

## TRANSCENDENT HOMOSEXUALS AND DANGEROUS SEX OFFENDERS: SEXUAL HARM AND FREEDOM IN THE JUDICIAL IMAGINARY

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### ABSTRACT

*Among much of the American political and cultural left is the widespread sense that, despite temporary setbacks and isolated obstacles, the trajectory for sexual politics—which has come to be synonymous with the achievement of same-sex marriage—is inevitably coursed for success. Whether through the slower, deliberative process of state-by-state legislation and/or through the reasoning of particularly enlightened judges, sexual justice will be formally accomplished. Lawrence v. Texas functions as a watershed, authorizing moment of this narrative.*

*I assert in this Article that the national story of growing acceptance and appreciation for sexual pluralism is an incomplete one, and that a more dimensional view suggests that a refueled anxiety about sex offenders, as well as recent enactment and enforcement of sex offender registration and notification laws, operate to redraw lines of sexual normality, and to reassuringly but falsely isolate sexual harm within a legally constructed category of persons. By comparing the changes in rhetoric and judicial argument from Bowers v. Hardwick to Lawrence v. Texas against the rhetoric and argument of the 2003 sex offender Supreme Court cases, Smith v. Doe and Connecticut Dept. of Public Safety v. Doe, I claim that the “sex offender” has been juridically codified as the exhaustive figure of sexual amorality and dangerousness, a position vacated by the once homophobic but now more dignified juridical construction of the homosexual. Constructed as such, the constitutional claims of sex offenders are easily dismissed, and the Court helps produce the understandings of sexual personae and sexual harm it claims merely to report on. Part I broadly canvasses the reemergence of sex offender registration and notification laws to give socio-legal context. Part II outlines the constitutional claims of the John Does and the Court’s rejection of those claims in Smith and Connecticut. Part III more closely examines how, rhetorically and jurisprudentially, the Court neutralizes the Does’ claims, and Part IV attempts to suggest why.*

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## INTRODUCTION

"[The Framers and the drafters of the 14<sup>th</sup> Amendment] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."<sup>1</sup>

"The sexual fringe is a scary place."<sup>2</sup>

For John Lawrence and Tyrone Garner, iconic figures for gays nationwide, June 2003 was nothing less than world transformative. The Supreme Court declared sodomy laws unconstitutional, and granted previously withheld privacy and liberty protections to gays, lesbians, and their intimate (consensual, private, unpaid for) decisions.<sup>3</sup> *Lawrence* is a landmark decision for the gay rights movement, as well as a landmark decision for the purchasing power of the 14<sup>th</sup> Amendment. "When the history of our times is written, *Lawrence* may well be remembered as the *Brown v. Board* of gay and lesbian America."<sup>4</sup>

That is some pretty emancipatory stuff.<sup>5</sup>

1. *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

2. Gayle Rubin, *Sexual Politics, the New Right, and the Sexual Fringe*, in *THE AGE TABOO: GAY MALE SEXUALITY, POWER AND CONSENT* 108, 115 (Daniel Tsang ed., 1981).

3. *Lawrence*, 539 U.S. at 578.

4. Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 *HARV. L. REV.* 1893, 1895 (2004).

5. Of course, not everyone agrees that the promised freedoms and constitutional guarantees of *Lawrence* are purely emancipatory. Katherine Franke contends that *Lawrence* "domesticates" the concept of liberty itself, affording liberty only as a privatized right to those who mimic heterosexual, bourgeois sexual practices and lifestyles, and only at the expense of a re-sanitized, re-regulated public sphere that no longer defends a more capacious understanding of sexual pluralism and sexual freedom. Likewise, she proposes that the mostly uncritical and warm reception of *Lawrence* by the mainstream gay and lesbian rights movement signals a miniaturizing of the movement's earlier postwar and post-Stonewall political aims. See Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 *COLUM. L. REV.* 1399, 1414, 1418 (2004) ("I fear that *Lawrence* and the gay rights organizing that has taken place in and around it have created a path dependency that privileges privatized and domesticated rights and legal liabilities, while rendering less viable projects that advance nonnormative notions of kinship, intimacy, and sexuality ... How has this become a community that privileges recognition so highly, and seems to have abandoned some of the more radical strategies and goals grounded in a politics that sought to destabilize dominant forms of sexuality and kinship, rather than seeking to be stabilized by them?"). Similarly, Mary Anne Case suggests the liberty in *Lawrence* distills down to a right of gays and lesbians not to face criminal sanctions for their homebound sex, scaling back any potential the ruling offered to promote sexual equality. See Mary Anne Case, *Of "This" and "That" in Lawrence v. Texas*, 2003 *SUP. CT. REV.* 75, 80, 96-97 (2003). Jasbir Puar argues that the protected intimacy of the private gay couple found in *Lawrence* is made intelligible and valuable through the "reracialization of sodomy elsewhere." See JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES*, 84, 120 (2007). The cultural and media-inflected sexualizing of Arabs and Muslims after September 11<sup>th</sup> (from Abu Ghraib to news cartoons) as well as the legal withdrawal of intimacy and privacy rights to indefinite detainees authorized the "national queer liberal subject before the law" as white and worthy of judicial safeguards. *Id.* Bernard Harcourt warns that decriminalization of sodomy might serve to deradicalize queer activism, which hinges in part on the power of transgression. See Bernard E. Harcourt, *"You are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers*, 94 *J. CRIM. L. & CRIMINOLOGY* 503, 512 (2004) ("There may be more to be gained from resisting a criminal stigma where—or so long as, or on the condition that—criminal

Things did not bode so well in March of that same year for John Doe, John Doe, John Doe, and Jane Doe, three sex offenders and the wife of one, respectively and pseudonymously. The Supreme Court handed down twin decisions, *Smith v. Doe* and *Connecticut Department of Public Safety v. Doe*, rebuffing all of the Does' claims seeking constitutional protections from state sex offender registration and notification requirements.<sup>6</sup> If the 2003 spring/summer Court session ushered in the promise of juridical freedom for one historical sexual outcast, the homosexual, it codified another sexual outcast, the sex offender, and declared open season on him.

Since the specter of the pedophile is and has been historically deployed to criminalize gays (see J. Edgar Hoover),<sup>7</sup> retract their rights (see Anita Bryant and the "Save Our Children" campaign),<sup>8</sup> or neutralize their political aspirations (see Prop 8),<sup>9</sup> it may seem particularly cruel and politically naive—if not dangerous—to consider the setbacks faced by the John Does against the successes achieved by John Lawrence and Tyrone Garner, and to ask what rhetorical, discursive, political, juridical connections there are, if any, between these cases. Yet the formal similarities of the cases are evident and invite comparison: *Lawrence* and the sex offender cases involved regulating marginalized sexual personae, adjudicating the limit of law's reach in citizens' lives, delimiting the liberty afforded by due process protections, and discerning the proper figuration of harm and morality in lawmaking around sex. Moreover, if, *Lawrence* and the sexual moral imaginary it animates and stokes require creating, disavowing, and then demonizing a sexual subclass, then theorizing the 2003 cases *in tandem* is neither cruel nor naive, but necessary in diagnosing and interrogating how understandings of sexual freedom and sexual harm are currently, juridically inscribed. More clearly, the thesis of this article is this: *Lawrence* argues that sex between consenting adults in private is constitutionally protected.<sup>10</sup> The fault line between the sexually acceptable and the sexually abject, between the terrain of progressive sexual politics and the terrain of sexual perversion, is brokered by the apparently transparent figure of the consenting adult. The *presumption of Lawrence is that sexual harm is present*

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enforcement and accompanying punishments are in fact *de minimis*, than there is to be lost in the normalization of conventional deviance"). The corollary to these objections might be that while *Lawrence* is not purely emancipatory—emancipation is never pure—the best one can hope for is minimizing the costs rather than eliminating them.

6. *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

7. See generally George Chauncey, Jr., *The Postwar Sex Crime Panic*, in *TRUE STORIES FROM THE AMERICAN PAST* 160 (William Graebner ed., 1993).

8. See Patrick McCreery, *Beyond Gay: "Deviant" Sex and the Politics of the ENDA Workplace*, in *OUT AT WORK: BUILDING A GAY-LABOR ALLIANCE* 31, 35–37 (Kitty Krupat & Patrick McCreery eds., 2001).

9. Supporters of Proposition 8, the 2008 anti-gay marriage referendum in California, successfully made the protection of children the *central* topic of debate in a referendum on the statutory recognition of and distribution of benefits to adult citizens. The "Yes on 8" advertisements are available at <http://www.youtube.com/watch?v=0PgjcgqFYP4> and [http://www.youtube.com/watch?v=l61Pd5\\_jHQw](http://www.youtube.com/watch?v=l61Pd5_jHQw). Many of the testimonials, ads, and information on the Yes on 8 site reference public schools, teaching children about gay marriage, and parents' efforts to shield their children from gay teachers and gay curricula. See *ProtectMarriage.com*, <http://www.protectmarriage.com> (last visited Apr. 6, 2010).

10. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

only where the consenting adult is absent, or at least the kind of harm with which a liberal non-interfering state ought to interfere.<sup>11</sup> But because “consenting adult” cannot capture sexual ethics as cleanly or completely as the Court or the nation would like—that is, on the one hand, because a whole lot of sex is still harmful that involves legally consenting adults,<sup>12</sup> and, on the other, not all sex among minors or between minors and adults is necessarily harmful<sup>13</sup>—the figure of the sex offender, remade and marked in *Smith* and *Connecticut*, contains the ambiguities of adult consent that threaten its coherence as a normative compass in the labyrinthine universe of sex and law. The sex offender, and what the Court and the nation does with and to him, keeps alive, which is to say immunizes, adult consent as *the* story, *the* bright line, of sexual ethics, transmuting any fragility, ambiguity, loose ends, or displaced and disavowed erotic desire (for the child, or for riskiness) into violent reprisal.<sup>14</sup> The sexual pluralism in *Lawrence*, acerbically recognized by Justice Scalia,<sup>15</sup> registers on

11. *Id.* at 564, 578.

12. On forms of coercive sex that escapes the ambit of criminal rape law, *see, inter alia*, CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171–83 (1989); CATHARINE A. MACKINNON, WOMEN’S LIVES, MEN’S LAWS 240–48 (2005); Latoya Peterson, *The Not-Rape Epidemic, in YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE* 209, 209–19 (Jaclyn Friedman & Jessica Valenti eds., 2008); STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 1-16 (1998).

13. *See, inter alia*, THE AGE TABOO: GAY MALE SEXUALITY, POWER AND CONSENT 17-18, 46-48, (Daniel Tsang ed., 1981); JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 68–89 (2002); MATTHEW WAITES, THE AGE OF CONSENT: YOUNG PEOPLE, SEXUALITY AND CITIZENSHIP 26-28 (2005); Bruce Rind & Philip Tromovitch, *A Meta-Analytic Review of Findings from National Samples on Psychological Correlates of Child Sexual Abuse*, 34 J. SEX RES. 237 (1997); Bruce Rind, *Gay and Bisexual Adolescent Boys’ Sexual Experiences With Men: An Empirical Examination of Psychological Correlates in a Nonclinical Sample*, 30 ARCHIVES OF SEX BEHAV. 345 (2001); Jessica L. Stanley, Kim Bartholomew, & Doug Oram, *Gay and Bisexual Men’s Age Discrepant Childhood Sexual Experiences*, 41 J. SEX RES. 381 (2004).

14. On the collective anxieties and latent desires that animate the violent police, legal, and social response to sex offenders, *see* Steven Bruhm and Natasha Hurley, *Curiouser: On the Queerness of Children*, in *CURIOUSER: ON THE QUEERNESS OF CHILDREN* ix, xxi–xxx (Steven Bruhm & Natasha Hurley eds., 2004); JAMES R. KINCAID, *EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING* 74–109 (1998); LAURA KIPNIS, *BOUND AND GAGGED: PORNOGRAPHY AND THE POLITICS OF FANTASY IN AMERICA* 3–63 (Duke Univ. Press 1999) (1996); LEVINE, *supra* note 13, at 20–44. On the ways in which the imagined vulnerability and always threatened innocence of the child has infused the political and sexual practices and self-understandings of adults in the United States, *see* Lauren Berlant, *Live Sex Acts*, 21 FEM. STUD. 379, 381 (1995) (“The little girl stands ... as a condensation of many citizenship fantasies. It is in her name as future citizen that state and federal governments have long policed morality around sex and other transgressive representations.”).

15. *Lawrence*, 539 U.S. at 590 (2003) (Scalia, J., dissenting) (“State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*’ validation of laws based on moral choices. Every single one of these laws is called into question by today’s decision.”). Scalia is, in fact, right. The *Lawrence* opinion maintains that sexual regulatory laws are permissible only to the extent that they stop harm rather than enforce morality, without any cognizance that what counts as harm is animated by moral understanding and deliberation. By running roughshod over the array of ethical questions raised by sexual practices that are *not* reducible to the presence or absence of consent, which the *Lawrence* opinion takes to be as the metric of sexual harm—questions about gender hierarchy, dependency, and family sexual abuse, for example—it, as well as the *Smith* and *Connecticut* rulings, smuggles the law’s and the court’s sexual moralism as an apparently non-moral concern with harm prevention. By pinning the “sex offender” as the purveyor of sexual harm, the Court both disavows its own

both judicial and national fronts. Americans, social-justice loving people, and the legal system have entered (and created) an era where our conventional moral arguments and political capacity to identify and mitigate sexual harm are unraveling. The legislative-turned-judicial understanding of, and punitive, mostly uncritical response to, the sex offender,<sup>16</sup> comfotingly, and wrongly, relocates the danger of sexual harm onto a discrete body (the stranger, the pathological recidivist). The figure reassuringly (re)partitions the moral universe on Manichean lines. The legislative-turned-judicial maneuver glosses over the complexities of sexual harm and danger, and detracts from the primary sources of sexual abuse: fathers, family members, and family acquaintances.<sup>17</sup> Put slightly differently, while scholars have argued that “sex offenders” ought to be treated with greater restraint, nuance, and fairness,<sup>18</sup> my argument

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sexual morality and shields its moral investments and distinctions as decidedly not moral, but rather neutral and Millian. To hedge against the tidal wave of legally-sanctioned sexual pluralism prophesied by Scalia, the *Lawrence*, *Smith*, and *Connecticut* opinions collapse questions of morality into questions of harm (the absence of consent) as a way to narrow the more capacious sexual field it has helped inaugurate. Parts III and IV, *infra*, extend and elaborate upon this argument. See generally Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999). Mary Anne Case argues that, despite Scalia’s apocalyptic fears (and progressives’ hopes), *Lawrence* spatially and conceptually contains protected sexual freedom far more than it extends it. I’m not sure the argument of this Article conflicts with hers: as a matter of law, the reach of *Lawrence* may be short and yet to be fully-determined. *Symbolically*, however, the juridical promise to safeguard adult consensual sex, and the juridical dignification of the homosexual, are politically and morally vast, and it is to this symbolic transformation which I believe Scalia’s dissent, the majority opinion, and the *Smith* and *Connecticut* decisions respond. See Case, *supra* note 5, at 79. On both the capaciousness and constraints of substantive privacy protections enunciated in *Lawrence*, see Marybeth Herald, *A Bedroom of One’s Own: Morality and Sexual Privacy After Lawrence v. Texas*, 16 YALE J.L. & FEMINISM 1, 29–32 (2004).

16. For comprehensive accounts on the historical emergence of “sexual pathology” as a conceptual category, the medicalization of sexual deviance, the influence of psychiatry on the legislative response to sex crimes and sex criminals, and the three waves of “sexual psychopath” and sex offender laws enacted in the United States (the late 1930s, the postwar era, and the 1990s–present), see Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317 (1998); PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 49, 189 (1998).

17. AM. PSYCHOL. ASS’N, UNDERSTANDING CHILD SEXUAL ABUSE: EDUCATION, PREVENTION, AND RECOVERY (2001), available at <http://www.apa.org/pubs/info/brochures/sex-abuse.aspx>; HUM. RTS. WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>; HOWARD N. SNYDER, DEP’T OF JUST., BUREAU OF JUST. STAT., SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000). Rose Corrigan argues that sex offender laws frame sexual violence as a pathological problem that inheres in predatory persons, undermining feminist attention to sexual violence as a common, persistent, and often sanctioned feature of everyday life and sexual relations. See Rose Corrigan, *Making Meaning of Megan’s Law*, 31 LAW & SOC. INQUIRY 267 (2006) See also ERIC S. JANUS, FAILURE TO PROTECT: AMERICA’S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 88 (2006) (“By focusing intensely on rare but horrific crimes, the predator laws convey a clear message that the feminists—and the solid empirical science—are wrong . . . . Rather, these laws tell us that the real sex criminals are those who lurk in the bushes and parking lots.”).

18. See generally Sarah E. Agudo, Comment, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws*, 102 NW. U. L. REV. 307 (2008); Ryan A. Boland, Note, *Sex Offender Registration and Community Notification: Protection, Not Punishment*, 30 NEW ENG. L. REV. 183 (1995); Carol L. Kunz, Comment, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453 (1997); Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint*

presupposes (and contends) instead that the “sex offender” does not exist;<sup>19</sup> or rather, that the figure of the sex offender has been legally created and codified, in part judicially, and that such creation and codification distinguishes sexual harm from sexual freedom, and sexual deviants from intimacy-valuing citizens, clearly and discretely, incorrectly and detrimentally. The legislative attack on the “sex offender,” and the judicial affirmation of this attack—both in its rhetorical and doctrinal dimensions—skew our understanding of sexual harm onto and into one person, thus simplifying the world and its multiply sourced dangers. In the following pages, I suggest that the amplified legislative and judicial anxiety around sex offenders is contemporaneous with the judicial emancipation (or at least decriminalization)—and the changing social mores that underwrite that emancipation—of the homosexual. While the *Lawrence* opinion offers freedom and protection to the intimate, private homosexual, it nevertheless retains a structural logic that imagines and then attributes sexual harm and dangerousness onto one body, a character type, a sex offender. Even though the characters changed, the script remained intact.

Part I tracks the emergence of sex offender laws and the variety of forms they take from the 1990s to the present, and catalogues some common criticisms of them. This section analyzes notification and registration broadly as a national diffusion, rather than discusses the statutes of the *Smith* and *Connecticut* jurisdictions (Alaska and Connecticut, respectively),<sup>20</sup> to situate these cases, their constitutional questions, and their cultural ramifications in a national context. Indeed, Part I is skeletal, providing the institutional parameters to the argument of the Article. Part II explicates the twin sex offender cases, focusing on the constitutional claims of the respondents and the arguments invoked by the Justices against them. Part III reads the arguments of *Smith* and *Connecticut* against Justice Kennedy’s opinion in *Lawrence*. The sort of juridical reasoning and rhetorical maneuvers of *Bowers v. Hardwick* (holding sodomy laws

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*of Released Sex Offenders*, 109 HARV. L. REV. 1711 (1996); Note, *Making Outcasts Out of Outlaws: The Unconstitutionality of Sex Offender Registration and Criminal Alien Detention*, 117 HARV. L. REV. 2731 (2004).

19. On the medical and juridical construction of sexual subjects—and the consolidation of discrete sexual acts into comprehensive identities—see MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY: AN INTRODUCTION (1978). Foucault’s most popularized contribution is that the “homosexual” is a modern production of multiple discourses rather than a stable figure throughout history. *Id.* at 43. As Foucault himself observed, the argument extends to all sexual subjects, from the heterosexual to the sex offender. See also JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 2 (1990) (“Juridical notions of power appear to regulate political life in purely negative terms—that is, through the limitation, prohibition, regulation . . . of individuals . . . . But the subjects regulated by such structures are, by virtue of being subjected to them, formed, defined, and reproduced in accordance with the requirements of those structures.”)

Some sociologists, lawyers, and psychiatrists objected to the rise of “sexual psychopath” laws in the late 1940s and early 1950s, suggesting that the term itself was vacuous and that singling out sex offenses for separate criminal law treatment would have adverse consequences. See Edwin H. Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142, 142 (1950) (“[T]he concept of the ‘sexual psychopath’ is so vague that it cannot be used for judicial and administrative purposes without the danger that the law may injure the society more than do the sex crimes which it is designed to correct.”).

20. Alaska Sex Offender Registration Act, 1994 Ala. Sess. Laws ch. 41 § 12(a); CONN. GEN. STAT. ANN. § 54-251 (West 2009).

constitutional)<sup>21</sup> that *Lawrence* so heavily criticizes and rejects is strikingly parallel to the juridical reasoning of the *Smith* and *Connecticut* cases. At the same historical moment – spring/summer 2003 – the Court (via Justice Kennedy) rejects certain forms of argumentation in the sphere of sexuality, morality, and the law; it then redeploys these strategies against sex offenders. Part IV asks and begins to answer: why? Why does the Court shift its *Bowers* strategies over to *Smith* and *Connecticut*? What can theorizing these cases together tell us about the juridical construction of sexual harm and sexual freedom, and about the national-liberal fantasy of *adult consent* as simply and summarily morally determinative in the terrain of sexuality?

#### PART I: THE REEMERGENCE OF U.S. SEX OFFENDER LAWS

“Moral panic” rapidly escalates around social and sexual deviancy in moments of political expediency and social dislocation.<sup>22</sup> At various times in American history, the supposed sexual threat embodied in and by Jewish men, black men, gay men, and “sex psychopaths” has been hyperbolized by media, political elites, mental health professionals, and social conservatives to regulate the sexuality of newly urbanized girls;<sup>23</sup> to re-sanctify the heterosexual nuclear family and reconstitute gender norms in the postwar period;<sup>24</sup> to crack down on gays, gay bars, and gay public spaces;<sup>25</sup> to stifle or superimpose the sexuality of children;<sup>26</sup> to win votes; to make a profit; and even to cut welfare.<sup>27</sup> It is beyond the scope of this Article to historicize changing sex offender laws or the varied social interpretations and legal constructions of the sex offender since the turn of the 20<sup>th</sup> century (as feeble-minded, as pathetic, as treatable, as evil, depending on the decade).<sup>28</sup> I gesture at this history simply to note that the most recent

21. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

22. See generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (1972); STUART HALL, ET AL., *POLICING THE CRISIS: MUGGING, THE STATE AND LAW AND ORDER* (1978); JENKINS, *supra* note 16; SIMON WATNEY, *POLICING DESIRE: PORNOGRAPHY, AIDS AND THE MEDIA* (1987). However, Denno challenges whether “panic” is the best descriptive category to explain enactment of “sexual psychopath,” and sex offender laws. She argues that “moral panic” literature does not empirically ground the assertion that sensationalist media accounts and public fear are the primary explanatory variables for sex crime legislation. See Denno, *supra* note 16, at 1355–68.

23. See CAROLYN E. COCCA, *JAILBAIT: THE POLITICS OF STATUTORY RAPE LAWS IN THE UNITED STATES* 12–14 (2004).

24. See Chauncey, *supra* note 7, at 166–71; Denno, *supra* note 16, at 1368–73; Estelle B. Freedman, “Uncontrolled Desires”: *The Response to the Sexual Psychopath, 1920–1960*, 74 J. AM. HIST. 83, 96–98 (1987); JENKINS, *supra* note 16, at 71–72.

25. See PAT CALIFIA, *PUBLIC SEX: THE CULTURE OF RADICAL SEX* 54–97 (2000); Chauncey, *supra* note 7; Freedman, *supra* note 24, at 103–04.

26. See generally Steven Angelides, *Feminism, Child Sexual Abuse, and the Erasure of Child Sexuality*, 10 GLQ: J. LESBIAN & GAY STUD. 141 (2004); KINCAID, *supra* note 14, at 9452–72., 101 (“The pedophile is something more than a scapegoat for us; it does more than siphon off and bottle dark desires and fears the culture cannot otherwise contain. Our pedophile handles those chores, certainly, but not so well that these desires and fears are expelled ... One reflex of our obsessive focus on protection is to saturate children with a sexual discourse that inevitably links children, sexuality, and erotic appeal.”).

27. See Carolyn E. Cocca, *From “Welfare Queen” to “Exploited Teen”: Welfare Dependency, Statutory Rape, and Moral Panic*, 14 NAT. WOMEN’S STUD. ASS’N J. 56 (2002).

28. See generally JENKINS, *supra* note 16.

panics around child sexual abuse and sex offenders inaugurated in the 1980s and continue into the present, and the laws these panics motivate have a genealogy and historical antecedents. The important point is that there is a constructivist story to be told, and neither sex panics, nor the laws that flow from them, necessarily correlate to documented increases in sexual violence or sexual abuse against children.<sup>29</sup> Moral panics and their resultant laws are often about something other than, or in addition to, child protection.

From the mid-1990s to the present, the United States has witnessed a tidal wave of state and federal sex offender laws.<sup>30</sup> There are currently three<sup>31</sup> main varieties of sex offender laws, all of which come into effect immediately prior to or upon the offender's release from prison: registration, community notification, and residency restrictions.

Registration laws differ greatly by state, but generally offenders must register with local authorities and provide their address, bodily characteristics, place of employment, and social security number, along with their vehicle license number, make, and model. Offenders must periodically re-register—sometimes for life—or face federal criminal charges. States must meet minimum registration requirements under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, or face federal budget cuts.<sup>32</sup>

Notification laws: after an offender relocates from prison to civil life, either the offender himself or local authorities are required to notify members and/or institutions of the community. Like registration, the degree of community notification is often proportionate to the designated severity of the crime. Minimum state notification requirements are also mandated federally by the 1996 "Megan's Law."<sup>33</sup> The federal Megan's Law and its state equivalents require sex offender information—often a picture of the offender, his address,

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29. See JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD-VICTIMS 22–31 (1990); Denno, *supra* note 16, at 1363 ("the number of statutes passed each year appears to be largely unrelated to the rates of rape or sex offenses."); Freedman, *supra* note 24, at 84; HUM. RTS. WATCH, *supra* note 17, at 23 ("Sexual violence in the US is, fortunately, decreasing."); Sutherland, *supra* note 19, at 142.

30. See Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885 (1995); Boland, *supra* note 18; Justin H. Boyd, Comment, *How to Stop a Predator: The Rush to Enact Mandatory Sex Offender Residency Restrictions and Why States Should Abstain*, 86 OR. L. REV. 219 (2007); Bret R. Hobson, *Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?*, 40 GA. L. REV. 961 (2006).

31. Some states also civilly commit certain offenders past their prison release date, a practice found constitutional in *Kansas v. Hendricks*, 521 U.S. 346 (1997). On the reemergence of sex predator commitment laws and the ways they distort national perceptions of sexual violence see generally JANUS, *supra* note 17. GPS tracking and chemical or surgical castration have also become statutory methods of sex offender supervision and regulation over the past twenty years. For summaries of sex offender laws, their costs, empirical validity, deterrent effects, and unintended or unknown consequences, see the collection of essays in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS* (Richard G. Wright ed., 2009).

32. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (2006). For a discussion of the Act and its mandates, see Kunz, *supra* note 18; Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1172–1173 (1999).

33. Megan's Law, 42 U.S.C. § 16921 (2006).

the crime for which the offender was convicted, the age of the perpetrator and the victim at the time of the crime—to be made available for the public at large. States and the federal government post much of the information on online sex offender databases, which are, generally, freely accessible.<sup>34</sup>

Residency restrictions: these are the newest iterations of sex offender laws, requiring that sex offenders live outside measured radii of places where children congregate, like schools or swimming pools. In some states, offenders cannot live within 500 feet of schools; in other states the radius is 2000 feet.<sup>35</sup> These laws have some unintended consequences: offenders are effectively prohibited from living in entire municipalities, so they overflow into another,<sup>36</sup> or, in Miami, sex offenders all live together under a bridge, because it is the only locale legally far enough from protected institutions.<sup>37</sup>

The most recent federal minimum requirements for state sex offender laws are set in the Adam Walsh Child Protection and Safety Act of 2006, and failure for state compliance will ultimately result in federal funding cuts.<sup>38</sup> The AWA surpasses the baseline requirements of the Wetterling Act and the Megan's Law, both in scope (whom it covers) and duration (how long offenders must register).<sup>39</sup> The AWA creates a three-tiered system of sex offenses, labels any crime vaguely sexual (public urination) a sex offense,<sup>40</sup> requires certain juvenile offenders to register,<sup>41</sup> compels registration for violent and nonviolent offenses alike, compels constant re-registration,<sup>42</sup> and mandates that all offenders' personal information be posted online for 15 years, 25 years, or life, depending on the tier of the crime.<sup>43</sup> The AWA is offense-based, and does not allow for individualized, clinical risk assessment to determine whether an offender should or should not register, and whether his personal information ought to be made available.<sup>44</sup> The requirements of the Adam Walsh Act are stricter than

34. See Maureen S. Hopbell, Article, *Balancing the Protection of Children Against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law*, 42 DUQ. L. REV. 331, 341 (2004); Jessica Ann Orben, Comment, Connecticut Department of Public Safety v. Doe: *Sex Offenders' Due Process Under "Megan's Law" and the Effectiveness of Sex Offender Registration*, 36 U. TOL. L. REV. 789, 791–92 (2005).

35. See Mark Loudon-Brown, "They Set Him on a Path Where He's Bound to Get Ill": *Why Sex Offender Residency Restrictions Should be Abandoned*, 62 N.Y.U. ANN. SURV. AM. L. 795, 798–800 (2007).

36. Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1.

37. See Matthew Singer, Comment and Casenote, . . . *And Procedure for All: Rehearings for "Dangerous" Offenders*, 76 U. CIN. L. REV. 1067, 1090 (2008); Damien Cave, *Roadside Camp for Miami Sex Offenders Leads to Lawsuit*, N.Y. TIMES, Jul. 10, 2009, at A14.

38. 42 U.S.C. § 16901 (2006).

39. *Id.* § 16911(5)(A)(i) (2006).

40. *Id.* § 16911(2) – (5) (2006).

41. *Id.* § 16911(8) (2006).

42. *Id.* § 16916(1) – (3) (2006).

43. *Id.* § 16915(a)(1) – (3) (2006).

44. See Lara Geer Farley, Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471 (2008); HUM. RTS. WATCH, *supra* note 17, at 37–38.

those of most states, and some states have objected that compliance will be prohibitively costly.<sup>45</sup>

But cost is by no means the only objection to the array of sex offender laws. On a policy level, critics object that: sex offender laws do not work, that is, they do not reduce sex offenses;<sup>46</sup> many laws make no or few assessments of risk, and so waste resources tracking the recidivist and the non-recidivist, the violent offender and the nonviolent 'Romeo';<sup>47</sup> the stigmatizing and ostracizing effects of registration, notification, and residency restriction may encourage the violent behavior they are aimed to deter. The stress and depression resultant from social segregation, bullying, threats, verbal and physical attacks, and unemployment, are fertile psychological ground for recidivist, sexually aggressive behavior.<sup>48</sup>

On a humanitarian level, critics argue that these laws excessively burden offenders' lives and the lives of offenders' family members. Offenders often cannot reunite with their families because of residency restrictions.<sup>49</sup> As a result of online notification, offenders are routinely harassed, publicly humiliated, and assaulted, and homes of offenders have been burned down or otherwise vandalized.<sup>50</sup> Facing such responses, some offenders have committed suicide.<sup>51</sup> The humanitarian criticism clusters around the wide net of registration and notification, in which the 'wrong place, wrong time' offender gets lumped in with the playground abductor. Indeed, a widely shared sentiment is that these

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45. Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance from States*, N.Y. TIMES, Feb. 9, 2009, at A1.

46. See Agudo, *supra* note 18, at 309; Boyd, *supra* note 30, at 230; Orben, *supra* note 34, at 806; Kunz, *supra* note 18, at 476. Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 52 (2005) ("Little empirical evidence exists to support conclusions that Megan's Law leads to the above-mentioned benefits or consequences, particularly those concerning its commonly cited goal of increased public safety."); Bob Edward Vásquez, et al., *The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQ. 175, 188 (2008) ("The empirical finding of this research is that the sex offender legislation seems to have had no uniform and observable influence on the number of rapes reported in the states analyzed.").

47. See Agudo, *supra* note 18, at 332–33; Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 318 (2006); Farley, *supra* note 44.

48. See Agudo, *supra* note 18, at 309; Kunz, *supra* note 18, at 477; HUM, RTS, WATCH, *supra* note 17, at 9–10; Levenson & Cotter, *supra* note 46, at 61–62.

49. See Loudon-Brown, *supra* note 35, at 797–98; Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L.R. 1397, 1412, 1453 (2009).

50. See Farley, *supra* note 44, at 494; Kunz, *supra* note 18, at 476; Orben, *supra* note 34, at 808. Corrigan notes that these incidents of vigilantism, although troubling, are not widespread. Concerns with the problems of sex offender notification laws should not overshadow the fact that many convicted sex offenders are not included in online databases. See Corrigan, *supra* note 17, at 299–304. So too, while registration and notification requirements may promote a vision of the state as encroaching and invasive, the "statutes permit legislators to claim they are tough on crime without remedying systemic problems of inadequate training for police and judges (especially in cases involving children), law enforcement insensitivity to victims, abysmal levels of support for victim advocacy groups, and lack of treatment options for offenders who seek to change their behavior." *Id.* at 302.

51. See Farley, *supra* note 44, at 472; Todd S. Purdum, *Death of Sex Offender is Tied to Megan's Law*, N.Y. TIMES, Jul. 9, 1998, at A16.

laws are grossly overbroad.<sup>52</sup> As mentioned, the Adam Walsh Act likely requires states to label anyone who perpetuates any sexual crime a sex offender, including public urination, public indecency, statutory rape, and soliciting a prostitute.<sup>53</sup>

On a constitutional level, the laws have been challenged on wide-ranging grounds, only the most prevalent of which are mentioned here. One set of oppositions revolves around the laws as punishment: if notification, registration, and residency restrictions function to punish, their retroactive application violates the Ex Post Facto Clause of the Constitution.<sup>54</sup> Plaintiffs have also argued that the laws are uniquely harsh and disproportionate, violating the Cruel and Unusual Punishment Clause of the Eighth Amendment.<sup>55</sup> Another set of oppositions maintains that the laws are functional deprivations of liberty or equality, thus triggering Fourteenth Amendment protections. If the law singles out and subjects a class of people, i.e. sex offenders, to unfair treatment without rational basis – without any reasonable relation to a legitimate state interest – the law contravenes Equal Protection guarantees.<sup>56</sup> If the law provides no administrative process to oppose registration and notification requirements, or no individualized risk-assessment, plaintiffs argue the laws violate procedural due process.<sup>57</sup> Finally, claimants maintain that the intrusions into their privacy, the restrictions on their travel and residency, the consequent “stigma plus” the social consequences of stigma, amount to a violation of substantive due process, to infractions of fundamental rights that warrant strict scrutiny review.<sup>58</sup> On

52. See Agudo, *supra* note 18; cf. Corrigan, *infra* note 167.

53. Although these are “tier 1” offenders, the least serious in the three-tiered system, they may nonetheless be listed online as sex offenders for fifteen years, reducible to ten at judicial discretion. See 42 U.S.C. § 16915(a)(1)-(3), 16915(b)(2)(A) (2006).

54. See *Doe v. Poritz*, 662 A.2d 367, 404 (N.J. 1995) (holding that registration and notification laws are not punitive); Boland, *supra* note 18, at 202 (“Registration is frequently applied retrospectively, but it has been upheld against ex post facto challenges in nearly every instance because most courts view registration as a regulation, not a punishment. Notification has faced limited challenges and the results have varied.”); See, *infra* notes 64–75 and accompanying text.

55. See *Rainer v. Georgia*, No. S09A1900, 2010 2010 Ga. LEXIS 229, at \*4 (Ga. Mar. 15, 2010) (“[B]ecause the registration requirements themselves do not constitute punishment, it is of no consequence whether or not one has committed an offense that is “sexual” in nature before being required to register ... The nature of the offense requiring the registration would not somehow change the registration requirements themselves into a form of “punishment” for purposes of an Eighth Amendment cruel and unusual punishment analysis.”); Kunz, *supra* note 18, at 467–68 (“In the majority of cases, challenges claiming that notification and registration laws impose cruel and unusual punishment have failed.”).

56. See *Poritz*, 662 A.2d at 413 (“Classification of plaintiff based on his conviction of one of the enumerated sex offenses and his characterization as a repetitive compulsive offender is rationally related to the government’s interest in protection of the public. The need for public safety outweighs the restrictions placed upon plaintiff as a result of his inclusion in this class. We conclude therefore that the registration and notification requirements do not violate plaintiff’s right to equal protection under either the Federal or State Constitution.”); Hobson, *supra* note 30, at 988; Kunz, *supra* note 18, at 468 (“Challenges to notification on equal protection grounds have proved unsuccessful as well.”).

57. See sources cited *infra* notes 76–87 and accompanying text.

58. See *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005); *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004); Hobson, *supra* note 30, at 972 (“Convicted sex offenders have brought unsuccessful substantive due process challenges against various types of post-release restrictions. . . . [C]ircuit courts have ruled that the statutes in question do not infringe the asserted fundamental right.”).

these 14<sup>th</sup> Amendment challenges, the policy critique bleeds into the constitutional one: since there is some empirical evidence that these laws do the opposite of their intended objectives, there may be no rational basis for them and, so the argument proceeds, for their enactment and enforcement.<sup>59</sup>

Why is all of this important? Because none of it matters.

Despite the laws' being bad policy, morally and physically devastating, and constitutionally questionable, legislatures continue to push them through, and courts (mostly) continue to reject objections on all counts.<sup>60</sup> Some courts have placed temporary injunctions on the most egregious components of the law,<sup>61</sup> and few courts have ruled that blanket registration, notification, and residency requirements without attention to degrees of dangerousness, risk assessment, or administrative process of appeal violate due process protections.<sup>62</sup> Nevertheless, the 2003 Supreme Court cases on sex offender laws to which this article now turns soundly reject claims that registration and notification are either punitive or in conflict with procedural due process protections.

## PART II: JOHN DOES AND THE SUPREME COURT

Two cases on sex offender laws made their way up to the Supreme Court by 2003. In *Smith v. Doe*,<sup>63</sup> the respondents (two John Does and the wife of one) claimed that since they were convicted of sex offenses prior to the enactment of Alaska's registration and notification laws, retroactive application violated Ex Post Facto.<sup>64</sup> They argued that the continued requirement of registration and re-registration as sex offenders, and the continual community notification of their sex offender status via the Internet and other forms of public announcement, constituted a form of punishment.<sup>65</sup>

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Regarding a liberty interest in reputation, see *Paul v. Davis*, 424 U.S. 693 (1976) and *infra* notes 79–82, and accompanying text; regarding *Tandeske* and similar dismissals of substantive due process claims, see *infra* notes 147–53 and accompanying text.

59. See generally Boland, *supra* note 18; Loudon-Brown, *supra* note 35; Singer, *supra* note 37 (offering examples of the many negative counter-effects of sex offender laws).

60. See sources cited *supra* notes 54–58.

61. See Catrin Einhorn, *Judge Blocks Rules Limiting Sex Offenders on Halloween*, N.Y. TIMES, Oct. 28, 2008, at A12 (“A federal judge in Missouri . . . blocked parts of a new state law that requires sexual offenders to remain in their homes on Halloween evening and to avoid any contact with children related to the holiday.”); Stephanie Chen, *After Prison, Few Places for Sex Offenders to Live*, WALL ST. J., Feb. 19, 2009, at A16 (reporting on a federal court injunction against a 2006 Georgia law prohibiting sex offenders from residing within 1000 feet of school bus stops).

62. See *State v. Bani*, 36 P.3d 1255, 1257 (Haw. 2001) (holding that a public notice of defendant as a sex offender, “without notice, an opportunity to be heard, or any preliminary determination of whether and to what extent [defendant] actually represent[ed] a danger to society” violated due process requirements).

63. *Smith v. Doe*, 538 U.S. 84 (2003).

64. *Id.* at 91. John Doe I was convicted of sexually abusing his daughter for two years, when she was 9 to 11 years old. John Doe II was convicted of sexually abusing a 14-year-old. Both pleaded *nolo contendere*. They were released from prison in 1990 and completed rehabilitation programs. The Alaska Sex Offender Registration Act was passed on May 12, 1994.

65. *Id.* at 91-92.

Delivering the majority opinion and reversing the Ninth Circuit decision,<sup>66</sup> Justice Kennedy ruled that Alaska's notification and registration laws are regulative, not punitive, and therefore trigger no Ex Post Facto problem, since one cannot be punished retroactively, but one can be regulated.<sup>67</sup> To determine if a statute is regulatory or punitive, the Court first looks to legislative intent.<sup>68</sup> The manifest intent of the Alaskan legislature was evidently regulatory: it sought to protect the public health, not to punish offenders. Thus, the Court turns to criteria enumerated under *Kennedy v. Mendoza-Martinez* that may determine laws to be punitive despite their evidently regulatory intent.<sup>69</sup> The factors that may override legislative intent include whether the law: (1) has historically been regarded as punitive; (2) imposes an affirmative disability or restraint; (3) has a rational connection to a nonpunitive objective; and, (4) is excessive in respect to its purpose.<sup>70</sup> The Court determined that sex offender laws reach none of these thresholds. The laws are dissimilar to colonial acts of shaming and humiliating; they are reasonably related to rates of recidivism; no physical restraint is imposed on offenders; and difficulty in finding employment or housing on account of notification is "conjecture."<sup>71</sup> Dissenting, Justice Ginsburg argued that the absence of an assessment of dangerousness or an assessment of individualized likelihood of recidivism marks the laws excessive,<sup>72</sup> and Justice Stevens insisted that the majority's reliance on the presumptive recidivism of offenders in fact substantiates the Ex Post Facto claim, as it singles out a subset of persons for legal restraint.<sup>73</sup> Both Ginsburg and Stevens also documented the threats, assaults, evictions, and arson faced by offenders, which Kennedy and the majority overlooked, that might constitute affirmative restraint.<sup>74</sup>

In *Connecticut Department of Public Safety v. Doe*, Doe argued that Connecticut's registration and notification laws violated procedural due process

66. *Doe I v. Otte*, 259 F.3d 979, 982 (9th Cir. 2001) (holding that the Alaska Sex Offender Registration Act violated the Ex Post Facto Clause).

67. *Smith*, 538 U.S. at 94 (states can pass retroactive laws as long as they are exercised under the state's regulatory power and not intended to be punitive). Eric Janus observes that states enacted sex offender registration, notification, and commitment laws under civil codes precisely to bypass the constitutional checks that restrain criminal law. See JANUS, *supra* note 17, at 20 ("The fact that civil regulatory measures allowed the states to circumvent constitutional limitations that would otherwise limit their powers was the central driving force behind the new laws.").

68. *Id.* at 92.

69. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

70. *Id.*

71. *Smith*, 538 U.S. at 97-106.

72. *Id.* at 116-17 (Ginsburg, J., dissenting) ("[P]ast crime alone, not current dangerousness, is the 'touchstone' triggering the Act's obligations. . . . This Touchstone adds to the impression that the Act retributively targets past guilt.").

73. *Id.* at 113 (Stevens, J., dissenting) (noting that a restriction imposed only on someone who commits a criminal offense is "punishment").

74. *Id.* at 111 (Stevens, J., dissenting) (comparing the requirements to those placed on criminals on parole); *id.* at 115 (Ginsburg, J., dissenting) (noting that the Act "imposes onerous and intrusive obligations").

protections guaranteed by the 14<sup>th</sup> Amendment.<sup>75</sup> Since the laws allegedly deprived him of protected liberty rights, the state, under prior case law,<sup>76</sup> ought to be required to administer a “predeprivation hearing” to assess Doe’s dangerousness and determine whether registration and notification are indeed applicable.<sup>77</sup>

The protected liberty interest in balance is one of reputation. Although the Court has consistently ruled that damage to reputation alone (from the dissemination of truthful information, for example) does not qualify as a protected liberty interest,<sup>78</sup> the “stigma plus” test outlined in *Paul v. Davis*<sup>79</sup> stipulates that procedural protections are warranted when “the injury to reputation [is] accompanied by a change in the injured person’s status or rights.”<sup>80</sup> In Doe’s case, the “plus” is his change in legal status to “sex offender.”<sup>81</sup>

Delivering a brief, unanimous decision reversing the Second Circuit opinion,<sup>82</sup> Justice Rehnquist ruled that first, there are no protected liberty interests of the sex offender violated by notification and registration laws and second, even if there were, no predeprivation hearing would be necessary.<sup>83</sup> Such a hearing must be “material to the State’s statutory scheme,” or in plainer speak, must be related to the law in question.<sup>84</sup> John Doe, argued Rehnquist, mistakenly assumed that Connecticut’s laws were enacted to supervise *dangerous* people, and that his dangerousness ought to be assessed. But the laws target sex offenders as a *class*, make no reference to dangerousness, and so dangerousness is irrelevant.<sup>85</sup> No hearing is necessary to establish his legal

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75. *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 1-8 (2003) (Respondent, a convicted sex offender, argued that the Connecticut law violated procedural due process because it did not require a hearing to determine whether he was currently dangerous.).

76. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring inquiry into additional procedural safeguards); *Fullmer v. Mich. Dep’t of State Police*, 207 F. Supp. 2d 650, 654-55 (E.D. Mich. 2002) (stating that the plaintiff, a sex offender, had a right to be free from government defamation, entitling him to certain procedural safeguards).

77. *Conn. Dep’t of Pub. Safety*, 538 U.S. at 4.

78. *See Codd v. Velger*, 429 U.S. 624, 628 (1977) (no protected liberty interest for a police officer who had negative, but truthful, information placed in his public personnel file).

79. *Paul v. Davis*, 424 U.S. 693, 705 (1976) (holding that without any change in legal status, stigma imposed as a result of action by the Attorney General does not invoke protection under the Due Process Clause).

80. *Beitzell v. Jeffrey*, 643 F.2d 870, 878 (1st Cir. 1981); *see also Orben, supra* note 34, at 56.

81. *See Doe v. Dep’t of Pub. Safety ex rel. Lee*, 271 F.3d 38, 45-46 (2d Cir. 2001) (finding that a change in legal status to sex offender constituted a “plus” factor).

82. *Conn. Dep’t of Pub. Safety*, 538 U.S. at 4.

83. *Id.* at 7-8.

84. *Id.* at 4.

85. However, the Connecticut statute grants judicial discretion in exempting some offenders from registration and notification requirements, a detail which Justice Rehnquist omits and which may compromise (and authorize) his ruling that dangerousness is immaterial. *See* CONN. GEN. STAT. ANN. § 54-251(b), (c) (West 2009). Particular offenders may be exempted if determined not to threaten public safety. I owe this well-made point to Gabriel Baldwin, *Connecticut Department of Public Safety v. Doe: The Supreme Court’s Clarification of Whether Sex Offender Registration and Notification Laws Violate Convicted Sex Offenders’ Right to Procedural Due Process*, 24 J. NAT’L ASS’N ADMIN. L. JUDGES 383, 393-94 (2004).

status as a sex offender, a status confirmed by conviction. In concurring opinions, Justices Ginsburg and Souter also reject the procedural challenge, but suggested that equal protection and substantive liberty claims might still be available to Doe and those similarly situated.

PART III: A REVISIONIST READING OF *SMITH* AND *CONNECTICUT* OR HOW THE COURT DOES THINGS WITH SEX OFFENDERS<sup>86</sup>

The analyses of Parts III and IV closely track the arguments in *Smith* and *Connecticut* alongside the arguments advanced in *Bowers* that were subsequently and vehemently rejected by *Lawrence*. This comparison is made to substantiate the claim that, whether or not sex offender laws are ultimately constitutional, these laws, like the socio-juridical construction of the sex offender himself, inform a judicial imaginary that fictively stabilizes and isolates sexual harm onto discrete bodies and character types. The Court does so in, and because of, a national climate increasingly sexually pluralistic and socially progressive where the homosexual is no longer a sufficient repository for sexual amorality. Put perhaps too simply, where the homo/hetero distinction once divided the sexually moral from the amoral and consent/nonconsent divided the sexually harmful from the non-harmful, the consent/nonconsent divide, in the wake of *Lawrence*, does double duty, partitioning morality *and* harm. The Court's consent/nonconsent distinction is therefore overburdened and overdrawn, covering at once too little and too much. It is unable to diagnose or mitigate sexual injustice that is legally consensual (too little),<sup>87</sup> and it smuggles in sexual practices considered amoral and designates them nonconsensual and harmful (too much).<sup>88</sup> It is the fragility and volatility of this distinction that the figure of the sex offender stills and obscures.

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86. I borrow this phrase from J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1976). Although Austin initially sought to distinguish "constative" speech acts that correspond to objective reality ("the cloud is in the sky") from "performative" speech acts that produce reality ("I do," at a wedding ceremony), he eventually confounded his own typology, proposing instead that all speech acts produce certain effects or perform functions that exceed or subtend the simply referential component. My claim here is that while the Court understands itself as describing, referencing, and reporting on sex offenders and sex offender law, it simultaneously, through that very same "speech," produces the sex offender and the ancillary concepts of sexual harm (*Smith* and *Connecticut*) and sexual freedom (*Lawrence*). On the adoption of Austin's theory of performative speech to the cultural construction of gender see generally BUTLER, *supra* note 19; see also Paul Kelleher, *How to Do Things with Perversion: Psychoanalysis and the "Child in Danger,"* in CURIUSER 151, *supra* note 14.

87. See sources cited *supra* note 12.

88. See sources cited *supra* note 13; Harcourt, *supra* note 15. Analogously, Sarah Jain compellingly argues that the contemporary formation of U.S. product safety and injury law discursively delimits what does and does not count as injury and who can or cannot make claims to being injured, while it obscures systemic injury endemic to a capitalist consumer economy. See SARAH S. LOCHLANN JAIN, *INJURY: THE POLITICS OF PRODUCT DESIGN AND SAFETY LAW IN THE UNITED STATES* 34, 52 (2006) ("The compensation system thus brooks attention from both the ways in which consumption injures as a matter of course and the ways in which injury itself is a productive force ... What happens, then, when we see the law not as a neutral adjudicator but as constituting the terms of citizenship? How does injury culture instruct its subjects to understand wounding?").

The following three subsections explicate how the Court constructs the sociopolitical figure of the sex offender, and Part IV suggests in more detail why it does so.

### IIIa.Sodomizing and Recidivating

To overturn *Bowers*, the majority opinion of *Lawrence* deploys a battery of arguments, the first of which is an accusation of bad faith historicism.<sup>89</sup> For *Bowers*, part of the rational basis for sodomy laws was a presumably historic, uninterrupted, Judeo-Christian moral aversion to homosexuals and their sodomitical acts. *Bowers* maintained that longstanding proscriptions against sodomy testified to a universal moral code that disapproved of homosexuals and homosexuality.<sup>90</sup> In *Lawrence*, Justice Kennedy countermands the assertion on several fronts. First, sodomy laws were originally enacted and enforced to protect people deemed incapable of consent—they were not aimed to target homosexuals; second, sodomy laws that did focus on same-sex sex were only recently drafted, in the 1970s; third, most states have repealed their sodomy statutes.<sup>91</sup> These three arguments taken together challenged both the claim that sodomy laws historically manifested disapproval of homosexuality, and the claim that such disapproval is widely shared.<sup>92</sup> Justice Kennedy also remarkably observed that the homosexual is an historical invention of the 19<sup>th</sup> century, and thus could not have been singled out by colonial sodomy laws because he did not—as a category—yet exist.<sup>93</sup>

Important here is the degree to which the *Lawrence* Court felt compelled to do its history homework, citing scholars of colonial America and gay and lesbian studies.<sup>94</sup> Also important is that not far from the surface of *Lawrence* is the suspicion that homophobia directed and then marred *Bowers*' selective use of history, and that homophobia does not a good constitutional decision make, blinding or mischaracterizing the facts of the case. "At the very least," writes Kennedy, *Bowers*' history was "overstated," and he scrutinizes Justice Burger's "sweeping references" to the moral reprobation of homosexuality.<sup>95</sup>

Just three months before Justice Kennedy's compelling performance as a revisionist historian, he and the majority for which he wrote categorically refused to ask similar historical or social scientific questions about the behavior of sex offenders. The backbone of Kennedy's opinion in *Smith*, and Rehnquist's opinion in *Connecticut*, is the uncritical presumption of high recidivism, the great

89. See *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (noting that early sodomy laws were not aimed at homosexuals).

90. *Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986) ("[p]roscriptions against [homosexuality] have ancient roots").

91. *Lawrence*, 539 U.S. at 568-70.

92. See *id.* at 571-72 ("the historical grounds relied upon in *Bowers*. . . are not without doubt").

93. *Id.* at 568 (citing JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 10 (1995) and JOHN D'EMILIO & ESTELLE FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 121 (2d ed. 1997).); see also FOUCAULT, *supra* note 19.

94. *Lawrence*, 539 U.S. at 568.

95. *Id.* at 571-72.

likelihood that sex offenders will re-offend.<sup>96</sup> As mentioned above, the *Smith* Court found Alaska's registration and notification requirements regulatory, not punitive. Justice Kennedy approvingly cites Alaska's 1994 legislative finding that "sex offenders pose a high risk of reoffending" as evidencing a regulatory purpose, protecting public safety.<sup>97</sup> Reversing the Ninth Circuit's ruling that the Alaska requirements were "excessive in relation to its regulatory purpose" because the laws *did not* track dangerousness,<sup>98</sup> Kennedy writes:

Alaska could conclude that a conviction for a sex offense provides evidence of a substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high.'<sup>99</sup>

Kennedy also cites two Bureau of Justice and Statistics studies, conducted in 1983 and 1997, which allegedly claim that convicted sex offenders are more likely to commit sexual crimes than other criminals.<sup>100</sup> In other words, the classification "sex offender" indexes dangerousness, so no further assessment is necessary. Further, it is the presumption of dangerousness that hedges against a punitive reading of registration and notification requirements: although targeting "sex offenders" as a class may look like punishment, the "dangerousness as a class" turns the laws regulatory, protective, and constitutional.<sup>101</sup>

Justice Rehnquist introduces his opinion in *Connecticut*, citing *McKune v. Lile*: "Sex offenders are a serious threat to the nation," and reports as well that the victims of sex assaults are mostly juveniles, and that recidivism runs disproportionately high among sex offenders.<sup>102</sup> Strikingly, it is the dangerousness inherent in the class of criminals, a dangerousness Connecticut has a legitimate interest in containing, that neutralizes any claim to an individualized risk-assessment under the Due Process Clause. Sex offenders are threateningly recidivistic by legal designation. Respondents "alleged nondangerousness simply does not matter," and is immaterial to the state regulatory scheme, but only because that scheme depends on the presumption of "serious threat," or high recidivism (one may already sense the tautological force at work here, to be discussed later).<sup>103</sup>

Concurring, Justice Scalia also asserts that since the notification scheme targets sex offenders as a class rather than dangerousness *per se*, an assessment

96. See *Smith v. Doe* 538 U.S. 84, 103 (2003); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003).

97. *Smith*, 538 U.S. at 103.

98. *Doe I v. Otte*, 259 F.3d 979, 992-94 (9th Cir. 2001).

99. *Smith*, 538 U.S. at 103 (citing *McKune v. Lile* 536 U.S. 24, 34 (2002)).

100. *Id.* See Bureau of Justice Statistics studies discussed *infra* notes 110-11, 113, 115.

101. See *Smith*, 538 U.S. at 103. (Despite the punitive appearance of the law, Kennedy uses the high recidivism statistics to show that the intent of Alaska legislature was not to punish, but to exercise its police power to enhance public safety).

102. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 3 (citing *McKune* 536 U.S. at 32-33) (2003).

103. *Id.* at 7 (stating that Connecticut has chosen to make all sex offenders, regardless of current dangerousness, subject to the public disclosure law).

of dangerousness is immaterial and void as a matter of due process protection.<sup>104</sup> He reasons by analogy: a sex offender who claims he has been deprived of liberty without due process because his dangerousness has not been individually determined is as nonsensical as a fifteen year-old who claims that a law prohibiting him from driving on account of his young age is a due process violation unless his driving safety skills are tested.<sup>105</sup> He does not explain the analogy, but it seems to be about a shared obviousness and absurdity in both cases. It is obvious that most children are not capable of driving, and absurd to suggest there is no rational state interest in barring children from driving. It is obvious that sex offenders sex offend, and absurd to suggest there is no rational state interest in tracking and publicizing their location and activities.<sup>106</sup> Moreover, it is the sex offending that vitiates any claim to ethical or constitutional competency on the part of the offender—due process is inapplicable for those, like children and sexual sociopaths, legislatively scripted as incapable of self-assessment. The law and its representatives are the competent constitutional surveyors.

The central problem with Kennedy's and Rehnquist's opinions, and Scalia's cryptic analogy, is that the social fact of recidivism is just social. Evidence of sex offender recidivism from the 1980s into the present is complicated and contested, but generally national, state, and private research studies suggest that, if anything, sex offenders have some of the *lowest* recidivism rates among criminals.<sup>107</sup> So too, recidivism varies hugely by the particular crime, so any generalized statistic is definitionally bogus.<sup>108</sup> There is much state discretion in determining who is a 'sex offender,' and that broadened category exceeds the

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104. *Id.* at 8-9 (Scalia, J., concurring) (As the law was properly enacted, sex offenders no longer have a right to a process to demonstrate that they are not dangerous.).

105. *Id.* ("[A] convicted sex offender has no more right to additional 'process' enabling him to establish that he is not dangerous . . . than a 15-year-old has a right to 'process' enabling him to establish that he is a safe driver.").

106. *See, e.g.,* Baldwin, *supra* note 85, at 395-96. Baldwin proposes that the analogy may overlook the judicial exemptions to the Connecticut notification requirements, exemptions premised on an individualized assessment of dangerousness. However, both the infantilization of the sex offender and the naturalization of his alleged dangerousness advance a judicial "subject creation" of the sex offender as a childlike container for lawlessness and sexual perversity, discussed in Part IV. On jurisprudence, policing and the creation of criminal subjects, *see* BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 160-84 (2001).

107. *See* CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUST., *MYTHS AND FACTS ABOUT SEX OFFENDERS* (2000), available at <http://www.csom.org/pubs/mythsfacts.pdf>. Multiple studies are cited in Boyd, *supra* note 30, at 230; HUM. RTS. WATCH, *supra* note 17, at 25-35; Hobson, *supra* note 30, at 965; KINCAID, *supra* note 14, at 95; Kunz, *supra* note 18, at 471-73. *See also* Francis M. Williams, *The Problem of Sexual Assault*, and Karen J. Terry & Alissa R. Acherman, *A Brief History of Major Sex Offender Laws*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS*, *supra* note 31, at 18, 92. Kim English convincingly suggests that low recidivism rates may result in part from the well-known problem of low reporting rates by victims, yet this is precisely the policy problem with registration and notification laws. They target convicted offenders who have been reported, rather than on unreported sexual violence by family members and acquaintances. *See* Kim English, *The Containment Approach to Managing Sex Offenders*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS*, *supra* note 31, at 428.

108. *See* CTR. FOR SEX OFFENDER MGMT., U.S. DEP'T OF JUST., *supra* note 109, at 2 ("[R]eoffense rates vary among different types of sex offenders and are related to specific characteristics of the offender and the offense.").

typical subject populations of recidivist studies, namely violent offenders (the 1997 Bureau of Justice and Statistics study, discussed below, examines the behaviors of only those who were convicted of rape and sexual assault).<sup>109</sup> Given too that over 90% of sex offenses against children are committed either by family members or family acquaintances, the recidivist stranger seems like a doubly wrong concern for public or legislative attention.<sup>110</sup> The Justice Center, an organization critical of Alaska's statutes and the Court's approval of them, notes that the "legislature did not attempt to distinguish among types of offenders or to evaluate which offender were most likely to recidivate."<sup>111</sup> Thus, an older teenager who has sex with a younger teenager is a "sex offender." What does it mean to suggest that he is a high recidivist?

Perhaps most importantly, the Bureau of Justice and Statistics studies referenced by Kennedy and Rehnquist *do not say what the Justices want them to say*. Sex offenders, according to these studies, *do not* recidivate at a higher rate than other criminals. If any fact could be comported to sustain the claim, it is the supposition that rapists are 10.5% more likely to commit rape than other convicts who have not raped, a number pared down to 4.2% in a 1994 BJS study.<sup>112</sup> But all this means is that rapists are more likely to rape than *other criminals who have not raped*. A rapist is more likely to commit rape in the future than is an armed robber. This simply cannot intend that sex offender recidivism is "frightening and high" or that "sex offenders are a serious threat to the nation."<sup>113</sup> Indeed, what Kennedy omits to report is more illustrative than his selective citations. Violent sex offenders were *less* likely to be on "probation or parole prior to prison admission" than other violent offenders.<sup>114</sup> So too, rapists were less likely to be rearrested for violent felonies than "most categories of probationers with convictions of violence."<sup>115</sup> The studies offer *no data* on nonviolent offenders who would be labeled sex offenders by both the Connecticut and Alaska statutes and the Adam Walsh Act provisions.

(Incidentally, if the sex offender were unrelentingly recidivistic, there is no good reason registration and notification would help ensure public safety—this same violent predator would presumably be undeterred by the publication of his name on the Internet, and precautionary efforts, short of locking one's self and one's children away from the world forever, would be futile. Were the registries and notification schemes not disorganized and inefficient, they might

109. See LAWRENCE A. GREENFELD, BUREAU OF JUST. STAT., *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (1997), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF>.

110. See generally SNYDER, BUREAU OF JUST. STAT, *supra* note 17; see also HUM. RTS. WATCH, *supra* note 17, at 24-25; Richard G. Wright, *Introduction: The Failure of Sex Offender Policies*, in *SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS*, *supra* note 31, at 4.

111. Deborah Periman, *Revisiting Alaska's Sex Offender Registration and Public Notification Statute*, 25 ALASKA JUST. F. 2 (2008), available at [http://justice.uaa.alaska.edu/forum/25/1-2springsummer2008/c\\_asora.html](http://justice.uaa.alaska.edu/forum/25/1-2springsummer2008/c_asora.html).

112. See PATRICK LANGAN ET AL., BUREAU OF JUST. STAT., *Recidivism of Prisoners Released in 1994* 11 (2002), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>.

113. See *Smith v. Doe*, 538 U.S. 84, 103 (2003).

114. See GREENFELD, BUREAU OF JUST. STAT., *supra* note 110, at 25.

115. *Id.* at 25-26.

provide police with suspects *post facto*, but that is surely a colder kind of comfort.)

Meanwhile, where the homosexual of *Lawrence* is a recent, historical, and conceptual figure of modernity,<sup>116</sup> the sex offender of *Smith* and *Connecticut* appears transhistoric, prediscursive, and perverted.<sup>117</sup> Like hardcore pornography, the Court knows a sex offender when it sees one.<sup>118</sup> That the “sex offender” is an explicitly legal construct seems only to suggest to the Court that the law applies a concept to a person, but that the concept is simply right in its ascription: these people are like this—threatening, recidivistic, pathologically violent—we just hadn’t come up with a name for it yet. Recourse to false suppositions of recidivism, and to invocations of the impending threat of the sex offender, occludes the huge range of people classified as such, and assumes their constitutive immunity to therapy and rehabilitation. The sex offender is imagined as a hypersexualized and unremorseful Voldemort who keeps coming back for Harry.<sup>119</sup>

The point is unequivocally not that sexual crimes are unserious or that they do not carry severe consequences for their victims. Rather, the severity and seriousness of these crimes is, by selective judicial interpretation and deployment of social scientific studies, transformed into a misleading characterization of these crimes’ prevalence and persistence. In other words, it seems rather clear that both the judicial and national concern with sex offenses is not their comparative rate of occurrences but rather their heinousness. Yet, the focus on rates and recidivism (and incidentally, almost no discussion about the physiological consequences to victims) constructs the problem in a particular and inaccurate but strangely comforting fashion. Perhaps the anxiety generated by the heinousness of sex crimes is offset by imagining a contained subpopulation—regulated, constricted, publicized—as the sole perps. More substantive hypotheses follow in Part IV. In any event, Justice White in *Bowers* rehearsed a grand and bogus story about sodomy laws and transhistorical Judeo-Christian morality to characterize the homosexual as a criminological type undeserving of constitutional protections.<sup>120</sup> Justice Kennedy refuted that story in *Lawrence* while recycling its rhetorical form in *Smith*: selectively using and misusing history and social science to project an image of a sex offender whose dangerousness and recidivism precludes constitutional questions about punishment and procedure.<sup>121</sup> At the moment incapacitating history and

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116. See *Lawrence v. Texas*, 539 U.S. 558, 568 (2003) (noting that homosexuality as a concept did not exist in the 19th century).

117. See FOUCAULT, *supra* note 19 at 43.

118. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Of course, the question before the Warren Court was *whether or not* a film was obscene (Stewart concluded it was not). Before the Rehnquist Court, John Doe *is already* a sex offender, settling the question prior to its being asked. Thus, the question, “Are sex offender registries and notification systems rational and regulatory?” comes to be synonymous with the tautological and self-evident, “Do sex offenders sex offend?” This is the logic underpinning Justice Scalia’s concurrence-by-analogy in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), discussed *supra* notes 103-06.

119. See LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE 1-31 (2004).

120. *Bowers v. Hardwick*, 478 U.S. 186, 190-92 (1986).

121. See *Smith v. Doe*, 538 U.S. 84, 103 (2003).

debilitating myth are dislodged from the juridical image of the homosexual, analogous “truths” and behaviors are rebuilt into the figure of the sex offender on the premise of a seemingly solid social science.

### IIIb. Stuck (Again) Between Acts and Identities

In *Lawrence*, the majority refused the narrowing interpretation *Bowers* gave to appellant Hardwick’s liberty deprivation claim. Justice White’s appraisal in *Bowers* of the liberty claim as “a fundamental right upon homosexuals to engage in sodomy,” according to Justice Kennedy in *Lawrence*, “demea[ned] the claim the individual put forward.”<sup>122</sup> Such misinterpretation, analogized Kennedy, is like suggesting married people’s claims to privacy rights are tantamount to claims to copulate.<sup>123</sup> More, much more for Kennedy, is packed into the liberties Hardwick and *Lawrence* sought, rights of intimate association, spatial privacy, and finding meaning in human relations.<sup>124</sup>

Kennedy is drawing attention to the rhetorical shuttling between acts and identities which underwrite the *Bowers* decision throughout, a shuttling Janet Halley noted over fifteen years ago.<sup>125</sup> As Halley observed, in order to disfigure and then disparage Hardwick’s rights claim, the Court equated homosexual identity to the act of sodomy. Reframing the question as such, the Court unsurprisingly found no fundamental constitutional liberty to engage in homosexual sodomy.<sup>126</sup> You knew *Bowers* was over before it began when Justice White went looking into the Constitution for gay sex.<sup>127</sup> Conversely, when the *Bowers* Court entertained whether or not a rational basis existed for Georgia’s *gender-neutral* sodomy law, it found that basis in the supposedly longstanding moral condemnation of *homosexuality*.<sup>128</sup> Homosexual identity legitimates criminalizing sodomitical acts. Where one might conclude that maneuvering between acts and identities, between dismissing the claims lodged from one axis by invoking the other, might reveal the decision’s self-contradiction, Halley instead maintains that there is a “homophobic power” in this kind of discursive incoherence. It is this incoherence that allows Justice White and Burger to bar the homosexual from constitutional shelter, and to immunize heterosexual sodomy from state supervision.<sup>129</sup>

Is there a similar act/identity rhetorical strategy at play in *Smith* and *Connecticut*? (You might predict where I’m heading, given my rhetorical question about rhetorical questions.) In *Connecticut*, plaintiffs argued that, since Connecticut did not undertake individual risk assessment of offenders or

122. *Lawrence v. Texas*, 539 U.S. 558, 566-67 (citing *Bowers v. Hardwick*, 478 U.S. 186, 190).

123. *Id.*

124. *Id.* See generally Tribe, *supra* note 4.

125. See generally Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721 (1993).

126. *Bowers*, 478 U.S. at 191 (finding no connection between family or marriage and homosexuality and discussing homosexual sodomy).

127. Halley, *supra* note 126, at 1750. See *infra* note 133.

128. Halley, *supra* note 126, at 1768-70. See also *Bowers* 478 U.S. at 196 (holding that anti-sodomy laws are not unconstitutional under the Due Process Clause).

129. Halley, *supra* note 126, at 1756-57.

provide procedures for appealing the registration and notification requirements, the law violated procedural due process.<sup>130</sup> The majority responded that since the law was not tracking dangerousness, but rather keeping the subpopulation of sex offenders in check, there was no procedural hang up.<sup>131</sup> There was no requirement for an administrative appeal process because the rational basis for monitoring sex offenders is that they are sex offenders, not that they are more or less dangerous.<sup>132</sup> There is nothing in need of appeal. They are, after all, sex offenders, and that is who is being targeted by the state. However, in *Smith*, the Does argued that sex offender laws are punitive because they unfairly target a subpopulation, invasively interfere with their lives, have negative social consequences, and so forth, thus triggering Ex Post Facto protection.<sup>133</sup> Here, the court responded that sex offender laws are not punitive because they have regulatory intent, *because these laws are aimed to minimize dangerousness and protect public safety*.<sup>134</sup> In essence, when the offender argues he is punished, the court declares he is merely being regulated or prevented. When the offender argues he is being regulated or prevented (without procedural safeguards), the court countermands that he is being punished, or at least singled out by virtue of conviction.

Now, the Court maintains that singling out and regulating subpopulations based on prior conviction is not *ipso facto* punitive.<sup>135</sup> This is true by precedent, but deflects the more important antecedent assumption, that dangerousness is the glue that holds the legal construction—and legal fiction—of sex offenders together in *Smith*. The ruling in *Smith* relies upon its prior ruling in *Kansas v. Hendricks*, where the Court found that Kansas could civilly commit sex offenders indeterminately because they pose continuous danger to the community.<sup>136</sup> *Hendricks* governs *Smith*: containing dangerousness is regulatory and outweighs the punitive potential.<sup>137</sup> But *Hendricks* requires individual risk assessment, and *Smith* does not. Justice Kennedy argues that individualized risk assessment is not necessary because notification and registration are not as severe as confinement, and because, as discussed, sex offenders are definitionally high recidivists.<sup>138</sup> We have now reached the apex of absurdity, and the more one reads *Smith* and *Connecticut* against each other, the more puzzlingly incoherent they both become. The Court relies on *Hendricks* in *Smith* but dismisses what *Hendricks* held to be critical, the assessment of dangerousness, even though dangerousness is the regulatory target of Alaska. When the sex offender in *Connecticut* requests that his dangerousness be evaluated, his dangerousness is rendered immaterial to his legal status as a sex offender, *even though future dangerousness* is understood as what makes the sex offender a sex offender, by

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130. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 5-6 (2003).

131. *Id.* at 4.

132. *Id.* at 7-8.

133. *Smith v. Doe*, 538 U.S. 84, 97 (2003).

134. *Id.* 538 U.S. at 103.

135. *Id.* at 103-04.

136. *Kansas v. Hendricks*, 521 U.S. 346, 357 (1997).

137. *Id.*; *Smith*, 538 U.S. at 104.

138. *Smith*, 538 U.S. at 104.

Justices Kennedy of *Smith* and Justices Rehnquist and Scalia of *Connecticut*.<sup>139</sup> We can extend Halley's observation on the rhetorical management of the homosexual in the *Bowers* imaginary to the rhetorical management of the sex offender in the imaginaries of *Smith* and *Connecticut*. When the sex offender claims his identity (a convicted sex offender) is unfairly penalized, the Court argues his (future dangerous) acts trump any incurred penalty. When the sex offender claims his acts (or lack of acting) deserve particularized treatment, the Court rejoins that his (legal) identity renders his (lack of) acting moot. John Doe, like Michael Hardwick, juridically ricochets between acts and identities: acts are transmuted into identity, and identity comes to betray a set of presumed acts. Constitutional protections fall by the wayside. But let me be clear: unlike Hardwick and Lawrence, who engaged in consensual oral and anal sex respectively, the John Does sexually molested children. The actions of the Does are neither equated with those of Lawrence and Hardwick nor are they excused by analyzing the strategies utilized to frame the relevant constitutional questions.

### IIIc. Straw Liberties

As discussed above, Justice White infamously contorted Hardwick's liberty claim of privacy into the patently spurious claim that the Constitution provides a "fundamental right upon homosexuals to engage in sodomy."<sup>140</sup> In contrast, for Kennedy, the liberty claim was rather about spatial privacy, consensual intimacy, discovering transcendental mysteries intersubjectively, and human flourishing.<sup>141</sup> As far as I know, this is the most robust—which is not to say most consistent or justified—understanding of substantive due process to date.<sup>142</sup>

What happens when sex offenders claim their fundamental liberties have been infringed by the state?

First, neither the John Does of *Smith* nor of *Connecticut* make claims to substantive liberty, although Justice Souter's concurring opinion in *Connecticut* nods in that direction.<sup>143</sup> Secondarily, the protected liberty often claimed by sex offenders in lower court cases (and claimed as a liberty warranting procedure in *Connecticut*) is the liberty of reputation, delimited by the "stigma plus" test.<sup>144</sup> However, there are two seriously debilitating problems with pushing "stigma plus" as a violation of liberty interests. First, the stigmatizing information that triggers substantive due process protection by precedent affects the status or rights of the complainant.<sup>145</sup> There is nothing technically incorrect or status-

139. *Id.* at 103; Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003).

140. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

141. *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

142. *Id.*; See generally Tribe, *supra* note 4, but *cf.* sources cited *supra* note 5. In particular, see Franke, *supra* note 5, at 1403-04 (arguing that the liberty in *Lawrence* is actually a winnowing departure from more relational, less territorialized understandings of protected liberty as developed in *Griswold*, *Eisenstadt*, and *Roe*). See *infra* note 163.

143. See Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 9-10 (2003) (Souter, J., concurring).

144. See sources cited *supra* notes 78-80.

145. See *Paul v. Davis*, 424 U.S. 693, 708-09 (1976).

changing in the legal fact that sex offenders are sex offenders. Second, the “plus”—loss of status or rights—must be a direct effect of government action.<sup>146</sup> All the state agencies do is register offenders and put their names online. Neither Alaska nor Connecticut burn down sex offenders’ houses or terminate their employment—neighbors and employers do, so these are indirect consequences. Substantive due process claims, particularly in the realm of reputation, are shaky. Nonetheless, substantive cases materialized after *Smith* and *Connecticut*, and explicating the judicial reasoning and non-reasoning is instructive.

*Doe v. Tandeske*<sup>147</sup> rehears the case reversed by *Smith*. This is the same court (Ninth Circuit) that originally held Alaska’s registration and notification requirements in violation of Ex Post Facto protections; now the court entertains the Does’ procedural and substantive due process claims. *Connecticut* governs the procedural claim.<sup>148</sup> As Alaska’s registration and notification is also based on conviction status, not dangerousness, no hearing on dangerousness is necessary.<sup>149</sup> On the question of fundamental liberty and substantive due process, the circuit judges mention neither *Lawrence* and its capacious understanding of protected liberties nor the concurring opinions in *Connecticut* suggesting that substantive due process may be a viable road for the Does.<sup>150</sup> Instead, the court quickly cites the stricter, enumerated liberty standards of *Washington v. Glucksberg*,<sup>151</sup> and writes that it is “bound by controlling Supreme Court law,” notwithstanding that *Connecticut* avowedly did not entertain substantive claims.<sup>152</sup> And here is the punch line: The Does argued that their “fundamental interests in life, liberty, and . . . property” are unconstitutionally infringed by Alaska’s sex offender laws.<sup>153</sup> The circuit court is “forced to conclude” that “persons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements set forth in the Alaska statute.”<sup>154</sup> Michael Hardwick asked for privacy and was told he had no right to gay sodomy. John Doe asked for rights to life, property, and liberty, and was told he had no right not to have his name on a sex offender list. So too, this court, like the *Connecticut* Court, refuses to disambiguate the legal designation “sex offender” and the many nonviolent, non-recidivist crimes that fall under its purview. *Doe v. Moore* and *United States of America v. Madera* pull the *Bowers* flip too.<sup>155</sup> In *Moore*, appellants argued that Florida’s sex offender scheme violated their rights, *inter alia*, to “family association, to be free of threats to their persons and members of their

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146. See *Siegert v. Gilley*, 500 U.S. 226, 233-34 (1991).

147. 361 F.3d 594 (9th Cir. 2004).

148. *Id.* at 596.

149. *Id.* at 597.

150. *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 9-10 (2003) (Souter, J., concurring).

151. 521 U.S. 702 (1997); see *infra* note 163.

152. *Tandeske*, 361 F.3d at 596.

153. *Id.*

154. *Id.* at 597.

155. *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005); *United States v. Madera*, 474 F. Supp.2d 1257 (M.D. Fla. 2007).

immediate families . . . to find and/or keep any housing . . .”<sup>156</sup> The district court unsurprisingly finds that there is no fundamental right “of a person convicted of ‘sexual offenses’ to refuse subsequent registration of his or her personal information with Florida law enforcement and prevent publication of this information on Florida’s Sexual Offender/Predator website.”<sup>157</sup> Like *Tandeske*, the *Moore* court cites *Glucksberg*, and similar Supreme Court cases with restrictive interpretations of due process.<sup>158</sup> There is no mention of *Griswold*, *Roe*, *Eisenstadt*, *Casey*, *Lawrence*, or the concurring opinions in *Connecticut* intimating the possibility of a substantive due process claim.<sup>159</sup> Finally, the opinion explicitly insists that it will dismiss the Doe’s capacious liberty claims in exchange for their own understanding of the Does’ grievance, a claimed fundamental liberty to be removed from a sex offender list.<sup>160</sup> The judges of *Madera* rehearse the move too, citing *Tandeske*.<sup>161</sup>

Obviously, appellants overstate the substantive interests to make them sound fundamental. So too, because of the reasons mentioned above—the indirect effects of the requirements, the “truth” of the stigmatizing facts (sex offenders are legally so, despite their individual crimes, recidivism rates, etc.)—substantive liberty claims are weak. Nonetheless, the juridical reductionist maneuver, collapsing a big liberty to a tiny risible one, allows the court neither to seriously engage appellants’ arguments, nor to substantively canvass the physical, economic, and psychic harms incurred by these individuals, nor ultimately, to perceive them as individuals at all.<sup>162</sup> It’s all just about a name on

156. *Moore*, 410 F.3d at 1343.

157. *Id.* at 1344.

158. *Id.* at 1343; *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937) (finding that only those rights “implicit in the concept of ordered liberty,” by which “neither liberty nor justice would exist if they were sacrificed “are fundamental and thus sheltered under substantive due process protection). *See infra* note 163.

159. *See infra* note 163.

160. *Moore*, 410 F.3d at 1343-44 (“Despite Appellants’ broad framing of their rights in this case, however, we must endeavor to create a more careful description of the asserted right in order to analyze its importance. . . . [T]he right at issue here is the right of a person, convicted of ‘sexual offenses,’ to refuse subsequent registration of his or her personal information with Florida law enforcement and prevent publication of this information on Florida’s Sexual Offender/Predator website.”).

161. *United States v. Madera*, 474 F.Supp.2d 1257, 1264-65 (M.D. Fla. 2007) (“Keeping in line with the Eleventh Circuit as well as her sister Circuits, this Court finds that the Act in question does not violate substantive due process because it does not infringe upon any fundamental right.”). Unlike the *Tandeske* and *Moore* courts, the district court did not canvass the defendant’s particular substantive liberty claims to reconfigure them, but omitted them from the opinion altogether. The district court ruling was subsequently reversed in *United States v. Madera*, 528 F.3d 852 (11th Cir. 2008) (finding that the retroactive application of the Adam Walsh Act had not been clearly specified at the time of *Madera*’s conviction).

162. As Marybeth Herald observes, “whether an activity ‘wins’ fundamental right status often seems to depend on how broadly or narrowly the courts frame the question before them. . . . Framing the question in a particular way provides an easy way to influence the outcome. Asking the question at a very specific level is not only a way to constrict the doctrine [of substantive due process], but to shut it down if that outcome is preferred.” Herald, *supra* note 15, at 9, 11. Herald notices this judicial practice (“straw liberties,” as I have called it) in her research on substantive due process challenges to state laws banning sex aids: “Does the due process clause of the Fourteenth Amendment guarantee a citizen the right to stimulate his, her or another’s genitals with an object

a list. Or it's all just about gay sodomitical acts. The collapsing act sidesteps entirely the longstanding debate among both jurists and legal theorists about the scope and application of substantive due process, thereby sidestepping too the constitutional interpretations that underwrite the debate.<sup>163</sup>

PART IV: SEX OFFENDERS IN THE JUDICIAL IMAGINARY OR WHY THE COURT DOES THINGS WITH SEX OFFENDERS

An insufficiently reductive distillation of the thesis of this article might be: the sex offender is the new homosexual. He or It is the newly minoritized Other, a new outcast, a cultural mirage on whom to superordinate normative

designed or marketed primarily for that purpose?" Herald, *supra* note 15, at 10 (citing *Yorko v. State* 690 S.W.2d 260, 262 (Tex. Crim. App. 1985)).

163. Laurence Tribe identifies an ideological split over the nature and purview of substantive due process in the course of Court history since the *Lochner* era (although he argues the split is conceptually nonsensical and he favors the more expansive reading of liberty protections). Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1070-71 (1980) ("If process is constitutionally valued, therefore, it must be valued not only as a means to some independent end, but for its intrinsic characteristics: being heard is part of what it means to be a person. Process itself, therefore, becomes substantive."). On the traditionalist side of the bench, substantive protections are strictly limited to state infringements against liberties that are "deeply rooted in the Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). Substantive due process, on this reading, covers a set of enumerated liberties, like freedom of expression or choices regarding family upbringing, and no more. See *Palko v. Connecticut* 302 U.S. 319, 324-25 (1937). On the more progressive side of the bench, substantive protections cover not enumerated liberties, specific individual acts and phenomena, but rather shield expressive and intimate forms of association—and autonomy in determining and partaking in those associations—from government infringement. The case history supporting this reading runs from *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that a state statute prohibiting contraceptive use among married couples infringed the right to privacy), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold's* protections to individuals), *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that a right to privacy encompasses a woman's decision to terminate her pregnancy), and *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (confirming but constricting *Roe*; however—and crucial to *Lawrence* and the due process debate—"at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."), to *Moore v. City of East Cleveland*, 431 U.S. 494 (1997) (protecting family arrangements outside marriage from government housing discrimination), and finally to *Lawrence*.

Among legal scholars, the debate has centered on whether the judicial branch—as opposed to the legislative or executive—should ensure any protections to individuals besides proceduralist ones, and if so, on what moral and/or constitutional grounds. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); RONALD DWORIN, *JUSTICE IN ROBES* (2006); Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tribe, *supra* note 4, at 1922-31. Ely favors a narrow proceduralist interpretation of due process protection while Tribe argues that a position such as Ely's is immanently contradictory—a defense of procedure at root presupposes a belief in a substantive right to procedure.

I recount these ideological, interpretive disputes as a counterpoint to my suggestion above that the Does' claims to substantive liberty protections are weak; they are, but one could interpret both the Does' claims (as claims for privacy or rights to self-determination, say, instead of claims to be taken off a sex offender web site) and also due process case law (as more capacious, covering relational and intimate association, rather than as restricted to foundational, predetermined sets of practices) in such a way that grants more credibility to the petitioners. As the Does' liberty claims are rhetorically restructured in *Tandeske*, *Madera*, and *Moore* (see sources cited *supra* notes 148-62, and accompanying text) such claims cannot enter these debates, let alone win them.

sexuality, to displace perversity outside ourselves, to localize, personalize, and smooth out deep structural injustices: family incest, the pedophilia of capitalistic everyday life, the coerciveness of everyday heterosexuality.<sup>164</sup>

This does not capture the complete story, but it certainly captures a chunk of it. Yet it leaves unanswered still a host of questions: What makes, and makes efficacious, the rhetorical strategies employed by state legislatures<sup>165</sup> and the Court to pin the sex offender where he is: the recidivist, the gravest threat, the primary and summary figure of the perverse, the dangerous, and the sexually harmful? If “recidivism” is overly prescribed at best and just wrong at worst, why do legislators and Justices endlessly invoke its truth to enact or secure these laws? What motivates the Court to conflate and thus officially equate dangerous acts with legal identities, taking the acts to be inevitable and the identities to be prediscursive? Why are the rights claims to substantive liberty miniaturized to a seemingly silly request to get one’s name off a list? Objectors to sex offender laws have not answered these sorts of questions. Cultural criticism and left-leaning law journal articles uncritically assume it is either public anxiety that propels and maintains these laws and/or a fantasy of security that shields us from the main perpetrators of sexual abuse: family and family acquaintances.<sup>166</sup> But the laws are nonetheless rationalized as good, just, and constitutional, and fear is too blunt an emotion to do all that complicated justificatory work. The problem, or blind spot, of left legal critique that calls for better actuarial models of registration and notification and demands more measured attention to dangerousness<sup>167</sup> is that it accepts the juridical construction of the sex offender as such, as an organizing and disavowing figure for understandings of harm and sexual normalcy. The sex offender *productively*

164. See sources cited *supra* note 12; Richard Mohr, *The Pedophilia of Everyday Life*, in CURIUSER, *supra* note 14, at 17. Mohr makes an evident but overlooked point that current social hysteria around pedophilia is matched by an endless eroticization of, and voyeuristic fascination with, children and teenagers in advertisements, film, and news media.

165. Mona Lynch examines congressional records of four 1990s sex offender legislative bills, and documents the language of pollution, contagion, and purity-violation that infuses the discussions. Lynch argues that the visceral emotionality of these debates overrides constitutional caution and empirical investigation and silences opposition to sex offender notification and registration laws. See generally Mona Lynch, *Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529 (2002). Daniel Filler also investigates the rhetoric of legislative debate on Megan’s Law in the U.S. Congress and the New York state legislature, evidencing the use of graphic anecdotes of child victimization, (often misinformed or misrepresented) statistical claims, and demonic characterizations of offenders. See generally Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001).

166. See generally Linda Gordon, *The Politics of Child Sexual Abuse: Notes from American History*, 28 FEMINIST REV. 56 (1988); sources cited *supra* note 18; HUM. RTS. WATCH, *supra* note 17.

167. See sources cited *supra* note 18. Cf. Janus, *supra* note 17, at 103-04 (“As constructed by the predator laws, risk tells us something essential—rather than accidental—about the person. This characteristic—sometimes called ‘dangerousness’—is portrayed as a stable ingredient of the person, a part of him even if it is now not visible.”). Rose Corrigan objects to left assessments of sex offender laws for similar but separate reasons. Although many have drawn attention to the laws’ punitive excessiveness and their potential violations of civil liberties, critics have not carefully considered how the sex offender laws, through their selective enforcement, categorical exceptions, and symbolic configuration regress to an individualistic and antifeminist portrayal of sexual violence. See Corrigan, *supra* note 17, at 276, 280, 288, 291-92, 297.

blocks critical thinking about sex and harm. This article hypothesizes that what mechanizes these laws and their judicial defenses is an absence of measured theorizing on harm, sex and power, an absence that has become a crisis as the homosexual is no longer fair game for subordination and projection, an absence that is then filled in by moralized and fictive certainties and reliably predictable tropes. These certainties and tropes provide not, or not only, a false sense of security, but a false sense of knowing, by locating harm and danger onto discrete bodies and stories.<sup>168</sup> The sex offender is not only a scapegoat but also a palliative, a way to literalize simple understandings of sexual harm and freedom that do not describe the world we live in, but that nevertheless make the world inhabitable for us. The rhetorical strategies of legislatures and then courts might be perceived as efforts to manage harm and danger by a steadfast refusal to think about them. Rather than consider the distribution of sexually harmful acts across populations, the law has fictively consolidated that harm into a subpopulation. For various historical and political reasons, we can assuredly say that John Lawrence is a homosexual, that there are homosexuals. But is John Doe a sex offender, or did we make him one? Does the law equate a particularly disturbing act with an even more disturbing identity to re-organize the world of good sex and bad sex, harmful sex and sexual freedom, when the homosexual is a now-untenable foil against the protected and potentially procreative heterosexuals of *Griswold*, *Eisenstadt*, *Casey*, and *Roe*?<sup>169</sup>

Let us momentarily return to the rhetoric of *Lawrence* to clarify this argument and its stakes. Justice Kennedy continually presses that the *Lawrence* claimants are consenting adults, and that their consenting adulthood portends any legal interferences as morally motivated, and not motivated to prevent harm. Kennedy writes, "The present case does not involve minors . . . persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused . . . or public conduct or prostitution."<sup>170</sup>

A new boundary, or a new emphasis on an old boundary, gets its architecture in *Lawrence*, an architecture that reflects the changing national temperament. The hetero/homo divide in sexual morality is unworkable, archaic, and now defunct.<sup>171</sup> Kennedy's homosexuals are loving people who make intimate, transcendent decisions—they are not gay sodomizers.<sup>172</sup> What takes its place is the divide between consent and nonconsent. Consent is certainly a phenomenally better metric of sexual harm than gender of object choice, but this is not my point. Rather, as claimed at the outset of Part III, the morality question is subsumed under the consent question, where everyone classified as a sex offender has presumably violated consent—whether against the incapable child, the unwilling woman—and this is morally wrong.

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168. On the "will to know" the criminal and to partition criminal and normal behavior, see BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 173-92 (2007).

169. See *supra* note 165.

170. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

171. See generally Susan Burgess, *Queer (Theory) Eye for the Straight (Legal) Guy: Lawrence v. Texas' Makeover of Bowers v. Hardwick*, 59 POL. RES. Q. 401 (2006).

172. *Lawrence*, 539 U.S. at 562 ("The instant case involves liberty of the person both in its spatial and more transcendent dimensions.").

However, whether such acts are wrong, and whether rectifying those wrongs is best addressed by overreaching sex offender notification and registration requirements, are separate questions, but they are mashed together as the same. In the language of *Smith* and *Connecticut* these latter questions get coded as questions of harm prevention, not morality enforcement, and because they are coded as such they find constitutional shelter.<sup>173</sup> Meanwhile the set of proscribed acts where the application of consent seems relatively irrelevant—prostitution,<sup>174</sup> public urination—remain forms of behavior socially and juridically unacceptable, forms not as beautiful or mysterious as Kennedy's homosexual identity.<sup>175</sup> However, these acts too are drafted as harmful and perpetually dangerous under Alaska's 1994 statute, and now under the 2006 Adam Walsh Act, and can be regulated accordingly, post—and yet regardless of, or maybe because of—the robust liberties discovered in *Lawrence* in 2003.<sup>176</sup>

In *Lawrence*, for a case not about morality, morality is referred to all the time as the abstraction the Court shall not evaluate nor regulate. Kennedy presses the morality/harm distinction, insisting the law has no place in moral redress.<sup>177</sup> He cites the famous passage of *Casey*: our "obligation is to define the liberty of all, not to mandate our own moral code."<sup>178</sup> Like John Stuart Mill, Justice Kennedy insists on driving a wedge between morality and (other-regarding) harm, and bracketing morality from legal interference.<sup>179</sup> Like Mill, Kennedy's distinction must fail, as Justice Scalia biting reminds us. A law prohibiting harm reflects a moral investment. As Scalia notes, laws against bigamy, polygamy, and prostitution are morally motivated.<sup>180</sup> Distinctions between self-regarding harm, other-regarding harm, and offense are always shifty. But unlike Mill, Kennedy has no consciousness of the division's inherent instability, its slipperiness; there is no humbled latitude that leaves open the harm/morality classification to future interpretation.<sup>181</sup> It is this absolute emphasis on a bright line where none exists that comes to be injuriously moralistic, that re-divides sexual lives and acts between right and wrong, that overextends the law and over-penalizes its infractions. More, it is the very

173. See generally Harcourt, *supra* note 15.

174. I am not ignoring the considerable feminist literature challenging the validity of consent under the structural and economic constraints of prostitution. Rather, I am suggesting that by positioning the consenting adult as the bearer of constitutional privilege and protection against those cases involving minors, prostitution, and sex offenses, *Lawrence* presumes the nonconsensuality and harmful effects of these latter cases by assertion instead of argument.

175. *Lawrence*, 539 U.S. at 574 (citing *Planned Parenthood v. Casey* 505 U.S. 833, 851 (1992)); see *supra* note 165.

176. See Tribe, *supra* note 4.

177. See *Lawrence*, 539 U.S. at 571.

178. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (citing *Planned Parenthood v. Casey* 505 U.S. 833, 850 (1992)).

179. See generally J.S. MILL, *ON LIBERTY AND OTHER ESSAYS* 5-128 (John Gray ed., Oxford Univ., 2d. ed., 1998) (1859).

180. See *supra* note 15.

181. See MILL, *supra* note 179, 83-93; Harcourt, *supra* note 15, at 121. Perhaps Mill is not completely cognizant of the slipperiness of his categories, but over the course of *ON LIBERTY*, what counts as harmful action which requires legal intervention comes to look less like an objective and ontological matter and more like a societal determination.

expansion of liberty Kennedy extends to homosexual identities, to consenting adults, that, in good binary form, in the hope of preserving a social order that is always already ruined, requires curtailing liberties elsewhere, in a newly re-publicized sexual minority, the sex offender. Might it be the case that the 'nameless,' multidimensional character of the substantive liberty in *Lawrence* is *terrifyingly* open-ended, that left agreement in principle is cushioned in practice by redrawing lines that are named and naturalized?<sup>182</sup> Is the promise of robust substantive liberty also an abyss, patched over by the uncomfortable comfort of online sex offender registries—in which one finds, on one website, in one place, exhaustively, sex harm? Since offenders are perceived as uniformly harming, liberty curtailment here looks not like mandating a moral code, but doing the right thing.<sup>183</sup> Justice Kennedy is right that *Lawrence* is not about minors, prostitution, or coerced adults, but rather than considering the ethical and legal questions presented by intergenerational sex, sex for money, and differing forms of force in everyday sexual interaction, *Lawrence*—combined with *Smith* and *Connecticut*—casts homosexuals on the good side of sexuality and sexual morality, and casts the others, unilaterally, as sex offenders.

In *The Domesticated Liberty of Lawrence v. Texas*, Katherine Franke makes an argument orthogonal to mine.<sup>184</sup> It is the limitedness, she argues, of the liberty protections in *Lawrence* afforded to consensual adults in private that depresses its utility for progressive sexual politics.<sup>185</sup> She notes that after *Lawrence*, the Kansas Court of Appeals upheld a law mandating longer prison sentences for homosexual sex with a minor than for heterosexual sex with a minor.<sup>186</sup> (Eighteen year-old Matthew Limon was given a seventeen year sentence for having oral sex with a fourteen year-old.) The court held that *Lawrence* liberty protections did not apply to differential sentencing based on sex, because the Kansas law was not concerned with consenting adults. Franke writes that this ruling evidences that *Lawrence* "offers little . . . to those who seek to engage in non-normative heterosexual behavior."<sup>187</sup> But it is not that *Lawrence* does not extend its reach to Matthew Limon so much as *Lawrence* in some sense portends his imprisonment, that it organizes and understands sexual harm such that the person who crosses the boundary of legally-defined consent, who crosses the boundary of legally-defined ages of majority and minority, is the anti-John

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182. See Tribe, *supra* note 4.

183. Rather than conceive *Bowers* in terms of judicial restraint as a "romantic stabilization" narrative of the foregone past, or *Lawrence* in terms of judicial activism as a "comedic liberation" narrative of a promising future, Susan Burgess ironizes the judicial trajectory from 1986 to 2003. Burgess suggests that *Lawrence* is a kind of queer makeover of *Bowers*, in which the Justices grew savvier, more cosmopolitan, indeed more queer in their appreciation of gay relations. See Burgess, *supra* note 172. I find her reading persuasive, and yet I think *Smith* and *Connecticut* are stuck in the genre of gothic, of Manichean morality and justice that subtends the Justices' moments of queer irony. See KINCAID, *supra* note 14, at 30. The risk of fluid cosmopolitan sensibilities is acquiesced by the rigid installment of a gothic—which is to say fictional—villain.

184. See Franke, *supra* note 5.

185. *Id.* at 1412-13.

186. *Id.* at 1411-12; State v. Limon, 32 Kan. App.2d 369, 383-84 (2004), subsequently reversed in State v. Limon, 280 Kan. 275 (2005) (but holding that the law violated equal protection guarantees, not due process).

187. Franke, *supra* note 5, at 1413.

Lawrence; he makes not intimate decisions but recidivates impulsively, his liberty is not to be contained in the domestic but constricted through public notification. There are no gradations between *Smith* and *Connecticut* on the one hand and *Lawrence* on the other: either one is a consenting adult having sex in private, whose sex is good and free, or one is a sex offender, whose sex is harmful. Put differently, Franke's concern is that the Kansas law punished gay teenagers for having sex more harshly than it did straight teenagers, and *Lawrence* has nothing to say about this. My concern is that this law punished teenagers for having sex, and *Lawrence* has everything to say about this.

Indeed, how else should we make sense of Kennedy's reference to *Smith* and *Connecticut* in the *Lawrence* decision itself? He writes, "the stigma this criminal statute imposes . . . is not trivial. . . . [I]t remains a criminal offense with all that imports for the dignity of the persons charged . . ."188 Justice Kennedy, referencing the *Smith* decision of three months prior, admonishes that were sodomy statutes permitted, Lawrence would "come within the registration laws of at least four States."189 Remarkably, he writes, "this underscores the consequential nature of the punishment and the state-sponsored *condemnation attendant to the criminal prohibition*."190

For homosexuals then, sex offender laws *do* amount to state condemnation, impose serious stigma, and undermine human dignity. The laws do all the sorts of things against homosexuals that they apparently do not do to other sex offenders, from prostitutes, to sexually active teenagers, to people who have committed violent sexual acts. This is because, for Kennedy, homosexuals are people. Sex offenders are not.<sup>191</sup> Less dramatically, homosexuals are identities that now fall under the apparently de-moralized (but not demoralized) ambit of

188. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

189. *Id.*

190. *Id.* at 576 (emphasis added). See also Case, *supra* note 5, at 121 ("[A] substantial driving force for the result in *Lawrence* may be that the majority and concurring Justices see people like Lawrence and Garner . . . as precisely not the sort of people who should be spending the night in jail, or registering as sex offenders . . ."). But who are these "sort of people"? Does one become a sex offender, a persona, in the act of registering as one? Is it possible that not only are Lawrence and Garner *not* sex offenders, but at the very moment a particular form of sexual privacy is secured and codified, there is a concomitant codification of intensified *publicizing* of sexual deviance and crime, in the name of security? It is as if, now that we can neither know nor regulate what gay people do in their homes, we must know what happens outside, and knowing feels like doing something, or preventing something, even if the "what" we know (sex offenders are in our neighborhood) has no correlation to the "who" (the practices and variations of, as well as the regulatory effects of the laws on, "sex offenders").

191. Between earlier gay rights cases and *Lawrence*, notes Mary Ann Case, "It appears Kennedy has . . . come to understand that the law is implicated in creating stigma, rather than stigma being just a social fact unrelated to the law." See Case, *supra* note 5, at 106. I would qualify that Kennedy's revelation of law's constitutive functions stops dead at the homosexual, and plays no parallel role for sex offenders. According to Eric Janus, "After the Supreme Court's *Lawrence* decision declared that homosexuality may not be used as a degraded status, we might have been tempted to pronounce American outsider jurisprudence all but dead. . . . But there is evidence that the existence of the degraded other has not been a horrible historical diversion but is rather a central—though tragic—addiction of our liberal democracy." JANUS, *supra* note 17, at 105-06. By "outsider jurisprudence," Janus refers to the legal discrimination of subject populations deemed threatening to the social order. My argument is that *Lawrence*, rather than being a leaky stopgap to outsider jurisprudence, in fact continues its logic.

consenting adults, with all the constitutional protection that (now) entails. The homosexual, though, is the limit case, and the sex offender takes up the vacated space, complicated of course, and also exacerbated, by the fact that subsets of those designated sex offenders do commit crimes that are indeed harmful.

How then might we conceptualize the rhetoric of recidivism? What is so interesting about claims to recidivism is not that they are factually suspect, but that they propel legislation<sup>192</sup> and judicial affirmation *despite* their factual faults. One recalls David Halperin's astute observation that homophobia is not countered merely by proving homophobic stereotypes false. Homophobia is powerful precisely because it operates over facts, or makes up new ones.<sup>193</sup> Recidivism, like escalating danger, like homophobia, is a trope, a discourse. It allows us to manage harm, identify sexual deviance, and neatly trace harm to sexual deviance.<sup>194</sup> The very image of recidivism, of criminal conduct occurring and recurring, of ultimate and unrelenting sexually abhorrent behavior, of violence without a responsible agent behind the violence, is a marvel of a condensation point. The magnitude and uncontrollability of sexual dangerousness purportedly endemic to the recidivist reassures that the recidivist embodies sexual harm itself, is its exclusive, endlessly absorbing repository.

Responding to the concern that the Connecticut scheme does not adequately assess dangerousness,<sup>195</sup> the state's Attorney General, Richard Blumenthal, quipped, "In fact, we disclaim any assessment of individual dangerousness. . . . The reason *every* individual is on the registry is because he has been convicted of a sex offense, which unfortunately has an exceptionally high rate of recidivism."<sup>196</sup> Condensed in this quotation are both the irresolvable paradox at the root of the sex offender court cases (and the legislation), as well as an explanation for the persistent power the paradox holds. Dangerousness in this context can mean nothing other than the likelihood of re-offense, and in one impressive move, the state attorney general posits that the state is both uninterested in convicted sex offenders' dangerousness and that their alleged dangerousness motivates the statutory scheme. In effect, Blumenthal, like the Rehnquist opinion<sup>197</sup> and the Scalia concurrence,<sup>198</sup> *declares* the convicts dangerous—they are dangerous because the law and the state says so, not because their dangerousness has been evaluated—

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192. See *supra* note 166.

193. See DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 37-38 (1995).

194. On the emergence of the pathological recidivist in criminology and theories of punishment see MICHEL FOUCAULT, DISCIPLINE AND PUNISH 100 (Alan Sheridan trans., Vintage Books 2d. ed. 1995) (1977) ("Now through the repetition of the crime, what one was aiming at was not the author of an act defined by law, but the delinquent subject himself, a certain will that manifested his intrinsically criminal character. Gradually, as criminality, rather than crime, became the object of penal intervention, the opposition between first offender and recidivist tended to become more important.").

195. See *Smith v. Doe*, 538 U.S. 84, 116-17 (2003) (Ginsburg, J., dissenting).

196. Jane Gordon, *Ruling Opens Door to List Sex Offenders*, N.Y. TIMES, Mar. 9, 2003, at 14CN6 (emphasis added).

197. See *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 3-9 (2003).

198. See *id.* at 9-10 (Scalia, J., concurring).

so offenders' claims to the contrary are preemptively neutralized by sovereign authority. The maneuver works, I have been arguing, because there is already an operative preconception of what a sex offender is and does, his presumptive pathological recidivism, that makes him into a kind of comprehensive yet always combustible container of sexual danger. So too, the very language of recidivism, a language that trades in probabilities, social science, and actuarial models, a language that seems objective, neutral, and dispassionate, perhaps masks the kinds of cultural anxieties and juridical codification of those anxieties that create the monolithic<sup>199</sup> figure of the sex offender as we know him.

How might we conceptualize the shuttling between acts and identities? Janet Halley argues that the *Bowers* Court shuttled between acts rhetoric and identity rhetoric to superordinate heterosexuality, subordinate homosexuality, and ultimately to conceal the (sodomitical) sex of heterosexuality, to conceal heterosexuality as a social marker, because power resides in invisibility, in not being marked.<sup>200</sup> I do not think that *Smith* and *Connecticut* relay between dangerous acts and punished identities simply to overlook or obscure everyday forms of sexual violence, or shield heterosexual relations from juridical or critical scrutiny. I do think the rhetorical relay is an additional strategy to isolate sex harm, and to remoralize sex in a more gay-friendly nation and a more gay-friendly Court.

A 2004 Harvard Law Review Note, criticizing sex offender laws on the dangerousness/punishment disjuncture, argues that the government "cannot have its cake and eat it too."<sup>201</sup> However the dangerousness/punishment contradiction, like its act/identity predecessor, is performative, it does something, and it is *exactly* why the government can have and eat its sex offenders.<sup>202</sup> By relaying between the two judicial postures, by inhabiting neither and both, the Court imagines harm and danger on the same body, it requires that harm and dangerousness be ambiguated, and warns that disambiguating them is to invite harm and danger rather than, say, to engage critically and carefully. The sex offender in the judicial imaginary discourages thinking about sex harm because we already know it when we see it, and seeing otherwise, seeing shades of gray or ambiguity, is moral laxity. And seeing otherwise is nipped before it begins by traversing between the offender as uniformly perverse and punishable (identity) and the offender as uniformly dangerous (future, inevitable acts). It is all in one place and on one person.

Perhaps more invidiously, the response of dangerousness to the claim of punishment grants a liberally neutral or actuarial mask to a court that vilifies offenders when they request risk assessment. I am thinking here too of the Adam Walsh Act tier system.<sup>203</sup> Its division of sex offenders according to

199. I should note that in both popular and scholarly discourse, the figure of the sex offender is not in fact monolithic, and there has been increasingly vocal concern about young and nonviolent persons designated sex offenders by the state. See *supra* notes 18, 46-51. Nevertheless, *Smith*, *Connecticut*, and the Adam Walsh Act suppress the disagreement where it matters most—the law—as far as the offender is concerned.

200. See Halley, *supra* note 126, at 1770.

201. See Note, *Making Outcasts Out of Outlaws*, *supra* note 18, at 2732.

202. See *supra* note 87.

203. See *supra* notes 38-48, and accompanying text.

severity into three tiers seems facially actuarial, neoliberal, and softly biopolitical;<sup>204</sup> but the gratuitously wide cast of those tiers with few distinctions for violence, few distinctions for age, automatic valuing “up” of any sex involved with a minor, and the extended duration of registration and notification, suggest that the punitive violence of AWA, as well as the Connecticut and Alaska statutes, are covered by a façade of probability talk.<sup>205</sup>

How might we conceptualize the miniaturizing of the liberty claims to privacy, familial association, and employment, as well as the liberty claims to avoid the “stigma plus” damages of registration and notification, the violent threats and acts against offenders’ homes and bodies? For Justice White, turning the homosexual into a sex act purposefully devalued the homosexual. When the lower courts entertain substantive liberty claims, their rejections often start in some form of the question: “Does the sex offender have a right to remove his name from the sex offender list?”<sup>206</sup> It is not the human John Doe the Court considers, already a pseudonym to avoid the shame of public record, but the sex offender sex offending and sex reoffending, the presumption of recidivism tautologically built into the structural logic of the question. John Does are reduced to a personage, a personage automatically betraying a past and inevitable future of dangerous acts, a personage that is not a person, but a pathology.<sup>207</sup>

We want there to be an Iago, a Voldemort, a Hannibal Lecter, particularly in a judicial era and a national climate marked by new acceptances of sexual life forms and identities, in which consent does double duty as our metric of morality and our metric of harm. No doubt, there are some pathologically abusive, harmful people who do very bad things. No doubt, consent is the necessary starting point for legal adjudication in the liberal state. But it is just the starting point, and a more robust and attuned judicial and social vocabulary is required to address the array of sexually unjust and harmful practices that does not collapse into adjudicating, with wrongheaded certainty, between the

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204. The argument is influenced by MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLEGE DE FRANCE, 1975-76 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., Picador 2003) (1997) and HARCOURT, *supra* note 168. A tiered system of sex offender notification and registration purports to gauge the probability of reoffense (actuarial) and to relieve government agencies of invasive regulatory and rehabilitative techniques in favor of a seemingly more hands-off monitoring and deterrent approach (neoliberal); it also aims in its manifest purpose at preserving public health and safety rather than corporally or capitally punishing individuals (biopolitical). These advantages may work to obscure the singling out of sex offenders for this kind of regulation, the breadth of the regulation, and its psychic and physical consequences for offenders. The Adam Walsh Act, and notification and registration more broadly, functionally make *recidivism* itself a crime. By targeting recidivists and recidivism, these schemes may distract attention from sexual harm in the larger population, and may also contribute to an exaggerated correlation of recidivism to sex crimes. For a broader critique of actuarial models of crime prediction and punishment, see HARCOURT, *supra* note 168, at 3, 24, 29, 31, 164-65, 189-90; Janus also suggests that the legal focus on sex offender commitment reflects and authorizes the state’s turn to preventing crimes yet to have happened over punishing crimes that have already occurred. The emphasis on prevention enables broader police and surveillance powers, most recently borne by terrorist suspects. See JANUS, *supra* note 17, at 93-109.

205. See *supra* note 40-44.

206. See *supra* notes 147-63.

207. See FOUCAULT, *supra* note 19; FOUCAULT, *supra* note 194.

normal everyday sexually ethical citizen and the unstoppably evil predator, between the transcendent and free homosexual and the dangerous sex offender. Evil is only anthropomorphized in the gothic, and the gothic is a genre, not a lived reality.<sup>208</sup> The gothic is an injurious but juridically consolidating and socially productive riposte. And where consent may be legally determinative, it masks a pre-*Lawrence* cultural morality, sublimated but salient, and a cultural longing for social and sexual simplicity, for fixed absolutes of right and wrong, for righteousness and vengeance, that cannot be disavowed through the juridical freedom promised to the post-*Lawrence* homosexual.

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208. See KINCAID, *supra* note 14, at 30.