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CHALLENGING THE PUNITIVENESS OF "NEW-GENERATION" SORN LAWS

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ABSTRACT: *Sex offender registration and notification (SORN) laws have been in effect nationwide since the 1990s, and publicly available registries today contain information on hundreds of thousands of individuals. To date, most courts, including the Supreme Court in 2003, have concluded that the laws are regulatory, not punitive, in nature, allowing them to be applied retroactively consistent with the Ex Post Facto Clause. Recently, however, several state supreme courts, as well as the Sixth Circuit Court of Appeals, addressing challenges lodged against new-generation SORN laws of a considerably more onerous and expansive character, have granted relief, concluding that the laws are punitive in effect. This article examines these decisions, which are distinct not only for their results, but also for the courts' decidedly more critical scrutiny of the justifications, purposes, and efficacy of SORN laws. The implications of the latter development in particular could well lay the groundwork for a broader challenge against the laws, including one sounding in substantive due process, which unlike ex post facto–based litigation would affect the viability of SORN vis-à-vis current and future potential registrants.*

Keywords: sex offender • Megan's Law • constitutionality • ex post facto

INTRODUCTION

Today, hundreds of thousands of individuals are subject to a social control method that was unimaginable a little over twenty-five years ago.[1] Commonly called "Megan's Laws," named after a seven-year-old girl who was sexually assaulted and murdered by a neighbor previously convicted of multiple sex offenses against children,[2] the laws require that convicted sex offenders provide

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identifying information to government authorities, who then make the information available to the public at large.[3] Sex offender registration and notification (SORN) laws have been in effect nationwide since the mid-1990s and have served as the foundation for a gamut of other social control strategies also targeting convicted sex offenders, such as laws imposing limits on where they can reside[4] and requiring electronic monitoring.[5]

Despite the onerous conditions imposed by SORN, including on individuals convicted long before the enactment of provisions, SORN laws have proved largely impregnable to constitutional challenge. Most notably, on two occasions in 2003 the U.S. Supreme Court rejected claims, one alleging that a SORN law imposed retroactive punishment in violation of the Constitution's Ex Post Facto Clause,[6] the other contending that procedural due process requires that individuals be assessed for recidivism risk before being subject to SORN.[7]

Of late, however, signs of change have been in the air. In addition to an ever-increasing body of social science evidence questioning the public safety benefits of SORN laws,[8] it is now accepted that the laws themselves are predicated on the questionable assumptions that most sexual offenses are committed by strangers[9] and that the re-offending rates of convicted sex offenders are "frightening and high."[10] Indeed, the U.S. Supreme Court's most recent decision concerning sex offender registrants, which invalidated on First Amendment grounds a state law making it a felony for registrants to access commercial networking sites,[11] refrained from using such heated rhetoric, and acknowledged "the troubling fact that the law imposed severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system."[12] The Court also found it "unsettling" that individuals who have completed their sentences would be denied "access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives."[13]

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Whether in future cases the Court adopts the same measured tone and critical orientation remains to be seen.[14] However, of late, an important shift has occurred in the views of state and lower federal courts, which have increasingly found fault with "new-generation" SORN laws, which in many respects are more expansive and onerous than those condoned by the Court in 2003.[15]

In the federal judicial realm, the Sixth Court of Appeals in *Does v. Snyder*[16] unanimously invalidated on federal ex post facto grounds Michigan's law that, like many other amended state laws, not only requires in-person information verification and updating by registrants, but also limits where they can live and work. To the Sixth Circuit, Michigan's SORN law was "something altogether different from and more troubling than Alaska's circa 2000 first-generation registry law."[17] Tellingly, when the State petitioned the U.S. Supreme Court for certiorari, and the Court invited the Acting U.S. Solicitor General to weigh in and brief the matter, the latter acknowledged the correctness of the decision in light of what it termed the "distinctive features" of Michigan's law.[18] Whether it is accurate to say that the Michigan law varies so substantially as to make it sui generis is certainly subject to dispute,[19] but the reluctance of the Court and the Solicitor General (in the Trump administration, no less) to let stand a circuit decision categorically invalidating a state SORN law, using quite denunciatory language,[20] was a significant surprise.

In its upcoming October 2018 Term the Court will hear *Gundy v. United States*,[21] which concerns whether the "non-delegation" doctrine was violated when Congress authorized the U.S. Attorney General to decide whether the federal Sex Offender Registration and Notification Act (2006) should be retroactive in its application and, if so, to devise regulations to that effect.[22] The Court's decision to grant certiorari was unexpected given that federal circuits courts have repeatedly found the delegation proper, suggesting disagreement among the at least four Justices

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deeming the matter certiorari-worthy, which would be a major blow to the federal regime (and possibly state laws that rely upon it).[23]

Also in the federal realm, U.S. Senior District Judge Richard Matsch in Colorado, best known for presiding over the trial of Timothy McVeigh for the Oklahoma City bombing, recently not only concluded that Colorado's toughened SORN law was punitive in nature but also that it actually constituted cruel and unusual punishment in violation of the Eighth Amendment.[24] In his decision, which the state has appealed to the Tenth Circuit, Judge Matsch relied on an extensive record recounting the hardships imposed by the new law, concluding that they were "plainly punitive."[25] Moreover, Matsch reasoned, the law's effects and the "known and uncontrollable risk of public abuse" of registry information "resulted in and continues to threaten Plaintiffs with punishment disproportionate to the offenses they committed."[26] According to Judge Matsch, "Where the nature of such punishment is by its nature uncertain and unpredictable, the state cannot assure that it will ever be proportionate to the offense."[27]

No less significant, over the past several years eight state supreme courts have invalidated their state's SORN laws, based on the federal Ex Post Facto Clause and/or their own parallel state provisions.[28] The decisions include that of the Alaska Supreme Court, which despite the U.S. Supreme Court's conclusion in *Smith v. Doe* (2003) that Alaska's law did not violate the U.S. Ex Post Facto Clause, later reached the opposite conclusion based on the state constitution's Ex Post Facto Clause.[29] And, most recently, the Pennsylvania Supreme Court invalidated the state's amended SORN law on state and federal ex post facto grounds,[30] emphasizing the "significant differences between Pennsylvania's most recent attempt at a sex offender registration statute and the statue upheld in … *Smith*."[31]

Taken together, the decisions mark an important development in an area of constitutional litigation that to date has been decidedly one-sided in favor of government outcomes. While it remains the case that constitutional challenges to SORN most often fail, the statistical odds of success have improved of late. The willingness of state courts in particular to rely on their indigenous constitutions—what Justice William Brennan called a "font of individual liberties"[32]—is in itself significant. So too is the advent of more sophisticated litigation efforts by petitioners' legal counsel, including use of social science experts and statistical data permitting creation of compelling evidentiary records for courts to assess and rely upon.[33]

The following pages survey these developments, in particular focusing on whether features added to SORN laws in recent years qualify as punishment for constitutional purposes, a finding that triggers application of a variety of constitutional limits. Part I provides background on the origin and requirements of SORN laws and litigation up to and including the Supreme Court's 2003 landmark decision in *Smith v. Doe*,[34] which deemed a circa 2000 SORN law non-punitive in character, permitting it to be imposed retroactively consistent with the Ex Post Facto Clause in the U.S. Constitution. Part II surveys developments in the federal courts, including the Sixth Circuit's important recent decision in *Does v. Snyder*. Part III discusses successful state supreme court challenges, predicated on state and/or federal constitutional grounds, which now approach ten in number. The paper concludes with some observations regarding the broader implications of the judiciary's increasing willingness to deem new-generation SORN laws punitive in nature.

I. BACKGROUND

A. History and Current Requirements

Although registration and community notification (SORN) is usually thought to have emerged whole cloth in the 1990s, its origins actually date back to the 1930s when local

governments in the Los Angeles area, concerned that their communities were being flooded by anonymous "gangsters" from the East and Midwest,[35] enacted laws requiring that convicted felons (not exclusively sex offenders) register with authorities. Registration laws, including those eventually enacted by states, existed to varying degrees through the mid-1980s, without attracting much public or legislative attention.[36]

Shortly thereafter, however, the landscape experienced a seismic shift. In 1989, the abduction and disappearance of 11-year-old Jacob Wetterling in Minnesota renewed interest in registration,[37] and the brutal sexual assault of a 7-year-old boy in Washington State, by a convicted sex offender living in the community, catalyzed interest in a new concept: make information on registrants available to the public at large.[38] A few years later, the abduction, sexual assault, and murder of 7-year-old Megan Kanka in New Jersey (July 1994) by a convicted sex offender living nearby, generated more public and state legislative interest in registration and community notification. In rapid-fire succession and often without much debate, legislatures enacted new registration laws, this time targeting sex offenders and a cluster of offenses thought often tied to sexual victimization (e.g., kidnapping), and required that registrants' information be made publicly available.[39] Voicing a sentiment that would come to define SORN laws, the mother of Megan Kanka asserted that "if [we] had known there was a pedophile living on our street, [Megan] would be alive today."[40]

In 1994, Congress, concerned that states were slow in embracing registration and wishing greater uniformity in registration laws, passed the Jacob Wetterling Act, which threatened to withhold from states ten percent of their allocated federal crime-fighting funds if they did not adopt registration laws satisfying the federal "floor" of requirements.[41] Two years later, in 1996, Congress passed Megan's Law, which threatened similar loss of federal funds if states did not

require that registry information be disseminated to community members.[42] By 1999, SORN laws were in place in all fifty states and the District of Columbia, as well as U.S. territories and many tribal jurisdictions.[43] In 2006, Congress enacted the federal Adam Walsh Child Protection and Safety Act of 2006,[44] which requires that U.S. jurisdictions make an array of significant substantive and procedural changes to their laws or suffer loss of federal funds.[45] At the time of this writing, fewer than twenty states have been certified as compliant with the terms of the Act.[46]

Registrants must provide law enforcement authorities with a considerable amount of information, including a current photo; name; residence, work, and school addresses; physical descriptions (including tattoos); Internet "identifiers" and email addresses; and vehicle descriptions.[47] The information must be verified at least annually, possibly more often depending on a registrant's status, and must be updated in the event of any change (e.g., residential move or change in physical appearance, such as growth of a beard).[48] In addition, registrants must inform authorities of their intent to temporarily leave or move out of the jurisdiction. Individuals must pay a state-prescribed annual fee,[49] provide a DNA sample,[50] and register for a minimum of ten years, and often for their lifetimes, with violations usually resulting in felony prosecution.[51] Juveniles, who have been adjudicated delinquent by a court on the basis of a registration-eligible offense,[52] increasingly have been subject to SORN. Today, thirty-eight states require at least some adjudicated juveniles to register (in North Carolina, the minimum age is 11), and many make juvenile registrant's information publicly available to some extent.[53]

States categorize registrants on the basis of either individualized risk assessment or offense of conviction (the latter being the majority approach, urged by the federal government), with their categorizations determining the duration and onerousness of registration, and in some instances whether and how community notification occurs.[54] As a rule, state laws afford very little

opportunity for individuals to exit registries before their registration period ends,[55] and a state's registration requirement can at times apply when an individual no longer resides in the state.[56]

In most states, all registrants are subject to notification, based solely on offense of conviction, with registry websites only occasionally stating that individuals have not been evaluated for risk of re-offense. In Florida, for instance, all individuals must register for their lifetimes and appear on the state's community notification website.[57] In a few states, such as Massachusetts[58] and New York,[59] notification is limited: only information on registrants determined to pose medium or high risk is made publicly available. In Minnesota, only registrants assessed as having a high likelihood of re-offense are subject to general public notification.[60]

B. Early Judicial Challenges

From their early incarnation to the present, SORN laws have been subject to constitutional challenge. *Lambert v. California*,[61] a staple of first-year law school criminal law courses, marked the most notable early challenge. In *Lambert*, the U.S. Supreme Court addressed the validity of Los Angeles' felon registration ordinance, finding that in the absence of actual knowledge of a duty to register, criminalizing the "wholly passive [conduct]—mere failure to register," "mere presence in the city"—violated due process.[62] According to the five-member *Lambert* majority:

> Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.[63]

Later, in the 1970s and 1980s, state courts entertained challenges to state-wide registration laws. In *In re Birch* (1973),[64] the California Supreme Court addressed whether a guilty plea was entered with requisite knowledge when the defendant, who pled guilty to misdemeanor lewd and dissolute conduct for urinating in public, did so without being told that the conviction would trigger life-long registration. The court unanimously held that Birch's lack of knowledge of "the unusual

and onerous nature" of registration rendered the plea invalid. Registration would make Birch "the subject of continual police surveillance."[65] "Although the stigma of a short jail sentence should eventually fade, the ignominious badge carried by the convicted sex offender can remain for a lifetime."[66]

A decade later, in *In re Reed*,[67] the California Supreme Court again granted relief, this time in a case requiring registration as a result of an individual being convicted of soliciting "lewd and dissolute conduct" from an undercover officer, a misdemeanor. The court held that the requirement violated the California Constitution's prohibition of "cruel or unusual" punishment, again focusing on the lifetime ignominy of registration, which entailed "command performances" before police,[68] and concluded that in light of registration's uncertain efficacy as a police investigative tool, it appeared "out of all proportion to the crime of which petitioner was convicted."[69] A year later, in 1984, in *In re King* the court of appeals deemed California's registration requirement for indecent exposure cruel or unusual punishment.[70]

By the mid-1980s, in short, whereas registration was not considered constitutionally suspect per se,[71] courts with some frequency granted relief in certain circumstances. In ensuing years, however, there came a constitutional sea-change. State and federal courts alike, faced with challenges to laws requiring not only registration, but also the considerably more onerous and consequential (from registrants' perspective) use of community notification, regularly ruled in favor of the government.[72]

It was not until 2003, however, almost fifty years after *Lambert*, that the U.S. Supreme Court again weighed in, deciding two cases on the same day: *Smith v. Doe*[73] and *Connecticut Department of Public Safety v. Doe*[74] (*CDPS*). In *Smith*, the Court found that the Alaska registration and community notification law in question was punitive in neither its intent nor effect,

allowing for its retroactive application under the U.S. Constitution's Ex Post Facto Clause.[75] In *CDPS*, the Court upheld Connecticut's registration and notification law against a procedural due process attack, condoning the State's choice to predicate SORN eligibility on a conviction alone (without any individualized risk assessment).[76] Noting that Connecticut's website registry explicitly stated that officials had not assessed individuals for current dangerousness, the Court concluded that any assessment would be a **"**bootless exercise"[77] and that the petitioner already had a procedural opportunity to contest his eligibility at the time of his earlier conviction.[78]

Since 2003, state SORN laws have expanded very considerably.[79] Not only is government use of internet websites to effectuate notification now the norm, but registrants are required to provide much more information and remain subject to SORN for considerably longer periods of time (often their lifetimes). Moreover, registrants are often subject to legal limits on where they live and work, and must verify and update their information in person (as opposed to by mail) on at least an annual basis, and carry a stamped identification card.

II. RECENT FEDERAL CHALLENGES

The Supreme Court, for its part, has shied away from the question of whether more burdensome SORN requirements warrant reexamination of the *Smith v. Doe* conclusion in 2003 that SORN is not punitive in purpose or effect for ex post facto purposes.[80] Federal circuit courts of appeal, however, have regularly rejected ex post facto claims lodged against state and federal SORN laws alike[81]—that is, until August 2016, when the Sixth Circuit Court of Appeals decided *Does v. Snyder*.[82]

In *Snyder*, registrants in the State of Michigan (five men and one woman) challenged the state law SORN law, which had been amended several times since their initial registration. The changes included a law prohibiting registrants from living, working, or loitering within 1,000 feet

of a school; categorization into tiers, without a finding of individual dangerousness (based on conviction alone); and requiring that they apprise authorities, in person, of any changes to their registry information (such as a new vehicle or "internet identifier").[83] The trial court concluded that Michigan's law was not punitive and therefore did not violate the Ex Post Facto Clause, but that several provisions of the law were unconstitutionally vague.[84]

On appeal, the Sixth Circuit, with Judge Alice Batchelder writing for the panel, addressed only the Ex Post Facto Clause challenge, unanimously reversing the trial court's conclusion that Michigan's amended law was not punitive, and held that the law therefore could not be retroactively applied to the Does.[85] As the Supreme Court had done in *Smith v. Doe* in 2003, the *Snyder* court utilized the two-part test employed to assess whether a law is punitive in nature, triggering the protections of the Clause.[86] First, the reviewing court must determine whether the legislature intended the law to be civil or regulatory in nature, not punitive; second, if not, whether the law is so punitive in effect as to negate the legislature's avowed civil intent.[87] The court concluded that, like the Alaska SORN law upheld by the Supreme Court fifteen years earlier in *Smith v. Doe*, the Michigan Legislature's intent in enacting its SORN law was non-punitive.[88]

Next, the Sixth Circuit assessed whether the actual effects of Michigan's law were punitive, applying the "guideposts" typically used in such inquiries, asking whether the challenged law:

(1) "has been regarded in our history and traditions as punishment";
(2) "imposes an affirmative disability or restraint";
(3) "promotes the traditional aims of punishment";
(4) "has a rational connection to a non-punitive purpose"; and
(5) "is excessive with respect to [achieving] this purpose"?[89]

Turning to the first question, the court concluded that although SORN had no direct historic ancestry, the geographic restrictions imposed on registrants resembled banishment, a traditional form of punishment. In support, the court cited extensive evidence in the record showing that the

1,000-foot buffer zones around schools barring where registrants could work, live, or loiter were "very burdensome, especially in densely populated areas."[90] The court added that the law also resembled traditional shaming punishments. Unlike the Alaska law upheld in *Smith*, which published information on a website registry that the Supreme Court regarded as already public in nature, Michigan's law publicized registrant tier classifications "corresponding to the state's estimation of present dangerousness without providing any individualized assessment."[91] "[U]nlike the statute in Smith, the ignominy under [Michigan's] law flows not only from the past offense, but also from the statute itself."[92] Finally, the *Snyder* court found that the law had effects resembling probation and parole, which the Supreme Court in *Smith v. Doe* acknowledged constituted a form of punishment. Unlike the Alaska law upheld in *Smith*, which did not limit where individuals could live and work,[93] Michigan's law imposed such constraints, much like probation and parole.[94]

With respect to whether the law imposed an affirmative disability or restraint, the court noted that "[a]s should be evident, [Michigan's law] requires much more from registrants than did the statute in *Smith*."[95] "Most significant," the court reasoned, was the law's limit on "where registrants may live, work, and 'loiter,'" which imposed "significant restrictions on how registrants may live their lives."[96] Also, unlike the Alaska law, Michigan's law required that the plaintiffs appear in person to verify and update their information, for their lifetimes. In response to the state's argument that such restraints were "minor and indirect" because they were not physical in nature, the panel responded that

> surely something is not "minor and indirect" just because no one is actually being lugged off in cold irons bound. Indeed, these irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment. These restraints are greater than those imposed by the Alaska statute by an order of magnitude. *Cf. Smith*, 538 U.S. at 101

(noting, for example, that "[t]he Alaska statute, on its face, does not require these updates to be made in person.").[97]

The court then found the third consideration, whether the law advanced the traditional aims of punishment (incapacitation, retribution, and deterrence), satisfied but deserving of "little weight" because civil laws can have such aims,[98] and turned to the fourth and "'most significant' factor"[99]: whether the law had a rational relation to a non-punitive purpose. Noting that Michigan sought to prevent sexual misconduct among registrants, the court concluded that the record "provide[d] scant support for the proposition that SORA accomplishes its professed goals."[100] The court cited studies contained in the record casting "significant doubt" on the posited exorbitant high recidivism rates of convicted sex offenders, and concluded that Michigan's offense-based (versus individual risk-based) "public registration has, at best, no impact on recidivism."[101] Indeed, the court noted, recidivism might be increased as the result of the law, "making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities."[102] With respect to the residential restriction in particular, the record did not show that the restrictions had "any beneficial effect on recidivism," and although "it is intuitive to think that at least some offenders" should be kept away from schools, the law itself did not subject registrants to individual risk assessments.[103]

Regarding the fifth and final guidepost, the court concluded that the law was excessive in relation to its purported civil purpose. Adopting a far less accepting approach than prior Sixth Circuit panels,[104] the *Snyder* court concluded that "while the statute's efficacy is at best unclear, its negative effects are plain on the law's face."[105] The geographic restrictions, while imposing significant burdens, were supported by no record evidence showing positive effect, and the in-person appearance requirement "appear[ed] to have no relationship to public safety at all."[106]

Taken together, the court concluded, the punitive effects of the "blanket restrictions thus far exceed even a generous assessment of their salutary effects."[107]

In conclusion, the court acknowledged that states can enact retroactive SORN laws, and that there exists a heavy burden to refute the civil intent of a law, but hastened to add that "difficult is not the same as impossible. Nor should *Smith* be understood as writing a blank check to states to do whatever they please in this arena."[108] The effects of Michigan's law were "something altogether different from and more troubling than Alaska's first-generation registry law."[109]

Although only recently decided, *Does v. Snyder* has already had an impact. To be sure, many courts have seen fit to distinguish *Snyder*, usually on the basis of factual dissimilarities relative to the specific law challenged (e.g., the law did not contain residence and work location limits)[110] or because of the lack of an extensive record like that created in *Snyder*.[111] Other courts, independent of *Snyder*, have been content to conclude that the recent changes to SORN laws are not sufficient to warrant a departure from the conclusions reached by the Supreme Court in *Smith*,[112] including when (as in *Snyder*) the state law contained a residence exclusion provision.[113] *Snyder*, however, has already been relied upon to grant relief.[114] As a federal trial judge in the Middle District of Tennessee put it in a challenge to Tennessee's SORN law, which had withstood federal court ex post facto challenges in the past:

> Applying *Snyder* in this case will require the Court to look at the cumulative effect of all of the Act's interlocking requirements and examine those requirements in the context of any historical antecedents—both of which will require a factual record. The Court, moreover, cannot merely presume that assembling a factual record is unnecessary because prior challenges to Tennessee's regime have been unsuccessful. As *Snyder* demonstrates, the available evidence regarding, for example, the efficacy and necessity of registration and monitoring regimes has not been frozen in amber since the regimes were adopted. *Snyder* unambiguously holds that these fact-dependent issues are relevant to the determination of whether a state's scheme should be considered civil or punitive in purpose and effect.[115]

Another recent federal decision of note, *Millard v. Rankin*,[116] addressed alleged punitiveness from another constitutional perspective: the Cruel and Unusual Punishment Clause of the Eighth Amendment. In contrast to several decades ago, when registration alone was at times deemed cruel and/or unusual punishment,[117] recent challenges against registration and notification combined have been rejected.[118] *Millard*, from the District of Colorado, marks a bold departure from this orthodoxy. Applying the same intent-effects test as *Snyder* (and *Smith v. Doe*), Senior Judge Richard Matsch found that the Colorado law challenged was non-punitive in intent but was "plainly punitive" in effect.[119]

As a threshold matter, Judge Matsch concluded that the *Smith* Court in 2003 did "not foresee the development of private commercial websites exploiting the information made available to them and opportunities for 'investigative journalism' as that done by a Denver television station [that targeted one of the plaintiffs]."[120] Moreover, the disclaimer on the state's website, which like other states provides that registry information is not to be abused, rang hollow: "The register is telling the public—DANGER—STAY AWAY. How is the public to react to this warning? What is expected to be the means by which people are to protect themselves and their children?"[121] Citing evidence in the record by the three plaintiffs and several witnesses, Judge Matsch concluded that

> the effect of publication of the information required to be provided by registration is to expose the registrants to punishments inflicted not be the state but by their fellow citizens.
>
> The fear that pervades the public reaction to sex offenders … generates reactions that are cruel and in disregard of any objective assessment of the individual's actual proclivity to commit new sex offenses. The failure to make any individual assessment is a fundamental flaw in the system.[122]

Turning to the first "effects" guidepost—resemblance to historical forms of punishment—Judge Matsch found that the public notification requirement resembled shaming and, citing *Does*

v. Snyder, that the in-person reporting requirement resembled probation and parole.[123] Also, citing evidence showing difficulties faced by registrants in finding housing and work and being subjected to harassment, Matsch likened the experience to the historic punishment of banishment.[124] Finally, focusing on the state requirement that registrants disclose and register their email addresses and internet identities, and any changes thereto, Judge Matsch reasoned that the requirement provided a supervisory tool for law enforcement akin to probation and parole.[125]

Analysis of the second guidepost—whether SORN imposed an "affirmative disability or restraint"—also weighed in favor of plaintiffs. Noting that the Supreme Court in *Smith v. Doe* considered the effects of Alaska's law "minor and indirect," Judge Matsch found that the effects of Colorado's new-generation law were significant. Whereas the *Smith* Court explicitly noted that Alaska's law did not require in-person verification and updating, Colorado's law did so,[126] and the law's adverse consequences were "not simply a result of the crimes [plaintiffs] committed, but of their placement on the registry and publication of their status."[127]

After next finding that Colorado's law promoted the traditional aims of punishment, namely retribution and deterrence, Judge Matsch concluded that there existed "at least some rational connection to a non-punitive purpose,"[128] but that Colorado's law was excessive in relation to that purpose. Matsch pointed to quarterly or annual in-person registration requirements, with no prospect of de-registration and no individualized assessment of recidivism risk, and the government's dissemination of registration information without determination of individual risk. "These sweeping registration and disclosure requirements—in the name of public safety but not linked to a finding that public safety is at risk in a particular case—are excessive in relation to [the law's] expressed public safety objective."[129]

Having found that Colorado's SORN law was punitive in effect, Judge Matsch addressed whether the punishment was cruel and unusual, which hinged on whether it was disproportionate to the offense committed.[130] Matsch concluded that the law subjected plaintiffs "to additional punishment beyond their sentences through pervasive misuse and dissemination of information published by [the state]."[131] He found particularly problematic the "known and uncontrollable risk of public abuse of information from the sex offender registry … [which] has resulted in and continues to threaten Plaintiffs with punishment disproportionate to the offenses they committed."[132] Indeed, "Where the nature of such punishment is by nature uncertain and unpredictable, the state cannot assure it will ever be proportionate to the offense."[133]

Millard remains in limbo, as the state is appealing the court's decision to the Tenth Circuit Court of Appeals, and thus lacks the precedential status of the Sixth Circuit's decision in *Does v. Snyder*. However, the categorical quality of the conclusions reached in *Millard*, on a constitutional claim that in recent years has been regularly rejected, is noteworthy. So too is the court's recognition that SORN plays a culpable causal role in the community harassment and other adverse extra-legal consequences experienced by registrants, notwithstanding government efforts to disclaim responsibility.[134]

III. RECENT STATE CHALLENGES

In recent years, state supreme courts have also weighed in on whether broadened, more onerous SORN laws enacted by their legislatures in recent years qualify as punishment. Indeed, if anything, state supreme courts have been more amenable than their federal counterparts to deem new-generation SORN laws punitive, relying on their own state constitutions, the U.S. Constitution, or both.

In 2008, the Alaska Supreme Court, interpreting the Alaska Constitution's identically worded ex post facto provision, and applying the same test applied by the Supreme Court in *Smith*, disagreed with the *Smith* majority that Alaska's law was non-punitive.[135] Assuming without deciding that the state legislature intended the law to be non-punitive, the court found its effects to be punitive, expressly relying on views expressed by the dissenting Justices in *Smith*.[136] A year later, the Indiana Supreme Court unanimously found that its amended law, including allowing in-home visits by police, at least annual in-person verification, limits on where certain registrants can live, and the requirement that a personal identification card be carried at all times,[137] violated the state's ex post facto provision.[138] Also in 2009, the Maine Supreme Court found that its amended state law was punitive,[139] based on both the state and federal ex post facto clauses.[140] The court distinguished the Alaska law upheld in *Smith* because Maine's law required in-person information verification, the absence of which in the Alaska law the *Smith* majority explicitly noted.[141]

In 2011, the Ohio Supreme Court granted relief based in a challenge lodged against the state's amended SORN law.[142] Applying Ohio's constitutional ban on non-remedial retroactive laws, the court found that "all doubt has been removed" over whether the state's law was punitive in character.[143] In 2012, Maryland's highest court invalidated its amended state law,[144] and the Oklahoma Supreme Court did likewise in 2013,[145] finding that the new law violated the state constitution by "mov[ing] the finish line."[146] In 2015, the Supreme Court of New Hampshire found that successive amendments to its law over a twenty-year period, including increasingly onerous notification requirements, made its lifetime-registration-without-review requirement punitive as applied to Tier 2 and 3 offenders.[147] Most recently, the Supreme Court of Pennsylvania deemed the state's new law punitive and granted relief on state and federal ex post facto grounds.[148]

Altogether, the supreme courts of eight states have now found that amended SORN laws within their states are punitive in effect and unconstitutional on ex post facto grounds. To be sure, as in the federal arena, many state courts have rejected similar challenges and remain unconvinced that recent amendments warrant divergence from *Smith v. Doe*.[149] Indeed, the ambivalence was dramatically highlighted in Kansas, where on the same day that the state supreme court by a 4-3 vote decided three cases that deemed the state SORN law punitive under the federal Ex Post Facto Clause, it issued another decision (with a different justice siting in the latter decision) overruling the decisions regarding punitiveness issued earlier (albeit on cruel and unusual punishment grounds).[150]

Nonetheless, a critical mass of state court decisions is emerging, providing bases for new challenges to once-settled state precedent. Notably, successful claims can involve SORN alone, without reliance on the residential and/or work exclusion zones that the Sixth Circuit in *Does v. Snyder* deemed particularly significant.[151] Moreover, recent decisions often rely upon state constitutional Ex Post Facto Clause provisions,[152] which is important because the constitutional conclusions reached cannot be second-guessed by the U.S. Supreme Court.[153] Nor should it be overlooked that the growing body of state court decisions invalidating SORN laws affects not only coverage in states but also possibly registrants' obligations under federal law as well.[154]

With respect to Eighth Amendment claims, as in the federal arena, success has been limited but warrants discussion. In *In re C.P.*,[155] the Ohio Supreme Court, relying on its prior finding that the state's amended SORN law was punitive in nature,[156] held that application of SORN to an adjudicated delinquent offender qualified as cruel and unusual punishment. Citing to recent U.S. Supreme Court decisions that have adopted a more rigorous Eighth Amendment proportionality analysis vis-à-vis juveniles,[157] the court held that automatic lifetime SORN (subject to possible

review at twenty-five years) qualified as cruel and usual punishment.[158] The court in *C.P.* held likewise with respect to the analogous ban on cruel and unusual punishment contained in the Ohio Constitution.[159]

C.P., it must be recognized, is a relative anomaly. Despite sound policy[160] and jurisprudential reasons to exempt juveniles altogether from SORN,[161] the vast majority of state courts reject cruel and unusual punishment claims brought by juvenile petitioners (whether convicted in adult court or adjudicated delinquent).[162] Indeed, the significance of a petitioner's particular status was evidenced in the Ohio Supreme Court's rejection three years later of a similar claim from an adult registrant,[163] with the court emphasizing the distinct analysis applicable to adjudicated juveniles.[164]

CONCLUSION

The Supreme Court's 2003 decision in *Smith v. Doe*, concluding that a circa 2000 SORN law was non-punitive in character and therefore could be retroactively applied, stands on increasingly shaky precedential foundation as courts assess the punitiveness of new-generation SORN laws. As the Sixth Circuit recently held, *Smith* should not "be understood as writing a blank check to states to do whatever they please in this arena."[165]

Although the focus here has been on whether SORN qualifies as punishment for Ex Post Facto Clause and Eighth Amendment purposes, the analysis undertaken by courts can and likely will affect other constitutional questions. The Double Jeopardy Clause, for instance, bars successive punishment for the same crime, which a finding of punitiveness will likewise impact.[166] The due process right to a jury, as interpreted by *Apprendi v. New Jersey*,[167] is triggered by a finding that a sanction is punitive, obliging that a jury play a role when SORN turns on fact-finding.[168]

More broadly, the increasingly critical approach taken by courts, and their willingness to eschew the pro-forma, stock analysis common to date in assessing punitiveness, could well affect other constitutional questions with even more significant practical impact. In particular, the Sixth Circuit's landmark decision in *Does v. Snyder* and other decisions discussed, which bar retroactive application of SORN laws, can possibly pave the way for a successful substantive due process claim, which would bar application of SORN to current and future individuals. To date, despite a passing reference by concurring Justices in 2003 that a substantive due process challenge against SORN might have merit,[169] courts have usually rejected due process claims reasoning that SORN laws satisfy the modest threshold inquiry of whether the law satisfies the rational relationship test.[170]

Recent decisions have scrutinized the avowed public safety rationales of SORN and compared them against what researchers have learned about its actual efficacy and the incidence of sex offender recidivism more generally. In *Snyder*, the Sixth Circuit disputed the commonly relied upon legislative premise that sex offender recidivism rates are exorbitant, and questioned whether Michigan's SORN law had a "[r]ational [r]elation to a [n]on-[p]unitive [p]urpose."[171] Although *Snyder* was decided on ex post facto not due process grounds, both require assessment of the rationality of the law in question (with ex post facto analysis making the question "most significant").[172] The Sixth Circuit, for its part, characterized a due process claim as "far from frivolous" and "a matter[] of great public importance."[173]

Today, fifteen years after *Smith v. Doe* was decided, no longer can a reviewing court (as the Supreme Court did in *Smith*) reasonably dismiss as "conjecture" the extensive negative personal consequences SORN has for registrants.[174] Nor can a court ignore, presuming creation of a proper record by counsel, that little evidence exists showing that SORN laws actually achieve

the benefits they purport to achieve.[175] It might be the case, of course, that a reviewing court ultimately concludes that a rational basis exists for a law;[176] then again, scrutiny of the record might warrant relief.[177] However, it is past time that such a robust analysis and accounting should occur.[178]

Today, roughly a quarter century after their genesis, SORN laws are a fixture of the nation's legal, social, and political landscape. They remain popular with the public[179] and political actors alike.[180] And because of their retroactive scope, extended duration, limited opportunities for exit,[181] and daily infusion of new registrants,[182] state registries continue to expand.[183] Of late, however, the political status quo has shown some signs of change. For the first time, since 1994, state governments have been slow to submit to the federal government pressure to enact tougher SORN laws.[184] A few have amended their laws or are considering amendments to lessen their onerousness and reach,[185] amid calls for reform by entities such as the Council of State Governments,[186] the Center for Sex Offender Management,[187] and the American Law Institute.[188]

Meanwhile, as discussed here, state and federal courts are increasingly casting a critical eye on the constitutionality of new-generation SORN laws, focusing especially on their onerous effects. Although it remains unlikely that SORN will disappear altogether anytime soon, the views of these courts, and others likely to follow, will at a minimum signal to legislatures that enacting harsher and more expansive SORN laws might face resistance in the courts.

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1 *See Map of Registered Sex Offenders in the United States*, NAT'L CTR. MISSING & EXPLOITED CHILDREN (2018), http://www.missingkids.com/content/dam/ncmec/en_us/SOR%20Map%20with%20Explanation_

10_2017.pdf. It warrants mention that a significant number of registrants (approximately 12%) do not reside in communities but rather are incarcerated or involuntarily civilly committed. Alissa Ackerman et al., *How Many Sex Offenders Actually Live Among Us? Adjusted Counts and Population Rates in Five U.S. States*, 35 J. CRIME & JUST. 464, 466 (2012).

[2] *See* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 54–55 (Stanford Univ. Press, 2009).

[3] *Id.* at 69–72.

[4] *See generally* Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1 (2006).

[5] *See* Ben A. McJunkin & J.J. Prescott, *Fourth Amendment Constraints on Technological Monitoring of Convicted Sex Offenders*, in this Issue.

[6] Smith v. Doe, 538 U.S. 84 (2003).

[7] Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003).

[8] *See generally* SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION (Cambridge Univ. Press, forthcoming 2019) (Wayne A. Logan & J.J. Prescott eds.).

[9] *See* MICHAL PLANTY ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010 (2013). Familiarity is especially common with sexual offenses against children: an estimated 93% of minors know their offender. HOWARD SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000). With respect to child abductions in particular, "only one-hundredth of 1 percent of all missing children" are abducted by strangers or "slight acquaintances."

David Finkelhor, *Five Myths About Missing Children*, WASH. POST, May 10, 2013, https://www.washingtonpost.com/opinions/five-myths-about-missing-children/2013/05/10/efee398c-b8b4-11e2-aa9e-a02b765ff0ea_story.html?utm_term=.4650089f24ed.

[10] *See, e.g.*, McKune v. Lyle, 536 U.S. 24, 34 (2002). The characterization, which has long served as a staple basis to justify SORN laws, was based on a 1986 article published in *Psychology Today*, in which the authors claimed that the recidivism rate of sex offenders was as high as 80%. The assertion has since been abandoned by the article's authors, and belied by social science research showing that while certain subgroups of sex offenders do recidivate at relatively higher rates, as a group sex offenders recidivate at considerably lower rates than many other criminal offenders. *See* Ira M. Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 508 (2015); Adam Liptak, *Did the Supreme Court Base Its Ruling on a Myth?*, N.Y. TIMES, Mar. 6, 2017, https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html. For more on the relative lower recidivism risk of convicted sex offenders, which also bears importance for the often decades-long duration of SORN, see R. Karl Hanson et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCHOL. PUB. POL'Y & L. 48 (2017).

[11] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[12] *Id.* at 1737.

[13] *Id.* For more on the potential significance of *Packingham*, see Wayne A. Logan, *SCOTUS Invalidates Law Criminalizing Sex Offender Access to Social Media*, COLLATERAL CONSEQUENCES RESOURCE CENTER BLOG, June 20, 2017, available at

http://ccresourcecenter.org/2017/06/20/scotus-invalidates-law-criminalizing-sex-offender-access-to-social-media/#more-13112.

[14] In this regard, it is worth noting that Justice Kennedy, the author of *Packingham*, authored *Smith v. Doe*, which downplayed the negative effects of SORN and invoked the heated rhetoric regarding recidivism risk absent in *Packingham*. Smith v. Doe, 538 U.S. 84, 103 (2003) (quoting *McKune*, 536 U.S. at 34) ("The risk of recidivism posed by sex offenders is 'frightening and high.'"). However, whereas Justice Kennedy's *Packingham* opinion was joined by four colleagues (Justice Gorsuch did not take part), the three-member concurrence authored by Justice Alito (joined by Chief Justice Roberts and Justice Thomas), contains some of the recidivism-related rhetoric found in prior opinions. *See Packingham*, 137 S. Ct. at 1739 (Alito, J., concurring). The concurring Justices focused on what they perceived as "undisciplined dicta" in Justice Kennedy's opinion, which they worried would "equate the entirety of the internet with public streets and parks." *Id.* at 1738. Nevertheless, for the Court's most conservative Justices to endorse an outcome benefitting registered sex offenders is itself noteworthy.

[15] *See, e.g.*, Wallace v. State, 905 N.E.2d 371, 374–77 (Ind. 2009) (noting multiple changes to state SORN law increasing its coverage, requirements, and burdens); Comm. v. Muniz, 164 A.3d 1189, 1210–18 (Pa. 2017) (noting "significant differences between Pennsylvania's most recent attempt at a sex offender registration statue and the statutes upheld in … *Smith*"); Comm. v. Perez, 97 A.3d 747, 755–56 (Pa. 2017) (Donohue, J., concurring) ("The environment has changed significantly with advancements in technology since the Supreme Court's decision in *Smith*…. Yesterday's face-to-face shaming punishment can now be accomplished online, and an individual's presence in cyberspace is omnipresent.").

[16] 834 F.3d 696 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub. nom., Snyder v. Does #1-5,* 138 S. Ct. 55 (Oct. 2, 2017).

[17] *Id.* at 705.

[18] *See* Snyder v. Does, No. 16-768, July 7, 2017, Amicus Brief of the Acting Solicitor General, 2017 U.S. S. Ct. Briefs LEXIS 2369 *16–17:

> Michigan's sex-offender registration scheme contains a variety of features that go beyond the baseline requirements set forth in federal law and differ from those of most other states … [T]he [Sixth Circuit] court of appeals' analysis of the distinctive features of Michigan's law does not conflict with [decisions of other lower courts rejecting ex post facto claims], nor does it conflict with the Court's holding in *Smith* [*v. Doe*].

[19] The Sixth Circuit, for instance, singled out for particular concern the imposition of residence restrictions on registrants and the requirement that verification occur in person, features that are increasingly common in state SORN laws—and were not entailed in the Alaska law upheld by the Court in Smith v. Doe, 538 U.S. 84, 101 (2003). Also, the Solicitor General's brief emphasized the importance of assessing the "cumulative effects" of a law when deciding if it is punitive in effect for ex post facto purposes, *id.* at 19, 21, which the *Smith* majority did not expressly do.

[20] *See, e.g., Snyder*, 834 F.3d at 705 (stating that the Supreme Court's precedents upholding SORN laws should not "be understood as writing a blank check to states to do whatever they please in this arena").

[21] 695 Fed. Appx. 639 (2d Cir. 2017), *cert. granted sub. nom.* Gundy v. United States, 2018 WL 1143828 (Mar. 5, 2018).

[22] *See* 28 C.F.R. § 72.3 (2016) (retroactively applying the Federal Sex Offender Registration and Notification Act to cover "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to enactment of this Act").

[23] Since 1994, the federal government has enacted a series of laws requiring first registration, then notification, along with requirements regarding SORN coverage and operation, threatening states with loss of federal funds if they do not enact provisions conforming to federal preferences. *See* Wayne A. Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 996–1005 (2010). At the time of this writing, only eighteen states have "substantially implemented" federal SORNA requirements, including with regard to retroactivity. *See infra* note 46. Finally, federal law criminalizes a variety of acts or omissions, including making it a crime for a state registrant to travel across state lines without re-registering. 18 U.S.C. § 2250. For more on the federal provisions, see generally Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation and the Future*, 64 DRAKE L. REV. 741 (2016).

[24] Millard v. Rankin, 265 F. Supp. 3d 1211 (D. Colo. 2017), appeal filed, No. 17-1333, Sept. 21, 2017.

[25] *Id.* at1225.

[26] *Id.* at 1232.

[27] *Id.*

[28] *See infra* Part II.

[29] Doe v. State, 189 P.3d 999 (Alaska 208).

[30] Comm. v. Muniz, 164 A.3d 1189 (Pa. 2017).

[31] *Id.* at 1210–18.

[32] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 491 (1977).

[33] *See, e.g.*, Valenti v. Lawson, __ F.3d __, 2018 WL 2092535 *3 (7th Cir. 2018) (acknowledging outcome in *Snyder* and noting that "the record in this case is devoid of any statistical evidence" contesting the purported high recidivism rates of convicted sex offenders); State v. Kinney, 2018 WL 1598914 *7 (Idaho Ct. App. 2018) (noting that "[t]he Sixth Circuit [in *Snyder*] had evidence in the record regarding demographic and geographic information that was specific to Michigan. No such comparable Idaho evidence exists in the record in Kinney's case."); People v. Rodriguez, 2018 IL App (1st) 15138 *4 (Ill. Ct. App. 2018) (noting that plaintiffs in *Snyder* "also supported their claims with an 'extensive demonstration' that included maps depicting the effects of Michigan's geographical restriction," whereas plaintiff "has not presented any comparable evidence of the Illinois scheme's punitive effects."); Baugh v. Comm., 809 S.E.2d 247, 254 n.6 (Va. Ct. App. 2018) (noting that the "the evidentiary record in *Snyde*r is much more expansive than the one at hand."). *See generally* Melissa Hamilton, *Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of* Doe v. Snyder, 58 B.C. L. REV. E-SUPPLEMENT 34 (2017).

[34] 538 U.S. 84 (2003).

[35] *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 2, at 22–28.

[36] *Id.* at 28–33.

[37] *Id.* at 49–54.

[38] *Id.*

[39] *Id.*

[40] Michelle Reuss, *A Mother's Plea: Pass Megan's Bill—Panel Oks Compromise*, RECORD (N.J.), Sept. 27, 1994, at A1.

[41] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, tit. XVII, subtit. A, § 170101, 108 Stat. 1796 (1994) (codified as amended at 42 U.S. § 14071 (2006)).

[42] Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071 (2006)).

[43] LOGAN, KNOWLEDGE AS POWER, *supra* note 2, at 65.

[44] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.).

[45] *See generally* Wayne A. Logan, Symposium, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 74–84 (2008) (noting inter alia required use of a three-tiered classification system based on type of conviction, irrespective of individual risk, which drives registration duration and the intervals at which information must be verified, and increased penalties for registration violations). To date, resistance to the federal mandate has stemmed mainly from the projected costs associated with the Act's distinct and more expansive and hence expensive coverage provisions. *See* Logan, *Failed Promise*, *supra* note 23, at 1003–05; *see also* U.S. Government Accountability Office, *Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implementing the Act, and Stakeholders Report Positive and Negative Effects* (Feb. 7, 2013), http://www.gao.gov/products/GAO-13-211.

[46] Although the Act had an initial compliance deadline of July 2009, subject to grant of extension by the Department of Justice, as of January 2014, only 17 states, 61 tribes, and 3 U.S. territories were certified as compliant. *See Newsroom*, Office of Justice Programs,

http://www.ojp.usdoj.gov/smart/newsroom_jurisdictions_sorna.htm (visited January 19, 2014). Recently, the federal policy shifted to requiring that jurisdictions only "substantially implement" the Act in order to be deemed compliant. As of late April 2018, 18 states, 132 tribes, and 4 territories met the standard. *See* SMART Newsroom, https://www.smart.gov/newsroom.htm (last visited April 26, 2018); *see also* SMART, *SORNA Implementation Status*, https://www.smart.gov/newsroom.htm (last visited April 26, 2018).

[47] For a helpful overview of the increasing gamut of information required in recent years, *see* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1088–90 (2012).

[48] *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 2, at 66–70.

[49] *See, e.g.*, Mueller v. Raemisch, 740 F.3d 1128 (7th Cir. 2014) (upholding Wisconsin's $100 annual fee); State v. Jones, 182 So. 3d 1218 (La. Ct. App. 2015) (denying challenge to state law that made no exception for indigency).

[50] *See, e.g.*, Wash. Rev. Code § 43.43.754 (2017).

[51] *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 2, at 66–70.

[52] This population is distinct from juveniles who have been transferred to the adult criminal justice system, convicted, and sentenced; they typically have been subject to SORN from the outset.

[53] Rebecca Beitsch, *States Slowly Scale Back Juvenile Sex Offender Registries*, HUFFINGTON POST, Nov. 19, 2015, https://www.huffingtonpost.com/entry/juvenile-sex-offender-registries_us_564de825e4b031745cf0015f. As of July 2011, Delaware had an individual who was nine-years-old when placed on the registry. NICOLE PITTMAN & QUYEN NGUYEN, A SNAPSHOT OF

JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS: A SURVEY OF THE UNITED STATES 12 (2011).

[54] *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 2, at 66–79. In the federal criminal justice system, tier designation (I–III, the latter being the most serious) also affects sentencing under the U.S. Sentencing Guidelines when an individual violates federal registration provisions. United States v. Berry, 814 F.3d 192, 195 (4th Cir. 2016) (citing U.S.S.G. § 2A3.5(a)). One such provision criminalizes residence changes from one state to another without notifying authorities. 18 U.S.C. § 2250.

[55] Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219, 225–29.

[56] *See, e.g.*, Mueller v. Raemisch, 740 F.3d 1128 (7th Cir. 2014) (addressing Wisconsin law).

[57] Florida Dept. of Law Enforcement, Sexual Offenders and Predators Search, https://offender.fdle.state.fl.us/offender/sops/home.jsf.

[58] Commonwealth of Massachusetts, Sex Offender Registry Board (SORB) Public Website, https://sorb.chs.state.ma.us/sorbpublic/standardSearchforSexOffenders.action?_p=ZbkTM1aY55EUaIn1U2SQJ5g1Y76B-_-BnvdMMRYNNu4 (last visited Apr. 26, 2018).

[59] New York Division of Criminal Justice Servs., Sex Offender Management, http://www.criminaljustice.ny.gov/nsor/ (last visited Apt. 26, 2018).

[60] Minnesota Bureau of Criminal Apprehension, Minnesota Predatory Offender Registration, https://por.state.mn.us/OffenderSearch.aspx (last visited Apr. 26, 2018).

[61] 355 U.S. 225 (1957).

[62] *Id*. at 228–29.

[63] *Id.* at 229–30.

[64] 515 P.2d 12 (Cal. 1973).

[65] *Id.* at 17.

[66] *Id.*

[67] 663 P.2d 216 (Cal. 1983).

[68] *Id.* at 218.

[69] *Id.* at 222.

[70] 204 Cal. Rptr. 39 (Cal. Ct. App. 1984). California appellate courts, however, upheld registration for more serious offenses. *See People v. Monroe*, 215 Cal. Rptr. 51 (Cal. Ct. App. 1985) (upholding registration for child annoyance and molestation); *People v. Mills* 146 Cal. Rptr. 411 (1978) (upholding registration for lewd and lascivious behavior on a child under age 14).

[71] *See* Abbott v. Los Angeles, 349 P.2d 974, 680 (Cal. 1960) (noting in dictum that the *Lambert* Court "refused to pass upon the constitutionality of [registration] per se."). In 1968, the Nevada Supreme Court unanimously rejected a claim that Nevada's "Registration of Convicted Persons Act" violated the Fifth Amendment privilege against compelled self-incrimination. According to the court, "The disclosure required by the act is merely a compilation of former convictions already publicly recorded in the jurisdiction where obtained." Atteberry v. State, 438 P.2d 789, 791 (Nev. 1968). While the law could be used "for 'rousting' purposes by the police," and it might "be desirable and wise" to exempt certain ex-convicts (e.g., those who had remained crime-free for many years), such concerns were for the legislature to consider. *Id.* at 791–92. According to the court, there was "no doubt that registration was a valuable tool in the hands of

the police, because it gives them a current record of the identity and location of ex-felons." *Id.* at 791.

Similarly, in 1978, in *People v. Mills*, 146 Cal. Rptr. 411 (1978), the California Court of Appeal rejected a variety of claims, including that registration violates the constitutional rights to privacy and equal protection. With respect to privacy, the court reasoned, Mills "waived" any such right when he was convicted of child molestation, and to the extent the right endured, it was trumped by the state's right to collect and maintain information on convicted sex offenders. With respect to equal protection, California's decision to subject some sex offenders to registration, but not others, was a legislative determination that it refused to second-guess. All that was needed to uphold the decision was a rational basis, which the court had no hesitance in finding: "a legitimate state interest in controlling crime and preventing recidivism by sex offenders." *Id.* at 181.

[72] *See, e.g.*, Burr v. Snider, 234 F.3d 1052 (8th Cir. 2000); Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000); Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997); Kellar v. Fayetteville Police Dep't, 5 S.W.3d 402 (Ark. 1999); State v. Patterson, 963 P.2d 436 (Kan. Ct. App. 1998); State v. Cook, 700 N.E.2d 570 (Ohio 1998), *cert. denied*, 525 U.S. 1182 (1999).

[73] 538 U.S. 84 (2003).

[74] 538 U.S. 1 (2003).

[75] *Smith*, 538 U.S. at 97–106 (applying the multi-factor test enunciated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). The reach of the Court's finding SORN a non-punitive regulatory sanction, it warrants mention, has implications for other claims similarly hinging on whether a sanction is deemed punitive, such as the Bill of Attainder and Double Jeopardy Clauses. *See* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1280 (1998).

[76] *CDPS*, 538 U.S. at 4.

[77] *Id.* at 8; *see also id.* at 7 ("[E]ven if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed.").

[78] *Id.*

[79] Often, the additions and changes have resulted from state efforts to comply with the federal Adam Walsh Child Protection and Safety Act of 2006, which as noted earlier required that states conform to requirements contained in the Act or face loss of federal funding. 42 U.S.C. § 16925(a). *See, e.g.*, Comm. v. Muniz, 164 A.3d 1189, 1203 (Pa. 2017) (stating that "[t]he General Assembly enacted SORNA in response to the federal Adam Walsh Child Protection and Safety Act of 2006….").

[80] *See* United States v. Kebodeaux, 570 U.S. 387, 389 (2013) (assuming arguendo that the federal SORNA law did not violate the Ex Post Facto Clause); United States v. Juvenile Male, 564 U.S. 932, 938 (2011) (deeming moot an ex post facto challenge to the federal SORNA law); United States v. Carr, 560 U.S. 438, 458 (2010) (concluding that federal law did not apply to pre-enactment travel, obviating need to address any ex post facto issue).

[81] *See, e.g.*, Limon v. Harris, 768 F.3d 1237 (9th Cir. 2014); Doe v. Cuomo, 755 F.3d 105 (2d Cir. 2014); U.S. v. Brunner, 726 F.3d 299 (2d Cir. 2013); United States v. Under Seal, 709 F.3d 257 (4th Cir. 2013); U.S. v. Parks, 698 F.3d 1 (1st Cir. 2012); ACLU v. Masto, 670 F.3d 1046 (9th Cir. 2012).

[82] 834 F.3d 696 (6th Cir. 2016), *reh'g denied* (Sept. 15, 2016), *cert. denied sub. nom., Snyder v. Does #1-5*, 138 S. Ct. 55 (Oct. 2, 2017).

[83] *Id*. at 698.

[84] Does 1-4 v. Snyder, 932 F. Supp. 2d 803 (E.D. Mich. 2013), *rev'd sub nom.,* Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016).

[85] *Snyder*, 834 F.3d at 705–06.

[86] *See id.* at 700 (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003). The test was previously applied in *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997), which upheld against ex post facto challenge a Kansas law retroactively subjecting "sexually violent predators" to potentially indefinite involuntary commitment, which itself borrowed the test from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

[87] *Id.* at 700.

[88] *Id.* at 700–01.

[89] *Id.* at 701.

[90] *Id.* According to the court, registrants "are forced to tailor much their lives around these school zones, and, as the record demonstrates, they often have great difficulty in finding a place where they may legally live or work. Some jobs that require traveling from jobsite to jobsite are rendered basically unavailable since work will surely take place within a school zone at some point." *Id.* at 702.

[91] *Id.*

[92] *Id.* at 703.

[93] *Id.* (citing *Smith*, 538 U.S. at 101).

[94] According to the court, the plaintiff-registrants:

> are subject to numerous restrictions on where they can live and work and. Much like parolees, they must report in person, rather than by phone or mail. Failure to comply can be punished by imprisonment, not unlike revocation of parole. And while the level of individual supervision is less than is typical of parole or probation, the basis mechanism and effects have a great deal in common. In fact,

> many of the plaintiffs have averred that SORA's requirements are more intrusive and more difficult to comply with than those they faced while on probation.

Id.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Id. at 704.

[99] *Id.* (quoting *Smith*, 538 U.S. at 102).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *See* Doe v. Bredesen, 507 F.3d 998, 1006 (6th Cir. 2007) (concluding that the "the Tennessee General Assembly could rationally conclude that sex offenders present an unusually high risk of recidivism" and that there was no basis "to conclude that the Act's requirements are excessive in relation to its legitimate, nonpunitive purpose of protecting the public from the undisputed high risk of [sex offender] recidivism").

[105] *Snyder*, 834 F.3d at 705.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.* The court added that Michigan's law

> brands registrants as lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school restrictions, they may not even live. It directly regulates

> where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.

Id.

[110] *See, e.g.*, United States v. Morgan, 255 F. Supp. 3d 221, 231 n.2 (D. D.C. 2017) (SORN law contained neither limit); *cf.* Vasquez v. Foxx, 2016 WL 7178465, No. 16-cv-8854 (N.D. Ill., Dec. 12, 2016) (challenged Illinois residence restriction law did not also restrict work location).

[111] *See, e.g.*, State v. Kinney, __ P.3d __, 2018 WL 1598914 *7 (Idaho Ct. App. 2018); People v. Rodriguez, __ N.E.3d __, 2018 WL 1096109 *4 (Ill. Ct. App. 2018); People v. Parker, 70 N.E.3d 734, 752 (Ill. Ct. App. 2016).

[112] *See, e.g.*, Riley v. Corbett, 622 Fed. Appx. 93 (3d Cir. 2015) (Pennsylvania law); Litmon v. Harris, 768 F.3d 1237 (9th Cir. 2014) (California law); Doe v. Cuomo, 755 F.3d 105 (2d Cir. 2014) (New York law); Windwalker v. Gov. of Alabama, 579 Fed. Appx. 769 (11th Cir. 2014) (Alabama law).

[113] *See, e.g.*, Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016) (Oklahoma law).

[114] *See, e.g.*, United States v. Millard, 265 F. Supp. 3d 1211, 1224 (D. Colo. 2017).

[115] Doe and Doe #2 v. Haslam, 2017 WL 5187117 *20, Nos.: 3:16-cv-02862, 3:17-cv-00264 (M.D. Tenn., Nov. 11, 2017) (citations omitted). *Cf.* Hoffman v. Village of Pleasant Prairie, 249 F. Supp. 3d 951, 960 (E.D. Wis., 2017) (citing *Snyder*'s trial record questioning the efficacy of Michigan's SORN law and concluding that the local government's failure to muster efficacy evidence regarding its residence exclusion law "eliminates the possibility that the [government's] action was rational.").

[116] 265 F. Supp. 3d 1211 (D. Colo. 2017), appeal filed, No. 17-1333, Sept. 21, 2017.

[117] *See* notes 67–70 and accompanying text.

[118] *See, e.g.*, United States v. Under Seal, 709 F.3d 257 (4th Cir. 2013); State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016).

[119] *Millard*, 265 F. Supp. 2d at 1226.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1227.

[124] Although not the result of the State of Colorado law challenged, the judge heard testimony regarding the effects of a local government law imposing geographic limits on where registrants could live. *Id.* (discussing City of Englewood provision). A city councilman of the jurisdiction, for instance, incorrectly characterized a registrant as a "'sexually violent predator,' based on information he saw on a private website. This evidenced the random vulnerability of registered sex offenders to false accusations, innuendo, and public humiliation based on either mistaken or intentional spreading of information and, given normal human foibles, misinformation." *Id.*

Also of concern to the court was the testimony of another witness, who, while not a registrant, stated that she was subjected to harassment and neighborhood shunning after she allowed a registrant to reside in her home. "The pressure was so intense that it ultimately led her to sell her house and move, even though her [registrant] acquaintance had moved out." *Id.* And a third witness, who was married to a registrant, was a parochial school teacher who was pressured by her employer—a Roman Catholic archdiocese, which "questioned whether she should continue teaching there, and even questioned whether she should remain married to her husband." *Id.* "All

of these witnesses further demonstrated the significant and ubiquitous consequences faced by registrants and their families and associates." *Id.*

[125] *Id.* at 1228 (noting that the requirement "complements and continues the state's comprehensive supervision of registered sex offenders even after they are released from the express provisions of their parole and probation").

[126] *Id.* at 1229.

[127] *Id.*

[128] *Id.*

[129] *Id.* at 1230.

[130] *Id.* at 1231.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *See* Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 188–89 (2000). *Cf.* James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1059, 1088 (1998) (stating with regard to use of shame sanctions more generally that the government's release of highly stigmatizing information creates a "complicity between the state and the crowd," and "[o]nce the state stirs up public opprobrium … it cannot really control the way the public treats the offender…."); *see also id.* (arguing that inflicting shame sanctions "involve[s] a dangerous willingness, on the part of the government, to delegate part of its enforcement power to a fickle and uncontrollable general populace.").

[135] *See* Doe v. State, 189 P.3d 999 (Alaska 2008).

[136] *Id.* at 1018 (footnote omitted) (stating that its analysis of the guideposts "lead us to disagree, respectfully but firmly, with the Supreme Court's analysis and its ultimate conclusion that the state's [SORN law] is not penal. Our decision is consistent with what we consider to be the compelling comments of [the] dissenting justices in *Smith*….").

[137] Wallace v. State, 905 N.E.2d 371, 375–77 (Ind. 2009).

[138] *Id.* at 384; *see also id.* at 379 ("The short answer is that the Act imposes significant affirmative obligations and severe stigma on every person to whom it applies.").

[139] State v. Letalien, 985 A.2d 4 (Me. 2009).

[140] *Id.* at 26.

[141] Furthermore, Maine's law required verification on a quarterly basis, not the annual basis required by Alaska's law. *Id.* at 18.

[142] State v. Williams, 952 N.E.2d 1108 (2011).

[143] *Id.* at 1112; *see also id.* at 1113 ("No one change compels our conclusion that [the new law] … is punitive. When we consider all the changes … in the aggregate, we conclude that the [new law] … is punitive.").

[144] Doe v. Dep't of Pub. Safety & Correctional Services, 40 A.3d 39 (Md. 2012).

[145] Starkey v. Oklahoma Dep't of Corrections, 305 P.3d 1004 (Okla. 2013).

[146] *Id.* at 1030.

[147] Doe v. State, 111 A.3d 1077 (N.H. 2015).

[148] Comm. v. Muniz, 164 A.3d 1189 (Pa. 2017).

[149] *See, e.g.*, Illinois ex rel. Birkett v. Konetski, 909 N.E.2d 783 (Ill. 2009); Smith v. Comm., 743 S.E.2d 146 (Va. 2013); Vaughn v. State, 391 P.3d 1086 (Wyo. 2017).

[150] *See* State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016) (reversing Doe v. Thompson, 373 P.3d 750 (Kan. 2016), State v. Buser, 371 P.3d 886 (Kan. 2016), State v. Redmond, 371 P.2d 900 (Kan. 2016)).

[151] *See, e.g.*, Henver v. State, 919 N.E.2d 109 (Ind. 2010); Comm. v. Muniz, 164 A.3d 1189 (Pa. 2017).

[152] *See, e.g., Henver*, 919 N.E.2d at 112 (relying on state constitution); Doe v. Dep't of Pub. Safety & Corr. Servs., 62 A.3d 123, 130–37 (Md. 2013) (relying on state constitution provision, which provides more protection than the federal); Starkey v. Okla. Dep't of Corrections, 305 P.3d 104, 1031 (Okla. 2013) (relying on state constitution alone); *Muniz*, 164 A.3d at 1223 (relying on both federal and Pennsylvania ex post facto provisions and noting that the latter affords more protections against retroactive criminal laws).

[153] Michigan v. Long, 463 U.S. 1032, 1041 (1983); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

[154] *See* Dep't of Pub. Safety v. Doe, 94 A.3d 791 (Md. 2014).

[155] 967 N.E.2d 729 (Ohio 2012).

[156] *Id.* at 734 (citing State v. Williams, 952 N.E.2d 1108 (Ohio 2011)).

[157] *Id.* at 737–38 (citing *Graham v. Florida*, 560 U.S. 48 (2010) (banning life without parole sentences for juveniles convicted non-homicide offenses) and *Roper v. Simmons*, 543 U.S. 551 (2005) (banning execution of juveniles).

[158] *Id.* at 744.

[159] *Id.* at 746 (citing and relying upon Art. I, § 9, Ohio Constitution).

[160] *See, e.g.*, Elizabeth J. Letourneau et al., *Effects of Juvenile Offender Registration on Adolescent Well-Being: An Empirical Examination*, 24 PSYCHOL. PUB. POL'Y & L. 105 (2017).

[161] *See, e.g.*, Catherine L. Carpenter, *Against Juvenile Registration*, 82 U. CIN. L. REV. 746 (2014); Robin Walker Sterling, *Juvenile Sex Offender Registration: An Impermissible Life Sentence*, 82 U. CHI. L. REV. 295 (2015).

[162] *See, e.g.*, In the Interest of J.O., 383 P.3d 69 (Colo. Ct. App. 2015); In re A.C., 54 N.E.3d 952 (Ill. Ct. App. 2016); People v. T.D., 823 N.W.2d 101 (Mich. 2011). *See also* United Sates v. Juvenile Male, 670 F.3d 999 (9th Cir. 2012). State courts have also rejected cruel and unusual punishment claims brought by juveniles convicted in adult court. *See, e.g.*, State v. Boche, 885 N.W.2d 523 (Neb. 2016). State courts, however, have seen fit to impose distinct procedural requirements regarding juveniles. *See. e.g.*, N.L. v. State, 989 N.E.2d 773 (Ind. 2013) (adjudicated juvenile may be required to register only after an evidentiary hearing); In re J.B., 107 A.3d 1 (Pa. 2014) (holding that application of irrebuttable presumption of registration requirement violated due process when applied to juveniles).

[163] *See* State v. Blankenship, 48 N.E.2d 516 (Ohio 2015).

[164] *Id.* at 522. *Cf.* In re Interest of C.K., __ A.3d __, 2018 WL 1915104 (N.J. 2018) (invalidating on state substantive due process grounds adjudicated juvenile lifetime registration requirement (without public notification), emphasizing distinctiveness of juveniles).

[165] Does #1-5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2017), *reh'g denied* (Sept. 15, 2016), *cert. denied sub. nom.*, *Snyder v. Does #1-5,* 138 S. Ct. 55 (Oct. 2, 2017).

[166] See Logan, *Jurisprudence of Punishment*, *supra* note 75, at 1287.

[167] 530 U.S. 466 (2000) (holding that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

[168] *See* State v. Hachmeister, 395 P.3d 833 (Kan. 2017) (noting same but relying on precedent deeming SORN non-punitive). *But see cf.* Fushek v. State, 183 P.3d 536 (Ariz. 2008) (concluding that imposition of SORN qualified offense as "serious" requiring jury determination under Arizona law).

[169] *See* Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1, 8 (2003) [*CDPS*] (noting that petitioner did not rely on substantive due process, only procedural due process, and stating that the Court "express[ed] no opinion as to whether Connecticut's Megan's Law violates principles of substantive due process."); *id.* at 9 (Souter, joined by Ginsburg, J.J., concurring) (noting that the majority's holding did not foreclose a substantive due process challenge); *cf.* Smith v. Doe, 538 U.S. 84, 110 (2003) (Stevens, J., dissenting and concurring) (noting that neither the instant case, nor *CDPS*, addressed whether the challenged statutes "deprive the registrants of a constitutionally protected interest in liberty," but concluding that "these statutes unquestionably affect a constitutionally protected interest in liberty").

[170] *See, e.g.*, Doe v. Mich. Dep't of State Police, 490 F.3d 491, 499–502 (6th Cir. 2007) (rejecting substantive due process claim due to lack of sufficient privacy interest); Doe I v. Phillip, 194 S.W.3d 833, 845 (Mo. 2006) ("The safety of children is a legitimate state interest and the purpose of [SORN] is to 'protect children from violence at the hands of sex offenders.' [SORN] bears a rational relationship to this legitimate state interest and is not violative of substantive due process principles.").

Arguably, SORN implicates a fundamental right, warranting strict scrutiny, a claim to date also typically rejected by courts. *See, e.g.*, Doe v. Moore, 410 F.3d 1337, 1345 (11th Cir. 2005) (rejecting privacy claim because registry information, such as home address and vehicle information, is "public" in nature); Russell v. Gregoire, 124 F.3d 1079, 1094 (9th Cir. 1997)

(same); Hyatt v. Comm., 72 S.W.3d 566, 574 (Ky. 2002); State v. Williams, 728 N.E.2d 342, 356 (Ohio 2000). *But see* Doe v. Poritz, 662 A.2d 367, 408 (N.J. 1995) (concluding that aggregated data triggers a privacy interest because "if the information disclosed under the Notification Law were, in fact, freely available, there would be no need for the law," but ultimately deciding that the public safety purpose of the law outweighed the privacy intrusion). *See also* Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167 (1999).

[171] *Snyder*, 834 F.3d at 704.

[172] *See id.* (quoting *Smith*, 538 U.S. at 102) ("'The Act's rational connection to a nonpunitive purpose is a 'most significant' factor in our determination that the statute's effects are not punitive.'")

[173] *Id.*

[174] Smith v. Doe, 538 U.S. 84, 101 (2003).

[175] *See* Logan & Prescott, *supra* note 8.

[176] *Cf.* People v. Pepitone, __ N.E.3d __, 2018 WL 122034 (Ill. 2018) (applying rational relationship test and rejecting challenge against residence exclusion zone based on view that the state legislature is in the best position to gather data and make decisions, "regardless of how convincing the social science might be").

[177] Indeed, in a decision issued as this article was going to press, the New Jersey Supreme Court unanimously held that life-long registration for an adjudicated juvenile petitioner violated the state constitution's substantive due process guarantee. *See* In re Interest of C.K., __ A.3d __, 2018 WL 1915104 (N.J. 2018). According to the court, the irrebuttable presumption of dangerousness lacked a rational basis:

> When, in the case of juveniles, the remedial purpose of Megan's Law—rehabilitation of the offender and protection of the public—is satisfied, then the continued constraints on their lives and liberty …, long after they have become adults, takes on a punitive aspect that cannot be justified by our Constitution.
>
> It is at that point that [the SORN law], as applied to juveniles, no longer bears a rational relationship to a legitimate state purpose and arbitrarily denies those individuals their right to liberty and enjoyment of happiness guaranteed by [the constitution].

Id. at *17. The court emphasized that the law's irrebuttable presumption of dangerousness was "not supported by scientific or sociological studies, our jurisprudence, or the record in this case." *Id.* at *18.

[178] In doing so, courts will align themselves with what turns out to be a rather substantial body of decisions finding that a broad spectrum of laws fail to pass the rational basis test, which in actuality is considerably less deferential than commonly believed. *See* Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J. L. & POL'Y 373 (2016); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018).

[179] Jill S. Levenson et al., *Public Perceptions and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 137 (2007); Stacey Katz Schiavone & Elizabeth L. Jeglic, *Public Perception of Sex Offender Social Policies and the Impact on Sex Offenders*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 679 (2009).

[180] Wayne A. Logan, Symposium, *Megan's Laws: A Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371 (2011) (discussing the many reasons accounting for the political popularity and staying power of SORN laws); Lisa L. Sample & Colleen Kadleck, *Sex Offender Laws: Legislators' Accounts for the Need for Policy*, 19 CRIM. JUST. POL'Y REV. 40, 54 (2008) (noting that in a survey of 35 Illinois legislators only 4 were confident that SORN promoted public safety yet almost all agreed that SORN satisfied a public demand for action).

[181] Logan, *Database Infamia*, *supra* note 55, at 227.

[182] In Texas, for instance, the registry grew over 35% in size over a five-year period (as of June 1, 2016, numbering almost 88,000 individuals). Eric Dexheimer, *Program to Corral Ballooning Sex Offender Registry Failing*, AUSTIN AMERICAN-STATESMAN, July 14, 2016, http://www.mystatesman.com/news/state--regional/program-corral-ballooning-sex-offender-registry-failing/z4ltoUh7g2A8KSxI64vv5I/.

[183] *See id.* ("[T]he [Texas] registry is like a cemetery: Because many offenders are placed on it for a lifetime, or at least decades, it only expands in size. Over the past five years, Texas has added new names to the list at a rate of nearly a dozen every day.").

[184] *See supra* notes 44–46. *See also* Logan, *Failed Promise*, *supra* note 23, at 1009 n.96 (discussing reasons behind state resistance, including implementation costs and the retroactive reach of laws).

[185] California, with the nation's largest registry, is one such state, recently amending its SORN law to lessen registration periods (from lifetime) and tiering registrants on the basis of crime severity. Kelsey Brugger, *Changes Are Coming to California Sex Offender Registry*, SANTA BARBARA INDEPENDENT, Feb. 15, 2018, https://www.independent.com/news/2018/feb/15/changes-are-coming-california-sex-offender-registr/. Also, in a few states, legislatures tried unsuccessfully to trim back SORN laws but were stymied by gubernatorial vetoes. Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underling Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 290–91 (2016) (noting experience in Missouri where legislature sought to discontinue registration of

juveniles and in Nevada where legislature sought to repeal use of conviction-based registrant classification system).

[186] COUNCIL STATE GOV'TS, SEX OFFENDER MANAGEMENT POLICY IN THE STATES: STRENGTHENING POLICY & PRACTICE, FINAL REPORT 6 (2010), http://www.csg.org/policy/documents/SOMFinalReport-FINAL.pdf (noting that "common myths about sex offenders continue to influence laws" and concluding that "there is little empirical proof that sex offender registries and notification make communities safer").

[187] CTR. SEX OFFENDER MGMT., U.S. DEP'T JUSTICE, THE COMPREHENSIVE APPROACH TO SEX OFFENDER MANAGEMENT 4–5 (2008) (advocating shift away from expansive SORN policies toward schemes that focus instead on individuals posing the greatest risk to the public).

[188] *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.11 (Prelim. Draft No. 5, Sept. 8, 2015) (urging in preliminary draft significantly less expansive registration approach and no notification), https://www.ali.org/smedia/filer_private/62/f0/62f0997d-a8e7-4e06-bb2a-d889dd9f902b/comparison_-_mpc_sexual_assault_-_dd_2_to_pd_5_-_sept_2015.pdf