THE SEVENTH CIRCUIT JUSTIFIES LIFETIME GPS MONITORING BY CALLING IT PREVENTION

ANDREA R. TORRES


INTRODUCTION

In July 2016, parents at Assumption Catholic School in a small city in Washington learned that the school had failed to inform them about the presence of a registered sex offender parent for nearly a year.¹ Although school officials established strict policies regarding the supervision of the parent while on school grounds, they decided against informing the families of all the students.² In the 1980s, this parent was convicted of molesting two girls under the age of twelve in South Dakota.³ In 2002, he was convicted for abusing two other girls in Washington.⁴ By 2008, he was charged again with molesting two

---

² Id.
³ Id.
⁴ Id.
more underage girls. This time, the charges were dropped due to a lack of sufficient evidence. A few years later, he married a woman who gave birth to his daughter. In 2015, their daughter started attending preschool at Assumption. The following year, one of the mothers at the elementary school started pairing up new families with more established ones in order to create a “buddy system.” When a family declined to be paired up with the sex offender’s family, the mother decided to search for answers on the Internet. To her horror, she found out that the man who had been visiting the school on a daily basis was a registered sex offender. The school principal somehow concluded that because the preschool was separate from the other schools, the notification of parents outside of the preschool was unnecessary, especially since the sex offender was only on campus for a “very, very brief” time. Several parents found the presence of a known sex offender and the “moderate risk” that he would reoffend too much to bear and decided to withdraw their children from the school.

This worry is exactly what Wisconsin legislators sought to address when they passed Section 301.48 of the Wisconsin Statutes, which requires lifetime GPS monitoring of serious child sex offenders. The relevant portion of the statute states:

(2) Who is covered . . .
(b) Except as provided in subs. (7) and (7m), the department shall maintain lifetime tracking of a person if any of the

---

5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
following occurs with respect to the person on or after January 1, 2008 . . .

2. A court discharges the person under s. 980.09 (4). This subdivision does not apply if the person was on supervised release immediately before being discharged.15

The above provision of the statute applies to sexually violent persons who were released from civil commitment.16 The language of 980.09(4) states:

If the court or jury is satisfied that the state has not met its burden of proof under sub. (3), the person shall be discharged from the custody of the department. If the court or jury is satisfied that the state has met its burden of proof under sub. (3), the court shall proceed under s. 980.08 (4) to determine whether to modify the person’s existing commitment order by authorizing supervised release, unless the person waives consideration of the criteria in s. 980.08 (4) (cg). If the person waives consideration of these criteria, the waiver is a denial of supervised release for purposes of s. 980.08 (1).17

A recent case involving this statute, Belleau v. Wall, tells the story of Michael Belleau who was convicted of multiple sexual assaults of minors.18 After spending years in prison, in jail, and on probation, he was committed to a secure treatment center as “a sexually violent person” under Chapter 980 of the Wisconsin Statutes.19

“Sexually violent person” means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found

15 § 301.48(2)(b)(2).
16 Id.
17 Wis. Stat. § 980.09(4) (1994).
19 Id.
not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.20

In 2010, he was released from civil commitment wearing a GPS tracking device on his right ankle.21 By then, Belleau’s sentences had expired, and he was not under any form of supervision.22 If the lifetime monitoring was part of his sentence as punishment for his crimes, the story would have ended here.23 “Given the fact that one can be sentenced to life in prison for such a crime, it necessarily follows that lifetime GPS tracking, as a component of a sentence imposed for such an offense, would be lawful.”24 Similarly, the monitoring would have been acceptable if it was a condition of his release.25 The United States District Court Eastern District of Wisconsin declared that the statute was an ex post facto law because it applied to Belleau retroactively and because it was punitive in effect.26 Judge Griesbach further held that the monitoring program was not a reasonable search under the Fourth Amendment.27

The United States Court of Appeals for the Seventh Circuit overturned the decision and declared that the statute did not violate the Ex Post Facto Clause of the Constitution because the monitoring was considered “prevention,” not “punishment.”28 It also decided that the statute did not offend the Fourth Amendment because a search under the circumstances was reasonable, and the Amendment only prohibits

20 § 980.01(7).
21 Belleau, 132 F. Supp. 3d at 1090.
22 Id. at 1093.
23 Id. at 1092.
24 Id.
25 Id.
26 Id. at 1104.
27 Id. at 1109-10.
28 Belleau v. Wall, 811 F.3d 929, 937 (7th Cir. 2016).
unreasonable searches. After all, people like Belleau “have a diminished right of privacy as a result of the risk of their recidivating.”

Despite having the best interests of children in mind, GPS monitoring laws have the potential to infringe upon the constitutional rights of offenders. Part I of this paper takes a closer look at the background of lifetime satellite-based monitoring of sex offenders. Part II focuses on the procedural history of Belleau v. Wall and reviews the contrasting opinions of the district court and the Seventh Circuit. Lastly, Part III discusses the current state and the constitutional implications of lifetime tracking programs.

I. SHOULD STATES MONITOR SEX OFFENDERS FOR LIFE?

The majority of victims do not report sexual abuse. This is especially true when the victims are minors. Children often have difficulty describing what happened to them. Though they may provide hints, these are easily missed by adults. Other times, children are simply too afraid to talk, either because they don’t know how their parents will react or they worry that their abusers may retaliate. The younger the victim, the more likely the crime goes unreported. In light of these facts, it is not hard to imagine that many children grow

29 Id.
30 Id. at 935.
32 Id.
33 Id.
34 Id.
35 Id.
up without access to adequate treatment and that, in turn, increases the likelihood of anxiety, depression, substance abuse, and even suicide.\footnote{37} Even with treatment, the psychological and physical scars remain for many years, if not forever.\footnote{38} Victims are more likely to run into problems in school and have difficulty holding onto jobs as adults.\footnote{39} They may even become child abusers themselves.\footnote{40}

The high rate of recidivism further exacerbates the problem.\footnote{41} Because of the significant underreporting of these crimes, it is particularly difficult to properly estimate how high the recidivism rates are among child sex offenders.\footnote{42} Pedophiles with more than one prior arrest are two or three times more likely to repeat their crimes.\footnote{43} The National Institute of Justice (“NIJ”) sponsored a study that examined the effect of satellite-based monitoring of sex offenders in California.\footnote{44} The study “found that those placed on GPS monitoring had significantly lower recidivism rates than those who received traditional supervision.”\footnote{45} In fact, 38% more arrests were recorded in the group for

\footnote{41} Przybylski, supra note 36.
\footnote{42} Id.
\footnote{43} Id.
\footnote{45} Id.
under traditional supervision as opposed to the group wearing GPS monitors.46

With these statistics in mind and given the states’ well-recognized compelling interest in protecting children from physical and psychological harm, it is understandable why many states have enacted statutes requiring the satellite-based monitoring of sexual predators.47 A few of the states even provide for lifetime monitoring.48 Nonetheless, legislatures should not overlook the constitutional implications of these programs. The Seventh Circuit analyzed both the Fourth Amendment and the Ex Post Facto Clause to determine that the Wisconsin statute was constitutional.

A. The Fourth Amendment

The purpose of the Fourth Amendment of the United States Constitution is to protect people from unreasonable searches and seizures.49 As the word “unreasonable” suggests, not all searches are prohibited.50 Determining what is reasonable is usually not simple and may involve the balancing of the right of individuals “to be secure in their persons, houses, papers, and effects” against legitimate government interests.51

In Grady v. North Carolina, the Supreme Court reviewed the case of Torrey Dale Grady, a two-time sex offender subjected to North
Carolina’s lifetime satellite-based monitoring program.\textsuperscript{52} Grady argued that the tracking device violated his right to be free from unreasonable searches under the Fourth Amendment.\textsuperscript{53} The North Carolina courts rejected his argument relying on the theory that “the State’s system of nonconsensual satellite-based monitoring d[id] not entail a search within the meaning of the Fourth Amendment.”\textsuperscript{54}

In its decision to reverse the lower court, the Supreme Court cited two of its prior cases that were inconsistent with this reasoning.\textsuperscript{55} In \textit{United States v. Jones}, the Court concluded that attaching a GPS tracking device to a vehicle was a search because the government physically entered a constitutionally protected space.\textsuperscript{56} In \textit{Florida v. Jardines}, the Court held that taking a drug-sniffing dog onto a person’s porch was also a similar physical intrusion that fit well within the definition of a Fourth Amendment “search.”\textsuperscript{57}

Next, the Court reviewed the text of the North Carolina statute, which required the monitoring to provide “[t]ime-correlated and continuous tracking of the geographic location of the subject” and “[r]eporting of subject’s violations of prescriptive and proscriptive schedule or location requirements,”\textsuperscript{58} Based on this language and the two prior cases, the Court declared that attaching “a device to a person’s body, without consent, for the purpose of tracking that individual’s movements” was in fact a “search.”\textsuperscript{59} The only question left for the lower court to answer on remand was whether the search itself was reasonable.\textsuperscript{60}

\textsuperscript{53} \textit{Id}.
\textsuperscript{54} \textit{Id}. at 1370.
\textsuperscript{55} \textit{Id}.
\textsuperscript{56} \textit{Id}. (citing \textit{United States v. Jones}, 132 S. Ct. 945, 949 (2012)).
\textsuperscript{57} \textit{Grady}, 135 S. Ct. at 1370 (citing \textit{Florida v. Jardines}, 133 S. Ct. 1409, 1417 (2013)).
\textsuperscript{58} \textit{Id}. at 1371.
\textsuperscript{59} \textit{Id}.
\textsuperscript{60} \textit{Id}.
When law enforcement obtains a judicial warrant before conducting a search, it is generally considered reasonable.\textsuperscript{61} When law enforcement operates without a warrant, courts review the reasonableness of the search by examining the totality of the circumstances.\textsuperscript{62} Specifically, the court will evaluate the level of intrusion on the reasonable expectation of privacy of the person being searched and the character and purpose of that search.\textsuperscript{63}

The Supreme Court in \textit{Grady} did not review whether this type of statute may be applied retroactively to an offender who completed serving his sentence.\textsuperscript{64} Some state courts have answered in the negative.\textsuperscript{65} “According to these courts, the monitoring law’s adverse effects are so punitive that they negate whatever civil intent was envisioned by state legislature.”\textsuperscript{66}

\textbf{B. The Ex Post Facto Clause}

The Constitution of the United States proscribes the enactment of retroactive laws through the Ex Post Facto Clause.\textsuperscript{67} There are actually two such clauses in the Constitution.\textsuperscript{68} One is in Article I Section 9, which applies to the federal government, and another is in Article I Section 10, which applies to the states.\textsuperscript{69} In \textit{Calder v. Bull}, the Supreme Court announced four circumstances when the clauses are implicated.\textsuperscript{70}

\begin{thebibliography}{9}
\bibitem{61} Belleau v. Wall, 132 F. Supp. 3d 1085, 1105 (D. Wis. 2015).
\bibitem{62} \textit{Grady}, 135 S. Ct. at 1371.
\bibitem{63} \textit{Id}.
\bibitem{64} \textit{Id}. at 1370.
\bibitem{66} \textit{Id}.
\bibitem{67} Peugh v. United States, 133 S. Ct. 2072, 2081 (2013).
\bibitem{68} \textit{Id}.
\bibitem{69} \textit{Id}.
\bibitem{70} \textit{Id}. (citing Calder v. Bull, 3 U.S. 386, 390 (1798)).
\end{thebibliography}
1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.\footnote{Peugh, 133 S. Ct. at 2081 (quoting Calder, 3 U.S. at 390).}

The Supreme Court has not addressed whether a state may subject a convicted sex offender to lifetime GPS tracking retroactively. The Court did address the ex post facto implications of a civil commitment statute in\textit{ Kansas v. Hendricks}, a law that is cited as most similar to the satellite-based tracking program statutes.\footnote{See Belleau v. Wall, 811 F.2d 929, 937 (7th Cir. 1987) (citing Kansas v. Hendricks, 521 U.S. 346, 369 (1997)).} In 1994, Kansas enacted the Sexually Violent Predator Act to mitigate the risk recidivist sex offenders pose to public safety.\footnote{Id. at 351.} In the same year, Leroy Hendricks, who had an extensive history of sexually abusing minors, was about to be released to a halfway house.\footnote{Id. 354-55.} The State asked the court’s permission to place him under civil commitment.\footnote{Id. at 355.} The trial court granted the State’s request and held that pedophilia fit the definition of “mental abnormality” described in the statute.\footnote{KAN. STAT. ANN. § 59-29a02(b) (1994) (“Mental abnormality’ means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”); id. at 355-56.} In his appeal, Hendricks attacked the statute on an ex post facto basis, among other claims.\footnote{Hendricks, 521 U.S. at 350.} The Court discussed the dangerousness of pedophilia and the
statute’s narrow focus on well-defined offenders in detail. Because
the statute lacked punitive legislative intent, because it only applied to
a narrow class of dangerous offenders who were unable to control
their urges, because procedural safeguards required the periodic
judicial review of the appropriateness of ongoing confinement, and
because the statute required the offender to undergo treatment, the
Court declared that the civil commitment statute was not punitive.

If GPS tracking is found comparable to civil commitment, the
Supreme Court may similarly label it “prevention” when it finally
decides an ex post facto challenge in a case involving this type of
monitoring. Some state courts disagree with this theory. In Riley v.
New Jersey State Parole Bd., the Supreme Court of New Jersey
reviewed the ex post facto implications of the State’s Sex Offender
Monitoring Act (“SOMA”) passed in 2007. George Riley was
“convicted of the second-degree attempted sexual assault of a minor”
in 1986. Because of his prior sexual assault convictions, he was
sentenced to twenty years. Six months after his release, the New
Jersey Parole Board advised Riley that, pursuant to SOMA, he would
have to wear an anklet monitor for the rest of his life. The Appellate
Division reversed the decision of the Parole Board and declared that
the statute violated federal and state ex post facto laws. The Parole
Board appealed arguing that Riley was subject to monitoring not
because of his past crimes but because of his “present
dangerousness.” The Supreme Court of New Jersey rejected this
argument because Riley’s 1986 conviction was the reason behind this
designation. The court held that the monitoring program was no

78 Id. at 357-60.
79 Id. at 368-69.
81 Id.
82 Id.
83 Id. at 274.
84 Id. at 278-79.
85 Id. at 281.
86 Id. at 291.
different than parole, even though Riley was not under any court ordered supervision. The court recognized that the legislature intended to pass a nonpunitive statute, but it found the law to be significantly punitive in effect, therefore, in violation of the “the Ex Post Facto Clauses of the Federal and State Constitutions.”

The Seventh Circuit decided to follow a different approach and rejected both the Fourth Amendment and ex post facto violation arguments in Belleau v. Wall.

II. BELLEAU V. WALL

In 1992, Michael Belleau was found guilty of sexually assaulting an eight-year-old boy multiple times during a period of five years, starting around 1987. Despite the severity of his crimes, his sentence was only one year in jail and five years on probation. While on probation in 1994, he was tried and convicted of the sexual assault of another child, a nine-year old girl, which took place in 1988. This time, his punishment was an additional ten years in prison. Nevertheless, he was paroled again after six years. By October 1, 2001, a year after his release, Belleau was back in prison. His parole was revoked after he revealed his desire to molest two additional children. Before he finished serving his latest sentence, the State of Wisconsin petitioned to place him under civil commitment as “a sexually violent person.” Belleau spent the next six years at the Sand

87 Id. at 294.
88 Id. at 297-98.
90 Belleau v. Wall, 811 F.3d 929, 931 (7th Cir. 2016).
91 Belleau, 132 F. Supp. 3d at 1088.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id. (citing WIS. STAT. § 980.01(7) (1994)).
Ridge Secure Treatment Center in Mauston, Wisconsin. In 2010, Dr. Richard Ellwood, a psychologist at the facility, concluded that Belleau no longer met the definition of “a sexually violent person” under the civil commitment statute. As a result, he was going to be released again.

While Belleau was under civil commitment, the Wisconsin legislature passed Wis. Stat. § 301.48, which requires the Wisconsin Department of Corrections (“DOC”) to continue monitoring the locations of persons who committed serious sexual offenses against children following their release from involuntary civil commitment under Chapter 980. Shortly after Belleau was released from the Sand Ridge Secure Treatment Center, DOC agents detained him “without any warrant or other court order” and secured a GPS device on his right ankle. Belleau was “required to wear the GPS device 24 hours per day, seven days a week, for the rest of his life.” Although the device is waterproof, it may cause skin irritation and has to be charged about one hour every day. Moreover, technicians may need to visit Belleau’s home periodically to replace the batteries in the device. The anklet itself is fairly large, requiring the wearer to put on long pants to hide it from plain sight.

The law requires the DOC to create individualized inclusion zones, which the offender is prohibited from leaving, and exclusion zones, which he is prohibited from entering except to pass through, if needed to protect the public. The DOC is not required to define such zones for maximum discharge registrants, “those who have completed

97 Id. at 1088.
98 Id. at 1089.
99 Id. at 1090.
100 Id.
101 Id.
102 Id.
103 Id.
104 Id.
105 Belleau v. Wall, 811 F.3d 929, 932 (7th Cir. 2016).
and been discharged from their sentences and/or commitments.”

While Belleau was not subject to an exclusion zone at the time of his trial, the statute left the creation of the zones in the hands of the DOC. He was not monitored in real time, but a DOC employee reviewed his whereabouts every night.

Belleau appeared pro se in front of the United States District Court Eastern District of Wisconsin to contest the constitutionality of the statute. Recognizing the importance of Belleau’s challenge, the court advised him to retain an attorney. “In view of the significance of the issue Belleau has attempted to raise and his obvious lack of legal training and difficulty in even naming and serving the proper party, it would appear that this might be an appropriate case for the court to consider recruitment of counsel to represent him.” Following the court’s advice, Belleau retained attorneys who submitted an amended complaint on his behalf claiming that the GPS monitoring statute violated the Ex Post Facto clauses, the Fourth Amendment, and the Fourteenth Amendment of the Constitution.

A. The District Court Agreed With the Defendant

The district court did not question the need for the GPS monitoring statute. “Given his prior convictions, Dr. Ellwood’s diagnosis of pedophilia, and the impact of sexually assaultive crimes on children, few would not want to take any step that could reduce the risk of another offense.” However, the court disagreed with the
application of the statute to an individual who was no longer under any supervision, probation, or parole. The court stated:

Having served his sentences for his crimes and been discharged from his civil commitment, Belleau’s liberty has thus been restored, subject to the limited disqualifications, such as the right to possess a firearm, that the law expressly allows. He is, moreover, legally presumed to be free, like the rest of us, to choose whether or not to engage in criminal conduct.

The question the court focused on was “whether such a person who has already served his sentence for his crimes and is no longer under any form of court ordered supervision can be forced by the State to wear such a device and to pay the State for the cost of monitoring him for the rest of his life” when it granted Belleau’s motion for summary judgment “on his ex post facto and Fourth Amendment claims.” Judge Griesbach found it unnecessary to address Belleau’s equal protection violation claim under the Fourteenth Amendment.

1. The District Court Found That the Statute Violated the Ex Post Facto Clause of the Constitution

The district court first examined whether applying the statute to Belleau was an ex post facto violation. Judge Griesbach answered the question in the affirmative. He rejected the State’s argument that

115 Id.
116 Id.
117 Id. at 1092-93, 1110.
118 Id. at 1092-93, 1111 n.6 (“Although Belleau also argues that the State's lifetime GPS tracking law violates his right to equal protection of the law under the Fourteenth Amendment, it is not necessary to address that issue, especially since the answer likely rises or falls with my analysis of his claims that the law violates his rights under the Ex Post Facto Clause and the Fourth Amendment.”)
119 Id. at 1093-1104.
120 Id.
the statute was not retroactive because it was triggered by Belleau’s release from civil commitment in 2010, not by the crime he committed twenty years prior. 121 “[E]ven if it was the discharge from his civil commitment that made him subject to lifetime GPS monitoring, it was his previous criminal convictions that made him eligible for civil commitment in the first place.” 122 There was no “subsequent misconduct” that would suggest otherwise. 123

After concluding that the statute applied to Belleau retroactively, the court turned its focus to whether the statute itself was a punishment. 124 While Judge Griesbach could not ascertain the legislative intent behind the statute regarding punishment, he did highlight that the execution of the statute itself was in the hands of the DOC, whose purpose was to “provide ‘correction’ to people who engage[d] in criminal conduct.” 125 The statute itself can be found in a section that “governs corrections,” but that fact by itself is not dispositive because Wisconsin’s sex offender registry is located under the same section, and it has been declared “not to be punitive.” 126 Historically, the court observed, the supervision of persons was “regarded as a traditional form of punishment.” 127 Moreover, if Belleau failed to charge the device or tampered with it, he would face a hefty fine or imprisonment. 128 Judge Griesbach noted that the public shaming that accompanied the wearing of an ankle monitor further tipped the scale toward punishment. 129 Belleau would not be able to wear shorts or change in a public dressing room if he did not want his

121 Id. at 1094.
122 Id.
123 Id.
124 Id. at 1095.
125 Id. at 1096.
126 Id. (citing Doe v. Raemisch, 895 F. Supp. 2d 897, 906 (D. Wis. 2012), aff’d in part and rev’d in part by Mueller v. Raemisch, 740 F.3d 1128 (7th Cir. 2014)).
127 Id. at 1098.
128 Id.
129 Id. at 1099.
device discovered. Additionally, the required payment of $50 per month “ha[d] the effect of a fine, another traditional form of punishment imposed by the State on criminal defendants.”

The court also considered the time Belleau was obligated to spend dealing with the device. He was required to plug it into an outlet one hour each day. While there are many devices today that take about an hour a day to be fully charged, most do not require a person to remain near the outlet during that time. According to the court, this added up to 75 days over five years, not including the time Belleau had to spend waiting to let technicians into his home. Admittedly, the goal of the statute is to protect the public because “a person subject to GPS supervision is believed to be less likely to re-offend since he knows he will be caught.” However, that “is simply deterrence by another name,” and deterrence can be a form of punishment.

Judge Griesbach concluded that the Wisconsin law violated the Ex Post Facto Clause of the Constitution because “the effects of the law [were] so punitive that they negate[d] the legislature’s non-punitive intent.” He then turned his attention to Belleau’s Fourth Amendment violation claim.

2. The District Court Found That the Statute Violated the Fourth Amendment of the Constitution

Relying on *Grady v. North Carolina*, the district court concluded that GPS monitoring of a person implicated the Fourth Amendment.

---

130 *Id.*
131 *Id.* at 1100.
132 *Id.*
133 *Id.*
134 *Id.*
135 *Id.* at 1102.
136 *Id.*
137 *Id.* at 1104.
138 *Id.*
139 *Id.* (citing *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015)).
However, because “the Fourth Amendment prohibits only unreasonable searches,” not all searches fall into this category.\textsuperscript{140} Reasonableness “depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.”\textsuperscript{141} If the primary purpose of a search is to gather evidence, law enforcement is generally under an obligation to obtain a warrant.\textsuperscript{142} The existence of probable cause that a crime has been committed is necessary to convince a judge to sign a warrant.\textsuperscript{143} Accordingly, attaching a GPS monitoring device to a vehicle without a warrant was found to be unlawful in \textit{United States v. Jones}.\textsuperscript{144} In Belleau’s case, the court found no probable cause.\textsuperscript{145}

Precedent leads to the conclusion that a search may be considered reasonable without a warrant in some cases but still “requires a balancing of the individual privacy interests at stake against the needs of the public.”\textsuperscript{146} In \textit{Samson v. California}, for example, “the Court upheld a warrantless and suspicionless search of a parolee” while acknowledging the “high levels of recidivism in California and the State’s strong interest in reducing that rate and promoting reintegration of people released from prison into the community.”\textsuperscript{147} However, in \textit{Samson}, the offender consented to the search as a condition of his parole.\textsuperscript{148} While holding that the GPS monitoring program in Belleau’s case violated the Fourth Amendment, the court concluded that his expectation of privacy was higher than the parolee in \textit{Samson} because

\begin{itemize}
  \item \textsuperscript{140} Id. (quoting \textit{Grady}, 135 S. Ct. at 1371).
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} Id. (citing \textit{Vernonia School Dist. 47J v. Acton}, 515 U.S. 646, 653 (1995)).
  \item \textsuperscript{143} Id. at 1105 (citing \textit{Skinner v. Ry. Labor Execs.’ Ass’n}, 489 U.S. 602, 619 (1989)).
  \item \textsuperscript{144} Belleau, 132 F. Supp. 3d at 1105 (citing \textit{United States v. Jones}, 132 S. Ct. 945, 948-49 (2012)).
  \item \textsuperscript{145} Belleau, 132 F. Supp. 3d at 1105.
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} Id. at 1105-06 (citing \textit{Samson v. California}, 547 U.S. 843, 848 (2006)).
  \item \textsuperscript{148} Belleau, 132 F. Supp. 3d at 1106 (citing \textit{Samson}, 547 U.S. at 852).
\end{itemize}
Belleau fully served his sentence. At the same time, the court acknowledged the unquestionable “importance of protecting children from sexual assault or the devastating effects of such crimes,” which is why states could include lifetime GPS monitoring in punishments for serious crimes.

B. The Seventh Circuit Reversed the District Court

The State appealed the lower court’s decision to grant Belleau’s motion for summary judgment. Judge Posner, who delivered the opinion of the United States Court of Appeals for the Seventh Circuit, focused heavily on the nature of Belleau’s crimes when he reversed the district court’s holding. The court also noted that pedophilia was not curable and predisposed offenders to molest children. The court quoted the Sand Ridge Secure Treatment Center psychologist who “concluded that Mr. Belleau had not shown that he could suppress or manage his deviant desire.” Although Belleau’s age may have reduced the probability that he would commit another crime against a child, the court noted that these types of offenses are especially heinous due to the deep psychological scars that follow and the shocking level of underreporting. Though Belleau’s supervision ended, he had not become harmless. “[W]e doubt that the community would or should be reassured by a psychologist’s guess that a pedophile has ‘only’ (say) a 49 percent chance of reoffending, or even the 16 percent chance estimated in this case.”

149 Belleau, 132 F. Supp. 3d at 1108.
150 Id.
151 Belleau v. Wall, 811 F.3d 929, 931 (7th Cir. 2016).
152 Id. at 932.
153 Id. at 932-33.
154 Id. at 933.
155 Id. at 933-34.
156 Id. at 934.
157 Id.
With these factors in mind, the court announced that “persons who have demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely than not chance of reoffending must expect to have a diminished right of privacy as a result of the risk of their recidivating.”\textsuperscript{158} The Seventh Circuit went on to compare Belleau’s current state of privacy under the existing sex offender registry law to the added loss of his privacy under the GPS monitoring statute and concluded that this additional loss was merely incremental: “it just identifies locations.”\textsuperscript{159}

1. The Seventh Circuit Found no Fourth Amendment Violation

The court cited \textit{Grady} as an indication that GPS monitoring of sex offenders was valid under the Fourth Amendment as long as the search itself was reasonable.\textsuperscript{160} Although continuously keeping track of Belleau’s locations can generate evidence if he does decide to commit another heinous crime against a child, the primary goal of the monitoring statute is to deter him from doing so.\textsuperscript{161} Even his own attorney admitted that lifetime monitoring of a child sex offender would not offend the Fourth Amendment if it was part of the punishment or a condition of parole.\textsuperscript{162} The court was not particularly convinced that the GPS monitor was a burden on Belleau, but even if it was, it had to “be balanced against the gain to society from requiring that the anklet monitor be worn.”\textsuperscript{163} At least one study in California pointed to the likelihood that parolees wearing such devices were less likely to be re-arrested for a new sex offense.\textsuperscript{164} Society benefits if law enforcement can easily identify the locations of sex offenders when a victim reports a sexual

\textsuperscript{158} \emph{Id.} at 935.
\textsuperscript{159} \emph{Id.} at 936.
\textsuperscript{160} \emph{Id.} at 932 (citing \textit{Grady v. North Carolina}, 135 S. Ct. 1368, 1371 (2015)).
\textsuperscript{161} \emph{Id.} at 935.
\textsuperscript{162} \emph{Id.} at 935-36.
\textsuperscript{163} \emph{Id.} at 936.
\textsuperscript{164} \emph{Id.}
assault. Judge Posner noted that even sex offenders would benefit from this statute. They are provided with a rock solid alibi if they were nowhere near the crime scene. More broadly, the court noted that the balance of Belleau’s rights against the goal of protecting children weighed in favor of protection. “Given how slight is the incremental loss of privacy from having to wear the anklet monitor, and how valuable to society (including sex offenders who have gone straight) the information collected by the monitor is, we can't agree with the district judge that the Wisconsin law violates the Fourth Amendment.”

Belleau argued that the monitoring required a search warrant, which was not necessary under the statute. The court disagreed, calling the idea “absurd.” Police officers use surveillance techniques to keep an eye on a neighborhood where illegal drug dealing is suspected. They use hidden cameras to record drivers who run a red light. No warrant is required in either case because these techniques are considered “investigative surveillance.” Furthermore, because DOC agents could follow Belleau after he left his house, there is no reason why they couldn’t utilize a GPS tracking device to achieve the same result. With that said, the court concluded that there was no Fourth Amendment violation because Belleau’s monitoring was reasonable under the circumstances.

165 Id.
166 Id.
167 Id.
168 Id.
169 Id.
170 Id.
171 Id.
172 Id.
173 Id.
174 Id. at 936-37.
175 Id. at 937.
2. The Seventh Circuit Found no Ex Post Facto Violation

Next, the Seventh Circuit turned its attention to Belleau’s claim that the GPS monitoring statute was an ex post facto law. While the statute did take effect after Belleau had committed his crimes, the ex post facto rule only applies to statutes that impose punishments. The court briefly discussed *Kansas v. Hendricks*, a case in which the Supreme Court held that civil commitments of sex offenders were considered prevention, not punishment. Drawing on this case, Judge Posner declared that if civil commitment was not punishment, neither was GPS monitoring. They both had the same goal: to prevent violent sex offenders from hurting children. The court continued with comparing the anklet monitor to posted speed limits. The same way speed limit signs inform a driver that he will face a fine if he doesn’t obey them, the GPS monitor informs the pedophile that he could be punished if he commits another crime. Because the court found that the lifetime tracking served a preventive purpose and was not intended as a punishment, they also concluded that the law did not violate the Ex Post Facto Clause.

3. The Concurring Opinion Offered Slightly Different Justifications

Judge Flaum concurred in judgment and authored a separate opinion. He focused on the need for balancing a person’s right to privacy against the state’s compelling interest in protecting children.
from sexual abuse. “These sexual predators victimize children, who may suffer from trauma from the assault for the rest of their lives.” Because Belleau was no longer under any supervision, Judge Flaum turned to the special needs doctrine to find justification for the GPS monitoring statute. The doctrine applies to “suspicionless searches” that serve special needs and do not exist merely for gathering evidence. Because the primary goal of the tracking program was to reduce recidivism, it qualified as a special needs search. Judge Flaum acknowledged the tremendously important privacy interest at stake in this case, especially because Belleau fully served his sentence and was not a parolee. At the same time, Belleau’s expectation of privacy was not the same as an ordinary citizen’s due to “mandatory registration laws and civil commitment.” In this program, requiring a warrant just did not make sense because warrants are usually issued when there is a suspicion that a crime has been committed. Here, the goal was to prevent the crime from ever taking place. Therefore, the monitoring was “a reasonable special needs search,” and the Fourth Amendment was not violated.

Next, Judge Flaum turned his attention to the ex post facto claim. “Unquestionably, this law applies retroactively to Belleau.” From the language of the statute, Judge Flaum found it

---

185 Id.
186 Id.
187 Id. at 939.
188 Id.; See 12 Wash. Prac., § 2736 “Special needs” exception, Westlaw (database updated Nov. 2016).
189 Id. at 940.
190 Id. at 941.
191 Id.
192 Id.
193 Id.
194 Id. at 939.
195 Id. at 941.
196 Id.
clear that the primary goal of the legislature was prevention. 197 "The language of the monitoring statute indicates that the legislature’s objective was to protect children, not punish sex offenders." 198 He also considered whether, in spite of the lack of punitive intent, the law had a punitive effect. 199 He relied on five of the seven “Mendoza-Martinez factors” the Supreme Court promulgated in *Kennedy v. Mendoza-Martinez* to guide his review. 200

Whether the sanction 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 are all relevant to the inquiry, and may often point in differing directions. 201

GPS technology is “distinguishable from traditional forms of punishment” because it is “relatively new.” 202 It is not like probation or parole because those “impose restrictions.” In this case, there were not any restrictions on where Belleau was able to go. 203 Although Belleau complained of “public shaming” because the device occasionally became visible to others, it was not the objective of the statute. 204 The minor inconvenience was not significant enough to be

---

197 *Id.* at 942.
198 *Id.*
199 *Id.* at 942-43.
200 *Id.*
202 *Belleau*, 811 F.3d at 943.
203 *Id.*
204 *Id.*
called punitive. 205 “[A]s GPS devices become smaller and batteries last longer, any affirmative restraint imposed by this law will, over time, become less and less burdensome.” 206 The statute is similar to sex offender registries where the goal is not punishment but deterrence. 207 Similarly, the primary goal is to protect children from such offenders, not to punish them. 208

Lastly, Judge Flaum found that the law was not excessive because pedophilia was simply not treatable. 209 “Coupled with the particularly devastating consequences of their conduct, these offenders pose a unique—and perhaps insurmountable—challenge for conventional law enforcement techniques.” 210 In the end, Judge Flaum came to the same conclusion as the majority: the GPS monitoring statute was not an ex post facto law. 211

III. WHAT HAPPENS NEXT?

A. States May Utilize GPS Technology to Monitor Sex Offenders for the Rest of Their Lives

After Belleau v. Wall, States in the Seventh Circuit’s jurisdiction may freely monitor sex offenders for life, even if they fully served their sentences and are not under any form of supervision. 212 Considering that no warrant or court order is needed, the ruling appears to be in slight conflict with the district court judge’s statement that “[t]he State’s authority over the individual is not unlimited.” 213

205 Id.
206 Id.
207 Id.
208 Id.
209 Id. at 944.
210 Id.
211 Id.
212 See id. at 938.
The Supreme Court of the United States offered limited guidance on the issue. In *Samson*, the Court held that the suspicionless search of a parolee did not offend the Fourth Amendment, and because Donald Curtis Samson, the defendant in the case, was on parole “following a conviction for being a felon in possession of a firearm,” his expectation of privacy was drastically diminished.\(^{214}\) Although Belleau was not a parolee, because of the seriousness of his crimes and because there was a significant possibility that he would repeat them, the Seventh Circuit concluded that his right to privacy was similarly reduced.\(^{215}\) In *Grady v. North Carolina*, Torrey Dale Grady, a convicted sex offender, argued that “his Fourth Amendment right to be free from unreasonable searches and seizures” was violated when he was ordered to wear a GPS anklet monitor for the rest of his life.\(^{216}\) The Supreme Court declared that such tracking did constitute a search implicating the Fourth Amendment, but it was only unconstitutional if it was unreasonable.\(^{217}\) Several states now allow or even require lifetime monitoring of sex offenders.\(^{218}\)

Ultimately, *Grady* and *Samson* suggest that the Supreme Court will find lifetime tracking programs constitutional, especially when considering the high rates of recidivism among sex offenders and the ongoing need to protect children from them.\(^{219}\) For now, the Court has left open the question whether lifetime GPS monitoring is reasonable under the Fourth Amendment.\(^{220}\) Until and unless the Supreme Court or Congress says otherwise, tracking sex offenders for the remainder of their lives is permitted, even after they fully serve their sentences and complete their probations.

\(^{215}\) Belleau, 811 F.3d at 935.
\(^{217}\) Id.
\(^{220}\) *Grady*, 135 S. Ct. at 1371.
B. The Supreme Court Needs to Review Whether States are Permitted to Apply GPS Monitoring Laws Retroactively

The Seventh Circuit conceded that the Ex Post Facto Clause of the Constitution was implicated because the Wisconsin statute became effective long after Belleau had committed his crimes.\textsuperscript{221} To escape this limitation, the court relied on \textit{Kansas v. Hendricks}, a case in which the Supreme Court concluded that the civil commitment of a violent sex offender was a preventive measure, not a punishment.\textsuperscript{222} After Judge Posner declared that civil commitments and GPS monitoring were alike, the Ex Post Facto Clause was no longer an obstacle to the validity of the Wisconsin statute.\textsuperscript{223}

Other circuits have come to a different conclusion. In \textit{Riley}, George C. Riley, a convicted sex offender, claimed that New Jersey’s Sex Offender Monitoring Act, a law that was passed two decades after his last offense, was additional punishment because it was no different than a form of supervision for life.\textsuperscript{224} The Supreme Court of New Jersey agreed with the defendant and concluded that the statute violated “both the federal and state constitutional guarantees against ex post facto laws.”\textsuperscript{225} In \textit{Commonwealth v. Cory}, the Supreme Judicial Court of Massachusetts came to the same conclusion that GPS monitoring was punishment and could not be applied to a sex offender retroactively.\textsuperscript{226}

Several factors suggest that GPS monitoring is different from civil commitment. Tracking devices merely monitor an offender’s location and do not provide treatment similar to the ones available in civil commitment settings. Belleau, for example, spent time with a psychologist at the Sand Ridge Secure Treatment Center.\textsuperscript{227}

\textsuperscript{221} Belleau v. Wall, 811 F.3d 929, 937 (7th Cir. 2016)
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{225} Id. at 275.
\textsuperscript{227} Belleau v. Wall, 132 F. Supp. 3d 1085, 1088-89 (E.D. Wis. 2015).
Additionally, the Wisconsin monitoring program, unlike the statute in *Hendricks*, does not provide for periodic judicial review.\(^{228}\) The main objective of the ankle monitor was to deter Belleau from repeating his crimes.\(^{229}\) The *Hendricks* Court, however, differentiated civil commitments from deterrence because pedophiles were “unlikely to be deterred by the threat of confinement.”\(^{230}\) Lastly, unlike the lifetime length of the GPS monitoring statute, an offender under civil commitment is not to “remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.”\(^{231}\)

The Supreme Court should weigh in on the disagreement among the lower courts and proclaim whether the retroactive application of GPS monitoring programs to sex offenders is an additional punishment or simply a preventive measure. In their current state, these programs look more like punishment and less like prevention because they penalize the offender for noncompliance.\(^{232}\) Even if the offender just forgets to charge the device, he may be in violation of the statute that could punish him with imprisonment or a hefty fine.\(^{233}\) Today, better technology is available to keep batteries charged longer than a single day.\(^{234}\) There is no reason, other than perhaps cost, why the states could not design a more maintenance-free version of the ankle monitor. Additionally, if legislatures removed the threat of punishment from these programs, they would start looking more like preventive measures or even treatments. At a minimum, legislatures should consider incorporating mandatory satellite-based lifetime

\(^{228}\) See Wis. Stat. § 301.48 (2006); Kansas v. Hendricks, 521 U.S. 346, 364 (1997)).

\(^{229}\) Belleau v. Wall, 811 F.3d 929, 935 (7th Cir. 2016).

\(^{230}\) *Hendricks*, 521 U.S. at 362-63.

\(^{231}\) *Id.* at 364.

\(^{232}\) See Belleau, 132 F. Supp. 3d at 1090.

\(^{233}\) *Id.*

monitoring of repeat sex offenders in their sentencing guidelines to avoid ex post facto challenges all together.

CONCLUSION

Due to the heinous nature of sexual assault, particularly the impact on children, there is tremendous pressure on courts to keep sex offenders under lifetime surveillance or supervision. Because of this pressure, courts struggle to find the right balance between the rights of felons to be free from unreasonable searches and retroactive application of laws against the rights of the public, including children, to be free from sexual violence.

Surveillance is fairly common today, and many of the methods do not raise serious constitutional questions. Red light cameras, for example, are acceptable because they are installed on traffic signals and monitor public roads. Perhaps monitoring by using drone technology could also fall into the permitted category. However, the moment monitoring devices are attached to individuals or their vehicles, the government is crossing into a world protected by the Constitution. These lifetime GPS tracking programs are powerful tools that allow offenders to re-enter society and deter them from repeating their crimes, but states should proceed with caution and design their programs without violating the Constitution’s prohibition against unreasonable searches and seizures and ex post facto application of laws.