

A Racial Justice Perspective on Monitoring Domestic Violence Offenders Using GPS Systems

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The very legislation meant to provide greater protection to victims of domestic violence could actually exacerbate the conditions that facilitate its occurrence within certain minority communities.¹ While some women who are terrified by their abusers will seek help from law enforcement as a result of this legislation, patterns of domestic violence in the black community suggest that using GPS to monitor offenders will silence many female victims in that community, where domestic violence is both more prevalent and is more likely to lead to homicide than in white communities.² By failing to build appropriate safeguards into this policy, law enforcement officials with ulterior motives will face an added incentive to determine disproportionately that offenders from targeted racial groups warrant GPS monitoring. This might include the desire to constantly monitor black offenders, whom they perceive as more likely to engage in other illicit activities.

As an initial matter, studies of domestic violence in the black community have revealed that there are unique factors associated with black male offenders: “The situational context in which intimate partner violence occurs among African Americans is, in many ways, a product of the various structural forces (e.g., institutional racism, cycles of chronic underemployment and unemployment, poverty, etc.) that constrict the lives of African Americans.”³ “Frustrated masculinity syndrome” has been used “to describe how some African American men responded to racial prejudice and various institutional barriers that blocked them from having equal access to the desig-

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¹ While this legislation is likely to negatively impact many minority populations, including Latinos, Native Americans and immigrants, this paper will focus on African Americans.

² The average annual rate of nonfatal intimate partner violence from 1993 to 2004 was higher for black females than for white females. SHANNAN CATALANO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES (2006), <http://www.ojp.usdoj.gov/bjs/intimate/victims.htm> (last visited Oct. 31, 2007). Black women are also more likely to suffer the most severe forms of violence in comparison to most other groups of women. Chicago Foundation for Women, What Will It Take? Types of Violence, <http://www.cfw.org/netcommunity/document.doc?&id=97> (last visited Oct. 31, 2007).

³ Robert Hampton, et al., *Domestic Violence in the African American Community: An Analysis of Social and Structural Factors*, VIOLENCE AGAINST WOMEN 533, 542 (2003) (discussing various structural, cultural-community, and situational reasons (overshadowed by institutional racism) why intimate partner abuse is more prevalent in the African American community).

nated legitimate means to achieve manhood through conventional, societal avenues.”⁴

The pressures of an oppressive and socially stratified society have elicited a certain response from black women as well, many of whom feel they cannot subject their partner to an oppressive and racist institution by seeking help through the legal system.⁵ In addition, in a society where many black men already feel frustrated and emasculated, physically imposing a GPS unit on their bodies so that the government can constantly monitor their behavior will only serve to heighten their sense of powerlessness. Such an effect will not go unnoticed by their partners debating whether to seek help from law enforcement officials, and it may tilt the fragile scale away from pursuing help from official authorities. Moreover, any reputational harm or difficulty this system creates for offenders in their hunt for gainful employment will only further the conditions that bred abuse in the first place.

Battered women of color will also be considered the racial bias inherent in the criminal justice system and civil system.⁶ Even where equality in process should be at its apex, there is discrimination. Justice Scalia, in discussing the death penalty, wrote that “[t]he unconscious operation of irrational sympathies and antipathies, including racial, upon jury decisions, and [hence] prosecutorial decisions, is real, acknowledged in the decisions of this court, and ineradicable.”⁷ Our civil system, which subscribes to a lesser evidentiary standard, is likely to be similarly infected. In fact, a clinical professor at Boston University candidly spoke of her realization that she and one of her law students had unconsciously relied on racial stereotypes to construct their legal strategy in a domestic violence case: “Without even being conscious of it, we both had assumed that the judge would be more likely to restrain a black man than a white man. Without even thinking about it, we had structured the cultural stereotype of the violent, over-sexed black man into our vision of the case. We were using racism for strategic advantage.”⁸ This unfortunate reality requires a concerted effort on the part of policy makers to

⁴ *Id.* at 539 (“One way in which such men may seek to cope with their lack of success in the pursuit of the traditional male role is through the adoption of alternative definitions of manhood.”).

⁵ *Id.* at 548 (“The historical legacy of racial oppression and the contemporary structural position of African Americans place many African American women in a tragic double bind . . . [H]ow do they seek redress for the violence if doing so opens their abuser to systemic abuse from White, racist institutions?”).

⁶ See Jason Borenstein, *The Death Penalty: Conceptual and Empirical Issues*, 2 *CARDOZO PUB. L. POL’Y & ETHICS J.* 377, 384 (2004) (“Studies continue to show that minorities are more likely to receive a death sentence than white defendants, especially in cases where the victim of a murder is white.”); Arthur L. Rizer III, *Justice in a Changed World: The Race Effect on Wrongful Convictions*, 29 *WM. MITCHELL L. REV.* 845 (2003).

⁷ Kevin M. Doyle and Charles J. Hynes, *Catholics and the Death Penalty Panel Discussion*, 44 *J. CATH. LEGAL STUD.* 297 (2006) (citing STUART BANNER, *THE DEATH PENALTY* 289, 290 (2002) (quoting Memorandum from Antonin Scalia, Associate Justice, United States Supreme Court, to the Conference of Supreme Court Justices (Jan. 6, 1987))).

⁸ Leslie E. Garvey, *The Race Card: Dealing with Domestic Violence in the Courts*, 11 *AM. U. J. GENDER SOC. POL’Y & L.* 287, 306 (2003).

sensitively design any domestic violence legislation that incorporates GPS monitoring with the appropriate procedural safeguards.

What is even more telling is the ease with which one may obtain a civil protective order. This suggests the potential for serious civil liberties violations.⁹ For these reasons, we must avoid legislation that supplies criminal-like sanctions based on a civil law process.¹⁰ Because the controlling Supreme Court precedent holds that a disproportionate impact on racial minorities without more does not violate the Constitution, it would be extremely difficult to prove that disparate GPS enforcement unjustly denies equal protection of the laws for racial minorities.¹¹ Therefore, a policy that includes a GPS system must be designed to minimize racially disparate impact before being enacted or enforced.

Further, while the lax burden of proof required to secure a protective order correlates to the nature of the civil infraction, it should nevertheless make us wary of imposing a sanction that calls for GPS monitoring. Dangerousness assessments,¹² which have been proposed as a way to determine whether batterers will qualify for GPS monitoring, risk disparate enforcement and have “repeatedly been shown in the psychological and psychiatric literature” to be “notoriously unreliable.”¹³ Professor Rosenfeld suggests that the dangerousness assessment can easily be administered at the scene of the incident: “When called to a domestic violence scene, police can easily screen for these and other factors.”¹⁴ Yet, there is ample opportunity for abuse at this stage. This proposed policy grants law enforcement officials the

⁹ The process for getting a civil protective order is as follows: (1) the victim goes before a judge or magistrate judge in an ex parte hearing (an abridged court hearing where the alleged abuser is not present) to share her story and is usually issued a temporary restraining order for a few days or a week; (2) within ten days of this initial court proceeding, the victim will usually appear before a judge in a full court hearing, where the defendant is allowed to appear, and where the judge hears both sides of the story. Restraining orders are usually extended to a year. Either party can have a lawyer present, but this is not required; additionally, the judge may choose not to hear from a witness because of the short amount of time given to each hearing. See WomensLaw.org, How to Get an Abuse Prevention Order, http://www.womenslaw.org/MA/MA_how_to.htm (last visited Oct. 31, 2007).

¹⁰ See Fred Medick, Comment, *Why GPS Monitoring of Domestic Violence Defendants at the Civil Stage Does Not Violate Defendants' Jury Trial Rights Under the U.S. and Massachusetts Constitutions*, 43 HARV. C.R.-C.L. L. REV. 281 (2008).

¹¹ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.”) (citations omitted).

¹² See 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. 261 (2008) (discussing dangerousness assessments).

¹³ Jason Borenstein, *The Death Penalty: Conceptual and Empirical Issues*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 377, 391 (2004) (citations omitted); see also Douglas Mossman, *Dangerousness Decisions: An Essay on the Mathematics of Clinical Violence Prediction and Involuntary Hospitalization*, 2 U. CHI. L. SCH. ROUNDTABLE 95 (“The inadequacy of clinical predictions of violence has been the subject of extensive literature . . .”) (citations omitted).

¹⁴ Rosenfeld, *supra* note 12, at 267.

discretion to screen the offender's level of dangerousness during the most heated moment between the couple. Law enforcement officials make this determination without the help of well-trained mental health professionals (or even judges).

As a result, before legislation of this type is used as a model by other states, we must ensure that it is not unjustly enforced against people of color and that it is actually benefiting the women it is trying to protect. There are certain concrete practices that can be incorporated into this policy to avoid cultural and racial bias and to ensure that the use of the GPS system in protecting against domestic violence does not become the pretext for constant monitoring of black batterers. For example, a victim could be given the option of deciding whether to seek a protective order that includes GPS monitoring. It is true that many of the women who decide to cancel their restraining orders or fail to complete the process are the ones in gravest danger, having caved to pressure from abusive partners. Nevertheless, allowing choice will empower battered women, without allowing fear or concern for their abusers to control their decisions to seek help. If the GPS monitoring will afford the protection and peace of mind some battered women need before seeking help, then having the option available will be beneficial. Those women who would otherwise not choose to seek a restraining order because of the GPS requirement will still be able to seek a traditional restraining order.

Further, in educating women about this policy, it is important that it is discussed in a culturally sensitive way,¹⁵ keeping in mind the myriad considerations these victims must factor into a decision to seek help from officials. Such considerations include their poverty, lack of education, and the burden placed on them by their racial or ethnic community to protect their men against the "system."¹⁶ Training a diverse law enforcement team and providing for a diverse selection of mental health professionals will further legitimate the system and fight the perception of a racist and oppressive governmental institution. Moreover, if the policy must rely on the dangerousness assessment, having the test administered at a later stage by a trained mental health professional might eliminate some potential for bias. Providing information to battered women on job training programs and on ways to

¹⁵ See Shondrah Tarrezz Nash, *Through Black Eyes: African American Women's Constructions of Their Experiences with Intimate Male Partner Violence*, 11 VIOLENCE AGAINST WOMEN 1420 (2005).

¹⁶ Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245-46 (1991). Crenshaw states:

Many women of color, for example, are burdened by poverty, child care responsibilities, and the lack of job skills. These burdens, largely the consequence of gender and class oppression, are then compounded by the racially discriminatory employment and housing practices women of color often face, as well as by the disproportionately high unemployment among people of color that makes battered women of color less able to depend on the support of friends and relatives for temporary shelter.

(citations omitted). *Id.*

access governmental benefits, such as housing assistance, will help to assuage distrust of the system and help domestic violence victims to function financially without their abusers. Finally, to protect against the incentive to find certain minority offenders highly dangerous, the policy can require GPS technology that cabins the government's ability to monitor batterers to only those areas that are restricted under the restraining order.¹⁷

¹⁷ See Leah Satine, *Maximal Safety, Minimum Intrusion: Monitoring Civil Protective Orders Without Implicating Privacy*, 43 HARV. C.R.-C.L. L. REV. 271, 272 (2008) ("GPS technologies can feasibly be modified such that only violations of court orders are known. Multiple methods of accomplishing permissible monitoring exist. The two most promising methods are reverse tagging and filtering. . . .").

