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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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. 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. 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.
Or that they cost too much for what they deliver, which is true as well.\footnote{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).} Or that they may work in a perverse way to increase crime, which scholars claim.\footnote{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).} 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,\footnote{See infra notes 84-89 and accompanying text on the empirical refutation of recidivism rates as “frightening and high.”} and registry schemes are collapsing under their own ambitious weight from laws that have swelled beyond any non-punitive justification.\footnote{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).} With recent court decisions that have held sex offender registration aspects unconstitutional,\footnote{See infra notes 147-72 and accompanying text (analyzing recent court decisions that overturn aspects of sex offense registration laws).} and newly-minted
public sympathy for the injustice and devastation of registration. I believe we are witnessing an important shift. A tipping point, if you will. 

As of January 2017, there were more than 861,000 people on the registry nationwide. 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, 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. Or they may recall the terrifying story of Jaycee Dugard, held captive for seventeen years by a


registered offender in plain sight of law enforcement. 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.

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. And not only on their lives. Registrants’ families – parents, spouses, children – suffer as much as the registrant. As district
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


\(^{19}\) 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”).

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


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.*


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 registrable 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. Only because of a public awareness campaign initiated by Zach’s parents and the ensuing public pressure, did Zach’s fate change; he was removed from Michigan sex offender registry.

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. 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. Unfortunately, without a public campaign on his behalf to argue for a reduction of his charges, the onerous restrictions placed on Darian remain.

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. Because registration is founded exclusively on


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/lastvisited/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.


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. 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.” 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.

Alabama’s registration and notification burdens are among the most egregious in the country. The district court so acknowledged when it wrote, “Alabama’s scheme goes miles beyond the minimum federal requirements of the Sex Offender Registration Act.” 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.

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. Like Mr. McGuire, his life spiraled down from that point, and it cannot go unstated that any later interactions with the

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).
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. 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. 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, viewing child pornography, and miscellaneous sexual crimes that marginally implicate public safety, such as urinating in public – yes, it is true. Urinating in public. 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

45. Id.
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).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{53}  

\textit{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


\textsuperscript{53} Hessick, \textit{supra} note 51, at 873-78 (countering arguments that viewing child pornography leads to escalating behavior of sexual abuse).
female drug dealer.\textsuperscript{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.\textsuperscript{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.\textsuperscript{56} That is what happened to Andre Fuller who stole a van.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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 \textit{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.’”\textsuperscript{60}

\textsuperscript{54} Rainer v. State, 690 S.E.2d 827 (Ga. 2010).
\textsuperscript{55} \textit{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.”).
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 260. For similar reasoning, see State v. Sakobie, 598 S.E.2d 615, 616 (N.C. Ct. App. 2004); \textit{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). \textit{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. 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.

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. 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.

*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. And some of them are as young as nine or ten. 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.*


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{74} For that act of bullying, they were required to register as sex offenders for the rest of their lives.\textsuperscript{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,

\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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”).
\textsuperscript{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”).
\textsuperscript{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).
\textsuperscript{73} Id.
\textsuperscript{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)).
\textsuperscript{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.”  

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. He assigns three hallmarks to a societal panic. First, is an official reaction that is not proportional to issue. Second, are politicians who talk about it in identical

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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.  And third, is a complicit media that fans the flames.  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.

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, 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 Cacolo 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.”).

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

A fascinating article written recently by Professor Ira Ellman and his wife Tara Ellman exposes the myth surrounding the phrase “frightening and high.” In *The Supreme Court’s Crucial Mistake about Sex Crimes Statistics*, the authors do a deep dive to uncover the genesis of the fallacy. 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. 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.

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).


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* in *McKane 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. 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. For the juvenile offender, the risk drops precipitously after thirty years of age, to minimal.

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, 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).

constitutional framework for sex offender registration laws.\textsuperscript{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.\textsuperscript{93}

First, in \textit{Smith v. Doe}, petitioners challenged their placement on the registry because of the principle of \textit{ex post facto}, which rejects the government’s ability to impose punishment retroactively on a person.\textsuperscript{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.\textsuperscript{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 \textit{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 \textit{ex post facto} application.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item [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).
\item [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”).
\item [94.] Smith, 538 U.S. at 89-90 (addressing whether Alaska’s sex offender registration scheme violated \textit{ex post facto} principles for its retroactive application).
\item [95.] Id. at 91.
\item [96.] See U.S. Const. art. 1, § 10 (“No state shall. . .pass any. . .\textit{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.”).
\item [97.] Smith, 538 U.S. at 97-100.
\end{itemize}
is already public.\textsuperscript{998} The effect – \textit{ex post facto} principles under the Eighth Amendment did not apply to retroactive registration.\textsuperscript{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.”\textsuperscript{100}

It is fair to say that the second case, \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{103} But that argument held no sway with the Court.\textsuperscript{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.\textsuperscript{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

\textsuperscript{998}. \textit{Id}. at 98.

\textsuperscript{99}. \textit{Id}. at 102-04 (endorsing retroactive application).

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


\textsuperscript{103}. \textit{Conn. Dep’t of Pub. Safety}, 538 U.S at 5-7.

\textsuperscript{104}. \textit{Id}.

\textsuperscript{105}. \textit{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 federal107 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

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.").


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” where “[c]ompetitive lawmaker 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.

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, the seven-factor test from Kennedy v. Mendoza-Martinez provides instruction on this assignment. 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.

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.

112. See Carpenter, supra note 10, at 41.
113. Id.
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).
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, public shaming, and requirements that are akin to parole or supervised release. 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. 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.”); Munic, 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. On that point, Smith was clear. Registration requirements, the Court held, do not physically restrain an individual. 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. 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.’” 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.” 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.” 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.

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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.”).  
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. 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.” 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.”

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.

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.” 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,

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.”).
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

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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.
139. Id. (citations omitted).
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.

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

147. For a thorough examination of the rise in registry laws and penalties, see Carpenter & Beverlin, supra note 7.
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.”).
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* and by a plurality of the Maryland Court of Appeals in *Doe v. Department of Public Safety and Correctional Services*. However, one Maryland justice in a concurring opinion implored members of the court to overturn its registration scheme on federal grounds. “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.”

This background makes the results of two recent decisions even more remarkable. In *Does #1-5 v. Snyder*, 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. 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.”

For the Sixth Circuit, a Smith-type analysis compelled the court to conclude that Michigan’s registration scheme was punitive under *Mendoza-Martinez*. 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.” 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..."
banishment.” 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.” The court wrote, “[S]urely something is not “minor and indirect” just because no one is actually being lugged off in cold irons bound.” Further, and extremely compelling, the court was very concerned that Michigan’s registration scheme was not rationally connected to its non-punitive purpose. Specifically, it chastised the government’s ‘scant evidence’ that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.'"

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, and that as applied to the three Plaintiffs, it also violated substantive and procedural due process. After a thorough application of the Mendoza-Martinez factors to conclude that Colorado’s SORA was punishment, the court took the next step to declare it cruel and unusual punishment that violated the Eighth 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 petitioners’ 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).
nature uncertain and unpredictable, the state cannot assure that it will ever be proportionate to the offense.\textsuperscript{169}

Both opinions also paint the devastating and unescapable impact of modern registration. Judge Matsch in \textit{Millard} stated it directly, \textquoteright\textquoteleft Justice Kennedy\textquotesingle s words [from \textit{Smith}] ring hollow that the state\textquotesingle s website does not provide the public with means to shame the offender when considering the evidence in this case.\textquoteright\textquoteright\textsuperscript{170} The Sixth Circuit statements were equally powerful. \textquoteright\textquoteright SORA brands registrants as moral lepers solely on the basis of a prior conviction.\textquoteright\textquoteright\textsuperscript{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 \textit{Millard} observed that Justice Kennedy\textquotesingle s thinking on the impact of Internet notification appears to have evolved since he authored \textit{Smith}.\textsuperscript{172} Specifically, in an aside that Justice Kennedy wrote in \textit{Packingham v. North Carolina},\textsuperscript{173} he acknowledged the burdens of registration, \textquoteright\textquoteright [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.\textquoteright\textquoteright\textsuperscript{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.

\textsuperscript{169} Id. at *17.

\textsuperscript{170} Id. at *12 (\textquoteright\textquoteright [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 \textquoteleft\textquoteleft investigative journalism.\textquoteright\textquoteright\textquoteright).

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

\textsuperscript{172} \textit{Millard}, 2017 WL 3767796, at *13.


\textsuperscript{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 \textquoteright\textquoteright can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.\textquoteright\textquoteright Id.