PRETRIAL DETENTION AND THE RIGHT TO BE MONITORED

I. FLIGHT RISK, PRETRIAL DETENTION, AND THE NEED FOR ALTERNATIVES TO MONEY BAIL

Historically, the U.S. system of bail and associated pretrial detention was employed solely to prevent pretrial flight,[20] but increasingly, the many individuals awaiting trial in jail are detained because a judge has deemed them potentially dangerous.[21] Although this type of detention raises serious constitutional concerns, the liberty[22] and privacy burdens placed on this subset of detainees seem, to some extent, intuitively reasonable; if evidence suggests that individuals could jeopardize the safety of their community while they awaited trial, their detention might be merited.[23] In light of the recent rise in officially sanctioned detention for dangerousness, however, the modern literature addressing the problems with bail tends to focus on this group of pretrial detainees, highlighting the problems with predicting dangerousness, the expansive judicial discretion allowed within this predictive process, and suggesting better constitutional protections.[24] Nonetheless, the Department of Justice estimates that non-dangerous defendants make up approximately two-thirds of the 500,000 defendants held pretrial in jails at any given time.[25]

These individuals are the product of a long tradition of money bail in the United States.[26] Since the founding of this country, judges have required individuals to post some form of collateral[27] in order to incentivize them to appear at a trial that they strongly wish to avoid--a process that could ultimately lead to their conviction and imprisonment. This system of money bail is an archaic institution, a holdover from times when there were few police officers and jails and when fleeing across a county or state line was more likely to be an effective means of avoiding trial;[28] requiring an individual or family members to post something of value was a necessary and reasonable means of preventing flight.

Recent, extensive changes in technology, such as the rise of Internet photos and enhanced police communication, have greatly decreased flight incentives, and technologies such as GPS monitoring also allow the police to easily monitor those individuals who still have an incentive to flee.[29] Yet money bail still dominates the pretrial process in most states.[30] This system typically employs both personal bonds, in which an individual, friends, or family members post the money or a percentage of the money with a court, and commercial bonds, in which a bondsman becomes responsible for the amount of the bond and charges the defendant a percentage of the bond amount as a fee;[31] both types are exceedingly problematic. Money bail is increasingly not an alternative to pretrial detention but rather an enabler of the practice: as bail amounts are set higher, and as financial inequalities become wider in the United States, many individuals cannot pay and are thus detained while awaiting trial.[32] Increased pretrial detention harms poor defendants and their families, leads to greater recidivism, and uses up scarce criminal justice resources. These pervasive problems, explored in further detail below, create a pressing need for an alternative to money bail and associated pretrial detention of non-dangerous defendants. Advancing monitoring technology will soon, if it does not already, provide this alternative.

A. The Burdens of Pretrial Detention

Non-dangerous individuals jailed to prevent flight suffer the same harms as those detained for safety reasons--the same harms suffered by convicted defendants.[33] They are taken from their communities and physically barred from the outside world, restricted to limited visits by family members and attorneys.[34] Their conversations are constantly monitored by guards and other inmates, their mail is searched, and they are subjected to frequent and invasive searches and pat-downs to ensure institutional security.[35] To compound the gravity of the harm, these high liberty and privacy burdens are often prolonged; despite speedy trial requirements, many defendants awaiting trial are detained for months.[36]

Being jailed also has a variety of more quantifiable negative effects. It increases the likelihood that detainees will commit future crimes, substantially impacts the quality of their defense, and encourages plea bargains--all of which increase the likelihood that the detainee will be convicted, imprisoned, and subjected to prolonged deprivation of liberty, privacy, and other fundamental elements of human existence.

1. The Criminogenic and Plea-Inducing Effects of Pretrial Detention

Many inmates detained pretrial have been accused of low-level or non-violent crimes,[37] yet they are jailed with convicted criminals and potentially dangerous defendants who await trial.[38] Predictably, incarceration multiplies the chances that the accused will learn criminal behavior.[39] Those accused of drug possession may develop new addictions, and non-violent criminals may quickly learn violence (if only to defend themselves at first[40]). As months pass and new defendants arrive, desperation may set in, leaving a potentially permanent mark and possibly lingering violent tendencies.[41]

Moreover, the current pretrial system produces false convictions in addition to training real criminals. In the mid-1960s, the Manhattan Bail Project led by the Vera Foundation concluded that "a person's inability or unwillingness to post bail may result in more than a temporary deprivation of his liberty,"[42] finding that those detained pretrial were more likely to be convicted and imprisoned than those released on bail, regardless of whether they had been previously charged or imprisoned.[43] This trend has continued, leading some to conclude that "[t]he most glaring concern of the pretrial detainee is the large percentage of detainees who are eventually found guilty."[44] While this could simply suggest that judges assessing flight risk and dangerousness are also accurately predicting guilt, further research suggests several other likely contributors to this trend, which are troubling from an equality perspective--and, of course, with respect to defendants' long-term liberty interests. One factor is the substantial difficulty faced by a pretrial detainee attempting to mount a successful defense from a jail cell.[45] The defendant must recruit friends or family members to collect evidence and witnesses and will often have difficulty communicating with his attorney due to limited visiting hours.[46] The difficulty of preparing an adequate defense makes the likelihood of success at trial much lower for pretrial detainees than for those who have secured release and have avoided the stigma of a prison cell.[47]

Faced with these high defense burdens, defendants jailed pretrial often accept plea bargains in lieu of persevering through trial. In some cases, the periods that defendants spend in jail awaiting trial is comparable to, or even greater than, their potential sentences,[48] thus substantially incentivizing quick plea deals regardless of guilt or innocence. One empirical study found that of the federal pretrial detainees in 1987 and 1988, about eighty-five percent were criminally convicted, and that the majority of these convictions appeared to have "resulted from some form of plea bargaining."[49]

2. Financial Harm to Defendants and Their Families

Even if detention does not lead to a conviction, it places significant financial costs on detainees and their families, who, in addition to suffering the stigma of having a loved one in jail, are also deprived of the detainee's financial support.[50] Many detainees lose their jobs even if jailed for a short time,[51] and this deprivation can continue after the detainee's release. Without income, the defendant and his family also may fall behind on payments and lose housing, transportation, and other basic necessities.[52] More broadly, the removal of productive workers from the labor pool negatively affects the economy. As Attorney General Holder recently noted, nonviolent defendants "could be released . . . and allowed to pursue or maintain employment, and participate in educational opportunities and their normal family lives--without risk of endangering their fellow citizens or fleeing from justice."[53]

3. The Tax Burden

High pretrial detention rates do not only impose high costs on defendants, but also on the public. During the recent economic downturn, the cost of money bail to society has been raised as a more practical rallying flag for reform.[54] The American Bar Association notes that "the taxpayer implications of pretrial detention are significant given the expenses of operating detention facilities," observing that "New York City spends approximately $45,000 annually to house a single pre-trial detainee."[55]

Accurately assessing the exact costs of pretrial detention is itself difficult. Fixed costs of prisons must include the expense of housing both convicted criminals and pretrial detainees, and it is difficult to identify the point at which the number of pretrial detainees, in isolation, forces construction of a new facility. It is clear, though, that some states and counties have had to build new jails to accommodate burgeoning populations. The Baltimore City Detention Center, for example, in which ninety percent of women held are awaiting trial, is planning a new $181 million facility to accommodate more inmates.[56] The variable costs of pretrial detention are somewhat better known. Although they differ by jurisdiction, the costs of feeding, clothing, securitizing, and providing medical care for millions of pretrial defendants are high. Daily estimates range from $50 in Kentucky[57] to $85 in Florida[58] and $123 in New York.[59] Additional estimates suggest that jail costs range from $84 million[60] to $124 million[61] or even $860 million[62] annually. . .

C. Not Worth the Cost: The Ineffectiveness of Money Bail

From a bird's-eye view of the U.S. system of money bail and associated pretrial detention for flight, one might assume that the high burdens imposed by this system are justified by its effectiveness--or perhaps a lack of feasible alternatives.[74] In fact, however, neither effectiveness nor a lack of alternatives justifies this costly system.

A non-negligible percentage of defendants flee despite having posted large bonds. In the seventy-five largest counties in the country, twenty-one to twenty-four percent of state court felony defendants who were released on bail or personal recognizance between 1990 and 2004 failed to appear at trial.[75] Twenty-five percent of the defendants who failed to appear had been released on surety bond;[76] of all defendants released on surety bond during this time, there was an eighteen percent failure to appear rate.[77] While this failure rate was lower than that of defendants on emergency release (forty-five percent of defendants released on an emergency basis failed to appear) and unsecured bonds (thirty percent of

those released under this type of bond failed to appear),[78] it shows that bail bonds of any type do not perfectly achieve their goal of ensuring a defendant's presence at trial; the system tolerates a relatively high level of failure as compared to the alternative of jailing all individuals, which would guarantee nearly perfect appearance rates.

This failure is likely due to flight incentives that remain despite technological advances in tracking and monitoring defendants. Although there is no longer as high a likelihood of avoiding conviction by escaping across a state or county line, as the police will eventually detect and track down the defendant,[79] the temptation remains. The common use of fixed bail schedules[80] contributes to the problem: in addition to placing unfair burdens on indigent defendants charged with pricey crimes, it leaves rich defendants charged with the same crime in a relatively easy financial condition. A crime with a fixed bail rate of $50,000 is expensive for a poor man, in other words, but relatively cheap for someone with adequate funds. The wealthier individual may not think twice about absconding and forever forfeiting these funds, particularly if the alternative--a long jail sentence-- has a particularly high cost.

In commercial bail states, individuals may also be incentivized to flee despite low chances of success because their bondsmen have insufficient incentives to monitor them. In the majority of states that allow commercial sureties, the system relies largely on private entities to track down individuals and ensure their appearance at trial. The defendant pays the bondsman a percentage of the bail set as a fee, often along with additional collateral, and the bondsman posts the bail.[81] Depending on the size of the collateral, even defendants of reasonable means may have relatively little incentive to stay in a jurisdiction.[82] Bondsmen, in turn, will only worry about funds that they have put down to the extent they think that the court will collect it upon the defendant's failure to appear. Yet many courts have been lax about declaring bonds forfeited when defendants flee, thus allowing bondsmen to keep the money and reducing private incentives to monitor defendants.[83]

II. ELECTRONIC MONITORING AS AN ALTERNATIVE

Increasingly advanced technologies are able to closely monitor pretrial defendants' locations while granting them far greater freedom--and with it the opportunity to continue working, consult with attorneys, and spend time with their families.[87] Indeed, in recent years U.S. and international jurisdictions have deployed monitoring technologies both pretrial and post-trial for thousands of defendants.[88] While these monitoring programs, described in greater detail below, represent a promising start, electronic monitoring has yet to meaningfully supplant pretrial detention for flight risk. There are numerous obstacles to that goal, including practical concerns as well as the likelihood of entrenched opposition from the bail industry. With this in mind, after describing existing technologies and programs, this Part addresses likely concerns about monitoring's effectiveness, costs, and impact upon liberty, privacy, and equality. These issues will have legal significance, because, as developed in Part III, both the statutory and constitutional arguments for a right to monitoring depend on demonstrating that monitoring is at least as effective and inexpensive as money bail.[89]

A. Technologies and Implementation

Defendants and offenders in the United States and Europe have been electronically monitored since the 1980s, and monitoring has since spread to a limited number of other countries.[90] As early as 1983, one

judge required an offender in New Mexico to be confined to his home and monitored with an electronic bracelet that sent signals to his home,[91] and in 1985, Palm Beach County deployed one of the first electronic monitoring programs using radio beepers--for convicted, not pretrial, defendants.[92] Indeed, although it is counterintuitive, as monitoring seems better suited for locating fugitives than controlling their behavior,[93] electronic monitoring is more widely used in sentencing.[94]

Nonetheless, electronic monitoring has a long history of pretrial use. In the late 1980s, Marion County, Indiana, ran an experimental program of pretrial home detention and electronic monitoring for those who could not afford bail or meet release on personal recognizance conditions. Discussing the benefits of the Marion County program, Indiana University professors note that "awaiting trial at home is less restrictive than confinement in jail" and that the program allowed "offenders to maintain employment and ties to their families."[95] And in 1991, Federal Pretrial Services began a national, pretrial home confinement programming using electronic monitoring.[96] Monitoring was introduced in Europe around the same time.[97]

Current electronic monitoring technologies take several forms. In Europe, the most common monitoring systems use radio devices combined with home curfews.[98] In continuous-signal curfewed monitoring systems,[99] individuals wear a tag on their ankle, which sends a signal to a receiver attached to the individual's phone.[100] The individual is typically confined to the home during certain hours, and a 24-hour monitoring center, using data from the receiver, can track when the individual is at home and whether the equipment has been tampered with.[101] Other monitoring does not rely on confinement to the home but rather requires periodic check-ins through "voice verification" or another means of proving location.[102] In the United States, Federal Pretrial Services uses both radio and GPS tracking devices to enforce home confinement and other conditions of supervised release,[103] along with frequent, required interactions with supervising officers.[104] Cook County, Illinois, has used electronic monitoring--a radio signal and home monitoring unit--for more than 250,000 non-violent defendants since 1989, some of whom were released in the pretrial context.[105]

House-arrest models, however, are both more restrictive and, when not combined with real-time monitoring, likely less effective[106] than the active tracking[107] of individuals using GPS satellite technology, which has become more common in recent years.[108] Mesa, Arizona, for example, releases and electronically monitors certain defendants pretrial using GPS satellite tracking devices.[109] And Strafford County, New Hampshire, tracks certain defendants on pretrial release (as well as sentenced offenders in community supervision) using GPS systems that allow "officials to know within 10 meters where a person has been throughout the day."[110] Private firms have also begun to offer GPS monitoring to help wealthy defendants avoid pretrial detention.[111]

Although active monitoring can be limited by the availability of the cellular telephone networks through which the device transmits location data,[112] it appears to be the best current option for both defendants and governments: its accuracy deters flight and allows fugitives to be readily located, and it is much less restrictive than a curfew requirement. Indeed, at least for relatively low-risk defendants, it potentially need only be actively (as opposed to periodically) monitored once a defendant has failed to appear for trial. And other technologies may emerge in the near future. The advent of phones capable of mobile videoconferencing and Google Glass,[113] for example, suggests that live audio-video monitoring may be a possibility in the future, presumably for the highest flight risk defendants.

B. Effectiveness

One concern about the use of monitoring technology in lieu of pretrial detention for failure to post bond is purely practical: that it will never be totally effective at eliminating failures to appear.[114] Of course, the effectiveness of any given monitoring program at reducing flight risk is an empirical question, and while, as discussed below, existing technology shows promise, no conclusive empirical evidence of effectiveness currently exists (and with respect to future innovations, obviously cannot). The sparse empirical studies addressing the cost and effectiveness of monitoring have, as a result of the predominance of post-conviction monitoring, focused largely on that context.[115] In the United States, there are few studies of the effectiveness of monitoring pretrial, and the limited research available tends to involve small sample sizes.[116] Federal courts have generally been positive in their assessment of the Federal Pretrial Services location-based implementation of monitoring,[117] although, as noted above, it is typically combined with a high degree of supervision.[118]

The European literature is slightly richer, although still inconclusive. In a pilot study conducted in England between 1998 and 1999, judges imposed conditional bail with monitored curfews[119] on a select group of defendants--in some cases, directly in lieu of pretrial detention.[120] Of the 173 individuals who received monitoring curfews, researchers collected data on 118 individuals, eleven of whom absconded[121]--a failure to appear rate "lower than national and local figures" for other forms of bail.[122] Other European studies suggest potentially positive results, although, again, not producing any firm empirical conclusions. In Portugal, very early results of a small pilot of a bail curfew and electronic monitoring program showed "no relevant non-compliances, nor revoked orders" in 2002, from a total of 39 participants.[123] In Scotland, however, a study of the country's bail monitoring pilot showed more compliance problems; in 31 of the 63 monitored bail orders completed, defendants were accused of breaching bail conditions or committing new offenses.[124]

Studies of post-trial monitoring in Europe and the United States also suggest potential success in terms of individuals completing their programs without recidivating.[125] These statistics are not easily compared with the ability of monitoring to prevent flight, however--the core purpose of the monitoring proposed here.

Further study--particularly of the use of active GPS tracking in place of pretrial detention--will be essential to convincing wary judges and legislators. But the potential of advanced tracking technology to reduce flight risk and aid in fugitive recovery appears enormous. Anecdotally, this intuition is supported by the use of GPS monitors by bondsmen themselves,[126] as well as by recent high-profile examples of GPS monitoring as an alternative or addition to bail, including for arms dealers, gangsters, and financial fraudsters.[127] A judge initially ordered Bernie Madoff, for example, to wear a GPS monitoring ankle bracelet in addition to paying $10 million in bail and remaining on nightly house arrest.[128] Dominique Strauss-Kahn was similarly granted bail and assigned a GPS electronic ankle bracelet-- along with house arrest, armed guards, and "24-hour video monitoring of every door"--at Strauss-Kahn's expense,[129] leading Slate magazine to the conclusion advanced here: "Most defendants don't run the International Monetary Fund. They don't have citizenship in non-extraditing countries or standing arrangements to board any Air France flight. They don't need guards to keep them from escaping justice. They just need an ankle monitor."[130]

Nonetheless, it might be argued that no amount of high-tech monitoring will ever be as effective at ensuring a defendant's presence at trial as detaining the defendant (which is, of course, nearly 100%

effective). As Blackstone observed, defendants facing the most serious penalties could not be bailed because of their great incentive to flee: "in . . . offenses of a capital nature, no bail can be a security equivalent to the actual custody of the person. For what is there that a man may not be induced to forfeit, to save his own life?"[131] This will almost certainly be true of monitoring as well. No matter how ingenious the technology, it is likely that highly motivated defendants will find a way to defeat it, perhaps by damaging or removing the tracking device or by blocking its signal.[132] Technology, then, cannot completely eliminate pretrial detention for flight risk; at most, by being more effective than money bail, it could narrow the class of defendants considered too great of a flight risk to release (most of whom, under contemporary practice, would be detained for dangerousness anyway). But this is not a particularly serious objection: the principal beneficiaries of replacing money bail with monitoring are not those who, facing serious charges, have too much at stake to be released, but those who, facing less serious charges, simply have too little to stake. These concerns, moreover, can also be addressed by imposing higher penalties for failing to appear while monitored or for tampering with a monitoring device.[133]

There will likely be missteps, in the form of malfunctioning technology and fugitive defendants, along the way to widespread deployment as an alternative to pretrial detention.[134] But, in the near term, it has the potential to effectively replace unmeetable monetary requirements for non-dangerous defendants. Technology might not be able to completely eliminate detention for flight risk, but it should be able to eliminate detention for poverty.

C. Cost

As the American Bar Association and other organizations have begun to emphasize the expense of pretrial detention,[135] the practical benefits of the technological alternative have become even more compelling. Increasingly computerized, they do not require the staff, medical programs, and vast security controls of pretrial detention. Monitoring programs appear to generate significant savings if used in place of pretrial detention, although some of the savings may be lost if convicted defendants are not given time-served credit for time-monitored, and thus eventually spend the same amount of time incarcerated.[136]

Pretrial services programs that combine technology with relatively inexpensive monitoring have substantially reduced the financial cost of preventing flight. Miami-Dade County cut costs from approximately $20,000 per pretrial defendant to $432 annually for released, monitored defendants,[137] and the Southern District of Iowa saved $1.7 million over one fiscal year by releasing 15% more defendants.[138] Federal active monitoring of pretrial defendants in the 1990s cost approximately $2.77 to $9.04 daily,[139] compared to daily costs of pretrial detention ranging, according to some estimates, from $50 to $123.[140] Other estimates suggest that electronic monitoring programs "[o]n average . . . cost between five and twenty-five dollars per day."[141] And approximately one out of three offenders who were electronically monitored in Florida between 2001 and 2007 would have otherwise been jailed at six times the cost, according to one study, which concluded that monitoring was a "cost-effective method of dealing with offenders."[142] Similarly, results from Europe also suggest that monitoring can be far less expensive than other options if implemented properly--ensuring that monitoring is implemented in lieu of jail, thus offsetting costs.[143]

As GPS, live audiovisual monitoring, and other technologies become more common outside of the

criminal world for ease of navigation and of sharing life experiences with friends and family, costs likely will continue to decline, while effectiveness will rise. Governments need not operate the programs themselves: already, multiple competing private providers exist (and one could imagine bond agents, some of whom already use tracking devices, becoming monitoring agents).[144] The cost-effectiveness of a monitoring program, of course, will depend on the details. A minimalist system, designed to track the location only of those who have already failed to appear and giving at least partial time-served credit, which is clearly more desirable from a privacy perspective, will also be more cost-effective than a more intrusive program[145] without credit. And, for better or worse, it is likely that monitoring programs will shift pretrial flight prevention costs to defendants; some defendants in pretrial release programs already pay for the cost of their own monitoring.[146] If electronic monitoring is implemented on a broader scale, more legislatures will try to recoup the costs of monitoring from indigent defendants as they have done with counsel[147] and jail costs.[148] As others have noted, this is deeply problematic,[149] but it is still preferable to detention (which defendants might also have to pay for).

Empirically, the cost savings of monitoring in lieu of detention require further detailed investigation. The goal here is not to suggest that monitoring is completely effective or costless, but rather that the available data suggest that it can be at least as cheap and effective as money bail.

D. Privacy and Net-Widening

Another, more fundamental set of reservations centers on privacy. The degree to which a monitored defendant's privacy is invaded depends on the technology employed--a device that transmits location data only on the day of a court appearance is less invasive than one that transmits constantly, and both are far less invasive than a device that transmits audio and video. But even the most limited version is a serious intrusion, and privacy concerns almost certainly explain why monitoring technologies have not so far been widely heralded by academics and criminal justice advocacy groups as a solution to the serious and seemingly intractable problems with money bail and pretrial detention described above.[150]

Focusing solely on defendants who would otherwise be detained for failure to post bond, privacy objections have little purchase. Even the most thorough observation--even if it causes defendants to carefully monitor and restrict their behavior in order to limit the government's knowledge of their lives--would for most defendants almost certainly be preferable to imprisonment. Agence France-Presse, for example, described Strauss-Kahn's ankle bracelet as a "symbol of shame for the beleaguered global finance titan,"[151] but even a high-profile figure like Strauss-Kahn apparently preferred shame (and constant surveillance) to imprisonment. In one study of those subject to home curfew and monitoring, the most common complaints voiced included "[n]ot being able to go to the store when you want" and "[n]ot being able to go out to eat when you want," followed by "[h]aving to wear a visible monitor."[152] These are significant deprivations, but, unsurprisingly, "most electronically monitored offenders prefer house arrest to jail."[153] A fortiori, a less intrusive, curfew-less monitoring regime would also be preferable to jail.

This calculus holds even if, leaving aside the tremendous increases in liberty and physical and psychological well-being, privacy is used as the sole criterion. Being in jail, after all, involves not only near-constant surveillance by guards, but also by fellow inmates. And in the absence of other realistic options for systemic reform, the perfect must not be the enemy of the good.

Not surprisingly, then, opposition to the use of monitoring technology has largely focused not on those already subject to a high level of government surveillance, but on the risk that technology will allow the government to surveil more people[154]: ever cheaper and more powerful monitoring equipment lessens resource constraints, and the physically unobtrusive nature of the monitors themselves lessens political and constitutional opposition.[155] These net-widening concerns are slippery slope arguments--the use of monitoring in a given context may not be bad in itself, but it will lead to the use of monitoring in other, more objectionable contexts. . .

Turning to the narrower class of pretrial defendants eligible for release, the risk is that expanding the use of monitoring as an alternative to detention will lead to the increased use of monitoring on defendants who would previously have been released on bail, personal recognizance, or other less restrictive conditions.[164] And, to some extent, it likely would: once a monitoring infrastructure is in place, the marginal cost of adding to the monitored population is likely to be relatively low, and if monitoring is more effective at producing presence at trial than the alternatives, policymakers will have an incentive to use it. As discussed above, expanded use will lead to greater economies of scale. Moreover, increasing the demand for monitoring technology may lead to a corresponding increase in the financial ability of its producers to lobby governments for further expansion.[165] These fears appear to have been partially realized in England and Wales.[166] Nonetheless, the potential harms should not be overstated. Many defendants are likely to be monitored in the future regardless of whether technology is used as a replacement for flight-risk detention. Indeed, electronic monitoring by pretrial services departments is increasingly imposed as an additional condition of release, while private bondsmen have begun exploiting monitoring as a means of protecting their investment.[167] (As discussed in Part IV below, this is an unsurprising outcome given the interests of both bondsmen and technology purveyors in maximizing their profits.) To the extent that wider monitoring of non-dangerous pretrial defendants is probable in any case, net-widening concerns diminish. There are some ways to combat net-widening within the class of pretrial defendants. Perhaps most significantly, granting time-served credit, whether in full or part, for the monitoring period would both acknowledge the very real privacy cost to the defendant and likely reduce the incentive to use monitoring in place of non-incarcerative options. Maintaining a money bail option for those able and willing to pay for it could help as well--indeed, this is advisable from both a privacy and political economy perspective. Finally, the Scottish experience suggests some cause for optimism about the ability of legislation to control net-widening. Judges in the small trial program there were instructed to consider monitoring only as an alternative to detention, and this appears to have been effective.[168]

On the whole, then, Orwellian fears about monitoring--however well justified elsewhere--are not as strong in the context of its use as a substitute for pretrial detention for failure to post bond. From the perspective of the defendant who would otherwise sit in jail, the privacy and liberty gains are immense. Larger segments of society are unlikely to be snagged by the criminal justice system as a result. And while some released defendants may be monitored who would otherwise not be if monitoring were to replace flight-risk detention, the liberty and privacy costs must be weighed against the benefits to those who would otherwise not be released. Similarly, if monitoring decreases the marginal cost of arrests by reducing jail costs, arrests may increase--a benefit if more murderers are caught, but, in the eyes of many, a cost if more low-level drug offenders are arrested.[169] The exact balance of this tradeoff is difficult to predict, and it depends, inter alia, on the form of monitoring employed--the more invasive it is, the lower the benefit to the newly freed and the greater the harm to the newly monitored. As discussed below, the doctrinal bases for courts to limit the extent of flight-risk monitoring exist, and for

all but the most intrusive technologies, the result is likely to be a net gain of liberty and privacy.

E. Inequality

Finally, there are concerns about continued inequality if monitoring is used in lieu of commercial bail. These are, in a way, the opposite of the net-widening objection discussed just above: to the extent that unmonitored release on bail remains an option for those who can afford it, the economic discrimination of the current system is maintained. So far, in fact, the advent of GPS tracking, combined with older and more expensive forms of monitoring, has in some cases worsened this discrimination, as rich-and-high-flight-risk defendants have avoided detention by a combination of electronic monitoring and expensive private guards.[170] But if it is true, as argued here, that electronic monitoring is a major improvement over imprisonment, then the gap between rich and poor will be narrowed significantly by using it in place of imprisonment for failure to post bond. In the absence of better alternatives, opposing the expanded use of monitoring on equality grounds would seem perverse, but equality concerns might justify a call for universal monitoring of pretrial defendants. Such a proposal pits liberty (for the wealthier) against economic equality in an unusually stark way, and while the resolution of the moral question may be in some doubt, the practical question is not: courts as well as legislatures are unlikely to curtail the rights of moneyed defendants in the name of equality.[171]

Considered as a whole, the objections to the replacement of pretrial detention for flight risk with electronic monitoring pale in comparison to the arguments in its favor--the tremendous gains in liberty, privacy, fairness, and equality for those released. Because pretrial detainees are subjected to an extremely high and extremely burdensome level of government control, a less repugnant method of control offered by technology is a boon. And because the size of the group subject to this control is governed almost entirely by factors unrelated to the financial and political costs of exercising it, lowering those costs will not cause the government to extend its grasp much further. There is something unsavory about a government electronically monitoring its citizens, but in this case, it is more savory than a government imprisoning them for lack of funds; it is an evil, but a lesser one.