THE USE OF ELECTRONIC MONITORING IN THE ALASKA CRIMINAL JUSTICE SYSTEM: A PRACTICAL YET INCOMPLETE ALTERNATIVE TO INCARCERATION

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ABSTRACT

Alaska's prisons are full, but crime has not come to a standstill. The costs of incarceration continue to rise and so do the number of inmates. The State has found itself in the midst of an urgent dilemma – it must control the mounting costs of criminal justice yet ensure public safety. It must also ensure that criminals receive just punishment. And since packing prisons has proved an inadequate solution, it is time to search for effective alternatives. This Note proposes increasing the use of electronic monitoring as an alternative to incarceration. The current electronic monitoring program in Alaska has addressed budget concerns but has not met crime reduction goals. Thus, the Note proposes a "hybrid" electronic monitoring program – one that combines the current electronic monitoring program with other alternatives to incarceration, including therapeutic justice and halfway housing. This "hybrid" should maximize resources and minimize costs, helping to correct the prison-packing predicament of the Alaskan criminal justice system.

INTRODUCTION

With one of the fastest-growing prison populations in the United States, Alaska faces an urgent criminal justice dilemma of how to control costs while maintaining public safety.[1] Alaska spends $44,000 per

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1. STEPHANIE MARTIN AND STEVE COLT, INSTITUTE OF SOCIAL AND ECONOMIC RESEARCH, UNIVERSITY OF ALASKA ANCHORAGE, RESEARCH SUMMARY NO. 71, THE COST OF CRIME: COULD THE STATE REDUCE FUTURE CRIME AND SAVE MONEY BY EXPANDING EDUCATION AND TREATMENT PROGRAMS? 1 (2009) [hereinafter THE

inmate per year, and prisons are at full capacity.[2] In addition to curbing the rising costs of incarceration and the number of inmates, the state must simultaneously ensure public safety and effective use of tax dollars.[3] And, of course, offenders must receive punishments that appear just and serve retributive, deterrent, and rehabilitative or reintegrative goals.[4] Because increasing the prison population has failed to thwart the mounting crisis,[5] the use of alternatives to incarceration has become imperative. One such alternative is electronic monitoring.

The Electronic Monitoring (EM) program in Alaska, governed by sections 33.30.061(c) and 33.30.065 of the Alaska Statutes,[6] "allows inmates who meet certain requirements to serve time at home."[7] Eligible offenders apply to one of five Electronic Monitoring Offices, located in Anchorage, Fairbanks, Kenai, Ketchikan, and Sitka.[8] If approved, an offender pays a twelve or fourteen dollar fee per day plus ten dollars for a urinalysis test.[9] She may then serve her sentence from home, in accordance with specific terms and conditions.[10] Outwardly, Alaska's EM program, like several others across the country, appears to provide a cost-effective and viable alternative to incarceration.[11] However, successful use of EM has not yet been fully realized in the state.[12] This is

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COST OF CRIME], *available at* http://www.iser.uaa.alaska.edu/Publications/researchsumm/RS_71.pdf.

2. *Id.* at 2. The $44,000 per inmate per year figure is actually less than its 1980s counterpart. *Id.* Martin and Colt contend that even so, the figure is still high. *Id. But cf.* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 11 (2003), *available at* http://www.albany.edu/sourcebook/pdf/t18.pdf (documenting state and local justice system per capita expenditures and specifically documenting Alaska's high per capita expenditures on corrections as $279.09—second only to those for the District of Columbia).

3. THE COST OF CRIME, *supra* note 1, at 1.

4. *See generally* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005) (discussing the limitations of and conflicts between various contemporary sentencing rationales).

5. THE COST OF CRIME, *supra* note 1, at 1.

6. ALASKA STAT. § 33.30.061(c) (2010); ALASKA STAT. § 33.30.065 (2010).

7. *Electronic Monitoring*, ALASKA DEP'T OF CORR., http://www.correct.state.ak.us/corrections/institutions/anch/anchEM.jsf (last visited Feb. 20, 2011).

8. *Id.*

9. *Id.*

10. *See* ALASKA DEP'T OF CORR., ELECTRONIC MONITORING TERMS AND CONDITIONS (2007), *available at* http://www.correct.state.ak.us/corrections/institutions/anch/docs/SW_Terms_and_Conditions.pdf.

11. *See* THE COST OF CRIME, *supra* note 1, at 3 fig.6 (demonstrating that the state saves about twenty-two times the amount it spends by using EM as an alternative to incarceration).

12. *See id.* (noting that, although significantly less expensive than other alternatives to jail and prison, EM has not been shown to reduce future crime in Alaska).

due to several factors, including the newness of the technology,[13] but courts' confusion with how to apply credit from time served while on EM to sentencing has been particularly problematic. The Alaska Court of Appeals' holding in *Matthew v. State*[14] is a telling example.

In *Matthew*, the court applied its rule from an earlier case, *Nygren v. State*,[15] holding that petitioner's court-ordered condition of release—EM—did not amount to "restrictions approximating those experienced by one who is incarcerated."[16] The court further held that a petitioner subjected to pretrial conditions of release that are the same as those experienced by a sentenced individual should not automatically receive credit for time served.[17] Although the court affirmed the "restrictions approximating those experienced by one who is incarcerated"[18] standard set out in *Nygren*, the case as a whole demonstrates a continuing lack of clarity about the effective and efficient use of EM in the criminal context—especially with respect to its dissimilar use in the pretrial and sentencing contexts. Embedded in this uncertainty is the need to manage prisons and balance punitive goals with budget concerns. The current EM program in Alaska has addressed budget concerns, but has not met crime reduction goals.[19] At the same time, prisons are still overcrowded.[20] This Note attempts to put these various issues into perspective and proposes a possible solution that could

13. *See* DICK WHITFIELD, TACKLING THE TAG: THE ELECTRONIC MONITORING OF OFFENDERS 36–37 (1997) [hereinafter WHITFIELD, TACKLING THE TAG] (citing Ronald Corbett and Gary T. Marx, *Critique: No Soul in the Machine; Technofallacies in the Electronic Monitoring Movement*, 8 JUST. Q. 399–414 (1991)).

14. Matthew v. State, 152 P.3d 469, 473 (Alaska Ct. App. 2007) (holding that credit was not given when conditions during EM were not "approximate" to those in incarceration).

15. 658 P.2d 141, 146–47 (Alaska Ct. App. 1983) (holding that credit for time served while released on bail or probation is determined by the "extent to which a person released on bail or probation is subjected to restrictions approximating those experienced by one who is incarcerated").

16. *Matthew*, 152 P.3d at 473 (quoting *Nygren*, 658 P.2d at 146).

17. *See id.*

18. *Id.* (quoting *Nygren*, 658 P.2d at 146).

19. *See* THE COST OF CRIME, *supra* note 1, at 3.

20. *See id.* at 2 (supporting the claim that Alaska prisons are full by comparing the 1980 rate of incarceration—2 in 1000 Alaskans behind bars—to the current rate of 10 in 1000, and acknowledging that "the 1,500-bed prison scheduled to open in 2012 is projected to be full soon after it opens"); *see also* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (2003), tbl.6.30.2009, *available at* http://www.albany.edu/sourcebook/pdf/t6302009.pdf (documenting percent change in number of prisoners under Alaska's jurisdiction, which increased 3.3 percent from 4173 prisoners in 2000 to 5167 in 2007); *id.* at tbl.6.2, *available at* http://www.albany.edu/sourcebook/pdf/t62.pdf (documenting the total number of Alaska adults under correctional supervision in 2003 as 10,900, 41.7 percent of whom were incarcerated).

successfully incorporate EM into the Alaskan criminal justice system both efficiently and effectively.

Part I discusses the nature of EM in the criminal justice system and focuses on the present use of it in the Alaskan correctional system. Part II analyzes the state of the law concerning EM in Alaska. Part III probes both the potential of and the controversy surrounding the use of EM as an alternative to incarceration through the lenses of efficiency and effectiveness. Part IV then proposes a practical approach to EM that merges its use with other alternatives to incarceration.

I. THE NATURE OF ELECTRONIC MONITORING IN THE CRIMINAL JUSTICE SYSTEM

A. What Is Electronic Monitoring?

1. Electronic Monitoring in General

EM is a tool that is often used in conjunction with house confinement or house arrest to monitor an offender's whereabouts and restrict his movements.[21] By using electronic devices that emit electronic signals, EM systems can track an offender's location and ensure compliance with the requirements of sentencing or supervised release.[22]

EM systems vary widely and include a range of options such as "home monitoring devices, wrist bracelets, ankle bracelets, field monitoring devices, alcohol testing devices, and voice verification systems."[23] In a typical EM program, offenders wear uniquely coded electronic transmitter devices.[24] This uniquely coded device sends a signal to a home monitoring device located in offenders' homes and communicates with a central computer (and monitoring specialists) located in a monitoring center via telephone line.[25] Because offenders must follow a regimented schedule and because their uniquely coded

21. DORIS LAYTON MACKENZIE, WHAT WORKS IN CORRECTIONS 319 (2006).
22. *Id.*
23. NAT'L L. ENFORCEMENT & CORR. TECH. CTR., KEEPING TRACK OF ELECTRONIC MONITORING 2 (1999) [hereinafter NLECTC], *available at* http://www.justnet.org/Lists/JUSTNET%20Resources/Attachments/859/Elec-Monit.pdf; *see also* Matthew DeMichele & Brian Payne, *Using Technology to Monitor Offenders: A Community Corrections Perspective*, CORRECTIONS TODAY, Aug. 2009, at 35 (providing examples of EM devices that agencies are currently experimenting with, including kiosk reporting, secure remote alcohol detection, GPS, and voice verification).
24. NLECTC, *supra* note 23, at 2.
25. *Id.*

devices signal any deviations from that schedule, monitoring specialists are able to keep track of offenders' activities at all times.[26]

Electronic offender monitoring occurs either passively or actively.[27] Passive EM systems usually require an offender to speak to a case officer via telephone (e.g. voice verification system) or verify his presence by inserting an electronic transmitter, unique to him, into a home monitoring device.[28] These systems may also require an offender to breathe into a home breathalyzer device to determine his sobriety.[29] Active EM systems, on the other hand, have the advantage of constantly monitoring an offender's whereabouts and do not depend on the offender's cooperation.[30]

2. Economic, Practicability, and Eligibility Issues Surrounding the Use of Electronic Monitoring

With either the passive or active EM model, certain economic, practicability, and eligibility issues arise. First, EM programs require participating offenders to have access to homes with telephone land lines.[31] Since these are not available to all who may wish to participate, the requirement unfairly limits the pool of eligible offenders at the outset—discriminating against the poor and those who do not have homes or phones.[32] Consequently, "[a] challenge that the rich get tagged and the poor get prison might well have some substance."[33] But at the same time, EM is viewed as more economical than incarceration precisely because most offenders subjected to EM programming must cover the costs of that sanction.[34]

Second, the criminal justice process as a whole is not without an underlying profit motive.[35] EM programs resulted from privatization

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *See* Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 375 (1995) ("Without a stable address and phone, the [EM] program cannot be used for an otherwise eligible offender.").
32. *See* DICK WHITFIELD, THE MAGIC BRACELET 106 (2001) [hereinafter WHITFIELD, THE MAGIC BRACELET]. Whitfield cites the American Civil Liberties Union's (ACLU) concern that EM would deny offenders an equal opportunity to participate by discriminating against those without homes and telephones. *Id.*
33. *Id.*
34. *See* Brian K. Payne & Randy R. Gainey, *The Electronic Monitoring of Offenders Released from Jail or Prison: Safety, Control, and Comparisons to the Incarceration Experience*, 84 PRISON J. 413, 415 (2004).
35. *See* WHITFIELD, THE MAGIC BRACELET, *supra* note 32, at 109.

and eventually, public-private partnerships,[36] and the commercial pressures of the private sector may have led to overselling and unrealistically high expectations.[37] The powerful interest groups that form this sector may have framed EM as more advantageous than it actually was,[38] thereby contributing to "the unexpectedly slow development of electronic monitoring."[39]

Third, EM programs typically target low-risk offenders.[40] The term "low-risk" reflects both the actual offenses committed and the characteristics of the offenders, including first-time offenders, those who committed non-violent or property offenses, and those with structured living arrangements.[41] Moderate- to high-risk offenders may also be subjected to EM programming, but the EM used for these types of offenders consistently differs from that used for those who are considered to be lesser risks.[42] Specifically, "[in] low-risk populations, EM may be used by itself or in conjunction with other forms of low-contact monitoring. In moderate to high-risk populations, EM is more likely to be one part of a program that involves human contact and supervision, drug treatment, or other services."[43] Accordingly, for higher risk offenders, EM may prove to be a more rehabilitative and complete alternative to prison. Yet, because further research is necessary, this conclusion is, at best, a speculative one. For now, those most often selected for EM programming, whether passive or active, continue to be those who are low-risk offenders, or as some have argued, those that "probably don't need to be monitored anyway."[44]

36. *See id.*

37. *See id.* at 112–13.

38. *See* WHITFIELD, TACKLING THE TAG, *supra* note 13, at 47 ("'Success' rates on electronic monitoring—as in so much of criminal justice—are infinitely elastic, easily manipulated and often conceal more than they reveal. They should be treated with considerable caution.").

39. WHITFIELD, THE MAGIC BRACELET, *supra* note 32, at 113.

40. *See* MACKENZIE, *supra* note 21, at 319; *see also* WHITFIELD, TACKLING THE TAG, *supra* note 13, at 46; DeMichele & Payne, *supra* note 23, at 36 (recognizing that "community corrections focus on technologies designed for low-risk offenders because these offenders do not need face-to-face interaction . . . [and] are people who have committed crimes that deserve to be addressed but who do not present any unique risk to society").

41. WHITFIELD, TACKLING THE TAG, *supra* note 13, at 46–47.

42. *See* Marc Renzema & Evan Mayo-Wilson, *Can Electronic Monitoring Reduce Crime for Moderate to High-risk Offenders?*, 1 J. OF EXPERIMENTAL CRIMINOLOGY 215, 215–16 (2005) (describing how the use of EM differs according to the type of risk an offender presents); *see also* DeMichele & Payne, *supra* note 23, at 35 ("[M]any different practices are used to monitor offenders in the community, including classifying offenders by risks, needs and change levels.").

43. Renzema & Mayo-Wilson, *supra* note 42, at 215–16.

44. WHITFIELD, TACKLING THE TAG, *supra* note 13, at 47 (citation omitted).

3. Electronic Monitoring in Alaska

Alaska has adopted a passive EM system. The Anchorage Correctional Complex, for example, requires an offender to connect a large black box, a Field Monitoring Device, to the power and phone lines in her home.[45] The offender must keep the phone lines clear at the designated call time and must answer after the fourth ring.[46] In some instances, the offender must also provide a breath sample using a "sobrietor" device.[47] More remotely, in Mat-Su Valley, the Kids Are People, Inc. EM program requires a juvenile probationer to connect a base unit to the phone line in her home.[48] The offender must also wear an ankle bracelet that transmits signals to a receiving computer.[49] Then, at preplanned intervals throughout the day, indicator lights trigger reporting from the offender so that information on her location is periodically updated into a file that is monitored and then reviewed by case managers at the Mat-Su Youth Corrections Office.[50]

B. The History of Electronic Monitoring Use in Law Enforcement

1. Early Electronic Monitoring Programming and Design

Whether testing sobriety or ensuring that an offender remains within a certain radius, EM systems provide a means of enforcing compliance with conditions of supervised release, or "community control."[51] But this punitive aspect of "compliance" was not what the systems' designers originally had in mind for the systems' prototype.[52] Instead, the designers sought "to help offenders gain self-esteem and

45. ALASKA DEP'T OF CORR., ANCHORAGE CORRECTIONAL COMPLEX ELECTRONIC MONITORING GUIDELINES FOR SOBRIETOR AND FIELD MONITORING DEVICE (FMD), *available at* http://www.correct.state.ak.us/corrections/institutions/anch/docs/EM_Guidelines.pdf.

46. *Id.*

47. *Id.*

48. N.E. Schafer & Pamela Martin, Justice Ctr., Univ. of Alaska Anchorage, Evaluation of a JAIBG-Funded Project: Voice and Location Telephone Monitoring of Juveniles 3–4 (2001), *available at* http://justice.uaa.alaska.edu/research/2000/0010kap/0010.kap.pdf.

49. *Id.* at 4.

50. *Id.*

51. *See* Ralph Kirkland Gable & Robert S. Gable, *Electronic Monitoring: Positive Intervention Strategies*, 69 FED. PROBATION 21, 21 (2005) (noting EM documents violations of community supervision better than more traditional procedures); *see also* MACKENZIE, *supra* note 21, at 319 (describing how technological advances of EM made it possible to ensure compliance with EM correctional programs).

52. *See* Gable & Gable, *supra* note 51, at 21.

socially valued skills."[53] Others, including Jack Love, a former federal public defender and judge, specifically sought to create a scheme that would keep individuals out of prison.[54] Love focused on probationers who had breached their probation orders and, in 1983, first used an electronic device to monitor five offenders.[55] He wanted to know whether EM would allow probation to continue on a restricted basis, reducing various white collar offenders' exposure to risks of violence in prison.[56] That curiosity helped stimulate the commercial use of EM for correctional purposes.[57] Another system was developed by Thomas Moody in Florida, and "[b]y 1987, 21 states had reportedly begun EM programs, with more than 900 offenders being monitored."[58] "[B]y 1993, EM was employed in all fifty states . . . [and] approximately seventy thousand offenders were being monitored electronically."[59] By 2005, about twenty percent of community-based supervision programs in the United States had incorporated the use of EM and about twenty private companies provided the necessary equipment.[60]

2. Prison Overcrowding as a Driving Force Behind the Growth of Electronic Monitoring Use

Although a number of factors contributed to the rapid growth of EM programs in the 1980s and onward, prison overcrowding is consistently cited as a driving force.[61] In the 1980s, prison populations

53. *Id.*

54. *See id.*; *see also* WHITFIELD, TACKLING THE TAG, *supra* note 13, at 34.

55. Gable & Gable, *supra* note 51, at 21; *see also* WHITFIELD, TACKLING THE TAG, *supra* note 13, at 34.

56. *See* WHITFIELD, TACKLING THE TAG, *supra* note 13, at 34.

57. *Id.* at 33–34; *see also* Gable & Gable, *supra* note 51, at 21. Inspired by "a 'Spiderman' story in which the villain attached an electronic bracelet to Spiderman to monitor his movements," Judge Jack Love persuaded Michael Goss to develop a similar apparatus. *Id.* His curiosity helped develop and commercialize EM equipment. *Id.* But Judge Love was not the first to experiment with EM. *Id.* Dr. Ralph Schwitzgebel of Harvard University is credited with patenting the first correctional EM system in 1969. *Id.*

58. *See* Gable & Gable, *supra* note 51, at 21 (citation omitted).

59. MACKENZIE, *supra* note 21, at 319 (citation omitted).

60. *See* Gable & Gable, *supra* note 51, at 21.

61. *See, e.g.*, Michael G. Maxfield & Terry L. Baumer, *Home Detention with Electronic Monitoring: Comparing Pretrial and Postconviction Programs*, 36 CRIME & DELINQ. 521, 521–22 (1990). In addition to prison and jail overcrowding, factors contributing to the rapid growth of EM included private entrepreneurs' aggressive marketing of EM equipment as a solution to prison and jail overcrowding and the extension of home detention to broader categories of offenders, such as those directly released from prison or jail and those who had not been convicted but were held in lieu of bail. *Id.* at 522. Yet another was the belief in the infallibility of EM technology, also known as a "technofallac[y]." *See* Terry L. Baumer & Robert I. Mendelsohn, *Electronically Monitored Home*

"had reached a crisis point in both legal and financial terms" and led to judicial mandates to limit prison intake.[62] Unfortunately, the situation is no better today and, for Alaska, the problem is particularly acute. In the 1980s, the state expanded its justice system and enforced stiffer, more uniform sentences for the most serious felonies.[63] A sharp increase in the number of incarcerated individuals resulted.[64] By 2007, Alaska had five times the inmates it had in 1981, and spending for the state's justice system almost doubled in those years.[65] An immediate solution was needed both in the state and across the country, and the technologically advanced (and less expensive) alternative of EM offered a seemingly "quick fix."[66] The shortcomings of probation programs only added to the "nothing works" debate and incentivized the rapid rise of EM programs in correctional systems.[67]

3. The Interests Served and Overarching Goals of Correctional Electronic Monitoring Programs

Effective marketing of EM equipment by retailers also contributed to the rapid rise of correctional EM.[68] As any profit-seeking businessmen would do, these retailers saw an opportunity in the prison overcrowding crisis and seized it.[69] And, by strategically offering an inexpensive, utilitarian, and immediate solution to overcrowded prisons, EM vendors found a receptive audience in correctional departments across the country.[70] These departments faced a pressing need to protect their communities from potentially dangerous offenders

Confinement: Does it Work?, *in* SMART SENTENCING: THE EMERGENCE OF INTERMEDIATE SANCTIONS (J.M. Byrne, A.J. Lurigio, & J. Petersilia eds., 1992) 54, 54; *see also* WHITFIELD, THE MAGIC BRACELET, *supra* note 32, at 9 (citing "technical advances, a huge and costly rise in prison populations and the growing use of house arrest or curfew schemes" as the three reasons why, in the 1980s, the increased development of EM became possible).

62. WHITFIELD, TACKLING THE TAG, *supra* note 13, at 35.

63. THE COST OF CRIME, *supra* note 1, at 2.

64. *Id.*

65. *Id.* at 1.

66. *See* WHITFIELD, TACKLING THE TAG, *supra* note 13, at 36 (describing how the allure of new EM technology and the belief that it would provide an immediate solution to the problem of rising crime led to the rapid growth of EM programming).

67. *See id.* at 37 (explaining the failures of traditional probation that led to a sudden rush for experimental alternatives such as EM).

68. *See* Maxfield & Baumer, *supra* note 61, at 522.

69. *See id.*

70. *See id.*

and could not do so with prisons at maximum capacity.[71] They therefore had a strong interest in a solution that would specifically deter offenders—one that would keep potentially dangerous offenders off the streets and under appropriate custody.[72] EM programming appeared to offer just that.[73]

In reality, the conditions imposed under EM programs are less restrictive than those imposed under traditional incarceration.[74] This means the use of EM may actually *benefit* the same individuals it is supposed to punish.[75] EM programs provide certain offenders a more rehabilitative option of reintegrating back into their communities while still serving time for their wrongdoings.[76] As a result, the programs may promise more return as specific and utilitarian deterrents (in terms of providing efficient, economic, and secure public safety) and even more as rehabilitating and reintegrative alternatives to incarceration. And it is quite possibly this promise—rather than one rooted in a retributive goal—that has maintained the growth of EM programming in corrections.[77]

But while the growing number of EM programs might point to success in terms of quantity, a few questions still remain: Have the programs succeeded in terms of quality? How do the programs compare to incarceration or other punitive options? Is EM enough of a sanction? Is it efficient? What is the best use of EM programming for Alaska?

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71. *See id.* at 521–22 (describing how chronic overcrowding in jails and prisons led "to desperation on the part of criminal justice officials . . . [and] a frantic search for punitive, safe, and secure alternatives to incarceration").

72. *See The Legality of Innovative Sanctions for Nonviolent Crimes*, 111 Harv. L. Rev. 1944, 1960–61 (1998) (discussing criminal sentencing's goal of protecting the public from dangerous offenders through incarnation).

73. *See* Maxfield & Baumer, *supra* note 61, at 522.

74. *See* Payne & Gainey, *supra* note 34, at 432 (recognizing that although EM is less restrictive than other sanctions, it "is still punitive and potentially rehabilitative" even if it "is often misinterpreted as a slap on the wrist").

75. Offenders commented that they preferred EM to incarceration and viewed EM as controlling, but not nearly as controlling or invasive as prison; the EM option afforded them certain everyday luxuries and freedoms that they were denied in prison. *Id.* at 428. For example, they enjoyed control over the television and being able to eat whatever they wanted and whenever they wanted. *Id.*

76. *See id.* at 416.

77. Retributive rationales for punishment often conflict with utilitarian and rehabilitative rationales. *See generally* Frase, *supra* note 4, at 75–77 (discussing the limitations of and conflicts between various contemporary sentencing rationales). The attractive promise advertised by EM retailers appeared to resolve this conflict and therefore appealed to correctional departments both in the United States and abroad. However, EM programs probably hold more "promise" as deterrents and even more so as mechanisms of rehabilitation/reintegration for reasons discussed below. *See infra* Part III.B.

The remainder of this Note will address these questions and others and will ultimately propose a solution that maximizes the potential of EM in Alaska by incorporating it into other correctional programs.

II. THE LAW ON ELECTRONIC MONITORING

Any attempt to maximize the potential of EM must comport with the current law on the subject, and therefore, it is critical to understand the parameters of that statutory framework. This Part endeavors to explain the relevant statutes and case law effecting EM in Alaska. Because EM is still relatively new and EM programming is still gaining momentum as an "effective" alternative to incarceration, the law governing its use is sparse and still developing. This is especially true in Alaska. A few statutes and cases provide some guidance, but the law on the correctional use of EM is far from settled.

A. The Statutes Governing Correctional Electronic Monitoring in Alaska

At present, two statutes control the use of EM in Alaska—Section 33.30.061, and more significantly, Section 30.30.065 of the Alaska Statutes. Section 33.30.061(c) allows for the use of EM at the discretion of the Department of Corrections commissioner but expressly excludes certain classes of offenders:

> The commissioner may, under [section 33.30.365], designate a prisoner to serve the prisoner's term of imprisonment or period of temporary commitment, or a part of the term or period, by electronic monitoring. A prisoner serving a term of imprisonment, or a period of temporary commitment, for a crime involving domestic violence is not eligible for electronic monitoring.[78]

Section 33.30.065 provides specific, practical guidelines for administering EM.[79] Subsection (a) mandates that EM be administered by the Department of Corrections and that EM equipment be designed "so that any attempt to remove, tamper with, or disable the monitoring equipment or to leave the place selected for the service of the term or period will result in a report or notice to the department."[80] Subsection (b) lists criteria for

78. ALASKA STAT. § 33.30.061(c) (2010).
79. § 33.30.065.
80. § 33.30.065(a).

> determining whether to designate a prisoner to serve a term of imprisonment or period of temporary commitment by electronic monitoring, [including]
>
> (1) safeguards to the public
> (2) the prospects for the prisoner's rehabilitation
> (3) the availability of program and facility space
> (4) the nature and circumstances of the offense for which the prisoner was sentenced or for which the prisoner is serving a period of temporary commitment;
> (5) the needs of the prisoner as determined by a classification committee and any recommendations made by the sentencing court;
> (6) the record of convictions of the prisoner, with particular emphasis on crimes specified in AS 11.41 or crimes involving domestic violence;
> (7) the use of drugs or alcohol by the prisoner; and
> (8) other criteria considered appropriate by the commissioner.[81]

Subsection (c) emphasizes that EM does not provide an offender with a liberty interest and that a "prisoner may be returned to a correctional facility at the discretion of the commissioner."[82] Subsection (d) permits the commissioner to require an offender to pay all or some of the costs of EM, but acknowledges that only offenders with sufficient financial resources should be subjected to such a requirement.[83]

Both sections 33.30.061(c) and 33.30.065 of the Alaska Statutes *only* pertain to sentencing.[84] In Alaska, there is no statutory law on the use of EM for pretrial, pre-sentencing, or pre-appeal purposes. The closest such statute, section 12.25.025(c) of the Alaska Statutes, has been interpreted to extend credit for time spent in pretrial, pre-conviction, or pre-appeal custody,[85] but this has not included time spent on EM—yet.[86] And while several cases have explained the applications of section 12.25.025(c) of the Alaska Statutes in non-EM situations, the statute has proven quite controversial with respect to EM.

81. § 33.30.065(b).
82. § 33.30.065(c).
83. § 33.30.065(d).
84. *See* § 33.30.61(c); § 33.30.065.
85. § 12.55.025(c) ("A defendant shall receive credit for time spent in custody pending trial, sentencing, or appeal, if the detention was in connection with the offense for which sentence was imposed.").
86. Matthew v. State, 152 P.3d 469, 473 (Alaska Ct. App. 2007).

B. The Case Law on Alternatives to Incarceration

The case law governing EM use in Alaska has developed in response to the enactment of statutes governing alternatives to incarceration (mainly sections 12.25.025(c), 33.30.061(c), and 33.30.065 of the Alaska Statutes) and case law directing the use of those alternatives. This precedent has set limits on alternatives to incarceration, and the limits, in turn, have implications for EM. Understanding the precedent governing alternatives to incarceration is therefore useful for understanding the current status of correctional EM in the state.

1. The Early Cases Defining Appropriate Alternatives to Incarceration

In its 1980 decision *Lock v. State*, the Alaska Supreme Court ruled that "upon revocation of probation, one is entitled to credit against his sentence on the original offense for time spent as a condition of probation, in a rehabilitation program which imposes *substantial restrictions on one's freedom of movement and behavior*."[87] In *Nygren v. State*, the Alaska Court of Appeals sought to determine what types of restrictions meet the "'*substantial restrictions on one's freedom of movement and behavior*'" test.[88] It concluded that credit for time served while released on bail or probation is determined by the "extent to which a person released on bail or probation is subjected to restrictions approximating those experienced by one who is incarcerated."[89] The court also listed several characteristics common to incarcerative facilities, noting that those characteristics, though not exhaustive, were "at least sufficient to serve as sound points of reference for determining, in any given case, whether 'substantial restrictions on one's freedom of movement and behavior' have been imposed, so as to require credit for time served under *Lock*."[90] The list included the following restrictive characteristics:

> [R]esidents are invariably sent there by court order; the facilities require residency, and residency requirements are sufficiently stringent to involve a definite element of confinement; residents of the facilities are subject to twenty-four hour physical custody or supervision; any periods during which residents may be permitted to leave the facility are expressly limited, both as to time and purpose; while in the

87. Lock v. State, 609 P.2d 539, 545 (Alaska 1980) (emphasis added).
88. Nygren v. State, 658 P.2d 141, 144 (Alaska Ct. App. 1983) (emphasis added) (quoting *Lock*, 609 P.2d at 545).
89. *Id.* at 146.
90. *Id.*

> facility, residents are under a continuing duty to conform their conduct to institutional rules and to obey orders of persons who have immediate custody over them; and residents are subject to sanctions if they violate institutional rules or orders and to arrest if they leave the facility without permission.[91]

2. Cases Applying the Nygren *Example to Non-Electronic Monitoring Alternatives*

The *Nygren* test has already been applied to award credit for time served in residential alcoholism treatment programs[92] and Community Residential Centers (CRCs).[93] In the 2002 case *State v. Fortuny*, the Alaska Court of Appeals gave the defendant credit against his sentence for the time he voluntarily spent in a residential alcoholism treatment facility before sentencing.[94] The court began its analysis by first comparing the *Nygren* list of restrictions (deemed equivalent to incarceration) to the restrictions imposed by the residential program in which Fortuny participated. It reasoned that the defendant's work release privileges at the facility were "not conspicuously different from the work release privileges that are granted to selected prisoners in the custody of the Department of Corrections."[95] The court also noted that the facility provided twenty-four hour supervision, required conformity to a set of house rules, and subjected residents to bed checks, random checks, and random urine and breath tests.[96] Because these restrictions generally complied with the remainder of the *Nygren* factors, the court granted Fortuny credit for the time he served there and ruled that work release constituted "a supplemental method of correction" rather than "a vacation from correctional supervision."[97]

That same year, in *Potter v. State*, the court was presented with the question of whether *Nygren* credit could be applied to time spent under the court-ordered custody of a CRC prior to sentencing.[98] Again, the court began its analysis by going through the *Nygren* test.[99] It then reasoned that the restrictions imposed by the CRC in custody of Potter amounted to incarceration as defined by *Nygren*. It emphasized how the

91. *Id.*
92. *See, e.g.*, State v. Fortuny, 42 P.3d 1147, 1147–50 (Alaska Ct. App. 2002).
93. *See, e.g.*, Potter v. State, No. A-8080, 2002 WL 818059, *1–2 (Alaska Ct. App. May 1, 2002).
94. *See Fortuny*, 42 P.3d at 1152.
95. *Id.* at 1151.
96. *Id.* at 1148–49.
97. *Id.* at 1151–52.
98. *Potter*, 2002 WL 818059, at *1.
99. *See id.* at *2.

CRC required Potter to remain there under strict supervision, only permitted him to leave unescorted under limited circumstances, and would subject him to sanctions if he violated program rules and regulations.[100] Much as it did in *Fortuny*, the court relied on the *Nygren* test and held that Potter should not be barred from receiving credit toward the time he served at the CRC merely because he was regularly allowed to leave the facility to work.[101]

By testing the *Nygren* list of restrictions approximating incarceration against the specific restrictions imposed by various incarcerative facilities, the Alaska Court of Appeals effectively extended credit for time served in residential alcohol treatment programs and CRCs prior to sentencing. Its decisions in *Fortuny* and *Potter* also cemented the fact that work release privileges would not hinder a defendant from receiving credit for time served at a residential alcohol treatment program or CRC prior to sentencing. Unfortunately, the same has not been true of EM programming since the Alaska Court of Appeals has firmly refused to extend credit to time served on EM prior to sentencing.[102]

3. Why Electronic Monitoring Does Not Fit the Nygren *Test – the* Matthew v. State *Perspective*

In *Matthew v. State*, the Alaska Court of Appeals denied defendant Matthew credit toward his sentence of imprisonment for the time he voluntarily spent subjected to EM.[103] After his sentencing, Matthew asked the trial court to delay the date on which he was to report for incarceration.[104] He specifically asked for a sixty-day extension that would allow him to work in Barrow while being monitored by a private EM system known as "secure continuous remote alcohol monitoring," or SCRAM.[105] The SCRAM system is an ankle bracelet that detects alcohol consumption through skin pores and tracks a subject's whereabouts through an attached global positioning system, or GPS.[106] In Alaska it is operated by a private company, Alaska Monitoring Services.[107]

100. *See id.*
101. *See id.*
102. Matthew v. State, 152 P.3d 469, 473 (Alaska Ct. App. 2007).
103. *See id.* at 471, 473.
104. *See id.* at 470.
105. *Id.*
106. *Id.*; *see also* Alcohol Monitoring Systems, Inc., *The SCRAMx System*, SCRAMx, http://www.alcoholmonitoring.com/index/scram/the-scramx-system (last visited Feb. 18, 2011) (describing SCRAMx, the new generation of the SCRAM system).
107. *Matthew*, 152 P.3d at 470.

Per Matthew's request, the trial judge granted the stay of imprisonment and ordered him confined to work, home, and travel back and forth.[108] The judge also told him that no credit would be awarded toward his sentence for any time served while released on EM.[109] The same occurred at Matthew's bail hearing, where he was granted another delay of his imprisonment.[110] Nevertheless, Matthew attempted to obtain credit toward his sentence of imprisonment for the time he spent subjected to EM.[111] His motion was denied, and Matthew subsequently appealed.[112]

In its ultimate ruling, the appellate court incorporated the same analytical method it did in both *Fortuny* and *Potter*, starting with a review of the *Nygren* test.[113] It also noted that it must review *de novo* whether the conditions of release imposed on Matthew sufficiently approximated incarceration.[114] The court then analyzed the conditions of release Matthew faced under EM.[115] It found that those restrictions included requirements that Matthew be at home, work, or commuting in between and that his movements and alcohol consumption be constantly monitored by EM.[116] It further found that the restrictions did not amount to "'restrictions approximating those experienced by one who is incarcerated.'"[117]

The court reasoned that "Matthew's day-to-day activities were unencumbered by the kind of institutional rules and routines that are the hallmark of correctional or residential rehabilitative facilities."[118] It also observed that "[t]he conditions of release did not subject him to the kind of structured, regimented lifestyle that is the central feature of both incarceration and residential treatment programs."[119] The court then explained its interpretation of EM's shortcomings, specifying that Matthew "could do whatever he wanted to do (except for consume alcohol) and was free to associate with whomever he wanted."[120] Moreover, he "did not suffer the same lack of privacy experienced by an

108. *Id.*
109. *Id.*
110. *Id.* at 471.
111. *Id.*
112. *Id.*
113. *See id.*
114. *Id.* at 472.
115. *See id.*
116. *Id.*
117. *Id.* (quoting Nygren v. State, 658 P.2d 141, 146 (Alaska Ct. App. 1983)).
118. *Id.*
119. *Id.*
120. *Id.* at 473.

offender in an incarcerative facility or residential program."[121] The court again referred to its analysis as an application of the *Nygren* test before concluding that the restrictions imposed on Matthew did not "'approximate those experienced by one who is incarcerated.'"[122]

In its reasoning, the court broadly claimed to have applied the *Nygren* test, but a closer examination suggests that it instead focused on one particular *Nygren* factor,[123] that "while in the facility, residents are under a continuing duty to conform their conduct to institutional rules and to obey orders of persons who have immediate custody over them."[124] Such a focus fits with the fact that EM differs from residential alcohol treatment programs and CRCs in one critical respect—an offender lives within the confines of his or her own home (or other private residence) rather than in a communal or more institutional facility. In recognizing a structured, regimented lifestyle as "the central feature of both incarceration and residential treatment programs" and institutional rules and routines as "the hallmark of correctional or residential rehabilitative facilities,"[125] the court elevated the significance of this one *Nygren* factor to become more of a requirement rather than a mere "point of reference."[126] Its decision to deny Matthew credit for the time he served on EM turned on a perceived lack of institutional rules, regulations, and structure in EM correctional programming.[127]

4. Rethinking the Outcome in Matthew v. State[128]

In its interpretation of *Nygren*, the court in *Matthew* failed to clarify what is meant by "institutional rules and routines." For example, are institutional rules and routines only administered in an *institution*? Because the Department of Corrections administers EM sanctions, are the regulations imposed under EM still institutional? Do such institutional rules and routines completely inhibit an incarcerated individual from exercising any free will, enjoying free association, or

121. *Id.*
122. *Id.*
123. *Id.* at 472–73.
124. Nygren v. State, 658 P.2d 141, 146 (Alaska Ct. App. 1983).
125. *Matthew*, 152 P.3d at 472.
126. *See Nygren*, 658 P.2d at 146 (explaining that although not exhaustive, the common characteristics of incarcerative facilities set out in *Nygren* "are at least sufficient to serve as sound points of reference for determining, in any given case, whether 'substantial restrictions on one's freedom of movement and behavior' have been imposed, so as to require credit for time served under *Lock*" (quoting Lock v. State, 609 P.2d 539, 545 (Alaska 1980))).
127. *See Matthew*, 152 P.3d at 472–73.
128. The author gives special thanks to Professor Lisa Kern Griffin, Duke University School of Law, for her assistance with the development of this section.

maintaining privacy? None of these questions are answered by the Court of Appeals in *Matthew*. As a result, if EM is to obtain independent standing as an alternative to incarceration—one that could give credit toward an offender's sentence—a reworking of the *Matthew* decision is necessary.

Nygren aside, the decision in *Matthew* may affect how other courts interpret credit for time served on EM when it is used before trial or prior to sentencing. This, in turn, could influence whether these courts will ever interpret EM as a sufficient *sanction*, at least with respect to retribution rationales. In other words, the parameters placed on the use of EM in the pretrial context could affect those placed on EM sanctions. Moreover, the purposes of pretrial detention (especially pretrial release under EM) could also have an effect on EM sanctions. Instead of retribution, punishment, or general deterrence, the rationale behind pretrial detention is based on protecting communities from potentially dangerous offenders (*specific deterrence*) and ensuring that offenders appear at court proceedings.[129] EM's strength is just that (in addition to serving rehabilitative or reintegrative purposes). Thus, the strengths of EM are most apparent in the pretrial context. It is very likely that EM also has unrealized potential as a sanction, but policymakers and lawmakers must first examine its use in the pretrial context to determine what works and what challenges may arise in the sentencing context.

The *Matthew* court's treatment of EM credits suggests that there might be some reluctance to viewing EM as a sufficient sanction. In its analysis, the court emphasized EM's inability to satisfy the "institutional rules" prong of *Nygren*.[130] It also expressed a concern that Matthew "did not suffer the same lack of privacy experienced by an offender in an incarcerative facility or residential program."[131] That concern might be even more acute in the sentencing context. But, while the court was correct in acknowledging that EM is advantageous to offenders, its reasoning was somewhat misguided.

An offender may watch television at his will or choose what he will have for lunch while subjected to home confinement under EM, but his privacy is hardly undisturbed. He must respond to routine phone calls or video check-ins, may have his every move tracked by an electronic device, and may be subjected to random checks or visits from EM

129. ABA CRIMINAL JUSTICE SECTION STANDARDS, Pretrial Release Standard 10-1.1: Purposes of the Pretrial Release Decision, *available at* http://www.abanet.org/crimjust/standards/pretrialrelease_blk.html#10-1.1; *see also* Maxfield & Baumer, *supra* note 61, at 534 ("Pretrial *detention* seeks to protect the public while bringing defendants to trial.").

130. *See Matthew*, 152 P.3d at 472.

131. *Id.* at 473.

officers or administrators. These constraints clearly do not amount to those experienced under traditional incarceration, but they are nevertheless adequate. In fact, the use of EM may very well be advantageous for the correctional system as a whole because it frees space in jails and prisons, it costs less than incarceration, and it benefits yet penalizes offenders. So even though EM may fall short under a strict application of *Nygren*, it would likely prove viable under a broader assessment. In particular, when a court-ordered sanction is at issue, EM could prove particularly viable because a court-ordered sanction presumably imposes the most stringent possible requirements. Accordingly, and in spite of the suggestion in *Matthew*, a court-ordered EM sanction could prove even more successful than its pretrial counterpart, which is designed as an alternative to detention and which presumes release.

The court's "something is missing with EM" opinion in *Matthew* hinders defendants from obtaining credit for pretrial, pre-appeal, and pre-sentencing release under EM, and therefore it has limited EM's potential as an alternative to incarceration. A solution that resolves EM's supposed lack of institutional structure would likely remedy the problem. One particularly promising option is to incorporate EM into other court-approved alternatives to pretrial, pre-appeal, and pre-sentencing incarceration, such as residential alcohol treatment programs or CRCs. A proposal for such a "hybrid" use of EM and other alternatives to incarceration is presented in Part IV.

III. THE POTENTIAL AND THE CONTROVERSY SURROUNDING THE USE OF ELECTRONIC MONITORING

This Part will address the broader potential and possible pitfalls of EM—an analysis that must necessarily precede any Alaska-specific proposal for new, or modified, EM programming. The Alaska Court of Appeals' recent decision in *Matthew* reflects a narrow view of EM's potential and thus provides an interesting point of comparison. That view might lead to a conclusion that EM is less valuable than incarceration. But, as noted by the National Law Enforcement and Corrections Technology Center, "EM offers two distinct advantages over incarceration."[132] The first is cost-effectiveness.[133] The second is a reduction in prison overcrowding.[134] For the purposes of this Note, these

132. NLECTC, *supra* note 23, at 1.
133. *See id.*
134. *Id.*

"advantages" will be respectively analyzed in terms of efficiency and effectiveness.

A. The Efficiency Rationale

1. A Cost-Benefit Analysis of Electronic Monitoring

On average, EM programs cost between five and twenty-five dollars per day.[135] Incarceration costs, on the other hand, average fifty dollars a day—at least twice the cost of EM.[136] Yet, the comparatively inexpensive EM equipment is not the only cost-effective benefit that EM programs promise. Other tangible benefits include pretrial release of offenders who would have otherwise been detained, early release from incarceration and the resulting reduction in overall confinement costs, reduced costs for repeated treatment enrollments, and finally, a diminished need for the construction of new prisons.[137] The realization of such cost savings will vary according to the actual costs of incarceration and EM equipment and programming in a specific jurisdiction.[138] In Alaska, the high number of inmates and lack of prison space is a particularly pressing issue.[139] For example, the new Mat-Su prison, scheduled to open in 2012, is already expected to be full soon after it opens.[140] Strategically expanding EM programming would offer a workable solution that could potentially curb the need for another Mat-Su (or several) in the future.

Already, Alaska has seen savings in social costs because EM programs allow offenders to work and later pay off the costs of EM participation.[141] But such intangible savings are not all. Currently, the

135. *See id.* This claim was based on 1999 estimates of EM program costs. *Id.*

136. *See id.* In 1999, the cost of incarceration per inmate per day in Alaska was $97.92. In Louisiana, it was $30.36. ANN H. CROWE ET AL., AMERICAN PROBATION AND PAROLE ASS'N, OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY: A USER'S GUIDE 44 fig.5b (2002), *available at* http:// www.ncjrs.gov/ pdffiles1/nij/grants/197102.pdf. *But cf.* Admin. Office of the U.S. Courts, Office of Pub. Affairs, *Costs of Incarceration and Supervision*, THE THIRD BRANCH (May 2004), http://www.uscourts.gov/News/TheThirdBranch/05-05-01/Costs_ of_Incarceration_and_Supervision.aspx (citing Bureau of Prisons statistics indicating that the cost of imprisonment in a Bureau of Prisons facility at the time was $63.51 per inmate per day).

137. *See* CROWE ET. AL., *supra* note 136, at 27, 44–45.

138. *Id.*

139. *See generally* THE COST OF CRIME, *supra* note 1.

140. *Id.* at 4 fig.8.

141. *See* CROWE ET AL., *supra* note 136, at 45; *see also* NLECTC, *supra* note 23, at 1 (contending that communities benefit from EM "because offenders are paying taxes, taking care of their families, and sometimes even going to school to increase their future employment options").

use of EM saves the state about twenty-two times more than it would spend on incarceration.[142] This figure trumps all other alternatives to incarceration but falls short in one regard—reduced recidivism rates.[143] Other alternatives to prison have saved the state money *and* successfully reduced recidivism rates.[144] Thus, with respect to recidivism, the failures of Alaska's current correctional EM programming suggest that EM is not the cheap "quick fix" it may appear to be.

And while EM is cost-effective relative to incarceration, there are still cost concerns. Intangible costs, or "hidden fees," of EM use include initial investments in staff time for education and marketing purposes and investments in the planning process for incorporating EM use into existing correctional options.[145] An increased net-widening effect (whereby offenders who would have otherwise been successfully supervised without EM would now be placed in an EM program), opportunity costs (in terms of other correctional programs that could be implemented), and increased technical violations (which could lead to additional court hearings or reincarceration and therefore result in extra costs to the justice system) also add to the cost of EM.[146] These potential costs, along with concerns about the effectiveness of EM programming as opposed to incarceration or other alternatives, stress the need for careful and calculated spending on correctional EM.

2. Electronic Monitoring on the Alaska Budget

Alaska's spending on correctional EM depends on several factors, with federal spending in Alaska the primary factor. After the 1980s oil boom faded, Alaska increasingly relied on federal spending to fuel the state's economy.[147] Between 1993 and 2003, federal spending in the state more than doubled (not counting inflation), but nationwide, federal spending increased only about fifty percent.[148] Between 1996 and 2002, federal spending for grants jumped from $1.3 billion to $3.1 billion, and fifty-six percent of grants were undesignated.[149] Because such undesignated grants could provide funding for electronic supervision

142. THE COST OF CRIME, *supra* note 1, at 3 fig.6.
143. *See id.*
144. *Id.* (providing examples of alternatives to incarceration that have saved the state money and helped reduce recidivism, including therapeutic courts and adult residential treatment for substance abuse).
145. CROWE ET AL., *supra* note 136, at 43.
146. *Id.*
147. Scott Goldsmith & Eric Larson, *What Does $7.6 Billion in Federal Money Mean to Alaska?*, UNDERSTANDING ALASKA, Nov. 2003, at 4, *available at* http://www.iser.uaa.alaska.edu/Publications/FedSpendSum.pdf.
148. *Id.* at 1.
149. *See id.*

programs, the fifty-six percent is critical. While it is true that grants are only one of several sources of EM program funding,[150] in Alaska, federal spending and federal grants make up a vast portion of the state's economy.[151] As such, the ways in which federal grants are allocated could indirectly yet significantly impact the state's correctional EM programs. Because Alaska is a young, developing state and because only a few private industries bring in new revenue, federal spending is important to the state's economy and, ultimately, to EM programming.[152]

Despite the ample (and increasing) federal spending in Alaska, total state spending on corrections has not experienced as substantial a jump—yet. The state's operating budget has grown, but the percentage spent on corrections has been rather steady.[153] This percentage has also lagged in comparison to other states. In Fiscal Year 2007, Alaska spent 5.3% of its total state government expenditures on corrections while the nation on average spent 6.8%.[154] Moreover, "[e]xpenditures for the major justice system agencies—Department of Corrections, Public Safety, and Law, the Alaska Court System, Public Defender Agency, and Office of Public Advocacy—have comprised about 9 percent of Alaska's total state agency spending for the past ten years (FY 2000-2010)."[155] The figures are especially dreary for correctional EM. For Fiscal Year 2009, the Department of Corrections received $245,962,000 in resources "to achieve results,"[156] but just 914.1 Results Delivery Units (RDU) were

150. *See* CROWE ET AL., *supra* note 136, at 46–47 (discussing sources for EM program funding, including grants and government funding, private donations, in-kind resources and resource sharing, and offender fees).

151. *See generally* Goldsmith & Larson, *supra* note 147.

152. *Id.* at 2.

153. *See Justice System Operating Expenditures*, ALASKA JUST. F., Spring 2009, at 1, 2, *available at* http://justice.uaa.alaska.edu/forum/26/1spring2009/261.spring2009.pdf. The total operating budget for Alaska's justice system (in actual expenditures) for Fiscal Year 2000 was $336,883,300, or 9.6% of the total state budget. *Id.* Of that amount, the Department of Corrections received 4.4%, or $153,725,500. *Id.* For Fiscal Year 2010, the total projected operating budget for the justice system is $566,220,700 (9.2% of the total state budget) and the total for the Department of Corrections is $224,223,300 (3.7%). *Id.*

154. *See* THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 14 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/ One%20in%20100.pdf.

155. *See Justice System Operating Expenditures*, *supra* note 153, at 2.

156. STATE OF ALASKA, FY2009 GOVERNOR'S OPERATING BUDGET, DEPARTMENT OF CORRECTIONS PERFORMANCE MEASURES 4 (2007), *available at* http://www.gov.state.ak.us/omb/09_omb/budget/DOC/perfmeas_20.pdf.

allotted to EM.[157] In contrast, 13,099.1 RDU were allotted to statewide probation and parole and 16,827.6 RDU were allotted to Community Residential Centers in an effort to manage prison populations.[158] Clearly, if efficient EM use is to occur, Alaska will have to invest more in EM by adjusting spending priorities and allocating more resources to the Department of Corrections, which in turn should allocate more to EM programming. This will have to happen alongside a broader effort to attain more substantial federal grants for the state's justice system.

B. The Effectiveness Rationale

1. *What Does the Current Research Tell Us? General Purposes and Successes of Electronic Monitoring*

Other than cost savings, EM promises a reduction in prison overcrowding.[159] But the promise actually extends much further. A few original purposes of EM included reintegrating offenders into the community, treating them, and to a lesser degree, punishing and deterring them from future criminal conduct.[160] Others included public safety, compliance with mandates to reduce prison and jail overcrowding, and the provision of the most cost-effective correctional services.[161] At present, however, these purposes have focused almost exclusively on inexpensive and safe ways to provide surveillance or incapacitation while relieving overcrowded jails and prisons.[162] In a sense, then, these "new" purposes of EM actually tend to emulate the

157. STATE OF ALASKA, OFFICE OF THE GOVERNOR, COMPONENT SUMMARY FOR DEPARTMENT OF CORRECTIONS 2 (2009), *available at* http://www.gov.state.ak.us/omb/10_omb/budget/DOC/amended/10amd_4-3-09_compsummary_gf_doc.pdf.

158. *Id.*

159. NLECTC, *supra* note 23, at 1.

160. Randy R. Gainey, Brian K. Payne & Mike O'Toole, *The Relationship Between Time in Jail, Time on Electronic Monitoring, and Recidivism: An Event History Analysis of a Jail-Based Program*, 17 JUST. Q. 733, 746 (2000).

161. CROWE ET AL., *supra* note 136, at 14.

162. *See* Jody Klein-Saffran, *Electronic Monitoring vs. Halfway Houses: A Study of Federal Offenders*, ALTERNATIVES TO INCARCERATION, Fall 1995, at 1 (excerpts from unpublished Ph.D dissertation, University of Maryland) (stating that the primary purpose of current community corrections programs is to provide surveillance or incapacitation for as little cost as possible), http://www.bop.gov/news/research_projects/published_reports/gen_program_eval/orepralternatives.pdf (last visited Feb. 21, 2011); *see also* DeMichele & Payne, *supra* note 23, at 34 (discussing Rios and Greene's notion of the justice reinvestment movement, a concept suggesting that current use of community corrections is meant to offset state budgets by serving as an alternative to incarceration) (citing N. RIOS & J. GREENE, REDUCING RECIDIVISM: A REVIEW OF EFFECTIVE STATE INITIATIVES (2009)).

retributive and deterrent purposes of incarceration, which primarily seek "to punish offenders, to protect society by removing dangerous offenders from society, and to deter future criminal behavior."[163] Alaska's current EM program is an apt example. As such, when evaluating the effectiveness of the program, the state's policymakers must keep in mind the many *different* purposes EM was intended to serve (as opposed to incarceration) and the diverse goals it aspired to achieve. Doing so will help these policymakers understand how to combine EM with other sanctions to maximize its potential.[164]

At this point, regrettably little is known about the effectiveness of EM as an alternative to incarceration, and it is still unclear whether EM has successfully met its purported purposes and goals.[165] The uncertainty results from sparse research into the operation and impact of EM[166] and a lack of empirical proof.[167] More rigorous empirical research is necessary to render reliable and widely applicable conclusions,[168] but until this occurs, the current research proves helpful in assessing the uses and general successes of EM. For example, EM has been cited as having at least three distinct uses.[169] These include use in the pretrial context, use as a sanction in and of itself immediately after conviction, and use in conjunction with other sanctions (i.e., offenders who receive a jail or prison sentence and are subsequently placed on EM when released back into the community).[170] Within the context of each use, EM has already had several successes.[171]

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163. *See* Gainey, Payne & O'Toole, *supra* note 160, at 746 (describing the main purposes of incarceration).

164. *See id.* at 747 (suggesting that because the purposes of incarceration and EM are so different, it makes theoretical and practical sense to combine sentences for certain offenders).

165. Kathy G. Padgett, William D. Bales, & Thomas G. Blomberg, *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 CRIMINOLOGY & PUB. POL'Y, 61, 65 (2006). "Although some form of home confinement with EM had been implemented in all 50 states by 1990 there is still little known about its effectiveness as an alternative to incarceration or in protecting public safety by reducing rates of reoffending." *Id.*; *see also* Annesley K. Schmidt, *Electronic Monitoring: What Does the Literature Tell Us?*, 62 FED. PROBATION 10, 10 (1998) (explaining why little is definitively known about EM devices' effectiveness).

166. *See, e.g.*, Maxfield & Baumer, *supra* note 61, at 522.

167. Padgett, Bales, & Blomberg, *supra* note 165, at 65.

168. *See id.* (observing that researchers themselves have recognized that EM research "has not kept pace with the rapid implementation of the penal strategy").

169. Payne & Gainey, *supra* note 34, at 415; *see also* CROWE ET AL., *supra* note 136, at 14.

170. *Id.*

171. *See infra* text accompanying notes 172–76.

Pretrial home detention under EM has allowed suspects "to avoid the criminogenic environment found in many jails,"[172] provided more access to attorneys,[173] given another option to "those unable to post bond or to meet eligibility criteria for release on recognizance," helped offenders maintain employment and family ties, and depending on the particular program, may even provide rehabilitative effects.[174] Immediately after conviction, EM serves punitive and rehabilitative purposes, protects public safety by subjecting offenders to a controlled environment, and in some cases, deters offenders from committing new offenses.[175] Finally, an EM sanction that follows time served in an incarcerative facility "affords offenders respect by trusting them with early release into the community."[176]

2. How Is the Success of Electronic Monitoring Measured? Common Methods of Evaluation

The success of EM in the pretrial context, immediately after conviction, and following incarceration can be measured by several factors.[177] After all, EM would hardly be effective (or desirable) if it only relieved prison and jail overcrowding.[178] Accordingly, its success is often determined by answering a number of instructive questions: How many violations of EM conditions occurred? Did offenders fail to finish the full length of their EM sanctions? Was EM able to deter future misconduct? Is there public support of EM for less serious and less dangerous offenders? Did offenders still experience the pains of incarceration while serving time under EM supervision? Did they perceive the EM experience to be a punitive one?[179]

Running through these questions are three purposes of criminal justice: retribution, deterrence, and rehabilitation or reintegration.[180] The

172. *See* Payne & Gainey, *supra* note 34, at 415.
173. *See id.* at 415–16.
174. *See* Maxfield & Baumer, *supra* note 61, at 523–24.
175. *See* Payne & Gainey, *supra* note 34, at 416.
176. *Id.*
177. *Id.* at 416–17 (listing EM's successes pretrial, immediately after conviction, and postincarceration).
178. *See* Stephen J. Fay, *Electronically Monitored Justice: A Consideration of Recent Evidence as to Its Effectiveness*, 24 ANGLO-AM L. REV. 397, 424 (1995) ("Of course, to do something in response to prison and jail overcrowding is not necessarily to do something effective.").
179. Payne & Gainey, *supra* note 34, at 416–17.
180. *See* DAVID LEVINSON, ENCYCLOPEDIA OF CRIME AND PUNISHMENT 333–34 (2002). According to Levinson, the two main justifications for punishment are retribution and prevention (deterrence) with rehabilitation and reintegration as secondary justifications often grouped under deterrence. *Id.* Having established the added and significant rehabilitative purpose of alternative sanctions such as

remainder of this section will attempt to probe the effectiveness of EM through these three lenses.

a. The Retributive Model[181]

EM is often considered less restrictive than other sanctions, especially incarceration.[182] But while less restrictive, EM is still *punitive*.[183] At least one study points to the lack of freedom experienced under EM.[184] Others refer to the structure and control imposed by EM.[185] Taken together, the studies suggest commentators' views on EM's effectiveness that are in direct opposition to the one suggested by the Alaska Court of Appeals in *Matthew v. State*.[186] There the court decided that EM did not approximate the restrictions experienced in prison or jail because Matthew "could do whatever he wanted to do (except for consume alcohol) and was free to associate with whomever he wanted."[187] He also "did not suffer the same lack of privacy experienced by an offender in an incarcerative facility or residential program."[188] Although these observations were correct, the court appears to have taken a rather cursory view of EM's retributive purpose. A comprehensive study of offenders' perspectives on the Alaska EM program could shed light on this matter, providing the court with a more reliable and more informative basis for evaluating the freedom (or lack thereof) experienced under the Department of Correction's EM program.

Another broader concern about retribution entails the use of punishment in the pretrial context.[189] The question often asked is whether it is ethical or logical to punish a "presumed innocent"

EM, this Note elevates rehabilitation and reintegration to primary rather than secondary justifications for punishment. While all three justifications are evaluated in this Note, particular attention will be paid to the potential rehabilitative effect of EM.

181. According to Levinson, "[r]etribution is based on a theory that it is right to punish those who have committed a wrong." *Id.* at 333. Black's Law Dictionary defines it as "punishment imposed as repayment or revenge for the offense committed; requital" and "something justly deserved; repayment; reward." BLACK'S LAW DICTIONARY 1431 (9th ed. 2009).

182. *See* Payne & Gainey, *supra* note 34, at 432.

183. *See id.* at 426–27, 432.

184. *See id.* at 427.

185. *Id.* at 432.

186. 152 P.3d 469 (Alaska Ct. App. 2007).

187. *Id.* at 472–73.

188. *Id.* at 473.

189. *See* Maxfield & Baumer, *supra* note 61, at 523–24 (suggesting the use of EM can be both beneficial to offenders but also restrictive of offenders' freedom).

defendant before he or she is convicted.[190] Viewed in this regard, EM is all the more appropriate alternative to incarceration precisely because it is less restrictive than others.[191]

b. The Deterrence Model

Black's Law Dictionary defines deterrence "as a goal of criminal law, the prevention of criminal behavior by fear of punishment."[192] As such, recidivism[193] rates provide a "logical tool for measuring the performance of the criminal justice system in Alaska."[194] Alaska's criminal justice system applies presumptive sentencing and significantly increases an offender's sentence if she commits a new offense after an earlier conviction.[195] "Thus, arrests and convictions of recent offenders are logical measures for the effectiveness of the system."[196] Already, recidivism reports have helped measure the success of various criminal justice programs and policies, including the effectiveness of the state's therapeutic courts.[197] The same is possible with respect to evaluating the effectiveness of Alaska's EM program.[198]

In 2007, the Alaska Judicial Council conducted the state's first general study on recidivism.[199] Unfortunately, the results were undeniably disappointing. Just three years after they were released from their sentences, "66% of all offenders in the sample had been re-

190. *See id.* at 524 (proposing that "the propriety of trying to rehabilitate an unconvicted and presumed innocent pretrial population can be questioned").

191. *See id.* at 523 ("Defendants wearing wristlets and confined to home or work face more restrictions than do those on bond, but awaiting trial at home is less restrictive than confinement in jail.").

192. BLACK'S LAW DICTIONARY 514 (9th ed. 2009). Deterrence is classified as either specific ("actions taken to prevent that defendant from committing future offenses") or general ("actions designed to prevent others from committing crimes") and falls under the broader category of prevention. LEVINSON, *supra* note 180, at 333.

193. *Black's Law Dictionary* defines recidivism as "[a] tendency to relapse into a habit of criminal activity or behavior." *Id.* at 1384.

194. Teresa W. Carns, *Recidivism in Alaska*, 25 ALASKA L. REV. ONLINE ARTICLES F. 1, 3 (2008), http://www.law.duke.edu/shell/cite.pl?25online+Alaska+L.+Rev.+1+pdf.

195. *See id.* at 3.

196. *Id.* at 3–4.

197. *Id.* at 4.

198. *See id.* at 23. The Alaska Judicial Council's first general study of recidivism in Alaska resulted in a comprehensive report entitled "Criminal Recidivism in Alaska," published in January 2007. *Id.* at 1. The report has already aided the discussion of new Driving Under the Influence (DUI) legislation and will likely prove equally helpful in the discussion of new or restructured EM programming. *Id.* at 23.

199. *See* ALASKA JUDICIAL COUNCIL, CRIMINAL RECIDIVISM IN ALASKA *Exec. Summary* (2007), *available at* http://www.ajc.state.ak.us/reports/1-07CriminalRecidivism.pdf.

incarcerated at least once, for a new offense or a probation or parole violation [and] 59% were arrested at least once for a new offense."[200] Offenders were also "most likely to recidivate during the first year of release and even more so during the first six months."[201] Other recidivism studies have produced mixed results with respect to EM.[202] Some show that EM has successfully helped reduce recidivism rates.[203] Some show there is no difference in recidivism rates after EM and after incarceration.[204] Nonetheless, even if EM does not reduce recidivism, unchanged conviction rates with EM still allow for a more cost-effective sanction overall.[205] EM expert Dick Whitfield specifically suggests using EM as a part of a wider approach of deterrence.[206] In his opinion, seeing how EM fits into a broader scheme of deterrence "is a much more realistic way of measuring the impact [it] has had, and the policy contribution it can make."[207] Of course, in assessing EM's value as "part of a whole," researchers and policymakers will have to keep in mind that EM is a strictly voluntary sanction, and therefore, the primary target for home confinement under EM will continue to be the "low-risk" offender who is not considered a threat to public safety.[208] Unless there is such a combined, or "hybrid," approach to EM and "unless there is a shift in emphasis away from surveillance and control towards (more expensive) treatment as the basis of intermediate sanctions, electronic

200. *Id.*

201. *Id.* at 14.

202. *See* Gainey, Payne & O'Toole, *supra* note 160, at 737. ("Research findings . . . suggest that the effects of participation in house arrest with electronic monitoring are not clear-cut.").

203. *See id.* at 737–38 (listing studies that suggest high rates of program completion for EM programs in which offenders were sentenced to house arrest with EM but not incarcerated).

204. *See id.* at 738. The authors specifically discuss a 1997 study comparing recidivism rates of offenders sentenced to jail with those of offenders sentenced to house arrest with EM. *Id.* The study found that the recidivism rates for both groups were relatively low and the differences between the groups were more or less negligible. *Id.*

205. *See* WHITFIELD, THE MAGIC BRACELET, *supra* note 32, at 92. Whitfield explains that EM's cost-effectiveness has been used as a justification for expanding its use. *Id.* He then cautions that EM must nevertheless demonstrate an "added value" component if it is to become a more prominent part of sentencing schemes. *Id.*

206. *See id.* at 94.

207. *Id.*

208. Baumer & Mendelsohn, *supra* note 61, at 65. EM is a strictly voluntary sanction because the incapacitation it provides is only supported by "the threat of detection and sanctions for violations." *Id.* This suggests that low-risk offenders, who are a lesser threat to public safety, will remain the target population for participation in EM programming. *Id.*

monitoring is never likely to 'deliver the goods' in terms of reduced rates of recidivism."[209]

c. The Rehabilitation or Reintegration Model

Rehabilitation is the last of the three traditional theories of criminal justice.[210] Reintegration is closely associated with rehabilitation and seeks "to change deviant behavior, while emphasizing that the change can most effectively be accomplished in concert with the community, and not in a prison or jail."[211] The Alaska Constitution espouses these same views and even includes "the principle of reformation" as a policy underlying the state's criminal justice system.[212] And while "an offender's constitutional right to rehabilitation does not extend beyond release from custody, Alaska law recognizes a *public* interest in rehabilitation."[213] One such interest involves public safety.[214] Because studies have shown "a statistical relationship between a lack of employment and increased risk of recidivism," released offenders should be given adequate opportunities for employment in order to prevent the potentially costly and dangerous consequences that would otherwise become the burden of the Alaska taxpayer.[215] In fact, the Alaska Department of Corrections has explicitly referred to goals of "reformation" or "reintegration" in both its mission and vision statements.[216]

This evident institutional support and promotion of the rehabilitative or reintegrating aspects of criminal justice implies that Alaska policymakers will likely endorse a reasonable and effective rehabilitative alternative to incarceration. Although some criticize EM as a lesser form of rehabilitation (because offenders released on home confinement do not get exposed to the social networks and rebuilding

209. Fay, *supra* note 178, at 422.

210. BLACK'S LAW DICTIONARY 1398 (9th ed. 2009). Black's Law Dictionary also defines rehabilitation as "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes." *Id.*

211. LEVINSON, *supra* note 180, at 334.

212. ALASKA CONST. art. 1, § 12; *see also* Deborah Periman, *The Hidden Impact of a Criminal Conviction: A Brief Overview of Collateral Consequences in Alaska*, ALASKA JUST. F., Fall 2007, at 1, 1, *available at* http://justice.uaa.alaska.edu/forum/24/3fall2007/243.fall2007.pdf.

213. Periman, *supra* note 212, at 6.

214. *See id.*

215. *See id.*

216. ALASKA DEP'T OF CORR., (last visited Jan. 30, 2011), http://www.correct.state.ak.us/corrections/index.jsf;jsessionid=C565744BDA54E72C6EE44270D1718602.

skills that incarcerated offenders are exposed to),[217] EM gives eligible offenders the ability to maintain family ties,[218] teaches them to control themselves and structure their daily activities,[219] and ultimately eases them back into society by providing them with the tools necessary to reintegrate and comport with the expectations of their local communities.[220] The dire statistics on recidivism in Alaska provide yet another compelling (and cost-effective) reason to reallocate current resources to "re-entry" programs that can reduce recidivism by helping offenders adjust to the expectations of mainstream society and their local communities.[221] EM is a fitting program in this regard.

In order to consistently reach its full rehabilitative potential, EM should be combined with other correctional programs that focus on treatment.[222] This will require a much more substantial financial investment in combined EM efforts and a major shift away from surveillance and control to a more integrative, and hence, more rehabilitative and reintegrating option.[223]

IV. ELECTRONIC MONITORING AS A VIABLE BUT INCOMPLETE ALTERNATIVE TO INCARCERATION

As an alternative to incarceration, home confinement under EM has proven significantly more cost-effective.[224] Nonetheless, its ability to

217. *See* Fay, *supra* note 178, at 409 (arguing that EM, "in its obsession with potential cost-savings . . . ignores the value of assessment, counseling and support offered by experienced probation personnel"); *see id.* at 416 (suggesting that "rehabilitation is seldom a specific objective of electronic monitoring [programs]").

218. *See* Payne & Gainey, *supra* note 34, at 428 (summarizing statements from offenders sentenced to EM that note EM gives offenders the ability to maintain ties with their families).

219. *See* Maxfield & Baumer, *supra* note 61, at 524 (stating that EM forces participating offenders to plan their activities and may thus impose order on heretofore disorderly lives).

220. *See* Payne & Gainey, *supra* note 34, at 416 (proposing that the use of EM as a sanction has rehabilitative effects and helps offenders reintegrate into the community).

221. *See* ALASKA JUDICIAL COUNCIL, CRIMINAL RECIDIVISM IN ALASKA, *supra* note 199, at 14; *see also* Carns, *supra* note 194, at 27.

222. *See* Fay, *supra* note 178, at 417 (discussing how researchers have already recognized that EM programs should include a treatment component and focusing on the insistence that EM be accompanied by treatment plans that cater to each individual offender and are designed to have effects that last beyond the offender's release date).

223. *See id.* at 423.

224. *See* THE COST OF CRIME, *supra* note 1, at 3 fig.6 (demonstrating that the use of EM saves the state about twenty-two times what it would have spent on other alternatives to incarceration).

carry out the three theories, or goals, of criminal justice has not provided the same assurance. Perhaps this is the reason why the Alaska Court of Appeals restricted the use of correctional EM in *Matthew v. State*[225] and why others courts have ruled similarly.[226] In order to persuade these courts—and particularly the Alaska Court of Appeals—that EM *is* capable of carrying out the three goals of criminal justice in an efficient and effective manner, it is imperative to highlight the potential EM would reach as part of a "hybrid" correctional scheme.[227]

In *Matthew*, the court expressed dissatisfaction with what it perceived to be the lack of "institutional rules and routines" in correctional systems based on home confinement with EM.[228] Other critics argue that home confinement under EM cannot punish enough,[229] cannot deter criminals from recidivating anymore than other alternatives,[230] and cannot rehabilitate because it strips offenders of the social networking and rebuilding skills offered in prison.[231] Any proposal for a hybrid scheme obviously will have to correct for these perceived shortcomings if it is to be implemented and widely accepted for use at various stages of the correctional process, and particularly the sentencing stage.

Matthew (and its stringent adherence to *Nygren*) will pose some obstacles to hybrid endeavors because it emphasizes the perceived shortcomings of EM. But the opinion is not definitive precedent for how to approach EM as a judicial sanction. A court will still give credit for a sentence served as long as that sentence was the one an offender

225. *See* 152 P.3d 469 (Alaska Ct. App. 2007).

226. *See also* CROWE ET AL., *supra* note 136, at 24–25 (citing Fraley v. U.S. Bureau of Prisons, 1 F.3d 924 (9th Cir. 1993); United States v. Herrera, 913 F.2d 761 (11th Cir. 1991); Pennsylvania v. Shartle, 652 A.2d 874 (Pa. Super. Ct. 1995)) (discussing selective cases in which courts denied credit for time served on EM).

227. *See* Payne & Gainey, *supra* note 34, at 431 ("[C]ommunity-based sanctions can be effectively used in conjunction with other traditional sanctions."). Here the authors specifically suggest that applying EM directly after incarceration would be most effective. *Id.*

228. *See* 152 P.3d at 472.

229. *See* Payne & Gainey, *supra* note 34, at 432 (explaining that EM "is often misinterpreted as a slap on the wrist").

230. *See* Fay, *supra* note 178, at 415 (noting that various research studies have found that EM offers no significant advantages in terms of reducing recidivism rates); *cf.* Gainey, Payne & O'Toole, *supra* note 160, at 737 ("Research findings . . . suggest that the effects of participation in house arrest with electronic monitoring are not clear-cut.").

231. *See* Fay, *supra* note 178, at 409 (arguing that the strategy of substituting inexpensive EM for incarceration, "in its obsession with potential cost-savings . . . ignores the value of assessment, counseling and support offered by experienced probation personnel"); *see id.* at 416 ("[R]ehabilitation is seldom a specific objective of electronic monitoring [programs].").

received. Thus, the success of EM as a sanction will likely depend on other factors: whether courts will be willing to impose EM as a sentence in and of itself, whether the appropriate vehicles exist to carry out such a sanction, and whether the public will recognize it as just if it is used more widely.[232]

Strategically pairing EM with another correctional system can win over critics and EM-opposed courts by combining the clear benefits of EM with a scheme that embodies the "institutional" elements that EM may lack. It is therefore crucial to choose an appropriate alternative to incarceration to complete the "hybrid." The options are abundant, but this Note will attempt to narrow the available choices to those most advantageous to Alaska.

A. Proposal One: Combine Electronic Monitoring with Existing Therapeutic Jurisprudence and Programs

Several commentators have already recommended adding a more substantial treatment element to home confinement under EM.[233] Combining EM sanctions with existing therapeutic alternatives to incarceration would supply this "treatment" aspect. Even more convincing is the fact that Alaska has already successfully implemented therapeutic, or problem-solving, courts in several cities. The courts work to address a myriad of therapeutic concerns and are akin to traditional courts because they weigh the seriousness of a crime and then look for an appropriate sanction.[234] They are innovative in their additional focus on treatment options and the likelihood that offenders will participate in available options and rehabilitate from that participation in ways that benefit both offenders and society.[235] By striving "to balance the letter of

232. The author gives special thanks to Professor Lisa Kern Griffin, Duke University School of Law, for assistance with this paragraph.

233. *See* Fay, *supra* note 178, at 417 (pointing to two research studies which have already recognized that many of the offenders subjected to home confinement under EM should receive other treatment in conjunction with EM).

234. *See Therapeutic Jurisprudence*, ALASKA JUST. F., Spring 2009, at 10, 10, *available at* http://justice.uaa.alaska.edu/forum/26/1spring2009/261.spring2009.pdf.

235. *See id.* Other common purposes of such courts include (1) providing positive outcomes for not only offenders but also victims and society as a whole; (2) promoting reform by responding to problems such as substance abuse or mental illness; (3) encouraging judicial involvement to address offenders' problems; (4) encouraging collaboration with groups operating outside the justice system in order to improve treatment options; (5) taking on "unconventional" and less adversarial roles; (6) screening and assessing which

the law and the spirit in addressing issues of fairness to offenders and to victims and communities," these problem-solving courts have demonstrated an ability to reduce both recidivism and incarceration rates.[236]

Problem-solving courts' success with respect to deterrence and rehabilitation[237] provides compelling reason for combining therapeutic jurisprudence with EM. But since most of Alaska's problem-solving courts concentrate on addictions or mental health issues,[238] it will be necessary to expand the scope of the courts' current reach (in terms of what issues they address). Then, especially with lower risk offenders, the courts could possibly prescribe sentences that involve elements of institution or community-driven therapy followed by home confinement on EM.

A sanction involving elements of therapeutic jurisprudence followed by the use of EM would provide a more graduated and guided release to home confinement on EM and could therefore broaden the scope of eligible offenders. For example, higher risk offenders that may have been excluded from EM participation due to inappropriate behavior in jail or prison or severe substance abuse or mental illness[239] might find a "second chance" in this proposal.

Then again, the extent that an offender would be eligible should still be weighed against the probability that the hybrid might successfully punish, deter, and rehabilitate him. This would vary according to the unique capabilities and capacities of each individual hybrid program. Reasonable expectations for community safety would also factor in, so offenders deemed highly dangerous probably would not meet the criteria for eligibility unless the conditions imposed by the hybrid advanced to accommodate such offenders. And since assessing these matters would require additional time and monetary investment on top of what would likely be an already expensive hybrid, selectively screening potential participants might be even more necessary with the hybrid than without.

At the very least, the therapeutic justice-EM approach would help relieve the state's overcrowded prisons and bolster EM's ability to deter and rehabilitate offenders. But in case policymakers or other critics

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offenders should be referred to therapeutic courts; and (7) using screening and assessing tools as early as possible to identify potential candidates. *Id.*

236. *Id.*

237. *See id.*

238. *See id.*

239. *See* CROWE ET AL., *supra* note 136, at 36 (recommending exclusion criteria for EM participation, with one criterion being "severe substance abuse or mental illness that limits offender's ability to control his or her behavior").

argue that this hybrid lacks an appropriate degree of "retribution," another option would be to impose a shorter sentence of traditional incarceration followed by the therapeutic justice-EM approach. Although this alternative might not immediately relieve jail and prison overcrowding, it could speed up the turnover in these facilities while successfully deterring and rehabilitating participants. Ultimately, no matter how the hybrid is implemented, it will surely require significant research, planning, resource redistribution, financial investment, and patience.

B. Proposal Two: Combine Electronic Monitoring with Halfway Housing

A halfway house, or residential community treatment center, "is a transitional housing facility designed to rehabilitate people who have recently left a prison or medical-care facility, or who otherwise need help in adjusting to a normal life."[240] The restrictive community-based environment comprises the punitive component of this sanction while the reintegration and transitional services offered to participants comprise the rehabilitative, or reintegration, component.[241] Adding an EM element to halfway housing could reinforce the sanction's restrictive and retributive aspects. This option would also appease those concerned with public safety. And for several of the same reasons the therapeutic jurisprudence-EM option allows a larger class of offenders to reap the benefits of EM, the community-driven reintegration offered in the halfway house-EM option likewise would allow many more offenders to benefit.

Although halfway houses have not been shown to reduce recidivism any more than other alternatives to incarceration,[242] policymakers could potentially borrow from the successful recommendations of therapeutic courts and apply those to the halfway house-EM combination. In the alternative, policymakers could implement further restrictions on halfway houses that would more closely reflect the "institutional rules and routines" found in traditional jails or prisons. By then adding the EM element of restraint, correctional systems would better achieve a balance between community-driven and institutional-enforced retribution, deterrence, and rehabilitation.

240. BLACK'S LAW DICTIONARY 781 (9th ed. 2009).
241. *See* Klein-Saffran, *supra* note 162, at 24–25.
242. *See generally* Charles L. Walsh and Scott H. Beck, *Predictors of Recidivism Among Halfway House Residents*, 15 AM. J. CRIM. JUST. 1066 (1990).

CONCLUSION

In order to move toward the realization of EM "hybrid" efforts, whether based on therapeutic jurisprudence or halfway housing, Alaska policymakers need to encourage public understanding and generate wider support for EM at different stages of the criminal justice process. Policymakers should also recognize the feasibility of combining diverse sanctions, consider how different offenders respond to different sanctions, and remember not to overrate or underrate EM's potential as an efficient and effective alternative to incarceration when part of a combined correctional scheme.[243] These steps will allow policymakers to maximize the potential benefits of EM while addressing the concerns discussed by the Alaska Court of Appeals in *Matthew v. State* and cited by various critics. Because these concerns pinpoint a perceived lack of institutional structure, policymakers should first conduct an in-depth statistical analysis of the advantages and deficiencies of home confinement under EM in Alaska.[244] Knowing these advantages and deficiencies will allow them to target the alternatives to incarceration that will produce the most efficient and effective "hybrid" when combined with EM.

The success EM already has had as the state's most cost-effective alternative to incarceration and as a viable method of reintegration suggests that it certainly can improve Alaska's correctional system if executed strategically. While the means to this end may be costly in the short term, the results would allow for a more cost-effective and comprehensive administration of criminal justice in the long term. Consequently, Alaska policymakers will have to redistribute resources and seek out new ones in addition to planning and executing the substantive EM hybrid. Then, through trial and error, the state's correctional department will be in a much more informed and experienced position to determine whether to expand the use of EM or continue the search for a more suitable alternative to incarceration. Perhaps this determination will confirm the perceived shortcomings of EM discussed in *Matthew v. State* or perhaps it will have the opposite effect—proving that the potential of home confinement under EM *can* be realized in Alaska. This, in turn, could affect the status of the statutes governing EM use in the state and could even affect the current interpretation and importance of *Nygren v. State*. For now, the state ought to at least engage in a close examination of what could potentially

243. *See* Gainey, Payne & O'Toole, *supra* note 160, at 749–50.

244. *See* DeMichele & Payne, *supra* note 23, at 34 ("[T]echnologies used to monitor offenders in the community have both benefits and drawbacks.").

be an invaluable alternative to incarceration at all stages of the criminal process.