The Evolution of Unconstitutionality in Sex Offender Registration Laws

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ABSTRACT

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 particular article does not challenge the state's legislative power to enact sex offender registration laws. Instead, this piece posits that, even if sex offender registration schemes were initially constitutional, serially amended sex offender registration schemes – what this piece dubs super-registration schemes – are not. Their emergence over the last several years demands re-examination of traditionally held assumptions that shaped the original legislation.

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 unmoored from its constitutional grounding because of its punitive effect and excessive reach.

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Excess: the amount or condition of going beyond what is necessary, usual or proper; overindulgence.¹

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 were originally designed to protect the children of a community,² then according to prevailing thought, harsher sex offender laws must surely protect children more effectively. Unfortunately, that philosophy is neither accurate nor constitutional: inaccurate for its reliance on unproven recidivism statistics³ and false claims of security⁴, and unconstitu-

¹ Webster’s Dictionary 118.
² See infra notes x to x and accompanying text.
³ Some have criticized the blind adoption of statistics claiming that registrants recidivate at a higher rate than 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 (2010) (referencing Department of Justice statistics to rebut the claim that sex offenders recidivate at higher rates); Wayne A. Logan, Megan’s Law 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 Law, 42 HARV. J. ON LEGIS. 355, 382-83 (2005) (arguing that interpreting recidivism data is more complex than generally acknowledged); Jane A. Small, 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, 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 CRIMINAL JUSTICE, INTERIM REPORT TO 82ND LEG., S. Rep. No. 81, at 4 (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 Philip Garrido to appreciate that sex offender registration laws at most aid in the apprehension of suspects, but do little to protect
tional for its excessive and punitive effect. Like “piling on” penalties in football that nullify clean tackles,\(^5\) serially amended sex offender registration schemes are faltering under their own weight and ambition.\(^6\)

This article posits that two intertwined causes are responsible for their 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 cases from the Supreme Court’s 2003 term to define the parameters of constitutionality in sex offender registration laws. In *Smith v. Doe*, the Court grappled with whether registration

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\(^3\) See Marisol Bello, *Questions Arise on Monitoring of Sex Offenders*, ABC NEWS (Sept. 2, 2009), http://abcnews.go.com/US/story?id=8470353 (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), http://articles.latimes.com/2009/sept/05/local/me-kidnap-parole5 (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, 854 (1996) (arguing that notification laws create a false sense of security in the community because of the inherent voluntariness of the system).

\(^5\) See *About Football Glossary*, ABOUT.COM, http://football.about.com/cs/football101/g/gl_pilingon.htm (last visited Aug. 17, 2011) (“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 over-inclusive nature. See Wallace v. State, 905 N.E.2d 371 (Ind. 2009) (concluding that Indiana’s amended scheme violates constitutional principles); State v. Letalien, 985 A.2d 4 (Me. 2009) (concluding that the new registration schemes violates principles of ex post facto); State v. Williams, No. 2009-0088, 2011 WL 2732261 (Ohio July 13, 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 price tag and are proving very difficult to enact and enforce; see also Emanuella Grinberg, *5 Years Later, States Struggle to Comply with Federal Sex Offender Law*, CNN (July 28, 2011, 11:51 AM), http://www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/index.html?hpt=hp_e2.
schemes violated principles of *ex post facto* in requiring retroactive application to offenders convicted prior to the enactment of the laws.\(^7\) And in *Connecticut Department of Public Safety v. Doe*, the Court addressed whether procedural due process demands that convicted sex offenders are afforded the opportunity to be heard as to the level of danger they pose before their information is disseminated to the community.\(^8\)

In both cases, albeit on different bases, the Court upheld the constitutionality of sex offender registration schemes as civil regulations, 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 principle of *ex post facto* is inapplicable,\(^9\) while *Connecticut Department of Public Safety* determined that procedural due process demands did not require individualized assessment for the dissemination of registrants’ information to the community.\(^10\) 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.\(^11\) It is not surprising, then, that these interrelated decisions suggested to politicians the “green light” to ramp up registration and notification burdens. Even the Court’s 2010 decision in *Carr v. United States* analyzing an *ex post facto* challenge will do little to dampen this message.\(^12\) Although *Carr* limited the reach of SORNA’s “failure to register” law to offenders who travel interstate after SORNA’s

\(^7\) 538 U.S. 84 (2003).
\(^8\) 538 U.S. 1 (2003).
\(^9\) *Smith*, 538 U.S. at 105.
\(^10\) *Conn. Dep’t of Pub. Safety*, 538 U.S at 8 (“States are not barred by principles of procedural due process from drawing such classifications”).
\(^11\) An interesting example of swelling unchecked legislation can be found in the number of strict liability offenses, which grew considerably since first enacted 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 LOY. L. REV. 828, 841-843 (2004) (tracing the significant expansion of strict liability offenses). Only recently did the United States 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, 1023 (1999) (examining recent decisions to conclude that the Court has re-invoked the importance of moral culpability, and therefore mens rea, as a necessary component to a conviction).
\(^12\) 130 S. Ct. 2229 (2010).
enactment,\textsuperscript{13} it did not promote a discussion of whether registration schemes are punitive in nature or in effect. Instead, Carr framed the \textit{ex post facto} challenge around the narrow question of Congressional intent: did the language of 18 U.S.C. § 2250 demonstrate Congress’s intent to apply the “failure to register” criminal penalties to offenders whose interstate travel occurred prior to SORNA’s enactment?\textsuperscript{14} Parsing the language of § 2250 to draw its conclusion enabled the Court to avoid the fundamental question of whether \textit{ex post facto} principles are violated because registration schemes are punitive in nature. A natural outgrowth of the Court’s jurisprudence, therefore, 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 post \textit{Smith} and \textit{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 importantly, 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 principles of \textit{ex post facto} to determine whether the assumptions that controlled in \textit{Smith} continue to have vitality. This section concludes that new assumptions dominate super-registration schemes, which recasts them 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

\textsuperscript{13} Id.
\textsuperscript{14} Id. at 2234-37. Section 2250 states “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.” See id. at 2232-33.
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.”\textsuperscript{15} Absent 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 the three state supreme courts to date that have filled the judicial silence with eloquent opinions that recognize the punitive nature of these serially amended schemes.

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

Separate incidents involving three young children – Adam,\textsuperscript{16} Jacob,\textsuperscript{17} and Megan\textsuperscript{18} – who were each abducted and murdered, coalesced in a national conversation on crimes against children.\textsuperscript{19}

\textsuperscript{15} 28 U.S.C. § 453 (“Oaths of Judges and Justices”).


\textsuperscript{17} Jacob Wetterling was eleven when he was abducted by gunpoint in front of his friends, kidnapped and presumed murdered. See generally How We Began and the Need for Transition . . . , Jacob Wetterling Resource Center, http://www.jwrc.org/WhoWeAre/History/tabid/128/Default.aspx (last visited Aug. 17, 2011) (recounting the abduction of Jacob Wetterling).


The accounts are well known, but they are still heartbreaking to hear. Spearheaded by grieving families, 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). The Act, which was part of the Federal 1994 Omnibus Crime Bill, required each of the fifty states to adopt sex offender registration laws within three years of the Act’s passage to receive federal law enforcement funding. 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.” 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.

However, SORA was only the beginning. This section surveys the major changes to the first generation of registration schemes. In 2006, Congress passed the Adam Walsh Child Protection and Safety Act (AWA). Encompassed in AWA is the Sex Offender Registration and Notification Act (SORNA).
Offender Registration and Notification Act (SORNA), which includes a set of regulations, penalties and punishments for sex offenders, and a comprehensive national system for their registration.

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. Although jurists and scholars alike decried aspects of the original sex offender registration schemes

Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led To Unintended Consequences, 2008 UTAH L. REV. 697 (2008) (challenging the assumptions underlying AWA); David A. Singleton, Sex Offender Residency Statutes and the Culture of Fear: The Case For More Meaningful Rationale 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); Steven J. Costiglacci, Protecting Our Children From Sex Offenders – Have We Gone Too Far?, 46 FAM. CT. REV. 180 (2008) (criticizing the lack of flexibility in determining registrants’ status under the Adam Walsh Act).

SORNA enacted “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. § 16902.

See §§ 16911-29 (operating sections of SORNA). 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 each jurisdiction where the offender resides, where the offender is an employee and where the offender is a student, which may be three separate jurisdictions. § 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. §§ 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 §§ 16914(a)(7), 16915a. SORNA also requires that every jurisdiction provide for a criminal penalty that includes a maximum term of imprisonment that is greater than one year if the offender fails to comply with the registration requirements espoused in the Act. § 16913(e).

SORNA requires that each jurisdiction makes the registry information available to the public on the Internet. § 16918. And, the Act established a national sex offender registry, which is accessible by the public via a website. §§ 16919-20.

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 in federal and Indiana sex offender registration schemes); see also State v. Letalien, 985 A.2d 4, 8-11 (Me. 2009) (decrying changes in Maine’s registration scheme); State v. Bodyke, 933 N.E.2d 753, 757-60 (Ohio 2010) (detailing the amendments to Ohio’s sex offender registration scheme); State v. Henry, 228 P.3d 900, 903-905 (Ariz. Ct. App 2010) (providing detailed history of amendments to Arizona’s offender schemes); Doe v Nebraska, 734 F. Supp. 2d 882, 893 (D. Neb. 2010) (discussing the impact of two 2009 amendments to Nebraska’s sex offender registration laws).
as punitive, in retrospect, those laws were tame by comparison to SORNA and its progeny.

The revised registration schemes include ever-increasing number of registration-worthy offenses, lengthening durational registration requirements, expanded personal information, swelling residency restrictions, the introduction of the GPS system tracking device, and a systematic elimination of individualized assessment as a touchstone. One embodiment of the super-registration scheme is California’s Jessica’s Law, the highly trumpeted ballot measure, which was passed by voters in 2006. Acknowledged on both the ballot measure and in subsequent

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32 See infra Part I (describing changes made to the first generation of sex offender legislation).


case law as the toughest in the country,\textsuperscript{35} Jessica’s Law dramatically increased and made more stringent numerous laws impacting sex offender registrants.\textsuperscript{36}

The stereotypic image of the sex offender – the violent pedophile on the lookout for small children\textsuperscript{37} – 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 Doe, a citizen of Maine, who was convicted of public indecency when he was eighteen and was notified of his obligation to register under Maine’s amended sex offender statute over twenty years later.\textsuperscript{38} Doe’s wife of almost twenty years, who had three children from a previous marriage, said she would have to leave him if his name appeared on the state’s sex offender registry.\textsuperscript{39} The profile of an offender also 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.\textsuperscript{40} And it is Ricky Blackmun whose family moved to Oklahoma from Iowa for a fresh start after Ricky was adjudicated a sex offender for

\textsuperscript{35}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).

\textsuperscript{36}Id. at 332.

\textsuperscript{37}This image of the violent pedophile is seared into everyone’s minds because of the tragic deaths of Megan Kanka and Jacob Wetterling, both of whom were killed by violent pedophiles hunting for children. See supra note x and x for detailed discussions of these stories.

\textsuperscript{38}Doe v. District Attorney, 932 A.2d 552, 554 (Me. 2007).

\textsuperscript{39}Id.

\textsuperscript{40}See Weisart v. Stewart, 665 S.E.2d 187, 187-88 (S.C. 2009) (explaining circumstances surrounding offender’s requirement to register); see also State v. Chun, 76 P.3d 935, 935-36 (Haw. 2003) (describing the background of Llewelyn Chun, a husband and father, who was charged with indecent exposure and required to register). Ultimately the Supreme Court of Hawaii concluded that Chun’s offense was not registration-worthy. See Chun, 76 P.3d at 935.
having sex with a thirteen-year-old girl when he was sixteen.\textsuperscript{41} 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.\textsuperscript{42}

And the face of registration also comprises offenders displaced from their homes because of onerous residency restrictions.\textsuperscript{43} In New York, a 77-year-old convicted offender living in Manhattan was banished from his residence of some forty years because of amended New York residency restrictions.\textsuperscript{44} In South Florida, a large population of convicted offenders lives under the Julia Tuttle Causeway, a large bridge, because there is no community in South Florida where they may reside without violating residency restrictions.\textsuperscript{45} In Georgia, Anthony Mann, a registered sex offender, was prohibited from entering the restaurant he half-owned and ran because childcare facilities located themselves within 1,000 feet of Mann’s business.\textsuperscript{46}

These are the casualties of a system that at the outset was intended to protect the public from dangerous offenders, but has evolved into the politically motivated pursuit of harsher laws designed to satisfy a fearful public.\textsuperscript{47} Unfortunately, in that pursuit,

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\textsuperscript{42} Id.

\textsuperscript{43} See infra Part I.D for a description of the change in residency restrictions.

\textsuperscript{44} Berlin v. Evans, 923 N.Y.S.2d 828, 828 (N.Y. Sup. Ct. 2011).

\textsuperscript{45} Catharine Skipp, A Bridge Too Far, NEWSWEEK (July 25, 2009), http://www.newsweek.com/2009/07/24/a-bridge-too-far.html; see also Catharine Skipp, A Law for the Sex Offenders Under a Miami Bridge, TIME MAGAZINE (Feb. 1, 2010), http://www.time.com/time/nation/article/8,8599,1957778,00.html.

\textsuperscript{46} Mann v. Dep’t of Corr., 653 S.E.2d 740, 742 (Ga. 2007) (finding Georgia’s residency restrictions unconstitutional only in so far as they permitted the regulatory taking of Mann’s home without just compensation).

\textsuperscript{47} Much has been written on the public’s fear and commensurate desire for harsher punishments. See 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 crimes and punishments in the face of countermanding evidence); see also 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); 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 ST. THOMAS L.J. 600, 602-03 (2006) (arguing that the proliferation of crime reports induced the proliferation of sex offender registration laws); William J. Stuntz, The Political Constitution of Criminal Justice, 119 HARV. L. REV. 780, 781 (2006) (contending
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these laws have become excessively punitive and, consequently, no longer rationally connected to their regulatory purpose.\textsuperscript{48}

\textbf{A. The Number and Breadth of Registerable Offenses}

Since the 1990s, registration-worthy sex offenses have grown dramatically in number and scope.\textsuperscript{49} 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,\textsuperscript{50} a mere eight crimes triggered registration.\textsuperscript{51} Currently, Zachary’s Law lists forty offenses that trigger registration: twenty-one offenses trigger registration as a “sex or violent offender”\textsuperscript{52} and an additional nineteen offenses trigger registration as a “sex offender.”\textsuperscript{53} Other states have similar trajectories with some registration schemes adding as many as forty registration-worthy offenses to their initial legislation.\textsuperscript{54}

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\textsuperscript{48}See Catherine L. Carpenter, \textit{Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country}, 58 BUFF. L. REV. 1, 51-55 (2010) (arguing that the increasing harshness of registration schemes is tied to political desire to push offenders from their communities before adjoining communities do the same). Although legislative intent behind registration schemes is often characterized as remedial in nature, the emotional charge prompting the legislation is sometimes 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).

\textsuperscript{49}See infra notes x to x and accompanying text (describing the changes).


\textsuperscript{51}See Wallace v. State, 905 N.E.2d 371, 375 (Ind. 2009) (detailing the historical perspective of registerable offenses in Indiana); see also State v. Letalien, 985 A.2d 4, 8-11 (Me. 2009).

\textsuperscript{52}Wallace, 905 N.E.2d at 375 (Ind. 2009) (citing IND. CODE § 11-8-8-5, -7 (Supp. 2008)).

\textsuperscript{53}See IND. CODE § 11-8-8-4.5 (West 2007).

\textsuperscript{54}See, e.g., Letalien, 985 A.2d at 7 (reporting that Maine’s first registration scheme “limited the class of registrants to only those persons who had a gross sexual assault conviction that involved a victim who was under 16 years of age at the time of the commission of the crime”). Compare Feneoorter v. Haun, 227 F.3d 1244, 1247 n.1 (10th Cir. 2000) (noting that the registration scheme at that time listed 18 triggering offenses) with UTAH CODE ANN. § 77-27-21.5(g), (n) (West 2007) (listing twenty-six registerable offenses). See also LA. REV. STAT. ANN. § 15:541(24) (West 2007) (listing twenty-five offenses that qualify as sexual
In addition, some states have introduced “discretionary registration,” which affords courts the opportunity to require registration where mandatory registration is otherwise not required or not allowed. In People v. Picklesimer, for example, the State did not contest that defendant’s oral copulation with a 17-year old girl was “voluntary,” thus conceding that his conviction could not support mandatory registration under existing California law. However, the State successfully argued that the defendant’s conviction, nonetheless, supported the trial court’s decision to impose discretionary lifetime registration under California’s sex offender statute. Indeed, the watchword appears to be “discretionary” as legislative enactments specifically rest discretion on a number of legal points with one of the federal or state government branches.

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

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55 See, e.g., CAL. PENAL CODE § 290.006 (West 2007) (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 the purposes of sexual gratification”); LA. REV. STAT. ANN. § 15:544(E)(1) (West 2007) (permitting a court to impose lifetime registration after a contradictory hearing); LA. REV. STAT. ANN. § 15:544(E)(1) (West 2007) (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)

56 See, e.g., People v. Picklesimer, 226 P.3d 348, 356-57 (Cal. 2010) (explaining that mandatory registration for oral copulation was unconstitutional under California case law, but that discretionary registration was not).

57 Picklesimer, 226 P.3d at 356 (Cal. 2010) (citing People v. Hofsheier, 39 Cal. Rptr. 3d 821 (Cal. 2009)) (considering the proposition that mandatory registration triggered by voluntary oral copulation violates equal protection).

58 Id. 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 subject to registration.” Id. at 358-59; see also United States v. Dodge, 597 F.3d 1347, 1352-53 (11th Cir. 2010) (reasoning that, because of the expansive language used in the federal Sex Offender Registration and Notification Act, the Act does not represent a closed universe of federal crimes requiring registration).

59 See United States v. Juvenile Male, 590 F.3d 924, 929 (9th Cir. 2009) (describing Congress’s delegation to the Attorney General to determine whether SORNA applied retroactively, and if so, whether it applied retroactively to juveniles); State v. Bodyke, 933 N.E.2d 753, 760 (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) (affording discretion to public agencies to determine “relevant and necessary” release of information).
dangerous, so, too, is the individual convicted of that crime.\textsuperscript{60} Upward reclassification increases registration and notification burdens, and reclassification affects both future offenders and those previously convicted and classified as less dangerous.\textsuperscript{61} Consequently, burdens associated with the reclassification are being applied retroactively to convicted offenders who were deemed at lower risk under previous registration schemes.\textsuperscript{62} Although it is within legislative purview to alter or expand legislation,\textsuperscript{63} 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.\textsuperscript{64} And even when a reclassification hearing is statutorily authorized, it does not ensure procedural due process because often the hearing is not held,\textsuperscript{65} or if it is held, it is administered in a cursory fashion that calls into question the hearing’s legitimacy.\textsuperscript{66}

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\begin{enumerate}[\textsuperscript{60}]
\item See, e.g., State v. Ortega-Martinez, No. 95656, 2011 WL 2112726, at *1 (Ohio Ct. App. May 26, 2011) (noting that upon reclassification of its registration scheme in Ohio, convicted 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); Lemmon v. Harris, 949 N.E.2d 803, 804-05 (Ind. 2011) (stating that defendant, who was originally required to register for ten years, was later notified that his conviction had been reclassified to require registration for life); State v. Poling, No. 2009-CA-00264, 2011 WL 2557030, at *3, *7 (Ohio Ct. App. June 27, 2011) (writing that registrant’s reporting requirements had changed from annually to every 90 days).
\item See, e.g., Jensen v. State, 905 N.E.2d 384, 388 (Ind. 2009) (detailing Jensen’s reclassification which changed his status from a “sex offender” who must register for ten years to a “sexually violent predator” who must register for life).
\item See, e.g., \textit{Bodyke}, 933 N.E.2d at 766 (acknowledging the Legislature’s authority to enact or amend sex offender registration laws).
\item See \textit{id}. at 760 (describing that reclassification in Ohio is statutorily authorized to be administered by the attorney general alone, and that reclassification is made without individualized assessment or expert testimony).
\item See, e.g., Smith v. State, Nos. 2009 CA 1765 & 2009 CA 1169, 2010 WL 1173071, *7 (La. App. Ct. Mar. 26, 2010) (reporting that, although Smith 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 registrant to present evidence “did not pose any actual risk of erroneous deprivation of his protected liberty interests”).
\item See, e.g., Doe v. Pataki, 3 F. Supp.2d 456, 459 (S.D.N.Y 1998) (finding that offender’s classification hearing lasted no more than five minutes during which time the court relied on an improper offense to determine offender’s classification).
\end{enumerate}
\end{footnotesize}
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.\(^{67}\) So troubling was this apparent usurpation of authority, that the Ohio Supreme Court determined that such legislative action was a violation of the doctrine of Separation of Powers.\(^{68}\)

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\(^ {69}\) and from legislative history.\(^ {70}\) Today, however, registration schemes include mandatory registration for crimes committed against minors, even where there is no sexual purpose or contact.\(^ {71}\)

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\(^{67}\) *See, e.g.*, *Ohio Rev. Code Ann.* § 2950.031(A)(1) and (2) (articulating the new classifications and their applicability to previously convicted offenders).

\(^{68}\) *See* State v. Bodyke, 933 N.E.2d 753, 766 (Ohio 2010) (“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.”). *But see* Doe v. Moore, 410 F.3d 1337, 1348 (11th Cir. 2005) (rejecting defendant’s claim that Florida Sex Offender Act violated the doctrine of Separation of Powers).

\(^{69}\) *See, e.g.*, State v. Letalien, 985 A.2d 4, 8 (Me. 2009) (defining sex offender 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 34-A M.R.S.A. § 11103(5) (Supp.1996)); *see also* People v. Logan, 705 N.E.2d 152, 156 (Ill. App. Ct. 1998) (specifying that a sex offender is “any person who is convicted of sex offense or who is certified as a sexually dangerous person pursuant to the Sexually Dangerous Persons Act.”).

\(^{70}\) *See, e.g.*, Doe v. Moore, 410 F.3d 1337, 1345 (11th Cir. 2005) (observing that state’s intended reason for enacting Florida’s Sex Offender Act was to “protect the public from sexual abuse”); People v. Logan, 705 N.E.2d 152, 328-29 (Ill. App. Ct. 1998) (explaining the original intent of Illinois’ Registration Act); Lee v. State, 895 So. 2d 1038, 1040 (Ala. Crim. App. 2004) (noting that “[t]he Legislature finds that the danger of recidivism posed by criminal sex offenders and that the protection of the public from these offenders is a paramount concern or interest to government.” (quoting Ala. Code § 15-20-20.1 (1975))). Sexual purpose was of such fundamental import that, where plea agreement resulted in sexual crimes being dismissed and only non-sexual crimes remaining, the court was required to make a “sexual motivation finding” to require registration. *See, e.g.*, State v. Whalen, 588 S.E.2d 677, 681 (W. Va. 2003) (holding that sentencing judge must make a finding that the offense was “sexually-motivated”).

\(^{71}\) *See, e.g.*, People v. Johnson 870 N.E.2d 415 (Ill. 2007) (affirming state’s interest in automatic registration of offenders who commit crimes against minors despite lack of sexual motivation); People v. Beard, 851 N.E.2d 141 (Ill. 2006) (upholding registration for kidnap-
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. And to some extent, that was initially 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. For example, in State v. Robinson, the Florida Supreme Court rejected automatic registration for defendant’s kidnapping of a minor, where defendant stole a vehicle unaware that a sleeping child was in the backseat. 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.”

Over the past decade, faithfulness to this rationale has faded. One observes a perceptible shift as courts defer to legislative attempts to sweep non-sexual crimes into the purview of registerable offenses. Early in the development of registration jurisprudence, rhetoric focused on support for legislative intent that

72 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 (Cal. Ct. App. 2004) (“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’” (quoting 1996 Cal. Stat., ch. 908 § 1(c))).

73 See, e.g., Johnson, 843 N.E.2d at 440 (stating that “there is no rational basis for having this defendant 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 purpose.”); State v. Robinson, 873 So.2d 1205 (Fla. 2004) (overturning automatic registration for kidnapping of child); People v. Bell, 778 N.Y.S.2d 837, 847 (N.Y. Sup. Ct. 2003) (rejecting registration in kidnapping case where there was no proof of sexual motivation because “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”).

74 Robinson, 873 So.2d 1205.

75 Id. at 1215.
protected minors from sexual predators. 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 are committed without sexual purpose or intent.

Employing “minor as victim” as a factual predicate for registration has arguably created a list of registerable offenses removed from the original legislative purpose of sex offender registration schemes. *Ranier v. State* offers an excellent illustration. 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. In affirming automatic registration, the court dismissed as irrelevant the fact that defendant’s robbery did not involve sexually activity. The majority reasoned that requiring defendant to register as a sex offender served to “[protect] children from those who would harm them.” But dissenting Chief Justice Hunstein was concerned by the over-inclusiveness of

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76 See, e.g., *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 the “potential molestation, rape, or murder”); *People v. Malchow*, 739 N.E.2d 433, 437 (Ill. 2000) (acknowledging that the legislative intent behind the creation of the Registration Act and Notification Law was “to create an additional measure of protection for children from the increasing incidence of sexual assault and child abuse.”); *Doe v. Pataki*, 120 F.3d 1263, 1277 (2d Cir. 1997) (observing that SORA was established to “enhance[e] law enforcement’s authority ability to fight sex crimes”).

77 See, e.g., *People v. Johnson*, 870 N.E.2d 415 (Ill. 2007) (affirming 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 (Wis. 2010) (determining that automatic registration did not violate equal protection or due process when applied to defendant who was convicted of false imprisonment of a minor that involved no sexual misconduct); see also GA. CODE ANN. § 42-1-12(a)(9)(B)(ii) (including as registerable false imprisonment of a minor by anyone other than a parent); LA. REV. STAT. ANN. § 11-8-8-5(11), (12) (requiring registration for kidnapping and criminal confinement of a minor by anyone other than a parent or guardian). For a thoughtful look at the practice of including nonsexual offenses in registration schemes, see Ofer Raban, *Be They Fish or Not Fish: The Fishy Registration of Nonsexual Offenders*, 16 WM. & MARY BILL RTS. J. 497 (2007) (arguing that inclusion of nonsexual offenses violates due process).

78 690 S.E.2d 827 (Ga. 2010).

79 Id. at 829 (concluding that under GA. CODE ANN. § 42-1-12(a)(20)(A) robbery of a minor qualifies as a registerable offense).

80 Id. (“The fact that Ranier’s [robbery] did not involve sexual activity [was] of no consequence.”).

81 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”).
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.’”

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, and second, is a clear disinclination to employ an as-applied analysis to due process claims. 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. Despite a clear statement of 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.” Similarly, in People v. Johnson the Supreme Court of Illinois upheld automatic registration where defendant kidnapped his granddaughter for financial gain and not 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.

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82 Ranier, 690 S.E.2d at 831 (Hunstein, P.J., dissenting). Although Presiding Justice Hunstein did not sway the majority, 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 long standing resident to move. See Mann v. Dep’t of Corr., 653 S.E.2d 740 (Ga. 2007).

83 See Ranier, 690 S.E.2d at 829 (holding that automatic registration for false imprisonment “advances the State’s legitimate goal of informing the public for the purposes of protecting the public”).

84 See State v. Smith, 780 N.W.2d 90, 107 (Wis. 2010) (Walsh 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).

85 Id. at 90.

86 Id. at 102.

87 See People v. Johnson, 870 N.E.2d 415, 418 (Ill. 2007) (“Once an offender makes a decision to commit aggravated kidnapping of a child, there is a very real possibility the child will become the victim of sexual abuse”).
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.” Indeed, courts acknowledge that registration involves significant and intrusive burdens that brand the offender. Concomitant to the increase number and nature of registration-worthy offenses, registration schemes have also expanded the burdens of registration – both in duration and in the detailed nature of the personal information required. And in many states, the increased burdens are unrelated to the risk level of the offender.

1. 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. Generally, offenders were required to register according to their level of dangerousness, with a minimum of ten years, up to a requirement of

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89  Id. at 574.
91  See infra notes x to x and accompanying text.
92  See infra notes x to x and accompanying text.
a maximum of lifetime registration. Under SORNA, offenders
are categorized by their convictions and are automatically as-
signed to a tier based on that offense. Tier 1 offenses are re-
garded as the least serious crimes, with each succeeding tier con-
sisting of more dangerous offenses. Today, a Tier I offender
must register generally for a minimum of fifteen years, and often
twenty years. Additionally, many more crimes today have been
assigned lifetime registration, or recast to require lifetime regis-

2. Additional Personal Information

All registration schemes require offenders to provide de-
tailed, personal information. The first incarnation of registration
following then federal guidelines required that each registrant
provide local law enforcement with: name, address, a photograph,
and fingerprints, and in some states, the offender must also

96 See 42 U.S.C.A. § 16911 (West 2006) (defining offenses that make up Tier II and Tier 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”).
98 See, e.g., N.Y CORRECT. LAW § 168-h(1) (West 2007) (requiring level one offenders to register 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 non-lifetime offenses from ten years to twenty years).
99 See, e.g., CAL. ANN. PENAL. Code § 290 (West 2006) (compelling lifetime registration for a number of crimes including: 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; obscene exhibitions).
100 See, e.g., Jensen v. Indiana, 905 N.E.3d 384 (Ind. 2009) (upholding the change from ten years to lifetime registration); State v. Letalien, 985 A.2d 4, 9-10 (Me. 2009) (discussing the change in registration from fifteen years to lifetime registration following amendment of SORNA); McCabe v. Commonwealth, 650 S.E.2d 508, 510 (Va. 2007) (reporting the change from ten years to lifetime registration); Smith, 2010 WL 1173071, *4 (noting that registration requirements had changed for offender’s crime from ten years to lifetime registration).
101 See 42 U.S.C. § 14071(b)(1)(A)(ii), (iv), (B) (2000); CONN. GEN. STAT. § 54-258(a)(1) (2001 & Supp. 2005) (stating that information in the registration, including a picture, is public record which is available for access during normal business hours at the local police department); FLA. STAT. ANN. § 943.043(3) (2001) (explaining that a member of the public can, either through a toll-free number or in person, obtain information including a picture of the offender and a summary of convictions); HAW. REV. STAT. § 846E-3(b) (2003) (allowing
supply a biological specimen. 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. Some states also require offenders to provide DNA samples.

The changes made to Louisiana’s registration scheme exemplify the nation-wide 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 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.” 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. Additionally, the risk 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 2001) (indicating that information of all registrants shall be available to the public either through the internet or by request); Miss. Code Ann. § 45-33-49(3)-4(4) (1999 & Supp. 2005) (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 received by anybody who requests the information of any registrant); N.H. Rev. Stat. Ann. § 651-B:7(IV) (1996 & Supp. 2005) (declaring that any member of the public may request information of the local law enforcement agency regarding the list of registrants including their pictures and addresses).


103 See, e.g., N.Y. Correct. Law § 168-b(1)(a)-(c) (McKinney 1987 & Supp. 1997-98) (requiring a sex offender to provide 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 (West 2006) (requiring all names or aliases, physical description, including age, height, weight, eye and hair color, type of vehicle(s) driven, current photograph); Wash. Rev. Code § 9A.44.130 (West 2006) (obliging sex offenders to provide his name, address, date and place of birth, place of employment, crime of conviction, date and place of conviction, aliases used, social security number, a recent photograph, and fingerprints).


106 See La. Rev. Stat. Ann. § 15:542(C)(1) (West 2007) (requiring sex offenders and child predators alike to provide local law enforcement with detailed information including: the name and aliases used by the offender; complete physical description of the offender, addresses of every residence including temporary housing, employment, and school where applicable, a current photograph; fingerprints, palm prints and a DNA sample; a description
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.107

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 e-mail and social network log-ins and passwords, plus any changes to those log-ins or passwords.108 As of 2009, Alaska requires all registrants, regardless of conviction date or risk level, to disclose their e-mail addresses, instant messaging address, and other Internet communication identifiers when registering as a sex offender.109 Indiana requires an offender to disclose any e-mail address, instant message user name, electronic chat room username, or social networking web site username that the sex offender uses or intends to use.110 And, also as of 2009, members of the Alaskan public can submit an electronic mail, instant message address or other Internet identifier to the Department and receive a confirmation of whether that address or identifier has been registered by a sex offender or child kidnapper.111

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.112 The offender must also agree to the installation of hardware to monitor the offender’s Internet usage.113 Such consent is required no matter the level of risk the

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107 See id.
110 IND. CODE § 11-8-8-8(a)(7) (West 2007); see also N.Y. CORRECT. LAW § 168b-10 (McKinney 2007).
112 IND. CODE § 11-8-8-8(b) (West 2007). For discussion of the impact of this law on the Fourth Amendment, see Doe v. Indiana, 566 F. Supp.2d 862, 879 (Ind. Dist. Ct. 2008) (finding the search was unconstitutional because registrants “are entitled to full Fourth Amendment protection, without the lowered expectation of privacy”).
113 IND. CODE § 11-8-8-8(b) (West 2007).
offender poses, or even whether the conviction resulted from illegal online activity.\footnote{See § 11-8-8(a), (b).}

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.\footnote{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 public safety.’”); State v. Ward, 869 P.2d 1062, 1065 (Wash. 1994) (“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 agencies jurisdiction.”); State v. Myers, 923 P.2d 1024, 1028 (1996) (observing that the majority of jurisdictions kept the information confidential and that only a few registration schemes “showed a trend toward limited public disclosure”).}

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.\footnote{See, e.g., Commonwealth v. Baker, 295 S.W.3d 437 (Ky. 2009) (“Since 1994, when it adopted Kentucky’s initial version of Megan’s Law, the General Assembly has engaged in an evolving effort to address the profoundly serious and vexing problem of sex offenders, particularly those who offend against children.”); Bertram v. Ohio, No. 2008-L-037, 2009 WL 3154902, at *3 (Ohio Ct. App. Sept. 30, 2009) (“While the statute at issue in [State v. Cook] restricted the access of an offender’s information to ‘those persons necessary in order to protect the public[,]’ Senate Bill 10 requires the offender’s information to be open to public inspection and to be included in the internet sex offender and child-victim offender database.”).}

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 discerned from the public record of a conviction,\footnote{See, e.g., Smith, 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.”); State v. Haskell, 784 A.2d 4, 11 (Me. 2001) (“The dissemination of accurate information about past criminal activity…has never been regarded as punishment”); 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.”).}

and second, the amount of personal information disseminated was specifically tied to the risk level of the offender.\footnote{See, e.g., Doe v. Pataki, 120 F.3d 1263, 1278 (2d Cir. 1997) (emphasizing that notification statute is “carefully calibrated to, and depends solely upon, the offender’s perceived risk...”)}
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. The release of this information affects registrants’ lives in ways far more consequential than the lingering effect public knowledge of a conviction may generate. And it not just because of the amount of information – it is also because of the subtext of the message. In Knowledge as Power, scholar Wayne Logan argues that the context in which the information is conveyed is “far from neutral.” 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.”

1. The Nature of the Information Released

Because many modern notification schemes do not distinguish among offenders, they provide the public with a significant amount of information about all offenders, including de-
etailed physical descriptions of the registrants, home and work addresses, and links to maps of their locations. Upheld by the Supreme Court in *Connecticut Department of Public Safety v. Doe*, online registries need not distinguish between those individuals who pose a high risk to society and those who pose a low risk. Under Ohio’s sex offender law, for example, “every offender must provide identical information, and the information is published in the same manner for every offender.” Additionally, because the selection of font size and coloring are the same for all registrants, the posts add a measure of perceived danger about all offenders.

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.” “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.” Plus, “any entity receiving information on a sex offender may disclose or further disseminate such information at its discretion.”

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124 See, e.g., Doe v. State, 189 P.3d 999, 1001 (Alaska 2008) (“A photograph of each registrant appears on the 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.”).


129 N.Y. CORRECT. LAW §168-l(6)(a) (McKinney 2007).

130 See id.

131 See id. (emphasis added).
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 its children].”\textsuperscript{132} 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.”\textsuperscript{133} Armed with that information, the fear of retributive violence or harassment “[i]s not short lived.”\textsuperscript{134}

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.”\textsuperscript{135} 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.\textsuperscript{136} No hard limits are placed on Washington’s public agencies in interpreting the notification provisions of the state’s Community Protection Act.\textsuperscript{137}

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.\textsuperscript{138} While this argument holds merit, courts nevertheless


\textsuperscript{133} E.B. v. Verniero, 119 F.3d 1077, 1102 (3d Cir. 1997).

\textsuperscript{134} \textit{Id}. \textsuperscript{135} \textsc{Wash. Rev. Code} § 4.24.550(1) (West 2006).

\textsuperscript{136} \textit{Id.; see also} N.Y. \textsc{Correct. Law} §168-l(6)(a) (McKinney 2007).

\textsuperscript{137} Doe \textit{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 local agencies.”), \textit{overruled on other grounds} by Russell \textit{v.} Gregoire, 124 F.3d 1079 (9th Cir. 1997). For judicial interpretation of Washington’s “necessary and relevant” language see \textsc{State v. Ward}, 869 P.2d 1069, 1071 (Wash. 1994) (upholding the language in the belief that it ensures that notification will “fit the threat posed to public safety”).

\textsuperscript{138} \textit{See Doe v. Poritz}, 662 A.2d 367, 411 (N.J, 1995) (acknowledging that notification laws link some information together that would not be readily discernible); \textit{see also} Brief for Committee of Public Counsel Services and ACLU of Massachusetts as Amici Curiae Supporting Appellant, Doe \textit{v.} Attorney General, 686 N.E.2d 1007 (Mass. 1997) (No. SJC-
declared them constitutional because, on balance, the information was disseminated in a controlled manner and contained no greater information than that otherwise disseminated from any conviction.\footnote{139} In State v. Cook, the Ohio Supreme Court found the notification provision to be an “objectively reasonable measure to warn those most likely potential victims,” with disclosure specifically aimed at “those most likely to have contact with the offender.”\footnote{140} But, almost ten years later, the Ohio Supreme Court dealt with a “significantly modified” statute in Bertram v. Ohio.\footnote{142} 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.”\footnote{143}

Current notification laws provide the public with unfettered access to considerable personal information that would otherwise be unavailable to them.\footnote{144} A few short years ago, by comparison, hard copies of registries were maintained by local law enforcement and available to the public “during normal business hours.”\footnote{145} The introduction of the Internet has made the geographic reach of registration information boundless.\footnote{146} An offender’s information is globally disseminated through online...
state-maintained registries and any individual from any part of the world – whether they may ever be contemplated future victims – can access a state’s online registry and the accumulated personal information on it with the click of a mouse.

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 lived within the offender’s zip code or an adjoining one. Prompted by “a backlog of information requests,” Utah’s Legislature eliminated this geographical restriction on the dissemination of registration information in 1998. 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. 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.”

But it is not just the Internet where information is posted. Today, dissemination of public information comes in all 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.”

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147 Femedeer v. Haun, 227 F.3d 1244, 1247 (10th Cir. 2000); see also Doe v. District Attorney, 932 A.2d 552, 557 (Me. 2007) (noting that Maine’s Bureau of Identification is now required to post on the Internet much of the same information that could previously only be retrieved by the public through written request).

148 Femedeer, 227 F.3d at 1247 (noting that the 1998 amendment made public all of the information contained in the registry).

149 Id. at 1247-48; see also 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.”).

150 Femedeer, 227 F.3d at 1248 (“Access to the information is not controlled in any way; anyone with access to the Internet can access all of the registry information…”); see also Doe v. Lee, 123 F. Supp. 2d 57, 59 (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.”).

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, possibly due in part to the recognition of how difficult such a task may be. 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.

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.”

Ricky Blackmun’s story is not atypical. Ricky was sixteen when he had sexual intercourse with his thirteen-year old girlfriend. The offense occurred in Iowa, where Ricky’s record was eventually expunged. But Ricky’s family had moved to Oklahoma to get a fresh start after Ricky’s conviction. In Oklahoma, Ricky was required to register as a Tier III sex offender, a classi-
fication that entailed having his driver's license stamped with the words “sex offender” just below his picture in red letters.\textsuperscript{159} 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.\textsuperscript{160} Although Ricky’s name was removed from the state’s sex offender registry,\textsuperscript{161} the impact of the label continues to haunt him. In one interview, Ricky expressed fears wherever he goes because of lingering concerns other may have about him.\textsuperscript{162}

\textbf{D. The New Generation of Residency Restrictions}

Residency restrictions serve as an accurate barometer for the harshening of sex offender registration schemes.\textsuperscript{163} Generally upheld to date as civil non-punitive measures,\textsuperscript{164} residency restrictions prohibit convicted sex offenders from residing near designated locations “where children congregate,” such as schools, day-care centers, and recreational parks and playgrounds.\textsuperscript{165} Where

\begin{footnotes}
\item[159] Id.
\item[160] Id.
\item[161] Id.
\item[163] See, e.g., \textit{In re E.J.}, 104 Cal. Rptr. 3d 165, 173-74 (Cal. 2010) (reviewing the stricter restrictions embodied in “Jessica’s Law”); Doe v. Miller, 405 F.3d 700, 706 (8th Cir. 2005) (observing that “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.)
\item[164] See, e.g., \textit{Miller}, 405 F.3d 700 (finding that residency restrictions do not violate constitutional principles); Doe v. City of Lafayette, 377 F.3d 757, 766 n.8 (7th Cir. 2004) (noting that the city’s decision to ban the offender from parks “was not ‘punishing’ him at all” because the ban was a civil measure designed to protect the public); Coston v. Petro, 398 F. Supp. 2d 878, 885 (D. Ohio 2005) (determining that residency restrictions are not punitive in nature).
\item[165] See, e.g., GA. CODE ANN. § 42-1-13(b) (West 2009) (prohibiting sex offenders from living within 1,000 feet of a school, day care center, or area where minors congregate); 720 ILL. COMP. STAT. 5/11-9.4(b-5) (2009) (barring sex offenders from living within 500 feet of a playground, child care centers, or facilities that offer programs for children); UTAH CODE ANN. § 77-27-21.7 (West 2007) (prohibiting sex offenders from “being in the area, on foot or in or on any motorized or non-motorized vehicle, of any day care facility, public park, primary or secondary school”); OHIO REV. CODE ANN. § 2950.034 (West 2007) (restricting sex offenders from residing within 1,000 feet of any school, pre-school, or child day care center); KY. REV. STAT. ANN. §17.545 (West 2007) (barring sex offenders from residing within 1,000
enacted, they are intended to apply to all registrants, including those whose convictions occurred prior to the enactment of the particular residency restriction, those whose crimes were committed against adult victims, and those whose crimes were of a non-sexual nature.

When first introduced, restrictions often contemplated a buffer zone 1,000 feet or less. By today’s standards, that would be considered minimal. Current legislative enactments boast buffer zones of up to 2,500 feet. In addition to enlarging the feet of any pre-school, primary or secondary school public playground or licensed child daycare facility).

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.’”); 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.”); 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.”).

See, e.g., Miller, 405 F.3d 700 (affirming Iowa’s residency restrictions); In re E.J., 104 Cal. Rptr. 3d 165. Recently, however, courts have begun to question the constitutionality of such restrictions. See, e.g., Berlin v. Evans, 923 N.Y.S.2d 828, 834-35 (N.Y. Sup. Ct. 2011) (concluding that residency restrictions are punitive in nature); Commonwealth v. Baker, 295 S.W.3d 437, 437 (Ky. 2009) (determining that residency restrictions violate ex post facto principles when applied to previously convicted offenders); 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).

See, e.g., Baker, 295 S.W.3d at 446 (“The record before us does not reveal whether or not Respondent might be a threat to children and to public safety.”); 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.”).

See, e.g., In re E.J., 104 Cal. Rptr. 3d 165 (2010). 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 (2007).

See, e.g., 11 DEL. CODE ANN. tit. 11, § 1112(a) (2009) (enacted 1995) (preventing sex offenders from living within 500 feet of school property); MICH. COMP. LAWS § 28.735(1)-28.733(f) (enacted 1995) (defining student safety zones as “1,000 feet or less from school property”). See also Wayne A. Logan, Constitutional Collectivism and Ex-Offender Residence Exclusion Laws, 92 IOWA L. REV. 1, 7 (2006) (noting that the average buffer zone in 2006 was 1,000 feet).

See, e.g., ALA. CODE § 15-20-26(a) (2009) (revising buffer zone from 1,000 feet to 2,000 feet); CAL. PENAL CODE § 3003.5 (2009) (increasing residency restriction to 2,000 feet under Jessica’s Law); 57 OKLA. ST. ANN § 590A (West 2009). See also Sex Offender Setback for New Jersey Children, BAYSHORE COURIER NEWS (May 8, 2009), http://www.bayshorenws.com/publication/show/1075 (reporting on attempts to prohibit high and moderate-risk sex offenders from living within 2,500 feet of schools, child care centers, or parks).
zones, legislatures have broadened the concept of “where children congregate” to include bus stops,172 video arcade centers,173 and libraries.174 Moreover, it is often the offender who has to keep track of whether a daycare center or video arcade moves to within 1,000 feet of an offender’s home. Thus, the burden is placed on the registrant to determine compliance.175 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 zone of activity moves into the neighborhood.176 As expanding residency restrictions play out against the community landscape, one thing is clear: larger buffer zones with more points of reference effectively freeze out most sex offenders from the vast majority of communities in the United States.177

175 See, e.g., KY. REV. STAT. ANN. §17.545 (West 2007), unconstitutional as applied by Commonwealth v. Baker, 295 S.W.3d 437 (Ky. 2009); OHIO REV. CODE ANN. § 2950.034 (West 2007); GA. CODE ANN. § 42-1-15 (West 2006). But see ALA. CODE § 15-20-26(e) (West 2007) (“Changes to property within 2,000 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].”).
176 Mann v. Dep’t of Corr., 653 S.E.2d 740, 754 (Ga. 2007) (stating that “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” because it contains “no move-to-offender exception to its provisions”).
177 Jurists, scholars and journalists alike have recognized the magnitude of impact that residency restrictions have on offenders. See, e.g., Berlin v. Evans, 923 N.Y.S.2d 828, 835 (N.Y. Sup. Ct. 2011) (accepting as true that registrant, a tier one offender, was effectively banished from living in Manhattan); Mann, 653 S.E.2d at 744 (noting that Georgia’s residency restrictions “[d]o not merely interfere with, it positively precludes [a registrant] from having any reasonable investment-backed expectation in any property purchases as his private residence”). For articles criticizing residency restrictions, see Richard Tewksbury, Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions, 42 HARV. C.R.-C.L. REV. 531 (2007); 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); Catharine Skipp and Arian Campo-Flores, A Bridge Too Far, NEWSWEEK, Aug. 3, 2009 (reporting on displaced persons around the country); Carol DeMare, Efforts to Protect Kids Often Carry Own Risks, ALBANY UNION TIMES, Sept. 9, 2007 (describing the travails of one offender who moved and was unable, because of residency restrictions, to find housing of any kind); Monica Davey, Iowa’s Residency Rules Drive Sex Offenders Underground, N.Y. TIMES, Mar. 15, 2006,
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 global positioning satellites or other electronic devices to track certain sex offenders after release from confinement. Subsequently, in 2006, as part of the Adam Walsh Act, the federal government offered grant programs and technical assistance to states to implement similar electronic monitoring programs.

Inspired by Florida’s legislation, and spurred on by the federal incentives in the Adam Walsh Act, as many as thirty-nine states have amended their sex offender statutes to permit some form of electronic monitoring of convicted sex offenders. The majority of monitoring programs are imposed on sex offenders during the time that they are on supervised release. However, some states impose electronic monitoring on statutorily specified offenders for the duration of the offenders’ natural life.
most cases, individuals subject to electronic monitoring are also required to reimburse the state for the cost of the monitoring program.\footnote{182}{See, e.g., ARK. CODE ANN. § 12-12-923(c)(1)(a) (West 2007); GA. CODE ANN. § 42-1-14(c) (West 2006); MASS. GEN. LAWS ch. 265, § 47 (2006); MICH. COMP. LAWS § 791.285(2) (West 2006); S.C. CODE ANN. § 23-3-540(K) (West 2006).}

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.\footnote{183}{Erin Murphy, Paradigms of Restraint, 57 Duke L.J. 1321, at 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 also Commonwealth v. Cory, 911 N.E.2d 187, 193 (Mass. 2009); (emphasizing that the GPS requirement “must be 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 every offender convicted of a sex offense or any attempt to commit a sex offense for which lifetime registration is required to be monitored by a GPS system for life) and N.C. GEN. STAT. § 14-208.40 (West 2008) (imposing satellite-based monitoring on any offender who falls within one of the three delineated categories of offenders).}

In Massachusetts, for example, legislation demands that any person who is placed on probation following conviction of certain proscribed sex offenses must wear a GPS device at all times.\footnote{184}{MASS. GEN. LAWS ch. 265, § 47.}

Prior to this enactment, a sentencing judge could exercise discretion in imposing GPS monitoring as a condition of probation.\footnote{185}{Cory, 911 N.E.2d at 197.}

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.”\footnote{186}{Id. at 197-98.}

The introduction of GPS monitoring programs has not affected the offender’s obligation to comply with registration burdens. Conversely, an offender who is required to register may also be required to wear an electronic or GPS monitoring device for the duration of registration. Because of the recent emergence of GPS monitoring, case law is still developing to determine whether the imposition of GPS, which straddles both the civil and punitive, constitutes punishment, or whether it can be viewed as...
one burden among many in a civil regulatory scheme.  \footnote{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 Cory, 911 N.E.2d at 195 (determining that the GPS requirement has a pronounced punitive effect, and consequently may not be applied retroactively); see also Commonwealth v. Goodwin, 933 N.E.2d 925, 935 (Mass. 2010) (concluding that GPS is “so punitive in effect as to increase significantly the severity of the original probationary conditions”).}

\section{F. On the Horizon: Even Harsher Legislation}

SORNA 2006 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 peak in the proliferation of these laws. Proposed Congressional bills would: give power of the Secretary of State to revoke, restrict, or limit a passport issued to an individual who is a sex offender under the Adam Walsh Act;\footnote{To Restrict Passports of Certain Sex Offenders And For Other Purposes, H.R. 5870, 111th Cong. (2010).} require sex offenders to notify government agencies when they travel internationally;\footnote{Sex Offender Notification of International Travel Act, H.R. 6266, 111th Cong. (2010).} provide notice to foreign countries upon the intended travel of a convicted high-risk sex offender;\footnote{International Megan’s Law of 2009, H.R. 1623, 111th Cong. (2009).} prohibit sex offenders from working in property management or maintenance where they have access others’ residences;\footnote{Safety from Sex Offenders Act of 2011, S. 329, 112th Cong. (2011).} and withdraw burial related benefits for certain offenders.\footnote{Hallowed Grounds Act, H.R. 2355, 112th Cong. (2011).} One bill proposed expending funds to expand programs that use GPS as a sentencing option.\footnote{See GPS Protection and Safety Act of 2009, H.R. 3528, 111th Cong. (2009) (establishing a grants program to assist states in establishing programs that use global positioning systems to track offenders as an alternative to incarceration).}

State proposals are equally extensive and equally random. Proposals include expanding the list of registerable offenses to include tongue-kissing of a minor;\footnote{Virginia Law Takes Aim at Adults Who French Kiss Minors, FOX NEWS (Mar. 9, 2008) http://www.foxnews.com/story/0,2933,336231,00.html (discussing Virginia’s successful efforts to make tongue kissing of a minor a registerable offense).} requiring offenders to register with campus police if attending school;\footnote{Jeremy Alford, Bill Would Expand Sex Offender Registration To Campus Police, HOUMA TODAY (Mar. 10, 2011, 9:59 AM), http://houmatoday.com/article/20110310/articles/110319975.} barring sex offenders...
from attending festivals or participating in Halloween activities, increasing the reach of residency restrictions, and requiring weekly registration for homeless offenders.

II. REGULATORY V. PUNITIVE: A PRIMER ON THE DIFFERENCE

To characterize a particular piece of legislation as ‘civil’ or ‘punitive’ alters attendant requirements that flow from that determination. 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 United States Supreme Court observed, “The notion of punishment, as we commonly understand it, cuts across the division between civil and criminal.” That comment aptly describes sex offender registration schemes, which shares both the characteristics of a civil regulation that is designed to protect the public and 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.” A lower court of New York framed well the tension of

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 18 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 a 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.”


Smith v. Doe, 538 U.S. 84, 110 (2003) (Souter, J. concurring) (commenting that his tip toward constitutionality of the statute was premised on the presumption of constitutionality afforded the State); see also State v. Rodriguez, 93 S.W.3d 60, 70 (Tex. Ct. App. 2002)
competing regulatory and penal policies in affixing the appropriate label when it noted that a residency restriction serves to “protect children [but] on the other hand, the law is also intended to increase punishment against convicted sex offenders.”

Where legislation can be cast as either civil or criminal, the Supreme Court’s decision of Kennedy v. Mendoza-Martinez shapes the inquiry. Called the “two-part intent-effects test,” courts readily acknowledge a two-step process to make the determination. The first step of the inquiry is to resolve whether the legislature intended the statute to be a civil remedy or punishment. Assuming the legislature intends the law to be civil, the second step of the inquiry is whether, despite regulatory aims, the laws are so punitive in fact that “they may not be legitimately viewed as civil in nature.”

(acknowledging that the question of whether the 1997 Texas sex offender registration scheme constitutes an affirmative disability or restraint was closer than the State suggested).


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

See Hudson v. United States, 522 U.S. 93, 99 (1997) (characterizing the Mendoza-Martinez as the “intent-effects test”); see also United States v. Ward, 448 U.S. 242, 248-49 (1980) (describing the two levels of inquiry required to determine the issue); 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); People v. Logan, 705 N.E.2d 152, 158-60 (Ill. App. Ct. 1998) (labeling the Mendoza-Martinez test as an “intent-effects” test to determine whether sex offender registration statute was constitutional).

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 defendant); Femeedeer v. Haun, 227 F.3d 1244, 1248 (10th Cir. 2000) (utilizing the two-part test); Lescher v. Florida Dep’t of Highway Safety and Motor Vehicles, 985 So.2d 1078, 1082 (Fla. 2008) (analyzing whether the Florida Legislature intended law permanently revoking driver’s license to be civil regulation or 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).

See Hudson, 522 U.S. at 103 (stating that “[i]t is evident that Congress intended the OCC 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 which disqualifies drug offenders from receiving food stamp benefits was a civil remedy because of Congressional intent to confer authority to an administration agency).

Hudson, 522 U.S. at 99 (citations omitted) (recognizing that it is largely an issue of statutory construction whether a punishment is civil or criminal in nature); cf. Ursery, 518 U.S. at 279 (1996) (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 (1980) (determining whether civil fines added to criminal penalties violated double jeopardy clause).
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. On occasion, a court will rely on the fact that the legislature placed the registration scheme outside the Criminal Code. But in most cases, the legislative preamble articulates a non-punitive civil purpose. The legislative findings recorded in Idaho’s Sexual Offender Registration Notification and Community Right to Know Act offers a representative example:

The legislature finds that sexual offenders present 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.

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

208 See, e.g., State v. Letalien, 985 A.2d 4, 16 (Me. 2009) (recognizing that location of Maine’s SORNA in the code was one indicia that the scheme was intended to be a civil regulation).

209 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 include language that operate to demonstrate that the registration scheme was enacted as a civil measure. ARK. CODE ANN. § 12-12-902 (West 2003) (“[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 (1964 & Supp. 2005) (“The purpose of the chapter is to protect the public from potentially dangerous sex offenders and sexually violent predators by enhancing access to information concerning sex offenders and sexually violent predators.”); MICH. COMP. LAWS § 28.721a (West 2004) (“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, morals, and welfare of the people, and particularly the children, of this state.”).

210 See IDAHO CODE ANN. § 18-8301 et seq. (West 2006).

211 IDAHO CODE ANN. § 18-8302 (1998) (amended 2011); see also ARK. CODE ANN. § 12-12-902 (West 2009) (“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
However, the “intent-effects” test emphasizes that, even if a legislature intends a statute to serve an alternative purpose to punishment, the statute may nonetheless be deemed 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.” 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 whether a law is punitive in nature despite its civil rhetoric:

[1] whether the statute 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.

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 (West 2006) (“[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 (West Supp. 2008) (“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.”).

212 Hudson v. United States, 522 U.S. 93, 99 (1997); see also United States v. Halper, 490 U.S. 435 (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 (9th Cir. 2009) (determining that public dissemination of information of juvenile sex offender is punitive in effect because of the high degree of confidentiality afforded juveniles).

213 372 U.S. 144, 168-69 (1963); see also Wallace v. State, 905 N.E.2d 371 (Ind. 2009) (employing the Mendoza-Martinez test to conclude that sex offender registration schemes are punitive in nature).

214 Mendoza-Martinez, 372 U.S. at 168-69. The multi-factored Mendoza-Martinez test is not free from criticism. See, e.g., Artway v. Att’y Gen., 81 F.3d 1235, 1263 (3d Cir. 1996) (crafting a three-prong test of (i) actual purpose; (ii) objective purpose, and (iii) effect to determine whether regulation was a civil or criminal penalty); Doe v. Poritz, 662 A.2d 367, 388 (N.J. 1995) (disagreeing with the Mendoza-Martinez test because of its potential to “pre-
While all seven Mendoza-Martinez factors inform this inquiry, 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. 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. Indeed, only the “clearest proof” of punition will outweigh countervailing legislative intent.

Requiring “clearest proof” to overturn legislative intent is not unusual, nor does it only apply to 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. Indeed,
the presumption of constitutionality cloaks all legislation.\textsuperscript{220} Justice Souter’s concurrence in \textit{Smith v. Doe} underscores this point when he stated, “What tips the scale for me [in this close question] is the presumption of constitutionality normally accorded a State’s law.”\textsuperscript{221}

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.\textsuperscript{222} Consequently, courts regularly strike down laws where, despite a particular legislative intent, the laws have been deemed to violate constitutional principles.\textsuperscript{223}

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 \textit{Mendoza-Martinez} multifactored test, spiraling amendments have tipped the schemes to the punitive.\textsuperscript{224} And that \textit{tip} unravels their constitutionality.\textsuperscript{225}

\textbf{III. Proving Punition}

\textsuperscript{220} See, e.g., State v. Letalien, 985 A.2d 4, 11 (Me. 2009) (“A statute is presumed to be constitutional and the person challenging the constitutionality has the burden of establishing its infirmity.”).

\textsuperscript{221} 538 U.S. 84, 110 (2003) (Souter, J., concurring).

\textsuperscript{222} See, e.g., Lawrence v. Texas, 539 U.S. 558, 578 (2003) (striking Texas law that criminalized sodomy).

\textsuperscript{223} See \textit{Lawrence}, 539 U.S. at 564 (rejecting legislation that prohibited certain sexual behavior between consenting adults, concluding that statute intruded on a liberty interest); Staples v. United States, 511 U.S. 600 (1994) (determining that criminal possession of a machine gun necessitated a \textit{mens rea} requirement despite Congressional intent to the contrary); Finger v. State, 27 P.3d 66 (Nev. 2001) (declaring that legislature’s attempt to abolish the insanity defense violated principles of due process).

\textsuperscript{224} 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). And, for examples of a variety of legal scholarship on this phenomenon see Catherine L. Carpenter, \textit{Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country}, 58 BUFF. L. REV. 1, 1 n.1 (2010).

Excessive legislation may prove to be SORNA’s Achilles’ heel. This section argues that because of escalating burdens, a different set of assumptions controls the new generation of sex offender laws making them punitive; specifically, that super-registration schemes 1) impose a significant affirmative restraint, not previously considered, and 2) when viewed cumulatively, 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. One constitutional constriction on criminal legislation is the Ex Post Facto Clause, which prohibits retroactive application of a law that “inflicts a greater punishment, than the law annexed to the crime, when committed.” Ex post facto challenges have arisen in a variety of 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.

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. Ad-
ditionally there is great pushback from legislators, who argue that the laws compel retroactive application because of the high incidence of recidivism among sex offenders.232 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.233 After all, an Act’s influence would dilute significantly if registration laws exempted previously convicted offenders who were thought to be dangerous to the public.234 In Doe v. Poritz, New Jersey’s Supreme Court 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.”235

However compelling this argument appears at first glance, retroactive application of any law is only valid 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 principles of ex post facto because sex offender registration schemes cannot be characterized as punishment.236

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232 In part, this was the Government’s contention in Carr v. United States, which addressed the narrow question of whether the failure to register should apply to offenders who traveled pre-SORNA’s enactment. See Carr v. United States, 130 S. Ct. 2229, 2240-41 (2010). The amicus brief filed in Smith 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 Governments et. al. as Amici Curiae Supporting Petitioners, Smith v. Doe, 538 U.S. 84 (2003) (No. 01-729), 2002 WL 1268682.


234 See, e.g., 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 enactment of the Act was central to the enforcement of a comprehensive system); United States v. Cotton, 760 F. Supp. 2d 116, 127 (D.D.C. 2011) (identifying as persuasive the policy rationale invoked by the Attorney General for retroactive application of SORNA).

235 Doe v. Poritz, 662 A.2d 367, 373 (N.J. 1995) (observing 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.”).

236 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.”)
At first blush, one might suppose that the non-applicability of \textit{ex post facto} to sex offender registration schemes is a settled issue because of the Court’s ruling in \textit{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 [because of \textit{Smith}].”\footnote{United States v. Leach, 639 F.3d 769, 773 (7th Cir. 2011). Although the 2010 Supreme Court decision of \textit{Carr} addressed an \textit{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. \textit{See Carr v. United States}, 130 S. Ct. 2229 (2010).} Indeed, perhaps in deference to what it perceived to be controlling federal principle derived from \textit{Smith}, the Indiana Supreme Court in 2009 based its determination that Indiana registration laws violated \textit{ex post facto} on adequate and independent state constitutional grounds, rather than on federal principles of \textit{ex post facto}.\footnote{Wallace v. State, 905 N.E.2d 371, 377-78 (2009).}

However “tempting” it is to conclude that \textit{Smith} controls,\footnote{Although the Ninth Circuit concluded that \textit{Smith} may not always control, it nonetheless accorded deference to the Court’s decision. \textit{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 \textit{Doe} sex offender registration by its nature does not constitute punishment.”).} it would be a mistake because the statutory landscape has so dramatically altered.\footnote{See \textit{Lawrence v. Texas}}, 538 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.”). \textit{See also} Mortimer N.S. Sellers, \textit{The Doctrine of Precedent in the United States of America}, 54 AM. J. COMP. L. 67 (2006), for an interesting discussion on the role of \textit{stare decisis} in judicial decision-making in America.

While one can argue the merits of the \textit{Smith} decision – 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 \textit{super-registration} schemes post SORNA include the very characteristics the Court found wanting in 2003?

\textbf{A. Affirmative Disability or Restraint}

At its paradigmatic core, the term “affirmative disability or restraint” employed in \textit{Mendoza-Martinez} refers to imprisonment\footnote{See \textit{Hudson v. United States}}, 522 U.S. 93, 104 (1997) (distinguishing between disbarment from the banking industry and “infamous punishment of imprisonment”). In the seminal
case, *United States v. Hudson*, the Court viewed debarment from the banking industry as not “involv[ing] an affirmative disability or restraint as normally understood. While petitioners have been prohibited from participating in the banking industry, this is certainly nothing approaching the infamous punishment of imprisonment.”²⁴³ Relying on the *Hudson* framework – imprisonment vs. 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,²⁴⁴ permanent revocation of one’s driver’s license,²⁴⁵ withdrawal of right to food stamps,²⁴⁶ cancellation of alcoholic beverage license,²⁴⁷ or termination of ownership rights in horses.²⁴⁸

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*.²⁴⁹ Using traditional definitions of punishment, the Court posed three questions to determine whether the laws impose 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.²⁵⁰

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²⁴³ 522 U.S. at 104.
²⁴⁴ Wong Wing v. United States, 163 U.S. 228, 299 (1896) (rejecting contention that the denial of social security benefits was punishment).
²⁴⁶ See Turner v. Glickman, 207 F.3d 419, 431 (7th Cir. 2000).
²⁵⁰ Id. at 98-101.
Having concluded that registration and notification schemes do not involve physical restraints, the Court considered whether they nonetheless equal shaming punishments from colonial times. Although *Smith* analyzed specifically the Alaska Sex Offender Registry Act, the Court offered comparative analogies to distinguish sex offender registration schemes from historical non-corporal acts traditionally deemed punishment. To this end, the Court identified hallmarks of shaming punishments to include: banishment, loss of freedom of movement, public shame and humiliation, occupational or housing disadvantages, and conditions analogous to probation or supervised release. The majority found these indices lacking in sufficient degree to warrant a finding that the Alaska Sex Offender Registry was punitive. Today, however, super-registration schemes are readily identifiable by these hallmarks of shaming.

**Banishment**

Banishment defines the most serious of colonial shaming punishments. Historical banishment involved “[expulsion] from the community,” where “they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one.” By contrast, the *Smith* 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.”

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251 *Id.* at 98-99.
252 *Id.* at 99-100.
253 *Id.* at 99-101.
255 *Id.*
256 *Id.* at 100.
257 *Id.*
258 *Id.* at 97-102. Dissents by Justices Stevens, Ginsburg, and Breyer vehemently opposed the characterization that sex offender registration laws did not involve affirmative disabilities or restraints. See *id.* at 111-116.
259 *See United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905) (Brewer, J., dissenting) (quoting *Black’s Law Dictionary*) (internal quotation marks omitted) (defining “banishment” as “a punishment inflicted upon criminals, by compelling them to quit a city, place, or country, for a specific period of time, or for life”).
260 *See Smith*, 538 U.S. at 98.
261 *Id.* at 97-98 (citations omitted).
262 *Id.*
263 *Id.* at 101; see also *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
That assumption is no longer accurate given the sweeping nature of current residency restrictions. Today, in the vast majority of communities, registrants are not free to live or work where they wish. The Smith Court’s observation that Alaskan registrants are free to move about the state only underscores the quickly changing landscape because of the intensification of the registration schemes. 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 in finding that residency restrictions constitute banishment.

Indeed, case after case corroborates this assessment: an offender is made homeless or transient because of residency restrictions. 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. One offender who had moved from Ohio to Kentucky because of Ohio’s residency restrictions, was arrested in Kentucky for living within 1,000 feet of East Covered Bridge Park, “allegedly a public playground.” In Manhattan, a 77-year offenders may reside as opposed to expelling them from communities or prohibiting access to areas near schools or child care facilities).

See State v. Pollard, 908 N.E.2d 1145, 1153 (“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.”).

See supra notes x to x and accompanying text (describing the impact of residency restrictions on registrants’ movement).


See, e.g., Mann v. 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, Many Sex Offenders are Often Homeless, USA TODAY (Nov. 11, 2007, 7:46 AM), http://www.usatoday.com/news/nation/2007-11-18-homeless-offenders_N.htm (quoting an administrator who stated, “Residency restrictions are the linchpin for causing homelessness among sex offenders”).

Catharine Skipp, A Bridge Too Far, NEWSWEEK (July 25, 2009, 8:00 PM), http://www.newsweek.com/2009/07/24/a-bridge-too-far.html; see also Catharine Skipp, A Law for the Sex Offenders Under a Miami Bridge, TIME MAGAZINE (Feb. 1, 2010), http://www.time.com/time/nation/article/8,8599,1957778,00.html.

Baker, 295 S.W.3d at 441 (“According to Respondent, the Division of Probation and Parole provided him 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.”).
old convicted offender, with a residence for over forty years, was banished from it because of amended New York residency restrictions. 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.” In Georgia, a registrant, peacefully residing in his community with his wife, was almost forced to leave it when childcare facilities sprung up within 1,000 feet of the registrant’s home and business. To compound the injury, he had already been forced to vacate another residence three years earlier because of Georgia residency restriction statutes. This is the face of modern day banishment.

Loss of Freedom of Movement

Offenders suffer serious restrictions in 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, or obtain steady employment. As the Williams court persuasively articulated, it is the cumulative effect of all these requirements – not a separate analysis of these burdens – that accurately portrays the effect these requirements have on the offenders subject to them.

Periodic in-person registration, the frequency of which has been increased in recent years, limits the registrant’s freedom in general. In 2003, Smith theorized that the lack of in-person registration helped refute the claim that offenders were under an

271 Id. at 835.
272 Catharine Skipp, A Bridge Too Far, Newsweek (July 25, 2009, 8:00 PM), http://www.newsweek.com/2009/07/24/a-bridge-too-far.html (exposing the unintended consequences of residency restrictions).
273 Mann v. Dep’t of Corr., 653 S.E.2d 740, 742 (Ga. 2007) (finding Georgia’s residency restrictions unconstitutional in so far as it permitted the regulatory taking of Mann’s home without just compensation, but determining Mann failed to establish the economic impact of the work restriction so that he was prohibited from entering his business).
275 Compare Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000) (analyzing the effect of Utah’s Internet notification scheme on its own in determining that the notification scheme imposed only a “civil burden” on sex offenders) with State v. Williams, No. 2009-0088, 2011 WL 2732261, at *6 (Ohio July 13, 2011) (finding that all of the changes enacted by recent amendments to Ohio’s sex offender laws in aggregate, rather than any one change in particular, warrants the conclusion that imposing the current registration requirements on an offender whose crime was committed prior to the amendments is punitive).
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 exercise of individual liberty.”

In-person registration is “continuing, intrusive, and humiliating,” but a requirement that a GPS device be permanently attached to an offender’s person is “dramatically more intrusive and burdensome.” A GPS monitoring device affects an offender’s ability to travel by airplane, bathe, swim, scuba dive, camp or travel to rural areas, and even the ability to enter certain buildings. Though North Carolina’s Supreme Court ultimately found that neither the purpose nor effect of the state’s satellite-based monitoring (“SBM”) program negated the legislature’s civil intent in implementing it, the court did recognize that the SBM program “may affect a participant’s daily activities.”

In stark contrast to the view of North Carolina’s supreme court, Massachusetts’s highest court has determined that GPS monitoring renders the statute punitive in effect because it does impose 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.” And because GPS monitoring is imposed as part of

277 State v. Letalien, 985 A.2d 4, 24-25 (Me. 2009) (explaining the differences between the SORNA Act of 1995 and 1999 on the burdens facing lifetime registrants); see also supra notes x - x.
281 Id. at 11, 13 (reasoning that the requirements necessary to operate a satellite-based monitoring program simply “make a valid regulatory program effective and do not impose punitive restraints”).
282 Id. at 4 (emphasis added) (recognizing that activities may be curtailed by the need to reestablish satellite connections or when the anklet is submerged in water during swimming or bathing).
283 Id. at 11 (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” or in cases of civil confinement).
284 Cory, 911 N.E.2d at 196 (“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
an offender's sentence for certain crimes, the Massachusetts Supreme Court determined that the statute is punitive in effect.\footnote{285} 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\footnote{286} because there is always the potential that the offender will be forced from any new residence whenever a third party chooses to establish a prohibited activity within the exclusion zone.\footnote{287}

In fact, exclusion zones do not only prohibit residency; in some cases they attempt to prohibit movement.\footnote{288} Massachusetts, for example, sought to establish exclusion zones that do 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.”\footnote{289} When used together, GPS monitoring plus geographic exclusion zones, “could dramatically limit an offender's freedom of movement.”\footnote{290} As one commentator

\textit{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."}).

\footnote{285}Id. at 197; see also Commonwealth v. Goodwin, 933 N.E.2d 925, 935 (Mass. 2010). It has been held that the addition of registration burdens that modify or enhance a sentence is similar to adding conditions to an offender’s probation. \textit{See State v. Letalien, 985 A.2d 4, 25-26 (Me. 2009)} (declaring that registration was required as “an integral part of the 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); People v. Castellanos, 982 P.2d 211, 222 (Cal. 1999) (Kennard, J., concurring in part and dissenting in part) (writing, “If the legislature intended the sanction to be imposed in a criminal proceeding it probably intended the sanction to be punitive.”).

\footnote{286} Mann v. Ga. Dep’t of Corrections, 653 S.E.2d 740, 744 (Ga. 2007); Commonwealth v. Baker, 295 S.W.3d 437, 445 (Ky. 2009); State v. Pollard, 908 N.E.2d 1145, 1150 (Ind. 2009). \textit{See also Brenda Goodman, Georgia Justices Overturn a Curb on Sex Offenders, N.Y. TIMES, Nov. 22, 2007} ("'You live every kind of 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.’").

\footnote{287} Cory, 911 N.E.2d at 196 n.19.

\footnote{288} MASS. GEN. LAWS ch. 265, § 47 (2006) (defining geographic exclusion zones to include, 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”); \textit{see also FLA. STAT. ANN. § 947.1405(12)(a) (West 2007)} (permitting the parole commission to designate additional “prohibited locations” to protect a victim).

\footnote{289} Goodwin, 933 N.E.2d at 935 (finding that “the additional probation condition of GPS monitoring, paired with geographic exclusions, is ‘so punitive in effect as to increase the
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. ²⁹¹

Public Shame and Humiliation

Despite the long line of cases concluding that sex offender registration schemes are non-punitive civil regulations,²⁹² courts nonetheless recognize that these laws serve to shame, isolate, and ostracize the convicted offender.²⁹³ The question, therefore, is not 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 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.”²⁹⁴ 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 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 Erin Murphy, Paradigms of Restraint, 57 DUKE L.J. 1321, 1328 (2008).
²⁹³ See, e.g., Smith, 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 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.”); 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.”); Doe v. Prior, 61 F. Supp. 2d 1224, 1232 (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.”).
whether the public shame and humiliation registrants suffer are too profound to disregard.

In concluding that notification schemes were civil in nature, Smith distinguished the paradigmatic shaming punishments of branding and other permanent labels from the publicity associated with community notification. That the shame suffered by registrants is less profound than those suffered by colonists is no longer a valid assumption. 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” described in Smith. For Doe, who had been convicted in 1990 of one count of indecent liberties with another consenting male and fined 62 dollars, automatic registration as a Tier I offender would have caused untold embarrassment and humiliation. So significant was his perceived shame, that Doe “seriously considered suicide rather than face the humiliation and disgrace of registering as a sex offender.” 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.

**Occupational Employment and Housing Disadvantages**

Spiraling amendments have severely restricted the registrant's opportunity for employment and housing. The change is palpable from 2003 when Smith commented, “The Act does not restrain activities sex offenders may pursue but leaves them free

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296 Smith, 538 U.S. at 99.


298 Id. (detailing Doe’s beliefs regarding the fallout from registration).


300 See supra Part II (detailing the changes in the new sex offender laws).
to change jobs and residences.”

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.

Employment options are equally scarce. Faced with scenarios more extreme than those found in Hudson, which involved debarment from only the banking industry, states have barred registrants from all manner of employment. Illustrating this point is Iowa’s attempt to preclude employment opportunities at any business located near industries affecting children.

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. 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.

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301 Smith, 538 U.S. at 100; see also Femande 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”); Doe v. Miller, 405 F.3d 700, (8th Cir. 2005) (acknowledging that Iowa’s residency restrictions were more disabling than those at issue in Smith v. Doe, but reasoning they are “certainly less disabling” than civil commitment schemes in finding the statute non-punitive).

302 See supra Part II.

303 Hudson v. United States, 522 U.S. 93 (1997) (concluding that debarment from the sole industry was not sufficiently punitive).

304 See Doe 1 v. Otte, 259 F.3d. 979, 988 (2001) (“In contrast [to Hudson], the procedures employed under the Alaska statute are likely to make the plaintiffs completely unemployable.”).

305 See IOWA CODE ANN. § 692A.113 (West 2011) (emphasis added) (prohibiting registrants from engaging in employment 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’’); LA. REV. STAT. ANN. § 15:553 (West 2007) (prohibiting registrants from operating any bus, taxicab, or limousine for hire, 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 to operate any carnival or amusement ride); CAL. CIV. CODE § 2079.10a (West 2006) (requiring real estate agents to provide potential homebuyers with information on how to access sex offender registries). See also supra Part II.D. (describing residency restrictions).

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

307 Smith, 538 U.S. at 101.
in the Alaskan registration scheme. For example, the registration scheme did not include mandatory conditions or the potential for revocation of freedom in case of infraction.\textsuperscript{308} Nor did it require the level of in-person registration and frequency of registration associated with probation or supervised release. 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.\textsuperscript{309}

Similar to the other assumptions underlying \textit{Smith}, this one no longer applies. Offenders are not free to “move where they wish to live and work as other citizens, with no supervision.”\textsuperscript{310} Current registration burdens look like probation or supervised release; they require registration in person as often as every ninety days\textsuperscript{311} and a variety of other mandatory actions, which if not met, threaten the registrant with loss of freedom.\textsuperscript{312}

B. Excessiveness

The final factor under \textit{Mendoza-Martinez} asks whether the law, in its necessary operation, is excessive in relation to its stated regulatory purpose.\textsuperscript{313} If the means chosen to carry out a law’s non-punitive purpose are excessive, the law may be deemed

\begin{smallnotes}
\begin{enumerate}
\item Id.
\item Id. (relying on the fact that registration did not have to be made in person to uphold registration as civil). Lower courts have relied on the Court’s message in \textit{Smith}. \textit{See}, \textit{e.g.}, McCabe v. Com., 650 S.E.2d 508, 511 (Va. 2007) (concluding that no liberty interest was affected because of lack of in-person registration); 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, only requires one registration per move, and registration once per year).
\item Smith, 538 U.S. at 101.
\item See supra notes x – x and accompanying text.
\item See, \textit{e.g.}, Commonwealth v. Goodwin, 933 N.E.2d 925, 927 (Mass. 2010) (suggesting that a court may impose GPS monitoring as an additional condition of a registrant’s probation if the registrants violates any of the original conditions); State v. Williams, No. 2009-0088, 2010 WL 2732261, at *3 (Ohio July 13, 2011) (stating that failure to comply with certain registration requirements will subject a sex offender to criminal prosecution); see also supra notes x to x and accompanying text. Even in 2003, members of the Court believed that registration requirements were tantamount to requirements imposed as consequences of other criminal convictions. \textit{See Smith}, 538 U.S. at 111 (Stevens, J., dissenting in part, concurring in part).
\item Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); see also \textit{Smith}, 538 U.S. at 97.
\end{enumerate}
\end{smallnotes}
punitive in its effect.\textsuperscript{314} So critical is this factor, that for some courts, it is the most dispositive.\textsuperscript{315}

Although the vast majority of courts have consistently found that registration and notification schemes are rationally connected to their proposed goal, namely public safety,\textsuperscript{316} a fundamental change in these schemes threatens the legality of this sixth and final factor. Individualized risk assessment, a mainstay of the previous generation of sex offender schemes,\textsuperscript{317} has been replaced by offense-based assessment, where individuals are assigned to tiers based on the crimes for which they were convicted.\textsuperscript{318} In many states, courts are no longer permitted to de-

\textsuperscript{314} Smith, 538 U.S. at 105 ("The question is whether the regulatory means chosen are reasonable in light of the non-punitive objective."); see also Doe v. State, 189 P.3d 999, 1016 (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.").

\textsuperscript{315} Wallace v. State, 905 N.E.2d 371, 383 (Ind. 2009); see, e.g., Smith, 538 U.S. at 117 (Ginsburg, J., dissenting) ("What ultimately tips the balance for me is the Act’s excessive-ness in relation to its nonpunitive purpose."); Rodriguez v. State, 93 S.W.3d 60, 75 (Tex. Crim. App. 2002) ("Of 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."); Kellar v. Fayetteville Police Dep’t, 5 S.W.3d 402 (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 (Kan. 1996) ("This is the key factor in our analysis.").

\textsuperscript{316} See, e.g., Smith, 538 U.S. at 102-03; State v. Letalien, 985 A.2d 4, 22 (Me. 2009) ("SORNA of 1999 was enacted to serve the legitimate non-punitive purpose of public safety."); Wallace, 905 N.E.2d at 383 ("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."); Doe v. State, 189 P.3d 999, 1015 (Alaska 2008) ("ASORA can rationally be viewed as advancing a non-punitive purpose.").

\textsuperscript{317} See, e.g., MASS. GEN. LAWS ch. 6, § 178E(f) (2004) (permitting the court to relieve a sex offender of his or her duty to register if "the circumstances of the offense in conjunction with the offender’s criminal history indicate that [he or she] does not pose a risk of reoffense"). See also Letalien, 985 A.2d at 8 (reviewing SORA of 1991 which allowed a court to waive registration requirements where good cause was shown); State v. Ellison, No. 78256, 2002 WL 1821927, *1 (Ohio Ct. App. 2002) (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).

\textsuperscript{318} See State v. Williams, No. 2009-0088, 2011 WL 2732261, at *5 (Ohio July 13, 2011) (noting that offenders were no longer entitled to a hearing to determine whether he would be classified as a sexually oriented offender, habitual sex offender or sexual predator under Ohio’s amended sex offender statute); 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); Doe v. State, 189 P.3d 999, 1017 (Alaska 2008) (stating the offenders are not permitted to shorten their registration or notification periods “even on the clearest determination of rehabilitation”); Commonwealth v. Williams, 832 A.2d 962, 965-66 (Pa. 2003) (describing the changes in risk assessment procedures the Court demanded to afford constitutional protec-
termine whether a registrant poses a risk to society;\textsuperscript{319} indeed, many states expressly prohibit relief from registration or disclosure obligations.\textsuperscript{320} In note her dissent in \textit{Smith}, Justice Ginsburg expressed caution regarding the constitutionality of sex offender registration laws that do not provide individualized assessment nor offer the registrant the opportunity to demonstrate rehabilitation.\textsuperscript{321}

The first wave of sex offender legislation permitted trial courts to waive registration requirements for certain individuals, but many states have repealed such provisions.\textsuperscript{322} As a result, offenders are no longer entitled to present any evidence to shorten their registration or notification period.\textsuperscript{323} Doe’s story illustrates

\begin{itemize}
  \item \textsuperscript{319} See, \textit{e.g.}, Williams, 2011 WL 2732261, at *5 (stating that judges are no longer permitted to review a sex offenders statutory classification); \textit{Letalien}, 985 A.2d at 9-10 (acknowledging that Maine’s sex offender law was amended to eliminate court’s ability to waive registration on a showing of reasonable likelihood that registration was no longer necessary); Doe v. State, 189 P.3d 999, 1017 n.143 (Alaska 2008) (remarking that Alaska’s Sex Offender Registration Act “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);
  \item \textsuperscript{320} See, \textit{e.g.}, \textit{La. Rev. Stat. Ann.} § 15:542(F)(1) (West) (“[T]he sex offender registration and notification requirements required by Louisiana’s sex offender law are mandatory and shall not be waived or suspended by any court.”).
  \item \textsuperscript{321} \textit{Smith}, 538 U.S. at 117 (Ginsburg, J., dissenting) (“And merit[ing] 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.”); \textit{see also} \textit{Letalien}, 985 A.2d at 23 (“No statistics have been offered to suggest that every registered offender or a substantial majority of 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 (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 . . . .”).
  \item \textsuperscript{322} See Doe v. Poritz, 662 A.2d 367, 382-83 (N.J. 1995) (explaining that part of the rationale for upholding retroactive registration is because the scheme includes individualized assessment); \textit{see also} State v. Cook, 700 N.E.2d 570 (Ohio 1998) (detailing the hearing to which offender is entitled); Doe v. District Attorney, 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); State \textit{ex rel} Oliveri v. State, 779 So.2d 735, 737 n.4 (La. 2001) (acknowledging that the proviso that permitted exclusion from community notification was repealed in 1999).
  \item \textsuperscript{323} \textit{See Smith}, 538 U.S. at 116 (Ginsburg, J. dissenting); \textit{see also} Doe v. State, 189 P.3d 999, 1017 (Alaska 2008) (“ASORA provides no mechanism by which a registered sex offender
the damaging effect that elimination of waiver provisions can have on offenders. As court documents attest, Doe, a 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 ago. He was “a good candidate” for waiver. But, after Maine repealed its waiver provisions, Doe no longer had the ability to escape the registration requirements of the state’s sex offender statute.

We do 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. 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.” For example, Doe, a citizen of Massachusetts, received notice that the 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. Massachusetts’s sex offender registry board recognized that it could relieve Doe of the burdens of registration, but it nonetheless refused to grant relief, despite the fact that Doe had not been convicted of any crime since he was discharged from probation.

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324 Doe v. District Attorney, 932 A.2d 552, 563 (Me. 2007).
325 Id.
326 Id.
327 Id.
328 See, e.g., Doe v. Pataki, 120 F.3d 1263, 1278 (2d Cir. 1997); Doe, Sex Offender Registry Bd. No. 8725 v. Sex Offender Registry Bd., 882 N.E.2d 298, 300 (Mass. 2008) (describing process by which an offender seeking relief from registration must “submit documentary evidence ‘relative to his risk of recidivism, the degree of dangerousness posed to the public and his duty to register.’”).
329 Doe v. Pataki, 3 F. Supp. 2d 456, 469 (S.D.N.Y. 1998) (recounting classification hearing for mentally retarded offender, who appeared without a lawyer and was not informed of his right to a lawyer, at which court read from a document incorrectly stating offender’s conviction); Smith v. State, Nos. 2009 CA 1765 & 2009 CA 1169, 2010 WL 1173071, at *7 (La. Ct. App. Mar. 26, 2010) (noting that a contradictory hearing was never held in Smith’s case even thought Louisiana’s sex offender law requires an offender be given an opportunity to challenge his re-classification).
twenty-five years previously, and had been married for twenty-one years, raised three children and had established a stable life in the community.

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 reporting and expansive notification requirements that apply to individuals convicted of a broad spectrum of ever-changing crimes.

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.” 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. 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.

So excessive are the regulations, they are rendered over- and under-inclusive. Over-inclusive in that they require individuals who are acknowledged to pose no threat to society to register for ten years, fifteen years, or even life. 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. Thus, “all registrants, including those who have successfully rehabilitated, will naturally be viewed as potentially dangerous by their neighbors,

331 Id.
332 Id.
333 See supra Part I (detailing the extensive changes in registration schemes).
335 See supra Part II (describing registration and notification burdens).
336 See supra notes xx-xx or pp. xx-xx.
337 See Doe v. State, 189 P.3d 999, 1015 (Alaska 2008); see also State v. Letalien, 985 A.3d 4, 23 (Me. 2007).
338 Letalien, 985 A.3d at 23; see also Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009) (rejected an approach of over-inclusion, and finding the Indiana registration scheme fundamentally flawed, in part, because it was “so broad and sweeping”)
co-workers, and larger community.” In light of their purported purpose, sex offender statutes are also under-inclusive because they do not require individuals charged with sexual offenses but acquitted or individuals whose conviction is vacated or overturned to register. At both ends of the spectrum, super-registration schemes are excessive.

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 2006 Adam Walsh Act as the genesis for the change, this article argues that the shift actually can be traced to the Court’s decision in *Connecticut Department of Public Safety v. Doe*, which was handed down the same term as *Smith*. There, the Supreme Court affirmed the State of Connecticut’s decision to include all sex offenders on a public registry, without regard to individualized risk assessment or danger. The Court wrote, “The fact that respondent seeks to prove – that he is not currently dangerous – is of no consequence under Connecticut’s Megan’s Law.” Conviction alone triggers registration and notification, and Connecticut’s decision to publicly post all registrants’ information, whether dangerous or not, also constituted a valid exercise of its authority.

Although *Connecticut Department of Public Registry* presented on a narrow ground of procedural due process, the case is, nonetheless, disturbing for the message it imparts. In uphold-

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339 *Letalien*, 985 A.2d at 23-24 (“It is unknown to what extent this reality will impair the opportunity for rehabilitated offenders to reintegrate and become productive members of society.”).
340 See *Doe v. State*, 189 P.3d 999, 1015 (Alaska 2008); *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 non-punitive because its application is based on criminal conduct rather than criminal conviction).
343 *Id.* at 3-4; see also *Smith v. Doe*, 538 U.S. 84, 103 (2003) (“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.”).
344 *Conn. Dep’t of Pub. Safety*, 538 U.S. at 7 (emphasis added).
345 *Id.*
346 *Id.* at 7-8. The Court did leave the door open for a future substantive due process challenge. *See id.*
347 *Id.* at 8.
ing a system of sex offender notification that does not distinguish among registrants, the Court signaled the constitutional legitimacy of broad-based, over-inclusive 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 statutes excessive in relation to its non-punitive purpose.\textsuperscript{348} Classifying an individual as a sex offender remains automatic even though “a sexually oriented conviction, without more, may not predict future behavior.”\textsuperscript{349}

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 means. Recently, a few courts have criticized the lack of rational connection,\textsuperscript{350} but other courts continue to find that sex offender statutes are not excessive in relation to their non-punitive purposes, relying on the Supreme Court’s assertion in \textit{Smith} that “[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.”\textsuperscript{351}

\textsuperscript{348} Doe v. Miller, 405 F.3d 700, 721 (8th Cir. 2005) (quoting Smith v. Doe, 538 U.S. at 84, 103 (2003)) (reasoning that the absence of a particularized risk assessment did not convert Iowa’s residency restrictions into a punitive measure because “[t]he \textit{Ex Post Facto} Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences”).


\textsuperscript{350} See, e.g., 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 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.”); 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.”); Doe v. District Attorney, 932 A.2d 552, 563 (Me. 2007) (“The fact that a sex offender never has the ability to escape the registration requirement of the current SORNA, regardless of behavior, consequences, or contributions following conviction, strikes us as having the capability to be excessive and as diverging from the purpose of protecting the public.”).

\textsuperscript{351} Smith v. Doe, 538 U.S. 84, 103 (2003).
fails to address the impact of extensive expansion of state sex 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.\textsuperscript{352} A due process challenge faces greater hurdles because of its narrow, yet amorphous underpinnings.\textsuperscript{353} As the Court wrote in County of Sacramento v. Lewis, “[R]ules of due process are not subject to mechanical application...and the need to preserve the constitutional proportions of substantive due process demands an exact analysis of context and circumstances.”\textsuperscript{354}

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.”\textsuperscript{355} Challenges are difficult to sustain, however, because of the Court’s unwillingness to expand protections beyond traditional fundamental interests.\textsuperscript{356} In Washington v. Glucksberg, the Court reiterated, “We have always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this unchartered area are scarce and open-ended.”\textsuperscript{357} Consequently, the Court has held firm to the proposition that the right asserted must be “deeply rooted in this

\textsuperscript{352} See Wallace, 905 N.E2d at 379-384, and State v. Letalien, 985 A.2d 4, 18-24 (Me. 2009), for an excellent analysis of all seven factors.

\textsuperscript{353} 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”).

\textsuperscript{354} 523 U.S. 833, 850 (1998).

\textsuperscript{355} Hurtado v. California, 110 U.S. 516, 527 (1884).


\textsuperscript{357} Id. at 720; see also Albright v. Oliver, 510 U.S. 266 (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.”).
Nation’s history and tradition” or “implicit in the concept of ordered liberty.”

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. Without a fundamental interest to anchor the inquiry, legislation will be deemed constitutional if it rationally related to a legitimate governmental interest. Successful challenges under the rational basis test are rare because great deference is afforded the legislative authority to craft and define laws. Indeed, so difficult is the burden that scholars evoked surprise when the Court in Lawrence v. Texas overturned a Texas sodomy law without first finding a traditional fundamental interest.

For the sex offender, a substantive due process claim is especially problematic. Registrants can neither rely on sympathy nor case precedent for support. Perhaps, in recognition of these obstacles, offenders have been hesitant to bring substantive due

358 Glucksberg, 521 U.S. at 721 (refusing to find a fundamental right to end one’s life).
359 Id. at 728.
360 See, e.g., Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001) (“The rational basis standard is ‘highly deferential; and we hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances.’”).
361 See, e.g., Wilson Huhn, The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence, 12 WM. & MARY BILL RTS. J. 65, 65-66 (2003) (arguing that the “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, 29 Vt. B. J. 5, 6 (2003) (criticizing the Court’s reasoning because “[the Court—or at least Justice Kennedy—has chosen to build jurisprudential castles on the most shifting of sands, if not on thin air.”).
362 See, e.g., Doe v. Moore, 410 F.3d 1337, 1343-44 (11th Cir. 2005) (rejecting 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 plaintiffs’ substantive due process claim because it did not allege a sufficient privacy interest); In re W.M., 851 A.2d 431 (D.C Ct App. 2004) (concluding that registrants failed to prove substantive due process claim).
363 See Doe v. Tandeske, 361 F.3d 594 (9th Cir. 2004), cert denied 543 U.S. 817 (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 substantive due process challenge must either “directly or indirectly burden the fundamental rights claimed by Appellants”).
364 See, e.g., Moore, 410 F.3d at 1342-43 (emphasizing reluctance to expand substantive due process protections); Lee v. State, 895 So.2d 1038, 1039 (Ala. Crim. App. 2004) (declining to consider substantive due process claim because it was not preserved on appeal); Milks v. State, 894 So.2d 924, 925 (Fla. 2005) (refusing to address substantive due process claim,
process challenges, even when invited to do so.367 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.”368

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*.369 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.”370

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 any conviction.371 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,372 it is the concept of overpowering gov-

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367 Although issue was briefed by both parties; *In re W.M.*, 851 A.2d at 451 (holding “[s]ince SORA does not threaten rights and liberty interests of a ‘fundamental’ order, appellants cannot succeed on their substantive due process challenge”); *In re Detention of Garren*, 620 N.W.2d 275, 285 (Iowa 2000) (rejecting substantive due process challenge because of the “reasonable fit between the governmental purpose and the means chosen to advance that purpose”); 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”); Doe v. Poritz, 662 A.2d 367, 421-22 (N.J. 1995) (determining that disclosure of information does not violate substantive due process).


370 *Id.*

371 *See supra* note x to x and accompanying text.

372 In *Rochin*, the government attempted to extract drugs from Petitioner who had swallowed them – first by forcible extraction and then by involuntary stomach pumping. *See Rochin*, 342 U.S. at 167.
ernmental 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.”

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, with whom to associate. Indeed, there is no aspect of the sex offender’s life untouched by the imprint of registration and notification. 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.

**B. Asserting Procedural Due Process Protections**

Even where no substantive due process violation exists when the government interferes with a registrant’s liberty interest, procedural due process nonetheless demands that safeguards ensure that the registrant’s liberty is not taken without due process of law. That generally translates to notice and an opportunity to be heard.

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
However, whether, and to what extent, reputation is a protected liberty interest that triggers procedural due process protections has been the subject of serious debate. As articulated by the Supreme Court in 1976 in *Paul v. Davis*, injury to reputation alone is insufficient. 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.

And so was born the concept of “stigma-plus,” which demands not only proof of injury to one’s reputation, but also that the injury was accompanied by the loss of a tangible interest that had been denied or curtailed. Although numerous cases pay homage to the “plus” part of the “stigma-plus” test, courts have

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377 See Conn. Dep’t of Pub. Safety v. Doe, 538 U.S. 1, 6 (2003); see also Tandeske, 361 F.3d at 596-597 (acknowledging that sex offenders have an affected liberty interest).
379 Paul, 424 U.S. at 701.
380 Id. at 698-700 (worrying that, without a limitation in place, Section 1983 actions would open the door for a myriad of state defamation claims); see also Siegert v. Gilley, 500 U.S. 226 (1991) (affirming Paul v. Davis, 424 U.S. 693 (1976) in holding that injury to reputation alone was an insufficient liberty interest).
382 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 defamation statements and the “plus” of adverse action by the government.”); see also Velez v. Levy, 401 F.3d 75, 87 (2d Cir. 2005) (defining “stigma-plus” 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 “stigma-plus” needs proof of “stigmatization in connection with a denial of a right or status previously recognized under state law”).
383 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, 215 F.3d 1326 (6th Cir. 2000) (observing that “the Supreme Court and federal courts have since embraced Paul’s
also acknowledged that “outside [Paul’s] limited context, it is not entirely clear what the ‘plus’ is.”

Where loss of reputation is alleged, litigation centers on whether the stigmatizing statements produce an additional state-imposed burden. 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 good-will, where a “name-clearing hearing” was later held, termination from at-will employment, removal from bankruptcy panel, and debarment of adopting a child because of the defamation.

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. But Justice


385 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”); Doe v. Dep’t of Justice, 753 F. 2d 1092, 1106 (D. C. Cir. 1985) (analyzing in depth “the special tangible relationship that gives rise to the violation); Mosrie v. Barry, 718 F. 2d 1151, 1159 (D. C. Cir. 1983) (asking whether appellant was deprived of “some other interest that rises to constitutional status”).

386 Sadallah v. City of Utica, 383 F. 3d 34, 39 (2d Cir. 2004) (determining that loss of good will is not sufficient for a violation when attached to defamatory statements); see also WMX Technologies v. Miller, 197 F. 3d 367 (9th Cir. 1999).

387 Patterson v. City of Utica, 370 F. 3d 322 (2d Cir. 2004) (concluding that, although the name-clearing hearing in this case violated procedural due process, such a hearing bars substantive due process claim).

388 Silva v. Worden, 130 F. 3d 26, 32 (1st Cir. 1997) (finding that termination of at-will employment was an insufficient additional burden to constitute substantive due process violation).

389 Shaltry v. United States, 87 F. 3d 1322 (9th Cir. 1996) (determining that membership in bankruptcy panel was not a tangible interest).

390 Behrens v. Regier, 422 F. 3d 1255, 1260-61 (11th Cir. 2005) (holding that barred adoption proceedings was insufficient to meet the “stigma-plus” test).

391 Some case law has suggested that the “plus” must be a protected property interest. See, e.g., Clark v. Township of Falls, 890 F. 2d 611, 620 (3d Cir. 1989) (concluding that, because plaintiff had no property interest in retaining his duties as a 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. Dep’t of Justice, 753 F. 2d 1092, 1106
Rehnquist, writing for the majority in *Paul* in 1976, may have foreshadowed this modern procedural due process challenge when he wrote, “[I]t is to be noted that [Paul 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.”\(^{392}\) Forty years later, *super*-registration schemes have created just the kind of infamy accompanied by loss of a tangible right that Justice Rehnquist may have referenced.

The discussion of procedural due process safeguards in the context of community notification received short shrift in *Connecticut Department of Public Safety* when registrants challenged their inclusion in the Connecticut on-line registry without a hearing to determine their individual dangerousness. There, the Court reversed the Second Circuit to hold that on-line registries postings did not violate procedural due process because inclusion of the registrants was based on their prior convictions and not on their future dangerousness.\(^{393}\) The Court wrote, “[D]ue process does not require the opportunity to prove a fact that is not material to the statutory scheme.”\(^{394}\) The obvious colorable fact that swayed the Court was the disclaimer posted on the registry stating that the State of Connecticut had made “no determination that any individual included in the registry is currently dangerous.”\(^{395}\)

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*: any consequence that flows from on-line dissemination of an offender’s information is no different than that which generally flows from the public’s knowledge of any conviction.\(^{396}\) 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.

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\(^{394}\) *Id.* at 4.

\(^{395}\) *Id.* at 5.

\(^{396}\) *Id.* at 7.
But on-line registries are different. Despite disclaimers, or the courts’ reliance on them, registrants are at risk for retribution from the community. Cases have been reported that demonstrate the causal connection between the attacks and the on-line registries. 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 Maine’s online registry. 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 competing policies that demand notifying the community of dangerous offenders, yet aware 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

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397 See, e.g., Russell v. Gregoire, 124 F.3d 1079, 1091 (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.”); see also Smith v. Doe, 538 U.S. 84, 105 (2003) (noting with approval inclusion of a warning that use of information displayed on 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) (stating that “each notification is accompanied by a warning against the misuse of information conveyed[s] an assurance that any private violence will be prosecuted).


399 Doe v. District Attorney, 932 A.2d 552, 568 (Me. 2007) (Alexander and Silver, JJ., concurring) (“Reports of other murders, assaults, and harassment abound.”).
civil commitment has been upheld as constitutional, in large measure, due to the significant procedural safeguards in place to make that determination. In the landmark case of *Kansas v. Hendricks*, the Supreme Court upheld a Kansas law that allowed the civil commitment of those deemed to be sexually violent predators where: they had been convicted of sexually violent offenses; or if not convicted, they had been charged but either acquitted or not able to stand trial because of mental disease or defect. In so concluding, the Court emphasized that the actor’s prior conviction alone was insufficient to trigger civil commitment proceedings. In fact, Justice Stevens underscored this key point in his dissent in *Smith* when he stated, “While one might disagree with other aspects of *Hendricks*, it is clear that a conviction standing alone did not make anyone eligible for the burden imposed by the statute.”

Recasting the model of notification is the first step. Over-inclusion—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 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*.

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 applica-

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401 Id. at 357-58 (upholding the Kansas Sexually Violent Predator Act, KAN. STAT. ANN. § 59-29i03(a) (1994)). See Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungserwahrung*, 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 dangerous.
402 See *Hendricks*, 521 U.S. at 352.
404 *Hendricks*, 521 U.S. at 357 (stressing that civil commitment was only intended for “a limited subclass of dangerous persons”).
tion to previously convicted offenders, courts maintain that these registration schemes are, nonetheless, civil regulatory laws.\textsuperscript{405}

But times might be changing. Slowly courts have begun to appreciate the devastating picture current sex offender registration laws present. In a relatively short timeframe, supreme courts from Indiana, Maine and Ohio have said, “Enough is enough,” with each court concluding that its state’s serially amended scheme is no longer worthy of the designation ‘civil regulation.’\textsuperscript{406} In \textit{State v. Williams}, the Supreme Court of Ohio summed up well this dawning realization when it wrote,

No one change compels our conclusion that [the new registration scheme] is punitive . . . When we consider all of the changes enacted by S.B. 10 in aggregate, we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of S.B. 10 is punitive.\textsuperscript{407}

Review of the Ohio Supreme Court’s jurisprudence serves to illustrate the collective journey from constitutionally regulatory to unconstitutionally punitive. Ohio’s version of Megan’s Law was first enacted in 1996.\textsuperscript{408} As early as 1998, the statute was challenged in \textit{State v. Cook} as a violation of the prohibition against \textit{ex post facto} legislation.\textsuperscript{409} However, Ohio’s Supreme Court found that the statute served the “solely remedial purpose of protecting the public.”\textsuperscript{410} The \textit{Cook} court reasoned that the registration and address verification procedures were “\textit{de minimis} procedural requirements” necessary to achieve the statute’s re-

\textsuperscript{405} A review of federal case law offers a sobering look at how entrenched the view is that SORNA is not punitive. \textit{See}, e.g., United States v. DiTomasso, 621 F.3d 17, 25 (1st Cir. 2010); United States v. Guzman, 591 F.3d 83, 94 (2d Cir. 2010); United States v. Shemandoah, 595 F.3d 151, 158–59 (3d Cir.2010); United States v. Gould, 568 F.3d 459, 466 (4th Cir. 2009); United States v. Young, 585 F.3d 199, 203–06 (5th Cir. 2009); United States v. Leach, 639 F.3d 769 (7th Cir. 2010); United States v. May, 535 F.3d 912, 919–20 (8th Cir. 2008); United States v. George, 625 F.3d 1124, 1131 (9th Cir. 2010); United States v. Hinckley, 550 F.3d 926, 936 (10th Cir.2008); United States v. Ambert, 561 F.3d 1202, 1207 (11th Cir. 2009).


\textsuperscript{407} \textit{Williams}, 2011 WL 2732261, at *6.

\textsuperscript{408} \textit{Id.} at *2.

\textsuperscript{409} \textit{State v. Cook}, 700 N.E.570, 573 (Ohio 1998).

\textsuperscript{410} \textit{Id.} at 585.
medial goals.\textsuperscript{411} And this was the logic to which Ohio’s Supreme Court clung for over fourteen years.\textsuperscript{412} Even after the statute was “significantly amended” by Senate Bill 5, Ohio’s Supreme Court continued to rely on \textit{Cook}.\textsuperscript{413}

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 \textit{Williams} court paints a picture of excessive regulation.\textsuperscript{414} No longer convinced that Ohio’s statute was remedial, even though some elements of it remain so,\textsuperscript{415} the court determined that, in the aggregate, the scheme was punitive, and thus violated \textit{ex post facto} principles when applied to an offender convicted prior to Senate Bill 10’s enactment.\textsuperscript{416}

Neither one change, nor one amendment, nor one alteration compelled the court’s conclusion in \textit{Williams}.\textsuperscript{417} “It is a matter of degree whether a statute is so punitive that its retroactive application is unconstitutional.”\textsuperscript{418} \textit{Williams} does not inhibit the authority of Ohio’s General Assembly to pass legislation in order to protect the public from sex offenders.\textsuperscript{419} But the decision is a re-

\begin{thebibliography}{9}
\bibitem{411} Id.
\bibitem{412} See, \textit{e.g.}, State v. Williams, 728 N.E.2d 342 (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 addressed legitimate government interests without a detrimental effect on individual constitutional rights); State v. Eppinger, 743 N.E.2d 881 (Ohio 2001) (stressing the importance of statutorily provided classification hearings and the significance of classifying offender appropriately in upholding Ohio’s sex offender statute).
\bibitem{413} State v. Williams, No. 2009-0088, 2011 WL 2732261, at *2 (Ohio July 13, 2011). \textit{See, \textit{e.g.}}, State v. Ferguson, 896 N.E.2d 110 (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 \textit{Cook}, even if it made more burdensome the registration requirements and more extensive the notification provisions); State v. Wilson, 865 N.E.2d 1264, 1272-73 (Ohio 2007) (finding, in reliance on \textit{Cook}, that Ohio’s sex offender statute did not constitute \textit{ex post facto} legislation because the legislation was remedial and was a reasonable measure designed to protect the public). \textit{But see} State v. Williams, 868 N.E.2d 969 (Ohio 2007) (reasoning that the court of appeals’ reliance on \textit{Cook} was misplaced in this case because failure to verify current address does not implicate the constitutionality of the registration and notification process as a whole).
\bibitem{414} \textit{Williams}, 2011 WL 2732261, at *5.
\bibitem{415} Id.
\bibitem{416} Id.
\bibitem{417} Id. at *6
\bibitem{418} Id. (quoting State v. Cook, 700 N.E.2d 570, 582 (Ohio 1998)).
\bibitem{419} Id.
\end{thebibliography}
minder that spiraling amendments can undermine the civil regulatory aim of a registration scheme.\textsuperscript{420}

\textbf{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.\textsuperscript{421} 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. \textit{Wallace, Letalien,} and \textit{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 \textit{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.\textsuperscript{422} It is time to reexamine \textit{Smith} and \textit{Connecticut Department of Public Safety}, and their attendant assumptions. Mostly importantly, it is time to provide meaningful guidance on the parameters that will support the

\textsuperscript{420} Justice Judith Ann Lanzinger recognized the significant restraint on liberty imposed by Ohio’s sex offender statute even prior to Senate Bill 10’s enactment. See \textit{State v. Ferguson}, 896 N.E.2d 110, 120-24 (Lanzinger, J. dissenting) (articulating compelling arguments why the scheme is punitive).


\textsuperscript{422} Throughout the Court’s jurisprudence, there are a number of noteworthy cases that changed the national conversation. These are but a few. See, \textit{e.g.}, \textit{Brown v. Board of Education}, 347 U.S. 483, 492 (1954) (declaring the importance of moving beyond basic facts “to the effect of segregation itself on public education”); \textit{Miranda v. Arizona}, 384 U.S. 436 (1966) (changing the practice of police interrogations); \textit{Lawrence v. Texas}, 539 U.S. 558 (2003) (redefining liberty to include sexual autonomy).
states’ interest in keeping their communities safe while providing constitutional protections to offenders. The dissenting words of Judge Damon J. 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.”

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423 Doe v. Bredesen, 521 F.3d 680, 681 (6th Cir.) (Keith, J., dissenting).