Wisconsin's Sex Offender Registration and Notification Laws: Has the Wisconsin Legislature Left the Criminals and the Constitution Behind?

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I. INTRODUCTION

Shunning, shaming, and societal ostracism stemming from the collective perception of one's character have persisted since the beginning of societal evolution. One need only mention characters such as Miss Havisham of *Great Expectations* and Boo Radley of *To Kill a Mockingbird* to illustrate that societal ostracism based on the communal assessment of one's character—whether warranted or unwarranted—has even been memorialized in literature that has stood the test of time. Under some circumstances, public shaming upon one's commitment of a vulgar act can be justified to an extreme extent; other times, it is completely unjustified and fueled by an utterly false perception of reality. Convicted sex offenders released from incarceration to live among the public fall somewhere in the gray area between these two extremes. On one hand, these offenders committed heinous crimes that harshly impact society, and some of these offenders may have a higher risk than other criminals of recommitting a similar type of crime upon their release from incarceration; on the other hand, these offenders paid their debt to society through incarceration and should not be punished in the present for a crime they may not commit in the future.

Indeed, with the recent sensationalization of sex abuse crimes committed by priests and others in positions of power over children, discussions regarding sex crimes and the necessary response to these crimes have become commonplace at water coolers and dinner tables around the country. State legislatures certainly are cognizant of these very real concerns, as legislatures in all fifty states have enacted various forms of mandatory sex offender registration and notification requirements in an attempt to keep communities informed as to just who may have moved next door.1 Under Wisconsin’s sex offender registration and notification laws, convicted sex offenders are

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required to supply personal information to a registry.\(^2\) This information is subsequently disseminated to certain named agencies\(^3\) and to the public upon the fulfillment of various prerequisites,\(^4\) and the information is posted on an Internet site.\(^5\)

Predictably, the current sex offender registration and notification laws have faced several challenges under various constitutional provisions, including the Equal Protection Clause, the Double Jeopardy Clause, the Due Process Clause, the Eighth Amendment, the Ex Post Facto Clause, the Bill of Attainder Clause, and the constitutional rights to privacy and to travel interstate.\(^6\) In 2003, the United States Supreme Court tackled the issue of whether Connecticut’s sex offender registration and notification scheme violated a convicted sex offender’s constitutional right to procedural due process.\(^7\) Although succinctly holding that no such violation occurred, the Supreme Court explicitly left open the possibility that these laws violated constitutional principles of substantive due process.\(^8\) Accordingly, the constitutional challenge addressed in this Comment is whether Wisconsin’s sex offender registration and notification laws comport with substantive due process requirements pursuant to the Fifth and Fourteenth Amendments and whether they would withstand any constitutional challenge pursuant to United States Supreme Court jurisprudence.

The following discussion will address the constitutionality of Wisconsin’s sex offender registration and notification procedures pursuant to substantive due process jurisprudence. Part II of this Comment expounds on the events immediately preceding the enactment of Megan’s Law; it also explores Wisconsin’s enactment of the same. Part III discusses case law providing the basis for the Supreme Court’s 2003 decision in *Connecticut Department of Public Safety v. Doe*\(^9\) and summarizes the decision itself. Part IV addresses

\(^2\) WIS. STAT. § 301.45(lg) (2002).
\(^3\) § 301.46(4). These agencies and organizations include: public and private schools, day care providers, child welfare agencies, group homes, shelter care facilities, foster homes, county departments, the Department of Justice, the Department of Public Instruction, the Department of Health and Family Services, neighborhood watch programs, the Boy Scouts or Girl Scouts organizations, and any other community-based public or nonprofit organization that the department determines should have access to the information. *Id.*
\(^4\) § 301.46(5).
\(^5\) § 301.46(5n). Wisconsin’s Sex Offender Registry is located online at http://offender.doc.state.wi.us/public/.
\(^6\) See, e.g., Cutshall v. Sundquist, 193 F.3d 466, 469 (6th Cir. 1999).
\(^8\) *Id.* at 8.
the various liberty interests applicable to sex offender notification laws that are grounded in the doctrine of substantive due process: privacy, employment, and personal security. Part V analyzes the constitutionality of Wisconsin’s sex offender notification laws, concluding that the laws’ infringement on sex offenders’ liberty interests deprives offenders of substantive due process and renders the laws unconstitutional.

II. MEGAN’S LAW: THE PRODUCT OF PUBLIC ALARM

An examination of the tragic origin of Megan’s law is essential to understanding the elements of Wisconsin’s sex offender registration and notification laws.

A. Megan’s Law

Public infuriation following the sexual abuse and murder of Megan Kanka, a seven-year-old New Jersey girl, fueled the New Jersey Legislature’s enactment of the 1994 “Megan’s Law.” Following New Jersey’s lead, all fifty states quickly imposed similar forms of registration requirements on sex offenders. Many states also enacted statutes that mandated community notification of the sex offender’s personal registration information.

With its 1996 amended version of the Jacob Wetterling Act, the federal

10. Michelle L. Earl-Hubbard, Comment, The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s, 90 NW. U. L. REV. 788, 789 (1996). After Megan’s neighbor lured the young girl into his home with the promise of seeing his new puppy, he asphyxiated and raped young Megan while she was unconscious. Id. Megan’s killer had been convicted of two prior sex offenses; Megan’s family was never informed that the convicted sex offender had moved into their neighborhood. Id.

11. See N.J. STAT. ANN. § 2C:7-1 et seq. (West 2003). “Megan’s Law” is the commonly used name for New Jersey’s Sex Offender Registration Act.

12. Earl-Hubbard, supra note 10, at 814. Some critics believe the laws were passed too hastily and that lawmakers failed to consider the constitutional or policy implications of the laws. Id.; see also Koresh A. Avrahamian, A Critical Perspective: Do “Megan’s Laws” Really Shield Children From Sex-Predators?, 19 J. JUV. L. 301, 316 (1998) (“The hasty fashion in which Megan’s Law was crafted is the source of its greatest weakness, i.e., its inability to provide a comprehensive and fundamental solution to the problem of violent sex crimes against children.”).

13. See, e.g., State v. Bollig, 2000 WI 6, ¶ 19, 605 N.W.2d 199, 204 (Wis. 2000); Logan, supra note 1, at 1172.


government reinforced its support for stringent sex offender regulation when it extended sex offender registration a step further to include public notification of the sex offender’s personal information. Upon signing the amendment into law, President Clinton zealously declared: “If you dare to prey on our children, the law will follow you wherever you go—state to state, town to town.” The Wetterling Act commissioned “guidelines for a child sex offender registration law while allowing states to enact more stringent requirements if they so chose,” and the Act instructed the release of “relevant information that is necessary to protect the public concerning a specific person required to register.” The Act also mandated that state law enforcement, under the threat of fund withholding, “shall release [the registrants’] relevant information that is necessary to protect the public.” Thus, the federal government directed the existence of a public notification requirement; however, the federal government left much latitude to the states in determining whether an offender’s personal information should be disseminated. As a result, the states opting to do so have enacted a garden variety of notification requirements.

registration of persons convicted of offenses listed in the statute, defined as offenses which include... ‘sexually violent offenses.’” Id. at 652 (citing 42 U.S.C. § 14071(a)(1)). Congress amended the Jacob Wetterling Act in 1996 “to provide that registry information may be disclosed for any permissible state law purpose, and that information shall be released when necessary to protect the public.” Id. at 653.

16. Logan, supra note 1, at 1173.
19. Van Duyn, supra note 17, at 645 (quoting 42 U.S.C. § 14071(d)(2) (Supp. 1996)). “Officials have utilized a variety of means to notify residents of the presence of sex criminals, including front-page newspaper articles, community meetings, bright-colored fliers, and wanted posters.” Id.
20. Earl-Hubbard, supra note 10, at 796. “[T]he Jacob Wetterling Act required states to enact a registration system for child sex offenders by 1997 or lose ten percent of the state’s share of federal grants for local and state crime-fighting programs.” Id. If a state failed to comply with the Act, it would lose its portion of more than $100 million in federal grants. Id.
22. Id. at 1174. The federal government left the following questions to the state’s discretionary decision-making powers: “(1) which offenders should be the target of disclosure; (2) the information gathered and the extent of disclosure; and (3) the standards and procedures, if any, appropriate to these determinations.” Id.
23. Id. at 1175. The states’ sex offender laws include everything from “particularized risk assessments” to “compulsory approach[es]” pursuant to which the offender is not afforded a right to a hearing. Id. In some states, including Wisconsin, local law enforcement determines the recidivism risk level. Id. at 1176.
B. The Wisconsin Sex Offender Registration and Notification Act

1. The Registration Requirements

Following New Jersey's lead, Wisconsin drastically revised its existing sex offender registration statute and enacted its own version of Megan's Law in 1995. Under section 301.45(2)(a) of the Wisconsin Statutes, the Department of Corrections (DOC) must maintain a registry of each sex offender's registration information. Offenders are subject to mandatory registration requirements if convicted of certain named offenses, and Wisconsin courts retain the discretion to mandate offender registration for other listed offenses. Offenders that fulfill enumerated criteria are subject to lifetime registration, and all other offenders are required to register for


25. See generally WIS. STAT. § 301.45(2)(a) (2002). At the time of the offender's initial registration, the DOC must disclose the offender's information to "the chief of police of the community and the sheriff of the county in which the person is residing, working, or attending school." State ex rel. Kaminski v. Schwarz, 2001 WI 94, ¶ 33, 630 N.W.2d 164, 172 (Wis. 2001).

26. WISCONSIN DEPARTMENT OF CORRECTIONS SUPERVISION OF SEX OFFENDERS: A HANDBOOK FOR AGENTS, Sex Offender Registration and Community Notification, 7.3-7.4 (2002) [hereinafter HANDBOOK]. Offenders convicted of the following offenses are subject to mandatory registration: First, Second, and Third Degree Sexual Assault, Sexual Exploitation by Therapist, False Imprisonment and Kidnapping (but only if the victim was under the age of eighteen and the offender was not the victim's parent), Incest, Rape, Sexual Intercourse with a Child, Indecent Behavior with a Child, Enticing Child for Immoral Purposes, First or Second Degree Sexual Assault of a Child, Repeated Acts of Sexual Assault, Sexual Exploitation of Child, Forced Viewing of Sexual Activity, Incest with a Child, Child Enticement, Soliciting a Child for Prostitution, Sexual Assault of a Student by School Instructional Staff Person, Exposing a Child to Harmful Materials (felony only), Possession of Child Pornography, Child Sex Offender Working/Volunteering with Children, Abduction of Another's Child, Sex Crimes Law Commitment, and Sexually Violent Person Commitment. Id. Additionally, an individual who pleads not guilty by reason of mental disease or defect to one of the listed offenses is subject to mandatory registration. Id.

27. Id. at 7.5. Wisconsin courts have discretion to require persons convicted of certain crimes to register if "the underlying conduct is sexually motivated, [the r]egistration of the offender is in the best interest of public safety[, or r]egistration was not required at time of conviction; but for reasons listed above, offender is later identified as person who should register." Id. Discretionary registration is applicable for the following offenses:

- Chapter 940: Crimes Against Life and Bodily Security
- Chapter 944: Crimes Against Sexual Morality
- Chapter 948: Crimes Against Children
- ss.971.17: Not Guilty by Reason of Mental Disease
- ss.943.01 to 943.15: Certain Crimes Against Property

Id.

28. Id. at 7.6. Offenders that fulfill any of the following criteria are subject to lifetime registration: offenders with two or more separate convictions of any of the offenses listed in note 26;
fifteen years following the discharge of supervision or the expiration of a sentence. A convicted offender that is required to register must supply personal information regarding his physical characteristics, address, and employer. Notably, the offender is subject to ongoing registration requirements, with a penalty of up to $10,000 or nine months imprisonment upon the first offense for knowingly failing to comply with these continuing requirements. Only in extremely limited circumstances is an offender permitted to move the court for a hearing if the offender believes that he is exempt from compliance with the registration requirements.

2. The Notification Requirements

As will be discussed in this section, all convicted sex offenders are subject

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any offender that was found not guilty by reason of mental disease for a violation, solicitation, conspiracy, or attempt to commit first or second degree sexual assault, first or second degree sexual assault of a child, or repeated acts of sexual assault; any offender that was committed as a Sexually Violent Person; any offender that was court ordered to comply with registration requirements for life; and any offender subject to lifetime supervision. Id.

29. Id.

30. Although not all sex offenders are male, sex offenders will be generically referred to in the masculine form throughout this Comment.

31. WIS. STAT. § 301.45(2) (2002). The offender must provide his “date of birth, gender, race, height, weight and hair and eye color.” Id. Furthermore, he must provide the following: “[t]he statute the person violated that subjects the person to the requirements of this section, the date of conviction, adjudication or commitment, and the county or, if the state is not this state, the state in which the person was convicted, adjudicated or committed.” Id. The offender may also have to provide other applicable information, including the address of his or her employer, his home address, and any school that the offender will be or is attending. Id.

32. § 301.45(3). An offender subject to lifetime registration must notify the Department of Corrections every ninety days to verify or update his current personal information. Id. All other offenders must verify or update their information once every calendar year. Id. Further, the offenders are required to update their information whenever their personal information changes. § 301.45(4).

33. Earl-Hubbard, supra note 10, at 831. To prove that the offender “knowingly” failed to comply with the registration requirements, the offender must have received notice of the requirement. Id. In fact, “[w]ithout such notice, the state will be unable to show probable knowledge of the obligation, and the offender will be immune from punishment for failing to register.” Id.

34. § 301.45(6).

35. § 301.45(1m)(a). An offender is not required to comply with the reporting requirements if all of the following apply: (1) the offender satisfies the offense criteria based on his violation, or his conspiracy, solicitation, or attempt to commit any of the designated offenses; (2) the offender’s sexual offense did not involve sexual intercourse either by the use of force or with a victim under the age of twelve years; and (3) at the time of the violation, the offender had not attained the age of nineteen years and was not more than four years older or four years younger than the child. Id. If the offender believes that he fulfills these elements, the offender may move the court for a hearing to decide whether he must comply with the registration requirements. Id.

36. See id.
to a certain level of community notification of their registration information.\textsuperscript{37} However, the DOC employs a special notification procedure for those convicted sex offenders that are determined to necessitate a Special Bulletin Notification.\textsuperscript{38} A Special Bulletin Notification (SBN) is "an active, written notification process whereby law enforcement officials, in the county and areas of the offender's residence, employment or school enrollment, will receive detailed information from the DOC... on a specific offender prior to their scheduled release from confinement."\textsuperscript{39} An SBN must be issued to law enforcement if the offender was committed under the Sexually Violent Persons provision or if he was twice convicted of a sex offense; the DOC is also vested with the discretion to determine if an SBN is warranted for cases not requiring mandatory bulletins.\textsuperscript{40} Additionally, an SBN must be issued for all offenders who are referred for a Special Purpose Evaluation to determine if commitment is warranted, and regardless of the results of the evaluation, an SBN will be issued prior to the release of these offenders.\textsuperscript{41}

Upon receipt of the SBN, each convicted sex offender is assigned to one of three notification levels.\textsuperscript{42} Local law enforcement, sex offender specialists, probation and parole agents, and victim/witness coordinators evaluate the level of notification and assign each convicted offender to a category.\textsuperscript{43} The ultimate notification level decision is to be determined by law enforcement.\textsuperscript{44} If a convicted sex offender is designated as a Level One offender, his personal information is disseminated only to law enforcement and not to the general public.\textsuperscript{45} If an offender is designated as a Level Two offender, his information is disseminated to specific individuals and groups; these individuals and groups are determined depending on the particular facts of the

\textsuperscript{37}WISCONSIN DEPARTMENT OF CORRECTIONS, DIVISION OF COMMUNITY CORRECTIONS, Digital Photography of Offenders 1 (2001) [hereinafter Digital Photography].

\textsuperscript{38}See Wisconsin Department of Corrections, Sex Offender Registry, at http://offender.doc.state.wi.us/public/proginfo/communitynotification.jsp.

\textsuperscript{39}Id.

\textsuperscript{40}HANDBOOK, supra note 26, at 7.11-7.12.

\textsuperscript{41}Id.

\textsuperscript{42}See Wisconsin Department of Corrections, Sex Offender Registry, at http://offender.doc.state.wi.us/public/fyi/faq.jsp.

\textsuperscript{43}See id.; see also James A. Billings & Crystal L. Bulges, Maine's Sex Offender Registration and Notification Act: Wise or Wicked?, 52 ME. L. REV. 175, 248 (2000) ("DOC personnel simply do not have the training or education to attempt behavior prediction, an ability that has thus far eluded even the most experienced of psychologists.").

\textsuperscript{44}HANDBOOK, supra note 26, at 7.13.

\textsuperscript{45}See Wisconsin Department of Corrections, Sex Offender Registry, at http://offender.doc.state.wi.us/public/fyi/faq.jsp.
A Level Three offender is subject to community-wide notification, including neighborhood meetings, door-to-door notification, and media publications. In its original notification procedure proposal, the DOC discouraged the use of "mass media releases, distribution of door-to-door fliers, or any other method of notification that may be described as 'intrusive'"; currently, however, probation agents often employ these methods when complying with the notification requirements. Modern standards dictate that the offender’s information may be shared with "significant others, landlords, neighbors, employers, etc., if it is determined that providing the information is in the best interest of public safety and/or the offender’s rehabilitation." After the offender’s notification level is determined, the offender’s registration information is disseminated to the public accordingly.

All registered offenders are subject to partial public notification of their registration information—even if they do not necessitate a Special Bulletin Notification. Even though the majority of convicted sex offenders do not necessitate Special Bulletin Notifications, all convicted sex offenders that register must be photographed, and as discussed below, are subject to the public dissemination of some of their registration information on the Internet. Additionally, upon request, the victim of the offender’s crime, as well as numerous agencies and organizations, are entitled to receive any of the information included in the sex offender registry regarding any registered offender. This dissemination may include the offender’s home address and employment information. Notably, the general public may receive any of the sex offender’s registration information upon request, including his exact address and place of employment, if the police chief or sheriff determines that providing this information is necessary to protect the public. Further, the

46. Id.
47. Id.
49. Telephone Interview with Ronald P. Blair, Probation & Parole Agent, Wisconsin Department of Corrections (Sept. 28, 2003).
51. See infra notes 58-60 and accompanying text.
52. Digital Photography, supra note 37, at 1.
53. WIS. STAT. § 301.46(3) (2002).
54. § 301.46(4). For a list of these agencies and organizations, see supra note 3.
55. See generally § 301.46.
56. §§ 301.46(3)(e), (4)(a).
57. § 301.46(5).
Wisconsin DOC is required to provide access to the registrant’s information through an Internet site and by any other means that the department determines are appropriate. The offender’s photograph and offense history are included on this website, but the offender’s exact address is purposefully excluded because of fears of vigilantism against the offenders. Wisconsin’s laws attempt to combat acts of vigilantism by prescribing that if any individual utilizes the information gained through the sex offender registry to commit a crime, that individual is subject to misdemeanor or felony penalties.

III. OUT WITH THE OLD AND IN WITH THE NEW: RETIRING PROCEDURAL DUE PROCESS CHALLENGES TO SEX OFFENDER NOTIFICATION LAWS

State sex offender registration and notification laws have faced numerous constitutional challenges. In 2003, the United States Supreme Court addressed the issue of whether Connecticut’s sex offender registration and notification laws violated procedural due process requirements pursuant to the Fifth and Fourteenth Amendments of the United States Constitution. As discussed below, courts and commentators addressing this issue, prior to the decision, expected the Court to apply the test it set forth in Paul v. Davis; the lower courts almost uniformly applied this test in their analyses of the issue. The Court did not apply this test and quickly rejected the procedural due process claim. However, the Court left open the possibility that these laws violated principles of substantive due process.

To fully understand the evolution of due process constitutional challenges to sex offender notification laws and the subsequent analysis of the constitutionality of these laws pursuant to principles of substantive due process, this section will discuss case law providing the baseline for the Supreme Court’s 2003 decision in Connecticut Department of Public Safety v. Doe and summarize the decision itself.

58. § 301.46(5n).
59. See Wisconsin Department of Corrections, Sex Offender Registry, at http://offender.doc.state.wi.us/public/fyi/faq.jsp.
60. HANDBOOK, supra note 26, at 7.15.
62. Id. at 7.
63. Id. at 8.
64. 538 U.S. 1 (2003).
A. The Evolution of the "Stigma Plus" Test

Wisconsin v. Constantineau is an influential decision in which the Court initially acknowledged a reputational liberty interest grounded in due process. In this case, the United States Supreme Court held a Wisconsin statute unconstitutional under the guise of procedural due process. The Wisconsin statute permitted local law enforcement to post warnings in liquor stores; these warnings instructed store clerks not to sell liquor to listed individuals who were labeled excessive drinkers. The listed individuals failed to receive a hearing before the dissemination of this information.

The Constantineau Court opined that "where the State attaches 'a badge of infamy' to the citizen, due process comes into play. . . . Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." The Court held that because these warnings harmed the reputations of the individuals who were subjects of the improper posting, these individuals were entitled to notice and an opportunity to be heard preceding the dissemination of the information. Consequently, at this time, "the concept of 'liberty' in the Due Process Clause of the Fourteenth Amendment appears to have been widely understood to encompass a person's interest in his or her good name and reputation, without more."

In Paul v. Davis, the Court promptly about-faced and held that an injury to the plaintiff's reputation alone was not sufficient to warrant procedural due process protection. In Paul, the plaintiff's photograph was included on a flier that was circulated to store owners. The flier was circulated to warn the owners about recently arrested shoplifters. The plaintiff had been arrested for shoplifting but was never convicted. The plaintiff sued, alleging that the failure to afford him notice and an opportunity to be heard prior to the

66. Id. at 437.
67. Id. at 434.
68. Id. at 437.
69. Id. (internal citations omitted).
70. Id.
71. See Doe v. Dep't of Pub. Safety ex rel. Lee, 271 F.3d 38, 51 (2d Cir. 2001) (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-9 (2d ed. 1988)).
73. Id. at 702.
74. Id. at 695.
75. Id.
76. Id. at 695-96.
dissemination of his photograph violated his right to procedural due process.\footnote{Paul, 424 U.S. at 702.} The Paul Court, speculatively driven by concerns of federalism,\footnote{Id. at 711.} held that the only injury the plaintiff suffered was an injury to his reputation; the Court rejected the claim that an individual’s interest in his or her reputation alone was tantamount to a deprivation of procedural due process, thereby creating the “stigma plus” test.\footnote{Id. at 53-54 (internal citations omitted). Consequently, “[s]ome contend that the Court’s ruling in Paul was motivated by a desire to prevent torts committed by state actors from automatically implicating a federal constitutional right, thereby meriting federal court jurisdiction.” Earl-Hubbard, supra note 10, at 839 (citing Tribe, supra note 71, at 1397-98).}

The Paul Court subsequently held that a plaintiff could satisfy the “plus” factor by illustrating the abrogation or alteration of a more tangible interest, such as “a right or status previously recognized by state law.”\footnote{Dep’t of Pub. Safety ex rel. Lee, 271 F.3d at 47 (citing Paul, 424 U.S. at 701-02, 710-11). The plaintiff must only “allege, not prove, that the statement is false in order to establish a due process right to the hearing he seeks.” Id. at 48 (quoting Brandt v. Bd. of Co-Op Educ. Servs., 820 F.2d 41, 43 (2d Cir. 1987)).} To state a procedural due process claim under the Due Process Clause, the Paul Court held that a plaintiff must assert two wrongs to satisfy the “stigma plus” test:

“(1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false,\footnote{Id. at 47 (citing Paul, 424 U.S. at 701-02, 710-11).} and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement.”\footnote{Id. at 698. See Doe v. Dep’t of Pub. Safety ex rel. Lee, 271 F.3d 38, 53 (2d Cir. 2001), cert. granted, 122 S. Ct. 1959 (2002). As the Department of Public Safety court opined:}

If, as some thought before Paul, the Fourteenth Amendment notion of “liberty” encompassed an individual’s unadorned interest in his or her reputation, then the issue whether an allegation of “stigma” stated a federal constitutional or state-law claim would depend entirely on whether the defendant happened to be a state officer or a private citizen. A plaintiff who was defamed by a private defendant could sue only in state court on a state law claim; a plaintiff who was defamed by a government actor could sue in federal court on a federal claim. Such a regime would “trivialize the centuries-old principle of due process” by enlarging the scope of the Fourteenth Amendment beyond the type of “arbitrary exercise of the powers of government” against which that provision was intended to guard . . . . The “plus” requirement avoids this result by ensuring that a plaintiff cannot allege as a deprivation of a constitutionally protected liberty interest an injury that could have been inflicted by a private citizen in a position analogous to the state actor.\footnote{See Doe v. Dep’t of Pub. Safety ex rel. Lee, 271 F.3d 38, 53 (2d Cir. 2001), cert. granted, 122 S. Ct. 1959 (2002). As the Department of Public Safety court opined:}
The *Paul* decision "has been widely condemned as an unjustified departure from what appeared to be the unequivocal recognition in *Constantineau* of a 'reputational' liberty against government stigmatization."[83]

**B. Challenges to Connecticut's "Megan's Law"**

When addressing whether state sex offender registration and notification laws are constitutional pursuant to principles of procedural due process, the lower courts have applied the *Paul v. Davis* Court's "stigma plus" test in their analyses.[84] In the decision for which the Supreme Court granted certiorari to address the procedural due process issue, *Doe v. Department of Public Safety ex rel. Lee*,[85] the Second Circuit applied this "stigma plus" test as well.

In *Department of Public Safety*, the Second Circuit held that Connecticut's version of Megan's Law,[86] which bears a remarkable resemblance to Wisconsin's version of Megan's Law,[87] was unconstitutional on the grounds of procedural due process.[88] In reaching this holding, the *Department of Public Safety* court applied the *Paul* Court's "stigma plus" test. With respect to the stigma component, the plaintiff in *Department of Public Safety* asserted that the stigmatization of his status as a dangerous sex offender was false.[89] Based on this false stigmatization, the plaintiff alleged he was entitled to a hearing in which he could prove that he was not a threat to public safety.[90] The court agreed with the plaintiff and held that the registration and notification requirements damaged the plaintiff's reputation and constituted a

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[85] 271 F.3d 38 (2d Cir. 2001).

[86] Under Connecticut's version of "Megan's Law," the offender was required to register with the Department of Public Safety (DPS). *Id.* at 43-44. Like the Wisconsin registrant, the Connecticut registrant was required to provide the DPS with "identifying factors," and the offender was subject to continuing legal obligations, such as annual registration requirements and information updates. *Id.* Connecticut's "Megan's Law" also mandated that the DPS make the registry available to the public and create an Internet site, and it required the DPS to issue a notice to the media once per year regarding the means of accessing the registry. *Id.* at 44.

[87] *See generally* Wis. STAT. §§ 301.45-301.46 (2002).


[89] *Id.* at 49.

[90] *Id.*
false stigmatization.\textsuperscript{91}

Turning to the second component of the “stigma plus” test, the Department of Public Safety court articulated that to constitute a “plus” factor, the sex offender laws must “(1) alter the plaintiff’s legal status, and (2) [be] ‘governmental in nature.’”\textsuperscript{92} Because they were enacted by the legislature, the sex offender laws were governmental in nature.\textsuperscript{93} Moreover, because the offender was burdened with a new set of legal duties, these legal duties constituted an alteration of the offender’s status under state law.\textsuperscript{94} The court held that the plaintiff’s legal status was altered based on the continuing registration duties\textsuperscript{95} imposed on the offender.\textsuperscript{96} Because the plaintiff fulfilled both components of the “stigma plus” test, the court held that the plaintiff was entitled to a hearing in accordance with principles of procedural due process to determine whether he was likely to be dangerous before being labeled as such by a registry.\textsuperscript{97}

The Department of Public Safety court’s holding was at variance with holdings of other courts. The circuits had split jaggedly on the issue of what liberty interests, if any, fulfilled the “plus” component of the test, and the Supreme Court granted certiorari presumably to resolve this split.\textsuperscript{98}

\textbf{C. Connecticut Department of Public Safety v. Doe}

Much to the astonishment of courts and countless commentators who premised predictions of the outcome of the Supreme Court’s decision on the Paul v. Davis Court’s “stigma plus” test, the Supreme Court in Connecticut Department of Public Safety v. Doe\textsuperscript{99} failed to apply this “stigma plus” test, and it premised its decision on a seemingly simple principle. The Court found

\textsuperscript{91} Id. at 49.
\textsuperscript{92} Id. at 56 (quoting McClary v. O’Hare, 786 F.2d 83, 89 (2d Cir. 1986)).
\textsuperscript{93} Id. at 57.
\textsuperscript{94} Id. The Department of Public Safety court found that requiring an alteration of the plaintiff’s legal rights also served the federalism-based function of the “plus” factor: “to ensure that the plaintiff cannot convert a state-law defamation claim into a § 1983 action because of the mere fortuity that he or she is suing a state defendant.” Id.
\textsuperscript{95} The continuing registration duties were as follows: Offenders convicted of a sexually violent offense were required to verify their addresses every ninety days, and any other offender was required to verify his address annually for ten years. Id. at 43. If a registrant changed his address or regularly traveled out of state, he was required to notify the DPS, and the registrant was required to submit to be photographed per the Commissioner’s request, or at least once every five years. Id. The failure to comply with these requirements was punishable by up to five years in prison. Id.
\textsuperscript{96} Id. at 59.
\textsuperscript{97} Id. at 62.
\textsuperscript{98} Id. at 43-44.
\textsuperscript{99} 538 U.S. 1 (2003).
it futile to address the petitioners' contention that they failed to deprive respondent of a liberty interest pursuant to Paul v. Davis; instead, the Court opined that "due process does not entitle [the respondent] to a hearing to establish a fact that is not material under the Connecticut statute."\textsuperscript{100} The Court stated that in decisions such as Wisconsin v. Constantineau, the fact at issue was "relevant to the inquiry at hand."\textsuperscript{101} In the case at bar, the sex offender sought a hearing to prove that he was not currently dangerous.\textsuperscript{102}

With respect to the relevance of this fact to the inquiry at hand, Chief Justice Rehnquist, delivering the Court's opinion, stated as follows:

Here, however, the fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under Connecticut's Megan's Law. As the DPS Website explains, the law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest. ... No other fact is relevant to the disclosure of registrants' information. Indeed, the disclaimer on the Website explicitly states that respondent's alleged nondangerousness simply does not matter.

In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of all sex offenders—currently dangerous or not—must be publicly disclosed.\textsuperscript{103}

This succinct holding will serve to terminate procedural due process claims to sex offender notification laws.\textsuperscript{104} It also will curtail the lower courts' usage of the "stigma plus" test in addressing these decisions.\textsuperscript{105}

Pursuant to the Court's explicit language, however, out of the ashes of these

\textsuperscript{100} Id. at 7.

\textsuperscript{101} Id.

\textsuperscript{102} Id.

\textsuperscript{103} Id. (internal citations omitted); see also Kimberly B. Wilkins, Sex Offender Registration and Community Notification Laws: Will These Laws Survive?, 37 U. RICH. L. REV. 1245, 1264 (2003) (opining that "Connecticut's statute does not violate procedural due process because the registration requirement hinges upon the sex offender's conviction alone—a conviction the sex offender previously had the opportunity to contest at trial").

\textsuperscript{104} As one commentator asserts, the Court's opinion "appears to put procedural due process challenges to sex offender registration and community notification laws to death." Wilkins, supra note 103, at 1263.

\textsuperscript{105} Id. at 1266 (reasoning that because the Court explicitly opted not to analyze the case under the "stigma plus" test, "[l]ower courts must abandon the use of Paul v. Davis to analyze any future procedural due process challenges to sex offender registration and community notification laws ... Any relief sought in the due process context must be asserted under substantive due process").
procedural due process claims may arise a successful challenge that would render sex offender notification provisions violative of the Constitution: substantive due process. Indeed, explicitly reserving the possibility that a substantive due process claim would be successful, the Court stated as follows: “Unless respondent can show that the substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise.” This statement will provide the baseline for the analysis contained subsequently in this Comment.

Although the decision was a nine to zero decision, a number of Justices wrote separately to express their views. Justice Scalia, concurring in the Court’s decision, agreed with the Court’s reservation of the possibility of a successful substantive due process challenge to these laws. Justices Souter and Ginsburg concurred in a separate opinion and agreed that the notification laws may be susceptible to a substantive due process challenge. These Justices also maintained that the selective dissemination of sex offender registration information might present an actionable claim pursuant to principles of equal protection.

IV. SUBSTANTIve DUE PROCESS AND ITS INTERPLAY WITH SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS

This Part will address the various liberty interests applicable to sex offender notification laws that are grounded in the doctrine of substantive due process: a convicted offender’s right to privacy, his right to pursue employment, and his right to personal security.

A. The Evolution of Substantive Due Process

Substantive due process is derived from the Fifth and Fourteenth Amendments of the United States Constitution; these Amendments protect individuals from governmental deprivations of “life, liberty, or property, without due process of law.” As illustrated by the above discussion addressing the Paul v. Davis Court’s “stigma plus” test, the doctrine of due process can be segregated into two components: procedural due process and

107. Id. at 8-9.
108. Id. at 9-10.
109. Id.
substantive due process. Both of these components constitute restraints on state and federal legislative power and serve to protect individual rights. 111

Unquestionably, substantive due process is an evolving constitutional doctrine encompassing many individual liberties—none of which will be found anywhere near the text of the Constitution. 112 In their rawest form, "[t]he due process clauses recognize the essential obligation of government to protect the individual’s physical security, liberty, and right to acquire, enjoy, and dispose of wealth (property), within the limits of the community’s duty to protect the collective welfare." 113 Evolving from these basic and essential obligations have arisen the following judge-made liberty interests: the "right to marry, to procreate, to rear and educate children, to use contraceptives, and to terminate a pregnancy," 114

freedom from bodily restraint, . . . the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, . . . to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly

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111. See, e.g., JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 82 (2003) ("Attention is rightly paid to substantive due process as a restraint on legislative power."); Kelly A. Spencer, Sex Offenders and the City: Ban Orders, Freedom of Movement, and Doe v. City of Lafayette, 36 U.C. DAVIS L. REV. 297, 302 (2002) ("The doctrine of substantive due process restricts state regulations that abridge individual rights."). Moreover, as one commentator asserted:

The language of the Constitution suggests that the due process clauses are conditional, rather than absolute, guarantees of life, liberty, and property. Neither the Fifth nor the Fourteenth Amendment was intended to frustrate the legitimate exercise of governmental authority to promote the public’s health, safety, morals, or welfare. They were designed to prevent government from depriving people of fundamental rights without a justification rooted in the public interest.


112. ORTH, supra note 111, at 82 (stating that the application of substantive due process has yielded controversy and that "its historical development has carried due process the farthest from its roots").

113. KEYNES, supra note 111, at 6.

114. Id. at 5. With respect to these liberty interests, one commentator has opined:

Since 1965, U.S. Supreme Court decisions concerning marriage, the family, contraception, and abortion have kindled a national debate about the role of the judiciary in a democratic society. The Court’s critics have argued that it is beyond the competence of the federal judiciary to make policy in these areas. The Court’s advocates have responded that questions of marital privacy and reproductive liberty implicate constitutional rights that federal judges are eminently suited to decide.

Id. at x.
pursuit of happiness by free men.\textsuperscript{115}

The liberty interests grounded in the Fifth and Fourteenth Amendments that are relevant to the analysis of the constitutionality of sex offender registration and notification laws include the right to privacy, the right to employment, the right to personal security, the right to travel, and the rights to housing and family relations.\textsuperscript{116}

The doctrine of substantive due process “requires states to enact legislation that is ‘fair and reasonable in content’ and ‘further[s] a legitimate governmental objective.’”\textsuperscript{117} If an individual can identify a fundamental right and a court finds that the government infringed on this right (the right must be deemed fundamental and no less), then a court will apply strict scrutiny review.\textsuperscript{118} If strict scrutiny review were applicable, “the federal government would have to demonstrate a compelling governmental interest served by the law. The finding of a compelling state interest would then necessitate a determination of whether Congress sufficiently tailored the statute to the government’s interest.”\textsuperscript{119} If the court finds that the right at issue is not

\textsuperscript{115} Earl-Hubbard, supra note 10, at 836 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

\textsuperscript{116} Id. at 842 (“Courts that have considered the effects of registration on an individual’s liberty have cited this privacy deprivation and interference with family relations, as well as a loss of one’s job opportunities, as a deprivation of a liberty interest.”); Caroline Lewis, The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process, 31 HARV. C.R.-C.L. L. REV. 89, 102 (1996) (“The Fourteenth Amendment protects individual freedom from arbitrary exercise of government power, as well as individual interests in personal security, employment, and travel.”); Stephen R. McAllister, “Neighbors Beware”: The Constitutionality of State Sex Offender Registration and Community Notification Laws, 29 TEX. TECH L. REv. 97, 133 (1998) (“The argument frequently made is that registration and notification laws unfairly ‘stigmatize’ sex offenders with tangible and substantial consequences (e.g., loss of employment and housing, or actual physical abuse and harassment by neighbors."). Three potential liberty interests—the right to privacy, the right to employment, and the right to personal security—will be discussed below in detail.

\textsuperscript{117} Wilkins, supra note 103, at 1253 (quoting BLACK’S LAW DICTIONARY 517 (7th ed. 1999)).


\textsuperscript{119} Id. at 314; see also Lewis, supra note 116, at 102 (“Fourteenth Amendment substantive due process protects individuals from arbitrary state deprivation of liberty interests. In analyzing a substantive due process claim, individual liberty infringements must be balanced against the state’s interest in maintaining an organized society."); Spencer, supra note 111, at 303 (stating that to perform a substantive due process analysis, the court must first determine whether a fundamental right is impacted, then apply the appropriate judicial test to determine whether a Due Process Clause violation occurred, and lastly apply strict scrutiny if a fundamental constitutional right is implicated); Trinkle, supra note 118, at 317; see also id. at 319 (reasoning that “[u]nder substantive due process
fundamental, the court will apply the more reverential rational basis test. Thus, in the context of the constitutionality of sex offender notification laws, if a court finds a fundamental right implicated in the suit, these laws will be found violative of the guarantee of substantive due process “if the individual liberty interests of former sex offenders outweigh the state interests in crime prevention and law enforcement.”

B. The Right to Privacy

1. The Evolution of the Right to Privacy

Because of the intrusive nature of state sex offender notification schemes, analyzing the infringement of these laws on an offender’s fundamental privacy rights provides the most obvious starting point in analyzing these laws under substantive due process. In determining whether the laws infringe upon an offender’s privacy rights, one preliminary issue is whether offenders have a reasonable privacy interest in information such as their home address and employment information, information relating to their offense, and their photograph.

Judges have read a constitutional right to individual privacy into the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. As applicable to the present analysis of the constitutionality of

120. Spencer, supra note 111, at 299-300.
121. Lewis, supra note 116, at 102.
122. Judicial holdings in the context of the constitutionality of sex offender registration and notification laws pursuant to the right to privacy inherent in the doctrine of substantive due process suggest “that an individual’s fundamental right to privacy provides the first, and perhaps most obvious, basis for an examination of the Federal Registration Act under substantive due process theory.” Trinkle, supra note 118, at 315. Even though this right may provide the most obvious basis for the examination of these laws:

To date, substantive due process claims drawn from the Supreme Court’s uncertain informational privacy jurisprudence . . . have been rejected by the courts. Even when notification is found to jeopardize a substantive right to privacy (usually because registrants’ home addresses and places of employment are disclosed), the right is deemed subsidiary to the overriding public interest thought served by making such information available. In other instances, no privacy right is recognized as a threshold constitutional matter, on the reasoning that registrants have a lessened expectation of privacy as to such “public” information, despite the fact that without notification the information is otherwise not nearly so readily available for community inspection and use.

123. Lewis, supra note 116, at 96.
sex offender notification laws, this constitutional right to privacy may be violated when the state disseminates information to the community regarding, among other things, the sex offender’s name, photograph or physical description, and home address and workplace information.  

The judiciary has based the right to privacy in the substantive due process clauses of the Fifth and Fourteenth Amendments in order to protect individuals from unjustifiable governmental intrusion. As Justice Brandeis opined: “‘[T]he right to be let alone’ is ‘the right most valued by civilized men.’” The constitutional right to privacy is not a textual right, but the judiciary has found this right to be an inherent one emanating from the Due Process Clauses. This right was born in 1965 in Griswold v. Connecticut, in which the Supreme Court held that a privacy right existed in contraceptive use. This right quickly ballooned:

[t]his domain of unenumerated personal liberty now includes the right to marry, to choose a marital partner, to establish a family, to define family relationships, to procreate, to rear and educate one’s children, to determine one’s sexual relationships, to prevent conception, to terminate a pregnancy, and to seek medical treatment and care for oneself.

The Griswold line of cases, recognizing personal autonomy, illustrates one prong of the constitutional right to privacy: the freedom of individuals to render decisions regarding the fundamental areas of their lives. As discussed in detail below, the Supreme Court in the 1977 decision Whalen v.
Roe also identified another prong of substantive due process that is encompassed in the constitutional right to privacy: “the right to be free from unwanted disclosure of personal information.” Because the sex offender notification schemes cause personal information about sex offenders to be widely disseminated to the public, the analysis of the constitutionality of these laws under principles of substantive due process involves the latter prong and will be analyzed in this Comment as such. However, it must be kept in mind that although the Court continuously has expanded upon the right of privacy, “the Court has never addressed the implications of that right for statutes that, like the Federal Registration Act, allow full public disclosure of detailed personal information.”

Additionally, many argue that the sex offender registration and notification laws do not implicate an offender’s constitutional right to privacy because the offender jettisoned his privacy right upon committing such a heinous crime. However, it is not certain as a matter of law to what degree these rights are reduced. Moreover, although “[t]hose who commit or are accused of a crime are generally considered to have a lowered expectation of privacy regarding publication of information related to their crime,” sex offenders who have been released from incarceration differ “in that they have already served their sentences.” Opponents of the notification laws assert that these laws hinder sex offenders’ abilities to reintegrate into the community; they question the validity of the statistics illustrating a high rate of recidivism among sex offenders, and they contest the claim that sex offenders cannot be rehabilitated.

132. Rafshoon, supra note 110, at 1647-48 (recognizing that “[t]he Court has identified two types of privacy rights—the right to be free from unwanted disclosure of personal information and independence in making certain decisions”); see also Earl-Hubbard, supra note 10, at 836-37 (“This privacy interest includes the right to be free from unwarranted government intrusion into private matters and the right to prevent the disclosure of private matters.”); Lewis, supra note 116, at 96; Spencer, supra note 111, at 302-03.

133. Trinkle, supra note 118, at 316.

134. Lewis, supra note 116, at 97; see also Wilkins, supra note 103, at 1253 (stating that “courts often reject substantive due process claims because sex offenders have a lessened expectation of privacy’ as to the type of information shared with the public under community notification laws even though the information would be more difficult to ascertain without notification statutes’); Id. at 1254 (recognizing that some courts have held that convicted sex offenders forfeit their right to privacy); Id. at 1254-55 (“Other courts have found that those sex offenders who are dangerous and pose a threat to the public possess reduced privacy rights because any infringement on their privacy must succumb to the need to protect the public’s safety.”).

135. Lewis, supra note 116, at 97.

136. Id.

137. Id. at 92-94. As one commentator asserted:
Lastly, in addition to the issue of whether a convicted sex offender retains his privacy right upon release from prison, the right "to be let alone" is not absolute—indeed, a line must be drawn in the sand demarcating when the privacy interest and dignity of an individual person must succumb to the "demands of the public welfare or of private justice." Thus, if a court would determine that the dissemination of a convicted sex offender's personal information implicated a privacy interest, then, presumably, the court would apply a heightened form of scrutiny, possibly even strict scrutiny.


This section will explain the constitutional privacy precedent that is particularly relevant to the analysis of whether notification laws infringe upon a sex offender’s privacy rights. The Paul Court addressed the constitutional right to privacy when it determined whether the dissemination of the plaintiff’s photograph infringed upon the accused shoplifter’s privacy rights. The Court believed that the accused shoplifter’s alleged right to privacy was distinguishable from “matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.” In holding that the dissemination of this information did not violate the offender’s right to privacy, the Paul Court stated:

A familiar principle of the American criminal justice system is that after individuals have served their sentence, they can put their criminal past behind them and endeavor to lead a normal life. It follows that, once released from prison, offenders should reasonably expect that they can keep their criminal pasts private and begin to rebuild their lives. By authorizing public dissemination of information about released sex offenders’ prior offenses, however, sex offender laws shatter this expectation.

Id. at 96-97.

138. See supra note 126 and accompanying text.

139. Lewis, supra note 116, at 96 (quoting Samuel Warren & Louis Brandeis, The Right to Privacy, 4 HARV. L. REV. 193, 214 (1890)).

140. McAllister, supra note 116, at 134 (If strict scrutiny were applied, the government would be required “to prove both a substantial or compelling governmental interest supporting the imposition of such requirements on sex offenders and that the provision at issue is narrowly tailored to serve that interest.”). With respect to the level of scrutiny to be applied, one court noted as follows: “[T]he confidentiality interest ‘has not fared as well as . . . autonomy.’ Most courts addressing the right to confidentiality have applied a balancing, or intermediate, standard of review. . . . Some courts, however, apply heightened scrutiny if the information involved is considered ‘fundamental.’” Doe v. Poritz, 662 A.2d 367, 406 n.20 (N.J. 1995).


142. Id. at 713.

143. Id. at 713-14.
Respondent's claim is far afield from this line of decisions. He claims constitutional protections against the disclosure of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.\textsuperscript{144}

In determining whether sex offender notification laws infringed upon a convicted offender's asserted right to privacy, the courts of appeals have repeatedly looked to the Supreme Court's decision in \textit{Whalen v. Roe}\textsuperscript{145} for guidance. The \textit{Whalen} decision was handed down post-\textit{Paul}; consequently, the \textit{Whalen} decision likely expanded upon \textit{Paul}'s right to privacy holding.\textsuperscript{146} In \textit{Whalen}, a New York law required doctors to report to the government the names of patients that were using certain types of prescription medication.\textsuperscript{147} The Court upheld the law.\textsuperscript{148} It held that the compilation of the patient's information did not implicate a liberty interest because the information was not disclosed to the public and security measures were enacted to ensure that the information was not disseminated.\textsuperscript{149} Because the collection of this information without dissemination did not pose a threat to the patient's privacy interest, the Court opted not to "decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—or by a system that did not contain comparable security provisions."\textsuperscript{150}

\textsuperscript{144} \textit{Id.} at 713; see also Billings & Bulges, \textit{supra} note 43, at 230-31 (citing Opinion of the Justices of the Senate, 668 N.E.2d 738, 757 (Mass. 1996) ("Even though the Court has recognized a right to privacy in certain areas like marriage, procreation, and child rearing, it does not follow that there is a right to privacy under the Federal Constitution that protects against unauthorized publicity of private information.").

\textsuperscript{145} 429 U.S. 589 (1977).

\textsuperscript{146} See, e.g., Paul P. v. Verniero, 170 F.3d 396, 403 (3d Cir. 1999) (citing Slayton v. Willingham, 726 F.2d 631, 635 (10th Cir. 1984)). Additionally, as one commentator reasoned: "\textit{Whalen v. Roe} modified the Court's position as announced in \textit{Paul} and recognized a more expansive privacy right." Trinkle, \textit{supra} note 118, at 317.

\textsuperscript{147} \textit{Whalen}, 429 U.S. at 593.

\textsuperscript{148} \textit{Id.} at 603-04.

\textsuperscript{149} \textit{Id.} at 598, 600.

\textsuperscript{150} \textit{Id.} at 605-06 (emphasis added); see also J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981) (failing to recognize a general constitutional right to the nondisclosure of private information and eliminating the need to require balancing government action against individual privacy, but stating, "[o]ur opinion does not mean that we attach little significance to the right of privacy, or that there is no constitutional right to nondisclosure of private information").
The issue concerning the public disclosure of private data as a protectable privacy interest was also before the Court in two cases subsequent to the *Whalen* decision.\(^{151}\) In *United States Department of Justice v. Reporters Committee for Freedom of the Press*,\(^{152}\) the issue before the Court was whether the FBI could disclose criminal records, or “rap sheets,” of individuals pursuant to the Freedom of Information Act (FOIA).\(^{153}\) The reporters that requested the information argued that the individual did not possess a privacy interest in his rap sheet because the events contained in the document previously were disclosed to the public.\(^{154}\) The Court “reject[ed the reporters’] cramped notion of personal privacy.”\(^{155}\) The Court stated:

[B]oth the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another... The very fact that federal funds have been spent to prepare, index, and maintain these criminal-history files demonstrates that the individual items of information in the summaries would not otherwise be “freely available” either to the officials who have access to the underlying files or to the general public.\(^{156}\)

The Court held that the government could not release the information contained in the rap sheet because of the individual’s right to privacy.\(^{157}\) In formulating this holding, the Court recognized the “distinction... in terms of personal privacy... between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole.”\(^{158}\) However, the Court acknowledged that “[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual’s interest in privacy is protected by the Constitution.”\(^{159}\) Commentators have posited that despite the fact that the *Reporters Committee* Court’s decision was not premised on the Constitution per se, “the decision

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151. Logan, *supra* note 1, at 1180.
153. *Id.* at 751.
154. *Id.* at 762-63.
155. *Id.* at 763.
156. *Id.* at 763-64.
157. *Id.* at 780.
158. *Id.* at 764.
159. *Id.* at 762 n.13.
demonstrates that an individual can claim a privacy interest in government compilations which may not exist in scattered pieces of public information.\textsuperscript{160}

The Court rendered a decision similar to the Reporters Committee decision in United States Department of Defense \textit{v.} Federal Labor Relations Authority.\textsuperscript{161} In this case, the issue before the Court was whether a number of federal agencies could disclose to local unions the home addresses of the agencies' employees who were involved in bargaining with the union.\textsuperscript{162} The Court held that this disclosure violated the employees' FOIA privacy rights.\textsuperscript{163} Although the addresses were available in the public domain,\textsuperscript{164} the Court opined: "An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."\textsuperscript{165} The Court expressed its reluctance "to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions";\textsuperscript{166} accordingly, the Court did not permit the disclosure of the employees' address information.\textsuperscript{167} Significantly, this decision was also rendered pursuant to a FOIA analysis and was not premised on a constitutional right to privacy.

The courts of appeals have applied these ambiguous precedents and formulated a number of distinct holdings regarding whether the dissemination of a sex offender's home address and employment information infringes on his right to privacy. These decisions will be summarized below.

3. Privacy Precedent in the Context of Sex Offender Notification Laws

In the years preceding the United States Supreme Court's decision in \textit{Doe v. Connecticut Department of Public Safety}, lawsuits addressing an offender's substantive due process rights and infringement on the offenders' constitutional right to privacy were blasts in the explosion of litigation addressing the constitutionality of sex offender registration and notification

\begin{itemize}
\item \textsuperscript{160} Rafshoon, \textit{supra} note 110, at 1649-50; see also id. at 1651 ("Read together, Constantineau and Reporters Committee provide support for a substantive due process claim based on the right to privacy. The released sex offender, no matter how horrific his crime, is entitled to a minimum degree of privacy.").
\item \textsuperscript{161} 510 U.S. 487 (1994).
\item \textsuperscript{162} \textit{Id.} at 489.
\item \textsuperscript{163} \textit{Id.} at 502.
\item \textsuperscript{164} \textit{Id.} at 500.
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{Id.} at 501.
\item \textsuperscript{167} \textit{Id.} at 502.
\end{itemize}
schemes. Like the split among circuits and state courts with respect to the constitutionality of these laws under principles of procedural due process, courts addressing a sex offender’s substantive due process and privacy rights have reached divergent results. This section will explore these lower court decisions in detail.

This section delineates the numerous lower court decisions into three categories: (1) courts that addressed a sex offender’s right to privacy as grounded in principles of substantive due process of the Fourteenth Amendment, and whose holdings turned on whether the disseminated information already was available in the public domain; (2) courts holding that no constitutional right to privacy was implicated because the state action did not impinge on an offender’s rights that are “implicit in the concept of ordered liberty”; and (3) courts that recognized a constitutional right in the offender’s home address information, but found that the state’s legitimate interest in dissemination outweighed the offender’s interest in privacy. Each of these categories will be addressed below in turn.

First, courts have rendered decisions addressing a sex offender’s right to privacy as grounded in principles of substantive due process of the Fourteenth Amendment, and holdings in these cases have turned on whether the disseminated information already was in the public domain. Two of these decisions will be discussed in detail, and it must be noted that other courts have rendered holdings similar to those in these two decisions.

168. See, e.g., Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997) (holding that because the dissemination of the offender’s information was carefully designed and because the information disseminated, including the general vicinity of the offender’s residence, was available to the public, the information disseminated was not “private” and thus not constitutionally protected); Helman v. Delaware, 784 A.2d 1058, 1072 (Del. 2001) (finding that the sex offender had no privacy interest in the dissemination of his personal information because “[a]n individual does not have a constitutional right to keep private information that is already available to the public”); In re Meyer, 16 P.3d 563, 569 (Wash. 2001) (finding in the context of the Paul Court’s “stigma plus” test that because the information disseminated was widely available from public sources, no privacy interest was implicated); Patterson v. Alaska, 985 P.2d 1007, 1016 (Alaska Ct. App. 1999) (citing Roe v. Wade and Whalen v. Roe and recognizing a right to privacy in the non-disclosure of personal matters, but finding that because a sex offender’s biographical information was already public information, the right to privacy “does not attach to matters already within the public domain”); see also Ohio v. Wheeler, 99-L-095, 2000 Ohio App. LEXIS 3395 (Ohio Ct. App. July 28, 2000) (holding that the notification provisions did not deprive the offender of substantive due process because the statute was rationally related to a legitimate legislative purpose—protecting the public’s health and safety). But see Doe v. Attorney Gen., 686 N.E.2d 1007 (Mass. 1997) (recognizing in the context of a procedural due process analysis a liberty and privacy interest in the dissemination of the sex offender’s accumulated personal information; therefore, the offender was entitled to procedural due process protections).
In *Corbin v. Chitwood*, the sex offender asserted that the city and its employees violated his constitutional right to privacy when they distributed throughout the community a flier that contained his criminal record and his home address information. The court quickly found that the offender did not have a privacy right in this information. Although discussing the FOIA line of decisions, the court recognized that these decisions were not constitutionally based. Moreover, the court cited First Circuit precedent mandating that “the right of confidentiality under the Constitution does not extend ‘beyond prohibiting profligate disclosure of medical, financial, and other intimately personal data.’” The court held that neither the sex offender’s arrest records nor his home address information fit these categories because of their public availability. Additionally, the court curtly recognized that the sex offender’s grievance was not solely the dissemination of his home address: “It is his address coupled with his identity as a sex offender that disturbs him.”

Similarly, in *Akella v. Michigan Department of State Police*, the court applied a two-pronged test to determine whether the public notification of the offender’s name, address, and arrest record violated his constitutional right to privacy. Recognizing that Sixth Circuit precedent mandated that the court must “narrowly construe[] the holdings of *Whalen* and *Nixon* to extend the right to information privacy only to interests that implicate a fundamental liberty interest,” the court set forth the following test to determine whether the offender’s privacy right was violated: “(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government’s interest in disseminating the information must be balanced against the individual’s interest in keeping the information private.” With respect to the first prong, the court held that the plaintiff did not have a privacy interest in protecting the dissemination of his arrest record because it was public record. Under the second prong, although not explicitly recognizing that the plaintiff had a liberty interest in protecting the

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170. *Id.* at 96-99.
171. *Id.* at 97.
172. *Id.* at 97 (quoting *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174, 183 (1st Cir. 1997)).
173. *Id.* at 98 n.3.
174. *Id.*
176. *Id.* at 729 (quoting *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998)).
177. *Id.*
dissemination of his home address information, the court held that the state had a significant interest in disseminating the information.\textsuperscript{178}

Second, courts have rendered decisions holding that the offender’s constitutional right to privacy was not violated because the state action did not impinge on an offender’s rights that are “implicit in the concept of ordered liberty.”\textsuperscript{179} For example, in \textit{Illinois v. Logan},\textsuperscript{180} the sex offender claimed that the state’s dissemination of his address pursuant to the registration and notification scheme violated his constitutional right to privacy. The court quickly held that this interest was not protected under the “zone of privacy” that is constitutionally protected.\textsuperscript{181} The court also recognized that although it is not freely available, the information disseminated was a matter of public record and thus could not be constitutionally protected.\textsuperscript{182} The court also noted that “any attendant consequences, such as embarrassment or ridicule, are caused by the offender’s status as a felon and not as a direct result of the notification.”\textsuperscript{183}

Third, two courts have recognized a constitutional privacy right in the offender’s home address information, but found that the state’s compelling interest in dissemination outweighed the offender’s interest in privacy. In \textit{Doe v. Poritz},\textsuperscript{184} the sex offender asserted that the state’s registration and notification scheme infringed on his privacy right to be free from the dissemination of personal information. Recognizing that an individual does not have a privacy interest in matters of public record, the court first addressed the offender’s privacy interest in the disseminated information. The court found that individuals do not have a privacy interest in an arrest record, name, age, and place of employment because these all are matters of

\textsuperscript{178} \textit{Id}. at 730.

\textsuperscript{179} Cutshall v. Sundquist, 193 F.3d 466, 481 (6th Cir. 1999) (holding that because the registration and notification scheme “does not impose any restrictions on [the offender’s] personal rights that are fundamental or implicit in the concept of ordered liberty, such as his procreative or marital rights,” the scheme did not infringe on the offender’s asserted federal constitutional right of privacy); Corbin v. Chitwood, 145 F. Supp. 2d 92, 100 (D. Me. 2001) (acknowledging that “substantive due process applies only to rights that are ‘fundamental’ or ‘implicit in the concept of ordered liberty’” and holding that the offender’s arrest record did not fall into this category); Dick v. Gainer, No. 98-2287, 1998 U.S. App. LEXIS 31988, at *7 (7th Cir. Dec. 16, 1998) (unpublished opinion) (quickly rejecting the offender’s violation of his constitutional right to privacy claim under the Fourteenth Amendment because “[n]one of the traditional Fourteenth Amendment privacy rights are at issue here”).

\textsuperscript{180} 705 N.E.2d 152, 161 (Ill. App. Ct. 1998).

\textsuperscript{181} \textit{Id}. at 161.

\textsuperscript{182} \textit{Id}.

\textsuperscript{183} \textit{Id}.

\textsuperscript{184} 662 A.2d 367 (N.J. 1995).
However, the court noted:

Our analysis is altered, however, by the disclosure of plaintiff's home address, and more importantly, by the totality of the information disclosed to the public. We believe that public disclosure of plaintiff's home address does implicate privacy interests. "We are reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions."... The fact that plaintiff's home address may be publicly available, therefore, does not lead ineluctably to the conclusion that public disclosure of his address implicates no privacy interest. We note in particular that the issue here is not whether plaintiff has a privacy interest in his address, but whether the inclusion of plaintiff's address, along with other information, implicates any privacy interest.

Next, the *Poritz* court addressed whether the state interest in the dissemination of this information justified its disclosure. For the following reasons, the court ultimately held that the state interest in disseminating this information substantially outweighed the offender's privacy interest in this information: (1) the disseminated information was general and not confidential; (2) the sex offender's danger of recidivism vested the state with a compelling interest in disclosure; and (3) the scope of disclosure was narrowly tailored to combat the sex offender's risk of reoffense.

Likewise, in *Paul P. v. Verniero*, the court held that a person has "*some* nontrivial privacy interest" in home address disclosure. The court recognized but dismissed counterarguments averring that home addresses are not private because they are widely available in telephone directories. However, the court balanced the state's interest in disclosing this information with the sex offender's privacy interest in this personal information. The court ultimately held that the state had a compelling interest in preventing sex offenses, and this interest outweighed the offender’s privacy interest in the

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185. *Id.* at 407.
186. *Id.* at 408-09 (internal citations omitted).
187. *Id.* at 411-12.
188. 170 F.3d 396, 404 (3d Cir. 1999).
189. *Id.* (quoting U.S. Dep't of Defense v. FLRA, 510 U.S. 487, 501 (1994)); see also Doe v. Williams, 167 F. Supp. 2d 45, 55 (D.D.C. 2001) ("[W]hile much of the registry information disclosed publicly is a compilation of information otherwise available to the public, the block address of the home, employment, and school of the offender is not generally information that would otherwise be publicly available.").
190. *Paul P.*, 170 F.3d at 404.
dissemination of his home address information.\textsuperscript{191} Thus, these decisions illustrate that courts addressing a convicted sex offender's privacy rights have reached divergent results.

\textbf{C. The Constitutional Right to Personal Security}

In addition to privacy rights, also relevant to the constitutionality of sex offender registration and notification laws is the issue of the offender's right to personal security as grounded in principles of substantive due process. The United States Supreme Court has recognized the right to personal security\textsuperscript{192} as a "'historic liberty interest' protected substantively by the Due Process Clause."\textsuperscript{193} The use of the term "historic" certainly is accurate, as Blackstone in 1765 wrote that the right to personal security is "one of three 'primary' categories of absolute rights that imprisonment or other infirmities did not extinguish."\textsuperscript{194} Generally, states have no constitutional duty to protect the public at large.\textsuperscript{195} Through judge-made law evolved the state's duty to protect an individual's personal security when the state has assumed responsibility for his or her safety.\textsuperscript{196} As such, the state has a constitutional duty to provide for the personal security of institutionalized persons as well as persons confined in state-run mental institutions.\textsuperscript{197} In the context of sex offender notification schemes, it must be noted that "the United States Supreme Court has never held that formal state custody is necessary to establish a constitutional right to personal security. Rather, the Court has stated that the right to personal security is 'not extinguished by lawful confinement,' thereby implying that the right exists outside of institutional walls."\textsuperscript{198}

\textsuperscript{191} Id.
\textsuperscript{192} This right also has been referred to as "a constitutional right to safety." Lorene Feuerbach Schaefer, Comment, \textit{Abused Children and State-Created Protection Agencies: A Proposed Section 1983 Standard}, 57 U. CIN. L. REV. 1419, 1421 (1989).
\textsuperscript{193} Lewis, \textit{supra} note 116, at 106 ("Personal security is a fundamental liberty interest protected by the Fourteenth Amendment.").
\textsuperscript{194} Lewis, \textit{supra} note 116, at 107 ("The Constitution... does not require the state to ensure the complete safety of all individuals.").
\textsuperscript{195} Schaefer, \textit{supra} note 192, at 1421; \textit{see also} Lewis, \textit{supra} note 116, at 107 ("The Constitution... does not require the state to ensure the complete safety of all individuals.").
\textsuperscript{196} Schaefer, \textit{supra} note 192, at 1421.
\textsuperscript{197} Id. at 1422 (citing Youngberg v. Romeo, 457 U.S. 307 (1982)).
\textsuperscript{198} Id. at 1423 (citing Youngberg, 457 U.S. at 315). For a discussion of cases in which courts
The issue in the context of the constitutionality of sex offender registration and notification laws pursuant to substantive due process is whether the laws afford offenders adequate protection from acts of vigilantism subsequent to the state’s public notification. To establish that these laws violate the offender’s constitutional right to personal security, a nexus must be established between the state’s dissemination of the offender’s information and the potential for vigilantism against the offender.\textsuperscript{199} Moreover, “[t]he Supreme Court has intimated that, in cases where private action is the proximate cause of harm to an individual, the degree of state involvement in bringing about the private action must be substantial for responsibility to be ascribed to the state.”\textsuperscript{200}

A number of lower courts addressed the issue of the offender’s liberty interest in personal security in the context of the “stigma plus” procedural due process analysis. For example, in \textit{Akella v. Michigan Department of State Police}, the plaintiffs alleged that the state’s dissemination of information regarding their convictions subjected them to “threats, anonymous letters telling them to move, loss of housing, reduced educational opportunities for themselves and their children,” and in the context of the “stigma plus” test, they alleged that this dissemination infringed upon their liberty interest in personal security.\textsuperscript{201} For support, the plaintiffs cited the Sixth Circuit’s decision in \textit{Kallstrom v. City of Columbus}.\textsuperscript{202} In \textit{Kallstrom}, the court addressed the issue of whether the state’s disclosure of a police officer’s personal information to defense counsel during a trial in which the officer testified deprived the officer of substantive due process.\textsuperscript{203} The \textit{Kallstrom} court “identified a due process right in the disclosure of highly personal information where the disclosure places an individual ‘at substantial risk of recognized an individual’s constitutional right to personal safety ‘outside of institutional walls,’” see \textit{id}. Moreover, as one commentator stated: “While notifying communities about the presence of released offenders is not the same as imprisoning them or involuntarily committing them to mental institutions, disseminating their names, addresses, and photographs still renders them susceptible to vigilant attacks.” Lewis, \textit{supra} note 116, at 108.

\textsuperscript{199} Lewis, \textit{supra} note 116, at 108-09; \textit{see also} Hawaii v. Bani, 36 P.3d 1255, 1265 (Haw. 2001) (“[P]ublic disclosure may encourage vigilantism and may expose the offender to possible physical violence.”); Lewis, \textit{supra} note 116, at 109 (“Defenders of the constitutional validity of community notification measures may argue that the relationship between the state’s disclosure of identifying information about released offenders and the consequent vigilant violence directed against them is too attenuated for the state to be responsible for the danger those individuals face.”).

\textsuperscript{200} Lewis, \textit{supra} note 116, at 108 (citing DeShaney v. Winnebago County, 489 U.S. 189 (1989)).


\textsuperscript{202} \textit{id} (citing \textit{Kallstrom v. City of Columbus}, 136 F.3d 1055 (6th Cir. 1998)).

\textsuperscript{203} \textit{id} at 730-31 (citing \textit{Kallstrom}, 136 F.3d at 1064).
serious bodily harm, possibly even death, from a perceived likely threat." The Akella court opted not to follow the reasoning of the Kallstrom court because the information disclosed in Kallstrom constituted private information; whereas the Akella court believed that the information disseminated pursuant to the sex offender laws was public information. Although the offenders claimed that the dissemination of the circumstances surrounding their conviction violated their constitutional right to personal security, the court believed that this information was "already a matter of public record that is available for inspection at a local police station." Moreover, the court found that the plaintiffs failed to allege that they faced a danger of substantial bodily harm. Thus, the court held that the plaintiffs failed to state a claim with respect to their allegation of a personal security rights violation.

Similarly, in Patterson v. Alaska, the plaintiff alleged that the dissemination of his personal information infringed upon his substantive due process right of personal safety. With respect to this allegation, the court succinctly stated as follows: "Patterson has shown no adverse impact on any liberty interest.... The state's notification scheme does not endanger personal safety." Therefore, as these decisions illustrate, issues pertaining to a convicted sex offender's personal security rights are extremely relevant to the substantive due process analysis at hand.

D. The Constitutional Right to Employment

The right to work is a protectable liberty interest inherent in substantive due process. The Supreme Court has stated that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." The Paul Court also suggested that harm to the offender's current employment could constitute a sufficient "plus"
under the "stigma plus" test. In one line of cases, courts held that the speculative harm to the offender's earning capacity or ability to obtain employment, usually coupled with a number of other "pluses" (for example, reputational injury, privacy infringement, and continuing registration burdens), fulfilled the "plus" facet and rendered the notification laws violative of procedural due process. The raison d'être for these decisions was that employers, once learning of the sex offender's status, would exhibit a reluctance to employ someone of that character.

Other judicial holdings decree a contrary outcome. In this line of cases, courts refused to recognize the potential harm to the offender's future earning...
capacity or potential employability as a "plus" under the "stigma plus" test.\textsuperscript{216} Underlying a number of these decisions was the rationale that even though the dissemination may render it difficult for a sex offender to obtain employment, the dissemination did not foreclose all future employment opportunities.\textsuperscript{217} Moreover, in a discrete line of cases, the courts failed to recognize a general right to private employment; instead, the courts stated that the right to employment extended only to governmental employment.\textsuperscript{218} As these decisions illustrate, lower courts have split on issues pertaining to a convicted sex offender's future employment rights.

V. WISCONSIN'S NOTIFICATION LAWS ARE UNCONSTITUTIONAL UNDER THE SUBSTANTIVE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS

This Comment posits a bright-line conclusion: Wisconsin's sex offender

\begin{itemize}
\item \textsuperscript{216} Fullmer v. Mich. Dep't of State Police, 207 F. Supp. 2d 650, 660-61 (E.D. Mich. 2002) (rejecting the offender's loss of employment claim because the disseminated information already was available in the public domain); Akella v. Mich. Dep't of State Police, 67 F. Supp. 2d 716, 728-29 (E.D. Mich. 1999) (rejecting the offender's possibility of future employment harm claim and failing to recognize this possible loss as a protectable liberty interest); Lanni v. Engler, 994 F. Supp. 849, 855 (E.D. Mich. 1998) (rejecting the offender's future loss of employment claim because "such injuries are purely speculative on the present record"); Helman v. Delaware, 784 A.2d 1058, 1072 (Del. 2001) (finding that the dissemination did not foreclose the offender from obtaining employment).
\item \textsuperscript{217} See, e.g., Helman, 784 A.2d at 1072. In Helman, the court recognized that:

the dissemination of this information to certain employers in the community may make it more difficult for [the offender] to obtain employment and establish familial and social relationships, but the dissemination of this information does not completely foreclose him from obtaining employment or establishing relationships. There is no evidence that community notification will result in the alteration of a tangible interest held by [the offender].

\textit{Id.}

\item \textsuperscript{218} See, e.g., Cutshall v. Sundquist, 193 F.3d 466, 479-80 (6th Cir. 1999). In Cutshall, the court began its analysis by noting that the dissemination hindered, but did not completely impede, the offender's ability to obtain employment. \textit{Id.} at 479. The court also reasoned as follows:

Courts recognizing a constitutionally protected right to employment have done so in very limited circumstances and have dealt with terminations of government employment where either state law or an agreement between the parties purports to limit the ability of the government to terminate the employment. Cutshall has not cited, and we have not found, any case recognizing a general right to private employment.

\textit{Id.; accord} Haddad v. Fromson, 154 F. Supp. 2d 1085, 1096-97 (W.D. Mich. 2001) (labeling as "strained" the offender's attempt to distinguish the \textit{Paul} and \textit{Siegert} holdings and citing \textit{Cutshall} when opining that "the injury to reputation and employability alleged by Plaintiff is precisely the kind of harm that the Supreme Court has held does not rise to constitutional levels").
\end{itemize}
notification laws unconstitutionally infringe on sex offenders' privacy rights, personal security rights, and future earning capacity rights under substantive due process precedent. Further, if strict scrutiny would be applied upon a judicial finding agreeing that the laws resulted in these liberty interest deprivations, the state's interest in public safety would not outweigh the offenders' liberty interests in privacy, employment, and personal security. This conclusion comports with the United States Supreme Court's recent statement intimating that notification laws likely deprive offenders of substantive, as opposed to procedural, due process.

A. Wisconsin's Notification Laws Infringe Upon Sex Offenders' Privacy Rights

This Comment advocates the position that Wisconsin's sex offender notification laws infringe upon registered sex offenders' privacy rights. Pursuant to Wisconsin's sex offender public notification procedure, the offender's personal information, such as work and address information, may be disclosed to the public under certain circumstances. The victim of the sex crime and numerous agencies and organizations can receive this personal information upon request. The offender's exact address and place of employment also can be disseminated to the general public upon request if the police chief or sheriff determines that the dissemination of this information is necessary. Although the offender's offense history and photograph are available on Wisconsin's sex offender registration website, the offender's exact home address is not included on this site out of fear of acts of vigilantism against the offender.

One issue that arises in this analysis is the applicability of the line of the Freedom of Information Act decisions to sex offender notification laws. The facts and analyses contained in these decisions are similar to the facts and analyses of notification law decisions. However, the Freedom of Information Act decisions were rendered in the context of the FOIA and not on a constitutional basis. As one court stated, "[w]hile arguably not expanding the right to privacy, Reporters Committee essentially summarized, albeit in

220. §§ 301.46(2)(b), (3)(b), (3)(e).
221. See generally § 301.46(5).
222. See Wisconsin Department of Corrections, Sex Offender Registry, at http://offender.doc.state.wi.us/public/faq.jsp.
223. See supra Part IV.B.2.
224. See supra note 159 and accompanying text.
another context, the notification authorized by Megan's law. Because of the strong analogies that can be drawn between the FOIA cases and the sex offender notification cases, it seems inane to prevent the governmental dissemination of certain private information under the FOIA and not prevent the governmental dissemination of similar private information under the Constitution. Because of these similarities, the Court may opt to extend this reasoning in a substantive due process analysis, thereby prohibiting the dissemination of convicted sex offenders' private information.

If the Court would opt not to extend the reasoning of the FOIA decisions on a constitutional level, it likely would look to the Paul v. Davis and Whalen v. Roe holdings for guidance. The Paul and Whalen Courts addressed the issue of informational privacy rights. Although the Paul Court held that the dissemination of an individual's address information was not within the constitutionally protected "zone of privacy," the Whalen Court modified this holding. The Whalen Court implicitly extended the right to privacy to encompass the right not to have governmental actors disseminate personal and private information to the public. Another issue in this analysis thus becomes whether the information disseminated pursuant to Wisconsin's laws can be considered "private" information when all the information is in the public domain in some form.

This Comment advocates the position that the manner in which the information is disseminated renders it "private" under the Whalen Court's reasoning. As one court stated, "a privacy interest is implicated when the government assembles those diverse pieces of information into a single

226. See supra note 160 and accompanying text.
227. See supra Part IV.B.2.
228. See supra note 142 and accompanying text. But see Trinkle, supra note 118, at 317 (opining that Paul's holding "does not eliminate the possibility of a challenge to the Federal Registration Act on privacy grounds").
229. Although the Whalen Court held that the collection of the patient's personal information without its public dissemination did not pose a threat to the patient's privacy interest, one commentator addressed this holding's relevance to the analysis at hand by stating as follows:

By their nature, community notification provisions afford no protection to individual privacy as did the state regulation at issue in Whalen; indeed, the purpose of community notification is to disseminate personal information about released sex offenders to the public. Thus, the protection against disclosure of personal medical information distinguishes the factual context of Whalen from the case of sex offender community notification.

Lewis, supra note 116, at 100.
package and disseminates that package to the public. This reasoning is persuasive, as it is not mandatory to publish a home address or telephone number in a public directory, and one’s place or type of employment certainly can be kept from the public eye if so desired. When all of this information is compiled and given to a random member of the public solely because of the registrant’s status as a sex offender, on its face this personal information becomes far less “public” and carries a poignantly stigmatic meaning. It is the manner in which these pieces of “public” information are disseminated that renders this information protectable under *Whalen*.

Proponents of Wisconsin’s laws would assert that these laws do not infringe upon offenders’ privacy rights because the laws are tailored to allow the public at large to receive personal information about offenders only upon request and with a determination that the dissemination is necessary; accordingly, Wisconsin’s laws are narrowly tailored to maintain some semblance of the offender’s privacy. This argument has some merit because, for example, the Wisconsin offender’s home address and employment information is not included on the website, whereas other states have chosen to include this information on their websites. However, pursuant to Wisconsin law, any member of the general public can obtain this personal information upon request and upon a determination that this dissemination is “necessary,” and what constitutes “necessary” surely is a low bar. Additionally, Special Bulletin Notification offenders are subjected to active notification procedures, including door-to-door notification procedures. Thus, because of the high probability that any member of the community can obtain any offender’s home address and employment information at any time, the laws still sufficiently infringe on the offenders’ privacy interests.

Opponents of this conclusion also will assert that convicted sex offenders

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231. The information disclosed under these laws “is of a far more sensitive, less public nature than otherwise publicly available.” Logan, *supra* note 1, at 1199. One commentator notes:

> Although under *Whalen* the offender does not have the right to prevent the government from gathering the private information, he does have an interest in preventing its disclosure. Perhaps the offender’s criminal record is not a private matter, but his home and work addresses and phone numbers are still within the realm of privacy encompassed under the term “liberty.”

Earl-Hubbard, *supra* note 10, at 841; Rafshoon, *supra* note 110, at 1638 (“Community notification laws do more than make information on convicted sex offenders available to the public. They give police a green light to publicize the whereabouts and criminal histories of released offenders.”).


have a lessened privacy interest in their personal information because these offenders jettisoned their privacy rights upon committing such a heinous crime. It is true that "[t]hose who commit or are accused of a crime are generally considered to have a lowered expectation of privacy regarding publication of information related to their crime."234 However, it also must be kept in mind that these offenders already have served their sentences and have been released into the public domain.235 The justice system has deemed it appropriate to release these offenders into the community, yet these offenders continue to be subjected to a unique form of ongoing and intrusive punishment for crimes for which they have already served their sentences. Perhaps the justice system’s release of these offenders is the issue that should be explored instead of punishing individuals after they have allegedly served their time to society. Because offenders have already served their sentences and because of the highly intrusive and stigmatic nature of the personal information dissemination, Wisconsin’s laws still violate offenders’ privacy rights, even assuming the offenders have a lowered expectation of privacy in their personal information.

Wisconsin’s notification procedures likely infringe on offenders’ privacy rights. This conclusion, however, does not end the analysis, as any offender must then withstand a judicial application of heightened scrutiny. Thus far, “[s]ubstantive due process claims relying upon privacy rights have not been successful, as public notification outweighs any infringement on the substantive due process rights of sex offenders.”236

If the offender is found to have a protectable privacy interest with respect to his address information, the offender likely can prove that his interest in privacy is stronger than the state’s compelling interest in dissemination. Lower courts have not held in accordance with this conclusion. As the Paul P. v. Verniero court stated, “the state interest, which we characterized as compelling, ‘would suffice to justify the deprivation even if a fundamental right of the registrant’s were implicated.’”237 Likewise, the Doe v. Poritz court held that “[a]lthough the potential consequences of active dissemination under the Notification Law alter the privacy interests, the incursion on those interests is necessary for the protection of the public, as the means chosen are narrowly tailored to that interest.”238

234. Lewis, supra note 116, at 97.
235. See supra note 136 and accompanying text.
236. Wilkins, supra note 103, at 1253.
Public perception with respect to the state's fervent and justifiable interest in crime prevention versus public perception with respect to a convicted sex offender's privacy rights falls on opposite ends of the spectrum. However, public perception must not set in motion a judicial decision that transgresses constitutional precedent. Indeed, "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."\(^2\)

Wisconsin's sex offender notification laws severely infringe upon a convicted offender's privacy rights, and as discussed below, also serve to endanger his personal security and harm his future earning capacity. The state certainly has a fervent and justifiable interest in crime deterrence and prevention as well as public protection; certainly many would label this interest as more compelling than a convicted sex offender's liberty interest. But the state's interest does not outweigh the state's act of subjecting the released offender to personal harm and loss of privacy when he is attempting to assimilate into the community. The infringement on the sex offender's privacy rights and other liberty interests is far too weighty to render the laws constitutional on the basis of the state's compelling interest. Moreover, because "the success of community notification measures in preventing reoffense is disputed, the degree of need for communities to have access to the information identifying released sex offenders is unclear."\(^2\) Thus, the state's interest in public safety likely does not outweigh the severe governmental infringement on the sex offender's substantive due process liberties.

Lastly, supporting the conclusion that the Court may find that notification schemes similar to Wisconsin's scheme are unconstitutional is its decision to explicitly leave open the possibility that these laws violate substantive due process. By this statement, the Court implied that the state's interest in sex offense prevention does not outweigh the state's infringement on an offender's substantive due process liberty interests. Thus, notification laws similar to Wisconsin's laws likely are unconstitutional.

**B. Wisconsin's Notification Laws Hinder Sex Offenders' Employment Opportunities**

Convicted sex offenders, like all American citizens, have a protectable right to work that is grounded in principles of substantive due process.\(^2\) If presented with this claim in the context of Wisconsin's sex offender laws, the

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\(^{240}\) Lewis, supra note 116, at 101.

\(^{241}\) See supra Part IV.D.
Court likely would find that Wisconsin’s laws violate substantive due process because they have the net effect of hampering convicted sex offenders’ employment opportunities and future earning capacities.\textsuperscript{242}

Wisconsin’s laws mandate that sex offenders provide the registry with information relating to their employer.\textsuperscript{243} This information can be provided to the general public.\textsuperscript{244} Employers may not want to hire convicted sex offenders when the offenders’ personal information is publicly available because the employer may be afraid that this hire would eventually lead to a loss of business.\textsuperscript{245} Thus, Wisconsin’s laws quite likely hinder a convicted sex offender’s ability to obtain and retain employment: The laws foster employers’ reluctance to hire convicted sex offenders and thereby can completely foreclose convicted sex offenders from obtaining employment.

\textit{C. Wisconsin’s Notification Laws Do Not Protect Offenders’ Personal Security}

The right to personal security is encompassed in the substantive due process clauses of the Fifth and Fourteenth Amendments.\textsuperscript{246} This right ensures sex offenders security after their release from state confinement, but because private actors—in contrast to state actors—tend to perpetrate harm upon sex offenders after their release, the state action must be “substantial for responsibility to be ascribed to the state.”\textsuperscript{247} Wisconsin’s sex offender notification laws likely violate sex offenders’ right to personal security because these laws do very little to deter acts of vigilantism against offenders.

Few would deny that a nexus exists between the state’s dissemination of the offender’s information and the potential for vigilantism against the offender. As Judge Posner has stated: “If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be hard to

\begin{itemize}
\item \textsuperscript{242} See Lewis, supra note 116, at 112 (“Community notification measures are likely to hinder released offenders’ ability to find employment.”).
\item \textsuperscript{243} See supra Part II.B.2.
\item \textsuperscript{244} See id.
\item \textsuperscript{245} See Lewis, supra note 116, at 112 (“Labeling individuals as convicted sex offenders may engender fear in employers, either of the offender himself or of loss of business.”); see also id. at 113 (“[A]bsent community notification, employers would feel less pressured to refuse to hire a released offender by fear of loss of business from customers aware of the offender’s past.”).
\item \textsuperscript{246} See supra Part IV.C.
\item \textsuperscript{247} See supra note 200 and accompanying text. But see Lewis, supra note 116, at 109 (stating that proponents of community notification laws “may argue that the relationship between the state’s disclosure of identifying information about released offenders and the consequent vigilante violence directed against them is too attenuated for the state to be responsible for the danger those individuals face”).
\end{itemize}
say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." 248 If the state did not disseminate the offender’s status and personal information, few would know of the offender’s status, thereby decreasing the opportunity for public retaliation against the offender.

Arguments have been posited, and quite rightfully so, that these laws do not provide offenders adequate protection, 249 and vigilantism against sex offenders following community notification has been well-documented. Community meetings and door-to-door warnings practically beg for acts of retaliation from a community that fails to understand the offender’s mental state and fails to acknowledge the fact that offenders have been living in their communities and neighborhoods for years. 250 One study found that public notification resulted in the harassment of 26% of offenders, 251 and of those harassed, 73% of the offenders’ families were also harassed. 252 As a direct result of the public notification laws, sex offenders have been attacked, abused, harassed, and terrorized. 253 Retaliatory acts such as these occur in even our own backyard: One Wisconsin sex offender was continuously threatened, words such as “pervert” were spray-painted onto his home, and upon an attempt to move to a new neighborhood, the retaliators located him

248. Lewis, supra note 116, at 109 (quoting Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982)).

249. See, e.g., id. at 112 (“The nexus between community notification and the increased risk of vigilantism is sufficiently close to violate substantive due process.”); id. at 106 (“Violence directed against sex offenders has not been isolated to a few incidents.”). Additionally, as one commentator maintained:

The most significant practical problem associated with community notification is the enormous potential it creates for vigilantism. Supporters of community notification insist that vigilantism is rare and that most communities react calmly to word that a sex offender has moved into the neighborhood. But how are we to measure what level of violence or mob rule is tolerable for a system with no proven effectiveness? Is even a single incident of community justice, even if no one is killed, an acceptable level? If so, it seems unlikely that vigilantism will stop with an isolated incident.

Rafshoon, supra note 110, at 1673.

250. Van Duyn, supra note 17, at 657.


and continued their abuse.\textsuperscript{254} The Wisconsin Supreme Court has recognized that "sex offenders have suffered adverse consequences, including vandalism, loss of employment, and community harassment."\textsuperscript{255}

Unlike other states, however, Wisconsin does not disseminate the offenders’ home addresses and employment information on its sex offender notification website.\textsuperscript{256} The state’s protection of this information may militate against the conclusion that Wisconsin fails to adequately protect offenders’ security upon their release from confinement. However, any member of the general public can obtain this personal information on request,\textsuperscript{257} thereby increasing the likelihood that these offenders will be harassed. Additionally, the offender’s name, photograph, and zip code are included on the website, and his home address could be obtained in many cases simply by looking up his name in a telephone directory or on the Internet. Lastly, Special Bulletin Notification offenders are subject to active notification procedures, including door-to-door notification and community meetings,\textsuperscript{258} and obviously, this form of notification does not serve to protect these offenders. Thus, although Wisconsin does not include the offender’s home address and employment information on its website, the fact that this information is readily available does not sufficiently serve to protect registered offenders from harassment and vigilantism.

The most apparent explicit measure the Wisconsin legislature has employed to combat acts of vigilantism against sex offenders is evident on its sex offender notification website. On this website, the following disclaimer appears:

\begin{quote}
It is not the intent of the Legislature that this information be used to injure, harass, or commit a criminal act against persons named in the registry, their families, or employers. Anyone who takes any criminal action against these registrants, including vandalism of property, verbal or written threats of harm or physical assault against these registrants, their families or employers is subject to criminal prosecution.\textsuperscript{259}
\end{quote}

\textsuperscript{254} Interview with Ronald P. Blair, \textit{supra} note 49.

\textsuperscript{255} \textit{State v. Bollig}, 2000 WI 6, ¶ 26, 605 N.W.2d 199, 205 (Wis. 2000).

\textsuperscript{256} \textit{See generally} Wisconsin Department of Corrections, Sex Offender Registry, at http://offender.doc.state.wi.us/public/proginfo/communitynotification.jsp.

\textsuperscript{257} \textit{See supra} Part II.B.2.

\textsuperscript{258} \textit{See supra} Part II.B.2.

\textsuperscript{259} Wisconsin Department of Corrections, Sex Offender Registry, at http://offender.doc.state.wi.us/public/disclaimer.jsp.
For one, surely this disclaimer will not deter an individual from committing an act of violence against an offender if that individual truly desires to do so. Moreover, the argument may be made that this disclaimer illustrates that the state is aware of the fact that "vigilantes are likely to use that information to locate and to harm those particular individuals."\(^{260}\) On the other hand, some may argue that it is precisely because the state discourages vigilantism against offenders that it cannot be held responsible for any inflicted harm. This argument is devoid of merit, as "state intent carries no weight in substantive due process analysis; it is the actual effect of the laws on individual rights that is balanced against their furtherance of state interests."\(^{261}\)

Thus, because Wisconsin does little to protect offenders from vigilantism despite making their information readily available to the public, Wisconsin’s laws likely violate convicted sex offenders’ substantive due process rights.

VI. CONCLUSION

On one hand, sex crimes are heinous, inherently harmful, and highly intrusive crimes. On the other hand, sex offender registration and notification laws severely infringe on registered sex offenders’ privacy rights, endanger these individuals’ personal security, and likely hinder employment opportunities for these individuals. The societal response to sex offenses must be severe; however, this response must remain within the bounds of constitutionality mandated by the United States Constitution.

Wisconsin’s sex offender notification scheme does not fall within these bounds. The Wisconsin legislature has unconstitutionally infringed upon convicted sex offenders’ substantive due process liberty interests, and because of the severity of the infringement, these laws would not survive strict scrutiny review. The United States Supreme Court explicitly left open the possibility that notification schemes deprive registered offenders of substantive due process, and Wisconsin’s scheme is not sufficiently tailored to fall outside this realm of potential unconstitutionality. Thus, for Wisconsin’s scheme to be constitutional, the legislature must amend these laws to cause a lesser dissemination of the offenders’ private information to the public.

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\(^{260}\) Lewis, supra note 116, at 109. One commentator believes that the state “provide[s] vigilantes with the means of locating their victims.” Id. at 110-11.

\(^{261}\) Id. at 111.