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Sex Offenders and the Free Exercise of Religion

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SEX OFFENDERS AND THE FREE EXERCISE OF RELIGION

*Christopher C. Lund**

In a variety of ways, sex offenders in the United States find themselves in a difficult position. One of the lesser-known ways relates to the free exercise of religion. Sometimes by categorical statute, and sometimes by individualized parole, probation, or supervised-release condition, sex offenders can find themselves legally barred from places where children are present (or likely to be present). Because children are usually present at religious services, sex offenders can find themselves unable to attend them altogether. And this hardship has a bit of irony in it too. Back in prison, sex offenders could worship freely with others; now ostensibly free, they can no longer do so.

This simple problem has real scope—tens (maybe hundreds) of thousands of people barred from essentially all religious services, sometimes for decades, sometimes for life. Moreover, these prohibitions are often vague and overbroad—and so restrictive that low-level administrators (like sheriffs and probation officers) are often pushed into softening or waiving them. But this ends up creating a kind of licensing scheme, whereby low-level government officials make—on their own, without any formal criteria—ad hoc and practically unreviewable decisions about who gets to go to church and under what conditions. Risks of selective enforcement, discrimination, and abuse are obvious.

These rules have come into being as if concerns about the free exercise of religion have no weight at all. But this is not the case. In fact, a robust body of law protects the free exercise of religion, requiring exemptions from religiously burdensome laws. Now this does not mean that sex offenders should be universally exempt from any and all restrictions regarding church attendance. There are probably some people who pose such a threat to children that they should be kept away from churches. Courts will have to answer tricky questions—who should be barred, who should decide who is barred, and on what criteria?—that require nuanced and elaborate answers. Yet informed by analogies from other areas of law (like freedom of speech) where courts have wrestled with similar issues, this Article offers some recommendations that are analytically rigorous, practically realizable, and judicially manageable.

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Introduction

If you were to ask a judge or a law professor whether people in this country have a right to go to church, you would get a strange look.[1] After all, the Constitution and a host of statutes protect the free exercise of religion, and it is hard to think of anything more constitutive of that right than the ability to attend religious services without getting arrested by the police and thrown in jail.[2]

Recently our society has seen an increasing number of disputes about what the free exercise of religion entails. Two terms ago, the Supreme Court asked whether religious objectors could refuse to make cakes for gay wed-

1 Throughout this piece, this Article will use the word "church" to describe religious groups of all denominations, as constantly using bulkier phrases like "religious institutions" or "religious organizations" would grow cumbersome. Such usage is common in the literature. *See, e.g.*, Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1373 n.2 (1981).

2 This Article, and this particular paragraph, was written before the COVID-19 pandemic began, which has generated a number of similar issues. *See* Roman Catholic Diocese of Brooklyn v. Cuomo, No. 20A87, 2020 WL 6948354 (S. Ct. Nov. 25, 2020). For reflections on religious liberty in our current pandemic, see Christopher C. Lund, *Quarantines, Religious Groups, and Some Questions About Equality*, Int'l Ctr. for L. & Religion Stud. (Oct. 2, 2020), https://talkabout.iclrs.org/2020/10/02/quarantines-religious-groups-and-some-questions-about-equality/.

dings.[3] A few years earlier, the Court had asked whether corporate owners could refuse to provide insurance coverage for religiously forbidden contraceptives.[4] Besides their practical importance, these cases posed difficult conceptual questions about the scope of free exercise. Should for-profit corporations have religious rights?[5] Can merely being forced to provide contraceptive coverage amount to a cognizable burden on religious liberty?[6] Can the government's interest in preventing discrimination ever be outweighed by religious interests on the other side?[7] These debates have not been over the core of free exercise but its boundaries, and they have been extremely public and dramatic.

At the same time though, something has been happening at the core of free exercise, something neither public nor dramatic. Here, in America, in the twenty-first century, a large group of people find themselves legally prohibited from attending religious services. These people are sex offenders, who are barred from being places where children are present (or likely to be present). As children are usually present at religious services, this means that sex offenders cannot attend them.

Some cases here are striking. In North Carolina, a sex offender had gone to church services regularly for ten years following his release from prison. He was completely open about his past with the church, but was arrested after an anonymous person saw him in church and called the police.[8] In Virginia, a woman brought suit after she found herself barred

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3 *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018). For two different views of the case, compare Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133 (2018), with Douglas Laycock, *The Broader Implications of* Masterpiece Cakeshop, 2019 BYU L. REV. 167.

4 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). For an examination of the social and cultural backdrop surrounding *Hobby Lobby*, see Paul Horwitz, *The* Hobby Lobby *Moment*, 128 HARV. L. REV. 154 (2014).

5 This is an issue in *Hobby Lobby*, 573 U.S. at 705. *Compare id.* at 707–19 (concluding that for-profit corporations can exercise rights under the Religious Freedom Restoration Act), *with id.* at 751–57 (Ginsburg, J., dissenting) (concluding against that proposition). For a sustained examination of this question, from multifarious perspectives, see THE RISE OF CORPORATE RELIGIOUS LIBERTY (Micah Schwartzman, Chad Flanders & Zoë Robinson eds., 2016).

6 This is another issue in *Hobby Lobby*, 573 U.S. at 719. *Compare id.* at 719–26 (concluding there is a substantial burden), *with id.* at 757–61 (Ginsburg, J., dissenting) (concluding there is no substantial burden). For reflections on the substantial burden requirement, see Michael A. Helfand, *Identifying Substantial Burdens*, 2016 U. ILL. L. REV. 1771 (2016).

7 This issue arises in a variety of contexts. *See, e.g.*, *Masterpiece Cakeshop*, 138 S. Ct. at 1723 (asking whether a religious objector can be compelled by antidiscrimination law to make a cake for a gay couple); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012) (asking whether a religious school can be compelled by antidiscrimination law to either rehire a teacher or pay her damages).

8 The charges were dropped when he agreed to restrictions on attending church events other than worship services. *See* Does v. Cooper (*Does I*), 148 F. Supp. 3d 477, 483 (M.D.N.C. 2015).

from church for life, because of a statutory-rape conviction from twenty years earlier.[9] Some Americans now face the possibility of arrest, conviction, and incarceration for walking into a church, synagogue, or mosque. And these rules often prevent them from going to church not just for a week or a month, but often for decades and sometimes for life.

This is a serious problem that carries with it a bitter irony. For while they are still inside prison, sex offenders can go to church freely with others.[10] But once outside prison's walls, everything changes, and sex offenders find themselves locked out of religious life. When it comes to their religious options, as strange as it sounds, sex offenders are better off in prison. Besides creating some bad incentives, this seriously undermines the attempt to reintegrate sex offenders back into society. Churches can be, and often are, valuable sites of rehabilitation and redemption for people earnestly trying to get their lives back on track. It is bad enough that the law contributes so little to the rehabilitative project. The least the law could do, one would think, is get out of the way.

Arising from this basic problem is a set of other ones—problems that First Amendment theorists will find familiar. The laws limiting sex offenders are often vague and overbroad, which causes chilling effects. They are also quite restrictive—so restrictive in fact that they are often relaxed or ignored on the ground by low-level administrators like probation officers, sheriff's departments, and ordinary police. But this ends up acting as a kind of licensing scheme, under which government officials decide—on their own without any formal or written criteria—who gets to attend church, who does not, and under what conditions. Instances of selective enforcement, discrimination, and abuse are entirely foreseeable and probably inevitable.

But this Article means to do more than just identify these problems and diagnose their roots. It seeks to suggest some possible ways forward. These rules came into existence as if this were a rights-free zone, as if there were no legal protections in this country for the free exercise of religion. But this is not so. The Constitution and related bodies of law (like the federal Religious Freedom Restoration Act and various state-law analogues) guarantee the free exercise of religion, and presumptively require religious exemptions from generally applicable laws. Like other Americans, sex offenders in fact have

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9 *See* Doe v. Va. Dep't of State Police, 713 F.3d 745 (4th Cir. 2013).

10 "Even prisoners have a right to associate with each other in religious services," as one court recently put it. *See* Trisvan v. Annucci, 284 F. Supp. 3d 288, 300 (E.D.N.Y. 2018) (quoting Best v. Nurse, No. CV 99-3727, 1999 WL 1243055, at *4 (E.D.N.Y. Dec. 16, 1999)). It has always been the case that prisoners have had religious rights. *See* O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) ("Inmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion." (citation omitted)). But Congress later strengthened those rights when it passed the Religious Land Use and Institutionalized Persons Act (RLUIPA). *See* Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2018)); *see also* Cutter v. Wilkinson, 544 U.S. 709 (2005) (upholding RLUIPA against constitutional challenge); Holt v. Hobbs, 574 U.S. 352 (2015) (giving RLUIPA a broad construction).

rights to go to church that cannot be overlooked. This requires a fundamental rethinking of the whole topic—these restrictions are not simply limitations on sex offenders that are debatable matters of social policy. Instead, there are questions here about fundamental legal rights that cannot simply be swept under the conceptual rug.[11]

Now this is not to say that any and all sex offenders will be universally exempt from any and all restrictions relating to church attendance. There are probably people who pose too much of a threat to children. The best solution, therefore, would be a regime of *individualized consideration*—sex offenders would have their individual situations considered in a judicial process to decide whether they can attend religious services. But this is not just the best solution all things considered; it is actually the legally required one as well. For one thing, it flows naturally from the ordinary principles of religious exemptions, which require judicial consideration and evaluation of an individual's particular circumstances. For another, it fits with the bodies of law relating to restrictions on sex offenders in other constitutionally sensitive areas—like freedom of speech, family rights, and bodily integrity. Finally, this solution has practical virtues: it is contextually sensitive, it is judicially manageable, and it is practically realizable.

This Article opens in Part I with a general description of the legal restrictions presently imposed on sex offenders in America. Part II examines how these restrictions affect the free exercise of religion and unpacks the various resulting problems. Part III opens with the law relating to the free exercise of religion and explains how the law should apply in these contexts. Part IV responds to an important objection, namely that this whole piece tacitly depends on the idea that religion is special—that religion should be treated differently than other human concerns. Part V offers some concluding thoughts.

I. The Rules Regarding Sex Offenders

The legal rules relating to sex offenders are complicated, although most of them are quite recent.[12] In 1994, Congress passed the first nationwide legislation on the subject, requiring states to create systems in which sex offenders would periodically report to law enforcement.[13] Two years later,

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11 In this way, this Article seeks to tap into, and further, the insights of the "naming, blaming, and claiming" movement. *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 Law & Soc'y Rev. 631 (1980–81).

12 As this Article tells it, the story begins twenty-five years ago. But this is more convenient than accurate. A number of states, for example, established legal requirements for sex offenders much earlier. *See* Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 Calif. L. Rev. 885, 887 n.4 (1995) (noting how a number of states had sex-offender registration requirements, beginning as early as 1947).

13 *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (repealed 2006). To be technical, states have not actually been *required* to do anything. This is all Spending

Congress revised the legislation to make sure that some of that information would be made public.[14]

Things changed significantly in 2006 with the passage of the Sex Offender Registration and Notification Act (SORNA).[15] Among other things, SORNA revamped the registration requirements for sex offenders.[16] It expanded who had to register (by adding to the list of crimes requiring registration), made registration requirements more onerous, lengthened registration periods, and backed it all up with new criminal penalties.[17] SORNA has led to a number of thorny issues requiring Supreme Court intervention—like whether sex offenders have due process rights to a hearing before being put on registries,[18] what happens to sex offenders who leave a jurisdiction,[19] and what happens to those whose sex-offense convictions predate SORNA's enactment.[20]

Now, SORNA is just the tip of the iceberg in the sense that SORNA simply sets *minimums* for state sex-offender systems. States could, for example,

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Clause legislation, so states can avoid the rules by not taking the money. *See* United States v. Kebodeaux, 570 U.S. 387, 398 (2013) ("[T]he [current] statute, like the Wetterling Act, used Spending Clause grants to encourage States to adopt its uniform definitions and requirements. [But i]t did not insist that the States do so.").

14 This Act became known as Megan's Law. *See* Pub. L. No. 104-145, 110 Stat. 1345 (1996) (repealed 2006). All of the states quickly adopted it. *See* Smith v. Doe, 538 U.S. 84, 90 (2003) ("By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law.").

15 Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified as amended in scattered sections of 18 and 42 U.S.C.).

16 *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) ("SORNA makes 'more uniform and effective' the prior 'patchwork' of sex-offender registration systems." (quoting Reynolds v. United States, 565 U.S. 432, 435 (2012))).

17 *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1078–80 (2012) (describing SORNA's effects); *see also Gundy*, 139 S. Ct. at 2121 ("To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, than most States had before.").

18 *See* Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (concluding that they do not, because registration is required simply by virtue of the previous conviction).

19 *See* Nichols v. United States, 136 S. Ct. 1113 (2016) (concluding that SORNA does not require offenders who move out of the country to maintain registration where they used to live); Carr v. United States, 560 U.S. 438 (2010) (concluding that SORNA does not require offenders who changed jurisdictions before SORNA's effective date to register in the new jurisdiction).

20 The Supreme Court first held that the statute's particular language meant that SORNA would not apply to pre-Act offenders until the Attorney General so specified. *See* Reynolds v. United States, 565 U.S. 432, 435 (2012). After the Attorney General so specified, the Court then considered (and rejected) the claim that Congress's vesting so much power in the AG violated the nondelegation doctrine. *See* Gundy v. United States, 139 S. Ct. 2116 (2019). As for the claim that SORNA's retroactivity might violate the Ex Post Facto Clause, one must keep in mind how the Supreme Court earlier rejected an Ex Post Facto challenge to Alaska's sex-offender reporting requirements, concluding that Alaska's SORNA-like regime was civil and nonpunitive rather than criminal and punitive. *See* Smith v. Doe, 538 U.S. 84, 95 (2003).

choose to require registration for more crimes, or they could choose to have longer registration periods, more frequent updates, or more detailed disclosures.[21] SORNA establishes floors not ceilings.[22]

Yet SORNA is limited in one important respect: its regime is one of registration and reporting only. SORNA does not impose primary obligations on sex offenders. So while SORNA requires sex offenders to keep the authorities updated about where they reside, work, or study, it does not actually limit where sex offenders reside, work, or study.[23] Those kinds of primary restrictions—which had probably had the most serious consequences on the daily lives of sex offenders—instead have come from state and local law.[24]

Many states and localities have adopted such rules. More than half the states, for example, have residency restrictions prohibiting sex offenders from living within a certain distance of protected sites.[25] While some only prohibit sex offenders from living near schools, others also establish daycares, playgrounds, and other places as protected sites.[26] In some states, sex

21 *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,053 (July 2, 2008) ("[T]he SORNA requirements are met so long as sex offenders who satisfy the SORNA criteria for placement in a particular tier are consistently subject to *at least* the duration of registration, frequency of in-person appearances for verification, and extent of website disclosure that SORNA requires for that tier." (emphasis added)).

22 This is generally true but not entirely so. SORNA, for example, does create a ceiling in how it forbids states from making certain kinds of information public. *See* 34 U.S.C. § 20920(b) (2018) (requiring states to not disclose certain things to the public, like "the Social Security number of the sex offender" or "any reference to arrests of the sex offender that did not result in conviction").

23 *See Residency Restrictions FAQs*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING (SMART) https://www.smart.gov/faqs/faq_residency.htm (last visited Oct. 21, 2019) ("Does the Adam Walsh Act place restrictions on where sex offenders can live, work, go to school or loiter? No. Residency restrictions and safety zones are NOT part of the Adam Walsh Act. All such restrictions are the result of jurisdictional or local legislation, not federal law or the Adam Walsh Act.").

24 *See* Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741, 790 (2016) ("All of these collateral consequences: residency restrictions, GPS monitoring, Internet restrictions, and employment restrictions—are functions of laws passed by state or local governments.").

25 *See* John Kip Cornwell, *Sex Offender Residency Restrictions: Government Regulation of Public Health, Safety, and Morality*, 24 WM. & MARY BILL RTS. J. 1, 6 & n.18 (2015) (noting that "[s]ex offender residency restrictions currently exist in more than thirty states" and providing citations). For a helpful chart detailing these residency restrictions by state, see Jennifer Burnett, *Sex Offender Residency Restriction Zones*, COUNCIL OF STATE GOV'TS (Nov. 19, 2015), http://knowledgecenter.csg.org/kc/content/sex-offender-residency-restriction-zones.

26 *See, e.g.*, GA. CODE ANN. § 42-1-15(b) (2020) ("child care facility, church, school, or area where minors congregate"); IOWA CODE § 692A.114(2) (2020) ("school or a child care facility"); WYO. STAT. ANN. § 6-2-320(a)(iv) (2020) ("school").

offenders are barred from being within 500 feet of a protected site; in other states, the radius can go up to 3000 feet.[27]

The cumulative effect of these restrictions can be enormous. Sex offenders have trouble in small towns because so much is in the radius of a single protected site;[28] they have trouble in big cities because protected sites are everywhere.[29] This is why we have accounts of sex offenders living in tent camps and under bridges.[30] For understandable reasons, much of the literature dealing with sex offenders has been about these residency restrictions and their effects.[31]

No one has talked about religion in the context of residency restrictions, although it deserves to be part of the debate. Residency restrictions do not legally prevent sex offenders from going to church, but living far from a church makes it hard to attend. Sex offenders may find themselves unable to go to religious services without a car, a ride, or a perfectly placed bus route, which will be particularly hard on low-income folks. Moreover, some religious denominations will be particularly affected by residency restrictions.

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27 *See, e.g.*, CAL. PENAL CODE § 3003.5(b) (West 2020) (2000 feet); 720 ILL. COMP. STAT. ANN. 5/11-9.3(b-10) (2020) (500 feet); MISS. CODE. ANN. § 45-33-25(4)(a) (2020) (3000 feet).

28 *See, e.g.*, Doe v. Miller, 405 F.3d 700, 706 (8th Cir. 2005) ("In smaller towns, a single school or child care facility can cause all of the incorporated areas of the town to be off limits to sex offenders [due to residency restrictions].").

29 *See, e.g.*, McGuire v. Strange, 83 F. Supp. 3d 1231, 1241 (M.D. Ala. 2015) (noting that eighty percent of Montgomery was off limits to sex offenders); Berlin v. Evans, 923 N.Y.S.2d 828, 835 (Sup. Ct. 2011) ("[P]etitioner has convinced the court that, based on the number of places fitting the definition of 'school grounds' as defined by the statute, he has effectively been banished from Manhattan, where he has lived most of his life.").

30 *See* Marc L. Roark, *Under-Propertied Persons*, 27 CORNELL J.L. & PUB. POL'Y 1, 3 (2017) (discussing the situation in Miami, where "underneath the Julia-Tuttle causeway, a colony of 140 homeless sex offenders lived until 2010, when the community was forced out"); *see also* Douglas Hanks, *Tent Camp of Homeless Sex Offenders Near Hialeah 'Has Got to Close,' County Says*, MIA. HERALD (Aug. 22, 2017), http://www.miamiherald.com/news/local/community/miami-dade/article168569977.html. This has led to allegations that these residency restrictions are actually counterproductive. *See* Autumn Long, *Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 145, 153–54 (2009) (arguing that such restrictions can backfire by "forc[ing] offenders from their homes to other places such as rest stops or streets where it is harder for police to monitor them").

31 *See, e.g.*, Carpenter & Beverlin, *supra* note 17, at 1078–80; Cornwell, *supra* note 25; Gina Puls, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C. J.L. & SOC. JUST. 319 (2016); Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007). The interest in residency restrictions goes well beyond law professors too. *See, e.g.*, Amy L. Anderson, Lisa L. Sample & Calli M. Cain, *Residency Restrictions for Sex Offenders: Public Opinion on Appropriate Distances*, 26 CRIM. JUST. POL'Y REV. 262 (2015); Songman Kang, *The Consequences of Sex Offender Residency Restriction: Evidence from North Carolina*, 49 INT'L REV. L. & ECON. 10 (2017).

Orthodox Jews are religiously forbidden from driving on the Sabbath; if they cannot live near a synagogue, they will not be able to go.[32]

Yet even so, there is a different set of legal restrictions that have a much greater impact on the free exercise of religion. These restrictions are not on where people can live, but on where they can be. And these restrictions do not make it more difficult to go to church; they make it simply illegal to do so.

II. Sex Offenders and the Free Exercise of Religion

While the problem here may be hard to solve, it is easy to describe. Churches usually have children in them. Churches often have schools and daycares that operate during the week; they usually have some kind of religious instruction for children; and they frequently have children present during religious services. But sex offenders are often legally required to stay away from children, wherever they are. After unpacking this basic arrangement, this Part unpacks the layered and nested complications arising from it.

A. *Sex Offenders and Church Attendance*

Although many states impose requirements on sex offenders that restrict church attendance, there is little uniformity among them, and the resulting statutory regimes are both varied and complicated. Given that, it perhaps helps to begin with a single jurisdiction. We begin with North Carolina, in part because its rules are particularly striking and in part because its rules have sparked some informative litigation.[33]

North Carolina restricts sex offenders in some typical ways. It imposes residency restrictions on where sex offenders can live,[34] as well as employment restrictions on where sex offenders can work.[35] But without discounting the seriousness of these limitations,[36] North Carolina has another set of

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32 This possibility is actually not hypothetical. *See* People v. Oberlander, 872 N.Y.S.2d 692 (Sup. Ct. 2008) (rejecting such a claim).

33 North Carolina's rules on sex offenders got widespread attention in the Supreme Court's decision in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), where the Court unanimously invalidated North Carolina's total social-media ban on sex offenders. *Packingham* will be discussed more later. *See infra* subsection III.C.1. Moreover, separate from *Packingham*, there was a serious and partially successful challenge to other restrictions imposed on sex offenders by North Carolina. *See* Does v. Cooper (*Does I*), 148 F. Supp. 3d 477 (M.D.N.C. 2015); Does v. Cooper (*Does II*), No. 1:13CV711, 2016 WL 1629282 (M.D.N.C. Apr. 22, 2016); Doe v. Cooper (*Does III*), 842 F.3d 833 (4th Cir. 2016).

34 *See* N.C. Gen. Stat. § 14-208.16(a) (2020) ("A registrant under this Article shall not knowingly reside within 1,000 feet of the property on which any public or nonpublic school or child care center is located."). For a detailed analysis of North Carolina's residency restriction, see Kang, *supra* note 31, at 10.

35 *See* N.C. Gen. Stat. § 14-208.17(a) (2020) (requiring registrants not to "work . . . at any place where a minor is present and the person's responsibilities or activities would include instruction, supervision, or care of a minor or minors").

36 These two features alone illustrate well how these second-generation sex-offender restrictions are more intrusive than the first-generation ones, which only required report-

restrictions that affects church attendance. Rather than limiting where sex offenders can live or work, these restrictions limit where they can *go*—they limit, in other words, the places where such offenders can be physically present.[37]

There are two sets of restrictions here. The first, which appears to be more typical, bars sex offenders from being at or near places *intended for minors*—places like schools, daycares, and playgrounds.[38] The second, apparently less common, is broader, banning sex offenders from being at any place where minors *congregate*.[39] A number of states have variations on these two basic types of restriction.[40]

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ing and registration. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 101 (2003) (noting that sex offenders under that particular statutory regime "are free to move where they wish and to live and work as other citizens, with no supervision").

37 Probably the best demonstration of the breadth of North Carolina's sex offender restrictions lies in how North Carolina had to create a statutory safe harbor to make clear that sex offenders could still take their children to emergency rooms if a sex offender would be barred from being at an emergency room under the statutory restrictions. *See* N.C. GEN. STAT. § 14-208.18(b) (2020) ("Notwithstanding any provision of this section, a person subject to subsection (a) of this section who is the parent or guardian of a minor may take the minor to any location that can provide emergency medical care treatment if the minor is in need of emergency medical care.").

38 *See* N.C. GEN. STAT. § 14-208.18(a)(1) (2020) (barring sex offenders from "knowingly be[ing] at any of the following locations: (1) On the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds"); *see also id.* § 14-208.18(a)(2) (also barring sex offenders from "knowingly be[ing] . . . [w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors . . ."). The second section of this, *id.* § 14-208.18(a)(2), was held unconstitutionally overbroad in *Does III*, 842 F.3d at 847–48.

39 *See* N.C. GEN. STAT. § 14-208.18(a)(3) (2020) (barring sex offenders from "knowingly be[ing]" at "any place where minors frequently congregate, including, but not limited to, libraries, arcades, amusement parks, recreation parks, and swimming pools, when minors are present"). An earlier version of this provision, which prohibited sex offenders from "knowingly be[ing]" at "any place where minors gather for regularly scheduled educational, recreational, or social programs," was held unconstitutionally vague in *Does III*, 842 F.3d at 844. It was then replaced in 2016 with the above (a)(3) language. *See* 2016 N.C. Sess. Laws 581 (H.B. 1021).

40 Again, the laws here vary significantly, and some states are less stringent than North Carolina. Some only forbid sex offenders from being near certain specified places (like schools or daycares); others only forbid loitering near specified places. *See* GA. CODE ANN. § 42-1-15 (2020) (child or violent sex offenders may not reside or work within 1000 feet of childcare facilities, schools or churches); IDAHO CODE § 18-8329 (2020) (child or violent sex offenders may not enter or loiter within 500 feet of school or daycare when children are present without permission of school or daycare); 720 ILL. COMP. STAT ANN. 5/11-9.3 (2020) (child sex offenders may not enter or loiter within 500 feet of school without permission or of public park); IND. CODE § 35-42-4-14 (2020) (child or violent sex offenders may not enter schools nor remain at religious institutions or houses of worship located on school property for longer than thirty minutes after the conclusion of worship services or religious instruction); IOWA CODE § 692A.113 (2020) (child sex offenders may not enter or

But the issue is larger than this. For apart from these state statutes, similar kinds of restrictions are sometimes imposed by judges on individual sex offenders as conditions of their parole, probation, or supervised release.[41] There is even less uniformity here. The relevant court order could be relatively formal and part of a long list of conditions: "Special Parole Condition 18 states: 'You shall not enter or loiter within 250 feet of the perimeter of places where children congregate . . . .' "[42] Or it might be specific, like when a magistrate judge simply tells a sex offender in open court that he "can't attend church services where minor[s] are present."[43] Sometimes, and this will be returned to later, such conditions explicitly grant correctional officers the ability to waive or relax the requirements.[44]

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loiter within 300 feet of a school, childcare facility, public library, or recreational area intended primarily for the use of minors); KY. REV. STAT. ANN. § 17.545 (2020) (registered sex offenders may not enter schools, daycares, or playgrounds without permission); LA. STAT. ANN. § 15:538(D)(1) (2020) (child sex offenders may not go within 1000 feet of a school when children are present or of specified facilities like early learning centers and public pools); MD. CODE ANN., CRIM. PROC. § 11-722 (West 2020) (registered sex offenders may not enter school or daycare without permission); MISS. CODE. ANN. § 45-33-26 (2020) (child or violent sex offenders may not enter or loiter within 500 feet of a school or facility like a public beach or campground where minors congregate without permission); OR. REV. STAT. § 163.476 (2020) (expiring 2022) (violent sex offenders may not enter schools, childcare centers, playground or other recreational places intended primarily for minors); VA. CODE ANN. § 18.2-370.5 (2020) (child or violent sex offenders may not enter schools or daycares without permission).

41 Parole, probation, and supervised release are different concepts, of course. Yet for the purposes here, their similarities matter more than their differences. For an explanation of those similarities and difference, see NEIL P. COHEN, LAW OF PROBATION & PAROLE § 1:1, Westlaw (database updated July 2020) ("Despite these differences, probation, parole, and supervised release are similar in most respects [in that they] enable criminal offenders to serve at least part of their sentences in the community rather than in prison.").

42 *See, e.g.*, Manning v. Powers, 281 F. Supp. 3d 953, 957–58 (C.D. Cal. 2017) (noting also how the sex offender in question "contends that Defendants have interpreted this condition to prohibit him from attending church and preaching"). For other similar examples, see *United States v. Trepanier*, 576 F. App'x 531, 536–37 (6th Cir. 2014) ("The defendant shall be prohibited from loitering where minors congregate, such as playgrounds, arcades, amusement parks, recreation parks, sporting events, shopping malls, swimming pools, etc."); *Collins v. State*, 911 N.E.2d 700, 715 (Ind. Ct. App. 2009) ("Stipulation 16 provides as follows: 'You shall not be present at parks, schools, playgrounds, day care centers, or other specific locations where children are known to congregate in your community.' ").

43 United States v. Hernandez, 209 F. Supp. 3d 542, 544 (E.D.N.Y. 2016) (alteration in original).

44 In *State v. McCormick*, for example, one condition imposed on a sex offender was that he "not frequent areas where minor children are known to congregate, as defined by [his] supervising Community Corrections Officer." 213 P.3d 32, 35 (Wash. 2009) (en banc). The officer then informed him that this included "[p]arks, schools, churches, day cares, movie theaters, shopping malls, bowling alleys, skating rinks, video arcades, Boys and Girls Club, et cetera." *Id.* at 34 (alteration in original); *see also* State v. Gauthier, 145 A.3d 833, 838 (Vt. 2016) ("The condition reads: 'You may not access or loiter in places where

Both kinds of restrictions—the categorical statutes and the individualized conditions—operate to prevent sex offenders from being able to attend houses of worship. They typically do not single religious exercise out specifically; the restrictions on church attendance happen as consequences of neutral and generally applicable laws.[45] They forbid sex offenders from being in places where children are present (or where they gather or congregate), and houses of worship during religious services fall within that description. Now some might try to avoid conflict by reading these statutory prohibitions narrowly. But that does not always work. In Indiana, for example, a statute only forbade sex offenders from "enter[ing] school property."[46] But a trial court interpreted it as barring sex offenders from going to any church service where there was a Sunday school for older kids or nursery care for infants (because those counted as schools).[47]

Yet broad judicial interpretations of these statutes are probably less important than the broad interpretations given to them by local law enforcement—like sheriff's departments and probation officers. Perhaps the relevant statute is somewhat clear. But say the sheriff's department mails you a letter saying in plain English that you can only go to church "[a]s long as the church has only regular services and has no Sunday school for the age group denoted in the new law."[48] Or say that when you point out ambiguities to your parole officer, she simply tells you "should not be going to church anyway,"[49] or that it would be better for you not to "just to be on the safe side."[50] Or say the sheriff in your county is a little more confrontational, and tells you plainly that, whatever you think the statute means, you are "forbidden to go to church, and they will arrest [you] for doing so, or find some other reason to arrest [you], if [you] go to church."[51] (Find some other reason?) Few people would go to church in the face of all that, even if winning in court later was a virtual certainty. And winning in court later is not a virtual certainty. In one North Carolina case, a sex offender had been going to church

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children congregate, i.e., parks, playgrounds, schools, etc., unless otherwise approved, in advance, by your probation officer or designee.'").

45 This obviously affects the legal analysis. *See* Emp. Div. v. Smith, 494 U.S. 872 (1990) (holding that religious exemptions are generally not required from neutral and generally applicable laws); *infra* Section III.A (unpacking the legal doctrine).

46 *See* IND. CODE § 35-42-4-14(b) (2020).

47 *See* Doe 1 v. Boone Cnty. Prosecutor, 85 N.E.3d 902, 906–07 (Ind. Ct. App. 2017) (noting the trial court's conclusion that if sex offenders "attend church during the time 'Sunday Schools, vacation bible schools and pre-schools' are being conducted, they may be prosecuted and arrested"). The Indiana Court of Appeals ended up reversing this decision on statutory grounds, *see id.* at 907–10, while also suggesting that the district court's broad interpretation would render the statute unconstitutional, *see id.* at 910. In 2018, the Indiana legislature amended the statute to exempt houses of worship altogether from the statute. *See* 2018 Ind. Acts 986 (codified at IND. CODE § 35-42-4-14(c) (2020)).

48 *See Boone Cnty. Prosecutor*, 85 N.E.3d at 905 (alteration in original).

49 *See* Manning v. Powers, 281 F. Supp. 3d 953, 958 (C.D. Cal. 2017).

50 *See* Doe v. Cooper (*Does III*), 842 F.3d 833, 839 (4th Cir. 2016).

51 *See Manning*, 281 F. Supp. 3d at 962.

regularly for the ten years following his release from prison. He sang in the choir; he acted as an usher; he served on church committees. Moreover, he was completely open about his past; the church's leaders and its pastor knew everything about it. A decade after prison, with no further misbehavior, he probably thought he had managed to find his way back to an ordinary life. But he was arrested when an anonymous caller saw him in church and called the police.[52]

In a similar case in Virginia, a woman sought to go to church.[53] Back in 1993, she had been convicted of statutory rape for having sex with a boy who was more than five years younger than her. At the time, Virginia had no sex-offender registration rules. But in 1994, Virginia created a sex-offender registry, which forced her to register but did not yet bar her from church. That happened in 2008, when Virginia broadened the definition of "sexually violent offense" to include statutory rape. As a result, this woman—now twenty years distant from her conviction for statutory rape—became barred from church for the rest of her life.[54] Whatever the proper result of the case, the facts are striking.[55]

Moreover, the rules are so broad even apparently harmless interactions become felonies. In one case, a sex offender went to a church to talk to the pastor.[56] He did not go regularly to that church; he only went once.[57] But there were children at the church when he went to see the pastor, and even

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52 *See* Does v. Cooper (*Does I*), 148 F. Supp. 3d 477, 483 (M.D.N.C. 2015) ("In 2011, an anonymous caller reported John Doe 1's presence at his church's worship service, and he was arrested . . . ."). For all the facts surrounding these events, see Brief for Appellees at 4–5, *Does III*, 842 F.3d 833 (No. 16-6026), https://mitchellhamline.edu/sex-offense-litigation-policy/wp-content/uploads/sites/61/2017/10/Doe-v.-Cooper-Brief-for-Appellees.pdf.

53 The case is *Doe v. Virginia Department of State Police*, 713 F.3d 745, 751 (4th Cir. 2013). For the full account of the facts, see Petition for Writ of Certiorari, *Va. Dep't of State Police*, 714 F.3d 745, No. 13-385, 2013 WL 5372425, and Brief in Opposition to the Petition for Writ of Certiorari, *Va. Dep't of State Police*, 714 F.3d 745, No. 13-385, 2014 WL 651865.

54 *See Va. Dep't of State Police*, 713 F.3d at 751 ("[B]ecause Virginia law does not provide an avenue for sexually violent offenders to petition for removal from the Registry, Doe must now remain on the Registry for life.").

While Virginia's statute bans sex offenders only from being present on school or daycare property, Doe claimed "that all the local churches of her faith have Sunday schools, so the prohibition from entering daycare property prevents her from going to church." *Id.*; *see also* Doe v. Va. Dep't of State Police, No. 3:10CV533, 2011 WL 2551014, at *2 (E.D. Va. June 27, 2011) (noting that all "the Episcopal Churches in the Spotsylvania area that she wishes to attend have a child daycare, Sunday school, or weekend Bible study program").

55 The Fourth Circuit ultimately turned away her challenge on standing grounds, as she had not exhausted the administrative remedies available to her under Virginia law. Refusal to hear her claim inspired a passionate dissent. *See Va. Dep't of State Police*, 713 F.3d at 773–74 (King, J., dissenting) ("I must admit that I am nonplused—floored, even—that we would turn away someone in Ms. Doe's position, straining to forgo involvement for the nonce, while affording precious little hope for the future that her modest request for federal adjudication of a federal constitutional claim will be fulfilled. . . . I emphatically and wholeheartedly dissent.").

56 *See* State v. Fryou, 780 S.E.2d 152, 154 (N.C. Ct. App. 2015).

57 *See id.*

though there was no allegation that he had any contact with any of them, he still ended up convicted on felony charges with a statutory range of four to twenty-five months.[58]

It is hard to figure out how many sex offenders are under these restrictions. While states keep numbers on how many sex offenders they have, the prohibitions on church attendance sometimes apply only to a subset of sex offenders. On top of that, it is hard to figure out how many sex offenders are under relevant parole, probation, or supervised-release conditions. Yet even so, it is clear that we are talking about tens (or maybe hundreds) of thousands of people. North Carolina alone apparently has more than ten thousand sex offenders bound by its statutes forbidding church attendance.[59]

Moreover, the problem is exacerbated by three other features of the system: (1) the duration of these restrictions, (2) their retroactivity, and (3) and the sometimes-overbroad definition of sex offenders. To sum it up, these restrictions bar people from church for a long time, they are often imposed retroactively, and they are placed on people who have committed a wide variety of crimes.

First, these restrictions can last a long time. SORNA establishes a minimum period of fifteen years for the least-severe classification of sex offenders.[60] States must respect that minimum, but they can do more. For many sex offenders in many states, registration is for life.[61] But that, of course, can mean a lifetime prohibition on church attendance. Now, it is true that judicially imposed conditions of parole, probation, and supervised release are, by nature, temporary. But that is not to say that these periods are short. In a

58 *See id.* at 155; *see also* N.C. GEN. STAT. § 14-208.18(h), § 15A-1340.17 (2020) (sentencing range).

59 *See* Does v. Cooper (*Does II*), No. 1:13CV711, 2016 WL 1629282, at *8 n.4 (M.D.N.C. Apr. 22, 2016 ("At the status conference, Plaintiffs asserted that there are currently approximately 11,000 registered sex offenders in North Carolina and that 20,000 individuals have ever been registered sex offenders in North Carolina. Though the Court recognizes that these figures are only estimates and refer to all registered sex offenders rather than restricted sex offenders, suffice it to say, there are numerous restricted North Carolina sex offenders.").

60 *See* Gundy v. United States, 139 S. Ct. 2116, 2122 (2019) (noting that sex offenders must register "for a period of between fifteen years and life (depending on the severity of his crime and his history of recidivism)"); Kristyn M.N. Wong, *Children As Predators: Courts Should Handle Juvenile Sex Offenders and Adult Sex Offenders Differently*, 52 CREIGHTON L. REV. 217, 221 (2019) ("The registration period is fifteen years for Tier I sex offenders, twenty five years for Tier II sex offenders, and lifetime for Tier III sex offenders.").

61 *See* Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for A Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1105–06 & n.98 (2007) (noting how "many jurisdictions require such registration for life" and providing citations). Several pieces have attacked lifetime registration when imposed on juvenile sex offenders. *See, e.g.*, Catherine L. Carpenter, *Throwaway Children: The Tragic Consequences of a False Narrative*, 45 SW. L. REV. 461 (2016); Shannon C. Parker, *Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification*, 21 VA. J. SOC. POL'Y & L. 167 (2014).

case out of New Hampshire, a sex offender who was a Jehovah's Witness sought to go to church.[62] A condition of his supervised release said that he could have no contact with children under seventeen, but he asked for a modification so that he could attend church when accompanied by an elder member of the congregation. The court rejected his claim. And looking back on it, the burden on religious liberty here is minor in a sense because the restriction itself is temporary rather than permanent. Perfetto will eventually be able to go to church; he just needs to wait until his period of supervised release ends. But that logic breaks down a bit, when one realizes that Perfetto's term of supervised release was set to last somewhere between fourteen and twenty-eight years![63]

Second, these restrictions are retroactive in the sense that when legislatures expand the category of sex offenders, new people can newly fall into the redefined category because of old crimes. SORNA itself is retroactive.[64] And the second-generation sex-offender restrictions are similarly retroactive, and almost constantly expanding. Georgia originally started with a modest and intuitive definition of "dangerous sex offender," one that included things like rape and child molestation. But the category was widened almost every year, and now one can become a "dangerous sex offender" in Georgia for obscene telephone calls to minors.[65]

Third, and connected to the last point, the definition of sex offender can be overbroad. On almost anyone's understanding, there are sex offenders who do not seem like they deserve the label. These rules keep sex offenders away from churches because they might sexually abuse children. But qualifying offenses usually need to involve either sex or children, but not both.[66] Kidnapping a child usually counts, even when it is totally nonsex-

62 State v. Perfetto, 7 A.3d 1179, 1181 (N.H. 2010).

63 Brief for the Petitioner at 1, *Perfetto*, 7 A.3d 1179, No. 2009-0647, 2010 WL 10933170.

64 *See Gundy*, 139 S. Ct. 2116 (concluding that SORNA did not excessively delegate authority to the Attorney General); Reynolds v. United States, 565 U.S. 432 (2012) (concluding that SORNA would not apply to pre-Act offenders unless the Attorney General specified).

65 *Compare* GA. CODE ANN. § 42-1-12(a)(10)(B.3)(xviii) (2020) (including, in the definition of dangerous sex offense, "[a] second or subsequent conviction for obscene telephone contact in violation of Code Section 16-12-100.3"); *with id.* § 16-12-100.3(b) ("A person 17 years of age or over commits the offense of obscene telephone contact with a child if that person has telephone contact with an individual whom that person knows or should have known is a child, and that contact involves any aural matter containing explicit verbal descriptions or narrative accounts of sexually explicit nudity, sexual conduct, sexual excitement, or sadomasochistic abuse . . . .). For an application, see *Frix v. State*, 680 S.E.2d 582, 588 (Ga. Ct. App. 2009) (holding that sexually explicit text messages are in "written format and not capable of being heard," and thus are not "'aural matter' within the meaning of [the statute]").

66 *See* Carpenter & Beverlin, *supra* note 17 at 1084 (noting that "sexual motivation or purpose [used to be] a necessary component for an offense to be registerable," but now "registration schemes include mandatory registration for crimes committed against minors, even when there is no sexual purpose or contact").

ual.[67] Plain assault of a child can count as well—so the eighteen-year-old in Georgia who hits a seventeen-year-old in a drug deal gone wrong becomes a sex offender.[68]

Importantly, statutory rape almost always counts, which brings in a lot of sex offenders.[69] Recall the Virginia case, discussed earlier, where a woman was barred for life from attending church for having sex with a boy under her supervision more than five years younger than her. The district judge in her case could not resist saying that she "seems to have maybe not committed the worst sex crime in the world."[70] We should be careful, of course, not to minimize these kinds of harms. While some cases of statutory rape may not deserve criminal punishment; other cases probably do.[71] Even so, the category of sex offenses that trigger these restrictions can be quite broad. Some states, for example, treat it as a criminal sex offense for a teacher to have sex with an adult student.[72] Other states have no exception to their statutory rape laws for those close in age, meaning that two minors cannot have con-

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67 Kidnapping cases without any sexual element are common, and kidnappers have brought constitutional challenges to being labeled as a sex offender on substantive due process grounds. Results have been mixed. *See* People v. Knox, 903 N.E.2d 1149 (N.Y. 2009) (upholding the legislative decision to define nonfamily aggravated kidnapping of a minor as a sex offense); People v. Johnson, 870 N.E.2d 415 (Ill. 2007) (same); ACLU of N.M. v. City of Albuquerque, 137 P.3d 1215 (N.M. Ct. App. 2006) (striking down the decision); State v. Robinson, 873 So.2d 1205 (Fla. 2004) (same).

68 *See* GA. CODE ANN. § 42-1-12(e)(1) (2020) (requiring registration as a sex offender by any individual convicted "of a criminal offense against a victim who is a minor"); *see also* Rainer v. State, 690 S.E.2d 827 (Ga. 2010) (upholding registration requirement for eighteen-year-old who pleaded guilty to robbery and false imprisonment of a seventeen-year-old). *Rainer* inspired a passionate dissent by the Chief Justice that ended, "I am a parent. I am a grandparent. I care about the children of this State. But I am also obligated to care about the constitutional rights of all those affected by its laws. For this reason, I must dissent." *Id.* at 831 (Hunstein, C.J., dissenting).

69 As Catherine Carpenter notes, "Whether prosecution for statutory rape is based on the intentional act of exploitation of a young child or strict liability, those convicted are subject to sex offender registration laws and the burdensome consequences of such registration in the vast majority of jurisdictions." Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 324–25, 325 nn. 137–39 (2006) (providing citations).

70 Doe v. Va. Dep't of State Police, 713 F.3d 745, 773 (4th Cir. 2013) (King, J., dissenting) (reporting the district judge's comments).

71 For one thing, statutory rape of children below a certain age is simply considered rape. *See* MODEL PENAL CODE § 213.1 (AM L. INST. 1980) (setting the age at ten). For another, while some prosecuting authorities have said they will not prosecute every statutory rape case, they still prosecute when they see extreme cases. *See* Rigel Oliveri, Note, *Statutory Rape Law and Enforcement in the Wake of Welfare Reform*, 52 STAN. L. REV. 463, 493 (2000) (noting, among other examples, that "some California counties . . . such as San Diego only accept cases for prosecution when there is both a large age difference between the parties and a pregnancy has resulted").

72 *See* LA. STAT. ANN. § 14:81.4 (2020); N.C. GEN. STAT. § 14-27.32 (2020).

sensual sex without at least one of them becoming a sex offender.[73] These three things—the duration of these restrictions, their often-retroactive imposition, and the overbroad nature of the sex-offender category—can come together in a kind of perfect storm. In 2004, a nineteen-year-old school bus driver had sex with a fifteen-year-old student at the school.[74] That was statutory rape and required him to register as a sex offender for ten years.[75] But then North Carolina changed its rules. It changed the registration period to thirty years for statutory rape and also began to bar those convicted of statutory rape from church attendance (for the entire thirty-year period).[76] As a result, that nineteen-year-old bus driver will probably be barred from religious services for most of the rest of his life.

B. The Basic Problem

It may be obvious, but the basic problem is worth stating clearly. In America, in the twenty-first century, tens (maybe hundreds) of thousands of people in America are legally barred from going to church. Not everyone wants to go to church, of course, and the Constitution guarantees that the government will neither force nor push people into going.[77] But for many people, going to church is an important part of their lives.

Churches often serve important functions for people trying to reenter society after prison. They are places of spiritual and emotional transformation and also places that offer social and financial support to ex-offenders. Some readers will probably say that ex-offenders who go to church are better off because of God; others will probably say that they are better off because churches provide so much in the way of secular benefits. But either way, churches can be important sites of rehabilitation for ex-offenders trying to leave the criminal justice system for good. And frankly, ours is a criminal justice system that does not offer ex-offenders much in the way of rehabilitation.

For that reason, the rules we have been talking about are an enormous burden on the free exercise of religion. Legal analysis often begins with a threshold question about how deeply the law affects religious exercise.[78] But

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73 *See* Stephanie Gaylord Forbes, Note, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WM. & MARY L. REV. 1717 (2011); Chauntelle R. Wood, Note, *Romeo and Juliet: The 21st Century Juvenile Sex Offenders*, 39 S.U. L. REV. 385, 392 (2012). For an example of this, see *In re Maurice D.*, 34 N.E.3d 590 (Ill. Ct. App. 2015) (rejecting all the constitutional claims of a seventeen-year-old boy convicted with sleeping with a fifteen-year-old girl).

74 *See* Petition for Writ of Certiorari at 3, Bethea v. North Carolina, 139 S. Ct. 793 (2019), No. 18-308, 2018 WL 4357985.

75 *See In re* Bethea, 806 S.E.2d 677, 678 (N.C. Ct. App. 2017).

76 *See* Petition for Writ of Certiorari, *supra* note 74, at 4–6.

77 This principle goes back a long way. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government . . . can force nor influence a person to go to or to remain away from church against his will . . . .").

78 In legal parlance, this a question about substantial burdens. Exemption schemes, like the Religious Freedom Restoration Act, often operate by creating rights to religious

the "burden" question, so common in litigation nowadays,[79] has a relatively easy answer here. This is a burden under anyone's theory of burdens.

Justice Douglas once said that "[r]eligion is an individual experience."[80] This is no doubt true for some, but it is not true for everyone. In every religion, people gather together to read, to pray, and to worship. Together they laugh and cry, chat and sing, rejoice and mourn. Confession and communion cannot be done alone; a person alone is nine short of a minyan. Religion without religious groups may be possible, but it does not square with the lived reality of many Americans. Religion, at least for most, is a communal experience. For these people, communal experiences are part of the free exercise of religion, and thus protected by the Constitution's protection of the free exercise of religion. The Supreme Court takes it for granted that the Constitution protects religious freedom in its corporate capacities; several of its holdings cannot make any sense apart from it.[81]

Yet, despite this, it is easy to minimize the effects of these restrictions on sex offenders. Take this passage from a unanimous opinion of the New Hampshire Supreme Court, upholding such restrictions:

> Here, the defendant's freedom of belief has not been restricted. He may still practice his religion in ways that do not violate the condition of his sentences, including the use of books and video and audio recordings. He may also arrange bible study with elders from his congregation and attend meetings at a congregation where minors are not present.[82]

This passage tries to stress the positives, but it ends up reinforcing the negatives. The court emphasizes that, despite these restrictions, sex offenders can still believe what they want. But freedom of religion is not mere freedom of belief.[83] The court says that sex offenders can still read books and

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exemptions but only when religious exercise has been "substantially burdened." *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb (2018)).

79 In the *Hobby Lobby* litigation, for example, the issue was whether there was a substantial burden in being forced to provide insurance coverage for forms of contraception one believes religiously forbidden. *Compare* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719–25 (2014) (concluding there was a substantial burden), *with id.* at 757–61 (Ginsburg, J., dissenting) (concluding there was no substantial burden).

80 Wisconsin v. Yoder, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting).

81 *See, e.g.*, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 189 (2012) (arguing that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations"); Kedroff v. St. Nicholas Cathedral in N. Am., 344 U.S. 94, 116 (1952) (noting how the Court's decisions "radiate[ ] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine"). For some reflections on the Court's comment in *Hosanna-Tabor*, see Christopher C. Lund, *Free Exercise Reconceived: The Logic and Limits of* Hosanna-Tabor, 108 Nw. U. L. Rev. 1183, 1192 (2014).

82 State v. Perfetto, 7 A.3d 1179, 1183 (N.H. 2010).

83 The Supreme Court began this way. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."). But the Court eventu-

watch videos by themselves. But doing those things alone in one's house is a transparently pathetic substitute for religious study, worship, and fellowship with other human beings.

Two further points are worth pressing here. First, one striking aspect of the New Hampshire Supreme Court's opinion here is that the options it describes are things we typically associate with people *in prison*—reading books and watching videos are what prisoners do alone in their cells. The sad truth here is that, at least when it comes to their religious options, life is better for sex offenders in prison. Inside prison, they can freely go to religious worship services with other people. But outside it—now ostensibly free people—they are reduced to reading books and watching videos in a kind of solitary confinement.

Second, congregations of all religious faiths and denominations should take note. In the above passage, the New Hampshire Supreme Court points out that sex offenders could try to get other adults from their desired congregation to meet alone with them. This should be a wake-up call to any religious congregation interested in outreach to ex-offenders. Sex offenders will not be coming to your churches. If you want to reach them, you must find a way to go to them.

C. Other Problems

The burden these laws impose on the free exercise of religion is one problem. But there are other problems here too—a chain of problems, in fact, that will be familiar to First Amendment specialists. These laws are often both vague and broad, which can generate chilling effects. And these laws are restrictive enough that they end up being softened or waived by enforcement officials. Such softening is certainly sensible, but it results in a kind of licensing scheme, where a probation officer or local sheriff decides—usually on their own without any criteria or guidance—who should be allowed to go to church, who should not, and under what conditions. In turn, this generates risks of selective enforcement, discrimination, and abuse.

1. Vagueness

The restrictions on sex offenders discussed earlier are, of course, criminal in nature. In a variety of ways, criminal law works hard to keep vagueness within acceptable limits. The principle of lenity requires vague statutes to be

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ally moved on from this. *See Yoder*, 406 U.S. at 219–20 (noting that while the state "argues that 'actions,' even though religiously grounded, are outside the protection of the First Amendment[,] . . . our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause"); *see also* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 841 ("A right to believe a religion, but no right to act on its teachings, would be a hollow right indeed. . . . Even when Justice Scalia shrank the Free Exercise Clause in *Employment Division v. Smith*, he explicitly agreed that religiously motivated actions are part of the exercise of religion." (footnote omitted)).

interpreted generously to criminal defendants.[84] And courts even have power to invalidate statutes on vagueness grounds.[85]

Yet these vagueness doctrines have played only a marginal role in the context of these restrictions on sex offenders. Take restrictions that bar sex offenders from being in "places where children frequent," or "places where children congregate."[86] Words like "frequent" and "congregate" are imprecise by their nature, but courts have been quick to reject any constitutional claim of vagueness. The Vermont Supreme Court summarized the judicial mindset: "As other courts have found, the phrase 'where children congregate' is descriptive enough to put a defendant on notice that it includes all places where children are likely to be found in large numbers."[87] It is easy to quarrel with this logic—what are "large numbers" of children?—but the point is that few courts have been willing to entertain vagueness challenges.[88] Indeed, courts have generally refused to get involved even when the vagueness problem is compounded by other confusing language. In a striking example, a court upheld a restriction barring a sex offender from "*fre-*

84 *See, e.g.*, Skilling v. United States, 561 U.S. 358, 410 (2010) (noting the "familiar principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity' " (quoting Cleveland v. United States 531 U.S. 12, 25 (2000))); Jones v. United States, 529 U.S. 848, 858 (2000) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952))).

85 *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018) (holding the "crime of violence" provision of the Immigration and Nationality Act's definition of "aggravated felony" unconstitutionally vague); Johnson v. United States, 576 U.S. 591, 606 (2015) (holding a provision of the Armed Career Criminal Act unconstitutionally vague). When laws impinge on First Amendment freedoms, the Court has been even more concerned about vagueness. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 871–72 (1997).

86 *See supra* Section II.A (discussing these restrictions and providing citations).

87 State v. Gauthier, 145 A.3d 833, 840 (Vt. 2016). Other cases employ similar logic. For a striking example, see United States v. Shultz, 733 F.3d 616, 619 (6th Cir. 2013) (upholding the requirement that the defendant " 'shall not visit, frequent, or remain about any place where children under the age of 18 normally congregate (public parks, playgrounds, etc.) or any business that caters to and/or targets child customers' ").

88 When courts do call such restrictions vague, it is usually because of uncertainties created by catchall language. So, for example, the Washington Court of Appeals once held that the condition, "Do not enter any parks/playgrounds/schools and/or any places where minors congregate" to be unconstitutionally vague. But the court went out of its way to say that the restriction would have been fine without the catchall provision ("and/or any places where minors congregate"). *See* State v. Norris, 404 P.3d 83, 87–88 (Wash. Ct. App. 2017); *see also* McVey v. State, 863 N.E.2d 434, 449 (Ind. Ct. App. 2007) (invalidating the condition, "Special condition 14 [which] states that McVey 'shall not be present at parks, schools, playgrounds, day care centers, or ________ (other specific locations where children are known to congregate in your community),' " because the blank space was not properly filled in).

quent[ing] places where minors are *known* to *congregate*," despite the obvious uncertainty in each of the italicized terms.[89]

As a result, only in the most exceptional case have restrictions been held unconstitutional on vagueness grounds. The Fourth Circuit, for example, struck down an earlier version of North Carolina's statute that barred sex offenders from being "[a]t any place where minors gather for regularly scheduled educational, recreational, or social programs."[90] In particular, the court thought the phrase "regularly scheduled" too vague.[91] But the story ends in a twist: North Carolina replaced its ban with a broader one that extends to "any place where minors frequently congregate," which so far has not been struck down.[92] The vagueness has been reduced, but sex offenders are more limited than ever.

Moreover, vagueness naturally becomes a genuine problem when one remembers the position in which sex offenders find themselves. In the context of free speech, theorists talk about chilling effects. That comes into play here too in the context of freedom of religion.[93] Maybe a statute bars you from going to church; maybe not. But if the only clearly legal option is not going to church, and the penalty is severe enough, you will be pressured into not going. And this sets up the next point, which is that vague statutes add to the discretion that criminal statutes always give law enforcement, and thus heighten the dangers of selective and discriminatory enforcement.

As a practical example of this, take Indiana's statute, which bars sex offenders from "school property," which is defined to include both private and public schools, as well as any property used to "benefit children who are at least three (3) years of age and not yet enrolled in kindergarten."[94] Looking at the statute, one might think that sex offenders would be fine attending church on the weekends, because any schools connected to the church would be closed. But what about Sunday school? And what about infant care in the nursery during worship services? In isolation, one would probably think those things should not trigger the statute, because the statute's focus seems to be on full-time, Monday–Friday, educational institutions. But because any violation here would mean a return to jail, sex offenders will be

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89 *See* State v. Riles, 957 P.2d 655, 658 (Wash. 1998) (emphasis altered).

90 Doe v. Cooper (*Does III*), 842 F.3d 833, 838 (4th Cir. 2016).

91 *Id.* at 842.

92 The statute now reads: "It shall be unlawful for any person required to register under this Article . . . to knowingly be at any of the following locations: . . . (3) At any place where minors frequently congregate, including, but not limited to, libraries, arcades, amusement parks, recreation parks, and swimming pools, when minors are present." N.C. GEN. STAT. § 14-208.18 (2020).

93 *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 871–72 (1997) (observing that the "vagueness" of content-based regulation of speech "raises special First Amendment concerns because of its obvious chilling effect on free speech"); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 687–88 (1978) ("[T]he chilling effect doctrine is but the logical combination of two simple yet fundamental propositions[:] . . . uncertainty and . . . comparative harm.").

94 *See* IND. CODE § 35-31.5-2-285 (2020).

instinctively cautious. And when the Boone County Sheriff's Department sends them a letter (as it did), interpreting the statute to apply to Sunday school, and commanding sex offenders not to attend church unless the church "has no Sunday school [or childcare] for the age group denoted in the new law"[95]—well, what sex offender would go against that? Indeed, when the whole thing was eventually litigated, even the Indiana courts disagreed on whether it applied to Sunday school.[96]

As this last case reveals, the concern is not just about vague statutes. Sex offenders must not just consider statutes in the abstract; they also must take into account the interpretations of parole officers, the sheriff's department, and police. In one Washington case, a condition of a sex offender's suspended sentence was that he could not "frequent areas where minor children are known to congregate."[97] Lawyers will attack such conditions as vague, because words like "frequent" and "congregate" are subject to debate. But in the case, the Community Corrections Officer interpreted the restriction and simply told the sex offender "he could not frequent churches or schools."[98] It is hard to imagine a sex offender going against that. In another case, a sex offender was barred by statute from being "[w]ithin 300 feet" of places "intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors."[99] That statute is quite hard to interpret—it was later held unconstitutional[100]—but police departments dealt with the difficulty by interpreting it as a flat ban on church: "[I]f the church ha[s] children in it," one police officer said to another, "Fryou [the sex offender] was not to be within 300 feet of it."[101]

2. Licensing, Delegation, Bargaining, Selective Enforcement, and Discrimination

These last examples illustrate an important facet of the problem. Decisions about whether sex offenders can go to church are most frequently being made not by judges or even by prosecutors, but instead by lower-level enforcement officials—parole and probation officers, the sheriff's depart-

95 *See* Doe 1 v. Boone Cnty. Prosecutor, 85 N.E.3d 902, 905 (Ind. Ct. App. 2017) (quoting the letter).

96 The trial court adopted the view that "churches are 'school property' only when they hold programs for children who are at least three years old and not yet enrolled in kindergarten." *Id.* at 906. But the Indiana Court of Appeals reversed on statutory grounds, found the statute unconstitutional as applied, and issued a permanent injunction against arresting or prosecuting the appellants from entering their churches. *Id.* at 911.

97 *See* State v. McCormick, 213 P.3d 32, 33 (Wash. 2009) (en banc).

98 *Id.* at 40.

99 *See* State v. Fryou, 780 S.E.2d 152, 154 (N.C. Ct. App. 2015); N.C. GEN. STAT. § 14-208.18(a)(2) (2020).

100 *See* Doe v. Cooper (*Does III*), 842 F.3d 833 (4th Cir. 2016).

101 Brief for Appellant-Defendant at 3, *Fryou*, 780 S.E.2d 152, No. COA14-1168, 2014 WL 9883613, at *3.

ment, and police.[102] In practical terms, these officials are free to waive or soften the rules—to allow sex offenders to go to church despite a formal prohibition against it. Given the severity of the restrictions imposed on sex offenders, this is often both just and sensible. Maybe it makes the best of a bad situation. But it also creates some concerns.

Say you are a sex offender under a restriction on church attendance. Your parole officer may decide to let you go to church anyway, because he thinks religion is good. Or he may decide not to, because he thinks religion is foolish superstition. Or he might be okay with you going to a church but not a mosque. Or he might be all right with you going to church weekly but not more than that, because he is suspicious of intensely religious people. There is simply nothing tying anybody's hands here. Enforcement officials like probation officers and police have no obligation to treat anyone any certain way, and they may not even feel any obligation to treat like cases alike. We now have essentially a licensing scheme, whereby government officials—on their own, without formal criteria—are making ad hoc and practically unreviewable decisions about who gets to attend church, who does not, and under what conditions.[103]

Conversations between parole officers and sex offenders rarely show up in published decisions, but if one looks at the cases, one gets the sense that the problems here are real. Take again that North Carolina case where a sex offender was arrested after an anonymous caller reported him at church during Sunday worship.[104] Just as important is what happened next. The district attorney dropped the charges and allowed the sex offender to attend church, as long as he would obey a list of restrictions created sua sponte by the district attorney's office—among them, the sex offender couldn't "assist"

102 There are possible constitutional arguments against this, at least when it comes to formal conditions being imposed by probation officers on federal prisoners, based on Article III's commitment of the judicial power to Article III courts. But such arguments would not affect the informal power of probation officers to report or ignore violations and would only apply to federal prisoners anyway. *See, e.g.*, United States v. Shultz, 733 F.3d 616, 621 (6th Cir. 2013) (noting the defendant's argument that there is potential Article III problem when probation officers are given discretion to set probation conditions); *see also, e.g.*, United States v. Halverson, 897 F.3d 645, 659 (5th Cir. 2018) (noting that courts cannot "delegate to probation officers the 'core judicial function' under Article III of imposing a sentence, including supervised-release conditions" (quoting United States v. Barber, 865 F.3d 837, 839 (5th Cir. 2017))).

103 In the speech context, the Court has said that "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 759 (1988); *see also* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 130 (1992) (warning against "overly broad licensing discretion to a government official" and saying that such schemes "must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication").

104 *See* Does v. Cooper (*Does I*), 148 F. Supp. 3d 477, 483 (M.D.N.C. 2015) ("In 2011, an anonymous caller reported John Doe 1's presence at his church's worship service, and he was arrested . . . .").

with the main worship service or go to any other church activity besides the main worship service.[105]

Again, this makes a certain kind of sense. We may well want law enforcement officials to make reasonable compromises in the face of uncompromising statutes that seem to forbid church attendance altogether. But even so, there is something worrying here. While the district attorney's office may control prosecution as a practical matter, it has no formal power to simply waive the restrictions here, which are a creature of state law. The district attorney's practical power is an example of prosecutorial discretion, but prosecutorial discretion has a dark side—the risk of arbitrariness, discrimination, and abuse.[106]

The district attorney in this case apparently came up with the restrictions here—no "assisting" the service or going to anything other than the service—off the top of his head. The next district attorney (or the one in the next county) is free to come up with whatever restriction she thinks best. There is no guarantee that any of these restrictions will be fair; there is no guarantee that any of them will be evenly applied. In the case above, the district attorney bent the rules to allow a Christian sex offender to go to church. Maybe a Jew, a Buddhist, or a Wiccan would have been treated precisely the same way. But maybe not, and it is impossible to tell. Moreover, even if prosecutors and probation officers ended up creating generally applicable rules, they would still be free to change those rules whenever they want and for almost any reason.

A case from California illustrates the power this gives to government officials. There a defendant was effectively barred from church attendance because of a parole condition that he not go within 250 feet of places where kids regularly met.[107] But his parole officer said she would relax the condition and let him attend church, as long as she got a letter from the pastor acknowledging that the church knew he had been in prison and why. When the defendant refused, the parole officer responded that he "should not be going to church anyway" and just barred him from church attendance altogether.[108] In the system at present, that is simply the power they have.

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105 Does 1–5 v. Cooper, 40 F. Supp. 3d 657, 666–67 (M.D.N.C. 2014).

106 Courts are especially sensitive to that dark side in First Amendment contexts. *See, e.g.*, United States v. Stevens, 559 U.S. 460, 480 (2010) ("But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

107 "Special Parole Condition 18 states: 'You shall not enter or loiter within 250 feet of the perimeter of places where children congregate, (e.g. day care centers, school, parks, playgrounds, video arcades, swimming pools, state fairgrounds, county fairgrounds, etc.).' " Manning v. Powers, 281 F. Supp. 3d 953, 957–58 (C.D. Cal. 2017).

108 *Id.* at 958 (alteration in original).

III. Legal Responses

In response to these issues, there are many paths the law could take. The easiest would be to simply deny that sex offenders have any rights in this area. And this is probably the most natural: the infrequency with which sex offenders have pressed legal arguments to attend church has meant few courts have seriously considered what rights they do have. But this would be (or should be) unfortunate. Distinctively legal restrictions on church attendance would not even be seen as creating a distinctively legal problem.

All this cries out for reconceptualization. Once released from prison, sex offenders have rights to go to church, just like other Americans. And these rights are *legal* rights, for the Constitution and related bodies of statutory law guarantee the free exercise of religion to every American. It does not matter that the rules forbidding church attendance are neutral with regard to religion, because these bodies of law operate by requiring religious exemptions from generally applicable laws whenever religious exercise is substantially burdened (as it certainly is here).

This should not mean, however, that any and all sex offenders are entirely free to ignore any and all restrictions on church attendance. That would be questionable policy: perhaps some people do need to be kept away from children at all cost. Indeed, if one were dealing with this issue as a policy issue without regard to law, one would think the most sensible solution would be a regime of *individualized consideration*—sex offenders should have their individualized situations considered in a judicial process deciding whether they can attend religious services.

But here legal and policy analyses come together, for this is exactly what governing free exercise doctrine requires in this situation. For free exercise doctrine requires religious exemptions, but only presumptively: the government is always free to rebut an exemption claim by demonstrating a compelling governmental interest and least restrictive means. Here in the context of sex offenders, this leads to the very same requirement of *individualized consideration*—sex offenders have a legal right to attend church, unless the government can show in court that barring them is truly necessary to protect children from harm. This means that sex offenders will sometimes have valid as-applied challenges to state statutes and parole/probation/supervised-release conditions that restrict church attendance.[109]

Finally, while this notion of individualized consideration raises questions of institutional capacity (can judges do this?) and judicial role (should judges do this?), such fears get tempered when one realizes that the very kind of individualized consideration proposed here is already happening in other

109 The idea that religious exemptions are a form of as-applied challenge has been drawn up most formally in Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. Rev. 1595, 1597 (2018) ("[R]eligious exemption requests are just a version of what is generally thought of as one of the most common, modest, and preferred modes of constitutional adjudication: the as-applied challenge.").

doctrinal areas—in the context of free speech, familial association, and bodily integrity. In each of these other contexts, courts have required heightened showings to justify impositions on sex offenders in constitutionally sensitive areas. That individualized consideration has worked in these other contexts, and the details of how it has worked, suggests that (and how) it can work here too, in ways that are contextually sensitive, judicially manageable, and practically realizable.

A. An Introduction to Free Exercise Jurisprudence

The First Amendment of the Constitution, among other things, protects the free exercise of religion. While the specifics of what this ought to mean are controverted, the basic idea is clear—people, within limits, should be able to practice their religion without interference from the government.[110] The main disagreement here has been over religious exemptions—whether, and to what extent, the Free Exercise Clause entitles religious believers to a judicially granted exemption from a neutral and generally applicable law.

The Supreme Court has gone back and forth on this question. For about three decades, the Supreme Court in the Warren and Burger eras had been warm toward religious exemptions, holding them to be constitutionally required in sufficiently sympathetic cases.[111] But in 1990, in *Employment Division v. Smith*,[112] the Supreme Court suddenly changed course. *Smith*'s narrow holding was that the Native American Church was not entitled to a religious exemption from the peyote laws. But more broadly, *Smith* rejected religious exemptions in general, reasoning that the Free Exercise Clause generally did not require the government to give religious exemptions.[113]

Smith was heavily criticized by scholars at the time.[114] But maybe more importantly, legislatures too rejected it. Congress responded with the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Insti-

110 "The Free Exercise Clause gives people the right to practice their religion, while the Establishment Clause denies the government the right to practice religion." Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 12 (2011); *cf.* Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 n.8 (1991) ("We treat the First Amendment as containing a single, coherent Religion Clause whose establishment and free exercise provisions are both in the service of the same fundamental value: religious freedom.").

111 The Court used to ask whether burdens on religious liberty had been justified by a compelling governmental interest. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 228 (1972); Sherbert v. Verner, 374 U.S. 398, 406 (1963).

112 494 U.S. 872 (1990).

113 *See id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment))).

114 For the earliest and probably best criticisms of *Smith*, see generally Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). For a qualified defense,

tutionalized Persons Act (RLUIPA), which restores religious exemptions at the federal level and in prisons; state legislatures responded with state law analogues (called state RFRAs).[115] Even the Supreme Court has been hesitant about *Smith.* A few years ago, when the Court finally had to address what would have been the most far-reaching implication of *Smith*—that the Catholic Church could not maintain its male-only clergy because of the sex-discrimination laws—the entire Court assumed from the very start that there had to be some way around *Smith.*[116]

For the thirty years since *Smith*, the Court has seemed content to work within *Smith*'s paradigm. But recently, cracks have appeared—*Smith*, it turns out, may not last forever. Last term, from out of nowhere, four Justices signaled that they would be interested in reconsidering *Smith.*[117] The dynamic around free exercise has changed, no doubt in part because of modern conflicts between religious freedom and civil-rights laws.[118] In *Smith*, it was the liberals who supported exemptions and conservatives who opposed them. Now things have flipped—the four Justices voicing the idea of reconsidering *Smith* were all on the right side of the Court.

Yet even if *Smith* is not overturned, sex offenders still have strong doctrinal arguments to religious exemptions in a number of contexts.[119] Sex offenders in the federal system can call upon RFRA to challenge their indi-

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see generally William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RSRV. L. REV. 357 (1989–90).

115 *See* Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb (2018)); Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc (2018)).

116 *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC., 565 U.S. 171, 190 (2012) (concluding that *Smith* should not apply to "internal church decision that affects the faith and mission of the church itself"); *see also id.* at 203, 206 (Alito, J., concurring) (discussing ways the majority's ministerial exception would avoid court scrutiny of Catholic clergy restrictions). For thoughts on this opinion, see Lund, *supra* note 81, at 1192–95.

117 *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (statement of Alito, J., respecting the denial of certiorari, joined by Thomas, Gorsuch, and Kavanaugh, JJ.) (noting that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause," and adding that "[i]n this case, however, we have not been asked to revisit" the decision).

118 *See, e.g.*, Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719 (2018) (free exercise and the Colorado Anti-Discrimination Act); Zubik v. Burwell, 136 S. Ct. 1557 (2016) (Religious Freedom Restoration Act and Patient Protection and Affordable Care Act); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014) (same). For reflections on this theme, see generally Douglas Laycock, *Sex, Atheism, and the Free Exercise of Religion*, 88 U. DETROIT MERCY L. REV. 407 (2011), and Laycock, *supra* note 83.

119 If *Smith* were overturned, this would likely return us to the compelling-interest test associated with the Supreme Court's pre-*Smith* decisions, which would be globally applicable to all disputes involving religious restrictions on sex offenders. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

vidually imposed parole, probation, or supervised-release conditions.[120] Sex offenders in state systems can call upon RLUIPA to challenge similar conditions.[121] And finally, sex offenders in state systems can also call upon state RFRAs (and equivalently interpreted state constitutional provisions) to challenge the wide variety of state statutes restricting church attendance.[122]

RFRA, RLUIPA, and state RFRAs all create a right of religious exemptions even as against neutral and generally applicable laws.[123] Fortunately for conceptual simplicity, they all do so in the same general way, through the same three-step process. In the first step, religious claimants must show a "substantial burden" on their religious practice, which creates a presumptive right to a religious exemption. In the second and third steps, the government can refute the right to a religious exemption by proving two things. In the second step, the government must show the burden is justified by some "compelling governmental interest." In the third step, the government must show the burden is the "least restrictive means" of furthering that interest.[124] If the government can make those showings, it prevails.

B. *Sex Offenders and Religious Exemptions*

In the context of sex offenders challenging church restrictions, certain things are clearer than others. Traditionally, the first step in the analysis—the "substantial burden" question—can be somewhat sharp and disputed terrain. In *Hobby Lobby*, the Court held there was a substantial burden when objecting employers had to provide insurance coverage that covered religiously forbidden forms of contraception.[125] It was a 5–4 decision, and the

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120 RFRA applies to all burdens on religious exercise imposed by federal law. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 516 (1997) ("[RFRA's] universal coverage is confirmed in § 2000bb–3(a), under which RFRA 'applies to all Federal . . . law, and the implementation of that law, whether statutory or otherwise . . . .'")

121 RLUIPA applies to certain burdens on religious exercise imposed by state and local law. Most crucially here, RLUIPA has been held applicable by lower courts to state-imposed parole and probation conditions. *See* Derek L. Gaubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 555 (2005) ("In the normal case, a prisoner is likely to be the plaintiff pursuing a claim. However, this provision also allows a prisoner to raise RLUIPA as a defense in judicial proceedings such as parole hearings where the state may seek to enforce parole conditions that substantially burden religious exercise.").

122 There will be places where sex offenders will be bound by *Smith*—in states without state RFRAs, sex offenders may find no avenue to challenge state statutes preventing church attendance. For more on state RFRAs, including information about which states have state RFRAs and which do not, see generally Christopher C. Lund, *Religious Liberty After* Gonzales*: A Look at State RFRAs*, 55 S.D. L. REV. 466 (2010).

123 *See supra* notes 115–19 and accompanying text.

124 *See* Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1(b) (2018); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(a)(1) (2018). State RFRAs sometimes differ on this language, but the differences tend to be fairly modest. *See* Lund, *supra* note 122, at 477 & tbl. 1.

125 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 719–25 (2014) (concluding there is a substantial burden).

four dissenters took the position that the burden was too attenuated to be considered substantial.[126]

But there is no attenuation issue here, nor any other issue similar to any other case finding no substantial burden.[127] For reasons discussed earlier, the issue here is relatively straightforward.[128] Here, people are legally barred from being able to attend worship services themselves. This is clearly a substantial burden—it is hard to imagine a more substantial one.[129]

The second step in the analysis is almost as easy, for it also is undoubtedly true that the government has a compelling interest here. All the rules imposed on sex offenders—from the registration requirements, to the mandatory reporting, to the limitations on where sex offenders can work, reside, or even go—attempt to serve valid interests in child protection. While these laws impose a staggering burden on sex offenders, there are staggeringly important reasons for that burden—if sufficient steps are taken to keep sex offenders away from children, those children are less likely to be sexually abused. That is a compelling interest on anyone's account of a compelling interest.[130]

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126 *See id.* at 760 (Ginsburg, J., dissenting) (concluding that "the connection between the families' religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial" because "the decisions whether to claim benefits under the plans are made not by Hobby Lobby or Conestoga, but by the covered employees and dependents").

127 *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 447–58 (1988) (holding logging and construction on sacred land not unconstitutionally burdensome to faithful petitioners); Bowen v. Roy, 476 U.S. 693, 700–01 (1986) (holding that requiring obtaining a Social Security number for continued benefits not unconstitutionally burdensome despite religious objection).

128 *See supra* Section II.B (discussing the impact of church restrictions on sex offenders).

129 *See* Emp. Div. v. Smith, 494 U.S. 872, 898 (1990) (O'Connor, J., concurring) ("A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it 'results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'" (quoting Braunfeld v. Brown, 366 U.S. 599, 605 (1961) (plurality opinion))).

130 One could quarrel with this by framing the question of compelling interests at a lower level of generality. If one began the compelling-interest analysis here by asking whether the government had a compelling governmental interest in the particular governmental action taken—that is to say, a compelling governmental interest in restricting church attendance by sex offenders—then the answer could conceivably be that the government lacks a compelling interest altogether. But this phrases the question of compelling interests at too low a level of generality; with such a setup, there would be nothing for the "least restrictive means" inquiry to do. Moreover, this would be inconsistent with the way the Court has talked about the "compelling interest" part of the analysis as being about ends, and the "least restrictive means" part as being about means. *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."); Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 185 (1979) (explaining

This brings us to the final step in the analysis—whether the government is pursuing its compelling interest in the least restrictive way. Here the analysis turns from questions of ends to questions of means. Protecting children from sexual abuse is undoubtedly an interest of the highest order. But a total ban on church attendance is a far-reaching prophylactic measure. Is it genuinely necessary to prevent this kind of harm?

These are the sorts of genuinely difficult questions that the Free Exercise Clause rarely has to face. Many religious exemption cases are easy, because the balance of interests is so obviously on one side. When the government interest is heavy and the burden on religion is light, we deny an exemption. When the government interest is light and the burden on religion is heavy, we grant one. Sometimes both the government interest and the burden on religion are light—those cases usually don't get litigated and don't matter much anyway.

But when the government interest and the religious interest are both strong, that is when things become truly difficult. And it is precisely in such cases that the least restrictive means requirement begins to play a real role. In *Hobby Lobby*, for example, corporations that did not want to provide insurance coverage for religiously forbidden contraceptives squared off against the government, which wanted to make sure those corporations' employees had full contraceptive coverage. Both sides had something real at stake, and both sides' positions seemed incompatible. But the Court found an intermediate position, crafting a solution where the employees would still get full contraceptive coverage, but the corporations would not have to provide it themselves.[131]

Yet perhaps the most important thing to say about application of the compelling-interest test is its rigor. If there is a single lesson from the Supreme Court's application of the compelling-interest test in free exercise cases, it is that courts cannot simply defer to the government. Courts cannot turn away; they must themselves make their own judgments about possible harms and their likelihoods. This was the lesson of *Holt v. Hobbs*, where a unanimous Court dismissed the government's claims that allowing religious beards in prison would drastically undermine prison security.[132] This was the lesson of *Gonzales v. O Centro Espírita*, where a unanimous Court dismissed the

strict scrutiny as requiring that the states "adopt the least drastic means to achieve their ends").

131 In brief, the Court's solution was to extend an accommodation available to religious nonprofit corporations to the religious for-profit corporations that were the plaintiffs in *Hobby Lobby*. Under this accommodation, the insurers and third-party administrators of religious nonprofit corporations would voluntarily and gratuitously provide the contraceptive coverage directly. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, at 692–93 (2014).

132 574 U.S. 352, 364 (2015) (noting that statutes like RLUIPA and RFRA do "not permit such unquestioning deference"); *see also* MICHAEL W. MCCONNELL, THOMAS C. BERG & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 206 (4th ed. 2016) (noting that the "constant question for Holt's counsel at oral argument" was whether this was "an appropriate matter for judicial second-guessing").

government's claims that a Brazilian group's use of hoasca were too harmful to allow.[133] "RFRA makes clear," the Supreme Court has said several times, "that it is the obligation of the courts to consider whether exceptions are required under the test set forth by Congress."[134] This is even embedded in the statutory text of RFRA and RLUIPA, which tinker with the traditional compelling-interest prong to make clear that the government must show a compelling interest and a lack of lesser restrictive means *not* in general, but with respect to the *particular* religious claimant at issue.[135]

In the context of sex offenders, this has an important consequence. States often have categorical statutes that effectively bar sex offenders from church. These statutes are not immune from free exercise challenge. Courts cannot blindly defer to them; courts must make their own judgments about whether they are really necessary. Moreover, and this is perhaps most crucial, there must be *individualized consideration.* Courts must decide these questions on an individualized basis, looking at the situation of the particular individual before the court claiming a right to attend religious services. Of course, this means intensive judicial involvement in some questions that were traditionally left to legislatures. But that, of course, was the very point of statutes like the Religious Freedom Restoration Act—to create meaningful judicial review whenever the free exercise of religion was hampered by governmental action.

C. Three Analogies

Yet, at the same time, this notion of *individualized consideration* is neither anomalous nor impracticable. For in three different doctrinal areas—speech, family rights, and bodily integrity—courts have already adopted it. In other words, in each of these three areas, courts have done precisely what is being suggested here in the context of free exercise—they have allowed restrictions that affect the basic constitutional rights of sex offenders, but only upon a heightened evidentiary showing and only upon consideration of an individual sex offender's particular situation. These three analogies not

133 Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006) (noting that the Court looks "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting specific exemptions to particular religious claimants").

134 *Id.* at 434 (quoted in *Holt*, 574 U.S. at 364).

135 For example, RFRA says that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden *to the person*—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b) (2018) (emphasis added). RLUIPA has a similar provision. *See* 42 U.S.C. § 2000cc-1(a) (2018). This provision means something significant: "[I]t is not enough that repeal of the law would defeat the government's compelling interest. Rather, government must make the much more difficult showing that an exception for religious claimants would defeat its compelling interest." Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 222 (1994).

only help to justify such an approach in the context of free exercise, they also help explain how it can be conducted in a judicially manageable way.

1. Speech

Whenever one runs into a novel free exercise question, one should think about possible parallels in free speech. Two terms ago, the Supreme Court decided *Packingham v. North Carolina*,[136] a case about the free speech rights of sex offenders. North Carolina had flatly barred sex offenders from going on any social-media websites, including Facebook and Twitter, because they might encounter kids there and possibly later abuse them. That was not Packingham's story exactly; though indeed a sex offender, Packingham himself was arrested after he went on Facebook to celebrate getting out of a traffic ticket.[137]

The Supreme Court unanimously struck down North Carolina's law as a violation of the Free Speech Clause. The Court did not doubt North Carolina's interest in protecting children, but it saw North Carolina's ban as simply too broad. Blocking sex offenders from all social media not only intrudes deeply on their rights of free speech, but it also impairs their ability to start over on a better path.[138]

The analogy to free exercise here is intuitive. Total bans on church attendance hurt sex offenders in similar ways as total bans on social media; they intrude on the associative core of the First Amendment right, impairing earnest attempts at rehabilitation—rehabilitation that sex offenders vitally need and that society vitally needs to encourage.

But the crucial analogy here goes to the notion of *individualized consideration*. North Carolina's ban on social media was categorical, in the sense that it applied to those deemed sex offenders under state law, without consideration of any individual's particular circumstances. The Supreme Court in *Packingham* struck that categorical ban down. But *Packingham* did not say that individual sex offenders could *never* be banned from social media. In fact, the Court suggested the opposite—that, upon a sufficient showing, individuals could be so banned. *Packingham* did not invalidate total social-media bans altogether. It merely said that they had to be imposed individually,

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136 137 S. Ct. 1730 (2017).

137 His Facebook post read, "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . [sic] Praise be to GOD, WOW! Thanks JESUS!" *Id.* at 1734.

138 *See, e.g.*, *id.* at 1736 ("[G]iven the broad wording of the North Carolina statute at issue, it might well bar access not only to commonplace social media websites but also to websites as varied as Amazon.com, Washingtonpost.com, and Webmd.com."); *id.* at 1737 ("Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.").

based on the facts of an individual's particular situation, rather than categorically.[139]

This is what *Packingham* suggested, and this is exactly how lower courts have taken it. In the short two years since *Packingham*, lower courts have struck down categorical statutory bans.[140] Yet at the same time, they have held the same restrictions constitutional when imposed on particular individuals after consideration of their particular circumstances.[141]

In other words, *Packingham* has led to a regime of *individualized consideration* in the context of free speech, the very solution proposed here in the context of free exercise. Bans on church attendance should be treated like bans on social media: they can be imposed, but they must be imposed on an individual basis based on the situation of each individual sex offender. *Packingham* both provides legal authority for the solution proposed here and also demonstrates that the solution proposed here is realizable, manageable, and consistent with well-established notions of the judicial role.

2. Familial Association

Another body of law supports the notion of *individualized consideration* in the context of free exercise. Just as restrictions on sex offenders can affect constitutional rights of speech and religion, they also can impair rights of familial association. And when they do, courts have turned to the same conceptual apparatus of *individualized consideration* that courts have developed in the speech context and that this Article recommends for the religion context.

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139 *See id.* at 1737 ("[I]t can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime . . . ."). Justice Alito's concurrence elaborated on this point in more detail. It would be a different case, he suggested, if targeted restrictions were imposed on particular offenders. *See id.* at 1743 (Alito, J., concurring) ("May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems?").

140 *See, e.g.*, Doe v. Kentucky *ex rel.* Tilley, 283 F. Supp. 3d 608, 610 (E.D. Ky. 2017) (striking down provisions of Kentucky's Sex Offender Registration Act on *Packingham* grounds).

141 *See, e.g.*, United Stated v. Washington, 763 F. App'x 870, 872 (11th Cir. 2019) ("[T]he statute invalidated in *Packingham* was not tailored to any particular offender or offense—unlike the computer-use conditions imposed by the district court."); United States v. Eaglin, 913 F.3d 88, 95–96 (2d Cir. 2019) ("The restriction in *Packingham* created a permanent restriction in the form of a criminal statute applicable to all registered sex offenders. The restriction that Eaglin challenges here, in contrast, was imposed as a condition of supervised release that applies to Eaglin alone and for a limited albeit lengthy duration. Certain severe restrictions may be unconstitutional when cast as a broadly-applicable criminal prohibition, but permissible when imposed on an individual . . . ." (citations omitted) (citing *Packingham*, 137 S. Ct. at 1737)); *cf.* United States v. Burroughs, 613 F.3d 233, 243 (D.C. Cir. 2010) ("[R]estrictions on computer or Internet access are not categorically appropriate in [sex offender] cases where the defendant did not use them to facilitate his crime." (emphasis omitted)).

Speech concerns arise when sex offenders are kept away from speech forums (like social-media sites); religious concerns arise when sex offenders are kept away from religious institutions. But how do the restrictions on sex offenders affect their rights of familial association? The answer is simple. The Article has discussed the many ways in which laws barring sex offenders from having contact with children. One consequence of those same laws is that, on their face, they would also bar sex offenders from having contact with *their own* children. This is where concerns about familial association come into play because parents have constitutional rights with respect to their children. Parents have rights to custody of their natural children, and to raise them (within bounds) as they see fit.[142] To prevent a parent from even seeing his or her children is a deep and extraordinary interference with the basic constitutional right.

In response to these deeply felt and constitutionally inflected concerns, courts have come up with *individualized consideration* as a solution. Sex offenders can be barred from having contact with children in general. But given their rights of familial association, they cannot be barred from having contact with their own children, absent some special showing.[143] There must be some special evidentiary showing of plausible harm to the offender's own children to justify such an extraordinary limitation. To be sure, there are indeed cases upholding bans on sex offenders seeing their own children—often they involve parents who have sexually abused children and thus pose a genuine threat to their own kids.[144] But the crucial thing is, again, this

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142 *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."). This line of case goes back a long way. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923) (holding that parents have constitutional rights to "establish a home and bring up children" and "to control the education of their own"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that parents have rights "to direct the upbringing and education of children under their control").

143 *See* United States v. Hobbs, 710 F.3d 850, 854 (8th Cir. 2013) ("[W]e have repeatedly upheld conditions requiring defendants to receive permission from a probation officer before contacting their own children. . . . However, an 'individualized inquiry,' and a 'particularized showing' of need for the condition, is required in each case." (quoting United States v. Springston, 650 F.3d 1153, 1156 (8th Cir. 2011)); United States v. Lonjose, 663 F.3d 1292, 1303 (10th Cir. 2011) ("Where a condition of supervised release interferes with [the right of familial association], compelling circumstances must be present to justify the condition. A district court abuses its discretion where it imposes such a condition in the absence of a record that 'unambiguously support[s] a finding' that the defendant is a danger to his own family members." (citations omitted) (quoting United States v. Smith, 606 F.3d 1270, 1284 (10th Cir. 2010))).

144 *See* United States v. Widmer, 785 F.3d 200, 208–10 (6th Cir. 2015) (upholding a ban on a sex offender seeing his daughter, because "the district court explicitly addressed the application of the association restriction to Widmer's daughter," and reasonably concluded that "the restriction [was] tailored for the precise purpose of protecting Widmer's daughter," given "the sadistic content of the images possessed by Widmer, the images' depictions

notion of *individualized consideration*—sex offenders may be barred from their own children, but such a ban must be justified in court to a judge on an individual basis (rather than a collective one).

3. Bodily Integrity

There is one more relevant area where these restrictions on sex offenders have collided with their constitutional rights. The rights here are those of bodily integrity, and the collision arises with the government's practice of penile plethysmography.

Penile plethysmography is a procedure, typically for sex offenders, whereby a device is put over a man's penis, and the device takes measurements of his erectile responses to potentially stimulating images.[145] "Although one would expect to find a description of such a procedure gracing the pages of a George Orwell novel rather than the Federal Reporter," Judge Berzon once noted, "plethysmograph testing has become routine in the treatment of sexual offenders and is often imposed as a condition of supervised release."[146]

Here too, in the context of penile plethysmography, we see the notion of *individualized consideration*. To be sure, some courts have simply accepted mandatory penile plethysmography without much in the way of reservation or limitation.[147] Yet others have been more cautious. And the more cautious courts have come to this same notion of individualized consideration—that penile plethysmography cannot be flatly imposed on the entire category of sex offenders, but instead can only be imposed in a more targeted and individualized fashion. As the Ninth Circuit put it, courts must ask whether "plethysmograph testing is reasonably necessary for the *particular defendant* based upon his *specific psychological profile* . . . consider[ing] the *particular sex-*

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of prepubescent children in sexual contact with adults, Widmer's sexual interest in children, and a doctor's opinion that Widmer may 'sexually act out in the future'" (emphasis omitted)); United States v. Simons, 614 F.3d 475, 481 (8th Cir. 2010) (noting how "[i]n many of our cases affirming no-contact conditions, we have cited a defendant's history of sexual abuse of minors as a factor in our decisions").

145 For a comprehensive discussion of the mechanics and history of penile plethysmography, see generally Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & C.R. L. REV. 1 (2004). For some trenchant thoughts on this and related practices, see generally Andrea Roth, *Trial by Machine*, 104 GEO. L.J. 1245 (2016).

146 United States v. Weber, 451 F.3d 552, 554 (9th Cir. 2006) (footnote omitted).

147 *See, e.g.*, United States v. Dotson, 324 F.3d 256, 261 (4th Cir. 2003) (upholding penile plethysmograph testing). To be clear, there have always been doubts about the reliability of penile plethysmography. *See* Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 382 (2003) (discussing *United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), where a penile plethysmograph test was held inadmissible). *See generally* W.L. Marshall & Yolanda M. Fernandez, *Phallometric Testing with Sexual Offenders: Limits to Its Value*, 20 CLINICAL PSYCH. REV. 807 (2000) (criticizing the reliability of phallometric testing generally, including penile plethysmograph testing).

ual offenses committed by the defendant . . . . [A] generalized assessment based on the class of sex offenders generally [is improper]."[148] More recently, the Second Circuit held precisely the same thing.[149] And again, these circuits "are not holding that a district court may never impose plethysmograph testing as a condition of supervised release, only that 'a thorough inquiry is required.'"[150]

D. The Mechanics of Individualized Consideration

These three analogies—free speech, familial association, and bodily integrity—demonstrate the propriety and workability of individualized consideration in the context of free exercise. This is not to say that courts have come to the right answers in each of these three domains; one might reasonably conclude, for example, that we would be better off rejecting penile plethysmography altogether.[151]

For our purposes, however, the important point is that in each of these areas, courts have adopted a regime of individualized consideration as a way of giving force to constitutional rights in the context of sex-offender restrictions. Engaging in this sort of case-by-case analysis, courts can appropriately balance fears that children might be harmed with a sex offender's rights of religious exercise, through consideration of the individual sex offender's situation. This is how courts have proceeded in our analogous contexts (free speech, familial association, and bodily integrity), rejecting blanket impositions on whole categories of sex offenders but allowing tailored impositions on an individualized basis. And it is how courts should proceed here too, aligning perfectly with traditional religious-exemption analysis, which also proceeds through individualized analysis of a particular claimant (*her* religious beliefs, and the government's interest with respect *to her*).

At the same time, this raises questions as to how this individualized inquiry should be conducted. How is a judge to decide whether a particular sex offender should be allowed to go to church? How can a judge decide how likely it is that a sex offender will use church attendance to commit

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148 *Weber*, 451 F.3d at 569 (9th Cir. 2006) (some emphasis added).

149 *See* United States v. McLaurin, 731 F.3d 258, 263 (2d Cir. 2013) ("Before imposing a 'standard' condition as intrusive and demeaning as this one, a district court must, at a minimum, make findings, sufficiently informative and *defendant-specific* for appellate review . . . ." (emphasis added)). A *Harvard Law Review* case note offers an excellent overview of *McLaurin*. *See generally Criminal Law—Sentencing Law—Second Circuit Holds Penile Plethysmography Condition Acceptable Only if Defendant-Specific and Narrowly Tailored to Compelling Government Interest.*—United States v. McLaurin, *731 F.3d 258 (2d Cir. 2013)*, 127 HARV. L. REV. 1839 (2014).

150 *Weber*, 451 F.3d at 570 (emphasis omitted).

151 For a powerful wholesale rejection of it, see *id.* at 570–71 (Noonan, J., concurring) ("I would . . . hold the Orwellian procedure at issue to be always a violation of the personal dignity of which prisoners are not deprived. . . . There is a line at which the government must stop. Penile plethysmography testing crosses it.").

future acts of abuse? Aren't such questions beyond judicial competence and inconsistent with the judicial role?

There is force to these points, but they grow weaker on reflection. Judges have always asked themselves questions about recidivism. Every time a judge decides on a sentence, she does so in part based on a predictive judgment about how likely it is that the defendant will reoffend. And our three analogies matter here as well—in those analogous contexts, courts already get their hands dirty making determinations about whether a particular sex offender should be banned from social media, kept away from his own children, or forced into penile plethysmography.

And in the context of religious exemptions, courts frequently make such predictive judgments of future harm. In *Holt v. Hobbs*, the central question for the Court was how much religious beards in prison threatened to undermine prison security—not enough, the Court unanimously said. In *Gonzales v. O Centro Espírita*, the central question for the Court was how harmful hoasca actually was—not enough, the Court unanimously said.[152] Nothing is more common than a free exercise case where the government says the sky will fall with a religious exemption. Here, as in other places, it falls to courts to determine whether that is actually true.[153]

The first thing for a judge to think about is whether the particular sex offender needs to have their church attendance restricted at all. The nature of a sex offender's past crimes is highly relevant. Sex offenders are a large and variegated group. Some sex offenders have committed the most serious of crimes (like forcible rape). Yet other sex offenders may be quite different—earlier we discussed how many sex offenders have been barred from church attendance for far lesser crimes (like less culpable instances of statutory rape).[154]

Moreover, the particular facts of the sex offender's particular crime can help courts in making predictive judgments about future harm. If an offender's particular crimes are those that might be enabled or facilitated by the kind of easy access to children one gets in a church, that may well justify a restriction (even a total ban) on church attendance. Other kinds of facts can enter into the recidivistic calculus as well. The longer it has been since the defendant's sex offenses, other things being equal, the less necessary these

152 *See supra* notes 133–35 and accompanying text.

153 For a couple of other dramatic examples, see *Potter v. District of Columbia*, 558 F.3d 542, 544 (D.C. Cir. 2009) (awarding, under RFRA, an exemption allowing Muslim firefighters to wear beards, despite government allegations that it would endanger safety); *Tagore v. United States*, 735 F.3d 324, 325–26 (5th Cir. 2013) (permitting a case to go forward involving a Sikh IRS agent who sought to wear a kirpan because the government had not convincingly established any real safety risk); *Litzman v. N.Y.C. Police Dep't.*, 2013 WL 6049066, at *1 (S.D.N.Y. Nov. 15, 2013) (similar to *Potter* but with Jewish firefighters); *Church of the Holy Light of the Queen v. Mukasey*, 615 F. Supp. 2d 1210, 1211–12 (D. Or. 2009) (enabling members of the Brazilian Santo Daime religion to drink Daime tea, which contains DMT, despite government allegations of harm). For other examples, see Christopher C. Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 167–69 (2016).

154 *See supra* notes 69–76 and accompanying text.

restrictions may be. A defendant's life may suggest he is reformed; even if not, he may be less capable of crimes because of age or disability.

The second thing for judges to consider is the existence of less restrictive alternatives. It is easy to conceive of these issues in all-or-nothing ways: sex offenders should be totally restricted from attending houses of worship or under no restrictions at all. But intermediate solutions deserve consideration. Courts could allow sex offenders to attend church, but only if a responsible adult who knows of their offenses goes with them. This sounds curious, but it has been done. None of these cases have involved religion in any way, but several Montana courts and at least one California court have imposed such a "buddy system" on sex offenders wanting to go to sensitive places.[155] North Carolina does a similar thing when it allows sex offenders who are parents to attend their children's schools, but only so long as a school official stays with them.[156] Judges could say that a sex offender can attend church as long as a responsible adult attends with him, or as long as leaders of the church are aware, consent, and provide a monitor.

Finally, and most strikingly, judges should give thought to whether restrictions on church attendance on sex offenders *ever* serve compelling interests. While this is a pretty radical suggestion at first glance, three things make it less so. First, consider that modern restrictions on sex offenders are relatively recent. Only a generation ago, virtually no jurisdiction had rules restricting sex offenders at all.[157] Second, consider that many states still have no rules barring sex offenders from being places where children are present.

155 *See* State v. Leyva, 2012 MT 124, ¶ 11, 280 P.3d 252, 256 ("29: The Defendant shall not frequent places where children congregate unless accompanied by an appropriately trained, responsible adult who is aware of the Defendant's sexual conviction and is approved by the Probation & Parole Officer and sexual offender treatment provider."); State v. Melton, 2012 MT 84, ¶ 2, 276 P.3d 900, 902 ("Condition 15 . . . prohibited Melton from frequenting places where children congregate or are reasonably expected to be present . . . unless accompanied by an approved and appropriately trained, responsible adult who is aware of Melton's sexual conviction and approved by the probation and parole officer and sexual offender treatment provider."); *see also* People v. Moses, 131 Cal. Rptr. 3d. 106, 110 (Cal. Ct. App. 2011) ("Probation condition No. 24 reads: 'Do not associate with minors or frequent places where minors congregate . . . unless in the company of a responsible adult over the age of 21 who is approved by the probation officer or court, knows of your offense(s), and is willing to monitor your behavior.").

156 North Carolina permits sex offenders with kids in a school to enter that school as long as they are "under the direct supervision of school personnel" and also forbids them from being "on school property even if [they have] permission for regular visits of a routine nature if no school personnel are reasonably available to supervise the parent or guardian on that occasion." N.C. GEN. STAT. § 14-208.18(d)(2)(b) (2020).

157 *See supra* notes 12–16 and accompanying text. Moreover, it raises real questions that we have such restrictions on sex offenders without having similar restrictions on those who have committed other serious crimes—like, say, murder. *See* Melanie Dellplain, *Can a Feminist Defend a Rapist?: The Ethics of Legal Representation*, 31 GEO. J. LEGAL ETHICS 583, 586 (2018) ("There are sex offender registries but no homicide registries, residency restrictions for sex offenders but not for convicted killers, and civil commitment statutes for sexually dangerous persons but not for homicidally dangerous ones.").

And third, consider that some states have such categorical rules but statutorily exempt churches from them. Texas and Florida, for example, require judges to impose conditions on sex offenders to keep them away from places with children—but both statutory regimes explicitly exempt houses of worship.[158] These three points matter greatly in themselves, and they tie into a key theme in the Supreme Court's approach to the Free Exercise Clause: if other governments allow it, it may not be not so bad. In *Holt v. Hobbs*, the case about prison beards, the fact that forty states allowed prison beards was almost conclusive evidence that Arkansas lacked a compelling interest in forbidding them.[159] In *Employment Division v. Smith*, the fact that the federal government and many states tolerated religious use of peyote undermined Oregon's argument that it had a compelling interest in stopping the Native American Church from using it.[160] RFRA and state RFRAs say the free exercise of religion can only be restricted out of governmental necessity. And if some states are getting along fine without onerous church restrictions on sex offenders, that cuts deeply against any arguments of governmental necessity.

IV. Postscript: Is Religion Special?

One final concern remains to be addressed. Throughout this Article, a question lingers: Why is religion special? While sex offenders come under restrictions affecting their ability to go to religious services, those restrictions are only part of a much larger system of control. To put it another way, our system does extraordinary things to sex offenders. Why should religion be any different?

This Article thus depends, tacitly, on some notion that religion and religious exercise are in some way deserving of special treatment. This is a contested issue, probably *the* contested issue, in the law-and-religion field nowadays. Some thoughtful scholars believe religion's special status cannot

158 *See* Fla. Stat. § 948.30(4)(a) (2020) ("The prohibition ordered under this paragraph does not prohibit the offender from visiting a school, child care facility, park, or playground for the sole purpose of attending a religious service . . . ."); Tex. Gov't Code Ann. § 508.187(b-1)(5)(B) (West 2019) (explaining that the restrictions in question should not apply where the "releasee has legitimate business, including a church, synagogue, or other established place of religious worship, a workplace, a health care facility, or a location of a funeral"). Georgia similarly exempts churches from some of its prohibitions. *See* Ga. Code Ann. § 42-1-15(a)(4) (2020) (excluding, from the prohibition on volunteering with children, "participating in worship services or engaging in religious activities or activities at a place of worship that do not include supervising, teaching, directing, or otherwise participating with [unsupervised] minors").

159 574 U.S. 352, 369 (2015) ("We do not suggest that RLUIPA requires a prison to grant a particular religious exemption as soon as a few other jurisdictions do so. But when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course, and the Department failed to make that showing here.").

160 *See, e.g.*, Emp. Div. v. Smith, 494 U.S. 872, 912 (1990) (Blackmun, J., dissenting).

be defended,[161] others believe that it can,[162] and I, myself, have taken the latter position in other writing.[163] Yet while this is not the place for a full treatment of the issue, the example of free exercise and sex offenders sheds some light on the ways in which religion both is and is not special.

One way of approaching the issue is doctrinal. One question might be whether it violates the Establishment Clause, as a kind of religious favoritism, to allow sex offenders to go to church when they are barred from other places with children. This question has an easy answer. The Supreme Court has made it clear that religious exemptions are not the kinds of religious favoritism that, generally speaking, violate the Establishment Clause.[164]

This answer may be doctrinal, but it carries over into the normative sphere, and indeed the example of sex offenders and free exercise nicely illustrates how courts and commentators can square religious exemptions with the principle of religious neutrality. The insight is that religious exemptions, often though not always, enable religious practice without encouraging it. There is no endorsement issue, for example, when the government exempts religious objectors from having to get a photograph for their drivers' licenses, because almost no one wants such a thing on nonreligious grounds.[165] In our context, religious exemptions would enable sex offenders to go to church. But the state would not be forcing or pressuring them to do so; it would only be *allowing* them to go if they voluntarily chose. In a liberal system that allows choice and freedom, in a system that relinquishes government control over certain human decisions, this cannot be considered an endorsement of religion.

Religion is special. Everyone likes going to the mall and the movie theater. Sex offenders often cannot go to the mall or the movie theater because there are children there. That is a significant imposition, and we should not minimize it. But for religious people, the burden of not being able to go to

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161 *See, e.g.*, CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); BRIAN LEITER, WHY TOLERATE RELIGION? (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

162 *See, e.g.*, Andrew Koppelman, *Is It Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000).

163 *See* Christopher C. Lund, *Religion Is Special Enough*, 103 VA. L. REV. 481 (2017).

164 The Supreme Court has itself awarded religion-only exemptions a number of times recently. *See Holt*, 574 U.S. 352; Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006). For a deeper defense of this position, see, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) ("There is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970))).

165 For two such cases, see *Freeman v. Dep't of Highway Safety and Motor Vehicles*, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006), and *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd sub nom* Jensen v. Quaring, 472 U.S. 478 (1985).

church is a far more significant imposition. It is different in degree, if not in kind.

Yet at the same time, religion is not the only thing that is special. Recall our three analogies—the analogies of free speech, familial association, and bodily integrity. Those analogies reinforced the conclusion that individualized consideration would work in the context of free exercise. But those analogies also show that religion is not the *only* special thing—just as sex offenders have constitutionally weighty interests in attending church, they also have weighty interests in going on social media, seeing their own children, and avoiding bodily intrusions. Moreover, this should not exhaust the list: to the extent we find sex offender restrictions infringing on other constitutionally sensitive domains, we should think about other kinds of exemptions too. So far, no one has thought about whether sex offenders might be exempted from restrictions to attend a political rally or an art museum. This should not be off the table. Free exercise is indeed special, but it is one of a set of special things. Religion may not be uniquely special, but it is special enough.[166]

Conclusion

The rights of sex offenders to attend religious services is a difficult issue. What makes it so difficult is that it pits two interests of the highest order—the core of the right to freely exercise one's religion and the government's interest in protecting children from abuse—against each other.

Taking seriously the interests on both sides, this Article explores the core problem and problems flowing from it. After diagnosing the situation, it explains how existing positive law can bring us toward a set of solutions that are contextually sensitive, judicially manageable, and practically realizable. There is no magic bullet to the deep problem explored here, but it is a problem worth addressing and trying to solve.

166 *See* Lund, *supra* note 163, at 523 ("Religious liberty is an important liberty within the pantheon of liberties. Religion may not be uniquely special, but it does not have to be. Religion is special enough.").