

November 16, 2020

Supervisor Sandra Lee Fewer
Chair, Budget & Finance Committee
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

***RE: Legal & Policy Problems with Electronic Monitoring in San Francisco, California
Agenda Item 200876 & 201198, Budget and Finance Committee, Nov. 18, 2020***

Dear Supervisor Fewer:

This letter addresses the San Francisco Sheriff's office use of electronic monitoring for people on pretrial release and probation. The COVID-19 pandemic brought into sharp focus the dangers of incarceration and the critical need to release as many incarcerated people as possible. But the continued and increased use of electronic monitors (including GPS-equipped ankle monitors) is not the answer.¹ Instead, significantly fewer people should be on monitors and the rules of monitoring should be modified to be much less restrictive and oppressive.

By way of introduction, I am a law professor and my area of expertise is the use of surveillance technology for people involved in the criminal legal system. Prior to joining academia, I was an attorney at the East Bay Community Law Center in Berkeley, California, where I represented young people charged with crimes, many of whom were ordered to wear ankle monitors. I know the problems with electronic monitoring very well.

The Board of Supervisors is uniquely positioned to address the problems with electronic monitoring. Pursuant to California Penal Code § 1203.16, the Board may "prescribe reasonable rules and regulations" regarding electronic monitoring. Some of the relevant rules are set forth in the contract with Sentinel Offender Services and other rules are set by the Sheriff's Office.² Both sets of rules should be reviewed and modified by the Board of Supervisors. Thanks to the efforts of community organizers, the harmful and racialized impact of electronic monitoring has been exposed. This letter adds to those efforts by explaining some of the specific legal problems with electronic monitoring for people on pretrial release and court supervision.

Electronic Monitoring Improperly Infringes on Fourth Amendment Rights & Privacy.

Electronic monitoring, as well as police use of the data generated by ankle monitors, is governed by the Fourth Amendment.³ Accordingly, there must be a legal basis for these searches and yet there is often no such basis when it comes to electronic monitoring. Although there is not uniformity among courts on this issue, at least two state supreme courts struck down electronic monitoring as unreasonable searches under

the Fourth Amendment.⁴ In those cases, the courts found that the significant privacy intrusions of electronic monitors outweighed the government interest in tracking people.⁵

Electronic Monitoring is Often an Unreasonable Condition of Court Supervision and Pretrial Release.

To be lawful, conditions of release, such as electronic monitoring, must reasonably relate to the purposes of supervised release, such as rehabilitation, public safety, or, in the case of pretrial release, ensuring attendance at future court dates.⁶ There must be a “degree of proportionality between the burden imposed by [the] condition and the legitimate interests served by the condition.”⁷ Although there is not uniformity among courts on this issue, there are three general reasons why electronic monitoring is neither reasonable nor proportional.

First, monitoring burdens the significant privacy interests in our personal digital data, including our location data.⁸ As Justice Sonia Sotomayor explained, extensive use of GPS surveillance of location data “generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”⁹ This surveillance, in turn, disrupts “the relationship between citizen and government in a way that is inimical to democratic society.”¹⁰

Second, there is no convincing evidence that electronic monitoring furthers any of the purposes of supervised or pretrial release. In fact, the opposite is true: less supervision and fewer restrictions lead to better outcomes.¹¹ The stigmatizing effect of wearing a monitor, as well as the myriad of technical requirements (including being on 24/7 house arrest), makes it hard to obtain and keep a job,¹² as well as maintain social and familial relationships.¹³ As the Massachusetts Supreme Court recently observed: “When a judge orders GPS tracking, a ‘modern-day ‘scarlet letter’ is physically tethered to the individual, reminding the public that the person has been charged with or convicted of a crime.”¹⁴ In the context of pre-trial release in particular, there is no evidence that people on monitors have lower rates of missed court dates as compared to people not on monitors.¹⁵

Third, and finally, electronic monitoring is often used disproportionately. Although it did not address GPS monitoring specifically, the California Supreme Court recently struck down electronic surveillance of cellphone data as a condition of juvenile probation because the “burden it imposes on [the accused person’s] privacy is substantially disproportionate to the countervailing interests of furthering his rehabilitation and protecting society.”¹⁶

Electronic Monitoring Reflects the “New Jim Code.”¹⁷

Electronic monitoring builds on decades of surveillance as a mode of racial control and subordination.¹⁸ As Professor Michelle Alexander, author of *The New Jim Crow*, observed: “digital prisons are to mass incarceration what Jim Crow was to slavery.”¹⁹ Race directly corresponds with “who is watched in society.”²⁰ In San Francisco, Black people make up around 3 % percent of the general population but almost 50 % of the people on electronic monitors. National data also shows that Black and Latinx people are also reincarcerated for technical violations at a much higher rate than white people.²¹

Being watched 24/7 undermines personal autonomy and dignity, resulting in racialized disenfranchisement and social marginalization.²² Rejecting the idea that GPS monitoring furthers rehabilitation, one federal judge remarked in a dissent: “a public sighting of the modern day ‘scarlet letter’—the relatively large GPS device—will undoubtedly cause panic, assaults, harassment, and humiliation.”²³

Electronic Monitoring Is Not Always Used as An Alternative to Incarceration and Pretrial Detention.

The common narrative is that but for electronic monitoring, people would otherwise remain in custody. This “favorable alternative” narrative is a myth for two reasons. First, there is no empirical evidence that monitoring is, in fact, used as an alternative - that in a world without monitors the same people would be in custody. Perhaps some people would otherwise be incarcerated, but many people would not (or should not) be incarcerated. In practice, monitoring is often added on as an additional condition of probation or pretrial release, used as a sanction for technical violations that often had nothing to do with public safety, or used on people who should just be straight released (or released on their own recognizance).

Second, even in cases where monitoring is, in fact, being used as an alternative – in other words, the person would otherwise remain in custody – there is limited evidence that monitoring is an effective alternative. In fact, GPS monitoring, with its near perfect capacity to detect invariable imperfections, increases the risk of technical violations,²⁴ which in turn drives reincarceration.²⁵ People on monitors often spend months cycling in and out of jail for technical violations. For example, failing to charge the monitor at a predetermined time or going to the doctor’s office without authorization, are violations and often result in reincarceration.²⁶ It is rarely a question of one day of electronic monitoring versus one day in custody – it is most often both.²⁷

Electronic Monitoring Improperly Infringes on Liberty Interests.

As one federal judge observed of GPS monitoring in the context of pretrial release: “Required wearing of an electronic bracelet, every minute of every day, with the government capable of tracking a person not yet convicted as if he were a feral animal would be considered a serious limitation on freedom by most liberty-loving Americans.”²⁸ Although there is not uniformity within the law on this issue, a small but growing number of courts have found that GPS monitoring improperly infringes on liberty interests.²⁹

Electronic Monitoring Is Uniquely Harmful to Certain Groups.

The requirements of electronic monitoring are especially challenging for people with disabilities, mental illness, young people,³⁰ and those with housing insecurity.³¹ Life on a monitor means remaining inside at all times, complying with sometimes upwards of 50 different rules, having regular access to electricity for a set amount of time (sometimes two or more hours at a time), and the ability to plan daily schedules at least 48 hours in advance. Compliance with these requirements would be challenging for anyone, but compliance is particularly hard for more vulnerable groups of people.

Data Should Show Progress, Not Simply Swapping One Form of Incarceration for Another.

According to the San Francisco Sheriff’s Office, the use of monitoring increased three-fold while the jail population decreased. This data suggests that monitoring is overused. Ideally, there should be a decrease in the jail population and a decrease (or at least not an uptick) in the use of monitoring. As a point of

comparison, in neighboring Alameda County, the use of electronic monitoring in juvenile court has gone down over the past two years, as has the overall juvenile hall population. Similar trends should be seen in San Francisco's use of monitoring.

San Francisco Should be a Leader in Limiting & Reforming the Use of Electronic Monitoring.

It is incumbent on the Board to consider these legal and policy concerns, and address the demands identified by those directly impacted.³² The rules and regulations governing the use of monitoring must be changed to counter the negative implications of monitoring. A range of advocacy groups, many of which include directly impacted people, have argued against the expanded use of electronic monitoring and proposed alternatives.³³ I fully support those efforts.

Please let me know if you have questions about this letter or would like to discuss any of these points. I would be honored to be of assistance as you continue to address these important issues. Please feel free to contact me by phone (510-326-8678) or email (kweisburd@law.gwu.edu).

Thank you for your time.

Sincerely,



Kate Weisburd
Associate Professor of Law

CC:

Supervisor Rafael Mandelman
MandelmanStaff@sfgov.org

Supervisor Shamann Walton
Shamann.Walton@sfgov.org

Chelsea Boilard
Legislative Aide to Sup. Sandra Fewer
Chelsea.Boilard@sfgov.org

Tracy Gallardo
Legislative Aide to Sup. Shamann Walton
Tracy.Gallardo@sfgov.org

Jacob Bintliff
Legislative Aide to Sup. Rafael Mandelman
Jacob.Bintliff@sfgov.org

Linda Wong
Clerk of the Budget & Finance Committee
linda.wong@sfgov.org

John Carroll
Clerk of the Board of Supervisors
john.carroll@sfgov.org

-
- ¹ James Kilgore, [As the U.S. Scrambles To Slow Coronavirus, We Should be Wary of Increased Surveillance](#), The Appeal, March 23, 2020.
- ² The rules set by the Sheriff's office are located [here](#).
- ³ [Grady v. North Carolina](#), 575 U.S. 306, 309 (2015).
- ⁴ [Comm. v. Norman](#), 484 Mass. 330, 338 (2020); [Com. v. Feliz](#), 119 N.E.3d 700, 692–93 (Mass. 2019); [State v. Grady](#), 831 S.E.2d 542, 556 (N.C. 2019).
- ⁵ Kate Weisburd, [Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring](#), 98 N.C. L. REV. 717 (2020).
- ⁶ [See Comm. v. Norman](#), 484 Mass. 330, 338 (2020).
- ⁷ [In re Ricardo P.](#), 7 Cal. 5th 1113, 1122 (2019).
- ⁸ [Carpenter v. United States](#), 138 S. Ct. 2206 (2018), [Riley v. California](#), 134 S. Ct. 2473 (2014), [United States v. Jones](#), 132 S. Ct. 945, 951 (2012).
- ⁹ [United States v. Jones](#), 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).
- ¹⁰ [Jones](#), 565 U.S. at 416.
- ¹¹ Michelle S. Phelps, [Mass Probation from Micro to Macro: Tracing the Expansion and Consequences of Community Supervision](#), 3 ANN. REV. CRIMINOLOGY 261, 262 (2020); Jennifer L. Doleac, [Study after study shows ex-prisoners would be better off without intense supervision](#), Brookings Institute (July 2, 2018); Michael P. Jacobson Et Al., [Less Is More: How Reducing Probation Populations Can Improve Outcomes](#) 6, Harvard Kennedy School (2017).
- ¹² [Comm. v. Feliz](#), 119 N.E.3d 700, 704 (Mass. 2019) (noting that GPS may require individual “to leave his [or her] job and walk around outside during work hours, risking potential economic consequences, including loss of employment”).
- ¹³ MAYA SCHENWAR AND VICTORIA LAW, [PRISON BY ANY OTHER NAME](#), 35 (2020) (noting that electronic surveillance mechanisms are not “rehabilitative or transformative – they don’t support people in making changes that would be helpful in their lives, gaining needed resources, addressing harm or violence, or confronting the social forces that have affected them.”).
- ¹⁴ [Norman](#), 484 Mass. at 338–39.
- ¹⁵ [See](#) Alicia Virani, et al, [Creating A Needs-Based Pre-trial Release System: The False Dichotomy of Money Bail Versus Risk Assessment Tools](#), UCLA School of Law, Criminal Justice Program, 2020, pg. 18.
- ¹⁶ [In re Ricardo P.](#), 7 Cal. 5th 1113, 1119 (2019).
- ¹⁷ RUHA BENJAMIN, [RACE AFTER TECHNOLOGY: ABOLITIONIST TOOLS FOR THE NEW JIM CODE](#) 5-6 (2019).
- ¹⁸ SIMONE BROWNE, [DARK MATTERS](#) (2015); Malkia Amala Cyril, [Black America's State of Surveillance](#), The Progressive, March 30, 2015.
- ¹⁹ Michelle Alexander, Opinion, [The Newest Jim Crow](#), N.Y. TIMES (Nov. 8, 2018).
- ²⁰ Mary Anne Franks, [Democratic Surveillance](#), 30 HARV. J.L. & TECH. 425, 441 (2017).
- ²¹ [See e.g.](#), Kendra Bradner & Vincent Schiraldi, [Racial Inequities in New York Parole Supervision](#), Columbia University Justice Lab, March 2020.
- ²² Chaz Arnett, [From Decarceration to E-Carceration](#), 41 CARDOZO L. REV. 641, 644 (2019).
- ²³ [Doe v. Bredesen](#), 507 F.3d 998, 1012 (6th Cir. 2007) (J. Keith, dissenting)
- ²⁴ [See](#) Kathryn Saltmarsh, Ill. [Sentencing Policy Advisory Council, Research Briefing: State Use Of Electronic Monitoring](#) 6-8, Illinois Sentencing Policy Advisory Council (2019).
- ²⁵ Kendra Bradner, Vincent Schiraldi, Natasha Mejia, and Evangeline Lopoo, [More Work to Do: Analysis of Probation and Parole in the United States](#), Columbia Justice Lab, 2017-2018.
- ²⁶ Aaron Cantu, [When Innocent Until Proven Guilty Costs \\$400 a Month—and Your Freedom](#), VICE, May 28, 2020.
- ²⁷ Ava Kofman, [Digital Jail: How Electronic Monitoring Drives Defendants Into Debt](#), NY TIMES MAGAZINE, July 3, 2019.
- ²⁸ [United States v. Polouizzi](#), 697 F. Supp. 2d 381, 389 (E.D.N.Y. 2010).
- ²⁹ [Norman](#), 484 Mass. at 339; [see also Comm. v. Cory](#), 454 Mass. 559, 570 (2009); [State v. Dykes](#), 403 S.C. 499, 506–07 (2013) (overruled on other grounds by [State v. Ross](#), 815 S.E. 2d 754 (2018)); [United States v. Smedley](#), 611 F. Supp. 2d 971, 975 (E.D. Mo.2009); [United States v. Merritt](#), 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009); [State v. Stines](#), 200 N.C. App. 193, 683 S.E.2d 411 (2009); [Riley v. New Jersey State Parole Bd.](#), 219 N.J. 270, 295 (2014).
- ³⁰ Catherine Crump, [Tracking the Trackers: An Examination of Electronic Monitoring of Youth in Practice](#), 53 U.C. DAVIS L. REV. 795 (2019) ; Chaz Arnett, [Virtual Shackles: Electronic Surveillance and the Adultification of Juvenile Courts](#), 108 J. CRIM. L. & CRIMINOLOGY 399 (2018); Kate Weisburd, [Monitoring Youth: The Collision of Rights and Rehabilitation](#), 101 IOWA L. REV. 297 (2015).

³¹ *Comm. v. Canadyan*, 458 Mass. 574, 575, 578-579 (2010) (noting “undisputed evidence that homeless shelters” could not provide electrical outlets necessary to charge GPS units).

³² See [The Voices of the Monitored-Video and Audio Gallery](#), CHALLENGING E-CARCERATION, <https://www.challengingecarceration.org/watch-videos>; James Kilgore & Emmett Sanders, [Ankle Monitors Aren't Humane. They're Another Kind of Jail](#), *Wired*, Aug. 4, 2018.

³³ See The Center for Media Justice, [No More Shackles: Ten Arguments Against Pretrial Electronic Monitoring](#) (2019); The Center for Media Justice, [No More Shackles: Why We Must End the Use of Electronic Monitors for People on Parole](#) (2018); James Kilgore & Myaisha Hayes, [Guidelines for Respecting the Rights of Individuals on Electronic Monitors](#) (2018); Alicia Virani, et al, [Creating A Needs-Based Pre-trial Release System: The False Dichotomy of Money Bail Versus Risk Assessment Tools](#), UCLA School of Law, Criminal Justice Program, 2020.