

# The Specter of Sex Offenders on Halloween: Unmasking Cultural, Constitutional, and Criminological Concerns

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## I. INTRODUCTION

There can be no doubt that some sex offenders are dangerous.<sup>1</sup> However, stories greatly impact the ways in which we perceive reality. Whether or not

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we are aware of the circumstances, television, the print media, and even urban legends shape the problems we identify, the importance we ascribe to those problems, and the potential solutions we formulate to battle them. The autumn of 2008 saw a meeting of two spheres of society prone to skewed societal perceptions: Halloween and sex offenders. Over the past few years, the media has reported heightened measures taken by law enforcement officials to protect trick-or-treaters from attacks by sexual predators.<sup>2</sup> In 2005, Westchester County, New York, officials required “high-risk” sex offenders to attend programs during trick-or-treat times, reasoning that Halloween presents “a unique situation where children are literally showing up at the doors of sex offenders.”<sup>3</sup>

In 2008, controversy erupted around a Missouri statute that restricts the ability of sex offenders to leave their homes on the evening of Halloween.<sup>4</sup> Four Missourians, all registered sex offenders and all parents,<sup>5</sup> filed suit against the state, alleging that the statute was too vague to comport with the Due Process Clause of the Fourteenth Amendment.<sup>6</sup> The United States District Court for the Eastern District of Missouri found parts of the statute unconstitutionally vague.<sup>7</sup> Later, the United States Court of Appeals for the

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<sup>1</sup> The Supreme Court has acknowledged that “[s]ex offenders are a serious threat in this Nation.” *McKune v. Lile*, 536 U.S. 24, 32 (2002).

<sup>2</sup> *E.g.*, Rogene Fisher, *Communities Plan Halloween Crackdowns on Sex Offenders*, ABC NEWS ONLINE, Oct. 27, 2005, <http://abcnews.go.com/GMA/story?id=1253920> (reporting on the “growing concern that children could unwittingly be seeking treats from sex offenders living in the neighborhood.”).

<sup>3</sup> Anahad O’Connor, *Sex Offenders See New Limits for Halloween*, N.Y. TIMES, Oct. 26, 2005, at B1.

<sup>4</sup> Catrin Einhorn, *Judge Blocks Rules Limiting Sex Offenders on Halloween*, N.Y. TIMES, Oct. 28, 2008, at A12 (“A federal judge in Missouri . . . temporarily blocked parts of a new state law that requires sexual offenders to remain in their homes on Halloween evening and to avoid any contact with children related to the holiday.”).

<sup>5</sup> Complaint at 2, *Doe v. Nixon*, No. 4:08-cv-1518 (E.D. Mo. 2008).

<sup>6</sup> *Id.* at 8 (“Plaintiffs and other persons of reasonable intelligence do not have an understanding of several terms in the statutes, including what constitutes ‘avoid,’ ‘Halloween-related contact’ or ‘just cause,’ within the context of the challenged statute.”). The complaint also alleged violations of the Ex Post Facto Clause, violations of substantive due process, and violations of the Missouri Constitution. *Id.* at 9–15.

<sup>7</sup> *Doe v. Nixon*, No. 4:08-CV-1518 (E.D. Mo. Oct. 27, 2008) (order granting preliminary injunction in part, denying in part), *available at* <http://www.moed.uscourts.gov/10702505082.pdf>. Based only on unconstitutional vagueness, Judge Carol E. Jackson enjoined the enforcement of provisions addressing certain “Halloween-related” activities and those regulating when a sex offender could leave his home for “just cause.” *Id.* at 2. The injunction did not cover provisions mandating that offenders put signs on their doors and turn off outside lights during trick-or-treat hours. *Id.*

Eighth Circuit issued a stay on the district court's order, rendering the entire Missouri statute enforceable.<sup>8</sup>

Statutes like the one in Missouri send a strong message, but do they make sense? At first glance, they appear to make people feel safer and they give legislators accomplishments that they can describe to their constituents. However, they also impose restrictions that may not actually have an impact on crime prevention. Despite a desire to restrict what sex offenders can do, research has uncovered only one incident of a person who victimized a child during the course of trick-or-treating.<sup>9</sup>

This year, Halloween restrictions on sex offenders have not only created controversy in the courtroom, but they have even created a stir on late night television. On NBC's *Saturday Night Live*, Maryland's restrictions became the subject of mockery.<sup>10</sup> Even if this year's round of sex offender restrictions are legally permissible, this treatment by *Saturday Night Live* seems to beg us to ask whether the restrictions imposed will make any difference or whether they are truly as irrational as "Weekend Update" seems to believe.

Rules regulating sex offenders on Halloween represent only one of many types of restrictions that may be placed on such individuals;<sup>11</sup> however, as of yet, this growing set of restrictions has not been explored much beyond the pages of newspapers and in other mainstream media. This Note seeks to

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<sup>8</sup> *Missouri: Judges Uphold Curfew for Sex Offenders*, N.Y. TIMES, Oct. 31, 2008, at A16. In January 2010, the Supreme Court of Missouri decided that retroactive application of the law violated Article I, section 13 of the Missouri Constitution, but did not address ex post facto, equal protection or due process concerns. See *Missouri v. Raynor*, No. SC90164, slip op. at 17 (Mo. Jan. 12, 2010).

<sup>9</sup> Scott Henson, *Annual Halloween Scare Tactic on Sex Offenders Doesn't Improve Public Safety*, GRITS FOR BREAKFAST BLOG, Oct. 31, 2007, <http://gritsforbreakfast.blogspot.com/2007/10/annual-halloween-scare-tactic-on-sex.html>. The "Halloween Killer," Gerald Turner, sexually assaulted and killed a nine-year-old girl while she was trick-or-treating. Turner, however, had never been accused or convicted of a prior sex offense. See Meg Jones, *Turner Headed Back to Prison*, MILWAUKEE J. SENTINEL, Apr. 2, 2003, at B1.

<sup>10</sup> During the "Weekend Update" segment of the program, comedian Seth Meyers joked: "Sex offenders in Maryland are now required to post signs on their doors that read: 'No candy at this residence,' on Halloween or face a possible parole violation. They are also being required to take down the signs that read: 'Knock if you can keep a special secret.'" *Saturday Night Live* (NBC television broadcast Oct. 18, 2008), transcript available at <http://snltranscripts.jt.org/08/08eupdate.phtml>.

<sup>11</sup> Over the past decades, Americans have become more familiar with longer jail sentences, more stringent monitoring, increased notification requirements, and residency requirements. For a discussion of these issues, see generally JOHN Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETIES SHOULD COPE WITH SEX OFFENDERS 3–14 (2005).

explore these relatively new restrictions, to place them in the context of broader sex offender restrictions, and to attempt to provide some guidance for future action with regard to these restrictions.

Part II of this Note looks at fear of sex offenders and fear of Halloween from historical and social science perspectives. Beginning around 1990, and in response to highly publicized, gruesome crimes against children, state governments began to enact increasingly tough penalties and restrictions on sex offenders.<sup>12</sup> In 2005, Illinois enacted the first codified Halloween restriction to impact sex offenders.<sup>13</sup> While the 2005 enactment does not seem to have been spurred by any horrific sex crime against a child, general Halloween-related fears may have contributed to the statute. Part II of this Note also looks briefly into fears about Halloween, myths that have grown surrounding the day, and even how irrational fears prompted one state to pass a law regulating razor blades in Halloween apples. Part II concludes that there are reasons to be circumspect about the extra-strict regulation of sex offenders on Halloween. These restrictions lie at the nexus of two areas in which many people's fears may be irrational.

Part III of this Note investigates the current scheme of sex offender regulations pertaining to Halloween. Three states currently have legislated the restrictions they place on sex offenders: Illinois, Louisiana, and Missouri. While the Illinois statute only affects sex offenders on parole or on conditional release, the Louisiana and Missouri statutes impact a larger portion of registered sex offenders. In addition to the three state laws in place, many other government entities, from local law enforcement to state parole offices, have implemented restrictions that affect parolees.

Part IV of this Note discusses the logic behind having such laws and will attempt to look at several potential constitutional difficulties behind the statutes. Finally, Part IV of this Note will address the futures of these laws. First, it will suggest a means of attacking laws through state constitutional provisions. Second, it will suggest means by which the current laws, and any future laws, could be less oppressive and more effective, using as a model Minnesota's scheme for sex offender registration and notification.

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<sup>12</sup> See *infra* Part III.A, discussing the range of state statutory and executive branch restrictions placed on what sex offenders can and cannot do on Halloween and on other holidays that involve contact with minor children.

<sup>13</sup> See 730 ILL. COMP. STAT. 5/5-6-3(a)(10) (2008), discussed *infra* Part III.A. These restrictions were enacted as part of former Governor Rod Blagojevich's "Sex Offender Initiative," which incorporated special supervision units to "highly supervise sex offenders." Press Release, Ill. Dep't of Corr., Illinois Dep't of Corrections to Increase Monitoring of Paroled Sex Offenders on Halloween (Oct. 27, 2006), <http://www.illinois.gov/PressReleases/ShowPressRelease.cfm?RecNum=5463&SubjectID=3>.

## II. AT THE INTERSECTION OF TWO FEARS: HISTORICAL AND SOCIAL SCIENCE PERSPECTIVES ON OUR FEARS OF SEX OFFENDERS AND HALLOWEEN

Sociologist Barry Glassner hypothesizes that Americans fear the wrong things because others can reap profits from those fears, both in terms of money and power.<sup>14</sup> We also fear particular risks, real or not, because of media attention and because certain risks provide outlets for our moral outrage.<sup>15</sup> Fear surrounding the dangers of sexual predators have been overstated, Glassman contends, due to “incessant” mention by the media, politicians, and social advocates.<sup>16</sup>

In general, violent crime figures prominently in the news media—especially in local television news.<sup>17</sup> Professors Franklin Gilliam, Jr. and Shanto Iyengar note that, for local news reporting, crime accounts for the majority of coverage—sometimes as much as 75% of news coverage.<sup>18</sup> In the struggle for ratings, news stations have adopted the “action news” format of reporting on crime; newscasters create familiar stories involving “a regular ‘cast’ of characters.”<sup>19</sup> Through these characters, Gilliam and Iyengar argue that we develop assumptions about certain types of people and certain types of crimes.

However, to acknowledge only the media to explain our fears of sex offenders would oversimplify reality. Glassner posits that extreme fears are projections<sup>20</sup> of guilt that parents experience with regard to their children

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<sup>14</sup> BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* xxviii (1999) (“[I]mmense power and money await those who tap into our moral insecurities and supply us with symbolic substitutes.”).

<sup>15</sup> *Id.* at xxvi.

<sup>16</sup> *Id.* at 53.

<sup>17</sup> Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 560 (2000). Professor David Singleton notes the prominence of violent crime reporting in the national media. Between 1990 and 1998, the crime rate in America decreased by 20%, but coverage of crimes increased by 83% and coverage of homicides increased by 473%. David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 602–03 (2006).

<sup>18</sup> Gilliam, Jr. & Iyengar, *supra* note 17, at 560.

<sup>19</sup> *Id.* These characters include suspects in robberies, murders, and rapes, as well as their victims and members of law enforcement.

<sup>20</sup> Projection, one of the classic Freudian defense mechanisms, is thought to develop as a means to reduce anxiety. A person “projects” his internal anxiety-producing beliefs onto a third party. One manifestation of protection is hypervigilance to external threats. See Jack Novick & Anne Hurry, *Projection and Externalisation*, 3 J. CHILD

onto third parties, such as pedophiles, murderers, and other monstrous individuals.<sup>21</sup> Through the media, our own psychology, and through the opportunism of others, our fears can become exacerbated to the point of irrationality.

*A. Fear of Sex Offenders: The Media and Development of Sex Offender Laws*

Media attention has figured heavily into the way Americans perceive sex offenders, and a number of researchers chronicle the rare, but gruesome, stories of sexual victimization that have been broadcast to the public.<sup>22</sup> For instance, while imprisoned, sex offender Earl Shriver informed fellow prisoners that he would victimize more children after his prison term ended.<sup>23</sup> After failed attempts to commit Shriver, authorities in the state of Washington released him.<sup>24</sup> When he raped and killed a six-year-old boy, the State of Washington faced immense pressure to act, and the resulting legislation “included much longer prison sentences, a novel civil

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PSYCHOTHERAPY 5, 5 (1969), *in* KEY PAPERS FROM THE JOURNAL OF CHILD PSYCHOTHERAPY 25 (Paul S. Barrows, ed., 2004). One scholar has argued that, “[b]y framing sex offenders as monsters, we not only dehumanize them, we also hide from our own anxieties about deviant sexual conduct and undermine rational strategies for addressing such conduct and the damage it causes.” John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 39 (2008).

<sup>21</sup> GLASSNER, *supra* note 14, at xxvii.

<sup>22</sup> Sexual victimization appears in the news, but why does it lead to fear that may be out of proportion with reality? Singleton notes two biases recognized by social psychologists that allow news viewers to create mountains out of proverbial mole hills. First, the vividness bias describes the tendency to recall facts and events that are particularly vivid. *See* Singleton, *supra* note 17, at 603–04. Because the media picks stories that emphasize the personal and the emotional, we create assumptions about the prevalence of those emotionally charged occurrences. *Id.* Second, the availability bias reflects a person’s tendency to associate significance and frequency with facts and events that he can recall most easily. *Id.* Together, people use these psychological shortcuts and fail to realize that their conclusions are not based on solid information.

In addition to these biases, people develop psychological scripts when they experience sequences of events. Gilliam, Jr. & Iyengar, *supra* note 17, at 561. Gilliam and Iyengar studied the development of scripts through exposure to local news reports from Los Angeles, and they identified a particular three-step news sequence that can form a script. *Id.* The study found that portrayals by the media correlated with scripts biased toward minorities, even though biases did not correspond with reality. *Id.* at 571. While that study did not focus on sex offenders in particular, one might hypothesize that the viewing public could develop scripts based on portrayals of gruesome sex offenses by repeat offenders. Perhaps future studies will shed light on this question.

<sup>23</sup> LAFOND, *supra* note 11, at 5.

<sup>24</sup> *Id.*

commitment law for sexually violent predators, mandatory registration for virtually all sex offenders, and community notification laws.”<sup>25</sup> In fact, the media attention surrounding the Washington attack and a similar attack in Minnesota in 1989 have been credited with energizing the movement to use social control mechanisms to prevent recidivism.<sup>26</sup>

In 1993, another horrific crime received heightened media attention. Polly Klaas, a girl from Petaluma, California, was abducted from a sleepover party at her house.<sup>27</sup> After the twelve-year-old’s abduction, Winona Ryder, from Petaluma, offered a \$200,000 reward, and Klaas’s parents were featured on several national television programs.<sup>28</sup> The *New York Times* reported that volunteers lent their support “because they [were] parents and [could] no longer pretend things [were] normal in what they believed was a safe community . . . .”<sup>29</sup> In the end, a man who had formerly been imprisoned for child molestation was convicted of Klaas’s murder and sentenced to death.<sup>30</sup> Widely publicized by the media, Klaas’s abduction and murder figured prominently in California’s “three strikes” law.<sup>31</sup>

Other horrendous crimes have led to the swift passage of tough legislation. Megan Kanka’s rape and murder by a paroled sex offender sparked efforts to pass sex offender registration and notification laws in Megan’s home state of New Jersey.<sup>32</sup> In 2002, Danielle van Dam was raped

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<sup>25</sup> *Id.* at 7; see also MICHELLE L. MELOY, *SEX OFFENSES AND THE MEN WHO COMMIT THEM* 5 (2006) (“The public was outraged that prior to his release from prison the assailant spoke of his continuing fantasies to kidnap, rape, and murder children.”). Washington implemented the first sexually violent predator acts in the country. See WASH. REV. CODE § 71.09.010 (2008). Today, nineteen states and the District of Columbia have some sort of sexually violent predator act. Douard, *supra* note 20, at 46.

<sup>26</sup> Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 61 (2008). The movement to register sex offenders began in the United States in the 1930s in Florida and California, and the first wide-scale registry went into effect in 1947. They remained rare until the 1990s when widespread knowledge of gruesome assaults, like that by Earl Shriener, prompted changes in state law. *Id.* While these cases are rare, lawmakers feel compelled to show the public that they are responding to horrific stories.

<sup>27</sup> *Kidnapping Summons City to Action*, N.Y. TIMES, Oct. 15, 1993, at A24.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> MELOY, *supra* note 25, at 5–6.

<sup>31</sup> Jane Gross, *Drive to Keep Repeat Felons in Prison Gains in California*, N.Y. TIMES, Dec. 26, 1993, at A1.

<sup>32</sup> MELOY, *supra* note 25, at 6. Legislative findings conclude that “[t]he danger of recidivism posed by sex offenders . . . require[s] a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.” N.J. STAT. ANN. § 2C:7-1(a) (West 2008). Registrations must include identifying

and murdered in California.<sup>33</sup> Weeks of media attention prompted members of the public to call for more stringent community notification standards for released sex offenders.<sup>34</sup> The 2005 murder of Jessica Lunsford by a released rapist prompted media attention and the passage of Florida's Jessica Lunsford Act.<sup>35</sup> The media continues to publicize the crimes against Jessica Lunsford and other similarly victimized children.<sup>36</sup>

For instance, entire television shows have stemmed from crimes against children: John Walsh of *America's Most Wanted* has proclaimed that the United States is "littered with mutilated, decapitated, raped, strangled children."<sup>37</sup> Research suggests that three-quarters of parents in America worry about their child being abducted by a stranger; however, other research suggests that most missing children have runaway from their parents and that only about 0.001% of American children are taken by members outside their family.<sup>38</sup> In addition, only about 7% of child sexual assaults are committed by strangers.<sup>39</sup> Among victims under age six, 97% of perpetrators were members of the victims' families or acquaintances.<sup>40</sup>

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information, address, place of employment, the date and place of every conviction, fingerprints, a description of any crimes for which registration is required, and any other information deemed necessary. N.J. STAT. ANN. § 2C:7-4(b) (West 2008). The law also provides for notifications that depend on the offender's risk of recidivism. *Id.* § 2C:7-8(a).

<sup>33</sup> MELOY, *supra* note 25, at 6.

<sup>34</sup> *Id.*

<sup>35</sup> "[L]ewd or lascivious molestation against a victim less than 12 years of age" constitutes a felony punishable in Florida by life in prison. FLA. STAT. § 800.04(5)(b) (2008). Electronic monitoring is mandatory for any releasee whose victim was age fifteen or under at the time of the offense. *Id.* § 947.1405(10).

<sup>36</sup> Radio and FoxNews personality Bill O'Reilly campaigns for the passage of "Jessica Lunsford Acts" throughout the nation. *See* Bill O'Reilly, *Bill O'Reilly: Jessica's Law*, <http://www.billoreilly.com/outragefunnels>. O'Reilly claims that "[m]any states don't protect children from sexual predators" and highlights children victimized by sex offenders who received "soft sentences." *Id.* He maintains that "there is simply no question that Jessica's Law will save lives" and displays a graphic of "states heading in the wrong direction," "states heading in the right direction," and states that have passed a "partial Jessica's Law." *Id.*

<sup>37</sup> GLASSNER, *supra* note 14, at 62.

<sup>38</sup> *Id.* at 61.

<sup>39</sup> MELOY, *supra* note 25, at 5.

<sup>40</sup> *Id.* at 10.



### B. *Our Fear of Halloween*

The original pagan celebrators of Halloween, or Samhain, would barely recognize Halloween as it is now celebrated throughout North America.<sup>41</sup> Our current celebrations of Halloween began to take shape at the end of the nineteenth and the beginning of the twentieth centuries at a time when youths felt free to engage in mischief.<sup>42</sup> While some initial attempts at restraining activities during Halloween were condemned for being overzealous, law enforcement officers stepped up patrol of youth activities during the first decades of the twentieth century.<sup>43</sup> Simultaneously, alternative, non-threatening festivities began to take form.<sup>44</sup> Trick-or-treating, introduced in North America in about 1939, introduced new measures for making Halloween safe.<sup>45</sup>

One common Halloween fear involves poison candy and the “razor in the apple” urban legend.<sup>46</sup> Beginning in the 1960s, a number of stories about treat bags filled with poison and lye surfaced, although at least one of the cases turned out not to be malicious.<sup>47</sup> Also in the 1960s, the media reported a rash of incidences of booby-trapped apples in the United States and Canada.<sup>48</sup> According to historians, the New Jersey legislature even became involved.<sup>49</sup> These rumors became widespread and probably were aided by

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<sup>41</sup> Samhain marked the end of summer and the beginning of the Celtic New Year. It involved prayers for the harvest and prayers for the dead, a time when the Druids thought that “the boundaries between the living and the supernatural were erased.” Nicholas Rogers, *Halloween in Urban North America: Liminality and Hyperreality*, 29 SOC. HIST. 461, 463 (1996). The Christians adopted Samhain, but All Hallows Eve retained its pagan nature. *Id.* Celebrators continued to practice rituals associated with spirits, omens, and magic, and masks and disguises figured into the festivities. *Id.* at 463–64.

<sup>42</sup> *Id.* at 467.

<sup>43</sup> *Id.* at 469.

<sup>44</sup> Rogers, *supra* note 41, at 469. “Church groups, high schools, and rotary clubs all strove to sponsor Halloween parties and dances featuring costume contests and games.” *Id.* They were designed “to wean youth from their revelrous vandalism . . .” *Id.*

<sup>45</sup> *Id.* at 470.

<sup>46</sup> Bill Ellis, “Safe” Spooks: *New Halloween Traditions in Response to Sadism Legends*, in HALLOWEEN AND OTHER FESTIVALS OF DEATH AND LIFE 24, 25 (Jack Santino ed., 1994).

<sup>47</sup> *Id.* Other poison candy stories may have been fabricated by families attempting to hide poisonings actually perpetrated by family members. *Id.* at 27.

<sup>48</sup> *Id.* at 26.

<sup>49</sup> *Id.* (“Outrage was so strong in New Jersey that the state legislature passed a law shortly before Halloween 1968 mandating prison terms for those caught booby-trapping apples.”).

scary movies linked to Halloween during the 1970s.<sup>50</sup> While most of the reported incidents turned out to be hoaxes, “there were enough reports of adulterated gifts to make parents nervous about taking their children to trick-or-treat.”<sup>51</sup>

Perhaps even more disturbing are fears that developed about satanic cults. Beginning in the 1970s with rumors of “cattle mutilations” throughout Middle America, fears developed that worshipers of Satan gathered on Halloween to sacrifice humans.<sup>52</sup> Professor Bill Ellis notes that law officers even became involved in the hysteria about satanic cults.<sup>53</sup> Despite all of the panic, no reliable evidence has ever corroborated a story of a satanic cult acting on Halloween.<sup>54</sup>

Given the media attention and hype surrounding both gruesome sex offenses and around Halloween, it is hardly surprising that state legislatures and executive offices have begun to place restrictions on sex offenders during Halloween. However, these same circumstances should force us to be circumspect when we examine these restrictions. Part III of this Note seeks, for the first time, to summarize the Halloween-related sex offender restrictions that have developed during the first years of the twenty-first century.

### III. THE CURRENT ARRAY OF HALLOWEEN-RELATED SEX OFFENDER RESTRICTIONS

In the past few years, two main types of Halloween restrictions have appeared. First, three states have actually passed laws that specify restrictions to be imposed on released sex offenders.<sup>55</sup> Second, many more states and local jurisdictions have enforced Halloween restrictions on offenders on parole and on supervised release programs.<sup>56</sup> This section will attempt to give an overview of both of these categories of restrictions.

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<sup>50</sup> Rogers, *supra* note 41, at 471.

<sup>51</sup> *Id.* Candy companies even became involved to assuage the public. They asked hospitals to use their x-ray technologies to examine candy and spent hundreds of thousands of dollars on media campaigns. *Id.*

<sup>52</sup> Ellis, *supra* note 46, at 27.

<sup>53</sup> One officer in Missouri warned that a cult would attempt to murder a thirteen-year-old girl on Halloween, and a 1990 rumor reported that a cult would attempt to snatch as many as 100 children around Bloomington, Indiana. *Id.* at 28.

<sup>54</sup> *Id.*

<sup>55</sup> See *infra* Part III.A.

<sup>56</sup> See *infra* Part III.B.

### A. State Laws Targeting Sex Offenders on Halloween

Several states—Missouri, Louisiana, and Illinois—have statutes on the books regarding the activities of convicted, paroled, or conditionally released sex offenders during Halloween, and some have passed laws dealing with other allegedly high risk periods for sex offenders. Missouri’s law, in effect since August 28, 2008, is the most recent.<sup>57</sup> Missouri makes it a misdemeanor offense, for any sex offender who must register under state law, to violate curfew and other requirements.<sup>58</sup> The Halloween provisions were part of a larger bill that strengthened sex offender laws, a measure sponsored by Missouri State Senator John Loudon.<sup>59</sup> According to Senator Loudon, he “want[s] to keep Missouri as one of the safest places for kids to live and one of the worst places for sexual offenders to reside in or visit.”<sup>60</sup>

Louisiana, like Missouri, places restrictions on the Halloween activities of certain sex offenders. The law, new in 2008, applies to any person convicted of a sex offense or who pleads guilty to a sex offense.<sup>61</sup> One

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<sup>57</sup> Press Release, Mo. State Highway Patrol, Expanded Missouri Sex Offender Law (July 28, 2008), <http://www.msdp.dps.missouri.gov/MSHPWeb/Root/SexOffenderLawInjunctionArticle2.html>; MO. REV. STAT. § 589.426 (2008).

<sup>58</sup> MO. REV. STAT. § 589.426 (2008). The statute requires registered sex offenders—on October thirty-first of each year to:

- (1) Avoid all Halloween-related contact with children;
- (2) Remain inside his or her residence between the hours of 5 p.m. and 10:30 p.m. unless required to be elsewhere for just cause, including . . . employment or medical emergencies;
- (3) Post a sign at his or her residence stating, “No candy or treats at this residence”; and
- (4) Leave all outside residential lighting off during the evening hours after 5 p.m.

*Id.*

<sup>59</sup> See Press Release, Office of Sen. John Loudon, Sen. Loudon’s Child-Protection Bill Advances with House Committee Endorsement (Apr. 23, 2008), <http://www.senate.mo.gov/08info/members/newsreel/d07/042308.pdf>.

<sup>60</sup> *Id.* In response to the lawsuit brought by the ACLU and four offenders affected by the law, Senator Loudon responded that he thought it “kind of silly that people are raising the constitutional right of people to hand out candy on Halloween.” Robert Patrick, *Sex Offenders Sue over Halloween Restrictions*, ST. LOUIS POST-DISPATCH, Oct. 8, 2008, at A12. Despite this statement, Loudon did not consider the restriction to impose any punishment. *See id.*

<sup>61</sup> LA. REV. STAT. ANN. § 14:313(E), 14:313.1 (2008).

section of the new law covers disguises, hoods, and masks.<sup>62</sup> A second portion of the new law covers the distribution of candy and gifts.<sup>63</sup> The Louisiana law, unlike the Missouri law, does not give any indication of the period over which sex offenders must abide by the law. Presumably, anyone who has been convicted of or who has pleaded guilty to a sex offense in Louisiana must refrain from Halloween activities involving disguises and minors indefinitely.

Nick Gautreaux, a state senator from Louisiana and one of the sponsors of Senate Bill 143 (later enacted and codified at Section 14:313), stated in a press release that the bill, as well as a contemporaneous bill on chemical castration constituted “[s]erious punishments . . . [that] might make those who wish to harm our children think twice before they act.”<sup>64</sup>

Illinois, like Missouri and Louisiana, has chosen to regulate the Halloween activities of sex offenders through state statutes. Illinois House Bill 121 went into effect in July 2005<sup>65</sup> and covers only sex offenders on parole or on conditional release.<sup>66</sup> In this manner, the Illinois requirements lack the indefinite nature of the Louisiana requirements enacted in 2008. However, like the Louisiana enactment, the Illinois bill seeks to cover more than only Halloween activities, extending to Christmas and Easter celebrations. One supporter of the bill, Representative Robin Kelly stated that this measure “ensures” children’s safety, and she remarked that

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<sup>62</sup> *Id.* § 14:313(E) (preventing convicted sex offenders from “using or wearing a hood, mask or disguise of any kind with the intent to hide, conceal or disguise his identity on or concerning Halloween . . .”).

<sup>63</sup> The statute makes it illegal:

for any person convicted of or who pleads guilty to a sex offense specified in R.S 24:932 to distribute candy or other gifts to persons under eighteen years of age on or concerning Halloween, Mardi Gras, Easter, Christmas, or any other recognized holiday for which generally candy is distributed or other gifts given to persons under eighteen years of age. Whoever violates the provisions of this Section shall be sentenced to a term of imprisonment of not less than [sic] six months nor more than three years.

LA. REV. STAT. ANN. § 14:313.1 (2008).

<sup>64</sup> Press Release, La. State Sen., State Senator Nick Gautreaux Continues Fight to Protect Children (Apr. 10, 2008), <http://senate.legis.state.la.us/gautreaux/releases/2008/04-10-2008.htm>.

<sup>65</sup> Press Release, Ill. Dep’t of Corr., *supra* note 13.

<sup>66</sup> 730 ILL. COMP. STAT. 5/5-6-3(a)(10) (2008). A paroled or conditionally released sex offender, unless the person is the caretaker of a minor child “[may] not participate in a holiday event involving children under 18 years of age, such as distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, being employed as a department store Santa Claus, or wearing an Easter Bunny costume on or preceding Easter.” *Id.*

“[p]rotecting children is one of [her] top legislative priorities and it is something [that she] take[s] seriously.”<sup>67</sup>

Because the sample size of states that have codified their Halloween restrictions on sex offenders is so small, it is impossible at this time to look for any diverging or converging trends. However, each of the three states discussed above provides a slightly different approach that other states might take in the future. These variations include the duration of restrictions on a released offender, whether restrictions affect only parolees, and whether those affected must take affirmative steps on Halloween, such as hanging signs to signal that there is no candy at the offender’s home. Finally, the statutes suggest that, in the future, statutes might target a broader array of holidays, rather than just Halloween.

### B. *Non-Codified Restrictions on Sex Offenders*

While only Missouri, Louisiana, and Illinois have codified Halloween restrictions on sex offenders, many other states and smaller entities place similar restrictions on sex offenders. Doing a complete survey of these “off the books” restrictions would be nearly impossible; furthermore, such a survey would be far beyond the scope of this student Note.<sup>68</sup> However, a snapshot of various restrictions should help to complete the picture of restrictions sex offenders face around the country.

In California, the State Department of Corrections and Rehabilitation has implemented “Operation Boo” throughout the state’s four parole regions.<sup>69</sup> In addition to restrictions keeping parolees indoors, the state works with local law enforcement to monitor compliance.<sup>70</sup> According to Tom Hoffman, California’s director of parole, the “objective is to ensure kids are free to

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<sup>67</sup> Press Release, Office of State Representative Robin Kelly, Kelly Tightens Restrictions on Sex Offenders (July 12, 2005), <http://www.housedem.state.il.us/members/kellyr/Press/071205-SexOffenders.htm>.

<sup>68</sup> Even chronicling local ordinances that are officially on the books would be quite a feat!

<sup>69</sup> Press Release, Cal. Dep’t of Corr. & Rehab., CDCR Parole to Conduct Random Sex Offender Checks During “Operation Boo” on Halloween Night (Oct. 30, 2008), [http://www.cdcr.ca.gov/News/2008\\_Press\\_Releases/Oct\\_30.html](http://www.cdcr.ca.gov/News/2008_Press_Releases/Oct_30.html). The “special conditions” of parole in California include remaining indoors from 5 p.m. on October 31 to 5 a.m. on November 1, turning off any outside lights, not offering candy, and only opening doors in response to law enforcement officers. *Id.*

<sup>70</sup> Cynthia Dizikes, *No Halloween for Maryland’s Sex Offenders*, L.A. TIMES, Oct. 31, 2008, at A8.

have fun without added worries about potential predators and that communities are safe from potential contacts with sex offenders.”<sup>71</sup>

The District of Columbia, which in 2008 implemented special procedures for sex offenders for the fourth year, has a collaborative program involving the Metropolitan Police Department and the Court Services and Offender Supervision Agency.<sup>72</sup> The joint patrol sent thirteen teams on Halloween to make random checks at the residences of child sex offenders released on supervision—a total of 181 of the District’s 584 sex offenders on supervision at the time.<sup>73</sup> Before Halloween, the joint force made face-to-face contact with each of the nearly 200 offenders and each offender signed off on a pledge not to participate in Halloween: no person at a sex offender’s residence could participate in Halloween activities and sex offenders were required to remain at home.<sup>74</sup> The District also paid special attention to the approximately 100 offenders it monitors via global positioning.<sup>75</sup>

The assistant chief of the Metropolitan Police Department, Diane Groomes, explained via the Internet that the purpose of the program is to protect children at a time when their chances of coming across a sex offender are “very high.”<sup>76</sup> During the 2008 measures, about twenty people were not at home during the random checks; however, six of those twenty were found, after investigation, to have been at shelters.<sup>77</sup>

Tennessee, where a statute bans certain sex offenders from dressing in certain costumes with the intent to entice children,<sup>78</sup> has in the past followed a similar approach to California and the District of Columbia. Tennessee’s

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<sup>71</sup> Press Release, Cal. Dep’t of Corr. & Rehab., *supra* note 69.

<sup>72</sup> Press Release, Court Services & Offender Supervision Agency, Halloween Checks of Child Sex Offenders in Washington, D.C. (Oct. 31, 2008), <http://media.csosa.gov/podcast/audio/?p=111> (audio podcast recording). The program covers not only sex offenders out on supervision for sex offense convictions, but also people with past sex offense convictions who are out on supervision for other convictions. *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Press Release, Court Services & Offender Supervision Agency, Capturing a Child Sex Offender/Halloween Sex Offender Follow-Up (Nov. 12, 2008), <http://media.csosa.gov/podcast/audio/?p=115> (audio podcast recording). It is debatable whether the risk of encountering a sex offender is “very high.” In 2008, about 592,000 people lived in the District of Columbia. U.S. Census Bureau, District of Columbia QuickFacts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/states/11000.html>. That means that at any given time, less than one out of every thousand D.C. residents is a sex offender—a statistic that does not change on Halloween.

<sup>78</sup> TENN. CODE ANN. § 40-39-215 (Supp. 2009).

Board of Probation and Parole contacted the sex offenders under its supervision and informed them of their responsibilities during the Halloween season.<sup>79</sup> Unlike the statutes in Missouri, Illinois, and Louisiana, the Tennessee letter provides a long list of specific prohibitions by which paroled sex offenders must abide.<sup>80</sup>

Finally, some government entities participate in Halloween “round-ups” of sex offenders. For instance, since 2005, authorities in McLennan County, Texas, have required sex offenders to remain at the parole office while children trick-or-treat.<sup>81</sup> In Anderson, South Carolina, sex offenders remain at parole offices between 5 p.m. and 10:30 p.m.<sup>82</sup> Elsewhere in Texas, law enforcement officials are attempting to combine detention with other programs. For instance, at the Cameron and Willacy County Adult Probation Sex Offender Unit, sex offenders on parole spent the hours of 5 p.m. to midnight in detention, but they also had “[m]otivational speakers and therapists . . . on hand during the detainment to discuss with sex offenders how to build healthy relationships.”<sup>83</sup>

All of the non-codified differ from codified sex offender restrictions because they reach only sex offenders who are on parole or some other

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<sup>79</sup> Letter from Tenn. Bd. of Prob. & Parole to sex offenders registered in Tennessee, <http://news.tennesseeanytime.org/system/files/2008%20Halloween%20Letter.pdf>.

<sup>80</sup> The restrictions provide:

1. You are not allowed to place any fall or Halloween decorations either inside or outside of your home.
2. Neither you nor anyone in you home is allowed to answer your door to Trick-or-Treaters on Halloween. Your porch lights are to be off, drapes/blinds and front doors closed on Halloween night.
3. You are not allowed to give any Halloween treats or candy to any children. No treats or candy are to be given out by anyone from your registered place of residence and you are not allowed to visit a residence where treats are being handed out.
4. You are not allowed to wear costumes.
5. You are not allowed to go with any child to trick or treat.
6. You are not allowed to have a Halloween party at your home.
7. You are not allowed to go to corn mazes, haunted houses, hayrides or any other seasonal activity.
8. You are not allowed to be at any function where children are gathered, even if it is a private residence.

*Id.*; see also Press Release, Tenn. Bd. of Prob. & Parole, Sex Offenders Put on Notice: No Halloween Activities (Oct. 18, 2007), <http://www.tn.gov/bopp/Press%20Releases/Sex%20Offender%20Activities%20Restricted%20During%20Halloween.pdf>.

<sup>81</sup> Lomi Kriel, *Roundup Targets Sex Offenders*, SAN ANTONIO EXPRESS NEWS, Oct. 23, 2008, at A1.

<sup>82</sup> *Sex Offenders Locked Down, in the Dark for Halloween*, CNN, Oct. 31, 2007, <http://www.cnn.com/2007/US/10/31/halloween.offenders/>.

<sup>83</sup> Gabriel Saldaña, *Sex Offender Roundup Set for Halloween Night*, VALLEY MORNING STAR, Oct. 30, 2008, available at [http://www.valleymorningstar.com/news/sex\\_38014\\_article.html/offenders\\_cameron.html?referrer=digg](http://www.valleymorningstar.com/news/sex_38014_article.html/offenders_cameron.html?referrer=digg).

controlled-release program.<sup>84</sup> It appears that these local agencies exercise a great deal of discretion over parolees in their neighborhoods. This discretion seems to have both positive and negative components. Law enforcement agents must be able to keep track of people not fully out of the state's custody. However, with great flexibility come concerns about ill-informed strategies for keeping the streets safe from sex offenders. The next section of this Note will attempt to introduce a number of legal and practical concerns that might arise over new laws that may restrict sex offenders. The purpose of this analysis is not solely to criticize; rather, it is to help decision makers make more informed choices about future policy considerations.

#### IV. HALLOWEEN SEX OFFENDER RESTRICTIONS: LEGAL AND LOGICAL CONCERNS

As discussed above, sex offender laws have taken a number of forms over the years, including registration requirements, notification requirements, and residency restrictions.<sup>85</sup> Registration requirements are arguably the least onerous on released offenders; offenders simply must submit personal information to law enforcement authorities. Notification requirements are more demanding. Depending on the state, community notification requirements may or may not require disclosure of an individual's status to people who live near him. Finally, residency restrictions are more restrictive. Depending on jurisdiction, these laws may require individuals to live anywhere from 1000 to 3000 feet from a school, daycare center, or park.<sup>86</sup> The Halloween sex offender restrictions add yet another layer to the increasingly complicated array of sex offender restrictions.

This section attempts to look at the legal context in which Halloween-type restrictions lie, with respect to due process and ex post facto concerns. In addition, this section will address possible logical concerns with these new laws. Whom will they protect? Are they worth the cost?

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<sup>84</sup> See *supra* notes 68–82 and accompanying text.

<sup>85</sup> See *supra* Part III.

<sup>86</sup> See, e.g., GA. CODE ANN. § 41-1-15(b) (2008) (prohibiting registered sex offenders from residing within 1,000 feet of any child care facility, church, or school); IOWA CODE § 692A.2A (Supp. 2003) (prohibiting registered sex offenders from residing within 2,000 feet of any elementary school, secondary school, or child care facility).



### A. *Legal Concerns*

While the only known legal challenges to Halloween sex offender restrictions have been in response to Missouri's new regulations,<sup>87</sup> many legal challenges have been brought against restrictions placed on sex offenders. Lawsuits have challenged substantive due process, whether sex offender restrictions are punitive in nature or civil in nature, whether laws violate the Due Process Clause,<sup>88</sup> and whether they violate the Ex Post Facto Clause.<sup>89</sup> This section will lay out some areas of constitutional law that have been used to challenge sex offender laws in the past, and will attempt to look for possible concerns regarding Halloween sex offender restrictions.

#### 1. *Procedural Due Process*

The Fourteenth Amendment to the Constitution mandates that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ." <sup>90</sup> The Court has interpreted procedural protections to come into effect "whenever the State seeks to remove or significantly alter [a] protected status."<sup>91</sup> In order for procedural due process to become an issue, the government must somehow deprive an individual of a "liberty" or a "property" interest.<sup>92</sup> A property interest involves an entitlement.<sup>93</sup> Liberty, like property, has been defined to exceed the scope of physical restraints on a

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<sup>87</sup> See discussion on Missouri's regulations, *supra* notes 57–58 and accompanying text.

<sup>88</sup> U.S. CONST. amend. XIV, § 1 states that:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>89</sup> U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . .").

<sup>90</sup> U.S. CONST. amend. XIV, § 1.

<sup>91</sup> *Paul v. Davis*, 424 U.S. 693, 711 (1976).

<sup>92</sup> See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564, 570–71 (1972) ("[T]o determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property." (internal citation omitted)).

<sup>93</sup> See *id.* at 571–72 (1972). Constitutionally protected property interests do not only involve tangible property; rather property interests "extend well beyond actual ownership of real estate, chattels, or money." *Id.* at 572.

person.<sup>94</sup> Among other things, liberty encompasses the right “to contract, to engage in any of the common occupations of life, to acquire useful knowledge, [and] to marry, establish a home and bring up children . . . .”<sup>95</sup> However, while the Fourteenth Amendment (and the Fifth Amendment for the federal government) require some type of due process, the amendments do not specify what process is due in any particular situation. Rather, as the Court acknowledged in *Mathews v. Eldridge*, “due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances.”<sup>96</sup> In various situations, the *Eldridge* balancing test has led to a broad array of process that is due.<sup>97</sup>

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<sup>94</sup> *Id.* at 572.

<sup>95</sup> *Id.* (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). The Court has refrained from actually defining the concept of “liberty.” See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“Liberty under law extends to the full range of conduct which the individual is free to pursue . . .”). While the range of potential liberty interests is broad, not every personal interest comes within the bounds of a protected liberty interest. See *Paul v. Davis*, 424 U.S. 693, 701 (1976). In *Paul*, respondent claimed that injury to his reputation constituted a liberty interest protected by the Fourteenth Amendment. *Id.* at 694. The Court, however, noted that injury to reputation alone does not amount to an interest sufficient to become constitutionally protected as “liberty” or “property.” *Id.* at 701. This view on injury to personal reputation has implications for sex offender restrictions. This contrasts with Justice Douglas’s earlier opinion in *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). He opined that, “[w]here 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.” *Id.*; see also discussion *infra*.

<sup>96</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). Rather, the court views due process as “flexible” and takes a case-by-case analysis of the variables involved. See *id.* (citation omitted). The *Eldridge* Court set forth three principles that a court should use to consider the amount of process due in a given situation:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 335.

<sup>97</sup> This might range from a full and formal hearing or it might amount to something less. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 224–29 (2005) (informal state procedures for placement of prisoners in supermax prisons are sufficient under *Mathews* test); *Hamdi v. Rumsfeld*, 542 U.S. 507, 528–34 (2004) (United States citizen held as enemy combatant is entitled under *Mathews* test to notice and an opportunity to be heard); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542–48 (1985) (terminated public school employees are entitled to both a pre-termination opportunity to respond and to a post-termination administrative proceeding as provided under state law).

Until the Supreme Court decided the case of *Connecticut Department of Public Safety v. Doe*,<sup>98</sup> it had never considered the due process implications of a sex offender registration. In that case, the Court looked into the permissibility of Connecticut's law on sex offender registration and notification.<sup>99</sup> With Connecticut's version of "Megan's Law," the registration requirements applied to any offenses against minors, violent and nonviolent sexual offenses, and any felonies related to sex.<sup>100</sup> The law also required the state's Department of Public Safety to maintain an online, publicly accessible database of sex offenders.<sup>101</sup> Arguing that he had a liberty interest in his reputation, the sex offender in the case alleged that he had been deprived of that interest without due process because Connecticut listed him on the registry without determining whether he was actually dangerous.<sup>102</sup> The Court relied on its precedent in *Paul v. Davis* and reiterated that injury to reputation by itself is not enough to bring a liberty interest into play.<sup>103</sup>

More important than the existence of the liberty interest was the fact that Connecticut's law did not use any criteria, such as dangerousness, to decide whether a sex offender had to register.<sup>104</sup> Rather, registration under the Connecticut Megan's Law hinged only on a person's conviction of a particular crime.<sup>105</sup> The Court continued:

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<sup>98</sup> 538 U.S. 1 (2003).

<sup>99</sup> *See id.* at 3–4.

<sup>100</sup> *Id.* at 4.

<sup>101</sup> *Id.* at 4–5. The statute requires released sex offenders to give personal information and a photograph to the State's Department of Public Safety. *Id.* at 4. It also requires periodic updates, usually for a period of ten years. *Id.*

<sup>102</sup> *Id.* at 6. The Second Circuit had agreed with the sex offender's argument that he had a liberty interest at stake. *Doe v. Dep't of Pub. Safety*, 271 F.3d 38 (2d Cir. 2001):

The injury that the plaintiff alleges in this case—stigma plus an alteration in his or her state-law duties and status—could not have been inflicted by a private person in a position analogous to that of the state. Only a defendant employing his or her 'power as a *state official*' could impose and enforce the duties inherent in Connecticut's sexual offender registry law and then publish the information obtained by those state-imposed duties.

*Id.* at 57.

<sup>103</sup> *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 6–7 (2003) (citing *Paul v. Davis*, 424 U.S. 693 (1976)). Only Justice Stevens recognized that the case implicated a liberty interest; however, he was able only to define that interest in very nebulous terms. *See* Erin Murphy, *Paradigms of Restraint*, 57 *DUKE L.J.* 1321, 1355 (2008) (quoting *Smith v. Doe*, 538 U.S. 84, 112 (2003) (Stevens, J., dissenting)).

<sup>104</sup> *See Conn. Dep't of Pub. Safety*, 538 U.S. at 7.

<sup>105</sup> *Id.*

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. Unless respondent can show that that *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise.<sup>106</sup>

Eight of the nine Justices agreed that Connecticut was not obliged to provide any process because dangerousness was not “material” to the statutory scheme.<sup>107</sup>

Based on the precedent set by the Court in *Connecticut Department of Public Safety*, there seems to be little chance that procedural due process, at the federal level, poses a threat to the continued proliferation of restrictions on sex offenders during Halloween. States may craft their laws to ensure that the concept of an offender’s “dangerousness” does not become a material element of the requirement to abide by the restrictions. In Missouri, Illinois, and Louisiana, the laws do not impose any requirement of dangerousness.<sup>108</sup> Without a procedural bar, these laws will cast a far wider net than necessary. More laws in other states will be easier to enact, because they can rest solely on prior convictions and will not require the administrative mechanisms or costs higher due process burdens would impose. Any change in due process

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<sup>106</sup> *Id.* at 7–8. This case addresses only registration and notification provisions. The Court has thus far not considered any sex offender cases dealing with sex offender residency restrictions. The Court of Appeals for the Eighth Circuit has reiterated this sentiment in the context of residency restrictions. *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005). The Iowa statute at issue in *Miller* required sex offenders convicted of offenses against minors to live no closer than 2000 feet from schools and registered child care facilities. *Id.* at 705. While procedural due process in *Miller* did not require a hearing, the Eighth Circuit hinted that there might be situations where a state may have to provide notice of where affected sex offenders may live. *Id.* at 708.

<sup>107</sup> *Conn. Dep’t of Pub. Safety*, 538 U.S. at 6–7. Some of the basic assumptions that led the Court to reach the decision that no process was necessary have been called into question. *See, e.g.*, Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 347 (2006). First, the Court assumes that “all prior convictions of sexual offenses demonstrate dangerousness to the community and are therefore registration-worthy . . .” *Id.* Second, the Court rests on the false assumption that “all convictions result from procedurally safeguarded opportunities to contest the issue of the offender’s dangerousness to the community.” *Id.*

<sup>108</sup> *See supra* notes 55–66 and accompanying text. Missouri’s statute requires all people who register under Sections 589.400 to 589.425 to abide by the restrictions. MO. REV. STAT. § 589.426 (Supp. 2009). Only a plea or conviction is necessary to trigger the Louisiana statutory scheme. LA. REV. STAT. ANN. §§ 14:313(E), 14:313.1 (Supp. 2010). Illinois’s law automatically applies to any sex offender on parole or conditional release. 730 ILL. COMP. STAT. ANN. 5/5-6-3(a)(10) (West Supp. 2009).

requirements will have to come from state constitutions.<sup>109</sup> At the federal level, as the Court has suggested, any challenge to sex offender restrictions must be substantive.<sup>110</sup>

## 2. *Substantive Due Process*

The doctrine of “substantive” due process comes into play whenever the state acts in a way that impacts a fundamental right.<sup>111</sup> The Supreme Court has stated that fundamental rights, while not necessarily stated outright in the Constitution, are tied to the nation’s history.<sup>112</sup> Throughout the years, the Court has recognized a variety of fundamental rights, including freedom from physical restraint,<sup>113</sup> the right to marry,<sup>114</sup> the right to have children,<sup>115</sup> the right to direct a child’s education,<sup>116</sup> the right to choice in personal sexual behavior,<sup>117</sup> and the right to travel.<sup>118</sup> If a law does infringe a fundamental liberty interest, the Court will subject it to a test of strict scrutiny, which

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<sup>109</sup> See, e.g., *State v. Bani*, 36 P.3d 1255 (Haw. 2001). The Hawai’i Supreme Court held that, under Article I, section 5 of the Hawai’i Constitution, the state’s requirement for sex offender notification deprived the defendant of a liberty interest without due process of law. *Id.* at 1257. Using the *Mathews* factors, the court concluded that sex offender notification deprived the defendant of liberty interests in his reputation and his personal and professional life. *Id.* at 1267–68. The court also found a “substantial” risk of erroneous deprivation of liberty, because not all sex offenders are dangerous. *Id.* at 1267. Finally, it found that the state did have an interest in notifying the public of dangerous people. *Id.* at 1267–68.

<sup>110</sup> See *Conn. Dep’t of Pub. Safety*, 538 U.S. at 9 (Souter, J., concurring) (noting that sex offender restrictions could still be open to an equal protection challenge). There has been some commentary regarding whether other, more severe, sex offender restrictions would survive procedural due process with so little scrutiny. See, e.g., Steven J. Wernick, Note, *In Accordance with a Public Outcry: Zoning out Sex Offenders through Residence Restrictions in Florida*, 58 FLA. L. REV. 1147, 1169–70 (2006).

<sup>111</sup> See *Reno v. Flores*, 507 U.S. 292, 301–02 (1993).

<sup>112</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (“We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices.”).

<sup>113</sup> See *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

<sup>114</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>115</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“[P]rocreation [is] fundamental to the very existence and survival of the race.”).

<sup>116</sup> *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

<sup>117</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>118</sup> *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

determines whether the restriction is “narrowly tailored to serve a compelling state interest.”<sup>119</sup>

While no Supreme Court decisions have addressed Halloween sex offender restrictions or sex offender residency restrictions, lower courts have begun to address the issue. Perhaps most notably the Court of Appeals for the Eighth Circuit addressed Iowa’s particularly onerous residency restrictions.<sup>120</sup> The Iowa statute in question made it a misdemeanor offense for any sex offender to live within 2000 feet of a public school, private school, or daycare facility.<sup>121</sup> Eighteen “John Does” challenged the statute, arguing that it violated their substantive due process rights.<sup>122</sup> The district court first found that the act infringed sex offenders’ “fundamental right to govern their family affairs as they so desire and without undue interference from the State.”<sup>123</sup> In addition, the court decided that the Iowa law impacted a fundamental right to intrastate travel, a right that the Supreme Court has never found fundamental.<sup>124</sup> Given the implication of these fundamental rights, the court decided that the laws were not “narrowly tailored to address a compelling State interest using the least restrictive means possible.”<sup>125</sup>

The Court of Appeals for the Eighth Circuit saw things differently. It believed that the district court characterized the right of privacy too broadly.<sup>126</sup> In the court’s opinion, the restrictions did not dictate what family relations could take place, but only had an incidental impact on where families could live.<sup>127</sup> Next, the court dismissed any implication of the fundamental right to travel because the Iowa statute “does not prevent a sex

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<sup>119</sup> *E.g.*, *Flores*, 507 U.S. at 302.

<sup>120</sup> *See Doe v. Miller*, 405 F.3d 700, 704–05 (8th Cir. 2005).

<sup>121</sup> *Id.* at 704 n.1.

<sup>122</sup> *See Doe v. Miller*, 298 F. Supp. 2d 844, 852, 865 (S.D. Iowa 2004), *rev’d*, 405 F.3d 700 (8th Cir. 2005).

<sup>123</sup> *Miller*, 298 F. Supp. 2d at 874. The court not only discussed this right in connection with the sex offender, but also with regard to members of the sex offender’s family. *See id.* at 873.

<sup>124</sup> *See id.* at 874.

<sup>125</sup> *Id.* at 875.

<sup>126</sup> *Miller*, 405 F.3d at 710 (noting that that characterization would “trigger strict scrutiny of innumerable laws and ordinances that influence ‘personal choices’ made by families on a daily basis.”).

<sup>127</sup> *Id.* Not everyone agrees with such a narrow reading of the right to interstate travel. *See, e.g.*, Sarah E. Agudo, Comment, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws*, 102 NW. U. L. REV. 307, 330 (2008) (“The *Miller* decision needs to be reexamined. Restricting where a person may live, especially in an expansive manner that virtually forbids residency in all urban areas, inhibits travel significantly.”).

offender from entering or leaving any part of the State, including areas within 2000 feet of a school . . . and it does not erect any actual barrier to intrastate movement.”<sup>128</sup> Because the law did not infringe upon any fundamental right, the court found no need to analyze it using strict scrutiny.

Even if residency restrictions do not raise questions about fundamental rights, some Halloween restrictions threaten to impermissibly restrict those rights, including the right to family privacy and the right to travel. The Supreme Court has noted that the freedom of association is a “fundamental element of personal liberty.”<sup>129</sup> As Justice Brennan noted in *Roberts v. U.S. Jaycees*:

The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family—marriage . . . childbirth . . . the raising and education of children . . . and cohabitation with one’s relatives . . .<sup>130</sup>

The Court also touched upon the importance of family in *Moore v. City of East Cleveland*.<sup>131</sup> In that case, East Cleveland, Ohio, defined family in a manner that made it a criminal offense for a grandmother to live with her two grandsons.<sup>132</sup> The plurality acknowledged “a private realm of family life which the state cannot enter.”<sup>133</sup>

The new Halloween sex offender regulations threaten to impinge upon privacy rights that have been recognized by the Supreme Court. For instance, the first restriction of Missouri’s sex offender law bars registered sex offenders from having any “Halloween-related contact” with children.<sup>134</sup> Louisiana’s statute also restricts giving candy to any minor, regardless of whether the minor is the sex offender’s own child.<sup>135</sup> Only Illinois’s statute protects sex offender parents who wish to take part in their children’s

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<sup>128</sup> *Miller*, 405 F.3d at 713.

<sup>129</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984) (internal citations omitted) (“[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation . . .”).

<sup>130</sup> *Id.* at 619 (citations omitted).

<sup>131</sup> 431 U.S. 494, 494 (1977) (plurality opinion).

<sup>132</sup> *Id.* at 499.

<sup>133</sup> *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (internal quotations omitted)).

<sup>134</sup> MO. REV. STAT. § 589.426 (2008) (“*Any* person required to register as a sexual offender under sections 589.400 to 589.425 shall be required on October thirty-first of each year to: avoid all Halloween-related contact with children . . .”) (emphasis added).

<sup>135</sup> LA. REV. STAT. ANN. § 14:313.1 (2008).

Halloween festivities.<sup>136</sup> Other regulations, like the ones promulgated by Tennessee's parole board, also threaten parents' ability to take part in the normal process of rearing a child.<sup>137</sup> Whereas residency restrictions do not intentionally disrupt the family lives of sex offenders who are also parents of minor children, the newer Halloween restrictions serve to restrict how parents may interact with their own children within the confines of their own homes. If the state can restrict parents on one night, can it restrict parents on every night?

### 3. *Civil or Criminal Sanctions—Ex Post Facto Concerns*

State legislators have decided to apply many types of sex offender laws retroactively, even ones on the civil commitment of sex offenders.<sup>138</sup> These challenges implicate the Ex Post Facto Clause.<sup>139</sup> Whether treatment is considered criminal or civil can have profound implications for certain constitutional protections.<sup>140</sup> In *Hendricks*, the Court looked first to the language of the statute to determine whether it was labeled a civil or a criminal statute.<sup>141</sup> However, a statute's "label is not always dispositive."<sup>142</sup> The Supreme Court will only override the state's label when a "scheme [is] so punitive either in purpose or effect as to negate" any intent of establishing a civil penalty.<sup>143</sup>

The Court has looked to a number of factors to determine whether a statute labeled as civil truly acts as a criminal law, including factors listed in *Kennedy v. Mendoza-Martinez*.<sup>144</sup> In *Hendricks*, the Court first addressed

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<sup>136</sup> 730 ILL. COMP. STAT. 5/5-6-3(a)(10) (2008) (forbidding a sex offender from any participation in a holiday event, "unless the offender is a parent or guardian of the person under 18 years of age . . . and no non-familial minors are present" in the home.).

<sup>137</sup> See *supra* notes 78–79 and accompanying text.

<sup>138</sup> See, e.g., *Kansas v. Crane*, 534 U.S. 407, 407 (2002); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

<sup>139</sup> *Hendricks*, 521 U.S. at 361. *Hendricks* contended that his confinement was a punishment under a criminal proceeding. *Id.*

<sup>140</sup> For instance, the Double Jeopardy Clause can only be violated when a person receives two criminal punishments. See, e.g., *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938) (finding that criminal and civil penalties for tax fraud together did not amount to double jeopardy). In addition, measures provided by the Sixth Amendment only apply in criminal cases. *United States v. Ward*, 448 U.S. 242, 248 (1980).

<sup>141</sup> 521 U.S. at 361.

<sup>142</sup> *Id.* (citing *Allen v. Illinois*, 478 U.S. 364, 369 (1986)).

<sup>143</sup> *Ward*, 448 U.S. at 248–49.

<sup>144</sup> See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963); see also *Smith v. Doe*, 538 U.S. 84, 97 (2003); *Hendricks*, 521 U.S. at 362; *id.* at 394 (Breyer, J.,



whether the statute serves the purpose of retribution or deterrence—the “two primary objectives” of punishment.<sup>145</sup> The Court concluded that the civil commitment statute fit neither of these two objectives. In addition, the Court was swayed neither by the fact that Hendricks was confined nor by the fact that his confinement was indefinite; rather, the Court looked solely to the intention of the law.<sup>146</sup>

Unlike the two “punitive” purposes discussed by the Court—retribution and deterrence—incapacitation may be civil in nature. Hendricks argued that the civil commitment statute was akin to punishment because it incapacitated him without providing him with any real treatment.<sup>147</sup> The Court rejected this

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dissenting). In *Mendoza-Martinez*, the leading case on punitive versus regulatory measures, the Court noted that:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment[,] whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

*Mendoza-Martinez*, 372 U.S. at 168 (internal citations omitted). The *Mendoza-Martinez* factors do not comprise the only test that courts could use. See William F. Shimko, *Constitutional Law—The Supreme Court Still Hasn’t Found What It Should Be Looking For: A Test That Effectively and Consistently Defines Punishment for Constitutional Protection Analysis*, *Smith v. Doe*, 123 S. Ct. 1140 (2003), 4 WYO. L. REV. 477, 517 (2004). The Second and Third Circuits, as well as the Supreme Court of New Jersey, have each developed tests. *Id.* at 518.

<sup>145</sup> *Hendricks*, 521 U.S. at 361–62. Because the Kansas law involved no scienter, the court determined that the civil commitment statute could not be retributive. *Id.* at 362. In addition, the statute was not a deterrent because it was aimed at people with mental illnesses—people who would likely not be deterred. *Id.* at 362–63.

<sup>146</sup> *Id.* at 361.

<sup>147</sup> *Id.* at 365. In response to Hendricks’s contention that incapacitation had to be accompanied by treatment to be a civil measure, the Court noted:

While we have upheld state civil commitment statutes that aim both to incapacitate and to treat . . . we have never held that the Constitution prevents a State from civilly detaining those for whom no treatment is available, but who nevertheless pose a danger to others. A State could hardly be seen as furthering a “punitive” purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease.

*Id.* at 366.

argument and concluded that incapacitation alone could constitute a civil measure and not a criminal punishment.<sup>148</sup>

Registration requirements have also been challenged under the Constitution's prohibitions against ex post facto punishments. In *Smith v. Doe*, a convicted sex offender challenged Alaska's Sex Offender Registration Act, which mandated registration for fifteen years for most sex offenders and life registration for people convicted of multiple sex crimes or a single aggravated sex crime.<sup>149</sup> The sex offender claimed that the registration and notification requirements violated the Ex Post Facto Clause of the Constitution.<sup>150</sup> Using the same test for judging whether a law labeled as civil is truly punitive as it used in *Hendricks*, the Court found that the registration and notification requirements were civil measures.<sup>151</sup> The petitioner argued that the purpose of the Act, which was to protect the public, was also one of the purposes stated in the Alaska Constitution for Alaska's criminal law.<sup>152</sup> The Court differentiated the compulsory registration law from historical punishments, such as public shaming, humiliation, and banishment, because those acts held a person up before his fellow citizens and stigmatized him in front of the public.<sup>153</sup> In addition, the Court noted that

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<sup>148</sup> *Hendricks*, 521 U.S. at 366. Four Justices—Breyer, Stevens, Souter, and Ginsburg—dissented from Justice Thomas's opinion on the civil/punitive issue. *Id.* at 373 (Breyer, J., dissenting). Justice Breyer began by noting "certain resemblances" between Kansas's civil commitment and ordinary criminal punishments. *Id.* at 379. In addition, he argued that punishment serves more than the two purposes outlined by Justice Thomas; along with deterrence and retribution, criminal punishment can serve rehabilitative and preventative purposes. *Id.* Moreover, the Kansas statute only applies to people who have committed a crime. *Id.* at 380.

<sup>149</sup> 538 U.S. 84, 90 (2003).

<sup>150</sup> *Id.* at 91.

<sup>151</sup> *Id.* at 93.

<sup>152</sup> *Id.* ("Respondents seek to cast doubt upon the nonpunitive nature of the law's declared objective by pointing out that the Alaska Constitution lists the need for protecting the public as one of the purposes of criminal administration."). Justices Ginsburg and Breyer, unlike the Justices in the majority, did not see the purpose of the law as clearly nonpunitive and regulatory. *See id.* at 114–15 (Ginsburg, J., dissenting). Justice Stevens also agreed that "the retroactive application of these statutes constitutes a flagrant violation" of the Ex Post Facto Clause. *Id.* at 114 (Stevens, J., dissenting in part and concurring in part).

<sup>153</sup> *Smith v. Doe*, 538 U.S. at 98–99 (majority opinion):

By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence.

the Act did not resemble imprisonment, because it did “not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.”<sup>154</sup> Because the registration and notification scheme was non-punitive, it could not violate any prohibition against ex post facto laws.

As with the commitment statute in *Hendricks* and the notification requirements in *Smith v. Doe*, one can easily come up with a public safety purpose behind sex offender restrictions for Halloween: few other holidays bring together children and unknown adults.<sup>155</sup> However, precedent from the Supreme Court shows that it is important to look to see whether a law’s punitive aspects outweigh any possible civil justification.

Among other things, the Supreme Court has looked at whether a particular type of treatment resembles historical methods of punishing people.<sup>156</sup> In the case of sex offender restrictions for Halloween, the requirements in Missouri and Maryland’s (that offenders place signs in their windows) are reminiscent of colonial punishments.<sup>157</sup> Compared with the

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For commentary on sex offender restrictions as banishment, see Corey Rayburn Young, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L.R. 101, 151–53 (2007); Kari White, Note, *Where Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 CASE W. RES. L. REV. 161, 185–88 (2008).

<sup>154</sup> *Smith*, 538 U.S. at 100.

<sup>155</sup> Indeed, this is just the justification given by states that enforce these restrictions. California’s director of parole has stated that the “objective is to ensure kids are free to have fun without added worries about potential predators . . . .” Press Release, Cal. Dep’t of Corr. & Rehab., *supra* note 69. Tennessee has noted similar goals in its release to the media. Letter from Tenn. Bd. of Prob. & Parole, *supra* note 79.

However, public protection is not the only stated purpose of the Halloween restrictions. Among the comments by state actors, the careful observer can detect the desire to punish sex offenders further. See Press Release, Office of Senator John Loudon, *supra* note 59 and accompanying text. Recall the statement by Missouri Senator John Loudon that he wants to make Missouri the worst possible place for sex offenders to live. *Id.* Whether punishment is the primary motive is unclear, but it certainly seems to be a motive in some places.

<sup>156</sup> *Smith*, 538 U.S. at 97.

<sup>157</sup> See MO. REV. STAT. § 589.426(3) (requiring signs); Tom LoBianco, *Maryland Cancels Program as Pumpkin Signs Become a Joke*, WASH. TIMES, Oct. 30, 2008, at A1 (reporting that Maryland sex offenders have the option of placing cartoon pumpkin signs on their houses proclaiming “No Candy at This Residence” or of placing more muted signs in their windows). These signs, coupled with visits from parole officers during the night could be analogized to tactics used in colonial times that required criminals to wear signs of their crimes. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991) (noting that temporary and permanent signs were used to punish a range of offenders). These tactics, sometimes intended to reintegrate offenders, are generally not considered effective. See *id.* at 1918–19.

restrictions in *Smith v. Doe*, which dealt with notification and registration, the use of signs on sex offenders' houses seems even closer to the colonial idea of shaming—akin to a “scarlet letter.”

Next, the Halloween sex offender restrictions implicate the idea of an “affirmative restraint” on those who fall within its scope. In *Smith v. Doe*, the Court found that notification and registration requirements were not affirmative restraints.<sup>158</sup> However, the Court did note that “the punishment of imprisonment . . . is the paradigmatic affirmative disability or restraint.”<sup>159</sup> The sex offender restrictions surrounding Halloween implicate this segment of the test outlined by the Court in *Mendoza-Martinez*.<sup>160</sup> One of the main purposes of the restrictions is to keep offenders in their homes on Halloween, and sometimes to restrict what offenders may do within their own homes.<sup>161</sup> While Halloween only comes one night of the year, that one night could be the beginning of a slippery slope toward restrictions on other days, effectively trapping sex offenders in their houses because of the possibility that they might interact with children.

A final aspect of the *Mendoza-Martinez* framework that raises concerns about the Halloween sex offender restrictions is the degree to which the law exceeds its nonpunitive purpose.<sup>162</sup> The majority in *Smith v. Doe* mentions this factor only in passing.<sup>163</sup> However, the dissenters give a more thorough analysis of the issue.<sup>164</sup> For instance, Justice Ginsburg discusses the Alaska law's goal of “alerting the public to potentially recidivist sex offenders” and compares it to the law's scope, which covers all convicted sex offenders.<sup>165</sup>

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Moreover, unlike the notification in *Smith v. Doe*, these signs provide little actual information about the offender or his offense.

<sup>158</sup> See 538 U.S. at 102.

<sup>159</sup> *Id.* at 100.

<sup>160</sup> See *Mendoza-Martinez*, 372 U.S. at 168–69.

<sup>161</sup> Recall the Missouri statute, MO. REV. STAT. § 589.426(3), which keeps offenders in their homes and bars them from engaging in Halloween-related activities. In addition, Tennessee's restrictions effectively keep a person inside his home through the list of eight holiday-related activities in which paroled sex offenders may not engage. Press Release, Tenn. Bd. of Prob. & Parole, *supra* note 79.

<sup>162</sup> See 372 U.S. at 168–69.

<sup>163</sup> See *Smith*, 538 U.S. at 105 (noting that this factor looks at “whether the regulatory means chosen are reasonable in light of the nonpunitive objective.”).

<sup>164</sup> See *id.* at 116 (Ginsburg, J., dissenting) (“What ultimately tips the balance for me is the Act's excessiveness in relation to its nonpunitive purpose.”).

<sup>165</sup> *Id.* (“However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.”); *id.* at 117.

Similarly, Halloween restrictions are excessive when they fail to distinguish between offenders who pose no threat and those who pose great threat.

Whether a law raises a constitutional question and whether the Court will find the law unconstitutional are two different questions. Given the Court's decisions on sex offender laws, on civil commitment and on registration and notification, it seems unlikely that the Court would find Halloween sex offender restrictions to violate the Ex Post Facto Clause. However, policy makers ought to keep these implications in mind when they craft new restrictions on sex offenders.

### B. *Do the Laws Make Practical Sense?*

When it comes to views about sexual offenders, stereotyping can often overshadow the facts.<sup>166</sup> Given the potential for stereotyping, it is important to look to empirical evidence of sex offender violence. Based on television coverage and popular sentiment, one might think that strangers committed most sex offenses against children. However, data from the federal government suggests that 93% of children are victimized by people they know.<sup>167</sup> Children ages five and below are victimized by strangers in only about 3% of cases, while strangers account for 4.7% of children between the ages of six and eleven.<sup>168</sup> Among children ages eleven and under, victimizers were adults only about 60% of the time.<sup>169</sup>

This evidence, which like all social science evidence has its flaws, suggests that a relatively low number of convicted sex offenders commit another sex crime.<sup>170</sup> Comparatively, "sex offenders are less likely to recidivate in general, but are still more likely to reoffend with a sex

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<sup>166</sup> As previous sections of this Note have indicated, media coverage and our own psychological mechanisms influence our exposure to selected information and later how we process the limited information we receive. *See supra* note 22.

<sup>167</sup> HOWARD N. SNYDER, NAT'L CTR. FOR JUVENILE JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), *available at* <http://www.bjs.ojp.usdoj.gov/content/pub/pdf/saycrlr.pdf>. Snyder's report, prepared for the Department of Justice, uses data from the National Incident-Based Reporting System, which collects data about crimes reported to law enforcement. *Id.* at 4. Therefore, it is impossible to know from these statistics anything about the unreported instances of child victimization.

<sup>168</sup> *Id.* at 10.

<sup>169</sup> *Id.* at 13. In general, the evidence from Snyder's report suggests that far fewer older people victimize children than do young people. *See id.* at 9. The ages of child victimizers form a bimodal distribution: the first mode, of far greater magnitude than the second, peaks with victimizers in their teens, while the second mode tends to peak at between ages twenty-five and thirty-five. *See id.* at 8-9.

<sup>170</sup> *See* MELOY, *supra* note 25, at 21.

crime.”<sup>171</sup> Based on data from the Bureau of Justice Statistics, 68% of non-sexual offenders in a sample recidivated (for any crime) within three years of release.<sup>172</sup> By contrast, 43% of released sex offenders recidivated for any crime within three years of release.<sup>173</sup> Based on the same report, 5.3% of sex offenders committed another sex offense within three years of their release from prison; only 1.3% of other offenders recidivated with a sex offense within three years.<sup>174</sup>

Another study, conducted in Minnesota found that, of 556 sex offenders put on probation in 1992, only 5.6% committed another sexual offense.<sup>175</sup> Moreover, the same study observed that new offenses dropped dramatically after the first two years of probation.<sup>176</sup> The researchers found a number of trends in the data. First, offenders with juvenile arrest records tended to recidivate more frequently than did those without such records.<sup>177</sup> In addition, offenders who had victimized children tended to recidivate more frequently than did those who victimized adults.<sup>178</sup> But, people on probation from intra-family sexual offenses were less likely to recidivate than people who victimized people outside the family circle.<sup>179</sup>

One study has looked at sex offenders released on probation and parole into the context of an intensive program of supervision.<sup>180</sup> Each of the 169 participants was released into a “Midwestern suburb” and most had been

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<sup>171</sup> MINN. DEP’T OF CORR., *SEX OFFENDER RECIDIVISM IN MINNESOTA 1* (2007).

<sup>172</sup> PATRICK A. LANGAN, ERICA L. SCHMIDT & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* at 14 (2003), available at <http://www.bjs.ojp.usdoj.gov/content/pub/pdf/rsorp94.pdf>. This massive fifteen-state data project tracked 272,111 prisoners released in 1994, 9691 of whom had been in prison for a sex crime. *Id.* at 1.

<sup>173</sup> *Id.* at 14. In actual numbers, 517 sex offenders were rearrested for a sex offense and 3328 non-sex offenders were rearrested for a sex crime. *Id.* at 24.

<sup>174</sup> *Id.* The report further disaggregated the data for child molesters. Of the released child molesters, 3.5% were reconvicted for a sex offense. *Id.*

<sup>175</sup> Candace Kruttschnitt, Christopher Uggen & Kelly Shelton, *Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 JUST. Q. 61, 73 (2000). Besides studying the impact of social controls, the paper presents demographic data concerning the 556 offenders. The average age of participants was just over thirty-three years. *Id.* at 72. Nearly a third were married at the time they were sentenced and half had steady employment prior to their arrests. *Id.*

<sup>176</sup> *Id.* at 73.

<sup>177</sup> *Id.* at 74.

<sup>178</sup> *Id.*

<sup>179</sup> Kruttschnitt, Uggen & Shelton, *supra* note 175, at 74.

<sup>180</sup> See MELOY, *supra* note 25, at 53–70. In this case, the community supervision approach involved law enforcement, courts, and mental health professionals. *Id.* at 54.

convicted of felonies.<sup>181</sup> Of the offenders, 20 of the 169 participants committed another sex crime within their parole or probation period, and not all offenses happened immediately.<sup>182</sup> The average time to recidivate among the participants was eight months and all but two of the incidents of recidivism occurred within sixteen months of the start of parole or probation.<sup>183</sup> Using regression analysis, the researchers uncovered only two variables correlated to recidivism: offenders who attacked strangers were more likely to recidivate, as were offenders who reported that they had been victimized.<sup>184</sup>

Another recent study, prepared by the Minnesota Department of Corrections, has looked for trends in data from 3166 sex offenders who reentered the community from prison between 1990 and 2002.<sup>185</sup> Over the course of the study, about 12% of participants were rearrested for a sex offense, although the rate of recidivism declined over the course of the twelve-year study.<sup>186</sup> Participants were more likely to reoffend if they fell into one of a number of categories. For instance, they were more likely to reoffend if they had previously been convicted of a sex crime, if their victims were under thirteen, or if their victims were strangers.<sup>187</sup> On the other hand, participants who did not reoffend tended to have completed some form of sex offender treatment program.<sup>188</sup> Significantly, the authors noted that predictors for sexual recidivism differed from predictors for non-sexual recidivism.<sup>189</sup>

Although research will probably never allow us to predict sexual recidivism perfectly, even the preliminary data collected over the past fifteen to twenty years suggests that certain offenders will more likely reoffend than

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<sup>181</sup> *Id.* at 53–54, 56. Most of the crimes involved were “aggravated criminal assault, predatory criminal sexual assault, child pornography, and sexual exploitation of a child.” *Id.* at 56. In about 80% of cases, the offenders knew their victim, either based on family relationship or acquaintance; 49% of the offenders were parents, relatives, teachers, religious leaders, or coaches of their victims. *Id.* at 56–57.

<sup>182</sup> *Id.* at 56.

<sup>183</sup> See MELOY, *supra* note 25, at 62.

<sup>184</sup> *Id.* at 63.

<sup>185</sup> MINN. DEP’T OF CORR., *supra* note 171, at 5.

<sup>186</sup> *Id.* at 20.

<sup>187</sup> *Id.* at 22.

<sup>188</sup> *Id.* Other studies have failed to replicate this result. See, e.g., MELOY, *supra* note 25, at 69. In that study, the trend in the data suggested that intense post-release treatment correlated with higher levels of recidivism. *Id.*

<sup>189</sup> *Id.* at 33.

will others.<sup>190</sup> A meta-analysis of ninety-five studies of sex offender recidivism has suggested that “sexual deviancy,” “antisocial orientation,” “sexual interest in children,” and certain personality scores on the Minnesota Multiphasic Personality Inventory have the strongest links to future sexual violence.<sup>191</sup> The results from this meta-analysis seem to correspond to the other studies discussed above—employment stability, family stability, and sexual deviancy stand out as predictors of future sexual offenses. In the future, as data continue to refine our understanding of sexual violence, states should use these predictors to put resources in the appropriate places.<sup>192</sup>

Moreover, the data suggest that Halloween restrictions wastefully aim for targets that may not actually exist (or they barrage a very small target with many arrows). These laws not only target the general group of offenders least likely to victimize a child, but they indiscriminately target that group, with no attempt to differentiate between offenders likely to target strangers and those with no such proclivities. The data suggests that governments are sinking manpower and money in the wrong places.<sup>193</sup>

#### V. STRIKING A BALANCE BETWEEN PROTECTING CITIZENS AND RESPECTING CONSTITUTIONAL PRINCIPLES

After reviewing the cultural histories of our treatment of Halloween and our views about sex offenders, as well as some of the legal and logical issues involved in preventing recidivism, there seem to be two main avenues to

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<sup>190</sup> The Canadian government has begun to look empirically at how it might best use its resources: “Not all sexual offenders, however, are equally likely to reoffend. The observed sexual recidivism rate among typical groups of sexual offenders is in the range of 10%–15% after 5 years; there are, however, identifiable subgroups whose observed recidivism rates are much higher. Interventions directed towards the highest risk offenders are most likely to contribute to public safety.” R. KARL HANSON & KELLY MORTON-BOURGON, PUB. SAFETY AND EMERGENCY PREPAREDNESS CAN., PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS 1 (2004), available at [http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2004-02-pred-se-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2004-02-pred-se-eng.pdf).

<sup>191</sup> *Id.* at 8–9.

<sup>192</sup> Of course, any predictor of future behavior will have its faults and even for the most reliable models, there are potential errors and limitations. See MELOY, *supra* note 25, at 23. Meloy notes a number of potential issues involved in risk appraisal, including reliance on “global samples” of sex offenders and reliance mostly on static factors related to sex offenders. *Id.* However, “[i]mprovements in statistical techniques and model specification have allowed researchers to assess more accurately which violent offenders are most likely to recidivate . . .” *Id.* at 25. Better models will hopefully lead to even more reliable predictors.

<sup>193</sup> See *supra* notes 68–79 and accompanying text. Heightened supervision, face-to-face meetings with offenders, and GPS tracking cost a great deal in technology and extra parole board and police staff.



pursue. One avenue involves utilizing the state court system to challenge sex offender laws under provisions of state constitutions.<sup>194</sup> The second, and not mutually exclusive avenue, involves formulating a new legislative outlook on sex offender laws on Halloween, taking into account data,<sup>195</sup> an understanding of myths surrounding the dangers of Halloween,<sup>196</sup> and guidance from the Constitution.<sup>197</sup> After nearly two decades of registration requirements, notification provisions, and residency restrictions, the new Halloween sex offender restrictions should act as a call to action to address the increasingly onerous burdens placed on sex offenders. Burdens with a true purpose should remain, but burdens with no purpose should be abandoned.

Halloween, obviously, comes only once per year. As such, one might ask why it is so important to focus on laws that only impact behavior for one very small fraction of the year. A number of dangers should convince the wary. First is the danger of gradually burdening sex offenders on more and more days of the year.<sup>198</sup> Second, when laws are based at least partially on the public's fears and the desire of legislators to pander to those fears, someone must scrutinize the impact of those laws.<sup>199</sup> Third, there are dangers that sex offender restrictions will set a precedent for a preventative criminal justice system, completely devaluing the rights of individuals judged to have some propensity to offend.<sup>200</sup>

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<sup>194</sup> See *supra* notes 55–66 and accompanying text. As recently as October 2009, the Supreme Court of Kentucky invalidated the state's residency restrictions under both the United States and the Kentucky constitutions. See *Commonwealth v. Baker*, 295 S.W.3d 437, 447 (Ky. 2009).

<sup>195</sup> See *supra* Part IV.B.

<sup>196</sup> See *supra* Part II.B.

<sup>197</sup> See *supra* Part IV.A.

<sup>198</sup> The statutes in place in Illinois and Louisiana already do target more than just Halloween. The Illinois statute covers any "holiday event involving children under 18 years of age . . ." 730 ILL. COMP. STAT. ANN. 5/5-6-3(a)(10) (2009). The Louisiana statute covers "Halloween, Mardi Gras, Easter, Christmas, or any other recognized holiday for which generally candy is distributed or other gifts given to persons under eighteen years of age." LA. REV. STAT. ANN. § 14:313.1 (2008).

<sup>199</sup> See Singleton, *supra* note 17, at 628 ("[W]hen legislatures pander to the electorate and pass laws driven by community fear and outrage, lawmakers should forfeit their right to object to judicial second-guessing of their motives."); Douard, *supra* note 20, at 52 (warning that "sex offender laws may . . . be templates for a far more extensive preventative approach to criminal conduct").

<sup>200</sup> See Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 49 (2008).

### A. Attack via State Constitutions

It is a basic principle of our federal system that states can interpret their constitutions to protect rights in ways that exceed those guaranteed by the federal Constitution.<sup>201</sup> These courts can also interpret the federal Constitution, subject to review by the United States Supreme Court. In the Hawai'i case *State v. Bani*,<sup>202</sup> the state supreme court held sex offender notification provisions unconstitutional under the Due Process Clause of the Hawai'i constitution.<sup>203</sup> While the Hawai'i court found that the state constitution protected due process rights of sex offenders, the United States Supreme Court has reached a different conclusion.<sup>204</sup>

Recent action in the New Jersey state courts illustrates the value of pursuing challenges to Halloween sex offender laws in state court. A college student, classified as a sex offender at age fifteen for engaging in sexual conduct with a thirteen-year-old girl, challenged local residency restrictions that prevented him from living in his college dorm, within 2500 feet of a school.<sup>205</sup> In state court, G.H. challenged the residency restrictions as preempted by New Jersey's Megan's Law, as violating the Due Process Clause of the New Jersey constitution, and as violating the Ex Post Facto and Double Jeopardy Clauses of the New Jersey constitution.<sup>206</sup> On each of these attacks, the court struck down the residency restriction in Galloway

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<sup>201</sup> See generally *Gilliard v. Mississippi*, 464 U.S. 867, 870 (1983) (Marshall, J., dissenting).

<sup>202</sup> 36 P.3d at 1257 (Haw. 2001).

<sup>203</sup> Article I of the Hawai'i Constitution states that:

No person shall be deprived of life, liberty or property without due process of law, nor shall be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

HAW. CONST. art. I, § 5.

<sup>204</sup> See *supra* notes 99–107 and accompanying text. In parallel with recent Supreme Court decisions, the federal circuit courts do not seem to be receptive to arguments about sex offenders. See, e.g., *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005). The *Moore* court addressed the constitutionality of the Florida Sex Offender Act. See *id.* at 1340. After considering various constitutional attacks, the Eleventh Circuit concluded that the Act did not violate substantive due process, *id.* at 1346, the Equal Protection Clause, *id.* at 1348, or the right to travel, *id.* at 1349. Other circuits have found no constitutional problems with sex offender registration and notification laws. See, e.g., *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (per curiam) (discussing fundamental rights); *Gunderson v. Hvass*, 339 F.3d 639, 643 (8th Cir. 2003) (implicating no fundamental rights).

<sup>205</sup> See *G.H. v. Twp. of Galloway*, No. ATL-L-6395-06, 2007 WL 700501, at \*1 (N.J. Super. Ct. Law Div. Feb. 5, 2007).

<sup>206</sup> See *id.* at \*3, 12, 15.

Township and another in the town of Cherry Hill, New Jersey.<sup>207</sup> To gauge substantive due process, the court looked to the New Jersey constitution, which declares that “[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”<sup>208</sup> Under New Jersey’s due process balancing test, the restrictions failed to appropriately balance intrusion of rights against the state’s interest.<sup>209</sup> The towns appealed the trial court’s decision. In 2009, the Supreme Court of New Jersey affirmed the ruling on preemption grounds and decided not to consider the constitutional challenges to the laws.<sup>210</sup>

Like New Jersey, Missouri also has state constitutional provisions that make state-court litigation a possibility. Article I, section 13 of the Missouri constitution proscribes not only Ex Post Facto laws, but also any law “retrospective in its operation.”<sup>211</sup> In January 2010, the Supreme Court of Missouri determined that the restrictions embodied in the 2008 Halloween restrictions could not be applied retroactively, because retroactive application “impose[d] new obligations or duties on [the defendant-respondent], giving new legal effect to [his] prior conviction[.]”<sup>212</sup> The constitutional provision has also been used successfully to challenge the retroactive effect of sex offender registration, which the United States Supreme Court declared valid under the Ex Post Facto Clause in *Connecticut Department of Public Safety v. Doe*.<sup>213</sup>

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<sup>207</sup> *See id.*

<sup>208</sup> *Id.* at \*12; *see also* N.J. CONST. art. I, § 1.

<sup>209</sup> *Twp. of Galloway*, 2007 WL 700501 at \*13 (noting that New Jersey uses an analysis that balances the “nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction” (quotations omitted)).

<sup>210</sup> *See* G.H. v. Township of Galloway, 971 A.2d 401, 401–02 (2009).

<sup>211</sup> MO. CONST. art. I, § 13.

<sup>212</sup> *State v. Raynor*, No. SC90165, slip op. at 12 (Mo. Jan. 12, 2010). Raynor was convicted in 1990 of an offense requiring him to register as a sex offender under Missouri law. *Id.* at 5. On Halloween night, Raynor did not place a sign in the door in compliance with the Missouri’s statute, and a woman at his residence passed out candy to children. *Id.* at 6. As his conviction occurred about 18 years prior to the enactment of Section 589.426, the court determined he could not be bound by the extra restrictions. *See id.* at 17.

<sup>213</sup> *See* *Doe v. Phillips*, 194 S.W.3d 833, 838 (Mo. 2006) (“[T]he portions of the law imposing an affirmative duty to register based solely on pleas or convictions for conduct committed prior to enactment of Megan’s Law . . . violates [sic] Missouri’s constitutional prohibition of laws retrospective in . . . operation.”) (internal quotations omitted).

In light of successful challenges to arguably overzealous sex offender restrictions, state courts provide useful forums for litigating the propriety of Halloween sex offender provisions. The degree to which various freedoms are protected can differ from state to state, and the legal community should be willing to think creatively to litigate in a variety of forums. For instance Missouri's Halloween sex offender restrictions<sup>214</sup> could be challenged under Article I, section 13 of the Missouri constitution.<sup>215</sup> Those restrictions mandate all those required to register as sex offenders to abide by the Halloween restriction. However, Missouri's constitution prohibits the retroactive application of laws. Based on precedent, the Halloween restrictions should only apply to people who become required to register after the enactment of the law.

### *B. Developing a Sex Offender Scheme Free from Irrational Fear*

While litigation presents one avenue for addressing potential problems with Halloween sex offender restrictions, reasonable actions by state legislatures may result in a bigger overall impact, as only three of fifty states currently have these laws on their books.<sup>216</sup> In light of the issues addressed throughout the course of this Note—the passage of sex offender laws in the wakes of rare but highly publicized events, the evolution of Halloween mythology, the impact of sex offender restrictions on released offenders, and current social science research on recidivism—legislators and their constituents have reason to look circumspectly at any new restrictions.

One method of eliminating some of the concerns discussed about restricting Halloween activities involves looking to exemplar statutes. This Note explores Minnesota's procedures for rating sex offenders based on their dangerousness in order to determine their need to register for Minnesota's sex offender database.<sup>217</sup> Minnesota has performed significant research into the practical appropriateness of residency restrictions for even the most violent sex offenders.<sup>218</sup> The Minnesota system for registration categorizes offenders based upon their predicted dangerousness and not solely upon the

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<sup>214</sup> See *supra* note 58.

<sup>215</sup> See *supra* note 211.

<sup>216</sup> See *supra* Part III.A.

<sup>217</sup> See generally MINN. STAT. § 244.052 (2008).

<sup>218</sup> See generally, MINNESOTA DEPARTMENT OF CORRECTIONS, *supra* note 171; MINNESOTA DEPARTMENT OF CORRECTIONS, LEVEL THREE SEX OFFENDERS: RESIDENTIAL PLACEMENT ISSUES (2003).

crime for which offenders were convicted.<sup>219</sup> Its ideas could easily be borrowed to address the three constitutional issues discussed in this Note<sup>220</sup> and to incorporate some of the research-based findings also discussed.<sup>221</sup>

First, Minnesota gives sex offenders administrative hearings during which they can contest their dangerousness.<sup>222</sup> This procedural safeguard goes significantly beyond the constitutional requirements declared by the Supreme Court in *Connecticut Department of Public Safety*, which does not require any process for determining an offender's level of risk.<sup>223</sup> In Minnesota, the first risk review happens no later than ninety days before a prisoner's release, in most cases.<sup>224</sup> After a hearing, the risk assessment committee drafts a report, to which the offender is entitled.<sup>225</sup> Through a number of mechanisms, the offender and law enforcement officers may request review of the sex offender's classifications.<sup>226</sup> Providing offenders with process has a number of benefits. It allows law enforcement to seek higher classifications (and harsher restrictions) when it deems them necessary and to seek lower classifications (and reduced monitoring burdens and costs) over time.<sup>227</sup> Incorporating research on sex offender recidivism, it makes practical sense to reduce some monitoring burdens over time, because

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<sup>219</sup> See MINN. STAT. § 244.052(2) (2008) (mandating development of a risk-assessment scale that weighs "various risk factors" related to an offender's dangerousness).

<sup>220</sup> For discussion of procedural due process, substantive due process, and ex post facto concerns, see *supra* Parts IV.A.1–IV.A.3.

<sup>221</sup> See *supra* Part IV.B.

<sup>222</sup> MINN. STAT. § 244.052(3)(d)(i) (2008) ("The offender and the law enforcement agency that was responsible for the charge resulting in confinement shall be notified of the time and place of the committee's meeting. The offender has a right to be present and be heard at the meeting.").

<sup>223</sup> See *supra* notes 99–107 and accompanying text.

<sup>224</sup> MINN. STAT. § 244.052(3)(d)(i) (2008). In cases of supervised release, a risk assessment must be performed no later than sixty days before release. *Id.* § 244.052(3)(d)(iv).

<sup>225</sup> *Id.* § 244.052(3)(f).

<sup>226</sup> See *id.* § 244.052(6) (allowing Class II and Class III offenders to seek immediate review of the initial determination in front of an administrative law judge and mandating that the offender have access to counsel if desired); *id.* § 244.052(3)(h) (listing circumstances under which law enforcement can request a rehearing); *id.* § 244.052(3)(i) (allowing for periodic reassessments at the request of the offender).

<sup>227</sup> In just one year, the state of New Jersey spent about \$2,000,000 solely to implement its registration and notification programs. LAFOND, *supra* note 11, at 105. Halloween sex offender laws will require large sums of money to monitor sex offenders on only one day of the year, likely involving telephone calls, heightened monitoring, and extra police forces to perform sex offender "sweeps."

the risk of recidivism seems to be lowest in the oldest populations of offenders.<sup>228</sup> It also restricts the state's ability to burden a sex offender's rights based solely on a conviction—the framework found permissible in *Connecticut Department of Public Safety*. If a state bases its Halloween restrictions on dangerousness, and not merely a conviction, the federal Constitution requires some sort of process, based on the *Eldridge* factors.<sup>229</sup>

Not only does the Minnesota system for rating sex offenders allow for some procedural process, it also bases the level of restriction on risk, not just a prior conviction.<sup>230</sup> By focusing on dangerousness, Halloween sex offender laws could move further away from implicating fundamental rights. From a fundamental rights perspective, basing Halloween restrictions on some measure of dangerousness would more narrowly tailor government intrusion to the rights of sex offenders. The purpose of protecting the safety of the public is a compelling governmental interest, and the government by necessity must sometimes limit individual freedoms for the greater goal of protecting the public.<sup>231</sup> By legislating in a manner sensitive to factors that actually pertain to dangerousness and recidivism, the legislature can create Halloween restrictions that come far closer to the least restrictive means necessary to promote public safety. In the end, that might spell an end to Halloween restrictions as they exist today. Because the current laws address stranger attacks at the expense of family and acquaintance attacks, narrow tailoring might mean a complete shift in strategy. Legislators should inform themselves and focus on sex offenders' families, their formal and informal support systems, treatment programs, and the degree to which offenders fall into recognized categories that are plagued by tendencies to recidivate.

A research-based perspective can also ameliorate ex post facto problems endemic to the current Halloween restrictions. While, in the past, such a research-based perspective would have been impossible due to a lack of research, we have now reached a level of understanding that would permit predictions to be made.<sup>232</sup> The same more nuanced approach to sex offender

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<sup>228</sup> See LANGAN ET AL., *supra* note 172, at 1. (“Recidivism studies typically find that, the older the prisoner when released, the lower the rate of recidivism.”).

<sup>229</sup> See *Eldridge*, 424 U.S. at 335. Since the risk of unwarranted deprivation appears high in these cases.

<sup>230</sup> Factors include prior offenses; offender characteristics like response to treatment and substance abuse; presence of informal social support; and age. See MINN. STAT. § 244.052(3)(g) (2008).

<sup>231</sup> *United States v. Salerno*, 481 U.S. 739, 748 (1987). More pertinent to sex offenders, the Supreme Court has sanctioned the civil detention of offenders deemed to be mentally unstable and dangerous to the community. See *Addington v. Texas*, 441 U.S. 418, 432–33 (1979).

<sup>232</sup> See discussion *supra* Part IV.B.

risks would reduce the number of *Mendoza-Martinez* factors implicated by the Halloween laws, especially the factor that the scope of the restriction not dramatically exceed its regulatory purpose.<sup>233</sup>

Recent scholarship has noted a shift in policy toward the “preventative state,” a system under which the state prevents crime rather than punishing it.<sup>234</sup> With an ability to make legislators look tough on crime, “[t]he preventative state is all the rage these days, and it can be seen in many different guises.”<sup>235</sup> Many questions remain regarding the extent to which government actors can impinge the rights of individuals in the name of prophylaxis. As legislators tread into largely uncharted constitutional territory, they must remain focused on preserving rights, even if those rights belong to individuals as unpopular as sex offenders.

## VI. CONCLUSION

The details of this story are new, but its underlying motifs have their roots in much older territory. Halloween restrictions ask legislators, their constituents, and the courts to balance public safety interests against the burdens that state measures place on individuals. This balancing act is complicated enough when the actors are rational, but it becomes infinitely more troublesome when irrational fear injects itself into our cognitive processes. Halloween restrictions implicate not one, but two irrational fears: monstrous stranger attacks by sex offenders and vicious Halloween anxieties. Taken together, these fears raise doubts about both the efficacy and wisdom of recent Halloween restrictions levied on sex offenders by statute in Missouri, Illinois, and Louisiana, and by parole-board fiat elsewhere throughout the country.

This Note has endeavored to explore these new Halloween restrictions from a number of perspectives—cultural, legal, and scientific. Viewed through each of these lenses, the Halloween restrictions raise questions about the direction in which state actors are guiding sex offender law. From a socio-cultural standpoint, we can place these new restrictions in the context of a long line of sex offender regulations predicated on public fears of mythic proportions. The legal lens illuminates the danger that increasing intrusive restrictions pose for the rights of sex offenders. Finally, research-driven analysis begins to demystify the subject of sex offender recidivism; not only do Halloween restrictions implicate fundamental rights, but they may implicate the fundamental rights of the people who may represent least

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<sup>233</sup> See *supra* note 144.

<sup>234</sup> See Shimko, *supra* note 144, at 517.

<sup>235</sup> Carol S. Steiker, *Foreword: The Limits of the Preventative State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 774 (1998).

worrisome segment of the sex offender population. Hopefully, in years to come, legislators will consider these concerns before they expand the array of sex offender restrictions.