

TRACKING THE CONSTITUTION—THE PROLIFERATION AND LEGALITY OF SEX-OFFENDER GPS-TRACKING STATUTES

Eric M. Dante^{*}

I. INTRODUCTION

If the 1990s can reasonably be referred to as the “registration decade” with regard to sex-offender statutes,¹ then the first decade of the twenty-first century could accurately be considered the “tracking decade.” Since 2005, an increasing number of states have expanded their registration programs to allow for various degrees of electronic monitoring of sex offenders to deal with the dangers that post-incarceration sex offenders pose to their communities.² As the Supreme Court has repeatedly stated, “Sex offenders are a serious threat in this Nation.”³ At least as far as the Court is concerned, there is no doubt that sex offenders, once released back into our communities, pose a significant danger of recommitting the crimes that led to their incarceration in the first place.⁴ Especially when dealing with sexual predators who target children, the public seems to want nothing more than to “lock ‘em up and throw away the key.”⁵

The trend in the law has been to place sex offenders into a form of “internal exile” upon release from prison, restricting their rights in

^{*} J.D., 2012, Seton Hall University School of Law; B.A., 2006, Kean University. I would like to thank Professor Alice Ristorph and Daniel McGrady for their guidance throughout the writing process. I would also like to thank my wife, my family, and my friends for their unwavering support.

¹ See 42 U.S.C. § 14071 (2006) (requiring all states to establish a program to register and track sex offenders).

² Ian Friedman et al., *Sexual Offenders: How to Create a More Deliberative Sentencing Process*, CHAMPION, Dec. 2009, at 12, 17, available at http://www.iannfriedman.com/?/ianf/articles_detail/creating_a_more_deliberative_sentencing_process_for_sex_offenders/.

³ Conn. Dep’t of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (quoting McKune v. Lile, 536 U.S. 24, 32 (2002) (plurality opinion)).

⁴ *Id.*

⁵ Friedman et al., *supra* note 2, at 12.

various ways “that exclude them from major aspects of society.”⁶ The use of global positioning system (GPS) tracking on post-incarceration sex offenders is the latest manifestation of this internal exile, allowing the government to know where an offender is at all times. Yet, there are privacy issues and other limitations inherent in the use of GPS tracking of sex offenders that undoubtedly lead to an invasion of their individual rights and are much more intrusive than registration alone.⁷ Unlike registration requirements, which render a sex offender’s status openly available only to those people searching for it, an external GPS device on an offender’s ankle or belt can reveal this information to the public wherever the offender goes.⁸

The U.S. Supreme Court has already affirmed the constitutionality of registration requirements,⁹ but the constitutionality of this new plethora of sex-offender tracking statutes has yet to be tested. The Court upheld registration requirements as a “civil regulatory scheme” to notify the public about the threat of sex-offender recidivism and not as a punitive measure,¹⁰ but GPS tracking is much more restrictive. This Comment seeks to restore the balance between the rights of the individual sex offender and the security interest of society by examining the arguments on both sides of the issue and ultimately proposing a model statute that would survive constitutional review.

The proliferation of GPS-tracking statutes started out the same way as most sex-offender legislation:¹¹ a horrible crime was committed

⁶ *Nora v. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 153 (1999).

⁷ *See Commonwealth v. Cory*, 911 N.E.2d 187, 196–97 (Mass. 2009) (explaining that a lifetime GPS-tracking requirement is “dramatically more intrusive and burdensome” than registration only).

⁸ *See Doe v. Bredesen*, 507 F.3d 998, 1011–12 (6th Cir. 2007) (Keith, J., concurring in part and dissenting in part) (explaining that wearing a “relatively large satellite monitoring device[]” is similar to having a police escort following the offender wherever he goes and acts as “a modern day scarlet letter” (internal quotation marks omitted)).

⁹ *See Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (holding that Alaska’s sex offender registration law is non-punitive and does not violate the Ex Post Facto clause of the U.S. Constitution); *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 6–7 (2003) (holding that Connecticut’s sex offender law does not violate the Due Process Clause of the Fourteenth Amendment even if registration does cause injury to reputation).

¹⁰ *Smith*, 538 U.S. at 105–06.

¹¹ *See Whitman Latest to Urge Laws on Notices of Sex Offenders*, N.Y. TIMES, Aug. 6, 1994, at 24 (describing the push for Megan’s Law after the rape and murder of seven-year-old Megan Kanka by a convicted sex offender); Editorial, *Keeping Track of Child Molesters*, ATLANTA J. & CONST., Jan. 6, 1994, at A10 (describing the push for the Jacob Wetterling Crimes Against Children Registration Act (Jacob Wetterling Act) after the kidnapping of 11-year-old Jacob Wetterling).

against a child and prompted legislators to take action.¹² Jessica Lunsford, a name that is associated with many of these statutes, was a nine-year-old girl in Homosassa, Florida, who was kidnapped, raped, and murdered by a registered sex offender in 2005.¹³ Even though her murderer was a registered sex offender who had been jailed previously for four years for exhibiting indecent behavior in front of a kindergarten, he was still able to get a job working at Jessica's school on a construction project.¹⁴ His criminal record was never checked, and that gave him the opportunity to victimize Jessica, ultimately burying her under his motor home only 150 yards away from Jessica's parents' home.¹⁵

The Jessica Lunsford case created a public outcry that registration for post-incarceration sex offenders was not enough; in response, Florida State Representative Charles Dean drafted the original "Jessica Lunsford Act" to allow real-time tracking by GPS of violent sex offenders.¹⁶ A few different variations of this initial statute have been written, and this Comment will not be limited to the original statute; rather it will focus on the developing body of law across the nation as a whole.¹⁷ These new statutes are merely part of the increasingly harsh treatment that sex offenders face when they finish their prison sentences,¹⁸ and one question that has yet to be asked is whether forcing a sex offender to wear a tracking device for decades, or even for the rest of his¹⁹ life, goes too far.

This Comment will examine the broad array of sex-offender tracking statutes and the question of whether such laws would survive

¹² See Mark Memmott, *Girl's Death Raises Questions About Tracking of Sex Offenders*, USA TODAY, Mar. 25, 2005, at 4A.

¹³ Mark Memmott, *Girl's Death Raises Questions About Tracking of Sex Offenders*, USA TODAY, Mar. 25, 2005, at 4A.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Please note that this Comment will focus on the effect that such statutes have on post-incarceration sex offenders who have already served their time in prison and have been forced to wear a GPS tracking device after their release back into society. There are additional situations, such as house arrest prior to trial as a condition of bail, that may also lead to the utilization of GPS-tracking or similar technologies, but such situations are outside of the scope of this Comment.

¹⁸ See Isaac B. Rosenberg, *Involuntary Endogenous RFID Compliance Monitoring as a Condition of Federal Supervised Release—Chips Ahoy?*, 10 YALE J.L. & TECH. 331, 334 (2008) ("Sex offenders are the foremost targets of our nation's punitive zeal." (internal quotation marks omitted)).

¹⁹ Please note that this Comment will use male pronouns, but this in no way indicates that all sex offenders are male or that the GPS-tracking statutes could not equally apply to female offenders.

Supreme Court scrutiny if their constitutionality is challenged. Part II will review the various statutory models, providing a general survey of which states have such electronic-monitoring capability and how slight differences in statutory wording or construction can have a large constitutional impact. Part III will provide an overview of the various arguments against the constitutionality of GPS-tracking statutes and the numerous ways in which these statutes restrict sex offenders' rights. Part IV will examine the constitutional arguments of the opposing side, which tends to view such restrictions as reasonable limitations on the rights of sexual predators. Part V will deliver this Comment's findings and propose several ways in which the various states can amend their current statutes in order for these statutes to survive constitutional challenges. For example, such statutes should (1) be based on an individualized risk assessment, (2) should not be applied retroactively, and (3) should not provide usable evidence when an offender is within a protected area. Lastly, Part VI will propose a model statute that would be likely pass constitutional review.

II. STATUTORY MODELS

Forty-one states and the District of Columbia allow some form of electronic monitoring of sex offenders, but the laws vary greatly as to how they are written and applied.²⁰ Even though there are a few distinct models that can be used to group together similar states, there are also states that have gone in different directions from the Florida Model, the California Model, or the Massachusetts Model. Florida,²¹ California,²² and Massachusetts²³ are considered the main statutory models for this Comment because they were the first three states to enact a detailed statutory scheme for sex-offender GPS tracking and because many states follow these models. A few states, however, have departed from these three main approaches.²⁴ In addition, there has been some federal action in this area of law,²⁵ and there are still nine states where sex offenders are tracked solely through the registration laws in force.²⁶ Part II is a survey of the laws' similarities, differences, and approaches to various problems that post-incarceration sex offenders pose.

²⁰ See discussion *infra* Parts II.A–D.

²¹ See discussion *infra* Part II.A.

²² See discussion *infra* Part II.B.

²³ See discussion *infra* Part II.C.

²⁴ See discussion *infra* Part II.D.

²⁵ See discussion *infra* Part II.E.

²⁶ See discussion *infra* Part II.D.2.

A. The Florida Model

On May 2, 2005, the Florida governor approved the original statute drafted by Representative Dean, dubbed the “Jessica Lunsford Act,” less than three months after Jessica originally went missing.²⁷ In response to the public perception that registration alone was not enough to prevent sexual predators from committing heinous crimes, the new statute required heightened “community control” supervision for those sex offenders who were deemed a threat.²⁸ The Act required the Department of Corrections to develop a “graduated risk assessment” to identify those sex offenders who pose a heightened risk of recidivism by December 1, 2005.²⁹

The law imposed different treatment for violent sex offenders depending on the date that the crime was committed.³⁰ If the offender committed any one of specific crimes³¹ on or after October 1, 1997, but prior to September 1, 2005, it was within the court’s *discretion* whether to submit him to electronic monitoring.³² For any offender who committed those same crimes on or after September 1, 2005, however, the court was *required* to order “*mandatory* electronic monitoring as a condition of the probation or community-control supervision.”³³ For certain sex offenders who preyed on children, the court was no longer allowed to impose leniency because the state was now required to know where they were at any moment while under community supervision.³⁴

Although the Florida statute was very clear that mandatory tracking was required only for offenses committed after the statute’s effective date, the legislature enacted another statute at the same time to bring a significant number of sex offenders whose crimes were committed prior to September 1, 2005, within the electronic-monitoring

²⁷ FLA. STAT. ANN. § 948.30 (LexisNexis 2010) (effective Sept. 1, 2005).

²⁸ *Id.* § 948.061.

²⁹ *Id.* § 948.061(1).

³⁰ *Id.* § 948.30(2).

³¹ *Id.* §§ 800.04, 827.071, 847.0135(5), 847.0145 (allowing the use of post-incarceration GPS tracking for the following offenses: “Lewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age,” “sexual performance by a child,” prohibited “computer transmissions” with a child, and the “selling or buying of minors”). In comparison with other states like California, *see* discussion *infra* Part II.B, the Florida law limits GPS tracking to very few crimes focusing exclusively on the abuse or exploitation of minors.

³² *Id.* § 948.30(2) (emphasis added).

³³ FLA. STAT. ANN. § 948.30(3) (LexisNexis 2010) (emphasis added).

³⁴ *See id.* § 948.11(6) (requiring “a system that actively monitors and identifies the offender’s location”).

mandate if they committed any violation of their probation or parole.³⁵ In *State v. Petrae*, the Court of Appeals for the Fifth District found that the trial court was required to order electronic monitoring of an offender who committed “lewd or lascivious battery” by having sex with a thirteen-year-old girl in November 2003 and then violated his probation in 2006.³⁶ The court pointed out the irony in the fact that it would be within the trial court’s authority to end the probation altogether, but while the probation was in effect, the court had no discretion to modify the electronic-monitoring mandate for probation violators.³⁷

This wide net for probation violations does not need to be triggered by a new sex offense. A court may impose mandatory electronic monitoring even if a person previously designated as a “sexual predator” commits a probation violation that has nothing to do with the aforementioned sexual offenses.³⁸ In *State v. Lacayo*, the offender was designated a sexual predator in 1999³⁹ but violated probation by fleeing a police officer in 2005, a violation that the trial court did not believe could trigger electronic monitoring.⁴⁰ The appeals court reversed, holding that any probation violation for a person previously designated to be a sexual predator, whether the probation violation was sexual or not, was enough to trigger mandatory electronic monitoring.⁴¹

Fields v. State yielded a similar result in a situation where the offender had committed her crime in 1999 and then violated her subsequent probation by driving habitually with a suspended license in 2006.⁴² Even though the probation violation had nothing to do with her original offense and was not even remotely sexual in nature, the courts were required to grant the motion for electronic monitoring.⁴³ There is no room for judicial discretion once a sex offender who has committed in the past one of the enumerated crimes violates probation in any way, and this wide net is being used to justify the GPS tracking of many sex offenders regardless of how long ago they com-

³⁵ *Id.* § 948.063.

³⁶ 35 So. 3d 1012, 1013–14 (Fla. Dist. Ct. App. 2010).

³⁷ *Id.* at 1014 n.2.

³⁸ 8 So. 3d 385, 387 (Fla. Dist. Ct. App. 2009).

³⁹ *Id.* at 386 (receiving this designation—“following his convictions for lewd and lascivious assault on a child and for sexual battery on a helpless victim”).

⁴⁰ *Id.*

⁴¹ *Id.* at 387.

⁴² 968 So. 2d 1032, 1033 (Fla. Dist. Ct. App. 2007).

⁴³ *Id.* at 1033–34.

mitted their crime. This retroactivity was built into the Florida Model, and the state is very quick to use it at the earliest opportunity.⁴⁴

In other cases, the courts have not yielded to the state's rush to sweep prior offenders into the mandatory electronic monitoring program under the probation-violation exception. In *Bell v. State*, an offender was accused of violating a condition that the probation officer had added after the original court-ordered probation was set up, immediately pushing the state to file a request for mandatory electronic monitoring.⁴⁵ The court held that the officer was not allowed to impose additional conditions and then attempt to move for electronic monitoring when the offender had not violated any of the court's conditions for probation.⁴⁶ *Bell* is a good example of the state's readiness to pursue electronic monitoring for sex offenders who trip up on their probation without any judicial discretion to protect the offender's interests.

Courts have shown ample confusion in the application of the Florida sex-offender-tracking statutes, and this confusion does not always stem from a court trying to use discretion where mandatory electronic monitoring is required. On a number of occasions, trial courts have been under the impression that electronic monitoring was mandatory in cases in which it was actually discretionary.⁴⁷ This has led appeals courts to repeatedly insist on an individual assessment of an offender's risk to the community if his crime was committed before September 1, 2005.⁴⁸ In *Burrell v. State*, for example, the offender committed lewd battery on a child in 2002, prior to the effective date of the Jessica Lunsford Act.⁴⁹ Even though the Department of Corrections and the courts had discretion to decide whether Burrell required electronic monitoring, the trial court imposed monitoring without any risk assessment, mistakenly assuming that it was mandatory under Florida Criminal Code section 984.30.⁵⁰ The appeals court reversed and remanded, holding that where the statute gives the courts discretion, the offender deserves an individual assessment of

⁴⁴ See, e.g., *Lacayo*, 8 So. 3d at 387; *Fields*, 968 So. 2d at 1033.

⁴⁵ 24 So. 3d 712, 713–14 (Fla. Dist. Ct. App. 2009).

⁴⁶ *Id.* at 714.

⁴⁷ See, e.g., *Burrell v. State*, 993 So. 2d 998, 999 (Fla. Dist. Ct. App. 2007) (“However, in this case, the trial court was under the mistaken impression that it was required to impose the electronic monitoring under the Act. The court stated at the hearing that the proposed reinstatement of probation ‘is a GPS mandatory.’”).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

whether electronic monitoring is required.⁵¹ For anyone who committed the applicable crime on or after September 1, 2005, however, no individualized review is required; the court must impose electronic monitoring for the term of the offender's probation.⁵²

Fourteen states have adopted the Florida Model, requiring electronic monitoring when an offender who committed an enumerated crime is on probation after incarceration.⁵³ Each of these states enacted some form of mandatory electronic monitoring for sex offenders on probation, but there are subtle differences. For example, Alabama's statute is very close to the Florida statute, requiring anyone adjudicated to be a "sexually violent predator" to be subject to electronic monitoring.⁵⁴ Alabama actually goes one step further than Florida, though, not only requiring anyone who commits certain crimes to automatically be electronically monitored upon release from incarceration but also mandating that such electronic monitoring be in effect for a minimum of ten years, a specification that Florida did not enact.⁵⁵ Although differences exist, the statutes of these fourteen states are similar enough to the original Jessica's Law to fall under the larger categorization of the Florida Model.

The Florida Model, which requires electronic monitoring during the probation period based not upon the individual's threat of reoffending but on the crime committed, is the most prevalent form of sex-offender electronic-monitoring statutory model. This is likely due to the fact that the Adam Walsh Child Protection and Safety Act of 2006,⁵⁶ a federal law providing state grants for sex-offender elec-

⁵¹ *Id.* at 1000.

⁵² FLA. STAT. ANN. § 948.30(3) (LexisNexis 2010).

⁵³ ALA. CODE § 15-20-26.1 (LexisNexis 2010) (effective Sept. 1, 2006); ALASKA STAT. § 12.55.100 (f) (2010) (effective Sept. 23, 2007); ARIZ. REV. STAT. § 13-902(G) (LexisNexis 2010) (effective June 21, 2006); DEL. CODE ANN. tit. 11, § 4121(u) (2010) (effective May 17, 2007); IDAHO CODE ANN. §§ 18-8308(3), 20-219(2) (2010) (effective July 1, 2009); 730 ILL. COMP. STAT. ANN. 5/5-8A-6 (LexisNexis 2010) (effective July 1, 2007); IOWA CODE § 692A.124(1) (2010) (effective May 21, 2009); LA. REV. STAT. ANN. § 15:560.4(A) (2010) (effective Aug. 15, 2009); MONT. CODE ANN. § 46-18-206 (2010) (effective July 1, 2005); N.M. STAT. ANN. § 31-21-10.1(E) (LexisNexis 2010) (effective July 1, 2007); S.C. CODE ANN. § 23-3-540 (2010) (effective July 1, 2006); S.D. CODIFIED LAWS §§ 23A-27-12.1, 24-15A-24 (2010) (effective Mar. 7, 2006); VA. CODE ANN. § 19.2-303 (2010) (effective July 1, 2006); W. VA. CODE ANN. § 62-11D-3(a) (LexisNexis 2006) (effective Oct. 1, 2006).

⁵⁴ ALA. CODE § 15-20-26.1 (LexisNexis 2010).

⁵⁵ *Id.* § 15-20-26.1(c).

⁵⁶ 42 U.S.C. § 16981 (2006) (effective Oct. 1, 2006).

tronic-monitoring programs that meet minimum requirements, was modeled after the Florida statute.⁵⁷

B. *The California Model*

One of the harshest statutory models enacted thus far is the California sex offender tracking statute. Known as the Sexual Predator Punishment and Control Act: Jessica's Law (SPPCA), the statute was approved by California voters as Proposition 83 in 2006.⁵⁸ Governor Schwarzenegger then approved the SPPCA on September 20, 2006, and the sections which were deemed to be "urgent" went into effect immediately while the "[n]on-urgen[t]" provisions went into effect on January 1, 2007.⁵⁹ A clear illustration of the punitive effect that the SPPCA was meant to have on sex offenders is evident from the bill's name on the ballot initiative: Sex Offenders. Sexually Violent Predators. *Punishment*, Residence Restrictions and Monitoring. Initiative Statute.⁶⁰

The bill required the Department of Corrections and Rehabilitation to assess "every eligible person who is incarcerated or on parole for the risk of reoffending" by using the State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO).⁶¹ The enacted statute mandated lifetime electronic monitoring by GPS for any offender who committed certain offenses, without any reference to the date that the offense was actually committed.⁶² Unlike the Florida Model, which is very specific as to the date ranges within which discretionary and mandatory electronic monitoring is triggered,⁶³ the California Model makes no mention of any retroactive application, and leaves it to the courts to decipher legislative intent.

The mandatory lifetime GPS monitoring applies to anyone convicted in any jurisdiction of a much broader list of offenses as soon as he is released on parole.⁶⁴ Needless to say, the California Model is

⁵⁷ See discussion *infra* Part II.E.2.

⁵⁸ *People v. Milligan*, 83 Cal. Rptr. 3d 550, 554 (Cal. Ct. App. 2008).

⁵⁹ 2006 Cal. Legis. Serv. Ch. 336 (West).

⁶⁰ 2006 Cal. Legis. Serv. Prop. 83 (West) (emphasis added).

⁶¹ 2006 Cal. Legis. Serv. Ch. 336 (West).

⁶² CAL. PENAL CODE § 3004 (Deering 2010) (effective Nov. 8, 2006).

⁶³ See *supra* notes 30, 32–33 and accompanying text.

⁶⁴ The commission of the following offenses requires post-incarceration GPS-tracking: murder "committed in the perpetration, or an attempt to perpetrate, rape," CAL. PENAL CODE § 290(c) (Deering 2010), sodomy, *Id.* § 286, lewd or lascivious acts, *Id.* § 288, oral copulation involving children, *Id.* § 288(a), penetration by a foreign object involving children, *Id.* § 289, kidnapping, *Id.* § 207, "kidnapping for gain or to commit robbery or rape," *Id.* § 209, if the intent was to violate any of the previously

much broader than the Florida Model,⁶⁵ encompassing many more criminal acts. While the Florida Model allows court discretion for acts committed prior to September 1, 2005,⁶⁶ the California Model removes all judicial discretion from the equation, mandating GPS monitoring for life for a much broader list of offenses.⁶⁷ In essence, since section 290(c) of the California Penal Code applies to any convictions since July 1, 1944, courts could have interpreted section 3004(b), as written, to require lifetime GPS tracking of someone who was incarcerated for making a lewd telephone call to a minor in 1944.⁶⁸ In addition, the offender being tracked is required to pay for any costs associated with his monitoring by the Department of Corrections and Rehabilitation.⁶⁹ This is the broadest and harshest of the sex-offender statutory models.

The California legislators initially left open the possibility of the GPS-tracking requirement applying to crimes committed at the end of World War II, but the California courts have since closed off any possibility of retroactive application.⁷⁰ In *People v. Milligan*, an offender was originally required to register in 1987 and challenged additional conditions placed on him retroactively as violating the ex post facto provisions in the United States and the California Constitutions.⁷¹ The court made a clear distinction between statutory provisions that were punitive in nature and those that were “a regulatory scheme that is civil and nonpunitive.”⁷² Although the court found that DNA sampling and registration requirements were not punitive

listed sections plus “[r]ape, duress, or menace,” *Id.* § 261, voluntarily aiding or abetting a person in committing these acts, *Id.* § 264.1, “[a]ssault with intent to commit mayhem or specified sex offenses,” *Id.* § 220, “[a]ssault of a person under 18 years of age with intent to commit specified sex offenses,” *Id.*, excluding “assault to commit mayhem,” *Id.* § 243.3, various aforementioned offenses involving the use of force or violence, *Id.* § 290(c), “any offense involving lewd or lascivious conduct,” *Id.*, while “contributing to delinquency of [a] minor,” or “[l]uring [a] minor under 14 away from home,” *Id.* § 272, or any felony violation involving the sending of “harmful matter to [a] minor by telephone messages, electronic mail, Internet, or commercial online service,” *Id.* § 288.2. In addition, the statute covers “any statutory predecessor that includes all elements” of any of the enumerated penal code sections, or conspiracy to commit any of the listed offenses. *Id.* § 290(c).

⁶⁵ See *supra* notes 30, 32–33 and accompanying text.

⁶⁶ See *supra* note 32 and accompanying text.

⁶⁷ *Id.* § 3004(c).

⁶⁸ See *supra* note 64.

⁶⁹ CAL. PENAL CODE § 3004 (c) (Deering 2010).

⁷⁰ *Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178, 1181–82 (E.D. Cal. 2007); *People v. Milligan*, 83 Cal. Rptr. 3d 550, 559 (Cal. Ct. App. 2008).

⁷¹ *Milligan*, 83 Cal. Rptr. 3d. at 553–54.

⁷² *Id.* at 555 (quoting *Smith v. Doe*, 538 U.S. 84 (2003)).

in nature, the court did not address the issue whether the GPS-tracking requirement was punitive because the Attorney General conceded that the law only operated prospectively and not retroactively, which made the point moot.⁷³

A similar case attacking the statute's retroactive application, *Doe v. Schwarzenegger* was a multiple-plaintiff case in which various sex offenders challenged the constitutionality of the state's attempt to apply the SPPCA retroactively on the same grounds as in *Milligan*.⁷⁴ One plaintiff, referred to as "John Doe I," had originally committed a crime requiring registration twenty years earlier and was later jailed and paroled for not following the registration requirements.⁷⁵ After his release, he obtained approval from the Department of Corrections and Rehabilitation to live at a location that was within 2,000 feet of several neighborhood parks, which was not a crime until the SPPCA imposed harsh residency requirements along with the GPS-tracking requirement.⁷⁶ In October 2006, when Proposition 83 seemed likely to pass, he received a letter mandating that he move away from the parks to comply with the new statute.⁷⁷ The other two "John Does" were in similar circumstances, which required them to leave their homes because of the state's attempt to apply the SPPCA retroactively.⁷⁸ The district court found that the SPPCA could not apply retroactively because the statute did not expressly state the legislature's intent that it be applied not solely prospectively, and therefore, the plaintiffs were not required to move in order to comply with the new law.⁷⁹ Even though the courts have definitively held that the California statute only applies prospectively, it is still the strictest of the sex-offender tracking-statute models passed in the last decade.

Seven states have endorsed the California Model and mandate lifetime electronic monitoring for various classes of sex offenders.⁸⁰

⁷³ *Id.* at 554.

⁷⁴ *Doe*, 476 F. Supp. 2d 1178.

⁷⁵ *Id.* at 1179.

⁷⁶ *Id.* at 1179–80.

⁷⁷ *Id.* at 1180.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1181–82.

⁸⁰ GA. CODE ANN. § 42-1-14(e) (2011) (effective July 1, 2006); MD. CODE ANN., CRIM. PROC. § 11-723(c)(1)(i), (d)(3)(i) (LexisNexis 2011) (effective Apr. 13, 2010); MICH. COMP. LAWS SERV. § 750.520n(1) (LexisNexis 2011) (effective May 30, 2006); MO. REV. STAT. § 217.735 (2011) (effective June 5, 2006); N.C. GEN. STAT. § 14-208.40, 208.40A(c) (2011) (effective Dec. 1, 2007); R.I. GEN. LAWS § 11-37-8.2.1 (2009) (effective June 28, 2006); WIS. STAT. § 301.48 (2011) (effective July 1, 2007).

As with the Florida Model,⁸¹ while this category does encompass those states that require mandatory lifetime monitoring of certain sex offenders, there are differences beyond this core similarity. For example, in Georgia there is a slight difference with the California Model in that there is an individual assessment for how likely it is that the offender will strike another child, but once a person is deemed a “sexually dangerous predator,” he is required to wear a GPS tracking device for the rest of his natural life.⁸²

In Maryland, a sex-offender-tracking statute similar to the California Model applies to various crimes committed on or after October 1, 2010.⁸³ Even though there is no specific date of applicability in the California Model, the Maryland statute can accurately be included under the California Model category because it requires lifetime GPS monitoring based on the crime committed, not the specific individualized threat of recidivism.⁸⁴ Michigan adopted the California Model but focused on the age of the offender and the victim, triggering lifetime electronic monitoring if certain crimes are committed when the offender is at least seventeen and the victim is less than thirteen.⁸⁵ Missouri requires lifetime monitoring for offenders who have committed certain crimes⁸⁶ but adds a unique provision that allows a court to terminate lifetime electronic monitoring when the offender has reached the age of sixty-five.⁸⁷ Even with these differences, the California Model is the second most prevalent statutory scheme, likely because the harsher requirements are more popular with a public who, as stated before, wants to “lock [sex offenders] up and throw away the key.”⁸⁸

C. *The Massachusetts Model*

A third main model of sex-offender-tracking statutes is the Massachusetts Model, which allows judicial discretion when determining an individual’s length of probation, but then requires GPS tracking for the entire probationary period for certain sexual crimes.⁸⁹ The original bill made sweeping changes to Massachusetts’s laws regard-

⁸¹ See *supra* notes 53–55 and accompanying text.

⁸² GA. CODE ANN. § 42-1-14(e) (2011).

⁸³ MD. CODE ANN., CRIM. PROC. § 11-723(c)(1)(i), (d)(3)(i) (LexisNexis 2011).

⁸⁴ *Id.* § 11-723(a).

⁸⁵ MICH. COMP. LAWS SERV. § 750.520n(1) (LexisNexis 2011).

⁸⁶ MO. REV. STAT. § 217.735 (2011).

⁸⁷ *Id.* § 559.106(4).

⁸⁸ Friedman, *supra* note 2, at 12.

⁸⁹ MASS. ANN. LAWS ch. 265, § 47 (2011) (effective Dec. 20, 2006).

ing sex-offender monitoring and punishments and was approved on September 21, 2006, the day after the California statute was signed into law.⁹⁰ Under Massachusetts law, a sex-offender registry board was created to keep track of any sex-offender registry information,⁹¹ maintain compliance with the requirements of the Jacob Wetterling Act,⁹² and classify the public threat that each sex offender poses to the community.⁹³ The board is required to classify each sex offender on a scale ranging from level one offenders (“risk of reoffense is low”)⁹⁴ up to level three offenders (“risk of reoffense is high”).⁹⁵ The board then works with the sentencing court to determine the appropriate probationary period for the individual offender,⁹⁶ an element of judicial discretion that is lacking in the California Model.⁹⁷

The sex-offender tracking statute then applies as a mandatory condition of probation to offenders who committed an enumerated crime.⁹⁸ Similarly to the scope of the California Model,⁹⁹ this is a

⁹⁰ 2006 Mass. Legis. Serv. 303 (West).

⁹¹ MASS. ANN. LAWS ch. 6, § 178D (2011).

⁹² 42 U.S.C. § 14071 (2006).

⁹³ MASS. ANN. LAWS ch. 6, § 178L (2011).

⁹⁴ *Id.* § 178K(2)(a).

⁹⁵ *Id.* § 178K(2)(c).

⁹⁶ *Id.* § 178K(1).

⁹⁷ See discussion *supra* Part II.B.

⁹⁸ The commission of the following offenses required GPS-tracking during the probationary period, MASS. ANN. LAWS ch. 6, § 178C (2011): “indecent assault and battery on a child under 14,” MASS. ANN. LAWS ch. 265, § 13B (2011); “indecent assault and battery on a mentally retarded person,” *Id.* § 13F, “indecent assault and battery on a person age 14 or over,” *Id.* § 13H, rape, *Id.* § 22, “rape of a child under 16 with force,” *Id.* § 22A, “rape and abuse of a child,” *Id.* § 23, “assault with intent to commit rape,” MASS. ANN. LAWS ch. 265, § 24 (2011), “assault of a child with intent to commit rape,” *Id.* § 24B, “kidnapping of a child,” *Id.* § 26, “enticing a child under the age of 16 for the purposes of committing a crime,” *Id.* § 26C, “enticing away a person for prostitution or sexual intercourse,” MASS. ANN. LAWS ch. 272, § 2 (2011), “drugging persons for sexual intercourse,” *Id.* § 3, “inducing a minor into prostitution,” *Id.* § 4A; “living off or sharing earnings of a minor prostitute,” *Id.* § 4B, “second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior,” *Id.* § 16, “incestuous marriage or intercourse,” *Id.* § 17, “disseminating to a minor matter harmful to a minor,” *Id.* § 28, “posing or exhibiting a child in a state of nudity,” *Id.* § 29A, “dissemination of visual material of a child in a state of nudity or sexual conduct,” *Id.* § 29B, “possession of child pornography,” *Id.* § 29C, “unnatural or lascivious acts with a child under 16,” *Id.* § 35A, “aggravated rape,” MASS. ANN. LAWS ch. 277, § 39 (2011), any of the aforementioned offenses involving a child, MASS. ANN. LAWS ch. 6, § 178C (2011), any of the aforementioned offenses that is categorized as a “sexually violent offense” under Massachusetts law, *Id.*, and any attempt to commit any of the enumerated sex offenses or a “like violation” under another jurisdiction’s laws, *Id.*

⁹⁹ See *supra* note 64 and accompanying text.

broad category of crimes, some of which do not involve any physical contact with a child, but any of the offenses that require a period of probation or community supervision as decided by the sentencing board also mandate a GPS tracker for the probationary period.¹⁰⁰ In addition, the probationer must pay “[t]he fees incurred by installing, maintaining and operating the global positioning system device, or comparable device.”¹⁰¹

Aside from helping to determine the necessary period of probation, the sex-offender registry board must also determine the “defined geographic exclusion zones including, but not limited to, the areas in and around the victim’s residence, place of employment and school and other areas defined to minimize the probationer’s contact with children, if applicable.”¹⁰² If the tracked offender enters any of the excluded zones, the police is notified and the offender is arrested.¹⁰³ This is a unique specification in the Massachusetts statute because the Florida and the California Models do not specify how the transmitted tracking data will be used.

Unlike the California Model which mandates lifetime tracking based on the crime committed, under the Massachusetts Model, the judiciary has discretion regarding the length of the probationary period, which is determined on an individualized basis.¹⁰⁴ But, such discretion evaporates if the offender fails to comply with his sex-offender registration requirements.¹⁰⁵ Similar to Florida’s probation-violation provision,¹⁰⁶ the Massachusetts registration-violation provision mandates “community parole supervision” for life, depending on the offense originally committed and the number of times the offender has violated his registration requirements.¹⁰⁷ Anyone placed on lifetime parole must also wear a GPS device “for the length of his parole,” which has the same effect as mandating lifetime GPS tracking for an offender who violates his registration requirements, even though it is split into two different statutes.¹⁰⁸ The judicial discretion to control the period of probation is thus nullified if the sex offender does not

¹⁰⁰ MASS. ANN. LAWS ch. 265, § 47 (2011).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See discussion *supra* Part II.B.

¹⁰⁵ MASS. ANN. LAWS ch. 6, § 178H (2011).

¹⁰⁶ See *supra* notes 35–46 and accompanying text.

¹⁰⁷ MASS. ANN. LAWS ch. 6, § 178H (2011).

¹⁰⁸ MASS. ANN. LAWS ch. 127, § 133D1/2 (2011).

comply with his registration requirements under the Massachusetts Model.

Unlike the Florida and the California Models, which base their application on the date on which the crime was committed,¹⁰⁹ the courts have interpreted the Massachusetts statute to focus on the date on which the probation was sentenced, which makes the actual date of the crime irrelevant.¹¹⁰ In *Commonwealth v. Cory*, the Supreme Judicial Court of Massachusetts read the phrase “is placed on probation”¹¹¹ strictly and held that, even if the crime was committed prior to the effective date of the statute, it was the date on which the offender was placed on probation that was important.¹¹² This interpretation brings more sex offenders within the ambit of the statute because sometimes there can be a long period of time between the actual commission of a crime and the imposition of probation or parole as a result of that crime. For example, even if an applicable crime was committed in 1990, if probation was not imposed until December 21, 2006, the day after the tracking statute went into effect, the offender would be required to wear the GPS tracker for at least the probationary period, but possibly for the rest of his life.

The Massachusetts courts have also been much more ready to accept the true punitive nature of GPS sex-offender tracking than other courts.¹¹³ In the court’s opinion, the physical attachment of a GPS device to a person’s body was a “serious, affirmative restraint” on the wearer especially because it has to remain attached for years and may not be tampered with.¹¹⁴ In addition, the court found that the continuous tracking data that the GPS device releases is “an affirmative burden on liberty.”¹¹⁵ Although the issue in *Cory* was whether or not the probationary GPS-tracking requirement could be ap-

¹⁰⁹ FLA. STAT. ANN. § 948.30(2) (LexisNexis 2011); see *People v. Milligan*, 83 Cal. Rptr. 3d 550, 561 (Cal. Ct. App. 2008) (explaining that in California the court’s interpretation focuses on whether the crime was permitted before the effective date when any indication of retroactive application is not present in the statute).

¹¹⁰ See *Commonwealth v. Cory*, 911 N.E.2d 187, 191 (Mass. 2009).

¹¹¹ MASS. ANN. LAWS ch. 265, § 47 (2010).

¹¹² *Cory*, 911 N.E.2d at 191 n.6.

¹¹³ Compare *id.* at 196–97 (stating that a lifetime GPS-tracking requirement is “dramatically more intrusive and burdensome” when compared to registration only), with *State v. Bowditch*, No. 448PA09, 2010 N.C. LEXIS 741, at *30–31 (N.C. May 10, 2010) (finding that a GPS-tracking requirement, while having an impact on the offender, is not a criminal punishment when compared to disbarment or post-incarceration involuntary confinement because offenders are still allowed “to choose where they work and what type of occupation they pursue”).

¹¹⁴ *Cory*, 911 N.E.2d at 196–97.

¹¹⁵ *Id.*

plied retroactively, the case is instructive because the court held that the forced wearing of a GPS tracking device on its own was restrictive on the offender's liberty when the Massachusetts tracking laws can require GPS tracking for the rest of an offender's natural life under certain circumstances.¹¹⁶

Commonwealth v. Thissell is a good example of the various incidental ways that GPS tracking devices reduce the wearer's rights.¹¹⁷ In *Thissell*, the offender was placed on probation in 2004 for various assaults on his wife.¹¹⁸ He violated his probation by contacting his wife while he was in prison in 2005, which resulted in an additional probationary condition of GPS monitoring.¹¹⁹ In 2007, a bench warrant was issued for the offender because he went to the beach and submerged the GPS device when swimming in the ocean.¹²⁰ The electronic monitoring system used in Massachusetts "consists of two pieces of electronic equipment: an ankle bracelet, which is permanently attached to the probationer, and a GPS-enabled cellular telephone, which communicates with the ankle bracelet and transmits the probationer's current location to the probation department."¹²¹ A monitoring agent called the tracking cell phone to inform Thissell that he should not enter the water because it would damage the device that was permanently attached to his ankle.¹²² Even though the inability to swim in the ocean might not seem to be a significant limitation on the wearer's rights, such limitations could also translate into a government order that the person shall not swim in the ocean or a pool or shall not submerge his ankle during a bath for the remainder of his life.

Out of the three main models, the Massachusetts Model gives the most judicial discretion because the judiciary is allowed to determine the requisite probationary period based on an individual assessment of the risk that a person poses to society. The individualized assessment is important because it allows tailoring of a probation period based on the actual risk that the offender poses to society, as op-

¹¹⁶ See MASS. ANN. LAWS ch. 6, § 178H (2011) (mandating lifetime community parole supervision for certain sex offenders who violate their registration requirements); MASS. ANN. LAWS ch. 127, § 133D1/2 (2010) (mandating GPS tracking for the length of the community parole supervision).

¹¹⁷ 928 N.E.2d 932 (Mass. 2010).

¹¹⁸ *Id.* at 933.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 934–35.

¹²¹ *Id.* at 933 n.1 (quoting *Commonwealth v. Raposo*, 905 N.E.2d 545, 546 (Mass. 2009)) (internal quotation marks omitted).

¹²² *Thissell*, 928 N.E.2d at 934.

posed to determining the probation period based on the overall threat that people who commit a specific crime generally pose to society as a whole. It is still a very strict statute, however. Given the wide range of offenses covered under the Massachusetts statute and the imposition of mandatory electronic monitoring of whatever probationary period the court deems just and proper, there are still a great number of people who will be tracked under this statute for the foreseeable future. The Massachusetts Model does represent a unique statutory model but it has not, to date, been enacted in any other jurisdiction.

D. *The Hybrid Models*

Florida, California, and Massachusetts were the first three states to enact detailed statutes for the GPS tracking of sex offenders,¹²³ but not all states have followed their lead. Some have followed the federally mandated registration requirements only;¹²⁴ others have adopted their own statutory solutions for the electronic monitoring of sex offenders.¹²⁵

1. States Without a Sex-Offender-Tracking Statute

Only nine U.S. jurisdictions have failed to implement some form of electronic monitoring since 2005.¹²⁶ These nine states have continued to rely solely on registration laws to protect society from the danger of sex-offender recidivism.¹²⁷ Even some of these jurisdictions, however, have expressed interest in the possibility of sex-offender GPS-tracking legislation. For example, two of these states, Indiana and Kansas, have undertaken feasibility studies to explore the possi-

¹²³ See discussion *supra* Part II.A–C.

¹²⁴ See, e.g., IND. CODE ANN. § 11-8-8-7 (LexisNexis 2011) (effective Mar. 24, 2006); KAN. STAT. ANN. § 22-4904 (2011) (effective Apr. 22, 1993); KY. REV. STAT. ANN. § 17.510 (LexisNexis 2011) (effective Mar. 27, 2009); ME. REV. STAT. tit. 34-A, § 11202 (2011) (effective June 23, 2005); MINN. STAT. § 243.166 (2009) (effective Aug. 1, 1991); N.H. REV. STAT. ANN. § 651-B:2 (2011) (effective Aug. 9, 1996); OKLA. STAT. tit. 57, § 583 (2010) (effective Mar. 15, 2005); OR. REV. STAT. § 181.595 (2011) (effective July 14, 1997); VT. STAT. ANN. tit. 13, § 5402 (2011) (effective Sept. 1, 1996).

¹²⁵ See, e.g., ARK. CODE ANN. § 12-12-923 (2011) (effective Apr. 7, 2006); NEV. REV. STAT. § 176A.410(1), (2)(b)–(c) (2011) (effective Oct. 1, 2007); N.J. STAT. ANN. § 2C:43-6.4(a) (West 2011) (effective Jan. 14, 2004); N.J. STAT. ANN. § 30:4-123.91(c) (West 2011) (effective Aug. 6, 2007); N.Y. EXEC. LAW § 837-r(1), (2)(d) (Consol. 2011) (effective Apr. 13, 2007); N.Y. PENAL LAW § 65.10(4) (Consol. 2011) (effective June 22, 2010); TENN. CODE ANN. § 40-39-302(b) (2011) (effective July 1, 2004); WASH. REV. CODE . § 9.94A.704(5) (2011) (effective Aug. 1, 2009).

¹²⁶ See statutes cited *supra*, note 124.

¹²⁷ See statutes cited *supra*, note 125.

bility of implementing an electronic-monitoring sex-offender statute.¹²⁸

Indiana, while currently without an electronic monitoring statute, did implement a pilot program to assess the costs of tracking violent sex offenders by GPS.¹²⁹ The Indiana Department of Correction (IDOC) explored the costs of active GPS tracking of violent sex offenders, and the report submitted to the legislative council discusses the positive and the negative findings from the pilot program.¹³⁰ The IDOC found that the GPS technology was an asset for parole agents in keeping track of the parolees whom they were required to monitor and that the ability of agents to utilize the technology from laptops with wireless accessibility improved the agents' mobility.¹³¹

The IDOC report also found the following negative points with the technology: 1) poor utilization of police resources due to false alarms, 2) high costs of \$15–\$22 per offender, per day, 3) ankle bracelets are not actually permanent because they can be removed, 4) the GPS technology does not prevent crimes from occurring, 5) comparable results between GPS technology and traditional electronic monitoring technology, 6) logistical problems with monitoring homeless offenders, and 7) signal-reception issues with the technology.¹³² Since the report was issued, a GPS-tracking statute has not been enacted and there are no bills in the state legislature to implement such a system.

Kansas, likewise, created a Sex Offender Policy Board (SOPB)¹³³ that explored the utilization of sex offender electronic monitoring and issued a report to the Kansas Criminal Justice Coordinating Council.¹³⁴ The SOPB found that GPS-tracking technology should be utilized only selectively, for the worst offenders, by assessing the risk for each individual to determine who are the offenders who “pose the greatest risk to the community.”¹³⁵ The board found that the technology, by itself, “will not change behavior and is not enough to pro-

¹²⁸ See IND. DEP'T OF CORR., 2007 RESEARCHED COST OF GLOBAL POSITIONING SYSTEMS (2007), *available at* <http://www.in.gov/legislative/igareports/agency/reports/CORR05.pdf>; KAN. SEX OFFENDER POLICY BD., REPORT (2007), *available at* <http://www.calcasa.org/wp-content/uploads/2007/11/sopbreport.pdf>.

¹²⁹ See IND. DEP'T OF CORR., *supra* note 128.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ KAN. STAT. ANN. § 74-9501(8)(F)(i) (2011).

¹³⁴ KAN. SEX OFFENDER POLICY BD., *supra* note 128.

¹³⁵ *Id.* at 2.

vide security for the community.”¹³⁶ It also found most of the negative consequences of the GPS-tracking technology that the Indiana report noted.¹³⁷ Like Indiana, Kansas has not implemented a GPS-tracking sex-offender statute; civil commitment is still the preferred method of dealing with dangerous sex offenders in Kansas.¹³⁸ Such interest in the concept, however, shows that the remaining nine states without GPS-tracking of sex offenders may utilize some form of the technology as costs decrease and the devices become more reliable.

2. States with Discretionary Electronic Monitoring

Some states have enacted statutes that are entirely discretionary, allowing a court to impose electronic monitoring on those sex offenders who are determined to be a high risk on an individualized basis, but these states vary greatly in how and under what circumstances this discretion may be used. Six states have passed statutes that specifically address electronic monitoring and give judges much more discretion than the Florida, California, and Massachusetts Models.¹³⁹ For example, Arkansas enacted a statute that only applies to “a sex offender determined to be a sexually violent predator” and requires electronic monitoring on an individual basis “for a period not less than ten (10) years” upon release.¹⁴⁰ The “not less than” language in the Arkansas statute indicates that the court may impose a longer period of electronic monitoring, depending on the individualized risk assessment.

In Nevada, the Chief Parole and Probation Officer assesses the individual risk that a sex offender poses and has the discretion to recommend electronic monitoring for a period up to the offender’s natural life.¹⁴¹ New Jersey mandates that judges who sentence defendants convicted of certain sexual offenses require lifetime parole

¹³⁶ *Id.*

¹³⁷ *Id.* (noting issues with technology limitations, increased workload of supervisors, lack of actual crime prevention, high costs, and removal of devices by offenders).

¹³⁸ See discussion *infra* Part IV.B.

¹³⁹ ARK. CODE ANN. § 12-12-923 (2011) (effective Apr. 7, 2006); NEV. REV. STAT. § 176A.410(1), (2)(b)–(c) (2011) (effective Oct. 1, 2007); N.J. STAT. ANN. § 2C:43-6.4(a) (West 2011) (effective Jan. 14, 2004); N.J. STAT. ANN. § 30:4-123.91(c) (West 2011) (effective Aug. 6, 2007); N.Y. EXEC. LAW § 837-r(1), (2)(d) (Consol. 2011) (effective Apr. 13, 2007); N.Y. PENAL LAW § 65.10(4) (Consol. 2011) (effective June 22, 2010); TENN. CODE ANN. § 40-39-302(b) (2011) (effective July 1, 2004); WASH. REV. CODE . § 9.94A.704(5) (2011) (effective Aug. 1, 2009).

¹⁴⁰ ARK. CODE ANN. § 12-12-923(a)(1) (2011) (effective Apr. 7, 2006).

¹⁴¹ See NEV. REV. STAT. § 176A.410(1), (2)(b)–(c) (2011) (effective Oct. 1, 2007).

or community supervision¹⁴² and then gives judges full discretion to impose electronic monitoring as a “condition of discharge.”¹⁴³ New York, in 2007, created an Office of Sex Offender Management to assess individualized sex offender risks, and it is within its discretion to use electronic monitoring as a “supervisory tool.”¹⁴⁴ In addition, the courts also have discretion to impose electronic monitoring as a condition of probation when it would “advance public safety.”¹⁴⁵ Tennessee and Washington place the responsibility for the individualized risk assessment on their respective boards of probation and parole and provide the boards with discretion to use electronic monitoring on high-risk offenders.¹⁴⁶

Other states never get that specific and allow GPS monitoring as a general “tool” that courts may implement as they see fit without specifying or mandating when it needs to be used with specific statutory guidelines. There are twelve jurisdictions where a vague electronic-monitoring condition is one tool that judges or probationary boards have within their sole discretion.¹⁴⁷ Each of these states allow some circumstances under which electronic monitoring may be imposed on a post-incarceration sex offender without specifying how such a tool must be utilized. The degree of judicial discretion in these states is much higher than under the Florida, California, or Massachusetts Models,¹⁴⁸ and strict bright-line rules have been avoided in favor of judicial flexibility.

For example, in Colorado, a sex offender who is released on parole is subject to a period of parole that will last at least ten years for class four felonies and twenty years for class two or three felonies and

¹⁴² N.J. STAT. ANN. § 2C:43-6.4(a) (West 2011) (effective Jan. 14, 2004).

¹⁴³ *Id.* § 30:4-123.91(c) (effective Aug. 6, 2007).

¹⁴⁴ N.Y. EXEC. LAW § 837-r(1), (2)(d) (Consol. 2011) (effective Apr. 13, 2007).

¹⁴⁵ N.Y. PENAL LAW § 65.10(4) (Consol. 2011) (effective June 22, 2010).

¹⁴⁶ See TENN. CODE ANN. § 40-39-302(b) (2011) (effective July 1, 2004); WASH. REV. CODE ANN. § 9.94A.704(5) (2011) (effective Aug. 1, 2009).

¹⁴⁷ COLO. REV. STAT. § 18-1.3-204(2)(a)(XIV.5) (2011) (effective Mar. 8, 2006); CONN. GEN. STAT. § 53a-30(a)(14) (2011) (effective Oct. 1, 2003); D.C. CODE § 22-1211 (2011) (effective Dec. 10, 2009); HAW. REV. STAT. § 353G-7(a)(4)(D) (2011) (effective July 7, 1998); HAW. REV. STAT. § 706-624(2)(p) (LexisNexis 2011) (effective June 22, 2006); MISS. CODE ANN. § 99-19-84 (2011) (effective July 1, 2007); NEB. REV. STAT. § 83-174.03 (LexisNexis 2011) (effective Apr. 13, 2006); N.D. CENT. CODE § 12.1-32-07(3)(f) (2011) (effective Apr. 4, 2007); OHIO REV. CODE ANN. § 2929.13(L) (LexisNexis 2011) (effective Aug. 3, 2006); 42 PA. CONS. STAT. § 9798.3 (2011) (effective Jan. 1, 2007); TEX. GOV'T CODE ANN. § 508.221 (West 2010) (effective Sept. 1, 1997); UTAH CODE ANN. § 77-18-1(8)(a)(vi) (2011) (effective Mar. 21, 1995); WYO. STAT. ANN. § 7-13-1102 (2011) (effective July 1, 1996).

¹⁴⁸ See discussion *supra* Part II.A–C.

will last at most for the rest of the sex offender's life.¹⁴⁹ Although the statute does not explicitly mandate any form of electronic monitoring, when determining a period of probation, a judge is allowed to require the probationer to "[b]e subject to electronic or global position monitoring."¹⁵⁰ While it is not explicitly stated, the combination of various Colorado statutory provision does put the possibility of lifetime electronic monitoring, based entirely on the judge's discretion, in a judge's toolkit.¹⁵¹ Similarly, in Connecticut and Mississippi the court may, but need not, impose electronic monitoring as a condition of probation.¹⁵²

Some states, while making vague mention of a possibility of the use of GPS tracking, do not specify any guidelines for its utilization. In the District of Columbia, for example, a statute makes it unlawful for anyone to tamper with a global positioning device that is required as a condition of various sentencing options, including probation, supervised release, and parole.¹⁵³ At no other point, however, does the D.C. Code specify the circumstances under which electronic monitoring may be imposed; thus a vague reference to tampering implies that a possibility of GPS tracking exists. Texas also makes a vague reference to the possibility of electronic monitoring as a condition of parole, but does not specify the use of electronic monitoring in relation to sex offenses.¹⁵⁴

There are also a couple of states that are truly unique in their treatment of the issue. For example, Ohio is unique in that its statute applies only to sex offenders who do not serve a prison sentence (applying to probation-only sentences), and it is within the Ohio courts' discretion to impose the electronic monitoring (it is not mandatory).¹⁵⁵ Minnesota, while not having authorized GPS tracking for sex offenders, does have an electronic-monitoring program for those who commit domestic violence.¹⁵⁶ The statute is limited to crimes "committed against a family or household member,"¹⁵⁷ but it does encom-

¹⁴⁹ COLO. REV. STAT. § 18-1.3-1006(b) (2011).

¹⁵⁰ *Id.* § 18-1.3-204 (2)(a) (XIV.5).

¹⁵¹ *See id.* §§ 18-1.3-1006(b), 18-1.3-204 (2)(a) (XIV.5).

¹⁵² CONN. GEN. STAT. § 53a-30(a)(14) (2011) (effective May 26, 2006); MISS. CODE ANN. § 99-19-84 (2011) (effective July 1, 2007).

¹⁵³ D.C. CODE § 22-1211 (2011) (effective Dec. 10, 2009).

¹⁵⁴ *See* TEX. GOV'T CODE ANN. § 508.221 (West 2011) (effective Sept. 1, 1997).

¹⁵⁵ OHIO REV. CODE ANN. § 2929.13(L) (LexisNexis 2011).

¹⁵⁶ *See* MINN. STAT. § 611A.07 (2011) (effective Apr. 30, 1992).

¹⁵⁷ *Id.* § 518B.01 (2010).

pass “criminal sexual conduct,”¹⁵⁸ which allows a minimal level of sex-offender tracking in situations of sexual abuse within the family.¹⁵⁹

In summary, a vast majority of states allow some form of electronic monitoring of sex offenders, but the specific provisions of such statutes can vary greatly. Most of the statutes that differ from the Florida, the California, or the Massachusetts Models do so because of the degree of judicial or regulatory-agency discretion that they grant, but these states still have systems in place to monitor those sex offenders who pose the greatest risks, especially to children. There are forty-two different statutes that in some way allow for sex-offender GPS tracking (including in the District of Columbia), and this number does not even include actions that the federal government has taken on this issue.

E. The Federal Models

At the same time when a supermajority of states enacted some form of sex-offender tracking legislation, the U.S. Congress entered the debate in two different ways: through direct statutory action and through state-funding programs. In 2005, during the public outcry over the death of Jessica Lunsford, Congress made its first and only official attempt to directly legislate for electronic monitoring of sex offenders at the federal level.¹⁶⁰ Modeled after the Florida statute and called the Jessica Lunsford Act, the House bill would have amended the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program¹⁶¹ in a couple of key ways.¹⁶² First, it would have strengthened the sex-offender registration program by requiring states to verify the last known address of sex offenders by randomly mailing a verification form at least twice a year.¹⁶³ If the offender did not mail the form back within a predetermined time thus verifying the accuracy of his registered address, he would be held liable as if he had never registered at all.¹⁶⁴

Second, and more relevant to this Comment’s discussion, the bill would have required electronic monitoring of certain sex offenders who habitually failed to follow their registration requirements for at least five years upon release or ten years if they were considered

¹⁵⁸ *Id.*

¹⁵⁹ MINN. STAT. § 629.72, subd. 2a (20011) (effective Apr. 30, 1992).

¹⁶⁰ H.R. 1505, 109th Cong. (2005).

¹⁶¹ 42 U.S.C. § 14071 (2006).

¹⁶² See H.R. 1505.

¹⁶³ *Id.* § 2(a).

¹⁶⁴ *Id.*

2012]

COMMENT

1191

“violent predators.”¹⁶⁵ This was a direct federal requirement on the states not only to have a program to track registration of sex offenders within their borders but also to implement an enforcement mechanism with “location-transmitting device[s]” to verify their whereabouts.¹⁶⁶ Representative Ginny Brown-Waite from Florida introduced this bill in the House on April 6, 2005, along with eighty-six co-sponsors (twenty-one Democrats and sixty-five Republicans), but the bill never made it out of the House Committee on the Judiciary.¹⁶⁷

Although direct federal control of sex-offender tracking never came out of congressional committee, another piece of legislation had a much larger impact on the issue by tying state action to federal grants. The Adam Walsh Child Protection and Safety Act of 2006 implemented a Sex Offender Monitoring Program that authorized the Attorney General to award Jessica Lunsford and Sarah Lunde Grants to various state and local governments if they complied with the stated minimum standards.¹⁶⁸ These standards required states, at a minimum, to set up programs to track sex offenders with active electronic-monitoring devices twenty-four hours a day in order to get a federal grant.¹⁶⁹ The statute authorized \$5,000,000 in grants and gave a major financial incentive for each state to pass a sex-offender tracking statute.¹⁷⁰

It is hardly a coincidence that most of the state statutes analyzed above were implemented between 2007 and 2009, the period for which the state grants were authorized. Even though a bill that would have allowed the federal government to mandate electronic monitoring for sex offenders never made it out of the House of Representatives, the federal government still achieved its goal by providing the financial incentive needed to move the states into action where federal legislation could not be passed. While legislation requiring some form of electronic monitoring of sex offenders has proliferated over

¹⁶⁵ *Id.* § 2(c).

¹⁶⁶ *Id.*

¹⁶⁷ *H.R. 1505 (109th): Jessica Lunsford Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/109/hr1505> (last visited June 11, 2012). After a hearing in the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security on June 9, 2005, movement on the Jessica Lunsford Act ceased because the provisions that Congress wished to pass were included in H.R. 4472, the Adam Walsh Child Protection and Safety Act. The provision for federal GPS tracking of sex offenders was not passed and no further efforts for federal tracking of sex offenders were pursued in later sessions. *See* H.R. REP. NO. 109-749, at 102 (2007).

¹⁶⁸ *See* 42 U.S.C. § 16981(a)(1) (2006) (effective July 27, 2006).

¹⁶⁹ *See* § 16981(a)(1)(C).

¹⁷⁰ § 16981(c)(1).

the past six years, the statutes for the most part have not faced constitutional review beyond the various challenges to retroactive application.¹⁷¹ As the Massachusetts Supreme Judicial Court found, GPS tracking is “dramatically more intrusive and burdensome” when compared to registration only.¹⁷² This Comment will next assess whether these statutes go too far in reducing the constitutional rights of sex offenders.

III. ARGUMENTS AGAINST CONSTITUTIONALITY

One of the chief reasons for the Framers to write the Constitution was to “secure the Blessings of Liberty to ourselves and our Posterity.”¹⁷³ And it is the province of the courts to determine whether or not a law is “repugnant to the Constitution” and thus void.¹⁷⁴ Although a majority of states have determined that the individual rights of sex offenders are secondary to the safety of society at large,¹⁷⁵ when the government decides to intrude upon the protections that the Constitution bestows on all Americans, this determination must ultimately be made by the courts.

Because the U.S. Supreme Court has yet to determine the constitutionality of GPS tracking of sex offenders, Part III will review some of the various constitutional arguments against such statutes. Part III.A will review the argument that retroactive application of the statutes violates the Ex Post Facto Clause of the U.S. Constitution.¹⁷⁶ Part III.B will review the argument that the long-term or permanent GPS tracking of sex offenders violates their freedom of movement, both intrastate and interstate. Part III.C will review the argument that attaching GPS-locators to sex offenders’ bodies violates their freedom to control their own bodily integrity free from unreasonable government intrusion. Finally, Part III.D will review the argument that a tracking device cannot continuously transmit evidence regarding the offender’s location for hypothetical future crimes without violating the Fourth Amendment’s protection against unreasonable searches.¹⁷⁷

¹⁷¹ See, e.g., *Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178, 1181–82 (E.D. Cal. 2007); *People v. Milligan*, 83 Cal. Rptr. 3d 550, 559 (Cal. Ct. App. 2008).

¹⁷² *Commonwealth v. Cory*, 911 N.E.2d 187, 196 (Mass. 2009).

¹⁷³ U.S. CONST. pmbl.

¹⁷⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁷⁵ See *supra* Part II.

¹⁷⁶ U.S. CONST. art. I, § 9, cl. 3 (“No . . . ex post facto Law shall be passed.”).

¹⁷⁷ U.S. CONST. amend. IV (“The right of the people to be *secure in their persons*, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated”) (emphasis added).

A. *Retroactive Application Violates the Ex Post Facto Clause of the U.S. Constitution*

One issue with sex-offender tracking statutes arises when a state attempts to apply a new law to a sex offender who has committed his crime before the effective date of the tracking statute. An ex post facto law is a law that criminalizes behavior that was legal when originally committed; the ex post facto prohibition, however, does not apply to civil laws enforced retroactively.¹⁷⁸ Some courts have found that electronic monitoring requirements violate the Ex Post Facto Clause and thus may not be applied retroactively, while other courts have found that the laws are non-punitive in nature, and thus, do not violate the Ex Post Facto Clause.¹⁷⁹ The U.S. Supreme Court has yet to rule on this issue, but there is already a well-established framework in place to make this determination, which the Court used when it found that sex offender registration laws did not violate the Ex Post Facto Clause when applied retroactively.¹⁸⁰

In *Smith v. Doe*, the Supreme Court entered the debate about sex-offender registration and found that the retroactive application of registration laws did not violate the Ex Post Facto Clause under the “well-established” framework for deciding whether or not a law has crossed the line from civil proceedings to criminal punishment.¹⁸¹ Under the Court’s guidelines, the first step is to “ascertain whether the legislature meant the statute to establish ‘civil’ proceedings;” if the legislature intended to impose the law as a punishment, it would “end the inquiry” and any retroactive application would violate the Ex Post Facto Clause.¹⁸² If the Court determines that the legislature intended to enact a civil proceeding or that the legislature’s intent is ambiguous, the next step is to analyze whether the statute’s effects on

¹⁷⁸ See BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

¹⁷⁹ Compare *Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178, 1180–81 (E.D. Cal. 2007) (holding that the California monitoring statute was only to be applied prospectively and noting that applying it retroactively would “raise serious ex post facto concerns”), with *Doe v. Bredeisen*, 507 F.3d 998, 1000 (6th Cir. 2007) (holding that retroactive application of the Tennessee monitoring statute does not violate the Ex Post Facto Clause because the statute is non-punitive), and *State v. Bare*, 677 S.E.2d 518, 528 (N.C. Ct. App. 2009) (holding that retroactive application of the North Carolina monitoring statute does not violate the Ex Post Facto Clause because it is a civil regulatory scheme and no more punitive than sex-offender registration).

¹⁸⁰ See *Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (holding that Alaska’s sex offender registration statute was a non-punitive civil regulatory scheme and, therefore, retroactive application did not violate the Ex Post Facto Clause).

¹⁸¹ *Id.* at 92.

¹⁸² *Id.* (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)) (internal quotation marks omitted).

the individual are punitive under the seven-factor *Mendoza-Martinez* test.¹⁸³

The *Mendoza-Martinez* test, under which the Court determines whether the sanctions that a statute imposes are punitive in nature, asks: (1) whether the statute imposes “an affirmative disability or restraint,” (2) whether the sanction imposed has traditionally been regarded as a punishment, (3) whether the sanction is imposed only upon a showing of *scienter*,¹⁸⁴ (4) whether the sanction promotes retribution and deterrence, (5) whether the sanction applies to behavior that was already a crime, (6) whether a separate, rationally related purpose can be attributed to the sanctions aside from punishment, and (7) whether the sanction seems excessive in relation to the alternative purpose attributed to the statute.¹⁸⁵ While this list is “neither exhaustive nor dispositive,”¹⁸⁶ the Supreme Court applied the *Mendoza-Martinez* test when it determined the constitutionality of imposing sex-offender registration requirements retroactively, and thus it is a fair assumption that the same analysis applies to sex-offender tracking statutes as well.¹⁸⁷

Although the explicit legislative intent for enacting a sex-offender tracking statute is not always stated, it is likely that when the Supreme Court does face this issue, even if the legislative intent is stated, it will not be alone dispositive one way or the other. For example, in the text of the Colorado tracking statute, the legislature explicitly stated that “continued monitoring of sex offenders at each stage of the criminal justice system . . . will curtail recidivistic behavior and the protection of victims and potential victims will be enhanced.”¹⁸⁸ This, on its face, would probably be classified as a “civil regulatory scheme” because the goal is not to punish the offenders but rather to protect the potential victims; this is the same legislative

¹⁸³ See *id.* at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)).

¹⁸⁴ See BLACK’S LAW DICTIONARY 1373 (8th ed. 2004) (“A degree of knowledge that makes a person legally responsible for the consequences of his act or omission; the fact of an act’s having been done *knowingly*, esp. as a ground for civil damages or criminal punishment.” (emphasis added)).

¹⁸⁵ *Kennedy*, 372 U.S. at 168–69.

¹⁸⁶ *Smith*, 538 U.S. at 97 (internal quotation marks and citations omitted).

¹⁸⁷ See *id.*

¹⁸⁸ COLO. REV. STAT. § 16-11.7-101 (2010) (repealed 2011) (stating that the legislative intent in passing the statute was to reduce recidivism threats). The legislature changed this language only one year later, clarifying that “[t]he general assembly does not intend to imply that all offenders can or will positively respond to treatment.” COLO. REV. STAT. § 16-11.7-101(2) (2011).

goal that the Supreme Court deemed “civil” in *Smith*.¹⁸⁹ The true determination of whether or not sex-offender tracking statutes are punitive in nature will be based on the *Mendoza-Martinez* review.

Unlike registration requirements, however, the Court could still very easily find that requiring an offender to wear a GPS-tracking device for an extended period is punitive in nature under the *Mendoza-Martinez* analysis. Offenders are forbidden to go near certain areas, such as anywhere where “children congregate,”¹⁹⁰ which constantly requires them to plan their paths ahead of time to ensure that they will not pass by a school, a playground, or a shopping mall and face harsh punishments. Such broad statutory limitations on movement are definitely affirmative restraints on how an offender can live his life.¹⁹¹ Unlike registration requirements—under which members of the public must actively seek out the information whether someone is a sex offender—electronic monitoring requires that a sex offender have a device on the outermost layer of clothing, which makes the device visible to the public wherever he goes.¹⁹² As public awareness of sex-offender-tracking requirements grows, these devices may very well become “modern day ‘scarlet letter[s]’” that expose the offender to public shame and hostility—a sanction that has traditionally been regarded as punishment.¹⁹³

An alternative justification for sex-offender tracking is reducing sex-offender recidivism,¹⁹⁴ but this is not likely to sway the Supreme Court to allow retroactive application of such requirements because long-term or lifetime GPS tracking is excessive in relation to that purpose. Such sanctions do not prevent crimes, but merely give the police an active source of evidence to solve crimes after-the-fact.¹⁹⁵ Sex-offender registration was found, under the *Mendoza-Martinez* test,

¹⁸⁹ See *Smith*, 538 U.S. at 93.

¹⁹⁰ See FLA. STAT. ANN. § 948.30(1)(b) (LexisNexis 2011).

¹⁹¹ See discussion *infra* Part III.B.

¹⁹² See discussion *infra* Part III.B.1.

¹⁹³ Doe v. Bredesen, 507 F.3d 998, 1009 (6th Cir. 2007) (Keith, J., dissenting in part).

¹⁹⁴ See, e.g., COLO. REV. STAT. § 16-11.7-101 (2010).

¹⁹⁵ See IND. DEP’T OF CORR., *supra* note 128 (noting that a major negative aspect of GPS monitoring is the “[c]reation of a false sense of security because GPS monitoring does not *prevent* crimes from happening.” (emphasis added)). Real-time tracking of a sex offender may act as a deterrent because the offender knows that he can be traced, but it cannot actually prevent crimes from occurring because it is impossible to know what the offender is doing at a given moment even if the police knew his location. Thus, the only practical effect of GPS-tracking statutes is to provide evidence of location after the fact or the hope that the sex offender will be less likely to commit crimes if he knows that the state is following him.

to be a non-punitive civil regulation, but sex-offender-tracking statutes interfere with the rights of the offenders to a much greater extent and have much more permanent punitive effect on these rights. If the Court does find that these statutes have a punitive effect, retroactive application would violate the Ex Post Facto Clause. Even prospective application after the effective date of the statute, however, could be unconstitutional if the laws go too far.

B. Sex-Offender Tracking Statutes Unreasonably Restrict Freedom of Movement

The Supreme Court has not yet addressed whether sex-offender tracking statutes infringe on an offender's freedom of movement. Wearing a GPS tracking device for decades, or even for the course of his life, does not directly inhibit an offender's movement, but the issue is more complex. Under the broad concept of "personal liberty," the Supreme Court has recognized that a person has a right to travel throughout the country "uninhibited by statutes, rules, or regulations that unreasonably burden or restrict this movement"¹⁹⁶ and that the freedom to move without government interference is "a virtually unconditional personal right, guaranteed by the Constitution to us all."¹⁹⁷

1. Intrastate Freedom of Movement

These statutes directly interfere with the freedom of movement by prohibiting offenders from entering designated exclusionary zones. The Wisconsin statute is a good example of these exclusionary provisions. It sets specific areas where the offender may not go, focusing on "areas where children congregate, with perimeters of 100 to 250 feet."¹⁹⁸ Such exclusions are similar to a restraining order and can encompass other areas, including the "victim's residence, place of employment and school."¹⁹⁹ These zones, set out at the time when probation is enacted, are the only explicit restrictions to the offender's freedom of movement. Thus even under the personal liberty test in *Saenz v. Roe*, these would likely pass judicial review as reasonable limitations because a person who commits any sexual act with a child should not be able to knowingly go where children congregate just as

¹⁹⁶ *Saenz v. Roe*, 526 U.S. 489, 499 (1999) (quoting *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969)) (internal quotation marks omitted).

¹⁹⁷ *Id.* at 498 (quoting *Shapiro*, 394 U.S. at 643) (internal quotation marks omitted).

¹⁹⁸ WIS. STAT. § 301.48(3)(c) (2011).

¹⁹⁹ MASS. ANN. LAWS ch. 127, § 133D1/2 (2011).

a person who sexually assaults another person should not be able to approach the victim when he is let out of prison. This does not acknowledge, however, the other incidental ways that the tracked offender's freedom of movement is impacted by GPS-tracking statutes.

Judicial review of GPS-tracking statutes has not yet reached the Supreme Court, but there have been cases in the lower courts that have challenged the statutes' validity. In 2007, for example, a sex offender challenged Tennessee's Monitoring Act on various grounds.²⁰⁰ One of the grounds was that it "ha[d] a marked effect on his lifestyle and freedom of movement."²⁰¹ The offender, Doe, explained that he was "required to carry with him at all times when not at his residence a relatively large box that contains the electronics necessary for the monitoring to take place."²⁰² He had to wear the tracking device on the outside of his outermost layer of clothing that was "obvious to any onlooker."²⁰³

Doe was burdened in ways other than the visibility of the tracking box. If he was going into any building, he would need to wait several minutes before entering to allow the device to reset.²⁰⁴ Once inside the building, Doe would need to exit the building "at least once every hour so that monitoring could take place."²⁰⁵ In addition, as in *Thisell*, Doe was forbidden to "swim or participate in any other water activity" because the device was not waterproof.²⁰⁶ GPS tracking also made taking a bath impossible due to its limitations.²⁰⁷

In addition to the incidental restrictions on Doe's movements, Doe experienced additional burdens due to device malfunctions.²⁰⁸ Doe went on a vacation after receiving permission from the authorities, and because the device was not transmitting properly, he was repeatedly threatened with immediate arrest if he did not call in to the probation officer.²⁰⁹ This was just one of the many times in the two years that Doe was required to wear the GPS tracker that the device malfunctioned, causing extreme inconvenience.²¹⁰ Although the ap-

²⁰⁰ Doe v. Bredesen, 507 F.3d 998, 1001–02 (6th Cir. 2007).

²⁰¹ *Id.* at 1002.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Doe*, 507 F.3d at 1002.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

peals court found that these limitations were not “punitive” in nature, Doe’s description of the day-to-day effect of living with a GPS monitor is instructive; he would have to consider whether or not the state would allow him to go where he wanted to go and worry about whether a device malfunction would get him arrested.

Judge Keith’s partial dissent in *Bredesen* cautioned that the requirement to always carry a visible tracking box with him exposed Doe to public scorn.²¹¹ By contrast, the majority opinion found that members of the public would not know what the GPS tracking device was, and even if they did, they would not know that such a device designated the person wearing it as a sex offender.²¹² However true the majority’s point may have been in 2007, public knowledge and perception of GPS tracking devices will change as almost every jurisdiction has passed sex-offender tracking statutes, which will change the reality in line with the dissent’s point of view.²¹³

Judge Keith considered the “relatively large box as a symbol of [Doe’s] crime for all to see,” arguing that it had the effect of a “modern day ‘scarlet letter.’”²¹⁴ Judge Keith went on to reflect that forcing a sex offender to wear the GPS-tracking box anywhere he went “[wa]s dangerously close to having a law enforcement officer openly escorting him to every place he [chose] to visit for all [the general public] to see, but without the ability to prevent him from re-offending.”²¹⁵ As these statutes proliferate and public awareness of GPS tracking of sex offenders increases with time, sex offenders will be faced with increasing scorn from the public when they venture out of their homes. Unlike registration laws, in the case of which the sex offender only worries about facing those members of the public who actively seek out his sex-offender status and actually recognize him, a tracked sex offender worries about anyone who may suspect that the GPS-tracker designates him as a high-risk sex offender.²¹⁶

²¹¹ *Id.* at 1008–09 (Keith, J., dissenting in part).

²¹² *Bredesen*, 507 F.3d at 1005 (majority opinion).

²¹³ See, e.g., Brian Joseph, *GPS Units Fail to Protect Public from Sex Offenders*, ORANGE CNTY. REG. (June 18, 2010 3:00 AM), <http://taxdollars.ocregister.com/2010/06/18/gps-units-fail-to-protect-public-from-sex-offenders/59253/> (giving an overview of the California tracking statute and providing an example of the increased coverage that GPS tracking of sex offenders has received since 2007).

²¹⁴ *Bredesen*, 507 F.3d at 1009 (Keith, J., dissenting in part).

²¹⁵ *Id.* at 1012.

²¹⁶ *But cf.* *United States v. Gementera*, 379 F.3d 596, 610 (9th Cir. 2004) (holding that forcing a man convicted of stealing mail to stand outside a post office wearing a signboard stating that he stole mail was an allowable form of public shaming).

Although not a direct restriction on the offender's freedom of movement, the possibility of public scorn and hostility is definitely an incidental restriction on a sex offender's ability to move freely within the state in which he lives. If the government forces an offender to permanently wear a tracking device, which causes the offender to face fear, apprehension, anger, or outright hostility every time he leaves his home, it cannot truly be said that his freedom of movement is not infringed. As knowledge of the "scarlet letter" device hooked to an offender's belt increases, the sex-offender-tracking statute will eventually lead to state-sponsorship of two classes of citizens: those who can travel freely, and those who can only leave their homes if they are willing to face public condemnation.²¹⁷

2. Interstate Freedom of Movement

Another fundamental right articulated in *Saenz* is the right to travel freely between states.²¹⁸ Some states, such as Montana, deal with interstate considerations explicitly in their statutes.²¹⁹ In Montana, if a tracked offender is allowed to "transfer supervision to another state," he must "pay a fee of \$50 to cover the cost of processing the transfer."²²⁰ This implies that if the offender wishes to exercise his fundamental right to travel between states, he can only do so if he first gets permission from the monitoring body, pays a \$50 transfer fee, and the new state is willing to take over tracking responsibilities. It is unlikely that the Supreme Court, when proclaiming such a fundamental right, intended for the right to be subject to the bureaucracy of two state governments. The statute also does not clarify what would happen if an offender who is tracked wants to move to a state that does not impose GPS tracking for sex offenders. Nor does it deal with the jurisdictional issues that could possibly come from a GPS tracking device transmitting location data to the home state even when the offender is no longer within the jurisdictional boundary of that state.

Some sex-offender-tracking statutes make reference to the Interstate Compact for Adult Offender Supervision (ICAOS), an interstate

²¹⁷ See, e.g., Demleitner, *supra* note 6, at 158–59 (explaining how post-conviction restrictions can push ex-offenders into a realm of second-class citizenship).

²¹⁸ 526 U.S. 489, 499 (1999).

²¹⁹ See MONT. CODE ANN. § 46-23-1031(1)(b) (2011).

²²⁰ *Id.*

effort to monitor sex-offender risks.²²¹ One of the main purposes of the ICAOS, as the enacting statutes indicate, is to “[p]rovide for the effective *tracking*, supervision, and rehabilitation of these [sex] offenders by the sending and receiving states.”²²² All fifty states and the District of Columbia are members of the ICAOS.²²³ This should be the interstate agency to coordinate transfers of sex offenders currently being tracked by their original states, but it is unclear whether ICAOS has an efficient process in place to safeguard offenders’ freedom of interstate movement not only when they are moving to another state but also when they are just crossing into a neighboring state for a temporary trip.

If the states are going to condition the exercise of an offender’s right of interstate movement on the states’ approval, then there needs to be an efficient process in place that will accomplish that in the least-restrictive way possible. If states are going to restrict interstate movement even for day-trips into neighboring states, then it is likely impossible for the bureaucracies of two different states to make the process efficient enough to make it practical for the offender to even try to get permission unless he knows at least a week in advance that he will need to travel out of his home state. In situations where a sex offender lives on the border of two different states and could possibly be employed or have family across the border, GPS-tracking statutes could truly become burdensome on the offender’s freedom of interstate movement, and this aspect of sex-offender tracking statutes could be held unconstitutional.

C. Sex-Offender Tracking Statutes Unreasonably Interfere with Offenders’ Bodily Integrity

The Supreme Court has also yet to deal with the question whether requiring a sex offender to wear a GPS unit on his body for the rest of his natural life unreasonably interferes with his bodily integrity. There are two different ways that the Supreme Court could find such interference, and this section will discuss both in turn. First, these statutes require that a sex offender wear a permanent tracking device on his body. Second, as the technology of GPS track-

²²¹ See, e.g., NEV. REV. STAT. ANN. § 213.1243(2)(b) (2011) (“Lifetime supervision shall be deemed a form of parole for . . . [t]he purposes of the Interstate Compact for Adult Offender Supervision . . .”).

²²² WIS. STAT. § 304.16(1)(a)(2) (2011) (emphasis added).

²²³ *State and Region Maps—ICAOS Directory*, INTERSTATE COMM’N ADULT OFFENDER SUPERVISION, <http://www.interstatecompact.org/Directory/RegionsStates.aspx> (last visited Apr. 17, 2011).

ing devices gets smaller and more efficient, it is possible that these tracking devices, which are currently only attached to the exterior of the offender's body, break the skin and be permanently implanted in the offender's body.

1. Freedom of Bodily Integrity from Unreasonable Government Intrusion

The Supreme Court has not yet dealt with state action that interferes with the exterior of one's body in the way that a permanent GPS tracker does, but it has addressed state action that interferes with a person's right to be "secure in [his] person[]" from state action.²²⁴ In *Schmerber v. California*, the Supreme Court considered whether a police officer's order that a hospital take a blood sample from a drunk driver without his consent violated his personal liberty.²²⁵ After rejecting the argument that the "Self-Incrimination Clause of the Fifth Amendment requires the human body in all circumstances to be held inviolate against state expeditions seeking evidence of [a] crime," the Court went on to explore whether such action violated Schmerber's Fourth Amendment right to be secure in his person.²²⁶ This was the Court's first analysis of a search *inside* one's body, and its starting point was whether the government's violation of Schmerber's bodily integrity to search for evidence "[was] justified in the circumstances, or [was] made in an improper manner."²²⁷

The Court found that when the police are searching a person's body and are not authorized by previous exceptions to the warrant requirement (e.g., a search incident to a lawful arrest²²⁸ or a *Terry* "stop and frisk" search for weapons to protect officer safety),²²⁹ "[t]he interests in human dignity and privacy [that] the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained."²³⁰ Even though the blood test involved a search "beyond the body's surface,"²³¹ the same Fourth Amendment

²²⁴ U.S. CONST. amend IV.

²²⁵ 384 U.S. 757, 758 (1966).

²²⁶ *Id.* at 767.

²²⁷ *Id.* at 768.

²²⁸ See *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (establishing the "search incident to a lawful arrest" exception to the Fourth Amendment's warrant requirement, allowing a limited search of a person when lawfully arrested to look for weapons).

²²⁹ See *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968) (allowing an officer to conduct a limited frisk of a suspect when there is reasonable suspicion that he may be armed).

²³⁰ *Schmerber*, 384 U.S. at 769–70.

²³¹ See discussion *infra* Part III.C.2.

protections would apply to GPS-tracking. Much like the blood test in *Schmerber*, the constant flow of information that the GPS tracker provides to police is primarily used as evidence of possible wrongdoing. And the blood sample in *Schmerber* was used to provide evidence about a drunk-driving accident that had *already* occurred; the connection between the warrant requirement in the Fourth Amendment and monitoring through a GPS tracking device is even less clear where the police are gathering evidence from a sex offender's body based on the possibility that a crime *may be* committed in the future.

The Supreme Court found that "[i]n the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search."²³² No matter how high the risk of recidivism is with a sex offender, the police will seldom be able to determine when a crime will be committed, if ever. Also, unlike the momentary bodily violation that the blood test in *Schmerber* represented, the long-term tracking of a sex offender represents a constant government infringement on the offender's body in the interest of obtaining evidence for a hypothetical future crime. Under *Schmerber*, the Supreme Court should find that this is an unreasonable infringement of the "fundamental human interest" that a person has over his own body.

In the majority of the state sex-offender-tracking statutes, an individualized risk assessment is not necessary and tracking is imposed categorically based on the crime committed.²³³ In these circumstances, the government's ability to justify the infringement of a person's rights to his own body to get possible evidence of a future crime is precarious at best. In *United States v. Polouizzi*, the district court first found that even requiring the wearing of a GPS tracker while a person is awaiting trial is a greater infringement of individual liberty than it appears at first glance.²³⁴ The court then held that even though the government interest in protecting children is significant, "a *per se* rule that the governmental interest always outweighs the constitutional right of liberty denies due process."²³⁵ When a state imposes a mandatory electronic-monitoring statute on an entire class of criminals without an individual risk assessment, the state is making a judgment that the governmental interest automatically outweighs all

²³² *Schmerber*, 384 U.S. at 770.

²³³ See discussion *supra* Part II.A–C.

²³⁴ 697 F. Supp. 2d 381, 392–93 (E.D.N.Y. 2010).

²³⁵ *Id.*

of those individuals' rights to their own bodies, regardless of whether individual circumstances would indicate otherwise.

Under the court's rationale in *Polouizzi*, a per se application of GPS-tracking requirements without any individualized risk assessment would deny the individual's liberty without due process. These are devices that, while not surgically attached to the outside of an offender's body, must be worn on a person's body for his entire life to help prevent, or at least provide evidence of, future crimes. Such an "[a]ssessment of the risk of future crime by particular individuals at this state of our knowledge is hazardous and fraught with uncertainty."²³⁶ In *Schmerber*, the Court held that because there was probable cause to arrest the drunk driver even without the blood sample, such a minor intrusion into the body to collect evidence that would have disappeared with time was reasonable to protect evidence of a crime.²³⁷ With GPS trackers, however, such intrusion to the exterior of one's body cannot be justified by probable cause that a crime will be committed prospectively. Given the rationale behind *Schmerber* and *Polouizzi*, if a state wants to violate an offender's bodily rights with a GPS tracking device, such actions should only result from an individualized risk assessment if these statutes are to survive constitutional review. Currently, as discussed in Part II, the majority of states do not provide for such individualized review.

2. Technological Advances in Tracking Technologies

Schmerber dealt with a minor intrusion under the body's surface to collect blood and does not directly apply to analysis of external tracking devices, but the technology for internal GPS tracking is on the horizon. In *Bredesen*, the majority justified the inconvenience of wearing a GPS tracker based on the fact that it was the same size as a walkie-talkie and would "only become smaller and less cumbersome as technology progresses."²³⁸ GPS tracking devices smaller than the six-inch device that Doe wore in 2007 are already on the market,²³⁹ and there are also potential devices that could be planted under a

²³⁶ *Id.* at 392.

²³⁷ *Schmerber*, 384 U.S. at 770–71.

²³⁸ *Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir. 2007).

²³⁹ See *Spark Nano Real-Time GPS Tracking Device*, BRICKHOUSE SECURITY, <http://www.brickhousesecurity.com/covert-small-gps-tracking-device.html> (last visited Apr. 20, 2012) (selling a GPS tracking device smaller than the palm of one's hand for less than \$200).

person's skin²⁴⁰—a much greater invasion of an offender's rights to his body than the external device in *Bredesen* caused.

As early as 2003, Applied Digital Solutions, Inc. patented and tested “the first-ever subdermal GPS ‘personal location device’ (PLD).”²⁴¹ This device was 2.5 inches long by 1.5 inches wide, and the company reported that the device could ultimately be approximately one-half to one-tenth of that size.²⁴² This technology is currently not as readily available as the company's report in 2003 would have indicated, but it is a prime example of the direction in which this technology is headed. Not surprisingly, Applied Digital Solution's report focused on the positive uses of such a device,²⁴³ but there is nothing in the current sex-offender statutes that prevents such implantable technology from being forced on sex offenders as a condition of their release. In fact, many of the statutes allow for technological advancement by requiring the use of GPS or other equivalent technologies.²⁴⁴ The courts will likely be forced, at some point, to consider the propriety of sub-dermal GPS tracking device.

While the *Schmerber* Court allowed a forced test as a minimal infringement of individual's bodily rights, the Supreme Court has already denied more intrusive methods of evidence-gathering. In *Winston v. Lee*, the Court considered a state's effort to force a burglar to undergo surgery for the removal of a bullet that would have almost certainly provided evidence of his guilt.²⁴⁵ The Court held that “[a] compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be ‘unreasonable’ even if likely to produce evidence of a crime.”²⁴⁶ The Court did leave the “reasonableness of surgical intrusions beneath the skin . . . [to be determined by a] case-by-case approach.”²⁴⁷ This indicates that the Court's determination ultimately comes down to a balancing test based on the in-

²⁴⁰ *Implantable RFID and GPS Devices*, FUTUREPUNDIT (May 26, 2003), <http://www.futurepundit.com/archives/001299.html>.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* (noting the positive uses of avoidance of kidnapping and the benefits for other “high-risk” situations).

²⁴⁴ See, e.g., TENN. CODE ANN. § 40-39-302(b)(1)(A) (2010) (allowing GPS device or “other location tracking technology”); VA. CODE ANN. § 19.2-303 (2010) (allowing GPS device “or other similar device”).

²⁴⁵ 470 U.S. 753, 755–56 (1985).

²⁴⁶ *Id.* at 759.

²⁴⁷ *Id.* at 760.

dividual circumstances of the search.²⁴⁸ But the fact that Supreme Court opposed the surgical removal of an item that evidenced an already committed crime indicates that the Court would likely be even less sympathetic to allowing the implantation of a sub-dermal GPS device when the device provides evidence for *possible* future crimes. Even if the technological market develops internal GPS tracking devices, states should avoid using them for sex-offender tracking in order to stay within the bounds of Supreme Court precedent. In addition, each state's statute should incorporate an explicit limitation to the use of sub-dermal technology.

D. Freedom from Unreasonable Searches

The purpose of the Fourth Amendment is to limit the government's power and "to forever secure the people,"²⁴⁹ their persons,²⁵⁰ houses,²⁵¹ papers²⁵² and effects,²⁵³ against all unreasonable searches and seizures under the guise of law."²⁵⁴ One of the most significant arguments against the GPS-tracking statutes is that they violate the Fourth Amendment²⁵⁵ by providing the police with the wearer's location even when the person is constitutionally protected areas, such as his home. This is an issue that the Supreme Court has considered in detail although not within the direct circumstances of a sex-offender tracking statute. In *United States v. Katz*, the Court decided that a key tenet of Fourth Amendment analysis is that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."²⁵⁶ Yet "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."²⁵⁷ *Katz* dealt with the electronic eaves-

²⁴⁸ See, e.g., *Schmerber v. Cal.*, 384 U.S. 757, 768 (1966) ("[T]he Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.").

²⁴⁹ BLACK'S LAW DICTIONARY 1171 (8th ed. 2004) (defining people as "the citizens of a state as represented by the prosecution in a criminal case").

²⁵⁰ *Id.* at 1178 (defining person as "the living body of a human being").

²⁵¹ *Id.* at 756 (defining house as "a home, dwelling, or residence").

²⁵² *Id.* at 1142 (defining paper as "any written or printed document or instrument").

²⁵³ *Id.* at 554 (defining effects as "movable property" and "goods").

²⁵⁴ *Weeks v. United States*, 232 U.S. 383, 392 (1914).

²⁵⁵ The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV (emphasis added).

²⁵⁶ 389 U.S. 347, 351 (1967).

²⁵⁷ *Id.*

dropping of a suspect through a device attached to the exterior of a phone booth.²⁵⁸ The Court held that Katz had a reasonable expectation of privacy within the phone booth and that the government violated that right by collecting evidence without a warrant.²⁵⁹

The Court did emphasize in *Katz* that a state entity may use an electronic device “for the narrow and particularized purpose of ascertaining the truth of the . . . allegations’ of a ‘detailed factual affidavit alleging the commission of a *specific* criminal offense.”²⁶⁰ A GPS tracking device placed on a sex offender is not transmitting information pursuant to a warrant founded on probable cause. In addition, it transmits location information based on a possibility of some future crime. A crime that has yet to be committed cannot meet the *Katz* requirement for a warrant exception that such electronic infringement of a person’s expectation of privacy be based on a specific criminal offense.

The Supreme Court has considered the use of electronic monitoring equipment to gather evidence against a criminal suspect in other contexts as well. Two other cases concerning electronic monitoring of property are relevant to the tracking of a person’s body²⁶¹ because the protections of the Fourth Amendment apply not only to a person’s *effects*, but also, if not more strictly, to *his person*.²⁶²

The first case, *United States v. Knotts*, involved the use of an electronic “beeper” to track a drum of chloroform to the defendant’s cabin where drug manufacturing was conducted.²⁶³ The defendants challenged the use of the beeper, which led to the discovery of incriminating evidence, as an infringement of their Fourth Amendment rights.²⁶⁴ The majority opinion relied on the test articulated in Justice Harlan’s *Katz* concurrence.²⁶⁵ This two-part test looks at (1) “whether the individual, by his conduct, has ‘exhibited an actual (subjective) expectation of privacy’ . . . [and (2)] whether the indi-

²⁵⁸ *Id.* at 348.

²⁵⁹ *Id.* at 355–57.

²⁶⁰ *Id.* at 355 (quoting *Osborn v. United States*, 385 U.S. 323, 329–30 (1966)) (emphasis added).

²⁶¹ *United States v. Knotts*, 460 U.S. 276, 277 (1983); *United States v. Karo*, 468 U.S. 705, 708 (1984).

²⁶² U.S. CONST. amend. IV.

²⁶³ *Knotts*, 460 U.S. at 277.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 280–81 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

2012]

COMMENT

1207

vidual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable."'²⁶⁶

Under this test, the Court held that the defendants did not have any reasonable expectation of privacy when the car carrying the drum was driving on public roads not only because a person has a lesser expectation of privacy while in an automobile but also because a person's location is in the public view.²⁶⁷ This allowed the admission of all tracking information gathered while the truck was on the public roadways.²⁶⁸ Once within private property, however, *Knotts* was entitled to a reasonable expectation of privacy against any information the beeper gave to the police.²⁶⁹ The Court noted that "[t]he right of officers to thrust themselves into a home is also of grave concern, not only to the individual, but to a society that chooses to dwell in reasonable security and *freedom from surveillance*."²⁷⁰

Further, the Court in *Knotts* stated that "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a *judicial officer*, not by a policeman or government enforcement agent."²⁷¹ The Supreme Court has already held that the use of a GPS tracking device on a person's vehicle and the use of that device to track the vehicle's movement is a "search" under the Fourth Amendment,²⁷² and it is likely that this rationale would extend to a device placed on a person's body. Thus, when a sex-offender statute requires imposition of electronic monitoring without individualized risk assessment, it is the state legislators, rather than a judicial officer, who are deciding that the individual's rights must yield to a search. Even if the wearing of a GPS tracking device is a search, however, *Knotts* does not forbid the gathering of location information when the offender is in a public area where his location is open to public view. But using GPS tracking devices in private areas, on the other hand, is much more problematic in light of the Court's more recent precedent.

United States v. Karo was the Court's first case to specifically address whether an electronic monitoring device can provide evidence

²⁶⁶ *Knotts*, 460 U.S. at 281 (internal citations omitted).

²⁶⁷ *Id.* at 281–82.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 282.

²⁷⁰ *Id.* (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)) (emphasis added).

²⁷¹ *Id.* (emphasis added).

²⁷² *United States v. Jones*, 132 S.Ct. 945, 949 (2012).

when used in a protected area.²⁷³ In *Karo*, DEA agents placed an electronic beeper in a can of ether with the consent of the can's owner and pursuant to court authorization.²⁷⁴ The agents then proceeded to track the can of ether after *Karo* picked it up and brought it into his house.²⁷⁵ Using the beeper technology, the agents continued to track the can of ether as it was moved to another defendant's house, and eventually to a commercial storage facility.²⁷⁶ Although none of the information obtained while the beeper was in public view violated the defendants' Fourth Amendment rights, the Court held that "the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence."²⁷⁷

The basic principle reaffirmed in *Karo* is that "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable."²⁷⁸ Such searches are "presumptively unreasonable absent exigent circumstances."²⁷⁹ Even more relevant to this Comment, the Court rejected the Government's argument "that it should be completely free from the constraints of the Fourth Amendment to determine *by means of an electronic device*, without a warrant and without probable cause or reasonable suspicion, whether a particular article—or *a person*, for that matter—is in an individual's home at a particular time."²⁸⁰

Recently, the Court applied this principle specifically to the use of GPS technology in *United States v. Jones*.²⁸¹ In *Jones*, the Court decided "whether the attachment of a [GPS] tracking device to an individual's vehicle, and subsequent use of that device to monitor the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment."²⁸² The government argued that attaching a GPS device to the exterior of Jones's Jeep,

²⁷³ 468 U.S. 705, 708 (1984).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 714.

²⁷⁸ *Id.*

²⁷⁹ *Karo*, 468 U.S. at 714–15 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 748–49 (1984)).

²⁸⁰ *Id.* at 716 (emphasis added).

²⁸¹ 132 S. Ct. 945, 952 (2012).

²⁸² *Id.* at 948.

which was constantly in public view, is not a search under the Fourth Amendment.²⁸³ The Court disagreed, holding that “[b]y attaching the device to the Jeep, officers encroached on a protected area.”²⁸⁴ Even though this decision deals with a GPS device placed on a vehicle and not a person, the case extends the Court’s previous Fourth Amendment precedents to GPS-tracking technology.²⁸⁵

When a sex offender enters his home, or another private area, the tracking device continues to reveal his location.²⁸⁶ The Supreme Court has explicitly stated that such monitoring, in areas where the offender has a reasonable expectation of privacy, violates the Fourth Amendment “absent exigent circumstances.”²⁸⁷ The exigent circumstances required for an exception to the court’s ruling in *Karo* simply do not apply when an offender is going to be tracked for an extended period of time under a sex-offender-tracking statute. When the government receives location data from a tracking device while the wearer is in a protected area, such as his home, it is a violation of the wearer’s Fourth Amendment rights.

IV. ARGUMENTS FOR CONSTITUTIONALITY

As shown in Part III, there are a few major arguments against the constitutionality of sex-offender tracking statutes.²⁸⁸ New technologies, such as GPS tracking devices, are testing the fundamental protections of the Constitution in ways that the Framers never could have envisioned. Until the Supreme Court reviews this new area of statutory development specifically,²⁸⁹ courts and circuits throughout the country will be entitled to independently decide whether to uphold such laws. This is a difficult decision because, notwithstanding the various arguments that attack the constitutionality of sex-offender tracking, there are also various legal arguments to defend the constitutionality of such statutes. Part IV will address some of the strongest justifications for the constitutionality of sex-offender tracking statutes

²⁸³ *Id.* at 952.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 951–52.

²⁸⁶ *See, e.g.*, 42 U.S.C. § 16981(a)(1)(C)(ii) (2006) (setting a minimum standard for any state requesting a federal grant for setting up a sex offender monitoring program to utilize a device that “permit[s] active, real-time, and *continuous* monitoring of offenders 24 hours a day”).

²⁸⁷ *Karo*, 468 U.S. at 714–15.

²⁸⁸ *See* discussion *supra* Part III.

²⁸⁹ The Court’s holding in *Jones* is limited to the placement of a GPS tracking device on a vehicle and does not directly address sex-offender GPS-tracking statutes. *See supra* notes 281–85 and accompanying text.

and review the counter-arguments to the arguments discussed in Part III.

Part IV.A will review the argument that, since the Fourth Amendment only applies to *unreasonable* searches and seizures,²⁹⁰ it does not apply to sex-offender tracking statutes at all because they are a reasonable application of government authority. Part IV.B will review restrictions of rights based on a judgment that an individual is a “danger to society” and how such precedent is applicable given the danger that sex offenders pose to society. Finally, Part IV.C will review the argument that because probationers and parolees have reduced rights due to their prior crimes, especially when dealing with searches that would not otherwise be constitutional, none of the arguments analyzed in Part III apply to sex-offender-tracking statutes.

A. *Sex-Offender Tracking is a Reasonable Search Under the Fourth Amendment*

One of the most significant arguments against the constitutionality of these searches asserts that such constant location monitoring violates the offender’s Fourth Amendment rights.²⁹¹ Even assuming that using the information from an active tracking device to verify an offender’s location within his residence is a search under the Fourth Amendment, such searches may not violate the Fourth Amendment if the court determines that the intrusion is “reasonable.”²⁹² Although the Supreme Court has repeatedly found that “searches and seizures inside a home without a warrant are presumptively unreasonable,”²⁹³ the Court has also found in various cases that “because the ultimate touchstone of the Fourth Amendment is ‘reasonableness,’ the warrant requirement is subject to certain exceptions.”²⁹⁴ The Court has gone on to find that “[a]n action is ‘reasonable’ under the Fourth Amendment . . . ‘as long as the circumstances, viewed *objectively*, justify [the] action.’”²⁹⁵ Although the Fourth Amendment generally requires a warrant for searches of a person’s home, under the standard articulated in *United States v. Knights*, “a lesser degree satisfies the

²⁹⁰ U.S. CONST. amend. IV.

²⁹¹ See discussion *supra* Part III.D.

²⁹² See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

²⁹³ *Payton v. New York*, 445 U.S. 573, 586 (1980).

²⁹⁴ *Stuart*, 547 U.S. at 403 (quoting *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999)).

²⁹⁵ *Id.* at 404 (quoting *Scott v. United States*, 436 U.S. 128 (1978) (emphasis added)).

Constitution when the balance of governmental and private interests makes such a standard reasonable.”²⁹⁶

Given the strong government interest in protecting children from sexual predators, there is a compelling argument that the government interest outweighs the individual’s privacy interests when sex-offender tracking statutes are in question. This type of legislation attempts to monitor sex offenders after they are released from jail; thus the primary purpose of sex-offender tracking statutes is to “best protect the public from the risk that the individual will reoffend.”²⁹⁷ GPS tracking can only be implemented on someone who has already committed a sexual crime because there would be no way to identify a sex offender *before* he has committed a sex crime. Because of this, electronic monitoring is completely focused on the risk of recidivism and the fear that registration alone does not protect society sufficiently.²⁹⁸ Thus, the *Knights* balancing test requires an examination whether the government’s interest in reducing sex-offender recidivism is warranted when compared to the recidivism threat of other crimes.²⁹⁹

An individual risk assessment of a sex offender is a rather inexact science; the best available indicators of recidivism risks are statistical models that provide data on general groupings of sex offenders.³⁰⁰ Such statistics can differ depending on a wide range of variables, but referring to the statistics that the judicial system uses is valuable because probably similar statistics will be utilized under any “reasonableness” analysis of the government interest. The most recent sex-offender recidivism study was conducted by the U.S. Department of Justice and the Bureau of Justice Statistics in 2003, and followed 9,691 male sex offenders that were released in 1994 by fifteen different states.³⁰¹ This is the most recent government study on recidivism and various courts have cited it.³⁰²

²⁹⁶ 534 U.S. 112, 121 (2001).

²⁹⁷ NEB. REV. STAT. ANN. § 83-174.03(3) (2011).

²⁹⁸ See, e.g., Memmott, *supra*, note 13 (discussing how the rape and murder of Jessica Lunsford by a registered sex offender raised the issue that sex offender registration is insufficient to protect children, leading directly to the passing of sex-offender tracking statutes).

²⁹⁹ See *Knights*, 534 U.S. at 121.

³⁰⁰ But see discussion *infra* Part V.E (arguing that risk assessment is still necessary to ensure that the threat a sex offender poses actually justifies GPS tracking without violating his due process rights.).

³⁰¹ PATRICK A. LANGAN ET AL., BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>.

³⁰² See, e.g., *United States v. Irey*, 612 F.3d 1160, 1215 (11th Cir. 2010) (citing the Langan report to justify overturning an unreasonably light sentence for a sex offend-

The report divides “sex offenders” into the categories of “rapists” and “sexual assaulters,” but all 9,691 sex offenders included in the report were considered “violent sex offenders.”³⁰³ This group corresponds to the offenders who would be liable under the GPS-tracking statutes of many states as posing the worst sex-offender threat.³⁰⁴ The chance that a sex-offender would be rearrested or reconvicted for any crime within three years of his release in 1994 was forty-three percent and twenty-four percent, respectively.³⁰⁵ These percentages may seem very high, but when compared to the non-sex offender control group, in which sixty-eight percent of the members were rearrested and forty-eight percent were reconvicted, the recidivism threat for sex offenders is much lower than the recidivism threat for non-sex offenders.³⁰⁶

According to the report, even though the re-arrest or reconviction rates for *any* crime may be less than rates for non-sex offenders, the threat that a sex offender will commit a *sexual* crime within three years of release is actually much higher than the threat of a non-sex offender committing such crimes.³⁰⁷ One thing to consider is that the study is limited to comparing sex offenders and non-sex offenders for a period of only three years after release, which may just indicate that sex offenders wait longer than three years after release to commit new sex offenses. This hypothesis is supported by the fact that out of the sex-offender control group, prior to their incarceration, 28.5% had at least one arrest for a sex offense and 10.3% had at least one arrest for a sex offense committed against a child.³⁰⁸ This seems to justify the “government’s interest” that causes the authorities to focus on sex offenders as a specific threat that needs to be addressed in unique ways—namely, that they will commit new sex crimes long after they have served their time.

The Supreme Court has yet to address a sex-offender case in which this specific report has been cited, but the Court has relied on similar data in the past. When the Court granted certiorari to review sex-offender registration requirements in *Smith*, the Court based its

er); *United States v. Russell*, 600 F.3d 631, 641–42 (D.C. Cir. 2010) (citing the Langan report to justify overturning a sex offender’s thirty-year ban from using a computer as too severe).

³⁰³ LANGAN ET AL., *supra* note 301, at 3.

³⁰⁴ See discussion *supra* Part II.

³⁰⁵ LANGAN ET AL., *supra* note 301, at 13 tbl.7.

³⁰⁶ *Id.* at 14.

³⁰⁷ See *id.* at 24 tbl.21 (showing that 5.3% of sex offenders were rearrested for a sex offense, in comparison to 1.3% of non-sex offenders).

³⁰⁸ *Id.* at 11 tbl.5.

ruling, at least in part, on a previous study by the Department of Justice, which stated that “[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.”³⁰⁹ The Court found that Alaska’s conclusion that “conviction for a sex offense provides evidence of substantial risk of recidivism” was consistent with the “grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class.”³¹⁰ Although not citing specific statistics, in 2003 the Supreme Court conclusively found that “[t]he risk of recidivism posed by sex offenders is frightening and high.”³¹¹ Therefore, the Supreme Court may very well find that the reduction of this risk is a serious “government interest” that can counter the Fourth Amendment challenges presented against GPS-tracking statutes, at least in part.³¹²

B. Reduced Rights Because Sex Offenders Are a “Danger to Society”

If the Supreme Court was correct in 2003 and sex offenders pose a recidivism risk that makes them more dangerous than other criminals, then the general rights of sex offenders could be reduced for the greater good of society. Although the Supreme Court has yet to review the constitutionality of GPS-tracking statutes, the Court has upheld the constitutionality of civil- and involuntary-commitment statutes that allow criminals or sex offenders who are still deemed to be a threat to society to be detained after completing their prison sentences.³¹³ Thus, it is a strong argument that GPS-tracking statutes are less invasive than involuntary- and civil-commitment statutes that are already declared constitutional because the infringements discussed in Part III pale in comparison to restraining someone in a mental hospital or another government facility against his will.

Civil and involuntary commitment represents the most invasive reduction of the rights of individuals who represent “dangers to soci-

³⁰⁹ Smith v. Doe, 538 U.S. 84, 103 (2003) (quoting McKune v. Lile, 536 U.S. 24, 33 (2002)) (internal quotation marks omitted).

³¹⁰ *Id.*

³¹¹ *Id.* (quoting *McKune*, 536 U.S. at 34) (internal quotation marks omitted).

³¹² See discussion *supra* Part III.D.

³¹³ See *Kansas v. Hendricks*, 521 U.S. 346 (1997) (upholding the constitutionality of Kansas’s Sexually Violent Predator Act, KAN. STAT. ANN. § 59-29a01–29a22 (2009), which is the strictest sex-offender civil-commitment statute in the country); *O’Connor v. Donaldson*, 422 U.S. 563 (1975) (upholding the constitutionality of involuntary commitment of those individuals with mental illness who are shown to be a danger to themselves or others). It is important to note that these statutes required an individualized risk assessment before they could be applied.

ety” because these proceedings literally take away an individual’s right to be free from custody even when his sentence has finished or when he has not committed a crime at all. The Supreme Court has agreed with the common law at times that, where “one who takes charge of a third person is under a duty to exercise reasonable care to control that person to prevent him from causing reasonably foreseeable bodily harm to others.”³¹⁴ It is under this rationale—that the authorities should not release back into society anyone who is deemed a threat—that civil and involuntary commitment were born.³¹⁵

Involuntary commitment and civil commitment are different types of restraints, and therefore they are address separately. Involuntary commitment tends to refer to confinement in a mental hospital against one’s will.³¹⁶ The Supreme Court set the national guidelines for involuntary commitment in *O’Connor v. Donaldson* where it held that a state may not confine someone against his will if he is not dangerous to himself or others.³¹⁷ The flip side of this ruling is that a state has every right to hold someone against his will if he *is* found to be a danger to himself or others upon release. Donaldson was committed for paranoid schizophrenia by his father against his will and spent fifteen years confined in an institution because the Florida laws at the time required involuntary commitment for anyone deemed “mentally incompetent.”³¹⁸ As soon as a jury determined that he could be released back into society without posing a danger to himself or others, his mental illness became irrelevant; the state could no longer hold him because its “government interest”³¹⁹ in keeping the “harmless mentally ill” away from the public could no longer outweigh the rights of the individual.³²⁰

Involuntary commitment is also allowed as an alternative to releasing a prisoner at the end of his prison term if he is deemed to be a threat to society.³²¹ Congress has passed legislation that protects the

³¹⁴ *United States v. Comstock*, 130 S. Ct. 1949, 1961 (2010) (citing RESTATEMENT (SECOND) OF TORTS § 319 (1963)).

³¹⁵ See KAN. STAT. ANN. § 59-29a01 (2011) (justifying civil commitment of “sexually violent predators” due to “the dangers they present.”).

³¹⁶ See *O’Connor*, 422 U.S. at 564–65 (illustrating a challenge by a patient who was civilly confined in a mental hospital for fifteen years against his will).

³¹⁷ *Id.* at 573–74 (specifying that mental illness alone is not enough for a state to involuntarily commit someone to a mental institution).

³¹⁸ *Id.* at 566–67.

³¹⁹ For a discussion of the balancing between “government interest” and Fourth Amendment rights, see discussion *supra* Part.IV.A.1 .

³²⁰ *O’Connor*, 422 U.S. at 574–75.

³²¹ See 18 U.S.C. § 4246 (2006).

public from a criminal who is due for release, but is “suffering from mental disease or defect.”³²² Even though the individual might have served his complete sentence, if courts believe “his release would create a substantial risk of bodily injury to another person or serious damage to property of another,”³²³ “the court *shall* commit the person to the custody of the Attorney General.”³²⁴ There is no more fundamental right than to be free from physical restraint. But even this right is secondary to the interest of society if the person is shown to be a threat to others.

Civil commitment is a more recent concept that applies specifically to sex offenders who are held beyond their initial sentence because of their individual risk of recidivism.³²⁵ For example, the Kansas legislature found that “existing civil commitment procedures . . . are inadequate to address the special needs of sexually violent predators and the risks they present to society” and enacted a separate statutory process to keep sex offenders behind bars for as long as they posed a threat due to a showing of “mental abnormality or personality disorder.”³²⁶ The first sex offender who was committed under the act, Leroy Hendricks, was originally convicted for “taking indecent liberties with two 13-year-old boys.”³²⁷ After nearly ten years of his sentence had passed, the state filed a petition to keep Hendricks under civil commitment right before his scheduled release because he was a habitual child molester and posed a high threat of recidivism.³²⁸ Hendricks challenged his commitment and the Kansas Sexually Violent Predator Act ultimately receiving a grant of certiorari by the U.S. Supreme Court.³²⁹

The Court upheld the constitutionality of the Kansas statute on various grounds, clarifying that even though freedom of bodily restraint from arbitrary government action is at the core of due process,

³²² *Id.*

³²³ § 4246(a) (emphasis added).

³²⁴ § 4246(d).

³²⁵ See *Kansas v. Hendricks*, 521 U.S. 346, 350–51 (1997).

³²⁶ § 59-29a01. “Mental abnormality” is defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others. *Id.* § 59-29a02. Thus, if an individualized risk assessment finds that a sex offender has a high risk of reoffending, that would likely qualify as a “mental abnormality” under the Kansas Act.

³²⁷ *Hendricks*, 521 U.S. at 353 (internal quotation marks omitted).

³²⁸ *Id.* at 354–55.

³²⁹ *Id.* at 350, 354; *Kansas v. Hendricks*, 116 S.Ct. 2522, 2522 (1996) (granting certiorari).

it is not an absolute right.³³⁰ The Court found that the right to be free from bodily restraint is subject to “manifold restraints to which every person is necessarily subject for the common good” and “[o]n any other basis organized society could not exist with safety to its members.”³³¹ The Court rejected the argument that “mental illness,” as opposed to “mental abnormality” prerequisite that Kansas statute incorporated, should be a prerequisite for any involuntary commitment and that the Kansas statute’s focus on the dangerousness of the individual satisfied due process.³³²

The right to be free from restraint is one of the most cherished liberties that the Constitution bestows upon American citizens, but this right comes secondary to the safety of society when the individual is deemed to be dangerous in a way that cannot be controlled outside of custody. Although the GPS-tracking statutes are extremely invasive on the sex offender’s rights to move freely, control his own body, or be free from unreasonable searches,³³³ it is very likely that the Supreme Court, which has upheld the constitutionality of civil commitment,³³⁴ would also find constitutional the curtailment of other constitutional rights based on an individualized assessment that the person in question poses a continued danger to society.

C. *Diminished Rights of Parolees or Probationers*

An additional argument supporting the constitutionality of sex-offender tracking is that most of the sex-offender-tracking statutes only apply to offenders while they are on parole,³³⁵ probation,³³⁶ or under community supervision,³³⁷ where the rights of the released offenders are not at their full pre-conviction level. It is important to note that probation, which typically refers to an alternative sentence

³³⁰ *Hendricks*, 521 U.S. at 356.

³³¹ *Id.* at 356–57 (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905)) (internal quotation marks omitted).

³³² *Id.* at 360.

³³³ See discussion *supra* Parts III.B–D.

³³⁴ See *Hendricks*, 521 U.S. at 350–51.

³³⁵ See, e.g., CAL. PENAL CODE § 3004 (West 2007) (requiring electronic monitoring for sex offenders who are “released on *parole*” (emphasis added)).

³³⁶ See, e.g., MASS. GEN. LAWS ch. 265, § 47 (2006) (establishing electronic monitoring “as a requirement of any term of *probation*” (emphasis added)).

³³⁷ See, e.g., FLA. STAT. ANN. § 948.30(3) (West 2010) (requiring electronic monitoring for certain sex offenders who are “placed on probation or *community control*” (emphasis added)).

that does not involve any prison time,³³⁸ can have a very different meaning in the context of sex offenders, who may be placed on probation for extended periods of time even after serving jail time. For example, the Florida law states that periods of probation shall not exceed two years generally,³³⁹ but periods of probation for sex offenders can continue for decades after incarceration.³⁴⁰ As more states enact harsh mandatory prison sentences for sex offenders,³⁴¹ the terms of probation, parole, and community supervision tend to mean the same thing: if a sex offender ever gets out of prison, the state will watch him for decades or for life.

With regard to parolees generally, the Supreme Court has acknowledged that “the Fourth Amendment does not render the States powerless to address . . . concerns [of recidivism] *effectively*.”³⁴² Because probationers, and implicitly parolees, pose a higher risk of recidivism, a state can “justifiably focus on probationers in a way that it does not on the ordinary citizen.”³⁴³ Thus, even though a police officer would not be able to walk up to a citizen and search him for contraband or search his apartment for evidence of illegal activity, the Supreme Court authorized such searches of parolees in *Samson v. California* and of probationers in *Knights*, respectively.

As the Supreme Court acknowledged in *Samson*, “a State has an overwhelming interest in supervising parolees because parolees . . . are more likely to commit future criminal offenses.”³⁴⁴ Because most sex-offender tracking statutes either have limited scope to the term of probation, parole, or community supervision, or mandate lifetime probation for certain crimes, sex offenders’ rights are not at their full

³³⁸ See BLACK’S LAW DICTIONARY 1240 (8th ed. 2004) (defining probation as “[a] court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison”).

³³⁹ FLA. STAT. ANN. § 948.04 (West 2011).

³⁴⁰ See, e.g., *Honrine v. McNeil*, No. 5:07cv227/MCR/EMT, 2009 U.S. Dist. LEXIS 128271, at *2 (N.D. Fla. Mar. 13, 2009) (discussing a plea agreement for sexual battery on a child that consisted of two years community supervision and twenty years of probation); *Kasichke v. State*, 991 So. 2d 803, 805 (Fla. 2008) (discussing a plea agreement for three counts of lewd or lascivious battery and exhibition on a child under the age of sixteen that included 364 days of prison time, two years of community supervision, and eight years on probation).

³⁴¹ See, e.g., MICH. COMP. LAWS SERV. § 750.520b(2) (LexisNexis 2011) (setting the mandatory prison term for “criminal sexual conduct in the first degree” between twenty-five years and lifetime without parole).

³⁴² *Samson v. California*, 547 U.S. 843, 854 (2006).

³⁴³ *United States v. Knights*, 534 U.S. 112, 121 (2001).

³⁴⁴ *Samson*, 547 U.S. at 853 (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998)) (internal quotation marks and citations omitted).

pre-conviction level. It is likely that the Supreme Court will approve some type of diminished constitutional protections for sex offenders because of their previous crimes, provided that the laws that curtail those protections were in place before the crime was committed to give constructive notice to an offender about the possible consequences of his actions.³⁴⁵

V. FINDING THE PROPER BALANCE FOR CONSTITUTIONAL STATE AND FEDERAL STATUTES

The proper balance between the rights of a sex offender who has served his sentence and the right of the government to protect the public from the risk of recidivism has not yet been decided, but at some point the Supreme Court will be asked to review the various arguments on both sides. Nothing is certain, but Supreme Court precedent on issues at least comparable to the long-term or lifetime GPS tracking of sex offenders provides insight into the Court's likely determination.³⁴⁶ This Part will list the various conclusions that can be drawn from Court precedent with regard to statutes currently in force, and how they should be amended based on constitutional principles.

A. *Limited GPS-Tracking of Sex Offenders is Likely Constitutional*

First and foremost, this Comment concludes that GPS-tracking of sex offenders can be brought within the bounds of the Constitution. The recidivism threat that sex offenders pose is real,³⁴⁷ and GPS-tracking statutes are less restrictive than other statutes that have already been upheld. The Supreme Court has already held in *Hendricks* that a state may implement a statute that subjects a post-incarceration sex offender to civil commitment if he is deemed to be a threat to himself due to a mental abnormality.³⁴⁸ Any sex offender who shows a predisposition to committing such crimes would be considered "mentally abnormal" under the Kansas Act and would be eligible for civil commitment.³⁴⁹ Taking away a person's freedom is the most invasive infringement of constitutional rights that a government can impose on an individual, but such actions have already been held

³⁴⁵ See discussion *supra* Part III.A.

³⁴⁶ See discussion *supra* Parts III–IV.

³⁴⁷ See discussion *supra* Part IV.A.

³⁴⁸ See discussion *supra* Part IV.B.

³⁴⁹ See *supra* text accompanying note 328.

constitutional when a person is a “danger to society.”³⁵⁰ GPS-tracking statutes undeniably infringe on offender’s rights, but these infringements are still less severe than civil commitment, which has already been held constitutional.³⁵¹ Thus, the limited GPS-tracking of sex offenders can also be constitutional with a showing that these individuals have a predisposition for committing such crimes. Furthermore, the Court in *Hendricks* held that safeguards, such as the ones in the Kansas civil-commitment statute, and determination based on narrow individual circumstances were within the Court’s “understanding of ordered liberty.”³⁵² Therefore, if GPS-tracking statutes are written and applied in way that would fit within the Court’s “understanding of ordered liberty,” such government action would likely be held constitutional. As the statutes stand right now, some changes are necessary to reach that point.

B. Retroactive Application Violates the Ex Post Facto Clause

In order for sex-offender GPS tracking statutes to be held constitutional, they should not be applied to crimes that were committed before the statutes’ effective dates.³⁵³ In *Smith*, the Supreme Court held that registration requirements, and the dissemination of sex-offender information to the public, constituted a civil regulatory scheme and were not punitive in nature, which would have made the Ex Post Facto Clause applicable.³⁵⁴ With GPS-tracking of sex offenders, however, the states are imposing requirements on sex offenders that go far beyond the mere dissemination of information to the community.³⁵⁵ Although registration may make offenders’ lives more difficult, GPS-tracking is a constant infringement on the offenders’ freedom of movement,³⁵⁶ bodily integrity from unreasonable govern-

³⁵⁰ See discussion *supra* Part IV.B.

³⁵¹ See discussion *supra* Part IV.B.

³⁵² *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997). The Court reached this conclusion, in part, because Kansas’s civil-commitment statute was based on three different individualized risk assessments conducted prior to commitment, which also had three different avenues for review: (1) an annual review of the detention by the court, (2) ability by the Secretary of Social and Rehabilitation Services to end the commitment at any time if the offender’s dangerousness has changed, and (3) the availability of a release petition, which the committed offender could file at any time. *Id.* at 353.

³⁵³ See discussion *supra* Part III.A.

³⁵⁴ *Smith v. Doe*, 538 U.S. 84, 105–06 (2003).

³⁵⁵ See *Commonwealth v. Cory*, 911 N.E.2d 187, 196–97 (Mass. 2009) (explaining that a lifetime GPS-tracking requirement is “dramatically more intrusive and burdensome” than registration only).

³⁵⁶ See discussion *supra* Part III.B.

ment intrusion,³⁵⁷ and freedom from unreasonable searches.³⁵⁸ The Supreme Court has repeatedly used the *Mendoza-Martinez* factors to decide whether a statute is punitive, in which case the Ex Post Facto Clause would forbid retroactive application, or a civil-regulatory scheme, in which case retroactive application is allowed.³⁵⁹ When reviewing the effect of GPS-tracking statutes under the *Mendoza-Martinez* test, the GPS-tracking statutes fall much more on the punitive side of the equation than registration laws do.³⁶⁰ Therefore, this Comment finds that any retroactive application of sex-offender GPS-tracking laws is unconstitutional.

C. Technology Utilized Should Be as Minimally Invasive as Possible

Any technology that the states use to track the location and movement of sex offenders should infringe as little as possible on the individual's bodily integrity.³⁶¹ When reviewing limitations on a person's bodily integrity, the Court has already stated that it will take into account whether the limitations are justified in the circumstances or whether they are made in an improper manner.³⁶² Even though the Supreme Court may find that the limited GPS-tracking of sex offenders is justified after balancing the offender's individual rights against the government's interest in protecting society against sex-offender recidivism,³⁶³ there still need to be safeguards in place to ensure that the offender's rights are not infringed more than is absolutely necessary. In order to protect those rights, the states should use the smallest, least visible tracking devices that are practical to obtain necessary information under the statutes.³⁶⁴ Technology is improving, and as the technology becomes more reliable and less noticeable, the state should safeguard an offender's mobility by ensuring that the GPS tracking device will not evolve into a "modern-day scarlet letter," exposing the offender to public ridicule, fear, or hostility any time he leaves his home.

If the technology that a state uses malfunctions frequently, resulting in incessant threats of an arrest to an offender who has done nothing wrong, then the state should consider using more reliable

³⁵⁷ See discussion *supra* Part III.C.

³⁵⁸ See discussion *supra* Part III.D.

³⁵⁹ See *supra* notes 183–87 and accompanying text.

³⁶⁰ See discussion *supra* Part III.A.

³⁶¹ See discussion *supra* Part IV.A.

³⁶² *Schmerber v. California*, 384 U.S. 757, 768 (1966).

³⁶³ See discussion *supra* Part IV.A.1.

³⁶⁴ See discussion *supra* Part III.B.1.

2012]

COMMENT

1221

tracking devices.³⁶⁵ If, as public awareness of such tracking statutes increases, the state determines that the utilized device is too visible and instantly exposes the wearer to public condemnation, then the state should examine whether or not a smaller device, or perhaps one that can be worn underneath clothing and still transmit required location data, should be adopted.³⁶⁶ In addition, if a state requires notification and approval before a sex offender leave the state, the state needs to establish an efficient procedure to ensure that the wait for such approval is not unreasonably long as to make interstate travel that complies within the law impractical.³⁶⁷

Finally, even if technology evolves to the point where implantable sub-dermal devices become viable, states should never use them for the tracking of sex offenders, and state statutes should specifically authorize only the use of external devices.³⁶⁸ Using sub-dermal implants to track sex offenders is much more intrusive and should not be used when less-invasive means are available to achieve the same end.³⁶⁹ Since the ultimate decision on this issue will come down to a balancing the infringement of the individual's rights against the needs of the state to address with sex-offender recidivism, each state should use the least visible and stigmatizing external devices available to reduce public condemnation and limit the intrusiveness of the GPS device as much as possible.³⁷⁰

D. Tracking in Protected Areas Violates the Fourth Amendment

Any evidence obtained from a GPS tracking device while the offender is in a protected area where there is a legitimate expectation of privacy should explicitly be inadmissible against the offender.³⁷¹ The tracking devices that sex offenders continuously wear provide the police with information about their location that can ultimately be used as evidence.³⁷² When a sex offender is in the public view, such location information is not protected by the Fourth Amendment under the Supreme Court's holding in *Katz*.³⁷³ Anyone can see the offender's location when he is at the store, sitting in a baseball stadi-

³⁶⁵ See discussion *supra* Part III.B.1.

³⁶⁶ See discussion *supra* Part III.B.1.

³⁶⁷ See discussion *supra* Part III.B.2.

³⁶⁸ See discussion *supra* Part III.C.2.

³⁶⁹ See discussion *supra* Part III.C.2.

³⁷⁰ See discussion *supra* Part III.C.

³⁷¹ See discussion *supra* Part III.D.

³⁷² See discussion *supra* Part III.D.

³⁷³ See discussion *supra* Part III.D.

um, or driving on a highway, so the offender does not have a reasonable expectation of privacy in these areas.³⁷⁴ Likewise, the Fourth Amendment protections do not apply in areas in which, by court order or statute, the offender has been forbidden to go, such as near the victim's residence or near a grade school.³⁷⁵ When the GPS tracking device is transmitting from areas where even a sex offender has a reasonable expectation of privacy, however, such as his home or another private property, the state should not obtain location-based evidence that it would not otherwise be able to obtain legally.³⁷⁶

In sum, in order to comply with the Supreme Court's holding in *Karo*, statutes should specifically limit the use of evidence from GPS trackers to evidence obtained in public areas or excluded zones where the sex offender does not have a reasonable expectation of privacy.³⁷⁷ Ideally, tracking devices would not provide any location data while the offender is within a protected area, but programming a device to recognize the difference between a public area and a protected area for each individual offender is not an efficient use of state resources. Instead, the recommended option is for the state to explicitly assert in the statute that any location data will not be utilized if the police would not have been constitutionally permitted to obtain such information without the tracker.³⁷⁸ For example, while an active tracking device will continue to transmit the offender's location even when he is home, protected under the Fourth Amendment, the main threat to the individual is that such data will be used against him in a court of law.³⁷⁹ If a state establishes that such evidence from private areas will be excluded per se under the state's tracking statute, the infringement of the individual's Fourth Amendment protections will be reduced.³⁸⁰

E. GPS Tracking Without Individualized Risk Assessment is Unconstitutional

Lastly, and perhaps most importantly, any decision to impose GPS-tracking on a sex offender needs to be based on an individualized risk assessment and not, as most statutes are currently written,

³⁷⁴ See discussion *supra* Part III.D.

³⁷⁵ See discussion *supra* Part III.D.

³⁷⁶ See discussion *supra* Part III.D.

³⁷⁷ See discussion *supra* Part III.D.

³⁷⁸ See discussion *supra* Part III.D.

³⁷⁹ See discussion *supra* Part III.D.

³⁸⁰ See discussion *supra* Part III.D.

2012]

COMMENT

1223

based on the crime committed.³⁸¹ One of the main reasons that the Court upheld Kansas's civil-commitment statute in *Hendricks* was that the statute ensured that every civilly committed individual was actually a danger to society due to a mental abnormality and that this issue could not be resolved otherwise.³⁸² The current majority of statutes, including the Florida, California, and Massachusetts Models, impose GPS-tracking requirements on entire classes of sex offenders based on the crime committed.³⁸³ Without safeguards in place to ensure that a particular individual actually does pose enough of a danger to society to justify tracking his location and movement, a statutory scheme does not fall under the Court's "understanding of ordered liberty" and will not be granted the same constitutional leeway that the Kansas civil-commitment statute received.³⁸⁴

VI. A PROPOSED MODEL STATUTE FOR CONSTITUTIONAL TRACKING OF SEX OFFENDERS

Though the current statutory models for the GPS-tracking of sex offenders do not properly balance the rights of post-incarceration sex offenders with the government's interest in protecting the public from sex-offender recidivism, there are ways to bring the two opposing interests into balance.³⁸⁵ Below, this Comment provides the text of a model statute that illustrates how legislators can draft GPS-tracking legislation to survive constitutional review. This model statute is a combination of provisions of various GPS-tracking statutes that are already in effect. Any state can tailor this Model Statute to address the crimes that the state would like to cover, the expense it wishes to bare in such a tracking program, and the GPS tracking devices it wishes to use.

Model Sex-Offender Tracking Statute *Purpose*

The purpose of this Act is to protect the public generally, and children specifically, from the threat of recidivism that Sexually Violent Predators and Child Sexual Predators can pose when released from incarceration. In addition to registration requirements and other restrictions that are applicable to sex offenders in this jurisdiction, this Act allows for the GPS tracking of those

³⁸¹ See discussion *supra* Part III.C.1.

³⁸² See *Kan. v. Hendricks*, 521 U.S. 346, 352–53 (1997).

³⁸³ See discussion *supra* Parts II.A–C.

³⁸⁴ See discussion *supra* Part IV.B.

³⁸⁵ See discussion *supra* Part V.A–E.

Violent Sex Offenders who pose the highest risk of recidivism and are the greatest dangers to society. The purpose of such tracking is both to serve as a deterrent for future crimes effectively and to ensure that Violent Sex Offenders do not enter prohibited Exclusion Zones, where the risk of re-offense is heightened.

Definitions: As Used in This Act:

1. “Child Sexual Predator” is a person who was previously convicted of a violent sex crime and is predisposed to commit such sex crimes against children in the future because he or she has a mental disorder or abnormality that has been verified by a licensed doctor or psychologist or because he or she has a history of committing crimes that indicate an ongoing lustful predisposition toward children, as determined by a Court upon review of evidence from whatever source is deemed relevant.³⁸⁶

2. “Conviction” means that there was either (a) a judgment or determination of guilt at trial, or (b) a guilty or nolo contendere plea.³⁸⁷

3. “Court” means a judicial district court of this jurisdiction.³⁸⁸

4. “Exclusion Zone” is any zone in which a person wearing a GPS tracking device is prohibited from going, unless the person is merely travelling through the zone in order to reach another location.³⁸⁹

5. “GPS Tracking” means the tracking through the use of any GPS Tracking Device that identifies a person’s location and actively reports or records such information.³⁹⁰

6. “GPS Tracking Device” is any device that identifies a person’s location and actively reports or records such information. It includes any comparable technology that is worn externally on the offender’s person.³⁹¹

7. “Judicial Determination” is a decision by the Court that a person is or continues to be a Child Sexual Criminal or a Violent Sex Criminal as defined by this Act.³⁹²

8. “Mental Abnormality” is an acquired or congenital condition that affects the volitional or emotional of a person in any way that predisposes the person to the commission of criminal sexual acts in a way that makes the person a danger to the safety or health of other people.³⁹³

³⁸⁶ See LA. REV. STAT. ANN. § 15:560.1(1) (2011).

³⁸⁷ See MISS. CODE ANN. § 45-33-23(a) (West 2011).

³⁸⁸ See LA. REV. STAT. ANN. § 15:560.1(2) (2011).

³⁸⁹ See WIS. STAT. ANN. § 301.48(1)(a) (West 2011).

³⁹⁰ See *id.* § 301.48(1)(b).

³⁹¹ See *id.* § 301.48(1)(b).

³⁹² See LA. REV. STAT. ANN. § 15:560.1(3) (2011).

³⁹³ See *id.* § 15:560.1(4).

2012]

COMMENT

1225

9. “Sexually Violent Criminal” means an offender who has been convicted of a Violent Sex Offense and who has a Mental Abnormality or antisocial personality disorder that makes the offender likely to engage in predatory sexually violent offenses as determined by the Court upon receipt and review of information from whatever source the Court deems relevant.³⁹⁴

10. “Violent Sex Crime” is:

a. A Conviction for any of the following crimes:

(i) Rape;

(ii) Aggravated Rape;

(iii) Sexual battery;

(iv) Battery;

(v) Sexual exploitation of a child;

(vi) Aggravated sexual exploitation of a child;

(vii) Statutory rape;

(ix) Especially aggravated sexual exploitation of a child;

(x) Rape of a child;

(xi) Incest;

(xii) Solicitation of a child;

(xi) Sexual battery by an authority figure.

b. A Conviction for attempt, conspiracy, or solicitation to commit any offense listed in subdivision (a) of this section.

c. A Conviction for being an accessory after the fact, or criminal responsibility for facilitating the commission of any offense listed in subdivision (a) of this section.³⁹⁵

Applicability of the Act.

1. When a Court is initially sentencing a person convicted of any Violent Sex Crime, the Court may impose GPS-tracking as a condition of release following any period of incarceration if there is a Judicial Determination that the person being sentenced is either a Sexually Violent Criminal or a Child Sexual Criminal under this Act, and thus a danger to society. The Court may establish the length of such tracking based on the individual risk assessment of the person, the length of probation, parole, or community supervision as required by law, or, if the law is silent, whatever length of supervision that the Court deems just and proper based on the individual circumstances of the person being sentenced.

2. When a person who has been Convicted of any Violent Sex Crime is to be released back into society on probation, parole, or community supervision,

³⁹⁴ See *id.* § 15:560.1(5).

³⁹⁵ See TENN. CODE ANN. § 40-39-301(2) (West 2011).

the supervising authorities may make a motion to the Court to impose GPS-tracking on that person as a condition of release. The Court may impose such monitoring conditions if it has been shown that the person is either a Sexually Violent Criminal or a Child Sexual Criminal under this Act, and thus a danger to society. The Court may establish the length of such tracking based upon the individual risk assessment of the person, the length of probation, parole, or community supervision as required by law, or, if the law is silent, whatever length of supervision that the Court deems just and proper based upon the individual circumstances of the person being released.

3. When the Court is sentencing a person convicted of any Violent Sex Crime for a violation of his or her probation, parole, or community supervision, the Court may impose GPS-tracking as a condition of release following any period of incarceration if it has been shown that the person sentenced is either a Sexually Violent Criminal or a Child Sexual Criminal under this Act, and thus a danger to society. The Court may establish the length of such tracking based on the individual risk assessment of the person and his or her history of violating previous conditions of release. Such a period of GPS-tracking may be imposed for any period up to, and including, the person's natural life in response to a violation of probation, parole, or conditional release.

Limitations of the Act

1. The location data gathered from a GPS tracking device is only admissible against the offender in a court of law if the data was not taken while the person was in a place or area where he or she has a reasonable expectation of privacy, such as within his or her home or curtilage. Location data is admissible against the offender if the data was taken while the offender was in a public place, Exclusion Zone, or other area where the offender does not have a reasonable expectation of privacy.

2. This Act may only be applied based on an individualized risk assessment, and not solely on the crime committed or any other generalized risk assessment that looks beyond the individual in question.

3. This Act may only be applied on those offenders who have committed their offense or violation of probation, parole, or community supervision on or after the effective date. Any retroactive application is prohibited.

VII. CONCLUSION

Not all sex-offender statutes are unconstitutional, but the majority of statutes currently in force require adjustments. Unlike registration requirements, which merely notify members of the public of a possible threat in their neighborhoods, the primary result of sex-offender tracking statutes is to perpetually gather evidence against a

2012]

COMMENT

1227

sex offender for crimes that *may* happen. The punitive nature of lifetime electronic monitoring, while possibly serving the public interest, is a serious infringement on an individual's freedoms in a variety of ways, and legislators should take measures to better balance an individual offender's rights with the interests of the public. This Comment has offered one possibility for restoring the balance between the rights of the offender and the security interest of society, but this is not the only to reach such a balance. In the end, it is for the Supreme Court to determine the correct balance, but resolving this issue may take years or even decades. In the mean time, states should use the ideas developed this Comment to bring current GPS-tracking statutes more in line with Supreme Court precedent.