

**USING ELECTRONIC MONITORING TO ENHANCE THE  
PROTECTION OFFERED BY CIVIL PROTECTION ORDERS IN  
CASES OF DOMESTIC VIOLENCE: A NEW TECHNOLOGY  
OFFERS NEW PROTECTION**

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## PART I. INTRODUCTION

[1] Domestic violence is a widespread epidemic in the United States. Each year, between 1.8 and 4 million domestic violence incidents are reported.<sup>1</sup> One in three women will experience some form of domestic violence in her lifetime.<sup>2</sup> Civil protection orders (also known as protection from abuse orders or restraining orders) are a common remedy employed by the courts to prevent future violence and protect survivors of domestic violence.<sup>3</sup> These orders can be tailored to fit the circumstances, but frequently include no contact provisions.<sup>4</sup> However, no contact provisions can be difficult to enforce because the abuser is usually intimately familiar with the routine of the survivor.<sup>5</sup>

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<sup>1</sup> See Suraji R. Wagage, *When the Consequences Are Life and Death: Pretrial Detention for Domestic Violence Offenders*, 7 DREXEL L. REV., 195, 201 (2015) (quoting David M. Zlotnick, *Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders*, 56 OHIO ST. L.J. 1153, 1158–59 (1995)).

<sup>2</sup> See *id.*

<sup>3</sup> See Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 WIS. L. REV. 429, 447, 459 (2017); see also Natalie Fox Malone, *GPS Monitoring of Domestic Violence Offenders in Tennessee: Generating Problems Surreptitiously*, 43 U. MEM. L. REV. 171, 180 (2012).

<sup>4</sup> See M. Alexandra Verdi, *Strengthening Protections for Survivors of Domestic Violence: The Case of Washington, D.C.*, 64 BUFF. L. REV. 907, 913 (2016).

<sup>5</sup> See Amanda Rhodes, *Strengthening the Guard: The Use of GPS Surveillance to Enforce Domestic Violence Protection Orders*, 2 TENN. J. RACE, GENDER & SOC. JUST. 129, 132 (2013).

[2] Studies have shown that as many as one quarter of protection orders are violated.<sup>6</sup> The time following a survivor's decision to separate from his or her abuser is often a very dangerous period for the survivor because the abuser may seek to reassert his dominance and deter the survivor from seeking help.<sup>7</sup> Since the early 2000s, several states have statutorily authorized the use of electronic monitoring devices to enforce protection orders.<sup>8</sup> Judges have the discretion to impose electronic monitoring in both the pre-trial and post-trial phases.<sup>9</sup> Electronic monitoring can be very useful in enforcing protection orders, both in deterring abusers and helping survivors get their lives back.<sup>10</sup>

[3] Courts typically impose electronic monitoring after a criminal conviction or a substantial violation of an existing civil protection order.<sup>11</sup> However, courts should consider imposing electronic monitoring before a substantial violation of a civil protection order, including at the temporary protection order stage. Current electronic monitoring technology focuses on setting exclusion zones in which the abuser cannot enter. However, new

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<sup>6</sup> See Jaime Kay Dahlstedt, *Notification and Risk Management for Victims of Domestic Violence*, 28 WIS. J.L. GENDER & SOC'Y 1, 8, 10 (2013); see also Hannah Brenner, *Transcending the Criminal Law's "One Size Fits All" Response to Domestic Violence*, 19 WM. & MARY J. WOMEN & L. 301, 318 (2013).

<sup>7</sup> See Malone, *supra* note 3, at 175–76, 179; see also Dahlstedt, *supra* note 6, at 10.

<sup>8</sup> See Oren M. Gur et al., *Specialization and the Use of GPS for Domestic Violence by Pretrial Programs: Findings from a National Survey of U.S. Practitioners*, 34 J. TECH. HUM. SERVS. 32, 34–35 (2016); see also Edna Erez et al., *GPS Monitoring Technologies and Domestic Violence: An Evaluation Study*, at x (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/238910.pdf>, <https://perma.cc/3JFL-PYQQ> (last visited Dec. 8, 2017).

<sup>9</sup> See Shelley M. Santry, *Can You Find Me Now? Amanda's Bill: A Case Study in the Use of GPS in Tracking Pretrial Domestic Violence Offenders*, 29 QUINNIPIAC L. REV. 1101, 1110, 1112–4 (2011).

<sup>10</sup> See Rhodes, *supra* note 5, at 140; see also Brenner, *supra* note 6, at 342; Malone, *supra* note 3, at 184.

<sup>11</sup> See Santry, *supra* note 9, at 1112–4.

technology has the potential to increase protection for survivors. A new technology offers a device for survivors to carry that will alert them if the abuser enters an exclusion zone or comes within a certain proscribed proximity—regardless of whether the survivor and abuser are in an exclusion zone.<sup>12</sup> This technology will allow survivors to take more control of their lives and not feel limited to remaining in the exclusionary zones. Additionally, while law enforcement is also alerted, survivors will not have to rely on law enforcement responding to the violation. Survivors will be able to take their own steps to protect themselves once alerted. Courts should consider imposing electronic monitoring on domestic violence abusers at the temporary civil protection order stage and utilizing the new technology that would monitor both exclusion zone and proximity violations.

[4] Part I will discuss the background and costs of domestic violence. Additionally, it will explain the types of civil protection orders and their enforcement. Part II will briefly discuss the use of electronic monitoring in sex offender cases and the success it has had in reducing recidivism rates. The section will then turn to states' adoption of electronic monitoring for abusers in cases of domestic violence and explain three different statutes. Part III will describe the current electronic monitoring technologies and the use of exclusion zones to monitor domestic violence abusers. The section will also briefly discuss the costs of electronic monitoring and potential avenues for funding electronic monitoring programs. Part IV will examine the practical and constitutional issues with electronic monitoring of domestic violence abusers. The section will explain how electronic monitoring statutes can be narrowly tailored to survive strict scrutiny. Finally, Part V will analyze a new technology soon to be launched by a Swiss company that could enhance survivor protection. The section will explain how the technology works and the potential legal ramifications.

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<sup>12</sup> See *Main Monitoring Modes and Related Products*, GEOSATIS TECHNOLOGY, <http://geo-satis.com/wp-content/uploads/Geosatis-Products-Overview-English.pdf>, <https://perma.cc/5FGP-X685> (last visited Dec. 8, 2017).

## PART II. DOMESTIC VIOLENCE: BACKGROUND & CIVIL PROTECTION ORDERS

### A. Definition and Costs of Domestic Violence

[5] Domestic violence (also known as intimate partner violence) is defined as a “pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.”<sup>13</sup> Domestic violence (DV) includes physical, sexual, emotional, psychological, and economic abuse.<sup>14</sup>

[6] DV is a widespread epidemic in the United States. Each year, there are between 1.8 and 4 million reported domestic violence incidents.<sup>15</sup> The prevalence of DV extends across race, gender, sexuality, age, religion, socioeconomic status, and education.<sup>16</sup> One in three women will experience some form of domestic violence in her lifetime.<sup>17</sup> Domestic violence comprises 15% of all violent crime in the United States.<sup>18</sup>

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<sup>13</sup> DEP’T OF JUSTICE, DOMESTIC VIOLENCE, <https://www.justice.gov/ovw/domestic-violence>, <https://perma.cc/Q3L3-HDY3> (last updated June 16, 2017) [hereinafter DOMESTIC VIOLENCE]; *see also* NAT’L INST. OF JUSTICE, INTIMATE PARTNER VIOLENCE, <https://www.nij.gov/topics/crime/intimate-partner-violence/Pages/welcome.aspx>, <https://perma.cc/9SAS-9BZU> (last modified Mar. 30, 2017).

<sup>14</sup> *See* DOMESTIC VIOLENCE, *supra* note 13 (listing examples of each type of abuse).

<sup>15</sup> *See* Wagage, *supra* note 1, at 201.

<sup>16</sup> *See* DOMESTIC VIOLENCE, *supra* note 13.

<sup>17</sup> *See* Wagage, *supra* note 1, at 201; *see also* THE NAT’L DOMESTIC VIOLENCE HOTLINE, *Get the Facts and Figures*, <http://www.thehotline.org/resources/statistics/>, <https://perma.cc/4FUT-32KJ> (last visited Mar. 29, 2018).

<sup>18</sup> *See* NAT’L COAL. AGAINST DOMESTIC VIOLENCE, *Statistics: National Statistics*, <https://ncadv.org/learn-more/statistics>, <https://perma.cc/KQ8E-4Y3X> (last visited Mar. 29, 2018).

[7] The costs of DV can be enormous. The costs include direct costs of physical and mental health care as well as an indirect cost in lost productivity.<sup>19</sup> Survivors miss nearly eight million days of paid work each year, and almost 5.6 million days of household productivity due to injuries, counseling appointments, and court proceedings.<sup>20</sup> In 2003, the Centers for Disease Control (CDC) estimated the costs of domestic violence exceeded \$8.3 billion.<sup>21</sup>

### B. Types of Civil Protection Orders and Common Provisions

[8] Many domestic violence survivors<sup>22</sup> do not wish to use the criminal justice system.<sup>23</sup> Beginning in the 1970s, states enacted statutes providing for civil protection orders (CPOs) and they are now currently available in all fifty states.<sup>24</sup> However, CPOs are not uniform across the country—they

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<sup>19</sup> See CENTERS FOR DISEASE CONTROL & PREVENTION (CDC), INTIMATE PARTNER VIOLENCE: CONSEQUENCES, <https://www.cdc.gov/violenceprevention/intimatepartnerviolence/consequences.html>, <https://perma.cc/8VL3-JJH6> (last visited Mar. 29, 2018) [hereinafter CDC]. The CDC estimates that DV costs survivors almost eight million unpaid workdays a year equaling almost 32,000 full time jobs; see also Brenner, *supra* note 6, at 346.

<sup>20</sup> See CDC, *supra* note 19.

<sup>21</sup> See *id.*

<sup>22</sup> Throughout the paper, I will refer to those who experience domestic violence as “survivors” rather than “victims.” Those who survive domestic violence should be viewed as survivors and empowered rather than treated as victims. I will also refer to survivors as female for the sake of simplicity but note here that survivors include both men and women, and abusers can be men or women.

<sup>23</sup> See Dana Harrington Conner, *VAWA at 20 – Where Do We Go From Here?: Civil Protection Order Duration: Proof, Procedural Issues, and Policy Considerations*, 24 TEMP. POL. & CIV. RTS. L. REV. 343, 343 (2015).

<sup>24</sup> See Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J.L. & PUB. POL’Y 139, 146 (2010); see also Jennifer C. Daskal, *Pre-Crime Restraints: The Explosion of Targeted, Noncustodial Prevention*, 99 CORNELL L. REV. 327, 335 n. 38 (2014).

differ in terms of duration, if and how they can be renewed or extended, and the terms of the order.<sup>25</sup> CPOs provide survivors of DV a civil remedy to end the violence.<sup>26</sup> Civil remedies offer some benefits over the criminal system, including a lower standard of proof, a broader definition of abuse, and allowing the survivor to take part in decision-making.<sup>27</sup> However, approximately two-thirds of the states require the petitioner to prove an act of physical violence, or threatened physical violence, in order to obtain a civil protection order.<sup>28</sup> Studies show that emotional, financial, and psychological abuse are predictors of future, severe physical harm and courts should consider this when determining whether to grant a civil protection order.<sup>29</sup> Waiting until an incident of physical violence occurs puts survivors at too much risk.

[9] Two types of protection orders are generally available: temporary and permanent.<sup>30</sup> Temporary, sometimes known as emergency, protective orders are available to a petitioner who establishes that her abuser endangered her immediate safety.<sup>31</sup> The abuser need not be present at the proceeding, but the order has no legal effect until law enforcement serves

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<sup>25</sup> See Conner, *supra* note 23, at 349.

<sup>26</sup> See Dahlstedt, *supra* note 6, at 6–8; see also Malone, *supra* note 3, at 180; Seventeenth Annual Review of Gender and Sexuality Law, *Annual Review Article: Domestic Violence*, 17 GEO. J. GENDER & L. 211, 234 (Dania Bardavid et al. eds., 2016).

<sup>27</sup> See Conner, *supra* note 23, at 343.

<sup>28</sup> See Debra Pogrud Stark & Jessica Choplin, *Seeing the Wrecking Ball in Motion: Ex Parte Protection Orders and the Realities of Domestic Violence*, 32 WIS. J.L. GENDER & SOC'Y 13, 20 (2017).

<sup>29</sup> See *id.*

<sup>30</sup> See Dahlstedt, *supra* note 6, at 7.

<sup>31</sup> See *id.*

the order upon the abuser.<sup>32</sup> The temporary orders expire after a few days, or a couple of weeks, depending on the statute.<sup>33</sup>

[10] However, during the time of the temporary order, the survivor can return to court for an evidentiary hearing, at which the abuser must be present to have an opportunity to be heard, in order to obtain a permanent order.<sup>34</sup> Most states limit the duration of “permanent” CPOs to one to three years, although some states do provide actual permanent protection orders.<sup>35</sup>

[11] One of the goals of a civil protection order is to prevent serious injury and death to the survivor.<sup>36</sup> Most CPOs contain three common provisions: (1) a provision preventing further abuse or threats; (2) a provision preventing the abuser from contacting the survivor; and (3) a stay away provision ordering the abuser not to go near the survivor.<sup>37</sup> The stay away provision allows the court to order that the abuser cannot get within a certain distance of the survivor, or enter certain zones, called exclusionary zones, regardless of whether the survivor is currently present or not.<sup>38</sup>

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<sup>32</sup> See Santry, *supra* note 9, at 1107; see also VA. CT. SYS., DISTRICT COURT PROTECTIVE ORDER INFORMATION SHEET: WHAT YOU NEED TO KNOW ABOUT PROTECTION ORDERS, [http://www.courts.state.va.us/forms/district/info\\_sheet\\_protective\\_order\\_stalking.pdf](http://www.courts.state.va.us/forms/district/info_sheet_protective_order_stalking.pdf), <https://perma.cc/AW9C-6E69> (last updated July 2012).

<sup>33</sup> See Dahlstedt, *supra* note 6, at 7.

<sup>34</sup> See *id.*

<sup>35</sup> See Conner, *supra* note 23, at 349 (noting Alabama, Alaska, Colorado, Delaware, Florida, Louisiana, Montana, New Jersey, Texas, and Washington allow for permanent protection orders).

<sup>36</sup> See Stark & Choplin, *supra* note 28, at 20.

<sup>37</sup> See Dahlstedt, *supra* note 6, at 8.

<sup>38</sup> See *id.* The zones typically include the survivor’s home, place of work, children’s school or daycare, family-member residences, and any other areas the survivor frequents.



[12] In addition to these common provisions, the judge can use his discretion to tailor the CPO to the circumstances of the survivor. For instance, the court can order the abusive party to vacate the residence and maintain or restore utilities; compensate the survivor for medical or psychological treatment; award use and possession of jointly-owned vehicles; and order family relief like custody or child support.<sup>39</sup>

### C. Enforcement of Civil Protection Orders

[13] CPOs provide legal consequences if the abuser violates any provision of the order.<sup>40</sup> The abuser can be criminally charged for any violation of the CPO, regardless of whether violence occurs.<sup>41</sup> Violations are typically a misdemeanor, but if the abuser is convicted of multiple violations of a CPO, a felony charge may be filed.<sup>42</sup> The punishment for violations can be imprisonment, fines, or both.<sup>43</sup>

[14] However, survivors depend on law enforcement and the courts to respond to and prosecute violations of a protection order.<sup>44</sup> In most states, police officers have discretion in responding to domestic violence calls, and

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<sup>39</sup> See Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1111 (2009); see also Aiken & Goldwasser, *supra* note 24, at 147.

<sup>40</sup> See Johnson, *supra* note 39, at 1111–1112.

<sup>41</sup> See Stark & Choplin, *supra* note 28, at 62 (merely stepping into an exclusion zone is a punishable violation).

<sup>42</sup> See Aiken & Goldwasser, *supra* note 24, at 147.

<sup>43</sup> See Diane L. Rosenfeld, *GPS Monitoring of Domestic Violence Offenders: Correlative Rights and the Boundaries of Freedom: Protecting the Civil Rights of Endangered Women*, 43 HARV. C.R.-C.L. L. REV. 257, 261 (2008).

<sup>44</sup> See Verdi, *supra* note 4, at 925; see also Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Orders*, 72 OHIO ST. L.J. 303, 375 (2011).

civil protection orders are often under-enforced.<sup>45</sup> Violations are often ignored by law enforcement, and this practice leads many survivors not to report violations because they do not believe law enforcement will respond.<sup>46</sup> In fact, the Supreme Court has held that survivors who obtain a civil protection order have no right to police enforcement of that order.<sup>47</sup> Although the civil protection order has legal consequences if violated, the fact is that these orders are merely a piece of paper that are unable to protect survivors if they are not enforced by law enforcement.<sup>48</sup> However, when combined with other safety steps, civil protection orders can be a valuable tool in protecting domestic violence survivors.<sup>49</sup>

[15] The time period during which a survivor decides to leave her abuser is the most dangerous.<sup>50</sup> Abusers often retaliate against survivors for seeking protection, and the retaliation can be lethal.<sup>51</sup> Because domestic violence is about dominance and control, the retaliation is the abuser's way

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<sup>45</sup> See Maryum Jordan, *Domestic Violence Homicide-Suicide: Expanding Intervention Through Mental Health Law*, 37 HARV. J.L. & GENDER 545, 550 (2014); see also Rosenfeld, *supra* note 43, at 258–259.

<sup>46</sup> See Jordan, *supra* note 45, at 550; see also Aiken & Goldwasser, *supra* note 24, at 155. In one study of 663 abusers, 34% were arrested for re-abuse and violation of a protection order within two years. 33% of those cases against the abusers were dismissed and another 10% did not find guilt.

<sup>47</sup> See *Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005). The Court reasoned that the Due Process Clause does not require the State to protect citizens against actions by private actors. While there is no right to have law enforcement enforce the civil protection order, the order does make certain behavior criminal and in contempt of court.

<sup>48</sup> See Stark & Choplin, *supra* note 28, at 62.

<sup>49</sup> See *id.*

<sup>50</sup> See Malone, *supra* note 3, at 175–76, 179.

<sup>51</sup> See *id.*; see also Stark & Choplin, *supra* note 28, at 25. The time when a survivor attempts to leave is the deadliest time for that survivor.

to reassert the control he lost when the survivor decided to leave.<sup>52</sup> Studies show that as many as one quarter of civil protection orders are violated.<sup>53</sup> Domestic violence is predictable and preventable.<sup>54</sup> Severe physical abuse and death are more likely when certain factors are present.<sup>55</sup> Although CPOs offer survivors some protection against abusers, they are not foolproof and the legal system can do more to strengthen civil protection orders.

### **PART III. GPS TRACKING IN SEX OFFENDER CASES AND HOW STATES HAVE ADOPTED THE TECHNOLOGY FOR USE IN DOMESTIC VIOLENCE CASES**

#### **A. Electronic Monitoring of Sex Offenders**

[16] Electronic monitoring has been used for decades to track convicted sex offenders who have been deemed a high risk.<sup>56</sup> State legislatures and the courts have recognized the “serious threat” sex offenders pose to society.<sup>57</sup> Over forty states allow some level of electronic monitoring of sex offenders.<sup>58</sup> Many of the states using electronic monitoring of sex offenders require an individualized risk assessment before the electronic monitoring

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<sup>52</sup> See Stark & Choplin, *supra* note 28, at 25.

<sup>53</sup> See Dahlstedt, *supra* note 6, at 10; see also Brenner, *supra* note 6, at 318; Jordan, *supra* note 45, at 547.

<sup>54</sup> See Rosenfeld, *supra* note 43, at 260.

<sup>55</sup> See *id.* at 263; see also *infra* Part IV, Section B, pp. 24–25.

<sup>56</sup> See Malone, *supra* note 3, at 182–83; see also Eric M. Dante, *Tracking the Constitution – the Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 SETON HALL L. REV. 1169, 1169 (2012); Nicholas Corsaro, *Sex, Gadgets, and the Constitution – A Look at the Massachusetts Sex Offender GPS-Tracking Statute*, 48 SUFFOLK U. L. REV. 401, 409 (2015).

<sup>57</sup> See Dante, *supra* note 56, at 1169.

<sup>58</sup> See *id.* at 1172.

can be imposed.<sup>59</sup> The devices used proscribe exclusion zones (victim's residence, victim's place of employment, and places where children congregate) which sex offenders are not allowed to enter.<sup>60</sup> If the offender enters an exclusion zone, law enforcement is notified and the offender is arrested.<sup>61</sup> Studies show that the use of electronic monitoring has reduced recidivism rates among high-risk sex offenders.<sup>62</sup>

[17] The Fourth Amendment allows for reasonable restrictions on liberty.<sup>63</sup> The Supreme Court has recognized a freedom of movement guaranteed by the Constitution.<sup>64</sup> Electronic monitoring is a restriction on an individual's freedom of movement. Some states, like California, allow courts to impose electronic monitoring on sex offenders for life.<sup>65</sup> The government can infringe on a fundamental right if due process is provided and the government's interest outweighs the individual's interest and the risk of erroneous deprivation.<sup>66</sup> The government has a strong interest in protecting society from sex offenders.<sup>67</sup> Convicted sex offenders, and the recidivism threat they pose to society, means their rights are secondary to those of society when they are on probation or parole.<sup>68</sup> Forced civil

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<sup>59</sup> *See id.* at 1177; *see, e.g.*, CAL. PENAL CODE §1202.8(b) (Deering 2018).

<sup>60</sup> *See Dante, supra* note 56, at 1182.

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* at 1211–12; *see also* Corsaro, *supra* note 56, at 427.

<sup>63</sup> *See Dante, supra* note 56, at 1210.

<sup>64</sup> *See Saenz v. Roe*, 526 U.S. 489, 499 (1999).

<sup>65</sup> *See* CAL. PENAL CODE § 3004(b) (Deering 2018).

<sup>66</sup> *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

<sup>67</sup> *See Dante, supra* note 56, at 1211.

<sup>68</sup> *See id.* at 1216.

commitment of high risk sex offenders has been upheld as a constitutional restriction on an individual's freedom of movement.<sup>69</sup> Electronic monitoring is a less restrictive means than civil commitment for monitoring high risk sex offenders after release from imprisonment; therefore, electronic monitoring is also constitutional.

[18] Given the success of using electronic monitoring in sex offender cases, states have started to utilize electronic monitoring technologies in cases of domestic violence to give strength to civil protection orders and decrease recidivism by abusers.<sup>70</sup> Electronic monitoring provides an added layer of enforcement to civil protection orders.<sup>71</sup> The abuser knows he is monitored and law enforcement will be notified if he enters an exclusion zone.<sup>72</sup> Rather than relying on "he said/she said" testimony, prosecutors can pull data from the electronic monitoring device to prove an abuser violated a protection order.<sup>73</sup> The knowledge that the electronic monitoring technology will offer concrete proof of violation serves to deter at least some abusers from violating civil protection orders.<sup>74</sup>

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<sup>69</sup> See *id.* at 1219; see also *Kan. v. Hendricks*, 521 U.S. 346 (1997).

<sup>70</sup> See Dahlstedt, *supra* note 6, at 10; see also Erez, *supra* note 8, at xvi; Malone, *supra* note 3, at 185; William Bales et al., *A Quantitative and Qualitative Assessment of Electronic Monitoring*, NAT'L CRIMINAL JUSTICE REFERENCE SERV. (May 2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/230530.pdf>, <https://perma.cc/7EPD-GFB5>; Molly Carney, *Correction Through Omniscience: Electronic Monitoring and the Escalation of Crime Control*, 40 WASH U. J. L. & POL'Y 279, 290 (2012).

<sup>71</sup> See Edna Erez & Peter Ibarra, *Making Your Home a Shelter: Electronic Monitoring and Victim Re-entry in Domestic Violence Cases*, 47 BRIT. J. CRIM. 100, 102 (2006) (referring to electronic monitoring as an "accountability mechanism" that deters abusers from offending again and bolsters protections for survivors).

<sup>72</sup> See Rosenfeld, *supra* note 43, at 261.

<sup>73</sup> See *People v. Charlesworth*, No. D065144, 2015 Cal. Ct. App. LEXIS 3632, at \*7–8 (4th App. Dist. May 26, 2015) (noting electronic monitoring data was used to prove defendant's repeated violations of a protective order).

<sup>74</sup> See Stark & Choplin, *supra* note 28, at 62 (noting that abusers have a strong incentive to comply with a protective order when they are aware of the consequences for violating

## B. Electronic Monitoring in Civil Cases

[19] While several states have statutorily allowed courts to implement electronic monitoring in domestic violence cases, the implementation has not been uniform. Some states allow electronic monitoring only if criminal charges are filed.<sup>75</sup> Some states allow for electronic monitoring only after a criminal conviction.<sup>76</sup> Other states allow for electronic monitoring in civil protection orders, but only after a substantial violation has occurred.<sup>77</sup> This paper will focus on electronic monitoring in civil cases, particularly temporary civil protection orders.

[20] Massachusetts has been one of the leading states in utilizing electronic monitoring in domestic violence cases.<sup>78</sup> The statute permits a judge to order an abuser who has violated a civil protection order to wear a global positioning satellite tracking device (GPS) that transmits and records the abuser's location.<sup>79</sup> If the abuser enters an exclusion zone, an alert and

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it). *See also* Rosenfeld, *supra* note 43, at 264 (discussing success of Newburyport, Massachusetts' program where eight high-risk abusers were electronically monitored for two years and none re-offended).

<sup>75</sup> *See e.g.*, IND. CODE ANN. § 35-33-8-11(a) (LexisNexis 2018) (allowing courts to order electronic monitoring as a condition of bail when defendant is charged with domestic violence). *Accord* MICH. COMP. LAWS SERV. § 765.6b(6) (LexisNexis 2018) (allowing judges to impose electronic monitoring on defendant abusers so long as such discretion considers the potential lethality of future offenses by such defendant).

<sup>76</sup> *See* 730 ILL. COMP. STAT. ANN. 5/5-8A-7 (LexisNexis 2018) (allowing for the use of electronic monitoring only after a conviction as a condition of parole or early release).

<sup>77</sup> *See* KY. REV. STAT. ANN. § 403.761(1) (LexisNexis 2018).

<sup>78</sup> *See* MASS. ANN. LAWS ch. 209A, § 7 (LexisNexis 2018); *see e.g.*, Rosenfeld, *supra* note 43, at 261, 264 (discussing Massachusetts newly enacted law and the study conducted in Newburyport, Massachusetts).

<sup>79</sup> *See* MASS. ANN. LAWS ch. 209A, § 7 (LexisNexis 2018).

the abuser's location is immediately sent to law enforcement and the survivor.<sup>80</sup>

[21] Oklahoma's statute is a little broader. The court may order electronic monitoring with any civil protection order.<sup>81</sup> The electronic monitoring is potentially indefinite and is to be reviewed on an annual basis.<sup>82</sup> Before ordering the abuser be subject to electronic monitoring, the court must find that the abuser "has a history that demonstrates an intent to commit violence against the victim."<sup>83</sup> The standard is preponderance of the evidence, and the judge can consider prior convictions, past violence, or any other evidence that indicates a likelihood of future violence.<sup>84</sup>

[22] Kentucky's statute allows for the survivor to request the abuser participate in electronic monitoring.<sup>85</sup> The survivor can request electronic monitoring only if there has been a "substantial violation" of a prior CPO.<sup>86</sup> At an evidentiary hearing, the judge must consider the abuser's history and the likelihood that electronic monitoring will increase the survivor's safety.<sup>87</sup> Notably, removing or tampering with the GPS device constitutes a felony.<sup>88</sup>

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<sup>80</sup> *See id.*

<sup>81</sup> *See* OKLA. STAT. tit. 22, § 60.17 (2018).

<sup>82</sup> *See id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See* KY. REV. STAT. ANN. § 403.761(1) (LexisNexis 2018).

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.* § 403.761(6).

**PART IV. CURRENT ELECTRONIC MONITORING TECHNOLOGIES AND  
HOW TRACKING DOMESTIC VIOLENCE ABUSERS WORKS**

**A. Types of Electronic Monitoring Technology**

[23] There are many companies that manufacture and market electronic monitoring devices.<sup>89</sup> Private companies market not only the technology, but will also track and monitor offenders for law enforcement agencies.<sup>90</sup> There are three general types of electronic monitoring: active, passive, and hybrid systems.<sup>91</sup> Active electronic monitoring tracks the location of the abuser and reports that data to those monitoring the offender as often as every minute.<sup>92</sup> Passive electronic monitoring also tracks the location of the abuser, but that information is only downloaded a few times throughout the day.<sup>93</sup> Hybrid systems function in passive mode, but switch to active reporting mode if the abuser enters an exclusion zone, tampers with the device, or the device has low power.<sup>94</sup> Active or hybrid systems are preferred in domestic violence cases because they alert law enforcement almost immediately to violations of the civil protection order.

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<sup>89</sup> See, e.g., Steven R. Taylor et al., *Market Survey of Location-Based Offender Tracking Technologies, Version 1.1*, NAT'L CRIMINAL JUSTICE REFERENCE SERV., at 3–2 to 3–3 tbl.1 (May 2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/249889.pdf>, <https://perma.cc/GSS3-MBKQ> (detailing thirty-three technologies offered and their capabilities).

<sup>90</sup> See GPS MONITORING SOLUTIONS, <http://www.gpsmonitoring.com>, <https://perma.cc/L3BC-L2JG?type=image> (last visited Mar. 30, 2018).

<sup>91</sup> See Taylor, *supra* note 89, 2–2.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

<sup>94</sup> See *id.*



## B. Exclusion Zones and Alerts to Law Enforcement and Survivors

[24] Most of the electronic monitoring devices on the market focus on setting exclusion zones.<sup>95</sup> These devices can be programmed to include multiple exclusion zones, including the survivor's residence and workplace, the children's school and daycare facilities, family residences, and other locations the survivor frequents.<sup>96</sup> The abuser wears a device that alerts law enforcement if the abuser enters one of the exclusion zones.<sup>97</sup> Different technologies allow law enforcement to respond differently to a violation. For instance, some devices will emit a light, vibration, or tone to alert the abuser that he has entered an exclusion zone.<sup>98</sup> Other devices allow for the person monitoring the abuser to talk to the abuser, tell him he has entered an exclusion zone, and tell him to leave.<sup>99</sup> Some devices allow the abuser to acknowledge the alert through pressing a button, two-way conversation, or a text message.<sup>100</sup> Theoretically, regardless of how the abuser is alerted—through tone, buzz, or a conversation—law enforcement should respond if the abuser does not automatically leave the exclusion zone. However, as discussed above, law enforcement response to domestic violence is often lacking.<sup>101</sup>

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<sup>95</sup> *See id.*, 5–4 tabl.3 (noting that strap tamper is of equal frequency).

<sup>96</sup> *See generally* Dahlstedt, *supra* note 6, at 8 (describing the exclusionary zones established by common protection orders and discussing how GPS monitoring of an abuser's location relative to exclusionary zones may more effectively protect victims).

<sup>97</sup> *See id.* at 10.

<sup>98</sup> *See* Taylor, *supra* note 89, at 5–4 tabl.3 (discussing twenty-nine devices that use light, vibration, or tone to alert an abuser).

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

<sup>101</sup> *See* Jordan, *supra* note 45, at 549.

[25] Some electronic monitoring technologies also have a feature that would alert the survivor if the abuser enters an exclusion zone.<sup>102</sup> However, not all law enforcement agencies utilizing electronic monitoring devices in domestic violence cases use the feature that would simultaneously alert the survivor.<sup>103</sup>

[26] Electronic monitoring of abusers can deter violations and violence against survivors, but it is not a foolproof mechanism to prevent crime. Law enforcement agencies that do not utilize the survivor alert function force survivors to rely on law enforcement to respond and enforce the protection order. Alerts to law enforcement allow them to respond in a timely fashion. However, as discussed above, law enforcement response to violations of civil protection orders has been spotty, and the Supreme Court has held that those with protection orders do not have a right to their enforcement.<sup>104</sup> Therefore, alerts to survivors of the abuser's violation of an exclusion zone provide the survivor crucial time to leave, seek help, or hide, especially in the event of slow or non-responsive law enforcement.<sup>105</sup> The technology can thus empower survivors to control their own protection without the need to rely on often unreliable law enforcement. Additionally, electronic monitoring can ensure survivors maintain control over their lives in general. Using electronic monitoring to enforce CPOs will offer the survivor the option of staying at home and maintaining her life and employment.<sup>106</sup>

[27] The exclusion zone technology has one major flaw: it does not protect survivors against violations of the protection order outside the

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<sup>102</sup> See Taylor, *supra* note 89, at 5–4 tabl.3. Seven devices allow for notifications to reach survivors via text, email, or a notification device the survivor carries.

<sup>103</sup> See Gur, *supra* note 8, at 45. A study in 2009 found that only one third of law enforcement agencies using electronic monitoring of domestic violence abusers utilize the function to alert survivors of violations.

<sup>104</sup> See discussion *supra* Part I.

<sup>105</sup> See Dahlstedt, *supra* note 6, at 10.

<sup>106</sup> See Erez & Ibarra, *supra* note 71, at 100–101.

exclusion zones. CPOs often include a provision stating the abuser cannot be within a certain distance of the survivor (proximity provision).<sup>107</sup> However, current electronic monitoring technology only alerts law enforcement (and sometimes the survivor) if the abuser steps inside an exclusion zone.<sup>108</sup> No alert is sent, to law enforcement or the survivor, if the abuser violates the proximity provision of the CPO outside the exclusion zone.<sup>109</sup> Violations of the proximity provision of the civil protection order are just as dangerous to the survivor.

### C. Costs of Electronic Monitoring: Who Pays?

[28] Electronic monitoring costs about ten dollars per day.<sup>110</sup> Many states who have statutorily allowed the courts to impose electronic monitoring require the abuser to pay the costs of the monitoring.<sup>111</sup> In cases where the abuser is unable to pay the costs of electronic monitoring, some states have implemented a “sliding scale” model.<sup>112</sup> In these states, the court evaluates the abuser’s income and ability to pay based on the federal poverty guidelines.<sup>113</sup> The court requires the abuser to pay between 0 and 75%, based on his ability.<sup>114</sup> The sliding scale model is a better alternative than

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<sup>107</sup> See Jane K. Stoeber, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 VAND. L. REV. 1015, 1019 (2014).

<sup>108</sup> See Matthew J. Kucharson, *GPS Monitoring: A Viable Alternative to the Incarceration of Nonviolent Criminals in the State of Ohio*, 54 CLEV. ST. L. REV. 637, 667–68 (2006).

<sup>109</sup> See *id.* at 645–46.

<sup>110</sup> See Rosenfeld, *supra* note 43, at 261.

<sup>111</sup> See *id.* See, e.g., KY. REV. STAT. ANN. § 403.761(2)(a) (LexisNexis 2018) (requiring the abuser to pay and the state to bear any costs not covered by an indigent abuser).

<sup>112</sup> See Santry, *supra* note 9, at 1115.

<sup>113</sup> See *id.* at 1115–16.

<sup>114</sup> See *id.* at 1116.

incarcerating those abusers who are ordered to participate in electronic monitoring, but cannot afford to pay the costs associated with the monitoring. However, if the abuser cannot pay, the state must find some other way to cover the costs of the electronic monitoring.

[29] There are two avenues through which the state can seek funding for electronic monitoring programs: state funds and federal funds. If the abuser is monitored electronically for a year, the average of ten dollars per day amounts to \$3,650.<sup>115</sup> By contrast, incarcerating an abuser because he cannot afford to pay the electronic monitoring fees costs much more.<sup>116</sup> States could divert budgets that fund incarceration to projects like electronic monitoring of domestic violence abusers.

[30] Additionally, states could seek federal funding for electronic monitoring programs. In the case of sex offender electronic monitoring, the Adam Walsh Child Protection and Safety Act of 2006 is a federal law that provides grants to states for electronic monitoring of sex offenders.<sup>117</sup> Similar federal laws, like the Violence Against Women Act (VAWA) offer avenues for federal funding of state programs to electronically monitor domestic violence abusers.<sup>118</sup> For instance, the Services, Training, Officers, Prosecutors (STOP) federal grant program awards grants to state law enforcement agencies to strengthen their capacity in protecting women from violent crimes.<sup>119</sup> Fifteen percent of the grant is discretionary funding and

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<sup>115</sup> See Rosenfeld, *supra* note 43, at 261.

<sup>116</sup> See Santry, *supra* note 9, at 1122 (noting that in 2009, Kentucky spent \$18,000 per year to incarcerate one person. The national average to incarcerate one person costs roughly \$24,000 per year).

<sup>117</sup> See 34 U.S.C.S. § 20981 (LexisNexis 2018) (formerly codified at 42 U.S.C.S. § 16981).

<sup>118</sup> See 34 U.S.C.S. § 10441 (LexisNexis 2018) (formerly codified at 42 U.S.C.S. § 3796gg).

<sup>119</sup> See *Grant Programs*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/ovw/grant-programs>, <https://perma.cc/R7EJ-6YK5> (last updated Mar. 22, 2018) (noting the STOP program is part of the Violence Against Women Act).

could be allocated by the states to law enforcement agencies to implement electronic monitoring of domestic violence abusers.<sup>120</sup> Additionally, Congress could start and fund a new program under VAWA specifically for electronic monitoring of domestic violence abusers. Another potential source of federal funds is the Victims of Crime Act (VOCA) Fund created in 1984.<sup>121</sup> VOCA is funded by fines paid by federal criminals.<sup>122</sup> The amount of funds that can be released each year from VOCA is capped to avoid depleting the fund entirely, but Congress could allocate some funds for states to set up electronic monitoring of domestic violence abusers.<sup>123</sup>

**PART V. PRACTICAL AND CONSTITUTIONAL OBSTACLES TO  
IMPLEMENTING ELECTRONIC MONITORING AT THE TEMPORARY CIVIL  
PROTECTION ORDER STAGE**

[31] Imposing electronic monitoring at the temporary civil protection order stage has two major obstacles. Practically, the electronic monitoring can be difficult to implement because the abuser must first be found after the temporary CPO is ordered. Constitutionally, there are serious due process concerns at the temporary CPO stage.

**A. Practical Concern with Electronic Monitoring of Domestic  
Violence Abusers**

[32] Because temporary CPOs can be issued without the presence of the abuser, and the order must then be served on the abuser to take effect, implementing electronic monitoring can be practically difficult. Typically, statutes and courts can impose the costs of the electronic monitoring on the

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<sup>120</sup> *See id.*

<sup>121</sup> *See* 34 U.S.C.S. § 20101 (LexisNexis 2018) (formerly codified at 42 U.S.C.S. § 10601).

<sup>122</sup> Victims of Crime Act, NAT'L NETWORK TO END DOMESTIC VIOLENCE, <https://nnedv.org/content/victims-of-crime-act/>, <https://perma.cc/K6YB-N3PR> (last visited Apr. 5, 2018).

<sup>123</sup> *See id.*

abuser. Therefore, the abuser must be present to pay, and must also be fitted with the device. Before either of those steps can occur, the abuser must be found and brought into the law enforcement agency or company that will implement and monitor the electronic monitoring. It can often be difficult to find the abuser and serve him with the civil protection order—some survivors must go back to court and renew the temporary protection order if it has not been served before the temporary CPO expires. However, difficulties in serving CPOs and implementing electronic monitoring should not deter judges from imposing the condition. The period in which a survivor leaves her abuser is the most dangerous,<sup>124</sup> and judges should craft CPOs to offer as much protection and as many tools to the survivor as needed in the circumstances.

### **B. Constitutional Issues with Electronic Monitoring of Domestic Violence Abusers**

[33] The second and larger obstacle, is the constitutional due process concern. The Supreme Court has held that electronic monitoring is a search and seizure within the scope of the Fourth Amendment.<sup>125</sup> Because electronic monitoring is an invasion of privacy, a person is therefore, entitled to due process before being placed on electronic monitoring.<sup>126</sup> Fourth Amendment concerns are especially prevalent in cases where electronic monitoring is imposed in a civil protection order, before a trial and conviction for domestic violence.<sup>127</sup>

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<sup>124</sup> See Dahlstedt, *supra* note 6, at 9.

<sup>125</sup> See Grady v. N.C., 135 S. Ct. 1368, 1370 (2015).

<sup>126</sup> See Malone, *supra* note 3, at 204–05.

<sup>127</sup> See, e.g., Rachel Levinson-Waldman, *Hiding in Plain Sight: A Fourth Amendment Framework for Analyzing Government Surveillance in Public*, 66 EMORY L.J. 527, 535, 539, 546 (2017) (discussing constitutional concerns of various tracking technology).

[34] The test for the amount of due process required from *Mathews v. Eldridge* controls the analysis.<sup>128</sup> The court must balance the governmental interest against the individual interest and the potential for erroneous deprivation of a right.<sup>129</sup> In cases of domestic violence, the state interest is compelling—protection of domestic violence survivors.<sup>130</sup> However, the individual interest of the abuser is also compelling—a right to be free in one’s person. Freedom of movement is arguably a fundamental liberty and if the law restricts that liberty, the law must survive strict scrutiny—meaning a compelling governmental interest exists and the law is narrowly tailored to achieve that governmental interest.<sup>131</sup> A conviction of a domestic violence charge, or a hearing at which the abuser has the notice and opportunity to be heard before a permanent protection order is granted, satisfies these due process requirements.<sup>132</sup>

[35] However, the Fourth Amendment issues are more complex when electronic monitoring is imposed as part of a temporary civil protection order. The *Mathews* test requires the abuser be given notice and an opportunity to be heard, but temporary CPOs can be granted even in the absence of the abuser.<sup>133</sup> Civil procedure does allow a survivor to obtain a temporary CPO, if she demonstrates that an “immediate and irreparable

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<sup>128</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>129</sup> See *id.* at 335.

<sup>130</sup> See Malone, *supra* note 3, at 205.

<sup>131</sup> See *id.*

<sup>132</sup> See Dahlstedt, *supra* note 6, at 14–15; see also Rhodes, *supra* note 5, at 135; Warner v. Majia, 3:14-CV-1968(JCH), 2016 U.S. Dist. LEXIS 59721, at \*3 (D. Conn. 2016) (defendant sentenced to electronic monitoring after violating a protective order); Jones v. State, 31 N.E.3d 36, ¶ 6 (Ind. Ct. App. 2015) (defendant abuser sentenced to electronic monitoring when convicted of violating a no-contact order).

<sup>133</sup> See Stark & Choplin, *supra* note 28, at 13. While the Constitution requires both parties be present at a hearing, the rules of civil procedure allow vulnerable parties to appear in court without notice to the other party to obtain a temporary protection order to prohibit wrongful action.

injury will result before the adverse party can be heard.”<sup>134</sup> Despite the lack of notice and opportunity to the abuser, judges should not be reluctant to consider and impose electronic monitoring at this stage in the process. As discussed above, the time when a survivor decides to leave her abuser is the most dangerous.<sup>135</sup> Because of this danger, courts should look to use technology like electronic monitoring to enhance the protections offered to survivors during this stage.

[36] Imposing electronic monitoring in CPOs, even temporary ones, can survive strict scrutiny. Strict scrutiny requires a compelling governmental interest and narrow tailoring. The Supreme Court has held that protecting human life is a compelling governmental interest.<sup>136</sup> The goal of a CPO is to protect the survivor from severe harm and potential death. To survive strict scrutiny, the states must, therefore, draft the law allowing courts to impose electronic monitoring at the temporary CPO stage to be narrowly tailored.<sup>137</sup> Narrow tailoring could be achieved by three means: narrowing the use of the data collected by electronic monitoring; narrowing the scope in which electronic monitoring can be applied; and limiting the duration of the electronic monitoring. In the first instance, the data collected can be limited in its use to alerting law enforcement of a violation of the protection order and alerting the survivor to the violation. The data should not be made available to prove other crimes outside of domestic violence and violations of a protective order.

[37] Second, a statute imposing electronic monitoring in a temporary protection order must be narrowly tailored in scope to limit the risk of

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<sup>134</sup> *Id.* at 15–16.

<sup>135</sup> *See* Dahlstedt, *supra* note 6, at 9.

<sup>136</sup> *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992) (holding that protecting fetal life at viability is a compelling governmental interest); U.S. v. Salerno, 481 U.S. 739, 750 (1987) (holding that the government’s interest in preventing crime is heightened when life is threatened). *See also* Cruzan v. Mo. Dep’t of Health, 497 U.S. 261, 280 (1990) (recognizing states’ interests in protecting life).

<sup>137</sup> *See* Malone, *supra* note 3, at 204.



erroneous deprivation<sup>138</sup> The risk of erroneous deprivation can be mitigated through careful consideration of a dangerousness assessment, similar to the ones used by courts in evaluating sex offenders. Jacquelyn Campbell developed a dangerousness assessment that evaluates the risk of further abuse and the potential lethality of abuse in domestic violence.<sup>139</sup> The assessment consists of two parts: (1) a calendar that asks the survivor to list, to the best of her knowledge, when abuse occurred and to weigh the severity of that abuse; and (2) a series of questions focusing on risk factors like the severity and frequency of the abuse; use or possession of weapons by the abuser; whether substance abuse is involved (drugs or alcohol); jealousy; stalking; and threats.<sup>140</sup> Depending on the survivor's answers to questions, the abuser is placed in one of four categories: variable danger, increased danger, severe danger, and extreme danger.<sup>141</sup> Prior physical abuse, stalking, harassment, and the other factors included in the assessment are all indicators of increased, severe future abuse and potential homicide.<sup>142</sup> Using such an assessment, domestic violence homicides can be predicted and prevented because research shows that certain factors, like the ones measured, make death far more likely.<sup>143</sup>

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<sup>138</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>139</sup> See Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. INTERPERSONAL VIOLENCE 653, 654–55 (2009).

<sup>140</sup> See *id.* at 655.

<sup>141</sup> See *id.* at 655, 662.

<sup>142</sup> See Amanda Hitt & Lynn McLain, *Stop the Killing: Potential Courtroom Use of a Questionnaire that Predicts the Likelihood that a Victim of Intimate Partner Violence Will Be Murdered by Her Partner*, 24 WIS. J.L. GENDER & SOC'Y 277, 280–81 (2009).

<sup>143</sup> See Rosenfeld, *supra* note 43, at 260.

[38] Many law enforcement agencies have implemented a version of this assessment when officers arrive at a domestic violence call.<sup>144</sup> The law enforcement assessment can also be used by the courts at temporary CPO proceedings to determine the risk to the survivor and whether electronic monitoring of the abuser is warranted. If an abuser falls within the severe danger or extreme danger categories in the dangerousness assessment, the judge should consider imposing electronic monitoring. The dangerousness assessment and the limit of imposing electronic monitoring only for those who fall within the high-risk categories will mitigate the risk of erroneous deprivation of rights that was the concern in *Mathews v. Eldridge*.

[39] Courts have used the dangerousness assessment and are capable of evaluating domestic violence abusers and the risk they pose to survivors. For instance, in *People v. Holiday*, the defendant pled guilty to assault and domestic violence.<sup>145</sup> At his release, the probation officer conducted a Spousal Assault Risk Assessment in which the defendant scored in the high-risk category.<sup>146</sup> The probation officer thus recommended electronic monitoring, which was imposed.<sup>147</sup> The defendant appealed the imposition of electronic monitoring, but the appellate court found that the electronic monitoring would serve as evidence of future violations, was not overly restrictive, and would deter future violations.<sup>148</sup> Although the dangerousness assessment was administered in this case post-conviction

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<sup>144</sup> See Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 164 (2015) (noting that 30 states use Maryland's Lethality Assessment Program). See Maryland Network Against Domestic Violence, LETHALITY ASSESSMENT PROGRAM, <https://lethalityassessmentprogram.org>, <https://perma.cc/DJ36-86GH> (last visited Mar. 27, 2018).

<sup>145</sup> See *People v. Holiday*, No. D058982, 2012 Cal. App. Unpub. LEXIS 2235, at \*1 (Cal. Ct. App. Mar. 23, 2012).

<sup>146</sup> See *id.* at \*5.

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* at \*8–9.

and release, courts are capable of using the dangerousness assessment and evaluating domestic violence abusers at temporary CPO hearings.

[40] Finally, statutes allowing for electronic monitoring at the temporary protection order stage should require the court to reevaluate the need for electronic monitoring at regular intervals so as not to infringe any more than necessary on the abuser's liberty.<sup>149</sup> Reevaluation should be conducted at set court dates, including the hearing for a permanent CPO; the expiration of the current CPO; or when there are changes in the survivor's or abuser's life, such as moving or starting a new intimate relationship.<sup>150</sup> The court should have discretion to set the dates for reevaluation based on the circumstances of each individual case and informed by the dangerousness assessment. Additionally, the court should have the discretion to modify the CPO, if it determines modification is necessary, by releasing the abuser from electronic monitoring or adding electronic monitoring to an already existing order.

#### PART VI. A NEW TECHNOLOGY

[41] Law enforcement agencies and private companies that utilize and administer electronic monitoring typically use one type of technology—GPS monitoring.<sup>151</sup> This technology allows the court to set exclusion zones—zones in which the abuser is not allowed to enter—and the device the abuser wears will alert law enforcement if the abuser strays into an exclusion zone.<sup>152</sup> Although the exclusion zone technology is helpful and has been shown to have a deterrent effect on abusers, a new technology could be even more helpful in protecting survivors of domestic violence.

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<sup>149</sup> See Rosenfeld, *supra* note 43, at 263.

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* at 261.

<sup>152</sup> See *id.*

### A. A Device for Survivors to Carry

[42] A Swiss company, Geosatis Technology, will soon launch a new technology that would allow the survivor to carry a device that receives a notification not only if the abuser enters an exclusion zone, but also if the abuser comes within a proscribed proximity of the device the survivor carries.<sup>153</sup> The two devices are linked, and the survivor's device alerts the survivor if the abuser's device is detected within the proscribed proximity set by the court order.<sup>154</sup> The technology will offer two benefits to the survivor.

[43] The first benefit will be the fact that the company offers a device for survivors to carry. Alerts will automatically go to the survivor and she will not have to rely on law enforcement to alert her.<sup>155</sup> The alert would empower the survivor to take steps to ensure her own protection, rather than waiting for law enforcement to arrive. The automatic alert will give the survivor crucial time to leave the area, seek help, or hide. The device has three additional key features that would allow the survivor to enhance her security: (1) a panic button to send an alert to the monitoring station, along with the device's position; (2) a camera incorporated into the device to take pictures that are automatically sent to the monitoring station; and (3) the device can be preset with two numbers to call for help.<sup>156</sup>

[44] The second benefit to the new technology is more freedom of movement for survivors. Research shows that the law's response to domestic violence should be supportive of the survivor's role in the

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<sup>153</sup> See *Main Monitoring Modes and Related Products*, GEOSATIS TECHNOLOGY, [https://geo-satis.com/wp-content/uploads/Geosatis\\_Products\\_Overview\\_EN.pdf](https://geo-satis.com/wp-content/uploads/Geosatis_Products_Overview_EN.pdf), <https://perma.cc/BHF7-GUKT> (last visited Apr. 19, 2018).

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.*

decision-making and recovery process.<sup>157</sup> Empowering the survivor to protect herself and regain control of her life will aid in her recovery process. Additionally, research shows that survivors' safety increases when she has input in the decision-making process.<sup>158</sup> The current technology leaves survivors vulnerable outside the preset exclusion zones.

[45] However, the new technology would decrease the vulnerability of the survivor when she is outside the proscribed exclusion zones, thus empowering her to move about freely. Current technology and the use of exclusion zones in essence limit the survivor while granting the abuser the right to move about freely outside the exclusion zones.<sup>159</sup> The exclusion zones are useful and should still be utilized by the courts. The exclusion zones provide predictability for both the survivor and the abuser—the survivor and the abuser both know precisely where he is not allowed to enter. However, outside the exclusion zone, with the current technology, the survivor has no warning, and law enforcement is not alerted, if the abuser is within the proscribed proximity of the civil protection order.<sup>160</sup> The vulnerability of the survivor outside the exclusion zones may encourage her to stay only within the exclusion zones, limiting her freedom of movement. However, if the survivor is able to carry a device that will alert her if the abuser breaches the proscribed proximity, she will feel empowered to leave the exclusion zones.

### **B. Legal Ramifications of the New Technology**

[46] There are two potential legal ramifications with the new technology. The first legal ramification concerns the notification system. The second

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<sup>157</sup> See Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1489 (2008).

<sup>158</sup> See Jane K. Stoeber, *Transforming Domestic Violence Representation*, 101 KY. L.J. 483, 487 (2012).

<sup>159</sup> See Rosenfeld, *supra* note 43, at 257–58.

<sup>160</sup> See *id.* at 262.

legal ramification concerns potential false or inadvertent violations overloading the court system.

[47] The first concern is whether abusers should be notified of potential proximity violations. The current technology alerts law enforcement when the abuser enters an exclusion zone.<sup>161</sup> Many devices also alert the abuser, via a buzz, tone, or personnel monitoring and speaking through the device.<sup>162</sup> The notification to the abuser allows him to correct the violation if it was inadvertent. Such notifications do not increase danger to the survivor. The abuser entered the exclusion zone knowing he should not be there and that he could potentially encounter the survivor. However, the new technology that allows for proximity alerts to the survivor, should not also alert the abuser that he has violated the proscribed proximity provision of the CPO. Alerting the abuser would allow the abuser to correct the inadvertent violation; but alerting the abuser that the survivor is within a certain proximity would also increase the danger to the survivor. An abuser may not have been stalking the survivor, but if he is alerted to her proximity, he may take advantage of the opportunity. The burden, therefore, is placed on the abuser to be aware of his surroundings and potential proximity violations. Because notifying the abuser could increase danger to the survivor, abusers should not be notified of proximity violations outside the exclusion zones.

[48] The second, related concern is the potential for false or inadvertent violations overloading the court system. If the abuser violates the proscribed proximity outside of an exclusion zone, law enforcement and the survivor will be notified. Law enforcement should investigate and file charges of a violation if they believe the abuser did not inadvertently violate the proximity provision. The abuser would be given a hearing and the court would decide if the proximity violation was inadvertent. There is a chance that the court would find the violation was inadvertent and dismiss the charges, especially in small towns where both the abuser and survivor might shop at the same grocery stores and gas stations. Although the court may

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<sup>161</sup> See Dante, *supra* note 56, at 1182.

<sup>162</sup> See Taylor et al., *supra* note 89, at 5–4.

see an increase in violations hearings, that should not deter the court from implementing electronic monitoring and using the technology that would allow survivors to receive proximity alerts outside of the exclusion zones. The burden on the court system cannot be known yet and studies should be conducted before a potential burden encourages judges to refuse imposing electronic monitoring with proximity technology.

#### PART VII. CONCLUSION

[49] Domestic violence is a widespread epidemic in the United States. States have made significant changes in how domestic violence cases are viewed and handled, and the remedies offered to survivors. However, states can do more. States can utilize electronic monitoring to help enforce civil protection orders and increase survivor safety. Many states currently allow for courts to impose electronic monitoring in domestic violence cases. However, two flaws exist: (1) the electronic monitoring is imposed after a violation of a civil protection order or a criminal conviction on domestic violence charges; and (2) current technology only alerts law enforcement and survivors must rely on law enforcement response and enforcement of protection orders for their safety.

[50] The first flaw can be addressed by allowing for the imposition of electronic monitoring both at the temporary protection order stage and the permanent protection order stage. At both stages, the court should utilize a dangerousness assessment tool, like that developed by Jacquelyn Campbell. The use of a dangerousness assessment would decrease the risk of erroneous deprivation of the abuser's rights, therefore satisfying the due process test developed in *Mathews v. Eldridge*. The dangerousness assessment accounts for factors in addition to physical violence—emotional, psychological, and financial abuse. The courts need to consider these other factors because they are indicative of further physical abuse and potential death. Considering physical abuse as well as emotional, psychological, and financial abuse, will allow the court to holistically evaluate the situation and determine whether the abuser is a candidate for electronic monitoring.

[51] The second flaw can be addressed by utilizing the new technology soon to be launched by the Swiss company, Geosatis Technology. Although some electronic monitoring systems currently have a feature to alert the survivor if the abuser violates an exclusion zone, the function is not often implemented by law enforcement. The new technology by Geosatis offers a device for the survivor to carry that would alert her immediately upon the violation of an exclusion zone, without relying on law enforcement to enable that function. Additionally, the new technology can be programmed to alert the survivor if the abuser violates the proximity provision of the CPO. The new technology with the proximity alert capability will allow the survivor to leave the exclusion zones knowing she is still protected by the electronic monitoring. The survivor's ability to freely move about outside the exclusion zones will enable her to get her life back.

[52] Courts should utilize a dangerousness assessment, like the one developed by Jacquelyn Campbell, to identify high risk domestic violence abusers as candidates for electronic monitoring at the temporary civil protection order stage. The time a survivor decides to leave her abuser is the most dangerous time<sup>163</sup> and courts should utilize their discretion in crafting CPOs to enhance the survivor's safety. Additionally, courts should consider using the new technology from Geosatis to enhance survivor's safety outside the preset exclusion zones.

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<sup>163</sup> See Dahlstedt, *supra* note 6, at 9.