

GPS Monitoring and Constitutional Rights

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Both Massachusetts Senate Bill No. 1351¹ and Florida's Jessica's Act² empower the state to require certain individuals to wear Global Positioning System (GPS) devices that record their movements and transmit information to the police in order to prevent those individuals from entering forbidden areas. Jessica's Act mandates that individuals convicted of certain sexual offenses against children under the age of twelve be subject to lifetime electronic monitoring,³ and states such as Pennsylvania and California have enacted similar provisions.⁴ The Massachusetts bill allows courts to impose GPS tracking on domestic abusers⁵ who have violated restraining orders and been identified as dangerous after an assessment.⁶ While the two laws both concern GPS tracking of criminals to prevent repeat offenses, they differ significantly in their constitutional implications. Specifically, while statutes allowing GPS tracking of sex offenders will likely face constitutional challenges on due process and Fourth Amendment grounds, the Massachusetts statute will likely avoid these concerns by individualizing the application of tracking in terms of both the identity of the wearer and the area where the wearer is tracked.

The Massachusetts statute will avoid the due process challenges that Jessica's Act and its siblings may face due to class-based tracking. Statutes imposing GPS tracking on all sex offenders residing in a given state will likely face due process challenges based on the absence of individualized assessments, similar to those faced by other statutes imposing other requirements or restrictions on sex offenders.⁷ In *Connecticut Department of Public*

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¹ S. 1351, 185th Gen. Ct., Reg. Sess. (Mass. 2007).

² 2005 Fla. Sess. Law Serv. Ch. 2005-28 (H.B. 1877) (West).

³ See 2005 Fla. Sess. Law Serv. Ch. 2005-28 (H.B. 1877) (West); FLA. STAT. ANN. § 947.1405 (West 2007).

⁴ See CAL. PENAL CODE § 1202.8 (West 2007); 42 PA. CONS. STAT. § 9798.3 (2007).

⁵ Because statistics indicate that 85% of intimate partner violence is committed against women by their partners, largely in heterosexual relationships, I use male referents for the batterer or abuser, and female referents for the victim. Further, femicide statistics bear out the prevalence of murders of female intimate partners by their male partners. See CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, INTIMATE PARTNER VIOLENCE, 1993-2001 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf>. [hereinafter RENNISON, INTIMATE PARTNER VIOLENCE].

⁶ S. 1351, 185th Gen. Ct., Reg. Sess. (Mass. 2007).

⁷ Restrictions on sex offenders that lack individualized assessments have also been challenged on the grounds that they constitute ex post facto punishments. See, e.g., *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (upholding an Iowa statute that prevented anyone convicted of a sexual offense against a minor from living within 2,000 feet of a school or childcare facility).

Safety v. Doe,⁸ for example, plaintiffs challenged a Connecticut law that required all convicted sex offenders to register with the Department of Public Safety when released from prison and required the department to post a public registry with their names, pictures, addresses, and physical descriptions on the Internet.⁹ The plaintiffs argued, in part, that the law violated their due process rights because it publicly stigmatized them without a hearing to assess their current dangerousness.¹⁰

The Massachusetts bill would avoid these concerns by providing just such an individualized dangerousness assessment. Section 1 of the statute requires the executive office of public safety to adopt a “uniform dangerousness assessment protocol” to determine which abusers are most likely to injure their domestic partners and thus to decide who should be fitted with a GPS tracking device.¹¹ Moreover, the statute, unlike residency restrictions on or GPS tracking of sex offenders, also individualizes the area from which the wearer is excluded. Laws limiting the residence or movement of sex offenders, for example, will exclude them from types of areas such as schools or child care facilities.¹² In contrast, the Massachusetts law would exclude the tracked domestic abuser only from particular areas frequented by his victim; the statute specifies that the GPS device transmits and records the abuser’s location only “in the event the attacker enters [the victim’s] household, building, or workplace or household or educational facility of a minor child.”¹³ Thus, the area from which the abuser is excluded would be individualized and, moreover, would presumably be identical to the area from which the restraining order alone would ban him. This individualization in terms of both who must wear the tracker and where they are excluded, would render the statute immune from due process challenges that have embattled statutes imposing requirements on sex offenders.

The Massachusetts bill would also escape challenges that Jessica’s Act may face based on Fourth Amendment rights against unreasonable search

⁸ 538 U.S. 1 (2003).

⁹ Conn. Gen. Stat. §§ 54-251, 54-252, 54-254, 54-257, 54-258 (2001).

¹⁰ Respondent’s Brief at 17-18, Conn. Dep’t of Pub. Safety, 538 U.S. 1 (2003) (No. 05-428). Note that the Supreme Court ultimately rejected the due process claim on the grounds that the underlying statute did not consider current dangerousness as a relevant factor in deciding whose identity would be publicized, and the plaintiffs had not proven that the substantive law was constitutionally defective. See Conn. Dep’t of Pub. Safety, 538 U.S. at 7.

¹¹ S. 1351, 135th Gen. Ct., Reg. Sess. § 1 (Mass. 2007).

¹² See, e.g., GA. CODE ANN. § 42-1-15 (2006) (prohibiting registered sex offenders from living or loitering “within 1,000 feet of any child care facility, church, school or area where minors congregate” including playgrounds, school bus stops and parks); TENN. CODE ANN. § 40-39-211 (2007) (prohibiting registered sex offenders from living or working within 1,000 feet of any school, recreation center, child care facility, playground, public athletic field, or public park). Some state laws do provide some measure of individualized assessment of the areas from which sex offenders are excluded in addition to the class-based areas. See, e.g., IND. CODE ANN. § 35-42-4-11 (West 2006) (prohibiting certain types of sex offenders from living within one mile of their victims, but also prohibiting them from living near certain areas frequented by children such as schools and parks).

¹³ S. 1351, 185th Gen. Ct., Reg. Sess. § 7 (Mass. 2007).

and seizure. In *Katz v. United States*,¹⁴ the Supreme Court established that an individual has a right against unreasonable search and seizure in areas where he has “exhibited an actual (subjective) expectation of privacy,” and that expectation is “one that society is prepared to recognize as ‘reasonable.’”¹⁵ The Court has also held that the government violates that right when, without a warrant, it uses various kinds of technology to gain information about acts within such a constitutionally protected space.¹⁶ Although the Supreme Court has not yet issued a ruling dealing specifically with GPS tracking devices,¹⁷ sex offender GPS statutes will likely implicate the tracked individual’s Fourth Amendment rights because they require the wearer to wear the device continuously,¹⁸ including in protected areas. Indeed, the District Court for the District of Columbia has reasoned along just these lines in the context of car tracking and found that although an individual has no constitutional protection against GPS tracking of her car on public roads, tracking that continued while the car was in a constitutionally protected area, such as a garage, would violate her Fourth Amendment rights.¹⁹

In contrast, the Massachusetts statute will not implicate the tracked individual’s right against unreasonable search and seizure because no tracking will occur while the individual is in a constitutionally protected space. In order for the Fourth Amendment to protect a space, the individual must have a subjective expectation of privacy, and that expectation must be reasonable.²⁰ By Section 7 of the statute, the GPS device will only transmit and record data when the wearer has entered a forbidden zone.²¹ An abuser cannot possibly have an expectation of privacy in areas from which he is legally excluded by a restraining order. The statute will therefore not implicate the abuser’s Fourth Amendment right against unreasonable search and seizure. Thus, individualizing the area where the abuser’s movements are tracked and recorded will prevent the Massachusetts statute from facing the same Fourth Amendment challenges as statutes allowing for the continuous GPS tracking of sex offenders.

¹⁴ 389 U.S. 347 (1967).

¹⁵ *Id.* at 361.

¹⁶ See *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that police violated the Fourth Amendment when, without a warrant, they used thermal imaging to scan a private home); *United States v. Karo*, 468 U.S. 705 (1984) (finding that using a beeper to identify the location of an item within a home without a warrant violated the Fourth Amendment).

¹⁷ Lower courts have held, however, that GPS tracking does not per se violate constitutional rights against unreasonable search and seizure. See, e.g., *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007).

¹⁸ See, e.g., CAL. PENAL CODE § 1202.8(b) (West 2007); Jessica’s Act, 2005 Fla. Sess. Law Serv. Ch. 2005-28 (H.B. 1877) (West); 42 PA. CONS. STAT. § 9798.3 (2007). A national version of Florida’s law called the Jessica Lunsford Act was proposed. See H.R. 1505, 109th Cong. (2005).

¹⁹ *United States v. Jones*, 451 F. Supp. 2d 71, 88 (D.D.C. 2006).

²⁰ *Katz v. United States*, 389 U.S. 347, 361 (1967).

²¹ S. 1351, 185th Gen. Ct., Reg. Sess., § 7 (Mass. 2007).

Massachusetts Senate Bill No. 1351 will avoid the due process and Fourth Amendment challenges that laws like Jessica's Act will likely face because it individualizes GPS tracking in terms of both who is tracked and where tracking occurs.