminal-court](http://articles.courant.com/2010-04-04/news/hc-domestic-violence-gps-0403_1_offender-and-victim-high-risk-offenders-criminal-court). One interesting characteristic of this pilot program is that both the offender and the victim will wear tracking bracelets. *Id.* The program will initially last one year on federal stimulus funding of \$140,000. *Id.*

59. *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants*, 23 INT'L J. REFUGEE L. 876 (2011) (advocating for electronic monitoring as one alternative to detention of undocumented immigrants, specifically refugees and asylum seekers).

60. Gable & Gable, *supra* note 44, at 21. Monitoring is most commonly used with nonviolent offenses such as drug possession, driving under the influence, driving without a license, petty theft, welfare or housing fraud, and credit card offenses. *Id.* Selection criteria often limit availability to persons with family support, employment, school, or those who can pay a participation fee. *Id.*

61. PEW CTR. ON THE STATES, *supra* note 17, at 25.

62. See Wood, *supra* note 22, at 88 (citing the use of “pilot programs that demand adherence to onerous parole guidelines, such as frequent, random drug testing, and that provide for immediate punishment if the parolees fail”).

63. See BENTHAM, *supra* note 1.

Inside the Panopticon (the name is derived from the Greek word for “all-seeing”), the prisoners are arranged in a ring of cells surrounding their guard, who is concealed in a tower in the center. The idea is that the guard controls the prisoners through his presumed observation: they constantly imagine his eyes on them, even when he’s looking elsewhere. Bentham promoted the concept of the Panopticon for much the same reasons that spur criminal-justice innovation today—a ballooning prison population and the need for a cheap solution with light manpower demands. Whereas the guard in Bentham’s day had only two eyes, however, today’s watcher can be

upon Bentham-like psychology in operating with “swift, certain and proportionate” surveillance guidelines and sanctions.<sup>64</sup> Proponents claim the combination of constant surveillance and “swift and certain” punishment will instigate behavioral changes, ultimately decreasing criminality.<sup>65</sup> The ultimate goal is to deter crime—thus reducing incarceration and recidivism, and allowing for community rebuilding.<sup>66</sup> Two applications of the swift and certain paradigm show promising results.

First, criminologist David Kennedy has spent over twenty-five years developing his approach to crime prevention.<sup>67</sup> In *Don't Shoot: One Man, A Street Fellowship, and the End of Violence in Inner-City America*, Kennedy highlights past work and successes in cities including Boston, Baltimore, and Cincinnati.<sup>68</sup> Kennedy's approach to deterrence is relatively simple: by preventatively shaping individual and group behavior, law enforcement can avoid locking up offenders.<sup>69</sup> Initially, his team identifies core offenders, such as the

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virtually all-seeing, thanks to GPS monitoring technology. The modern prisoner, in other words, need not wonder whether he is being observed; he can be sure that he is, and at all times.

Wood, *supra* note 22, at 88. See also MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1975) (applying the concept of Panopticon surveillance to nineteenth-century society).

64. Probation and parole systems should have graduated sanctioning according to the range of offenses committed. PEW CTR. ON THE STATES, *supra* note 17, at 25. For example, community service may be assigned for more minor transgressions while day reporting or secure residential treatment facilities could be assigned for serious or repeat offenses. *Id.* “Clear authority” such as a respected official should impose the sanctions. *Id.* Pew recommends that certainty and swiftness can be maximized if states “provide parole and probation agencies the authority to move offenders up and down the ladder of sanction programs—even including short stays in jail—without first requiring a time-consuming trip back to court.” *Id.*

65. Wood, *supra* note 22, at 92. Philosopher Cesare Beccaria first introduced the theory of swift and certain justice in the mid 1700s. *Id.* He proposed the use of “immediate, automatic penalties—though not necessarily severe ones—doled out by credible, identifiable figures.” *Id.*

66. “If applied in that way, sanctions can stop misbehavior early in the game, thereby reducing the odds that parolees and probationers will commit more serious violations and land in an expensive prison cell.” *Id.*

67. DAVID M. KENNEDY, *DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA* (2011).

68. *Id.*

69. *Id.* at 218 (Kennedy's team looks at “law enforcement as a way to shape behavior and get compliance, not to sweep the streets and stuff the prisons. They sit down with likely offenders and say, Here's what we're going to do if you make us, please don't . . . They use clearer and more transparent strategies to make it more appealing to go get help.”).

few key leaders connected to recent gang shootings.<sup>70</sup> Next, his team partners, organizes, and strategizes with law enforcement, service providers, and influential community voices.<sup>71</sup> Kennedy's employment of the swift and certain paradigm involves building "a sustained relationship between the partnership and the streets in which we clearly, crisply, and repeatedly spell out standards, opportunities, and consequences."<sup>72</sup> Kennedy's team held community forums with key gang members to promote deterrence.<sup>73</sup> For instance, at one forum, the team presented influential drug dealers with binders of probative incriminating evidence against them, warning them that any future slip-up would result in prosecution.<sup>74</sup> Communities have responded remarkably well to this approach, demonstrated anecdotally and by statistics such as reduced gang killings.<sup>75</sup> Over fifty jurisdictions are involved with the team's National Network for Safe Communities, signifying growing acceptance and use of this approach.<sup>76</sup>

Second, Hawaii's Opportunity Probation with Enforcement (HOPE) program stresses the swift and certain paradigm. Judge Steve Alm of Hawaii's First Circuit Court in Honolulu created HOPE in 2004.<sup>77</sup> Alm, a former prosecutor, envisioned a process that would decrease probation violations and recidivism in the long term, particularly by drug offenders.<sup>78</sup> The basic premise is that offenders are subject to both constant monitoring and "swift, predictable, and immediate sanctions" for violations.<sup>79</sup> The judge warns HOPE participants in an initial hearing that they will be sent to jail for any violation.<sup>80</sup> Over the course of the next few months, the court randomly drug tests participants.<sup>81</sup> An offender who fails a drug test,

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70. *Id.* at 269.

71. *Id.*

72. *Id.*

73. *Id.* at 62–66, 173–83, 248–54.

74. *Id.* at 179.

75. *Id.* at 268.

76. *Id.*

77. Dupont et al., *supra* note 18, at 38.

78. FRIENDS OF HOPE, <http://www.hopeprobation.org> (last visited Oct. 22, 2010). Alm created the program as a response to his frustrations with the probation system. *Id.*

79. *Id.*

80. *Id.*

81. The testing begins at a rate of at least one weekly test during the first two months of

does not appear for an appointment, or violates another probation term is immediately arrested.<sup>82</sup> The average transgressor is sentenced to a short time in jail.<sup>83</sup> Repeat offenders may receive longer jail sentences or residential treatment.<sup>84</sup>

Strong publicity and initial statistical results indicate a positive response to HOPE.<sup>85</sup> Statistical improvements occurred in drug test results, missed appointments, and the percentage of probation revocations.<sup>86</sup> One study estimated that recidivism was cut in half.<sup>87</sup> Several jurisdictions have created similar programs based upon the program and its use of the swift and certain paradigm.<sup>88</sup> National

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the program. *Id.* Each probationer must call a court hotline every weekday morning to see if they will be subject to a drug test on that day. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* This program differs from normal probation in a number of ways. Regular, non-HOPE probationers are given scheduled probation appointments and drug tests. Dupont et al., *supra* note 18, at 38. If probation is violated, the probation officer has discretion over punishment. *Id.* Probationers may be warned or sanctioned lightly. *Id.* The only option may be probation revocation. *Id.* HOPE, on the other hand, is only available for offenders who meet specific conditions. *Id.* An offender must make an individual request and be judged by the court to have a demonstrated need for the treatment, which is shown by relapses in drug use. *Id.* Dupont et al. argue that limiting mandated treatment in this manner reduces costs and “ensures that those who need it the most receive it.” *Id.* Clearly, this is a limiting aspect of the current HOPE program.

85. See ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE 4, 25 (2010), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> (two evaluation studies found, *inter alia*, that HOPE probationers were significantly less likely to be re-arrested within the next year or revoked from probation). See also RICHARD KIYABU ET AL., HAWAII’S OPPORTUNITY PROBATION WITH ENFORCEMENT (HOPE): AN IMPLEMENTATION ANALYSIS (2010) (finding that specific network strategies achieved buy-in from the program’s necessary members). Wood praises HOPE as a “revolutionary possibility,” claiming that its model could “save billions of dollars annually, it could theoretically produce far better outcomes, training convicts to become law-abiders rather than more-ruthless lawbreakers. The ultimate result could be lower crime rates, at a reduced cost, and with considerably less inhumanity in the bargain.” Wood, *supra* note 22, at 88.

86. In early 2010, HOPE had approximately 1,200 participants, all of whom were probationers. Dupont et al., *supra* note 18, at 38. “In an initial pilot study of HOPE, nearly half of the participants stopped using drugs immediately after participating in the formal warning hearing; more than half of the remainder stopped using drugs after a single experience of the jail sanction.” *Id.*

87. See HAWKEN & KLEIMAN, *supra* note 85.

88. Nevada, Oregon, and Alaska have established similar programs on a smaller scale based on the HOPE program. See Wood, *supra* note 22, at 93. The next challenges for the HOPE program will be “to test the model to other jurisdictions in the United States and to include parole and bail populations along with probationers.” Dupont et al., *supra* note 18, at 39

HOPE legislation introduced in the House of Representatives proposes to provide seed grants for other states to implement similar programs.<sup>89</sup> The swift and certain approach employed by both the Kennedy and HOPE programs is likely to influence future developments in crime control. After considering the institutionalization of EM surveillance in the context of the modern criminal system, this Note suggests that the swift and certain approach may prove useful in guiding the future implementation of EM technologies.

## II. ANALYSIS

### A. *The Need for Solutions*

The current U.S. criminal system clearly faces many difficulties, particularly an overwhelming and unceasing expansion.<sup>90</sup> Policymakers, courts, and corporations offer EM technologies as a solution, promising less incarceration, lower costs, and more efficiency.<sup>91</sup> These potential benefits must be weighed against the practical costs of EM surveillance. This Part contends that EM surveillance is institutionalizing new populations, new industry, and new constitutional concerns. Ultimately, the lack of new results

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(also discussing South Dakota's 24/7 Sobriety Project and Driving Under the Influence and Drug Courts as examples of programs similar to HOPE). For example, a program in Georgia called Probation Options Management allows chief probation officers and hearing officers "to impose administrative sanctions on violators in certain circumstances." PEW CTR. ON THE STATES, *supra* note 17, at 26. One evaluation estimated that the program has reduced the number of days an offender spends in jail waiting for court by 70 percent, reduced jail costs by approximately \$1.1 million, and freed time for probation officers to spend helping offenders rather than waiting in court. *Id.*

89. See Honest Opportunity Probation with Enforcement (HOPE) Initiative Act of 2009, H.R. 4055, 111th Cong. (2009). The bill was sponsored by Representatives Adam B. Schiff (D-California) and Ted Poe (R-Texas). *Id.* After its introduction, the HOPE legislation was referred to the House Committee on the Judiciary. *Id.* Subcommittee Hearings on the bill were last held in May 2010, and it now sits in the House. *Id.* Drawing upon Congressional findings as to the high costs of the criminal system, the results of incarceration, and the success of Hawaii's HOPE, the proposed bill's stated purpose is "to authorize a national HOPE Program to reduce drug use, crime, and the costs of incarceration." *Id.* The bill calls for competitive seed money in the form of "HOPE Initiative Grants" to be available to individual state programs. *Id.*

90. See *supra* notes 23–24 and accompanying text (discussing recent expansion of the system).

91. See, e.g., Gable & Gable, *supra* note 44.



suggests that thus far EM surveillance has augmented the culture of control without providing systemic solutions.<sup>92</sup>

### *B. New Populations*

First, EM surveillance brings new populations under the control of the criminal system. Proposed and implemented state and federal programs adopting EM technologies target all kinds of offenders at all stages of the criminal process.<sup>93</sup> Basically, these programs aim to attach EM surveillance to all populations except the most serious and violent.<sup>94</sup> At least some of these populations would not in fact be incarcerated or otherwise under physical control.<sup>95</sup> For example, populations now commonly subject to EM surveillance during the pretrial and supervised release stages traditionally would have been free of court control.<sup>96</sup> Therefore, looking at EM surveillance as a de-carceration tool is not sufficient.

As EM technologies become increasingly cost-effective and manageable, the likelihood that they will be used upon greater numbers of the population and for longer periods of time multiplies.<sup>97</sup> The total offender population under some form of criminal surveillance will likely continue to increase rather than decrease.<sup>98</sup> This phenomenon is known as net widening.<sup>99</sup> It appears that net widening is taking place as EM programs are institutionalized.<sup>100</sup> As new surveillance technologies are invented and developed, it is likely

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92. See generally GARLAND, *supra* note 31 (assessing and arguing for the reduction of the current “culture of control”).

93. See *supra* notes 52–60 and accompanying text (referencing state programs using electronic monitoring and the various populations targeted).

94. *Id.*

95. *Id.*

96. See, e.g., *supra* note 56 and accompanying text (discussing the extensive use of supervised release monitoring upon sex offenders).

97. See, e.g., Stephen Mainprize, *Electronic Monitoring in Corrections: Assessing Cost Effectiveness and the Potential for Widening the Net of Social Control*, 34 CANADIAN J. CRIMINOLOGY 161 (1992) (concluding that a British Columbia electronic monitoring program promoted overall systemic expansion); see also *supra* notes 49–62 and accompanying text.

98. Mainprize, *supra* note 97, at 176.

99. *Id.* at 164.

100. *Id.* at 176.

that the number of supervisees will only continue to grow.<sup>101</sup> Thus, stakeholders must be wary of EM surveillance's role in introducing new populations to the culture of control.

### C. New Industry

Next, a new industry touting EM technologies is emerging and becoming entrenched in the prison-industrial complex.<sup>102</sup> While privatization and outsourcing impact many aspects of the American criminal system, these issues are especially clear in the context of the industry built upon technological devices.<sup>103</sup> Financial costs to the corrections system<sup>104</sup> and individual offenders<sup>105</sup> actually appear to be augmented by the creation of new EM programs and punishments. Taxpayer funds go to private industry instead of back towards improvement of the system.<sup>106</sup> The industry profiting from EM surveillance wants to grow larger by becoming necessary to the criminal system, possibly exploiting individual offenders and taxpayers in the process.

In addition, EM devices pose unique technological challenges including product design, malfunction-related difficulties, and risk calculation.<sup>107</sup> For example, a glitch in BI Incorporated's system in

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101. See *supra* notes 47–48 and accompanying text (discussing the development of new technologies).

102. See *supra* notes 28, 45–48 and accompanying text.

103. See, e.g., Weissman, *supra* note 28, at 262–64.

104. The current probation and parole system is actually relatively cheap, especially compared to the costs of sentencing and incarceration. See PEW CTR. ON THE STATES, *supra* note 17, at 12. Currently, almost 90 percent of state corrections funds are spent on prisons rather than on probationers or parolees. *Id.*

105. The costs of electronic monitoring devices, repair, and check-ins are more often than not paid by offenders. See PEW CTR. ON THE STATES, *supra* note 17. The costs of monitoring may add up to several dollars per day. *Id.* This becomes a challenge where EM is only available to those offenders who can afford it. *Id.* Some programs, however, do subsidize the costs of EM surveillance for low-income offenders. *Id.*

106. See Weissman, *supra* note 28, at 264. While the privatization and expansion of prisons may provide new jobs, the disproportionate impacts upon low-income and African American communities demonstrate the dangers of such development. *Id.*

107. See Gable, *supra* note 39, at 39 (concluding after a risk-utility assessment that “manufacturers are currently distributing a defective product in light of the availability of a more effective and economically feasible design”). Some companies have begun to develop risk-management plans and operations. Wood, *supra* note 22, at 88. For example, BI Incorporated has advanced backup systems, including “an ultrasecure data room and extreme

October 2010 allowed sixteen thousand offenders in forty-nine states to go unmonitored for twelve hours.<sup>108</sup> Such technological malfunctions demonstrate the need for risk-management planning and other safeguards.<sup>109</sup> Upon establishing more complex and effective technologies, the growing EM manufacturing and sales industry will cement its function in enlarging the prison-industrial complex.

#### *D. New Constitutional Concerns*

Finally, EM technologies create new constitutional concerns that remain unresolved. Courts have been slow to address the constitutionality of electronic monitoring of individuals.<sup>110</sup> The majority of relevant current litigation and debate centers upon Fourth Amendment search and seizure in warrantless location tracking, most recently addressed by the Supreme Court in *United States v. Jones*.<sup>111</sup> Nevertheless, a slew of emerging EM issues implicate key rights including privacy, liberty, equal protection, and freedom from ex post facto and cruel and unusual punishment.

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redundancy.” *Id.*; see also Kenneth A. Bamberger, *Technologies of Compliance: Risk and Regulation in a Digital Age*, 88 TEX. L. REV. 669 (2010) (discussing the viability of various risk calculations and regulations, along with the challenges of holding electronic monitoring systems providers accountable for technical malfunctions).

108. *U.S. Offenders Unmonitored as Tagging System Fails*, BBC NEWS (Oct. 7, 2010), <http://www.bbc.co.uk/news/world-us-canada-11491937> (referencing the repercussions of temporary failure of an electronic system hub).

109. See Bamberger, *supra* note 107, at 726.

110. “[C]hallenges to requirements to wear electronic monitors do not appear to have yet been fully litigated.” Murphy, *supra* note 47, at 1335. One potential explanation for the lack of litigation surrounding electronic monitoring, particularly at the level of the U.S. Supreme Court, is the substantial discretion given to sentencing judges and probation and parole officers. Interview with Taylor Landesman, J.D., Mo. (Nov. 2010). Most of these programs are created and assessed at the state and local levels. *Id.* Some litigation has occurred at the federal appellate level, with results typically favoring the discretionary use of electronic monitoring. See, e.g., *United States v. Edwards*, 960 F.2d 278, 283 (2d Cir. 1992) (holding that an offender subject to electronic monitoring while on bail would not receive credit towards his sentence); *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007) (holding that monitoring does not violate an offender’s constitutional rights under the ex post facto clause).

111. *United States v. Jones*, 132 S. Ct. 945 (2012) (holding that attaching GPS tracking device to criminal suspect’s vehicle for use in monitoring movements constitutes a search under the Fourth Amendment).

Whether EM surveillance functions as an anticipatory, alternative, or additional restriction to incarceration may determine which individual rights are at stake.<sup>112</sup> Constitutional issues arise both before and after punishment. First, offenders subject to pretrial release on bail or through a diversion program may argue that they are being punished without having been convicted, that their privacy is infringed, or that they are subject to excessive bail.<sup>113</sup> As few cases directly address pretrial EM surveillance, constitutional case law and analysis regarding the GPS tracking of suspected criminals may provide insight into the scope of the government's broad pre-conviction surveillance power.<sup>114</sup> Second, cases in which offenders have already completed punishment but are monitored either on parole or through another form of supervised release raises unique concerns under the Fourth Amendment, ex post facto clause, and Fourteenth Amendment.<sup>115</sup> The widespread EM surveillance of former sex offenders post-sentence demonstrates these concerns.<sup>116</sup>

Beyond the specific concerns regarding pretrial and post-release monitoring, EM surveillance raises a number of general constitutional questions. Both substantive and procedural due process rights may be threatened, particularly where judicial safeguards are indeterminate or nonexistent.<sup>117</sup> For example, assigning an EM device

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112. EM may function as an anticipatory restriction for a suspect released on bail, as an alternative restriction during post-conviction probation or parole, or as an additional restriction upon supervised release.

113. See, e.g., *United States v. Polouizzi*, 697 F. Supp. 2d 381 (E.D.N.Y. 2010) (finding mandatory attachment of EM surveillance to be unconstitutionally excessive bail and a violation of procedural due process as applied to defendant).

114. See *supra*, note 111 and accompanying text. Several scholars have addressed the overlap between privacy, the Fourth Amendment, and electronic monitoring. See, e.g., M. Ryan Calo, *People Can be So Fake: A New Dimension to Privacy and Technology Scholarship*, 114 PENN ST. L. REV. 809 (2010); Ian James Samuel, *Warrantless Location Tracking*, 83 N.Y.U. L. REV. 1324 (2008); Kevin Keener, Note, *Personal Privacy in the Face of Government Use of GPS*, 3 I/S: J.L. & POL'Y FOR INFO. SOC'Y 473 (2007–2008) (analyzing when suspects can be tracked by GPS without a warrant, including the release of vehicle and cell phone documentation from third party service providers).

115. See, e.g., Shekhter, *supra* note 56 at 1098–104 (concluding that lifetime monitoring of sex offenders in California threatens Fourth Amendment, ex post facto clause, and Fourteenth Amendment protections).

116. *Id.* at 1094–98.

117. The replacement of pure physical incarceration or preventive incapacitation with technological restraints may restrict certain freedoms with less stringent procedural requirements than incarceration. See Murphy, *supra* note 47, at 1334. There may be a need for

without consideration for the individual characteristics of the transgression or the transgressor arguably violates due process.<sup>118</sup> The overbroad and inflexible use of EM on specific populations may implicate equal protection concerns.<sup>119</sup> In addition, the stigma, physical bulkiness, and check-in requirements of many devices could initiate many more cruel and unusual punishment challenges.<sup>120</sup> As EM surveillance is now commonplace, more serious attention must be given to the individual rights at stake.

#### *E. No New Results*

Given the new populations controlled, industry created, and constitutional concerns implicated by EM surveillance, notable new results should be expected. After over twenty years of use, however, there is no real consensus on the viability of EM surveillance as a crime control tool. Studies, none of which can be considered comprehensive, show mixed results.<sup>121</sup> If anything, the majority of

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“greater judicial scrutiny of technological restraint,” particularly where technologies are assigned outside of the formal criminal process. *Id.* at 1322.

118. Kleiman terms the phenomenon of punishment disparities in probation and parole violations “randomized severity.” See Mark Kleiman, *When Brute Force Fails: How to Have Less Crime and Less Punishment*, HUFFINGTON POST, (Oct. 18, 2009, 5:08 PM), [http://www.huffingtonpost.com/mark-kleiman/when-brute-force-fails-ho\\_b\\_325256.html](http://www.huffingtonpost.com/mark-kleiman/when-brute-force-fails-ho_b_325256.html).

119. Equal protection challenges arise where certain classes of offenders, such as drunk drivers or sex offenders, are singled out for electronic monitoring. See Murphy, *supra* note 47, at 1334. The availability of EM surveillance may also vary with economic class, which requires consideration of which populations have access to EM in lieu of incarceration. See *supra* note 105 and accompanying text.

120. See, e.g., Wood, *supra* note 22, at 87, 94 (reporting *inter alia* that “over their lifetimes, many of the trackers become encrusted with the filth and dead skin of previous bearers, some of whom are infected with prison plagues such as herpes or hepatitis”).

121. See, e.g., NAT’L INST. OF JUSTICE, U.S. DEP’T. OF JUSTICE, ELECTRONIC MONITORING REDUCES RECIDIVISM (2011), available at <https://www.ncjrs.gov/pdffiles1/nij/234460.pdf> (finding that electronic monitoring significantly reduced the likelihood of failure of Florida offenders under community supervision, while also noting negative effects including stigma); Office of Juvenile Justice and Delinquency Prevention, *Home Confinement/Electronic Monitoring*, OJJDP MODEL PROGRAMS GUIDE, available at <http://www.ojjdp.gov/mpg/programTypesHomeConfinement.aspx> (last visited May 6, 2012) (summarizing a number of studies on EM surveillance: “Several studies have examined the impact of home confinement or electronic monitoring on recidivism. Most of the early research suffered from poor research designs, a lack of program integrity, and an exclusive use of low-risk adult offenders. These studies indicated that home confinement programs produce a low rearrest rate of about five percent. More recently, several studies examining both pretrial and post adjudication programs found low recidivism rates using experimental designs but no significant difference in recidivism

EM surveillance programs have yet to unmistakably accomplish their objectives.<sup>122</sup>

In analyzing the viability of electronic monitoring, it is important to identify which objectives should define improvement of the criminal system.<sup>123</sup> Studies of EM thus far tend to focus narrowly upon one indicator, recidivism.<sup>124</sup> Instead, EM's success should be measured against a broader objective: reducing the overreach of the U.S. criminal system.<sup>125</sup> Over time, attempts to fix the criminal system have tended to provoke useless systemic expansion that increases the culture of control without decreasing crime.<sup>126</sup> By presenting it as a recidivism-reducing alternative to incarceration, electronic monitoring proponents evidently intend to reduce the scope of the criminal system.<sup>127</sup> Nevertheless, EM surveillance, like other lauded "alternatives to incarceration," clearly controverts this fundamental goal.<sup>128</sup> By bringing new populations under surveillance, embedding a new profit-making industry, and threatening individual rights, EM surveillance enlarges the overall criminal system. Even if minimal de-carceration takes place, EM surveillance unjustifiably

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between offenders under electronic monitoring and under close manual supervision.") (citations omitted); Jody Klein-Saffran, *Electronic Monitoring v. Halfway Houses: A Study of Federal Offenders*, ALTERNATIVES TO INCARCERATION (1995), available at [http://www.bop.gov/news/research\\_projects/published\\_reports/gen\\_program\\_eval/orepralternatives.pdf](http://www.bop.gov/news/research_projects/published_reports/gen_program_eval/orepralternatives.pdf) (finding no significant difference in recidivism in offenders subject to electronic monitoring versus those in halfway house programs).

122. Gable, *supra* note 39, at 341 ("Most current monitoring programs, with some notable exceptions, fail to produce desired results.").

123. *See supra* note 30 and accompanying text.

124. *See* studies on recidivism cited *supra* note 121; Gable & Gable, *supra* note 44, at 21 ("The most common outcome variables include recidivism, revocations, and recorded infractions.").

125. *See supra* Part I.A.

126. Proponents of widespread EM surveillance implementation should cautiously consider the mixed results of numerous proposed and implemented alternatives to incarceration (ATI) programs. Weissman, *supra* note 28. Weissman argues that ATI programs, now widely used, have "become part of a technocratic criminal justice system, characterized by punishment, increasing control over social institutions, and a dominant focus on fiscal calculations . . . term[ed] 'the culture of control.'" *Id.* at 235–36. Therefore, the problematic use of incarceration, structural issues with the criminal justice system, and underlying societal programs remain despite the best-intentioned attempts of ATI programming. *Id.*

127. *See supra* notes 44, 121 and accompanying text. The defining paradigm in this context could be called "de-systemization." Encompassing de-carceration and decriminalization, this term targets reduction of the overall criminal system.

128. *See supra* note 126 and accompanying text.

expands the reach of the criminal system by further amplifying the culture of control.

This is not to say that EM surveillance must be a total failure. Advocates of electronic monitoring technologies continue to laud potential benefits such as cost savings and efficiency.<sup>129</sup> Decreased recidivism and de-carceration would be positive outcomes, and would promote societal productivity and community stability.<sup>130</sup> Nevertheless, these potential benefits do not yet appear to outweigh the costs of subjecting new populations to control, creating a new industry that profits off the criminal system, and raises serious constitutional concerns. Given the likelihood that EM surveillance will nevertheless continue to be engaged as a method of control, the final Part of this Note proposes approaches to implementing EM surveillance that may promote better outcomes.

### III. PROPOSAL

#### *A. Policies for Change: Promoting Alternatives to the Criminal System, Not Expansion*

The current U.S. criminal system, facing the high costs of extreme expansion, must be fixed.<sup>131</sup> EM surveillance, promising a solution, appears to be a new facet of the modern criminal system.<sup>132</sup> But EM surveillance should not be automatically accepted and institutionalized.<sup>133</sup> To the extent that EM technologies merely expand rather than transform the current criminal system, they are not

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129. Reductions in initial incarceration and future recidivism could promote high cost savings. *See generally* HAWKEN & KLEIMAN, *supra* note 85. As to efficiency, an offender under surveillance can be monitored by a few people at a call center in another state or even country. Wood, *supra* note 22, at 90. Probation officers and judges will have immediate and almost certain knowledge when the terms of probation have been violated. *Id.* at 92.

130. *See supra* note 30 and accompanying text (advancing possible objectives of attempts to change the criminal system).

131. *See supra* notes 17–25 and accompanying text (discussing the large populations under criminal control and costs to American society).

132. *See supra* Part II.

133. *See, e.g.*, Weissman, *supra* note 28, at 237 (suggesting that alternatives such as electronic monitoring hold promise, but that the structure of the criminal justice system will thwart progress).

worthwhile.<sup>134</sup> In particular, attention should be given to how EM surveillance programs unnecessarily broaden the culture of control.<sup>135</sup> Where electronic monitoring simply reinforces the culture of control and augments the criminal system without targeting deeper institutional issues, needed change is unlikely to occur.<sup>136</sup> EM technologies should be developed and pursued only as a true alternative minimizing the reach of the current criminal system. This Part proposes that stakeholders executing EM surveillance programs adopt swift and certain methodology, allocate resources wisely, balance short- and long-term agendas, and continually assess outcomes. By taking these steps, stakeholders may enable EM surveillance as an effective tool for reducing the culture of control.

### *B. Monitoring Using the Swift and Certain Paradigm*

Employing the swift and certain paradigm is one possible approach to EM surveillance.<sup>137</sup> Promising results of the Kennedy and HOPE initiatives demonstrate the prospect of positively modifying behavior.<sup>138</sup> When combined with these seemingly successful methods of enforcement, EM technologies could improve the criminal system by providing a strong and cost-effective alternative to incarceration.<sup>139</sup> EM surveillance programs should account for key aspects of the Kennedy and HOPE programs, specifically population selection, education, enforcement, and recognition. First, EM surveillance should only be attached to a specific population: the key leaders of groups driving crime in a specific community.<sup>140</sup> This will prevent bringing new populations into the system. Second, offenders should be expressly educated about the consequences of failing the conditions of monitoring.<sup>141</sup> Third, offenders who fail should be swiftly sanctioned for each

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134. See generally GARLAND, *supra* note 16 (criticizing continuous over-expansion of the criminal system).

135. *Id.*

136. *Id.*

137. See *supra* notes 64–65 and accompanying text.

138. See *supra* Part I.D.

139. See sources cited *supra* note 129 and accompanying text.

140. See KENNEDY, *supra* note 67, at 269.

141. See *id.* at 5; see also *supra* notes 72–74, 80 and accompanying text.



transgression.<sup>142</sup> Finally, successful offenders should be rewarded.<sup>143</sup> Such specific targeting will promote results, ideally reducing the need for further expansion of the criminal system.

When implementing a swift and certain approach, procedural safeguards must protect individual rights.<sup>144</sup> In particular, programs must ensure due process as a matter of course.<sup>145</sup> For example, courts sanctioning offenders must do so uniformly and reasonably, and only after a proper hearing.<sup>146</sup> Privacy is another key concern.<sup>147</sup> As courts give more extensive attention to the plethora of issues raised by EM surveillance, programs should be reassessed. At the same time, building protections into existing and new EM programs should not justify the overexpansion of EM surveillance programs.<sup>148</sup> When properly employed, the swift and certain paradigm may promote greater success in EM surveillance programs.

### C. Allocating Resources

Adequate resources must back well-designed policies to encourage success.<sup>149</sup> The relatively low costs of EM technologies should allow for adequate funding—with resources prioritizing the quality of programming over the quantity of supervisees.<sup>150</sup> Grantmakers and grantees must consider whether they will be able to maintain the costs and upkeep of successful EM surveillance

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142. See KENNEDY, *supra* note 67, at 5; see also notes 79, 82 and accompanying text.

143. Some scholars suggest that electronic monitoring and sanctions, without more, will fail to improve long-term behavior. PEW CTR. ON THE STATES, *supra* note 17, at 26. A combination of positive reinforcement with sanctions may be more effective than the use of sanctions alone. *Id.* Pew calls for the use of not only “sticks,” but “carrots” as well. *Id.*

144. See *supra* Part II.D (discussing infringement on individual rights and other potential constitutional issues).

145. See *supra* Part II.D.

146. HOPE’s system of quick hearings in front of a judge provides a procedural safeguard. HAWKEN & KLEIMAN, *supra* note 85, at 27. Swiftness may reduce the traditionally discretionary roles of sentencing judges and probation and parole officers while promoting uniform responses to violations. *Id.* at 29, 35–36.

147. See *supra* Part II.D.

148. See *supra* Part III.A.

149. PEW CTR. ON THE STATES, *supra* note 17, at 25 (“[I]f states are going to make full use of these advances, they must back the technology with adequate resources and policies to respond when offenders are caught breaking the rules.”).

150. See Part III.A.

programs after grants expire.<sup>151</sup> In addition, courts should pay for or subsidize the costs of technologies for low-income offenders.<sup>152</sup> Ideally, replacing the current system of incarceration with EM technologies would provide extra funding for EM programs while reducing the overall costs of control.<sup>153</sup> Moreover, policymakers should keep in mind the troubling implications of the profit-driven industry driving EM surveillance.<sup>154</sup> On the whole, well-designed programs should provide adequate funding.

*D. Short- v. Long-term Agendas: Targeting Institutional Concerns*

Rather than accepting EM technologies as a simple solution to the criminal system's problems, policymakers should target institutional issues of the criminal system and American society at large.<sup>155</sup> The structure of the modern criminal system limits the ability of EM surveillance to fix it.<sup>156</sup> Furthermore, it is possible that short-term surveillance and sanctioning will promote only short-term behavioral changes without ever addressing the structural problems behind the criminal system.<sup>157</sup> Approaches targeting both individuals and communities are likely to be more successful in the long term.<sup>158</sup> Thus, EM surveillance programs should be combined with long-term community building outside of the criminal system.<sup>159</sup> The cost

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151. See, e.g., Leukhardt, *supra* note 58 (reporting \$140,000 in federal stimulus funding required to launch a Connecticut EM program). The federal HOPE legislation would provide limited seed money to states to create programs, but would not provide long-term financial support. See H.R. 4055. This pattern of federal funding for state programs is not unheard of, although most probation programs are run at state and local levels and largely left to local discretion.

152. See *supra* note 105 and accompanying text.

153. See GARLAND, *supra* note 31, at 189 (“The chief virtue of new policies such as . . . ‘punishment in the community’ is [its] claim to be [an] economically rational alternative[] to previous arrangements.”).

154. See *supra* Part II.C.

155. See, e.g., THOMPSON, *supra* note 25, at 9–26 (discussing racial disparities in the criminal justice system).

156. Weissman, *supra* note 28.

157. See *id.* at 241. Normatively, stakeholders should also consider whether this form of behavioral modification is a viable goal, or even a desirable one.

158. Byrne & Taxman, *supra* note 34.

159. See *supra* note 35 and accompanying text (referencing assertions that treatment must accompany crime control).

savings of monitoring should be diverted towards education, job creation, and re-integration in disadvantaged communities, not funneled back into the criminal system.<sup>160</sup> New policies both within and outside of the criminal context must take root structural patterns concerning race and economics into consideration.<sup>161</sup>

Notably, EM surveillance's expansion of the culture of control affects social arrangements within and outside of the formal criminal system.<sup>162</sup> EM technologies will increasingly couple constant surveillance outside of the physical prison system with punishment, producing an overlap between formal and informal social controls.<sup>163</sup> Ensuring that arrangements are improved in favor of disadvantaged communities should be a goal of EM programs.<sup>164</sup> Ideally, offenders on EM surveillance should be treated as full community participants in a manner de-escalating crime control.

#### *E. Monitoring the Effects of Monitoring*

The development of EM technologies is far from complete; the long-term effects far from clear.<sup>165</sup> Moreover, policymakers, courts, and scholars have yet to fully consider the range of significant concerns arising from the use of surveillance in this context.<sup>166</sup> As new technologies and concerns emerge, it will be necessary to

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160. See generally THOMPSON, *supra* note 25. For example, treatment programs and resources minimizing collateral consequences may be necessary in order to truly reintegrate offenders. See Byrne & Taxman, *supra* note 34.

161. Populations disproportionately affected by the current criminal system, particularly African Americans, might benefit if EM surveillance is appropriately used as an alternative to incarceration. See *supra* note 25 and accompanying text. Reintegration into communities could be quicker and recidivism reduced. On the other hand, if EM devices are only available to those who can afford them, such as Lindsay Lohan, disadvantaged communities will fail to see benefits. Likewise, if EM technologies only promote a useless expansion of the culture of control over disadvantaged populations, it will further damage communities.

162. See generally GARLAND, *supra* note 31. State infringement upon a personal sphere, or simply greater state control over private actions and interactions, will likely occur as electronic monitoring expands to greater numbers of suspected, convicted, and released offenders.

163. *Id.* at 5–6 (discussing the pairing of formal controls, such as camera surveillance or incarceration within a prison, with informal controls, such as societal norms or community involvement). EM surveillance appears to depend upon both types of crime control.

164. See generally THOMPSON, *supra* note 25.

165. See *supra* Part II.E.

166. See *supra* Part II.D–E.

critically reexamine the use of EM in the criminal system. While the Kennedy and HOPE programs show the potential promise of swift and certain surveillance, the long-term effects upon costs and behavior are yet to be measured, demonstrating the need for some skepticism.<sup>167</sup> Long-term goals, specifically curtailment of the criminal system, must be prioritized. Key actors, including policymakers, judges, and probation and parole officers, must ask whether EM surveillance can truly solve the criminal system's problems.

#### CONCLUSION

Lindsay Lohan's pattern of partying antics and punishment shows the potential failure of EM surveillance to prompt behavioral change. While Lohan may not represent all criminals, her story matches greater patterns of recidivism. Clearly, modifying behavior in the short and long terms is challenging. Where, as in Lohan's case, electronic monitoring multiplies the methods of punishment without changing systemic outcomes, the goals of criminal sentencing may be controverted.

Where EM surveillance augments the culture of control, it exacerbates underlying problems with the American system. Thus far, EM surveillance controls new populations, cultivates new industry, and creates new constitutional concerns without demonstrating new results. Therefore, new policies must ensure that EM surveillance operates as a solution rather than a useless expansion of the current system. The proper employment of swift and certain justice could possibly prompt improved behavior in offenders like Lohan. Rebuilding communities must be prioritized. Furthermore, new EM technologies and programs must be comprehensively and continuously assessed into the future to ensure that systemic progress is not only swift, but also certain.

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167. *See supra* Parts I.D, II.E.