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GPS MONITORING MAY CAUSE ORWELL TO TURN IN HIS GRAVE, BUT WILL IT ESCAPE CONSTITUTIONAL CHALLENGES? A LOOK AT GPS MONITORING OF DOMESTIC VIOLENCE OFFENDERS IN ILLINOIS

MARY ANN SCHOLL*

I. INTRODUCTION

On March 7, 2008, Cindy Bischof of Arlington Heights, Illinois was shot dead outside her office by her ex-boyfriend, Michael Giroux, who then fatally shot himself.¹ Cindy, who broke up with Giroux a year before, did everything she could to protect herself after continued threats and harassment by her ex-boyfriend.² The court system gave Cindy the nickname “the girl with the wish list,” her brother said, because she continued to show up to court with a list of ways to ask the system to help her.³ The Illinois legislature has adopted one of Cindy’s suggestions: a Global Positioning Satellite (GPS) device used to track offenders. Tragically, it came too late for Cindy Bischof.⁴ However, this piece

* J.D., *cum laude*, May 2010. The author would like to thank her family for their unconditional support during the creation of this article as well as throughout law school and life.

1. Emma Graves Fitzsimmons & Monique Garcia, *Family Says Split Led to Life of ‘Horror’; Cops Say Ex-boyfriend Killed Woman, Then Self*, CHI. TRIB., Mar. 9, 2008, at C1, available at http://archives.chicagotribune.com/2008/mar/09/news/chi-elmhurst_09mar09.

2. See Megan Twohey & Liam Ford, *The Law Didn’t Save Her*, CHI. TRIB., Mar. 16, 2008, at C1, available at <http://archives.chicagotribune.com/2008/mar/16/local/chi-domestic-violence-080316> (indicating that Giroux violated an order of protection on two occasions, including an attempt to hang himself on her patio, forcing her to press charges landing Giroux in jail for two months followed by home confinement); see also Jamie Sotonoff, *Victim’s Brother Says ‘The System Failed’ to Protect Sister From Ex-Boyfriend*, CHI. DAILY HERALD, Mar. 10, 2008, at 1, available at <http://www.dailyherald.com/story/?id=150569> (indicating that Bischof installed security cameras, changed residences a number of times, and would not shower unless she had her mace spray, cell phone, and keys nearby).

3. Sotonoff, *supra* note 2, at 1.

4. Editorial, *A Good Anti-Stalker Law, if Illinois Gets it Right*, CHI. SUN TIMES, Aug. 13, 2008, at 25, available at http://www.cindysmemorial.org/downloads/SunTimes_130808.pdf; see H.B. 3038 *infra*, note 68 (discussing the

of legislation, which took effect January 1, 2009, will help prevent future “separation assaults” on victims who obtain restraining orders against domestic violence offenders.⁵

This Comment discusses generally the constitutional challenges that may surface when GPS legislation is implemented. Part II of this Comment addresses the tragedy of domestic violence and its prevalence in the United States, as well as the history and background of GPS.

Part III of this Comment discusses the potential constitutional challenges that Illinois might face with the passage of legislation placing GPS monitors on domestic violence offenders. Particularly, the Fourth, Fourteenth, and Eighth Amendments to the Constitution pose potential problems to Illinois GPS legislation.

Part IV and V of the Comment predict that Illinois will evade any major challenges, provided it implements the legislation with the proper programs and funding.

II. BACKGROUND

A. Domestic Violence: History and Current Issues

Domestic violence⁶ has a range of negative effects on women⁷

amendments proposed by H.B. 3038). See also Deborah Horan & Jeremy Gerner, *Charges in Love Triangle Attack*, CHI. TRIBUNE, Sept. 26, 2008, available at <http://www.chicagobreakingnews.com/2008/09/3-seriously-hurt-in-domestic-related-squabble-on-west-side.html> (reporting another tragic story that may have been helped by the passage of Illinois legislation). Sulee Gonzales obtained an order of protection against her former boyfriend—pleading to the judge that the order would prohibit contact of any kind—after he tried to break into her home in August 2008. *Id.* However, the former boyfriend forcibly broke into her house on Sept. 26, 2008, and fatally shot a pregnant Gonzales and her current boyfriend. *Id.*

5. See Governor Blagojevich Signs Legislation to Increase Protections For Domestic Violence Victims; Cindy Bischof Law Allows Courts to Order That Abuser Wear GPS Tracking Device as Condition of Bail in Stalking Situations, STATE NEWS SERVICE, Aug. 4, 2008 (discussing Senate Bill 2719, effective January 1, 2009, that “allows the courts to order an abuser to wear a GPS tracking device as a condition of bail in instances when a restraining order has been violated”). The term “separation assault” is defined as:

[T]he attack on the woman’s body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship. It is an attempt to gain, retain, or regain power in a relationship, or to punish the woman for ending the relationship. It often takes place over time.

Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65-66 (1991).

6. Domestic violence is defined by the Office on Violence Against Women as a “pattern of abusive behavior in any relationship that is used by one

including depression and poor health, and on society by violating our communities' safety.⁸ Around the world, at least one in every three women has been beaten, coerced into sex, or otherwise abused during her lifetime.⁹ Nearly two out of five women in the U.S. report being physically or sexually assaulted or abused by an intimate partner at some point in their lives.¹⁰

Cultural values and social stereotypes involving traditional gender roles help justify domestic violence and silence the abuse.¹¹

partner to gain or maintain power and control over another intimate partner . . . [It] can be physical, sexual, emotional, economic, or psychological actions or threats of action that influence another person." OFFICE OF VIOLENCE AGAINST WOMEN, U.S. DEPT. OF JUSTICE, THE FACTS, <http://www.ovw.usdoj.gov/docs/ovw-focus-areas.pdf>. Stalking by an intimate partner is closely associated with domestic violence, and can often lead to domestic violence. *Id.* Stalking is defined as a pattern of repeated and unwanted attention, harassment, contact, or any other course of conduct directed at a specific person that would cause a reasonable person fear. *Id.*

7. This Comment will refer to the battered as female and the batterer as male because of the statistical data indicating that women in heterosexual relationships are primarily the victims of domestic violence. *See* Callie Marie Rennison, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PUB. NO. NCJ 197838, CRIME DATA BRIEF; INTIMATE PARTNER VIOLENCE 1993-2001 (February 2003) available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf> (indicating that 85% of nonfatal violent victimizations were against women in 2001); *see also* Mahoney, *supra* note 5, at 3 (indicating that "self-defense cases in which women kill their batterers are small in number compared to the overall universe of domestic violence"); *see also* Illinois Coalition Against Domestic Violence, http://www.ilcadv.org/resources/what_is_domestic_violence/myths_facts.html (last visited June 6, 2010) (stating that eighty-five percent of all domestic violence is perpetrated against women, and therefore, referring to the victim as female for purposes of the website).

8. *See* SCOTT COLLINS, ET AL., HEALTH CONCERNS ACROSS A WOMAN'S LIFESPAN: THE COMMONWEALTH FUND 1998 SURVEY OF WOMEN'S HEALTH 7-8 (1999) (finding the lasting negative effects on the women's physical and psychological well-being as indicated by a significantly larger number of women with violence in their background reporting fair or poor health). Additionally, these women were found to be nearly twice as likely to have depressive symptoms or had been diagnosed with depression or anxiety. *Id.* *See also* The Family Violence Project of the National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L. Q. 197, 223 (1995) (commenting that domestic violence is a "pervasive problem that devastates all family members and challenges society at every level . . . while violating the 'communities' safety, health, welfare, and economy by draining billions of dollars annually in social costs such as medical expenses, psychological problems, lost productivity, and intergenerational violence").

9. L. Heise, M. Ellsberg & M. Gottmoeller, *Ending Violence Against Women*, POPULATION REPORTS, Series L, No. 11, December 1999, at 1, available at <http://www.inforhealth.org/pr/111/violence.pdf>.

10. COLLINS, *supra* note 8, at 7.

11. *See generally* ROGER J.R. LEVESQUE, CULTURE AND FAMILY VIOLENCE: FOSTERING CHANGE THROUGH HUMAN RIGHTS LAW 43-52 (Bruce D. Sales, ed.) (American Psychological Association 2001) (discussing how cultures create climates conducive to violence and how they affect intervention efforts).

The common misconception that a woman has the ability to pick-up and leave her aggressor at will does not take into consideration one important factor: the woman might stay with an aggressor who is the father of her children simply because she does not want to break-up the home.¹² Further, the woman can develop a learned helplessness to the violence that causes her to not only blame herself but to feel as though she has lost control over the situation.¹³

The notion of learned helplessness has become a fixture in the domestic violence field.¹⁴ The community's lack of response and frequent accusations that the woman was the cause of the abuse only contribute to the helplessness.¹⁵ Studies suggest that this response may be rooted in violence during childhood or what appears to be "brainwashing" by the batterer in the abusive relationship.¹⁶ Another possible explanation is the theory of "traumatic bonding," which essentially suggests that the woman is left so emotionally drained and vulnerable by the abuser that she may sympathize and over identify with her batterer.¹⁷ This helplessness, coupled with other cultural influences, often prevent the women from seeking help.¹⁸

It wasn't until the late 1960s that women's shelters appeared across the U.S.¹⁹ However, advocates soon learned that shelters were not enough to solve the domestic violence issue²⁰ and pleaded

12. "[T]he question 'why did she stay?' commonly finds answers that attempt to explain difference: 'because she had children' or 'because she was frightened' or 'because she became pathologically helpless.'" Mahoney, *supra* note 5, at 16; *see also id.* 19-20 (suggesting that the connectedness and commitment mothers have to their children leaves them vulnerable to violence and oppression).

13. CLARE DALTON & ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND THE LAW 108 (Robert C. Clark et. al, eds. Foundation Press 2001).

[T]here is a tendency to become submissive in the face of intermittent punishments or abuse . . . [T]he battered woman is immobilized amidst the uncertainty of when abuse will occur. She begins to feel that she has no control over her experience . . . In the process, the victim begins to self blame herself for the abuse.

Id.

14. *Id.* at 109.

15. *Id.*

16. *Id.* The batterer's manipulation has been compared to tactics used by brainwashers in prisoner-of-war camps. *Id.*

17. *Id.*

18. *See* LEVESQUE, *supra* note 11, at 51-52 (noting that the most remarkable aspect of violence that occurs within intimate relationships is the pervasive failure to seek assistance even with systems in place, and how this might be a result of the extent to which the victim blames herself and the effects of cultural forces on victims' responses).

19. Barbara Hart, *Why Protective Orders? State Codes on Domestic Violence: Analysis, Commentary and Recommendations*, in DALTON, *supra* note 13, at 500.

20. *See* Hart, *supra* note 19, at 500 (indicating that legal services attorneys

for a remedy tailored to the unique situation of the family and marriage.²¹ The civil protective order answered these needs.²² Legislators carefully crafted civil protective order statutes with the victim in mind, providing comprehensive relief.²³

The effectiveness of a civil protection order depends both on how specific and comprehensive the orders are and on how the orders are enforced.²⁴ For the majority of victims, civil protection orders are a valuable tool against a violent offender.²⁵

Recently, domestic violence in Illinois increased²⁶ while, at the same time, the number of orders of protection issued decreased.²⁷ In Illinois, a victim may obtain an order by filing a petition or through another civil proceeding.²⁸ Although orders of protection create some help for victims, stronger safeguards must

were discovering that many of the women seeking domestic relations representation were abused by their husbands, and that shelters were inadequate because they provided only a short-term safe haven for the violence committed by husbands to control and coerce both during and after marriage).

21. *See id.* (describing the new remedy as one that would provide the following: enjoining the perpetrator from future abuse; compelling relocation of the abuser; constraining his interference with the life of the children; providing stability and predictability; giving the mother authority as the primary care-taker; limiting the risk of abduction by the father to abuse the woman for revealing the violence or terminating the relationship; affording economic support; limiting sharply the husband's ability to coerce or reconcile; and providing autonomy and independence to the woman).

22. *Id.*

23. *See id.* at 501 (indicating that women's advocates constructed the statutes keeping in mind that domestic violence is intentional, instrumental behavior to control the family and with the understanding that it is not just a single violent outburst, and that this period of elevated danger could last for several years).

24. *See* SUSAN KEILITZ ET AL, NATIONAL INSTITUTE OF JUSTICE, U.S. DEPT. OF JUSTICE, PUB. NO. FS 000191, CIVIL PROTECTION ORDERS: VICTIMS' VIEWS ON EFFECTIVENESS (1998), <http://www.ncjrs.gov/pdffiles/fs000191.pdf> (providing that victims' views of effectiveness are based on the following: how accessible the courts are for victims; how well established the links are between public and private services; and the support resources for victims).

25. *See id.* (indicating that in a majority of cases, victims felt that civil protection orders protected them against repeated incidents of physical and psychological abuse and were valuable in helping them regain a sense of well-being). *But see id.* (noting that protection orders alone, however, were not as likely to be effective against abusers with a history of violence and that women in these cases were more likely to report a greater number of problems with violations of the protective orders).

26. *See* Illinois Violence Prevention Authority, Violence in Illinois: Fact Sheet, http://ivpa.org/uploaded_files/uploads/3/original_IllinoisViolenceFactSheet.pdf?1229633484 (last visited Sept. 29, 2008) (indicating that in 2005 there were 115,282 domestic violence crimes reported in Illinois—a 5.6% increase from 2000).

27. *See id.* (indicating that, in 2005, 64,639 Orders of Protection were issued in Illinois—a 2.5% decrease from 2000).

28. Illinois Domestic Violence Act, 750 ILL. COMP. STAT. 60/201-202 (2000).

be put in place.²⁹

Studies have shown that around a quarter of all orders of protection are violated.³⁰ Many victims do not report the violations, as they assume the police and courts will not help them.³¹ In fact, the orders may actually expose the victim to more harm than help.³²

The flaws apparent in orders of protection and other aspects of the criminal justice system have been in the national spotlight since 1994 with the passage of the Violence Against Women Act (VAWA).³³ Three women are killed each day by an intimate partner, many of whom are known to have had orders of protection.³⁴ Thus, the order is often, in effect, nothing more than a piece of paper. GPS monitoring is a valuable alternative to the shortcomings of the order.

29. See KEILITZ, *supra* note 24 (indicating that violations increase and reported effectiveness decreases as the criminal record of the abuser becomes more serious); see also Diane L. Rosenfield, *GPS Monitoring of Domestic Violence Offenders: Correlative Rights and the Boundaries of Freedom: Protecting the Civil Rights of Endangered Women*, 43 HARV. C.R.-C.L. L. REV. 257, 258 (discussing the “limited and unreliable” protection orders of protection provide, the underreporting if violations of the orders, and the “alarming incidence of so called ‘retribution assault,’ in which the batterer attacks the partner to punish for seeking protection . . .”).

30. KEILITZ, *supra* note 24.

31. See Rosenfield, *supra* note 29, at 258 (providing that many women do not report violations of their orders of protection, “assuming (accurately) that the criminal justice system will not take their complaints seriously”); see also Mahoney, *supra* note 5, at 75-76 (indicating that in some jurisdictions, when a woman seeks an order of protection against a violent man, they automatically grant a reciprocal order against the woman). This has the effect of making the woman look equally dangerous. *Id.* Thereafter, the man may not be held responsible for a violent incident. *Id.* Even in jurisdictions without mutual orders, the man often will make cross-accusations, only creating a confusing situation for judges. *Id.*

32. See Rosenfield, *supra* note 31, at 258, 260 (describing “retribution assault” and the far worse situation women are put in when there is a weak state intervention); see also, Mahoney, *supra* note 5, at 75-79 (discussing the danger women are subject to at separation from the intimate partner).

33. Violence Against Women Act of 1994 was passed as Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act of 1994 HR 335 and signed as Public Law 103-322. See KEILITZ, *supra* note 24 (indicating that after years of considering domestic violence a “family matter,” the criminal justice system and the legal and medical communities are recognizing it as an issue that needs attention and collaboration to help protect women and children from domestic violence offenders).

34. Domestic Violence is a Serious, Widespread Social Problem in America: The Facts, <http://www.endabuse.org/resources/facts/> (last visited June 11, 2010). See generally LINDA LANGFORD ET AL., PEACE AT HOME, HOMICIDES RELATED TO INTIMATE PARTNER VIOLENCE IN MASSACHUSETTS 1991-1995 11 (1999).

B. The History of GPS, How it Works, and Implementing It for Domestic Violence Offender Monitoring

In the mid-1960s, a Harvard psychologist developed the idea of an electronic monitoring device as an alternative to custody.³⁵ It was not until the 1980s that the criminal justice system implemented this type of monitoring.³⁶

GPS has only recently appeared as a type of electronic monitoring for criminals.³⁷ The U.S. Department of Defense originally used the GPS system in the 1950s to provide both the Navy and the Air Force with missile guidance.³⁸ The government introduced a limited version to the public in 1983.³⁹ Eventually, access to a fully capable GPS system containing twenty-four satellites that orbit the Earth was available for military and non-military use.⁴⁰

GPS tracking systems have the ability to track an offender's movement and location in real time by the radio signals the satellites emit.⁴¹ These signals, travelling at the speed of light, are encoded with precise time messages and the satellites' positions in orbit.⁴²

Twenty-four GPS satellites are orbiting the Earth in such a position that at least four are visible from any point on Earth at any given time.⁴³ The GPS satellites "rain" signals down on the Earth, and anyone with a "bucket" (GPS receiver) can "catch" them.⁴⁴ When the GPS receiver locates and "catches" the signals,

35. See I.M. Gomme, *From Big House to Big Brother: Confinement in the Future*, in THE CANADIAN CRIMINAL JUSTICE SYSTEM 489-516 (N. Larsen ed., Canadian Scholars Press 1995) (discussing the first monitoring device developed by Harvard psychologist Robert Schwitzgebel who felt that it could provide a humane and inexpensive alternative to custody).

36. M. Nellis, *The Electronic Monitoring of Offenders in England and Wales*, 31(2) BRIT. J. OF CRIMINOLOGY 165, 165-85 (1991).

37. *Id.*

38. JOHN SPENCER ET AL., GLOBAL POSITIONING SYSTEM: A FIELD GUIDE FOR THE SOCIAL SCIENCES 26 (Blackwell Publishing 2003).

39. See Matthew J. Kucharson, *GPS Monitoring: A Viable Alternative to the Incarceration of Nonviolent Criminals in the State of Ohio*, 54 CLEV. ST. L. REV. 637, 641 (2006) (discussing the intentional introduction of an error in the system by the military, impairing the accuracy of readings as a means of constraining use to the civilian population).

40. *Id.* at 641-42.

41. ANN H. CROWE ET AL., AMERICAN PROB. & PAROLE ASS'N, OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY 65 (2002), <http://www.ncjrs.gov/pdffiles1/nij/grants/197102.pdf>.

42. *Id.*

43. iSECUREtrac Systems and Services, Solutions: GPS, How it Works, <http://www.isecuretrac.com/Services.aspx?p=GPS#howworks> (last visited Aug. 21, 2010); see also CROWE, *supra*, note 41, at 65 (describing current location tracking systems that rely on twenty-four satellites that orbit eleven thousand miles from Earth every twelve hours).

44. iSECUREtrac, *supra* note 43.

the receiver measures how far it is from each of (at minimum) the four satellites.⁴⁵ Over time, the receiver can compute speed and direction of travel by calculating from several locations and the receiver's location can be plotted accurately to within feet.⁴⁶

The Illinois Department of Corrections selected iSECUREtrac Corporation, the industry leader in offender monitoring solutions, for GPS tracking and monitoring.⁴⁷ iSECUREtrac offers one- and two-piece GPS systems for electronic monitoring.⁴⁸

The two-piece system includes a battery transmitter,⁴⁹ which is worn by the offender,⁵⁰ and a portable tracking device,⁵¹ which receives a radio signal two or more times per minute from the transmitter.⁵² If the portable tracking device no longer receives a signal from the transmitter, it sends an alert to a monitoring station.⁵³ The two-part system, therefore, prevents the offender from disposing of the portable tracking device and evading supervision.⁵⁴ The alternative one-piece system integrates the transmitter and portable tracking into one piece, often an ankle bracelet.⁵⁵

GPS systems can be divided into two types: active and passive.⁵⁶ Active GPS "uses a cellular communications network to report locations and violation status."⁵⁷ Active GPS provides

45. *Id.*

46. *Id.*

47. See Press Release, PR Newswire US, iSECUREtrac Awarded GPS Monitoring for Illinois DOC (June 7, 2005) available at <http://www.mywire.com/a/PRNewswire/iSECUREtrac-Awarded-GPS-Monitoring-Illinois/883367?extID=10051> (announcing that iSECUREtrac was awarded a contract by the Illinois Department of Corrections for GPS monitoring of criminal offenders).

48. See iSECUREtrac, GPS, One and Two Piece Systems, <http://www.isecuretrac.com/Services.aspx?p=GPS#onetwopiece> (last visited Aug. 21, 2010) (discussing the one and two piece GPS tracking systems available from iSECUREtrac Corp.).

49. CROWE, *supra* note 41, at 66. The transmitter is approximately the size of a watch or small pager, light-weight, usually worn on the ankle, and includes built in tamper-resistant features. *Id.* Most batteries are rechargeable by plugging the unit into a regular power outlet. Some include adapters for a car battery. *Id.* at 65.

50. *Id.* at 66.

51. *Id.* The portable tracking device contains channels to receive messages from different satellites and contains computer circuitry that detects, decodes, and processes GPS satellite signals. *Id.* at 65.

52. *Id.* at 66. The portable tracking device has a range of 100 to 150 feet, but some models can be programmed anywhere from 35-150 feet. *Id.*

53. *Id.*

54. Kucharson, *supra* note 39, at 643.

55. iSECUREtrac, *supra* note 48.

56. *Id.*

57. *Id.* An advanced form of "active" GPS is also available, Ultra-Active, which has the ability to use both land-line and cellular communication network in communication with a monitoring center.

location information frequently during the day and reports violations as they occur.⁵⁸ Passive GPS operates similarly but on a delayed basis, only downloading information a few times during a twenty-four hour period.⁵⁹

The iSECUREtrac GPS records locations several times per minute, at regular intervals, by both landline and wireless communication networks.⁶⁰ The information is stored on computers, and the “corrections personnel can check the individual’s location and status.”⁶¹ Thus, the GPS system creates virtual boundaries.⁶² With the combination of active and passive GPS, the offender can be warned when he is getting too close to a prohibited zone.⁶³

One case study in Pitt County, North Carolina, studied the effectiveness of the iSECUREtrac system as a tool in reducing domestic violence.⁶⁴ The study found that since the implementation of the iSECUREtrac program, there have been almost no deaths resulting from domestic violence.⁶⁵ Prior to the program, “one in five domestic violence victims died at the hands of abusers who were free on bond.”⁶⁶

C. *The Illinois Legislation Providing for the Implementation of GPS Technology*

It was an important day for Cindy Bischof’s family and friends when Governor Blagojevich signed legislation strengthening protection for domestic violence victims.⁶⁷ The

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* These boundaries create what are often called “exclusion” (areas that are prohibited) and “inclusion” (areas that are allowed) zones. *Id.* Common exclusion for a domestic violence offender would include the spouse’s residence or child’s school, whereas inclusion zones might include the offender’s home or place of employment. *Id.*

63. *Id.*

64. iSECUREtrac.com, <http://www.isecuretrac.com/Library.aspx?id=8> (follow link for Pitt County) (last visited Aug. 21, 2010) The Pitt County Sheriff’s Office had an increase in population and also a rise in the number of calls and cases related to domestic violence. *Id.* They implemented the program with the belief that the GPS technology could benefit the community. *Id.*

65. *Id.* (noting that two deaths occurred from domestic violence in Pitt County since the implementation).

66. *Id.* Based on its initial success, the program was expanded in 2005 “to provide an evidence-based technology for the enforcement of protection orders.” *Id.*

67. “Our family, friends, and foundation thank the General Assembly and Governor for acting quickly and decisively to pass this legislation which will go a long way toward helping victims of domestic violence maintain some semblance of freedom from their offender in stalking situations,” said Michael

legislation amends several codes and acts within Illinois⁶⁸ and provides that the Domestic Violence Act may be referred to as the Cindy Bischof Law.⁶⁹ The amendment provides a court with the ability to order a domestic violence offender to carry a GPS tracking device.⁷⁰ Further, the amendment increases fines for violating the order⁷¹ and defines what constitutes a violation of an order of protection.⁷²

The law also requires domestic violence offenders to complete intervention treatment when necessary.⁷³ The bill establishes that the supervising authority⁷⁴ will use the most modern GPS technology and that the Division of Probation Services must establish all standards and protocols to implement the program.⁷⁵

III. ANALYSIS

GPS Monitoring for domestic violence offenders poses a number of constitutional issues⁷⁶ that may result in challenges to

Bischof, brother of Cindy Bischof.” STATE NEW SERVICE, *supra* note 5.

68. The legislation amends the Department of State Police Law of Civil Administration Code of Illinois, the State Finance Act, the Criminal Code of 1961, the Unified Code of Corrections, the Code of Criminal Procedure of 1963, and the Illinois Domestic Violence Act. See Illinois General Assembly, Bill Status of HB3038, 95th General Assembly, <http://ilga.gov/legislation/billstatus.asp?DocNum=3038&GAID=9&GA=95&DocTypeID=HB&LegID=31919&SessionID=51> (last visited Aug. 21, 2010) (providing in detail the specific deletions and additions made to the previously mentioned statutes referenced).

69. Illinois General Assembly, Bill Status of HB3038, *supra* note 68.

70. *Id.*

71. See *id.* (providing for and “additional fine in an amount not less than \$200”).

72. See *id.* (providing that the offense of violation of an order of protection includes the offender’s failure to attend and complete partner abuse intervention programs); see also House Republicans, *infra* note 73 (describing the types of intervention programs).

73. Illinois General Assembly, Bill Status of HB3038, *supra* note 68; see also House Republicans Introduce Life-Saving Protections for Victims of Domestic Violence, <http://www.repwait.com/2008/04/03/house-republicans-introduce-life-saving-protections-for-victims-of-domestic-violence/> (indicating that intervention treatment may include drug, alcohol, or psychological counseling).

74. Supervising authority can include the Illinois Department of Corrections, the Patrol Review Board, or the court. House Republicans, *supra* note 73; see also STATE NEWS SERVICE, *supra* note 5 (identifying the law enforcement agencies included in the bill).

75. See House Republicans, *supra* note 73 (providing that the Department of State Police will develop a protocol to coordinate the action of courts and law enforcement agencies to implement the surveillance program created by the Act).

76. See CROWE, *supra* note 41, at 22 (indicating that there are a number of potential constitutional challenges for electronic supervision and although few cases have won upon these challenges, programs implementing the technology should be aware of constitutional amendments that might be challenged,

the Illinois legislation, which became effective in January 2009.⁷⁷ This portion of the Comment analyzes the Fourth, Fourteenth, and Eighth Amendments to the U.S. Constitution and considers potential controversies that might arise upon implementation of the Illinois statute.

A. *Search and Seizure: Fourth Amendment Challenges to GPS Monitoring*

The Fourth Amendment protects the right of people to be secure against unreasonable search and seizure without probable cause.⁷⁸ In *Katz v. United States*, the Supreme Court established that an individual has a right against unreasonable search and seizure in areas where he has a reasonable expectation of privacy.⁷⁹

Consequently, one constitutional concern is whether electronic monitoring invades the privacy rights of offenders because one can reasonably expect to have privacy in one's own movements and whereabouts.⁸⁰ Some fear that widespread use of the technology will eventually lead to an Orwellian⁸¹ like society described in George Orwell's⁸² book, *1984*, where communications and movements are strictly monitored by the government.⁸³

particularly the Fourth, Fifth, Eighth, and Fourteenth Amendments).

77. See Liam Ford, *Stalker Crackdown Off to a Slow Start; Most Jurisdictions Lack Tracking Gear*, CHI. TRIB., Jan. 1, 2009, at 19 (providing that as of January 1, 2009, Illinois judges can require satellite tracking devices of repeated offenders who violate orders of protection; however, budget constraints and questions about the best technology to use have delayed actual implementation in most Illinois counties).

78. 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

79. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (holding that an individual has a right against unreasonable search and seizure in areas where he has "exhibited an actual (subjective) expectation of privacy," and that expectation is "one that society is prepared to recognize as 'reasonable'").

80. See JOHN HOWARD SOC'Y OF ALTA., *ELECTRONIC MONITORING 8* (2000), www.johnhoward.ab.ca/pub/pdf/A3.pdf (describing the concerns about the implications of electronic monitoring on the privacy rights of offenders and their families).

81. "Of, relating to, or evocative of the works of George Orwell, especially the satirical novel *1984*, which depicts a futuristic totalitarian state." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1279 (3d ed. 1992).

82. Pen name of Eric Arthur Blair. 1903-1950. British writer whose imaginative fiction attacks totalitarianism and reflects his concern with social justice. *Id.*

83. George Orwell's famous novel provides a vision into a society with

However, these Fourth Amendment concerns are countered by the fact that the offender is, in a sense, consenting to the monitoring because the offender can alternatively choose incarceration.⁸⁴ Violation of a protective order could result in the offender being imprisoned. Thus, in choosing the less obtrusive alternative the offender is impliedly consenting to the monitoring system and its level of intrusiveness.⁸⁵

Even if the Fourth Amendment concerns do not dissolve based on the idea that the offender is essentially consenting to the intrusion,⁸⁶ the Supreme Court has held that probationers have a lower level of liberty under the Fourth Amendment's protections against unreasonable search and seizure.⁸⁷ In *Griffin v. Wisconsin*, the Supreme Court held that a probation officer's entry and search of a probationer's home, while accompanied by police officers, was reasonable.⁸⁸ The Court held that, although a probationer's home, like anyone else's, is protected by the Fourth Amendment's requirement that searches be "reasonable," the "special needs" of the probation system of a state justified searching without a warrant.⁸⁹ Thus, the same logic could be applied to GPS monitoring: the special needs of a GPS monitoring program can justify tracking the offender's movements, making the "search" a "reasonable" one. Further, the GPS device, which continually monitors the probationer, should not offend the unreasonable

pervasive and constant surveillance. It is significant because of its impact on the public's perception of surveillance, inspiring such terms as "Big Brother" and "Orwellian". See generally GEORGE ORWELL, NINETEEN EIGHTY-FOUR: A NOVEL (Signet Classic 1961) (1949).

84. See JOHN HOWARD SC'Y OF ALTA., *supra* note 80, at 9 (providing that consent plays a major role in determining whether electronic monitoring is legally acceptable).

85. See *id.* at 8-9 (indicating that a prison cell is far more intrusive than any electronic monitoring, therefore reducing privacy concerns under the Constitution).

86. *Id.* The offender is only placed on GPS monitoring with his full consent. *Id.* Therefore, although it is potentially tracking every step twenty-four hours a day, there is no expectation of privacy if the offender has consented to GPS as an alternative to incarceration.

87. See *United States v. Knights*, 534 U.S. 112, 199 (2001) (providing that depriving an offender of some freedoms that are enjoyed by law-abiding citizens is not necessarily unreasonable and likely does not offend the Constitution). See generally *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (explaining that the special need of supervising probationers permits a certain degree of infringement upon privacy rights that would not be constitutional if applied to the public at large).

88. See generally *Griffin*, 483 U.S. 868 (holding that the special needs of operating a state system justifies a search on less than probable cause without warrant and that the probationer has conditional liberty on observance of the restrictions placed on him by his own actions; finding search of a probationer's home is "reasonable" within the meaning of the Fourth Amendment).

89. *Griffin*, 438 U.S. at 868.

search clause of the Fourth Amendment because this technology is merely enhancing the ability of the justice system to achieve objectives they are authorized to do in an ordinary visual surveillance, such as the one that took place in *Griffin*.⁹⁰ In sum, if the Fourth Amendment is not violated with an unannounced entry to an offender's home, it should generally not be violated when information about an offender is gathered through electronic monitoring.⁹¹

Furthermore, GPS tracking programs that only transmit and record data when the offender enters a "forbidden zone" will avoid Fourth Amendment challenges based on subjective or "actual" expectation of privacy.⁹² Similar to the traditional paper order of protection, the offender may be prohibited from entering within a certain distance of the victim's home or office.⁹³ The offender, therefore, cannot argue he had an expectation of privacy in areas legally excluded by the protective order.⁹⁴

On the other hand, constant monitoring may be unnecessarily invasive on the individual under the protective order. A GPS system that transmits data from any location, tracking the offender's proximity to the victim, is likely more effective in protecting the victim than a GPS that limits the monitoring to specific zones. In this respect, GPS monitoring may pose a constitutional issue.

Certain monitoring systems are better suited for domestic violence monitoring than others because they avoid being overly invasive by focusing on victim safety.⁹⁵ At least one company, Secure Alert, conducts its own monitoring with a trained staff that operates from a script to avoid personal bonding with the

90. See CROWE, *supra* note 41, at 22 (commenting that Fourth Amendment challenges are not expected to be successful because of the holding in *Griffin v. Wisconsin* and the unobtrusive electronic monitoring device as minor compared to the invasion of privacy in *Griffin*).

91. *Id.*

92. See Zoila Hinson, *GPS Monitoring of Domestic Violence Offenders: GPS Monitoring and Constitutional Rights*, 43 HARV. C.R.-C.L. REV. 285, 287 (suggesting that Fourth Amendment rights against unreasonable search and seizure will not be implicated in the Massachusetts statute imposing GPS tracking on domestic violence offenders because the "abuser cannot possibly have an expectation of privacy in areas for which he is legally excluded by a restraining order").

93. See Rosenfield, *supra* note 29 (describing the Massachusetts legislation that provides judges with an option of ordering offenders who have violated an order of protection to wear a GPS monitoring device and to establish, as a condition of their probation, geographic exclusion zones which can include "the victim's residence, place of work, her children's schools, or other places that she frequents").

94. Hinson, *supra* note 92, at 287.

95. Rosenfield, *supra* note 29, at 261.

offender.⁹⁶ One commentator described the staff as “personal assistants” to the probation officers.⁹⁷ Secure Alert makes attempts to control the behavior of the offender, but if they fail, they will immediately notify the law enforcement agency and the victim.⁹⁸ Secure Alert does not give law enforcement agencies all of the data on the whereabouts of offenders, but rather, only reports violations.⁹⁹ Retaining this information, except when necessary to prove violations, is crucial to protecting against invasive surveillance.¹⁰⁰

iSECUREtrac,¹⁰¹ the other leader in GPS monitoring, has a system which notifies both agencies and victims in real-time if the offender has entered a forbidden zone.¹⁰² However, the monitoring is done on computers by probation or other law enforcement officials.¹⁰³ Ultimately, this raises concerns about whether it is acceptable for the law enforcement agency to deal directly with the offender’s information in contrast to a neutral third-party system such as Secure Alert.

B. Equal Protection and Due Process Concerns for GPS Monitoring: The Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.¹⁰⁴ The United States Supreme Court has interpreted this clause to mean that a “State can no more discriminate on account of poverty than on account of religion, race, or color.”¹⁰⁵

Many electronic monitoring programs require the offenders to

96. *Id.*; see also Secure Alert, <http://www.securealert.com/Home/index.php> (last visited Aug. 21, 2010) (providing a demonstration of the monitoring system and its features).

97. Rosenfield, *supra* note 29, at 261-62.

98. *Id.*

99. *Id.*

100. See *id.* at 261 n.20 (providing that care must be given to avoid any monitoring of the victim’s movements, as this may give rise to unintended infringements of personal liberty).

101. iSECUREtrac, <http://www.isecuretrac.com> (last visited Aug. 21, 2010).

102. Rosenfield *supra*, note 29, at 262.

103. *Id.*

104. U.S. CONST. amend XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

105. Griffin v. Illinois, 351 U.S. 12, 18 (1956).

pay all or part of the cost of supervision.¹⁰⁶ GPS monitoring therefore runs into an equal protection issue when an offender who is otherwise eligible for the GPS alternative cannot participate in the program because he is indigent.¹⁰⁷

One mechanism used to avoid this challenge is a sliding scale¹⁰⁸ fee which would vary the cost of GPS monitoring based on the offender's ability to pay.¹⁰⁹ The sliding scale nevertheless has the effect of eliminating low-income participation because indigents are often put on a waiting list that has a limited number of openings.¹¹⁰ Thus, without careful planning, the GPS legislation could offend the Equal Protection Clause because it favors those with the resources to afford the program.¹¹¹

In general, a GPS tracking program should not disqualify offenders from programs solely based on their inability to pay the fees.¹¹² Therefore, the selection process should be based initially on other eligibility criteria before financial resources are investigated.¹¹³ If the offender is indigent, instead of turning him down from the program, it may be acceptable to require that community service be performed in lieu of program fees.¹¹⁴ A clearly articulated monitoring program based on non-financial criteria providing alternative options for indigent offenders will likely not be found discriminatory.¹¹⁵

The Illinois GPS statute imposes a fine of not less than \$200 on the offender of the order of protection.¹¹⁶ The money is then deposited into the Domestic Violence Surveillance Fund and is used to offset the costs of the program.¹¹⁷ This supplemental offender fee could help offset the costs to offenders who are unable

106. See CROWE, *supra* note 41, at 23 (indicating that the fee usually covers equipment costs and also may include costs associated with the monitoring and staff time).

107. *Id.*

108. A sliding scale is defined as "a scale in which indicated prices, taxes, or wages, vary in accordance with another factor . . ." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1696 (3d. ed. 1992).

109. CROWE, *supra* note 41, at 23.

110. *Id.*

111. See *generally Griffin*, 351 U.S. at 12 (finding a violation of equal protection under the Fourteenth Amendment where convicted robbers were denied an appeal because they were unable to pay for a certified copy of the record, and additionally, that providing equal justice for the poor and rich, weak and powerful alike is difficult).

112. See CROWE, *supra* note 41, at 47 (discussing that while it is acceptable to charge offenders a fee for the use of electronic supervisions technologies, the programs should not disqualify offenders based on their inability to pay the fee).

113. *Id.*

114. *Id.*

115. *Id.*

116. 730 ILL. COMP. STAT. 5/5-9-1.16(a) (2007).

117. *Id.*

to pay for services.¹¹⁸ How Illinois chooses to use the funds will determine whether the program is discriminatory.

Another issue that may arise under the Fourteenth Amendment is a procedural due process challenge.¹¹⁹ Certain procedures must be followed before a person can be deprived of their freedom.¹²⁰ Therefore, the Illinois courts should consider various factors before placing a domestic violence offender on GPS.¹²¹

The Illinois statute gives discretion to the courts regarding whether to place the offender on GPS or not. The program may be subject to due process challenges if it is found that it is placing offenders on GPS without consideration of the risks the offenders pose to the community.

This particular Fourteenth Amendment problem is exemplified when considering due process challenges that have battled sex offender statutes implementing GPS.¹²² The concern for sex offender statutes is that they constitute class-based tracking.¹²³ Essentially, a statute of this type subjects sex offenders as a class to lifetime electronic monitoring.¹²⁴ This type of statute is unconstitutional because it lacks an individualized assessment of dangerousness, thus raising concerns of fundamental fairness and the opportunity to affect judgment or result in a proceeding.¹²⁵

GPS monitoring in the area of domestic violence differs from that of sex offenders.¹²⁶ Domestic violence statutes often include a

118. CROWE, *supra* note 41, at 22.

119. *Id.* at 23.

120. U.S. CONST. amend. XIV, § 1. No state shall deprive any person of life, liberty, or property without due process of law. *Id.*

121. *See* CROWE, *supra* note 41, at 22 (providing that, in general, due process is not violated when a court uses factors—including the dangerousness of an offender to the community—in making a determination as to whether this particular individual should be placed on electronic monitoring).

122. *See* Hinson, *supra* note 92, at 285 (suggesting that “statutes imposing GPS tracking on all sex offenders residing in a given state will likely face due process challenges based on the absence of individualized assessments, similar to challenges faced by other statutes imposing various requirements or restrictions on sex offenders”); *see also* Doe v. Miller, 405 F.3d 700, 704-05 (8th Cir. 2005) (involving a challenge of a restriction preventing anyone convicted of a sexual offense against a minor from living within 2000 feet of a school or childcare center; it was challenged on grounds that the statute lacked individualized assessments and therefore constituted *ex post facto* punishments).

123. Hinson, *supra* note 92, at 285.

124. *Id.*

125. *Id.*

126. *See generally* Hinson, *supra* note 92 (analyzing the differences between Florida’s Jessica’s Act which empowers the state to put certain sexual offenders on GPS monitoring and the Massachusetts Senate Bill No. 1351 which imposes GPS tracking on domestic abusers who have violated

protocol that assesses the dangerousness of the offender, unlike sex offender statutes that are class-based without consideration of an offender's current dangerousness.¹²⁷ For this reason, GPS monitoring programs that consider individualized assessments when deciding whether to place the device on the offender are less likely to face a due process challenge.

C. Cruel and Unusual Punishment: Eighth Amendment Challenges

The Eighth Amendment protects individuals from cruel and unusual punishments imposed by the government.¹²⁸ In the context of GPS devices, this constitutional requirement provides an obstacle to GPS tracking if the device is characterized as excessively harsh or if it is unlikely the offender is able to comply with the GPS monitoring program.¹²⁹

The Supreme Court set forth a number of principles in *Furman v. Georgia* for determining whether a particular punishment is "cruel and unusual."¹³⁰ The primary principle requires that the punishment is not so severe that it degrades human dignity.¹³¹ Another factor to be considered is whether the punishment is inflicted in a "wholly arbitrary fashion."¹³² Finally, society cannot clearly and totally reject the punishment nor can the punishment be "patently unnecessary."¹³³ The test is cumulative and each principal interrelated; therefore, it is unlikely that a punishment is fatally offensive under any one principal.¹³⁴

restraining orders and have been identified as dangerous).

127. *Id.* at 285.

128. "Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

129. See CROWE, *supra* note 41, at 23 (indicating that "[e]lectronic technologies might be challenged on the basis of the constitutional protection against cruel and unusual punishment if release conditions are excessively harsh or an offender is unlikely to have the ability to comply with them").

130. See *Furman v. Georgia*, 408 U.S. 238, 281-82 (1972) (articulating the principles by which to determine whether a particular punishment is "cruel and unusual").

131. *Id.* The paradigm violation of this principle would be the "infliction of a torturous punishment of type that the [Eighth Amendment] has always prohibited," however, a punishment of this type has never been before the Supreme Court. *Id.* at 281.

132. *Id.*

133. See *id.* (providing that it is unlikely that the Court would ever have to review a severe punishment that is clearly and totally rejected throughout society because no legislature would authorize the infliction of such punishment).

134. See *id.* at 282 (describing the test as cumulative). The Court stated the following:

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal

One of the major Eighth Amendment concerns related to GPS tracking is whether it is oppressive or humiliating to require an offender to wear a GPS monitoring device in public.¹³⁵ Regardless of the social stigma and embarrassment an ankle device might cause the offender, it appears entirely more humane than incarceration.¹³⁶

The Supreme Court's case law does not provide a coherent definition of what "cruel and unusual" actually means.¹³⁷ Thus, the outcome of an Eighth Amendment challenge to GPS monitoring of

purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the [Eighth Amendment] that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Id. The convergence of the interrelated principles will likely be the justification or a conclusion that a punishment constitutes cruel and unusual.

Id.

135. CROWE, *supra* note 41, at 23.

136. *Id.*; see also JOHN HOWARD SC'Y OF ALTA., *supra* note 80, at 10 (finding that the effects of an ankle device are not viewed as oppressive and it does not subject the user to humiliation or degradation because compared to incarceration, it is seen as less restrictive and more humane).

137. See generally Benjamin Wittes, *What is "Cruel and Unusual"?*, POLICY REVIEW, HOOVER INSTITUTION, No.134, Dec. 2005 & Jan. 2006, available at <http://www.hoover.org/publications/policyreview/2920126.html> (commenting that the Eighth Amendment is a "jurisprudential train wreck" because case law has left it without meaning and justices no longer even pretend to examine whether the punishment offends the amendment's textual prohibition). The Supreme Court has recognized a limited number of punishments that would constitute cruel and unusual punishment under any circumstance or crime. See *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878) (commenting that drawing and quartering, public dissecting, burning alive, or disemboweling would constitute cruel and unusual punishment regardless of the crime). See also *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (holding that executing individuals under the age of eighteen constitutes cruel and unusual punishment regardless of the crime); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (declaring that execution of the mentally handicapped is a violation of the Eighth Amendment regardless of the crime).

The Supreme Court has also held particular punishments forbidden for certain crimes. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (holding that punishing a natural-born citizen for a crime by taking away his citizenship is unconstitutional because it is "more primitive than torture" and involves the "total destruction of an individual's status in organized society").

The standard used by the Court today in analyzing the "cruel and unusual" question is the "evolving standards" test, first articulated in *Trop*, where the Court stated, "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. This standard has been criticized for defining "cruel" and "unusual" in terms of sociological and political development of the country, rather than on any durable or fixed definition. Wittes, *supra* note 137. Some commentators suggest analyzing the "cruel and unusual" question by providing a clear articulation of what is meant by "cruel" and what is meant by "unusual" and only barring a punishment if it meets the words' legal definitions rather than the evolving standards of decency. *Id.*

domestic violence offenders could turn on the temperaments or politics of nine Justices.

IV. PROPOSAL

Whether GPS monitoring of domestic violence offenders will offend guarantees of the Constitution is unknown. Because GPS monitoring is a fairly recent development enacted in a small number of states¹³⁸ there have been few opportunities for the United States Supreme Court to review such challenges.¹³⁹ However, Illinois, assuming it takes the proper precautions, should not run into any major constitutional challenges upon implementation of GPS technology.

The remainder of this Comment provides predictions and suggestions for the crafting and implementing of GPS monitoring for domestic violence offenders in such a way that the statute can avoid many, if not all, challenges on constitutional grounds.

A. *How Illinois Can Avoid Unreasonable Search and Seizure Challenges upon Implementing GPS Monitoring*

Although originally meant to protect “people, not places,”¹⁴⁰ the Supreme Court tends to define the Fourth Amendment’s “reasonable expectation of privacy” provision¹⁴¹ with reference to the physical world, drawing the line between private and public.¹⁴² Anything that other people can see or hear is not protected.¹⁴³ Thus, the issue of whether GPS monitoring is invasive depends on this characterization. If the offender were to choose the alternative—incarceration—it is obvious that he would be

138. MASS. GEN. LAWS ANN. ch. 209A § 7 (2007); CAL. PENAL CODE §§ 1210.7(a)-(d), 3010(a)-(d)(West 2007); FLA. STAT. ANN. § 947.1405 (West 2007); 42 PA. CONS. STAT. § 9798.3 (2007).

139. See generally, *United States v. Knotts*, 460 U.S. 276 (1983) (holding that the Fourth Amendment was not implicated when electronic tracking devices (GPS) were placed on moving vehicles on a public street). The knowledge that the electronic monitoring device was able to obtain information was nothing more than might have been obtained by an officer following the car. *Id.* at 285. Therefore, as long as it remained in a public space, there was no physical intrusion on a reasonable expectation of privacy. *Id.*

140. *Katz v. United States*, 389 U.S. 347, 351 (1967).

141. See generally *id.* at 351 (providing that an individual has a right against unreasonable search and seizure where he has a subjective and reasonable expectation of that right).

142. See William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1269 (1999) (providing that no infringement of privacy exists when it involves a situation in which any member of the public might also infringe).

143. See *id.* (describing how eavesdropping on a telephone conversation from the home is a “search,” but listening to someone’s conversation on the street is not).

monitored within the confines of the prison and would have no expectation of privacy. Therefore, since the alternative affords the offender much less privacy, he is in no place to argue that the device is overly invasive.¹⁴⁴ Further, depriving the offender of some freedoms enjoyed by law-abiding citizens is not necessarily unreasonable.¹⁴⁵

Domestic violence offenders in Illinois who have violated an order of protection cannot challenge GPS monitoring as an unreasonable seizure because the violation of a protective order itself lowers the offenders expectation of privacy in his movements.¹⁴⁶ Nevertheless, the Illinois court system should always receive the consent of the offender. The offender should be aware of how the GPS works, including when and how he is monitored. This will assure that consent has been obtained and protect against the offender later challenging on grounds that he was not aware, for example, that he was being monitored in a particular zone.¹⁴⁷

Illinois should also be careful with the way the data is transmitted and to whom information is provided.¹⁴⁸ Illinois, working with iSECUREtrac,¹⁴⁹ should consider using a neutral third-party¹⁵⁰ to monitor the offenders. Further, the neutral third-party should only provide law enforcement agencies with information on the offender's whereabouts when the victim is in danger.¹⁵¹ Otherwise, Illinois runs the risk of violating Fourth Amendment concerns and giving the impression that state officials are acting as "Big Brother."¹⁵²

144. See *supra* note 84 and accompanying text (discussing the offender's effective consent to monitoring).

145. *Knights*, 534 U.S. at 119.

146. See *supra* note 85 and accompanying text (noting the choice offenders make between a lack of privacy in a prison cell and the less intrusive method of electronic monitoring).

147. See *supra* note 62 and accompanying text (describing the tracking capabilities of electronic monitoring).

148. See generally *Rosenfield*, *supra* note 29, at 261-62.

149. See *supra* note 47 and accompanying text (indicating that iSECUREtrac was awarded the contract in Illinois for GPS monitoring of criminal offenders in 2005).

150. See *Rosenfield*, *supra* note 29, at 261-62 (describing the relationship as "personal assistants" who avoid personal bonding with the offender in order to protect against excessive surveillance concerns).

151. See *id.* at 262 (providing that the monitoring company should retain information and only report if there is a violation, rather than giving the law enforcement all the information on an offender's whereabouts and, furthermore, only when necessary to prove violations of the order).

152. See *supra* notes 80-82 and accompanying text (discussing the concern that monitoring schemes are what George Orwell identified as "Big Brother" in his Book "1984").

B. Avoiding Equal Protection and Due Process Challenges in Illinois

The second major problem Illinois faces in implementing GPS monitoring for domestic violence offenders is the Fourteenth Amendment. The easiest way for Illinois to avoid an equal protection challenge is to construct a program that takes into consideration the offender's ability to pay.¹⁵³ GPS monitoring in Illinois will mainly be funded by fines (not less than \$200) that are deposited into the Domestic Violence Surveillance Fund.¹⁵⁴ If \$200 covers the costs of the offender paying the fine and there is leftover money that can be kept in the Fund for low-income offenders, then the Illinois program is not discriminating on account of poverty.¹⁵⁵ The Fund is one way to provide a non-discriminatory program, and Illinois has taken the right step in providing for funding within the statute itself.

A second concern Illinois may face is a due process challenge under the Fourteenth Amendment. In order for Illinois to circumvent due process challenges that have plagued other GPS monitoring programs, it must be careful to individualize the assessments of the offenders.¹⁵⁶

The statute provides that the court system shall create and implement certain protocols with regard to the issuance of GPS monitoring on domestic violence offenders.¹⁵⁷ These protocols will serve the purpose of setting guidelines in assessing¹⁵⁸ whether the

153. See CROWE, *supra* note 41, at 47 (providing that offender's inability to pay fees should not disqualify him from an electronic supervision program).

154. See 730 ILL. COMP. STAT. 5/5-9.16(a) (2007) (indicating the additional fines of at least \$200 for violations of orders of protection are to be used to implement the domestic violence surveillance program).

155. See generally *Griffin* 351 U.S. at 12 (interpreting the Equal Protection Clause of the Fourteenth Amendment to prevent any state from discriminating on account of poverty). Alternatively, Illinois could require the offender to pay the fine in addition to the cost of his own surveillance thereby acquiring money that could later be used for offenders unable to pay for services.

156. See *supra* note 122 and accompanying text (explaining that statutes lacking individualized assessments face due process challenges); see also CROWE, *supra* note 41, at 22 (indicating that when making a determination as to whether an individual is placed on electronic monitoring, his level of dangerousness to the community should be assessed in order to avoid due process challenges).

157. See *supra* note 75 and accompanying text (stating that a protocol shall be developed that coordinates the action of the courts and law enforcement agencies).

158. CROWE *supra* note 41, at 38-9. Offenders must be assessed individually for their appropriateness in the program. *Id.* A formal process of assessment and classification is essential for two fundamental reasons: 1) the structure and consistency of the assessments in the decision making process provide an increased degree of validity and 2) it helps to efficiently allocate resources—in a system of limited resources—by targeting only those individuals who are the

court should place the individual on GPS monitoring. The statute does not specifically provide for guidelines.¹⁵⁹ Thus, discretion is left to the judicial system and law enforcement agencies in creating a process that is fundamentally fair to the offender.

The GPS monitoring legislation in Massachusetts¹⁶⁰ should serve as a model to Illinois when developing a protocol the court and law enforcement can cooperatively utilize. Massachusetts implemented a program that increased the level of monitoring based on the level of dangerousness of the offender.¹⁶¹ The success in this program makes it clear that certain offenders should be subject to closer monitoring, even if it means compromising some rights of the offender.¹⁶² If the Illinois court system can effectively evaluate the dangerousness of individuals by the use of lethality factors and place GPS only on violators posing a significant threat, it should sidestep any due process challenges.¹⁶³

most serious, violent, and chronic offenders. *Id.* A limited set of factors should be used and equally administered across the board to all offenders, resulting in classifying the offender in a predetermined criteria. *Id.* Assessment instruments are effective in predicting whether a certain classification group will act in the anticipated way. *Id.* Although they cannot always accurately predict offenders' behavior, they are vital for the success of the program. *Id.*

159. 750 ILL. COMP. STAT. 60/101.

160. "The Massachusetts legislation, ('An Act Relative to Enhanced Protection for Victims of Domestic Violence,') provides judges with the option of ordering offenders who have violated an order of protection to wear a GPS monitoring device." Rosenfield, *supra* note 29, at 261. *See generally* MASS. GEN. LAWS. ANN. ch. 209A, § 7 (2007) (providing a good example of GPS monitoring legislation for Illinois).

161. *See* Laura Crimaldi, Special Report, *Program Offers Hope in Domestic Abuse Cases*, BOSTON HERALD, Sept. 3, 2007, [http://www.jeannegeigercrisiscenter.org/pdfs/press/09_04_07_Program%20Offers%20Hope%20in%20Domestic%20Abuse%20Cases%20\(The%20Boston%20Herald\).pdf](http://www.jeannegeigercrisiscenter.org/pdfs/press/09_04_07_Program%20Offers%20Hope%20in%20Domestic%20Abuse%20Cases%20(The%20Boston%20Herald).pdf) (describing a promising program in Newburyport, Massachusetts, which relied in part on GPS technology by identifying the most dangerous cases of domestic violence and monitoring the offenders more closely). The Jeanne Geiger Crisis Center's Greater Newburyport High Risk Case Response Team was presented with the first-ever Spirit of Advocacy Award for its dedication by the National Network to End Domestic Violence. *Id.*

162. *See* Rosenfield, *supra* note 29, at 264 (describing the success that the Newburyport program has achieved, illustrated by a published two-year report demonstrating the effectiveness of the dangerousness assessments and GPS monitoring). Moreover, in forty-two cases of high risk individuals, only two had re-assaults, neither of which were on GPS monitoring. *Id.*

163. Rosenfield, *supra* note 29, at 263. Diane Rosenfield provides examples of lethality factors in her article on GPS Monitoring for Domestic Violence Offenders:

[W]hether the abuser has threatened to kill the victim; whether the abuser has attempted strangulation; whether the abuser owns a weapon; whether the victim is attempting or has attempted to leave the abuser; whether the abuser has committed violence to children or pets; whether the abuser has previously been violent or threatened to the

C. GPS Monitoring of Domestic Violence Offenders Is Not Likely to Be Considered Cruel and Unusual

It is unlikely that the Illinois statute will come across an Eighth Amendment challenge based on cruel and unusual punishment. The problem, however, is the minimal amount of precedent analyzing what constitutes cruel and unusual punishment. One factor, however vague, is that the punishment cannot be so severe as to be “degrading to human dignity.”¹⁶⁴ Illinois can protect the offender from undue degradation or embarrassment by providing the latest technology.¹⁶⁵ Illinois should be aware of any advancement in GPS technology; if, for example, an even less noticeable model of the device becomes available, Illinois should consider using it.

V. CONCLUSION

Illinois should be able to effectively implement GPS technology for domestic violence offenders in the future with few constitutional obstructions. The concerns raised by the Fourth, Fourteenth, and Eighth Amendments can be successfully bypassed by taking into consideration each constitutional requirement and accommodating accordingly.

Fourth Amendment challenges can be avoided by providing the offender with full disclosure of when and how he will be monitored, only monitoring in zones that are necessary based on the dangerous assessment of the victim, and preferably implementing the program by a neutral third-party. Fourteenth Amendment equal protection challenges are also avoidable provided the Domestic Violence Surveillance Fund affords low-income offenders an equal opportunity to participate in the program. Due process challenges are unlikely to surface if the court system implements a protocol set forth to correctly analyze the dangerousness of the individual before placing him or her on GPS monitoring. Finally, Eighth Amendment concerns are an unlikely obstacle, considering most offenders will not argue that

victim; and (perhaps less obviously) whether the abuser has threatened suicide.

Id. These lethality factors are crucial to risk management protocols that help judges and law enforcement officials in determining whether GPS monitoring on a domestic violence offender is appropriate. *Id.* These tools help courts to identify potential lethality and act accordingly to prevent further victimization. *Id.* They should serve as a model to the Illinois courts and law enforcement when designing a protocol for risk assessments. *Id.* The factors are important not only because they help protect the victim but because they assure fundamental fairness in the offender’s court proceedings, as required by the Due Process Clause of the Fourteenth Amendment. *Id.*

164. *Furman*, 408 U.S. at 281-82.

165. See *supra* note 49 and accompanying text (describing the GPS device as light-weight and usually designed to be worn on the ankle).

an ankle device is oppressive when they are aware of the harsher alternative—incarceration.