

not enough to implicate constitutional search and seizure or liberty interest.

Location information that can be gathered manually, at tremendous expense, can be gathered electronically without implicating a “fundamental right.” Because GPS tracking of convicted sex offenders does not infringe on a fundamental right, courts evaluating GPS tracking statutes for purposes of substantive due process are likely to use a rational basis of review.

B. GPS Tracking of Convicted Sex Offenders Passes Rational-Basis Review and Strict Scrutiny

Legislation implementing GPS tracking of convicted sex offenders is consistent with constitutional substantive due process protections because the legislation not only passes the rational-basis review test (the deferential test appropriate for the legislation because it does not implicate a “fundamental right”), but also passes the more stringent test of strict scrutiny.

Rational-basis review asks whether the legislation is “rationally related to legitimate government interests.” *Glucksberg*, 521 U.S. at 728. Rational-basis review is the standard likely to be applied to GPS tracking because no “fundamental right” is implicated by the tracking of convicted sex offenders. “The rational basis standard is ‘highly deferential’ and [courts] hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances.” *Moore*, 410 F.3d 1345. GPS tracking of convicted sex offenders easily passes rational-basis review because tracking convicted sex offenders is “rationally related to [the] legitimate government interest[]” of protecting the public from sex offenders.

Strict scrutiny asks whether the legislation (1) serves a compelling state interest, and (2) is narrowly tailored to achieve that interest. See *Reno v. Flores*, 507 U.S. 292, 302 (1993). In the event that a fundamental right were determined to be implicated by the tracking of convicted sex offenders, the

constitutionality of the legislation would be evaluated under “strict scrutiny.”

First, protecting the public from convicted sex offenders likely to re-offend is undeniably a compelling state interest. Protecting the public is one of the state’s highest orders of duty. It has long been a compelling interest of the state to protect its citizens from criminal activity—especially criminal activity, like sex crimes, that wreaks devastating effects. Second, GPS tracking of convicted sex offenders is narrowly tailored to achieve the state’s interest in protecting the public from further sex crimes.

Legislation implementing GPS tracking of convicted sex offenders is narrowly tailored because (a) the legislations only track sex offender convicts; (b) the legislations identify specific sub-groups of the convicts for GPS tracking; (c) convict sub-group identification is based on the judged likelihood of the convict re-offending; and (d) the legislations provide mechanisms for judicial discretion, appeal, or planned reevaluation.

Conclusion

GPS tracking of convicted sex offenders is constitutional. The decision whether to implement such tracking of sex offenders—and for which sex offenders—is a policy decision and should be carefully considered on its policy merits without red herring diversions.



Executive Summary

Legislation designed to protect the public from convicted sex offenders has withstood challenges pinned to several federal and state constitutional provisions. Such legislation has withstood challenges tied to (1) the Constitution’s prohibition on ex post facto laws, (2) substantive due process privacy rights and 4th Amendment protections, and (3) procedural due process relating to the implementation and use of the public protection legislation. For the reasons, legislation providing for GPS tracking of convicted sex offenders withstands constitutional challenge. The decision whether to implement such tracking of sex offenders—and for which sex offenders—is a policy decision and should be carefully considered on its policy merits without red herring diversions. *The Constitutionality of GPS Tracking of Convicted Sex Offenders.*

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“must be limited to those which are ‘fundamental’ or ‘implicit in the concept of ordered liberty’”). GPS tracking does not implicate a right to be free from unreasonable search and seizure, nor does it implicate one of the specified liberty interests, because (1) tracking of a convicted sex offender is not a search or seizure, and (2) the level of detail available from GPS tracking is similar to the level of detail constitutionally available from “old-fashioned” tracking means.

violate the Ex Post Facto Clause because it was protective, not punitive); and Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997) (holding that Washington’s sexoffender notification statute did not violate the Ex Post Facto Clause because it was “necessary for public protection”).

It is perfectly constitutional for police to follow a convicted sex offender. Police can stake out the homes of convicted sex offenders. Police can follow sex offenders in their vehicles. Police can wait outside places of employment. And police can keep a log of the convict’s location. The Supreme Court has held that the tracking of a vehicle by means of a device (a beeper) similar to a GPS tracking device is not a search or seizure under the Fourth Amendment—and therefore does not implicate a fundamental right. *United States v. Knotts*, 460 U.S. 276, 284–85 (1983). In *United States v. Garcia*, 474 F.3d 994 (7th Cir. 2007), Judge Richard Posner held that there was no search or seizure under Fourth Amendment when police placed a GPS tracking device underneath a suspect’s vehicle. Posner reasoned:

It is the difference between, on the one hand, police trying to follow a car in their own car, and, on the other hand, using cameras (whether mounted on lampposts or in satellites) or GPS devices. In other words, it is the difference between the old technology—the technology of the internal combustion engine—and newer technologies (cameras are not new, of course, but coordinating the images recorded

by thousands of such cameras is). But GPS tracking is on the same side of the divide with the surveillance cameras and the satellite imaging, and if what they do is not searching in Fourth Amendment terms, neither is GPS tracking.

Id. at 997 (emphasis added).

Because law enforcement already can track convicted sex offenders by way of old-fashioned methods, it logically follows that law enforcement can track convicted sex offenders through high-technology methods. And courts have so held. The Fourth Amendment “cannot sensibly be read to mean that police shall be no more efficient in the twenty-first century than they were in the eighteenth.” *Id.* at 999; see also *Knotts*, 460 U.S. at 284 (“Insofar as respondent’s complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.”). Using technology—including GPS tracking—to assist law enforcement with the protection of the public does not implicate a “fundamental right.”

Moreover, the level of detail available from GPS tracking of convicted sex offenders may, for practical purposes, be no more specific than the level of detail available through the eighteenth century methods to which Judge Posner refers. The FAA estimates that GPS signals are accurate to 100 meters. “The basic GPS signal is accurate on a worst-case basis to within approximately 100 meters lateral and 140 meters vertical.” <http://gps.faa.gov/FAQ/index.htm>. Other tests have indicated that accuracy of 6 to 10 meters is possible. http://www.ngs.noaa.gov/FGCS/info/sans_SA/compare/ERLA.htm. Whichever the case, this level of accuracy is enough to indicate whether the convicted sex offender is at home or in a schoolhouse—just as following the sex offender would so indicate—but

² See *Patterson v. State*, 985 P.2d 1007 (Alaska Ct. App. 1999) (holding that Alaska's sex offender notification requirement was not punishment for purposes of the Ex Post Facto Clause); *Arizona Dept. of Public Safety v. Superior Court In and For Maricopa County*, 190 Ariz. 490, 949 P.2d 983 (Ct. App. Div. 1 1997), review denied, 192 Ariz. 276, 964 P.2d 477 (1998) (holding that Arizona's sex offender notification statute did not constitute punishment for purposes of the Ex Post Facto Clause); *Kellar v. Fayetteville Police Dept.*, 339 Ark. 274, 5 S.W.3d 402 (1999) (holding that Arkansas's sex offender statute did not violate the Ex Post Facto Clause); *In re William M.*, 84 Cal. Rptr. 2d 394 (App. 4th Dist. 1999), review granted and opinion superseded by grant of review, 88 Cal. Rptr. 2d 478, 982 P.2d 726 (Cal. 1999) (holding that California's sex offender notification statute does not violate the Ex Post Facto Clause); *Roe v. Office of Adult Probation*, 125 F.3d 47 (2d Cir. 1997) (holding that Connecticut's sex offender notification requirement was not punishment for purposes of the Ex Post Facto Clause); *People v. Logan*, 302 Ill. App.3d 319, 705 N.E.2d 152 (2d Dist. 1998) (holding that Illinois sex offender notification requirement was not punishment for purposes of the Ex Post Facto Clause); *Spencer v. O'Connor*, 707 N.E.2d 1039 (Ind. Ct. App. 1999) (holding that Indiana's sex offender notification statute did not inflict punishment for purposes of the Ex Post Facto Clause); *Doe v. Weld*, 954 F. Supp. 425 (D. Mass. 1996) (holding that Massachusetts's sex offender notification statute did not violate the Ex Post Facto Clause); *Lanni v. Engler*, 994 F. Supp. 849 (E.D. Mich. 1998) (holding that Michigan's sex offender notification statute did not violate the Ex Post Facto Clause because the purpose was to protect the public, not to punish); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997) (holding that New Jersey's sex offender notification statute did not inflict punishment, and thus did not violate the Ex Post Facto Clause); *People v. Afrika*, 168 Misc.2d 618, 648 N.Y.S.2d 235 (N.Y. Sup. Ct. 1996) (holding that New York's sex offender notification statute did not violate the Ex Post Facto Clause because it is not punitive and because a sex offender's past behavior is a strong predictor of future conduct, and accordingly, implemented appropriate measures to protect society); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997) (holding that New York's sex offender notification statute did not violate the Ex Post Facto Clause); *State v. Cook*, 83 Ohio St. 3d 404, 700 N.E.2d 570 (1998) (holding that Ohio's sex offender notification statute did not violate the Ex Post Facto Clause); *Williford v. Board of Parole and Post-Prison Supervision*, 137 Or. App. 254, 904 P.2d 1074 (1995) (holding that Oregon's sex offender notification statute did not

II. GPS Tracking of Convicted Sex Offenders Is Consistent with Substantive Due Process.

Legislation implementing GPS tracking of convicted sex offenders is consistent with substantive due process for two reasons. First, as explained below, GPS tracking of convicted sex offenders not does implicate a “fundamental right,” and thus is subjected to and easily meets a deferential substantive due process standard. Second, even if GPS tracking of convicted sex offenders does implicate a “fundamental right,” GPS tracking passes “strict scrutiny”—it serves a compelling state interest and is narrowly tailored to achieve that interest.

A. GPS Tracking of Convicted Sex Offenders Does Not Implicate a Fundamental Right

Legislation implementing GPS tracking of convicted sex offenders is consistent with constitutional substantive due process protections because GPS tracking does not implicate a “fundamental right” (and if tracking did, the legislation still would be constitutional because it meets the test for abrogating a fundamental right, see Part II.B., *infra*).

GPS tracking of convicted sex offenders does not implicate a fundamental right because GPS tracking simply is a more cost-effective means of doing what already has been found to be constitutional. “Fundamental rights” include the Fourth Amendment right to be free from unreasonable searches and seizures, and certain “liberty” interests such as “the rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception,” and limited other liberties. See *Wash. v. Glucksberg*, 521 U.S. 702, 720 (1997) (citations omitted). The Supreme Court “has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection.” *Doe v. Moore*, 410 F.3d 1337, 1343–44 (11th Cir. 2005); see *Paul v. Davis*, 424 U.S. 693, 713 (1976) (noting that personal privacy rights protected by substantive due process



Introduction

States increasingly are turning to GPS tracking of convicted sex offenders to help protect the communities into which they are released and to help identify repeat sex offenders. This White Paper examines the constitutionality of GPS tracking of sex offenders, and concludes that legislation implementing the tracking of sex offenders is constitutional. GPS tracking of sex offenders safely complies with the U.S. Constitution and with a series of decisions by the U.S. Supreme Court and the highest Courts of various states throughout this country.

THE BOTTOM LINE: GPS tracking of convicted sex offenders is constitutional. The decision whether to implement such tracking of sex offenders—and for which sex offenders—is a policy decision and should be carefully considered on its policy merits without red herring diversions.

Legislation designed to protect the public from convicted sex offenders has withstood challenges pinned to several federal and state constitutional provisions. Such legislation has withstood challenges tied to (1) the Constitution’s prohibition on ex post facto laws, (2) substantive due process privacy rights and 4th Amendment protections, and (3) procedural due process relating to the implementation and use of the public protection legislation. For the reasons outlined below, legislation providing for GPS tracking of convicted sex offenders withstands constitutional challenge.

I. GPS Tracking of Convicted Sex Offenders Does Not Violate the Ex Post Facto Clause.

Legislation implementing GPS tracking of convicted sex offenders is civil regulatory legislation designed to protect the public, not to punish convicted sex offenders. The U.S. Constitution prohibits ex post facto laws imposing retroactive punishment. See U.S. Const., Art. I, § 10 (“No state shall . . . pass any . . . ex post facto Law”). An ex post facto law is a law that

punishes as a crime an act that was innocent when committed, or a law that makes more burdensome the punishment for a crime after its commission. See *Calder v. Bull*, 3 U.S. 386 (1778). Legislation implementing GPS tracking of convicted sex offenders does not violate the Ex Post Facto Clause’s prohibition on retroactive punishment because the legislation does not impose a punishment; thus, it cannot and does not violate the Constitution’s ex post facto prohibition on retroactive punishment.

The Supreme Court has held that similar legislation does not constitute retroactive punishment. In *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court considered whether a convicted sex offender registration and notification law constituted retroactive punishment forbidden by the Ex Post Facto Clause.

At issue in *Smith v. Doe* was the Alaska Sex Offender Registration Act, which made available to the public—via the Internet—various information about convicted sex offenders, including name, picture, description, license plate numbers, place of employment, date of birth, and the crime for which the offender was convicted. See Alaska Stat. § 18.65.087(b). Like its counterparts in other states, the Alaska Act is known as “Megan’s Law.” The Supreme Court ruled that “[i]f the intention of the legislature was to impose punishment, that ends the inquiry”; the legislation would be prohibited by the Ex Post Facto Clause. *Smith v. Doe*, 538 U.S. at 92. “If, however, the intention was to enact a regulatory scheme that is civil and non-punitive, [courts] must further examine whether the statutory scheme



is so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" Id. (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)). The Supreme Court held that it was proper to "defer to the legislature's stated intent," id. (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)), and "only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith v. Doe*, 538 U.S. at 92 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

The Supreme Court ruled in *Smith v. Doe* that the Alaska registration and notification law did not violate the Ex Post Facto Clause because "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate non-punitive governmental objective and has been historically so regarded. . . . [N]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." *Smith v. Doe*, 538 U.S. at 93.

The Court identified several "useful guideposts," id. at 97, to assist an analysis of whether a law intended to be non-punitive nonetheless has excessive punitive effect. Id.; see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). The guideposts are:

- First, the Court found that sex offender registration and notification systems are of recent origin, and are not viewed as "traditional means of punishment." Id. The same is true for GPS tracking of convicted sex offenders; GPS tracking is not a "traditional means of punishment"—it clears the first guidepost.
- Second, the Court found that notification systems do not subject the sex offender to an "affirmative disability or restraint." Id. There is no physical restraint or other disability under notification systems; nor is there physical restraint or other disability under GPS tracking systems.

Tracking clears the second guidepost.

- Third, the Court found that notification systems do not promote the traditional aims of punishment; the fact that the law might deter future crimes does not make it punitive. Id. Similarly, GPS tracking of convicted sex offenders does not promote the traditional aims of punishment; its focus and purpose is to protect the public. Tracking clears the third guidepost.
- Fourth, the Court found that the Act had a rational relation to a non-punitive purpose—public safety. Providing explicit guidance, the Court held that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the non-punitive aims it seeks to advance." Id. at 103. So too, the purpose of GPS tracking is public safety; this high-technology solution to a very old problem is a solid fit with its non-punitive public safety purpose. Tracking clears the fourth guidepost.
- Fifth, the Court found that the Act's regulatory scheme is not excessive with respect to the Act's purpose. "The excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the non-punitive objective." Id. at 105. GPS tracking regulation is reasonable and not excessive in light of the objective of protecting the public from convicted sex offenders. Tracking clears the final guidepost.

Legislation implementing GPS tracking of convicted sex offenders is indistinguishable—in terms of (a) its public protection purpose, and (b) its consistency with the *Smith/Mendoza-Martinez* guideposts—from the Alaska registration and notification legislation upheld in *Smith v. Doe*. The purpose of GPS tracking of convicted sex offenders is to "protect the public from harm," not to punish the convicted sex offender. As

such, GPS tracking of convicted sex offenders cannot and does not violate the Ex Post Facto Clause prohibition on retroactive punishments because the purpose of the legislation is not to impose a punishment.

An examination and balancing of any punitive side-effects of GPS tracking of convicted sex offenders further demonstrates that legislation implementing such tracking of convicted sex offenders does not violate the Ex Post Facto Clause. Any punitive side-effects of GPS tracking of convicted sex offenders pale in comparison to the potentially punitive side-effects of the Alaska registration and public notification system upheld by *Smith v. Doe*. GPS tracking technology is increasingly common. Cars, trucks, airplanes, cell phones—even shoes¹—are being equipped with GPS tracking technology. The convicted sex offender assigned to wear a GPS tracking ankle bracelet may prefer not to wear the bracelet, but any punitive side-effect of the bracelet is minimal compared to the potential punitive effect of Internet publication of detailed individual information associated with the Alaska statute upheld by the Supreme Court and implemented by similar Megan's Laws throughout the country. The Supreme Court held in *Smith v. Doe* that any "lasting and painful impact on the convicted sex offender [is a] consequence[that] flow[s] not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." Id. at 101. So, too, with any embarrassment caused by a GPS ankle bracelet; the consequence flows from the fact of conviction.

Legislation implementing GPS tracking of convicted sex offenders is civil regulatory legislation designed to protect the public, not to punish convicted

¹ See Kelli Kennedy, "Engineer: GPS Shoes Make People Findable," Associated Press, Feb. 9, 2007, available at <http://apnews.myway.com/article/20070209/D8N64ESG0.html>. Excerpt:

MIAMI (AP)—Isaac Daniel calls the tiny Global Positioning System chip he's embedded into a line of sneakers "peace of mind." He wishes his 8-year-old son had been wearing them when he got a call from his school in 2002 saying the boy was missing. The worried father hopped a flight to Atlanta from New York where he had been on business to find the incident had been a miscommunication and his son was safe.

Days later, the engineer started working on a prototype of Quantum Satellite Technology, a line of \$325 to \$350 adult sneakers that hit shelves next month. It promises to locate the wearer anywhere in the world with the press of a button. A children's line will be out this summer.

sex offenders. The legislation does not violate the Ex Post Facto Clause for the same reasons that sex offender registration and notification systems do not violate the Ex Post Facto Clause. In addition to the Supreme Court's holding in *Smith v. Doe*, a variety of state and federal appellate courts similarly have held valid other similar state sex offender registration and notification systems.²

