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## ARTICLE

### NOTIFICATION AND RISK MANAGEMENT FOR VICTIMS OF DOMESTIC VIOLENCE

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Technological advances have made possible the real-time enforcement of temporary and contested protection orders issued on behalf of victims of domestic abuse, particularly through global positioning satellite (GPS) monitoring of individuals who have been found to have committed domestic violence offenses and against whom “stay-away” orders have been entered. Notwithstanding this capability, however, courts rarely impose GPS monitoring requirements alongside the safety provisions routinely imposed in domestic abuse cases.

This Article examines and critiques this prevailing practice. It argues that the procedural, substantive and logistical objections to GPS monitoring do not sufficiently justify the systemic failure to impose such conditions. This Article further discusses the role of institutional and attitudinal constraints in the continued reluctance of courts to impose GPS monitoring conditions. Finally, in light of these constraints, this Article advances a multifaceted approach by victim advocates designed to recognize more fully the potential of GPS monitoring to reduce domestic violence recidivism.

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## INTRODUCTION

Domestic violence is one of the most costly and chronic epidemics that our country confronts. Intimate partner violence cost this country over 58,139 lives from 1980 to 2008.<sup>1</sup> In 2007 alone, an estimated 2,340 individuals were killed by an intimate partner.<sup>2</sup> Nearly eight million paid work days—the equivalent of 32,114 full-time jobs—are lost to unproductivity each year by women who are abused by intimate partners.<sup>3</sup> Health-related costs for victims abused by intimate partners exceed \$4.1 billion annually.<sup>4</sup> Courts have made

1. See Alexia Cooper & Erica L. Smith, *Homicide Trends in the U.S., 1980-2008*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, fig.24 (Nov. 16, 2011), <http://bjs.gov/index.cfm?ty=pbdetail&iid=2221> (follow "Spreadsheets" hyperlink). The proportion of homicides in which the victim/offender relationships were unknown increased from 36% of all homicides in 1980 to 44% in 2008. *Id.* at 16. Thus, only 63.1% of the data was able to be calculated into the figures above. *Id.* One would assume that this figure therefore underestimates the number of lives lost to intimate partner violence during this period.

2. Shannan Catalano et al., *Selected Findings: Female Victims of Violence*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 2 (Oct. 23, 2009), <http://bjs.gov/content/pub/ascii/fvv.txt>.

3. *Costs of Intimate Partner Violence Against Women in the United States*, DEP'T HEALTH & HUMAN SERVS., 26 tbl.7 (2003), <http://www.cdc.gov/violenceprevention/pdf/IPVBook-a.pdf>; see Marcy L. Karin, *Changing Federal Statutory Proposals to Address Domestic Violence at Work: Creating a Societal Response by Making Businesses a Part of the Solution*, 74 Brook. L. Rev. 377, 382 (2009); see also Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 Fla. St. U. L. Rev. 669 (2008).

4. *Costs of Intimate Partner Violence Against Women in the United States*, *supra* note 3, at 2.

efforts to address and resolve the high incidence of intimate partner violence. The use of many resources and the creation of court units devoted to domestic violence cases highlight these attempts.<sup>5</sup> A 2004 study found that 160 jurisdictions across the country had created specialized domestic violence courts.<sup>6</sup> While progress has been made, the attempts to combat the problem have been largely ineffective.<sup>7</sup> This is in part due to courts' unwillingness to impose GPS monitoring of respondents, despite studies showing that violent offenders placed on GPS monitoring are 91.5 percent less likely to commit a new offense than violent offenders who were not electronically monitored.<sup>8</sup> This Article explores this dynamic.

Part I provides an overview of the evolution of societal and legal responses to domestic violence. Part II addresses the systemic legal challenges in domestic violence cases, and Part III identifies the benefits and need for GPS monitoring due to the systemic legal challenges inherent to domestic violence cases and the predominant practices of courts in these cases. Part IV addresses constitutional and logistical objections to imposition of GPS monitoring. It also discusses courts' reluctance to utilize GPS monitoring and identifies the role that path dependency plays in this reluctance. Part V identifies the normative implications to be drawn from this study: namely, the potential of GPS monitoring to reduce the occurrence of domestic violence and alleviate many of the legal challenges posed by domestic violence. This Article concludes with a call to begin utilizing GPS monitoring.

## I. DOMESTIC VIOLENCE OVERVIEW: PAST AND PRESENT

In 1871, Massachusetts and Alabama became the first states to declare wife-beating illegal.<sup>9</sup> While certainly a victory for human rights, for several

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5. See generally Andrew R. Klein, *Special Report: Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges*, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE (June 2009), <https://www.ncjrs.gov/pdffiles1/nij/225722.pdf>.

6. *Id.* at 61; see also *Specialized Domestic Violence Court Systems*, STOP VIOLENCE AGAINST WOMEN (Feb. 10, 2009), [http://stopvaw.org/specialized\\_domestic\\_violence\\_court\\_systems.html](http://stopvaw.org/specialized_domestic_violence_court_systems.html).

7. See *Domestic Violence Counts 2011: A 24-Hour Census of Domestic Violence Shelters and Services*, Nat'l Network to End Domestic Violence (2011), [http://nnedv.org/docs/Census/DVCounts2011/DVCounts11\\_NatlReport\\_BW.pdf](http://nnedv.org/docs/Census/DVCounts2011/DVCounts11_NatlReport_BW.pdf). In just one day, September 15, 2011, 67,399 victims of domestic violence were served by domestic violence programs across the United States. *Id.* at 2.

8. Kathy G. Padgett et al., *Under Surveillance: An Empirical Test of the Effectiveness and Consequences of Electronic Monitoring*, 5 CRIMINOLOGY PUB. POL'Y 61, 61 (2006) (analyzing data from 75,661 serious offenders in Florida who had been placed on home confinement between 1998-2002). The study found that electronic monitoring, such as GPS, greatly reduced recidivism. *Id.* Violent offenders on GPS monitoring were 90.2 percent less likely to commit a new offense than violent offenders who were not electronically monitored. *Id.* at 79.

9. *Fulgham v. State*, 46 Ala. 143, 147 (1871) (holding a husband has no right to chastise his wife); *Commonwealth v. McAfee*, 108 Mass. 458, 461 (1871) (holding a man has no right to beat his wife, although she is drunken or insolent).

decades these laws and others that followed provided limited legal causes of action for women.<sup>10</sup> This practice was due to the continued desire that domestic violence be dealt with in the home and to preserve the sanctity of marriage.<sup>11</sup> In 1976, Pennsylvania was the first state to pass legislation providing protection orders for battered women, though other states adopted similar legislation in time.<sup>12</sup> Despite these developments, there remained a strong-held belief that domestic abuse should be dealt with privately without public or police involvement.<sup>13</sup> This belief manifested itself in police refusal to intervene in situations of domestic abuse.<sup>14</sup> The widespread refusal of police forces to assist victims of domestic violence or to arrest perpetrators of domestic violence led to mandatory arrest laws and equal protection claims.<sup>15</sup>

In 1994 Congress passed the Violence Against Women Act (VAWA) and renewed it in 2005 and 2013.<sup>16</sup> VAWA provides discretionary grant programs

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10. See generally DEL MARTIN, BATTERED WIVES (1976).

11. *Thompson v. Thompson*, 218 U.S. 611, 617 (1910) (denying wife right to prosecute her husband for assault). See Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 *Yale L. J.* 2117 (1996), for a discussion of the limited remedies available to women.

12. *The History of the Violence Against Women Act*, U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, <http://www.ovw.usdoj.gov/docs/history-vawa.pdf> (last visited on Apr. 1, 2013).

13. See generally MARTIN, *supra* note 10.

14. Daniel G. Saunders & Patricia B. Size, *Attitudes About Women Abuse Among Police Officers, Victims, and Victim Advocates*, 1 *J. Interpersonal Violence* 25, 25-26 (1986).

15. See *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984). In this case, wife and son brought a civil rights action alleging a violation of the 14th Amendment's equal protection clause because police protection was fully provided to persons abused by someone with whom the victim had no domestic relationship, but the police consistently afforded lesser protection when the victim was a woman abused or assaulted by a spouse or boyfriend or when a child was abused by a father or stepfather. *Id.* at 1524, 1527. This is "the first reported case in which a court held the police policy of treating victims of domestic violence differently than victims of non-domestic violence constituted a violation of the right to equal protection." Christopher J. Klein, *Will the § 1983 Equal Protection Claim Solve the Equal Protection Problem Faced by Victims of Domestic Violence?: A Review of Balistreri, Watson, Hynson, and McKee*, 29 *J. FAM. L.* 635, 645 (1991). In response to the case, Connecticut implemented a mandatory arrest law. See Barbara Fedders, *Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics Of the Battered Women's Movement*, 23 *N.Y.U. Rev. L. & Soc. Change* 281, 291 (1997); see also *Estate of Macias v. Ihde*, 219 F.3d 1018, 1018-19 (9th Cir. 2000) ("Estate and family members of wife slain by estranged husband brought a [civil rights] action. . .alleging that the Appellees [county and deputy sheriff] denied [the wife's] right to equal protection by providing her with inferior police protection on account of her status as a woman, a Latina, and a victim of domestic violence.").

16. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. The 2012 VAWA Reauthorization was a rollercoaster due to language that would give homosexual individuals recourse for violence committed by their partner. See Jillian Rayfield, *Senate Has the Votes to Pass Violence Against Women Act*, SALON (Feb. 1, 2013, 8:19 PM), [http://www.salon.com/2013/02/01/senate\\_has\\_the\\_votes\\_to\\_pass\\_violence\\_against\\_women\\_act/](http://www.salon.com/2013/02/01/senate_has_the_votes_to_pass_violence_against_women_act/). Both the Senate and House voted to reauthorize VAWA in February 2013 and on March

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for state, local, and Indian tribal governments to improve enforcement efforts and educational and social programs to prevent crime.<sup>17</sup> The main funded VAWA program is the Services-Training-Officers-Prosecutors (STOP).<sup>18</sup> STOP consists of formula grants that are used to assist state governments, Indian tribal governments, and units of local government in strengthening law enforcement, prosecution, and victims' services in cases involving violent crimes against women.<sup>19</sup>

Current laws recognize that a husband has no right to physically beat his wife — all states provide some sort of recourse for victims of domestic violence.<sup>20</sup> Even with this legal progress, domestic violence is still rampant, the true extent of which is unknown because domestic violence is one of the most underreported crimes in this country.<sup>21</sup> Merely one-quarter of all physical assaults, one-fifth of all rapes, and one-half of all stalkings perpetrated against females by intimate partners are reported to the police.<sup>22</sup> In 2008, nearly 653,000 people were violently victimized by an intimate partner; this averages to 1,789 intimate partner attacks a day.<sup>23</sup> The American Medical Association has estimated that nearly four million women are victims of severe assaults by boyfriends and husbands each year.<sup>24</sup> In 2007, over four individuals a day were killed by their intimate partner in this country.<sup>25</sup>

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7, 2013, President Obama signed into law the reauthorized Violence Against Women Act (VAWA) of 2013. *Violence Against Women Act (VAWA) 2005 and 2013*, NAT'L CTR. ON DOMESTIC AND SEXUAL VIOLENCE [http://www.ncdsv.org/publications\\_vawa.html](http://www.ncdsv.org/publications_vawa.html) (last updated Apr. 08, 2013).

17. Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA), Pub. L. No. 109-162, 119 Stat. 2960 (2006) (codified as amended in scattered sections of 42 U.S.C.).

18. GARRINE P. LANEY, CONG. RESEARCH SERV., RL30871, VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING 1-2 (2010), available at [http://assets.opencrs.com/rpts/RL30871\\_20100226.pdf](http://assets.opencrs.com/rpts/RL30871_20100226.pdf); see also *Recovery Act: STOP Violence Against Women Act Grant*, MO. DEP'T PUB. SAFETY, <http://dps.mo.gov/dir/programs/cvus/rastopvawa.asp> (last visited Mar. 24, 2013).

19. See LANEY, *supra* note 18, at 2.

20. See M. ANN WOLFE, CONG. RESEARCH SERV., RL32579, VICTIMS OF CRIME COMPENSATION AND ASSISTANCE: BACKGROUND AND FUNDING (2004), available at <http://www.policyarchive.org/handle/10207/bitstreams/19535.pdf>.

21. See Cathy Maston & Patsy Klaus, *Criminal Victimization in the United States, 2003 Statistical Tables*, U.S. DEP'T JUSTICE, BUREAU OF JUSTICE STATISTICS, tbl.26 (July 2005), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus0302.pdf>.

22. Patricia Tjaden & Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey*, Nat'l Inst. Just. & Ctrs for Disease Control & Prevention, v (July 2000), <https://www.ncjrs.gov/pdffiles1/nij/181867.pdf>.

23. Catalano, *supra* note 2, at 1.

24. Sarah Glazer, *Violence Against Women: Is the Problem More Serious than Statistics Indicate?*, 3 CONG. Q. RESEARCHER 171, 171 (1993).

25. About 1,600 American women are murdered by husbands or boyfriends each year. See Catalano, *supra* note 2, at 4.

Previously, the predominant way that society had attempted to combat domestic violence was to criminalize it and increase penalties.<sup>26</sup> Despite the increase in punishment, domestic violence remained prevalent due to difficulties in effectuating these policies.<sup>27</sup> Often victims would refuse to cooperate in the criminal prosecution of their abuser who also happened to be a loved one.<sup>28</sup>

Witnesses would not come forward or cooperate for fear of retaliation by the abuser and judgment from the local community because aiding in sending a member of one's own community to jail was often viewed as a betrayal to the community itself.<sup>29</sup> With few victims and witnesses willing to testify, forcing reliance on physical evidence alone, prosecution of these cases became more difficult and infrequent.<sup>30</sup>

As a result, state legislation relating to domestic violence began focusing on providing abused women with civil remedies.<sup>31</sup> The availability of civil remedies to victims of domestic violence is critical, as, given the nature of the relationships involved, the victim may not wish to pursue criminal charges. In light of the multiple barriers to prosecution, the key remedy provided to abused women is the civil protection order. Currently, the predominant way the civil legal system attempts to solve problems of domestic violence is to have the victim, also known as the petitioner, petition the court for a protection order against her abuser.<sup>32</sup>

## II. SYSTEMIC LEGAL CHALLENGES IN DOMESTIC VIOLENCE CASES

New laws protecting victims of domestic violence presented numerous challenges for the legal system, in part due to the high volume of cases. As victims of domestic violence obtained increased ability to seek legal recourse

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26. Eve Clarian Zamora, *Enhanced Penalties for Domestic Violence 2005*, Battered Women's Justice Project (2005), [http://www.bwjp.org/files/bwjp/articles/Enhanced\\_Penalties\\_2005.pdf](http://www.bwjp.org/files/bwjp/articles/Enhanced_Penalties_2005.pdf).

27. Eric Weslander, *Domestic Violence Cases Often a Challenge to Prosecute*, LJWORLD.COM (Sept. 17, 2006), [http://www2.ljworld.com/news/2006/sep/17/domestic\\_violence\\_cases\\_of\\_en\\_challenge\\_prosecute](http://www2.ljworld.com/news/2006/sep/17/domestic_violence_cases_of_en_challenge_prosecute).

28. *Id.*

29. Barbara J. Hart, *Battered Women and the Criminal Justice System*, MINN. CTR AGAINST VIOLENCE & DRUG ABUSE 3, 5 (1992), <http://www.mincava.umn.edu/documents/hart/justice/justice.pdf>.

30. *Id.* at 11.

31. See Widiss, *supra* note 3, at 690. In light of the fact that 85% of domestic violence victims are female, the term "women" is used simply for efficiency and the laws apply equally to all individuals, regardless of sex. *Id.* at 676; Callie Marie Rennison, *Crime Data Brief: Intimate Partner Violence 1993-2001*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Feb. 2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/ipv01.pdf>.

32. See *Civil Remedies on Domestic Violence: Order for Protection Remedies*, STOP VIOLENCE AGAINST WOMEN (May 2010), [http://www.stopvaw.org/civil\\_remedies\\_on\\_domestic\\_violence](http://www.stopvaw.org/civil_remedies_on_domestic_violence).

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against their abusers, courts quickly became overwhelmed.<sup>33</sup> In response, specialized domestic violence courts were formed.<sup>34</sup> Although there are various models for these courts, the unifying trait is that the docket solely consists of cases involving domestic violence.<sup>35</sup> The volume of domestic violence cases threatens to overwhelm even these efforts to adequately address the problem.<sup>36</sup>

In most jurisdictions two types of protection orders are available.<sup>37</sup> The right to these orders is based in statute and varies by state. A temporary or emergency protection order is available on an *ex parte*, or individual, basis when a petitioner establishes the following under oath: jurisdiction, a requisite relationship, and that her immediate safety or welfare is endangered by the respondent.<sup>38</sup> This order contains limited relief and is valid for a short period; for example, in the District of Columbia, this order shall not exceed fourteen days.<sup>39</sup> During that time an evidentiary hearing can be held for a civil protection order, which in contrast, typically lasts up to one year.<sup>40</sup>

In the District of Columbia, the Intrafamily Offenses Act is the statute that victims of domestic violence must work within to secure a civil protection order.<sup>41</sup> After the respondent receives notice and an opportunity to be heard, petitioners must establish three statutory requirements: jurisdiction, a requisite relationship, and that a criminal offense was threatened or committed upon the petitioner by the respondent.<sup>42</sup> If the petitioner meets her burden of proof and establishes these three requirements, a judge may issue a protection order that includes enumerated relief and directs the respondent to perform or refrain from other actions as appropriate to the effective resolution of the matter.<sup>43</sup>

33. Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements On An Effective Innovation*, 68 FORDHAM L. REV. 1285, 1291, 1293-94 (2000).

34. "By the early 2000s domestic violence courts were the fastest growing kind of specialized courts in the United States." *Criminal Courts – Early American Courts, The Constitution And the Courts, Creating a National Court System, Federal Courts – Special state courts*, L. LIBR. - AM. L. & LEGAL INFO., <http://law.jrank.org/pages/12048/Criminal-Courts.html#ixzz16cALA74M> (last visited Aug. 21, 2012).

35. See EMILY SACK, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES 2, 24 (May 2002), available at [http://www.futureswithoutviolence.org/userfiles/file/Judicial/FinalCourt\\_Guidelines.pdf](http://www.futureswithoutviolence.org/userfiles/file/Judicial/FinalCourt_Guidelines.pdf) (detailing the various models of specialized domestic violence courts).

36. Telephone interview with Mariela Olivares, Assistant Professor of Law, Howard University (Aug. 10, 2012) (explaining her experiences of seven to eight hour wait periods for clients seeking emergency orders of protection).

37. *Domestic Violence Civil Protection Orders (CPO's) By State*, A.B.A COMMISSION ON DOMESTIC VIOLENCE (August 2007), [http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/DV\\_CPO\\_Chart\\_8\\_2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/docs/DV_CPO_Chart_8_2007.authcheckdam.pdf).

38. D.C. Code § 16-1004(b)(1) (LexisNexis 2001 & Supp. 2012).

39. *Id.* § 16-1004(b)(2).

40. *Id.* § 16-1004(b)(2), § 16-1005(d).

41. *Id.* § 16-1005.

42. See *id.* § 16-1001, § 16-1005(c), § 16-1006.

43. *Id.* § 16-1005(c)(1-12).

The common protection order contains three safety provisions:<sup>44</sup> 1) a no abuse, threaten, or harass provision, essentially ordering respondents not to engage in behavior that is independently illegal;<sup>45</sup> 2) a no contact provision that prevents the respondent from contacting the petitioner;<sup>46</sup> and 3) a stay away provision that precludes the respondent from coming within a certain distance of the petitioner or specific locations she commonly frequents, such as her home or workplace.<sup>47</sup> In essence, this provision creates “exclusionary zones,” both fixed and moving.<sup>48</sup>

This three-part “safety” package serves an important and valuable function, including protecting the petitioner from additional abuse or harassment before police intervene.<sup>49</sup> For example, if the respondent contacts the petitioner or comes within an exclusionary zone, the police can arrest him for violation of a court order.<sup>50</sup> Without this order, such actions alone would usually be insufficient to trigger police involvement. Ideally, having a protection order in force would result in the respondent being denied the opportunity to harm the petitioner again, but reality is anything but ideal. Many petitioners with protection orders are still subject to an attack by their abuser.<sup>51</sup> A variety of factors may contribute to this including the low number of police officers per capita, the delay in response to 911 calls, the petitioner’s lack of resources—such as telephones—and their lack of awareness that respondent may be lying in wait.

Without GPS monitoring relief, approximately one-half of the orders obtained by women against abusive intimate partners are violated, and more than two-thirds of the restraining orders against intimate partners who raped or stalked the victim are violated.<sup>52</sup> Abusers openly disregard the court’s authority

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44. Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 Hofstra L. Rev. 801, 915-927 (1993).

45. *Id.* at 915-18.

46. *Id.* at 925-27.

47. *Id.* at 918-25.

48. Fixed zones are identified by address, business name or latitude and longitude coordinates. Moving zones are determined by the distance, usually in feet, that the respondent is ordered to stay away from the petitioner, another protected person or a vehicle. *See id.*

49. *Id.* at 915-27.

50. General Order: *Intrafamily Offenses*, METROPOLITAN POLICE, D.C. (Nov. 7, 2003), <https://go.mpdconline.com/GO/3743000.pdf> (“When the preliminary investigation establishes probable cause to believe that an intrafamily offense has been committed or that a suspect has violated a Temporary Protection Order, a Civil Protection Order, or a Foreign Protection Order, members shall arrested the alleged perpetrator of the offense.”).

51. In one study, nearly half of the victims who obtained a protection order were reabused within two years. EVE S. BUZAWA & CARL G. BUZAWA, *DO ARRESTS AND RESTRAINING ORDERS WORK?* 10 (1996).

52. Tjaden & Thoennes, *supra* note 22, at 53.

and violate no-contact and stay-away orders with disturbing frequency.<sup>53</sup> These statistics reveal only known violations, and given that domestic violence is grossly under-reported, these statistics likely underrepresent the number of violations actually occurring.<sup>54</sup>

As more evidence that the safety package does not adequately protect victims from further harm, approximately one-quarter of women murdered by their intimate partners are known to have had orders of protection against their killers.<sup>55</sup> Women are terrified, and understandably so. Even after petitioners obtain a protection order, they often continue to fear that the respondent will harm them in defiance of the order.<sup>56</sup> Statistically, this belief is well founded.<sup>57</sup> By far, the most dangerous time for victims is immediately after leaving the abuser.<sup>58</sup> Survey estimates show that 1,131,999 victims of intimate partner rape, physical assault, and stalking obtain protective or restraining orders against their attackers annually.<sup>59</sup> Approximately 60 percent (646,809) of these orders are violated.<sup>60</sup> In interviews with men who have killed their wives, interviewees indicate that either their partner's threats of separation or actual separation are most often the precipitating events that lead to murder.<sup>61</sup>

Due to the plight of numerous domestic violence victims who have reached out for help from the legal system, our country must endeavor to provide improved protection to these women. Currently victims must grapple with the value and benefits of protection orders and their limitations so as not to be detrimentally deterred from seeking legal redress. They must recognize the

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53. Jennifer Hahn, *Tracking The Abusers – Can GPS Protect Women From Harm?*, Ms., <http://www.msmagazine.com/Summer2008/GPStracking.asp> (last visited Aug. 21, 2012).

54. Most intimate partner victimizations are not reported to the police. See Tjaden & Thoennes, *supra* note 22, at v. Only approximately one-fifth of all rapes, one-quarter of all physical assaults, and one-half of all stalkings perpetrated against female respondents by intimates were reported to the police. *Id.* Even fewer rapes, physical assaults, and stalkings perpetrated against male respondents by intimates were reported. *Id.* The majority of victims did not report their victimization to the police because they thought the police would not or could not do anything on their behalf. *Id.*

55. Diane L. Rosenfeld, *Correlative Rights and the Boundaries of Freedom: Protecting the Civil Rights of Endangered Women*, 43 Harv. C.R.-C.L. L. Rev. 257, 259 (2008).

56. *See id.*

57. *Legal Interventions in Family Violence: Research Findings and Policy Implications*, U.S. Dep't of Justice (1998), <https://www.ncjrs.gov/pdffiles/171666.pdf> (finding that 60 percent of the women with temporary restraining orders reported that the order was violated within the year after issuance).

58. Ronet Bachman & Linda Salzman, *Violence Against Women: Estimates From the Redesigned Survey*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, 1 (Aug. 1995), <http://www.prisonpolicy.org/scans/bks/femvied.pdf>.

59. *Id.* at 54.

60. *Id.*

61. Martin Daly & Margo Wilson, *Evolutionary Social Psychology and Family Homicide*, 242 Sci. 519, 519-24 (1988).

need to develop additional safety plans to work in conjunction with their legal orders and remedies that, as of now, fall short of providing adequate protection.

### III. GPS: THE NEW FRONTIER

The technological advances of GPS monitoring make it possible to bridge the gap between obtaining a civil protection order and achieving safety for victims of domestic violence. This technology holds promise in many contexts by allowing for real-time enforcement of court orders. Use of this technology is necessary to give teeth to court orders and to decrease recidivism by violent criminals. GPS monitoring has the potential to enhance our legal system and the safety of society.

#### A. *The Need for GPS Monitoring*

Even after obtaining a protection order, petitioners face danger.<sup>62</sup> One-quarter of all orders of protection are known to be violated.<sup>63</sup> In one study, sixty percent of petitioners obtaining protection orders reported violations within one year.<sup>64</sup> Fortunately, new and widespread technology provides us with strategies to combat this problem through the ability to track abusers. This can be done using the same GPS technology that a large segment of society has in their cell phone or car navigation systems. It is feasible to make an abuser wear a GPS chip, have that chip monitored, and, if that chip breaches an exclusionary zone, immediately notify the victim, respondent, and the police, if necessary.<sup>65</sup> Upon receiving this alert, the victim can alter her actions in order to protect herself—by relocating, going into hiding, or locking herself in a colleague's office. It would give women a fighting chance until police arrive.

For example, Cindy Bischof was a resident of Illinois and a victim of domestic violence.<sup>66</sup> She was gunned down by her ex-boyfriend in the parking lot of the real estate office where she worked.<sup>67</sup> Cindy had previously sought legal redress and obtained several protection orders against her ex-boyfriend.<sup>68</sup> Before murdering Cindy, he had been arrested and prosecuted twice for

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62. Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 Cornell J.L. & Pub. Pol'y 139, 140 (2010).

63. See Susan L. Keilitz et al., *Civil Protection Orders: Victims' Views on Effectiveness*, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE (Jan. 1998), <http://www.ncjrs.gov/pdffiles/fs000191.pdf>.

64. Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, in *Do Arrests and Restraining Orders Work?* 214, 240 (Eve S. Buzawa & Carl G. Buzawa eds., 1996).

65. See Rosenfeld, *supra* note 55, at 261.

66. Interview by Alex Chadwick with Michael Bischof, Victims Rights Lobbyist, *GPS to Warn Domestic Violence Victims*, NAT'L PUB. RADIO (Aug. 8, 2008), <http://www.npr.org/templates/story/story.php?storyId=93420266>.

67. Jamie Sotonoff, *Court Orders, Cameras Not Enough to Protect Arlington Hts. Murder Victim*, Daily Herald (Mar. 10, 2008, 12:08 AM), <https://prev.dailyherald.com/story/?id=150569>.

68. Interview with Michael Bischof, *supra* note 66.

violating the underlying protection order.<sup>69</sup> Cindy had asked the judge to order that the respondent wear a GPS bracelet, but the judge denied the request, likely out of a mistaken belief that this level of protection was not provided for in the Illinois Domestic Violence Act of 1986.<sup>70</sup> While it is true that GPS tracking was not specifically identified as enumerated relief within the statute, GPS monitoring would have been permissible so long as it was necessary or appropriate to prevent further abuse.<sup>71</sup>

In Cindy's case, GPS tracking as injunctive relief would have been an effective way to enforce the court's stay away order and keep Cindy alive. She would have received an alert as soon as her ex-boyfriend breached the exclusionary zone. She would have been able to hide or lock herself in a colleague's office, or simply not go outside until her ex-boyfriend was apprehended. In September 2011, the Justice Department weighed in, concluding that electronic monitoring reduces recidivism.<sup>72</sup>

### *B. The Promise of GPS Monitoring*

GPS monitoring has been used in a variety of contexts as a way to reduce recidivism and enforce court orders. In fact, twenty-three states currently have some sort of GPS monitoring program for sex offenders.<sup>73</sup> Some states, such as California, Colorado, Florida, and Missouri, have gone so far as to enact legislation that requires lifetime monitoring of sex offenders.<sup>74</sup>

Studies have been conducted to measure the effectiveness of this new tool.<sup>75</sup> A study designed to better gauge the effectiveness of GPS monitoring in reducing recidivism and increasing compliance was recently funded by the U.S.

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69. Press Release, Office of the Governor, Governor Blagojevich Signs Legislation to Increase Protection for Domestic Violence Victims (Aug. 4, 2008), available at <http://www.illinois.gov/pressreleases/ShowPressRelease.cfm?SubjectID=3&RecNum=7039>.

70. Interview with Michael Bischof, *supra* note 66; see 750 ILL. COMP. STAT. ANN. 60 (West 2012).

71. 60/214(b)(17) ("Order for injunctive relief. Enter injunctive relief necessary or appropriate to prevent further abuse of a family or household member."). Section 103(6) of the Act defines "family or household members," which includes "persons who have or have had a dating or engagement relationship." 60/103(6).

72. U.S. Dep't of Justice, Nat'l Inst. of Justice, *Electronic Monitoring Reduces Recidivism*, In Short: Toward Criminal Justice Solutions (Sept. 2011), <https://www.ncjrs.gov/pdffiles1/nij/234460.pdf>.

73. *GPS Supervision Update*, Interstate Comm'n on Adult Offender Supervision (Apr. 2006), <http://www.interstatecompact.org/LinkClick.aspx?fileticket=G15nNXGpbLc%3d&tabid=105&mid=431>.

74. INT'L ASSOC. OF CHIEFS OF POLICE, *Tracking Sex Offenders With Electronic Monitoring Technology: Implications and Practical Uses for Law Enforcement 1* (2008), available at <https://www.bja.gov/Publications/IACPSexOffenderElecMonitoring.pdf>.

75. See STEPHEN V. GIES ET AL., *Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation of the California Supervision Program vii* (Apr. 2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238481.pdf>.

Department of Justice to evaluate the California Department of Corrections and Rehabilitation's GPS Supervision Program.<sup>76</sup>

The subjects of the study were 516 high-risk sex offenders, half of whom were monitored under traditional parole conditions and the other half of whom were equipped with GPS monitoring.<sup>77</sup> The subjects within the GPS group demonstrated significantly better outcomes for both compliance and recidivism.<sup>78</sup> The GPS monitored parolees had three times less sex-related violations and less than half arrests of any kind.<sup>79</sup> Additionally, they were returned to custody 38 percent less often than the traditional parolee group.<sup>80</sup> The results also suggest that a GPS offender's risk of being convicted is approximately 54 percent less than the control group.<sup>81</sup> As a result, the study unequivocally demonstrates the effectiveness of GPS monitoring in lowering recidivism and increasing compliance with court orders among high-risk groups.<sup>82</sup>

By definition, respondents in civil protection order cases pose a high risk with respect to their violent propensities since they have committed or have threatened to commit a criminal offense constituting domestic violence.<sup>83</sup> Arguably, GPS holds great promise for protecting victims of domestic violence from future attacks.

### C. Current Utilization of GPS in Domestic Violence Cases

In places where GPS monitoring has been ordered in civil domestic violence cases, it has greatly reduced the number of protection order violations.<sup>84</sup> This is true even though monitoring was ordered only after a judge found that the abuser violated the terms of the existing protection order.<sup>85</sup> Approximately twenty-two states have passed legislation explicitly providing

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76. *See id.*

77. *Id.*

78. *See id.* at 3-9.

79. *Id.*

80. *Id.* at 3-15.

81. GIES ET AL., *supra* note 75, at 3-13.

82. *Id.* at vii.

83. *See, e.g.*, D.C. Code § 16-1005(c) (LexisNexis 2001 & Supp. 2012).

84. At the Newburyport pilot program, a team of court officials and advocates used dangerousness assessments to identify 55 men who had violated protective orders and were likely to re-offend. Andrew Wolfson, *12 States Use GPS Monitoring*, *The Courier-Journal*, Mar. 14, 2010, <http://www.courier-journal.com/article/20091115/NEWS01/911150318/12-states-use-GPS-monitoring>. Nine men were chosen to participate in GPS monitoring. *Id.* None of these nine who were electronically monitored committed additional offenses from 2005 through 2008, while 17 who were not subject to monitoring were charged with assault in the first year, with six more charged in the second year. *Id.* Additionally, after North Carolina's Pitt County adopted the technology in late 2005, the county's recidivism rate for domestic violence fell from 36 percent in 2004 to 14 percent in 2006. Jason Szep, *GPS Grows As a Crime-Fighting Tool in U.S.*, *REUTERS*, May 14, 2008, <http://www.reuters.com/article/idUSN0647848720080514>.

85. Wolfson, *supra* note 84.

for GPS tracking in civil domestic violence cases; however, all state statutes prescribing GPS monitoring operate only after a civil protection order has been granted.<sup>86</sup> In some states, the statutes provide GPS tracking as enumerated relief only after a judge has found that the respondent violated the underlying order.<sup>87</sup> In other states, GPS monitoring is explicitly provided for if the abuser has been criminally charged with a domestic violence offense.<sup>88</sup> These states vary with respect to the level of discretion provided to judges regarding whether or not to consider GPS tracking warranted in certain situations.<sup>89</sup> Common to all legislation is the limited context to which it applies—all require that the victim suffer additional violence or threats before the statutes' mandates take effect.<sup>90</sup> Surely, both victims and courts would benefit from removing the requirement that a violation occur prior to permitting GPS monitoring. So why is this not done?

#### IV. OBJECTIONS TO GPS MONITORING

Given the widespread capability and proven success of GPS monitoring in the places it has been utilized in the domestic violence context, one has to wonder why so few courts impose GPS monitoring notwithstanding its undisputed potential. There are three basic categories of objections raised by opponents of this technology being used in the civil domestic violence context: procedural due process objections, substantive fourth, sixth, and seventh amendment as well as privacy objections, and logistical objections.

##### A. Procedural Due Process

The seminal procedural objection is that many protection orders are entered in an expedited fashion, sometimes as a prejudgment remedy.<sup>91</sup> While

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86. After Massachusetts passed its GPS legislation, Utah, Washington, Colorado, Arizona, Texas, Oklahoma, Louisiana, Arkansas, Mississippi, Florida, Illinois, Indiana, North Dakota, Minnesota, Wisconsin, Michigan, Kentucky, Connecticut, Alaska, Hawaii and New Hampshire followed suit. *National Progress by State*, CYNTHIA L. BISCHOF MEMORIAL FOUND., <http://www.cindysmemorial.org/progress.php> (last visited Mar. 15, 2013). Additionally, several more states are in the process of implementing their own GPS legislation, including California, Maine, Virginia, New Jersey, North Carolina, Iowa, Ohio, Kentucky, and Washington D.C. *Id.*

87. See Liam Ford, *GPS May Help Enforce Restraining Orders*, CHI. TRIB., Apr. 2, 2008, <http://www.chicagotribune.com/news/local/chi-domestic-violence-080402,0,3052747.story>.

88. See Maria Kantzavelos, *GPS Law Gives Abusers Little Latitude*, Chi. Lawyer Magazine, Nov. 12, 2008, available at [http://cindysmemorial.org/downloads/ChicagoLawyer\\_081117.pdf](http://cindysmemorial.org/downloads/ChicagoLawyer_081117.pdf).

89. See KY. REV. STAT. ANN. § 403.761 (West 2012); OHIO REV. CODE. ANN. § 4:6 (West 2012); IND. CODE § 34-26-5-9(i) (2012), for examples of state laws that by requiring a violation to occur prior to ordering GPS monitoring subject abuse victims to additional harm.

90. *Id.*

91. See Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 1035-1039 (1993).

this is a concern because everyone is constitutionally entitled to procedural due process, it is not a valid basis for categorically rejecting GPS monitoring in civil domestic violence cases. This is true for many reasons. To begin with, this objection fails to distinguish between emergency or temporary protection orders and civil protection orders. Emergency or temporary protection orders are issued on an *ex parte* basis when a court finds that the safety or welfare of an individual is in immediate danger.<sup>92</sup> They are valid for a very short period of time, typically fourteen days or less.<sup>93</sup> Civil protection orders, on the other hand, are only issued after the respondent receives notice and an opportunity to be heard, and after a judicial finding that the respondent committed or threatened to commit a criminal offense against the petitioner.<sup>94</sup> The forms of relief available in emergency *ex parte* protection orders are much more limited than those available in the latter context.<sup>95</sup>

In a substantial number of civil protection order cases, before an order is issued, a full hearing on the merits, including witness or police testimony, takes place.<sup>96</sup> Certainly, in cases where an order is issued after a full hearing on the merits has been held, the due process objection is overcome because the respondent has been fully afforded his due process rights. Even in more expedited proceedings such as default hearings where the due process rights are more restricted, the respondent has an immediate opportunity to move to vacate the order itself or any of the components of relief therein.<sup>97</sup> Additionally, at any time during the length of the protection order the respondent may file a motion to modify the order, including components of relief therein.<sup>98</sup> The respondent also has thirty days from the time of service to appeal the order and potentially longer than thirty days if good cause is shown for the delay in filing the appeal.<sup>99</sup> Furthermore, upon the respondent's request, the court may stay the order during the appeal's pendency.<sup>100</sup> The availability of a motion to vacate, modify, and appeal the protection order reduces due process concerns.

Furthermore, procedural objections to the imposition of this relief fail to appreciate the burdens inherent in remedies already provided for in civil protection orders, which are granted using the exact same procedures. For

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92. See, e.g., D.C. Code § 16-1004 (b)(1) (LexisNexis 2001 & Supp. 2012).

93. See, e.g., *id.* § 16-1004 (b)(2).

94. See, e.g., *id.* §§ 16-1004 (b)(3), 16-1005(c); see also R. GOVERNING P. IN THE DOMESTIC VIOLENCE UNIT OF THE SUP. CT. OF D.C. 3.

95. See, e.g., §§ 16-1004, 1005.

96. Due to the limited number of appeals these cases are often unreported. Anecdotal evidence has been used. Interview with Mariela Oliveras, *supra* note 36.

97. See, e.g., R. GOVERNING P. IN THE DOMESTIC VIOLENCE UNIT OF THE SUP. CT. OF D.C. 5(d) (providing the respondent with 10 days from the time of service to file a motion to vacate the order).

98. See, e.g., R. GOVERNING P. IN THE DOMESTIC VIOLENCE UNIT OF THE SUP. CT. OF D.C. 7(d).

99. See, e.g., R. GOVERNING P. IN THE DOMESTIC VIOLENCE UNIT OF THE SUP. CT. OF D.C. 13(a) (1), (2).

100. See, e.g., R. GOVERNING P. IN THE DOMESTIC VIOLENCE UNIT OF THE SUP. CT. OF D.C. 13(b).

example, often included in these truncated hearings are decisions relating to temporary child custody.<sup>101</sup> Orders to vacate a shared residence are frequently made on an *ex parte* basis.<sup>102</sup> While respondents have notice and an opportunity to be heard at a second hearing, they are often served with papers and escorted off their property immediately.<sup>103</sup> Furthermore, it is quite common that a respondent be ordered to surrender any weapons or firearms at the time of service.<sup>104</sup> Accordingly, if the limited due process provided in temporary protection order and civil protection order cases is sufficient to satisfy constitutional strictures, it is similarly sufficient to justify GPS monitoring as a component of relief in a civil protection order.

Finally, these procedural objections fail to recognize or apply legal precedent permitting prejudgment deprivations and seizures in many types of civil cases.<sup>105</sup> In *Mathews v. Eldridge*, the United States Supreme Court held that prejudgment termination of an individual's social security disability benefits satisfies procedural due process, so long as there is an opportunity for an evidentiary hearing prior to the termination becoming permanent.<sup>106</sup> The Court noted that the dictates of due process are not static, but rather are determined by the individual context at hand.<sup>107</sup> The Court identified three factors for consideration: 1) the private interest that will be affected; 2) the risk of an erroneous deprivation of such interest through the procedures used and probable value, if any, of additional procedural safeguards; and 3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedures would entail.<sup>108</sup> Although *Mathews* dealt with administrative proceedings, the analysis logically extends to judicial proceedings as well. Applying the *Mathews* analysis to GPS tracking as a form of injunctive relief when a civil protection order is issued, it is clear that procedural due process is met.

First, the private interest affected is relatively low, as the respondent is already prohibited by court order from going to these exclusionary zones, and the invasiveness of GPS tracking is low, as the respondent's movements are not recorded unless he violates the underlying order.<sup>109</sup> The respondent is free to

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101. See, e.g., D.C. Code §16-1005 (c)(6) (LexisNexis 2001 & Supp. 2012).

102. See, e.g., *id.* §16-1005 (c)(4).

103. See, e.g., R. GOVERNING P. IN THE DOMESTIC VIOLENCE UNIT OF THE SUP. CT. OF D.C. 11(c) (providing in default settings for metropolitan police to serve the respondent and stand by while the respondent vacates the premises).

104. See, e.g., §16-1005 (c)(10).

105. See *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974).

106. *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976). Although *Mathews*, dealt with administrative proceedings, the analysis logically extends to the instant proceeding. Under its application, it is clear that procedural due process is met.

107. *Id.* at 321.

108. *Id.*

109. See Leah Satine, *Maximal Safety, Minimal Intrusion: Monitoring Civil Protective Orders Without Implicating Privacy*, 43 HARV. C.R.-C.L. L. REV. 267 (2008).

move anywhere outside of these exclusionary zones without any recording of his movements.<sup>110</sup>

Second, the risk of an erroneous deprivation of such interest is low, given the extensive procedures used. The respondent has notice and an opportunity to be heard, a hearing on the merits is held, and prior to issuing this particular component of relief, a lethality and dangerousness assessment is performed to determine whether this relief is appropriate in the instant circumstances and for the particular respondent.<sup>111</sup> Successful risk management must include individualized application of tracking because of risk or dangerousness assessment factors present in the given situation.<sup>112</sup> These include whether the respondent has threatened to kill the petitioner, stalked the petitioner, attempted strangulation, abused pets or children, or owns a weapon, whether the victim is attempting to leave the abuser, and whether this respondent has been violent towards this victim previously.<sup>113</sup> This analysis ensures that the individual respondent has been afforded his due process rights.<sup>114</sup> The probable value of additional procedural safeguards is low, since a plenary hearing and individualized assessment regarding whether this relief is appropriate in the immediate circumstances has already occurred.

Third, in contrast, the governmental interests at hand are high and include the dual interest of protecting residents from further harm, as well as enhancing enforcement of court orders. The governmental cost of requiring additional procedural safeguards prior to issuing this injunctive relief, such as requiring contempt charges to be brought and won, would be crippling, especially if prosecutorial offices had to be party to the cases.<sup>115</sup> Additionally, requiring that

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110. *Id.*

111. See generally Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. OF INTERPERSONAL VIOLENCE 653, 655 (2009).

112. *Id.* at 669-70.

113. *Id.* at 655.

114. But see CAL. PENAL CODE §§ 269, 288.7, 3010; 3004 (West 2008 & Supp. 2013); FLA. STAT. ANN. §§ 800.04, 775.082 (West 2010 & Supp. 2012); GA. CODE ANN. §§ 16-5-21, 17-10-6.2, 16-6-4, 42-1-14 (LexisNexis 2008 & Supp. 2011); KAN. STAT. ANN. §§ 21-4642, 21-4643, 22-3717 (West 2007 & Supp. 2011); LA. REV. STAT. ANN. §§ 14:78.1, 14.81.2, 14.81.1, 14.43.1, 15:550, 15:560.4 (2007 & 2012 Supp.); MICH. COMP. LAWS ANN. §§ 750.520b, 750.520n (West 2004 & Supp 2011); MO. ANN. STAT. §§ 566.030, 566.060, 566.213, 217.735 (West 2004 & Supp. 2013); N.C. GEN. STAT. §§14-27.2A, 14-27.4A, 14-208.40, 14-208.40A (2011); R.I. GEN. LAWS §§ 11-37-8.2.1, 11-37-8.2, 13-8-30 (2002 & Supp. 2012); WIS. STAT. §§ 939.616, 301.48 (2005 & Supp. 2012), for examples of class-based laws such as state laws requiring GPS tracking for all defendants convicted of sexual offenses against children under a certain age.

115. It is unclear whether there is a private right of action to enforce civil protection orders through contempt proceedings. The Supreme Court granted certiorari in *Robertson v. U.S.*, 940 A.2d 1050 (D.C. 2008), *cert. granted*, 130 S.Ct. 1011, 175 L.Ed.2d 617 (2009), to resolve the issue but dismissed the writ as improvidently granted. *Robertson v. U.S. ex rel. Watson*, *cert dismissed*, 130 S.Ct. 2184, 176 L.Ed.2d 1024 (2010). As a result, there is no clear rule as to whether there is a private right of action to enforce civil protection orders through contempt proceedings. To the degree prosecutor's offices must be involved, the

the respondent commit subsequent acts in violation of a civil protection order before GPS monitoring is granted would largely sacrifice the government's interest in protecting its residents from further violence and lessen enforcement of its orders. After applying the *Mathews* analysis to the circumstances, it is clear that procedural due process is satisfied and the deprivation inherent to GPS monitoring does not violate respondents' due process rights in civil protection order cases.

### *B. Sixth and Seventh Amendments*

There is a potential Sixth Amendment objection to the imposition of GPS monitoring because these cases are decided by judges, not juries.<sup>116</sup> Accordingly, one might argue that the imposition of GPS monitoring by a judge and not a jury deprives the respondent of his Sixth Amendment right to a jury trial.<sup>117</sup> This argument fails, however, because the Sixth Amendment only provides a jury guarantee for criminal penalties.<sup>118</sup> The use of GPS monitoring, as discussed in the context of this Article, is not a criminal penalty, but rather a component of injunctive relief in a civil stay away order. Injunctive relief has historically been regarded as civil not criminal, as was intended by legislation.<sup>119</sup>

In determining whether a remedy is criminal or civil, the factors expounded by the Supreme Court must be used.<sup>120</sup> These factors include: whether the sanction involves an affirmative disability or restraint, whether it historically was viewed as punishment, whether scienter must be present, whether it promotes the traditional aims of punishment such as retribution and deterrence, whether the behavior it is applied to is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose proposed.<sup>121</sup> As discussed below, application of these factors to GPS monitoring as injunctive relief in the civil protection order context indicates

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required dedication of governmental resources would soar and likely result in fewer enforcement actions.

116. See R. GOVERNING P. IN THE DOMESTIC VIOLENCE UNIT OF THE SUP. CT. OF D.C. 9(b)(2) ("The [c]ourt shall, without a jury, hear and adjudicate petitions for civil protection orders and all motions made pursuant to these rules.").

117. See generally Fred Medick, *Domestic Violence Defendant's Jury Trial Rights in GPS Monitoring*, 43 HARV. C.R.-C.L. L. REV. 277 (2008).

118. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

119. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

120. *Id.*

121. *Id.* at 99-100.

that both the purpose and effect of the relief is restorative rather than retributive.

Turning to each factor, GPS monitoring does not constitute an affirmative restraint. Unlike incarceration, injunctions have historically been treated as civil remedies.<sup>122</sup> Scienter need not be found, as many bases for civil protection orders and individual relief only require general intent, that the act was not an accident or involuntary reflex.<sup>123</sup> Injunctive relief is not retributive—arguably it may help deter future acts as it increases the likelihood that the offender will be caught; however, unlike incarceration the injunction does not constitute a punishment itself. The behavior it applies to would not normally constitute a crime outside of the civil protection order. There is no alternative purpose assignable for it, and it is not excessive given the important interests of enforcing court orders and preserving individuals' safety. Accordingly, the imposition of injunctive relief such as GPS monitoring in conjunction with a stay away order does not give rise to the Sixth Amendment right to a jury trial.<sup>124</sup> Thus, a respondent is not entitled to a jury trial in these cases.

There is a potential Seventh Amendment objection—right to a jury trial—to GPS monitoring because in all states a civil protection order is entered by a judge rather than a jury.<sup>125</sup> Accordingly, some might argue that imposing GPS monitoring deprives the respondent of his Seventh Amendment rights.<sup>126</sup> There are several responses to this objection. First, if this were true, the traditional relief granted in the order, such as a stay away and vacate order, would also be invalid. Yet, it is routinely upheld.<sup>127</sup> Secondly, although the Seventh Amendment applies in federal cases, it does not apply to state cases because it was never incorporated into the Fourteenth Amendment.<sup>128</sup> Accordingly, because the vast majority of civil protection orders occur in state courts, there would be no Seventh Amendment barrier to imposing GPS requirements without a jury finding.

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122. See generally Mary M. Cheh, *Civil Remedies to Control Crime: Legal Issues and Constitutional Challenges*, 9 CRIME PREVENTION STUD., 1998, at 45.

123. E.g., State of Conn. Judicial Branch, Crim. Jury Instructions, 6.8-1 Criminal Violation of a Protective Order §53a-223 (2007), available at <http://www.jud.ct.gov/ji/criminal/part6/6.8-1.htm>.

124. Medick, *supra* note 117, at 278 (citing *Foreman v. Dallas County*, 193 F.3d 314, 323 (5th Cir. 1999) (“A temporary restraining order is a ‘stay put,’ equitable remedy that has as its essential purpose the preservation of the status quo while the merits of the cause are explored through litigation.”)).

125. Klein & Orloff, *supra* note 91, at 1070.

126. U.S. CONST. amend. VII. (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”).

127. See Medick, *supra* note 117, at 278 (arguing that it is unlikely that a court would find that the Seventh Amendment applies to domestic violence civil proceedings).

128. *Fourteenth Amendment: Incorporation (1868)*, BILL OF RIGHTS INST., <http://billofrightsinstitute.org/resources/educator-resources/americanpedia/amendments/fourteenth-amendment-general/incorporation/> (last visited Mar. 17, 2013).

Some may argue that respondents in the District of Columbia have a Seventh Amendment right to a jury trial, since they are in federal and not state court.<sup>129</sup> This argument fails, however, as the Seventh Amendment only applies to matters where the individual had a right to a jury trial at common law.<sup>130</sup> This is a historical inquiry, and historically, respondents did not have a right to a jury trial in these sorts of cases.<sup>131</sup> Accordingly, imposing GPS monitoring as an aspect of relief in civil protection orders granted by judges would not violate respondents' Seventh Amendment rights.<sup>132</sup>

In reality, civil protection orders often involve more extensive procedural protections than other types of civil cases involving serious deprivations.<sup>133</sup> Given this background, the procedural objections to providing GPS monitoring in the context of a civil protection order are not persuasive.

### C. Privacy

The main substantive objection to GPS monitoring is the claim that it invades the respondents' privacy rights. This is a serious concern, as the possibility for abuse is raised anytime the court can monitor an individual's whereabouts. Again, however, this objection does not hold weight in the civil protection order context.

To begin with, GPS monitoring would only be imposed after a judge finds that the respondent committed a criminal offense upon the petitioner and poses a high risk of re-offense.<sup>134</sup> An individual's reasonable expectation of privacy in this context is somewhat diminished, particularly when there is a compelling state interest in protecting residents and ensuring enforcement of its orders.<sup>135</sup> The privacy concern is also minimized by the nature of the technology itself. GPS technology is passive in nature, and unless there is a breach of an exclusionary zone, there is no active monitoring or recording of the individual's location.<sup>136</sup> There are various methods of monitoring that can be used, which

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129. See CHARLES ALAN WRIGHT & ARTHUR R. MILLER., FEDERAL PRACTICE & PROCEDURE § 2302.2 (2008).

130. *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899).

131. See *Herron v. Southern Pacific Co.*, 283 U.S. 91 (1931).

132. State constitutional limitations exist, but vary, and generally do not apply to injunctive or non-traditional relief filed in equity courts at the time of adoption of state constitutions. See generally *Medick*, *supra* note 117.

133. See *Mathews v. Eldridge*, 424 U.S. 319, 340 (1976).

134. See *Campbell et al.*, *supra* note 111 (describing how to assess the danger and lethality of an abuser).

135. See Edna Erez, et al., *GPS and DV: Evaluation Study*, U.S. DEP'T OF JUSTICE, (June 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238910.pdf>.

136. See Satine, *supra* note 109, at 268. The use of passive in the immediate context relates to the collection and recording of information. Alice Douglas, *Active GPS Tracking Vs Passive GPS Tracking*, EZINE ARTICLES (Nov. 17, 2009), <http://ezinearticles.com/?Active-GPS-Tracking-Vs-Passive-GPS-Tracking&id=3281893>. It is worth noting that the terms "passive" and "active" are also used in discussing GPS monitoring, but in a different context that being the device used. *Id.* When one reads that states use "passive" monitoring they are referring to a device more akin to a flashdrive. *Id.*

guarantee that any reasonable expectation of privacy that a respondent does have is not violated.<sup>137</sup> These methods include reverse tagging and filtering technology.<sup>138</sup>

Reverse tagging monitors and tracks the movements of the petitioner, not the respondent.<sup>139</sup> The petitioner is equipped with a monitoring chip, which transmits her location to a central database.<sup>140</sup> The respondent is equipped with a signal-receiving device, which is programmed with the fixed exclusionary zones and the fixed exclusionary distance of the zone surrounding petitioner's person.<sup>141</sup> The device worn by the respondent does not send any information to the central database.<sup>142</sup> This is somewhat analogous to the bracelets worn by newborns in maternity wards of hospitals. The precise whereabouts or movements of the infant are not tracked, but the bracelet is programmed to sound an alarm if the infant goes beyond a fixed perimeter.<sup>143</sup>

Using this technology, there is no continuous tracking of respondent's whereabouts.<sup>144</sup> The only time the respondent's whereabouts are known and recorded is when an exclusionary zone is breached.<sup>145</sup> Upon a breach, the respondent is contacted via cellular phone and has an opportunity to remove himself from the prohibited area prior to the violation being reported to the police.<sup>146</sup> This provides the respondent with an opportunity to remedy an accidental violation prior to police involvement.<sup>147</sup> Thus, the location of the respondent is not communicated, saved, or retrievable by the police or anyone else outside of a breach circumstance.<sup>148</sup>

Filtering technology, as the name indicates, involves limiting the information that is sent and recorded.<sup>149</sup> In contrast to reverse tagging, the

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While it stores information regarding where one traveled during the day, it must be plugged into a computer for this information to be used. *Id.* In contrast, when a state uses "active" devices real time information is processed. *Id.* Thus, while "active" devices are the device at issue in this article, the method of data collection remains passive in nature.

137. See Kevin Gosztola, *Court: Absent "Physical Intrusion," Warrantless GPS Tracking Legal*, THE DISSENTER (August 15, 2012), <http://dissenter.firedoglake.com/2012/08/15/court-absent-physical-intrusion-warrantless-gps-tracking-legal/>.

138. *Id.*

139. See Satine, *supra* note 109, at 268.

140. *Id.*

141. *Id.*

142. *Id.*

143. Jerome R. Corsi, *Life With Big Brother: Hospitals Tagging Babies With Electronic Chips*, WND (Jan. 15, 2008, 1:00 AM), <http://www.wnd.com/2008/01/45542>.

144. *Id.*

145. *Id.*

146. *GPS: Your Supervising Officer is Watching*, U.S. COURTS: THE THIRD BRANCH, (Apr. 2007), [http://www.uscourts.gov/News/TheThirdBranch/07-0401/GPS\\_Your\\_Supervising\\_Officer\\_is\\_Watching.aspx](http://www.uscourts.gov/News/TheThirdBranch/07-0401/GPS_Your_Supervising_Officer_is_Watching.aspx).

147. *See id.*

148. Satine, *supra* note 109, at 267.

149. *Id.* at 269.

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respondent, not the petitioner, wears a monitoring unit.<sup>150</sup> The respondent and the petitioner both carry signal-receiving devices.<sup>151</sup> The monitoring devices are programmed with the fixed latitudes and longitudes of the fixed exclusionary zones, and the fixed distance required between the petitioner and the respondent, the two receiving units (one affixed to the respondent, the other carried by the petitioner).<sup>152</sup> The only information that the receiving units are programmed to send, and the only information that the monitoring devices are programmed to receive, is the latitudinal and longitudinal coordinates that constitute a breach of an exclusionary zone.<sup>153</sup> In turn, it is the monitoring device worn by the respondent that sends information of a violation to the central database.<sup>154</sup> Once the database receives this information, it is communicated to the respondent, victim, and the police, if necessary.<sup>155</sup> This method prevents the collection or storage of the respondent's whereabouts outside of a violation.<sup>156</sup>

Indeed, respondents in some cases will benefit from GPS monitoring because it will refute unfounded allegations that the respondent violated a stay away order. Given that data regarding the respondent's whereabouts is only collected when there is a violation, the respondent has a built-in alibi against false claims.<sup>157</sup> This provides a benefit to the government and to courts in deciphering when true violations have occurred.<sup>158</sup> Ketki Steffen, the prosecutor in Cindy Bischof's case, sees this as an invaluable prosecution tool: "[The GPS data] will provide me with direct evidence. If there is a violation, I can prove that the person with the bracelet was at this location at this time."<sup>159</sup> Given that the only time the respondent's privacy is actively violated under either method is when he has violated a known court order, his reasonable expectation of privacy in such settings is fairly low.

#### D. Fourth Amendment

The final potential substantive objection to GPS monitoring involves the mandate that a respondent provide the government with his location at all times. Some may argue that this violates the respondent's Fourth Amendment right to be free from unreasonable searches and seizures.<sup>160</sup> This is a serious

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150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Satine, *supra* note 109, at 269.

155. *Id.* at 269-70.

156. *Id.* at 270.

157. Christian Nolan, *GPS Data Can be Evidence - Or Provide Alibi*, THE CONN. L. TRIB. (Nov. 12, 2008), <http://www.law.com/jsp/article.jsp?id=1202425967720&slreturn=20120715180354>.

158. *Id.*

159. Kantzavelos, *supra* note 88.

160. Julian Sanchez, *Skinning the Fourth Amendment: The Sixth Circuit's Awful GPS Tracking Decision*, CATO INSTITUTE (Aug. 15, 2012, 1:03 PM),

objection, but upon examination there is, in fact, no Fourth Amendment barrier to mandatory GPS monitoring.

Initially, it is unclear whether imposition of GPS monitoring is even a “search” subject to Fourth Amendment constraints. Prior to the Supreme Court’s recent opinion in *United States v. Jones*,<sup>161</sup> the federal courts of appeals were split regarding whether GPS monitoring was subject to Fourth Amendment constraints.<sup>162</sup> One group of courts held that it was a search.<sup>163</sup> Another group held that it was not, because it was just like following a car and there is no reasonable expectation of privacy regarding whereabouts on public roads.<sup>164</sup> If the latter were true, then GPS monitoring would not be subject to the Fourth Amendment.

In *Jones*, the Supreme Court held that under certain circumstances, GPS monitoring may constitute a search.<sup>165</sup> The Court departed from its prior tests, including the reasonable expectation of privacy test, and decided the case using common law property principles.<sup>166</sup> The critical holding was that the circumstances constituted a search because while installing the device, law

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<http://www.cato.org/blog/skinning-fourth-amendment-sixth-circuits-awful-gps-tracking-decision>.

161. *U.S. v. Jones*, 132 S. Ct. 945, 181 L.Ed. 2d 911 (2012).

162. The Courts’ treatment of warrantless GPS monitoring varied widely amongst the circuits due to different interpretations of the limited United States Supreme Court cases that touch on the issue including *U.S. v. Knotts*, 460 U.S. 276 (1983), and *U.S. v. Karo*, 468 U.S. 705 (1984). In *Knotts*, the Supreme Court held that the monitoring did not constitute a Fourth Amendment search or seizure and, therefore, did not require a warrant because the respondent did not have a reasonable expectation of privacy in his movements from one place to another. *Knotts*, 460 U.S. at 285. In *Karo*, the Court held that the warrantless monitoring of a beeper within a private residence violated the Fourth Amendment rights of those with justifiable interest in the privacy of the residence because it revealed information that would otherwise not be visible to the outside. *Karo*, 468 U.S. at 706. See Orin S. Kerr, *The Fourth Amendment and New Technologies*, 102 MICH. L. REV. 801 (2004), for a detailed discussion of Fourth Amendment jurisprudence and detailed analysis of *Karo* and *Knotts*.

163. *U.S. v. Maynard*, 615 F.3d 544, 558 (D.C. Cir. 2010) (relying on the aggregate theory, i.e., quantity and length of surveillance can make monitoring become a search and seizure even if it initially would not have constituted one).

164. *U.S. v. Pineda-Moreno*, 591 F.3d 1212, 1214-17 (9th Cir. 2010) (holding installation of a GPS monitoring device on the undercarriage of jeep in private driveway and subsequent tracking of the jeep’s movements on public roads did not constitute a search and seizure due to the particular makeup of the driveway: “agents did not observe any fence, gate, or “No Trespassing” sign indicating that they were not to enter the property [to install the GPS device]”); see also *U.S. v. Sparks*, 750 F. Supp. 2d 384, 387 (D. Mass. 2010) (involving a GPS device placed on the undercarriage of the defendant’s mother’s vehicle in the middle of the night while it was parked in a private open-air parking lot).

165. *Jones*, 132 S. Ct. at 946 (involving the warrantless attachment and subsequent monitoring of a GPS unit on the defendant’s wife’s vehicle). In *Jones*, the movement of the vehicle was tracked for 28 days. *Id.* The Supreme Court held that the attachment of the GPS monitor to the vehicle constituted a search as it was a trespass to chattel, which at the time of the adoption of the Fourth Amendment would have been deemed a search. *Id.* at 946-49. The Court did not address the reasonable expectation of privacy analysis because it held the trespass was enough to deem it as a search requiring a warrant. *Id.* at 950.

166. *Id.* at 946-50.

enforcement committed a trespass to chattels, which was historically subject to the Fourth Amendment.<sup>167</sup> Rather than clarifying the matter for lower courts, the Supreme Court, in *Jones*, essentially skirted the issue of determining when one has a reasonable expectation of privacy, which in modern times has become the focus of Fourth Amendment inquiries.<sup>168</sup> Justice Scalia, who delivered the opinion, departed from the modern approach and went back in time to when Fourth Amendment jurisprudence was seen as protection of people's property rights against unlawful physical trespasses.<sup>169</sup> However ripe this concern was in the early 20th century, today the protection of privacy rather than property should be of greater concern because it is more consistent with later Court analysis.<sup>170</sup>

Today widespread technology exists allowing GPS monitoring without a physical trespass. For example, some cars come standard with GPS and cell phones are also equipped with GPS.<sup>171</sup> *Jones* provides courts with little to no guidance in cases involving GPS monitoring utilizing this technology.<sup>172</sup> In this upcoming vein of cases, various courts will likely still apply the differing tests mentioned beforehand—causing continued confusion for police and judges. As a case in point, the Sixth Circuit recently decided a case involving the warrantless monitoring of pings off of cell phone towers utilizing GPS technology that came standard in the voluntarily procured cell phone used by the defendant.<sup>173</sup> Given that no “physical trespass” occurred, *Jones* was of little guidance. The Sixth Circuit ruled that the warrantless monitoring of the defendant's phone—specifically the pings on cell towers that led to his arrest

167. *Id.* at 949 (“It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a “search” within the meaning of the Fourth Amendment when it was adopted.”); *Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S.Ct. 1378 (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886) (stating that *Entick v. Carrington*, 95 Eng. Rep. 807 (C.P. 1765) is a “case we have described as a ‘monument of English freedom’ ‘undoubtedly familiar’ to ‘every American statesman’ at the time the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law’ “ with regard to search and seizure)).

168. See *Knotts*, 460 U.S. 276, for an example of a recent case that focused on determining when one has a reasonable expectation of privacy.

169. See, e.g., *Boyd v. United States*, 116 U.S. 616, 627 (1886); *Adams v. New York*, 192 U.S. 585, 598 (1904); *Olmstead v. United States*, 277 U.S. 438, 464-66 (1928); *Goldman v. United States*, 316 U.S. 129, 134-36 (1942).

170. *Warden v. Hayden*, 387 U.S. 294, 304-05 (1967) (explaining that “the principal object of the Fourth Amendment is the protection of privacy rather than property” and discussing the shift in Fourth Amendment jurisprudence from an emphasis on property to privacy); see also *Knotts*, 460 U.S. 276; *U.S. v. Karo*, 468 U.S. 705 (1984).

171. Jeremy Aber et al., *GPS and its Emerging Role in Cellular Phones and Car Navigation Systems*, ACADEMIC EMPORIA (Dec. 10, 2003), <http://academic.emporia.edu/aberjame/student/aber1/index.htm>.

172. See Michael Isikoff, *The Snitch in Your Pocket*, NEWSWEEK (Feb. 19, 2010), <http://www.newsweek.com/2010/02/18/> (reporting on one example of a case where federal prosecutors used GPS technology already in suspect's phone to place him within a mile of the murder scene).

173. See *United States v. Skinner*, 690 F.3d 772 (6th Cir. 2012).

and subsequent conviction did not violate the defendant's Fourth Amendment rights as he "did not have a reasonable expectation of privacy in the data emanating from his cell phone that showed his location."<sup>174</sup> The court relied on the reasoning in *Knotts*, namely that one's reasonable expectation of privacy is determined by what is disclosed to the public.<sup>175</sup> *U.S. v. Skinner* demonstrates the accuracy of Justice Sotomayor's concurrence in *Jones*, stating that the majority opinion's "trespassory test" provides little guidance on "cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion on property."<sup>176</sup>

Also, subsequent to *Jones*, and upon remand from the Supreme Court, the Ninth Circuit upheld its earlier decision that the attachment and use of GPS monitoring did not constitute a search and seizure under the Fourth Amendment.<sup>177</sup> The court held that because the incidents at issue occurred prior to the *Jones* decision, the court was not bound to follow it.<sup>178</sup> One would assume that all pre-*Jones* cases in which courts held that the attachment and monitoring of GPS chips did not constitute a search would follow suit.

It is unclear whether applying a GPS monitor directly to the body would be analogous to a trespass to chattels. Certainly if it was done covertly (as in *Jones*) it would be a trespass (or even a battery) and hence, under *Jones*, likely subject to the Fourth Amendment. Even if done outright—in a court—the same analysis might apply. One could argue, however, that applying a GPS device is no different than shaking hands or receiving a pat on the back, thus not a trespass, but this seems wrong. Were *Jones* to address the reasonable expectation of privacy question and not simply stop at property rights, the court and society would likely not recognize that an individual has a legitimate expectation of privacy in the relativeness of his whereabouts in comparison to the exclusionary zones set by a judge.<sup>179</sup> This is the case only if a judge has found that the individual has committed domestic violence and poses a high risk of re-offense. In other words, an individual does not have a reasonable expectation of privacy in his or her movements when those movements violate a court order, as this information is not private in nature. However, pursuant to *Jones*, and its trespass to chattel focus, it is most likely a search.

That is not, however, fatal to sanctioning GPS monitoring in domestic violence cases. The GPS device in *Jones* was installed without a warrant.<sup>180</sup> In domestic violence cases, a judge will order it after a hearing.<sup>181</sup>

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174. *Id.*

175. *See id.* at 777-78.

176. *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

177. *U.S. v. Pineda-Moreno*, 688 F.3d 1087 (9th Cir. 2012). The U.S. Supreme Court vacated the lower court's judgment in *U.S. v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir 2010) and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *U.S. v. Jones*, 132 S. Ct. 945, 181 L.Ed. 2d 911 (2012).

178. *Pineda-Moreno*, 688 F.3d at 1091.

179. *See Kyllo v. U.S.*, 533 U.S. 27, 27 (2001).

180. *Jones*, 132 S. Ct. at 949.

If attaching the GPS chip or the monitoring itself is deemed a Fourth Amendment search or seizure, the warrant requirement is invoked.<sup>182</sup> The United States Supreme Court has interpreted the Warrant Clause to require three components: 1) prior authorization by a neutral detached magistrate; 2) a demonstration upon oath or affirmation that there is probable cause to believe that evidence sought will aid in a particular conviction for a particular offense; and 3) a particularized description of the place to be searched and items to be seized.<sup>183</sup> Each of these requirements is satisfied when GPS monitoring is ordered as a component of relief in a civil protection order case.

The first requirement was borne out of the idea that an impartial judgment must be interposed between the private citizen and the police or prosecution in order to remove bias and partiality from the determination.<sup>184</sup> This concern is not directly at issue in the instant circumstances, as neither the police nor prosecution is involved. Before GPS monitoring is ordered, a neutral and detached judicial officer reviews the evidence presented during the civil protection order case, makes a finding that an intrafamily offense has occurred, and determines through an assessment of lethality and dangerousness factors that the respondent is at high risk for re-offense.<sup>185</sup> The probable cause requirement was intended to ensure a legitimate connection between the information sought and the conviction for a crime at issue.<sup>186</sup> Given that the only information collected by GPS is the respondent's relative whereabouts in relation to the order's "exclusionary zones" when such zones are breached, there is more than probable cause to believe that any information collected by GPS monitoring would aid in the conviction for a violation of the issuing court's order.<sup>187</sup> The particularity requirement was designed to prevent general searches and to prevent the seizure of items not identified in the warrant.<sup>188</sup> This requirement is met because the GPS monitoring is programmed strictly

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181. If done prior to a violation, notice and opportunity to be heard, plus a hearing on the merits would still be held prior to the imposition of GPS monitoring. See D.C. Code § 16-1005(a), (c) (LexisNexis 2001 & Supp. 2012).

182. Jones, 132 S. Ct. at 949.

183. Dalia v. U.S., 441 U.S. 238, 255 (1979) (quoting *Stanford v. Texas*, 379 U.S. 476, 481 (1965)).

184. *Johnson v. U.S.*, 333 U.S. 10, 13-14 (1948).

185. One such danger assessment was developed by Jacqueline Campbell from Johns Hopkins University, which looks at a number of factors including whether the offender has threatened to kill victim, whether the offender owns a weapon, and whether the victim attempts to leave the offender. See Danger Assessment – View the Instrument, <http://www.dangerassessment.com/DATools.aspx> (follow the appropriate hyperlink for chosen language under "Download the Danger Assessment") (last visited Apr. 06, 2013).

186. *Steagald v. U.S.*, 451 U.S. 204, 213 (1981); see also *U.S. v. Savoca*, 761 F.2d 292, 297-98 (6th Cir. 1985).

187. See DICK WHITFIELD, *THE MAGIC BRACELET: TECHNOLOGY AND OFFENDER SUPERVISION* 86-87 (2001).

188. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); see also *Andresen v. Maryland*, 427 U.S. 463, 480 (1976) (quoting *Marron v. U.S.*, 275 U.S. 192, 196 (1927)) (particularity requirement "prevents the seizure of one thing under a warrant describing another").

according to the exclusionary zones established in the underlying court order, such as to stay one hundred feet away from the petitioner's home. Thus, similar to the above-mentioned procedural objections, the substantive objections do not prevent GPS monitoring from being an appropriate component of relief in civil protection order cases.

#### *E. Logistical Obstacles*

A core logistical objection is that this relief is simply too difficult and costly to warrant its use.<sup>189</sup> A second concern relates to who will pay for the monitoring.<sup>190</sup> The final logistical objection concerns whether structures exist that are equipped to handle overseeing GPS monitoring in these cases.<sup>191</sup> While it is true that issues linger regarding how much GPS monitoring will cost, who will be responsible for the cost, and who will do the monitoring, there are multiple solutions and options for each concern. Thus, in many ways these logistical objections are the least persuasive.

Admittedly, GPS monitoring comes at some cost and although it ranges due to multiple factors, the financial cost is actually lower than people might think. There are various factors that would likely impact the cost of GPS monitoring, including but not limited to: the type of tracking system used, the company selected, the contract terms and discount rate with the company, the volume of individuals being monitored, whether there is an existing infrastructure for the system, the type of monitoring sought, as well as variances in personnel costs.<sup>192</sup> For example, if a jurisdiction elected to use the same system already utilized for parolees, one would expect that the daily cost would be lower because there would be little to no start-up costs and presumably preexisting personnel could oversee at least some of the additional volume, thereby reducing the workforce expense. In contrast, one would expect costs to be higher in a jurisdiction attempting to implement such a program from scratch. Various cost figures relating to GPS monitoring have been collected from different jurisdictions.<sup>193</sup> Consistent with the preface regarding factors impacting costs, there are slight variances in the data.<sup>194</sup> While

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189. *But see Public Safety: GPS Services "E.M.P.A.C.T."*, SEMINOLE CNTY (FLA.) GOV'T (2013) <http://www.seminolecountyfl.gov/dps/probation/GPSServices.aspx> (reporting this particular jurisdiction's finding that GPS actually reduces costs because it is cheaper than keeping someone in jail).

190. *See GPS: Your Supervising Officer is Watching*, *supra* note 146 ("In most districts, offenders help defray the cost of monitoring[.]").

191. *See id.* (describing some of the existing structures in place to oversee GPS monitoring).

192. *See GIES ET AL.*, *supra* note 75, at 3-20-3-22.

193. *Id.*; *GPS Supervision September 2005*, INTERSTATE COMM'N FOR ADULT SUPERVISION, <http://www.interstatecompact.org/LinkClick.aspx?fileticket=O6o14MnHHqM%3d&tabid=105&mid=431> (reporting the cost per annum to offender at \$4000, which averages out to a daily cost of \$10.96 (4000/365=10.96))

194. *See GPS Supervision Sept. 2005*, *supra* note 193.

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differences in costs exist, a reasonable inference is that the overall data provides a general range of the costs associated with the proposed remedy.

The following figures were compiled in September 2005 by the Interstate Commission for Adult Offender Supervision.<sup>195</sup> The costs reported are for active or real-time monitoring of adult offenders each day: Colorado \$15.50, Connecticut \$12.95, Florida \$8.97, Iowa \$4.75-\$7.25, Minnesota \$17, Missouri \$5, Montana \$10.96,<sup>196</sup> Nebraska \$7.95, New Jersey \$9-\$11, North Dakota \$9.75, Tennessee \$8.50, and Wisconsin \$9-\$11.50.<sup>197</sup> The above data averages out to approximately \$10 per day per offender.<sup>198</sup> Although this report is not divided by type of offender,<sup>199</sup> one would assume the costs would not differ amongst general adult offenders and domestic violence offenders. This assumption is supported by the \$8 cost per day of GPS monitoring of domestic violence offenders in Massachusetts.<sup>200</sup> The above figures demonstrate that GPS monitoring is not cost prohibitive, and that cost alone does not justify an argument against its utilization.

The concern regarding who will bear the cost of this remedy is valid, especially given current economic times. However, there are various options as to who might bear this cost. The most obvious and arguably equitable option would be to shift the cost of GPS monitoring to the respondent who through his own wrongdoing was found by a judge to have committed or threatened to commit a criminal act.<sup>201</sup> Currently, respondents ordered to attend anger management classes or parenting classes are often forced to pay the cost associated with the program.<sup>202</sup> Many jurisdictions allow respondents to file for a fee deferral or waiver depending on financial status.<sup>203</sup> This model prevents the system from having to pay for an individual's treatment when it is necessitated by their own wrongdoing, yet recognizes that payment plans or fee waivers are necessary in some cases.

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195. *See id.*

196. *Id.* (reporting the cost per annum to offender at \$4000, which averages out to a daily cost of \$10.96. (4000/365=10.96)).

197. *Id.*

198. *Id.* Each dollar cost figure was added together, the total was then divided by the number of dollar cost figures. Given that a few states provided ranges, there is a low standard deviation in the calculated average cost.

199. *See id.*

200. Harriette Halepis, *GPS to Track Domestic Violence Offenders*, ROCKY MOUNTAIN TRACKING (June 30, 2009), <http://www.rmtracking.com/blog/2009/06/30/gps-to-track-domestic-violence-offenders>. ("In the state of Massachusetts, domestic violence offenders are charged \$8 per day for the tracking bracelets that they are forced to wear – these criminals literally pay for their crimes."); *see* Mass. Gen. Laws ch. 209A § 7 (2007).

201. *See, e.g.*, D.C. CODE § 16-1005(c) (LexisNexis 2001 & Supp. 2012).

202. *Id.*

203. *Parent Education Class, Frequently Asked Questions*, THE JUDICIAL BRANCH OF ARIZ., PINAL CNTY., <http://pinalcountyaz.gov/Departments/ConciliationCourt/Pages/ParentEducationClassFAQ.aspx> (last visited Mar. 15, 2013).

An additional option is to fund this relief with Violence Against Women Act (VAWA) funds. These funds, specifically STOP grants, are made available to states and the District of Columbia to provide increased services to victims of domestic violence, to decrease domestic violence, and to ensure the enforcement and cooperation of police in responding to domestic violence.<sup>204</sup> Using VAWA funds in this manner would further its intent and purpose: to keep victims of domestic violence safe and stop violence from reoccurring.<sup>205</sup> Existing state programs such as Arizona's Victims of Crime Act Funds (VOCA) could also be utilized to fund this relief.<sup>206</sup>

"Every victim of crime is entitled to Safety, Healing, Justice and Restitution. The mission of the Arizona Department of Public Safety's Crime Victim Services Unit is to effectively administer Victims of Crime Act Assistance funds by ensuring appropriate and accessible services are available to crime victims, enhancing the delivery of those services through technical assistance, training opportunities, and promoting a continuum of care for every victim in every community."<sup>207</sup>

Federal stimulus grants provide an additional source of potential funding.<sup>208</sup> Connecticut received \$140,000 in federal stimulus grants for its pilot program of ordering GPS monitoring subsequent to a court order finding that a violation of an underlying protection order had occurred.<sup>209</sup> In this pilot program, according to State Representative Mae Flexer, D-Killingly, a total of 119 offenders were tracked, and none of the victims were re-injured.<sup>210</sup> In light of the pilot's success, legislators restored funding to continue GPS monitoring of domestic violence offenders, investing an additional \$510,000.<sup>211</sup>

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204. See Laney, *supra* note 18.

205. *Violence Against Women Act*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <http://www.nnedv.org/policy/issues/vawa.html> (last visited Apr. 07, 2013).

206. *Crime Victim Services*, ARIZ. DEP'T PUB. SERVS., [http://www.azdps.gov/Services/Crime\\_Victims/](http://www.azdps.gov/Services/Crime_Victims/) (last visited Apr. 07, 2013).

207. *Id.*

208. Mike Scott, *Stimulus Bill to Funnel More than \$1 Billion to Public Fleets*, GOV'T FLEET (Feb. 2009), <http://www.government-fleet.com/article/print/story/2009/02/stimulus-bill-to-funnel-more-than-1-billion-to-public-fleets.aspx>.

209. Josh Kovner, *Domestic-Violence Offenders To Be Tracked Again*, THE HARTFORD COURANT (June 13, 2012), [http://articles.courant.com/2012-06-13/news/hc-domestic-violence-gps-0614-20120613\\_1\\_gpsdevice-alvin-notice-tiana-notice](http://articles.courant.com/2012-06-13/news/hc-domestic-violence-gps-0614-20120613_1_gpsdevice-alvin-notice-tiana-notice).

210. *Id.*

211. *Media Alert: Legislators Restore Funding for GPS Monitoring Program for Domestic Violence Offenders*, CONN. COALITION AGAINST DOMESTIC VIOLENCE, <http://www.ctcadv.org/Portals/0/Uploads/Documents/GPS%20Monitoring.pdf> ("A move by Connecticut lawmakers today to include funding for the continuation of the state's global positioning system (GPS) monitoring program in its budget implementation bill will significantly increase the safety of those victims at highest risk, according to the Connecticut Coalition Against Domestic Violence (CCADV). As the recognized leading voice for domestic violence victims and those who serve them in Connecticut, Coalition Executive

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These are just a handful of the various funding options available. Witness protection funds and dedicating marriage license fees or other fines are also potential sources.<sup>212</sup> Additionally, victims of domestic violence have made clear that they desire this protection and would most certainly be willing to pay for it if that were their only option.<sup>213</sup> Also, while GPS monitoring has some costs, the practice of not ordering it most likely costs more. One need only look to the annual costs this country bears from domestic violence: eight billion dollars every year for the direct medical and shelter costs, and lost productivity in the work force caused by domestic violence.<sup>214</sup> In addition, one of the primary reasons women go to homeless shelters is because they do not feel safe at home.<sup>215</sup> Shelters cost a lot more than ten dollars a day, even for one person, but especially when children are included.<sup>216</sup> GPS monitoring may well address this safety concern, allowing victims to stay in their homes, thereby reducing the number of women and children that require homeless shelters and services. Given the relatively low cost of GPS monitoring for domestic violence offenders and the multiple sources of funding, the joint concerns of cost and cost responsibility do not overcome the value and cost savings both in terms of dollars and lives.

In response to the third logistical concern regarding whether there are structures equipped to handle this sort of relief, naysayers need only look to current court practices in relation to parolees. For example, courts in California

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Director, Karen Jarmoc, today thanked the General Assembly for investing an additional \$510,000 in this meaningful project that saves lives.”).

212. *New GPS Device To Help Warn Domestic Violence Victims About Abusers*, CBS N.Y. (Nov. 1, 2011), <http://newyork.cbslocal.com/2011/11/01/new-gps-device-to-help-warn-domestic-violence-victims-about-abusers/>. In an interview with CBS reporter Dan Dahler, Staten Island District Attorney Dan Donovan spoke of the GPS tracking of respondents, which began in 2012, who have been found to violate a civil protection order. *Id.* Donovan said “If the abuser can’t pay, he’ll use witness protection funds.” *Id.*

213. See *Restraining Order Services*, GPS MONITORING SOLUTIONS, <http://www.gpsmonitoring.com/Restraining-Order-services.html> (last visited Mar. 15, 2013); Cherry Simpson, *GPS Tracking*, THE HOTLINE: SHARE YOUR VOICE (May 12, 2009, 11:34 AM), <http://www.thehotline.org/2009/05/gps-tracking/>, for examples of stories of women who used GPS monitoring for their protection and were satisfied with the results.

214. KEEPING AMERICA’S WOMEN MOVING FORWARD: THE KEY TO AN ECONOMY BUILT TO LAST, THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS i (April 2012), available at [http://www.whitehouse.gov/sites/default/files/email-files/womens\\_report\\_final\\_for\\_print.pdf](http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf).

215. Betty Reid Mandell, *Homeless Shelters: A Feeble Response to Homelessness*, 11 NEW POL., no. 3, 2007, available at <http://newpol.org/content/homeless-shelters-feeble-response-homelessness>.

216. For shelters with 20 beds or less the per diem rate is \$112.61. New York State Office of Children & Family Services, *New York City Domestic Violence Residential Programs 2011-12 Flat per Diem Rates Effective July 1, 2011, Through June 30, 2012*, 4 (October 21, 2011), [http://www.ocfs.state.ny.us/main/policies/external/OCFS\\_2011/ADMs/11-OCFS-ADM-11%20New%20York%20City%20Domestic%20Violence%20State%20Aid%20Rates%20for%20July%201%202011%20through%20June%2030%202012.pdf](http://www.ocfs.state.ny.us/main/policies/external/OCFS_2011/ADMs/11-OCFS-ADM-11%20New%20York%20City%20Domestic%20Violence%20State%20Aid%20Rates%20for%20July%201%202011%20through%20June%2030%202012.pdf). For shelters with 21 beds or more the per diem rate is \$91.32. *Id.*

have structures in place to monitor parolees' alcohol consumption.<sup>217</sup> Celebrity Lindsay Lohan was equipped with an ankle monitor that revealed her alcohol consumption in real time because a condition of her bail was to abstain from alcohol consumption.<sup>218</sup> If legal resources and structures exist to provide real-time monitoring of Lindsay Lohan's alcohol consumption, presumably in the name of public safety, structures also exist to use GPS monitoring to ensure that a husband who has taken a baseball bat to his wife's head does not have an additional opportunity to do so before being outfitted with a monitor.

As discussed above, courts already order GPS monitoring in some probation cases, and, in fact, courts order lifetime GPS monitoring for entire classes of sex offenders.<sup>219</sup> In the study regarding high-risk offenders in California, the services of two vendors, Satellite Tracking of People (or STOP) LLC and Pro Tech, were used to maintain the GPS program.<sup>220</sup> Additionally, California G4S Justice Services LLC, a security firm based in Atlanta, plans to run a GPS program in New York with the Richmond County District Attorney and operates a similar service in Chicago.<sup>221</sup> "We are pleased to work with D.A. Dan Donovan to implement this program. We have had great success with this type of notification process in other cities. It has been very effective in helping to keep victims safe," said David Winter, the northeast regional account manager for G4S.<sup>222</sup> This is just one example of the existing structures for this type of monitoring.<sup>223</sup>

Additional structures already in place for GPS monitoring exist in the private sector as well. In response to the number of children reported missing each year, (approximately 640,000 in 2007, in this country alone)<sup>224</sup> parents

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217. Nancy Dillon, *Lindsay Lohan Will Have to Wear an Alcohol-Monitoring Bracelet, Have Weekly Drug Tests: Judge*, DAILY NEWS (May 24, 2010, 12:33 PM), <http://www.nydailynews.com/entertainment/gossip/lindsay-lohan-wear-alcohol-monitoring-bracelet-weekly-drug-tests-judge-article-1.181305>.

218. *Id.*

219. See *GPS Update Survey*, INTERSTATE COMM'N ADULT OFFENDER SUPERVISION (Apr. 2007), [http://www.interstatecompact.org/Portals/0/library/surveys/SexOffender\\_GPS\\_Update\\_042007.pdf](http://www.interstatecompact.org/Portals/0/library/surveys/SexOffender_GPS_Update_042007.pdf); see, e.g., CAL. PENAL CODE §§ 269, 288.7, 3010, 3004 (DEERINGS 2008); MICH. COMP. LAWS ANN §§ 750.52(b), 750.52(n) (West 2004); MO. ANN. STAT. §§ 566.030, 566.060, 217.735 (WEST 2012); N.C. GEN. STAT. ANN. §§ 14-27.2(a), 14-27.4(a), 14-208.40(a); WIS. STAT. §301.48 (2009).

220. Tracy M. L. Brown et al., *Global Positioning System (GPS) Technology for Community Supervision: Lessons Learned*, CTR FOR CRIM. JUSTICE TECH., app. C, tbl.C-1 (2007), [http://www.in.gov/idoc/files/B\\_M\\_W\\_2007\\_GPS1.pdf](http://www.in.gov/idoc/files/B_M_W_2007_GPS1.pdf).

221. Press Release, Office of the District Attorney Richmond County, DA Donovan: New Program Uses GPS to Warn Domestic Violence Victims, Track Persistent Abusers (Oct. 31, 2011), available at <http://rcda.nyc.gov/pdf/press/2011/pr10312011.pdf>.

222. *Id.*

223. *GPS Update Survey*, *supra* note 219.

224. *NCIC Missing Person and Unidentified Person Statistics for 2007*, FED. BUREAU OF INVESTIGATION, NAT'L CRIME INFO. CTR., <http://www.fbi.gov/about-us/cjis/ncic/ncic-missing-person-and-unidentified-person-statistics-for-2007> (last visited March 12, 2013).

began to utilize GPS technology to safeguard their children.<sup>225</sup> Parents can purchase discrete necklaces, wristwatches, or tiny objects to place in shoes or backpacks, all containing a GPS chip.<sup>226</sup> The children's whereabouts are sent to a central monitoring system, which is run by a private company.<sup>227</sup> Parents are able to log on and observe their child's whereabouts and movements.<sup>228</sup>

The various structures, both public and private, that already conduct GPS monitoring, the relative low cost of the monitoring, and the multitude of funding sources available, all provide a response to the aforementioned logistical obstacles and demonstrate that these concerns do not warrant a categorical objection to GPS monitoring.

#### *F. Path Dependency*

Given that the aforementioned procedural, substantive, and logistical objections are not meritorious, one must examine the real reason behind courts' reluctance to impose GPS monitoring conditions. It seems highly unlikely that judges simply fail to realize the potential benefits of GPS monitoring. A more accurate explanation for the divergence is path dependency, or reliance on previous decisions.<sup>229</sup> Path dependency is prevalent in this context for many reasons, including the fact that this technology is relatively new, only having become fully operational in 1995 for the United States military.<sup>230</sup> Civilian use was permitted at this time, though at a mandatorily downgraded quality.<sup>231</sup> The year 2000 marked the end of the lesser quality mandate for civilians,<sup>232</sup> however, it was not until 2005 that a second civilian satellite was launched to

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225. See *GPS Child Locator—Look at What it Can Do*, MAPS-GPS-INFO.COM, (May 2, 2011), <http://www.maps-gps-info.com/gps-child-locator.htm>

226. *Id.*

227. *Id.* (“The tracking a [sic] device is monitored by a third party called the Location Service Provider.”)

228. *Id.*

229. See Dave Praeger, *Our Love Of Sewers: A Lesson in Path Dependence*, Daily Kos (June 15, 2008, 8:24 AM), <http://www.dailykos.com/story/2007/06/15/346883/-Our-Love-Of-Sewers-A-Lesson-in-Path-Dependence> (stating that path dependency is not merely inertia and explaining “how the set of decisions one faces for any given circumstance is limited by the decisions one has made in the past, even though past circumstances may no longer be relevant.”).

230. *The Global Positioning System for Military Users: Current Modernization Plans and Alternatives*, CONG. BUDGET OFFICE, ix (Oct. 2011), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-28-GPS.pdf>.

231. See Press Release, Office of Sci. and Tech. Policy Nat'l Sec. Council, Fact Sheet U.S. Global Positioning System Policy (March 29, 1996), available at <http://clinton4.nara.gov/textonly/WH/EOP/OSTP/html/gps-factsheet.html>.

232. Press Release, The White House Office of the Press Secretary, President Clinton: Improving the Civilian Global Positioning System (May 1, 2000), available at [http://clinton4.nara.gov/WH/New/html/20000501\\_2.html](http://clinton4.nara.gov/WH/New/html/20000501_2.html) (“The decision to discontinue Selective Availability is the latest measure in an ongoing effort to make GPS more responsive to civil and commercial users worldwide. —This increase in accuracy will allow new GPS applications to emerge and continue to enhance the lives of people around the world.” (quoting President Bill Clinton)).

improve user performance.<sup>233</sup> Thus, the widespread use and knowledge of the technology did not occur until the mid-2000s.<sup>234</sup> Police began using the technology to investigate criminal suspects and aid in evidence collection in the mid-2000s.<sup>235</sup> Police in one Virginia locality reported that they used GPS devices in nearly 160 cases from 2005 to 2007.<sup>236</sup> The first case to address a challenge to GPS use as part of a criminal investigation was not until 2003.<sup>237</sup> As such, many courts have not confronted the technology or its use, especially in the civil context.<sup>238</sup> Given that most domestic violence judges do not have experience with the technology, nor do their colleagues,<sup>239</sup> it is easier to simply maintain the status quo by doing what they have always done: entering no abuse, stay away, and no contact provisions without any GPS monitoring.<sup>240</sup>

Path dependency is a powerful influence—it is particularly powerful in domestic violence cases.<sup>241</sup> There are a huge number of cases, and the fastest way to get through them is to do the same thing in every one.<sup>242</sup> In August 2009 alone, the Domestic Violence Unit in the Superior Court of the District of Columbia had 1,011 pending civil protection order cases and contempt motions.<sup>243</sup> Two judges are appointed to the civil domestic violence calendar.<sup>244</sup> The high volume of cases incentivizes efficiency, and thus, results in

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233. *New Civil Signals*, GPS.gov, <http://www.gps.gov/systems/gps/modernization/civilsignals/#L2C> (last modified Feb. 6, 2013) (“The first GPS IIR(M) satellite featuring L2C launched in 2005. Every GPS satellite fielded since then has included an L2C transmitter.”).

234. *See id.*; *see also* Adam Liptak, *Court Case Asks if ‘Big Brother’ Is Spelled GPS*, N.Y. TIMES, Sept. 11, 2011, [http://www.nytimes.com/2011/09/11/us/11gps.html?\\_r=0](http://www.nytimes.com/2011/09/11/us/11gps.html?_r=0).

235. ALISON M. SMITH, CONG. RESEARCH SERV., RL 41663, LAW ENFORCEMENT USE OF GLOBAL POSITIONING (GPS) DEVICES TO MONITOR MOTOR VEHICLES: FOURTH AMENDMENT CONSIDERATIONS 2 n.11 (2011) *available at* <http://www.fas.org/sgp/crs/misc/R41663.pdf> (citing *Public Safety & Disaster Relief*, GPS.gov, *available at* <http://www.gps.gov/applications/safety> (last modified Feb. 17, 2006)).

236. *Id.*

237. *See State v. Jackson*, 150 Wash. 2d 251, 76 P.3d 217 (2003) (en banc).

238. *GPS Tracking In Intimate Violence Cases Uneven*, THE CRIME REPORT (May 9, 2009, 8:52 AM), <http://www.thecrimereport.org/news/cjn/gps-tracking-in-intimate-violence-cases-uneven> (“‘Until they know how GPS can be used and how successful it can be, judges are reluctant to order it because it’s unfamiliar,’ said Judge Peter Doyle of Newburyport, Ma., District Court. ‘Without seminars and convincing presentations, I wouldn’t have been comfortable ordering it.’”).

239. *Id.*

240. *See Ariana Green, More States Using GPS to Track Abusers and Stalkers*, N.Y. Times, May 9, 2009, at A1.

241. Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414 (2004).

242. *Facts About Domestic Violence*, Violence Against Women Online Res. (2010), <http://www.vaw.umn.edu/documents/inbriefs/domesticviolence/domesticviolence.html> (citing the large number of annual domestic violence incidents).

243. *See Domestic Violence Unit: Statistics for August 2009*, D.C. SUPERIOR COURT (Aug. 2009) [on file with the author].

244. *Id.*

repetitious treatment by the courts.<sup>245</sup> The period of time that a judge covers the civil domestic violence calendar is a mere six months.<sup>246</sup> This short time prevents judges from becoming well-versed in the governing law and, more importantly, in the unique issues present in cases of intimate abuse requiring a particular approach by the court.<sup>247</sup> The psychological effects of abuse by a loved one produce a host of issues not present in stranger abuse.<sup>248</sup> Unlike stranger violence, where there is usually an isolated incident to examine, intimate abuse often involves years of abuse and patterns of violence.<sup>249</sup> Additional testimony regarding the length of abuse and relationship dynamic is necessary to determine appropriate relief<sup>250</sup> and yet is at odds with the court's desire to speed things up. This places a huge burden on the victim, who is expected to expose and relive the most tragic events in her life quickly, in open court, in front of her abuser, who has through violence, intimidation, and psychological torture, successfully prevented the victim from coming forward in the past.

In many jurisdictions, individuals initially appointed to the bench are rotated and often assigned to family law and domestic violence courts.<sup>251</sup> Thus, the judges in the domestic violence unit are often fairly new—they get appointed to the bench, complete their six months on the domestic violence docket, and are reassigned to a different unit.<sup>252</sup> Given the cyclical nature of this rotation, domestic violence courts are most often presided over by judges with little experience with or understanding of domestic violence.<sup>253</sup> Inexperience often causes people to be risk averse and desirous of maintaining the status quo.<sup>254</sup> As such, a judge's inexperience makes him or her reluctant to try new things. It is simply easier and less risky to one's professional reputation to take the same steps as one's predecessors. This natural instinct is compounded by the fairly short period of time the judge presides over domestic violence cases. Because the judge will be transferred in a matter of months, there is little incentive for the judge to improve or change the system.

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245. *Id.*

246. *Id.*

247. *Id.*

248. Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343, 352, 394 (2007).

249. See KEEPING AMERICA'S WOMEN MOVING FORWARD, *supra* note 214, at 19.

250. See *id.* at 21.

251. See Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 YALE J.L. & FEMINISM 3, 32-33 (1999).

252. See DVCC 360, *Examining CT's Domestic Violence Courts*, 2 Verve, no. 4, April 2012 at 2, available at [http://www.dvccct.org/files.php?file=Images2012/Verve\\_Examining\\_CT's\\_DV\\_Courts\\_609575152.pdf](http://www.dvccct.org/files.php?file=Images2012/Verve_Examining_CT's_DV_Courts_609575152.pdf).

253. *Id.* (suggesting that a best practice should include non-rotating judges who specialize in domestic violence).

254. See *supra* note 238.

In part due to the above influences, domestic violence cases are largely form driven, which exasperates the routinized relief ordered. There are check-the-box petitions, check-the-box notice forms, and check-the-box orders.<sup>255</sup> The box format discourages supplementation and rogue requests.<sup>256</sup> There is a box on the form for stay away provisions, there is a box on the form for firearms, and there is a box on the form to vacate the home.<sup>257</sup> There is a two-line space for “other” relief where judges can write in any relief that is being granted for which there is no box to check.<sup>258</sup> Given that there is no box for GPS monitoring, if a judge wants to impose GPS monitoring, he or she must write it into the form and figure out the logistical issues.<sup>259</sup> That requires a lot more time, energy, and resolution to do, and it is simply easier to check the pre-existing boxes.

Finally, path dependency is particularly strong in the domestic violence context because the vast majority of litigants appear *pro se*.<sup>260</sup> It is unlikely that a *pro se* litigant would know about GPS monitoring, since it is not among the enumerated relief on the forms.<sup>261</sup> Even if they know about the technology, *pro se* litigants are likely unaware that they may ask for relief beyond what is identified on the forms and what they are told is available by court personnel while filing.<sup>262</sup> In fact, if they attempt to write in the request for GPS on the petition, the clerk would likely require the petitioner to fill out a new form without the GPS monitoring request because court personnel often view any deviation from the forms and norm as a violation of policy or court rules, despite no such rule or policy existing.<sup>263</sup>

Even assuming a *pro se* litigant survives the bureaucracy within the clerk’s office, she is generally in no position to convince a judge to grant novel relief.<sup>264</sup> Without knowing the exact statutory language permitting other relief

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255. See, e.g., DOMESTIC VIOLENCE UNIT, PETITION AND AFFIDAVIT FOR A CIVIL PROTECTION ORDER, available at <http://forms.lp.findlaw.com/form/courtforms/state/dc/dc000067.pdf> (last visited Aug. 20, 2012); SUPERIOR COURT OF D.C., available at <http://forms.lp.findlaw.com/form/courtforms/state/dc/dc000068.pdf> (last visited Aug. 20, 2012).

256. *Id.*

257. See, e.g., CIVIL PROTECTION ORDER FORM, *supra* note 270; N.Y. STATE UNIFIED COURT SYS., ORDER OF PROTECTION, available at <http://www.nycourts.gov/forms/familycourt/pdfs/gf-5a.pdf> (last visited Apr. 07, 2013).

258. *Id.*

259. *Id.*

260. Kristen Girard Morgan, *Legal Beat: Clinics Seek Volunteers During Domestic Violence Month*, Wash. Lawyer (October 2000), [http://www.dcb.org/for\\_lawyers/resources/publications/washington\\_lawyer/october\\_2000/1\\_egalbeat.cfm](http://www.dcb.org/for_lawyers/resources/publications/washington_lawyer/october_2000/1_egalbeat.cfm) (stating that 80 percent of litigants filing for civil protection orders in the District of Columbia were *pro se*).

261. See, e.g., *supra* note 257.

262. *Id.*

263. Epstein, *supra* note 251.

264. Morgan, *supra* note 260.

appropriate to the effective resolution of the matter, the *pro se* litigant is unable to explain to the judge why the relief is proper.<sup>265</sup> In addition, the *pro se* litigant is unlikely able to identify potential systems and programs whose funding and services would allow proper facilitation of the relief.<sup>266</sup> In sum, courts may give procedural or substantive reasons for why they do not issue GPS monitoring as relief, but a more accurate explanation is one of path dependency.

## V. NORMATIVE IMPLICATIONS

The most obvious normative implications drawn from this Article include that GPS monitoring should be imposed more than it currently is, and that it is a valuable tool to help enforce protection orders and reduce future violence by making it more than just a piece of paper. On average, more than three women and one man are killed every twenty-four hours by intimate partners.<sup>267</sup> This is just one of the many relationships that constitute domestic violence; it does not even factor in the number of adults and children killed by their parents, step-parents, or siblings.<sup>268</sup> Not only would this technology save lives, it would also allow victims to feel and be more secure. There are additional normative implications for domestic violence advocates. Given that path dependency is a large obstacle to GPS monitoring, it is extremely important and valuable for domestic violence advocates to engage in efforts to reduce that dependency or to create a new path. There are practical ways to do so on multiple fronts.

The starting place likely involves efforts outside the courtroom. Getting society, including judges, to recognize the severity of domestic violence is necessary to reduce path dependency. Successful examples of this occurred in Cincinnati and Baltimore where resolutions were passed declaring that freedom from domestic violence is a fundamental human right.<sup>269</sup> Having to face the obvious truth that freedom from violence is a human right, regardless of one's relation to the abuser, courts will increasingly be pressured into deviating from the status quo of providing minimal protections.<sup>270</sup> One hopes instead that

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265. *See id.*

266. *See id.*

267. *Domestic Violence Statistics*, DOMESTIC VIOLENCE RES. CTR. (2013), available at <http://www.dvrc-or.org/domestic/violence/resources/C61/>.

268. 44, 289 people were killed by non-spouse family members from 1980-2008. *See Cooper & Smith, supra* note 1, at fig.24.

269. Baltimore, Md., Council Bill 12-003rR (2012); Cincinnati, Ohio, Res. 47 (2011).

270. *See generally* Anthony G. Brown, *Maryland's New Tools Against Domestic Violence*, THE BALT. SUN (October 1, 2012), [http://articles.baltimoresun.com/2012-10-01/news/bs-ed-brown-violence-20121001\\_1\\_domestic-violence-awareness-abuser-victims-and-survivors](http://articles.baltimoresun.com/2012-10-01/news/bs-ed-brown-violence-20121001_1_domestic-violence-awareness-abuser-victims-and-survivors); Albany Law School, *Albany City and County Declare Freedom from Domestic Violence to be a Fundamental Human Right*, AlbanyLaw.edu, <http://www.albanylaw.edu/about/news/current/Pages/Freedom-from-Domestic-Violence-Fundamental-Human-Right.aspx>; Jennifer Cunningham-Minnick, Nick Maull & Josh Lefevre, *City Council Takes Stand Against Domestic Violence*, CINCINNATI.COM (Oct. 18, 2011, 5:31 PM), <http://cincinnati.com/blogs/letters/2011/10/18/city-council-takes-stand-against-domestic-violence/>; Arlene M. Roberts, *Domestic Violence as a Human Rights*

courts will seek to ensure that their residents' fundamental human rights are upheld by increasing the relief necessary to stop repeat violence.

Advocates can also work with the state judicial councils and other committees responsible for creating and updating forms used in domestic violence protection orders to ensure that there is a box for GPS monitoring. Consistent with the path dependency theory, this seemingly minor change of adding a box on the form can, over time, result in a huge delta by changing the direction of momentum. The momentum is changed as these seemingly small changes over time have a multiplying effect. Using this framework for looking at the basic construct that past decisions matter and that small changes repeated over time can make a huge difference, the fact of having a box to check will make it easier for judges to award this relief and will presumably go a long way towards reducing the burden on judges who might otherwise be unwilling to impose GPS monitoring conditions.

Additional ways to create a new path exist. There would be huge benefits to the adoption of a pilot program in selected courts as a means of showing judges and legislatures that GPS monitoring programs are feasible, effective, and easy to apply. Once the initial barrier to GPS monitoring is overcome, courts will be far more willing to impose GPS monitoring in non-pilot program cases.

Education is another way of reducing path dependency.<sup>271</sup> Given the high turnover of judges in domestic violence courts, there are a large number of training programs where judges and domestic violence advocates work together to devise effective strategies in these cases.<sup>272</sup> Domestic violence advocates need to utilize those opportunities to both introduce judges to the possibility of GPS monitoring and educate them regarding its ease and effectiveness. Once judges know there are existing structures in place, their reluctance to start down a new path will diminish.

Inside the courtroom, lawyers should consider a carefully planned strategy of incremental change as a means to persuade judges to impose GPS monitoring, similar to what Justice Marshall and the NAACP did in their legal challenges to segregation that ultimately led to *Brown v. Board of Education*.<sup>273</sup> Recognizing that immediately filing a suit claiming that segregation was unconstitutional would be futile given the current political dynamic, Marshall began his quest by enforcing the "separate-but-equal" rule, first by demanding

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*Violation*, HUFFINGTON POST (Jan. 12, 2009, 5:52 PM), [http://www.huffingtonpost.com/arlene-m-roberts/domestic-violence-as-a-hu\\_b\\_156788.html](http://www.huffingtonpost.com/arlene-m-roberts/domestic-violence-as-a-hu_b_156788.html).

271. See generally Kenneth J. Meier et al., Path Dependency and Organizational Performance: Representative Bureaucracy, Prior Decisions, and Academic Outcomes, Prepared for Delivery at the 59<sup>th</sup> National Meeting of the Midwest Political Science Association (Apr. 2001), available at <http://teep.tamu.edu/pubs/midwest01.pdf>.

272. See Robyn Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work: Lessons from New York*, 42 A.B.A. JUDGES' J. 5, 5-6 (2003), available at <http://www.vaw.umn.edu/documents/whatmakesdvcourtwork/whatmakesdvcourtwork.pdf>.

273. Wendy B. Scott, *McKissick v. Carmichael Revisited: Legal Education in North Carolina Through the Lens of Desegregation Jurisprudence*, 34 N.C. CENT. L. REV. 38, 39-41 (2011).

that black schools have the same quality of books and resources as white schools.<sup>274</sup> Compliance with this demand was incredibly costly to the state, as was Marshall's second round strategy—demanding that black and white teacher salaries be comparable.<sup>275</sup> In combination, these demands led supporters of the “separate-but-equal” law to realize that its continuation would possibly be cost prohibitive.<sup>276</sup> It was only then that Marshall turned to the courtroom and ultimately the unconstitutionality of the “separate-but-equal” doctrine.<sup>277</sup> He carefully selected the suits to file and knew that most would be lost initially.<sup>278</sup> It was only after a careful, deliberate, and systematic approach of incremental changes to the political climate and judicial attitudes that he ultimately succeeded in having segregation and “separate-but-equal” laws deemed unconstitutional in schools.<sup>279</sup> This allowed a logical transition for Marshall to move to other areas of life subject to public scrutiny.<sup>280</sup>

In the same way Marshall eased into desegregation, prudent lawyers should push stricter enforcement of protection orders until the logical, most cost effective option for the court is GPS monitoring. Even if the request for GPS monitoring is denied in initial cases, domestic violence advocates still have a card to play. Lawyers need to take a long-term view of their clients' welfare. Advocates must follow up in those cases and see if the order is violated, or if any of the clients for whom requests for GPS monitoring were denied were subsequently killed by their abusers in situations where GPS monitoring would have saved their lives. If so, that should become the opening paragraph in the next brief requesting GPS monitoring on behalf of a client.

There is no doubt that if domestic violence advocates asked for GPS monitoring in every case, no matter how meritorious that request might be, judges will not do it—the path dependency is too great. Judges are not willing to adopt a wholesale change to the way things consistently have been done for the last 25 years. However, if an attorney selects a particularly egregious case where the violence is severe, the client is sympathetic, and the respondent is entirely unsympathetic, with a long history of violence and perhaps even a violation of previous protection orders; the chances are higher of the likely success of putting a comprehensive brief requesting GPS monitoring in front of the judge and explaining why such relief would be especially beneficial. Once the initial inroad is made, lawyers can start requesting this relief in slightly less egregious cases. Once judges get used to imposing GPS monitoring, a new path is created and can be used to obtain GPS monitoring in more routine cases where it would be beneficial.

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274. *Id.* at 42.

275. *Id.* at 45.

276. *Id.* at 43.

277. *Id.* at 42-43.

278. *See generally id.* (detailing Marshall's litigation strategy and perseverance to end racial desegregation).

279. Scott, *supra* note 273, at 57.

280. *Id.* at 39.

An alternative normative implication is having a law that requires judges to evaluate and order this relief in certain circumstances. This would certainly overcome path dependency and would have the benefit of saving lives because, presumably, this relief would be applied more often.<sup>281</sup> While this would be better than the status quo, it would also create the illusion that a new law is necessary in order to provide this injunctive relief. This overlooks the fact that this type of injunctive relief is already provided for in most states' protection order statutes as relief appropriate to the effective resolution of the matter and for the petitioner's safety.<sup>282</sup> A large drawback to this legislation is the narrowing effect it has on people's perceptions of when this relief is available. If the above suggestions are implemented to reduce path dependency, women everywhere, regardless of jurisdiction, will be safer.

#### CONCLUSION

"This program will apply the power of technology and creative thinking to intervene in this all-too-familiar cycle of violence. Most importantly, it gives victims of domestic violence another layer of protection at a critical point in their lives."<sup>283</sup> In light of the annual cost domestic violence continues to impose on our society, both in monetary terms and lives lost, we must attempt to rectify the problems inherent in the law's current approach to domestic violence. In sum, path dependency contributes largely to our system's failure to adequately respond to domestic violence, but recognition of this will help lead to developing solutions, such as an increase in GPS monitoring, to better combat the underlying problem of domestic violence.

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281. See Green, *supra* note 240, at A1.

282. Klein & Orloff, *supra* note 91, at 912, n.691 (citing to the state statutes that "contain catch-all provisions that authorize courts to offer domestic violence a broad range of range").

283. Mike Durkin, *GPS to Track Domestic Violence Offenders in Minnesota*, MYFOXPHILLY.COM (Nov. 01, 2012, 10:41 AM), <http://www.myfoxphilly.com/story/19975679/gps-tracking-domestic-violence-offenders-in-minnesota?clienttype=printable> (quoting Ramsey County (Minnesota) Attorney John Choi).