Released into Shackles: The Rise of Immigrant E-Carceration

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This Note challenges the increasingly normalized characterization of ankle monitors as a positive alternative to detention. Although ankle monitors have been subject to some public criticism, advocates on both sides of the aisle have increasingly pointed to ankle monitors as a more humane, cost-effective alternative to detention. In comparison to immigration detention or refoulement, ankle monitors are clearly the lesser evil. Yet this Note argues that the disadvantages of ankle monitors cannot be so easily dismissed. By disentangling the circumstances in which ankle monitors are used, this Note documents the harms that follow these devices across contexts. The Note then argues that meaningful alternatives to detention should not include ankle monitoring. The Note concludes by exploring both legal avenues to resist ankle monitoring and alternatives to detention that do not include ankle monitoring at all.

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INTRODUCTION

Amid all the crises, real[1] and invented,[2] that populate the landscape of immigration enforcement in the United States today, more quotidian issues are often pushed out of the public consciousness. Yet these background issues have much to teach us about the logic of immigration policy. Moreover, they are not really background issues at all for those they touch. This Note takes up one such issue: ankle monitors.

Ankle monitors are in widespread use today and are likely to become a principal method of immigration enforcement in the future. Based on the way some commentators advocate for the increased use of electronic monitoring, it might seem that few immigrants are actually subject to ankle monitors now.[3] Yet the numbers tell a different story.[4] As the use of ankle monitors has grown in the

1. Joshua Barajas, *A Second Migrant Child Died in U.S. Custody this Month. Here's What We Know*, PBS (Dec. 26, 2018), https://www.pbs.org/newshour/nation/a-second-migrant-child-died-in-u-s-custody-this-month-heres-what-we-know [https://perma.cc/APR5-7UGS].

2. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html [https://perma.cc/6QA4-UPAP].

3. *See, e.g.*, Sonia Nazario, *There's a Better, Cheaper Way to Handle Immigration*, N.Y. TIMES (June 22, 2018), https://www.nytimes.com/2018/06/22/opinion/children-detention-trump-executive-order.html [https://perma.cc/5RZJ-E72X] (advocating for the use of electronic monitoring as an alternative to detention).

4. *See* Part I.A for a discussion of the number of immigrants subject to electronic monitoring.

last two decades, advocates on both sides of the aisle have increasingly pointed to ankle monitors as a more humane, more cost-effective alternative to detention.

But ankle monitors are a form of mass control that fails to provide a meaningful alternative to detention. This Note argues that ankle monitors have significant economic, social, psychological, and legal consequences that disqualify them as a positive alternative to detention. By exploring both legal avenues to resist ankle monitoring and alternatives to detention that do not include ankle monitoring at all, this Note concludes that meaningful alternatives to detention should not include ankle monitoring. Part I discusses the rise of ankle monitoring throughout the immigration legal system in the civil, criminal, and contractual contexts. Part II contrasts common portrayals of ankle monitoring with the lived reality of wearing an ankle monitor. Part III then narrows the Note's focus to discuss legal protections that could limit prolonged ankle monitoring in the civil immigration context. Last, Part IV explores alternatives to civil immigration detention that do not rely on ankle monitoring.

Finally, a note on language. This Note primarily uses the term "ankle monitor," but, in reality, the word "shackles" and its commonly used Spanish translation "*grilletes*" comes much closer to representing the lived reality of wearing such a device. Moreover, these terms illuminate the linguistic connection between the restraints worn by immigrants today and those worn by enslaved people in the past, shedding light on a consistent and long-running practice of shackling the bodies of black and brown people in the United States. This Note uses the term "ankle monitor" because "monitor" best captures the dual nature of the device, which is both a physical constraint and an omnipresent form of surveillance. Yet the Note retains the term "shackles" in the title to foreground the punitive and racialized nature of modern immigration enforcement.

I.
THE RISE OF ANKLE MONITORING

A. Electronic Versus Ankle Monitoring

While many immigrants are subject to electronic monitoring, not all are subject to ankle monitors. Electronic monitoring encompasses both ankle monitors and phone check-ins that use voice recognition.[5] Phone check-ins involve daily phone calls from a registered landline to ensure that an immigrant

5. John Burnett, *"Alternatives to Detention" Are Cheaper Than Jails, but Cases Take Far Longer*, NAT'L PUB. RADIO, ALL THINGS CONSIDERED (July 18, 2018, 4:24 PM), https://www.npr.org/2018/07/18/629496174/alternatives-to-detention-are-cheaper-than-jails-but-cases-take-far-longer [https://perma.cc/WQ2N-R2TP]. In February 2019, immigrants were also reporting the debut of a smart phone application that was being used in conjunction with other forms of electronic monitoring. It is not yet clear whether this application will supplant or merely complement existing forms of electronic monitoring. Email Interview with Karen Hoffman, Attorney, Aldea People's Justice Center (Feb. 26, 2018) (on file with author).

has not absconded. Ankle monitors, on the other hand, "achieve[] near perfect surveillance" by tracking an immigrant's every move at every moment with GPS technology.[6] The primary focus of this Note is ankle monitors. But because studies and statistics do not always disaggregate phone check-ins from ankle monitors, this Note will also discuss at times the broader universe of electronic monitoring.

At least eighty-four thousand immigrants are enrolled in electronic monitoring programs.[7] This number is likely much lower than the actual number of electronically monitored immigrants, however, because it only accounts for monitoring by U.S. Immigration and Customs Enforcement (ICE) as a part of their immigration proceedings. In reality, immigrants in the criminal justice system are also subject to electronic monitoring as a condition of release from criminal custody. Likewise, immigrants may face ankle monitoring in the contractual context, where ankle monitors are used as a guarantee for a loan for an immigration bond.

In the civil immigration context, phone check-ins and ankle monitors are often used in tandem, along with unannounced house visits and scheduled check-ins that require immigrants to visit an office during work hours.[8] Those same mechanisms are in place in the criminal context, but because individuals on probation and parole have limited Fourth Amendment rights, unannounced visits and searches may occur with much greater frequency.[9] Finally, in the contractual context, where ankle monitors function as a guarantee for immigration bonds, ankle monitoring is the primary method of surveillance. However, companies have also used phone check-ins, house visits, and even visits to employers to ensure that people continue to pay back their debts.[10] Yet while all of these tactics raise issues of privacy and dignity, this Note will focus, as much as possible, on the particular issues raised by ankle monitoring.

B. Civil Immigration Context

Both administrative immigration judges and ICE officers have the statutory authority to impose ankle monitoring as a specific condition of release from

6. Carpenter v. United States, 138 S. Ct. 2206, 2218 (2018).

7. *See* Burnett, *supra* note 5.

8. DORA SCHRIRO, U.S. DEP'T HOMELAND SEC., IMMIGRATION & CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf [https://perma.cc/5UER-X89B.]

9. Carl Takei, *From Mass Incarceration to Mass Control and Back Again: How Bipartisan Criminal Justice Reform May Lead to a For-Profit Nightmare*, 20 U. PA. J. L. & SOC. CHANGE 125, 177 (2017).

10. Michael E. Miller, *This Company is Making Millions from America's Broken Immigration System*, WASH. POST (Mar. 9, 2017), https://www.washingtonpost.com/local/this-company-is-making-millions-from-americas-broken-immigration-system/2017/03/08/43abce9e-f881-11e6-be05-1a3817ac21a5_story.html [https://perma.cc/MM8F-7FBU] [hereinafter Miller, *This Company is Making Millions*].

immigration detention.[11] In practice, however, it is primarily ICE officers who impose ankle monitors.[12] Under the Immigration and Nationality Act (INA), the U.S. Department of Homeland Security (DHS) has the statutory authority to release immigrants from detention both before and after individual removal proceedings, so long as they are not subject to mandatory detention.[13] Immigrants released from detention prior to a removal hearing are released either on bond or on an Order of Release on Recognizance (ROR). In other words, people either pay a bond or give their word that they will reappear for their removal hearing.[14] Immigrants who have been ordered removed, but who are not subject to mandatory detention, may be released on an Order of Supervision (OSUP).[15] Regardless of whether an immigrant is released on bond, on an ROR, or on an OSUP, ICE officers have the discretion to impose ankle monitoring as a condition of release.[16] Once they are released, "[f]ailure of [an immigrant] to comply with the program requirements may result in increased supervision restrictions including the [immigrant's] return to detention."[17] Thus, when immigrants are released on an ankle monitor, they carry a daily physical reminder that they could be ordered to return to a detention center at any moment.

Today, electronic monitoring is the primary, if not only, alternative to immigration detention. DHS has experimented, however, with a variety of alternative to detention (ATD) programs since the 1990s.[18] The motivation to explore ATD programs encompasses a variety of goals, not least of which is cost

11. Memorandum from Wesley J. Lee, U.S. ICE Acting Director, on Alternatives to Detention Programs (ATDP) Enrollment Guidance 1–3 (June 28, 2005), https://www.ice.gov/doclib/foia/dro_policy_memos/dropolicymemoeligibilityfordroisapandemdprograms.pdf [https://perma.cc/P7GL-47WU].

12. Telephone Interview with Linda Tam, Visiting Clinical Professor, UC Irvine School of Law (Feb. 15, 2019).

13. *See* INA § 236(c), 8 U.S.C. § 1226(c) (2018). Grounds for mandatory detention include aggravated felonies, crimes involving moral turpitude, controlled substances offenses, firearms offenses, and terrorism offenses, as defined by statute. *Id.*

14. INA § 236(a) provides for the release of noncitizens who are not subject to mandatory detention and are awaiting removal proceedings. *See* INA § 236(a), 8 U.S.C. § 1226(a). Here, ICE officers would first consider whether an immigrant was subject to mandatory detention under INA § 236(c). *See* INA § 236(c), 8 U.S.C. § 1226(c). Only then would ICE proceed to determine whether an individual was a flight risk or a threat to public safety, and thus ineligible for release.

15. INA § 241 provides for the release of noncitizens who have been ordered removed, but who are not subject to mandatory detention. *See* INA §§ 236(c), 241, 8 U.S.C. §§ 1226(c), 1231. Because of constitutional limits on prolonged detention, an OSUP is generally granted when a noncitizen cannot be removed within a reasonable time. *See* INA § 241, 8 U.S.C. § 1231(a)(3); Clark v. Martinez, 543 U.S. 371 (2005); Zadvydas v. Davis, 533 U.S. 678 (2001). As with a release on bond or an order of ROR, ICE officers would follow the steps outlined in the footnote above to evaluate release on an OSUP. *See supra* note 14.

16. Memorandum from Wesley J. Lee, *supra* note 11.

17. *Id.*

18. Kyle Barron & Cinthya Santos Briones, *No Alternative: Ankle Monitors Expand the Reach of Immigration Detention*, NACLA.ORG (Jan. 6, 2015), https://nacla.org/news/2015/01/06/no-alternative-ankle-monitors-expand-reach-immigration-detention [https://perma.cc/573F-9TQL].

reduction.[19] Given political pressure from organized prison lobbies, however, the goal of such ATD programs is not necessarily to reduce the number of people involved in the immigration detention system.[20] Rather, data show that while ATD programs have grown enormously since the 1990s, the number of immigrants in detention has also increased.[21] Thus, ATD programs have resulted in more system-involved immigrants, rather than an overall reduction in immigration incarceration.

Most of DHS's experiments with ATD programs have involved some form of ankle monitoring.[22] In a report authored in 2009, DHS outlined three ATD programs in effect at the time: the Intensive Supervision Appearance Program (ISAP), Enhanced Supervision Reporting (ESR), and Electronic Monitoring (EM).[23] Of these three programs, the report described ISAP as "the most restrictive and costly," involving telephonic check-ins, ankle monitoring, employment verification, and curfew checks.[24] And despite the report acknowledging criticisms of the "overly restrictive conditions of supervision

19. *See infra* Part II.A; *see also* U.S. DEP'T OF HOMELAND SEC., ICE DETENTION REFORM: PRINCIPLES AND NEXT STEPS (2009) (stating that one of ICE's goals for long-term reform was to "ensure Alternatives to Detention (ATD) are cost effective and promote a high rate of compliance with orders to appear and removal orders").

20. While it is hard to say precisely how much power the organized prison lobby exerts over federal immigration policy, the economic incentives for this industry are clear. Because supervision is cheaper than incarceration, "any shift from prisons to supervision would tend to incentivize these companies to boost revenue by widening the net of criminal justice system involvement." Takei, *supra* note 9, at 175. For this reason, it is unsurprising that companies like GEO Group and CoreCivic have expanded beyond prison management into offender rehabilitation and community reentry programs. *See, e.g.*, *CoreCivic Community*, CORECIVIC, https://www.corecivic.com/community [https://perma.cc/8MZG-H69Q] (detailing diversified services including management of group homes, electronic monitoring, and career counseling); *GEO Continuum of Care*, GEO GROUP, https://www.geogroup.com/GEOs_Continuum_of_Care [https://perma.cc/P2MD-X6GJ] (detailing diversified services including management of academic and vocational programming, electronic monitoring, post-release case management, and faith-based, substance abuse, and cognitive behavioral therapy).

21. Namely, "[t]he daily detention capacity in 1996 was 8,279 beds." RUTGERS SCH. OF LAW-NEWARK IMMIGRANT RIGHTS CLINIC, FREED BUT NOT FREE: A REPORT EXAMINING THE CURRENT USE OF ALTERNATIVES TO IMMIGRATION DETENTION 3 (2012) [hereinafter FREED BUT NOT FREE]. In 2018, on the other hand, the projected average daily population in immigration prisons was 48,879 adults. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-343, IMMIGRATION DETENTION: OPPORTUNITIES EXIST TO IMPROVE COST ESTIMATES 19 (2018) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION].

22. Barron & Briones, *supra* note 18. One notable exception to this is the Vera Institute for Justice's Appearance and Assistance Program (AAP), which provided a community-based model, including both individualized supervisory components and individualized support services and case management. FREED BUT NOT FREE, *supra* note 21, at 7. Though remarkably successful, with a 90 percent attendance rate at immigration hearings from 1997 to 2000, the program was defunded after September 11, 2001. *Id.* at 8. *See* Part IV.B for more discussion of community-based ATD programs.

23. *See* SCHRIRO, *supra* note 8.

24. *Id*. at 20.

imposed by [ISAP]," Congress funded a nationwide expansion of ISAP.[25] In the years since then, ISAP has evolved, in subsequent iterations, from a pilot program into ICE's only ATD program.[26]

Over time, the type of immigrant enrolled in the ISAP program has also evolved. That is, in the early years of ISAP, ICE generally limited enrollment to "high-priority categories" of immigrants.[27] Namely:

> (1) [immigrants] who are in removal proceedings but have not yet been issued final orders of removal and may be at risk to flee; (2) [immigrants] who have been issued final orders of removal and are considered dangerous, but who cannot legally be held in custody any longer; and (3) [immigrants] with final orders of removal who have been released from custody on general orders of supervision, but who have violated their orders by committing crimes or otherwise failing to comply with release conditions.[28]

However, "ISAP has since become the default [ATD] program and is often used for very low-risk individuals, including mothers released from family detention."[29] Mirroring this trend, most recent media attention focusing on ankle monitoring has centered almost exclusively on immigrant families and asylum seekers, rather than so-called "high-priority categories" of immigrants.[30]

Since ISAP began in 2004, ICE has outsourced its entire operation to BI Incorporated.[31] BI Incorporated, a self-proclaimed "industry leader for offender monitoring," was purchased by GEO Group's GEO Care division in 2011.[32] Under the ISAP program, ICE can choose between two supervision options: "technology-only," which is limited to telephonic check-ins and ankle monitoring, and "full service," which includes intensive case management,

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25. *See id.*; OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-15-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S ALTERNATIVES TO DETENTION (REVISED) 4 (2015) [hereinafter OIG ATD REPORT].

26. Jason Fernandes, *Alternatives to Detention and the For-Profit Immigration System*, CTR. FOR AM. PROGRESS (June 9, 2017), https://www.americanprogress.org/issues/immigration/news/2017/06/09/433975/alternatives-detention-profit-immigration-system [https://perma.cc/TC5M-3ZST]. ISAP has gone through multiple stages as it expanded. ISAP I operated from 2004 to 2009. ISAP II operated from 2009 to 2014. And ISAP III took effect in 2014 and remains in effect to date. OIG ATD REPORT, *supra* note 25, at 3. This Note uses "ISAP" to refer to all three iterations of this ATD program.

27. *See* Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2164 (2017).

28. Nguyen v. B.I. Inc., 435 F. Supp. 2d 1109, 1112 (D. Or. 2006).

29. *See Marouf*, *supra* note 27.

30. *See generally* footnotes accompanying text of Part II.

31. *Immigration Services*, BI.COM, https://bi.com/immigration-services [https://perma.cc/HK92-UGZQ]. It appears that BI Incorporated originally went by the name Behavioral Interventions Incorporated, but this name has been scrubbed from the website. *See* Barron & Briones, *supra* note 18; *Immigration Services*, *supra*. Notably, ICE chose BI Incorporated over the Vera Institute, which had already developed a successful community-based model of supervision, and Volunteers of America, which pitched a similar model. FREED BUT NOT FREE, *supra* note 21, at 8.

32. *About Us*, BI.COM, https://bi.com/company/about-us [https://perma.cc/NFJ4-V7MQ]; Fernandes, *supra* note 26.

referrals to community services, and departure preparation planning in addition to electronic monitoring.[33] While the number of immigrants enrolled in "full service" supervision vastly outnumbered those enrolled in technology-only supervision in the early 2000s, enrollment numbers have reversed in recent years.[34] With the suspension of all community-based or "full service" models of supervision under the Trump administration, all immigrants released on ISAP are now subject to technology-only supervision.[35]

It remains unclear precisely how much authority ICE has delegated to BI Incorporated with respect to ankle monitors. For example, while ICE has ultimate supervisory authority, it appears that ICE's outsourcing contract with GEO Group may allow BI Incorporated "to select the level of supervision for each individual."[36] Hence, although ICE makes the initial decision to place an immigrant on an ankle monitor, it is unclear who has the authority to remove or re-impose ankle monitors. Anecdotal reports seem to indicate that both ICE and BI Incorporated exercise discretion over who is placed on or taken off an ankle monitor.[37] A pro se guide on how to request the removal of an ankle monitor also recommends that immigrants direct such requests to both ICE and BI Incorporated ISAP officers.[38] Because there is no formal guidance clarifying the standards for imposing or removing ankle monitors, it is impossible to ascertain precisely how or by whom this authority is exercised.

Regardless of how authority is delegated between ICE and BI Incorporated, the involvement of a for-profit company in the administration of ISAP introduces

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33. *Immigration Services*, BI.COM, https://bi.com/immigration-services/ [https://perma.cc/9X6H-CDKF].

34. OIG ATD REPORT, *supra* note 25, at 4, 23; SCHRIRO, *supra* note 8, at 20. For example, in 2010, 19,996 immigrants were on "full service" supervision, while only 5,782 immigrants were on technology-only supervision. As of February 2014, the trend had almost reversed, with 11,368 immigrants on "full service" supervision and 10,833 on technology-only supervision. OIG ATD REPORT, *supra* note 25, at 4, 23.

35. *See, e.g.*, Aria Bendix, *ICE Shuts Down Program for Asylum-Seekers*, ATLANTIC (June 9, 2017), https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887 [https://perma.cc/BHW5-E3R4].

36. Takei, *supra* note 9, at 142.

37. Telephone Interview with Karen Hoffman, Attorney, Aldea People's Justice Center (Feb. 19, 2019); Telephone Interview with Avantika Shastri, Legal Director, San Francisco Immigrant Legal Defense Collaborative (Feb. 19, 2019); Telephone Interview with Linda Tam, *supra* note 12; Complaint Letter from Eleni Wolfe-Roubatis, Immigration Program Dir., Centro Legal de la Raza, to Megan H. Mack, Officer of Civil Rights & Civil Liberties, Dep't of Homeland Sec., and John Roth, Inspector Gen., Dep't of Homeland Sec. at 15 (Apr. 20, 2016) [hereinafter ISAP Complaint Letter] (on file with author) ("Lisa Knox, of the East Bay Community Law Center, reports that one of her clients was told by an ISAP official that . . . the ankle shackle would be removed when 'I say it happens.'"). The subject line of this complaint letter is "Re: Violations of due process and liberty rights of asylum seekers by U.S. Immigration and Customs Enforcement through the use of the Intensive Supervision and Appearance Program (ISAP)." ISAP Complaint Letter, *supra*. It was sent on behalf of Centro Legal de la Raza, Community Legal Services in East Palo Alto, East Bay Community Law Center, the Bar Association of San Francisco, and the San Francisco Immigration Legal Defense Collaborative. *Id.*

38. STANFORD LAW SCH. IMMIGRANTS' RIGHTS CLINIC, GUIDE: HOW TO REQUEST REMOVAL OF YOUR ANKLE MONITOR (2016) [hereinafter ANKLE MONITOR REMOVAL GUIDE].

the possibility that a profit motive is driving decisions around ankle monitoring. BI Incorporated has several economic incentives to advocate for increased ankle monitoring, whether by exercising delegated authority or by exerting pressure on ICE decision-making through lobbying. First, since ankle monitoring is more lucrative than telephonic check-ins, BI Incorporated has an economic incentive to prolong the time that immigrants must remain on an ankle monitor.[39] Second, BI Incorporated is incentivized to keep or re-escalate immigrants onto ankle monitors to ensure a high rate of compliance, thereby ensuring future contracts with ICE. BI Incorporated has claimed a high compliance rate, stating that 99.6 percent of immigrants under its supervision appeared for court hearings and 79 percent appeared for final deportations.[40] To remain competitive for future contracts with ICE, BI Incorporated has an incentive to maintain these figures by opting for the higher level of surveillance provided by ankle monitors. Finally, BI Incorporated has a clear incentive to expand the classes of immigrants placed on an ankle monitor; to the extent that ICE is influenced by corporate lobbies, such lobbying could explain ICE's shift from using the ISAP program on "high-priority categories" of immigrants to using it for asylum seekers who have a statistically proven low flight risk.[41]

C. Criminal Context

Immigrants involved in the criminal justice system may also be subject to ankle monitoring. Although many immigrants who intersect with the criminal justice system are released from criminal custody only to be immediately transferred to ICE custody, some immigrants are subject to fewer grounds of removal (e.g. permanent residents) or may not face immigration consequences for their involvement with the criminal justice system, despite more impermanent immigration statuses (e.g. visa holders). It is this group of immigrants that faces the possibility of being released from criminal custody subject to ankle monitoring.

It is important to reckon with the criminal context because, with the increased intermeshing of criminal and immigration law, policymakers are increasingly turning to criminal law and procedure to effect immigration policy outcomes.[42] In fact, some scholars have urged that "viewing the practice of

39. *See* OIG ATD REPORT, *supra* note 25, at 4 ("[BI Incorporated] charges $0.17 a day per participant for telephonic monitoring and $4.41 for GPS monitoring.").

40. Alexia Fernandez Campbell, *Trump's Tent Cities Are an Enormous Waste of Money. There are Better Options*, VOX (Nov. 2, 2018), https://www.vox.com/2018/6/22/17483230/migrant-caravan-tent-city-cost-trump [https://perma.cc/TC5M-3ZST].

41. *See* Ingrid Eagly et al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785 (2018) ("We find that family members seeking asylum who were released from detention attended their hearings in 96% of cases that began in family detention since 2001.").

42. *See* César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1459 (2014) [hereinafter Hernández, *Creating Crimmigration*] ("When immigration became a national political concern for the first time since the civil rights era, policymakers turned to criminal law

locking up migrants as a single, multi-stranded phenomenon of immigration imprisonment better reflects the reality of immigration law enforcement today."[43] Thus, the imposition of ankle monitors on immigrants, even in the criminal context, may ultimately find its root in policing that "turns on migrant status or on activity inextricably tied to being a migrant."[44]

The criminal context also bears discussing because of the procedural borrowing that has taken place between immigration law enforcement and criminal law enforcement.[45] "[T]he adoption of relaxed procedural norms to prosecute immigration crimes, and the conflation of immigration and criminal policing norms[,] has melted away a stark boundary that once existed between criminal law and immigration law."[46] Thus ankle monitoring in the criminal context is relevant both as a consequence of the emergence of crimmigration law and as a comparative model from which the civil immigration context may continue to borrow.

Two recent trends in the criminal context deserve special attention. First, some states have formally imposed lifelong ankle monitor sentences for individuals convicted of sex crimes.[47] Although there is no formal time limit for an ankle monitor sentence in the civil immigration context, the normalization of lengthier and even permanent ankle monitoring in the criminal context could easily bleed into the civil immigration context.[48]

Second, as many cities and counties turn to ankle monitoring as an alternative to incarceration, they increasingly pass on the cost of surveillance to the person sentenced to wear the device.[49] While not the focus of this Note, these

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and procedure to do what race had done in earlier generations: sort the desirable newcomers from the undesirable.").

43. César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CALIF. L. REV. 1449, 1453 (2015).

44. *Id.*

45. García Hernández, *Creating Crimmigration*, *supra* note 42, at 1482 ("[S]everal policing trends that originated in immigration law enforcement have expanded into criminal law enforcement.").

46. *Id.* at 1484.

47. *See* Olivia Solon, *'Digital Shackles': The Unexpected Cruelty of Ankle Monitors*, GUARDIAN (Aug. 28, 2018), https://www.theguardian.com/technology/2018/aug/28/digital-shackles-the-unexpected-cruelty-of-ankle-monitors [https://perma.cc/S4DJ-PK32]. These states include Colorado, Florida, Missouri, Ohio, Oklahoma, and Wisconsin. *Id.*

48. Although courts tend to treat sex crimes differently, the shared history of civil immigration and criminal enforcement shows how frequently the two contexts blend or merge. As García Hernández puts it:

> The end result of the expanded list of crimes that may result in removal, the growing willingness to regulate immigration through federal and subfederal penal codes, the adoption of relaxed procedural norms to prosecute immigration crimes, and the conflation of immigration and criminal policing norms has melted away a stark boundary that once existed between criminal law and immigration law.

García Hernández, *Creating Crimmigration*, *supra* note 42, at 1484.

49. For example, in the class action lawsuit *Edwards v. Leaders in Community Alternatives, Inc.*, plaintiffs take issue with the Leaders in Community Alternatives (LCA)'s contract with Alameda County. Complaint, Edwards v. Leaders in Community Alternatives, Inc., No. 3:18-cv-04609 (N.D. Cal. July 31, 2018) [hereinafter *Edwards* Complaint]. The "no-cost contract" at issue in the case costs the

"no-cost contracts" have faced widespread criticism and lawsuits.[50] And while the trend has faced resistance, it could nevertheless have widespread ripple effects. Namely, although the federal government currently pays for the cost of ankle monitors, the logic of "no-cost contracts" could easily take hold among immigration policymakers.[51]

D. Contractual Context

Ankle monitoring is also used in the contractual context as a guarantee of the immigration bonds that allow people to leave immigration detention. Immigration judges are generally not required to take immigrants' financial resources into account when setting bond.[52] In fact, there is a statutorily mandated bond minimum of $1,500.[53] Further, while detained individuals can pay 10 percent of a bond in the criminal context, ICE requires immigrants to pay immigration bonds in full.[54] With the national average for immigration bonds resting around $9,274, many immigrants are unable to pay immigration bonds

County nothing. *See Edwards v. Leaders in Community Alternatives*, EQUAL JUST. UNDER L., https://equaljusticeunderlaw.org/edwards-v-leaders-in-community-alternatives [https://perma.cc/23QA-9G68]. Instead, the cost is passed on to those sentenced to wear an electronic monitoring device. *Id.* Regardless of a person's ability to pay, LCA allegedly charges its "clients" as much as $25 a day for their use of a judicially imposed ankle monitor. *Id.*

50. For example, the plaintiffs in *Edwards*, allege that LCA and its parent company, SuperCom, engaged in extortion, racketeering, and violations of plaintiffs' Fourteenth Amendment rights. *Edwards* Complaint, *supra* note 49. The complaint alleges that when people failed to pay on time or in full, LCA "extort[ed] fees from people through the threat of incarceration"—a threat that a public probation officer could never make under the law. Notably, the lead plaintiff in this case, William Edwards, was never convicted of a crime, and the charges that led to the imposition of an ankle monitor were ultimately dropped. *Id.* Nevertheless, he was charged twenty-five dollars a day for four months—and constantly harassed by LCA—while the charges were pending. *Id.*; *see also* Solon, *supra* note 47.

51. Indeed, the logic of "no-cost contracts" is strikingly similar to the logic behind the presidential proclamation on October 4, 2019, barring immigrants from entering the United States without health insurance. *See* Stuart Anderson, *Trump Bars Immigrants Without Health Insurance: What It Means*, FORBES (Oct. 7, 2019), https://www.forbes.com/sites/stuartanderson/2019/10/07/trump-bars-immigrants-without-health-insurance-what-it-means [https://perma.cc/R5Y2-WND9]. Like a "no-cost contract," the policy passes on a novel cost to immigrants. *See id.* And like a "no-cost contract," the policy would have the likely effect of forcing immigrants out or barring their entry in the first place. *See id.* Although this proclamation is now subject to a constitutional challenge and has been preliminarily enjoined, the animating logic behind the policy remains in place. *See US Judge Bars Trump Health Insurance Rule for Immigrants*, AP NEWS (Nov. 26, 2019), https://apnews.com/b30684608d544ba48b9f93922b0e7387 [https://perma.cc/X86E-W8PR].

52. Importantly, this is no longer the case in the Ninth Circuit. In 2017, the Ninth Circuit affirmed a preliminary injunction requiring immigration judges and ICE officers to consider "(1) financial ability to obtain bond and (2) alternative conditions of release" (such as non-monetary alternatives like an OSUP or ROR order) when making bond determinations, to ensure that no person is "imprisoned merely on account of his poverty." Hernandez v. Sessions, 872 F.3d 976, 981–82 (9th Cir. 2017). While this ruling is only in effect in the Ninth Circuit and could be overturned at the conclusion of the underlying litigation, it is also possible that it could presage a new standard in immigration bond proceedings.

53. INA § 236(a)(2)(A), 8 U.S.C. § 1226(a)(2)(A) (2018).

54. Miller, *This Company is Making Millions*, *supra* note 10.

outright and must rely instead on bail bonds companies.[55] However, because most bail bonds companies consider immigration bonds to be particularly risky, many either do not offer immigration bond services or charge exorbitant interest rates.[56] Enter Libre by Nexus, a business founded in 2013. Libre by Nexus claims to solve the bond problem by allowing immigrants to guarantee their bonds not with a hefty down payment or an exorbitant interest rate but by wearing an ankle monitor.[57] While an ankle monitor helps to address the problem of flight risk, Libre by Nexus has allegedly failed to tell clients they must pay $420 per month for the use of the monitor on top of the actual cost of the bond.[58] Many immigrants report paying nearly the entire amount of an immigration bond, only to discover that all those payments went toward the cost of the ankle monitor—not the principal of the loan.[59] When immigrants have failed to pay the monthly fee, Libre employees have allegedly threatened them with the prospect of returning to immigration detention.[60] As a result, these contracts have been the

55. *Id.* Twenty years ago, the median amount for an immigration bond was only $3,000. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, WHAT HAPPENS WHEN INDIVIDUALS ARE RELEASED ON BOND IN IMMIGRATION COURT PROCEEDINGS? (2016). Current data for 2018 pegs the median immigration bond at $7,500. *See* TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, THREE-FOLD DIFFERENCE IN IMMIGRATION BOND AMOUNTS BY COURT LOCATION (2018). However, bond amounts vary "markedly from one court location to another," with bonds set in Tacoma, Washington, and Hartford, Connecticut, soaring to a median of $15,000 per bond. *Id.* Four point six percent of immigrants had bonds set at $25,000 or higher. *Id.* At least one immigration attorney has reported that "thousands of families have gotten higher bonds since Trump took office." Daniel Bush, *Under Trump, Higher Immigration Bonds Mean Longer Family Separations*, PBS NEWS HOUR (June 28, 2018), https://www.pbs.org/newshour/politics/under-trump-higher-immigration-bonds-mean-longer-family-separations [https://perma.cc/2ZF6-W9ZK] (quoting Erica Schommer, Clinical Associate Professor of Law, St. Mary's Law).

56. Telephone Interview with Mitch Slaughter, Founder, Mitch Slaughter Bail Bonds (Aug. 8, 2016).

57. *Libre–What We Do*, LIBRE BY NEXUS, https://www.librebynexus.com/what-we-do [https://perma.cc/5T5P-LX87].

> We understand how unfair prolonged detention can be, and we understand how hopeless it can feel to know your loved one has bond when you can't afford it. We know how depressing it can be to call company after company and hear that they can't help you. . . . Our programs secure your immigration bond, meaning you won't need to pay cash for the full amount of the bond, or provide property you may not have. At Libre, we work hard for you to reunite your family!

Libre GPS, LIBRE BY NEXUS, https://www.librebynexus.com/gps [https://perma.cc/DCP7-ZE4S] ("GPS Tracking technology—securing your bond, securing your freedom!").

58. Michael E. Miller, *Company Accused of Preying on Detained Immigrants is Under Investigation*, WASH. POST (Oct. 20, 2017) [hereinafter Miller, *Company Accused of Preying*], https://www.washingtonpost.com/local/company-accused-of-preying-on-detained-immigrants-under-federal-investigation/2017/10/20/33232aae-b5aa-11e7-9e58-e6288544af98_story.html [https://perma.cc/T5DA-Z52Q].

59. *Radio Ambulante*: *Firme Aqui*, NAT'L PUB. RADIO (May 1, 2018), http://radioambulante.org/audio/firme-aqui [https://perma.cc/X9CR-UMBX].

60. *See* Miller, *This Company is Making Millions*, *supra* note 10.

subject of multiple investigations,[61] public policy efforts,[62] and lawsuits.[63] And though results have been slow to materialize, advocacy groups continue to take aim at Libre's practices.[64] As of the time of publication, Libre by Nexus had entered into at least one settlement agree with Washington Attorney General Bob Ferguson, in which it agreed "to provide more than $2.7 million in debt relief and refund a total of $58,000 to 140 customers in the state."[65]

II.
THE PERCEPTION VERSUS THE REALITY OF ANKLE MONITORING

A. Ankle Monitors: The Perception

Advocates frequently present ankle monitoring as a less traumatic alternative to detention, correctly highlighting the profound negative effects of physical incarceration.[66] Immigration prisons have been "proven to traumatize vulnerable populations, [and] jeopardize the basic health and safety of those detained."[67] Immigrants frequently report "poor medical care, spoiled food, and physical or sexual abuse."[68] The lack of medical care and effective safety mechanisms has proven to be both more pronounced and more harmful for people who are pregnant, trans, or diagnosed with conditions like HIV.[69]

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61. Libre by Nexus has been investigated by ICE, the Consumer Financial Protection Bureau, and the Washington Post. *See* Miller, *Company Accused of Preying*, *supra* note 58.

62. *See* Stop Predatory Bail Contracts Act, H.R. 2395, 115th Cong. (2017).

63. Plaintiffs have alleged that Libre contracts are unfair, fraudulent, and unlawful under California law, and that they violate U.S. laws prohibiting peonage and forced labor. Complaint, Vasquez v. Libre by Nexus, Inc., No. 3:17-cv-755 (N.D. Cal. Feb. 15, 2017). The court recently entered an order staying the case "while the parties finalize a written agreement and prepare the necessary motion and supporting papers for preliminary approval," signaling that a settlement is likely imminent. Order on Joint Stipulation Staying Case at 2, *Vasquez*, No. 3:17-cv-755 (N.D. Cal. Feb. 3, 2020).

64. For example, the Virginia-based Legal Aid Justice Center filed a new lawsuit against Libre by Nexus in August 2019. Michael E. Miller, *Virginia Regulators Threaten to Shut Down Company Accused of Preying on Undocumented Immigrants*, WASH. POST (Oct. 10, 2019 5:21 PM), https://www.washingtonpost.com/local/va-regulators-threaten-to-shut-down-company-accused-of-preying-on-undocumented-immigrants/2019/10/10/42f6b79e-eb94-11e9-9c6d-436a0df4f31d_story.html [https://perma.cc/6WTG-DXPS].

65. *Id.*

66. *See* Burnett, *supra* note 5.

67. NAT'L IMMIGRANT JUSTICE CTR. ET AL., THE REAL ALTERNATIVES TO DETENTION, (2018), https://www.immigrantjustice.org/sites/default/files/content-type/research-item/documents/2018-06/The%20Real%20Alternatives%20to%20Detention%20FINAL%2006.17.pdf [https://perma.cc/6UAM-V7XZ] [hereinafter NAT'L IMMIGRANT JUSTICE CTR. ET AL., REAL ALTERNATIVES].

68. Fernandes, *supra* note 26.

69. HUMAN RIGHTS WATCH, CHRONIC INDIFFERENCE: HIV/AIDS SERVICES FOR IMMIGRANTS DETAINED BY THE UNITED STATES (2007); HUMAN RIGHTS WATCH, DETAINED AND DISMISSED: WOMEN'S STRUGGLES TO OBTAIN HEALTH CARE IN UNITED STATES IMMIGRATION DETENTION (2009); Scott Bixby, *Immigrant Miscarriages in ICE Detention Have Nearly Doubled Under Trump*, DAILY BEAST (Mar. 2, 2019), https://www.thedailybeast.com/immigrant-miscarriages-in-ice-detention-have-nearly-doubled-under-trump [https://perma.cc/BYL4-6D3Y]; Jack Herrera, *Why*

Detention has also been associated with heightened levels of anxiety, depression, post-traumatic stress disorder, and suicidal ideation.[70] Adding to the horror, a number of children have died in immigration custody in recent months, while the overall death toll continues to rise.[71] Thus, critiquing ankle monitoring is complicated when "[s]ome lawyers are fighting tooth and nail to get their clients out of detention and enrolled in [ankle monitoring]"[72] and immigrants "are quick to acknowledge that they would rather wear [ankle monitors] than sit in a detention facility."[73]

Immigration advocates also associate ankle monitoring with more favorable immigration outcomes. Detention is "proven to . . . undermine meaningful access to counsel in isolated, remote facilities."[74] Only 14 percent of detained immigrants secure representation, whereas non-detained immigrants retain counsel at a rate of 66 percent.[75] This disparity in access to counsel can have huge impacts on case outcomes. For example, "among similarly situated removal respondents, the odds were fifteen times greater that immigrants with representation, as compared to those without, sought relief, and five-and-a-half times greater that they obtained relief from removal."[76] Many advocates therefore associate release from detention, even in association with ankle monitoring, as a win for immigration cases.

Additionally, release from detention on an ankle monitor is likely to prolong an immigrant's stay in the country considerably. The Justice Department moves people released on ankle monitors to the non-detained docket, "which is so backlogged that it takes years for these cases to be heard and resolved."[77] The backlog is impressive: there are roughly 2.5 million immigrants on the non-detained docket compared with forty-five thousand immigrants on the detained docket.[78]

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are Trans Women Dying in ICE Detention?, PAC. STANDARD (June 4, 2019); https://psmag.com/social-justice/why-are-trans-women-dying-in-ice-detention [https://perma.cc/3ZH9-BUEP].

70. FREED BUT NOT FREE, *supra* note 21, at 3.

71. *See, e.g.*, Molly Hennessy-Fiske, *Six Migrant Children Have Died in U.S. Custody. Here's What We Know About Them*, LA TIMES (May 24, 2019), https://www.latimes.com/nation/la-na-migrant-child-border-deaths-20190524-story.html [https://perma.cc/3EFP-ZH8M]; Hannah Rappleye & Lisa Riordan Seville, *24 Immigrants Have Died in ICE Custody During the Trump Administration*, NBC NEWS (June 9, 2019, 7:00 AM), https://www.nbcnews.com/politics/immigration/24-immigrants-have-died-ice-custody-during-trump-administration-n1015291 [https://perma.cc/72KE-RBUN].

72. Barron & Briones, *supra* note 18.

73. David Yaffe-Dellany, *"It's Humiliating": Released Immigrants Describe Life with Ankle Monitors*, TEXAS TRIBUNE (Aug. 10, 2018), https://www.texastribune.org/2018/08/10/humiliating-released-immigrants-describe-life-ankle-monitors [https://perma.cc/YR5R-W3KP].

74. NAT'L IMMIGRANT JUSTICE CTR. ET AL., REAL ALTERNATIVES, *supra* note 67.

75. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration* Court, 164 U. PENN. L. REV. 1, 32 (2015).

76. *Id.* at 2.

77. *See* Burnett, *supra* note 5.

78. *See id.* On the other hand, the Transactional Records Access Clearinghouse puts the immigration court backlog, including both detained and non-detained dockets, at just 1,023,767 as of

Finally, ankle monitors are portrayed as a cost-effective alternative to detention. The government pays private immigration prisons roughly $320 per day to detain a family, while an ankle monitor costs only $4.41 per immigrant per day.[79] In 2017, ICE spent approximately $2.97 billion to fund immigration detention.[80] On the other hand, ICE spent around $50 million on ankle monitoring in 2016.[81]

B. Ankle Monitors: The Reality

1. Physical and Psychological Consequences

a. Pain

Ankle monitors are not designed to be painless. In fact, of the two ankle monitors on BI Incorporated's website, both advertise robust tamper detection technologies and multiple location technologies, while only one touts a "curved design" that is "easily adjustable to fit any individual."[82] In reality, many immigrants report that ankle monitors cause swelling, numbness, and severe cramps.[83] "Although it is plastic and lightweight," reports Zully García, "it still causes my foot to swell, and it becomes very hot when it is being recharged."[84] At times, ankle monitors can bruise[85] or even scar their wearers through blistering and scabbing.[86] Many monitored immigrants must wear "thick socks under low-cut sneakers to avoid chafing."[87] Those who are unable to avoid chafing or blistering may develop sores that can lead to long-term health consequences. For example, Jesus Escobar-Villalta almost lost his foot when a blister from his ankle monitor became infected.[88] Another woman, "YSM," developed an "extremely painful sore" underneath her ankle monitor and "[within] hours the sores had spread throughout [her] entire body . . . Some of

September 2019. *Immigration Court Backlog Tool*, TRAC IMMIGR. (2018), http://trac.syr.edu/phptools/immigration/court_backlog [https://perma.cc/6DNE-E2GM].

79. *See* Burnett, *supra* note 5; Miller, *This Company is Making Millions*, *supra* note 10.

80. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION DETENTION, *supra* note 21, at 1.

81. Miller, *This Company is Making Millions*, *supra* note 10.

82. *GPS Monitoring - LOC8*, BI.COM, https://bi.com/products-and-services/loc8-gps-monitoring-device-remote-location-technology [https://perma.cc/Y4EL-9YF3]; *GPS Monitoring - ExacuTrack One*, BI.COM, https://bi.com/products-and-services/exacutrack-one-gps-monitoring-device-remote-location-technology [https://perma.cc/HK92-UGZQ].

83. Barron & Briones, *supra* note 18; ISAP Complaint Letter, *supra* note 37, at 6–14.

84. Barron & Briones, *supra* note 18.

85. Araceli Martínez Ortega, *Grilletes de Monitoreo Electrónico, una Tortura para los Inmigrantes*, LA OPINIÓN (June 1, 2018), https://laopinion.com/2018/06/01/grilletes-de-monitoreo-electronico-una-tortura-para-los-inmigrantes [https://perma.cc/K8RN-72RV].

86. *See* E.C. Gogolak, *Ankle Monitors Weigh on Immigrant Mothers Released from Detention*, N.Y. TIMES (Nov. 15, 2015), https://www.nytimes.com/2015/11/16/nyregion/ankle-monitors-weigh-on-immigrant-mothers-released-from-detention.html [https://perma.cc/6T5N-CRU5].

87. Miller, *This Company is Making Millions*, *supra* note 10.

88. *Id.* Notably, this ankle monitor was provided by Libre by Nexus, not ICE. Upon learning of the incident, the company convinced Escobar-Villalta to waive his right to sue. *Id.*

the sores went away or became less swollen and less painful within hours of having the ankle shackle removed, but sores still cover a large part of YSM's body."[89] In one particularly horrific incident, Leyli Martinez-Perez's ankle monitor charger actually burst into flames. While unplugging the device, she received burns to her hand that resulted in permanent scars.[90] Another woman, "BOA," was taken to the emergency room after picking up a metal pan and feeling "a strong electric shock and a sharp pain in her chest."[91] After she requested to have her ankle monitor taken off, her ISAP officer told her that this experience "was normal."[92]

b. Immobility

Ankle monitors restrict immigrants' physical and geographical mobility in a variety of ways. First, eligibility for release on ISAP is contingent upon residing within eighty-five miles of an ISAP office.[93] Once released, immigrants must remain within this zone at all times. In fact, ICE's bid for contractors to administer the ISAP program specifically required the contractor to "provide GPS transmitters that are able to monitor the Participant's whereabouts inside Exclusion and/or Inclusion zones" that an immigrant may or may not enter or leave.[94] These zones are enforced rigidly. As Reginald recounts, he accidentally drove a few blocks outside of New York City during his honeymoon. "Immediately, the [ankle monitor] started beeping, and a pre-recorded message repeatedly declared, 'You are exiting your master zone.'"[95] When Reginald and his wife reentered the city moments later, the ankle monitor again beeped, declaring, "You are now entering your master zone."[96] Although Reginald was fortunate to avoid immigration consequences, leaving one's designated zone can count as a violation of an OSUP or ROR order, triggering serious immigration consequences.[97]

Apart from these formal geographic limits, immigrants experience decreased mobility due to the limits of the technology itself. Ankle monitors take hours to charge, requiring immigrants to remain next to outlets for long periods

89. ISAP Complaint Letter, *supra* note 37, at 7–8.

90. Miller, *This Company is Making Millions*, *supra* note 10. This was also a Libre by Nexus ankle monitor. Here, too, the company succeeded in convincing Martinez-Perez to sign a document waiving her right to sue. *Id.*

91. ISAP Complaint Letter, *supra* note 37, at 6.

92. *Id.*

93. FREED BUT NOT FREE, *supra* note 21, at 8.

94. U.S. IMMIGRATION CUSTOMS & ENF'T, INTENSIVE SUPERVISION APPEARANCE PROGRAM (ISAP III) SOLICITATION, ATTACHMENT 6: DETAILED GPS ANKLE BRACELETS AND TRACKING/MONITORING SYSTEM AND TELEPHONIC REPORTING SYSTEM 2 (2014), https://govtribe.com/opportunity/federal-contract-opportunity/intensive-supervision-appearance-program-isap-iii-hscecr14r00001#details [https://perma.cc/JA49-AA3D].

95. FREED BUT NOT FREE, *supra* note 21, at 18.

96. *Id.*

97. *Id.* at 9, 18.

without moving. The charger for an ankle monitor is "extremely heavy" and it is not necessarily feasible for everyone to carry a charger with them—especially, for example, when also looking after a toddler on public transportation.[98] As a result, immigrants are discouraged from the type of daily movement that most take for granted simply because it could interfere with their ability to maintain a charged ankle monitor and to remain in compliance with the terms of their release.

"It's easy to think, 'Oh, it's just a little thing around your ankle,'" said Heidi Altman, director of policy at the National Immigrant Justice Center. "In fact, we hear from folks that it really feels like another way in which their liberty and their ability to live their life is being severely curtailed. And it's constantly present."[99]

c. Stigma

Ankle monitors carry the intense weight of social stigma, perhaps by design. As one ankle monitor vendor put it: "Over the years there's been a huge debate . . . Do we make them small and unobtrusive so there's not a stigma? Or do we make them big and obnoxious, like a Scarlet Letter?"[100] María Asuncíon experienced this stigma firsthand: "My son asked me why they put this on me, he said that they only do this to thieves. I explained to him that I am not a thief."[101] Regardless of design intent, the UN Special Rapporteur on the Human Rights of Migrants once stated that "the stigmatizing and negative psychological effects of the electronic monitoring are likely to be disproportionate to the benefits of such monitoring."[102]

This stigmatization may even expose people to increased interactions with the criminal justice system. As Zully García recounted, "A few days ago the police stopped me and asked if I had been a prisoner. I told them that I had not, and they answered, then why do you wear this [ankle monitor]. They only put those on prisoners who have committed a crime."[103] Other immigrants have reported similar experiences. Nefi Flores, for example, had ICE called on him after a bus driver spotted his ankle monitor.[104]

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98. ISAP Complaint Letter, *supra* note 37, at 8 (describing the experience of DPP).

99. Yaffe-Dellany, *supra* note 73.

100. Rachel Swan, *Jail To-Go: Ankle Bracelets Could be the Next Great Law Enforcement Tool, if the City Doesn't Get Defeated by Data*, SF WEEKLY (May 21, 2014), http://www.sfweekly.com/news/jail-to-go-ankle-bracelets-could-be-the-next-great-law-enforcement-tool-if-the-city-doesnt-get-defeated-by-data [https://perma.cc/P4ZH-95S5]. Notably, this vendor's company, LCA, is subject to the lawsuit mentioned *supra* note 49, alleging extortion, racketeering, and violations of plaintiffs' Fourteenth Amendment rights. *See Edwards* Complaint, *supra* note 49.

101. Barron & Briones, *supra* note 18.

102. Francois Crepeau (Special Rapporteur on the Human Rights of Migrants), *Rep. of the Special Rapporteur on the Human Rights of Migrants*, U.N. Doc. A/HRC/20/24 (Apr. 2, 2012).

103. Barron & Briones, *supra* note 18.

104. Miller, *This Company is Making Millions*, *supra* note 10.

d. Trauma

For survivors of violence and trauma, ankle monitors may also serve as "a physical reminder of what they've been through."[105] Lisa Knox, an advocate who has worked with survivors of domestic and sexual violence, reports that "I have seen that the strict monitoring only serves to re-traumatize them and bring back the feeling of powerlessness they experienced as victims of abuse."[106] For survivors of abuse, the physical intrusion of an ankle monitor may be a constant reminder of feeling unable to control who or what touches one's body.[107] Ankle monitoring may also conjure memories of historical trauma. As Carla Garcia explains, ankle monitors recall the history of her community's experience of slavery. "We the Garífunas were slaves, and we freed ourselves . . . . [N]ow in the capitalist economy our chains are electronic."[108]

2. Immigration Consequences

a. May Not Improve Access to Counsel

As discussed *supra*, research shows that immigrants who are not in detention enjoy increased access to legal representation. However, immigrants subject to ankle monitoring may still face significant barriers to consulting with their attorneys once secured. First, because ankle monitors encumber physical mobility, as discussed *supra*, these devices could actually impede access to counsel by making it physically difficult to meet with attorneys in person. More critically, many immigrants have reported that they are not permitted to speak with or have their attorneys present during check-ins with the BI Incorporated contractors who administer the ISAP program.[109] The San Francisco Field Office Director of ICE explained that "according to their national contract, [BI Incorporated] ISAP officers were not permitted to speak with attorneys or allow attorneys to be present at ISAP meetings with clients."[110] Given that these check-ins can result in re-detention, which could impact the adjudication of applications for immigration relief, this ISAP-imposed lack of access to counsel is extremely troublesome.[111]

105. Gogolak, *supra* note 86.

106. ISAP Complaint Letter, *supra* note 37, at 16. Knox is a Managing Attorney at Centro Legal de la Raza.

107. My thanks to Leti Volpp, Robert D. and Leslie Kay Raven Professor of Law, UC Berkeley School of Law, for this important insight.

108. Barron & Briones, *supra* note 18.

109. ISAP Complaint Letter, *supra* note 37, at 17; Telephone Interview with Karen Hoffman, *supra* note 37.

110. ISAP Complaint Letter, *supra* note 37, at 17.

111. *See* Telephone Interview with Karen Hoffman, *supra* note 37.

b. May Not Prolong Stay in the United States

While cases on the non-detained docket span years, as discussed *supra*, this delay is not a fixed right or privilege. Voices far and wide, from the former Acting Director of ICE to the Center for Immigration Studies,[112] have advocated for the Trump administration to hire more immigration judges to address the backlog on the non-detained docket.[113] Responding to this pressure, former U.S. Attorney General Jeff Sessions restructured the hiring process for immigration judges. Under this accelerated hiring plan, "128 immigration judges have been sworn in" since January 2017.[114] While the backlog persists, this swift change signals how quickly the non-detained backlog could be addressed given sufficient political will. Thus, although being moved to the non-detained docket currently moves immigrants to a slower adjudication schedule, this reality could change quickly and unpredictably. As such, it is not necessarily strategic to advocate for ankle monitoring as an ideal alternative to detention in the long term.

c. May Not Reduce Rates of Immigration Detention

The use of ankle monitors likely does not reduce immigration detention rates because many of the people on ankle monitors would not have been detained in the first place. As ankle monitoring has grown, it is increasingly unclear whether ATD programs were ever meant to serve as an actual alternative to detention. In fact, despite the increased use of ankle monitoring, immigration detention itself has only skyrocketed.[115]

When ISAP was first launched, it "was not targeted at those individuals in detention who might be good candidates for release; rather, it was targeted at individuals who were not in detention at all."[116] "A lot of the people who are on ISAP are people who would otherwise not be in detention."[117] Instead, many immigrants placed on ankle monitors either were never detained in the first place or would have been released from detention on bond or on an OSUP or ROR order without the condition of ankle monitoring.[118] Further, stateless individuals and even immigrants who have been granted some form of immigration relief

112. The Southern Poverty Law Center has designated the Center for Immigration Studies as a hate group and described it as the "go-to think tank for the anti-immigrant movement." *Center for Immigration Studies*, SOUTHERN POVERTY L. CTR. (SPLC), https://www.splcenter.org/fighting-hate/extremist-files/group/center-immigration-studies [https://perma.cc/4XV2-QKGB].

113. *See* Burnett, *supra* note 5.

114. Press Release, U.S. Dep't of Justice, Office of Pub. Affairs, EOIR Announces Largest Ever Immigration Judge Investiture (Sept. 28, 2018), https://www.justice.gov/opa/pr/eoir-announces-largest-ever-immigration-judge-investiture [https://perma.cc/5EBH-RN3S].

115. Fernandes, *supra* note 26.

116. FREED BUT NOT FREE, *supra* note 21, at 8.

117. Fernandes, *supra* note 26 (quoting immigration attorney Jeremy Jong).

118. FREED BUT NOT FREE, *supra* note 21, at 1.

have been placed on electronic monitoring without justification.[119] Instead of reducing the number of people in immigration detention, the expansion of electronic monitoring may only signal a widening of the net of immigrants under mass control, be it through incarceration or e-carceration.

Rather than reduce detention, electronic monitoring itself is a sort of revolving door that may push immigrants back into detention. This is because ICE considers information including "supervision history (such as bond breaches or supervision violations), and disciplinary infractions" when determining whether to release an immigrant on an ankle monitor.[120] In fact, even minor violations of ISAP's terms can push an immigrant right back into immigration detention. Stories abound of immigrants being re-detained simply because an ankle monitor "ran out of batteries."[121] The Center for American Progress, for example, reported in 2017 on Marco Tulio Hernandez's case. Tulio Hernandez purportedly violated the terms of his electronic monitoring by visiting a cousin in another state—with his ISAP officer's permission.[122] When he returned home a few days later, he was arrested by immigration agents and re-detained, despite complying with all the terms of his supervision for over four years.[123] Accounts from the criminal justice context also support this revolving door effect. As James Kilgore at the Center for Media Justice explained, "The minute you have a device on you you can go back to prison because your bus is late, or the battery dies or there is a power outage."[124]

d. May Not Improve Immigration Case Outcomes

Because ankle monitors are fairly simple devices, they are not generally understood to directly affect immigration case outcomes. However, as their use grows, technological advances are likely to follow, creating the possibility that ankle monitors could detect behaviors with immigration consequences. Two examples leap to mind. First, ankle monitors could detect substance use. In fact, there are already ankle monitors in use in the criminal justice context that are capable of detecting alcohol consumption.[125] While alcohol itself does not

119. *Id.* at 4. The use of ankle monitors on these two populations is particularly nonsensical because neither presents an imminent flight risk. Immigrants who have been granted some form of immigration relief do not present a flight risk because they are not at imminent risk of deportation, and thus have no cause to abscond. Likewise, given that stateless individuals who have been ordered removed are only released from immigration detention if there is no imminent likelihood that a third country would agree to receive them, they also present no flight risk.

120. Robert Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 5 LAWS 3, 7–8 (2016).

121. Fernandes, *supra* note 26.

122. *Id.*

123. *Id.*

124. Solon, *supra* note 47.

125. *Scram Continuous Alcohol Monitoring*, SCRAM SYSTEMS, https://www.scramsystems.com/products/scram-continuous-alcohol-monitoring [https://perma.cc/R6Q3-E7Z9] (providing 24-hour transdermal alcohol monitoring).

necessarily trigger immigration consequences, detection of alcohol consumption that could lead to driving-while-intoxicated charges could ultimately have significant negative immigration consequences—especially where such charges tend to disproportionately influence immigration judges' discretionary decision-making.[126] And given the existence of ankle monitors that test for alcohol, it is easy to imagine monitors testing for substances that automatically trigger drug-related grounds of removal.[127] Second, ankle monitors could be used to eavesdrop on immigrants. Ankle monitors with two-way communication capabilities are in use today, and allegations of eavesdropping have already arisen in the criminal ankle-monitoring context.[128] While such eavesdropping would raise serious constitutional privacy concerns, the resulting data could also have significant impacts on pending immigration cases, particularly if the data related to grounds for relief or removal. Ultimately, the possibilities are limited only by the government's ability to invest in research and new technology. As technology advances, it could be easier than ever to use ankle monitors not only as a mechanism of supervision but as an actual tool of immigration enforcement and case adjudication.

Apart from the actual technology of ankle monitors, the surrounding ISAP program could also trigger negative case outcomes. Though not the precise focus of this Note, a particular example bears mentioning. Karen Hoffman, an immigration advocate, recently reported that ISAP told her client to stay home all day as a condition of monitoring on a day when he was scheduled to appear in immigration court.[129] Only after persistent intervention did the ISAP office ultimately reschedule this immigrant's home check-in. Had it not been for this intervention, her client could have failed to show up for his hearing and been ordered deported—or, in the alternative, been punished for missing his check-in by remaining on an ankle monitor even longer.

3. Economic Consequences

In the civil immigration context, unlike in other contexts, immigrants are not required to pay for the ankle monitors they are required to wear.[130] Nevertheless, an ankle monitor can have significant negative economic consequences for immigrants. First, because some employers view ankle

126. *See generally* KATHY BRADY, IMMIGRATION LEGAL RES. CTR., IMMIGRATION CONSEQUENCES OF DRIVING UNDER THE INFLUENCE: CALIFORNIA DUI AND RECKLESS DRIVING STATUTES (2017).

127. *See* INA § 237(a)(2), 8 U.S.C. § 1227(2)(A)(iii) (2018).

128. *See, e.g.*, Kira Lerner, *Chicago's Ankle Monitors Can Call and Record Kids Without Their Consent*, CITYLAB (Apr. 8, 2019), https://www.citylab.com/equity/2019/04/chicago-electronic-monitors-juveniles-can-call-and-record-them-without-consent/586639 [https://perma.cc/PG3Q-9N3L] (describing electronic monitors with two-way communication capabilities).

129. *See* Email Interview with Karen Hoffman, *supra* note 5.

130. On the other hand, immigrants who are required to pay for their ankle monitors in the criminal or contractual context often face ballooning debt that interferes with their ability to pay for even basic necessities. *See supra* Part I.

monitors with suspicion, it can be difficult for immigrants to find or hold a job in the first place.[131] Added to this is the reality that ankle monitors "loudly play pre-recorded messages for various reasons without warning," which could lead to further deterioration of a strained working relationship.[132] One asylum seeker lost his job after his ankle monitor went off, because his boss "worried it could put other undocumented employees at risk of deportation."[133] Second, depending on the actual device, an immigrant might need to spend as much as three hours a day recharging the battery in a wall outlet or might need to recharge the battery multiple times a day, severely undercutting their ability to work long or irregular hours.[134]

Collateral consequences of ankle monitors are wide-ranging. Immigrants subject to ankle monitoring are generally required to attend in-person check-ins in both ISAP and ICE offices, and may also be subject to curfews and unannounced work visits.[135] Employers "may be unwilling to work around an individual's curfew or visit schedule."[136] Further, due to the irregularity of check-ins and the frequent delays during actual appointments, it may be almost impossible to hold down a job with regular hours.[137]

III.
RESISTING PROLONGED ANKLE MONITORING

This Note now moves to a discussion of the legal theories available for resisting prolonged ankle monitoring, specifically in the civil immigration context. While the harms associated with ankle monitoring follow immigrants across contexts, this Note narrows its scope to civil immigration ankle monitoring to address a gap in the discourse. In the criminal context, ankle monitors have faced widespread criticism and lawsuits in recent years.[138] Likewise, the use of ankle monitors in the contractual context is currently the subject of several high-profile lawsuits.[139] Yet in the civil immigration context, resistance to the use of ankle monitors has virtually stalled. Meanwhile, advocates began reporting in March 2019 that ICE is no longer removing ankle

131. FREED BUT NOT FREE, *supra* note 21, at 17.
132. *Id.*
133. Yaffe-Dellany, *supra* note 73.
134. *See* Solon, *supra* note 47; Yaffe-Dellany, *supra* note 73; ISAP Complaint Letter, *supra* note 37, at 8.
135. FREED BUT NOT FREE, *supra* note 21, at 17; ISAP Complaint Letter, *supra* note 37, at 7, 9, 15–18.
136. *See* FREED BUT NOT FREE, *supra* note 21, at 17.
137. *Id.* at 16.
138. *See supra* note 49 (discussing one such high profile challenge to ankle monitors in the criminal context).
139. *See supra* note 63 (discussing one such high profile challenge to ankle monitors in the contractual context).

monitors prior to the final resolution of a case.[140] Given the intense politicization of immigration policy in recent years, few advocates have the capacity to focus on ankle monitoring. As such, this Note seeks to address this gap and to propose forms of resistance to ankle monitors, both through existing legal avenues and through alternatives to electronic monitoring.

A. Administrative Procedure Act

Immigrants are unlikely to successfully challenge ankle monitoring on the basis of an Administrative Procedure Act (APA) claim. The APA provides that a notice and comment period must precede any substantive rulemaking.[141] ICE's promulgation of the ISAP program, through which ankle monitors are imposed, took place without this notice and comment period, and the substance of the program has never been articulated in the Code of Federal Regulations. Courts, however, have denied challenges to the imposition of ankle monitors on the basis that ISAP violates the APA notice and comment requirement. In *Nguyen v. B.I. Inc.*, the court found that "ISAP is not a new administrative rule, and is not subject to APA requirements."[142]

B. Substantive Due Process

Immigrants have extremely limited substantive due process rights[143] and have not yet successfully challenged ankle monitoring on this basis. To date, substantive due process challenges to ankle monitoring have centered around immigrants who have been ordered deported. Because the liberty interest of an immigrant under a final order of removal is not a fundamental right, ankle monitors must only survive rational basis review.[144] Courts have generally found that an ankle monitor as a condition of ISAP "does not violate aliens' [substantive] due process rights because it is rationally related to the governmental purposes of monitoring aliens under final removal orders and protecting the community."[145] However, immigrants who are not under a final

140. Email Interview with Joseph Navé, Attorney, Navé Immigration Law (Mar. 29, 2019) (on file with author) ("[A]s of this week, ICE headquarters have introduced a new policy that they will no longer remove ankle monitors, even if a bond is paid. The options are either ankle monitor or immigration detention.").

141. Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. (2018).

142. 435 F. Supp. 2d 1109, 1116 (D. Or. 2006).

143. *See, e.g.*, Harisiades v. Shaughnessy, 342 U.S. 580 (2007) (denying relief from deportation on a substantive due process claim because the matter was "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference"); Fiallo v. Bell, 430 U.S. 787 (2003) (denying judicial review of denials of immigration relief, even as the denials infringed upon the substantive due process rights of citizens and legal permanent residents in familial relationships with the applicants).

144. *See* Demore v. Kim, 538 U.S. 510, 521–22 (2003).

145. Iruene v. Weber, No. 3:12-CV-1864-O-BH, 2012 WL 5945079, at *3 (N.D. Tex. Aug. 1, 2012), *report and recommendation adopted*, No. 3:12-CV-1864-O, 2012 WL 5995350 (N.D. Tex. Nov. 28, 2012); *see also* Nguyen v. B.I. Inc., 435 F. Supp. 2d 1109, 1115 (D. Or. 2006) (finding ISAP ankle monitors rationally related to the government interest in reducing rate of absconders); Zavala v. Prendes,

order of removal but are instead seeking admission to the United States may be a distinguishable carve-out class. For immigrants in this class, whose liberty interests are not compromised by final removal orders, another result may be possible. Such a carve-out would be especially salient in this political moment because it would likely encompass asylum seekers who have been admitted into the United States.

A further wrinkle to any substantive due process challenge is the fact that current law may not recognize ankle monitoring as a deprivation of liberty. While advocates have recommended classifying ankle monitors as "custody for immigration detention purposes,"[146] recent cases have created hurdles for this proposal. For example, in a 2010 habeas case where an immigrant challenged an order of supervision that required him to wear an ankle monitor for more than six months, the court found that ankle monitors are not a deprivation of liberty, but rather an acceptable condition of supervision.[147] Looking beyond the immigration context, a recent Wisconsin Supreme Court case held that a lifetime sentence imposing an ankle monitor was not even a "punishment."[148] Any substantive due process challenge would face a significant uphill battle given this negative precedent.

C. Procedural Due Process

While immigrants' procedural due process rights are also limited, immigrants may be more likely to successfully challenge the imposition of ankle monitors on these grounds. The constitutional right to procedural due process guarantees that if the federal government denies a person of life, liberty, or property, the person must be given notice, the opportunity to be heard, and an adjudication by a neutral decisionmaker.[149] Although immigrants' constitutional liberty interests are limited, these interests are likely still sufficient to bring procedural due process claims that center around the arbitrary and capricious nature by which ankle monitors are imposed.[150] But first, a little background is necessary.

No. 3-10-CV-1601-K-BD, 2010 WL 4454055, at *2 (N.D. Tex. Oct. 5, 2010), *report and recommendation adopted*, No. 3:10-CV-1601-K, 2010 WL 4627736 (N.D. Tex. Nov. 1, 2010) (same); Diawara v. Sec'y of DHS, No. CIV.A. AW-09-2512, 2010 WL 4225562, at *2 (D. Md. Oct. 25, 2010) (same).

146. FREED BUT NOT FREE, *supra* note 21, at 2.

147. *Diawara*, 2010 WL 4225562, at *2 ("[W]e nowhere deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." (quoting Zadvydas v. Davis, 533 U.S. 678, 694 (2001))).

148. State v. Muldrow, 912 N.W.2d 74 (Wisc. 2018) (holding that a lifetime ankle monitor was not a punishment and thus defendant did not have a due process right to be informed that his guilty plea would result in this condition).

149. U.S. CONST. amend. V; *id.* XIV; *see also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

150. *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001) (finding that there must be adequate procedural safeguards or a special justification to outweigh an immigrant's liberty interest).

In 2009, DHS recommended developing a standardized assessment tool to determine when it was appropriate to impose ankle monitoring on immigrants.[151] In response to this recommendation, ICE implemented the Risk Classification Assessment (RCA) tool in January 2013 to improve decision-making about detention and supervision.[152] This assessment tool generates standardized recommendations regarding detention and release.[153] If the RCA recommends further detention, it also recommends a custody classification level.[154] If the RCA recommends release, it also makes recommendations about immigration bonds and supervision levels, as applicable.[155] But because these recommendations are discretionary, "RCA recommendations are of limited value" in determining what conditions ICE will actually impose.[156] For example, although the RCA system is designed to recommend either a bond or electronic monitoring, in practice ICE field offices "are encouraged to ensure compliance" by imposing an immigration bond, telephonic check-ins, *and* ankle monitoring.[157] As a result, the RCA "may only add a scientific veneer" to the decision to place released immigrants on ankle monitors.[158] In reality, decision-making about ankle monitoring is in no way tethered to unbiased evaluation criteria.

The criteria assessed by the RCA tool have never been publicly released and ICE is not required to justify its decisions regarding the imposition of ankle monitoring.[159] It is unclear who even makes the decision to de-escalate immigrants off an ankle monitor.[160] Individuals are forced to guess why they were placed on an ankle monitor and why similarly situated individuals are de-

151. *See* SCHRIRO, *supra* note 8, at 20–21.

152. OIG ATD REPORT, *supra* note 25, at 4.

153. While outside the scope of this Note, the RCA has come under significant scrutiny following a 2017 modification to the tool, eliminating the "release" recommendation altogether. *See* Mica Rosenberg & Reade Levinson, *Trump's Catch-and-Detain Policy Snares Many Who Have Long Called U.S. Home*, REUTERS (June 20, 2018), https://www.reuters.com/investigates/special-report/usa-immigration-court [https://perma.cc/8JR3-R968]. As a result of the modification, the RCA now automatically recommends detention. Daniel Oberhaus, *ICE Modified its 'Risk Assessment' Software so it Automatically Recommends Detention*, VICE MOTHERBOARD (June 26, 2018), https://motherboard.vice.com/en_us/article/evk3kw/ice-modified-its-risk-assessment-software-so-it-automatically-recommends-detention [https://perma.cc/HX53-ZVEN] (expanding on the Reuters investigation). Although ICE agents can still override these RCA recommendations, this modification "led to an almost immediate increase in detention of immigrants" in alignment with Trump's "zero tolerance" stance. *See id*.

154. OIG ATD REPORT, *supra* note 25, at 5.

155. *Id.*

156. *Id.* at 12.

157. *Id.*

158. *See* Mark Noferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L. REV. 45, 45 (2014) ("[T]he immigration risk assessment may only add a scientific veneer to enforcement that remains institutionally predisposed towards detention and control.").

159. *See* ISAP Complaint Letter, *supra* note 37, at 21.

160. Some reporting seems to indicate that BI Incorporated agents are responsible for this decision, while immigration judges and ICE officers have clearer authority to impose an ankle monitor as a condition of release from custody. *See* Takei, *supra* note 9, at 142.

escalated off ankle monitors on very different timelines.[161] Rather than reflecting an administrative law judge's determination of flight risk or dangerousness, the decision to impose an ankle monitor sometimes comes down to the discretion of an individual ICE officer.[162]

In certain circumstances, ICE has made no effort to make individualized determinations of the appropriateness of ankle monitoring. For example, following the surge of Central American asylum seekers in 2014, ICE declared that every head of household released through an ATD program "will include Full Service – GPS monitoring" upon initial ATD enrollment.[163] A contemporaneous internal ICE email "stated that: 'Absent extraordinary circumstances, *all* persons released from [detention] *will be enrolled* in some form of ATD.'" Thus, all heads of households at the time—primarily mothers with children—were subjected to automatic ankle monitoring upon release.[164]

Likewise, the ISAP program itself is not necessarily anchored to an individualized determination of risk. Because the ISAP program requires participants to live within an eighty-five-mile radius of an ISAP office, participation in the program is not based on an individualized determination of flight risk or potential threat to public safety.[165] Rather, participation in the program is fundamentally linked to where an immigrant plans to live if released from detention.

Advocates have critiqued the dearth of consistent, public, and enforceable ISAP guidelines. In a complaint letter sent to the Department of Homeland Security, advocates wrote:

> Given that violations of the ISAP rules can lead to the individual's detention and deprivation of their liberty, they must be afforded a fair opportunity to understand the requirements of the program. There should also be very clear criteria for the removal of ankle shackles and de-escalation of the ISAP requirements.[166]

161. *See* FREED BUT NOT FREE, *supra* note 21, at 14 (reporting that multiple people have unexpectedly been required to start wearing ankle monitors during routine OSUP check-ins).

162. For example, the landmark study FREED BUT NOT FREE details the story of two similarly situated immigrants who were both told they would have to wear an ankle monitor during routine ISAP check-ins. However, while one immigrant, Santoso, accepted this condition, the other immigrant, Komi, successfully persuaded the officer not to impose the monitor. *See* FREED BUT NOT FREE, *supra* note 21, at 16.

163. *See* Richard A. Rocha, U.S. Immigration & Customs Enf't Spokesperson, July 2015 Family Detention Announcement, https://immigrantjustice.org/ice-july-2015-family-detention-announcement [https://perma.cc/B9PJ-WKVY].

164. *See* ISAP Complaint Letter, *supra* note 37, at 5 (quoting Email from ERO Taskings to Field Office Directors, Deputy Field Office Directors, and Assistant Field Office Directors (May 15, 2015) (on file with counsel)).

165. OIG ATD REPORT, *supra* note 25, at 3.

166. ISAP Complaint Letter, *supra* note 37, at 21–22.

Despite this criticism, ICE has failed to release any guidance on ISAP rules or to adopt guiding factors proposed by the Northern California Chapter of American Immigration Lawyers Association (AILA Norcal).[167]

Given recent reports that ICE will no longer de-escalate anyone off an ankle monitor,[168] immigrants may be able to mount a viable legal challenge arguing that "ankle shackles are an extreme restriction on an individual's liberty" and that ICE's arbitrary and capricious imposition of ankle monitors on immigrants for indeterminate periods of time is a violation of their procedural due process rights.[169] Without adequate procedural safeguards in place, ankle monitors are arguably a violation of immigrants' liberty interests.

D. ICE Administrative De-escalation Policy

Immigrants may also be able to challenge the long-term imposition of an ankle monitor on the grounds that ICE's internal guidelines require de-escalation as early as possible. In an October 2015 meeting between the San Francisco ICE Field Office Director and members of AILA Norcal, the Director "quoted an undisclosed email stating that ICE policy was to affirmatively review every case for de-escalation at 60 days, and to provide subsequent regular reviews" every thirty days thereafter.[170] Following this revelation, the Stanford Law School Immigrants' Rights Clinic developed a de-escalation guide based on this sixty-day policy, with a template letter requesting review after sixty days.[171]

This sixty-day de-escalation policy provides little meaningful difference, however, for most immigrants. For one, the policy is not publicly available and is not regularly disclosed to immigrants placed on ankle monitoring. ICE has disclosed so little about the policy, in fact, that it is possible that the policy is unique to the San Francisco Field Office and is not in effect throughout the country.[172] Moreover, with recent reports that the San Francisco Field Office region is no longer de-escalating anyone off an ankle monitor, this policy may have been quietly rescinded.[173] Further, because an internal policy does not have the same weight as formal rulemaking or adjudication, the violation or rescission of the policy does not automatically give rise to a claim under the Administrative Procedure Act.[174]

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167. Responding to the lack of consistent procedures with respect to ankle monitors, AILA Norcal proposed guiding factors for ICE to consider when making de-escalation decisions. *Id.* at 19–20. These factors include: "history of compliance with ISAP program requirements, the existence of a phone line, and the existence of a valid passport that has been surrendered to ISAP." *Id.* at 20. To date, these factors have not been formally adopted by ICE and are only available to AILA Norcal members for review. *Id.*

168. Email Interview with Joseph Navé, *supra* note 140.

169. ISAP Complaint Letter, *supra* note 37, at 23.

170. *Id.* at 19.

171. ANKLE MONITOR REMOVAL GUIDE, *supra* note 38.

172. ISAP Complaint Letter, *supra* note 37, at 19.

173. *See* Email Interview with Joseph Navé, *supra* note 140.

174. Administrative Procedure Act of 1946, 5 U.S.C. § 500 *et seq.* (2018).

Regardless of official policy, the reality is that many immigrants spend much longer on ankle monitors, and many are never evaluated for de-escalation. Some estimates place the average duration of an ankle monitor term at three months,[175] although some immigrants, like Miguel Araujo, have been on ankle monitors for up to six years.[176]

IV.
ALTERNATIVE ALTERNATIVES TO DETENTION

Although litigation and administrative advocacy may not present perfect vehicles to challenge ankle monitoring, there remain a number of other routes to resist or altogether replace the use of ankle monitors in the civil immigration context. Below, this Note takes up alternative proposals that would not subject immigrants to the indignities of a shackle.

A. ICE Discretionary Decision-Making Alternatives

The most straightforward method to eliminate ankle monitors would be for ICE to exercise its existing discretion. Simply put, ICE could release immigrants on an OSUP or ROR order without imposing ankle monitoring. Both of these orders, which provide for the release of immigrants from detention, require a determination of an individual's flight risk and threat to public safety.[177] ICE could thus use existing procedures to ensure that immigrants do not evade custody without inflicting on immigrants the many harms associated with ankle monitoring.

B. Community-Based ATD Program Alternatives

Community-based ATD programs have achieved remarkable results without ankle monitors. These programs, which rely on community monitoring and social workers, have gained approval from a variety of stakeholders. For example, the most recent community-based ATD program in operation, the Family Case Management Program (FCMP), boasted an extremely high rate of compliance: 99 percent of participants attended ICE check-ins and appointments; 100 percent of participants attended court hearings; and only 2 percent of participants were reported as having absconded.[178] This is noticeably higher than the rate of compliance associated with ankle monitors.[179] Advocates have also praised the FCMP for its success in connecting immigrants with legal

175. Gogolak, *supra* note 86.

176. Martínez Ortega, *supra* note 85.

177. *See* INA §§ 236(a), 241, 8 U.S.C. §§ 1226(a), 1231 (2018).

178. OFF. OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-18-22, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT'S AWARD OF THE FAMILY CASE MANAGEMENT PROGRAM CONTRACT (REDACTED) 5 (2017) [hereinafter OIG FCMP REPORT].

179. As discussed above, BI Incorporated reported that 99.6 percent of participants attended court hearings, while 21 percent of participants were reported as having absconded. *See* Campbell, *supra* note 40.

services, housing and healthcare, schooling for their children, and an orientation to the immigration court system.[180] Costing roughly $36 per day per family, the FCMP was also significantly cheaper than the $319 per day that it would cost to detain a family.[181] Following the recent family separation crisis, many have revisited the FCMP as a successful model preventing both family separation and prolonged family detention.[182]

Although ISAP is now ICE's only ATD program in operation, other programs have found success with community-based alternatives to detention. From 1997 to 2000, the Vera Institute of Justice operated an Appearance and Assistance Program in New York City.[183] In addition to individualized supervision, the Vera Institute program "focused on individualized support services," connecting immigrants with a variety of services.[184] Despite the Vera Institute's track record, ICE instead awarded the FCMP contract to GEO Care, LLC, a subsidiary of the GEO Group, Inc. and counterpart of BI Incorporated, which administers the ISAP program.[185] GEO Care administered the FCMP program from January 2016 to June 2017, when the Trump administration abruptly shuttered it.[186]

Several other organizations have proposed community-based ATD programs, but none have received governmental funding. These organizations include the Reformed Church of Highland Park in New Jersey, the Christ House and the Seafarers & International House's Guest House Program in New York, Casa Marianella in Texas, and Freedom House in Michigan.[187] Despite a lack of government funding, these organizations have instituted successful case management programs that provide critical services to immigrants, demonstrating the viability of ATD programs even when faced with a lack of government support.

Community-based ATD programs represent a viable alternative to ATD programs that rely on ankle monitoring. This does not, however, mean that they are not subject to some critique. Although these programs do not contribute to the widening net of electronic surveillance, community-based ATD programs nevertheless extend the scope of government surveillance over immigrants—

180. *See* Bendix, *supra* note 35.

181. *See id.*; Jaden Urbi, *This is How Much it Costs to Detain an Immigrant in the US*, CNBC (June 20, 2018), https://www.cnbc.com/2018/06/20/cost-us-immigrant-detention-trump-zero-tolerance-tents-cages.html [https://perma.cc/Q6M2-PV8N]. However, FCMP is more expensive than ankle monitoring, which costs just $4.41 per day. OIG ATD REPORT, *supra* note 25, at 4.

182. Jacqueline Thomsen, *Advocates Point to Canceled Obama-Era Program Meant to Keep Families Together After Trump Separation Policy*, HILL (June 25, 2018), https://thehill.com/latino/393897-advocates-point-to-cancelled-obama-era-program-keeping-families-together-after-trump [https://perma.cc/6GNA-DZX3].

183. FREED BUT NOT FREE, *supra* note 21, at 7.

184. *Id.*

185. OIG FCMP REPORT, *supra* note 178, at 2.

186. *See* Bendix, *supra* note 35.

187. FREED BUT NOT FREE, *supra* note 21, at 10.

albeit through a civil society intermediary.[188] Community-based ATD programs also allocate a greater share of responsibility and risk to collaborating non-profits, arguably overburdening them, while insulating the government from the full costs and liabilities of the program.[189]

C. Community Advocacy Alternatives

Community advocacy has played a critical role in decreasing the number of immigrants subject to ankle monitoring. For example, the de-escalation policy discussed *supra* is a direct result of the advocacy of a coalition of immigrants' rights advocates in the Bay Area.[190] Without this coalition's work it is likely that ICE's de-escalation policy never would have come to light, since it had never previously been publicized to immigrants or advocates. Through the coalition's work, advocates across the country may have gained a viable path to challenge prolonged ankle monitoring.[191] Likewise, this coalition submitted a civil rights complaint letter to the Department of Homeland Security in 2016, documenting the serious issues associated with ankle monitoring.[192] Although the organization spearheading the complaint at the time, Centro Legal de la Raza, "did not have the resources to follow up with a lawsuit," the coalition's documentation and criticisms of the ISAP program continue to be reported on, demonstrating the impact of such advocacy.[193] Another coalition partner, the San Francisco Immigrant Legal Defense Collaborative, is still engaged in FOIA litigation about the ISAP program.[194]

Apart from this coalition work, advocates have also informally developed an ankle monitor de-escalation strategy that relies on the strength of zealous community support. Namely, advocates will file a petition for a writ of habeas corpus on the basis that ankle monitors constitute a deprivation of liberty.

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188. *See* Robert Koulish, *Entering the Risk Society: A Contested Terrain for Immigration Enforcement, Social Control and Justice*, *in* SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 82 (Maria João Guia, Maartje van der Woude & Joanne van der Leun eds., 2013) ("In this new neoliberal sensibility [of community-based ATD programs], the government widens its control net over non-detained immigrants, and now it does so within a post-human rights discourse. . . . It also deals with some of the concerns of immigrant rights advocates, while promising to cut costs. All the while, it extends disciplining technologies into and through local immigrant communities.").

189. *See id.* ("While the government extends its gaze over immigrants it outsources risk and responsibility to the CSN [Community Support Network]. The NGO network subsidises the project through private grants, philanthropy and fundraising and thus assumes nearly all the financial risk. The network also assumes responsibility for the care and wellbeing of persons whose temporary parole status reinforces ICE's plenary seeming power over them.").

190. *See* ISAP Complaint Letter, *supra* note 37, at 19. This coalition includes Centro Legal de la Raza, Community Legal Services in East Palo Alto, East Bay Community Law Center, the Bar Association of San Francisco, and the San Francisco Immigration Legal Defense Collaborative. *Id.* at 1–2.

191. However, reports that ICE is no longer de-escalating anyone off an ankle monitor may signal a reversal of this victory. *See* Email Interview with Joseph Navé, *supra* note 140.

192. *See* ISAP Complaint Letter, *supra* note 37, at 19.

193. *See, e.g.*, Yaffe-Dellany, *supra* note 73.

194. Telephone Interview with Avantika Shastri, *supra* note 37.

Anecdotal reports suggest that this legal strategy is remarkably successful despite the limited liberty interest of some immigrants as discussed in Part IV.B *supra*.[195] In practice, it appears that DHS will often release a person from custody in order to moot the petition, rather than confront strong community disapproval while litigating the petition.[196]

D. Policy Alternatives

The final alternatives that could eliminate the use of ankle monitors are the most ambitious. These policy proposals take two forms. First, criminal justice reform focused on decriminalizing immigrants could decrease the use of ankle monitors simply by reducing the number of immigrants funneled into the detention and deportation pipeline. With fewer immigrants entering the criminal or immigration detention systems due to low level offenses, a correspondingly smaller number of immigrants would be eligible for and subject to an ankle monitor. Similarly, comprehensive immigration reform focused on granting immigration relief to certain classes of immigrants could reduce the number of people subject to removal proceedings, thus reducing the number of immigrants eligible for an ankle monitor—at least in the short term.

Alternately, advocates could ground their advocacy for the elimination of ankle monitoring in proposals to abolish immigration prisons altogether. To be clear, not all proposals for immigration prison abolition contemplate eliminating the use of ankle monitors. This is so because some advocates do not view ankle monitors as a form of custody or e-carceration, while others believe that although ankle monitors are a form of custody, they are still the lesser of two evils. However, as immigration scholar César Cuauhtémoc García Hernández suggests, "attempts to close immigration prisons that lack a common foundation of shared concern for migrants' humanity will simply result in reshaping the violent ethos at the heart of the prison regime."[197] As such, García Hernández proposes a vision of abolition that "is as much about closing prison doors as it is about creating a new moral framework for the regulation of migrants and migration."[198] In this view of abolition, and in light of the violence that shackles enact upon immigrants, opposition to ankle monitoring is a moral imperative in the movement for prison abolition.

CONCLUSION

Ankle monitoring does not provide a good alternative to detention. In fact, it is not even a true alternative to detention. Rather, ankle monitoring often works as an "additional enforcement measure[] for individuals who are legitimately

195. Telephone Interview with Karen Hoffman, *supra* note 37.

196. *Id.*

197. César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 300 (2017).

198. *Id.* at 250.

living outside of a detention facility."[199] More simply put, release from custody onto an ankle monitor is not so much a release from detention as it is a transition from incarceration to e-carceration. As the use of ankle monitoring grows, it is imperative that we recognize the wide-ranging consequences of ankle monitors and develop alternatives to detention that are not so deeply flawed.

199. FREED BUT NOT FREE, *supra* note 21, at 9.