
CRIMINAL LAW & PROCEDURE

A COMPREHENSIVE STRATEGY TARGETING RECIDIVIST CRIMINALS WITH CONTINUOUS REAL-TIME GPS MONITORING: IS REVERSE ENGINEERING CRIME CONTROL POSSIBLE?

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One of the most pressing criminal justice challenges facing the nation is reducing the incidence and prevalence of violent crime, the costs of which are incomprehensibly tragic, destructive, and far-reaching. Over the years, electronic monitoring has been a rising star in the criminal justice system. For nearly three decades, in fact, the technology has been used by correctional departments for supervising criminal offenders in a wide variety of settings.

Electronic monitoring's most traditional application, however, has been to assure that provisionally released offenders comply with judicially-imposed conditions, such as confining a defendant to his residence during a specified period of time. Recently, Global Positioning System ("GPS") technology has been employed to track domestic abusers and sex offenders, primarily to help ensure the safety of the community and/or the safety of former victims through enforcement of "exclusion zones," areas within which the offender's physical presence is prohibited. Even more recently, however, some jurisdictions have instigated pilot programs designed to combat recidivism in sex offenders.

According to the Bureau of Justice Statistics, a significant percentage of the general prison population is recidivist offenders. In fact, recidivists commit the majority of violent crime in the United States. Some studies of metropolitan areas suggest that as much as 70% of reported crimes are committed by felons with prior records.¹ Against this unsettling backdrop, could GPS monitoring be expanded to cover a far broader scope of criminal recidivists to strategically reduce crime in our nation?

This article examines whether it might be possible to craft a comprehensive strategy designed to dramatically reduce crime by using advances in GPS technology to effectively eliminate the recidivist criminal's ability to relapse into prior criminal conduct. Such a long-term strategic approach would implicate a number of constitutional and legal issues. However, if the legal hurdles can be overcome, such an innovative crime-reduction strategy might well be successful, particularly if it could integrate a number of other time-tested crime reduction strategies that

criminal justice advocates have successfully employed. These strategies would support long-term, active GPS monitoring, and would include: crime scene correlation, active supervision, and community-oriented behavioral modification techniques such as restorative justice, a powerful program requiring criminals to interact with their victims and immediate social communities.

I. CONVENTIONAL METHODS TO CONTROL CRIME HAVE FAILED

Anyone who pays even the slightest attention to the evening news is aware that our criminal justice system is broken. The age-old solution of building more prisons and incarcerating more offenders with stiffer penalties has failed to stop a segment of our society from engaging in repetitive criminal behavior. Ironically, it seems that everyone understands the root causes of crime, yet, at the same time, we seem unable to do anything about it. The failure of our public schools to educate and the breakdown of the moral and family structure of society have combined to create cultural breeding grounds for crime. The results have been staggering. Pervasive cultures of crime now exist in many areas of the country which, once limited to the inner cities, have evolved and spread into other communities like a cancer.

Accordingly, it should come as no surprise that the United States has one of the highest per capita incarceration rates in the world.² As reported by *The New York Times* in 2008, America has less than 5% of the world's population but almost a quarter of the world's prisoners, which equates to over two million people behind bars, more than any other nation on earth.³ In fact, the U.S. incarceration rate has almost doubled in each decade since 1970, increasing, for example, from 135 per 100,000 residents in 1978, to 244 in 1988, to 460 in 2003.⁴

Based on these sobering figures, one would think that the crime rate would have fallen proportionally. However, in reality, violent crime in the United States has soared over the long-term. Since 1964, the nation's crime rate has increased by as much as 350%. In 2007 alone, for example, over 11 million crimes were reported.⁵ At the end of 2009, approximately 7.2 million people in the United States were on probation, in prison, or on parole.⁶ As a consequence of this meteoric rise in criminal offenders, state correctional facilities are bursting at the seams, which has even resulted in the release of prisoners back onto the streets.⁷ Recently, the Supreme Court, in *Brown v. Plata*,⁸ ordered California to release 46,000 convicted criminals based on the prison system's inability to provide adequate physical health treatment. Today, approximately one in every 32 Americans is subject to the criminal justice system.⁹

To put all this in relevant perspective, a recent Justice

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Department study conducted over ten years in the most populous counties discovered that the majority of those committing violent felonies had multiple prior arrests and at least one prior felony arrest.¹⁰ More specifically, the report found that an estimated 70% of violent felons in the 75 largest counties previously had been arrested, and 57% had at least one prior arrest for a felony.¹¹ Similarly, another recent Justice Department report found that nearly half of the inmates in local jails were on probation or parole at the time of their arrest; 40% had served three or more prior sentences of incarceration or probation; and 40% had a current or prior violent felony offense.¹² More than half of these inmates reported having a pre-existing criminal justice status at the time of arrest.¹³

Hence, the data have been mounting for quite some time that recidivist offenders are responsible for the majority of criminal acts in America. In a study by the Justice Department's Bureau of Justice Statistics, which tracked recidivism of released prisoners throughout the United States, approximately seven out of ten released inmates committed at least one serious new crime within the following three years.¹⁴ Within those same three years, 52% of the former inmates were back in prison either because of a new offense or because of a violation of release conditions.¹⁵ Among those with at least three prior arrests, 55% were re-arrested. Among the more serious repeat offenders, i.e., those having at least fifteen prior arrests, a whopping 82% were re-arrested within the same three-year period,¹⁶ and this figure does not even take into account any crimes the former inmates committed for which they were never caught.

Clearly, the nation's criminal justice system was in a state of crisis *before* the economic downturn and skyrocketing unemployment witnessed in 2011. Police departments and prisons have been overwhelmed. In fact, the prisons *themselves* have become learning centers for better crime, not to mention the hardening of criminals that undeniably occurs. A new program, requiring extended GPS monitoring of the very group of criminals statistically responsible for the majority of crime, might offer the long-awaited solution. What if cutting the crime rate in half was merely as simple as wrapping GPS bracelets on the ankles of all the recidivist criminals? Would the device alter their behavior? Would it stop them from harming more victims?

II. THE CURRENT STATE OF ELECTRONIC OFFENDER MONITORING

Electronic monitoring is employed by courts and corrections departments to track the movement and location of criminal offenders for a wide variety of purposes. In its infancy, electronic monitoring, at least by today's standards, was fairly simple—a monitoring device was connected to a telephone line which alerted officials if the offender left his home. This form of supervising technology was used first in Florida during the mid-1980s as a part of a house arrest program.¹⁷ Specifically, a device worn by the offender emitted a coded signal to a monitoring unit in the residence, which could dial officers over the phone line. In most instances, the device worn by the offender was an ankle bracelet transmitter. First-generation units relied on a radio-frequency ("RF") transmitter that sent the signal to the

receiving unit. If an offender moved outside of a permissible range, the authorities would be notified. By 1990, some sort of home confinement with electronic monitoring was in place in all fifty states.¹⁸

While first-generation devices relied on RF technology, second-generation devices began employing GPS technology. Unlike the earlier systems, GPS devices are capable of tracking *all* of an offender's movements, both in and outside the home. In fact, commercial GPS technology is so accurate that systems can locate an offender anywhere on land or sea within a margin of error of about six feet. As the technology continues to advance, the transmitters undoubtedly will become even smaller and easier to manage and use.

GPS monitoring may be either passive or active. In a passive system, the transmitter communicates with a series of global positioning satellites (hence "GPS") to map out the person's movements. Then, once or twice a day, for example, the information is transferred into a computer where the offender's tracking data is stored for later use.¹⁹ In an active system, however, the offender's location is monitored in real time through a continuous signal, and the transmission rate can be adjusted by seconds or minutes. If an offender were to enter or leave a restricted zone, for example, the monitoring station would be instantly notified of his then-current location.

Today, more than 120 federal, state, county, and local law enforcement organizations have implemented GPS systems (many pilot programs) to track offenders short-term who are on pretrial supervision, serving terms of probation or parole, or as an alternative to jail.²⁰ The technology is being used to track gang members on supervised release, parolees convicted of certain kinds of burglaries, immigrants who are awaiting hearings,²¹ and persons convicted of domestic violence. Accordingly, jurisdictions have found ways to leverage GPS technology to create a wide range of structured offender monitoring programs for various types of needs. As one example, a Massachusetts law grants authority to judges to require domestic abusers to wear GPS transmitters where they have violated restraining orders and been determined to be dangerous after undergoing an assessment.²² The movements of these offenders are monitored by several centers. If an offender crosses an "exclusion zone" mapped digitally around the victim or her children, the police are instantly notified.²³ In fact, the use of GPS to reign in domestic abusers appears to be catching on. Twelve other states have passed similar legislation, and, as a result, about 5000 domestic abuse offenders are being tracked nationwide.²⁴

However, "[t]he greatest use by corrections agencies of the [GPS] technology has been in tracking sex offenders, mostly to keep these offenders away from areas such as schools or near the homes of a previous victims."²⁵ At least seventeen states have laws enabling some form of electronic tracking for sex offenders on supervised release,²⁶ and some states impose a lifetime monitoring requirement on certain types of these offenders.²⁷ Hence, while the majority of other programs generally employ monitoring for limited durations of no more than a few months, far longer terms are being imposed in sex offender cases by legislatures and judges. For example, a Florida statute entitled *Jessica's Act* requires that persons convicted of sexual offenses

against children under the age of twelve be subject to lifetime electronic monitoring, and Pennsylvania and California have followed suit with similar laws.²⁸

Reducing Recidivism

Several years ago, a pilot program was initiated in Bergen, Illinois, whereby sex offenders were placed on continuous GPS monitoring. Significantly, only one offender was charged with a new sex crime while under electronic supervision,²⁹ and less than ten percent were caught committing other non-sex related crimes such as tampering with the equipment or violating the GPS statute. A report issued by the program found that “GPS monitoring appears to encourage these high-risk offenders to control their behavior, and avoid situations that would inspire new crimes.”³⁰

A shining example of the GPS monitoring platform in the high-risk category can be found in Washington, D.C., with the Court Services and Offenders Supervision Agency (“CSOSA”), which was created by Congress in 1997 to improve public safety in the district through effective community supervision of criminal offenders.³¹ Over the past decade, CSOSA has been using GPS devices to monitor largely high-risk offenders on a selective basis. Offenders are assessed with risk-screening tools that effectively predict recidivism and the probability of negative outcomes for those seeking admission into the monitoring program, an alternative to incarceration. For example, as part of the screening process, CSOSA collects information on criminal history, drug use, mental status, and instances of past violence. The stated objectives of the CSOSA program include: (1) ensuring that offenders meet appointments and otherwise comply with program requirements, (2) enforcing domestic violence exclusion areas, (3) restricting the movement of offenders within or without certain geographic locations, and (4) assisting law enforcement officials in solving crimes. With regard to solving crimes, CSOSA cooperates with the police to coordinate data with crime-scene locations for the purpose of developing leads and apprehending those responsible. CSOSA does not monitor offenders for extended periods of time; most are monitored for no more than several months. Even with such short durations, CSOSA has witnessed an increased rate of success in offender reentry with fewer instances of recidivism.

Recently, the use of GPS has been expanded to targeting violent and repeat offenders, largely for the purpose of monitoring them to ensure they follow conditions of release before trial. In 2007, the Charlotte-Mecklenburg Police Department began operating a GPS-based monitoring program targeting certain offenders, requiring them to wear GPS transmitters as a condition of pre-trial release for certain categories of serious criminal offenses.³² The program also employed a crime-scene correlation feature which allowed officers to quickly identify re-offenders and return them to jail, which reduced the likelihood of others engaging in repetitive criminal behavior. The program’s results were stunning: 88% of the offenders in the program did not commit a crime or have their bond revoked while being monitored.³³ Monitoring these serious criminals with GPS locators effectively neutralized nearly nine out of ten of them.

In fact, there is now a consensus among professionals

that electronic monitoring is not only effective in reducing the costs of incarceration, but also in reducing recidivism among the offenders released.³⁴ In the juvenile setting, for example, “one study revealed a 3% recidivism rate for electronically monitored home detention cases.”³⁵ In September 2011, the Justice Department weighed in, concluding that electronic monitoring reduces recidivism.³⁶

III. EXTENDED GPS MONITORING OF RECIDIVISTS COMBINED WITH CRIME-SCENE CORRELATION AND COMMUNITY-ORIENTED BEHAVIORAL MODIFICATION TECHNIQUES

None of the GPS monitoring programs in use today appears to have been engineered, from the ground up, for the central purpose of intentionally reducing victim crime as a whole. Why not take a quantum leap forward and launch such a GPS-based model that is strategically and comprehensively designed to neutralize the population of recidivists who are responsible for the majority of crime? If recidivist offenders as an entire class were technologically “blocked” from engaging in criminal behavior, would not crime rates plummet correspondingly? What would such a program look like? What would it require? Would it be feasible? Would it be successful? Would its application be legal? Constitutional?

A threshold question would be how to define the term “recidivist” for purposes of the program. While recognizing that no single definition in the criminal justice system exists, the likely answer would be in the broadest sense possible, consistent with constitutional principles of due process and established definitions adopted by the Department of Justice and state corrections agencies. Of course, the broader the term, the more sweeping the net, and, for the program to reach its greatest potential, that net must capture the largest number of recidivists as possible who are statistically responsible for most crime. Otherwise, the program’s effect would have less impact on the incidence and prevalence of crime. Whatever the definition’s final scope, inclusion of qualifying offenders would be based on objective criteria following a personalized assessment process comparable to the one currently employed by CSOSA in Washington, D.C.

This personalized assessment process likely would include screening for mental function and anti-social behavior, and it might also examine the individual’s needs, strengths, health, and disabilities, as well as an assessment of anticipated risk through other screening tools capable of predicting future criminal behavior. Based on the assessments and the offender’s prior criminal record, a determination would be made by professionals administering this new program as to whether to classify the offender as a recidivist or not. If designated as a recidivist, the offender would be required to wear a GPS transmitter, either through judicial order, voluntary agreement, or legislative mandate, when not incarcerated for reasons of (or as a condition of) bond, probation, supervision, or prison overcrowding. The GPS device would monitor the recidivist’s precise location in real time, record the data for future use as evidence in court, and would alert the police instantly if an exclusion or “hot” zone (if appropriate) were violated or if the recidivist committed a violation or crime (via the enhanced crime-scene correlation infrastructure).

beeper or a GPS device should not affect the constitutionality of the surveillance. “[I]t is the exploitation [through the nature of the information collected] of technological advances that implicates the Fourth Amendment, not their mere existence.”⁴⁴ Notwithstanding this statement, Justice Rehnquist, who wrote the majority opinion in *Knotts*, was insightful enough to leave the door open to the possibility of having to curtail more intrusive surveillance methods in the future as technologies advance. Thus, the Court expressed reservation with using beeper technology to conduct what might amount to “dragnet-type law enforcement.”⁴⁵

Since *Karo* and *Knotts*, courts generally have upheld warrantless GPS monitoring of a vehicle moving in public space.⁴⁶ However, a question remaining is whether long-term surveillance is permissible, particularly with the capability of GPS systems to continuously map a person’s movements. Whether this intrusive ability implicates *Knotts* “dragnet-type” concerns is an exceedingly legitimate question as GPS surveillance is certainly more intrusive than older technologies because it can reveal far more intimate details concerning a person’s life: the doctors they visit, how often they gamble, which political rallies they prefer to attend, etc. Moreover, the longer the term of monitoring, the more details and patterns in a person’s life begin to emerge.

The constitutionality of long-term GPS tracking is the precise subject matter under review by the Supreme Court in *Jones*, albeit in a warrantless and non-statutorily enabled program context. The case, due to be decided in early 2012, stems from the district court’s decision in *United States v. Maynard*,⁴⁷ which held that individuals have a reasonable expectation of privacy in the totality of their movements over a lengthy period of time, even if they don’t have a reasonable expectation of privacy in a single movement from one point to another.⁴⁸ On appeal, Jones argued that the GPS device violated his reasonable expectation of privacy per *Katz v. United States*,⁴⁹ and was thus a search within the meaning of the Fourth Amendment. The D.C. Circuit split with other circuits⁵⁰ that had approved long-term GPS surveillance per *Knotts*. The D.C. Circuit held that *Knotts* does not govern and that the use of the GPS device constituted “a search because it defeated Jones’ reasonable expectation of privacy.”⁵¹ In distinguishing *Knotts*, the D.C. Circuit concluded that round-the-clock use of a GPS transmitter without a warrant violated the Fourth Amendment. The Court reasoned that prolonged monitoring was not covered by *Knotts* because of the intrusive nature, specifically the enhanced ability to learn private details about an individual’s life.

In *Katz*,⁵² the Supreme Court established that an individual has a right against unreasonable search and seizure in areas where he has “exhibited an actual (subjective) expectation of privacy,” and that expectation is “one that society is prepared to recognize as reasonable.”⁵³ “The Court also has held that the government violates that right when, without a warrant, it uses various kinds of technology to gain information about acts within such a constitutionally protected space.”⁵⁴

Although the Supreme Court’s ruling in *Jones* likely will be limited to warrantless tracking in public spaces of police suspects, it might nonetheless impact statutorily-created

GPS programs under the Fourth Amendment because of the requirement for offenders to wear the device continuously, including in protected areas. Will the Supreme Court draw a line of distinction between warrantless police tracking and GPS tracking statutes?

In addition to the Fourth Amendment, statutorily-created GPS programs for the purpose of tracking criminally-charged and/or convicted offenders raise a number of other constitutional issues, including the Ex Post Facto Clause together with procedural and substantive due process rights affecting cognizable fundamental rights or liberty interests. The most prevalent GPS statutory regimes, which are those involving sex offenders, have been challenged in the courts based on a variety of grounds, including the Fourth Amendment, double jeopardy, cruel and unusual punishment, invasion of privacy, the Ex Post Facto Clause, and equal protection, as well as substantive and procedural due process.

Procedural Due Process

Arguably, the most likely procedural vehicle for challenging a *technological* restraint, such as continuous GPS monitoring, falls within the constitutional rubric of procedural due process,⁵⁵ which must be afforded to persons throughout the criminal process, including during the conviction and sentencing phases.⁵⁶ No state shall “deprive any person of life, liberty, or property, without due process of law”⁵⁷ In order to implicate due process, however, the state must act in some manner that deprives a person of a “liberty” or a “property interest.”⁵⁸ The Supreme Court has acknowledged that the concept of “liberty” is not limited to mere freedom from bodily restraint,⁵⁹ although physical restraint (e.g., prison) undeniably is the most elemental of all restraints on liberty interests. However, beyond that, the concept of liberty rights remains somewhat foggy.

In the context of GPS monitoring, courts generally have looked to whether the monitoring serves to deprive an offender of a protected liberty interest, such as the freedom to move.⁶⁰ In a recent North Carolina case,⁶¹ a state court of appeal concluded that the state’s requirement that offenders enroll in a GPS monitoring program violated due process by unconstitutionally infringing on the offender’s protected liberty interest in having freedom to move. The state GPS program required constant, continuous surveillance through a permanently-installed GPS device that tracked offenders in real time.

Notwithstanding the North Carolina decision, GPS programs largely have withstood most procedural due process challenges.⁶² The arguments in favor of due process compliance are varied. Obviously, a small GPS device strapped on an ankle presents no significant deprivation of liberty in and of itself and, as discomfiting as one may be in the early stages, over time, the device will feel less intrusive to the person wearing it. A GPS device imposes no physical harm to speak of, and, therefore, is unlikely to be evaluated as punitive. Wearing a GPS device does not impede travel in the slightest degree. In fact, GPS tracking is just a more cost-effective and efficient means of doing something already held to be constitutional—the imposition of lengthy terms of supervision and probation. Accordingly, to the extent that prolonged GPS tracking of recidivist offenders likely does not violate a cognizable “liberty interest” and, thus,

implicate a procedural due process violation, there is even less of a probability of violating a substantive due process interest.

Substantive Due Process

Substantive due process, according to the Supreme Court, is implicated when the government acts in a manner that affects an individual's fundamental right,⁶³ such as the right to have children, the right to travel, and the right to be free of physical restraint.⁶⁴ If a law encroaches on a fundamental liberty interest, the courts apply a "strict scrutiny" analysis that seeks to determine whether the intrusion is "narrowly tailored to serve a compelling state interest."⁶⁵ Hence, strict scrutiny looks to whether the legislation (1) serves a compelling state interest, and (2) is narrowly tailored to achieve that interest.⁶⁶

In the event that a fundamental right is not found to be implicated by the new GPS program, the test is then whether the statutory scheme is "rationally related to legitimate government interests."⁶⁷ In fact, this lesser standard would probably be applied because GPS tracking of recidivist "street" and violent criminals likely does not implicate a fundamental right. "The rational basis standard is 'highly deferential' and [courts] hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances."⁶⁸ GPS tracking of the very subset of criminals responsible for the majority of crime would likely pass the rational-basis test because the monitoring would be rationally related to the legitimate government interest of protecting the public from their continued criminal acts.

However, as stated above, in the event that a fundamental right were determined to be implicated, the constitutionality of the legislation would be evaluated under "strict scrutiny." Under the first prong of the test, it could be argued that protecting the public from high-risk criminal offenders who are likely to re-offend is undeniably a compelling state interest. Protecting the public is one of the state's highest orders of duty. It has long been a compelling interest of the state to protect its citizens from criminal activity. Under the second prong, GPS tracking of recidivist criminals could be narrowly tailored to achieve the state's interest in protecting the public from further violence. Legislation implementing such a GPS program would have to be narrowly tailored to track only high-risk recidivists who have been properly screened based on an objectively-determined likelihood that the subjects will re-offend.

When the state's interest in preventing crime is weighed with the new law's anticipated effectiveness against the resulting intrusion into the recidivist criminal's privacy rights, the GPS program likely will be upheld.⁶⁹ In fact, a number of federal circuit courts have ruled that GPS tracking does not violate a defendant's privacy.⁷⁰ States clearly have a substantially strong interest in stopping violent crime and ending recidivism, and, based on the prior studies and GPS programs, there is clear evidence that subjecting the recidivist criminal population to long-term GPS monitoring will substantially reduce crime.

Ex Post Facto Clause

A GPS program of this magnitude and scope might also implicate the Ex Post Facto Clause, assuming the mandatory monitoring provision of the statute can be triggered by an offender's prior conduct, such as arrests and convictions, or

any other factors pre-dating the effective date of the enabling legislation. Following this line of inquiry, it is first critical to determine whether the legislation is intended to be criminal or civil (i.e., regulatory) in nature. However, even if a state labels a law as being a regulatory one, the Supreme Court can override that label if the monitoring scheme is "so punitive either in purpose or effect as to negate" any intent of creating a civil penalty.⁷¹

Courts will treat a law as "criminal" if it serves the purpose of either retribution or deterrence, both of which are primary objectives of punishment.⁷² Such a law would be ex post facto if it retroactively alters the punishment that the offender received at sentencing.⁷³ If the legislature's intent was for the GPS bracelet to be a civil or "regulatory" restraint, then courts examine whether the law is so punitive in effect that it is more properly characterized as punishment.⁷⁴ In deciding whether a statute is "punitive" in effect and thus violative, a number of factors per *Mendoza-Martinez*⁷⁵ are considered, including (1) whether the statute imposes "an affirmative disability or restraint" on the offender, (2) whether the statute seeks to promote retribution or deterrence, and (3) whether "it has historically been regarded as a punishment," together with a number of other relevant factors.⁷⁶ The "ultimate question always remains whether the punitive effects of the law are so severe as to constitute the 'clearest proof' that a statute intended by the legislature to be nonpunitive and regulatory should nonetheless be deemed to impose ex post facto punishment."⁷⁷

When analyzing whether an electronic monitoring statute violates the Ex Post Facto Clause, courts often look to the Supreme Court's decision in *Smith v. Doe*,⁷⁸ which involved a sex offender registration act that required offenders to register based on offenses committed prior to the law's effective date. Most courts analyzing continuous GPS monitoring of sex offenders under the Ex Post Facto Clause have found no violation,⁷⁹ regardless of the fact that the monitoring laws did not exist at the time of the predicate sex crimes. There was no finding that the monitoring law increased the punishment received. However, the issue remains somewhat unsettled. In the recent case *Commonwealth v. Cory*, for example, the Massachusetts Supreme Court distinguished *Smith*, finding that it only applies to registration laws, not to a statute requiring constant electronic GPS monitoring of sex offenders, and found the Massachusetts statute to be punitive in effect.⁸⁰ The *Cory* court stressed that continuous GPS surveillance during probation or supervised release imposed more restraints and burden on sex offenders than registration alone.

In 2007, the Sixth Circuit took up the constitutionality of a sex offender monitoring law intended to reduce recidivism in Tennessee. The program required offenders to wear a GPS bracelet twenty-four hours a day and be subjected to continuous surveillance. Similar to other states enacting measures to rein in sex offenders, the law applied even with regard to sentences the offenders received prior to the effective date of the law, opening the door to an ex post facto challenge. However, the Sixth Circuit found no constitutional infirmities and held that the Act did not violate the Ex Post Facto Clause.⁸¹ In reaching this conclusion, the court followed *Smith* and found that the legislature intended the law to be civil, concluding

that monitoring sex offenders with GPS locating devices is not punitive. Applying the *Mendoza-Martinez* factors, the court reasoned that the monitoring restrictions did not impose an affirmative disability and did not result in additional incarceration (and hence was nonpunitive). According to the court, the deferential intent of the Act alone was not enough to overcome the other factors weighing in favor of the state, and the legislature's goals were rationally related to a nonpunitive purpose.⁸²

The controversy continues, however, as only this year a New Jersey appellate court ruled that requiring a sex offender, convicted two decades earlier, to wear a GPS device pursuant to a new monitoring law violated the Ex Post Facto Clause. Even though it determined that the legislature's intent was civil, the court concluded that the law was so punitive in effect that it violated the Constitution.⁸³

Notwithstanding the New Jersey case, a comprehensive GPS program targeting recidivists likely will survive challenges under the Ex Post Facto Clause. Although permanently wearing a GPS ankle bracelet might be cumbersome and, arguably, an affirmative disability, it also can be considered to be a mere nuisance that is relatively minor and employed not for the purposes of punishment. The GPS device would in no way serve to physically restrain a recidivist in the program, who, except for selected exclusion zones that might be appropriate on a case-by-case basis, would be free to travel anywhere. Other than exclusion zones designated to protect victims, the only physical restraint presented by the GPS device would be that of not committing other crimes. Hence, the monitoring of recidivists would effectively promote deterrence, and any burden on the offender would be far outweighed by society's interests in not only preventing crime, but dramatically reducing the incidence and prevalence of both violent and non-violent victim crimes. Where, as here, there would be a rational connection to a non-punitive purpose, and, in most instances, lifetime monitoring probably would not be required, numerous courts have already upheld similar laws in the context of sex offender statutes.

Endnotes

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- 11 See *id.*
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- 13 *Id.*
- 14 *Id.*
- 15 *Id.*
- 16 *Id.*
- 17 S. Mainprize, *Electronic Monitoring in Corrections: Assessing Cost Effectiveness and the Potential for Widening the Net of Social Control*, 34 CANADIAN J. CRIMINOLOGY 161 (1992).
- 18 See Kathy S. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 Criminology & Pub. Pol'y 61 (2006).
- 19 For example, an offender might wear a GPS device during the day and in the evening connect it to another device to upload his tracking data into a computer system; or, as another example, an offender might be "required to answer a telephone call from a case officer or insert a transmitter into a home device to verify his presence." Stacey L. Sklaver, *The Pros and Cons of Using Electronic Monitoring Programs in Juvenile Cases*, JUV. JUST. COMMITTEE NEWSL., July 2010.
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38 See ELECTRONIC MONITORING, *supra* note 36, at n.1

39 See, e.g., U.S. v. Cuevas-Perez, 2011 U.S. App. Lexis 8675 (7th Cir. Apr. 28, 2011).

40 United States v. Jones, No. 10-1259 (U.S. cert. granted June 27, 2011).

41 460 U.S. 276 (1983).

42 468 U.S. 705 (1984).

43 *Id.*

44 *Id.* at 712.

45 *Knotts*, 460 U.S. at 284.

46 See, e.g., United States v. Sparks, 750 F. Supp. 2d 384 (D. Mass. 2010); United States v. Coombs, 2009 U.S. Dist. Lexis 105547 (D. Ariz. Nov. 12, 2009).

47 615 F.3d 544 (D.C. Cir. 2010).

48 *Id.* (Agents had placed a GPS tracking unit on Antoine Jones' vehicle without a valid warrant for nearly a month. Using the tracking data and other information gleaned from cell phone records and a wiretap, they conducted a search of a house and recovered close to 100 kilograms of cocaine. The district admitted the GPS data excluding only the data when it was located on private residential grounds.)

49 389 U.S. 347 (1967).

50 See, e.g., United States v. Pinedo-Moreno, 591 F.3d 121 (9th Cir. 2010).

51 *Id.* at 16 (internal citation omitted).

52 389 U.S. 347 (1967).

53 *Id.* at 361.

54 Hinson, *supra* note 22, at 287 (citing *Kyllo v. United States*, 533 U.S. 27 (2001)).

55 See Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1351 (2008).

56 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

57 U.S. CONST. amend. XIV, § 1.

58 See, e.g., *Bd. Of Regents v. Roth*, 408 U.S. 564, 570-71 (1972).

59 *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

60 See, e.g., United States v. Smedley, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009).

61 *State v. Stines*, 683 S.E. 2d 411 (N.C. Ct. App. 2009)

62 See, e.g., STOP CHILD PREDATORS, THE CONSTITUTIONALITY OF GPS TRACKING OF SEX OFFENDERS (2007), available at http://www.stopchildpredators.org/pdf/SCP_PR041707.pdf (cases cited therein). See generally Murphy, *supra* note 55, at 1351-1358.

63 See *Reno v. Flores*, 507 U.S. 292, 301-01 (1993).

64 See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

65 See, e.g., *Reno*, 507 U.S. at 302.

66 See *id.*

67 *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

68 *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005).

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70 United States v. Cuevas-Perez, 2011 U.S. App. Lexis 8675 (7th Cir. Apr. 28, 2011); United States v. Pinedo-Moreno, 591 F.3d 121 (9th Cir. 2010); United States v. Marquez, 605 F.3d 604 (8th Cir. 2010).

71 United States v. Ward, 448 U.S. 242, 248-49 (1980).

72 See *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997).

73 See *Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

74 *Ward*, 448 U.S. at 248.

75 *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

76 *Id.* at 168.

77 Megan Janicki, *Better Seen than Herded: Residency Restrictions and Global Positioning System Tracking Laws for Sex Offenders*, 16 Pub. Int. L.J. 299 (2007) (citing *Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005)).

78 *Smith v. Doe*, 538 U.S. 84 (2003).

79 See United States v. Morris, No. 08-0142, 2008 U.S. Dist. Lexis 104029, at *2 (W.D. La. Nov. 14, 2008) (dismissing ex post facto challenge against Louisiana's sex offender monitoring law); *Uresti v. Collier*, No. H-04-3094, 2005 U.S. Dist. LEXIS 34292, at *35 (S.D. Tex. June 23, 2005) (dismissing ex post facto challenge to Texas's sex offender monitoring law); *State v. Bare*, 677 S.E.2d, 518, 531 (N.C. Ct. App. 2009) (finding North Carolina's satellite-based monitoring constitutional).

80 *Commonwealth v. Cory*, 911 N.E.2d 187 (Mass. 2009).

81 *Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007).

82 See *id.* at 1005-1006.

83 *Riley v. N.J. State Parole Bd.*, No. A-1004-09T1 (N.J. Super. Ct. App. Div. Sept. 22, 2011).

