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The ***Special Needs Doctrine*** and REDUCED EXPECTATIONS OF PRIVACY UNDER THE FOURTH AMENDMENT

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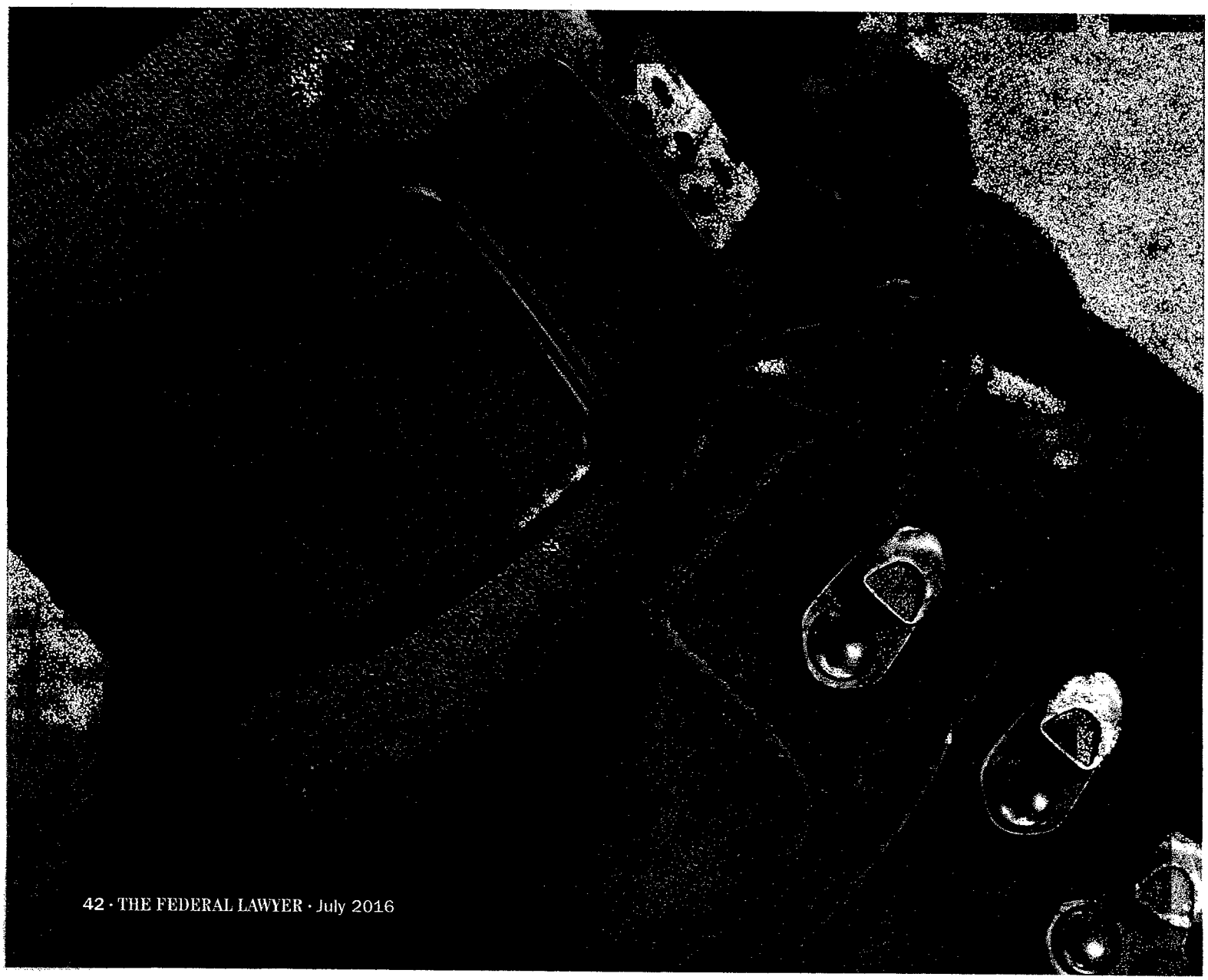

has a diminished expectation of privacy by virtue of his or her prior conviction.[21] At least one member of the Seventh Circuit panel relied upon the special needs doctrine.[22]

Michael Belleau was convicted of a series of sexual assaults involving young children.[23] After that conviction but before his release from prison, Belleau was civilly committed after a trial in which he was found to be "dangerous because he ... suffers from a mental disorder that makes it likely that [he] will engage in one or more acts of sexual violence."[24] In 2010, he was released from civil confinement without any further state supervision.[25] Because of the enactment of Wisconsin's electronic monitoring statute in 2006, Belleau was (and remains) required to wear a GPS monitoring device 24 hours a day for the rest of his life.

Belleau filed suit challenging the constitutionality of the statute asserting, *inter alia*, that it violated his rights under the Fourth Amendment.[26] The District Court held that the statute violated the Fourth Amendment, noting that the GPS tracking system could be used for law enforcement purposes.[27] Specifically, the District Court noted that the state's authority for attaching the device directly to Belleau's person was because he might commit a crime in the future, even though the state admitted it did not have probable cause to support this claim.[28] The District Court stated: "Protection of the public, deterrence, and assisting in the investigation of crime clearly constitute crime control ends."[29] Because the special needs doctrine can only be applied to searches that are *not* for law enforcement purposes, the inquiry could have stopped here. But the District Court continued its analysis and applied a balancing test of the interests at stake and found the electronic monitoring required by the statute constituted an unreasonable search based in large part on the fact that the monitoring was continuous and lifelong, which would extend the special needs doctrine far beyond its current constraints.[30]

The Seventh Circuit overruled the District Court and found that the electronic monitoring required by the Wisconsin statute was a reasonable search and therefore did not violate the Fourth Amendment.[31] In a separate concurring opinion, one member of the panel framed the question as whether the statute was for the primary purpose of "uncover[ing] evidence of ordinary criminal wrongdoing" or "is ultimately indistinguishable from the general interest in crime control."[32] The court found the latter to be the case, stating:

> The program reduces recidivism by letting offenders know that they are being monitored and creates a repository of information that may aid in detecting or ruling out involvement in future sex offenses. These goals are not focused on obtaining evidence to investigate a particular crime. Information gathered from this program may, at some later time, be used as evidence in a criminal prosecution, *but that is not the primary purpose of the program.* Indeed, the program is set up to obviate the likelihood of such prosecutions.[33]

At least one other circuit has held that "the mere fact that crime control is *one* purpose—but not the *primary* purpose—of a program of searches does not bar the application of the special needs doctrine."[34]

Having found that law enforcement was not the primary goal of the Wisconsin statute, the Seventh Circuit also found the lifetime, electronic monitoring to be a reasonable search when balancing the government's interests against those of Belleau. The court addressed, at length, recidivism rates for convicted sex offenders and the underreporting of child sex crimes before concluding that Belleau could not be considered harmless.[35] Based on these considerations, the Court concluded "that persons convicted of crimes, especially very serious crimes such as sexual offenses against minors, and especially very serious crimes that have high rates of recidivism such as sex crimes, have a diminished *reasonable* constitutionally protected expectation of privacy."[36] This conclusion appears to conflate the expectations of parolees, who often agree to suspicionless searches as a condition of parole, with the expectations of citizens who are no longer under government supervision. Regardless, the result of this decision appears to curtail the Fourth Amendment rights of individuals based solely on a previous conviction.

Opposition to curtailing constitutional rights often makes for strange bedfellows. At first blush, requiring convicted sex offenders to submit to lifetime electronic monitoring seems like a reasonable balancing of interests, especially if even one child is spared the horrors of sexual assault. But "[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."

Opposition to curtailing constitutional rights often makes for strange bedfellows. At first blush, requiring convicted sex offenders to submit to lifetime electronic monitoring seems like a reasonable balancing of interests, especially if even one child is spared the horrors of sexual assault. But "[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases, and the Red Scare and McCarthy-era internal subversion cases, are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it."[37] "Statutes authorizing unreasonable searches were the core concern of the framers of the Fourth Amendment."[38] The Seventh Circuit's ruling may not be limited to