A SIGN OF HOPE: SHIFTING ATTITUDES ON SEX OFFENSE REGISTRATION LAWS

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This paper stems from remarks made at the inaugural conference of Alliance for Constitutional Sex Offense Laws entitled "We Are All In This Together."

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* The Honorable Arleigh M. Woods and William T. Woods Professor of Law, Southwestern Law School. My gratitude to Alliance for Constitutional Sex Offense Laws (ACSOL) for inviting me to present at its inaugural conference entitled *We Are All in this Together*. My thanks as well to Davit Shanto, a second-year law student who provided valuable research assistance for the presentation. *Successful ASCOL Conference Brought Dignity, Hope and Information to Many*, ALL. FOR CONST. SEX OFFENSE L. (June 23, 2017), http://all4consolaws.org/2017/06/successful-acsol-conference-brought-dignity-hope-and-information-to-many/.

I. INTRODUCTION

I met a young man last year in Chicago, Illinois at a conference where I was speaking on the unconstitutionality of sex offense registration laws.[1] Hesitantly, he approached me after my presentation. He introduced himself and told me that he was a registrant and that despite serious registration and notification burdens he faced daily, he had been working hard to lead a productive life within those severe restrictions. His church was a comfort for him, and through it, he had found a support group. But recently, all that had changed. As he reported to me, newly enacted residency restrictions in Illinois were now preventing him from attending the church, which had given him so much support. His tenuous hold on life was eroding. The weight of the restrictions and attendant penalties were wearing him down and he was losing hope that anything would ever change. That forever, he would be ostracized and stigmatized without any hope for a different life.

He told a compelling story. His account of isolation and desperation is one that is repeated among registrants.[2] I responded, "Please hang in there. I am hopeful that we are starting to witness positive changes to these draconian and unconstitutional laws and to the public's attitude about them."

And it is true; I am hopeful.

In this presentation, I want to describe why. I want to trace the rise of sex offender registration laws and highlight what I believe may be a signal of a shift in our collective views about them. Ironically, their recent disfavor may not come from the fact that these laws are ineffective, which they are.[3]

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1. Illinois Voices for Reform, November 2016.

2. *See, e.g.*, Carolyn E. Frazier, *Today's Scarlet Letter – the Sex Offender Registry – is Risky Justice for Youth*, CHI. TRIBUNE: OPINION (May 26, 2017, 1:31 PM), http://www.chicagotribune.com/news/opinion/commentary/ct-sex-offenders-list-teens-risk-perspec-0529-md-20170526-story.html; Michael Rellahan, *Sex Offender Commits Suicide Before Prison Term Begins*, DAILY LOCAL NEWS: NEWS (June 4, 2017, 7:57 PM), http://www.dailylocal.com/article/DL/20170604/NEWS/170609922; *Teen Kills Self after Streaking Backlash*, N.Y. POST: NEWS (Oct. 11, 2013, 12:04 PM), http://nypost.com/2013/10/11/teen-who-faced-sex-offenders-list-for-streaking-commits-suicide; Katie Walmsley, *NJ Case Raises Questions About Meghan's Law*, ABC NEWS (July 27, 2011), http://abcnews.go.com/US/nj-case-raises-questions-meghans-laws/story?id=14171897 (biographing Justin Fawcett who overdosed at twenty-years-old because he had been required to register at seventeen for statutory rape). For a haunting look at the emotional toil the registry has on juvenile offenders, see HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE U.S. 37-38 (May 2013), https://www.hrw.org/report/2013/05/01/raised-registry/irreparable-harm-placing-children-sex-offender-registries-us. *See also* Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 747, 770-72 (2014).

3. Scholars and social scientists have been highly critical of the effectiveness of sex offender registration laws. *See, e.g.*, Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring*

Or that they cost too much for what they deliver, which is true as well.[4] Or that they may work in a perverse way to increase crime, which scholars claim.[5] Instead, we may be seeing the beginning of their demise for two important reasons: the empirical evidence does not support the false claim that sex offenders recidivate at high rates,[6] and registry schemes are collapsing under their own ambitious weight from laws that have swelled beyond any non-punitive justification.[7] With recent court decisions that have held sex offender registration aspects unconstitutional,[8] and newly-minted

Measures of Judicial Discretion to Sex Offender Management, 4 VA. J. CRIM. L. 241, 287 (2016) (decrying the "sweeping mandates" implemented by Congress without empirical evidence to warrant such action); Michael F. Caldwell, Mitchell H. Ziemke & Michael J. Vitacco, *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCHOL. PUB. POL'Y & L. 89, 91 (2008) ("Extant research has not supported the effectiveness of sex offender registration and notification at reducing recidivism with adults"); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J. L. & ECON. 207, 224 (2011) (employing empirical evidence to conclude that sex offender registration laws are not effective).

4. *See, e.g.*, Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 742-43 (2013) (criticizing legislators who enacted sex offender registration laws without considering the high cost of implementation).

5. *See, e.g.*, J.J. Prescott, *Do Sex Offender Registries Make Us Less Safe?*, Reg. 35, no. 2 (2012), http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1078&context=articles (arguing that notification laws may have the perverse effect of increasing crime); *see also* Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Law*, 42 HARV. J. ON LEGIS. 355, 407-08 (2005) (opining that shaming punishments do not curb, but rather increase crime).

6. *See infra* notes 84-89 and accompanying text on the empirical refutation of recidivism rates as "frightening and high."

7. *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L. J. 1071 (2011) (tracing the unprecedented growth of sex offender registration laws and penalties to conclude that they are now unconstitutional).

8. *See infra* notes 147-72 and accompanying text (analyzing recent court decisions that overturn aspects of sex offense registration laws).

public sympathy for the injustice and devastation of registration,[9] I believe we are witnessing an important shift. A tipping point, if you will.[10]

As of January 2017, there were more than 861,000 people on the registry nationwide.[11] Most audiences I speak to are not familiar with those who are forced to register. They only know what the politicians tell them, or what I call legislative soundbites,[12] and they only know of the high profile and violent cases discussed in the media. They may remember Jerry Sandusky, the Penn State Assistant Coach convicted of child rape and molestation, who preyed on vulnerable youths through his connection as an assistant football coach and as the founder of a youth organization.[13] Or they may recall the terrifying story of Jaycee Dugard, held captive for seventeen years by a

9. *See, e.g.*, Patrick McGreevy, *Criminal Justice Leaders Seek to End Lifetime Registry for Low-Risk Sex Offenders in California*, L.A. TIMES: POLITICS (June 18, 2017, 12:05 AM), http://www.latimes.com/politics/la-pol-ca-sex-offender-registry-20170618-story.html (showcasing the burdens Frank Lindsay has faced as a registrant); Sarah Stillman, *The List: When Juveniles Are Found Guilty of Sexual Misconduct, the Sex-Offender Registry Can Be a Life Sentence.*, NEW YORKER: ANNALS OF JUSTICE (Mar. 14, 2016), https://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes (highlighting the onerous journey Leah Dubuc has taken as a child registrant); David Feige, *When Junk Science About Sex Offenders Infects the Supreme Court*, N.Y. TIMES: OPINION (Sept. 12, 2017), https://www.nytimes.com/2017/09/12/opinion/when-junk-science-about-sex-offenders-infects-the-supreme-court.html?_r=0 (critiquing flawed empirical evidence that the United States Supreme Court employed in its analysis of the rationale for the registry); Julie Bosman, *Teenager's Jailing Brings a Call to Fix Sex Offender Registries*, N.Y. TIMES: U.S. (July 4, 2015), https://www.nytimes.com/2015/07/05/us/teenagers-jailing-brings-a-call-to-fix-sex-offender-registries.html?_r=0.

10. Noted author, Malcolm Gladwell, deconstructed the social phenomenon of a tipping point. *See* MALCOLM GLADWELL, THE TIPPING POINT (2000). For an examination of the tipping point phenomenon in the context of criminal legislation, see Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 2-3 (2010) (employing Gladwell's tipping point analysis to three-strikes laws, drunk driving laws, and sex offender registration schemes).

11. *See Map of Registered Sex Offenders in the U.S.*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD., http://www.missingkids.com/content/dam/ncmec/en_us/documents/sexoffendersmap.pdf (last visited Nov. 6, 2017).

12. *See* Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL'Y & L. 452, 455 (1998) ("The politicians, bolstered by what is taken to be nearly universal public support, compete to propose ever more severe responses to criminal behavior."); *see also* 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) (exploring why the public favors harsh crimes and punishments in the face of countermanding evidence).

13. *See* Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES: COLLEGE FOOTBALL (June 22, 2012), http://www.nytimes.com/2012/06/23/sports/ncaafootball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?_r=0; Malcolm Gladwell, *In Plain View*: *How Child Molesters Get Away With It*, NEW YORKER: MAGAZINE (Sept. 24, 2012), https://www.newyorker.com/magazine/2012/09/24/in-plain-view (describing how molesters "ingratiate themselves into the communities they wish to exploit").

registered offender in plain sight of law enforcement.[14] And they certainly know the name "Megan" even if they are not familiar with the tragic and heartbreaking circumstances that led to the enactment of Megan's Law, the national sex offender notification system.[15]

But the public does not know the full extent of those who comprise the registry. Of the 861,000 on the registry, a clear truth emerges about them. The vast majority on the registry are not dangerous, nor will they recidivate. The overwhelming face of registration is non-violent and non-reoffending.

Indeed, the sad truth is that the only danger visited here is the devastating impact of registration and notification burdens on those who are trying to lead constructive lives.[16] And not only on their lives. Registrants' families – parents, spouses, children – suffer as much as the registrant.[17] As district

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14. *See* Casey Glynn, *Nancy and Philip Garrido Sentenced for Jaycee Lee Dugard Kidnapping*, CBS NEWS (June 2, 2011, 1:56 PM), http://www.cbsnews.com/news/nancy-and-philip-garrido-sentenced-for-jaycee-lee-dugard-kidnapping; Marisol Bello, *Questions Arise on Monitoring of Sex Offenders*, ABC NEWS (Sept. 2, 2009), http://abcnews.go.com/US/story?id=8470353 (criticizing the value of registries because Phillip Garrido was still able to hold Jaycee Dugard captive for seventeen years despite the fact that he was a registered sex offender subjected to repeated home visits by law enforcement).

15. Megan's Law, a national notification system, is named in memory of seven-year-old Megan Kanka who was brutally murdered by her neighbor, Jesse Timmendequas. *See* Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, §129(b), 120 Stat. 587 (codified as amended at 42 U.S.C. § 14071 (2010)) (providing that the designated state law enforcement agency "shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section"); *see also* Doe v. Poritz, 662 A.2d 367, 422-23 (N.J. 1995) (affirming the constitutionality of notification systems). The substantive provisions of "Megan's Law" are currently codified under the title "Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program" and require officials to provide sex offender registration information to various local institutions and law enforcement agencies in the jurisdiction where the registrant resides and to "Any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction." 34 U.S.C.S. § 20923 (a)-(c) (LexisNexis 2017).

16. *See generally* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 35-46 (Vol. 19, No. 4(G) Sept. 2007), https://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf (raising serious concerns regarding the value of registries in light of its devastating impact); Courts have also come to appreciate the devastating impact of registration and notification burdens. *See, e.g.*, Sigler v. State, No. 08-CA-79, 2009 WL 1145232, at *1 (Ohio Ct. App. Apr. 27, 2009) ("[O]nly a person protected by legal training from the ordinary way people think could say, with a straight face, that this terrible consequence of a sex offender's conviction is not punishment."). For a portrayal of the impact of registration and notification burdens on juvenile registrants, see *Carpenter*, *supra* note 2, at 770-72.

17. *See, e.g.*, Millard v. Rankin, No. 13-cv-02406-RPM, 2017 WL 3767796, at *4-9 (D. Colo. Aug. 31, 2017) (recently published; no F. Supp. 3d pagination yet) (recounting witness testimony on the impact of registration); *see also* HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY, *supra* note 2; Steven Yoder, *Collateral Damage: Harsh Sex Offender Laws May Put Whole Families at Risk*, ALJAZEERA (Aug. 27, 2015, 5:00 AM), http://america.aljazeera.com/articles/2015/8/27/harsh-sex-offender-laws-may-put-whole-families-at-risk.html.

court Judge Matsch recounted in *Millard v. Rankin*, registrants and their families:

> face a known, real, and serious threat of retaliation, violence, ostracism, shaming, and other unfair and irrational treatment from the public, directly resulting from their status as registered sex offenders, and regardless of any threat to public safety based on an objective determination of their specific offenses, circumstances, and personal attributes.[18]

Without secure prospects for employment, housing, or education, both adult and child registrants often spiral down – just as the young man who approached me at my talk felt he was doing.[19] What can only be described as a sense of hopelessness fills them as they are subjected to ever-changing harsher laws.

II. THE FACE OF REGISTRATION UNDER A BLOATED CONVICTION-BASED ASSESSMENT MODEL

Prior convictions, not current dangerousness, land people on a sex offense registry.[20] It is a puzzling but obvious fact that one's current dangerousness is irrelevant for purposes of registration and notification. Although it is less taxing on a regulatory system to categorize without individualized assessment, automatic registration based on prior convictions alone comes with a cost. It produces a swollen registry devoid of the nuanced sorting that should be demanded if such a system is established.[21]

I want to introduce you to some people whose placement defies any logical connection between their status as registrants and the state's need to protect the public from dangerous offenders.

Those convicted of statutory rape. The registry is filled with adults and juveniles who have had consensual sexual activity with those who are presumed incapable of consenting because of their age.[22] Yet, whether their

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18. *Millard*, 2017 WL 3767796, at *9.

19. *See supra* Part I.

20. *See, e.g.*, Commonwealth v. Baker, 295 S.W.3d 437, 444 (Ky. 2009) (criticizing the conviction-based assessment model because it "begins to look far more like retribution for past offenses [than a civil regulation]"); *see also Millard*, 2017 WL 3767796, at *16.

21. *See, e.g.*, Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1029 (Okla. 2013) (condemning a registration scheme that is based on "a wide variety of crimes of which the severity of the crime and circumstances surrounding each crime can vary greatly"); *id.* (criticizing lifetime registration "based solely upon the crime for which he originally entered his plea").

22. *See, e.g.*, *In re* Wheeler, 354 P.3d 950, 951 (Wash. Ct. App. 2015) (reversing failure to register violation for a person convicted of statutory rape in 1985 only because the state had changed its legislative scheme in 1999); *accord* Meinders v. Weber, 604 N.W.2d 248, 251-54 (S.D. 2000); Kennedy v. State, 411 S.W.3d 873 (Mo. Ct. App. 2013); People v. Jimenez, 679 N.Y.S.2d 510, 518 (Sup. Ct. Kings Cnty. 1998). For an exploration of children who are required to register as sex

transgression merits mandatory registration has gone without much discussion until 2015. That is when national headlines were made with nineteen-year-old Zach Anderson who had voluntary sexual intercourse with someone he thought was seventeen – over the age of consent in Michigan.[23] If that had been the case, their sexual encounter would have been legal.[24] In reality, she was only fourteen years old. She had lied to Zach, exposing him to a charge of criminal sexual conduct.[25]

Unfortunately, in Michigan, statutory rape is a strict liability crime, which meant that Zach was unable to tender a mistake-of-age defense.[26] Not only was Zach facing a charge of statutory rape to which he had no legal defense, he was also facing twenty-five years on the registry for that conviction. As though for the first time, the public understood the far-reaching nature of registration when it learned that a young man without a criminal mens rea could be required to register as a sex offender.[27] More to the point, they were outraged by the extraordinarily burdensome conditions Zach faced as a registrant: sixty-one conditions, in fact.[28] Restrictions barred

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offenders because they engaged in voluntary sexual intercourse, see Carpenter, *supra* note 2, at 751 (showcasing juveniles who were required to register for statutory rape).

23. *See, e.g.*, *Teen Lands on Sex Offender Registry after Dating App Hookup*, CBS NEWS (Aug. 5, 2015, 2:35 PM), https://www.cbsnews.com/news/indiana-teen-zach-anderson-labeled-sex-offender-after-sex-girl-lied-about-age/ (reporting that everyone was on Anderson's side when they heard the story); Chris James & Lauren Effron, *Indiana Man Zach Anderson Avoids 25 Years on Sex Offender Registry, Given Probation*, ABC NEWS (Oct. 19, 2015, 8:47 PM), http://abcnews.go.com/US/indiana-man-zach-anderson-avoids-25-years-sex/story?id=34585365.

24. *See* MICH. COMP. LAWS ANN. § 750.520e(a) (West 2015 & Supp. 2017) (legislating that criminal sexual conduct takes place with a person who is under the age of sixteen).

25. In Michigan, criminal sexual conduct in the fourth degree occurs where "[a] person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person." *Id.*

26. *See* People v. Cash, 351 N.W.2d 822 (Mich. 1984) (affirming People v. Gengels, 188 N.W. 398 (Mich. 1922) in holding that mistake-of-age defense cannot be employed in statutory rape charge in Michigan because it is a strict liability crime). Michigan is not the only state that holds statutory rape is a strict liability offense. *See* Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 AM. U. L. REV. 313, 385-91 (2003) (reporting thirty jurisdictions that make statutory rape a strict liability offense). Scholars have criticized statutory rape as a strict liability offense. *See, e.g.*, *id*. (urging reconsideration of strict liability as an appropriate framework for statutory rape); Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 92 (2005) (suggesting that *Lawrence* requires a mistake-of-age defense to a charge of statutory rape); Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 136 (1965) (arguing for reasonable mistake-of-age defense to a charge of statutory rape).

27. For an examination of the constitutionality of registration for strict liability statutory rape, see Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws,* 86 B.U. L. REV. 295 (2006) (arguing that strict liability statutory rape should not be a registerable offense).

28. Media assailed the number of restrictions placed by Judge Wiley on Anderson. *See, e.g.*, Adam B. Summers, *When the Sex Offender Registry Goes Too Far*, ORANGE COUNTY REGISTER:

him from going online, dining at restaurants that serve alcohol, continuing as a computer science major, owning a smart phone, speaking with those who were below the age of seventeen, and even living at home because a minor sibling lived in the home.[29] Only because of a public awareness campaign initiated by Zach's parents,[30] and the ensuing public pressure, did Zach's fate change; he was removed from Michigan sex offender registry.[31]

Zach's initial treatment is not a one-off. Sadly, the national registry includes many stories of adults and children who are not proven to be dangerous, but who are required to register, sometimes for life, because they were convicted of a sexual offense involving voluntary sexual activity.[32] Darian Yoder shares a similar story to Zach's. Like Zach, Darian was a nineteen-year-old who had sexual intercourse with someone he thought was of age but who turned out to be thirteen.[33] Unfortunately, without a public campaign on his behalf to argue for a reduction of his charges, the onerous restrictions placed on Darian remain.[34]

Decades-old crimes. The registry is also filled with those who committed crimes before registration schemes came into effect, or before their harsher penalties did.[35] Because registration is founded exclusively on

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OPINION (Aug. 12, 2015, 12:00 AM), http://www.ocregister.com/2015/08/12/when-the-sex-offender-registry-goes-too-far/ (criticizing Judge Wiley's 61 conditions of probation for Zach Anderson as "excessive by any reasonable standard"); Anneliese Mahoney, *Young Man Sentenced to Years on the Sex Offender List May Get a Second Chance*, LAWSTREET: NEWS (Sept. 8, 2015), https://lawstreetmedia.com/news/young-man-sentenced-to-a-lifetime-on-the-sex-offender-list-may-get-a-second-chance (recounting Judge Wiley's castigation of Zach Anderson).

29. *See* Francis X. Donnelly, *Teen Out of Jail, but Stays on Sex Offender Registry*, DETROIT NEWS (Aug. 4, 2015, 12:58 AM), http://www.detroitnews.com/story/news/local/michigan/2015/08/04/teen-jail-stays-sex-offender-registry/31091073 (highlighting a few conditions including that Zach would not be able to access the Internet for five years, go to a restaurant that served alcohol or be out past 8:00 p.m.); *see also Teen Lands on Sex Offender Registry after Dating App Hookup*, *supra* note 23 (detailing some of the 61 conditions of probation that Zach faced); James & Effron, *supra* note 23.

30. *See Justice for Zachery Anderson*, CHANGE.ORG, https://www.change.org/p/justice-for-zachery-anderson (last visited Oct. 10, 2017) (reporting over 221,000 supporters).

31. James & Effron, *supra* note 23.

32. *See, e.g.*, People *ex rel*. J.L., 800 N.W.2d 720, 725 (Meierhenry J., concurring specially); *In re* Maurice D., 34 N.E.3d 590, 592 (Ill. App. Ct. 2015) (upholding registration for seventeen-year-old who engaged in consensual activity with fifteen-year-old); *In re* A.E., 922 N.E.2d 1017, 1018-19 (Ohio Ct. App. 2009) (requiring lifetime registration for fifteen-year-old who had consensual sex with twelve-year-old).

33. *See Second Elkhart Family Fights to Get Son Off Sex Offender Registry*, FLORIDA ACTION COMMITTEE (July 8, 2015), https://floridaactioncommittee.org/second-elkhart-family-fights-to-get-son-off-sex-offender-registry; Lenore Skenazy, *When a Teen Had Sex with Another Teen, a Judge Tore His Family Apart*, NEWSWEEK: OPINION (July 20, 2015, 1:50 PM), http://www.newsweek.com/when-teen-had-sex-another-teen-judge-tore-his-family-apart-355471.

34. *See Second Elkhart Family Fights to Get Son Off Sex Offender Registry*, *supra* note 33.

35. *See infra* Part III (describing the retroactive nature of sex offender registration laws).

the conviction itself, the state is under no obligation to prove that the offender continues to be a danger to the community, nor is there an opportunity for the offender to prove a lack of dangerousness. Even where the conviction is decades old.

Consider Mr. McGuire who made the mistake in 2009 of leaving Washington, D.C. where he was a married musician and hairstylist to return to his home state of Alabama to care for his ailing mother.[36] Mr. McGuire had committed a sexual assault in the 1980s for which he had served time in prison, but he was never placed on a registry – not in Colorado where the crime occurred, nor in Washington D.C., where he lived for many years. Sadly, returning home to Alabama was the beginning of the end of his life as he knew it. As the court wrote, attempting to "confirm his belief that he would not be subject to the state's restrictions [was a belief that] was erroneous by multiples."[37] Because of a prior sexual conviction from the 1980s in Colorado, the State of Alabama forced Mr. McGuire to register as a Tier Three registrant – a tier that is reserved for the most dangerous offenders and with the most severe restrictions and penalties.[38]

Alabama's registration and notification burdens are among the most egregious in the country.[39] The district court so acknowledged when it wrote, "Alabama's scheme goes miles beyond the minimum federal requirements of the Sex Offender Registration Act."[40] And the court was correct. Mr. McGuire was forced to register in person twice each week. His driver's license was stamped to reflect that he had been convicted of a sexual offense. He lost employment opportunities and he was unable to live in the family home because of residency restrictions.[41]

Mr. McGuire has company. William Pittman was convicted of a sexual offense in 1989, but faced compulsory registration after he moved to Alabama thirteen years later.[42] Like Mr. McGuire, his life spiraled down from that point, and it cannot go unstated that any later interactions with the

36. McGuire v. Strange, 83 F. Supp. 3d 1231, 1236 (M.D. Ala. 2015).

37. *Id.*

38. *Id.* at 1238-39 (describing the restrictions that Mr. McGuire faced).

39. *Id.* at 1268 ("[N]o other state has a scheme whereby sex offenders are retroactively regulated for life through residency, employment, and travel restrictions.").

40. *Id.* at 1251.

41. *Id.* at 1240-41. Mr. McGuire has had a modest victory at the district court level when the trial court threw out a few of the more draconian requirements that Mr. McGuire faced. *See id.* at 1270-71 (declaring unconstitutional weekly registration with two separate law enforcement jurisdictions and similarly travel permits with two separate agencies).

42. Pittman v. Strange, No. 12-00667-CB-M, 2014 WL 4685536, at *1 (S.D. Ala. Sept. 22, 2014).

judicial system all stemmed from his conviction from the 1980s, not from an independent assessment of his current dangerousness.

Others whose crimes were decades old have also been caught up in the requirement to register as sex offenders when registration laws came into existence or were amended.[43] Possibly the most absurd example is the story of Dean Edgar Wiesart who had been convicted in 1979 of skinny dipping in a hotel pool.[44] His plea to indecent exposure at that time caught up with him in the 1990s when he was forced to register as a sex offender because of that incident. Not until 2011, could Mr. Wiesart receive relief when he was removed from the registry.[45]

Non-contact sexual offenses. Many on the registry have only committed non-contact sex crimes. That includes sexting,[46] viewing child pornography,[47] and miscellaneous sexual crimes that marginally implicate public safety, such as urinating in public – yes, it is true. Urinating in public.[48] What would have been laughable if the result were not so tragic is the case of Christian Adamec, a fifteen-year-old who was arrested for streaking at a football game. When he learned that he might be required to register as a sex offender for this transgression, Christian hanged himself.[49] That a streaker or teens who send each other sexually explicit photos face mandatory registration, highlights the inflexibility and irrationality of a

43. *See, e.g.*, Doe v. Dep't of Pub. Safety and Corr. Servs., 62 A.3d 123, 124 (Md. 2013); Doe v. Williams, 2013 ME 61, 61 A.3d 718 (Me. 2013); Gonzales v. State, 980 N.E.2d 312, 315 (Ind. 2013).

44. Wiesart v. Stewart, 665 S.E.2d 187, 187-88 (S.C. Ct. App. 2008).

45. *Id.*

46. *See, e.g.*, Michael E. Miller, *N.C. Just Prosecuted a Teenage Couple For Making Child Porn — of Themselves*, WASHINGTON POST: MORNING MIX (Sept. 21, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/21/n-c-just-prosecuted-a-teenage-couple-for-making-child-porn-of-themselves/?utm_term=.552e41ccfad5; Jeffry Scott, *Atlanta Schools, Parents and Law Try to Deal with Sexting*, ATLANTA J. CONST. (Apr. 22, 2010, 5:18 AM), http://www.ajc.com/news/local/atlanta-schools-parents-and-law-try-deal-with-sexting/rb2K4EHCTJkzunuf0yajiP/ (reporting incident involving seventeen-year-old boy who was charged with furnishing obscene material to a minor after texting a naked picture of himself to a sixteen-year-old girl).

47. *See* Shoemaker v. Harris, 155 Cal. Rptr. 3d 76 (Ct. App. 2013) (requiring lifetime registration despite convictions for misdemeanor possession of child pornography); People v. Gonzalez, 149 Cal. Rptr. 3d 366 (Ct. App. 2012) (rejecting defendant's argument that his crime of child pornography was no worse than voluntary statutory rape); Hevner v. State, 919 N.E.2d 109 (Ind. 2010) (requiring first time possessor of child pornography to retroactively register).

48. *See* Chanakya Sethi, *The Ridiculous Laws That Put People on the Sex Offender List*, SLATE.COM (Aug. 12, 2014, 11:41 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/mapped_sex_offender_registry_laws_on_statutory_rape_public_urination_and.html (mapping the thirteen states that require registration for "peeing in public").

49. *Teen Kills Self after Streaking Backlash*, *supra* note 2.

system that focuses exclusively on the conviction alone, and not on whether the actor portends future dangerousness.[50]

My including child pornography in the same group as sexting or urinating in public may be a controversial position to some. After all, possession of child pornography has been viewed to be among the worst of sexual offenses.[51] While that may appear true at first blush, deeper examination reveals two potential issues regarding automatic registration. First, evidence is inconclusive that people who engage in non-contact criminal sexual behavior demonstrate a propensity for future dangerousness or escalation to sexual contact offenses.[52] Professor Carissa Byrne Hessick elaborates further to question whether the public has conflated two behaviors – viewing child pornography with child sexual abuse – to demand harsher penalties for non-contact sexual offenses than is necessary.[53]

Those with no sexual motives. As hard as it is to believe, registration laws have grown so virulently, they capture those who have not committed sexual offenses. Focus for a moment on the case of Jake Rainer, a nineteen-year-old drug user who robbed and falsely imprisoned his seventeen-year-old

50. *See, e.g.*, A.H. v. State, 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007) (involving a sixteen and seventeen year old who took digital naked pictures of themselves); *see also* Wendy Koch *Teens Caught 'Sexting' Face Porn Charge*s, ABC NEWS (Mar. 11, 2009), http://abcnews.go.com/Technology/story?id=7063767 (providing details of police investigation of "more than two dozen teens in at least six states this year for sending nude images of themselves in cellphone text messages, which can bring a charge of distributing child pornography"); Greg Barnes, *Fayetteville High School Quarterback Facing 'Sexting' Charge*, ABC11 EYEWITNESS NEWS (Sept. 4, 2015), http://abc11.com/news/high-school-quarterback-facing-sexting-charge/964620 (reporting that the sexting charge carries a potential requirement of lifetime registration). For scholarly critique of the phenomenon of charging teens with child pornography for sexting, see Amy F. Kimpel, *Using Laws Designed to Protect as a Weapon: Prosecuting Minors Under Child Pornography Laws*, 34 N.Y.U. REV. L. & SOC. CHANGE 299 (2010) (raising constitutional questions surrounding such prosecutions); Julia Halloran McLaughlin, *Crime and Punishment: Teen Sexting in Context*, 115 PENN ST. L. REV. 135 (2010) (decrying the poor fit of child pornography laws for acts of teen sexting).

51. *See* Carissa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 857-59 (2011) (tracking the recent dramatic increase in sentences for child pornography). For a discussion of the harsh treatment non-contact sex offenders face, see ALAN GERSHEL ET AL., CAUGHT IN THE WEB OF THE CRIMINAL JUSTICE SYSTEM (Lawrence A. Dubin & Emily Horowitz eds., Jessica Kingsley, 2017).

52. *See, e.g.*, Melissa Hamilton, *The Efficacy of Severe Child Pornography Sentencing: Empirical Validity or Political Rhetoric?*, 22 STAN. L. & POL'Y REV. 545 (2011) (arguing that harsh sentences are not supported by the empirical evidence); Michael C. Seto, R. Karl Hansen & Kelly M. Babchishin, *Contact Sexual Offending by Men with Online Sexual Offenses*, 23 SEXUAL ABUSE: A J. OF RES. & TREATMENT 124, 136 (2011) (theorizing that the commission of online sexual offenses does not necessarily translate to the commission of sexual abuse of a child); Neil Malamuth & Mark Huppin, *Drawing the Line on Virtual Child Pornography: Bringing the Law in Line with the Research Evidence*, 31 N.Y.U. REV. L. & SOC. CHANGE 773, 790, 797 (2007).

53. Hessick, *supra* note 51, at 873-78 (countering arguments that viewing child pornography leads to escalating behavior of sexual abuse).

female drug dealer.[54] The Georgia Supreme Court affirmed his requirement to register as a sex offender because his victim was a minor. The Court reasoned that it was within the purview of sex offender registration laws to protect the community from those who would falsely imprison children, even where they did so without a sexual motive.[55]

Georgia is not alone in its overreach. Despite the lack of sexual motivation, defendants in other states face mandatory registration for non-sexual offenses.[56] That is what happened to Andre Fuller who stole a van.[57] Unfortunately for Mr. Fuller, what was a theft in progress turned into a kidnapping because two children were in that van waiting for their father to come out from the grocery store.[58] During the twenty minutes that he had the car, Mr. Fuller never touched the children, nor did he make any attempt to chase them after they fled the car.[59]

If registration is anchored by the fundamental desire to protect the community from those who would harm its children, where is the rational basis for requiring Mr. Fuller to register as a sex offender? Essentially, the *Fuller* court sidestepped this question, relying instead on the automatic nature of registration for certain designated offenses. The court rationalized, "While defendant did not commit what is generally labeled a sexually oriented offense, such as rape, sexual assault or pimping, the law clearly identifies aggravated kidnaping of a person under eighteen as a 'sex offense.'"[60]

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54. Rainer v. State, 690 S.E.2d 827 (Ga. 2010).

55. *Id.* at 829 ("Here, it is rational to conclude that requiring those who falsely imprison minors who are not the child's parent to register. . .advances the State's legitimate goal of informing the public for purposes of protecting children from those who would harm them.").

56. *See, e.g.*, State v. Coleman, 385 P.3d 420, 426 (Ariz. Ct. App. 2016) (affirming registration in false imprisonment case even though no proof of sexual motive); State v. Brown, 2004 WI App 109, ¶ 16, 273 Wis. 2d 785, 680 N.W.2d 833 (permitting registration where the underlying offense was providing drugs to a minor); Does #1-5 v. Snyder, 834 F.3d 696, 703 (6th Cir. 2016) (recognizing that Doe #1 was on Michigan's registry for a non-sexual robbery of a McDonalds in 1990). *But see, e.g.*, State v. Reine, No. 19157, 2003 WL 77174 (Ohio Ct. App. 2003) (overturning registration on kidnapping conviction of minors because defendant entertained no sexual motive).

57. People v. Fuller, 756 N.E.2d 255, 257 (Ill. Ct. App. 2001).

58. *Id.*

59. *Id.*

60. *Id.* at 260. For similar reasoning, see State v. Sakobie, 598 S.E.2d 615, 616 (N.C. Ct. App. 2004); People v. Wing Dong Moi, No. 114-87, 2005 N.Y. Misc. LEXIS 1401, at ***27 (2005) (jumping to the conclusion that kidnapping is a predatory offense within the reach of the sex offender registration laws). *But see* State v. Robinson, 873 So. 2d 1205, 1215 (Fla. 2004) (rejecting the State's request to register a car thief as a sex offender, writing, "Although the Legislature's concern for protecting our children from sexual predators may be reasonable, however, the application of this statute to a defendant whom the State concedes did not commit a sexual offense is not.").

There is something troubling about an argument that conflates the concern over violent, but non-sexual behavior, with the misguided belief that a sex offender registry is the appropriate tool to address this concern. Certainly, that was true in *People v. Johnson*, where defendant and his accomplices had abducted a woman and her twenty-month-old grandchild for ransom.[61] A violent crime, yes; but not a sexual crime. Although the court determined that "[t]he purpose of the [Sex Offender Registration] Act is to aid law enforcement by facilitating ready access to information about sex offenders and, therefore, to protect the public," it nonetheless determined that it was appropriate to mandate defendant's registration.[62]

Not only is such inclusion a dilution of public resources, Professor Raban argues that the false designation of "sex offender" gives rise to the denial of registrants' liberty interests.[63] Specifically, the article posits that reputational interests for the nonsexual offender are more grievously injured than is the reputation for the sexual offender whose information is released.[64]

Children who commit sex offenses. It may surprise some in the audience to learn that it is common practice to require children to register as sex offenders. It is estimated that between 10% and 20% of a state's sex offender registry is filled with children who have committed sex offenses.[65] And some of them are as young as nine or ten.[66] So here is the question I pose to those who are not familiar with this practice: "Imagine if you were held accountable for the rest of your life for something that you did at ten years old. You stole a candy bar and for the rest of your life, you are labeled a thief. You cheated on a fifth-grade test, and for the rest of your life, you are called a liar and a cheat." That is essentially the impactful burden placed on

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61. *See* People v. Johnson, 870 N.E.2d 415 (Ill. 2007) (upholding automatic registration based on Pub. Act 94-945, § 1025 (eff. June 27, 2006)).

62. *Id.* at 422; *see also* People v. McClenton, Appeal No. 3-16-0387, 2017 IL App. LEXIS 564 (Ct. App. 2017) (affirming ruling in *Johnson*, 870 N.E.2d 415).

63. *See* Ofer Raban, *Be They Fish or Not Fish: The Fishy Registration of NonSexual Offenders*, 16 WM. & MARY BILL OF RTS. J. 497, 511-13 (2007); *id.* at 513 ("[P]rotections should be especially strict when the defamation originates not from a private party, but from the government, with its aura of authority.").

64. *Id.*

65. *See* Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative*, 45 Sw. L. Rev. 461, 467 n.33 (2016) (reporting sources that estimated the percentage of children on the registry).

66. *See, e.g.*, N.C. GEN. STAT. ANN. § 14-208.26(a) (West 2015) (providing discretion to a court to impose registration on juveniles as young as eleven years of age if the court determines that the juvenile is a danger to the community); *In re* J.R.Z., 648 N.W.2d 241, 248 (Minn. Ct. App. 2002) (upholding registration for life of eleven-year-old); *In re* Ronnie A., 585 S.E.2d 311, 312 (S.C. 2003) (affirming mandatory registration for a child whose sexual offense took place when he was nine years old).

juveniles who may be adjudicated in the juvenile court system, but who are also required to meet registration requirements, sometimes for life.[67]

Juveniles on the registry include a fifteen-year-old who had sex with his twelve-year-old girlfriend and was required to register for life.[68] Make the defendant slightly younger, and it calls to mind J.L., who, at fourteen had consensual sex with his twelve-year-old girlfriend.[69] Because he had engaged in sexual intercourse with someone under the age of thirteen, J.L. was required to register as a violent sex offender for life.[70] Indeed, had the girlfriend been thirteen, their transgression would have only been a misdemeanor, and J.L. would not have faced registration in that state.[71]

Not only are children required to register for unlawful sexual intercourse, they are placed on the registry for other sexual acts as well. Leah was ten years old when, fully clothed, she simulated a sex act with her two younger step-brothers.[72] Because the younger of the two stepbrothers was five years old, the act had dire consequences. Leah was removed from her home, required to register as a sex offender, and placed on a public registry when she was of age.[73]

To be sure, some sexual acts committed by children are coercive. There is the example of the brutal prank committed by two middle school aged boys. They held down two sixth grade boys and rubbed their own bare buttocks in the sixth graders' faces.[74] For that act of bullying, they were required to register as sex offenders for the rest of their lives.[75]

It is disturbing that court acknowledged that the consequences of their ruling would be extreme for the two boys, yet it meted it out nonetheless, "Our role as a court is not to question the wisdom of legislative enactments,

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67. *See, e.g.*, People v. J.W., 787 N.E.2d 747, 753 (Ill. 2003) (mandating lifetime registration for a twelve-year-old adjudicated delinquent); *In re* J.R.Z., 648 N.W.2d at 248 (upholding registration for life of eleven-year-old).

68. *In re* A.E., 922 N.E.2d 1017 (Ohio Ct. App. 2009) (requiring lifetime registration for fifteen-year-old who had consensual sex with twelve-year-old).

69. People *ex rel*. J.L., 800 N.W.2d 720, 721 (S.D. 2011); *In re* Registrant J.G., 777 A.2d 891, 894, 900 (N.J. 2001) (upholding lifetime registration for a ten-year-old).

70. *See* S.D. CODIFIED LAWS § 22-22-1 (2015) (defining rape as "an act of sexual penetration accomplished with any person . . . if the victim is less than thirteen years of age").

71. *See* S.D. CODIFIED LAWS § 22-22-7 (2015) (providing that "[i]f the victim is at least thirteen years of age and the actor is less than five years older than the victim, the actor is guilty of a Class 1 misdemeanor").

72. Stillman, *supra* note 9 (reporting on Leah DuBuc's attempt to navigate college life and beyond as a registered sex offender for an incident that occurred when she was ten years old).

73. *Id.*

74. State *ex rel.* B.P.C., 23 A.3d 937, 946-47 (N.J. Super. Ct. 2011) (determining that the boys' sexual prank required that they register for life under N.J.S.A. 2C:7–2b(2)).

75. *Id.* at 947 ("We recognize the severe penal consequences that flow from an adjudication of delinquency based on fourth degree criminal sexual contact.").

but to enforce them as long as they are not contrary to constitutional principles."[76]

Unfortunately, this posture highlights the problem. We are witnessing cringe-worthy outcomes that have produced a swollen registry because mandatory registration is not predicated on individualized risk assessment, but instead is based solely on a predetermined legislative scheme as to which crimes warrant registration.

III. THE FALSE NARRATIVE THAT GRIPS THE PRACTICE OF REGISTRATION

It is fair to ask: How did we arrive at a place where our public conversation on this topic is so rigid and ugly? Where children as young as nine and ten are forced onto a public registry, where those who have committed sexual crimes and have paid their debt to society are forced into homelessness because of residency restrictions, or where suicide is foremost on so many registrants' minds.

Historian Philip Jenkins would say the answer is clear. Our communities are gripped in the throes of a societal panic. As he describes it, a societal panic is a fear that is wildly distorted and wrongly directed.[77] He assigns three hallmarks to a societal panic. First, is an official reaction that is not proportional to issue.[78] Second, are politicians who talk about it in identical

76. *Id.*

77. PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 6-7 (1998); *see also* John Douard, *Sex Offender as Scapegoat*: *The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 41 (2009) ("[S]ex offenders are the targets of 'moral panic.'"); Roger N. Lancaster, *Panic Leads to Bad Policy on Sex Offenders*, N.Y. TIMES: OPINION (Feb. 20, 2013) https://www.nytimes.com/roomfordebate/2013/02/20/too-many-restrictions-on-sex-offenders-or-too-few/panic-leads-to-bad-policy-on-sex-offenders?mcubz=1. Although the California Sex Offender Management Board called for an end to lifetime registry for most offenders in California, it was not sure that the public would agree. *See* Melodie Gutierrez, *Calls for Limiting Sex-Offender Registry Will Be Tough to Act on*, SAN FRANCISCO CHRONICLE: POLITICS (Mar. 25, 2016, 10:34 PM), http://www.sfchronicle.com/politics/article/Calls-for-limiting-sex-offender-registry-will-be-7123214.php (quoting Alameda County District Attorney Nancy O'Mally, "'If you say to people that sex offenders don't have to register after 10 years, they freak out.'").

78. *See, e.g.*, *In re* Alva, 92 P.3d 311, 325 (Cal. 2004) ("Given the general danger of recidivism presented by those convicted of criminal sexual misconduct. . .the Legislature may adopt a rule of general application for this class of offenders, and may guard against the demonstrated long-term risk of reoffense by imposing a permanent obligation on persons convicted of such crimes."); Doe v. Nebraska, 734 F. Supp. 2d 882, 898 (D. Neb. 2010) (reporting that the sponsoring legislators to Nebraska's expanded sex offender laws "expressed 'rage' and 'revulsion' regarding persons who have 'these convictions'"); Doe v. Pataki, 940 F. Supp. 603, 621 (S.D.N.Y. 1996) (noting that the debate minutes over passage of sex offender registration laws showed Assembly members' "passion, anger and desire to punish" sex offenders).

terms.[79] And third, is a complicit media that fans the flames.[80] A cursory tracking of the development and fueling of registration schemes confirms that we are in the clutches of a societal panic as it relates to those who have committed sexual offenses.[81]

Sadly, this societal panic stems from a false narrative that those convicted of sexual offenses recidivate at a rate that is both "frightening and high." This phrase – "frightening and high" – referenced by the United States Supreme Court in back to back opinions in 2002 and 2003,[82] took hold and

79. *See, e.g.*, *California Lawmakers Approve Proposal to End Lifetime Registry for Some Child Sex Offenders*, FOX NEWS: U.S. (June 18, 2017) http://www.foxnews.com/us/2017/06/18/california-lawmakers-approve-proposal-to-end-lifetime-registry-for-some-child-sex-offenders.html (reporting that Republican Senator Jeff Stone of Murrieta opposed a tiered registry bill in California because "it remains crucial for residents to know if sex offenders, irrespective of how long ago the crime was committed, live nearby"); *see also* THE JUSTICE POLICY INSTITUTE, REGISTERING HARM: HOW SEX OFFENSES FAIL YOUTH AND COMMUNITIES 6 (quoting a lawmaker who stated, "You can't turn on your TV without hearing about some pervert trying something on some kid."); *id.* at 12 (quoting Florida's then-Attorney General Charlie Crist who stated, "The experts tell us that someone who has molested a child will do it again and again."); *id.* (reporting comments of U.S. Representative Ric Keller (R-FL), "The best way to protect children is to keep child predators locked up in the first place, because someone who has molested a child will do it again and again and again.").

80. For an excellent examination of the media's role in fanning the flames of panic, see Heather Ellis Cucolo and Michael L. Perlin, *"They're Planting Stories In The Press": The Impact Of Media Distortions On Sex Offender Law And Policy*, 3 U. DENV. CRIM. L. REV. 185 (2013).

81. *See* Carpenter & Beverlin, *supra* note 7, at 1078 ("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.").

82. *See* Smith v. Doe, 538 U.S. 84, 103 (2003) (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)); Neal v. Shimoda, 905 F. Supp., 818, 819 (D. Ct. Haw. 1995) ("Research has also shown that the rate of recidivism among untreated sex offenders is high being between 60-80 percent and that incarceration without treatment tends to increase the offenders' propensity to reoffend."). For a critique of this sentiment, see David Post, *More Fuel for the Movement to Reform Sex Offender Laws*, WASH. POST: OPINION (Aug. 18, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/18/more-fuel-for-the-movement-to-reform-sex-offender-laws/?utm_term=.fa6251e8c18a (stating that "[d]efenders of these laws often point to the exceptionally high recidivism rate for sex offenders as a way of justifying these post-conviction prohibitions.").

now appears to be a permanent part of the conversation.[83] But as study after study shows, this assumption is not accurate.[84]

A fascinating article written recently by Professor Ira Ellman and his wife Tara Ellman exposes the myth surrounding the phrase "frightening and high."[85] In *The Supreme Court's Crucial Mistake about Sex Crimes Statistics*, the authors do a deep dive to uncover the genesis of the fallacy.[86] First, they trace the Court's evidentiary reliance on that statement, sharing that the study referenced by the Supreme Court was not really a study at all, but an informal review by a therapist that was cited in a pop psychology journal.[87] Despite its lack of scientific foundation, the study was elevated by two Supreme Court decisions to occupy a central, but false, place in the discussion.

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83. *See In Re* Alva, 92 P.3d at 332 ("Given the 'frightening and high' danger of long-term recidivism by this class of offenders, the permanent nature of the registration obligation also is designed to serve legitimate regulatory aims."); State v. Seering, 701 N.W.2d 655, 665 (Iowa 2005) ("As numerous authorities have acknowledged, '[t]he risk of recidivism posed by sex offenders is "frightening and high."'"); State v. Blankenship, 48 N.E.3d 516, 531 (Ohio 2015) (endorsing the "frightening and high" language to affirm automatic registration); State v. Wade, 757 N.W.2d 618, 626 (Iowa 2008) (adopting the United States Supreme Court's language to hold that "sex offenders are not similarly situated to other criminal offenders"). *But see* Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 593-95 (2000) (rejecting the assumption that sex offenders recidivate at higher rates than others convicted of crimes).

84. *See, e.g.*, R. Karl Hanson, Andrew J. R. Harris, Leslie Helmus & David Thornton, *High Risk Offenders May Not be High Risk Forever*, JOURNAL OF INTERPERSONAL VIOLENCE (in press Nov. 3, 2013), https://floridaactioncommittee.org/wp-content/uploads/2014/12/HighRisk Offenders_MayNotBeHighForever_Hanson_Harris_Helmus_Thornton.pdf (reporting the low rates of reoffense over time); Alissa R. Ackerman & Marshall Burns, *Bad Data: How Government Agencies Distort Statistics On Sex-Crime Recidivism*, 13 JUST. POL'Y J., Spring 2016, at 3, http://www.cjcj.org/uploads/cjcj/documents/jpj_bad_data.pdf. Regarding recidivism rates for juveniles, see NICOLE PITTMAN & QUYEN NGUYEN, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES 6 (2012), http://stoneleighfoundation.org/content/snapshot-juvenile-sex-offender-registration-and-notification-laws-survey-unites-states (reporting on studies by Professor Franklin E. Zimring showing that over 92% of those convicted of a sex offense as a juvenile did not commit another sex offense). *See also id.* (recounting Dr. Elizabeth Letourneau's study finding a sexual offense reconviction rate of less than 1%); Michael F. Caldwell, *Juvenile Sex Offenders*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 9-10 (D. Tanenhaus & F. Zimring eds., 2014) (concluding that juveniles who have committed sex offenses are not more likely to reoffend than their counterparts who have committed other crimes).

85. *See* Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015) (uncovering the origin of the Court's reliance on the term "frightening and high" as it relates to recidivism of those who commit sex offenses, and why that phrase is inaccurate).

86. *Id.*

87. *Id.* at 497-99 (tracing the Court's use of *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender xiii* in McKune v. Lile, 536 U.S. 24, 34 (2002)).

This false narrative – with its accompanying noise – has made an indelible impression. So much so that the myth of high recidivism rates has been difficult to rebut, even with statistical evidence to the contrary. Numbers vary, of that there is no doubt. How one calculates the group to be considered and what qualifies as a reoffense skews the results. But studies by reputable social scientists support the proposition that 5-15% of adults will recidivate, and as for children only 1-5% of juveniles commit a new sexual offense.[88] Social scientist Karl Hanson has produced a longitudinal study that shows that rates of reoffense substantially reduce over time. Not only do rates of reoffense drop dramatically with the passage of time, once an offender has reached 16.5 years without reoffending, incidents of reoffense are no more likely than with any other offender.[89] For the juvenile offender, the risk drops precipitously after thirty years of age, to minimal.[90]

IV. THE IMPACT OF THE 2003 TERM ON SEX OFFENDER REGISTRATION: WRONGLY DECIDED DECISIONS THAT CONTRIBUTED TO THE NARRATIVE

Our story begins in 2003. For the first time since registration and notification schemes made their national debut in 1995,[91] the United States Supreme Court addressed the constitutionality of registration and notification schemes in two cases that term. Whether this audience is intimately familiar with the legal holdings of these cases, you nevertheless have felt their impact. Together, they established a permissive lens through which to view the

88. *See* Declaration of R. Karl Hanson, Doe v. Harris, No. 3:12-cv-05713-THE, 2013 WL 144048 (N.D. Cal. Nov. 7, 2012), https://www.eff.org/files/filenode/024_hanson_decl_11.7.12.pdf; *see also* Does #1-5 v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016) (detailing several studies that reject the notion); *see* Carpenter, *supra* note 65, at 489-91 (detailing studies that support the low recidivism rates of juveniles who commit sex offenses).

89. *See* Declaration of R. Karl Hanson, *supra* note 88.

90. *See* Carpenter, *supra* note 65, at 490-93 (demonstrating that lifetime registration is unwarranted for juvenile offenders).

91. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("SORA") was passed by Congress following the brutal kidnapping and presumed murder of eleven-year-old Jacob Wetterling. *See* Pub. L. No. 103-322, §170101, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. §14071 (2006)) (repealed 2006) (establishing federal guidelines for state sex offender registration laws). On September 7, 2016, nearly twenty-seven years after Jacob was kidnapped by a masked gunman, Danny Heinrich confessed to abducting, molesting, and killing Jacob. *See* Erik Ortiz, *Man Admits to Abducting and Killing Jacob Wetterling, Missing Minnesota Boy in 1989*, NBC NEWS: U.S. NEWS (Sept. 7, 2016, 8:27 AM) https://www.nbcnews.com/news/us-news/man-admits-abducting-killing-jacob-wetterling-missing-minnesota-boy-1989-n643506.

constitutional framework for sex offender registration laws.[92] And together, fourteen years later, they continue to contribute to an environment where registration laws have expanded with impunity and without regard to their original mandate.[93]

First, in *Smith v. Doe*, petitioners challenged their placement on the registry because of the principle of *ex post facto*, which rejects the government's ability to impose punishment retroactively on a person.[94] Alaskan petitioners claimed that because they had completed their prison time for sexual offenses by 1991, it was unconstitutional to require them to register as sex offenders under Alaska's newly enacted registry scheme.[95] Mind you, petitioners did not challenge the power of Alaska to establish a sex offender registry; their claim was that because the registration scheme was criminal penalty bound by *ex post facto* laws, the registry should be reserved for those whose convictions occurred after the registry was enacted. This would have been a compelling argument if the Court were to rule that the requirement to register as a sex offender was a criminal penalty governed by the Eighth Amendment prohibition against *ex post facto* application.[96]

In an exercise of comparison, the Court concluded that the requirements of registration under the then-existing Alaskan registry did not share traditional indices of punishment, a hallmark of criminal penalties.[97] In distinguishing colonial punishments from mandatory sex offender registration, the Court stated, "By contrast, the 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

92. *See* Smith v. Doe, 538 U.S. 84 (2003) (determining that sex offender registration laws are only civil regulations not bound by the proscriptions of the Eighth Amendment); *see also* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (affirming the practice of a notification scheme that does not require individualized assessment).

93. *See* Carpenter, *supra* note 10, at 42-44 (explaining how the Court's two decisions contributed to the ensuing public panic in the form of increasingly harsh registration and notification burdens); *id.* at 50 (theorizing that the decisions were impacted by "an angry public, politicians unwilling to apply restraint, and judicial deference to the original legislative intent of a nonpunitive purpose").

94. *Smith*, 538 U.S. at 89-90 (addressing whether Alaska's sex offender registration scheme violated ex post facto principles for its retroactive application).

95. *Id.* at 91.

96. *See* U.S. CONST. art. 1, § 10 ("No state shall. . .pass any. . .*ex post facto* Law"). For defining instruction, see Beazell v. Ohio, 269 U.S. 167, 170 (1925) ("[L]aws. . .which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.").

97. *Smith*, 538 U.S. at 97-100.

is already public."[98] The effect – *ex post facto* principles under the Eighth Amendment did not apply to retroactive registration.[99] Serially-changing amendments apply to registrants without recourse. But the Sixth Circuit later admonished the injustice of this approach to registration, "As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice."[100]

It is fair to say that the second case, *Connecticut Department of Public Safety*, profoundly changed the lives of registrants and their families with its endorsement of a state's notification scheme that was singularly based on proof of an offender's prior conviction, not on the offender's continuing dangerousness.[101] You may not know the case, but undoubtedly, you know of "Megan's Law," the national public database of registrants, named in memory of seven-year-old Megan Kanka who was brutally murdered at the hands of her neighbor Jesse Timmendequas who had a prior conviction for a sexual assault.[102]

Seemingly, petitioners had a reasonable argument. They claimed that procedural due process demanded that they receive individualized hearings to determine their risk to the community before their information was placed on a public registry.[103] But that argument held no sway with the Court.[104] Automatic placement on a public registry, it found, did not offend procedural due process because inclusion only signified that a person had been convicted of a sexual crime, not that the person portended future dangerousness.[105] And with that pronouncement, the Court signaled its acceptance of a conviction-based assessment model that moved further away from the original underpinnings of risk assessment. Indeed, the Court was quite dismissive of the argument. It downplayed the significance of the stigmatizing effect of Internet notification, surmising instead that notice to the public in this form

98. *Id.* at 98.

99. *Id.* at 102-04 (endorsing retroactive application).

100. Does #1-5 v. Snyder, 834 F.3d 696, 706 (6th Cir. 2016).

101. *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 5 (2003). National notification schemes were first introduced in 1996 as an amendment to the Jacob Wetterling Act. *See* Megan's Law of 1996, Pub. L. No. 104-145, §2, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. §14071 (2010)) (designating state law enforcement agency to "release relevant information that is necessary to protect the public concerning a specific person required to register under this section"); *see also* Doe v. Poritz, 662 A.2d 367, 372-73 (N.J. 1995) (embracing Megan's Law in New Jersey, which provided notice to the public of whether a sex offender resided in its community).

102. *See* State v. Timmendequas, 737 A.2d 55 (N.J. 2001) (affirming Jesse Timmendequas's conviction for capital murder and sentence of death for the killing of Megan Kanka).

103. *Conn. Dep't of Pub. Safety*, 538 U.S at 5-7.

104. *Id.*

105. *Id.* at 7.

was no different than if members of the public had searched through public documents to learn of a person's convictions.[106]

These two decisions were, in effect, a one-two punch to constitutional challenges of sex offender registration laws. By the end of the 2003 term, registration and notification schemes had been endorsed by the Court as civil regulations, which as structured, could be based exclusively on an offender's prior conviction for a sex offense.

Legislatures understood the import of these decisions. It should come as no surprise then that the last decade has witnessed a great flurry of sex offender registration legislation on the federal[107] and state level.[108] It is human nature to take as much as one can get, and the political arena is no different. Indeed, the last decade has been marked by what I call the development of *super*-registration schemes – increased registration and notification burdens that are a far cry from the original generation of laws.[109] The effect? In an article from 2012, I wrote of the onslaught of legislation, "[R]egistration schemes had spiraled out of control because legislators have been given unfettered freedom by a deferential judiciary to please a fearful public."[110] The Sixth Circuit in *Does #1-5 v. Snyder* summed up well exploding registration laws, when it wrote of Michigan's scheme, "Thus, what began in 1994 as a non-public registry maintained solely for law enforcement use . . . has grown into a *byzantine* code governing in minute detail the lives of the state's sex offenders."[111]

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106. *Id.* ("[E]ven if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders – whether currently dangerous or not – must be publicly disclosed.").

107. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified at 42 U.S.C. §§ 16901-62) (establishing a comprehensive national sex offender registry based on a conviction-assessment model that includes more registerable offenses, harsher penalties, and mandatory inclusion for juveniles); *see* Carpenter & Beverlin, *supra* note 7 at 1078-79 (for an examination of the changes).

108. *See* Carpenter & Beverlin, *supra* note 7, at 1081-94 (recounting the slew of legislative changes).

109. *Id.* at 1076-100 (describing increased registration, notification, and residency restrictions in various state statutes). For examples of the ever-harshening penalties assigned registrants, see, for example, State v. Letalien, 2009 ME 130, ¶ 4, 985 A.2d 4, 9-11 (Me. 2009) (explaining how Eric Letalien, who was identified as having the lowest possible risk of re-offense, was ultimately required to register for life because of the changes in the laws); State v. Henry, 228 P.3d 900, 903-05 (Ariz. Ct. App. 2010) (detailing amendments to Arizona's offender schemes); Doe v. Dep't Pub. Safety and Corr. Servs., 62 A.3d 123, 126 (Md. 2013) (reporting the changes to Maryland's registration laws that resulted in Petitioner's duty to register as the most dangerous of offenders).

110. Carpenter & Beverlin, *supra* note 7, at 1073. For an example of a registration scheme that dramatically changed since inception, see Wallace v. State, 905 N.E.2d 371, 374-77 (Ind. 2009) (recounting the numerous changes to the registration and notification laws that increased the breadth and scope of penalties and burdens).

111. Does #1-5 v. Snyder, 834 F.3d 696, 697 (6th Cir. 2016) (emphasis added).

An additional factor accounts for the serial amendments to registration schemes. It can best be described as a "race to the harshest"[112] where "[c]ompetitive lawmaking inevitably pits jurisdictions against each other as each community tries to create harsher sets of laws" to deter registrants from traveling to, or residing in, their communities.[113]

But the time is ripe for judicial intervention. Because we can trace the genesis of spiraling legislation back to the Court's decisions in *Smith* and *Connecticut Department of Public Safety*, it is fair to ask whether that analysis endures for today's registration schemes especially given our knowledge of the impact of social media on the privacy and safety of our citizens.

It all starts with a determination of whether registration laws are civil regulations or criminal penalties. As recognized by the United States Supreme Court in *Smith*,[114] the seven-factor test from *Kennedy v. Mendoza-Martinez* provides instruction on this assignment.[115] Called the "intent-effects test," *Mendoza-Martinez* examines whether a legislature intended for the law to be punishment, and equally importantly and irrespective of legislative intent, whether its effect is punitive despite a contrary legislative intent.[116]

Employing the "intent-effects" test, jurists and scholars alike have departed from the conclusions of *Smith* to conclude that modern day sex offender registration schemes are punishment, not civil regulations.[117]

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112. *See* Carpenter, *supra* note 10, at 41.

113. *Id.*

114. Smith v. Doe, 538 U.S. 84, 97-100 (2003).

115. 372 U.S. 144, 168-69 (1963) (establishing seven factors to be applied in analyzing whether a law is a criminal penalty: [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned). *See, e.g.*, *In re* Alva, 92 P.3d 311 (Cal. 2004); Riley v. New Jersey State Parole Bd., 98 A.3d 544 (N.J. 2014); State v. Ward, 869 P.2d 1062 (Wash. 1994); People v. Tucker, 879 N.W.2d 906 (Mich. 2015).

116. *See* People v. Logan, 705 N.E.2d 152, 158-60 (Ill. App. Ct. 1998) (labeling *Mendoza-Martinez* the "intent-effects test"); *accord* Doe v. Dep't of Pub. Safety and Corr. Servs., 62 A.3d 123, 136 (Md. 2013); *see also* United States v. Ward, 448 U.S. 242, 248-49 (1980) (describing *Mendoza-Martinez* as the two-part test).

117. *See, e.g.*, Does #1-5 v. Snyder, 834 F.3d 696, 703 (6th Cir. 2016) ("As should be evident, [Michigan's registration scheme] requires much more from registrants than did the statute in *Smith*. Most significant is its regulation of where registrants may live, work, and 'loiter.'"); Commonwealth v. Muniz 164 A.3d 1189, 1210-18 (Pa. 2017) (comparing *Smith's* review of an earlier registration scheme with Pennsylvania's current laws to conclude that "review of SORNA under the *Mendoza–Martinez* factors reveals significant differences between Pennsylvania's most recent attempt at a sex offender registration statute and the statutes upheld in . . . *Smith*"); State v. Petersen-Beard, 377

Today's registration schemes share indices of punishment that include affirmative disability or restraint,[118] public shaming,[119] and requirements that are akin to parole or supervised release.[120] Finally, it could also be argued that, even if the legislature intended these laws to be civil regulation, they are no longer rationally connected to their original non-punitive purpose because they are excessive and over-inclusive.[121] Ironically, they appear poised to fall because of their overreach and under their own ambitious weight.

P.3d 1127, 1145-46 (Kan. 2016) (Johnson, J., dissenting) (highlighting the differences in KORA and the 1994 Alaskan registration system). *See also* Carpenter & Beverlin, *supra* note 7, at 1108-22 (critiquing point by point the factors of *Mendoza-Martinez* to conclude that the *Smith* rationale no longer applies to modern registration schemes).

118. *See, e.g.*, Wallace v. State, 905 N.E.2d 371, 379 (Ind. 2009) ("The short answer is that the Act imposes significant affirmative obligations and a severe stigma on every person to whom it applies."); *Muniz*, 164 A.3d. at 1210 (recognizing that registration "imposes extraordinary secondary disabilities in finding and keeping housing, employment, and schooling, traveling out of state, and increases the likelihood the offender may be subject to violence and adverse social and psychological impacts"); State v. Letalien, 985 A.2d 4, 18 (Me. 2009) ("These provisions, which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place substantial restrictions on the movements of lifetime registrants and may work an 'impractical impediment that amounts to an affirmative disability.'"); McGuire v. Strange, 83 F. Supp. 3d 1231, 1269-71 (M.D. Ala. 2015) (finding that "requiring dual, in-person weekly registration for in-town homeless registrants and dual applications for travel permits for all in-town registrants are affirmative disabilities or restraints excessive of their stated nonpunitive intent").

119. *See Does #1-5*, 834 F.3d at 702 (concluding that Michigan's sex offender registration laws "resemble traditional shaming punishments"); *Dep't Pub. Safety*, 62 A.3d at 140 ("[D]issemination of information about registrants imposes many negative consequences. The result is that the dissemination of information about registrants, like Petitioner, is the equivalent of shaming [them]."); *Petersen-Beard*, 377 P.3d. at 1145 (Johnson, J., dissenting) ("[D]espite the spin the majority would put on it, today's dissemination of sex offender registry information does resemble traditional forms of punishment."); *see, e.g.*, 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."); Ray v. State, 982 P.2d 931, 936 (Idaho 1999) ("[R]egistration brings notoriety to a person convicted of a sexual offense [and] does prolong the stigma attached to such convictions."); Young v. State, 806 A.2d 233, 249 (Md. 2002) ("Being labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism.").

120. Modern day registration schemes include significant penalties for the failure to register. *See* State v. Williams, 952 N.E.2d 1108, 1111 (Ohio 2011) (acknowledging that failure to comply with certain registration requirements will subject a sex offender to criminal prosecution); *see also McGuire*, 83 F. Supp. 3d at 1239 ("A violation of ASORCNA's requirements potentially subjects the offender to one of 115 Class C felonies, 82 of which are applicable to Mr. McGuire."); *Wallace*, 905 N.E.2d at 380 ("We observe that the Act's requirements also resemble historical common forms of punishment in that its registration and reporting provisions are comparable to conditions of supervised probation or parole.").

121. *See, e.g.*, *Williams*, 952 N.E.2d at 1113 ("No one change compels our conclusion that [the new registration scheme] . . . is punitive. . . . When we consider all the changes enacted by [Senate Bill] 10 in aggregate, we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of [Senate Bill] 10 is punitive."); *see*

Let's first consider whether registration creates an affirmative disability or restraint.[122] On that point, *Smith* was clear. Registration requirements, the Court held, do not physically restrain an individual.[123] Possibly that was true of Alaska's registration scheme of 1994, which did not limit the right of registrants to live and work where they wanted, nor did it restrain their freedom by requiring in-person registration.[124]

That is no longer true. Today, *super*-registration schemes create affirmative disabilities or restraints through residency and presence restrictions, frequent in-person registration, and serious penalties for violations.[125] The Sixth Circuit recognized this when it found that Michigan's SORA "requires much more from registrants than did the statute in *Smith.* Most significant is its regulation of where registrants may live, work, and 'loiter.'"[126] Put more bluntly, the opinion continued, "[S]urely something is not 'minor and indirect' just because no one is actually being lugged off in cold irons bound."[127] Similar reasoning found support in *Commonwealth v. Baker*, which emphasized the "significant collateral consequences" that arises from registration burdens, including, "where an offender's children attend school, access to public transportation for employment purposes, access to employment opportunities, access to drug and alcohol rehabilitation programs and even access to medical care and residential nursing home facilities for the aging offender."[128] The Supreme Court of Pennsylvania in *Commonwealth v. Muniz* rested its determination of an affirmative disability on an additional distinction – Pennsylvania's registration scheme mandated regular in-person visits, a feature not present in the Alaska registry.[129]

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also Carpenter & Beverlin, *supra* note 7, at 1117-22 (analyzing why current registration schemes are no longer rationally connected to their non-punitive purpose).

122. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963); *see also* Smith v. Doe, 538 U.S. 84, 99-100 (2003) (outlining the question to be asked to determine whether a law poses an affirmative disability or restraint).

123. *Smith*, 538 U.S. at 86.

124. *Id.*

125. *See* Carpenter & Beverlin, *supra* note 7, at 1076-100 (detailing the significant restrictions on registrants through various changes in the laws).

126. *See, e.g.*, Does #1-5 v. Snyder, 834 F.3d 696, 702 (6th Cir. 2016) (finding that because of pervasive school zones, registrants "often have great difficulty in finding a place where they may legally live or work").

127. *Id.* at 703; *see also* Commonwealth v. Baker, 295 S.W.3d 437, 445 (Ky. 2009) ("We find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint.").

128. *Baker*, 295 S.W.3d at 445.

129. Commonwealth v. Muniz, 164 A.3d 1189, 1210 (Pa. 2017) (observing that "Tier III offender under SORNA, is now required to appear in person at a registration site four times a year, a minimum of 100 times over the next twenty-five years").

Second was the *Smith* Court's rejection that registration and notification requirements were akin to colonial instances of face-to-face public shaming, another hallmark of punishment.[130] The Court wrote, "Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record."[131] Further, the Court rejected any contention that notification was intended to humiliate. Justice Kennedy wrote, "Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation."[132]

Does the *Smith* reasoning apply today: Is it accurate to dismiss the impact of public notification as inconsequential? Shaping this narrative is the Internet's growing importance and reach. When *Smith* was decided in 2003, the Internet's impact may not have been as well known or understood. So much so that the Court in *Smith* concluded that providing a name, address, and conviction on a public registry was tantamount to that same information being made available in a court-created public document.[133]

Few can argue that truth today. In responding to the benign characterization of Internet notification, one Pennsylvania supreme court justice wrote, "The environment has changed significantly with the advancements in technology since the Supreme Court's 2003 decision in *Smith*. . . . Yesterday's face-to-face shaming punishment can now be accomplished online, and an individual's presence in cyberspace is omnipresent."[134] Not only has the public's understanding of the Internet grown, one justice mused whether that was true of the Court as well. In *State v. Petersen-Beard*, a 2016 decision from the Kansas supreme court,[135]

130. Smith v. Doe, 538 U.S. 84, 98 (2003) (insisting that "[a]ny initial resemblance to early punishments is, however, misleading").

131. *Id.* at 101.

132. *Id.* at 99. For a very different view of the devastating impact of Internet notification, see District Court Judge Matsch's ruling in *Millard v. Rankin*, No 13-cv-02406-RPM, 2017 WL 3767796, at *4-5 (D. Colo. Aug. 31, 2017) (recently published; no F. Supp. 3d pagination yet) (detailing the significant intrusions Mr. Millard experienced for a crime committed seventeen years previously).

133. *Smith*, 538 U.S. at 99 (comparing a national Internet notification to physically visiting "an official archive of criminal records"). For pointed criticism of that view, see Doe v. Thompson, 373 P.3d 750, 774 (Kan. 2016) (overruled by State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016)) ("Any suggestion that disseminating sex offender registration [information] on an Internet website reaches no more members of the public and is no more burdensome to the offender than maintaining an archived criminal record simply ignores the reality of today's world.").

134. Commonwealth v. Perez, 97 A.3d 747, 765-66 (Pa. 2014) (Donohue, J., concurring).

135. State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016).

dissenting Justice Johnson mused whether today's United States Supreme Court, more technologically savvy than the *Smith* Court, might view Internet notification through a different lens.[136]

The significant consequence of Internet notification is not a theoretical concern. David Millard knows its impact all too well. Convicted in 1999 of second degree sexual assault, Mr. Millard served his 90-day sentence and all registration requirements faithfully over the next ten years. Despite his never having committed another offense, broadening Internet notification jeopardized his employment of fourteen years, took away the stability of housing, and threatened his safety at home and at work.[137]

Public shaming also takes the form of a "sex offender" stamp on a driver's license. In *Starkey v. Oklahoma Department of Corrections*, the court specifically singled out this practice as similar to colonial acts of public shaming.[138] In noting the various establishments and times that a driver's license would be shown to a member of the public, the court wrote, "This subjects an offender to unnecessary public humiliation and shame and is essentially a label not unlike a 'scarlet letter.'"[139]

But it is fair to say that not all members of the High Court shared Justice Kennedy's view in *Smith* that Internet notification did not constitute public shaming. Justice Ginsburg wrote in dissent that public labels such as Registered Sex Offender "calls to mind shaming punishments once used to mark an offender as someone to be shunned."[140] Might Justice Ginsburg's reproach in *Smith* resonate with today's Court in light of the Court's recent opinions combined with our collective understanding of the insidious and devastating reach of Internet notification?[141]

Third, and perhaps most egregiously, registration schemes are no longer moored to their original non-punitive stated purpose – a foundational requirement under *Mendoza-Martinez*. That was the conclusion of the

136. *Id.* at 1144 (Johnson, J., dissenting):

> And not only are the new justices different, but they are younger, which might well make them more attuned to the digital age. For instance, the youngest member of the current court was about 21 years old when IBM introduced the PC (personal computer) in 1981, as compared to Chief Justice Rehnquist—a member of the *Smith* majority—who was approaching 60 years old when the personal computer revolution began to go mainstream.

137. *See Millard*, 2017 WL 3767796, at *4-5.

138. 305 P.3d 1004, 1025 (Okla. 2013).

139. *Id.* (citations omitted).

140. Smith v. Doe, 538 U.S. 84, 116 (2003) (Ginsburg, J., dissenting).

141. *See* State v. Petersen-Beard, 377 P.3d 1127, 1144-45 (Kan. 2016) (contrasting the Supreme Court's 2003 decision in *Smith* with the technologically sophisticated analysis a decade later in California v. Riley, 134 S. Ct. 2478, 2491 (2014)); *see also* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (recognizing that the internet and social media websites "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard").

Pennsylvania supreme court when it found that its SORNA provisions were over-inclusive and excessive to the statute's original stated civil purpose.[142] Other courts have reached similar conclusions: over-inclusive registration schemes that are not based on individualized risk assessment are vulnerable to attack under *Mendoza-Martinez*.[143] Interestingly, the position expressed by these courts echo the prescient view expressed by Justice Ginsburg in her dissent in *Smith*:

> What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose. . . . The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated. . . . And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation.[144]

It is becoming clear. As registration penalties pile up and devastating consequences for residents and their families mount, it becomes inherently disingenuous to maintain that these laws are only civil regulations.[145] To my lay audience, here is my non-legal argument: "If it walks like a duck, swims like a duck, and quacks like a duck, then it is a duck."[146] Let's please stop pretending that the current registration and notification schemes, with burdens that foreclose safe housing, employment, travel, and educational opportunities, are not criminal penalties prohibited by the Eighth Amendment.

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142. Commonwealth v. Muniz, 164 A.3d 1189, 1218 (Pa. 2017).

143. *See, e.g.*, Millard v. Rankin, No 13-cv-02406-RPM, 2017 WL 3767796, at *15 (D. Colo. Aug. 31, 2017) (recently published; no F. Supp. 3d pagination yet) ("These sweeping registration and disclosure requirements—in the name of public safety but not linked to a finding that public safety is at risk in a particular case—are excessive in relation to SORA's expressed public safety objective"); *accord* Starkey v. Okla. Dep't Corr., 305 P.3d 1004, 1029 (Okla. 2013); Doe v. State, 111 A.3d 1077, 1100 (N.H. 2015) ("[W]e find that the act as currently constituted is excessive when compared with this purpose, and when compared with past versions of the act.").

144. *Smith*, 538 U.S. at 116-17 (Ginsburg, J., dissenting) (citations omitted).

145. For an excellent review of the damaging effects of registration, see *Millard*, 2017 WL 3767796 at *4-7 (detailing the injurious injustices that several petitioners faced through registration and notification). *See also id.* at *5 n. 4 (highlighting the penile plethysmograph, "which has been found to be so 'exceptionally intrusive in nature and duration' as to implicate substantive due process concerns when imposed as a requirement of employment or supervised release." (citations omitted)).

146. This colloquial expression exemplifies abductive reasoning – from observations one can derive a logical conclusion.

V. THE STIRRINGS OF HOPE

At the start of my presentation, I indicated that for the first time since registration schemes made their national debut, I am hopeful that the ever-harshening and escalating penalties we have witnessed over the past twenty years may soon be coming to an end.[147] Given my introduction and review of the 2003 Supreme Court decisions, it may seem odd that I am predicting that we will witness positive and constitutional change in the laws. Indeed, at this point in my talk, and given where the law stands, you may feel dispirited, or worse, cynical about a potential shift in attitude on this issue.

But I am hopeful the false narrative that blankets this issue is poised to fail. In *Engines of Liberty*, David Cole wisely counseled that "constitutional reform is slow, difficult, and incremental."[148] And though advocacy for change in these laws has been a slow and painful process, marked by numerous defeats, we can see the stirrings of positive change as far back as 2009 when Indiana's supreme court in *State v. Wallace* concluded that its serially-amended registration laws amounted to punishment under *Mendoza-Martinez*, and therefore, any retroactive application violated *ex post facto* principles.[149] Certainly, this decision was cause for celebration. A state High Court had recognized that its registration scheme was no longer a civil regulation because of its ever-increasing penalties and burdens.

But viewed from a broader perspective, it was only a partial victory because the decision left undisturbed the findings of *Smith*. Instead, the court carefully crafted its opinion relying on an analysis of the Indiana state constitution.[150] It does not matter that Indiana's state constitution's *ex post facto* language was the same as the federal prohibition, so clear was the court's strategy to protect its decision from potential review by the United States Supreme Court.[151]

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147. For a thorough examination of the rise in registry laws and penalties, see Carpenter & Beverlin, *supra* note 7.

148. DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVITIES TO MAKE CONSTITUTIONAL LAW 227 (2016).

149. Wallace v. State, 905 N.E.2d 371, 384 (Ind. 2009) ("We conclude that as applied to Wallace, the Act violates the prohibition on ex post facto laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed.").

150. *See, e.g.*, Doe v. Dep't of Pub. Safety and Corr. Servs., 62 A.3d 123, 135-37 (Md. 2013) (affirming the state court's authority to provide greater protections under the Maryland constitution); *accord* Commonwealth v. Muniz, 164 A.3d 1189, 1227 (Pa. 2017) ("holding the Pennsylvania clause is even more protective than its federal counterpart[.]"); *Wallace*, 905 N.E.2d at 371 (Ind. 2009); State v. Williams, 952 N.E.2d 1108 (Ohio 2011).

151. The plurality in *Doe v. Department of Public Safety and Correctional Services* articulated in great detail the judicial tightrope that it walked to depart from federal stare decisis. *See Dep't of Pub. Safety*, 62 A.3d at 134-37 (outlining why it was appropriate to carve a separate path of analysis

A similar approach was employed by the Pennsylvania supreme court in *Commonwealth v. Muniz*[152] and by a plurality of the Maryland Court of Appeals in *Doe v. Department of Public Safety and Correctional Services*.[153] However, one Maryland justice in a concurring opinion implored members of the court to overturn its registration scheme on federal grounds.[154] "In my view, neither the language nor the history of that provision, taken as a whole, offers a principled reason for differentiating its prohibition against *ex post facto* laws from the parallel prohibition in the federal Constitution."[155]

This background makes the results of two recent decisions even more remarkable. In *Does #1-5 v. Snyder*,[156] a federal court overturned Michigan's registration scheme, and in the process, did what some other courts had refused – it challenged *Smith's* assumption that modern day registries were only civil regulations.[157] Although the presumption of validity is a difficult burden for petitioners to overcome, the court admonished, "*Smith* [should not] be understood as writing a blank check to states to do whatever they please in this arena."[158]

For the Sixth Circuit, a *Smith*-type analysis compelled the court to conclude that Michigan's registration scheme was punitive under *Mendoza-Martinez*.[159] Simply put, according to the court, Michigan's registration scheme was "something altogether different from and more troubling than Alaska's first-generation registry law."[160] The pervasive and severe presence restrictions, called "school safety zones," were akin, not present in Alaska's scheme, "in some respects at least, [to] the ancient punishment of

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under adequate and independent state grounds). *Cf.* State v. Letalien, 2009 ME 130, ¶ 4, 985 A.2d 4, 9-11 (Me. 2009) (affirming the view that Maine's *ex post facto* clause was coextensive with the federal prohibition).

152. *Muniz*, 164 A.3d at 1222 (Pa. 2017); *see also* Commonwealth v. Butler, No. 1225 WDA 2016, 2017 WL 4914155 (Pa. Super. Ct. 2017 Oct. 31, 2017) (extending the reach of *Muniz* to require that the designation of sexually violent predator (SVP) must be determined by the trier of fact per the requirements under Apprendi v. New Jersey, 530 U.S. 466 (2000)). *But see* Commonwealth v. Baker, 295 S.W.3d 437, 447 (Ky. 2009) (concluding that retroactive application of residency restrictions violated both the federal and state constitutions).

153. *Dep't of Pub. Safety*, 62 A.3d at 130-32 (Md. 2013) (examining Petitioner's claim under Article 17 of Maryland's state constitution); *see also* Starkey v. Okla. Dep't of Corrs., 305 P.3d 1004 (Okla. 2013) (holding that retroactive application of registration laws violated the Oklahoma constitution).

154. *Dep't of Pub. Safety*, 62 A.3d at 148 (McDonald J., concurring).

155. *Id.*

156. 834 F.3d 696 (6th Cir. 2016).

157. *Id.* at 704-05.

158. *Id.* at 705.

159. *Id.* at 706 ("We conclude that Michigan's SORA imposes punishment.").

160. *Id.* at 705.

banishment."[161] The court found these "school safety zones" to be so oppressive that it rejected the State's characterization that the burdens associated with registration were "minor" or "indirect."[162] The court wrote, "[S]urely something is not "minor and indirect" just because no one is actually being lugged off in cold irons bound."[163] Further, and extremely compelling, the court was very concerned that Michigan's registration scheme was not rationally connected to its non-punitive purpose.[164] Specifically, it chastised the government's 'scant evidence' that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'"[165]

Equally groundbreaking is *Millard v. Rankin*, where a federal district court judge concluded that Colorado's registry was not only punishment – it was cruel and unusual punishment,[166] and that as applied to the three Plaintiffs, it also violated substantive and procedural due process.[167] After a thorough application of the *Mendoza-Martinez* factors to conclude that Colorado's SORA was punishment,[168] the court took the next step to declare it cruel and unusual punishment that violated the Eight Amendment because of its lack of proportionality. "Where the nature of such punishment is by its

161. *Id.* at 703 (using Grand Rapids as the example for the banishment-like effect of the implementation of the "school safety zone").

162. *Id*.

163. *Id.* at 702. *See also* Commonwealth v. Baker, 295 S.W.3d 437, 445 (Ky. 2009) ("We find it difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint.").

164. *Does #1-5*, 834 F.3d at 704.

165. *Id.* (quoting Smith v. Doe, 538 U.S 84, 103 (2003)).

166. No. 13-cv-02406-RPM, 2017 WL 3767796, at *20 (D. Colo. Aug. 31, 2017) (recently published; no F. Supp. 3d pagination yet). The court also held that there were violations of due process as applied to three plaintiffs. *Id.* at *18 ("This Kafka-esque procedure, which was played out not once but twice, deprived Mr. Vega of his liberty without providing procedural due process.").

167. *Id.* at *19 ("[W]hat the plaintiffs have shown is that the public has been given, commonly exercises, and has exercised against these plaintiffs the power to inflict punishments beyond those imposed through the courts, and to do so arbitrarily and with no notice, no procedural protections and no limitations or parameters on their actions other than the potential for prosecution if their actions would be a crime."). Proving a violation of substantive due process has been nearly impossible in this arena. *See, e.g.*, Doe v. Moore, 410 F.3d 1337, 1343-44 (11th Cir. 2005) (rejecting petitioner's broad-based and general assertions of due process rights connected to registration); *In re* W.M., 851 A.2d 431, 451 (D.C. 2004) ("Since SORA does not threaten rights and liberty interests of a 'fundamental' order, appellants cannot succeed on their substantive due process challenge."). Even the Sixth Circuit, which was favorably disposed to an Eighth Amendment challenge in *Does #1-5 v. Snyder*, was not equally inclined on a due process claim. *See* Doe v. Mich. Dep't of State Police, 490 F.3d 491, 499-502 (6th Cir. 2007) (dismissing the plaintiffs' substantive due process claim because it did not allege a sufficient privacy interest).

168. *Millard*, 2017 WL 3767796, at *9-11.

nature uncertain and unpredictable, the state cannot assure that it will ever be proportionate to the offense."[169]

Both opinions also paint the devastating and unescapable impact of modern registration. Judge Matsch in *Millard* stated it directly, "Justice Kennedy's words [from *Smith*] ring hollow that the state's website does not provide the public with means to shame the offender when considering the evidence in this case."[170] The Sixth Circuit statements were equally powerful. "SORA brands registrants as moral lepers solely on the basis of a prior conviction."[171]

It may be an exercise in reading tea leaves, but possibly, we may also derive hope for change from the Supreme Court itself. Judge Matsch in *Millard* observed that Justice Kennedy's thinking on the impact of Internet notification appears to have evolved since he authored *Smith.*[172] Specifically, in an aside that Justice Kennedy wrote in *Packingham v. North Carolina*,[173] he acknowledged the burdens of registration, "[T]he troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system . . . *not an issue before the Court*."[174]

A new picture may be emerging. Taken together with newly forming public sentiment, these opinions demonstrate that we may be witnessing an new narrative on sex offender registration laws. A new tipping point, if you will.

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169. *Id.* at *17.

170. *Id.* at *12 ("[Justice Kennedy] and his colleagues did not foresee the development of private, commercial websites exploiting the information made available to them and the opportunities for 'investigative journalism.'").

171. Does #1-5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016).

172. *Millard*, 2017 WL 3767796, at *13.

173. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

174. *Id*. at 1737 (emphasis added). In addition, it may be that Justice Kennedy has come to appreciate the full extent and reach of the Internet when he wrote that the internet and social media websites "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.*