
THE CONSTITUTIONALITY OF STRICT LIABILITY IN SEX OFFENDER REGISTRATION LAWS

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The subject of sex offender registration laws involves a complex interplay of constitutional limitations, individual liberties, and legislative goals aimed at

* Professor of Law, Southwestern University School of Law. I would like to thank Southwestern University School of Law for its generous support of this project, and my research assistants Debbie Caroline Carlos, Kyndra Casper, Timothy Fuller, Alberto Jimenez, Jennifer Rutherford, and Fernando Saldivar for their significant research efforts over the last two years. I am also grateful to Professor Joshua Dressler for his continued encouragement of my writing, my colleagues Kelly Strader and Jonathan Miller for their guidance, Sarah Saucedo, Articles Editor at the *Boston University Law Review*, for her skill and dedication in editing the piece, Erica Carpenter, an inspiration, and Martin, David, and Scott Carpenter, who have given new meaning to the term in-house counsel.

*assuaging public concern. Indeed, one need only hear the heartbreak-
ing account of a child abducted and assaulted, or murdered by a convicted sex
offender, to appreciate a community's desire to protect its children from
predators living among them. Sex offender registration and notification
schemes, which are designed to track the offenders and to protect the
community, are motivated by justifiable regulatory intentions; nonetheless,
legislators may be guilty of overreaching. This article explores the
constitutionality of sex offender registration laws as applied to one specific
group of convicted sex offenders – the statutory rapist who has been convicted
in one of thirty jurisdictions that employs a strict liability framework.
Specifically, this article questions whether strict liability provides a sufficient
and constitutional framework for the requirement to register as a sex offender.
I draw the distinction between a narrowly constructed sex offender registration
system designed to protect the public, and a system marked by a net cast so
wide that it captures offenders whose predatory behavior or criminal intent
was never proven. This article argues that because of the convergence of
several factors, including the recent Supreme Court decisions in Connecticut
Department of Public Safety v. Doe and Lawrence v. Texas, the sweeping
nature of sex offender registration laws unconstitutionally impacts the strict
liability offender.*

“A ‘stigma’ is ‘[a] mark or token of infamy, disgrace, or reproach’”

— *Doe v. Dep’t of Pub. Safety*¹

INTRODUCTION

People are afraid, and it is understandable. One need only hear the heartbreak-
ing account of a child abducted and assaulted, or murdered by a convicted sex offender, to appreciate a community's desire to protect its children from sexual predators.² Sex offender registration and community

¹ 271 F.3d 38, 47 (2d Cir. 2001) (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1702 (4th ed. 2000)).

² Sadly, numerous accounts have made national news. For reports in 2005, see Associated Press, *Fla. Man Trusted Kidnapping Suspect*, WXIA.COM, Jan. 23, 2005, http://www.wxia11.com/news/news_article.aspx?storyid=57832 (concerning the kidnapping of eleven-year-old Adam Kirkirt in Marion County, Florida, in January 2005 by his father's roommate, Frederick Fretz, a convicted sex offender); Associated Press, *Fla. Slay Suspect Charged with Capital Murder*, MSNBC.COM, Mar. 21, 2005, (describing convicted sex offender John Evander Couey's confession to the kidnapping, sexual assault, and murder of nine-year-old Jessica Lunsford) (on file with author); Associated Press, *Sex Offender Charged in Iowa Girl's Death*, FOXNEWS.COM, Mar. 28, 2005, <http://www.foxnews.com/story/0,2933,151677,00.html> (discussing the alleged kidnapping, sexual abuse, and slaying of ten-year-old Jetseta Gage by convicted sex offender Roger Paul Bentley); *Police Seek Sex Offender, Missing Girl*, CNN.COM, July 23, 2005 (on file with author), (involving eight-year-old girl, Lydia Bethany-Rose Rupp, abducted by sex offender

notification statutes³ have been established to track potential recidivists⁴ and to protect the community from offenders who reside in close proximity.⁵ The rationale for such statutes has been clearly articulated: public safety is the primary goal.⁶ The intrusion suffered by the offender is outweighed by the

Fernando Aguerro, who lived with the family); *Sheriff: Sex Offender Confesses in Killing*, CNN.COM, Apr. 17, 2005, <http://www.cnn.com/2005/US/04/17/florida.girl/index.html> (relating the confession of David Onstott, a convicted sex offender, who admitted murdering thirteen-year-old Sarah Michelle Lunde); Sam Verhovek, *Missing Girl Found with Sex-Offender*, L.A. TIMES, July 3, 2005, at A20 (detailing the rescue of eight-year-old Shasta Groene from convicted sex offender Joseph Edward Duncan, III, six weeks after she was kidnapped from her home following the brutal murders of her mother, brother, and mother's boyfriend, with which Duncan has been charged).

³ Sex offender registration requirements enable law-enforcement officials to acquire information concerning persons obligated to register because of prior convictions based on the commission of sex offenses. Community notification statutes authorize dissemination of information concerning a sex offender to prescribed organizations and members of the community. This information may include a photograph, a description of the underlying offense, residence address, place of employment, and vehicle license-plate number. *See infra* Part II for detailed description and discussion of sex offender registration laws and community notification statutes.

⁴ According to some reports, there is a likelihood that sexual predators will reoffend. *See Doe v. Poritz*, 662 A.2d 367, 374-75 (N.J. 1995) (recounting statistical studies on the rate of recidivism among sex offenders). According to the *Poritz* court:

[R]apists recidivate at a rate of 7 to 35%; offenders who molest young girls, at a rate of 10 to 29%, and offenders who molest young boys, at a rate of 13 to 40%. Further, of those who recidivate, many commit their second crime after a long interval without offense. In cases of sex offenders, as compared to other criminals, the propensity to commit crimes does not decrease over time. . . . [I]n one study, 48% of the recidivist sex offenders repeated during the first five years and 52% during the next 17 years.

Id. at 374 (citations omitted). One extreme case demonstrates this all too clearly. Convicted child molester, Dean Arthur Schwartzmiller, rearrested in May 2005, is believed to have committed sex crimes against thousands of victims, as demonstrated by meticulous computer logs he kept. *See Associated Press, Thousands of Boys Molested? Cops Seek Victims*, MSNBC.COM, June 17, 2005, <http://www.msnbc.msn.com/id/8247899> (reporting the police discovery of an unregistered sex offender's logs which suggest that he abused thousands of children over a thirty-year period).

⁵ *See E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997) ("[R]egistration and carefully tailored notification can enable . . . those likely to encounter a sex offender to be aware of a potential danger and 'to stay vigilant against possible re-abuse.'") (quoting *Artway v. Attorney General*, 81 F.3d 1235, 1264 (3d Cir. 1996))).

⁶ *See, e.g.*, ARK. CODE ANN. § 12-12-902 (2003) (finding that "protecting the public from sex offenders is a primary governmental interest, [and] that the privacy interest of the persons adjudicated guilty of sex offenses is less important than the government's interest in public safety"); ME. REV. STAT. ANN. tit. 34-A § 11201 (1964 & Supp. 2005) ("The purpose of the chapter is to protect the public from potentially dangerous registrants by enhancing access to information concerning those registrants."); MICH. COMP. LAWS ANN. § 28.721a (2004) ("The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to

community's need to protect itself from those sex offenders most likely to reoffend.⁷ As one court observed:

The remedy goes directly to the question of what a community can do to protect itself against the potential of reoffense by a group the Legislature could find had a relatively high risk of recidivism involving those crimes most feared, and those crimes to which the most vulnerable and defenseless were exposed – the children of society.⁸

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

Courts have also acknowledged the legislative purpose of these laws. *See, e.g., Verniero*, 119 F.3d at 1097 (“[W]e found that the legislative purpose of Megan’s Law was to identify potential recidivists and alert the public when necessary for the public safety, and to help prevent and promptly resolve incidents involving sexual abuse and missing persons.”); *Lee v. State*, 895 So. 2d 1038, 1040 (Ala. Crim. App. 2004) (“The Legislature finds that the danger of recidivism posed by criminal sex offenders and that the protection of the public from these offenders is a paramount concern or interest to government.” (quoting ALA.CODE § 15-20-20.1 (1975))); *Fredenburg v. City of Fremont*, 14 Cal. Rptr. 3d 437, 439 (Cal. Ct. App. 2004) (commenting that the California Legislature “further found that the public had a ‘compelling and necessary . . . interest’ in obtaining information about released sex offenders so they can ‘adequately protect themselves and their children from these persons’” (quoting 1996 Cal. Stat., ch. 908 § 1(c))); *State v. Sakobie*, 598 S.E.2d 615, 617 (N.C. Ct. App. 2004) (recognizing that the purpose of the state’s sex offender registration law is “to prevent recidivism because ‘sex offenders often pose a high risk of [reoffense]. . . and protection of the public from sex offenders is of paramount governmental interest’” (quoting N.C. GEN. STAT. § 14-208.5 (2003))).

⁷ *See State v. Bollig*, 605 N.W.2d 199, 205-06 (Wis. 2000) (“Although we recognize that sex offenders have suffered adverse consequences, including vandalism, loss of employment, and community harassment, the punitive or deterrent effects resulting from registration and the subsequent dissemination of information do not obviate the remedial and protective intent underlying those requirements.”); *accord State ex. rel. Olivieri v. State*, 779 So. 2d 735, 749 (La. 2001) (explaining that any economic burden on the sex offender resulting from the notification scheme is a necessary result of a “well justified system”); *Young v. State*, 806 A.2d 233, 249 (Md. 2002) (concluding that although the sex offender registration statute does place affirmative burdens on the registrants, these burdens are not unreasonable in light of the statute’s remedial aims).

⁸ *Poritz*, 662 A.2d at 376; *see also Cannon v. Igborzurkie*, 779 A.2d 887, 890 (D.C. 2001) (articulating three ways sex offender registration laws promote public safety: ““by facilitating effective law enforcement; by enabling members of the public to take direct measures of a lawful nature for the protection of themselves and their families; and, by reducing registered offenders’ exposure to temptation to commit more offenses”” (quoting REPORT OF THE COUNCIL COMMITTEE ON THE JUDICIARY ON BILL 13-350, The “Sex Offender Registration Act of 1999” at 3 (Nov. 15, 1999))); *State v. Wilkinson*, 9 P.3d 1, 5-6 (Kan. 2000) (stating that the “legislative purpose [of the Kansas Sex Offender Registration Act] is to protect public safety and, more specifically, to protect the public from sex offenders as a class of criminals who are likely to reoffend”); *Coe v. Sex Offender Registry Bd.*, 812 N.E.2d 913, 919 (Mass. 2004) (“Internet dissemination of level three sex offender information effectively allows the communication of information to help protect victims and

But what of a sex offender registration system whose regulatory reach is so far-flung that it ensnares not only the violent sex offender but also those who were convicted without proof of predatory conduct or intent? This article explores the validity of sex offender registration laws as applied to one specific group of convicted sex offenders – the statutory rapist convicted under a strict liability framework. Specifically, this article questions whether strict liability provides an appropriate and constitutional underpinning for the requirement to register under sex offender registration laws. I draw the distinction between a narrowly drawn sex offender registration system designed to protect the public and a system marked by a net cast so wide that it captures offenders whose predatory behavior or criminal intent was never proven. This article argues that because of the convergence of several factors, the sweeping nature of sex offender registration laws creates an impermissibly punitive and unconstitutional impact on the strict liability offender.

Although the motivation behind sex offender registration laws is well founded, it is equally clear that these laws also serve to name, brand, and stigmatize those convicted of sexual offenses,⁹ a stigma that attaches and follows the offender for years, no matter the inconsequential nature of the underlying offense.¹⁰ Steeped in historical tradition, public humiliation serves as an important tool for a community to expend its disapprobation for a crime.¹¹ From seventeenth century stockades to modernly crafted sentencing

others in a practical way.”); *Meinders v. Weber*, 604 N.W.2d 248, 255 (S.D. 2000) (“[T]he Legislature’s intention in requiring registration was to accomplish the regulatory purpose of assisting law enforcement in identifying and tracking sex offenders to prevent future sex offenses, especially those against children These are remedial measures akin to warning communities of potential health hazards.”).

⁹ 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.”); *Young*, 806 A.2d at 249 (“Being labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism.”); cf. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) (decrying public posting of flyers listing those who may not purchase alcohol as “an official branding of a person. The label is a degrading one.”); *Paul v. Davis*, 424 U.S. 693, 714 (1976) (Brennan, J., dissenting) (observing that the label of criminal is “one of the most stigmatizing and debilitating labels in our society”).

¹⁰ See *infra* Part II (reviewing the range of sex offender registration statutes and their requirements, which apply not only to violent, sexual predators, but also to strict liability offenders).

¹¹ See *Smith v. Doe*, 538 U.S. 84, 97-98 (2003) (reviewing colonial punishments that were designed to inflict public disgrace); see also *United States v. Gementera*, 379 F.3d 596, 602 (9th Cir. 2004) (acknowledging the value of public ““humiliation or shame . . . [as] hav[ing] a specific rehabilitative effect on defendant [(a convicted mail thief)] that could not be accomplished by other means, certainly not by a more extended term of imprisonment” (quoting underlying district court record)). For a historical look at punishment, see Notes, *Making A Spectacle Of Panopticism: A Theoretical Evaluation Of Sex Offender Registration And Notification*, 38 NEW ENG. L. REV. 1049, 1051-61 (2004) (describing the “spectacle of

conditions, courts and county officials have publicly chastised those guilty of a variety of offenses.¹² Since the advent of sex offender registration laws and community notification statutes in all fifty states,¹³ the nature and extent of the public branding has grown more invasive,¹⁴ and the humiliation, as the Supreme Court observed, “increasing in proportion to the extent of the publicity.”¹⁵ And while not a common occurrence, one cannot dismiss the

punishment” throughout history and analogizing modern sex offender registration schemes to the Benthamian theory of “panopticism,” in which prisoners are exposed to constant, but invisible, surveillance).

¹² See *Gementera*, 379 F.3d at 598 (upholding district court’s condition of supervised release to include the wearing of a signboard saying “I stole mail. This is my punishment.”). Sometimes, however, these creative conditions run afoul of the court’s sentencing authority. See, e.g., *People v. Hackler*, 16 Cal. Rptr. 2d 681, 682-83 (Cal. Ct. App. 1993) (reversing probationary condition that convicted shoplifter wear a tee shirt at all times in public with bold letters stating, “I am on felony probation for theft.”); *People v. Johnson*, 528 N.E.2d 1360, 1362 (Ill. App. Ct. 1988) (overturning probationary condition that required convicted drunk driver to publish an apology along with his mug shot in daily newspaper); *People v. Letterlough*, 655 N.E.2d 146, 147 (N.Y. 1995) (reversing probationary condition that convicted drunk driver’s license plate be affixed with fluorescent sign stating “CONVICTED DWI”). For an excellent discussion of the role of shaming in a variety of cultures, see Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 MICH. L. REV. 1880 (1990).

¹³ See *People v. Ross*, 646 N.Y.S.2d 249, 250 n.1 (N.Y. Sup. Ct. 1996) (listing sex offender registration statutes in all fifty states); see also *infra* Part II (examining current sex offender registration laws).

¹⁴ Florida, for example has introduced legislation, entitled “The Jessica Lunsford Act,” which would require convicted child molesters to wear global position satellite tracking devices for life. See Associated Press, *Florida Governor OKs Tough Child Molester Bill*, MSNBC.COM, May 2, 2005, <http://www.msnbc.msn.com/id/7712095>. For other legislative reform see, for example, Susan Abram, *Removal of Sex Offender Sought*, DAILYNEWS.COM, June 15, 2005 (on file with author) (describing a proposed amendment to Los Angeles County’s housing policy that would bar sex offenders from living in subsidized housing); Associated Press, *Pennsylvania to Post Personal Information on More than 7,000 Registered Sex Offenders*, POST-GAZETTE.COM, Nov. 26, 2004, <http://www.postgazette.com/pg/04331/417656.stm> (describing Pennsylvania’s efforts to open its sex offender registry to the public by creating a sex offender registration website with personal information and photos of convicted sex offenders); *Sex Offenders Banned from Florida Storm Shelters*, CNN.COM, Aug. 6, 2005 (on file with author) (discussing Florida’s efforts to prevent sex offenders from using public hurricane shelters).

¹⁵ *Smith*, 538 U.S. at 99 (upholding Alaska’s Internet sex offender registry, while acknowledging that the “geographic reach of the Internet is greater than anything which could have been designed in colonial times”). In *E.B. v. Verniero*, the Third Circuit evoked strong images of the impact of registration:

[R]egistrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely

potential for the community to react violently to news that a convicted sex offender has moved into the neighborhood.¹⁶ Indeed, if one observation can be made, it is this: the collective fear over sex offenders continues to escalate, prompting new legislative and judicial responses aimed at tracking offenders and protecting the community.¹⁷

strained. Retribution has been visited by private, unlawful violence and threats, and, while such incidents of “vigilante justice” are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them. It also must be noted that these indirect effects are not short lived. While there are suggestions in the record that the circumstances of a registrant may stabilize as time passes after notification, the statute permits repeat notification over a period of many years.

119 F.3d 1077, 1102 (3d Cir. 1997).

¹⁶ See, e.g., Donna Gordon Blankinship, Associated Press, *Washington Man Admits Killing Two Sex Offenders: Idaho Kidnapping Case May Have Been Factor*, SAN JOSE MERCURY NEWS, Sept. 7, 2005, at A13 (detailing account of man who, having received community notification about sex offenders in his area, targeted and killed two convicted child molesters); John T. McQuiston, *Sex Offender Is Suing His Neighbors Over Protests*, N.Y. TIMES, June 20, 1997, at B1 (describing sex offender’s lawsuit against neighbors, alleging harassment for rallies staged to protest his presence in the neighborhood, the throwing of a brick through his car window, and harassing calls to his employer); *Notorious Sex Killer to Leave Prison Monday*, CNN.COM, July 3, 2005 (on file with author) (recounting death threats that Karla Homolka, “[d]ubbed ‘English-Canada’s monster’” received upon her release from prison, following incarceration for the rapes and murders of Ontario teenagers); Iver Peterson, *Mix-Ups and Worse Arising from Sex-Offender Notification*, N.Y. TIMES, Jan. 12, 1995, at B6 (detailing the account of two men who severely beat a man at the registered address of a sex offender, having mistaken him for a recently-released child molester); Reuters, *Vigilantism Against Offenders*, PREVENT-ABUSE-NOW.COM, July 5, 2005, <http://www.prevent-abuse-now.com/news7.htm#Vigilant> (explaining that less than two weeks after police began notifying residents that a sex offender moved into the community, the offender’s house was “shot up”); cf. Associated Press, *Officials Seize Sex Offender’s Baby; Mother Fought to Keep Custody of Infant Son*, CNN.COM, Oct. 23, 2005 (on file with author) (recounting court ruling that authorized removal of newborn baby from parents’ custody because father was convicted of rape and sodomy twenty years earlier).

¹⁷ See, e.g., Reuters, *Senate Votes to Improve Sex Offender Monitoring*, CNN.COM, July 29, 2005, <http://www.cnn.com/2005/POLITICS/07/29/sex.offenders.reut/index.html> (recounting the U.S. Senate’s unanimous passage of a bill to require the creation of a national sex offender registry); John-Thor Dahlburg, *Limits on Sex Offenders Spread in Florida*, L.A. TIMES, July 5, 2005, at A13 (reviewing a number of Florida city ordinances that require convicted sex offenders to live at least 2,500 feet from schools); Jonathan Roos, *Stricter Sex Crime Laws Take Effect This Week*, DESMOINESREGISTER.COM, June 27, 2005, <http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=/20050627/NEWS10/506270335/1001/RSS01> (describing a variety of new and stricter sex crimes laws in Iowa, including a requirement that convicted pedophiles be monitored electronically for at least five years); Associated Press, *Miami Beach Votes to Effectively Ban Sex Offenders*, TAMPABAYLIVE.COM, June 8, 2005, <http://tampabaylive.com/stories/2005/06/050608offenders.shtml> (discussing laws passed in Miami, Florida, and Hamilton Township, New Jersey, that create buffer zones to keep sex

Given the onerous burdens on registrants, how have sex offender registration laws passed constitutional muster? In general, regulations that appear to be criminal penalties have been upheld as constitutionally permissible where (i) the regulation serves an alternative nonpunitive purpose that is rationally connected to the restriction, and (ii) the regulation is not excessive in relationship to the alternative purpose assigned.¹⁸ Based on this two part “intent-effects” test,¹⁹ a regulation meets the guarantees of due process if it is sufficiently tailored to its civil aims.²⁰ Even where a measure carries incidental effects of punishment, the legislation will be regarded as nonpunitive.²¹ Sex offender registration requirements, therefore, can only be viewed as regulatory legislation if the stigmatizing nature of registration is

offenders 2,500 feet away from schools, day care centers, and parks, which, in effect, bans sex offenders from these cities).

¹⁸ See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The *Mendoza-Martinez* Court delineates seven factors used to determine whether a law is regulatory or punitive in its effect:

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

Id. (citations omitted).

¹⁹ *Doe v. Poritz*, 662 A.2d 367, 433 (N.J. 1995) (Stein, J., dissenting) (commenting that “the last two factors of *Mendoza-Martinez* consistently are referred to as a short-hand test for determining punishment” and that the United States, as amicus curiae in the instant case, “refer[red] to the last two factors of *Mendoza-Martinez* as the Supreme Court’s two-part intent-effects test”).

²⁰ See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 361-69 (1997) (characterizing civil commitment for “sexually violent predators” as a nonpunitive regulatory measure). For support of the “intent-effects” test outside the area of sex offender registration, see *Bell v. Wolfish*, 441 U.S. 520, 538-39, 561-62 (1979) (concluding that a variety of pretrial detention procedures did not violate principles of due process because they had valid alternative purposes); *United States v. Salerno*, 481 U.S. 739, 747-48 (1987) (finding that preventative detention is not punishment because it serves an alternative purpose of preventing danger to the community).

²¹ See, e.g., *Salerno*, 481 U.S. at 747 (determining that pretrial detention allowed in the Bail Reform Act was regulatory in nature and not punitive for purposes of a substantive due process challenge); accord *Poritz*, 662 A.2d at 394-95 (articulating the distinction between remedies that are incidentally punitive and those that are punitive in nature); *State v. Walls*, 558 S.E.2d 524, 526 (S.C. 2002) (concluding that the General Assembly, in creating a sex offender registry, intended “to create a nonpunitive act,” as it “did not intend to punish sex offenders, but instead intended to protect the public from those sex offenders who may reoffend and to aid law enforcement in solving sex crimes”).

outweighed by a clear demonstration of sufficient alternative purpose: in this case, protection of the public from sexual predators.²² As one court stated,

[To find sex offender notification laws unconstitutional] is to find that society is unable to protect itself from sexual predators by adopting the simple remedy of informing the public of their presence. That the remedy has a potentially severe effect arises from no fault of government, or of society, but rather from the nature of the remedy and the problem; it is an unavoidable consequence of the compelling necessity to design a remedy.²³

Where sex offender registration laws serve to protect the community and track recidivists, they are legitimate regulatory vehicles that withstand constitutional scrutiny.²⁴ But central to their legitimacy must be the determination that the regulation is carefully crafted to limit its punitive effect.²⁵ Only statutes that

²² See *State v. Bani*, 36 P.3d 1255, 1256 (Haw. 2001) (“The question ultimately raised is how the people of Hawai’i may protect themselves against future offenses by those prone to recidivism without jeopardizing the constitutional rights of persons who have already paid the price imposed by law for their crimes.”); *State ex rel. Olivieri v. State*, 779 So. 2d 735, 748 (La. 2001) (“[A]lthough Louisiana’s Megan’s Law has provisions which may be remotely similar to historical forms of punishment, the immediate need for public protection is a corollary of rather than an addendum to the punishment of sex offenders.”).

²³ *Poritz*, 662 A.2d at 422; cf. *Meinders v. Weber*, 604 N.W.2d 248, 255 (S.D. 2000) (comparing the legislative authority to enact sex offender registration laws to the state’s authority to warn of potential health hazards in the community).

²⁴ The U.S. Supreme Court has found that registration statutes are regulatory in nature, and consequently are not *ex post facto* laws or violative of procedural due process. *See Smith v. Doe*, 538 U.S. 84, 102 (2003) (determining that sex offender “registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the *Ex Post Facto Clause*”); *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (concluding that public disclosure of a state’s sex offender registry does not violate procedural due process, even though registration is based on prior conviction and not current dangerousness). State courts have generally followed suit. *See, e.g., Milks v. State*, 894 So. 2d 924, 927-28 (Fla. 2005) (holding that procedural due process does not require that sex offenders be allowed an evidentiary hearing to prove whether they present a danger to the community because registration is based on the fact of previous conviction, not dangerousness); *People v. Pennington*, 610 N.W.2d 608, 612-13 (Mich. 2000) (finding that state sex offender registration law does not violate the *Ex Post Facto Clause*); *State v. White*, 590 S.E.2d 448, 457-58 (N.C. Ct. App. 2004) (holding that North Carolina’s sex offender registration law does not violate the *Ex Post Facto Clause*). *But see Bani*, 36 P.3d at 1268 (“[A] registered sex offender [should be offered] a meaningful opportunity to argue that he or she does not represent a threat to the community and that public notification is not necessary, or that he or she represents only a limited threat such that limited public notification is appropriate”); *id.* at 1267 (stating that the legislature intended registration and notification “to protect the public from sex offenders who present an ‘extreme threat to public safety’” (quoting 1997 Haw. Sess. L. Act 316, § 1 at 749)) (emphasis added).

²⁵ *See, e.g., Salerno*, 481 U.S. at 750 (upholding pretrial detention for dangerous suspects under the Bail Reform Act because the punitive nature of such detention was not “excessive

are sufficiently tailored to meet their civil aims and limit their incidental punitive effects will be deemed constitutional.²⁶

As this article will explore, several factors have coalesced to create a system in which sex offender registration laws have become unmoored from their regulatory purposes, and, as applied to the strict liability offender, create punitive laws without the benefit of due process. These factors include the Supreme Court's approval of a registration system that does not require individualized assessment of dangerousness;²⁷ a persistent and incorrectly held position that strict liability serves as an appropriate framework for the determination of serious criminal offenses, particularly in statutory rape;²⁸ and, finally, a narrow view of the protected interest of loss of reputation that may not correspond with evolving liberty interests under *Lawrence v. Texas*.²⁹

Alone, each of these factors has withstood constitutional attack.³⁰ Taken together, however, they create an impermissibly punitive effect which denies

in relation to the regulatory goal Congress sought to achieve"); *Addington v. Texas*, 441 U.S. 418, 426-28, 428 n.4 (1979) (authorizing civil commitments because, in contrast to criminal commitment, "the state power is not exercised in a punitive sense" but "only for the purpose of providing care designed to treat the individual").

²⁶ See *Salerno*, 481 U.S. at 747-48 (upholding the Bail Reform Act's pretrial detention procedures as consistent with the Due Process Clause because "[t]he Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious crimes").

²⁷ See *Conn. Dep't of Pub. Safety*, 538 U.S. at 4 (2003) (concluding that Connecticut's registration system did not violate procedural due process despite its application to all convicted sex offenders, regardless of their current dangerousness).

²⁸ For scholarly criticism of statutory rape as 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 (2003) (urging reconsideration of strict liability as an appropriate framework for statutory rape); see also Arnold H. Loewy, *Statutory Rape in a Post Lawrence v. Texas World*, 58 SMU L. REV. 77, 92 (2005) (interpreting *Lawrence* to require a mistake-of-age defense to a charge of statutory rape); Larry W. Myers, *Reasonable Mistake as to Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1965-66) (arguing for reasonable mistake-of-age defense to a charge of statutory rape); Richard Singer, *Strict Criminal Liability: Alabama State Courts Lead the Way into the Twenty First Century*, 46 ALA. L. REV. 47 (1994) (criticizing the Alabama courts for their cursory analysis in determining whether statutory rape should be treated as a strict liability crime).

²⁹ 539 U.S. 558, 578-79 (2003):

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 'It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.'

(quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 847 (1992)).

³⁰ For a discussion of caselaw regarding strict liability in the statutory rape context, see *infra* Part I.B.; for a review of the constitutionality of automatic sex offender registration,

the strict liability offender due process.³¹ In concert, these factors tip the balance from a constitutional scheme based on laudable governmental goals to an unconstitutional intrusion upon the registrant. As a result of this convergence, sex offender registration laws are no longer narrowly drawn to accomplish their regulatory purposes and are therefore unconstitutional as applied to the strict liability offender.³²

The factual pattern of *Owens v. State*³³ demonstrates the problem. He was eighteen.³⁴ She was sixteen – at least that is what she told him.³⁵ That is also what she told the two officers on routine patrol who discovered the couple in a state of undress in the back seat of a parked car late one evening.³⁶ The officers surmised that the couple, Timothy Owens and Ariel Johnson, had just engaged in sexual intercourse because a freshly used latex condom fell on the ground next to the car.³⁷ Only when one of the patrolmen became suspicious and followed up by calling Ariel's home did the officers find out that Ariel Johnson was not sixteen, as she had said.³⁸ She was, in fact, thirteen years old.³⁹

When Timothy Owens was charged with second degree rape⁴⁰ of Ariel Johnson, the trial court refused to admit evidence of Owens's reasonable, but mistaken, belief that the girl with whom he was having sexual intercourse was sixteen years old.⁴¹ In Maryland, statutory rape is a strict liability crime,⁴² and

see *infra* Part III.B.; and for the impact of *Lawrence* on the constitutionality of sex offender registration, see *infra* Part III.D.

³¹ The United States Constitution guarantees that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

³² The concept that a regulatory scheme may be unconstitutional if not narrowly drawn was explored in *Poritz*, 662 A.2d 367, 390 (N.J. 1995) (“The law is characterized as punitive only if the punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purposes – that is, if the law is ‘excessive,’ the excess consisting of provisions that cannot be justified as regulatory.”).

³³ 724 A.2d 43 (Md. 1999).

³⁴ See *id.* at 45.

³⁵ See Record Extract at E-15, *Owens v. State*, 724 A.2d 43 (Md. 1999) (No. 129).

³⁶ See *id.* at E-14.

³⁷ See *id.* at E-15.

³⁸ See *id.* at E-14-15.

³⁹ See *Owens*, 724 A.2d at 45. The facts recited in *Owens* were not in dispute. See *id.* Sometimes, however, it is the actor of majority age who has lied. See *State v. Clark*, 588 S.E.2d 66, 67 (N.C. Ct. App. 2003) (involving twenty-year-old who claimed to his twelve-year-old “girlfriend” that he was sixteen years old).

⁴⁰ See MD. CODE ANN., CRIM. LAW § 3-304(a)(3) (formerly MD. CODE art. 27 § 463) (LexisNexis 2002) (defining “rape in the second degree” to include “vaginal intercourse with another . . . if the victim is under the age of 14 years, and the person performing the act is at least 4 years older than the victim”).

⁴¹ Record Extract at E-31, *Owens*, 724 A.2d 43 (quoting the judge: “although I do not consider the mistake of age defense as far as the question of guilt or innocence is concerned,

consequently, mistake-of-age defense is not relevant to the proceedings.⁴³ Once the actus reus of intercourse with a person under a specified age has been proven, a conviction is secured.⁴⁴ Owens was convicted of second degree rape, and his conviction was affirmed by the Maryland Court of Appeals.⁴⁵ He was ordered to register as a child sex offender under Maryland law⁴⁶ and the community was notified of his status as a sexual offender.⁴⁷ Owens's registration as a sex offender was not based on an allegation of propensity toward the future commission of sexual offenses nor upon any notion that he represented a danger to the community.⁴⁸ Indeed, at no time during the trial or appeals that followed was it suggested that Owens was a sexual predator.⁴⁹

I do consider it as far as mitigation in concerned and consideration of the sentence to impose."); *see also id.* at E-15 ("The victim, if asked, would also testify that she had told the Defendant that she was 16 years of age."); *id.* at E-16 ("It's agreed by the State, she told Mr. Owens, the Defendant, she was 16 and she told the police officer that she was 16.").

⁴² See *Garnett v. State*, 632 A.2d 797, 803-04 (Md. 1993) (interpreting Maryland's legislative silence on mens rea with respect to statutory rape as creating a strict liability offense); *see also Owens*, 724 A.2d at 49 (rejecting the mistake-of-age defense).

⁴³ See *id.* at 585 (finding that Maryland's statutory rape law "makes no allowance for a mistake-of-law defense").

⁴⁴ See *id.* Maryland is not alone in its view that statutory rape is a strict liability crime. See *Carpenter*, *supra* note 28, at 385-91 (cataloging the thirty jurisdictions in which statutory rape is a strict liability offense). For a recent review of statutory rape, its policies, and countervailing arguments, see *State v. Jadowski*, 680 N.W.2d 810, 814-22 (Wis. 2004) (rejecting the mistake-of-age defense, thereby subjecting defendant to sex offender registration requirements).

⁴⁵ *Owens*, 724 A.2d at 43. Owens was sentenced to eighteen months of incarceration, with all but time served suspended, and eighteen months of supervised probation. In addition, he was ordered to register as a sex offender for ten years. Although his reasonable mistake-of-age defense was not allowed at trial, it was included at sentencing for purposes of mitigation. *Id.* at 45.

⁴⁶ *Id.*; *see MD. CODE ANN., CRIM. PROC.* § 11-701 (LexisNexis 2001) (defining "child sexual offender" as a person convicted of sexual offense involving a child under age fifteen). Under Maryland law, statutory rapists are required to register for at least ten years. *MD. CODE ANN., CRIM. PROC.* § 11-707 (LexisNexis 2001) (requiring registration for ten years for child sex offenders; however, life registration is required if the child was under twelve years of age, if the registrant is a repeat offender, if the registrant was convicted of a sexually violent offense, or if the registrant is determined to be a sexually violent predator).

⁴⁷ See *MD. CODE ANN., CRIM. PROC.* § 11-717 (LexisNexis 2001) (allowing public disclosure of registration statements and internet disclosure of registrants).

⁴⁸ The court expressed frustration over its lack of discretion with respect to whether Owens was required to register. See Record Extract at E-31, *Owens v. State*, 724 A.2d 43 (Md. 1999) (No. 129) ("The law also requires that the Defendant must register as a child sex offender and submit to DNA testing. I have no control over that. It's the law.").

⁴⁹ To the contrary, Timothy Owens had "no prior record, no prior involvement with the law whatsoever." *See Brief of Appellant* at 5, *Owens v. State*, 724 A.2d 43 (Md. 1999) (No. 1266).

The requirement that Owens register as a sex offender came solely from his conviction as a statutory rapist.⁵⁰ And the requirement that a statutory rapist register is not unique to Maryland.⁵¹ Whether it carries significant prison time or minimal jail time, conviction of statutory rape is subject to the requirements of registration and notification in the vast majority of jurisdictions.⁵²

Underlying Owens's conviction for strict liability statutory rape is the widely-held view that it is valid to substitute strict liability for criminal mens rea because the adult assumes the risk that he or she may be having sex with someone below the statutory age of consent.⁵³ And herein lies the quandary. While strict liability convictions for statutory rape have withstood constitutional scrutiny to date,⁵⁴ one must ask whether the same framework used for conviction should also be valid for the requirement to register as a sex offender. Without additional inquiry into the perpetrator's propensity for future dangerousness, using a strict liability conviction to require sex offender registration creates an uncharacteristically damaging label that cannot be defended – one based on a generalized notion of assumption of the risk,⁵⁵ which is hardly the language of sexual predatory conduct. When coupled with the recent Supreme Court ruling, which does not require individualized assessments of dangerousness prior to registration,⁵⁶ the spotlight shines more brightly and more harshly on the strict liability conviction used to trigger registration.

This article argues that even if assumption of risk is a viable framework for statutory rape,⁵⁷ it offers no rational basis to justify mandatory registration for sex offenders. Doing so only highlights the disconnect between the intended

⁵⁰ See Md. CODE ANN., CRIM. PROC. § 11-704 (LexisNexis 2001) (listing the categories of sexual offender, including "child sexual offender," who must register); *id.* at § 11-701(b)(2) (defining "child sexual offender" to include persons convicted of statutory rape).

⁵¹ See *infra* Part II (listing strict liability states that require registration).

⁵² See *id.*

⁵³ See, e.g., *State v. Martinez*, 14 P.3d 114, 120 (Utah Ct. App. 2000) (observing that risk of mistake as to partner's age is placed on the older person who chooses to engage in the sexual activity).

⁵⁴ See, e.g., *Owens*, 724 A.2d at 45 (holding that due process did not entitle defendant to mistake-of-age defense); *State v. Jadowski*, 680 N.W.2d 810, 822 (Wis. 2004) (declaring that prohibition of affirmative mistake of age defense comports with due process).

⁵⁵ See *infra* Part I.B. (discussing the theory of assumption of the risk in the context of statutory rape).

⁵⁶ See *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (concluding that there is no procedural due process violation in a registration scheme that does not provide for individualized assessments of dangerousness).

⁵⁷ See *infra* Part I.B. (tracing the genesis of strict liability and reviewing the arguments in favor of it). In an earlier piece, I argued that based on *Lawrence v. Texas*, 539 U.S. 558 (2003), statutory rape should no longer be a strict liability offense, and that *Morissette v. United States*, 342 U.S. 246 (1952), should be clarified insofar as it suggests that statutory rape could be a strict liability crime. Carpenter, *supra* note 28, at 364-71.

purpose of the regulatory scheme and its actual effect. What was intended to protect the community inevitably becomes a punitive scheme designed to shame the statutory rapist without the attendant regulatory civil benefits of tracking recidivists or protecting the public. As the Third Circuit stated, “While even a substantial ‘sting’ will not render a measure ‘punishment’ . . . at some level the ‘sting’ will be so sharp that it can only be considered punishment regardless of the legislators’ subjective thoughts.”⁵⁸ Without an underlying basis that the strict liability offender was ever dangerous, or an individualized assessment that the offender is likely to reoffend, the requirement to register serves no rational purpose.

To understand the unique issues affecting registration of the strict liability offender, this article will first offer in Part I a primer on statutory rape and the genesis of strict liability in the thirty jurisdictions that employ it, followed by an overview in Part II of sex offender registration laws and community notification statutes as they apply to statutory rape. Part III will examine the general constitutional principles affecting sex offender registration laws and will challenge the constitutionality of the strict liability statutory rapist’s inclusion in the registry on two bases: first, due process is denied the strict liability offender because of the Supreme Court’s endorsement of a registry system that does not require individualized assessment of dangerousness, and secondly, that under evolving liberty interests of *Lawrence*, unwarranted loss of reputation deserves greater substantive due process protection.

To whatever degree strict liability statutory rape may be justified, inclusion of strict liability offenders in the registry does not satisfy the two part “intent-effects” test of *Mendoza-Martinez*⁵⁹ because their registration is excessive in relation to the alternative regulatory purpose of sex offender registration laws. As such, the punitive impact on the strict liability offender outweighs the regulatory nature of the registration statute.

Yes, people are frightened, and that is understandable. Sex offender registration laws and community notification statutes are important in the state’s arsenal to protect its citizens from sexual predators. Despite their value, however, this article concludes that the net has been cast too widely, and the stigma created too great, to include actors, like Timothy Owens,⁶⁰ who are made to suffer the burdens of registration only because they were held strictly liable.

⁵⁸ E.B. v. Verniero, 119 F.3d 1077, 1101 (3d Cir. 1997) (citation omitted).

⁵⁹ See *infra* Part III.A.1 (discussing the *Mendoza-Martinez* test).

⁶⁰ See *supra* notes 33-50 and accompanying text.

I. STATUTORY RAPE

A. *The Basics*

Statutory rape is an anomaly. Historically devised to protect the innocence of youth,⁶¹ statutory rape laws continue in force today, even though most Americans admit to having their first sexual experience as teenagers, and for more than twenty percent of Americans, their first sexual encounter occurred prior to the age of fifteen.⁶² At its essence, statutory rape is unlawful sexual intercourse with a person under a specified age, who, because of that age, is presumed incapable of consenting to the sexual activity.⁶³ Unlike rape, where the primary focus is on sexual intercourse accomplished against the will of the victim,⁶⁴ the crime of statutory rape is premised on a different rationale.⁶⁵ Key

⁶¹ See, e.g., *People v. Salazar*, 920 P.2d 893, 895 (Colo. Ct. App. 1996) (observing that “the purpose underlying the crime of statutory rape at common law was to protect the morals of children from the consequences of acts that they were not able to comprehend”); *State v. Granier* 765 So. 2d 998, 1001 (La. 2000) (“The policy underlying such a statute is a presumption that, because of their innocence and immaturity, juveniles are prevented from appreciating the full magnitude and consequences of their actions.”); see also *Miller v. State*, 79 So. 314, 315 (Ala. Ct. App. 1918) (reasoning that young girls who are more mature in their appearance are those “whom the statute is intended to protect, and who most need the protection of this statute”).

⁶² THE ALAN GUTTMACHER INSTITUTE, FACTS IN BRIEF: TEEN SEX AND PREGNANCY (1999), http://www.agi-usa.org/pubs/fb_teen_sex.pdf (asserting that most young people first have sex in their late teens, and that twenty percent of girls and thirty percent of boys have had sex by the age of fifteen); see Britton Guerrina, *Mitigating Punishment for Statutory Rape*, 65 U. CHI. L. REV. 1251, 1255 (1998) (acknowledging that “most states have recognized that such laws are ill-adapted to the contemporary complexity of sexual relationships”); Michelle Oberman, *Regulating Consensual Sex With Minors: Defining A Role For Statutory Rape*, 48 BUFF L. REV. 703, 703-04 (2000) (observing that because so many underage adolescents are having sexual intercourse, there are, in effect, 7.5 million statutory rapes per year).

⁶³ See BLACK’S LAW DICTIONARY 1288 (8th ed. 2004) (defining statutory rape as “[u]nlawful sexual intercourse with a person under the age of consent (as defined by statute), regardless of whether it is against that person’s will”). Referred to in this article as “statutory rape,” the crime has a variety of other names. See, e.g., ALASKA STAT. § 11.41.434 (2004) (“sexual abuse of a minor”); ARIZ. REV. STAT. ANN. § 13-1405 (2001) (“sexual conduct with a minor”); LA.. REV. STAT. ANN. § 14:80 (2004) (“felony carnal knowledge of a juvenile”); ME. REV. STAT. ANN. tit. 17-A, § 253 (1983) (“gross sexual misconduct”); NEV. REV. STAT. § 200.368 (2003) (“statutory sexual seduction”).

⁶⁴ For a discussion of common law rape, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.04 (3d ed. 2001) (detailing elements of common law rape). Modernly, states have expanded the common law definition of force to include other instances where intercourse is against the will of the victim. See, e.g., CAL. PENAL CODE § 261 (West 1999) (recounting seven circumstances that support the charge of rape, including where the victim is unconscious, intoxicated, or suffering from a mental disorder).

in statutory rape is the acknowledgement that while the activity may be voluntary, it is nonetheless criminalized because the state maintains a strong interest in protecting its minors from sexual exploitation by older individuals,⁶⁶ unwanted pregnancies,⁶⁷ and physical and emotional trauma due to early sexual activity.⁶⁸ It is common, as in *Owens*, that the underage partner –

⁶⁵ There are occasions where the lines blur between the crimes of rape and statutory rape. *See, e.g.*, Michael M. v. Super. Ct., 450 U.S. 464, 466 (1981) (concerning conviction for statutory rape although there was significant evidence of violence during the intercourse); State v. Carlson, 767 A.2d 421, 423 (N.H. 2001) (involving conviction for statutory rape where victim testified that she felt afraid during the sexual activity); Reid v. State, 290 P.2d 775, 779-780 (Okla. Crim. App. 1955) (describing differing accounts by underage victim and defendant of whether intercourse was consensual). *But see* State v. Searles, 621 A.2d 1281, 1284 (Vt. 1993) (admitting in statutory rape trial evidence of force, which is usually associated with rape prosecutions). Sometimes, rape and statutory rape are charged together. *See, e.g.*, State v. Collins, 508 S.E.2d 390, 390 (Ga. 1998) (detailing charges against defendant of rape and the lesser-included offense of statutory rape); State v. Smith, 576 P.2d 1110, 1110-11 (Mont. 1978) (upholding convictions for both rape and statutory rape, where perpetrator forced the underage victim to the floor, restrained her, and removed her pants).

⁶⁶ *See, e.g.*, State v. Blake, 777 A.2d 709, 712 (Conn. App. 2001) (observing the need to protect youth from being taken advantage of by someone who is significantly older); State v. Anthony, 528 S.E.2d 321, 324 (N.C. 2000) (emphasizing the state's interest in protecting children thirteen to fifteen); State v. Yanez, 716 A.2d 759, 766 (R.I. 1998) (explaining that the statute is designed to “[protect] female children from the severe physical and psychological consequences of engaging in coitus before attaining the age of consent in the statute”); State v. Martinez, 14 P.3d 114, 118 (Utah Ct. App. 2000) (reiterating the “legislative intent to protect minors from sexual exploitation by older individuals”); State v. Jadowski, 680 N.W.2d 810, 817 (Wis. 2004) (identifying the state’s goal to protect children from predators).

⁶⁷ For a blunt legislative directive, see 1996 Cal. Stat. 789 (“Society can no longer ignore the disregard of statutory rape laws and the consequent increase in teenage pregnancies. The laws prohibiting adults from having sexual relations with persons under the age of 18 years must be more vigorously enforced.”); *see also* CAL. PENAL CODE § 261.5e(2) (West 1999):

The district attorney may bring actions to recover civil penalties [for statutory rape] From the amounts collected for each case, an amount equal to the costs of pursuing the action shall be deposited with the treasurer of the county in which the judgment was entered, and the remainder shall be deposited in the Underage Pregnancy Prevention Fund, which is hereby created in the State Treasury. Amounts deposited in the Underage Pregnancy Prevention Fund may be used only for the purpose of preventing underage pregnancy

⁶⁸ *See Michael M.*, 450 U.S. at 470-72 (chronicling the interests of the state in prosecuting underage sex); *People v. Dozier*, 424 N.Y.S.2d 1010, 1014 (N.Y. App. Div. 1980) (including in the list of state concerns “[f]orce marriage, unwed motherhood, adoption, abortion, [and] the need for medical treatment”). And in an interesting twist, see *State v. Barry*, 373 A.2d 355, 357 (N.H. 1977) (indicating that statutory rape laws were not only for the protection of the emotionally and sexually immature, but for the protection of all under the age of consent, “regardless of their maturity”). For a general discussion of the

sometimes statutorily referred to as “the other person,”⁶⁹ the “victim,”⁷⁰ or the “child”⁷¹ – voluntarily engaged in the sexual activity.⁷² Indeed, it is not unusual for the underage partner to testify to this fact at time of trial.⁷³ Nevertheless, the sexual activity is conclusively presumed unlawful because the underage partner does not have the capacity to consent to such activity.⁷⁴ Interestingly, although states are in agreement that young people do not have the maturity to make decisions regarding sexual activity, there is great disparity of legislative thought as to the appropriate age of consent, with states

policies behind statutory rape laws, *see* WAYNE R. LAFAVE, CRIMINAL LAW § 17.4(c) (4th ed. 2003).

⁶⁹ *See, e.g.*, IOWA CODE § 709.4(2)(c) (2003) (describing underage partner as “[t]he other person”); MICH. COMP. LAWS ANN. § 750.520d (West 2004) (defining the underage person as “[t]hat other person” between thirteen and sixteen years of age); VT. STAT. ANN. tit. 13, § 3252(a)(3) (1998) (defining victim as “[t]he other person” under age of sixteen).

⁷⁰ *See, e.g.*, MD. CODE ANN., CRIM. LAW § 3-304(3) (LexisNexis 2002) (describing the underage person as “the victim”); NEB. REV. ST. § 28-319(1)(c) (1995) (same); N.J. STAT. ANN. § 2C:14-2 (West 2005) (same).

⁷¹ *See, e.g.*, VA. CODE ANN. § 18.2-63 (2004) (defining underage person between thirteen and fifteen as “such child”).

⁷² *See* Owens v. State, 724 A.2d 43, 45 (Md. 1999); *see also* Walker v. State, 768 A.2d 631, 632 (Md. 2001) (detailing account by fifteen-year-old runaway that she had consensual sex with defendant); State v. Campbell, 473 N.W.2d 420, 423 (Neb. 1991) (involving fourteen-year-old complainant who stated that she had consensual sex with the defendant); State v. McLean, 580 S.E.2d 431, 432 (N.C. Ct. App. 2003) (concerning thirteen-year-old who admitted she initiated the sexual encounters with defendant).

⁷³ *See, e.g.*, People v. Hernandez, 393 P.2d 673 (Cal. 1964) (regarding female who was three months shy of her eighteenth birthday and who testified in defendant’s offer of proof that she voluntarily engaged in sexual intercourse with defendant); Jenkins v. State, 877 P.2d 1063, 1064 (Nev. 1994) (recounting testimony by complainant that she had consensual sex with defendant over a three to four week period); *cf.* State v. Thorp, 2 P.3d 903, 904-05 (Or. Ct. App. 2000) (describing testimony at sentencing by underage partner that the defendant “didn’t do anything wrong” and by her mother that “she did not consider ‘two young kids making love’ to be rape”).

⁷⁴ *See, e.g.*, State v. Searles, 621 A.2d 1281, 1283 (Vt. 1993) (recognizing the state’s “enhanced concern for the protection and well-being of minors and the gravity we attach to crimes involving the exploitation of minors”); State v. Jadowski, 680 N.W.2d 810, 817 (Wis. 2004) (articulating the state’s “strong interest in the ethical and moral development of its children”). For a general endorsement of the state’s ability to control the actions of minors, see Bellotti v. Baird, 443 U.S. 622, 635 (1979), recounting cases in which the Court has held that

[s]tates validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.

pegging the age of consent from fourteen⁷⁵ to eighteen years old.⁷⁶ In a case that highlights the arbitrariness of the selected age of consent, one need only look to a Georgia case which involved a voluntary sexual relationship between an adult and a fifteen-year-old. In that case, the relationship was considered lawful until the state increased the age of consent to sixteen years.⁷⁷

Statutory rape schemes have grown in complexity. They often involve a number of separate offenses based on the activity proscribed and the ages defined.⁷⁸ Depending on the state's age of consent and the nature of the offense, they may also include age differential requirements between the perpetrator and underage partner.⁷⁹

⁷⁵ See, e.g., ARK. CODE ANN. § 5-14-103(a)(1)(C)(i) (1997 & Supp. 2005) (setting the age of consent at fourteen years).

⁷⁶ See, e.g., CAL. PENAL CODE § 261.5(a) (West 1999) (defining a minor as "a person under the age of 18 years"); IDAHO CODE ANN. § 18-6101 (2004) (classifying as a victim any "female [who] is under the age of eighteen (18) years").

⁷⁷ See *Phagan v. State*, 486 S.E.2d 876, 879 (Ga. 1997) (affirming statutory rape conviction where sexual activity with the fifteen-year-old was lawful prior to a statutory increase in the age of consent, but the continuing sexual relationship became unlawful following the statutory change).

⁷⁸ See, e.g., N.J. STAT. ANN. § 2C:14-2 (West 2005) (defining "aggravated sexual assault" as sexual penetration where the victim is less than thirteen years old, or where the victim is between thirteen and sixteen years old and the actor is in a special relationship to the victim, among other circumstances; defining "sexual assault" as either: sexual contact with a victim less than thirteen years old and where the actor is four years older than victim; or where there is penetration of a victim between sixteen and eighteen years old and the actor is in a special relationship to the victim or where the victim is at least thirteen but less than sixteen years old and the actor is at least four years older than the victim, among other circumstances); see also MINN. STAT. ANN. § 609.342-345 (West 2003 & Supp. 2006) (proscribing sexual penetration, conduct, or contact with an underage person, and including four separate offenses depending on both the ages of the victim and the perpetrator).

⁷⁹ See *id.*; see also, e.g., ALASKA STAT. § 11.41.436(a)(1), (b) (2004) (charging as a Class B felony sexual abuse of a victim who is between thirteen and fifteen by one who is at least three years older than the victim); *id.* § 11.41.440 (categorizing as a Class A misdemeanor sexual abuse of a victim who is younger than thirteen by an offender under the age of sixteen and at least three years older than the victim, or where the victim is sixteen or seventeen and the offender is at least eighteen and at least three years older than the victim); N.C. GEN. STAT. § 14-27.7A (2005) (charging Class B1 felony if victim is thirteen, fourteen, or fifteen years old and defendant is at least six years older, and as a Class C felony if the victim is thirteen, fourteen, or fifteen years old and defendant is between four and six years older); VA. CODE ANN. § 18.2-63 (2004) (charging as a Class 4 misdemeanor carnal knowledge when the accused is a minor and the consenting victim is "less than three years the accused's junior" and charging as a Class 6 felony carnal knowledge when the accused is a minor and the consenting victim "is three years or more the accused's junior"). For other states that classify the crime depending on the age of the victim and perpetrator, see N.Y. PENAL LAW §§ 130.25-.50, 130.75-.80 (McKinney 2004); OHIO REV. CODE ANN. § 2907.04 (LexisNexis 2003).

Two occurrences in recent years have reshaped the contours of statutory rape. The first relates to the expanded scope of prosecution. Originally gender-specific, statutory rape was established to charge males for intercourse with underage females who were believed to need the protection of the state.⁸⁰ Today, statutory rape is gender-neutral in all but one state,⁸¹ although vestiges of gender-specific language remain.⁸²

The second change is the trend to decriminalize, in certain circumstances, peer-on-peer underage sexual activity. Until recently, and especially when statutory rape was gender-specific, underage males were charged with statutory rape for having sexual intercourse with underage females.⁸³ Perhaps because of a dawning recognition that the threat of criminal prosecution was not a realistic deterrent to peer-on-peer high school sexual activity, some states have retreated from this type of prosecution or have statutorily prescribed lower penalties.⁸⁴ In certain circumstances, including where the sexual activity

⁸⁰ See *People v. Hernandez*, 393 P.2d 673, 674 (Cal. 1964) (“This goal, moreover, is not accomplished by penalizing the naive female but by imposing criminal sanctions against the male, who is conclusively presumed to be responsible for the occurrence.”). The California Supreme Court, later upholding the constitutionality of the gender-specific statute, stated that “[t]he injurious effects of pregnancy on an unwed teenager are . . . substantial, far-reaching, and may well include severe physical, mental and emotional trauma.” *Michael M. v. Super. Ct.*, 601 P.2d 572, 575 (Cal. 1979), *aff’d*, 450 U.S. 464 (1981). Although the U.S. Supreme Court has upheld gender-specific statutory rape schemes, an equal protection issue remains unresolved concerning disparate treatment between heterosexual statutory rape and homosexual statutory rape. See *Limon v. Kansas*, 539 U.S. 955, 955 (2003) (vacating judgment of *State v. Limon*, 41 P.3d 303 (Kan. 2002), in light of *Lawrence v. Texas*, 539 U.S. 558 (2003)).

⁸¹ Only Idaho remains gender-specific. See IDAHO CODE ANN. § 18-6101 (2004) (defining statutory rape to be “where the female is under the age of eighteen (18) years”). See *Carpenter*, *supra* note 28, at 338-39 (describing the changes from gender-specific to gender-neutral terminology).

⁸² See, e.g., 1996 Cal. Stat. 789 (warning “[a]dult males who prey upon minor girls” to accept responsibility for their actions); KY. REV. STAT. ANN. § 510.040 (LexisNexis 1999) (referring to the perpetrator as “he” throughout the Code); WYO. STAT. ANN. § 6-2-308 (2005) (prohibiting an affirmative defense if “the actor did not know the victim’s age, or that he reasonably believed that the victim was twelve (12) years or fourteen (14) years of age or older” (emphasis added)).

⁸³ See, e.g., *Michael M. v. Super. Ct.*, 450 U.S. 464, 466 (1981) (affirming conviction of 17-and-a-half-year-old male for statutory rape of a sixteen-year-old female in a state where age of consent was eighteen); *People v. Mackey*, 120 Cal. Rptr. 157, 160 (Cal. App. 1975) (upholding conviction of seventeen-year-old male for statutory rape of fourteen-year-old female); *In re Interest of J.D.G.*, 498 S.W.2d 786, 791-93 (Mo. 1973) (affirming conviction of fifteen-year-old male for statutory rape of female under sixteen); *Shelton v. State*, 554 P.2d 1378 (Okla. Crim. App. 1976) (permitting charge of seventeen-year-old with second degree rape of underage female).

⁸⁴ See Charles A. Phipps, *Misdirected Reform: On Regulating Consensual Sexual Activity Between Teenagers*, 12 CORNELL J.L. & PUB. POL’Y 373, 408 (2003) (reporting that

is believed to be voluntary and where the victim is close to the age of consent, states have either required the prosecuted actor to be at least eighteen years of age,⁸⁵ and/or have included age differentials between the actor and the underage partner, which necessarily require the actor to be at least eighteen years of age.⁸⁶ For states that do prosecute underage actors, some have considered their youth at sentencing.⁸⁷

"nearly every state divides sex offenses against minors into at least two tiers, creating a more serious offense involving younger victims (typically under fourteen) and a less serious offense involving older victims (typically those aged fourteen and fifteen)"; *see also* Michelle Oberman, *Turning Girls into Women: Re-evaluating Modern Statutory Rape Laws*, 85 J. CRIM. L. & CRIMINOLOGY 15, 16 (1994) (quoting Los Angeles District Attorney's Office policy "not to file criminal charges where there is consensual sex between teenagers"). In Kansas, the crime of unlawful voluntary sexual relations, KAN. STAT. ANN. § 21-3522 (1995 & Supp. 2004), which penalizes peer-on-peer adolescent sexual activity less seriously, has been called the "Romeo and Juliet law." *See State v. Limon*, 83 P.3d 229, 243 (Kan. App. 2004) (recognizing that the purpose of the 'Romeo and Juliet' law "reflect[s] the judgment that consensual sex between males and females of specified ages should have less severe punishment than consensual sex between older males (usually) and young females"). The "Romeo and Juliet law" was subsequently overturned because it was held to violate equal protection. *See State v. Limon*, 122 P.3d 22, 24 (Kan. 2005) (finding the "Romeo and Juliet law" unconstitutional because it "results in a punishment for unlawful sexual conduct between members of the opposite sex that is less harsh than the punishment for the same conduct between members of the same sex").

⁸⁵ *See, e.g.*, NEB. REV. ST. § 28-319-1(c) (1995) (defining first-degree sexual assault to include where the actor is at least nineteen and the victim is less than sixteen years old); N.Y. PENAL LAW § 130.30 (McKinney 2004) (prohibiting sexual conduct between actor who is eighteen years or older and victim who is less than fifteen). *But see* ALA. CODE § 13-A6-62 (2005) (prohibiting sexual conduct between person over sixteen years of age and person under the age of sixteen); *accord* S.D. CODIFIED LAWS § 22-22-7 (1998) (criminalizing sexual contact by person sixteen years of age or older with person under the age of sixteen).

⁸⁶ *See, e.g.*, HAW. REV. STAT. ANN. § 707-732(c) (LexisNexis 2003 & Supp. 2005) (defining actor as someone "not less than 5 years older" than minor who is between fourteen and sixteen years of age); IOWA CODE ANN. § 709.4(2)(c)(4) (West 2003) (proscribing sexual conduct of someone who is fourteen or fifteen years old by someone who is at least four years older); MICH. COMP. LAWS. ANN. § 750.520e (West 2004) (proscribing sexual conduct where the victim is between thirteen and sixteen years of age and the actor is five or more years older); N.C. GEN. STAT. § 14-27.7A(a) (2005) (prohibiting sexual act with a person who is thirteen, fourteen, or fifteen years old where the defendant is at least six years older than that person). This is not to suggest that underage actors always escape prosecution. Sometimes, criminal statutes do not exclude underage actors in the class of persons to be prosecuted where the victim is below a certain age. *See, e.g.*, HAW. REV. STAT. § 707-732(1)(b) (2003) (charging "a person [who] knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person"); IOWA CODE ANN. § 709.4(2)(b) (West 2003) (prohibiting a sex act by a person where the other person is twelve or thirteen years of age); N.C. GEN. STAT. § 14-27.4(a)(1) (2005) (criminalizing a sexual act where the victim is under the age of thirteen).

B. *But the Victim Lied and Why it Is Irrelevant: Examining Strict Liability in Statutory Rape*

It is a fundamental principle in criminal jurisprudence that conviction of a crime requires proof of both the actus reus and mens rea of the crime.⁸⁸ The public welfare offense doctrine, with strict liability as its hallmark, serves as an exception to this rule. Applied to petty crimes affecting traffic and the sale of food and liquor, public welfare offenses were designed to help burgeoning cities ease the obstruction that might develop with the increasing numbers of prosecutions.⁸⁹ As one scholar observed, requiring both actus reus and mens rea for blameworthiness was not suited to the numerous petty offenses created for urban life.⁹⁰

Statutory rape as a strict liability crime is a marked departure from both the basic premise of criminal jurisprudence and from its counter-model, the public welfare offense. Two reasons stand out – the punishment that attaches and the subject matter of the prohibition are strikingly different from traditional public welfare offenses and identical to other criminal offenses. First, unlike public welfare offenses, which are generally infractions and misdemeanors that carry light monetary fines,⁹¹ statutory rape can carry significant penalties and

and “the defendant is at least twelve years old and is at least four years older than the victim”).

⁸⁷ See, e.g., GA. CODE ANN. § 16-6-3(b) (2003) (altering sentencing provisions depending on age of perpetrator and age of victim); see also State v. Yanez, 716 A.2d 759, 769 (R.I. 1998) (permitting defendant’s mistaken belief of the victim’s age to be considered at sentencing).

⁸⁸ See WILLIAM BLACKSTONE, 4 COMMENTARIES *21 (declaring that because no court can read the mind of the actor, an act must be accompanied by the desire to do the act). This basic principle is reflected in the oft-quoted maxim “*actus non facit reum nisi mens sit rea*” – an act does not make one guilty unless one’s mind is guilty.” See also United States v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978) (“We start with the familiar proposition that “[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”” (quoting Dennis v. United States, 341 U.S. 494, 500 (1951))); State v. Steiffler, 788 P.2d 220, 221 (Idaho 1990) (quoting State v. Sterrett, 207 P. 1071, 1072 (Idaho 1922), in voicing the common law position that “a crime possessed the element of an evil intention together with an unlawful act”). But see Lambert v. California, 355 U.S. 225, 228 (1957) (disagreeing with Blackstone’s position that mens rea is always necessary to constitute a crime, “for conduct alone without regard to the intent of the doer is often sufficient”).

⁸⁹ See Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 61-70 (1933) (discussing the public welfare offense doctrine).

⁹⁰ Id. at 69, 72; see also Morissette v. United States, 342 U.S. 246, 253 (1952) (explaining that “[c]onvenience of the prosecution thus emerged as a rationale” for public welfare offenses).

⁹¹ See Sayre, *supra* note 89, at 72-73 (detailing the traditional types of public welfare offenses); see also id. at 72 (“To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice . . .”); Commonwealth v. Koczwara, 150 A.2d 825, 827 (Pa. 1959) (“[Public

repercussions.⁹² Such a characterization runs contrary to the general rule that the severity of the penalty is an important factor in deciding whether mens rea may be eliminated.⁹³ Despite its harsh penalties, the view stubbornly persists that statutory rape is a strict liability crime.⁹⁴ In *State v. Yanez*,⁹⁵ involving an eighteen-year-old sentenced to twenty years in prison for statutory rape, the dissenting justice presented the issue well when he argued against the constitutionality of strict liability in statutory rape: “[T]he degree of punishment and societal opprobrium befitting true sexual-abuse crimes cannot be so cavalierly imposed without regard to the culpable intention of the actor as can the light fines and slap-on-the-wrist penalties attached to typical public-welfare offenses.”⁹⁶

The subject matter of statutory rape is also not traditionally associated with public welfare offenses.⁹⁷ Unlike the petty crimes traditionally associated with the administration of urban life, scholars report that statutory rape arose as a

welfare] statutes are generally enforceable by light penalties . . . [and] are totally different from those applicable to true crimes, which involve moral delinquency and which are punishable by imprisonment or another serious penalty.”).

⁹² See, e.g., ALA. CODE § 13A-5-6(2) (2005) (providing up to twenty years for Class B felonies, which under section 13A-6-62, includes statutory rape of a person between the ages of twelve and sixteen by another who is at least sixteen years of age and at least two years older than the victim); GA. CODE ANN. § 16-6-3(b) (2003) (providing up to twenty years punishment for statutory rape, and a minimum of ten years if perpetrator is over twenty-one years of age); MD. CODE ANN., CRIM. LAW § 3-304(b) (LexisNexis 2002) (prescribing maximum twenty-year prison sentence for statutory rape where victim is younger than fourteen and perpetrator is at least four years older); MASS. GEN. LAWS ch. 265, § 23 (2004) (establishing potential life sentence for statutory rape); MISS. CODE ANN. § 97-3-65(3)(a)-(b) (1999 & Supp. 2005) (conferring sentences of up to five years for perpetrators between the ages of eighteen and twenty-one, and up to thirty years for perpetrators who are over twenty-one); R.I. GEN. LAWS § 11-37-8.2 (2002) (providing sentence between twenty years and life for first degree child molestation sexual assault).

⁹³ See *Staples v. United States*, 511 U.S. 600, 618 (1994) (explaining that the severity of the penalty suggests that Congress did not intend to make possession of an unregistered machine gun a strict liability crime); see also *State v. Guest*, 583 P.2d 836, 838 (Alaska 1978) (concluding that statutory rape “may not appropriately be characterized as a public welfare offense. It is a serious felony”).

⁹⁴ See, e.g., *Owens v. State*, 724 A.2d. 43, 50 (Md. 1999) (“Nor do we believe that the risk of 20 years of imprisonment or the trial court’s requirement that the defendant register as a ‘child sex offender’ renders unconstitutional [the strict liability assessment of] Maryland’s statutory rape law.”); *Commonwealth v. Moore*, 269 N.E.2d 636, 640 (Mass. 1971) (acknowledging the potential “Draconian” punishment in the face of strict liability but upholding Massachusetts strict liability statutory rape law).

⁹⁵ 716 A.2d 759, 767 (R.I. 1998) (holding due process does not require a mens rea element for the victim’s age in statutory rape).

⁹⁶ *Id.* at 781 (Flanders, J., dissenting).

⁹⁷ See *Sayre, supra* note 89, at 73 (asserting that statutory rape crimes are distinct from public welfare offenses).

morality offense in the thirteenth century.⁹⁸ Indeed, if statutory rape has its roots as a strict liability offense at common law, it may have been influenced by the presumption of criminality associated with sexual behavior of one so young.⁹⁹

Yet, it is not entirely accurate to paint the crime with one broad brush. Not all jurisdictions consider statutory rape a strict liability crime. While thirty jurisdictions, including the District of Columbia, treat statutory rape as a strict liability offense,¹⁰⁰ three states allow a good faith mistake-of-age defense in all cases,¹⁰¹ and eighteen states that employ strict liability provide a limited mistake-of-age defense where the victim is close to the age of consent as prescribed by statute.¹⁰²

Under a strict liability framework in statutory rape, the prosecution need only prove the actus reus of intercourse with the underage person. The state is not required to prove mens rea, and consequently, the defendant may not offer an affirmative mens rea defense of mistake-of-age. No matter the compelling

⁹⁸ See Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 800-04 (2001) (tracing scholarly review of the common law roots of statutory rape to protect the female's chastity); see also Commonwealth v. Decker, 698 A.2d 99, 102 (Pa. Super. 1997) (finding that sexual activity between a thirty-seven-year old male and a fifteen-year-old female "would offend the common sense of the community and the sense of decency, propriety and the morality which most people entertain").

⁹⁹ There is debate on whether the common law employed strict liability in sex offenses. See Morissette v. United States, 342 U.S. 246, 251 n.8 (1952) (noting in dicta that strict liability was employed in sex offenses at common law). But see Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 106-07 (1965-66) (arguing that sex offenses at common law were not strict liability crimes).

¹⁰⁰ The jurisdictions that employ strict liability for statutory rape are: Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, and Wisconsin. See Carpenter, *supra* note 28, at 385-91 (providing jurisdictional analysis of states that employ strict liability in all statutory rape contexts).

¹⁰¹ The three jurisdictions that provide for a mistake-of-age defense in all statutory rape crimes are Alaska, Indiana, and Kentucky. See Carpenter, *supra* note 28, at 385, 387 (offering analysis of the three states, and labeling them "true crime" jurisdictions for their support of the mens rea requirement in statutory rape).

¹⁰² The eighteen jurisdictions that employ strict liability but also provide a limited mistake-of-age defense are: Arizona, Arkansas, California, Colorado, Illinois, Maine, Minnesota, Missouri, Montana, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Washington, West Virginia, and Wyoming. See Carpenter, *supra* note 28, at 385-91 (detailing analysis of the eighteen jurisdictions described as "hybrid" jurisdictions because they employ both strict liability and a limited mens rea defense).

evidence that the underage partner lied about his or her age,¹⁰³ or the reasonableness of defendant's mistaken belief,¹⁰⁴ defendant's mens rea is not relevant at time of trial.¹⁰⁵ Indeed, for purposes of determining guilt, it is irrelevant whether defendant is a sexual predator who has demonstrated a predilection for underage partners, or is a nineteen-year-old who is simply operating under a reasonable mistake of fact. Conviction for statutory rape in strict liability jurisdictions *makes no such distinction.*¹⁰⁶

¹⁰³ See *Owens v. State*, 724 A.2d 43, 44 (Md. 1999) (involving thirteen-year-old who told defendant and the police that she was sixteen); *see also Walker v. State*, 768 A.2d 631, 632 (Md. 2001) (regarding fifteen-year-old complainant who told defendant she was seventeen years old, and whom defendant believed because her place of employment refused to hire persons younger than seventeen); *Commonwealth v. Moore*, 269 N.E.2d 636, 639 (Mass. 1971) (concerning fourteen-year-old victim who used a false identification card to convince the defendant, police officers, her probation officer, her lawyer, and a judge, that she was eighteen years old); *People v. Cash*, 351 N.W.2d 822, 823 (Mich. 1984) (detailing defendant's claim that victim, who was one month shy of her sixteenth birthday – the threshold age for consent – told defendant she was seventeen years old); *State v. Carlson*, 767 A.2d 421, 423 (N.H. 2001) (involving fifteen-year-old victim who told the defendant that she was sixteen).

¹⁰⁴ In an especially fact-rich case, one justice lamented on the difficulty of determining the victim's true age because of all the documentation she provided. *See Jenkins v. State*, 877 P.2d 1063, 1067 (Nev. 1994) (Springer, J., dissenting) (asserting that the evidence of the victim's age provided by an adoption certificate, where a birth certificate did not exist, does not support "a jury's conclusion, beyond a reasonable doubt, that [the victim] was fourteen years old at the time the sexual acts were being performed"). Not all claims of good faith are reasonable, however. *See, e.g.*, *People v. Salazar*, 920 P.2d 893, 895 (Colo. Ct. App. 1996) (rejecting defendant's claim of good faith belief that eleven-year-old was seventeen or eighteen years of age).

¹⁰⁵ *See, e.g.*, *State v. Silva*, 491 P.2d 1216, 1217 (Haw. 1971) (stating that Hawaii's strict liability statutory rape law "denounces the mere doing of the act as criminal, regardless of whether the perpetrator had a bad mind, the generalized intent to engage in a course of criminal conduct"); *State v. Hodge*, 866 So.2d 1270, 1272 (Fla. App. 2004) ("The legislature left no doubt as to its intention that this offense be treated as a strict liability crime for which the State was not required to prove criminal scienter on the part of Hodge").

¹⁰⁶ *See State v. Yanez*, 716 A.2d 759 (R.I. 1998). In *Yanez*, the dissent argued that there is a world of difference between a crime involving intentional child molestation and a situation . . . in which two teenage lovers engage in a fully consensual act . . . of sexual intercourse in the mistaken belief on the part of one of them that they are both of a legal age to do so.

Id. at 772 (Flanders, J., dissenting). In the troubling case of Raymond Garnett, a twenty-year-old mentally retarded male convicted of strict liability statutory rape of a thirteen year old, the defendant argued that the events surrounding the sexual activity "were inconsistent with the criminal sexual exploitation of a minor by an adult." *Garnett v. State*, 632 A.2d 797, 800 (Md. 1993) (detailing Erica's apparent sexual assertiveness as contrasted with Raymond's mental retardation to present a picture inconsistent with sexual exploitation by defendant). Indeed, students who read *Garnett* in my first year Criminal Law class often view Raymond as the victim.

The modern endorsement of statutory rape as a strict liability crime stems from two distinct sources: legislative authority to eliminate an element of a crime;¹⁰⁷ and dicta from the landmark United States Supreme Court decision of *Morissette v. United States*, a case involving theft of government property.¹⁰⁸ In general, great deference is afforded legislative decisionmaking to eliminate a mens rea requirement,¹⁰⁹ and it is equally true in statutory rape where courts have concluded that, despite ambiguously worded statutes or statutes that appear silent on the subject, legislative intent controls whether statutory rape is a strict liability crime.¹¹⁰

It is somewhat surprising, however, that *Morissette* should also be used to bolster the proposition that statutory rape is a strict liability offense.¹¹¹ After

¹⁰⁷ See *Lambert v. California*, 355 U.S. 225, 228 (1957) (acknowledging “wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition”); *see also United States v. Balint*, 258 U.S. 250, 252 (1922) (reiterating that whether a crime invokes strict liability “is a question of legislative intent to be construed by the court”). *But see State v. Hazelwood*, 946 P.2d 875, 882 (Alaska 1997) (rejecting “any rule that grants the legislature unbridled discretion to impose strict liability crimes”).

¹⁰⁸ 342 U.S. 246, 248-49 (1952).

¹⁰⁹ See, e.g., *Simmons v. State*, 10 So. 2d 436, 438 (Fla. 1942) (stating that it is within the legislature’s power “to dispense with the necessity for a criminal intent”); *State v. Moore*, 253 A.2d 579, 581 (N.J. Super. Ct. App. Div. 1969) (reiterating that within reasonable limitations the “Legislature has the power and the right to designate the mere doing of an act as a crime, even in the absence of mens rea”); *Commonwealth v. Sanico*, 830 A.2d 621, 625-27 (Pa. Commw. Ct. 2003) (recognizing that the legislature intended the Solid Waste Management Act to impose strict liability); *State v. Mertens*, 64 P.3d 633, 637 (Wash. 2003) (determining that the crime of commercial fishing without a license was a strict liability offense because of the statute’s language and definitional structure).

¹¹⁰ See, e.g., *State v. Buch*, 926 P2d 599, 608 (Haw. 1996) (concluding from ambiguously worded statute and legislative history that statutory rape was a strict liability offense); *accord Simmons*, 10 So. 2d at 438 (upholding conviction under strict liability framework, despite statutory silence with respect to mens rea); *State v. Granier*, 765 So. 2d 998, 1000 (La. 2000) (interpreting statutory rape as a strict liability crime, despite statutory silence with respect to mens rea because the legislature may determine intent is not a necessary element of a crime); *Garnett*, 632 A.2d at 803-04 (finding statutory rape a strict liability crime where statute is silent on mens rea, but the legislative intent was to eliminate any such element); *Commonwealth v. Miller*, 432 N.E.2d 463, 465-66 (Mass. 1982) (affirming conviction for statutory rape and suggesting the defendant address his argument for a mistake-of-age defense to the legislature, which has the power to create strict liability crimes); *People v. Cash*, 351 N.W.2d 822, 826 (Mich. 1984) (finding statutory rape a strict liability offense where statute was silent on mens rea requirement and where legislative intent was clear).

¹¹¹ See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 n.2 (1994) (citing *Morissette* for the proposition that, in contrast to the law involving the distribution of sexually explicit videos, sex offenses have traditionally been strict liability crimes); *see also Gilmour v. Rogerson*, 117 F.3d 368, 370 (8th Cir. 1997) (relying on a footnote in *Morissette* to eliminate a mens rea requirement, recognizing “a long-established exception to the

all, *Morissette* was a case involving theft of property that defendant believed to be abandoned.¹¹² But, *Morissette* was significant for the larger issue presented: the nature of strict liability offenses and the scope of legislative power to eliminate mens rea requirements.¹¹³ Although the Court would not use the occasion to create a bright line rule on public welfare offenses, it concluded that the theft statute in question required proof of a criminal mens rea.¹¹⁴ *Morissette*'s importance to the jurisprudence of statutory rape happened in passing. In a footnote to its discussion of the public welfare offense doctrine, the Court appeared to endorse the use of strict liability in statutory rape when it referenced the historical use of strict liability in sex offenses.¹¹⁵ And while there has been serious and open criticism of strict liability statutory rape,¹¹⁶ the majority of jurisdictions continue to endorse it.¹¹⁷

general rule that proof of *mens rea* is required" regarding victim's age) (citing *Morissette v. United States*, 342 U.S. 246, 251 n.8 (1952)); *United States v. Ransom*, 942 F.2d 775, 776 (10th Cir. 1991) (observing that while *Morissette* recognized the general rule that criminal statutes include an intent requirement, an exception exists for sex offenses with respect to the victim's age); *Granier*, 765 So. 2d at 1000 (acknowledging that *Morissette* noted an exception for mens rea for sex offenses where the victim's age is determinative); *Yanez*, 716 A.2d at 767 (recognizing that *Morissette* identified statutory rape as an exemption to the general mens rea requirement); *Scott v. State*, 36 S.W.3d 240, 242 (Tex. Ct. App. 2001) (quoting language from *Morissette* that the presumption of mens rea is not applicable to statutory rape).

¹¹² *Morissette*, 342 U.S. at 247-48.

¹¹³ *Id.* at 259 (declaring that the legislative purpose would be defeated if mens rea were required). Justice Jackson wrote, "This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted to the jury as to raise questions both fundamental and far-reaching in federal criminal law." *Id.* at 247.

¹¹⁴ *Id.* at 260-62 (determining that Congressional silence as to mens rea in the statute that codified the common law crime signaled an intent to incorporate the common law's intent element).

¹¹⁵ *Id.* at 251 n.8 (observing that historically sex offenses were considered the exception to the mens rea requirement); *see supra* note 111 (referencing cases that cite *Morissette* to support strict liability in statutory rape).

¹¹⁶ *See, e.g., Yanez*, 716 A.2d at 786 (Flanders, J., dissenting):

[T]he majority's conversion of § 11-37-8.1 into a strict-liability crime in mistake-of-age cases, coupled with the statute's mandatory minimum twenty-year prison sentence and convicted sex-offender status, creates an unparalleled and unjustified 'double-whammy' that rains down its crushing blows indiscriminately upon innocently intentioned teenage lovers and heinous child molesters alike.

See also Jenkins v. State, 877 P.2d 1063, 1068 (Nev. 1994) (Springer, J., dissenting) ("Good sense and good morals would demand that a person who has done nothing wrong not have to serve sixteen years in prison. . . . [Imposing strict liability] is counter-intuitive and contrary to moral common sense."); *Goodrow v. Perrin*, 403 A.2d 864, 868 (N.H. 1979) (Douglas, J., dissenting) (declaring that applying strict liability to statutory rape "presents serious equal protection and due process problems"). Chief Justice Bell of the Maryland Court of Appeals has been especially outspoken in his criticism of the doctrine. *See Owens v. State*, 724 A.2d 43, 59 (Md. 1999) (Bell, J., dissenting):

C. *The Impact of Lawrence v. Texas on Strict Liability*

Proponents of strict liability argue that it serves as an appropriate substitute for mens rea because the actor is not entirely blameless. Culpability arises from the actor's assumption of the risk in engaging in sexual intercourse with someone who might be underage.¹¹⁸ As one court observed, “[a] person who engages in sexual intercourse with a female below the statutory age of consent does so at his peril.”¹¹⁹ Interestingly, the notion that an actor assumes a criminal risk when engaging in sexual intercourse is not particular to the crime of statutory rape. Historically, all sexual activity outside of marriage was thought to be inherently risky behavior because the actor was subjected to a range of possible criminal prosecutions, including for adultery, fornication, and sodomy.¹²⁰ That one's partner might be under the age of consent was only one

[S]tatutory rape, not being a public welfare offense, can not be justified as a strict liability offense on the basis of either of the two theories, ‘lesser legal wrong’ or ‘moral wrong,’ that historically has underlain such treatment . . . I believe that due process both under the Fourteenth Amendment and under the Declaration of Rights, precludes strict criminal liability for statutory rape.

Walker v. State, 768 A.2d 631, 639 (Md. 2001) (Bell, J., dissenting, for the same reasons as in *Garnett*, 632 A.2d 797, and *Owens*, 724 A.2d 43); *Garnett v. State*, 632 A.2d 797, 824 (Md. 1993) (Bell, J., dissenting) (“So interpreted [by the majority], [strict liability statutory rape] not only destroys absolutely the concept of fault, but it renders meaningless, in the statutory rape context, the presumption of innocence and the right to due process.”).

¹¹⁷ See *supra* note 100 (listing the jurisdictions that employ strict liability).

¹¹⁸ See, e.g., *Nelson v. Moriarty*, 484 F.2d 1034, 1036 (1st Cir. 1973) (rejecting mistake-of-age defense in favor of “plac[ing] the risk of mistake as to the prosecutrix’s age on the person engaging in sexual intercourse with a partner who may be young enough to fall within the protection of the statute”).

¹¹⁹ *State v. Fulks*, 160 N.W.2d 418, 420 (S.D. 1968) (rejecting mistake-of-age defense where thirteen-year-old victim told defendant she was fifteen); see also *State v. Tague*, 310 N.W.2d 209, 211 (Iowa 1981) (“[S]trict liability concepts are commonly used in the public interest to ‘put the burden upon the person standing in a responsible relation to a public danger even though he might otherwise be innocent.’”). For a scathing response to this argument, see *Yanez*, 716 A.2d at 785 (Flanders, J., dissenting) (“[I]n many jurisdictions the only authority for a strict-liability rule is a musty judicial decision – the product of an era of radically different mores and social attitudes – when any extramarital sex, let alone sex between consenting teenagers, was generally considered morally reprehensible.”).

¹²⁰ Until *Lawrence v. Texas*, 539 U.S. 558, 576 (2003), the state’s authority to prohibit sexual behavior was expansive, as evidenced by *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986) (upholding the legislative power to criminalize sodomy). Although not often enforced, states have criminalized adultery and fornication. See ALA. CODE § 13A-13-2(a) (2005) (“A person commits adultery when he engages in sexual intercourse with another person who is not his spouse and lives in cohabitation with that other person when he or that other person is married.”); D.C. CODE § 22-1602 (2001) (establishing the penalty for fornication as a fine of up to \$300 or six months imprisonment); Id. CODE ANN. § 18-6603 (2004) (defining the crime of fornication and establishing a penalty of up to \$300 or six months imprisonment or both); 720 ILL. COMP. STAT. ANN. 5/11-8(a) (West 2002) (“Any

of many potential criminal prohibitions associated with sexual behavior outside of marriage. The *Owens* majority wrote of the risk of criminal prosecution, “[I]t has been held that a person has no constitutional right to engage in sexual intercourse, at least outside of marriage, and sexual conduct frequently is subject to state regulation.”¹²¹ Strict liability, the argument continues, is appropriate because the actor has been placed on notice that there may be criminal consequences when engaging in sexual behavior outside of marriage.¹²²

One wonders, however, whether this argument may have been weakened by *Lawrence v. Texas*, which overturned a criminal prosecution for same-sex sodomy.¹²³ In *Lawrence*, two adult men were convicted of engaging in private consensual homosexual activity under a Texas law prohibiting same-sex sodomy.¹²⁴ On review, the Supreme Court found the Texas statute

person who has sexual intercourse with another not his spouse commits fornication if the behavior is open and notorious.”); MASS. GEN. LAWS ch. 272, § 18 (2004) (providing maximum punishment of three months imprisonment or fine of \$30 for fornication); MINN. STAT. § 609.34 (2003) (classifying fornication as a misdemeanor); N.C. GEN. STAT. § 14-184 (2005) (classifying fornication as a misdemeanor); S.C. CODE ANN. § 16-15-60 (2003) (providing a fine or \$100 to \$500 or imprisonment for six months to a year for adultery or fornication); UTAH CODE ANN. § 76-7-104 (2003) (classifying fornication as a misdemeanor). However, *Lawrence* has called into question the nature and scope of legislative authority to control adult sexual behavior. See, e.g., *Martin v. Ziherl*, 607 S.E.2d 367, 370 (Va. 2005) (deciding that, in light of *Lawrence*, criminalizing consensual sexual conduct between unmarried adult persons infringed on the individual’s liberty interests).

¹²¹ 724 A.2d 43, 51 (Md. 1993). In an interesting interplay between statutory rape and fornication, the Mississippi Supreme Court explained that the defendant’s blameworthiness in statutory rape is derived from his intent to commit “the morally or legally wrongful act of fornication.” *Collins v. State*, 691 So. 2d 918, 923 (Miss. 1997).

¹²² See *State v. Silva*, 491 P.2d 1216, 1217 (Haw. 1971) (justifying strict liability by concluding that “what was done would have been unlawful and highly immoral even under the facts as offender supposed them to be”) (citation omitted); see also *United States v. Brooks*, 841 F.2d 268, 270 (9th Cir. 1988) (affirming the constitutionality of strict liability statutory rape and placing the assumption of risk on adult partner); *Nelson*, 484 F.2d at 1036:

Nothing in the [Supreme] Court’s recent decisions . . . suggests that a state may no longer place the risk of mistake as to the prosecutrix’s age on the person engaging in sexual intercourse with a partner who may be young enough to fall within the protection of the statute.

People v. Cash, 351 N.W.2d 822, 826 (Mich. 1984) (explaining that the perpetrator proceeds at his own risk).

¹²³ 539 U.S. 558, 578-79 (2003) (holding that same-sex sodomy law violates liberty interests under the Due Process Clause).

¹²⁴ *Id.* at 562-63. The applicable criminal statute in effect at the time was TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003) (providing that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex”).

unconstitutional.¹²⁵ In so doing, the Court reversed *Bowers v. Hardwick*, which had affirmed state legislative authority to determine the sexual activity it wished to proscribe.¹²⁶ In decriminalizing all acts of sodomy, *Lawrence* established that liberty interests under the Fourteenth Amendment's Due Process Clause give substantial protection from legislative interference to consenting adults on matters of sexual activity.¹²⁷ Justice Kennedy wrote, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."¹²⁸

This article does not suggest that *Lawrence* prohibits legislative authority to enact the crime of statutory rape. To the contrary, the Court was quite clear that *Lawrence* did not stand for that proposition. The Court stated, "[t]he present case does not involve minors."¹²⁹ Although the Supreme Court specifically excluded statutory rape from the reach of its decision, *Lawrence* may nonetheless have eroded underlying support for strict liability in statutory rape, when it concluded that promotion of morality was not a sufficient rational basis to control adult sexual behavior.¹³⁰ The decision thus calls into question the state's legislative authority to control other consenting adult sexual behavior. Indeed, the Virginia Supreme Court so concluded in *Martin v. Zihrel* when it overturned Virginia's fornication statute.¹³¹ There, the court determined that, in light of *Lawrence*, criminalizing sexual conduct between consenting unmarried persons "infringes on the rights of adults to 'engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.'"¹³²

So how does *Lawrence* specifically affect strict liability in statutory rape? States, after all will still have the legislative authority to enact laws that prohibit underage consensual sexual activity. *Lawrence* was clear about that.

¹²⁵ *Lawrence*, 439 U.S. at 578-79.

¹²⁶ 478 U.S. 186, 189 (1986) (upholding the legislative power to criminalize sodomy), overruled by *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹²⁷ 539 U.S. at 578 (finding that the "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government"); see Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak its Name*, 117 HARV. L. REV. 1893, 1945 (2004) (characterizing the most distinctive facet of *Lawrence* as the right to dignity and equal respect for people in intimate relationships).

¹²⁸ *Lawrence*, 539 U.S. at 578 (portraying the Constitution's promise of a realm of personal liberty the government may not enter).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ 607 S.E.2d 367 (Va. 2005).

¹³² *Id.* at 370 (quoting *Lawrence*, 539 U.S. at 564). Thirty years earlier, and ahead of his time, Justice Levenson of the Hawaii Supreme Court made a similar argument regarding Hawaii's fornication statute. *State v. Silva*, 491 P.2d 1216, 1222 (Haw. 1971) (Levenson, J., dissenting) (arguing that Hawaii's fornication statute, which proscribes sexual intercourse between an unmarried man and an unmarried woman, may be an unconstitutional application of the State's police power and Hawaii's State Constitution).

Yet strict liability as the premise for such culpability may be problematic. Pre-*Lawrence*, the argument for strict liability was that the actor was placed on notice that sexual activity outside of marriage could be subject to a host of criminal prosecutions. Post-*Lawrence*, one must question whether this argument is still viable. As the Supreme Court reasoned in *Staples v. United States*, strict liability is only appropriate where the actor is put on notice that his conduct is subject to “strict regulation.”¹³³ If it is true that *Lawrence* has diminished the legislative authority to prohibit adult sexual conduct – and the Virginia fornication case would suggest that it has¹³⁴ – then engaging in sexual activity outside of marriage is no longer subject to strict regulation. From a legal perspective, sexual activity between consenting adults outside of marriage is not the inherently risky enterprise it once was. Therefore, according to the *Staples* analysis, strict liability is not appropriate for an industry no longer seriously regulated.¹³⁵ Only with time will the full import of *Lawrence* be known. However, as it relates to statutory rape, the constitutionality of strict liability is in doubt.

II. A PRIMER ON SEX OFFENDER REGISTRATION LAWS AND THE STRICT LIABILITY OFFENDER

A. A Historical Perspective

Sex offender registration and notification schemes have been dubbed the modern day scarlet letter.¹³⁶ Tantamount to public branding in the technology age, sex offender registration and notification schemes have secured a permanent place among the state’s measures to protect its citizens from sexual predators. Whether prosecution for statutory rape is based on the intentional act of exploitation of a young child or strict liability, those convicted are subject to sex offender registration laws and the burdensome consequences of

¹³³ 511 U.S. 600, 607 (1994) (reasoning that “as long as the defendant knows that he is dealing with a dangerous device of a character that places him ‘in responsible relation to a public danger,’ he should be alerted to the probability of strict regulation” (quoting *United States v. Dotterweich*, 320 U.S. 277, 281)) (citation omitted).

¹³⁴ See *supra* note 131 and accompanying text.

¹³⁵ *Staples*, 511 U.S. at 607 (drawing a necessary connection between the inherent dangerousness of an activity and the notice imputed to the actor of its strict regulation).

¹³⁶ The ‘scarlet letter’ refers to Nathaniel Hawthorne’s novel by the same name, published in 1850, and involves an adulterous relationship between a married woman and a young minister, where upon discovery of the affair, the heroine is forced to wear a scarlet letter around her neck. See NATHANIEL HAWTHORNE, THE SCARLET LETTER (New York, Fleet Press Corp. 1969) (1850). For an early look at the stigmatizing effect of sex offender registration and notification laws, see Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788 (1996).

such registration in the vast majority of jurisdictions.¹³⁷ Of the thirty jurisdictions that employ strict liability as the basis for conviction¹³⁸ all but two deem statutory rape a registerable offense.¹³⁹

Registration of sex offenders and community notification statutes gained prominence following the tragic circumstances that befell two children: eleven-year-old Jacob Wetterling, who was abducted at gunpoint and presumed

¹³⁷ See, e.g., 42 U.S.C. § 14071 (2000) (establishing state sex offender registration guidelines, including for those who commit any sexual crime against a minor, excluding, however, statutory rape where the perpetrator is eighteen or younger).

¹³⁸ See *supra* note 100 and accompanying text (listing the jurisdictions that employ strict liability in statutory rape); Carpenter, *supra* note 28, at 385-91 (examining the strict liability statutory rape statutes).

¹³⁹ The strict liability jurisdictions that include statutory rape in the registerable offenses are: Alabama, ALA. CODE § 13A-11-200 (2005); Connecticut, CONN. GEN. STAT. § 54-250 (2001); Delaware, DEL. CODE ANN. tit. 11, § 4121 (2001); District of Columbia, D.C. CODE § 22-4001 (2001); Florida, FLA. STAT. § 943.0435 (2001 & Supp. 2006); Georgia, GA. CODE ANN. § 42-1-12 (1997 & Supp. 2005); Hawaii, S. 708, 23rd Leg., Reg. Sess. (Haw. 2005), available at <http://www.capitol.hawaii.gov/session2005/status/SB708.asp> (amending former registration law to include statutory rape as a registration offense); Idaho, IDAHO CODE ANN. § 18-8304 (2004); Iowa, IOWA CODE ANN. § 709.4(2) (West 2003); Kansas, KAN. STAT. ANN. § 22-4902 (1995 & Supp. 2004); Louisiana, LA. REV. STAT. ANN. § 15:541(14.1) (2005); § 11-701(b)(2) (LexisNexis 2001); Massachusetts, MASS. GEN. LAWS ch. 6 § 178D-K (2004); Michigan, MICH. COMP. LAWS § 28.721a-731 (2004); Mississippi, MISS. CODE ANN. § 45-33-21 (1999 & Supp. 2005); Nebraska, NEB. REV. STAT. § 29-4002-4013 (1995 & Supp. 2005); Nevada, NEV. REV. STAT. § 179D.620 (2003); New Hampshire, N.H. REV. STAT. ANN. § 651B:1 (1996 & Supp. 2005); New Jersey, N.J. STAT. ANN. § 2C:7-1-19 (West 2005); New York, N.Y. CORRECT. LAW § 168(a)-(v) (Consol. 2003); North Carolina, N.C. GEN. STAT. § 14-27.7A§ (2005); Oklahoma, 57 OKLA. STAT. tit. 57 § 582 (2004); Rhode Island, R.I. GEN. LAWS § 11-37.1-2 (2002 & Supp. 2005); South Carolina, S.C. CODE ANN. § 23-3-430 (1989 & Supp. 2005); South Dakota, S.D. CODIFIED LAWS § 22-22-31 (1998 & Supp. 2003); Texas, TEX. CODE CRIM. PROC. ANN. art. 62.001 (Vernon 1979 & Supp. 2005); Utah, UTAH CODE ANN. § 77-27-21.5 (2003); Vermont, VT. STAT. ANN. tit. 13, § 5401 (1998); Virginia, VA. CODE ANN. § 9.1-902 (1998 & Supp. 2005); Wisconsin, Wis. STAT. § 301.45 (2005). The only strict liability states to exempt statutory rape from registration are Iowa and North Carolina. See IOWA CODE § 692A.1 (2003) (enumerating only subsection 1 of IOWA CODE § 709.4 for registration, and excluding subsection 2 statutory rape); N.C. GEN. STAT. § 14-208.6(5) (2005) (excluding convictions of “statutory rape or sexual offense of a person who is 13, 14, or 15 years old” in the list of convictions subject to registration). California and Pennsylvania, which allow the mistake-of-age defense, also exempt statutory rapists from registration. See CAL. PENAL CODE § 290.4 (West 1999) (excluding CAL. PENAL CODE § 261.5, unlawful sexual intercourse with a person under eighteen); 42 PA. CONS. STAT. § 9795.1(a) (1998) (omitting statutory sexual assault, 18 PA. CONS. STAT. § 3122.1 (2000) from the list of sexual offenses subject to registration). Some strict liability states, while requiring most statutory rapists to register, exclude certain statutory rapists from the registration requirement. See *infra* note 170 (reporting examples of jurisdictions that exempt certain sex offenders from the registration requirement).

murdered in 1989;¹⁴⁰ and seven-year-old Megan Kanka, who was sexually assaulted and murdered in 1994 by a neighbor who, unbeknownst to Megan's family, had prior convictions for sexual assault against children.¹⁴¹ As a result of national attention, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which was included in the Federal 1994 Omnibus Crime Bill,¹⁴² and which required the states to adopt sex offender registration laws within three years of the Act's passage in order to receive federal law enforcement funding.¹⁴³ In what is often termed "Megan's Law," community notification statutes were added when Congress amended the Jacob Wetterling Act in 1996.¹⁴⁴ And in 2005, Congress moved one step closer to the creation of a national sex offender registry with Senate passage of the Dru Sjodin National Sex Offender Public Database Act of 2005.¹⁴⁵ Called "Dru's Law," the measure would also increase the intensity of monitoring and provide options to keep violent sex offenders institutionalized following completion of their prison terms.¹⁴⁶

Because of the reported high rate of recidivism among sex offenders,¹⁴⁷ sex offender registration laws were designed to protect the public's safety through

¹⁴⁰ A description of the abduction of Jacob Wetterling and the history and programs of the Jacob Wetterling Foundation are available at <http://www.jwf.org>.

¹⁴¹ See *Smith v. Doe*, 538 U.S. 84, 89 (2003) (recounting the tragic killing of Megan Kanka and the genesis of "Megan's Law").

¹⁴² 42 U.S.C. § 14071 (2000) (establishing federal guidelines for state sex offender registration laws).

¹⁴³ *Id.* at § 14071(g). States that did not comply were faced with decreased funding. *See id.* at § 14071(g)(2)(A) & (B). Although Congressional action provided the much needed national push for such laws, a few states had passed sex offender registration laws much earlier. *See Abril R. Bedarf, Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 887 n.4 (1995) (recounting that Alabama, Arizona, California, Illinois, and Nevada were the first to introduce sex offender registration laws).

¹⁴⁴ *See* 42 U.S.C. § 14071(e)(2) ("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."). For a general review of the origins of community notification statutes, see Maureen Hopbell, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law*, 42 DUQ. L. REV. 331 (2004); *see also* Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535, 1549-59 (2003-04) (discussing the impact of community notification statutes on African-Americans).

¹⁴⁵ S. 792, 109th Cong. (2005) (requiring the Attorney General to make available a national sex offender registry via the internet).

¹⁴⁶ *Id.* at § 4(b) (requiring that States "intensively monitor, for not less than 1 year, any person" who qualifies as a sexually violent predator or who is at high-risk for recommitting a sexual offense).

¹⁴⁷ *See supra* note 4 (citing the Poritz court's finding that sex offenders were likely to reoffend). For an examination of studies on recidivism, see Bedarf, *supra* note 143, at 893-98. Some scholars dispute the assertion of high recidivism among convicted sex offenders. *See, e.g.*, Wayne A. Logan, *A Study In "Actuarial Justice": Sex Offender Classification*

the release of certain information about sex offenders to public agencies¹⁴⁸ and, as initially envisioned, were intended to facilitate data banks of sex offenders for law enforcement officials.¹⁴⁹ With the advent of Megan's Law, the focus on public safety shifted from informing law enforcement agencies to alerting the community to the convicted sex offender's location.¹⁵⁰ Community notification has been deemed a justifiable intrusion into the registrant's expectation of privacy because of "the public's interest in safety."¹⁵¹ Currently, all states and the District of Columbia have passed sex offender registration laws and community notification statutes,¹⁵² and given the genesis of these statutes, it is not surprising to learn that states' registration

Practice And Procedure, 3 BUFF. CRIM. L. REV. 593, 593-595 (2000) (arguing that the assumption of recidivism among sex offenders is incorrect); David P. Bryden & Roger C. Park, *Other Crimes Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 572-74 (1994) ("Studies of sex offenders with smaller samples and different follow-up periods have shown both higher and lower recidivism rates for certain populations of sex offenders, but no study has demonstrated that sex offenders have a consistently higher or lower recidivism rate than other major offenders.").

¹⁴⁸ Legislative history clearly articulates public safety as the chief legislative goal of sex offender registration laws. *See, e.g.*, ARK. CODE ANN. § 12-12-902 (2003) ("[P]rotecting the public from sex offenders is a primary governmental interest, and . . . the privacy interest of the persons adjudicated guilty of sex offenses is less important than the government's interest in public safety."); ME. REV. STAT. ANN. tit. 34-A § 11201 (1964 & Supp. 2005) ("The purpose of the chapter is to protect the public from potentially dangerous sex offenders and sexually violent predators by enhancing access to information concerning sex offenders and sexually violent predators"); MICH. COMP. LAWS § 28.721a (2004) ("The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.").

¹⁴⁹ *See* 42 U.S.C. § 14072(b)(1) (2000) ("The Attorney General shall establish a national database at the Federal Bureau of Investigation to track the whereabouts and movement of . . . each person who has been convicted of a criminal offense against a victim who is a minor."). The Idaho legislature noted in enacting the registration laws, "[E]fforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sexual offenses are impaired by the lack of current information available about individuals who have been convicted of sexual offenses." IDAHO CODE ANN. § 18-8302 (2004).

¹⁵⁰ *See, e.g.*, Smith v. Doe, 538 U.S. 84, 102-03 (2003) (highlighting the nonpunitive purpose of "public safety which is advanced by alerting the public to the risk of sex offenders in their community" (quoting Doe I v. Otte, 259 F.3d 979, 991 (9th Cir. 2001))).

¹⁵¹ ALA. CODE § 15-20-20.1 (1995 & Supp. 2005) ("Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in safety and in the effective operation of government."); *see also* HAW. REV. STAT. § 846E-3(c) (2003) (stating that registrants have a "diminished expectation of privacy in the information" collected).

¹⁵² *See* Roe v. Farwell, 999 F. Supp. 174, 177 n.1 (D. Mass. 1998) (reporting that every state has enacted registration and notification schemes).

requirements are “remarkably similar.”¹⁵³ But it is also true that these acts granted states significant discretion in the structure of the statutory scheme, the list of crimes that would trigger registration, and the specific burdens imposed on the registrant.¹⁵⁴

B. Classification Schemes

One salient feature of sex offender registration acts is that offenders are classified according to their perceived risk of reoffending, which is critical for the determination of the range of burdens imposed on the registrant and the extent of the public notification.¹⁵⁵ Classification systems vary greatly among the strict liability jurisdictions. In some jurisdictions, registration requirements are based on how the crime or offender is labeled. In other states, the classification is based on a tiered evaluation of the perceived risk of reoffense; and in a few jurisdictions, crimes are divided into categories based on duration of the registration.

Classification based on label of crime or offender: In some jurisdictions, the registrant is classified according to label designations, such as “sexually violent offense,” “sexual predator,” or “sexual offender,” all of which are intended to convey levels of seriousness attached to the crime.¹⁵⁶ Indeed, the Florida legislature’s adoption of the term “sexual predator” rather than “sexual offender” was the subject of constitutional scrutiny because it was argued that the term “sexual predator” connotes a more dangerous level of offender than may be applied to a particular registrant who has not been proven dangerous to the community.¹⁵⁷ Generally, jurisdictions that distinguish offenders by their

¹⁵³ *State v. Bollig*, 605 N.W.2d 199, 204 (Wis. 2000) (pointing out that sex offender registration statutes are similar across states because of their common origins in federal legislation).

¹⁵⁴ See Megan’s Law: Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, *as amended*, 64 Fed. Reg. 572 (Jan. 5, 1999).

¹⁵⁵ See, e.g., MASS. GEN. LAWS ch. 6, § 178E(f) (2004) (permitting the court to relieve a sex offender of his or her duty to register if “the circumstances of the offense in conjunction with the offender’s criminal history indicate that [he or she] does not pose a risk of reoffense”).

¹⁵⁶ See, e.g., KAN. STAT. ANN. § 22-4902 (1995 & Supp. 2004) (distinguishing between those offenses considered to be violent and those that are not); MASS. GEN. LAWS ch. 6, § 178C (2004) (categorizing sex offenses into three groups: those that are “sexually violent offenses,” those that are sex offenses “involving a child,” and those that are “sex offenses”); R.I. GEN. LAWS § 11-37-1(a)(b)(c) (2002) (differentiating between offenders and those designated as “sexually violent predators” and “recidivists and aggravated crime offenders”).

¹⁵⁷ See *Milks v. State*, 894 So. 2d 924, 930 (Fla. 2005) (Anstead, J., concurring in part, dissenting in part) (arguing that it is unconstitutional to label a registrant as a predator, “one that preys, destroys, or devours,” without an individualized assessment of dangerousness (quoting MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 917 (10th ed. 1994))).

labels treat statutory rape as a “sexual offense” and subject the offender to registration requirements for a set term of years.¹⁵⁸ A small minority, however, label statutory rape as “a sexually violent” offense which, absent the registrant’s right to petition relief, requires lifetime registration.¹⁵⁹

Classification based on a tiered system: Strict liability states that employ tiered systems of classification assign registrants to one of three levels of risk based on their perceived danger to the community.¹⁶⁰ Most tiered systems use a multitude of factors to determine the perceived level of all registrants’ risk of reoffense,¹⁶¹ and those deemed to pose a high risk of recidivism are subjected

¹⁵⁸ See, e.g., ALA. CODE § 15-20-33 (1995 & Supp. 2005) (permitting adult criminal sex offenders to be relieved from the registration requirement twenty-five years after conviction or release); FLA. STAT. § 943.0435(11) (2001 & Supp. 2005) (permitting sex offenders, but not sexual predators, to petition the court to remove the requirement for registration after twenty years); GA. CODE ANN. § 42-1-12(g) (1997 & Supp. 2004) (requiring lifetime registration only for those convicted of an aggravated offense or those considered sexually violent predators); S. 708, 23rd Leg., Reg. Sess. (Haw. 2005), available at http://www.capitol.hawaii.gov/session2005/bills/sb708_sd1.htm (amending former registration law to permit automatic termination of registration requirements for statutory rapists after ten years); KAN. STAT. ANN. § 22-4906 (1995 & Supp. 2005) (permitting registration to terminate after ten years from the conviction or from release from confinement providing the offender has not been convicted more than once); LA. REV. STAT. ANN. § 15:542.1(H) (2005) (excluding statutory rapists from the list of those who must register for life); VT. STAT. ANN. tit. 13, § 5407(e) (1998 & Supp. 2004) (permitting reporting requirements to cease after ten years, unless the offender is found to be a sexually violent predator); Wis. STAT. § 301.45(5)(b)(2) (2005) (requiring lifetime registration only for “sexually violent person[s]”).

¹⁵⁹ See MD. CODE ANN., CRIM. PROC. § 11-707 (a)(4)(ii) (LexisNexis 2001) (detailing registration for life for “child sexual offender,” which, according to MD. CODE ANN., CRIM. PROC. § 11-701 (LexisNexis 2001) includes statutory rapists); MISS. CODE ANN. § 45-33-47(2)(b)(i) (1999 & Supp. 2005) (requiring lifetime registration, but permitting petition for relief); S.C. CODE ANN. § 23-3-460 (1976 & Supp. 2005) (requiring registration “annually for life” which, according to S.C. CODE ANN. § 23-3-430, includes statutory rape).

¹⁶⁰ See, e.g., DEL. CODE ANN. tit. 11 § 4121(e)(1) et. seq. (2001) (assigning sex offenders to different “Risk Assessment Tiers”); MASS. GEN. LAWS ch. 6, § 178K(1) (2004) (directing the sex offender registry board to develop guidelines that shall include “three levels of notification depending on such risk of reoffense and the degree of dangerousness posed to the public”); NEB. REV. STAT. § 29-4013(2)(c)(i)(ii)(iii) (1995 & Supp. 2005) (establishing notification procedures based on whether the offender’s risk of recidivism is “low,” “moderate,” or “high”); NEV. REV. STAT. § 179D.730 (2003) (describing the three tiers of community notification); N.Y. CORRECT. LAW § 168-1 (6)(a)(b)(c) (Consol. 2003) (describing the classification tiers as “level one,” “level two,” and “level three” based on the risk of reoffense); TEX. CODE CRIM. PROC. ANN. art. § 62.007(c)(1)(2)(3) (Vernon 1979 & Supp. 2005) (creating a risk assessment review committee to develop a screening tool that would evaluate registrants based on one of three levels of risk).

¹⁶¹ See, e.g., MASS. GEN. LAWS ch. 6, § 178K(1)(a) (2004) (employing a range of factors including whether the sex offender has a mental abnormality, the ages of the offender and victim, whether a weapon was used in the commission of the crime, the relationship

to increased registration and notification provisions.¹⁶² Tiered systems grant greater judicial scrutiny of the process of registration. For example, in Massachusetts, New York, and New Jersey, courts have found that procedural due process demands that classification of registrants be assigned only after hearings are held to determine the individual offender's level of dangerousness to the community.¹⁶³

Classification based on duration of registration: In a few states, classification is not based on a specific characterization of the offender or offense, but instead is based on the duration of registration. In these jurisdictions, registerable crimes are divided into two categories: those crimes that require registration for a set period of years, and those crimes that require lifetime registration.¹⁶⁴ In the few states that classify offenses by the term of

between the offender and the victim, the number, date and nature of prior offenses, and physical and psychological conditions that indicate the potential risk of reoffense); *accord* N.Y. CORRECT. LAW § 168-1 (2003) (using a wide variety of factors to be considered when evaluating the risk of repeat offenses for sex offenders); N.J. STAT. ANN. § 2C:7-8 (2005) (listing various factors to determine whether a registrant should be classified as representing either a low, moderate, or high risk of reoffending). *But see* DEL. CODE ANN. tit. 11 § 4121(e) (2001) (classifying statutory rape specifically as Risk Assessment Tier II but including more extreme cases of statutory rape in Risk Assessment Tier III).

¹⁶² See, e.g., NEB. REV. STAT. § 29-4013(2)(c)(iii) (1995 & Supp. 2005) (providing increased notification procedures for offenders who pose a high risk of recidivism); N.Y. CORRECT. LAW § 168-h(3) (Consol. 2003) (requiring sex offender who has been designated a level three risk to "personally verify his or her address every ninety calendar days"); *see also supra* note 160.

¹⁶³ See People v. David W., 733 N.E.2d 206, 212 (N.Y. 2000) ("The need for expediency cannot overshadow the fact that a critical decision was being made about defendant that determined his potential to commit further sex offenses"); *see also* Doe v. Attorney General, 715 N.E.2d 37, 44-45 (Mass. 1999) (holding that Massachusetts procedural due process requires notice and an opportunity to be heard except in cases of "repeated crimes of violence against young children"); Doe v. Poritz, 662 A.2d 367, 417 (N.J. 1995) ("Public notification implicates a privacy interest in nondisclosure, and therefore triggers due process.").

¹⁶⁴ See, e.g., D.C. CODE § 22-4001 (2001) (placing offenders in one of two lists: "lifetime registration offense" and a "registration list"); MICH. COMP. LAWS §§ 28.725(7), 28.728d(1)(b) (2004) (providing that, for certain offenses, the offenders must register for life, whereas others only require ten years of registration); N.H. REV. STAT. ANN. § 651-B:6 (1996 & Supp. 2005) (having two lists only: a lifetime registration list and a ten-year registration list); OKLA. STAT. tit. 57 § 583 (C) (2004) (stating that "[e]xcept for habitual or aggravated sex offenders [who must register for life], the person shall be required to register for a period of ten (10) years"); UTAH CODE ANN. § 77-27-21.5(9) (2003) (having lists only for those who register for ten years and for those who register for life); VA. CODE ANN. § 9.1-908 (1998 & Supp. 2005) (requiring violent sexual offenders to register for life and other sexual offenders to register for ten years). Hawaii has three classifications. See HAW. REV. STAT. § 846E-1 (2003) (detailing divisions of "sex offender," "sexually violent offense," and "criminal offense against victim who is a minor").

registration, most require the statutory rapist to register for a set term of years.¹⁶⁵

C. Registration Requirements

Registration requirements are not inconsequential. Indeed, as often noted, they present serious burdens to the registrant that involve significant intrusions into the individual's privacy interest.¹⁶⁶ Under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, registration is required of any person convicted of a "criminal offense against a minor,"¹⁶⁷ including "criminal sexual conduct toward a minor[,] solicitation of a minor to engage in sexual conduct[, and] use of a minor in a sexual performance."¹⁶⁸ The one noted exemption to registration requirements is for "conduct which is criminal only because of the age of the victim[, which] shall not be considered a criminal offense if the perpetrator is 18 years of age or younger."¹⁶⁹ This provision also coincides with the current view of some

¹⁶⁵ See MICH. COMP. LAWS § 28.728d(1)(b) (2004) (directing that a statutory rapist register for ten years); OKLA. STAT. tit. 57 § 583 (C) (2004) (excluding one-time statutory rapists from a lifetime registration requirement); UTAH CODE ANN. § 77-27-21.5(9) (2003) (requiring one-time statutory rapists to register for ten years after the termination of their sentence). The District of Columbia also requires statutory rapists to register for a term of years unless the victim was twelve years old or younger. See D.C. CODE § 22-4001 (2001) (including "statutory rape . . . committed against a person under the age of 12 years" in the list of lifetime registration offenses). But see N.H. REV. STAT. ANN. § 651-B:6 (I) (1996 & Supp. 2005) (requiring lifetime registration for statutory rape, as defined in § 632-A:3).

¹⁶⁶ See, e.g., Doe v. Pryor, 61 F. Supp. 2d 1224, 1226 (M.D. Ala. 1999) (characterizing Alabama's registration scheme as "among the . . . most restrictive of such laws in the nation"); Doe v. Dep't of Pub. Safety, 92 P.3d 398, 409 (Alaska 2004) (reiterating the burdensome nature of Alaska's registration requirements); State v. Robinson, 873 So. 2d 1205, 1213 (Fla. 2004) ("We believe the Act imposes more than a stigma. As outlined above, under the Act, a person designated a sexual predator is subject to life-long registration requirements."); State v. Myers, 923 P.2d 1024, 1041 (Kan. 1996) (acknowledging that "the practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment"); Doe v. Pataki, 3 F. Supp.2d 456, 468 (N.Y. 1998) ("[T]he registration provisions of the Act place a 'tangible burden' on plaintiffs, potentially for the rest of their lives.").

¹⁶⁷ 42 U.S.C. § 14071(a)(1) (2000).

¹⁶⁸ See 42 U.S.C. § 14071(a)(3)(A)(iii-v) (2000) (listing the range of offenses that constitute a "criminal offense against a victim who is a minor").

¹⁶⁹ 42 U.S.C. § 14071(a)(3)(A) (2000). Some strict liability states have adopted similar provisions. See, e.g., CONN. GEN. STAT. § 54-251(b) (2001) (exempting from registration sexual assault in the fourth degree where the actor is under nineteen years of age and registration is not required for public safety); HAW. REV. STAT. § 846E-1(7) (2003) (excluding registration requirements where perpetrator is eighteen years of age or under); IDAHO CODE § 18-8303(1) (2004) (excluding from registration requirements rape in which the victim is at least twelve years old and the perpetrator is eighteen or younger); KY. REV. STAT. ANN. § 17.500(2)(b) (2003) (indicating that statutory rape is not registerable if the

jurisdictions that perpetrators who are under eighteen should be exempted from liability or charged only with misdemeanors in connection with the sexual assault.¹⁷⁰

Federal guidelines require that each registrant provide local law enforcement with: name, address, a photograph, and fingerprints,¹⁷¹ and in some states, the offender must also supply a biological specimen.¹⁷² The offender must register in the state where employed or attending school, report any change in address, and must also notify proper authorities of the intention to move to another

offender was under the age of eighteen); MISS. CODE ANN. § 45-33-23(g)(ii) (1999 & Supp. 2005) (determining that rape committed when the perpetrator was eighteen years old or younger is not a registerable offense); S.C. CODE ANN. § 23-3-430 (1976 & Supp. 2005) (excluding from registration requirements offenders under eighteen, where there is evidence that the sexual conduct was consensual); VT. STAT. ANN. tit. 13, § 5401(10)(B)(vi) (1998) (excepting purely statutory rape where the perpetrator is under age eighteen from registration requirements); WIS. STAT. § 301.45(1m)(a)(2)(2005) (exempting offenders from registration who are under nineteen and not more than four years older or four years younger than the victim).

¹⁷⁰ See, e.g., GA. CODE ANN. § 16-6-3 (2003) (“[I]f the victim is 14 or 15 years of age and the person so convicted is no more than three years older than the victim, such person shall be guilty of a misdemeanor.”); N.Y. PENAL LAW § 130.30 (McKinney 2004) (“It shall be an affirmative defense to the crime of rape in the second degree as defined in subdivision one of this section that the defendant was less than four years older than the victim [who is under 15 years of age] at the time of the act.”); OR. REV. STAT. § 163.345 (2003) (“[I]t is a defense that the actor was less than three years older than the victim at the time of the alleged offense if the victim was at least 15 years of age at the time of the alleged offense.”); see also *supra* Part I.A. (discussing differing statutory schemes and prosecution of the underage actor).

¹⁷¹ See 42 U.S.C. § 14071(b)(1)(A)(ii),(iv) & (B) (2000); cf. CONN. GEN. STAT. § 54-258(a)(1) (2001 & Supp. 2005) (stating that information in the registration, including a picture, is public record which is available for access during normal business hours at the local police department); FLA. STAT. ANN. § 943.043(3) (2001) (explaining that a member of the public can, either through a toll-free number or in person, obtain information including a picture of the offender and a summary of convictions); HAW. REV. STAT. § 846E-3(b) (2003) (allowing information, such as address, car information, and a picture to be released by the county police department); MD. CODE ANN., CRIM. PROC. § 11-717 (LexisNexis 2001) (indicating that information of all registrants shall be available to the public either through the internet or by request); MISS. CODE ANN. § 45-33-49(3)-(4) (1999 & Supp. 2005) (ordering that any information “deemed necessary for the protection of the public” such as a photograph, place of employment, and crime for which the offender was convicted shall be received by anybody who requests the information of any registrant); N.H. REV. STAT. ANN. § 651-B:7(IV) (1996 & Supp. 2005) (declaring that any member of the public may request information of the local law enforcement agency regarding the list of registrants which includes their pictures and addresses).

¹⁷² See, e.g., CONN. GEN. STAT. § 54-251(a) (2001); FLA. STAT. ANN. § 943.325 (2001 & Supp. 2006); KAN. STAT. ANN. § 22-4907(b) (1995); MISS. CODE ANN. § 45-33-37 (1999 & 2005 Supp.); OKLA. STAT. tit. 57 § 584 (2004).

state.¹⁷³ Satisfying the duty to reregister in many states can be as easy as mailing a form that only verifies the current residential employment addresses to the appropriate entity.¹⁷⁴ In some states, however, this duty to reregister can be as burdensome as having to appear in person to verify the information supplied previously.¹⁷⁵ The frequency of reregistration is generally dependent upon the classification of the offender. In most states, the sexually violent predators and/or sexually violent offenders are required to reregister every ninety days, while nonviolent offenders are to reregister annually.¹⁷⁶ The failure to register, reregister, or verify the registrant's current address subjects the registrant to serious penalties.¹⁷⁷

¹⁷³ See 42 U.S.C. § 14071(b)(1)(A)(ii)-(iii) (2000).

¹⁷⁴ See, e.g., NEB. REV. STAT. § 29-4006(2) (1995 & Supp. 2004) (providing for reregistration through the mail); NEV. REV. STAT. § 179D.480(3) (2003) (allowing a registrant to reregister through mail by sending a new set of fingerprints and a recent picture in addition to verifying address with each verification); S.D. CODIFIED LAWS § 22-22-31.1 (1998 & Supp. 2003) (allowing verification through mail at least once every year). Indeed, one court noted the relative ease of registration in North Carolina. *See State v. White*, 590 S.E.2d 448, 456 (N.C. Ct. App. 2004) ("[P]rior offenders are free to move wherever they choose subject only to the requirement that they update their addresses in writing within ten days of moving and verify their address annually.").

¹⁷⁵ See, e.g., N.Y. CORRECT. LAW § 168-h (Consol. 2003) (requiring that the level three offender, "the sexual predator, the sexually violent offender, and the predicate sex offender," register in person every ninety days while the rest may not have to reregister in person); R.I. GEN. LAWS § 11-37.1-4 (c) (2002) (requiring recidivists and aggravated crime offenders to register annually in person with local law enforcement); D.C. CODE § 22-4008 (2001 & Supp. 2005) (delegating authority to an Offender Supervision Agency to impose requirements on sex offenders which may include appearing in person for purposes of verification).

¹⁷⁶ See, e.g., ALA. CODE § 15-20-25.3(e) (1975 & Supp. 2005) (requiring the nonviolent offender to reregister annually and the sexually violent predator to reregister every ninety days); NEB. REV. STAT. §§ 29-4005, 4006 (1995 & Supp. 2004) (stating that a sexually violent predator must reregister every ninety days, while nonviolent offenders must reregister yearly); TEX. CODE CRIM. PROC. ANN. art. § 62.058 (Vernon 1979 & Supp. 2005) (mandating that a person who has been convicted two or more times of a sexually violent offense report to the local law enforcement authority every ninety days). *But see, e.g.*, CONN. GEN. STAT. § 54-257(c) (2001) (stating that everyone, including nonviolent offenders, must register every ninety days); KAN. STAT. ANN. § 22-4904(c) (1995) (requiring that "any person required to register" must mail back a verification form every ninety days (emphasis added)).

¹⁷⁷ See, e.g., CONN. GEN. STAT. §§ 54-251(e), 54-252(d) (2001) (making failure to comply with the sex offender registration statute a felony); DEL. CODE ANN. tit. 11, § 4121(t) (2001) (categorizing the failure to register or reregister as a class G felony); FLA. STAT. ANN. § 943.0435(9)(a) (2001) (criminalizing the failure to comply as a felony in the third degree); GA. CODE ANN. § 42-1-13(c) (1997 & Supp. 2005) (making knowing failure to comply with the sex offender registration act a felony); IDAHO CODE § 18-8311 (2004) (making willful evasion of the registration requirements a felony); KAN. STAT. ANN. § 22-4903 (1995) (stating that a person who violates the provisions of the registration act is guilty

Registration requirements continue for a minimum period of ten years if it is a non-aggravated sex crime conviction, and in many jurisdictions, for life if convicted of an aggravated sex crime.¹⁷⁸ Lifetime registration has been deemed constitutional in one court, even when required of juveniles,¹⁷⁹ although there is some debate on the nature and extent of procedural safeguards that must attach to such a determination.¹⁸⁰ No matter the classification system – label, tier, or duration of registration – jurisdictions are divided on the length of time the statutory rapist must register. Many states call for registration for a set term of years, with lengths varying from between ten and twenty years,¹⁸¹ but a sizeable minority require the statutory rapist to

of a “level 10, nonperson felony”); MICH. COMP. LAWS § 28.729 (2004) (stating that a person who willfully violates the act will be found guilty of a felony); OKLA. STAT. tit. 57 § 587 (2004) (making it a felony, punishable by not more than five years in prison or five thousand dollars, to violate the provisions of the act). There is debate on whether the crime of failing to register requires a criminal mens rea. *Compare* State v. Giorgetti, 868 So. 2d 512, 518 (Fla. 2004) (requiring proof of criminal mens rea based on a procedural due process theory) *with* State v. Bryant, 614 S.E.2d 479, 484 (N.C. 2005) (holding that no showing of knowledge or intent is required to prove the violation based on a theory of legislative intent).

¹⁷⁸ See 42 U.S.C. § 14071(b)(6)(A)-(B) (2000) (stating that a registrant must register for a period of ten years unless he or she has more than one sex offense conviction, has been convicted of an aggravated offense, or has been determined a “sexually violent predator”); Megan’s Law: Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, *as amended*, 64 Fed. Reg. 572, 576 (1999) (“To comply with subsections (a)(1) and (b)(6)(A) of the Wetterling Act, a state registration program must require current address registration for a period of 10 years for persons convicted of ‘a criminal offense against a victim who is a minor’ or a ‘sexually violent offense.’”).

¹⁷⁹ See *In re J.R.*, 787 N.E.2d 747, 757-58 (Ill. 2003) (holding lifetime registration constitutional for twelve-year-old who was judged to be a sexual predator under Illinois law).

¹⁸⁰ See State v. Guidry, 96 P.3d 242, 250 (Haw. 2004) (concluding that lifetime registration implicates a protected liberty interest on state grounds and requires that minimum requirements of due process be afforded to convicted sex offenders).

¹⁸¹ For strict liability states that require the statutory rapist to register for ten years, see, for example, CONN. GEN. STAT. §§ 54-251(a) (2001) D.C. CODE § 22-4002(a) (2001); GA. CODE ANN. § 42-1-12(g) (1997 & Supp. 2005); KAN. STAT. ANN. § 22-4906 (1995 & Supp. 2004); LA. REV. STAT. ANN. § 15:542.1(H) (1) (2005); MICH. COMP. LAWS § 28.728d(b) (2004); NEB. REV. STAT. § 29-4005 (1995 & Supp. 2005); N.H. REV. STAT. ANN. § 651-B:6 (1996 & Supp. 2005); N.Y. CORRECT. LAW § 168-h (2003); OKLA. STAT. tit. 57 § 583 (2004); R.I. GEN. LAWS § 11-37.1-4 (2002); UTAH CODE ANN. § 77-27-21.5 (2003); VT. STAT. ANN. tit. 13 § 5407 (1998); VA. CODE. ANN. § 9.1-908 (1998 & Supp. 2005). For states that require the statutory rapist to register for longer periods of time, see, for example, DEL. CODE ANN. tit. 11, §4121(f) (2001) (requiring the offender to register for fifteen years); MASS. GEN. LAWS ch. 6, § 178G (2004) (requiring a twenty-year term for a “sex offense against a child,” such as statutory rape); WIS. STAT. § 301.45(5) (2005) (requiring a fifteen-year term for a “sex offender,” such as a statutory rapist).

register for life.¹⁸² Some states that require lifetime registration afford the registrant the statutory right of petition for removal from the registry.¹⁸³

Sex offenders are sometimes subject to additional requirements. In some states, the offender is required to pay for registration in order to subsidize the dissemination of information.¹⁸⁴ Some states prohibit the registered sex offender from living within a certain distance of a school, day care center, or any place where minors congregate.¹⁸⁵ Indeed, even if the offender had established residency prior to the enactment of the prohibition, the offender may be ordered to move to comply with the residency requirements.¹⁸⁶

¹⁸² See, e.g., MD. CODE ANN., CRIM. PROC. § 11-707 (a)(4)(ii) (LexisNexis 2001) (detailing registration for life for “child sexual offender,” which, according to MD. CODE ANN., CRIM. PROC. § 11-701 includes statutory rapists); S.C. CODE ANN. § 23-3-460 (1976 & Supp. 2005) (requiring registration “annually for life” for statutory rape); *supra* Part II.B. (detailing state classifications and corresponding codes).

¹⁸³ See, e.g., FLA. STAT. § 943.0435(11)(a) (2001) (allowing sexual offender who is not considered a sexual predator to petition after twenty years of registration to be relieved of the duty to reregister); IDAHO CODE ANN. § 18-8310 (2004) (providing the ability to petition for relief from registration after ten years of compliance); NEV. REV. STAT. § 179D.490 (2003) (offering ability to petition for relief after fifteen years of compliance); N.J. STAT. ANN. § 2C:7-2(f) (2005) (affording petition for relief from reregistration after fifteen years, unless the registrant has committed more than one sex offense or committed an aggravated sexual assault).

¹⁸⁴ See, e.g., IDAHO CODE ANN. § 18-8324(7) (2004) (requiring violent sexual predator to pay fifty dollars to offset the costs of publishing offender’s picture in a newspaper in general circulation); MICH. COMP. LAWS § 28.725B (2004) (stating that the registrant must pay a fee of thirty-five dollars for registration).

¹⁸⁵ See, e.g., ALA. CODE § 15-20-26(a) (1995 & Supp. 2005) (prohibiting sex offender from living within 2,000 feet of a school or from a child care center); GA. CODE ANN. § 42-1-13(b) (1997 & Supp. 2005) (stating that sex offender must not live within 1,000 feet of a school, day care center, or area where minors congregate); IOWA CODE § 692A.2A(2) (2003) (refusing residency within 2,000 feet of a school or registered child care facility). In a recent development, Florida has enacted legislation to prevent sexual offenders from using public shelters during hurricanes. *See Sex Offenders Banned from Florida Storm Shelters*, CNN.COM, Aug. 6, 2005 (on file with author). To date, such restrictions have been deemed lawful. See, e.g., Doe v. Miller, 405 F.3d 700, 704-05 (8th Cir. 2005) (upholding Iowa’s residency restriction); People v. Leroy, 828 N.E.2d 769, 777 (Ill. App. 5th Dist. 2005) (rejecting substantive due process claim from registrant who could not live with his mother because her home was near a school).

¹⁸⁶ See, e.g., Thompson v. State, 603 S.E.2d 233, 234 (Ga. 2004) (holding that a sex offender who had lived in a house located within 303 feet of a municipal community center for over fifteen years violated the statute that prohibits sex offenders from residing by such areas). One court has found that its former sex offender registration act violated registrant’s fundamental right to travel. *See* State v. Dickerson, No. 30367, 2006 WL 250233 at *6-7 (Idaho App. 2006) (determining that former registration requirements, which imposed different burdens on out-of-state sex offenders moving into the state, violated registrant’s right to travel).

D. Community Notification Under Megan's Law

Coupled with the federal mandate that an offender must register with the state is the requirement that the state must maintain a central registry of the information. Under the terms of Megan's Law, “[t]he State or any agency authorized by the State . . . shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section.”¹⁸⁷

Often, a significant amount of the registrant's information is made available to the public. Alaska's notification system provides a typical example of information disseminated on the central registry, which includes:

the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender . . . is in compliance with the requirements . . . or cannot be located.¹⁸⁸

Additional personal information available to the public may include offender's social security number;¹⁸⁹ the age of the victim(s), and the nature of the relationship between offender and victim;¹⁹⁰ and description of the offender's tattoos and other identifying marks.¹⁹¹

States differ on which members of the public may have access to the information. In some states, dissemination is based proportionally on the

¹⁸⁷ 42 U.S.C. § 14071(e)(2) (2000) (detailing the rules by which information can be released to the public). States have enacted statutes to comply with these provisions. *See, e.g.*, ALA. CODE § 15-20-25(b) (1995 & Supp. 2005) (requiring that a community notification flier be regularly disseminated providing information about resident sex offenders); ARIZ. REV. STAT. ANN. § 13-3827(A) (2001 & Supp. 2005) (directing the department of public safety to maintain a website publishing information on Level 2 and 3 sex offenders); CONN. GEN. STAT. § 54-258(a)(1) (2001) (requiring registry to be maintained by Department of Public Safety and accessible to the public during normal business hours and through the Internet); IOWA CODE § 692A.13(2)(b) (2003) (authorizing registry information to be distributed through print, audio/visual materials, and/or radio); Miss. CODE. ANN. § 45-33-49(4) (1999 & Supp. 2005) (permitting the public to submit written requests for information regarding registered sex offenders); N.M. STAT. § 29-11A-5.1E (1978 & Supp. 2001) (allowing the department of public safety to “establish and manage an internet web site that provides the public with registration information regarding sex offenders”); W. VA. CODE § 15-12-5(b)(1) (2004 & Supp. 2005) (describing the circumstances under which sex offender information shall be disclosed to the public).

¹⁸⁸ ALASKA. STAT. § 18.65.087(b) (2004).

¹⁸⁹ *See, e.g.*, D.C. CODE §22-4007(a)(2) (2001).

¹⁹⁰ *See, e.g.*, DEL. CODE. ANN. tit. 11 § 4120(d)(2) (2001).

¹⁹¹ *See, e.g.*, FLA. STAT. § 943.0435(2)(b) (2001).

perceived risk of reoffending,¹⁹² or on the proximity of the offender to the members of the public.¹⁹³ The recent trend, however, is to provide general public access to personal information of every offender.¹⁹⁴ The articulated rationale is that notification is not burdensome because the personal information is already public to a certain degree.¹⁹⁵ However, registrants argue

¹⁹² See, e.g., MASS. GEN. LAWS ch. 6, § 178J(c) (2004) (stating that only Level 2 and 3 sex offender's information shall be available to any adult residing in the area who requests such information in person); NEB. REV. STAT. § 29-4013(b) (Supp. 2004) (promulgating rules for release of information based on sex offender's risk of recidivism); accord NEV. REV. STAT. § 179D.730 (2003) (describing the three different levels of community notification); N.J. STAT. ANN. § 2C:7-8(a) (West 2005) (authorizing the Attorney General to establish guidelines to determine the risk of reoffense and provide for three levels of notification on that basis); N.Y. CORRECT. LAW § 168-1(6) (Consol. 2003) (indicating that the lower the level of risk, the more confidential a sex offender's identifying information must be); R.I. GEN. LAWS § 11-37.1-12 (2002) (providing for "three (3) levels of notification depending upon the risk of reoffense by the offender"); VT. CODE tit. 13 § 5411a (b) (1998) (allowing online posting of registrant's picture and town of residence only for certain offenders that have been deemed to have a higher risk of reoffending).

¹⁹³ See, e.g., ALA. CODE § 15-20-25 (1995 & Supp. 2005) (providing notification to legal residents within 1,500 feet radius of residence of registrant); GA. CODE ANN. § 42-1-12(c.1)(1) (1997 & Supp. 2005) (enabling the Department of Education to have a list of all sex offenders in the community and to disseminate that information to all elementary and secondary schools in the community); LA. REV. STAT. ANN. § 15:542(B)(1) (2005) (requiring registrant to provide personal information and photo to every residence and business within a one-mile radius of registrant's residence).

¹⁹⁴ See People v. Cornelius, 821 N.E.2d 288, 291-292 (Ill. 2004) (explaining that reporting laws were amended to require that registration information be contained in a Statewide Sex Offender Database accessible online to the general public). See also H.R. 05-1035, 65th Gen. Ass., 1st Sess. (Co. 2005), available at 3/7/05 LegAlert 2005 WLNR 3744254 (acknowledging change of COLO. REV. STAT. § 16-22-110, which would eliminate the "need to know" aspect of Colorado's community notification statute, and giving local lawmakers greater discretion with regard to whether to release the information). For strict liability states that provide full access to the public under Megan's Law, see, for example, FLA. STAT. § 943.043(3) (2001) (offering public access to information of any sex offender for a small fee); IDAHO CODE § 18-8323(2) (2004) (enabling any member of the public to receive personal information of registrant with the exception of registrant's place of employment or school attending); KAN. STAT. ANN. § 22-4909 (1995 & Supp. 2004) (providing all information required under the Sexual Offenders Registration Act to be open to inspection by the public); MD. CODE ANN., CRIM. PROC. § 11-717 (LexisNexis 2001) (requiring dissemination of a registration statement that includes all personal information of the registrant); MISS. CODE ANN. § 45-33-49 (1999 & Supp. 2005) (releasing, upon written request, to any person the personal information of the offender).

¹⁹⁵ See State v. Mount, 78 P.3d 829, 838 (Mont. 2003) ("Any shame that [the registrant] may experience results from his previous conviction, not from disclosure of that fact to the public."); State v. White, 590 S.E.2d 448, 456 (N.C. Ct. App. 2004) ("[A]ny stigma flowing from registration requirements is not due to public shaming, but arises from accurate information which is already public[.]"); Meinders v. Weber, 604 N.W.2d 248, 257 (S.D.

that it is not specifically the fact that personal information has been disseminated, but rather that their privacy interests have been implicated by the detailed nature of the available information, the requirement that it be updated regularly, and the ease with which citizens can access it.¹⁹⁶

III. CHALLENGING THE INCLUSION OF STRICT LIABILITY STATUTORY RAPE IN SEX OFFENDER REGISTRATION

A. *General Principles of Constitutionality Affecting Sex Offender Registration Laws*

1. The *Mendoza-Martinez* Factors

If one starts from the basic premise that criminal penalties, even those masquerading as civil sanctions, deserve the protection of substantive and procedural due process,¹⁹⁷ then the corollary is equally important: civil nonpunitive regulations do not require the same adherence to substantive and procedural safeguards as do their criminal counterparts.¹⁹⁸ Because sex offender registration laws comprise both civil and criminal characteristics, the critical threshold issue is whether they are designed as civil remedies or criminal penalties. To determine whether a law is regulatory or punitive in nature, the United States Supreme Court, in *Kennedy v. Mendoza-Martinez*, articulated seven factors as guiding principles.¹⁹⁹ Two of the seven factors have come to be called the “two-part intent-effects test.”²⁰⁰ The first factor is

2000) (“The information contained in the sex offender registry is almost the same information available as a public record in the courthouse where the conviction occurred.”).

¹⁹⁶ See Doe v. Dep’t of Pub. Safety, 92 P.3d 398, 409 (Alaska 2004) (concluding that information posted on the central registry implicates offender’s liberty interest); State v. Myers, 923 P.2d 1024, 1041 (Kan. 1996) (acknowledging that “the practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment”).

¹⁹⁷ See *United States v. Ward*, 448 U.S. 242, 248 (1980):

The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to ‘any criminal case.’ Similarly, the protections provided by the Sixth Amendment are available only in ‘criminal prosecutions.’ Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court.

¹⁹⁸ See *Selig v. Young*, 531 U.S. 250, 263 (2001) (determining that commitment of sexually violent felons was a civil remedy that did not impact the constitutionality of the statute under ex post facto or double jeopardy clauses).

¹⁹⁹ 372 U.S. 144, 168-69 (1963) (delineating seven factors to determine whether a law is regulatory or punitive in its effect). For a list of the factors, see *supra* note 18.

²⁰⁰ See *Hudson v. United States*, 522 U.S. 93, 99 (1997) (rejecting double jeopardy claim in administrative hearings following criminal prosecution, deeming them civil under the *Mendoza-Martinez* “intent-effects test”); *see also* *People v. Logan*, 705 N.E.2d 152, 158-60

whether the legislature intended the statute to be a civil remedy.²⁰¹ Generally, great deference is afforded legislative enactments.²⁰² And specifically, in light of *Mendoza-Martinez*, courts give great deference to the state's expressed legislative intent that the statute was designed as a civil remedy with an alternative nonpunitive purpose.²⁰³

However, the inquiry does not end there. If the statute serves both punitive and nonpunitive purposes, the second part of the *Mendoza-Martinez* test inquires whether the nonpunitive purposes alone could fairly justify the sanction imposed.²⁰⁴ The "intent-effects" test emphasizes that even if the legislature intended the statute to serve an alternative purpose, the statute may be deemed a criminal penalty if the statutory scheme is "so punitive either in purpose or effect, . . . as to transform what was clearly intended as a civil remedy into a criminal penalty."²⁰⁵ As a result, the task has been to discern well-crafted legislation that is narrowly tailored to meet regulatory aims from legislation that is excessive in relation to its nonpunitive purpose.²⁰⁶

(Ill. App. 1998) (employing the "intent-effects" test to determine whether sex offender registration statute was constitutional); *Doe v. Poritz*, 662 A.2d 367, 433 (N.J. 1995) (Stein, J., dissenting) (observing the judicial evolution from the *Mendoza-Martinez* seven-factor test to the two-part intents-effects test).

²⁰¹ See *Poritz*, 662 A.2d at 433 (describing the first part of the "intent-effects" test).

²⁰² See, e.g., *Lambert v. California*, 355 U.S. 225, 228 (1957) (observing the wide latitude given to the legislature's authority to define an offense); *In re Christopher S.*, 776 A.2d. 1054, 1057 (R.I. 2001) (acknowledging that the Court's evaluation of legislative enactments "has been extremely deferential"). But see *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (affording little deference to the state's desire to control sexual behavior between consenting adults and concluding that the issue was whether the statute intruded on a liberty interest).

²⁰³ See, e.g., *Smith v. Doe*, 538 U.S. 84, 110 (2003) (Souter, J., concurring) ("What tips the scale for me is the presumption of constitutionality normally accorded a State's law. That presumption gives the State the benefit of the doubt in close cases like this one."); *Hudson*, 522 U.S. at 103 ("It is evident that Congress intended the OCC money penalties and debarment sanctions imposed for violations of 12 U.S.C. §§ 84 and 375b to be civil in nature."); *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (recognizing clear Congressional intent to characterize monetary penalties under the Clean Water Act as civil in nature).

²⁰⁴ See *Poritz*, 662 A.2d at 433 (describing the second part of the "intent-effects" test).

²⁰⁵ *Hudson*, 522 U.S. at 99 (citations omitted) (recognizing that it is largely an issue of statutory construction whether a punishment is civil or criminal in nature); cf. *United States v. Ursery*, 518 U.S. 267, 279 (1996) (deciding whether *in rem* civil forfeiture was so extreme and disproportionate in comparison to the government's damages that it had to be considered punitive); see also *Artway v. Att'y Gen.*, 81 F.3d 1235, 1263 (3rd Cir. 1996) (crafting three-prong test of (i) actual purpose; (ii) objective purpose, and (iii) effect to determine whether regulation was a civil or criminal penalty).

²⁰⁶ See, e.g., *Smith*, 538 U.S. at 102-03 (reiterating that the '[m]ost significant' factor in determining whether a statute is nonpunitive is its "rational connection to a nonpunitive purpose"); *State v. Jones*, 666 A.2d 128, 135 (Md. 1995) (analyzing whether suspension of

2. Regulation or Punishment? A Review of *Smith v. Doe*

Over the years, the Court has used the *Mendoza-Martinez* two-step inquiry in a broad array of legislative enactments to determine whether a sanction was civil or criminal in nature.²⁰⁷ Specifically, with respect to whether sex offender registration laws are civil or punitive, a common response has emerged. Despite their acknowledgement that registration requirements may be onerous to the registrant,²⁰⁸ courts view sex offender registration requirements as civil nonpunitive measures propelled by the state's legitimate interest to protect the public from sexual predators.²⁰⁹ Under *Mendoza-*

drivers' licenses served the civil regulatory aims); *Young v. State*, 806 A.2d 233, 249 (Md. 2002) (finding that registration provisions are tailored to protect the public); *cf. Meinders v. Weber*, 604 N.W.2d 248, 260 (S.D. 2000) (concluding that the legislature must be given deference in determining whether a statute is excessive to its alternative purpose).

²⁰⁷ See, e.g., *Smith*, 538 U.S. at 93, 97 (involving the civil-criminal distinction in sex offender registration laws); *Hudson*, 522 U.S. at 105 (entailing monetary penalties due to violation of banking laws); *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997) (concerning civil commitment of sexually dangerous predators); *United States v. Salerno*, 481 U.S. 739, 750-51 (1987) (regarding whether preventative detention served an alternative purpose of preventing danger to the community); *Ward*, 448 U.S. at 249 (regarding monetary penalties assessed due to violation of the Clean Water Act); *Bell v. Wolfish*, 441 U.S. 520, 537 (1979) (discussing pretrial detention procedures).

²⁰⁸ See *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("The stigma this criminal statute imposes, moreover, is not trivial. The offense to be sure is but a class C misdemeanor Still, it remains a criminal offense with all that imports for the dignity of the persons charged."); see also *Russell v. Gregoire*, 124 F.3d 1079, 1092 (9th Cir. 1997) ("Notification may well subject offenders to humiliation, public opprobrium, ostracism, and the loss of job opportunities [and] . . . may have a lasting and painful impact on a sex offender's life, which ought not be lightly disregarded."); *Doe v. Pataki*, 3 F. Supp. 2d 456, 467-468 (S.D.N.Y 1998) ("[W]idespread dissemination of the above information is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences."); *Poritz*, 662 A.2d at 409 (recognizing the invasion of privacy from public notification of registrant's personal information); *State v. Cook*, 700 N.E.2d 570 (Ohio 1998) ("This court is not blind to the effects of the notification provisions. . . . Offenders may become ostracized from society and even experience harassment.").

²⁰⁹ See *Smith*, 538 U.S. at 102-03 (reiterating the nonpunitive purpose of sex offender registration schemes); see also *Femedeer v. Haun*, 227 F.3d 1244, 1249 (10th. Cir. 2000) (recognizing the "unambiguous" statement of purpose in Utah's registration scheme); *Lee v. State*, 895 So. 2d 1038, 1040 (Ala. Crim. App. 2004) ("The Legislature finds that the danger of recidivism posed by criminal sex offenders and that protection of the public from these offenders is a paramount concern" (quoting ALA. CODE § 15-20-20.1 (Supp. 2005))); *State ex rel. Olivieri v. State*, 779 So. 2d 735, 747 (La. 2001) (articulating "an avowedly nonpunitive intent" of registration laws); *Rodriguez v. State*, 93 S.W.3d 60, 67-79 (Tex. Crim. App. 2002) (concluding that, under the intent-effects test, the Texas statutory scheme was not punitive). But see *Young*, 806 A.2d at 253 (Bell, C.J., dissenting) (voicing concern that the punitive effect of registration statute "outweighs, and negates, any remedial purpose it has").

Martinez, two important findings shape this determination. First, courts accept that registration statutes were designed primarily to offer regulatory remedies for the community, not to punish perpetrators.²¹⁰ Such explicit statements of intent serve to meet the first part of the “intent-effects” test. Assuming the legislative intent to create a civil remedy is clearly shown, courts have proceeded to the next level of inquiry: whether registration statutes offer an alternative nonpunitive purpose.²¹¹ In the case of registration statutes, protecting the public from recidivist predators serves as the alternative nonpunitive purpose to which the statute is rationally connected.²¹²

So compelling is the alternative purpose requirement that the Court, in its review of whether sex offender registration schemes violated *ex post facto* laws, wrote in *Smith v. Doe*, “The [Alaska Sex Offender Registration] Act’s rational connection to a nonpunitive purpose is a ‘most significant factor’ in our determination that the statute’s effects are not punitive.”²¹³ The Ex Post

²¹⁰ See, e.g., *State v. White*, 590 S.E.2d 448, 456 (N.C. Ct. App. 2004) (“[A]ny stigma flowing from registration requirements is not due to public shaming, but arises from . . . accurate information which is already public”); see also *State v. Mount*, 78 P.3d 829, 838 (Mont. 2003) (“We conclude that the registration and disclosure requirements of the Act do not constitute historical shaming or punishment.”); *State v. Druktenis*, 86 P.3d 1050, 1061 (N.M. Ct. App. 2004) (“The purpose and the principal effect of notification are to inform the public for its own safety, not to punish or stigmatize and ostracize the offender.”); *Hendrix v. Taylor*, 579 S.E.2d 320, 324 (S.C. 2003) (commenting that the registration scheme is “not intended to violate the guaranteed constitutional rights of” the registrants); see also *supra* note 6 and accompanying text (reviewing legislative pronouncements of intent).

²¹¹ See, e.g., *Rodriguez*, 93 S.W.2d at 69 (stating that once the first part of the test is met, the court must “consider whether the [statute is] so punitive in purpose as to transform what was clearly intended as a civil regulation into a criminal penalty”).

²¹² See, e.g., *State v. Costello*, 643 A.2d. 531, 533 (N.H. 1994) (observing that a statute which is both penal and nonpenal will be deemed nonpenal if it is “the evident purpose of the legislature”); *State v. Sakobie*, 598 S.E.2d 615, 617 (N.C. Ct. App. 2004) (asserting the nonpunitive purpose of registration statutes is to “prevent recidivism because ‘sex offenders often pose a high risk of engaging in sex offenses . . . and protection of the public from sex offenders is of paramount governmental interest’” (quoting N.C. GEN. STAT. § 14-208.5 (2003))); *Meinders v. Weber*, 604 N.W.2d 248, 255 (S.D. 2000) (acknowledging twin purposes of protection of community and tracking of sex offenders); *Kitze v. Commonwealth*, 475 S.E.2d 830, 832 (Va. Ct. App. 1996) (reporting that one of the purposes of the Virginia Registry is to protect children from becoming victims of repeat offenders); *State v. Bollig*, 605 N.W.2d 199, 205 (Wis. 2000) (concluding that Wisconsin’s registration scheme is not punitive but “reflects the intent to protect the public and assist law enforcement”).

²¹³ 538 U.S. at 102 (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)). But see *id.* at 109 (Souter, J., concurring) (questioning “when a legislature uses prior convictions to impose burdens that outpace the law’s stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones”); *Kitze*, 475 S.E.2d at 835-36 (Benton, J., dissenting) (arguing that attaching the requirement to register to a felony sentencing order is tantamount to punishment).

Facto Clause²¹⁴ prohibits retroactive application of a law that “inflicts a greater punishment, than the law annexed to the crime, when committed.”²¹⁵ In *Smith*, petitioners challenged their inclusion in Alaska’s Sex Offender Registration Act, which required registration of those who were convicted prior to enactment of the Sex Offender Registration Act.²¹⁶ Both petitioners had been convicted of aggravated sexual offenses, served time in prison, and had been released prior to the enactment of the Act.²¹⁷ Interestingly, the federal government in its establishment of registration laws did not require the states to apply registration laws retroactively.²¹⁸ Although the post sentence requirement to register could have been viewed as an additional punitive measure applied *ex post facto*, the Court in *Smith* found that the registration scheme was supported by an alternative nonpunitive purpose.²¹⁹ Speaking for the majority, Justice Kennedy found that the legislative intent behind the Alaska registration requirement was to create a civil, nonpunitive regime which was rationally connected to its stated goal.²²⁰ While the Court

²¹⁴ See U.S. CONST. art. I, § 10 (“No state shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.” (emphasis added)).

²¹⁵ *Calder v. Bull*, 3 U.S. 386, 390 (1798). The Supreme Court summarized well the meaning of the Ex post facto Clause. See *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925):

[A]ny statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.

²¹⁶ 538 U.S. 84.

²¹⁷ *Id.* at 91-92 (remarking that the Act controlled petitioners although they were convicted prior to its passage).

²¹⁸ See *Doe v. Poritz*, 662 A.2d 367, 424-28 (N.J. 1995) (Stein, J., dissenting) (detailing the initial federal parameters of the registration requirements under 42 U.S.C.A. § 14071).

²¹⁹ *Smith*, 538 U.S. at 93 (stating that the imposition of restrictions upon dangerous sex offenders is “a legitimate nonpunitive governmental objective”).

²²⁰ See *id.* (“Here, the Alaska Legislature expressed the objective of the law in the statutory text itself. The legislature found that ‘sex offenders pose a high risk of reoffending’ and identified ‘protecting the public from sex offenders’ as the ‘primary governmental interest’ of the law.”). Even before the U.S. Supreme Court addressed the *ex post facto* issue, other courts had concluded that registration statutes were constitutional under *ex post facto* laws. See *Doe v. Pataki*, 120 F.3d 1263, 1265 (2nd Cir. 1997) (concluding that New York’s sex offender registration act did not violate the *Ex Post Facto Clause*); *accord Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000) (concluding that “Utah’s notification scheme imposes only a civil burden upon sex offenders and therefore does not run afoul of the *Ex Post Facto Clause*”); *Akella v. Michigan Dep’t of State Police*, 67 F.Supp. 2d 716, 734 (E.D. Mich. 1999) (holding that notification provisions of Michigan statute were intended to serve a regulatory purpose and did not violate the *Ex Post Facto Clause*); *State v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1997) (affirming district court ruling that the Iowa sex offender statute is not punitive and, therefore, is not *ex post facto*); *State v. Walls*, 558 S.E.2d 524, 526 (S.C. 2002) (finding no *ex post facto* issue where South

characterized Alaska's registration statute as nonpunitive, it acknowledged that "[t]he publicity [from registration and notification] may cause adverse consequences . . . running from mild personal embarrassment to social ostracism," with attendant "humiliation increasing in proportion to the extent of the publicity."²²¹ Nonetheless, because there was a clearly stated alternative civil purpose for the statute, its punitive effects were considered incidental.²²²

The majority's position was not without debate, however, as dissenters disputed the characterization of the Alaskan statute as clearly evincing a legislative intent to create a civil remedy.²²³ The concern? That "past crime alone, not current dangerousness, is the touchstone triggering the Act's obligations."²²⁴ Additionally, dissenters believed that the majority had diminished the importance of some *Mendoza-Martinez* factors in favor of others in order to find that the statute was civil in nature; Justice Ginsburg wrote, "Measured by the *Mendoza-Martinez* factors, I would hold Alaska's Act punitive in effect."²²⁵

It is a fine line for sex offender registration schemes. The dialogue from *Smith* demonstrated the importance of, and tension inherent in, the *Mendoza-Martinez* analysis: legislative aims that are regulatory in nature can turn punitively intrusive very quickly. In the end, however, because registration schemes have been cast as civil regulatory measures that are rationally connected to alternative civil purposes, they have survived a variety of constitutional attacks beyond *ex post facto*, including alleged violations of the

Carolina Sex Offender Registry Act aimed to protect the public and aid law enforcement and was not intended to punish).

²²¹ *Smith*, 538 U.S. at 99.

²²² *Id.* (explaining that "the attendant humiliation is but a collateral consequence of a valid regulation"). State courts have similarly concluded. *See Young v. State*, 806 A.2d 233, 249 (Md. 2002) (acknowledging that registration imposes an affirmative burden but finding the burden to be reasonable in light of the remedial aims of the statute); *State v. Costello*, 643 A.2d 531, 533 (N.H. 1994) (determining that any incidental punishment is secondary to the regulatory nature of the act).

²²³ *Smith*, 538 U.S. at 114-15 (Ginsburg, J., dissenting) (challenging the majority's position that the statute was designed as a regulatory measure); *see also id.* at 113-14 (Stevens, J., dissenting) (arguing that the statute was punitive and, therefore, under *ex post facto* principles, inapplicable to those convicted prior to its enactment).

²²⁴ *Id.* at 116 (Ginsburg, J., dissenting) (contending that the Act targets prior crimes).

²²⁵ *Id.* at 115; *see also id.* at 112 (Stevens, J., dissenting) (arguing that the registration laws constitute a "severe deprivation of the offender's liberty"). Although Justice Souter concurred in the judgment, he expressed concern that the requirement to register had the indicia of punishment. *Id.* at 108-09 (observing that "the fact that the Act uses past crime as the touchstone . . . serves to feed suspicion that something more than regulation of safety is going on").

separation of powers;²²⁶ due process based on the reasoning of *Apprendi v. New Jersey*;²²⁷ the prohibition of cruel and unusual punishment;²²⁸ the presumption of innocence;²²⁹ and the prohibition of unreasonable search and seizure.²³⁰

B. Trivializing Dangerousness: The Fallacy Behind Connecticut Department of Public Safety and the Strict Liability Offender

Smith demonstrated that the constitutionality of sex offender registration schemes rests on the assertion that compelling regulatory intentions outweigh the punitive impact on the registrant because there is a sufficiently tailored nexus between the requirement to register and the alternative nonpunitive purpose of the registration scheme.²³¹ The question arises whether the assumption underlying this assertion is accurate. Is there a sufficiently tailored nexus between the requirement to register and the alternative nonpunitive purpose in the case of the strict liability offender? This section examines whether the sanction of registration is excessively drawn if there is no

²²⁶ See *Milks v. State*, 894 So.2d 924, 929 (Fla. 2005) (concluding that sex offender registration laws were a permissible exercise of the legislature's public policymaking function and thus did not violate the separation of powers).

²²⁷ See *Young*, 806 A.2d at 235 (determining that registration is a civil measure that is not controlled by *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which requires that any fact other than a prior conviction that increases the potential penalty beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

²²⁸ See *People v. Adams*, 581 N.E.2d 637, 642 (Ill. 1991) (finding that Illinois's Registration Act did not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment); *accord State v. Scott*, 961 P.2d 667, 671-673 (Kan. 1998) (concluding that punitive effects of Kansas statute were not so disproportionate to defendant's crime as to constitute cruel and unusual punishment); *Ex parte Robinson*, 116 S.W.3d 794, 797-798 (Tex. Crim. App. 2003) (finding the purpose of sex offender registry program to be "nonpunitive in both intent and effect . . . [and thus] does not constitute cruel and unusual punishment").

²²⁹ See *Boutin v. LaFleur*, 591 N.W.2d 711, 717 (Minn. 1999) (declaring that the sex offender registration act does not violate the fundamental right of the presumption of innocence because the act is not punitive in nature).

²³⁰ See *Doe v. Poritz*, 662 A.2d 367, 381 (N.J. 1995) (rejecting Fourth Amendment search and seizure attack on grounds that plaintiff has no reasonable expectation of privacy in his fingerprints, photographs, or matters of public record and, therefore, the requirement to provide such information does not constitute a "search").

²³¹ See *Smith v. Doe*, 538 U.S. 84, 93 (2003); *see also Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000) (expressing the majority view in sex offender registration analysis that "[a] rational connection between ends and means clearly exists in the present case"); *accord Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (reasoning that the duration of the registration requirement of Alaska's sex offender registration law was "reasonably related to the danger of recidivism"); *Ray v. State*, 982 P.2d 931, 935-36 (Idaho 1999) (finding that the purpose of the Idaho registration statute is to assist local law enforcement agencies).

procedurally guaranteed opportunity to determine the likelihood of the strict liability offender's danger to the community.

Procedural due process requires that, before the government takes action that impacts a person's life, liberty, or property, the government must afford the person a fair process that provides notice and a meaningful opportunity to be heard.²³² In the context of sex offender registration laws, offenders have challenged that their inclusion in the registry occurs without notice and without a meaningful opportunity to be heard on whether they pose a danger to the community.²³³ The Court addressed this issue in *Connecticut Department of Public Safety v. Doe*, in which a purportedly non-dangerous sex offender challenged the constitutionality of the Connecticut sex offender registry act, claiming that his inclusion in the state-wide registry deprived him of a constitutionally protected liberty interest without adequate procedural safeguards in place.²³⁴ Connecticut's community notification system disseminates information regarding all offenders through a state-wide database posted on the Internet and freely accessible to the public.²³⁵ Offenders are included on the registry based "solely by virtue of their conviction record and state law."²³⁶ The Connecticut registry contains a disclaimer stating, "The Department of Public Safety has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous."²³⁷

Ultimately, it was a narrow issue before the Court – whether, as designed, Connecticut's registration scheme denied offenders procedural due process because it did not provide offenders, as a prerequisite to registration,

²³² For a general discussion of procedural due process, see JOHN E. NOWAK AND RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW, § 13.1 et. seq. (7th ed. 2004).

²³³ See, e.g., *Doe v. Lee*, 132 F. Supp. 2d 57, 59 (D. Conn. 2001) (claiming due process violation because Connecticut's registration scheme does not require assessment of dangerousness); *Welvaert v. Neb. State Patrol*, 683 N.W.2d 357, 362-364 (Neb. 2004) (arguing due process violation for a classification system that relies on the prior conviction).

²³⁴ 538 U.S. 1, 7-8 (2003) (reversing a Second Circuit decision that procedural due process entitled registrants to a hearing to determine current dangerousness).

²³⁵ See CONN. GEN. STAT. § 54-258(a)(1) (2001) ("The Department of Public Safety shall make registry information available to the public through the Internet.").

²³⁶ *Doe v. Conn. Dep't of Pub. Safety*, 271 F.3d 38, 44 (2nd Cir. 2001) (emphasis added) (referring to Department of Public Safety's disclaimer on the registry website). Other states share similar registration characteristics. See, e.g., *In re W.M.*, 851 A.2d 431, 435 (D.C. 2004) (finding that the District of Columbia's sex offender registration act, like Connecticut's, requires all sex offenders to register, regardless of current dangerousness); accord *Milks v. State*, 894 So. 2d 924, 927 (Fla. 2005) (observing that Florida's registration requirements are based on the fact of prior conviction, not current dangerousness); *Ex Parte Robinson*, 116 S.W.3d 794, 796 (Tex. Crim. App. 2003) (noting that "[t]he Texas statute, like the Connecticut one, requires registration of all sex offenders, dangerous or not").

²³⁷ See *Conn. Dep't of Pub. Safety*, 271 F.3d at 44.

individualized hearings on the issue of their dangerousness to the community.²³⁸ The district court had found that the registration scheme was procedurally flawed as designed and issued a permanent injunction to prohibit the state from disseminating the information,²³⁹ a ruling that was affirmed by the Second Circuit Court of Appeals.²⁴⁰ In reversing the Court of Appeals decision, the Supreme Court found that a registrant's federal right to procedural due process does not require an individualized hearing on the issue of dangerousness, thus validating Connecticut's registration scheme and sanctioning the public disclosure "of all sex offenders – currently dangerous or not."²⁴¹ In so concluding, the Court explained that procedural due process "does not entitle [the offender] to a hearing to establish a fact that is not material under the Connecticut statute."²⁴²

On its face, *Connecticut Department of Public Safety* might not seem to be controversial; indeed, no Justice dissented from it. And as framed, one can understand why the issue presented had little debate. It is possible to conclude, as the Court did, that because Connecticut's system was designed without consequence to dangerousness, inquiry into the lack of procedural safeguards concerning the issue of dangerousness becomes a "pointless" inquiry.²⁴³ As the Court observed, due process does not demand the opportunity to prove a fact – here, current dangerousness – that is not material to the State's statutory scheme.²⁴⁴

The effect of this decision, as the Court recognized, was to place the prior conviction front and center as the sole triggering mechanism for registration, and the burdens that flow from it.²⁴⁵ Such a conclusion raises an important question: If a prior conviction may serve as the sole requirement for registration and community notification, should there be constitutional limitations on which sexual offenses qualify as registration-worthy? Because

²³⁸ *Conn. Dep't of Pub. Safety*, 538 U.S. at 4.

²³⁹ See *Conn. Dep't of Pub. Safety*, 271 F.3d. at 46 (citing *Doe v. Lee*, No. 3:99CV314, 2001 WL 536729 (D. Conn. May 17, 2001)).

²⁴⁰ See *id.* at 56-57.

²⁴¹ *Conn. Dep't of Pub. Safety*, 538 U.S. at 7.

²⁴² *Id.*; see also *Doe v. Tandeske*, 361 F.3d 594, 596 (9th Cir. 2004) (applying *Conn. Dep't of Pub. Safety* to hold that Alaska's sex offender registration system did not violate procedural due process); *accord Milks v. State*, 894 So. 2d 924, 927-28 (Fla. 2005) (maintaining that to provide hearings on dangerousness would be "pointless"). But see *Doe v. Attorney General*, 715 N.E.2d 37, 45 (Mass. 1999) (concluding that a hearing must be held to allow the offender an opportunity to demonstrate exemption from the regulations).

²⁴³ See *Milks*, 894 So. 2d at 927 (Fla. 2005) (using *Conn. Dep't of Pub. Safety* and the similarity of Florida's registration scheme to conclude that inquiry into the procedural process would be "pointless").

²⁴⁴ See *Conn. Dep't of Pub. Safety*, 538 U.S. at 4.

²⁴⁵ See *id.* at 7. ("[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 – currently dangerous or not – must be publicly disclosed.").

of the emphasis placed on the conviction, it is critical that *all* convictions stand for the proposition intended – that the conviction demonstrates the actor's likelihood of reoffense and danger to the community.²⁴⁶ The Court offered no specific guidance on this issue, and in fact, its silence on the subject implies that any previously secured conviction would be registration-worthy. Unfortunately, to suggest that all previously secured convictions could be registration-worthy is a flawed premise that relies on generalized assumptions about the conviction, assumptions that are not valid as applied to the strict liability offender. Indeed, *Connecticut Department of Public Safety* supports two conclusions which, as applied to the strict liability offender, are erroneous: (i) all prior convictions of sexual offenses demonstrate dangerousness to the community and are therefore registration-worthy; and (ii) all convictions result from procedurally safeguarded opportunities to contest the issue of the offender's dangerousness to the community. The combined effect of these faulty assumptions makes registration of the statutory rapist excessive in relation to the regulatory goal sought to be achieved.²⁴⁷

All prior convictions are registration-worthy: In endorsing the registration and notification scheme of all sex offenders, “*currently* dangerous or not,”²⁴⁸ the Court operated under the unspoken, but inescapable assumption, that individualized assessment of current dangerousness was not necessary to prove because *at least at the time of the commission of the crime*, the actor was judged to be a danger to the community.²⁴⁹ Generally, this is an accurate assumption. Most sex offense convictions do support the assertion that the

²⁴⁶ The registrant's likelihood of reoffense and danger to the community provide the underpinning to conclude that the law is rationally related to its alternative purpose. *See* *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963) (emphasizing that to categorize a law as regulatory or punitive it must be determined “whether [the law] appears excessive in relation to the alternative purpose assigned”).

²⁴⁷ *Cf. Schall v. Martin*, 467 U.S. 253, 269 (1984) (analyzing whether under *Mendoza-Martinez* the pretrial detention of juveniles was excessive in relation to the regulatory goal intended); *see also* *United States v. Salerno*, 481 U.S. 739, 747 (1987) (quoting *Mendoza Martinez* to explain that “the punitive/regulatory distinction turns on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]’”) (citation omitted).

²⁴⁸ *See Conn. Dep't of Pub. Safety*, 538 U.S. at 7 (emphasis added).

²⁴⁹ As noted by the Court of Appeals, the Connecticut Department of Public Safety’s website confirms this assessment in its statement, “This information is made available for the purpose of protecting the public.” *See Doe v. Dep’t of Pub. Safety*, 271 F.3d 38, 45 (2nd Cir. 2001). Interestingly, in a brief to the Supreme Court of Florida on appeal from *State v. Espindola*, 855 S.2d 1281 (Fla. App. 2003), petitioners offered the opposite argument; that since all offenders were included, the state must have thought that none of them were dangerous. *See Brief of Appellee-Respondent at 31-32, State v. Espindola*, No. SC03-2103 (Fla. 2003 April 5, 2004).

actor poses a high risk to the community.²⁵⁰ But what of criminal convictions that do not support the Court's assumption? Consider the strict liability statutory rapist. The key to strict liability statutory rape, as noted in Part I, is that the actor assumes a criminal risk by engaging in sexual activity with someone who could be under age. It is a stretch of significant proportions to transform the theory of "assumption of the risk" – a theory more common to tort jurisprudence²⁵¹ than criminal law – into a symbol of predatory conduct, which is the legislative justification for the registration and notification statutes. No matter the inherent value or historical place of assumption of the risk as a theory of culpability in statutory rape, the doctrine cannot be said to support the proposition that the offender is a proven danger to the community. Indeed, language in statutory rape cases is fraught with the contrary indication – that despite the offender's mistake, or the victim's fraud, a conviction is warranted.²⁵² If, as argued here, there is insufficient legislative justification to offset the burdensome intrusion, then under *Mendoza-Martinez* there is no sufficiently drawn nexus between the requirement to register and the nonpunitive purpose of the registration scheme.²⁵³

Meaningful opportunity to contest: Intertwined with this generalized but faulty inference is another one worth noting: the Court's assumption that the underlying criminal trial provides adequate due process guarantees in lieu of an individualized assessment of dangerousness. In *Connecticut Department of Public Safety*, the Court concluded that using a prior conviction to trigger registration and public disclosure is justified because "a convicted offender has

²⁵⁰ See *supra* notes 4-7 and accompanying text (addressing the high likelihood for certain types of sex offenders to reoffend).

²⁵¹ See, e.g., *Raith v. Blanchard*, 611 S.E.2d 75, 77 (Ga. App. 2005) ("The defense of assumption of the risk bars recovery when the evidence shows that the plaintiff, without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not.") (quotation marks omitted); see also *Henry v. Barlow*, 901 So. 2d 1207, 1213 (La. App. 2005) (explaining that assumption of the risk "comes into play in determining the risks included within the scope of the defendant's duty and to whom the duty is owed"); *Guzman v. Iceland*, 795 N.Y.S.2d 745, 746 (A.D.2d 2005) ("Application of the doctrine of assumption of risk is justified when a consenting participant is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks.").

²⁵² See *supra* Part I.B. (regarding specific cases that acknowledged offender's innocent conduct).

²⁵³ See *Doe I v. Otte*, 259 F.3d 979, 989-990 (9th Cir. 2001), *overruled by* *Smith v. Doe*, 538 U.S. 84 (2003) (comparing Washington's narrowly drawn notification statute with Alaska's system, which was broadly defined). The year following *Smith v. Doe*, 538 U.S. 84 (2003), the Alaska Supreme Court found the statute to be constitutionally infirm with respect to set-aside convictions. See *Doe v. State, Dep't of Pub. Safety*, 92 P.3d 398, 400 (Alaska 2004) (concluding that it violated due process to apply the Act to a person whose conviction was set aside before the statute became specifically applicable to set aside convictions).

already had a procedurally safeguarded opportunity to contest.”²⁵⁴ The subtext is clear. Notification to the community without a contemporaneous assessment of dangerousness is justified because the offender’s dangerousness was already vetted at trial in a procedurally safeguarded manner. Unfortunately, in the case of the strict liability offender, the trial does not offer a meaningful opportunity for the offender to raise affirmative mens rea defenses that would cast doubt on the offender’s danger to the community, or on the propensity for reoffense.

Apply the Court’s reasoning to Timothy Owens and these false assumptions become evident. Owens was convicted of statutory rape and required to register as a sexually violent offender for life, despite an offer of proof that he was reasonably mistaken about his partner’s age.²⁵⁵ Under the *Mendoza-Martinez* test, the essential is missing: the alternative civil purpose of the sex offender registration scheme is not rationally connected to Owens’s requirement to register. His conviction, standing alone, does not demonstrate that Owens was a danger to the community; nor does his conviction demonstrate, as the Court suggested, that he had an opportunity to meaningfully contest it, since he was not allowed to present a mistake-of-age defense. The cautionary note sounded by Justice Souter is appropriate here: “[W]hen a legislature uses prior convictions to impose burdens that outpace the law’s stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.”²⁵⁶

Trivializing the importance of a finding of dangerousness – as *Connecticut Department of Public Safety* has done – only suffices if the underlying conviction already supports the assertion that the offender is a danger to the community. But where it does not, then “[o]verestimation of an individual’s dangerousness will lead to immediate and irreparable harm to the offender.”²⁵⁷ Without any attempts to distinguish from among types of sex offenders, the broad reach of the intrusion has impermissibly outweighed the regulatory nature of the sex offender registration law. What was intended to protect the community inevitably becomes a punitive scheme designed to shame the statutory rapist without the attendant regulatory civil benefits of tracking recidivists or protecting the public. And the *Mendoza-Martinez* limitation rears its head: a strict liability conviction coupled with a registration scheme that does not assess dangerousness creates an excessive sanction.

This is fundamentally the problem of a registration scheme based automatically and exclusively on a prior conviction. Absent individualized hearings on dangerousness, it cannot be concluded that there is always a

²⁵⁴ Doe v. Conn. Dep’t of Pub. Safety, 538 U.S. 1, 7 (2003).

²⁵⁵ See *supra* notes 33-47 and accompanying text (discussing Owens v. State, 724 A.2d 43 (Md. 1999)).

²⁵⁶ Smith v. Doe, 538 U.S. 84, 109 (2003) (Souter, J., concurring).

²⁵⁷ *In re Registrant R.F.*, 722 A.2d 538, 540 (N.J. 1998); cf. People v. David, 733 N.E.2d 206, 213 (N.Y. 2000) (“Due process requires that the State bear the burden of proving, at some meaningful time, that a defendant deserves the classification assigned.”).

sufficiently drawn nexus between the state's civil aims and the requirement that a particular offender must register. In a recent case, the Wyoming Supreme Court so decided when it rejected the state's contention that defendant presented a high risk of reoffending based solely on his past conviction.²⁵⁸ The court stated, "If the statutory classification system is to have any integrity, the State must prove more than the mere commission of the original offense, especially where the offender has been out and about in society during the interim without further offense."²⁵⁹

In the case of the strict liability sex offender, the compelling reason for sex offender registration laws – the protection of the community from sexual predators – is never specifically litigated, either at trial or at time of registration. Without a sufficiently tailored nexus between the type of crime that triggers registration and the nonpunitive purpose of the registration scheme, there is a significant risk of an erroneous deprivation of a liberty interest under *Mathews v. Eldridge*.²⁶⁰ Indeed, the Hawaii Supreme Court determined that such a broad-based registration scheme violated Hawaii's due process principles and created the risk of erroneous deprivation of the registrants' liberty.²⁶¹ The court wrote:

Without any preliminary determination of whether and to what extent an offender represents a danger to society, the level of danger to the public posed by any particular sex offender, if any, remains unknown. . . . Therefore, persons . . . who do not pose a significant danger to the community are at substantial risk of being erroneously deprived of their liberty interests.²⁶²

Connecticut Department of Public Safety is disturbing on another level. It has not only authorized Connecticut's broad registration system, it has also signaled the constitutional legitimacy of registries based exclusively on convictions of indeterminate quality and seriousness. The Florida Supreme Court, for example, followed the lead of *Connecticut Department of Public Safety* and upheld Florida's registration and notification scheme, despite the

²⁵⁸ *Avery v. State*, 47 P.3d 973, 978 (Wyo. 2002).

²⁵⁹ *Id.*; see also *State v. Ward*, 869 P.2d 1062, 1070 (Wash. 1994) ("Absent evidence [that the offender poses a threat to the community], disclosure would serve no legitimate purpose.").

²⁶⁰ 424 U.S. 319, 335 (1976) (delineating the factors to determine a due process violation: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used; and the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail).

²⁶¹ *State v. Bani*, 36 P.3d 1255, 1267 (Haw. 2001).

²⁶² *Id.*; see also *Doe v. State, Dep't of Pub. Safety*, 92 P.3d 398 (Alaska 2004) (finding due process violation under Alaska state constitution where registrant, whose sex offense conviction had been set aside prior to enactment of Alaska's sex offender registration statute, would nevertheless be required to register despite having met said conditions).

factual proffers that the petitioning registrants did not pose danger to the community:²⁶³

To provide [the offenders] with hearings at which they could contest the fact of current dangerousness would be pointless. Even if they could prove that they present absolutely no threat to the public safety, the Act would still require that they be designated as “sexual predators,” that they register, and that the public be notified.²⁶⁴

With only the prior conviction as justification for registration, a system of automatic registration inclusion creates serious rippling consequences for registrants who do not have the opportunity at any stage of the proceedings to question the legitimacy of the underlying case.²⁶⁵ The Massachusetts Supreme Court, concerned by the unwarranted reach of automatic registration, stated in *Doe v. Attorney General*:

[T]he [Massachusetts statutory rape law] . . . encompasses acts such as sexual experimentation among underage peers and consensual sexual activity between teenagers (commonly referred to as statutory rape). In either of these latter circumstances, the State’s interest in protecting

²⁶³ See *Milks v. State*, 894 So. 2d 924, 927 (Fla. 2005) (determining that due process does not require a hearing on current dangerousness).

²⁶⁴ *Id.* at 927-28; *accord In re J.R.*, 793 N.E. 2d 687 (Ill. App. 2003) (rejecting substantive and procedural due process challenges against registration act, which requires sex offenders to register regardless of current dangerousness and which makes no provision for individual findings of dangerousness). Other states, like Connecticut, require registration of all sex offenders. *See, e.g., IDAHO CODE ANN. § 18-8323* (2004) (releasing information to public of *any* sexual offender); *MD. CODE ANN., CRIM. PROC. § 11-704(a)* (LexisNexis 2001) (requiring *all* sexual offenders to register); *S.D. CODIFIED LAWS § 22-22-32* (1998 & Supp. 2003) (requiring registration for *all* convicted offenders); *WIS. STAT. § 301.46(5)* (2005) (allowing any member of the public to request information on *any* sex offender).

²⁶⁵ Two cases demonstrate the inherent problems of automatic registration. Consider the Florida case of the unlucky thief who stole a car that held a sleeping baby. The taking of the baby resulted in a conviction of kidnapping a minor and, although the thief had not committed any sexual crime, he was automatically required to register as a “sexual predator” under Florida law. *See State v. Robinson*, 873 So. 2d 1205 (Fla. 2004) (concluding, in this case, that automatic registration violated procedural due process principles). In a similar case from New York, a trial court judge ruled that it was unconstitutional to require registration for a convicted kidnapper of a minor. *See People v. Moi*, 8 Misc. 3d 1012(A) 2005 WL 1618124 at *10 (N.Y. County Ct. 2005). For a more detailed examination of these cases, see *infra* Part III.D.3.. In a twist on the issue raised by automatic registration, see *Cain v. State*, 872 A.2d 681, 686 (Md. 2005) (rejecting state’s contention that defendant should be required to register even though the offense of assault was not included as a registerable offense). In a case that highlights the impact of automatic registration on guilty pleas, see *State v. Rolfe*, 2006 WL 126718 at *3 (Iowa Ct. App. 2006) (affirming defendant’s claim that the incorrect guilty plea was entered, which, as a result, improperly triggered his registration as a sex offender).

children from recidivist sex offenders might not be sufficiently urgent to warrant subjecting to registration every person convicted of those acts.²⁶⁶

This is not to suggest that the crime of statutory rape is never registration-worthy or deserving of public notification. Indeed, it would be constitutionally permissible to require the statutory rapist to register and to notify the community, provided that at least one of two controlling factors is present: the statutory rape conviction is based on the offender's criminal mens rea; or, if strict liability is employed, an individualized assessment of dangerousness accompanies registration. Either would suffice, but where the conviction is based on strict liability and there is no individualized assessment of dangerousness, this "civil" measure has turned impermissibly punitive.

C. Comparing Procedural Guarantees in Pretrial Detentions and Civil Commitments with Registration Schemes

A review of sex offender registration schemes invites comparison to the analysis of pretrial detentions and civil commitments, where instructive parallels afford a look at the *Mendoza-Martinez* analysis in other settings.²⁶⁷ Both pretrial detention and civil commitment have been judged regulatory pieces of legislation with nonpunitive purposes, yet unlike registration schemes, pretrial detentions and civil commitments faithfully commit to *Mendoza-Martinez* based on the clearer nexus between the regulations and their nonpunitive purposes.²⁶⁸

Pretrial detention: In light of pressing security issues, the Bail Reform Act of 1984 was established to empower the states to order pretrial detentions.²⁶⁹

²⁶⁶ 715 N.E.2d 37, 44 (Mass. 1999) (declaring that "[b]ecause we can envision certain situations . . . where the risk of reoffense by one convicted under [the law] may be minimal and the present danger to children not significant, the general legislative category does not adequately specify offenders by risk so as to warrant automatic registration of every person convicted under that statute") (citations omitted).

²⁶⁷ See *Smith v. Doe*, 538 U.S. 84, 97-101 (2003) (holding that because of the regulatory purpose behind the scheme, sex offender registration schemes are not punitive measures under *Mendoza-Martinez*).

²⁶⁸ For analysis of the Bail Reform Act of 1984, see *United States v. Salerno*, 481 U.S. 739 (1987) (finding that pretrial detention is a regulatory measure rather than additional punishment under *Mendoza-Martinez*). For the constitutionality of civil commitment, see *Kansas v. Hendricks*, 521 U.S. 346 (1997) (concluding that civil commitment requirements were sufficiently tailored to meet nonpunitive purpose). For a look at the shift from punishment to regulatory measures to prevent future crime, see Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001) (analyzing the use of preventative detention and other measures to deter future crimes).

²⁶⁹ See 18 U.S.C. § 3142(e) (2000):

If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and

United States v. Salerno found that pretrial detention under the Bail Reform Act did not violate principles of due process because of two controlling factors: the regulation was sufficiently tailored to meet its nonpunitive purpose of community safety, and significant procedural safeguards were in place before implementation.²⁷⁰ Unlike registration schemes that have been authorized to require *all* offenders to register, the Bail Reform Act authorizes pretrial detention only for the most dangerous of suspects.²⁷¹ Such a sufficiently tailored regulation, the Court concluded, satisfied procedural due process under *Mendoza-Martinez*.²⁷²

Second, and equally important, the Court heralded the significant procedural safeguards that had been contemplated by Congress before pretrial detention could be compelled.²⁷³ The Court referenced “the nature and seriousness of the charges, the substantiality of the Government’s evidence against the arrestee, the arrestee’s background and characteristics, and the nature and seriousness of the danger posed by the suspect’s release.”²⁷⁴ While *Salerno* upheld the Bail Reform Act, under which only the most serious offenders are subject to the onerous requirements of pretrial detention, *Connecticut Department of Public Safety* authorizes inclusion in a sex offender registry of *all* convicted offenders, without regard to the nature and quality of their convictions. The linchpin of *Salerno* – providing the specific rational connection between the person detained and the regulatory aims of the pretrial detention – is decidedly absent in sex offender registration schemes where automatic registration is authorized.

the community, such judicial officer shall order the detention of the person before trial.

²⁷⁰ 481 U.S. 739, 747 (1987) (“The legislative history of the Bail Reform Act clearly indicates that Congress did not formulate the pretrial detention provisions as punishment for dangerous individuals.”).

²⁷¹ See *id.* at 749-51 (finding that given the legitimate and compelling regulatory purpose of the Act and the procedural protections it offers, the Bail Reform Act does not violate due process). Though beyond the scope of this article, *Salerno* also is noteworthy for the standard it set in determining facial statutory challenges. See *id.* at 745 (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”). But see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (replacing *Salerno*’s arguably “no set of circumstances” test with a reduced burden for plaintiff to succeed in facial challenges).

²⁷² See *Salerno*, 481 U.S. at 747-49 (recounting circumstances in which the governmental interest under *Mendoza-Martinez* outweighed the imposition on detainee’s liberty).

²⁷³ See *id.* at 750 (“Nor is the Act by any means a scattershot attempt to incapacitate those who are merely suspected of these serious crimes.”).

²⁷⁴ *Id.* at 742-43 (citing the factors enumerated in the Bail Reform Act, which the government must consider in order to justify pretrial detention of a defendant); see *Denmore v. Kim*, 538 U.S. 510, 550 (2003) (emphasizing that the *Salerno* Court’s finding of constitutionality was based on a “sharply focused scheme”).

Civil commitment: Similar to pretrial detention, the Court has authorized the civil commitment of sexually violent predators, finding that their commitment serves a valid alternative nonpunitive purpose. In *Kansas v. Hendricks*, the Court upheld a Kansas law that allowed the civil commitment of those deemed to be sexually violent predators where they had been convicted of sexually violent offenses; or if not convicted, where they had been charged but acquitted or not able to stand trial because of mental disease or defect.²⁷⁵ Like sex offender registration, civil commitment also serves a civil regulatory purpose. But that is where the similarity ends. Unlike *Connecticut Department of Public Safety*, which concluded that a prior conviction alone could trigger registration, *Hendricks* determined that the actor's prior conviction or charge was not sufficient, in itself, to trigger the civil commitment proceedings.²⁷⁶ The Court emphasized the safeguards in the Kansas law which included a hearing where the State bears the burden of proof beyond a reasonable doubt that civil commitment is warranted, assistance of counsel, and the ability to cross-examine witnesses at the hearing.²⁷⁷ In his dissent in *Smith*, Justice Stevens correctly observed of *Hendricks*, "the fact that someone had been convicted was not sufficient to authorize civil commitment under Kansas law."²⁷⁸

In addition, unlike the automatic registration systems endorsed by *Connecticut Department of Public Safety*, the civil commitment laws of Kansas, like the Bail Reform Act, were narrowly drawn to affect only the most serious of sex offenders.²⁷⁹ It is ironic that, in *Smith v. Doe*, decided the same term as *Connecticut Department of Public Safety*, the Court should quote *Hendricks* in support of a rationally connected registration scheme: "[A]n imposition of restrictive measures on sex offenders *adjudged to be dangerous* is a 'legitimate nonpunitive governmental objective and has been historically so regarded.'"²⁸⁰ Indeed, the irony of using *Hendricks* for support was not lost on Justice Stevens, who wrote in his dissent in *Smith* that "it is clear that a conviction standing alone did not make anyone eligible for the burden imposed

²⁷⁵ 521 U.S. 346, 357-58 (1996) (upholding KAN. STAT. ANN. § 59-29a03(a) (1994), the Kansas Sexually Violent Predator Act). For a discussion of the civil commitment of sex offenders and the legitimacy of the state's authority to control future dangerous, see Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment and Sicherungswahrung*, 30 FORDHAM URB. L.J. 1621 (2003).

²⁷⁶ See *Hendricks*, 521 U.S. at 352 (detailing the criteria necessary to initiate commitment proceedings).

²⁷⁷ See *id.* at 353. ("In addition to placing the burden of proof upon the State, the Act [affords] the individual a number of procedural safeguards."). For an in-depth look at the rules required and level of certainty employed in a range of preventive measures, see Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003).

²⁷⁸ *Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting).

²⁷⁹ See *Hendricks*, 521 U.S. at 357 (emphasizing that civil commitment was only for "a limited subclass of dangerous persons").

²⁸⁰ *Smith*, 538 U.S. at 93 (quoting *Hendricks*, 521 U.S. at 363) (emphasis added).

by [the Kansas] statute.”²⁸¹ As the 2003 term played out, however, the Court authorized the registration of all sex offenders, irrespective of whether they have been adjudged dangerous.²⁸²

Contrasting *Salerno* and *Hendricks*, *Connecticut Department of Public Safety* does not require the additional safeguards so important to the prior Courts.²⁸³ Unlike *Salerno*, where only the most serious of offenders were subject to the onerous requirements of pretrial detentions, *Connecticut Department of Public Safety* authorized registration for a wide variety of offenses, without regard to proof of the offender’s current danger to the community.²⁸⁴ Automatic registration schemes ensnare the dangerous and the innocent alike, and one court, in recognizing such dangers, observed that automatic registration is only legitimate where the registration scheme is narrowly drawn and “where the danger to be prevented is grave, and the risk of reoffense great.”²⁸⁵

D. Reframing the Issue: Employing Substantive Due Process

Thus far, this article has identified two central problems connected to the registration of strict liability offenders: the assumption that strict liability statutory rape is registration-worthy because of a previously secured conviction; and the broad-based and disconnected nature of automatic registration schemes that do not assess the actor’s danger to the community.

²⁸¹ *Id.* at 113 (Stevens, J., dissenting).

²⁸² See *id.* at 104 (upholding State’s determination to legislate sex offenders as a class, rather than require an individual finding of dangerousness).

²⁸³ See *Doe v. Conn. Dep’t of Pub. Safety*, 538 U.S. 1, 7 (2003) (concluding that a convicted sex offender has already had a procedurally safeguarded opportunity to contest the conviction and, therefore, due process does not require a hearing on current dangerousness); see also *Comm. v. Maldonado*, 838 A.2d 710, 717 (Pa. 2003) (theorizing that one difference between involuntary commitment and registration as a sexual predator is that the involuntary commitment, unlike the registration scheme, has procedural safeguards in place to correct an erroneous decision).

²⁸⁴ See *Conn. Dep’t of Pub. Safety*, 538 U.S. at 7 (holding that due process requires no finding of current dangerousness); see also *Doe I v. Otte*, 259 F.3d 979, 990 (9th Cir. 2001), overruled by *Smith v. Doe*, 538 U.S. 84 (2003) (addressing the punitive effect of registration when the length of registration is tied to the degree of wrongdoing, not the likelihood of reoffense).

²⁸⁵ *Doe v. Attorney General*, 715 N.E.2d 37, 45-46 (Mass. 1999). Despite the grievous facts of this case, in which a fifteen-year-old was convicted of statutory rape for twice forcing a four-year-old girl to perform fellatio on him, the Massachusetts high court held the Massachusetts registration statute

unconstitutional as applied to Doe in the absence of either an individualized hearing to determine whether he is a present threat to children because of the likelihood that he will reoffend or the promulgation of regulations identifying with particularity as to offender and offense the fit between the remedial measure sought by the Commonwealth (registration) and the danger to be averted.

These flaws in reasoning highlight the lack of adherence to *Mendoza-Martinez* in that there is not a sufficiently drawn nexus between the legislative aims of the regulation and the intrusion suffered by the individual. Nevertheless, *Smith* and *Connecticut Department of Public Safety* remain active principles.²⁸⁶

But what if the issue were recast as a substantive due process challenge? Under such a challenge, the focus would shift from whether the state followed adequate procedures to whether, as designed, the registration scheme deprived an offender of a protectible liberty interest. Members of the Court may have signaled their willingness of late to entertain substantive due process arguments. Justice Souter wrote in *Connecticut Department of Public Safety*, “[T]oday’s holding does not foreclose a claim that Connecticut’s dissemination of registry information is actionable on a substantive due process principle.”²⁸⁷ And in another reference, Justice Souter, with whom Justice Ginsburg joined, wrote, “The refusal to allow even the possibility of relief to, say, a 19-year-old who has consensual intercourse with a minor aged 16 is therefore a reviewable legislative determination.”²⁸⁸

²⁸⁶ See, e.g., Doe v. Tandeske, 361 F.3d 594, 596 (9th Cir. 2004) (applying *Conn. Dep’t of Pub. Safety* to hold that Alaska’s sex offender registration system did not violate procedural due process); Lee v. State, 895 So. 2d 1038, 1041-44 (Ala. App. 2004) (applying principles of *Smith* to hold that Alabama’s sex offender registration laws did not violate ex post facto); *In re W.M.*, 851 A.2d 431, 434-35 (D.C. 2004) (employing *Smith* and *Conn. Dep’t of Pub. Safety* to conclude that sex offender registration laws did not violate ex post facto or due process); Milks v. State, 894 So. 2d 924, 928 (Fla. 2005) (using *Conn. Dep’t of Pub. Safety* to uphold Florida’s registration requirements, which are based on the prior conviction, not current dangerousness); State v. Seering, 701 N.W.2d 655, 667 (Iowa 2005) (citing *Smith* in reaching its conclusion that registration requirements were not punitive); State v. Raines, 857 A.2d 19, 35-43 (Md. 2004) (applying analysis of *Smith* to evaluate whether the DNA Collection Act was punitive in nature); R.W. v. Sanders, 168 S.W.3d 65, 71 (Mo. 2005) (determining that the analysis of *Conn. Dep’t of Pub. Safety* controlled in the case of offender who was given a suspended sentence); Slansky v. Neb. State Patrol, 685 N.W.2d 335, 351-52 (Neb. 2004) (relying on *Smith* to hold that Nebraska’s sex offender registration laws were not punitive in nature). Some courts have attempted to distinguish these principles under a variety of theories. See, e.g., Doe v. State, Dep’t of Pub. Safety, 92 P.3d 398, 403-05 (Alaska 2004) (explaining that *Smith* and *Conn. Dep’t of Pub. Safety* were inapplicable principles to cases where the conviction had been set aside prior to enactment of sex offender registration laws); State v. Guidry, 96 P.3d 242, 252 (Haw. 2004) (determining that lifetime registration requires additional procedural due process protection under state constitution); Branch v. Collier, 2004 WL942194 *6 (N.D. Tex. 2004) (distinguishing *Conn. Dep’t of Pub. Safety* to find that a plea agreement may not be used to trigger registration).

²⁸⁷ 538 U.S. at 9 (Souter, J., and Ginsburg, J., concurring). Beyond the scope of this article is whether Connecticut’s registration scheme denies registrants equal protection under the law. See *id.* at 10 (Souter, J., and Ginsburg, J., concurring) (observing that the line drawn between those who may seek discretionary relief from those who are unable is “open to challenge under the Equal Protection Clause”).

²⁸⁸ *Id.* at 10 (Souter, J., and Ginsburg, J., concurring).

Despite these indications, one should not underestimate the difficulty in mounting a substantive due process challenge. A review of the caselaw reveals that substantive due process claims in sex offender registration cases have been met with stony silence or swift rejection.²⁸⁹ Registrants have also been hesitant to raise the challenge, as seen in *Connecticut Department of Public Safety*, for example, where they declined the Court's invitation to advance a substantive due process challenge.²⁹⁰ The Court observed, "It may be that respondent's claim is actually a substantive challenge to Connecticut's statute recast in 'procedural due process' terms. Nonetheless, respondent expressly disavows any reliance on the substantive component of the Fourteenth Amendment's protections."²⁹¹

But that may have changed with a case decided the same term as *Connecticut Department of Public Safety*. Enter *Lawrence v. Texas*,²⁹² which has repositioned substantive due process front and center. The full import of *Lawrence* is yet unknown. But one observation is clear: the case stands for more than its holding that the Texas criminal statute prohibiting same-sex sodomy was unconstitutional under the Fourteenth Amendment.²⁹³ For our

²⁸⁹ See, e.g., Doe v. Tandeske, 361 F.3d 594, 596-597 (9th Cir. 2004) (affirming summary judgment denying petitioner's substantive due process claim because while "the Does possess liberty interests that are indeed important, *Smith* [v. Doe, 538 U.S. 84 (2003)] precludes our granting them relief"); Lee v. State, 895 So. 2d 1038, 1039 (Ala. Crim. App. 2004) (declining to consider substantive due process claim because it was not preserved on appeal); *In re W.M.*, 851 A.2d 431, 451 (D.C. 2004) (holding that "[s]ince [the] S[ex] O[ffender] R[egistration] A[ct] does not threaten rights and liberty interests of a 'fundamental' order, appellants cannot succeed on their substantive due process challenge"); Milks v. State, 894 So. 2d 924, 925 (Fla. 2005) (refusing to address substantive due process claim, although issue was briefed by both parties); People v. Malchow, 714 N.E.2d 583, 589 (Ill. App. 1999) (concluding that no substantive due process violation occurred because the statute "bears a reasonable relationship to a public interest to be served"); *In re Detention of Garren*, 620 N.W.2d 275, 285 (Iowa 2000) (rejecting substantive due process challenge because of the "reasonable fit between the governmental purpose and the means chosen to advance that purpose"); Doe v. Poritz, 662 A.2d 367, 421-22 (N.J. 1995) (determining that disclosure of information does not violate substantive due process).

²⁹⁰ 538 U.S. at 7-8 (acknowledging that registrant viewed his challenge as "strictly a procedural one"). On occasion, a registrant refuses to proceed on *procedural* due process grounds. See *Doe v. Moore*, 410 F.3d 1337, 1342 (11th Cir. 2005) (highlighting petitioners' insistence on arguing a substantive, rather than procedural, due process violation).

²⁹¹ *Conn. Dep't of Pub. Safety*, 538 U.S. at 8 (citations omitted); see also Brief for Respondents at 19, *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (No. 01-1231) ("The Court should also decline to address the new claim [of substantive due process] because it would require the Court to address complex arguments in the first instance, including the level of constitutional review warranted where legislative classifications deprive individuals of their reputational interest.").

²⁹² 539 U.S. 558 (2003).

²⁹³ *Id.* at 578. As one can imagine, the initial scholarship generated by *Lawrence* has been prolific. See, e.g., Libby Adler, *The Future of Sodomy*, 32 FORDHAM URB. L.J. 197,

purposes, two themes stand out: *Lawrence* represents significant groundbreaking in its view of the individual's liberty to be free from unwarranted governmental interest; and the rational basis test employed to judge legislative enactments will demand closer scrutiny than as previously employed.

Using the word "liberty" throughout the opinion – indeed, the first word of the opinion is "liberty"²⁹⁴ – Justice Kennedy framed the issue before the Court, not as whether a fundamental right had been impacted, or even whether the Texas law infringed on the individual's right of privacy, but rather whether the Fourteenth Amendment included "broad statements of the substantive reach of liberty."²⁹⁵ The Court wrote, "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."²⁹⁶ Actually, the state of Texas did offer an interest in support of its claim that the statute was rationally related to an intended goal: the prohibition against same-sex sodomy allegedly furthered the "governmental interest of the promotion of morality."²⁹⁷ In rejecting this contention out of

199 (2005) (predicting the effect of *Lawrence* on future civil rights cases); Carpenter, *supra* note 28, at 317 (arguing that, in light of *Lawrence*, strict liability in statutory rape is unconstitutional); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1023-24 (2004) (debating the merits of popular constitutionalism versus the role of judicial review and its import to the decisionmaking in *Lawrence*); Joanna Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 109 (2004) (questioning whether the Defense of Marriage Act would fail based on *Lawrence*'s view of substantive due process); Yuri Kapgan, *Of Goli and Ghouls: The Prose Style of Justice Scalia*, 9 LEGAL WRITING: J. LEGAL WRITING INST. 71, 83 (2003) (highlighting the strength of Justice Scalia's rhetorical style in *Lawrence*); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004) (inquiring about the role of international and foreign law in constitutional interpretation in the aftermath of *Lawrence*).

²⁹⁴ *Lawrence*, 539 U.S. at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."). Justice Kennedy's frequent use of the term "liberty interest" without any connection to fundamental rights was vehemently criticized by Justice Scalia. *See id.* at 593 (Scalia, J., dissenting) (emphasizing that the Fourteenth Amendment "prohibits States from infringing fundamental liberty interests") (citations omitted). For scholarly criticism of *Lawrence*'s use of the rational basis test, see Susan Austin Blazier, *The Irrational Use of Rational Basis in Lawrence v. Texas: Implications for Our Society*, 26 CAMPBELL L. REV. 21, 24-25 (2004) (arguing that the term "liberty interest" as used in *Lawrence* has no basis in stare decisis).

²⁹⁵ *Lawrence*, 539 U.S. at 564; *see also id.* at 562 ("The instant case involves liberty of the person both in its spatial and more transcendent dimensions.").

²⁹⁶ *Id.* at 578.

²⁹⁷ *Id.* at 582 (O'Connor, J., concurring). ("Texas attempts to justify its law, and the effects of the law, by arguing that the statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality.").

hand, the Court found that Texas had not offered a *legitimate* state interest.²⁹⁸ Despite the lack of a fundamental interest to support closer examination, the Court signaled that a rational basis review would also demand closer scrutiny of whether the intended legislation was rationally related to a legitimate state interest.

It is understandable, in legislative challenges, to focus almost exclusively on whether a fundamental right had been implicated. After all, even a novice constitutional law student understands the importance of the inquiry: with a fundamental right implicated, the constitutionality of the statute is determined by applying the “strict scrutiny” test,²⁹⁹ which provides an analytical boost for the moving party. If the challenged legislation implicates no fundamental right, the Court employs the rational basis test,³⁰⁰ which is “a relatively relaxed standard” that protects most legislative actions from court interference.³⁰¹ One scholar noted, perhaps more cynically, that the rational basis test “was tantamount to declaring that the legislation was constitutional.”³⁰²

²⁹⁸ *Id.* at 583 (O’Connor, J., concurring) (“Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy.”).

²⁹⁹ See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (delineating that “the most exacting scrutiny” is given to statutory classifications involving a fundamental right or certain suspect classifications); *see also United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (stating that “strict scrutiny will be applied to the deprivation of whatever sort of right we consider to be ‘fundamental’”); *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 236 (1987) (explaining that a restriction or prohibition will pass the strict scrutiny test if it is “necessary to serve a compelling state interest and . . . [is] narrowly drawn to achieve that end”). Generally, the Court has expressed reservation about expanding substantive due process rights. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“[W]e ‘have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.’”). For a thorough examination of whether fundamental rights are triggered by sex offender registration laws, see *Doe v. Moore*, 410 F.3d 1337, 1340 (11th Cir. 2005) (concluding that registrant has no fundamental right to be free from registration requirements because such requirements do not infringe on any right that is “deeply rooted in this Nation’s history and tradition”).

³⁰⁰ See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (citing *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)); *see generally JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.4 et. seq. (7th ed. 2004)* (describing the great deference the Court gives to legislative judgments when those judgments do not impair or implicate fundamental rights).

³⁰¹ *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

³⁰² See Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 3-4 (1980) (bemoaning the fact that “rational basis” had become synonymous with “absolute deference”).

Following *Lawrence*, however, the Court would no longer afford such clear deference to legislative enactments under the rational basis test.³⁰³ Whether the state could prove that there was a rational relationship between the statute and its intended goal would be subject to closer scrutiny, and as occurred in *Lawrence*, the Court might find the legislation lacking.³⁰⁴ Such analysis was not new to *Lawrence*; indeed, the Court had entertained a remarkably similar analysis in *Romer v. Evans* to strike down a Colorado constitutional amendment which would have barred legislation that prohibited discrimination based on sexual orientation.³⁰⁵ This standard evidenced in *Romer* and *Lawrence* had become a rational basis test “with teeth,”³⁰⁶ and with the advent of *Lawrence*, it was official: a new analytical posture was in effect.

Can it be argued that the liberty interest defined in *Lawrence*, and encompassed in the substantive due process protections of the Fourteenth Amendment, extends beyond its specific borders? In the sex offender registration and notification context, the identifiable liberty interest is the freedom from the loss of reputation and the stigma associated with that loss. For a registrant to allege reputational interests would appear, at first blush, to state the obvious: inclusion in a sex offender registry is devastating to one’s reputation.³⁰⁷ As one court observed, “such widespread dissemination of the [sex offender’s personal] information is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences.”³⁰⁸ *Lawrence* alluded to the impact of registration when the Court wrote:

³⁰³ See *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring) (announcing, “When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review”).

³⁰⁴ See *id.* at 581 (O’Connor, J., concurring) (explaining that the Texas statute fails rational basis review because the state advances only moral disapproval as the basis for the legislation).

³⁰⁵ 517 U.S. 620, 632 (1996) (holding that such state action “lacks a rational relationship to legitimate state interests”).

³⁰⁶ See Jay Weiser, *Foreword: The Next Normal – Developments Since Marriage Rights for Same-Sex Couples in New York*, 13 COLUM. J. GENDER & L. 48, 55 n.43 (2004) (citing *Romer* and *Lawrence* for the proposition that the Court employed a “rational basis test with teeth” to strike down a Colorado constitutional amendment that permanently barred legislation forbidding sexual orientation discrimination).

³⁰⁷ One registrant expressed well the serious stigma attached to registration and its repercussions, including the impact of being branded a pedophile, the impact on his family who would be ostracized, and the effect on how his children would perceive him and be perceived in the community. See *People v. Moi*, 8 Misc. 3d 1012(A), 2005 WL 1618124, at *2 (N.Y. County Ct. June 3, 2005).

³⁰⁸ *Doe v. Pataki*, 3 F. Supp.2d 456, 467-68 (S.D.N.Y. 1996) (emphasizing that “there can be no genuine dispute that registration alters the legal status of all convicted sex offenders subject to the Act for a minimum of ten years and, for some, permanently”); see

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions.³⁰⁹

1. Applying the Stigma *Plus* Test in Loss of Reputation

Given the stigmatizing nature of registration, one would imagine that offenders would have success in challenging registration requirements under a theory of loss of reputation. Yet, that has not been the case. Born outside the context of sex offender registration laws, actionable loss of reputation has received uneven treatment in the Court. In the span of five years in the 1970s, the Court shifted from recognizing reputational interests as an important liberty interest in *Wisconsin v. Constantineau*³¹⁰ to clearly retreating from that position in *Paul v. Davis*.³¹¹ *Lawrence*, however, invites reexamination of this doctrine regarding the balance between the intrusion on the individual's liberty interest and the rational basis for the government's incursion.

The Court fully explored reputational interests in *Constantineau*, where the Hartford chief of police, without notice or hearing on whether the allegations were true, posted a public admonishment in all retail liquor stores that Constantineau should not be sold any liquor because her excessive drinking exhibited behavior which endangered family or community.³¹² Although the Supreme Court acknowledged the power of the state to deal with the effects of excessive alcohol use, the Court nonetheless recognized that the stigma attached to such a public characterization demanded that due process

also E.B. v. Verniero, 119 F.3d 1077, 1101-1102 (3d Cir. 1997) (evoking strong images of the effects of registration, including numerous complaints from sex offenders that registration has subjected them to "vigilante justice" from other members of the community); Doe v. Poritz, 662 A.2d 367, 411 (N.J. 1995) (elaborating on the privacy interest implicated in the gathering and dissemination of the offender's information).

³⁰⁹ *Lawrence*, 539 U.S. at 575 (explaining that someone convicted under Texas' homosexual sodomy statute must register as a sex offender both in Texas and in at least four other states if they ever fall under their jurisdiction). See TEX. CODE CRIM. PROC. ANN. art. 62.101 (Vernon 1979 & Supp. 2005) (requiring registration for ten years for non-aggravated offenses, including class C misdemeanors); *see also supra* Part II (discussing registration requirements).

³¹⁰ 400 U.S. 433, 437 (1971) (holding that one's reputation is an important liberty interest that should not be taken without due process of law).

³¹¹ 424 U.S. 693, 698 (1976) (clarifying that harm to reputation was insufficient in itself to create a cause of action against the government).

³¹² 400 U.S. at 435; *accord* WIS. STAT. § 176.26 (1967), *repealed by* L.1971, ch. 211 § 103 (1972) (authorizing that a designated person may, in writing, forbid all persons to knowingly sell or give intoxicating liquors to the subject of the prohibition).

safeguards be met.³¹³ The Court stated, “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.”³¹⁴

However, *Constantineau* was not the defining word on loss of reputation. In *Paul v. Davis*,³¹⁵ with facts strikingly similar to *Constantineau*, the Court held that the damaging loss of reputation occasioned by a state official was insufficient, in itself, to trigger a due process challenge.³¹⁶ Concerned with the exposure to potential tort liability under claims of defamation, the Court concluded that some tangible interest must accompany the loss of reputation in order for it to be actionable.³¹⁷ Stigma alone was insufficient.³¹⁸ The Court reasoned that the fact that a state may afford the damaged party an opportunity to sue under tort law does not transform the acts into a federal cause of action.³¹⁹ Although mindful that the ambiguous language of *Constantineau* suggested that damage to reputation was sufficient to raise a liberty interest,³²⁰ the Court nonetheless retreated from *Constantineau*.³²¹ Concerned that state tort law would be engulfed by a swollen set of causes of action by private persons seeking redress under the Fourteenth Amendment and Section 1983 actions,³²² the Court grafted factors onto loss of reputation to prevent a flood of

³¹³ *Constantineau*, 400 U.S. at 436 (finding that the state could not exact such a devastating loss to reputation without notice).

³¹⁴ *Id.* at 437; *cf. Goss v. Lopez* 419 U.S. 565, 575 (1975) (determining that suspensions of public school students without a prior hearing deprived them of a liberty interest in public education without the benefit of due process of law).

³¹⁵ 424 U.S. 693 (concerning police circulation to retail businesses of mug shots of suspected shoplifters).

³¹⁶ *Id.* at 711-12 (commenting that not every legally cognizable injury which may have been inflicted by a state official acting under “color of law” establishes a violation of the Fourteenth Amendment, even where no procedural steps were taken to avoid or mitigate that injury).

³¹⁷ *Id.* at 701 (proclaiming that recognizing a due process violation in cases of harmed reputation would make the Fourteenth Amendment a “font of tort law”).

³¹⁸ *Id.* (postulating that, without a requirement of tangible harm, there would be no logical stopping point to substantive due process).

³¹⁹ *Id.* (asserting the need to keep the federal Constitution from swallowing state tort law).

³²⁰ *Id.* at 707-08 (acknowledging that the Court of Appeals in *Paul* was justified in its reliance on *Constantineau* to raise the liberty interest because the Court in *Constantineau* claimed that, “where the State attaches ‘a badge of infamy’ to the citizen, due process comes into play”); *cf. Bohn v. Dakota County*, 772 F.2d 1433, 1436 (Minn. 1985) (distinguishing *Paul* in concluding that plaintiff had a previously recognized protectible interest in family privacy that was damaged by the dissemination of information that he was a child abuser).

³²¹ *Paul*, 424 U.S. at 702 (finding that harm to reputation, by itself, did not call for a due process analysis).

³²² See 42 U.S.C. § 1983 (2000):

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

litigation.³²³ Hence the birth of the “stigma *plus*” test,³²⁴ which articulated that, for governmental defamation to be actionable, the injured party must demonstrate not only the loss of reputation, but also that the loss of reputation must be accompanied by an established right which has been denied or curtailed.³²⁵

Paul has been criticized,³²⁶ but the stigma *plus* test has been adopted by a number of courts reviewing sex offender registration claims.³²⁷ For offenders

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

³²³ For commentary on *Paul*, see Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 1397 (2d ed. 1988) (“[T]he Court evidently believed that any contrary result would have the unthinkable consequence of federalizing the entire state law of torts whenever government officers are the wrongdoers.”). *But see Doe v. Poritz*, 662 A.2d 367, 419-20 (N.J. 1995) (rejecting the stigma *plus* test under New Jersey law in concluding that a due process analysis is triggered whenever the state stigmatizes an individual, even though “the added stigma may be slight”).

³²⁴ The term “stigma *plus*” test appears to have been originally coined in *Danno v. Peterson*, 421 F. Supp. 950, 954 (N.D. Ill. 1976) (characterizing *Paul* as “formulating a ‘stigma plus’ analysis, finding a deprivation of liberty interest where the state inflicted stigma is accompanied by a failure to rehire or by a discharge”). The district court’s reference was adopted one year later in *Moore v. Otero*, 557 F.2d 435, 437 (5th Cir. 1977) (referencing *Danno* in using the term “‘stigma-plus’ test” to describe *Paul*). It was not until much later that the Supreme Court used the term to describe the *Paul* analysis. *See Siegert v. Gilley*, 500 U.S. 226, 234 (1991) (employing the phrase to capture the factors required in *Paul*).

³²⁵ See *Paul*, 424 U.S. at 711 (concluding that there was no deprivation of a protectible liberty interest because the dissemination of information did not alter defendant’s status as a matter of state law). The liberty interest of loss of reputation was further diminished by *Siegert v. Gilley*, 500 U.S. 226, 234 (1991) (declaring loss of reputation actionable only if it affected current employment, not if it affected one’s chances of future employment).

³²⁶ See *McClendon v. Turner*, 765 F. Supp. 251, 254 (W.D.P.A. 1991) (“*Paul* . . . was a short-lived and poorly received attempt to substantively distinguish constitutional from common law torts.”); *see also* William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 581 (1989) (asserting that constitutional jurisprudence has suffered because of Court imposed limitations like those in *Paul*, limitations that are not supported by the wording of nor the policies behind the Fourteenth Amendment); Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1152 (1992) (arguing the underutilization of procedural due process guarantees because of decisions such as *Paul* that reflect the Court’s “retreat to positivism” and refusal to recognize liberty interests not specifically guaranteed by the state).

³²⁷ *See, e.g.*, *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005) (asserting the need to carefully describe the liberty interest the state has infringed; if that interest is not protected by the Constitution or state law, something more than its infringement is needed); *Doe v. Dep’t of Pub. Safety*, 271 F.3d 38, 46 (2d Cir. 2001) (describing the district court argument that sex offender registry laws meet the “stigma” portion of the test because they harm

attacking registration on due process grounds, therefore, the ensuing challenge has been to articulate the “*plus*” attached to the stigma of registration.³²⁸ Registrants have argued that the obligation to register curtails other established rights specifically outlined in *Paul*, including loss of employment, restrictions on where they may live, and the potential for criminal penalties if they fail to register.³²⁹ Yet, courts have divided on whether registration includes a sufficient alterable status to qualify as the stigma *plus*. In *Doe v. Pataki*, the court found that the loss of reputation coupled with the restriction on the tangible loss of benefits accompanying the onerous obligations to register satisfied the stigma *plus*.³³⁰ In *Doe v. Poritz*, the harm to the registrant’s

reputation, and they meet the “*plus*” part of the test because they alter the offender’s status as a matter of state law by imposing upon him an affirmative obligation to register); *E.B. v. Verniero*, 119 F.3d 1077, 1100 (3d Cir. 1997) (indicating that state dissemination of a sex offender’s information, by itself, does not trigger a due process analysis); *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1232-33 (M.D. Ala. 1999) (concluding that, because sex offenders lose many rights as a result of registration, this loss satisfies the *plus* part of the stigma *plus* test); *State v. Robinson*, 873 So. 2d 1205, 1213 (Fla. 2004) (quoting *Paul* to conclude that the interest in one’s reputation alone is not a liberty interest); *Milks v. State*, 894 So. 2d 924, 928 (Fla. 2005) (announcing that it applies the stigma *plus* test from *Paul v. Davis* when analyzing sex offender registration cases); *State v. Bani*, 36 P.3d 1255, 1264 (Haw. 2001) (describing the Court’s holdings in *Paul* and its progeny as requiring more than mere emotional anguish resulting from the harm to reputation).

³²⁸ See *Dep’t of Pub. Safety*, 271 F.3d at 44 (arguing that the affirmative obligation to register satisfied the “*plus*” part of the test); *Pryor*, 61 F. Supp. 2d at 1232 (asserting that loss to family privacy, among other rights, satisfied the stigma *plus* test).

³²⁹ See, e.g., *Pryor*, 61 F. Supp. 2d at 1231 (alleging loss of standing in the community and lost housing opportunities); *Spencer v. O’Connor*, 707 N.E.2d 1039, 1045 (Ind. Ct. App. 1999) (raising concerns of lost employment and harassment from community, including verbal public attacks, intimidation, and violence); *State v. Manning*, 532 N.W.2d 244, 248 (Minn. Ct. App. 1995) (arguing that registration severely restricts freedom of movement because it causes the offender to “live within the shadow of his crime”); accord *State v. Burr*, 598 N.W.2d 147, 153-54 (N.D. 1999) (asserting that the increased police scrutiny and lifelong stigma associated with registration severely restrict freedom of movement).

³³⁰ See *Doe v. Pataki*, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998) (finding that in light of the onerous burdens placed on convicted sex offenders, “there can be no genuine dispute that registration alters the legal status of all convicted sex offenders subject to the Act for a minimum of ten years and, for some, permanently” and thus meets the stigma *plus* test delineated in *Paul*); accord *Valmonte v. Bane*, 18 F.3d 992, 1000-01 (2d Cir. 1994) (distinguishing *Paul* in concluding that harm to future employment opportunities constitutes harm to a tangible right when the offender seeks employment in the child-care field); see also, e.g., *Pryor*, 61 F. Supp. 2d at 1232 (explaining that stigma *plus* test was met because of lost housing and employment opportunities); *Robinson*, 873 So.2d at 1213 (outlining the tangible losses to the registrant, including loss of right to seek certain tort remedies and prohibition against working in certain areas close to schools); *Bani*, 36 P.3d at 1265 (“*Bani* will foreseeably suffer serious harm to other “tangible interests” as a result of registration as a sex offender.”); *Doe v. Att’y Gen.*, 686 N.E.2d 1007, 1011 (Mass. 1997) (listing the

reputation coupled with the “incursion on his right of privacy” constituted a protectible interest.³³¹ But other courts have concluded that offenders could not establish the requirements under *Paul*. Some courts found that registrants had not been stigmatized by registration – stigma had come from the conviction itself.³³² Other courts, however, accepted that the offender was stigmatized by registration, but concluded that no alterable right accompanied the stigma to produce a due process violation.³³³

2. The Impact of *Lawrence* on the Stigma *Plus* Test

Under the evolving liberty interests of *Lawrence*, can it be argued that the registrant has an identifiable interest to be free from loss of reputation where the legislature does not have a clearly articulated rational basis for the infringement? It is true that the Court has not afforded loss of reputation the same protection as a fundamental right.³³⁴ Indeed, the Court has emphasized the judicial restraint that must accompany an inquiry into the expansion of fundamental rights.³³⁵ *Lawrence* may, nonetheless, signal greater respect for loss of reputation as a liberty interest, and closer scrutiny for legislative enactments that impact it. One scholar wrote of *Lawrence*, “Themes of respect

effects of registration that infringe upon protectible liberty and privacy interests, including the disclosure of accumulated private information, the potential loss to earning capacity, the harm to reputation, and the statutory branding of the offender as a public danger).

³³¹ 662 A.2d 367, 419 (N.J. 1995); *accord* Noble v. Bd. of Parole and Post-Prison Supervision, 964 P.2d 990, 995-96 (Or. 1998) (interpreting *Paul* to find that labeling offender as a sexual predator significantly impacted offender’s liberty interest).

³³² See, e.g., Welvaert v. Neb. State Patrol, 683 N.W.2d 357, 366 (Neb. 2004) (“[C]onsequences flow not from [a sex offender registration act’s] registration and dissemination provisions, but from the fact of conviction, already a matter of public record.”); State v. White, 590 S.E.2d 448, 450 (N.C. App. 2004) (“[A]ny stigma flowing from registration requirements is not due to public shaming, but arises from accurate information which is already public.”); Meinders v. Weber, 604 N.W.2d 248, 257 (S.D. 2000) (“The information contained in the sex offender registry is almost the same information available as a public record in the courthouse where the conviction occurred.”); see also People v. Logan, 302 Ill. App.3d 319, 329-30 (Ill. 1998):

[T]he registration requirement places no more constraint on the liberty of someone required to register with the local police authority than do many of the well-established civil disabilities associated with felony convictions in Illinois, such as limitations on the possession of firearms, the right to vote, or the right to hold public office.

³³³ See, e.g., Boutin v. LaFleur, 591 N.W.2d 711, 718 (Minn. 1999) (holding that registrant did not suffer a loss of a recognizable interest and, therefore, the stigma *plus* test was not met); see also Creekman v. Att’y Gen. of Tex., 341 F.Supp. 2d 648, 655-56 (E.D. Tex. 2004) (finding that registrant failed to allege protected liberty interest).

³³⁴ See, e.g., Doe v. Moore, 410 F.3d 1337, 1342-43 (11th Cir. 2005) (rejecting loss of reputation as a fundamental right protected by substantive due process).

³³⁵ See Washington v. Glucksberg, 521 U.S. 702, 721-22 (1997) (maintaining that fundamental rights must be “deeply rooted” in legal tradition so as to provide “guideposts for responsible decisionmaking”).

and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine.”³³⁶ In the world of sex offender registration schemes, it may translate into a more careful review of the infringement of registrant’s personal liberty to ensure that the legislative aims are rationally connected to the offender’s requirement to register.

If loss of reputation does, in fact, deserve closer review, the stigma *plus* test has little applicability in a substantive due process infringement.³³⁷ Critical for its gatekeeping function in a procedural due process challenge, the hyper-technical addition of the stigma *plus* test would not be in keeping with *Lawrence*’s recognition of the broad nature of individual liberty interests. Indeed, *Paul* recognized the limitations of the test when it stated that damage to one’s reputation is not “sufficient by itself to invoke the *procedural* due process guarantees of the Fourteenth Amendment.”³³⁸ Under the rational basis test operating in *Lawrence*, and free of the stigma *plus* test that controls procedural due process claims, the registrant would be offered a greater opportunity to challenge the alleged rational connection between the regulation and the legislative intent.³³⁹ For the strict liability offender, the argument is persuasive: no rational connection exists between the strict liability offender’s requirement to register and the legislative goal of protecting the public.³⁴⁰

3. Instructive Analysis: Successful Due Process Challenges

Post-*Lawrence*, the language is slowly changing as courts begin to acknowledge the government’s responsibility to demonstrate a rational basis

³³⁶ Robert C. Post, *The Supreme Court 2002 Term, Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97 (2003) (signaling that the Court is “concerned with constitutional values that have not heretofore found their natural home in the Due Process Clause”).

³³⁷ See *Paul v. Davis*, 424 U.S. 693, 711 (1976) (commenting that the state implicates Fourteenth Amendment *procedural* due process rights when it seeks to deny a person rights protected by law); see also *Olivera v. Town of Woodbury*, New York, 281 F. Supp. 2d 674, 687 (S.D.N.Y. 2003) (distinguishing the procedural due process implications of *Paul* from substantive due process arguments); accord *O’Donnell v. Brown* 335 F. Supp. 2d 787, 814 (W.D. Mich. 2004) (contending that *Paul* governs procedural due process concerns, not substantive due process concerns).

³³⁸ *Paul*, 424 U.S. at 705 (emphasis added). The stigma *plus* test has not been applied to equal protection challenges. See *Harris v. Harvey*, 605 F.2d 330, 338 (7th Cir. 1979), (citing cases from the Fourth, Fifth, Seventh, Eighth, and Ninth Circuits distinguishing due process challenges under *Paul* from equal protection claims).

³³⁹ Registrants can almost always point to some reputational harm resulting from the stigma of registration, and the *Lawrence* rational basis test would require states to advance a legitimate reason for inflicting that harm. See *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (announcing a “more searching” form of rational basis review).

³⁴⁰ See *Doe v. Dep’t of Pub. Safety*, 92 P.3d 398, 405 (Alaska 2004) (finding that no legitimate government interest is served in requiring convicts to register as sex offenders when they have not intended to commit a sexual offense).

for an offender's requirement to register.³⁴¹ Acknowledging the protectible liberty interest of the registrant, the Alaska Supreme Court wrote in *Doe v. Department of Public Safety*, "We have often recognized the importance of personal liberty under our constitution. 'At the core of this concept is the notion of total personal immunity from governmental control.'"³⁴² *Doe* involved the issue of whether an offender whose conviction had been set aside could be compelled to register.³⁴³ The Alaska Supreme Court found that the underlying assumption of Alaska's registration act – that persons convicted of sex offenses pose a significant danger of committing new sex offenses – was not served by requiring this offender to register.³⁴⁴ The court reasoned, "[T]he general assumption [that an offender is dangerous] is fundamentally inconsistent with the individualized findings of fact a court makes before setting aside a particular offender's conviction."³⁴⁵ Concerned by the statute's wholesale and undifferentiated grouping of offenders, the court stated that the Alaska Sexual Offender Registration Act "indiscriminately groups [offenders with set-aside convictions] with persons who are presumed to pose a future danger."³⁴⁶ The *Doe* analysis is instructive for the strict liability offender. Automatic registration of the strict liability offense – its indiscriminate grouping with dangerous offenders – is fundamentally inconsistent with the regulatory purpose of a registration scheme designed to track offenders and protect the public. As a result, the state cannot justify the significant intrusion of registrant's liberty interest.

³⁴¹ See, e.g., *id.* at 409 (emphasizing that the state must advance a legitimate reason for sex offender registration laws because such laws "directly affect the lives" of offenders as a matter of law); *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004) (applying an equal protection argument to hold that states must have a rational basis for registration laws); *People v. Moi*, 8 Misc. 3d 1012(A) 2005 WL 1618124, at *8-9 (N.Y. County Ct. June 3, 2005) (determining that even though the registration requirement implicates no fundamental right, it must pass the rational basis test); cf. *Milks v. State*, 894 So. 2d 924, 928 (Fla. 2005) (confirming that Florida's registration scheme has "implicated constitutionally protected liberty interests").

³⁴² *Doe*, 92 P.3d at 405 (citations omitted).

³⁴³ *Id.* at 406 (emphasizing that, when courts set aside someone's conviction, they are absolving that person of responsibility for the crime for which he had been convicted).

³⁴⁴ *Id.* at 409.

³⁴⁵ *Id.*

³⁴⁶ *Id.* (comparing the inconsistency of this generalized grouping scheme with the individualized judicial determinations made in set-aside hearings). Similar sentiment was expressed by the Massachusetts Supreme Court in analyzing whether indecent assault and battery should be a registerable offense. *See Doe v. Att'y Gen.*, 686 N.E.2d 1007, 1013 (Mass. 1997) (rebuffing state's interest in registering offender, stating "[n]or is the State's interest in registration or notification so great that the risk of error in classifying the plaintiff as a sex offender must be tolerated").

Two other cases, *State v. Robinson*³⁴⁷ from Florida, and *People v. Moi*³⁴⁸ from New York, provide further analogous support. Arising in slightly different contexts – both cases involved child kidnappers who were required to register in their respective jurisdictions as sex offenders – the analysis is nonetheless compelling. Each court concluded that registration was unjustified because the state could not articulate a legitimate rationale for the infringement upon the offender’s personal liberties.³⁴⁹ In *Robinson*, the Supreme Court of Florida wrote:

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. . . . No rational relationship exists between the statute’s purpose of protecting the public from known sexual predators and Robinson’s designation as one.³⁵⁰

Robinson thus held that the state did not have a legitimate interest in the automatic designation of a convicted kidnapper as a registered sex offender. While the court found that there may be some circumstances in which kidnapping may justify registration, it cannot be concluded that all kidnapping offenses are registration-worthy.³⁵¹ Similarly, the district court in *Moi* concluded that the offender had demonstrated that the registration statute, as applied to him, “lacks a rational relationship to a legitimate state interest.”³⁵²

The *Robinson* analysis can be applied to the strict liability offender. Like the offenses underlying *Robinson* and *Moi*, it cannot be concluded that strict liability statutory rape is automatically registration-worthy. Like the child

³⁴⁷ 873 So. 2d 1205, 1211 (Fla. 2004) (addressing “whether the State may designate someone a sexual predator when the State agrees he did not commit, or intend to commit, a sexual crime”).

³⁴⁸ 8 Misc. 3d 1012(A) 2005 WL 1618124, at *5 (N.Y. County Ct. Jun. 3, 2005) (discussing whether a state violates the Due Process Clause when a convicted offender is required to register although the underlying crime has no sexual component).

³⁴⁹ *Robinson*, 873 So.2d at 1217 (“We hold that the sexual offender designation is unconstitutional as applied to *Robinson*.); *Moi*, 2005 WL 1618124, at *12 (“[T]here is no rational basis for having the statute apply to [the offender] as there was no sexual component to his crime.”); *accord* *State v. Young*, 2003 WL 2004025, at *6 (Ohio Ct. App. May 2, 2003) (holding that classifying someone as a sex offender when that person has not committed any crime with a sexual component “offends the Due Process clauses of both the Ohio and United States constitutions”).

³⁵⁰ *Robinson*, 873 So.2d at 1215. For similar analysis, see *State v. Small*, 833 N.E.2d 774, 782 (Ohio Ct. App. 2005) (concluding that, absent evidence of sexual motivation, classifying defendant as a “sexually oriented offender” is not rationally related to a legitimate state interest).

³⁵¹ *Id.* at 1215-16.

³⁵² 2005 WL 1618124, at *9 (acknowledging the state’s legitimate interest in requiring sex offenders to register, but concluding that the interest “evaporates” when applied to a convict whose crime contained no sexual element).

kidnapper, the strict liability statutory rapist has not been specifically proven to have intended to sexually exploit a minor. Additionally, in examining the connection between the offender's conviction and the offender's danger to the community, "no rational relationship exists between the statute's purpose of protecting the public from known sexual predators and [the strict liability offender's] designation as one."³⁵³ Indeed, in comparing the kidnapper and the statutory rapist, the disconnect between the potential for violence and the requirement to register is more compelling in the case of the strict liability statutory rapist than the kidnapper. Unlike the child kidnapper, the strict liability offender has not been proven to be a danger to the community.

To be sure, the strict liability offender's relationship to the registry has always been problematic. But *Robinson* and *Moi* highlight the added difficulty of the *Connecticut Department of Public Safety*'s ruling. By endorsing registration systems that are based exclusively on convictions without individualized assessments of dangerousness, the *Connecticut Department of Public Safety* decision has effectively caused a disconnect between the strict liability offender's requirement to register and the state's ability to demonstrate a sufficient nexus. If dangerousness is deemed irrelevant, as *Connecticut Department of Public Safety* suggests, then requiring the strict liability offender to register does not survive substantive due process analysis emerging out of *Lawrence*. Without proof at trial that the offender intended to sexually exploit the underage partner, or proof of dangerousness at time of registration, the state cannot prove a rational connection between its legislative aims of protecting the community and the burdensome intrusion into registrant's liberty interest.

CONCLUSION

Yes, people are afraid, and it is understandable. States justifiably desire to track known sexual predators and to protect the community from such offenders. The subject of sex offender registration laws, however, involves a complex interplay of constitutional limitations, individual liberties, and legislative goals aimed at assuaging public concern. Well-crafted sex offender registration laws and community notification statutes provide appropriate incursions into registrants' privacy. This article has demonstrated that, despite laudatory intentions, the appropriate turns impermissibly punitive when there is not a sufficiently tailored nexus between the particular offender's requirement to register and the state's alternative nonpunitive purpose. Without this nexus, a system whose reach is so far-flung ensnares not only violent sexual offenders, but also those who were convicted without proof of predatory conduct or intent. In the case of the strict liability offender, who has never been judged dangerous to the community and who has never had the

³⁵³ *Robinson*, 873 So. 2d at 1215 (criticizing strict liability regimes as not rationally related to any legitimate governmental interest, when the state concedes the offender did not commit a sex offense).

opportunity to meaningfully contest inclusion in the registry, the punitive impact outweighs the civil nonpunitive purpose of the registration statute.

To whatever degree strict liability may be justified as a theory of culpability for statutory rape, recent factors have made registration of such offenders vulnerable to substantive and procedural due process challenges. First, the Supreme Court's endorsement in *Connecticut Department of Public Safety* of automatic registration and notification systems effectively disconnects the requirement to register from the state's demonstrated necessity for registration – the likelihood that the offender is dangerous. Without limitations on which offenses should be registration-worthy, there is not a sufficiently drawn nexus between the regulation and the intrusion. The civil nonpunitive aspect of the regulation turns impermissibly punitive.

An interrelated but separate challenge is the argument that, under *Lawrence*, substantive due process may demand greater protection from the unwarranted loss of reputation, and closer scrutiny of legislative enactments that impact individual liberty interests. For the strict liability offender, the loss of reputation occasioned by inclusion in a registry may violate due process because no sufficient connection exists between the requirement to register and the purpose of the regulation.

So where does that leave us? This article urges that one of three steps be taken to ensure due process protection for the strict liability offender. First, states must either exclude strict liability statutory rape from the list of registerable offenses, as a few states have already done. Alternatively, they must provide the strict liability offender with procedural due process guarantees of a contemporaneous hearing to assess dangerousness. Or finally, states must reject the strict liability framework and require proof of a criminal mens rea. For actors like Timothy Owens, convicted of strict liability statutory rape and required to register for life, anything short of these measures is unconstitutional.