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Seeking Equity in Electronic Monitoring: Mounting a *Bearden* Challenge

ABSTRACT. In the 1983 landmark case, *Bearden v. Georgia*, the Supreme Court held that a court could not revoke a defendant's probation for failure to pay a fine or fee if the defendant established that they could not afford it. Yet, even today, many defendants remain incarcerated solely because they lack financial resources to afford the requirements of pretrial or postconviction release conditions. One example of such a condition is electronic monitoring (EM), which is often heralded as a less restrictive alternative to incarceration. However, EM is only available to defendants who can afford both its explicit costs and its implicit costs, such as stable housing and phone connectivity. This Comment seeks to remedy the disparity that EM imposes on defendants by applying *Bearden* to courts' EM requirements. Under the logic of *Bearden*, it is unconstitutional for a defendant or convicted individual to be incarcerated solely because they lack the funds to comply with a pretrial or postconviction condition of release. Litigators should seek to apply *Bearden* not only to explicit court fines, but also to the underlying costs associated with any release conditions.

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INTRODUCTION

While working as a Public Defense Intern in Juneau, Alaska, I was often confronted with some version of the following scenario: a client gets caught driving under the influence (otherwise known as committing a DUI) in a small town outside of Juneau—for purposes of this scenario, let's say it's in Kake. They are arrested but quickly get released from custody on their own recognizance due to a relatively clean record and deep community ties. The prosecution is willing to make a deal: they ask my client to plead guilty to a DUI, and, in exchange, the prosecutor promises to recommend the minimum sentence. If the client has committed one previous DUI in the last fifteen years, that minimum is twenty days of incarceration and the associated fines and driving restrictions.¹ The client decides pleading guilty is likely the best option—they admit they drank and drove and have no other defense—but they are worried about spending twenty days in jail. I tell them there's a potential solution: in Alaska, as in many states, qualifying offenders can serve their time via electronic home monitoring (EM), or what is often known colloquially as wearing an ankle bracelet.²

Excitedly, they ask me for details—after all, they tell me, serving time on EM at home would be far preferable to being incarcerated.³ Unfortunately, I have to inform them that, while DUIs ordinarily qualify for EM, there is no possibility of EM in Kake.⁴ To serve their time on EM, they would need to pay for their own

1. ALASKA STAT. § 28.35.030(b)(1)(B) (2023).

2. *Id.* § 28.35.030(k); *see also id.* § 33.30.061(c) (allowing a prisoner to serve their term of imprisonment by electronic monitoring).

3. While, in my experience, many clients requested electronic home monitoring (EM) and believed it would be preferable to incarceration, there is some debate about whether EM in practice is less punitive than incarceration. *See infra* Section I.C.

4. Some jurisdictions use cellular signals to transmit information about the whereabouts of the device; however, such devices may not work in rural areas without cellular signals. *See* Taylor Dobbs, *Lack of Cell Coverage Hampers Electronic Monitoring of Vermont Inmates*, VT. DIGGER (June 16, 2011, 12:09 AM), <https://vtdigger.org/2011/06/16/cell-coverage-hampers-use-of-electronic-monitoring-devices-for-vermont-inmates> [<https://perma.cc/S3LW-JQKZ>] (describing how “[c]ertain areas of Vermont currently lack cell phone coverage,” which has “stymied” efforts at expanding EM usage). Even if cell phone coverage is available, EM may be limited to certain areas because of staffing shortages. EM not only requires a device but also a probation or pretrial officer to monitor that device. Often, jurisdictions impose geographic requirements so that their officers are only responsible for limited spatial regions—especially since such officers often initiate in-person contact when suspected violations occur. In some rural areas, like many of the rural communities in Alaska, there are no available officers to monitor individuals sentenced to EM, and thus, EM is unavailable in those regions. *See, e.g., Federal Location Monitoring*, ADMIN. OFF. U.S. CTS., <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/supervision/federal-location-monitoring> [<https://perma.cc/XAW3-CHEA>] (describing the roles and responsibilities of officers in an Electronic Monitoring program).

transportation to get to Juneau or another city that provides electronic monitoring.⁵ Moreover, even if the client were able to pay for that transportation, they would also be responsible for paying for their lodging during their twenty-day sentence, and they would be required to install a “corded telephone” with a “long-distance carrier” inside that residence.⁶

Indeed, while Alaska allows many convicted individuals to serve their time via EM rather than in a cell, only those with sufficient financial resources can take advantage of this option. To start, Alaska only provides EM in specific locations, predominantly the larger, more metropolitan areas in the state.⁷ In smaller and more rural communities—communities that have disproportionately high Alaska Native populations and disproportionately less money⁸—convicted individuals are required either to serve their time in a cell or pay to travel to a city that offers EM and rent a home in that city for the duration of their time on EM. Even if the individual lives in a city that offers EM, they must have a permanent

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5. See *Sentenced Electronic Monitoring*, ALASKA DEP'T CORR., <https://doc.alaska.gov/institutions/sentenced-electronic-monitoring> [<https://perma.cc/V96X-XXMB>] (noting that the individual on EM must reside and work in one of a specified list of areas, including Juneau).
 6. *Id.*
 7. *Id.* Even in metropolitan jurisdictions, EM is often restricted to residences within the jurisdiction itself or within some general radius of the area—meaning that those who live outside the jurisdiction's borders must relocate to take advantage of EM. See *Electronic Monitoring Program Placement*, COOK CNTY. SHERIFF'S OFF., <https://www.cookcountysheriff.org/departments/cook-county-department-of-corrections/electronic-monitoring-program/electronic-monitoring-program-placement> [<https://perma.cc/P6SH-YNJG>] (requiring that “the residence must be in Cook county”); *Electronic Monitoring Program Rules: Pre-Sentenced Participants*, S.F. SHERIFF'S DEP'T 1 (2020), <https://www.sfsheriff.com/sites/default/files/2020-02/Pre-Sentenced%20Individuals%20SFSD%20EM%20Rules%20-%20Revised%202.3.20.pdf> [<https://perma.cc/VPW8-X69P>] (“All participants must live within 50 driving miles of the San Francisco Sheriff's Department Community.”); *Electronic Monitoring Program Policy*, VENTURA CNTY. SHERIFF'S OFF. 24 (2012), <http://bosagenda.countyofventura.org/sirepub/cache/2/gxnlq03c3bpsjb35iiblrkly/57243508272023030810104.PDF> [<https://perma.cc/F8W9-HAN9>] (“[Participants] must remain within the County of Ventura at all times unless approved by the EMU [Electronic Monitoring Unit]”).
 8. See ALASKA NATIVE POL'Y CTR., *Alaska Native Population, in OUR CHOICES, OUR FUTURE: ANALYSIS OF THE STATUS OF ALASKA NATIVES REPORT* 30, 30 (2004), <https://arctichealth.org/en/viewer?file=%2fmedia%2fOur%20Choices%20Our%20Future.pdf> [<https://perma.cc/SVN7-2ACE>] (explaining that the majority of the Alaska Native population lives in rural Alaska); *Alaska, RURAL HEALTH INFO. HUB*, <https://www.ruralhealthinfo.org/states/alaska> [<https://perma.cc/G6JM-NBJK>] (“Based on 2020 ACS data, the ERS reports that the poverty rate in rural Alaska is 12.6%, compared with 8.2% in urban areas of the state.”); Matthew Berman, *Resource Rents, Universal Basic Income, and Poverty Among Alaska's Indigenous Peoples*, 106 WORLD DEV. 161, 161 (2018) (noting that “the state's rural Indigenous (Alaska Native) peoples” are “a population with historically high poverty rates living in a region with limited economic opportunities”). Geographic restrictions on EM likely result in a disparate racial impact, though a full discussion of such disparities is outside the scope of this Comment.

address, the ability to charge their EM device, and working phone service.⁹ Put simply, those who live in more rural communities, those without a home, and those who cannot afford to equip a home with electricity or phone service are forced to serve their time in custody, while those with greater financial resources are not.¹⁰

EM has been used as an alternative to custodial detention since the 1980s, allowing convicted defendants to serve time at home while tracked by EM instead of in jail or prison.¹¹ In the decades after its introduction, the use of EM has expanded: more jurisdictions began using it, jurisdictions used it more frequently, and jurisdictions extended its use to include using EM as an alternative to pretrial detention as well as postconviction imprisonment.¹² Today, all fifty states and the federal government utilize electronic ankle monitors in some capacity to track individuals at both the pretrial and postconviction stages of the criminal-legal process.¹³

While EM offers an attractive alternative to custodial incarceration for many defendants, only those with sufficient financial resources can take advantage of the benefits of EM. Most states charge fees for EM services, though these fees may be on a sliding scale or waived for indigent defendants.¹⁴ For example, California recently passed a law that prohibits most EM fees.¹⁵ In Alaska, those

9. See *Sentenced Electronic Monitoring*, *supra* note 5.

10. Notably, even those who can take advantage of electronic monitoring are charged for the service. See ALASKA STAT. § 33.30.065(d) (2023).

11. See Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1476 (2017).

12. *Id.* at 1477.

13. See *Use of Electronic Offender-Tracking Devices Expands Sharply*, PEW CHARITABLE TR. 1 (Sept. 2016), http://www.pewtrusts.org/-/media/assets/2016/10/use_of_electronic_offender_tracking_devices_expands_sharply.pdf [https://perma.cc/3K9Q-3PXY]; Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147, 154 (2022).

14. See, e.g., *Electronic Monitoring Fees: A 50-State Survey of the Costs Assessed to People on E-Supervision*, FINES & FEES JUST. CTR. 1 (Sept. 2022) [hereinafter *Electronic Monitoring Fees*], <https://finesandfeesjusticecenter.org/articles/electronic-monitoring-fees-a-50-state-survey-of-the-costs-assessed-to-people-on-e-supervision> [https://perma.cc/U8TU-YG2E] (noting that, of all the fees in the criminal justice system, “fees imposed for electronic monitoring (EM) can be among the most costly, least transparent, and most complicated to quantify”); Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 704-10 (2019) (discussing the costs associated with EM). For an argument in favor of eliminating EM fees, see generally Jaden Warren, *What’s Free: A Proposal to Abolish User Fees for Pretrial Electronic Monitoring*, 47 AM. J. CRIM. L. 139 (2020).

15. CAL. PENAL CODE § 1465.9 (West 2022) (prohibiting the collection of court-imposed costs under California Penal Code section 1203.016, which pertains to EM); see also *California AB 1869 Criminal Fees*, FINES & FEES JUST. CTR. (Oct. 1, 2020), <https://finesandfeesjusticecenter.org/articles/california-ab-1869-criminal-fees> [https://perma.cc/MZ76-2YX4] (describing the California bill repealing fees in the criminal-legal system, including the fees for EM).

sentenced to EM may be charged a fee of twelve or fourteen dollars every day they use the service, and while “[a]n indigent offender may request lowered fees, or fees waived based on financial need,”¹⁶ there are no data on how effective these “requests” are in practice.

Even assuming that some jurisdictions are waiving the explicit fees of EM for indigent defendants, the underlying costs of the basic requirements to qualify for EM release continue to exclude the most economically disadvantaged defendants. Across the country, EM programs almost invariably require that defendants have a permanent address,¹⁷ telephone service (often via a landline),¹⁸ and working electricity to charge the device.¹⁹

In the landmark 1983 case *Bearden v. Georgia*,²⁰ the Supreme Court held, under the Fourteenth Amendment’s Due Process and Equal Protection Clauses, that a sentencing court could not revoke a defendant’s probation for failure to

16. *Policies and Procedures 818.10: Sentenced Electronic Monitoring*, ALASKA DEP’T CORR. 5 (2020), <https://doc.alaska.gov/pnp/pdf/818.10.pdf> [<https://perma.cc/H2UT-3RLK>].

17. See, e.g., *Electronic Monitoring Program Placement*, *supra* note 7 (requiring a “residence” that “must be a house, apartment, or condo”); *Electronic Home Monitoring*, HENNEPIN CNTY., MINN., <https://www.hennepin.us/residents/public-safety/electronic-home-monitoring> [<https://perma.cc/3M4T-QTDB>] (requiring “[a] verifiable address and [the] ab[ility] to stay at that residence”); Prob. Dep’t, *Electronic Monitoring Program (EMP)*, CNTY. SANTA CLARA, <https://probation.sccgov.org/adult-services/electronic-monitoring-program> [<https://perma.cc/PQ2E-959W>] (same); *Probation Department Policy/Procedure Manual: 1:11 Electronic Monitoring*, CNTY. SAN LUIS OBISPO, <https://www.slocounty.ca.gov/Departments/Probation/Forms-Documents/Education-and-Training-Materials-Documents/Procedures/1-Adult-Services-Procedures/Division-Wide/1-11-Electronic-Monitoring.aspx> [<https://perma.cc/K62J-HD3F>] (explaining that individuals may be “terminated” from EM if they “no longer have a place of residence”).

18. Some jurisdictions explicitly require users to have a landline phone – likely because the equipment in those jurisdictions requires a landline phone to monitor effectively. See, e.g., *Pretrial Process and Resources*, U.S. PROB. & PRETRIAL SERVS.: N. DIST. TEX., <https://www.txnp.uscourts.gov/content/pretrial-process-and-resources> [<https://perma.cc/GV5W-C98R>] (requiring a “private telephone line” that is not “[c]ordless”); *Electronic Monitoring*, ELEC. FRONTIER FOUND. (July 12, 2019), <https://www EFF.org/pages/electronic-monitoring> [<https://perma.cc/3HYP-GEE5>] (“Some counties . . . require users to own a landline phone.”).

19. See Arnett, *supra* note 14, at 705; *Electronic Monitoring/GPS Tracking Unit Rules*, CT. COMMON PLEAS & PROB. DEP’T: CUYAHOGA CNTY. OHIO, <https://cp.cuyahogacounty.us/media/1918/em-gps-rules.pdf> [<https://perma.cc/WN56-VMH4>].

20. 461 U.S. 660 (1983).

pay a fine²¹ or fee,²² absent evidence that the defendant was somehow responsible for the failure.²³ Under this “willfulness” standard, a defendant cannot be incarcerated solely because they are too poor to pay court-mandated fees. However, despite the lofty goals of *Bearden*, people are still being kept in cells due solely to their socioeconomic status—incarcerated because of an inability to afford not only explicit fees,²⁴ but also the underlying costs of the requirements for conditional release.

The disproportionate impact of conditional release is especially concerning because states have been steadily increasing the use of conditions that involve underlying costs to the defendant. While bail-reform movements have succeeded in reducing the amount of cash bail imposed,²⁵ judges have responded by

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21. A fine is a monetary amount “imposed upon conviction” which is “intended as both deterrence and punishment.” Matthew Menendez, Lauren-Brooke Eisen & Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines*, BRENNAN CTR. FOR JUST. (Nov. 21, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> [https://perma.cc/KP8Q-8BGC].
 22. Fees are “intended to raise revenue.” *Id.* They can be “automatically imposed and bear no relation to the offense committed” because they are often “intended to shift the costs of the criminal justice system from taxpayers to defendants.” *Id.* Examples of court-mandated fees include “court-appointed attorney fees, court clerk fees, filing clerk fees, DNA database fees, jury fees, crime lab analysis fees, late fees, installment fees” and fees for EM installment, equipment, and continued monitoring. *Id.* While the *Bearden* case itself explicitly addressed the issue of fines, the Court’s language refers to one’s “ability to pay” more broadly, and it is widely accepted that *Bearden* also applies to other court costs, including fees. See, e.g., Andrea Marsh & Emily Gerrick, *Why Motive Matters: Designing Effective Policy Responses to Modern Debtors’ Prisons*, 34 YALE L. & POL’Y REV. 93, 96 (2015) (“Most recently, the Court held in *Bearden v. Georgia* that states cannot automatically revoke probation for nonpayment of a fine or cost, without consideration of a person’s ability to pay.”); Theresa Zhen, *(Color)blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 185 (2019) (“In the context of probation revocations for failure to pay court costs, state court cases mirroring *Bearden* have proliferated.”); Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors’ Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 213 (2016) (“*Bearden* established that sentencing courts must inquire into a defendant’s reasons for not paying a fine or fee before sentencing him to jail time.”); see also *Williams v. Illinois*, 399 U.S. 235, 244 n.20 (1970) (“What we have said regarding imprisonment for involuntary nonpayment of fines applies with equal force to imprisonment for involuntary nonpayment of court costs.”).
 23. *Bearden*, 461 U.S. at 668.
 24. There is a developing literature surrounding the ineffectiveness of the “willfulness” standard of *Bearden* to prevent individuals from going to jail. See sources cited *infra* note 117.
 25. See, e.g., Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, NAT’L PUB. RADIO (Aug. 28, 2018, 10:49 PM ET), <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail> [https://perma.cc/5ZZG-P6GV] (noting that some states have “passed laws that reduce their reliance on money bail” while other states “are considering making similar changes”).

expanding the non-monetary conditions of pretrial release.²⁶ Such non-monetary conditions can include requirements of court attendance, no new law violations, drug or alcohol testing, no-contact orders, substance or mental-health treatment, and EM.²⁷ Even at the postconviction stage, judges continue to impose onerous non-monetary sanctions in the form of post-release probation or parole conditions.²⁸ Much as the efforts at ending cash bail have led to the proliferation of non-monetary conditions of pretrial release, efforts at decreasing mass incarceration have led advocacy groups to push for expanding the use of probation—which, inevitably, expands the use of probation conditions.²⁹

While even the most onerous pretrial or probation conditions may be preferred to incarceration,³⁰ the expansion of such conditions will likely only further exacerbate the disproportionate effects of the criminal legal system on indigent defendants.³¹ Scholars have begun to note that these conditions pose equity

26. See Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 149 (2021); Alexa Van Brunt & Locke E. Bowman, *Toward a Just Model of Pretrial Release: A History of Bail Reform and a Prescription for What's Next*, 108 J. CRIM. L. & CRIMINOLOGY 701, 757 (2018).

27. Carroll, *supra* note 26, at 146.

28. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 339 (2016).

29. *Id.* at 294.

30. While, of course, there are a wide variety of preferences among defendants, and I acknowledge the harms that EM can cause individuals, the fact that clients continue to ask for EM or probation conditions *rather* than accepting the default of pretrial or postconviction incarceration suggests, in practice, many prefer such conditions to incarceration. This was borne out in my own work with clients in Alaska, who frequently asked for any conditions necessary to avoid incarceration. See also Derek Gilna, *Electronic Monitoring Becomes More Widespread, but Problems Persist*, PRISON LEGAL NEWS (Oct. 9, 2017), <https://www.prisonlegalnews.org/news/2017/oct/9/electronic-monitoring-becomes-more-widespread-problems-persist> [<https://perma.cc/3WGK-HM3A>] (“Those on electronic monitoring and their families prefer the freedom it grants them to remain together.”); Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys’ Perspectives*, 32 PACE L. REV. 800, 854 (2012) (“These conditions [including EM], while onerous in their own right, are far preferable to detention.”). Some scholars and activists are starting to question whether EM is actually preferable to incarceration. See generally Weisburd, *supra* note 13 (suggesting that EM is a form of “punitive surveillance” that can deprive individuals of fundamental right such as the right to privacy, speech, liberty, and due process); Marina Richter, Barbara Ryser & Ueli Hostettler, *Punitiveness of Electronic Monitoring: Perception and Experience of an Alternative Sanction*, 13 EUR. J. PROB. 262 (2021) (performing a meta-analysis to assesses the degree of punitiveness of EM). However, even if EM as a general practice should be eliminated, see *infra* Section IV.B, so long as it exists, I argue it should be available to all individuals—no matter their socioeconomic status.

31. See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLY INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/2G5G-46BG>] (reporting that “incarcerated people are dramatically concentrated at the lowest ends of the national income distribution”).

concerns, as it is frequently more difficult—if not impossible—for indigent defendants to abide successfully by such conditions. For example, Natasha Alladina has noted that the requirements of Alaska’s EM program “unfairly limit[] the pool of eligible offenders at the outset—discriminating against the poor and those who do not have homes or phones.”³² The same analysis can be applied to many other probationary conditions: a defendant may be unable to “comply with the court’s order” to receive drug treatment “because she lacks the funds to pay for treatment,” or lacks the funds to pay for the child care or transportation necessary to arrange for such treatment.³³ Effectively, pretrial and postconviction conditions of release result in a two-tiered criminal-legal system: the rich are released because they can afford to observe an array of increasingly burdensome conditions, while the poor remain in custody because their poverty means they are unable to meet those same conditions.

In this Comment, I will propose one way to challenge release conditions that effectively incarcerate the poor: mounting a Fourteenth Amendment challenge using the logic of *Bearden*. According to *Bearden*, the Fourteenth Amendment mandates that an individual cannot be incarcerated *solely* because of their inability to pay a fee. This Comment argues that, according to that same logic, it is unconstitutional for a defendant or convicted individual to be incarcerated *solely* because they lack the funds to comply with a pretrial or postconviction condition of release. Thus, litigators should seek to apply *Bearden* not just to explicit court fines, but also to the underlying costs associated with release conditions.

While this argument could be applied to many pretrial and probation conditions, I have chosen to focus on EM as a case study for two reasons. First, especially since the COVID-19 pandemic, EM has been expanding at a rapid rate, making it a particularly relevant time to analyze this release condition and the inequities it (re)produces.³⁴ Secondly, EM demonstrates some of the most extreme disparities between rich and poor defendants and convicted individuals. Whether an individual meets the conditions for EM is a binary decision (i.e., the defendant qualifies for EM or they do not) and is typically decided *before* the

32. Natasha Alladina, *The Use of Electronic Monitoring in the Alaska Criminal Justice System: A Practical Yet Incomplete Alternative to Incarceration*, 28 ALASKA L. REV. 125, 129 (2011).

33. See Carroll, *supra* note 26, at 148; see also Alicia Virani, Rodrigo Padilla-Hernandez, Tali Gires, Kaitlyn Fryzek, Rachel Pendleton, Ethan Van Buren & Máximo Langer, *Creating a Needs-Based Pre-Trial Release System: The False Dichotomy of Money Bail Versus Risk Assessment Tools*, UCLA SCH. L. CRIM. JUST. PROGRAM 17-18 (2020), <https://law.ucla.edu/sites/default/files/PDFs/Academics/CJP%20Pretrial%20Proposal%20-%202020.pdf> [https://perma.cc/AG2L-C7CY] (discussing release conditions that have had “negative consequences”).

34. See *infra* Part I.

court orders EM.³⁵ Moreover, EM is one of the few conditional release methods that typically offers day-for-day credit for sentences – meaning being sentenced to EM is directly comparable to being sentenced to time in a cell, and therefore a particularly valuable release condition for many.³⁶ As a result, one’s ability to pay can lead to dramatic differences in the EM context. Individuals who do not meet the minimum qualifications for EM (for instance, because they do not have a home address) may not be considered for EM at all, while those who qualify for EM may avoid physical incarceration entirely.

To date, some scholars have chronicled the ways fines and fees continue to drive the incarceration of the poor due to the inconsistent application of *Bearden* by courts.³⁷ These scholars primarily focus on individuals’ inability to pay

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35. Many conditions of release are simply imposed by the judge. In contrast, EM often requires the defendant to complete an application or agreement form to qualify. These forms often require the defendant to specify their permanent address, making it impossible for defendants who have yet to secure permanent housing to qualify for EM. *See, e.g., Electronic Monitoring Application*, VENTURA CNTY. SHERIFF (Mar. 30, 2021), <https://www.venturasheriff.org/public-resources/electronic-monitoring-application> [<https://perma.cc/7VMV-R7ZC>]; Cmty. Corr. Div., *Community Corrections Programs—Electronic Home Detention (EHD)*, KING CNTY. 3 (July 2015), <https://kingcounty.gov/~media/courts/superior-court/docs/criminal/criminal-forms/6-ehd-application-packet-pdf-web.ashx> [<https://perma.cc/QA2Y-TCG4>]; Cook County Sheriff’s Office *Community Corrections—Electronic Monitoring (EM) Program (GPS) Information Sheet*, COOK CNTY. 2 (Jan. 2022), <https://www.cookcountysheriffil.gov/wp-content/uploads/2022/10/Electronic-Monitoring-Unit-Participant-Packet-002.pdf> [<https://perma.cc/Y2ZR-MR8Y>]; *see also Criminal Division: Frequently Asked Questions*, FIFTH JUD. DIST. ALLEGHENY, <https://www.allegheynecourts.us/criminal/frequently-asked-questions> [<https://perma.cc/H8K9-9QPB>] (explaining, for pretrial EM, that the defendant “must agree to comply with all rules and regulations set forth by the Allegheny County Adult Probation Electronic Monitoring Program and Pretrial Services to be placed on the program”); *Sentenced Electronic Monitoring*, *supra* note 5 (listing requirements for EM, then stating: “DO NOT APPLY if these requirements cannot be met” – indicating that the requirements are mandatory).
 36. *See, e.g.*, 18 U.S.C. § 3563(b)(19) (2018) (stating that when a defendant is “monitored by telephonic or electronic signaling devices,” then that is an “alternative to incarceration”); N.Y. CRIM. PROC. LAW § 510.40(d) (McKinney 2023) (“A defendant subject to electronic location monitoring under this subdivision shall be considered held or confined in custody.”). Conversely, other conditions of release – such as drug and alcohol testing – often do not substitute for time in custody and thus do not shorten one’s sentence.
 37. *See, e.g.*, Walter Kurtz, *Pay or Stay: Incarceration of Minor Criminal Offenders for Nonpayment of Fines and Fees*, 51 TENN. BAR J. 16 (2015) (addressing the framework meant to protect indigent defendants from “being jailed for nonpayment costs”); Jaclyn Kurin, *Indebted to Injustice: The Meaning of “Willfulness” in a Georgia v. Bearden Ability to Pay Hearing*, 27 GEO. MASON U. C.R. L.J. 265, 286 (2017) (quoting *Profiting from Probation: America’s “Offender-Funded” Probation Industry*, HUM. RTS. WATCH (Feb. 5, 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry> [<https://perma.cc/P6FA-2QVB>]) (noting “the supervision fee model is inherently discriminatory” against the poor).

explicit fees, rather than chronicling the ways in which underlying conditions of release can have the exact same effect: the disproportionate incarceration of the poor. Thus, this Comment argues that it is only by expanding *Bearden*'s application to the costs associated with EM conditions that the true promise of *Bearden* can be realized.

This Comment proceeds in four parts. Part I describes how EM operates, both in the pretrial and postconviction context. Part II examines the standard set forth by *Bearden* and how that standard has been applied in the years since. Part III analyzes how *Bearden* might be used to challenge EM requirements, discussing potential pitfalls and challenges to this approach. Finally, Part IV concludes with some suggestions for future policies, including state funding of EM and the elimination of EM entirely.

I. A BRIEF SURVEY OF ELECTRONIC MONITORING

EM is a relatively broad term, but generally refers to the use of a radio or Global Positioning System (GPS) device to track an individual's movement.³⁸ Frequently, this location tracking is paired with restrictions such as house arrest or exclusion zones (for example, the individual cannot go anywhere alcohol is sold, or to the place the alleged crime took place). In general, EM is intended to make it more likely individuals comply with the terms of their release through the knowledge that they are being watched.³⁹ EM programs can be run by the state—often through the state Department of Corrections or probation agencies—or managed by private companies that contract with the state.⁴⁰

38. Yang, *supra* note 11, at 1477.

39. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., NCJ 234460, ELECTRONIC MONITORING REDUCES RECIDIVISM 2 (2011) [hereinafter ELECTRONIC MONITORING REDUCES RECIDIVISM].

40. See Henry Druschel, *Opinion: Private Electronic Monitoring Companies Are a Bad Option—for Clients, Courts and Taxpayers*, MD. MATTERS (Mar. 30, 2023), <https://www.marylandmatters.org/2023/03/30/opinion-private-electronic-monitoring-companies-are-a-bad-option-for-clients-courts-and-taxpayers> [https://perma.cc/Z8YR-K8LG] (“In 17 of Maryland’s 24 counties, the people placing ankle bracelets and monitoring defendants are county officials. But in the other seven counties . . . that responsibility is outsourced to private contractors.”); *GPS and Electronic Monitoring Vendors*, HARRIS CNTY. CMTY. SUPERVISION & CORRS. DEP’T, <https://cscd.harriscountytexas.gov/Pages/GPS-and-Electronic-Monitoring-Vendors.aspx> [https://perma.cc/998W-8KLF] (listing two private companies as “approved vendors” for Houston’s EM); *Parole Division—Electronic Monitoring*, TEX. DEP’T CRIM. JUST., https://www.tdcj.texas.gov/divisions/pd/contracts_em.html [https://perma.cc/8KCH-MK9M] (listing one private “vendor” for EM service); *Electronic Monitoring*, CNTY. L.A. PROB., <https://probation.lacounty.gov/electronic-monitoring> [https://perma.cc/539U-E3Q3] (noting “the Probation Department contracts with a private company to provide electronic monitoring services”); *Electronic Monitoring Fees*, *supra* note 14, at 2.

Most states require individuals to meet a series of requirements to qualify for EM, many of which disproportionately burden those in rural communities and those without reliable housing. These requirements often include: residing and working in particular cities where EM is offered;⁴¹ having a phone service, often with specifications on the kind of phone service required;⁴² and residing in a home without weapons, alcohol, or controlled substances.⁴³ If a person meets all the requirements and is conditionally approved for EM, the relevant pretrial services agency, Department of Corrections, or probation officer will usually conduct a residence inspection before finalizing approval.⁴⁴

EM can be imposed as a pretrial condition, or postconviction as part of probation or parole. The following Sections describe both pretrial and postconviction EM, then discuss the impact of EM on individuals.

41. See *Sentenced Electronic Monitoring*, *supra* note 5.

42. See, e.g., *Electronic Monitoring*, *supra* note 18 (noting that some counties require that EM users “own a landline phone”); FAQs, BUTLER CNTY., PA., <https://www.butlercountypa.gov/Faq.aspx> [<https://perma.cc/BXY5-759U>] (reserving the right to require “a private telephone line”); *Sentenced Electronic Monitoring*, *supra* note 5 (requiring a landline phone); *Electronic Monitoring Application*, ARMSTRONG CNTY. CTS., <https://www.accourts.com/images/emonitoringapplication/acelectronicmonitoringapplication.pdf> [<https://perma.cc/623M-Q6UQ>] (requiring “basic phone service”).

43. See, e.g., 103 DOC 468: *Electronic Monitoring Program*, MASS. DEP’T CORR. 5 (May 30, 2023) <https://www.mass.gov/doc/doc-468-electronic-monitoring-program/download> [<https://perma.cc/7T6V-UBZJ>] (requiring defendants “have a suitable home plan”); *Electronic Monitoring Program*, KERN CNTY. SHERIFF’S OFF., https://www.kernsheriff.org/E_Monitoring_Program [<https://perma.cc/Z99N-MHXM>] (prohibiting “alcohol, drugs, [and] weapons” in EM applicant’s residence); *Electronic Monitoring Program*, ORANGE CNTY. SHERIFF’S DEP’T, <https://www.ocsheriff.gov/commands-divisions/custody-operations-command/theo-lacy-facility/electronic-monitoring-program> [<https://perma.cc/Z6JR-EKTG>] (same); *GPS Electronic Monitoring System Program*, LINN CNTY. CORR. CTR., <https://www.linncountyiowa.gov/DocumentCenter/View/21047/LCCC-GPS-Electronic-Monitoring-System-Program-Work-Release-Form> [<https://perma.cc/FJ9X-4JDY>] (“All alcohol and drugs shall be removed from the residence while on GPS monitoring.”).

44. See, e.g., *Global Position Satellite Surveillance (GPS) Program*, OKLA. DEP’T CORR. 4 (Oct. 23, 2020), <https://oklahoma.gov/content/dam/ok/en/doc/documents/policy/section-06/opo61001.pdf> [<https://perma.cc/TZW3-ARQG>] (“It will be the responsibility of the field officer assigned the verification request, to investigate and verify the proposed home offer by conducting an on-site inspection of the residence.”); *Electronic Monitoring*, *supra* note 40 (delineating the responsibilities of pretrial services employees, including interviewing the defendant and completing an assessment).

A. *Pretrial EM*

In the 1980s, EM was “incorporated into the pretrial phase of the justice system and has been used to supervise defendants awaiting trial” ever since.⁴⁵ In many (if not most) jurisdictions, “judges determine if an accused person is going to be placed on pretrial electronic monitoring.”⁴⁶ In making this determination, judges typically refer to a pretrial risk assessment, often calculated by pretrial services.⁴⁷ The decision usually takes place shortly after a person is arrested and charged, when the judge decides whether to release the individual on their own recognizance, to require bail, or to require any number of release conditions, including EM.⁴⁸ Often, the accused individual or their attorney can apply for EM or request a bond hearing and suggest EM as a condition of release.⁴⁹

45. Karla Dhungana Sainju, Stephanie Fahy, Katherine Baggaley, Ashley Baker, Tamar Minassian & Vanessa Filippelli, *Electronic Monitoring for Pretrial Release: Assessing the Impact*, 82 FED. PROB. 3, 3 (Dec. 2018), https://www.uscourts.gov/sites/default/files/82_3_1.pdf [<https://perma.cc/65A6-5AR5>].

46. Patrice James, James Kilgore, Gabriela Kirk, Grace Mueller, Emmett Sanders, Sarah Staudt & LaTanya Jackson Wilson, *Cages Without Bars: Pre-Trial Electronic Monitoring Across the United States*, SHRIVER CTR. ON POVERTY L. 20 (Sept. 2022), <https://www.povertylaw.org/wp-content/uploads/2022/09/cages-without-bars-final-rev1.pdf> [<https://perma.cc/R85B-DPCY>].

47. See *id.* at 20–21. The use of pretrial risk-assessment tools has expanded in recent years, leading to criticism, especially since such tools may perpetuate racial and socioeconomic bias. See, e.g., Ember McCoy, *The Risks of Pretrial Risk Assessment Tools: Policy Considerations for Michigan*, U. MICH. FORD SCH. PUB. POL’Y (May 2023), <https://stpp.fordschool.umich.edu/sites/stpp/files/2023-05/Risk%20Assessment%20Policy%20Brief%20Final%205.2.23.pdf> [<https://perma.cc/7QNG-DDGW>]; *Mapping Pretrial Injustice*, MOVEMENT ALL. PROJECT, <https://pretrialrisk.com/#top> [<https://perma.cc/3YXQ-VL54>]; Brandon Buskey & Andrea Woods, *Making Sense of Pretrial Risk Assessments*, NAT’L ASS’N CRIM. DEF. LAWS. (2018), <https://www.nacdl.org/Article/June2018-MakingSenseofPretrialRiskAsses> [<https://perma.cc/2BFY-RCK5>]. See generally Sean Allan Hill II, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910 (2021) (explaining the use of pretrial risk-assessment instruments, including for EM decisions, and concluding that such risk assessments disproportionately impact Black and Latinx individuals).

48. See Carroll, *supra* note 26, at 185 (describing various conditions of pretrial release).

49. See James et al., *supra* note 46, at 21.

The pretrial EM process leaves tremendous discretion to judicial decision makers—either judges,⁵⁰ pretrial services, or correctional officials.⁵¹ These decision makers are often able to impose EM without any clearly defined decision-making standards.⁵² Typically, the decision maker will require that the individual follow specific—often confusing—movement rules (ranging from house arrest to a curfew).⁵³ In addition, the defendant must often maintain the EM equipment, meaning the defendant must regularly charge the battery of the device and pay any associated fees related to the device.⁵⁴ If a defendant violates any of these

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50. See *id.* at 22; see also Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 423 (2016) (detailing the “heavy reliance on judicial discretion in pretrial release determinations,” including the determination of whether to sentence a defendant to EM); Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants Into Debt*, N.Y. TIMES (July 3, 2019), <https://www.nytimes.com/2019/07/03/magazine/digital-jail-surveillance.html> [<https://perma.cc/A3VU-4NBX>] (quoting Chris Albin-Lackey, a senior legal adviser with Human Rights Watch, as explaining, “[t]here are a lot of judges who reflexively put people on monitors, without making much of a pretense of seriously weighing it at all”). Moreover, the discretion of trial-level judges is heightened by the deferential standard of review on appeal, as appellate courts ordinarily review pretrial release conditions and decisions under an abuse-of-discretion standard. See AM. BAR ASSOC., STANDARDS FOR CRIM. JUST.: PRETRIAL RELEASE § 10-5.10(h) (2022), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk [<https://perma.cc/XG8Q-LGWR>]. Due to the tremendous discretionary power of judges in deciding pretrial conditions, “people of color and the indigent largely feel a disparate impact from pretrial conditions of release”—which may result in Black and Latinx defendants being placed on EM at higher rates than white defendants. Paige Lehman, *The Other Stay-at-Home Order: Electronic Monitoring and the Employability of Criminal Defendants After COVID*, 15 WASH. U. JURIS. REV. 171, 176 (2022).
51. See, e.g., *Electronic Monitoring Program*, SHEBOYGAN CNTY., <https://www.sheboygancounty.com/departments/departments-r-z/sheriff-s-department/correctional-division/adult-detention-center/emp> [<https://perma.cc/7K7E-RDZ7>] (“The Sheriff or his/her designee will determine who can participate in the [electronic monitoring] program. The courts, probation and parole and the district attorney cannot order an Inmate into this program although their recommendations . . . will be considered . . .”); *Electronic Monitoring Program*, PORTAGE CNTY., <https://www.co.portage.wi.us/departments/sheriff-s-office/corrections-division/home-detention-electronic-monitoring> [<https://perma.cc/YQ4D-E75R>] (“Portage County Courts may order that an offender be considered for the Electronic Monitoring Program, however the courts cannot order placement on electronic monitor. The final decision rests with the Sheriff . . .” (emphasis omitted)).
52. See Sara Zampierin, *Mass E-Carceration: Electronic Monitoring as a Bail Condition*, 2023 UTAH L. REV. 589, 603-04, 648-57 (describing how “most jurisdictions lack substantive restrictions on pretrial electronic monitoring conditions,” which allows judges to impose EM after “hearings lasting less than two to three minutes, often without counsel”).
53. See Yazmine Nichols, Ayomikun Idowu, Allison Frankel & Mile Inglehart, *Rethinking Electronic Monitoring: A Harm Reduction Guide*, ACLU 7 (Sept. 2022) [hereinafter *Rethinking Electronic Monitoring*], https://www.aclu.org/sites/default/files/field_document/2022-09-22-electronicmonitoring.pdf [<https://perma.cc/NR2H-MZ4H>].
54. See James et al., *supra* note 46, at 22.

requirements, it is usually up to the judge to determine whether the defendant should be reincarcerated.⁵⁵

In the pretrial setting, advocates have not historically been encouraged to raise a *Bearden*-style challenge to EM due to the logistics of litigation pretrial. EM is one of many conditions judges consider when deciding whether to release the defendant pretrial.⁵⁶ Many jurisdictions still do not provide defendants with counsel at bail hearings.⁵⁷ And even in those jurisdictions that do provide counsel, defense attorneys have been reticent to challenge EM conditions. Defense counsel – seeking to get their clients out of physical custody – often push for any combination of conditions that would allow for their client’s release. In such circumstances, advocates may think it makes little sense to ask for a condition that is unattainable because the defendant does not meet the minimum requirements.⁵⁸ Moreover, once the initial pretrial conditions are decided, appealing is a difficult process. By the time the appeal is heard, there is a chance the defendant has pled or gone to trial, making the issue of pretrial conditions moot.⁵⁹

B. Postconviction EM

In the postconviction context, EM is mainly used in two ways: (1) as an alternative to custodial sentences after conviction, or (2) as a condition of probation.⁶⁰ This Comment will focus on only the first instance of postconviction EM:

55. See *id.* at 27.

56. See AM. BAR ASSOC., *supra* note 50, § 10-5.2.

57. Shamena Anwar, Shawn Bushway & John Engberg, *The Impact of Defense Counsel at Bail Hearings*, 9 SCI. ADVANCES 1, 1 (2023).

58. Indeed, in my own experience, defense counsel often has little time to investigate or consider alternatives, as pretrial detention hearings occur quickly after the attorney meets her client. See also Carroll, *supra* note 26, at 159-60 (explaining that pretrial detention hearings disadvantage defense counsel because they often occur “before the defense has enjoyed a meaningful opportunity to investigate”).

59. See Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment’s Right to Bail*, 32 N. KY. L. REV. 1, 13-14 (2005).

60. See *Rethinking Electronic Monitoring*, *supra* note 53, at 4. When used as a condition of probation, EM can be imposed even without a custodial sentence or after the custodial sentence has expired as an additional form of punishment and supervision. See Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 741, 745-46 (2020). EM can also be imposed on defendants who are no longer on probation or parole; however, further discussion of the imposition of EM in such contexts is outside the scope of this Comment. For further reading, see *Grady v. North Carolina*, 575 U.S. 306, 307 (2015); Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CAL. L. REV. 123, 149 (2017); and Rachel Ness-Maddox, *The Probationer, the Free Man, and the Fourth Amendment: Constitutional Protections for Those Who Have Served Their Sentences and Those Who Have Not*, 71 MERCER L. REV. 1247, 1247-48 (2020).

when EM is used as an alternative to physical incarceration. The framework I outline should allow convicted individuals who would prefer EM to physical incarceration, but cannot afford the conditions of EM, to mount a challenge that would enable them to receive EM rather than incarceration.⁶¹

Some states explicitly allow certain classes of offenders to get day-for-day credit in serving their sentences on EM rather than being physically incarcerated.⁶² California has used EM as a method to reduce prison overcrowding, deploying EM as a substitute for incarceration for “nonviolent, nonsexual, and nonserious” offenders.⁶³ Similarly, a federal statute designates a “prerelease” status, allowing individuals to serve the last six months of their time in “home confinement” which requires they “be subject to 24-hour electronic monitoring.”⁶⁴ Often, such statutes leave the determination of who gets EM and who is denied up to officials in the Department of Corrections or probation.⁶⁵

Convicted defendants are usually not automatically eligible for EM, but rather must apply to qualify to serve their sentence via home detention with EM as opposed to in physical custody. Often, the applications to serve one’s sentence on EM rather than in physical custody are designed to be completed by the convicted individual themselves.⁶⁶ Convicted defendants who hope to serve their

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61. While I encourage advocates to continue challenging the imposition of EM itself, such challenges require different arguments and are outside the scope of this Comment. For further reading, see *Grady*, 575 U.S. at 307, which considers whether EM GPS conditions constitute a Fourth Amendment search; and Michael L. Snyder, *Katz-ing Up and (Not) Losing Place: Tracking the Fourth Amendment Implications of United States v. Jones and Prolonged GPS Monitoring*, 58 S.D. L. REV. 158, 159 (2013).
 62. See, e.g., ALASKA STAT. § 28.35.030(k) (2023) (“Imprisonment . . . may be served at a community residential center or at a private residence if approved by the commissioner of corrections. Imprisonment served at a private residence must include electronic monitoring . . .”); see also *id.* § 33.30.061(c) (“The commissioner may . . . designate a prisoner to serve the prisoner’s term of imprisonment or period of temporary commitment . . . by electronic monitoring.”).
 63. Eisenberg, *supra* note 60, at 146; *Issue Brief: Public Safety Realignment—What Is It?*, CHIEF PROB. OFFICERS CAL. 1 (2012), https://www.cpoc.org/sites/main/files/file-attachments/public_safety_realignment_brief_1_o.pdf?1502315953 [<https://perma.cc/5JYU-Z7NX>].
 64. 18 U.S.C. § 3624(g)(2) (2018).
 65. See, e.g., CAL. PENAL CODE § 1210.12 (West 2023) (“A county chief probation officer shall have the sole discretion . . . to decide which persons shall be supervised using continuous electronic monitoring.”); *id.* § 1210.13 (West 2023) (“A county chief probation officer may revoke, in his or her discretion, the continuous monitoring of any individual.”).
 66. Notably, applications for EM often do not have a place for a lawyer’s signature or name. See, e.g., *Electronic Monitoring Application*, *supra* note 35; *Application for DOC Electronic Monitoring*, ALASKA DEP’T CORR., <https://www.yumpu.com/en/document/view/2654898> [<https://perma.cc/L8LG-D35R>]; *Application for Electronic Monitoring*, MARATHON CNTY. SHERIFF’S DEP’T, <https://www.marathoncounty.gov/home/showpublisheddocument/2868/638215526616870000> [<https://perma.cc/6YN8-3GCV>].

entire sentence via EM may apply at the time of sentencing or shortly before.⁶⁷ Others may apply after being incarcerated, in the hopes of serving some portion of their remaining sentence via EM.⁶⁸ As a result, indigent convicted individuals may find it difficult to mount a challenge to onerous EM requirements because they have lost touch with their public defender or do not think to ask for a lawyer's help.⁶⁹

In other cases, the parole board may order EM as a condition to incentivize the board to grant parole for offenders who would otherwise be denied.⁷⁰ Parole is a period of supervised release in the community following a prison term, often allowing defendants to get out of custody before their sentence expires.⁷¹ In these circumstances, much like the pretrial context, offenders may desire to be on EM because it is seen as a preferable alternative to time in physical custody.⁷²

C. *How EM Impacts Individuals*

While this Comment hopes to provide advocates with resources to ensure indigent defendants who are facing incarceration can access the option of EM, the goal is not to expand EM to include those who would otherwise be

67. See *Sentenced Electronic Monitoring*, *supra* note 5 (explaining that forms to request EM should be completed “prior to your remand date”); *Electronic Monitoring Requirements*, COWLITZ CNTY., <https://www.co.cowlitz.wa.us/697/EMWR-qual> [<https://perma.cc/ERW3-AAVN>] (“Cowlitz County Offender Services must receive the listed pre-qualification information 7 to 10 days prior to sentencing or jail commitment date.”).

68. See *Electronic Monitoring*, *supra* note 40 (explaining that EM screening can occur both for “post-sentenced Los Angeles County adults in custody” or earlier, as a “sentencing option”); *Electronic Monitoring Program*, *supra* note 43 (“Interested inmates can ask any jail staff for an application for our [EM] program.”).

69. While working as a Public Defense Intern in Juneau, I often worked with clients who didn’t realize EM was an option for them, or who were unable to access EM because they did not know where to find the EM application and missed the deadline to apply.

70. See Eisenberg, *supra* note 60, at 148 (describing how, after the Michigan Parole Board implemented GPS monitoring, “the parole rate for sex offenders had increased to 50 percent”). Of course, in requiring EM for all paroled sex offenders, Michigan’s parole board may have “widened the net” (i.e., imposed EM on those who, under a previous regime, would have been released and subject to less onerous restrictions).

71. See Barbara Oudekerk & Danielle Kaebler, *Probation and Parole in the United States*, 2019, U.S. DEP’T JUST. 2 (2021), <https://bjs.ojp.gov/content/pub/pdf/ppus19.pdf> [<https://perma.cc/FC4W-2RRM>]; U.S. Parole Comm’n, *Frequently Asked Questions*, U.S. DEP’T JUST. (2023) <https://www.justice.gov/uspc/frequently-asked-questions> [<https://perma.cc/KH7V-497U>] (“When someone is paroled, they serve part of their sentence under the supervision of their community.”); *Morrissey v. Brewer*, 408 U.S. 471, 477-78 (1972) (“The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.”).

72. See *infra* Section I.C.

unmonitored and unsupervised. Indeed, I envision the goal of *Bearden* challenges to EM in two distinct phases: while I hope *Bearden* challenges to EM will engender greater equity in the use of EM in the short term, I hope that these challenges can also be used as one tool in the effort to eliminate EM entirely in the long term.

This Section will discuss how EM impacts individuals who want EM but cannot access it due to financial circumstances — reflecting the need for equity in EM in the short term — and then discuss the insidious impacts of EM on individuals who are currently subject to EM — reflecting the need for the elimination of EM in the long term.

In the short term, expanding EM access to indigent defendants would result in a more equitable system, as EM represents a desirable alternative for at least some defendants facing a choice between EM and incarceration. Research suggests individuals who see EM as an alternative to physical custody view EM positively.⁷³ This reflects my own experience working as a Public Defense Intern in Juneau — most of my clients who were offered EM in lieu of physical incarceration were eager to take advantage of it.⁷⁴ Thus, at present, EM represents an attractive option for at least some defendants; the challenge is that it is only available to those individuals with sufficient resources to qualify for it.

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73. See, e.g., Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1375-76 (2014) (“Focusing solely on defendants who would otherwise be detained for failure to post bond, privacy objections have little purchase. Even the most thorough observation . . . would for most defendants almost certainly be preferable to imprisonment.”); Crim. Just. Pol’y Program, *Moving Beyond Money: A Primer on Bail Reform*, HARV. L. SCH. 18 (2016), <https://www.prisonpolicy.org/scans/cjpp/FINAL-Primer-on-Bail-Reform.pdf> [<https://perma.cc/2W7F-BUKP>] (“[T]he invasiveness of electronic monitoring will almost always be less severe than detention.”). In comparison, defendants who compared EM to a period without any supervision viewed EM negatively. See Sandra Susan Smith & Cierra Robson, *Between a Rock and a Hard Place: The Social Costs of Pretrial Electronic Monitoring in San Francisco* 41 (Harv. Kennedy Sch. Fac. Rsch. Working Paper Series, Paper No. RWP22-014, 2022), <https://www.hks.harvard.edu/publications/between-rock-and-hard-place-social-costs-pretrial-electronic-monitoring-san-francisco> [<https://perma.cc/8WS9-EVBU>]; James Kilgore, Emmett Sanders & Kate Weisburd, *The Case Against E-Carceration*, INQUEST (July 30, 2021), <https://inquest.org/the-case-against-ecarceration> [<https://perma.cc/FYB4-8UPS>] (EM “is not an alternative to incarceration; it is an alternative form of incarceration.”); Brief for Professor Kate Weisburd and James Kilgore as Amici Curiae Supporting Petitioner-Appellant at 4, *Corridore v. Washington*, 71 F.4th 491 (2023) (No. 22-1301) (arguing EM is custody for purposes of habeas corpus).
74. See also Yang, *supra* note 11, at 1480-82 (“[D]efendants would almost certainly prefer electronic monitoring over pre-trial detention.”); Brian K. Payne & Randy R. Gainey, *The Electronic Monitoring of Offenders Released from Jail or Prison: Safety, Control, and Comparisons to the Incarceration Experience*, 84 PRISON J. 413, 420-24 (2004) (finding offenders did not find electronic monitoring overly punitive).

However, while EM may be viewed positively when compared to incarceration, it is far from a panacea. In recent years, scholars have drawn attention to the insidious effects of EM.⁷⁵ First, academics have documented how EM negatively impacts the community of the individual subject to EM.⁷⁶ Close friends, family, and roommates must often sacrifice to support the person on EM—for example, by helping complete errands, like grocery shopping, that require leaving the home—which can lead to tension in relationships.⁷⁷ Second, EM can cause economic, physical, and mental harms. EM fees may financially bankrupt individuals⁷⁸ and wearing an electronic monitor can make obtaining and maintaining employment nearly impossible.⁷⁹ Third, just like physical incarceration, EM tends disproportionately to impact marginalized individuals—including Black people⁸⁰ and those with physical or intellectual disabilities.⁸¹

Scholars also critique EM on the grounds that it is ineffective, namely that EM does not further any of its goals of protecting public safety, reducing failures to appear, and promoting rehabilitation. According to the few studies that have examined the use of EM, there is no conclusive evidence it achieves any of these

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75. See generally Kate Weisburd et al., *Electronic Prisons: The Operation of Ankle Monitoring in the Criminal Legal System* (Geo. Wash. U. L. Sch. Pub. L. Rsch. Paper, No. 2021-41, 2021), <https://ssrn.com/abstract=3930296> [<https://perma.cc/M8XU-ZM3J>] (presenting an empirical study documenting how EM can restrict movement, limit privacy, affect relationships, and lead to loss of wealth); Mary Holper, *Immigration E-Carceration: A Faustian Bargain*, 59 SAN DIEGO L. REV. 1 (2022) (criticizing EM in the context of immigrant detention); Arnett, *supra* note 14 (arguing that EM contributes to social marginalization).
 76. See Richter, Ryser & Hostettler, *supra* note 30, at 273.
 77. *Id.* Relationships may also be negatively affected by EM requirements themselves. For instance, some jurisdictions “forbid people on monitors from having house guests, gatherings, or allowing anyone to move into the house without permission.” Weisburd, *supra* note 13, at 166.
 78. See Warren, *supra* note 14, at 142; see also *Electronic Monitoring Fees*, *supra* note 14, at 1 (documenting the costs of EM across all fifty states).
 79. See Weisburd, *supra* note 13, at 168; James et al., *supra* note 46, at 29.
 80. Black individuals are disproportionately more likely to be on EM. See *Rethinking Electronic Monitoring*, *supra* note 53, at 8; Arnett, *supra* note 14, at 655, 677-78. In addition, the social marginalization caused by wearing an EM device may especially negatively impact Black individuals. See Yasmiyn Irizarry, David C. May, Adrienne Davis & Peter B. Wood, *Mass Incarceration Through a Different Lens: Race, Subcontext, and Perceptions of Punitiveness of Correctional Alternatives When Compared to Prison*, 6 RACE & JUST. 236, 245 (2016) (noting that in a survey sample, Black survey respondents had “significantly lower odds of preferring electronic monitoring over prison” as compared to white respondents).
 81. People with physical or intellectual disabilities may find it more challenging to comply with EM’s complex requirements due to difficulty understanding the requirements or mobility limitations. See *Rethinking Electronic Monitoring*, *supra* note 53, at 8.

stated goals.⁸² In fact, EM may increase the risk of rearrest due to technical violations,⁸³ suggesting, if anything, EM is not only ineffective, but actively harmful to defendants.

The arguments I present in this Comment are made with the goal of ensuring that so long as EM continues to be an option in the criminal-legal system, the availability of EM does not discriminate based on wealth. At the same time, I recognize EM can harm individuals and is not a permanent solution for mass incarceration. Thus, in the long term, I hope the mounting of *Bearden* challenges to EM qualifications will also encourage jurisdictions to eliminate EM altogether in favor of releasing individuals without conditions.⁸⁴ In the next Part, I will begin my discussion of how advocates may mount such a *Bearden* challenge to EM qualifications, starting with an examination of Supreme Court jurisprudence leading up to *Bearden*.

II. THE DOCTRINAL FRAMEWORK OF FINES AND FEES

The Warren Court is known for its commitment to the rights of criminal defendants, spearheading what is often called the “due process revolution.”⁸⁵

82. *Id.* at 6 (“Numerous studies have failed to find conclusive evidence that EM programs meet their stated goals.”); see also Kristin Betchel, Alexander M. Holsinger, Christopher T. Lowenkamp & Madeline J. Warren, *A Meta-Analytic Review of Pretrial Research: Risk Assessment, Bond Type, and Interventions*, 42 AM. J. CRIM. JUST. 443, 449 (2017) (“[T]here is no conclusive evidence of [EM’s] effectiveness in reducing failure to appear or new criminal arrest pending case disposition.”); Kevin T. Wolff, Christine A. Dozier, Jonathan P. Muller, Margaret Mowry & Barbara Hutchinson, *The Impact of Location Monitoring Among U.S. Pretrial Defendants in the District of New Jersey*, 81 FED. PROB. J. 8, 11-14 (2017) (finding pretrial EM defendants in New Jersey were no less likely to fail to appear than non-EM defendants); Evan M. Lowder & Chelsea M.A. Foudray, *Use of Risk Assessments in Pretrial Supervision Decision-Making and Associated Outcomes*, 63 CRIME & DELINQ. 1765, 1765-69 (2021) (identifying that pretrial monitoring was associated with increased rates of pretrial misconduct). While some government studies suggest that EM reduces failure to appear and reduces recidivism, see ELECTRONIC MONITORING REDUCES RECIDIVISM, *supra* note 39, at 1-3, scholars have identified significant flaws in these studies, see James Kilgore, *Electronic Monitoring: A Survey of the Research for Decarceration Activists*, REAL COST PRISONS PROJECT 3-4 (2018), <http://www.realcostofprisons.org/writing/kilgore-survey-of-em-research.pdf> [<https://perma.cc/3DF4-S6TA>].

83. Kathryn Saltmarsh, *Research Briefing: State Use of Electronic Monitoring*, ILL. SENT’G POL’Y ADVISORY COUNCIL 6 (2019), https://spac.icjia-api.cloud/uploads/Research_Briefing_-_State_Use_of_EM_2019_FINAL-20191211T23034528.pdf [<https://perma.cc/Q2Y4-437X>].

84. See *infra* Section IV.B.

85. See, e.g., Raquel E. Aldana & Thomas O’Donnell, *A Look Back at the Warren Court’s Due Process Revolution Through the Lens of Immigrants*, 51 U. PAC. L. REV. 633, 633-34 (2020) (citing Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 525); Sarah A. Seo, *Democratic Policing Before the Due Process Revolution*, 128 YALE L.J. 1246, 1249 (2019).

However, the line of cases culminating with *Bearden v. Georgia* is particularly significant for the Court's use of a combination of due process *and* equal protection to carve out special rights for indigent criminal defendants and convicted individuals. This Part traces the origins of that combination, then follows that doctrinal line to *Bearden*. In doing so, I hope to highlight the ways in which the Court's combination of due process with equal protection in this line of cases suggests *Bearden's* reasoning should apply even to discretionary EM regimes in the postconviction context.

A. *The Road to Bearden*

The origins of the *Bearden* combination of equal protection and due process can be traced to *Griffin v. Illinois*.⁸⁶ In *Griffin*, indigent defendants requested free transcripts of their trials in order to appeal.⁸⁷ The Court found for the defendants, noting “[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’”⁸⁸ Thus, even though “a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all,” if a state is to grant appellate review to some defendants, then it cannot “do so in a way that discriminates against some convicted defendants on account of their poverty.”⁸⁹ In holding that a state must make appellate review available to indigent defendants in practice (rather than only in theory), the Court explained that in “all stages of the proceedings the Due Process and Equal Protection Clauses protect” indigent defendants “from invidious discriminations.”⁹⁰

Griffin represents the first time the Court recognized the Equal Protection Clause as creating “affirmative obligations on government to redress inequalities not of its own making,” as compared to the Clause merely restricting governmental discrimination.⁹¹ In particular, the Court highlighted the government’s obligation of ensuring equity between the indigent and the wealthy in “criminal

86. 351 U.S. 12 (1956); see also Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 95 (2019) (“The origins of the distinct test for assessing the constitutionality of poverty penalties . . . may be found in constitutional norms first espoused in the 1956 case of *Griffin v. Illinois*.”).

87. *Griffin*, 351 U.S. at 13 (plurality opinion).

88. *Id.* at 17 (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940)).

89. *Id.* at 18.

90. *Id.*

91. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 266 (1991); Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1227–28 (2013).

trials,” suggesting it is the government’s prosecutorial power in particular that triggers this special consideration for equity.⁹²

Griffin set the stage for two related cases in the early 1970s: *Williams v. Illinois*⁹³ and *Tate v. Short*.⁹⁴ In both cases, defendants were imprisoned to “work off” fines related to their convictions.⁹⁵ Citing *Griffin*, the Court in *Williams* held that the government’s scheme represented “an impermissible discrimination that rests on ability to pay,” as “once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.”⁹⁶ The Court acknowledged the challenged statutory scheme did “not distinguish between defendants on the basis of ability-to-pay fines,” however, the statute “as applied” to the particular defendant “work[ed] an invidious discrimination solely because he is unable to pay the fine.”⁹⁷ The *Tate* Court similarly held that the practice constituted “unconstitutional discrimination” since the defendant “was subjected to imprisonment solely because of his indigency.”⁹⁸

Notably, the majorities in *Tate* and *Williams* distanced themselves from the combination of equal-protection and due-process analyses that was used in *Griffin*, instead relying solely on equal protection. Indeed, in *Williams*, Justice Harlan concurred separately to indicate he would “prefer to judge the legislation before [the Court] in this case in terms of [substantive] due process” rather than using the equal protection analysis of the Court’s majority.⁹⁹ Justice Harlan argued it was an “impossible task” for the government to try to create a penal system that would result in truly “equal treatment” — some defendants were always going to be advantaged by arbitrary factors, such as the luck of a particularly talented defense attorney.¹⁰⁰ Instead of aiming for equality of outcome, Justice Harlan advocated for focusing on the legislation in question, suggesting “any legislation that deprives an individual of his liberty,” meaning “his right to remain free,” requires the Court to “squint hard” and apply a stricter scrutiny when determining if the “legislature has impermissibly affected an individual right or has done

92. See *Griffin*, 351 U.S. at 17-18 (plurality opinion).

93. 399 U.S. 235 (1970).

94. 401 U.S. 395 (1971).

95. *Williams*, 399 U.S. at 236-37; *Tate*, 401 U.S. at 398 & n.4.

96. *Williams*, 399 U.S. at 241-42.

97. *Id.* at 242.

98. *Tate*, 401 U.S. at 397-98.

99. *Williams*, 399 U.S. at 259 (Harlan, J., concurring).

100. *Id.* at 260-62.

so in an arbitrary fashion.”¹⁰¹ Thus, Justice Harlan’s argument shied away from labeling socioeconomic status as a protected class, and instead focused on the importance of the liberty interest at issue in custodial sentencing.

In some ways, Justice Harlan’s concurrence in *Williams* set the stage for *San Antonio Independent School District v. Rodriguez*.¹⁰² Decided two years after *Tate*, the Court in *Rodriguez* refrained from invoking equal protection to prevent governmental action that had the effect of discriminating against the poor in contexts beyond the criminal-legal system. In *Rodriguez*, families from poor school districts challenged the Texas system of awarding school finances according to local property taxes, arguing it violated equal-protection requirements because it resulted in large disparities in per-pupil expenditures due to differences in property value between districts.¹⁰³ The Court rejected the argument, explaining that “this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny,” since “the class of disadvantaged ‘poor’ cannot be identified or defined in customary equal protection terms.”¹⁰⁴ The majority went on to distinguish *Williams* and *Tate*, because in those cases, “the disadvantaged class was composed only of persons who were totally unable to pay the demanded sum” rather than merely “persons with relatively less money on whom designated fines impose heavier burdens.”¹⁰⁵ Thus, in *Rodriguez*, the plaintiffs failed because they did not establish “the financing system . . . result[ed] in the absolute deprivation of education,” since all students were still able to attend school despite the disparity in funds between schools.¹⁰⁶ Furthermore, the majority held that education was not a “fundamental right or liberty,” suggesting that *Rodriguez* was “significantly different from any of the cases . . . touching upon constitutionally protected rights.”¹⁰⁷

Rodriguez thus presents three limiting principles in terms of the government’s affirmative obligation to prevent unequal treatment based on wealth disparities. First, the decision suggests only those cases that implicate constitutionally protected rights—such as the right to liberty or a fair trial—require courts’ careful scrutiny of the disparate effects of government action. Second, the government’s affirmative obligation to prevent unequal treatment does not apply when some individuals struggle to afford government-imposed costs, but instead only when the individual is “totally unable to pay” the cost. Finally, this

101. *Id.* at 262–63.

102. 411 U.S. 1 (1973).

103. *Id.* at 4–5, 13–15.

104. *Id.* at 19, 29.

105. *Id.* at 22.

106. *Id.* at 25 & n.60.

107. *Id.* at 37–38.

total inability to pay must result in “the absolute deprivation” of the right at issue.

B. Bearden and a Return to the Combination of Equal Protection and Due Process

A decade after *Rodriguez*, the Court returned to utilizing a combination of due-process and equal-protection analysis in *Bearden v. Georgia*.¹⁰⁸ In *Bearden*, the defendant was sentenced to three years of probation after pleading guilty to felonies of burglary and theft by receiving stolen property. As a condition of probation, the judge required the defendant to pay a \$500 fine and \$250 in restitution.¹⁰⁹ However, after losing his job, the defendant was unable to afford the fine.¹¹⁰ On the prosecution’s motion, the court revoked his probation for failure to pay and sentenced the defendant to serve the remaining portion of the probationary period in prison.¹¹¹

In a landmark decision, the Supreme Court held that “the Fourteenth Amendment prohibits a State from revoking an indigent defendant’s probation for failure to pay a fine and restitution.”¹¹² In so holding, the Court noted that “[d]ue process and equal protection principles converge in the Court’s analysis in [the *Griffin* line of] cases.”¹¹³ Explaining further, the Court wrote:

To determine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant’s indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine. Whether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as “the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection

108. 461 U.S. 660, 662 (1983).

109. *Id.*

110. *Id.* at 662-63.

111. *Id.* at 663.

112. *Id.* at 661.

113. *Id.* at 665.

between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose.¹¹⁴

Applying those factors to the case at hand, the Court held that the state may not “imprison a person solely because he lacked the resources to pay [a fine or restitution].”¹¹⁵ Thus, “if the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically.”¹¹⁶

Bearden applies most directly to explicit fines and fees, where a judge may not incarcerate a defendant for his inability to pay without first determining if that non-payment was willful. Unfortunately, *Bearden* has not eliminated disparate case outcomes due to defendants’ wealth. With the proliferation of pretrial and postconviction conditional release, indigent criminal defendants increasingly remain incarcerated solely because of their inability to pay for the underlying costs associated with conditional release, including on EM.

III. USING *BEARDEN* TO CHALLENGE EM REQUIREMENTS

In this Part, I argue *Bearden*’s requirement that a state “may not . . . imprison a person solely because he lacked the resources to pay” should be applied both to EM’s explicit fees and to the underlying costs associated with the EM requirements.

Importing the *Bearden* willfulness requirement to the explicit fees and associated costs underlying EM is not a panacea for indigent individuals.¹¹⁷ However, I maintain that requiring an ability-to-pay hearing utilizing a *Bearden* willfulness standard before imposing EM would result in an improvement to the present, in which ability to pay is not considered a constitutionally mandated consideration in decisions about EM at all. In this Part, I will discuss how *Bearden* might apply to both explicit fees and underlying costs associated with the EM requirements. I will also discuss some logistical and legal challenges and why the *Bearden* framework I propose will nonetheless succeed in the face of such challenges.

114. *Id.* at 665-67 (footnotes omitted) (quoting *Williams v. Illinois*, 399 U.S. 235, 260 (1970)).

115. *Id.* at 667-68.

116. *Id.* at 668.

117. See, e.g., Kurin, *supra* note 37, at 288 (“Courts tend to violate *Bearden* in three ways: (1) not conducting an ability to pay hearing, (2) omitting procedural stages of an ability to pay hearing, and (3) erroneous interpretations.”); see also Jack Furness, *Willful Blindness: Challenging Inadequate Ability to Pay Hearings Through Strategic Litigation and Legislative Reforms*, 52 COLUM. HUM. RTS. L. REV. 957, 961 (2021) (discussing that *Bearden*’s legal standard has been “poorly enforced and, in many cases, completely ignored”).

A. Applying *Bearden* to Explicit EM Fees

The connection between *Bearden* and explicit EM fees is clear: courts apply *Bearden* in cases where a person is unable to pay court-mandated fees, which should include direct EM-related fees. At present, while a few jurisdictions do not charge any fees for EM services,¹¹⁸ or mandate an individual's ability to pay be considered when assessing EM fees,¹¹⁹ the vast majority have no such statutory requirements.¹²⁰ The *Bearden* line of cases requires courts to consider a defendant or convicted individual's ability to pay when assessing EM fees or incarcerating the individual for failure to pay.

Explicit fees can be challenged under *Bearden* at two points in time. First, advocates could challenge explicit EM fees at the time of imposition of the EM conditions. Second, if an indigent defendant is sentenced to EM but fails to pay for fees associated with the EM device, advocates could dispute a court's determination that they violated a condition of release from custody.

In this Section, I will address some potential barriers—namely, the precedent of *Rodriguez*¹²¹ and concerns about reduced liberty interests in postconviction contexts¹²²—and explain why I believe a *Bearden* challenge to explicit EM fees will nonetheless be successful.

118. *Electronic Monitoring Fees*, *supra* note 14, at 4 (noting that California and Rhode Island “expressly prohibit the use of EM fees, at least at some stages”).

119. *Id.* (“Illinois, Kentucky, Missouri & Nevada are the only four states with statutes that expressly mandate consideration of a person’s ability to pay in *both* the pretrial and post-sentencing stage when assessing EM fees.”); see also Just. Servs., *Home Electronic Monitoring Program (HEM)*, CITY RICHMOND, VA., <https://www.rva.gov/justice-services/home-electronic-monitoring-hem> [<https://perma.cc/HP5K-B2JR>] (requiring an individual to be “willing to pay a daily fee (if working) based on the HEM sliding scale” to be eligible for EM); *Electronic Home Monitoring*, HENNEPIN CNTY., MINN., <https://www.hennepin.us/residents/public-safety/electronic-home-monitoring> [<https://perma.cc/6GUU-CZ5D>] (allowing individuals to request a waiver for “financial hardship” to avoid EM fees).

120. *Electronic Monitoring Fees*, *supra* note 14, at 5 (noting “23 states do not statutorily require that someone’s ability to pay be considered when assessing EM fees,” and many other states have ambiguous standards for determining ability to pay).

121. See *infra* Section III.A.1.

122. See *infra* Section III.A.2.

1. *A Bearden Challenge Is Not Barred by Rodriguez*

To date, I have been unable to find any published examples of judges using *Bearden* to invalidate explicit EM fees.¹²³ However, recently, advocates have attempted to use the combination of due process and equal protection from *Bearden* to challenge cash-bail provisions that disparately impact poor defendants.¹²⁴ These challenges to cash bail provide generative insights into how such a challenge could be brought in the EM context. While courts have rejected such challenges to cash bail by relying on the *Rodriguez* limiting principles, the courts' reasoning suggests that challenges to EM fees under *Bearden* may succeed where bail challenges have failed.

Recall that *Rodriguez* presented three limiting principles in terms of applying the *Bearden* line of cases to challenge unequal treatment based on wealth disparities: the *Bearden* line of cases is limited to cases in which (1) constitutionally protected rights – such as the right to liberty – are implicated by the government action; (2) individuals are “totally unable to pay” the government-imposed cost; and (3) challengers suffer an “absolute deprivation” of some right or privilege due to that inability to pay.¹²⁵

A *Bearden*-style challenge to EM fees would satisfy all three of those limiting principles. First, it would assert the individual is being incarcerated – a deprivation of the fundamental right to liberty, thereby satisfying the first of *Rodriguez*'s limiting principles. Second, individuals denied EM due to their inability to pay are not merely more burdened by the cost as compared to wealthier individuals,

123. In *Hiskett v. Lambert*, the attorneys raised a *Bearden* argument. See Petitioner's Supplemental Brief at 2, *Hiskett v. Lambert*, 451 P.3d 408 (Ariz. Ct. App. 2019) (No. 1 CA-SA 19-0119), https://www.acluz.org/sites/default/files/field_documents/2019.07.01_hiskett_-_supplemental_brief_002.pdf [<https://perma.cc/JU2J-WGS3>] (“[I]mposing the cost of electronic monitoring on someone who has demonstrated a financial hardship, while threatening jail if payments are not made, violates due process and equal protection principles as explained by the Supreme Court in *Bearden*.”). However, citing the principal of constitutional avoidance, the court ignored Mr. Hiskett's constitutional claims and instead concluded the Arizona statute at issue provided “no authority for imposing the cost of pretrial electronic location monitoring on a defendant.” *Hiskett*, 451 P.3d at 414.

124. See Robert William Gordon Wright, *Pretrial Detention of Indigents: A Standard Analysis of Due Process and Equal Protection Claims*, 54 GA. L. REV. 707, 717-18 (2020) (analyzing the use of *Bearden* in cases challenging wealth-based discrimination in bail policies); Kurin, *supra* note 37, at 305-06. For other examples of such cases, see *Walker v. City of Calhoun*, 901 F.3d 1245 (11th Cir. 2018); *Buffin v. City & County of San Francisco*, No. 15-CV-04959, 2018 WL 424362 (N.D. Cal. Jan. 16, 2018); and *Daves v. Dallas County*, 22 F.4th 522 (5th Cir. 2022).

125. Tyler Smoot, *Punishing the Poor: Challenging Carceral Debt Practices Under Bearden and M.L.B.*, 23 U. PA. J. CONST. L. 1086, 1096-1101 (2021) (discussing “shields against *Bearden*,” including the incarceration-cases-only shield and the “absolute deprivation” shield).

but cannot pay for the cost of EM at all. Finally, those individuals face “absolute deprivation” of the right to liberty due to their inability to pay for those fees.

Schultz v. Alabama — a recent case out of Alabama — provides a useful point of comparison from the bail context.¹²⁶ In *Schultz*, indigent defendants challenged an Alabama county’s bail system as violating both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.¹²⁷ According to the county’s bail policies, accused defendants who could pay the amount listed on the schedule were immediately released.¹²⁸ Defendants who could not afford the listed bail were detained until a later bail hearing, where the defendant had to “prove his inability to post bail and show that he is not a flight risk or a danger to the community in order to secure his release.”¹²⁹ Thus, the Alabama county system had a disproportionate impact on those who could not afford the listed bail-schedule amount; they would be required to sit in a jail cell longer than a similarly situated defendant who could afford bail.

The Eleventh Circuit found the bail system constitutional. The court acknowledged that the “Supreme Court . . . has signaled that heightened scrutiny for claims of wealth discrimination may be appropriate in . . . setting the terms of carceral punishment” — satisfying the first of the *Rodriguez* principles.¹³⁰ The Eleventh Circuit then discussed the second and third *Rodriguez* limiting principles, explaining the application of heightened scrutiny to claims of wealth discrimination applies only to those situations in which individuals “were *completely unable to pay* for some desired benefit, and as a consequence, they sustained an *absolute deprivation* of a meaningful opportunity to enjoy that benefit.”¹³¹ The court noted indigent pretrial detainees did not “suffer an absolute deprivation of a meaningful opportunity to obtain pretrial release” because they had the opportunity to prove that they were not a flight risk at the later bail hearing.¹³²

Furthermore, the court asserted strict scrutiny did not apply to the bail schedule because the indigent pretrial detainees “are not discriminated against solely based on their inability to pay.”¹³³ The court pointed out that the “indigent and the non-indigent arrestees are not on equal footing; only the latter has made

126. 42 F.4th 1298 (11th Cir. 2022), *cert. denied sub nom.* Hester v. Gentry, 143 S. Ct. 2610 (2023) (mem.).

127. *Id.* at 1318.

128. *Id.* at 1306.

129. *Id.*

130. *Id.* at 1323.

131. *Id.* (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 20 (1973)).

132. *Id.* at 1324.

133. *Id.*

a showing that he will appear for his trial, and he has made that showing by satisfying the terms of . . . [the] bail schedule.”¹³⁴ Thus, “pretrial detainees who do not secure immediate release are not being discriminated against due to inability to pay—they are being discriminated against for failure to ensure in the first instance their future appearance at trial.”¹³⁵

Schultz suggests a *Bearden* challenge based on the costs of EM—either at the imposition or enforcement stage—could have more success in overcoming the *Rodriguez*’s limiting principles compared to a challenge to cash bail. Both cash-bail systems and EM implicate the fundamental right to liberty. Moreover, both defendants who cannot afford their cash-bail amounts and those who cannot afford EM are “totally unable to pay” the government-imposed cost. However, unlike a *Bearden* challenge to the cost of EM, a challenge to cash bail does not satisfy the third *Rodriguez* limiting principle—which requires that absolute deprivation be caused by the complete inability to pay.

First, as compared to the cash-bail system in *Schultz*, challenging EM is challenging the defendant’s “absolute deprivation.” In *Schultz*, the court found there was no absolute deprivation because the indigent detainees were not entirely barred from obtaining pretrial release. They merely had to wait until a later hearing to prove they were not a flight risk.¹³⁶ Thus, in the court’s mind, they were still presented with the opportunity of pretrial release eventually. However, defendants who cannot afford EM do suffer an “absolute deprivation”—they are entirely unable to take advantage of the opportunity to serve their sentence on EM, as opposed to in physical custody.

Second, the sole difference between a defendant who can pay for EM and one who cannot is their ability to pay—meaning defendants who cannot pay for EM suffer an absolute deprivation *because* of their inability to pay. The same does not hold true for cash bail (at least, according to the *Schultz* court). The *Schultz* court reasoned that a defendant who does not post bail is materially different from a defendant who posts bail; in the court’s view, only the defendant who has posted bail has a financial interest in appearing for trial. By contrast, in the case of EM, the ability to pay for the underlying costs associated with EM is not meant to secure the defendant’s appearance at trial—that is the purpose of EM *itself*. Thus,

^{134.} *Id.*

^{135.} *Id.*

^{136.} *Id.* at 1326–27 (concluding that the “indigent arrestees did not satisfy” the *Rodriguez* “absolute deprivation” standard because “the plaintiffs . . . ‘merely’ had to ‘wait some appropriate amount of time to receive the same benefit as the more affluent’” (quoting *Walker v. City of Calhoun*, 901 F.3d 1245, 1261–62 (11th Cir. 2018))). *But see* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J. F. 1098, 1123 (2019) (critiquing such “temporality”-based reasoning as “completely untenable,” because “[t]he ‘absolute’ quality of a liberty deprivation cannot turn on temporality”).

the ability to *qualify* for EM—and thus not be incarcerated—is solely determined by the defendant’s ability to pay for its fees.

While certainly the outcomes of these challenges to cash bail are disappointing to those hoping to make the pretrial system more equitable,¹³⁷ an analysis of those unsuccessful challenges provides some hope to defendants and their advocates: the three *Rodriguez* limiting principles that have protected cash-bail schemes should not hinder a *Bearden* challenge to explicit fees associated with EM.

2. *Any Reduced Liberty Interest in Postconviction Settings Do Not Bar a Bearden Challenge to EM Requirements*

States may attempt to defend the imposition of postconviction EM by distinguishing it from pretrial EM and asserting convicted individuals possess reduced liberty interests. As a result of such reduced liberty interests, states may claim the Due Process Clause does not pose a barrier to EM conditions that disparately impact indigent individuals in the postconviction context. However, such arguments are unlikely to be persuasive in *Bearden* cases.

The Due Process Clause¹³⁸ involves two types of protections: (1) substantive due process, which requires the government provide an adequate justification for any deprivation of life, liberty, or property; and (2) procedural due process, which asks if the process used to deprive someone of life, liberty, or property is fair.¹³⁹ In the pretrial setting, both procedural and substantive due process work together to protect the accused defendant’s liberty interests.¹⁴⁰ Before conviction,

137. See generally Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589 (2018) (arguing for the right to affordable bail); Cynthia E. Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 ALBANY L. REV. 1063 (2019) (“explor[ing] the constitutionality and necessity of the use of money bail”).

138. The Due Process Clause applies to both the federal government through the Fifth Amendment and to the states through the Fourteenth Amendment. The Supreme Court has held that the Fifth Amendment’s Due Process Clause provides the same protections as the Fourteenth Amendment’s Due Process Clause. *Heiner v. Donnan*, 285 U.S. 312, 326 (1932).

139. Erwin Chemerinsky, *Substantive Due Process*, 15 Touro L. REV. 1501, 1501 (1999); see also Note, *The Right to Be Free from Arbitrary Probation Detention*, 135 HARV. L. REV. 1126, 1134 (2022) (citing *Sacramento v. Lewis*, 523 U.S. 833, 845–46) (discussing the differences between substantive and procedural due process) [hereinafter *Right to Be Free*].

140. Indeed, “at least some courts are persuaded by the logic that *Bearden*’s rule applies ‘with special force in the bail context, where . . . arrestees are presumed innocent.’” Funk, *supra* note 136, at 1103 (quoting *Buffin v. City & Cnty. of San Francisco*, No. 15-CV-4959, 2018 WL424362, at *9 (N.D. Cal. Jan. 16, 2018)).

the Supreme Court has made clear that “[l]iberty” is a “fundamental” right.¹⁴¹ Consequently, in the preconviction context, substantive-due-process rights are at their strongest, and any constraint on liberty is analyzed under a strict-scrutiny standard.¹⁴² Procedural due process, which applies when an individual has enforceable right to life, liberty, or property, also provides robust pretrial protections, as individuals have an enforceable right to liberty preconviction.¹⁴³

In comparison, the application of substantive and procedural due process in the postconviction context provides less protection. While the Supreme Court has recognized that “[t]he Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation”¹⁴⁴ and parole,¹⁴⁵ there is some uncertainty as to how much protection those rights truly provide. The Supreme Court has never explicitly said a probationer or parolee’s liberty interest in obtaining release is “fundamental” for the purpose of a substantive-due-process analysis.¹⁴⁶ Indeed, the Court has indicated individuals have a lesser liberty interest postconviction.¹⁴⁷ Similarly, the application of procedural due process in postconviction settings is often hindered because an individual must first demonstrate a

141. *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

142. *United States v. Salerno*, 481 U.S. 739, 750 (1987); see also *Right to Be Free*, *supra* note 139, at 1136 (describing the Court’s decision in a challenge to pretrial detention in *Salerno* as “invoking the familiar language of strict scrutiny”); Funk, *supra* note 136, at 1106 (“Although never invoking substantive due process or the strict-scrutiny standard by name, the *Salerno* Court acknowledged the ‘fundamental nature’ of pretrial liberty.”).

143. See Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 ALA. C.R. & C.L. L. REV. 115, 128 (2019) (explaining procedural due process’s application to the bail setting); Funk, *supra* note 136, at 1109 (same); Case Comment, *Brangan v. Commonwealth*, 131 HARV. L. REV. 1497, 1499 (2018) (discussing *Brangan v. Commonwealth*, 80 N.E.3d 949 (Mass. 2017), and noting that “[a]lthough judges are not required to set bail in an amount that the defendant can afford, the court justified prohibiting groundless, high bail for indigent defendants by discussing substantive and procedural due process as those rights relate to pretrial detention”).

144. *Black v. Romano*, 471 U.S. 606, 610 (1985).

145. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (“Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one.”).

146. *Right to Be Free*, *supra* note 139, at 1137 (2022); see also *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979) (“The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right . . .”).

147. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (“To a greater or lesser degree, it is always true of probationers (as we have said it to be true of parolees) that they do not enjoy ‘the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.’” (alteration in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972))).

“legitimate expectation” of release.¹⁴⁸ Thus, if a probation or parole statute grants discretion to the state in determining whether to grant release, due-process protections do not apply, as the individual has no enforceable right to liberty.¹⁴⁹

However, *Bearden* provides a clear rebuttal to the claim that postconviction challenges to EM requirements should fail because due-process protections are not as strong postconviction. *Bearden* itself arose in the postconviction context, suggesting its holding is directly applicable to postconviction EM requirements.¹⁵⁰ Moreover, even if states successfully argue that procedural due process does not apply to discretionary parole decisions (because there is no enforceable liberty interest), equal protection continues to apply.¹⁵¹ After all, the government cannot violate equal-protection principles *even* in situations where procedural due process does not apply because the state cannot “invidiously den[y] one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause.”¹⁵² For example, *even if* defendants had no enforceable liberty interest in obtaining early release via parole, it would violate the Equal Protection Clause to grant release to white defendants and deny release to Black defendants. Similarly, because denying indigent individuals release on EM is an absolute deprivation of their liberty,¹⁵³ that denial violates the Equal Protection Clause.¹⁵⁴ Since *Bearden* was decided based on a combination of due-process and equal-protection grounds, *Bearden* applies even to discretionary EM regimes. Thus, *even if* EM statutes do not create an enforceable right to release

148. See *Greenholtz*, 442 U.S. at 9, 12.

149. *Id.* at 7, 9 (holding that “[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence,” and the mere possibility of discretionary parole does not implicate a liberty interest entitling procedural due process protections).

150. Recall that the defendant in *Bearden* pled guilty and was challenging a condition of probation. See *Bearden v. Georgia*, 461 U.S. 660, 662 (1983).

151. See, e.g., *Wottlin v. Fleming*, 136 F.3d 1032, 1036 (5th Cir. 1998) (finding no “due-process liberty interest in early release,” but still finding that the early-release requirements had to satisfy the Equal Protection Clause of the Fourteenth Amendment); *Cook v. Wiley*, 208 F.3d 1314, 1323 (11th Cir. 2000) (same).

152. *Bearden*, 461 U.S. at 665.

153. See *supra* Section III.A.1.

154. See Funk, *supra* note 136, at 1102 (explaining that, under *San Antonio Independent School District v. Rodriguez*, “an absolute deprivation’ of liberty occasioned by wealth (or indigence) triggers heightened scrutiny”); Jonathan Zweig, *Extraordinary Conditions of Release Under the Bail Reform Act*, 47 HARV. J. LEGIS. 555, 562 (2010) (“Under the Equal Protection Clause, the government may not condition access to certain fundamental rights on the basis of an individual’s ability to pay, particularly in the criminal justice arena.”).

on EM, those statutes remain vulnerable to attack on equal-protection grounds.¹⁵⁵

B. *Applying Bearden to the Underlying Costs of EM*

While *Bearden* most clearly applies to explicit fees associated with EM, *Bearden*'s logic should also extend to the underlying costs of EM. Advocates should assert that the unaffordable requirements for EM violate *Bearden* because they result in indigent individuals remaining incarcerated solely because they cannot afford those conditions. Thus, these requirements are tantamount to incarcerating an individual solely due to their inability to pay and consequently violate both the Equal Protection and Due Process Clauses. Just like explicit fees, the implicit costs of EM can be challenged under *Bearden* at two points. First, advocates could challenge requirements associated with EM—such as those listed on an EM application or agreement—when clients apply for EM. Second, if an indigent defendant is sentenced to EM but their indigency results in violating a condition—such as failing properly to charge the EM device—then advocates could challenge a court's attempt to incarcerate the individual as punishment for violating that condition.

Defense attorneys have recently started mounting such challenges,¹⁵⁶ and courts have shown a willingness to consider *Bearden* challenges at the enforcement stage of EM when a defendant is unable to comply with an EM condition due to their indigency. For example, in *Commonwealth v. Canadyan*, the Massachusetts Supreme Judicial Court relied, in part, on *Bearden* in holding that “a finding of violation of the condition of wearing an operable GPS monitoring device was unwarranted” because “there was no evidence of wilful noncompliance,” and finding otherwise would be “akin to punishing the defendant for being homeless.”¹⁵⁷ In *Canadyan*, after pleading guilty, the defendant was sentenced to probation conditions including a requirement to “wear a global positioning

155. Indeed, the Supreme Court has suggested that “when the Equal Protection Clause and the Due Process Clause interact, each clause expands the reach and scope of the other.” Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling Obergefell and Glucksberg*, 21 LEWIS & CLARK L. REV. 245, 247 (2017); see also *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015) (suggesting that “[t]he Due Process Clause and the Equal Protection Clause are connected in a profound way” and that “each may be instructive as to the meaning and reach of the other”).

156. Allison Frankel, Ayomikun Idowu & Yazmine Nichols, *Defense Attorneys Can Help Limit Electronic Monitor Overuse*, LAW360 (Dec. 2, 2022, 4:06 PM EST), <https://www.law360.com/articles/1554406/defense-attorneys-can-help-limit-electronic-monitor-overuse> [<https://perma.cc/D6FA-M4VL>] (providing defense attorneys with suggestions for challenging EM as a condition of release).

157. 944 N.E.2d 93, 96 (Mass. 2010).

system (GPS) monitoring device.”¹⁵⁸ However, upon release from prison, “the defendant was indigent and residing in a shelter for homeless veterans that could not provide residents with access to a reliable electrical outlet necessary for operating the GPS device.”¹⁵⁹ As a result, shortly after his release “[t]he defendant was found to be in violation of the GPS condition of his probation.”¹⁶⁰ The Supreme Judicial Court vacated the finding of a probation violation, quoting *Bearden* for the proposition that “basic fairness forbids the revocation of probation when the probationer is without fault in his failure to [comply].”¹⁶¹

In addition, courts have applied *Bearden*’s reasoning to other conditions of release beyond EM that indigent defendants are unable to meet because of their indigency. In *White v. State*,¹⁶² after pleading guilty, the defendant was sentenced to post-release supervision, including the requirement of reporting to his probation officer. The lower court found the defendant violated his probation after he failed to report to the probation office.¹⁶³ The Court of Appeals of Mississippi reversed.¹⁶⁴ In so holding, the court noted the record indicated the defendant “was not able to report” because he was homeless and did not have transportation to get to the probation office.¹⁶⁵ Quoting *Bearden*, the court explained, since “[i]t is well-established that a court cannot ‘deprive [a] probationer of his conditional freedom simply because, through no fault of his own, he cannot pay’ fines or restitution” then it “[l]ogically” follows that “the same rule would apply to a reporting requirement,” and thus, revoking the defendant’s probation would violate due process.¹⁶⁶

Both *Commonwealth v. Canadyan* and *White v. State* involve situations in which a defendant was sentenced to a condition and only brought a *Bearden* challenge after being found in violation of that condition. But the same logic should apply to defendants who seek to qualify for EM in the first instance. To challenge the underlying costs of EM, a defendant who hopes to be conditionally released on EM, but cannot afford the underlying costs, could point to the written requirements in an EM application or agreement as the reasons why they have

158. *Id.* at 93-94.

159. *Id.* at 94.

160. *Id.*

161. *Id.* at 96 (alteration in original) (quoting *Bearden v. Georgia*, 461 U.S. 660, 669 n.10 (1983)).

162. 311 So. 3d 1278 (Miss. Ct. App. 2021).

163. *Id.* at 1281.

164. *Id.* at 1282.

165. *Id.* at 1283-84.

166. *Id.* at 1284 (second alteration in original) (quoting *Bearden*, 461 U.S. at 672-73).

been denied conditional release.¹⁶⁷ For example, defendants or their advocates could point to application requirements of a permanent address or landline phone service, demonstrate such requirements are unaffordable for this particular defendant, and argue, as a result, that those requirements effectively deprive this defendant of the conditional freedom of EM release. Such an argument could point to the logic and reasoning of the enforcement-stage case law – after all, denying a defendant’s request to serve time on EM rather than in physical custody because the defendant cannot afford the phone service necessary for that device is also “depriv[ing the defendant] of his conditional freedom simply because, through no fault of his own, he cannot pay.”¹⁶⁸

IV. THE WAY FORWARD

Assuming a *Bearden*-style claim is successful, the question remains of how states will react. This Part details some possible ways states could respond to a *Bearden* challenge to EM, including by providing state funding for EM requirements or by eliminating EM entirely.

A. State Funding of EM Requirements

In the short term, states may respond to *Bearden* challenges by funding EM requirements themselves.¹⁶⁹ Indeed, some states have already begun to waive the explicit costs of EM, either by eliminating any fees associated with EM or mandating consideration of an individual’s ability to pay before imposing EM fees. For example, California recently passed a bill which eliminated EM fees as of July 1, 2021.¹⁷⁰ Other jurisdictions have imposed sliding scales based on individuals’

167. See *supra* notes 41-44 and accompanying text (citing examples of EM applications and agreements).

168. *Bearden*, 461 U.S. at 672-73.

169. *Rethinking Electronic Monitoring*, *supra* note 53, at 13.

170. Public Notice, Superior Ct. of Cal., Cnty. of San Bernadino, Assembly Bill 1869: Criminal Fees, (July 22, 2021), <https://www.sb-court.org/sites/default/files/2021-12/Assembly-Bill1869CriminalFees.pdf> [<https://perma.cc/EYK3-AEDV>]; see also Press Release, Fines & Fees Just. Ctr., New Report Sheds Light on Murky Word of Electronic Monitoring Fees (Sept. 14, 2022), <https://finesandfeesjusticecenter.org/2022/09/14/press-release-new-report-sheds-light-on-murky-world-of-electronic-monitoring-fees> [<https://perma.cc/G8GP-SKEV>] (“With successive legislative reforms in 2020, 2021 and 2022, California expressly prohibited the use of electronic monitoring fees.”).

ability to pay when imposing EM fees.¹⁷¹

States could also cover the underlying costs of EM. One of the primary barriers to EM is stable housing, and states could fund housing for individuals sentenced to EM who otherwise could not afford it—for instance, by paying for an apartment or bed in a halfway house.¹⁷² Such state funding for housing has precedent: many jurisdictions already provide halfway houses, or community-based residential programs, either as a re-entry service for formerly incarcerated individuals or as an alternative to incarceration.¹⁷³ While halfway houses are increasingly run by private, for-profit companies,¹⁷⁴ state and federal governments have

171. See, e.g., *Electronic Home Detention (EHD)*, KING CNTY., <https://directory.kingcounty.gov/ServiceDetail.asp?ServiceID=6962> [<https://perma.cc/UF4C-74XS>] (for pretrial EM, defendants “are required to pay a fee based on a sliding fee scale while on this program”); *Electronic Monitoring Program/GPS*, HENRY CNTY., ILL., <https://www.henrycty.com/FAQ.aspx?TID=26> [<https://perma.cc/FG4B-38XX>] (“If the court determines an offender is appropriate for [EM]; however, he or she does not have the ability to pay the \$40 daily user fee, the court may lower the daily user fee.”).

172. Halfway houses certainly come with a host of problems, though a discussion of those problems is outside the scope of this Comment. For further reading, see, for example, Cyrus J. O’Brien, “A Prison in Your Community”: *Halfway Houses and the Melding of Treatment and Control*, 108 J. AM. HIST. 93, 94 (2021) (suggesting that halfway houses serve as sites of involuntary confinement); Sam Dolnick, *As Escapees Stream Out, a Penal Business Thrives*, N.Y. TIMES (June 16, 2022), <https://www.nytimes.com/2012/06/17/nyregion/in-new-jersey-halfway-houses-escapees-stream-out-as-a-penal-business-thrives.html> [<https://perma.cc/L36N-PVM8>] (describing halfway houses as a “shadow corrections network, where drugs, gang activity, and violence, including sexual assaults, often go unchecked”); Susan Taylor Martin, *Felons, Drug Dealers Run Halfway Houses for Addicts*, TAMPA BAY TIMES (Nov. 18, 2022), <https://www.tampabay.com/news/publicsafety/felons-drug-dealers-run-halfway-houses-for-addicts/1261881> [<https://perma.cc/CU7R-QBSL>] (same). But see Jennifer S. Wong, Jessica Bouchard, Kelsey Gushue & Chelsey Lee, *Halfway Out: An Examination of the Effects of Halfway Houses on Criminal Recidivism*, 63 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1018, 1018 (2019) (finding “halfway houses are an effective correctional strategy for successful reentry”).

173. See Wong et al., *supra* note 172, at 1020.

174. Laura I. Appleman, *The Treatment-Industrial Complex: Alternative Corrections, Private Prison Companies, and Criminal Justice Debt*, 55 HARV. C.R.-C.L. L. REV. 1, 12 (2020) (“For-profit corrections companies have aggressively expanded into the world of alternate corrections, including halfway houses . . .”); see also Caroline Issacs, *Community Cages: Profitizing Community Corrections and Alternatives to Incarceration*, AM. FRIENDS SERV. COMM. 23 (Aug. 2016), <https://www.prisonlegalnews.org/media/publications/Community%20Cages%20-%20Profitizing%20community%20corrections%20and%20alternatives%20to%20incarceration%2C%20AFSC%2C%202016.pdf> [<https://perma.cc/SB2C-4QGW>] (noting that state halfway houses “often are run by for-profit and non-profit entities”); Roxanne Daniel & Wendy Sawyer, *What You Should Know About Halfway Houses*, PRISON POL’Y INITIATIVE (Sept. 3, 2020), <https://www.prisonpolicy.org/blog/2020/09/03/halfway> [<https://perma.cc/MD9S-HXSV>] (“The majority of halfway houses in the United States are run by private entities, both nonprofit and for-profit.”).

historically paid for some or all of the cost of this housing.¹⁷⁵ For those areas that do not provide EM services due to lack of staff or resources, the state could fund the defendant or convicted individual's transportation to an area that offers EM. While most individuals would likely prefer to be monitored in their own home, such a solution would, at the very least, work to remedy the worst inequities posed by the current EM regime by eliminating the complete inability of indigent individuals to access EM.

States could also work to ensure that difficulties in affording phone service or electricity is not a barrier to EM access. Recent state legislation from Washington provides a promising example of a state working to accommodate the costs of phone service: in 2021, Washington passed a bill providing that if an individual does not have the required phone line for the EM equipment, the Department of Corrections will work towards "accommodations" so those individuals can still access EM.¹⁷⁶ There is also precedent for government discounts for phone services¹⁷⁷ and electricity¹⁷⁸ for low-income individuals. Other jurisdictions could use such examples as a model and begin imagining and implementing accommodations for indigent individuals who could not otherwise access EM—for instance, by eliminating the use of EM devices that require a landline phone or offering to pay for the phone service and electricity required to implement EM services.¹⁷⁹

175. Appleman, *supra* note 174, at 14. In the federal system, residents "are required to pay a subsistence fee to help defray the cost of their confinement" which is up to "25 percent of their gross income." *Completing the Transition*, FED. BUREAU PRISONS, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp [https://perma.cc/2JVU-44ME].

176. *Graduated Reentry Expansion*, WASH. ST. DEP'T CORR. (Nov. 2021), <https://www.piercecountywa.gov/DocumentCenter/View/109738/Graduated-Reentry-Expansion> [https://perma.cc/29BQ-3CY6]; *Graduated Reentry Brochure*, WASH. ST. DEP'T CORR., <https://www.doc.wa.gov/docs/publications/400-BR015.pdf> [https://perma.cc/E78W-G729].

177. See, e.g., *Lifeline Support for Affordable Communications*, FED. COMMC'NS COMM'N, <https://www.fcc.gov/lifeline-consumers> [https://perma.cc/JH6H-WHSG] ("[A]n FCC program that helps make communications services more affordable for low-income consumers."); *Affordable Connectivity Program*, FED. COMMC'NS COMM'N, <https://www.fcc.gov/acp> [https://perma.cc/WRH9-AZR3] ("[A]n FCC benefit program that helps ensure that households can afford the broadband they need for work, school, healthcare and more.").

178. See, e.g., *Low Income Home Energy Assistance Program*, CAL. DEP'T CMTY. SERVS. & DEV., <https://www.csd.ca.gov/pages/liheaprogram.aspx> [https://perma.cc/S3H6-TADK] ("[A] federally funded program aimed at assisting low-income households that pay a high portion of their income to meet their energy needs.").

179. See Stephanie Lacambra, *Practical Advice for Defense Attorneys with Clients Who May Be Placed on Electronic Monitoring*, ELEC. FRONTIER FOUND. 2 (2018), <https://www.eff.org/document/em-practical-advice-o> [https://perma.cc/NG65-RTS5].

B. Eliminating EM

If a *Bearden* claim is successful, states may respond by ultimately eliminating EM due to an inability to implement EM in a constitutional manner. States may assert that because of a lack of funds or bureaucratic difficulties, they are unable to pay for the costs of EM without shifting those costs onto defendants. States may prefer to eliminate EM altogether rather than finding a way to accommodate the increased costs. Indeed, in *Hiskett v. Lambert*, where a defendant challenged an EM condition because he was unable to pay for it, the lower court ruled “electronic location monitoring was not ‘available’” in the relevant county “because the county was unable and/or unwilling to bear that expense” if the defendant was no longer paying for the EM services.¹⁸⁰

On its face, the elimination of all EM may appear to be a pyrrhic victory for defendants. Even with all its drawbacks, many individuals would prefer to serve time while on EM rather than in a cell.¹⁸¹ If eliminating the disparate impact of wealth in EM simply means that the rich and poor alike remain incarcerated, then perhaps there is no reason to upset the status quo.

However, replacing all forms of EM with incarceration is an unlikely outcome. States initially turned to EM to save money¹⁸² and prevent prison overcrowding.¹⁸³ Since many jurisdictions continue to struggle with prison overcrowding,¹⁸⁴ it is likely they would be hesitant to incarcerate all those currently on EM as doing so would only exacerbate the problem.

Furthermore, eliminating EM in its current form would not necessarily mean that the only option is incarcerating more people; instead, states could eliminate the current regime of EM and replace it with something that is less likely to

180. *Hiskett v. Lambert*, 451 P.3d 408, 410 (Ariz. Ct. App. 2019) (discussing the procedural history in the lower court). The appellate court later vacated this ruling, but its reasoning suggests government officials may be inclined to eliminate EM altogether rather than face the prospect of paying for it without passing that cost on to individuals on EM. *Id.* at 411-12.

181. See Payne & Gainey, *supra* note 74, at 427-30; sources cited *supra* note 30; Wiseman, *supra* note 73, at 1376-77.

182. See, e.g., Mirko Bagaric, Dan Hunter & Gabrielle Wolf, *Technological Incarceration and the End of the Prison Crisis*, 108 J. CRIM. L. & CRIMINOLOGY 73, 100 (2018); ELECTRONIC MONITORING REDUCES RECIDIVISM, *supra* note 39, at 1; Weisburd, *supra* note 13, at 147.

183. See, e.g., Sheriff's Dep't, *Electronic Monitoring Unit*, CUYAHOGA CNTY., OHIO, <https://cuyahogacounty.us/sheriff/law-enforcement/electronic-monitoring-unit> [<https://perma.cc/KM6T-YBFQ>] (“The Electronic Monitoring Unit was established to provide an alternative sentencing option, ultimately helping to reduce jail overcrowding.” (emphasis added)).

184. See Ryan Spohn & Melanie Kiper, *State Prison Overcrowding and Capacity Data*, UNIV. NEB. OMAHA (May 3, 2020), <https://www.unomaha.edu/college-of-public-affairs-and-community-service/governing/stories/state-prison-overcrowding-and-capacity-data.php> [<https://perma.cc/5GJQ-QJ4N>].

perpetuate the inequities between rich and poor defendants while still achieving EM's goals of public safety and ensuring court appearance. In the pretrial context, states could allow defendants to call and report to pretrial monitoring employees at various times in the day—a solution that would allow some degree of supervision but would be accessible to far more defendants and convicted individuals.¹⁸⁵ Moreover, sending text or written reminders about court dates has been shown to better achieve the goals of court appearance than simply wearing an EM device.¹⁸⁶

States could also develop alternatives to postconviction EM. They might replace probation or parole conditions requiring EM, which are extremely punitive, with less restrictive conditions¹⁸⁷ such as mental-health treatment, check-ins with probation officers, or drug or alcohol testing. Rather than finding new ways to monitor defendants and convicted individuals or placing all those previously on EM in custody, states may choose simply to stop monitoring such individuals at all—allowing early postconviction release without burdensome stipulations.¹⁸⁸

Finally, the elimination of EM could be coupled with an abolitionist or restorative-justice approach to criminal justice more generally. Some jurisdictions have developed specialized courts that divert individuals to individualized treatment plans as opposed to custodial sentences.¹⁸⁹ Other jurisdictions have

185. Of course, such a system would still require defendants have access to a phone, but this is a much less onerous barrier than present requirements, especially considering the ubiquity of cell phones. See also Taylor King & Kaylan Mueller-Hsia, *A New Path Forward for Community Supervision*, BRENNAN CTR. FOR JUST. (Aug. 25, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/new-path-forward-community-supervision> [<https://perma.cc/8KCR-HSEZ>] (arguing for eliminating EM in favor of “more humane methods of community supervision”).

186. *Rethinking Electronic Monitoring*, *supra* note 53, at 7.

187. Weisburd et al., *supra* note 75, at 27.

188. Kilgore, Sanders & Weisburd, *supra* note 73 (“[V]iewing electronic surveillance as an alternative to incarceration presumes a dangerous false binary between incarceration or surveillance and ignores a third option: unconditional freedom.”).

189. See, e.g., *Brooklyn Felony Alternatives to Incarceration Court*, BROOKLYN JUST. INITIATIVES, https://www.innovatingjustice.org/sites/default/files/media/document/2021/BJI_Factsheet_FelonyATI_12212020.pdf [<https://perma.cc/5GD7-SBNX>]; *Alternatives to Incarceration: Court-Mandated, Supportive, Community-Based Services*, NYC MAYOR'S OFF. CRIM. JUST. (July 2022), https://criminaljustice.cityofnewyork.us/wp-content/uploads/2022/11/Alternatives-to-Incarceration-Program-Booklet_July-2022.pdf [<https://perma.cc/N7G9-8E7E>] (discussing New York's alternative to incarceration programs); L.A. Alt. to Incarceration Working Grp., *Care First, Jails Last: Health and Racial Justice Strategies for Safer Communities*, CNTY. L.A., CAL. 24 (2020), https://ceo.lacounty.gov/wp-content/uploads/2020/10/1077045_AlternativestoIncarcerationWorkGroupFinalReport.pdf [<https://perma.cc/5RF8-FX84>] (describing Los Angeles County's pretrial diversion programs).

implemented restorative-justice practices and thereby eliminated the need for custodial sentences in some cases.¹⁹⁰ Through diverting the money spent on EM to supportive services to ameliorate the “social, economic, and political problems” that drive people to commit crimes, we could make incarceration, supervision, and EM unnecessary.¹⁹¹

One advantage to a *Bearden*-style challenge to EM is that it can support abolitionist goals. For one, forcing states to internalize the costs of EM, rather than passing that cost along to defendants, may make states less inclined to expand the practice further.¹⁹² Moreover, a *Bearden* challenge to EM can expose how even a seemingly “benevolent” alternative to incarceration perpetuates many of the same disparities of mass incarceration. Such a challenge will necessarily draw attention to the ways EM reproduces and enforces societal injustices, disadvantaging those who are already most disadvantaged. Thus, I hope that even as advocates push to make EM more equitable, we remember the ultimate goal is abolition: a world in which EM, and incarceration as a whole, is unnecessary.

CONCLUSION

The use of conditional-release conditions, including EM, has increased in recent decades and will likely continue to expand. This expansion will likely further exacerbate disparities between the rich and poor in the criminal-legal system. Thankfully, Supreme Court precedent indicates that the indigent, and their advocates, have a ready-made response: a *Bearden*-style challenge to such release conditions. *Bearden* challenges have the potential to achieve what the Warren Court began in *Griffin* and continued in *Bearden*: ensuring no one is incarcerated solely because of their inability to afford release.¹⁹³

190. Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1050 (2020) (detailing the expansion of restorative justice); see also Vanessa Hernandez, *Restorative Justice Offers a Powerful Alternative to Prisons and Jails*, AM. C.L. UNION: WASH. (Oct. 24, 2016), <https://www.aclu-wa.org/story/restorative-justice-offers-powerful-alternative-prisons-and-jails> [<https://perma.cc/VW7G-9BRH>] (discussing the benefits of restorative justice programs).

191. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172 (2015).

192. See Kilgore, Sanders & Weisburd, *supra* note 73 (“Electronic monitoring does not erase the cost of incarceration, but rather redistributes it, placing the burden squarely upon those historically least positioned to carry it.”).

193. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion).