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SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: WILL THESE LAWS SURVIVE?

I. INTRODUCTION

While the 1990s witnessed the emergence of sex offender registration and community notification laws nationwide,¹ the constitutionality of such laws is still being challenged today. Sex offender registration and community notification laws have received both positive and negative reactions. Opponents argue that the laws violate substantive and procedural due process, privacy rights, and the Ex Post Facto Clause of the Constitution² because sex offenders bear a lifetime of stigmatization as a result of the laws.³ However, proponents of the laws argue sex offenders should not be entitled to live a new life while the victim's family suffers from a lifetime of emotional trauma as a result of the sexual offense perpetrated against them.⁴ Today all fifty states and the District of Columbia have sex offender registration and community notification laws,⁵ and thirty-two states make their registries available on the Internet.⁶

This Comment examines sex offender registration and community notification laws. Part II examines the development of state and federal sex offender registration and community notification laws. Part III discusses the purpose of sex offender classification

1. See Wayne A. Logan, *Criminal Law: Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172 (1999).

2. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *Id.* § 10, cl. 1 ("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.").

3. See Robert R. Hindman, Note, *Megan's Law and Its Progeny: Whom Will the Courts Protect?*, 39 B.C. L. REV. 201, 218 (1997) (citing *Doe v. Pataki*, 919 F. Supp. 691, 701 (S.D.N.Y. 1996)).

4. *Id.* at 202.

5. Logan, *supra* note 1, at 1172.

6. KlaasKids Foundation, *Megan's Law in All 50 States*, at <http://www.meganslaw.org> (last updated Feb. 7, 2003).

and the methods states use to classify sex offenders. Part IV analyzes the purposes and goals of sex offender registration and community notification laws. Part V considers the constitutional challenges to sex offender registration and community notification laws. In addition, Part V provides a description of *Connecticut Department of Public Safety v. Doe*⁷ and *Smith v. Doe*,⁸ two cases recently decided by the Supreme Court of the United States, which challenged the constitutionality of sex offender registration and community notification laws. *Connecticut Department of Public Safety* challenged Connecticut's sex offender registry laws as a violation of the procedural due process rights of sex offenders under the Fourteenth Amendment,⁹ and *Smith* challenged Alaska's sex offender registry law as a violation of the Ex Post Facto Clause of the Constitution.¹⁰ Part VI analyzes the Supreme Court's decisions in *Connecticut Department of Public Safety* and *Smith* and discusses the impact of both decisions on sex offender registration and community notification laws. Part VII offers insight into the future of sex offender registration and community notification laws.

II. THE DEVELOPMENT OF FEDERAL AND STATE SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS

In response to the kidnap and murder of seven-year-old Megan Kanka, the New Jersey legislature passed sex offender registration legislation, which spawned a nationwide movement for the development of sex offender registries.¹¹ Although California was the first to enact sex offender registry legislation,¹² the passage of sex offender registration laws in New Jersey, now popularly called Megan's Laws, spurred the passage of similar measures nationwide.¹³

7. 123 S. Ct. 1140 (2003).

8. 123 S. Ct. 1160 (2003).

9. Brief for Respondents at i, 16–19, *Conn. Dep't of Public Safety v. Doe*, 123 S. Ct. 1160 (2003) (No. 01-1231) (citing U.S. CONST. amend. XIV).

10. Brief for Petitioners at i, 15–18, *Smith v. Doe*, 123 S. Ct. 1140 (2003) (No. 01-729) (citing U.S. CONST. art. I, § 9, cl. 3; art. I, § 10, cl. 1).

11. Logan, *supra* note 1, at 1172; *see also* N.J. STAT. ANN. §§ 2C:7-1 to -19 (West 1995 & Supp. 2002).

12. Logan, *supra* note 1, at 1172 n.25 (noting that California enacted the first registry laws in 1947).

13. Logan, *supra* note 1, at 1172. Washington was the first state to enact sex offender

While some states took the initiative to enact sex offender registries in the early 1990s,¹⁴ most states passed sex offender registration legislation in response to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Jacob Wetterling Act"), which Congress enacted in 1994.¹⁵ The Jacob Wetterling Act mandates that states pass legislation creating a sex offender registration database to be shared with the FBI and local law enforcement agencies, government agencies conducting confidential background checks, and the public if "necessary to protect the public concerning a specific person required to register."¹⁶ States risk losing ten percent of their federal law enforcement block grants and having their funds reallocated to compliant states if they fail to comply with the Jacob Wetterling Act.¹⁷ As a result, states hastened to pass legislation in compliance with the Jacob Wetterling Act, which allows information to be released to a member of the public without a law enforcement agency assessing the need for disclosure and without assessing the privacy rights or concerns of the sex offender.¹⁸

Federal legislation regulating and mandating the creation of sex offender registration and community notification systems further expanded in 1996 with the passage of the federal Megan's Law.¹⁹ This legislation provides that information collected in the registry system may be disclosed to members of the public in compliance with state law.²⁰ The legislation also permits law enforcement authorities to release information needed to protect public safety.²¹ Local law enforcement authorities no longer have

community notification laws. See WASH. REV. CODE § 9A.44.130 (Supp. 2003); Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L. REV. 333, 334–35 (1998).

14. See Logan, *supra* note 1, at 1170–73.

15. See Kabat, *supra* note 13, at 348; Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2000).

16. 42 U.S.C. § 14071(e).

17. See *id.* § 14071(g)(2); see also *id.* § 14071(e); Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, 64 Fed. Reg. 572, 585 (Jan. 5, 1999) [hereinafter Final Guidelines] (requiring states to comply with the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act by November 25, 2000 to avoid losing Byrne Formula Grant funding, but a two-year extension could be granted).

18. See Kabat, *supra* note 13, at 348–49.

19. 42 U.S.C. § 14071(e) (2000).

20. *Id.* § 14071(e)(1).

21. *Id.* § 14071(e)(2).

discretion in releasing the information because they *must* release the information if the information is necessary to protect public safety.²²

Congress also enacted the Pam Lyncher Sexual Offender Tracking and Identification Act of 1996 ("Pam Lyncher Act") creating a FBI database for all persons that have committed sexual crimes against minors and providing authority for both the FBI and state law enforcement authorities to provide community notification.²³ The database allows authorities to monitor the movement of sex offenders, especially sex offenders who move from state to state, and promotes the exchange between states of information regarding sex offenders and sex crimes.²⁴ Furthermore, the Pam Lyncher Act mandates that persons with two or more prior convictions for a registration-eligible offense and any person guilty of an "aggravated" sexual offense remain registered throughout his lifetime.²⁵ An aggravated offense includes sex crimes involving penetration through the use or threat of force and sexual acts with a person under the age of twelve.²⁶

Finally, Congress heightened the registration requirements for "sexually violent predators" in 1998.²⁷ A "sexually violent predator" is a "person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses."²⁸ Under this legislation, states must prescribe and implement methods of identifying "sexually violent predators" and determine when the assessment should be made.²⁹ Federal law dictates that a court make the determination after considering the recommendation of a board comprised of "experts in the behavior and treatment of sex offenders, victims' rights advocates, and representatives of law enforcement agencies."³⁰ However, the Attorney General may either waive (1) the above

22. *Id.* § 14071(e)(2); Kabat, *supra* note 13, at 349.

23. Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, 42 U.S.C. § 14072 (2000).

24. *See id.* § 14072(b), (g); *see also* Kabat, *supra* note 13, at 349.

25. 42 U.S.C. § 14072(d)(2).

26. 18 U.S.C. §§ 2241, 2246 (2000).

27. *See* 42 U.S.C. § 14071(i) (2000).

28. *Id.* § 14071(a)(3)(C).

29. *Id.* § 14071(a)(2)(A)-(B).

30. *Id.* § 14071(a)(2)(A).

requirements if a state develops appropriate methods and standards for identifying “sexually violent predators”; or (2) “approve alternative measures of comparable or greater effectiveness in protecting the public from unusually dangerous or recidivistic sexual offenders.”³¹ Thus, a state may designate the responsibility to a parole board or an administrative agency to avoid involving the judiciary in the assessment.³² Not only must sexually violent predators register throughout their lifetime, but they must also provide their name, “identifying factors, anticipated future residence, offense history, and documentation of any treatment received for [their] mental abnormality or personality disorder.”³³ In addition, sexually violent predators must verify their registry information four times a year.³⁴

Under current federal law and pursuant to the Jacob Wetterling Act, all persons convicted of a crime against a minor or convicted of a “sexually violent offense” are required to register.³⁵ A person, other than a parent, convicted of child kidnapping or false imprisonment of a child must register, as well as a person convicted of sexual offenses, including attempts, against minors.³⁶ A “sexually violent offense” includes both aggravated and non-aggravated sexual abuse as defined under federal law.³⁷ Registry information must include, at a minimum, the sex offender’s name, current address, fingerprints, and photograph.³⁸ Furthermore, eligible sex offenders must remain registered for a minimum of ten years unless a pardon is granted or their conviction is reversed, vacated, or set aside.³⁹

The federal statutory provisions provide states with “a minimum baseline for registration, database maintenance, and community notification” systems.⁴⁰ Thus, individual state laws regarding registration, database maintenance, and community

31. *Id.* § 14071(a)(2)(B)–(C).

32. Final Guidelines, 64 Fed. Reg. 572, 583 (Jan. 5, 1999).

33. 42 U.S.C. § 14071(b)(1)(B).

34. *Id.* § 14071(b)(3)(B).

35. *Id.* § 14071(a)(1)(A).

36. *Id.* § 14071(a)(3)(A)(i)–(viii).

37. *Id.* § 14071(a)(3)(B).

38. *Id.* § 14071(b)(1)(A)(iii)–(iv). In addition, states may require sex offenders to submit current employment information and samples of DNA. Final Guidelines, 64 Fed. Reg. 572, 579 (Jan. 5, 1999).

39. See 42 U.S.C. § 14071(b)(6)(A).

40. Kabat, *supra* note 13, at 349.

notification vary widely because individual states may choose which sex offenders must register, what information sex offenders must provide, what information must be disclosed, and what standards and procedures to use to determine which sex offenders must register.⁴¹

III. THE METHODS OF SEX OFFENDER CLASSIFICATION

Since states have a wide degree of latitude in the development and implementation of sex offender registration and community notification laws, they use various methods to classify and identify sex offenders for the purpose of community notification.⁴² Compulsory and discretionary notification are the two methods primarily used by states to classify sex offenders.⁴³ Nineteen states use the compulsory method of classification, which requires sex offenders convicted of child or sex crimes enumerated in state law to register and submit to community notification.⁴⁴ The compulsory system requires community notification regardless of the risk of recidivism.⁴⁵ States, like Alaska, justify the use of the compulsory system as a means to collect and provide information on sex offenders without the adjudication or evaluation of individual sex offenders.⁴⁶ Alaska's legislature believes the conviction of a sex crime provides an adequate basis for including every sex offender in the state's registry because a risk of recidivism always exists.⁴⁷

The discretionary system is used by the remaining thirty-one states and the District of Columbia.⁴⁸ Under the discretionary system, a state uses a case-by-case analysis to determine whether a sex offender is required to register and submit to community

41. See Final Guidelines, 64 Fed. Reg. at 582; Logan, *supra* note 1, at 1174.

42. See Final Guidelines, 64 Fed. Reg. at 582; Wayne A. Logan, *A Study in "Actuarial Justices": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 599 (2000).

43. Logan, *supra* note 42, at 602-03.

44. *Id.* at 603.

45. *Id.*

46. *Id.* at 605-06 (citing *Patterson v. State*, 985 P.2d 1007, 1017 (Alaska Ct. App. 1999)).

47. *Id.* at 605.

48. *Id.* at 606.

notification laws.⁴⁹ The risk of an individual's recidivism is used to determine what, if any, information should be released to the public.⁵⁰ Standard criteria are utilized at a hearing before a court or board to determine the length, method, and appropriate means of community notification.⁵¹ Under the discretionary system, a sex offender with a low risk of recidivism may only be subject to law enforcement notification; however, community organizations may be notified of the risk particular sex offenders pose, and the entire community may be notified of extremely high risk sex offenders.⁵² Unlike the compulsory system, sex offenders are given notice and an opportunity to be heard under the discretionary system.⁵³

IV. THE PURPOSE AND GOALS OF SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS

Many policy reasons are provided to justify the enactment of sex offender registration and community notification laws; the protection of public safety is a predominant justification for the laws.⁵⁴ Preventing and controlling crime is important to the American public, especially preventing crimes against children.⁵⁵ Political candidates and legislators have campaigned and worked to pass sex offender registration and community notification laws in order to bring the importance of preventing sex crimes to the attention of the American public, thereby gaining support of constituents who view sex offenders as outcasts of society.⁵⁶ Sex offender registration and community notification laws serve as a means of balancing and addressing public concern in a manner that is most beneficial to the public and the least burdensome to sex offenders.⁵⁷

49. *Id.* at 598.

50. *See id.*; *see also* Final Guidelines, 64 Fed. Reg. 572, 582 (Jan. 5, 1999); Logan, *supra* note 1, at 1175.

51. Logan, *supra* note 1, at 1175.

52. *Id.*

53. *Id.*

54. Carol L. Kunz, Comment, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453, 471 (1997).

55. *Id.*

56. *Id.* at 475.

57. *Id.* at 471.

Sex offender registration and community notification laws are justified further due to the high rate of recidivism among sex offenders.⁵⁸ Proponents of the laws argue that once convicted sex offenders come into contact with potential victims in their neighborhood, they will succumb to their previous behavior.⁵⁹ As a result, supporters of sex offender registration and community notification laws believe the laws deter sex crimes.⁶⁰ Not only do supporters argue that sex offenders are less likely to commit an offense if they know the community and law enforcement are closely monitoring their activity, but they also believe that parents are better able to protect their children once a potential risk of harm has been identified.⁶¹ Furthermore, proponents believe the laws provide the most effective means of preventing recidivism because sexual deviance cannot be cured—even with treatment programs.⁶² Finally, supporters argue that sex offender registration and community notification laws are the most economical means of monitoring and preventing recidivism because life imprisonment is too expensive and not practical.⁶³

However, critics of notification laws argue that the laws create a false sense of security because many sex crimes against children are committed by a person the child knows. Furthermore, only five to ten percent of all sex offenders are ever arrested and convicted, meaning most sexual predators are never subject to registration and community notification laws.⁶⁴ Additionally, opponents assert that if a sex offender knows which people in the community are subject to notification, the sex offender will seek to commit a subsequent offense outside of the geographic area where he or she is subject to registration and community notification laws.⁶⁵ Since state notification requirements vary, sex offenders can move to states with less stringent registration and notification requirements, reducing the effectiveness of registration and community notification laws.⁶⁶

58. *Id.*

59. Kabat, *supra* note 13, at 335.

60. Kunz, *supra* note 54, at 473.

61. *Id.*

62. *Id.* at 475.

63. *Id.*

64. *Id.* at 474.

65. *Id.*

66. *Id.*

V. CONSTITUTIONAL CHALLENGES TO SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS

Since the enactment of federal legislation, opponents have initiated constitutional challenges to sex offender registration and community notification laws.⁶⁷ While courts throughout the country have attempted to settle constitutional issues regarding sex offender registration and community notification laws,⁶⁸ new challenges are still emerging and have yet to be resolved.

A. *Substantive Due Process Claims and Privacy Rights*

Substantive due process claims relying upon privacy rights have not been successful, as public notification outweighs any infringement on the substantive due process rights of sex offenders.⁶⁹ Substantive due process under the Fifth and Fourteenth Amendments to the Constitution requires states to enact legislation that is "fair and reasonable in content" and "further[s] a legitimate governmental objective."⁷⁰ The courts often reject substantive due process claims because sex offenders "have a lessened expectation of privacy" as to the type of information shared with the public under community notification laws even though the information would be more difficult to ascertain without notification statutes.⁷¹

While no per se constitutional right to privacy exists, privacy has long been recognized by the Supreme Court as the "right to be let alone"⁷² and an inherent right implied in the Fourteenth Amendment to the Constitution.⁷³ *Griswold v. Connecticut*⁷⁴ recognized that a right of privacy existed in marriage and in the right to procreate.⁷⁵ In the criminal context, the right to privacy requires "first[,] that a person ha[s] exhibited an actual (subjec-

67. See *infra* text accompanying notes 69–75, 86–88, 113–27.

68. See *infra* text accompanying notes 78–85, 99–107.

69. Logan, *supra* note 1, at 1186–87.

70. BLACK'S LAW DICTIONARY 517 (7th ed. 1999).

71. See Logan, *supra* note 1, at 1187.

72. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

73. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (holding that the Fourteenth Amendment guarantees citizens personal liberty and privacy rights).

74. 381 U.S. 479 (1965).

75. *Id.* at 485–86.

tive) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"⁷⁶

However, the Supreme Court has not fully extended the right of privacy to criminals.⁷⁷ Applying the right of privacy to sex offenders, privacy is the right to live and maintain anonymity in a community without being subject to community notification laws.⁷⁸ In *Doe v. Poritz*,⁷⁹ the New Jersey Supreme Court analyzed whether sex offenders have a "reasonable expectation of privacy in the information disclosed."⁸⁰ Here, the court noted that the disclosure of one's age, name, previous convictions, automobile description, pictures, and fingerprints did not infringe on a sex offender's right of privacy.⁸¹ The court determined that a sex offender does have a right of privacy with regard to the disclosure of the address of his or her residence; however, New Jersey's interest in protecting its citizenry outweighed any infringement on a sex offender's privacy rights.⁸² Like the court in *Poritz*, the Third Circuit determined that a sex offender's privacy rights are not violated, even though the sex offender must disclose his or her home address.⁸³ Thus, in the eyes of state legislatures, the protection of public safety afforded by sex offender registration and community notification laws outweighs any infringement on the privacy rights of sex offenders.⁸⁴ Not only have courts recognized that certain information disclosed is not private, but some courts also have held that sex offenders forfeit their privacy rights when they commit a sex crime.⁸⁵ Other courts have found that those sex offenders who are dangerous and pose a threat to the public pos-

76. *Katz v. United States*, 389 U.S. 347, 361 (1967).

77. See *Paul v. Davis*, 424 U.S. 693, 713 (1976) (holding that the disclosure of the names and photographs of unconvicted shoplifters did not violate any privacy right).

78. *Kabat*, *supra* note 13, at 337.

79. 662 A.2d 367 (N.J. 1995).

80. *Id.* at 406.

81. *Id.* at 407-08.

82. *Id.* at 408-11.

83. *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999) (finding that while a privacy right exists in the information provided, the state and public interest in disclosing the information outweighs any infringement on a sex offender's privacy rights).

84. See, e.g., 1994 Alaska Sess. Laws, ch. 41, § 1 ("the privacy interests of persons convicted of sex offenses are less important than the government's interest in public safety").

85. *People v. Mills*, 146 Cal. Rptr. 411, 417 (Ct. App. 1978) ("[A]ny person who commits a violation . . . has waived any right to privacy and may absolutely forfeit for a considerable time—the term prescribed by law—his right to travel.").

sess reduced privacy rights because any infringement on their privacy must succumb to the need to protect the public's safety.⁸⁶

B. *Procedural Due Process*

Encountering little success with substantive due process claims, claimants have turned to procedural due process claims in an attempt to overturn sex offender registration and community notification laws. They argue that the laws fail to provide sex offenders with adequate notice or an opportunity to be heard prior to being required to comply with community notification requirements.⁸⁷ Procedural due process, under the Fifth and Fourteenth Amendments to the United States Constitution, requires a person to be given notice and an opportunity to be heard before the person is deprived of life, liberty, or a property interest.⁸⁸ To have a successful due process claim, sex offender registration and community notification laws must deprive the sex offender of a liberty or property interest previously enjoyed under the law.⁸⁹

1. Reputation and Stigmatization

One issue raised by sex offender registration and community notification laws in the procedural due process context involves whether a liberty interest protects an individual from governmental stigmatization.⁹⁰ However, the extent of constitutional protection afforded to a sex offender remains largely unanswered.⁹¹ The Supreme Court, in *Wisconsin v. Constantineau*,⁹² addressed the constitutionality of a Wisconsin statute that allowed liquor stores to refuse to sell alcohol and to post the names of people engaged in "excessive drinking" without affording them notice and an opportunity to be heard.⁹³ The Court ruled that

86. *State v. Ward*, 869 P.2d 1062, 1070 (Wash. 1994) (holding that convicted sex offenders have a reduced expectation of privacy if there is evidence that they pose a threat to the public).

87. See discussion *infra* Part V.B.

88. BLACK'S LAW DICTIONARY 517 (7th ed. 1999).

89. See *Paul v. Davis*, 424 U.S. 693, 708 (1976).

90. *Logan*, *supra* note 1, at 1182.

91. *Id.* at 1182-83.

92. 400 U.S. 433 (1971).

93. *Id.* at 434-35 (quoting WIS. STAT. § 176.26 (1967)).

posting the names violated the individuals' due process rights because "where the State attaches 'a badge of infamy' to the citizen, due process comes into play."⁹⁴ However, the Court elevated the requirements for a successful due process claim in *Paul v. Davis*.⁹⁵

In *Paul v. Davis*, the Supreme Court addressed whether the disbursement of shoplifters' identifications, including names and photographs, to eight hundred local businesses violated the due process rights of the individuals labeled as shoplifters.⁹⁶ The Court held that damage to one's reputation alone does not implicate any constitutional protection.⁹⁷ The Court distinguished this case from *Constantineau* because the Court felt in *Constantineau* that the posting "deprived the individual of a right previously held under state law—the right to purchase or obtain liquor . . . with the rest of the citizenry."⁹⁸ Subsequently, the *Paul* test has been deemed the "stigma plus" test and has been used by lower courts to determine whether sex offender registration and community notification laws are constitutional.⁹⁹

2. The Rejection of Procedural Due Process Claims

In *Russell v. Gregoire*,¹⁰⁰ the Ninth Circuit addressed the violation of due process in the context of sex offender registration and community notification laws.¹⁰¹ The Ninth Circuit upheld a Washington statute that required all sex offenders to provide their name, address, date and place of birth, present employment, criminal record, the location and date of each criminal offense, social security number, picture, and fingerprints.¹⁰² The Ninth Circuit held that the claimants' due process rights were not violated

94. *Id.* at 437 (citing *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952)).

95. 424 U.S. 693, 701–02 (1976).

96. *Id.* at 694–95.

97. *Id.* at 701 (holding that "reputation alone, apart from some more tangible interests" does not warrant constitutional protection).

98. *Id.* at 708.

99. See discussion *infra* Part V; Logan, *supra* note 1, at 1185.

100. 124 F.3d 1079 (9th Cir. 1997).

101. *Id.* at 1082 (examining a law that assessed each sex offender's risk of recidivism before classifying the offender and determining the offender's notification requirements). The law also permitted local law enforcement officials to release to the public the information necessary to protect public safety. *Id.*

102. *Id.* at 1082, 1094.

because the information disclosed to the public was not protected unless it was personal information, like medical records.¹⁰³ The court ruled that the information disclosed was already available to the public through other means and not constitutionally protected except for the location of the claimants' residence and the claimants' place of employment, but even this information was not considered private.¹⁰⁴

The claimants also asserted that the Washington statute violated their procedural due process rights by infringing on a "liberty interest" without affording them notice and an opportunity to be heard.¹⁰⁵ However, the court determined that the claimants did not have a liberty interest at stake because the court had already denied their substantive due process claims.¹⁰⁶ Other courts have followed the precedent established in *Russell* and held that sex offender registration and community notification laws do not infringe on the procedural due process rights of sex offenders.¹⁰⁷

3. The Recognition of Procedural Due Process Claims

While many courts have refused to recognize substantive and procedural due process claims, others have applied the *Paul v. Davis* test and have been more willing to find a protected liberty interest.¹⁰⁸ Under *Paul*, reputation alone is not enough to succeed

103. *Id.* at 1094 (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

104. *Id.*

105. *Id.*

106. *Id.*

107. *See, e.g.*, *Lanni v. Engler*, 994 F. Supp. 849, 855 (E.D. Mich. 1998) (holding that for a claimant to establish a procedural due process claim, the sex offender must prove that the registration and community notification statute deprived him/her "of a protected liberty or property interest" under the Fourteenth Amendment and that a hearing would protect that interest). The court determined that Michigan's sex offender registration and community notification laws did not infringe on the procedural due process rights of sex offenders because the law merely "compiles truthful, public information and makes it more readily available." *Id.* Furthermore, the court determined that "any detrimental effects that may flow from the Act would flow most directly from plaintiff's own misconduct and private citizen's reaction thereto, and only tangentially from state action." *Id.* The court determined that a hearing would not protect the procedural due process rights of sex offenders because all sex offenders were required to register and were subject to the public disclosure of information without the benefit of police discretion to make an individualized determination with regard to disclosing information. *Id.* *See also* *Cutshall v. Sundquist*, 193 F.3d 466, 478-81, 483 (6th Cir. 1999); *People v. Logan*, 705 N.E.2d 152, 160-61 (Ill. App. Ct. 1998).

108. *See* discussion *infra* Part V; *Logan*, *supra* note 1, at 1192-93.

on a procedural due process claim because to succeed on such a claim the government must "alter 'a right or status previously recognized by state law,' for it is that 'alteration, officially removing the interest from the recognition . . . previously afforded by the State, which [the Court has] found sufficient to invoke the procedural guarantees contained in the Due Process clause of the Fourteenth Amendment.'"¹⁰⁹

Courts applying the stigma plus test announced in *Paul* have agreed that community notification laws negatively affect the reputations of sex offenders.¹¹⁰ While sex offenders have already suffered reputational harm when prosecuted and convicted of a sex offense, the harm sustained from notification laws may cause greater damage because the harm sustained is of a longer duration and involves the government deliberately labeling one as an outcast to society.¹¹¹ In *Doe v. Pryor*,¹¹² the loss or foreclosure of employment, as well as notification laws that present a threat to future employment, have been found to violate procedural due process.¹¹³ Furthermore, courts have ruled that registration and notification requirements violate procedural due process because they alter a legal status by imposing a penalty for failing to register.¹¹⁴

4. *Connecticut Department of Public Safety v. Doe*¹¹⁵

In *Connecticut Department of Public Safety v. Doe*, the respondents, in a class action lawsuit, argued that Connecticut's sex offender registration and community notification laws violate procedural due process because any individual convicted of a sex crime listed in the Connecticut statute must register, inform law enforcement authorities of his or her name and current address, and provide a picture.¹¹⁶ As a result, the respondents believed

109. See *W.P. v. Poritz*, 931 F. Supp. 1199, 1219 (D.N.J. 1996) (quoting *Paul v. Davis*, 424 U.S. 693, 711 (1976)).

110. *Logan*, *supra* note 1, at 1193.

111. *Id.* at 1193-94.

112. 61 F. Supp. 2d 1224 (M.D. Ala. 1999).

113. *See id.* at 1232.

114. *Doe v. Conn. Dep't of Pub. Safety*, 271 F.3d 38, 57 (2d Cir. 2001), *rev'd*, 123 S. Ct. 1160 (2003).

115. 123 S. Ct. 1160 (2003).

116. *Id.* at 1163. In addition, a person who has been found not guilty of a sex offense

that the law infringes on their procedural due process rights under the Fourteenth Amendment because it fails to identify only the sex offenders that are truly dangerous to society.¹¹⁷ While some sex crimes have more stringent registration and community notification requirements, a sex offender falling under certain statutory provisions may be exempt from registration and notification requirements if a court determines the sex offender does not pose a threat to public safety.¹¹⁸

The respondents challenged the Connecticut sex offender registration and community notification laws on procedural due process grounds because they felt the registry stigmatizes all sex offenders as a danger to public safety without making an individual assessment as to the dangerousness of each sex offender.¹¹⁹ The respondents believed an accurate assessment of the dangerousness of each sex offender could be made as Connecticut agencies and boards make similar determinations when deciding to release an individual on parole.¹²⁰ Furthermore, the respondents argued that the broad language of the Connecticut sex offender registration and community notification statute encompasses a larger category of sex offenders than the federal legislation envisioned.¹²¹ The respondents based this argument on the Jacob Wetterling Act, which they argued does not require the personal information of every sex offender to be distributed, and mandates an individual assessment of the dangerousness of each sex offender.¹²²

due to his or her mental disease must abide by Connecticut's registration requirements. Brief for Respondents at 2 n.1, *Conn. Dep't of Pub. Safety* (No. 01-1231).

117. See *Conn. Dep't of Pub. Safety*, 123 S. Ct. at 1163-64.

118. See CONN. GEN. STAT. ANN. § 54-251(b)-(c) (West 2001).

119. Brief for Respondents at 16-17, *Conn. Dep't of Pub. Safety* (No. 01-1231). Since the registry did not classify each sex offender's degree of danger to public safety, the respondents argued that all sex offenders were unlawfully characterized as dangerous. *Id.* at 17. The database combines individuals convicted of felonies, misdemeanors, and non-sex related crimes. *Id.* The statute and database also apply to persons receiving various prison sentences, persons receiving treatment, and offenders acquitted due to mental disease or illness. *Id.*

120. See *id.* at 18, 42 (quoting *Schall v. Martin*, 467 U.S. 253, 278-79 (1984)). Unlike Connecticut, other states use discretionary classification systems and provide sex offenders with notice and an opportunity to be heard. *Id.* at 18.

121. See *id.* at 18.

122. *Id.*

Citing *Paul v. Davis*,¹²³ the respondents asserted their procedural due process rights were violated; they claimed the statute altered their legal rights and status because all sex offenders are stigmatized by being labeled a danger to public safety.¹²⁴ The legal status of a sex offender is altered because all sex offenders are subject to burdensome registration and notification requirements from which other criminals and citizens are exempt.¹²⁵ Furthermore, sex offenders receive a felony conviction for failing to comply with the law and have no legal recourse against the state or its officials for injuries caused by Connecticut's registration and community notification laws.¹²⁶ The respondents asserted that their procedural due process rights were violated because they did not receive notice or an opportunity to be heard before the "defamatory statements" were published in the registry.¹²⁷

The respondents presented a powerful case arguing that failing to give a sex offender notice and an opportunity to be heard violates the purpose of the Connecticut statute, which is to protect the public by informing them of the location of dangerous sex offenders.¹²⁸

Instead of providing a tailored list of persons whom the State has determined pose a danger to public safety, the State provides a long list of names and faces about whom the public is told to "beware." The overbroad category overloads the public by including information about offenders who do not pose a danger, thereby frustrating the purpose of the State's warning.¹²⁹

On March 5, 2003, the Supreme Court of the United States decided the fate of sex offender registration and community notification laws under the procedural due process claims of affected parties.¹³⁰

123. 424 U.S. 693 (1976).

124. See Brief for Respondents at 18, *Conn. Dep't of Public Safety* (No. 01-1231).

125. *Id.* at 33 (stating that the legal status of sex offenders is altered because sex offenders must register, report their residential address, submit a picture, provide details of their physical appearance for publication as a registered sex offender, and cannot sue state officials, who are subject to immunity, for defamation or an invasion of privacy).

126. *Id.*

127. *Id.* at 18.

128. *Id.* at 49.

129. *Id.*

130. *Conn. Dep't of Pub. Safety v. Doe*, 123 S. Ct. 1160 (2003). See discussion *infra* Part VI.A-B., which contains an analysis of the Court's decision and the impact of the decision

C. *Ex Post Facto Challenges and Smith v. Doe*¹³¹

Over the years, sex offender registration and community notification laws have been challenged on the basis that they violate the Ex Post Facto Clause of the Constitution.¹³² In order to prevent passing an ex post facto law, a state legislature cannot enact a law that punishes a citizen for an act that was lawful at the time the citizen committed the act.¹³³

Like many other challenges to the constitutionality of sex offender registration and community notification laws, the respondents in *Smith v. Doe* sought to declare Alaska's sex offender registration and community notification statute unconstitutional.¹³⁴ Two convicted sex offenders challenged the statute on the basis that it deprived them of pre-existing rights they enjoyed under the Alaska Constitution and state law.¹³⁵ They claimed the laws infringed upon their legal rights because they had a right to have all their civil rights restored when they were unconditionally released from prison.¹³⁶ In arguing that the statute constituted an ex post facto law, the respondents based their argument upon the right of privacy, the right to seek and obtain employment, and the right to privacy free from government invasion in the home.¹³⁷ Under Alaska's law, the respondents are required to register as

on future constitutional challenges.

131. *Smith v. Doe*, 123 S. Ct. 1140 (2003).

132. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant Title of Nobility.").

133. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) ("[N]o man should be compelled to do what the laws do not require; nor refrain from acts which the laws permit.").

134. *Smith*, 123 S. Ct. at 1146. The respondents asserted that the sex offender registration and community notification laws are ex post facto laws because they impose a duty on sex offenders which requires them to submit their fingerprints, regularly report to authorities for the rest of their lives, take an oath that the information provided is true, and submit private information. Brief for Respondents at 28–29, *Smith* (No. 01-729). The respondents argued the law intends to punish sex offenders and that their duty to register arises solely because they have been convicted of a sex crime. *Id.* at 28. Thus, the respondents believed the laws constituted ex post facto laws. *Id.* According to the respondents, ex post facto laws encompass laws that subject an individual to compulsion. *Id.* at 29 (citing *Nat'l Labor Relations Bd. v. Exchange Parts Co.*, 304 F.2d 368, 374 (5th Cir. 1962)).

135. Brief for Respondents at 2–3, *Smith* (No. 01-729).

136. *Id.* at 2; (citing ALASKA STAT. §§ 12.55.185(15), 33.30.241 (Michie 2002)).

137. *Id.* at 3–4.

sex offenders, and, as a result, they argued they are automatically labeled "dangerous."¹³⁸

The respondents claimed the law is an *ex post facto* law because the law is punitive, as it regulates the individual rather than his or her participation in an activity.¹³⁹ To determine whether the law is *ex post facto*, the respondents applied the "intent and effects" test used in *Kansas v. Hendricks*.¹⁴⁰ *Hendricks* requires the determination of legislative intent; however, if the legislative intent cannot be determined, the court must analyze whether the law is regulatory in both structure and design by looking at its codification, procedural protections, triggering events, and sanctions imposed.¹⁴¹ When the purpose of the law cannot be determined by examining the face of the statute or when the law is a civil statute, the court must determine if the nature of the law is "so punitive either in purpose or effect' as 'to transfor[m] what was clearly intended as a civil remedy into a criminal penalty."¹⁴² To make this determination, the respondents argued that factors from *Kennedy v. Mendoza-Martinez*¹⁴³ should be applied.¹⁴⁴ These factors include:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.¹⁴⁵

138. *Id.* at 5 n.3.

139. *Id.* at 18.

140. 521 U.S. 346, 361 (1997). The respondents concluded that the law is punitive on its face because it is codified in the criminal code and not codified in the civil code. Brief for Respondents at 25, *Smith* (No. 01-729). Thus, the respondents believed the law demonstrates a punitive intent. *Id.*

141. See *Hendricks*, 521 U.S. at 361–63; see *infra* Part VI.C.

142. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 249 (1980); *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956)) (ruling that the government can impose sanctions to deter the specific activity of a person). The respondents urged the statute is not regulatory because each sex offender must comply with the notification and registration laws or be subject to criminal prosecution. Brief for Respondents at 21, *Smith* (No. 01-729). Thus, the respondents concluded the law regulates "the individual" because each sex offender must comply with the law merely because he or she has been convicted of a sex crime. *Id.*

143. 372 U.S. 144 (1963).

144. Brief for Respondents at 19, *Smith* (No. 01-729).

145. *Mendoza-Martinez*, 372 U.S. at 168–69 (footnotes omitted).

According to the respondents, they merely had to demonstrate that one or more of the *Mendoza-Martinez* factors make Alaska's sex offender registration and community notification law excessive in its purpose and effect.¹⁴⁶

After applying the *Mendoza-Martinez* test, the respondents concluded that the laws do not regulate the activity of sex offenders but are punitive as they punish sex offenders for their previous convictions.¹⁴⁷ Furthermore, the respondents argued that the statute unduly infringes on their privacy rights and retroactively infringes on their rights because the statute applies to offenders who committed crimes before the enactment of the statute.¹⁴⁸

Like *Connecticut Department of Public Safety*, the Supreme Court of the United States issued an opinion in this case on March 5, 2003, and finally resolved whether sex offender registration and community notification laws violate the Ex Post Facto Clause of the Constitution.¹⁴⁹

VI. DID *CONNECTICUT DEPARTMENT OF PUBLIC SAFETY* AND *SMITH* ALTER THE CONSTITUTIONALITY OF SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS?

A. *The Inevitable Failure of the Procedural Due Process Claim in Connecticut Department of Public Safety v. Doe*¹⁵⁰

On March 5, 2003, the Supreme Court issued an opinion in *Connecticut Department of Public Safety*, which appears to put procedural due process challenges to sex offender registration and community notification laws to death.¹⁵¹ Unlike lower courts,¹⁵² the Court did not analyze the validity of the claimants' due process claim under the *Paul v. Davis* framework.¹⁵³ In fact, the Court

146. Brief for Respondents at 20, *Smith* (No. 01-729) (citing *Ward*, 448 U.S. at 250–51).

147. *Id.*

148. *Id.*

149. *Smith v. Doe*, 123 S. Ct. 1140 (2003). See discussion *infra* Part VI.C–D., which contains a discussion of the Court's opinion and analyzes the impact of the decision on the constitutionality of sex offender registration and community notification laws.

150. 123 S. Ct. 1160 (2003).

151. See *id.* at 1164–65.

152. See discussion *infra* Part V.B.

153. *Conn. Dep't of Pub. Safety*, 123 S. Ct. at 1164.

determined that, even if sex offenders are deprived of a liberty interest, they are not entitled to notice and a hearing because procedural due process does not mandate a person be afforded a hearing to establish a fact that “is not material under the Connecticut statute.”¹⁵⁴ Accordingly, Connecticut’s statute does not violate procedural due process because the registration requirement hinges upon the sex offender’s conviction alone—a conviction the sex offender previously had the opportunity to contest at trial.¹⁵⁵ Connecticut’s compulsory registration requirement mandates that a sex offender convicted of a particular crime register; the risk the sex offender poses to the public does not impact a sex offender’s requirement to register under the Connecticut statute because a sex offender must register under the statute regardless of whether or not he or she is a current danger to society.¹⁵⁶

The Court also concluded the case presented a substantive due process claim “recast in ‘procedural due process’ terms.”¹⁵⁷ Thus, the Court stated “[u]nless [the] respondent can show that the *substantive* rule of law is defective (by conflicting with a provision of the Constitution) any hearing on current dangerousness is a bootless exercise.”¹⁵⁸ Since the claimant did not challenge the Connecticut statute as a violation of substantive due process, the Court left open the question as to whether such sex offender registration and community notification laws violate substantive due process.¹⁵⁹

While the Court refused to analyze the case under *Paul v. Davis*, Justice Scalia, in his concurrence, concluded that even if the laws implicate a sex offender’s liberty interest “the categorical abrogation of the liberty interest by a validly enacted statute suffices to provide all the process that is due—just as a state law providing that no one under the age of 16 may operate a motor vehicle suffices to abrogate that liberty interest.”¹⁶⁰ Unless sex offender registration and community notification laws infringe upon a sex offender’s substantive due process rights, the laws

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1164–65 (quoting *Reno v. Flores*, 507 U.S. 292, 308 (1993)).

158. *Id.* at 1164 (quoting *Flores*, 507 U.S. at 308).

159. *Id.* at 1165.

160. *Id.* (Scalia, J., concurring).

cannot be attacked in the context of due process.¹⁶¹ Thus, a sex offender does not have a right to establish that “he is not dangerous [any more] than . . . a 15-year-old boy has a right to process enabling him to establish that he is a safe driver.”¹⁶²

In addition, Justice Souter, with whom Justice Ginsburg joined in a concurring opinion, reiterated that a sex offender may still challenge sex offender registration and community notification laws on substantive due process grounds.¹⁶³ Furthermore, Justice Souter suggested that sex offenders may challenge the validity of sex offender registration and community notification laws, like Connecticut’s, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution.¹⁶⁴ The Equal Protection Clause provides that a state cannot “deny to any person within its jurisdiction the equal protection of the laws.”¹⁶⁵ Justice Souter held that, under Connecticut’s statutory scheme, courts utilizing their discretion may excuse a sex offender from registering if he or she meets certain requirements and public safety does not necessitate that the information be released to law enforcement officials or the public.¹⁶⁶ Thus, Connecticut distinguishes between sex offenders qualifying for an exemption from registration and notification requirements from those who are not, and “like all legislative choices affecting individual rights, [is] open to challenge” on equal protection grounds.¹⁶⁷

While Justice Stevens appended his concurrence to his dissent in *Smith v. Doe*,¹⁶⁸ he stated that sex offender registration and community notification laws do not violate procedural due process unless the sex offender previously has not been afforded a trial satisfying the Constitution.¹⁶⁹ Since none of the justices dissented in *Connecticut Department of Public Safety* and the Court re-sounded that the Connecticut sex offender registration and community notification laws do not violate sex offenders’ procedural due process rights, the Court seems to extinguish the validity of

161. *Id.* (Scalia, J., concurring).

162. *Id.* (Scalia, J., concurring).

163. *Id.* (Souter, J., concurring).

164. *Id.* (Souter, J., concurring).

165. U.S. CONST. amend. XIV.

166. *Conn. Dep’t of Pub. Safety*, 123 S. Ct. at 1165 (Souter, J., concurring).

167. *Id.* at 1166.

168. *Smith v. Doe*, 123 S. Ct. 1140, 1156 (2003) (Stevens, J., dissenting).

169. *Id.* at 1158 (Stevens, J., dissenting).

future procedural due process challenges to sex offender registration and community notification laws.

B. *The Implications of Connecticut Department of Public Safety on the Constitutionality and Future of Sex Offender Registration and Community Notification Laws*

While the Supreme Court made a case-specific inquiry into the statutory scheme of Connecticut's sex offender registration and community notification laws, the Supreme Court unanimously (through the majority and concurring opinions) declared the invalidity of procedural due process challenges to sex offender registration and community notification laws.¹⁷⁰ Although the Court analyzed the validity of a statute utilizing the compulsory classification system, any challenge to a statute using a discretionary classification system will likely fail because the Court resounds that all sex offenders have notice and an opportunity to be heard during their trial.¹⁷¹ Furthermore, sex offenders receive an additional opportunity to be heard in states using discretionary classification systems.¹⁷²

Lower courts must abandon the use of *Paul v. Davis* to analyze any future procedural due process challenges to sex offender registration and community notification laws because the Court explicitly refused to apply the stigma plus test in *Connecticut Department of Public Safety*.¹⁷³ As a result, lower courts will likely find it impossible to conclude that such laws infringe upon sex offenders' procedural due process rights—even if sex offender registration and community notification laws implicate an offender's liberty interest, they are not entitled to notice and an opportunity to be heard.¹⁷⁴ Under compulsory classification regimes, like Connecticut's, procedural due process does not mandate a person be afforded a hearing to establish that he is not a threat to society under such statutory schemes.¹⁷⁵

170. See *supra* Part VI.A.

171. See *supra* Part VI.A.

172. See *supra* Part III.

173. See *supra* Part VI.A.

174. See *supra* Part VI.A.

175. See *supra* Part VI.A.

Any relief sought in the due process context must be asserted under substantive due process. Since the respondents did not attack the Connecticut statute on substantive due process grounds, the Court refused to address the validity of these laws on this basis.¹⁷⁶ However, as a result of this opinion and from the encouragement provided by Justices Souter and Ginsburg, the Court will likely have the opportunity to analyze the constitutionality of sex offender registration and community notification laws under substantive due process. Furthermore, if sex offenders follow the advice of Justices Souter and Ginsburg, they will also seek to challenge sex offender registration and community notification laws, especially laws like Connecticut's, on equal protection grounds. Ultimately, opponents of sex offender registration and community notification laws will continue to attack the constitutionality of these laws; however, the Supreme Court recognized the importance of these laws to the safety of every American and will likely continue to validate such laws.

C. *The Death of the Ex Post Facto Claim in Smith v. Doe*¹⁷⁷

On the same day that the Supreme Court of the United States handed down its decision in *Connecticut Department of Public Safety*, the Court also issued an opinion in *Smith v. Doe*. The Court ruled that sex offender registration and community notification laws, which apply retroactively, do not violate the Ex Post Facto Clause of the United States Constitution.¹⁷⁸

Before analyzing the arguments of the case, the Court dictated the framework for the ex post facto analysis.¹⁷⁹ First, the Court must determine whether the legislative intent of the statute is civil or punitive.¹⁸⁰ If the statute has a punitive purpose, the inquiry ends.¹⁸¹ If the statute implements a "regulatory scheme that is civil and nonpunitive," the Court must examine the statute to determine whether it is so punitive that it cannot be deemed

176. *See supra* Part VI.A.

177. 123 S. Ct. 1140 (2003).

178. *Id.* at 1152.

179. *Id.* at 1146–47.

180. *Id.* (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

181. *Id.*

civil.¹⁸² According to the Court, only the “clearest proof” may override the purported legislative intent and transform a civil remedy into a punitive remedy.¹⁸³ To accurately interpret the meaning of the statute, the Court must examine the text and structure of the statute.¹⁸⁴

The Court determined that the statute explicitly stated the legislative intent—to protect the public from sex offender recidivism.¹⁸⁵ Accordingly, the Alaskan legislature believed the best way to effectuate the purpose of the statute was to disseminate the information to appropriate governmental agencies and the public.¹⁸⁶ The Supreme Court looked to *Kansas v. Hendricks*¹⁸⁷ where it held that a statute imposing restrictive measures on sex offenders determined to be dangerous is “a legitimate nonpunitive governmental objective and has been historically so regarded.”¹⁸⁸ The Court found, as it did in *Hendricks*, that “[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm.”¹⁸⁹ Applying precedent, the Court determined even if the statute’s objective was consistent with the purpose of the criminal justice system, the state’s pursuit of a regulatory scheme did not make the statute punitive.¹⁹⁰

While the Court recognized that the codified location of a statute serves as a factor in determining whether the statute is punitive, the location of the statute was not a determinative factor in this case because the statute is codified in Alaska’s “Health, Safety, and Housing Code.”¹⁹¹ However, the registration requirements are located in Alaska’s criminal procedure code.¹⁹² Al-

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. 521 U.S. 346 (1997).

188. *Id.* at 363.

189. *Smith*, 123 S. Ct. at 1147 (quoting *Hendricks*, 521 U.S. at 361). The Court also examined other precedents, including *Flemming v. Nestor*, 363 U.S. 603 (1960), where the Court held that a federal law that retroactively terminated accrued social security benefits of aliens who were members of the Communist Party was constitutional, as the purpose of the law was not to punish but to condition receipt of benefits on residence in the United States. *Id.* at 616–20.

190. *Smith*, 123 S. Ct. at 1148.

191. *Id.* at 1148.

192. *Id.*

though the location of the statute may serve as a determinative factor, it is not a dispositive factor and cannot transform a civil remedy into a punitive remedy.¹⁹³ Applying precedent, the Court determined that the location of the registration statute in the criminal procedure code did not automatically make the statute punitive because Alaska's criminal procedure code contains provisions which do not impose punishments, but have an administrative purpose and cannot be deemed punitive.¹⁹⁴

Next, the Court examined the statute's procedural mechanisms.¹⁹⁵ The statute requires a court to notify a sex offender in writing of the civil registration and notification requirements when the sex offender enters a plea as well as at the time a court renders a judgment against the offender.¹⁹⁶ The Court determined that alerting convicted offenders to the civil registration requirements and punishment for noncompliance does not render the statute punitive, because courts regularly provide defendants with notice of civil requirements and penalties for noncompliance to facilitate compliance with the statute.¹⁹⁷ Here, as in many statutes, notice is important because violators are subject to criminal punishment.¹⁹⁸ Finally, the statute only requires a sex offender to register, and the Alaska Department of Public Safety, which regularly enforces compliance with civil and criminal laws, enforces the registration and community notification laws.¹⁹⁹ Thus, the statute has a civil intent and purpose.²⁰⁰

After determining the intent of the statute, the Court examined the effect of the statute under the following *Mendoza-Martinez* factors: "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, . . . whether its operation will promote the traditional aims of punishment—retribution and deterrence, . . . whether an

193. *Id.* The Court examined *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), where the Court deemed a forfeiture to be civil even though the statute authorizing forfeiture was part of the criminal code, and refused to allow the mere location of a statute to be dispositive of the statute's intent because both civil and criminal cases can be deemed punitive. *Id.* at 363–65.

194. *Smith*, 123 S. Ct. at 1148.

195. *Id.*

196. *Id.*

197. *Id.* at 1149.

198. *Id.*

199. *Id.*

200. *Id.*

alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."²⁰¹ The Court did not analyze whether the statute only assists in a finding of *scienter* and whether the statute only applies to acts already constituting crimes.²⁰² Applying the *Mendoza-Martinez* factors, the Court determined that sex offender registration and community notification laws do not constitute punishment.²⁰³ While the laws stigmatize sex offenders, these individuals are not stigmatized as a result of public punishment or ridicule but from the distribution of accurate information obtained from their criminal record, which consists primarily of public information.²⁰⁴ Traditionally, courts have not recognized the distribution of truthful information as punitive.²⁰⁵ Unlike colonial punishments, where people were forced to wear letters and shunned from participating in society, sex offender registration and community notification laws do not make stigmatization an integral objective of the statutory scheme.²⁰⁶

Furthermore, Alaska's method of distributing registry information on the Internet did not influence or alter the Court's decision.²⁰⁷ The Court concluded that broad dissemination of information does not render the statute punitive because the purpose of Alaska's statute is to distribute registry information to protect public safety.²⁰⁸ Thus, broad access is necessary to effectuate the statute's purpose, and stigmatization and humiliation are collateral consequences because the information provided does not facilitate a means to shame the offenders by allowing the public to post comments or appear in public.²⁰⁹ Furthermore, the Court stated that the statute disseminates registry information via the Internet because it is an efficient, convenient, and effective manner to protect the public from sex offenders.²¹⁰

201. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted).

202. *See Smith*, 123 S. Ct. at 1154.

203. *See id.* at 1150.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 1150-51.

208. *Id.* at 1150.

209. *Id.* at 1151.

210. *Id.*

Although the statute stigmatizes sex offenders, the statute does not impose a punishment.²¹¹ Stigmatization results indirectly from the statute because the statute does not prevent sex offenders from obtaining employment, traveling, or choosing to reside in a neighborhood.²¹² The Court rejected the argument that the laws prevent sex offenders from obtaining employment or housing because without the laws, landlords and employers may use background checks to obtain an applicant's criminal record.²¹³ Stigmatization and societal ostracism do not result from registration and notification laws, but from a sex offender's conviction—which is a public record even without the enactment of registration and notification laws.²¹⁴ Furthermore, the Court concluded that forcing sex offenders to update registry information does not constitute a disability and does not equate to parole or supervised release because sex offenders may live and work freely like every other citizen.²¹⁵ Although sex offenders must report changes in their appearance, they do not have to seek permission to do so before making such changes, which further demonstrates their ability to live freely without governmental invasion on their privacy.²¹⁶ Even though states like Alaska prosecute a sex offender for failing to comply with registration and community notification laws, prosecution for violating these laws constitutes an offense, which is independent of the sex offender's original crime.²¹⁷

While sex offender registration and community notification laws may deter future crimes, deterrence does not automatically deem a statute punitive because such a rule would undermine the government's ability to create regulatory schemes.²¹⁸ In addition, the Court ruled that sex offender registration and community notification laws are not retributive because, under Alaska's statute, reporting requirements are determined by the crime committed and not by the risk the individual sex offender poses.²¹⁹

211. *Id.*

212. *See id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 1152.

217. *Id.*

218. *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 105 (1997)).

219. *Id.* The broad categories, which determine the length of reporting, distinguish between various crimes, but this distinction is justified because the distinctions are based on the risk of recidivism, which is a reasonable governmental objective. *Id.*

Furthermore, registration and notification requirements do not constitute *ex post facto* laws because they refuse to make an individual assessment of each sex offender's risk of recidivism.²²⁰ The Court concluded that Alaska's sex offender registration and community notification laws are narrowly tailored to meet the Alaskan government's regulatory purpose.²²¹

Finally, the Court ruled that the length of time sex offenders must report registry information is not excessive because most sex offenders do not commit subsequent offenses during their first few years after their release, but instead commit offenses years after their release.²²² The Court held that the regulatory nature of Alaska's statute did not constitute an *ex post facto* law because the law reasonably related to the government's objective, which is to protect the public and prevent recidivism.²²³ Since Alaska's sex offender registration and community notification statute, like other states' registration and notification laws, is regulatory and not punitive, the retroactive application of the statute does not offend the *Ex Post Facto* Clause.²²⁴

While Justice Thomas concurred in judgment, he wrote a separate concurrence to express disfavor with the Court's analysis of the constitutionality of disclosing registry information via the Internet.²²⁵ Since the statute does not specify the means of disseminating registration, Justice Thomas concluded the Court "strayed from the statute."²²⁶ Thus, Justice Thomas determined that the Court should not have analyzed the constitutionality of distributing registry information via the Internet because the Court's *ex post facto* analysis should be limited to the statutory requirements.²²⁷

Like Justice Thomas, Justice Souter concurred in judgment, but wrote a concurrence to explain how he thought the statute should be analyzed.²²⁸ Instead of requiring the clearest proof to overturn the legislature's purported purpose, Justice Souter did

220. *See id.*

221. *See id.*

222. *Id.* at 1153.

223. *See id.*

224. *Id.*

225. *Id.* at 1154 (Thomas, J., concurring).

226. *Id.* (Thomas, J., concurring).

227. *Id.* (Thomas, J., concurring).

228. *Id.* at 1155 (Souter, J., concurring).

not believe the heightened burden applied to cases where “legislative intent clearly points in the civil direction.”²²⁹ Justice Souter felt the clearest proof standard did not apply because of the legislative intent of the statute. Furthermore, Justice Souter concluded that Alaska’s sex offender registration and community notification laws did not violate the Ex Post Facto Clause because the Court deferentially presumes that state laws are constitutional.²³⁰

Justice Stevens dissented in this case, but combined his concurrence in *Connecticut Department of Public Safety* with his opinion in *Smith*.²³¹ In both cases, Justice Stevens believed the Court should have determined whether sex offender registration and community notification laws implicate a sex offender’s liberty interest.²³² Justice Stevens concluded that Alaska’s statute imposes registration requirements equivalent to those imposed on parolees and persons subject to supervised release.²³³ As a result, Justice Stevens believed the laws implicate a liberty interest because a sex offender must register for an extended period of time, must report changes in his or her residence and appearance, and must bear a lifetime of stigmatization.²³⁴ Justice Stevens concluded the laws are punitive, instead of civil, because they deprive a sex offender of his liberty interest, are applicable to every person convicted of an enumerated sex crime, and only are imposed on criminals.²³⁵ Furthermore, Justice Stevens determined that the mere fact the legislature implemented the laws to combat recidivism coupled with the retroactive application of the laws, renders the laws ex post facto.²³⁶ However, Justice Stevens concluded that a sex offender registration and community notification statute is constitutional if it applies to sex offenders convicted after the enactment of the statute because the statute provides adequate notice and constitutes a traditional form of punishment—in the context of retribution and deterrence.²³⁷

229. *Id.* (Souter, J., concurring).

230. *Id.* at 1156 (Souter, J., concurring).

231. *Id.* at 1156 (Stevens, J., dissenting).

232. *Id.* at 1157 (Stevens, J., dissenting).

233. *Id.* (Stevens, J., dissenting).

234. *Id.* (Stevens, J., dissenting).

235. *Id.* (Stevens, J., dissenting).

236. *Id.* at 1158 (Stevens, J., dissenting).

237. *Id.* (Stevens, J., dissenting).

Justice Breyer joined Justice Ginsburg in her dissent.²³⁸ Justice Ginsburg believed the clearest proof standard should not be applied to *Smith*.²³⁹ When analyzing the statute, Justice Ginsburg applied the *Mendoza-Martinez* factors to evaluate the statute's purpose and effects.²⁴⁰ She concluded the law has a punitive effect because it imposes "onerous and intrusive" registration requirements on sex offenders and exposes sex offenders to humiliation and ostracism.²⁴¹ Justice Ginsburg equated the punishment imposed by registration and notification laws to the colonial punishments of shaming and shunning because she felt the laws resemble requirements imposed on persons subject to parole and supervised release.²⁴² Unlike the majority, Justice Ginsburg thought that past crimes, not an individual's current dangerousness, trigger the implementation of the statute, which does not further the purported purpose of the statute—deterrence of future crimes.²⁴³ Justice Ginsburg concluded that the punitive effects of the statute overshadow any regulatory purpose because sex offenders must register as the result of their conviction of a particular crime and not because they pose a current or future danger to society.²⁴⁴ Finally, Justice Ginsburg determined that Alaska's statute was ambiguous as to its intent and punitive as to its effect.²⁴⁵ Thus, Justice Ginsburg found that the law constituted an *ex post facto* law.²⁴⁶

D. *The Impact of Smith v. Doe on the Constitutionality and Future of Sex Offender Registration and Community Notification Laws*

Although the Supreme Court did not issue a unanimous decision, the Court's opinion clearly dictates that sex offender registration and community notification laws do not constitute *ex post facto* laws even if they apply retroactively and are implemented

238. *Id.* at 1159–60 (Ginsburg, J., dissenting).

239. *Id.* at 1159 (Ginsburg, J., dissenting).

240. *Id.* (Ginsburg, J., dissenting).

241. *Id.* (Ginsburg, J., dissenting).

242. *Id.* (Ginsburg, J., dissenting).

243. *Id.* at 1160 (Ginsburg, J., dissenting).

244. *Id.* (Ginsburg, J., dissenting).

245. *Id.* (Ginsburg, J., dissenting).

246. *Id.* (Ginsburg, J., dissenting).

by a state using a compulsory classification system to determine which sex offenders are subject to registration and notification.²⁴⁷ Clearly, the Court recognized the important role these laws play in promoting public safety and preventing recidivism. Furthermore, the Court validated the regulatory purpose of sex offender registration and community notification laws and acknowledged that these laws are not implemented to punish sex offenders for their prior crimes, but to protect the public and deter future crimes.²⁴⁸ While the laws will hopefully deter future sex crimes, the Supreme Court determined that the deterrent effect of registration and notification laws does not deem them *ex post facto* or unconstitutional.²⁴⁹

Potential sex offenders and convicted sex offenders should heed the warning that they will be subject to registration and notification laws if they commit a crime, and their crimes will cause them to be stigmatized and possibly ostracized from their community. However, this stigmatization and ostracism does not prevent them from living, marrying, traveling, raising a family, and acquiring an education—rights many victims of sexual crimes lose.²⁵⁰ Rather, sex offenders enjoy the same rights of all other American citizens. Finally, the laws do not ostracize sex offenders, but sex offenders' stigmatization arises from their voluntary engagement in sexually deviant conduct—conduct they can prevent.²⁵¹

Since the laws distribute accurate, truthful, and public information about sex offenders, they cannot be deemed punitive. The Court's determination that the laws do not exhibit a punitive intent or effect will likely impact any defamation claims asserted by sex offenders. Furthermore, since the Court determined that the notification laws merely disclose public information that is largely available through background checks and criminal records, any claims that such laws infringe on one's right to privacy will continue to face an uphill battle.

Not only did the Court validate the laws under the *Ex Post Facto* Clause, but the Court also ratified the dissemination of sex

247. *See supra* Part VI.C.

248. *See supra* Part VI.C.

249. *See supra* Part VI.C.

250. *See supra* Part VI.C.

251. *See supra* Part VI.C.

offender information via the Internet.²⁵² Since the Internet is the most efficient means to distribute the information to the largest audience, other methods of distributing sex offender information, such as by newspaper or allowing citizens to examine registration records at the police station, must also be considered constitutional as well.

Both of these opinions further the belief that states are free to create their own sex offender registration and community notification laws as long as they comply with the federal statutory scheme. States may implement statutes using compulsory and discretionary classification systems and laws applying retroactively without violating procedural due process or the Ex Post Facto Clause. When faced with constitutional challenges to sex offender registration and community notification laws, the Supreme Court will be forced to continue to make a case specific inquiry into a state's law unless a mandatory federal statutory scheme emerges, which is very unlikely. Thus, state sex offender registration and community laws will continue to vary with regard to persons required to register, the length of time a sex offender is subject to registration, the means used to disclose registry information, and the content of the information disclosed.

VII. CONCLUSION

Due to public sentiment and the importance of protecting children from sexual predators, sex offender registration and community notification laws will continue to play an important role in American society. While sex offender registration and community notification laws do not provide a per se guarantee that sex offenders will not commit subsequent sexual crimes, they increase public awareness by allowing citizens to watch for potential threats to the safety of their family and friends.²⁵³ Sex offender registration and community notification laws allow citizens and law enforcement to join in fighting sexual deviance.²⁵⁴

252. See *supra* Part VI.C.

253. See *supra* Part IV.

254. See *supra* Part IV.

Since the inception of sex offender registration and community notification laws, these laws have overcome numerous constitutional challenges.²⁵⁵ The Supreme Court of the United States unanimously held that sex offender registration and community notification laws do not violate a sex offender's procedural due process rights, and the Court also held that such laws do not constitute *ex post facto* laws.²⁵⁶ However, the Supreme Court left open the question of whether sex offender registration and community notification laws infringe on a sex offender's substantive due process rights and equal protection rights.²⁵⁷ Thus, lower courts will attempt to resolve substantive due process and emerging equal protection challenges.²⁵⁸ If the Supreme Court plays a more active role in defining the constitutionality of sex offender registration and community notification laws, these laws may have uniformity throughout the nation. The methods of classifying sex offenders and the persons subject to registration may change; however, sex offender registration and community notification laws will survive. While constitutional challenges inevitably remain, the Supreme Court will likely continue to validate the constitutionality of sex offender registration and community notification laws.

Like many laws, sex offender registration and community notification laws impose registration and notification requirements, but these ministerial burdens imposed on sex offenders are necessary to protect the public from sexual predators.²⁵⁹ Sex offenders forfeit their privacy rights when they infringe on the rights of others by committing heinous sexual crimes. While sex offender registration and community notification laws may disclose information that might otherwise be less accessible, the disclosure of such information is required to inform the public of dangerous persons in the community.²⁶⁰ Ultimately, all laws infringe upon the "freedom" of every American citizen in some manner. However, sex offender registration and community notification laws do not serve to punish but to protect all American citizens. Although sex offender registration and community notification laws

255. *See supra* Part V.

256. *See supra* Parts VI.A., C.

257. *See supra* Part VI.A.

258. *See supra* Part VI.A.

259. *See supra* Part IV.

260. *See supra* Part IV.

may cause sex offenders to have a negative reputation in the community, these laws do not infringe upon a sex offender's right to live, work, and travel—rights sex offenders have denied many of their victims.²⁶¹

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261. *See supra* Part VI.