

ALL EXCEPT FOR: ANIMUS THAT DRIVES EXCLUSIONS IN CRIMINAL JUSTICE REFORM

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ABSTRACT**

Saying something is true does not make it so. And saying it louder does not make it truer. But such is the legislative posture behind modern day sex offense registration laws that punish those who commit sex crimes because of entrenched myths that overstate the laws' positive impact on public safety and exaggerate recidivism rates of offenders. And it is not only registration schemes themselves that have been scaffolded by these myths, but numerous ancillary laws that exclude benefits to offenders strictly because they have committed sex offenses.

Sadly, this sticky but false narrative has provided the animus that galvanized implementation of registration and notification regimes. And in its most recent chapter, the narrative has been formalized into blanket exclusions—or what this article calls “all except for” provisions—that have been inserted into a myriad of criminal justice reform efforts without much notoriety.

The effect? Registrants and their families have been prohibited from broad-based and important ameliorative changes to the carceral state, many to which they should be entitled and to which they are denied only because of their status as registrants. Indeed, within comprehensive legislation

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** This paper stems from remarks made at the 2020 Alliance for Constitutional Sex Offense Laws Conference.

covering numerous crime and sentencing reforms, these ubiquitous blanket exclusions have the markings of boilerplate language that have been introduced even where the new legislation has no rational relationship to the protection of the public's safety or the prior sex offense conviction.

This article examines the moral panic and false data used to buttress blanket exclusions—their inflated importance obvious in the conversation. It concludes that these measures, which are untethered to public safety concerns, and only supported by governmental and community animus, violate Fourteenth Amendment protections.

INTRODUCTION

Saying something is true does not make it so. And saying it louder does not make it truer. But such is the legislative posture behind modern day sex offense registration laws that punish sex offenders¹ because of entrenched myths that overstate the laws' positive impact on public safety² and exaggerate recidivism rates of offenders.³ And it is not only registration schemes themselves that have been scaffolded by these myths, but numerous

1. "Sex offender" is a ubiquitous but misleading and damaging term. It connotes a permanent characteristic of a person who has committed a crime categorized as a sexual offense. It carries demonstrably false connotations and causes irreparable harm to the reputations of those so labeled. See Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 247 (2016) (arguing that the term "sex offender" is a developed stereotype that reflects public opinion rather than evidence-based facts correlated with people that have perpetrated sex offenses). Although this article employs the term within certain contexts, the article frequently uses phrases such as "those who commit a sexual offense" and "registrant." See also Guy Hamilton-Smith, *Banishing 'Sex Offenders': How Meaningless Language Makes Bad Law*, 50 SW. L. REV. 44, 52 (2020) (chastising a public that "talk[s] about sex offenders like they are something real—a category of person that can be meaningfully described with a label that tells us something about who they are, what they do, how they spend their days. Those answers, in turn, inform what society must do about them, to them, with them.").

2. See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 165, 181 (2011) (asserting that notification laws coupled with registration schemes serve to decrease public safety, not enhance it); Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355, 407-08 (2005); *accord* *Does #1-5 v. Snyder*, 834 F.3d 696, 704-05 (6th Cir. 2016) ("Tellingly, nothing the parties have pointed to in the record suggests that the residential restrictions have any beneficial effect on recidivism rates."); see also KRISTEN ZGOBA ET AL., RSCH. & EVALUATION UNIT OFF. POL'Y & PLAN. N.J. DEP'T CORR., MEGAN'S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 1, 2 (2008), <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf> ("Given the lack of demonstrated effect of Megan's Law on sexual offenses, the growing costs may not be justifiable.").

3. See Declaration of R. Karl Hanson at 7, *Doe v. Harris*, No. 3:12-cv-05713-TEH, 2013 WL 144048 (N.D. Cal. Jan. 11, 2013); see also *Snyder*, 834 F.3d at 704-05 (highlighting several studies that reject the prevailing view that those convicted of sex offenses recidivate at a much higher rate than the rest of the prison population).

ancillary laws that exclude benefits to offenders strictly because they have committed sex offenses.⁴

Despite empirical studies to the contrary,⁵ legislatures persist in the assertion that these offenders must be singled out for harsher treatment because their convictions portend future dangerousness.⁶ The basis for this assertion is the wildly familiar perception but wholly inaccurate finding that sex offenders recidivate at rates that are “frightening and high.”⁷ Ira and Tara Ellman’s article, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, exposes the faulty and scant data that

4. See *infra* Part I (offering a sample of legislation with blanket exclusions that block those who commit sex offenses from receiving these benefits).

5. See *infra* Part II.B (reviewing empirical studies that support the proposition that those who commit sex offenses recidivate at lower rates than other felons); see also AMANDA PETTERUTI & NASTASSIA WALSH, JUST. POL’Y INST., REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH AND COMMUNITIES 12 (2008), http://www.justicepolicy.org/uploads/justicepolicy/documents/walsh_act.pdf (reporting sixty-one studies that found that recidivism rates of non-sexual offenders were much higher than sexual offenders).

6. See, e.g., ARK. CODE ANN. § 12-12-902 (West 2014 & Supp. 2019) (“The General Assembly finds that sex offenders pose a high risk of reoffending after release from custody, that protecting the public from sex offenders is a primary governmental interest, that the privacy interest of persons adjudicated guilty of sex offenses is less important than the government’s interest in public safety, and that the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting the public safety.”); see also Sexual Offender Registration Notification and Community Right-to-Know Act, ch. 83, § 18-8302, S.B. No. 1297, 2 (1998) (current version at IDAHO CODE ANN. § 18-8302 (West 2006 & Supp. 2020)) (“The legislature finds that sexual offenders present a danger.”); MISS. CODE ANN. § 45-33-21 (West 2012 & Supp. 2019) (“The Legislature finds that the danger of recidivism posed by criminal sex offenders and the protection of the public from these offenders is of paramount concern and interest to government.”). And it is not only a modern view. In 1947, the myth of high recidivism rates provided support for California’s first registry. See *Barrows v. Mun. Ct.*, 464 P.2d 483, 486 (Cal. 1970) (explaining California Penal Code section 290 was created to assure that persons convicted of sexual offenses “shall be readily available for police surveillance at all times *because the Legislature deemed them likely to commit similar offenses in the future.*” (emphasis added)).

7. See Ira Mark Ellman & Tara Ellman, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 497-98 (2015) (disputing the validity of the term by tracing its origin to a wholly inaccurate citation by the United States Supreme Court). For a critical review of a state court’s use of the term, see *State v. Chapman*, 944 N.W.2d 864, 879 (Iowa 2020) (Appel, J., concurring specially) (scolding his fellow justices for having adopted the phrase without independent research, writing: “Embarrassingly, the ‘frightening and high’ risk of recidivism has been totally eviscerated subsequent to *McKune* and *Smith*. The source of the statement was run into the ground by scholars Tara and Ira Mark Ellman.”).

was used by the Supreme Court in two decisions⁸ to promote this inaccurate view.⁹

Faulty data is not relegated to adult offenders. Flawed statistics also provided the impetus to place child offenders on the registry. Noted scholar and researcher, Franklin E. Zimring, traced the claim of high recidivism rates among child offenders to a 1993 study conducted by an inexperienced and ill-equipped Task Force that included “387 unproven assumptions about adolescent behavior, appropriate justice system responses, dangerousness, and the impact of various interventions on the long-term development and life opportunities of juvenile offenders.”¹⁰

And even if the data were not faulty, we know that registration schemes do not deliver what was promised: they do not keep the community safe. In a groundbreaking study by J.J. Prescott and Jonah E. Rockoff, they offered a nuanced look at sex offense registration and notification laws based on data that spanned time and geography.¹¹ Their two takeaways unmask the false position that notification laws enhance public safety. Their findings support the premise that notification laws do not curtail crime,¹² and more importantly, “convicted sex offenders become more likely to commit crimes when their information is made public because the associated psychological, social, or financial costs make crime-free life relatively less attractive.”¹³ So powerful were their conclusions that courts have paused over them in reviewing the constitutionality of registration schemes.¹⁴

8. See *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)); see also Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative*, 45 SW. L. REV. 461, 487-89 (2016) (analyzing why the message “frightening and high” permeated and “stuck” in the public conversation).

9. Not surprisingly, the term “frightening and high” caught on. See Ellman & Ellman, *supra* note 7, at 497 (revealing that “[a] Lexis search of legal materials found that phrase in 91 judicial opinions, as well as briefs in 101 cases.”). The Ellmans were not alone in their criticism of the underlying data used to support the false narratives. See Heather Ellis Cucolo & Michael L. Perlin, “*The Strings in the Books Ain’t Pulled and Persuaded*”: *How the Use of Improper Statistics and Unverified Data Corrupts the Judicial Process in Sex Offender Cases*, 69 CASE W. RESV. L. REV. 637, 640 (2019) (“The premises of judges’ decisions related to the assessment of who is a sexually violent predator are built on houses of cards that could and should crumble quickly if we dispassionately examine the underlying statistics and data.”).

10. FRANKLIN E. ZIMRING, *AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEX OFFENDING* 78 (2009).

11. Prescott & Rockoff, *supra* note 2, at 163.

12. *Id.* at 164.

13. *Id.* at 165; see also *infra* notes 190-93 and accompanying text.

14. See, e.g., *Does #1-5 v. Snyder*, 834 F.3d 696, 704-05 (6th Cir. 2016) (referencing the study to raise doubt that notification schemes serve a non-punitive purpose); *Hoffman v. Vill. of Pleasant Prairie*, 249 F. Supp. 3d 951, 963 n.10 (E.D. Wis. 2017) (chastising the government for recognizing that “the Ordinance could have a negative effect on sex offender recidivism and community safety by making them outcasts.”); *Jordan v. Lee*, No. 3:19-cv-00907, 2020 WL 4676477, at *16 (M.D.

Sadly, the sticky but false narrative that registration and notification laws serve the public good has provided the animus that galvanized implementation of registration and notification regimes. And in its most recent chapter, the narrative has been formalized into blanket exclusions—or what this article calls “all except for” provisions—that have been inserted into a myriad of criminal justice reform efforts. *The effect?* Registrants and their families have been prohibited from broad-based and important ameliorative changes to the carceral state, many to which they should be entitled, and to which they are denied only because of their status as registrants.¹⁵

There is no doubt that the country is on the precipice of change. At all levels of government, we are witnessing reforms in incarcerating¹⁶ and policing policies.¹⁷ Too slowly, it has dawned on us the seriously negative consequences of mass incarceration, propped up by decades of retributive policies,¹⁸ monetary bail requirements,¹⁹ three strikes laws,²⁰ and lengthy prison sentences.²¹ The bill has come due and we can no longer afford it.²²

Tenn. Aug. 12, 2020) (citing the study as a part of its conclusion that Tennessee’s registration schemes are punitive).

15. See *infra* Part I (listing reform efforts across the country that have purposefully excluded registrants).

16. See *infra* notes 67, 69-72, 74, 79.

17. The killing of George Floyd in May 2020 by Minneapolis police officers galvanized national protests and broad-based policing reforms. See, e.g., Weihua Li & Humera Lodhi, *The States Taking on Police Reform After the Death of George Floyd*, FIVETHIRTYEIGHT (June 18, 2020, 3:00 PM), <https://fivethirtyeight.com/features/which-states-are-taking-on-police-reform-after-george-floyd> (reporting that within weeks of George Floyd’s killing, “legislatures had introduced, amended or passed 159 bills and resolutions related to policing.”); see also Orion Rummler, *The Major Police Reforms Enacted Since George Floyd’s Death*, AXIOS (Oct. 1, 2020), <https://www.axios.com/police-reform-george-floyd-protest-2150b2dd-a6dc-4a0c-a1fb-62c2e999a03a.html> (detailing specific police reform from police departments around the country).

18. See, e.g., Alfred Blumstein, *Dealing with Mass Incarceration*, 104 MINN. L. REV. 2651, 2655-60 (2020) (recounting the contributing factors to the increase in incarceration rates); see also Chrysanthi Leon et al., *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 WIDENER L. REV. 127, 128 (2011) (“Nationally, these largely unopposed general sentencing policies, as well as those focused on sex offenders, have led to spectacular growth in the imprisonment of adult sex offenders since the 1980s, even though crime rates have generally declined.”).

19. See generally Elizabeth Hardison, *Cash Bail, Explained: How it Works and Why Criminal Justice Reformers Want to Get Rid of It*, PA. CAP.-STAR (July 14, 2019), <https://www.penncapitalstar.com/criminal-justice/cash-bail-explained-how-it-works-and-why-criminal-justice-reformers-want-to-get-rid-of-it> (cataloguing some of the difficulties that arise from the bail system).

20. See *Ewing v. California*, 538 U.S. 11, 30-31 (2003) (upholding “three strikes” laws and consequently packing prisons with more serving lifetime sentences).

21. For a searing examination of the root of mass incarceration, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (New Press 2020).

22. A pivotal point of reckoning at the damage caused by mass incarceration occurred for California prisons in 2011. See *Brown v. Plata*, 563 U.S. 493, 501-06 (2011) (condemning the

The era of criminal justice reform did not happen overnight, but changes have been sweeping and with bipartisan support rarely seen these days on other topics.²³ Occurring at both the national²⁴ and state level,²⁵ reform efforts have resulted in a dizzying array of legislation to reclassify crimes to

overcrowded conditions of California prisons). Delaware was another state with an over-incarcerated population. See *Delaware Profile*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/profiles/DE.html> (last visited Oct. 13, 2020) (reporting that Delaware's incarceration rate was 756 per 100,000 people, as compared to the national average of 698 per 100,000).

23. See, e.g., Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 800-03 (2019) (recounting the political efforts on both sides of the aisle to gain reform at the federal level); Jonathan Feniak, Article, *The First Step Act: Criminal Justice Reform at a Bipartisan Tipping Point*, 96 DENV. U. L. REV. ONLINE 166, 171-72 (2019), https://static1.squarespace.com/static/5cb79f7efd6793296c0eb738/t/5cb7a01902d7bcc7a186359c/1551665920747/FINAL_2019_3_3_Feniak.pdf; see also Jessica Kelley & Arthur Rizer, *Keep Calm and Carry on with State Criminal Justice Reform*, 32 FED. SENT'G REP. 86, 87-89 (2019) (outlining the political efforts in various states).

24. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, 34, and 42 U.S.C.).

25. States developed comprehensive legislative packages of criminal justice reform roughly at the same time as the federal government did. See, e.g., Safe Neighborhoods and Schools Act, 2014 Cal. Legis. Serv. Prop. 47 (West) (codified as amended in scattered sections of CAL. GOV'T, PENAL, and HEALTH & SAFETY CODES) (boasting a wide range of criminal reforms aimed at reducing incarceration); Public Safety and Rehabilitation Act of 2016, 2016 Cal. Legis. Serv. Prop. 57 (West) (codified as amended at CAL. CONST. art. 1, § 32 and CAL. WELF. & INST. CODE §§ 602, 707 (West 2016 & Supp. 2020)) (supporting a host of reforms to reduce prison spending and rehabilitate minors); CAL. CONST. art. 1, § 32, subdiv. (a)(1) ("Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense."); Rachel Frazin, *Florida Legislature Passes Criminal Justice Reform Bill*, THE HILL (May 3, 2019, 4:03 PM), <https://thehill.com/homenews/state-watch/442053-florida-legislature-passes-compromise-criminal-justice-reform-bill> (describing the scope of the reform); S.B. 220, 2017 Leg., Reg. Sess. (La. 2017) (eliminating mandatory minimum sentences and reducing maximum sentences for several nonviolent offenses); S.B. 221, 2017 Leg., Reg. Sess. (La. 2017) (reducing habitual offender penalties); H.B. 7104, 2015 Gen. Assemb., Spec. Sess. (Conn. 2015) (reducing penalties for drug possession); H.B. 349, 2013 Leg., Reg. Sess. (Ga. 2013) (allowing judges to reduce sentences and fines by up to fifty percent for drug offenses).

shorten prison time,²⁶ provide parole²⁷ and expungement opportunities,²⁸ change long-standing policies on monetary bail,²⁹ and create reentry and diversion programs.³⁰

That is, all except for those who have been convicted of sex offenses.³¹

Blanket provisions that exclude those who have committed sex offenses are commonplace in this era of reform,³² inserted into legislative reform regimes without much opposition or notoriety.³³ Indeed, within

26. See, e.g., Safe Neighborhoods and Schools Act, 2014 Cal. Legis. Serv. Prop. 47 (West) (codified as amended in scattered sections of CAL. GOV'T, PENAL, and HEALTH & SAFETY CODES) (reducing prison sentences for nonviolent crimes); H.B. 1269, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014) (reclassifying crimes to reduce prison sentences); H.B. 4, 150th Gen. Assemb., Reg. Sess. (Del. 2020) (removing most Title 16 drug offenses from list of violent felonies).

27. See, e.g., CAL. CONST., art. 1, § 32, subdiv. (a)(1) (“Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.”); S.B. 54, 30th Leg., 4th Spec. Sess. (Alaska 2017) (granting discretionary parole to persons who have not been convicted of non-felony and non-sex offenses); S.B. 16, 2017 Leg., Reg. Sess. (La. 2017) (permitting most people sentenced to life as juveniles to be considered for parole after twenty-five years in prison); S.B. 139, 2017 Leg., Reg. Sess. (La. 2017) (making people convicted of nonviolent, non-sex offenses including habitual offenders eligible for parole consideration after serving twenty-five percent of their sentences); H.B. 7104, 2015 Gen. Assemb., Spec. Sess. (Conn. 2015) (establishing an expedited parole process for nonviolent, no-victim offenses); S.B. 367, 2015 Leg., Reg. Sess. (Ga. 2016) (extending parole eligibility to some who have served decades-long sentences for drug-related offenses or nonviolent felonies).

28. See, e.g., H.B. 7125, 2019 Leg., Reg. Sess. (Fla. 2019) (providing expungement of a criminal history record by a person found to have acted in lawful self-defense).

29. See, e.g., H.B. 1436, 30th Leg., Reg. Sess. (Haw. 2019) (setting bail under the least restrictive conditions with consideration of offense alleged, possible punishment upon conviction, and the defendant’s financial circumstances); S.B. 91, 29th Leg., Reg. Sess. (Alaska 2016) (requiring bail release to be determined by a pretrial service officer using a risk assessment tool developed by the Department of Corrections).

30. See, e.g., H.B. 7125, 2019 Leg., Reg. Sess. (Fla. 2019) (requiring the Department of Children and Families to provide rehabilitation programs to criminal offenders designated as sexually violent predators); H.B. 681, 2017 Leg., Reg. Sess. (La. 2017) (allowing people with drug-related convictions to receive public assistance through the Supplemental Nutrition Assistance Program (SNAP) and the Temporary Assistance for Needy Families program (TANF)). Beyond the scope of this paper is the recent interest to provide disenfranchised felons the right to vote and to sit on juries.

31. Purposeful exclusion of registrants was never more explicitly stated than in a response to the FAQs distributed by the Judicial Council on the standing of registrants in California reform efforts. See *Frequently Asked Questions*, CAL. CTS. (Nov. 2016), <https://www.courts.ca.gov/documents/Prop47FAQs.pdf> (announcing exclusions from reform for “[p]ersons with one or more prior convictions for offenses specified under Penal Code section 667(e)(2)(C)(iv) or for a sex offense that requires registration under section 290(c) are *not* eligible for the new misdemeanor, resentencing, or reclassification provisions of Proposition 47. Instead, those persons generally remain subject to punishment under traditional sentencing rules.” (footnote omitted)).

32. See *infra* Part I (detailing the laws and “all except for” provisions).

33. In the early stages of drafting federal criminal reform, there was opposition to the “all except for” regulations. See Hopwood, *supra* note 23, at 810-11 (recounting the argument that

comprehensive legislation covering numerous crime and sentencing reforms, these ubiquitous “all except for” provisions have the markings of boilerplate language that have been introduced even where the new legislation has no rational relationship to the protection of the public’s safety or the prior sex offense conviction.³⁴

Consider a small but instructive example: the crime of shoplifting. Until recently, California did not have a crime called shoplifting. A petty thief who intended to steal upon entry of a commercial establishment in California was guilty of the more serious crime of burglary,³⁵ punishable either as a felony or up to one year in county jail.³⁶ In 2014, California voters ushered in the crime of shoplifting as part of Proposition 47, a sweeping set of criminal justice reforms designed to reduce the ills of mass incarceration and reallocate money spent there to schools and other non-criminally related projects.³⁷ Differentiated from burglary, shoplifting is charged where the intent upon entry of a commercial establishment was to steal less than \$950, resulting in a punishment less severe if convicted.³⁸ The new crime of shoplifting fit well into this paradigmatic shift because it carved out a less serious crime that would not necessarily require imprisonment. However, two classes of persons were excluded at the outset from receiving this potential benefit—habitual offenders and sex offense registrants.³⁹

It is not only in newly enacted laws or downgraded felonies where registrants are excluded. In what is best described as a demonstration of governmental animus, registrants have also been excluded from receiving

“[t]he First Step Act’s exclusions will negatively affect public safety because those who have committed violent crimes will not be incentivized to successfully complete meaningful rehabilitation programming.”); see also *id.* at 811 (“The exclusions were a compromise to which many in the House quickly acceded—some Democrats included—even as the reform community pressed for reducing the exclusion list.”).

34. See *infra* Part I (detailing the laws and “all except for provisions”).

35. CAL. PENAL CODE § 459 (West 2010 & Supp. 2020).

36. *Id.* § 461.

37. See Safe Neighborhoods and Schools Act, 2014 Cal. Legis. Serv. Prop. 47 (West) (codified as amended in scattered sections of CAL. GOV’T, PENAL, and HEALTH & SAFETY CODES) (ensuring that “prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K–12 schools, victim services, and mental health and drug treatment.”).

38. CAL. PENAL CODE § 459.5(a) (“[S]hoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars (\$950).”).

39. *Id.* (“Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170.”).

compensation from a state victim's compensation fund, *even where the compensation requested does not arise from circumstances of the crime the registrant had committed*.⁴⁰ That is the effect of this blanket exclusion: a one-size-fits-all punitive stance that deems all registrants unworthy of benefits from criminal justice reform, reintegration efforts, or compensation that is available to others.⁴¹

And this is where the article starts. Part I of this article provides an overview of registration and notification schemes and offers a sampling of various criminal justice reform efforts across the country that have instituted blanket exclusions to bar sex offenders from benefits of the reform.

With an understanding of the blanket exclusion, Part II exposes its fundamental flaw. The section contends that “all except for” provisions rely on false assumptions and faulty data regarding a registrant's future dangerousness, and consequently, they lack a rational relationship to a public safety interest. Rather, Part II demonstrates that, without empirical support, these blanket exclusions are but another symbol of the societal panic that has gripped the country and the political pressures that have succumbed to it.⁴²

Building on accurate data regarding recidivism rates, Part III demands that we should no longer accept as the status quo meritless exclusions formed by governmental and community animus. Relying on recent judicial developments in the law, Part III urges that these laws should be struck under Fourteenth Amendment protections.

I. “ALL EXCEPT FOR” LAWS: BLANKET EXCLUSIONS BASED ON ANIMUS

The “all except for” provision to reform efforts is only one piece of a much larger tapestry that isolates and marginalizes those who have committed sex offenses. Historically, by definition and operation, registration and notification schemes were designed specifically to set apart these actors from their criminal counterparts.⁴³ The registry's origin was

40. See, e.g., CAL. GOV'T CODE § 13956(c)(1) (West 2015 & Supp. 2020) (“In no case shall compensation be granted to an applicant pursuant to this chapter during any period of time the applicant is held in a correctional institution, or while an applicant is required to register as a sex offender pursuant to Section 290 of the Penal Code.”).

41. For an interesting article that examines the tension between our recognition that the criminal system is flawed and our certainty of the guilt of people who have experienced it, see Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. 2501 (2020).

42. See *infra* Part II (elaborating on the societal panic that shapes the conversation regarding those convicted of sex offenses).

43. See *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997) (quoting *Artway v. Att'y Gen.*, 81 F.3d 1235, 1265 (3d Cir. 1996)) (“[R]egistration and carefully tailored notification can enable . . . those likely to encounter a sex offender to be aware of a potential danger and ‘to stay vigilant against possible re-abuse.’”); *Lee v. State*, 895 So. 2d 1038, 1040 (Ala. Crim. App. 2004)

undeniably checkered; arguably the first registry was motivated by homophobia.⁴⁴ Adopted in California in 1947, the earliest registry has been critiqued as a not-so-subtle attempt to target and criminalize the sexual conduct of gay men.⁴⁵ But even with that unseemly historical context, the earliest registry, with eleven registrable offenses and no public notification,⁴⁶ is a far cry from the breadth and scope of state registration schemes today, which are complex and mammoth, often including forty registrable offenses, residency and presence restrictions, GPS satellite monitoring, and frequent in-person registration.⁴⁷

The dramatic increase in the burdens associated with registration was not accidental. With support from two Supreme Court decisions in 2003,⁴⁸ registration and notification laws have flourished modernly as civil regulatory measures, still expanding and largely unchecked.⁴⁹ The Court's

(quoting ALA. CODE § 15-20-20.1 (1975) (repealed 2011)) (“The Legislature finds that the danger of recidivism posed by criminal sex offenders and that the protection of the public from these offenders is a paramount concern or interest to government.”); *State v. Sakobie*, 598 S.E.2d 615, 617 (N.C. Ct. App. 2004) (quoting N.C. GEN. STAT. § 14-208.5 (West 2014 & Supp. 2019)) (recognizing that the purpose of the state’s sex offender registration law is “to prevent recidivism because ‘sex offenders often pose a high risk of [reoffense] . . . and . . . protection of the public from sex offenders is of paramount governmental interest.’”).

44. See Emily Horowitz, *Timeline of a Panic: A Brief History of Our Ongoing Sex Offense War*, 47 SW. L. REV. 33, 35-37 (2017) (referencing J. Edgar Hoover’s reign as FBI Director who warned of sex fiends in a memorandum); see also *Johnson v. Dep’t of Just.*, 341 P.3d 1075, 1095 (Cal. 2015) (Werdegar, J., dissenting) (recounting the origins of the registry, including its title of “Sex perversions,” which “punished as a felony *all* oral copulation, even that occurring between consenting adults”).

45. See *Johnson*, 341 P.3d at 1096 (Werdegar, J., dissenting) (explaining that certain sexual crimes were enforced largely against homosexual acts, quoting one rationale at the time: “One reason given for this significant disparity in enforcement is that deviant heterosexual conduct is not viewed with the same distaste as is homosexual conduct by the public” (citations omitted)); see also *Origin of the Registry*, SOL RSCH., (Sept. 8, 2009), http://www.solresearch.org/report/Origin_of_Registry#Ref_FN_1947_CA_SOR (citing the annual report from the Los Angeles County Police Department showing that arrests for “homosexuality” were more than double that for other sexual assaults).

46. See *Origin of the Registry*, *supra* note 45.

47. See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1081-94 (2012) (detailing the increase in registrable offenses and consequential burdens).

48. See *Smith v. Doe*, 538 U.S. 84, 102-03 (2003) (determining that registration laws were regulatory, and not punitive, in nature); *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (affirming the right of states to post registrants’ information).

49. See Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 103-04 (2007) (tracking the growth of residency restrictions); see also Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 51-56 (2010) (denouncing the legislative “race to the harshest” that includes expanded registration and notification requirements following the Supreme Court’s decisions). *But see, e.g., Does #1-5 v. Snyder*, 834 F.3d 696, 702–03, 705–06

limited jurisprudence on this issue nonetheless delivered what I would describe as a one-two punch. In an opinion, from which twenty years of lower court decisions have flowed,⁵⁰ *Smith v. Doe* held that, because sex offender registration laws are not punitive but regulatory in nature, constitutional protections such as *ex post facto* or cruel and unusual punishment do not apply.⁵¹ In that same term, in a case that legitimized public notification under “Megan’s Law” websites, *Connecticut Department of Public Safety v. Doe* held that procedural due process did not demand individualized assessment to disseminate registrants’ information to the community.⁵² Together these decisions “green lighted” the ensuing wave of increased governmental burdens and prohibitions protected by the label of civil regulation.

Nearly twenty years later, “*super-registration schemes*” have become a staple for the carceral state.⁵³ A brief look at today’s registry paints a grim picture of a society intent on punishing and ostracizing those who have committed sex offenses.⁵⁴ Today, nearly one million people have been

(6th Cir. 2016) (overturning Michigan’s registration requirements by distinguishing *Smith v. Doe*, 538 U.S. 84 (2003)).

50. Since the opinion’s publication, *Smith* has been faithfully followed by federal and state courts. See, e.g., *United States v. Wass*, 954 F.3d 184, 193 (4th Cir. 2020) (“[*Smith*] remains the law of this Circuit and compels the conclusion that ‘SORNA’s registration requirements, as applied to [Wass], do not violate the’ *ex post facto* clause.”); *United States v. Morgan*, 255 F. Supp. 3d 221, 230-32 (D.D.C. 2017) (relying on *Smith* to find that the “failure to register” law was not punitive); *United States v. Parks*, 698 F.3d 1, 5 (1st Cir. 2012); *United States v. Elkins*, 683 F.3d 1039, 1041 (9th Cir. 2012); *State v. Hunt*, 727 S.E.2d 584, 589-93, 595 (N.C. Ct. App. 2012) (quoting *Smith* throughout the opinion to hold that the statute was a civil regulation); *State v. Worm*, 680 N.W.2d 151, 160-63 (Neb. 2004).

51. See 538 U.S. at 105-06.

52. 538 U.S. at 7-8.

53. “*Super-registration schemes*” is a term I coined in an earlier piece to describe the second generation of registration and notification schemes with its escalating burdens and demands. See Carpenter & Beverlin, *supra* note 47, at 1073 (“[A] new breed of law has emerged – what this Article terms *super-registration schemes* – resulting from unchecked legislative action spurred on by emotionally charged rhetoric.”) (emphasis added). The term has been picked up by advocates and scholars. See, e.g., Brief in Opposition at 6, *Snyder v. Does #1-5*, 138 S. Ct. 55 (2017) (No. 16-768), 2017 WL 695463, at *6 (“Over the last two decades, some states, including Michigan, have adopted increasingly harsh sex offender restrictions, described by some legal scholars as ‘*super-registration schemes*.’”); see also Guy Padraic Hamilton-Smith, *The Digital Wilderness: A Decade of Exile & the False Hopes of Lester Packingham*, 24 TEX. J. ON C.L. & C.R. 25, 28 (2018); Samantha R. Millar, *Doe v. O’Donnell and New York’s Sex Offender Registration Act: The Problem of Continued Registration Under SORA After Leaving the State*, 38 CARDOZO L. REV. 337, 371 n.210 (2016); Colton Johnston, Comment, *Luster v. State and Starkey v. Oklahoma: Modern Scarlet Letter Regulations and the Courts’ Cold Shoulder*, 92 DENV. U.L. REV. 613, 634 n.213 (2015).

54. See, e.g., *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1214-17 (D. Colo. 2017) (describing in detail the burdens facing a registrant in Colorado attempting to meet the registry requirements), *rev’d in part, and vacated in part sub nom. Millard v. Camper*, 971 F.3d 1174, 1186-87 (10th Cir. 2020); see also *In re Taylor*, 343 P.3d 867, 869 (Cal. 2015) (“Blanket enforcement of the residency

forced to register,⁵⁵ obligated to meet onerous burdens and prohibitions on their housing, employment, education, and movement,⁵⁶ which deeply harm not only the registrant but family members as well.⁵⁷ Professor Wayne Logan criticizes registration regimes as a governmental attempt “to use geographic limits to achieve social control goals.”⁵⁸ If not guaranteeing physical banishment from the community,⁵⁹ what has been achieved through these laws comes very close.⁶⁰ The district court in *Millard v. Rankin* summed it up well:

[Registrants] face a known, real, and serious threat of retaliation, violence, ostracism, shaming, and other unfair and irrational treatment from the public, directly resulting from their status as registered sex offenders, and regardless of any threat to public safety based on an objective determination of their specific offenses, circumstances, and personal attributes.⁶¹

restrictions against these parolees has severely restricted their ability to find housing in compliance with the statute, greatly increased the incidence of homelessness among them, and hindered their access to medical treatment, drug and alcohol dependency services, psychological counseling and other rehabilitative social services available to all parolees.”)

55. Registry statistics are difficult to amass because of state reporting differences, but as of 2018, there were 904,001 on state registries. See Steven Yoder, *Why Sex Offender Registries Keep Growing Even as Sexual Violence Rates Fall*, THE APPEAL (July 3, 2018), <https://theappeal.org/why-sex-offender-registries-keep-growing-even-as-sexual-violence-rates-fall/> (providing a map of registrants by state).

56. For an examination of the depth of the burdens and restrictions registrants face, see Carpenter & Beverlin, *supra* note 47, at 1087-1100.

57. See, e.g., Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54, 62-64 (2009) (explaining that the family members of sex offenders suffer from employment limitations, housing concerns, subsequent financial problems, threats, harassment or property damage); Teichman, *supra* note 2, at 386 (recounting a significant number of cases where offenders’ family members were harassed); Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. & LAW 375, 383 (2000) (showing that two-thirds of offenders reported negative effects on the lives of their family members).

58. Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 3 (2006).

59. Banishment, either physical or through isolation, was a staple of colonial punishments. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991) (listing banishment among the favored colonial punishments); see also *Smith v. Doe*, 538 U.S. 84, 98 (2003) (citing Massaro, *supra* note 59) (“The aim was to make these offenders suffer ‘permanent stigmas, which in effect cast the person out of the community.’”).

60. For an up-close look at a registration scheme that causes banishment, see *Hoffman v. Vill. of Pleasant Prairie*, 249 F. Supp. 3d 951, 955 (E.D. Wis. 2017) (reproducing a chart that states that those not domiciled in the Village are “permanently banned from the Village” and those who lived in the Village when the Ordinance was passed “must leave the Village by October 18, 2016, and may never return”).

61. 265 F. Supp. 3d 1211, 1222-23 (D. Colo. 2017). In an unsurprising but disappointing decision, the Tenth Circuit overturned the district court’s ruling, minimizing the punishing and public shaming aspects of the laws. See *Millard v. Camper*, 971 F.3d 1174, 1186-87 (2020).

With this as our landscape, it is not surprising that legislatures have enacted reform efforts that specifically and intentionally exclude registrants. This section provides an overview—a snapshot if you will—of the various state-led “all except for” exclusions. What knits these unrelated laws together is animus toward the registrant. Not one demonstrates a rational relationship between the blanket exclusion and the state’s goal to protect the safety of the community.⁶² Instead, each law described below suffers from an important failing: each is wildly overinclusive and untethered to public safety concerns.

Primarily, reform efforts arise in two forms: automatic entitlement and allowance based on discretionary judicial review. Under new legislation that provides automatic entitlement, all registrants are categorically barred from receiving the benefit of reform even though, like their counterparts, they meet the other statutory requirements.⁶³ Under statutes that incorporate discretionary judicial review to receive the benefit, registrants are even *denied the opportunity* to present the same evidence that their counterparts are able to show to receive the benefit.⁶⁴

There is another commonality among these blanket exclusions. Because they are overinclusive, the non-violent sex offender has become the casualty. Although the newly enacted laws focus most often on non-violent offenders, it appears that the term “non-violent” is in the eye of the beholder—in this case, the state legislatures. Despite their characterization as non-violent, non-violent sex offenses are routinely statutorily excluded from the reform efforts listed below.⁶⁵

Think overinclusion. Think shoplifting.

62. Not included in this section are exclusions that on their face ostensibly have a demonstrable (even if faulty) tie to public safety, such as licensure requirements or employment opportunities that arise in working with children. For the purpose of this argument only, this article does not contend otherwise.

63. See *infra* notes 73-89 and accompanying text.

64. See *infra* notes 73-89 and accompanying text.

65. In an interesting piece of legislative drafting, Idaho avoided the “non-violent” controversy by making sexual offenses its own category. See Shirah Matsuzawa, *Idaho Legislators Plan to Introduce ‘Clean Slate’ Bill to Give Certain Felons a Second Chance*, KTVB7 (Jan. 22, 2020, 6:45 AM), <https://www.ktvb.com/article/news/local/capitol-watch/idaho-legislators-plan-to-introduce-clean-slate-bill-to-give-certain-felons-a-second-chance/277-ff5341ee-fab2-4313-810a-cf187fd30ae5> (allowing felons convicted of non-violent and nonsexual crimes to petition the courts to seal their public records if they serve their total sentences and do not re-offend after three years); accord LA. STAT. ANN. §15:529.1(c) (2012 & Supp. 2020) (reducing the so-called “cleansing period” from ten to five years for non-violent offenses, but maintaining the ten-year period for sex and violent offenses); California Proposition 47, *Reduced Penalties for Some Crimes Initiative* (2014), [https://ballotpedia.org/California_Proposition_47_Reduced_Penalties_for_Some_Crimes_Initiative_\(2014\)](https://ballotpedia.org/California_Proposition_47_Reduced_Penalties_for_Some_Crimes_Initiative_(2014)) (last visited Oct. 16, 2020).

Denial of sentence reclassification aka “Second Chance Acts.” The landscape was ugly: prison populations were rising even as non-violent crimes were down.⁶⁶ In response, initiatives developed to reclassify certain felonies, mostly drug related and theft, to misdemeanors in order to ameliorate rising prison populations and to target limited correctional resources more efficiently.⁶⁷

The message resonated with voters and legislators alike across the country.⁶⁸ California serves as an excellent example when it implemented the Safe Neighborhood and Schools Act (often called “Prop 47”), a legislative package that included reclassification provisions for non-serious and non-violent crimes.⁶⁹ The Act also created new sentencing provisions which allow persons serving, or who have served, felony sentences to petition for a recall or resentencing.⁷⁰ Same was true for Indiana where the new criminal code changed Indiana’s four classes of felonies to six levels,⁷¹ as well as for Delaware where stakeholders came together “to propose Delaware’s most comprehensive criminal justice reform effort in decades.”⁷² Yet, each of these comprehensive packages specifically excludes registrants from many benefits.⁷³

66. See, e.g., Brian Elderbroom & Julia Duman, *Reclassified: State Drug Law Reforms to Reduce Felony Convictions and Increase Second Chances*, URB. INST. 1, 1-2 (Oct. 2018), https://www.urban.org/sites/default/files/publication/99077/reclassified_state_drug_law_reforms_to_reduce_felony_convictions_and_increase_second_chances.pdf.

67. See, e.g., *id.* at 3-4.

68. See, e.g., *id.* at 1.

69. See BALLOTPEDIA, *supra* note 65 (detailing the reallocation of monies spent on prisons to now support truancy prevention, mental health and substance abuse treatment, and victim services).

70. 6 EDWARD A. RUCKER & MARK E. OVERLAND, CALIFORNIA CRIMINAL PRACTICE: MOTIONS, JURY INSTRUCTIONS & SENTENCING § 72:4 (4th ed. 2019).

71. H.B. 1006, 118th Gen. Assemb., Reg. Sess. (Ind. 2013); see also *No More Room: Indiana’s Prison Overhaul Is Contributing to Jail Overcrowding, Rising Costs*, THE REPUBLIC (Mar. 12, 2019, 8:53 PM), http://www.therepublic.com/2019/03/13/no_more_room_indianas_prison_overhaul_is_contributing_to_jail_overcrowding_rising_costs; Kristine Guerra, *House Passes \$80 Million Criminal Justice Bill*, INDYSTAR (Feb. 23, 2015, 4:19 PM), <https://www.indystar.com/story/news/crime/2015/02/23/house-passes-million-criminal-justice-bill/23895109>.

72. Del. Dep’t of Just., *Jennings, Office of Defense Services, and Legislative Leaders Announce Comprehensive Criminal Justice Reform Package*, DELAWARE.GOV (Mar. 15, 2019), <https://news.delaware.gov/2019/03/15/jennings-ods-legislative-leaders-announce-comprehensive-criminal-justice-reform-package/>.

73. See, e.g., 6 RUCKER & OVERLAND, *supra* note 70 (disqualifying adult and juvenile sex offenders from qualifying for reduction in sentencing); Jeff Wiese, Director, Trial Ct. Mgmt., 2014 Criminal Reform and Traffic Legislation at the Trial Court Personnel Conference (July 14, 2014) <http://indiana.gov/judiciary/center/files/sedu-cec2014-new-laws.pdf> (preventing sex offenders from having the same opportunities under the new law to accommodate/improve their sentencing and rehabilitation, sentencing modifications and eligibility for good behavior credits); H.B. 4, 150th Gen. Assemb., Reg. Sess. (Del. 2019) (prohibiting sex offenders from demonstrating rehabilitation or benefiting from modification of services).

Denial of good time credits. To alleviate overcrowding, states introduced good time credits where inmates who have shown by conduct and attitude while in custody that the risk of offending has diminished are eligible for modification of their sentence.⁷⁴ Yet, despite being model prisoners, all sex offenders are prohibited from seeking good time credits or risk having their credits reduced.⁷⁵ And in a clear example of animus directed at registrants,⁷⁶ even those who commit violent felonies in California may receive fifteen percent conduct credit,⁷⁷ while those who commit sex offenses may not receive any credit.⁷⁸

Denial of Parole. Given the impetus to reduce prison overcrowding, it makes sense that states have revamped the parole system to provide inmates with increased eligibility for early parole.⁷⁹ Here, legislatures continue to contort the term “non-violent.” Recognizing that all sex offenses are not violent, some states have created a new category of exclusion for sex offenses specifically for the purpose of excluding them.⁸⁰ Louisiana’s Senate Bill 139 is representative.⁸¹ It provides for parole reformation, and it removes barriers to successful re-entry for non-violent ex-felons, except for anyone convicted of a sex offense.⁸²

California presents a particularly egregious example of governmental interference. Although the ballot language of Proposition 57 authorized parole consideration for every person convicted of a non-violent offense, that

74. See, e.g., Del. H.B. 4; H.B. 1006, 118th Gen. Assemb., Reg. Sess. (Ind. 2013) (prohibiting sex offenders from receiving good time credits); see also LAURIE L. LEVENSON & ALEX RICCIARDULLI, CALIFORNIA CRIMINAL PROCEDURE, § 31:7 (2019).

75. See, e.g., S.B. 139, 2017 Leg., Reg. Sess. § 1 (La. 2017) (excluding murder and all sex offenses); see also LA. STAT. ANN. § 15:541 (2012 & Supp. 2020) (requiring those who have committed sex offenses to serve forty percent more time than other prisoners); Wiese, *supra* note 73 (preventing sex offenders from having the same opportunities under the new law to accommodate/improve their sentencing and rehabilitation, sentencing modifications, and eligibility for good behavior credits).

76. See *infra* Part III for a discussion of the impact of animus on a law’s constitutionality.

77. See J. RICHARD COUZENS & TRICIA A. BIGELOW, PROPOSITION 57: THE PUBLIC SAFETY AND REHABILITATION ACT OF 2016, at 12 (2017), <https://www.courts.ca.gov/documents/prop57-Parole-and-Credits-Memo.pdf>.

78. See CAL. CONST. art. I, § 32, subdiv. (a)(2); see also *Information on Proposition 57: Prison Credit Rules*, PRISON LAW OFFICE (May 2019), <https://prisonlaw.com/wp-content/uploads/2019/05/Prop-57-CreditsMay-2019.pdf>.

79. See OFF. OF THE ATT’Y GEN., PROPOSITION 57: CRIMINAL SENTENCES, PAROLE, JUVENILE CRIMINAL PROCEEDINGS AND SENTENCING, INITIATIVE CONSTITUTIONAL AMENDMENT AND STATUTE 58, <https://www.courts.ca.gov/documents/BTB24-5H-1.pdf> (last visited Oct. 16, 2020).

80. *Id.*

81. *Criminal Justice Reform*, OFF. OF GOVERNOR JOHN BEL EDWARDS, <https://gov.louisiana.gov/index.cfm/page/58> (last visited Oct. 16, 2020).

82. *Id.*

language was altered by the California Department of Corrections and Rehabilitations (CDCR), which added a measure to exclude all registrants, including those who had committed non-violent sex offenses.⁸³ What constitutes non-violence is a line-drawing contest that is playing out in the California courts. The results to date have been unanimous—in each case appealed, the CDCR has lost.⁸⁴

Denial of other benefits. Other benefits are lost to those who have committed sex offenses for no reason other than animus.⁸⁵ Louisiana, for example, developed a substance abuse probation program that provides counseling and treatment for defendants with substance abuse disorders or with co-occurring mental illnesses.⁸⁶ However, these provisions do not apply to anyone convicted of a crime of violence *or a sex offense*.⁸⁷

In Delaware, expungement is available through the petition process.⁸⁸ Yet, even though the language of the bill builds in discretion in the petition process, it statutorily excludes most sex offenses from even that opportunity.⁸⁹

California's Victim Compensation Fund offers another illustration of animus at work. In 2016, the California legislature reformed the Victim's Compensation Fund to specifically exclude registrants from receiving

83. Jazmine Ulloa, *Debate Over Sex Offenders Moves to Court as California Undertakes Prison Parole Overhaul*, L.A. TIMES (May 22, 2017, 12:05 AM), <https://www.latimes.com/politics/la-pol-sac-prop-57-sex-offenders-lawsuit-20170522-story.html>.

84. See *In re Gadlin*, 243 Cal. Rptr. 3d 331, 334-35 (Ct. App.) (finding that CDCR cannot exclude persons presently incarcerated for a nonviolent, non-sex offense, based upon a past sex offense), *review granted*, 440 P.3d 144 (Cal. 2019); see also *All. for Const. Sex Offense L. v. Dep't of Corr. & Rehab.*, 258 Cal. Rptr. 3d 498, 507-08 (Ct. App.) (holding CDCR cannot exclude any person from early parole consideration based upon either a past sex offense conviction or a present nonviolent sex offense conviction), *review granted*, 464 P.3d 265 (Cal. 2020); *In re Mohammad*, 255 Cal. Rptr. 3d 706, 713 (Ct. App. 2019) (rejecting CDCR's claim to exclude persons when their primary offense as designated by the sentencing court is nonviolent), *review granted*, 458 P.3d 69 (Cal. 2020); *In re Schuster*, 256 Cal. Rptr. 3d 158, 167 (Ct. App. 2019), *review granted*, 458 P.3d 69 (Cal. 2020); *In re McGhee*, 246 Cal. Rptr. 3d 834, 842-43 (Ct. App. 2019) (determining that CDCR cannot exclude persons incarcerated for a nonviolent offense and otherwise eligible for early parole consideration); *In re Edwards*, 237 Cal. Rptr. 3d 673, 682 (Ct. App. 2018) (concluding that the CDCR cannot exclude nonviolent, indeterminately sentenced third strikers).

85. See Colleen M. Berryessa & Chaz Lively, *When a Sex Offender Wins the Lottery: Social and Legal Punitiveness Toward Sex Offenders in an Instance of Perceived Injustice*, 25 PSYCH. PUB. POL'Y & L. 181, 181-83 (2019) (addressing the animus felt toward registrants who are entitled to benefits). Beyond the scope of this paper, but worthy of continued examination is the prohibition of all felons to vote or to serve on juries, rights that are integral to productive reintegration into one's community.

86. LA. CODE CRIM. PROC. ANN. art. 903.1 (2008 & Supp. 2020).

87. *Id.*

88. S.B. 37, 150th Gen. Assemb., Reg. Sess. (Del. 2019).

89. *Id.*

compensation even if they fit other criteria of “victim.”⁹⁰ At first blush, this “all except for” provision might make sense. A rapist should not be able to recover from the Victim’s Compensation Fund for having been injured by his victim during the assault. However, as is the failing of all blanket exclusions, the restriction is overly broad. It precludes an offender from ever recovering for injuries, even injuries unrelated to the crime for which the registrant was convicted. As one legislator put it, “The purpose of this bill [AB 1140] is to . . . deny compensation to registered sex offenders.”⁹¹

An incident in Oxnard, California supports the legislator’s animus. A deadly boat fire killed thirty-five.⁹² A registrant who lost family members in that fire was statutorily ineligible for recovery from the Victim’s Compensation Fund only because he had been convicted of a sex offense.⁹³

Finally, another snapshot of the laws reveals the obstacles registrants face upon reentry. Louisiana House Bill 681 lifts restrictions for people who were convicted for drug offenses from receiving welfare, cash and food stamps benefits, but does not extend to people who committed violent or sex offenses under Louisiana law.⁹⁴ The irony cannot be lost that registration regimes which block gainful employment and limit housing also make it more difficult for registrants to receive subsidies.

II. FAULTY ASSUMPTIONS THAT DRIVE THE EXCLUSIONS

Categorizing groups of people or behaviors is a necessary and fundamental precept of legislative drafting, and flowing from the categorization, are often burdens conclusively bestowed on one group of people over another.⁹⁵ In the case of registrants, the classification is based

90. Assemb. B. 1140, 2015 Leg., Reg. Sess. (Cal. 2015).

91. S. COMM. ON PUB. SAFETY, Assemb. B. 1140, 2015 Leg., Reg. Sess., at 2 (Cal. 2015).

92. See Scott Wilson & Eli Rosenberg, *Authorities Have Recovered 20 Bodies, 14 Unaccounted For After Diving Boat Catches Fire Near California Coast*, WASH. POST (Sept. 3, 2019, 11:43 AM), <https://www.washingtonpost.com/nation/2019/09/02/missing-after-boat-fire-near-national-park-california-coast/>; see also Richard Winton et al., *Serious Safety Flaws Aboard Conception, Early Boat Fire Investigation Finds*, L.A. TIMES (Sept. 6, 2019, 6:00 AM), <https://www.latimes.com/california/story/2019-09-05/california-boat-fire-victims-crew-members-passengers>.

93. See Complaint for Declaratory and Injunctive Relief at 2, All. for Const. Sex Offense L., Inc. v. Cal. Victim Comp. Bd., No. 34-2020-00272598 (Cal. Super. Ct. filed Jan. 6, 2020), <https://tinyurl.com/y6m2dly7>.

94. See H.B. 681, 2017 Leg., Reg. Sess. § 1 (La. 2017).

95. See *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993) (“In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”); see also *id.* at 314-15 (citing cases that upheld legislative classifications).

on faulty presumptions that group all registrants together as more likely to recidivate than their counterparts. Although legislative categorization is a staple of the drafting process, the Supreme Court cautioned in *Stanley v. Illinois*, “Procedure by presumption is always cheaper and easier than individualized determination.”⁹⁶

Unfortunately, that is the effect of this blanket exclusion. The “all except for” provision serves as an ill-fitting, one-size-fits-all attempt to exclude all registrants from the benefits of reform.⁹⁷ Faulty presumptions surrounding sex offense convictions have framed the question and delivered the answer: registrants are unworthy because they continue to be dangerous. What makes the presumption faulty—beyond the lack of individualized assessment—is that robust and valid empirical data refute the flawed message that all registrants recidivate at alarmingly high rates.

A. *The Moral Panic that Overtakes the Conversation*

That the myth of high recidivism rates persists is cause for circumspection. Before this Part of the article delves into the empirical studies that refute the underlying premise for registration schemes, it is important to understand its stranglehold. Why, in the face of reputable statistics, does such a false message continue to resonate with the public and with a judicial body that values empiricism?

The answer is obvious, pervasive, and controlling. The country is suffering from what sociologists describe as a “moral panic.” It is a societal reaction that is wildly out of proportion to its factual predicate but is nonetheless stoked by elected officials, affirmed by courts, and relayed by the media.⁹⁸ Rose Corrigan described the phenomenon in particularly vivid detail. She wrote, “Taken at face value, Megan’s Law sees a society in which sexual violence is rare, recognizable by its physical brutality, and perpetrated

96. 405 U.S. 645, 656-57 (1972).

97. See, e.g., *People v. Pollard*, 54 N.E.3d 234, 247 (Ill. App. Ct. 2016) (acknowledging that “the SORA Statutory Scheme may be overinclusive, thereby imposing burdens on offenders who pose no threat to the public because they will not reoffend”); see also Rose Corrigan, *Making Meaning of Megan’s Law*, 31 L. & SOC. INQUIRY 267, 269 (2006) (observing that registration and notification schemes are overinclusive and consequently without true deterrent capability).

98. Sociologists have weighed in on the phenomenon of a societal or moral panic. See, e.g., STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* 1-4 (3d ed. 2002) (introducing the concept of moral panic to depict the reactions of politicians, press, and the public to the fights between the Mods and the Rockers in Britain in 1960); see also KENNETH THOMPSON, *MORAL PANICS* (1998) (ascribing and detailing the reaction of a societal moral panic to a variety of situations); Erich Goode & Nachman Ben-Yehuda, *Moral Panics: Culture, Politics, and Social Construction*, 20 ANN. REV. SOCIO. 149, 155-59 (1994) (establishing the indices for a moral panic and developing the role that politicians, the media and lobbyists play in it).

by mentally disturbed monsters who strike without warning or reason. This society needs no change, *just better tools to control these individuals*.⁹⁹ This view of a dangerous world that needs to be controlled is impelled by societal fear. It is reminiscent of scholar Donna Coker’s statement on the concept of Crime Logic. Contained within the set of beliefs that animate our criminal processes is “a preference for removing individuals who have harmed others as though excising an invasive cancer from the body politic.”¹⁰⁰

The fear is palpable. As the district court wrote in *Millard v. Rankin*, “The fear that pervades the public reaction to sex offenses—particularly as to children—generates reactions that are cruel and in disregard of any objective assessment of the individual’s actual proclivity to commit new sex offenses.”¹⁰¹

Registrants are the target of today’s moral panic,¹⁰² but they are certainly not the first. Societal panics emerged during the HIV/AIDS epidemic directed at those with HIV,¹⁰³ against juveniles who committed crime,¹⁰⁴ and targeting those who peddled drugs.¹⁰⁵ But, this moral panic is different

99. Corrigan, *supra* note 97, at 269 (emphasis added).

100. Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 150 (2016). To see how much more punitive registries have become, compare with *Kelly v. Mun. Ct.*, 324 P.2d 990, 995 (Cal. Ct. App. 1958) (repeating that “in the case of the probationer who demonstrates his ability to go stright [sic], upon his own, by faithfully fulfilling all of the terms and conditions of his probation, the need for further surveillance and registration terminates upon his release pursuant to the sanction of section 1203.4.” (emphasis added)).

101. 265 F. Supp. 3d 1211, 1226 (D. Colo. 2017), *rev’d in part, vacated in part sub nom. Millard v. Camper*, 971 F.3d 1174, 1177 (10th Cir. 2020); *see also In re J.B.*, 107 A.3d 1, 16 (Pa. 2014) (recognizing that the “common view of registered sexual offenders is that they are particularly dangerous and more likely to reoffend than other criminals.”).

102. *See, e.g.,* Vanessa Amyot, *Sex Offender Registries: Labelling Folk Devils*, 55 CRIM L.Q. 188, 209-11 (2009) (arguing that the creation of registries led to fear and moral panic); Huffman, *supra* note 1, at 246 (theorizing that a moral panic surrounding sex offenders prevents careful and rational analysis).

103. *See, e.g.,* Simon Watney, *The Spectacle of AIDS*, 43 MIT PRESS 71, 75 (1987) (arguing that the HIV/AIDS panic is perpetually revived because of a distrust of homosexuality); Michael S. Sinha & Wendy E. Parmet, *The Perils of Panic: Ebola, HIV, and the Intersection of Global Health and Law*, 42 AM. J.L. & MED. 223, 244 (2016) (noting that this panic blames vulnerable people because of societal panic around the disease).

104. Proposition 21, which passed in California in 2000, is an excellent example of the political move to treat juvenile offenders more harshly. *See Proposition 21*, BALLOTEDIA, http://www.lao.ca.gov/ballot/2000/21_03_2000.html (last visited Oct. 17, 2020); TEX. FAM. CODE ANN. § 51.01 (West 2014 & Supp. 2018) (noting the purpose of the Juvenile Justice Code is “to provide for the protection of the public and public safety . . . consistent with the protection of the public and public safety . . . to promote the concept of punishment for criminal acts”).

105. *See, e.g.,* THOMPSON, *supra* note 98, at 7 (citing British sociologist JOCK YOUNG, *THE DRUGTAKERS: THE SOCIAL MEANING OF DRUG USE* (1971)).

according to sociologists. Unlike the others, this moral panic is not fleeting, but seems to gain ferocity with the passage of time.¹⁰⁶

What has become clear to sociologists is that no matter the subject matter or targeted group, moral panics generally include the following indices:

1) an elevated level of concern over the behavior of a particular group of people and the impact of that behavior on the society; 2) an escalated level of hostility towards the group of people that are engaging in the harmful or threatening behavior, who are stereotypically labeled as enemies of the law-abiding society; 3) a widespread agreement of members of the society that the threat posed by that group of people is real and serious; 4) the concern is blown out of proportion compared to the realistic appraisal of the threat, which is generally the result of presenting exaggerated numbers of crimes, victims, injuries, damages, deaths, etc.; 5) “volatility” of moral panics, causing them to burst suddenly and vanish, but not without generating fear and hostility, the so-called “cultural and institutional legacy.”¹⁰⁷

An interesting phenomenon occurs in a moral panic: the panic inspires and adopts faulty messaging. As noted by sociologist Kenneth Thompson, an inaccurately perceived threat or one that is blown out of proportion leads to the exaggeration and fabrication of statistics and stories designed to fuel the panic’s longevity.¹⁰⁸ He is not alone in arriving at this conclusion. Anthropologist Roger Lancaster wrote that the moral panic surrounding those who commit sex offenses gives rise to “bloated imaginings of risk, inflated conceptions of harm, and loose definitions of sex.”¹⁰⁹

These observations confirm that we are witnessing what psychologists call “Confirmation Bias,” which is “the tendency to acquire or process new information in a way that confirms one’s preconceptions and avoids contradiction with prior beliefs.”¹¹⁰ That is not surprising when we consider the horrific high profile cases of serial child rapists seared into our minds: Jerry Sandusky, coach for Penn State football who was convicted of grooming and raping children,¹¹¹ John Couey, who brutally raped and

106. See Keri Burchfield et al., *Public Interest in Sex Offenders: A Perpetual Panic?*, 15 CRIMINOLOGY CRIM. JUST. L. & SOC’Y 96, 98 (2014).

107. Goode & Ben-Yehuda, *supra* note 98, at 156-59. For another sociological take, see THOMPSON, *supra* note 98.

108. THOMPSON, *supra* note 98.

109. ROGER N. LANCASTER, SEX PANIC AND THE PUNITIVE STATE 2 (2011).

110. Armen E. Allahverdyan & Aram Galstyan, *Opinion Dynamics with Confirmation Bias*, 9 PLOS ONE, July 2014, at 1, <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0099557&type=printable>; see also Shahram Heshmat, *What is Confirmation Bias?*, PSYCH. TODAY (Apr. 23, 2015), <https://www.psychologytoday.com/us/blog/science-choice/201504/what-is-confirmation-bias> (“In sum, people are prone to believe what they want to believe.”).

111. See Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES (June 22, 2012), <https://www.nytimes.com/2012/06/23/sports/ncaafotball/jerry-sandusky-convicted-of->

murdered nine-year-old Jessica Lunsford for whom the California registry is named,¹¹² and Philip Garrido, who kidnapped eleven-year-old Jaycee Lee Dugard and held her hostage in plain sight for eighteen years.¹¹³ It is these “pictures in our heads” that shape and filter our view of the world.¹¹⁴ And if we layer images on top of images, as the media incorporate and reproduce narratives of high profile cases, it is no wonder that the public believes that everyone who commits a sex offense is a predator, and why false messaging of high recidivism sticks.¹¹⁵

Because a moral panic inflates concepts of harm, a critical weakness is laid bare: society has no ability to distinguish true harm from that manufactured by the panic. As a consequence, the panic has ushered in zero

sexually-abusing-boys.html. The Sandusky scandal caused serious and damaging ripple effects to those around him. See Will Hobson, *What Did Joe Paterno Really Know About the Sandusky Scandal at Penn State?*, WASH. POST (Apr. 7, 2018, 12:15 PM), <https://www.washingtonpost.com/news/sports/wp/2018/04/07/what-did-joe-paterno-really-know-about-the-sandusky-scandal-at-penn-state> (questioning what beloved head coach Joe Paterno knew during the years that Sandusky was molesting children on the campus and when traveling at away games with the team); *Penn State Ex-Athletic Director Pleads Guilty in Jerry Sandusky Case*, USA TODAY (Mar. 13, 2017, 4:52 PM), <https://www.usatoday.com/story/sports/ncaaf/bigten/2017/03/13/penn-state-ex-athletic-director-pleads-guilty-jerry-sandusky-case/99123372> (reporting that former athletic director and vice president pled guilty to child endangerment for their mishandling of the Jerry Sandusky case).

112. See David Schoetz, *Lunsford Killer to Die for His Crime*, ABC NEWS (Jan. 7, 2009, 9:07 PM), <https://abcnews.go.com/TheLaw/story?id=3520178&page=1> (reporting that John Couey was sentenced to death for the brutal rape and murder of Jessica Lunsford). In a postscript to this horrifying event, see *Convicted Child Killer Couey Dies in Prison, Florida Officials Say*, CNN (Sept. 30, 2009, 7:42 PM), <https://www.cnn.com/2009/CRIME/09/30/florida.couey.dead>.

113. See Casey Glynn, *Nancy and Philip Garrido Sentenced for Jaycee Lee Dugard Kidnapping*, CBS NEWS (June 2, 2011, 1:56 PM), <https://www.cbsnews.com/news/nancy-and-philip-garrido-sentenced-for-jaycee-lee-dugard-kidnapping/>; Marisol Bello, *Questions Arise on Monitoring of Sex Offenders*, ABC NEWS (Sept. 2, 2009, 5:25 AM), <https://abcnews.go.com/US/story?id=8470353> (criticizing the effectiveness of registration registries because Phillip Garrido was still able to hold Jaycee Dugard captive for eighteen years despite the fact that he was a registered sex offender subjected to repeated home visits by law enforcement).

114. LORI DORFMAN & VINCENT SCHIRALDI, *BLDG. BLOCKS FOR YOUTH, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS 4* (2001), http://www.justicepolicy.org/uploads/justicepolicy/documents/off_balance.pdf.

115. For an excellent examination of what makes the public remember certain messaging, see CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE 8* (2007) (“By ‘stick,’ we mean that your ideas are understood and remembered, and have a lasting impact—they change your audience’s opinions or behavior.”); *id.* at 16-17 (offering six reasons why an idea is remembered and has a lasting impact: (1) *simplicity*, where an idea is stripped to its essential meaning; (2) *unexpectedness*, which means that an idea should be counterintuitive to generate interest and curiosity; (3) *concreteness*, which demands that an idea be explained in terms of human action using concrete images; (4) *credibility*, which requires that the ideas or their agents carry authority and believability; (5) *emotion*, wherein the idea must tap into a human feeling; and (6) *stories*, which indicates that narratives help people respond quickly and effectively to the message).

tolerance policies leading to absurd results. For example, children are now labeled sex offenders¹¹⁶ for what a generation ago was called “playing doctor.”¹¹⁷ In what can only be described as ludicrous, the district attorney in Grant County, Wisconsin, charged a six-year-old with a first degree felony for playing “butt doctor” with his five-year-old playmate.¹¹⁸ When pressed on the potential absurdity of the charge, the district attorney defended her actions with this response: “The legislature could have put an age restriction in the statute if it wanted to. The legislature did no such thing.”¹¹⁹

Inability to distinguish the serious from the trivial among a range of illegal behaviors also mischaracterizes the degree of danger. It is what Lancaster describes as “blur[ring] the difference between major and minor crimes, real and imaginary offenses, grievous injury and social nuisance.”¹²⁰ Indeed, the inability—or refusal—to focus on only true sexual violence has accounted for a registry that includes approximately 904,011 as of 2019,¹²¹ many of whom were convicted of non-violent sexual and even non-sexual offenses.¹²²

116. See, e.g., HUM. RTS. WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 68 (2007), <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> (describing forced registration for ten-year-old who fondled four-year-old sister); accord Leah DuBuc, *So, Who Is Leah DuBuc Anyway?*, KALAMAZOO VALLEY CMTY. COLL., http://classes.kvcc.edu/eng155/21410/ldubuc/all_about_me.htm (last visited Oct. 17, 2020); Erik Ortiz, *Houston Girl, 10, Faces Sexual Assault Charge After Playing Doctor with 4-Year-Old*, N.Y. DAILY NEWS (Aug. 27, 2013, 12:19 PM), <http://www.nydailynews.com/news/crime/houston-girl-10-faces-sex-assault-charge-playing-doctor-article-1.1438216> (criticizing the aggravated nature of the charge against a ten year old for essentially “playing doctor”).

117. “Playing Doctor” describes healthy and normal exploration by children of each other’s genitals. See, e.g., Jose I. Concepcion, *Understanding Preadolescent Sexual Offenders: Can These Children Be Rehabilitated to Stem the Tide of Adult Predatory Behaviors?*, 78 FLA. BAR J. 30, 33 (2004) (“Sexual play by developing children—‘playing doctor’—is normal and not a cause for concern.”).

118. See Jacob Sullum, *Parents Sue D.A. for Charging Their 6-Year-Old Son with a Felony After He Played Doctor with a 5-Year-Old Girl*, REASON (Nov. 23, 2011, 4:38 PM), <https://reason.com/blog/2011/11/23/parents-sue-da-for-charging-their-6-year>; Jonathan Turley, *Family Sues Wisconsin Prosecutor After She Charges 6-Year-Old Boy with First-Degree Sexual Assault After “Playing Doctor”*, JONATHAN TURLEY (Nov. 25, 2011), <http://jonathanturley.org/2011/11/25/family-sues-wisconsin-prosecutor-after-she-charges-6-year-old-boy-with-first-degree-sexual-assault-after-playing-doctor> (recognizing that, if convicted, the six-year-old would have to register as a sex offender when he turns eighteen).

119. Turley, *supra* note 118.

120. LANCASTER, *supra* note 109, at 4.

121. To arrive at the total number of registrants in the country, one needs to add each state’s registrant population to determine the total, itself not an accurate assessment because of the way states publish their numbers. Estimates report 904,000 as of 2019. See Yoder, *supra* note 55 (criticizing the way some states reflect the registrants in their states).

122. See, e.g., *Does #1-5 v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016) (involving complainant who was placed on sex offender registry for robbery involving father and twelve-year-old son);

Two examples stand out. In both, the behavior was unlawful, but notwithstanding the panic's hold, should not be characterized as sexual predatory behavior worthy of lifetime registration. The first scenario concerns the conviction of teenagers for engaging in voluntary sexual intercourse with girls under a specified age.¹²³ J.L., a fourteen-year-old boy, was convicted and required to register for life for having voluntary sexual intercourse with his twelve-year-old "girlfriend."¹²⁴ True, this kind of behavior is problematic and should not be rewarded, but to consider J.L.'s act an "aggravated sexual offense" calls into question the legitimacy of the very regime his acts triggered.¹²⁵

An equally difficult case to reconcile involves the registration *for life* of two eighth grade boys who played a cruel and aggressive prank on two sixth grade boys.¹²⁶ The older boys held the younger boys down while each perpetrator sat on one boy's face with their own pants down, all of this to the laughter of other eighth graders.¹²⁷ As one boy admitted in interrogation, "I went up and put my butt in his face."¹²⁸

One must pause to recognize that this kind of activity—some might call it horseplay—airs in graphic detail on reality television.¹²⁹ But assuming the acts qualified as criminal batteries, is this activity, which is seen by audiences to their delight, worthy of the sex offender label and lifetime registration? Hardly. Yet, an inflated and distorted view of what constitutes sexual harm led the New Jersey court to draw exactly that conclusion.¹³⁰

For a panic to take hold, it is not enough that there are legal decisions that affirm the public's view of the danger. In any moral panic, it takes other actors to spread it. Historian Philip Jenkins traces the spread of moral panics to nearly identical messaging from political leaders and the media.¹³¹ The

Rainer v. State, 690 S.E.2d 827, 829-30 (Ga. 2010) (concluding that robbery of a female drug dealer who was underage qualified as a registrable offense).

123. See Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U.L. Rev. 295 (2006) (criticizing strict liability statutory rape as an offense that demonstrates dangerousness).

124. *People ex rel. J.L.*, 800 N.W.2d 720, 721 (S.D. 2011).

125. See S.D. CODIFIED LAWS § 22-22-1 (2017 & Supp. 2020) (defining rape as "an act of sexual penetration accomplished with any person . . . if the victim is less than thirteen years of age.").

126. *State ex rel. B.P.C.*, 23 A.3d 937, 941-44 (N.J. Super. Ct. App. Div. 2011).

127. *Id.* at 942-44.

128. *Id.* at 944.

129. See, e.g., *Vanderpump Rules: Dirty Thirty* (BRAVO television broadcast Dec. 21, 2015).

130. *State ex rel. B.P.C.*, 23 A.3d at 945-47 (concluding that the boys' actions were registration-worthy and required lifetime registration).

131. PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 6-7 (1998); see also Heather Ellis Cucolo & Michael L. Perlin, "They're

panic is fueled by inflammatory rhetoric and graphic storylines involving children victims.¹³² It will come as no surprise that in passing Megan's Law, senators who spoke in favor of its passage supported their vote with a vivid and disturbing story of sexual abuse.¹³³ The natural reaction for politicians to exploit the high profile case was confirmed in a fascinating study conducted of sixty-one policymakers across the country who sponsored sex offense bills.¹³⁴ Survey results revealed that lawmakers admitted that their bills were most often inspired by a high profile case that grabbed state or national headlines.¹³⁵

This is not by happenstance. Emotionally laden rhetoric drives a moral panic. *Ideal Victims and Monstrous Offenders*, which tracked the public discourse around sex offenses in the *LA Times* from 1990-2015, contended that "sexual predator" became an overused term to describe all sexual offenses, violent or not, and predatory or not.¹³⁶ Emotionally laden rhetoric also sustains the moral panic, as observed by sociologists who were questioning why the panic surrounding sex offenders had yet to wane.¹³⁷

One cannot also underestimate the ferocity of a moral panic. Mary Katherine Huffman paints a vivid picture: "[W]hat began as mere concern surrounding an identifiable group grows in such intensity that boundless fear

Planting Stories in The Press": *The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185 (2013) (examining the role of the media in perpetuating the myth).

132. See B. Drummond Ayres, Jr., *California Child Molesters Face 'Chemical Castration'*, N.Y. TIMES (Aug. 27, 1996), <https://www.nytimes.com/1996/08/27/us/california-child-molesters-face-chemical-castration.html> (quote from California State Assemblyman Bill Hoge) ("What we're up against is the kind of criminal who, just as soon as he gets out of jail, will immediately commit this crime again at least 90 percent of the time."); AMANDA PETTERUTI & NASTASSIA WALSH, JUST. POL'Y INST., REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH AND COMMUNITIES 12 (2008), http://www.justicepolicy.org/uploads/justicepolicy/documents/walsh_act.pdf (statement of U.S. Representative Ric Keller (R-FL)) ("The best way to protect children is to keep child predators locked up in the first place, because someone who has molested a child will do it again and again and again."); *id.* at 6 (contending that media reports of sexual offenses increased between 1991 and 1998 even as statistics on those crimes fell). For an interesting analysis of media reporting, see COHEN, *supra* note 98, at 25 (observing that there are three stages of reporting that help fan the flames in a societal panic: exaggeration and distortion, prediction, and symbolization).

133. See Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 330-32 (2001).

134. See Michelle Meloy et al., *The Sponsors of Sex Offender Bills Speak Up: Policy Makers' Perceptions of Sex Offenders, Sex Crimes, and Sex Offender Legislation*, 40 CRIM. JUST. & BEHAV. 438, 438 (2013).

135. *Id.* at 443.

136. Rebecca A. DiBennardo, *Ideal Victims and Monstrous Offenders: How the News Media Represent Sexual Predators*, 4 SOCIUS, 2008, at 1, 1 ("There is increasingly myopic focus on the 'predator' as personifying the danger to [communities] . . . the predator template [has become] more and more central to how we think and talk about sexual violence." (alterations in original)).

137. See Burchfield et al., *supra* note 106, at 100.

directed at the scourged no longer bears any relation to an actual threat.”¹³⁸ Fear-laden messaging that morphs into governmental sanctioned legislation comes at a tremendous cost to those targeted in a moral panic. Registrants are ostracized and vilified and left without an opportunity for meaningful reintegration into society.¹³⁹ Sociologist Cohen called those targeted in a moral panic “the folk devils,” perceived to be the manifestation of evil threatening the community.¹⁴⁰ To combat the “folk devils,” the panicked citizens create an infrastructure of harsher sentences, targeted isolation, community vigilantism, and bars to reentry programs.¹⁴¹

Societal panics give communities permission to unleash their hatred. Support by governmental adoption of registration and notification schemes gives the community a sense of agency over the fate of registrants. Lancaster calls the exaggerated community panic “poisoned solidarity” or “mutual suspicion.”¹⁴² Sadly, it is not uncommon that those who have committed sex offenses are targets of violence.¹⁴³ But even if not targeted for violence, they

138. Huffman, *supra* note 1, at 247.

139. Although determining them to be constitutional, even courts reviewing the first generation of registration schemes acknowledged the devastating impact on offenders. *See, e.g.,* Smith v. Doe, 538 U.S. 84, 99 (2003) (“It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times.”); *see also* Young v. State, 806 A.2d 233, 249 (Md. 2002) (“Being labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism.”); Ray v. State, 982 P.2d 931, 936 (Idaho 1999) (“[R]egistration brings notoriety to a person convicted of a sexual offense [and] does prolong the stigma attached to such convictions.”); Doe v. Pryor, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999) (“[C]ommunity notification under the Act will seriously damage [a registrant’s] reputation and standing in the community.”); Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997) (“We can hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling of a prison inmate as a sex offender.”).

140. COHEN, *supra* note 98, at 1-2.

141. *See* Carpenter, *supra* note 49, at 51-56; *see also* Jane A. Small, *Who Are the People in Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451, 1465-66 (1999) (cautioning implications to community notification laws); Miriam Aukerman, *Sex Offender Registries Endanger the Lives They’re Meant to Protect*, THE HILL (Oct. 25, 2017, 1:20 PM), <http://thehill.com/opinion/criminal-justice/357096-sex-offender-registries-endanger-the-lives-theyre-meant-to-protect> (“[T]he internet has turned these registries into modern-day scarlet letters, leading to harassment and even vigilantism.”).

142. LANCASTER, *supra* note 109, at 21; *see also* Sara Sun Beale, *What’s Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997) (exploring why the public favors harsh crimes and punishments in the face of countermanding evidence).

143. *See, e.g.,* Ramon Antonio Vargas, *Teen Beat Up a Stranger He Recognized as a Sex Offender, Now Faces Hate Crime Count, NOPD Says*, NOLA.COM (Oct. 25, 2019, 11:53 AM), https://www.nola.com/news/crime_police/article_8b0b2784-f744-11e9-9e16-4370b10664e3.html; David Boroff, *Vigilante Pleads Guilty to Beating Three Sex Offenders, Implores Others Not to Take Law into Own Hands*, N.Y. DAILY NEWS (Jan. 2, 2018, 3:50 PM),

come under the kind of scrutiny that makes reintegration impossible. Fearful of losing their livelihood and their homes, they live in constant fear of being outed and ostracized.¹⁴⁴ Finally, vigilantism from panic causes people to target those who they incorrectly believe are registrants,¹⁴⁵ or who “just look suspicious.”¹⁴⁶

The latter is what happened to Eric Haskett, a twenty-eight-year-old man whose only mistake was to fall asleep for a few moments outside his date’s home because he had arrived too early to pick her up.¹⁴⁷ As Lancaster wrote of the incident, “This innocent napping was to set in motion a chain reaction involving snoopy neighbors, community vigilantes, the Internet, various modes of surveillance (some plainly un-lawful), local police investigators, and no fewer than three FBI agents.”¹⁴⁸

Before the confusion had cleared, three separate law enforcement agencies had investigated, neighborhood emails had circulated regarding sightings of Haskett, and Haskett had been advised to leave the area.¹⁴⁹ A disturbing takeaway from this event is that imagined threats take precedence over discerning the truth in this moral panic. Witness the defiance of the groupthink on display as neighbors displayed a lack of remorse in their misidentification of Haskett and their role in the ensuing troubles that befell him.¹⁵⁰ Although mischaracterizing Haskett’s actual behavior, one woman defended the actions of the community with this ominous threat, “Don’t [mess] with suburbia, because we will chew you up and spit you out.”¹⁵¹

<https://www.nydailynews.com/news/crime/man-beat-sex-offenders-admits-vigilante-justice-wrong-article-1.3733638>.

144. For a sampling of the extremely difficult experiences facing registrants who attempt to reintegrate, see *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1217-21 (D. Colo. 2017) (detailing the lives of three registrants who feared for their safety, the security of a residence, and the continuation of employment), *rev’d in part, vacated in part sub nom.* *Millard v. Camper*, 971 F.3d 1174, 1177 (10th Cir. 2020).

145. *California Man Beaten to Death After Being Mistaken for Sex Offender*, MERCURY NEWS (Sept. 3, 2019, 10:04 AM), <https://www.mercurynews.com/2019/09/03/california-man-beaten-to-death-after-being-mistaken-for-sex-offender>.

146. See LANCASTER, *supra* note 109, at 4-5.

147. *Id.* at 19.

148. *Id.*

149. See Fredrick Kunkle, *Caught in a Neighborhood Web: Innocent Man Mistaken for Registered Offender*, WASH. POST (May 13, 2006), <https://www.washingtonpost.com/archive/politics/2006/05/13/caught-in-a-neighborhood-web-span-classbankheadinnocent-man-mistaken-for-registered-offender-span/19cbb41c-ba88-417d-b077-b77b6e653066/> (detailing additional confusion because Eric Haskett had rented a room previously rented by a registrant).

150. *Id.*; see also Teichman, *supra* note 2, at 387 (analyzing the role the community plays in these non-legal shaming laws).

151. Kunkle, *supra* note 149 (alteration in original).

Yes, it appears we are in the throes of a moral panic. Certainly, all the signs point to one: the weight of the infrastructure we have built to punish and ostracize offenders, the inability to admit the ineffectiveness of registries, the especially harsh treatment all offenders face post-prison, and the obstacles we have erected to bar their reintegration. Only with this appreciation can we understand the depth of resistance to empirical data that upends the status quo. And only with this appreciation can we understand why it is so difficult for the public to let go of the false messaging.

B. The Real Data

Statistics play the leading role in registry analysis. In effect, their use serves as a legal crystal ball; we rely on the numbers to assess future dangerousness of a specific part of the offending population.

No doubt, one could examine the use of statistical evidence with a jaundiced eye. It harkens back to the famous quote: “There are lies, damned lies, and statistics.”¹⁵² Despite their alleged malleable nature, statistics play an important role in the law because they “summarize and clarify the nature of our complex society.”¹⁵³ If we are concerned by their ability to manipulate the message, Professor Joel Best tells us the solution is “not to give up on statistics, but to become better judges of the numbers we encounter.”¹⁵⁴

And that is where the tension lies. Competing statistics often fight for supremacy in the message. Consider for a moment the role that statistical evidence played in the establishment of the registration and notification regimes. Even before the United States Supreme Court weighed in on the constitutionality of registration schemes, the stage was set in New Jersey. A terrifying event for any parent to imagine—seven-year-old Megan Kanka was lured into the home of her neighbor one afternoon where she was brutally

152. The origin of this quote is uncertain, although it has been popularly attributed to Israeli statesman Benjamin Disraeli. See Georges Monette, *Lies, Damned Lies and Statistics*, UNIV. OF YORK (July 19, 2012), <https://www.york.ac.uk/depts/maths/histstat/lies.htm> (detailing the various attributions of the quote). This topic has spawned a host of books and articles. See, e.g., JOEL BEST, DAMNED LIES AND STATISTICS: UNTANGLING NUMBERS FROM THE MEDIA, POLITICIANS, AND ACTIVISTS (2012); Kalev Leetaru, *Lies, Damned Lies and Statistics: How Bad Statistics Are Feeding Fake News*, FORBES (Feb. 2, 2017, 8:50 PM), <https://www.forbes.com/sites/kalevleetaru/2017/02/02/lies-damned-lies-and-statistics-how-bad-statistics-are-feeding-fake-news/> (critiquing statistics that are published without rigorous statistical review); Mac Hill, *Lies, Damned Lies, and Statistics: Exploring the Relationship Between Aesthetics and Interpretation*, ANDSO (June 1, 2017), <https://academics.design.ncsu.edu/andso/2017/06/01/lies-damned-lies-and-statistics> (using the quote as a springboard to a discussion of visual exploration of truth versus interpretation in design).

153. See BEST, *supra* note 152, at 5.

154. *Id.* at 6.

raped and murdered.¹⁵⁵ This horrifying tragedy motivated what became known as Megan’s Law—the first community notification statute in the country.¹⁵⁶

Such a legislative reaction is not unusual. A high-profile and senseless murder naturally demands action. What is confusing, however, were the empirical studies used as foundation for launching the notification regime. In determining that registration and notification statutes were constitutional, the New Jersey Supreme Court in *Doe v. Poritz* endorsed studies that reported recidivism rates of sex offenders at upwards of 40% to 52%.¹⁵⁷ But, in approximately the same timeframe, the Bureau of Justice Statistics reported a far different conclusion: “Of the 9,691 male sex offenders released from prisons in 15 States in 1994, 5.3% were rearrested for a new sex crime within 3 years of release.”¹⁵⁸ And in a companion study tracking 272,111 former inmates who were discharged in 1994, the study found that the lowest re-arrest rates were for those previously convicted of murder or rape, while the highest recidivism rates were for offenders previously convicted of property crimes.¹⁵⁹ Other studies during roughly the same timeframe also support low recidivism rates:¹⁶⁰ New York reported a recidivism rate of 2.1%; Arizona 5.5%; and Ohio 8%.¹⁶¹

Conflicting statistical evidence took center stage in the Sixth Circuit in 2016 when it grappled with recidivism rates that were in contradiction to those claimed by the Supreme Court. As noted earlier, in 2003, the Supreme Court in *Smith* asserted that sex offenders recidivate at rates that are “frightening and high.”¹⁶² By comparison, in 2016, the accuracy of the *Smith*

155. See *State v. Timmendeguas*, 737 A.2d 55, 68-69 (N.J. 1999) (recounting the brutal killing of Megan Kanka at the hands of Jesse Timmendeguas).

156. See *Doe v. Poritz*, 662 A.2d 367, 372 (N.J. 1995) (“On October 31, 1994, a group of bills concerning sex offenders became law. They are generally referred to as ‘Megan’s Law,’ named after the second female child abducted, raped, and murdered during the prior year.”).

157. *Id.* at 374 (detailing at the outset of the opinion high recidivism to support the need for a registration scheme).

158. See PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP’T OF JUST. BUREAU OF JUST. STAT., RECIDIVISM OF PRISONERS RELEASED IN 1994, at 8 tbls.9 & 10 (2002), <https://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

159. See *State v. O’Hagen*, 881 A.2d 733, 744 (N.J. Super. Ct. App. Div. 2005) (reporting findings that those who commit sex offenses reoffend at a much lower rate than those who commit property crimes).

160. See Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 413-14 (2010).

161. *Id.* at 414.

162. See *supra* notes 7-9 and accompanying text on *Smith*. Even prior to *Smith*, lower courts had relied on similarly inflated numbers. See, e.g., *Neal v. Shimoda*, 905 F. Supp. 813, 819 (D. Haw. 1995) (“Research has also shown that the rate of recidivism among untreated sex offenders is

assessment was questioned by the Sixth Circuit in *Does #1-5 v. Snyder*,¹⁶³ the court writing, “The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in *Smith* that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.’”¹⁶⁴

How do we reconcile these vastly different pictures painted by the statistics? On the one hand, according to *Poritz*, and later reaffirmed in *Smith*, those who commit sex offenses re-offend at much higher rates than their criminal counterparts.¹⁶⁵ The ability to predict future dangerousness because of those statistics became the prime justification for registration laws¹⁶⁶—although fidelity to that premise is in serious doubt given the lack of effectiveness of the registry.¹⁶⁷ On the other hand, two decades of study, as referenced in *Snyder*, offer a very different conclusion: registrants recidivate at much lower rates than is believed.¹⁶⁸

high being between 60-80 percent and that incarceration without treatment tends to increase the offenders’ propensity to reoffend.”), *aff’d in part, rev’d in part*, 131 F.3d 818 (9th Cir. 1997).

163. 834 F.3d 696 (2016).

164. *Id.* at 704 (citing a study by LAWRENCE A. GREENFIELD ET AL., U.S. DEP’T OF JUST. BUREAU OF JUST. STAT., *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003), <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf>); *see also* *United States v. Kebodeaux*, 570 U.S. 387, 396 (2013) (acknowledging a study by R. Tewsbury, W. Jennings, and K. Zgoba that “sex offenders have relatively low rates of recidivism”). For a supporting view, see Cntr. for Sex Offender Mgmt., *Myths and Facts About Sex Offenders*, CTR. FOR EFFECTIVE PUB. POL’Y (Aug. 2000), <https://cepp.com/wp-content/uploads/2020/01/3-Myths-and-Facts.pdf> (refuting the prevailing view that sex offenders reoffend at higher rates); *Criminal Offender Statistics*, U.S. DEP’T OF JUST. (Aug. 8, 2007), <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (reporting statistics that demonstrate adult sex offenders do not recidivate at higher rates than other criminal offenders).

165. *Doe v. Poritz*, 662 A.2d 367, 375 (N.J. 1995); *Smith v. Doe*, 538 U.S. 84, 103 (2003).

166. For a look at early case language, see *E.B. v. Verniero*, 119 F.3d 1077, 1097 n.17 (3d Cir. 1997) (“Heinous crimes have been committed against children after [sex offenders’] release from incarceration.” (alternation in original)); *State v. Druktenis*, 86 P.3d 1050, 1068 (N.M. Ct. App. 2004) (quoting N.M. STAT. ANN. § 29-11A-2(A)(1) (West 2011 & Supp. 2020)) (“[S]ex offenders pose a significant risk of recidivism.”); *State v. Sakobie*, 598 S.E.2d 615, 617 (N.C. Ct. App. 2004) (quoting N.C. GEN. STAT. ANN. § 14-208.5) (“The purpose of [the state’s sex offender registration law] is to prevent recidivism because ‘sex offenders often pose a high risk of [reoffense] and . . . protection of the public from sex offenders is of paramount governmental interest.’”).

167. *See supra* note 2.

168. *See infra* notes 168-91; *see also* Ryan W. Porte, Note, *Sex Offender Regulations and the Rule of Law: When Civil Regulatory Schemes Circumvent the Constitution*, 45 HASTINGS CONST. L.Q. 715, 727 (2018) (quoting ROGER PRZYBYLSKI, U.S. DEP’T OF JUST. SEX OFFENDER MGMT ASSESSMENT & PLAN. INITIATIVE, *RECIDIVISM OF ADULT SEXUAL OFFENDERS 4* (2015), <https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/recidivismofadultsexualoffenders.pdf> (“[R]esearch comparing the recidivism rates of sex offenders with those of non-sex offenders consistently finds that sex offenders have lower overall recidivism rates than non-sex offenders.”); Application to File Amici Curiae Brief and Brief of Amici Curiae Nineteen Social Science and Law Scholars in Support of Petitioner Gregory Gadlin at 21-22, *In re Gadlin*, 440 P.3d 144 (Cal. 2019) (No. S254599), 2020 WL 560078, at *21-22 [hereinafter *Gadlin Amicus Brief*]

Which message is accurate? Professor Ira Ellman, author of *Frightening and High*,¹⁶⁹ argues that the key to assessing statistical validity lies in asking the correct questions and tracking the relevant pool to predict future danger.¹⁷⁰ His guidance to better statistical understanding is laid out in amici briefs on behalf of law professors and social scientists where he served as the primary author.¹⁷¹ Common themes emerge from his analysis of published studies: ensuring valid results requires a nuanced assessment of the group to be tracked, and tracking must include all relevant, but often overlooked, populations.

The pool matters. Just because a study tracks “sex offenders” does not necessarily ensure an accurate snapshot of their future dangerousness. That is because sex offenders are not a homogeneous unit. Grouping them all together produces misleading results on their future dangerousness. Put bluntly by Professor Ellman, “[E]ven a properly computed average re-offense risk across *all* registrants is no more likely to fit the individual registrant than would a shoe of the group’s average size.”¹⁷² Mr. Shajnfeld and Dr. Krueger agree that “[c]ollapsing all sex offenders together into a single category and making generalizations about this diverse range of offenders . . . is likely to result in substantial mischaracterizations regarding the risk of re-offending for many of these individuals.”¹⁷³ To put this into concrete terms, the moniker “sex offender” applies equally to the violent and non-violent, as well as to those who have committed non-sexual offenses but who are required to register as “sex offenders.”¹⁷⁴ That last point—that non-

(concluding that registrants recidivate at lower rates than their counterparts in a detailed review of data on 33,113 prisoners released from California prisons in 2019).

169. See *supra* notes 7, 9.

170. See Brief of 17 Scholars Who Study Sex Offenses as Amici Curiae in Support of Appellees and Supporting Affirmance at 4, *Millard v. Camper*, 971 F.3d 1174 (10th Cir. 2020) (No. 17-1333), 2018 WL 3693887, at *4 [hereinafter *Millard* Amicus Brief].

171. In addition to Professor Ellman and myself, amici included law professors and social scientists who engage in research on the subject. See *Gadlin* Amicus Brief, *supra* note 168, at 7 (“This application is on behalf of nineteen scholars across six disciplines whose work includes leading empirical studies of persons convicted of sexual offenses and the laws applied to them.”); accord *Millard* Amicus Brief, *supra* note 170, at 1; Brief of Scholars Whose Work Includes Sex Offense Studies as Amici Curiae in Support of Petitioner at 1, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086) 2018 WL 2716794, at *1.

172. *Millard* Amicus Brief, *supra* note 170, at 15.

173. Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEVS. MENTAL HEALTH L. 81, 84 (2006); see also Keith Soothill, *Sex Offender Recidivism*, 39 CRIME & JUST. 145, 158 (2010) (criticizing the statistical error that occurs when extrapolating a large finding from a specific pool).

174. The inclusion of non-sexual offenders is one of the hardest concepts for any lay audience to grasp to whom I make presentations around the country. But it symbolizes the overbreadth and reach of a registration regime that has grown unchecked. See, e.g., *Does #1-4 v. Snyder*, 932 F. Supp. 2d 803, 807-08 (E.D. Mich. 2013) (involving 1990 conviction of defendant who robbed the

sexual offenders are on the registry—only amplifies its bloated and disconnected reach.

A point often overlooked is that the term “sex offenders” reflects a different population than the term “registrants,” although most people reviewing the statistical results assume the terms—and therefore the pools—are the same. Professor Ellman highlighted this misconception when he reviewed a Bureau of Justice study.¹⁷⁵ There, “sex offenders” was the term used in the highlighted Bureau of Justice study, and although the resulting five percent may appear to be a low statistic, even that reported result may have been inaccurately high.¹⁷⁶ *The reason?* In that particular study, “sex offenders” were primarily adult, male, violent offenders released from state prisons. While that is a valuable group to track, they comprise only a portion of those placed on the registry, many of whom, as is later discussed, do not re-offend.¹⁷⁷

In another deep dive, Professor Ellman examined a study used by the *Smith* Court to support lifetime registration, and not surprisingly, he found that the summary of the study upon which the Court had relied, mischaracterized the findings.¹⁷⁸ Extrapolating the value of lifetime registration for all registrants from this study was misleading because the study had only examined a small subset of a registrant population to confirm its findings.¹⁷⁹

Juveniles. Another common oversight but one that alters the findings dramatically, is the failure to include juveniles who are required to register as adults. Their exclusion from statistical results distorts those results because their presence on a state registry is not insignificant and because their re-offense rate is very low.¹⁸⁰

manager of a fast food restaurant and threatened to kidnap his twelve-year-old son), *rev'd sub nom. Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016); *see also Rainer v. State*, 690 S.E.2d 827, 830 (Ga. 2010) (Hunstein, C.J., dissenting) (regarding an eighteen-year-old male who robbed a seventeen-year-old female drug dealer); *People v. Fuller*, 756 N.E.2d 255, 257 (Ill. App. Ct. 2001) (concerning the poor fortune of Mr. Fuller who stole a van from a parking lot with two children in the backseat).

175. *Millard* Amicus Brief, *supra* note 170, at 11-15.

176. *Id.*

177. *Id.*

178. *See Ellman & Ellman*, *supra* note 7, at 508.

179. *Millard* Amicus Brief, *supra* note 170, at 15 (“In other words, the study did not examine the re-offense rates of ‘child molesters,’ much less of all registrants, but rather of a small and atypical subgroup, incarcerated in a special facility designed for sexual offenders who presented a particularly high risk.”); *see also Gadlin* Amicus Brief, *supra* note 168, at 24 (criticizing CDRC results and finding “for a three-year sexual re-offense rate of 1.7%, following release”).

180. Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 13-15 (2013) (reporting on numerous studies that show that juvenile sex offenders recidivate at very low rates).

Although numbers are difficult to pin down,¹⁸¹ experts report approximately 20% to 25% of the registry is filled with juveniles who must register as adults.¹⁸² Dr. Michael F. Caldwell's review of twenty-two studies found a juvenile recidivism rate of less than 5%.¹⁸³ In one study of 11,219 juvenile sex offenders, the mean sexual recidivism rate was slightly higher at 7% but was still six times lower than the general recidivism rate of 43%.¹⁸⁴ Other studies similarly have found that child sex offenders do not recidivate at the rates imagined by the public,¹⁸⁵ and when children do re-offend, they likely do so for motivations other than serial predatory tendencies.¹⁸⁶

181. See Carpenter, *supra* note 8, at 467 n.33 (recounting an interview conducted with the author, Nicole Pitman, formerly at Human Rights Watch, who estimated that twenty-five percent of the registry was comprised of juvenile offenders, but noting the difficulties in arriving at accurate numbers because of the various ways that states approach registration of juvenile offenders); see also HUM. RTS. WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 17 (2013), http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf (describing the different approaches that states take to juvenile registration).

182. See Carpenter, *supra* note 8, at 467 & n.33; see also MALIK PICKETT et al., JUV. L. CTR., LABELED FOR LIFE: A REVIEW OF YOUTH SEX OFFENDER REGISTRATION LAWS 2 (2020), <https://jlc.org/sites/default/files/attachments/2020-08/Labeled%20for%20Life%20August%202020.pdf> (“Over 200,000 individuals are on sex offender registries for offenses committed when they were children.”); DAVID FINKELHOR ET AL., U.S. DEP’T OF JUST. OFF. OF JUV. JUST. & DELINQ. PREVENTION, JUVENILES WHO COMMIT SEX OFFENSES AGAINST MINORS 3 (2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf> (reporting that “juvenile sex offenders comprise more than one-quarter (25.8 percent) of all sex offenders.”).

183. See Michael F. Caldwell, *Juvenile Sex Offenders*, in CHOOSING THE FUTURE FOR AMERICAN JUSTICE 40, 42 (David Spinoza Tanenhaus & Franklin Zimring eds., 2014).

184. See *id.*

185. See *In re J.B.*, 107 A.3d 1, 13 (Pa. 2014) (endorsing a report that “the recidivism rate for juvenile sexual offenders to commit another sexual offense is less than two percent”); see also NICOLE PITTMAN & QUYEN NGUYEN, DEF. ASS’N OF PHILA., A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES 6 & 9 n.31 (2011), http://www.njjn.org/uploads/digital-library/SNAPSHOT_web10-28.pdf (reporting the findings of studies compiled by Professor Franklin E. Zimring revealing that over ninety-two percent of all individuals who committed a sex offense as a juvenile did not commit another sex offense); *id.* at 6 & 9 n.29 (citing Janis F. Bremer, *Juveniles Who Engage in Sexually Harming Behavior A Restorative Justice System*, 32 WM. MITCHELL L. REV. 1085, 1087 (2006)) (reporting on a study conducted in 1996 of 1,600 child sex offenders that found a recidivism rate of four percent); RICK MCELFRISH ET AL., MO JUVENILE OFFENDER RECIDIVISM REPORT: A 2019 STATEWIDE JUVENILE COURT REPORT 18 & fig.6 (2009) (finding that juvenile sex offenders had the lowest rate of recidivism among juvenile offenders).

186. See, e.g., Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 JUST. Q. 58, 70 (2009); AARON GARNER, IND. DEP’T OF CORR., JUVENILE RECIDIVISM RATES, 2008, at 12 (2008), <https://www.in.gov/idoc/dys/files/2008JuvRecidivismRpt.pdf> (reporting that juvenile sex offenders in Indiana were less likely to recidivate than nonsexual offenders); MCELFRISH ET AL., *supra* note 185, at 18 (finding that juvenile sex offenders had the lowest rate of recidivism among juvenile offenders).

Zimring's research found that "juveniles with sexually based police contacts have a high volume of non-sex contacts and a low rate of sexual recidivism during their juvenile careers, and an even lower probability for sexual offending during young adulthood."¹⁸⁷ To put the absence of juvenile registrants into perspective, tracking results are suspect when 20% of a registry is not factored into the statistical analysis to determine future dangerousness, and that this particular 20% has very low re-offense rates.

Studies that only track those released from prison. It is misleading to track *only* those offenders who are released from prison in an attempt to extrapolate future dangerousness as to all registrants. That is because a state's registry includes many persons who never went to prison, either because they were placed on probation or served time in the county jail. As Professor Ellman illustrates with the Colorado registry, juveniles and those whose registerable conviction was a misdemeanor make up nearly 25% of Colorado registrants.¹⁸⁸ The absence of these registrants, who are not likely to re-offend, skews the results of prediction.

Years from the registering offense. One statistical fact that has emerged from the studies is that re-offense rates of registrants—no matter the seriousness of their crime—steadily decline over the years.¹⁸⁹ "Whatever a registrant's risk level at the time of . . . release, the probability of re-offending declines every year he or she remains at liberty without having re-offended."¹⁹⁰ This is true for "even those who present a high re-offense risk at the time of their release."¹⁹¹

This statistical fact alone should animate all aspects of the conversation. Armed with the knowledge that re-offense rates decline precipitously with the offender's age, the one-size-fits-all approach to future dangerousness is suspect. And if suspect, then blanket rules affecting all registrants including "all except for" provisions should be eliminated.

The hidden reality of ineffectiveness. Buried beneath the infrastructure of registration and notification schemes is the open secret shared by social scientists: registration and notification schemes are ineffective. Amanda Y. Agan summed it up well after conducting a myriad of empirical tests from different angles and across numerous states: "I find little evidence to support the effectiveness of sex offender registries, either in practice or in

187. Zimring et al., *supra* note 186, at 59-60.

188. Millard Amicus Brief, *supra* note 170, at 13.

189. See, e.g., R. Karl Hanson et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERSONAL VIOLENCE 2792, 2807 (2014).

190. Millard Amicus Brief, *supra* note 170, at 17.

191. *Id.* For a critique on our obsession with fixed views of the convicted, see Mihailis E. Diamantis, *Limiting Identity in Criminal Law*, 60 B.C. L. REV. 2011 (2019).

potential.”¹⁹² Agan is joined by J.J. Prescott & Jonah E. Rockoff who separated their research into the effectiveness of registration and the effectiveness of notification.¹⁹³ “Importantly, we detect no evidence that notification laws . . . curtail crime by reducing recidivism among convicted sex offenders; the estimated effect of notification is actually weaker when a state applies the law to a large number of offenders.”¹⁹⁴

III. DEMANDING CHANGE UNDER THE FOURTEENTH AMENDMENT

Challenging sex offense registration and notification laws under the Fourteenth Amendment has been a herculean task, one that, unsurprisingly, has been met with only modest success.¹⁹⁵ Yet, as registration and notification schemes continue to grow dramatically with an ever more pervasive and punitive reach, it is time to ask whether there is *still* a rational relationship between these laws and public safety claims. It is time to question whether these decisions should continue unchecked when they are driven by naked animus.

In an earlier article, I posed the question: “Is the time ripe for a successful due process challenge?”¹⁹⁶ I argued that substantive due process was a fitting challenge to irrational sex offense legislation and further that I was hopeful such a successful challenge was on the horizon.¹⁹⁷ The year was 2012. It turned out I was wrong—at least on the second point. A successful due process challenge was not on the horizon. However, I was not wrong on the first point. A substantive due process challenge remains a fitting challenge to animate the conversation of the extent to which the government

192. Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON 207, 208 (2011); see also *id.* at 235 (“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.”).

193. Prescott & Rockoff, *supra* note 2, at 163-64.

194. *Id.* at 164-65; see also Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 612-13 (2009) (recognizing that “there is no evidence proving the effectiveness of [sex offender residency restrictions].”).

195. See *In re Taylor*, 343 P.3d 867, 879, 870, 879 (Cal. 2015) (overturning San Diego’s blanket residency restrictions based on substantive due process); see also *Millard v. Rankin*, 265 F. Supp. 3d 1211 (D. Colo. 2017) (invalidating Colorado’s registration scheme on a number of constitutional bases including substantive due process), *rev’d in part, vacated in part sub nom. Millard v. Camper*, 971 F.3d 1174, 1177 (10th Cir. 2020) (rejecting the substantive due process argument embraced by the district court).

196. Carpenter & Beverlin, *supra* note 47, at 1122.

197. *Id.* at 1124 (“Given the far-ranging burdens of super-registration schemes, a compelling argument can be made that . . . governmental conduct no longer comports with traditional notions of decency and fair play.”).

may use its official powers to deny its citizens essential aspects of life others enjoy.

So, that is where this article lands. In this Part, I argue that blanket exclusions are a denial of substantive due process because of arbitrary and capricious governmental action that is perpetrated only by full-throated animus. Although recognizing that the climb for such an argument is steep, recent judicial developments, modest in number but not in impact, suggest substantive due process may provide registrants with a viable path for relief.

Substantive due process was “intended to secure the individual from the ‘arbitrary exercise of the powers of the government,’”¹⁹⁸ but its extent has been the subject of considerable debate.¹⁹⁹ The difficulty lies in two interwoven fronts: the scope of substantive due process and the test for its review. Successful substantive due process challenges have generally required strict scrutiny analysis, which are triggered only by a fundamental interest. I say “generally” because there have been notable exceptions.²⁰⁰

Yet, its limiting principle is clear. Signaling extreme reluctance to expand notions of substantive due process, the Court, in *Washington v. Glucksberg*,²⁰¹ held firmly to the belief that “fundamental rights and liberties [are those] which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of ordered liberty.’”²⁰² Despite the extreme burdens they face, constitutional challenges by registrants have only been met with stony silence.²⁰³

198. *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819)). For other early references of the quote, see *Jenkins v. Ballantyne*, 30 P. 760, 761 (Utah 1892); *accord State v. Loomis*, 22 S.W. 350, 351 (Mo. 1893).

199. See *City of Sacramento v. Lewis*, 523 U.S. 833, 856-65 (1998) (offering the spectrum of views on substantive due process among the justices’ five concurring opinions). Compare *Lochner v. New York*, 198 U.S. 45, 59-60 (1905) (ushering in economic substantive due process), with *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (narrowing substantive due process to primarily fundamental rights deeply rooted in the constitution).

200. See *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (rejecting Texas’ argument on why sodomy laws met the rational basis test); see also *In re Taylor*, 343 P.3d 867, 879-82 (Cal. 2015) (overturning San Diego residency restrictions using rational basis review).

201. 521 U.S. at 720 (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)) (“[W]e ‘ha[ve]’ always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” (second alteration in original)).

202. *Id.* at 720-21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)); see also *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (quoting *Fuentes v. Shevin*, 407 U.S. 67, 90 n.21 (1972)) (“The question is not merely the ‘weight’ of the individual’s interest, but whether the nature of the interest is one within the contemplation of the ‘liberty or property’ language of the Fourteenth Amendment.”).

203. See, e.g., *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003) (Scalia, J., concurring) (“Absent a claim (which respondent has not made here) that the liberty interest in question is so fundamental as to implicate so-called ‘substantive’ due process, a properly enacted law can

It is not difficult to understand why registrants have largely failed in the courts. Without a fundamental interest to anchor strict scrutiny analysis, conventional thinking suggests that the traditional rational basis test offers little hope for registrants. A traditional rational basis review generally presumes that legislation is constitutional provided it bears a rational relationship to some legislative purpose.²⁰⁴ Indeed, quite cynically declared by one legal scholar, the rational basis test was “tantamount to declaring that the legislation was constitutional.”²⁰⁵

But there looms an additional obstacle to a successful challenge. Generally, the government “has no obligation to produce evidence to sustain the rationality of a statutory classification.”²⁰⁶ Instead, the burden rests with the complainant to “negative every conceivable basis which might support it.”²⁰⁷ So cemented is this view that the Supreme Court underscored it with this statement: “In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.”²⁰⁸ Moreover, because the legislature does not have to articulate its reasons for enacting a statute, the Court finds it irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.²⁰⁹ Criticizing this posture, one commentator wrote, “[O]nly under the rational-basis test do judges routinely decide cases on the basis of government-favoring speculation and conjecture rather than admissible evidence Only under the rational-basis test do judges expressly refuse to inquire into the true ends that legislation is calculated to achieve.”²¹⁰

At first blush, blanket exclusions look like such a legislative choice—sex offenders are differentiated from other felons for benefits to which others are entitled. Arguably that is the legislative choice. When combined with

eliminate it.”); see also *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005) (“[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.”).

204. See, e.g., *Heller v. Doe*, 509 U.S. 312, 319 (1993) (“[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.”).

205. Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 4 (1980).

206. *Heller*, 509 U.S. at 320. But see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (chastising the government for having a record that “does not reveal any rational basis”).

207. See *Lehnhausen*, 410 U.S. at 364.

208. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

209. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

210. Evan Bernick, *Subjecting the Rational Basis Test to Constitutional Scrutiny*, 14 GEO. J.L. & PUB. POL’Y 347, 348 (2016) (citing Clark Neily, *Litigation Without Adjudication*, 14 GEO. J.L. & PUB. POL’Y 537 (2016), to critically evaluate the deferential posture of courts in their examination of legislation).

the panic that has enveloped the laws' development, employing a "relatively relaxed standard"²¹¹ that does not demand governmental evidentiary burden dooms the challenge.²¹² The reason is clear: courts have been able to opt out of the scrutiny needed to question whether the laws are *actually* rationally related to the policy they are designed to serve.²¹³

A. Unreasonableness and Arbitrariness

Even within the current structural hierarchy of judicial review, a deferential rational basis test is not without limitations on legislative action.²¹⁴ Justice Werdegar so emphasized when she dissented in *Johnson v. Department of Justice*:

[D]eferential as it is, [the rational basis test] nevertheless requires real scrutiny of the relationship between a classification and the possible legislative goals. We have described the necessary inquiry into that relationship as a serious and genuine one, in which the court seeks plausible reasons for the classification, resting on a reasonably conceivable factual basis.²¹⁵

Justice Werdegar was correct. And so was Judge Batchelder in *Does #1-5 v. Snyder* when she refused to insulate the government from producing evidence to support its extensive residency and presence restrictions, writing, "Intuitive as some may find [the policy for these laws], the record before us provides *scant* support for the proposition that SORA in fact accomplishes

211. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (per curiam).

212. *See, e.g., State v. Smith*, 780 N.W.2d 90, 96 (Wis. 2010) (upholding offender's registration for non-sexual crime because it is "rationally related to the state's legitimate interest in protecting the public, including children, and assisting law enforcement"); *Lee v. State*, 895 So. 2d 1038, 1044 (Ala. Crim. App. 2005) (quoting *Smith v. Doe*, 538 U.S. 85, 105 (2003)) ("The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective."); *People v. Malchow*, 714 N.E.2d 583, 589 (Ill. App. Ct. 1999) ("There is a direct relationship between the registration of sex offenders and the purpose served by the Registration Act, the protection of the public, and we find nothing unreasonable in the statute's method of serving its purpose."), *aff'd*, 739 N.E.2d 433 (Ill. 2000).

213. *See* Randy E. Barnett, *Why Popular Sovereignty Requires the Due Process of Law to Challenge "Irrational or Arbitrary" Statutes*, 14 GEO. J.L. & PUB. POL'Y 355, 363 (2016) (denouncing as undemocratic the policy of judges to abdicate their roles to evaluate legislation).

214. *See, e.g., Lambert v. California*, 355 U.S. 225, 228 (1957) (striking California's "failure to register" law because it did not include a scienter requirement); *Does #1-5 v. Snyder*, 834 F.3d 696, 704-05 (6th Cir. 2016) (striking residency restrictions using rational basis review); *cf. Garnett v. State*, 632 A.2d 797, 824 (Md. 1993) (Bell, J., dissenting) (advocating to strike legislative enactment of strict liability statutory rape because it violates due process). For an interesting examination of the potential (and lost) legacy of *Lambert*, see Cynthia Alkon, *The Lost Promise of Lambert v. California*, 49 STETSON L. REV. 267 (2020).

215. 341 P.3d 1075, 1094 (Cal. 2015) (Werdegar, J., dissenting).

its professed goals.”²¹⁶ *Scant* is a revelatory term. Used again a short time later in the opinion, the *Snyder* opinion called into question the presumption of legislative validity that cloaks the government’s failure to produce sufficient evidence to show a rational purpose.²¹⁷ Powerful was the admonition to the State of Michigan, the court rebuked the State when it wrote, “Nor should [the jurisprudence] be understood as writing a blank check to states to do whatever they please in this arena.”²¹⁸ It is reminiscent of the Supreme Court’s own admonishment to the government in *Gonzales v. Carhart*: “Although we review congressional factfinding under a deferential standard[,] . . . [t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”²¹⁹ In a striking about-face, Michigan Attorney General Dana Nessel filed an amicus brief in support of petitioners.²²⁰ In agreeing with the position taken by the Sixth Circuit, the attorney general stated, “SORA’s burdensome requirements and its devastating consequences for noncompliance are untethered to the purpose of protecting the health and safety of the public.”²²¹

Despite general deference to the legislature, *Snyder* and *Carhart* remind us of the importance of judicial oversight. Indeed, legislation should fail when it cannot withstand examination of the reason for the governmental intrusion. *Lawrence v. Texas*, a landmark Fourteenth Amendment case, serves as the leading example.²²² In one declarative swoop, the Court struck Texas’ sodomy law, writing, “The Texas statute furthers no legitimate state

216. *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016) (emphasis added); cf. *Reid v. Lee*, No. 3:20-cv-00050, 2020 WL 4501457, at *16-18 (M.D. Tenn. Aug. 5, 2020) (granting plaintiff’s preliminary injunction because of the likelihood plaintiff could prove that Tennessee’s expansive registration requirements, similar to Michigan’s, violates ex post facto principles).

217. *Does #1-5*, 834 F.3d at 705 (“A regulatory regime that severely restricts where people can live, work, and ‘loiter,’ that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, *all supported by at best scant evidence* that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska’s first-generation registry law.” (emphasis added)); see also *Doe v. Miami-Dade Cnty.*, 846 F.3d 1180, 1186 (11th Cir. 2017) (concluding that plaintiffs demonstrated sufficiency in their complaint that highly restrictive residency restrictions did not support public safety objectives).

218. *Does #1-5*, 834 F.3d at 705; see also Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of Doe v. Snyder*, 58 B.C. L. REV. 34, 40 (2017) (recognizing the importance of Judge Batchelder’s engagement with statistical evidence).

219. 550 U.S. 124, 165 (2007).

220. Brief of Amicus Curiae Michigan Attorney General Dana Nessel at 1, *People v. Betts*, 943 N.W.2d 84 (Mich. 2020) (No. 148981), 2020 WL 717619, at *1.

221. *Id.* at 44.

222. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overturning Texas’ sodomy law using the rational basis test).

interest which can justify its intrusion into the personal and private life of the individual.”²²³

Think arbitrary. Think shoplifting.

Arbitrariness is key to a successful due process challenge. *In re Taylor* may be instructive on the development of such an argument challenging “all except for” provisions.²²⁴ In striking down blanket residency restrictions in San Diego, the California Supreme Court concluded, “[The law] thus has infringed their liberty and privacy interests, however limited, while bearing no rational relationship to advancing the state’s legitimate goal of protecting children from sexual predators, and has violated their basic constitutional right to be free of unreasonable, arbitrary, and oppressive official action.”²²⁵

Who the petitioners were in *Taylor* matters—all were on active parole.²²⁶ Yet, despite their status, and even employing the rational basis test, the California Supreme Court declared the San Diego residency restrictions arbitrary and unreasonable governmental action.²²⁷ True, the right of privacy is deemed a fundamental right under the California Constitution and could have been used to trigger a strict scrutiny analysis of the restrictions.²²⁸ Nevertheless, the court avoided the thorny question of whether to implicate a fundamental right in its analysis by declaring, “[W]e are persuaded that blanket enforcement of the mandatory residency restrictions . . . cannot survive even the more deferential rational basis standard of constitutional review.”²²⁹

Interestingly, the term *substantive* due process is nowhere to be found in the *Taylor* opinion. Instead, and quite artfully, the court emphasized the concept of liberty²³⁰ and injected language of arbitrariness employed under the rational basis test²³¹ to reject the blanket residency restrictions.²³²

223. *Id.*

224. 343 P.3d 867, 870, 879 (Cal. 2015) (overturning blanket residency restrictions in San Diego County based on a substantive due process challenge).

225. *Id.* at 869.

226. *Id.*

227. *Id.*

228. See CAL. CONST. art. 1, § 1 (“All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.” (emphasis added)).

229. *Taylor*, 343 P.3d at 879.

230. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972)) (“[T]he liberty of a parolee . . . includes many of the core values of unqualified liberty’ and his or her ‘condition is very different from that of confinement in a prison.’”).

231. *Id.* (“Moreover, well-settled authority establishes that every parolee retains basic constitutional protection against *arbitrary and oppressive official action*.”).

232. *Id.*

Weaving the two themes together, the court wrote, “[A]ll parolees retain certain basic rights and liberty interests, and enjoy a measure of constitutional protection against the arbitrary, oppressive and unreasonable curtailment of ‘the core values of unqualified liberty’ even while they remain in the constructive legal custody of state prison authorities until officially discharged from parole.”²³³

The underlying reasoning of *Taylor* harkens back to Justice Kennedy’s opinion in *Lawrence*, where he accomplished what few have done. He removed the artificial barriers that separated three interrelated categories of protection: substantive due process, procedural due process, and equal protection to overturn a Texas law prohibiting sodomy. The groundbreaking case is filled with bold assertions of Fourteenth Amendment protections—in particular, liberty, but interestingly, without referencing a specific clause in it or particular elements of it.²³⁴

But it cannot go without comment that *Lawrence* also foreshadowed the burdens of registration and notification schemes, which the Court upheld as constitutional in the same term as *Lawrence*. Only in retrospect was its full import noted when Justice Kennedy wrote:

The stigma the Texas criminal statute imposes, moreover, is not trivial. Although the offense is but a minor misdemeanor, it remains a criminal offense with all that imports for the dignity of the persons charged, including notation of convictions on their records and on job application forms, and registration as sex offenders under state law.²³⁵

To be sure, *Lawrence* is different. The population is not the convicted. The liberty interest to be protected—benefits of criminal justice reform efforts—are not guaranteed. Yet, there is guidance to be gleaned from *Lawrence*. Like *Taylor* after it, opinion drafting is enlightening. Whether the Court employed a deferential rational basis test or one “with bite,”²³⁶ it recognized that unreasonableness of Texas’ legislative action controlled the constitutional outcome. Indeed, so dismissive of any possible rationale for the law, the opinion offers one sentence: “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and

233. *Id.* at 882 (citation omitted); see also *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1231-35 (D. Colo. 2017) (overturning Colorado’s registration schemes on several constitutional grounds including substantive due process), *rev’d in part, vacated in part sub nom.* *Millard v. Camper*, 971 F.3d 1174, 1177 (10th Cir. 2020).

234. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

235. *Id.* at 560.

236. For analysis of the levels of scrutiny, see Maxwell L. Stearns, *Obergefell, Fisher, and the Inversion of Tiers*, 19 U. PA. J. CONST. L. 1043 (2017) (suggesting that there are five tiers of scrutiny).

private life of the individual.”²³⁷ Although the opinion as crafted had its detractors,²³⁸ the decision breathed life into the historical view that the Fourteenth Amendment as a whole “ha[d] transformed America by providing the basis for the creation of a much more just and inclusive society.”²³⁹

On that, the parallel seems clear. The Fourteenth Amendment’s overarching theme must be respected. Whether we are informed by *Lawrence* or *Taylor*, governmental intrusion that does not have a rational connection to its public purpose should not stand. As this article has demonstrated, the “all except for” provision is an arbitrary exercise of governmental power because there is no plausible explanation for excluding *all* registrants from *all* benefits of criminal justice reform.

B. *The Role of Animus*

Without accurate empirical evidence to bolster the exclusion, the emptiness of the State’s argument must be revealed for what it is: boilerplate language designed to feed the community’s panic. What we are left with is animus. On that topic, Randy Barnett writes, “It cannot be enough that a legislature *claims* its acts are within one of its just powers. Such an inquiry must include the question of whether such an assertion is being made *in good faith*.”²⁴⁰ But, because illicit motives might be difficult for the challenger to prove, Barnett argues that arbitrary and irrational decisions serve as evidence of bad faith decision making.²⁴¹

Evidence of arbitrary decision making is mounting. Social scientists have concluded that this labyrinth of a system does not execute on its promise to deliver public safety,²⁴² yet the system continues to grind on, ever expanding and further unwieldy. When combined with the faulty data that has been used to prop up the regime,²⁴³ Randy Barnett’s question of whether these actions are taken in good faith come into sharper focus.

We are left with no choice but to understand that the moral panic surrounding sex offenses is our lens through which we must recognize that there is bad faith decision making. It is frustrating to identify discriminatory

237. *Lawrence*, 539 U.S. at 578.

238. See, e.g., Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2770 (2005).

239. Joel K. Goldstein, *Teaching the Transformative Fourteenth Amendment*, 62 *ST. LOUIS U. L.J.* 581, 602 (2018).

240. Barnett, *supra* note 213, at 368.

241. *Id.*

242. See *supra* Part II.

243. See *supra* Part II.

governmental behavior but not believe there is a legal path to rectify it. In *Romer v. Evans*, we find that path.²⁴⁴ Although it was an equal protection challenge, the Court's language transcends that narrow analysis: even under a rational basis review, laws based on animus will not survive constitutional scrutiny.²⁴⁵ “[Amendment 2’s] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”²⁴⁶

Legitimizing private animus should not be condoned. That is the lesson from *Palmore v. Sidoti*, which found a constitutional violation when a family law judge adopted the community's bias regarding interracial marriage.²⁴⁷ It raises the question to what extent moral panic targeting registrants has morphed a community's private animus into legislative enactments.

More egregious than the government adopting private bias is the government purposely intending to cause harm to a group of people. There too, the Court has been fixed and resolved. It struck down a federal food stamp program provision that was specifically altered to deny benefits to groups of unrelated people living together.²⁴⁸ The Court held, “The legislative history that does exist, however, indicates that that amendment was intended to prevent so called ‘hippies’ and ‘hippie communes’ from participating in the food stamp program.”²⁴⁹ Despite a rational basis review, Congressional animus controlled the result.

It is difficult to imagine why the government would continue to support a scheme that costs millions, does not work, and is not supported by measurable data except for its blinding rage directed at those to be subjugated. Think animus. Think Victim's Compensation Fund. The comment reported earlier in this article from a California legislator illustrates well the animus directed at a group of people: “The purpose of this bill [AB 1140] is to . . . deny compensation to registered sex offenders.”²⁵⁰

244. 517 U.S. 620 (1996).

245. *Id.* at 632 (acknowledging deference under the rational basis test for the validity of legislation but admonishing that “Amendment 2 fails, indeed defies, even this conventional inquiry”); see also *id.* at 634-35 (“[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”).

246. *Id.* at 632.

247. 466 U.S. 429, 433-34 (1984); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding government adoption of private animus against the mentally ill to be unconstitutional).

248. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973).

249. *Id.* at 534 (citing H.R. Rep. No. 91-1793, at 8 (1970)).

250. Assemb. B. 1140, 2015 Leg., Reg. Sess. (Cal. 2015).

CONCLUSION

Blanket exclusions are but a small piece of a larger tapestry of legislative and community animus targeting registrants. Fueled by inaccurate data and community panic, “all except for” provisions only further punitive measures designed to isolate and marginalize this community. Saying something is true does not make it so. And saying it louder does not make it truer.