William & Mary Bill of Rights Journal

Volume 16 | Issue 2 Article 5

Be They fish or Not Fish: The Fishy Registration of Nonsexual Offenders

Ofer Raban

BE THEY FISH OR NOT FISH: THE FISHY REGISTRATION OF NONSEXUAL OFFENDERS

Ofer Raban*

> A "Fish" means any creature of the sea, be it fish or not fish.[1]
>
> A "Sex crime" means . . . Kidnapping in the first degree if the victim was under 18 years of age.[2]

INTRODUCTION

In 1989, Wing Dong Moi, an eighteen-year-old member of a Manhattan Chinatown gang, pled guilty to kidnapping in the second degree in a case involving the murder of two rival gang members.[3] The two victims, ages fifteen and sixteen, were taken off an ice-skating rink, pushed into a car, driven to Westchester County (which adjoins New York City) and, a few hours later, were shot dead—apparently at the orders of the gang leader.[4] Moi claimed that he only helped put the victims in the car, that he was not involved in any of the subsequent events, and that he was not aware that the victims would be killed.[5] The prosecution agreed to a kidnapping plea (a plea consistent with Moi's claims), and Moi was sentenced to two to six-and-a-half years in prison.[6] He was released from prison in 1991.[7]

In 1996, Moi was notified that he was required to register as a "level three" (highest risk) sex offender for life under New York's newly enacted Sex Offender Registration Act (SORA).[8] The Act defined the kidnapping of a victim less than seventeen years of age as a sex offense.[9] Moi became a registered sex offender.[10]

---

* Visiting Professor, University of Utah S.J. Quinney College of Law, Assistant Professor of Law, University of Detroit Mercy School of Law. D.Phil., Oxford University; J.D., Harvard Law School; B.A., City College of New York. I would like to thank Professor Lee Goldman for his helpful comments and my two research assistants, Tim Chervenak and Ben McMartin for their hard work and professionalism.

[1] Fishery, Executive Order, Chapter 69, Section 6 (1937) (Isr.).

[2] OR. REV. STAT. § 181.594 (2007).

[3] People v. Moi, 801 N.Y.S.2d 780, 2005 WL 1618124, at *1 (N.Y. County Ct. June 3, 2005).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] N.Y. CORRECT. LAW § 168(a) (McKinney 1996).

[10] *Moi*, 2005 WL 1618124, at *1.

On June 2, 2004, the Legal Aid Society of New York and New York State reached an agreement regarding procedural due process violations in the classification of New York's sex offenders.[11] Soon thereafter, Moi—who had no further encounters with the law—received a letter telling him he was entitled to a re-determination of his level three sex offender status.[12] But Moi's new attorney, having looked at the facts of the case, was not content to challenge only Moi's classification: she filed papers claiming that registering Moi—a nonsexual criminal—as a sex offender was a violation of the Constitution.[13] The position of the Westchester District Attorney's Office was that Moi was properly registered as a level three sex offender.[14]

Moi died of a heart attack a few weeks before a court found his sex offender registration unconstitutional:

> There is simply no rational basis for requiring Defendant to register every 30 days with his local police department as a level three sex offender. . . . [and] having Defendant's photo placed on the internet in an effort to protect the community by notifying it that Defendant is a sex offender when Defendant has not committed any offense with a sexual component.[15]

But the legal issue presented in *Moi* is far from settled. One year after the case was decided, another New York court reached the opposite conclusion, holding that the sex offender registration of a nonsexual criminal was perfectly constitutional and slamming *Moi* for "fail[ing] to take into account that it is for the Legislature, not the judiciary, to determine whether making kidnapping and unlawful imprisonment of a minor subject to SORA (Sexual Offender Registration Act) serves the public interest."[16] Courts across the nation are equally divided on the constitutionality of registering

---

[11] *See* Doe v. Pataki, 427 F. Supp. 2d 398, 400–04 (S.D.N.Y. 2006) (providing that certain levels of sex offenders had a "right to redetermination of their risk level").

[12] *Moi*, 2005 WL 1618124, at *1.

[13] *Id.*

[14] *See id.* By way of disclosure: I was asked to press this claim as an Assistant District Attorney in the Westchester County Appeals and Special Litigation Division. Working on the file, I soon discovered that Moi's level three classification was not sound; moreover, the constitutional claims had substantial merit and were also supported by a lower court case—though that court committed a number of mistakes in its constitutional analysis. I recommended that Moi be offered a different classification, which would have terminated his sex offender registration soon thereafter. When my recommendation was rejected I asked to be removed from the case—a request that was graciously granted.

[15] *Id.* at *11.

[16] People v. Cintron, 827 N.Y.S.2d 445, 460 (N.Y. Sup. Ct. 2006).

offenders like Moi.[17] Disagreements abound not only among different jurisdictions, but—as in New York—within jurisdictions.[18]

This Article argues that the ongoing practice of registering criminals like Moi as sex offenders violates the Due Process Clauses of the Fifth and Fourteenth Amendments. The practice is also a textbook example of negligent policymaking supported by faulty data and upheld by often poor judicial reasoning. Section I provides a brief introduction to the Jacob Wetterling Act, the federal statute which precipitated the enactment of sex offender registration acts by the states and which required the registration of certain nonsexual offenders. Section II discusses the Due Process Clause and the constitutional scrutiny it entails. Section III explains the "liberty" interest involved in the due process claim of sex offender registrants.

---

[17] Courts have disagreed on every conceivable constitutional issue involved. Some found a Due Process Clause violation. *See* Branch v. Collier, No. Civ.A. 302CV0021-BF, 2004 WL 942194, at *8 (N.D. Tex. Apr. 30, 2004); State v. Robinson, 873 So. 2d 1205, 1216 (Fla. 2004); People v. Johnson, 843 N.E.2d 434, 440 (Ill. App. Ct. 2006), *rev'd*, in 870 N.E.2d 415 (2007); People v. Bell, 778 N.Y.S.2d 837, 850 (Sup. Ct. 2003); State v. Small, No. 04AP-316, 2005 WL 1785124, at *2, *5 (Ohio Ct. App. July 28, 2005); State v. Gooden, No. 82621, 2004 WL 1172074, at *10 (Ohio Ct. App. May 27, 2004); State v. Barksdale, No. 19294, 2003 WL 77115, at *5 (Ohio Ct. App. Jan. 10, 2003); State v. Reine, No. 19157, 2003 WL 77174, at *5 (Ohio Ct. App. Jan. 10, 2003). Many courts rejected the Due Process Clause challenge. *See* Gunderson v. Hvass, 339 F.3d 639, 645 (8th Cir. 2003), *cert. denied*, 540 U.S. 1124 (2004); People v. Woodard, 854 N.E.2d 674, 691–92 (Ill. App. Ct. 2006); People v. Beard, 851 N.E.2d 141, 148 (Ill. App. Ct. 2006); *In re* Phillip C., 847 N.E.2d 801, 809 (Ill. App. Ct. 2006); *Cintron*, 827 N.Y.S.2d at 860; People v. Fuller, 756 N.E.2d 255, 260 (Ill. App. Ct. 2001); State v. Sakobie, 598 S.E.2d 615, 618 (N.C. Ct. App. 2004); State v. Bowman, No. 02AP-1025, 2003 WL 22290183, at *7 (Ohio Ct. App. Oct. 7, 2003). Some courts found an Equal Protection Clause violation. *See* Raines v. State, 805 So. 2d 999, 1002–03 (Fla. Dist. Ct. App. 2001); *Bell*, 778 N.Y.S.2d at 850; State v. Washington, No. 99-L-015, 2001 WL 1415568, at 3–4 (Ohio Ct. App. Nov. 14, 2001). Some courts rejected the Equal Protection Clause claim. *See* Williams v. Ballard, No. 3-02-cv-0270-m, 2004 WL 1499457, at *7 (N.D. Tex. June 18, 2004); *Woodard*, 854 N.E.2d at 692–93; *Beard*, 851 N.E.2d at 150; *Cintron*, 827 N.Y.S.2d at 460; *Bowman*, 2003 WL 22290183, at *9. Some found both Due Process Clause and Equal Protection Clause violations. *See Bell*, 778 N.Y.S.2d at 850; *Washington*, 2001 WL 1415568, at *3–*4. Still other courts found the Equal Protection Clause wholly inapplicable to the case and refused to even consider it. *See Robinson*, 873 So.2d at 1209; *Johnson*, 843 N.E.2d at 439. One court even prohibited the practice as a matter of statutory construction—a holding later overruled by the Supreme Court of New Jersey. *See In re* Registrant T.T., 907 A.2d 416, 424 (N.J. 2006); *In re* Registrant T.S., 834 A.2d 419, 424 (N.J. Super. Ct. App. Div. 2003).

[18] *Compare Bell*, 778 N.Y.S.2d at 850 (finding due process and equal protection violations), *with Cintron*, 827 N.Y.S.2d at 860 (rejecting a due process challenge); *compare Johnson*, 843 N.E.2d at 439 (finding a due process violation), *with Beard*, 851 N.E.2d at 150 (rejecting a due process challenge and an equal protection claim); *compare Bowman*, 2003 WL 22290183, at *7 (rejecting a due process challenge), *with Barksdale*, 2003 WL 77115, at *5 (finding a due process violation).

Section IV argues that the registration of nonsexual offenders in sex offender registries must be subjected to strict constitutional scrutiny—a test that it fails. Section V explains why registration of nonsexual offenders in sex offender registries also fails the laxer "rational basis" test. And Section VI concludes with a discussion of the possible constitutional remedies to this unconstitutional practice.

I. THE JACOB WETTERLING ACT

On October 22, 1989, in St. Joseph, Minnesota, a masked man wielding a gun emerged from a driveway and ordered three boys to get off their bikes and lie face down on the ground.[19] He asked the boys for their ages, and then ordered two of them to get up and run away, saying he would shoot if they looked back.[20] Eleven-year-old Jacob Wetterling remained behind and was never seen again.[21] Two months later, a man whose description matched that of the gunman molested a twelve-year-old boy approximately ten miles from the location of Jacob's disappearance.[22]

Five years later, in 1994, the U.S. Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program (hereinafter Jacob Wetterling Act or the Act).[23] Among other things, the Act established a national sex offender registry where offenders convicted of certain specified offenses were to register.[24] Offenses triggering the registration requirement were divided into two categories: "sexually violent offense[s]" and "criminal offense[s] against a victim who is a minor."[25] Among the offenses listed under the latter heading were two

---

[19] Richard Meryhew, *Hope Keeps Search for Jacob Going*, STAR TRIB. (Minneapolis), Oct. 22, 1999, at 1B.

[20] *Id.*

[21] *Id.*

[22] Richard Meryhew, *Assault Victim Hopes His Story Will Lead to Break in Wetterling Case*, STAR TRIB. (Minneapolis), May 7, 2004, at 3B.

[23] 42 U.S.C.A. § 14071 (West Supp. 2007). Proposed legislation would amend this provision while maintaining the registration of nonsexual criminals that constitutes the subject matter of this Article. Pub. L. No. 109-248, 120 Stat. 600; *see* H.R. REP. NO. 104-555, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 980, 981. Jacob's mother, Patty Wetterling, tirelessly advocated for the Act and later became herself a candidate for Congress in 2004 and 2006. *See* Bill Salisbury, *Wetterling a Stronger Candidate, She Says She Won't Run for 6th District Congressional Seat*, ST. PAUL PIONEER PRESS, Apr. 20, 2005, at B14. Patty Wetterling was the Democratic-Farmer-Labor Party candidate in 2004 and 2006 for the Minnesota Sixth District seat in the United States House of Representatives. She lost both races. *Id.*

[24] *See* 42 U.S.C.A. § 14071(b)(2). Sex offender registration lists were not a new idea: California enacted the nation's first registration law in 1947. *See* BILL LOCKYER, CAL. ATT'Y GEN., 2002 REPORT TO THE CALIFORNIA LEGISLATURE ON CALIFORNIA SEX OFFENDER INFORMATION (2002), *available at* http://org.ca.gov/megan/pdf/ca_sexoff_0702.pdf.

[25] 42 U.S.C.A. § 14071(a)(3)(A)–(B).

nonsexual offenses: "kidnapping of a minor, except by a parent" and "false imprisonment of a minor, except by a parent."[26]

The Act required states to establish sex offender registries within three years as a condition for receiving federal funds.[27] Compliance with the Act necessitates registration of criminal offenses which are "comparable to or which exceed[] the following [specified] range of offenses."[28] The distinction between sexual and nonsexual offenses plays no part in the called-for state registries, which are simply referred to as "sexual offender registration program[s]."[29] Within two years of the enactment of the Jacob Wetterling Act, sex offender registries were established in all fifty states,[30] and nonsexual criminals became registrable sex offenders.[31] Shortly thereafter, Congress expanded the Act by mandating the public dissemination of the personal details of registered offenders.[32]

II. THE DUE PROCESS CLAUSE: A (CRITICAL) OVERVIEW OF DUE PROCESS DOCTRINE

The Fifth Amendment forbids the federal government to deprive any person of "life, liberty, or property without due process of law."[33] The Fourteenth Amendment's

---

[26] *Id.* § 14071(a)(3)(A)(i)–(ii).

[27] *Id.* § 14071(g)(1)–(2) (providing that if a state fails to create a registry within three years of its enactment, the state loses ten percent of its federal crime control grant funds). Additionally, states that create sex offender registries are awarded grants to offset the costs of complying with the registration program. *Id.* § 14071(i)(1)(A). The DOJ reviews each program, and must certify it as compliant. *Id.* § 14071(g).

[28] *Id.* § 14071(a)(3)(A).

[29] *See id.* § 14072(a)(3) ("[T]he term 'minimally sufficient sexual offender registration program' means any State sexual offender registration program . . . ."); *id.* § 14072(g)(3) ("A person required to register under subsection (c) of this section or under a State sexual offender registration program, including a program established under section 14071 of this title . . . .").

[30] See People v. Ross, 646 N.Y.S.2d 249, 250 n.1 (Sup. Ct. 1996), for a list of registration acts by state.

[31] Some states expanded the number of nonsexual registrable offenses to include: homicide, including negligent homicide if the victim is under the age of twelve; unlawful restraint; permitting child abuse; assault if the victim is under the age of twelve; negligently causing bodily injury if the victim is under the age of twelve; threatening to commit any crime of violence or act dangerous to human life if the victim is under the age of twelve; and removal of a child from state in violation of custody decree. *See, e.g.*, ARK. CODE ANN. § 12-12-903(12)(A)(s) (West 2007); N.D. CENT. CODE § 12.1-32-15 (1)–(2) (2007). Some of these nonsexual registrable offenses are misdemeanors. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-250(2) (West 2007) (mandating the sex offender registration of those convicted of Unlawful Restraint in the Second Degree, a Class A Misdemeanor).

[32] 42 U.S.C.A. § 14071(e)(2).

[33] U.S. CONST. amend. V.

Due Process Clause extends an identical constitutional requirement to the states.[34] The Due Process Clause has a procedural prong, which deals with the extent of the legal process that is due, and a substantive prong, which places substantive limitations on governmental powers no matter the extent of the accorded procedures.[35] When examining a substantive due process claim, courts must first determine whether the claim involves a "fundamental right."[36] If it does, the challenged regulation will be invalidated unless "narrowly tailored to serve a compelling state interest."[37] If it does not, it is sufficient if the regulation has "a reasonable relation to a legitimate state interest."[38] Thus, the recognition of a fundamental right changes the nature of the inquiry from one merely demanding a rational relationship between the means employed and a legitimate end,[39] to one insisting that the regulation be supported by a compelling reason and that it not sweep too broadly.[40] This difference has immense significance in practice, as strict scrutiny has often proven fatal while the rational basis test has often been branded a rubber stamp.[41]

A. Fundamental Rights

The test for determining whether a right is fundamental inquires whether the right is "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"[42] Recognized fundamental rights include: the right to privacy; the right to travel; the right to marry; and the right of parents to make decisions regarding the procreation, care, custody, and control of their children.[43]

---

[34] *Id.* amend. XIV.

[35] *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 337 (1986).

[36] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

[37] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 302 (1993).

[38] Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

[39] *See, e.g.*, FCC v. Beach Comm'n, Inc., 508 U.S. 307, 313 (1993).

[40] Legislative enactments affecting fundamental rights must be narrowly tailored to serve a compelling state interest. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Sec'y of State, 378 U.S. 500, 508 (1964); Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940).

[41] *See, e.g.*, Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[42] *Glucksberg*, 521 U.S. at 720–21 (citations omitted); *see also* Palko v. Connecticut, 302 U.S. 319, 325–26 (1937), *overruled on other grounds*, Benton v. Maryland, 395 U.S. 784 (1969).

[43] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 753 (1982) (recognizing the fundamental right of parents to rear their children); Zablocki v. Redhail, 434 U.S. 374 (1978) (recognizing a fundamental right to marry); *Griswold*, 381 U.S. at 485 (recognizing a fundamental right to privacy); Kent v. Dulles, 357 U.S. 116, 125 (1958) (recognizing a fundamental right to travel).

Due process fundamental rights are hard to come by these days. Recent decades have seen a Supreme Court "extremely reluctant to breathe still further substantive content into the Due Process Clause."[44] This reluctance finds its expression, among other things, in the requirement that any alleged fundamental right be "carefully described"—which often means that the alleged right receives a highly specific and narrow articulation.[45] For example, in the notorious *Bowers v. Hardwick*,[46] which upheld a gender-neutral criminal sodomy law challenged by a homosexual, the Supreme Court described the asserted right not as the right to autonomy or privacy in the bedroom, but as the right of "homosexuals to engage in sodomy."[47] Similarly, in *Michael H. v. Gerald D.*,[48] which involved the claim of a biological father to a determination of biological parenthood as a step toward establishing visitation rights to a child residing with her biological mother and the mother's husband, the Court described the asserted right not as a right in a parental relationship, but as the right of a natural father to "substantive parental rights to . . . a child conceived within, and born into, an extant marital union that wishes to embrace the child."[49] Once an asserted constitutional right is defined so narrowly and in such peculiar a manner, it is only to be expected that evidence for its presence in American tradition be sparse.[50] It is unsurprising that the test has proven difficult to satisfy.[51]

Yet, this constitutional test—as was cogently argued in Justice Brennan's lengthy dissent in *Michael H.*—was not only a radical break from precedent, where fundamental rights were often described in broad terms and in reference to universal values, but also was a test that rendered the Constitution "a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."[52] It was also a test that assumed that "the only purpose of the Due Process Clause is

---

[44] Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (Scalia, J., plurality opinion) (citing Moore v. East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting)); *see also* Bowers v. Hardwick, 478 U.S. 186, 194–95 (1986) ("Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. . . . There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental."), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[45] *See, e.g.*, *Glucksberg*, 521 U.S. at 721–22; Reno v. Flores, 507 U.S. 292, 302 (1993); Collins v. Harker Heights, 503 U.S. 115, 125 (1992); Cruzan v. Dir. Mo. Dep't. of Health, 497 U.S. 261, 277–78 (1990).

[46] *Bowers*, 478 U.S. 186.

[47] *Id.* at 190.

[48] *Michael H.*, 491 U.S. 110.

[49] *Id.* at 127.

[50] *See Bowers*, 478 U.S. 186.

[51] For an excellent criticism of existing substantive due process doctrine and the suggestion of an alternative conceptual framework, see Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601 (2006).

[52] *Michael H.*, 491 U.S. at 140–41 (Brennan, J., dissenting).

to confirm the importance of interests already protected," thereby "[t]ransforming the protection afforded by the Due Process Clause into a redundancy."[53] Previous due process decisions, said Brennan, were very different:

> Surely the use of contraceptives by unmarried couples, or even by married couples, the freedom from corporal punishment in schools, the freedom from an arbitrary transfer from a prison to a psychiatric institution, and even the right to raise one's natural but illegitimate children, were not "interest[s] traditionally protected by our society," at the time of their consideration by this Court. If we had asked, therefore, in *Eisenstadt*, *Griswold*, *Ingraham*, *Vitek*, or *Stanley* itself whether the specific interest under consideration had been traditionally protected, the answer would have been a resounding "no."[54]

The insistence on historical support and a "careful description" of the asserted right apparently derived from the wish to curb judicial discretion: "This approach," said the Court, "tends to rein in the subjective elements that are necessarily present in due process judicial review."[55] But as predicted by Brennan and confirmed by subsequent cases, the test was in fact highly indeterminate. The notion of "tradition," wrote Brennan, "can be as malleable and as elusive as 'liberty' itself. . . . [b]ecause reasonable people can disagree about the content of particular traditions, and because they can disagree even about which traditions are relevant to the definition of 'liberty.'"[56] Indeed, due process jurisprudence is replete with disputes not only about the correct interpretation of historical data,[57] but also about what data is relevant: while some Justices seem to believe that the older the data the stronger its legal authority—going back to the thirteenth century in search of relevant practices[58]—others claim that the most relevant data is that of "the past half century."[59]

---

[53] *Id.*

[54] *Id.* at 139–40 (citations omitted).

[55] Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

[56] *Michael H.*, 491 U.S. at 137 (Brennan, J., dissenting).

[57] *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190–94 (1986)(discussing the conflicting interpretations of American traditions regarding homosexuality), *overruled by* Lawrence v. Texas, 539 U.S. 558, 571–73 (2003).

[58] *See, e.g.*, *Glucksberg*, 521 U.S. at 711 ("[F]or over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide. In the 13th century, Henry de Bracton, one of the first legal-treatise writers, observed that '[j]ust as a man may commit felony by slaying another so may he do so by slaying himself.'" (citations omitted)).

[59] *Lawrence*, 539 U.S. at 571–72. ("[W]e think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that

The test's indeterminacy was not helped by the Court's manipulation of the "careful description" requirement. In *Washington v. Glucksberg*, where the Court was faced with an asserted right to assisted suicide, the "careful description" of the alleged right was the "right to commit suicide which itself includes a right to assistance in doing so."[60] So whereas in *Bowers* and *Michael H.* the Court described the asserted rights in exceedingly narrow and case-specific ways, in *Glucksberg* the Court depicted a broad right far wider than the one articulated by the claimants themselves, who merely asserted the right of terminally ill patients (all claimants died of their illness before the case reached the Court) to be aided in their imminent death by their licensed physicians, all of whom were experts in the treatment of the terminally ill.[61] If what is meant by a "careful description" of the asserted right can be either an exceedingly narrow description or an exceedingly wide one, the "subjective elements" of due process review cannot have been "reined in."

B. The Rational Basis Test

Due process claims that do not implicate fundamental rights are scrutinized using the rational basis test, which requires that the challenged governmental action bear a rational relationship to a legitimate governmental interest.[62] As noted above, the test is famed for its great deference to legislative enactments and has proven easy to pass. Nevertheless, the axe does descend sometimes.

Some scholars have come to believe that the Supreme Court, although not explicitly acknowledging the fact, is also sometimes engaged in a heightened form of rational basis review.[63] This alleged heightened review tends to appear in cases affecting disfavored groups. It is found mostly in the Equal Protection Clause context,[64] but may have made a recent appearance in the substantive due process case of *Lawrence v. Texas*.[65]

---

liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

[60] 521 U.S. at 723.

[61] *Id.* at 739 (Stevens, J., concurring).

[62] *See id.* at 735 (majority opinion).

[63] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1611 (2d ed. 1988); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (1999); Gunther, *supra* note 41, at 12. Justice O'Connor acknowledged that fact in *Lawrence v. Texas*. 539 U.S. at 580 (O'Connor, J., concurring) ("When a law exhibits . . . a desire to harm a politically unpopular group, we have applied a more searching form of rational review to strike down such laws . . . .").

[64] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (invalidating a Colorado constitutional amendment prohibiting all legislative, executive, or judicial action designed to protect homosexuals from discrimination); Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (invalidating a federal statute denying food stamps to any household containing an individual unrelated to any other member of the household).

[65] 539 U.S. 558 (2003); *see also* Civil Liberties for Urban Believers v. City of Chicago, 342

III. THE BURDEN ON REGISTRANTS' LIBERTY

The principal constitutional interest implicated in the case of nonsexual registrants is their substantive due process right in "liberty"—a constitutional concept going well beyond mere freedom from physical restraint.[66] The burdens on liberty affected by sex offender registration are substantial: depending on the state, registrants are required to register periodically with a law enforcement agency—sometimes in person,[67] sometimes as often as every thirty days—often for life, at the very least for ten years after their release from prison.[68] They are required to provide personal information that includes their address, employment, enrollment in an educational institution, a photograph (periodically updated), the vehicle they drive, a biological sample, and whether they seek psychiatric counseling.[69] They must notify local law enforcement agencies—sometimes within twenty-four hours, sometimes within three days—of any change, temporary or permanent, in that information, including any change in their facial features (shaving a moustache for example), any time they borrow a car from a friend, or any time they see a mental health specialist.[70] Failure to register or re-register is usually a felony punishable by

---

F.3d 752, 769-70 (7th Cir. 2003) (Posner, J., dissenting), *cert. denied*, 541 U.S. 1096 (2004).

[66] "Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[67] *See, e.g.*, CONN. GEN. STAT. §54-257(c) (2001) (stating that all sexual offenders, including nonviolent offenders, must register by mail every ninety days); N.Y. CORRECT. LAW § 168-h (Consol. 2003) (requiring level three offenders to register in person every ninety days for life).

[68] The federally mandated minimum is ten years. *See* 42 U.S.C.A. § 14071(b)(6)(A)–(B) (West Supp. 2007) (stating that a registrant must register for a period of ten years unless he or she has more than one sex offense conviction, has been convicted of an aggravated offense, or has been determined a "sexually violent predator"—in which case the registration is for life).

[69] *See, e.g.*, CONN. GEN. STAT. § 54-251(a) (2001) (requiring a photograph upon request); FLA. STAT. ANN. § 943.325 (West 2006) (requiring two specimens of blood); KAN. STAT. ANN. § 22-4907(a)–(b) (1995) (requiring that registrants include a photograph, address, and fingerprints); MISS. CODE ANN. § 45-33-37 (2005) (requiring a biological sample for DNA testing), *amended by* 2006 Miss. Laws 563 (retaining the biological sample requirement); OKLA. STAT. tit. 57, § 584 (2004) (requiring a photograph, biological samples, employment information, and address).

[70] *See e.g.*, CONN. GEN. STAT. §§ 54-251(a), 54-252(a), 54-254(a) (2001) (stating that whenever any registrant changes his or her address, he or she must notify the Commissioner of Public Safety within five days. If he or she "regularly travels into or within another state or temporarily resides in another state for purposes including, but not limited to employment or schooling," he or she must notify the Connecticut Commissioner of Public Safety and register with the appropriate agency in the other state).

years of imprisonment,[71] and in some jurisdictions a conviction does not even require a showing of intentional or willful evasion.[72] Some states prohibit registered sex offenders from living or working within a certain distance of a school, a day care center, a community center, or any place where minors congregate.[73] Registrants' information is made available to the public via government websites that usually refer to the registrant as "sex offender" or "sexual predator," and that exhibit, among other things, a photograph, an address, the make of the offender's vehicle, and his employer's address.[74] Some jurisdictions require community-wide notifications, which include door-to-door notices and media publications.[75] In some jurisdictions, the offender's information may be shared with "significant others, landlords, neighbors, [and] employers . . . if it is determined that providing the information is in the best interest of public safety and/or the offender's rehabilitation."[76]

---

[71] *See, e.g., id.* §§ 54-251(d), 54-252(d) (2001); DEL. CODE ANN. tit. 11, § 4121(t) (2001); FLA. STAT. ANN. § 943.0435(9) (West 2006).

[72] *See, e.g.*, State v. Bryant, 614 S.E.2d 479, 484–85 (N.C. 2005) (holding that no showing of knowledge or intent is required to prove the violation).

[73] *See, e.g.*, ALA. CODE § 15-20-26(a) (LexisNexis 2005) (prohibiting sex offenders from living within 2000 feet of a school or a child care center); GA. CODE ANN. § 42-1-15(b) (2007) (prohibiting sex offenders from working within 1000 feet of a school, day care center, or area where minors congregate); 720 ILL. COMP. STAT. ANN. 5/11-9.3(a), (b), (b-5) (West 2002); *id.* 5/11-9.4 (a), (b), (b-5) (West 2002) (prohibiting sex offenders from living within 500 feet of any school building or public park); IOWA CODE § 692A.2A(2) (2003) (prohibiting residency within 2000 feet of a school or registered child care facility).

[74] Alaska is typical in the information it makes available to the public, which includes:

> [T]he sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender . . . is in compliance with [the] requirements . . . or cannot be located.

ALASKA STAT. § 18.65.087(b) (2004).

[75] *See, e.g.*, WIS. STAT. ANN. § 301.46 (West 2003), *as amended by* 2005–2006 Wis. Legis. Serv. 431 (West); Wisconsin Department of Corrections: Sex Offender Registry Frequently Asked Questions, http://offender.doc.state.wi.us/public/fyi/faq.jsp. (last visited Sep. 12, 2007); *see also* 42 U.S.C.A. § 14071(e)(2) (West Supp. 2007) (listing the ways by which information can be released to the public); ALA. CODE § 15-20-25(b) (LexisNexis 2005) (allowing employer's address to appear on a website); IOWA CODE § 692A.13(2)(b) (2006) (authorizing registry information to be distributed through print, audio/visual materials, and/or radio); *cf.* State v. Bollig, 605 N.W.2d 199, 205 (Wis. 2000).

[76] WIS. DEP'T OF CORRECTIONS SUPERVISION OF SEX OFFENDERS: A HANDBOOK FOR AGENTS §7.14 (2002), *available at* http://www.wi-doc.com/04-12-2004/Sex%20Offender%20Manual.pdf; *see also* Wisconsin Department of Corrections: SOR Community Notification, http://offender.doc.state.wi.us/public/proginfo/communitynotification.jsp (last visited Sept. 12, 2007).

The ready availability of the information often makes it extremely difficult for registrants to find employment or housing,[77] and many are subjected to harassment and the threat of vigilante actions.[78] A study published by the Department of Justice examined the impact of community notification provisions[79] (as noted previously, such provisions were added to the Jacob Wetterling Act in 1996 and were subsequently adopted by all fifty states).[80] The study reports:

> Loss of employment, exclusion from residence, and the breakup of personal relationships were frequently cited consequences of expanded notification actions and ensuing detrimental publicity. Seventy-seven percent told of being humiliated in their daily lives, ostracized by neighbors and lifetime acquaintances, and harassed or threatened by nearby residents or strangers. Although only one interviewee [out of thirty] was on the receiving end of what might be described as a vigilante action, all expressed various degrees of concern for their own safety.
>
> Two-thirds of the interviewed sex offenders also spoke of how community notification unfavorably affected the lives of family members, including parents, siblings, and offspring. Several cited emotionally painful examples. One interviewee talked of his mother's anguish and depression following newspaper accounts stemming from notification. Another spoke of his son's decision to quit his high school football team because of ridicule from teammates, and a third related how his sister was shunned by former friends. . . .Some of the interviewees . . . had to accept residence in minimum-security prisons or correctional centers because of the lack of alternative housing in the community. Expanded notification has created enormous obstacles in locating housing resources for returning sex offenders.[81]

---

[77] *See, e.g.*, State v. Myers, 923 P.2d 1024, 1041 (Kan. 1996) ("The practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment.").

[78] "[P]ublic dissemination of information about their conviction has [allegedly] subjected registrants to 'threats, anonymous letters telling them to move, loss of housing, reduced educational opportunities for themselves and their children and siblings whose performance in school is affected by the notoriety of the public listing.'" Akella v. Mich. Dep't of State Police, 67 F. Supp. 2d 716, 730 (E.D. Mich. 1999).

[79] RICHARD G. ZEVITZ & MARY ANN FARKAS, NATIONAL INSTITUTE OF JUSTICE: RESEARCH IN BRIEF, SEX OFFENDER COMMUNITY NOTIFICATION: ASSESSING THE IMPACT IN WISCONSIN, 9–10 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/179992.pdf.

[80] *See supra* note 30 and accompanying text.

[81] ZEVITZ & FARKAS, *supra* note 79, at 9–10.

Finally, registrants are barred from suing the government for any damages resulting from the good faith implementation of a sex offender registration act.[82]

IV. STRICT SCRUTINY

The claim of nonsexual registrants is that their registration as sex offenders, and the dissemination of their registration information, is an infringement of their liberty in violation of substantive due process. Nonsexual criminals have three independent grounds weighing in favor of strict constitutional scrutiny of their claim: a fundamental right to freedom from intrusive registration requirements (shared with all sex offender registrants), a fundamental right to freedom from government defamation, and their status as a burdened group whose interests were essentially ignored during the legislative process.

A. Fundamental Rights: Registration and Reputation

The first step in examining this due process claim is determining whether it implicates a "fundamental right."[83] As noted above, this establishes the constitutional test

---

[82] "Law enforcement agencies, employees of law enforcement agencies and independent contractors acting at the direction of such agencies, and State officials shall be immune from liability for good faith conduct under this section." 42 U.S.C.A. § 14071(f) (West Supp. 2007).

[83] Some courts faced with the substantive due process claim of nonsexual registrants erroneously applied a threshold test, entitled the "stigma-plus" test, which requires a showing of a "constitutionally cognizant interest" before a court will examine the merits of the claim. *See, e.g.*, State v. Robinson, 873 So. 2d 1205, 1219–20 (Fla. 2004) (Wells, J., dissenting); People v. Bell, 778 N.Y.S.2d 837, 843 (Sup. Ct. 2003). The "stigma plus" test was first announced by the Supreme Court in the much criticized *Paul v. Davis*, 424 U.S. 693 (1976). *Paul* held that more than mere injury to reputation ("stigma") needed to be shown before a constitutionally cognizant interest warranting constitutional scrutiny could be recognized. *Id.* at 701–02. The "stigma-plus" test, however, is inapplicable to substantive due process claims. The confusion is caused by the apparent similarity between the claims advanced in *Paul* and those of nonsexual registrants: *Paul* involved a man who had been arrested and arraigned for shoplifting, had never been tried for the crime, and then discovered his name and photograph appearing on a list of "active shoplifters" distributed by the police to local businesses. *Id.* at 697. He claimed a constitutional due process violation, but the Court refused to reach the merits of his claim by holding that mere injury to reputation did not implicate a constitutionally cognizant interest. *Id.* at 710–12. *Paul*, however, involved a *procedural* due process claim, and the Court explicitly stated that its decision was "limited to consideration of the procedural guarantees of the Due Process Clause and was not intended to describe those substantive limitations upon state action which may be encompassed within the concept of 'liberty.'" *Id.* at 711 n.5. The threshold showing of a constitutionally cognizant interest has no place in the context of substantive due process. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 630 (15th ed. 2004).

to be employed in the case—"strict scrutiny" or "rational basis review"—which is an important decision for a claim's chance of success.

Nonsexual offenders have alleged that their registration implicates a variety of "fundamental rights,"[84] including a fundamental right to liberty, the right to privacy, and the right to travel; but virtually all courts examining the issue have rejected the claim, either refusing to recognize a new fundamental right or rejecting attempts to fit the affected interest into an existing fundamental right category.[85] Given the current state of "fundamental rights" analysis we saw above, this is unsurprising. Nevertheless, courts' discussions of the issue have often been extremely cursory. The Illinois Supreme Court, for example, simply noted in passing that "the challenged statute does not affect a fundamental right"[86] and cited a previous case,[87] a case which in turn resolved the issue by stating: "[The appellant] does not argue, nor do we find, that the statute at issue affects a fundamental right. Accordingly, we analyze the statute at issue using the rational basis test."[88] Hence, one unreasoned determination relied on another unreasoned one. One New York court justified its decision with a somewhat lengthier but rather absurd argument highlighting the sorry state of current constitutional doctrine:

> If the right to enter into a same sex marriage is not considered fundamental, the right to avoid stigmatization as a sex offender where defendant has not engaged in any express sexual conduct most certainly cannot rise to this status. Sex offender registration statutes did not become widespread before the 1990's; it can hardly be claimed that the rights implicated by SORA are "deeply rooted in our Nation's history."[89]

And yet, the refusal to recognize an implicated fundamental right results in a very lax constitutional test for a highly invasive civil, non-criminal governmental

---

[84] For the argument that sex offender registration acts implicate fundamental rights, see Marissa Ceglian, *Predators or Prey: Mandatory Listing of Non-Predatory Offenders on Predatory Offender Registries*, 12 J.L. & POL'Y 843 (2004); Melissa Blair, Comment, *Wisconsin's Sex Offender Registration and Notification Laws: Has the Wisconsin Legislature Left the Criminals and the Constitution Behind?*, 87 MARQ. L. REV. 939 (2004); Catherine A. Trinkle, Note, *Federal Standards for Sex Offender Registration: Public Disclosure Confronts the Right to Privacy*, 37 WM. & MARY L. REV. 299 (1995).

[85] One exception is *Bell*, 778 N.Y.S.2d at 845, which erroneously deduced the presence of a fundamental right from the fact that the "stigma-plus" test was satisfied. *See supra* note 83 (providing a quick summary of the "stigma-plus" test).

[86] People v. Johnson, 870 N.E.2d 415, 421–22 (Ill. 2007).

[87] *Id.* at 422 n.2 (citing *In re* J.W., 787 N.E.2d 747, 757 (Ill. 2003)).

[88] *In re* J. W., 787 N.E.2d at 757.

[89] People v. Cintron, 827 N.Y.S.2d 445, 453 (Sup. Ct. 2006).

action[90]—indeed, the sort of action ordinarily identified with authoritative regimes.[91] As one Massachusetts Supreme Court Justice put it: "To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government."[92] The justice added: "This is not to say that registration is always an unjustifiable infringement on liberty, but only that any justification for it must take into account its peculiar burdens in measuring them against the harm to be averted."[93] However, weighing the interests advanced against the burdens imposed is only required in the case of fundamental rights, where courts examine the importance of the interest involved, but not under rational basis review, which is deliberately designed to avoid the "balancing of competing interests."[94] Thus, if no fundamental right is involved in this civil, non-punitive regulation, then requiring citizens to periodically register and provide the authorities with detailed personal information need not be supported by any important or "compelling" government interest: it is enough that the interest served is "legitimate," and that the requirement is rationally related to it. This is a rather odd result, given American "history and traditions."

But *nonsexual* registrants—as opposed to all registrants—have an additional alleged fundamental right, independent of the right to be free from onerous registration requirements: the right not to be publicly identified by the government as something that they are not—namely, *sex* offenders. This *false designation* concerns the legal protection in reputation—a concern with very deep roots in our law.[95]

---

[90] *See* Smith v. Doe, 538 U.S. 84 (2003) (holding that retroactive application of sex offender registration did not violate the Ex Post Facto Clause because it was part of a civil, non-punitive scheme).

[91] Doe v. Att'y Gen., 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring).

[92] *Id.*

[93] *Id.*

[94] Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

[95] *See, e.g.*, LAURENCE H. ELDRIDGE, THE LAW OF DEFAMATION § 53, 293–94 (1978) ("There is no doubt about the historical fact that the interest in one's good name was considered an important interest requiring legal protection more than a thousand years ago; and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection."). An English statute from 1275 provided civil and criminal remedies in the King's courts for "great men of the realm" who had been defamed, and this statutory recognition followed many years of judicial protection of reputation going back at least as far as the eleventh century. *See* Frank Carr, *The English Law of Defamation* (pts. I–II), 18 LAW Q. REV. 255, 388 (1902); Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 COMM. L. & POL'Y 433 (2004); Colin Rhys Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962); Jerome Lawrence Merin, *The Supreme Court and Libel*, 11 WM. & MARY L. REV. 371 (1969); Van Vechten Veeder, *The History and Theory of the Law of Defamation I*, 3 COLUM. L. REV. 546 (1903); Van Vechten Veeder, *The History and Theory of the Law of Defamation II*, 4 COLUM. L. REV. 33 (1904).

Indeed, American legal protections of reputation are so well entrenched that only in 1964 was it first recognized that the First Amendment imposed some constitutional limitations on anti-defamation laws—limitations whose scope remains rather limited.[96] Both civil and criminal penalties for defamation remain widespread in American law, though criminal prosecutions are extremely rare.[97] Even more to the point, special legal protections have been extended in regard to accusations of *criminal conduct* (sex offender registration avers a conviction for a *sexual crime*). In civil actions, such accusations are considered "defamation per se," so that no proof of actual damages is required in order to claim reparations.[98] And threatening a person with public accusations of criminal conduct so as to obtain some object of value has long been criminally punished as extortion.[99]

The protection of reputation in American law, particularly in relation to charges of criminal conduct, is undoubtedly "rooted in the traditions and conscience of our people" and has been repeatedly and explicitly recognized by the U.S. Supreme Court as one "implicit in the concept of ordered liberty." "[T]he individual's right to the protection of his own good name," declared the Supreme Court on several occasions, "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[100] Such

---

[96] *See, e.g.*, Konigsberg v. State Bar of Cal., 366 U.S. 36, 49 n.10 (1961) (explaining that freedom of speech is not absolute); Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1961) (holding that not all motion pictures are protected); Roth v. United States, 354 U.S. 476, 481–85 (1957) (holding that obscene speech is not protected); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (holding that libelous speech is not protected); Pennekamp v. Florida, 328 U.S. 331, 348–49 (1946) (holding that editorials did not pose clear and present danger to the administration of justice, but could be libelous); Chaplinsky v. New Hampshire, 315 U.S. 568, 574 (1942) (holding that offensive words are not protected); Near v. Minnesota, 283 U.S. 697 (1931) (limiting freedom of the press). The case recognizing those limits was the landmark *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which nevertheless applied only to defamation of "public officials."

[97] *See* Lisby, *supra* note 95, at 479–80 (listing American jurisdictions that have criminal libel laws); *see also*, Garrison v. Louisiana, 379 U.S. 64, 67–70 (1964) (discussing common law defamation); *Beauharnais*, 343 U.S. at 254–55 (discussing the history of criminal libel).

[98] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 571 (1977) ("One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude.").

[99] *See* 31A AM. JUR. 2D *Extortion, Blackmail, and Threats* §§ 1–4 (2002).

[100] Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)); *see also* Spencer v. Kemna, 523 U.S. 1, 24 n.5 (1998) (Stevens, J., dissenting); Milkovich v. Lorain Journal Co., 497 U.S. 1, 22 (1990); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 781 (1986) (Stevens, J., dissenting); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985); Paul v. Davis, 424 U.S. 693, 723 (1976) (Brennan, J., dissenting); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 78 (1971) (Marshall, J., dissenting); *In re* Winship, 397 U.S. 358, 363–64 (1970)

protections should be especially strict when the defamation originates not from a private party, but from the government, with its aura of authority.

(The one precedent which *appears* to conflict with this claim of an implicated fundamental right is the notorious *Paul v. Davis*,[101] a widely criticized decision which declared that "the interest in reputation alone" did not even amount to a cognizant constitutional interest.[102] But as explained earlier, *Paul* was strictly and explicitly confined to procedural due process issues, and the reasons leading to its startling conclusion are in any case wholly irrelevant to the case at hand.)[103]

In short, two alleged fundamental rights appear to be implicated in the sexual registration of nonsexual criminals: a fundamental right to freedom from civil, non-criminal intrusive registration requirements, which extends to all registrants, and a fundamental right to freedom from false government accusations of sexual criminal conviction, which is limited to nonsexual registrants.

B. Suspect Classes in the Due Process Context

There is an additional reason, independent of any alleged fundamental right, for subjecting the sex offender registration of nonsexual criminals to a heightened constitutional review: such action implicates anti-majoritarian concerns.[104] The principal rationale for the laxity of rational basis review is judicial deference to the legislative products of the democratic process. But this deference has much less justification when the regulated group is distinct, politically powerless, and

---

("Accordingly, a society that values the *good name* and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." (emphasis added)); *Rosenblatt*, 383 U.S. at 92 (Stewart, J., concurring); *id.* at 86 (majority opinion) (explaining that the court had regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation").

[101] 424 U.S. 693 (1976).

[102] *Id.* at 711; *see, e.g.*, McClendon v. Turner, 765 F. Supp. 251, 254 (W.D. Pa. 1991); William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 581 (1989); Erwin Chemerinsky, *The Supreme Court and the Fourteenth Amendment: The Unfulfilled Promise*, 25 LOY. L.A. L. REV. 1143, 1152 (1992); Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973, 1983–84 (1996). *See generally supra* note 83 (discussing *Paul* in more depth). Interestingly, Justice Brennan, who dissented in the case, thought that the Court's refusal to recognize a constitutional interest was simply an inadvertent confusion. *Paul*, 424 U.S. at 728–29 (Brennan, J., dissenting).

[103] *See supra* note 83. *Paul*'s principal reasoning was based on federalism: the Court feared that allowing the action for damages under 42 U.S.C. § 1983 would entail a wholesale conversion of state tort actions into constitutional claims whenever the tortfeasor was a government actor. *Paul*, 424 U.S. at 699. *See* TRIBE, *supra* note 63, § 1611; Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1100 n.135 (1977).

[104] *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

unpopular. In such instances the legislative process may fail to give voice to the interests of that group, and a hostile majority may trample the group's most important civil rights without adequate justification. The relevance of this consideration to determining the proper level of constitutional scrutiny has been recognized since the famous footnote four of *United States v. Carolene Products Co.*, in which the Supreme Court noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[105] That comment, although made in the context of a substantive due process claim, has developed into an equal protection doctrine where courts subject regulations affecting "suspect classes" to heightened forms of constitutional scrutiny;[106] but the insight has been practically abandoned in the substantive due process context. This may not be surprising given that the comment focuses on the nature of the affected class—a factor which appears most pertinent to equal protection concerns—and yet, the worry over the potential tyranny of a hostile majority is just as pertinent for due process challenges: surely a majority may tyrannize a minority "regardless of how other individuals in the same situation may be treated."[107] The abandonment of this concern in the context of the Due Process Clause from which it originated is but another unwarranted emasculation of due process jurisprudence.

There can be little doubt that those targeted for sex offender registration—both sexual and nonsexual criminals—share the characteristics giving rise to anti-majoritarian concerns: they constitute a distinct and easily identifiable minority, often without a voice in the democratic process—many states disenfranchise convicted felons[108]—and they are highly unpopular. Indeed, it is hard to think of a group less popular than suspected sex offenders who victimized minors—even terrorists may lose on this one.

The legislative history of sex offender registration statutes bears out this concern. Senator David Durenberger of Minnesota, one of the sponsors of the Jacob Wetterling Act in the U.S. Senate—who was himself later convicted of a nonsexual

---

[105] *Id.*

[106] *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973).

[107] Ross v. Moffitt, 417 U.S. 600, 609 (1974). "Equal protection . . . emphasizes disparity in treatment by a State between classes of individuals," in contrast to due process, which "emphasizes fairness between the State and the individual dealing with the State." *Id.*

[108] Nationally, more than four million Americans are denied the right to vote as a result of laws that prohibit voting by felons or ex-felons. In 48 states (with the exception of Maine and Vermont) and the District of Columbia prisoners cannot vote, in 33 states felons on probation or parole are disenfranchised, and in 12 states a felony conviction can result in a lifetime ban long after the completion of a sentence.

STEVEN KALOGERAS, THE SENTENCING PROJECT, LEGISLATIVE CHANGES ON FELONY DISENFRANCHISEMENT, 1996–2003, at I (Marc Mauer ed., 2003), *available at* http://www.sentencingproject.org/Admin/Documents/publications/fd_legischanges96_03.pdf.

albeit non-registrable offense[109]—made the following statement when introducing the Jacob Wetterling Bill in the U.S. Senate: "Mr. President, for this Senator, there are no competing issues to debate. If a registration requirement for convicted sex offenders will assist law enforcement authorities in one criminal apprehension, or if it will deter a single kidnaping, I believe it is worth implementing."[110] His declared—indeed, flaunted—disregard for potential registrants was echoed in word and action by many federal and state legislators: unanimous votes—often without debates—on sex offender registration statutes were common, as were unanimous votes on subsequent legislative amendments—each allowing one politician or another to claim credit for an ever-toughening regulation of actual and purported sex offenders.[111] In such a legislative climate, courts must provide a counter-majoritarian oversight that is at odds with the highly deferential "rational basis" review and its "presumption of constitutionality."[112]

To sum up, publicly declaring criminals "sex offenders," and subjecting them to detailed, intrusive, and potentially dangerous registration requirements, especially when their crimes were nonsexual, implicates freedoms that are "rooted in the traditions and conscience of our people as to be ranked as fundamental" and also

---

[109] Durenberger plead guilty in 1995 to five misdemeanor charges of stealing public funds. *Ex-Senator Is Given A Year's Probation*, N.Y. TIMES, Nov. 30, 1995, at B17.

[110] 137 CONG. REC. 12,529 (1991) (statement of Sen. Durenberger).

[111] Steven Young & Bryan Brickner, *This Man is Not a Sexual Predator*, CHI. READER (Oct. 21, 2005), *available at* http://www.chicagoreader.com (reporting that the sex offender registration bill passed the Illinois Senate without debate, apart from a few routine questions about procedure, and without opposition); *see also* State v. Druktenis, 86 P.3d 1050, 1068 (N.M. Ct. App. 2004) ("[New Mexico's] Megan's Law 'was enacted in a matter of weeks' after the occurrence of the sex offense against Megan and 'was never subjected to any kind of scientific review, nor were the state and federal statutes that flowed from it.'"); Press Release, Hawaii Governor Linda Lingle, Governor Lingle Signs Sex Offender Law (May 9, 2005), *available at* http://www.hawaii.gov/gov/news/releases/2005/News_Item.2005-05-09.2426 (announcing that she signed into law a bill enlarging public access to sex offender registration information, which passed unanimously); Press Release, Tenn. State Senator Mark Norris, Norris Bills Strengthen Sex Offender Registration Laws (May 12, 2006), *available at* http://www.marknorris.org/NNews2006/05-12-06.html (announcing his Senate sponsorship of a bill enlarging the scope of sex offender registration requirements in Tennessee, which passed unanimously); Press Release, Senate Democratic Leader Harry Reid, Reid: Senate Bill Will Protect Children (May 5, 2006), *available at* http://reid.senate.gov/newsroom/record.cfm?id=255261 (announcing his sponsorship of a recently enacted amendment enlarging the scope of the Federal Sex Offender Registration and Notification Act, which passed unanimously).

[112] For authoritative scholarly support for this proposition, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 60–63, 101–04 (1980); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 984–86 (1987); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

implicates constitutional anti-majoritarian concerns.[113] Such government action should be subjected to strict constitutional scrutiny and should therefore be invalidated unless narrowly tailored to serve a compelling state interest. Since the asserted governmental purpose is the prevention of future crime by recidivist sex offenders and the quick apprehension of such recidivists when they reoffend, a statute mandating the sexual registration of nonsexual offenders is clearly not "narrowly tailored."

V. THE RATIONAL BASIS TEST

The registration of nonsexual offenders in sex offender registries also fails the much laxer rational basis test, which is employed whenever a due process claim does not implicate a fundamental right.[114] The test requires that the challenged governmental action bear a rational relationship to a legitimate governmental interest.[115] Several courts concluded that the registration of nonsexual offenders fails this test: the governmental interest involved—the prevention of future crime by recidivist sex offenders and their quick apprehension when they reoffend—was certainly legitimate, but there was insufficient rational relation between that interest and requiring *nonsexual* offenders to register.[116] These courts reasoned that it was the *sexual* component of an offender's crime that indicated the high likelihood of recidivism and that formed the basis for the registration requirement. This claim was also the one made by the sponsors of the Jacob Wetterling Act in Congress:

> The reasons for enacting this legislation on the national level are clear: sexual crimes against children are widespread; the people who commit these offenses repeat their crimes again and again . . . . The widespread tragedy of sexual abuse and molestation of children is compounded by the fact that child sex offenders are serial offenders. A National Institute of Mental Health study found that the typical offender molests an average of 117 children, most of whom do not report the offense. Those who attack young boys molest an average of 281. A study of imprisoned offenders found that 74 percent had one or more

---

[113] *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

[114] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996).

[115] *See* Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

[116] *See, e.g.*, State v. Robinson, 873 So. 2d 1205 (Fla. 2004); State v. Reine, No. 19157, 2003 WL 77174 (Ohio Ct. App. Jan. 10, 2003); State v. Barksdale, No. 19294, 2003 WL 77115 (Ohio Ct. App. Jan. 10, 2003) (identical opinion, different defendant); State v. Washington, No. 99-L-015, 2001 WL 1415568 (Ohio Ct. App. Nov. 14, 2001); *cf.* State v. Young, No. 19472, 2003 WL 2004025 (Ohio Ct. App. May 2, 2003).

> prior convictions for a sexual offense against a child. The behavior of child sex offenders is repetitive to the point of compulsion. In fact, one State prison psychologist has observed that sex offenders against children have the same personality characteristics as serial killers.[117]

Now since the sexual component—the alleged indicator of recidivism—is lacking in the case of nonsexual offenders, the asserted governmental interest bears no rational relationship to the registration of *nonsexual* offenders.

But other courts disagreed, declaring that the legislature "could rationally conclude"[118] that the kidnapping or false imprisonment of minors are "often a precursor to more grievous sexual offenses,"[119] and that there was therefore a rational relation between means and ends.[120] A recent decision of the Illinois Supreme Court is a typical example of the judicial reasoning upholding the constitutionality of the practice under rational basis review: "The purpose of the [sex offender registration] Act," said the court, "is to aid law enforcement by facilitating ready access to information about sex offenders and, therefore, to protect the public. This is obviously a legitimate state interest."[121] The more difficult question concerned the rationality of registering nonsexual criminals as sex offenders in order to advance that interest: "[W]e ask whether it was reasonable to require the defendant, a nonparent convicted of aggravated kidnapping of a minor, to register under the Act, regardless of whether this offense was sexually motivated."[122] Answering the question in the affirmative, the court borrowed heavily from a recent New York case—*People v. Cintron*, cited previously for its silly fundamental rights analysis[123]—that relied on

---

[117] 137 CONG. REC. 12,529 (1991) (statement of Sen. Durenberger); *see also* 139 CONG. REC. 12,057 (1993) (statement of Sen. Durenberger). The resulting Jacob Wetterling Act also requires the registration of those convicted of sexual crimes against adults. *See* 42 U.S.C.A. § 14071 (West Supp. 2007).

[118] People v. Johnson, 870 N.E.2d 415, 424 (Ill. 2007) (citing *In re* Phillip C., 847 N.E.2d 801, 808 (Ill. App. Ct. 2006) ("[T]he legislature could rationally conclude that kidnappers of children pose such a threat to sexually assault those children as to warrant their inclusion in the sex offender registry.")).

[119] *See, e.g.*, People v. Beard, 851 N.E.2d 141, 146 (Ill. App. Ct. 2006) (citing People v. Fuller, 756 N.E.2d 255, 259 (Ill. App. Ct. 2001)).

[120] *See* People v. Cintron, 827 N.Y.S.2d 445, 455–56 (Sup. Ct. 2006).

[121] *Johnson*, 870 N.E.2d at 422 (citations omitted). The registration of nonsexual criminals in Illinois was eliminated in 2006 through a legislative amendment requiring that all registered sex offenders have a sexual motivation to their crime. *Id.* at 418. Nevertheless, the Illinois Supreme Court held that *Johnson* fell under the pre-amendment statute, and that therefore the constitutionality of the sexual registration of nonsexual criminals was squarely before it. *Id.* at 419. The court upheld the constitutionality of the practice. *Id.* at 426.

[122] *Id.* at 422.

[123] *See supra* note 89 and accompanying text.

a 1990 Department of Justice study which reported that two-thirds of non-family abductions involve sexual assault.[124] Since non-parent abductions of minors posed a substantial risk of sexual assault, concluded the Illinois Supreme Court (following the New York case), the requirement was a rational means to advance a legitimate government purpose.[125] The court added, again following *Cintron*, that Illinois was required to register nonsexual criminals in its sex offender registries in order to obtain compliance with the federal Act.[126]

All courts upholding the constitutionality of the practice under rational basis review relied on a similar line of reasoning.[127] Let us then look at the proffered arguments in more detail, starting with their factual inaccuracies.

A. Compliance

Although the Jacob Wetterling Act appears to require states to include non-parent kidnapping and false imprisonment of a minor as registrable sexual offenses,[128] the Department of Justice (DOJ) does not enforce the letter of that provision. While most state legislatures enacted sex offender registries that dutifully tracked the language of the federal Act, some legislatures refused to include nonsexual criminals as registrable sex offenders. The Colorado legislature, for example, simply omitted these offenses from its list,[129] while California and Delaware required a sexual motivation for any registrable kidnapping or false imprisonment.[130] Nevertheless, all three states have been certified for compliance by the DOJ.[131] The bureaucrats at the DOJ appear to operate with more common

---

[124] *Cintron*, 827 N.Y.S.2d at 456.

[125] *Johnson*, 870 N.E.2d at 426.

[126] *Id.* at 424.

[127] *See, e.g.*, Gunderson v. Hvass, 339 F.3d 639 (8th Cir. 2003), *cert. denied*, 510 U.S. 1124 (2004); People v. Woodard, 854 N.E.2d 674 (Ill. App. Ct. 2006); People v. Beard, 851 N.E.2d 141 (Ill. App. Ct. 2006); *In re* Phillip C., 847 N.E.2d 801 (Ill. App. Ct. 2006); People v. Fuller, 756 N.E.2d 255 (Ill. App. Ct. 2001); *Cintron*, 827 N.Y.S.2d at 455; State v. Sakobie, 598 S.E.2d 615 (N.C. Ct. App. 2004); State v. Bowman, No. 02AP-1025, 2003 WL 22290183 (Ohio Ct. App. Oct. 7, 2003).

[128] Compliance with the Act requires registration of criminal offenses that were "comparable to or which exceed[] the . . . range of offenses" specified in the federal act including non-parent kidnapping and false imprisonment of a minor. 42 U.S.C.A. § 14071(a)(3)(A) (West Supp. 2007). The Act provides that if a state fails to create a registry within three years of its enactment, the state loses ten percent of its federal crime control grant funds. *Id.* § 14071(g)(1)–(2). The Department of Justice reviews each program and may grant extensions for good-faith efforts to become compliant. *Id.*

[129] *See* COLO. REV. STAT. ANN. § 16-22-102 (West 2006).

[130] *See* CAL. PENAL CODE § 290(2)(A) (West 2007), *invalidated by* People v. Dulan, 55 Cal. Rptr. 3d 312 (Ct. App. 2007); DEL. CODE ANN. tit. 11, § 4121(4)(a) (2006).

[131] Telephone Interviews with Department of Justice (various dates).

sense, and perhaps more sensitivity to constitutional restrictions, than our federal legislators and some of our courts.

Of course, even if Illinois were obliged to register nonsexual offenders in order to comply with the federal Act, that would cut no ice insofar as substantive due process is concerned; but courts' reliance on federal compliance requirements is in any case misplaced. If anything, the DOJ's certification of states which refuse to register nonsexual criminals evidences federal recognition that the practice is problematic.

B. The Statistics

More important is the inaccuracy of the statistics cited by the Illinois Supreme Court. The court notes that one of the sponsors of the Jacob Wetterling Act, U.S. Senator David Durenberger of Minnesota,[132] declared that "two-thirds of non-family abductions of minors involved a sexual assault" when he introduced the Act in Congress:

> The reasons for enacting this legislation on the national level are clear: sexual crimes against children are widespread; the people who commit these offenses repeat their crimes again and again; and local law enforcement officials need access to an interstate system of information to prevent and respond to these horrible crimes against children. If there is any doubt about the seriousness of the problem, consider the following statistics, provided to me by the National Center for Missing and Exploited Children: ChildHelp USA estimates that . . . [t]wo-thirds of reported nonfamily child abductions involved sexual assault.[133]

These statistics, as also noted by the court in *Johnson*, were apparently taken from a 1990 publication entitled National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children in America (NISMART-1), a study conducted for the DOJ that concluded that "about two-thirds or so of the Non-Family Abductions involved sexual assaults. . . . So most of the children were abducted in conjunction with and in order to facilitate sexual attacks."[134] But the study's

---

[132] Senator Durenberger was discussed previously. *See supra* notes 109-10 and accompanying text.

[133] 137 CONG. REC. S6703 (daily ed. May 23, 1991) (statement of Sen. Durenberger); *see also* H.R. REP., No. 103-392 (1993) (referring to a 1990 study by the DOJ finding that two-thirds of reported non-family abductions involved sexual assault); 139 CONG. REC. S6864 (daily ed. May 28, 1993) (statement of Sen. Durenberger).

[134] DAVID FINKELHOR, GERALD HOTALING, & ANDREA SEDLAK, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, MISSING, ABDUCTED, RUNAWAY, AND THROWNAWAY CHILDREN IN AMERICA (1990), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/nismart90.pdf [hereinafter NISMART-1].

methodology casts serious doubt on the accuracy of this statement, and the data it used was in any case irrelevant to the case of nonsexual registrants.

The study was based on an examination of police files—which are classified by crime—and focused on only four crime categories: abduction, homicide, sexual offenses, and "missing persons" files.[135] All other files were omitted from the study. The employed methodology had researchers sifting through police files and examining whether crime reports contained an "abduction."[136] The study was therefore

---

[135] The major challenge for this study was to identify abduction cases in what were frequently voluminous police records. Unfortunately, police agencies do not generally keep a separate file in which they store all cases involving abductions. Many abductions (in the sense covered by our definition of Legal Definition Abductions) occur in conjunction with other crimes, such as homicide and rape. Our exploratory discussions with law enforcement officials, criminologists, and missing children's advocates, as well as one previous police records study of child abduction, indicated that four general types of crime classifications would contain most of the reported cases involving non-family abductions: abduction, missing persons, homicides and sexual assaults.

Id. at 65–66. A total of 1259 homicide, abduction, and missing persons files from twenty-one counties were examined. *Id.* at 69. Three hundred thirteen of 1566 sexual offense files were studied. *Id.* at 69. These 313 files were taken from only four counties because the researchers found sexual offense records to be "very large and heterogeneous" and so decided to limit the scope of their search and then to multiply the results accordingly. *Id.* at 68–69.

[136] *Id.* at 24. "Abduction" was defined so as to "correspond[] to the technical crime of abduction as it is specified in the criminal law of many States." *Id.*

> Under the Legal Definition Abduction type, a Non-Family Abduction can occur in any one of three ways: 1) coerced taking 2) detainment or 3) luring. . . . Coerced taking in this definition means a child is taken by force or threat into a vehicle, into a building, or a substantial distance (which we set at 20 feet, a distance roughly consistent with rule established in a California court case). . . . Detainment: When a child is unlawfully detained by force or threat for a "substantial period" in a place of isolation, an abduction also occurs. We set substantial period at 1 hour from the time the force or threat is invoked. A place of isolation refers to any area which the child is not able to leave on his or her own and from which s/he had no opportunity to appeal for help or assistance. . . . Luring: There are abductions where children go voluntarily with a perpetrator or are so young that voluntariness is immaterial. One type of abduction by lure recognized by these definitions is where the perpetrator had the intent at the time of the lure to physically or sexually assault the child. . . . Note how this definition draws a line between two types of "date rape" situations, where a girl goes off with a boy who later sexually assaults her. If the date had the intent to assault the girl when he left with her, as might be indicated by efforts to isolate her, then this would be an abduction. . . . A second type of abduction by lure is where the child goes voluntarily but where

based neither on actual abduction convictions nor on abduction prosecutions and in most cases not even on a police determination that an abduction occurred.

The study reported that "[m]any short-term abductions that took place in the course of . . . sexual assault were counted."[137] Many indeed: sexual offense files made up the majority of the files supporting the study's conclusion. According to the study, "at least 57 to 70 percent of combined Legal Definition Abductions came from sexual assault files."[138] The study states that only "20 percent or more of the [abduction] cases in the abduction, missing person, and homicide files involved sexual assault."[139]

Given this methodology, the study could not support the registration of non-parent kidnappers and false imprisoners in sex offender registries: first, the "two-thirds" figure is not a particularly relevant one, and second, that figure is not supported by the study's own methodology.

Even if we were willing to equate a researcher's determination that a police file contained an "abduction" with an actual *criminal conviction* for the crime of kidnapping—quite a leap, one might add—the "two-thirds" figure would not be particularly relevant. The more relevant figure is that of twenty percent— "twenty percent or more of the [abduction] cases in the abduction, missing person, and homicide files involved sexual assault"—[140] which excluded the abductions found in the sexual assault files. This is so because what we are ultimately seeking are "abductions" *unaccompanied by a conviction for a sexual offense or an attempt to commit a sexual offense*—the Jacob Wetterling Act includes attempts as registrable crimes.[141] After all, if a defendant is convicted of a sexual offense, he would be registrable regardless. The question is whether nonsexual abductors *not* convicted of either a sexual offense or an attempt to commit one should be made to register. In other words, the most relevant "abductions" are those involving sexual assaults that are likely to ensue in an abduction conviction but *no conviction* for the sexual assault. Yet the "two-thirds" figure was derived mostly from "abductions" found in files the police classified as sexual assault files—precisely the sort of "abductions" that are likely to involve a conviction for a sexual offense and no conviction for "abduction." Given public sentiment and the heavy penalties accorded sexual assaults, it is unlikely that the police or the prosecution would forego a sexual charge and focus exclusively on a nonsexual crime in cases the police classified as

---

> the intent of the perpetrator is to conceal the child, keep the child, or extort ransom. . . . [A]n abduction by lure of the second type in this definition can occur only to children 14 or younger or who are mentally incompetent.

Id. at 361–63.

[137] *Id.* at xiii.

[138] *Id.* at 142.

[139] *Id.*

[140] *Id.*

[141] 42 U.S.C.A. § 14071(a)(3)(A)(ix) (West Supp. 2007).

sexual assaults. This is why, to repeat, the more relevant figure is the twenty percent figure, which reflects the percentage of abductions involving a sexual offense which were found outside sexual assault files. Of course, even that number may be highly inflated compared to the number of actual convictions.

Moreover, that "two-thirds or so of the Non-Family Abductions involved sexual assaults" is a claim that is incompatible with the study's own methodology.[142] The claim cannot be supported by data taken only from a highly limited set of files, as was done in the study, since it requires an examination of *all* files which may involve what the researchers termed "abduction": not only files of sexual assaults, homicide, missing persons, and kidnapping, but also files of robberies, nonsexual assaults, burglaries, carjacking, child abuse, drug delivery offenses, etc. Only when the entire universe of non-family abductions is examined can the percentage of non-family abductions involving sexual crimes be ascertained. The study made no such examination.[143]

To top it off, the sample of sexual offense files, which constituted the bulk of the data supporting the two-thirds assertion, was too small—according to the authors' own admission—to generate reliable results: whereas all the other examined police files were taken from twenty-one counties, the sex offense files were taken only from four.[144] "Thus, estimates based on [the sex offense files]," said the study, "are of unknown bias and reliability."[145]

The credibility of the NISMART-1 study was further undermined by the findings of a follow-up study from 2002, NISMART-2, based on data from 1999 and written by two of the three original authors of the first study. That second study

---

[142] *See* NISMART-1, *supra* note 134, at xv.

[143] The authors commented that:

> [S]ome abductions may have been missed because they occurred in conjunction with crimes that were not systematically included in this study. For example, some robberies might also have involved abductions, but would not have been counted if they were not filed in the police records in abduction, missing persons, homicide or sexual assault files. It is possible that as many as 20 percent of abductions may be filed in such miscellaneous files.

Id. at 70. This twenty percent figure was taken from an earlier study from 1986, *An Evaluation of the Crime of Kidnapping As It Is Committed Against Children by Non-Family Members*, which seemed to have concluded that eighty percent of what the study defined as "child kidnapping" could be found in those files. *Id.* at 70 n.24. Whatever the merit of that earlier study, it dealt with only two counties and employed a different definition of abduction than the one employed in NISMART-1. Moreover, there was no attempt to take into account even this twenty percent figure.

[144] *Id.* at 71. ("[W]e should caution about the use of data from the sexual offense files for making estimates. Due to limitations on resources, these files were only surveyed in 4 of the 21 counties. Thus, estimates based on them are of unknown bias and reliability."). "Because the records came from only four counties, however, it precluded developing an unbiased national estimate with known reliability of the number of non-family abductions that get classified only as sexual offenses." *Id.* at 68.

[145] *Id.* at 71.

concluded that close to half of all nonfamily abduction victims (forty-six percent) were sexually assaulted.[146] The difference in the estimates of the two studies, from two-thirds to less than half—which also included a revised estimate of non-family abductions from a yearly 3200 to 4600 incidents to a whopping 58,200 [147]—is significant in its own right, for it means that a non-parent kidnapper of a minor is more likely than not to *not* be a sex offender. This fact went completely unheeded by the Illinois Supreme Court, which did mention that second study.[148] But the second study employed an equally suspicious methodology: NISMART-2 was not even based on police reports but on random household surveys where alleged victims or their family members—the majority of which never filed any complaint with the police—were asked whether an alleged victimization involved an "abduction" as the study defined it.[149]

Finally, a third study from 2000, entitled NIBRS and written by one of the two co-authors of both NISMART-1 and NISMART-2, was based on yet a third methodology and concluded that "only 15 percent of non-family kidnaping [of minors] (of both male and female victims) was coded with the additional crime of sexual assault."[150]

---

[146] ANDREA SEDLAK, DAVID FINKELHOR, HEATHER HAMMER, & DANA J. SCHULTZ, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, NATIONAL INCIDENCE STUDIES OF MISSING, ABDUCTED, RUNAWAY, AND THROWNAWAY CHILDREN IN AMERICA: NATIONAL ESTIMATES OF MISSING CHILDREN: AN OVERVIEW 10 (Oct. 2002), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/196465.pdf [hereinafter NISMART-2]; NISMART Bulletin: Nonfamily Abducted Children: National Estimates and Characteristics (Oct. 2002), http://www.ncjrs.gov/html/ojjdp/nismart/03/ns4.html.

[147] NISMART-2, *supra* note 146, at 10 tbl. 7.

[148] "The State also directs us to a 2002 Department of Justice study, finding that nearly half of all nonfamily abductions involve sexual assault." People v. Johnson, 870 N.E.2d 415, 425–26 (Ill. 2007) (citing NISMART-2, *supra* note 146, at 10).

[149] The Household Surveys were conducted during 1999, using computer-assisted telephone interviewing methodology to collect information . . . [from a national] sample of households. A total of 16,111 interviews were completed with an adult primary caretaker, resulting in an 80-percent cooperation rate among eligible households with children, and a 61-percent response rate. The total number of children . . . [included in the Household Survey of Adult Caretakers] was 31,787.

NISMART-2, *supra* note 146, at 2.

> Because the new estimate is based on victim accounts rather than police records, it inherently involves a much lower threshold of seriousness. Moreover, the definition of nonfamily abduction used in NISMART-1 involves modest amounts of coerced movement or detention that are present in many violent and sexual crimes. [T]here is more imprecision and margin of error in the nonfamily abduction estimate than in any of the other NISMART-2 estimates.

NISMART Bulletin, Nonfamily Abducted Children: National Estimates and Characteristics (Oct. 2002), http://www.ncjrs.gov/html/ojjdp/nismart/03/ns5.html.

[150] DAVID FINKELHOR & RICHARD ORMROD, OFFICE OF JUVENILE JUSTICE &

This third study was also not based on actual abduction convictions or prosecutions, but it at least had the advantage of being based on police determination of the implicated crimes. That third study was also mentioned by the Illinois Supreme Court in *Johnson*, although oddly enough not for its most relevant and specific finding, but for the rather vague proposition that "nonfamily kidnaping is generally associated with other offenses."[151]

To be fair, the authors of NISMART-1, aware of the stakes involved in their research, took pains to caution future users of their findings, saying:

> People in the heat of partisan passions often feel justified in using and manipulating statistics however they want, in order to better support their own prejudices. We recognize that we cannot control the use to which these numbers are put. But we urge those who read and use this report to be circumspect and, among other things, to respect the following recommendations: Do not pull figures out of context. In presenting the figures, repeat the cautions and limitations that we mention. Use and specify the definitions and terminology developed by the study.[152]

But their warnings went unheeded. Federal legislators, negligently and apparently without any serious examination, relied on an irrelevant figure taken from a defective study given to them by a partisan organization.[153] That courts then relied on that figure in rejecting nonsexual registrants' constitutional claims doubles that scandal.[154]

As for the constitutional question: in examining the implications of these statistical errors to rational basis review, we must first distinguish between facial and as applied constitutional challenges. As we shall see, while the more realistic numbers cast doubt on the practice's rationality under facial challenges, the registration of nonsexual criminals is often unconstitutional as applied even if the numbers cited by Congress and the courts were perfectly correct.

C. Facial v. As Applied Challenges

Two important and interrelated distinctions should be kept in mind when examining the constitutionality of registering nonsexual criminals under rational basis review—one a familiar distinction in constitutional law, the other a straightforward

---

DELINQUENCY PREVENTION, KIDNAPING OF JUVENILES: PATTERNS FROM NIBRS, (June 2000), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/181161.pdf [hereinafter NIBRS].

[151] *Johnson*, 870 N.E.2d at 426 (citing NIBRS, *supra* note 150, at 4).

[152] NISMART-1, *supra* note 134, at 25–26.

[153] The study was supplied to Senator Durenberger by the National Center for Missing and Exploited Children. *See* 137 CONG. REC. 12,529 (1991) (statement of Sen. Durenberger).

[154] *See, e.g.*, *Johnson*, 870 N.E.2d at 425–26; People v. Cintron, 827 N.Y.S.2d 445, 455 (Sup. Ct. 2006).

factual one. The first distinction is that between "facial" constitutional challenges and constitutional challenges "as applied." The distinction—a staple of constitutional doctrine, despite some academic squabbling over its meaning[155]—revolves around whether a constitutional claim challenges an entire statutory provision, or whether it merely asks that an exception be carved out of a statutory provision so as to exclude the claimant and the class the claimant represents. For example, a constitutional challenge to a statute criminalizing assisted suicide may seek to invalidate the entire prohibition on assisted suicide (a facial challenge) or only the application of the statute to the case of terminally ill patients assisted by their physicians (an as applied challenge).[156]

Nonsexual registrants can advance both facial and as applied challenges. Their as applied challenges are based on a factual distinction between offenders convicted of a nonsexual offense, such as kidnapping of a minor, *in which the crime had a sexual component or motivation*, and cases in which there was no such component or motivation. As applied challenges, therefore, seek to carve an exception from the registration requirement for those nonsexual criminals whose crimes had no sexual nexus.

1. Facial Constitutional Challenges

Nonsexual criminals mounting a facial challenge claim that the very inclusion of nonsexual crimes as registrable offenses is unconstitutional. As we saw, that inclusion is based on the argument that these crimes often involve a sexual assault;[157] but the statistics cited on Congress's floor in support of this claim were essentially irrelevant and also unsupported by the study's methodology, and later studies indicate that, if anything, non-parental kidnappings and false imprisonments of a minor are *not* likely to be accompanied by a sexual assault.[158] NIBRS, which was based on police determination of the involved crimes, claimed that fifteen percent of non-family abductions involved a sexual crime;[159] and from this number we need to subtract the estimated number of abductions *accompanied by a conviction for an associated sexual crime*. Given these figures, does the registration of these nonsexual offenders "bear a rational relationship to a legitimate governmental interest?"[160]

The question involves an important principle: what is the point at which the correlation between kidnapping and sexual assaults is so weak that the registration

---

[155] *See, e.g.*, Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 157 (1998); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third Party Standing*, 113 HARV. L. REV. 1321, 1336-37 (2000).

[156] *See* Washington v. Glucksberg, 521 U.S. 702 (1997) (finding a ban on assisted suicide did not violate the Fourteenth Amendment facially or as applied).

[157] *See supra* notes 133-34 and accompanying text.

[158] *See supra* note 150 and accompanying text.

[159] NIBRS, *supra* note 150, at 6.

[160] *See Glucksberg*, 521 U.S. at 728.

of nonsexual criminals as sex offenders ceases to be rational? For example, could a one-percent correlation between kidnappings and sexual assaults support the registration of kidnappers as sex offenders under rational basis review, or would such a weak correlation demonstrate that the requirement was arbitrary, derived as it was from the idiosyncrasies of the Jacob Wetterling tragedy? Substantive due process claimants challenging the classifications' rationality have adduced proofs of weak correlations between a legislative classification and the alleged legislative purpose, but courts have been reluctant to rely on such data.[161] The worry is not only over the specter of judicial statistics competing with legislative ones—itself no small concern (especially since courts are not likely to embark on analyses of statistical studies)—but also over the fact that even a small correlation evidences *some measure* of rationality. The question "how much rationality is enough?" may invite precisely the sort of balancing of interests that the rational basis test is supposed to avoid.

The facial challenge of nonsexual registrants may fare better under a heightened rational basis review. As mentioned previously, the Supreme Court has sometimes engaged in a more exacting form of rational basis review in cases involving legislation that appears to be based, at least in part, on an animus toward a disfavored group.[162] The sexual registration of nonsexual criminals is a good candidate for this more exacting treatment. This heightened review is said to be different from its commonplace counterpart in that it "look[s] to the record to see if there is in fact some real correlation between classification and purpose. . . . If the legislature's factual assumptions about the nexus between classification and purpose are incorrect, then the standard has not been satisfied."[163] Given that the legislature's factual assumption that over sixty-six percent of non-parent abductions involved a sexual offense was incorrect, and that the accurate number appears to be less—and possibly substantially less—than fifteen percent, the classification should fail a heightened rational basis review.

Having said all this, a facial invalidation under the rational basis test is not likely given public sentiments on the matter and the availability of more modest as applied invalidations. Indeed, all the courts that held the sex offender registration of nonsexual criminals unconstitutional under the rational basis review grounded their determination not on the facial unconstitutionality of the challenged statutory provision, but

---

[161] *See, e.g.*, Kraley v. Nat'l Transp. Safety Bd., No. 97-4227, 1998 WL 708705, at *1–3 (6th Cir. Oct. 1, 1998) (upholding a substantive due process challenge to a Federal Aviation Regulation providing that a motor vehicle action involving drugs or alcohol occurring within three years of a previous motor vehicle action involving drugs or alcohol is grounds for the revocation of an airman's "certificate or ratings," based on the claim that there is too small a correlation between driving while under the influence of alcohol and alcohol-related flying accidents).

[162] *See supra* notes 104–106 and accompanying text.

[163] Farrell, *supra* note 63, at 360.

on the unconstitutionality of applying it to the claimant before them.[164] Moreover, as applied invalidations have an advantage from the claimants' perspective in that their success does not depend on a court's endorsement of this or that statistical correlation: whatever correlation between certain nonsexual offenses and sexual assaults exists, *no correlation* can justify the registration of nonsexual offenders *whose crimes had no sexual nexus.*

2. As Applied Constitutional Challenges

Nonsexual registrants advancing as applied substantive due process challenges ask courts to carve out of the statutory classification the sub-group of nonsexual offenders whose crimes were devoid of any sexual motivation or component. Thus, these challenges assert an implied right for a judicial determination of whether the defendant's nonsexual crime had a sexual nexus: they contain a procedural due process claim that is based on an alleged substantive due process right. Many courts dealing with these challenges found it necessary to make such findings: courts sustaining as applied challenges often relied on the absence of a sexual nexus,[165] while those rejecting such challenges often relied on a finding that a sexual nexus existed.[166]

D. Judicial Determination of Sexual Nexus and Connecticut Department of Public Safety v. Doe

The *substantive* due process basis of these as applied challenges means that a 2003 Supreme Court case, seemingly adverse to judicial determinations of a sexual nexus, is in fact inapplicable here. *Connecticut Department of Public Safety v. Doe*[167] upheld Connecticut's Sex Offender Registration Act against a due process challenge. The plaintiff, who was convicted of a *sexual* offense, claimed that registering him as a sex offender violated the Due Process Clause because, while

---

[164] *See* State v. Robinson, 873 So. 2d 1205 (Fla. 2004); People v. Johnson, 843 N.E.2d 434 (Ill. App. Ct. 2006), *rev'd*, 870 N.E.2d 415 (2007); People v. Moi, 801 N.Y.S.2d 780, 2005 WL 1618124, (County Ct. June 3, 2005); State v. Gooden, No. 82621, 2004 WL 1172074 (Ohio Ct. App. May 27, 2004); State v. Barksdale, No. 19294, 2003 WL 77115 (Ohio Ct. App. Jan. 10, 2003); State v. Reine, No. 19157, 2003 WL 77174 (Ohio Ct. App. Jan. 10, 2003).

[165] *See, e.g.*, *Robinson*, 873 So. 2d 1205; Raines v. State, 805 So. 2d 999 (Fla. Dist. Ct. App. 2001); *Johnson*, 843 N.E.2d 434; People v. Bell, 778 N.Y.S.2d 837 (Sup. Ct. 2003); *Moi*, 2005 WL 1618124; *Gooden*, 2004 WL 1172074; *Barksdale*, 2003 WL 77115; *Reine*, 2003 WL 77174; State v. Washington, No. 99-L-015, 2001 WL 1415568 (Ohio Ct. App. Nov 2, 2001).

[166] *See, e.g.*, State v. Bowman, No. 02AP-1025, 2003 WL 22290183 (Ohio Ct. App. Oct. 7, 2003); State v. McClellan, No. 01AP-1462, 2002 WL 31160074 (Ohio Ct. App. Sept. 30, 2002); State v. Brown, No. 03-1717-CR, 2004 WL 830668 (Wis. Ct. App. Apr. 13, 2004).

[167] 538 U.S. 1 (2003).

registration was based on an assumed future dangerousness, he was not dangerous.[168] The district court granted Doe a summary judgment, and the Second Circuit affirmed, agreeing with the District Court that "a threat to public safety is the sole avowed and legitimate purpose of the registry," and that, this being the case, appearing on the registry implied that the registrant was dangerous.[169] Since the plaintiff claimed that, as to him, that implication was false, the court concluded that he was entitled to a determination of dangerousness as a matter of *procedural* due process; in the absence of such a determination, the registration was unconstitutional.[170]

The Supreme Court reversed in a very short opinion with an equally small rationale:

> [T]he fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under Connecticut's Megan's Law. As the DPS Website explains, the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. No other fact is relevant to the disclosure of registrants' information. . . .
>
> . . . .
>
> In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed. Unless respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise. It may be that respondent's claim is actually a substantive challenge to Connecticut's statute "recast in 'procedural due process' terms." Nonetheless, respondent expressly disavows any reliance on the substantive component of the Fourteenth Amendment's protections and maintains, as he did below, that his challenge is strictly a procedural one. . . . Because the question is not properly before us, we express no opinion as to whether Connecticut's Megan's Law violates principles of substantive due process.
>
> . . . .
>
> Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that

---

[168] *Id.* at 5–6.

[169] Doe v. Dep't of Pub. Safety, 271 F.3d 38, 49 (2d Cir. 2001), *rev'd*, 538 U.S. 1 (2003).

[170] *Id.* at 50.

> hearing are relevant under the statutory scheme. Respondent cannot make that showing here.[171]

Sex offender registration statutes generally do not consider sexual nexus relevant to a determination of registrability either. But *Connecticut Department of Public Safety v. Doe* does not govern the claim of nonsexual registrants for a determination of a sexual nexus because, as quoted above, that decision made clear—as did the two concurring opinions in the case[172]—that it was based on the absence of any implicated substantive due process claim. By contrast, the claim for a determination of sexual nexus in the case of nonsexual registrants is squarely based on substantive due process grounds.

Perhaps more importantly, although the decision was based on the statute's omission of any reference to "dangerousness" as a criterion for registration, this reasoning is inaccurate and should not be taken too literally. The opinion was written by then–Chief Justice Rehnquist, not the most clear-eyed of opinion-writers.[173] Procedural due process precedents have recognized rights to judicial determinations of fact that are not required by the challenged statute. In *Bell v. Burson*,[174] for example, the Court invalidated a part of Georgia's Motor Vehicle Safety Responsibility Act, which required that the motor vehicle registration and driver's license of an uninsured motorist involved in an accident be suspended unless the driver posted security to cover the amount of damages claimed by aggrieved parties.[175] The statute did not provide for any pre-suspension determination of the motorist's fault for the accident.[176] The Georgia Court of Appeals, in a reasoning very similar to the one employed by Justice Rehnquist in *Doe*, rejected the claim that the defendant was entitled to such a determination.[177] The Supreme Court reversed:

> The Georgia Court of Appeals rejected petitioner's contention that the State's statutory scheme, in failing before suspending the licenses to afford him a hearing on the question of his fault or liability, denied him due process in violation of the Fourteenth Amendment: the court held that "'Fault' or 'innocence' are completely irrelevant factors. . . ." The Georgia Supreme Court denied review. We reverse.
>
> . . . .

---

[171] *Doe*, 538 U.S. at 7–8 (citations omitted).

[172] *Id.* at 8–10 (Scalia, J., concurring) (Souter, J., concurring).

[173] *Id.* at 1 (majority opinion).

[174] 402 U.S. 535 (1971).

[175] Motor Vehicle Safety Responsibility Act, GA. CODE ANN. § 92A-601 (1958), *cited in Bell*, 402 U.S. at 536 n.1.

[176] *Bell*, 402 U.S. at 536.

[177] Burson v. Bell, 174 S.E.2d 235, 236 (Ga. Ct. App. 1970).

> Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.[178]

There are other examples, including the invalidation of a statute declaring the children of unmarried fathers "state wardens" upon the death of the mother without judicial determination of the father's parental unfitness and statutes authorizing the pre-judgment seizure of leased property without requiring judicial determination that the property might be wrongfully held.[179] The Supreme Court invalidated these statutes as violations of procedural due process without bothering to examine whether substantive due process rights were also involved. Of course, if we took *Doe* literally, these statutes would be perfectly constitutional insofar as procedural due process is concerned, because "the fact that respondent seeks to prove"—be it a non-insured driver's lack of fault in the accident, an unmarried father's parental fitness, or a lessee's rightful possession—"is of no consequence under" the challenged statutory scheme.[180] That result is both inconsistent with precedent—a fact the *Doe* Court apparently did not realize—and makes little sense: statutes may violate procedural due process by presuming, unjustifiably, the existence of facts (the fault of the uninsured driver, the parental unfitness of the unmarried father, the wrongful possession of leased property, the sexual nature of an offender's crime) without allowing for their judicial determination.

Thus, that the Connecticut statute failed to provide a determination of dangerousness should have been the beginning of the inquiry, not its end. The real question in *Doe* was whether the registration of the claimant unjustifiably presumed his dangerousness in violation of procedural due process. If it did—and assuming, as we should, that sex offender registration deprives registrants of a constitutionally cognizant interest in liberty[181]—and if registrants nevertheless were not afforded an opportunity to be heard on the matter, then the statute could have violated procedural due process. Indeed, that sex offender registration presumed a determination of dangerousness was the basis for both the District Court's and the Second Circuit's invalidation of the statute.[182] The better reading of the Supreme Court

---

[178] *Burson*, 402 U.S. at 536–537, 539.

[179] *See* Stanley v. Illinois, 405 U.S. 645 (1972) (holding that an Illinois statutory scheme declaring the children of unmarried fathers state wardens upon the death of the mother violated procedural due process because it failed to provide unmarried fathers a judicial determination of parental fitness); Fuentes v. Shevin, 407 U.S. 67 (1972) (holding that Florida and Pennsylvania statutes authorizing seizure of property violated procedural due process because they failed to require a judicial determination that the property was in fact wrongfully held).

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

[181] *See supra* note 84 and accompanying text.

[182] *See* Doe v. Dep't of Pub. Safety, 271 F.3d 38, 49 (2d Cir. 2001), *rev'd*, 538 U.S. 1 (2003).

decision in *Doe* is therefore this: either Connecticut's sex offender registration did *not* presume dangerousness (dangerousness was simply not a necessary assumption of sex offender registration), or if it did, the presumption of dangerousness was justified by the mere fact of conviction for a registrable offense.

Applying this more sensible interpretation of *Doe* to the case of nonsexual registrants seeking a determination of sexual nexus, it is clear that *Doe* does not stand in the way of that claim. Unlike *dangerousness*, there is little doubt that sex offender registration presumes the sexual nature of the defendant's crime, and it is equally clear that the assumed sexual nature of the crime could not justifiably derive from the mere conviction for a nonsexual offense. Thus, even if *Connecticut Department of Public Safety v. Doe were* applicable to the claims of nonsexual defendants—which it is not due to the *substantive* due process nature of their claims—it would still pose no obstacles to nonsexual criminals' claims for a judicial determination of sexual nexus.

E. As Applied Challenges and Rational Basis Review

Nonsexual registrants advancing as applied challenges claim that sex offender registration of nonsexual criminals *whose crime had no sexual nexus* fails even the deferential rational basis review: there is no rational relationship between the registration of such nonsexual criminals and the purpose of sex offender registries—*viz.*, the prevention of future crime by recidivist sex offenders, and their quick apprehension if they reoffend. As we saw, the registration of nonsexual criminals as sex offenders has been justified on the ground that their crimes are likely to have a sexual nexus;[183] where it has been determined that no such sexual nexus existed, there is no rational basis for the registration. A judicial determination that a claimant's nonsexual crime lacked sexual nexus should therefore render his registration as a sex offender unconstitutional. Indeed, no court rejecting the constitutional challenge of nonsexual offenders did so after finding an absence of sexual nexus:[184] apparently that would have been too preposterous.

One argument worth mentioning appeared in a case in which Florida opposed an as applied challenge, claiming that the "legislature rationally could have concluded that the difficulty in confirming whether an abducted child has been sexually exploited . . . [due to the victim's young age, her fear, or even her lack of awareness that such a crime had occurred] justifies the inclusion of all persons convicted of kidnapping . . . of a minor not their child."[185] Accordingly, sex offender registration of nonsexual criminals should not be conditioned on judicial determinations of a sexual nexus because it may be too difficult to determine whether a sexual nexus existed.

First, there is no good reason to believe that such determinations are particularly difficult: the prosecution did not find it too difficult to concede the lack of sexual

---

[183] *See supra* notes 134-35 and accompanying text.

[184] *See supra* note 166 and accompanying text.

[185] State v. Robinson, 873 So. 2d 1205, 1215 (Fla. 2004).

nexus in a number of cases, and courts have been making such determinations regularly.[186] Second, there is little that is "rational" in registering nonsexual criminals as sex offenders simply because determinations of sexual nexus may be "difficult": such arguments prove too much, and the rationality required by rational basis review would be reduced to an empty shell if satisfied by them. More importantly, the claim that the government may name nonsexual criminals sex offenders and impose on them onerous and potentially ruinous registration requirements because it may be "difficult" to determine whether there was a sexual nexus to their crime, is a preposterous reversal of the values found in our due process jurisprudence. Factual uncertainties are a fact of life in legal disputes, especially those involving criminal conduct; and to claim that these uncertainties allow the government to simply *assume* a sexual nexus is argumentation run amok. The Supreme Court responded to an analogous argument, made in the context of a statute presuming the continuing non-residency of out-of-state public university students, by rejecting as violating due process what it called "procedure by presumption."[187] The constitutional violation is even clearer when the presumption results not in higher university fees but in ruinous life-altering sex offender registration.

F. The Process that Is Due

There still remains the question of how much process is due in judicial determinations of sexual nexus. Although many of the courts who made such determinations simply announced their findings unceremoniously and without discussing the burden of proof, the matter is in fact governed by the Due Process Clause. *Mathews v. Eldridge*,[188] which dealt with the termination of disability benefits, provides one often-used framework for evaluating the appropriate burden of proof:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[189]

---

[186] *See, e.g.*, State v. Barksdale, No. 19294, 2003 WL 77115, at *1 (Ohio Ct. App. Jan. 10, 2003); State v. Reine, No. 19157, 2003 WL 77174, at *1 (Ohio Ct. App. Jan. 10, 2003).

[187] "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues. . . . [it] cannot stand." Stanley v. Illinois, 405 U.S. 645, 656–57 (1972).

[188] 424 U.S. 319 (1976).

[189] *Id.* at 335. The *Mathews* framework has been used in the criminal context. *See, e.g.*,

While the test allows substantial latitude, it seems reasonable to assume, given the enormous stakes involved for potential registrants, that the government must shoulder a considerable burden of proof.[190]

VI. CONSTITUTIONAL REMEDIES AND CONCLUSION

The registration of nonsexual criminals in sex offender registries, absent a determination of a sexual nexus, violates the Due Process Clause. And this means not only that the states implementing these registration requirements are violating the Constitution, but that the federal government is too: the Jacob Wetterling Act posits conditions to the allocation of federal funds, and Congress's spending power cannot be constitutionally used so as to induce constitutional violations.[191]

What are the alternatives for remedying this unconstitutional practice? The most obvious remedy is to require a finding of a sexual nexus for any registrable nonsexual crime. As we saw, some state legislatures, like those of California and Delaware, wisely required a sexual nexus from the start.[192] Some courts similarly required—sometimes explicitly, often implicitly—such judicial findings, and in some instances matching legislation has followed these judicial pronouncements.[193]

But a few states, similarly reluctant to call nonsexual offenders sexual criminals, have chosen a different route: they either established separate registries for sexual and nonsexual offenders, or omitted the designation "sexual" from the registry's title while identifying the sex offenders as such individually. Hawaii, for example, has established two separate registries—one entitled "Sex Offender Registry" and the other "Offender Against Minor Registry."[194] Louisiana's registry is entitled "State Sex Offender and Child Predator Registry."[195] Kansas has a registry entitled

---

Ake v. Oklahoma, 470 U.S. 68 (1985); United States v. Raddatz, 447 U.S. 667 (1980). The Court has retreated from the use of *Mathews* in evaluating *state* procedural due process rules in the criminal context due to federalist concerns. *See* Medina v. California, 505 U.S. 437, 442–43 (1992). But the test still widely informs the determinations of state courts. *See* Britton v. Rogers, 631 F.2d 572, 580 (8th Cir. 1980).

[190] For a case addressing the issue and reaching a different conclusion, see State v. Pierce, 794 A.2d 1123, 1129 (Conn. App. Ct. 2002) ("[T]he court's finding of a sexual purpose requires a hearing with the quantum of proof being a fair preponderance of the evidence. The hearing must afford the defendant an opportunity to present evidence to show that he did not commit the crime for a sexual purpose."), *rev'd on other grounds*, 849 A.2d 375 (Conn. 2004).

[191] *Cf.* South Dakota v. Dole, 483 U.S. 203, 210–11 (1987).

[192] *See supra* note 130 and accompanying text.

[193] *See, e.g.*, S.B. 318, 126th Gen. Assem., Reg. Sess. (Ohio 2005–2006).

[194] Hawaii Criminal Justice Data Center, Sex Offender and Offender Against Minors Information, http://sexoffenders.ehawaii.gov/sexoff/search.jsp (last visited Sept. 22, 2007).

[195] Louisiana State Police, State Sex Offender and Child Predator Registry, http://lasocpr1.lsp.org (last visited Sept. 22, 2007).

"Registered Offenders," which identifies only those convicted of sex crimes as sexual criminals,[196] while Minnesota's list is entitled "Predatory Offender Registry."[197] The Washington statute establishing Washington's registry is entitled "sex offenders and kidnapping offenders—Release of information to public—Web Site."[198]

But these seemingly facile solutions run into constitutional difficulties of their own. First, many of these attempts to separate sexual from nonsexual offenders do a miserable job at it, thereby failing to eliminate the unconstitutional infirmity. For example, Washington's official offender registration website, which purports to distinguish between sex offenders and kidnappers of minors, is entitled "Washington State Sexual Offender Information Center."[199] Louisiana's registry is entitled "State Sex Offender and Child Predator Registry," but both sex offenders and nonsexual offenders appear together on the same page and can be distinguished only by an examination of the specific offense for which an offender is registered (which requires going beyond the initial list of offenders, and then beyond an individual presentation which includes, among other things, the offender's picture, address, and employer).[200] Given the high likelihood that nonsexual offenders be taken for sexual ones, such half-measures should not pass constitutional muster.

But the problems go deeper. The registration of non-parent kidnappers and false imprisoners of minors in differently titled registries may run afoul of the Equal Protection Clause, which requires that all those similarly situated be treated alike.[201] The registration of *sex* offenders—as opposed to all other criminals—is based on the claim of high recidivism rates; but what is the basis for registering some nonsexual criminals victimizing minors—whose crime had no sexual nexus—while failing to register others? What can justify the difference in the treatment of kidnappers and false imprisoners of minors as opposed to murderers, abusers, robbers, or assaulters of minors? The government is of course not barred from imposing registration requirement on some criminals but not on others: registering only sex offenders is certainly constitutional, and so is Montana's registration of violent offenders,[202] or West Virginia's and Connecticut's registration of sex offenders and nonsexual

---

[196] *See* KAN. STAT. ANN. § 22-4909 (2007).

[197] Minnesota Predatory Offender Registry, http://por.state.mn.us (last visited Sept. 22, 2007).

[198] *See* WASH. REV. CODE 4.24.550 (2007).

[199] *See* The Washington State Sex Offender Information Center, http://ml.waspc.org (last visited Sept. 22, 2007). From this webpage one proceeds to another one which informs the viewer, who cares to read the information instead of simply progressing to the search page, that "The Washington State Registered Sex Offender Law [was] amended to include kidnapping offenders in the registration program"; it then allows the viewer to press an icon which reads "click here to search for registered sex offenders." The site was established and is maintained by the Washington association of sheriffs and police chiefs, in accordance with Washington's sex offender registration statute. *See* WASH. REV. CODE 4.24.550(5)(a) (2007).

[200] *See* Louisiana State Police, *supra* note 195.

[201] *See* Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942).

[202] Sexual or Violent Offender Registry, http://www.doj.mt.gov/svor/default.asp (last visited Sept. 29, 2007).

offenders whose crimes had a sexual nexus.[203] Registering all offenders against children is also perfectly constitutional. But all these differentiations have some *rational basis*, while in the case of nonsexual kidnappers and false imprisoners, there seems to be none: singling out these crimes for sex offender registration has more to do with the peculiarities of the Jacob Wetterling tragedy than with a rationally-grounded distinction.

There are still more difficulties. Allowing the registration of purely nonsexual criminals casts doubt on the constitutionality of the retroactive application of registration requirements.[204] In *Smith v. Doe*,[205] the Supreme Court, reversing a decision by the Ninth Circuit, upheld the retroactive application of Alaska's Sex Offender Registration Act on the ground that sex offender registration was a civil, non-punitive regulatory scheme.[206] (The Ex Post Facto Clause's prohibition on retroactive application applies only to criminal punishments).[207] Although Alaska's registration provisions were codified in the State's Code of Criminal Procedure, and although the Act imposed burdens seemingly unnecessary to fulfill its preventive and law enforcement purposes, the Supreme Court nevertheless determined that the legislature intended the registration as a civil measure.[208] Concerns over recidivism among sex offenders lay at the heart of that determination:

> The [Alaska] legislature found that "sex offenders pose a high risk of reoffending," and identified "protecting the public from sex offenders" as the "primary governmental interest" of the law. . . . Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The

---

[203] *See, e.g.*, CONN. GEN. STAT. ANN. § 54-254(a) (West 2007) ("Any person who has been convicted . . . in this state on or after October 1, 1998, of any felony that the court finds was committed for a sexual purpose, may be required by the court upon release into the community . . . to register such person's name, identifying factors, criminal history record and residence address with the Commissioner of Public Safety, on such forms and in such locations as the commissioner shall direct, and to maintain such registration for ten years."); W. VA. CODE ANN., § 15-12-2(c), (j) (West 2007) ("Any person who has been convicted of a criminal offense and the sentencing judge made a written finding that the offense was sexually motivated shall also register as set forth in this article. . . . (j) For purposes of this article, the term 'sexually motivated' means that one of the purposes for which a person committed the crime was for any person's sexual gratification.").

[204] The retroactive application of sex offender registration and notification requirements has been challenged in many jurisdictions. *See* Carol Schultz Vento, *Annotation, Validity, Construction, and Application of State Statutes Authorizing Community Notification of Release of Convicted Sex Offender*, 78 A.L.R. 5th 489 (2000).

[205] 538 U.S. 84 (2003).

[206] *See id.* The decision employed the test developed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Smith*, 538 U.S. at 97.

[207] *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

[208] *Smith*, 538 U.S. at 85.

> legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high." . . . Empirical research on child molesters . . . has shown that, "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release," but may occur "as late as 20 years following release." . . . [R]ecidivism is the statutory concern.[209]

All this reasoning is, of course, inapplicable to nonsexual offenders—a point lost on some courts that rejected the ex post facto challenges of nonsexual registrants by relying on *Smith*.[210] Once registration is expanded beyond sexual crimes, the question of retroactive application is no longer settled.

The Constitution protects from governmental overreaching not only the law-abiding citizen, but also the criminal—who may often be in an even greater need of protection. Indeed, some constitutional provisions—the Eighth Amendment's Cruel and Unusual Punishment Clause or the Fifth Amendment's Double Jeopardy Clause—are specifically designed to protect those convicted of crimes.[211] Registering nonsexual criminals whose crimes lack a sexual nexus as sex offenders is an arbitrary, oppressive, and unjustified government action that is forbidden by the Due Process Clause. It is also an obnoxious demonstration of what little justification may suffice to override criminals' most basic rights. Flawed statistics, the absence of any serious legislative debate, and facile judicial reasoning combine to perpetuate this patently unconstitutional practice in a large number of jurisdictions. Given the enormous personal cost to those registered in sex offender registries, as well as the raison d'être for sex offender registration, requiring a showing of sexual nexus is not only the most straightforward remedy of this constitutional violation—it is also the most decent one.

---

[209] *Id.* at 93, 103–105 (citations omitted). The Ninth Circuit relied on the fact that no determination of dangerousness was required to conclude that the Act imposed a criminal punishment. *See* Doe I v. Otte, 259 F.3d 979 (9th Cir. 2001), *rev'd*, 538 U.S. 84 (2003).

[210] *See, e.g.*, People v. Cintron, 827 N.Y.S.2d 445 (Sup. Ct. 2006); State v. Sakobie, 598 S.E.2d 615 (N.C. Ct. App. 2004).

[211] *See* U.S. CONST. amend. VIII; *id.* amend. V.