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Rights Violations as Punishment

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Is punishment generally exempt from the Constitution? That is, can the deprivation of basic constitutional rights—such as the rights to marry, bear children, worship, consult a lawyer, and protest—be imposed as direct punishment for a crime and in lieu of prison, so long as such intrusions are not "cruel and unusual" under the Eighth Amendment? On one hand, such state intrusion on fundamental rights would seem unconstitutional. On the other hand, such intrusions are often less harsh than the restriction of rights inherent in prison. If a judge can sentence someone to life in prison, how can a judge not also have the power to strip someone of the right to marry, or speak, as direct punishment? Surprisingly, as this Article reveals, existing law offers no coherent explanation as to why rights-violating punishments somehow escape traditional constitutional scrutiny. Yet the question is critical as courts—often in the name of decarceration—increasingly impose non-carceral punishments that deprive people of constitutional rights.

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This Article argues that "punishment exemption"—the assumption that criminal punishment is exempt from traditional constitutional scrutiny—has no legal basis. Drawing on original empirical research, this Article first exposes a maze of modern non-carceral punishments that infringe on constitutional rights, justified by nothing more than the assertion that they are punishment and therefore permissible. If both legal and limitless, these rights-restricting punishments erase basic constitutional protections for people on court supervision and risk re-entrenching the very racial, gender, and economic inequities that decarceration efforts aim to address. This Article then explains, based on the Constitution's plain language and well-established constitutional principles, that punishment is not exempt from the Constitution. Rather, all punishment, including imprisonment, is state action subject to traditional constitutional scrutiny. Properly understood as such, many punishments—both carceral and non-carceral—may be unconstitutional.

INTRODUCTION

To what extent can a judge deprive someone of fundamental constitutional rights as punishment for a crime and in lieu of prison? The question is not merely theoretical. For the 4.5 million people who are subject to criminal court control, but not incarcerated, criminal punishments routinely restrict their rights to travel, marry, bear children, worship, socialize, and protest.[1] People under criminal court supervision are frequently required to provide DNA samples to law enforcement, use devices that measure drug and alcohol use, or wear GPS and microphone-equipped ankle monitors that record and track their precise location 24/7, sometimes for months or years at a time.[2] And as part of non-carceral punishments, courts commonly order people to participate in religious drug treatment programs like Alcoholics Anonymous ("AA") or others that may require individuals to sign self-incriminating acceptance of responsibility statements.[3]

These punishments, and others like them, highlight two interrelated and often conflicting phenomena in criminal law: increased reliance on "alternative" non-carceral punishments, and the increasing degree to which these punishments strip people of constitutional rights. Although the deprivation of rights has always featured prominently in all forms of punishment, advances in surveillance technology, along with the influence of private "community corrections" entrepreneurs, has created an even more invasive web of rights-restricting non-

1. *See infra* Part I.
2. *See infra* Part I; Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV.147, 147–48 (2022).
3. S*ee infra* Part I. *See also* 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 (2020).

carceral punishments.[4] While these punishments are often imposed in the name of decarceration, they instead risk reinforcing what Professors Amanda Alexander and Reuben Jonathan Miller call "carceral citizenship,"[5] a status that legitimates the legal exclusion of historically subordinated groups and reinforces social-legal hierarchies based on race, class, disability, and gender.

This expanded landscape of non-carceral punishments surfaces a lurking but critical question: Why do rights-violating punishments escape traditional constitutional review that applies outside of the punishment context?[6] On one hand, the "right to have rights" is "not a license that expires upon misbehavior,"[7] and non-carceral punishments that restrict rights seem like classic state actions that are unconstitutional "unless . . . narrowly tailored to [meet] a compelling state interest."[8] On the other hand, the rights-deprivations inherent in non-carceral punishments are often less harsh than the deprivations inherent in prison. If a judge can sentence someone to life in prison, how can a judge not also have the power to strip someone of the right to marry, worship, or speak as direct punishment?

Punishment jurisprudence offers clues but no clear answer. A prison sentence, after all, involves the obvious deprivation of liberty, and people in prison generally lose rights that are "inconsistent with" incarceration.[9] Likewise, courts uphold exploitative prison labor and felony disenfranchisement as legal punishments explicitly permitted by the Thirteenth and Fourteenth Amendments.[10] And the deprivation of still other rights, such as the right to bear arms or serve on a jury, are justified as collateral consequences of a criminal conviction.[11] But are non-carceral punishments that restrict religious practices or intimate relationships, for example, justified merely because they are punishment, or rather, because they pass First Amendment and substantive due process scrutiny? Likewise, is tracking a person's location 24/7 through a GPS ankle monitor permissible because it is punishment, or because it is considered a "reasonable" Fourth Amendment search?

4. *See infra* Part I.

5. Reuben J. Miller & Amanda Alexander, *The Price of Carceral Citizenship: Punishment, Surveillance, and Social Welfare Policy in an Age of Carceral Expansion*, 21 MICH. J. RACE & L. 291, 294-97 (2016).

6. By "traditional," I mean the type of constitutional scrutiny or review that would apply but for the rights-restriction being imposed as punishment.

7. Trop v. Dulles, 356 U.S. 86, 92, 102 (1958).

8. Reno v. Flores, 507 U.S. 292, 302 (1993).

9. Pell v. Procunier, 417 U.S. 817, 822 (1974).

10. Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (upholding permanent disenfranchisement of people convicted of crimes); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963) (holding that prison labor does not violate the Thirteenth Amendment).

11. *See* MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY & PRACTICE § 2 (ed. 2021).

In short, is there something *special* about punishment that justifies what I refer to as punishment exemption,"[12] the assumption that non-carceral punishment is exempt from traditional constitutional scrutiny? The question of punishment exemption is not limited to non-carceral punishments, though the problems are most stark in that context. People in prison—like people subject to non-carceral punishments—also loose rights, though there is a more robust, albeit often inadequate, legal regime to evaluate such deprivations.[13] No such legal framework exists with respect to non-carceral punishments. This Article engages these murky questions and offers a simple, if unexpected, answer: punishment is not exempt from the Constitution. All punishment, including imprisonment, is state action subject to traditional constitutional review.[14] Properly understood as such, many non-carceral punishments—along with some prison sentences—are unconstitutional, even if not cruel and unusual. How punishment exemption has nonetheless flourished, and its implications, is the focus of this Article.

Certainly, part of the puzzle is courts' failure to recognize, much less appreciate, the rights-stripping nature of non-carceral punishments. Because non-carceral punishments are generally viewed as "better" than prison—and they often are—the analysis of their impact on fundamental rights often stops there. But better-than-prison is a low threshold and fails to resolve the question of what constitutional scrutiny is due, much less whether these punishments are sound or humane policies.

Drawing on my ongoing and original empirical research on the operation of non-carceral punishments, this Article exposes the web of rights-violating

12. This Article's invocation of the term "punishment exemption" is inspired by, and part of, a burgeoning literature focused on exceptionalism in criminal law and procedure. While the thesis of paper makes separate (but related) points, I view this wave of scholarship as a healthy sign of the decline of "siloing" criminal law and greater inquiries into what makes criminal law distinct. *See* Benjamin Levin, *Criminal Law Exceptionalism*,108 Va. L. Rev. 1381, 1434 (2023); Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 930–32 (2021); Alice Ristroph, *The Wages of Criminal Law Exceptionalism*, CRIM. L. AND PHIL. (2021); Salil Dudani, Note, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2132 (2020); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 570 (2021); Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. Rev. 1949, 1953-54 (2019); Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 764 (2012) (reviewing DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010)); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1012 (2006).

13. *See infra* Part II D.

14. A handful of scholars argue that prison sentences or probation detention should be subject to additional constitutional limits, including strict scrutiny, but none address the unique rights-restrictions inherent in non-carceral punishments. *See* Driver & Kaufman, *supra* note 12, at 576; Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. Rev. 1667, 1676 (2021); Dudani, *supra* note 12, at 2132; Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 783 (1994); Note, *The Right to Be Free From Arbitrary Probation Detention*, 135 HARV. L. R. 1126 (2022); ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 78 (2019); Michael L. Zuckerman, *When a Prison Sentence Becomes Unconstitutional*, 111 GEO. L.J. 281, 338–39 (2022).

punishments that would typically be considered unconstitutional outside of the punishment context. To be sure, as alternatives to incarceration gain in popularity, scholars and activists have raised alarm about the restrictive and invasive nature of non-carceral punishments and how they reproduce the racialized carceral state, even if to a lesser degree than physical incarceration.[15]

My own prior experience defending young people in juvenile delinquency court reinforced these concerns. I saw firsthand how non-carceral punishments—such as house arrest, therapeutic courts, halfway houses, and GPS-ankle monitoring—were not so much alternatives to incarceration, but alternative *forms* of incarceration.[16] Even the label "non-carceral" is imperfect as it fails to capture the myriad ways that distinctly carceral logic defines purported alternatives to incarceration.[17]

Overlooked by scholars and courts alike, however, is the legal doctrine—and lack thereof—that has facilitated the proliferation of non-carceral punishments that restrict basic rights. Neither the text of the Constitution nor basic constitutional principles offer doctrinal support for exempting state action in the form of non-carceral punishment from traditional constitutional scrutiny.[18] Indeed, in his dissent in *Samson v. California*, in which the majority upheld suspicionless searches of people on parole, Justice Stevens cautioned that the Court has never "sanctioned the use of any search as a *punitive* measure."[19] Following this logic, a small handful of courts appear to reject punishment exemption and subject at least some non-carceral punishments to traditional constitutional scrutiny, but they are the rare exception.[20]

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15. *See, e.g.*, Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html [https://perma.cc/UV4E-B9JG]; Patricia J. Williams, *Why Everyone Should Care About Mass E-carceration*, NATION (Apr. 29, 2019), https://www.thenation.com/article/archive/surveillance-prison-race-technology/ [https://perma.cc/U3SS-AKCD]; Miller & Alexander, *supra* note 5, at 294; Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of A Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012); Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 663 (2019); MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME 57 (2020); Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1401 (2016); Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 222 (2013); JAMES KILGORE, UNDERSTANDING E-CARCERATION: ELECTRONIC MONITORING, THE SURVEILLANCE STATE, AND THE FUTURE OF MASS INCARCERATION (2022); Derecka Purnell, *Reforms Are The Master's Tools*, MEDIUM (Oct. 19, 2020), https://level.medium.com/the-system-is-built-for-power-not-justice-c83e6dc4dd66 [https://perma.cc/HW54-9RQJ].

16. *See* James Kilgore, Emmett Sanders & Kate Weisburd, *The Case Against E-Carceration*, *Inquest* (July 30, 2021), https://inquest.org/the-case-against-e-carceration/.

17. *See, e.g.*, McLeod, *Decarceration Courts*, *supra* note 15, at 1591 (observing that specialty courts, a type of non-carceral punishment "threaten to produce a range of unintended and undesirable outcomes: unnecessarily expanding criminal surveillance, diminishing procedural protections, and potentially even increasing incarceration.").

18. *See* Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 141 (1977) (Marshall, J., dissenting) (questioning the "wholesale abandonment of traditional principles of [constitutional] analysis" in the context of prison litigation).

19. Samson v. California, 547 U.S. 843, 864 (2006) (Stevens, J., dissenting) (emphasis added).

20. *See infra* Part II A.

More often, courts either ignore the rights-stripping nature of non-carceral punishments, rely on the purported consent of the person subject to the punishment, assume the restrictions are merely "conditions" and not punishment, or uphold rights-restrictions that "reasonably relate" to rehabilitation or public safety, a standard imported from the prison context.[21] These deferential approaches are consistent with Justices Scalia and Thomas' view that states should be afforded deference "to define and redefine all types of punishment, including imprisonment, to [include] various types of deprivations"[22] and that criminal conduct properly extinguishes the right against unwarranted confinement and liberty.[23] In a dissent penned by Justice Thomas and joined by Justice Scalia, the Justices explain that there is no general fundamental right to freedom from bodily restraint; if there were, "convicted prisoners could claim such a right," and "we would subject all prison sentences to strict scrutiny[, which] we have consistently refused to do."[24] Under this view, it is only the Eighth Amendment that limits punishment.[25]

The problem, however, is that there is no obvious legal basis to exempt punishment from traditional constitutional scrutiny that would otherwise apply.[26] Not only is consent a questionable legal basis,[27] but the "reasonably related" standard is often inapplicable to the non-carceral setting,[28] and classifying the deprivation of rights as a "condition" or "regulation" and not punishment is likewise legally, and factually, unsound.[29] Perhaps most significant, these deferential justifications do not resolve why rights-restricting punishments are exempt from the constitutional scrutiny that traditionally applies to state action.[30] Rather, as this Article argues, state action is state action regardless of the context. There is nothing *exceptional* about criminal punishment that makes it immune from standard constitutional scrutiny. Indeed, decades of prisoner's rights litigation have helped establish that incarceration does not escape constitutional scrutiny simply because it is imposed as punishment.[31] It may be that many long prison sentences or certain types of non-carceral punishments are constitutional, but not because they are exempt from traditional constitutional review.

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21. *See infra* Part II B & III C.
22. Overton v. Bazzetta, 539 U.S. 126, 139 (2003) (Thomas, J., concurring in the judgment).
23. Foucha v. Louisiana, 504 U.S. 71, 121 (1992) (Thomas, J., dissenting).
24. *Id.* at 118.
25. *Overton*, 539 U.S. at 139-40 (Thomas, J., concurring).
26. *Cf.* Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L. J. 490, 521 (2018) (considering whether constitutional doctrine "grants the state more expansive authority to preventively restrain defendants than members of the public at large").
27. *See infra* Part III C.
28. *See infra* Part II B.
29. *See infra* Part III D; *see also* Weisburd, *Punitive Surveillance*, *supra* note 2, at 187.
30. *See infra* Part II B.
31. *Id.*

While some progressive legal scholarship understandably questions the efficacy of rights-based frameworks to disrupt the racial and economic inequities endemic to the carceral state,[32] this Article suggests that there is value added in challenging the legitimacy of punishment exemption and exposing its lack of jurisprudential support. On an immediate and pragmatic level, applying greater scrutiny to the deprivation of rights associated with punishment can shrink the carceral apparatus and rein in extreme rights infringements, as well as make visible rights-deprivations that currently fly below the radar. A more radical reimagination of the carceral state—in all its permutations—is also in order,[33] and, at the same time, the need to reckon with the current state of punishment law remains.

On a broader jurisprudential level, exploring how rights-restricting punishments escape traditional constitutional scrutiny reveals a categorical chasm—and mismatch—between the fields of criminal procedure and constitutional law.[34] The surveillance inherent in electronic monitoring and community supervision, for example, raises not just Fourth Amendment concerns, but also implicates First Amendment and substantive due process rights. Likewise, requiring someone to write an apology letter raises First Amendment concerns, but such a requirement could also be viewed as raising Fifth Amendment concerns, since an inculpatory statement could be used against them in a later proceeding. Yet, the legal analysis of these practices is routinely siloed, with courts opting to not analyze Fourth Amendment problems as First Amendment or as substantive due process problems and vice versa.[35] The disconnect between criminal procedure and constitutional law is neither preordained nor inevitable. In fact, by having law students take separate classes in criminal procedure and constitutional law, the legal academy sends a clear message that criminal procedure is *not* constitutional law, even though the two fields both focus on constitutional text and amendments.[36] This divide reflects—

32. *See* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1467 (2016); Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616, 2621 (2014); Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 6 (2022); Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 376, 440 (2021).

33. *See, e.g.*, Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 479 (2018) (arguing for a "radical reimagination of the state and of law" in alignment with "social movements").; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1171 (2015) ("motivat[ing] the case for a prison abolitionist ethic"); MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 14–18 (2021) (advocating for a new abolitionist perspective in law and society).

34. *See* Sharon Dolovich and Alexandra Natapoff, *New Criminal Justice Thinking*, 10—12 (making the case for a broad understanding of criminal law that accounts for both civil and criminal laws).

35. *See* Alex Abdo, *Why Rely on the Fourth Amendment to Do the Work of the First*?, 127 YALE L.J. FORUM 444, 451 (2017).

36. For a detailed analysis of the law school curriculum as "pro-carceral" and underinclusive, see Shaun Ossei-Owusu, *Making Penal Bureaucrats*, INQUEST (Aug. 23, 2021),

and may help explain—why criminal punishments are generally not viewed as raising constitutional concerns beyond the Eighth Amendment.

This Article proceeds in four Parts. Drawing on a large and ongoing empirical research project, Part I offers a portrait of rights-restricting non-carceral punishments to bring into focus the scope and impact of punishment exemption. Part II draws on the text of the Constitution as well as foundational constitutional principles to demonstrate the lack of jurisprudential support for punishment exemption. Part III addresses five anticipated objections: first, that prison is more restrictive than most non-carceral punishments yet still perfectly legal. Second, that but for non-carceral punishments people would otherwise be imprisoned. Third, that consent nullifies the need to address constitutional questions. Fourth, that the deprivation of rights is not punishment, but rather conditions or rules. And fifth, that the Eighth Amendment is the only constitutional provision that limits punishment. Part IV explores the implications of applying traditional constitutional scrutiny to not just non-carceral punishment, but all punishment. It explains how restrictions on religion or speech, for example, are unconstitutional punishments unless they pass the applicable First Amendment scrutiny. The Article concludes with lessons for the future of decarceration.

I.
A PORTRAIT OF RIGHTS VIOLATIONS AS PUNISHMENT

As courts and legislators increasingly look to non-carceral punishments—often in the name of decarceration—the lack of jurisprudential support for these rights-restricting punishments comes into sharp focus. Drawing on my original empirical research, this Part shines a light on a few examples of rights-restricting non-carceral punishments, the impact of the restrictions, and how they exemplify the problem of exempting punishment from traditional constitutional review.

A. The Rise of Non-Carceral Punishment

Several forces have contributed to the increased use of non-carceral punishments: bipartisan interest in curbing mass incarceration, advances in surveillance technology, and the influence of the "technocorrections"[37] industry and other private vendors that market "alternatives" to incarceration.[38] Together,

https://inquest.org/making-penal-bureaucrats/ [https://perma.cc/MAY3-345B]; Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020); Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 222 (2012).

37. Ruha Benjamin, *The Shiny, High-Tech Wolf in Sheep's Clothing*, LEVEL (Oct. 22, 2020), https://level.medium.com/the-shiny-high-tech-wolf-in-sheeps-clothing-17d8db219b6d [https://perma.cc/JCC9-FZ8E].

38. Appleman, *supra* note 3, at 2; Malcolm M. Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System - An Account of Convict Transportation and Electronic Monitoring*, 17 CRIMINOLOGY, CRIM. JUST. L. & SOC'Y 1, 24 (2016).

these forces, further accelerated by the COVID-19 crisis in prisons and jails, produced an expanded landscape of incarceration alternatives, including therapeutic and (or) mental health courts,[39] electronic monitoring,[40] community service programs,[41] drug courts,[42] restitution centers,[43] residential religious treatment programs,[44] domestic violence and sex offense courts,[45] shoplifting diversion,[46] special court programs for people convicted of prostitution,[47] community courts,[48] treatment centers,[49] and police- or prosecutor-led restorative justice circles,[50] to name just a few.

In general, non-carceral punishments are imposed in low-level felonies, misdemeanors, non-violent crimes, or for people accused of crimes for the first time.[51] As Professor Issa Kohler-Hausmann describes her experience observing criminal court in New York City, "[s]it in any misdemeanor arraignment or all-

39. McLeod, *Decarceration Courts*, *supra* note 15, at 1613.

40. Eli Hager, *Where Coronavirus Is Surging—And Electronic Surveillance, Too*, MARSHALL PROJECT (Nov. 22, 2020), https://www.themarshallproject.org/2020/11/22/where-coronavirus-is-surging-and-electronic-surveillance-too [https://perma.cc/GR5N-YV5Q]; April Glaser, *Incarcerated at Home: The Rise of Ankle Monitors and House Arrest During the Pandemic*, NBC NEWS (July 5, 2021), https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008 [https://perma.cc/UR8D-WTNB].

41. Lucero Herrera, Tia Koonse, Melanie Sonsteng-Person & Noah Zatz, *Work, Pay, or Go to Jail: Court-Ordered Community Service in Los Angeles*, UCLA Lab. Ctr. & UCLA School of Law (Oct. 2019), https://www.labor.ucla.edu/publication/communityservice/ [https://perma.cc/74ED-YQRN].

42. SCHENWAR, *supra* note 15, at 5; Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1578 (2021); Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 597 (2016); Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 835 (2008); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO STATE L.J. 1479, 1479 (2004).

43. Anna Wolfe & Michelle Liu, *Think Debtors Prisons Are a Thing of the Past?*, MARSHALL PROJECT (Jan. 9, 2020), https://www.themarshallproject.org/2020/01/09/think-debtors-prisons-are-a-thing-of-the-past-not-in-mississippi [https://perma.cc/8JDV-GKDU].

44. Shoshana Walter, *At Hundreds of Rehabs, Recovery Means Work Without Pay*, REVEAL PODCAST (July 7, 2020), https://revealnews.org/article/at-hundreds-of-rehabs-recovery-means-work-without-pay/ [https://perma.cc/G44H-QRSP].

45. McLeod, *Decarceration Courts*, *supra* note 15, at 1621; Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1483 (2017).

46. John Rappaport, *Criminal Justice, Inc.*, 118 COLUM. L. REV. 2251, 2272 (2018).

47. Christina Goldbaum, *Charged With Prostitution, She Went to a Special Court. Did It Help?*, N.Y. TIMES (Jan. 6. 2020), https://www.nytimes.com/2020/01/06/nyregion/ny-prostitution-courts.html [https://perma.cc/AGA4-BM4G]; Gruber et. al., *supra* note 15, at 1333.

48. Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 64 WASH. UNIV. J. L. & POL'Y 63, 81 (2002).

49. *See* Priscilla A. Ocen, *Awakening to a Mass Supervision Crisis*, ATLANTIC (Dec. 26. 2019), https://www.theatlantic.com/politics/archive/2019/12/parole-mass-supervision-crisis/604108/ [https://perma.cc/GCS4-39FE].

50. Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2303 (2020).

51. *See* Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 174 (2017); Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1704 (2019); Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L. J. 291, 294, 334 (2016); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1086 (2015).

purpose part in the city, and you will hear a veritable alphabet soup of programs being offered and accepted as part of case dispositions."[52] Usually imposed at sentencing, these punishments are often standalone programs but other times take the form of additional conditions or restrictions added onto already existing sanctions. People convicted of crimes are most frequently asked to consent to certain non-carceral punishments, even though the court has the authority to impose the punishment regardless of the individual's consent.[53] While these programs do not involve jail time, they represent what Professors Jonathan Simon and Malcolm Feeley term the "new penology," which relies on techniques to "identify, classify, and manage" people based on their alleged offense.[54]

Although there are many examples of non-carceral punishment, this Section focuses on only a few, with the goal of highlighting the ways in which non-carceral punishment escapes traditional constitutional scrutiny. Many of these examples come from my large and ongoing empirical research project examining the operation of punishment outside of prisons.[55] This research involves collecting and analyzing hundreds of agency records (such as rules and internal policies) that govern non-carceral punishment. Taken together, these records paint a vivid picture of carceral practices operating outside of physical prisons. The categories below are approximate, as there is often overlap between programs or different names for the same program depending on the jurisdiction.

1. Probation, Parole, and Supervised Release

Probation, parole, and other forms of court supervision have long been deployed as alternatives to incarceration, while also being recognized as punishment.[56] There are currently nearly 4.5 million people on probation, parole, or supervised release.[57] Probation is generally imposed in cases where a defendant is not eligible for a prison sentence or might otherwise be incarcerated but is instead sentenced to probation. Parole, by contrast, is most often provided

52. ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 241 (2018).

53. *See infra* Part III C; Kate Weisburd, *Carceral Control: A Nationwide Survey of Criminal Court Supervision Rules*, HARV. C.R.-C.L. L. REV., 11 (forthcoming 2023) (on file with author).

54. Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 452 (1992).

55. *See* Weisburd et al., *Electronic Prisons: The Operation of Electronic Monitoring in the Criminal Legal System*, GEO WASH. LEGAL STUD. RSCH. PAPER NO. 2021-41 (Sept. 27, 2021), https://ssrn.com/abstract=3930296 (herein after "Electronic Prisons"); Weisburd, *Carceral Control*, *supra* note 53.

56. *See* Griffin v. Wisconsin, 483 U.S. 868, 874 (1987); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 141 (10th ed. 2017); Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. POL'Y 51, 52 (2013); Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. CRIM. L. & CRIMINOLOGY 1015, 1018 (2013).

57. Barbara Oudekerk & Danielle Kaeble, *Probation and Parole in the United States, 2019*, BUREAU OF JUST. STAT. (July 2021), https://bjs.ojp.gov/library/publications/probation-and-parole-united-states-2019 [https://perma.cc/P223-YGQ2].

for by statute and exists as a way for people to complete their prison sentence outside of a prison. In the federal system, federal supervised release is added on at the end of a prison sentence.[58]

The deprivation of rights is a definitional part of court supervision. As other scholars have shown, people on probation, parole, and supervised release are subject to dozens of restrictive and invasive rules.[59] These rules govern all aspects of life: suspicionless searches, random drug testing, collection of DNA samples, court-mandated treatment programs, community service, restrictions on associating with certain people, curfews, and house arrest are all common features of court supervision.[60]

2. Halfway Houses and Work Centers

Throughout the country, people are often sentenced to spend time after a prison sentence at halfway houses, residential drug treatment programs, or work centers. Because people sent to these residential programs are often already on probation, parole, or supervised release, they are subject to multiple sets of rules—the rules governing court supervision and the rules of the program and/or facility. In most places, the programs are residential, and participants must abide by curfew and are limited in when they can leave and where they can go.[61] In many work and restitution centers, residents are restricted in the use of their income. They are often prevented from having ATM cards and forced to save a certain percentage of their income.[62]

Many of these programs also limit people's travel rights.[63] For example, a work release center in California forbids residents from leaving during the first few weeks of the program.[64] Even after the first few weeks, residents cannot drive a car or leave the center without an approved pass that includes a description of everyone and every place the resident will visit.[65]

Work and restitution centers take different forms. In Mississippi, people are sentenced to restitution centers where, for months (and sometimes years), they work for less than minimum wage and the state collects their pay, giving them only enough money to buy necessities.[66] Likewise, in Oklahoma, people are

58. *See* Jacob Schuman, *Supervised Release is Not Parole*, 53 LOY. L.A. L. REV. 587, 601 (2020).

59. *See* Doherty, *supra* note 51; Phelps, *supra* note 56; Tonja Jacobi, L. Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CALIF. L. REV. 887 (2014); Alexis Karteron, *Family Separation Conditions*, 122 COLUM. L. REV. 649 (2022).

60. *See* Doherty, *supra* note 51.

61. *Id.;* Ocen, *supra* note 49; Eric Borsuk, *Inside the Absurd Limbo of a Post-Prison Halfway House*, VICE (Feb. 9, 2015), https://www.vice.com/en/article/vdpakb/halfway-to-nowhere-0000582-v22n2 [https://perma.cc/WG4U-6MYX].

62. Ocen, *supra* note 49.

63. *Id.*

64. *Id.*

65. *Id.*

66. *See* Wolfe & Liu, *supra* note 43.

sentenced to rehabilitation camps where they are required to work for free often in poor conditions, like in chicken processing plants.[67]

Non-government entities, both for-profit companies and non-profits, operate most halfway houses. The GEO Group, which is one of the largest contractors for private prisons and electronic monitoring in the country, runs Community Education Centers, which operate almost 30% of halfway houses nationwide.[68] The federal government also operates over 150 residential reentry centers with a capacity of almost 10,000 residents.[69] Several work-release programs—both publicly- and privately-run—have been criticized for returning participants to prison for minor rule violations, retaliation, arbitrary discipline by staff, rampant violence, and inadequate staffing.[70]

3. Problem-Solving Courts and Treatment Programs

There is a rich literature on the operation and efficacy of problem-solving courts and related specialized diversion programs.[71] These courts and treatment programs aim to address a wide range of issues (mental health, drug treatment, human trafficking, and prostitution, among others) and have different titles, such as community courts, drug courts, and specialty courts. Nonetheless, these programs share common characteristics. Most people are referred to problem-solving courts as part of the case disposition or are required to plead guilty as a prerequisite for entering the program. Treatment programs are likewise ordered as part of a case disposition, usually in addition to some form of court supervision. Problem-solving courts and treatment programs often involve a host of rights-deprivations, from limited access to counsel to suspicionless searches and mandated treatment programs.[72] Participants who successfully complete the programs are sometimes eligible to have their case dismissed and (or) their

67. *See* Walter, *supra* note 44; *Welcome to CAAIR*, CHRISTIAN ALCOHOLICS & ADDICTS IN RECOVERY [CAAIR], https://caair.org/ [https://perma.cc/FP6U-CVF8]; Appleman, *supra* note 3, at 1.

68. 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/ZRD4-G4G2].

69. Daniel & Sawyer, *supra* note 68.

70. Paul Kiefer, *Investigation of Work Release Centers Spurs Some Changes, But Advocates Proceed with Caution*, PUBLICOLA (July 7, 2021) https://publicola.com/2021/07/07/investigation-of-work-release-centers-spurs-some-changes-but-advocates-proceed-with-caution/ [https://perma.cc/X6PW-7LZV]; Sam Dolnick, *As Escapees Stream Out, a Penal Business Thrives*, N.Y. TIMES (June 16, 2012), 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/4UMN-56WX].

71. *See, e.g.*, McLeod, *Decarceration Courts*, *supra* note 15; Christine S. Scott-Hayward, *Rethinking Federal Diversion: The Rise of Specialized Criminal Courts*, 22 BERKELEY J. CRIM. L. 47, 50 (2017); Michael D. Sousa, *Procedural Due Process, Drug Courts, and Loss of Liberty Sanctions*, 14 N.Y.U. J.L. & LIBERTY 733 (2021); Gruber et. al., *supra* note 15, at 1380; Collins, *Problem*, *supra* note 42, at 1601; Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 222 (2013).

72. *See* McLeod, *Decarceration Courts*, *supra* note 15; at 1691; Collins, *Problem*, *supra* note 42, at 1491; Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. Rev. L. & Soc. Change 37, 50–52 (2000).

record expunged.[73] The detailed, invasive, and onerous conditions of these programs make them easy to fail. People are often reincarcerated not for new offenses, but for violations of technical requirements.[74] As a result, these programs have been criticized as net-widening, pathologizing, and ineffective.[75]

4. Electronic Monitoring and Other Forms of Technological Surveillance

Every state uses some form of electronic ankle monitoring or surveillance, which is most often imposed in addition to probation, parole, or pretrial release.[76] The use of this technology is increasing exponentially, fueled in part by the COVID-19 pandemic.[77] Although electronic monitoring data is limited, numbers from a few jurisdictions reflect its increasing use. For example, in Harris County, Texas, electronic ankle monitoring skyrocketed from a daily average of 27 people on monitors in 2019 to over 4,000 people on monitors in 2021.[78] In Cook County, Illinois, there are over 3,000 people on monitors, which represents almost a 25% increase from the year before.[79] These numbers reflect national trends.[80]

Electronic surveillance includes tracking and analyzing people's location data, monitoring online activity, searching the contents of cell phones, and recording conversations between people.[81] In reviewing agency records governing the use of electronic ankle monitors, a few themes emerged. First, people on monitors are almost always required to remain in their homes unless they receive prior permission to leave from a supervising agent or agency, a rarely straightforward process.[82] For example, visiting the doctor, attending religious services, shopping, and taking children to school all require

73. SCHENWAR, *supra* note 15, at 97.

74. See, Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 Law & Pol'y 51, 52 (2013) (describing probation as a net widener and an alternative to traditional incarceration); Doherty, *supra* at 51, at 345; Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. Rev. 717, 774 (2020).

75. Melissa Gira Grant, *Human Trafficking Courts Are Not a Criminal Justice "Innovation"*, NEW REPUBLIC (Jan. 7, 2020), https://newrepublic.com/article/156135/human-trafficking-courts-not-criminal-justice-innovation [https://perma.cc/KHG2-8TSR]; Gruber et. al., *supra* note 15, at 1380; McLeod, *Decarceration Courts*, *supra* note 15, at 1631; Collins, *supra* note 42, at 1601.

76. *See* Arnett, *supra* note 15, at 663; Avlana K. Eisenberg, *Mass Monitoring*, 90 S. CALIF. L. REV. 123, 161 (2017); Weisburd, *Punitive Surveillance*, *supra* note 2; Patrice James, et. Al., *Cages Without Bars: Pretrial Electronic Monitoring Across the United States*, Shriver Center on Poverty Law, Media Justice, Chicago Appleseed, Sept. 2022.

77. *See* Hager, *supra* note 40; Glaser, *supra* note 40.

78. Mario Díaz, *Harris County Electronic Monitor Population Skyrockets to Nearly 4,000*, HOUSTON NBC (Oct. 15, 2021), https://www.click2houston.com/news/investigates/2021/10/15/harris-county-electronic-monitor-population-skyrockets-to-nearly-4000/ [https://perma.cc/FV75-8FC4].

79. *10 Facts About Electronic Monitoring in Cook County*, Chicago Appleseed (Sept. 2021) https://www.chicagoappleseed.org/wp-content/uploads/2021/11/202109_10-Facts-EM-Cook-County-EM-FINAL-updated.pdf [https://perma.cc/3HVB-HCSH].

80. *Electronic Prisons*, *supra* note 55, at 2.

81. *Id*. at 1.

82. *Id*. at 4.

preapproval.[83] Second, people on monitors have their precise location data tracked, analyzed, and shared with law enforcement and courts. Most of the agency records in our research did not contain any privacy protection for the sensitive data collected through ankle monitors.[84] Third, people on ankle monitors are often subject to both the rules governing court supervision, as well as the additional (and often more restrictive and invasive) rules governing monitoring.[85]

Other forms of technological surveillance are also proliferating. For example, people are often tracked through cellphone applications[86] or are required to wear devices that detect drug or alcohol use.[87] These applications and devices allow for "perfect detection of inevitable imperfections"[88] with rules and requirements, thus raising concerns about hyper-compliance, overcriminalization and the invasiveness of the surveillance.[89] Suspicionless searches of people's electronic devices is also common. In a fifty-state survey of rules governing court supervision, almost a quarter of the programs allow for warrantless searches of electronic devices.[90] Finally, in some places, people on court supervision must agree to have their social media accounts monitored. For example, the rules for probation in Pima County, Arizona state: "I understand all social media accounts (e.g., Facebook, Snapchat, Twitter, etc.) are subject to search. I will provide all passcodes, usernames, and login information necessary as directed by the IPS team."[91] Likewise, people on parole in Vermont must "provide access to any social networking sites [they] participate in to [their] Parole Officer."[92]

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83. *Id*. at 6.

84. *Id.* at 9.

85. Sandra Susan Smith & Cierra Robson, *Between a Rock and a Hard Place: The Social Costs of Pretrial Electronic Monitoring in San Francisco*, 10–11, Harvard Kennedy School, Faculty Research Working Paper Series (Sept. 2022).

86. Molly Osberg & Dhruv Mehrotra, *When Your Freedom Depends on an App*, GIZMODO (Apr. 27, 2020), https://gizmodo.com/when-your-freedom-depends-on-an-app-1843109198 [https://perma.cc/8DDC-5M92]; Kentrell Owens, Anita Alem, Franziska Roesner & Tadayoshi Kohno, *Electronic Monitoring Smartphone Apps: An Analysis of Risks from Technical, Human-Centered, and Legal Perspectives*, USENIX (Aug. 2022), https://www.usenix.org/conference/usenixsecurity22/presentation/owens [https://perma.cc/8V6X-D7DD].

87. Maya Dukmasova, *Cook County Judge Vazquez's Heavy Use of Sobriety Monitor Highlights Oversight Gaps*, INJUSTICE WATCH (Dec. 8, 2021), https://www.injusticewatch.org/news/judicial-conduct/2021/judge-vazquez-scram-monitor/ [https://perma.cc/BYZ7-NRHU].

88. Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 764.

89. *Id.; see also* Osberg & Mehrotra, *supra* note 86; Dukmasova, *supra* note 87; *Jay-Z Invests in Company That Tracks Parolees With GPS Software*, BLACKBUSINESS.COM (May 30, 2019), https://www.blackbusiness.com/2019/05/jayz-invests-promise-company-tracks-parolees-gps-software.html [https://perma.cc/9CY2-QP4U]; Glaser, *supra* note 40.

90. Weisburd, *Carceral Control*, *supra* note 53, at 13.

91. *Id.*

92. *Id.*

B. The Scope of Rights Violations as Punishment

The rights-stripping nature of these punishments exemplifies how punishment exemption operates: these rights-deprivations would likely be unconstitutional if applied outside the context of punishment. Yet, because these rights violations are part of punishment, they escape traditional constitutional scrutiny. To be sure, some extreme features of probation and parole, such as pornography bans,[93] church attendance requirements,[94] penile plethysmography testing,[95] anti-procreation requirements,[96] and full internet bans[97] have been struck down as unreasonable or not sufficiently related to rehabilitation.[98] But these cases are the exception and not the norm. Constraints as extreme as these, as well as more "garden variety" forms of non-carceral punishments are most often upheld. These restrictions are generally upheld with either little or no explanation or, as detailed below, upheld because the restriction "reasonably relates" to a purpose of punishment, or because they are incorrectly categorized as "conditions" or collateral and, therefore, are not punishment.[99]

What follows are some of the ways that non-carceral punishments routinely deprive people of constitutional rights but are nonetheless upheld as constitutional.

1. First Amendment

There are several First Amendment concerns with non-carceral punishment. First, restrictions such as internet bans, surveillance of personal electronic devices, social media account monitoring, cellphone-use limitations, and prohibitions on communicating with certain people all chill free speech.[100] Courts routinely uphold conditions of release that limit a person's right to protest,[101] associate with certain people,[102] and visit certain cultural clubs and social organizations.[103] For people convicted of certain sex offenses, possessing

93. Laura A. Napoli, *Demystifying "Pornography": Tailoring Special Release Conditions Concerning Pornography and Sexually Oriented Expression*, 11 UNIV. N.H. L. Rev. 69, 83 (2013).

94. State v. Evans, 796 P.2d 178, 182 (Kan. Ct. App. 1990).

95. United States v. McLaurin, 731 F.3d 258, 261–62 (2d Cir. 2013).

96. Trammell v. State, 751 N.E.2d 283, 290–91 (Ind. Ct. App. 2001); United States v. Harris, 794 F.3d 885, 889 (8th Cir. 2015).

97. United States v. Ellis, 984 F.3d 1092, 1095 (4th Cir. 2021).

98. *See infra* Part II B for a more detailed explanation of the "reasonably related" standard.

99. *See infra* Part III D.

100. Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 735.

101. *See, e.g.*, State v. Sahr, 470 N.W.2d 185, 194 (N.D. 1991) (fashioning probation conditions curtailing the right to protest); United States v. Lowe, 654 F.2d 562, 567 (9th Cir. 1981) (same); State v. Friberg, 421 N.W.2d 376, 380 (Minn. Ct. App. 1988) (same).

102. *See, e.g.*, *Electronic Prisons*, *supra* note 55; United States v. Romig, 933 F.3d 1004, 1006-07 (8th Cir. 2019) (restriction on engaging in certain associational activities as a special condition of supervised release was constitutional); United States v. Pacheco-Donelson, 893 F.3d 757, 762-763 (10th Cir. 2018) (same); United States v. Evans, 883 F.3d 1154, 1161 (9th Cir. 2018) (same); People v. Lopez, 66 Cal. App. 4th 615, 629–630 (Cal. Ct. App. 1998) (same).

103. *See* Malone v. United States, 502 F.2d 554, 555 (9th Cir. 1974).

pornography is sometimes banned and more general bans or restrictions on internet use are common.[104]

Second, some non-carceral punishments compel certain types of speech.[105] For example, courts have sentenced people convicted of environmental crimes (such as illegal disposal of hazardous waste) to become members of the Sierra Club.[106] Likewise, appellate courts have upheld court-ordered treatment programs, like programs aimed at people convicted of sex offenses or shoplifting, that require participants to make statements about their culpability.[107] Other programs require participants to take polygraph tests.[108] Still other programs require participants to undergo therapy and make statements about their past drug use, mental health, and crimes—raising not only First Amendment concerns, but also Fourth and Fifth Amendment concerns, discussed *infra*.

Third, some non-carceral punishments raise Free Exercise Clause concerns. For example, courts generally uphold requirements to participate in Alcoholics Anonymous ("AA") programs.[109] As others have noted, AA programs are religious in nature and require participants to make statements about God.[110] Prohibitions on leaving residential programs or travel restrictions related to electronic monitoring or house arrest also implicate religious freedom because people cannot freely attend religious services or worship. For example, people on electronic ankle monitors in Milwaukee must obtain specific authorization to attend church and for no more than four hours once a week.[111] Conversely, some programs require participants to attend religious programming.[112]

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104. Napoli, *supra* note 93, at 77–79; Gabriel Gillett, *A World Without Internet: A New Framework for Analyzing a Supervised Release Condition That Restricts Computer and Internet Access*, 79 FORDHAM L. REV. 217, 221 (2010); Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. REV. L. & SOC. CHANGE 663, 674 (2019).

105. *See* Jaimy M. Levine, *"Join the Sierra Club!": Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841, 1842–45 (1994) (collecting cases).

106. *Id.*

107. *See, e.g.*, McKune v. Lile, 536 U.S. 24, 30 (2002) (finding that a rehabilitation program requiring admission of a crime committed was constitutional); Roman v. DiGuglielmo, 675 F.3d 204, 214 (3d Cir. 2012) (same); Searcy v. Simmons, 299 F.3d 1220, 1224 (10th Cir. 2002) (same).

108. Ashley J. Fausset, *Answer Me or Go to Jail: Why Court Ordered Polygraph Testing to Treat Probationers Violates the Fifth Amendment*, 21 AM. U. J. GENDER SOC. POL'Y & L. 455, 455 (2012).

109. *See* O'Connor v. State, 855 F.Supp. 303, 308 (C.D. Cal. 1994); Stafford v. Harrison, 766 F.Supp. 1014, 1018 (D. Kan. 1991); Christopher K. Smith, *State Compelled Spiritual Revelation: The First Amendment and Alcoholics Anonymous as a Condition of Drunk Driving Probation*, 1 WM. & MARY BILL RTS. J. 299, 313 (1992).

110. Michael G. Honeymar, Jr., *Alcoholics Anonymous as a Condition of Drunk Driving Probation: When Does It Amount to Establishment of Religion?*, 97 COLUM. L. REV. 437, 437 (1997); Byron K. Henry, *In "A Higher Power" We Trust: Alcoholics Anonymous as a Condition of Probation and Establishment of Religion*, 3 TEX. WESLEYAN L. REV. 443, 445–47 (1997); Derek P. Apanovitch, *Religion and Rehabilitation: The Requisition of God by the State*, 47 DUKE L.J. 785, 788–90 (1998).

111. Milwaukee Cnty., Wis., Justice Point, Supervision—GPS Policies & Procedures Manual 7 (2016) (on file with author).

112. Appleman, *supra* note 3, at 1.

Fourth, restrictions that limit who people can spend time with raise freedom of association concerns. In my nationwide survey of court supervision rules, well over half of the programs limited or regulated who people could spend time with and (or) be around.[113] Over a quarter of the programs prohibit participants from being around people with a criminal record, a felony conviction, or who are on court supervision themselves.[114]

Some rules also limit social relationships based on vague characteristics.[115] For example, in Alabama, people on parole must "avoid persons or places of disreputable or harmful conduct or character."[116] Likewise, in Kansas, people must "avoid persons and places of harmful and/or disreputable character, including establishments whose primary source of income is from the sale of alcohol."[117]

Travel restrictions that forbid people from leaving a certain geographical area, as well as curfews and prohibitions on who is allowed into someone's home, are very common and raise similar freedom of association concerns.[118] For example, in Montgomery County, Pennsylvania, people on ankle monitors are prohibited from having more than two "visitors in [their] place of residence" per day.[119] For people subject to house arrest or electronic monitoring, attending a political rally without prior approval may be a violation of their release conditions.[120]

2. Fourth Amendment

Non-carceral punishments also violate the Fourth Amendment in ways that would be clearly unconstitutional if applied outside the context of punishment. There are several features of non-carceral punishments that raise Fourth Amendment concerns.

First, most forms of non-carceral punishment involve a substantial loss of privacy. Suspicionless searches of people and homes are common features of

113. Weisburd, *Carceral Control*, *supra* note 53, at 16–17.

114. *Id.*

115. Doherty, *Obey All Laws*, *supra* note 51, at 68.

116. *Electronic Prisons*, *supra* note *55*, at 14.

117. *Id.*

118. *Id.*; *see also* Gordon Hill, *The Use of Pre-Existing Exclusionary Zones As Probationary Conditions for Prostitution Offenses: A Call for the Sincere Application of Heightened Scrutiny*, 28 SEATTLE UNIV. L. REV. 173, 183–84 (2004) (writing about how "Stay Out of Areas of Prostitution" (SOAP) orders "infringe on First Amendment rights of association"; United States v. Many White Horses, 964 F.3d 825, 827 (9th Cir. 2020) ([i]t is well settled that a district court may impose a geographic or residency restriction when it is properly supported by the record and substantively reasonable).

119. MONTGOMERY CO. ADULT PROBATION & PAROLE DEP'T, PENN., RULES, REGULATIONS, AND SPECIAL CONDITIONS OF ELECTRONIC MONITORING SUPERVISION (Aug. 2021) (on file with author).

120. Weisburd, *Punitive Surveillance*, *supra* note 2, at 133.

many non-carceral punishments, most notably, probation and parole.[121] In my nationwide survey of rules governing various forms of court supervision, 65% of the programs provided for physical searches of people's homes, and of those, the vast majority did not require any level of suspicion or a warrant.[122] These searches impact not just the person on supervision, but also everyone in their household, violating what Professor David Sklansky terms "privacy as refuge."[123] There is even less privacy for people in residential programs or halfway homes. For example, the Minnesota Department of Corrections requires that halfway houses "[conduct] searches of residents, their belongings, and all areas of the facility to control contraband and locate missing or stolen property."[124]

Second, non-carceral punishments also often involve various types of body searches, which are traditionally subject to Fourth Amendment constitutional scrutiny. Drug and alcohol testing, for example, are common features of non-carceral punishment.[125] Likewise, people subjected to different forms of non-carceral punishment are often required to wear alcohol-detecting bracelets (known as SCRAM) and submit DNA samples to law enforcement.[126] These are all Fourth Amendment searches that have been upheld as constitutional.[127]

Third, the various forms of electronic surveillance raise significant Fourth Amendment concerns. Near constant location tracking (through GPS ankle monitors), as well as monitoring and searching private social media accounts, and personal electronic devices like computers and cellphones, are all Fourth Amendment searches.[128] As I detail in prior work, electronic surveillance of people on court supervision allows prosecutors and law enforcement, with the click of a mouse, to access immense amounts of personal, otherwise private, data at any time of day and without notice to the person subject to the surveillance.[129]

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121. *See* Samson v. California, 547 U.S. 843, 844 (2006); United States v. Knights, 534 U.S. 112 (2001); Doherty, *Obey All Laws*, *supra* note 51, at 327; John Lassetter, Samson v. California*: "Evil" Suspicionless Searches Become a Part of Everyday Life for Parolees*, 25 LAW & INEQ. 539 (2007); David M. Stout, *Home Sweet Home?! May Not for Parolees and Probationers When It Comes to Fourth Amendment Protection*, 95 KY. L.J. 811 (2007); Tonja Jacobi & Addie Maguire, *Searches Without Suspicion: Avoiding a Four Million Person Underclass*, BYU L. REV. (forthcoming), available at https://ssrn.com/abstract=4199658.

122. Weisburd, *Carceral Control*, *supra* note 53, at 13.

123. David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1113 (2014).

124. Daniel & Sawyer, *supra* note 68.

125. *Electronic Prisons supra* note 55, at 11; Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Use in Probation*, 55 BROOK. L. REV. 1159, 1171–78 (1990).

126. *See, e.g.*, United States v. Kriesel, 508 F.3d 941, 947 (9th Cir. 2007) (DNA samples); Kopkey v. State, 743 N.E.2d 331, 338 (Ind. Ct. App. 2001) (alcohol monitoring).

127. Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 735.

128. Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 745–46; Weisburd, *Punitive Surveillance*, *supra* note 2, 176–77.

129. Weisburd, *Punitive Surveillance*, *supra* note 2, at 175.

Electronic surveillance technology used to monitor people on court supervision continues to develop. In some places, GPS ankle monitors are also equipped with audio features that emanate loud beeping alerts and facilitate two-way conversations between people on the monitors and the agents monitoring them.[130] The audio features mean that anyone within earshot will be alerted to the monitor.[131] Although the Supreme Court has taken a hard line protecting people's location data,[132] those same protections are not extended to people on various forms of criminal court supervision.[133] For the most part, constitutional challenges to electronic surveillance of people on court supervision have been unsuccessful.[134]

3. Fifth and Sixth Amendments

Non-carceral punishments also implicate the right to counsel and the right against self-incrimination. Despite Fifth and Sixth Amendment concerns, courts generally uphold requirements that people on supervision write apology letters, discuss their alleged crime with probation and parole officers, or make other incriminating statements.[135] Because these admissions occur outside of the normal trial process, people are rarely provided counsel. And even if they have a lawyer, the role of defense counsel in problem-solving courts is often limited such that they are not a traditional advocate for their client.[136] Likewise, significant limits on free movement and surveillance of personal electronic devices also impact people's ability to consult with a lawyer, if they have one.

130. Kira Lerner, *Chicago Is Tracking Kids with GPS Monitors That Can Call and Record Them Without Consent*, APPEAL (Apr. 8, 2019), https://theappeal.org/chicago-electronic-monitoring-wiretapping-juveniles/ [https://perma.cc/Z8TX-9RL2]; Joshua Kaplan, *D.C. Defendants Wear Ankle Monitors That Can Record Their Every Word and Motion*, WASH. CITY PAPER (Oct. 8, 2019); *Electronic Prisons*, *supra* note 55, at 9.

131. *Electronic Prisons*, *supra* note 55, at 9.

132. *See* Carpenter v. United States, 138 S. Ct. 2206, 2217 (2018); United States v. Jones, 565 U.S. 400, 415 (2012); Riley v. California, 573 U.S. 373, 403 (2014).

133. *See* Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 745–46.

134. *Id.*

135. *See* Fausset, *supra* note 108; *see also* United States v. Riley, 920 F.3d 200, 205–07 (4th Cir. 2019) (finding that defendant's right to receive a Miranda warning while in custody was not violated because his confession was made during a probation revocation proceeding—not a criminal proceeding); Minnesota v. Murphy, 465 U.S. 420, 440 (1984) (defendant "could not successfully invoke the privilege [against self-incrimination] to prevent the information he volunteered to his probation officer from being used against him in a criminal prosecution"); Ainsworth v. Stanley, 317 F.3d 1, 2 (1st Cir. 2002) (holding that non-carceral "programs [that] require participants to accept responsibility for their crimes" do not violate the Fifth Amendment).

136. Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 53–63 (2000); Tamar M. Meekins, "*Specialized Justice": The Over-Emergence of Specialty Courts and the Threat of the New Criminal Defense Paradigm*, 40 SUFFOLK UNIV. L. REV. 1, 38 (2006).

4. Substantive Due Process

Certain interests are so fundamental that government action cannot infringe upon them "at all . . . unless the infringement is narrowly tailored to serve a compelling state interest."[137] There are several ways that non-carceral punishments implicate fundamental interests protected by Substantive due process.

First, restraints on movement and liberty are perhaps the most common feature of most non-carceral punishments. People on house arrest, electronic monitoring, or in halfway houses or residential treatment centers are generally forbidden from leaving without some form of pre-approval.[138] For example, people on electronic monitors in Louisville, Kentucky, are "required to remain inside of [their] residence at all times . . . Inside means no decks, patios, porches, taking out the trash, etc."[139] Likewise, in Milwaukee, Wisconsin, people on monitors must get authorization to go to the grocery store (for one hour once a week), the laundromat (for two hours once a week), and to vote.[140] Bans on deviating from set schedules, or even taking a different route home, are also common requirements of electronic ankle monitoring.[141]

Limitations on travel and transportation methods are also common. For example, in Alaska, Washington, Vermont and, New Hampshire people on various forms of supervision cannot operate, and in some instances, purchase a car without approval.[142] In New York City, people may be prohibited from using or entering any Metropolitan Transportation Authority subway, train, and bus for up to three years following their release.[143]

Restrictions on where, and with whom, people can live feature prominently in most forms of non-carceral punishment.[144] For example, people on electronic monitoring in Kentucky are not permitted to live in Section 8 housing or public housing. Still other programs forbid or discourage people from living in hotels, shelters, or temporary housing.[145] In many places, people are limited to only living in homes "approved" by the supervising agent.[146] In many places, people cannot live with others who have a criminal record, and in some places, people must obtain permission or provide notice to their supervising agent before someone new moves into their household.[147] These restraints all burden people's liberty interests, as well as the right to bodily autonomy.

137. Reno v. Flores, 507 U.S. 292, 302 (1993).
138. *See Electronic Prisons*, *supra* note 55, at 10; *see also supra* Part I A.
139. *Electronic Prisons*, *supra* note 55, at 7.
140. *Id.*
141. *Id*., at 14.
142. Weisburd, *Carceral Control*, *supra* note 53, at 15.
143. *Id.*
144. *Electronic Prisons*, *supra* note 55, at 17.
145. Weisburd, *Carceral Control*, *supra* note 53, at 15.
146. *Id.* at 15–16.
147. *Id*. at 16.

The aforementioned curfews and limits on travel—such as prohibitions on leaving, entering, or living in a certain home, city, county, or country—infringe on liberty interests. In my nationwide survey of court supervision rules, 80% include some form of travel ban that either forbids people from leaving a certain geographical area or requires permission before leaving.[148] This means people are prohibited from visiting family, friends, and care providers—like doctors—without first getting permission.

Second, restraints on personal and intimate relationships are common features of non-carceral punishments that implicate individual autonomy protected by Substantive due process.[149] In some places, people cannot marry without the approval of their probation or parole officer,[150] a type of restriction that has been expressly rejected in the context of prisons.[151] Relatedly, people on probation for certain sex offenses in Maricopa County, Arizona, must "obtain prior written approval . . . before socializing, dating, or entering into a sexual relationship with any person who has children under the age of 18."[152] And in Virginia, people on monitors are required to "inform persons with whom you have a significant relationship of your sexual offending behavior as directed by your supervising officer and/or treatment provider."[153] These restrictions limit autonomy and simultaneously reinforce the "state's interest in cultivating disciplined sexual citizens."[154]

Non-carceral punishments also impact the right to parent. For example, in some places, courts have upheld restrictions on the ability to have children.[155] These restrictions can take different forms, including permanent sterilization, forced birth control, and general prohibitions against having children.[156] As Professor Alexis Karteron documents, common features of court supervision undermine the right to parent and result in the separation of families.[157] For example, courts routinely uphold limitations on living, visiting, or socializing with your own children[158] or other children.[159] Many programs include such

148. Weisburd, *Carceral Control*, *supra* note 53, at 15.

149. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644 (2015); Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978).

150. *Electronic Prisons*, *supra* note 55, at 14.

151. Turner v. Safley, 482 U.S. 78, 95 (1987).

152. Weisburd, *Carceral Control*, *supra* note 53, at 20.

153. *Id*.

154. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 51 (2012).

155. *See* State v. Kline, 963 P.2d 697, 699 (Or. Ct. App. 1998); State v. Oakley, 629 N.W.2d 200, 214 (Wis. 2001).

156. Devon A. Corneal, *Limiting the Right to Procreate: State v. Oakley and the Need for Strict Scrutiny of Probation Conditions*, 33 SETON HALL L. REV. 447, 470 (2003); Catherine Albiston, *The Social Meaning of the Norplant Condition: Constitutional Considerations of Race, Class, and Gender*, 9 BERKELEY WOMEN'S L.J. 9, 10 (1994).

157. Karteron, *supra* note 59, at 657.

158. *Id.*; *see also* United States v. Myers, 426 F.3d 117, 125 (2d Cir. 2005); United States v. Wolf Child, 699 F.3d 1082, 1091 (9th Cir. 2012).

159. United States v. Roy, 438 F.3d 140, 144-45 (1st Cir. 2006).

rules.[160] Travel restrictions, as well as inclusion and exclusion zones, also undermine the ability of families to live together. Furthermore, these rules generally fail to recognize parents "as part of a broader network of caregivers,"[161] and in doing so, further infringe on family autonomy and caregiving cohesion. By violating the right to bodily integrity, the right to parent, and the "private realm of family life which the state cannot enter,"[162] these rights restrictions appear to be the "price of pleasure."[163]

Third, non-carceral punishments often restrict people's ability to make decisions about their own bodies. For example, mandated drug, alcohol, and mental health treatment, including treatments such as "moral reconation treatment,"[164] are very common, and the failure to participate can be grounds for removal from the program and potential reincarceration.[165] Random drug and alcohol tests are also customary features of non-carceral punishment.[166] Otherwise private medical and mental health records are commonly shared with treatment providers, law enforcement, and courts.[167]

Even seemingly small indignities—such as reporting the use of over-the-counter medication to a probation officer [168]—implicate bodily autonomy. Several programs also have rules related to appearance and dress.[169] In Harris County, Texas, for example, people visiting their probation officer are prohibited from wearing "revealing" clothing, or clothing in "poor taste" including "halters, short shorts, sagging pants, pajamas, house shoes, swimsuits, low cut revealing shirts/blouses, [or] clothing with vulgar language."[170]

Finally, restrictions on people's ability to make decisions about their employment also raise autonomy concerns. The vast majority of non-carceral punishment programs include some sort of restriction on employment, including the need to obtain permission or provide notice before people change jobs, requiring approval for work schedules, and limitations on work hours, or the type of work people can do.[171] These restrictions, in addition to the already existing challenge of finding employment with a criminal record, make it difficult to maintain financial stability and cover court-imposed fees and restitution.[172]

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160. Weisburd, *Carceral Control*, *supra* note 53, at 19–20.

161. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 387 (2008).

162. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

163. Cortney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125, 164 (2018).

164. *See e.g.*, Bexar County, Texas, Mental Health Court Rules (on file with author).

165. Weisburd, *Carceral Control*, *supra* note 53, at 16.

166. *Id.* at 15.

167. *Id.* at 16.

168. *See* Montgomery Co., Penn. Rules governing Monitoring, 2021 (on file with author).

169. Weisburd, *Carceral Control*, *supra* note 53, at 20.

170. *Id.*

171. *Id.* at 21.

172. *See* Anna VanCleave, Brian Highsmith, Judith Resnik, Jeff Selbin & Lisa Foster, *Money and Punishment, Circa 2020*, Arthur Liman Ctr. for Pub. Int. Law, Fines & Fees Just. Ctr. & Policy Advoc. Clinic at U.C. Berkeley Sch. of Law (2020) (describing fees); A Better Path Forward for

C. Cumulative Impact of Rights Violations

Although often heralded as "decarcerative" by progressives and conservatives alike, non-carceral punishments risk reinforcing the precise racial and economic inequities that decarceration efforts seek to address. Almost all non-carceral punishment "restricts liberty, limits privacy, disrupts family relationships, and jeopardizes financial security."[173] As such, the erasure of rights furthers the racial and economic subordination endemic to the carceral state. In addressing the impact of electronic ankle monitoring, for example, Professor Chaz Arnett exposed the extent to which monitoring "entrench[es] a marginalized second-class citizenship."[174] Left unchecked, the rights restrictions associated with non-carceral punishments facilitate legalized and institutionalized dehumanization,[175] or what Professor Khiara Bridges terms "informal disenfranchisement," which refers to the "process by which a group has been formally bestowed with a right is stripped of that very right by techniques that the Court has held to be consistent with the Constitution."[176]

While institutional anti-Black racism has always featured prominently in the functioning of the criminal legal system, oppression along other intersecting axes, such as gender, age, disability, immigration status, gender identity, sexual orientation, and housing status are also reinforced through the rights infringement.[177] Non-carceral punishments often operate as "reformist reforms" that reinforce more visibly racialized subordination and social marginalization.[178] Thanks to the efforts of activists, community organizers, researchers, and reporters, there is now a deeper understanding of the impact of rights infringements.[179]

Criminal Justice, Brookings-AEI Working Group, at 71 (Apr. 24, 2021) (describing the challenge of finding employment after release from prison).

173. Kilgore et al., *supra* note 16.

174. Arnett, *supra* note 15, at 653.

175. *See* DAYNA BOWEN MATTHEW, JUST HEALTH (2022).

176. KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 13 (2017) (emphasis omitted).

177. *See* Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1435 (2012); Liat Ben-Moshe, *The State of (Intersectional Critique of) State Violence*, 46 WSQ: WOMEN'S STUD. Q. 306, 306 (2018); I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159, 183–84 (2019); Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 FORDHAM L. REV. 2999, 3002 (2015).

178. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007).

179. *See The Challenging E-Carceration Project*, CHALLENGING E-CARCERATION (last visited Dec. 4, 2021), https://www.challengingecarceration.org/ [https://perma.cc/66GL-2QSY]; Eric Borsuk, *Inside the Absurd Limbo of a Post-Prison Halfway House*, VICE (Feb. 9, 2015); *Listen to the Podcast 'Document: Supervision'*, Podcast, NEW HAMPSHIRE PUBLIC RADIO, (Apr. 13, 2021), https://www.nhpr.org/podcasts/2021-04-13/listen-to-the-podcast-document-supervision [https://perma.cc/E6V2-7UX2]; *Chicago Rapper, Comedian Shares His Experience On Electronic Monitor*, NPR (Apr. 15, 2021), https://will.illinois.edu/21stshow/story/mohawk-johnson-house-arrest-electronic-monitoring [https://perma.cc/W86D-KWLF]; Sandra Susan Smith and Cierra Robson, Between a Rock and a Hard Place*: The Social Costs of Pretrial Electronic Monitoring in San Francisco*, Harvard Kennedy School, Faculty Research Working Paper Series, September 2022.

In many respects, the various forms of non-carceral punishment mimic, even if they do not replicate, "the violence inherent in the relationship between the state and the physically incarcerated individual."[180] The deployment of non-carceral punishments reflects the ultimate "governing through crime."[181] The restrictive nature of non-carceral punishment may be even harsher than prison in some circumstances. Despite the challenge of obtaining a job or housing with a criminal record, or while wearing a visible ankle monitor, people subject to non-carceral punishment are often ordered to obtain a job, seek medical care, and find housing, all while complying with a myriad of mandated treatment programs and other requirements.[182] The way that non-carceral punishment expects people to do more with less may explain why some people prefer short terms of incarceration over more lengthy non-carceral punishments.[183]

Rights infringements cause both individual and collective harm. On an individual level, losing the right to move, parent, travel, speak freely, live, socialize with loved ones, or control one's own body and home, undermines dignity and personal autonomy. The near-constant surveillance and limited privacy afforded to those subject to non-carceral punishment trigger related social and emotional harms.[184] As one teenager on an electric monitor explained, she could not hide the ankle monitor and the gaze of her teachers and classmates got to her: "[y]ou're trying to move on with your life, but you have this black box around your ankle."[185]

Privacy scholars have long warned that government surveillance, as well as surveillance by private companies, chills civic engagement and civil liberties, and strips people of personal agency, autonomy, and voice.[186] The lack of privacy associated with non-carceral punishment also reinforces the myriad ways that informational and intimate privacy primarily belongs to people *not* subject to non-carceral punishments.[187]

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180. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1396 (2008).

181. *See generally* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

182. SCHENWAR, *supra* note 15, at 15. For a vivid description of the restrictive nature of transitional programs, *see* Ocen, *supra* note 49.

183. *See* Klingele, *supra* note 56 at 1059 & n.188; Eric Wodahl et. al., *Offender Perceptions of Graduated Sanctions*, CRIME & DELINQUENCY, 1185–1210 (2013); Peter Wood & Harold Grasmick, *Toward the Development of Punishment Equivalencies: Male and Female Inmates Rate the Severity of Alternative Sanctions Compared to Prison*, JUSTICE QUARTERLY (1999).

184. *See* Weisburd, *Punitive Surveillance*, *supra* note 2, at 14-37; Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 757.

185. SCHENWAR, *supra* note 15, at 38.

186. *See, e.g.*, Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. REV. 793, 845 (2022); Mary Anne Franks, *Democratic Surveillance*, 30 HARV. J.L. & TECH. 425, 441 (2017); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1935 (2013); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject As Object*, 52 STAN. L. REV. 1373, 1423 (2000).

187. *See, e.g.*, KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS 16, 89 (2017) ("In theory, the contracted Fourth Amendment fails to protect the privacy of both rich and poor alike. However, the Fourth Amendment's contraction is simply a much more relevant fact for poor individuals."); I. Bennett Capers, *Race, Policing, and Technology*, 95 N.C. L. REV. 1241, 1285 (2017)

The collective harm is also significant. The erasure of rights impacts not just the person subject to carceral control, but also families and communities.[188] For example, conditions that restrict parent-child relationships or ban contact with people with criminal records break families apart and "effectively cut a supervisee off from large swaths of his entire community."[189] Relatedly, for people subject to non-carceral punishment, the "home is opened up as never before"[190] and exposes entire families and homes—the paradigmatic private place—to carceral surveillance.[191]

D. Structural Features that Facilitate Punishment Exemption

Punishment exemption has flourished in part because of courts' historically deferential approach to evaluating rights restrictions, discussed *infra*. The failure of courts to engage—much less address—punishment exemption also stems from several structural features of non-carceral punishment; features that have the effect of shielding punishment from judicial scrutiny. As a result, courts have been able to avoid resolving the constitutionality of punishment exemption.

1. Barriers to Legal Challenges

Efforts to limit litigation have made legal challenges to non-carceral punishment virtually impossible.[192] Many rights-stripping punishments exist—and expand—because people subject to non-carceral punishments, like people in prison, are deprived of the resources necessary to bring effective legal challenges.[193] Factors such as the lack of access to counsel, the difficulty of obtaining evidence, the challenges of pro se litigation, the inaccessibility of civil trial courts, and qualified immunity make constitutional challenges difficult.[194]

There are also few opportunities to meaningfully object to the rights-restricting features of non-carceral punishment. Because non-carceral

("privacy has never been distributed equally."); SCOTT SKINNER-THOMPSON, PRIVACY AT THE MARGINS 16 (2021).

188. *See* Doherty, *supra* note 51; Tonja Jacobi et. al., *supra* note 59; Arnett, *supra* note 15, at 644–718; Weisburd, *Punitive Surveillance*, *supra* note 2; James Kilgore, *Repackaging Mass Incarceration*, COUNTERPUNCH (June 6, 2014), https://www.counterpunch.org/2014/06/06/repackaging-mass-incarceration/ [https://perma.cc/94NL-Q9MH]; SCHENWAR, *supra* note 15.

189. Karteron, *supra* note 59, at 652.

190. R. Corbett & Gary T. Marx, *Critique: No Soul in the New Machine: Technofallacies in the Electronic Monitoring Movement*, 8 JUST. Q. 399, 401 (1991).

191. In related work, I draw on my empirical research on non-carceral punishments to expose the various ways the carceral state extends into, and transforms, the home. *See* Weisburd, *The Carceral Home* (forthcoming Boston Univ. L. Rev.)(on file with author).

192. Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L. J. 1385, 1392–94(2022).

193. *See id.* at 1434; David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 1005 (2016).

194. *See* Littman, *Free-World Law*, *supra* note 192, at 1447; *see also* Anna Carpenter, Colleen Shanahan, Jessica Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO L. J. 509, 513–15 (2022).

punishment is often presented as an alternative to incarceration, there is no obvious opportunity to challenge the sanction and the accused person's bargaining power is weak.[195] In the context of supervised release, people convicted of crimes "will accept nearly any arrangement as long as it provides them the opportunity to avoid going to prison."[196] When the contours of non-carceral punishment are determined by third parties, discussed *infra*, there is virtually no way to challenge the rights restrictions short of a lawsuit.[197] These barriers to legal challenges essentially immunize the rights-stripping nature of punishment from meaningful scrutiny. Put differently, punishment exemption has flourished in part because challenges to it are far and few between.

2. Delegation to Third Parties

The delegation of non-carceral punishment to third-party entities, be it private companies, nonprofits, or government agencies, also explains the lack of regulatory and constitutional protections.[198] Although courts set probation conditions, it is more often parole boards, treatment centers, specialty courts, government agents, and private companies that determine the precise contours of non-carceral punishment.[199] These entities, not courts, are responsible for rule making, enforcement, and sanctions.

The largely unregulated and nontransparent role of private industry complicates the deference afforded to the third-party entities tasked with administering non-carceral punishment.[200] For example, in some states, probation services are outsourced to private companies—often the same companies that own and operate private prisons and electronic ankle monitoring.[201] While government entities are subject to at least some forms of judicial and regulatory oversight, albeit minimal, the same cannot be said for privately-run non-carceral programs. These programs are rarely transparent about their operation, nor are they required to be as they are not governed by public records laws.[202] With limited involvement of state actors, courts' ability to monitor non-carceral programs is further curtailed.

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195. *See* Weisburd, *Punitive Surveillance*, *supra* note 2, at 22.

196. Doherty, *Testing*, *supra* note 51, at 1704.

197. *See* Weisburd, *Punitive Surveillance*, *supra* note 2, at 117.

198. *Id.* at 112.

199. *See* Joan Petersilia, *Probation in the United States*, 22 CRIME & JUST. 149, 153 (1997); Collins, *supra* note 42; Doherty, *supra* note 51, at 327.

200. Murphy, *supra* note 180, at 1399–400; Malcolm M. Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System—An Account of Convict Transportation and Electronic Monitoring*, 17 CRIMINOLOGY, CRIM. JUST. L. & SOC'Y 1, 24 (2016).

201. *"Set up to Fail:" The Impact of Offender-Funded Private Probation on the Poor*, HUMAN RTS. WATCH (Feb. 20, 2018), https://www.hrw.org/report/2018/02/21/set-fail/impact-offender-funded-private-probation-poor# [https://perma.cc/R9FH-LA69]; Weisburd, *Punitive Surveillance*, *supra* note 2, at 122.

202. Weisburd, *Punitive Surveillance*, *supra* note 2, at 122.

The interests and motivations of non-court institutions that oversee non-carceral punishments —such as agencies, nonprofits, and private companies— are also not the same as those of criminal courts.[203] As Professor Eisha Jain has noted, "the organizational logic that motivates key institutions is distinct from - and often in tension with - the sentencing interests of the state."[204] Just like the concern that private prisons prioritize profits over people,[205] there is a similar concern that private companies that market, sell, and operate various forms of non-carceral punishments are motivated primarily by financial gain.

Delegation is especially troubling in "authoritarian institutions" where "serious abuses of power and violations of rights are likely to occur" and the political process is unlikely to provide any meaningful protections.[206] As Justice Brennan warned in a dissent pertaining to restrictions on religion in prison, "we should be especially wary of expansive delegations of power to those who wield it on the margins of society. Prisons are too often shielded from public view; there is no need to make them virtually invisible."[207] The concern about expansive delegation applies to carceral institutions that exist outside of prison as well. Like barriers to legal challenges, this delegation has the net effect of judicial avoidance: courts need not resolve, much less address, punishment exemption if the issue is not before them.

3. Lack of Regulatory Protections

The operation and management of both carceral and non-carceral punishments are often beyond the reach of not just court oversight, but other regulatory regimes and agencies that oversee certain industries, like OSHA or the FDA. In the prison setting, services related to food, medical care, and telecommunications, for example, often evade the regulatory oversight that would otherwise apply outside of prison.[208] The same concerns extend to non-carceral punishments, where halfway houses, electronic monitors, and mandated

203. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2094 (2011).

204. Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1385 (2018).

205. *See* Timothy Williams, *Inside a Private Prison: Blood, Suicide and Poorly Paid Guards*, NY TIMES (Apr. 3, 2018) https://www.nytimes.com/2018/04/03/us/mississippi-private-prison-abuse.html [https://perma.cc/N3RN-TNSL].

206. Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 458 (1999); *see also* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT. R. 245, 246 (2012) (documenting the expansive judicial deference afforded to prisons and their officials); Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986-2010*, 5 UC IRVINE L. REV. 89, 103 (2015) (writing about the trend of "persistent judicial deference to the claims and assertions of prison administrators in the context of prison conditions challenges in and out of supermaxes."); Daniel Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941, 1014 (1999) ("Although the deference principle hovers over constitutional jurisprudence, it is explicitly invoked and practiced in a particular group of cases involving a common set of contexts[,]" including prison).

207. O'Lone v. Estate of Shabazz, 482 U.S. 342, 358 (1987) (Brennan, J., dissenting).

208. *See* Littman, *Free-World Law*, *supra* note 192.

treatment programs are also under- or un-regulated.[209] This is not an accident. As is true with prisons, the failure of all branches of government to regulate carceral institutions—both prisons and punishment outside of prison— reflects a "palpable hostility and contempt" towards people subjected to carceral control.[210] As a result, people subject to carceral control—be it in prison or not—are left in a "deregulatory state of exception."[211]

The private "alternatives to incarceration" industry is especially under-regulated. There are no regulations, for example, governing the production and operation of electronic ankle monitors or SCRAM devices, despite the fact that people wear these devices 24/7 on their bodies, and that the devices sometimes cause physical injuries.[212] Likewise, as journalists have pointed out, state and federal regulators routinely ignore halfway houses and rehabilitation centers to the detriment of people in the programs.[213] The exorbitant fees for various "alternatives," combined with the profit motives of private corrections entrepreneurs, also raise concerns about potential violations of federal antitrust and antimonopoly laws.[214]

In short, there is no meaningful accountability when the operation of non-carceral punishment is fully delegated to private companies or third parties. When the state incarcerates someone in prison, the state is—in theory—responsible for the wellbeing, health, and safety of that person.[215] The same cannot be said of non-carceral punishments, where the wellbeing of participants rests entirely with third parties and private companies. The lack of regulatory protection, and the distance between courts and the operation of these punishments, also helps explain why punishment exemption has escaped judicial review.

II.
THE CASE AGAINST PUNISHMENT EXEMPTION

Having established the rights-restricting nature of non-carceral punishment, this Part makes the case that there is no doctrinal basis to exempt rights-restricting punishments from traditional constitutional review that would otherwise apply outside of the punishment context. The case against punishment

209. *See* Appleman, *supra* note 3.

210. Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 17 ANN. REV. OF CRIMINOLOGY 22, 155 (2022).

211. Littman, *Free-World Law*, *supra* note 192, at 5.

212. *See* Dukmasova, *supra* note 87.

213. *See, e.g.*, *"American Rehab" and the Dark History of Rehabilitative Treatment*, NPR (July 9, 2020, 2:33 PM), https://www.npr.org/2020/07/09/889415007/american-rehab-and-the-dark-history-of-rehabilitative-treatment [https://perma.cc/C283-9E6X].

214. Littman, *Free-World Law*, *supra* note 192, at 29. *See also* I. Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 1, 14 (2023) ("Prison markets are notoriously anticompetitive because states generate revenue by outsourcing carceral markets to private firms with the promise of monopolistic control,").

215. Murphy, *supra* note 180, at 1400.

exemption is most vivid in the context of non-carceral punishment, but many of the reasons to reject punishment exemption apply to prison sentences as well.

As a threshold matter, the absence of clear doctrinal support for punishment exemption stems, at least in part, from a profound disagreement about the legal origins of liberty. In a doctrinal tug-of-war, Justices Stevens, Brennan, and Marshall generally viewed liberty as an unalienable right which is not easily extinguishable. Just as an incarcerated person "[does] not shed all constitutional rights at the prison gate,"[216] neither does a person subject to non-carceral punishment. In contrast, Justices White, Rehnquist, and Thomas viewed liberty as being rightly extinguished by incarceration, and to the extent that liberty interests remain, they are derived from federal or state law creating entitlement.[217] This approach is consistent with the concept of departmentalism, in which ultimate authority in constitutional interpretation resides with "the people themselves."[218]

This debate helps explain why no court has offered a sound explanation or justification for punishment exemption. Instead, most courts examining non-carceral punishments either assume that no constitutional scrutiny applies or apply the "reasonably related" standard—but neither approach explains *why* traditional constitutional scrutiny does not apply. Although Justices Thomas and Scalia stated in a dissent that the Court has consistently refused to apply strict scrutiny to prison sentences,[219] and some state courts have explicitly refused to apply strict scrutiny to the deprivation of rights associated with punishment,[220] there is no solid doctrinal explanation, much less justification, for this position. This Part exposes these doctrinal infirmities.

A. No General "Punishment Exception" to the Constitution

This Article's central claim is that a criminal conviction does not give the state license to impose rights deprivations as punishment, so long as such deprivations are not cruel and unusual. As Justice Stevens warned in his dissent in *Samson,* there is no history of courts imposing the deprivation of Fourth Amendment rights as a "punitive measure"[221] and as such, parole search

216. Sandin v. Conner, 515 U.S. 472, 486 (1995).

217. Judith Resnik, *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 NW. U. L. REV. 45, 108-10 (2020).

218. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 201 (2004).

219. Foucha v. Louisiana, 504 U.S. 71, 118 (1992) (Thomas, J., dissenting).

220. *See, e.g.*, Oakley, 629 N.W.2d at 207 (refusing to apply strict scrutiny to an anti-procreation condition of probation); State v. Talty, 814 N.E.2d 1201, 1209 (Ohio 2004) (same); Commonwealth v. Power, 650 N.E.2d 87, 91 (Mass. 1995) (refusing to apply strict scrutiny to a First Amendment challenge to a probation condition); In re Winton, 474 P.3d 532, 535 (Wash. 2020) (refusing to apply strict scrutiny to a condition of release that limited travel).

221. *See* Samson v. California, 547 U.S. 843, 864 (2006); *infra* Part II. C.

conditions are not immune from close constitutional scrutiny.[222] This warning applies equally to all forms of punishment and is consistent with prior Supreme Court proclamations that there is "no iron curtain drawn between the Constitution and the prisons of this country."[223] There is also no such curtain between the Constitution and non-carceral punishments.

It follows that there is no textual support for punishment to escape traditional constitutional rules that would otherwise apply. Specifically, there is no suggestion, much less clear statement, within the Constitution that punishments are exempt from normal levels of constitutional scrutiny. In fact, the Framers used clear categorical language when addressing which specific rights could be infringed upon or circumscribed and why. The only two rights and privileges singled out by the Constitution's drafters as capable of being legally abridged *as punishment* are the right to vote and the right to be free from slavery and involuntary servitude.[224] Section Two of the Fourteenth Amendment provides that the right to vote may be "abridged" upon "participation in rebellion, or other crime,"[225] and the Thirteenth Amendment prohibits slavery and involuntary servitude "except as a *punishment* for crime."[226]

Extensive criticism notwithstanding, exploitative prison labor and felony disenfranchisement have been upheld as legally permissible forms of punishment.[227] To be sure, these provisions are rightly questioned and challenged,[228] and I agree with scholars and policy makers calling for their

222. A handful of scholars have suggested that probation conditions be subject to more limitations, but the doctrine has yet to change. *See* Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 161 (2000); Phaedra Athena O'Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet Letter Probation Conditions*, 77 N.C. L. REV. 783, 786 (1999).

223. Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974).

224. U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 2.

225. Richardson v. Ramirez, 418 U.S. 24, 42 (1974) (upholding permanent disenfranchisement of people convicted of crimes).

226. U.S. CONST. amend. XIII, § 1.

227. Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 126–27 (2019); Michael Morse, *The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida*, 109 CALIF. L. REV. 1143, 1144 (2021); Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 628 (2008); James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. Rev. 1465, 1533 (2019); Wafa Junaid, *Forced Prison Labor: Punishment for a Crime?*, 116 NW. L. REV. 1099, 1122–26 (2022); ACLU & UNIV. OF CHICAGO LAW SCHOOL GLOBAL HUMAN RIGHTS CLINIC, CAPTIVE LABOR: EXPLOITATION OF INCARCERATED WORKERS, at 48 (2022) https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf.

228. *See, e.g.*, Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 908 (2019); Eric J. Miller, *Foundering Democracy: Felony Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT'L BLACK L.J. 32, 33 (2005); Wafa Junaid, *Forced Prison Labor: Punishment for A Crime*?, 116 N.W. U. L. REV. 1099, 1134 (2022).

abolition.[229] Yet under basic canons of construction, these two provisions undermine the idea that there is an *implicit* or *general* punishment exception to the Constitution.[230] The failure of the drafters to use limiting language elsewhere suggests that a conviction cannot be the sole grounds to deny people rights.

Some might argue that if the text of the Thirteenth Amendment in fact allows involuntary servitude and slavery as punishment, it follows that *any* rights-deprivation as punishment is permitted under the Constitution, since "lesser" punishments are less rights-depriving than enslavement. Yet even accepting the textual support for such a position—a reading that scholars debate[231]—current punishment jurisprudence rejects slavery and "civil deaths" as punishment for a crime, addressed *infra*.

To be sure, the Thirteenth and Fourteenth Amendments are arguably distinguishable from other constitutional provisions because they were part of the Reconstruction compromise. As addressed more thoroughly by other scholars, the Thirteenth Amendment both ended the formal institution of slavery but also insured the entrenchment of race and class-based hierarchies with "Black codes," convict leasing, and other mechanisms that perpetuated slavery through the Punishment Clause.[232] Yet, if we take at face value the general view of courts that the punishment clause "strips convicted persons of Thirteenth Amendment protection,"[233] it follows that there is no other *general* punishment exception beyond the punishment clause.

Moreover, the elimination of rights for people subject to carceral control reflects the "badges and incidents of slavery"[234] that the Thirteenth Amendment forbids.[235] As discussed in greater detail in Part IV, *infra*, the concerns that led

229. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 105 (2019); McLeod, *Prison Abolition*, *supra* note 33, at 1196-97; Brakkton Booker, *Democrats Push 'Abolition Amendment' to Fully Erase Slavery from U.S. Constitution*, NPR (Dec. 3, 2020), https://www.npr.org/2020/12/03/942413221/democrats-push-abolition-amendment-to-fully-erase-slavery-from-u-s-constitution [https://perma.cc/KD82-3K5H]; *Tennessee Senate Oks Bid to Remove 'Slavery' as Punishment*, AP NEWS (Mar. 15, 2021), https://apnews.com/article/tennessee-us-news-slavery-bbfc5729dac6dd769c9110c284993371 [https://perma.cc/N72V-LGJ5].

230. The view that omissions are deliberate reflects the *expressio unius* canon of statutory interpretation, meaning "expressing one item of [an] associated group or series excludes another left unmentioned." United States v. Vonn, 535 U.S. 55, 65 (2002).

231. *Compare* Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 439 (2009) (arguing that practice of forced labor cannot "rightfully be called punishment, for the purposes of escaping the Thirteenth Amendment's prohibitions, simply by virtue of it occurring in prison"), *with* Theodore R. Johnson, *Thank God and the GOP for the 13th Amendment*, NATIONAL REVIEW (Nov. 19, 2015), https://www.nationalreview.com/2015/11/gop-abolition-slavery-150-anniversary/ [https://perma.cc/F36U-GYE6] (arguing for a more expansive reading of the Thirteenth Amendment that permits involuntary servitude as criminal punishment, so long as it is not cruel and unusual).

232. *See, e.g.*, SCHENWAR, *supra* note 15, at 35; Goodwin, *supra* note 228 at 935; Pope, *supra* note 227, at 1534.

233. Pope, *supra* note 227, at 1534.

234. Jones v. Mayer, 392 U.S. 409, 439 (1968).

235. Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 145 (2022).

to the passage of the Reconstruction Amendments directly undermine exempting punishment from traditional constitutional protections. In particular, the brutal practices of separating enslaved families and the inhuman treatment of enslaved people motivated the passage of the Reconstruction Amendments.[236] Yet today, Professor Brandon Hasbrouck explains, liberty restrictions related to punishment strip people of "fundamental privileges and immunities of citizenship, including restrictions on speech, family relations, and legal status—all of which are textbook examples of badges and incidents of slavery."[237] For all these reasons, the Reconstruction Amendments—and in particular the Thirteenth Amendment—undermine the proposition that punishments are categorically exempt from traditional constitutional scrutiny.

B. The "Right to Have Rights"

On multiple occasions, the Supreme Court has made clear that the protections of the Free Exercise Clause, the Due Process Clause, and the Equal Protection Clause all apply to people subjected to various forms of non-carceral punishment,[238] and that people in the criminal legal system do not "forfeit all constitutional protections."[239] Despite this strong categorical language, punishment exemption persists.

There is no obvious doctrinal support for the argument that punishment or a conviction alone fully extinguishes the right to have rights.[240] As the Ninth Circuit noted, being on probation does not "extinguish" Fourth Amendment rights and a "conditional releasee may lay claim to constitutional relief, just like any other citizen."[241] There is nothing special about state action in the form of punishment that exempts it from scrutiny. The rules of constitutional law should be the same across contexts: the relevant constitutional scrutiny should apply to all state action, regardless of whether the state action is categorized as punishment, regulation, or a collateral consequence.[242] Focusing on non-carceral punishments in particular highlights why rights-violating punishment, and

236. Peggy Cooper Davis, *The Reconstruction Amendments Matter When Considering Abortion Rights*, WASH. POST (May 3, 2022), https://www.washingtonpost.com/outlook/2022/05/03/reconstruction-amendments-matter-when-considering-abortion-rights/ [https://perma.cc/Y8MK-5RSB].

237. Hasbrouck, *supra* note 235, at 145–46.

238. *See* Morrissey, 408 U.S. at 482 ("[T]he liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty."); Griffin v. Wisconsin, 483 U.S. 868, 875 (1987) ("[The] degree of impingement upon [a probationer's] privacy . . . . is not unlimited . . . ."); United States v. Knights, 534 U.S. 112, 119 (2001) ("Inherent in the very nature of probation is that probationers 'do not enjoy the absolute liberty to which every citizen is entitled.'") (citation and internal quotations omitted); Johnson v. California, 543 U.S. 499, 515 (2005) (holding that strict scrutiny standard governed equal protection challenge of race-based prison segregation).

239. Bell v. Wolfish, 441 U.S. 520, 545 (1979).

240. *See* Zuckerman *supra* note 14, at 27.

241. United States v. Kincade, 379 F.3d 813, 835 (9th Cir. 2004).

242. See *infra* Part III D.

exempting punishment from traditional constitution review, is not legally justified.

There are several reasons to subject non-carceral punishment to traditional levels of constitutional scrutiny. First, simply erasing rights as punishment is a form of "civil death," defined as a "form of punishment" that "extinguish[es] most civil rights of a person convicted of a crime and largely put[s] that person outside the law's protection"[243] While Civil Death was a common colonial era punishment, it is no longer accepted. In 1997, the Supreme Court held that "the ancient common law doctrine of 'outlawry,' and . . . 'civil death,' . . . could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen."[244] Likewise, in 1977, Justice Marshall explained in a dissent that the Court has repeatedly rejected the view once held by state courts that "prisoners were regarded as 'slave(s) of the State,' having not only forfeited [their] liberty, but all [their] personal rights . . .."[245] As Justice Stevens explained in a separate case:

> [I]f the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty at the very minimum the right to be treated with dignity which the Constitution may never ignore.[246]

This concern is not limited to prisons and applies equally to non-carceral punishments as well.

Restrictions on Second Amendment rights have garnered similar concerns about targeting and eliminating rights for people with criminal convictions.[247] For example, before joining the Supreme Court, then-Seventh Circuit judge Amy Coney Barrett observed in a dissent that "[f]ounding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons."[248] As she explained, history teaches us that "a felony conviction and the loss of all rights did not necessarily go hand-in-hand."[249] While most Second Amendment restrictions are categorized as collateral consequences or civil restraints, Justice Barrett's position suggests deep skepticism of any firearms restriction (punitive

243. Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. PA. L. REV. 1789, 1790 (2012).

244. Hovey v. Elliott, 167 U.S. 409, 444 (1897).

245. Jones v. N. Carolina Prisoners' Lab. Union, Inc., 433 U.S. 119, 139 (1977) (Marshall, J., dissenting) (citing Ruffin v. Commonwealth, 62 Va. 790, 796 (1871)) (modifications in original).

246. Meachum v. Fano, 427 U.S. 215, 233 (1976).

247. For a detailed analysis of the tension between the right to bear arms and criminal laws limiting gun possession, see Alice Ristroph, *The Second Amendment in a Carceral State*, 116 NW. U. L. REV. 203 (2021).

248. Kanter v. Barr, 919 F.3d 437, 451 (7th Cir. 2019), abrogated by New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

249. *Id.* at 461.

or collateral) that is triggered solely by someone's status as a "felon."[250] Of course, there is nothing exceptional about the right to bear arms as compared to other fundamental rights. In theory, Justice Barrett's concern extends to all rights and undermines the legitimacy of punishment exemption generally. At the very least, it suggests a conflict between the protection afforded to Second Amendment rights as compared to other rights.

Second, as a doctrinal matter, the loss of rights in prison, or in non-carceral settings, is most often justified because maintaining the rights would be inconsistent with the operation of the punishment. But the rights are not taken away *as the punishment itself*. As Professor Sherry Colb explains in the context of prisons, "we do not sufficiently scrutinize the penalty of incarceration as a deprivation of the fundamental right to be free from physical confinement."[251] The same can be said of non-carceral punishment. Indeed, scholars have rightly called for heightened constitutional scrutiny of both punishments and collateral consequences alike, regardless of their label as punishment or not.[252] There is nothing exceptional about criminal punishments that justifies unique constitutional treatment.[253]

Third, Supreme Court punishment and prison jurisprudence offers no clear categorical rule that exempts rights-violating punishments from traditional constitutional review. Instead, the caselaw reflects ongoing tension about what scrutiny is due.[254] On one hand, the Court appears to have rejected the applicability of strict scrutiny to punishment. In *Chapman v. United States*, the Court entertained a Substantive due process challenge to a mandatory five-year sentence that was based on the weight of the container of drugs plus the drugs, as compared to the weight of the drugs without the container. The Court rejected the challenge and upheld the sentence under a rational basis review.[255] Notably, the Court did not explain why it applied rational basis review and not strict scrutiny. In one short paragraph, the Court simply explained that once a person is convicted of a crime, courts may impose whatever punishment is authorized

250. *See also* United States v. Rahimi, No. 21-11001, 2023 WL 1459240, *179 (5th Cir. Feb. 2, 2023) (finding that federal statute criminalizing gun possession for someone subject to a domestic violence restraining order violates the Second Amendment).

251. Colb, *supra* note 14, at 783; *see also* Zuckerman *supra* note 14, at 29 (connecting the due process clause to incarceration as a deprivation of bodily autonomy).

252. *See* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 306-09 (2015); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1807 (2012); Zuckerman, *supra* note 14, at 30.

253. Sandra G. Mayson, *The Concept of Criminal Law*, 14 CRIM. L. & PHIL. 447, 448 (2020) (explaining that there is no clear consensus about what differentiates criminal law from other areas of law).

254. See Zuckerman, *supra* note 14, at 305 (noting that the Court has "never fully explained why incarceration does not trigger strict scrutiny.")

255. Chapman v. United States, 500 U.S. 453, 467 (1991).

by statute so long as it is not cruel and unusual and not irrational under rational basis review.[256]

On the other hand, *Chapman's* legacy is as uncertain as it is unclear. In the years after *Chapman*, the Court expressed concern that any institutionalization of an adult "triggers heightened, substantive due process scrutiny"[257] and requires a "'sufficiently compelling' government interest."[258] To be sure, these concerns appear in the context of civil commitment—not criminal incarceration. For example, in striking down the ongoing civil commitment of an insanity acquittee, the majority in *Foucha v. Louisiana* distinguished civil commitment from criminal incarceration.[259] Because the commitment was civil and not criminal, the majority reasoned, substantive due process protections applied.

Yet the difference in settings does not, without more, explain why punishment should be treated differently for purposes of substantive due process analysis.[260] Indeed, in his dissent in *Foucha*, Justice Thomas worried that the majority's focus on criminal convictions was just a question of semantics. As he explained, "I am not sure that [a conviction] deserves talismanic significance," because "[i]t is surely rather odd to have rules of federal constitutional law turn entirely upon the *label* chosen by a State."[261] In short, the civil-criminal distinction is of limited use since substantive due process "protects bodily liberty, full stop, and one's bodily liberty is equally constrained regardless of whether the judicial order doing the work is styled as a civil or a criminal judgment."[262]

In the Equal Protection context, the Supreme Court has also applied strict scrutiny to prisons, suggesting that *Chapman* is not the final word on the legality of exempting punishment from traditional standards of constitutional review. In evaluating a section 1983 Equal Protection challenge to prison policies that discriminated based on race, the Court explicitly held that strict scrutiny and not the "reasonably related" standard governed the challenge.[263]

To be sure, there is debate in the law and literature about what precise constitutional review is due,[264] but at a minimum, these cases all reveal that criminal punishment—both those in prison and out—is not *per se* exempt from

256. *See id.*

257. Reno v. Flores, 507 U.S. 292, 314 (1993) (O'Connor, J., concurring).

258. *Id.* at 314.

259. Foucha, 504 U.S. at 80.

260. *See* Dudani, *supra* note 12, at 2133.

261. *Id*. at 118 n.13 (Thomas, J., dissenting). "Concededly, Justice Thomas's objection was limited"—he "believed that a person's criminal *conduct*--irrespective of whether she was convicted or acquitted as insane--extinguished her right against unwarranted confinement." Dudani, *supra* note 12, at 2133 (2020).

262. Zuckerman, *supra* note 14, at 32.

263. Johnson v. California, 543 U.S., 499, 500 (2005).

264. *See e.g.*, Zuckerman *supra* note 14, at 26-27 (concluding that, although incorrect, the Court has articulated rational basis as the appropriate standard of review of incarceration); Dudani, *supra* note 12 (arguing that strict scrutiny is the appropriate standard to challenge incarceration).

constitutional scrutiny and that there is no obvious reason *not* to apply traditional constitutional scrutiny to punishments.[265]

Reading the cases this way is not novel. Justices Stevens and Brennan also believed that the traditional levels of constitutional scrutiny that apply to any state action should apply to state action in prison. In a dissent related to a freedom of association claim, Justice Marshall urged the Court to view restrictions on First Amendment activities the same for people in prison and outside.[266] In a dissent regarding restrictions of religious practices in prison, Justice Brennan likewise took the position that such restrictions should be subject to a "strict standard of review."[267]

These points, however, raise a follow-up question: If traditional constitutional scrutiny applies to non-carceral punishment, why have courts avoided doing just that? In 2001, the Wisconsin Supreme Court offered a possible explanation. In upholding an anti-procreation probation condition, the court in *State v. Oakley* noted, without citation to authority, that neither probation conditions nor prison regulations are subject to strict scrutiny review.[268] The court explained its reasoning:

> If probation conditions were subject to strict scrutiny, it would necessarily follow that the more severe punitive sanction of incarceration, which deprives an individual of the right to be free from physical restraint and infringes upon various other fundamental rights, likewise would be subjected to strict scrutiny analysis . . . [This] position is either illogical in that it requires strict scrutiny for conditions of probation that infringe upon fundamental rights but not for the more restrictive alternative of incarceration, or it is unworkable in that it demands the State meet the heavy burden of strict scrutiny whenever it is confronted with someone who has violated the law.[269]

Yet this explanation is suspect. It is hardly illogical to suggest that strict scrutiny applies to both carceral and non-carceral sentences. Both, after all, involve state action and the deprivation of liberty, just to different degrees. Likewise, the unworkable explanation seems to suggest, as Justice Brennan famously put it, a "too much justice" problem.[270] Simply because applying traditional constitutional scrutiny would be difficult is not, without more, a sufficient justification to not do so. Perhaps the real reason courts avoid applying traditional constitutional scrutiny to punishment is that it opens the floodgates to

265. Other examples of the Court applying constitutional law to criminal punishments are explored *infra* in section II E.

266. *See* Jones v. N. Carolina Prisoners' Lab. Union, Inc., 433 U.S. 119, 141–42 (1977) (Marshall, J., dissenting) (observing that with respect to First Amendment analysis, "I do not understand why a different rule should apply simply because prisons are involved").

267. O'Lone v. Estate of Shabazz, 482 U.S. 342, 357 (1987) (Brennan, J., dissenting).

268. Oakley, 629 N.W.2d at 214.

269. *Id.* at 207 n.23 (internal citations omitted).

270. McCleskey v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

constitutional challenges and might result in substantially limiting the State's ability to punish people with both carceral and non-carceral sanctions. In this way, courts' reliance on the consent of people convicted of crimes, as well deference to agencies and private companies, should be viewed as forms of judicial avoidance.

To be sure, a small handful of courts reject the idea of punishment exemption and have instead applied heightened levels of constitutional scrutiny to non-carceral punishments. For example, then-Judge Sonia Sotomayor invalidated a supervised release condition that limited a parent's ability to visit with his child on the grounds that "the liberty interest at stake is fundamental" and "a deprivation of that liberty is 'reasonably necessary' only if the deprivation is narrowly tailored to serve a compelling government interest."[271] A handful of courts followed suit in the context of family relationships, but they are the exception and not the norm.[272]

Notably, most of the cases that apply strict or heightened scrutiny to non-carceral punishments involve more extreme rights-restrictions, such as prohibitions on having children, complete internet bans, or penile plethysmographs.[273] Another small group of judges have subjected religious restrictions and speech restrictions to heightened scrutiny.[274] But these cases are outliers and inexplicably apply heightened scrutiny to some restrictions and strict scrutiny to others.[275] Nonetheless, these cases—many of them state court decisions—suggest that rights restrictions imposed as punishment are not categorically exempt from close constitutional scrutiny.

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271. United States v. Myers, 426 F.3d 117, 126 (2d Cir. 2005).

272. *See* Goings v. Ct. Servs. & Offender Supervision Agency for D.C., 786 F. Supp. 2d 48, 70–71 (D.D.C. 2011) (applying strict scrutiny to a no contact provision related to a defendant's ability to see their children); United States v. Reeves, 591 F.3d 77, 82–83 (2d Cir. 2010) (applying heightened scrutiny to a supervised release condition requiring a defendant to notify the probation department if he enters a "significant romantic relationship"); Simants v. State, 329 P.3d 1033, 1039 (Alaska Ct. App. 2014) (applying heightened scrutiny to a probation condition that barred a woman from living with her own child); Doe v. Lima, 270 F. Supp. 3d 684, 702 (S.D.N.Y. 2017) (applying strict scrutiny to a condition barring contact with son).

273. *See supra* notes 93–97; *see also* United States v. Voelker, 489 F.3d 139, 145 (3d Cir. 2007) (applying heightened scrutiny to a supervised release condition imposing a "lifetime ban on all computer equipment and the internet"); United States v. McLaurin, 731 F.3d 258, 261, 263 (2d Cir. 2013) (applying heightened scrutiny to a five-year supervised release condition imposing subjection to penile plethysmography examinations at the probation officer's discretion).

274. *See* United States v. Hernandez, 209 F. Supp. 3d 542, 544–46 (E.D.N.Y. 2016) (applying heightened scrutiny to condition prohibiting plaintiff from attending religious services with minors);; Galindo v. State, 481 P.3d 686, 691, 693 (Alaska Ct. App. 2021) (applying heightened scrutiny to condition prohibiting participation in a march); Sobell v. Reed, 327 F. Supp. 1294, 1303–05 (S.D.N.Y. 1971); State v. Evans, 796 P.2d 178 (Kan. Ct. App. 1990) (applying strict scrutiny to condition requiring "attendance at a specific church.")..

275. *Compare Lima*, 270 F. Supp. 3d at 702 (applying strict scrutiny) *with Galindo*, 481 P.3d at 691 (condition must be "narrowly tailored to avoid unnecessary interference with the constitutional right at issue") (internal quotations omitted)).

The vast majority of courts confronted with challenges to non-carceral punishments, however, either avoid the constitutional questions altogether, uphold restrictions that "reasonably relate" to a purpose of punishment (a form of rational basis review), or explicitly refuse to apply traditional constitutional scrutiny.

C. Prohibition on Punishments that Ruin People & Undermine Dignity

Rights-violating punishments also conflict with both Eighth Amendment and substantive due process jurisprudence that speak to dignity interests and personal ruin. While scholars have understandably questioned the continued viability of both substantive due process and Eighth Amendment challenges to various forms of punishment, a close reading of recent case law reveals reason to think otherwise.

In the context of the Eighth Amendment, two recent cases suggest a prohibition on punishments that ruin people. The Supreme Court's decisions in both *United States v. Bajakajain* and *Timbs v. Indiana* reflect a recognition that punishment is not meant to leave a person in a worse condition by depriving them of basic rights, liberty, and autonomy. Although both cases focus on the scope of the Eighth Amendment, the decisions aimed to limit "punishment powers to exploit and undermine individuals . . . to 'retaliate or chill' speech, or otherwise to abuse people."[276] As Professor Judith Resnik explains, *Timbs* suggests an "anti-ruination principle," which is the idea that "state punishment has to preserve (rather than diminish) people's capacities to function physically, mentally, and socially, even as governments may also aim to deter, incapacitate, be retributivist, rehabilitative, protect institutional safety, and minimize costs."[277]

The anti-ruination principle can be traced back further than *Timbs* and beyond the Eighth Amendment. In rejecting the view that the Eighth Amendment is the only limit on punishment, Justice Stevens explained that "it remains true that the 'restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual.'"[278]

The rights deprivation associated with non-carceral punishment does precisely what Professor Resnik warns against: it diminishes a person's ability to function physically, mentally, and socially. Instead, as suggested by Justice Stevens, punishment should preserve certain aspects of a person's liberty and dignity. Depriving people in prison of pictures of their loved ones, for example, "may mark the difference between slavery and humanity" and does not "comport

276. Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin*," 129 YALE L.J.F. 365, 367–68 (2020).

277. *Id.* at 408.

278. Overton v. Bazzetta, 539 U.S. 126, 138 (2003) (Stevens, J., concurring).

with any civilized standard of decency."[279] Likewise, in the context of the decades-long California prison condition cases, Judge Thelton Henderson explained that when prisons deprive people "of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture."[280] The same analysis can—and should—apply in the context of non-carceral punishments.

Both the Eighth Amendment and substantive due process also speak to dignity interests–interests undermined by many of the rights-restricting non-carceral punishments. In many of the early reproductive health care cases, for example, the Supreme Court spoke about the Fourteenth Amendment's liberty guarantee as respecting personal autonomy, as well as dignity.[281] Dignity interests—as part of substantive due process—appear in a range of cases, including the right to refuse life-sustaining medical care and the right to privacy with respect to sex and sexuality.[282] To be sure, post *Dobbs v. Jackson Women's Health Organization*, the ongoing viability of these cases is unknown, an issue addressed *infra* in Part IV.

The concern with dignity is not limited to the Fourteenth Amendment. Eighth Amendment jurisprudence also invokes dignity as an organizing principle by which to evaluate punishment.[283] As Justice Brennan famously noted, "punishment must not be so severe as to be degrading to the dignity of human beings."[284] In concluding that handcuffing someone to a hitching post for seven hours and not letting them use the bathroom violated the Eighth Amendment, the Court explained that the punishment was "antithetical to human dignity" and emphasized that "basic concept underlying the Eighth Amendment . . . is nothing less than the dignity of man."[285] In that case, the Court found that the prison's inability to meet basic human needs is a feature of punishment that undermines dignity and thus violates the Eighth Amendment.[286] As explored more fully in related work, punishments that may not amount to torture, and could be justified as "reasonably related" to rehabilitation or deterrence—for example, requirements to urinate in front of a state official as part of a drug test or limits on parenting—could still raise significant dignity concerns.[287]

279. Hudson v. Palmer, 468 U.S. 517, 542, 546 (1984).

280. Madrid v. Gomez, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995).

281. *See* Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1128 (2017); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

282. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003); Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 289 (1990); Obergefell v. Hodges, 576 U.S. 644, 663 (2015).

283. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 223 (2011); JONATHAN SIMON, MASS INCARCERATION ON TRIAL, 165–67 (2014).

284. Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring).

285. Hope v. Pelzer, 536 U.S. 730, 738, 745 (2002).

286. *Id.*at 738.

287. Weisburd, *Punitive Surveillance*, *supra* note 2, at 152, 200 (describing how electronic monitoring undermines basic notions of dignity).

A historical reading of the Eighth Amendment also supports the proposition that the right against cruel and unusual punishment means more than the right to not be tortured. Under the original meaning of "unusual," punishments were presumed unjust if they "attempted to replace 'reasonable' punishment practices that had developed over a very long period of time with something that was either new, foreign, or previously tried and then rejected."[288] Arguably, some forms of non-carceral punishments are sufficiently "unusual" so as to justify Eighth Amendment protection.

D. Reasons to Reject the "Reasonably Related" Standard

Punishment exemption is very much fueled by courts' deferential approach to reviewing rights-restricting punishment.[289] Generally, courts either ignore the rights-stripping nature of punishments or uphold rights-restrictions that reasonably relate to rehabilitation or public safety.[290] For example, restrictions that implicate First Amendment rights (such as mandatory participation in AA or restrictions on movement that implicate the ability to protest or practice religion) or restrictions on family and social relationships are routinely upheld under a "reasonably related" justification.[291] A condition requiring a person on probation to seek permission from his probation officer before "engaging in sexual relationship[s]" was also upheld as reasonably related to rehabilitation.[292] Likewise, at the height of the COVID-19 pandemic, a federal district court judge ordered that a probationer receive a COVID-19 vaccine on the grounds that it reasonably related to public safety.[293]

This Part takes on the "reasonably related" standard and makes the case that it does not justify exempting non-carceral punishment from traditional constitutional scrutiny.

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288. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745–46 (2008).

289. *See* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 311 (2022) (stating "it is hard to conceive of a more deferential standard").

290. *See, e.g.*, United States v. Schave, 186 F.3d 839, 843 (7th Cir.1999) ("[A] court will not strike down conditions of [supervised] release, even if they implicate fundamental rights, if such conditions are reasonably related to the ends of rehabilitation and protection of the public from recidivism.").

291. *See, e.g.*, United States v. Romig, 933 F.3d 1004 (8th Cir. 2019) (upholding prohibition on associating with any member of a motorcycle gang did not infringe on freedom of association because it was reasonably related to the sentencing factors); United States v. Pacheco-Donelson, 893 F.3d 757 (10th Cir. 2018) (same); United States v. Evans, 883 F.3d 1154 (9th Cir. 2018) (same); People v. Lopez, 78 Cal. Rptr. 2d 66 (Cal. Ct. App. 1998) (holding a probation condition prohibiting gang association was reasonably related to rehabilitation and prevention of future criminality).

292. Krebs v. Schwarz, 568 N.W.2d 26, 28 (Wis. Ct. App. 1997).

293. *See* Madison Alder, *N.Y. Federal Judge Orders Defendant Vaccinated as Bail Condition*, BLOOMBERG L. (Aug 18, 2021, 6:24 PM).

1. Limitless Limit

The "reasonably related" standard is not random. It migrated from prison jurisprudence to non-carceral jurisprudence with little adaptation for the differences between carceral and non-carceral settings. In the prison context, most rights restrictions are upheld so long as the burdens are "reasonably related to legitimate penological interests,"[294] including rehabilitation and public safety.[295]

This standard, most forcefully articulated in *Turner v. Safley*, is meant to be a balancing test between the restrictions on rights on one hand, and the needs of the prison on the other. In practice, it is a "species of rational basis review" that is highly deferential to prison officials and creates a "presumption of constitutionality."[296] As applied in both the context of prisons and non-carceral punishments, this standard is trans-substantive: this default applies regardless of the particular right.[297] Even when courts emphasize the need to proceed with caution when punishments strip people of rights, the final analysis is strikingly similar across all rights and settings: the erasure of rights survives so long as it is "primarily designed to affect the rehabilitation of the probationer or insure the protection of the public."[298]

In contrast, courts are much more concerned with the erasure of rights that occur *outside* of punishment. For example, in *Grady v. North Carolina* and *Packingham v. North Carolina*, the Supreme Court recognized the rights-restricting nature of life-time GPS monitoring and internet bans for people convicted of certain sex offenses.[299] However, the Court's concerns hinged on the fact that the restrictions were imposed on people who "already . . . served their sentence and are no longer subject to the supervision of the criminal justice system."[300] Lower courts have likewise declined to apply *Grady* and *Packingham* to people still serving a criminal sentence, reasoning that restrictions on First and Fourth Amendment rights are more troubling when they extend "beyond the completion of [the defendant's] sentence"[301] and that those

294. Turner v. Safley, 482 U.S. 78, 89 (1987).

295. *See* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 246, 251 (2012); Resnik, *(Un)constitutional Punishments*, *supra* note 276, at 367–68.

296. Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 311 (2022).

297. *See* Driver & Kaufman, *supra* note 12, at 537–38.

298. United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 n.14 (9th Cir. 1975).

299. Grady v. North Carolina, 575 U.S. 306, 310 (2015); Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

300. Packingham, 137 S. Ct. at 1737 (striking down on First Amendment grounds an internet ban for people convicted of certain sex offenses); State v. Grady, 831 S.E.2d 542, 559–60 (N.C. 2019) (noting that Fourth Amendment concerns are heightened with "respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the 'continuum of possible [criminal] punishments'").

301. United States v. Browder, 866 F.3d 504, 511 n.26 (2d Cir. 2017); *see also* State v. Grady, 831 S.E.2d 542, 559–60 (N.C. 2019); Friedman v. Boucher, 580 F.3d 847, 858 (9th Cir. 2009) (finding that nonconsensual DNA collection was unreasonable because "Friedman was not on parole. He had

still subject to state punishment are not afforded the same protections.[302] The difference in courts' concern with the deprivation of rights in the punishment setting as compared to the non-punishment setting is striking and reinforces this Article's claim that the right to have rights should depend on the existence of state action, regardless of the setting.

The most obvious concern with the deferential "reasonably related" standard is that it imposes no clear outer limit. Rights-restrictions are almost always justifiable as protecting public safety or furthering rehabilitation.[303] In his dissent in *Turner*, Justice Stevens critiqued the reasonably related justification on these grounds: If the standard is nothing more than a "*logical* connection" between the oppressive regulation and any "legitimate penological concern perceived by a cautious warden, . . . it is virtually meaningless."[304]

This deferential standard is hardly surprising, as it tracks punishment jurisprudence more broadly. As Professor Sharon Dolovich observes, prison law is "predictably pro-state, highly deferential to prison officials' decision-making, and largely insensitive to the harms people experience while incarcerated."[305] The same concern extends to the deference afforded to non-carceral punishments as well. Yet despite uniform scholarly criticism of the *Turner* standard, most courts continue to adopt this approach in evaluating rights-deprivations in prisons and for people subject to various forms of court supervision.[306]

2. Legally Unsound

The problem with the "reasonably related" standard is not just its limitlessness, but also its legal insufficiency in two significant ways. First, there is no clear explanation as to *why* courts apply this deferential standard in a trans-substantive way to all rights-restrictions and without regard to the specific right involved. As Professors Emma Kaufman and Justin Driver observe in the context of prison law, applying the same standard to all rights is a clear departure from traditional constitutional analysis that adjust the scrutiny standard based on the

completed his term of supervised release successfully and was no longer [under] the supervision of [sic] any authority").

302. *See* Browder, 866 F.3d at 511 n.26; *see also* United States v. Halverson, 897 F.3d 645, 658 (5th Cir. 2018) (finding that "*Packingham* does not—certainly not 'plainly'—apply to the supervised-release context"); United States v. Rock, 863 F.3d 827, 831 (D.C. Cir. 2017) (noting that *Packingham* does not apply to a supervised-release condition because such a condition "is not a post-custodial restriction of the sort imposed on Packingham").

303. *See* Chemerinsky, *supra* note 206, at 459–61.

304. Turner v. Safley, 482 U.S. 78, 100 (1987) (Stevens, J., dissenting in part concurring in part) (internal citations omitted).

305. Dolovich, *Coherence of Prison Law*, *supra* note 296, at 302.

306. *See* Dolovich, *Forms of Deference*, *supra* note 295. at 245; Driver & Kaufman, *supra* note 12, at 573; Shapiro, *Lenient in Theory*, *supra* note 193, at 989–94; Karteron, *supra* note 59, at 4; Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973, 982–85 (2019); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1606 (2003).

distinct rights at issue.[307] The result is an "oversimplified constitutional analysis" that fails to appreciate the differences between constitutional rights.[308] Of course, the differences between rights generally matter in constitutional analysis and there is no compelling justification to not recognize those differences in the context of punishment.[309]

Second, courts' treatment of the rehabilitative justification is often contradictory.[310] On one hand, the Supreme Court has explicitly rejected rehabilitation as a justification for harsh punishments. For example, in *Tapia v. United States*, the Court unanimously invalidated a district court's decision to impose a longer prison term so that the defendant could partake in a "500 Hour Drug Program."[311] Writing for the Court, Justice Kagan explained that it was improper for the court to sentence the defendant "for the purpose of rehabilitating [her] or providing [her] with needed educational or vocational training."[312] Although the case concerned the Sentencing Reform Act, the decision reflects the Court's skepticism that rehabilitation is a basis to impose a punishment. The Court has also recognized that harsh treatment, like solitary confinement, is not rehabilitative and cannot be justified as such.[313]

On the other hand, the Supreme Court, as well as lower courts, continue to selectively invoke rehabilitation as a justification for applying the "reasonably related" standard, despite simultaneously recognizing its shortcomings. Book bans and visitation restrictions in prison, for example, have been upheld as "reasonably related" to rehabilitation.[314] The Supreme Court also invoked rehabilitation when it rejected a Fifth Amendment challenge to a sex offender treatment program that required participants to admit guilt.[315] In short, courts often find that rehabilitation trumps constitutional rights.[316] This inconsistent approach suggests the legal infirmity of the rehabilitation justification.

3. Inapplicable to Non-Carceral Punishment

Another reason to reject the reasonably related standard is that it does not easily translate to the non-carceral setting.[317] On the most basic level, the deprivation of rights should only occur if it is incidental to the administration of the program. In prison, it is prison walls that limit liberty. Likewise, the erasure of First and Fourth Amendment rights in prison is often upheld on the grounds

307. Driver & Kaufman, *supra* note 12, at 537–38.
308. *Id.* at 572.
309. *See id.* at 576.
310. *See id.* at 566.
311. Tapia v. United States, 564 U.S. 319, 334–35 (2011).
312. *Id.* at 329–30.
313. *See* Wilkinson v. Austin, 545 U.S. 208 (2005); Driver & Kaufman, *supra* note 12, at 561.
314. Beard v. Banks, 548 U.S. 521 (2006); *see also* Overton v. Bazzetta, 539 U.S. 126, 138 (2003).
315. McKune v. Lile, 536 U.S. 24, 31–31, 47–48 (2002).
316. *See* Driver & Kaufman, *supra* note 12, at 565.
317. *See* Karteron, *supra* note 59, at 684.

that it "is necessary, as a practical matter, to accommodate a myriad of 'institutional needs and objectives' of prison facilities, . . . chief among which is internal security."[318] The deference afforded to prison officials in restricting rights reflects the view that because of the "dangers of prison life, prison officials need[] a free hand in the daily running of their facilities and in crafting institutional policy."[319]

In contrast, the same security concerns and institutional needs do not apply to non-carceral punishment.[320] Deference to correctional needs is *not* applicable in the non-carceral punishment setting. As Justice Stevens explained in the context of probation and parole searches, the *Safley* standard "cannot be mapped blindly" onto non-carceral punishments.[321] Unlike in prison where limited privacy may be needed to accommodate "institutional needs," such as the "safety of inmates and guards, 'internal order,' and sanitation," these concerns "manifestly do not apply to parolees"[322] or for that matter, anyone on court supervision.

Some might argue that there are separate security needs for people convicted of crimes who are not in prison. However, as discussed below, those needs can be addressed in narrower ways.

E. Courts Concede the Need for Constitutional Scrutiny

Another reason to reject punishment exemption is that courts appear to concede that non-carceral punishment is not categorically immune from all forms of constitutional scrutiny. There are four primary examples of courts acknowledging that rights-stripping punishments are subject to at least some constitutional review.

First, the "reasonably related" standard, described *supra*, demonstrates that punishment is not categorically immune from constitutional scrutiny. If it were, there would be no need to apply the reasonably related standard. And certainly, if punishment exemption was doctrinally accepted, there would be no obvious explanation for why some courts—albeit a small minority—have in fact applied strict scrutiny to some punishments.[323] The problem is not the lack of *any*

318. Hudson v. Palmer, 468 U.S. 517, 524 (1984) (internal citations omitted); *see also Overton*, 539 U.S. at 138 (2003) (upholding family visiting restrictions based on state's interest in prison security); Bell v. Wolfish, 441 U.S. 520, 547 (1979) ("Prison administrators . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."); Jones v. N. Carolina Prisoners' Lab. Union, Inc., 433 U.S. 119, 132 (1977) (upholding prison rule that prohibited a prison labor union because the union "would be detrimental to order and security in the prisons."); Beard, 548 U.S. at 521 (upholding prison restriction on newspapers, magazines and photos on the basis of prison security).

319. Dolovich, *The Failed Regulation*, *supra* note 210, at 166.

320. *See* Samson, 547 U.S. at 862–63 (Stevens, J., dissenting); Karteron, *supra* note 59, at 684.

321. Samson, 547 U.S. at 863 (Stevens, J., dissenting).

322. *Id*. at 862–63 (internal citations omitted).

323. *See infra* Part II A.

constitutional review; rather, there is no obvious doctrinal explanation for exempting rights-restricting punishment from the constitutional scrutiny that would apply outside the punishment context. But the mere existence of the "reasonably related" standard, despite its significant shortcomings, undermines the legality and legitimacy of exempting punishment from constitutional rules.

Second, the Fourth Amendment scrutiny applied to non-carceral punishments, such as probation or parole searches, also demonstrates that punishment is subject to at least some constitutional scrutiny. In *Samson* and *Knights*, the Court applied a Fourth Amendment "reasonableness" analysis in upholding searches of people on parole and probation.[324] Even though these cases resulted in fewer privacy protections for people on court supervision, it was not because the searches were immune from constitutional scrutiny. If searches could legally be imposed as punishment, there would be no need to determine if the searches are reasonable under the Fourth Amendment.

Third, as described in more detail below, courts' conspicuous reliance on people's consent to justify the deprivation of rights suggests that courts are indeed aware of constitutional limits on punishment. Were courts able to simply impose whatever punishment they saw fit (so long as it did not violate the Eighth Amendment), they would have no need to rely on consent. But that is not the case. Instead, courts often invoke and rely on consent, and thereby avoid addressing constitutional questions.

Fourth, the Court has acknowledged in two separate cases that punishment is not categorically immune from substantive due process scrutiny.[325] In *Cooper Industries v. Leatherman Tool Group*, the Court explicitly stated that substantive limits apply to punishment in both the criminal and civil context: "Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause . . . imposes substantive limits on that discretion."[326] Likewise, in *BMW v. Gore*, the court also recognized substantive due process limits criminal punishment.[327] There is no obvious doctrinal explanation as to why substantive due process would not similarly apply in the context of criminal punishments that infringe on fundamental rights.

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324. United States v. Knights, 534 U.S. 112, 121 (2001); Samson v. California, 547 U.S. 843, 844 (2006).

325. *See* Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. REV. 1667, 1679 (2021)

326. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001).

327. BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996).

III.
ANSWERING ANTICIPATED OBJECTIONS

A. Prison Is Worse Yet Perfectly Legal

Exempting punishment from traditional constitutional scrutiny is very much driven by courts' evaluating the deprivations of rights through the comparative lens of prison, which is the archetypal form of incarceration and punishment.[328] For example, in *Samson*, Justice Stevens observed that the majority "seems to assume" that if a person "may be subject to random and suspicionless searches in prison, . . . then he cannot complain when he is subject to the same invasion outside of prison, so long as the State still can imprison him."[329]

The reasoning of the majority in *Samson* is no anomaly. Because traditional prisons "serve as the touchstone of constitutional scrutiny,"[330] courts often view anything less restrictive than prison as categorically constitutional. For example, an Illinois court upheld a probation condition requiring the defendant to obtain pregnancy tests because the court had "difficulty seeing how a minor, routine blood test conducted every two months could be more intrusive upon defendant than six months in jail."[331]

Yet, it is legally unsound to conclude that anything less restrictive than prison is *per se* constitutional. As the Ohio Supreme Court stated, simply because the state "might have incarcerated a defendant does not, in itself, justify" the imposition of any restriction that would have also applied in prison.[332] In that case, the court was reviewing an anti-procreation probation condition and pointed out that while the government interest in maintaining security of a prison might justify such a restriction in prison, the same government interest does not apply in the context of probation.[333] Likewise, in striking down denaturalization as a punishment for a crime, the Supreme Court noted that "the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."[334] Presumably, a non-carceral punishment that forbids people from attending religious services or visiting with loved ones should be considered unconstitutional, even if those same rights are limited in prison. As the dissenting justice in the Wisconsin Supreme Court case explained with respect to the anti-procreation condition in *Oakley*, "[w]hile the State has chosen not to exercise control over Oakley's body by depriving him of the freedom from restraint, it does not necessarily follow that the State may opt to

328. Murphy, *supra* note 180, at 1347.
329. Samson, 547 U.S. at 864 (Stevens, J., dissenting).
330. *Id.*
331. People v. Ferrell, 659 N.E.2d 992, 995–96 (Ill. App. Ct. 1995).
332. State v. Talty, 814 N.E.2d 1201, 1206 (Ohio 2004).
333. *Id.*
334. Trop v. Dulles, 356 U.S. 86, 99 (1958).

exercise unlimited control over his right to procreate."[335] In short, the fact that prison is more restrictive and strips people of more rights, does not—without more—justify the same invasions associated with non-carceral punishment.

B. But For Non-Carceral Punishments, People Would Be Imprisoned

Exempting non-carceral punishment from traditional constitutional scrutiny is often either implicitly or explicitly justified on the assumption that *but for* a given non-carceral punishment, the same person would otherwise be incarcerated. Since non-carceral punishment is preferable to prison, the argument goes, there is no need for constitutional scrutiny. There are two key problems with this assumption.

First, in a world without non-carceral punishments, there is no convincing evidence that the same people would otherwise be incarcerated. Some may, but many would or should not. It is difficult, if not impossible, to empirically measure the impact of non-carceral punishments on incarceration rates.

Second, and relatedly, the claim that people would otherwise be incarcerated assumes that the alternative is prison, not freedom. Yet, for low-level crimes or people charged with crimes for the first time, it is likely that a judge would not—or at least *should not*—impose a traditional carceral sentence even if non-carceral punishments did not exist. Conversely, some non-carceral punishments, like parole and federal supervised release, are never substitutes for incarceration but are "meted out in addition to, not in lieu of, incarceration."[336] It is rarely a one-to-one exchange between one day in prison and one day subjected to non-carceral punishment.[337]

More fundamentally, the fact that some non-carceral punishments are experienced as less harsh than prison does not justify punishments that violate constitutional rights. As Professor Michelle Alexander explains in the context of electronic monitoring, "digital prisons are to mass incarceration what Jim Crow was to slavery."[338] She elaborates that simply because an enslaved person was permitted to live with their family, albeit subject to "whites only signs" and segregation, does not justify Jim Crow.[339] By the same token, simply because non-carceral punishment is less harsh than prison does not justify punishments that otherwise violate the Constitution.

C. Consent Nullifies Need for Constitutional Scrutiny

An individual's purported "consent" to non-carceral punishments is often invoked as a primary objection to subjecting punishment to heightened constitutional scrutiny. Indeed, in my nationwide survey of rules governing court

335. Oakley, 245 N.W.2d at 218 (Bradly, J. dissent).
336. United States v. Reyes, 283 F.3d 446, 461 (2d Cir. 2002).
337. Weisburd, *Punitive Surveillance*, *supra* note 2, at 105; Murphy, *supra* note 180, at 1323.
338. Alexander, *supra* note 15.
339. *Id.*

supervision, most required participants to either consent to, or waive, certain rights.[340] Because people choose non-carceral punishment over physical incarceration, the argument goes, there is no need for courts to resolve constitutional questions.

There are several reasons that consent does not resolve the question of punishment exemption. First, even if consent were not considered a basis to justify non-carceral punishments, the problem of constitutional limits remains. Imagine if consent was removed from the calculation. For example, if bargaining over punishment was impossible, it is likely that prosecutors would ask for, and judges would impose, non-carceral punishments that violate basic rights. Consent, in this scenario, is irrelevant. Indeed, in practice, courts often simply order many forms of non-carceral punishment and there is no opportunity to "opt out."[341] In short, consent is an easy way for courts to avoid thorny constitutional questions, like the legality of punishment exemption. But the questions remain.

Interestingly, when the Supreme Court had the opportunity to adopt consent as the basis to uphold various rights deprivations associated with punishment, they declined to do so.[342] Perhaps the Court's avoidance of invoking consent in some punishment-related cases is evidence that consent alone cannot—and should not—nullify the need for constitutional scrutiny.

Second, as previously noted, there is often no consent to non-carceral punishments. It is rarely as simple as someone consenting to a non-carceral option. More often, people often spend months cycling through different types of punishment. There is no reason to consent to non-carceral punishments since they do not offer a "discount" on an otherwise carceral sentence and raise unconstitutional conditions problems, a topic I have addressed in related work.[343]

Third, the influence of coercion also makes consent an insufficient safeguard against the deprivation of rights.[344] As other scholars have observed, consent is a normative construction that often fails to account for race, gender, and disability as factors in determining if someone is free to leave, to decline a search, or, in the context of non-carceral punishment, free to say no.[345] As Professors Roseanna Sommers' and Vanessa K Bohns' empirical research of

340. Weisburd, *Carceral Control*, *supra* note 53 at 11.

341. *See* Weisburd, *Sentenced to Surveillance*, *supra* note 74, at 741.

342. *See* United States v. Knights, 534 U.S. 112 (2001); Samson v. California, 547 U.S. 843 (2006). In both cases, the Court choose to not rely on consent to resolve the legality of the Fourth Amendment searches.

343. *See, e.g.*, Weisburd, *Sentenced to Surveillance*, *supra* note 74.

344. *Id.; see also* McLeod, *Decarceration Courts*, *supra* note 15, at 1667. There is also a rich Law and Political Economy literature challenging consent, and in particular, the limits of consent in private law. *See, e.g.*, Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski, K. Sabeel Rahman, *Building A Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1813 (2020).

345. *See* Jamelia Morgan, Essay, *Disability's Fourth Amendment*, 122 COLUM. L. REV. 489 (2022); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 141 (2017).

consensual police encounters demonstrates, "decision makers judging the voluntariness of consent consistently underestimate the pressure to comply with intrusive requests."[346] Their research also suggests that the increasingly popular reform of informing people that they can refuse consent is likely to have little effect on the coercive nature of encounters between individuals and the state.[347] This research further proves what Professors I. Bennett Capers and Devon Carbado claim: people's decision to consent is based on the premise that the "good citizen, at times, willingly waives their right to silence, and at other times their right to speak. The good citizen, having nothing to hide, welcomes police surveillance."[348] These coercion concerns apply equally to consent in the punishment context and undermine the premise that consent is a sufficient check against otherwise unconstitutional punishments.

D. Erasure of Rights is Not Punishment

Another objection to subjecting punishment to traditional levels of constitutional scrutiny is that the deprivation of rights is not punishment. Rather, the objection goes, the erasure of rights is a *condition* of punishment and not the punishment itself.[349] A related objection is that there must be a distinction between punishment and, for example, court-ordered treatment or court-ordered job training. Job training and treatment are not, and should not, be considered "punishment."

This objection is not without support. Under traditional Eighth Amendment analysis, if the restrictions are not "formally meted out as *punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting [person] before it can qualify" as punishment.[350] Indeed, as Justice Thomas has opined, the restriction of rights associated with punishment should not in fact count as punishment itself.[351] The Eighth Amendment, Justice Thomas explained in a dissent, applies only to punishments meted out by statutes or sentencing judges, and "not generally to any hardship that might befall a prisoner during incarceration."[352] As a lower court noted, conditions of probation are "not punitive in character and the question of whether or not the terms are cruel and unusual and thus violative of the Constitution . . . does not arise for the reason that the Constitution applies only to punishment."[353]

346. Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1962 (2019).

347. *Id.*

348. I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 655 (2018); Carbado, *supra* note 345.

349. Weisburd, *Punitive Surveillance*, *supra* note 2, at 185.

350. Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 380 (2018) (emphasis original) (quoting Wilson v. Settler, 501 U.S. 294, 300 (1991)).

351. Hudson v. McMillian, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting).

352. *Id.*

353. Springer v. United States, 148 F.2d 411, 415 (9th Cir. 1945).

Yet rights-restrictions that are often framed as merely conditions or rules are in fact "part of the punishment, even though not specifically 'meted out' by a statute or judge."[354] Justice Thomas himself later observed as much in the prison setting, observing in a footnote that "restrictions imposed by prison officials may also be a part of the sentence."[355]

In the context of non-carceral punishment, it is virtually impossible to separate conditions from punishment. They are one and the same. As the Seventh Circuit explained in the context of probation and parole, the conditions themselves "are the confinement" and challenging the conditions was the equivalent of attempting to remove bars from a cell.[356]

What are traditionally labeled as conditions or collateral consequences are often experienced as punishment. Some scholars have called for a broader definition of punishment, one that recognizes that conditions, as well as certain collateral consequences, are part of punishment if they are experienced as punishment.[357] As explored more fully in prior work, the factors set forth in *Kennedy v. Mendoza-Martinez*, which are relied on to determine if a measure is regulatory or punishment, weigh in favor of classifying non-carceral punishment as punishment.[358] Several courts have concluded that electronic ankle monitoring, for example, is punishment.[359] And should a person on probation or parole fail to attend court-ordered treatment or job training, they risk reincarceration—suggesting that these court-imposed requirements are in fact punishment.

The failure of courts to define punishment consistently or clearly is hardly new.[360] But even if rights-restricting punishments are classified as regulations, conditions, collateral consequences, or court-ordered treatment, that classification does not resolve the question of what constitutional security is due. The distinction makes a difference for Eighth Amendment purposes only.

354. Wilson v. Seiter, 501 U.S. 294, 306 (1991) (White, J., concurring) (emphasis omitted).

355. Overton v. Bazzetta, 539 U.S. 126, 140 (2003) (Thomas, J., concurring).

356. Williams v. Wisconsin, 336 F.3d 576, 579 (7th Cir. 2003) (contemplating parole); *see also* Drollinger v. Milligan, 552 F.2d 1220, 1225 (7th Cir. 1977) (contemplating probation).

357. Kamal Ghali, *No Slavery Except as a Punishment for Crime: The Punishment Clause and Sexual Slavery*, 55 UCLA L. REV. 607, 636 (2008); Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 168 (2006); John F. Stinneford, *Is Solitary Confinement A Punishment*?, 115 NW. U. L. REV. 9, 18 (2020).

358. Weisburd, *Punitive Surveillance*, *supra* note 2, at 194.

359. *See* Riley v. New Jersey Parole Bd., 98 A.3d 544, 560 (N.J. 2014); Commonwealth v. Cory, 911 N.E.2d 187, 196–97 (Mass. 2009); People v. Cole, 817 N.W.2d 497, 502 (Mich. 2012); Doe v. Rausch, 382 F.Supp.3d 783, 799 (E.D. Tenn. 2019); People v. Hallak, 873 N.W.2d 811, 820–21 (Mich. Ct. App. 2015), rev'd in part on other grounds, 876 N.W.2d 523 (2016).

360. *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 781 (1997); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1832 (2012); Jenny Roberts, *Gundy and the Civil-Criminal Divide*, 17 OHIO ST. J. CRIM. L. 207 (2019); Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences*," 59 HOW. L.J. 341, 366 (2016).

Conditions, rules, and regulations, like punishments or collateral consequences, have no special status that exempt them from traditional constitutional scrutiny.[361] State action is state action, regardless of the nature, title, or classification of the restraint or regulation. If a restraint is civil in nature, then it is more obvious that traditional constitution scrutiny applies. As this Article urges, the distinction between civil and criminal should make little difference when evaluating the legality of rights-violating restraints.

E. The Eighth Amendment Occupies the Field

Challenging punishment exemption also raises questions about the proper role of the Eighth Amendment: should the Eight Amendment occupy the field or do other constitutional limitations also apply? Skeptics might reasonably think that only the Eighth Amendment—and the Eighth Amendment only—is the definitive and final word on limiting punishment. This view is most clearly captured in Justice Thomas' dissent in *Overton v. Bazzetta*, in which he posits that the Eighth Amendment is the only provision of the Constitution that "speaks to" punishment and accordingly, states are "free to define and redefine all types of punishment, including imprisonment, to encompass various types of deprivations—provided only that those deprivations are consistent with the Eighth Amendment."[362] Under this reasoning, so long as the rights restriction does not amount to cruel and unusual punishment, the restriction stands.

The position that punishment is only subject to Eighth Amendment scrutiny also reflects the Court's position in *Graham v. Connor* that constitutional claims must be "judged by reference to the specific constitutional standard which governs that right" rather than other related rights or a "more generalized notion of 'substantive due process.'"[363]

Yet, despite the *Graham* and *Overton* opinions, the Court has more recently "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another."[364] Indeed, to the extent that punishments infringe on a range of rights, such as the First and Fourth Amendments or substantive due process, there is no obvious jurisprudential reason that *only* the Eighth Amendment applies.[365] Although the Supreme Court in *Graham* appeared to adopt the view that rights are "hermetically sealed units whose principles must not contaminate one another"[366] this "constitutional rights

361. *See* Mayson, *Collateral Consequences supra* note 252, at 306–09.
362. *Overton*, 539 U.S. at 139–40 (Thomas, J., concurring) (original emphasis omitted).
363. Graham v. Connor, 490 U.S. 386, 395 (1989).
364. United States v. James Daniel Good Real Property, 510 U.S. 43, 49 (1993).
365. *See* Zuckerman, *supra* note 14, at 28–29.
366. Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163, 193 (2002).

segregation"[367] position is not inevitable.[368] Instead, amendments should be read together and understood as a whole.[369]

The view that the Eighth Amendment occupies the field also ignores the entire line of cases that do in fact apply other forms of constitutional scrutiny to punishment.[370] If the Eighth Amendment were the only limit on punishment, then presumably punishment today (both in prison and out) would be even harsher, so long as it did not run afoul of the cruel and unusual standard. But that is not the case. As addressed in Part II, courts routinely subject punishment to at least some level of scrutiny beyond the Eighth Amendment. Likewise, if the Eighth Amendment were the only limit on punishment, there would be no need for courts to rely on consent to justify rights-restricting punishments.

In short, the Eighth Amendment is not the only provision of the Constitution that limits punishment. As prior Supreme Court case law has made clear, a conviction and confinement in prison—without more—is not sufficient grounds to deprive people of all constitutional protections.[371] Of course, prison involves obvious deprivations, including numerous liberty deprivations, but generally speaking, a person in prison "[r]etains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[372] If these are the protections afforded to people in prison, then people subject to non-carceral punishments should be no *worse* off when it comes to constitutional protections.

IV.
IMPLICATIONS OF ELIMINATING PUNISHMENT EXEMPTION

If non-carceral punishment is not immune from traditional constitutional scrutiny, what follows? What happens to non-carceral punishments like internet bans for people convicted of certain child pornography crimes? Or standard travel restrictions? Or court-mandated drug treatment or AA? Do these restrictions all disappear? This Part explores what it might mean for the future of non-carceral punishment, as well as punishment and the decarceration movement generally, if the erasure of rights associated with punishment were subject to the constitutional levels of scrutiny applied outside of the punishment context. Under this legal framework some punishments would undoubtedly pass constitutional muster, but other restrictions would be narrowed, if not eliminated altogether.

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367. I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 35 (2011).

368. I. Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 709 (2018).

369. *Id.*; Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 805-10 (1994).

370. *See supra* Part II E.

371. Bell, 441 U.S. at 545.

372. Procunier, 416 U.S. at 422–23 (Marshall, J, concurring).

A. New Limits on Non-Carceral Punishment

Eliminating punishment exemption would mean that rights-stripping punishments would be subject to traditional constitutional scrutiny that applies outside the punishment context. The chart below offers a visual depiction of how rights-restricting punishments are evaluated now and how they could be evaluated were punishment exemption eliminated.

Type of Punishment	**Existing Scrutiny**	**Applying Traditional Constitutional Scrutiny**
Electronic Monitoring	• Fourth Amendment Search • Not "reasonably related" to a purpose of punishment	• Fourth Amendment Seizure • First Amendment (Freedom of Association & Speech) • Substantive Due Process (autonomy and liberty)
Shaming Punishments	• Not "reasonably related" to a purpose of punishment • Eighth Amendment	• First Amendment (compelled speech) • Substantive Due Process (autonomy and liberty)
Family Restrictions	• Not "reasonably related" to a purpose of punishment • Eighth Amendment	• First Amendment (Freedom of Association) • Substantive Due Process (autonomy and liberty)
Apology Letters	• Not "reasonably related" to a purpose of punishment	• First Amendment (compelled speech) • Substantive Due Process (autonomy) • Fifth Amendment (right against self-incrimination)

As this chart makes clear, the applicable constitutional scrutiny depends on the right involved. For example, punishments that restrict or compel speech would be subject to traditional First Amendment strict scrutiny analysis. While analyzing each type of non-carceral punishment using traditional constitutional scrutiny is beyond the scope of this Article, focusing on one example, electronic ankle monitoring, is instructive.

As noted previously, electronic ankle monitoring implicates several rights, including liberty interests, protected by the Fourteenth Amendment. What happens when electronic ankle monitoring (including its attendant rules) is subject to strict scrutiny? As deployed today, there are at least two features of electronic ankle monitoring that are neither narrowly tailored nor directly related to public safety or rehabilitation.

First, it is not evident that the degree of surveillance, control, and restrictions inherent in electronic ankle monitoring is necessary because there are less restrictive means of achieving the goals of court supervision. Generally, rehabilitation, public safety, and improved court appearance rates may be

compelling government interests furthered by electronic ankle monitoring.[373] And yet, there is little empirical evidence that such monitoring promotes these interests.[374]

The question of efficacy was addressed in a dissent by the late Judge Keith of the Sixth Circuit, who expressed deep skepticism about ankle monitoring:

> Although the device is obvious, it cannot physically prevent an offender from re-offending. Granted, it may help law enforcement officers track the offender (after the crime has already been committed), but it does not serve the intended purpose of public safety because neither the device, nor the monitoring, serve as actual preventative measures. Likewise, it is puzzling how the regulatory means of requiring the wearing of this plainly visible device fosters rehabilitation. To the contrary . . . a public sighting of the modern day "scarlet letter"—the relatively large G.P.S. device—will undoubtedly cause panic, assaults, harassment, and humiliation.[375]

Following this logic, electronic monitoring rules that restrict people's ability to visit religious institutions, hospitals, or other places where the risk of re-offending is arguably low, is neither necessary nor narrowly focused. Similarly, there is scant evidence that house arrest and restrictions on social visits has a direct impact on recidivism.[376] As Maya Schenwar and Victoria Law explain, electronic surveillance mechanisms are not "rehabilitative or transformative—they do not support people in making changes that would be helpful in their lives."[377] According to the National Institute of Justice's report, people on ankle monitors believed that the visibility of the monitor made it *more* difficult to obtain and keep a job.[378] Without steady employment, it becomes impossible to cover court and monitoring fees and reincarceration becomes more likely.[379]

If there is little evidence that electronic monitoring in fact accomplishes the goals of rehabilitation, ensures court appearances, or protects public safety, it is

373. Eisenberg, *supra* note 76, at 137.

374. Comm. v. Norman, 142 N.E.3d 1, 9 (Mass. 2020) ("There is no indication on this record that GPS monitoring would have increased the likelihood of the defendant returning to court."); *see also* Eisenberg, *supra* note 76, at 136–45 (describing how electronic monitoring does not necessarily further traditional theories of punishment); Christine S. Scott-Hayward & Erin Eife, *Correctional and Sentencing Law Commentary: Electronic Monitoring*, Crim. L. Bull. (forthcoming 2021) (noting that "there is little evidence showing the effectiveness" of electronic monitoring); Kathryn Saltmarsh, RESEARCH BRIEFING: STATE USE OF ELECTRONIC MONITORING, ILLINOIS SENTENCING POLICY ADVISORY COMMITTEE, (2018) (concluding that monitoring has little effect on recidivism); Patrice James, et. al., *Cages Without Bars: Pretrial Electronic Monitoring Across the United States*, Shriver Center on Poverty Law, Media Justice, Chicago Appleseed, Sept. 2022 (addressing how the harms of monitoring undermine the goals of monitoring, including reducing risk to safety and missed court dates).

375. Doe v. Bredesen, 507 F.3d 998, 1012 (6th Cir. 2007) (Keith, J., dissenting).

376. Eisenberg, *supra* note 76, at 144.

377. SCHENWAR, *supra* note 15, at 35.

378. NATIONAL INSTITUTE OF JUSTICE, ELECTRONIC MONITORING REDUCES RECIDIVISM 3 (2011).

379. SCHENWAR, *supra* note 15, at 37–41.

difficult to justify the restraint as "necessary." In fact, the opposite may be true. Research consistently shows the dangers of isolation and the positive impact of social and familial relationships for people returning from prison.[380] There is also evidence that intensive supervision increases the odds that a person will be rearrested and reincarcerated.[381] It is therefore not surprising that probation and parole violations, which include violations related to electronic monitoring, are significant contributors to mass incarceration.[382]

Second, *who* is subject to electronic monitoring is also not narrowly tailored. For electronic monitoring to be limited and necessary it would only be imposed in cases where a person would be incarcerated in the absence of monitoring. This requirement would ensure that the monitoring was genuinely being used as an alternative and not simply as an add-on. This is a difficult inquiry. As other scholars have pointed out, risk assessment algorithms that are used at both the pretrial and sentencing stages to determine who should be released are rife with problems and bias, often relying on data that is itself suspect.[383] But the difficulty in answering this question should not stop the inquiry. Given the deplorable conditions in prisons and jails, electronic monitoring may be a better alternative in some circumstances, but those circumstances should be much more limited than they are today.

In some circumstances, electronic monitoring may survive strict scrutiny. If it was "imposed for only a short period, was demonstrably effective, and constituted the only means of achieving the safety goal, for instance, it might nonetheless withstand challenge."[384] Surviving strict scrutiny in this circumstance makes intuitive sense. Traditional constitutional scrutiny does not

380. *See* HARVARD KENNEDY SCHOOL, EXECUTIVE SESSION ON COMMUNITY CORRECTIONS, TOWARD AN APPROACH TO COMMUNITY CORRECTIONS FOR THE 21ST CENTURY: CONSENSUS DOCUMENT OF THE EXECUTIVE SESSION ON COMMUNITY CORRECTIONS (2017) ("family members should be viewed as critical partners in the process of social integration") or (noting that intervention services must include family members in the social integration process); AMY L. SOLOMON, JENNY W. L. OSBORNE, LAURA WINTERFIELD, BRIAN ELDERBROOM, PEGGY BURKE,RICHARD STROKER, EDWARD E. RHINE & WILLIAM D. BURRELL, PUTTING PUBLIC SAFETY FIRST, THE URBAN INSTITUTE 23 (2008) ("interventions shown to be successful with at-risk populations are those that recruit and engage family members, spouses, and other supportive individuals involved in the lives of the intervention population" pg. 18); STEVE AOS ET. AL., EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT (2006).

381. Michelle S. Phelps, *Mass Probation from Micro to Macro: Tracing the Expansion and Consequences of Community Supervision*, 3 ANN. REV. CRIMINOLOGY 261, 262 (2020); MICHAEL P. JACOBSON ET AL., LESS IS MORE: HOW REDUCING PROBATION POPULATIONS CAN IMPROVE OUTCOMES 6 (2017).

382. *See* KENDRA BRADNER ET AL., MORE WORK TO DO: ANALYSIS OF PROBATION AND PAROLE IN THE UNITED STATES, 2017–18 (2020); SCHENWAR, *supra* note 15, at 88; Human Rights Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (July 31, 2020).

383. *See* Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007 (2022); Jessica Eaglin, *Algorithms as Racial Ideology in Law* (manuscript on file with author); Sean Allan Hill III, *Bail Reform and the (False) Racial Promise of Algorithmic Risk Assessment*, 68 UCLA L. REV. 910 (2022); Sandra G. Mayson, *Bias in, Bias Out*, 128 YALE L.J. 2218 (2019).

384. Murphy, *supra* note 180 at 1406.

operate in a vacuum and the definition of a compelling state interest inevitably accounts for the specific needs and contexts of the institutional setting.

While applying heightened scrutiny to different types of non-carceral punishment is beyond the scope of this Article, the claim remains regardless of the right involved: while some subset of non-carceral punishments may survive traditional constitutional scrutiny, many forms and features of non-carceral punishment would be reined in, if not eliminated altogether.

B. New Limits on All Punishment

The problem of exempting punishment from traditional constitutional review is not limited to non-carceral punishment. If punishment exemption is rejected, then what about prison? Or the death penalty? Are those punishments also subject to the Bill of Rights? The answer must be yes, despite the practical implications. A prison sentence is a seizure. Presumably courts would uphold such seizures as reasonable, but not because the Fourth Amendment is inapplicable. Likewise, incarceration as an infringement on liberty would be subject to strict scrutiny.[385] And were a court to punish someone in prison by requiring that they never speak or write critically about the government, that punishment would need to withstand First Amendment scrutiny. As Professors Kaufman and Driver argue in the context of prison law, "courts are perfectly capable of refined, rights-specific jurisprudence, even when dealing with constitutional criminal procedure and exceptional institutions" such as prisons, or for that matter, punishment more generally.[386]

Applying traditional constitutional scrutiny to rights-stripping punishments is not without precedent. The Religious Land Use and Institutionalized Persons Act (RLUIPA), passed in 2001, aimed to protect religious practices in prisons. In passing the Act, Congress explicitly imposed a strict scrutiny standard: pursuant to the Act, prisons cannot substantially burden a prisoner's religious exercise unless the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that compelling governmental interest."[387] The Act "creates a bifurcated regime for expressive activity in prison, in which speech claims are governed by a highly deferential standard while free exercise claims are reviewed under strict scrutiny."[388] Indeed, when the Supreme Court relied on RLUIPA to strike down a prison policy that prevented a Muslim prisoner from growing a beard, the Court emphasized the need to apply RLUIPA's "rigorous standard" and not simply defer to the expertise of prison officials.[389]

385. *See* Dudani, *supra* note 12, at 2123.
386. Driver & Kaufman, *supra* note 12, at 575.
387. 42 U.S.C. §§ 2000cc(a)(1)(A), (B) (2000).
388. Shapiro, *Lenient in Theory*, *supra* note 193, at 978.
389. Holt v. Hobbs, 574 U.S. 352, 364 (2015).

Perhaps most notable for purposes of this Article are the repercussions of RLUIPA. While not wanting to overstate the impact of the Act, it has unquestionably helped protect the religious rights of people in prison without jeopardizing prison security, which as noted previously, is the cited justification for upholding rights-restrictions in prison.[390] In short, RLUIPA offers a helpful "real-world test of the likely effects of more rigorous review" of right-restrictions as punishment and, thus far, it has succeeded.[391] People in prison often prevail on RLUIPA claims while losing the same claims brought as violations of the Free Exercise clause.[392]

Despite the success of RLUIPA in the context of the First Amendment, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, suggests a more uncertain future for substantive due process challenges to non-carceral punishment.[393] Moreover, regardless of the right involved, it is not immediately obvious that subjecting all forms of rights-restricting punishments to great constitutional scrutiny would result in less restrictive punishments or address the deeper racial and economic inequities endemic to the legal system. Indeed, rights-based frameworks are sometimes of limited use and are rarely vindicative for already marginalized groups.[394]

The viability of successful constitutional challenges to punishment surfaces critical questions about the efficacy of purely legal interventions. On one hand, there is a legitimate concern that heighted scrutiny and greater emphasis on rights will result in doubling down on the current legal regime and will spur the "pacification effect" of reform, namely convincing people there is progress when there is none.[395] There is also no guarantee that applying traditional constitutional scrutiny will better protect rights than, for example, the *Turner* standard or rational basis review. This is partially why progressive scholars question whether a "rights-based framework" effectively protects the rights of marginalized individuals.[396] As Derecka Purnell explains, prison abolitionists "don't need lawyers who will seek to uphold the constitution, because most of the violence of prisons is constitutional; instead, we need lawyers who will

390. Gary R. Rom, *RLUIPA and Prisoner's Rights: Vindicating Liberty of Conscience for the Condemned by Targeting a State's Bottom Line*, 44 VAL. U. L. REV. 283 (2009).

391. Shapiro, *Lenient in Theory*, *supra* note 193, at 1023.

392. *Id.*; *see also* Davila v. Gladden, 777 F.3d 1198, 1212, 1214 (11th Cir. 2015); Lovelace v. Lee, 472 F.3d 174, 188 n.3 (4th Cir. 2006); Murphy v. Mo. Dep't of Corr., 372 F.3d 979, 983-84, 988-89 (8th Cir. 2004); Kikumura v. Hurley, 242 F.3d 950, 956-62 (10th Cir. 2001).

393. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2022) (overturning *Roe v. Wade* as unsupported by the Substantive Due Process Clause of the Fourteenth Amendment)

394. Paul D. Butler, Poor People Lose: Gideon and the Critique of Rights, 122 YALE L.J. 2176, 2196–97 (2013); Weisburd, Carceral Home, *supra* note 191, at 48.

395. Butler, *The System is Working*, *supra* note 32, at 1467.

396. Roberts, *supra* note 229, at 107. *See also supra* note 32; Dolovich, *Coherence of Prison Law*, *supra* note 296, at 303 (2022) (observing that "prison law's moral center of gravity" tilts so far in the direction of the government that constitutional claims only win "in the most extreme cases, leaving the prison environment largely free of judicial regulation.").

betray the power of the constitution."[397] The Constitution, according to this view, offers little solace for historically oppressed people and instead is more often a tool of racial, economic, and social subordination.[398] Indeed, the argument to reject punishment exemption implicitly accepts the legitimacy of some punishment—if limited—and the continued existence of the criminal legal system.[399]

On the other hand, deploying reimagined constitutional arguments to challenge the rights restrictions associated with punishment may be an example of what Professor Dorothy Roberts calls, "abolition constitutionalism."[400] Professor Roberts suggests that "prison abolitionism can craft an approach to engaging with the Constitution that furthers radical change" by using the Constitution to expose hypocrisy, while recognizing that the existing legal system will not bring about freedom for the people historically subordinated by the criminal legal system.[401] Under this approach, advocates might challenge punishment exemption or expose its hypocrisy to further the goal of abolition, which is to shrink and ultimately eliminate the carceral state.[402] Even if these arguments have limited purchase with the post-*Dobbs* Supreme Court, there may be greater success with advocacy efforts aimed at state courts, state legislatures and agencies amenable to policy changes that limit (or eliminate) the rights-restricting nature of non-carceral punishments.

The Reconstruction Amendments, in particular, can be deployed in the project to challenge rights-restricting punishments. These amendments were "inspired by antislavery beliefs" and were "designed to extend to all people the right to have autonomous life choices of the kind that slavery had so cruelly restricted."[403] As W.E.B. Du Bois explained, "[t]he abolition of slavery meant not simply abolition of legal ownership of the slave; it meant the uplift of slaves and their eventual incorporation into the body civil, politic, and social, of the United States."[404] Although the Punishment Clause of the Thirteenth Amendment "allows for the imposition of compelled labor as punishment for a

397. Micah Hershkind, *Some Reflections on Prison Abolition*, MEDIUM (Dec. 7, 2019), https://micahherskind.medium.com/some-reflections-on-prison-abolition-after-mumi-5197a4c3cf98 [https://perma.cc/4LFF-4QJF] (emphasis omitted) (quoting Derecka Purnell).

398. Roberts, *supra* note 229, at 106; Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2196 (2013); Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1790 n.22 (2020).

399. S*ee* Levin, *supra* note 12, at 1427 (Suggesting that "seeing the *carceral* state as uniquely troubling would and should require an account or theory of the *non-carceral* state" (emphasis in original)); Ristroph, *supra* note 12, at 3 (cautioning that a focus on "exceptionalism" then "makes it difficult or impossible to contemplate a world without criminal law").

400. Roberts, *supra* note 229, at 112.

401. *Id.* at 108.

402. *Id.* at 109. *See also* Brandon Hasbrouck, *The Antiracist Constitution,* 102 B.U. L. REV. 87, 129 (2022).

403. Davis, *supra* note 236.

404. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA 189 (Russell & Russell 1956) (1935).

crime, it still does not permit the badges and incidents of slavery,"[405] which rights-restricting punishments are. The goal of the amendments, as Professor Peggy Cooper Davis explains, "was not just to reunite the states, but to recreate the polity so that citizenship would, first, be universal, and second, encompass the liberties that slavery had denied."[406] This understanding of the Reconstruction Amendments is consistent with the reasons to reject punishment exemption, discussed *supra*.

Admittedly, while applying traditional constitutional scrutiny to punishment may find jurisprudential support in the Reconstruction Amendments, and RLUIPA provides an instructive case study, there are additional reasons to be skeptical of legal or legislative solutions. Progressive judges are often the most powerful and vocal proponents of alternatives to incarceration and may be less receptive to challenges. Likewise, legislative responses to the rights-stripping nature of non-carceral punishments may be equally unrealistic as prison-alternative programs are often viewed as, and sometimes are, politically viable solutions to mass incarceration.[407] Part of the challenge is that many of the alternatives to incarceration were conceived of by police, prosecutors, and courts—all institutional actors reluctant to give up power.[408] Ways of addressing punishment exemption that do not depend on legal or legislative interventions is the topic I turn to next.

C. New Lessons for Decarceration

Given growing bipartisan interest in alternatives to incarceration and the perceived benevolence of non-carceral punishments, it is imperative to reckon with the unconstitutionality of rights-stripping punishments. Rejecting punishment exemption has both normative and pragmatic implications for decarceration efforts.

Normatively, the concept of decarceration has been, at least to some degree, coopeted to include a range of rights-restricting punishments imposed in the name of decarceration.[409] As my empirical research demonstrates, however, these rights-restricting punishments run counter to the original goals of the decarceration movement, which were defined as "cutting of ties to the criminal (in)justice systems, including parole and probation, [and] utilizing the services

405. Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 145 (2022).

406. Peggy Cooper Davis, *Neglected Stories and Civic Space*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 45, 48 (2001).

407. *See generally* RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019).

408. *See, e.g.*, Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 213 (2022) (arguing that progressive prosecutors cannot reform the legal system from the inside).

409. *See* Arnett, *supra* note 15, at 663; SCHENWAR, *supra* note 15, at 57; McLeod, *Decarceration Courts*, *supra* note 15, at 1671 (arguing that criminal justice surveillance mechanisms, specifically via electronic ankle monitors, perpetuate social harm despite claims that they are more moderate forms of punishment).

of community groups on a contractual basis."[410] Although non-carceral punishments are often heralded as bipartisan decarceration efforts, the rights-stripping nature of these punishments in fact undermine truly progressive, decarcerative goals.[411]

In at least some respects, exposing the illegality of non-carceral punishments offers purchase, albeit modest, for reformers and abolitionists committed to "[g]radually reducing sanctions even while advocating their abolition," which "is not contradictory if we continue to reduce until they are eliminated."[412] There is also value in challenging the premise that some people are protected by the Constitution and others, in particular poor people and people of color convicted of crimes, are excluded.[413]

Challenging rights-violating punishments should also force a recalibration of what is considered the appropriate baseline for evaluating punishment that occurs outside of prison. Non-carceral punishment is most often compared to prison—and the extent to which non-carceral alternatives are less harsh than prison. But perhaps that is the incorrect baseline. When contemplating alternatives to incarceration, the baseline should be freedom from all forms of carceral control and surveillance.[414] The ideal presumption should be that if someone is not in prison, they should be free.[415]

Pragmatically, decoupling decarceration from state-imposed non-carceral punishment could mean that we rely instead on social structures of support and community self-care models, all of which are separate from criminal law institutions.[416] As Professors Monica Bell, Katherine Beckett, and Forrest Stuart explain, rather than social services embedded within the criminal justice system,

410. ROBERT BROWN, SCOTT CHRISTIANSON, LYNN COBDEN, FAY HONEY KNOPP, JANET LUGO, VIRGINIA MACKEY, VINCENT MCGEE & SHARON SMOLICK, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS (1976), https://www.prisonpolicy.org/scans/instead_of_prisons/chapter5.shtml [https://perma.cc/P92K-U84C].

411. *See* Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 268 (2018) (arguing that part of the reason critics cannot achieve criminal justice reform is because they are talking about two fundamentally different problems, *i.e.*, mass incarceration versus overcriminalization); *see also* Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 666 (2017) (reviewing MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015).

412. BROWN, ET AL., *supra* note 410.

413. *See* Fanna Gamal, *The Racial Politics of Protection: Critical Race Examination of Police Militarization*, 104 CALIF. L. REV. 979, 1006 (2016); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2057 (2017).

414. There is a related and important question about whether punishment can ever be consistent with freedom and when, if ever, violence should be used to express moral judgements. I do not purport to resolve these questions, only to highlight their existence. Alice Ristroph's work thoroughly and thoughtfully explores these important questions. *See* Alice Ristroph, *When Freedom Isn't Free*, 14 NEW CRIM. L. REV. 468, 478 (2011); Ristroph, *The Wages of Criminal Law Exceptionalism*, *supra* note 12, at 8.

415. SCHENWAR, *supra* note 15, at 23.

416. McLeod, *Prison Abolition*, *supra* note 33, at 1163, 1228.

sources of support may come from investments in the welfare state, safety production within communities and neighborhoods, and racial reparations.[417]

To be sure, there is reason to be skeptical that "criminal law and its pathologies [are] clearly distinguishable from any imagined alternative."[418] Scholars have cautioned that carceral logic and punitiveness are embedded in many systems that operate adjacent to, but outside, the criminal system (such as housing courts, schools, family law, welfare responses, and others).[419] Within the criminal legal system, Professor Jessica Eaglin examines three examples of "neorehabilitation" efforts—drug courts, parole revocation reform and early release reform—to make the case that these reforms are simply a rhetorical shift that keep in place an incapacitation regime.[420] The reality that carceral logic extends well beyond prison walls is all the more reason to treat all state action the same for purposes of constitutional rights. All state action, such as punishment, civil sanctions, welfare policies, or regulations, should be subject to the same level of constitutional scrutiny.

Thanks to the work of grassroots movements and community organizers and activists, examples of decarceration decoupled from the state abound. In Northern California, Silicon Valley Debug, a non-profit run by and for people impacted by the criminal legal system, began the Community Release Project. The project drives people to and from court dates and helps people navigate access to social services and provides re-entry support.[421] As Silicon Valley Debug's Founder Raj Jayadev explains, to "tap into this natural set of community resources can be the way out of the false dichotomy of incarceration or supervision."[422] The New Way of Life Reentry Project in Los Angeles provides another example. That program is not funded or run by the government and provides "housing, case management, pro bono legal services, advocacy, and leadership development for people rebuilding their lives after incarceration."[423]

417. Monica C. Bell et. al., *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 UC IRVINE L. REV. 1291, 1294 (2021).

418. Levin, *supra* note 12, at 1385.

419. *Id. See e.g.*, SCHENWAR, *supra* note 15, at 5; DOROTHY ROBERTS, TORN APART (2022); Murray, *Marriage as Punishment*, *supra* note 154; S. Lisa Washington, *Essay: Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM.L. REV. 1097 (2022); Nicole Summers, *Civil Probation*, STAN. L. REV. (forthcoming 2023).

420. Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 222 (2013).

421. Ray Jayadev, *Decarceration Doesn't Have to Mean Supervision Expansion – The Santa Clara County Story*, SV DE-BUG (Sept. 16, 2021), https://www.siliconvalleydebug.org/stories/decarceration-doesn-t-have-to-mean-supervision-expansion-the-santa-clara-county-story [https://perma.cc/SHR7-WHCP].

422. *Id.*

423. *About Us*, A NEW WAY OF LIFE, https://anewwayoflife.org/ [https://perma.cc/HH9B-P9KT].

CONCLUSION

As the nation grapples with defining the "new normal" post-COVID-19 pandemic, a similar question persists in the criminal legal system: what is the "new normal" punishment after a wave of new non-carceral punishments has replaced prison? As this Article suggests, the new normal is *not* brick and mortar prisons as the archetypal form of incarceration and punishment. While mass incarceration shows no sign of abating, new forms of non-carceral punishment are proliferating. Today, people in the criminal legal system experience an ever-growing web of carceral and non-carceral punishments, all of which entail the deprivation of fundamental rights that would be unconstitutional if imposed outside the punishment context. And yet, these non-carceral punishments continue to escape traditional constitutional scrutiny. As a result, the disenfranchisement of people convicted of crimes persists and further entrenches the economic, gender, and racial inequity that has long been part of the fabric of the criminal legal system.

But the new normal need not—and should not—include exempting punishment from traditional constitutional review. Punishment that infringes on constitutional rights should be viewed for what it is: state action subject to the corresponding and applicable constitutional review applicable outside of the punishment context. As we reckon with the future of the carceral state, including the potential for true decarceration, the illegality and illegitimacy of rights-violating punishments cannot be ignored.