

Boston University School of Law

Scholarly Commons at Boston University School of Law

Faculty Scholarship

2-2024

A Conversation on the Carceral Home

Ngozi Okidegbe

Boston University School of Law

Kate Weisburd

Emmett Sanders

James Kilgore

Follow this and additional works at: https://scholarship.law.bu.edu/faculty_scholarship



Part of the [Criminal Law Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Ngozi Okidegbe, Kate Weisburd, Emmett Sanders & James Kilgore, *A Conversation on the Carceral Home*, in 103 Boston University Law Review 1 (2024).

Available at: https://scholarship.law.bu.edu/faculty_scholarship/3821

This Conference Proceeding is brought to you for free and open access by Scholarly Commons at Boston University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarly Commons at Boston University School of Law. For more information, please contact lawlessa@bu.edu.



A CONVERSATION ON THE CARCERAL HOME^{1†}

Ngozi Okidegbe: Okay, let's get started. Good afternoon. It's my pleasure to be here. My name is Ngozi Okidegbe, I'm a professor here, and at the faculty of computing and data sciences. And it's such a treat to moderate this conversation about Kate Weisberg's article, *The Carceral Home*, which was recently published by Boston University Law Review. Her article delved into how criminal court supervision affects those subjected to it and transforms their home into what Kate identified as a carceral home, with profound consequences on them and their loved ones.

I'm so excited that she could join us today and speak about her article, and that James Kilgore and Emmett Sanders are also joining to provide us with their responses to her article. They'll also be able to speak about their policy and advocacy work in the area before we introduce our panelists. I just want to start by thanking the editors of the Boston University Law Review for hosting and organizing this event. Their work pulling this together was instrumental. So thank you. With that I will introduce our speaker. Kate Weisburd is a professor of law at George Washington School of Law. James Kilgore is the director as well as the advocacy and outreach coordinator at FirstFollowers re-entry program.

He is also a building community power fellow at Community Justice Exchange. Emmett Sanders is the policy and advocacy associate at the Prison Policy Initiative. A quick note about the structure of the conversation, Kate will start providing a short description of the article, as well as her motivation behind writing the piece. We will then hear from Emmett and James about their response to her article, and then we'll follow with a twenty minute, moderated. Q and A. And after that we'll open it up to audience questions. So thank you so much for joining us in person as well as those joining us on Zoom. Kate, take it away.

Kate Weisburd: Well, great! It's so nice to see all of you so many friends online. I wish we could be in person. Huge thanks, Ngozi, for moderating, and James and Emmett for being part of this conversation and responding. I also wanna shout out to Keenan and Caroline at the Law Review for thinking of this idea and suggesting it. I'm just really thrilled to be here, and it's a total honor.

^{1†}Transcript of the conversation taking place on February 8, 2024 discussing Kate Weisburd, *The Carceral Home*, 103 B.U. L. REV. 1879 (2023). Recommended citation: Ngozi Okidegbe, Assoc. Professor of L. & Assistant Professor of Computing & Data Sci., Bos. Univ., Kate Weisburd, Assoc. Professor, George Washington Univ. L. Sch., Emmett Sanders, Pol'y and Advoc. Assoc., Prison Pol'y Initiative, James Kilgore, Dir. & Advoc. and Outreach Coordinator, FirstFollowers, A Conversation on the Carceral Home at Boston University School of Law (Feb. 8, 2024).

So thank you so much for having me. I'll just speak very briefly to give a brief overview of my paper, and I'm really excited to have a longer conversation with James and Emmett and Ngozi.

You know this paper was very much inspired by a contradiction between black letter doctrine that I teach in criminal procedure classes, and the reality of what I saw when I was defending young people in juvenile delinquency court, as well as the reality of the work that I've been doing alongside James and Emmett to challenge electronic monitoring in particular. So with respect to the doctrine each year that I teach criminal procedure. My students and I debate a key theme that runs through countless Supreme Court cases.

The way that the physical home and private life occupy an elite and very protected status in Fourth Amendment doctrine. The Supreme Court often refers to the home as sacred as supreme, as quote the first among equals, and for the law students in the audience that should sound so familiar from Crimpro from the castle doctrine to curtilage. The Court has made really clear that the Fourth Amendment draws, quote a firm line at the entrance of the home unquote.

But what I saw in practice and in the work that I do with James and Emmett we see something very different. The sort of firm line certainly didn't exist for the young people that I worked with.

Despite living in a house with four walls and a door, young people on juvenile probation, as well as their families, were routinely excluded from the privacy protections generally afforded the home and private life. Various methods of state control and surveillance technology eliminated the sanctity of the home. Their homes were transformed into what I call carceral homes.

Because the carceral home is often viewed as a benevolent alternative to incarceration. The intensive surveillance is normalized and rarely scrutinized, but as the prison experience increasingly exists in homes, what happens to these home-centric doctrines. So while the inspiration for this paper started off as kind of a classic, the law-on-the-books versus the law-on-the-street question, I came to realize that the contradiction was much deeper. How do we reconcile both the law's purported commitment to the home as the ultimate private space with the reality that the carceral home in some ways is an inevitable outcome of many progressive reform efforts aimed at alleviating mass incarceration.

So my paper tries to get at this contradiction in 2 ways. First, it offers a pretty detailed description of the carceral home. So, what I saw in Juvenile Court in California was no anomaly, and reflects the reality of criminal court supervision in this country, often in the name of reform and decarceration. Prison walls are being replaced with punishments that occur outside of physical prisons. These punishments include things like probation, parole, electronic monitoring, problem solving courts, and various mandated treatment programs. So to understand exactly how these programs operated operate, a team of research assistants and I collected almost two hundred agency records

from all fifty states that set forth the various rules governing these programs. And these rules are a big part of what creates the carceral home.

So most often people either need to quote “consent,” or agree to these rules as a precondition to getting the purported benefit of not being in prison, and I’ll just share a few examples of the rules that we found. So in the vast majority of states, people in criminal supervision are subject to suspicion less searches of their homes and phones. Constant 24/7 geolocation tracking through ankle monitors, many of which are equipped with audio features like two way microphones.

Limits on physical movement are also very common features of all forms of court supervision. In many places people must obtain permission to leave their home or change their daily schedule.

People subject to monitoring in Denver, for example, must remain inside the walls of their house and their own front yard, backyard, garage, porch, and balcony are all quote off limits. The Denver rules further instruct people to quote, take out trash on the way to – and the – to approved activities and pick up your mail on the way home do not make special trips outside to do these activities

In Mississippi. The rules governing electronic monitoring state quote “offender has the right to work, one weekly church service, and medical treatment. Additional pastime is a privilege, and is at the sole discretion of the agent” unquote. In other places, people are required to take the most direct route to and from their various destinations and limitations on driving and transportation are common in many places. People can’t even operate, and in some instances can’t purchase a car without preapproval. It’s also really common that people on court supervision are subject to warrantless collections of genetic material, such as DNA samples and regular drug and alcohol tests.

In most places people must get permission before they move or change jobs. And there’s also strict prohibitions on spending time with people with criminal records. In many places people – there are also limits on even family relationships. So, for example, in Alaska, people on monitors cannot be, quote the sole guardian, babysitter, custodian, primary care caregiver for any person, children, or pets without approval from the monitoring officer. In some places people can’t marry or enter into intimate relationships without alerting or getting permission from authorities.

Rules also dictate the type of people that – that people on court supervision are permitted to be around. For example, in Nebraska, people on probation have to refrain from, quote frequently unlaw – frequenting unlawful or disreputable places, or consorting with disreputable persons, unquote. In Utah, people on monitors quote may not associate with persons deemed undesirable by the GPS deputies

As a result of doing various court order treatment programs, or monitoring intimate information, such as health records, medication use, as well as

biometric and geolocation data is routinely shared between government agencies, private companies and law enforcement. And so, while these may seem small on their own, added up it creates a very restrictive personal life and home life, and these are just a few examples of the ways that criminal court supervision really does transform home and private life. So based on this description, my paper offers a few thoughts on why this is happening and what's to be done. So I think that the existence of this carceral home reveals a real contradiction, while prisons have always been treated in the law as sites of punishment and diminished privacy. The home has not yet in the carceral home. Paradoxically, people have little privacy in the place where they should have the most.

To put it bluntly, the carceral home is at direct odds with all the case law talking about the home as a sacred place. There's simply nothing sacred about the carceral home. And in many ways this contradiction is a predictable outcome of decarceral reform efforts. Social control and surveillance are as these programs currently operate defining features, not bugs of systems considered to be quote better than prison. So treatment programs, parole, probation, electronic monitoring, these are often seen as decarcerative and progressive, yet, as the rules reflect, they all involve piercing the privacy of the home and private life. So what this really means is left unchecked, the carceral home further entrenches the precise racial economic disability and gender inequities that often inspire reform efforts in the first place. So these rules and systems, in effect further, the subordination of marginalized groups that is endemic to the carceral state.

So I promise to not end on a super grim note and offer to say that I don't think that carceral home is inevitable. Moving forward, I think it's important to stop relying on the physical home as the legal line between having privacy or not.

It's time to reconceptualize security as a positive entitlement that exists separate and apart from physical homes, and a big part of recognizing security is a positive entitlement requires reevaluating the question of what is considered quote "an alternative" to incarceration, because the surveilled homes are almost always compared to prison.

This – this, then, makes the baseline than sort of normalization of surveillance. But if freedom and the rights be left alone, those are equally justifiable baselines. To be free from State control and surveillance should be the guiding principle in both legal and policy reform and this would require flipping the carceral home on its head. So it's viewed in comparison to freedom, instead of being viewed in comparison to prison. So in sum, I think, the path forward should include both stronger legal limits on the carceral home, such as less reliance on consent, which I think we'll talk about in a few minutes, and subjecting restraints like these to greater scrutiny. But also policy solutions that contemplate privacy and security as positive entitlements

disconnected from the home. So I'll stop there, and I'm really excited to hear what you all think and to talk to Emmett and James about it.

Ngozi Okidegbe: James, you want to start James.
Emmett. Why don't we start with you?

Emmett Sanders: Okay? No problem technology. Right? So Hi, everyone my name's Emmet Sanders. I use he him pronouns. I'm currently based in Alabama, though I'm originally from Illinois.

I'm formerly incarcerated. I'm researcher, writer, advocate and these kinds of things. I'm currently a policy and advocacy associate with Prison Policy Initiative. We're a national nonprofit focus on challenging issues of mass incarceration largely through producing cutting edge research and just connecting folks.

So I gotta say that I come this work as someone who's actually directly impacted by the very systems that we're talking about changing here. I spent 3 months on the electronic monitoring after I came home from prison after 22 years of incarceration.

And actually, when I first met James and got involved in this work, I was actually wearing a monitor myself. And so I say this because I think it's – one I think it's important to sort of explain that my lens of this work is actually filtered through that direct experience. But also that I think it's important that we recognize that that experience and the experience of people who've been through these systems as integral in trying to change these systems. As integral not just being used as a sort of a resource but as actual change agents in the – in the work that we do.

So I understand what it feels like to live in a carceral home, frankly and to – to – and all the – the thousands of ways that it sort of impacts your life every single day. And – and – and I think that this article *The Carceral Home* does an amazing job of actually representing that and representing some of the – some of the real you know battles that we face, that we sort of struggle through. I think when we talk about, you know, interrogating things like, what does it mean when we say safety when we talk about public safety? What does that mean? Who does it? Who is safe? Right like who whose safety are we actually talking about?

Interrogating things like consent? What is? What does consent mean? How can you actually consent to something? How can you consent to surrendering your rights like who – who would actually do that? Why, that's not really consent that we're talking about. So I think this article gets at some really, really important things. And the erasure of – of, you know, the erasure of agency erasure of autonomy, as a – as a means to justify security which I think is – I think, is something that we really need to interrogate, too. Right? There's

this idea that the home we look at the – the literature out there that – that Kate has mentioned. We look that there is this idea of the home being imbued with some natural sanctity. Right? That is the place of that cannot be touched right? Rather than rather than the person who actually lives in that home.

And so I think these are things that – you know – I know we're gonna get into a lot of things, a lot of topics here. But these, these are just some of the things that really stood out for me in terms of – of why this article is actually really important, and why, it's so important we talk about, you know, these – these reforms in the form of electronic modern.

So I'm – I'm just gonna stop right there and turn over to James and let him introduce himself.

James Kilgore: Okay, thanks, Emmett, and thanks, Kate, for the for the article and your summary of it. I hope I'm not – I might be a little long winded here – I hope you – but I'll – I'll try to keep myself under control.

I mean like Emmett, I come to this work from being incarcerated and being on electronic monitor. And working for several years on projects challenging incarceration first with Media Justice and I'm now with Community Justice Exchange, continuing that work, and also looking at critiquing what are called alternatives to incarceration from a – from – through a more abolitionist lens.

So I just wanna start one – one Friday night about three years ago, I got a call from a black Chicago woman I'll call Miss Bertha. And Miss Bertha had been on house arrest with a GPS monitor for about a year.

[Audio Difficulties Omitted]

James Kilgore: so that per – I'll call this woman Miss Bertha. Miss Bertha had been on house arrest with a GPS monitor for about a year. And at that particular moment she was huddled in a bedroom closet with her seven-year-old son.

Someone in her apartment complex, had snapped and was moving around the building with a baseball bat, screaming and breaking every window she could find.

Miss Bertha was terrified that the woman would come and smash her windows and do harm to her and her son. At the same time she was equally terrified that if she left the house without permission, she would violate the terms of her house, arrest and be sent back to jail

The last time she'd been sent to jail, when the electronic monitor falsely reported her being out of the house, she ended up with a broken jaw and a year and a half of swelling and pain before she could get the surgery to fix that.

So when I try to unpack the term carceral home, I think first of Bertha, and how on that Friday night that device had her confined to her closet, shrinking in terror, and hoping and praying that the random violence of her building

would not visit her, but knowing that staying in that closet was a better bet than breaking the rules of the carceral home in which she lived.

So what I like best about Kate's piece is that she juxtaposes the – the sanctity and safety of the home to the reality of the home under mass incarceration. Of the home as constructed by electronic monitoring and other devices, processes and policies which on the surface may seem almost harmless, sometimes even bland, but are actually central to understanding where mass incarceration has come from, and where it's going, as she rep – repeatedly reminds us, and I quote, “prison walls are being replaced with restrictive walls that govern every aspect of intimate life and invasive surveillance technology that continuously records intimate information.” For the authorities and their devices, the door of the carceral home is always open.

Nothing is sacred. At its simplest level. The partial status of the home creates a long list of domestic absurdities of dignity, harms, as Kate calls them, as the targeted individuals try to circumvent the punitive, controlling thrusts of the law.

For example, Dustin Tirado was living at his parents house when he was on parole in California, while on a monitor, and his parents had very strict rules. Rules about no smoking. So, Dustin, to get around those rules had to lay down across the open front door, lay down on the porch, and smoked the cigarette while he was lying down with his ankle still inside the house, so it wouldn't be violating the rules of the electronic monitor.

So I mean, when we talk about – when we – we call these dignity harms, I'm wondering, how does a person maintain their dignity while lying on their front porch smoking a cigarette, or huddled in a bedroom closet hoping no one smashes down the door.

So, aside from these dignity harms, there's three key points I want to make about the notion of the carceral home.

The first is that it's not just about the home. It's about the extension of carceral space. About the conversion of community, of the streets and stores and schools and churches into carceral spaces. Places where a person can be seen, be watched, be surveilled, be controlled, and maybe be arrested. And while the carceral home is an intense form of this control, as it applies most specifically to a residence where a person under court supervision resides, it by no means ends there. It goes, hand in hand with the application of boundaries, of borders, of the capacity of the state, of the corporate of the corporate world to appropriate our space and the data trails we leave for their use.

It's not about the criminal legal system, but is about The System, which increasingly relies on surveillance and data, not only to control people's location and movement, but to capture their data for use in law enforcement, commerce, labor, social services in education and feeding information to a AI. Really reaching into all aspects of life

As the great writer, Tony Morrison, foretold in her essay Home.

and I quote “the contemporary world’s work, has become policing, halting, forming policy regarding and trying to administer the movement of people.” And that’s – that’s the work of the – of the – that happens in The Carceral Home.

The second point for me that’s – that’s crucial in Kate’s writing is that the notion of carceral homes and carceral spaces has become normalized. Now here – I’m someone who served six-and-a-half years in prison, twenty-seven years as a fugitive, I know better than to ignore the extent that I’m being watched and tracked and seduced into buying some product that lands in my inbox.

But true confessions. Just this week Temu got me with a hoodie. I couldn’t resist it at 40% off.

(Laughter)

Shame on me. I don’t turn the tracking off on my phone. I just agree to all the terms they asked me to approve when I download a new app.

We don’t even think about it. We just go along with a program set by Google, Elon Musk, or whichever Robber Baron is driving the spaceship. So this – the – and – and this – this also connects to the – our complicity, and our also at times going along with the idea of what Kate refers to as the punishment exception. And that is, it’s okay to ignore the right – the rights of somebody. If they’re a criminal. Criminal can’t vote, criminal can’t live near a park, criminal can’t work in retail, criminal can’t get into university, can’t own a gun or a cannabis shop because they’re a criminal. So we’re accepting that – ca – that carcerality as part of the reality that we that we live with.

And then third point I want to talk about is her strategies for resistance. Because, unlike most lawyers, hate does not totally retreat to the fortress of law. As if all problems can be resolved in the courts. As if a tweak of the statutes. A stroke of genius from a graduate of Harvard Law School, or one big, huge omnibus – omnibus crime bill is going to change all this. She respects European reforms, such as the right to be forgotten, and the general data protection regulation, but recognizes that to free the carceral home to liberate carceral spaces requires a new paradigm, a different understanding of how society functions.

Her citation of the Leaders of a Beautiful Struggle, a radical black, grass roots organization in – in Baltimore, and their pronouncement that safety is not simply the absence of violence, but the creation of conditions for human flourishing serves notice of her respect for impacted people and for the need for the oppressed to play a vital role in crafting a new path that taps into notions of freedom and – and liberation. So we not only need to curb the laws, but the urges to track, to compile infinite databases, to racially profile, and to turn a blind eye to neoliberal policies of austerity and border walls. Instead of re-conceptualizing what liberation of the oppressed might really mean in the twenty-first century.

This type of deep change requires strategies that get at the fundamental racial and gender inequalities inherent in the U.S. Constitution that have been deepened by our history of slavery, of Jim Crow of deportation and border walls, of appropriation of land and – and funding police and genocide in Gaza rather than justice, peace and flourishing communities. If Toni Morrison has pointed out that the work of contemporary society is surveillance and control. It is time, as Kate urges us to do, to turn that paradigm on its head before it's too late.

Thanks.

Ngozi Okidegbe: thank you so much, Kate, Emmett, and James for the conceptualization. And I want to move us to our next part of this conversation, which is Q and A. And I want to start with Emmett. One justification that is often given for this invasive surveillance is safety, and the idea that the carceral home, and that the profound consequences of surveillance on those – on criminal court surveillance is necessary to protect public safety. What's your response to that argument.

Emmett Sanders: Thanks. So – so first, just thanks for the question.

I think it's really important, because so often the argument is presented as those who are concerned with public safety on one side, and those who, you know, oppose oppressive carceral systems on the other. And I think that's kind of a – a missed over right there. People who favor prisons don't have a monopoly on the need to be safe. Right? Abolition is not the absence or lack of concern for safety. Rather, it's a recognition that what we're doing isn't making us safe.

Right? And – and a call for a reimagining of what safety actually means. So I think that we really need to interrogate the idea of safety a little bit. What does it mean to be safe? What does safety look like, and what does it mean like, for whom?

For whom are we talking about here? Does safety look like locking people in their homes and tracking their every move? Does safety look like up – up ending their ability to hold down a job? To seek medical help? Take the kids to school or to a doctor's appointment? You know. Does safety look like stripping people of their dignity, or their rights to autonomy, or the right to privacy? Turning the homes into satellite prisons and their families into cell mates or – or wardens. Right?

Or is safety support? Is it resources? An opportunity? Is it – is it connection and community that actually keeps us safe? So I think we need to begin with that. But what are we defining there?

So E.M. is quite literally – it's used to disconnect us to keep us apart. Right. To keep people away from each other.

And – and at the same time it’s robbing us of our – our autonomy, our – of our agency. So there’s these two competing ideas here, one that – that somehow we need to be disconnected from one another, we need to be isolated in order to be safe right. And that we also need to surrender agency or control to an outside force in order to be safe. These aren’t safety. These are abuse, like that’s what that is. And I could fairly easily say that, despite the – the – the narrative put out there by these E.M. companies and people really investing in carceral systems that there’s really no evidence that E.M. actually does keep us safe.

Right? This is all based on this – this narrative that’s put out there that has really, very, very little support to it. I think what it does is offer a false sense of safety to – to some at the very real expense of others.

And so I – I – I guess I would say that what makes us safer is actually building us up. It’s not investing more and more in these technologies. It’s not expanding surveillance to more and more people and placing more and more people under control while isolating us, but rather removing the barriers between us, providing support and – and trying to actually build community because community is actually what keeps us safe. A carceral home is not a key to public safety. A loving home is. Right. A home that’s resourced and a home that where people have support and have access to help if they needed. I think that’s actually the key to public safety.

Ngozi Okidegbe: Thanks so much Emmett. You get us thinking about safety, the need to rethink safety, and how the particular idea of safety underlying this invasive surveillance doesn’t keep us all safe, and that gets us to think a little bit about some of the ways in which – and – and concepts that keep in place, the carceral home. And so I wanna turn to the concept of consent. So, as explained in the article and was raised a bit in Kate’s comment, people on a criminal court surveillance consent to the terms of surveillance which raises a few questions. How should we be thinking about consent? What does consent mean in this context and how does it operate to keep the carceral home in place? And James, would you mind starting us off here? What do you think about that?

James Kilgore: Sure that’s fine. I just want to thank Emmett for the for – the comments on safety. And – and – and you know, really showing how – you know locking people in a house is not is not contributing to safety. I love the idea of, you know, creating loving homes rather than secure homes, lockdown homes.

So I think it’s interesting to think about. I – I don’t think we could have had mass incarceration without involuntary consent. If every time a parole agent or probation – parole – probation officer wanted to search a client’s home they had to get a search warrant, the courts would do nothing else.

Or alternatively, there'd be a lot less searches and a lot less people getting sent back to prison for parole violations. So mass incarceration requires the ubiquitous use of involuntary consent. Essentially the eradication of the Fourth Amendment.

It's built into the carceral home much like the consent forms we blindly sign when we register for a new app.

So as Kate has noted, the resident who is under carceral control has already signed away their right to require a search warrant to search them, their house, maybe even their family members

In the federal system, most likely if some one is on supervised release, they've signed on for drug testing. That is, it's part of standard conditions of supervised release. Whether or not your case had anything to do with drugs or not. You have to call in to the parole office every single day. And you're given a color. Let's say your color is blue. You have to call in. If they say red, you're good to go. If they say blue, you have to stop whatever you're doing and get in there and get a drug test that day, or you can be sent back to prison. And if you're out of town, that's tough luck for you. You gotta get back to your home office to do that – to do that drug test. So – so it – you're – you're – and – and all of this is – is wound – involuntary consent is wound into plea bargains.

I mean, which are these sort of templates for what people – for what people sign on for. But realistically, when most people sign a plea bargain what they're looking at is the sentence. They're not looking at what's gonna come after they do five years or ten years in prison they're looking at how much time they're gonna do. So they'll sign on for anything if it's gonna get them a little bit less time in prison. So the whole notion of involuntary – involuntary consent is baked in to the in – in – in – in – in – into the plea bargaining system. And so very – it's very rare that people you know kind of say, oh, by the way, I don't want to be on parole for that long I don't want I – I want different conditions of my supervised release until they're ready to get released.

So it's – it's – it's – it's – and – and I want – I wonder – I mean, I – this is just an idle thought, but I wonder if the big tech firms have looked at involuntary consent in the criminal legal system as they – as they dream up their templates to get us to sign on for these apps. But I don't know. That's – but for me, involuntary consent amounts to duties and responsibilities for the targeted person and minimal or no accou – accountability for the consent granter.

And, as we say, in prison. it's all a setup.

Ngozi Okidegbe: Emmett, would you like to join in the answer the question?

Emmett Sanders: Sure, yeah, I really appreciate those comments, James. So the – the thing – the part of – that I think we really need to integrate is the

voluntary, this idea that people are willingly signing up to surrender their rights, to surrender the right to have any kind of privacy, to – to surrender the right to take care of their kids? Because people are – who are monitored a lot of times can't leave the house. People again can't take their children to school

Right? And so why would anyone voluntarily give up the right to take care of their own children, or to take care of themselves, or to do any of these things, or even just the right to – to personal autonomy. Right? These are not – people are not willingly give – giving these rights up. People are coerced into giving these rights up, because the – if the alternative is that they sit in jail, or they sit in prison, or whatever the case may be, for a longer period of time.

And so they're looking at it as a lesser of two harms that they're faced with. But it's by no means voluntary. What we're talking about is a coercive system that actually punishes the person and punishes their families.

And so like the idea that this is all based on some kind of willingness to – to, you know, subject themselves to treatment is just is you know, maddening to me, frankly. We – we can look at cases where people have – there was one person whose partner died while they were incarcerated in jail and they were offered the chance to go home on electronic monitoring. And if they didn't go home, their children would place in in foster care. So where is the actual choice? There?

Where's the choice between being in a jail cell where you can't give life saving medication for your cancer or being on E.M., where you can't actually access your medication

Right? Where is the choice that that people are making there.

And I think it's very – I think that's much like the idea of the home as a place of safety. I think these are very privileged. These are – these thoughts are coming from very privileged positions, and I think that we really need to think about that a little bit more.

Ngozi Okidegbe: Well, thank you for raising the idea of coercion and absence of choice. Kate.

Kate Weisburd: Yeah. And I'm just so grateful for the question and these comments, cause I do think that consent is a really problematic feature of criminal procedure generally, and I'm actually working on another paper right now, called Criminal Procedure Without Consent. That looks at what happens if we just couldn't rely on consent anymore, because in so many ways consent does the dirty work of the criminal justice system. Right. Like it, alleviates the moral responsibility of judges and prosecutors and police by sort of shifting the burden to the person who allegedly consented. So you know, historically like in Crimpro classes, for example, most students, I think, don't really believe that consent searches are actually consensual. I think a lot of people don't think that those searches are consensual. But it's not just searches right? It's like agreeing

to electronic monitoring – “agreeing” to electronic monitoring, agreeing to have your home searched, I mean, consent is everywhere over – everywhere in criminal procedure. I actually just recently asked a bunch of defense lawyers to see plea agreements because I wanted to see what, to James’s point, what kinds of things people are giving up in plea agreements. And people agree all the time as part of a plea agreement to not seek early release, to not seek record expungement. I mean, people are giving up all sorts of rights as part of plea agreements and that’s so problematic because it’s very much deploying consent to justify and sustain subordination. But it’s really nefarious in the sense that, like it’s taking this idea of free will and flipping it to sort of force people into their own subordination.

James Kilgore: Could I just add one point here? I mean, I think I think we really see the – the – the – height of this problem when we look at people who are incarcerated during Covid, right. People are gonna agree to anything to get out of – of a jail – of an over packed jail cell.

To be away from the that intense threat of – of dying from Covid, so that – that is like the classic example of involuntary consent. Just whatever you gotta do to get me out of here, do it. I’m – I’m – I wanna – I wanna live. And I – I – I wanna see my family before I go, you know.

Ngozi Okidegbe: Yeah. And thank you all so much for weighing in on that question. And – and I really appreciate how you all in different ways get us thinking about how consent is being operating – is operating here to justify the oppression that people are facing and the lack of choices that they actually have.

And one thing is really interesting. And I’ll ask this question to Kate, is that you have this momentum that’s building around protecting privacy right now. Several states and municipalities have passed consumer protection privacy related laws, particularly around AI and surveillance technologies. These laws are kind of based on this idea that you know consent is a problem that we can’t think about consent when it comes to how consumers are engaging with AI and surveillance technologies.

And I wonder, should be optimistic about this trend. Is there any way that this momentum around consumer protection could have a role in dismantling the invasive surveillance that is happening to people on criminal court supervision.

Kate Weisburd: Yeah, I mean, I – I think this is really important, because I do think that so many – like I think on – on some level I think you know a critique of the carceral home generally is like, well, aren’t we all getting surveilled like? Isn’t all of our – to James’s point is – like, aren’t we all sort of subject to limited privacy, and we’re all signing away our rights all the time.

But I don't – that's a really incomplete picture, because frankly, that, like even the Supreme Court has said, we have a privacy expectation in our, say, location data. And you know, there's been legislative responses to these concerns. So take, for example, California, California passes the California Electronic Communications Act, and it's seen as like the gold standard it's modeled after the EU GDPR. And yet everyone on probation, parole, is exempted from it. They're just not covered by the statute, and I think that's happening over and over again. So, like, you know, being in DC, whenever I come across anyone who's anything to that need regulating – regulating function, I'm always like, well, are you thinking about things like how electronic monitors are regulated or tested? Are you considering the privacy per – like there's so many Federal privacy initiatives, I mean, they haven't gone very far, but people who are involved in the criminal justice system are never part of those bills. Those bills just exempt them completely. So I don't feel terribly optimistic. I love being optimistic, but I don't feel optimistic in this situation.

Nguzi Okidegbe: Thank you for that. And I think it's so powerful that we're seeing the exemption of people on criminal court super provision when it comes to these privacy initiatives which really gets at what you all are talking about, which is the way in which people on criminal court supervision are really being deprived of their rights, as well as how that affects their their livelihood and the livelihood of their family and communities. And before we turn actually to audience questions. I really want to raise the question of movements. So you know, we know that criminal court surveillance is affecting thousands of individuals across the country, and that there is – there are movements on the ground by those who've been impacted to try to contest this state of affairs. And so, James, would you mind speaking to that?

James Kilgore: Sure, I can do that and I ask Emmett to also join in on that. But I think when we, you know, began organizing around the issue of electronic monitoring in the sort of mid 2010s there was no, there was no literature on it.

Or almost no literature on it, and there was only I think there was only one academic in the country even cared about that and that's Kate, and she's still doing it. But – but – but – so wha – in order to get information and – and be able to – to figure out what was going on with this because we had both experienced it. We – we just – we interviewed people. We interviewed people who are impacted. And they, you know, they told their stories or their family members, because what we found when we went to people who worked in the criminal legal space, or even other – other activists who didn't have anything to do with electronic monitoring is say, "Oh it's better in jail. It's better than prison. What are you worried about? It's nothing. Just a little piece of plastic around your ankle."

But what happened is that gradually, you know, we more and more people were put on this. More and more people began to tell their stories, and I think we were able then to also bring some of those people together to dialogue with each other.

We were also able to bring some of those people into the into a – an effort to pass a law in Illinois to ban the use of electronic monitors for people coming out of prison. We got it passed through the house, and then Covid knocked it out of the box.

But – but – so really I – I – I feel like the – the – the – so a lot of the awareness that people have about electronic monitoring comes about from the stories of people who are impacted telling their experience, and I think that relates also to broader issues of mass incarceration that impacted people. Former incarcerated people are, have been some of the most outspoken and done some of the most important organizing around that. And I mean, so basic kind of principle, if someone is impacted by, you know, if someone is negatively impacted by some kind of system or form of oppression. It's the people who are directly impacted, that – that – tend – that tend to lead. We don't – we don't see men out there leading the the struggle for reproductive rights. I mean, we should be out there more. But that's the – the – but the reality is that the impacted folks kind of tend – tend to take the lead on this. So I know, Emmett, if you want to add anything.

Emmett Sanders: So I mentioned before that there's – there's, you know, that there's all these claims about electronic monitoring, that it protects public safety, that increased court appearance, all these other things. But when we look at, there's just not a lot of empirical evidence to support that.

What there is a lot of evidences of is the fact that electronic monitoring does a lot of harm. And we know that because we have talked to people. I've talked to kids in Chicago who who have been on, you know, fifteen years old, and we're on electronic monitoring three or four times by that point who were forced to sleep on their their grandparents porch because the home was not a safe place, because they were afraid to go inside the home. But they were also afraid to leave. Like we know that there are actual harms that happen from these kinds – from from these devices, right? And I think a lot of times we tend to look for – we're looking for the numbers that – but you know, and Vera put out a great report about the population I think people should actually read that but we're looking for numbers. We're – but there's this wealth of information that's this whole wealth quality data that we don't really, actually – we actually don't really consider they're not factored into these into these things. But this is where – where the real information lies.

Right like, if you really want to know how these things are impacting people, how – how you know, efficient they are, how well they work, talk to the

people who can't take the kids to school, talk to people who can't go get medical help. Talk to the people who've been impacted by these systems.

And so yeah, it's very important that people who are impacted are involved in this work. It's also very important that we start thinking about the information that we're receiving from folks who are impacted. Not as just, you know, not as just a narrative, but like actual data that we're actually considering. This is data, because that's what it is.

Ngozi Okidegbe: Thank you so much, James and Emmett. And I want to take our last 12 min and turn it to audience questions. If you're on zoom please raise your hand, and for those in the audience, we have a mic going around so – and when you ask a question, please state your name.

Caitlin Glass: Hi, I'm I'm Caitlin Glass. And I really really appreciate what everyone said today. And I think I agree with everything that everyone said. And – and this is so important. But one thing that's been going through my mind is how much of this is the electronic part?

Because I know in your article you talk about sort of, you know, all this supervision restrictions that exist sort of more broadly. And then, I think you know, data surveillance, electronic monitoring is layered on top of that, and that could create problems in terms of expanding the number of people on – in the supervision regime. Some people are getting, you know, electronic monitoring instead of incarceration. And it can also create a really scary like immediate enforcement mechanism, where, you know, like tech – small violation, like someone stepping out into their front porch creates like an immediate response in a way that didn't exist like before that kind of technology.

But in terms of thinking about the point of intervention for change. It seems like if you got totally got rid of electronic monitoring, that would be a very good thing, and there would still be like a huge surveillance state. Of course they wouldn't get rid of the carceral home. And so just thinking about that. And then also, just like other forms of regulation that I know you identify. You know, people in family court system, how they're surveilled in their homes or sex-offender registration. So I'm just – I'm just wondering if you think about this as like a data problem, a data privacy problem and a technology problem. Or if you see, the point of intervention is a little bit broader than that.

Kate Weisburd: Yeah, it's a great question. It's not either or it's and both, or whatever expression is right. It's – it's, I think, that so often, we consider data and privacy and technology and sort of carceral systems and siloed fashions. And I think that does a disservice to how integrated these systems are, and how much they operate in a larger ecosystem, where sort of electronic surveillance magnifies. It's sort of like surveillance on steroids, and it's really hard to just

look at it in isolation without looking at how it is connected to all these other systems.

I think you're absolute – your instinct is right, which is to say, like, yes, if we got, if – if tomorrow electronic monitors just, poof, disappeared, which they're not going to, if anything we just know they're gonna expand. Yeah, no, the problem still, not solved. Right? It's bigger than electronic monitoring the car – the problems of carcerality are much bigger than monitoring. Monitoring is one facet of it, but it's certainly not the only one.

I mean I often get some feedback of like, well, what if the monitor was just like the size of a fitbit, and it wasn't visible. Would that solve the problem? It's like, well, no, I mean, that solves a small fraction of the problem. But like, don't be deceived the bigger problem still remain.

Ngozi Okidegbe: Emmett.

Emmett Sanders: Yeah, sure. So I – I think – I think that's exactly right. I think what we're talking about electronic monitoring, or we're talking about this use of a carceral technology what we're talking about is a continuation of policies. We're ca – talking about a continuation of policies that go back far, far back into the dis – into the past and are poised to continue into the future. Right? So, you know, we – we move from slavery to, you know, convict leasing to Jim Crow to mass incarceration, to e-carceration, and so on and so on. Right? And so it is both things. But what we're talking about here is, you know when I when I'm thinking about doing something different I'm thinking about how can we actually interrupt that?

What are the things that are gonna interrupt the carcerality of these policies? What are – what are, the things are gonna interrupt that that cycle, because what we have is just, you know, incarceration repackaging itself and making itself look nicer each time and removing some of the the more overt you know oppositions that people have, right? And so you – you move this to slavery because it's obviously horrible. Well, this looks nicer but it's no good either. So we – we go to – to Jim Crow, and that looks nicer, but it's not good either. So this could be moved to mass incarceration. So we keep doing these things

Alright. And if we're talking about doing something different, we're – we're talking about a completely different mindset. We're moving away from, you know, putative measures and – and incarceration to things that actually support and – and, you know, build our communities.

James Kilgore: So I think, just just to add on to that a little bit. I think we have to place electronic monitoring into the into the whole world of surveillance technology and data and data grabbing. So it's not simply that, you know, the monitor controls – controls individuals who have to face the monitor. But it's that the – the – the – data that's gathered by the monitor is just one part

of the data that's being gathered on – on – on the population as a whole, particularly the marginalized population that gets impacted by the criminal legal system. So it's not just their location, or even whatever other data the monitor comes up with.

But it's a whole realm of data which then gets put up into the in – into a – into AWS land and sold – sold to law enforcement marketed to companies for – to promote their products, or to put different kinds of restrictions on people that have certain kinds of data in their record. So I think we really need to recognize that although in a certain way, an electronic monitor is a visible form of a device that collects data, that there's a lot of other devices out there, or a lot of other ways that data is collected that are not so visible that are at least as important as electronic monitors. So, like, Kate says, we get rid of electronic monitors. I mean, we're still giving them all kinds of data every time we go on Zoom right?

(Laughter)

Alex Lindon: Hello. My name is Alex Lindon. I'm a student here at B.U. So when you use the language of carceral home it kind of invokes an image of like a physical home.

And so what I'm wondering about folks who maybe don't have this home. So folks experiencing homelessness and especially when you talk about restrictions on movement where folks who experience homelessness rely on movement for everything. So because they don't have an address, a physical address, I'm wondering if they are at high risk of these incarceration alternatives? Or how do they get into the story of the carceral home? Maybe they are least likely to get these alternatives, and more likely to be incarcerated because of it. So where? Where do unhoused folks follow?

Kate Weisburd: Well, I can – I can start really quickly. And then I'd love to hear what Emmett and James, think about this, too. I mean, there's there's great research done by Sandra Susan Smith at Harvard. She's a sociologist at Harvard, about the impact of electronic monitoring, on – on unhoused people in San Francisco in particular. And she, as your question suggests, points out how difficult it is for people who are experiencing housing insecurity to be on monitors. And I mean think about it, it's almost impossible just get access to electricity, to charge the device, much less have a reliable address.

I also think that some of the problems with the lack of Fourth amendment protections for people who are unhoused, that goes back to the problematic use of the home as the line between having privacy and not because if you don't have a home suddenly, you have less privacy. And that's also problematic. So I think your question brings up, I think, two interesting aspects of these issues.

Ngozi Okidegbe: Emmett, would you like to join in?

Emmett Sanders: Sure, yeah, I – I think that’s exactly right. I think.

yeah, I – I – we did some research into, you know, folks who are unhoused and how they sort of experience, homeless, or how they sort of experience electronic monitoring. And you know, not having a home does not make you any less subject to these – these you know, harsh rules or restrictions right? In fact, it can. Actually, there are some things that we don’t can really consider like, how do people recharge these things, and so like during the pandemic, for example there was a you know here – here’s a police station if someone has to go charge this. And they would bring an extension cord and run it out the door to the – of the police station, for people actually sit there, for, you know, two hours and charge their – their device, right? But it also brings up things like when people get picked up or arrested for – because their devices malfunctioning. They can lose everything that they have. Can lose everything that they have. Simply from the act of getting arrested.

So yeah, I think there – I think there are – I think there are definitely like unique concerns to the unhoused population in particular, when we talk about electronic monitoring and and some of the like some of the restrictions and rules of the sort of phase.

James Kilgore: And just a little bit to add on to that. I mean one of the things I think is important to recognize about electronic monitoring is that it’s – it’s local. That is, the rules change. Every state has its own electronic monitoring program. Thou – you know, thousands of municipalities, counties have their own electronic monitoring programs. And each one has different rules for different groups and applying to different situations. So it’s re – so that makes it very difficult to attack the – the issue of reform of electronic monitoring at a global level. Because all these contracts, and these rules are set at a lo – at a – at a lo – at a local level. And as the Vera report is shown – showing us it’s – it’s in a lot of places and growing and growing and growing a lot.

And the technology is also expanding its capacity to do more than just location track.

Ngozi Okidegbe: Thank you so much. It looks like we are at time. I just wanna thank Kate James and Emmett so much.

(Applause)

Fantastic conversation. And I love the article, and I love what conversation it inspired. Thank you all for coming, and thank you everyone for coming on zoom as well. Have a good day.

