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Minnesota Statutes Section 243.166 Subdivision 1(b) Has Got to Go: Why Requiring Predatory Offender Registration Based on a Charge as Opposed to a Conviction Violates Procedural Due Process

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MINNESOTA STATUTES SECTION 243.166 SUBDIVISION 1(B) HAS GOT TO GO: WHY REQUIRING PREDATORY OFFENDER REGISTRATION BASED ON A CHARGE AS OPPOSED TO A CONVICTION VIOLATES PROCEDURAL DUE PROCESS

Alison Baker Faul

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I. INTRODUCTION

> "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."
> —*Mathews v. Eldridge*[1]

Minnesota Statutes section 243.166 subdivision 1(b) (subdivision 1(b)) requires a person to register as a predatory offender based on a charge rather than a conviction.[2] Minnesota is the only state in the nation with such a statute. Subdivision 1(b) requires a person to register as a predatory offender if they are convicted of an enumerated felony—including, but not limited to, murder, kidnapping, criminal sexual conduct, false imprisonment, and solicitation—or if they are "charged with . . . any of the [enumerated felonies] and convicted of or adjudicated delinquent for . . . another offense arising out of the same set of circumstances."[3] The statute relies on the muddy probable cause standard as the bar for compelling registration.[4] It does not allow for any judicial discretion to alter the

[1] 424 U.S. 319, 333 (1976) (Frankfurter, J., concurring) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951)) (internal quotations omitted).

[2] MINN. STAT. § 243.166, subdiv. 1(b) (2022).

[3] *Id.*

[4] The probable cause standard should not be used to determine long-term consequences like predatory registration. It is a standard designed to determine whether the prosecuting body should proceed with the case; it is not a standard meant to determine guilt or impose long-term consequences. Probable cause has been defined as "reasonable probability that the person committed the crime," but "reasonable probability" does not provide clear guidance. State v. Lopez, 778 N.W.2d 700, 703 (Minn. 2010). In its practical application, probable cause "is whatever a magistrate says it is." Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L.J. 1276, 1281 (2020). In a survey of 166 federal judges in the Eastern District of New York, when asked to report a percentage consistent with their understanding of the probable cause standard, the responses ranged from 10–90% certainty. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1327 (1982). 148 of the 166 judges reported levels of certainty in the 30–60% range, which is still a wide gap. *Id.* The space between these judges' understandings of what levels of certainty constitute probable cause is too wide to allow this standard to determine a life-altering consequence like predatory registration. Additionally, the use of probable cause seen in subdivision 1(b) puts too much discretion in the hands of law enforcement and prosecutors. U.S. District Court Judge Ann D. Montgomery imparted the same criticism in *Meyers v. Roy*. No. 11-291, 2012 WL 28122, at *7 (D. Minn. Jan. 5, 2012) ("The seemingly arbitrary nature of Minn. Stat. § 243.166, which is applied indiscriminately to all charged with a triggering offense regardless of the accuracy of that initial charging, is troubling . . . . [I]t is conceivable that under Minn. Stat. § 243.166 an individual could be mischarged or 'overcharged' by a zealous prosecutor, although the underlying facts never supported a predatory offender charge. As the Minnesota Court of Appeals noted in *Meyers*, the low threshold showing required for probable cause is sufficient to require an individual to register, although that 'charge is supported not by proof beyond a reasonable doubt, not by clear and convincing evidence, or not even by a preponderance of

registration requirement, nor the opportunity for a defendant to challenge their registration requirement, even if the defendant is acquitted of their predatory charge.[5] Instead, the law universally mandates registration for a period of ten years or more.[6]

This Note argues that subdivision 1(b) and its interpretation by the courts utterly defy the principles of procedural due process. Predatory offender registration implicates a liberty interest. In fact, the U.S. Supreme Court previously recognized reputational harm as a liberty interest by itself until the *Paul v. Davis* decision.[7] The Minnesota Supreme Court should abandon the *Paul v. Davis* "stigma-plus" test in the context of predatory registration.[8] The statute's widely expanded requirements and restrictions cause significant reputational harm and thus call for procedural due process protection. Additionally, the Minnesota legislature must recognize the

the evidence . . . .'"). The "susceptibility to abuse" embedded in the probable cause standard leaves vast room for implicit bias and disparate application. Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 810 (2013). Minnesota Statutes section 243.166 does not provide any safeguards against disproportionate and discriminatory arrests and charges. It is imperative to acknowledge the gaping opportunity for disparate impact within the statute, but there is currently no published research about the statute's impact on different racial groups. This is a gap in data that must be filled. It is widely known that people of color have more frequent contacts with the police and are arrested and charged at higher rates. Elizabeth Hinton, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA EVIDENCE BRIEF (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/QRG4-XRH4]; *see generally* Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System Is Racist. Here's the Proof.*, WASH. POST (June 10, 2020), https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/ [https://perma.cc/G3AG-TCCP] (providing a repository of evidence of racial bias in each stage of the criminal justice system); *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENTENCING PROJECT (Apr. 19, 2018), https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/ [https://perma.cc/F6B5-BE86] (reporting the findings of racial disparity in the various stages of the criminal justice system); Timothy Williams, *Black People Are Charged at a Higher Rate than Whites. What if Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html [https://perma.cc/24B2-PBU6] (providing evidence of disparate arrest rates between racial groups as support for an experimental race-blind charging approach). Thus, when subdivision 1(b) imposes a long-term, life-altering consequence based on a bar defined as "reasonable suspicion," it is reasonable to ask whether this statute is likely to impact people of color more than white individuals. While the Bureau of Criminal Apprehension (BCA) has not released any data on how subdivision 1(b) impacts different racial groups, the concern is there. In January 2021, the Criminal Sexual Conduct Working Group submitted to the Minnesota Legislature a list of recommended changes to the predatory offender registration statute. Stacy L. Bettison, *Momentum Builds for Changes to Predatory Offender Registry*, BENCH & B. MINN., Apr. 2021, at 31, 31. The group repeatedly raised concerns regarding "the registry's increasingly disparate impact on BIPOC, the homeless, juveniles, and other vulnerable people and communities." *Id.* at 32.

[5] MINN. STAT. § 243.166, subdiv. 1(b) (2022).

[6] *Id.*

[7] 424 U.S. 693 (1976); *see* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[8] *Paul*, 424 U.S. at 709–10 (1976).

collateral consequences that section 243.166 carries and amend subdivision 1(b) to grant judges the discretion to modify defendants' registration requirements based on the circumstances and grant defendants the opportunity to be heard prior to their required registration.

This Note begins by recounting the historical backdrop of predatory registration laws in the United States. Next, the Note examines section 243.166 and its legislative history. In part three, it explores procedural due process, specifically looking at case law addressing whether reputational harm is a liberty interest deserving of procedural due process protection. Following that, the Note discusses why the stigma and collateral consequences that accompany predatory registration under section 243.166 constitute a liberty interest worthy of procedural due process protection; it argues that requiring registration based on a charge without granting an opportunity to be heard violates procedural due process principles. Finally, the Note offers recommendations for amending section 243.166 to protect individuals not convicted of predatory offenses from being universally required to register as predatory offenders.

II. HISTORY OF PREDATORY REGISTRATION STATUTES

A. Federal Predatory Offender Registration Laws

The tragic abductions and murders of three young children—Adam Walsh, Jacob Wetterling, and Megan Kanka—sparked a nationwide conversation about how to keep kids safe from sexual offenders.[9] The result was the Jacob Wetterling Crimes Against Children and Sexually Violent

[9] Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1076–77 (2012). In 1981, six-year-old Adam Walsh was kidnapped from a Sears toy department in Hollywood, California. *The Case of Murdered 6-Year-Old Adam Walsh: 40 Years Later*, CBS NEWS: MIAMI (July 27, 2021), https://www.cbsnews.com/miami/news/adam-walsh-case-40-years-later [https://perma.cc/R842-S635]. While some of his remains were found just two weeks later, the case remained unsolved for more than twenty years. *Id.* In 1989, eleven-year-old Jacob Wetterling was riding his bike with his younger brother and a friend in St. Joseph, Minnesota, when he was abducted by a masked gunman. Pam Louwagie & Jennifer Brooks, *Danny Heinrich Confesses to Abducting and Killing Jacob Wetterling*, STAR TRIB. (Minneapolis) (Sept. 7, 2016), https://www.startribune.com/danny-heinrich-confesses-to-abducting-and-killing-jacob-wetterling/392438361 [https://perma.cc/SE8T-GTN2]. The case went unsolved until 2016, when Danny Heinrich confessed to sexually assaulting and murdering Jacob the same day he was abducted. *Id.* Heinrich was also responsible for the abduction and sexual assault of twelve-year-old Jared Scheierl just nine months prior to Jacob's abduction, though the Scheierl case was not solved until 2016. Pam Louwagie, *Stearns County Judge Awards Heinrich Sexual Assault Victim $17 Million in Damages*, STAR TRIB. (Minneapolis) (Nov. 29, 2018), https://www.startribune.com/stearns-county-judge-awards-heinrich-sexual-assault-victim-17-million-in-damages/501552811 [https://perma.cc/62UC-XSSK]. In 1994, seven-year-old Megan Kanka was lured into her killer's home by "the promise of seeing a puppy"; instead, she was sexually assaulted and murdered. John J. Goldman, *Details Convey Horror of Megan's Death*, L.A. TIMES (May 6, 1997), https://www.latimes.com/archives/la-xpm-1997-05-06-mn-55980-story.html [https://perma.cc/H4VN-JTCY]. Her murderer had two prior convictions for sexual offenses against young children. *Id.*

Offender Registration Act (SORA), which Congress passed in 1994.[10] SORA required states "to adopt sex offender registration laws within three years of the Act's passage in order to receive federal law enforcement funding."[11]

When SORA was initially enacted, predatory registration laws served "as [tools] solely for law enforcement agencies, and registry records were kept confidential."[12] However, in 1996, Congress amended SORA to include what is commonly known as "Megan's Law," which authorized "the dissemination of registration information to the community through community notification statutes."[13] Megan's Law provided that state law enforcement "shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section."[14]

Congress later enacted the Adam Walsh Child Protection and Safety Act (AWA) in 2006, which provided states with financial incentives to implement new requirements into their predatory registration laws.[15] The AWA's definition of "sex offense" included only "specified offense[s] *against a minor*," but it widened the net to include "crimes of kidnapping and false imprisonment . . . even if the crime committed did not include any sexual or violent element."[16] An individual who qualified as a sex offender within the meaning of the AWA was required to provide the following to the state:

> [H]is or her full name, Social Security number, address of every residence in which he or she resides or will reside, the name and address of any employer and school attended, and the license plate number of any vehicle the sex offender may own or operate[,] . . . a DNA sample, a set of fingerprints, a current photograph, and a copy of any driver's license or identification card . . . .[17]

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[10] Carpenter & Beverlin, *supra* note 9, at 1077 (citing Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, 42 U.S.C. § 14071 (repealed 2006)).
[11] *Id.*
[12] *Id.* (quoting Doe v. Mich. Dep't of State Police, 490 F.3d 491, 495 (6th Cir. 2007)).
[13] *Id.* (citing Pub. L. No. 104–145, § 2, 110 Stat. 1345 (1996)).
[14] *Id.* at 1077 n.29 (quoting Pub. L. No. 104–145, § 2, 110 Stat. 1345 (1996)).
[15] Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911 (current version at 34 U.S.C. § 20911).
[16] Steven J. Costigliacci, *Protecting Our Children from Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180, 183 (2008) (quoting 42 U.S.C. § 16911(5)(A)(ii) (2006) (current version at 34 U.S.C. § 20911(7))) (emphasis added). "A 'specified offense against a minor' [was] classified as 'an offense . . . that involves any of the following: (A) An offense (unless committed by a parent or guardian) involving kidnapping. (B) An offense (unless committed by a parent or guardian) involving false imprisonment.'" *Id.* (quoting 42 U.S.C. § 16911(7) (2006) (current version at 34 U.S.C. § 20911(7))).
[17] *Id.* (citing 42 U.S.C. § 16914(a)–(b) (2006) (current version at 34 U.S.C. § 20914(a))).

The AWA also created a three-tier system to differentiate predatory offenders based on the severity of their crime, with tier three being the most severe.[18] Tier three offenders must register for life "with a possible reduction based on the length of time they have endured with a clean record."[19] Tier two offenders must register "for 25 years with no possibility of a reduction."[20] Tier one offenders "must remain registered for 15 years with the possibility of a reduction of 5 years for a clean record."[21]

Each subsequent registration law makes clear that, over time, federal requirements for predatory registration laws have become more expansive in terms of the "number of registerable offenses, lengthening durational requirements, expanded personal information reporting requirements, . . . residency restrictions, the introduction of the GPS tracking device, and the systematic elimination of individualized assessment as a touchstone."[22] The same kinds of expanding restrictions show up in state predatory offender registration laws.

B. Minnesota Statutes Section 243.166

Minnesota's predatory registration statute was first adopted on June 1, 1991, in response to Jacob Wetterling's abduction.[23] When asked what would have helped in the search for Jacob, his mother, Patty Wetterling, replied that "[i]t would have been helpful to know who was in the area at

[18] *Id.* at 183 (citing 42 U.S.C. § 16911(4) (2006) (current version at 34 U.S.C. § 20911(2)–(4))). "Tier III offenders are those who have committed a felony that is considered to be one of the most severe as described by the statute. The kidnapping of a minor by a nonparent is one of the crimes that is listed under the Tier III provision. A Tier II sex offender is a person convicted of a felony against a minor, including such crimes as production or distribution of child pornography, sex trafficking, and coercion and enticement. A Tier I offender is any sex offender that does not qualify under the Tier III or Tier II categories." *Id.* at 183–84 (citing 42 U.S.C. § 16911(2)–(4) (2006) (current version at 34 U.S.C. § 20911(2)–(4))).

[19] *Id.* at 184 (citing 42 U.S.C. § 16915 (2006) (current version at 34 U.S.C. § 20915(b))). Tier three offenders "must also report to the state agency in charge of their registry every [three] months to take a current photograph and verify all of their contact information." *Id.* (citing 42 U.S.C. § 16916 (2006) (current version at 34 U.S.C. § 20918)).

[20] *Id.* (citing 42 U.S.C. § 16915 (2006) (current version at 34 U.S.C. § 20915(a))). Tier two offenders "must report every [six] months for contact information verification and a current photograph." *Id.* (citing 42 U.S.C. § 16916 (2006) (current version at 34 U.S.C. § 20918)).

[21] *Id.* (citing 42 U.S.C. § 16915 (2006) (current version at 34 U.S.C. § 20915(b))). "Those who qualify for Tier [one] status must report every year to verify their contact information and take a new photograph." *Id.* (citing 42 U.S.C. § 16916 (2006) (current version at 34 U.S.C. § 20918)).

[22] Carpenter & Beverlin, *supra* note 9, at 1079. With the growing prevalence of technology and the internet, many statutes have been amended to place restrictions on internet activity to protect children online. *Id.* at 1089–90. For instance, Indiana law requires predatory offenders to provide the state with "[a]ny electronic mail address, instant messaging username, electronic chat room username, or social networking web site username that [they] use[] or intend[] to use." IND. CODE § 11-8-8-8 (2022).

[23] Stacy L. Bettison, The New Scarlet Letter: Is Minnesota's Predatory Offender Registry Helping or Hurting?, BENCH & B. MINN., Dec. 2019, at 16, 17; Wayne A. Logan, Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota, 29 WM. MITCHELL L. REV. 1287, 1293 (2003).

that time that had a history of preying on children."[24] Not long after, the Minnesota legislature set out to design a law enforcement tool to address Patty Wetterling's grievance.[25] The predatory offender registration statute was based on the commonly held assumption that "[p]eople who commit sex crimes are significantly more likely than not to commit another sex crime," though, over the past decades, researchers have pushed back against that assumption.[26]

Prior to its enactment, the predatory registration statute took on different forms in each of the legislature's chambers. The House bill proposed that people convicted of kidnapping or sexual crimes against minors must register their home address with community corrections upon their release from prison and "maintain the accuracy of such information for ten years."[27] Unlike section 243.166 in its current form, the House bill granted judges the discretion to assess whether the offender should be required to register at the time of sentencing "based on an assessment of whether 'there is a significant risk that the offender may' reoffend."[28] Critics of the House bill reasoned that making the risk-of-reoffending determination at the sentencing stage "rejects the possibility of rehabilitation."[29]

Unlike the House bill, the Senate version did not grant courts discretion to dispose of the registration requirement, but instead required registration by anyone convicted of an enumerated offense against a minor.[30] The Senate bill provided that registrant information would only be accessible by law enforcement, not the public, because—as stated by the bill's sponsor, Senator Joe Bertram, Sr.—while "[t]here's a real concern for repeat offenders," the aim was not "to affect a person's ability to get a job."[31] Even with that accessibility restriction, Senator Thomas Neuville contended that the proposed legislation was still "contrary to the idea that released offenders had paid their debt to society" and would likely "deprive people of their freedom of movement and freedom of privacy."[32]

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[24] Bettison, *supra* note 23, at 17.
[25] *Id.*
[26] *Id.* at 18. "[C]urrent research suggests that after a certain amount of time living offense-free, sex offenders are no more likely to commit a sex offense than anyone else being released for another crime." *Id.* Between 2001 and 2015, only 7% of people convicted of criminal sexual conduct in Minnesota previously were convicted of a sex crime; the remaining 93% of people convicted of criminal sexual conduct during that time had no prior conviction. Bettison, *supra* note 23, at 21 n.24 (citing Brian Collins, Program Director, Minnesota Department of Corrections, Presentation at the MnATSA Conference: *Residency Restrictions, Sound Public Policy or Tinfoil Hats?* (Apr. 21, 2017)); *see also, e.g.*, Jeffrey C. Sandler, Naomi J. Freeman & Kelly M. Socia, *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCH., PUB. POL'Y & L. 284, 297 (2008) (explaining New York data showed that of people arrested for criminal sexual conduct, 95% are first-time sex offenders).
[27] Logan, *supra* note 23, at 1291.
[28] *Id.* at 1291–92 (quoting Journal of the House, 77th Leg. Sess., 1685 (Minn. Apr. 15, 1991)).
[29] *Id.* at 1292.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 1292–93.

Despite these criticisms, the Predatory Offender Registration Act (the Act) was passed by both chambers of the Minnesota legislature and signed into law by Governor Arne Carlson, making Minnesota the fifteenth state in the nation with a statute requiring registration of sex offenders.[33] The Act required any person (1) convicted of an enumerated offense and (2) released from prison after August 1, 1991, to register for "ten years following release."[34] The Act required the Commissioner of Corrections to notify the offender of the requirement to register prior to release.[35] Failure to register could result in an additional misdemeanor charge as well as five additional years of registration.[36]

In 1993, the legislature added the requirement now found in subdivision 1(b), "that a person register if convicted of an enumerated felony or another offense arising out of the same set of circumstances."[37] Courts have interpreted that the legislative purpose behind this provision was to prevent defendants from pleading out of a registration requirement, though the legislature never officially declared this as its legislative intent.[38] Despite that asserted legislative intent, with the way the statute is written, even those who go to trial and are acquitted of a predatory charge are still required to register without any opportunity to contest their registration requirement.[39] The 1993 amendment also expanded the scope of enumerated crimes, now requiring registration of people convicted of sex crimes with adult victims, whereas before, registration was only required if the alleged victims were minors.[40]

The legislature has since amended the predatory registration statute more than thirty times, adding to the list of offenses requiring registration, the requirements of registered individuals, and the list of consequences for failures to comply.[41] The amendments have resulted in an "ever-widening net," which has ensnared more than 21,000 people in Minnesota, including many never convicted of a predatory offense but still forced to register as a predatory offender based on a charge under subdivision 1(b).[42]

The Minnesota Supreme Court determined in *Boutin v. LaFleur*—

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[33] *Id.* at 1293.
[34] *Id.* at 1293–94. In 1991, the enumerated offenses were limited to "kidnapping a minor; criminal sexual conduct toward a minor; solicitation of a minor to engage in sexual conduct; use of minor in a sexual performance; or solicitation of a minor to practice prostitution." *Id.* at 1294.
[35] *Id.*
[36] *Id.*
[37] Boutin v. LaFleur, 591 N.W.2d 711, 715 (Minn. 1999) (internal quotations omitted).
[38] Gunderson v. Hvass, 339 F.3d 639, 643–44 (8th Cir. 2003). "Given the realities of the plea bargaining system, by extending the registration requirements to persons who are charged with a predatory offense, but who plead guilty to a non-predatory charge that arises from the same circumstances, the Minnesota legislature was attempting to insure the inclusion in the registration rolls, of all predatory offenders, including those who take advantage of favorable plea agreements." *Id.*
[39] *Id.* at 644.
[40] Logan, *supra* note 23, at 1295.
[41] Bettison, *supra* note 23, at 17; *see* discussion *infra* Section III.B.
[42] Bettison, *supra* note 23, at 17.

and has repeatedly upheld since—that section 243.166 is a civil, regulatory statute as opposed to a punitive, criminal statute.[43] Therefore, the presumption of innocence does not attach.[44] In making this determination, the Minnesota Supreme Court analyzed section 243.166 using the seven factors from the *Kennedy v. Mendoza-Martinez* "intent-effects test":

> Whether the sanction involves an affirmative disability or restraint; whether [the sanction] has historically been regarded as a punishment; whether [the sanction] comes into play only on a finding of scienter; whether [the sanction's] operation will promote the traditional aims of punishment—retribution, and deterrence; whether the behavior to which [the sanction] applies is already a crime; whether an alternative purpose to which [the sanction] may rationally be connected is assignable for it; and whether [the sanction] appears excessive in relation to the alternative purpose assigned.[45]

It is important to note that when the Minnesota Supreme Court deemed section 243.166 a regulatory statute as opposed to punitive, the statute only required that offenders "register with law enforcement[,] inform the state of any change of address," and provide fingerprints and a photograph of themselves.[46] The court emphasized that at the time, the statute "[did] not require an affirmative disability or restraint," and it "[did] not restrict [the defendant]'s ability to change residences at will or even to move out of state."[47] It also stressed that the defendant was "only required to register and update his address for 10 years."[48]

In congruence with the expansion of federal predatory registration laws, the list of requirements in section 243.166 has increased substantially since *Boutin*,[49] though the added requirements and restrictions "tend to be rooted in [public] fear . . . rather than informed public policy."[50] Today,

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[43] Boutin v. LaFleur, 591 N.W.2d 711, 717 (Minn. 1999).
[44] *Id.*
[45] Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (internal quotations omitted). "These factors are 'neither exhaustive nor dispositive; rather, they serve as useful guideposts to determine whether a statute creates a civil or criminal sanction.'" Werlich v. Schnell, 958 N.W.2d 354, 367 (Minn. 2021) (quoting Rew v. Bergstrom, 845 N.W.2d 764, 792 (Minn. 2014)).
[46] *Boutin*, 591 N.W.2d at 715, 717.
[47] *Id.* at 717.
[48] *Id.*
[49] MINN. STAT. § 243.166 (2022).
[50] Richard Weinberger, *Residency Restrictions for Sexual Offenders in Minnesota: False Perceptions for Community Safety*, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS 1 (2020), https://mnatsa.org/wp-content/uploads/2020/02/MnATSA-Residency-Restrictions-Feb-2019-Revised.pdf [https://perma.cc/WR2U-CKCY]; *see also* David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 601

when an individual is required to register, he or she must provide law enforcement the following information within five days:

> (1) the person's primary address;
> (2) all of the person's secondary addresses in Minnesota, including all addresses used for residential or recreational purposes;
> (3) the addresses of all Minnesota property owned, leased, or rented by the person;
> (4) the addresses of all locations where the person is employed;
> (5) the addresses of all schools where the person is enrolled;
> (6) the year, model, make, license plate number, and color of all motor vehicles owned or regularly driven by the person;
> (7) the expiration year for the motor vehicle license plate tabs of all motor vehicles owned by the person; and
> (8) all telephone numbers, including work, school, and home, and any cellular telephone service.[51]

If the individual "lack[s] a primary address," the individual must report to law enforcement "in person on a weekly basis" in the jurisdiction in which he or she is staying.[52]

Despite changes to the statute and the expansion of its accompanying burdens since *Boutin*, section 243.166 remains a civil,

(2006) ("[A]rgu[ing] that sex offender residency restrictions are driven primarily by fear and dislike of sex offenders, not reasoned analysis of what is necessary to protect children.").

[51] MINN. STAT. § 243.166, subdiv. 4(a) (2022).

[52] *Id.* § 243.166, subdiv. 3(a)(e). "If the law enforcement authority determines that it is impractical, due to the person's unique circumstances, to require a person lacking a primary address to report weekly and in person, as required under paragraph (e), the authority may authorize the person to follow an alternative reporting procedure. The authority shall consult with the person's corrections agent, if the person has one, in establishing the specific criteria of this alternative procedure, subject to the following requirements: the authority shall document, in the person's registration record, the specific reasons why the weekly in-person reporting process is impractical for the person to follow; the authority shall explain how the alternative reporting procedure furthers the public safety objectives of this section; the authority shall require the person lacking a primary address to report in person at least monthly to the authority or the person's corrections agent and shall specify the location where the person shall report. If the authority determines it would be more practical and would further public safety for the person to report to another law enforcement authority with jurisdiction where the person is staying, it may, after consulting with the other law enforcement authority, include this requirement in the person's alternative reporting process; the authority shall require the person to comply with the weekly, in-person reporting process required under paragraph (e), if the person moves to a new area where this process would be practical; the authority shall require the person to report any changes to the registration information provided under subdivision 4a and to comply with the periodic registration requirements specified under paragraph (g); and the authority shall require the person to comply with the requirements of subdivision 3, paragraphs (b) and (c), if the person moves to a primary address." *Id.* § 243.166, subdiv. 3(a)(f).

regulatory statute according to the Minnesota Supreme Court.[53] It does not have to be this way. Other state supreme courts have reversed their position and found their respective state's predatory registration laws to be punitive as opposed to regulatory because of expanded restrictions and requirements.[54] The regulatory designation carries important implications because "[l]aws deemed civil or regulatory in nature need not meet constitutional demands traditionally associated with criminal laws,"[55] a key implication being the presumption of innocence.[56]

III. PROCEDURAL DUE PROCESS

Both the United States Constitution and the Minnesota Constitution provide that the government may not deprive a person of "life, liberty, or property without due process of law."[57] The U.S. Supreme Court has interpreted the Due Process Clause language to include two separate components: (a) substantive due process—which "protect[s] fundamental rights from government interference"[58]—and (b) procedural due process—which "refers to the constitutional requirement that when the [] government acts in such a way that denies a citizen of a life, liberty, or property interest, the person must be given notice, the opportunity to be heard, and a decision by a neutral decision-maker."[59] This Note focuses exclusively on procedural

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[53] However, the court held in 2021 that *Boutin* "does not foreclose all constitutional challenges to the expanded statutory consequences of predatory offender registration as applied to a person charged with, but not convicted of, an enumerated offense." Werlich v. Schnell, 958 N.W.2d 354, 374 (Minn. 2021). "In each part of the *Boutin* analysis, we specifically looked at the statutory registration requirements that existed then, which only consisted of 'updating address information.' Since *Boutin*, the Legislature has repeatedly amended section 243.166 and other statutes, expanding the registration requirements and imposing additional consequences of registration. Some of the additional consequences of registration are more substantial than the reputational stigma that *Boutin* discussed. Accordingly, because the Legislature has provided for registration requirements and statutory consequences markedly different than those in *Boutin*, we are not necessarily bound by *Boutin* to reach the same conclusion here as we did in that case." *Id.* at 362 (citations omitted) (citing Boutin v. LaFleur, 591 N.W.2d 711, 717–18 (Minn. 1999)).

[54] *See* Doe v. State, 189 P.3d 999 (Alaska 2008); State v. Letalien, 985 A.2d 4 (Me. 2009); State v. Williams, 952 N.E.2d 1108 (Ohio 2011); Starkey v. Okla. Dep't of Corr., 305 P.3d 1004 (Okla. 2013).

[55] Carpenter & Beverlin, *supra* note 9, at 1101.

[56] *Boutin*, 591 N.W.2d at 716. The presumption of innocence is considered a fundamental constitutional right only when dealing with statutes deemed penal, or criminal, in nature; fundamental rights implicate substantive due process protection. *See* State v. Halvorson, 181 N.W.2d 473, 477 (Minn. 1970).

[57] U.S. CONST. amend. XIV; MINN. CONST. art. I, § 7.

[58] *Substantive Due Process*, CORNELL L. SCH.: LEGAL INFO. INSTIT., https://www.law.cornell.edu/wex/substantive_due_process [https://perma.cc/H5BU-2BQM].

[59] *Procedural Due Process*, CORNELL L. SCH.: LEGAL INFO. INSTIT., https://www.law.cornell.edu/wex/procedural_due_process [https://perma.cc/LM8Z-HTUH].

due process.[60]

Procedural due process analysis involves two key questions: (1) what are the life, liberty, and property interests deserving of procedural due process protection, and (2) what exactly constitutes the "opportunity to be heard and . . . decision by a neutral decision-maker," or more simply, what process is due?[61] This Note focuses on the first question.

A. *Reputation as a Liberty Interest*

The U.S. Supreme Court has "charted a zig-zag course" in determining whether reputational harm constitutes a liberty interest deserving of procedural due process protection.[62] In the 1971 case *Wisconsin v. Constantineau*, the Court held that a person's reputation constitutes a liberty interest.[63] In that case, the Court struck down a Wisconsin law that authorized a law enforcement officer to post signs in retail stores that identified the plaintiff as barred from buying alcohol in that area for one year.[64] The plaintiff filed suit, arguing that her procedural due process rights were violated because she did not receive notice of the posting or have the opportunity to challenge it.[65] The Court agreed, saying that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[66] Under the Wisconsin state law at issue, the plaintiff was given "no process at all . . . [because she was] not afforded a chance to defend herself" from such a "badge of infamy."[67] The Court quoted Justice Frankfurter's concurrence in *Joint Anti-Facist Refugee Committee v. McGrath*, declaring that "the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society."[68] The Court also pointed out that the plaintiff "may have been the victim of an official's caprice" without any real wrongdoing.[69] Ultimately, the Court established in *Constantineau* that reputational harm

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[60] Section 243.166 raises substantive due process concerns as well, but a discussion of those concerns is beyond the scope of this Note.

[61] *Procedural Due Process*, *supra* note 59.

[62] Wayne A. Logan, *Liberty Interests in the Preventative State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L & CRIMINOLOGY 1167, 1178 (1999). Though "difficult of definition," many interests have "attain[ed] . . . constitutional status by virtue of the fact that they have been initially recognized and protected by state [or federal] law." Paul v. Davis, 424 U.S. 693, 710 (1976). One example is the state's issuance of drivers' licenses; a state cannot withdraw a person's right to operate a motor vehicle on its highways without due process. *Id.* at 711 (citing Bell v. Burson, 402 U.S. 535 (1971)).

[63] 400 U.S. 433, 437 (1971).

[64] *Id.* at 434–35, 439.

[65] *Id.* at 436–37.

[66] *Id.* at 437.

[67] *Id.* (citing Wieman v. Updegraff, 344 U.S. 183, 191 (1952)).

[68] *Id.* (quoting Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

[69] *Id.*

qualifies as a liberty interest sufficient to invoke procedural due process protection.[70]

Five years later, in *Goss v. Lopez*, the Supreme Court expressly reiterated that reputation constitutes a liberty interest.[71] In *Goss*, a group of Ohio high schoolers were suspended for up to ten days without the opportunity to challenge their suspension.[72] However, Ohio Revised Code section 3313.66 required school administration to notify the suspended students' parents of the suspension as well as the reasons behind the decision; parents could then appeal the suspension to the Board of Education, and the Board could reinstate the students.[73] The Court provided that "[n]either the property interest in educational benefits temporarily denied *nor the liberty interest in reputation, which is also implicated*, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses."[74] The Court made it clear that the students' reputational harm was a key basis for the decision: the "charges of misconduct . . . could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment," and failure to provide adequate process would "immediately collide[] with the requirements of the Constitution."[75]

The following year, the Court overruled the holding in *Constantineau* with its ruling in *Paul v. Davis*, expressly rejecting the notion that reputation is itself a liberty interest worthy of procedural due process protection.[76] In that case, the plaintiff—who was previously charged with shoplifting—found his picture posted on a flyer labeled "Active Shoplifters."[77] The flyer was distributed by police officers to local stores and businesses.[78] Shortly after its distribution, the plaintiff's shoplifting charge was dismissed.[79] The plaintiff filed suit, alleging that the "active shoplifter" label would negatively impact his reputation by "inhibit[ing] him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment opportunities."[80] The Sixth Circuit ruled in favor of the plaintiff, relying on *Constantineau*'s discussion of "badge[s] of infamy" and reputational harm as a liberty interest warranting procedural due process protection.[81] However, the Supreme Court reversed the Sixth Circuit's

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[70] *Id.* at 436.
[71] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1151 (Rachel E. Barkow et al. eds., 6th ed. 2020) (citing Goss v. Lopez, 419 U.S. 565 (1975)).
[72] *Goss*, 419 U.S. at 567–69.
[73] *Id.* at 567 (citing OHIO REV. CODE ANN. § 3313.66 (1972)).
[74] *Id.* at 576 (emphasis added).
[75] *Id.* at 575.
[76] Paul v. Davis, 424 U.S. 693, 710 (1976).
[77] *Id.* at 695–96. The plaintiff's previous shoplifting charge had been "'filed away with leave to reinstate,' a disposition which left the charge outstanding." *Id.* at 696.
[78] *Id.*
[79] *Id.*
[80] *Id.* at 697.
[81] *Id.* at 707 (quoting Wieman v. Updegraff, 344 U.S. 183, 191 (1952)).

decision.[82] While the Supreme Court acknowledged that there was "sufficient[] ambigu[ity]" in *Constantineau* to justify the circuit court's reliance,[83] it clarified that "reputation alone, apart from some more tangible interests[,]" is not "sufficient to invoke the procedural protection of the Due Process Clause."[84] The Supreme Court focused on a specific phrase within a larger *Constantineau* quotation relied on by the Sixth Circuit: "Where a person's good name, reputation, honor, or integrity is at stake *because of what the government is doing to him*, notice and an opportunity to be heard are essential."[85] The Supreme Court rationalized that

> the italicized language . . . "*because of what the government is doing to him*," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law—the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards. The "stigma" resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of any "liberty" protected by the procedural guarantees of the Fourteenth Amendment.[86]

The Court also rationalized the holding in *Goss* by placing a stronger emphasis on the students' property interest.[87] The Court acknowledged that "[w]hile the [*Goss*] Court noted that charges of misconduct could seriously damage the student's reputation, it also took care to point out that Ohio law conferred a right upon all children to attend school, and that the act of the school officials suspending the student there involved resulted in a denial or deprivation of that right."[88] In overruling *Constantineau*, the majority opinion in *Paul* created the "stigma-plus" test, which says that a stigma or reputational harm will only be afforded procedural due process protection if there is also a deprivation of an additional liberty or property interest.[89] The stigma-plus test—though widely criticized—remains the law of the land,

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[82] *Id.* at 714.
[83] *Id.* at 707.
[84] *Id.* at 701.
[85] *Id.* at 708–09 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)) (emphasis added).
[86] *Id.* (emphasis added).
[87] *Id.* at 710.
[88] *Id.*
[89] *Id.* at 709–10.

but "it is not entirely clear what the 'plus' is[.]"[90]

In 2003, the Supreme Court applied the stigma-plus test in a predatory registration context in *Connecticut Department of Public Safety v. Doe*.[91] In that case, "registrants challenged their inclusion in the Connecticut online registry without a hearing to determine their individual dangerousness."[92] However, the Supreme Court reversed the Second Circuit, holding that the online registry postings did not violate procedural due process because the postings were "based on the fact of previous conviction," and the conviction process satisfied due process.[93] Thus, the defendant was not owed a separate hearing for a determination of the level of dangerousness.[94] The Court also cited the registration website's disclaimer of individual risk assessment:

> The registry is based on the legislature's decision to facilitate access to publicly-available information about persons convicted of sexual offenses. DPS has not considered or assessed the specific risk of reoffense with regard to any individual prior to his or her inclusion within this registry, and has made no determination that any individual included in the registry is currently dangerous. Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific individual.[95]

The Court assumed that "any consequence that flows from online dissemination of an offender's information is no different than that which generally flows from the public's knowledge of any conviction."[96]

B. Liberty Interest in the Context of Minnesota Predatory Offense Registration

In the 1999 case *Boutin v. LaFleur*, the Minnesota Supreme Court adopted the stigma-plus test.[97] Boutin was charged with two counts of third-degree criminal sexual conduct, one count of third-degree assault, and one

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[90] Jessica Ann Orben, Connecticut Department of Public Safety v. Doe*: Sex Offenders' Due Process Under "Megan's Law" and the Effectiveness of Sex Offender Registration*, 36 U. TOL. L. REV. 789, 795 (2005) (quoting Neu v. Corcoran, 869 F.2d 662, 667 (2d Cir. 1989)).
[91] 538 U.S. 1 (2003).
[92] Carpenter & Beverlin, *supra* note 9, at 1128 (citing *Conn. Dep't of Pub. Safety*, 538 U.S. at 3–4).
[93] *Conn. Dep't of Pub. Safety*, 538 U.S. at 4.
[94] *Id.*
[95] *Id.* at 5.
[96] Carpenter & Beverlin, *supra* note 9, at 1128 (citing *Conn. Dep't of Pub. Safety*, 538 U.S. at 7).
[97] 591 N.W.2d 711 (1999).

count of fifth-degree misdemeanor assault.[98] He pleaded guilty to the misdemeanor assault charge, and the other charges were dismissed.[99] Prior to his 40-month sentence, the judge informed Boutin that he was required to register under subdivision 1(b) based on his charges of third-degree criminal sexual conduct and third-degree assault charges and because his guilty plea resulted in a conviction that arose from the same set of circumstances as the predatory charges.[100] Boutin registered but filed suit against the Commissioner of Corrections, alleging (among other things) that the registration requirement violated his right to procedural due process since "he did not have an opportunity to confront the [predatory] charges against him."[101] The Minnesota Supreme Court applied the stigma-plus test and found that while the reputational harm associated with predatory registration may be sufficient to satisfy the "stigma" prong, the "minimal burden" of complying with the statute did not satisfy the "plus" prong.[102] As an alternative claim, Boutin asked the court to deviate from the stigma-plus test and "recognize, under the Minnesota Constitution, a protectable liberty interest in reputation alone."[103] The court acknowledged its power to do so,[104] but ultimately declined: "[W]e will not 'cavalierly construe our constitution more expansively than the United States Supreme Court has construed the federal constitution.'"[105]

In *Gunderson v. Hvass*, the Eighth Circuit followed suit in applying the "stigma-plus" test, holding that reputational harm alone was "not sufficient to invoke the procedural protection of the due process clause."[106] Despite holding so, the majority acknowledged the Minnesota registration statute's propensity for unfair results: "[F]or example, the statute would require registration of a person accused of both a predatory offense and a non-predatory offense arising out of the same set of circumstances who exercised his right to a trial and was acquitted of the predatory offense but convicted of the non-predatory one."[107] Ultimately, the court reiterated its obligation to defer to the intent of the Minnesota legislature.[108] In a

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[98] *Id.* at 713. Third-degree criminal sexual conduct and third-degree assault are predatory offenses requiring registration if convicted. MINN. STAT. § 243.166, subdiv. 1(b) (2022).
[99] *Boutin*, 591 N.W.2d at 713–14.
[100] *Id.* at 714. At the time *Boutin* was decided, section 243.166 only imposed the following requirements for registered offenders: "[T]he offender must submit a signed registration form which contains 'information required by the [BCA],' along with 'a fingerprint card, and photograph of the person taken at the time of the person's release from incarceration or, if the person was not incarcerated, at the time the person initially registered under this section' . . . sign and return an annual address verification form . . . [and] notify law enforcement officials in writing at least five days prior to any change in address." *Id.* at 715 (quoting MINN. STAT. § 243.166, subdiv. 4(a) (1998)) (citing MINN. STAT. § 243.166, subdiv. 3(b), 4(c)(1) (1998)).
[101] *Id.* at 714.
[102] *Id.* at 718.
[103] *Id.* at 718–19.
[104] *Id.* at 719 (citing State v. Oman, 110 N.W.2d 514, 522–23 (Minn. 1961)).
[105] *Id.* (quoting State v. Fuller, 374 N.W.2d 722, 726–27 (Minn. 1985)).
[106] 339 F.3d 639, 644 (8th Cir. 2003).
[107] *Id.* at 645.
[108] *Id.*

noteworthy concurring opinion, Judge C. Arlen Beam wrote that "the Minnesota Supreme Court's interpretation of the statute [section 243.166] in *Boutin v. LaFleur* . . . turn[ed] reason and fairness on its head."[109]

In 2010, in *State v. Lopez*, the Minnesota Supreme Court addressed the question of whether an individual is required to register based on a charge that is ultimately dismissed.[110] In that case, two brothers (Gabriel and José Carlos Lopez) were charged with a first-degree controlled-substance crime and two counts of aiding and abetting kidnapping, all arising out of the same set of circumstances.[111] The kidnapping charges were based on the allegations that as part of a drug sale to a confidential informant, the brothers "held the confidential informant and another individual hostage in the Lopez family garage for about 40 minutes until the informant arranged to pay $300 that he owed on the earlier drug transaction."[112] The court held that a defendant can be required to register based on a charge that is dismissed so long as the charge was supported by probable cause; the court determined that, in this case, the charges were supported by probable cause based on the informant's account of the events, even despite J.S.'s exculpatory statement.[113] The court also provided clarity about the "same set of circumstances requirement" in *Lopez*: "Although the conviction offense need not be based on identical facts to the charged predatory offense, the facts underlying the two must be sufficiently linked in time, location, people, and events to be considered the 'same set of circumstances.'"[114]

More recently, in *Thibodeaux v. Evans*, the Minnesota Court of Appeals—despite expansive changes to registration requirements and restrictions—reiterated the finding that the modern registration requirements found in section 243.166 still "do not sufficiently burden [a

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[109] *Id.* at 645 (Beam, J., concurring) (citing *Boutin*, 591 N.W.2d 711).
[110] 778 N.W.2d 700, 704 (Minn. 2010).
[111] *Id.* at 701–02.
[112] *Id.* at 701. The informant had previously purchased "a quantity of methamphetamine . . . for $900. The informant paid $600, and agreed to pay the remaining $300 at a later date." *Id.* at 702. It is worth noting that the informant's account of the facts differs greatly from J.S.'s account. The informant alleged that one of the brothers "got into the informant's car and told him that he was 'holding [the informant] hostage until [he received] his money.'" *Id.* at 702. The informant also alleged that same brother "threatened to punch him, forced him to drive to the Lopez home, and took possession of his cell phone." *Id.* The informant alleged that the brothers "locked him and J.S. in their garage for approximately forty minutes." *Id.* He then called the officer he was working for and told him he was being held hostage. *Id.* In contrast, J.S. claimed that the four individuals—the two brothers, the informant, and himself—met at a gas station coincidentally and the brothers invited J.S. to "hang out for a little bit." *Id.* at 702–03. J.S. alleged that he followed the brothers back to their house in his own vehicle and that the informant was in a third vehicle. *Id.* at 702. The informant alleged that then, the four individuals "just went into the [Lopez family's] garage"; the brothers "did not lock or even close the garage door behind them," but he did not necessarily "feel free to leave the garage until the informant had paid his $300 debt . . . ." *Id.* When asked if he felt like "he was being h[e]ld captive until the money was paid, he said, 'a little bit but not really.'" *Id.* (internal quotations omitted). According to J.S., "he was never threatened by the [brothers]" and "did not believe that the informant had been threatened by either [brother]." *Id.* at 703.
[113] *Id.* at 704.
[114] *Id.* at 706.

defendant's] liberty interest to constitute a due-process violation."[115] In that case, Thibodeaux—a juvenile—was charged with fourth-degree criminal sexual conduct.[116] Sixteen days after his initial charging, he was charged with fifth-degree criminal sexual conduct.[117] The second charge was based on the same set of circumstances and "contained an identical probable-cause statement"; however, it was filed in a new petition.[118] Thibodeaux pleaded guilty to the fifth-degree criminal sexual conduct charge—an offense that does not require registration—and the court dismissed the fourth-degree criminal sexual conduct charge.[119] However, because the fifth-degree criminal sexual conduct conviction arose from the same incident as the fourth-degree criminal sexual conduct charge, the law required him to register as a predatory offender.[120] He then filed suit against the Superintendent of the Bureau of Criminal Apprehension (BCA), alleging that "by requiring him to register as a predatory offender, [the BCA] violated his due-process rights."[121] Thibodeaux cited the expanded requirements in the predatory registration statute since the court's holding in *Boutin*, but the Minnesota Court of Appeals rejected that argument, affirming that *Boutin* "remain[ed] controlling precedent" despite the statute's changes.[122]

Most recently, in *Werlich v. Schnell*, the Minnesota Supreme Court seemed to signal that a procedural due process analysis need not consider "the collateral consequences resulting from registration as a predatory offender."[123] In the criminal case, Werlich was charged with "one count of kidnapping"—an enumerated offense—as well as "two counts of aggravated robbery[] and one count of unlawful possession of a firearm," all arising out the same set of circumstances.[124] The parties negotiated a plea agreement "that all sides agree was intended to allow him to participate in the Challenge Incarceration Program" (the Program),[125] a boot-camp style, rehabilitative intervention program designed to reduce recidivism and allow for early release.[126] The plea deal called for the State to dismiss the first complaint and file an entirely new complaint with a different docket

[115] 926 N.W.2d 602, 608 (Minn. Ct. App. 2019).
[116] *Id.* at 605.
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.* Thibodeaux also argued that "he was not charged with a predatory offense," to which the Minnesota Court of Appeals responded with a lesson in statutory interpretation. *Id.* at 605–06. The court provided that the language in subdivision 1(b) "does not require that the charged offense and ultimate conviction or adjudication be in the same petition," but "[r]ather . . . that the charged offense and adjudication arise 'out of the same set of circumstances.'" *Id.* at 606.
[122] *Id.* at 608.
[123] 958 N.W.2d 354, 358–59 (Minn. 2021).
[124] *Id.* at 359.
[125] *Id.*
[126] *Id.*; *Program Profile: Challenge Incarceration Program (CIP)*, NAT'L INST. OF JUST.: CRIME SOLUTIONS (July 31, 2017), https://crimesolutions.ojp.gov/ratedprograms/544#pd [https://perma.cc/FH6Z-APTF].

number—without the kidnapping charge.[127] Werlich pleaded guilty to the charges in the second complaint and was sentenced to seventy-one months in prison with the understanding that he was eligible for the Program and could begin supervised release after just six months (pending success in the Program).[128] Werlich applied and was admitted to the Program.[129] Still, the BCA required him to register as a predatory offender.[130] His status as a registered predatory offender meant that he was unable to participate in the Program and had to serve his entire sentence in prison.[131] Werlich then filed suit against the Commissioner of Corrections and the Superintendent of the BCA, arguing (among other things) that "the collateral consequences of the predatory offender registration statute violate his due process rights" because "revocation of supervised release is a paradigmatic form of punishment."[132] The Minnesota Supreme Court recounted its decision in *Boutin v. LaFleur*, which used the stigma-plus test to reach the conclusion that the subdivision 1(b) registration requirement, "while imposing stigma, did not" by itself "result in a 'loss of a recognizable interest' that could give rise to a liberty interest under procedural due process"; the court reiterated that an additional deprivation is required to warrant procedural due process protection.[133] Werlich argued that his collateral consequence of Program eligibility exclusion satisfied that "plus" part of the stigma-plus test; he claimed he had a "protectable liberty interest in the opportunity for conditional release under the Program."[134] The court agreed that a liberty interest is created "when release is mandated by statute."[135] However, because the Commissioner of Corrections has "discretion on who to admit into the Program . . . no particular person has a right to participate in the Program."[136] Thus, Werlich did not have a "'concrete expectation of release' . . . [giving] rise to a liberty interest."[137]

IV. DISCUSSION

A. *Minnesota Statutes Section 243.166 violates procedural due process.*

[127] *Werlich*, 958 N.W.2d at 359–60.
[128] *Id.* at 360; *Program Profile: Challenge Incarceration Program (CIP)*, *supra* note 126.
[129] *Werlich*, 958 N.W.2d at 360.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 361, 367 (citing United States v. Haymond, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring)); United States v. Bennett, 561 F.3d 799, 802 (8th Cir. 2009).
[133] *Id.* at 362 (citing Paul v. Davis, 424 U.S. 693 (1976)).
[134] *Id.* at 372.
[135] *Id.* (citing Bd. of Pardons v. Allen, 107 S. Ct. 2415 (1987)). "Supervised release under Minnesota law includes 'a presumption from the moment that a court imposes and explains the sentence that the inmate will be released from prison on a certain date' unless the inmate commits a disciplinary offense. The inmate consequently has a 'concrete expectation of release,' which gives rise to a liberty interest." *Werlich*, 958 N.W.2d at 372 (citations omitted) (quoting Carillo v. Fabian, 701 N.W.2d 763, 772–73 (Minn. 2005)).
[136] *Werlich*, 958 N.W.2d at 372.
[137] *Id.* (quoting *Carillo*, 701 N.W.2d at 772 n.6).

1. *Reputational harm should once again be recognized as a liberty interest deserving of procedural due process protection.*

The caselaw laid out in Part III prescribes that reputation is not currently considered a liberty interest; therefore, reputational harm is not afforded procedural due process protection. However, the U.S. Supreme Court reached this stance by disregarding stare decisis and deviating from the original holding in *Wisconsin v. Constantineau*. Rather than acknowledge or justify its departure, it appears as though the Supreme Court tried to rewrite its *Constantineau* holding in *Paul v. Davis* and hoped no one would notice. The original holding in *Constantineau* was that "[w]here a person's good name, reputation, honor, or integrity is at stake *because of what the government is doing to him*, notice and an opportunity to be heard are essential."[138] The Court went on to say that "[o]nly when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."[139] This certainly sounds like a recognition of reputational harm as a liberty interest which warrants procedural due process protection. However, the *Constantineau* holding was rewritten in *Paul v. Davis*.[140] The Court in *Paul* claimed:

> [T]he italicized language in the last sentence quoted, "*because of what the government is doing to him*," referred to the fact that the governmental action taken in that case deprived the individual of a right previously held under state law the right to purchase or obtain liquor in common with the rest of the citizenry. "Posting," therefore, significantly altered her status as a matter of state law, and it was that alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards.[141]

This discussion of the alteration of the plaintiff's status to obtain liquor as a matter of state law appears nowhere in the *Constantineau* opinion.[142]

Many in the legal community have labeled the distinguishment as a post hoc, made-up "historical invention."[143] "Even the most generous

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[138] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (emphasis added).

[139] *Id.*

[140] Paul v. Davis, 424 U.S. 693, 708–09 (1976).

[141] *Id.* (italics added).

[142] *See Constantineau*, 400 U.S. at 433.

[143] Logan, *supra* note 62, at 1231 n.93. "Under *Constantineau*, any damage to an individual's reputation attributable to a government source constituted a deprivation of a protected liberty interest." *Id.* (quoting Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1984 (1996)). "The Court's re-rationalization of the earlier cases is wholly startling to anyone familiar with those precedents. In many ways I find this *Paul*'s most disturbing aspect." *Id.* (quoting Henry P. Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 424 (1977)). It is "simply impossible to reconcile the

reading of *Constantineau* compels the conclusion that the holding had virtually nothing to do with a deprivation of the right to buy alcohol and everything to do with injury to a free-standing interest in reputation."[144] In *Paul*, the Court's repudiation of the *Constantineau* holding is even more glaring when you look to the dissent.[145] The dissenting Justices did not disagree with the majority on "the question of whether a liberty interest was at stake."[146] Rather, the dissenting Justices were concerned about abstention.[147]

Even if the majority in *Constantineau* had included the reasoning purported by the *Paul* opinion, "in a 'Constitution for a free people,' it is an unsettling conception of 'liberty' that protects an individual against state interference with his access to liquor but not with his reputation in the community."[148] "[I]f the meaning of words in the founding era matters, reputation deserves constitutional protection . . . ."[149] Therefore, the Minnesota Supreme Court should abandon the "stigma-plus" test, as it has the power to do.[150] The cases in Minnesota where a plaintiff challenges the registration statute on procedural due process grounds are unlike cases in other states where defendants receive some process through their conviction.[151] In *Connecticut Department of Public Safety*, the U.S.

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explication of procedural due process contained in *Paul v. Davis* with prior decisions . . . ." *Id.* (quoting David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 328 (1976)). See Logan's mention of Barbara E. Armacost, *Race and Reputation: The Real Legacy of Paul v. Davis*, 85 VA. L. REV. 569, 576–79 (1999), for a critique of the Court's narrowing of constitutional protection based on underlying concerns about the scope of tort law: "Even the most generous reading of *Constantineau* compels the conclusion that the holding had virtually nothing to do with a deprivation of the right to buy alcohol and everything to do with injury to a free-standing interest in reputation. . . . The Court's reasoning is perplexing in a number of ways. First of all, the Court appears to have it exactly backwards: As a matter of positive law, even traditional forms of 'property' have legal existence only because—indeed precisely because—the coercive power of the state can be invoked against anyone who interferes with them. The availability of tort recovery or the existence of administrative procedures is evidence that property rights do exist rather than evidence that they do not. Thus, the mere existence of a tort remedy for defamation does not support the Court's conclusion that the plaintiff has no protected interest in reputation, and it arguably cuts in exactly the opposite direction."

[144] Armacost, *supra* note 143, at 576 (emphasis added).

[145] Logan, *supra* note 62, at 1185 (citing *Constantineau*, 400 U.S. at 440 (Burger, J., dissenting)).

[146] *Id.* at 1185 n.94 (citing *Constantineau*, 400 U.S. at 440 (Burger, J., dissenting)).

[147] *Id.* "Very likely we reach a correct result since the Wisconsin statute appears, on its face and in its application, to be in conflict with accepted concepts of due process. The reason for my dissent is that it seems to me a very odd business to strike down a state statute . . . without any opportunity for the state courts to dispose of the problem either under the Wisconsin Constitution or the U.S. Constitution." *Constantineau*, 400 U.S. at 440 (Burger, J., dissenting).

[148] Monaghan, *supra* note 143, at 426.

[149] Sheldon Gelman, *"Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights*, 78 MINN. L. REV. 585, 696 (1994).

[150] *See* Boutin v. LaFleur, 591 N.W.2d 711, 718 (Minn. 1999); State v. Oman, 110 N.W.2d 514, 522–23 (Minn. 1961).

[151] *See, e.g.*, Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 2 (2003).

Supreme Court rejected the plaintiff's procedural due process claim, stating that "a convicted offender has already had a procedurally safeguarded opportunity to contest."[152] In doing so, the Court assumed that "any consequence that flows" from registration "is no different than that which generally flows from the public's knowledge of any conviction."[153]

That is not applicable for defendants in Minnesota who are forced to register based only on a determination of probable cause that they committed the enumerated offense—a very vague standard.[154] Particularly absurd, for the purposes of registration in Minnesota, a determination of probable cause overrides an acquittal; this means that even if a jury finds a defendant not guilty of an enumerated predatory offense, the defendant is still required to register as a predatory offender merely because the defendant was charged with the offense.[155] This scenario falls well outside of the asserted legislative intent—preventing predatory offenders from pleading out of the registration requirement—and is in direct opposition to both the United States and Minnesota Constitutions' requirements of procedural due process.

2. Even if courts refuse to recognize reputational harm as a liberty interest, the Minnesota legislature should amend section 243.166 subdivision 1(b) to ensure defendants the opportunity to be heard prior to registration due to near-certainty of life-altering collateral consequences.

Even if the Minnesota Supreme Court refuses to abandon the "stigma-plus" test, the Minnesota legislature should amend the statute to ensure defendants receive a hearing prior to registration. The serious implications of subdivision 1(b) demand that defendants receive some sort of process prior to requiring registration. It is imperative to look beyond what the statute requires the defendant provide to the BCA and consider "the cascading and devastating consequences that flow" from predatory offender registration.[156] While the courts appear to disregard collateral consequences in their procedural due process analysis, the legislature can and should consider such consequences.

On its face, section 243.166 provides that if registered individuals must be admitted to a healthcare facility, they need to disclose their status as a predatory offender to the facility prior to admission.[157] Additionally, once law enforcement is notified of the individual's admittance to the health care facility, law enforcement must distribute a "fact sheet" to the health care provider as well as "all residents of the facility" that includes the following

[152] *Id.* at 7.
[153] Carpenter & Beverlin, *supra* note 9, at 1128 (citing *Conn. Dep't of Pub. Safety*, 538 U.S. at 7).
[154] MINN. STAT. § 243.166 (2022).
[155] *See* State v. Haukos, 847 N.W.2d 270 (Minn. Ct. App. 2014).
[156] Carpenter & Beverlin, *supra* note 9, at 1129.
[157] MINN. STAT. § 243.166, subdiv. 4(b)(b) (2022).

information: "(1) name and physical description of the offender; (2) the offender's conviction history, including the dates of convictions; (3) the risk level classification assigned to the offender . . . ; and (4) the profile of likely victims."[158] It is important to note that the form does not differentiate between what the registered individual has been charged of versus convicted of. An offender must also "consent to a treatment facility, shelter, or residential housing unit releasing information to law enforcement about her admission to, or residence in such facilities," and many treatment facilities deny entrance to individuals registered as predatory offenders.[159]

Another serious collateral concern is the way in which section 243.166 interacts with parenting rights. When interpreted together, sections 243.166, 260C.301, and 260.012 provide that if a person is required to register as a predatory offender under subdivision 1(b), the juvenile court may involuntarily terminate that person's parental rights.[160] Additionally, section 244.057 provides that the correction agency supervising an individual required to register as a predatory offender must authorize that individual to live in a household with children.[161] The agency must also "notify the appropriate child protection agency" prior to authorizing the individual to live with children.[162] The risk of having one's children taken from them without the requirement of reunification—without ever being convicted of an enumerated predatory offense—sounds a procedural due process alarm, much more so than one's access to liquor.

Though not part of the text of section 243.166, residency restrictions for individuals registered as predatory offenders have skyrocketed despite the lack of "research to support residence restrictions as effective in reducing sexual recidivism."[163] As of April 2022, ninety-three Minnesota communities have predatory offender residency restriction laws.[164] For example, the city of Rosemount prohibits predatory offenders from living "within [2,000] feet . . . of any school, park, licensed childcare facility, place of worship that provides regular education programs for

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[158] *Id.* § 243.166, subdiv. 4(b)(c)–(d).

[159] Bedeau v. Evans, 926 N.W.2d 425, 432 (Minn. Ct. App. 2019) (citing MINN. STAT. § 243.166, subdiv. 4(a) (2018)).

[160] MINN. STAT. § 260C.301, subdiv. 1(b)(9) (2022) (citing MINN. STAT. § 260.012(g)(5) (2022)). Section 260.012 generally provides that, when a juvenile court assumes jurisdiction over a child who is alleged to be in need of protection or services, "the court shall ensure that reasonable efforts . . . by the social services agency are made to prevent placement or to eliminate the need for removal and to reunite the child with the child's family at the earliest possible time." Matter of Welfare of Child of S.B.G., 981 N.W.2d 224, 229 (Minn. Ct. App. 2022) (quoting MINN. STAT. § 260.012(a) (2020)). "Reunification of a child with a parent is not required if the parent has been convicted of . . . an offense that requires registration as a predatory offender under section 243.166, subdivision 1b, paragraph (a) or (b)." *Id.* (quoting MINN. STAT. § 260.012(g)(5) (2020)).

[161] MINN. STAT. § 244.057 (2022).

[162] *Id.*

[163] Weinberger, *supra* note 50, at 1.

[164] *Residency Restriction Ordinances in Minnesota*, MINN. DEP'T OF CORR. (Apr. 6, 2022), [https://perma.cc/6C6G-TP6G]. "Local ordinances across Minnesota are not consistent with regard to the scope of residency or zone restrictions." Weinberger, *supra* note 50, at 10.

children (i.e., Sunday school), or dedicated vulnerable adult housing."[165] However, research suggests that residency restrictions—like many predatory registration expansions—are founded on public fear as opposed to evidence-based recommendations.[166] The Minnesota Department of Corrections released a study in April 2007 entitled "Residential Proximity & Sex Offense Recidivism."[167] The study looked at "the potential deterrent effect of residency restrictions by analyzing the sexual reoffense patterns of the 224 recidivists released between 1990 and 2002 who were re-incarcerated for a sex crime prior to 2006."[168] The study reported the following:

> [T]he results clearly indicated that what matters with respect to sexual recidivism is not residential proximity, but rather social or relationship proximity. A little more than half (N = 113) of the 224 cases were "collateral contact" offenses in that they involved offenders who gained access to their victims through another person, typically an adult. . . . Although it is possible that a residency restrictions law could avert a sex offender from recidivating sexually, the chances that it would have a deterrent effect are slim because the types of offenses it is designed to prevent are exceptionally rare and, in the case of Minnesota, virtually non-existent over the last 16 years. *Rather than lowering sexual recidivism, housing restrictions may work against this goal by fostering conditions that exacerbate sex offenders' reintegration into society.*[169]

Predatory registration also has the potential to create devastating impacts on a person's employment. The public's understanding of predatory registration is that if someone is registered as a predatory offender, that individual was found guilty of a predatory offense. That "public" includes employers. Many employers do not hire registered predatory offenders, regardless of whether they were convicted of a predatory offense or not.

> It follows that when law enforcement officials identify an individual as a criminal wrongdoer . . . the potential for reputational harm is virtually certain. The words and actions of police officers and prosecutors are viewed as official declarations of the law enforcement arms of government. An arrest or charge is a "public act" that

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[165] ROSEMOUNT, MINN. CODE § 7-10-3(A) (2022).
[166] Weinberger, *supra* note 50, at 1.
[167] MINN. DEP'T OF CORR., RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA (2007), https://mn.gov/doc/assets/04-07SexOffenderReport-Proximity_tcm1089-272769.pdf [https://perma.cc/R72P-3WFG].
[168] *Id.* at 1.
[169] *Id.* at 2–4 (emphasis added).

> brands the subject as a criminal in the eyes of others; it has the potential to "disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends."[170]

It goes without saying that loss of employment can produce negative, unrelenting ripple effects in a person's life.

When considering several of the life-altering collateral consequences that flow from predatory registration, it is crucial to acknowledge that collateral consequences do not impact racial and social groups equally.[171] In 2021, the Criminal Sexual Conduct Working Group raised concerns regarding "the registry's increasingly disparate impact on BIPOC, the homeless, juveniles, and other vulnerable people and communities."[172] This is an area in which we completely lack data.

V. CONCLUSION

Something needs to change. The Minnesota Supreme Court must abandon the stigma-plus test in procedural due process analysis and acknowledge reputational harm as a liberty interest on its own. Additionally, Minnesota Statutes section 243.166 subdivision 1(b) must be repealed so that defendants cannot be forced to register based only on a charge. In the alternative, subdivision 1(b) should not require a person to register as a predatory offender if they are acquitted of the predatory charge, and it should "provide offenders who have never been convicted of an enumerated sexual offense with a hearing to challenge inclusion on a sex offender registry."[173] Considering the life-altering burdens and consequences that flow from predatory registration, judges must be afforded discretion to modify defendants' registration requirements based on the circumstances. To leave section 243.166 unchanged is wholly contrary to the underlying principles of procedural due process.

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[170] Armacost, *supra* note 143, at 622.

[171] *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 174–220 (The New Press ed., 2020) (discussing how collateral consequences adversely affect Black Americans); Trevor I. Shoels, *The Color of Collateral Damage: The Mutilating Impact of Collateral Consequences on the Black Community and the Myth of Informed Consent*, 21 J. L. SOC. DEVIANCE 194 (2021) (discussing the disparate impact of collateral consequences on different racial groups and the constitutional implications).

[172] Bettison, *supra* note 4, at 31.

[173] Marissa Ceglian, *Predators or Prey: Mandatory Listing of Non-Predatory Offenders on Predatory Offender Registries*, 12 J.L. & POL'Y 843, 886 (2004).