

# NOTES

## BADGERING “SEX OFFENDERS”:

### PROBLEMS WITH WISCONSIN’S SEX OFFENDER REGISTRY AND THE MANDATORY REGISTRATION FOR NON-SEXUAL CRIMES

*Laura Marie Crylen\**

INTRODUCTION.....	375
I. HISTORY OF SEX OFFENDER LEGISLATION.....	377
II. WISCONSIN’S SEX OFFENDER REGISTRY.....	383
Non-Sexual Offenses.....	383
State v. Smith.....	384
III. PROPOSALS FOR REFORM.....	389
CONCLUSION.....	394

#### INTRODUCTION

There are modern day pariahs that walk among us. However, despite the havoc that mere knowledge of their presence may cause throughout the community, they are impossible to pick out of a crowd. These individuals have been convicted of sex crimes and they face some of the most extensive penalties of all convicted criminals.<sup>1</sup> Not only does the label “sex offender” carry serious and life-long stigmatization, but it also requires continual monitoring measures, even upon serving out the entirety of their sentences.<sup>2</sup> While these procedures may be collectively accepted as necessary in order to secure a safe environment and to protect the nation’s citizens, it also underscores the importance of ensuring that those who face these measures are, in fact, as dangerous as they

---

\* Juris Doctor Candidate, 2011, Notre Dame Law School. I would like to thank my family for their love and encouragement. I would also like to thank Michael Julien for his enduring support. Finally, special thanks to Daniel Nora for the title’s inspiration and Megan Irving for her editing during the final stages.

1. *See generally*, Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16911 (2006).

2. *See generally* Jacob Wetterling Crimes Against Children Act, 42 U.S.C. § 14071 (2006); WIS. STAT. § 301.45 (2005-06). These measures have been upheld as constitutional because they are part of a “civil regulatory scheme” and are not “criminally punitive.” However, their practical effects continue for years after the offender has “paid their debt” to society. In addition to the registration requirement, sex offenders also face continued monitoring efforts. *See e.g.*, Smith v. Doe, 538 U.S. 84, 95 (2003) (classifying the regulatory scheme as civil and upholding Alaska’s sex offender registry as constitutional).

are purported to be. This poses a problem with the sex offender registries that are currently in effect. The registries, as established, illustrate a disconnect between the statutorily defined “sexual offense” and the colloquial understanding of “sexual offender.”<sup>3</sup> Resulting from this is a subset of individuals who fall within the overly broad category of sex offenders, but whose actual crimes, while repugnant, contain no sexual element. These individuals are often treated exactly the same, both legally and within the community, as those who have truly engaged in a sexual offense.

This analysis will focus specifically on Wisconsin’s sex offender statute because it illustrates two significant shortcomings that arise when constructing these laws. In a state that prides itself in its progressive movements and being at the forefront of social issues, it should not be surprising that Wisconsin has taken notable initiatives by proactively creating some of the nation’s most stringent sex offender laws.<sup>4</sup> However, despite the State’s good intentions, there are serious flaws in the way the statute is currently constructed. Like many other states receiving federal crime grant funding, the Wisconsin statute includes kidnapping and false imprisonment within the list of enumerated sex offenses, and mandates they be registered as sex offenders, despite the fact that those crimes contain no sexual element.<sup>5</sup> The inclusion of these offenses raises an important set of constitutional challenges; specifically concerning a person’s right to due process and equal protection under the law. First, this analysis will focus on the constitutional challenges posed by the overly broad definition of “sex offender” and examine how it threatens the very notion of a criminal justice system that rests upon a presumption of innocence.<sup>6</sup> Second, this

---

3. The most common association with the term “sex offender” tends to be that of an individual who targets children. This may be perpetuated, in part, by the fact that the original intent of the registries was to protect children, and in many states, the registry is juxtaposed on the website near a section discussing “crimes against children.” See Laura Kliewer, *New Sex Offender Laws Attack Crimes Against Children in a Variety of Ways*, FIRSTLINE MIDWEST (June 2006) (focusing on sex offender legislation addressing crimes against children in the Midwest). Even to those who may accept a broader definition of “sex offender”, it certainly should not extend so far as to encompass crimes that contain no sexual element. The archetype of the “sexual predator” has largely been attributed to the media’s sensationalism of an unrepresentative sample of sexual crimes. See also, ERIC S. JANUS, *FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTATIVE STATE*, 3–4 (Cornell Univ. Press 2006).

4. In a study performed by the University of Florida, Wisconsin’s registry is ranked as “mostly open” in a study measuring the amount of information that sex offenders were required to provide to the public. In making this determination, the study examined what type of information offenders were required to report, and how readily accessible it was to the public. See Press Release, Cathy Keen, *UF Research: No State Completely Open About Convicted Sex Offenders* (Jan. 25, 2007), <http://www.citizenaccess.org/sexpredpress.html> (last visited Feb. 18, 2010). Additionally, the current governor of Wisconsin, Jim Doyle, has campaigned for raising public awareness and creating more stringent laws focusing especially on those offenders who have been deemed non-compliant. See Carla Vigue, Press Release, *Governor Doyle Announces Over 3,000 Non-Compliant Sex Offenders Located: State Sex Offender Registry Compliance Rate Leads the Nation* (June 3, 2009), [http://www.wisgov.state.wi.us/journal\\_media\\_detail.asp?locid=19&prid=4294](http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=4294) (last visited Feb. 18, 2010).

5. 42 U.S.C. § 14071(a)(3)(A)(i)-(ii) (2006) (categorized as a “criminal offense against a victim who is a minor” a “kidnapping of a minor, except by a parent” and “false imprisonment of a minor, except by a parent”).

6. See *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (stating “[the] presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice”). However, sexual offenders continue to be treated differently in this regard as

analysis will focus on the inequities in mandated compliance with these laws and establish that many of these statutes threaten the constitutional liberties of the convicted.<sup>7</sup> This analysis will then conclude by suggesting comprehensive reform efforts for Wisconsin's sex offender registry that will minimize these concerns while still effectively serving its underlying goals.

## I. HISTORY OF SEX OFFENDER LEGISLATION

Sex offender legislation and regulation is a relatively new phenomenon. Until the last two decades, there were no federal laws mandating sex offender registration and the individual states were responsible for much of the monitoring process.<sup>8</sup> Deciding who is classified as a sex offender is an important determination because it consequently affects where a person may live, work, and with whom they may associate.<sup>9</sup> Sex offender laws gained national attention following a string of tragic incidents that occurred in the 1990s.<sup>10</sup> After the shocking kidnappings, rapes and deaths of a number of children, the nation was outraged and legislatures reacted quickly by drafting sex offender laws with stringent penalties. These laws proved to be well-

---

well. For example, the Federal Rules of Evidence have set forth three rules pertaining specifically to sex offenders (Rules 413-15) that supersede the general protections provided by Rule 403. *See* Fed. R. Evid. 403, 413-415.

7. Due to the limited scope of this article, not all constitutional issues raised by these registries will be addressed. However, there are other notable defects in the current registries. For example, some states' registries subject juveniles to many of the same long-term monitoring requirements as adults, despite the fact that juvenile records are typically expunged when a minor reaches eighteen. *See* Phoebe Geer, *Justice Served? The High Cost of Juvenile Sex Offender Registration*, 27 DEV. MENTAL HEALTH L. 33, 40-43 (2008) (discussing the distinctions between adult and juvenile offenders). Another argument addresses the overbreadth of the registries and how they consequently violate the offenders' right to privacy by pointing out instances in which convicted offenders have been stalked and killed in their homes as a result of the published personal information. *See* Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?* 34 N. ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 30-31 (2008) (discussing a variety of cases where individuals used the registry to stalk and kill sex offenders at random). There is also the concern that residency requirements (forbidding offenders from living within a certain distance from a school) essentially exiles offenders from certain communities thereby concentrating them in other areas. *See, e.g.* Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 520-21 (2009) (describing these governmental restrictions as "banishment by exclusion" and discussing the negative consequences in doing so).

8. The federal government's increased involvement with these issues has raised questions of federalism in many different areas in which the law regulates. For a general discussion on these issues, *see generally* Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51 (2008).

9. Individual communities within the state are able to create their own requirements, so long as they remain in compliance with the baseline set forth by state statute. For example, in the Village of Oostburg in Sheboygan County, Wisconsin, a city ordinance prescribed that there was a "compelling interest to promote, protect, and improve the health, safety, and welfare of the citizens of the Village" and set forth specific residency restrictions for that community. *See* Village of Oostburg, Wi., Ordinance No. 11-2008 (Oct. 13, 2008), available at [http://www.oostburg.org/government/pdfs/Section\\_2.12\\_-\\_Sexual\\_Offender\\_Residency\\_Ordinance.pdf](http://www.oostburg.org/government/pdfs/Section_2.12_-_Sexual_Offender_Residency_Ordinance.pdf).

10. While these incidents are in the minority of all sexual assaults, the names of these children continue to be invoked by the legislature to justify strengthening current measures. *See Sex Offender Notification and Registration Act (SORNA): Barriers to Timely Compliance by States: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary*, 111th Cong. 283 (2009) (statement of Evelyn Fortier, Vice President for Policy, (RAINN) Rape, Abuse & Incest National Network).

avored and passed quickly through Congress because they did not face the normal partisan divide.<sup>11</sup> The main purpose of these laws was to provide the public with information about dangerous individuals in order to ensure the safety of children and adults alike.<sup>12</sup> The Internet has proven to be a valuable tool in this endeavor because of its ability to disseminate messages rapidly to a widespread audience.<sup>13</sup> Today, the federal government continues to consider “sex offender management” a top priority both because of the heinousness of the crimes as well as the ability of such acts to capture both media and public attention.<sup>14</sup> The Department of Justice has even delegated specific branches which deal exclusively with sex offenders.<sup>15</sup>

The Violent Crime Control and Law Enforcement Act of 1994 was the first major piece of legislation passed.<sup>16</sup> It was the nation’s first law to comprehensively address sex offenders.<sup>17</sup> Within this Bill was the Jacob Wetterling Act, which, most significantly encouraged all states to create a sex offender registry.<sup>18</sup> If a state did not create a registry within three years of the

---

11. Laws against sexual predators have furthered both the conservative and the liberal agendas. It has been argued that the sexual predator laws have furthered the conservative agenda by providing “a highly visible symbol for politicians” while “resurrecting a set of assumptions about sexual violence.” See JANUS, *supra* note 3, at 87. Liberals have also centered their campaigns on tightening sex offender laws, gaining public support by appealing to the desire for safety and continued offender accountability. This is demonstrated clearly in Wisconsin as Democratic Governor Jim Doyle has made strengthening sex offender laws part of his mission. See Vigue, *supra* note 4.

12. The primary purpose of SORNA is stated as providing the public with information “to take common sense measures for the protection of themselves and their families . . . .” See U.S. ATT’Y. GEN. THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION: FINAL GUIDELINES 3–4 (2008).

13. Cell phone companies are even involving themselves with these issues. The “iPhone” has an application that allows users to download maps including the addresses of all sex offenders in the area. By the middle of 2009, it was ranked the tenth highest selling application. The legality of the application is unclear. See M.G. Siegler, *The iPhone’s Latest Hit App: A Sex Offender Locator*, THE WASHINGTON POST, July 25, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/25/AR2009072502363.html>.

14. CTR. FOR SEX OFFENDER MGMT., LEGISLATIVE TRENDS IN SEX OFFENDER MANAGEMENT, (Nov. 2008), [http://www.csom.org/pubs/legislative\\_trends.pdf](http://www.csom.org/pubs/legislative_trends.pdf). This heightened public awareness has been used to justify the necessity of such stringent reporting laws, with legislatures asserting that the public demands greater accountability. See BUREAU OF JUSTICE ASSISTANCE, MANAGING SEX OFFENDERS: CITIZENS SUPPORTING LAW ENFORCEMENT 1 (Sept. 1, 2006) (discussing the way in which increased media coverage combined with sweeping legislation has placed increased pressure on law enforcement agencies, particularly in attempting to balance the interests of informing the public while minimizing public anxiety).

15. In 1997, through a collaborative effort of various U.S. Justice Departments, the Center for Sex Offender Management (CSOM) was created. The purpose of the center is to “enhance public safety by preventing further victimization through improving the management of adult and juvenile offenders who are in the community.” The center serves both an informative and an assistive purpose. See generally Center for Sex Offender Management, <http://www.csom.org/> (last visited Feb. 16, 2010).

16. H.R. 3355, 103d Cong. (2d Sess. 1994) (codified as amended in scattered sections of 42 U.S.C.). This bill is the largest crime bill in U.S. history, both creating tighter standards in already regulated areas as well as creating new statutory crimes. The registration for sex crimes was contained within this legislation. See U.S. DEPT OF JUSTICE, VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, FACT SHEET (Oct. 24, 1994), available at <http://www.ncjrs.gov/txtfiles/bills.txt>.

17. 42 U.S.C. § 13941 (2006) (establishing Comprehensive Approaches to Sex Offender Management program).

18. Jacob Wetterling was abducted when he was eleven years old, and his whereabouts still

mandate, it would be subject to losing up to ten percent of its federal crime control grant fund.<sup>19</sup> In Wisconsin, compliance with this provision preserved approximately one million dollars in federally funded crime grants.<sup>20</sup> However, while this act mandated the registration of all sexual offenders for law enforcement purposes, it did not require that the information be made available to the public. A few years later, Megan's Law changed this by requiring that all states create easily accessible public registries of all sexual offenders.<sup>21</sup> However, the law neither specified how these registries should be constructed nor required that there be separate registries for offenses that were defined as sex crimes but that contained no sexual element. To remain in compliance with these federal acts, Wisconsin included kidnapping and false imprisonment under its definition of sex offender.<sup>22</sup> Amie's Law further expanded the reporting requirements, with the State acknowledging that the public's interest in maintaining an environment safe from sex offenders outweighed even the rights of convicted juveniles to maintain closed records.<sup>23</sup> This allowed registration for all crimes deemed "a criminal offense that is specifically targeted against a minor."<sup>24</sup> Therefore, a person may be statutorily defined as a "sex offender" even if the only crime committed was kidnapping or false imprisonment.

In 2006, the Adam Walsh Act created three tiers of sexually based offenses and enumerated corresponding reporting requirements for each.<sup>25</sup> Under this Act, both the kidnapping and the false imprisonment of a minor are classified as Tier III sex offenses. This means that anyone convicted of either one of these crimes must register in the sex offender database and report their whereabouts to law enforcement for life.<sup>26</sup> Tier III offenders are considered the worst offenders because they are considered to pose the greatest threat to the

---

remain unknown. The legislation passed in his name can be largely attributed to the lobbying efforts of his mother, Patty Wetterling. Interestingly enough, Patty Wetterling has spoken out against the turn that the current laws have taken, disagreeing with the sweeping laws and the overly broad definition of "sex offender." She has criticized the registry for including those who were never intended to be classified as sexual predators. See Patty Wetterling, *Patty Wetterling: The Harm in Sex Offender Laws*, THE SACRAMENTO BEE, Sept. 14, 2007.

19. 42 U.S.C. § 16925(a) (2006). See generally Marissa Ceglian, Note, *Predators and Prey: Mandatory Listings of Non-Predatory Offenses on Predatory Offender Registries*, 12 J.L. & POL'Y 843 (2004) (addressing the inequities of listing non-sexual offenders in the sex offender registry).

20. DANIEL F. RITSCHKE, WISCONSIN LEG. REFERENCE BUREAU, SEX CRIMES AND PENALTIES IN WISCONSIN, LRB-01-IB-1, Jan. 2001 (discussing modifications made by 1999 Wis. Act 89 to preserve the receipt of full funding).

21. Megan's Law, Pub. L. 104-145, 110 Stat. 1345 (1996) (amending Pub. L. 103-32 (1994)).

22. WIS. STAT. § 301.45 (2005-2006).

23. See 42 U.S.C. § 16911 (2006) (expanding the definition of sex offender); Act effective May 17, 2005, 2005 Wis. Sess. Laws 5 (modifying WIS. STAT. §§ 301.46(2)(e), 2(m)(c), 5(b)).

24. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, 120 Stat. 587 (2006) (codified in scattered sections of 42 U.S.C. § 16901 (2006)). An offense against a minor includes: an offense involving kidnapping, an offense involving false imprisonment, solicitation to engage in sexual conduct, use in sexual performance, solicitation to practice prostitution, video voyeurism, possession, production, or distribution of child pornography, criminal sexual conduct involving a minor, or any conduct that by its nature is a sexual offense against a minor. *Id.*

25. See SORNA, 42 U.S.C. § 16911 (2006).

26. § 16911.

community.<sup>27</sup> Notably, this expansion left significantly less discretion to the judiciary and, instead, gave ample power to the legislature in making these classifications and determining appropriate sentencing. While all fifty states maintain their own registries, the federal government also maintains its own national registry through the Department of Corrections Sex Offender Registration Program (SORP).<sup>28</sup> Under the federal law, all convicted offenders must register for fifteen years for a Tier I offense, twenty-five years for a Tier II offense, and life for a Tier III offense.<sup>29</sup> The states retain the discretion whether to expand upon this baseline.<sup>30</sup>

Collectively, these acts set forth two common objectives. First, mandatory sex offender registration is intended to provide law enforcement officials with valuable tools for tracking offenders.<sup>31</sup> This is largely based on the notion that a sex offender is likely to reoffend and the presumption that by providing continually updated information regarding their whereabouts, the public is enabled to take precautionary measures when dealing with these individuals.<sup>32</sup> Second, the registry may act as a deterrent, preventing convicted sex offenders from reoffending for fear of being caught, as well as preventing a would-be offender from offending in the first place due to the threatened loss of freedom.<sup>33</sup> Some states even encourage citizen volunteers to patrol sex offenders' homes and monitor any suspicious activities.<sup>34</sup> This exemplifies how sex offenders are placed in a significantly different position than other criminals because it subjects them to ongoing monitoring measures and the public dissemination of their personal information.<sup>35</sup>

---

27. § 16911.

28. § 16920. This is a "cooperative effort between Jurisdictions hosting public sex offender registries . . . and the federal government" to enable citizens to search using a variety of search criteria that may not otherwise be available. U.S. Dep't of Justice, Dru Sjodin National Sex Offender Public Website (NSOPW), <http://www.nsopw.gov/Core/Conditions.aspx?> (last visited Mar. 4, 2010).

29. § 16915.

30. See SMART: Frequently Asked Questions, <http://www.ojp.gov/smart/faq.htm> (last accessed Apr. 25, 2010). ("SORNA establishes a national baseline for sex offender registration and notification programs. It constitutes a set of minimum national standards and sets a floor, not a ceiling, for jurisdiction programs.")

31. See JANUS, *supra* note 3, at 4.

32. CTR. FOR SEX OFFENDER MGMT., *RECIDIVISM OF SEX OFFENDERS* (2001), available at <http://www.csom.org/pubs/recidsexof.pdf>.

33. See Bob Edward Vasquez et al., *The Influence of Sex Offender Registration and Notification Laws in the United States*, 54 *CRIME & DELINQ.* 175 (2008) (evaluating the actual effects that notification laws have had on deterring offenders and finding that few states have had reductions in rapes after the enactment of these laws).

34. Volunteers in Police Service, *Sex Offender Management: Involving Citizens to Strengthen Law Enforcement Efforts* (Nov. 2006), available at <http://www.policevolunteers.org/PDF/CISOM.pdf>.

35. The unique treatment of sex offenders has been described as placing them within a "reduced-rights zone," a lack of constitutional rights that no other groups of criminals are subjected to. This has also been characterized as punishing people merely for exhibiting certain propensities that may classify them as "dangerous." See JANUS, *supra* note 3, at 5; see also *State v. Doe*, 538 U.S. 84, 112 (2003) (Stevens, J., dissenting in part).

It is also clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on

However, despite the commendable purpose of these registries, they have had many unintended consequences. There is no doubt that sex offenses rank among the most horrific crimes and that perpetrators who engage in these acts deserve to be punished. While it is tempting to approve of anything that promises to “keep our children safe,” it is important to keep in mind the broader goals of our criminal justice system.<sup>36</sup> Our system rests on notions of fairness and a presumption that one is innocent until proven guilty. In contrast, sex offender laws act reactively and punish those who have demonstrated the potential to commit a crime, despite the fact that they may not have actually committed the crime for which they are being punished.<sup>37</sup> What is particularly troubling about sex offenses is the fact that what has been statutorily defined as a “sex offense” is overly broad and encompasses crimes that may not contain any sexual element. Incidents as innocuous as a college student engaging in public urination after a night out may land them on the registry.<sup>38</sup> Incidents of sexual experimentation concerning two minor children, even those who may be too young to appreciate their actions, might also be sufficient to obtain the label.<sup>39</sup> While these events may be tasteless and offensive, they do not warrant the stringent and life-long punishment of being labeled a sex offender.

Wisconsin’s sex offender statute reflects these federal mandates, and has even taken some of them to the extreme. Consistent with the Jacob Wetterling Act, Wisconsin defines a sex offender as a person who has engaged in any one of a number of sexual crimes, or a person who has kidnapped or falsely imprisoned a minor, even if that person is not the minor’s parent.<sup>40</sup> However, there is one exemption carved out for sexual activity when both parties are minors.<sup>41</sup> This demonstrates that the legislature has deemed the judiciary capable of making some determinations regarding the perpetrator’s intent, and

---

everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals. Unlike any of the cases that the Court has cited, a criminal conviction under these statutes provides both a sufficient and a necessary condition for the sanction.

*Id.*

36. The U.S. Department of Justice describes the mission of the justice system as:

To enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; and to ensure fair and impartial administration of justice for all Americans.

U.S. Dep’t of Justice, Mission Statement, <http://www.justice.gov/02organizations/about.html> (last visited Mar. 3, 2010).

37. See generally, HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. (2007), available at <http://www.hrw.org/en/reports/2007/09/11/no-easy-answers>.

38. *Id.* at 5.

39. Another commonly presented problem with the sex offender registry is that it does not distinguish intent before labeling someone a sexual deviant. Often children who have engaged in “curious” activities at an age where they may be too young to appreciate their actions can land them on the registry and result in them being branded with a label that will follow them for life. This is also true under some circumstances when two young minors engage in consensual sex. See, e.g., Emanuella Grinberg, *No Longer a Registered Sex Offender, But the Stigma Remains*, CNN. (Feb. 11, 2010),

<http://www.cnn.com/2010/CRIME/02/11/oklahoma.teen.sex.offender/index.html?hpt=C2>.

40. WIS. STAT. §301.45 (2005-2006).

41. § 301.45(1m).

that sex offenses are not strict liability. Notably, kidnapping and false imprisonment are the only non-sexual crimes that require registration.<sup>42</sup> Despite the fact that they contain no sexual element, their inclusion has also been justified on the grounds that kidnapping and false imprisonment are violent crimes and place children in a vulnerable position.<sup>43</sup>

During legislative debates, it is often argued that one reason that penalties of such high consequence have been applied is because sex offenders are often said to have extremely high recidivism rates.<sup>44</sup> However, other statistics contradict this conclusion and have determined that sex offender recidivism rates are, in fact, lower than those of other criminals.<sup>45</sup> Most notable is when enacting sex offender legislation, the legislature often groups all sex offenses into a single category despite the fact that only a narrow category of offenders may be likely to reoffend.<sup>46</sup> Further, the stated purpose of the registry is to prevent an offender from reoffending and to allow the communities to protect themselves. However, with studies predicting that only three percent commit a second sex-related offense, the effectiveness of the registry is questionable.<sup>47</sup>

Many state registries have followed the lead of the federal government and are also becoming more expansive. In addition to information about the offender's physical appearance and address, some states have extended their registries to include information such as vehicle make, model or license plate, email addresses, screen names, and employment information.<sup>48</sup> While some of this information may be necessary for monitoring purposes, other requirements are becoming increasingly more invasive. SORNA was supposed to have been fully implemented by July 2009,<sup>49</sup> however most states have not yet complied.

42. RITSCHKE, *supra* note 20.

43. Ofer Raban, *Be They Fish or Not Fish: The Fishy Registration of Nonsexual Offenders*, 16 WM. & MARY BILL RTS. J. 497, 531 (2007) (describing this as a legislative assumption presupposing a sexual element in cases where a child may not be able to explain sexual abuse to law enforcement).

44. Studies have estimated the sex offender recidivism rate as three to five percent. After following offenders for three years after their release from prison, only 3.3% were convicted of a new sex crime, while 38.6% were convicted for other offenses, including parole violations. Bureau of Justice Statistics, Press Release, 5 Percent of Sex Offenders Rearrested for a Sex Crime Within 3 Years of Prison Release (Nov. 16, 2003), <http://bjs.ojp.usdoj.gov/content/pub/press/rsorp94pr.cfm> (last visited Mar. 3, 2010) [hereinafter Bureau of Justice Statistics]. In addition, another 2003 study has in fact shown that sex offenders may be less likely to reoffend than others criminals. See PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, 2 (2003), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>.

45. U.S. DEP'T OF JUSTICE, *MYTHS AND FACTS ABOUT SEX OFFENDERS*, (2000), <http://www.csom.org/pubs/mythsfacts.html> (last visited Mar. 3, 2010).

46. *Id.*

47. See Bureau of Justice Statistics, *supra* note 44.

48. State registries are rapidly becoming more expansive. Texas even requires information regarding the offenders' shoe size. Despite good intentions, critics are concerned that such information has become overly intrusive and no longer serves a practical law enforcement purpose. See John Gramlich, *Online Sex Offender Info Rapidly Expands*, STATE POLICY & POLITICS, Jan. 12, 2009, <http://www.stateline.org/live/details/story?contentId=367676> (last visited Feb. 16, 2010).

49. See NAT'L CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, *SEARCH SURVEY ON STATE COMPLIANCE WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) 1* (2009), available at <http://www.search.org/files/pdf/SORNA-StateComplianceSurvey2009.pdf> (tracking compliance with SORNA and the reasoning and difficulties behind its implementation).



This delay can be attributed to internal legislative issues and the fact that by enacting SORNA, the states are limiting their own discretion in determining how to best manage the offenders within their borders.<sup>50</sup>

## II. WISCONSIN'S SEX OFFENDER REGISTRY

### *Non-Sexual Offenses*

Wisconsin's sex offender registry follows all of the federal mandates set forth by the laws previously discussed.<sup>51</sup> Currently, there are over 20,000 registered sex offenders that live in the State.<sup>52</sup> Wisconsin's registry has received national attention as being "tough on crime" and expanding beyond the federal requirements set forth by SORNA.<sup>53</sup> The registry has been deemed "mostly open" and ranks second among the states in the category of "personal information required."<sup>54</sup> This has important implications for offenders convicted in Wisconsin because they will consequently face more stringent reporting requirements and their information will be made more readily available to the community.

One of the most troubling issues concerning Wisconsin's sex offender registry is the fact that it does not distinguish between sexually motivated crimes and those that have no sexual nexus in its classification of "sex offenders." Constitutionally, mislabeling sex offenders implicates both the right to due process and the right to equal protection. The right to due process is implicated because a person's legal status under the state is a liberty interest of which they should not be deprived.<sup>55</sup> This claim is demonstrated by sex offender registries that name someone a "sex offender" when there is no sexual element to the crime and there is no way to appeal the classification. Likewise, concerns about the right to equal protection arise under the premise that similarly situated individuals are not being treated in like fashion.<sup>56</sup> In this context, the argument typically addresses two different groups. First, other violent offenders who pose a risk to children are not required to register. Second, and specifically concerning kidnapping and false imprisonment, parents are exempt from this classification. However, to be successful, these challenges must be brought "as applied" to the individual offender because there may be some offenders convicted under the kidnapping and false imprisonment whose crime clearly did have a sexual element; and they should

---

50. *Id.* 3-9.

51. WIS. STAT. § 301.45 (2005-06).

52. Karen Rivedal, *Use Map to Find Sex Offenders*, WISCONSIN STATE JOURNAL, Nov. 30, 2009, available at [http://host.madison.com/news/local/article\\_57a74e26-6aa1-5c23-b4ed-3a578784bb57.html](http://host.madison.com/news/local/article_57a74e26-6aa1-5c23-b4ed-3a578784bb57.html). It was reported that after the State made efforts to make the registry more "user friendly" there was an increase of approximately 200 visits to the webpage each day. *Id.*

53. WIS. STAT. § 301.46 (2005-06).

54. *See Keen, supra* note 4.

55. U.S. CONST. AMEND. XIV; *See Ceglian, supra* note 19, at 864 (discussing a protected liberty interest as being implicated when "the statutes impose atypical and significant hardship . . . in relation to the ordinary incidents of . . . life") (internal citations omitted).

56. U.S. CONST. AMEND. XIV.

be included in the registry. However, of the cases that have been litigated, both of these arguments have proven largely unsuccessful, and because kidnapping and false imprisonment are both Tier III offenses, the offender is subjected to the most stringent regulatory scheme.<sup>57</sup>

Wisconsin's Sex Offender Registration statute contains a list of offenses that require mandatory registration.<sup>58</sup> Of these twenty-seven specific offenses, only two do not require any sexual element.<sup>59</sup> These enumerated offenses require mandatory registration. There is, however, a secondary list of offenses that do not necessarily contain a sexual element, but that the court may nonetheless use its discretion to classify as a sexual offense.<sup>60</sup> Because of this, there is no reason to exclude kidnapping and false imprisonment from the offenses that allow the court to use its discretion.<sup>61</sup> The Jacob Wetterling Act is responsible for the mandatory inclusion of these offenses.<sup>62</sup> It was reasoned that these two crimes were inextricably linked to sexual misconduct against children and therefore their inclusion was necessary for the creation of a complete database. However, in practice, not allowing judicial discretion for these crimes has often led to absurd results.

#### *State v. Smith*

In *State v. Smith*,<sup>63</sup> a recent Wisconsin Supreme Court case, a seventeen-year-old male was convicted as a sex offender when he held another seventeen-year-old male captive in a car after a failed drug exchange.<sup>64</sup> Because his actions fell under the definition for the false imprisonment of a minor, he was required to register as a sex offender and to annually update the State with his personal information.<sup>65</sup> He was later charged with failing to provide an update and faced sanctions under the statute.<sup>66</sup> Smith challenged the action, arguing that the statute was unconstitutional as applied to him because it violated his due process and equal protection rights.<sup>67</sup> Smith is required to remain in the

---

57. SORNA, 42 U.S.C. § 16915. In stark contrast, crimes such as the production and distribution of child pornography, selling and buying of children and the coercion of a child to engage in prostitution are only Tier II offenses and therefore subjected to lesser penalties. See 18 U.S.C. §§ 2251A-52A, 2421-23(a) (2006).

58. WIS. STAT. § 301.45 (2005-06).

59. § 301.45.

60. The listed offenses include: crimes against life and bodily security, crimes against sexual morality, crimes against children, not guilty by reason of mental disease or defect, certain crimes against property and invasion of privacy. See Wis. Dep't of Corr., Registration, <http://offender.doc.state.wi.us/public/proginfo/sor.jsp> (last visited Mar. 3, 2010).

61. Kidnapping is statutorily defined, in pertinent part, as "[b]y threat or imminent force carr[ying] another without his or her consent and with intent to cause harm to him or her to be secretly confined or imprisoned. . . ." See WIS. STAT. § 940.31 (2005-06). False imprisonment is statutorily defined as "intentionally confin[ing] or restrain[ing] another without the person's consent and with knowledge that he or she has no lawful authority to do so. . . ." See § 940.30.

62. 42 U.S.C. § 14071(a)(3)(A) (2006).

63. 780 N.W.2d 90 (Wis. 2010). The Wisconsin Supreme Court issued its opinion on March 19, 2010, as this note was undergoing its final revisions. The text has been updated accordingly.

64. *Id.* at 106.

65. WIS. STAT. § 301.45(2)(g) (2005-2006).

66. *Smith*, 780 N.W.2d 90 at 92.

67. *Id.* at 94. Smith does not dispute his involvement with the drug transaction. He was

registry until 2020.<sup>68</sup>

However, both the trial court and the Wisconsin Court of Appeals rejected his challenges and upheld the conviction. The Wisconsin Court of Appeals relied on an earlier Wisconsin case, *In re. Jeremy P.*,<sup>69</sup> in which a minor was convicted of third-degree sexual assault.<sup>70</sup> It reasoned that statutes are presumed constitutional, and to successfully challenge a statute the appellant must prove its unconstitutionality beyond a reasonable doubt.<sup>71</sup> When it addressed Smith's constitutional argument, it adopted the definition of liberty interest from *Jeremy P.*, which asserted that a "fundamental liberty interest" is an interest "so deeply rooted in the tradition and conscience of our people as to be ranked as fundamental" and therefore held that Smith did not make a sufficient showing because he did not demonstrate that applying the scheme to him "shocks the conscience."<sup>72</sup> The court also determined that Smith's equal protection rights were not violated because the legislature had "reasonable and practical grounds for distinctions and classifications" that it drew and that because Smith did not demonstrate a fundamental right, the classification must only survive a rational basis review.<sup>73</sup>

On March 19, 2010, the Wisconsin Supreme Court affirmed the constitutionality of the statute as applied to Smith.<sup>74</sup> Similar to the court of appeals, the Court recognized that "a party challenging a statute's constitutionality bears a heavy burden" and cited the highly deferential rational basis standard.<sup>75</sup> It then upheld the rational basis analysis, identifying the State's interest in the registration requirement not as identifying sex offenders, but "protecting the public and assisting law enforcement."<sup>76</sup> At the conclusion of the opinion, the Court recognized its judicial function as "one of restraint and deference."<sup>77</sup>

The dissent condemned the majority's rationalization on two grounds. First, it thought that the majority did not accurately identify the statute's purpose, and that this inaccuracy resulted in the Court's finding.<sup>78</sup> It stated that if this purpose were to be accepted, "[a] conviction for violating most provisions of the Wisconsin Criminal Code could trigger mandatory 'sex

---

originally charged with holding a hostage, and pleaded to false imprisonment, which is a lesser charge. His defense attorney has stated that is "what caught him in the trap." Steven Elbow, *How Many Registered Offenders Have Never Committed Sex Crimes?*, CAPITAL TIMES, Apr. 3, 2010.

68. Wis. Dep't of Corr., Registration, *supra* note 60. While Tier III offenses require lifetime registration under federal law, Wisconsin is yet to come into complete compliance with the SORNA provisions and only requires a maximum registration period of fifteen years. See WISCONSIN COUNCIL ON CHILDREN AND FAMILIES, THE ADAM WALSH ACT AND WISCONSIN 2 (2009), available at [http://www.wccf.org/pdf/adam\\_walsh\\_report\\_summer\\_2009.pdf](http://www.wccf.org/pdf/adam_walsh_report_summer_2009.pdf).

69. 692 N.W.2d 311 (Wis. App. 2004).

70. *Id.* at 313-14.

71. *Id.*

72. *State v. Smith*, 762 N.W.2d 856, 860 (Wis. Ct. App. 2006).

73. *Id.* at 860-62.

74. *Smith*, 780 N.W.2d 90 at 106.

75. *Id.* at 95.

76. *Id.* at 101-02.

77. *Id.* at 106.

78. *Id.* at 106-07 (Bradley, J., dissenting).

offender' registration . . ."<sup>79</sup> Second, the dissent also contended that Smith's claim had been mischaracterized, resulting in the majority "abdicat[ing] its responsibility to determine whether there is a rational basis . . ."<sup>80</sup> The Court's disagreement on the issue further highlights the fact that in order to remedy these gross inequities, any reformation efforts must come from the legislature.

This case illustrates why the inclusion of non-sexual offenses is troubling and a detriment to the very purpose of the sex offender registry. It is undeniable that Smith committed a crime for which he should be punished. However, it is unlikely that he poses a threat of sexual violence to the community, and his actions clearly do not constitute that of a sexual offense as understood in common terms. However, the impact of being labeled a sex offender is more than an issue of semantics. Because of his status, Smith will not be allowed to reside near schools or hold certain jobs.<sup>81</sup> If at any point Smith chooses to attend college, he is required under Wisconsin law to notify the school of his status.<sup>82</sup> Recently, some social networking sites have even prohibited sex offenders from accessing their web pages.<sup>83</sup> If he had been punished for the crime that he actually committed, namely the drug transaction, he would be able to pay his penance to society and then have the opportunity to start anew.

Unfortunately, incidents such as this are not isolated, and a case in New York demonstrated similar results. Like Wisconsin, New York's statute also requires mandatory registration for false imprisonment and kidnapping.<sup>84</sup> In a consolidated appeal in *People v. Knox*,<sup>85</sup> the Court of Appeals of New York denied that the state's sex offender registration requirements were an abuse of discretion.<sup>86</sup> Like *Smith*, the court used the rational basis test, admitting that the standard "was not a demanding one" and upheld the inclusion of kidnapping in the database. The court also refused to require the legislature to take into account the cases that stood out as exceptions, and held that the broad law was permissible.<sup>87</sup> However, New York allows for kidnapping and false

---

79. *Id.* at 107 (Bradley, J., dissenting).

80. *Smith*, 780 N.W.2d 90 at 106-07 (Bradley, J. dissenting).

81. *See* Assem. B. 759, 2009-10 Assem. (Wis. 2010). The Bill seeks to replace residency restrictions set by local communities with a unified standard. The legislative session ended on April 22, 2010 and the Bill had not yet been passed.

82. Campus Sex Crimes Prevention Act (CSCPA), 42 U.S.C. § 14071(j) (2006).

83. In 2009 it was reported that Facebook deleted the accounts of 5,500 convicted sex offenders and MySpace had removed 90,000. *See* Marlon A. Walker, *Facebook Gives Sex Offenders the Boot*, MSNBC, Feb. 19, 2009, <http://www.msnbc.msn.com/id/29289048> (last visited Feb. 16, 2010). Other laws also require that a person who is required to register in the database must also notify institutions of higher education in the state if the person attends school or is employed there.

84. Sex Offender Registration Act (SORA), N.Y. CORRECTION LAW § 168-a (McKinney 2008).

85. 903 N.E.2d 1149 (N.Y. 2009).

86. *Id.* at 1152. In three of the consolidated cases, while the offenders' motives were different from *Smith*, it was clearly established that there was no sexual motivation in any of the kidnappings. Despite this, the court held that because their crimes fit the definition of sex offense under New York penal law, the title was appropriate. The court conceded that while the stigma and mischaracterization of the incorrect label is a liberty interest, it is not a "fundamental right" sufficient to implicate due process concerns.

87. *Id.* at 1154-55. In deciding not to exclude defendants and others similarly situated from the category of "sex offenders," the legislature could have considered not only that cases where the term is unmerited are few, but also that the process of separating those cases from the majority in

imprisonment to be categorized as lower level offenses and affords greater discretion to the courts in doing so. In contrast, Wisconsin has preemptively defined these offenses as Tier III without room for judicial discretion. The New York Supreme Court acknowledged that there was a procedural due process interest in not being incorrectly identified as a sex offender.<sup>88</sup> However, it held that although it was a liberty interest, it was not a “fundamental liberty interest” and like the court in *Smith*, applied the rational basis test, resulting in the overly broad legislative purpose controlling the court’s decision.<sup>89</sup>

The greatest problem with the *Smith* decision is the constraint on the court imposed by both the highly deferential standard of review and presumptions of constitutionality. While in this case it is clear that the offense had no sexual element, the court was limited by the fact that the charge against Smith clearly did fall under the statutory definition of false imprisonment. When reviewing a statute, the presumption is that the statute is constitutional, so long as there is a perceived rational basis in its contemplation.<sup>90</sup> Further, this rational basis does not necessarily need to be exactly what was actually contemplated by the legislature, but there must be a reasonable link between the purpose and the actually enacted text.<sup>91</sup> Combined, the rational basis standard and presumption of constitutionality has proven to be nearly insurmountable. Here, the court reasoned that there is a rational basis for protecting children from abductions by adults other than their parents. Wisconsin has also held that abduction warrants classification as a sexual offense because the isolation of a child provides a significantly greater opportunity for sexual abuse.<sup>92</sup>

The Court also reasoned that labeling Smith as a sex offender was constitutional because the term “sex offender” was a part of the statute.<sup>93</sup> However, while this reasoning may be legally correct, it does not address any of the problems posed by the registry. Even more frustrating is the fact that many of these problems are easily correctable. For example, if kidnapping and false imprisonment of a minor were changed from mandatorily registerable offenses to discretionary registerable offenses, it would avoid wrongfully labeling such people as sex offenders. It has also been determined that because the

---

which it is justified is difficult, cumbersome and prone to error. It could rationally have found that the administrative burden and the risk that some dangerous sex offenders would escape registration, justified a hard and fast rule, with no exceptions.

88. *Id.* at 1152–53.

89. *Id.* at 1154–55.

90. *See, e.g., State v. Smet*, 709 N.W.2d 474, 481 (Wis. Ct. App. 2005) (citing *State v. Thomas*, 683 N.W.2d 497 (Wis. Ct. App. 2004)).

Under this “rational basis” test, equal protection is violated only if the classification rests upon grounds wholly irrelevant to the achievement of the state’s objective. The legislature need not state the purpose or rationale justifying the classification. As long as there is a plausible explanation for the classification, we will uphold the law.

91. *Smet*, 709 N.W.2d at 481.

92. “The statute recognizes that multiple motives may exist. That some of the motives are arguably less harmful than others does not affect the seriousness of the crime of enticing the child into a secluded place.” *State v. Brown*, No. 03-1717-CR, slip op. at ¶ 10 (Wis. Ct. App. 2004) (quoting *State v. Hanson*, 513 N.W.2d 700, 702 (Wis. Ct. App. 1994)).

93. *See State v. Smith*, 762 N.W.2d 856, 862 n.9 (Wis. Ct. App. 2006). The court also addressed the fact that the name “Sex Offender Registration” has no bearing on his argument because “a statute’s title is not part of the statute.” *Id.* at 862 n.9.

registration requirement is not a criminal punishment, it is not subjected to many of the same constitutional protections.

Courts have long been entrusted to make discretionary determinations and there is no reason to believe that a court is unable to determine whether a kidnapping or a false imprisonment was sexually motivated. In its opinion, the Wisconsin Supreme Court explicitly acknowledged that “the legislature was well aware of its ability to carve out exceptions to the registration requirement” but that it chose not to do so.<sup>94</sup> However, the Court further asserted that “to require a second layer of proof regarding the sexual nature of a crime would prove unworkable and inconsistent.”<sup>95</sup> However, it is likely that if a person were in the midst of committing a sex offense, then his or her act would probably also classify under one of the other twenty-five categories, and the inclusion of kidnapping would prove to be redundant. Further, the appellate court’s reasoning that the act is a sex offense because it has been defined as a sex offense relies strictly on semantics and fails to acknowledge the actual repercussions of this label. By defining an individual as a sex offender, that individual’s rights are forever changed. While an individual engaged in a drug transaction undoubtedly should be legally punished, it does not follow that their punishment should extend so far beyond the typical scope of penalties for a drug conviction that does not involve kidnapping or false imprisonment.

Another concern with the registries is that in the cases of many sexual assaults, the victim already knows the assailant. In Wisconsin, it is estimated that of the cases that have reported the relationship to the victim, 88.9% of victims knew the person who attacked them and that only 6.5% of attacks were performed by strangers.<sup>96</sup> Another study estimates that almost half of all child victims are assaulted by a family member or family friend.<sup>97</sup> These statistics undermine the necessity for having such stringent registration requirements and raise questions as to what the database is accomplishing in its current form. Wisconsin has also established the Sex Offender Apprehension and Felony Enforcement Initiative (SAFE) which is a program enacted with the purpose of: (1) holding sex offenders accountable for their actions, (2) preventing sex offenders from becoming anonymous, and (3) apprehending and prosecuting offenders who do not comply with the reporting requirements.<sup>98</sup> To meet these goals, the State employs a staff of retired law enforcement officers and current registry specialists at all levels of government.<sup>99</sup>

---

94. *State v. Smith*, 780 N.W.2d 90, 99–100.

95. *Id.* at 103.

96. LORI PHILLIPS, WIS. OFFICE OF JUSTICE ASSISTANCE, SEXUAL ASSAULTS IN WISCONSIN REVISED 2 (2004), available at <http://oja.state.wi.us/docview.asp?docid=11165&locid=97>.

97. U.S. DEPT OF JUSTICE, MYTHS AND FACTS ABOUT SEX OFFENDERS 1 (Aug. 2000) <http://www.csom.org/pubs/mythsfacts.html> (last visited Feb. 18, 2010). It is predicted that 60% of assaults of males and 80% of assaults of females are by someone known by the victim’s family. *Id.* at 1.

98. See Press Release, Ethnie Groves, Governor Doyle Announces Sex Offender Apprehension and Felony Enforcement Initiative (Sept. 20, 2005), available at [http://www.wi-doc.com/PDF\\_Files/9%2020%2005%20-%20SAFE%20Announcement.pdf](http://www.wi-doc.com/PDF_Files/9%2020%2005%20-%20SAFE%20Announcement.pdf).

99. Press Release, Anne Lupardus, Governor Doyle Column: Keeping Families Safe from Sex Predators (Mar. 6, 2006), [http://www.wisgov.state.wi.us/journal\\_media\\_detail.asp?locid=19&prid=1791](http://www.wisgov.state.wi.us/journal_media_detail.asp?locid=19&prid=1791) (last visited Feb.

However, Wisconsin has made it nearly impossible to challenge its sex offender registration provisions. Because a statute is presumed to be constitutional so long as there is a rational basis for its enactment, and the purpose of the statute has been broadly defined as “protecting the public and assisting law enforcement,”<sup>100</sup> it is extremely difficult to effectively mount any challenges.<sup>101</sup> It is not necessary that this objective be fulfilled in practice, only that the legislature contemplated this when enacting the statute. While it is important to defer to the legislature in cases concerning issues in which the judiciary has no expertise, this is not to say that the rational basis standard should be applied so broadly and allow for unconstrained discretion. Currently, as applied in cases concerning sex offenses, the standard has demonstrated that it has “no teeth” and the overly vague purpose of the statute has proven sufficient to withstand any challenges. Even if this is constitutional, it has the propensity to result in blatantly unjust and undesirable outcomes.

### III. PROPOSALS FOR REFORM

It is important to note that reform efforts should not be guided toward abolishing the registry or lessening its effectiveness. Allowing the public to access information about sex offenders in their neighborhood is an important tool to help keep families and the general public safe. However, this increased safety should not come at the expense of the personal freedom of an individual who has not committed what would commonly be considered a “sexual offense.” It is clear that the legislature has room to act to address some of these challenges, and that it chooses not to do so.<sup>102</sup> The reasons for not doing so can be attributed to many things, ranging from fear of political repercussions from a public who seeks out a legislature that is tough on crime, to not wanting to expend additional state resources in making additional decisions. However, because the stakes in these cases are so high, there should be greater care taken to ensure that the result is, in fact, the right one. The irrational classification of a non-sexually motivated act as a sex offense imposes a label that carries with it great repercussions. With a tool this powerful at the state’s disposal, there should be more investigation before its dissemination. Additionally, rapidly changing technology opens the door for even more individuals to be classified as sex offenders. Trends such as “sexting” may land a child in the registry for the distribution of child pornography if the child in the telephonically transmitted photo is under eighteen years old.<sup>103</sup> Incidents such as these that fall under the letter of the law clearly depart from the law’s original intent and should raise awareness as to why it is important to construct these definitions carefully.

---

18, 2010).

100. *State v. Smith*, 762 N.W.2d 856, 861 (Wis. App. 2008).

101. See Raban, *supra* note 43, at 525–28 (discussing the various challenges that litigants have faced when raising constitutional claims).

102. *Id.* at 518.

103. See Mike Bruner, “Sexting” Surprise: Teens Face Child Porn Charges, MSNBC (Jan. 15, 2009), <http://www.msnbc.msn.com/id/28679588/>.

Draconian rules may work as deterrents. They also may contribute to portraying an image of a community that takes crime seriously. However, while there are undeniably costs that must be paid, those costs should not come at an unwarranted restriction on personal freedom. Additionally, people who have committed crimes with a non-sexual element would undeniably be punished for their criminal behavior; the question that remains is whether they should be punished as a sex offender and be forced to live with that label for the rest of their lives. It has proven extremely difficult for challenges to the sex offender registries to pass muster.<sup>104</sup> There have been few challenges that have succeeded in having a court find a registry unconstitutional, and they were found to be in violation of the state's own constitution and not that of the federal constitution.<sup>105</sup> The ideal registry would create a more narrowly tailored definition of a sex offender, not require the long-term registration of those who do not pose a threat, and more strictly monitor those whose crimes are the most egregious. The most effective way to reform Wisconsin's sex offender registry would be to allow the judiciary more discretion when addressing crimes that include kidnapping and false imprisonment in cases where there is no other sexual element. This power must be granted by the legislature. This would allow for a narrow class of individuals to be afforded a full hearing that considers the merits of their claim, rather than being bound by inequitable technicalities.

However, if Wisconsin is not willing to undertake such a large reform effort, there are other measures that can be taken to lessen the impact of these overly broad laws. First, the legislature should clearly define the nature and the purpose of the registry. If Wisconsin law can statutorily define a person as a sex offender, even when they would not be understood to be a sex offender under any common understanding of the term, the public must be explicitly informed as to the revised definition. While this may appear to be a semantic nuance, it is extremely significant because of the stigma attached to the title. This could also be done by creating two separate registries. This model is exemplified by Minnesota, which has created two separate registries for those labeled sexual offenders and those labeled predatory offenders.<sup>106</sup> Currently, while Wisconsin includes kidnapping and false imprisonment in its definition

---

104. See e.g., *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (upholding the registry against a constitutional challenge that it was unconstitutional as applied because the defendant was falsely implicated as being dangerous); *State v. Ward*, 869 P.2d 1062, 1076 (Wash. 1994) (holding that community notification provisions do not implicate procedural due process or equal protection violations of privacy, nor are they cruel and unusual punishment or double jeopardy as understood by the Fifth Amendment); Supreme Judicial Court of Massachusetts Opinion of Justices to the Senate, 668 N.E.2d 738, 753-61 (Mass. 1996) (holding that community notification provisions do not implicate procedural due process or equal protection violations of privacy, nor are they cruel and unusual punishment or double jeopardy as understood by the Fifth Amendment); *People in Interest of Z.B.* 757 N.W.2d 595, 603 (S.D. 2008).

105. *State v. Bani*, 36 P.3d 1255, 1269 (Haw. 2001) (holding that the registry violated due process because no preliminary determinations of the person's danger to the community were afforded); *Doe v. Phillips*, 194 S.W.3d 833, 852 (Mo. 2006) (prohibiting certain retrospective elements of the law);

106. See Minn. Dep't of Corr., Level 3 Sex Offender Search, <http://www.doc.state.mn.us/level3/search.asp> (last visited Feb. 18, 2010).



of “sex offender,” the registry itself does not make any explicit acknowledgement of any additional crimes, as the registry is only titled “Wisconsin Sex Offender Database.” While this may be constitutionally permissible, it is certainly not preferable. Even if the State did not want to spend the funds to create a separate registry, it could easily make a small change in the title that would, at the very least, lessen the impact of wrongful stigmatization. However, the majority found such a change to be unnecessary because it “makes the statute no more or less rational to protecting the public and assisting law enforcement.”<sup>107</sup> Such a rationalization, while legally acceptable, overlooks the greater impacts of the registry. The current website already contains a disclaimer that the website is not to be used for “vigilante” purposes and this may be the proper place to insert an explicit statement as to what constitutes a sex offense as understood by the State.<sup>108</sup> Washington’s registry is defined as a “Sex Offender and Kidnapping Registration Program,” and on its first page clarifies that it is important for the public to have complete knowledge in order to make informed decisions and to reduce fear.<sup>109</sup> Wisconsin may also want to consider renaming its registry in such a way, so at the very least, some of the sexual associations with the label would be minimized.

While *Smith* unsuccessfully raised the issue when addressing the circuit court, it still remains questionable that the kidnapping charges in the sex offender registry only apply to minors who are taken by a person other than their parent. Despite the failure of this claim in court, the issue raises interesting questions. There is no federally enacted law that specifically addresses kidnapping by a parent.<sup>110</sup> However, this makes little sense because parental kidnapping is the most common type of crime against children.<sup>111</sup> The exclusion of parental kidnapping has been justified under the presumption that this implicates unique policy concerns that do not apply when kidnapping occurs by a stranger.<sup>112</sup>

When crafting reformation efforts it is also important to continue to consider that despite the punitive effects that these laws may have, the Wisconsin Supreme Court has determined that they are not primarily punitive in purpose and, therefore, in order to be held unconstitutional they must only

---

107. *State v. Smith*, 780 N.W.2d 90, 100–01 (Wis. 2010).

108. This would be similar to Kansas’ offender registry, which requires, pursuant to K.S.A. 22-4909, that the website identify prominently whether or not the person is a sexual offender. Additionally, the registry is generally titled the “Registered Offender Website.” However, important to note is that this site also lists other violent and drug offenses and not strictly statutorily defined sexual offenses. See Kansas Bureau of Investigation, KBI Registered Offender Website Disclaimer, <http://www.kansas.gov/kbi/ro.shtml> (last visited Feb. 18, 2010).

109. Pierce County Sheriff Sex Offender Registration Program Information, <http://www.co.pierce.wa.us/pc/abtus/ourorg/sheriff/sexoffendersearch.htm> (last visited Feb. 18, 2010).

110. See 18 U.S.C. § 1204 (2006).

111. Teri Stoddard, *Dugard Type Abduction Rare, Common Parental Abduction as Painful*, FAMILY RIGHTS EXAMINER, Aug. 13, 2009, <http://www.examiner.com/x-15873-Family-Rights-Examiner~y2009m8d31-Dugard-type-abduction-rare-common-parental-abduction-as-painful> (last visited Feb. 18, 2010).

112. See *State v. Smith*, 762 N.W.2d 856, 861 (Wis. App. 2008).

pass a rational basis examination.<sup>113</sup> However, despite the fact that the court has articulated its purpose as furthering safety, it is interesting to note that the registry is maintained by the Wisconsin Department of Corrections through the Sex Offender Registration Program (SORP).<sup>114</sup> While this may be done for economic reasons, it raises questions as to the actual effects of the registry. It seems counterintuitive to assert repeatedly that the registry is not punitive, and then to have its primary arbitrator be the prison system. Another problem that the current registries pose is that by mandating such long registration periods for those such as Smith, whose presence in the database does little to accomplish its asserted mission, is the fact that over inclusion of those defined as “predators” actually makes it much more difficult to focus on those who pose a true threat to the community.<sup>115</sup> Continuous monitoring efforts expend a greater amount of the State’s resources. With over 20,000 offenders in the registry, this amounts to less money spent monitoring those who are the most dangerous in order to keep track of those, like Smith, who do not pose a threat of sexual misconduct to their communities.

The Wisconsin legislature has already demonstrated its ability to create statutory exemptions through a section of the statute that exempts underage sexual activity from the registration requirement.<sup>116</sup> This demonstrates that Wisconsin has already presumed judicial competency in making such determinations. There is also little concern that allowing greater judicial discretion would cause great disruptions in the system. If the exemption was only expanded to address cases involving crimes with a non-sexual element, this would amount to only a small portion of all cases. However, for those whose rights are implicated, this would make a significant difference. Further, and even if registration is important to enable law enforcement agencies to access information quickly, Wisconsin should follow Michigan’s approach and create both a public and non-public registry. In Michigan, the non-public registry is used in cases involving a juvenile offender.<sup>117</sup> If Wisconsin were to follow this approach, it could create a non-public registry that includes individuals convicted of these non-sexual crimes without publishing the

---

113. See *In re Jeremy P.*, 692 N.W.2d 311, 320-21 (Wis. App. 2006) (rejecting strict scrutiny standard when reviewing sex offender registration provision in terms of a juvenile’s due process and equal protection); Shelia T. Caplis, *Got Rights? Not if You’re a Sex Offender in the Seventh Circuit*, 2 SEVENTH CIRCUIT. REV. 116, 134 (2006) (discussing Seventh Circuit precedent for using this standard).

114. See Wis. Dep’t of Corr., Sex Offender Registry Program, <http://offender.doc.state.wi.us/public/proginfo/sor.jsp> (last visited Feb. 18, 2010).

115. See Sarah Toft, *America’s Flawed Sex Offender Laws*, GUARDIAN, Sept. 5, 2009, available at <http://www.guardian.co.uk/commentisfree/cifamerica/2009/sep/05/jaycee-lee-dugard-sex-offender-laws/print>. The Jaycee Duggard case spawned ample criticism on this point, claiming that the registry failed to detect her captor because of its oversaturation with convicted offenders who did not continue to pose any danger. It has also been noted that another problem with the registry is the law enforcement’s preoccupation with locating those who do not comply rather than those who remain compliant. See also Monica Davey, *Case Shows Limits of Sex Offender Alert Programs*, NEW YORK TIMES, Sept. 1, 2001, available at [http://www.nytimes.com/2009/09/02/us/02offenders.html?\\_r=2&hp](http://www.nytimes.com/2009/09/02/us/02offenders.html?_r=2&hp).

116. See WIS. STAT. § 301.45(1m) (2007-2008).

117. See Mich. State Police, Michigan Public Sex Offender Registry (PSOR), <http://www.mipsor.state.mi.us/> (last visited Feb. 18, 2010).

information. This would serve the dual purposes set forth by the registry: it would enable law enforcement to access information easily if a future incident arises, without compromising the person's reputation. There would also be no need to inform the public of a "sex offender" who poses no threat of sexual misconduct to the community.

New Mexico also faced similar problems, and like Wisconsin, its registry included crimes of kidnapping and false imprisonment. The ACLU challenged this classification as "not rationally related to the legitimate interest of the city in protecting victims or potential victims of sexual offenders."<sup>118</sup> The New Mexico Court of Appeals agreed, and held that registering kidnappers and those who falsely imprison others in cases in which their crimes had no sexual element was unconstitutional.<sup>119</sup> While under SORNA, those convicted of the false imprisonment or kidnapping of a minor are statutorily defined as sexual offenders, they are not required to be included in the registry. However, under state law they were required to be included. The court determined that it was the publication element that was most troubling and that implicated constitutional concerns. The court also suggested that New Mexico could still remain in compliance with the Jacob Wetterling Act by giving the offenders a separate name that did not connote sexual deviance.

New Mexico's history illustrates an alternative course of action that Wisconsin could take. By omitting those convicted of crimes with no sexual element from the registry, the state's overarching purpose in monitoring sex offenders remains strong. If anything, it minimizes the pool of offenders and allows for the state to allocate its resources better to those who pose the greatest threat. This will work dually by ensuring that those who are most dangerous will be closely monitored, while allocating more freedom to those whose behavior does not provide a serious threat to the community.<sup>120</sup> This approach is also more consistent with a criminal justice system based on fairness and ensures that similarly situated people truly are treated similarly.

Additionally, these measures are disproportionate to their goal because the current laws are both over and under inclusive. While sex offenses may receive widespread national attention, there are many other crimes against children that may be just as dangerous that are not included. If the purpose is in fact "to protect the public and assist law enforcement" it raises questions as to why other violent offenders are not required to register. However, the laws are sweeping in whom they are willing to brand a sex offender. Consensual sex between minors may require registration in some circumstances.<sup>121</sup> Similarly, minors who distribute sexually explicit pictures to one another may be prosecuted for the dissemination of child pornography.<sup>122</sup> Finally, as

---

118. *ACLU v. Albuquerque*, 137 P.3d 1215, 1226 (2006).

119. *Id.*

120. See David Alire Garcia, *Coalition: Focus Mich. Sex Offender Registry on Risk*, THE MICHIGAN MESSENGER, Dec. 14, 2009, <http://michiganmessenger.com/31807/coalition-wants-mich-sex-offender-registry-reformed> (last visited Feb. 18, 2010).

121. In Wisconsin, the court is allowed to exercise discretion on this issue. See RITSCHKE, *supra* note 20, at 4.

122. See Brunner, *supra* note 103.

demonstrated by *Smith*, individuals who kidnap or falsely imprison a minor will be branded sex offenders, even in cases where the crimes contained no sexual element. Consequently, many individuals who do pose a continued threat to society remain unmonitored, while some of those who pose no threat will remain under strict regulation, sometimes for the remainder of their lives.

States need greater autonomy. As the federal government continues to implement heightened reporting requirements, forty-nine states have been reluctant to follow, largely due to financial concerns.<sup>123</sup> While the deadline for compliance has been extended until July 2010, it remains questionable as to whether the cost of maintaining these registries has finally outweighed its benefits.<sup>124</sup> A number of states have also spoken out, raising concerns that the federal government has completely left them out of the decision making process.<sup>125</sup> This is troubling because each state has differing concerns regarding the population of offenders, their currently implemented registries, and resources available.

#### CONCLUSION

While sex offenders are among the most despised of all criminals, it is clear that under the current regulatory scheme there is dissonance between who constitutes a sex offender in the eyes of the law and the common public understanding of the term. Although some states have taken small measures to address this problem, the Wisconsin registry poses a threat to the constitutional freedoms of equal protection and due process to those who have committed crimes. Even though statutorily defined as sexual offenses, not all of the crimes contain sexual elements. Under the current state of the law, it has been determined that this is permissible as a civil regulatory function. Additionally, the flaws in the registration scheme leave open the possibility for an even broader group of individuals to be labeled sex offenders. Despite the fact that this may be constitutionally permitted, it illustrates a gross injustice that should be remedied.

---

123. Largely, efforts in implementing greater standards have been impeded due to the high costs associated with the ongoing monitoring initiatives. See Greg Bluestein, *Only Ohio Has Adopted Tough Federal Sex Offender Rules*, ASSOCIATED PRESS, Dec. 1, 2009, available at [http://www.cleveland.com/nation/index.ssf/2009/12/only\\_ohio\\_has\\_adopted\\_tough\\_fe.html](http://www.cleveland.com/nation/index.ssf/2009/12/only_ohio_has_adopted_tough_fe.html).

124. The original deadline for compliance was July 2009, but Congress extended it an additional year to July 2010. *Sex Offender Registration and Notification Act (SORNA): Hearing Before Subcomm. on Crime, Terrorism, and Homeland Security 111th Cong. (2009)* (testimony of Ernie Allen, President & CEO of the National Center for Missing and Exploited Children).

125. See Logan, *supra* note 8, at 91-94. States have been critical that the federal government has largely adopted a "one-size fits all" approach while failing to consider the resources available to individual states, or the necessity of imposing additional regulations on states that already have "strong" registration requirements.