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# Federal Habeas in the Information Age

Wayne A. Logan<sup>†</sup>

One would be hard-pressed to identify a more extolled, and storied, aspect of the Anglo-American legal tradition than the writ of habeas corpus. Tracing its lineage back to the Magna Carta, the Great Writ was so revered by the Framers of the U.S. Constitution that they expressly prohibited its suspension except in times of extreme governmental distress.<sup>1</sup> Writing in 1868, Chief Justice Salmon Chase characterized habeas as “the most important human right in the Constitution,” the “best and only sufficient defense of personal freedom.”<sup>2</sup> Justice Brennan,

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1. See U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”). For comprehensive discussions of the writ’s suspension during wartime, see MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WAR TIME* (1998).

For explorations of the common law and historic origins of the writ more generally, see WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* (1980); ROBERT S. WALKER, *THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS A WRIT OF LIBERTY* (1960); Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143 (1952); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995); Dallin H. Oaks, *Legal History in the High Court: Habeas Corpus*, 64 MICH. L. REV. 451 (1966); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862 (1994).

2. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868). Blackstone referred to habeas as “the most celebrated writ in English law.” 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*129. Alexander Hamilton, in responding to criticism that the Constitution lacked the protections afforded by the Bill of Rights, sought to neutralize concern by pointing to the availability of the writ, characterizing it as among “the greater securities to liberty.” *THE FEDERALIST* NO. 84 (Alexander Hamilton); see also 10 WILLIAM HOLDSWORTH, *A HISTORY*

writing almost one hundred years later, observed that the history of habeas "is inextricably intertwined with the growth of fundamental rights of personal liberty."<sup>3</sup>

The writ has enjoyed its preeminent place in history because of its simple yet radical purpose: to hold government accountable for restraints imposed upon its citizens in contravention of U.S. law.<sup>4</sup> The last two decades, however, have not been generous to habeas. Congress and the Supreme Court have repeatedly imposed new procedural hurdles or otherwise restricted its availability,<sup>5</sup> developments exhaustively addressed by others elsewhere.<sup>6</sup> The central focus here, rather, is a discrete but fundamental aspect of habeas jurisprudence—the requirement that a petitioner be in "custody" before habeas jurisdiction can be conferred. In contrast to the aforementioned limits, the interpretative breadth of the custody requirement has actually experienced a notable expansion over time as a result of judicial construction. In particular, since the early 1960s the Supreme Court has distanced itself from the historic requirement that a petitioner

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OF ENGLISH LAW 658 (1938) (referring to the writ as "the most effectual protector of the liberty of the subject that any legal system has ever devised").

3. *Fay v. Noia*, 372 U.S. 391, 401 (1963).

4. *See Ex parte McCordle*, 73 U.S. (6 Wall.) 318, 326 (1867) (stating that habeas jurisdiction extends to every "possible case of privation of liberty contrary to the National Constitution, treaties, or laws").

5. *See generally* Alan K. Chen, *Shadow Law: Reasonable Unreasonableness, Habeas Theory, and the Nature of Legal Rules*, 2 BUFF. CRIM. L. REV. 535 (1999) (surveying recent limits imposed on habeas availability); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996); Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578 (1998).

6. *See, e.g.,* Frank J. Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Altars of Expediency, Federalism and Deterrence*, 16 N.Y.U. REV. L. & SOC. CHANGE 339 (1987-1988); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362 (1991); Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised By State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315; Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997); Robert Weisberg, *A Great Writ While it Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990).

be in actual "physical" custody, i.e., suffer bodily restraint such as occurs with imprisonment.<sup>7</sup>

Contemporary America, however, faced with ever-mounting prisoner populations, and the enormous associated costs, is pursuing novel methods of social control that press the envelope of the jurisprudence of custody in unprecedented ways. One modern method will be examined here: the use of information and its dissemination to exercise ongoing control over ex-offenders after they fulfill their penal obligations. In particular, the Article examines the nationwide network of registration and community notification laws, which require convicted sex offenders to provide identifying information to law enforcement, and then facilitate the spread of such information when offenders are released into the community. The discussion here centers on how and why the laws operate to satisfy the custody requirement.

After first surveying the manner in which the custody requirement has been construed over time by the Court, the Article examines the historic use of registration and notification laws and the methods employed by states today to achieve the avowed public safety benefits the laws are thought to serve. Thereafter, several decisions of the sole federal appellate court to address the issue, the Ninth Circuit, are discussed, each concluding that sex offenders subject to registration and notification failed to satisfy the habeas custody jurisdictional requirement. The balance of the Article argues against the analytic approach adopted by the Ninth Circuit, one which places premium importance on the question of whether one's physical movement is measurably compelled or restrained by government action. Such an approach, it will be argued, is contrary to the broader liberty-protecting purposes of habeas, and underestimates the numerous tangible and intangible ways in which registration and notification infringe upon personal liberty. In short, the Article argues that habeas, as it has for centuries, must evolve in a manner sensitive to contemporary methods of social control, in this instance the government's aggressive use of information to achieve control beyond the walls of prison.

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7. See *infra* text accompanying notes 20-38.

## I. "CUSTODY" THROUGH THE LENS OF HISTORY

The writ of habeas corpus *ad subjiciendum*<sup>8</sup> traces its U.S. statutory origins to the Judiciary Act of 1789, which conferred on federal courts the authority to review the criminal convictions of those prosecuted under federal law.<sup>9</sup> Only in the aftermath of the Civil War did Congress expressly grant the federal judiciary power to issue writs in favor of those subject to state criminal prosecutions.<sup>10</sup> However, dating back to its common law origins,<sup>11</sup> and throughout its extended statutory

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8. When reference to the "Great Writ" is made, such reference typically has as its object the writ *ad subjiciendum*, which guards against illegal detention and commands government actors to produce the petitioner so that the legality of the detention can be tested. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.). Blackstone identified four other historic forms of habeas: habeas corpus *ad satisfaciendum*, *ad respondendum*, *ad prosequendum*, *testificandum et deliberandum*, and *ad faciendum et recipiendum*. See *Fay*, 372 U.S. at 399-400 n.5 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*129-32).

9. See Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (empowering federal courts to inquire into the "cause of commitment" of federal prisoners).

10. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86 (codified as amended at 28 U.S.C. § 2241 (1994)). As a technical matter, in 1833 Congress allowed petition by a select group of persons detained by state actors: federal officials. Force Act of March 2, 1833, ch. 57, § 7, 4 Stat. 634-35. Similarly, in 1842, Congress extended habeas protection to foreign nationals detained by states. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539. In a recent article, Professor Eric Freedman called into question the persistent assumption by the Supreme Court and scholars alike that federal habeas initially applied only to those detained by federal authorities. See Eric M. Freedman, *Milestones in Habeas Corpus: Part I, Just Because John Marshall Said It, Doesn't Make It So: Ex parte Bollman and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000). Upon reviewing the ratification debates surrounding the Suspension Clause and federal decisions from the area of the seminal *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), where Chief Justice Marshall deemed federal habeas unavailable to state prisoners, Freedman concludes that Section 14 of the Judiciary Act of 1789 and common law authority provided federal courts authority to issue habeas writs relative to state and federal prisoners alike. See *id.*

11. As Professor Larry Yackle has observed, "[t]he modern 'custody' requirement has ancient roots, bearing a correlative relation to the function of the writ in the seventeenth century—to secure the release of persons who were wrongly confined. Applicants for the writ had to be in some form of 'custody' from which they could be discharged." Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 999 (1985). Cases have also described the common law origins of the writ. See, e.g., *Preiser v. Rodriguez*, 411 U.S. 475,

history here, federal habeas has required that a petitioner be in "custody"<sup>12</sup> in violation of the "Constitution or laws or treaties of the United States"<sup>13</sup> before habeas jurisdiction can attach. This requirement applies to petitioners detained by state and federal authorities alike,<sup>14</sup> and must be satisfied as a threshold jurisdictional matter at the time the petition is filed in federal court.<sup>15</sup>

Although for decades federal courts narrowly, and quite literally,<sup>16</sup> interpreted the "custody" requirement to mean

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484 (1973) ("It is clear from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."); *McNally v. Hill*, 293 U.S. 131, 136 (1934) (stating that the common law function of writ is to test "the legality of the detention of one in the custody of another").

12. 28 U.S.C. § 2255 (1994 & Supp. 1998-99) (extending the right to "[a] prisoner in custody under sentence" of a federal court); 28 U.S.C. § 2254(b) (1994 & Supp. 1998-99) (extending the right to "a person in custody pursuant to the judgment of a State court").

13. 28 U.S.C. §§ 2241(c)(3), 2254(a) (1994); *see also* 28 U.S.C. § 2255 (1994 & Supp. 1998-99) (referencing the "Constitution or laws of the United States").

14. *Id.* The enabling provision for federal habeas jurisdiction is found in 28 U.S.C. § 2241(a) (1994) (providing "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions"). The states, in turn, have their respective post-conviction provisions. *See* DONALD E. WILKES, JR., *FEDERAL AND STATE POSTCONVICTION REMEDIES AND RELIEF* § 9-2 (1996); Clive A. Stafford Smith & Remy Voisin Starns, *Folly By Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 57 (1999). The focus here, however, is exclusively on the federal habeas right available to state and federal prisoners and its construction by federal courts.

15. *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968). In addition, petitioners must satisfy other requirements such as exhaustion of available state remedies and timeliness. *See* 2 JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* §§ 22-24 (3d ed. 1998 & Supp. 1999); LARRY W. YACKLE, *POSTCONVICTION REMEDIES* §§ 52-87 (1981 & Supp. 2000).

Habeas petitions are civil, collateral actions that are legally and procedurally distinct from direct appeals in the criminal process, yet nonetheless challenge the basis of criminal conviction and custody. *See* *O'Neal v. McAnich*, 513 U.S. 432, 440 (1995); *Teague v. Lane*, 489 U.S. 288, 310 (1989). Unlike a traditional civil action, however, with habeas "someone's custody, rather than mere civil liability, is at stake." *O'Neal*, 513 U.S. at 440.

16. *See, e.g., Wales v. Whitney*, 114 U.S. 564, 571-72 (1885) (denying writ sought by Navy officer who was confined to the territorial limits of the District of Columbia, because restraint must involve "actual confinement or the

actual physical restraint,<sup>17</sup> a markedly more expansive view emerged over time. Until the 1960s, for instance, it was well accepted that government-sponsored restraints in the form of bail<sup>18</sup> or parole<sup>19</sup> did not satisfy the custody jurisdictional requirement. In 1963, however, *Jones v. Cunningham*<sup>20</sup> signaled the Court's willingness to conceive of custody in broader terms, stating that "[h]istory, usage, and precedent can leave no doubt that, besides physical imprisonment, there are other restraints on a man's liberty, restraints not shared by the public generally, which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."<sup>21</sup> Habeas, according to the *Jones* Court, "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."<sup>22</sup> Quite simply, habeas should reach restraints, such as those accompanying parole in *Jones*, that prevent a person from doing the "things which in this country free men are entitled to do."<sup>23</sup>

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present means of enforcing it"); *Sibray v. United States*, 185 F. 401, 403-04 (3d Cir. 1911) ("The custody complained of must be actual and not constructive . . . . [The court must] have a subject to act upon, which is the body of the relator brought into court by the respondent."). *But see Wolfe v. Johnson*, 130 N.E. 286, 287 (N.Y. 1921) (Cardozo, J.) (construing the New York habeas writ expansively to include "constructive custody" associated with bail).

17. See BLACK'S LAW DICTIONARY 709 (6th ed. 1990) (providing Latin definition of habeas corpus as "[y]ou have the body"). For extended scholarly treatments of the "custody" requirement, see 1 LIEBMAN & HERTZ, *supra* note 15, § 8, at 321-44; YACKLE, *supra* note 15, §§ 41-51, at 177-229; Yale L. Rosenberg, *The Federal Habeas Corpus Custody Decisions: Liberal Oasis or Conservative Prop?*, 23 AM. J. CRIM. L. 99 (1995); Frank W. Smith, Jr., *Federal Habeas Corpus: State Prisoners and the Concept of Custody*, 4 U. RICH. L. REV. 1 (1969); Timothy C. Hester, Comment, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. MICH. J.L. REFORM 465 (1981); Thomas M. Hitch, Comment, *Federal Habeas Corpus: The Concept of Custody and Access to Federal Court*, 53 J. URB. LAW 61 (1975).

18. See, e.g., *Stallings v. Splain*, 253 U.S. 339 (1920).

19. See, e.g., *Weber v. Squier*, 315 U.S. 810 (1942).

20. 371 U.S. 236 (1963).

21. *Id.* at 240.

22. *Id.* at 243.

23. *Id.*; accord *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 510 (1982) (stating that the custody requirement is satisfied when a petitioner suffers "substantial restraints not shared by the public generally"); *Fay v. Noia*, 372 U.S. 391, 401-02 (1963) (stating that habeas functions "to

Today, in keeping with this liberal construction, federal courts consistently hold that in addition to civil or criminal confinement,<sup>24</sup> constraints associated with parole,<sup>25</sup> probation,<sup>26</sup> bail,<sup>27</sup> personal recognizance,<sup>28</sup> pendent consecutive sentences,<sup>29</sup> suspended sentences,<sup>30</sup> halfway house commitments,<sup>31</sup> community service,<sup>32</sup> and community-based alcohol treatment<sup>33</sup> satisfy the custody requirement. Inactive and unattached reserve status in the military also satisfies this requirement.<sup>34</sup> At the same time, courts have been reluctant to entertain habeas challenges to convictions resulting in compelled restitution,<sup>35</sup> fines,<sup>36</sup> and deprivations of various

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provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints"); 17A CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4262 (Supp. 2000) (stating that "any restraint on a petitioner's liberty because of his conviction that is over and above what the state imposes on the public generally will suffice" to satisfy the custody requirement).

With its focus on the liberty-restraining consequences of unlawful governmental action, habeas shares an originating purpose with the constitutional guarantee of due process, also dating back to the Magna Carta. See David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2502 (1998).

24. See *Winthrow v. Williams*, 507 U.S. 680 (1993) (prison); *Townsend v. Sain*, 372 U.S. 293 (1963) (jail); *Brock v. Weston*, 31 F.3d 887 (9th Cir. 1994) (special "civil" commitment facility for sexually violent predators).

25. See *Jones*, 371 U.S. at 242-43.

26. See *Cervantes v. Walker*, 589 F.2d 424, 425 (9th Cir. 1978).

27. See *Lefkowitz v. Newsome*, 420 U.S. 283, 286 n.2 (1975).

28. See *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 300 (1984); *Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist.*, 411 U.S. 345, 346 (1973).

29. See *Peyton v. Rowe*, 391 U.S. 54, 67 (1968).

30. See *Sammons v. Rodgers*, 785 F.2d 1343, 1345 (5th Cir. 1986).

31. See *Wottlin v. Fleming*, 136 F.3d 1032, 1034 n.1 (5th Cir. 1998).

32. See *Barry v. Bergen County Probation Dept.*, 128 F.3d 152, 161 (3d Cir. 1997).

33. See *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993).

34. See *Strait v. Laird*, 406 U.S. 341, 346 (1972).

35. See *United States v. Kramer*, 195 F.3d 1129, 1130 (9th Cir. 1999). Similarly, judicially compelled payment of a child support arrearage, even under the auspices of a county probation department, does not qualify as custody. See *Galbo v. Tirri*, 972 F. Supp. 292, 293 (D.N.J. 1997). The *Galbo* court elaborated as follows:

Galbo is not being forced to act or refrain from acting in any way,



licenses.<sup>37</sup> In short, as habeas scholar Professor Larry Yackle observes, the circumstances and conditions deemed to satisfy the custody jurisdictional requirement lie along a "continuum" of deprivations.<sup>38</sup>

A critical exception to this liberal stance in custody jurisprudence concerns the claims of petitioners who, having completed their sentences, remain subject to "collateral consequences," the gamut of legal disabilities attaching to convictions that can extend well beyond the period of confinement or conditional release.<sup>39</sup> The issue has arisen in

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other than to fulfill the terms of a court mandated civil judgment, ordering child custody payments. The Court's use of the Probation Department as the channel through which the payments should be made imposes no restraint on Galbo.

Galbo is not on probation . . . . [H]e is not required to report to any specific individual to allow monitoring of his activities. Nor is he restrained from pursuing a given type of employment or from occupying a particular residence. Galbo is not made to submit to random drug tests or counseling. Thus, Galbo does not suffer under any of the hallmarks of custody under probation.

*Id.* at 293-94.

36. See *United States v. Watroba*, 56 F.3d 28, 29 (6th Cir. 1995); *Spring v. Caldwell*, 692 F.2d 994, 999 (5th Cir. 1982). But see *Thistlethwaite v. City of New York*, 497 F.2d 339, 343 (2d Cir. 1974) (suggesting in dictum that a fine already paid might suffice for habeas jurisdiction).

37. See *Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987) (medical license); *Harts v. Indiana*, 732 F.2d 95, 96 (7th Cir. 1984) (driver's license); *Ginsberg v. Abrams*, 702 F.2d 48, 49 (2d Cir. 1983) (removal from judicial bench, loss of right to practice law, and disqualification as real estate or insurance agent); *Harvey v. South Dakota*, 526 F.2d 840, 841 (8th Cir. 1975) (exclusion from certain professions and the right to bear arms); *Furey v. Hyland*, 395 F. Supp. 1356, 1360 (D.N.J. 1975) (concerning a medical license and the legal capacity to hold public office); *Whorley v. Brillhart*, 359 F. Supp. 539, 541 (E.D. Va. 1973) (driver's license).

38. YACKLE, *supra* note 15, § 43, at 185 ("It may be that all the instances in which the Court is prepared to find 'custody' have not yet been identified, but it appears on the evidence to date that the cases can be arranged on a continuum . . . . As a practical matter, in the absence of clear rules for guidance . . . the best that can be proposed is a list of the decided cases and an attempt to identify the cases that remain for decision.").

39. The literature on collateral consequences is voluminous and expanding. See, e.g., George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895 (1999); Walter M. Grant et al., *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970); Kathleen M. Oliveras et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION, September 1996, at 10; Note, *The*

several of the Court's decisions, but two are of particular note. In the first case, *Carafas v. LaVallee*,<sup>40</sup> Carafas filed his habeas petition while still incarcerated, yet was freed by the State of New York by the time his petition was finally addressed by the federal courts.<sup>41</sup> The Supreme Court was therefore faced with the question of whether expiration of Carafas's sentence nullified jurisdiction and rendered his federal habeas petition moot.

Writing for a unanimous Court, Justice Fortas concluded as a threshold matter that the case was not moot, based on the collateral consequences attaching to Carafas's predicate convictions:

[H]e cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these "disabilities or burdens [which] may flow from" petitioner's conviction, he has "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." On account of these "collateral consequences," the case is not moot.<sup>42</sup>

The Court then added that the "substantial issue" was whether the physical release of Carafas, by the time his habeas petition reached the Court, in effect stripped the Court of jurisdiction.<sup>43</sup> Answering in the negative, the Court emphasized that habeas relief extended to those no longer in actual physical custody.<sup>44</sup> In light of the serious disabilities that Carafas would continue to suffer as a result of his conviction, the Court concluded that "[t]here is no need in the statute, the Constitution, or sound jurisprudence for denying to petitioner his ultimate day in court."<sup>45</sup>

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*Disenfranchisement of Ex Felons: Citizenship, Criminality, and "The Purity" of the Ballot Box*, 102 HARV. L. REV. 1300 (1989); Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403 (1967).

40. 391 U.S. 234 (1968).

41. *Id.* at 236.

42. *Id.* at 237-38 (footnotes and citations omitted).

43. *Id.* at 238.

44. *Id.* at 239.

45. *Id.* As a consequence, the Court squarely renounced its decision in *Parker v. Ellis*, 362 U.S. 574 (1960) (per curiam), which deemed moot a habeas claim of petitioner who was imprisoned at time of filing, yet freed when his petition was adjudicated.

Some twenty years after *Carafas*, the Court decided *Maleng v. Cook*.<sup>46</sup> Maleng was a recidivist who sought habeas relief for a 1958 conviction, the sentence for which had expired, reasoning that the conviction enhanced his punishment in 1978 for a subsequent conviction.<sup>47</sup> In a unanimous decision, the Court declared that a petitioner is not in custody merely because a predicate conviction carries the "possibility" of enhancing a future sentence.<sup>48</sup> After acknowledging that since 1963 it had read the custody requirement to embrace more than mere physical custody, the Court stated that it had "never held, however, that a habeas petitioner may be 'in custody' under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed."<sup>49</sup> "Indeed," the Court emphasized, "our decision in *Carafas v. LaVallee* strongly implies to the contrary."<sup>50</sup> The Court's custody finding in *Carafas* rested

not on the collateral consequences of the conviction, but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed. The negative implication of this holding is, of course, that once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not in themselves sufficient to render an individual "in custody" for the purposes of a habeas attack upon it.<sup>51</sup>

Noting that "almost all States have habitual offender statutes," the Court held that a fully expired sentence cannot satisfy the custody requirement, despite "the *possibility* that the prior conviction will be used to enhance" a subsequent

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46. 490 U.S. 488 (1989) (per curiam).

47. *Id.* at 489-90.

48. *Id.* at 490. The Court had no difficulty in concluding that the petitioner was in custody on the basis of his 1978 imprisonment. *Id.* at 493. The Court, however, "express[ed] no view on the extent to which the 1958 conviction itself may be subject to challenge in the attack upon the 1978 sentences which it was used to enhance." *Id.* at 494. Nevertheless, in the wake of *Maleng*, lower courts have "uniformly read [*Maleng*] as consistent with the view that federal habeas courts may review prior convictions relied upon for sentence enhancement and grant appropriate relief." *Custis v. United States*, 511 U.S. 485, 512 n.7 (1994) (Souter, J., dissenting); see also *United States v. Clark*, 203 F.3d 358, 364 (5th Cir. 2000) ("[A]s long as the habeas relief sought is framed as an attack on a present sentence, as to which the prisoner is still 'in custody,' then the expired conviction used to enhance that sentence may be challenged.").

49. *Maleng*, 490 U.S. at 491.

50. *Id.*

51. *Id.* at 492.

sentence.<sup>52</sup> To conclude otherwise would “mean that a petitioner whose sentence had completely expired could nonetheless challenge the conviction for which it was imposed at any time on federal habeas. This would read the ‘in custody’ requirement out of the statute and be contrary to the clear implications of the opinion in *Carafas v. LaVallee*.”<sup>53</sup>

Taken together, the Court’s custody jurisprudence makes it clear that restraints short of physical detention can satisfy the custody requirement. At the same time, however, the Court has been reluctant to discern custody in situations where petitioners have completed their formal sentences. Indeed, although predicate convictions can be challenged when used to enhance consecutive sentences currently being served,<sup>54</sup> the Court has been disinclined to recognize the lasting effects of criminal convictions as a basis for habeas jurisdiction.<sup>55</sup> This is so despite the obvious inconsistency thereby created: that collateral consequences can preserve habeas jurisdiction, once established, against a claim of mootness, but do not suffice, in and of themselves, in the absence of initial jurisdiction.<sup>56</sup> As one treatise notes, “the collateral consequences [petitioners] suffer may be burdensome, even debilitating, but in the Court’s eyes they do not justify extraordinary relief.”<sup>57</sup> In short, although collateral consequences might suffice to avoid mootness, it appears that “standing alone [they] are not enough to *initiate* a habeas petition.”<sup>58</sup>

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52. *Id.* (emphasis added).

53. *Id.*

54. See *Garlotte v. Fordice*, 515 U.S. 39, 47 (1995) (holding that consecutive sentences must be conceived in “the aggregate,” permitting scrutiny of convictions associated with sentences that have already been served).

55. See *Rosenberg*, *supra* note 17, at 117 n.111 (stating that “the Court has not directly decided whether the custody requirement is met by collateral consequences alone,” but *Carafas* and *Maleng* “strongly suggest” and “support” the contention that the requirement would not be satisfied).

56. See Note, *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1077 (1970) (noting that “by refusing to consider the collateral restraints themselves a custody, *Carafas* results in an apparent, arbitrary distinction”).

57. YACKLE, *supra* note 15, § 43, at 187.

58. *Id.* § 49, at 219 (emphasis in original); see also *Ward v. Knoblock*, 738 F.2d 134, 138-39 (6th Cir. 1984) (“The existence of collateral consequences . . . may enable a petitioner who has fully served a sentence he wished to challenge to avoid being dismissed on mootness grounds, but it will not suffice

## II. FEDERAL HABEAS AND MODERN SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS

It was against this backdrop that the Ninth Circuit recently issued a trio of decisions addressing whether the ongoing effects of registration and community notification, experienced by sex offenders having completed their sentences, satisfy the habeas "custody" requirement.<sup>59</sup> After first providing a brief overview of the history of registration and notification laws, this section examines the results and rationales of the court's decisions, addressing the laws in place in Washington, California, and Oregon.

### A. BRIEF HISTORY OF REGISTRATION AND NOTIFICATION

Criminal registration laws in particular trace their U.S. origins back to at least the 1930s,<sup>60</sup> with California, in 1947,

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to satisfy the 'in custody' jurisdictional prerequisite unless, as in *Carafas* itself, federal jurisdiction has already attached."); *Tinder v. Paula*, 725 F.2d 801, 803 (1st Cir. 1984) ("[A] sentence that has been fully served does not satisfy the custody requirement of the habeas statute, despite the collateral consequences that generally attend a criminal conviction.").

This paradox is evident in the Ninth Circuit's case law on sex offender registration and notification laws. Compare *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998) (concluding that the laws do not satisfy habeas custody requirement), *cert. denied*, 525 U.S. 1081 (1999), with *Wood v. Hall*, 130 F.3d 373, 376 n.1 (9th Cir. 1997) (rejecting claim of mootness in part because conviction would potentially subject petitioner to the laws).

In addition, in order to avoid mootness, it appears that only "legal" collateral consequences qualify, those of a mandatory and statutory origin. See *Lane v. Williams*, 455 U.S. 624, 632 (1982) (suggesting that discretionary, "non-statutory consequences" relating to parole violation do not suffice to avoid mootness); see also YACKLE, *supra* note 15, § 49, at 220 (inferring that the Court's "repetitive use of the adjective 'legal' in referring to collateral consequences in the cases" suggests that "only legal effects will suffice"). As a result, mootness may prevail if the petition relies solely "upon the moral stigma of a criminal conviction and the social burdens imposed upon convicts by the private community." *Id.* Professor Yackle concludes that "[c]omplaints about official, legal effects of convictions are perhaps distinguishable from less tangible, social consequences." *Id.* (emphasis in original).

59. See *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam); *Henry v. Lungren*, 164 F.3d 1240, 1241 (9th Cir. 1999), *cert. denied sub. nom. Henry v. Lockyer*, 120 S. Ct. 397 (1999); *Williamson*, 151 F.3d at 1184.

60. See Note, *Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. PA. L. REV. 60, 61-64 (1954) [hereinafter *Registration Ordinances*]. In 1934, Professor August Vollmer of the Berkeley law faculty advocated "universal registration" of all persons, highlighting what

implementing the nation's first registry dedicated exclusively to sex offenders.<sup>61</sup> A basic purpose of registration, as the New Jersey Supreme Court put it in 1969, "is to alert the local police department to the presence of persons convicted of crime. The premise is that recidivism is a reality, and hence law enforcement will be aided by an awareness of individuals whose prior offenses reveal an added risk."<sup>62</sup> Less direct, but no less critical, the laws at their origin were conceived as means to discourage criminals from locating in an area in the first place, and as a ready basis for arrest should the registration requirement not be met. As one early commentator observed,

[t]he immediate objectives of these ordinances appeared to be the incarceration or expulsion of undesirables, rather than the registration of criminals. It was believed that the individuals affected would move elsewhere to avoid registration. However, as more jurisdictions adopted these ordinances, a convicted person would be less able and less likely to escape registration by moving. Therefore, the principal mode of evasion would tend to become a failure to register with the consequent fulfillment of only the incarceration objective.<sup>63</sup>

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he saw as its manifold advantages. See Note, *Universal Registration*, 25 J. OF CRIM. LAW, CRIM. & POL. SCI. 650, 650-52 (1934-1935). Two years later, the Philadelphia City Council passed an ordinance dedicated exclusively to persons convicted of crimes. Note, *Criminal Registration Law*, 27 J. OF CRIM. LAW & CRIMINOLOGY 295, 295 (1936-1937). In Germany, criminal registration laws date back to the 1860s. Mathieu Deflem, *Surveillance and Criminal Statistics*, in 17 STUDIES IN LAW, POLITICS AND SOCIETY 149, 161 (Austin Sarat & Susan S. Sibley eds., 1997).

The laws share a common pedigree with the eugenics and "signalment" movements of the mid-late nineteenth century, products of the emerging discipline of criminology and its effort to systematize crime control and analysis. In 1880s Paris, for instance, Alphonse Bertillon spearheaded a system of "anthropological signalment" that measured the head, arms, feet, and ears of criminal suspects, as well as scars and other identifying characteristics. The police used these data to solve cases and corroborate the identities of criminal suspects. See generally ALPHONSE BERTILLON, *SIGNALETIC INSTRUCTIONS* (R.W. McClaughry ed., 1896).

61. See Elizabeth A. Pearson, *Status and Latest Developments in Sex Offender Registration and Notification Laws*, in NATIONAL CONFERENCE ON SEX OFFENDER REGISTRIES 45 (U.S. Bureau of Justice Statistics ed., 1998). For an interesting discussion of how the justice system in effect subverted California's registration law in the 1960s by commonly permitting sex offenders to plead to crimes not requiring registration, see E.A. Riddle, Note, *Compulsory Registration: A Vehicle of Mercy Discarded*, 3 CAL. W. L. REV. 195 (1967).

62. *State v. Ulesky*, 252 A.2d 720, 721 (N.J. 1969).

63. *Registration Ordinances*, *supra* note 60, at 63; see also *id.* at 104

Over the decades, the courts, including the U.S. Supreme Court, have had occasion to address the constitutionality of criminal registration laws. Most notably, in *Lambert v. California*,<sup>64</sup> the Supreme Court invalidated a Los Angeles ordinance that made it unlawful for "any convicted person" to fail to register with local authorities, reasoning that the provision violated due process in the absence of "actual knowledge of the duty to register or proof of the probability of such knowledge . . . ."<sup>65</sup> With the notice requirement satisfied, however, registration laws have consistently withstood constitutional challenge.<sup>66</sup>

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("Local authorities also use the ordinance to expel 'undesirables' from the jurisdiction by suspending sentence upon condition that they leave town . . . . The pattern of selective prosecution which was discerned in some communities enables local authorities to use the ordinances as an additional effective harassing weapon.").

64. 355 U.S. 225 (1957).

65. *Id.* at 229.

66. See, e.g., *Reyes v. United States*, 258 F.2d 774, 781 (9th Cir. 1958) (upholding 18 U.S.C. § 1407 (1956), requiring registration of persons convicted of narcotics offenses who seek to enter or leave the United States); *United States v. Bologna*, 181 F. Supp. 706, 708-09 (S.D. Cal. 1960) (same).

Judicial concern has surfaced, however, over locally-initiated registration ordinances, with the specter of state legislative preemption playing a central role. In *State v. Ulesky*, 252 A.2d 720 (N.J. 1969), for instance, the Borough of Belmar, New Jersey enacted an ordinance requiring those convicted within the past ten years of a "crime or a narcotics violation" to register with police within twenty-four hours of entry. *Id.* at 721. Such persons were required to submit a written statement under oath and forced to carry an identification card furnished by the authorities, the latter containing a photograph of the registrant as well as address and offense-related information. *Id.* Ulesky was arrested for failing to comply with the ordinance and eventually appealed to the New Jersey Supreme Court. *Id.*

The *Ulesky* court reversed, concluding that the state had preempted the field when it required registration solely of narcotics offenders. *Id.* at 722-23. "The Legislature having considered the subject and having acted with such particularity, there is reason to believe the Legislature was unwilling to say that other convictions warranted such restraint upon the right of the individual merely to be or to move about." *Id.* at 722. The court added:

Perhaps, too, it may be that the cumulative burden of legislation by all municipalities could exceed what due process of law would permit if it should appear the same public need could be met with a more modest burden by a statewide program or a statute specifying some uniform local legislative approach.

It seems to us, therefore, that the subject is such that, while it does not foreclose the delegation of the State's police power to municipalities, it nonetheless advises against that course except

Like "sexual psychopath" laws, also on the books since the 1930s,<sup>67</sup> registration laws existed in relative desuetude until the mid-1990s. However, with the brutal rape and murder of seven-year-old Megan Kanka in 1994, and the New Jersey Legislature's lightning-quick response,<sup>68</sup> Americans awakened

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under statutory guidance and restraint. For example, the Legislature, if it wished municipalities to deal with the matter, might well specify the particular crimes which it believes to be so suggestive of recidivism as to warrant the burden of registration, or prescribe a time limit upon the conviction, or require reciprocal recognition of registration among municipalities.

*Id.* at 723. The *Ulesky* court, therefore, did not premise its holding on any *per se* objection to registration laws, but rather on the preemption concerns and the perceived benefits of uniformly applicable registration laws. *See id.* (suggesting a "central agency . . . as a more palatable alternative to successive appearances at each local police headquarters").

The California Supreme Court reached essentially the same result in *Abbott v. Los Angeles*, 349 P.2d 974 (Cal. 1960). *Abbott* essentially invalidated a Los Angeles criminal registration ordinance, using as an "example" of the California Legislature's intent to occupy the field its statute that targeted sex offenders alone for registration. *Id.* at 982. This narrow focus, the court reasoned, "leads unerringly to the conclusion that the Legislature has adopted a clear policy based upon the dual presumptions that certain criminals are recidivistic and others are not, and that certain types of crime require registration and others do not." *Id.*; *see also id.* at 983 (inferring a legislative determination "that criminal identification together with maintenance and dissemination of criminal statistics is best handled at [the] state level").

67. The psychopath laws were directed toward securing involuntary civil institutional commitment of sex offenders, unlike registration laws, which seek community-based control of offenders. For discussions of the historic and contemporary uses of commitment laws, see Samuel J. Brakel & James L. Cavanaugh, *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69 (2000); Eric S. Janus & Nancy H. Walbeck, *Sex Offender Commitments in Minnesota: A Descriptive Study of Second Generation Commitments*, 18 BEHAV. SCI. & L. 343 (2000). In 1997, the U.S. Supreme Court endorsed a modern-day incarnation of the sexual psychopath laws when it rejected *ex post facto*, double jeopardy, and substantive due process challenges to Kansas's Sexually Violent Predator Act, which permits putative civil commitment of sex offenders after their release from prison. *See Kansas v. Hendricks*, 521 U.S. 346, 350 (1997). In contrast to the avowed therapeutic mission of earlier commitment laws, the modern regimes are unabashedly predicated on incapacitation. *See Janus & Walbeck, supra*, at 344 (noting the "fundamental shift in the espoused justification for sex offender commitments": "Second generation sex offender commitments are explicitly aimed at incapacitation.").

68. *See E.B. v. Verniero*, 119 F.3d 1077, 1081-82 (3d Cir. 1997) (recounting the rapid passage of "Megan's Law" in the New Jersey Legislature); *see also* Robert Hanley, 'Megan's Law' is Questioned as Injunction is Extended, N.Y. TIMES, July 10, 1996, at B6 (recounting how



to the scourge of sex offenders in their communities<sup>69</sup> and to the appeal of registration. Today, all fifty states, the District of Columbia, and the federal government require registration of convicted sex offenders.<sup>70</sup> For its part, the federal government is seeking to develop a nationwide registry, which, in President Clinton's words, is designed to "keep track of [sex offenders]—not just in a single state, but wherever they go, wherever they move, so that parents and police have the warning they need to protect our children. . . . Deadly criminals don't stay within state lines, so neither should law enforcement's tools to stop them."<sup>71</sup> Unlike earlier registration laws, which often required registrants to carry special cards identifying them as "convicted persons,"<sup>72</sup> modern sex offender laws mandate that individuals provide specified information to police, verify such information at designated intervals, and remain registered for at least ten years.<sup>73</sup> Like the old laws, however, eligible offenders<sup>74</sup> who fail

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legislators rushed the bill through session, with little in the way of hearings, in response to pleas of Megan's parents and the bill's advocates).

69. See, e.g., ADAM SAMPSON, *ACTS OF ABUSE: SEX OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM* 124 (1994) (noting that the "vehemence of the hatred for sex offenders is unmatched by attitudes to any other offenders"); Mimi Hall, *A Furor Brews Over Release of Sex Offenders*, USA TODAY, Aug. 17, 1994, at A3 (describing marked upsurge in public concern over sex offenders and legislative efforts in response); David van Biema, *Burn Thy Neighbor*, TIME, July 26, 1993, at 58 (noting that the "mass culture and some experts" refer to sex offenders as "irredeemable monsters").

70. See Andy Newman, *Megan, Her Law and What It Spawned*, N.Y. TIMES, Feb. 25, 1996, at N.J. 18.

71. Brian McGrory, *Clinton Sets Tracking of Sex Offenders*, BOSTON GLOBE, Aug. 25, 1996, at A1; see also Ron Fournier, *Clinton Signs Law On Sex Offenders*, CHICAGO SUN-TIMES, May 18, 1996, at 12 (quoting President Clinton: "If you dare to prey on our children, the law will follow you wherever you go—state to state, town to town.").

72. See *Registration Ordinances*, *supra* note 60, at 77-78. This distinction between the old and new regimes, however, will not likely persist. Delaware, for instance, now requires that sex offender registrants have a "Y" emblazoned on their automobile drivers' permits. See DEL. CODE ANN. tit. 21, § 2718(e) (1998). Similarly, Arizona, Michigan, and Texas now require registrants to acquire drivers' licenses or other official personal identification cards with photographs to facilitate their ongoing identification. See ARIZ. STAT. § 13-3821(H) (1999); MICH. COMP. LAWS § 28.725(a)(6), (7) (2000); TEX. CODE CRIM. PROC. arts. 42.016, 62.065 (2000). The Arizona and Texas laws mandate that the cards be renewed on an annual basis, in contrast to the lengthier renewal periods for non-registrants. See ARIZ. STAT. § 13-3821(H); TEX. CODE CRIM. PROC. arts. 42.016, 62.065.

73. Congress has set forth certain de minimis requirements with which

to comply with registration requirements risk independent prosecution, often at the felony level.<sup>75</sup>

More recently, once again under intense federal pressure, jurisdictions have acted to ensure that information pertaining to registrants is disseminated throughout communities.<sup>76</sup> At present, registrants' information is disseminated by numerous means, including telephone "hot-lines,"<sup>77</sup> Internet web sites,<sup>78</sup> and active disclosure by law enforcement by means of door-to-door visits, leaflets, mailings and community meetings.<sup>79</sup>

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states must comply if they are to avoid losing ten percent of their federal law enforcement funding. For instance, federal law designates minimal standards as to which offenders must register, the information that must be provided (name, address, fingerprints, and a photo), and the period of registration (ten years). 42 U.S.C. § 14071(a)-(b) (Supp. 1994).

74. See Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification and Procedure*, 3 BUFF. CRIM. L. REV. 593 (2000) (discussing the methods currently employed in jurisdictions to classify offenders for purposes of registration and notification).

75. See, e.g., ALASKA STAT. § 11-56.835 (1998); ARIZ. REV. STAT. § 13-3824 (Supp. 1999); MICH. COMP. LAWS § 28.729 (West 2000); MINN. STAT. § 243.166 (2000); WASH. REV. CODE § 9A.44.130(10) (2000).

76. As with registration, jurisdictions failing to develop systems to "release relevant information that is necessary to protect the public" risk the loss of significant federal law enforcement funds. 42 U.S.C. § 14071(e) (2000).

77. See, e.g., CAL. PENAL CODE § 290.4(a)(3) (West 1999); N.Y. CORRECT. LAW § 168-p (McKinney 2000).

78. Several organizations maintain web sites that permit links to jurisdictions currently making use of the Internet for notification purposes. See, e.g., *Megan's Law in All 50 States*, available at <http://www.klaaskids.org/pg-legmeg.htm> (last visited Sept. 24, 2000); *Nationwide Registries and Links*, available at [www.parentsformeganslaw.com](http://www.parentsformeganslaw.com) (last visited Sept. 24, 2000). See generally Paul Zielbauer, *Posting of Sex Offender Registries on Web Sets off Both Praise and Criticism*, N.Y. TIMES, May 22, 2000, at B1 (surveying rapid proliferation of state web sites and the concerns raised). The sites, which customarily contain such identifying information on registrants as home addresses, offense information, and mug shots, have proved enormously popular. See Melissa Moore, *New Sex Offender Site Can't Tell Entire Story*, THE ADVOCATE (Baton Rouge, La.), at 9B, May 10, 2000 (noting that in the two weeks since being initiated Louisiana's new site had nearly one million visitors), available at <http://www.theadvocate.com/opinion/story.asp?storyid=2110> (last visited Sept. 24, 2000).

79. See, e.g., DEL. CODE ANN. tit. 11, § 4121(a)(1) (Supp. 1998) ("Methods of notification may include door-to-door appearances, mail, telephone, newspapers or notices to schools and licensed day care facilities within the community, or any combination thereof."). See generally DEVON B. ADAMS, U.S. DEPT. OF JUSTICE, SUMMARY OF STATE SEX OFFENDER REGISTRY DISSEMINATION PROCEDURES: UPDATE 1999 (1999) (describing a variety of

Louisiana, unique among the states, requires that registrants themselves carry out notification by means of mail and advertising, at their own expense.<sup>80</sup> In the court's discretion, Louisiana registrants can also be forced to wear special identifying clothing, post signs at their residences or affix bumper stickers to their cars to provide "adequate" notice.<sup>81</sup> More generally, courts nationwide have liberally construed statutory language relating to permissible dissemination methods, consistent with the perceived public safety benefit of notification laws.<sup>82</sup>

Under federal law, dissemination of registrants' information is required.<sup>83</sup> The information disseminated varies among jurisdictions but typically includes, in addition to registrants' names and offense-related information, photos, home (and sometimes work) addresses, identifying physical characteristics, and date of birth.<sup>84</sup> The geographic scope of

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notification methods).

80. LA. REV. STAT. ANN. § 15:542(b) (Supp. 2000).

81. *Id.*

82. See, e.g., *Byron M. v. City of Whittier*, 46 F. Supp. 2d 1037, 1039, 1042 (C.D. Cal. 1998) (interpreting "advise the public" language in the California statutory law to allow the use of the media); *State v. Wilkinson*, No. 82,347, 2000 WL 992105, at \*9 (Kan. 2000) (permitting the use of an Internet web-site on the basis of a statutory requirement that registrants' information shall be "open to inspection").

83. The Guidelines associated with notification underscore the government's determination in this regard:

[A] state cannot comply with the Act by releasing registration information only to law enforcement agencies, to other governmental or non-governmental agencies or organizations, to prospective employers, or to the victims of registrants' offenses. States also cannot comply by having purely permissive or discretionary authority for officials to release registration information. Information must be released to members of the public as necessary to protect the public from registered offenders.

*Megan's Law, Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended*, 64 Fed. Reg. 572, 581 (1999). The Guidelines, however, are also at pains to emphasize that the federal requirements represent "a floor for state programs, not a ceiling" relative to the gamut of eligible offenders, the type of information collected, and the means and scope of information disseminated to communities. *Id.* at 572-79.

84. See, e.g., ALA. CODE § 15-20-21(3) (Supp. 1999); ALASKA STAT. ANN. § 18.65.087(b) (Michie 1998); HAW. REV. STAT. ANN. § 846E-3 (Michie Supp. 1999); KAN. STAT. ANN. § 22-4907 (1995 & Supp. 1999); S.C. CODE ANN. § 23-3-490 (Law. Co-op. Supp. 1999); TENN. CODE ANN. § 40-39-106(f) (West 1997 &

dissemination and the persons targeted to receive the information can vary. In many states, information on all statutorily eligible offenders is made available, without variation in geographic scope or selectivity of recipients.<sup>85</sup> In others, risk determinations are made by police or other authorities, outcomes that determine the duration of registration and the spread of information, subject to statutory or administrative guidelines.<sup>86</sup>

Registration and notification are thought to advance two primary purposes. First, notification can heighten community awareness of the presence of registrants, and their offending histories, thereby permitting citizens to undertake efforts to guard against possible future victimization.<sup>87</sup> Second, registrants, conscious that law enforcement and the public are mindful of their whereabouts, will themselves be deterred from committing additional sex crimes should they be so inclined.<sup>88</sup>

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Supp. 1999).

85. *See, e.g.*, CAL. PENAL CODE § 290 (West 1999); CONN. GEN. STAT. ANN. §§ 54-250 to 54-261 (West Supp. 1999); 730 ILL. COMP. STAT. 150/2 to /12, 152/105 to /130 (West Supp. 2000); IND. CODE ANN. § 5-2-12-4 (Michie Supp. 2000); KAN. STAT. ANN. §§ 22-4902 to 22-4909 (1995); LA. REV. STAT. ANN. § 15:546 (West Supp. 2000); MICH. COMP. LAWS ANN. §§ 28.722 to 28.730 (West Supp. 2000); OKLA. STAT. ANN. tit. 57, §§ 581-589 (West Supp. 2000); S.C. CODE ANN. §§ 23-3-400 to -460, 23-3-520 (Law. Co-op. Supp. 1999); TENN. CODE ANN. §§ 40-39-101 to -110 (1997 & Supp. 1999); UTAH CODE ANN. § 77-27-21.5 (Supp. 2000).

86. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3825 (West Supp. 1999); MASS. GEN. LAWS ANN. ch. 6, §§ 178D, 178K (West 1999); MINN. STAT. § 244.052 (2000); N.J. STAT. ANN. §§ 2C:7-1 to :7-11. (West 1999); N.Y. CORRECT. LAW §§ 168 l-n (McKinney 1999); OR. REV. STAT. §§ 181.585 to .588 (1997) (amended 1999); TEX. CRIM PROC. arts. 62.02, 62.03 (1999); WASH. REV. CODE ANN. § 4.24.550 (West Supp. 1999).

87. *See, e.g.*, ALA. CODE § 15-20-20 (1999) ("[T]he Legislature finds that releasing information about criminal sex offenders to law enforcement agencies and, providing access to or releasing such information . . . to the general public, will further the primary government interest of protecting vulnerable populations and in some instances the public, from potential harm."); OHIO REV. CODE ANN. § 2950.02(A)(1) (Anderson 1999) ("If the public is provided adequate notice and information . . . members of the public and communities can develop constructive plans to prepare themselves and their children . . ."); TENN. CODE ANN. § 40-39-101(b)(6) (1999) ("To protect the safety and general welfare of the people of this state, it is necessary to provide for continued registration of sexual offenders and for the public release of specified information regarding sexual offenders.").

88. *See, e.g.*, Doe v. Poritz, 662 A.2d 367, 389 (N.J. 1995) ("[T]he laws not only protect against crime but deter it: both for the potential offender . . . as

In addition to enjoying enormous public and political support, registration and notification laws have proved virtually impregnable to direct constitutional challenge. Appeals premised on the Cruel and Unusual Punishment, Double Jeopardy, and Ex Post Facto Clauses have consistently met defeat on the rationale that the laws do not impose "punishment" for constitutional purposes.<sup>89</sup> Less common claims sounding in equal protection,<sup>90</sup> the right to travel,<sup>91</sup> and the Fourth Amendment<sup>92</sup> have also proved unsuccessful.<sup>93</sup> Most recently, procedural due process challenges have been rejected as well, on the reasoning that registration and notification do not jeopardize a protectible liberty interest.<sup>94</sup>

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well as for those who might otherwise commit a first offense but for the potential impact . . .").

89. See, e.g., *Femedeer v. Haun*, Nos. 99-4082, 99-4093, 2000 WL 1217746, at \*5 (10th Cir. 2000); *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997); *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997); *Spencer v. O'Connor*, 707 N.E.2d 1039, 1044 (Ind. Ct. App. 1999); *Snyder v. State*, 912 P.2d 1127, 1132 (Wyo. 1996).

90. See, e.g., *Artway v. Attorney Gen.*, 81 F.3d 1235, 1267-68 (3d Cir. 1996); *Opinion of Justices to the Senate*, 668 N.E.2d 738, 755-56 (Mass. 1996).

91. See, e.g., *State v. Cameron*, 916 P.2d 1183, 1186 (Az. Ct. App. 1996).

92. See, e.g., *Rise v. Oregon*, 59 F.3d 1556, 1558 (9th Cir. 1995); *Rowe v. Burton*, 884 F. Supp. 1372, 1381 (D. Alaska 1994).

93. To the very limited extent that courts have found fault with the laws, such concern almost always, as a rule, relates to notification, not registration. See, e.g., *Rowe v. Burton*, 884 F. Supp. 1372, 1380 (D. Alaska 1994) (concluding that the retroactive imposition of notification, but not registration alone, violates the Ex Post Facto Clause); *State v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) (same); *State v. Babin*, 637 So. 2d 814, 824 (La. Ct. App. 1994) (same).

94. See, e.g., *Cutshall v. Sundquist*, 193 F.3d 466, 482 (6th Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000); *Russell v. Gregoire*, 124 F.3d 1079, 1094 (9th Cir. 1997); *Lanni v. Engler*, 994 F. Supp. 849, 855 (E.D. Mich. 1998); *Doe v. Kelly*, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997); *State v. Wilkinson*, No. 82,347, 2000 WL 992105, at \*8 (Kan. 2000); *People v. Logan*, 705 N.E.2d 152, 160-61 (Ill. App. Ct. 1998). But see *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998) (concluding that registration and notification implicate a liberty interest requiring due process protection); *Doe v. Attorney Gen.*, 715 N.E.2d 37, 43-45 (Mass. 1999) (same); *Doe v. Poritz*, 662 A.2d 367, 411 (N.J. 1995) (same); *Noble v. Board of Parole and Post-Prison Supervision*, 964 P.2d 990, 997 (Or. 1997) (same).

The judicial distinction drawn between registration and notification, discussed *supra* in note 93, is evident in the due process realm as well. Compare *Boutin v. LaFleur*, 591 N.W.2d 711, 718 (Minn. 1999) (permitting the compelled registration of an offender charged with but not convicted of a

The Supreme Court, for its part, has passed up several opportunities for review.<sup>95</sup>

#### B. THE NINTH CIRCUIT ADDRESSES THE "CUSTODY QUESTION"

Because of the recency of registration and notification laws, habeas claims brought by petitioners challenging their underlying convictions are only now making their way to federal courts. The sole exception to this decisional vacuum at the appellate level is the Ninth Circuit, which over the last two years has rendered three decisions on the question of whether the consequences of registration and notification satisfy the habeas custody requirement.

In the first and most important decision, *Williamson v. Gregoire*,<sup>96</sup> the petitioner was convicted in Washington State of child molestation and sentenced to twenty-seven months in prison and one year of community confinement.<sup>97</sup> After fulfilling these conditions in 1994, Williamson became subject to the registration and community notification laws of Washington.<sup>98</sup> Williamson was therefore required to register with the county sheriff where he resided, and provide the sheriff with his name, address, date and place of birth, place of employment, crime of conviction, date and place of conviction, aliases, fingerprints, social security number, and a

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statutorily enumerated sex offense requiring registration), *with In re Risk Level Determination of C.M.*, 578 N.W.2d 391, 399 (Minn. Ct. App. 1998) (precluding notification under similar circumstances).

For a discussion of the due process concerns raised by notification laws more generally, see Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167 (1999).

95. See, e.g., *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998); *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), *cert. denied*, 522 U.S. 1081 (1998).

96. *Williamson v. Gregoire*, 151 F.3d 1180, 1181 (9th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999).

97. See Brief for Respondent-Appellee at 2, *Williamson v. Gregoire*, 151 F.3d 1180 (9th Cir. 1998) (No. 97-35699).

98. *Williamson*, 151 F.3d at 1181. Washington was the first U.S. jurisdiction to institute a sex offender notification law (as opposed to registration alone), in 1990, predating the high-profile legislative efforts in New Jersey. See Pearson, *supra* note 61, at 45.

photograph.<sup>99</sup> Washington law further required that Williamson thereafter verify his address on an annual basis by responding to a certified letter, return receipt requested, sent every year by the sheriff to his specified address.<sup>100</sup>

If Williamson intended to move, he was required to notify the sheriff in advance, and, if moving to a new county, to provide notice to the new sheriff and register there anew within twenty-four hours of arrival; if moving out of state, he was also required to notify authorities in the new state prior to moving.<sup>101</sup> If he wished to enroll at an institution of higher learning, Williamson was required to notify the sheriff of his intent, and the sheriff in turn was to notify the school's law enforcement officials.<sup>102</sup> On a more personal level, Williamson was obliged to request permission to change his name, and, if allowed, was then required to update his registration information with the sheriff.<sup>103</sup> Finally, because he had been convicted of a class A felony,<sup>104</sup> Williamson remained subject to these constraints for life, subject to possible judicial review after ten years.<sup>105</sup> If he failed to satisfy any of the aforementioned requirements, he would be subject to prosecution for a class C felony.<sup>106</sup>

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99. *Williamson*, 151 F.3d at 1181 (citing WASH. REV. CODE § 9A.44.130 (1), (3)(a) (1998)).

100. *Id.* (citing WASH. REV. CODE § 9A.44.135 (1)(a) (1998)).

101. *Id.* (citing WASH. REV. CODE § 9A.44.130(5)(a) (1998)).

102. *Id.* (citing WASH. REV. CODE § 9A.44.130(1) (1998)).

103. *Id.* The court merely noted that Williamson was required to apprise authorities of his name change, neglecting to mention that, because of his sex offender registrant status, the request would be screened beforehand by authorities:

No sex offender under the requirement to register under this section at the time of application shall be granted an order changing his or her name if the court finds that doing so will interfere with legitimate law enforcement interests, except that no order shall be denied when the name change is requested for religious or legitimate cultural reasons or in recognition of marriage or dissolution of marriage.

WASH. REV. CODE § 9A.44.130(7) (1998).

104. *See* § 9A.44.083(2) (identifying first degree child molestation as a "class A" felony).

105. *See* § 9A.44.140(3). To be successful, Williamson would be required to (1) establish that he had not been convicted of "any new offenses" during the ten consecutive years since his initial registration and (2) prove by "clear and convincing evidence" that his continued registration would not "serve the purposes" of the registration and notification laws. *Id.*

106. *See* § 9A.44.130 (10), (11).

Pursuant to the Washington community notification scheme, Williamson would be assigned to one of three "risk level classifications . . .".<sup>107</sup> As in other jurisdictions using a discretionary tier scheme, the classification would determine the extent and nature of notification, consistent with the need "to protect the public and counteract the danger created by the particular offender."<sup>108</sup> For those in level I, information is shared with local law enforcement and "may" be disclosed to victims, witnesses, and any one near where the registrant will reside; for level II, information may also be disclosed to organizations that care for children, women or "vulnerable adults," and neighbors and community groups as deemed warranted; for level III, information may also be released to "the public at large."<sup>109</sup>

The trial court concluded that Williamson was "in custody" at the time he filed his habeas petition.<sup>110</sup> However, the court ultimately denied the writ because Williamson failed to properly raise his constitutional claims in state court, resulting in procedural default.<sup>111</sup>

On appeal, the Ninth Circuit addressed what it called "a novel question of law": whether Washington's registration and community notification scheme subjected Williamson to custody for habeas jurisdictional purposes.<sup>112</sup> The court began its analysis by citing what it saw as the "clear limitation" of the Supreme Court's habeas jurisprudence: "[O]nce the sentence

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107. See § 4.24.550(4).

108. See § 4.24.550(1); see also *id.* at § 4.24.550(2) ("The extent of the public disclosure of relevant and necessary information shall be rationally related to: (a) The level of risk posed by the offender to the community; (b) the locations where the offender resides, expects to reside, or is regularly found; and (c) the needs of the affected community members for information to enhance their individual and collective safety.").

109. § 4.24.550(3).

110. *Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999).

111. *Id.*

112. *Id.*; see also *id.* at 1183 ("We are unaware of any other case that has analyzed the 'in custody' requirement as it relates to a similar state law. Nor do we find the precedents interpreting this phrase so closely analogous as to be controlling."). Four years before, however, yet another Ninth Circuit panel addressed whether a habeas petitioner's involuntary civil commitment pursuant to Washington's "Sexually Violent Predators Act" satisfied the custody requirement. See *Brock v. Weston*, 31 F.3d 887, 888 (9th Cir. 1994). The panel unanimously concluded in the affirmative. *Id.* at 890.



imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody....'<sup>113</sup> Thus, the court reasoned, "the boundary that limits the 'in custody' requirement is the line between a 'restraint on liberty' and a 'collateral consequence of a conviction.'"<sup>114</sup>

In making this determination, the court inferred that the Supreme Court's decisions finding a restraint on liberty "rely heavily on the notion of a physical sense of liberty—that is, whether the legal disability in question somehow limits the putative habeas petitioner's movement."<sup>115</sup> The court bolstered its inference with an earlier Ninth Circuit decision holding that mandatory attendance at an alcohol treatment program qualified as custody because it required the petitioner's "physical presence at a particular place."<sup>116</sup> Applying this physicality test, the court rejected the argument that registration and notification combined to create a custodial situation:

The sex offender registration and notification provisions apply to Williamson whether he stays in the same place or whether he moves. Indeed, even if Williamson never leaves his house, he must still verify his address with the sheriff every year. The Washington sex offender law does not require Williamson even to personally appear at a sheriff's office to register; registration can be accomplished by mail. Thus, the law neither targets Williamson's movement in order to impose special requirements, nor does it demand his physical presence at any time or place. Furthermore, the law does not specify any place in Washington or anywhere else where Williamson may not go.<sup>117</sup>

The court did acknowledge that the law might "chill" Williamson's freedom to travel, insofar as it required him to apprise law enforcement in advance, and raised the specter of additional notification when he moved; these effects, however, were "purely subjective."<sup>118</sup> Moreover, the court reasoned, the "registration requirements involved in moving are not much

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113. *Williamson*, 151 F.3d at 1183 (quoting *Maleng v. Cook*, 490 U.S. 488, 492 (1992) (per curiam)).

114. *Id.*

115. *Id.*

116. *Id.* (quoting *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam)).

117. *Id.* at 1184 (citation omitted).

118. *Id.*

more severe than those involved in not moving.”<sup>119</sup> In short, the constraints lacked “the discernible impediment to movement that typically satisfies the ‘in custody’ requirement.”<sup>120</sup>

Next, the court dismissed the contention that the ongoing threat of criminal prosecution, triggered if Williamson failed to satisfy the registration requirements, satisfied the custody requirement.<sup>121</sup> The court reasoned that while of course such a prosecution, if successful, “might very well limit his movement, for example, through incarceration,” such an outcome was entirely contingent on Williamson’s willingness to follow the law.<sup>122</sup> In this sense, the registration law was analogous to restitution orders, which the court noted are consistently deemed insufficient to satisfy the custody requirement.<sup>123</sup>

Finally, the court looked to prior Ninth Circuit case law concerning an unsuccessful *Ex Post Facto* Clause challenge to the Washington registration and notification laws, which characterized the laws as “regulatory and not punitive.”<sup>124</sup> This regulatory character, although not dispositive of the custody inquiry,<sup>125</sup> bolstered the court’s conclusion “that the registration and notification provisions are more analogous to a loss of the right to vote or own firearms, or the loss of a professional license, rather than probation or parole.”<sup>126</sup>

Several months after *Williamson*, another Ninth Circuit panel addressed whether California’s law, which requires lifetime registration with annual verification, satisfied the

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119. *Id.*

120. *Id.* (“[T]he loss of a driver’s license amounts to a much greater limitation on one’s freedom of movement than does the Washington sex offender law, but the former does not satisfy the ‘in custody’ requirement either.”).

121. *Id.*

122. *Id.*; cf. *McDonald v. Marin County Sheriff*, No. 98-16144, 1999 WL 390991, at \*1 (9th Cir. May 25, 1999) (rejecting a habeas claim on its merits brought by a California registrant successfully prosecuted for failure to register).

123. *Williamson*, 151 F.3d at 1184.

124. *Id.* (citing *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997)).

125. *See id.* (stating that *Russell* “is not directly controlling, of course, because the ‘in custody’ requirement may be satisfied by restraints other than criminal punishment, such as conscription into military service or a denial of immigration”).

126. *Id.*

custody requirement. In *Henry v. Lungren*,<sup>127</sup> the court rejected the claim that the California regime amounted to "perpetual 'custody,'" finding the reasoning of *Williamson* controlling.<sup>128</sup> The *Henry* court characterized the differences between the two jurisdictions' laws as "minimal"; although California law required that offenders register in person (as opposed to by means of mail), the constraints did not "constitute the type of severe, immediate restraint on physical liberty" required to establish custody.<sup>129</sup> As a result, the regime was "merely a collateral consequence of conviction," not in itself sufficient to satisfy the custody requirement.<sup>130</sup>

In March 1999, a third Ninth Circuit panel addressed the custody question, this time in regard to Oregon law. In a per curiam decision relying on *Williamson* and *Henry*, the court in *McNab v. Kok*<sup>131</sup> also found custody to be lacking.<sup>132</sup> According to the *McNab* court, "[l]ike their counterparts in California and Washington, sex offenders subject to registration in Oregon are free to move to a new place of residence so long as they notify law enforcement officials of their new address."<sup>133</sup>

The Ninth Circuit's decisions in *Williamson*, *Henry*, and *McNab*, the only appellate decisions to date on the relation of habeas to the modern wave of sex offender laws,<sup>134</sup> evince a

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127. 164 F.3d 1240 (9th Cir. 1999), *cert. denied sub. nom.* *Henry v. Lockyer*, 120 S. Ct. 397 (1999).

128. *Id.* at 1242.

129. *Id.* In actuality, the Washington and California laws do differ in significant ways. In Washington, registration information is disseminated by means of active notification effectuated by local law enforcement based on discretionary risk assessments. WASH. REV. CODE § 4.24.550 (2000). In California, statutory law mandates which offenders are subject to registration and notification, and registrants' information is spread primarily by means of an "access" system, whereby community members obtain information through a CD-ROM or a "900" telephone number. CAL. PENAL CODE § 290.4 (1999). *But see* § 290(m) (2000) (allowing police to carry out affirmative community notification when they "reasonably suspect" that a "child or other person may be at risk").

130. *Henry*, 164 F.3d at 1242.

131. 170 F.3d 1246 (9th Cir. 1999) (per curiam).

132. *Id.* at 1247.

133. *Id.*

134. At the time of this writing, one trial court, the Northern District of Ohio, has also addressed the question of whether registration and notification satisfy the custody requirement. *See Thomas v. Morgan*, 109 F. Supp. 2d 763 (N.D. Ohio 2000). Citing *Williamson*, the court held that the classification of the petitioner as a "sexual predator," triggering Ohio's most extensive

notably narrow conception of custody: one asking whether a petitioner's actual physical "movement" is measurably compelled or restrained.<sup>135</sup> As discussed in Part III, such a view is both inconsistent with the broader purposes of habeas and out of step with modern methods of social control, which in contrast to past methods, place premium importance on the powerful role that information can play in affecting control beyond the reach of prison walls.

### III. INFORMATION AS A MEANS OF SOCIAL CONTROL: OF "VIRTUAL PILLORIES" AND THE EMERGING "SURVEILLANCE SOCIETY"

Given the trajectory of the Supreme Court's increasingly liberal custody jurisprudence, with its benchmark criterion of whether the petitioner suffers "restraints not shared by the public generally,"<sup>136</sup> the trio of Ninth Circuit cases discussed above represent starkly hidebound outcomes. Although the Ninth Circuit may have been the first tribunal to contemplate the relation between federal habeas and what might be called "informational sanctions," it will not likely be the last given the huge number of registrants who, having exhausted avenues of direct relief, will now turn to the federal courts for habeas collateral relief. This part discusses why the Ninth Circuit's view lacks merit and explores the need for a broader conception of "custody" in the emerging era of social control and penal policy, which increasingly places premium importance on information and its use.

#### A. THE EMERGING BRAVE NEW PENAL WORLD

For some time now, Americans have wrestled with a basic dilemma: they at once wish to exercise control over record numbers of criminal offenders, yet they do not wish to shoulder

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registration and notification conditions, did not create a custodial situation. *Id.* at 767-68.

135. Close examination of *Henry* and *McNab* makes it unclear whether the respective panels were focusing on the effects of both registration and notification, because express mention is made only of registration. The California laws at issue in *Henry*, however, subject all statutorily eligible sex offenders to compulsory notification. See CAL. PENAL CODE §§ 290, 290.4 (West 1999). The Oregon law at issue in *McNab* subjects all eligible offenders to a review by a state agency, which determines whether notification is warranted, and, if so, the degree. See OR. REV. STAT. § 181.586 (1999).

136. *Jones v. Cunningham*, 371 U.S. 236, 240 (1963).

the associated enormous financial costs.<sup>137</sup> This dilemma, in turn, has been aggravated by an abiding frustration over the perceived ineffectiveness of traditional correctional efforts, as manifest in high recidivism rates and the view that prisons serve as little more than "schools for crime."<sup>138</sup> These factors have spurred a philosophic and programmatic re-alignment in American penology, and public sentiment toward corrections more generally.<sup>139</sup> As one commentator recently noted: "An unusual thing is happening in the world of punishment. Different forms of punishment are starting to appear that challenge conventional notions of what punishment is all about."<sup>140</sup>

One crucial outgrowth of this evolution has been the increased use of information to exercise control over offenders outside the correctional setting, at significant cost-savings. The

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137. See, e.g., Dick Foster, *Colorado Prisons Bursting at Seams: Inmate Population Threatens State Funds for Education, Health, Other Pressing Needs*, DENVER ROCKY MTN. NEWS, Jan. 17, 2000, at 4A; Mark Tatge, *Counties Feel Pinch of Rising Jail Costs: Tougher Sentences Add to Local Tabs*, THE PLAIN DEALER (CLEVELAND), Aug. 14, 1999, at 1A; Jack Wardlaw, *Hainkel Says Jail Costs Are Shackling the State: Judiciary Committee Will Meet to Discuss It*, TIMES-PICAYUNE (NEW ORLEANS), Feb. 8, 2000, at A2.

138. See U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998 Table 2.16 (1999) (noting that a mere twenty-three percent of persons surveyed have "a great deal" or "quite a lot" of confidence in the criminal justice system) [hereinafter SOURCEBOOK]. This sentiment was captured in the 1970s by the pessimistic surmise that "nothing works," a reaction to Robert Martinson's meta-analysis of then existing recidivism studies. See Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INTEREST 22 (1974); see also FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981); DOUGLAS LIPTON ET AL., *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* (1975). Empirical work, however, belies this unqualified pessimism. An increasing body of work supports that, in fact, correctional interventions do have positive results, when the interventions focus on particular offender populations and interventions. See generally D.A. ANDREWS & JAMES BONITA, *THE PSYCHOLOGY OF CRIMINAL CONDUCT* (2d ed. 1998); FRANCIS T. CULLEN & BRANDON K. APPELGATE, *OFFENDER REHABILITATION: EFFECTIVE CORRECTIONAL INTERVENTION* (1998).

139. See Jody L. Sundt, *Is There Room for Change?: A Review of Public Attitudes Toward Crime and Alternatives to Incarceration*, 23 S. ILL. L. REV. 519, 526-32 (1999) (discussing public opinion surveys showing considerable public support for alternatives to imprisonment).

140. Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 733 (1998).

earmarks of this reorientation were first seen in the "community corrections" movement of the 1960s and 1970s. Although the movement was initially oriented toward rehabilitative goals, seeking offender re-socialization through probation and parole, eventually the surveillance and monitoring of offenders in the name of community safety became the primary objective.<sup>141</sup> The conspicuous reliance on information is also evident in the more recent, kindred "community justice" movement,<sup>142</sup> which endorses a problem-solving approach that seeks to forge connections among available community resources to achieve and maintain safety.<sup>143</sup> According to two of its chief proponents, "[t]he new age of community justice is made possible by the power of information. . . . Data, both official data about crimes and offenders and qualitative data that come from interaction with offenders, victims, and neighborhood residents, drive problem-solving and action."<sup>144</sup> In short, as sociologist Gary Marx has observed, the community-based shift in penology is serving to "diffuse the surveillance of the prison to the community at large."<sup>145</sup>

The critical role of information is evident in yet another popular contemporary method of social control: so-called

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141. Joan Petersilia, *The Evolution of Community Corrections*, in COMMUNITY CORRECTIONS: PROBATION, PAROLE, AND INTERMEDIATE SANCTIONS 1 (Joan Petersilia ed., 1998) (noting that starting in the 1980s probation and parole officers "were encouraged to redirect their efforts toward offender surveillance and monitoring, with community safety rather than offender rehabilitation as their primary goal").

142. See generally Todd R. Clear & David R. Karp, *The Community Justice Movement*, in COMMUNITY JUSTICE: AN EMERGING FIELD 2-28 (David R. Karp ed., 1998).

143. *Id.* at 14 (arguing that the "central focus is community-level outcomes, shifting the emphasis from individual incidents to systemic patterns, from individual conscience to social mores, and from individual goods to the common good").

144. *Id.* at 18; see also *id.* at 13 ("The new frontier of community justice is thus a cutting edge in the way it uses information, organizes staff, plans its activities, and is accountable to its environment.").

145. GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 220 (1988); see also JOHN LOWMAN ET AL., TRANSCARCERATION: ESSAYS IN THE SOCIOLOGY OF SOCIAL CONTROL 9 (1987) ("The advent of community corrections and other non-segregative techniques of control has resulted in more control, not less, as the control net is widened and its mesh thinned . . .") (citation omitted).

"shame" sanctions.<sup>146</sup> Typically, such sanctions assume novel form, requiring offenders to wear signs or shirts proclaiming their crime of conviction, to affix Day-Glo bumper stickers to their cars, or to plant placards on their property warning others to beware.<sup>147</sup> Shame sanctions also take the form of government-provided opprobrious information publicized in the media, including newspapers, television, and billboards.<sup>148</sup> The sanctions are thought to serve deterrent (both general and specific), retributive, and educative functions.<sup>149</sup> They also enjoy significant popularity with the public and bench alike, at least as much for their innovative "gotcha" quality as for the cost savings they represent in comparison to imprisonment.<sup>150</sup> Perhaps more important, from a penological perspective, as Professor Dan Kahan has remarked, the increasing use of shame sanctions has "enriched our punitive vocabulary."<sup>151</sup>

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146. See generally Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645 (1997); Aaron S. Book, Note, *Shame On You: An Analysis of Modern Shame Punishment as an Alternative to Incarceration*, 40 WM. & MARY L. REV. 653 (1999); Phaedra Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783 (1999).

147. Kahan, *supra* note 146, at 632-34.

148. See *id.* at 631-32; see also Courtney Persons, Note, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525 (1996); John Larrabee, *Fighting Crime With a Dose of Shame*, USA TODAY, June 19, 1995, at 3A (discussing the weekly cable television show of a Massachusetts police chief who broadcasts the names and photographs of arrestees, branding each with an epithet like "slithering low-life" or "punk of the week").

149. Garvey, *supra* note 140, at 738.

150. Kahan, *supra* note 146, at 632-37; see also Book, *supra* note 146 at 686 ("The current problems of overcrowding in America's prisons and soaring budgets have reached their limits . . . . Shaming punishment sets an example for others and provides the public with a tangible sense of justice in action.").

151. Kahan, *supra*, note 146, at 630. Recently, Professor Stephen Garvey provided a helpful analytic framework for conceiving of shame sanctions. First, there are informational sanctions designed to "condemn and shame" the offender before the public at-large, e.g., wearing a t-shirt proclaiming one's criminal status. Second, there are sanctions designed more to educate or reform the individual offender, which can be carried out in private, and come in three forms: (1) talionic punishments, whereby the offender is forced to experience the harm he has caused (e.g., being forced to watch the film "Mississippi Burning" as a result of a hate crime); (2) talionic restitution, whereby the offender must repair the harm caused (e.g., requiring a shoplifter

finally permitting embrace of the undisguised moral condemnation they signal.<sup>152</sup>

The developments outlined above share a common reliance on information to achieve social control beyond prison walls.<sup>153</sup> They are part of a "new penology," which, unlike prior efforts geared principally toward incarceration and rehabilitation, endeavors to secure public safety within the community through massive, impersonal surveillance and management of potential criminal harm on the basis of perceived risk.<sup>154</sup> Sex offender registration and community notification is part and parcel of this broader shift, insofar as it achieves "community management of offenders" as a result of "more eyes monitoring released offenders,"<sup>155</sup> based on information disseminated by the government. Notification allows citizens to "actively participate in reclaiming the safety of their neighborhoods, cities and towns,"<sup>156</sup> and permits a "problem-solving relationship [to] develop[ ] between criminal justice professionals and local residents."<sup>157</sup> The result marks

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to work in a store); and (3) apology rituals, whereby the offender is required to publicly express to his victims his remorse and the reasons underlying it. See Garvey, *supra* note 140, at 784-94.

152. Kahan, *supra* note 146, at 635.

153. In a report prepared under the auspices of the U.S. Department of Justice, Professors Michael Smith and Walter Dickey recently echoed this information-based approach to corrections: "The process ought to be grounded in information, gathered systematically and periodically, about the particular public safety threats and the naturally occurring community capacities to contain them found, neighborhood by neighborhood, throughout a State." Michael E. Smith & Walter J. Dickey, *Reforming Sentencing and Corrections for Just Punishment and Public Safety*, in SENTENCING AND CORRECTIONS: ISSUES FOR THE TWENTY-FIRST CENTURY 9 (U.S. Dep't. of Justice ed., Sept. 1999).

154. The main academic proponents of this view are Professors Malcolm Feeley and Jonathan Simon. See generally Jonathan Simon & Malcolm M. Feeley, *True Crime: The New Penology and Public Discourse on Crime*, in PUNISHMENT AND SOCIAL CONTROL: ESSAYS IN HONOR OF SHELDON L. MESSINGER 147-80 (Thomas G. Bloomberg & Stanley Cohen eds., 1995); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992). See also CRIME AND THE RISK SOCIETY (Pat O'Malley ed., 1999) (collecting writings that touch on various aspects of this shift).

155. David Beatty, *Community Notification-It's the Right Thing To Do*, 59 CORRECTIONS TODAY, Oct. 1997, at 20.

156. *Id.*

157. CENTER FOR SEX OFFENDER MANAGEMENT, AN OVERVIEW OF SEX OFFENDER COMMUNITY NOTIFICATION PRACTICES: POLICY IMPLICATIONS AND



an important shift in social control. In contrast to the past two centuries, during which control was achieved by dint of the government's unmediated action on the individual,<sup>158</sup> registration and notification laws enlist the active involvement of the community at-large to achieve broader control by means of triangulation.

Although today sex offenders are the prime target of such informational sanctions, this will not likely always be so. Indeed, expansion to other offender populations would be entirely consistent with the trajectory of penology, as manifest in several recent developments. First, there is the general "net-widening" witnessed with community-based sanctions more generally over the years,<sup>159</sup> an evolution relatively unhindered by judicial and public concern because the intrusiveness of such sanctions is thought to pale in comparison to prison.<sup>160</sup> Second,

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PROMISING APPROACHES 4 (1997).

158. For extended discussions of the nation's predominant dependence on incarceration and penal institutions, starting in the late 1700s, and especially since the 1820s, see generally INCARCERATING CRIMINALS: PRISONS AND JAILS IN SOCIAL AND ORGANIZATIONAL CONTEXT (Timothy J. Flanagan et al. eds., 1998); THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (Norval Morris & David J. Rothman eds., 1998); INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME (Franklin E. Zimring & Gordon Hawkins eds., 1995).

159. See James Austin & Barry Krisberg, *The Unmet Promise of Alternatives to Incarceration*, 28 CRIME AND DELINQUENCY 374, 405-06 (1982) (recognizing that community-based alternatives to prison were being used to exercise control over offenders previously placed on probation or released pursuant to a suspended sentence). As one commentator recently noted, "if alternative sanctions prove effective in dealing with traditionally non-incarcerated felons, they may then merit serious consideration as sentencing alternatives for a broader range of criminals." Note, *Developments in the Law: Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1967-69 (1998); see also Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, in SENTENCING AND CORRECTIONS, *supra* note 153 ("Restorative and community justice initiatives could continue to confine their efforts to juvenile offenders and people who commit minor crimes. This seems unlikely, as these approaches are expanding rapidly and winning many new supporters who want to extend their application . . . . [I]t seems likely that restorative and community justice values will to some extent become more institutionalized in criminal justice processes.") (footnote omitted).

160. Professor Andrew Von Hirsch recently assailed the "anything but prison" justification for community-based sanctions, which he asserted is premised on "fallacies of intrusiveness" that obfuscate the actual burdens of community intervention. Andrew Von Hirsch, *The Ethics of Community-Based Sanctions*, in Petersilia, *supra* note 141, at 189-97. Von Hirsch

information-based sanctions quench an enormous national need for additional methods of social control necessitated by the nation's overcrowded prisons.<sup>161</sup> Finally, informational sanctions complement the current infatuation with information-based innovations among law enforcement,<sup>162</sup> so-called "technocorrections" in particular,<sup>163</sup> and American

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observes:

Intervention in the community is tolerable irrespective of its intrusiveness, this theory asserts, as long as the resulting sanction is less onerous than imprisonment. This is tantamount to *carte blanche*: Because imprisonment (at least for protracted periods) is harsher than almost any other community punishment, one could virtually never object.

*Id.* at 192.

161. Today, non-incarcerative sanctions by far constitute the dominant form of correctional intervention in the U.S. In 1997, approximately seventy percent of adults under correctional supervision were actually in the community under the auspices of probation or parole. See SOURCEBOOK, *supra* note 138, Table 6.1. This community orientation enjoys support from liberals, because it compares favorably to incarceration as an alternative, and from conservatives, because of the cost savings involved. For an insightful discussion of the underlying political forces driving this change, see Mark C. Dean-Myrda & Francis T. Cullen, *The Panacea Pendulum: An Account of Community as a Response to Crime*, in Petersilia, *supra* note 141, at 3-18.

162. The enthusiastic embrace by law enforcement of sophisticated "crime mapping" computer software and the use of DNA to track and prosecute offenders represent only two of the many examples of this shift. See KEITH HARRIES, *MAPPING CRIME: PRINCIPLE AND PRACTICE* (1999); Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?*, 90 J. CRIM. L. & CRIMINOLOGY 635 (2000). For discussions of other representative innovations in this reorientation, see WILLIAM G. STAPLES, *THE CULTURE OF SURVEILLANCE: DISCIPLINE AND SOCIAL CONTROL IN THE UNITED STATES* (1997); Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383 (1997); Christopher S. Milligan, Note, *Facial Recognition Technology, Video Surveillance, and Privacy*, 9 S. CAL. INTERDISCIPLINARY L.J. 295 (1999); Kevin Flynn, *Police Gadgets Aim to Fight Crime With 007-Style Ingenuity*, N.Y. TIMES, March 7, 2000, at B2.

163. See generally Tony Fabelo, "Technocorrections": *The Promises, the Uncertain Threats*, in SENTENCING AND CORRECTIONS, *supra* note 153. After discussing the variety of emerging information-reliant, technology-based surveillance systems available to law enforcement, the author notes:

Reducing the risk of recidivism has always been part of the mission of corrections, but only in the technocorrectional world is it possible to reduce the risk of violent recidivism to almost zero. The promise of technology to supervise offenders more effectively will accelerate the impulse to expand technocorrections.

society as a whole.<sup>164</sup> In short, there exists no principled reason not to extend application of registration and community notification regimes to populations other than convicted sex offenders,<sup>165</sup> as currently advocated by some,<sup>166</sup> and which is already being pursued in a limited way in several jurisdictions. Indeed, although often overlooked due to the predominant focus on serious sex offenders, registration and notification laws at present often contain provisions expressly extending potential

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*Id.* at 4.

164. Aspects of this shift have been noted by numerous authors, who warn of an increasing indifference and passivity among Americans in the face of significant privacy intrusions and losses. *See, e.g.*, DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* (1998); FRED H. CATE, *PRIVACY IN THE INFORMATION AGE* (1997); CHARLES J. SYKES, *THE END OF PRIVACY* (1999).

165. This predilection toward expansion has already manifested in the effort in many states to modify their registration and notification laws to cover juvenile sex offenders. *See, e.g.*, ALA. CODE §§ 15-20-20, 15-20-28 (1999); CAL. PENAL CODE § 290(m)-(n) (West 1999); COLO. REV. STAT. ANN. § 18-3-412.5(6.5) (West 1999); TEX. CRIM. PROC. CODE ANN. arts. 62.01-.12 (West Supp. 2000). *See generally* Michael L. Skoglund, Note, *Private Threats, Public Stigma? Avoiding False Dichotomies in the Application of Megan's Law to the Juvenile Justice System*, 84 MINN. L. REV. 1805 (2000). It is also manifest in legislative broadening of the expanse of sex offenses triggering registration and notification. *See, e.g.*, David Shepardson, *State Adds Crime to List for Sex Offenders*, DETROIT NEWS, Sept. 2, 1999, at D1 (discussing amendments in Michigan law to include sodomy, sexual delinquency, child kidnapping, and solicitation of a prostitute under the age of eighteen).

As discussed above, registration provisions alone for select offender subgroups, other than sex offenders, have been in existence for decades. *See supra* Part II.A. and accompanying text; *see also* Licia A. Esposito, Annotation, *State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register With Authorities*, 36 A.L.R. 5th 161 (1996 & Supp. 1999).

166. *See, e.g.*, Maria Orecchio & Theresa A. Tebbett, *Sex Offender Registration: Community Safety or Invasion of Privacy?*, 13 ST. JOHN'S J. LEGAL COMMENT. 675, 699-700 (1999) ("If communities have the right to know of the presence of convicted sex offenders, then they arguably have a similar right with respect to other released violent criminals who have established residence in their locales . . . . [T]he underlying purposes of community notification laws pertaining to convicted sex offenders apply with equal force to other violent offenders."); Allan Gustafson, *Inmates Called Riskier Than Fairview Men*, STATESMAN JOURNAL (Salem, Or.), Jan. 22, 1998, at C1 (noting the recent suggestion by the author of Oregon's notification law to the effect that the law be "broaden[ed] . . . to allow public notice when risky noncriminal individuals are released from institutions").

coverage to serious, non-sexual offenders<sup>167</sup> as well as numerous non-violent, sexually-oriented offenders.<sup>168</sup> Given this likely expansion,<sup>169</sup> the availability of habeas becomes all the more important.

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167. Most commonly, statutory coverage extends to persons convicted of kidnapping and false imprisonment or unlawful restraint of persons under 18 years of age, including attempts. *See, e.g.*, ARIZ. REV. STAT. § 13-3821(A)(1)(2) (1999); ARK. CODE ANN. § 12-12-903(8) (Michie 1999); HAW. REV. STAT. § 846E-1 (1999); 730 ILL. COMP. STAT. 150/3 (1999); KAN. STAT. ANN. § 22-4902(a)-(c) (1999); MINN. STAT. ANN. § 243.166(1)(ii),(2) (1999); WYO. STAT. ANN. § 7-19-301(a)(iv) (Michie 1999). Montana, however, extends coverage to those convicted of homicides, aggravated assaults, robbery, kidnapping and arson. MONT. CODE ANN. § 46-23-502(9)(a) (1999). Kansas's law extends to those convicted of homicides, including involuntary manslaughter. KAN. STAT. ANN. § 22-4902(d) (1999). Minnesota targets those convicted of kidnapping both minors and adults. MINN. STAT. § 243.166(a)(1)(ii) (2000). Arkansas makes eligible those convicted of stalking as well as those who knowingly expose others to the HIV virus. ARK. CODE ANN. § 12-12-903 (West 1999).

168. *See, e.g.*, CAL. PENAL CODE §§ 290(a)(2)(A) (West 1999) (possession of child pornography); KAN. STAT. ANN. § 22-4902(a)(4) (1999) (adultery, consensual sodomy, if one of the parties is under eighteen); LA. REV. STAT. ANN. § 15:542(E) (West 1997) (consensual sodomy, bigamy); MICH. COMP. LAWS §§ 28.722(d)(iii) (2000) (repeat visitations of indecent exposure and "disorderly persons" laws); MINN. STAT. § 243.166(a) (indecent exposure and possession of child pornography); N.M. STAT. ANN. §§ 29-11A-3, 30-6A-3 (Michie 1997) (possession of child pornography with intent to distribute); OHIO REV. CODE ANN. §§ 2907.08, 2907.09, 2950.01(D)(1) (Anderson 1998) (prohibiting public indecency and voyeurism); S.C. CODE ANN. §§ 23-3-430(C)(10)(12) (Law. Co-op. 1999) (buggery, "peeping"). Consistent with this broadening, a recent study in New Orleans concluded that over forty percent of registrants listed on an internet website maintained by the state of Louisiana were convicted under the state's anti-sodomy law, typically used to prosecute male and female prostitutes. *See* Pamela Coyle, *400 Sex Offenders in Region; Web Site Lists Many in N.O.: 44% Probably Prostitutes*, TIMES PICAYUNE (New Orleans), May 2, 2000, at A1.

169. Expansion in times to come might also be prompted by equal protection claims based on a theory of under-inclusiveness, notwithstanding that a "rational basis" standard of judicial review would likely apply. *See, e.g.*, *People v. Felarca*, 88 Cal. Rptr. 2d 587, 593 (1999) (deeming "irrational" a California law that required persons convicted of oral copulation with a minor to register but not those convicted of sexual intercourse with a minor).

Such claims, however, would likely succumb to traditional judicial deference to legislative authority. As the California Court of Appeal was at pains to note in a prior case challenging the California sex registry,

[t]he fact that there are some types of classes of sex offenses which are not made subject to registration does not per se require the finding there is a denial of equal protection. This may be based upon the legislative determination a particular type of offender does not

## B. THE CUSTODIAL EFFECTS OF REGISTRATION AND NOTIFICATION

If indeed federal habeas "cuts through all forms and goes to the very tissue of the structure," as Justice Holmes once observed,<sup>170</sup> then it is important to examine in a critical way the actual effects of registration and notification on their subjects. Even if one presumes that such laws constitute a proper exercise of the police power,<sup>171</sup> and do not impose additional "punishment" or otherwise infringe constitutional liberties,<sup>172</sup> this does not dictate that the custody jurisdictional requirement is lacking,<sup>173</sup> thus precluding consideration of

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recidivate or recidivates less . . . . In this final analysis, these are matters for consideration for the Legislature and should be addressed to that body.

People v. Mills, 146 Cal. Rptr. 411, 416 (1978). However, as courts become sensitized to the current empirical uncertainty over whether sex offenders recidivate more than others, we might witness a corresponding greater receptivity to equal protection claims. See, e.g., David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 572-73 (1994) (stating that "no study has demonstrated that sex offenders have a consistently higher or lower recidivism rate than other major offenders"); R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 357 (1998) (concluding based on a meta-analysis of sixty-one follow-up studies that only thirteen percent of subjects committed new sex offenses within a four-to-five year follow-up period); Kirk Heilbrun et al., *Sexual Offending: Linking Assessment, Intervention, and Decision-Making*, 4 PSYCHOL. PUB. POL'Y & L. 138, 139 (1998) (noting that there is "little consensus in the literature" on recidivism).

170. Frank v. Magnum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

171. See, e.g., Roe v. Office of Adult Probation, 938 F. Supp. 1080, 1092 (D. Conn. 1996) (stating the laws seek "to protect the public from devastating crimes. This goal certainly is one within the traditionally broad police powers of the State").

172. See *supra* notes 89-95 and accompanying text.

173. Cf. Dickerson v. Guste, 932 F.2d 1142, 1144 (5th Cir. 1991) (holding that custody for habeas purposes is broader than "custody" required to trigger speedy trial provisions). This same principle is evidenced in decisions of courts grappling with the effects of sex offender community notification in different constitutional contexts. See, e.g., State v. Scott, 961 P.2d 667, 676 (Kan. 1998) (concluding that notification does not constitute punishment relative to the Eighth Amendment's ban against cruel and unusual punishment); State v. Myers, 923 P.2d 1024, 1042 (Kan. 1996) (concluding that notification does constitute punishment relative to the Ex Post Facto Clause's ban against retroactive punishment). For a more general discussion of this principle, see Wayne A. Logan, *The Ex Post Facto Clause and the*

registrants' unrelated legal claims against their underlying criminal judgments.<sup>174</sup> Nor is it legally significant that the constraints associated with the laws are less restrictive than incarceration in prison or jail.<sup>175</sup> While perhaps accurate, such a comparison suggests a false question. The relevant question for purposes of habeas jurisdiction is whether the laws impede the capacity of an individual to live life, in the words of the Seventh Circuit, "without a string upon his liberty."<sup>176</sup> As discussed next, the laws most assuredly do, as they carry very significant consequences, of both a tangible and intangible nature, which together amply satisfy the custody jurisdictional requirement.<sup>177</sup>

### 1. Tangible Consequences

Registration and notification have manifold tangible consequences. Registration in itself differentially infringes liberty: it both compels behaviors not required of one's fellow citizens, and serves to limit freedoms otherwise taken for granted by the public at-large. Indeed, to liken registration to traditional licensing schemes, such as attend driving a car, owning a firearm, or conducting a business, vastly understates what is involved. One can elect to not own a gun, drive a car, or pursue a particular livelihood. One cannot opt out of registration, which in at least four jurisdictions requires persons to possess special identification cards,<sup>178</sup> and in numerous others requires payment of annual registration fees.<sup>179</sup> Moreover, registration information must be verified at

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*Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1285-88 (1998).

174. See LIEBMAN & HERTZ, *supra* note 15, § 9.1, at 363-410 (surveying the broad array of constitutional claims reached by federal habeas); § 11.2(c), at 452-86.

175. *Contra* *People v. Adams*, 581 N.E.2d 637, 641 (Ill. 1991) (noting that a registration "requirement is an innocuous duty compared to the potential alternative of spending an extended period of years in prison").

176. *Mackenzie v. Barrett*, 141 F. 964, 966 (7th Cir. 1905).

177. At present, U.S. jurisdictions reflect considerable variation both in their methods and means of registration and notification. See *supra* notes 70-86 and accompanying text. Therefore, analysis of the custody question must necessarily be jurisdiction-specific, and, when appropriate, consider the registration and notification effects imposed on a given habeas petitioner. The basic thrust of the discussion here, however, should be generally applicable to registration and notification laws nationwide.

178. See *supra* note 72.

179. See, e.g., ARK. CODE ANN. §§ 12-12-911, -918 (Michie 1999); IDAHO

least annually for a minimum of ten years,<sup>180</sup> and often times at considerably shorter intervals,<sup>181</sup> with compliance compelled by threat of criminal prosecution.<sup>182</sup>

In short, registration, even if by mail, and most certainly if required in person, as Justice Fried of the Massachusetts Supreme Judicial Court has observed, amounts to a "continuing, intrusive, and humiliating regulation of the person himself."<sup>183</sup> The constant necessity to apprise law enforcement of one's whereabouts under threat of prosecution represents a unique encumbrance,<sup>184</sup> which chills registrants' freedom of movement, affecting temporary visits to other jurisdictions<sup>185</sup>

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CODE § 18-8307(4) (Supp. 1999); 730 ILL. COMP. STAT. ANN. 150/3(c)(6) (West Supp. 1999); ME. REV. STAT. ANN. tit. 34-A, § 11226 (West 1999); MONT. CODE ANN. § 46-23-504(5) (1999).

180. See 42 U.S.C. § 14071(b) (Supp. 1999); see also *supra* note 73 and accompanying text.

181. See, e.g., HAW. REV. STAT. ANN. § 846E-5 (Michie 1999) (requiring registration every three months for all registrants); KAN. STAT. ANN. § 22-4904(c) (1999) (same); MICH. COMP. LAWS § 28.725 a(4)(b) (1999) (same). Persons deemed "sexually violent predator[s]" and other more serious offenders are commonly required to verify registration, and sometimes be photographed anew, every 90 days. See, e.g., N.Y. CORRECT. LAW § 168-(f) (McKinney 1999); S.C. CODE ANN. § 23-3-460 (Law. Co-op. 1999).

182. See *supra* note 75 and accompanying text. Furthermore, registration violations can serve as predicate offenses for purposes of habitual felon sentence enhancement laws. See, e.g., *Hampton v. State*, No. CC-98-229, 1999 WL 982401, at \*2 (Ala. Crim. App. Oct. 29, 1999) (deeming a registration violation, a "Class C" felony, as a sufficient basis to enhance a sentence under the state Habitual Felony Offender Act).

183. *Doe v. Attorney Gen.*, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring). Justice Fried continued: "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." *Id.*

184. This burden extends even to those forced to seek temporary habitations, a not unusual occurrence given the housing difficulties faced by registrants. See *State v. Pray*, 980 P.2d 240, 243 (Wash. Ct. App. 1999) (upholding the conviction of individual for failure to register while living in three different locations over a ten-day period). In Washington State, permanent transients classified as Level II or III offenders must report in person to police and verify their registration information on a weekly basis, and Level I registrants must do so on a monthly basis. See Sarah Duran, *Is There a Sex Offender Living Next Door?*, THE NEWS TRIBUNE (Tacoma, Wash.), June 4, 2000, at A1.

185. See, e.g., FLA. STAT. ANN. § 943.0435(2) (West Supp. 2000); MICH. COMP. LAWS ANN. § 28.723(3) (West 1998).

and most certainly permanent moves.<sup>186</sup> As noted by one Washington appellate judge: "It is inconceivable to think that one who must, as his first act, go to local law enforcement and announce that he is a felon convicted of a sex offense will not be deterred from moving in order to avoid divulging that ignominious event."<sup>187</sup> Registrants also experience severe constraints on the most personal decision to change their names,<sup>188</sup> and are often forced to endure geographic limits on where they can live and work.<sup>189</sup> Suffice it to say, the manifold encumbrances experienced by registrants go well beyond those endured by other citizens in their everyday lives, involving terms and conditions often identical to those endured by

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186. This stems both from the fact that states vary in the aggressiveness of their registration and notification regimes and from the obvious disincentives associated with being subject to a new wave of notification upon relocating to a new jurisdiction, or even when relocating within a given jurisdiction.

187. *State v. Taylor*, 835 P.2d 245, 250 (Wash. Ct. App. 1992) (Agid, J., dissenting); cf. *City of Chicago v. Morales*, 119 S. Ct. 1849, 1857 (1999) (citation omitted) (identifying "the 'right to remove from one place to another according to inclination' as 'an attribute of personal liberty' protected by the Constitution"); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (invalidating a one-year residency requirement for welfare eligibility because the limit infringed the right to "travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement").

188. *Williamson*, 151 F.3d at 1181; see also, e.g., CAL. CIV. PROC. CODE § 1279.6 (West Supp. 1999) (prohibiting any change unless the court deems "it is in the best interest of justice to grant [the change] and that doing so will not adversely affect the public safety"); 735 ILL. COMP. STAT. 5/21-101 (West 1999) (prohibiting change for entire registration period); N.H. REV. STAT. ANN. § 547:3-i(II) (1997 & Supp. 1999) (permitting change only if registrant "makes a compelling showing that a name change is necessary"); UTAH CODE ANN. § 77-27-21.5(16) (1999) (prohibiting change during the entire registration period).

189. See, e.g., ALA. CODE § 15-20-26 (1999); MINN. STAT. § 244.052 (sub. 3) (k), (sub. 4) (1999); see also Debra Baker, *Slamming the Door: N.J. Court Lets Homeowners Turn Down Renters, Buyers on Megan's Law List*, A.B.A. J., Jan. 2000, at 24 (discussing decision by New Jersey trial court to uphold bylaw of homeowners' association that barred sale or lease of property to registrants). Judge Richard Matsch recently enjoined application of a Colorado local ordinance prohibiting sex offenders from living together. Karen Abbott, *Judge Puts Sex Offender Law on Hold*, DENVER ROCKY MTN. NEWS, Feb. 2, 2000, at 21A. He did so in response to a suit brought by a family containing three foster sons who were registered sex offenders. *Id.* Judge Matsch further noted that he didn't "like what's going on." *Id.*

Limits on employment are at times backed up by the threat of civil fines for employers if a registrant is not terminated. See, e.g., IND. CODE ANN. § 5-2-12-12 (West Supp. 1999); OKLA. STAT. ANN. tit. 57, § 584(F) (West 1999).



probationers and parolees, legal statuses which as a matter of course satisfy the habeas custody requirement.<sup>190</sup>

Less direct, but surely no less consequential, are the tangible byproducts of community notification. Registrants have experienced arson and vandalism of their homes,<sup>191</sup> and been the victims of violence<sup>192</sup> and harassment.<sup>193</sup> Suicides, not surprisingly, also have been associated with notification,<sup>194</sup> as have job firings and forced moves from living arrangements (presuming a living space can be found in the first instance).<sup>195</sup>

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190. See *Jones v. Cunningham*, 371 U.S. 236, 242-43 (1963) (holding that constraints associated with parole satisfy the custody requirement for habeas petitions); *Cervantes v. Walker*, 589 F.2d 424, 425 (9th Cir. 1978) (holding same with respect to probation). Indeed, it is not uncommon for registration and notification to be imposed as conditions of probation or parole. See, e.g., *State v. Hutchinson*, No. 99-0034, 2000 WL 722572, at \*3 (La. Ct. App. May 17, 2000).

191. See, e.g., Steven Amick, *Vandals Attack Ex-Convicts Home*, THE OREGONIAN (Portland), July 27, 1996, at B1; David Ammons, *Released Sex Offender Hounded in Northwest*, L.A. TIMES, Aug. 1, 1993, at A18.; Kathryn Wexler & Sarah Schweitzer, *Fears Build into Second Arson of Predator's Home*, ST. PETERSBURG TIMES (Fla.), Nov. 24, 1999, at B1; Carolyn Zinko, *Flyers Falsely Call Artist a Molester*, SAN FRANCISCO CHRONICLE, July 14, 1997, at A1.

192. See, e.g., Robert Hanley, *Neighbor Accused of Firing at House of Paroled Rapist*, N.Y. TIMES, July 1, 1998, at B6; Jon Nordheimer, *'Vigilante' Attack in New Jersey is Linked to Sex-Offenders Law*, N.Y. TIMES, Jan. 11, 1995, at A1. See generally Paul Zielbauer, *Posting of Sex Offender Registries on Web Sets Off Both Praise and Criticism*, N.Y. TIMES, May 22, 2000, at B1 (citing and discussing several violent attacks).

193. See, e.g., *Doe v. Pataki*, 940 F. Supp. 603, 609 (S.D.N.Y. 1996) (describing an incident in which a registrant and his mother were forced to flee a community after Guardian Angels distributed wanted posters and reporters staked out residence around the clock); Steven Amick, *Protestors Win, Sex Offender Will Move*, THE OREGONIAN (Portland), July 30, 1996, at B2 (describing how protestors placed torches on front lawn of registrant, who soon moved); Katherine Long, *Gas Station Picketed Over Ex-Con's Hiring: Boss Stands By Choice*, SEATTLE TIMES, Feb. 2, 1995, at B5 (describing a demonstration during rush hour intended to discourage drivers from patronizing a gas station that employed a registrant); John T. McQuiston, *Sex Offender is Suing His Neighbors Over Protests*, N.Y. TIMES, June 20, 1997, at B1 (describing protest rallies directed at registrant, a brick-throwing incident, and harassment calls to the registrant's employer).

194. See, e.g., Todd S. Purdum, *Death of Sex Offender is Tied to Megan's Law*, N.Y. TIMES, July 9, 1998, at A16 (describing two separate suicides).

195. See, e.g., Allen G. Breed, *Paroled Sex Offender Tests Couple's Faith*, THE DALLAS MORNING NEWS, Sept. 2, 1999, at 10A; David Chanen, *Threats Lead to Eviction of St. Paul Sex Offender*, STAR-TRIBUNE (Minneapolis), Feb.

Nor are these hardships suffered by the registrants alone, as family and friends can become the open subject of community anger and disdain.<sup>196</sup> Moreover, in a perverse twist, the blunderbuss character of the laws can result in the singling out of victims, especially when a registrant has been convicted of incest or another intra-familial sex offense.<sup>197</sup>

Some courts and commentators have downplayed the legal gravity of these events because they come at the hands of third parties, not the government; the government merely makes registrants' information available, and bears neither legal nor

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26, 1998, at B1; Lisa Richardson, *Megan's Law is Put to Test as Towns Bounce Child Molesters*, L.A. TIMES, May 25, 1997, at A3; Lisa Sink, *Long After Release Date, Man Still Lives in Prison*, MILWAUKEE J. SENTINEL, June 1, 1999, at 1.

According to one recent survey of registrants, "housing and employment have become nearly impossible [to find] for sex offenders." Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. & LAW 375, 388 (2000). The authors relate the experience of one Wisconsin registrant:

I was evicted from my apartment. I found another apartment that I could afford. The DOC said, no, you can't live here because it was fairly close to a school. We found another place, but it was kind of close to a park. So then we came out here only because my girlfriend's mother owns the place . . . . It's like I'm stuck here because I'm afraid to move. As soon as I move, they're going to renotify and it's going to be the whole shebang again.

*Id.* at 382. Another interviewee recounted that he had moved seven times in a five-month period, and described one particular eviction: "On [] Street, I was there for 22 hours and the police chief personally came with my PO and the supervisor, and handed me a piece of paper for the neighborhood saying I was removed from the neighborhood." *Id.* Other interviewees related that they were left with no housing option other than return to the care of the Department of Corrections. *Id.*

196. See, e.g., Zevitz & Farkas, *supra* note 195 at 382-84 (surveying hardships suffered by family and friends reported by Wisconsin registrants); Gene Warner, *2 Sex Offenders Say They Don't Deserve Harsh Label*, BUFFALO NEWS, Dec. 27, 1999, at B1 (recounting physical beatings and harassment suffered at school by a registrant's child).

197. This occurrence itself is quite likely given the empirical reality that sex crime victims most often know or are related to their assailants. See LAWRENCE A. GREENFELD, U.S. BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS 4 (1997) (citing data that three-out-of-four rape and sexual assault victims had a prior relationship with their assailant). Indeed, this empirical reality gives force to perhaps the most compelling argument against the undifferentiated use of registration and notification laws, undercutting their implicit assumption that information is needed to guard against victimization by strangers.

moral responsibility.<sup>198</sup> However, despite the Rehnquist Court's steely view that the government has no affirmative duty under the Constitution to prevent individuals from harming one another,<sup>199</sup> it is at best naive (and at worst disingenuous) to suggest that notification merely entails the provision by government of neutral information to the public.<sup>200</sup> As Professor James Whitman observed in the context of shame sanctions, more generally, the government's release of highly stigmatizing information forges a "complicity between the state and the crowd."<sup>201</sup> "Once the state stirs up public opprobrium against an offender, it cannot really control the way the public treats the offender. . . . When our government dangles a sex offender or a drunk driver before the public, it has vanishingly little control over how the public treats that person."<sup>202</sup> In

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198. For instance, according to the Western District of Michigan, registration and notification do

nothing more than compile truthful, public information and make it available. To the extent public use of such information may result in damage to plaintiffs' reputation or may destabilize their employment and other community relations, such effects . . . would appear to flow most directly from plaintiffs' own convicted misconduct and from private citizens' reactions thereto, and only tangentially from state action.

Doe v. Kelley, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997); see also Doe v. Pataki, 120 F.3d 1263, 1279-80 (2d Cir. 1997) (acknowledging that notification is "doubtless the 'but for' cause of some" vigilantism, but rejecting that such acts are fairly "attributable to community notification" per se); State v. Williams, 728 N.E.2d 342, 357 (Ohio 2000) (stating "[i]t cannot be presumed that the receipt of public information will compel private citizens to lawlessness").

199. See DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189, 197 (1989). See generally Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 96 MICH. L. REV. 982 (1996) (discussing the rationales and criticisms of "failure-to-protect" jurisprudence).

200. Cf. Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 7 (1991) ("No one doubts that Hester Prynne's scarlet letter provided more than neutral information, or that the effort of Senator Joseph McCarthy to 'expose' the background of his political opponents was not simply public education.") (footnotes omitted).

201. James Q. Whitman, *What is Wrong With Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1059 (1998); see also *id.* at 1088 (asserting that shame sanctions "involve a dangerous willingness, on the part of the government, to delegate part of its enforcement power to a fickle and uncontrolled general populace").

202. *Id.*; see also Kreimer, *supra* note 200, at 40-41 ("Where the relations between the subject of disclosure and the recipient of the disclosed information

short, the government's release of incendiary information unavoidably places tangible limits on the lives of registrants, limits not shared by other citizens.<sup>203</sup> A "string" is purposefully imposed on registrants' liberty.

## 2. Intangible Consequences

Beyond the significant tangible consequences of registration and notification, the laws carry a litany of other intangible consequences, with effects arguably even more invasive than those just discussed. These consequences can be characterized as at once having both expulsive and constraining qualities, effects that share a fundamental intrusiveness on the core privacy interests of registrants.

### *a. Expulsion*

Released sex offenders, like other individuals convicted of crimes, incur the inevitable stamp of criminal ignominy.<sup>204</sup>

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are already charged with violent potential, disclosure is a virtual invitation."); Toni M. Massaro, *Shame, Culture, and American Law*, 89 MICH. L. REV. 1880, 1938 (1991) ("Once an offense becomes notorious, the public will do as it chooses with the information."); Robert A. Prentky, *Community Notification and Constructive Risk Reduction*, 11 J. OF INTERPERSONAL VIOLENCE 295, 296 (1996) (stating that vigilantism is the "logical outcome of telling people that an evil menace lurks next door").

203. Indeed, the Supreme Court has repeatedly signaled its sensitivity to the causal relation between the release of information and the dangers presented by the predictable reactions of third parties. *See, e.g.*, *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747, 766-67 (1986) (regarding the possible harassment of women seeking abortions as a result of the government's disclosure of their identities), *overruled on other grounds by Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92-93 (1982) (regarding possible threat of harassment of political contributors as a result of disclosing their names).

204. In modern times, this labeling plays a paramount role in the criminal adjudicatory process. *See* DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 252 (1990) ("[P]enality communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters."); *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 416 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) (observing that "the convicted offender is excluded from the moral universe of discourse, and is made to serve merely as the object of and conduit for public messages of denunciation"). This denunciatory function, with its stigmatizing force, however, has not always been foremost. In colonial America, for instance, society viewed offenders more as sinners than as irredeemably flawed individuals. *See* WILLIAM E. NELSON, *AMERICANIZATION*

This labeling, however, is far more acute than that experienced by their ex-offender counterparts. Registration and notification (the latter in particular) raise the likelihood—indeed, seek to ensure—that their subjects will be expelled from everyday society. In contrast to being permitted to live anonymously with their ex-offender status, registrants are publicly and affirmatively singled out by the government as “sex offenders,” a distinctly odious label in contemporary America.<sup>205</sup> This designation, moreover, is backed by legislative “findings” that they pose especially high risk for recidivism (a designation not publicly shared by other ex-offenders) or, certainly, citizens more generally.<sup>206</sup>

In addition, although jurisdictions vary in their semantics, registrants are frequently branded with far more emotionally evocative terms such as “predatory sex offenders,”<sup>207</sup> “sexually

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OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 39 (1975) (“Like sin, crime could strike in any man’s family or among any man’s neighbors.”).

205. See *supra* note 69 and accompanying text (discussing acute disdain for sex offenders). Recognition of this unique stigma is evidenced in the several state and federal courts that have held that the stigmatizing effects of registration and notification jeopardize a liberty interest, sufficient to require due process protections before the laws are applied. See *supra* note 94. Moreover, federal courts uniformly recognize this stigma in due process claims by inmates seeking to avoid being branded “sex offenders” in the prison environment. See *Chambers v. Colo. Dep’t of Corr.*, 205 F.3d 1237, 1242-43 (10th Cir. 2000) (recognizing an inmate’s liberty interest in “not being labeled a sex offender.”); *Kirby v. Siegelman*, 195 F.3d 1285, 1291-92 (11th Cir. 1999) (recognizing an inmate’s liberty interest in “not being branded a sex offender,” an interest similar to that in not being branded “mentally ill”); *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) (stating that it could “hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling of a prison inmate as a sex offender”).

206. *E.g.*, ARK. CODE ANN. § 12-12-902 (Michie 1999) (“The General Assembly finds that sex offenders pose a high risk of reoffending after release from custody.”); FLA. STAT. ANN. § 775.21(3)(a) (West 2000) (“Sexual offenders are extremely likely to use physical violence and repeat their offenses.”); NEB. REV. STAT. ANN. § 29-4002 (Michie Supp. 2000) (“The Legislature finds that sex offenders present a high risk to commit repeat offenses.”); S.C. CODE ANN. § 23-3-400 (West 1999) (“Statistics show that sex offenders often pose a high risk of re-offending.”); TENN. CODE ANN. § 40-39-101(b)(1) (1997) (“[S]exual offenders pose a high risk of engaging in further offenses after release . . . and protection from these offenders is a paramount public interest.”).

207. *E.g.*, OR. REV. STAT. ANN. § 181.586 (Lexis Supp. 1999); see also FLA. STAT. ANN. ch. 775.21 (West 2000) (referring to “sexual predators”).

violent predators,”<sup>208</sup> or “habitual sex offenders.”<sup>209</sup> As recently noted by the New York Court of Appeals, this exercise is “[m]ore than ‘name calling by public officials.’”<sup>210</sup> Such designations “can have a considerable adverse impact on an individual’s ability to live in a community and obtain or maintain employment.”<sup>211</sup> Even in those jurisdictions that designate registrants in terms of ostensibly objective risk “levels,” as in Washington State, each level carries a corresponding degree of disclosure and opprobrium, and hence community disdain and apprehension.<sup>212</sup> The upshot of this massive exercise in branding is that registrants experience a double-stigmatization: (1) their offense history is purposefully

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208. *E.g.*, LA. REV. STAT. ANN. art. 15:542.1 (West Supp. 2000); N.C. GEN. STAT. ANN. § 14-208.6A (Lexis 1999); S.C. CODE ANN. § 23-3-460 (West Supp. 1999). Federal law expressly requires that jurisdictions identify “sexually violent predators.” 42 U.S.C. § 14071(a)(2)(C) (2000). Such an offender is one who has “been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.” *Id.* § 14071(a)(3)(C).

209. *E.g.*, OHIO REV. CODE ANN. § 2950.01 (B) (Anderson 1999); OKLA. STAT. ANN. tit. 57, § 584(H)(b) (West Supp. 2000).

The derogatory quality of the labels used, in lieu of the more neutral phrase “sex offender,” is itself worthy of note, in that it comports with the justice system’s historic preference for “filth” metaphors in reference to criminals. See Martha G. Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725 (1994). Referring to sex offenders in such hyperbolic terms, to borrow from Professor Duncan, “tends to hide the criminal’s humanity while encouraging us to see the criminal as an object. Moreover, the metaphor invites a particular emotional response to the criminal, the same one we consciously feel toward slime: disgust.” *Id.* at 799; see also *Doe v. Pataki*, 940 F. Supp. 603, 621-22 (S.D.N.Y. 1996) (quoting a New York legislator’s comment in consideration of that state’s registration and notification law, likening sex offenders to the “human equivalent of toxic waste”), *aff’d in part, rev’d in part*, 120 F.3d 1263 (2d Cir. 1997); Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 470 (1992) (referring to modern American penology as serving a “kind of waste management function”); Peter Linebaugh, *(Marxist) Social History and (Conservative) Legal History: A Reply to Professor Langbein*, 60 N.Y.U. L. REV. 212, 238-39 (1985) (likening the criminal justice system in eighteenth century England to a “garbage collection system”).

210. *People v. David W.*, 733 N.E. 2d 206, 210 (N.Y. 2000) (quoting *Paul v. Davis*, 424 U.S. 693, 703 (1976)).

211. *Id.* at 211.

212. See WASH. REV. CODE § 4.24.550(1)-(2), (4) (2000); see also Logan, *supra* note 74, at 602-19 (describing similar methods in other jurisdictions).

and publicly made known and (2) they experience a "*judicially-endorsed* pronouncement" that they pose an accentuated risk to fellow community members.<sup>213</sup> Judge Myron Thompson of the Middle District of Alabama recently characterized the phenomenon as follows:

While it might seem that a convicted felon could have little left of his good name, community notification in this case will inflict a greater stigma than would result from conviction alone. Notification will clearly brand the plaintiff as a "criminal sex offender" . . . a "badge of infamy" that he will have to wear for at least 25 years—and strongly implies that he is a likely recidivist and a danger to his community.<sup>214</sup>

As a result, beyond the severe and tangible outcomes resulting from vigilantism and harassment,<sup>215</sup> offenders experience banishment from their customary social, physical, and economic worlds,<sup>216</sup> for at least ten years and often for their

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213. *E.B. v. Verniero*, 119 F.3d 1077, 1117 (3d Cir. 1997) (Becker, C.J., concurring and dissenting in part) (emphasis in original).

214. *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999); *see also Doe v. Poritz*, 662 A.2d 367, 419 (N.J. 1995) (notification exposes a registrant to "public opprobrium not only identifying him as a sex offender but also labelling him as potentially currently dangerous"); *cf. Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) (Scalia, J.) ("Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential."), *vacated on other grounds by* 477 U.S. 242 (1986).

215. *See supra* notes 191-197 and accompanying text.

216. *See E.B.*, 119 F.3d at 1102 ("Knowing that someone is a convicted sex offender and has been evaluated as a continuing risk is likely to affect how most people treat that person."); *Doe v. Pataki*, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998) ("[W]idespread dissemination of the above information is likely to carry with it shame, humiliation, ostracism . . . ."); *Commonwealth v. Williams*, 733 A.2d 593, 606 (Pa. 1999) ("Notification puts the registrant's livelihood, domestic tranquility, and personal relationships all around him in grave jeopardy."); *see also Duncan, supra* note 209, at 751-55 (noting that, historically, likening offenders to "slime" and "filth" facilitates their banishment).

As noted, banishment seemingly represents one of the central appeals of the laws. *See, e.g., Pataki*, 940 F. Supp. at 621-22 (quoting a New York legislator's enforcement of the state's notification law: "I think that one of the results of this legislation might be that this guy is going to go out of town, out of state, and that's very good for us."), *aff'd and rev'd in part on other grounds*, 120 F.3d 1263 (2d Cir. 1997); Sheila Grissett, *Law Keeps Sex Offenders in Public Eye*, *TIMES-PICAYUNE* (New Orleans), Oct. 24, 1993, at B1 (quoting a Louisiana official's approving conclusion that the state's aggressive notification law has discouraged sex offenders from locating in Louisiana); *Turning Point: The Revolving Door: When Sex Offenders Go Free* (ABC TELEVISION BROADCAST, Sept. 21, 1994) (quoting police officer who stated that "Washington, by having a sexual offender law, is, in essence, telling its sexual offender, 'Hey, you'd best leave the state if you don't want to be registered.'").

lifetimes. "Notification draws a line not only between neighbors and an offender, but also between neighbors and anyone who offers the offender much-needed support, including relatives, friends, and employers."<sup>217</sup> According to Chief Judge Edward Becker of the Third Circuit,

the burden imposed by the collective weight of all these effects is borne by the offender in all aspects of his life. At worst, the offender is literally cut off from any interaction with the wider community. He is unable to find work or a home, cannot socialize, and is subject to violence or at least the constant threat of violence . . . Although perhaps some people will hire him or rent him a home, his social

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*But see* Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) ("To permit one state to dump its convict criminals into another is not in the interests of safety and welfare; [it] . . . is prohibited by public policy."); *People v. Baum*, 231 N.W. 95, 96 (Mich. 1930) (stating that such an orientation "tend[s] to incite dissension, provoke retaliation, and disturb that fundamental equality of political rights among the several states which is the basis of the union itself").

217. Lois Presser & Elaine Gunnison, *Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?*, 45 CRIME & DELINQ. 299, 309 (1999). As Professor James Whitman recently asked: "Does anyone really doubt that our own shame sanctions, whether directed against sex offenders or drunk drivers, have some impact on 'public opinion' about that person?" Whitman, *supra* note 201, at 1088. Writing with respect to shame sanctions more generally, Whitman observes: "The problem with shame sanctions . . . is that . . . they exclude the offender entirely from the life of ordinary transactions just as members of shunned classes are excluded everywhere from the simple dignity of admission to the marketplace." *Id.* at 1090 n.155.

Whether community notification, as a technical matter, is a "shame sanction" has been the subject of some disagreement. Professor Stephen Garvey, for one, asserts that "the primary aim of [notification] is neither to shame nor to educate. Public notification statutes appear designed primarily to protect third parties." Garvey, *supra* note 140, at 737 n.21. However, whatever the "primary aim" of notification, the unavoidable and irreducible outcome of notification is that it stigmatizes registrants with shameful information, and for this reason most commentators consider community notification a shame sanction. *See, e.g.,* Daniel Feldman, *The "Scarlet Letter Laws" of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081 (1997); Whitman, *supra* note 201; April R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 911-13 (1995); *see also E.B.*, 119 F.3d at 1119 (Becker, C.J., concurring and dissenting in part) (characterizing notification as "the functional equivalent of shaming punishments"); AMITAI ETZIONI, *THE LIMITS OF PRIVACY* 62 (1999) ("[A]lthough community notification would ideally lead to reintegrative shaming rather than to its punitive counterpart, in either case 'outing' the offender is necessary, both for shaming to work and for the community to be protected.").



intercourse with others is all but non-existent. The effects of notification permeate his entire existence.<sup>218</sup>

Conceived in these terms, the laws impose a de facto (if not de jure) banishment, a restraint manifestly not "shared by the public generally."<sup>219</sup>

*b. Constraint*

In a corollary sense, the laws also achieve a quarantine-like constraint of registrants.<sup>220</sup> Plainly, the workplace and residential limits, the requirement that offenders update their registration information at prescribed intervals, and numerous other requirements (e.g., providing advance notice of residential and name changes) have self-restraining effects. At the same time, the dissemination of registrants' identifying information, coupled with the use of uniquely stigmatizing labels (e.g., "sexual predator"), constrain registrants in a more subtle and pervasive phenomenological sense.<sup>221</sup> The laws

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218. *E.B.*, 119 F.3d at 1125 (Becker, C.J., concurring and dissenting in part); cf. Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, With Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 371 (1999) ("It is important to note . . . that even when viewed purely as an external sanction, that is, as the product of the actions or reactions of other people, shame (like guilt) is felt even if other people take no action.").

For classic treatments of the disabling effects of social stigma more generally, see ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1963); S. GIORA SHOHAM & GIORA RAHAV, *THE MARK OF CAIN: THE STIGMA THEORY OF CRIME AND SOCIAL DEVIANCE* (2d ed. New York Press 1982). As Professor Goffman observes, "[w]e believe the person with the stigma is not quite human. On this assumption, we . . . reduce his life chances." Goffman *supra*, at 5; cf. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 261 (Phillips Bradley ed., 1985) (1840) ("In a democratic country . . . public favor seems as necessary as the air we breathe, and to live at variance with the multitude is, as it were, not to live.").

219. *Jones v. Cunningham*, 371 U.S. 236, 240 (1963); see also *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895-97 (2d Cir. 1996) (holding that threatened banishment from the Seneca Indian tribe and land satisfied the habeas custody requirement).

220. See *People v. Pennington*, 610 N.W.2d 608, 611 (Mich. Ct. App. 2000) (per curiam) (observing that the laws closely resemble "quarantine notices when public health is endangered by individuals with infectious diseases" and that with notification "individuals can expect to experience some embarrassment and isolation").

221. As Professor Seth Kreimer has noted, "[t]he impact of stigma depends upon the strength and pervasiveness of the mobilized hostility. To be branded a Socialist in 1954 is quite different than being branded a Socialist in 1990." Kreimer, *supra* note 200, at 53. Given this relationship, and the

carry the paralyzing influence of social opprobrium, which, as John Stuart Mill once observed "leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself."<sup>222</sup> Registrants thus are forced to inhabit the world of "the Other," the self-conscious existential realm identified by Jean-Paul Sartre that operates on "recognition of the fact that I am indeed that object which the Other is looking at and judging."<sup>223</sup> This sensibility was evidenced in a recent survey of Wisconsin sex offender registrants, two of whom told the interviewer the following:

I feared for the longest time going out on the street, that there might be some type of vigilante attitude . . . . There were people in the building trying to get a petition together to have the sex offenders that were in the paper ousted from the building . . . . It caused me to be more confined and I felt ostracized from everyone there.

Just wondering . . . do they know? It kind of induces paranoia, you get all worried every time you see someone looking at you like they read it. You think—they know. You wonder, if someone confronts me, what am I going to say?<sup>224</sup>

Registration and notification achieve this constraint by in effect deputizing one's fellow citizens, in modern parlance making them "co-producers" of public safety and instruments of the state's surveillance apparatus. As two commentators recently observed, registration and notification "generalize[ ] the incapacitative functions of prison beyond the prison and, indeed, beyond the dominion of government. . . . There is no shortage of [citizen] volunteers to police those conditions."<sup>225</sup> In this sense, the laws achieve an effect sought by eighteenth century philosopher Jeremy Bentham's infamous, yet mythical, Panopticon with its central tower and inspector's lodge.<sup>226</sup> This

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unprecedented disdain currently felt for sex offenders, the government-sponsored labels used today obviously engender unique stigma.

222. JOHN STUART MILL, ON LIBERTY 4-5 (David Spitz ed., W.W. Norton & Co., Inc. 1975) (1859); see also Kreimer, *supra* note 200, at 6 ("The power of public opprobrium, once evoked, is often more pervasive and more penetrating than criminal punishment.").

223. JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY 222 (Hazel E. Barnes trans., 1956).

224. Zevitz & Farkas, *supra* note 195, at 382-83.

225. Presser & Gunnison, *supra* note 217, at 310.

226. See JEREMY BENTHAM, THE PANOPTICON WRITINGS (Miran Bozovic ed., Vers. 1995) (1791). Panoptic correctional houses were actually constructed in the United States: in 1800, Virginia utilized a semi-Panoptic design for its prison; Pennsylvania and Illinois built Panoptic prisons in 1826 and 1919, respectively. JOHN W. ROBERTS, REFORM AND RETRIBUTION: AN

is because, like the Panopticon, notification endeavors to give the impression that those subject are constantly being watched, even when perhaps not.<sup>227</sup> The avowed goal of the Panoptic system, philosopher Michel Foucault once observed, is to induce "a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action."<sup>228</sup> By like effect, registration and notification laws, with their stifling array of coercive, pan-geographic consequences,<sup>229</sup> achieves a "hidden custody"<sup>230</sup> by means of a coalition of police, neighbors, and society at-large, which, like panopticism also depends on classification and

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ILLUSTRATED HISTORY OF AMERICAN PRISONS 55 (1997).

227. REG WHITAKER, *THE END OF PRIVACY: HOW TOTAL SURVEILLANCE IS BECOMING A REALITY* 35 (1999) ("The Inspector sees without being seen. His presence, which is also an absence, is in his gaze alone. Of course, the omnipresence of the Inspector is nothing more than an architectural artifice, really just an elaborate conjuring trick.").

228. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 201 (Alan Sheridan trans., Vintage Books 1979). Foucault elaborates:

There are two images, then, of discipline. At one extreme, the discipline-blockade, the enclosed institution . . . . At the other extreme, with panopticism, is the discipline-mechanism: a functional mechanism that must improve the exercise of power by making it lighter, more rapid, more effective, a design of subtle coercion for a society to come.

*Id.* at 209.

229. *See supra* notes 70-75 and accompanying text (discussing constraints and national coverage of registration and notification laws). Indeed, if a registrant changes state residence, he is required to deduce whether his crime of conviction compels registration within that new state, as states differ in their respective substantive requirements. So, before going to the trouble of registering with local police, a potential registrant might be faced with a difficult legal research project, a burden not shared by other newcomers. *See, e.g., Roe v. Attorney Gen.*, No. 99-2706-H, 1999 WL 1260188, at \*1 (Mass. Super. Nov. 23, 1999) (discussing the difficulty of discerning whether the crime of conviction in Florida constituted a "like offense" requiring registration as a "sex offender" under Massachusetts law); *see also, e.g., CONN. GEN. STAT.* § 54-251(a) (1999) ("If any person who is subject to registration under this section regularly travels into or within another state or temporarily resides in another state . . . such person shall notify the Commissioner of Public Safety and shall also register with an appropriate agency in that state provided that state has a registration requirement for such offenders.").

230. This phrase is borrowed from STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND CLASSIFICATION* 71 (1985).

observation.<sup>231</sup> This situation, in turn, is made all the more invasive because individuals must update and maintain their registration information, effectively compelling their complicity in their own surveillance.<sup>232</sup> Indeed, the legislative history

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231. See Foucault, *supra* note 228, at 207 (observing that "the seeing machine was once a sort of dark room into which individuals spied; it has become a transparent building in which the exercise of power may be supervised by society as a whole"); *id.* at 203 (noting that panopticism is concerned with "individualizing observation, with characterization and classification").

This same surveillance effect was evidenced in previous registration efforts. In 1950s Philadelphia, for instance, one local detective supported registration because "it led the 'criminals' to believe that they were under the surveillance of the police department. The registrant's feeling of constant surveillance and obligation to notify the police of any change of address might impose some regimentation upon the criminals." See *Registration Ordinances*, *supra* note 60, at 64. The author elaborated:

In one case a Negro woman came into the Identification Division of the Philadelphia Police department to report that she was leaving the city for four days to attend her mother's funeral and wanted to notify the police so that she would not be in trouble when she returned . . . . One individual reported that he had lost his registration card and had come to the police right away because he did not want to get in trouble.

*Id.* at 64 n.24. Another objection

is the psychic effect which it has on every man who has committed a crime. It opens up old sores. It re-affirms the conviction that exists in the minds of too many of these people that the police are anxious to get something on them. The fact that this is not so does not matter. The important thing is that this group of individuals feels that it is so

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Current Note, *Criminal Registration Law*, 27 J. CRIM. L. & CRIMINOLOGY 295, 295-96 (1936)

232. In this sense, the interests threatened by registration and notification resemble those protected by the Fifth Amendment, which in pertinent part guards against compelled extraction of information by the government. Professor Charles Fried offers the following analysis:

By according the privilege as fully as it does, our society affirms the extreme value of the individual's control over information about himself . . . . [I]t is the point of the privilege that a man cannot be forced to make public information about himself. Thereby his sense of control over what others know of him is significantly enhanced, even if other sources of the same information exist.

Charles Fried, *Privacy [A Moral Analysis]*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 203, 214-15 (Ferdinand David Schoeman ed., 1984); cf. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (stating "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [taxes or

underlying the federal registration and notification law,<sup>233</sup> and well as President Clinton's words in support of the law,<sup>234</sup> signal an express desire for precisely this universal surveillance and constraining effect.<sup>235</sup>

Finally, the constraint experienced by registrants is exacerbated by a Damoclean-type anxiety, one that extends beyond the constant specter of harassment and vigilantism already discussed.<sup>236</sup> As one appellate judge put it: "One who is watched, investigated, questioned and accused, albeit informally, lives in fear of the moment of formal accusation and its aftermath. People tend to think that if he did it once, he

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punishment] . . . were thought likely to produce").

233. See 139 CONG. REC. H10, 319-02, H10,320 (daily ed. Nov. 20, 1993) (statement of Rep. Sensenbrenner); 139 CONG. REC. H10,319-02, H10,321 (daily ed. Nov. 20, 1993) (statement of Rep. Ramstad).

234. See *supra* text accompanying note 71.

235. Over thirty years ago, in his landmark study of the impact of then-modern technology upon privacy, Professor Alan Westin recognized the critical role of surveillance in the government's effort to exert social control:

Surveillance is obviously a fundamental means of social control . . . . The whole network of American constitutional rights . . . was established to curtail the ancient surveillance claims of governmental authorities . . . . Writings by leading social scientists have made it clear that observation by listening or watching which is known to the subject necessarily exercises a restrictive influence over him. In fact, in most situations this is exactly why the observational surveillance is set up—to enforce the rules.

ALAN F. WESTIN, *PRIVACY AND FREEDOM* 57-58 (1967).

The universal surveillance associated with registration and notification is not just compulsory but also largely *actual*, not merely perceived, which sets the laws apart from the self-regimenting influence of Bentham's Panopticon. Nonetheless, it is a central component shared by both. See Whitaker, *supra* note 227, at 36 ("Bentham's metaphor shows how surveillance can exact compliance and be an effective tool for social control, but only to the extent that the subjects of surveillance have no alternative to the Inspector's gaze.").

236. One aspect of this anxiety stems from the uncertain timing of such acts, an uncertainty that in some ways makes the lot of registrants even more angst-ridden than that of probationers and parolees. As the Second Circuit observed with respect to a pendent threat of banishment experienced by members of the Seneca Indian tribe,

[w]hile "supervision" (or harassment) by tribal officials or others acting on their behalf may be sporadic, that only makes it all the more pernicious. Unlike an individual on parole, on probation, or serving a suspended sentence—all "restraints" found to satisfy the requirement of custody—the petitioners have no ability to predict if, when, or how their sentences will be executed.

*Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996).

will do it again."<sup>237</sup> More formally, like the registration laws of old,<sup>238</sup> the current wave of sex offender provisions carries the constant threat of re-arrest, and achieves compliance through this coercive threat.<sup>239</sup> As a result, like an offender free on the basis of personal recognizance,<sup>240</sup> or a parolee subject to "rearrest[] at any time,"<sup>241</sup> persons subject to registration and notification are constrained for habeas custody purposes.<sup>242</sup>

### C. PRIVACY INTRUSIONS

Lastly, registration and notification impose a form of custodial restraint due to the unique privacy intrusions they engender. The laws mandate collection of a broad variety of information (e.g., date of birth and social security number; home and work addresses; identifying physical characteristics; and crime of conviction), and then require affirmative disclosure of the information to other citizens.<sup>243</sup> Even where

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237. *State v. Taylor*, 835 P.2d 245, 250 (Wash. Ct. App. 1992) (Agid, J., dissenting).

238. See *Registration Ordinances*, *supra* note 60, at 62-63 (identifying the re-arrest of those who failed to comply with registration requirements as a "principal" objective of circa 1950s registration laws).

239. Once again, the parallel to Bentham's Panopticon is evident. As noted by Reg Whitaker, "Bentham believed that surveillance would ensure compliance, without the need for coercion . . . . Yet compliance ultimately rests on the threat of coercion." WHITAKER, *supra* note 227, at 35.

240. See *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (deeming it significant that under such circumstances "[d]isobedience is itself a criminal offense"); see also *Sammons v. Rodgers*, 785 F.2d 1343, 1345 (5th Cir. 1986) (per curiam) (deeming the custody requirement satisfied when defendant is subject to a suspended sentence threatening future imprisonment).

241. *Jones v. Cunningham*, 371 U.S. 236, 242 (1963). To be sure, unlike the parolee in *Jones* whose readmission to prison for failure to comply with specified terms could be based on a mere administrative decision by a parole board, any conviction for failure to register or to maintain registry information presumably would be preceded by formal adjudication, with its procedural rights and protections. However, it is indisputable that registrants, unlike other community members, suffer from this specter of governmental intrusion, which, though short of summary incarceration, at a minimum subjects them to the threat of re-arrest on suspicion of a registration violation, a specter that surely warrants some recognition in the custody analysis.

242. See *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 895 (2d Cir. 1996) ("Restraint" does not require 'on-going supervision' or 'prior approval' [to satisfy the custody requirement].").

243. Consistent with this latitude, it is not uncommon for states to expressly allow private dissemination of registrant information. See, e.g., N.Y.

legislatively imposed limits exist on the intended spread of registrants' information, such limits are so susceptible of evasion as to be virtually meaningless.<sup>244</sup> This is despite the fact that every jurisdiction has laws in place that threaten penalties for the unauthorized spread of registrants' information.<sup>245</sup> With the advent of the Internet as a method of disclosure,<sup>246</sup> the breadth and indeed indelibility<sup>247</sup> of disclosure

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CORR. LAW § 168-1(6)(b) (McKinney Supp. 2000) (specifying that "any entity receiving information . . . may disclose or further disseminate such information at [its] discretion").

244. See, e.g., *Paul P. v. Farmer*, 80 F. Supp. 2d 320 (D.N.J. 2000) (enjoining New Jersey's notification law because it failed to impose sufficient controls to guard against unintended disclosures by local authorities). The court further explained:

A system of distributing this information with zero "leakage" to unauthorized persons is, in reality, unattainable. However, the mandate for the Attorney General is not to devise a perfect system, but one calculated to achieve the goals of the statute without unreasonably impinging on the "nontrivial" privacy interests of the plaintiffs.

*Id.* at 325. The district court subsequently approved the State's revised guidelines. See *Paul P. v. Farmer*, 92 F. Supp. 2d 410 (D.N.J. 2000), *aff'd*, No. 00-5244, 2000 WL 1277961 (3d Cir. 2000). Under the new regime, registrant information contained in a flier will be disseminated in redacted and unredacted form; the latter contains inter alia the exact home address of the registrant, which is provided only to community members willing to sign a receipt pledging that they will not disclose the information to unauthorized persons and not harass the registrant, his family, or employer. *Id.* at 411. All other community members will receive redacted information forms, which, while containing all other information, reflect only the general area of the registrant's home. *Id.*

245. The court in *Paul P.*, for instance, noted forty-five documented instances of misuse, yet not a single action for contempt was initiated. See *Paul P.*, 80 F. Supp. 2d at 324 n.8.

246. See *supra* note 78 (listing organizations that provide links to state-initiated Internet cites). In addition to state-sponsored sites, numerous local police departments maintain independent cites providing registrant information. See *id.*

247. To quote Charles Sykes, "[d]ata is like a prostitute; [o]nce it's on the street, everybody has access to it." CHARLES J. SYKES, *THE END OF PRIVACY* 101 (1999) (citing an advocate for the mentally ill).

Given this ephemeral quality, it should come as no surprise that enterprising citizens have seized the initiative to create Internet sites on their own to disseminate registrants' information. See, e.g., [www.jaye.org](http://www.jaye.org) (site maintained by Michigan State Senator Dave Jaye, disclaiming that the site "is not responsible for inaccuracies") (last updated Aug. 1, 2000); <http://www.parentsformeganslaw.com/html/offender.lasso> (containing infor-

has been increased incalculably. Other, emerging technologies carry additional promise for intrusiveness. For instance, a recent software innovation, known as "Megan's Mapper," now permits law enforcement to generate thousands of notification letters in minutes, making the labor intensive and time-consuming job of notification far easier, more effective, and less expensive.<sup>248</sup>

The interest threatened by such disclosures cuts to the heart of the critical interrelation between privacy and personal autonomy and liberty.<sup>249</sup> Although for decades, if not centuries, social thinkers have struggled to derive a comprehensive definition of privacy, the definition offered by Charles Fried is helpful: privacy is "that aspect of social order by which persons control access to information about themselves."<sup>250</sup> Ruth Gavison identifies the following functions of privacy: "the promotion of liberty, autonomy, selfhood, and human relations and furthering the existence of a free society."<sup>251</sup> In his recent

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mation on New York registrants "hand transcribed" by volunteers from Parents for Megan's Law organization) (last visited Oct. 10, 2000); (Nicole Brodeur, *Looking Backward, Staying Alert*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 8, 1998, at B1 (recounting the rapid spread of information as a result of private citizen's effort to print registry information from web site and contact community members about a particular registrant)).

248. See Rich Calder, *Technology Aids Sex-Offender Alerts*, May 24, 1999, available at <http://www.apbnews.com> (last visited Sept. 24, 2000).

249. As Ruth Gavison has observed, "privacy is seldom protected in the absence of some other interest." Ruth Gavison, *Privacy and the Limits of the Law*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 346, 348 (Ferdinand David Schoeman ed., 1984) [hereinafter Schoeman].

250. Fried, *supra* note 232, at 203, 218.

251. GAVISON, *supra* note 249, at 347; see also DAVID BRIN, *THE TRANSPARENT SOCIETY: WILL TECHNOLOGY FORCE US TO CHOOSE BETWEEN PRIVACY AND FREEDOM?* 79 (1998) (describing privacy as "a wonderful, highly desirable benefit of freedom"); JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* 44 (1997) (observing that "liberty, privacy, and autonomy are distinct concepts that overlap in their extensions"); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 1000 (1964) (stating "[i]ntrusion and public disclosure are merely alternative forms of injury to individual freedom and dignity").

Even more fundamentally, numerous commentators have noted the sociobiological origins of the need for privacy. See, e.g., Alan Westin, *The Origins of Modern Claims to Privacy*, in Schoeman, *supra* note 249 at 56-74; see also *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (Ga. 1905) (noting that privacy has "its foundation in the instincts of nature" and natural law).



book Charles Sykes writes that "[p]rivacy enables free, autonomous individuals to interact freely and equally."<sup>252</sup> Political scientist John Hall identifies a similarly crucial relation, stating that "two facts give the individual a meaningful sense of freedom: his ability to control information about himself and his right to choose to separate the audiences before whom he can play separate roles."<sup>253</sup>

Conceived in this way, registration and notification surely impose restraints plainly not shared by the public generally. The laws single out for branding particular citizens, on the basis of acutely stigmatizing information. As a consequence, registrants lose the critical right to manage their personal and social identities,<sup>254</sup> experiencing a loss of "self-ownership," which Jeffrey Reiman notes flows from unlicensed informational disclosure:

Privacy conveys to the individual his self-ownership precisely by the knowledge that the individual gains of his ability and his authority to withdraw himself from the scrutiny of others. Those who lose this ability and authority are thereby told that they don't belong to themselves; they are specimens belonging to those who would investigate them.<sup>255</sup>

In the eyes of their fellow citizens registrants thus become little more than a despised fragment of themselves—a synecdoche,<sup>256</sup> which deprives them of the individuality thought essential to

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252. SYKES, *supra* note 164, at 227; see also Gavison, *supra* note 249, at 362 (observing "privacy is central to the attainment of individual goals under every theory of the individual that has ever captured man's imagination").

253. JOHN A. HALL, *LIBERALISM: POLITICS, IDEOLOGY AND THE MARKET* 86-87 (1988). For additional discussions of the relation between privacy and the exercise of political autonomy, see SYKES, *supra* note 164, at 84-85; Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 732-33 (1999).

254. See GOFFMAN, *supra* note 218, at 41-72 (discussing the empowering effect on personal identity of uncontrolled information disclosure).

255. See Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed By the Highway Technology of the Future*, 11 SANTA CLARA COMPUTER & HIGH TECH. L.J. 27, 39 (1995); see also *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 37 (Cal. 1971) (citations omitted) ("The claim is not so much one of total secrecy as it is of the right to define one's circle of intimacy to choose who shall see beneath the quotidian mask. Loss of control over which 'face' one puts on may result in literal loss of self-identity, and is humiliating beneath the gaze of those whose curiosity treats a human being as an object.").

256. See HELEN MERRELL LYND, *ON SHAME AND THE SEARCH FOR IDENTITY* 50 (1958) (stating "[t]he thing that has been exposed is what I am").

liberated social existence.<sup>257</sup> The unrelenting privacy deprivation thus has an inevitable stunting effect.<sup>258</sup>

The preceding discussion, of course, assumes that one's status as a convicted criminal is somehow "private," a notion at apparent odds with the inherently "public" nature of the criminal justice process. In its 1989 decision in *United States Department of Justice v. Reporters' Committee for Freedom of the Press*,<sup>259</sup> however, the Supreme Court rejected the view that individuals lack privacy interests relative to information contained in publicly reposed criminal records. In *Reporters' Committee*, journalists filed a Freedom of Information Act (FOIA) request to obtain the "rap-sheet" of a specified individual believed to have ties to organized crime.<sup>260</sup> The Court concluded that the release would jeopardize a privacy expectation, despite the otherwise "public" nature of the assembled information: "Plainly there is vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."<sup>261</sup> In dismissing what it referred to as a "cramped notion of personal privacy,"<sup>262</sup> the *Reporters' Committee* Court emphasized that "the fact that an event is not wholly private does not mean that

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257. See Fried, *supra* note 232, at 210 (observing that privacy in its "dimension of control over information is an aspect of personal liberty"); Gavison, *supra* note 249, at 363-64 (stating that privacy "functions to promote liberty of action"); *id.* at 365-66 ("Privacy enables individuals to establish a plurality of roles and presentations to the world. This control over 'editing' one's self is crucial, for it is through the images of others that human relations are created and maintained.").

258. See SYKES, *supra* note 164, at 221 ("The erosion of privacy asphyxiates private life as it contracts the distance that separates individuals from one another and from the state."); Kreimer, *supra* note 200, at 71 ("Unwanted observation by others is itself a limitation of autonomy . . . . [T]he power of the state to inflict the [associated] sense of vulnerability is itself a sanction."). See generally Bloustein, *supra* note 251, at 1003 (arguing that the dignity-effacing aspect of privacy deprivations serves to limit individual liberty because it deprives persons of their individuality and human dignity).

259. 489 U.S. 749 (1989).

260. A "rap-sheet" typically reflects an individual's date of birth, physical description, and history of arrests, charges, conviction, and sentences. *Id.* at 752.

261. *Id.* at 764.

262. *Id.* at 763.

the individual has no interest in limiting disclosure or dissemination of the information.”<sup>263</sup>

Five years later, the Court again examined whether privacy is jeopardized by governmental disclosure of technically “public” information, this time home addresses, yet another form of information subject to disclosure under current notification laws. In *United States Department of Defense v. Federal Labor Relations Authority*,<sup>264</sup> the Court concluded that citizens enjoyed a privacy expectation relative to their home addresses sufficient to warrant rejection of a FOIA request for such information.<sup>265</sup> The Court downplayed the fact that the addresses themselves were otherwise publicly available in telephone directories and voter registration lists, stating “[a]n individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form.”<sup>266</sup> Privacy was of special concern, the majority reasoned, because the disclosures (in this instance of non-union members’ home addresses to union officials) threatened unwarranted intrusions into the home (by means of unsolicited mailings, phone calls or visits), a domain “accorded special consideration in our Constitution, laws, and traditions.”<sup>267</sup>

Although both *Reporters’ Committee* and *Federal Labor Relations Authority* arose in the statutory context of FOIA, and hence cannot be interpreted to support a per se constitutional right to informational privacy, the decisions underscore the Court’s sensitivity to the privacy issues implicated by the release of conviction and home address information in particular. Even presuming that such disclosures do not jeopardize a constitutional right,<sup>268</sup> they do, in the guise of community notification, differentially affect registrants relative to their fellow citizens. Notification, as the New Jersey Supreme Court has recognized, “link[s] various bits of information—name, appearance, address and crime—that

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263. *Id.* at 770.

264. 510 U.S. 487 (1994).

265. *Id.* at 502.

266. *Id.* at 500.

267. *Id.* at 501.

268. *But see* Paul P. v. Verniero, 170 F.3d 396, 404 (3d Cir. 1999) (noting the “general understanding that home addresses are entitled to some privacy protection whether or not so required by statute”).

otherwise might remain unconnected.”<sup>269</sup> The information conveyed is “public” only in a most narrow, technical sense:

However public any of those individual pieces of information may be, were it not for the Notification Law, those connections might never be made. . . . Those convicted of crimes may have no cognizable privacy interest in the fact of their conviction, but the Notification Law, given the compilation and dissemination of information, nonetheless implicates a privacy interest. The interests in privacy may fade when the information is a matter of public record, but they are not non-existent.<sup>270</sup>

Moreover, if the threat of unsolicited mailings and phone calls was enough to trigger privacy concerns in *Federal Labor Relations Authority* when home address information was to be spread,<sup>271</sup> the well-documented history of vigilantism and harassment suffered by registrants surly warrants some recognition in the habeas analysis.<sup>272</sup>

In short, in both a practical and metaphysical sense, the privacy-stripping effects of registration and notification satisfy the custody jurisdictional requirement. Although the police powers of government arguably entitle it to single out persons convicted of particular crimes for perpetual suspicion,<sup>273</sup> this

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269. *Doe v. Poritz*, 662 A.2d 367, 411 (N.J. 1995).

270. *Id.*; see also *Artway v. Attorney Gen.*, 876 F. Supp. 666, 689 (D.N.J. 1995) (“[U]nlike previous access provisions, registration and public notification ensure that, rather than lying potentially dormant in a courthouse record room, a sex offender’s former mischief whether habitual or once-off shall remain with him for life, as long as he remains a resident of New Jersey.”); *Boutin v. LaFleur*, 591 N.W.2d 711, 718 (Minn. 1999) (“While it is true that the information regarding [petitioner’s] case is available to the general public in the form of court documents, there is a distinct difference between the mere presence of such information in court documents and the active dissemination of such information . . .”).

For instances of other courts also recognizing a privacy interest as being jeopardized by the bundle of information made available by notification see, e.g., *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999); *Roe v. Farwell*, 999 F. Supp. 174, 197-98 (D. Mass. 1998).

271. See *Federal Labor Relations Auth.*, 510 U.S. at 500-501.

272. See *supra* notes 191-196 and accompanying text; see also *Poritz*, 662 A.2d at 409 (“[W]here as a result of the information disclosed under the Notification Law, plaintiff may be exposed to uninvited harassment, we conclude that disclosure of plaintiff’s home address, particularly when coupled with the other information disclosed, implicates a privacy interest.”).

273. Basic notions of utilitarianism and democratic liberalism, however, would militate against such a position. Professor George Fletcher recently noted:

Punishment as an imperative of justice hardly makes sense if the

program of punishment fails to include an opportunity for the offender's reintegration into society. There is no point to the metaphor of paying one's debt to society unless the serving of punishment actually cancels out the fact of having committed the crime. The idea that you pay the debt and be treated as a debtor (felon) forever verges on the macabre.

George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Use of Infamia*, 46 UCLA L. REV. 1895, 1907 (1999); see also *People v. Pieri*, 199 N.E. 495, 499 (N.Y. 1936) (Cardozo, J.) ("Persons who have been convicted of crime and served the sentence imposed are not thereafter barred from society or intercourse with other human beings; they are not outcasts, nor to be treated as such."); Whitman, *supra* note 201, at 1090 (noting the "dignity of the one-shot transaction the dignity that arises from our marketplace right to complete one deal and move on to the next one, the dignity that comes from our right to pay off a debt once and for all and be done with our creditor").

Jurisprudential support for this position is evidenced in recognition of the "private facts" tort relating to the publication of old arrest and conviction information. The tort was first recognized in *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971). *Briscoe* concerned an article published by Reader's Digest entitled "The Big Business of Highjacking," which mentioned Briscoe by name and detailed the events leading to his prior conviction for truck highjacking. As a result of the publication, Briscoe's 11-year-old daughter, as well as his friends, learned of his criminal history for the first time. After first noting that dissemination of the names of current criminal suspects and the circumstances of their alleged crimes warranted First Amendment protection, *id.* at 39, the court held that fairness and the interest in criminal rehabilitation warranted a different outcome with respect to past criminal activity:

The masks we wear may be stripped away upon the occurrence of some event of public interest. But just as the risk of exposure is a concomitant of urban life, so too is the expectation of anonymity regained. It would be a crass legal fiction to assert that a matter once public never becomes private again. . . .

Plaintiff is a man whose last offense took place 11 years before, who has paid his debt to society, who has friends and an 11-year-old daughter who were unaware of his early life - - a man who assumed a position in "respectable" society. Ideally, his neighbors should recognize his present worth and forget his past life of shame. But men are not so divine as to forgive the past trespasses of others, and plaintiff here therefore endeavored to reveal as little as possible of his past life. Yet, as if in some bizarre canyon of echoes, petitioner's past life pursues him through the pages of Reader's Digest, now published in 13 languages and distributed in 100 nations . . . .

*Id.* at 41-42. See generally RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 10:37-10:54 (2d ed. 2000); John A. Jurata, Comment, *The Tort That Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489 (1999).

right does not warrant analytic disregard of the intrusive effects of modern registration and notification schemes for purposes of habeas jurisdiction. They subject registrants to privacy intrusions not endured by the public at-large, for as long as their lifetimes.

#### IV. HABEAS AS AN EVOLUTIONARY DEVICE

As the preceding discussion establishes, registration and notification impose a unique litany of tangible and intangible constraints on liberty. Even if one were to accept the Ninth Circuit's dispositive emphasis on tangible physical constraints,<sup>274</sup> the laws plainly require registrants to satisfy affirmative requirements not demanded of others, and otherwise impose distinct restrictions. Moreover, in intangible yet perhaps more invasive ways, registrants experience manifold other unique burdens—including expulsion, psychological containment, and intrusions on privacy—that are surely no less disabling. Together, like the effects of Bentham's mythic Panopticon, the constraints gain their strength through the pervasive power of information and its use. Registrants are compelled to supply and periodically update information, and this information is used by police and the community at-large to exercise control over registrants, a technique very much in keeping with broader penal and cultural trends.

Given these trends, it is only proper that habeas jurisprudence evolve in a synchronous fashion, for, as the Court observed over thirty years ago, "the development of the writ of habeas corpus did not end in 1789."<sup>275</sup> Rather, as Justice Black stated for the Court in its 1963 decision in *Jones v. Cunningham*,<sup>276</sup> the scope of habeas "has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty."<sup>277</sup> If these benchmarks still apply, then developments

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274. It bears mention that at least one member of the current Court appears inclined to subscribe to the physical restraint requirement. See *Justices of Boston Mun. Ct. v. Lydon*, 466 U.S. 294, 339 (1984) (O'Connor, J., concurring) (opining that the custody requirement is satisfied only when petitioner "is under physical restraint or under a legal restraint that can be converted into a physical restraint without a further judicial hearing").

275. *Peyton v. Rowe*, 391 U.S. 54, 66 (1968).

276. 371 U.S. 236 (1963).

277. *Id.* at 243; see also *Slack v. McDaniel*, 120 S. Ct. 1595, 1603 (2000) ("The writ of habeas corpus plays a vital role in protecting constitutional

in the preferred methods of social control must be reflected in judicial understandings of the custody jurisdictional requirement. Just as a century ago technological innovations in the gathering and spread of information compelled the common law right to privacy to distance itself from the requirement that persons suffer actual physical intrusion,<sup>278</sup> today the government's use of information to exert social control warrants an analogous evolution in habeas jurisprudence.<sup>279</sup>

In the final analysis, it must be recognized, habeas is a "high prerogative writ"<sup>280</sup> the *raison d'être* of which is to afford relief to those petitioners who as a result of governmental intervention suffer "substantial restraints not suffered by the public generally."<sup>281</sup> Just how "substantial" restraints must be, of course, is a question of degree and one that ultimately falls to the judiciary.<sup>282</sup>

Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment . . . .<sup>283</sup>

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rights."); *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (stating that the custody requirement has been "defined broadly to effectuate the purposes of the writ").

278. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

279. See Kreimer, *supra* note 200, at 5 (noting that "[t]he expansion of government knowledge translates into an increase in the effective power of government").

280. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830); 3 WILLIAM BLACKSTONE, COMMENTARIES \*131.

281. *Lehman v. Lycoming County Children's Serv. Agency*, 458 U.S. 502, 510 (1982).

282. Although habeas is of statutory origin, the judiciary has been the main animating force behind its ongoing evolution as basis for redress against unlawful limits on personal liberty. See *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1072 (1970) (footnote omitted) ("[S]ince the custody concept, taken from the common law heritage of the writ, has not been defined in the statute, the courts have not felt constrained by the statute in their elaboration of its meaning."); see also Yackle, *supra* note 11, at 1009 (stating the custody requirement has "quickly [given] ground whenever it threatened to interfere with the development of an effective system of postconviction review").

283. *Fay v. Noia*, 372 U.S. 391, 401-02 (1963); see also Poodry v.

With this humanistic gauge in place, one would be hard-pressed to find a federal judge anywhere in the land who would honestly deem the consequences of registration and notification, pervasive modern incarnations of informational sanctions, as anything but substantial and intolerable.

### CONCLUSION

As the popular media incessantly remind us, American society is in the "information age," a time when mass collection, storage, and use of personal data dominate the social, political, and commercial realms.<sup>284</sup> While sounding alarm over the expansive yet often subtle intrusions attending this shift, most commentators are quick to recognize the benefits: our new information-based society offers much in terms of efficiency, cost savings, and ease of living.<sup>285</sup>

It should thus come as no surprise that the criminal justice system has likewise perceived the utility of information as a method of social control. Faced with burgeoning prison populations, and wanting to extend its reach for as long as possible over offenders (beyond the temporal limits of probation and parole), the justice system has vigorously embraced registration and community notification. As a consequence, hundreds of thousands of sex offenders are now the subject of

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Tonawanda Band of Seneca Indians, 85 F.3d 874, 894 (2d Cir. 1996) ("A court [must] judge the 'severity' of an actual or potential restraint on liberty."); *Harts v. Indiana*, 732 F.2d 95, 96 (7th Cir. 1984) ("[W]hether someone who is not under physical constraint can be considered in custody depends on the amount of restriction placed on his or her individual liberty.").

284. See, e.g., Peter McGrath, *If All the World's a Computer...*, NEWSWEEK, Jan. 1, 2000, at 72. This shift in turn has triggered new understandings of privacy. As one commentator recently noted, "[w]here once the issue of 'privacy' was primarily having to do with one's physical seclusion, one's personal domain, and one's physical withdrawal from society's gaze, it has now come to include access to information about one's self." Robert A. Reilly, *Conceptual Foundations of Privacy: Looking Backward Before Stepping Forward*, 6 RICH. J.L. & TECH. 6, 39 (1999), available at <http://www.richmond.edu/jolt/v6:2/article1.html> (last visited Sept. 24, 2000). For discussions of the dramatic impact of new technologies on informational privacy more generally, see, e.g., Steven C. Carlson & Ernest Miller, *Public Data and Personal Privacy*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 83 (1999); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193 (1998).

285. See, e.g., Joshua Quittner, *Invasion of Privacy; Our Right to Be Left Alone Has Disappeared, Bit by Bit, in Little Brotherly Steps. Still, We've Got Something in Return and It's Not All Bad*, TIME, Aug. 25, 1997, at 28.



ongoing state control and community opprobrium,<sup>286</sup> often for their lifetimes.<sup>287</sup> This population includes not just persons convicted of violent sex crimes (including attempts), but also a broad array of relatively minor offenses, including those of a consensual and/or non-violent nature (e.g., obscenity, peeping, bigamy, indecent exposure, and sodomy),<sup>288</sup> and criminal acts vaguely deemed to involve a sexual "motivation" or "gratification."<sup>289</sup> However, as discussed, while today it is principally sex offenders that are targeted, there is good reason to expect that it is only a matter of time before other criminal sub-populations will also experience the informational

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286. See *Megan's Law in All 50 States*, available at <http://www.klaaskids.org/pg-legmeg.htm> (providing state-by-state numerical overview of persons currently subject to registration and notification) (last visited Sept. 24, 2000).

287. Included in this group is a significant share of persons subjected to registration and notification after having been released from prison or jail years, sometimes decades, before implementation of the registration and notification laws in the 1990s. This is because at least sixteen states impose registration requirements retroactively, with no time restriction, a situation that sweeps up many persons convicted of non-violent, consensual sex crimes heretofore the subject of aggressive police enforcement. See Robert L. Jacobson, Note, "*Megan's Laws*" Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 GEO. L.J. 2431, 2467 (1999). However, because of the recently imposed one-year statute of limitations period on habeas petitions, such claims would likely be time-barred. See 28 U.S.C. § 2244(d) (1994 & Supp. II 1997); *Brown v. Odea*, 187 F.3d 572, 576 (6th Cir. 1999) (holding that petitioners whose convictions were final before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 have one year from April 24, 1996 to file); *Ross v. Artuz*, 150 F.3d 97, 102-03 (2d Cir. 1998) (same).

288. See *supra* note 168 and accompanying text.

289. See, e.g., ARIZ. REV. STAT. ANN. § 13-3821(C) (West 2000) ("sexual motivation"); IND. CODE ANN. § 5-2-12-4(1)(E) (Michie 2000) ("vicarious sexual gratification"); KAN. STAT. ANN. § 22-4902(c)(14) (Michie 2000) ("sexually motivated"). The Minnesota registration and notification law extends to enumerated offenses, as well as "another offense arising out of the same set of circumstances." MINN. STAT. § 243.166(a)(1) (2000).

In addition to the broad, over-inclusive sweep of the laws, there is increasing evidence that the massive governmental effort associated with their operation is ensnaring and mis-branding individuals who, although convicted of crimes related to a statutorily enumerated offense, do not fall within their legal ambit. See, e.g., Anne Krueger, *Convicted Rapist Sues Over Being Wrongly Labeled a Child Molester*, SAN DIEGO UNION-TRIBUNE, April 17, 1999, at B-3; Louise Palmer, *Megan's Law Often Brands Wrong People: Hundreds Challenge Registry*, TIMES-PICAYUNE (New Orleans), Oct. 12, 1997, at A10; cf. *Akella v. Michigan Dep't of State Police*, 67 F. Supp. 2d 716, 731-32 (E.D. Mich. 1999) (denying due process claim of homeowners whose address was wrongly listed on the Michigan sex offender registry).

panopticon. Because registration and notification laws have proved virtually impregnable to constitutional challenge,<sup>290</sup> and only very rarely are individuals afforded the right to contest the legal requirement that they register and be subject to notification,<sup>291</sup> habeas availability assumes critical importance.<sup>292</sup> The availability of habeas assumes added

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290. See *supra* notes 89-95 and accompanying text.

291. See Logan, *supra* note 74, at 626-33 (discussing the limited availability of statutory rights of appeal or administrative review of classification decisions).

292. No discussion of available federal relief would be complete without brief mention of two potentially alternate remedial avenues: 42 U.S.C. § 1983 and the writ of *coram nobis*. For its part, however, § 1983 is neither intended nor designed to free citizens from wrongful "custody," but rather is designed to afford legal and equitable relief for constitutional wrongs of governmental actors. See Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 104 (1988) (noting that "[r]elease from custody lies at the heart of the habeas corpus remedy. That relief, however, is not available in a civil rights action"); see also Allen v. McCurry, 449 U.S. 90, 104 (1980) (stating that the purpose of habeas is "not to redress civil injury, but to release applicant from unlawful physical confinement").

*Coram nobis*, on the other hand, much like habeas serves as a basis to vacate a conviction, and importantly, carries no express requirement that a petitioner be in "custody." However, *coram nobis* like habeas is an "extraordinary remedy," which courts are loath to extend. As the Supreme Court recently noted, the writ was

traditionally available only to bring before the court factual errors "material to the validity and regularity of the legal proceeding itself," such as the defendant's being under age or having died, before the verdict. . . . "[I]t is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate."

Carlisle v. United States, 517 U.S. 416, 429 (1996) (citations omitted). Moreover, as noted by one commentator, relief under *coram nobis* itself entails an exacting standard:

Because the justification of habeas corpus ends with the completion of custody, the petitioner for a writ of *coram nobis* must show a continuing civil disability that is serious enough to substitute for the custody requirement. The governing theory is that the writ of *coram nobis* should be reviewed under at least as stringent a standard as the writ of habeas corpus.

M. Diane Duszak, *Post-McNally Review of Invalid Convictions Through the Writ of Coram nobis*, 58 FORDHAM L. REV. 979, 986 (1990); see also United States v. Morgan, 39 F.R.D. 323, 327 (N.D. Miss. 1966) (stating that *coram nobis* is "not merely a means of evading the jurisdictional prerequisites" of habeas). Finally, and of particular significance to the discussion here given

significance because jurisdictions in recent years have in substantial part abolished parole,<sup>293</sup> a legal condition recognized to satisfy the habeas custody requirement.<sup>294</sup> As a result, thousands of citizens will be barred from collaterally challenging the constitutional validity of their underlying criminal judgments, which have rendered them subject to coercive governmental control, potentially for their lifetimes.<sup>295</sup>

The Great Writ (what remains of it), true to its historic role as a guarantor of personal liberty against unjustified governmental restraints, must keep pace with the advent of this new form of social control. What potentially stands in the way, however, is the jurisdictional requirement of "custody," which itself has evolved over time from its initial requirement that a petitioner's "body" be physically restrained. Today, federal courts must evaluate whether the petitioner suffers "substantial restraints" not "suffered by the public generally." Conceived in these terms, judicial interpretations of custody that look exclusively to tangible, physical constraints, such as that evinced by the Ninth Circuit in *Williamson*,<sup>296</sup> *Henry*,<sup>297</sup> and *McNab*,<sup>298</sup> are simply anachronistic and not in keeping with the fundamental purpose of the writ.

When almost forty years ago in *Jones v. Cunningham*<sup>299</sup> the Supreme Court disavowed the narrow carceral requirement, it at once signaled its sensitivity to the expansive breadth of the government's corrective reach, and, to the minds of some,

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the overwhelming disproportion of state sex offenders, coram nobis is available only to federal petitioners. See Yackle, *supra* note 15, § 35, at 162.

293. See generally MICHAEL TONRY, SENTENCING MATTERS 3-99 (1996) (discussing limits); SENTENCING REFORM IN OVERCROWDED TIMES: A COMPARATIVE PERSPECTIVE 3-121 (Michael Tonry & Kathleen Hatlestad eds., 1997) (same).

294. See *Jones v. Cunningham* 371 U.S. 236, 242-43 (1963).

295. Although likely less common, refusal to deem the custody requirement satisfied also effectively bars consideration of any irregularities associated with the all-important classification determinations made by local authorities, when a jurisdiction's statutory law provides for such discretionary determinations. See Logan, *supra* note 74, at 602-19 (describing various approaches used to classify offenders for registration and notification purposes).

296. 151 F.3d 1180 (9th Cir. 1998).

297. 164 F.3d 1240 (9th Cir. 1999), *cert. denied sub. nom.* *Henry v. Lockyer*, 120 S. Ct. 397 (1999).

298. 170 F.3d 1246 (9th Cir. 1999) (*per curiam*).

299. 371 U.S. 236 (1963).

untethered the custody requirement from any meaningful limit.<sup>300</sup> However, the custody requirement remains,<sup>301</sup> and arguably properly so.<sup>302</sup> By abandoning tangible physical constraint as the sine qua non of custody, the Court freed the federal judiciary to extend relief in response to the evolving efforts of government to control deviance.<sup>303</sup> And in so doing, it allowed the writ to retain the necessary flexibility to address emerging governmental forms of social control, and thus preserve some of its greatness for times to come.

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300. Indeed, the Court's disavowal of the tangible physical restraint test has inspired some to question retention of the custody requirement altogether. See, e.g., Yackle, *supra* note 11, at 1003 (observing that "[a]rguments for the abandonment of the 'custody' doctrine are powerful"); Timothy C. Hester, Comment, *Beyond Custody: Expanding Collateral Review of State Convictions*, 14 U. MICH. J.L. REFORM 465, 473 (1981) (arguing that "[p]arties not in custody . . . cannot be presumed to present less meritorious or significant constitutional claims than persons in custody").

301. See *Spring v. Cladwell*, 692 F.2d 994, 996 (5th Cir. 1982) ("The concept of custody has been relaxed considerably by the Supreme Court . . . . Nonetheless, the custody requirement has not lost all meaning.").

302. See *Waste Management of Wis., Inc. v. Fokakis*, 614 F.2d 138, 140-41 (7th Cir. 1980) (stating the requirement "represents the balance Congress struck between the interests of the individual in remaining free of unlawful intrusion on his physical freedom and the state courts' interest in remaining free of interference with their final judgments"); LIEBMAN & HERTZ, *supra* note 15, § 2.4(e), at 83-84 ("The 'custody' requirement provides a sensible rationing principle . . . . [I]t provides a sensible proxy for the nationally important questions whose prior resolution has in fact jeopardized nationally important interests.").

Government-imposed sanctions in the form of license forfeitures and fines, for instance, would stretch beyond plausibility constructions of the express "custody" contained in the several habeas petitions. See, e.g., 28 U.S.C. § 2241(c) (specifying "[t]he writ . . . shall not extend to a prisoner unless . . . [h]e is in custody . . . ."); see also *supra* notes 35-37 and accompanying text (discussing decisions rejecting fines and license forfeitures as forms of "custody" for habeas purposes). Interestingly, however, the federal habeas statute governing alleged unlawful deprivations by states speaks of a "person" not "prisoner," in custody, perhaps suggesting application of a more liberal test. See 28 U.S.C. § 2254(a) (emphasis added). Compare 28 U.S.C. § 2255 (extending habeas relief to "a prisoner in custody under sentence" imposed by a federal court) (emphasis added).

303. See *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (observing that "custody" has been "defined broadly to effectuate the purposes of the writ").

