Sex, Gadgets, and the Constitution—A Look at the Massachusetts Sex Offender GPS-Tracking Statute

"Should wild beasts break out of circus cages, a whole city would be mobilized instantly. But depraved human beings, more savage than beasts, are permitted to rove America almost at will."[1]

I. INTRODUCTION

Sex offenders are some of the most hated and feared members of our society.[2] This revulsion towards sex offenders is because they are considered more likely than other criminals to offend again.[3] Accordingly, the public seeks to strengthen legislation that imposes harsher penalties upon them.[4] While such proposed legislation is often used by politicians to garner popular support, the real impetus for change in sex offender legislation usually comes about after the commission of a few serious, high-profile sex crimes.[5]

1. J. Edgar Hoover, *How Safe Is Your Daughter?*, THE AM. MAG., July 1947, at 32 (commenting on danger sex offenders pose).

2. *See* Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 506 (1998) (declaring sex offenders "pariahs of our society"); Megan A. Janicki, Note, *Better Seen than Herded: Residency Restrictions and Global Positioning System Tracking Laws for Sex Offenders*, 16 B.U. PUB. INT. L.J. 285, 285-86 (2007) (noting society's hatred for sex offenders).

3. *See* Jean Peters-Baker, Comment, *Challenging Traditional Notions of Managing Sex Offenders: Prognosis Is Lifetime Management*, 66 UMKC L. REV. 629, 645 (1998) (describing studies demonstrating high recidivism rate for sex offenders); *see also* Smith v. Doe, 538 U.S. 84, 103 (2003) (acknowledging sex offenders present high risk for recidivism). The Bureau of Justice Statistics contradicts this theory by showing that sex offenders had a lower re-arrest rate than nonsex offenders over the three-year period following their release from prison. *See* PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, at 2 (2003), *available at* http://www.bjs.gov/content/pub/pdf/rsorp94.pdf, *archived at* http://perma.cc/532H-PX9D (finding forty-three percent of sex offenders arrested again, compared to sixty-eight percent for nonsex offenders). The released sex offenders, however, were four times more likely than the released nonsex offenders to be arrested again for a sex crime. *See id*. at 1 (highlighting convicted sex offenders' sex crime recidivism rate).

4. *See* Eric Ostermeier, *Pawlenty Proposal To Get Tough on Sex Offenders Likely To Have Huge Public Support*, SMART POLITICS (Feb. 9, 2010), http://blog.lib.umn.edu/cspg/smartpolitics/2010/02/pawlenty_proposal_to_get_tough.php, *archived at* http://perma.cc/S67G-DDEL (noting poll in which seventy-three percent of respondents supported tougher sentences for sex offenders).

5. *See, e.g.*, Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 66 (1998) (observing passage of sexual predator laws of 1990s as following high-profile sexual murders); Edwin H. Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142, 143 (1950) (asserting enactment of sexual psychopath laws as stemming from few serious sex crimes); Adan Soltren, Note, *Predators in Paradise: Puerto Rico's Recent Sex Offender Problems and the Federal Government's Ill Suited Solutions*, 18 CARDOZO J.L. & GENDER 801, 803 (2012) (acknowledging sex offender registration laws as spurred by several horrific sex attacks).

The origin of sex offender legislation can be traced back to the sexual psychopath laws of the 1930s, which called for the indefinite involuntary confinement of anyone deemed to be a sexual psychopath.[6] These early laws were eventually succeeded by the sexual predator laws of the 1990s.[7] In addition to civil commitment, the sexual predator laws created strict registration requirements for sex offenders and allowed for community notification.[8] Changes in sex offender legislation continued in the 2000s, when states passed laws that included residency restrictions and permitted global positioning system (GPS) tracking of released sex offenders.[9]

As of 2013, forty-one states had enacted statutes that authorize the electronic monitoring of sex offenders.[10] Each GPS-tracking statute, however, varies in how it is written and applied.[11] Moreover, the Supreme Court of the United States has only recently held that this electronic monitoring is a search under the Fourth Amendment, but it has yet to address the many other constitutional questions that GPS statutes pose.[12] Massachusetts is one of the states that has passed a sex offender GPS-tracking statute.[13] Still, while the Massachusetts Supreme Judicial Court (SJC) has referred to the attaching of an electronic monitoring device as a "serious, affirmative restraint," it, too, has not ruled on the constitutionality of such a statute.[14]

This Note will analyze the Massachusetts sex offender GPS-tracking statute by comparing it to tracking statutes in other states and to previous sex offender legislation.[15] Part II.A will explore the historical development and changes in sex offender legislation.[16] Then, Part II.B will discuss the history of GPS-

6. *See* Lieb et al., *supra* note 5, at 55-56 (describing early sexual psychopath laws). These laws aimed to achieve two goals: take the sex offenders out of the community and treat their underlying mental condition. *See id*. at 55.

7. *See id.* at 66 (discussing sexual predator laws passed in 1990s). Unlike sexual psychopath laws, which sought alternatives to conventional confinement, the sexual predator laws focused on social control mechanisms following prison terms. *See id.*

8. *See id.* at 71-72 (explaining development of registration and community notification).

9. *See* Janicki, *supra* note 2, at 286 (describing how local and state governments passed residency restriction and GPS-tracking laws).

10. *See* Eric M. Dante, Comment, *Tracking the Constitution—The Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 SETON HALL L. REV. 1169, 1172 (2012) (noting number of states allowing electronic monitoring of sex offenders).

11. *See id.* (acknowledging GPS-tracking statutes differ from state to state).

12. *See* Grady v. North Carolina, 135 S. Ct. 1368, 1370-71 (2015) (per curiam) (holding such monitoring is search under Fourth Amendment but not passing on ultimate constitutionality of monitoring); Dante, *supra* note 10, at 1170 (observing Supreme Court has not affirmed constitutionality of GPS-tracking statutes).

13. *See* MASS. GEN. LAWS ANN. ch. 265, § 47 (West 2015) (requiring certain sex offenders wear GPS device for probation duration).

14. *See* Commonwealth v. Cory, 911 N.E.2d 187, 196 (Mass. 2009) (holding Massachusetts tracking statute as punitive in effect); *see also* Commonwealth v. Guzman, 14 N.E.3d 946, 949 (Mass. 2014) (declining to address Fourth Amendment issues raised by Massachusetts tracking statute).

15. *See infra* Part III.A (comparing Massachusetts statute with other tracking statutes and previous sex offender legislation).

16. *See infra* Part II.A (outlining progression of sex offender legislation).

tracking technology.[17] Part II.C will look at the different GPS-tracking statutes that other states have passed, placing the Massachusetts statute in its national context.[18] Part II.D will explore the possible constitutional challenges that can be made against GPS-tracking statutes.[19] Finally, Part III will compare the Massachusetts GPS-tracking statute with other states' tracking statutes, analyze the constitutionality of Massachusetts's statute, and offer recommendations on how to improve it.[20]

II. HISTORY

A. Progression of Sex Offender Legislation

Changes in sex offender legislation at both the state and federal level are enacted in response to public demand, which is usually in response to the commission of a horrific crime.[21] Public outcry was the catalyst behind the movement for early civil commitment statutes that were designed to take sex offenders off the street and rehabilitate them.[22] Moreover, public outrage prompted the passage of registration and community notification laws that aimed to prevent released sex offenders from attacking again.[23] The latest development in sex offender legislation—residency restrictions—has also been driven by a desire to appease the public and make them feel safe from the potential threat released sex offenders pose.[24]

1. Civil Commitment

Legislation aimed specifically at sex offenders began to take shape in the 1930s, when some states enacted "sexual psychopath" statutes.[25] These statutes

17. *See infra* Part II.B (describing history of GPS technology).

18. *See infra* Part II.C (detailing various states' GPS-tracking statutes).

19. *See infra* Part II.D (noting constitutional questions arising from tracking statute).

20. *See infra* Part III (analyzing construction and constitutionality of Massachusetts sex offender GPS-tracking statute).

21. *See* Raquel Blacher, Comment, *Historical Perspective of the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 920 (1995) (noting public outcry led to changes in sex offender legislation in 1990s); *supra* note 5 and accompanying text (observing how horrific sex crimes spurred enactment of sex offender statutes).

22. *See infra* notes 25-27 and accompanying text (explaining background of sexual psychopath statutes and what proponents hoped they might accomplish).

23. *See* Blacher, *supra* note 21, at 916 (articulating how public outrage over murder committed by released sex offender compelled passage of statutes); *see also infra* Parts II.A.2-3 (discussing sex offender registration and community notification laws).

24. *See* Mary Helen McNeal & Patricia Warth, *Barred Forever: Seniors, Housing, and Sex Offense Registration*, 22 KAN. J.L. & PUB. POL'Y 317, 326 (2013) (opining public came to believe residency restrictions could protect children from sex offenders). High profile cases, like the kidnapping, rape, and murder of nine-year-old Jessica Lunsford by a registered sex offender, led the public to believe that residency restrictions were necessary to keep them safe. *See id*.

25. *See* Lieb et al., *supra* note 5, at 55 (noting states began passing legislation targeted at serious sex offenders in 1930s); Blacher, *supra* note 21, at 897 (observing passage of sexual psychopath statutes in 1930s).

were typically enacted after several sex crimes aroused public panic.[26] The individuals who perpetrated these sex crimes were viewed as being neither criminally nor legally insane.[27] Thus, statutes that permitted the indefinite civil commitment of sex offenders were seen as achieving two goals: "remov[ing] the sex offender from the community, and treat[ing] the underlying mental condition."[28] Constitutional challenges to sexual psychopath statutes generally failed as the statutes were usually deemed to be civil in nature and a valid exercise of the state's police power and *parens patriae*.[29] These sexual psychopath statutes remained on the books until the 1980s, when states started to repeal them and move away from civil commitment systems for sex offenders.[30]

This movement away from civil commitment systems was short-lived; beginning in the 1990s, states started to once again look at ways to protect the public from dangerous sex offenders.[31] Eventually, states settled on a new generation of civil commitment laws, commonly referred to as "sexual predator laws."[32] The first sexual predator law was enacted in Washington, and that law

Michigan enacted the first sexual psychopath statute in 1937, with Illinois following suit in 1938 and California and Minnesota in 1939. *See* Lieb et al., *supra* note 5, at 55 (listing chronological order of sexual psychopath statutes). By the mid-1960s, over half the states had enacted sexual psychopath laws. *Id*. (highlighting prevalence of sexual psychopath legislation).

26. *See* Sutherland, *supra* note 5, at 143 (asserting sexual psychopath laws enacted after commission of few serious sex crimes). In particular, "[t]he sex murders of children [were the] most effective in producing hysteria." *Id.*

27. *See* Lieb et al., *supra* note 5, at 55 (elucidating how society viewed sexual psychopaths). Statutes typically described sexual psychopaths as someone:

> [S]uffering from such conditions of emotional instability or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render him irresponsible for his conduct with respect to sexual matters and thereby dangerous to himself and to other persons.

Manfred Guttmacher & Henry Weihofen, *Sex Offenses*, 43 J. CRIM. L. & CRIMINOLOGY 153, 164-65 (1952).

28. *See* Lieb et al., *supra* note 5, at 55 (citation omitted) (explaining goals of sexual psychopath laws). Sexual psychopath statutes diverted sex offenders from correctional institutions to mental health facilities. *See* Blacher, *supra* note 21, at 898. Generally, a sex offender was confined until he either experienced a full recovery or was considered no longer a menace to others. *Id.* at 897-98.

29. *See* Blacher, *supra* note 21, at 902 (articulating how constitutional challenges to sexual psychopath laws usually failed); *see also* Minnesota *ex rel.* Pearson v. Probate Court, 309 U.S. 270, 277 (1940) (upholding constitutionality of Minnesota's sexual psychopath statute). The Court in *Pearson* found no violation of due process in a statute that authorized the indefinite civil commitment of a person found to be a sexual psychopath. *Id.*

30. *See* Blacher, *supra* note 21, at 906 (highlighting eradication of sexual psychopath laws). Factors that influenced this movement "included the recognition that not all violent sexual offenders were likely to respond to the same type of therapy; the growing awareness that sex offenders were not mentally ill; the lack of proven treatment methods to reduce recidivism rates; and the rising concern for civil rights." *Id*.

31. *See* Lieb et al., *supra* note 5, at 66 (noting states debating ways to shelter public from violent sex offenders).

32. *See id*. (discussing background of sexual predator laws). Unlike the predecessor sexual psychopath statutes, which explored alternatives to conventional confinement, sexual predator laws focused on social

served as a model for subsequent sexual predator laws that were enacted across the country.[33] The Supreme Court affirmed the constitutionality of these statutes in *Kansas v. Hendricks*,[34] where it upheld Kansas's sexual predator law.[35] In its decision, the Court held that the statute comported with the due process clause and did not violate either double jeopardy principles or the Ex Post Facto Clause.[36] As of 2013, twenty states and the District of Columbia have enacted sexual predator laws that permit the indefinite civil commitment of sex offenders.[37]

2. Registration

California enacted the first sex offender registration statute in 1947, which required certain sex offenders to register with the local police.[38] Registration laws, however, became prominent on a national scale when Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act) in 1994.[39] The Wetterling Act required any

control mechanisms for sex offenders following their prison terms. *See id.* As was the case with sexual psychopath statutes, the first sexual predator law was enacted after the commission of a serious sex crime. *See* Deborah L. Morris, Note, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators–A Due Process Analysis*, 82 CORNELL L. REV. 594, 611 (1997) (observing Washington enacted sexual predator law in response to sexual attack on boy).

33. *See* Lieb et al., *supra* note 5, at 66-67 (discussing Washington sexual predator law and statutes it influenced); *see also* WASH. REV. CODE ANN. § 71.09.010 (West 2015) (permitting involuntary civil commitment of sexually violent predators). The statute defines a sexually violent predator as someone "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence . . . ." *Id.* § 71.09.020. Pursuant to the statute, the state can initiate the involuntary commitment proceeding prior to the expiration of a defendant's criminal sentence for committing a sexually violent crime, prior to the release of a person found incompetent to stand trial for a sexually violent crime, and upon a verdict of not guilty by reason of insanity for a person charged with committing a sexually violent crime. *See id.* § 71.09.030. In the proceeding, the state must prove beyond a reasonable doubt that the person is a sexually violent predator. *See id.* § 71.09.060. If the state carries this burden, the person is committed to a secure facility until he or she is determined to be safe for release. *See id.*

34. 521 U.S. 346 (1997).

35. *See id.* at 371 (holding Kansas's Sexually Violent Predator Act constitutional).

36. *See id*. (holding statute did not violate constitutional principles). The Court noted that involuntary civil commitment statutes are permissible if the statutes apply proper procedures and evidentiary standards. *See id.* at 357-60. It determined that the Kansas act's required finding of "dangerousness" and "mental abnormality" prior to confinement met this threshold. *See id*. The Court dismissed the double jeopardy and ex post facto claims because it determined the act is civil in nature and not punitive. *See id*. at 369-70.

37. *See Civil Commitment of Sexually Violent Predators*, ATSA (Aug. 17, 2010), http://www.atsa.com/civil-commitment-sexually-violent-predators, *archived at* http://perma.cc/9C3M-LUAJ (noting number of states with sexual predator laws).

38. *See* Soltren, *supra* note 5, at 803 (highlighting origin of sex offender registration legislation). States were not quick to enact sex offender registration laws; by 1985, only five states had adopted such measures. *See id*.

39. *See id*. at 804 (describing background of federal Wetterling Act); *see also* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038-42 (1994) (codified at 42 U.S.C. § 14071), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 129(a), 120 Stat. 587, 600 (requiring states to create sex offender registry).

"person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense" and any person found to be "a sexually violent predator to register" his or her current address with the appropriate authorities.[40] The purpose of the Wetterling Act was to deter convicted sex offenders from reoffending and to protect the public—particularly children—from sex crimes.[41] Proponents of the Wetterling Act cited the high rate of recidivism among sex offenders, while opponents argued it infringed substantially on the civil liberties of released offenders and it failed to address the root of the problem—inadequate treatment for sex offenders in the penal system.[42]

3. Community Notification

The Wetterling Act, in addition to requiring sex offenders to register with local authorities, also contained a provision that permitted states to release to the public information obtained from this registry.[43] While the Wetterling Act

The federal Wetterling Act required every state, territory, and commonwealth to create a sex offender registry or else suffer a reduction in federal funding. *See* 42 U.S.C. § 14071(f)(2)(A) (repealed 2006). The federal act was named after a Minnesota boy who was abducted at gunpoint by an unknown assailant and never seen again. *See* Soltren, *supra* note 5, at 803-04.

40. § 14071(a)(1)(A)-(B) (repealed 2006). A person required to register under the first category had to comply with the registration requirements for ten years, while a person found to be a sexually violent predator had to comply with the registration requirements indefinitely until a determination was made that the person no longer suffered from a mental abnormality that made them sexually dangerous. *See* § 14071(b)(6)(A)-(B) (repealed 2006). A sexually violent predator was defined in the Wetterling Act as "a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." § 14071(a)(3)(C) (repealed 2006). The Wetterling Act applied to a person who committed certain enumerated offenses against minors, including sexual offenses and kidnappings by a nonparent, as Congress believed that most child abductions involve sexual assault. *See* 139 CONG. REC. 31,251 (1993) (statement of Rep. Ramstad) (citing study showing two-thirds of nonfamily child abductions involving sexual assault).

41. *See* Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 90, 94 (1996) (noting Congress designed Act to deter sex offenders and child molesters from reoffending).

42. *See id.* at 92-93 (highlighting different viewpoints in debate over sex offender registration laws). One study showed that seventy-four percent of imprisoned child sex offenders had a previous conviction for a child sex offense. *See* 139 CONG. REC. 31,251 (1993) (statement of Rep. Ramstad) (citing study showing high rate of recidivism for child sex offenders). *But see* LANGAN ET AL., *supra* note 3, at 2 (noting convicted sex offenders had lower re-arrest rate than other criminals). Opponents of registration laws contend that with proper treatment, sex offenders can be rehabilitated and pose no threat to the community. *See* Lewis, *supra* note 41, at 93 (opining sex offenders amendable to treatment). Moreover, opponents also theorize that registration laws interfere with a sex offender's rehabilitation, as the stigma associated with being a registered sex offender may make an offender believe that improvement in his or her condition is impossible. *See* Winick, *supra* note 2, at 556-57 (arguing registration laws impede sex offender's rehabilitation). In adopting the Wetterling Act, Congress took the position that treatment is not a viable solution to the problem that sex offenders pose. *See* 139 CONG. REC. 27,876 (1993) (stating dangerous sexual predators as very likely repeat sex offenders).

43. *See* 42 U.S.C. § 14071(d)(2) (repealed 2006) (permitting states to release public information relating to registered sex offenders).

originally gave states discretion in releasing this information, Congress later amended this and required states to release this information to the public.[44] The state laws regarding notification originally varied from state to state, with the degree of notification ranging from quite broad to more narrow, but, by 2007, all fifty states had created publicly accessible websites that contained the personal information of registrants.[45] The main constitutional challenge to these notification laws has been that they are a violation of the Ex Post Facto Clause, but for the most part, courts have rejected this claim and have upheld the constitutionality of notification laws.[46] The most recent development in the area of notification laws occurred in 2006 when Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 (AWA), which expanded the scope of community notification laws even further.[47]

4. Residency Restrictions

The next major development in sex offender legislation occurred when states began to pass residency restriction laws in an effort to decrease sex offender recidivism by keeping offenders away from children.[48] These laws prohibited

44. *See* Lieb et al., *supra* note 5, at 72 (noting Congress amended Act requiring states' release of information); *see also* Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345, 1345 (1996) (compelling states to release registered sex offender information to public). Megan's Law stated "[t]he designated State law enforcement agency and any local law enforcement agency authorized by the State agency shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section ." § 2, 110 Stat. at 1345. Megan's Law was named after a seven-year-old New Jersey girl who was raped and murdered by a twice-convicted child molester who lived on her street. *See* Lieb et al., *supra* note 5, at 72. The phrase "Megan's Law" has become synonymous with community notification. *See id.*

45. *See* Lieb et al., *supra* note 5, at 74-75 (observing different methods of notification employed by states); McNeal & Warth, *supra* note 24, at 323 (noting all fifty states maintain websites with sex offender information).

46. *See, e.g.*, Femedeer v. Haun, 227 F.3d 1244, 1253 (10th Cir. 2000) (holding Utah's notification statute imposed civil burden and did not violate ex post facto); Roe v. Office of Adult Prob., 125 F.3d 47, 48 (2d Cir. 1997) (holding Connecticut's notification law not ex post facto because it did not constitute punishment); Doe v. Pataki, 120 F.3d 1263, 1284 (2d Cir. 1997) (upholding New York's notification law as constitutional because burdens not punitive). *But see* State v. Myers, 923 P.2d 1024, 1043 (Kan. 1996) (concluding Kansas notification statute violated Ex Post Facto Clause as punitive).

47. *See* McNeal & Warth, *supra* note 24, at 323-24 (asserting AWA established broader notification scheme); *see also* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 102, 120 Stat. 587, 590-91 (codified at 42 U.S.C. § 16901) (establishing comprehensive registration and notification system for sex offenders). Unlike the Wetterling Act and Megan's Law, which gave states discretion on how to classify registrants and allowed for individualized assessments of risk in order to determine the duration of registration and notification, the AWA required a three-tier classification system that is based solely on the conviction history of the offender. *See* McNeal & Warth, *supra* note 24, at 324 (highlighting how AWA modifies previous community notification legislation); *see also* 42 U.S.C § 16911(2)-(4) (2012) (defining different classification tiers as a result of AWA). The reason for the comprehensive changes in notification legislation is elucidated in the AWA's declaration of purpose, which states the AWA was enacted "to protect the public from sex offenders and offenders against children." § 16901. *But see* McNeal & Wrath, *supra* note 24, at 355 (asserting notification laws may decrease public safety by increasing recidivism among registered offenders).

48. *See* Janicki, *supra* note 2, at 291 (highlighting reason why states enacted residency restriction laws).

sex offenders from living within a specified distance of "schools, parks, day care centers, and 'places where children normally congregate.'"[49] In addition to state-enacted residency restrictions, local units of government have also enacted their own residency restrictions, some of which are even more restrictive than their state counterparts.[50] Residency restrictions are justified by two premises: sex offenders target unknown neighborhood children as victims, and are not capable of being rehabilitated and thus are likely to be repeat offenders.[51] Opponents of residency restriction laws counter this by arguing that these laws increase sex offender homelessness and instability, thereby increasing the likelihood of recidivism.[52] Constitutional challenges to state residency restriction laws have been brought in the courts, but the constitutionality of these laws has usually been upheld.[53] Despite the

As of 2010, thirty states have adopted residency restriction laws. *See Sexual Offender Residence Restrictions*, ATSA (Aug. 2, 2014), http://www.atsa.com/sexual-offender-residence-restrictions, *archived at* http://perma.cc/L2H4-NMUP (noting current number of states with residency restriction laws).

49. Caleb Durling, Comment, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317, 322 (2006) (listing restrictions on places sex offenders may live near). The width of the prohibited zone varies from state to state. *See, e.g.*, ALA. CODE § 15-20A-11 (2015) (noting sex offenders cannot reside within two thousand feet of prohibited areas); GA. CODE ANN. § 42-1-15 (West 2015) (stating sex offenders cannot reside within one thousand feet of prohibited areas); 720 ILL. COMP. STAT. ANN. 5/11-9.3 (West 2015) (asserting sex offenders cannot reside within five hundred feet of prohibited areas).

50. *See* Durling, *supra* note 49, at 324 (observing local ordinances have expanded residency restrictions to public pools and libraries). "Unlike their state counterparts, [local residency restrictions] often bar sex offenders from working or even being in the restricted areas . . . ." Robert F. Worth, *Exiling Sex Offenders from Town; Questions About Legality and Effectiveness*, N.Y. TIMES (Oct. 3, 2005), http://query.nytimes.com/gst/fullpage.html?res=9C01E3D81030F930A35753C1A9639C8B63&pagewanted=1. The number of municipalities that have enacted residency restrictions was estimated at 400 in 2007, but that number has likely increased significantly in years since then. *See* McNeal & Warth, *supra* note 24, at 327 (presuming number of residency restriction local ordinances have spiked in recent years).

51. *See* Durling, *supra* note 49, at 329 (explaining justifications for residency restrictions). The premise that sex offenders tend to target unknown children has been disputed by studies which indicate that children are more likely to be sexually abused by people they know, including family members and acquaintances. *See id*. at 329-30. Moreover, "studies have not shown a correlation between a sex offender's 'residence['s] distance from a school or child care facility, and an increased likelihood of recidivism.'" *Id*. at 330 (alteration in original). Finally, critics also dispute the notion that sex offenders are more likely to reoffend than other criminals. *See id*. at 330-31 (describing studies showing sex offenders have lower recidivism rate than other criminals). *But see* LANGAN ET AL., *supra* note 3, at 1 (noting sex offenders four times more likely than other criminals to commit new sex crime).

52. *See Sexual Offender Residence Restrictions*, *supra* note 48 (asserting residency restrictions interfere with sex offender tracking and increase chance of criminal recidivism). Critics of residency restriction laws also cite studies that show that residential proximity to children is not correlated to sex offender recidivism. *See* McNeal & Warth, *supra* note 24, at 358 (noting studies debunk theory residency restrictions lower sex offender recidivism rates).

53. *See* Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1012 (8th Cir. 2006) (holding Arkansas residency restriction statute in conformity with due process and not punitive); Doe v. Miller, 405 F.3d 700, 704-05 (8th Cir. 2005) (holding Iowa residency restriction law did not violate due process or ex post facto clauses). Courts, however, have been more willing to find constitutional violations in residency restrictions enacted by local governments. *See* Michael Roberts, *Sex-offender Residency Restrictions Challenged by ACLU Ruled Unconstitutional*, WESTWORD (Aug. 23, 2013), http://blogs.westword.com/latestword/2013/08/sex_

surrounding controversy, the prevalence of residency restriction laws only continues to grow.[54]

B. History of GPS-Tracking Technology

The origin of GPS technology can be traced back to the 1970s, when the Department of Defense (DOD) developed it for military use.[55] The purpose of the technology was to provide military forces with precise, accurate information for navigation, targeting, and positioning during combat.[56] GPS technology was eventually made available to the public in 1983, but the military limited the public's use by purposely compromising the accuracy of the location capabilities.[57] The civilian population was not exposed to the full capabilities of GPS technology until Congress enacted legislation prohibiting the error system.[58]

The idea of using an electronic monitoring device as an alternative to incarceration can be traced back to the 1960s.[59] However, the use of GPS tracking as a form of electronic monitoring for criminals has only come about recently.[60] Law enforcement officials across the country are increasingly finding GPS technology appealing to monitor criminals because they are able to accurately track them twenty-four hours a day.[61] GPS technology has been

offender_resisdency_restrictions_aclu_englewood.php, *archived at* http://perma.cc/6YVK-GT82 (discussing Colorado residency restriction ordinance found unconstitutional).

54. *See* Janicki, *supra* note 2, at 292 ("[R]esidency restrictions are becoming pandemic."); McNeal & Warth, *supra* note 24, at 327 (noting residency restriction ordinances enacted frequently).

55. *See* Jonathan M. Epstein, Comment, *Global Positioning System (GPS): Defining the Legal Issues of Its Expanding Civil Use*, 61 J. AIR L. & COM. 243, 248 (1995) (describing origin of GPS technology).

56. *See id*. (noting how GPS technology assisted military forces); Matthew J. Kucharson, Note, *GPS Monitoring: A Viable Alternative to the Incarceration of Nonviolent Criminals in the State of Ohio*, 54 CLEV. ST. L. REV. 637, 641 (2006) (stating early GPS technology helped guide missiles during combat). In 1973, the U.S. military began implementing the NAVSTAR GPS program to enhance the accuracy of GPS technology. *See* Kucharson, *supra*, at 641. This program proposed having multiple satellites circle the globe instead of one in order to enhance efficiency. *See* Sameer Kumar & Kevin B. Moore, *The Evolution of Global Positioning System (GPS) Technology*, 11 J. SCI. EDUC. & TECH. 59, 61 (2002). As of 2002, the NAVSTAR system consisted of twenty-four satellites. *Id*.

57. *See* Kucharson, *supra* note 56, at 641 (describing early civilian use of GPS technology).

58. *See id*. at 641-42 (noting increased public use prompted congressional action ensuring public received full capabilities); *see also* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 279, 110 Stat. 186, 243 (prohibiting Secretary of Defense from denying nonDOD users full capabilities of GPS technology).

59. *See* Mary Ann Scholl, Comments, *GPS Monitoring May Cause Orwell To Turn in His Grave, But Will It Escape Constitutional Challenges? A Look at GPS Monitoring of Domestic Violence Offenders in Illinois*, 43 J. MARSHALL L. REV. 845, 851 (2010) (identifying origin of electronic monitoring for criminal justice purposes). In an experimental study, the whereabouts of parolees, mentally ill patients, and research volunteers were monitored within a prescribed monitoring area where repeater stations were located. *See* MATTHEW DEMICHLE & BRIAN PAYNE, OFFENDER SUPERVISION WITH ELECTRONIC TECHNOLOGY: COMMUNITY CORRECTIONS RESOURCE 19 (2d ed. 2009), *available* at http://www.appa-net.org/eweb/docs/APPA/pubs/OSET_2.pdf, *archived at* http://perma.cc/MQ43-CEGH.

60. *See* Scholl, *supra* note 59, at 851 (informing about first introduction of GPS tracking for criminals).

61. *See* Kucharson, *supra* note 56, at 642 (explaining what makes GPS technology popular for criminal

used to monitor high-risk persons on parole and probation, gang members, domestic abusers, stalkers, and sex offenders.[62] The constitutionality of such continuous, near-real time monitoring, however, has been questioned on several fronts.[63]

C. Sex Offender GPS-Tracking Statutes

Forty-one states and the District of Columbia have enacted statutes that allow for the GPS tracking of sex offenders.[64] These statutes can be separated into two categories: statutes that permit discretion in ordering the electronic monitoring of sex offenders and statutes that mandate the electronic monitoring of sex offenders based on the respective crime for which they were convicted.[65] Massachusetts is one of the states that has adopted mandatory GPS tracking for certain sex offenders on probation.[66]

justice purposes). GPS technology relies on twenty-four satellites that orbit the earth. *See* DEMICHELE & PAYNE, *supra* note 59, at 31. For the tracking of criminals, the required hardware "consists of a radio frequency transmitter worn by the offender, a portable GPS tracking device that the offender must carry or be near at all times, and a charging unit for the GPS device." *Id*. The transmitter emits a radio signal two or more times a minute that is picked up by the tracking device. *See id*. at 32. The tracking device also receives signals from the orbiting satellites that are used to determine an offender's location. *See id*. There are three manners by which GPS location data is transmitted to a monitoring station: active, passive, and hybrid. *See id*. at 35. Active GPS monitoring relays the information in near-real time, passive monitoring relays it usually once a day, and hybrid monitoring relays it a few times a day until an alert is detected, at which point it relays it in near-real time. *See id*. When all of the components of a GPS monitoring system are operating properly, "an offender's movements can be monitored twenty-four hours a day regardless of location." Kucharson, *supra* note 56, at 644.

62. *See, e.g.*, CAL. PENAL CODE §§ 1210.7(a)-(e), 3010(a)-(d) (West 2015) (allowing GPS monitoring of high-risk probationers and parolees); Sarah Shekhter, Note, *Every Step You Take, They'll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex Offenders*, 38 HASTINGS CONST. L.Q. 1085, 1091 (2011) (acknowledging gang members subjected to GPS monitoring); Matt Carroll, *Conklin Bill Would Allow GPS Tracking for Domestic Violence Abusers*, CENTRE DAILY TIMES (July 9, 2013), http://www.centredaily.com/2013/07/09/3681356/conklin-bill-would-mandate-gps.html, *archived at* http://perma.cc/V2TY-4UMX (noting twenty-one states permit use of GPS tracking devices in domestic abuse cases); Ken Paulson, *Stalking: New Law Will Help Protect Victims*, NEWS TRIBUNE (Apr. 25, 2013), http://blog.thenewstribune.com/letters/2013/04/25/gov-inslee-to-sign-stalking-protection-order/, *archived at* http://perma.cc/NM2J-CMSN (describing bill which permits GPS monitoring of stalkers); *infra* Part II.C (discussing GPS tracking of sex offenders).

63. *See infra* Part II.D (discussing constitutional challenges to GPS monitoring).

64. *See* Dante, *supra* note 10, at 1190 (stating how many GPS-tracking statutes exist). The popularity of GPS-tracking statutes is directly tied to the AWA, which authorized the appropriation of $5,000,000 in grants for states that created electronic monitoring programs for sex offenders from 2007-2009. *See* 42 U.S.C. § 16981 (2012).

65. *See infra* Part II.C.1 (reviewing different sex offender GPS-tracking statutes).

66. *See* MASS. GEN. LAWS ANN. ch. 265, § 47 (West 2015) (making GPS tracking of specific sex offenders on probation mandatory); *infra* Part II.C.2 (discussing Massachusetts sex offender GPS-tracking statute).

1. Nationally

a. Florida

After nine-year-old Jessica Lunsford was kidnapped, raped, and murdered by a convicted sex offender who lived near her home, a Florida state representative drafted a statute that would require released sex offenders to wear GPS-tracking technology.[67] A few months later, on May 2, 2005, the Florida governor approved the statute, which would come to be known as the Jessica Lunsford Act.[68] The Act provides that courts have the discretion to impose electronic monitoring on released sex offenders who committed a specific crime between October 1, 1997 and August 31, 2005.[69] If the crime was committed on or after September 1, 2005, however, courts no longer have discretion and are required to order "mandatory electronic monitoring as a condition of the probation or community control supervision."[70]

Additionally, a separate statute was enacted at the same time that required courts to mandate electronic monitoring of sex offenders who committed their crimes prior to September 1, 2005 if they later violated their probation or parole.[71] These parole or probation violations do not need to be sexual in nature in order to trigger the mandatory electronic monitoring.[72] As of 2012, fourteen states had adopted statutes based on the Florida act that made the electronic monitoring of certain released sex offenders mandatory.[73]

67. *See* Mark Memmott, *Girl's Death Raises Questions About Tracking of Sex Offenders*, USA TODAY (Mar. 24, 2005), http://usatoday30.usatoday.com/news/nation/2005-03-24-sex-offenders-usat_x.htm, *archived at* http://perma.cc/N7AE-ZFVA (describing what prompted drafting of Jessica Lunsford Act).

68. *See* FLA. STAT. ANN. § 948.30 (West 2015) (requiring electronic monitoring of released sex offenders convicted of specific crimes); Dante, *supra* note 10, at 1173 (noting passage of Jessica Lunsford Act). The specific crimes that place sex offenders within the purview of the Act are convictions for "[l]ewd or lascivious offenses committed upon or in the presence of persons less than 16 years of age, sexual performance by a child, prohibited computer transmissions with a child, and the selling or buying of minors." Dante, *supra* note 10, at 1173 n.31 (internal quotation marks omitted).

69. *See* § 948.30(2) (giving courts power to impose electronic monitoring when deemed necessary). When the imposition of electronic monitoring is discretionary, a sex offender is entitled to an individualized assessment of his risk to the community before he can be subjected to the monitoring. *See* Dante, *supra* note 10, at 1175-76 (noting assessment court must conduct prior to imposing discretionary monitoring).

70. § 948.30(3)(c) (requiring courts to impose GPS monitoring on certain sex offenders).

71. *See* FLA. STAT. ANN. § 948.063 (West 2015) (making GPS tracking of certain sex offenders who violate their parole or probation mandatory); *see also* State v. Petrae, 35 So. 3d 1012, 1014 (Fla. Dist. Ct. App. 2010) (acknowledging trial courts have no discretion on imposing electronic monitoring on certain sex offenders).

72. *See* Dante, *supra* note 10, at 1174 (observing any violation of probation by sex offenders covered under statute triggers mandatory GPS tracking); *see also* State v. Lacayo, 8 So. 3d 385, 386-87 (Fla. Dist. Ct. App. 2009) (subjecting sexual predator to mandatory electronic monitoring after violating parole by fleeing police officer); Fields v. State, 968 So. 2d 1032, 1033 (Fla. Dist. Ct. App. 2007) (holding GPS tracking mandatory for sex offender who violated probation by driving with suspended license).

73. *See* Dante, *supra* note 10, at 1176 (recognizing similarities between Florida act and statutes enacted in other states). These states, like Florida, require electronic monitoring of released sex offenders based on the crime they committed and not on their individualized threat of reoffending. *See id*.

b. California

On September 20, 2006, California Governor Arnold Schwarzenegger approved the Sexual Predator Punishment and Control Act: Jessica's Law (SPPCA).[74] California's version of Jessica's Law is the strictest in the country because it mandates lifetime GPS monitoring of sex offenders convicted of a broad array of crimes once they are released on parole.[75] Moreover, unlike the Florida act—which stipulates that mandated electronic monitoring could only be applied prospectively, unless there was a violation of probation—the SPPCA left open the possibility of the law applying to crimes that were committed as far back as World War II.[76] California courts foreclosed this possibility, however, as SPPCA can only be applied prospectively.[77] Nevertheless, in 2011, 6,500 sex offenders in California were wearing GPS-monitoring devices, "the largest use of GPS monitoring anywhere in the world."[78] Seven states have followed the California model of requiring lifetime GPS tracking of certain sex offenders, but some of these statutes vary by state.[79]

c. States with Discretionary Monitoring

Some states allow for discretion in the implementation of GPS monitoring of sex offenders, in contrast to the Florida, California, and Massachusetts statutes.[80] States that allow for discretionary monitoring vary in terms of how to and who may exercise that discretion.[81] Some states authorize the judge

74. *See id.* at 1177 (discussing California enactment of sex offender GPS-tracking statute); *see also* CAL. PENAL CODE § 3004 (West 2015) (codifying California sex offender GPS-monitoring statute).

75. *See* § 3004(b) (requiring lifetime GPS monitoring of paroled sex offenders convicted of specific crimes). The crimes that trigger lifetime GPS monitoring range from murder committed in the perpetration of rape to sending "harmful matter to [a] minor by telephone messages, electronic mail, Internet, or commercial online service." Dante, *supra* note 10, at 1177 n.64 (alteration in original).

76. *See* Dante, *supra* note 10, at 1178 (noting how broadly SPPCA theoretically applied).

77. *See* Doe v. Schwarzenegger, 476 F. Supp. 2d 1178, 1181-82 (E.D. Cal. 2007) (holding SPPCA only has prospective effect). The court held that the SPPCA could not be applied retroactively because there was no clear evidence of intent for the statute to be applied retroactively. *See id*. California adheres to its well established principle that statutes operate prospectively unless a contrary intent is expressly stated. *See* CAL. PENAL CODE § 3 (West 2015) ("No part of [this Code] is retroactive, unless expressly so declared.").

78. Shekhter, *supra* note 62, at 1087 (highlighting prevalence of GPS tracking of sex offenders in California).

79. *See* Dante, *supra* note 10, at 1179-80 (noting mandatory lifetime GPS monitoring also used on sex offenders in other states). One variation of mandatory lifetime GPS monitoring can be seen in Georgia, where an offender must be classified as a sexually dangerous predator before they are subjected to lifetime GPS monitoring. *See* GA. CODE ANN. § 42-1-14(d) (West 2015). To determine if a sex offender is a sexually dangerous predator, a board conducts an individual assessment of the likelihood that the offender will engage in another crime against a child or commit a sexually dangerous offense. *See* § 42-1-14(a)(1).

80. *See* Dante, *supra* note 10, at 1187 (noting how some states grant courts full discretion in imposing electronic monitoring on sex offenders); *supra* Part II.C.1.a-b (discussing Florida and California sex offender GPS-tracking statutes); *infra* Part II.C.2 (discussing Massachusetts sex offender GPS-tracking statute).

81. *See* Dante, *supra* note 10, at 1187 (observing how discretionary monitoring statutes vary in operation

presiding over the case to use his or her discretion to order GPS tracking of a sex offender.[82] Other states give their respective parole boards the discretionary power to impose electronic monitoring on serious sex offenders.[83] Moreover, an interesting wrinkle to sex offender electronic monitoring legislation can be seen in the Ohio statute, which only permits the court to mandate GPS tracking for sex offenders who have not served a prison term.[84] While the statutes that grant discretion vary in form, they nevertheless achieve the purpose of having systems in place to monitor the most dangerous sex offenders while at the same time allowing for greater flexibility in assessing an individual offender's risk to the community.[85]

2. Mass. Gen. Laws ch. 265, § 47

The Massachusetts sex offender GPS-tracking statute was enacted on September 21, 2006.[86] Similar to the Florida and California statutes, section 47 does not allow for discretion in the imposition of GPS tracking of offenders; instead, sex offenders who have been convicted of specific crimes are required to wear GPS-tracking technology for the length of their probation.[87] The offenses that trigger the mandatory GPS monitoring include a broad array of crimes, some of which do not even involve a child.[88] While the Massachusetts statute only requires GPS monitoring for the duration of an offender's probation, if a sex offender fails to register or violates his registration

among states).

82. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-30(a)(14) (West 2015) (authorizing judges to subject offenders to GPS tracking); MISS. CODE ANN. § 99-19-84 (West 2015) (permitting judges to require electronic monitoring as condition of parole for registered sex offenders); N.J. STAT. ANN. § 30:4-123.91(c) (West 2015) (granting judges full discretion to impose electronic monitoring on certain sex offenders); N.Y. PENAL LAW § 65.10(4) (McKinney 2015) (stating court has discretion to order electronic monitoring when it determines it "will advance public safety").

83. *See* TENN. CODE ANN. § 40-39-302(b)(1) (West 2015) (granting parole board authority to require GPS tracking of persons convicted of serious sex offenses); WASH. REV. CODE ANN. § 9.94A.704(5) (West 2015) (allowing department of corrections to impose electronic monitoring on convicted sex offenders).

84. *See* OHIO REV. CODE ANN. § 2929.13(L) (West 2015) (allowing imposition of GPS tracking on sex offenders for probation-only sentences).

85. *See* Dante, *supra* note 10, at 1190 (noting benefits of discretionary statutes).

86. *See* Dante, *supra* note 10, at 1180 (highlighting passage of Massachusetts sex offender monitoring bill); *see also* MASS. GEN. LAWS ANN. ch. 265, § 47 (West 2015) (requiring sex offenders convicted of certain crimes to wear GPS device for length of probation).

87. *See* ch. 265, § 47 (imposing GPS tracking as a requirement for certain sex offenders on probation); *supra* Part II.C.1.a-b (discussing Florida and California sex offender GPS-tracking statutes). Massachusetts does allow judges to exercise discretion in setting the length of probation. *See* MASS. GEN. LAWS ANN. ch. 276, § 87 (West 2015); Brief for the Commonwealth at 17, Commonwealth v. Selavka, 14 N.E.3d 933 (Mass. 2014) (No. 11461), 2013 WL 7103097.

88. *See* Dante, *supra* note 10, at 1181-82 (noting mandatory GPS tracking triggered by various sex offenses). Anyone placed on probation for any offense listed within the definition of "sex offense," a "sex offense involving a child," or a "sexually violent offense" is required to wear a GPS tracking device for the length of his or her probation. *See* ch. 265, § 47.

requirements, he can be sentenced to lifetime probation.[89] Furthermore, any person convicted of a "sex offense," a "sex offense involving a child," or a "sexually violent offense" who is sentenced to lifetime parole is required to be electronically monitored for the duration of his or her probation—essentially creating mandatory lifetime GPS tracking for any offender who violates his registration requirements.[90]

In addition to requiring certain sex offenders to wear GPS-tracking devices for the length of their probation, section 47 also permits the commissioner of probation to establish "defined geographic exclusion zones including, but not limited to, the areas in and around the victim's residence, place of employment and school and other areas defined to minimize the probationer's contact with children, if applicable."[91] If the offender enters an exclusionary area, the offender's location is immediately transmitted to the local police department, and if the offender has violated his probation by entering the area, he is arrested.[92] This portion of the Massachusetts statute differs from other electronic monitoring statutes, as it specifies how the tracking data will be used.[93] Another significant difference in the Massachusetts statute is how courts have interpreted the date of application.[94] Unlike the Florida and California statutes, which only apply mandatory monitoring to sex offenders convicted of a crime after the statute was enacted, the SJC interpreted the statute as originally applying to all sex offenders sentenced to probation after the statute was made effective, regardless of when the original crime was committed.[95] The SJC, however, quickly foreclosed the possibility of it being applied retroactively in holding that such application would violate the Ex Post Facto Clause.[96]

D. Constitutional Challenges to Sex Offender GPS-Tracking Statutes

The implementation of GPS-monitoring statutes has raised constitutional

89. *See* MASS. GEN. LAWS ANN. ch. 6, § 178H(a)(1) (West 2015) (requiring lifetime community parole supervision for violation of chapter).

90. *See id.* ch. 127, § 133D 1/2 (requiring electronic monitoring for life for certain sex offenders).

91. *See id.* ch. 265, § 47 (granting commissioner of probation power to prohibit offender from entering restricted areas).

92. *See id*. (explaining use of tracked GPS data to enforce probation).

93. *See* Dante, *supra* note 10, at 1182 (noting California and Florida statutes do not specify how transmitted data utilized).

94. *See id*. at 1183 (observing date of application for Massachusetts statute differs from other GPS-tracking statutes).

95. *See* FLA. STAT. ANN. § 948.30(2) (West 2015) (basing application of statute on when crime committed); Doe v. Schwarzenegger, 476 F. Supp. 2d 1178, 1181-82 (E.D. Cal. 2007) (holding SPPCA only applied prospectively); Commonwealth v. Cory, 911 N.E.2d 187, 191 (Mass. 2009) (holding section 47 applies to any sex offender sentenced to probation after statute's effective date). The SJC came to this conclusion by conducting a strict reading of the statutory phrase "is placed on probation." *See Cory*, 911 N.E.2d at 191.

96. *See Cory*, 911 N.E.2d at 197 (holding statute punitive in effect and thus inapplicable retroactively).

concerns.[97] Some of these constitutional challenges have been addressed by courts, while others have only been discussed in a theoretical sense.[98] The Supreme Court, though it has determined GPS monitoring is a search, has yet to rule on the constitutionality of these statutes, further adding to the uncertainty.[99]

1. Ex Post Facto

The U.S. Constitution prohibits states from passing any ex post facto law.[100] An ex post facto law retroactively alters the punishment that an offender receives at sentencing by increasing the punishment for a crime previously committed.[101] In determining if a law violates the Ex Post Facto Clause, courts conduct a two-part analysis.[102]

The court first determines if the legislature intended for the statute to be civil or punitive; if the intent is punitive, the statute is ex post facto and the inquiry ends there.[103] If the legislature's intent was for the statute to be civil, however, the court must conduct the second step of the analysis and determine if "the statutory scheme was so punitive either in purpose or effect as to negate that intention."[104] When conducting the analysis of whether a civil statute is punitive in effect, courts rely on the seven factors identified by the Supreme Court in *Kennedy v. Mendoza-Martinez*[105] for guidance.[106] While these factors are not exhaustive, they nevertheless assist courts in determining if a law

97. *See* Janicki, *supra* note 2, at 286 (noting questions surrounding constitutionality of GPS-tracking statutes).

98. *See infra* Part II.D.1-4 (discussing constitutional challenges to GPS-tracking statutes).

99. *See supra* note 12 and accompanying text (observing Supreme Court has only addressed whether sex offender GPS-tracking statutes are a Fourth Amendment search).

100. *See* U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law").

101. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (defining ex post facto laws as "[e]very law that changes the punishment, and inflicts a greater punishment"); Frank Jaehoon Lee, Note, *Severing the Invisible Leash: A Challenge to Tennessee's Sex Offender Monitoring Act in* Doe v. Bredesen, 44 U.C. DAVIS L. REV. 683, 688 (2010) (defining ex post facto laws in criminal context).

102. *See* Lee, *supra* note 101, at 688 (explaining how courts analyze ex post facto questions).

103. *See* Smith v. Doe, 538 U.S. 84, 92 (2003) (noting first step of analysis).

104. United States v. Ward, 448 U.S. 242, 248-49 (1980) (articulating second step of analysis).

105. 372 U.S. 144 (1963).

106. *See Smith*, 538 U.S. at 97 (recognizing factors courts use in conducting inquiry). The seven factors articulated in *Mendoza-Martinez* look to whether the sanction imposed by the statute:

> involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies 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 assigned.

372 U.S. at 168-69.

violates the Ex Post Facto Clause.[107]

In the wake of increasing changes in sex offender monitoring legislation, courts have had to determine if these new laws violate the Ex Post Facto Clause.[108] In *Smith v. Doe*,[109] the Supreme Court held that the Alaska Sex Offender Registration Act did not violate the Ex Post Facto Clause.[110] The Court first found that the legislature intended to create a "civil, nonpunitive regime," and second, that the statute's punitive effect was not enough to overcome the legislature's intent to create a civil statute.[111]

A similar ex post facto challenge was mounted against the Tennessee Serious and Violent Sex Offender Monitoring Pilot Project Act (Monitoring Act).[112] The Sixth Circuit, relying heavily on *Smith*, held that the requirement that sex offenders be subjected to GPS monitoring for the duration of their probation did not violate the Ex Post Facto Clause when applied retroactively.[113] The court, in discussing the *Mendoza-Martinez* factors, held that GPS monitoring of offenders did not impose an affirmative disability, was not traditionally considered a punishment, had a rational connection to a nonpunitive purpose, and did not exceed the nonpunitive purpose.[114] Conversely, not all courts have adopted this analysis in regard to GPS-tracking statutes.[115] The SJC reasoned that the state could not apply its GPS-tracking statute retroactively and held that GPS monitoring is punitive because it created

107. *See Smith*, 538 U.S. at 97 (describing how courts employ *Mendoza-Martinez* factors).

108. *See* Lee, *supra* note 101, at 690 (contending courts have utilized *Mendoza-Martinez* factors in reviewing constitutionality of sex offender monitoring statutes).

109. 538 U.S. 84 (2003).

110. *See id.* at 89, 105-06 (holding retroactive application of statute did not violate Ex Post Facto Clause); *see also* ALASKA STAT. ANN. § 12.63.010 (West 2014) (requiring sex offenders to register with Department of Corrections).

111. *See Smith*, 538 U.S. at 96, 105 (conducting two-part ex post facto analysis). First, in concluding that the legislature's intent was for the statute to be civil, the Court noted that the use of restrictive measures on sex offenders deemed to be dangerous has historically been "'a legitimate nonpunitive government objective.'" *Id*. at 93 (quoting Kansas v. Hendricks, 521 U.S. 346, 363 (1997)). Second, in determining that the punitive effects of the statute did not overcome the legislature's intent for the statute to be civil, the Court found that the nonpunitive purpose of the statute—to enhance public safety by alerting the public to the risk of possibly dangerous sex offenders in their community—to be the most persuasive factor that rebutted the ex post facto claim. *See id.* at 102-03. In her dissent, Justice Ginsburg found the statute to be excessive in relation to its nonpunitive purpose, as it applied the strict registration requirements to all sex offenders, without regard to their specific level of dangerousness. *See id*. at 116-17 (Ginsburg, J., dissenting).

112. *See* Doe v. Bredesen, 507 F.3d 998, 1000 (6th Cir. 2007) (holding Monitoring Act did not violate Ex Post Facto Clause); *see also* TENN. CODE ANN. § 40-39-302(b) (West 2015) (authorizing parole board to subject sex offenders to GPS tracking for duration of probation).

113. *See Bredesen*, 507 F.3d at 1007 (holding GPS monitoring not so punitive as to negate legislature's civil intent).

114. *See id*. at 1005-07 (explaining why GPS monitoring not punitive). *But see* Lee, *supra* note 101, at 705-06 (contending GPS monitoring form of public shaming and imposes affirmative restraint on offender).

115. *See* Commonwealth v. Cory, 911 N.E.2d 187, 189 (Mass. 2009) (striking down restroaction application of Massachusetts sex offender GPS-tracking statute).

an affirmative restraint.[116]

2. Due Process

The Fourteenth Amendment of the U.S. Constitution prohibits states from depriving "any person of life, liberty, or property, without due process of law."[117] This includes both procedural and substantive due process.[118] Courts have held that subjecting a sex offender to GPS monitoring deprives an offender of a protected liberty interest.[119] As a result, statutes that require the GPS tracking of sex offenders raise questions about the possible violation of both procedural and substantive due process.[120] Procedural due process challenges to GPS-tracking statutes focus on the process offered to the offender.[121] Substantive due process challenges, on the other hand, contend

116. *See id*. at 196-97 (stating GPS monitoring burdens offender's liberty by its physical attachment and continuous surveillance). The court distinguished *Smith* as only applying to retroactive registration requirements and not electronic monitoring statutes. *See id*. at 193 n.11.

117. *See* U.S. CONST. amend. XIV, § 1 (stating Due Process Clause).

118. *See* GEORGE BLUM ET AL., 16B AM. JUR. 2D *Constitutional Law* § 953 (2015) (explaining difference between procedural and substantive due process). Procedural due process is a guarantee of fair procedure. *See id*. § 955. When evaluating a procedural due process claim, a court must first consider if there is a "constitutionally protected" liberty interest at stake, and if there is, whether there are adequate procedural safeguards in place to protect it. *See* United States v. Polouizzi, 697 F. Supp. 2d 381, 387 (E.D.N.Y. 2010). In determining if procedural safeguards are adequate, the court must balance three considerations:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used . . . and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Substantive due process is concerned with whether a state regulation infringing on an individual's rights or liberties is justified. *See* BLUM ET AL., *supra*, § 964. If the infringement is on a fundamental liberty interest, it must be "narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993). If the infringement does not involve a fundamental right, however, it must only pass a rational basis review to withstand a substantive due process challenge. *See* BLUM ET AL., *supra*, § 965.

119. *See, e.g.*, United States v. Merritt, 612 F. Supp. 2d 1074, 1079 (D. Neb. 2009) (holding curfew with electronic monitoring implicated liberty interest protected by Due Process Clause); *Cory*, 911 N.E.2d at 196-97 (holding GPS monitoring represents affirmative burden on liberty); State v. Stines, 683 S.E.2d 411, 414 (N.C. Ct. App. 2009) ("[R]equiring enrollment in [electronic monitoring] program does deprive an offender of a significant liberty interest."); State v. Dykes, 728 S.E.2d 455, 462-63 (S.C. 2012) (discussing infringement on individual's liberty caused by continuous twenty-four hour GPS monitoring), *superseded by* 744 S.E.2d 505 (S.C. 2013).

120. *See* Lee, *supra* note 101, at 693-94 (highlighting procedural due process challenges to GPS-tracking statutes); Shekhter, *supra* note 62, at 1103 (asserting lifetime GPS monitoring violates substantive due process).

121. *See Stines*, 683 S.E.2d at 418 (holding state violated offender's procedural due process rights by failing to give sufficient notice). The North Carolina sex offender monitoring statute lists three categories of offenders who can be subjected to GPS monitoring. *See* N.C. GEN. STAT. ANN. § 14-208.40(a) (West 2015). In a prehearing notice, the state in *Stines* told the offender that the Department of Corrections had made the initial determination that he met the criteria for enrollment in the electronic monitoring program, but the state did not tell him under which category he fell. *See* 683 S.E.2d at 413.

that the statutes infringe on the offender's fundamental rights and are not justified by state interest when applied, irrespective of an offender's actual degree of risk.[122]

3. Unreasonable Search and Seizure

The Fourth Amendment protects citizens against unreasonable searches and seizures of their "persons, houses, papers, and effects."[123] The Supreme Court has interpreted this constitutional protection as applying to places where a citizen reasonably expects to preserve privacy.[124] With this policy in mind, the Court in *United States v. Karo*[125] held that electronic monitoring in a private residence "violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence."[126] Moreover, in *Grady v. North Carolina*,[127] where a convicted sex offender challenged North Carolina's GPS-monitoring statute, the Court held that "a state also conducts a search when it attaches a device to a person's body . . . for the purpose of tracking that individual's movements."[128] This extension could create Fourth Amendment issues for sex offender GPS-tracking statutes, as all of these statutes require continuous monitoring of an offender, even when he is at home.[129] Thus, monitoring offenders while they are in an area where they reasonably expect privacy—most notably their homes—could result in a violation of their Fourth

122. *See* Brief and Record Appendix for the Defendant on Appeal from the Hampshire Superior Court at 24-25, Commonwealth v. Selavka, 14 N.E.3d 933 (Mass. 2014) (No. 11461), 2013 WL 7103095, at *24-25 [hereinafter Brief for the Defendant] (asserting Massachusetts GPS-tracking statute not narrowly tailored because it applies regardless of offender's risk); Shekhter, *supra* note 62, at 1104 (arguing GPS-monitoring statutes infringe on right to travel and not narrowly tailored); *see also* United States v. Guest, 383 U.S. 745, 757 (1966) (recognizing freedom to travel as basic constitutional right). *But see* Commonwealth v. Pike, 701 N.E.2d 951, 959 (Mass. 1998) ("Judges . . . may place restrictions on probationers' freedoms that would be unconstitutional if applied to the general public."); Janicki, *supra* note 2, at 304-05 (concluding intrusion caused by GPS monitoring minor compared to government interest).

123. *See* U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures . . . ."); *see also* Samson v. California, 547 U.S. 843, 855 n.4 (2006) (emphasizing "touchstone of the Fourth Amendment is reasonableness").

124. *See* Katz v. United States, 389 U.S. 347, 351 (1967) ("Fourth Amendment protects people, not places."). In analyzing whether a person is protected by the Fourth Amendment, courts must determine if the person "exhibited an actual (subjective) expectation of privacy and . . . [if] the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Id*. at 361 (Harlan, J., concurring).

125. 468 U.S. 705 (1984).

126. *Id*. at 714 (holding monitoring of beeper in private residence violated residents' Fourth Amendment rights).

127. 135 S. Ct. 1368 (2015) (per curiam).

128. *See id.* at 1370. The court below determined that the monitoring program was not a search and therefore did not reach whether the search was reasonable. *Id.* Thus, after the Supreme Court determined the program was a search, it remanded the case to allow the North Carolina courts to consider, in the first instance, whether the search is reasonable. *Id.* at 1371.

129. *See* 42 U.S.C. § 16981(a)(1)(C)(ii) (2012) (permitting grants only to states which provide "continuous monitoring of offenders 24 hours a day"); *see also supra* note 64 and accompanying text (noting grants provided by AWA motivated states to enact GPS-monitoring statutes).

Amendment rights.[130]

4. Cruel and Unusual Punishment

The Eighth Amendment prohibits the government from imposing cruel and unusual punishment.[131] To determine if a punishment is "cruel and unusual," courts often consider the factors outlined by the Supreme Court in *Furman v. Georgia*,[132] which stated a punishment violates the Eighth Amendment if it is "unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment."[133] In analyzing statutes that govern GPS tracking of sex offenders in relation to the Eighth Amendment, the principal question is whether it is oppressive or humiliating to require an offender to wear the monitoring device in public.[134] Considering the disturbing circumstances surrounding most sex crimes and the belief that GPS tracking is an effective tool for sex offender monitoring, however, it is unlikely an Eighth Amendment challenge to sex offender GPS-monitoring statutes would prevail.[135]

130. *See* Dante, *supra* note 10, at 1209 (arguing receiving location data of offender in protected area violates Fourth Amendment). *But see* United States v. Knights, 534 U.S. 112, 119 (2001) (holding probationers have lower level of liberty compared to other citizens); Brief of the Commonwealth of Massachusetts at 38-39, Commonwealth v. Guzman, 14 N.E.3d 946 (Mass. 2014) (No. 11483) (arguing offender's expectation of privacy, insofar as GPS monitoring concerned, outweighed by government's interests); Scholl, *supra* note 59, at 856 ("[T]he special needs of a GPS monitoring program can . . . mak[e] the 'search' a 'reasonable' one.").

131. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.")

132. 408 U.S. 238 (1972).

133. *Id*. at 282 (explaining "cruel and unusual" punishment test to determine whether challenged punishment coheres with Eight Amendment). The factors outlined by the Court are interrelated, meaning it is unlikely that a punishment would be "fatally offensive" under any one factor. *See id*.

134. *See* Scholl, *supra* note 59, at 862 (noting how mandatory GPS monitoring may violate Eighth Amendment); *see also* Commonwealth v. Cory, 911 N.E.2d 187, 196 (Mass. 2009) (describing GPS' "permanent, physical attachment" as "dramatically more intrusive and burdensome" than yearly registration); Lee, *supra* note 101, at 705 (arguing GPS monitoring publicly shames offender).

135. *See* Janicki, *supra* note 2, at 297 (observing GPS tracking more efficient at monitoring released sex offenders than traditional parole system); Marisa L. Mortensen, Comment, *GPS Monitoring: An Ingenious Solution to the Threat Pedophiles Pose to California's Children*, 27 J. JUV. L. 17, 31 (2006) (suggesting severity of sex crimes precludes GPS monitoring from cruel and unusual status). *But see* Brief of Amicus American Civil Liberties Union of Massachusetts at 30-32, Commonwealth v. Selavka, 14 N.E.3d 933 (Mass. 2014) (No. 11461), 2014 WL 640872, at * 30-32 (asserting imposition of GPS monitoring without individual assessment cruel and unusual).

III. ANALYSIS

A. Comparison of Mass. Gen. Laws ch. 265, § 47 with Other Sex Offender Electronic Monitoring Statutes

Similar to other states, Massachusetts requires the GPS monitoring of released sex offenders who are convicted of certain crimes.[136] Massachusetts allows its sex offender registry board to work with the sentencing court in setting the length of probation—an element of discretion that is lacking in other mandatory monitoring jurisdictions.[137] This element of discretion is eliminated if an offender fails to comply with the state registration requirements, but at that point, if the offender was convicted of one of the listed sex crimes, he or she is subjected to lifetime probation and must wear a GPS device for life.[138] Mandatorily imposing lifetime GPS monitoring for failing to satisfy registration requirements is similar to the Florida statute that requires lifetime electronic monitoring of any offender who violates his probation after having been convicted of a specific sex crime.[139] States with this lack of discretion prior to imposing lifetime electronic monitoring, however, differ from states that require some form of risk assessment before an individual is obligated to be GPS tracked for life.[140]

136. *See* MASS. GEN. LAWS ANN. ch. 265, § 47 (West 2015) ("Any person who is placed on probation for any offense listed . . . shall . . . wear a [GPS] device . . . ."); *supra* note 73 and accompanying text (highlighting prevalence of mandatory electronic monitoring statutes). A conviction for any offense "within the definition of 'sex offense', a 'sex offense involving a child' or a 'sexually violent offense'" triggers the mandatory GPS tracking. *See* ch. 265, § 47.

137. *See* MASS. GEN. LAWS ANN. ch. 276, § 87 (West 2015) (granting court discretion in setting probation length); Dante, *supra* note 10, at 1181 (noting judicial discretion in setting probationary period differs from California model); *see also* MASS. GEN. LAWS ANN. ch. 6, § 178K(1) (West 2015) (denoting responsibilities of sex offender registry board). Under California's GPS-tracking statute, any person who is convicted of a "registerable sex offense" or any attempt to commit such offense is required to be monitored by GPS for life upon release from prison. *See* CAL. PENAL CODE § 3004(b) (West 2015).

138. *See supra* notes 89-90 and accompanying text (explaining how sex offenders automatically sentenced to mandatory lifetime GPS monitoring in Massachusetts). A sex offender is required to notify the registry board if, among other occurrences, he or she changes work addresses or decides to attend or stop attending an institution of higher learning. *See* MASS. GEN. LAWS ANN. ch. 6, §§ 178E(j), (o), (p) (West 2015). Thus, those previously convicted of one of the listed sex crimes who later fails to notify the board that they have dropped out of college would be subjected to lifetime GPS monitoring. *See* § 178E(p) (requiring sex offenders inform board if they stop attending institution of higher learning); *id.* § 178H(a)(1) (mandating lifetime community parole supervision for certain sex offenders who fail to verify registration information); *id.* ch. 127, § 133D 1/2 (requiring certain sex offenders on lifetime probation electronically monitored for life).

139. *See supra* note 71 and accompanying text (noting Florida courts required to impose lifetime electronic monitoring on certain sex offenders). Unlike in Massachusetts, however, where the event that triggers the mandatory lifetime GPS tracking is related to the penalty for the original offense, any violation of probation—sexual or otherwise—triggers the mandatory lifetime electronic monitoring in Florida. *See supra* note 72 and accompanying text (indicating any probation violation prompts lifetime GPS monitoring for certain sex offenders).

140. *See* GA. CODE ANN. § 42-1-14(e) (West 2015) (requiring "sexually dangerous predator[s]" to wear electronic monitoring system for life); *supra* note 79 (discussing individual risk assessment required before person classified as sexually dangerous predator).

In addition, the Massachusetts sex offender GPS-monitoring statute also differs from those in states that allow for discretionary monitoring.[141] Some of these states, like Connecticut, Mississippi, New York, and New Jersey, vest discretionary power in the judge presiding over the case.[142] On the other hand, states like Tennessee and Washington only give this discretionary power to parole boards.[143] Regardless of the structure, statutes that permit discretion allow for much more flexibility than is allowed under the Massachusetts sex offender GPS-tracking statute.[144] Moreover, another benefit of allowing for discretion is that the proper authority—either the sentencing judge or the parole board—is able to conduct an individualized risk assessment of the sex offender.[145] Scholars theorize that an individualized risk assessment is more effective at predicting future behavior and helping offenders rehabilitate their behavior.[146]

A unique aspect of the Massachusetts sex offender tracking statute is the judicial interpretation of its date of application.[147] The SJC held that the statute

141. *See* MASS. GEN. LAWS ANN. ch. 265, § 47 (West 2015) (requiring GPS monitoring as condition of probation for certain sex offenses); *supra* Part II.C.1.c (discussing states with discretionary monitoring statutes).

142. *See supra* note 82 (highlighting statutes where discretionary power vested in judge). New Jersey allows the Chairman of the State Parole Board to order "time correlated or continuous tracking" of sex offenders whose risk of reoffense has been determined to be high and for whom the Chairman deems such monitoring appropriate. *See* N.J. STAT. ANN. § 30:4-123.91(b) (West 2015). In addition, the New Jersey statute also allows a judge in his discretion to order the electronic monitoring of sex offenders not already enrolled in the monitoring program. *See* § 30:4-123.91(c). Mississippi notably makes electronic monitoring mandatory for at least five years for sex offenders who violate their registration requirements, but it also separately permits a judge to impose electronic monitoring as a condition of probation. *See* MISS. CODE ANN. § 45-33-33(2)(b) (West 2015) (requiring electronic monitoring for failing to satisfy registration requirements); *id.* § 99-19-84 (authorizing court to require electronic monitoring as part of probation). New York allows judges to impose electronic monitoring on a sex offender in their discretion if they determine it will "advance public safety, probationer control or probationer surveillance." N.Y. PENAL LAW § 65.10(4) (McKinney 2015). In Connecticut, the power to order GPS monitoring of sex offenders is vested solely in sentencing judges. *See* CONN. GEN. STAT. ANN. § 53a-30(a) (West 2015) ("When imposing sentence of probation . . . the court may . . . order that the defendant . . . be subject to electronic monitoring . . . .").

143. *See supra* note 83 (noting states where parole board has sole discretionary power to impose electronic monitoring).

144. *See* Dante, *supra* note 10, at 1188 (indicating states with discretionary monitoring have avoided bright line rules in favor of flexibility).

145. *See id*. at 1187 (noting individualized risk assessment precedes imposition of GPS monitoring in discretionary statutes).

146. *See* Winick, *supra* note 2, at 561 (describing benefits of risk assessment for sex offenders). The advantage of using a risk assessment method is that it considers all relevant information about an individual as opposed to being inflexible. *See id*. Moreover, such a method also gives offenders an incentive to change their behavior, as a determination that they no longer pose a danger can help them avoid infringements on their liberty. *See id*. In contrast, the Massachusetts sex offender tracking statute imposes GPS monitoring on an offender based solely on the crime committed, regardless of any improvement in behavior. *See* MASS. GEN. LAWS ANN. ch. 265, § 47 (West 2015) (requiring GPS tracking as condition of probation for certain sex crimes).

147. *See supra* notes 94-95 and accompanying text (observing date of application for Massachusetts statute differs from Florida and California statutes). The day on which the crime was committed is the relevant

applied to any sex offender sentenced to probation after the statute went into effect, regardless of when the applicable crime was committed.[148] An initial result of this interpretation was that it brought more sex offenders within the sphere of section 47 and created the possibility of retroactive application.[149] However, in also assigning the statute a punitive effect, the SJC prevented retroactive application and deemed any retroactive application an unconstitutional violation of the Ex Post Facto Clause.[150] Thus, statutory language aside, section 47 applies only prospectively in practice, making it similar to other state sex offender tracking statutes.[151]

B. Constitutionality of Mass. Gen. Laws ch. 265, § 47

1. Ex Post Facto

Previously, the SJC ruled that retroactive application of the GPS-monitoring statute violates ex post facto principles.[152] The court reached this conclusion after determining that the statutorily imposed "substantial burden on liberty" constituted a punitive effect.[153] Moreover, in acknowledging the punitive nature of the statute, the court distinguished mandatory GPS monitoring from sex offender registration requirements.[154] This distinction was proper because the burden imposed by GPS tracking on individuals is far greater than the burden imposed by registration requirements.[155] Thus, the SJC correctly

date when applying the statutes in those two states. *See* FLA. STAT. ANN. § 948.30(2) (West 2015) (basing application date on when crime was committed); Doe v. Schwarzenegger, 476 F. Supp. 2d 1178, 1181-82 (E.D. Cal. 2007) (holding statute only applies prospectively).

148. *See* Commonwealth v. Cory, 911 N.E.2d 187, 191 (Mass. 2009) (holding statute applied to all sex offenders sentenced to probation after statute's effective date). The court reasoned that it was irrelevant "whether the crimes at issue were committed before or after the statute's effective date" because the operative date for application was when the offender was placed on probation. *Id*.

149. *See* Dante, *supra* note 10, at 1183 (contending court's interpretation in *Cory* expanded pool of sex offenders to which statute applied).

150. *See supra* note 96 and accompanying text (noting SJC prohibited retroactive application of section 47).

151. *See Cory*, 911 N.E.2d at 189 (holding Massachusetts's tracking statute only applied prospectively); *supra* note 95 (noting California and Florida sex offender tracking statutes applied prospectively).

152. *See Cory*, 911 N.E.2d at 189 (discussing prospective application of statute); *supra* note 96 and accompanying text (highlighting SJC prohibited retroactive application of statute).

153. *See Cory*, 911 N.E.2d at 197 (concluding statute punitive based on *Mendoza-Martinez* factors); *supra* notes 103-07 and accompanying text (discussing analysis courts undertake to determine whether statute punitive).

154. *See* Commonwealth v. Cory, 911 N.E.2d 187, 193 n.11 (Mass. 2009) (distinguishing *Smith* decision because it merely involved registration requirements). *But see* Doe v. Bredesen, 507 F.3d 998, 1003-07 (6th Cir. 2007) (relying on *Smith* in analyzing ex post facto challenge to Tennessee sex offender monitoring statute); Lee, *supra* note 101, at 700 (noting *Bredesen* court used *Smith* as precedent in rejecting statute's ex post facto challenge).

155. *See* Lee, *supra* note 101, at 701 (contending GPS tracking more punitive than registration requirements); *see also supra* note 119 (listing cases where courts acknowledged electronic monitoring imposed burden).

rejected the retroactive application of section 47 as an unconstitutional violation of the ex post clause.[156]

2. Due Process

Another possible constitutional challenge to section 47 implicates both procedural and substantive due process.[157] The procedural due process challenge focuses on the fact that the statute effectively deprives an individual of a liberty interest without providing any opportunity for an individualized hearing.[158] Section 47, however, subjects an individual to GPS monitoring only if he or she is first convicted of a specific sex offense and then sentenced to probation; both conviction and sentencing provide the offender with an opportunity to be heard.[159] Moreover, any procedural due process analysis must also balance the government's interest in enforcing the statute.[160] The government's interest here—to protect the public and especially children from the threat released sex offenders pose—is legitimate given the high sex offender recidivism rate.[161] Thus, section 47 does not violate procedural due process.[162]

Substantive due process challenges to section 47 focus on the burden imposed by continuous GPS monitoring and contend that the statute infringes on the fundamental rights of sex offenders.[163] Moreover, this challenge argues

156. *See Cory*, 911 N.E.2d at 189 (holding retroactive application of section 47 runs afoul of United States and Massachusetts constitutions).

157. *See* Brief for the Defendant, *supra* note 122, at 22-29, 38-43 (arguing statute violates procedural and substantive due process); *see also supra* note 120 and accompanying text (noting GPS-monitoring statutes raise both procedural and substantive due process issues).

158. *See* MASS. GEN. LAWS ANN. ch. 265, § 47 (West 2015) (requiring certain sex offenders on probation wear GPS device without room for discretion); Brief for the Defendant, *supra* note 122, at 40 (asserting mandatory electronic monitoring violated defendant's procedural due process when ordered without individualized hearing); *supra* note 119 and accompanying text (noting courts have recognized GPS monitoring as deprivation of liberty interest).

159. *See* Brief for the Commonwealth, *supra* note 87, at 16-18 (arguing trial and sentencing hearing provide procedural due process for individuals implicated by section 47). This is distinguishable from instances where an offender is subjected to mandatory electronic monitoring prior to being convicted of a crime. *See* United States v. Polouizzi, 697 F. Supp. 2d 381, 384 (E.D.N.Y. 2010) (mandating electronic monitoring of defendant prior to trial and without hearing violated procedural due process).

160. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (emphasizing government's interest must weigh in analysis if procedural safeguards adequate).

161. *See* Janicki, *supra* note 2, at 310-311 (explaining individual rights inferior to social benefit of reducing sex crimes); Mortensen, *supra* note 135, at 25 (citing study showing 61.1% of convicted sex offenders reoffend with sex offense).

162. *See* Brief for the Commonwealth, *supra* note 87, at 16-18 (asserting section 47 does not violate procedural due process); *see also* Janicki, *supra* note 2, at 307 (contending statutes requiring tracking of sex offenders on probation do not violate procedural due process).

163. *See* Brief for the Defendant, *supra* note 122, at 22-24 (stressing GPS monitoring under section 47 implicates fundamental rights); *see also* Shekhter, *supra* note 62, at 1103-04 (arguing GPS monitoring infringes on fundamental right to travel); *supra* note 119 and accompanying text (noting courts have recognized substantial burden on liberty GPS monitoring creates).

that section 47 violates substantive due process because the law is not narrowly tailored to serve a compelling state interest as it applies to certain sex offenders on probation without any kind of individual assessment.[164] This argument, however, ignores the fact that restrictions may be placed on probationers that would be unconstitutional if applied to the general public.[165] The SJC has previously held that these restrictions must only meet the rational basis review if prescribed by the legislature.[166] Section 47, which only applies to sex offenders on probation, certainly satisfies the rational basis test; and section 47 may even satisfy the more stringent reasonably related test because it has the ability to monitor the offender at all times and notify the police if the offender enters a prohibited area, thereby serving the probationary goals of public protection, deterrence, and retribution.[167] Thus, the statute does not run afoul of substantive due process because it only affects sex offenders on probation and it is supported by a rational basis.[168]

3. Unreasonable Search and Seizure

Section 47 can also be challenged as an unconstitutional violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.[169] In deciding whether the statute violates the Fourth Amendment, the principle issue concerns whether the intrusion caused by continuous GPS tracking invades a reasonable privacy interest of sex offenders, which the Supreme Court has determined it does, and whether that interest is outweighed by the

164. *See* Brief for the Defendant, *supra* note 122, at 24-25 (arguing statute not narrowly tailored because it applies irrespective of offender's risk); *see also* BLUM ET AL., *supra* note 118 (discussing standard required for substantive due process analysis with implicated fundamental rights).

165. *See* United States v. Knights, 534 U.S. 112, 119 (2001) (stating probation deprives probationer of some freedoms enjoyed by other citizens); Commonwealth v. Pike, 701 N.E.2d 951, 959 (Mass. 1998) (stating fundamental rights of probationers constrained by probation conditions).

166. *See* Commonwealth v. Guzman, 14 N.E.3d 946, 952 (Mass. 2014) (noting legislatively mandated punishments subject only to rational basis review). The court's use of the rational basis test is based on its understanding that "the Legislature has broad power to determine the appropriate punishment for a given offense." *See id*.

167. *See id.* at 953 (upholding section 47 under rational basis review); Commonwealth v. Cory, 911 N.E.2d 187, 197 (Mass. 2009) (noting GPS tracking promotes aims of retribution and deterrence); Brief for the Commonwealth, *supra* note 87, at 12 (arguing GPS monitoring reasonably related to goals of probation); *supra* notes 91-92 and accompanying text (describing use of tracked GPS data).

168. *See Guzman*, 14 N.E.3d at 953-54 (noting section 47 does not violate substantive due process). If section 47 mandated the GPS monitoring of sex offenders not on probation, it would likely violate substantive due process. *See* State v. Dykes, 728 S.E.2d 455, 465 (S.C. 2012) (holding mandatory electronic monitoring of convicted sex offender not on probation violated substantive due process), *superseded by* 744 S.E.2d 505 (S.C. 2013).

169. *See* Brief for the Defendant, *supra* note 122, at 49 (contending continuous GPS tracking required by statute constitutes unreasonable search and seizure); *see also supra* notes 64, 127, 130 and accompanying text (discussing Fourth Amendment issues raised by sex offender GPS-monitoring statutes). Recently, the SJC decided a case involving section 47 where the court declined to rule on the Fourth Amendment claim that was raised by the defendant. *See Guzman*, 14 N.E.3d at 954 (declining to address Fourth Amendment claim due to lack of sufficient facts).

government's interest in monitoring them.[170] Because the statute only applies to sex offenders who are on probation, it is first necessary to note that probationers do not enjoy the same liberties that the public in general enjoys.[171] Moreover, while the "search" of sex offenders created by the statute occurs in the absence of reasonable suspicion, the Supreme Court has previously held that suspicionless searches of parolees do not violate the Fourth Amendment because the notice of certain probation conditions can significantly diminish a parolee's reasonable expectation of privacy.[172] Additionally, the state's interests—to protect the public from the threat of recidivism posed by sex offenders, to enhance their reintegration into society, and to discover criminal activity if an offender enters a prohibited area—are especially strong.[173] Thus, application of section 47 does not violate the Fourth Amendment because the government's interest in enforcing the statute outweighs any "minimal" expectation of privacy held by a sex offender.[174]

4. Cruel and Unusual Punishment

Another constitutional challenge to section 47 is the argument that it violates the Eighth Amendment's prohibition against cruel and unusual punishment.[175] There are two parts to this argument.[176] The argument first focuses on the

170. *See* Brief of the Commonwealth of Massachusetts, *supra* note 130, at 27-40 (addressing reasonable expectation of privacy held by sex offenders and government's interests under section 47); *see also* Grady v. North Carolina, 135 S. Ct. 1368, 1370 (2015) (per curiam) (holding similar North Carolina statute creates search under Fourth Amendment); Samson v. California, 547 U.S. 843, 855 n.4 (2006) (stressing reasonableness as touchstone of Fourth Amendment); *supra* note 124 and accompanying text (explaining Fourth Amendment protects reasonable privacies).

171. *See supra* note 165 and accompanying text (opining probationers have lower level of liberty).

172. *See Samson*, 547 U.S. at 857 (holding Fourth Amendment did not prohibit police from conducting suspicionless search of parolee); United States v. Knights, 534 U.S. 112, 119-120 (2001) (stating probationer's reasonable expectation of privacy diminished after being informed of probation condition). The fact that section 47 unambiguously states that certain sex offenders placed on probation will be subjected to GPS monitoring makes it distinguishable from cases where the defendant was unaware of the electronic monitoring. *See* MASS. GEN. LAWS ANN. ch. 265, § 47 (West 2015) (requiring GPS tracking of certain sex offenders while on probation); Brief of the Commonwealth of Massachusetts, *supra* note 130, at 36 (distinguishing GPS monitoring under section 47 from cases like *Jones*); *cf.* United States v. Karo, 468 U.S. 705, 707 (1984) (noting defendant unaware of monitoring device's presence).

173. *See Samson*, 547 U.S. at 854 (observing suspicionless searches of parolees aid their reintegration into "productive society"); Brief of the Commonwealth of Massachusetts, *supra* note 130, at 32-34 (discussing government's interests in enforcing section 47); *supra* notes 91-92 and accompanying text (explaining how GPS monitoring under section 47 assists law enforcement); *supra* note 161 and accompanying text (noting high rate of sex crime recidivism among sex offenders).

174. *See* Brief of the Commonwealth of Massachusetts, *supra* note 130, at 38-39 (arguing statute does not implicate legitimate privacy interest and government's interests would prevail regardless); *supra* notes 165, 172 and accompanying text (discussing lower level of privacy expectations held by probationers).

175. *See* Brief of Amicus American Civil Liberties Union of Massachusetts, *supra* note 135, at 29 (describing statute as "cruel and unusual"); *supra* note 134 and accompanying text (identifying Eighth Amendment issues raised by GPS-monitoring statutes); *see also supra* note 131 and accompanying text (noting Eighth Amendment prohibits cruel and unusual punishment).

176. *See* Brief of Amicus American Civil Liberties Union of Massachusetts, *supra* note 135, at 30-32

process—or lack thereof—offered to sex offenders under section 47, and it contends that the statute is cruel and unusual because it mandates the GPS monitoring of certain sex offenders on probation without any form of individual assessment.[177] Next, the argument focuses on the penalty itself and it asserts that forcing a sex offender to wear a GPS-monitoring device in public is cruel and unusual.[178] In deciding whether these arguments are persuasive, courts consider the following factors: if the punishment is unusually severe, if it is inflicted arbitrarily, if it is rejected by contemporary society, and if it serves a penal purpose that no lesser punishment can accomplish.[179] When applying these factors to GPS monitoring, it is apparent that section 47 does not violate the Eighth Amendment because it is not unusually severe, it is not applied arbitrarily, and it serves a legitimate penal purpose.[180]

C. Recommendations on How To Improve Section 47

Section 47, as currently constructed, is constitutional.[181] Nevertheless, the statute would be more efficient if it gave either judges or the Sex Offender Registry Board the authority to conduct an individualized risk assessment prior to imposing GPS monitoring on a sex offender.[182] Adding this discretionary element to the statute would still allow it to accomplish its main purpose—to protect the public from potentially dangerous sex offenders—while also making it more effective in aiding the rehabilitation of a particular offender.[183]

IV. CONCLUSION

Dangerous sex offenders who are released on parole present a serious threat

(arguing statute cruel and unusual because it applies to offenders regardless of their risk); *supra* note 134 and accompanying text (observing how wearing GPS device in public may implicate Eighth Amendment).

177. *See* Brief of Amicus American Civil Liberties Union of Massachusetts, *supra* note 135, at 30-32; *supra* note 134 and accompanying text.

178. *See* Brief of Amicus American Civil Liberties Union of Massachusetts, *supra* note 135, at 30-32; *supra* note 134 and accompanying text.

179. *See supra* note 133 and accompanying text (listing factors courts weigh in determining if punishment cruel and unusual).

180. *See* MASS. GEN. LAWS ANN. ch. 265, § 47 (West 2015) (applying statute to all sex offenders on probation who have committed certain crimes); *supra* note 62 and accompanying text (acknowledging GPS monitoring not only used on sex offenders); *supra* note 135 and accompanying text (noting severity of sex crimes and effectiveness of GPS monitoring make penalty proper).

181. *See supra* Part III.B (discussing constitutionality of section 47).

182. *See supra* note 146 and accompanying text (explaining benefits individual risk assessment provides); *see also supra* Part II.C.1.c (highlighting states with discretionary monitoring statutes).

183. *See* Commonwealth v. Pike, 701 N.E.2d 951, 959 (Mass. 1998) ("[Probationary] goals are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime."); Brief of Amicus American Civil Liberties Union of Massachusetts, *supra* note 135, at 31 (contending judicial flexibility enhances probation as correctional tool); *supra* note 85 and accompanying text (noting benefits discretionary monitoring statutes provide).

to society. These offenders are unlikely to respond to treatment, and the sex crime recidivism rate is high. Thus, statutes like section 47 that provide for the electronic monitoring of these offenders can be of great value to society. In order to achieve the proper balance between the protection of society and the rehabilitation of parolees, however, statutes like section 47 should contain some form of an individualized assessment. While such an assessment may not be needed to ensure that the statutes are constitutional, it is needed to ensure that the statute's intrusive monitoring is being applied solely to the offenders who require it.

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