

# The Evolution of Unconstitutionality in Sex Offender Registration Laws

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*More is not always better. Consider sex offender registration laws. Initially anchored by rational basis, registration schemes have spiraled out of control because legislators, eager to please a fearful public, have been given unfettered freedom by a deferential judiciary.*

*This Article does not challenge the state's legislative power to enact sex offender registration laws. Instead, this Article posits that, even if sex offender registration schemes initially were constitutional, serially amended sex offender registration schemes—what this Article dubs super-registration schemes—are not. Their emergence demands reexamination of the traditionally held assumptions that defined original registration laws as civil regulations.*

*Two intertwined causes are responsible for the schemes' constitutional downfall. The first is a legislative body eager to draft increasingly harsh registration and notification schemes to please an electorate that subsists on a steady diet of fear. When combined with the second cause, a Supreme Court that has yet to signal much-needed boundaries, the ensuing consequence is runaway legislation that is no longer rationally connected to its regulatory purpose. Ultimately, this Article is a cautionary tale of legislation that has become unmoored from its constitutional grounding because of its punitive effect and excessive reach.*

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*Excess*: action that goes beyond a reasonable amount.  
 —*Webster's New World Dictionary and Thesaurus*<sup>1</sup>

## INTRODUCTION

More is not always better. Consider sex offender registration laws. Initially anchored by rational basis, registration schemes have spiraled out of control because legislators, eager to please a fearful public, have been given unfettered freedom by a deferential judiciary. It has been a perfect storm of intersecting legislative action and judicial *inaction* that has produced ever-escalating registration burdens. Set against this backdrop, a new breed of law has emerged—what this Article terms *super-registration* schemes—resulting from unchecked legislative action spurred on by emotionally charged rhetoric.

If sex offender registration laws originally were designed to protect the children of a community,<sup>2</sup> then according to prevailing political thought, harsher sex offender laws surely must protect children more effectively. Unfortunately, that philosophy is neither accurate nor constitutional: inaccurate for its reliance on unproven recidivism statistics<sup>3</sup> and false claims of security,<sup>4</sup> and unconstitutional for its

1. WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS 214 (1996).

2. See *infra* notes 21–31 and accompanying text.

3. Some have criticized the blind adoption of statistics claiming that sex offenders recidivate at a higher rate than do other types of offenders. See, e.g., Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 57–58 (2010) (referencing Department of Justice statistics to rebut the claim that sex offenders recidivate at higher rates); Wayne A. Logan, *Megan's Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 393–94 (2011) (explaining the various sociological and political factors that may account for the claim of recidivism); Doron Teichman, *Sex, Shame and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355, 382–83 (2005) (arguing that interpreting recidivism data is more complex than generally acknowledged); Jane A. Small, Note, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1457 (1999) (identifying the flaws in adjudging recidivism rates of sex offenders).

4. A study commissioned by the Texas Senate Committee on Criminal Justice in 2010 concluded that “[b]ased on the research [and] the testimony provided during the hearing, it is clear registries do not provide the public safety, definitely not the way it is now.” S. COMM. ON CRIM. JUSTICE, INTERIM REPORT TO 82ND LEG., S. REP. NO. 81, at 4 (Tex. 2010), available at <http://www.senate.state.tx.us/75r/senate/commit/c590/c590.InterimReport81.pdf>. One need only review the tragic circumstance surrounding the capture and seventeen-year imprisonment of Jaycee Dugard by convicted sex offender Phillip Garrido to appreciate that sex offender registration laws at most aid in the apprehension of suspects, but do little to protect children. See Marisol Bello, *Questions Arise on Monitoring of Sex Offenders*, USA TODAY, Sept. 2, 2009, at A3 (observing ironically that Phillip Garrido was able to keep Jaycee Dugard captive for so long despite the fact that “[e]very April 5 for the past 10 years, Phillip Garrido registered on his birthday . . . as a convicted sex offender”); Maura Dolan, *Federal Parole Officials Released Phillip Garrido from 50-year Sentence After Short Interview*, L.A. TIMES, Sept. 5, 2009, at A9 (reporting that Phillip Garrido was on parole and subject to regular inspections and visits by his parole officers during the time that Jaycee Dugard remained his captive); see also Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 853–54 (1996) (arguing that notification laws create a false sense of security in the

excessive and punitive effect. Like “piling on” penalties in football that can nullify clean tackles,<sup>5</sup> serially amended sex offender registration schemes are faltering under their own weight and ambition.<sup>6</sup>

This Article posits that two intertwined causes are responsible for these schemes’ constitutional downfall. The first is a legislative body eager to draft increasingly harsh registration and notification schemes to please an electorate that subsists on a steady diet of fear. When combined with the second cause, a Supreme Court that has yet to signal much-needed boundaries, the ensuing consequence is runaway legislation that has become unmoored from its initial constitutional grounding.

Despite significant changes to registration schemes over the past several years, courts and legislative bodies continue to rely on two Supreme Court opinions from the 2003 term to define the parameters of constitutionality in sex offender registration laws. In *Smith v. Doe*, the Court grappled with whether registration schemes violated ex post facto principles by requiring retroactive application to offenders convicted prior to the enactment of the laws.<sup>7</sup> And in *Connecticut Department of Public Safety v. Doe*, the Court addressed whether procedural due process demands that we afford convicted sex offenders the opportunity to be heard as to the level of danger they pose before their information is disseminated to the community.<sup>8</sup>

In both cases, the Court upheld, albeit on different bases, the constitutionality of sex offender registration schemes as civil regulations, leaving them unencumbered by the substantive and procedural requirements traditionally associated with criminal laws. *Smith* held that because sex offender registration laws are regulatory in nature, the constitutional ex post facto principle is inapplicable,<sup>9</sup> while *Connecticut Department of Public Safety* determined that procedural due process did

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community because of the inherent voluntariness of the system).

5. See James Alder, *About Football Glossary—Piling On*, ABOUT.COM, [http://football.about.com/cs/football101/g/gl\\_pilingon.htm](http://football.about.com/cs/football101/g/gl_pilingon.htm) (last visited Mar. 17, 2012) (“An illegal play where several players jump on the player with the ball after he’s been tackled.”).

6. Several recent state court decisions have declared super-registration schemes unconstitutional because of their excessive and overinclusive nature. See *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (concluding that Indiana’s amended scheme violates constitutional principles); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009) (concluding that the state’s new registration scheme violates ex post facto principles); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (ruling that sections of the state’s sex offender laws unconstitutionally increase the punishment for crimes committed before the law took effect). Apart from the potential constitutional infirmities, the new sex offender registration schemes come with an exorbitant pricetag and are proving very difficult to enact and enforce. See Emanuella Grinberg, *5 Years Later, States Struggle to Comply with Federal Sex Offender Law*, CNN.COM (July 28, 2011, 11:51 AM), [http://www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/index.html?hpt=hp\\_c2](http://www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/index.html?hpt=hp_c2).

7. 538 U.S. 84, 89 (2003).

8. 538 U.S. 1, 1 (2003).

9. 538 U.S. at 105.

not require individualized assessment for the dissemination of registrants' information to the community.<sup>10</sup> Together, the decisions impart a striking message: Sex offender registration laws will be allowed to flourish as valid regulatory measures despite their intrusive impact.

It is only human nature—indeed it is the best of political nature—that left unchecked, drafters will test constitutional boundaries with ever-broadening legislation.<sup>11</sup> It is not surprising, then, that these interrelated decisions gave politicians an implicit “green light” to ramp up registration and notification requirements. Even the Court's decisions in *Carr v. United States*<sup>12</sup> and *Reynolds v. United States*<sup>13</sup> will do little to dampen this message. Although *Carr* limited the reach of the Sex Offender Registration and Notification Act's (“SORNA”) “failure to register” law<sup>14</sup> to offenders who traveled interstate after SORNA's enactment,<sup>15</sup> and *Reynolds* defined the role of the Attorney General to specify which pre-Act offenders must comply with SORNA,<sup>16</sup> neither case addressed whether SORNA is punitive in nature or in effect. Instead, both decisions framed the inquiry into SORNA around narrow questions of congressional intent.<sup>17</sup> Parsing language to determine the reach of “failure to register”<sup>18</sup> and to define the authority of the Attorney General to implement SORNA<sup>19</sup> enabled the Court to avoid the fundamental question of whether ex post facto principles are violated by the arguably punitive nature of registration schemes. Therefore, even

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10. 538 U.S. at 8 (“States are not barred by principles of ‘procedural due process’ from drawing such classifications.” (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion))).

11. An interesting example of swelling unchecked legislation can be found in the number of strict liability offenses, which has grown considerably since such offenses were first codified in the mid-nineteenth century. See Eric A. Degroff, *The Application of Strict Criminal Liability to Maritime Oil Pollution Incidents: Is There OPA for the Accidental Spiller?*, 50 *LOV. L. REV.* 827, 841–843 (2004) (tracing the significant expansion of strict liability offenses). Only recently did the Supreme Court squash the proliferation. See John Shepard Wiley, Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 *VA. L. REV.* 1021, 1022–23 (1999) (examining recent decisions to conclude that the Court has reinvented the importance of moral culpability, and therefore mens rea, as a necessary component of a conviction).

12. 130 S. Ct. 2229 (2010).

13. 132 S. Ct. 975 (2012).

14. Pub. L. No. 109-248, § 141(a)(1), 120 Stat. 587, 601–04 (2006) (codified as amended at 18 U.S.C. § 2250 (2010)). Some states have adopted the “SORNA” acronym for their registration and notification statutes. As the Court explained in *Carr*, § 2250 subjects to criminal penalties “any person who (1) ‘is required to register under [SORNA]’, (2) ‘travels in interstate or foreign commerce,’ and (3) ‘knowingly fails to register or update a registration.’” 130 S. Ct. at 2232.

15. 130 S. Ct. at 2241.

16. 132 S. Ct. at 978.

17. *Reynolds*, 132 S. Ct. at 980 (exploring whether SORNA applies to pre-Act offenders before the Attorney General so determines); *Carr*, 130 S. Ct. at 2241 (examining whether the failure-to-register criminal penalties applied to offenders whose interstate travel occurred prior to SORNA's enactment).

18. *Carr*, 130 S. Ct. at 2234–37.

19. *Reynolds*, 132 S. Ct. at 980–82.

taking into account the contribution of *Carr* and *Reynolds* to the discussion, a natural outgrowth of the Court's jurisprudence is what we have today: a second generation of sex offender statutes more burdensome and stigmatizing than its parent.

Part I of this Article examines the current state of sex offender legislation. It traces the growth of sex offender registration laws and community notification statutes after *Smith v. Doe* and *Connecticut Department of Public Safety*. Expansion includes more significant affirmative reporting obligations, a corresponding increase in the level and intensity of community notification, and, most important, the systematic elimination of individualized risk assessment. Part II reviews the case law and theories that guide a court's determination as to whether a law is a civil regulation or a criminal statute cloaked in civil rhetoric. Part II further explains the consequences of such determinations.

The balance of the Article explores the pervasive theme of excessiveness and its impact on the constitutionality of super-registration schemes. Part III analyzes today's sex offender schemes under ex post facto principles to determine whether the assumptions that controlled in *Smith v. Doe* continue to have vitality. This Part concludes that new assumptions dominate super-registration schemes, which recast these schemes as criminal penalties cloaked in civil disguise. Part IV makes the case that excessive legislation results in both substantive and procedural due process violations because registrants have been deprived of profound liberty interests under this generation of registration laws.

If one observation can be made, it is this: Judicial deference to legislative authority is no longer an appropriate response to ever-harshening registration schemes. Despite the disapproval and fear that sex offenders generate in the community, the judiciary's role must be to support and preserve foundational constitutional principles "without respect to persons."<sup>20</sup> Without judicial intervention to set boundaries, legislators will continue to respond to the community's collective fear with expanding laws that punish the sex offender. That is why Part V, entitled "Enough is Enough," heralds three state supreme courts that have filled the judicial silence with eloquent opinions that recognize the punitive nature of these serially amended schemes.

#### I. A RACE TO THE HARSHTEST: A SNAPSHOT OF THE NEW GENERATION OF SEX OFFENDER REGISTRATION LAWS

Separate incidents involving three young children—Adam,<sup>21</sup> Jacob,<sup>22</sup> and Megan<sup>23</sup>—each of whom was abducted and murdered, coalesced in a

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20. 28 U.S.C. § 453 (2010) ("Oaths of Justices and Judges").

21. Six-year-old Adam Walsh was abducted and murdered in 1981. *The Adam Walsh Story*, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, <http://www.missingkids.com/missingkids/servlet/>

national conversation on crimes against children.<sup>24</sup> The accounts are well known, but they are still heartbreaking to hear. Spearheaded by grieving families,<sup>25</sup> the conversation transformed into political action and resulted in a myriad of legislation including the passage of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (“SORA”).<sup>26</sup> The Act required each of the fifty states to adopt sex offender registration laws within three years of the Act’s passage in order to receive federal law enforcement funding.<sup>27</sup> The first generation of sex offender laws passed in response to SORA “was designed as a tool solely for law enforcement agencies, and registry records were kept confidential.”<sup>28</sup> In 1996, under its famous moniker “Megan’s Law,” Congress amended the Jacob Wetterling Act to include the dissemination of registration information to the community through community notification statutes.<sup>29</sup>

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PageServlet?PageId=1156 (last visited Mar. 17, 2012). Adam’s father, John Walsh, established the National Center for Missing and Exploited Children in response to Adam’s death. *About John Walsh*, AMERICA’S MOST WANTED, [http://www.amw.com/about\\_amw/john\\_walsh.cfm](http://www.amw.com/about_amw/john_walsh.cfm) (last visited Mar. 17, 2012).

22. Eleven-year-old Jacob Wetterling was abducted at gunpoint in front of his friends in 1989 and was never found. *How We Began and the Need for Transition*, JACOB WETTERLING RESOURCE CTR., <http://www.jwrc.org/WhoWeAre/History/tabid/128/Default.aspx> (last visited Mar. 17, 2012).

23. Seven-year-old Megan Kanka was sexually assaulted and murdered in 1994 by Jesse Timmendequas, a neighbor who, unbeknownst to Megan’s family, had prior convictions for sexual assault against children. *State v. Timmendequas*, 737 A.2d 55, 66–73 (N.J. 1999).

24. *See, e.g.*, Manuel Mendoza, *Nation Responds to Adam Re-Airing*, MIAMI NEWS, May 1, 1984, at 5A (reporting the flood of tips on missing children after the airing of Adam Walsh’s disappearance); Bud Newman, *Missing Children Center Like a Dream for Walsh*, PALM BEACH POST, Apr. 19, 1984, at A2 (announcing the opening of the National Center on Missing and Exploited Children); *see also* Steve Irsay, *The Search for Jacob*, CNN.COM (Nov. 26, 2002, 7:25 PM), <http://archives.cnn.com/2002/LAW/11/19/ctv.wetterling/index.html> (recounting theories on the abduction Jacob Wetterling).

25. For an account of the contribution each family made to the passage of registration and notification laws, *see* Carpenter, *supra* note 3, at 19–21.

26. *See* Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)) (repealed 2006) (establishing federal guidelines for state sex offender registration laws). Some states have adopted the “SORA” acronym for their registration and notification statutes.

27. *Id.* § 170101(g). States that did not comply were faced with a decrease in federal funding. *See id.* Although congressional action provided the final push for nationwide sex offender legislation, there were a few states that passed sex offender registration laws much earlier. *See* Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 887 n.4 (1995) (noting that the first states to introduce sex offender registration laws were Alabama, Arizona, California, Illinois, and Nevada, all between 1947 and 1967).

28. *Doe v. Mich. Dep’t of State Police*, 490 F.3d 491, 495 (6th Cir. 2007) (relating the history of SORA).

29. Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071 (2010)). The act provided that the designated state law enforcement agency “shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section.” *Id.* So strong was the public’s reaction to the Kankas’ call for reform, that New Jersey passed the first Megan’s Law just three months after Megan’s murder. *See* E.B. v. Verniero, 119 F.3d 1077, 1081–82 (3d Cir. 1997).

However, SORA was only the beginning. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act (“AWA”).<sup>30</sup> Encompassed in the AWA is SORNA,<sup>31</sup> which includes a set of regulations, penalties, and punishments for sex offenders, and a comprehensive national system for their registration.<sup>32</sup>

Passage of SORNA redefined the landscape. The ensuing years have been marked by a dizzying array of increased registration and community notification requirements, the emergence of harshening residency restrictions, and the elimination of individuated risk assessment.<sup>33</sup> Although jurists and scholars alike decried aspects of the original sex offender registration schemes,<sup>34</sup> in retrospect, those laws were tame by comparison to SORNA and its progeny.<sup>35</sup>

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30. Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 and 42 U.S.C. (2010)). The Act has been the subject of considerable scholarly criticism. *See, e.g.*, Steven J. Costigliacci, *Protecting Our Children from Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180, 183–84 (2008) (criticizing the lack of flexibility in determining registrants’ status under the AWA); David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 628 (2006) (arguing that residency restrictions have not been proven effective); Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 706–08 (noting that the AWA, enacted to protect minors, has harmed juvenile offenders who have been subject to its provisions); Emily A. White, Note, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 WASH. & LEE L. REV. 1783, 1792–93 nn.64–66 (2008) (noting a split among district courts regarding the retroactive applicability of provisions of the AWA).

31. Pub. L. No. 109-248, tit. I, 120 Stat. 590 (2006) (codified as amended at 42 U.S.C. §§ 16901–16929 (2010)). SORNA established “the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program,” immortalizing three of the most notable victims of sex offenders. *See* 42 U.S.C. § 16902 (2010).

32. *See* 42 U.S.C. §§ 16911–16929 (2010). A brief overview of SORNA’s most basic requirements should paint a sufficient picture of the regulations put into effect. SORNA requires every sex offender to register in the jurisdictions where the offender lives, works, and goes to school. *Id.* § 16913(a). Registration includes the provision of specified information to law enforcement, which will be included in the jurisdiction’s sex offender registry, for a period of fifteen years to life depending on the level of the offender. *Id.* §§ 16914(a), 16915(a). The Act authorizes the Attorney General to collect certain Internet-related information, as determined by the Attorney General, to be included in a federal registry. *See id.* §§ 16914(a)(7), 16915(a). SORNA also requires that every jurisdiction provide for a criminal penalty that includes a maximum term of imprisonment that is greater than one year for a failure to comply with the registration requirements espoused in the Act. *Id.* § 16913(e). SORNA requires each jurisdiction to make the registry information available to the public on the Internet. *Id.* § 16918. The Act also established a national sex offender registry, which is accessible by the public via a website. *Id.* §§ 16919–16920.

33. Courts have acknowledged the substantial changes to sex offender registration schemes. *See, e.g.*, *Wallace v. State*, 905 N.E.2d 371, 374–77 (Ind. 2009) (recounting the numerous changes to the federal and Indiana sex offender registration schemes); *see also State v. Henry*, 228 P.3d 900, 903–05 (Ariz. Ct. App. 2010) (providing a detailed history of amendments to Arizona’s offender schemes); *State v. Letalien*, 985 A.2d 4, 8–11 (Me. 2009) (detailing the extensive amendments to Maine’s registration scheme); *Doe v. Nebraska*, 734 F. Supp. 2d 882, 894 (D. Neb. 2010) (discussing the impact of two 2009 amendments to Nebraska’s sex offender registration laws); *State v. Bodyke*, 933 N.E.2d 753, 757–60 (Ohio 2010) (detailing the amendments to Ohio’s sex offender registration scheme).

34. For examples of judicial criticism, *see Doe v. Pryor*, 61 F. Supp. 2d 1224, 1226 (M.D. Ala.



The revised registration schemes include an ever-increasing number of registerable offenses, lengthening durational requirements, expanded personal information reporting requirements, harsher residency restrictions, the introduction of the GPS tracking device, and the systematic elimination of individualized assessment as a touchstone.<sup>36</sup> One embodiment of the super-registration scheme is California's Jessica's Law,<sup>37</sup> the highly trumpeted ballot measure that was passed by California voters in 2006.<sup>38</sup> Acknowledged on both the ballot measure<sup>39</sup> and in subsequent case law as the toughest in the country,<sup>40</sup> Jessica's Law expanded the list of registerable offenses and made more stringent reporting requirements and notification procedures.<sup>41</sup>

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1999) (characterizing Alabama's registration scheme as "among the . . . most restrictive of such laws in the nation"); *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998) ("[T]he registration provisions of the Act place a 'tangible burden' on plaintiffs, potentially for the rest of their lives."); *Doe v. Dep't of Pub. Safety*, 92 P.3d 398, 409–10 (Alaska 2004) (reiterating the burdensome nature of Alaska's registration requirements); *State v. Robinson*, 873 So. 2d 1205, 1213 (Fla. 2004) (recognizing that Florida's statute "imposes more than a stigma," subjecting designated sexual predators to "life-long registration requirements"); *State v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) ("The practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment."). For scholarly criticism, see, for example, Bedarf, *supra* note 27, at 939; Earl-Hubbard, *supra* note 4, at 826 ("Although the registration laws have a regulatory purpose, the laws cause offenders to suffer a disability that is so punitive as to negate this regulatory intent."); Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 593–95 (2000) (disputing the assumption that sex offenders recidivate at higher rates); see also Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 299 (2006) (challenging the inclusion of strict liability sex offenses in registration schemes).

35. See Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 370–71 (2009) (contending that SORNA's provisions must be amended to meet constitutional muster).

36. See *infra* Part I.

37. Jessica's Law is named in memory of nine-year-old Jessica Lunsford, who was raped and murdered by John Couey, a convicted sex offender. See Terry Aguayo, *Sex Offender Guilty of Rape and Murder of Florida Girl*, N.Y. TIMES, Mar. 8, 2007, at A15.

38. See Sexual Predator Punishment and Control Act: Jessica's Law, Prop. 83, § 22, 2006 Cal. Legis. Serv. 2155 (West) (codified as amended in scattered sections of Cal. Penal Code).

39. *Id.*

40. See, e.g., *People v. Mosley*, 116 Cal. Rptr. 3d 321, 332 (Ct. App. 2010) (listing the "dozens of changes to the laws" concerning the registration and notification schemes).

41. *Id.* The passage of Jessica's Law sparked controversy and invoked scrutiny. Shortly after the law was approved by California voters, a federal judge issued a temporary injunction against the retroactive enforcement of the law's residency restrictions. Jenifer Warren, *Judge Blocks Part of Sex Offender Law*, L.A. TIMES, Nov. 9, 2006, at A32. The law's sponsors, however, did not intend for those restrictions to apply retroactively. See *id.*; see also Bill Ainsworth, *Law Creates Homeless Parolees, Report Says—Sex Offenders Limited by Residency Rules*, SAN DIEGO UNION-TRIBUNE, Feb. 22, 2008, at A1 (observing that residency restrictions imposed by Jessica's Law have caused many sex offenders in California to become homeless). Nonetheless, the California Supreme Court ruled that the residency restrictions can be applied retroactively to offenders who committed their crimes before the law passed but were paroled after it took effect. *In re E.J.*, 223 P.3d 31, 38–40 (Cal. 2010).

Registration schemes like Jessica's Law have been propelled into passage by the public's fear of the stereotypic image of the sex offender—the violent pedophile on the lookout for small children.<sup>42</sup> Unfortunately, that singular perception ignores the reality that sex offender statutes stigmatize wide-ranging actions and apply to broad segments of the population. Although the cast of characters may change, countless cases relay stories of offenders, no longer dangerous, struggling to maintain stability in lives governed by ever-evolving and increasingly stringent legislation.

The face of registration includes Dean Edgar Weisart, who was convicted of indecent exposure for skinny-dipping with his girlfriend in a hotel pool in 1979 and then required to register more than twenty years later.<sup>43</sup> It contemplates offenders such as Ricky Blackmun, whose family moved to Oklahoma from Iowa for a fresh start after Ricky was convicted as an adult sex offender for having sex with a thirteen-year-old girl when he was sixteen.<sup>44</sup> Even though Ricky's record was expunged in Iowa, he was required to register as a tier III sex offender—the highest level—in Oklahoma until a change in the law terminated his duty to register.<sup>45</sup> Registration rolls are also populated by children—adjudicated juvenile offenders who, despite their ages, face the same burdensome registration requirements for certain offenses as do convicted adults.<sup>46</sup>

The face of registration also comprises offenders displaced from their homes because of onerous residency restrictions.<sup>47</sup> In New York, a seventy-seven-year-old convicted offender living in Manhattan was banished from his residence of some forty years because of amended New York residency restrictions.<sup>48</sup> In South Florida, numerous convicted offenders live under the Julia Tuttle Causeway, a large bridge, because there is no community in South Florida where they may reside without violating residency restrictions.<sup>49</sup> In Georgia, Anthony Mann, a registered

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42. This image is seared into everyone's minds because of the tragic death of Megan Kanka, who was killed by a violent pedophile. *See supra* notes 22–23.

43. *See* *Wiesart v. Stewart*, 665 S.E.2d 187, 187–88 (S.C. Ct. App. 2008); *see also* *State v. Chun*, 76 P.3d 935, 935–36, 942 (Haw. 2003) (concluding that the offense of Llewelyn Chun, a husband and father who pled no contest to indecent exposure and was required to register, was not registration-worthy because it did not entail “criminal sexual conduct”).

44. Emanuella Grinberg, *No Longer a Registered Sex Offender, but the Stigma Remains*, CNN.COM (Feb. 11, 2010), [http://articles.cnn.com/2010-02-11/justice/oklahoma.teen.sex.offender\\_1\\_offender-registry-oklahoma-label](http://articles.cnn.com/2010-02-11/justice/oklahoma.teen.sex.offender_1_offender-registry-oklahoma-label).

45. *Id.*

46. *See, e.g.*, *Helman v. State*, 784 A.2d 1058 (Del. 2001) (holding that registration and community notification requirements are constitutional as applied to juveniles); *In re J.W.*, 787 N.E.2d 747 (Ill. 2003) (affirming lifetime registration for an adjudicated juvenile offender); *In re Welfare of J.R.Z.*, 648 N.W.2d 241, 247–48 (Minn. Ct. App. 2002) (upholding lifetime registration for an eleven-year-old).

47. For a description of the changes in residency restrictions, see *infra* Part I.D.

48. *Berlin v. Evans*, 923 N.Y.S.2d 828, 828 (Sup. Ct. 2011).

49. Catharine Skipp & Arian Campo-Flores, *A Bridge Too Far*, NEWSWEEK, Aug. 3, 2009, at 46;

sex offender, was prohibited from entering the restaurant he half owned and ran because child-care facilities located themselves within 1000 feet of Mann's business.<sup>50</sup>

These are the casualties of a system that at the outset was intended to protect the public from dangerous offenders but that has evolved into the politically motivated pursuit of harsher laws designed to satisfy a fearful public.<sup>51</sup> Unfortunately, in that pursuit, these laws have become excessively punitive and, consequently, are no longer rationally connected to their regulatory purpose.<sup>52</sup>

#### A. GROWING NUMBER OF REGISTERABLE OFFENSES

Since the 1990s, registration-worthy sex offenses have grown dramatically in number and scope. For example, in 1994, when the Indiana General Assembly adopted Zachary's Law, the state's first registration scheme (named in honor of ten-year-old Zachary Snider, who was molested and murdered by a convicted molester),<sup>53</sup> a mere eight crimes triggered registration.<sup>54</sup> Currently, Zachary's Law lists forty offenses that trigger registration: twenty-one offenses trigger registration as a "sex or violent offender"<sup>55</sup> and an additional nineteen offenses

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see Catharine Skipp, *A Law for the Sex Offenders Under a Miami Bridge*, TIME (Feb. 1, 2010), <http://www.time.com/time/nation/article/0,8599,1957778,00.html>.

50. *Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740, 742 (Ga. 2007) (finding Georgia's residency restrictions unconstitutional only insofar as they permitted the regulatory taking of the defendant's home without just compensation).

51. Much has been written on the public's fear and commensurate desire for harsher punishments. See WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* 85–108 (2009) (exploring the social and political catalysts for the proliferation of registration schemes); Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997) (examining the reasons why the public favors harsh punishments in the face of countervailing evidence); Singleton, *supra* note 30, at 602–07 (arguing that an increase in crime reporting in the media induced the proliferation of sex offender registration laws); see also William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 781 (2006) (contending that the harsh justice of the 1970s was a response to the "constitutional proceduralism" of the 1960s).

52. See Carpenter, *supra* note 3, at 51–55 (arguing that the increasing harshness of registration schemes is tied to a political desire to push offenders from their communities before adjoining communities do the same). Although the legislative intent behind registration schemes is often characterized as remedial in nature, the emotional charge prompting the legislation sometimes is not. See, e.g., *Doe v. Nebraska*, 734 F. Supp. 2d 882 (D. Neb. 2010) (acknowledging that the sponsoring legislator expressed rage and revulsion toward convicted offenders).

53. See *Overview of Zachary's Law*, ALLEN COUNTY SHERIFF (Jan. 5, 2011), <http://www.allencountysheriff.org/sexoffender/zachary.html> (providing the background of the passage of Zachary's Law). For a review of the rise of personalized legislation and specifically naming legislation in honor of children victims, see Carpenter, *supra* note 3, at 23–34 (suggesting that the names are an effective marketing technique based on their simplicity and emotional power).

54. See *Wallace v. State*, 905 N.E.2d 371, 375 (Ind. 2009) (detailing the historical development of registerable offenses in Indiana); see also *State v. Letalien*, 985 A.2d 4, 8–11 (Me. 2009).

55. IND. CODE § 11-8-8-5, -7 (2011), *invalidated by Wallace*, 905 N.E.2d 371.

trigger registration as a “sex offender.”<sup>56</sup> Other states have similar trajectories, with some registration schemes adding as many as forty registration-worthy offenses to their initial legislation.<sup>57</sup>

In addition, some states have introduced “discretionary registration,” which permits courts to require registration where mandatory registration is otherwise not required<sup>58</sup> or not allowed.<sup>59</sup> In *People v. Picklesimer*, for example, the State conceded that the defendant’s oral copulation with a seventeen-year-old girl was “voluntary,” and that his conviction therefore could not support mandatory registration under existing California law.<sup>60</sup> However, the State successfully argued that the defendant’s conviction supported the trial court’s decision to impose *discretionary* lifetime registration under California’s sex offender statute.<sup>61</sup> Indeed, the watchword appears to be “discretionary,” as legislative enactments specifically rest discretion as to a number of legal points with one of the federal or state government branches.<sup>62</sup>

Commensurate with the increase in the number of offenses is their shifting classification. To be sure, reclassification is not merely a case of semantics. When a crime is reclassified as more dangerous, so, too, is the

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56. IND. CODE § 11-8-8-4.5, *invalidated by Wallace*, 905 N.E.2d 371.

57. *See, e.g., Letalien*, 985 A.2d at 8 (discussing Maine’s first registration scheme, which limited the class of registrants to only those persons who had been convicted of gross sexual assault involving a victim who was under sixteen years of age at the time of the commission of the crime). *Compare Femedeer v. Haun*, 227 F.3d 1244, 1247 n.1 (10th Cir. 2000) (noting that Utah’s registration scheme at that time listed nineteen triggering offenses), with UTAH CODE ANN. § 77-27-21.5(g), (n) (2011) (listing twenty-nine registerable offenses); *see also* LA. REV. STAT. ANN. § 15:541(24)(a) (2011) (listing twenty-six offenses that qualify as sexual offenses, including voyeurism and video voyeurism); N.Y. CORRECT. LAW § 168-a (2011) (cataloguing over forty registerable offenses in New York).

58. *See, e.g., CAL. PENAL CODE* § 290.006 (2011) (providing for discretionary registration where “the court finds at the time of conviction or sentencing that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification”); LA. REV. STAT. ANN. § 15:544(E)(1) (2011) (permitting a court to impose lifetime registration after a contradictory hearing); LA. REV. STAT. ANN. § 15:544(E)(1) (stating that the district attorney and the offender may enter into a plea agreement whereby the offender will be subject to lifetime registration without a contradictory hearing).

59. *See, e.g., People v. Picklesimer*, 226 P.3d 348, 357 (Cal. 2010) (explaining that mandatory registration for those convicted of oral copulation with a minor is unconstitutional under California case law, but that discretionary registration is not).

60. *Id.* at 356 (citing *People v. Hofsheier*, 129 P.3d 29 (Cal. 2006)).

61. *Id.* at 357. The California Supreme Court determined that there was “no constitutional bar to having a judge exercise his or her discretion to determine whether [one convicted of a crime] should continue to be subject to registration.” *Id.* at 358; *see United States v. Dodge*, 597 F.3d 1347, 1352–53 (11th Cir. 2010) (reasoning that because of the expansive language used in SORNA, the Act allows the imposition of registration requirements for offenses not specifically enumerated).

62. *See United States v. Juvenile Male*, 590 F.3d 924, 929 (9th Cir. 2009) (describing Congress’s delegation to the Attorney General of the power to determine whether SORNA applied retroactively and, if so, whether it applied retroactively to juveniles); *State v. Bodyke*, 933 N.E.2d 753, 759–60 (Ohio 2010) (criticizing Ohio’s statutory scheme, which authorized the attorney general alone to reclassify offenders already classified by the court); *see also* WASH. REV. CODE § 4.24.550(1) (2011) (affording discretion to public agencies to determine “relevant and necessary” release of information).

individual convicted of that crime.<sup>63</sup> Upward reclassification increases registration and notification burdens, and reclassification affects both future offenders and those previously convicted and classified as less dangerous.<sup>64</sup> Consequently, burdens associated with the reclassification are being applied retroactively to convicted offenders who were deemed a lower risk under previous registration schemes.<sup>65</sup> Although it is within legislative purview to alter or expand legislation,<sup>66</sup> in the absence of scientific evidence or other proof to explain the reclassification, the shift can be viewed as simply another example of legislative hunger in action.

Particularly disconcerting is the fact that revised classifications are often made without individualized assessment of the convicted offender's level of dangerousness.<sup>67</sup> And even when a reclassification hearing is statutorily authorized, it does not ensure procedural due process because often the hearing is not held,<sup>68</sup> or if it is held, it is administered in a cursory fashion that calls into question the hearing's legitimacy.<sup>69</sup>

Under Ohio's prevailing registration scheme, for example, a previously convicted offender's level of dangerousness could be reclassified upward *solely* upon the legislature's decision to reclassify the crime; it could not be based on a judicial determination of the dangerousness of the offender or upon a finding that the offense itself was of particular danger.<sup>70</sup> So troubling was this apparent usurpation of

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63. See, e.g., *Lemmon v. Harris*, 949 N.E.2d 803, 804–05 (Ind. 2011) (stating that the defendant, who originally was required to register for ten years, was later notified that his conviction had been reclassified to require registration for life); *State v. Ortega-Martinez*, 2011-Ohio-2540U, ¶¶ 1–2 (Ct. App.) (noting that upon reclassification of its registration scheme in Ohio, convicted sex offender Ortega-Martinez's classification changed from lowest level of risk offense to tier II offender with the commensurate increase in registration and notification requirements); *State v. Poling*, 2011-Ohio-3201U, ¶ 7 (Ct. App.) (registrant's reporting requirements changed from annual to once every ninety days).

64. See, e.g., *Jensen v. State*, 905 N.E.2d 384, 389 (Ind. 2009) (explaining that the defendant had been reclassified from a "sex offender," who must register for ten years, to a "sexually violent predator," who must register for life).

65. See *id.*; see also *Hannah v. State*, 2011-Ohio-2930U (Ct. App.) (reviewing the reclassification of seven tier I offenders to tier III status); *Ortega-Martinez*, 2011-Ohio-2540U, ¶¶ 1–2.

66. See, e.g., *Bodyke*, 933 N.E.2d at 766 (acknowledging the Legislature's authority to enact or amend sex offender registration laws).

67. For example, reclassification in Ohio is statutorily authorized to be administered by the attorney general alone, and therefore occurs without any individualized assessment or expert testimony. See *id.* ¶ 22.

68. See, e.g., *Smith v. State*, 2009-1765U, p. 7 (La. App. 1 Cir. 3/26/10) (reporting that although the offender was entitled to a "contradictory" hearing to determine his classification, one was never held); *State v. Germane*, 971 A.2d 555, 579 (R.I. 2009) (determining that the inability of the registrant to present evidence did not pose "any actual risk of erroneous deprivation of his protected liberty interests").

69. See, e.g., *Doe v. Pataki*, 3 F. Supp. 2d 456, 460 (S.D.N.Y. 1998) (finding that the offender's classification hearing lasted no more than five minutes, and that the court relied on an improper offense to determine the offender's classification).

70. See, e.g., OHIO REV. CODE ANN. § 2950.031(A)(1)–(2) (West 2011) (articulating the new classifications and their applicability to previously convicted offenders), *invalidated by Bodyke*, 933 N.E.2d 753.

authority that the Ohio Supreme Court determined that such legislative action was a violation of the doctrine of separation of powers.<sup>71</sup>

But it is not just about the expanding number of offenses; it is also about their broadening scope. Originally, sexual motivation or purpose was a necessary component for an offense to be registerable, as was evident from the definitional section of the codes<sup>72</sup> and from legislative history.<sup>73</sup> Today, however, registration schemes include mandatory registration for crimes committed against minors, even where there is no sexual purpose or contact.<sup>74</sup>

Fidelity to the original impetus for sex offender registration would suggest that, at a minimum, a registration-worthy offense must include underlying sexual predatory behavior or intent.<sup>75</sup> And to some extent, that initially was the practice. Courts would find a violation of due process when, on occasion, a state legislature had crossed the bounds to require automatic registration without proof of sexual motivation.<sup>76</sup> For

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71. See *Bodyke*, 933 N.E.2d at 766 (“The reclassification scheme in the AWA works to ‘legislatively vacate[] the settled and final judgments of the judicial branch of government.’ The legislative attempt to reopen journalized final judgments imposing registration and community notification requirements on offenders so that new requirements may be imposed suffers the same constitutional infirmity.” (citations omitted)). Other courts, however, have rejected such claims. See *Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005) (rejecting the defendant’s claim that Florida’s reclassification scheme violated the doctrine of separation of powers).

72. See, e.g., *State v. Letalien*, 985 A.2d 4, 8 (Me. 2009) (“[S]ex offender [is defined as] an individual convicted of gross sexual assault if the victim had not in fact attained 16 years of age at the time of the crime.” (citing ME. REV. STAT. tit 34-A, § 11103(5) (1996))); see also *People v. Logan*, 705 N.E.2d 152, 156 (Ill. App. Ct. 1998) (“The category of sex offenders includes any person who is convicted of a sex offense or who is certified as a sexually dangerous person pursuant to the Sexually Dangerous Persons Act . . .”).

73. See, e.g., *Doe v. Moore*, 410 F.3d at 1345 (observing that the State’s purpose in enacting Florida’s Sex Offender Act was to protect “the public from sexual abuse”); *Lee v. State*, 895 So. 2d 1038, 1042 (Ala. Crim. App. 2004) (“[T]he legislature found that the public was in danger because of the high recidivism rate among such offenders.”); *Logan*, 705 N.E.2d at 158–59 (explaining the original intent of Illinois’ registration law). Sexual purpose was of such fundamental import that, where a plea agreement resulted in sexual crimes being dismissed and only nonsexual crimes remaining, the court was required to make a “sexual motivation finding” before requiring registration. See, e.g., *State v. Whalen*, 588 S.E.2d 677, 681 (W. Va. 2003).

74. See, e.g., GA. CODE ANN. § 42-1-12(a)(9)(B)(ii) (2011) (including false imprisonment of a minor by anyone other than a parent to be a registerable offense); IND. CODE § 11-8-8-5(11), (12) (2011) (requiring registration for kidnapping and criminal confinement of a minor by anyone other than a parent or guardian), *invalidated by* *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009).

75. See, e.g., *E.B. v. Verniero*, 119 F.3d 1077, 1097 (3d Cir. 1997) (“[W]e found that the legislative purpose of Megan’s Law was to identify potential recidivists and alert the public when necessary for the public safety, and to help prevent and promptly resolve incidents involving sexual abuse and missing persons.”); *Fredenburg v. City of Fremont*, 14 Cal. Rptr. 3d 437, 439 (Ct. App. 2004) (“The Legislature further found that the public had a ‘compelling and necessary . . . interest’ in obtaining information about released sex offenders so they can ‘adequately protect themselves and their children from these persons.’” (alteration in original) (quoting CAL. PENAL CODE § 290.03)).

76. See, e.g., *People v. Johnson*, 843 N.E.2d 434, 440 (Ill. App. Ct. 2006) (“There is no rational basis for requiring defendant to register as a sex offender where he has no history of committing sex offenses and his offense of aggravated kidnapping was not sexually motivated and had no sexual

example, in *State v. Robinson*, the Florida Supreme Court rejected automatic registration for the defendant's kidnapping of a minor, where the defendant stole a vehicle with a sleeping child in the back seat.<sup>77</sup> Faced with what it perceived to be overreaching by the Florida legislature, the court stated, "No rational relationship exists between the statute's purpose of protecting the public from known sexual predators and Robinson's designation as one."<sup>78</sup>

But over the past decade, faithfulness to this rationale has faded. One observes a perceptible shift as courts defer to legislative attempts to sweep nonsexual crimes into the purview of registerable offenses. Early jurisprudence focused on support for legislatures' intent to use these schemes to protect minors from sexual predators.<sup>79</sup> Courts no longer appear wedded to that justification. Today, courts regularly uphold legislation that requires registration for crimes that do not involve sexual contact or that are committed without sexual purpose or intent.<sup>80</sup>

Employing "minor as victim" as a factual predicate for registration arguably has created a list of registerable offenses far removed from the original legislative purpose of sex offender registration schemes. *Rainer v. State* offers an excellent illustration.<sup>81</sup> Deferring to a general legislative aim of protecting children, the Georgia Supreme Court concluded that the statute's vague wording demanded that one convicted of robbery of a minor must register as a sex offender.<sup>82</sup> In affirming automatic

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purpose."); *rev'd* 870 N.E.2d 415 (Ill. 2007); *State v. Robinson*, 873 So. 2d 1205, 1207 (Fla. 2004) (overturning automatic registration for kidnapping a child); *People v. Bell*, 778 N.Y.S.2d 837, 847 (App. Div. 2003) ("None of [the defendant's] actions in kidnapping . . . the child were done for the purpose of sexual victimization of the child . . . [Therefore,] to require [defendant] to register as a 'sex offender' is completely arbitrary and unreasonable, having no substantial relation to the public morals or general sexually-charged safety issues.").

77. 873 So. 2d at 1215.

78. *Id.*

79. *See, e.g., Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997) (observing that SORA was established to improve the ability of law enforcement to combat sex crimes); *People v. Malchow*, 739 N.E.2d 433, 437 (Ill. 2000) ("[T]he legislature's intent in requiring registration of sex offenders was to create an additional measure of protection for children from the increasing incidence of sexual assault and child abuse."); *Doe v. Poritz*, 662 A.2d, 367, 373 (N.J. 1995) (recognizing that the legislature's intent in drafting registration laws was to protect women and children from "potential molestation, rape, or murder").

80. *See, e.g., People v. Johnson*, 870 N.E.2d 415, 426 (Ill. 2007) (affirming the State's interest in automatic registration of offenders who commit crimes against minors despite lack of sexual motivation); *State v. Smith*, 780 N.W.2d 90, 105-06 (Wis. 2010) (determining that automatic registration did not violate equal protection or due process when applied to a defendant who was convicted of false imprisonment of a minor that involved no sexual misconduct). For an argument that the inclusion of nonsexual offenses in registration schemes violates due process, see Ofer Raban, *Be They Fish or Not Fish: The Fishy Registration of Nonsexual Offenders*, 16 WM. & MARY BILL RTS. J. 497 (2007).

81. 690 S.E.2d 827 (Ga. 2010).

82. *Id.* at 829-30 (concluding that robbery of a minor qualifies as a registerable offense under Georgia's registration law).

registration, the court dismissed as irrelevant the fact that defendant's robbery did not involve sexual activity.<sup>83</sup> The majority reasoned that requiring defendant to register as a sex offender served to "protect[] children from those who would harm them."<sup>84</sup> But dissenting Chief Justice Hunstein was concerned by the overinclusiveness of such a pronouncement, stating that including crimes of this nature "serves merely to sweep within its purview those, such as [the appellant], who should not be characterized as 'sexual offenders.'"<sup>85</sup>

Two forces are at play when courts uphold automatic registration of offenders who did not commit sexually motivated crimes. First is the apparent commitment to defer to legislative intent and prerogative,<sup>86</sup> and second is a clear disinclination to employ an as-applied analysis to due process claims.<sup>87</sup> Both forces appeared to be operating in *State v. Smith*, when the Supreme Court of Wisconsin affirmed the duty of seventeen-year-old James Smith to register for falsely imprisoning another seventeen-year-old boy to collect a drug debt.<sup>88</sup> Despite clear proof that defendant was not sexually motivated to commit the crime, the majority determined that these facts were not of particular sway since "the legislature may well have rationally concluded that child abductions are often precursors to sexual offenses."<sup>89</sup> Similarly, in *People v. Johnson* the Supreme Court of Illinois upheld automatic registration in the case of a man who kidnapped his granddaughter for financial gain rather than sexual motivation, concluding that a generalized belief that kidnapping of a minor *could* lead to sexual abuse of the minor was sufficient to meet due process.<sup>90</sup>

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83. *Id.* at 829 ("[T]he fact that Rainer's [robbery] did not involve sexual activity is of no consequence.").

84. *Id.* *But see* *State v. Chun*, 76 P.3d 935, 941 (Haw. 2003) (rejecting the government's argument that registration is required "even if the elements of the charged offense do not entail 'sexual conduct'").

85. *Rainer*, 690 S.E.2d at 831 (Hunstein, P.J., dissenting). Although Presiding Justice Hunstein did not sway the majority in *Rainer*, she did prevail on a different law affecting offenders when she authored an opinion finding that Georgia's residency restrictions violated principles of eminent domain for forcing a long-standing resident to move. *See Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740, 742 (Ga. 2007).

86. *See Rainer*, 690 S.E.2d at 829 ("It is rational to conclude that requiring those who falsely imprison minors who are not the child's parent to register . . . advances the State's legitimate goal of informing the public for purposes of protecting children from those who would harm them.").

87. *See State v. Smith*, 780 N.W.2d 90, 109–10 (Wis. 2010) (Bradley, J. dissenting) (criticizing the majority's refusal to consider appellant's as-applied challenge to the requirement to register as a sex offender for commission of false imprisonment of a minor).

88. *Id.* at 92–93 (majority opinion).

89. *Id.* at 102.

90. 870 N.E.2d 415, 426 (Ill. 2007) ("Our General Assembly . . . recognized that aggravated kidnapping can be a precursor to sex offenses against children.").



## B. INCREASED REGISTRATION BURDENS

Registration requirements are not inconsequential. As the Supreme Court observed in *Lawrence v. Texas*, even a conviction of a misdemeanor sexual offense imposes a stigma that “is not trivial.”<sup>91</sup> Indeed, courts acknowledge that registration involves significant and intrusive burdens that brand the offender.<sup>92</sup> Concomitant to the increasing number and nature of registration-worthy offenses, registration schemes also have expanded the burdens of registration—both in duration and in the detailed nature of the personal information required.<sup>93</sup> And in many states, the increased burdens are unrelated to the risk level of the offender.<sup>94</sup>

### I. Duration

Under the first generation of sex offender registration laws, states employed a variety of classification systems to determine the offender’s attendant registration burdens.<sup>95</sup> Generally, offenders were required to register according to their level of dangerousness; the minimum usually was ten years<sup>96</sup> and the maximum was lifetime registration.<sup>97</sup> Under SORNA, offenders are categorized by their convictions and are automatically assigned to a tier based on that offense.<sup>98</sup> Tier I offenses are regarded as the least serious crimes, with each succeeding tier consisting of more dangerous offenses.<sup>99</sup> Today, a tier I offender generally must register for a minimum of fifteen years<sup>100</sup> or, often, twenty years.<sup>101</sup> Additionally, many more crimes today have been assigned lifetime registration<sup>102</sup> or recast to require lifetime registration.<sup>103</sup>

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91. 539 U.S. 558, 575 (2003).

92. *See, e.g.*, *State v. Robinson*, 873 So. 2d 1205, 1213 (Fla. 2004) (recognizing that Florida’s statute “imposes more than a stigma,” subjecting designated sexual predators to “life-long registration requirements”); *State v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) (“The practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment.”).

93. *See infra* notes 95–117 and accompanying text.

94. *See infra* note 110 and accompanying text.

95. *See* Carpenter, *supra* note 34, at 328–31.

96. *See, e.g.*, *Wallace v. State*, 905 N.E.2d 371, 375 (Ind. 2009) (citing IND. CODE § 5-2-12-13 (1995) (requiring a ten-year minimum registration period)); *Smith v. State*, 2009-1765U, p. 4 (La. App. 1 Cir. 3/26/10) (noting the ten-year minimum registration requirement in effect at the time of the defendant’s conviction in 1995).

97. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 11-707(a)(4)(iii) (LexisNexis 2011) (detailing registration for life for tier III sex offenders); S.C. CODE ANN. § 23-3-460 (2011) (requiring registration “biannually for life” for certain offenses).

98. *See* 42 U.S.C. § 16911 (2010).

99. *Id.* (defining the offenses that make up tiers II and III, and stating that “[t]he term ‘tier I sex offender’ means a sex offender other than a tier II or tier III sex offender”).

100. *Pollis v. State*, 2009-Ohio-5058U, ¶ 58 (Ct. App.) (discussing the change in the registration requirement from ten years to fifteen years).

101. *See, e.g.*, N.Y. CORRECT. LAW § 168-h(1) (2011) (requiring level one offenders to register

## 2. *Additional Personal Information*

All registration schemes require offenders to provide detailed personal information. The first incarnation of registration following the federal guidelines required that each registrant provide local law enforcement with their name, address, photograph, and fingerprints;<sup>104</sup> in some states, the offender must also supply a biological specimen.<sup>105</sup> Today, sex offenders may also be asked to supply driver's license numbers, dates and places of birth, dates and places of conviction, places of employment, passwords to social networking websites, and prior crimes.<sup>106</sup> Some states also require offenders to provide DNA samples.<sup>107</sup>

The changes made to Louisiana's registration scheme exemplify the nationwide trend towards more demanding requirements. In 2001, Louisiana's sex offender statute required a registrant to provide a few key pieces of information. An offender would be asked to register "his

annually for twenty years); *see also* *Buck v. Commonwealth*, 308 S.W.3d 661, 663 (Ky. 2010) (observing that the 2006 amendments to the Kentucky registration scheme increased registration for nonlifetime offenses from ten years to twenty years).

102. *See, e.g.*, CAL. PENAL CODE § 290 (2011) (mandating lifetime registration for sodomy; lewd and lascivious acts with a minor; oral copulation; forcible acts of sexual penetration; kidnapping; kidnapping for ransom, reward, or extortion, or to commit robbery or rape; harmful matter sent with intent of seduction of minor; lewd or obscene conduct; indecent exposure; and obscene exhibitions).

103. *See, e.g.*, *Jensen v. State*, 905 N.E.2d 384, 394 (Ind. 2009) (upholding the change from ten-year to lifetime registration); *see also* *State v. Letalien*, 985 A.2d 4, 9–10 (Me. 2009) (discussing the change in registration from fifteen-year to lifetime registration following the amendment of Maine's SORNA); *McCabe v. Commonwealth*, 650 S.E.2d 508, 510 (Va. 2007) (reporting the change from ten-year to lifetime registration); *Smith v. State*, 2009-1765U, p. 4 (La. App. 1 Cir. 3/26/10) (same).

104. *See* *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act* ("SORA"), Pub. L. No. 103-322, § 170101(b)(1)(A)(ii), (iv), 108 Stat. 2038, 2040 (1996) (codified as amended at 42 U.S.C. § 14071 (2006)) (repealed 2006); CONN. GEN. STAT. § 54-258(a)(1) (2011) (stating that information in the registration is a matter of public record and is available for access during normal business hours at the local police department); FLA. STAT. § 943.043(3) (2011) (explaining that a member of the public can obtain information, including a photograph of the offender and a summary of convictions, through a toll-free number); HAW. REV. STAT. § 846E-3(b) (West 2011) (allowing information, such as address, car information, and a picture to be released by the county police department); MD. CODE ANN., CRIM. PROC. § 11-717 (LexisNexis 2011) (indicating that all registrants' information shall be available to the public either through the Internet or by request); MISS. CODE ANN. § 45-33-49(3), (4) (2011) (ordering that "any information deemed necessary for the protection of the public," such as a photograph, place of employment, and crime for which the offender was convicted, shall be provided to anyone who requests the information of any registrant); N.H. REV. STAT. ANN. § 651-B:7(IV) (2011) (declaring that any member of the public may request information from the local law enforcement agency regarding the list of registrants including their pictures and addresses).

105. *See, e.g.*, FLA. STAT. ANN. § 943.325 (2011); KAN. STAT. ANN. § 22-4907(b) (2011); MISS. CODE ANN. § 45-33-37 (2011); OKLA. STAT. tit. 57, § 584 (2011).

106. *See, e.g.*, N.Y. CORRECT. LAW § 168-b(1)(a)-(c) (2011) (requiring a sex offender to provide his name, alias, date of birth, sex, race, height, weight, eye color, driver's license number, home address, description of the offense, date of conviction, sentence imposed, photograph, and fingerprints); UTAH CODE ANN. § 77-27-21.5 (2011); WASH. REV. CODE § 9A.44.130 (2011).

107. *See, e.g.*, ALA. CODE § 36-18-25 (2011); CAL. PENAL CODE § 296.2(c) (2011); LA. REV. STAT. ANN. § 15:542(C)(1) (2011).

name, address, and place of employment; the crime for which he was convicted; the date and place of such conviction; any aliases used by the person; and the person's social security number."<sup>108</sup> Today, Louisiana's Megan's Law includes one of the most detailed and extensive lists of required information, including palm prints, a DNA sample, and all landline and mobile telephone numbers.<sup>109</sup> Additionally, the risk level of the offender is not relevant to the level of detail required: sex offenders and child predators alike are asked to provide the same information under Louisiana's Megan's Law.<sup>110</sup>

Because computers are now an integral part of daily life, many sex offender statutes have been amended to restrict or remove freedoms and activities associated with computer usage. Many states require offenders to notify local law enforcement of all email and social network usernames and passwords, plus any changes to those usernames or passwords.<sup>111</sup> As of 2009, Alaska requires all registrants, regardless of conviction date or risk level, to disclose their email addresses, instant messaging address, and other Internet communication identifiers when registering as a sex offender.<sup>112</sup> Indiana requires an offender to disclose any email address, instant message username, electronic chat room username, or social networking website username that the sex offender uses or intends to use.<sup>113</sup> And, also as of 2009, members of the Alaskan public can submit an email address, instant message address, or other Internet identifier to the Department of Public Safety and receive a confirmation of whether that address or identifier has been registered by a sex offender or child kidnapper.<sup>114</sup>

But that is not all. In Indiana, for example, an offender who registers electronic or social networking information must also consent to searches of personal computers, or any device with Internet capacity, *at any time*.<sup>115</sup> The offender must also agree to the installation of hardware

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108. State *ex rel. Olivieri v. State*, 779 So. 2d 735, 739 (La. 2001) (quoting LA. REV. STAT. ANN. § 15:542(B)).

109. The statute requires sex offenders and child predators alike to provide local law enforcement with detailed information including: the name and aliases used by the offender; physical description of the offender; addresses, including temporary housing, employment, and school; a current photograph; fingerprints, palm prints and a DNA sample; a description of every vehicle registered to or operated by the offender, including license plate number; a copy of the offender's driver's license; and every email address, online screen name, or other online identifiers used by the offender to communicate on the Internet. See LA. REV. STAT. ANN. § 15:542(C)(1) (2011).

110. *Id.*

111. See, e.g., UTAH CODE ANN. § 77-27-21.5(14) (2011).

112. ALASKA STAT. ANN. § 12.63.010(b)(1)(I) (West 2010).

113. IND. CODE § 11-8-8-8(a)(7) (2011), *invalidated by* Wallace v. State, 905 N.E.2d 371 (Ind. 2009); see N.Y. CORRECT. LAW § 168b-10 (2011).

114. Doe v. State, 189 P.3d 999, 1001 n.13 (Alaska 2008).

115. IND. CODE § 11-8-8-8(b). For discussion of the impact of this law on the Fourth Amendment, see Doe v. Indiana, 566 F. Supp. 2d 862, 879 (D. Ind. 2008) (finding the search was unconstitutional).

that would monitor Internet usage.<sup>116</sup> Such consent is required no matter the level of risk the offender poses, or even whether the conviction resulted from illegal online activity.<sup>117</sup>

### C. EXPANDING NOTIFICATION REQUIREMENTS

Fundamentally, notification laws were appended to registration laws to provide communities with appropriate and necessary information about sex offenders residing in their communities.<sup>118</sup> When community notification schemes were first introduced, they were tailored to funnel information from law enforcement agencies and other designated entities to the communities in a narrow and controlled manner.<sup>119</sup> In upholding the constitutionality of the first generation of notification laws, courts emphasized two foundational aspects. First, courts found that the information was no greater than that discerned from the public record of a conviction,<sup>120</sup> and second, that the amount of personal information disseminated was specifically tied to the risk level of the offender.<sup>121</sup>

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because registrants who are not on supervised release “are entitled to full Fourth Amendment protection, without the lowered expectation of privacy”).

116. IND. CODE § 11-8-8-8(b).

117. *Id.* § 11-8-8-8.

118. *See, e.g.,* *Smith v. Doe*, 538 U.S. 84, 93 (2003) (“The legislature further determined that ‘release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.’” (quoting 1994 Alaska Sess. Laws ch. 41, § 1)); *Community Protection Act*, § 401, 1990 Wash. Sess. Laws 49 (“The legislature finds that . . . law enforcement’s efforts to protect their communities . . . are impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency’s jurisdiction.”).

119. *See, e.g.,* *State v. Cook*, 700 N.E.2d 570, 585 (Ohio 1998) (upholding the state’s registration statute as “narrowly tailored to disseminate information only to those persons necessary in order to protect the public,” namely, law enforcement, neighbors, and certain school officials); *see also* *State v. Myers*, 923 P.2d 1024, 1028 (Kan. 1996) (Abramson, J., dissenting) (observing that, at the time, the majority of jurisdictions kept the information confidential and that only a few registration schemes “show[ed] a trend toward limited public disclosure”).

120. *See, e.g.,* *Smith v. Doe*, 538 U.S. at 98 (“[T]he stigma of Alaska’s Megan’s Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.”); *E.B. v. Verniero*, 119 F.3d 1077, 1099 (3d Cir. 1997) (“The ‘sting’ of Megan’s Law for tier 2 and 3 registrants results not from their being publicly displayed for ridicule and shaming but rather from the dissemination of accurate public record information about their past criminal activities and a risk assessment by responsible public agencies based on that information.”); *State v. Haskell*, 784 A.2d 4, 11 (Me. 2001) (“The [d]issemination of [accurate information about past criminal activity] in and of itself has never been regarded as punishment . . . .” (quoting *E.B.*, 119 F.3d at 1099–1100 (alternation in original))).

121. *See, e.g.,* *Doe v. Pataki*, 120 F.3d 1263, 1278 (2d Cir. 1997) (“[New York’s notification statute was] carefully calibrated to, and depends solely upon, the offender’s perceived risk of re-offense . . . .”); *State ex rel. Olivieri v. State*, 779 So. 2d 735, 739 n.9 (La. 2001) (“[Louisiana’s sex offender statute] originally only provided that [c]riminal justice agencies are authorized to release relevant and necessary information regarding sex offenders to the public when release of the information is necessary for public protection . . . .” (internal quotation marks omitted)); *Cook*, 700 N.E.2d at 574–75 (comparing the information disseminated for “sexual predators” versus “sexually oriented offenders”).

Thus, if there was little likelihood of reoffense, fewer community members received a smaller amount of personal information.

Today, however, these controlling principles have been replaced by a new paradigm: Residents of any community are entitled to great amounts of information about all sex offenders, without regard to their likelihood of reoffense.<sup>122</sup> The release of this information affects registrants' lives in ways far more consequential than the lingering effect that public knowledge of a conviction may generate. And it is not just because of the amount of information—it is also because of the subtext of the message. In *Knowledge as Power*, Wayne Logan argues that the context in which the information is conveyed is “far from neutral.”<sup>123</sup> The release of sex offenders' information contains an implicit message of dangerousness because states have intentionally singled out sex offenders from other offenders for this specific treatment, thus “contradict[ing] governmental neutrality.”<sup>124</sup>

### I. *The Nature of the Information Released*

Because many modern notification schemes do not distinguish among offenders,<sup>125</sup> they provide the public with a significant amount of information about *all* offenders,<sup>126</sup> including detailed physical descriptions of the registrants,<sup>127</sup> their home and work addresses, “and links to maps of their locations.”<sup>128</sup> Upheld by the Supreme Court in *Connecticut Department of Public Safety v. Doe*, online registries are not required to distinguish between those individuals who pose a high risk to society and those who pose a low risk.<sup>129</sup> Additionally, because online

122. See, e.g., *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (“[Indiana’s registration scheme] makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk.”).

123. LOGAN, *supra* note 51, at 138.

124. *Id.*

125. See, e.g., ALASKA STAT. ANN. § 18.65.087(b) (West 2010); FLA. STAT. § 943.44353(1) (2011) (providing for automatic public notification of registration information for sex offenders and sexual predators alike); HAW. REV. STAT. § 846E-3 (West 2011); UTAH CODE ANN. § 77-27-21.5 (2011); WIS. STAT. § 301.46(5)(4)(bm) (2011). *But see* MASS. GEN. LAWS ch. 6, § 178(D) (2011) (prohibiting publication of level one and level two offenders’ registration information on Massachusetts’s sex offender Internet database).

126. LA. REV. STAT. ANN. § 15-542.1(A) (2011) (requiring any convicted sex offender to “give notice of the crime for which he was convicted, his name, residential address, a description of his physical characteristics . . . and a photograph” by mail to one person in every residence or business within a one-mile or three-tenths of a mile radius of where the offender will reside and to the superintendent of the school district in which the offender will reside).

127. See, e.g., *Doe v. State*, 189 P.3d 999, 1001 (Alaska 2008) (“A photograph of each registrant appears on a webpage under the caption ‘Registered Sex Offender/Child Kidnapper.’ Each registrant’s page also displays the registrant’s physical description, home address, employer, work address, and conviction information.”).

128. *Wallace v. State*, 905 N.E.2d 371, 376 (Ind. 2009).

129. 538 U.S. 1, 7–8 (2003); see, e.g., LA. REV. STAT. ANN. § 15:542.1(A) (articulating the same

registries generally use the same font size and coloring when labeling all registrants, the posts create an air of perceived danger around all offenders.<sup>130</sup>

Not only are comprehensive posts the order of the day, the posts are made available to an extensive list of persons. In New York, for example, a low-risk offender's information may be provided to "any entity with vulnerable populations related to the nature of the offense committed by such sex offender."<sup>131</sup> "Vulnerable population" is not defined in New York's sex offender statute, so it is within the discretion of the law enforcement agency to determine what entities will receive "relevant information."<sup>132</sup> Plus, "[a]ny entity receiving information on a sex offender may disclose or further disseminate such information *at its discretion*."<sup>133</sup>

In a critique of Connecticut's online registry that included all offenders regardless of their risk, the Second Circuit called it an "instrument . . . too blunt" to "protect the health and welfare of the State's children."<sup>134</sup> The fallout from such widespread posting should not be minimized. The Third Circuit recognized that "[p]eople interact with others based on the information they have about them."<sup>135</sup> For sex offenders whose information is publicly available on the Internet, the fear of retributive violence or harassment "[is] not short lived."<sup>136</sup>

Some notification laws appear to provide limitations on the information released. But the presence of these terms is misleading. Under Washington's Community Protection Act of 1990, for example, the release of information is dependent on an agency determination that the "information is relevant and necessary to protect the public and counteract the danger created by the particular offender."<sup>137</sup> While the terms "necessary and relevant" seem to restrict dissemination, in practice, public agencies in Washington may exercise their discretion in deciding when to notify the public and whom to notify.<sup>138</sup> No hard limits

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notification procedures for all sex offenders); *Bertram v. State*, 2009-Ohio-5210U, ¶ 42 (Ct. App.) ("[E]very offender must provide identical information, and the information is published in the same manner for every offender.").

130. For example, each entry in Alaska's registry includes the heading "sex offender/child kidnapper" in large blue lettering, but identifies the specific offense in small, black font at the bottom of the page. *Sex Offender/Child Kidnapper Registration Central Registry*, ALASKA DEP'T OF PUB. SAFETY, <http://www.dps.alaska.gov/sorweb/asp/sorcra1.aspx> (last visited Mar. 17, 2012).

131. N.Y. CORRECT. LAW § 168-1(6)(a) (2011).

132. *Id.* § 168-1.

133. *Id.* § 168-1(6)(a) (emphasis added).

134. *Doe v. Dep't of Pub. Safety ex rel. Lee*, 271 F.3d 38, 41 (2d Cir. 2001), *rev'd sub nom.* *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

135. *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997).

136. *Id.*

137. WASH. REV. CODE § 4.24.550(1) (2011).

138. *Id.*; *see* N.Y. CORRECT. LAW § 168-1(6)(a) (2011).

are placed on Washington's public agencies in interpreting the state's notification provisions.<sup>139</sup>

## 2. *Access to the Information*

When community notification statutes were first introduced, there was concern that a registrant's privacy interest was severely compromised by the disclosure of detailed personal information.<sup>140</sup> While this argument holds merit, courts nevertheless declared community notification statutes constitutional because, on balance, the collected data were disseminated in a controlled manner and contained no more information than what is otherwise disseminated by the fact of conviction.<sup>141</sup> In *State v. Cook*, the Ohio Supreme Court found the state's notification provision to be an "objectively reasonable measure to warn those . . . most likely to be potential victims,"<sup>142</sup> with disclosure specifically aimed at "those most likely to have contact with the offender."<sup>143</sup> But, almost ten years later, the Ohio Supreme Court dealt with a "significantly modified" statute in *Bertram v. State*.<sup>144</sup> When *Bertram* came before the court, Ohio's sex offender statute required that an "offender's information . . . be open to public inspection and . . . included in the internet sex offender and child-victim offender database."<sup>145</sup>

Current notification laws provide the public with unfettered access to considerable personal information that would otherwise be "far less accessible" to them.<sup>146</sup> A few short years ago, by comparison, hard copies

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139. *Doe v. Gregoire*, 960 F. Supp. 1478, 1481 (W.D. Wash. 1997) ("On the face of the statute, all information provided by the registrant (including his address and place of employment) could be publicized. No notice or hearing is required, and no guidelines are provided to the local agencies."). For judicial interpretation of Washington's "necessary and relevant" language, see *State v. Ward*, 869 P.2d 1062, 1071 (Wash. 1994) (upholding the language in the belief that it ensures that notification will "fit the threat posed to public safety").

140. See *Doe v. Poritz*, 662 A.2d 367, 411 (N.J. 1995) (acknowledging that notification laws link some information together that otherwise would not be readily discernible); see also Brief for the Comm. for Pub. Counsel Servs. & the ACLU of Mass. as Amici Curiae Supporting Appellant, *Doe v. Att'y Gen.*, 686 N.E.2d 1007 (Mass. 1997) (No. SJC-07481), 1997 WL 33832824, at \*29 (contending that registrants suffer invasion of privacy because the public is able to retrieve data from a "readily accessible location").

141. See, e.g., *Poritz*, 662 A.2d at 404 ("[T]he notification provisions are as carefully tailored as one could expect in order to perform their remedial function without excessively intruding on the anonymity of the offender."); see also *State v. Myers*, 923 P.2d 1024, 1036-37 (Kan. 1996) (finding a notification statute nonpunitive because of its provisions for only limited disclosure).

142. 700 N.E.2d 570, 581 (Ohio 1998).

143. *Id.* at 585; see *Russell v. Gregoire*, 124 F.3d 1079, 1090 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263, 1269 (2d Cir. 1997).

144. 2009-Ohio-5210U, ¶ 32 (Ct. App.).

145. *Id.* ¶ 20.

146. See *State v. Letalien*, 985 A.2d 4, 23 (Me. 2009); *Bertram*, 2009-Ohio-5210U, ¶ 32 ("Besides the change in the classification system, the increase in the duration and frequency of the requirements for registration, and the increase in the information provided, the access of the public to the

of registries were maintained by local law enforcement and available to the public “during normal business hours.”<sup>147</sup> The introduction of the Internet has made “the geographic reach of this information boundless.”<sup>148</sup> An offender’s information is globally disseminated through online state-maintained registries, and individuals from any part of the world—whether they may ever be contemplated future victims or even have contact with the offender—can access a state’s online registry and the accumulated personal information on it.

The evolution of Utah’s notification laws offers one example. The state’s original notification scheme restricted dissemination of an offender’s registration information to individuals who were the victim of a sex offense or who lived within the offender’s zip code or an adjoining one.<sup>149</sup> Prompted by “a backlog of information requests,” Utah’s legislature eliminated this geographical restriction on the dissemination of registration information in 1998.<sup>150</sup> Because the amended statute did not place any restrictions on the dissemination of information, Utah’s Department of Identification, the agency responsible for maintaining the state’s central registry, created an online registry.<sup>151</sup> Today, anyone with access to the Internet can access Utah’s sex offender registry, “regardless of [the person’s] place of residence or any other specific need.”<sup>152</sup>

But it is not just the Internet where information is posted. Today, dissemination of public information comes in many forms. One modern notification law also contemplates dissemination by “any other notice deemed appropriate by the court . . . including but not limited to signs, handbills, bumper stickers, or clothing labeled to that effect.”<sup>153</sup>

information has been greatly increased through the use of an internet database . . .”).

147. *Doe v. Dep’t of Pub. Safety ex rel. Lee*, 271 F.3d 38, 44 (2d Cir. 2001), *rev’d sub nom.* Conn. Dep’t of Pub. Safety v. *Doe*, 584 U.S. 1 (2003).

148. *Doe v. Dist. Att’y*, 932 A.2d 552, 568 (Me. 2007) (Alexander & Silver, JJ., concurring).

149. *Femedeer v. Haun*, 227 F.3d 1244, 1247 (10th Cir. 2000); *see Doe v. Dist. Att’y*, 932 A.2d at 557 (noting that Maine’s Bureau of Identification is now required to post on the Internet much of the same information that previously could be retrieved by the public only through written request).

150. *Femedeer*, 227 F.3d at 1247.

151. *Id.* at 1247–48; *see Smith v. Doe*, 538 U.S. 84, 91 (2003) (“The Act does not specify the means by which the registry information must be made public. Alaska has chosen to make most of the nonconfidential information available on the Internet.”).

152. *Femedeer*, 227 F.3d at 1248; *see Doe v. Lee*, 132 F. Supp. 2d 57, 69 (D. Conn. 2001) (“[T]he website makes information available to millions of people who will never come to the state or otherwise come into contact with a registrant.”), *aff’d sub nom. Doe v. Dep’t of Pub. Safety ex rel. Lee*, 271 F.3d 38, 44 (2d Cir. 2001), *rev’d sub nom.* Conn. Dep’t of Pub. Safety v. *Doe*, 584 U.S. 1 (2003).

153. LA. REV. STAT. ANN. § 15:542.1(A)(3) (2011). Dissemination comes in all forms. *See, e.g.*, Michael Dear & Django Sibley, *The One-Way Strategy for Sex Offenders Makes Nobody Safe*, L.A. TIMES, Oct. 1, 2000, at M6 (“Police handed out fliers and notified local media about Linares’ crimes, physical description, address and the license-plate number of a car registered to his family.”); Todd S. Purdum, *Death of Sex Offender Is Tied to Megan’s Law*, N.Y. TIMES, July 9, 1998, at A16 (discussing the suicide of a registered “high risk” sex offender who “was one of 6 such offenders singled out by the Santa Rosa Police Department . . . in its first effort at public notification”).



### 3. Removal from Registries

Although significant energy and resources have been expended to create broad-based notification systems, states have devoted insufficient thought to developing mechanisms to remove offenders from the registries. In some states, no mechanism exists for removal of a registrant's information from the government's online registry,<sup>154</sup> possibly due in part to the recognition of how difficult such a task might be.<sup>155</sup> And even where procedures are in place for removal, a jurisdiction may be vested with discretion to continue to provide information to law enforcement, *regardless* of whether the person is still required to register.<sup>156</sup>

Even where removal is contemplated, the use of the Internet to disseminate information creates significant challenges in attempting to remove an offender's information from an online registry. Unlike a generation ago, where a damning flyer or notice could be removed from a storefront wall, registration information on the Internet is forever "etched in cyberspace."<sup>157</sup>

Ricky Blackmun's story is not atypical. Ricky was sixteen when he had sexual intercourse with his thirteen-year-old girlfriend.<sup>158</sup> The offense occurred in Iowa, where Ricky's record was eventually expunged.<sup>159</sup> But Ricky's family had moved to Oklahoma to get a fresh start after Ricky's conviction.<sup>160</sup> In Oklahoma, Ricky was required to register as a tier III sex offender, a classification that entailed having his driver's license stamped with the words "sex offender" just below his picture in red letters.<sup>161</sup> It was not until four years later that Ricky's name was removed from the registry when Oklahoma's legislature passed a law that expunged offenders' records in Oklahoma of certain offenses committed in other jurisdictions.<sup>162</sup> Although Ricky's name was removed from the

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154. See, e.g., COL. REV. STAT. § 16-22-111 (2011); FLA. STAT. §§ 943.0435(11)(a)(3), 943.04354 (2011); ME. REV. STAT. tit. 34-A, §§ 11221, 11225-A (2011); TEX. CODE CRIM. PROC. ANN. art. 62.101 (2009). *But see* WIS. STAT. § 301.46(6)(a) (2011) (allowing dissemination of information only for the period during which an offender is required to register).

155. *Doe v. Dist. Att'y*, 932 A.2d 552, 562 (Me. 2007) ("[R]emoval may be both technically and practically difficult in light of websites . . . which take 'snapshots' of web pages and archive them for posterity."); see *Doe v. Pataki*, 120 F.3d 1263, 1286 (2d Cir. 1997) (addressing briefly the difficulty of removing offenders' information post registration).

156. See, e.g., WIS. STAT. § 301.46(6)(b) (providing that law enforcement agencies may be permitted access to an offender's registration information "for law enforcement purposes" even after registration period terminates).

157. *Doe v. Dist. Att'y*, 932 A.2d at 568 n.21 (Alexander & Silver, JJ., concurring).

158. Grinberg, *supra* note 44.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

state's sex offender registry,<sup>163</sup> the impact of the "sex offender" label continues to haunt him. In one interview, Ricky discussed the fear he feels wherever he goes, a result of the lingering concerns he believes that others may have about him.<sup>164</sup>

#### D. THE NEW GENERATION OF RESIDENCY RESTRICTIONS

Residency restrictions serve as an accurate barometer for the increasing harshness of sex offender registration schemes.<sup>165</sup> Generally upheld as civil nonpunitive measures,<sup>166</sup> residency restrictions prohibit convicted sex offenders from residing near designated locations "where minors congregate," such as schools, day-care centers, and recreational parks and playgrounds.<sup>167</sup> Where enacted, they are intended to apply to all registrants,<sup>168</sup> including those whose convictions occurred prior to the enactment of the particular residency restriction,<sup>169</sup> those whose crimes

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163. *Id.*

164. *Id.*

165. *See, e.g., Doe v. Miller*, 405 F.3d 700, 706 (8th Cir. 2005) ("In smaller towns, a single school or child care facility can cause all of the incorporated areas of the town to be off limits to sex offenders [due to residency restrictions.];" *In re E.J.*, 223 P.3d 31, 38–40 (Cal. 2010) (reviewing the stricter provisions embodied in Jessica's Law).

166. *See, e.g., Miller*, 405 F.3d at 704–05 (finding that residency restrictions do not violate constitutional principles); *Doe v. City of Lafayette*, 377 F.3d 757, 766 n.8 (7th Cir. 2004) (finding that the city's decision to ban the offender from parks "was not 'punishing' him at all," but was a civil measure designed to protect the public); *Coston v. Petro*, 398 F. Supp. 2d 878, 887 (S.D. Ohio 2005) (determining that residency restrictions are not punitive in nature).

167. *See, e.g., GA. CODE ANN. § 42-1-15* (2011) (prohibiting sex offenders from living within 1000 feet of a school, day-care center, or area where minors congregate); *720 ILL. COMP. STAT. § 5/11-9.3(b)* (2009) (barring sex offenders from loitering within 500 feet of a playground, child-care centers, or facilities that offer programs for children); *KY. REV. STAT. ANN. § 17.545* (West 2007) (barring sex offenders from residing within 1000 feet of any preschool, primary or secondary school public playground or licensed child day-care facility); *OHIO REV. CODE ANN. § 2950.034* (West 2011) (restricting sex offenders from residing within 1000 feet of any school, preschool, or child day-care center), *invalidated by State v. Williams*, 952 N.E.2d 1108 (Ohio 2011) (ruling that sections of the state's sex offender laws unconstitutionally increase the punishment for crimes committed before the law took effect); *UTAH CODE ANN. § 77-27-21.7* (2011) (prohibiting sex offenders from being in the area, on foot or in or on any motorized or nonmotorized vehicle, of any day-care facility, public park, or primary or secondary school).

168. *See, e.g., Miller*, 405 F.3d at 721 ("[Iowa's residency restrictions] appl[y] 'regardless of whether a particular offender is a danger to the public.'" (quoting *Doe v. Miller*, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004))); *State v. Pollard*, 908 N.E.2d 1145, 1153 (Ind. 2009) ("The statute does not consider the seriousness of the crime, the relationship between the victim and the offender, or an initial determination of the risk of re-offending."); *Commonwealth v. Baker*, 295 S.W.3d 437, 441 (Ky. 2009) ("While the original residency restriction statute applied only to those on probation, parole, or other form of supervised release, the current statute applies to all registrants regardless of probation or parole status.").

169. *See, e.g., Miller*, 405 F.3d at 723 (affirming Iowa's residency restrictions); *In re E.J.*, 223 P.3d at 34. Recently, however, courts have begun to question the constitutionality of such restrictions. *See, e.g., Pollard*, 908 N.E.2d at 1154 (finding that Indiana's residency restrictions violated the prohibition on ex post facto laws because it imposes a burden that has the effect of adding punishment beyond that which could have been imposed at the time of sentencing); *Baker*, 295 S.W.3d at 447 (determining

were committed against adult victims,<sup>170</sup> and those whose crimes were of a nonsexual nature.<sup>171</sup>

When first introduced, restrictions often contemplated a buffer zone of 1000 feet or less.<sup>172</sup> By today's standards, that would be considered minimal. Current legislative enactments boast buffer zones of up to 2500 feet.<sup>173</sup> In addition to enlarging the zones, legislatures have broadened the concept of "where children congregate" to include bus stops,<sup>174</sup> video arcade centers,<sup>175</sup> and libraries.<sup>176</sup> Moreover, it is often the offender who has to keep track of whether a day-care center or video arcade moves to within 1000 feet of his home. Thus, the burden is placed on the offender to determine compliance.<sup>177</sup> Compounding that burden, most residency restrictions do not include any type of "move-to-the-offender exception," which would exempt the offender from leaving an already established residence when the prohibited sites moves into the neighborhood.<sup>178</sup> As expanding residency restrictions play out against the community landscape, one thing is clear: Larger buffer zones with more points of

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that residency restrictions violate ex post facto principles when applied to previously convicted offenders); *Berlin v. Evans*, 923 N.Y.S.2d 828, 834–35 (Sup. Ct. 2011) (same).

170. See, e.g., *Pollard*, 908 N.E.2d at 1153 ("Although denominated as applying only to 'offender[s] against children,' the residency restriction statute is actually much broader."); *Baker*, 295 S.W.3d at 444 ("Even those registrants whose victims were adults are prohibited from living near an area where children gather.").

171. For a detailed look at the various components of sex offender registration laws, see Brian J. Love, *Regulating for Safety or Punishing Depravity? A Pathfinder for Sex Offender Residency Restriction Statutes*, 43 CRIM. L. BULL. 834, 839–53 (2007).

172. See Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6–7 (2006) (noting that the average residency restriction zone in 2006 was 1000 feet).

173. See, e.g., ALA. CODE § 15-20A-11(a) (2011) (enlarging the state's residency restriction zone from 1000 feet to 2000 feet); CAL. PENAL CODE § 3003.5 (2011) (increasing the state's residency restriction zone to 2000 feet under Jessica's Law); OKLA. ST. ANN. tit. 57 § 590A (West 2011) (2000 feet); see also Damien Cave, *Roadside Camp for Miami Sex Offenders Leads to Lawsuit*, N.Y. TIMES, July 10, 2009, at A14 (reporting on the growing number of sex offenders forced to camp out on Miami's Julia Tuttle Causeway because of a residency restriction barring registrants from living within 2500 feet of where children gather).

174. See H. 4323, 116th Sess. (S.C. 2006) (prohibiting certain sex offenders from residing within 1000 feet of bus stops).

175. See LA. REV. STAT. ANN. § 14:91.1A(2) (2011) (adding freestanding video arcades to the list of locations).

176. See H.R. 7621, Jan. Sess. (R.I. 2006) (barring child predators from residing within 500 feet of day-care facilities, schools, public parks, playgrounds, libraries).

177. See, e.g., GA. CODE ANN. § 42-1-15 (2011); KY. REV. STAT. ANN. § 17.545 (West 2007), *invalidated* by *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); OHIO REV. CODE ANN. § 2950.034 (West 2011), *invalidated* by *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011). *But see* ALA. CODE § 15-20A-11(c) (2011) ("Changes to property within 2000 feet of an adult criminal sex offender's registered address which occur after an adult criminal sex offender establishes residency or accepts employment shall not form the basis for finding that a criminal sex offender is in violation of [residency restrictions].").

178. *Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740, 742 (Ga. 2007) ("Under the terms of [Georgia's sex offender] statute, it is apparent that there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected. [It] contains no move-to-offender exception to its provisions.").

reference effectively freeze out most sex offenders from the vast majority of communities in the United States.<sup>179</sup>

#### E. INTRODUCTION OF GPS MONITORING SYSTEMS

Global Positioning Satellite (“GPS”) monitoring is a relatively recent addition to registration schemes. In 2005, Florida’s state legislature passed Jessica’s Law, which provided for the use of GPS or other electronic devices to track certain sex offenders after release from confinement.<sup>180</sup> Subsequently, in 2006, as part of the Adam Walsh Act, the federal government offered grant programs and technical assistance to states in order to implement similar electronic monitoring programs.<sup>181</sup>

Inspired by Florida’s legislation and spurred on by the federal incentives in the AWA, as many as thirty-nine states have amended their sex offender statutes to permit some form of electronic monitoring of convicted sex offenders.<sup>182</sup> A number of monitoring programs are imposed on sex offenders as a condition of, and for the duration of, parole or supervised release.<sup>183</sup> However, several states impose electronic

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179. Jurists, scholars, and journalists alike have recognized the magnitude of the impact that residency restrictions have on offenders. *See, e.g., Mann*, 653 S.E.2d at 744 (“[Georgia’s residency restrictions do] not merely interfere with, it positively precludes [a registrant] from having any reasonable investment-backed expectation in any property purchases as his private residence.”); *Berlin v. Evans*, 923 N.Y.S.2d 828, 835 (Sup. Ct. 2011) (acknowledging that the registrant, a tier I offender, was effectively banished from living in Manhattan). For articles criticizing residency restrictions, see Amanda Moghaddam, *Popular Politics and Unintended Consequences: The Punitive Effect of Sex Offender Residency Restriction Statutes from an Empirical Perspective*, 40 S.W. L. REV. 223 (2010); Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. REV. 531 (2007); Monica Davey, *Iowa’s Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1 (reporting on the consequences of Iowa’s residency restrictions and calling into question the restrictions’ effectiveness); Carol DeMare, *Efforts to Protect Kids Often Carry Own Risks*, ALBANY UNION TIMES, Sept. 9, 2007, at A1 (describing the travails of one offender who moved and was unable, because of residency restrictions, to find housing of any kind); Skipp & Campo-Flores, *supra* note 49 (reporting on displaced persons around the country).

180. *State Statutes Related to Jessica’s Law*, NAT’L CONFERENCE OF STATE LEGISLATURES CRIMINAL JUSTICE PROGRAM, [http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs\\_Jessicas\\_Law\\_Summary.pdf](http://www.leg.state.vt.us/WorkGroups/sexoffenders/NCSLs_Jessicas_Law_Summary.pdf) (last visited Mar. 17, 2012) [hereinafter *State Statutes Related to Jessica’s Law*].

181. *See* Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, § 621, 120 Stat. 587, 633-34 (2006) (codified as amended at 42 U.S.C. § 16981 (2010)) (authorizing the Attorney General to award grants to states and local governments to carry out programs to outfit sex offenders with electronic monitoring units).

182. *State Statutes Related to Jessica’s Law*, *supra* note 180, at 1; *see, e.g.,* ALA. CODE § 15-20A-20 (2011); ARIZ. REV. STAT. ANN. § 13-902(G) (2011); ARK. CODE ANN. § 12-12-923 (2011); CAL. PENAL CODE § 3004 (2011); FLA. STAT. § 947.1405(7) (2011); GA. CODE ANN. § 42-1-14 (2011); IND. CODE § 11-13-3-4(j) (2011); LA. REV. STAT. ANN. § 15:560.4 (2011); MICH. COMP. LAWS § 791.285 (2011); MO. REV. STAT. § 217.735 (2011); N.M. STAT. ANN. § 31-21-10.1(E) (West 2011); N.C. GEN. STAT. § 14-208.40B (2011); OKLA. STAT. tit. 57, § 510.10 (2011); S.C. CODE ANN. § 23-3-540 (2011); WASH. REV. CODE § 9.94A.704(5) (2011).

183. *See, e.g.,* ARIZ. REV. STAT. ANN. § 13-902(G); FLA. STAT. § 947.1405; IND. CODE § 11-13-3-4(j); MASS. GEN. LAWS ch. 265, § 47 (2011); S.C. CODE ANN. § 23-3-540(A); WASH. REV. CODE § 9.94A.704(5).

monitoring on statutorily specified offenders for the duration of the offenders' natural life.<sup>184</sup> And in most cases, individuals subject to electronic monitoring are also required to reimburse the state for the cost of the monitoring program.<sup>185</sup>

Similar to other registration burdens, electronic monitoring provisions are "drawn on broad categorical grounds" that do not allow for individualized determination of dangerousness or likelihood of recidivism.<sup>186</sup> In Massachusetts, for example, legislation demands that any person who is placed on probation following conviction for certain proscribed sex offenses must wear a GPS device at all times.<sup>187</sup> Prior to this enactment, a sentencing judge could exercise discretion in imposing GPS monitoring as a condition of probation.<sup>188</sup> Today, the sanction "applies without exception to convicted sex offenders sentenced to a probationary term, regardless of any individualized determination of their dangerousness or risk of reoffense."<sup>189</sup>

The introduction of GPS monitoring programs has not affected the offender's obligation to comply with registration burdens. An offender who is required to register may also be required to wear an electronic or GPS monitoring device for the duration of registration.<sup>190</sup> Because of the recent emergence of GPS monitoring, case law is still developing to determine whether the imposition of GPS constitutes punishment or

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184. See, e.g., CAL. PENAL CODE § 3004 (establishing lifetime monitoring by GPS for those individuals convicted of an offense that requires lifetime registration); GA. CODE ANN. § 42-1-14(e) (requiring lifetime monitoring for sexually dangerous predators); LA. REV. STAT. ANN. § 15:560.4 (requiring lifetime electronic monitoring for sexually violent predators and child sexual predators); MICH. COMP. LAWS § 791.285(1) (authorizing lifetime electronic monitoring); MO. REV. STAT. § 217.735(1), (4) (requiring lifetime monitoring for any offender convicted of any of thirteen listed offenses).

185. See, e.g., ARK. CODE ANN. § 12-12-923(c)(1)(a); GA. CODE ANN. § 42-1-14(e); MASS. GEN. LAWS ch. 265, § 47; MICH. COMP. LAWS § 791.285(2); S.C. CODE ANN. § 23-3-540(K).

186. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1333, 1337 (2008) ("[E]lectronic monitoring requirements tend to be triggered by broad categorical classifications based on prior conviction without regard to present status within the criminal justice system."); see *Commonwealth v. Cory*, 911 N.E.2d 187, 193 (Mass. 2009) ("[T]he GPS requirement [is] uniformly imposed on every defendant . . . without regard to present dangerousness, and even if there are no exclusion zones that can reasonably be applied to the defendant."). For examples of codification of these principles, see CAL. PENAL CODE § 3004 (requiring lifetime GPS monitoring for every offender convicted of an offense for which lifetime registration is required); N.C. GEN. STAT. § 14-208.40 (imposing satellite-based monitoring on any offender who falls within one of the three delineated categories of offenders).

187. MASS. GEN. LAWS ch. 265, § 47.

188. *Cory*, 911 N.E.2d at 197-98.

189. *Id.* at 197.

190. See *State Statutes Related to Jessica's Law*, *supra* note 180 (listing a number of statutes that require electronic monitoring of convicted sex offenders who are subject to registration as a result of their conviction).

whether it can be viewed as one burden among many in a civil regulatory scheme.<sup>191</sup>

#### F. ON THE HORIZON: EVEN HARSHER LEGISLATION

SORNA and its progeny have not proven to be the final word on sex offender legislation. A review of proposed federal and state legislation indicates that we have yet to reach peak proliferation of these laws. Proposed congressional bills would: give power to the Secretary of State to revoke, restrict, or limit a passport issued to an individual who is a sex offender under the AWA;<sup>192</sup> require sex offenders to notify government agencies when they travel internationally;<sup>193</sup> provide notice to foreign countries upon the intended travel of a convicted high-risk sex offender;<sup>194</sup> prohibit sex offenders from working in property management or maintenance where they have access to others' residences;<sup>195</sup> and withdraw burial-related benefits for certain offenders.<sup>196</sup> One bill proposed expanded funding for programs using GPS as a sentencing option.<sup>197</sup>

State proposals are equally extensive and equally random. Proposals include expanding the list of registerable offenses to include tongue-kissing of a minor;<sup>198</sup> requiring offenders to register with campus police if attending school;<sup>199</sup> barring sex offenders from attending festivals or participating in Halloween activities;<sup>200</sup> increasing the reach of residency restrictions;<sup>201</sup> and requiring weekly registration for homeless offenders.<sup>202</sup>

191. A minority of jurisdictions have determined that GPS is punitive and therefore cannot be applied retroactively or tacked on as a modification of probation. *See, e.g., Commonwealth v. Goodwin*, 933 N.E.2d 925, 935 (Mass. 2010) (“GPS monitoring, paired with geographic exclusions is so punitive in effect as to increase significantly the severity of the original probationary conditions . . .”); *Cory*, 911 N.E.2d at 195 (determining that the GPS requirement has a pronounced punitive effect, and consequently may not be applied retroactively).

192. H.R. 5870, 111th Cong. (2010).

193. Sex Offender Notification of International Travel Act, H.R. 6266, 111th Cong. (2010).

194. International Megan’s Law of 2009, H.R. 1623, 111th Cong. (2009).

195. Safety from Sex Offenders Act of 2011, S. 329, 112th Cong. (2011).

196. Hallowed Grounds Act, H.R. 2355, 112th Cong. (2011).

197. GPS Protection & Safety Act of 2009, H.R. 3528, 111th Cong. (2009) (creating a grant program to assist states in establishing programs that use GPS to track offenders as an alternative to incarceration).

198. VA. CODE ANN. §§ 9.1–902, 18.2–370.6 (2011).

199. LA. REV. STAT. ANN. § 15:542(B)(3) (2011).

200. *Tighter Restrictions for Registered Sex Offenders Under Proposed County Ordinance Amendment*, LAKE ELSINORE-WILDOMAR PATCH (Apr. 13, 2011), <http://lakeelsinore-wildomar.patch.com/articles/tighter-restrictions-for-registered-sex-offenders-under-proposed-county-ordinance-amendment>. Florida’s sex offender statute already prohibits any offender convicted of an offense against a victim who was under eighteen years of age at the time of the offense, absent a pardon or release from the requirement to register, from

distributing candy or other items to children on Halloween; wearing a Santa Claus costume, or other costume to appeal to children, on *or preceding* Christmas; wearing an Easter Bunny costume, or other costume to appeal to children, on *or preceding* Easter; entertaining at children’s parties; or wearing a clown costume *without prior approval* from the commission.

## II. REGULATORY VS. PUNITIVE: A PRIMER ON THE DIFFERENCE

To characterize a particular piece of legislation as “civil” or “punitive” defines the rights and obligations that flow from that classification. Sometimes labels matter. Laws deemed civil or regulatory in nature need not meet constitutional demands traditionally associated with criminal laws.

Most drafted legislation is easily ascribed to one camp or the other, but as the Supreme Court observed, “The notion of punishment, as we commonly understand it, cuts across the division between civil and criminal.”<sup>203</sup> That comment aptly describes sex offender registration schemes, which share the characteristics both of a civil regulation designed to protect the public and of a system of punitive burdens imposed on the registrant’s liberty. In fact, Justice Souter made that particular observation in *Smith v. Doe* when he stated, “[T]he indications of punitive character . . . and the civil indications . . . are in rough equipoise.”<sup>204</sup> A New York trial court framed well the tension of competing regulatory and penal policies in affixing the appropriate label when it noted that a residency restriction was intended to “protect children” but “[o]n the other hand . . . also intended to increase punishment against convicted sex offenders.”<sup>205</sup>

Where legislation can be cast as either civil or criminal, the Supreme Court’s decision in *Kennedy v. Mendoza-Martinez* shapes the inquiry.<sup>206</sup> Called the “intent-effects test,”<sup>207</sup> courts readily acknowledge a two-step process for making the determination.<sup>208</sup> The first step of the inquiry is to resolve whether the legislature intended the statute to be a civil remedy

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FLA. STAT. § 947.1405(12) (2011) (emphasis added).

201. John Lyon & Rob Moritz, *Bill to Tighten Sex Offender Rules Passes House*, ARK. NEWS (Feb. 28, 2011), <http://arkansasnews.com/2011/02/28/bill-to-tighten-sex-offender-passes-house> (reporting on a bill to increase residency restrictions for level two sex offenders to match restrictions for level three and four offenders).

202. ALA. CODE § 15-20A-12(b) (2011).

203. *United States v. Halper*, 490 U.S. 435, 447–48 (1989) (assessing whether civil fines constituted a second punishment for purposes of the Double Jeopardy Clause).

204. 538 U.S. 84, 110 (2003) (Souter, J. concurring). Justice Souter concluded, “[W]hat tips the scale for me is the presumption of constitutionality normally accorded a State’s law.” *Id.* Other courts that have upheld such laws also have acknowledged that the question is a close one. *See, e.g., Rodriguez v. State*, 93 S.W.3d 60, 70 (Tex. Crim. App. 2002).

205. *Berlin v. Evans*, 923 N.Y.S.2d 828, 834 (Sup. Ct. 2011).

206. 372 U.S. 144, 168–69 (1963) (articulating seven factors to be used to determine whether a regulation is punitive).

207. *See People v. Logan*, 705 N.E.2d 152, 158–60 (Ill. App. Ct. 1998) (applying the *Mendoza-Martinez* test, which it labeled the “intent-effects test,” to determine whether a sex offender registration statute was constitutional).

208. *See Hudson v. United States*, 522 U.S. 93, 99 (1997) (describing the two levels of inquiry required to determine the issue); *United States v. Ward*, 448 U.S. 242, 248–49 (1980); *State v. Lomas*, 955 P.2d 678, 680 (Nev. 1998) (describing a two-part test to be applied to determine whether revocation of a driver’s license was punishment).

or a punishment.<sup>209</sup> Assuming the legislature intended the law to be civil,<sup>210</sup> the second step of the inquiry is whether, despite regulatory aims, the law is so punitive in fact that it “may not be legitimately viewed as civil in nature.”<sup>211</sup>

In the case of sex offender registration laws, the first step of the inquiry has been resolved without much debate: Courts have regularly found that legislatures intended registration schemes to be civil remedies and not punishment.<sup>212</sup> On occasion, a court will rely on the fact that the legislature placed the registration scheme outside the criminal code.<sup>213</sup> But in most cases, the legislative preamble articulates a nonpunitive civil purpose.<sup>214</sup> The legislative findings recorded in Idaho’s Sexual Offender

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209. See *United States v. Ursery*, 518 U.S. 267, 277 (1996) (describing the first stage of inquiry into whether double jeopardy applied as whether Congress intended the forfeiture law to be a “remedial civil sanction”); see also *Ward*, 448 U.S. at 249 (scrutinizing as a first stage of inquiry whether it was clear that Congress intended to impose a civil penalty upon the defendant); *Femedeer v. Haun*, 227 F.3d 1244, 1248 (10th Cir. 2000) (utilizing the intents-effects test); *Lescher v. Fla. Dep’t of Highway Safety & Motor Vehicles*, 985 So. 2d 1078, 1082 (Fla. 2008) (analyzing whether the Florida legislature intended a law that permanently revoked driver licenses to be a civil regulation or a punishment). In the area of sex offender registration, see *Doe v. Poritz*, 662 A.2d 367, 433 (N.J. 1995) (describing the first part of the intent-effects test).

210. See *Hudson*, 522 U.S. at 103 (“It is evident that Congress intended the . . . money penalties and debarment sanctions imposed for violations of 12 U.S.C. §§ 84 and 375b to be civil in nature.”); *Ward*, 448 U.S. at 248–49 (recognizing clear congressional intent to characterize monetary penalties under the Clean Water Act as civil in nature); *Turner v. Glickman*, 207 F.3d 419, 428 (7th Cir. 2000) (holding that a law disqualifying drug offenders from receiving food stamp benefits was a civil remedy because of congressional intent to confer authority to an administration agency).

211. *Ursery*, 518 U.S. at 288 (deciding whether in rem civil forfeiture was so extreme and disproportionate in comparison to the government’s damages that it had to be considered punitive); *United States v. Halper*, 490 U.S. 435 (1989) (determining whether civil fines added to criminal penalties violated the Double Jeopardy Clause).

212. See, e.g., *Femedeer*, 227 F.3d at 1249 (declaring that the intent of the legislature “was clearly to establish a civil remedy”); *Commonwealth v. Baker*, 295 S.W.3d 437, 443 (Ky. 2009) (analyzing the express and implied intent of the legislature to conclude that the registration scheme was civil); *State v. Haskell*, 784 A.2d 4, 16 (Me. 2001) (adopting the legislature’s express statement that SORNA was intended to be civil). *But see Doe v. State*, 189 P.3d 999, 1007–08 (Alaska 2008) (refusing to analyze the law under the first step of the intents-effects test because the law was punitive in its effect); *Wallace v. State*, 905 N.E.2d 371, 379 (Ind. 2009) (observing that the legislature’s intent was not clear from the record).

213. See, e.g., *State v. Letalien*, 985 A.2d 4, 16 (Me. 2009) (noting that the placement of Maine’s registration and notification laws “entirely outside of the Criminal Code” was one indicia that the scheme was intended to be a civil regulation).

214. See, e.g., *Rodriguez v. State*, 93 S.W.3d 60, 68–69 (Tex. Crim. App. 2002) (relying on the legislative preamble to confirm that the statute was enacted with a civil purpose). Legislative preambles regularly state that the registration scheme was enacted as a civil measure. See, e.g., ARK. CODE ANN. § 12-12-902 (2011) (“[P]rotecting the public from sex offenders is a primary governmental interest, and . . . the privacy interest of the persons adjudicated guilty of sex offenses is less important than the government’s interest in public safety.”); ME. REV. STAT. tit. 34-A, § 11201 (2011) (“The purpose of this chapter is to protect the public from potentially dangerous registrants and offenders by enhancing access to information concerning those registrants and offenders.”); MICH. COMP. LAWS § 28.721a (2011) (“The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety,



Registration Notification and Community Right-to-Know Act<sup>215</sup> offer a representative example:

The legislature finds that sexual offenders present a danger and that efforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sexual offenses are impaired by the lack of current information available about individuals who have been convicted of sexual offenses who live within their jurisdiction. The legislature further finds that providing public access to certain information about convicted sexual offenders assists parents in the protection of their children.<sup>216</sup>

However, the intent-effects test emphasizes that, even if a legislature intends a statute to serve a purpose other than punishment, the statute may nonetheless be deemed to impose a criminal penalty if the statutory scheme is “so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty.”<sup>217</sup> Consequently, the judicial task has been to discern narrowly tailored legislation designed to meet regulatory aims from legislation that is excessive in relation to its nonpunitive purpose.

To help resolve whether a particular piece of legislation is excessive, *Mendoza-Martinez* identified seven factors to guide the determination of whether a law is punitive in nature despite its civil rhetoric:

[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment[,] [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . .<sup>218</sup>

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morals, and welfare of the people, and particularly the children, of this state.”).

215. IDAHO CODE ANN. § 18-8301 (2011).

216. *Id.* § 18-8302; see ARK CODE ANN. § 12-12-902 (2011) (“The General Assembly finds that sex offenders pose a high risk of reoffending after release from custody, that protecting the public from sex offenders is a primary governmental interest, that the privacy interest of persons adjudicated guilty of sex offenses is less important than the government’s interest in public safety, and that the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting public safety.”); LA. REV. STAT. ANN. § 15:540 (2011) (“[P]rotection of the public from sex offenders, sexually violent predators, and child predators is of paramount governmental interest.”); MISS. CODE ANN. § 45-33-21 (2011) (“The Legislature finds that the danger of recidivism posed by criminal sex offenders and the protection of the public from these offenders is of paramount concern and interest to government.”).

217. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citations and internal quotation marks omitted); see *United States v. Halper*, 490 U.S. 435, 447–48 (1989) (concluding that an excessive fine was punishment because there was no rational relationship to the remedial purpose of compensating the government); *United States v. Juvenile Male*, 590 F.3d 924, 940–41 (9th Cir. 2009) (determining that the public dissemination of a juvenile sex offender’s information is punitive in effect because of the high degree of confidentiality afforded juveniles).

218. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1962). The multifaceted *Mendoza-Martinez* test is not free from criticism. See, e.g., *Artway v. N.J. Att’y Gen.*, 81 F.3d 1235, 1263 (3d Cir.

While all seven *Mendoza-Martinez* factors inform this inquiry,<sup>219</sup> the Court cautioned that so great is the weight given to the legislature's regulatory aim that "[a]bsent conclusive evidence . . . as to the penal nature of a statute," the Court will not upset a civil characterization.<sup>220</sup> Even where a law may have punitive characteristics, the State's interest in creating a regulatory scheme will override the punitive nature of the law.<sup>221</sup> Indeed, only the "clearest proof" of punishment will outweigh countervailing legislative intent.<sup>222</sup>

Requiring "clearest proof" to overturn legislative intent is not unusual, nor does it apply only to the *Mendoza-Martinez* analysis. Cast in other terms, it merely demonstrates the Court's adherence to the fundamental principle that great deference is afforded to legislative authority to create and define an offense.<sup>223</sup> Indeed, the presumption of constitutionality cloaks all legislation.<sup>224</sup> Justice Souter's concurrence in *Smith v. Doe* underscored this point when he stated, "What tips the scale

1996) (crafting a three-prong test analyzing the (1) actual purpose, (2) objective purpose, and (3) effect of a regulation to determine whether it imposed a civil or a criminal penalty); *Doe v. Poritz*, 662 A.2d 367, 388 (N.J. 1995) ("But while the role of these constitutional provisions as protectors of individual rights must always be fully enforced, care should be exercised not to convert them into obstacles that prevent the enactment of honestly-motivated remedial legislation by subjecting laws to tests [such as *Mendoza-Martinez*] unsuited to the underlying purpose of these constitutional provisions.")

219. See *Wallace v. State*, 905 N.E.2d 371, 379–84 (Ind. 2009) (analyzing in detail each of the seven *Mendoza-Martinez* factors in determining that Indiana's sex offender registration scheme was punitive).

220. 372 U.S. at 169; see *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("[T]he presumption of constitutionality with which this enactment, like any other, comes to us forbids us lightly to choose that reading of the statute's setting which will invalidate it over that which will save it.")

221. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364–65 (1984) (finding that a law requiring the forfeiture of firearms sold by unlicensed dealers was intended by Congress as a civil regulatory measure).

222. See *Flemming*, 363 U.S. at 617 ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."); see also *Smith v. Doe*, 538 U.S. 84, 107 (2002) (Souter, J., concurring) ("[O]nly the clearest proof that a law is punitive based on substantial factors will be able to overcome the legislative categorization."); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (espousing that only "the clearest proof" will work to override legislative intent to enact a remedial measure and turn it into a criminal penalty); *Allen v. Illinois*, 478 U.S. 364, 369 (1986) (indicating that the civil label may be rebutted by the clearest proof that it is punitive); *United States v. Ward*, 448 U.S. 242, 249 (1980). *But see* *Smith v. Doe*, 538 U.S. at 115 (Ginsburg, J., dissenting) ("I would not demand 'the clearest proof' that the statute is in effect criminal rather than civil. Instead, guided by [*Mendoza-Martinez*], I would neutrally evaluate the Act's purposes and effects."); *United States v. Juvenile Male*, 590 F.3d at 931 (noting the impossibility of the defendant being able to develop a "record which contains the 'clearest proof' of the punitive effects that the law will have upon him").

223. See *Lambert v. California*, 355 U.S. 225, 228 (1957) (recognizing that courts give considerable weight to legislative authority to define an offense); see also *Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature . . ."); *Chi., Burlington & Quincy Ry. Co. v. United States*, 220 U.S. 559, 578 (1911) ("The power of the legislature to declare an offense . . . cannot, we think, be questioned.")

224. See, e.g., *State v. Letalien*, 985 A.2d 4, 12 (Me. 2009) ("A statute is presumed to be constitutional and the person challenging the constitutionality has the burden of establishing its infirmity.")

for me [in this close question] is the presumption of constitutionality normally accorded a State's law."<sup>225</sup>

Wide latitude, however, does not translate to unchecked legislative freedom. Legislatures may not exercise their power to draft or modify laws free of all constitutional restraint.<sup>226</sup> Consequently, courts regularly strike down laws that, despite a particular legislative intent, have been deemed to violate constitutional principles.<sup>227</sup>

And herein lies the critical threshold issue: Can it be said that ramped-up sex offender registration laws continue to warrant the label of civil remedial sanctions, or have they morphed into criminal penalties cloaked in civil rhetoric? The balance of the Article argues that under the *Mendoza-Martinez* multifactor test, spiraling amendments have tipped the schemes to the punitive<sup>228</sup>—and that *tip* unravels their constitutionality.<sup>229</sup>

### III. PROVING PUNITION

Excessive legislation may prove to be SORNA's Achilles' heel. This Part argues that escalating burdens have cast a net far wider than rationally related to a civil alternative purpose. And because of overly broad legislation, super-registration schemes (1) impose a significant affirmative restraint not previously considered, and (2) when viewed cumulatively and collectively, are so excessive that they are no longer rationally connected to their nonpunitive purpose.

As noted earlier, when a law is deemed to be punitive, substantive and procedural constitutional protections must flow from that determination.<sup>230</sup> One constitutional limitation on criminal legislation is the Ex Post Facto Clause,<sup>231</sup> which prohibits retroactive application of a law that "inflicts a *greater punishment*, than the law annexed to the crime, when committed."<sup>232</sup> Ex post facto challenges have arisen in a variety of

225. 538 U.S. at 110 (Souter, J., concurring).

226. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (striking down a Texas law that criminalized sodomy).

227. *See id.* at 564 (concluding that a statute prohibiting certain sexual behavior between consenting adults intruded on a liberty interest); *Finger v. State*, 27 P.3d 66, 68 (Nev. 2001) (declaring that the legislature's attempt to abolish the insanity defense violated principles of due process).

228. For the landmark discussion of the social phenomenon of tipping points, see MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000). For examples of a variety of legal scholarship on this phenomenon, see Carpenter, *supra* note 3, at 1 n.1.

229. *See State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (determining that, in the aggregate, Ohio's amended sex offender scheme had become punitive).

230. *See United States v. Ward*, 448 U.S. 242, 248 (1980) ("The distinction between a civil penalty and a criminal penalty is of some constitutional import.").

231. *See U.S. CONST.* art. I, § 10 ("No state shall . . . pass any . . . ex post facto Law . . .").

232. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *see Collins v. Youngblood*, 497 U.S. 37, 43 (1990) ("Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts."). *But see Seling v. Young*, 531 U.S. 250, 250 (2001) (determining that the

contexts. Litigants have challenged whether sanctions, such as the imposition of fines or forfeiture of property were, in fact, criminal penalties governed by the constraints of the ex post facto principle.<sup>233</sup>

To date, registrants have rarely been successful in mounting ex post facto challenges because of the difficulty they face in meeting the *Mendoza-Martinez* requirements to prove punishment.<sup>234</sup> Additionally, there is great pushback from legislators, who argue for retroactive application of the laws because of the high incidence of recidivism among sex offenders.<sup>235</sup> The argument continues: Effectiveness of enforcement, therefore, necessitates that these laws apply to *all* offenders, including those never subjected to registration when first convicted, as well as those who had been adjudged lower risk under previous but more lenient versions of the scheme.<sup>236</sup> After all, an act's influence would dilute significantly if registration laws exempted previously convicted offenders thought to be dangerous to the public.<sup>237</sup> In *Doe v. Poritz*, the Supreme Court of New Jersey adopted this rationale when it accepted the state's position that "there was no justification in protecting only children of the future from the risk of reoffense."<sup>238</sup>

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commitment of sexually violent felons was a civil remedy that did not implicate either the Ex Post Facto Clause or the Double Jeopardy Clause).

233. See, e.g., *Youngblood*, 497 U.S. at 44 (rejecting the contention that an after-imposed fine constitutes an ex post facto criminal penalty); see also *United States v. Reed*, 924 F.2d 1014, 1016–17 (11th Cir. 1991) (concluding that forfeiture of substituted property did not violate ex post facto principles); *United States v. Eleven Vehicles*, 836 F. Supp. 1147, 1162 (E.D. Pa. 1993) (opining that the forfeiture statute in question was civil and consequently not affected by ex post facto principles). For a rich discussion on the application of ex post facto principles to quasi-criminal penalties, see Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2149 (1996) (contending that the Supreme Court has been "surprisingly permissive" in the civil context).

234. See sources cited *supra* note 233. In the state courts, there has been a notable shift, as three jurisdictions have concluded that registration schemes violate ex post facto principles because they are punitive. See *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *State v. Letalien*, 985 A.2d 4 (Me. 2009); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011).

235. In part, this was the Government's contention in *Carr v. United States*, which addressed the narrow question of whether criminal penalties for an offender's failure to register upon moving across state lines should apply to offenders who did so prior to SORNA's enactment. See 130 S. Ct. 2229, 2240–41 (2010). The amicus brief filed in *Smith v. Doe* by the Council of State Governments, the National Governors Association, and a number of other entities, also provides an excellent example of the argument. See Brief for Council of State Gov'ts et al. as Amici Curiae Supporting Petitioners, *Smith v. Doe*, 538 U.S. 84 (2003) (No. 01-729), 2002 WL 1268682.

236. See *Carr*, 130 S. Ct. at 2238, 2240–41 (criticizing the government's argument that subjecting pre-SORNA offenders to travel restrictions is a necessary law enforcement tool).

237. See *United States v. Fuller*, 627 F.3d 499, 505–06 (2d Cir. 2010) (adopting the Attorney General's position that applying SORNA to offenders convicted prior to the enactment of the Act was central to the enforcement of a comprehensive system).

238. 662 A.2d 367, 373 (N.J. 1995). The *Poritz* court further observed that if the notification law had exempted previously convicted offenders, "the law would have provided absolutely no protection whatsoever on the day it became law, for it would have applied to no one." *Id.*

However compelling this argument appears at first glance, retroactive application of any law is valid only if the law is deemed to be remedial in nature. By a vote of 5–4, the Supreme Court in *Smith v. Doe* concluded exactly that. It held that the first generation of sex offender registration laws, represented by the Alaska Sex Offender Registry Act, did not violate ex post facto principles because sex offender registration schemes cannot be characterized as punishment.<sup>239</sup>

At first blush, one might suppose that the nonapplicability of ex post facto principles to sex offender registration schemes is a settled issue because of the Court’s ruling in *Smith*. Certainly, the Seventh Circuit so concluded when it wrote, “[W]hether a comprehensive registration regime targeting only sex offenders is penal...is not an open question.”<sup>240</sup> Indeed, perhaps in deference to what it perceived to be the controlling federal principle from *Smith*, the Indiana Supreme Court in 2009 based its determination that Indiana registration laws violated ex post facto principles on adequate and independent state constitutional grounds, rather than on federal ex post facto principles.<sup>241</sup>

However “tempting” it is to conclude that *Smith* controls,<sup>242</sup> it would be a mistake to do so because the statutory landscape has so dramatically altered.<sup>243</sup> While one can argue the merits of the *Smith* decision—that is, whether punitive indices were sufficiently present in 2003 to warrant a different conclusion—significant changes to registration schemes prompt the following question: Can it be argued that super-registration schemes post-SORNA include the very characteristics the Court found lacking in 2003?

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239. *Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (“Our examination of the Act’s effects leads to the determination that respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska’s intention to establish a civil regulatory scheme. The Act is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause.”).

240. *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011). Although the 2010 Supreme Court decision in *Carr* addressed an ex post facto challenge, the opinion never grappled with the fundamental issue of whether sex offender registration schemes were punitive, relying instead on statutory construction to determine that burdens attached to failure to register were intended to apply only to prospective travelers. *See* 130 S. Ct. at 2237.

241. *Wallace v. State*, 905 N.E.2d 371, 377–78 (Ind. 2009). For a similar response, see *Doe v. State*, 189 P.3d 999 (Alaska 2008) (holding that Alaska’s registration and notification law violated the ex post facto clause of Alaska’s state constitution).

242. *See United States v. Juvenile Male*, 590 F.3d 924, 931 (9th Cir. 2009) (“It would be tempting to conclude, without looking carefully at the special circumstances of former juvenile offenders, that in light of [*Smith v. Doe*] sex offender registration by its nature does not constitute punishment.”). Although the Ninth Circuit concluded that *Smith v. Doe* may not always control, it nonetheless accorded deference to the Court’s decision. *See id.* at 932.

243. *See Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.”). For an interesting discussion on the role of *stare decisis* in judicial decisionmaking in the United States, see Mortimer N.S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67 (2006).

### A. AFFIRMATIVE DISABILITY OR RESTRAINT

At its paradigmatic core, the term “affirmative disability or restraint” employed in *Mendoza-Martinez* refers to imprisonment<sup>244</sup> or an act that is akin to loss of freedom.<sup>245</sup> In the seminal case *Hudson v. United States*, the Court viewed debarment from the banking industry as not “involv[ing] ‘an affirmative disability or restraint’ as that term is normally understood. While petitioners have been prohibited from participating in the banking industry, this is certainly nothing approaching the infamous punishment of imprisonment.”<sup>246</sup> Relying on the *Hudson* framework—imprisonment versus anything short of loss of freedom—courts have concluded, often summarily, that the following laws do not impose an affirmative disability or restraint: the denial of Social Security benefits,<sup>247</sup> permanent revocation of one’s driver’s license,<sup>248</sup> withdrawal of the right to food stamps,<sup>249</sup> cancellation of an alcoholic beverage license,<sup>250</sup> and termination of ownership rights in horses.<sup>251</sup>

Unfortunately, the *Hudson* line of cases does not offer sufficient direction because burdens demanded of sex offender registrants require more detailed analysis than the perfunctory “this is not imprisonment” analysis offered by those cases. *Smith v. Doe* helps shape the inquiry on whether registrants suffer from an affirmative disability or restraint as used in *Mendoza-Martinez*.<sup>252</sup> Using traditional definitions of punishment, the Court posed three questions to determine whether the law imposed a physical restraint or disability: (1) whether the law involves physical restraint; (2) if no physical restraint, whether the law involves a restriction on activities that could otherwise be considered restraint; and (3) if no restraint, either physically or effectively, whether the sanctions imposed involve the type of shame and humiliation traditionally associated with shaming punishments from colonial times.<sup>253</sup>

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244. See *Hudson v. United States*, 522 U.S. 93, 104 (1997) (distinguishing between disbarment from the banking industry and the “infamous punishment” of imprisonment”).

245. See *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997) (recognizing an individual’s constitutionally protected interest in avoiding physical restraint); see also *Smith v. Doe*, 538 U.S. 84, 111 (2003) (Stevens J., dissenting in part and concurring in part) (“Proper analysis . . . begin[s] with a consideration of the impact of the statutes on the registrants’ freedom.”).

246. 522 U.S. at 104 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)) (internal quotation marks omitted).

247. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (“Here the sanction is the mere denial of a noncontractual government benefit. No affirmative disability or restraint is imposed . . .”).

248. See, e.g., *Lescher v. Fla. Dep’t of Highway Safety & Motor Vehicles*, 985 So. 2d 1078 (Fla. 2008); *State v. Evans*, 550 S.E.2d 853 (N.C. Ct. App. 2001).

249. See *Turner v. Glickman*, 207 F.3d 419, 431 (7th Cir. 2000).

250. See *Ex Parte Sheridan*, 974 S.W.2d 129 (Tex. App. 1998).

251. See *State v. Almendarez*, 301 S.W.3d 886, 892–93 (Tex. App. 2009).

252. *Smith v. Doe*, 538 U.S. 84, 99 (2003).

253. *Id.* at 98–101.

Having concluded that registration and notification schemes do not involve physical or effective restraints,<sup>254</sup> the Court considered whether they nonetheless equal shaming punishments from colonial times.<sup>255</sup> Although *Smith v. Doe* analyzed specifically the Alaska Sex Offender Registry Act, the Court offered comparative analogies to distinguish sex offender registration schemes from historical noncorporal acts traditionally deemed punishment. To this end, the Court identified hallmarks of shaming punishments to include: banishment,<sup>256</sup> loss of freedom of movement,<sup>257</sup> public shame and humiliation,<sup>258</sup> occupational or housing disadvantages,<sup>259</sup> and conditions analogous to probation or supervised release.<sup>260</sup> The majority found these indices lacking in sufficient degree to warrant a finding that the Alaska Sex Offender Registry was punitive.<sup>261</sup> Today, however, super-registration schemes are readily identifiable by these hallmarks of shaming.

### I. Banishment

Banishment defines the most serious of colonial shaming punishments.<sup>262</sup> Historical banishment involved “[expulsion] from the community,” where “[the offenders] could neither return to their original community nor, reputation tarnished, be admitted easily into a new one.”<sup>263</sup> By contrast, the *Smith v. Doe* Court found that sex offender registrants were not effectively banished from their communities; registrants were “free to move where they wish and to live and work as other citizens, with no supervision.”<sup>264</sup>

That assumption is no longer accurate given the sweeping nature of current residency restrictions.<sup>265</sup> Today, in the vast majority of

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254. *Id.* at 98–99.

255. *Id.* at 99–100.

256. *Id.* at 99–101.

257. *Id.* at 99.

258. *Id.*

259. *Id.* at 100.

260. *Id.*

261. *Id.* at 97–102. Separate dissents by Justice Ginsburg (joined by Justice Breyer) and Justice Stevens vehemently opposed the characterization that sex offender registration laws did not involve affirmative disabilities or restraints. *See id.* at 111 (Stevens, J., dissenting in part, concurring in part) (“The statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply.”); *id.* at 115 (Ginsburg, J., dissenting) (“Beyond doubt, the Act involves an ‘affirmative disability or restraint.’”).

262. *Id.* at 98 (majority opinion).

263. *Id.*

264. *Id.* at 101; *see Doe v. Miller*, 405 F.3d 700, 719 (8th Cir. 2005) (determining that Iowa’s residency restrictions did not affect banishment because they only restricted where offenders may reside as opposed to expelling them from communities or prohibiting access to areas near schools or child-care facilities).

265. *See State v. Pollard*, 908 N.E.2d 1145, 1153 (Ind. 2009) (“Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without

communities, registrants are not free to live or work where they wish.<sup>266</sup> The *Smith* Court's observation that Alaskan registrants were free to move about the state only underscores the how quickly the landscape of registration schemes is changing. The Supreme Court of Kentucky, commenting on case law that had addressed this issue, observed that although a majority of courts had "avoided or sidestepped" the issue of whether residency restrictions constitute banishment, dissenting judges have been "far more intellectually honest concluding that residency restrictions constitute banishment."<sup>267</sup>

Indeed, this is the face of modern day banishment. Stories corroborate the assessment that offenders are made homeless or transient because of residency restrictions.<sup>268</sup> For example, in South Florida, a group of convicted offenders huddle "under the Julia Tuttle Causeway, which spans Miami's Biscayne Bay," in squalid living conditions because there is no community in South Florida where they may reside without violating residency restrictions.<sup>269</sup> One offender, who had moved from Ohio to Kentucky because of Ohio's residency restrictions, was arrested in Kentucky "for living within 1000 feet of East Covered Bridge Park, allegedly a public playground."<sup>270</sup> In Manhattan, a seventy-seven-year-old convicted offender was banished from his residence of over forty years because of amended New York residency restrictions.<sup>271</sup> Homeless offenders in Suffolk County, New York, "were crammed into a trailer that periodically moved around until finally settling on the grounds of the county jail."<sup>272</sup> In Georgia, a registrant, peacefully residing in his community with his wife, was almost forced to leave it when child-care facilities sprung up within 1000 feet of his home

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considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes.").

266. See *supra* Part I.D. (describing the impact of residency restrictions on registrants' movement).

267. *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky. 2009).

268. See, e.g., *Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740, 755 (Ga. 2007) ("[I]t is apparent that there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected."); see also Wendy Koch, *More Sex Offenders Transient, Elusive: Homeless Life May Increase Crime Risk*, USA TODAY, Nov. 19, 2007, at A1 ("Residency restrictions are the linchpin for causing homelessness among sex offenders.").

269. Skipp & Campo-Flores, *supra* note 49; see also Skipp, *supra* note 49. So well-known are the conditions of the Julia Tuttle Causeway that a recent episode of a television show depicted the protagonist searching for someone among groups of sex offenders who had set up camp under the bridge. See *Dexter: First Blood* (Showtime television broadcast Oct. 24, 2010).

270. *Baker*, 295 S.W.3d at 441. The court in that case noted that "the Division of Probation and Parole provided [the offender] with a link to a website to determine whether he was in compliance with [Kentucky's residency restrictions]. The website did not show East Covered Bridge Park and the surrounding area to be a prohibited zone." *Id.*

271. See *Berlin v. Evans*, 923 N.Y.S.2d 828, 829, 831-32 (Sup. Ct. 2011).

272. Skipp & Campo-Flores, *supra* note 49 (exposing the unintended consequences of residency restrictions).



and business.<sup>273</sup> To compound the injury, he had already been forced to vacate another residence three years earlier because of Georgia's residency restriction statutes.<sup>274</sup>

## 2. *Loss of Freedom of Movement*

Offenders suffer serious restrictions on their freedom of movement. In addition to constructive banishment, the introduction of residency restrictions and GPS monitoring systems have affected offenders' ability to integrate into communities, find stable homes, and obtain steady employment. As the Ohio Supreme Court persuasively articulated in *State v. Williams*, it is the cumulative effect of all of these requirements—not a separate analysis of each burden—that accurately portrays the effect these requirements have on the offenders subject to them.<sup>275</sup>

The burdens associated with periodic registration can be significantly intrusive.<sup>276</sup> In 2003, in response to that concern, *Smith v. Doe* theorized that the lack of in-person registration helped refute the claim that offenders were under an affirmative disability.<sup>277</sup> Within a few years, when in-person registration had become the norm, Maine's Supreme Court reasoned that

it belies common sense to suggest that a newly imposed lifetime obligation to report to a police station every ninety days to verify one's identification, residence, and school, and to submit to fingerprinting and provide a current photograph, is not a substantial disability or restraint on the free exercise of individual liberty.<sup>278</sup>

While in-person registration is “continuing, intrusive, and humiliating,”<sup>279</sup> a requirement that a GPS device be permanently attached to an offender's person is “dramatically more intrusive and

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273. *Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740, 742 (Ga. 2007) (finding Georgia's residency restrictions unconstitutional insofar as they permitted the regulatory taking of the defendant's home without just compensation, but determining that the defendant had failed to establish that the work restriction prohibiting him from entering his business had a sufficient economic impact).

274. *Mann v. State*, 603 S.E.2d 283, 285–86 (Ga. 2004).

275. *Compare State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (finding that all of the changes enacted by recent amendments to Ohio's sex offender laws in the aggregate, rather than any one change in particular, warranted the conclusion that imposing the current registration requirements on an offender whose crime was committed prior to the amendments is punitive), *with Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000) (analyzing the effect of Utah's Internet notification scheme by itself in determining that the notification scheme imposed only a “civil burden” on sex offenders).

276. *See, e.g., Doe v. State*, 189 P.3d 999, 1009 (Alaska 2008) (describing registration requirements as “significant and intrusive”); *see also Wallace v. State*, 905 N.E.2d 371, 379 (Ind. 2009) (acknowledging the burdensome nature of in-home personal visitation to verify an offender's address); *State v. Letalien*, 985 A.2d 4, 24–25 (Me. 2009) (recognizing the burden associated with the requirement to register in-person every ninety days).

277. *See* 538 U.S. 84, 101 (2003).

278. *Letalien*, 985 A.2d at 24–25 (explaining the new burdens imposed on lifetime registrants following the 1999 amendments to the state's 1995 registration law).

279. *Doe v. Dist. Att'y*, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring).

burdensome.”<sup>280</sup> A GPS monitoring device affects an offender’s ability to travel by airplane; to bathe, swim, scuba dive, camp, or travel to rural areas; and even the ability to enter certain buildings.<sup>281</sup> Though the North Carolina Supreme Court recognized that the state’s satellite-based monitoring program “*may* affect a participant’s daily activities,”<sup>282</sup> it ultimately found that neither the purpose nor the effect of the program negated the legislature’s civil intent in implementing it.<sup>283</sup>

In stark contrast to the view of the Supreme Court of North Carolina,<sup>284</sup> the Massachusetts Supreme Court has determined that GPS monitoring renders a registration statute punitive in effect because it imposes a substantial burden on liberty as part of an offender’s sentence “in two ways: by its permanent, physical attachment to the offender, and by its continuous surveillance of the offender’s activities.”<sup>285</sup> And because GPS monitoring is imposed as part of an offender’s sentence for certain crimes, the Massachusetts Supreme Court determined that the statute is punitive in effect.<sup>286</sup>

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280. *Commonwealth v. Cory*, 911 N.E.2d 187, 196 (Mass. 2009).

281. *See State v. Bowditch*, 700 S.E.2d 1, 4 (N.C. 2010). As the court explained, the transmitting device used for North Carolina’s program required periodic recharging and could lose its satellite connection in some buildings or if submerged underwater. *Id.* The transmitting device was worn on a belt around the shoulder or waist and could not be hidden under clothing. *Id.*

282. *Id.* at 4 (emphasis added).

283. *Id.* at 11 (“[The requirements necessary to operate [satellite-based monitoring] ‘make a valid regulatory program effective and do not impose punitive restraints.’” (quoting *Smith v. Doe*, 538 U.S. 84, 102 (2003))).

284. *Id.* (determining that the effects of GPS monitoring were “no more onerous than the harsh effects of the regulations found to be nonpunitive in occupational debarment cases” and in cases of civil confinement).

285. In *Cory*, 911 N.E.2d at 196, the Massachusetts Supreme Court explained,

There is no context other than punishment in which the State physically attaches an item to a person, without consent and also without consideration of individual circumstances, that must remain attached for a period of years and may not be tampered with or removed on penalty of imprisonment. Such an imposition is a serious, affirmative restraint.

286. *Id.* at 197; *see Commonwealth v. Goodwin*, 933 N.E.2d 925, 935 (Mass. 2010). When registration is required as part of a defendant’s sentence, retroactive application of new registration requirements, like additional conditions of probation, is an unconstitutional modification of, and enhancement to, the offender’s criminal sentence. *See People v. Castellanos*, 982 P.2d 211, 222 (Cal. 1999) (Kennard, J., concurring in part and dissenting in part) (“If the legislature intended the sanction to be imposed in a criminal proceeding it probably intended the sanction to be punitive. Probably, but not necessarily.”); *State v. Letalien*, 985 A.2d 4, 20 (Me. 2009) (declaring that registration was required as “an integral part of the criminal sentencing process and resulting sentence” for the offender’s crime, so that retroactive application of SORNA made more burdensome the punishment for a crime after its commission).

The first wave of sex offender statutes subjected offenders to registration *as part of* their criminal sentence. More recently, in an effort to avoid those constitutional protections necessary to the retroactive enforcement of criminal laws, many states have since required that registration be imposed at the time the court imposes a sentence rather than as part of the offender’s sentence. *See, e.g., Doe v. Dist. Att’y*, 932 A.2d 552, 564 (Me. 2007) (Alexander & Silver, JJ., concurring) (describing the change in Maine’s law).

Residency restrictions and exclusion zones impose yet another affirmative disability on registered offenders. Residency restrictions have an almost unbearable impact on a registered sex offender's ability to move freely. The threat of eviction hangs over the heads of registered offenders because there is always the potential that the offender will be forced from any new residence whenever a third party chooses to establish within the exclusion zone a business that statutorily bars sex offenders.<sup>287</sup>

In fact, exclusion zones do not prohibit only residency; in some cases they attempt to prohibit movement.<sup>288</sup> Massachusetts, for example, sought to establish exclusion zones that would not only prevent offenders from living in areas where they might come into contact with children, "but even from passing through such areas while driving to another destination."<sup>289</sup> When used together, GPS monitoring *plus* geographic exclusion zones "could dramatically limit an offender's freedom of movement."<sup>290</sup> As one commentator observed, exclusion zones, residency restrictions, and electronic monitoring programs have severely limited a registrant's freedom of movement without the state ever having to erect a single wall around the registrant.<sup>291</sup>

### 3. Public Shame and Humiliation

Despite the long line of cases concluding that sex offender registration schemes are nonpunitive civil regulations,<sup>292</sup> courts nonetheless recognize that these laws serve to shame, isolate, and ostracize the convicted offender.<sup>293</sup> The question, therefore, is not

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287. *Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740, 744 (Ga. 2007); *State v. Pollard*, 908 N.E.2d 1145, 1150 (Ind. 2009); *Commonwealth v. Baker*, 295 S.W.3d 437, 445 (Ky. 2009); see Brenda Goodman, *Georgia Justices Overturn a Curb on Sex Offenders*, N.Y. TIMES, Nov. 22, 2007, at A26 ("You live kind of every day wondering if the sheriff's office is going to come out and tell you that you have three days to move," Mr. Mann said. "It's happened to me twice.").

288. MASS. GEN. LAWS ch. 265, § 47 (2011) ("The commissioner of probation, in addition to any other conditions, shall establish defined geographic exclusion zones including, but not limited to, the areas in and around the victim's residence, place of employment and school and other areas defined to minimize probationer's contact with children, if applicable."); see FLA. STAT. § 947.1405(12)(a) (2011) (permitting the parole commission to designate additional "prohibited locations" to protect a victim).

289. *Cory*, 911 N.E.2d at 196–97 n.19.

290. *Goodwin*, 933 N.E.2d at 935 ("[T]he additional probation condition of GPS monitoring, paired with geographic exclusions, is so punitive in effect as to increase significantly the severity of the original probationary conditions and therefore may be imposed only after a finding of a violation of a condition of probation.").

291. See *Murphy*, *supra* note 186, at 1328–29.

292. See, e.g., *Smith v. Doe*, 538 U.S. 84, 96 (2003); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997); *Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000); *State v. Haskell*, 784 A.2d 4, 14–16 (Me. 2001).

293. See, e.g., *Smith v. Doe*, 538 U.S. at 99 ("It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have

whether sex offender registrants suffer from some form of public shame and humiliation. On that, there is agreement. Rather, the question is whether, given the dramatic changes in registration schemes, registrants now face public shame and humiliation that rise to the level of historical notions of punishment.

To traverse this minefield, we must remember that an enduring tension exists in determining “the exact line at which the dignity and convenience of the individual must yield to the demands of the public welfare or of private justice.”<sup>294</sup> The compelling arguments for public dissemination of *some* information about *some* sex offenders are real and they are meaningful. However, wholesale dissemination of information and effective debarment from employment and housing opportunities raise the question whether the public shame and humiliation registrants suffer are too profound to disregard.

In concluding that notification schemes were civil in nature, *Smith v. Doe* distinguished the paradigmatic shaming punishments of branding and other permanent labels from the publicity associated with community notification.<sup>295</sup> However, it is no longer valid to assume that the shame suffered by registrants is less profound than that suffered by colonists. Today, registrants suffer the type of permanent stigmas occasioned in colonial times. Using the analytical framework from *Smith*, the town square has been replaced by the Internet, and each time an offender’s picture is posted online, that registrant is held up for “face-to-face shaming,” as described in *Smith*.<sup>296</sup> For one offender, who had been convicted in 1990 of one count of indecent liberties with an undercover police officer and fined sixty-two dollars, automatic registration as a tier I offender would have caused untold embarrassment and humiliation.<sup>297</sup> So

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been designed in colonial times.”); *see also* *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) (“We can hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling of a prison inmate as a sex offender.”); *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999) (“[C]ommunity notification under the Act will seriously damage [a registrant’s] reputation and standing in the community.”); *Ray v. State*, 982 P.2d 931, 936 (Idaho 1999) (“[R]egistration brings notoriety to a person convicted of a sexual offense [and] does prolong the stigma attached to such convictions.”); *Young v. State*, 806 A.2d 233, 249 (Md. 2002) (“Being labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism.”).

294. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

295. 538 U.S. at 98 (“[T]he stigma of Alaska’s Megan’s Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.”); *see* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1899 (1991) (describing that one classic justification for shaming punishments is incapacitation, which “holds that punishment should protect the community from the offender”); Brian J. Telpner, Note, *Constructing Safe Communities: Megan’s Laws and the Purposes of Punishment*, 85 GEO. L.J. 2039, 2055 (1997) (arguing that community notification laws constitute punishment under a “broad, common-sense meaning of the term”).

296. 538 U.S. at 99.

297. *Doe v. Att’y Gen.*, 686 N.E.2d 1007, 1009–10 (Mass. 1997) (“He would be embarrassed and

significant was his perceived shame that this offender “seriously considered suicide rather than face the humiliation and disgrace of registering as a sex offender.”<sup>298</sup> However, in Roy Martin’s case, the shame of being reclassified as a tier III offender actually proved too much: Mr. Martin hanged himself rather than face the burdens associated with that level of registration.<sup>299</sup>

#### 4. Occupational Employment and Housing Disadvantages

Spiraling amendments have severely restricted the registrant’s opportunity for employment and housing.<sup>300</sup> The change is palpable from 2003 when the *Smith v. Doe* Court commented, “The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.”<sup>301</sup> Changing jobs or relocating residences at will is no longer an option under super-registration schemes. Residency restrictions have expanded to such a degree that many parts of the country are off-limits to the offender.<sup>302</sup> Employment options are equally scarce. Faced with scenarios more extreme than those found in *Hudson*, which involved debarment from only the banking industry,<sup>303</sup> states have barred registrants from all manner of employment.<sup>304</sup> Illustrating this point is Georgia’s attempt to preclude employment opportunities at *any* business located near industries affecting children.<sup>305</sup>

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humiliated if his children, friends, associates, and co-workers knew that he has had homosexual experiences.”).

298. *Id.* at 1009.

299. See Grinberg, *supra* note 6.

300. See *supra* Part I (detailing the changes in the new sex offender laws).

301. 538 U.S. at 100; see *Doe v. Miller*, 405 F.3d 700, 721 (8th Cir. 2005) (acknowledging that Iowa’s residency restrictions were more disabling than those at issue in *Smith v. Doe*, but finding the statute nonpunitive in part because the restrictions at issue were “certainly less disabling” than civil commitment schemes); *Femedeer v. Haun*, 227 F.3d 1244, 1250 (10th Cir. 2000) (finding that registrants were “free to live where they choose, come and go as they please, and seek whatever employment they may desire.”).

302. See *supra* note 179 and accompanying text.

303. *Hudson v. United States*, 522 U.S. 93, 104–05 (1997) (concluding that debarment from the banking industry was not sufficiently punitive to outweigh the civil purpose of the sanction, which was to promote the stability of that industry).

304. See *Doe 1 v. Otte*, 259 F.3d 979, 988 (9th Cir. 2001) (“In contrast [to *Hudson*], the procedures employed under the Alaska statute are likely to make the plaintiffs *completely* unemployable.”), *rev’d sub nom.* *Smith v. Doe*, 538 U.S. 83 (2003).

305. See GA. CODE ANN. § 42-1-15 (2011) (prohibiting registrants from working at any child-care facility, school, or church, “or at any business that is located within 1,000 feet of a child care facility, a school or church” (emphasis added)); see also LA. REV. STAT. ANN. § 15:553 (2011) (prohibiting registrants from operating any bus, taxicab, or limousine for hire, and from engaging in employment as a service worker who goes into a residence to provide any type of service, and specifically prohibiting any person whose offense involved a minor child from operating any carnival or amusement ride).

### 5. *Conditions Similar to Probation or Supervised Release*

As *Mendoza-Martinez* illustrates, whether a law promotes traditional aims of punishment, such as retribution and deterrence, can help determine whether a law is punitive.<sup>306</sup> In considering whether the obligation of registrants to report regularly to their local law enforcement was akin to conditions of probation or supervised release, the Court concluded that certain hallmarks associated with probation or supervised release were not present in the Alaska registration scheme.<sup>307</sup> For example, the registration scheme did not include mandatory conditions or the potential for revocation of freedom in case of infraction.<sup>308</sup> Nor did it require the level of in-person registration or the frequency of registration associated with probation or supervised release.<sup>309</sup> In fact, the lack of in-person registration in Alaska's scheme bolstered the Court's position that registration was not sufficiently similar to supervised release.<sup>310</sup>

Similar to the other assumptions underlying *Smith v. Doe*, this one no longer applies. Offenders are not "free to move where they wish and to live and work as other citizens, with no supervision."<sup>311</sup> Current registration burdens look like probation or supervised release; they require registration in person as often as every ninety days,<sup>312</sup> as well as a variety of other mandatory actions that, if not met, threaten the registrant with loss of freedom.<sup>313</sup>

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306. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, at 168, 182–83 (1963) (reasoning that the legislative history, which invited the inference that Congress's purpose in passing the law at issue was to inflict effective retribution against draft evaders, confirmed the conclusion that the law was punitive in nature).

307. *Smith v. Doe*, 538 U.S. 84, 101 (2003).

308. *Id.*

309. *Id.*

310. *Id.* ("[T]he record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act."). Lower courts have relied on the Court's message in *Smith v. Doe*. See, e.g., *Rodriguez v. State*, 93 S.W.3d 60, 70 (Tex. Crim. App. 2002) (contrasting numerous in-person registration requirements with the Texas statute, which, for first-time offenders, requires only one registration per move and registration once per year); *McCabe v. Commonwealth*, 650 S.E.2d 508, 511 (Va. 2007) (concluding that no liberty interest was affected because of lack of in-person registration).

311. See *Smith v. Doe*, 538 U.S. at 101.

312. See e.g., OHIO REV. CODE § 2950.06(B)(3) (West 2011), *invalidated by State v. Williams*, 952 N.E.2d 1108 (Ohio 2011).

313. See, e.g., *Commonwealth v. Goodwin*, 933 N.E.2d 925, 927 (Mass. 2010) (concluding that a court may impose GPS monitoring as an additional condition of a registrant's probation only if the registrant violates any of the original conditions); *State v. Williams*, 952 N.E.2d 1108, 1111 (Ohio 2011) (noting that failure to comply with certain registration requirements will subject a sex offender to criminal prosecution). Even in 2003, members of the Court believed that registration requirements were tantamount to requirements imposed as consequences of other criminal convictions. See *Smith v. Doe*, 538 U.S. at 111 (Stevens, J., dissenting in part, concurring in part).

## B. EXCESSIVENESS

The final *Mendoza-Martinez* factor for determining whether a law is punitive in nature asks whether the law, in its necessary operation, is excessive in relation to its stated regulatory purpose.<sup>314</sup> If the means chosen to carry out a law's nonpunitive purpose are excessive, the law may be deemed punitive in its effect.<sup>315</sup> Courts recognize that this is the most critical of the seven factors.<sup>316</sup>

Although the vast majority of courts have consistently found that registration and notification schemes are rationally connected to their proposed goal, namely public safety,<sup>317</sup> a fundamental change in these schemes threatens the legality of this seventh and final factor. Individualized risk assessment, a mainstay of the previous generation of sex offender schemes,<sup>318</sup> has been replaced by offense-based assessment, where individuals are assigned to tiers based on the crimes for which they were convicted.<sup>319</sup> In many states, courts are no longer permitted to

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314. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963); see *Smith v. Doe*, 538 U.S. at 97 (majority opinion).

315. *Smith v. Doe*, 538 U.S. at 105 (“The question is whether the regulatory means chosen are reasonable in light of the non-punitive objective.”); see *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008) (“We use ‘means’ here to include the scope of the statute and the obligations it imposes on those subject to it and what the state can or must do in enforcing it.”).

316. See, e.g., *Kellar v. Fayetteville Police Dep’t*, 5 S.W.3d 402, 409 (Ark. 1999) (“It is the seventh and final factor which weighs most heavily in the balance in Arkansas, as in most other states: the question of whether the Act is excessive in relation to its alternative purposes.”); *State v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) (“This is the key factor in our analysis.”); *Rodriguez v. State*, 93 S.W.3d 60, 75 (Tex. Crim. App. 2002) (“[O]f all of the *Kennedy* factors, this factor cuts most directly to the question of which statutes cross the boundaries of civil sanctions, and which do not.”); see also *Smith v. Doe*, 538 U.S. at 116 (Ginsburg, J., dissenting) (“What ultimately tips the balance for me is the Act’s excessiveness in relation to its nonpunitive purpose.”).

317. See, e.g., *Smith v. Doe*, 538 U.S. at 102–03; *Doe v. State*, 189 P.3d at 1015 (“[Alaska’s registration scheme] can rationally be viewed as advancing a non-punitive purpose.”); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (“Although [the expansion of Indiana’s sex offender laws] supports the view that the effects of the Act are punitive, still the Act advances a legitimate regulatory purpose.”); *State v. Letalien*, 985 A.2d 4, 22 (Me. 2009) (“[Maine’s] SORNA . . . was enacted to serve the legitimate non-punitive purpose of public safety.”).

318. See, e.g., MASS. GEN. LAWS ch. 6, § 178E(f) (2011) (permitting the court to relieve a sex offender of his duty to register if “the circumstances of the offense in conjunction with the offender’s criminal history indicate that [she] does not pose a risk of reoffense or a danger to the public”); see also *Letalien*, 985 A.2d at 8 (reviewing Maine’s 1991 registration law, which allowed a court to waive registration requirements where good cause was shown); *State v. Ellison*, 2002-Ohio-4024U, ¶ 22 (Ct. App.) (explaining that prevailing law at the time of the decision permitted a trial or sentencing court to employ factors in order to determine whether to classify an offender as a sexual predator).

319. See *Doe v. State*, 189 P.3d at 1017 (“[O]ffenders cannot shorten their registration or notification periods even on the clearest determination of rehabilitation . . .” (quoting *Smith v. Doe*, 538 U.S. at 117 (Ginsburg, J., dissenting))); *In re W.M.*, 851 A.2d 431, 436 (D.C. 2004) (reporting that registration requirements are “based on the nature of the offenses . . . committed rather than on an individualized assessment of [the] risk of recidivism”); *Commonwealth v. Baker*, 295 S.W.3d 437, 446 (Ky. 2009) (acknowledging that Kentucky’s residency restrictions apply to certain offenders without any consideration as to whether they might be a threat to children or to public safety); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011) (noting that offenders were no longer entitled to a

determine whether a registrant poses a risk to society;<sup>320</sup> indeed, many states expressly prohibit relief from registration or disclosure obligations.<sup>321</sup> In her dissent in *Smith v. Doe*, Justice Ginsburg expressed caution regarding the constitutionality of sex offender registration laws that do not provide for individualized assessment nor offer the registrant the opportunity to demonstrate rehabilitation.<sup>322</sup>

The first generation of sex offender legislation permitted trial courts to waive registration requirements for certain individuals,<sup>323</sup> but many states have repealed such provisions.<sup>324</sup> As a result, offenders are no longer entitled to present any evidence to shorten their registration or notification period.<sup>325</sup> One offender's story illustrates the damaging effect

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hearing to determine whether they would be classified as a sexually oriented offender, habitual sex offender, or sexual predator under Ohio's amended sex offender statute); see also *Commonwealth v. Williams*, 832 A.2d 962, 965–66 (Pa. 2003) (describing the changes in risk-assessment procedures required by the court to afford constitutional protections to the registrants).

320. See, e.g., *Doe v. State*, 189 P.3d at 1017 n.143 (“[Alaska’s registration scheme] does not authorize a court to determine that a registrant poses no risk to society and consequently to altogether relieve him of registration and disclosure obligations.”); *People v. Hofsheier*, 129 P.3d 29, 34 (Cal. 2006) (noting that the duty to register as a sex offender cannot be avoided through a plea bargain or through the exercise of judicial discretion); *Letalien*, 985 A.2d at 9–10 (acknowledging that Maine’s sex offender law was amended to eliminate courts’ ability to waive registration on a showing of reasonable likelihood that registration was no longer necessary); *Williams*, 952 N.E.2d at 1113 (noting that judges are no longer permitted to review a sex offender’s statutory classification).

321. See, e.g., LA. REV. STAT. ANN. § 15:542(F)(1) (2011) (“[T]he sex offender registration and notification requirements required by this Chapter are mandatory and shall not be waived or suspended by any court.”).

322. 538 U.S. at 117 (Ginsburg, J., dissenting) (“And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.”). Other courts have expressed similar concerns. See, e.g., *Letalien*, 985 A.2d at 23 (“No statistics have been offered to suggest that every registered offender or a substantial majority of the registered offenders will pose a substantial risk of re-offending long after they have completed their sentences and probation, including any required treatment. The registry, however, makes no such distinctions.”); *State v. Eppinger*, 743 N.E.2d 881, 886 (Ohio 2001) (“One sexually oriented offense is not a clear predictor of whether that person is likely to engage in the future in one or more sexually oriented offenses . . .”).

323. See *Doe v. Poritz*, 662 A.2d 367, 382–83 (N.J. 1995) (upholding a retroactive registration requirement and explaining that part of the rationale for doing so was that the scheme included individualized assessment); see also *State v. Cook*, 700 N.E.2d 570, 585–88 (Ohio 1998) (describing the hearing to which an offender was entitled).

324. See *State ex rel Olivieri v. State*, 779 So. 2d 735, 737 (La. 2001) (acknowledging that the proviso that permitted exclusion from community notification was repealed in 1999); *Doe v. Dist. Att’y*, 932 A.2d 552, 563 (Me. 2007) (noting that Maine’s legislature repealed provisions that had allowed sentencing courts to waive registration requirements in 2001).

325. See *Smith v. Doe*, 538 U.S. at 116–17 (Ginsburg, J., dissenting); see also *Doe v. State*, 189 P.3d at 1017 (“[Alaska’s registration scheme] provides no mechanism by which a registered sex offender can petition the state or a court for relief from the obligations of continued registration and disclosure.”); *Bertram v. State*, 2009-Ohio-5210U, ¶ 64 (Ct. App.) (“[T]he offender is not entitled to a hearing where a judge could make an independent evaluation of the offender’s specific likelihood of recidivism based on the offender’s criminal history, psychiatric evaluations, age, and facts of the underlying offense.”).



that elimination of waiver provisions can have on offenders.<sup>326</sup> As court documents attest, this citizen of Maine was “a productive citizen” and “family man” who had no other arrests or convictions for sex offenses following his original conviction twenty years prior.<sup>327</sup> He was “a good candidate” for waiver.<sup>328</sup> But after Maine repealed its waiver provisions, he no longer had the ability to escape the registration requirements of the state’s sex offender statute.<sup>329</sup>

This Article does not discount the fact that some sex offender registration statutes formally employ means that might relate rationally enough to the state’s interest in public safety.<sup>330</sup> But as the District Court for the Southern District of New York warned, “The nature of the classification proceeding carries with it a high risk of error.”<sup>331</sup> One citizen of Massachusetts received notice that the Massachusetts Sex Offender Registry Board was reviewing his case to make a recommendation regarding his duty to register twenty-two years after he had completed probation for a sexual offense.<sup>332</sup> The board recognized that it could relieve him of the burdens of registration but it nonetheless refused to grant relief, despite the fact that he had not been convicted of any crime since he was discharged from probation twenty-two years previously<sup>333</sup> and had been married for twenty-one years, raised three children, and established a stable life in the community.<sup>334</sup>

The failure to provide for individualized assessment of the risk of reoffense is not the only aspect of super-registration schemes that renders them excessive. Today’s registration laws include unreasonable

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326. *See Doe v. Dist. Att’y*, 932 A.2d at 563.

327. *Id.*

328. *Id.*

329. *Id.*

330. *See, e.g., Doe v. Pataki*, 120 F.3d 1263, 1277–78 (2d Cir. 1997) (finding that notification was limited in extent and carefully controlled, with protections against misuses of the information); *Doe v. Sex Offender Registry Bd.*, 882 N.E.2d 298, 300 (Mass. 2008) (quoting 803 MASS. CODE REGS. § 1.01 (2002) (“The Sex Offender Registry Board shall mail to the sex offender a letter notifying him of his right to submit Documentary Evidence relative to his risk of reoffense, the degree of dangerousness posed to the public and his duty to register. Any documents submitted by the offender shall become part of his file as compiled by the Board in making its recommendation. The offender shall submit such Documentary Evidence to the Board within 30 calendar days of receiving his notification.”)).

331. *Doe v. Pataki*, 3 F. Supp. 2d 456, 469 (S.D.N.Y. 1998). The court discussed the classification hearing of one “borderline mentally retarded” offender, who appeared without a lawyer and was not informed of his right to a lawyer, and at which the hearing examiners read from a document stating the facts of a different offender’s case. *Id.* at 475; *see Smith v. State*, 2009-1765U, p. 7 (La. App. 1 Cir. 3/26/10) (noting that a hearing was never held, even though Louisiana’s sex offender law requires an offender be given an opportunity to challenge his reclassification).

332. *Doe v. Sex Offender Registry Bd.*, 882 N.E.2d at 300.

333. *Id.*

334. *Id.*

reporting and expansive notification requirements that apply to individuals convicted of a broad spectrum of ever-changing crimes.<sup>335</sup>

When viewed individually, the requirements may seem rationally related to public safety, but when viewed together, registration schemes paint a picture of excessiveness. As Alaska's Supreme Court noted, "It is significant that the registration and re-registration requirements are demanding and intrusive and are of a long duration."<sup>336</sup> Convicted sex offenders are required to register for longer periods of time, required to provide more information than originally contemplated by the first wave of registration statutes, and are subject to extensive and automatic notification requirements.<sup>337</sup> They have been transformed into a nomadic subset of the population struggling to find a place to put down roots in light of demanding residency restrictions.<sup>338</sup>

By imposing registration and notification requirements on *all* convicted sex offenders, states impliedly communicate to the public that each of those offenders poses a substantial risk to society.<sup>339</sup> Thus, "[a]ll registrants, including those who have successfully rehabilitated, will naturally be viewed as potentially dangerous persons by their neighbors, co-workers, and the larger community."<sup>340</sup> And here lies one key flaw: Because registration laws and community notification statutes are overinclusive, they are rendered excessive and consequently punitive.

What has accounted for a difference so fundamental that it shifts the structure of registration from risk-based to offense-based? While one can point to Congress's enactment of the AWA in 2006<sup>341</sup> as the genesis for the change, this Article argues that the shift actually can be traced to the Supreme Court's 2003 decision in *Connecticut Department of Public Safety*,<sup>342</sup> which was handed down the same day as *Smith v. Doe*.<sup>343</sup> There,

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335. See *supra* Part I.C (detailing the extensive changes in registration schemes).

336. *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008) (footnote omitted).

337. See *supra* Part I (describing registration and notification burdens).

338. See *supra* Part I.D.

339. *State v. Letalien*, 985 A.3d 4, 23 (Me. 2009); see *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (finding the Indiana registration scheme fundamentally flawed, in part because it was "so broad and sweeping"). Sex offender statutes are also underinclusive in light of their purported purpose because they do not apply to individuals charged with sexual offenses but are acquitted or to individuals whose conviction is vacated or overturned. See *Doe v. State*, 189 P.3d at 1015. At both ends of the spectrum, sex offender registration laws fail to accomplish their purported goals; *Wallace*, 905 N.E.2d at 381-83 (noting that a registration scheme that applies to individuals convicted of a sexual offense and individuals charged with but not convicted of a sexual offense favors a finding that the scheme is nonpunitive because its application is based on criminal conduct rather than criminal conviction).

340. *Letalien*, 985 A.2d at 23. The *Letalien* court continued, "It is unknown to what extent this reality will impair the opportunity for rehabilitated offenders to reintegrate and become productive members of society." *Id.* at 23-24.

341. Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 and 42 U.S.C. (2010)).

342. 538 U.S. 1, 1 (2003).

the Court affirmed Connecticut's decision to include *all* sex offenders on a public registry, without regard to individualized risk assessment or danger.<sup>344</sup> The Court wrote, “[T]he fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under Connecticut’s Megan’s Law.”<sup>345</sup> Conviction alone triggers registration and notification,<sup>346</sup> and Connecticut’s decision to publicly post all registrants’ information, whether dangerous or not, also constituted a valid exercise of its authority.<sup>347</sup>

Although *Connecticut Department of Public Safety* presented on a narrow ground of procedural due process,<sup>348</sup> the case is, nonetheless, disturbing for the message it imparts. In upholding a system of sex offender notification that does not distinguish among registrants, the Court signaled the constitutional legitimacy of broad-based, overinclusive registries. The Eighth Circuit followed the Supreme Court’s lead, finding that categorical application of Iowa’s registration and notification requirements did not render Iowa’s sex offender statute excessive in relation to its nonpunitive purpose.<sup>349</sup> Classifying an individual as a sex offender remains automatic even though “one sexually oriented conviction, *without more*, may not predict future behavior”<sup>350</sup>

Presumed dangerousness is the controlling assumption. The systematic refusal to assess the relative risk of each offender, or to enable the registrant to seek waiver or early termination of registration requirements, warrants reexamination of whether these super-registration schemes remain rationally connected to their purported goals. Recently, a few courts have criticized the lack of rational connection,<sup>351</sup> but other

343. 538 U.S. 84, 84 (2003).

344. *Conn. Dep’t of Pub. Safety*, 538 U.S. at 3–4; see *Smith v. Doe*, 538 U.S. at 103–04 (“The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences.”).

345. *Conn. Dep’t of Pub. Safety*, 538 U.S. at 7 (emphasis added).

346. *Id.*

347. *Id.* at 7–8. The Court did leave the door open for a future substantive due process challenge. See *id.* at 8 (“[W]e express no opinion as to whether Connecticut’s Megan’s Law violates principles of substantive due process.”).

348. *Id.*

349. *Doe v. Miller*, 405 F.3d 700, 721–22 (8th Cir. 2005) (reasoning that the absence of a particularized risk assessment did not convert Iowa’s residency restrictions into a punitive measure because “[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences” (quoting *Smith v. Doe*, 538 U.S. at 103)).

350. *Bertram v. State*, 2009-Ohio-5210U, ¶ 24 (Ct. App.) (emphasis added) (quoting *State v. Eppinger*, 743 N.E.2d 881, 886 (2001)).

351. See, e.g., *State v. Pollard*, 908 N.E.2d 1145, 1153 (Ind. 2009) (“Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes.”); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (“[W]e think it significant for this excessiveness inquiry that the Act provides no mechanism by which a registered sex offender can petition the court for relief from the obligation of continued registration and disclosure. . . . Thus, the

courts continue to find that sex offender statutes are not excessive in relation to their non-punitive purposes,<sup>352</sup> relying on the Supreme Court's assertion in *Smith v. Doe* that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance."<sup>353</sup> Yet the *Smith* reasoning should not persist, because it fails to address the impact of extensive expansion of regulations on the rational connection between registration schemes and their purported goals.

#### IV. IS THE TIME RIPE FOR A SUCCESSFUL DUE PROCESS CHALLENGE?

Challenging sex offender registration laws under due process can be a daunting task—possibly more so than an *ex post facto* analysis that relies on the analytical framework of the multifaceted test of *Mendoza-Martinez*.<sup>354</sup> A due process challenge faces greater hurdles because of its narrow yet amorphous underpinnings.<sup>355</sup> As the Court wrote in *County of Sacramento v. Lewis*, "Rules of due process are not . . . subject to mechanical application . . . [O]ur concern with preserving the constitutional proportions of *substantive due process* demands an exact analysis of [context and] circumstances . . ."<sup>356</sup>

##### A. MAKING THE CASE FOR SUBSTANTIVE DUE PROCESS RIGHTS

At its heart, substantive due process was "intended to secure the individual from the arbitrary exercise of the powers of government."<sup>357</sup>

non-punitive purpose of the Act, although of unquestioned importance, does not serve to render as non-punitive a statute that is so broad and sweeping."); *Commonwealth v. Baker*, 295 S.W.3d 437, 446 (Ky. 2009) ("Given the drastic consequences of Kentucky's residency restrictions, and the fact that there is no individual determination of the threat a particular registrant poses to public safety, we can only conclude that [Kentucky's residency restriction] is excessive with respect to the nonpunitive purpose of public safety."); *Doe v. Dist. Att'y*, 932 A.2d 552, 563 (Me. 2007) ("[T]he fact that a sex offender never has the ability to escape the registration requirements of the current SORNA, regardless of behavior, consequences, or contributions following the conviction, strikes us as having the capability to be excessive and as diverging from the purpose of protecting the public.").

352. A review of federal case law offers a sobering look at how entrenched the view is that registration and notification statutes are not punitive. *See, e.g.*, *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011); *United States v. George*, 625 F.3d 1124, 1131 (9th Cir. 2010); *United States v. DiTomasso*, 621 F.3d 17, 25 (1st Cir. 2010); *United States v. Shenandoah*, 595 F.3d 151, 158–59 (3d Cir. 2010); *United States v. Guzman*, 591 F.3d 83, 94 (2d Cir. 2010); *United States v. Young*, 585 F.3d 199, 203–06 (5th Cir. 2009); *United States v. Gould*, 568 F.3d 459, 466 (4th Cir. 2009); *United States v. Ambert*, 561 F.3d 1202, 1207 (11th Cir. 2009); *United States v. Hinckley*, 550 F.3d 926, 936 (10th Cir. 2008); *United States v. May*, 535 F.3d 912, 919–20 (8th Cir. 2008).

353. 538 U.S. 84, 103 (2003).

354. For excellent analyses of all seven factors, see *Wallace*, 905 N.E.2d at 379–84, and *State v. Letalien*, 985 A.3d 4, 18–24 (Me. 2009).

355. *See Rochin v. California*, 342 U.S. 165, 168 (1952) (iterating that courts must subject substantive due process claims "to the very narrow scrutiny which the Due Process Clause of the Fourteenth Amendment authorizes").

356. 523 U.S. 833, 850 (1998) (emphasis added).

357. *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okley*, 17 U.S.

Challenges are difficult to sustain, however, because of the Court's unwillingness to expand protections beyond traditional fundamental interests.<sup>358</sup> In *Washington v. Glucksberg*, the Court reiterated, "[W]e 'ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'"<sup>359</sup> Consequently, the Court has held firm to the proposition that the right asserted must be "deeply rooted in this Nation's history and tradition"<sup>360</sup> or "implicit in the concept of ordered liberty."<sup>361</sup>

Legislation that interferes with a fundamental right or liberty will survive constitutional scrutiny only if it is narrowly tailored to serve a compelling state interest.<sup>362</sup> Without a fundamental interest to anchor the inquiry, legislation will be deemed constitutional if it is rationally related to a legitimate governmental interest.<sup>363</sup> Successful challenges under the rational basis test are rare because great deference is afforded to the legislative authority to craft and define laws.<sup>364</sup> Indeed, so difficult is the burden that scholars evoked surprise when the Court in *Lawrence v. Texas* overturned a Texas sodomy law<sup>365</sup> without first finding a traditional fundamental interest.<sup>366</sup>

For the sex offender, a substantive due process claim is especially problematic.<sup>367</sup> Registrants can rely on neither sympathy nor case

(4 Wheat) 235, 241 (1819)).

358. See *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997) (declaring that substantive due process analysis requires a "'careful description' of the asserted fundamental liberty interest" (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

359. *Id.* at 720 (alteration in original) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 123 (1992)); see *Albright v. Oliver*, 510 U.S. 266, 272 (1994) ("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.").

360. *Glucksberg*, 521 U.S. at 721 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977)).

361. *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). The Court in *Glucksberg* found that the right to end one's life was not a fundamental one under this test. *Id.* at 728.

362. *Id.* at 721.

363. *Id.*

364. See, e.g., *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005) ("The rational basis standard is 'highly deferential' and we hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances." (citing *Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001))).

365. 539 U.S. 558, 578 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

366. See, e.g., Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 WM. & MARY BILL RTS. J. 65, 65 (2003) ("[T]he opinions of the Supreme Court in both *Lawrence* and *Grutter* work fundamental changes in the interpretation of our fundamental rights of liberty and equality."); Kevin F. Ryan, *A Flawed Performance*, VT. B.J., Fall 2003, at 5, 6 ("The Court—or at least Justice Kennedy—has chosen to build jurisprudential castles on the most shifting of sands, if not on thin air.").

367. See, e.g., *Moore*, 410 F.3d at 1343–44 (rejecting the registrant's broad-based and general assertions of the privacy interests implicated in registering as a sex offender); see also *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 499–502 (6th Cir. 2007) (dismissing the plaintiffs' substantive due process claim because it did not allege a sufficient privacy interest); *In re W.M.*, 851 A.2d 431, 451

precedent for support.<sup>368</sup> Perhaps in recognition of these obstacles,<sup>369</sup> offenders have been hesitant to bring substantive due process challenges, even when invited to do so.<sup>370</sup> Yet, as observed by the Court in the landmark decision of *Rochin v. California*, adherence to substantive due process principles demands that governmental actions must not offend “canons of decency and fairness . . . even toward those charged with the most heinous offenses.”<sup>371</sup>

Given the far-ranging burdens of super-registration schemes, a compelling argument can be made that under their auspices, governmental conduct no longer comports with traditional notions of decency and fair play. Members of the Court signaled their openness to such a challenge during the first generation of sex offender registration laws in *Connecticut Department of Public Safety*.<sup>372</sup> Justice Souter, with Justice Ginsburg joining, stated, “[T]oday’s holding does not foreclose a claim that Connecticut’s dissemination of registry information is actionable on a substantive due process principle.”<sup>373</sup>

Although mindful of the burdens placed on registrants, courts have nonetheless concluded that the schemes do not offend the canons of decency and fairness because any penalties associated with registration and notification mirror the consequences associated with the public’s knowledge of a conviction.<sup>374</sup> Even if that assumption was accurate at one time, preceding sections of this Article have demonstrated that super-registration schemes no longer abide by the notions of fair play espoused in *Rochin*. And although *Rochin* conjures images of brutal physical methods of government enforcement,<sup>375</sup> it is the concept of overpowering

(D.C. 2004) (“Since SORA does not threaten rights and liberty interests of a ‘fundamental’ order, appellants cannot succeed on their substantive due process challenge.”).

368. See *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (“[P]ersons who have been convicted of serious sex offenses do not have a fundamental right to be free from . . . registration and notification requirements . . .”); see also *Moore*, 410 F.3d at 1344 (emphasizing that a substantive due process challenge must show that a law either “directly or unduly burden[s] the fundamental rights claimed by Appellants”).

369. See, e.g., *Moore*, 410 F.3d at 1342–43 (emphasizing the reluctance to expand substantive due process protections); *People v. Malchow*, 714 N.E.2d 583, 589 (Ill. App. Ct. 1999) (concluding that no substantive due process violation occurred because the statute “bears a reasonable relationship to a public interest to be served”); *In re Detention of Garren*, 620 N.W.2d 275, 285 (Iowa 2000) (rejecting a substantive due process challenge by a sex offender challenging his civil confinement because of the “reasonable fit between the governmental purpose and the means chosen to advance that purpose”); *Doe v. Poritz*, 662 A.2d 367, 421–22 (N.J. 1995) (determining that disclosure of information does not violate substantive due process).

370. See, e.g., *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003) (reporting that the respondents “expressly disavow[ed] any reliance on the substantive component” of due process).

371. 342 U.S. 165, 169 (1952) (quoting *Malinski v. New York*, 324 U.S. 401, 416–17 (1945)).

372. See 538 U.S. at 9 (Souter, J., concurring).

373. *Id.*

374. See *supra* notes 367–69 and accompanying text.

375. In *Rochin*, the government attempted to extract drugs from the defendant (who had swallowed them), first by forcible extraction and then by involuntary stomach pumping. See 342 U.S. at 166.

governmental action that resonates. In *Daniels v. Williams*, the Court described the vital role that substantive due process plays in “prevent[ing] governmental power from being ‘used for purposes of oppression.’”<sup>376</sup> Although *Daniels* did not concern the constitutionality of registration schemes, the *Daniels* description of oppression applies with equal force to registration schemes.

The demonstration of governmental power is formidable. Registration burdens should not be viewed as isolated slices of prohibition; rather, they impact every aspect of life—where to live, where to work, where to travel, and with whom to associate. Indeed, there is no aspect of the sex offender’s life untouched by the imprint of registration and notification.<sup>377</sup> With continually increasing burdens, the inability of registrants to argue for waiver, residency restrictions that bar the offender from many parts of the country, and a lack of serious and sustained judicial oversight, registration schemes serve primarily to enable the government to oppress the sex offender. The counter to such governmental domination, therefore, lies with the registrant’s ability to mount a successful due process challenge.

#### B. ASSERTING PROCEDURAL DUE PROCESS PROTECTIONS

Even where no substantive due process violation exists as a result of the government’s interference with a registrant’s liberty interest, procedural due process nonetheless demands safeguards ensuring that the registrant’s liberty is not taken without due process of law.<sup>378</sup> That generally translates to notice and an opportunity to be heard.<sup>379</sup>

In the context of sex offender registration, the deprived liberty interest required to sustain a procedural due process challenge has been understood to mean the stigma and alteration of status that attach to registration and public dissemination of that information.<sup>380</sup> Whether, and to what extent, however, reputation is a protected liberty interest that triggers procedural due process protections has been the subject of

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376. 474 U.S. 327, 331 (1986) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856)).

377. Even courts that have upheld the constitutionality of registration laws nevertheless recognize that registrants have an affected privacy interest. See *Doe v. Tandeske*, 361 F.3d 594, 596–97 (9th Cir. 2004) (acknowledging the liberty interest of sex offenders).

378. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

379. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (finding that procedural due process requires an opportunity for a hearing before welfare benefits are terminated); *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (“It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law.”).

380. See *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 6 (2003); see also *Tandeske*, 361 F.3d at 596–97 (acknowledging that sex offenders have an affected liberty interest).

serious debate.<sup>381</sup> As articulated by the Supreme Court in 1976 in *Paul v. Davis*, injury to reputation alone is insufficient.<sup>382</sup> Concerned that a potential flood of federal litigation would arise if a state defamation case could be converted into an action for loss of liberty under the Due Process Clause, the Court in *Paul* concluded that stigma alone is not actionable.<sup>383</sup>

And so was born the concept of “stigma plus,”<sup>384</sup> which demands not only proof of injury to one’s reputation, but also that the injury was accompanied by the denial or curtailment of a tangible interest.<sup>385</sup> Although numerous cases pay homage to the “plus” part of the stigma-plus test,<sup>386</sup> courts have also acknowledged that outside *Paul*’s limited context, “it is not entirely clear what the ‘plus’ is.”<sup>387</sup>

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381. *Compare* *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971) (holding that a state law that allowed a police chief to prohibit the sale of alcohol to a specified individual was invalid because it put a person’s “reputation . . . at stake” without notice and an opportunity to be heard), *with* *Paul v. Davis*, 424 U.S. 693, 708 (1976) (holding that *Constantineau* did not rest on damage to reputation alone but also on the deprivation of the right to purchase alcohol).

382. 424 U.S. at 701.

383. *Id.* at 698–99 (expressing concern that without a limitation in place, § 1983 actions would open the door for a myriad of state defamation claims); *see* *Siegert v. Gilley*, 500 U.S. 226 (1991) (reaffirming *Paul* in holding that injury to reputation alone was an insufficient liberty interest).

384. *See* *Algarin v. Town of Wallkill*, 421 F.3d 137, 138 n.1 (2d Cir. 2005) (tracing the origins of “stigma plus” to *Paul*); *see* *Segal v. City of New York*, 459 F.3d 207, 211 (2d Cir. 2006) (employing the term “stigma plus” to describe the plaintiff’s claim); *Chisholm v. Ramia*, 639 F. Supp. 2d 240, 242 (D. Conn. 2009) (“[The plaintiff alleges] deprivation of her liberty or property interest under a ‘stigma-plus’ theory . . .”). For scholarship on the use of the stigma-plus test, *see* Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 102 n.83 (1996) (“The net liberty infringement imposed by sex offender laws, together with the harm to released offenders’ reputations, appears sufficient to satisfy [the] ‘stigma-plus’ requirement.”); Kevin M. McKenna, *The Tarkanian Decision: The State of College Athletics Is Everything but State Action*, 40 DEPAUL L. REV. 459, 482–83 (1991) (analyzing whether fired athletic coaches have suffered sufficiently under the stigma-plus test to find a substantive due process violation).

385. *See* *Herrera v. Union No. 39 Sch. Dist.*, 975 A.2d 619, 624 (Vt. 2009) (“[N]o liberty-interest due process claim lies unless the individual experiences both the ‘stigma’ of defamatory statements and the ‘plus’ of adverse action by the government.”); *see also* *Velez v. Levy*, 401 F.3d 75, 87 (2d Cir. 2005) (defining the stigma-plus test to require injury to reputation coupled with a “state-imposed burden”); *Smith ex rel. Smith v. Siegelman*, 322 F.3d, 1290, 1296 (11th Cir. 2003) (iterating that the stigma-plus test requires proof of stigmatization “in connection with a denial of a right or status previously recognized under state law”).

386. *See, e.g.*, *Patterson v. City of Utica*, 370 F.3d 322, 328 (2d Cir. 2004) (employing the test despite calling it a “still-evolving legal theory”); *Jackson v. Heh*, No. 98-4420, 2000 WL 761807, at \*4 (6th Cir. June 2, 2000) (“[T]he Supreme Court and federal courts of appeals have since embraced *Paul*’s ‘stigma-plus’ test.”); *Univ. Gardens Apartments Joint Venture v. Johnson*, 419 F. Supp. 2d 733, 738 (D. Md. 2006) (“[The challenge is] commonly . . . referred to as a ‘stigma plus’ claim.”).

387. *Neu v. Corcoran*, 869 F.2d 662, 667 (2d Cir. 1989); *see* *Boone v. Pa. Office of Vocational Rehab.*, 373 F. Supp. 2d 484, 497 (M.D. Pa. 2005) (“What satisfies the plus, however, is uncertain. Generally, the ‘plus’ is a termination of employment.” (quoting *Ersek v. Twp. of Springfield*, 102 F.3d 79, 83 n.5 (3d Cir. 1996))).



Where loss of reputation is alleged, litigation centers on whether the stigmatizing statements produce an additional state-imposed burden.<sup>388</sup> Courts following *Paul* have narrowly interpreted this requirement, thus rejecting stigma-plus challenges where there was insufficient proof of an additional burden. Consequently, claims have been dismissed involving loss of goodwill;<sup>389</sup> termination of at-will employment;<sup>390</sup> removal from a bankruptcy panel;<sup>391</sup> a prohibition against adopting a child, which resulted from the defamation;<sup>392</sup> and where a “name-clearing hearing” was later held.<sup>393</sup>

Against this backdrop of jurisprudence, registrants find themselves battling two fronts—trying to overcome the Court’s reluctance to expand the notion of what constitutes a protected liberty interest, and addressing conflicting case law on the proof required for the “plus” in the stigma-plus test.<sup>394</sup> But Justice Rehnquist, writing for the majority in *Paul* in 1976, may have foreshadowed this modern procedural due process challenge when he recalled Justice Stewart’s words from *Cafeteria Workers v. McElroy*: “[I]t is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity.”<sup>395</sup> Forty years later, super-registration schemes have created just the kind of infamy accompanied by loss of a tangible right to which both Justice Rehnquist and Justice Stewart referred.

The discussion of procedural due process safeguards in the context of community notification received short shrift in *Connecticut Department of*

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388. See, e.g., *Doe v. Dep’t of Pub. Safety ex rel. Lee*, 271 F.3d 38, 55 (2d Cir. 2001) (observing that the “plus” required “must at least entail some non-trivial state involvement”), *rev’d sub nom.* *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *Mosrie v. Barry*, 718 F.2d 1151, 1159 (D.C. Cir. 1983) (asking whether the appellant was deprived of “some other interest that rises to constitutional status”).

389. *Sadallah v. City of Utica*, 383 F.3d 34, 38–39 (2d Cir. 2004); see *WMX Techs., Inc. v. Miller*, 197 F.3d 367, 374–376 (9th Cir. 1999).

390. *Silva v. Worden*, 130 F.3d 26, 32 (1st Cir. 1997).

391. *Shaltry v. United States*, No. 95-15340, 1995 WL 866862, at \*5 (9th Cir. June 26, 1995).

392. *Behrens v. Regier*, 422 F.3d 1255, 1260–61 (11th Cir. 2005) (holding that because the plaintiff had no recognized right under state law to adopt a child, being erroneously labeled a “verified child abuser” did not deprive him of a liberty interest).

393. *Patterson v. City of Utica*, 370 F.3d 322, 328 (2d Cir. 2004) (concluding that, although the name-clearing hearing in this case did not satisfy procedural due process, when properly conducted such a hearing bars substantive due process claim).

394. Some case law has suggested that the “plus” must be a protected property interest. See, e.g., *Clark v. Twp. of Falls*, 890 F.2d 611, 620 (3d Cir. 1989) (concluding that, because the plaintiff had no property interest in retaining his duties as a police lieutenant, there was no “alteration or extinguishment of any right or interest”). Other case law has indicated that less than a property interest would qualify. See, e.g., *Doe v. U.S. Dep’t of Justice*, 753 F.2d 1092, 1106 (D.C. Cir. 1985) (explaining that “loss of government employment or a foreclosure of future government employment opportunities” might suffice to meet the stigma-plus test).

395. *Paul v. Davis*, 424 U.S. 693, 705 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961)).

*Public Safety* when registrants challenged their inclusion in the Connecticut online registry without a hearing to determine their individual dangerousness.<sup>396</sup> There, the Court reversed the Second Circuit to hold that online registry postings did not violate procedural due process because the inclusion of the registrants was based on their prior convictions and not on their future dangerousness.<sup>397</sup> The Court wrote, “[D]ue process does not require the opportunity to prove a fact that is not material to the State’s statutory scheme.”<sup>398</sup> The obvious colorable fact that swayed the Court was the disclaimer posted on the registry stating that Connecticut had made “no determination that any individual included in the registry is currently dangerous.”<sup>399</sup>

To be sure, the cost of individualized risk assessment is significant. And that fact alone may have led to the creation of the Connecticut model favored by super-registrations schemes. Bolstering the contention that individualized risk assessment is unnecessary, the Court relied on the same assumption it did in *Smith v. Doe*: any consequence that flows from online dissemination of an offender’s information is *no different* than that which generally flows from the public’s knowledge of any conviction.<sup>400</sup> Since the website’s purpose was only to list the information of all sexual offenders, the Court agreed that there was no need to differentiate the risk levels of the offenders.<sup>401</sup>

But online registries are different. Despite disclaimers or the courts’ reliance on them,<sup>402</sup> registrants are at risk for retribution from the community. Reported cases demonstrate the causal connection between the attacks and the online registries.<sup>403</sup> In 2006, for example, two men listed on Maine’s sex offender registry were targeted and murdered by a Canadian man who found the offenders’ personal information on

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396. Conn. Dep’t of Pub. Safety v. Doe, 538 U.S. 1, 3–4 (2003).

397. *Id.*

398. *Id.* at 4.

399. *Id.* at 5 (quoting Doe v. Dep’t of Pub. Safety *ex rel.* Lee, 271 F.3d 38, 44 (2d Cir. 2001)).

400. *Id.* at 7.

401. *Id.*

402. See, e.g., Russell v. Gregoire, 124 F.3d 1079, 1092 (9th Cir. 1997) (“[O]ur inquiry into the law’s effects cannot consider the possible ‘vigilante’ or illegal responses of citizens to notification. Such responses are expressly discouraged in the notification itself and will be prosecuted by the state. Indeed, courts must presume that law enforcement will obey the law and will protect offenders from vigilantism.” (citation omitted)); see also *Smith v. Doe*, 538 U.S. 84, 105 (2003) (noting with approval the inclusion of a warning that the use of information obtained from Alaska’s online registry to commit a criminal act against a registrant is subject to criminal prosecution); *E.B. v. Verniero*, 119 F.3d 1077, 1104 (3d Cir. 1997) (“[E]ach notification is accompanied by a warning against misuse of the information conveyed and an assurance that any private violence will be prosecuted.”).

403. See, e.g., *Man Who Shot at Home of Offender Is Sentenced*, N.Y. TIMES, Feb. 21, 1999, at 44; see also Small, *supra* note 3, at 1467–69 (1999) (highlighting incidents of harassment of and violence against registered sex offenders); Amy L. Van Duyn, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 635–36 (1999) (detailing the harassment and violence that results from community notification).

Maine's online registry.<sup>404</sup> Vigilante justice is a realistic concern that results from publicly labeling individuals as sex or violent offenders and disseminating their most personal information on the Internet.

And so we stand torn between the need to notify the community of the presence of dangerous offenders, and awareness of the fact that too many offenders have been improperly swept into the mix. Let's assume for the moment that *Connecticut Department of Public Safety* offered an accurate impression of registries at the launch of the global era of dissemination of information—that a disclaimer on the website was sufficient to offset any misconceptions regarding the relative danger of an individual post. Can it be argued convincingly that a disclaimer continues to afford the registrant sufficient protection, especially in light of the cascading and devastating consequences that flow from notification statutes?

One need only consider the civil commitment case law by way of analogy. There, the deprivation of liberty in the form of a civil commitment has been upheld as constitutional, in large measure due to the significant procedural safeguards in place in making the civil commitment determination.<sup>405</sup> In the landmark case *Kansas v. Hendricks*, the Supreme Court upheld a Kansas law that allowed the civil commitment of those who had been deemed sexually violent predators and who had been convicted of sexually violent offenses or, if not convicted, had been charged of such offenses but either acquitted or found unable to stand trial because of mental disease or defect.<sup>406</sup> In so concluding, the Court emphasized that a prior conviction alone is insufficient to trigger civil commitment proceedings.<sup>407</sup> In fact, Justice Stevens underscored this key point in his dissent in *Smith v. Doe* when he stated, "While one might disagree in other respects with *Hendricks*, it is clear that a conviction standing alone did not make anyone eligible for the burden imposed by that statute."<sup>408</sup>

Recasting the model of notification is the first step. Overinclusion—the Connecticut model—while intended to convey information that is not discriminatory among sex offenders, is especially problematic *for its lack of discrimination*. Under this model, all offenders are viewed as equally

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404. *Doe v. Dist. Att'y*, 932 A.2d 552, 568–69 (Me. 2007) (Alexander & Silver, JJ., concurring) ("Reports of other murders, assaults, and harassment abound.").

405. See *Kansas v. Hendricks*, 521 U.S. 346, 352 (1997) (describing the procedures necessary to initiate commitment).

406. *Id.* at 357–58 (upholding the Kansas Sexually Violent Predator Act, KAN. STAT. ANN. § 59-29a03(a) (1994)). See Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungsverwahrung*, 30 *FORDHAM URB. L.J.* 1621 (2003), for a discussion of the civil commitment of sex offenders and the legitimacy of the state's authority to control future dangerousness.

407. *Hendricks*, 521 U.S. at 352.

408. 538 U.S. 84, 113 (2003) (Stevens, J., dissenting).

dangerous, and the public, unschooled in the distinctions of varying levels of registration, condemns them equally. Taking a cue from *Hendricks*, therefore, online registries should be reserved for only the most dangerous of sex offenders—a subclass similar to that actually envisioned by the Court in *Hendricks*.<sup>409</sup>

#### V. ENOUGH IS ENOUGH: THREE COURTS SPEAK OUT

As this Article has demonstrated, super-registration schemes have flourished with relative impunity. Despite legislation that includes harsher registration and notification burdens, the inability of registrants to contest classification, and retroactive application to previously convicted offenders, courts maintain that these registration schemes are, nonetheless, civil regulatory laws.<sup>410</sup>

But times might be changing. Slowly, courts have begun to appreciate the devastating picture painted by current sex offender registration laws. In a relatively short timeframe, the supreme courts of Indiana, Maine, and Ohio have said, “Enough is enough.” Each court reached the conclusion that its state’s serially amended scheme is no longer worthy of the designation “civil regulation.”<sup>411</sup> In *State v. Williams*, the Supreme Court of Ohio summed up well this dawning realization:

No one change compels our conclusion that [the new registration scheme] is punitive. . . . When we consider all the changes enacted by [Senate Bill] 10 in aggregate, we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of [Senate Bill] 10 is punitive.<sup>412</sup>

A review of the Ohio Supreme Court’s jurisprudence serves to illustrate the court’s transition from its finding that the state’s registration laws were constitutionally regulatory to its discovery of their unconstitutionally punitive nature, a transition that mirrors the judicial evolutions that have occurred in Maine<sup>413</sup> and Indiana.<sup>414</sup> Ohio’s version of Megan’s Law was first enacted in 1996.<sup>415</sup> As early as 1998, the statute

409. 521 U.S. at 357 (stressing that civil commitment was only intended for “a limited subclass of dangerous persons”).

410. See *supra* note 352 (reviewing federal court decisions concluding that sex offender statutes are civil regulations).

411. See *Wallace v. State*, 905 N.E.2d 371, 378 (Ind. 2009); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011).

412. 952 N.E.2d at 1113.

413. See *Wallace*, 905 N.E.2d at 384 (concluding that, as amended, Indiana’s Sex Offender and Registration Act no longer is rationally connected to its civil purpose and therefore violates *ex post facto* principles); see also *Hevner v. State*, 919 N.E.2d 109 (Ind. 2010) (finding that retroactive application of Indiana’s amended registration scheme to a newly incorporated sex offense violates *ex post facto* principles).

414. See *Letalien*, 985 A.2d at 24–26 (determining that Maine’s serially amended registration scheme no longer is constitutional).

415. *Williams*, 952 N.E.2d at 1110.

was challenged in *State v. Cook* as a violation of the prohibition against ex post facto legislation.<sup>416</sup> However, Ohio's Supreme Court found that the statute "serve[d] the solely remedial purpose of protecting the public."<sup>417</sup> The *Cook* court reasoned that the registration and address verification procedures were "*de minimis* procedural requirements" necessary to achieve the statute's remedial goals.<sup>418</sup> And this was the logic to which the Ohio Supreme Court clung for over fourteen years.<sup>419</sup> Even after the statute was "significantly amended" by Senate Bill 5, the court continued to rely on *Cook*.<sup>420</sup>

But when addressing Senate Bill 10, which further modified Ohio's registration scheme in 2007, Ohio's highest court appreciated that it was faced with a dramatically altered statutory scheme. Comparing the significant changes effected by Senate Bill 10 to the requirements of its predecessor Senate Bill 5, the *Williams* court paints a picture of excessive regulation.<sup>421</sup> No longer convinced that Ohio's statute was remedial, even though some elements of it remain so, the court determined that, in the aggregate, the scheme was punitive and thus violated ex post facto principles when applied to an offender convicted prior to the Bill's enactment.<sup>422</sup>

Neither one change, nor one amendment, nor one alteration compelled the court's conclusion in *Williams*: "It is a matter of degree whether a statute is so punitive that its retroactive application is unconstitutional."<sup>423</sup> *Williams* does not inhibit the Ohio General Assembly's authority to pass legislation in order to protect the public from sex offenders within the confines of the state's constitution.<sup>424</sup>

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416. 700 N.E.2d 570, 573 (Ohio 1998).

417. *Id.* at 585.

418. *Id.* at 578.

419. *See, e.g.*, *State v. Eppinger*, 743 N.E.2d 881, 888 (Ohio 2001) (upholding Ohio's sex offender registration statute and stressing the importance of statutorily provided classification hearings and the significance of classifying an offender appropriately); *State v. Williams*, 728 N.E.2d 342, 355 (Ohio 2000) (holding that Ohio's sex offender statute constituted "reasonable legislation" despite the impact it had on the lives of sex offenders because it "addresses legitimate governmental interests without a detrimental effect on individual constitutional rights").

420. *Williams*, 952 N.E.2d at 1111; *see, e.g.*, *State v. Ferguson*, 896 N.E.2d 110, 118–19 (Ohio 2008), (holding that Ohio's statute did not violate the ban on retroactive legislation because Senate Bill 5 did not alter the essentially regulatory purpose of the statute established in *Cook*, even if it made more burdensome the registration requirements and more extensive the notification provisions); *State v. Wilson*, 865 N.E.2d 1264, ¶¶ 1270–71 (Ohio 2007) (relying on *Cook* in finding that Ohio's sex offender statute did not constitute ex post facto legislation because the legislation was remedial and was a reasonable measure designed to protect the public). *But see* *State v. Williams*, 868 N.E.2d 969, 971 (Ohio 2007) (reasoning that the court of appeals' reliance on *Cook* was misplaced in this case because the "simple" registration and notification at issue in *Cook* had been amended to make an offender's failure to verify his current address a crime).

421. 952 N.E.2d at 1112–13.

422. *Id.* at 1113.

423. *Id.* (citing *Cook*, 700 N.E.2d at 582).

424. *Id.*

Similarly, neither the Supreme Court of Indiana's decision in *Wallace v. State* nor the Supreme Court of Maine's decision in *State v. Letalien* questions a legislature's ability to institute a registration system in order to protect the public.<sup>425</sup> Instead, these decisions serve as a reminder that spiraling amendments can undermine the civil regulatory aim of a registration scheme.<sup>426</sup>

#### CONCLUSION

So where does that leave us? It may feel good—even righteous—to single out sex offenders for particular treatment in an effort to protect the community. But history has shown that a collective response to a national problem concerning safety and security does not necessarily make it the right one.<sup>427</sup> This Article demonstrates that ramped-up registration schemes, designed to appease a fearful public, are no longer rationally connected to their regulatory purpose, thus transforming the legislation into criminal penalties cloaked in civil rhetoric.

Recent stirrings in state courts offer hope of retrenchment. *Wallace*, *Letalien*, and *Williams* have filled a judicial void with articulate analysis of the evolution of the schemes' unconstitutionality. Yet one must be mindful that, at least in the case of *Wallace* and *Williams*, these holdings rested on state, rather than federal, constitutional grounds. Collectively, then, these cases may prove inadequate to command a paradigmatic shift in the public and legislative response to the perceived dangers of sex offenders.

Seminal Supreme Court decisions remind us that sometimes only the highest court can redirect the national conversation and bring about change in national behavior.<sup>428</sup> It is time to reexamine *Smith v. Doe* and *Connecticut Department of Public Safety* and their attendant assumptions. Most important, it is time to provide meaningful guidance on the parameters that will support the states' interest in keeping their communities safe while providing constitutional protections to offenders.

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425. See *Wallace v. State*, 905 N.E.2d 371, 383 (Ind. 2009); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009).

426. Even prior to Senate Bill 10's enactment, Justice Judith Ann Lanzinger recognized the significant restraint on liberty imposed by Ohio's sex offender statute and argued that it was punitive. *State v. Ferguson*, 896 N.E.2d 110, 122–24 (Ohio 2008) (Lanzinger, J. dissenting).

427. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 215–16 (1944) (describing the United States' decision to force Japanese-Americans into internment camps during World War II). As Justice Thurgood Marshall observed, "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." *Skinner v. Ry. Labor Excs. Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

428. Throughout the Court's jurisprudence, there are a number of noteworthy cases that changed the national conversation. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (redefining liberty to include sexual autonomy); *Miranda v. Arizona*, 384 U.S. 436, 476 (1966) (changing the practice of police interrogations); *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) (declaring the importance of moving beyond basic facts "to the effect of segregation itself on public education").

The dissenting words of Judge Damon Keith in *Doe v. Bredesen* ring especially true in light of the current legislative landscape: “We must be careful, in our rush to condemn one of the most despicable crimes in our society, not to undermine the freedom and constitutional rights that make our nation great.”<sup>429</sup>

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429. 521 F.3d 680, 681 (6th Cir. 2008) (Keith, J., dissenting).

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