SEX OFFENSES AND DUE PROCESS: WHEN PUBLIC OPINION CONTRADICTS SCIENTIFIC CONSENSUS

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"[N]or can our reason, unassisted by experience, ever draw any inference concerning real existence and matter of fact."

—David Hume[1]

In 2019, Tennessee passed a statute forbidding certain sexual offenders from residing with—or being alone with—their own children.[2] The same year, the North Carolina Supreme Court struck down a statute imposing lifetime ankle monitoring on sex offenders.[3] On January 22, 2020, the New York Assembly began considering a bill that would allow the Metropolitan Transportation Authority to ban sex offenders from public transportation.[4] All of this aggressive legislation has arisen despite a scientific consensus that it does not protect the public and sometimes even increases recidivism rates.[5]

The abduction of eleven-year-old Jacob Wetterling in 1989 triggered a nationwide pursuit of policies that would prevent crimes against children, and legislatures settled on monitoring and restricting the actions of people previously convicted of sexual offenses.[6] Wetterling was abducted by a person previously convicted of a sexual offense, and the United States Congress responded by requiring each state to create a registry system.[7] These

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1 DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 17 (Eric Steinberg ed., Hackett Publ'g Co. 2d ed. 1993) (1777).

2 TENN. CODE ANN. § 40-39-211(c) (2019).

3 State v. Grady, 831 S.E.2d 542, 547–48, 572 (N.C. 2019).

4 S. 7508-B, 2019-2020 Leg., Reg. Sess. (N.Y. 2020).

5 *See infra* note 34; *see generally* RICHARD G. WRIGHT, SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS (2d ed. 2015) (finding, among other conclusions, that "empirical studies on GPS monitoring do not support the finding that it reduces recidivism or helps to protect the community").

6 Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1076–77 (2012).

7 *Id.*

restrictions have become increasingly severe over time[8]: legislatures have banned convicted offenders from living in certain places,[9] forbidden them from using social media,[10] and even required them to wear ankle monitors for the rest of their lives.[11] While some such restrictions have been struck down as violating the United States Constitution or a state constitution, many remain.[12] Studies have repeatedly shown that these laws are ineffective or counterproductive at preventing recidivism, but courts and legislatures have been unresponsive to the science.[13]

The issue is not only whether legislatures are free to regulate sex offenders in this way but also whether they are free to enact regulations under the pretext of public safety no matter what their actual effect is on the public. Courts should not defer to legislative determinations when they are clearly contrary to the data. If legislatures were free to ban former sex offenders from living in a city despite an abundance of evidence that such a ban harms public safety,[14] they would also have the power to ban people who have been convicted of any crime, people with unpaid parking tickets, or even everyone who has read *Lolita*.

This Comment argues that the due process clause of the Constitution of the United States and parallel clauses of state constitutions require courts to examine the scientific evidence undermining sex offender statutes. After explaining the mistake courts make by refusing to consider the evidence, I examine the due process constraints that courts should find apply to these statutes. The form of that requirement depends on the structure of the statute. If it applies only to dangerous offenders, there is a procedural due process right to present evidence of non-dangerousness. If it applies to all people

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8 *Id.* at 1078.

9 Fross v. Cnty. of Allegheny, 20 A.3d 1193, 1197 (Pa. 2011).

10 Packingham v. North Carolina, 137 S. Ct. 1730, 1733 (2017).

11 Grady v. North Carolina, *575* U.S. 306, 307 (2015).

12 *See generally* Carol Schultz Vento, Annotation, *Validity, Construction, and Application of State Statutes Authorizing Community Notification of Release of Convicted Sex Offender*, 78 A.L.R.5TH 489 (2000) (outlining cases challenging registration requirements under various constitutional provisions). *See also* Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 767–78 (2013) (summarizing constitutional challenges made to sex offender laws).

13 *See generally* RICHARD G. WRIGHT, *supra* note 5 (examining ineffective sex offender policies).

14 *See, e.g.*, Fross v. Cnty. of Allegheny, 20 A.3d 1193, 1206–07 (Pa. 2011) (striking down a county ordinance that effectively banned former sex offenders from living in Pittsburg).

convicted of certain offenses, I argue that it violates substantive due process because empirical evidence shows that the statute has no rational basis.

Part I of this Comment discusses the sex offender statutes in place and the scientific evidence for and against their effectiveness. Part II explains the logical error that courts make by premising their reasoning on empirical claims while relying on deductive reasoning to make those claims. Part III reviews the precedent for incorporating sex offender data into court decisions in other areas of law. Part IV argues that sex offender statutes that ignore these data violate due process. They violate procedural due process when they purport to restrict only dangerous offenders but provide no mechanism for offenders to show that they are not dangerous. They violate substantive due process when they apply to all offenders, including those who pose no risk of recidivism. Finally, these statutes violate the due process prohibition on irrebuttable presumptions in jurisdictions that follow that doctrine because they presume that all people convicted of a sex offense will reoffend and offer no opportunity to rebut that presumption. As part of the due process analysis, courts have a duty to examine the available empirical data, and these constitutional provisions require courts to fulfill that duty.

I. THE STATUTES AND THE RESEARCH

Sex offender statutes have developed in three major acts. The 1994 Wetterling Act established the registry system that required those convicted of certain sexual offenses to register their address information with local authorities, who were allowed to publicize it.[15] Congress ensured state compliance with this Act by conditioning federal funds on its implementation.[16] Second, Congress passed Megan's Law in 1996, which made the release of registry information mandatory when "necessary to protect the public."[17] Third, the Adam Walsh Act,[18] passed in 2006, made many significant changes, including that the registration requirements would depend solely on the conviction offense, rather than on a judicial assessment

15 Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741, 749 (2016) [hereinafter McPherson].

16 *Id.* at 749–50.

17 Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345.

18 Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 [hereinafter Adam Walsh Act].

of the individual defendant's danger to the public.[19] In addition to the federal statutes requiring that states maintain registry systems, state statutes also create collateral consequences of a sex offense conviction, including residency restrictions, GPS monitoring, bans on internet use, and employment restrictions.[20] Some states have even banned people convicted of sex offenses from being present in public places such as parks[21] and libraries.[22]

All these restrictions also harm the offenders outside of what the restriction itself requires, from interfering with employment prospects to causing homelessness. New York, for example, enacted a ban for some offenders on living within one thousand feet of a school,[23] which rendered it virtually impossible to find housing in New York City, where schools are common and the population is dense.[24] As a result, many released offenders in New York City are homeless but are denied access to shelters—most of which are within one thousand feet of a school—and the state instead houses them in prisons.[25]

In *McKune v. Lile*, the Supreme Court upheld a state sex offender law, finding it justified because sex offenders have "a frightening and high risk of recidivism."[26] The Court gave no citation for that claim but did provide support earlier in the opinion,[27] citing a Bureau of Justice Statistics report that addressed recidivism.[28] Since the *McKune* decision, however, there has been a scientific consensus that the recidivism rate is low and that these laws are ineffective.[29]

First, contrary to the *McKune* Court's claim, sex offenders are unlikely to commit a new sexual offense. The reports cited in *McKune* found that

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19 McPherson, *supra* note 15, at 764–68.

20 *See id.* at 785–90 (discussing such restrictions).

21 Doe v. City of Lafayette, 377 F.3d 757, 770–71 (7th Cir. 2004).

22 Doe v. City of Albuquerque, 667 F.3d 1111, 1115–1116, 1133 (10th Cir. 2012).

23 *See* N.Y. Exec. Law § 259-c(14) (forbidding a sentenced offender from knowingly entering onto school grounds); *In re* Berlin v. Evans, 31 Misc. 3d 919, 928–29 (N.Y. Sup. Ct. 2011) (finding the restriction not to reside within 1000 feet of a school as punitive as applied and would effectively banish the appellant from Manhattan).

24 Allison Frankel, *Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless Sex-Offender Registrants*, 129 YALE L.J.F. 279, 286 (2019).

25 *Id.* at 292.

26 McKune v. Lile, 536 U.S. 24, 34 (2002).

27 *Id.* at 32–33.

28 *See* LAWRENCE A. GREENFIELD, U.S. DEP'T. OF JUST., BUREAU OF JUST. STAT., SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 27 (1997) (finding that released rapists were to be 10.5 times more likely to be rearrested for rape).

29 WRIGHT, *supra* note 5.

released rapists were 10.5 times as likely as non-rapists to be rearrested for rape while those released after a sexual assault conviction were 7.5 times as likely to be rearrested for sexual assault.[30] It is notable that these reports measured rearrest rates, not conviction rates, so the numbers are inflated. Since the publication of those reports, other studies have shown that the recidivism rate for people with prior sex offense convictions is lower than that for people with other convictions.[31] Studies show that only 0.08-1.05% of former sexual offenders commit a new sexual offense within three years,[32] and they are less likely to recidivate after that.[33]

Second, even if sex offenders were likely to recidivate, the laws restricting them do not lower the chances of recidivism and may even raise them. The registry system has been found to have either no impact on recidivism or to increase it.[34] Residency restrictions remove offenders from their communities, alienate them, prevent them from accessing treatment, and increase the risk

30 LAWRENCE A. GREENFIELD, U.S. DEP'T. OF JUST., BUREAU OF JUST. STAT., SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 27 (1997).

31 *See, e.g.*, PA. DEP'T OF CORR., RECIDIVISM REPORT 2013, at 21, tbl.12 (2013) (showing a lower recidivism rate for former sexual offenders than for other former offenders); Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-Based Sex Offender Registry Reform*, 43 J. SOCIO. & SOC. WELFARE 14 (2016) ("[L]ow risk sex offenders commit new sex crimes at rates below general criminal offenders . . . .").

32 Press Release, Ind. Dep't of Corr., Recidivism Rates Decrease for Third Consecutive Year (Mar. 10, 2009), http://www.in.gov/idoc/files/IDOCRecidivism.pdf; CAL. DEP'T OF CORR. & REHAB., RECIDIVISM REPORT FOR OFFENDERS RELEASED FROM THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION IN FISCAL YEAR 2014-15, at 35, tbl.13 (2020), http://www.cdcr.ca.gov/adult_research_branch/Research_Documents/2014_Outcome_Evaluation_Report_7-6-2015.pdf. *See also* R. Karl Hanson et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once A Sexual Offender, Not Always A Sexual Offender*, 24 PSYCH., PUB. POL'Y & L. 48, 59 (2017) ("The vast majority of individuals with a history of sexual crime desist from further sexual crime.").

33 *See* Hanson, *supra* note 32, at 59 ("Risk in most individuals with a history of sexual crime will eventually decline to levels that are difficult to distinguish from the risk presented by the general population.").

34 *See, e.g.*, Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207, 235 (2011) ("The data in these three data sets do not strongly support the effectiveness of sex offender registries. . . . This pattern of noneffectiveness across the data sets does not support the conclusion that sex offender registries are successful in meeting their objectives of increasing public safety and lowering recidivism rates."); J.J. Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 CONN. L. REV. 1035, 1040 (2016) ("[V]irtually no reliable empirical evidence exists to support claims that [sex offender post release] laws are effective at reducing sex offender recidivism, notwithstanding decades of scholarly effort.").

that they will recidivate.[35] A ban on internet use also interferes with a former offender's ability to find a job and increases the chances of recidivism.[36] The actual results of these laws are entirely contrary to their ostensible purpose.

Previous scholarship has framed the preponderance of ineffective laws as a policy failure, but I argue that it is also a failure of the courts. These statutes are not simply unwise: they are also unconstitutional.

II. THE EPISTEMOLOGICAL ERROR: DEDUCTIVE REASONING AND QUESTIONS OF FACT

The failure of courts to examine the data stems from their failure to recognize that deduction and induction are two distinct forms of reasoning which deliver two distinct forms of knowledge. Deduction begins with premises and draws necessary conclusions, while induction begins with evidence and determines what it tends to show.[37] Courts have mistakenly attempted to deduce facts about the external world: that sex offenders have a high recidivism rate, that treatment is not possible, and that regulations such as residency restrictions will reduce recidivism. These claims require data to support them.

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35 *See* Taurean J. Shattuck, *Pushing the Limits: Reining in Ohio's Residency Restrictions for Sex Offenders*, 65 CLEV. ST. L. REV. 591, 601 (2017) ("With residency restrictions in place, sex offenders have reduced access to treatment, often live apart from family, and, in many cases, end up being homeless. Some studies even suggest that the instability caused by residency restrictions may lead to an increased likelihood of reoffending, contrary to the goals of the restrictions.") (citations omitted). *See also* Lindsay A. Wagner, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 DREXEL L. REV. 175, 195 (2009) (explaining that housing and maintaining social bonds in communities help to reduce recidivism rates); Ron Wilson, *Geographic Research Suggests Sex Offender Residency Laws May Not Work*, 2 GEOGRAPHY & PUB. SAFETY 11 (2009) (reporting a South Carolina study showed that sex-offender buffer zones force offenders to live farther from treatment centers, thereby decreasing their ability to get necessary treatment, while potentially increasing trouble with reentry, recidivism, and strife).

36 *See* Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. REV. L. & SOC. CHANGE 663, 683–85 (2019) (noting that the Internet is now the primary job-seeking tool and that social media restrictions prevent individuals from promoting their businesses).

37 *See* James Hawthorne, *Inductive Logic*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, Spring 2018 ed.), https://plato.stanford.edu/archives/spr2018/entries/logic-inductive ("In a deductive logic, the premises of a valid deductive argument *logically entail* the conclusion, where *logical entailment* means that every logically possible state of affairs that makes the premises true *must* make the conclusion truth as well. . . . In a good inductive argument, the truth of the premises provides some *degree of support* for the truth of the conclusion . . . .").

The distinction between deductive and inductive reasoning is centuries old. John Locke argued in 1689, "The *knowledge of the existence* of any . . . thing, we can have only by *sensation*."[38] Sensation, which provides experiential data, is the only way to obtain knowledge of the world. David Hume also drew this distinction in his work published in 1777: "All reasonings may be divided into two kinds, namely demonstrative reasoning, or that concerning relations of ideas, and moral reasoning, or that concerning matter of fact and existence."[39] These are distinct forms of reasoning that deliver distinct forms of knowledge. "[O]ur reason, unassisted by experience, [can never] draw any inference concerning real existence and matter of fact."[40] Only experience, or data acquired through observation, can deliver answers about the external world. One cannot use deductive reasoning to answer empirical questions. A judge cannot deduce from the idea of a sex offender that recidivism rates are high. That is an empirical question, which requires data to answer.

Judges, however, frequently resist incorporating empirical data into their decisions. The Supreme Court of the United States repeated a common explanation in *McCleskey v. Kemp*: "Legislatures also are better qualified to weigh and 'evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.'"[41] Courts sometimes think of themselves as using pure deductive reasoning, while legislatures work with statistics and studies.[42] If a legislature finds that requiring sex offenders to register will reduce recidivism, courts must defer to that determination.[43]

Although judges prefer not to use inductive reasoning here, many decisions involving sex offender regulations make claims of fact, which can

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38 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 285 (Kenneth P. Winkler ed., Hackett Publ'g Co. 1996) (1689).

39 DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING 22 (Eric Steinberg ed., Hackett Publ'g co. 2d ed. 1993) (1777).

40 *Id.* at 17.

41 McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (quoting Gregg v. Georgia, 428 U.S. 153, 186 (1976)).

42 *See* Commonwealth v. Muniz, 164 A.3d 1189, 1217 (Pa. 2017) (recognizing that it is "ordinarily a matter for the General Assembly" to examine scientific studies, and the courts should therefore defer to the legislature on such issues); People v. Pepitone, 106 N.E.3d 984, 992–93 (Ill. 2018) ("[R]egardless of how convincing that social science may be, 'the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems.'") (quoting People v. Minnis, 67 N.E.3d 272, 289 (Ill. 2016)).

43 *See* cases cited *supra* note 42.

only be evaluated through such reasoning.[44] Beginning with *McKune*, courts have made explicit claims about the recidivism rate of sex offenders: they have not deferred to legislative findings on what the recidivism rate is but incorporated empirical claims into their reasoning.[45] The claim that the risk of recidivism is "frightening and high" has been quoted and repeated by courts since then.[46] Some courts citing the *McKune* language take it as binding precedent that the recidivism rate is high, rather than using new studies to determine what the recidivism rate is. For example, the Supreme Court of California in 2015 cited *Smith v. Doe* to support the claim that sex offenders pose a high recidivism risk rather than examining studies published since that decision.[47] Other courts use common sense—rather than the available evidence—to support claims about sex offenders.[48] The result is that courts make empirical claims but use no empirical work.

Empirical data on recidivism rates and the effects of existing regulations are available,[49] yet courts rarely consider these data. In citing the Bureau of Justice Statistics report, the *McKune* Court did not establish a binding precedent that it is a fact that sex offenders have a high recidivism rate. Rather, the Court cited an empirical study, which gives lower courts permission to examine other data that may undermine the Bureau of Justice Statistics

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44 *See* HUME, *supra* note 1, at 10 (explaining that questions of fact cannot be answered by deduction but only through observation of the external world).

45 *See* McKune v. Lile, 536 U.S. 24, 32 (citing Bureau of Justice Statistics reports to support their assertion that convicted sex offenders are more likely than other types of offenders to be rearrested for rape or sexual assault).

46 *See, e.g.*, Smith v. Doe, 538 U.S. 84, 103 (2003) (quoting *McKune*, 536 U.S. at 34); People v. Mosley, 344 P.3d 788, 804 (Cal. 2015) (quoting *Smith v. Doe*, 538 U.S. at 103); State v. Seering, 701 N.W.2d 655, 665 (Iowa 2005) (quoting *Smith v. Doe*, 538 U.S. at 103); State v. Mossman, 281 P.3d 153, 160 (Kan. 2012) (quoting *Smith v. Doe*, 538 U.S. at 103). *See generally*, Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015) (describing lower courts' reliance on the *McKune* Court's claim).

47 *Mosley*, 344 P.3d at 804.

48 *See, e.g.*, Doe v. Miller, 405 F.3d 700, 707 (8th Cir. 2005) (upholding a residency restriction based on testimony that "the appropriateness of such a restriction was 'common sense,' although . . . there were insufficient data to know 'where to draw the marks.'"); Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1015 (8th Cir. 2006) ("[W]e believe that a residency restriction designed to reduce proximity between the most dangerous offenders and locations frequented by children is within the range of rational policy options available to a state legislature charged with protecting the health and welfare of its citizens.").

49 *See generally*, RICHARD G. WRIGHT, *supra* note 5 (finding that sex offenders have a low rate of recidivism).

report's conclusion.[50] Under *McKune* and *Smith v. Doe*, the use of data on sex offender recidivism is not only permissible: it is required. Courts must replace their reliance on precedential reasoning and reasoning from common sense with inductive reasoning. When making claims about matters of fact, courts must examine data acquired by experience rather than deduction.

III. BACKGROUND DECISIONS USING EMPIRICAL DATA IN THE SEX OFFENDER CONTEXT

Despite courts' failures to use the data in this context, there is a wealth of precedent that courts may consider these empirical data on sex offender laws and recidivism in contexts other than due process. *Smith v. Doe* and *McKune* are not the only decisions that have cited empirical data. Courts have also done so in determining whether the restriction is a punishment, whether it violates the Fourth Amendment, and whether it violates state laws.

Courts have frequently performed the punishment analysis for sex offender laws because legislatures often apply them retroactively, which the ex post facto clause of the United States Constitution and parallel clauses in state constitutions forbid for punishments. Two factors in that analysis are whether there is a rational non-punitive purpose for the statute and whether the statute is excessive in relation to that purpose.[51] The year after *McKune*, the Supreme Court relied on its language to conclude that an Alaska registration statute did not impose punishment.[52] It found the statute proportionate to the nonpunitive purpose of public safety because "[t]he risk of recidivism posed by sex offenders is 'frightening and high.'"[53] Since that time, however, many courts have reexamined the scientific literature and determined that such statutes are punishment because they are out of proportion to the small public safety risk posed by sex offenders.

The Sixth Circuit, for example, relied on empirical studies and explicitly expressed its skepticism of the *Smith* Court's claim.[54] It determined that a sex

50 *See, e.g.*, Taylor v. Pa. State Police, 132 A.3d 590, 606 (Pa. Commw. Ct. 2016) ("[W]e decline to conclusively resolve factual questions based on statements made in judicial decisions that are nearly a decade old.").

51 Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963).

52 Smith v. Doe, 538 U.S. 84, 104 (2003).

53 *Id.* at 103 (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)).

54 *See* Does #1-5 v. Snyder, 834 F.3d 696, 704 (6th Cir. 2016) (stating that empirical studies cast doubt on the claim that there is a "frightening and high" risk of recidivism among sex offenders).

offender regulation was punishment and violated ex post facto laws because abundant studies showed that regulations like the one in question did not reduce recidivism and may actually increase it.[55] Rather than relying on *Smith* and *McKune*, the Sixth Circuit examined multiple studies that showed that registration requirements did not reduce recidivism, and therefore had no rational relation to a nonpunitive purpose.[56] The Sixth Circuit provided a model for how courts should interpret *Smith* and *McKune*: not as binding precedent establishing that sex offenders have a high recidivism rate, but as a precedent that requires courts to examine studies, just as those courts did.

Similarly, the Supreme Court of North Carolina found that an ankle monitor requirement violated the Fourth Amendment because the defendant had shown through empirical evidence that the recidivism rate for sex offenders is low.[57] To establish that the ankle monitoring, which was a Fourth Amendment search,[58] was a reasonable search "[t]he State has the burden of coming forward with some evidence that its [Satellite-Based Monitoring] program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise protects the public."[59] The court found that the search was unreasonable because the evidence demonstrated that it was unnecessary.

Additionally, the Supreme Court of Pennsylvania struck down a county ordinance that extended residency restrictions for sex offenders as violating the State Parole and Sentencing Codes because the studies presented showed that it contradicted the rehabilitative goals of those codes.[60] Although the court did not directly cite studies, it relied on empirical claims that were supported by studies in the briefs: for example, the court wrote that the statute would have the "unintended effect of threatening public safety, by depriving sex offenders of access to resources which have been shown to reduce the risks of recidivism,"[61] which was supported by data presented in a brief.[62]

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55 *Id.* at 704–705.

56 *Id.*

57 State v. Grady, 831 S.E.2d 542, 565 (N.C. 2019).

58 Grady v. North Carolina, 575 U.S. 306, 310 (2015).

59 *Grady*, 831 S.E.2d at 568.

60 Fross v. Cnty. of Allegheny, 20 A.3d 1193, 1207 (Pa. 2011).

61 *Id.* at 1205.

62 *See* Brief of the Ass'n for the Treatment of Sexual Abusers as Amicus Curiae in Support of Plaintiffs/Appellees at 16, Fross v. Cnty. of Allegheny, 438 F. App'x. 99 (3d. Cir. 2011) (No. 09-2036) (showing that such restrictions intensify "the psychosocial stressors that are linked to re-offense").

These decisions show that there is precedent for incorporating the abundant empirical data on sex offender statutes into decisions on the validity of those statutes. Courts should apply this same use of data to the due process context.

IV. DUE PROCESS CONSTRAINTS

Statutes regulating sex offenders vary widely, and how a state chooses to whom the restrictions apply determines whether procedural or substantive due process requires a court to examine the evidence. Procedural due process protects only those who are subjected to a statute that distinguishes between offenders who pose a high risk of recidivism and those who do not. If a statute seeks to impose restrictions on all those convicted of a certain offense, more procedure will not help. But substantive due process protects those who are subjected to statutes that have no rational basis. Legislatures cite public safety as the state interest in these statutes, but the scientific consensus shows that the means chosen by the legislatures are not rationally related to that end. Finally, due process prohibits the use of irrebuttable presumptions that former sex offenders are a danger to the public when they can show that they pose no such danger. These three components of due process together can restrain irrationally restrictive statutes.

A. Procedural Due Process

When a restriction applies only to offenders who are likely to recidivate, due process requires that there be a procedure in which the offender may present evidence of her recidivism risk. The procedural due process analysis involves weighing the private interest and the risk of erroneous deprivation of that interest against the cost to the government of additional procedures that would lower the risk of erroneous deprivation.[63] Courts that have struck down sex offender statutes that apply to all those convicted of certain crimes for procedural due process violations have mistakenly defined an erroneous deprivation as imposing a regulation on someone who is unlikely to

63 *See* Mathews v. Eldridge, 424 U.S. 319, 321 (1976) (listing three factors to consider when determining whether an individual has received due process under the Constitution).

recidivate.[64] As the legislature intended to deprive all convicted offenders of these rights, the deprivation is not erroneous.[65]

The Supreme Court clarified this issue in *Connecticut Department of Pub. Safety v. Doe* (*"CDPS"*), holding that a convicted sex offender has no right to a determination that she is dangerous before she is required to register if the state makes conviction the only prerequisite to registration.[66] "[T]he law's requirements turn on an offender's conviction alone," the Court explained, "a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest."[67] It would not be an error to require a non-dangerous offender to register because the legislature intended all those convicted to register, not only dangerous offenders.[68] Furthermore, under the Adam Walsh Act, the registration requirement is conditioned solely on the conviction offense, which prevents any procedural due process challenge to registration.[69] The burden to the state of additional procedure outweighs the defendant's interest in additional procedure because the risk of erroneously requiring someone who was not convicted of a sex offense to register as a sex offender is virtually zero. Any statute that follows the Adam Walsh Act's model of classification based on offense complies with procedural due process.

If, conversely, a statute does condition a sex offender regulation on the risk the offender poses, that offender has a procedural due process right. In

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64 *See, e.g.*, State v. Bani, 36 P.3d 1255, 1267 (Haw. 2001), as amended on clarification (Dec. 6, 2001) ("[P]ersons convicted of crimes listed under HRS chapter 846E who do not pose a significant danger to the community are at substantial risk of being erroneously deprived of their liberty interests.").

65 *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (2003) ("In short, even 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.").

66 *Id.*

67 *Id.*

68 *See* Doe v. Miller, 405 F.3d 700, 709 (8th Cir. 2005) ("Once such a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals who seek to prove that they are not individually dangerous or likely to offend against neighboring schoolchildren."). *But see* United States v. Smedley, 611 F. Supp. 2d 971, 975 (E.D. Mo. 2009) (defining an erroneous deprivation as one that is not necessary to protect the public).

69 *See* 34 U.S.C.A. § 20911 (West 2017) (defining three tiers of sex offender status according to the underlying offense); 34 U.S.C. § 20915(a) (2018) (conditioning registration period on tier classification). *See also* Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 771 (2013) ("[T]his issue is now irrelevant in the case of sex offender registries in those states striving to comply with the AWA, since the Act mandates the category-based approach discussed in CDP.").

Millard v. Rankin, for example, a Colorado statute violated procedural due process because it instructed a court to determine whether a convicted sex offender was likely to re-offend but denied the defendant an adequate opportunity to be heard.[70] The deficiency in the process was that the plaintiff's petition to be removed from the registry was denied without any "evident basis to deny the petition."[71] When a legislature only imposes a sex offender regulation on those with a high risk of recidivism, an offender has a right to be exempted from the regulation if she can demonstrate that her risk level is low.[72]

Although there is no procedural due process right to a risk level determination in general, there may be such a right if the state purports to only restrict those who have a high risk of recidivism or if the state leaves the restriction to the judge's discretion.[73]

B. Substantive Due Process

The *CDPS* Court suggested "that respondent's claim is actually a substantive challenge to Connecticut's statute 'recast in "procedural due process" terms,'" but it did not analyze the possible substantive due process challenge.[74] Substantive due process protects fundamental rights and liberty interests from unreasonable government interference.[75] If a state action interferes with a fundamental right, it must be narrowly tailored to serve a compelling state interest.[76] If the action does not implicate a fundamental right, it need only have a rational relation to a legitimate government interest.[77] Which of these two levels of scrutiny—strict scrutiny or rational basis—applies depends on whether the private right asserted is "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[78]

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70 Millard v. Rankin 265 F. Supp. 3d 1211, 1232–33 (D. Colo. 2017).

71 *Id.* at 1233.

72 *Id.*

73 *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 7 (2003) (suggesting that part of the reason for upholding the Connecticut statute was that the state explicitly stated on the registry website that it had not determined that registered individuals are currently dangerous).

74 *Id.* at 8 (quoting Reno v. Flores, 507 U.S. 292, 308 (1993)).

75 Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

76 *Id.* at 721.

77 *Id.* at 728.

78 *Id.* at 721 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

Although others have noted that there appears to be little hope for substantive due process challenges to reign in sex offender restrictions,[79] some restrictions implicate fundamental rights and fail heightened scrutiny, and even those that only trigger rational basis scrutiny fail when they plainly violate the scientific consensus.

1. Some Sex Offender Restrictions Infringe on Fundamental Rights

While federal courts frequently determine that the standard established in *Washington v. Glucksberg*[80] makes it difficult to recognize a fundamental right implicated by sex offender regulations,[81] states recognize rights not recognized in federal courts. State substantive due process provides an avenue to protect these rights from the unnecessary imposition of sex offender restrictions. Three important rights are frequently involved: the publication of registry information implicates privacy and reputation rights, residency restrictions implicate rights to live with one's family, and restrictions on use of public spaces implicate to right to travel freely within a state. In states that recognize

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79 *See, e.g.*, Catherine L. Carpenter & Amy E. Beverlin, *supra* note 6, 1123 ("For the sex offender, a substantive due process claim is especially problematic."); Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 772–73 (2013) ("With one narrow exception in the Third Circuit, federal appellate courts have found that sex offender registries do not implicate any fundamental right. Thus, almost all courts have determined the constitutionality of registries under the undemanding rational basis review test. Sex offender registries have passed this test in every circuit in which this question has been litigated, although some courts have expressed concerns that registries are overbroad.").

80 Washington v. Glucksberg, 521 U.S. at 720 ("We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.") (quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) and Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)) (citations omitted).

81 *Id. See also* Doe v. Mich. Dep't of State Police, 490 F.3d 491, 500 (6th Cir. 2007) ("[T]he right asserted here is not a fundamental right deeply rooted in our Nation's history."); Doe v. Moore, 410 F.3d 1337, 1345 (11th Cir. 2005) ("[W]e can find no history or tradition that would elevate the issue here to a fundamental right."); Doe v. Tandeske, 361 F.3d 594, 597 (9th Cir. 2004) ("[W]e are forced to conclude that persons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements set forth in the Alaska statute."); Gunderson v. Hvass, 339 F.3d 639, 643 (8th Cir. 2003) ("[A] fundamental right is not implicated . . . ."); Paul P. v. Verniero, 170 F.3d 396, 405 (3rd Cir. 1999) ("Megan's Law does not restrict plaintiffs' freedom of action with respect to their families and therefore does not intrude upon the aspect of the right to privacy . . . ."); Russell v. Gregoire, 124 F.3d 1079, 1094 (9th Cir. 1997) ("The collection and dissemination of information under the Washington law does not violate any protected privacy interest, and does not amount to a deprivation of liberty or property.").

these rights as fundamental, strict scrutiny applies under the state constitution's substantive due process provision.

First, whether the publication of an offender's conviction information infringes on her state privacy or reputation rights depends on whether a court distinguishes between the publication of such information and normal public availability of criminal conviction information. Since conviction information is already publicly available, courts have generally found that compiling and publishing it does not violate any right to privacy or reputation.[82] When, however, the registry publishes more information or presents it in a distinguishable form, doing so may implicate fundamental rights. For example, the Alaska Supreme Court recognized in *Doe v. Department of Public Safety* that publishing the information online risked inflicting harms "ranging from public scorn and ostracism to harassment, to difficulty in finding and maintaining employment, to threats of violence and actual violence," and determined that such publication therefore implicated the offender's privacy rights.[83] The Alaska Court relied on the United States Supreme Court's recognition that there is a distinction between records publicly available in a courthouse's physical files and those available online.[84] Similarly, the Supreme Judicial Court of Massachusetts determined that "the aggregation and dissemination of publicly available information has triggered a right to privacy."[85] The most important factor in determining that this distribution of information implicated privacy and reputation rights was that the statute implicitly branded the plaintiff as a public danger.[86] Publishing sex offender registration information is not equivalent to keeping criminal records available in physical files, and both state and federal courts should recognize these injuries to privacy and reputation where such rights are protected.

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82 *See, e.g.*, *Moore*, 410 F.3d at 1345 ("[A] state's publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy"); People v. Cornelius, 821 N.E.2d 288, 303 (Ill. 2004) (finding that a sex offender registry statute does not violate the defendant's right to privacy because his information was already publicly available). *See also* Nilson v. Layton City, 45 F.3d 369, 372 (10th Cir. 1995) ("Information readily available to the public is not protected by the constitutional right to privacy.").

83 Doe v. Dep't of Pub. Safety, 444 P.3d 116, 130 (Alaska 2019). *See also* Doe v. Poritz, 662 A.2d 367, 409 (N.J. 1995) ("The fact that plaintiff's home address may be publicly available, therefore, does not lead ineluctably to the conclusion that public disclosure of his address implicates no privacy interest.").

84 Doe v. Dep't of Pub. Safety, 444 P.3d at 129 (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 764 (1989)).

85 Doe v. Att'y Gen., 686 N.E.2d 1007, 1012 (Mass. 1997).

86 *Id.* at 1013.

Second, courts have been more reluctant to recognize that residency restrictions infringe on the fundamental rights of the family relationship because they do not see a close enough connection between a residency restriction and the offender's relation to her family. The Supreme Court has generally recognized family relations to be protected by fundamental rights that trigger strict scrutiny,[87] and there is a fundamental right to live with one's family.[88] Courts have not found, however, that restrictions on where that residence can be directly infringe on that right.[89] Neither state[90] nor federal courts[91] have recognized a fundamental right to live in a particular place with one's family. Even when presented with the reality that an offender's family may not be able to afford to relocate in order to live together, courts have found residency restrictions not to involve the right to live with family because they do not absolutely bar doing so.[92] Courts have not recognized that residency restrictions implicate fundamental rights, and they do not apply strict scrutiny.

Courts have not reached any clarity in a third area: whether a restriction on a sex offender's use of a public area implicates a fundamental right to travel

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87 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right . . . .").

88 *See* Moore v. City of E. Cleveland, 431 U.S. 494, 505–06 (1977) (plurality opinion) ("[T]he choice of relatives in this degree of kinship to live together may not lightly be denied by the State.").

89 *See, e.g.*, People v. Leroy, 828 N.E.2d 769, 776 (Ill. App. Ct. 2005) (finding no fundamental right to live with one's family within 500 feet of a school); State v. Seering, 701 N.W.2d 655, 663–64 (Iowa 2005) ("[A]n alleged infringement on a familial right is unconstitutional only when an infringement has a direct and substantial impact on the familial relationship . . . . We do not believe this impact is present in this case.") (citations omitted).

90 *See, e.g.*, *Leroy*, 828 N.E.2d at 776 (denying defendant's argument that he has a fundamental right to live with his mother within 500 feet of a school).

91 *See* Doe v. Moore, 410 F.3d 1337, 1343–45 (11th Cir. 2005) (finding that a residency restriction did not implicate a fundamental right because it did not directly restrict the plaintiff's actions with his family); Doe v. Miller, 405 F.3d 700, 711 (8th Cir. 2005) ("[T]he statute does not directly regulate the family relationship or prevent any family member from residing with a sex offender in a residence that is consistent with the statute. We therefore hold that § 692A.2A does not infringe upon a constitutional liberty interest relating to matters of marriage and family in a fashion that requires heightened scrutiny."); Paul P. v. Verniero, 170 F.3d 396, 405 (3d Cir. 1999) ("Megan's Law does not restrict plaintiffs' freedom of action with respect to their families and therefore does not intrude upon the aspect of the right to privacy that protects an individual's independence in making certain types of important decisions.").

92 *See, e.g.*, *Miller*, 405 F.3d at 711 (applying rational basis scrutiny because the statute did not absolutely bar living with family, despite evidence of the difficulty of doing so); *Seering*, 701 N.W.2d at 664 ("While the residency restriction may impact the Seerings insofar as they cannot choose the precise location where they can establish their home, it does not absolutely prevent them from living together.").

freely within a state. In *Doe v. Miller*, the Eighth Circuit recognized that there may be a right to intrastate travel related to sex offender restrictions but found it inapplicable in that case.[93] Many federal[94] and state[95] courts recognize a fundamental right to intrastate travel, but that right has not been found to be burdened by laws prohibiting sex offenders from entering public spaces. In *Standley v. Town of Woodfin*, the Supreme Court of North Carolina determined that a statute prohibiting sex offenders from entering public parks did not infringe on the right to intrastate travel.[96] The right to intrastate travel was not burdened because it only protected travel that was necessary for daily activities, which did not include the use of parks.[97] Similarly, the Seventh Circuit opined that a ban on entrance into public parks did not involve a fundamental right,[98] but that statement was dictum as the court found that the statute passed even strict scrutiny.[99] It is not clear whether the right to travel freely within a state also includes the right to use and be present in public places.

In some states, sex offender laws implicate fundamental rights and trigger heightened scrutiny. There is a wide variety of sex offender regulations, and some infringe on rights that states recognize as fundamental.

2. Heightened Scrutiny for Fundamental Rights: In States Where a Fundamental Right is Recognized

When a sex offender restriction implicates a fundamental right, courts must apply strict scrutiny,[100] which requires them to consider empirical evidence undermining the ostensible relation of the statute to the purpose.

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93 Miller, 405 F.3d at 712–13.

94 *See, e.g.*, Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002); Lutz v. City of York, 899 F.2d 255, 268 (3d Cir. 1990); Spencer v. Casavilla, 903 F.2d 171, 174 (2d Cir. 1990).

95 *See, e.g.*, Tobe v. City of Santa Ana, 892 P.2d 1145, 1161 (Cal. 1995); State v. J.P., 907 So. 2d 1101, 1113 (Fla. 2004); State v. Burnett, 755 N.E.2d 857, 864 (Ohio 2001); Brandmiller v. Arreola, 544 N.W.2d 894, 898 (Wis. 1996).

96 Standley v. Town of Woodfin, 661 S.E.2d 728, 731 (N.C. 2008).

97 *Id. See also* People v. Pepitone, 106 N.E.3d 984, 989 (Ill. 2008) (stating that there is no fundamental right to visit a public park).

98 Doe v. City of Lafayette, 377 F.3d 757, 771 (7th Cir. 2004).

99 *See id.* at 774 ("[E]ven assuming that we ought to consider this ban under the strict scrutiny standard, we still would hold it was valid as the narrowest *reasonable* means for the City to advance its compelling interest of protecting its children from the demonstrable threat of sexual abuse by Mr. Doe.").

100 *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (explaining fundamental rights protected by substantive due process).

When substantive due process strict scrutiny applies, the state infringement on the fundamental right must be narrowly tailored to serve a compelling state interest.[101] In *Doe v. Department of Public Safety*, for example, the Supreme Court of Alaska applied strict scrutiny and determined that "there is no compelling interest justifying registration if an offender does not present a danger to the public."[102] The court did not incorporate empirical evidence into this decision, but it instead held that the plaintiff had a right to file a civil action in which he may prove that he does not pose a risk to public safety, including by expert testimony.[103] Although courts have not applied strict scrutiny to sex offender regulations frequently, when it is applied there is a strong argument to consider the empirical evidence that shows that the laws are not narrowly tailored to public safety.

3. Rational Basis Scrutiny

Even if no fundamental right is involved, courts should find that many sex offender restrictions fail rational basis scrutiny because the empirical data show that the laws are both unnecessary and ineffective. While rational basis review requires courts to uphold legislative choices even when they are "based on rational speculation unsupported by evidence or empirical data,"[104] there is no rational basis when empirical data directly contradict legislative determinations.

Although state and federal courts have generally agreed that sex offender restrictions have a rational basis even when the scientific consensus undermines that basis, those decisions rely on epistemological fallacies:[105] courts take the *McKune* quotation[106] as unquestionable empirical truth, or they rely on conclusory statements instead of evidence.

By repeating the *McKune* Court's empirical claim, courts have failed to determine whether sex offender restrictions are "reasonably related to [the] promotion and protection" of legitimate government interests.[107] For example,

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101 *Id.* at 721.

102 444 P.3d 116, 124, 126, 132 (Alaska 2019).

103 *Id.* at 135–36.

104 Minerva Dairy, Inc. v. Harsdorf, 905 F.3d 1047, 1055 (7th Cir. 2018), *cert. denied sub nom.* Minerva Dairy, Inc. v. Pfaff, 139 S. Ct. 2746 (2019) (citing Monarch Beverage Co. v. Cook, 861 F.3d 678, 683 (7th Cir. 2017)).

105 *See supra* Part II (examining the courts' failures to properly account for empirical data).

106 *See* McKune v. Lile, 536 U.S. 24, 34 (2002) (claiming "a frightening and high risk of recidivism").

107 Washington v. Glucksberg, 521 U.S. 702, 735.

the Illinois Supreme Court determined that a law forbidding sex offenders from public parks was rationally related to the legitimate government interest of protecting the public because sex offenders have a high recidivism rate.[108] It explicitly stated that empirical work was irrelevant: "The problem for the defendant is that, regardless of how convincing that social science may be, 'the legislature is in a better position than the judiciary to gather and evaluate data bearing on complex problems.'"[109] The Illinois Court cited *McKune* and other cases to support its assertion instead of citing empirical work, ignoring the requirement that a law have a rational relation to a legitimate state interest.[110] The Supreme Court of Iowa,[111] the Supreme Court of North Carolina,[112] and the Eighth Circuit[113] have also made this mistake. These courts all premised their conclusions on empirical claims and stated that empirical work is irrelevant. They argued that there is a rational basis for the laws because they are necessary to protect the world from sex offenders, who have a high recidivism rate because the *McKune* Court said so.

Other federal courts have used conclusory statements to find a rational basis even when empirical data contradict those statements. Courts have done little analysis of whether the means are rationally related to the legitimate interest. In *Doe v. Moore*, the Eleventh Circuit conflated the step asking whether there was a legitimate state interest with the step asking whether the means were rationally related to that interest: "We agree with the state that the Sex Offender Act meets the rational basis standard. It has long been in the interest of government to protect its citizens from criminal activity and we find no exceptional circumstances in this case to invalidate the law."[114] The Eleventh Circuit is not alone here. Courts have repeatedly failed to apply any

108 People v. Pepitone, 106 N.E.3d 984, 992, 994–95 (Ill. 2018).

109 *Id.* at 992–93 (quoting People v. Minnis, 67 N.E.3d 272, 289 (Ill. 2016)).

110 *Id.* at 992, 994–95.

111 *See* State v. Seering, 701 N.W.2d 655, 665 (Iowa 2005) (finding the standard for rational basis met because, "[a]s numerous authorities have acknowledged, '[t]he risk of recidivism posed by sex offenders is "frightening and high."'") (quoting Smith v. Doe, 538 U.S. 84, 103).

112 *See* Standley v. Town of Woodfin, 661 S.E.2d 728, 731 (N.C. 2008) (citing Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) and McKune v. Lile, 536 U.S. 24 (2002) to support the claim that the public needs to be protected from sex offenders).

113 *See* Doe v. Miller, 405 F.3d 700, 714–15 (8th Cir. 2005) ("There can be no doubt of a legislature's rationality in believing that '[s]ex offenders are a serious threat in this Nation,' and that '[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.'") (alterations in original) (quoting *Conn. Dep't of Pub. Safety*, 538 U.S. at 4).

114 410 F.3d 1337, 1345 (11th Cir. 2005).

analysis to the question of rational relation and simply concluded that there is a rational relation. For example, the Eighth Circuit stated its belief that a residency restriction was rationally related to public safety without any explanation or support: "[W]e believe that a residency restriction designed to reduce proximity between the most dangerous offenders and locations frequented by children is within the range of rational policy options available to a state legislature charged with protecting the health and welfare of its citizens."[115]

In the few existing examples where courts apply rational basis with any scrutiny of the selected means at all, they strike down sex offender regulations as contrary to the evidence. In *In re Taylor*, the Supreme Court of California struck down a residency restriction statute under the due process clause of the United States Constitution.[116] The court relied on the trial court's findings of fact to conclude that the blanket enforcement of sex offender residency restrictions was not rationally related to public safety.[117] The trial court heard testimony and determined that only 2.9% of the multifamily rental housing in the county complied with the residency restrictions and that even less of that housing was available for rent.[118] It also found that application of the residency retractions hindered sex offender treatment and caused homelessness.[119] The Supreme Court of California determined that the regulation was not rationally related to the legitimate state interest in public safety because "[t]he increased incidence of homelessness has in turn hampered the surveillance and supervision of such parolees, thereby thwarting the legitimate governmental objective behind the registration statute (§ 290) to which the residency restrictions attach; that of protecting the public from sex offenders."[120]

This finding was based on an analysis of empirical work. The evidence that the Supreme Court of California relied on included a report from the California Department of Corrections and Rehabilitation and testimony by the

115 Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1015 (8th Cir. 2006). *See also* Gunderson v. Hvass, 339 F.3d 639, 643–44 (8th Cir. 2003) (explaining the legislative purpose and stating that the means are reasonably related to that purpose); Doe v. Mich. Dep't of State Police, 490 F.3d 491, 501 (6th Cir. 2007) (stating that the court was "constrained to conclude that the rationale articulated in the statute itself satisfies the rational-basis standard" without any explanation).

116 343 P.3d 867, 878, 882 (Cal. 2015).

117 *Id.* at 880–82.

118 *Id.* at 873.

119 *Id.* at 877.

120 *Id.* at 881.

Director of the San Diego County Department of Housing and Community Development, a detective, a parole agent, a psychotherapist, and a social worker—all of whom had professional experience with registered sex offenders.[121] The *Taylor* court did not strike down all residency restrictions but determined that they could only be applied when "based on, and supported by, the particularized circumstances of each individual parolee."[122] If the evidence in the record shows that the challenged regulation is contrary to the legitimate state interest, a court must find that there is no rational basis.[123] Without such evidence, a court may decline to examine any introduced on appeal and uphold the statute by default.[124]

Courts currently find that there is a rational basis for any law that the legislature claims is rationally related to a legitimate state purpose, but they should take a more critical approach. When all the available evidence shows that residency restrictions, for example, harm public safety, courts must find that there is no rational basis for a residency restriction. Refusing to examine the evidence inevitably leads to upholding statutes that violate due process.

C. Impermissible Irrebuttable Presumption

In addition to the procedural and substantive components, due process also forbids laws that establish irrebuttable presumptions that are not universally true.[125] There is a strong argument under irrebuttable presumption doctrine to introduce empirical evidence, but the doctrine is not alive on the

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121 *Id.* at 873–81.

122 *Id.* at 882.

123 *Id.* at 869. *See also* State v. Dykes, 744 S.E.2d 505, 510 (S.C. 2013) ("The complete absence of any opportunity for judicial review to assess a risk of re-offending, which is beyond the norm of Jessica's law, is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending.").

124 *See, e.g.*, People v. Avila-Briones, 49 N.E.3d 428, 451 (Ill. App. Ct. 2015) ("Unlike *Taylor*, this case does not involve detailed factual findings showing that Illinois's sex offender laws undermine the very goal that they were designed to serve . . . . Based solely on the record before us, we cannot say that the laws at issue here are an irrational means to protect the public from sex offenders.").

125 *See* Vlandis v. Kline, 412 U.S. 441, 452 (1973) ("[I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true, in fact, and when the State has reasonable alternative means of making the crucial determination."); Cleveland Bd. of Educ. V. LaFleur, 414 U.S. 632, 648 (1974) ("While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.").

federal level.[126] *Cleveland Board of Education v. LaFleur*[127] demonstrates the applicability of this doctrine to sex offender regulations. The defendant school board established a policy that pregnant teachers must take maternity leave because it believed that they were physically incapable of work. The Court found a due process violation because "[t]he rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary."[128] Although there was a legitimate state interest in requiring those who needed maternity leave to take it, pregnant teachers had a due process right to rebut the presumption that they could not work.[129] Similarly, even if there is a state interest in requiring dangerous offenders to register and follow other restrictions, sex offenders have a due process right to demonstrate by the use of evidence that they do not fall into the category of dangerous offenders that the laws are meant to regulate.

Pennsylvania has recognized that the proscription on irrebuttable presumptions applies to sex offender laws under the state due process clause. In *In re J.B.* the Pennsylvania Supreme Court held that automatic registration requirements for all juveniles adjudicated delinquent in regard to certain sexual offenses relied on an impermissible irrebuttable presumption that juvenile sex offenders were highly likely to recidivate.[130] The irrebuttable presumption was impermissible because "that presumption [was] not universally true and a reasonable alternative means currently exist[ed] for determining which juvenile offenders are likely to reoffend."[131] The court relied on empirical work to show that the presumption was not universally true: it cited a law journal article discussing the data, an empirical report by the Pennsylvania Juvenile Court Judges' Commission, and the trial court opinion

126 *See* Schanuel v. Anderson, 708 F.2d 316, 319 (7th Cir. 1983) ("[T]he continuing validity of the [irrebuttable presumption] doctrine has been questioned repeatedly . . . . The irrebuttable presumption doctrine has been discredited because it is unworkable regardless of the interest which might have invoked it. We decline to revive the doctrine in this case and accordingly reject Schanuel's first due process argument."); Deborah Dinner, *Recovering the Lafleur Doctrine*, 22 YALE J.L. & FEMINISM 343, 387–88 (2010) (describing irrebuttable presumption doctrine as widely criticized and no longer followed).

127 414 U.S. 632.

128 *Id.* at 644.

129 *Id.* at 647.

130 107 A.3d 1, 14 (Pa. 2014).

131 *Id.*

citing other studies.[132] The court prescribed an individualized risk assessment as the alternative means.[133] Because empirical work showed that juveniles were not necessarily a recidivism risk, they were entitled to a factual assessment of the need for the restrictions.[134]

In 2020, the Pennsylvania Supreme Court began to apply its reasoning in *In re J.B.* to adult cases. In *Commonwealth v. Torsilieri*, the court decided that the adult sex offender laws violate irrebuttable presumption doctrine if recidivism rates are low and if tier-based registration systems are ineffective.[135] The court, however, remanded the case for a hearing to allow the parties to offer evidence and argument regarding whether scientific data sufficiently undermine the legislature's findings.[136] Striking down the statute would only be appropriate after fully hearing the scientific evidence.[137] In this way, the court struck a balance: it maintained deference to the legislature while declaring "this Court will not turn a blind eye to the development of scientific research, especially where such evidence would demonstrate infringement of constitutional rights."[138]

Other jurisdictions have also shown that there may be room for a similar irrebuttable presumption challenge. For example, the Northern District of New York held that a provision of the Adam Walsh Act subjecting certain offenders to detention and electronic monitoring without a hearing on whether

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132 *Id.* at 17–18.

133 *Id.* at 19.

134 *See also* Doe v. Police Comm'r of Bos., 951 N.E.2d 337, 343 (Mass. 2011) (striking down an irrebuttable presumption that those convicted of a level-three sex offense are a danger to other rest home residents and must be barred from residing in rest homes). *But see* Doe #1 v. Marshall, No. 2:15-CV-606-WKW, 2018 WL 1321034, at *9 (M.D. Ala. Mar. 14, 2018) (finding that CDPS precludes consideration of irrebuttable presumption doctrine).

135 232 A.3d 567, 596 (Pa. 2020). *See also* Taylor v. Pa. State Police of Pa., 132 A.3d 590, 606–07 (Pa. Commw. Ct. 2016) (relying on studies showing that sex offenders have very low recidivism rates to conclude that the presumption that they are a danger is not universally true for irrebuttable presumption purposes); Huu Cao v. Pa. State Police, No. 512 M.D. 2015, 2019 WL 5208898, at *9 (Pa. Commw. Ct. Oct. 16, 2019) ("Mr. Cao has stated [a claim] . . . that SORNA II's irrebuttable presumption violates procedural due process."). *But see* State v. Martin, 51 N.E.3d 537 (Ohio Ct. App. 2016) ("The juveniles at issue in *J.B.* were adjudicated delinquent of certain sexually oriented offenses, were automatically classified as Tier III sex offenders, and became subject to a lifetime registration under Pennsylvania's SORNA. The juveniles were not convicted of a sexually oriented offense in adult court, as Martin was here.") (citations omitted).

136 232 A.3d at 595 n.22.

137 *See id.* (remanding to allow parties to proffer evidence and argument regarding the scientific evidence).

138 *Id.* at 596.

such conditions were necessary violated the United States Constitution's restriction on irrebuttable presumptions.[139] Such a holding opens a broad opportunity to show that sex offender post release laws are unconstitutional: any time that a statute presumes that a person convicted of a sex offense will be a danger to the public, that person has a right to show there is no such risk before any post release laws apply. People who are convicted of sexual offenses but can demonstrate that they pose no real threat to society—like teachers whose pregnancy will not interfere with their teaching ability—should be exempt from post-release regulations under irrebuttable presumption doctrine.

CONCLUSION

As a politically unpopular group, sex offenders are unlikely to have legislatures change the laws for their benefit. In fact, as the proposed New York public transportation ban and other recent statutes show, restrictions are becoming more severe despite the evidence that they are ineffective. It is a mistake to seek change only through the legislature. Due process, under both the United States Constitution and state constitutions, forbids these procedurally deficient and irrational laws. While courts say that they are leaving the work of interpreting the science to the legislatures, they also rely on empirical claims in their reasoning. A claim that residency restrictions are rationally related to public safety is an empirical question that can only be answered by observation of the external world. Judges cannot deduce the answer from their chambers.

Policies and treatments that prevent recidivism are available, and states could use them to provide real protection to the public.[140] Washington State, for example, has not implemented the provisions of the Adam Walsh Act that condition registration requirements on conviction charges, instead relying on evidence-based risk assessments to determine who must register.[141] In 2016, the Washington Sex Offender Policy Board recommended that the state remain out of compliance with the Adam Walsh Act, giving up federal funds,

139 United States v. Karper, 847 F. Supp. 2d 350, 360 (N.D.N.Y. 2011). *See also* Dean v. McWherter, 70 F.3d 43, 46 (6th Cir. 1995) (applying irrebuttable presumption doctrine to a sex offender regulation but finding it did not apply because there was no liberty interest that triggered due process rights).

140 *See, e.g.*, WRIGHT, *supra* note 5, at 285 (describing the success of a prison-based treatment program).

141 *Id.* at 288–89.

because implementing it "would be less effective at protecting public safety than the current process."[142] In most states, however, the existing sex offender laws fail to protect the public when compared to no action or to an evidence-based alternative. If courts struck these laws down, legislatures might be forced to find solutions that would prevent future harm. By ignoring the evidence and upholding ineffective laws, courts are validating statutes that harm both offenders and future victims.

142 WASH. STATE SEX OFFENDER POL'Y BD., WASHINGTON'S COMPLIANCE WITH SORNA FINDINGS AND RECOMMENDATIONS BY THE SEX OFFENDER POLICY BOARD 5 (2016), https://sgc.wa.gov/sites/default/files/public/sopb/documents/sorna_findings_and_recommendations.pdf.