

# **Intimate Terrorism and Technology: There's an App for That**

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## **ABSTRACT**

Technology enhances the ability of the domestic violence perpetrator. It also holds the promise of assisting domestic violence survivors in their quest for safety. This is true in practical, daily ways and is becoming increasingly true in the legal treatment of these cases. Perpetrators can use technology to stalk and find their victims; survivors can use it to access necessary information to get away from their batterers. Laws are being amended to take into account cyber-enhanced domestic violence techniques. Domestic or intimate terrorists are among the class of criminals targeted for use of GPS monitoring. This article discusses the way that technology is used in circumstances of intimate terrorism. It will examine how technology is used as a batterer's tool in exerting coercive control over a victim. It will also look at the changes in the laws as the legal system strives to keep pace with the rapid advancement of technology. In particular, the recent use of GPS monitoring of intimate terrorists will be analyzed. This analysis will identify some of the problems associated with the on-going legal changes.

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## I. INTRODUCTION

Terrorists are front and center in today's world. Global terrorists incite outrage and fear. They lead to much hand-wringing and the expenditure of countless sums. The concept of home-grown terrorists has also entered the national security nomenclature, perhaps more reviled because, locally born and bred, they are reasonably expected to have fealty rather than enmity towards their country of origin. Then there is a local terrorist of another sort: the intimate terrorist.<sup>1</sup>

Intimate terrorism, as defined by Michael Johnson in his book, *A Typology of Domestic Violence*,<sup>2</sup> is “violence deployed in the service of general control” over a partner.<sup>3</sup> With the threat of violence as a cudgel, the intimate terrorist may be able to exercise non-violent control over a partner by: (1) threats and intimidation; (2) monitoring; (3) undermining the will to resist; and (4) undermining the ability to resist.<sup>4</sup>

Intimate terrorists have long coercively controlled their partners using both violent and non-violent methods. Modern technology now makes this exercise of control much easier. How the ubiquity of technology has enhanced the intimate terrorist's powers can be examined through the fictional character of Frances Flynn Benedetto.

Fran is the emergency room nurse, mother, and long-time battered woman at the center of Anna Quindlen's novel, *Black and Blue*.<sup>5</sup> Set in the late 1990s, the story relays how Fran escaped, with her son Robert, from her husband Bobby. Bobby Benedetto was a police officer and intimate terrorist. At one point during the years of violence before Fran left, she came to the realization that she could not just leave; rather, she would have to disappear.<sup>6</sup> Finally, after one beating too many, Fran contacted a woman whom she had heard speak at a session on domestic violence for emergency room personnel at her hospital. That woman, Patty Bancroft, helped victims escape. Within hours of the contact, Patty provided Fran and her son Robert with new identities and had them chauffeured to Philadelphia. In the Philadelphia train station, a stranger dropped train tickets on the floor near where Fran and her son stood; the tickets were for them. They boarded a train to

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<sup>1</sup> MICHAEL P. JOHNSON, *A TYPOLOGY OF DOMESTIC VIOLENCE: INTIMATE TERRORISM, VIOLENT RESISTANCE, AND SITUATIONAL COUPLE VIOLENCE* (2008).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 6.

<sup>4</sup> *Id.* at 26–29.

<sup>5</sup> ANNA QUINDLEN, *BLACK AND BLUE* (1998).

<sup>6</sup> *Id.* at 73.

Florida, where another stranger picked them up and delivered them to a shabby apartment to begin a new life.

Secrecy, Patty Bancroft had told the emergency room staff, is the key to helping battered women successfully escape their tormentors.<sup>7</sup> Unfortunately, in this high-tech age, secrecy can be hard to achieve<sup>8</sup> and its relative, privacy, is an antiquated notion. Technology has dramatically shifted what, how, and to whom information is disclosed. Social intercourse is now conducted through the varied media that fit loosely within the technology rubric. People communicate to the multitudes through social media, e.g. Facebook and Twitter, as well as receive communication in this manner from friends or celebrities.

On an individual basis, texting has supplanted the more old-fashioned mobile telephone call or even email. AAA TripTiks have gone the way of the rotary telephone. GPS programs on phones and computer tablets provide directions, of course, but also real-time monitoring and geolocation.<sup>9</sup> Small electronics with advanced technological capacity are now practically appendages for many.

Benefits and pleasures accrue from technology, but detriments and horrors also lurk therein. Nowhere are these negative uses of technology more apparent than in the area of intimate terrorism. Intimate terrorism is centuries old. Once authorized by law,<sup>10</sup> it is now outlawed. But it is a persistent crime, eluding laws to stop; technology has made it easier.

Although the impact of technology on domestic violence has been discussed for some years in varied literature,<sup>11</sup> the ways in which the

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<sup>7</sup> *Id.* at 63.

<sup>8</sup> See generally Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Barriers*, 31 PACE L. REV. 228 (2011).

<sup>9</sup> See Daniel Ionescu, *Geolocation 101: How It Works, the Apps, and Your Privacy*, PC WORLD (Mar. 29, 2010, 10:45 PM), [http://www.peworld.com/article/192803/geolocation\\_101\\_how\\_it\\_works\\_the\\_apps\\_and\\_your\\_privacy.html](http://www.peworld.com/article/192803/geolocation_101_how_it_works_the_apps_and_your_privacy.html) (geolocation is the “tech buzzword” to define the software available for smart phones to both transmit data about the phone’s (and phone user’s) location and receive location data).

<sup>10</sup> See, e.g., Shelly 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, 1103 (2011) (initially, English law gave a husband a right to “chastise,” *i.e.*, beat, his wife).

<sup>11</sup> See, e.g., Laura Silverstein, *Double Edged Sword*, 13 BUFF. WOMEN’S L.J. 97 (2004-05); Cindy Southworth et al., *High-Tech Twist on Abuse: Technology, Intimate Partner Stalking, and Advocacy*, 1 FAMILY VIOLENCE PREVENTION & HEALTH PRAC. 3–5 (2005), available at <http://www.mincava.umn.edu/documents/commissioned/stalkingandtech/stalkingandtech.pdf>.

law deals with technology are emerging more slowly. Several problems emerge in assessing the value of the legal changes. First, the changes to combat technologically enhanced intimate terrorism are spread throughout the civil and criminal legal systems and, thus, are hard to track. Moreover, the comparisons between legal efforts in one state as opposed to another may be inconclusive or, worse, inaccurate because the laws are not necessarily parallel. Also, the changes have been piecemeal and their efficacy is largely untested. Finally, the diffuse nature of technology allows for imprecise generalizations and impedes concrete categorization.<sup>12</sup>

This article begins with a brief intimate terrorism primer. It then proceeds to examine some of the specific ways in which technological issues affect domestic violence. This discussion will include how technology—broadly defined—has been useful in combating intimate terrorism. It will also explore ways in which technology has increased the capacity of the intimate terrorist. Next, the article will consider some recent legislative efforts to confront the problem of domestic violence and technology. Finally, after examining the current legal landscape, the article will discuss some issues that still need attention.

## II. INTIMATE TERRORISM AND DOMESTIC VIOLENCE

In *A Typology of Domestic Violence*,<sup>13</sup> Michael P. Johnson laments domestic violence generalizations and sets out to identify subsets within the larger rubric. After analyzing the available research and literature, he argues that there are four distinct types of domestic violence: intimate terrorism, violent resistance, situational couples violence, and mutual violent control.<sup>14</sup> Of these types, intimate terrorism most closely resembles the prototypical pattern of domestic violence, which is now understood as, at its core, being about coercive control of the victim/survivor.<sup>15</sup> The other types of domestic violence identified by Johnson do not involve “coercive control.”<sup>16</sup> They may

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<sup>12</sup> See discussion *infra* Part III.A.

<sup>13</sup> JOHNSON, *supra* note 1.

<sup>14</sup> JOHNSON, *supra* note 1, at 7–12.

<sup>15</sup> It has become common to refer to survivors rather than victims. However, some don’t survive. Nonetheless, the terms victim and survivor will be used interchangeably in this article.

<sup>16</sup> See Evan Stark, *Re-presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALB. L. REV. 973, 986 (1995) (Dr. Evan Stark uses the term coercive control to indicate the type of generally non-violent behavior that a batterer exercises over his victim, noting that this “ongoing strategy of

involve self-defense or a generally aggressive disposition,<sup>17</sup> but the batterer is not trying to control the victim through coercion, violent or otherwise.<sup>18</sup>

Over the past two generations, domestic violence has received an enormous amount of attention. It has come out into the open; no longer may it hide under the cloak of family privacy. After centuries of no laws dealing with domestic violence,<sup>19</sup> each state now has a statute authorizing protection orders for domestic violence victims.<sup>20</sup> These statutes are routinely amended to expand the category of persons protected, the actions prohibited, or the remedies available.

The expansion of the category of persons who are now protected under protection order statutes or under criminal domestic assault statutes is largely laudable. It demonstrates an understanding of the changed nature of intimate partners in American society. That status is

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intimidation, isolation, and control . . . extends to all areas of a woman's life. . . ." (emphasis in original). Stark argues that the batterer's occasional violence makes this strategy of coercive control effective.).

<sup>17</sup> JOHNSON, *supra* note 1, at 60–71.

<sup>18</sup> JOHNSON, *supra* note 1, at 17.

<sup>19</sup> See Santry, *supra* note 10.

<sup>20</sup> ALA. CODE § 30-5-3 (2011); ALASKA STAT. § 18.66.100 (2011); ARIZ. REV. STAT. ANN. § 13-3602 (2011); ARK. CODE ANN. § 9-15-207 (West 2011); CAL. FAM. CODE § 6218 (2011); COLO. REV. STAT. § 13-14-102 (2011); CONN. GEN. STAT. § 46b-15 (2011); DEL. CODE ANN. tit. 10, § 1045 (West 2011); D.C. CODE § 16-1005 (2011); FLA. STAT. § 741.30 (West 2011); GA. CODE ANN. § 19-13-4 (West 2011); HAW. REV. STAT. § 586-3 (West 2011); IDAHO CODE ANN. § 39-6304 (West 2011); IND. CODE ANN. § 34-26-5-2 (West 2011); IOWA CODE ANN. § 236.4 (West 2011); KAN. STAT. ANN. § 60-3107 (West 2011); KY. REV. STAT. ANN. § 403.725 (West 2011); LA. REV. STAT. ANN. § 46:2136 (2011); ME. REV. STAT. tit. 19-A, § 4007 (2011); MD. CODE ANN., FAM. LAW § 4-506 (West 2011); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 2011); MICH. COMP. LAWS ANN. § 600-2950 (West 2011); MINN. STAT. ANN. § 518B.01 (West 2011); MISS. CODE ANN. § 93-21-15 (West 2011); MO. ANN. STAT. § 455.035 (West 2011); MONT. CODE ANN. § 40-15-202 (2011); NEB. REV. STAT. § 42-924 (2011); NEV. REV. STAT. ANN. § 33.020 (West 2011); N.H. REV. STAT. ANN. § 173-B:5 (2011); N.J. STAT. ANN. § 2C:25-26 (West 2011); N.M. STAT. ANN. § 40-13-5 (West 2011); N.Y. FAM. CT. ACT § 842 (McKinney 2011); N.C. GEN. STAT. ANN. § 50B-2 (West 2011); N.D. CENT. CODE ANN. § 12.1-31.2-02 (West 2011); OHIO REV. CODE ANN. § 2919.26 (West 2011); OKLA. STAT. ANN. tit. 22, § 60.2 (West 2011); OR. REV. STAT. ANN. § 107.718 (West 2011); 23 PA. CONS. STAT. ANN. § 6108 (West 2011); R.I. GEN. LAWS ANN. § 15-15-3 (West 2011); S.C. CODE ANN. § 20-4-40 (2011); S.D. CODIFIED LAWS § 25-10-3 (2011); TENN. CODE ANN. § 36-3-603 (West 2011); TEX. FAM. CODE ANN. § 81.001 (West 2011); UTAH CODE ANN. § 76-5-108 (West 2011); VT. STAT. ANN. tit. 15, § 1103 (West 2011); VA. CODE ANN. § 19.2-152.10 (West 2011); WASH. REV. CODE ANN. § 10.99.050 (West 2011); W. VA. CODE ANN. § 48-27-501 (West 2011); WIS. STAT. ANN. § 813.12 (West 2011); WYO. STAT. ANN. § 35-21-105 (West 2011).

no longer limited to heterosexual married couples. On the other hand, the expansion is overbroad and leads to peculiar results.<sup>21</sup> Coverage of household members could and should include intimate partners who live together but also may include, for instance, law school roommates. Thus, the remedies in these statutes, which are designed primarily to protect those who are being coercively controlled, are ill-suited as a response to an altercation between non-intimate roommates.

In addition to enlarging the categories of protected persons, states are paying more attention to the insidious linkage between intimate terrorism and other areas. For instance, after decades of denying the interrelationship between child rearing and intimate terrorism, most states now permit or mandate that judges consider past or extant domestic violence when determining child custody.<sup>22</sup> After years of blindness towards the co-existence between child abuse and intimate terrorism, many child protection agencies now have domestic violence experts housed within the agency.<sup>23</sup> This represents the sensible realization that helping a mother who is a victim of intimate terrorism has benefits that redound to the child.<sup>24</sup>

Prosecutors, law enforcement, and criminal courts have also altered their approaches. The mandatory arrest and mandatory prosecution waves of the 1990s changed the ways that police interact at the scene and how prosecutors treat these cases in court. New crimes have been legislated, such as criminalizing the violation of a protection order.<sup>25</sup> Batterers' treatment programs, although controversial, are increasingly common.<sup>26</sup> Statutes authorizing the global positioning system (GPS) monitoring of offenders are among the current legal changes underway.<sup>27</sup>

The majority of laws concerning domestic violence are found at the state level. However, federal laws now aid in combating the societal scourge of intimate terrorism. Most prominent is the Violence

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<sup>21</sup> See *infra* Part V.C.

<sup>22</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 208, § 31A (West 2011).

<sup>23</sup> See Ali Stieglitz et al., *Making Child Support Safe, Coordinating Child Support and Public Assistance Agencies in Their Response to Domestic Violence*, U.S. DEP'T. OF HHS: ACF OCSE REP. (May 2001), available at <http://www.acf.hhs.gov/programs/cse/pubs/reports/mpr8548300/>.

<sup>24</sup> Justine Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565 (2004).

<sup>25</sup> E.g., MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 2011).

<sup>26</sup> *Id.* § 10.

<sup>27</sup> See discussion *infra* Part IV.

Against Women Act.<sup>28</sup> Other federal enactments include laws against stalking, itself a relatively new crime that is carried out disproportionately by intimate or formerly intimate partners.<sup>29</sup>

The obvious progress notwithstanding, much work remains. Critics justly lament the legal system's inability to effectively deal with the problem despite the increased attention and resources that have been provided.<sup>30</sup> Further, some of the advancements have supplied a new crop of problems. For instance, increased public awareness and new laws have led to the perception, and the occasional reality, that the system is being gamed to gain advantage in custody and divorce proceedings or, more perniciously, is simply anti-male. On the other hand, there is a view among victims, batterers, and on-lookers alike that a protection order is a piece of paper that offers little protection.<sup>31</sup> In *Black and Blue*, Fran talked about how batterers and victims both viewed a protection order as "a joke, made, as they say, to be broken."<sup>32</sup>

Intimate terrorism is thus a dance that consists of one step forward and two steps backward or two steps forward and one step backward. Whatever the precise choreography at a given moment, much is left to do. Into this current state of affairs, technology has been thrust and is a reality that demands a reckoning.<sup>33</sup>

### III. INTIMATE TERRORISM AND TECHNOLOGY

Technology is a two-way street. It can give an intimate terrorist enhanced capacity to threaten, intimidate, and monitor his victim; it can also be used to benefit a survivor. GPS technology can track intimate terrorists to an effort to ensure they stay away from court-

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<sup>28</sup> Violence Against Women and Dep't of Just. Reauthorization Act (VAWA) of 2005, 42 U.S.C.A. § 13701 (West 2010).

<sup>29</sup> *The Model Stalking Code Revisited*, THE NAT'L CTR. FOR VICTIMS OF CRIME, 13 (Jan. 2007), available at <http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=45930>.

<sup>30</sup> LEIGH GOODMARK, *A TROUBLED MARRIAGE* (2012).

<sup>31</sup> *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 766 (2005) (doing little to dispel the notion the protection orders are ineffectual when it declared that the holder of a protection order did not have an entitlement to have that order enforced by the police).

<sup>32</sup> QUINDLEN, *supra* note 5, at 64.

<sup>33</sup> See Jill P. Dimond et al., *Domestic Violence and Information Communication Technologies*, 23(5) *INTERACTING WITH COMPUTERS* 413 (2011) (discussing the pros and cons of technology as reported by victims).



ordered exclusion zones.<sup>34</sup> Technology leaves a trail in its wake; that trail may be admissible in court against an intimate terrorist.<sup>35</sup>

Further, to successfully escape, a survivor must create a plan that helps her get or keep away from the perpetrator.<sup>36</sup> On-line resources can be invaluable to a survivor in her efforts to escape. However, on-line research can be perilous for a survivor. An intimate terrorist can, through the use of spyware or keystroke technology, ascertain the details of a survivor's computer usage.<sup>37</sup> These details may reveal the resources a survivor has used to get help or how she is planning to escape.<sup>38</sup> A perpetrator's increased access, by virtue of technology, to a survivor's plans for escape—either from a shared household or from the relationship—places the survivor at increased risk of harm due to the phenomenon known as separation assault.<sup>39</sup>

Separation assault means that the survivor is at greater risk when she is seeking to leave the batterer. When one accepts that intimate terrorism is about the perpetrator's coercive control of his partner—or ex-partner—separation assault is sadly predictable. The perpetrator realizes that his efforts at control are failing when he learns of his victim's plans to leave. He then redoubles his attempts to control, often leading to assault at the time of separation.

In *Black and Blue*, where the violence continued for years, one might long to ask Fran, “Why did you stay?” And if asked, Fran might explain with the taunt once delivered by her police officer husband, “What the hell [are you] going to tell the cops?”<sup>40</sup> However an

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<sup>34</sup> See discussion *infra* Part IV.B.

<sup>35</sup> See *State v. Sukin*, No. 24585-3-III, 2007 WL 2254425, at \*2 (Wash. App. Div. 3 Aug. 7, 2007); *Commonwealth v. Thissell*, 910 N.E.2d 943 (Mass. 2009); *Commonwealth v. Cushna*, No. 08-P-5, 2009 WL 763743, at \*1 (Mass. App. Ct. Mar. 25, 2009); *Ruise v. State*, 43 So. 3d 885 (Fla. 2010).

<sup>36</sup> See NAT'L NETWORK TO END DOMESTIC VIOLENCE, <http://www.nnedv.org/resources/stats/gethelp.html> (last visited Mar. 1, 2012); NAT'L COAL. AGAINST DOMESTIC VIOLENCE, <http://www.ncadv.org/protectyourself/MyPersonalSafetyPlan.php> (last visited Mar. 1, 2012).

<sup>37</sup> See *infra* Part III.B.2.

<sup>38</sup> See Dimond, *supra* note 33 (many advocacy websites now instruct victims on how to lessen, if not eliminate their non-paper trail. For instance the Nat'l Network to End Domestic Violence has the following message on its website's homepage: “SAFETY ALERT: If you are in danger, please use a safer computer, or call 911, a local hotline, or the U.S. Nat'l Domestic Violence Hotline at 1-800-799-7233 and TTY 1-800-787-3224. Learn more technology safety tips. There is always a computer trail, but you can leave this site quickly.”).

<sup>39</sup> Martha Mahoney, *Legal Images of Battered Women*, 90 MICH. L. REV. 1, 65 (1991).

<sup>40</sup> QUINDLEN, *supra* note 5.

individual survivor might respond to the “why did you stay?” query, it is now axiomatically regarded as the wrong question: a question that blames the survivor for the violence she endures.<sup>41</sup>

But Fran did ultimately leave—or disappear as she would have said.<sup>42</sup> After the abuse increased in severity and she realized the impact of it on her son, she reached out to people who could help her escape. At the nucleus of her exit strategy was her ability to remain hidden from Bobby, her husband as well as her intimate terrorist.

Here’s where the insidiousness of technology comes into play. If Bobby had access to technology, he could have coercively controlled Fran, in part through monitoring her activities.<sup>43</sup> He could have found out what friends or professionals she was contacting to assist in her escape by accessing her computer through spyware or through her improvident posts on social networking sites.<sup>44</sup> In that way, he may have been able to prevent her from escaping in the first place.

As it was, Bobby had to wait until his son surreptitiously called him, at which point he used his police contacts to unscramble the telephone number.<sup>45</sup> Today, however, Bobby could have found Fran by virtue of GPS technology on his son’s phone. He would not have needed his police contacts.

#### **A. Taxonomy of Technology: Definitions and Uses**

Technology is difficult to define. While certain understandings are summoned up by the use of various terms, a precise shared meaning is often lacking. Although common understandings may be elusive, two diverse examples of recent technologies that are used in intimate terrorism are defined as follows: (1) social media: “forms of electronic

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<sup>41</sup> The question has staying power because it is difficult for those not enmeshed in a domestic violence situation to truly understand the power that an intimate terrorist has against his victim. Two of the four factors that Johnson uses to define the intimate terrorist are undermining the will to resist and undermining the ability to resist. An understanding of these two factors explains why she didn’t leave. Getting to a place where the question itself is rarely asked is a larger, perhaps impossible, task. JOHNSON, *supra* note 1, at 269.

<sup>42</sup> QUINDLEN, *supra* note 5; see also Jane K. Stoeber, *Freedom from Violence: Using the Stages of Change Model to Realize the Promise of Civil Protection Order*, 72 OHIO ST. L.J. 303 (2011) (Survivors who leave often return. This is true for a myriad of reasons.).

<sup>43</sup> Even before current technologies expanded, monitoring was one of the four non-violent tactics used by intimate terrorists. JOHNSON, *supra* note 1, at 27.

<sup>44</sup> See, e.g., Katherine F. Clevenger, *Spousal Abuse Through Spyware*, 21 J. AM. ACAD. MATRIM. L. 653 (2008).

<sup>45</sup> QUINDLEN, *supra* note 5, at 273.

communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal message, and other content”;

(2) global positioning system: “a navigational system using satellite signals to fix the location of a radio receiver on or above the earth’s surface: also the radio receiver so used.”<sup>46</sup>

Although these terms are capable of definition, they are inherently inexact. The vast fluidity in the definitions has created problems crafting legal responses such as appropriate legislation, where the clear definition of terms is critical to proper application of the law to cover its intended purpose.<sup>47</sup> Also, technology can transform common items, such as a telephone, with new uses that stretch the law. In one case, an appellate court refused to sustain a conviction for harassing telephone calls because, although a telephone was used, the messages came via text. Texting was beyond the meaning of the statute.<sup>48</sup> Thus, harassing telephone calls were illegal, but the same texted content via the same device (a telephone) was not.

## **B. How Technology is Used in Intimate Terrorism**

### **1. Social Media**

Social media is a now-ubiquitous technology that connects people virtually.<sup>49</sup> Social media sites include Facebook, Twitter, and Tumblr.<sup>50</sup> These media sites are touted for their utility in making and maintaining connections. One general consequence of technology is its lessening of a personal sense of privacy boundaries.<sup>51</sup> This effect is vividly displayed in the use of social media. What people post on their Facebook walls makes many cringe including, though perhaps at a

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<sup>46</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 542 (11th ed. (2003)).

<sup>47</sup> See *infra* Part IV.

<sup>48</sup> Commonwealth v. Lane, No. 09-P-2134, 2011 WL 383024, at \*1 (Mass. App. Ct. Feb. 8, 2011).

<sup>49</sup> See Andrew R. Sorkin, *Those Millions on Facebook? Some May Not Actually Visit*, N.Y. TIMES (Feb. 6, 2012 9:39 PM), <http://dealbook.nytimes.com/2012/02/06/those-millions-on-facebook-some-may-not-actually-visit/> (the exact number of users may be unknown; even the definition of users is in dispute).

<sup>50</sup> *23 Types of Social Media*, ONBLOGGINGWELL.COM (Feb. 17, 2010, 4:23 PM), <http://onbloggingwell.com/23-types-of-social-media-sites/>.

<sup>51</sup> Andrew King-Ries, *Teens, Technology, and Cyberstalking: The Domestic Violence Wave of the Future?*, 20 TEX. J. WOMEN & L. 131 (2011).

later date, the individuals who made the postings. Worse yet, impulsive postings can be used later as indicia of wrongdoing.<sup>52</sup>

In addition to blurring the boundaries of privacy, social media can also be used for nefarious purposes. Intimate terrorists can use Facebook, for example, to spread harmful, untrue information about survivors in a venue where many people—often friends (or friends of friends) or relatives who are known to both parties—will be able to see it.<sup>53</sup> This use can affect the survivor’s will or ability to leave.

Intimate terrorists can also use the information that survivors unwisely post to gain knowledge of their activities.<sup>54</sup> This knowledge can, in turn, help the intimate terrorist to more effectively terrorize his victim or thwart her escape. If Facebook had existed at the time of *Black and Blue*, Fran or young Robert could have unwittingly posted information on it that would have provided Bobby with leads about their location.

## 2. Software and Hardware

There are several types of technology that are increasingly misused by the intimate terrorist. These include spyware and keystroke technology.<sup>55</sup> Spyware, a specific type of malware,<sup>56</sup> is defined as software “that is installed in a computer without the user’s knowledge and transmits information about the user’s computer activities over the Internet.”<sup>57</sup> Spyware can be installed remotely or through physical

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<sup>52</sup> See William Glaberson, *N.Y.C. Police Maligned Paradogers on Facebook*, N.Y. TIMES (Dec. 5, 2011), <http://www.nytimes.com/2011/12/06/ny-region/on-facebook-nypd> (police officer’s posting referring to West Indians as “savages” and terming Internal Affairs officers “rats”).

<sup>53</sup> *Id.*

<sup>54</sup> See *Law Enforcement Guidelines*, FACEBOOK.COM, <http://www.facebook.com/safety/groups/law/guidelines/> (last visited Apr. 15, 2012).

<sup>55</sup> See, e.g., Melissa F. Brown, *Safety and Security in a Digital Age*, S.C. LAW. (July 2010), available at <http://www.scbar.org/MemberResources/Publications/SouthCarolinaLawyer.aspx> (There are also pre-paid phone cards, whose technology may be available through smart phone applications. SPOFCARDS or LIARCARDS permit callers to disguise their identity—including changing voice gender—when making calls. TRAPCALL, on the other hand, reveals caller identity and phone number even when the caller has a blocked or unlisted number.).

<sup>56</sup> MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/malware> (last visited Apr. 4, 2012).

<sup>57</sup> MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/spyware> (last visited Apr. 4, 2012).

access to a computer.<sup>58</sup> It is not necessarily a virus and therefore may not be detected and removed through anti-virus software. Spyware continuously monitors a person's computer usage by recording the contents of a computer screen every few seconds.<sup>59</sup>

Keystroke technology is hardware, which, installed directly on a computer, records all keystrokes.<sup>60</sup> This information is stored on a miniscule hard drive and allows access to typically confidential items such as passwords and personal identification numbers. It is also reported that this technology is installed on certain smart phones.<sup>61</sup>

Spyware and keystroke technology have legitimate purposes. They can be used, for example, to appropriately monitor a child's computer usage. But, these technologies are easily used by intimate terrorists to monitor their victims. Imagine if Bobby could access all websites that Fran visited, all the emails or texts that she sent, all telephone calls that she made, as well as any activity on their on-line bank account. In this highly digitized age, it would be nearly impossible for Fran to escape Bobby without using computers, telephones, or internet resources.

### 3. Global Positioning Systems

A GPS is a navigational system that uses satellite signals to fix the location of a radio receiver.<sup>62</sup> Unstated but implicit is this: if the radio receiver is affixed to something, the location of that something is known or knowable. The radio receiver can be attached to or designed into a car.<sup>63</sup> It can be part of a smart phone or tablet computer that accompanies a person throughout the day.<sup>64</sup>

GPS technology can be used easily by intimate terrorists. Survivors who are trying to escape their abusers or think they have already done so can be tracked constantly. As one private investigator put it, the technology "to the victim is just as terrorizing as seeing [a face] in the

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<sup>58</sup> Southworth, *supra* note 11, at 7; *see also*, Cindy Southworth & Sarah Tucker, *Technology, Stalking and Domestic Violence Victims*, 76 MISS. L.J. 667 (2007) (providing overview of all types of technology).

<sup>59</sup> Clevenger, *supra* note 44.

<sup>60</sup> Southworth, *supra* note 11, at 7 (keystroke technology can also be software).

<sup>61</sup> Katherine Rushton, *Software on Android Phones 'Tracking Every Keystroke'*, THE TELEGRAM (Nov. 30, 2011), <http://www.telegraph.co.uk/technology/mobile-phones/8927164/Software-on-Android-phones-tracking-every-key-stroke.html>.

<sup>62</sup> *See supra* Part III.A.

<sup>63</sup> *See* ONSTAR, <http://www.onstar.com> (Apr. 4, 2012).

<sup>64</sup> CES: GPS Soon to [sic] Integrated with Field Computers and Smartphones, TMCNET.COM (Sept. 27, 2010), <http://m2m.tmcnet.com/topics/m2mevolution/articles/104560-ces-gps-soon-integrated-with-field-computers-smartphones.htm>.

window at night before they [sic] go to bed.”<sup>65</sup> Threats and intimidation, monitoring, undermining the will of the victim to resist, and undermining the ability of the victim to resist: these are the tactics of the intimate terrorist.<sup>66</sup> Each of these tactics is made easier, scarier, and deadlier by the technologies described above.<sup>67</sup>

#### IV. LEGAL RESPONSES TO THE IMPACT OF TECHNOLOGY ON INTIMATE TERRORISM

##### A. Anti-Stalking Statutes

Stalking and intimate terrorism can go hand-in-hand. Stalking behavior goes to the heart of the intimate terrorist’s monitoring strategy as described by Johnson.<sup>68</sup> Technology can make the stalker appear omnipresent and omniscient to the victim. GPS technology, whether on cars or telephones, allows an intimate terrorist to know the whereabouts of his victim at all times.<sup>69</sup> Her attempts to evade him are ineffectual as technology makes her easy to find. In one case, for instance, a husband put a GPS tracking device on his wife’s car and installed spyware on her cell phone. The wife left after a domestic violence incident, but her husband sent her text messages demonstrating that he knew her whereabouts and was monitoring her.<sup>70</sup>

Stalking is a relatively new crime.<sup>71</sup> It gained notoriety early on in several high profile cases where the stalker was obsessed with the victim, but did not know her personally.<sup>72</sup> In reality, however, stalking is not usually a crime between strangers. Stalkers know their victims;

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<sup>65</sup> Erik Eckholm, *Private Snoops Find GPS Trail Legal to Follow*, N.Y. TIMES (Jan. 28, 2012), [http://www.nytimes.com/2012/01/29/us/gps-devices-are-being-used-to-track-cars-and-errant-spouses.html?\\_r=1&pagewanted=all](http://www.nytimes.com/2012/01/29/us/gps-devices-are-being-used-to-track-cars-and-errant-spouses.html?_r=1&pagewanted=all).

<sup>66</sup> See *supra* Part I.

<sup>67</sup> See *M.M. v. J.B.*, No. CN08-05322, 2010 WL 1200329, at \*6 (Del. Fam. Ct. Jan. 12, 2010) (person subject to a protection order put a GPS tracker on the victim’s car shortly after the protection order was entered).

<sup>68</sup> JOHNSON, *supra* note 1, at 102–3.

<sup>69</sup> See *Minnesota v. Hormann*, 805 N.W.2d 883 (Minn. Ct. App. 2011).

<sup>70</sup> *Id.*

<sup>71</sup> The first stalking statute was in Cal. in 1990. CAL. PENAL CODE § 646.9 (West 2011).

<sup>72</sup> Ashley Beagle, *Modern Stalking Laws: A Survey of State Anti-Stalking Statutes Considering Modern Mediums and Constitutional Challenges*, 14 CHAP. L. REV. 457, 467-69 (2011).

77% of female stalking victims are stalked by someone they know and 59% are stalked by current or former intimate partners.<sup>73</sup>

All states now have anti-stalking statutes.<sup>74</sup> Congress passed an anti-stalking statute in 1996.<sup>75</sup> Unfortunately, technology has made some of these statutes virtually obsolete and, in some circumstances, counterproductive. Original anti-stalking statutes often required the stalker to be visually or physically proximate to the victim. Now, however, the victim can be found and stalked remotely. The stalker can access her computer or smart phone. Even for the non-tech savvy person, technological stalking is surprisingly easy. On-line step-by-step instructions chillingly show the way.<sup>76</sup>

The impact of technology on the crime of stalking was addressed in the 2007 revision of the Model Stalking Code.<sup>77</sup> Congress and some individual states have modified their stalking laws. For instance, New Jersey amended its stalking statute, effective in 2009, to define stalking as a “course of conduct” . . . by “any action, method, *device*, or means . . . *surveilling* . . . a person.”<sup>78</sup> The legislative history, taken from the revised Model Stalking Code, provides that the new language is meant to cover stalking through technology such as GPS tracking of a victim’s car.<sup>79</sup> Likewise, Alaska amended its stalking statute last year. It now includes following or monitoring a victim by GPS or by installing a device—including software—on a victim’s computer, telephone, vehicle, or at her work place or residence.<sup>80</sup>

Recently, the high-tech crime of cyberstalking has garnered attention.<sup>81</sup> Anti-cyberstalking laws generally preclude acts that occur

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<sup>73</sup> The Model Stalking Statute Revisited, *supra* note 30, at 13.

<sup>74</sup> See, e.g., MISS. CODE ANN. § 99-5-38 (2) (West 2011); N.D. CENT. CODE ANN. § 14-07.1-19 (2009); LA. CODE CRIM. PROC. ANN. art. 335.1A (2)(a) (2011).

<sup>75</sup> 12 U.S.C.A. § 2261 (West 2012).

<sup>76</sup> John Loveall, *Stalking by a “High Tech” Guy: A View from the Other Side* NAT’L CTR. FOR VICTIMS OF CRIME (2005), available at <http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspx?DocumentID=41389>.

<sup>77</sup> The Model Stalking Statute Revisited, *supra* note 29.

<sup>78</sup> N.J. STAT. ANN. § 2C:12-10 (West 2011) (emphasis added); see also ME. REV. STAT. ANN. tit. 17-A, § 210-A (2011) (Maine similarly defines “course of conduct” in its stalking statute).

<sup>79</sup> *An Act concerning stalking and amending P.L. 1994, c. 119*, Assembly, No. 1563—L.2009, ch. 28 (N.J. 2008) (the new law also enhances the severity of the crime of stalking, including in circumstances where it occurs in contravention of a protection order).

<sup>80</sup> ALASKA STAT. ANN. § 12.55.135 (a) (West 2011).

<sup>81</sup> See generally Naomi Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Law*, 72 MO. L. REV. 125 (2007).

via the internet, with computers, or networking. An anti-cyberstalking statute, therefore, would not bar stalking by GPS or spyware.<sup>82</sup> The drafters of the Model Stalking Statute, Revisited, have expressed concern about potential confusion between stalking and cyberstalking statutes. The revised model stalking law covers technological advances but is in fact broader in coverage than are most cyberstalking statutes.<sup>83</sup>

### B. GPS Monitoring of Offenders

GPS monitoring may be ordered for persons charged with crimes involving domestic violence.<sup>84</sup> Some states have added GPS tracking language to statutes specifically dealing with domestic violence offenders.<sup>85</sup> In other states, such statutes are pending.<sup>86</sup> These statutes are found scattershot throughout state codes. They are located in criminal codes, family law codes, and independent civil protection order statutes.<sup>87</sup>

Although a state may not have a law specifically authorizing the use of GPS technology in domestic violence cases, that monitoring still may be available. Many domestic violence crimes are prosecuted under traditional criminal statutes, such as assault, battery, stalking, rape, and murder. Therefore, if a jurisdiction has authority to order GPS monitoring of standard offenses, domestic violence cases should be included within that mandate.

Domestic violence/GPS (hereinafter “DV/GPS”) statutes may be categorized by whether they sanction monitoring in the pre-trial or post-conviction phase. Some statutes permit GPS monitoring as part of conditional release for persons accused of violating a protection order.<sup>88</sup> Other statutes apply only after a person has been found guilty of a crime involving domestic violence—perhaps the violation of a protection order, perhaps another crime—and receives probation rather than jail or prison time.<sup>89</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> The Model Stalking Statute Revisited, *supra* note 29, at 64.

<sup>84</sup> The DV/GPS statutes generally use the term domestic violence, so that term, rather than intimate terrorism, will be used through this section.

<sup>85</sup> Ariana Green, *More States Use GPS to Track Abusers*, N.Y. TIMES (May 8, 2009), <http://nytimes.com/2009/05/09/us/09gps.html>.

<sup>86</sup> *See, e.g.*, WOMEN’S LAW PROJECT, *available at* <http://www.womenslawproject.org> (last visited Mar. 4, 2012).

<sup>87</sup> *See, e.g.*, KY. REV. STAT. ANN. § 403.761 (West 2011).

<sup>88</sup> *E.g.*, ARK. CODE ANN. § 9-15-217 (West 2011).

<sup>89</sup> *See infra* Part IV.B.2.



### 1. Pre-Trial Monitoring

Some statutes permit GPS monitoring in a pre-trial circumstance. Often, the crime alleged is violation of a civil protection order.<sup>90</sup> Accordingly, the defendant, although in a pre-trial status, has already been ordered, at a minimum, not to abuse the victim, and is alleged to have violated that order. Arkansas, Texas, Louisiana, Mississippi, and North Dakota are among the states that have statutes permitting pre-trial monitoring.<sup>91</sup> The Arkansas and Texas statutes discussed below are fairly representative of this class of statute.

Under Arkansas's Family Law Code, a defendant charged with violating either an *ex parte* or final order of protection may be released provided he is placed under electronic surveillance.<sup>92</sup> The statute specifically defines the type of electronic monitoring, which may lead to problems as technology changes.<sup>93</sup> Surveillance is defined as "active"<sup>94</sup> technology that is a "single-piece device that immediately notifies law enforcement . . . of a violation of the distance requirements."<sup>95</sup> The technology can be tracked by "satellite or cellular phone tower triangulation."<sup>96</sup>

In Texas, a person charged with an offense of family violence<sup>97</sup> may be ordered to "carry or wear" a GPS device "as a condition of release on bond."<sup>98</sup> Prior to entering such an order, the judicial officer is compelled to consider the likely deterrent effect of such

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<sup>90</sup> In many states, the violation of a protection order is a separate crime.

<sup>91</sup> ARK. CODE ANN. § 9-15-217 (West 2011); TEX. FAM. CODE ANN. § 71.004 (West 2011); LA. CODE CRIM. PROC. ANN. art. 335.1A (2)(a) (2011); MISS. CODE ANN. § 99-5-38 (2) (West 2011); N.D. CENT. CODE ANN. § 14-07.1-19 (2009).

<sup>92</sup> ARK. CODE ANN. § 9-15-217 (West 2011).

<sup>93</sup> *See id.* § 9-15-217(c) (the surveillance is to be at the defendant's expense).

<sup>94</sup> GPS technology is either active or passive. Active technology reports location information nearly instantaneously. Passive technology uploads the data several times a day—not often enough to protect a victim. Robert S. Gable, *Left to Their Own Devices: Should Manufacturers of Offender Monitoring Equipment be Liable for Design Defect?*, 2009(2) U. ILL. J.L. TECH. & POL'Y 333, 337 (2009).

<sup>95</sup> ARK. CODE ANN. § 9-15-217(c).

<sup>96</sup> *See id.* § 9-15-217(c).

<sup>97</sup> TEX. FAM. CODE ANN. § 71.004 (West 2011) (family violence is defined as an act by a household or family member that is intended to result in physical harm, bodily injury, assault, or sexual assault or that is a threat that reasonably places the member in fear of imminent physical harm, bodily injury, assault, or sexual assault, but does not include defensive measures to protect oneself).

<sup>98</sup> TEX. CODE CRIM. PROC. ANN. art. 17.49(b)(2) (West 2011) (like Ark., a defendant must pay the cost of monitoring but, if he is indigent, he may be ordered to pay less than the full cost of the GPS monitoring).

monitoring.<sup>99</sup> Further, the judicial officer must seek input from a victim as to the areas from which the defendant is to be excluded. The judicial officer also must provide the victim with information regarding: 1) her right to participate or refuse to participate; 2) the functioning and limitations of the technology and “the extent to which the system will track and record the victim’s location and movements; 3) the locations from which the defendant is barred; 4) sanctions available in the event of a violation; 5) the procedures to follow if the GPS monitoring fails; and 6) the lack of confidentiality for the victim’s communications with the court.<sup>100</sup>

## 2. Post-Conviction Monitoring

Other states permit DV/GPS monitoring only after a defendant has been found to have violated an order of protection.<sup>101</sup> Massachusetts was one of the first states to enact DV/GPS legislation. In 2007, it amended its Abuse Prevention statute (209A) to provide that a court may, in lieu of incarceration and as a condition of probation, order that a defendant “wear a global positioning satellite tracking device designed to transmit and record the defendant’s location data.”<sup>102</sup> If a defendant enters an “exclusion zone,” that information is transmitted “immediately” to the victim and the police.<sup>103</sup> A court finding that the defendant entered the exclusion zone will result in the revocation of probation. Although this statute is more than four years old, as of January 2012, just 96 DV offenders were wearing GPS monitors and being tracked by the Massachusetts Department of Probation.<sup>104</sup>

In Kentucky, GPS monitoring is also an option only after a defendant has been found to have engaged in a “substantial violation” of a protection order.<sup>105</sup> The court, before imposing monitoring, must give the victim certain information, similar to that mandated in Texas.<sup>106</sup> The Kentucky statute also specifically gives the offender the right to provide information as to why monitoring ought not be

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<sup>99</sup> *Id.* at 17.49(b)(2).

<sup>100</sup> *Id.*

<sup>101</sup> *See, e.g.*, MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 2011); KY. REV. STAT. ANN. § 403.761 (West 2011); IND. CODE ANN. § 34-26-5-9 (i)(1) (West 2011).

<sup>102</sup> MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 2011).

<sup>103</sup> *Id.*

<sup>104</sup> E-mail from Steven Bocko, Mass. Dep’t of Probation, to author (Jan. 24, 2012, 03:11 PM) (on file with U. MASS. L. REV.).

<sup>105</sup> KY. REV. STAT. ANN. § 403.761 (West 2011).

<sup>106</sup> TEX. CODE CRIM. PROC. ANN. art. 17.49(b)(2) (West 2011).

imposed.<sup>107</sup> Before ordering monitoring, the court must consider the likelihood that the offender will “seek to kill, assault, stalk, harass, menace, or otherwise threaten” the victim without the imposition of GPS monitoring.<sup>108</sup> The court is also required to make findings of fact regarding the granting or denying of a monitoring request.<sup>109</sup>

### 3. Pre-Trial and Post-Conviction Monitoring

Several states allow for GPS monitoring after either a charge and or a conviction. In Oklahoma, for instance, a defendant who is alleged to have either violated a protection order or committed other offenses of domestic violence, including stalking, may be required to use a GPS monitoring device.<sup>110</sup> Before entering such an order, the court must find that the defendant has a “history that demonstrates an intent to commit violence against the victim . . .”<sup>111</sup> In addition, the court may permit the victim to monitor the defendant’s location; however, the statute specifically limits monitoring by the victim to areas that implicate her safety.<sup>112</sup> Oklahoma also permits the use of GPS monitoring of a defendant who has been convicted of violating a protective order.<sup>113</sup> Illinois similarly permits both pre-trial and post-conviction monitoring.<sup>114</sup>

### 4. Constitutional Issues

The use of GPS technology in law enforcement has been challenged on a variety of grounds.<sup>115</sup> In *U.S. v. Jones*, the U.S. Supreme Court held that the police may not install a GPS device on a suspect’s car without a valid search warrant.<sup>116</sup> The case raised legal issues largely different from those found in DV/GPS statutes; its

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<sup>107</sup> KY. REV. STAT. ANN. § 403.761(5) (West 2011).

<sup>108</sup> *Id.* § 403.761(7)(a).

<sup>109</sup> *Id.* § 403.761(7)(b).

<sup>110</sup> OKLA. STAT. ANN. tit. 22, § 60.17 (West 2011).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> OKLA. STAT. ANN. tit. 22 § 60.6 (West 2011).

<sup>114</sup> 730 ILL. COMP. STAT. ANN. 5/5-8A-7 (West 2011) (Enacted in 2009, this statute was introduced following the killing of Cindy Bischof, by her ex-boyfriend.).

<sup>115</sup> *See, e.g.*, *People v. Randolph*, 84 Cal. Rptr. 559 (2006); *United States v. Sparks*, 750 F.Supp.2d 384 (D. Mass. 2010); *Com v. Raposo*, 905 N.E.2d. 545 (2009); *Com v. Cory*, 911 N.E.2d. 187 (2009). *See also* Zoila Hinson, *GPS Monitoring and Constitutional Rights*, 43 HARV. C.R.-C.L. L. REV. 285 (2008).

<sup>116</sup> *United States v. Jones*, 132 S. Ct. 945, 945 (2012).

impact, therefore, is indirect.<sup>117</sup> The opinion does provide a window, however, into the Court's thinking on the Fourth Amendment considerations of GPS monitoring.<sup>118</sup>

Although unanimous in outcome, the Court split 5-4 in its rationale. The five person majority opinion, written by Justice Scalia, found that the placement and use of the device on Jones's car was a search.<sup>119</sup> Scalia's majority opinion focused on the physical intrusion involved in planting the device, which was the basis for search and seizure law until the 1960s.<sup>120</sup> However, more recent Fourth Amendment search and seizure jurisprudence has focused on reasonable expectations of privacy, not on physical intrusions.<sup>121</sup> Therefore, the impact of a return to a property-based inquiry remains to be seen. Certainly, it is a curious twist for a technology case, as

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<sup>117</sup> Santry, *supra* note 10, at 1110-14 (for instance, DV offenders are monitored so that they do not enter into exclusions zones—such places that the victim inhabits—that have already been legally declared off-limits in a protection order. Offenders, therefore, would be unable to claim a reasonable expectation of privacy in these areas).

<sup>118</sup> Although *Jones* involved drugs, GPS tracking by police could be used in cases involving domestic violence. In *Wisconsin v. Sveum*, the Wisconsin Supreme Court upheld the police use of GPS to track an alleged stalker, notwithstanding assertions of Fourth Amendment violations. *Wisconsin v. Sveum*, 787 N.W.2d 317, 330-33 (2010). In that case, however, unlike *Jones*, a valid warrant was issued to authorize the installation of the GPS device. *Id.*

<sup>119</sup> *Jones*, 132 S. Ct. at 949 n.2 (The car belong to Jones's wife but the Court found that he had "at least the property rights of a bailee.").

<sup>120</sup> See *Katz v. United States*, 389 U.S. 347, 351-353 (1967); see also *Smith v. Maryland*, 442 U.S. 735, 739, 740 (1979) ("In *Katz*, Government agents had intercepted the contents of a telephone conversation by attaching an electronic listening device to the outside of a public phone booth. The Court rejected the argument that a 'search' can occur only when there has been a 'physical intrusion' into a 'constitutionally protected area,' noting that the Fourth Amendment 'protects people, not places.' Because the Government's monitoring of *Katz*' conversation 'violated the privacy upon which he justifiably relied while using the telephone booth,' the Court held that it 'constituted a 'search and seizure' within the meaning of the Fourth Amendment.'").

<sup>121</sup> *Smith*, 442 U.S. at 739 ("Consistently with *Katz*, this Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. *E.g.*, *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *United States v. Chadwick*, 433 U.S. 1, 7 (1977); *United States v. Miller*, 425 U.S. 435, 442 (1976); *United States v. Dionisio*, 410 U.S. 1, 14 (1973); *Couch v. United States*, 409 U.S. 322, 335-36, (1973); *Mancusi v. DeForte*, 392 U.S. 364, 368, (1968); *Terry v. Ohio*, 392 U.S. 1, 9 (1968)"). See U.S. CONST. amend. IV.

technological techniques are increasingly available without any need for a physical trespass.

Justice Alito, in an opinion concurring in the judgment only, took issue with the majority's reliance on a trespass-based analysis.<sup>122</sup> Alito's opinion retained the focus of the reasonable expectation of privacy test articulated in *U.S. v. Katz*.<sup>123</sup> Relevant to the issues here, Alito's concurrence considers the often non-physical element of new technology, much of which can be installed from afar.<sup>124</sup>

The result in *Jones* is clear, despite the differing rationales. Police must obtain a warrant before they can physically place a GPS tracking device on a suspect's automobile. Less clear, in part because of the differing rationales, is the decision's effect on the current crop of DV/GPS tracking laws.<sup>125</sup>

## V. A VIEW TO THE FUTURE

Technology's impact on intimate terrorism—for good and for ill—is inescapable. On the one hand, intimate terrorists will continue to exploit new methods that expand their ability to coercively control their quarry. However, victims may be able to combat technological assaults as well as use technology to gain safety. The impact of technology will be ever-changing as technological methods advance. The following issues will require on-going attention as both law and technology evolve, doubtless at an uneven pace.

### A. GPS Monitoring

Monitoring of intimate terrorists via GPS technology creates both legal and non-legal challenges. They include the constitutionality of monitoring, its efficacy, its technological capability, and its proper implementation.

#### 1. Constitutionality

The constitutionality of the monitoring of intimate terrorists will vary, depending on the language of a particular statute and to whom

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<sup>122</sup> *Jones*, 132 S. Ct. at 957-59 (Alito, J., concurring) (Justice Sotomayor also wrote a concurring opinion, but she joined with Justice Scalia's opinion as well.).

<sup>123</sup> *Id.* at 958-963.

<sup>124</sup> *Id.*

<sup>125</sup> See, e.g., Shaun B. Spencer, *GPS Monitoring Device Leads the Supreme Court to a Crossroads in Privacy Law*, 46 NEW ENG. L. REV. 45 (2012).

and how it is applied. GPS monitoring already has been subjected to Fourth Amendment, Equal Protection, and Due Process challenges.<sup>126</sup>

The Fourth Amendment implications of GPS monitoring are addressed in *U.S. v. Jones*.<sup>127</sup> In *Jones*, the U. S. Supreme Court held that placing a GPS device on the undercarriage of a car was a search for which a valid warrant was required.<sup>128</sup> However, the Court has also found no reasonable expectation of privacy exists as cars travel on public streets.<sup>129</sup> Thus, *Jones* provides a reasonable justification for law enforcement to attach a GPS monitoring based on tracking a device onto an automobile as it travels public thoroughfares.<sup>130</sup> However, a car parked in a private garage does involve reasonable expectations of privacy.<sup>131</sup> Therefore, GPS technology that tracks a vehicle into non-public spheres may implicate the Fourth Amendment. So may GPS capacity on devices such as a smartphone or iPad, when those are taken into non-public areas. The U.S. Supreme Court has already found that the use of technology that invades a private home requires a warrant.<sup>132</sup>

Whether a valid reasonable expectation of privacy argument exists for the intimate terrorist will likely turn on whether the monitoring occurs pre-trial or post-conviction. In post-conviction situations, the GPS monitoring tracks whether the intimate terrorist is entering an area from which he already has been excluded by court order. In that setting, at least, there is no reasonable expectation of privacy and thus no Fourth Amendment trigger.<sup>133</sup> Even in those circumstances, however, GPS technology may capture movement data beyond the exclusion zones, thus raising expectation-of-privacy concerns. These circumstances may be alleviated by a monitoring technology called reverse tagging, which is only triggered when the intimate terrorist enters the exclusion zone.<sup>134</sup>

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<sup>126</sup> See, e.g., *Jones*, 132 S. Ct. at 945; *Sveum*, 787 N.W.2d at 317. See also U.S. CONST. amend. IV, V, XIV.

<sup>127</sup> *Jones*, 132 S. Ct. at 945.

<sup>128</sup> See discussion *supra* Part III.B.3.

<sup>129</sup> See generally *United States v. Knotts*, 460 U.S. 276, 281 (1983) (involved placing a radio transmitter in a container in a vehicle).

<sup>130</sup> *Jones*, 132 S. Ct. at 946.*Id.*

<sup>131</sup> See *Kyllo v. U.S.*, 533 U.S. 27 (2001).

<sup>132</sup> See, e.g., *id.* at 40.

<sup>133</sup> The trespass-based theory reinvigorated by *Jones* may, however, create new ways to argue Fourth Amendment violations. Santry, *supra* note 10; see also *Jones*, 132 S. Ct at 957 (Alito, J., concurring).

<sup>134</sup> Santry, *supra* note 10, at 1121-22.

Several states authorize GPS monitoring of an intimate terrorist who has not yet gone to trial.<sup>135</sup> Here, obviously, the intimate terrorist is still the accused, not the convicted. Although the U.S. Supreme Court has held that probationers have a lesser liberty interest, that rationale would not hold in a pre-trial circumstance.<sup>136</sup> Thus, pre-trial monitoring has a greater risk of impinging on constitutional freedoms. However, if monitoring is imposed as a condition of pre-trial release, in lieu of incarceration, monitoring is less of an infringement on liberty than is confinement.

Due Process Clause challenges to monitoring have been sustained, at least in pre-trial circumstances, when imposed by statutes requiring electronic monitoring for all offenders.<sup>137</sup> However, DV/GPS statutes generally have an individualized component that may forestall successful Due Process challenges. In some states, for instance, the monitoring is ordered only after a dangerousness or lethality assessment.<sup>138</sup> Elsewhere, it is done after a finding of the risk the offender poses to the victim.<sup>139</sup>

Equal Protection Clause issues arise if an intimate terrorist is rendered ineligible for monitoring because of penury.<sup>140</sup> Most GPS statutes require that the offender pay the costs of the monitoring.<sup>141</sup> To avert this concern, some states explicitly authorize community service or a sliding scale fee.<sup>142</sup> Others permit third parties or organizations to cover the cost.<sup>143</sup> Another approach is used in Illinois. It has instituted fines for domestic violence offenders; such fines are placed in the Domestic Violence Surveillance Fund, which may be used for low income offenders.<sup>144</sup> Measures like these help avoid successful Equal Protection Clause challenges.

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<sup>135</sup> See discussion *supra* Part IV.B.1.

<sup>136</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987).

<sup>137</sup> *United States v. Polouizzi*, 697 F.Supp.2d 381, 390-95 (E.D.N.Y. 2010) (finding unconstitutional, as applied, provisions of the Adam Walsh Act that require electronic monitoring in any case involving a minor victim).

<sup>138</sup> *Hinson*, *supra* note 115, at 286.

<sup>139</sup> *E.g.*, KY. REV. STAT. ANN. 403.761(7)(a) (West 2011).

<sup>140</sup> *Griffin v. Illinois*, 351 U.S. 12, 17 (1987) (“a state can no more discriminate on account of poverty than on account of religion, race, or color.”).

<sup>141</sup> See, *e.g.*, MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 2007).

<sup>142</sup> See, *e.g.*, LA. CODE CRIM. PROC. ANN. ART. 335.1 A(2)(C) (2011) (community service); See also MICH. COMP. LAWS ANN. § 765.6 b(6) (West 2011).

<sup>143</sup> IND. CODE ANN. § 34-26-5-9 (j) (West 2011).

<sup>144</sup> 730 ILL. COMP. STAT. ANN. 5/5-9-1.6 (a) (West 2011); see also Bryan Thompson, *Changes in the Cindy Bischof Law*, 24 D.C.B.A. BRIEF 40 (2011).

## 2. Effectiveness and Technological Capacity

The efficacy of GPS monitoring is unclear. Some studies suggest that the monitoring yields a modest decline in recidivism.<sup>145</sup> Others suggest that there is no statistically significant difference between those on electronic monitors and a control group.<sup>146</sup>

Even if GPS monitoring in domestic violence cases is shown to deter future incidents of domestic violence, it is only as good as the technology that supports it. There are several types of GPS devices available, including passive devices that do not transmit location data with enough frequency to enhance safety.<sup>147</sup> Moreover, GPS technology may depend on the cellular capacity in a region, thus creating problems for mountainous or rural areas. Problems can also arise in urban areas, due to dense building structures.<sup>148</sup> And nothing is perfect. Technology, or the devices that support it, can fail. There already have been lawsuits against GPS manufacturers for damages arising from a failed device.<sup>149</sup> Lawsuits aside, if monitoring appears to be ineffective, it will not be considered a useful tool to protect survivors.

If the device fails, the monitoring fails. If the monitoring fails, the survivor is no better off, and indeed, may be worse off, than she would

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<sup>145</sup> Mary Ann School, *GPS Monitoring May Cause Orwell To Turn In His Grave, But Will It Escape Constitutional Challenges? A Look at GPS Monitoring of Domestic Violence Offenders in Illinois*, 43 J. MARSHALL L. REV. 845, 853 (2010).

<sup>146</sup> See, e.g., Gable, *supra* note 94, at n.35, 339-42 (2009) (for a discussion of the studies of GPS monitoring effectiveness).

<sup>147</sup> Gable, *supra* note 94, at 337; Santry, *supra* note 10, at 1118-19 (for a discussion of different types of GPS devices).

<sup>148</sup> Gable, *supra* note 94, at 337.

<sup>149</sup> See, e.g., *Turner v. iSecuretrac Corp.*, No. 03CA70, 2004 WL 944386, at \*7 (Ohio Ct. App. Apr. 28, 2004) (“Turner, a probationer in a monitoring program, entered a prohibited area and seriously injured his wife. He was not wearing a monitoring anklet at the time because a defective device had not been promptly replaced by the manufacturer. The state district appellate court denied the plaintiff’s claim, holding, in part, that the trial record did not support the plaintiff’s argument that the GPS device was defective when it left the manufacturer because it could have been damaged in shipment, storage, or while being used by a previous offender. Furthermore, even if the probationer had been wearing the passive GPS device at the time of the attack, the information about his movements would not have been known until after the device was plugged into his home monitoring unit. Therefore, the court reasoned, the manufacturer could not have taken action to prevent the attack, so no legal cause was established.”); Gable, *supra* note 94, at 354-55; see also John E. Woodard, *Oops, My GPS Made Me Do It!: GPS Manufacturer Liability Under a Strict Products Liability Paradigm when GPS Fails to Give Accurate Directions to GPS End-User*, 34 U. DAYTON L. REV. 429 (2009).



be without the monitoring option.<sup>150</sup> The recognition of this undesirable possibility is seen in the several statutes that specifically require a judge, before imposing monitoring on an offender, to apprise the victim of the limitations of the technology and the risks involved if the technology fails.<sup>151</sup>

### 3. Implementation

Assume that GPS monitoring is constitutional and that it has been demonstrated to protect victims. Further assume that GPS monitoring has a highly effective technological capacity. None of this matters if it is not being used. Several impediments may prevent monitoring from being ordered. First, it is being introduced at a time when state budgets, including budgets for courts, corrections, and probation departments, are being cut.<sup>152</sup> Therefore, as an unfunded mandate, it may not be instituted. Second, if defendants cannot afford to pay for it, it may not be used. Finally, some professionals in the field, including victims' advocates and prosecutors, may be loath to recommend it if they believe that it provides women with a false sense of security.<sup>153</sup>

### B. Evidentiary Issues

Technological advances lead to new evidentiary problems.<sup>154</sup> Many of these problems may be resolved through proper application of an appropriate evidentiary rule. For example, GPS monitoring will yield reports that demonstrate the movements of the offender, including impermissible activity in the exclusion zone. These reports may be admissible pursuant to more than one evidentiary rule.<sup>155</sup> Courts have a long-established history of responding to and allowing

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<sup>150</sup> If monitoring is a condition imposed in lieu of incarceration, it seems likely that, in some circumstances at least, more intimate terrorists will be confined if monitoring is unavailable. In those circumstances the survivor would be, at least temporarily, safe.

<sup>151</sup> See, e.g., KY. REV. STAT. ANN. § 403.761 (West 2011).

<sup>152</sup> E.g., the city of Topeka, Kansas declined to prosecute prosecuting domestic violence misdemeanors for a period during the fall of 2011. See *All Things Considered: Robert Siegel Discusses Topeka, Kan., Repeals Domestic Violence Law*, NPR NEWS (Oct. 12, 2011), <http://www.npr.org/2011/10/12/141287214/topeka-repeals-domestic-violence-law>.

<sup>153</sup> See *supra* Part V.A.2; see also Santry, *supra* note 10, at 1118-20.

<sup>154</sup> See, e.g., Laurie L. Baughman, *Friend Request or Foe?*, 19 WIDENER L.J. 933, 945-53 (2010) (discussing evidentiary implications of technology).

<sup>155</sup> See, e.g., *Thissell*, 910 N.E.2d at 943 (GPS records sufficiently reliable—either as non-hearsay evidence or a recognized exception to hearsay rules); see also *Sukin*, 2007 WL 2254425, at \*2.

the admissibility of new technologies, whether DNA evidence or audio-frequency monitoring from an earlier time.<sup>156</sup> But judicial acceptance of GPS reports or other technologically related evidence will not happen overnight. Thus, there will be a period of time during which the evidence will be rejected. Further, there may be circumstances in which the evidence ought not to be admitted, due to authentication or other valid reliability flaws.<sup>157</sup>

### C. Unintended Consequences

The National Institute of Justice has recently issued a study on the effectiveness of GPS monitoring.<sup>158</sup> It demonstrates a beneficial reduction of recidivism, at least in some jurisdictions.<sup>159</sup> Not all of the study's findings, however, are similarly sanguine. One finding, in fact, is quite disturbing. The study indicates that GPS monitoring is being ordered for women who have had protection orders issued against them in situations involving a non-intimate family member, such as a daughter.<sup>160</sup>

Although perhaps counterintuitive, this outcome is possible because protection orders between two people who are not in an intimate relationship are possible. The class of protected persons in protection order statutes has been, in general, expanding.<sup>161</sup> Moreover, family members are nearly always included, so that a parent can seek a protection order from a child, a child from a parent, or siblings from each other. So although it may be legal to attach a GPS device to a woman offender who has violated an order against a daughter, a sister, or a mother, that scenario is not the driving force behind GPS monitoring legislation. In several states, GPS monitoring statutes were introduced after particularly heinous or high-publicity intimate terrorist killings.<sup>162</sup> Thus, while the imposition of monitoring in these

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<sup>156</sup> See, e.g., Gable, *supra* note 94, at 337.

<sup>157</sup> *Thissell*, 910 N.E.2d at 947 (admitting the evidence, but recommending that GPS records be properly attested and certified).

<sup>158</sup> E-mail from Edna Erez, Head of Dep't of Criminal Justice, Univ. of Ill. at Chicago, to author (Mar. 23, 2012, 10:59 a.m.) (on file with U. MASS. L. REV.).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See discussion *supra* Part II.

<sup>162</sup> See, e.g., Sheila Ahern, *Tragic Domestic Violence Death Leads to New Monitoring Legislation*, DAILY HERALD (Mar. 21, 2010), <http://www.dailyherald.com/article/20100321/news/303219959/>; Press Release, Dutchess Cty. Leg., GPS Pilot Program to Combat Dutchess Cty. Domestic Violence (May 12, 2011), available at [http://www.co.dutchess.ny.us/CountyGov/Departments/Legislature/19139\\_19737.htm](http://www.co.dutchess.ny.us/CountyGov/Departments/Legislature/19139_19737.htm).

non-intimate situations may be within the statutory purview, it foretells a larger problem.

This is not the first time that unintended consequences that harm victims have arisen from efforts to combat intimate terrorism. During the 1990s, for instance, mandatory arrest of batterers was heralded as an important part of the solution; states rushed to enact these laws.<sup>163</sup> As a result of these laws, there was an increase in dual arrests, i.e., both the victim and the batterer were arrested simultaneously.<sup>164</sup> Dual arrests occurred when police, upon arriving at the scene, believed that they could not sort out the facts to accurately determine the identity of the batterer.<sup>165</sup> Consequently, the police arrested both the alleged victim and alleged batterer. This often happened in circumstances where both parties were wounded, but the batterer's wounds were caused defensively by the victim in an effort to protect herself.

Although the increase in dual arrest eventually led to protocols that assist the police in determining the primary aggressor, it also revealed a negative side to laws that were perceived as an important advance forward.<sup>166</sup> Arrest of the victim leads potentially to dual protection orders; this provided a new tool of coercion for intimate terrorists—one that comes accompanied by state power. In part because of these negative consequences, mandatory arrest laws are now one of the few topics that are subject to criticism by all sides.<sup>167</sup>

Similarly, mandatory prosecution laws, once viewed as demonstrating that domestic violence crimes will be treated as seriously as other types of crimes, are now criticized for, at best, ignoring survivors' wishes. And at their worst, these laws now result in the legal system itself coercively controlling the survivor by forcing her to bend to the will of the prosecutor. The intimate terrorist's tactics of threats and manipulation are now transformed into a prosecutorial tool. For instance, prosecutors may subpoena survivors and, if they fail to appear or testify, the prosecutor may levy criminal charges against the survivors.<sup>168</sup>

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<sup>163</sup> See, e.g., Donna M. Welch, *Mandatory Arrest of Domestic Abusers: Panacea or Perpetuation of the Problem of Abuse?*, 43 DEPAUL L. REV. 1133, 1159 (1993).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1157-59.

<sup>167</sup> *Id.* at 1157.

<sup>168</sup> See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1910 (1996); Casey G. Gwinn & Anne O'Dell, *Stopping the Violence: The Role of the Police Officer and the Prosecutor*, 20 W. ST. U. L. REV. 297, 314 n.43 (1993).

Unintended consequences have extended beyond the arrest and prosecution of batterers. For example, judges, convinced that children may suffer harm when witnessing domestic violence, have started to consider the presence of domestic violence in the home when making custody determinations. This advance came after years of studying the effects of domestic violence on children and advocating those impacts to courts and legislatures.

Intended to protect children and mothers in the legal context of a custody battle, these gains instead have been used against adult and child survivors of intimate terrorism. Battered women have started to lose their children to foster care because the children were present in the home when the women were beaten. Thus, the rationale goes, the women had permitted their children to be exposed to domestic violence with all its pernicious effects by “allowing” the children to be at home during their mother’s abuse.<sup>169</sup> The knowledge of this possibility may deter survivors from calling the police, based on the all-too-real fear of losing their children to foster care.<sup>170</sup>

In other child custody circumstances, battered women are losing custody of their children due to “friendly parent” provisions now engrafted onto custody statutes.<sup>171</sup> These well-intended provisions are meant to protect children from being the victims of inter-parent squabbling. Judges are to award custody to the parent who is both more likely to encourage the child’s contact with the other parent and less likely to disparage the other parent. An intimate terrorist can easily portray his victim as the “unfriendly” parent who discourages or avoids contact, thus increasing the terrorist’s odds of getting custody or, perhaps, simply permitting the terrorist to use the legal system as yet another tool in aid of coercive control.

None of the above issues lend themselves to easy, clear, per se resolutions. They do illustrate, however, that advancements intended to combat intimate terrorism have a history of being used to the detriment of the victims. Initial indications suggest that DV/GPS

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<sup>169</sup> Dunlap, *supra* note 24.

<sup>170</sup> *Children and Women First? Voices From The Front Lines Of Domestic Violence On The Impact Of Child Welfare Reporting (VFC)*, OFFORD CENTRE FOR CHILD STUDIES (Mar. 6, 2012), <http://www.knowledge.offordcentre.com/component/content/article/73/286-children-and-women-first-voices-from-the-front-lines-of-domestic-violence-on-the-impact-of-child-welfare-reporting-vfc>.

<sup>171</sup> See, e.g., Lisa Bolotin, *When Parents Fight: Alaska’s Presumption Against Awarding Custody To Perpetrators Of Domestic Violence*, 25 ALASKA L. REV. 264, 274 (2008).

statutes may be the next area of progress that will be construed against victims.

## **VI. CONCLUSION**

It has always been hard, and potentially lethal, for the Frans of this world to escape the Bobbys. Some do—these are the survivors. Others don't—these are the victims. Technology is, as often as not, an aid to the intimate terrorist. The uber-speed of technological advances can overwhelm a deliberative legal system's efforts to thwart technology's negative effects. Although the pace may be ill-matched, efforts must continue to prevent the intimate terrorist from enlarging his power through technology. Once these efforts yield results, further effort is needed to see that intimate terrorism survivors are not harmed by measures intended to aid them.