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PREDATORS OR PREY: MANDATORY LISTING OF NON-PREDATORY OFFENDERS ON PREDATORY OFFENDER REGISTRIES

*Marissa Ceglian**

It is worthy to note that what separates our society from totalitarian states is that we take individual freedoms seriously and will not deprive citizens of those freedoms without strict adherence to the procedural requirements of the law.¹

INTRODUCTION

Sexual offender registration statutes have existed in the United States since 1944.² The primary impetus behind such statutes is to assist law enforcement in monitoring the movements and activities of convicted sexual offenders, should they pose any future threat to the community.³ Currently, all states have sex offender registration

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¹ *Boutin v. LaFleur*, 591 N.W.2d 711, 721 (Minn. 1999) (Anderson, J., dissenting) (noting that the serious consequences of Minnesota's predatory offender registration statute mandate that the defendant be accorded procedural due process protections).

² See Roxanne Lieb & Scott Matson, *Sex Offender Registration: A Review of State Laws*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY (1996), at <http://www.wspp.wa.gov/crime/pdf/regsrtm.pdf>. California enacted its sex offender registration law in 1944, making it the first state to enact such legislation. *Id.*

³ Klaas Kids Foundation, *Megan's Law By State*, available at

statutes mandating that convicted sex offenders comply with certain registration requirements following their release from confinement.⁴

<http://www.klaaskids.org/pglegmeg.htm> [hereinafter *Klaas Kids*] (noting that sex offender registration laws are necessary because information contained in registries assists public agencies in protecting public safety) (last visited Feb. 11, 2004).

⁴ See Colleen Miles, *Just Desserts, or a Rotten Apple? Will the Ninth Circuit's Decision in Doe v. Otte Stand to Ensure that Convicted Sex Offenders Are Not Excessively Punished?*, 32 GOLDEN GATE U. L. REV. 45 (2002) (noting that "society has determined that released sex offenders are a class of offenders that must be watched closely by the community"). See ALA. CODE §§ 15-20-20 to -38 (2003); ALASKA STAT. § 12.63.010, § 12.63.020, § 12.63.030 (Michie 2003); ARIZ. REV. STAT. §§ 13-3821 to -3827 (2004); ARK. CODE ANN. §§ 12-12-901 to -920 (Michie 2003); CAL. PENAL CODE § 290 (Deering 2004); COLO. REV. STAT. §§ 16-22-101 to -114 (2003); CONN. GEN. STAT. §§ 54-250 to -261 (2003); DEL. CODE ANN. tit. 11 § 4120 (2004); D.C. CODE ANN. §§ 22-4001 to -4017 (2003); FLA. STAT. ANN. § 775.21 (West 2003); GA. CODE ANN. § 42-1-12 (2002); HAW. REV. STAT. ANN. § 846E-1 to 846E-9 (Michie 2003); IDAHO CODE §§ 18-8301 to -8326 (Michie 2003); 730 ILL. COMP. STAT. 150/1 to /12 (2004); IND. CODE ANN. §§ 5-2-12-1 to -14 (2003); IOWA CODE §§ 692A.1 to .16 (2002); KAN. STAT. ANN. §§ 22-4901 to -4912 (2002); KY. REV. STAT. ANN. §§ 17.510, 17.520, 17.530, 17.578 (Michie 2002); LA. REV. STAT. ANN. §§ 15:540-549 (2003); ME. REV. STAT. ANN. tit. 34-A, §§ 11221 to 11228 (West 2003); MD. CODE ANN. CRIMINAL PROCEDURE §§ 11-701- 11-721 (2003); MASS. ANN. LAWS ch. 6, §§ 178D-178Q (Law. Co-op. 2004); MICH. COMP. LAWS §§ 28.721 to .732 (2003); MINN. STAT. ANN. § 243.166 (West 2003); MISS. CODE ANN. §§ 45-33-21 to -57 (2004); MO. REV. STAT. §§ 589.400, 589.403, 589.405, 589.407, 589.410, 589.414, 589.417, 589.420, 589.425 (2004); MONT. CODE ANN. §§ 46-23-501 to -513 (2003); NEB. REV. STAT. ANN. §§ 29-4001 to -4013 (2003); NEV. REV. STAT. ANN. § 179D.460 (Michie 2004); N.H. REV. STAT. ANN. § 651-B (2003); N.J. STAT. ANN. §§ 2C:7-1 to -19 (2004); N.M. STAT. ANN. §§ 29-11A-1 to -8 (Michie 2003); N.Y. CORRECT. LAW § 168 (Consol. 2003); N.C. GEN. STAT. §§ 14-208.5, 14-208.6 to 14-208.6c (2004); N.D. CENT. CODE § 12.1-32-15 (2003); OHIO REV. CODE ANN. §§ 2950.01 to .11 (West 2003); OKLA. STAT. ANN. TIT. 57, §§ 581 to 589 (West 2003); OR. REV. STAT. §§ 181.592 to 181.607 (2001); 42 PA. CONST. STAT. ANN. §§ 9791 to 9792, 9795 to 9799 (West 2003); R.I. GEN. LAWS §§ 11-37.1-1 to -20 (2003); S.C. CODE ANN. §§ 23-3-400 to 23-3-530 (2003); S.D. CODIFIED LAWS §§ 22-22-31 to 22-22-41 (Michie 2003); TENN. CODE ANN. §§ 40-39-101 to 40-39-111 (2003); TEX. CRIM. PROC. CODE ANN. §§ 62.01-62.14 (2004); UTAH CODE ANN. § 77-27-21.5 (2003); VT. STAT. ANN. tit. 13, §§ 5401 to 5414 (2003); VA. CODE ANN. §§ 9.1-900 to 9.1-920 (Michie 2004); WASH. REV. CODE ANN. §§

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Minnesota enacted its Predatory Offender Registration Statute in 1991 in response to the brutal gun-point abduction of eleven year-old Jacob Wetterling.⁵ As initially enacted, Minnesota's statute required that persons convicted of certain enumerated child-related offenses register as predatory offenders upon release from confinement.⁶ In 1993, the legislature amended the statute to expand the number of offenses that trigger registration.⁷ More significantly, the 1993 amendments mandated registration by individuals convicted of either an enumerated predatory offense or an offense "arising out of the same set of circumstances" if initially charged with an enumerated predatory offense.⁸

9A.44.130, 9A.44.135, 9A.44.140 (West 2004); W.VA. CODE §§ 15-12-1 to -10 (2003); WIS. STAT. § 301.45 (2003); WYO. STAT. ANN. §§ 7-19-301 to 7-19-307 (2003).

⁵ MINN. STAT. § 243.166 (2003); Wayne A. Logan, *Examining our Approaches to Sex Offenders and the Law: Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, And Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1289-90 (2003) (noting that Jacob Wetterling, abducted in rural St. Joseph, Minnesota, has never been found and his abductor still remains at large).

⁶ MINN. STAT. § 243.166.1(1) (1991). The statute mandated registration following a conviction for kidnapping, criminal sexual conduct, solicitation of children to engage in sexual conduct, use of minors in sexual performance, or solicitation of children to practice prostitution. *Id.*

⁷ See MINN. STAT. § 243.166 (1993) (expanding registration to include individuals convicted of sexual offenses with adult victims). See also Logan, *supra* note 5, at 1294 (noting that State Senator Joe Bertram initiated reform efforts to expand the category of offenses which would prompt registration).

⁸ MINN. STAT. § 243.166 (1993). Specifically, the 1993 Amendments require a person to register as a predatory offender if:

- 1) the person was charged with a felony violation of or attempt to violate any of the following, and convicted of that offense or of another offense arising out of the same set of circumstances: i) murder under section 609.185, clause (2); or ii) kidnapping under section 609.25, involving a minor victim; or iii) criminal sexual conduct under section 609.342, subdivision 1, paragraph (a), (b), (c), (d), (e), or (f); 609.343 subdivision 1, paragraph (a), (b), (c), (d), (e), or (f); 609.344 subdivision 1, paragraph (c) or (d); or 609.345; subdivision 1 paragraph (c), or (d); or 2) the person was convicted of a predatory crime as defined in section 609.1352, and the offender was sentenced as a patterned sex offender or the court found on its own motion or that of

The Eighth Circuit, in *Gunderson v. Hvass*, interpreted the 1993 amendments, holding that a defendant cleared of predatory offense charges was nonetheless required to register as a predatory offender.⁹ Although extensive forensic evidence failed to substantiate any allegations of sexual assault, the Eighth Circuit upheld Gunderson's registration requirement because it determined that his ultimate conviction for third-degree assault arose out of the same set of circumstances as the initially charged predatory offense.¹⁰

This note analyzes the constitutional problems inherent in mandating registration as a predatory offender when an individual has never been convicted of a sexual offense. Part I analyzes the court's holding and rationale in *Gunderson*. Part II provides background on state registration laws with a focus on the continuing expansion of Minnesota's Predatory Offender Statute. Part III addresses the substantive and procedural due process challenges to Minnesota's registration statute. Part IV addresses other consequences of Minnesota's registration statute, including the unfettered discretion conferred on the prosecution and the eventual decline of plea bargaining.¹¹ Given the due process concerns raised by Minnesota's statute, Part V proposes that if a defendant has never been convicted of a sexual offense, registration should be discretionary following a hearing in which the defendant is provided an opportunity to present evidence and call witnesses to challenge his inclusion on a sex offender registry.

the prosecutor that the crime was part of a predatory pattern of behavior that had criminal sexual conduct as its goal.

Id.

⁹ *Gunderson v. Hvass*, 339 F.3d 639, 642 (8th Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 364 (2004) (upholding *Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999), which held that a defendant cleared of predatory offense charges is required to register as a predatory offender under Minnesota Statute §243.166 because he was convicted of a non-predatory offense which arose out of the same set of circumstances as the charged predatory offense).

¹⁰ *Id.* at 641-42.

¹¹ *State v. Newell*, 2002 Minn. App. Lexis 1153 (Minn. Ct. App. 2002) (noting "the enormity of the potential unchecked power this statute, as written, places in the hands of the prosecution who has sole control over which offense to charge").

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This reform safeguards a defendant's constitutional right to contest the imposition of this stigmatizing label in an adversarial proceeding while still effectuating the primary purpose of the statute—to protect society from predatory offenders.

I. GUNDERSON V. HVASS

On August 6, 2003, the Eighth Circuit affirmed the district court's decision in *Gunderson v. Hvass*, holding that a defendant who was cleared of all sexual assault charges nonetheless was required to register as a predatory offender.¹² While noting that Minnesota's Predatory Offender Statute could produce "unfair results," the Eighth Circuit discerned no constitutional impediments in affirming the district court's holding that an individual dismissed of sexual assault charges must register as a sexual offender.¹³ Minnesota's statute requires individuals convicted of only a non-predatory offense to register as a predatory offender if the non-predatory offense "arises out of the same set of circumstances" as the originally charged predatory offense.¹⁴ Therefore, although only convicted of assault in the third degree, Brian Gunderson was required to register as a sexual offender because the court determined, based solely on the allegations contained in the criminal complaint, that his assault conviction arose out of the same circumstances as an initial charge for first-degree criminal sexual conduct.¹⁵

¹² *Gunderson*, 339 F.3d at 641; MINN. STAT. § 243.166 (2003).

¹³ *Gunderson*, 339 F.3d at 645 (noting that the statute and relevant precedent mandate that a defendant charged with both a predatory and a non-predatory offense who proceeds to trial and is acquitted of the predatory offense but convicted of the non-predatory offense must still register as a predatory offender).

¹⁴ MINN. STAT. § 243.166.1(a)(1) (2003).

¹⁵ *Gunderson*, 339 F.3d. at 642. *See* *Minnesota v. Kemmer*, 2001 Minn. App. LEXIS 379 (Minn. App. 2001) (holding that when it is clear that the charged offense and the offense to which the accused pled guilty "involved the same victim and occurred on the same date at the same place," then the two offenses are deemed to have arisen from the same set of circumstances). Here, because Gunderson's charged offense and the offense to which he pled guilty involved the same victim and occurred at the same place and on the same date,

The original complaint charging Gunderson with a sexual offense arose out of an incident involving a woman he met at a bar.¹⁶ The complainant alleged that Gunderson sexually assaulted her after driving her home.¹⁷ Gunderson consistently denied any sexual contact with the victim although he admitted that a physical altercation occurred.¹⁸ Forensic tests on biological samples from the victim corroborated Gunderson's account.¹⁹ Based on this forensic evidence, the original complaint, which charged Gunderson with a sexual offense, was dismissed in its entirety.²⁰ A new complaint was filed against Gunderson, charging him with third-degree assault from the same incident.²¹ Gunderson pled guilty to the new complaint.²² During his plea allocution, however, Gunderson was not informed of his duty to register as a predatory offender.²³ Indeed, he was not made aware of his duty to register as a predatory offender until he was later incarcerated for a violation of probation less than a year after his conviction.²⁴

Gunderson subsequently filed suit in the Minnesota district court, alleging that the statute requiring him to register as a sexual offender was an unconstitutional violation of his substantive and procedural due process rights.²⁵ The district court, however,

the court determined that the two offenses arose out of the same set of circumstances. *Gunderson*, 339 F.3d at 641-42.

¹⁶ *Gunderson*, 339 F.3d at 641. The incident is alleged to have occurred March 31, 1998. *Id.*

¹⁷ *Id.* The complainant claimed that Gunderson took off her pants while punching her and holding her arms and then had non-consensual sexual intercourse with her and ejaculated inside her vagina. *Id.* at 641.

¹⁸ *Id.* (noting that additional laboratory reports conducted by the Minnesota Bureau of Criminal Apprehension did not detect the presence of semen from physical examinations of the victim).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Gunderson v. Hvass*, 339 F.3d 639, 641 (8th Cir. 2003).

²² *Id.* Gunderson was placed on probation for three years and received a stayed sentence of fifteen months imprisonment. *Id.* at 641-42.

²³ *Id.*

²⁴ *Id.* at 642.

²⁵ *Id.* Gunderson argued that registration as a predatory offender implicates a fundamental right, specifically, the presumption of innocence, and therefore

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concluded that Gunderson's registration under Minnesota's Predatory Offender Registration Statute did not violate Gunderson's constitutional rights.²⁶ The district court determined that the registration requirements were not violative of Gunderson's procedural due process rights because of the minimal burdens imposed on registrants and because the fundamental right to a presumption of innocence is only implicated in criminal statutes and not regulatory laws like the registration statute.²⁷ The court then determined that the registration requirement was properly applied to a defendant charged with both predatory and non-predatory offenses who pleads guilty only to a non-predatory offense.²⁸

In affirming the district court's finding that Gunderson was required to register as a predatory offender, the Eighth Circuit relied on the Minnesota Supreme Court decision in *Boutin v. La Fleur*.²⁹ In *Boutin*, the court interpreted the "arising out of the same set of circumstances" phrase of the Minnesota statute to require the registration of a defendant convicted of a non-sexual offense if the non-sexual offense arose out of the same set of circumstances as a charged predatory offense.³⁰ Defendant

his substantive due process rights were violated. *Id.* Additionally, Gunderson asserted that he had a protectible liberty interest in not registering. Gunderson v. Hvass, No. Civ. 01-646, 2002 U.S. Dist. LEXIS 18674 (D. Minn. 2002).

²⁶ *Gunderson*, 339 F.3d at 641.

²⁷ Gunderson v. Hvass, No. Civ. 01-646, 2002 U.S. Dist. LEXIS 18674, at *4-5 (D. Minn. 2002).

²⁸ *Id.* at *6.

²⁹ 591 N.W.2d 711 (Minn. 1999). This case was the first to examine the 1993 Amendments to Minnesota's Predatory Offender Registration Statute. *Id.*

³⁰ *Id.* at 716. Predatory offenses include murder while committing or attempting to commit criminal sexual conduct in the first-degree or second-degree with force or violence; kidnapping; criminal sexual conduct in the first, second, third, fourth and fifth (felony only) degree; felony indecent exposure; false imprisonment of a minor; soliciting a minor to engage in prostitution or sexual conduct; using a minor in a sexual performance; and possessing pornographic work involving minors. MINN. STAT. § 243.166.1(a)(1)-(2) (2003). See also Minnesota Bureau of Criminal Apprehension, *2000 Predatory Offender Registration Tracking Program: Offenses Requiring Registration*, available at <http://www.dps.state.mn.us/bca/Invest/Documents/Offenses%20Requiring%0Registration.pdf>.

Timothy Boutin was charged with two counts of criminal sexual conduct in the third degree, one count of assault in the third degree, and one count of misdemeanor assault in the third degree.³¹ Boutin's charges stemmed from allegations made by Denise Rathman, Boutin's girlfriend, that he physically abused her and forced her to have sexual intercourse with him.³² Boutin admitted that he had non-consensual sexual intercourse with Rathman, stating that "she didn't want to and I still did it I guess."³³ Because Rathman later recanted her allegations of sexual assault, Boutin pled guilty to third-degree assault.³⁴ Although the criminal sexual conduct charges were dismissed against Boutin, Boutin was nevertheless required to register as a predatory offender.³⁵ The Supreme Court affirmed the registration requirement because Boutin was initially charged with an enumerated predatory offense which arose out of the same set of circumstances as the charged predatory offense.³⁶

Gunderson sought to factually distinguish Boutin's case from his own, noting that his conviction arose from a complaint which charged only a non-sexual offense while Boutin's conviction arose from a complaint which charged both a predatory and a non-predatory offense.³⁷ The court summarily dismissed Gunderson's argument, holding that the statute does not demand that a non-predatory offense be charged in the same complaint as a predatory offense; it demands only that the conviction arise from the same set of circumstances as an enumerated predatory offense.³⁸ Here, since both offenses occurred on the same date, at the same place, and involved the same victim, the court found that Gunderson's conviction for third-degree assault arose out of the same set of circumstances as his initial charge for first-degree criminal sexual

³¹ *Boutin*, 591 N.W.2d at 713.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 714.

³⁶ *Id.* at 716.

³⁷ *Gunderson*, 339 F.3d at 641. *See supra* text accompanying notes 15-21.

³⁸ *Gunderson*, 339 F.3d at 642-43.

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conduct.³⁹

The court next addressed Gunderson's constitutional challenges to the statute.⁴⁰ First, the court determined that the statute was not violative of Gunderson's substantive due process rights because no fundamental right was implicated.⁴¹ In a substantive due process analysis, if a fundamental right is implicated, the state must advance a legitimate and compelling governmental interest for interfering with that right.⁴² If no fundamental right is implicated, then the standard of review is "less exacting" and the statute will be upheld so long as it was determined to be rationally related to a legitimate governmental purpose.⁴³ While noting the presumption of innocence to be a fundamental right, the court concluded that such a right is only implicated in either a criminal or punitive law, not a regulatory law.⁴⁴ No fundamental right was implicated because the registration statute was found to be non-punitive.⁴⁵ Therefore, to withstand any constitutional challenge, the statute only needed to be rationally related to a legitimate governmental objective.⁴⁶ Here,

³⁹ *Id.* at 643. *But see* *Murphy v. Wood*, 545 N.W.2d 52, 53-54 (Minn. Ct. App. 1996) (holding that a factual record was necessary to determine whether defendant's sexual assault charge arose out of the same set of circumstances as his conviction for aggravated robbery and assault).

⁴⁰ *See Gunderson*, 339 F.3d at 643.

⁴¹ *Id.* at 643-44. *See* discussion *infra* Part III.B.

⁴² *Gunderson*, 339 F.3d at 643-44.

⁴³ *Id.* at 643. "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable basis for the classification." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

⁴⁴ *Gunderson*, 339 F.3d at 643. *See* *State v. Edwards*, 130 N.W.2d 623, 626 (Minn. 1964) (noting that while the Constitution has not expressly provided the presumption of innocence to be a fundamental right, courts have treated it as such).

⁴⁵ *Gunderson*, 339 F.3d at 643 (citing *Boutin v. LaFleur*, 591 N.W.2d 711, 717 (Minn. 1999) (holding that the registration statute was non-punitive given that registration as a predatory offender is not a permanent requirement and that it does not restrict a registrant's ability to change residences or to move out of state)).

⁴⁶ *Id.*

the court found the registration statute was rationally related to the government's legitimate interest in requiring all predatory offenders to register, "including those who take advantage of favorable plea agreements."⁴⁷

Second, the court dismissed Gunderson's claim that Minnesota's Predatory Offender Registration Statute violated his procedural due process rights.⁴⁸ While the court conceded that Gunderson's reputation would undoubtedly be injured by mandating his registration as a sexual offender, the court noted that reputation, alone, is insufficient "to invoke the procedural protections of the due process clause."⁴⁹ Reputational harm must be coupled with another tangible element to rise to the level of a protectible property interest.⁵⁰ The court reasoned that the requirements of Minnesota's registration statute posed only a minimal burden on the registrant.⁵¹ The court noted that the initial registration process would require only that Gunderson provide his fingerprints, a photograph, and information about his whereabouts

⁴⁷ *Id.* at 643 (quoting U.S. Magistrate Judge Raymond L. Erickson's report to the district court, *Gunderson v. Hvass*, No. 01-646, 2002 U.S. Dist. LEXIS 21783, at *25 (D. Minn. 2002)). In his report, the Magistrate Judge commented:

Given the realities of the plea bargaining system, by extending the registration requirements to persons who are charged with a predatory offense, but plead guilty to a non-predatory charge that arises from the same circumstances, the Minnesota Legislature was attempting to insure the inclusion in the registration rolls, of all predatory offenders, including those who take advantage of favorable plea agreements. The fact that such a registration policy may, in fact, require the inclusion of persons who are not predators, is not a fatal Constitutional defect.

Gunderson v. Hvass, No. 01-646, 2002 U.S. Dist. LEXIS 21783, at *25 (D. Minn. June 10, 2002) [hereinafter Magistrate's Report].

⁴⁸ *Gunderson*, 339 F.3d at 644. See discussion *infra* Part III.A.

⁴⁹ *Gunderson*, 339 F.3d at 644.

⁵⁰ *Id.* As identified in the Magistrate's Report, if reputational harm is coupled with a change in legal status, if State or Federal employment is denied, or if entitlements under State or Federal law are diminished as a result of the registration requirement, then a registrant has identified a protectible property interest. Magistrate's Report, *supra* note 47, at *42. See discussion *infra* Part III.A.2.

⁵¹ *Gunderson*, 339 F.3d at 644.

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to local law enforcement;⁵² Gunderson's only obligation thereafter would be to update his address information annually.⁵³ Therefore, because Gunderson failed to identify a protectible property interest, the court rejected his procedural due process claim.⁵⁴ Finding no viable due process challenges to the statute, the court affirmed Gunderson's obligation to register as a predatory offender.⁵⁵

II. OVERVIEW OF STATE SEXUAL OFFENDER REGISTRATION STATUTES

The majority of states enacted sexual offender registration laws after Congress passed the Jacob Wetterling Crimes Against

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 645. Justice Beam was the only judge to issue a separate opinion from the majority. In his concurrence, he noted that although the police investigation clearly established a lack of sexual contact between Gunderson and the complainant, and that the Minnesota Supreme Court's decision in *Boutin* would seem to "turn reason and fairness on its head," he nonetheless agreed with the court that Gunderson asserted no Fourteenth Amendment due process violation. *Id.*

⁵⁵ *Id.* Gunderson's duty to register as a predatory offender requires him to register all primary addresses, all secondary addresses, the addresses of all Minnesota property owned, leased or rented by him, the addresses of all locations where he is employed, the addresses of all residences where he resides when attending school, and the make, model, license plate number, and color of all vehicles owned or regularly driven by him. MINN. STAT. § 243.166.4a(b)(1)-(6) (2003). He must provide law enforcement with a fingerprint card, a photograph, and a written consent form allowing a treatment facility to release information to law enforcement. MINN. STAT. § 243.166.4(a). He must also notify law enforcement five days before each residence change. MINN. STAT. § 243.166.3(b) Additionally, he must register as a predatory offender in every other state where he works or attends school. MINN. STAT. § 243.166.3(d). Gunderson must update his information annually. MINN. STAT. § 243.166.4(e)(3). Violation of any of these provisions constitutes a felony, which carries a maximum sentence of five years in prison. MINN. STAT. § 243.166.5(a)-(b). While Minnesota does not automatically provide for the public dissemination of Gunderson's registration, if he is not in compliance with the registration provisions for over thirty days, his personal information and a photograph may be released to the public. MINN. STAT. § 243.166.7a.

Children and Sexually Violent Offender Registration Act.⁵⁶ This Act, part of the Violent Crime Control and Law Enforcement Act of 1994, encourages states to create registries of offenders convicted of crimes against children or sexually violent offenses.⁵⁷ The Act provides that if a state fails to create a registry within three years of its enactment, the state loses ten percent of its federal crime control grant funds.⁵⁸ Additionally, states that create registries of sexually violent offenders are awarded grants by the Director of the Bureau of Justice Assistance to offset the costs of complying with the registration program.⁵⁹

The Jacob Wetterling Act provides states with a “minimum baseline” for their registration programs.⁶⁰ States are free to impose, and indeed have imposed, more rigorous provisions when

⁵⁶ 42 U.S.C. § 14071 (2003). *See Lieb, supra* note 2 (noting that several states enacted sex offender registration laws prior to Congress’ passage of the Jacob Wetterling Act). California enacted the nation’s first registration law in 1944. *Id.* Following California, Arizona enacted its registration law in 1951, although this law was repealed and later replaced. *Id.* Between 1957-1967, Florida, Nevada, Ohio; and Alabama followed suit, enacting their own registration statutes. *Id.*

⁵⁷ *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); *see also* 42 U.S.C. § 14071(a)(1)(A)-(B) (2003) (mandating that the Attorney General establish guidelines for state programs that require registration of individuals convicted of criminal offenses against a minor or those convicted of a sexually violent offense). *See* Caroline Louise Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R.-C.L. L. REV. 89, 94 (1996). The provision of the Act that required sex offenders to register upon release from confinement received overwhelming support from both Democrats and Republicans. *Id.*

⁵⁸ 42 U.S.C. § 14071(g)(1)-(2) (2003). The statute provides that the Attorney General may extend the deadline for compliance by two years for any “state that is making a good faith effort to implement” the registry. *Id.*

⁵⁹ 42 U.S.C. § 14071(i)(1)(A) (2003). Such funds are distributed directly to the state and are to be used for training, salaries, equipment, materials, and other costs. 42 U.S.C. § 14071(i)(1)(B)(i)-(ii) (2003).

⁶⁰ Wayne A. Logan, *A Study in “Actuarial Justice”: Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 599 (2000) (noting that the Jacob Wetterling Act “constitute[s] a floor for state programs, not a ceiling”).

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enacting their own sex offender registries.⁶¹ The Act provides that “a determination of whether a person is a sexually violent predator . . . shall be made by a court after considering the recommendation of a board composed of experts in the behavior and treatment of sex offenders, victims’ rights advocates and representatives of law enforcement agencies.”⁶² States, however, may waive this requirement if they have established equally or more rigorous alternate procedures or legal standards for designating an individual as a sexually violent predator.⁶³ At minimum, a state registration program must require each registrant to 1) provide local law enforcement officials with the registrant’s name, address, a photograph, and fingerprints;⁶⁴ 2) report any change in address and notify proper authorities of any intention to move to another state; and 3) register in the state where he is employed or attending school.⁶⁵ Finally, each registrant must read and sign a document informing him of his duty to register as either a sexually violent offender or an offender convicted of crimes against children.⁶⁶ Registration is required for ten years.⁶⁷ Lifetime registration, however, is mandated for any individual either classified as a sexually violent predator or convicted of an aggravated offense.⁶⁸

⁶¹ *Id.* (noting that states may “broaden the list of eligible offense categories, lengthen the mandated registration period, and impose other measures more stringent than required by the Wetterling Act”). While the Jacob Wetterling Act specifies that information concerning sex offenders must be released to the public, states retain discretion in determining the method and extent of registration information that is released to the public. *Id.*

⁶² See 42 U.S.C. § 14071(a)(2)(A) (2003).

⁶³ See 42 U.S.C. § 14071(a)(2)(B) (2003); see also 42 U.S.C. § 14071(a)(3)(C) (defining the term “sexually violent predator” as a person convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses).

⁶⁴ See 42 U.S.C. § 14071(b)(1)(A)(ii),(iv), (B) (2003); Logan, *supra* note 60, at 599.

⁶⁵ 42 U.S.C. § 14071(b)(1)(A)(ii)-(iii) (2003).

⁶⁶ *Id.* § 14071(b)(1)(A)(v).

⁶⁷ *Id.* § 14071(b)(6)(A).

⁶⁸ *Id.* § 14071(b)(6)(ii)—(iii). “The term ‘sexually violent predator’ means

A. *States' Approaches to Registration under the Jacob Wetterling Act*

The federal guidelines imposed by the Jacob Wetterling Act produced varying state approaches to registration.⁶⁹ States differ as to the extent to which the public can access information contained in the registry.⁷⁰ For example, Florida, New York, and California have created hotlines where callers can obtain information regarding registered sex offenders.⁷¹ In over thirty states, information concerning registrants is disseminated via the internet,⁷² and in Washington, D.C., such information can be

a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses." *See supra* note 63. *Id.* § 14071(a)(3)(c). An individual commits aggravated sexual abuse when he knowingly uses force or threat of force to cause another to engage in a sexual act. 18 U.S.C. § 2241 (2004).

⁶⁹ *Doe v. Williams*, 167 F. Supp. 2d 45, 47 (D.D.C. Cir. 2001) (noting that because the Jacob Wetterling Act established only minimum standards, states have differed in their statutory approaches to registration and community notification).

⁷⁰ Carol L. Kunz, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453, 458 (1997) (noting that the flexibility of the Jacob Wetterling Act has led to diversity among state registration and notification statutes and that state notification statutes vary "in terms of . . . the scope of . . . notification, and the manner in which this process is carried out").

⁷¹ *See, e.g.*, CAL. PENAL CODE 290.4 (Deering 2004) (permitting "the department to operate a '900' telephone number [so] that members of the public may call and inquire whether a named individual" is contained in the registry); FLA. STAT. ANN. § 775.21(6)(k)(2) (West 2003) (authorizing the department "to disseminate this public information by any means deemed appropriate, including operating a toll-free telephone number for this purpose"); N.Y. CORRECT LAW § 168-p (Consol. 2003) (establishing a "900" telephone number so the public may call and inquire whether a named individual is required to register).

⁷² Kimberly B. Wilkins, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH. L. REV. 1245 (2003) (noting that thirty-two states make their registries available on the internet). *See, e.g.*, ALASKA STAT. § 18.65.087(g) (2003) (requiring the Department of Public Safety to post on the internet a list of offenders who have failed to register, whose addresses cannot be verified or who otherwise cannot be located); DEL. CODE ANN. tit. § 26 (2003) (establishing Delaware's Sex Offender Registry

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obtained through local law enforcement agencies.⁷³ In certain states, including Minnesota, access is more restricted.⁷⁴

State laws also vary as to the length of registration. For example, Florida requires lifetime registration for all “sexual predators” while Maine and Minnesota provide for a ten-year registration period.⁷⁵ The penalties for non-compliance also vary between states.⁷⁶

Additionally, state registration statutes vary as to whether

Internet Web Site, which allows the general public to receive updates by geographical region whenever a sex offender is added to, deleted from, or has any change in status on the registry).

⁷³ COLO. REV. STAT. § 16-22-112(2) (2003) (authorizing local law enforcement agencies to release to any person residing within the agency’s jurisdiction information regarding any person registered with the local law enforcement agency); D.C. CODE ANN. § 22-4011(a)-(B) (2003) (allowing the Metropolitan Police Department to make registration lists and information about registrants available for public inspection at police stations); S.C. CODE ANN. § 23-3-490(a) (Law. Co-op. 2002) (making information collected for the registry open to public inspection, upon request to the county sheriff).

⁷⁴ HAW. REV. STAT. ANN. § 846E-3(d) (Michie 2003). Hawaii does not provide for automatic release of registration information. *Id.* The state must first petition for release of information in a civil proceeding. *Id.* At this hearing, the offender has the opportunity to present evidence to show that he is not a threat to the community and that the public release of his information is not necessary to the safety of the community. *Id.* Like Hawaii, Minnesota does not provide for automatic dissemination of information contained in the registry. *See* MINN. STAT. § 243.166.7 (2003) (providing that registration information is considered “private data” and may only be used for law enforcement purposes).

⁷⁵ *See* ARIZ. REV. STAT. § 13-3821 (2003) (requiring lifetime registration after a conviction for sexual conduct with a minor); FLA. STAT. ANN. § 775.21(6)(l) (West 2003) (requiring lifetime registration for sexual predators); HAW. REV. STAT. ANN. § 846E-2 (Michie 2003) (requiring compliance with registration requirements for the lifetime of the offender); 34-A ME. REV. STAT. ANN. § 11225 (2003) (requiring sex offenders to register for a period of ten years from the initial date of registration).

⁷⁶ *See* N.Y. CORRECT. LAW § 168-t (Consol. 2003) (treating a first offense as class A misdemeanor); N.C. GEN. STAT. § 14-208.11 (2003) (treating any violation for non-compliance as a Class F felony); S.C. CODE ANN. § 23-3-470 (b)(1) (Law Co-op. 2002) (treating a first offense as a misdemeanor with a mandatory sentence of ninety days incarceration).

registration is compulsory or discretionary.⁷⁷ In Massachusetts, a state which employs discretionary classification, anyone convicted of a sex crime is entitled to a hearing before a Sex Offender Registry Board, where the offender can argue against inclusion on the registration list.⁷⁸ In contrast, nineteen states including Minnesota employ compulsory classification, whereby a court must classify a defendant as a sexual predator if the defendant satisfies the specified criteria in the statute.⁷⁹ In states requiring compulsory classification, the court does not have the ability to modify the person's duty to register.⁸⁰ Alaska, a state that employs the compulsory approach, has rationalized this approach, finding "the fact of an offender's conviction for a sex offense . . . sufficient reason to include that offender in the registry because of the potential for re-offense."⁸¹

States also differ with respect to the range of offenses that will trigger registration.⁸² The Jacob Wetterling Act specifies that states

⁷⁷ See Logan, *supra* note 60, at 603.

⁷⁸ MASS. ANN. LAWS ch. 6 § 178K (2004); see Turner, John C., *Megan's Law: Safety Net or Noose?*, CONN. L. TRIB., Dec. 27, 1999. In determining whether to relieve the registrant of his duty to register, the Sex Offender Registry Board shall consider whether the offender's criminal history indicates a risk of re-offense or a danger to the public as well as whether any physical harm was caused by the offense and whether the offense involved consensual conduct between adults. MASS. ANN. LAWS ch. 6 § 178K (2)(d) (2004).

⁷⁹ Logan, *supra* note 60, at 603 (noting that Alabama, Alaska, California, Connecticut, Delaware, Illinois, Kansas, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Virginia all employ compulsory classification of sex offenders).

⁸⁰ See MINN. STAT. § 243.166.2 (2003) (stating that "the Court may not modify the person's duty to register in the pronounced sentence or deposition order").

⁸¹ Logan, *supra* note 60, at 605. Similarly, Alabama provides that "certain juveniles and all adults convicted of a 'criminal sex offense,' are subject to compulsory registration and community notification by means of a 'notification flyer,' which is distributed by hand or regular mail by police." *Id.* See ALA. CODE 15-20-21(3) (2003).

⁸² See, e.g., ALA. CODE § 13A-11-200 (2003) (mandating registration for the following offenses: sexual perversion involving a member of the same or opposite sex, sexual abuse involving any member of the same or opposite sex,

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may impose registration for sexually violent offenses that include or exceed aggravated sexual abuse or any offense that involves “engaging in physical contact with another with the intent to commit aggravated sexual abuse or sexual abuse.”⁸³ Consequently, states have composed varying lists of enumerated offenses that require registration.⁸⁴ A minority of states demand registration if the defendant’s offense was “sexually motivated” or committed for a sexual purpose.⁸⁵

B. Minnesota’s Predatory Offender Registration Act

In 1991, Minnesota became the fifteenth state to enact a sex offender registration statute.⁸⁶ Although several senators “expressed concern that registration was contrary to the idea that released offenders had paid their debt to society” and “tends to

rape, sodomy, sexual misconduct, indecent exposure, promoting prostitution in the first or second degree, obscenity, incest, or an attempt to commit any of these crimes); IOWA CODE § 692A.2 (2003) (mandating registration for any individual who has been convicted of a criminal offense against a minor, an aggravated offense, sexual exploitation or a sexually violent offense); 42 PA. CONS. STAT. § 9795.1(a)(1)-(2) (2003) (mandating ten year registration for the following offenses: kidnapping a minor, indecent assault, incest where the victim is between the ages of twelve and eighteen, promoting prostitution of a minor, obscenity where the victim is a minor, sexual abuse of children, unlawful contact with a minor, and sexual exploitation of children or any attempt to commit these offenses). Lifetime registration is required for rape, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, incest where the victim is under twelve years-old, and sexually violent predators. 42 PA. CONS. STAT. § 9795.1(b)(2)-(3) (2003).

⁸³ 42 U.S.C. § 14071(a)(3)(B) (2003).

⁸⁴ See Logan, *supra* note 60, at 599 (noting that states may expand the categories of offenses that mandate registration).

⁸⁵ See, e.g., CAL. PENAL CODE § 290(a)(2)(E) (Deering 2004) (mandating registration if the crime is committed for “purposes of sexual gratification”); KAN. STAT. ANN. § 22-4902(c)(14) (2002) (requiring registration for “any act which at the time of sentencing for the offense has been determined beyond a reasonable doubt to have been sexually motivated”); W. VA. CODE § 15-12-2(c) (2003) (demanding registration if the offense was “sexually motivated”).

⁸⁶ Logan, *supra* note 5, at 1293 (noting that Minnesota was a “forerunner with respect to sex offender registration and community notification). See MINN. STAT. § 243.166 (2003).

deprive people of their freedom of movement and freedom of privacy,” the Predatory Offender Registration Act passed Minnesota’s House and the Senate by a commanding majority.⁸⁷ The original version of the Act mandated registration if an offender had been convicted of any of the following child-related offenses: kidnapping a minor; criminal sexual conduct toward a minor; solicitation of children to engage in sexual conduct; use of minors in a sexual performance; or solicitation of children to practice prostitution.⁸⁸ Any violation for non-compliance was considered a misdemeanor.⁸⁹

The 1993 amendments to Minnesota’s Predatory Offender Registration Statute considerably expanded the range of offenses that require registration.⁹⁰ Significantly, the amended law mandates registration if an individual is “charged with a felony violation” or an “attempt to violate” an enumerated offense, and is “convicted of that offense *or of another offense* arising out of the same set of circumstances.”⁹¹ Additionally, registration was extended to offenses involving adult victims.⁹² Amendments passed in 1996 broadened the scope of registration by requiring registration of persons adjudicated as sexually dangerous or those having sexual psychopathic personalities, regardless of whether the person was convicted of any offense.⁹³ The 1999 amendments further expanded registration to include those persons found not guilty by reason of insanity.⁹⁴

⁸⁷ Logan, *supra* note 5 at 1292-93.

⁸⁸ MINN. STAT. § 243.166.1(1) (1991).

⁸⁹ MINN. STAT. § 243.166.5.

⁹⁰ Logan, *supra* note 5, at 1294 (noting that the amendments greatly expanded “the array of criminal behaviors” that would require registration).

⁹¹ *Id.* at 1294-95 (emphasis added); *see* MINN. STAT. § 243.166.1(1) (1993).

⁹² Logan, *supra* note 5, at 1295; *see* MINN. STAT. § 243.166.1(1) (1993).

⁹³ MINN. STAT. § 243.166.4(c) (1996). To be adjudicated as either “sexually dangerous” or having a “sexual psychopathic personality,” facts must be submitted to the county attorney who will prepare a petition if good cause is shown. MINN. STAT. § 253B.185.1 (2003). A court will then hear the petition alleging that the patient who is subject to commitment at a treatment facility is a sexually dangerous person or is a person with a sexual psychopathic personality. *Id.* *See* Logan, *supra* note 5, at 1306.

⁹⁴ MINN. STAT. § 243.166.4(d)(2) (1999); *see* Logan, *supra* note 5, at 1308

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Katie's Law, a Minnesota statute passed in response to the brutal kidnapping and murder of nineteen year old Katie Poirier, resulted in a further expansion of the state's registration laws.⁹⁵ First, Katie's Law stiffened the penalties for non-compliance with registration requirements.⁹⁶ Registration violations, including failure to register address changes or return annual verification letters, could extend the registration period by an additional five years.⁹⁷ The first violation of the statute subjects the offender to a mandatory minimum sentence of one year in prison.⁹⁸ A second violation carries a minimum of two years incarceration.⁹⁹ Additionally, Katie's Law provided that if a person subject to the registration requirement is out of compliance for thirty days, the Minnesota Bureau of Criminal Apprehension may disseminate information about the offender, including a photograph, to the public.¹⁰⁰ The information released must be limited to that necessary for the public to assist law enforcement in locating the sex offender.¹⁰¹

Commentators have praised Minnesota's Predatory Offender

(noting that the 1999 amendments were a legislative response to the acquittal, for reasons of insanity, of a defendant who was charged with raping a thirteen year-old girl).

⁹⁵ MINN. STAT. § 243.166 (2000); see Logan, *supra* note 5, at 1311-13 (noting that the defendant charged with Katie's murder "had an extensive history of sex offense convictions" but was not subject to registration and community notification because these laws did not apply retroactively).

⁹⁶ MINN. STAT. § 243.166.5(a)-(b)(2000); see Logan, *supra* note 5, at 1313-14.

⁹⁷ MINN. STAT. § 243.166.6(b) (2000).

⁹⁸ MINN. STAT. § 243.166.5(b).

⁹⁹ MINN. STAT. § 243.166.5(c).

¹⁰⁰ MINN. STAT. § 243.166.7a. The Bureau of Criminal Apprehension may make information available regarding offenders who fail to return their annual verification letters or provide their primary or secondary residence to the public through electronic, computerized, or other accessible means. *Id.* This publication possibility applies to all offenders over the age of sixteen who have been out of compliance for at least thirty days. *Id.*

¹⁰¹ *Id.* Minnesota's registry presently contains over 11,000 registrants. Klaas Kids Foundation, *Megan's Law by State: Minnesota*, available at <http://www.klaaskids.org/st-minn.htm>. Seventy percent are believed to be in compliance. *Id.*

Registration Act as being one of the “least onerous” in the nation.¹⁰² Indeed, the ten year period of registration is comparably shorter than most other states.¹⁰³ In addition, unlike the registration statutes of most states, Minnesota does not provide for automatic public access to the information contained in the registry.¹⁰⁴ Furthermore, registrants in Minnesota are only required to verify their registration materials annually through a certified mailing, in contrast to other jurisdictions that require verification of registration materials in person and with greater frequency.¹⁰⁵

In spite of the arguable moderateness of the provisions of Minnesota’s registration statute, the statute as implemented reflects an enduring rigidity.¹⁰⁶ First, an offender is required to register even if the original sexual offense charges are dismissed or withdrawn and the offender’s remaining charge is a non-registerable offense.¹⁰⁷ Furthermore, Minnesota’s Bureau of

¹⁰² Logan, *supra* note 5, at 1322-23 (noting that “true to its reputation for moderation in criminal justice issues more generally, Minnesota’s registration and community notification laws rank among the nation’s least onerous in a variety of respects”).

¹⁰³ See Logan, *supra* note 5, at 1323. See also, e.g., ARIZ. REV. STAT. § 13-3821 (2003) (requiring lifetime registration after a conviction for sexual conduct with a minor); FLA. STAT. ANN. § 775.21(6)(l) (West 2003) (requiring lifetime registration for sexual predators); HAW. REV. STAT. ANN. § 846E-2(a) (Michie 2003) (mandating lifetime registration).

¹⁰⁴ See Logan, *supra* note 5, at 1324 n. 286 (noting that Washington, D.C. and New Mexico disseminate registrants’ employment addresses and that Arizona provides a map that indicates the registrant’s home address and the closest day care centers and schools); MINN. STAT. § 243.166.7 (2003) (providing that registration data is considered “private data” and “may be used only for law enforcement purposes”).

¹⁰⁵ See Logan, *supra* note 5, at 1323 n. 279 (noting that Hawaii, Kansas, and Michigan all require quarterly verification); MINN. STAT. § 243.166.4(e)(3) (2003) (providing the Bureau of Criminal Apprehension shall send registration information to registrants on an annual basis).

¹⁰⁶ See Logan, *supra* note 5, at 1320 (noting that Minnesota’s law “numbers among the nation’s most moderate in function and scope”).

¹⁰⁷ Minnesota Bureau of Criminal Apprehension, *2000 Predatory Offender Registration and Tracking Program, Minnesota Statutes Sections 243.166 and 243.167: Frequently Asked Questions*, available at <http://www.dps.state.mn.us/bca/Invest/Documents/Frequently%20Asked%20Questions.pdf>; see generally

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Criminal Apprehension (“BCA”) requires an offender to register as a sex offender even if the registerable offense is expunged from his criminal record.¹⁰⁸ An offender can only be exempt from the duty to register by obtaining a separate order expunging his registration requirements.¹⁰⁹ Finally, registration under Minnesota’s statute is compulsory, thereby prohibiting the court from modifying a person’s duty to register.¹¹⁰ The BCA provides that if a judge exercises discretion and finds that an individual is not required to register for a registerable offense, law enforcement and corrections agents have the authority to circumvent the judge’s ruling.¹¹¹ The BCA directs those agencies to assist the offender with the registration process in spite of a judge’s contrary ruling.¹¹²

Minnesota’s Predatory Offender Registration Statute requires the registrant to provide the citation for his original charges, his relationship to the victim, the victim’s age, race, and sex, as well as a brief description of his crime and past conviction record.¹¹³ The registrant must read and initial all provisions contained in the “Duty to Register” form, including an acknowledgement that it is his “duty to register as a predatory offender” in accordance with Minnesota law.¹¹⁴

Gunderson v. Hvass, 339 F.3d 639 (affirming Gunderson’s duty to register as a predatory offender even though his predatory offense charge was dismissed in its entirety).

¹⁰⁸ Minnesota Bureau of Criminal Apprehension, *2000 Predatory Offender Registration and Tracking Program, Minnesota Statutes Sections 243.166 and 243.167: Frequently Asked Questions*, available at <http://www.dps.state.mn.us/bca/Invest/Documents/Frequently%20Asked%20Questions.pdf>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Minnesota Bureau of Criminal Apprehension, *2000 Predatory Offender Registration and Tracking Program, Minnesota Statutes Sections 243.166 and 243.167: Blank Forms*, available at <http://www.dps.state.mn.us/bca/Invest/Documents/BlankForms.pdf> (last visited Apr. 2, 2004).

¹¹⁴ *Id.*

III. VIABLE DUE PROCESS CHALLENGES TO MINNESOTA'S PREDATORY OFFENDER REGISTRATION STATUTE

While registration statutes have come under considerable attack, they have thus far uniformly survived constitutional challenges.¹¹⁵ Courts have sustained registration statutes against equal protection,¹¹⁶ due process,¹¹⁷ and ex post facto challenges.¹¹⁸ In spite of the general reluctance to strike down registration

¹¹⁵ Licia A. Esposito, *State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities*, 36 A.L.R. 5th 161 (2004 West Group). *See, e.g.*, *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999) (upholding the Tennessee Sex Offender Registration and Monitoring Act against an equal protection challenge because the court determined that the Act had a rational basis in protecting public safety with respect to sex offenses); *People v. Malchow*, 739 N.E.2d 433 (Ind. 2000) (holding that the Illinois Sex Offender Registration Act, which required convicted sex offenders to register with local police departments, did not violate the defendant's constitutional right to privacy); *Byron M. v. City of Whittier*, 46 F. Supp. 2d 1032 (C.D. Cal. 1998) (holding that the community notification requirements of the statute did not violate either the ex post facto or double jeopardy clauses because the statute was enacted to advance regulatory goals, including public safety and protection).

¹¹⁶ *See Artway v. Attorney General of the State of New Jersey*, 81 F.3d 1235 (3d Cir. 1999) (holding that New Jersey's statute mandating "repetitive and compulsive" sex offenders to register with local law enforcement did not violate the equal protection clause); *see also Roe v. Farwell*, 999 F. Supp. 174 (D. Mass. 1998) (holding that the provisions of Massachusetts "Megan's Law" registration and disclosure requirements did not violate the equal protection clause).

¹¹⁷ *Patterson v. State*, 985 P.2d 1007 (Alaska Ct. App. 1999) (upholding Alaska's Sex Offender Registration Act against a due process challenge finding the statute rationally related to the legislature's legitimate interest in promoting public safety). *See Akella v. Michigan Dept. of State Police*, 67 F. Supp. 2d 716 (E.D. Mich. 1999) (holding that Michigan's Sex Offenders Registration Act did not violate substantive due process rights despite the fact that the Act applied to registrants who had been rehabilitated).

¹¹⁸ *See People v. Guillen*, 717 N.E.2d 563 (Ill. App. Ct. 1999) (upholding Sex Offender Registration Act against both federal and state ex post facto challenges); *see also Esposito, supra* note 115, at *2a (stating that criminal registration statutes have also survived challenges based on bill of attainder, vagueness, right to privacy, right to travel, privilege against self-incrimination, cruel and unusual punishment, double jeopardy, and unreasonable search and seizure).

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statutes, considerable due process concerns are raised when an individual who has never been convicted of a sexual offense must register as a predatory offender.¹¹⁹ Due process concerns arise when “fundamental procedural fairness” has been denied or when power is exercised “without any reasonable justification” in the pursuit of an otherwise legitimate governmental objective.¹²⁰ While the government undoubtedly has a valid objective in protecting the public, the importance of such aims does not justify trammeling constitutional due process protections.¹²¹

A. Procedural Due Process

Procedural due process protection provides notice of a possible deprivation of life, liberty, or property by the government, and it affords a meaningful opportunity to contest the deprivation prior to its imposition.¹²² “The essence of due process is that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.”¹²³ In a procedural due process analysis, therefore, the first inquiry is whether a protected liberty or property interest is implicated.¹²⁴

1. Implication of a Protectible Liberty Interest

A protected liberty interest is implicated when an individual is required to register as a sex offender. For instance, the Ninth Circuit held in *Neal v. Shimoda* that a protected liberty interest was

¹¹⁹ See generally, *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997).

¹²⁰ *People v. Bell*, No. 3610-80, 2003 N.Y. Misc. LEXIS 884, at *8-9 (N.Y. Sup. Ct. 2003) (citing *Fuentes v. Shevin*, 407 U.S. 67, 80) (1972) (asserting that the “central meaning” of procedural due process is clear—“parties whose rights are to be affected are entitled to be heard”); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (noting that the Due Process Clause was “intended to secure the individual from the arbitrary exercise of the powers of government”).

¹²¹ See *Doe v. Williams*, 167 F. Supp. 2d 45, 59 (D.D.C. Cir. 2001).

¹²² *People v. Bell*, No. 3610-80, 2003 N.Y. Misc. LEXIS 884, at *7-8.

¹²³ *Id.* at *8.

¹²⁴ *In the Matter of Risk Level Determination of C.M.*, 578 N.W.2d 391, 396 (Minn. Ct. App. 1998).

implicated where an inmate was dismissed of sex offense charges and consequently was never given an opportunity to formally challenge the imposition of the "sex offender" label.¹²⁵ In that case, Neal was indicted for robbery, kidnapping, sexual assault, terroristic threatening, and attempted murder, but he entered into a plea bargain in exchange for the dismissal of the sex offense charges.¹²⁶ Nonetheless, Neal was classified as a sex offender because his indictment alleged that he engaged in sexual misconduct during the course of his offenses.¹²⁷ Neal challenged this application, arguing that it violated his due process rights.¹²⁸ The court found that indeed, this classification invoked due process protections.¹²⁹

To decide whether a protected liberty interest was implicated, the court noted that state statutes may grant prisoners liberty interests which invoke due process protections if the statutes impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹³⁰ Therefore, because of the stigmatizing consequences of being labeled a sex offender, the court found that this classification "is precisely the type of atypical and significant hardship . . . that create[s] a protected liberty

¹²⁵ Neal v. Shimoda, 131 F.3d 818, 831 (9th Cir. 1997).

¹²⁶ *Id.* at 822. The complaint alleged that Neal, during a two-day period, kidnapped and robbed the victim and forced the victim to perform sexual acts on a juvenile. *Id.* Additionally, the indictment alleged that Neal sexually assaulted the victim. *Id.* He was also indicted for kidnapping a second victim and sexually assaulting her as well. *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 823.

¹²⁹ *Id.* at 831.

¹³⁰ *Id.* at 829 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). In *Sandin*, Conner, a defendant convicted of numerous crimes including murder, alleged that his procedural due process rights were violated because he was denied the ability to present witnesses at a disciplinary hearing. *Sandin*, 515 U.S. at 474-76. The hearing resulted in Conner being sentenced to thirty days' disciplinary segregation. *Id.* at 475. The Supreme Court held that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest. *Id.* at 486.

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interest.”¹³¹ These “increasingly popular ‘Megan’s laws’” stigmatize individuals classified as sex offenders insofar as such laws require that these individuals register with law enforcement officials and information about the offenders may subsequently be released to the public.¹³²

In determining that Neal had a protected liberty interest, the Ninth Circuit relied on the Supreme Court’s opinion in *Vitek v. Jones*.¹³³ In *Vitek*, inmates challenged the constitutionality of a Nebraska statute that authorized correctional officials to classify certain inmates as “mentally ill” without a hearing and to subsequently transfer them to mental hospitals for involuntary confinement.¹³⁴ The Supreme Court held that the liberty interest included both the characterization of the inmate as mentally ill and the transfer of the inmate to the mental hospital.¹³⁵ The Court also concluded that an inmate’s criminal conviction and sentence, alone, do not authorize the state to classify him as mentally ill and subject him to involuntary confinement without affording him due process protections.¹³⁶ The Ninth Circuit found the parallels between *Vitek* and the *Neal* case “striking.”¹³⁷ First, Hawaii’s sex

¹³¹ *Neal*, 131 F.3d at 829. The court, however, emphasized the stigmatizing consequences of sex offender registration statutes that authorize law enforcement officials to release information to the public. *Id.* See also *People v. Bell*, No. 3610-80, 2003 Misc. LEXIS 884, at *15 (“[A] defendant’s private interest, his liberty interest in not being stigmatized as a sexually violent predator, is substantial.”).

¹³² *Neal*, 131 F.3d at 829.

¹³³ *Neal v. Shimoda*, 131 F.3d 818, 828 (9th Cir. 1997).

¹³⁴ *Vitek v. Jones*, 445 U.S. 480, 484-85 (1980).

¹³⁵ *Id.* at 487-88 (affirming the district court’s holding that “characterizing Jones as a mentally ill patient” and transferring him to a mental hospital had “some stigmatizing” consequences that, when coupled with the mandatory behavior modification treatment that Jones would have to undergo, “constituted a major change in the conditions of confinement amounting to a ‘grievous loss’ that should not be imposed without the opportunity for notice and an adequate hearing”).

¹³⁶ *Id.* at 489-90. The Supreme Court noted that prisoners facing involuntary transfer to a mental hospital must receive notice so that the prisoner may be able to challenge the action and understand what is happening to him. *Id.* at 496.

¹³⁷ *Neal v. Shimoda*, 131 F.3d 818, 828-29 (9th Cir. 1997).

offender registration statute authorized correctional officials to classify an inmate as a sex offender without a hearing.¹³⁸ Additionally, inmates classified as sex offenders were required to complete a treatment program and confess to past sex offenses to be eligible for parole.¹³⁹ Therefore, the court could “hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling of a prison inmate as a sex offender.”¹⁴⁰

Using the analysis employed by the court in *Neal*, the *Gunderson* court should have held that because classifying Gunderson as a sex offender imposes substantial burdens on him, a protected liberty interest is implicated.¹⁴¹ Like defendant Neal, Gunderson was required to register as a sex offender, even though all charges of sexual misconduct had been dismissed.¹⁴² Although Gunderson was not required to complete a mandatory treatment program, he still encounters substantial hardships from his duty to register as a predatory offender. First, as a consequence of his duty to register, Gunderson is not only required to register as a predatory offender in Minnesota, but he must also register in each state where he works or attends school.¹⁴³ Gunderson’s foreseeable reluctance to register as a sex offender in additional jurisdictions restricts his mobility for the duration of his registration because while Gunderson is not legally prohibited from leaving Minnesota, he must comply with the registration laws of any state to which he moves.¹⁴⁴ Therefore, given that most jurisdictions provide for

¹³⁸ *Id.* at 829.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Like Minnesota, registrants in Hawaii must provide law enforcement officials with a recent photograph, verified fingerprints, all names and aliases used by the sex offender, the legal address, mailing address, and any temporary residence where the sex offender resides, the names and addresses of current employers, the names and addresses of educational institutions, and the year, make, model, color, and license plate of all vehicles owned or operated by the sex offender. HAW. REV. STAT. ANN. § 845E-2(b)(1)-(2), (5)-(7) (Michie 2003).

¹⁴² *Gunderson v. Hvass*, 339 F.3d 639, 642 (8th Cir. 2003).

¹⁴³ MINN. STAT. § 243.166.4a(4)-(5) (2003).

¹⁴⁴ MINN. STAT. § 243.166.9 (2003) (providing that when Minnesota accepts an offender from another state under the interstate compact, acceptance

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public dissemination of information contained in the registry, Gunderson will be significantly deterred from leaving Minnesota, which does not provide for automatic public dissemination.¹⁴⁵

Additionally, sex offender registration burdens registrants by creating psychological barriers to travel.¹⁴⁶ Should Gunderson violate any of the provisions of his registration, he is guilty of a felony and is subject to a mandatory minimum prison sentence of one year.¹⁴⁷

Furthermore, in Minnesota if a registrant is not in compliance for over thirty days or if he does not provide his primary *or secondary* address to law enforcement, his information including a photograph can be released to the public.¹⁴⁸ The stigmatizing consequences can certainly be recognized in Gunderson's case where, although he was dismissed of all charges of sexual assault, he is included on a sex offender registry and information concerning an offense he was never convicted of may be released to the public.¹⁴⁹ As the Minnesota Supreme Court has recognized,

is conditional on the offender agreeing to register under Minnesota's predatory offender registration statute). *See also* Lewis, *supra* note 57, at 113 (noting that sex offender laws "burden the ability of released offenders to relocate").

¹⁴⁵ *See supra* Part II.A notes 70-73 and accompanying text (noting that contrary to Minnesota, most states provide for public dissemination of information contained in the registry).

¹⁴⁶ Lewis, *supra* note 57, at 113-14. Indeed as noted by Judge Agid in *State v. Taylor*:

[The requirement of registration] surely will have a chilling effect on the [released offender's] freedom of choice to move to a new place. It is inconceivable to think that one who must, as his first act, go to local law enforcement and announce that he is a felon convicted of a sex offense will not be deterred from moving in order to avoid divulging that ignominious event.

Id. (quoting *State v. Taylor*, 835 P.2d 245, 250 (Wash. Ct. App. 1992) (Agid, J., dissenting)).

¹⁴⁷ MINN. STAT. § 243.166.5(a)-(b) (2003). Gunderson was not subject to mandatory incarceration following his conviction. *Gunderson*, 339 F.3d at 641-642 (noting that Gunderson originally received three years probation with a stayed sentence of fifteen months imprisonment).

¹⁴⁸ MINN. STAT. § 243.166.7a (2003) (emphasis added).

¹⁴⁹ *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003) (upholding Gunderson's duty to register under MINN. STAT. § 243.166 (2003)).

“being labeled a ‘predatory offender’ is injurious to one’s reputation.”¹⁵⁰ Indeed, “imputing criminal behavior to an individual is generally considered defamatory per se.”¹⁵¹ Minnesota’s sex offender registry clearly stigmatizes offenders on the list insofar as it suggests that they are individuals convicted of predatory offenses.¹⁵² In Gunderson’s case, law enforcement authorities have branded him a predatory offender although he was not convicted of a predatory offense.¹⁵³ Gunderson must acknowledge his status as a predatory offender for ten years in spite of the fact that the complaint charging him with a sexual offense was dismissed in its entirety.¹⁵⁴ Therefore, because of the potential for criminal sanction, the limitations on mobility, the additional obligations imposed on Gunderson, and the stigmatizing consequences of being labeled as a sex offender, registration as a predatory offender imposes on Gunderson “atypical and significant hardship,” which the Ninth Circuit held invokes due process protections.¹⁵⁵

¹⁵⁰ *Boutin*, 591 N.W.2d 711 at 718.

¹⁵¹ *Id.* (quoting *Paul v. Davis*, 424 U.S. at 697). *See also* *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) (noting the “stigmatizing consequences of being labeled a sex offender”).

¹⁵² *See Doe v. Dep’t of Pub. Safety*, 271 F.3d 38, 54-55 (2d Cir. 2001), *rev’d on other grounds*, 538 U.S. 1 (2003) “Publication of the Connecticut Sex Offender Registry plainly stigmatizes the people listed on it insofar as it asserts that they are persons convicted of crimes characterized by the State as sexual offenses.” *Id.*

¹⁵³ *Gunderson v. Hvass*, 339 F.3d 639, 642 (8th Cir. 2003).

¹⁵⁴ *Doe v. Attorney General*, 426 Mass. 136, 149 (1997) (Fried, J., concurring) (noting the distinct constitutional dangers inherent in registration requirements as opposed to community notification provisions). While community notification pertains to action on the part of law enforcement, registration “forces an action on the person required to register. It is a continuing, intrusive, and humiliating regulation of the person himself.” *Id.* at 150.

¹⁵⁵ *See Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997).

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In determining what procedural due process protections are owed to an individual subject to a predatory offender registration statute, some jurisdictions have examined whether a defendant has suffered a loss of reputation in conjunction with the removal of a protected status.¹⁵⁶ This examination is often referred to as the “stigma-plus” test.¹⁵⁷ Damage to reputation, even if defamatory, is insufficient to invoke the procedural protections of the due process clause.¹⁵⁸ Reputational damage must be combined with a tangible element, such as loss of employment, to rise to the level of a protectible property interest.¹⁵⁹ The tangible element, however, is not required to “meet some threshold of substantiality.”¹⁶⁰

Registration duties imposed on the offender constitute a “plus” factor under the “stigma plus” test when those obligations alter the defendant’s legal status, are “governmental in nature,” and are “extensive and onerous.”¹⁶¹ In addition to the reputational damage suffered by Gunderson, compliance with Minnesota’s sex offender registration statute alters Gunderson’s legal status.¹⁶² First,

¹⁵⁶ See, e.g., *State v. Pierce*, 794 A.2d 1123, 1132 (Conn. App. Ct. 2002).

¹⁵⁷ *Paul v. Davis*, 424 U.S. 693, 712 (1976). The stigma-plus analysis was first articulated by the Supreme Court in *Paul v. Davis*. Justice Rehnquist noted that an individual’s “interest in reputation . . . is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of the law.” *Id.*

¹⁵⁸ *Gunderson*, 339 F.3d at 644 (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

¹⁵⁹ *Id.*

¹⁶⁰ *Doe v. Dep’t of Pub. Safety*, 271 F.3d 38, 54-55 (2d Cir. 2001), *rev’d on other grounds*, 538 U.S. 1 (2003).

¹⁶¹ *Id.* at 57 (affirming that the registration duties imposed on the plaintiff constituted a “plus” factor because those obligations altered the plaintiff’s legal status, were “governmental in nature,” and the registration duties imposed were extensive and onerous).

¹⁶² *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998). Given that registrants must comply with the registration requirements and are subject to criminal prosecution for non-compliance, “there can be no genuine doubt that registration alters the legal status of all offenders subject to the Act for a minimum of ten years and, for some permanently.” *Id.* See *Doe*, 271 F.3d at 53

Gunderson's relationship with the criminal justice system has been extended for an additional ten years, and "the extent of his contact with the state has increased significantly."¹⁶³ Failure to comply with registration obligations is punishable as an independent felony offense.¹⁶⁴ In addition, Gunderson is likely to be under the constant supervision of local law enforcement officials.¹⁶⁵ While the police cannot arrest a registered sex offender based solely on his inclusion within the registry, they can pressure him to come to the police station and question him as a suspect.¹⁶⁶ For example, if law enforcement is investigating a sexual offense that occurred in the vicinity of Gunderson's home, there is little to prevent the investigating authorities from questioning Gunderson, a registered predatory offender, in connection with the crime. "If he is suspected in connection with every sex crime in the area where he lives, the costs to [his] liberty as well as the emotional and financial costs are likely to be high."¹⁶⁷ As a direct consequence of his placement on the predatory offender registration statute, unique burdens are placed on Gunderson that ordinary citizens are not required to endure.

In addition to altering a defendant's legal status, registration duties are undoubtedly governmental in nature.¹⁶⁸ The Fourteenth

(stating that "the imposition on a person of a new set of legal duties that, if disregarded, subject him . . . to felony prosecution, constitute a change of that person's status under state law").

¹⁶³ See *Doe v. Williams*, 167 F. Supp. 2d 45, 55 (D.C. Cir. 2001) (holding that "a sex offender's status has undergone a fundamental change" under Washington, D.C.'s Sexual Offender Registration Act considering that "his relationship with the criminal justice system has been prolonged for at least ten years, if not for life; and the extent of his contact with the State has increased significantly").

¹⁶⁴ MINN. STAT. § 243.166.5 (2003).

¹⁶⁵ See *Lewis*, *supra* note 57, at 105 (noting that "sex offender laws will likely make former offenders perpetual suspects of sex crimes committed in the areas in which they live").

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 106.

¹⁶⁸ *Doe v. Dep't of Pub. Safety*, 271 F.3d 38, 50 (2d Cir. 2001). The Due Process Clause was established to guard against abuses in governmental power. *Id.* at 56.

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Amendment is implicated where a government official or agency is able to “impose a loss” because of its unique status.¹⁶⁹ In *Doe v. Dep’t of Pub. Safety*, the Second Circuit found that registration duties were governmental in nature “insofar as they could not be imposed by a private actor in a position analogous to the state defendants.”¹⁷⁰ Because the BCA is entrusted with ensuring a registrant’s compliance with Minnesota’s Predatory Offender Registration Act and is given authority to “impose a loss” on Gunderson, these registration duties are governmental in nature.¹⁷¹

Finally, registration obligations can be “extensive and onerous.”¹⁷² The Appellate Court of Connecticut in *State v. Pierce* found that the defendant satisfied the “stigma plus” test given the burdensome requirements of Connecticut’s sex offender registration statute and thus warranted the protections of procedural due process.¹⁷³ Connecticut law requires registrants to verify their addresses annually for ten years.¹⁷⁴ If an offender fails to return an address verification form, a warrant may be issued for the registrant’s arrest.¹⁷⁵ The registrant must notify the Commissioner of Public Safety five days in advance of an anticipated change of address.¹⁷⁶ Registrants must provide blood samples for DNA analysis and photographs of the registrants must be taken whenever the Commissioner so requests.¹⁷⁷ Additionally, Connecticut law mandates that the offender register in all states where he regularly travels.¹⁷⁸ Connecticut law imposes a maximum

¹⁶⁹ *Id.* at 56.

¹⁷⁰ *Id.*

¹⁷¹ MINN. STAT. § 243.166.4(e)(2), .7a (2003) (providing that all registration information including address verification forms must be submitted to the BCA and if registrants are out of compliance with the statute for over thirty days, the BCA may release registration information to the public).

¹⁷² *Id.* (noting that the provisions of Connecticut’s sex offender law are “extensive and onerous”).

¹⁷³ *State v. Pierce*, 794 A.2d 1123, 1133 (Conn. App. Ct. 2002) (upholding *Doe v. Dep’t of Pub. Safety*, 271 F.3d 38 (2d Cir. 2001)).

¹⁷⁴ *Pierce*, 794 A.2d at 1133.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

five-year prison term if a registered offender fails to abide by any of these obligations.¹⁷⁹ The *Pierce* court found that these “onerous requirements” clearly established a “plus” factor in the stigma-plus analysis.¹⁸⁰

With few exceptions, the provisions of Connecticut’s sex offender registration statute mirror those of Minnesota’s statute.¹⁸¹ The penalties for non-compliance are identical.¹⁸² Both states mandate registration in additional jurisdictions if the registrant works or attends school in a different state.¹⁸³ Such ongoing obligations are significant restrictions on a registrant’s liberty and freedom.¹⁸⁴ Thus, while the Eighth Circuit alleges that the burdens

¹⁷⁹ *Pierce*, 794 A.2d at 1133.

¹⁸⁰ *Id.*

¹⁸¹ Compare CONN. GEN. STAT. § 54-254(a) (2003) (mandating registration for a period of ten years and a five-day notice prior to any anticipated move) with MINN. STAT. § 243.166.1(4)(b)(3), MINN. STAT. § 243.166.3(b) (2003) (mandating ten-year registration for predatory offenders and five-day notice prior to any anticipated move). A fundamental difference between the two statutes is that Minnesota treats registration information as private data whereas Connecticut considers registration information a public record and makes registry information available to the public through the Internet. See MINN. STAT. § 243.166.7 (2003); CONN. GEN. STAT. § 54-258(a)(1) (2003).

¹⁸² Compare CONN. GEN. STAT. § 54-254(b) (2003) (violation of registration provisions constitutes a Class D felony carrying a five year term of imprisonment) with MINN. STAT. § 243.166.5 (2003) (violation of any registration provisions is a felony subjecting a registrant to a maximum prison sentence of five years).

¹⁸³ Compare CONN. GEN. STAT. § 54-254(a) (2003) (providing that “if any person who is subject to registration under this section is employed in another state, carries on a vocation in another state or is a student in another state, such person shall notify the Commissioner of Public Safety and shall also register with an appropriate agency in that state”) with MINN. STAT. § 243.166.3(d) (2003) (requiring a registrant who works or attends school outside of Minnesota to “register as a predatory offender in the state where the person works or attends school).

¹⁸⁴ *Boutin*, 591 N.W.2d 711, 721 (Minn. 1999) (Anderson, J., dissenting). Judge Anderson noted that “the consequences of [Minnesota’s] Section 243.166 are serious” and it is because of grave implications that procedural due process must be followed. *Id.* Additionally, Judge Anderson made these findings when the penalty for non-compliance was merely a gross misdemeanor and not a felony. *Id.*

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imposed by Minnesota's statute are minimal, the statute, in fact, imposes conditions that are both "rigorous and confining."¹⁸⁵ Therefore, the registration duties imposed on Gunderson under the Minnesota statute constitute a "plus" factor, and he should be afforded with the procedural protections of due process.¹⁸⁶

The *Gunderson* court, however, dismissed the similarity of the two statutes, stating that Connecticut, unlike Minnesota, provides for public dissemination of registration data. Yet neither *Pierce* nor *Doe* addressed this factor in their analyses; indeed, the *Pierce* court affirmed that its holding was limited to the registration component of the statute as opposed to the disclosure component.¹⁸⁷

The *Gunderson* court also stated that because the Second's Circuit's decision in *Doe v. Dep't. of Public Safety* was reversed by the Supreme Court, any persuasive value of that opinion has since been eviscerated.¹⁸⁸ The Second Circuit held that Connecticut's statute violated the Due Process Clause because registrants were not afforded a prior hearing to determine whether they were likely to be dangerous upon release into the community.¹⁸⁹ The Supreme

¹⁸⁵ See *id.* (noting that Minnesota's section 243.166 imposes on registrants conditions that are rigorous and confining).

¹⁸⁶ Cf. *State v. Pierce*, 794 A.2d 1123, 1133 (Conn. App. Ct. 2002) (holding that the defendant satisfied the "plus" factor of the "stigma plus" test where he must verify his address annually for ten years, notify the Commissioner of Public Safety within five days whenever he changes his address, and is subject to a five-year prison term for non-compliance with these obligations).

¹⁸⁷ *Pierce*, 794 A.2d at 1133. See *Gunderson*, 339 F.3d 639 (8th Cir. 2003). Contrary to the court's belief, Minnesota's statute *does* provide for public dissemination of registration information if an offender is out of compliance for over thirty days or if the offender has failed to provide a primary or secondary address. MINN. STAT. § 243.166. 7a (2003).

¹⁸⁸ *Gunderson*, 339 F.3d at 644 (citing *Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003)). See *Gwinn v. Awmiller*, 2004 U.S. App. Lexis 345 n.6 (10th Cir. 2004) (finding that the Supreme Court's holding in *Dep't of Public Safety* does not foreclose a procedural due process claim brought by an individual who has not been convicted of a sexual offense because the Court's holding was limited to individuals convicted of enumerated sexual offenses).

¹⁸⁹ *Doe v. Dep't of Pub. Safety*, 271 F.3d 38, 49-50 (2d Cir. 2001), *rev'd*, 538 U.S. 1 (2003). See *Mathews v. Eldridge* 424 U.S. 319, 333 (1976) (holding that once a liberty interest is implicated, due process requires, at a minimum, notice and an opportunity to be heard).

Court reversed the *Doe* decision, finding that “due process does not require the opportunity to prove a fact that is not material” to the state’s statute.¹⁹⁰ The Supreme Court pointed out that Connecticut based the registration requirement on the fact of previous *conviction*, not on whether convicted sex offenders were likely to be currently dangerous.¹⁹¹ “The law’s requirements turn on an offender’s conviction alone.”¹⁹² Respondent Doe was a convicted sexual offender.¹⁹³ Therefore, whether Doe was currently dangerous was not material to the statutory scheme.¹⁹⁴ What was material to the statutory scheme was Doe’s conviction—“a fact that [*Doe*] has already had a procedurally safeguarded opportunity to contest.”¹⁹⁵ Gunderson, unlike Doe, has never been convicted of a sexual offense, and whether Gunderson’s conviction arose from the same set of circumstances as his charged criminal sexual conduct presents an issue of material fact.¹⁹⁶ The Eighth Circuit improperly distinguished *Doe* and unreasonably refused to apply *Doe*’s principle because unlike Doe, Gunderson was never provided an opportunity to contest the imposition of the predatory offender label.¹⁹⁷ Therefore, due process entitles an individual included on a sex offender registry who has not been convicted of a sexual offense to a hearing to establish a material fact.¹⁹⁸

¹⁹⁰ Dep’t of Pub. Safety v. Doe, 538 U.S. at 4.

¹⁹¹ *Id.* at 7. See also Chad Kinsella, *State Government News May 1, 2003*, COUNCIL OF STATE GOVERNMENTS No.5 Vol.46 (May 1, 2003) (noting that the Supreme Court found that the dispositive factor in being listed on Connecticut’s sex offender registry was that an individual had been convicted of committing a sex offense).

¹⁹² *Doe*, 538 U.S. at 7.

¹⁹³ *Id.* at 5.

¹⁹⁴ *Id.* at 7.

¹⁹⁵ *Id.* (emphasis added).

¹⁹⁶ See *Murphy v. Wood*, 545 N.W.2d 52, 54 (Minn. Ct. App. 1996) (stating that “whether Murphy’s convictions arose from the same set of circumstances as his charged sexual misconduct presents an issue of material fact”).

¹⁹⁷ *Doe v. Dep’t of Pub. Safety*, 271 F.3d 38 (2d Cir. 2001); *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003).

¹⁹⁸ See *Doe*, 538 U.S. at 7.

REGISTERING NON-PREDATORY OFFENDERS 877*3. Deprivation of Gunderson's Procedural Due Process Protections*

Given the harmful implications of denying a protected liberty interest, defendants like Gunderson who have never been convicted of an enumerated sexual offense must be accorded due process protections.¹⁹⁹ As noted in *Neal*, an offender who has an identified protected liberty interest should receive advance written notice of the claimed violation.²⁰⁰ Gunderson was not notified until nearly a year after his conviction of his obligation to register as a predatory offender.²⁰¹ Gunderson's registration requirement was not stated on the record during his plea colloquy, nor is there any evidence to indicate he was made aware of his obligation to register prior to the execution of his plea bargain.²⁰²

Additionally, an offender should receive a written statement by the fact-finders as to the evidence relied on and the reasons for requiring registration.²⁰³ Gunderson, much like *Neal*, was classified as a sex offender based solely on the information contained in his indictment and pre-sentence report.²⁰⁴

¹⁹⁹ See *Fullmer v. Michigan Dep't of State Police*, 207 F. Supp. 2d 650, 659-61 (E.D. Mich. 2002) (holding that the stigma of being falsely labeled on the state's sexual offender registry, coupled with the "obligations of registration and the attendant penalties for non-compliance" were sufficient to implicate a liberty interest).

²⁰⁰ *Id.* (noting that for "the minimum requirements of procedural due process are to be satisfied" the defendant must receive an "advance written notice of the claimed violation").

²⁰¹ *Gunderson v. Hvass*, 339 F.3d 639, 642 (8th Cir. 2003). Gunderson was made aware of his duty to register as a predatory offender following a violation of his probation that occurred nearly a year after his conviction. *Id.*

²⁰² *Id.* See Larry J. Richards, *Criminal Procedure—Plea Withdrawal: Grounds for Allowance—North Dakota Adopts the Minority Rule Regarding Court Notification of a Sex Offender's Duty to Register: State v. Breiner*, 562 N.W.2d 565 (N.D. 1997), 74 N.D. L. REV. 157, 168 (1998) (noting that the North Dakota Supreme Court held in *State v. Breiner* that trial courts must notify defendants of their obligations to register prior to accepting a guilty plea so as to ensure that the plea agreement has a factual basis and is voluntary).

²⁰³ See *Neal*, 131 F.3d at 831 (holding that these two elements are essential if the minimum requirements of procedural due process are to be met).

²⁰⁴ *Gunderson*, 339 F.3d at 642-43. See *Neal*, 131 F.3d at 822 (noting that

Gunderson's record lacked any specific findings as to the reasons for his classification as a sex offender.²⁰⁵ An indictment, without more, is an insufficient basis for imposing registration requirements.²⁰⁶ "As tempting as it may be to make . . . finding[s] based upon police reports and unverified statements, to do so is improper."²⁰⁷

B. Substantive Due Process

Substantive due process rights protect individuals against governmental power that is either arbitrarily or oppressively exercised.²⁰⁸ In analyzing a substantive due process claim, infringements on personal liberty must be weighed against the state's desire to maintain stability in society.²⁰⁹ If Minnesota's predatory offender registration statute implicates a fundamental right, the state must advance a legitimate and compelling interest for abridging that right.²¹⁰ The Minnesota Supreme Court has, however, determined that the sex offender registration statute is non-punitive, and therefore, because the statute does not implicate fundamental right, the statute must only be rationally related to a

because Neal's indictment and pre-sentence report alleged that he engaged in sexual misconduct, he was classified as a "sex offender").

²⁰⁵ *Gunderson*, 339 F.3d at 642-43.

²⁰⁶ *Neal*, 131 F.3d at 831.

²⁰⁷ *Boutin*, 591 N.W.2d at 721 (Anderson, J., dissenting). *See also* *Murphy v. Wood*, 545 N.W.2d 52, 54 (Minn. Ct. App. 1996). The court held that a factual record was necessary to determine whether Murphy's sexual assault arose from the same set of circumstances as his convictions for aggravated robbery and assault. *Id.* at 53. The court held that a copy of the criminal complaint which the defendant denied was insufficient to establish a factual record as to whether the sexual assault charge arose from the same set of circumstances as the robbery and assault convictions. *Id.*

²⁰⁸ *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (noting that "touchstone of due process is protection of the individual against arbitrary action of government").

²⁰⁹ *Lewis*, *supra* note 57, at 102 (noting that "if the individual liberty interests of former sex offenders outweigh the state interests in crime prevention and law enforcement, the [sex offender registration act] violates the Fourteenth Amendment guarantee of substantive due process").

²¹⁰ *Gunderson v. Hvass*, 339 F.3d 639, 643 (8th Cir. 2003).

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legitimate governmental purpose.²¹¹ While keeping track of predatory offenders and protecting public safety are legitimate governmental objectives, Minnesota's Predatory Offender Registration Statute is irrationally related to these objectives because it mandates registration for individuals like Gunderson whose sex offense charges have been dismissed and withdrawn.

Sex offender registration statutes have been justified on a number of grounds. First, it is asserted that registration laws are necessary because sex offenders have a higher risk of re-offending after release from custody than other criminals.²¹² Second,

²¹¹ The Minnesota Supreme Court held, in *Boutin v. LaFleur*, that the registration statute was non-punitive. 591 N.W.2d 711, 717 (Minn. 1999). To reach this conclusion, the *Boutin* Court, along with most state and federal courts, have applied the *Mendoza-Martinez* balancing test. *Id.* at 717. The *Mendoza-Martinez* balancing approach is utilized to determine whether a statute was intended to be regulatory or punitive when the legislature has not clearly indicated its intent. *Id.* In *Kennedy v. Martinez-Mendoza*, the Supreme Court determined that factors used to determine legislative intent include:

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 a *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.

Boutin, 591 N.W.2d at 717 (citing *Kennedy v. Martinez-Mendoza*, 372 U.S. 144 (1963)). In determining that the registration statute was regulatory, the court noted that it does not require an affirmative disability or restraint, but that it only requires the offender to register with law enforcement and to inform the state of any change of address. *Id.* Additionally, such registration statutes have not historically been regarded as punishment. *Id.* The *Boutin* court also noted that the registration statute does not promote the traditional aims of punishment because it does not involve confinement and that it is not intended to exact retribution. *Id.* The court concluded that the statute did not implicate *Boutin's* fundamental rights. *Id.* But see *In re Reed*, 33 Cal. 3d 914 (Cal. 1983) (finding California's sex offender registration statute punitive under the *Martinez-Mendoza* factors).

²¹² See ARK. CODE ANN. § 12-12-903 (Michie 2003); MISS. CODE ANN. § 45-33-21 (2004). A recent study issued by the Justice Department, however, revealed that sex offenders are *less* likely to be re-arrested after their release

registration laws are considered an invaluable tool in protecting the public from sex offenders.²¹³ Third, the privacy interests of convicted sex offenders are considered less important than the government's interest in public safety.²¹⁴ Each of these justifications, however, presupposes that the individual subject to the registration statute is in fact a sexual offender. It is irrational in light of those objectives to classify an individual as a predatory offender when the complaint charging that individual with a sexual offense has been dismissed and withdrawn by the prosecution.

Contrary to the Magistrate's assertion, inclusion in the predatory offender registry of persons who are not predators is a fatal constitutional defect.²¹⁵ Designating Gunderson a sex offender when there is no sexual element to his crime leads to an illogical and absurd result.²¹⁶ As it stands, the statute is over-inclusive given that it demands registration of persons convicted of only non-sexual offenses and thereby fails to achieve the primary

from prison than other criminals. U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994*, (2003) available at <http://www.ojp.gov/bjs/pub/pdf/rsorp94.pdf>. Of 9,691 men convicted of various sex offenses, only 43 percent were re-arrested within three years as compared to 68 percent for all other former inmates. *Id.* See also MARY ANN FARKAS & GEORGE B. PALERMO, THE DILEMMA OF THE SEX OFFENDER 171-72 (Charles C. Thomas 2001) (noting that there is no clear evidence to indicate whether sex offenders have higher recidivism rates than other offenders).

²¹³ Klaas Kids, *supra* note 3. The articulated purpose of Minnesota's Sex Offender Registration Statute is aimed at "assist[ing] law enforcement in keeping track of predatory offenders and protect[ing] public safety." Minnesota House of Representatives, *House Research: Predatory Offender Registration*, available at <http://www.house.leg.state.mn.us/hrd/ssinfo/ssporeg.htm> (last visited Feb. 10, 2004).

²¹⁴ See ARK. CODE ANN. § 12-12-903 (Michie 2003); MISS. CODE ANN. § 45-33-21 (2004).

²¹⁵ See Magistrate's Report at *25 (asserting that "the fact that such a registration policy may, in fact, require the inclusion of persons who are not predators, is not a fatal Constitutional defect").

²¹⁶ See *State v. Reine*, 2003 Ohio 50, ¶ 22 (Ohio Ct. App. 2003) (holding that labeling individuals as "sexually oriented offenders" is unreasonable and arbitrary when their offense involved no sexual motivation or purpose").

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purpose of the statute—to protect the public from sex offenders.²¹⁷ Indeed, the primary purpose of the statute is disserved by sweeping within its provisions individuals who are clearly not predatory offenders because these offenders pose no risk to society.²¹⁸ Nothing prevents the legislature from imposing registration requirements on all convicted felons.²¹⁹ However, “it is in the misnaming or mis-characterization, of the offense that is unreasonable and arbitrary.”²²⁰ Minnesota’s predatory offender registration statute violates substantive due process rights even under a rational basis review because it irrationally classifies an individual as a predatory offender when all predatory offense charges have been withdrawn due to a complete lack of physical evidence.²²¹ By enacting the 1993 Amendments, the Minnesota Legislature “was attempting to insure the registration of all predatory offenders including those who take advantage of favorable plea bargains.”²²² While this is certainly a valid legislative goal, it is highly doubtful that through these amendments the legislature intended to expand the predatory offender registry to include persons who did not commit a sexual offense.

²¹⁷ See MINN. STAT. § 243.166 (2003).

²¹⁸ *Reine*, 2003 Ohio at ¶ 20. As noted by Connecticut State Senator Donald E. Williams, co-chair of the judiciary committee and majority whip, having a registry where 75 percent of those on the list are not sexual predators is not a great help to individual citizens or local law enforcement who are trying to be apprised of those who will be dangerous to the community. Turner, *supra* note 78.

²¹⁹ *Reine*, 2003 Ohio at ¶ 21.

²²⁰ *Id.* at ¶ 23 (noting a hypothetical situation where a legislature, in an effort to protect public safety, enacted a statute designating all persons convicted of felonies as “murderers,” with registration and notification requirements so that neighbors would be notified that John Jones, a “murderer,” is living on their block when in fact John Jones was convicted of an esoteric election-law felony).

²²¹ See *Gunderson v. Hvass*, 339 F.3d 639, 641 (8th Cir. 2003).

²²² Magistrate’s Report, *supra* note 47 at *25.

IV. ADDITIONAL IMPLICATIONS OF MINNESOTA'S PREDATORY OFFENDER REGISTRATION STATUTE

In addition to the constitutional impediments posed by Minnesota's Predatory Offender Registration Statute, the statute raises several other problematic consequences. First, by mandating registration based solely on the charges contained in the initial complaint, the prosecution possesses an unchecked ability to determine whether a defendant will ultimately be required to register. Even if there is little evidence to support this charge, so long as the prosecution has charged a sexual offense, an individual will be required to register as a predatory offender. Additionally, Minnesota's Predatory Offender Registration Statute will lead to the ultimate decline of plea bargaining given that the threat of compulsory registration leads many defendants to seek jury trials rather than plead guilty.

A. *Unfettered Prosecutorial Discretion*

An alarming consequence of Minnesota's Predatory Offender Registration Statute is the enormous degree of "unchecked power" given to the prosecution.²²³ Registration duties arise solely from the allegations contained in the original complaint.²²⁴ Regardless of whether the complaint is subsequently dismissed or amended, if the original complaint charged an offender with a registerable sexual offense, that offender is required to register as a predatory offender for a minimum of ten years.²²⁵ As noted by Judge Randall in *State v. Newell*:

²²³ See *Minnesota v. Newell*, 2002 WL 31253657, at *6 (Minn. Oct. 8, 2002) (affirming the defendant's duty to register as a predatory offender while appreciating "the enormity of the potential unchecked power this statute, as written, places in the hands of the prosecution").

²²⁴ *Gunderson*, 339 F.3d at 643 (noting that since Gunderson's original complaint charged a sexual offense he was required to register as a predatory offender in accordance with Section 243.166).

²²⁵ MINN. STAT. § 243.166.1(b)(3) (2003) (requiring an offender to register as a predatory offender until ten years have elapsed since that individual was released from confinement).

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In some criminal sexual conduct cases, the state's case against the defendant weakens so significantly that the state will agree to bargain down from a serious sexual-assault charge to a misdemeanor such as simple assault Defendants may consider it prudent to accept a plea-of-guilty to a lower-level misdemeanor charge rather than go through the uncertainty of trial on an egregious sexual assault charge. Yet, the stigma of the original charge remains (meaning the registration requirement), even though it is now self-evident that the original charge did not result in a conviction Put another way, this is one of the few times in American jurisprudence where the "charge is the conviction," meaning that once you are charged with an enumerated felony under the statute, you are convicted of having to register.²²⁶

While the prosecutor has unrestrained discretion to determine what offenses to charge in the indictment, however, once the indictment is filed, the prosecutor herself is unable to withdraw the registration requirements.²²⁷ As the *Gunderson* case illustrates, once a prosecutor issues a complaint that contains a registerable offense, even if the prosecutor subsequently withdraws the original complaint, an individual must still register as a predatory offender based solely on the allegations contained in the original withdrawn complaint.²²⁸ This places significant power in the hands of prosecutors, allowing them to impose severe penalties associated with registration compliance without ever putting forth any evidence to prove that the individual committed the charged sexual offense.

B. Effects on the Plea Bargaining System

In addition, Minnesota's Predatory Offender Registration

²²⁶ State v. Newell, 2002 Minn. App. Lexis 1153, *7 (Minn. Ct. App. 2002).

²²⁷ *Gunderson*, 339 F.3d at 642 (asserting that registration is required so long as a predatory offense is charged even if the predatory offense charge is subsequently withdrawn from the complaint).

²²⁸ *Id.*

Statute will lead to the gradual decline of plea bargaining.²²⁹ Defendants who plead guilty to non-predatory offenses will rightfully fear that they may be subject to mandatory registration if the original complaint charged a predatory offense.²³⁰ This apprehension is well-placed, given that the Minnesota Supreme Court operating under the majority view has determined that the statutory duty to register as a sexual offender is a collateral rather than a direct consequence of a guilty plea.²³¹ “For a guilty plea to be intelligent, the defendant must be aware of the relevant circumstances and direct consequences of the plea.”²³² A direct consequence of a plea has a definite, immediate, and automatic effect on a defendant’s term and condition of sentence.²³³ Because most states find that the requirement to register is regulatory rather than punitive, registration requirements are not considered to be a direct consequence of a guilty plea.²³⁴ Thus, unlike a direct consequence, these jurisdictions do not require that a defendant be warned of a collateral consequence before entering a guilty plea.²³⁵

²²⁹ See Turner, *supra* note 78 (noting that the plea bargaining process will be slowed down by a defendant’s apprehension that he will be required to register as a sex offender).

²³⁰ *Id.*

²³¹ Kaiser v. State, 621 N.W.2d 49, 53 (Minn. Ct. App. 2001). A direct consequence of a guilty plea is a consequence that flows “definitely, immediately and automatically” from the guilty plea. *Id.* The court in *Kaiser* held that because the predatory offender registration requirement is regulatory and non-punitive, it is collateral to the plea agreement, and therefore, a defendant cannot withdraw his plea agreement simply because he was not made aware of his obligation to register as a predatory offender. *Id.*

²³² *Id.*

²³³ Richards, *supra* note 202, at 161-62.

²³⁴ *Id.*

²³⁵ *Id.* at 168 (noting that “many appellate courts view the consequence of registration as a sexual offender to be collateral, so that a trial court’s failure to advise defendants of the need to register does not constitute grounds for allowing a withdrawal of a guilty plea”). *But see In re Birch*, 515 P.2d 12, 17 (Cal. 1973) (finding registration as a sex offender to be a direct consequence of a guilty plea, given that registration subjects registrants to “continual police surveillance” and can result in an “ignominious badge” that can last for a lifetime). Because registration prolongs a defendant’s relationship with the state, and because it subjects a defendant to an independent felony offense and to

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Unfortunately, the failure to warn a defendant of his duty to register does not allow the defendant to subsequently withdraw his plea.²³⁶

If states can arbitrarily impose registration requirements on defendants, unbeknownst to them, after a plea bargain has been struck, defendants will be wary of entering into plea negotiations, and will opt instead to seek a jury trial. In an amicus brief filed in the case of *In re Reed*, the Los Angeles City Attorney asserted that the threat of mandatory registration leads defendants to seek jury trials rather than plead guilty, even if evidence of their guilt is overwhelming.²³⁷ Through a jury trial, a prosecutor is forced to advance evidence of the sexual offense and if the jury finds this evidence unconvincing, a defendant will be relieved of the registration requirement. In a system where approximately 96 percent of cases are resolved through plea bargains, such a disruption could have a devastating effect in terms of judicial economy.²³⁸ If a state deems it necessary to label a defendant as a sex offender and to subject him to registration requirements, the state should pursue prison terms that correspond to the offense, rather than dismissing sex offense charges pursuant to a plea bargain and yet still subjecting the defendant to registration

constant police surveillance, registration should be considered as a direct consequence of a guilty plea. Therefore, defendants should be notified of the requirement to register as a predatory offender prior to entering a guilty plea.

²³⁶ See *Kaiser v. State*, 641 N.W.2d 900 (Minn. 2002), *construed in the* Magistrate's Report, *supra* note 47. Indeed, Gunderson alleged that at the time of his plea, he was not informed of his obligation to register as a predatory offender and that if he had been informed of this obligation, he would never have accepted this plea bargain. Magistrate's Report, *supra* note 47, at n.5. See *Minnesota v. Andersen*, 2001 Minn. App. Lexis 1346 (Minn. Ct. App. 2001) (prohibiting defendant's withdrawal of her plea agreement in spite of the fact that her plea was conditioned on the district court's belief that she would not have to register as a predatory offender).

²³⁷ *In re Reed*, 663 P.2d 216, 220 n.7 (Cal. 1983) (holding that California's registration requirement constituted cruel and unusual punishment).

²³⁸ Eric Lichtblau, *Ashcroft Limiting Prosecutors' Use of Plea Bargains*, N.Y. TIMES, Sept. 22, 2003 (noting Attorney General John Ashcroft's efforts to restrict the ability of federal prosecutors to strike plea bargains in response to the "dangerously lenient practices" of certain federal prosecutors and judges).

requirements as if he were convicted of the sexual offense.

V. RECOMMENDATION

To comport with procedural and substantive due process, Minnesota's Predatory Offender Registration Statute should be reformed to provide offenders who have never been convicted of an enumerated sexual offense with a hearing to challenge inclusion on a sex offender registry.

"When protected liberty interests are implicated, the right to some kind of hearing is paramount."²³⁹ This procedural protection was denied to Mr. Gunderson.²⁴⁰ Providing courts with the authority to make discretionary determinations regarding registration, ensures that the predatory offender registry is limited to those offenders whose inclusion is necessary to promote public safety. Given the predominance of plea bargaining, prosecutors often dismiss sexual offense charges to secure a plea bargain on a lesser charge.²⁴¹ Nonetheless, registration as a sex offender is required although the sexual assault charges have never been adjudicated.²⁴² Minnesota's unique "arises out of the same set of circumstances" provision mandates that a defendant charged with an enumerated felony and subsequently convicted of any crime, even a mere misdemeanor, must register as a predatory offender.²⁴³ If a court deems that an offender's conviction has "arisen out of the same set of circumstances" as a charged predatory offense, registration should not be compulsory; instead it should be

²³⁹ *Neal*, 131 F.3d at 830.

²⁴⁰ *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003).

²⁴¹ *See State v. Johnson*, 2000 Minn. App. LEXIS 323 (Minn. Ct. App. 2000). The defendant was charged with one count of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct. *Id.* at *2. In exchange for his guilty plea to a charge of promotion of prostitution by fraud, the defendant received a stayed sentence and his sexual assault charges were dropped. *Id.* at *3.

²⁴² *Id.* *See also Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003); *Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997); *Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999).

²⁴³ *Logan*, *supra* note 5, at 1333.

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imposed at the court's discretion. Therefore, all defendants who have not been convicted of an enumerated predatory offense must be provided with a hearing to contest their classification as a predatory offender.²⁴⁴ At this hearing, the defendant should be provided with an opportunity to call witnesses and present evidence to defend against the charge that his offense arose from the same set of circumstances as a charged predatory offense.²⁴⁵ Additionally, in determining whether to require registration, the court should consider the offender's criminal history, his risk of re-offense, the circumstances surrounding the charged sexual offense, whether registration would promote public safety, and any other relevant evidence.²⁴⁶ Finally, the burden should be on the state to prove that the offense for which the defendant was convicted of arose out of the same set of circumstances as a charged predatory offense.

This procedural reform would not disturb the defendant's underlying conviction,²⁴⁷ but rather, would enable the trier of fact to consider individualized circumstances when deciding whether to impose registration obligations. For example, Gunderson never admitted to any charges of criminal sexual conduct and extensive physical evidence demonstrated a lack of sexual contact between the defendant and the complainant.²⁴⁸ Therefore, if the court were sufficiently convinced that the predatory offense did not occur, it could not be said that Gunderson's ultimate conviction arose out of an enumerated predatory offense, and the court could exempt Gunderson from the registration obligations.²⁴⁹ Therefore, a

²⁴⁴ See discussion *supra* Part III.A.3 (discussing procedural due process protections owed to sex offender registrants).

²⁴⁵ *Neal*, 131 F.3d at 831 n.14.

²⁴⁶ See MASS. ANN. LAWS ch. 6 § 178K (2)(d) (2004). See also *Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 10 (2003) (Souter, J., concurring) (noting that Connecticut permits courts to exempt certain sex offenders from registration and notification requirements of the statute).

²⁴⁷ *State v. Pierce*, 794 A.2d 1123, 1133 (Conn. App. Ct. 2002).

²⁴⁸ *Gunderson v. Hvass*, 339 F.3d 639, 641 (8th Cir. 2003).

²⁴⁹ For example, in *Boutin v. LaFleur*, 591 N.W.2d 711, 713 (Minn. 1999), the defendant admitted to police that he had forcible sexual intercourse with the victim, stating that "she said she didn't want to and I still did it I guess." *Id.* Presumably, it was only because the victim recanted her accusations of criminal

discretionary hearing safeguards the due process rights of defendants while promoting the law's primary goals—"keeping track of predatory offenders and protecting public safety."²⁵⁰

Reform of Minnesota's registration statute through the addition of an opportunity for a hearing is in accord with the greater degree of procedural protection already afforded by other states that mandate registration for general categories of behavior that exceed specifically enumerated offenses.²⁵¹ For example, in California, if a court orders the registration of an offender because it finds the offense was committed as a result of sexual compulsion or sexual gratification, the court must state on the record the reasons for its findings and the reasons for requiring registration.²⁵² In Kansas, while registration may be imposed on defendants whose offenses were sexually motivated, the court must determine beyond a reasonable doubt that the crime was in fact sexually motivated.²⁵³

A reform in the statutory scheme that would allow courts discretion in imposing registration requirements is also consistent with recent judicial trends. For example, a New York court recently held that where an individual is charged with a registerable offense that does not contain a sexual element, a decision concerning registration should be left to the discretion of the courts. A defendant is provided a hearing to determine if his

sexual conduct that Boutin was able to plead guilty to the charge of third-degree assault. *Id.* Therefore, in this instance, it is conceivable that Boutin's ultimate conviction for assault arose out of the same set of circumstances as an enumerated predatory offense. *Id.*

²⁵⁰ Judie Zollar, Predatory Offender Registration, House Research, Minnesota House of Representatives, *Predatory Offender Registration* (2002), available at <http://www.house.leg.state.mn.us/hrd/issinfo/ssporeg.pdf>.

²⁵¹ CAL. PENAL CODE § 290(a)(2)(E) (Deering 2004); KAN. STAT. ANN. § 22-4902(c)(14) (2002); W. VA. CODE § 15-12-2(c) (2003).

²⁵² CAL. PENAL CODE § 290(a)(2)(E) (Deering 2004).

²⁵³ KAN. STAT. ANN. § 22-4902(c)(14) (2002). *See* W. VA. CODE § 15-12-2(c) (2003) (while the statute mandates registration if the crime was sexually motivated, the sentencing judge must make a written finding that the offense was sexually motivated). *See Pierce*, 794 A.2d at 1128 (noting that under Connecticut's sex offender registration statute, if the defendant is required to register because the court finds that his crime was committed for a felony purpose, the decision to require registration is discretionary).

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crime had a sexual element.²⁵⁴

CONCLUSION

“The touchstone of due process is the protection of the individual against arbitrary action of the government.”²⁵⁵ Due process is denied when an individual who has not been convicted of a predatory offense is labeled a predatory offender and then denied an opportunity to challenge his inclusion on a predatory offender registry.²⁵⁶ Sex offender registration laws such as Minnesota’s continue to enjoy overwhelming popular support given the societal condemnation of sex offenders and the fear engendered by their actions.²⁵⁷ In order for such laws to be constitutional, however, they must recognize the rights of those who fall prey to them. While it has been said that “it is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people,” individuals required to register under Minnesota’s Predatory Offender Registration Statute are nevertheless entitled to both procedural and substantive due process as provided by the Constitution.²⁵⁸

Given the heavy burdens imposed on registrants under Minnesota’s Predatory offender registration statute, offenders like Gunderson who have never been convicted of a sexual offense

²⁵⁴ *People v. Bell*, No. 3610-80, 2003 N.Y. Misc. Lexis 884, at *34 (N.Y. Sup. Ct. June 30, 2003) (holding that where classification as a sex offender is mandatory but the crime itself does not contain a sexual element, the defendant must be afforded a hearing to determine if his crime had a sexual component). *See also* *State v. Reine*, 2003 Ohio 50, ¶ 22 (Ohio Ct. App. 2003) (holding that mandatory classification of certain offenses as sexually-oriented, which do not contain a sexual element, is unreasonable).

²⁵⁵ *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (noting that prisoners were entitled to procedural due process protections in disciplinary proceedings that could result in the forfeiture of their good-time credits).

²⁵⁶ *See* discussion *supra* Part II.A.3.

²⁵⁷ FARKAS, *supra* note 212, at 166-67.

²⁵⁸ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (dissenting from the majority’s holding that reasonable searches conducted without a search warrant pursuant to an arrest were permissible).

should be provided with a hearing to challenge their classification as a predatory offender. At the hearing, the burden must be on the State to demonstrate by a preponderance of evidence that the crime the defendant was convicted of did in fact arise out of the same set of circumstances as the charged sexual offense. Additionally, the State must make clear what governmental interests are furthered by labeling an individual who has never been convicted of a sexual offense a predatory offender. While ensuring that children do not fall prey to violent sexual predators is of the utmost importance, if states continue to mandate registration of alleged sexual predators without regard to the reality of the offense, American jurisprudence will become the predator and the rights of potentially innocent offenders will become the prey.