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Identity Crisis: First Amendment Implications of State Identification Card and Driver's License Branding for Registered Sex Offenders

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Identity Crisis

FIRST AMENDMENT IMPLICATIONS OF STATE IDENTIFICATION CARD AND DRIVER'S LICENSE BRANDING FOR REGISTERED SEX OFFENDERS

INTRODUCTION

On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA) in order "to protect the public from sex offenders and offenders against children."[1] SORNA created a national registration system for individuals convicted of sexual offenses, as well as criminal liability for those who are required to but fail to register.[2] Since its inception, federal and state sex offender registries and accompanying registration requirements have frequently been criticized for being excessively punitive in nature and ineffective as a tool of sex crime prevention.[3] Public registries allow for the ostracization of and discrimination against registrants and oftentimes prevent registered individuals[4] from becoming functioning members in society after incarceration.[5]

SORNA sets out minimum requirements for state and local jurisdictions to incorporate into their own registration and notification programs.[6] Individuals who are placed on registries are subject to restrictions lasting from five years to life,

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[1] Sex Offender Registration and Notification Act, Pub. L. No. 109-248, tit. I, § 102, 120 Stat. 587, 590 (2006) (codified at 42 U.S.C. § 20901).

[2] Ira Mark Ellman, *When Animus Matters and Sex Crime Underreporting Does Not: The Problematic Sex Offender Registry*, 7 U. PA. J.L. & PUB. AFF. 1, 2–3 (2021).

[3] Amanda Y. Agan, *Sex Offender Registries: Fear without Function?*, 54 J.L. & ECON. 207, 207–08 (2011).

[4] This note will use the terms "registrant," "registered individuals," and "individuals registered as sex offenders" interchangeably to refer to "sex offenders." The labeling of individuals as "sex offenders" can have counterintuitive, othering effects on this population, including the ostracization and social isolation of this group from their communities. *See* Giulia Lowe & Gwenda Willis, *"Sex Offender" Versus "Person": The Influence of Labels on Willingness to Volunteer with People Who Have Sexually Abused*, 32 SEXUAL ABUSE 591, 608 (2020) ("Humanizing individuals who have committed crimes may help to facilitate community connections and desistance from crime.").

[5] *Id.* at 212–13.

[6] Registration Requirements Under the Sex Offender Registration and Notification Act, 86 Fed. Reg. 69856 (Dec. 8, 2021). Failure to follow these minimum guidelines will result in "a reduction of Federal funding." *Id.*

depending on the state.[7] Many states require registrants to report their place of residence, employment, and schooling, and any changes or updates must be reported to the registrant's local police station within a certain period of time.[8] Many states also have residency restrictions prohibiting registrants from living within a certain distance of a school or childcare facility.[9] Failure to meet these extensive registration requirements is considered a felony in most states and can jeopardize a registrant's chances of getting their registrant status removed.[10] A felony conviction for failure to comply with registration requirements can result in jail time, fines, and potentially delay or prevent someone from getting removed from a registry.[11]

Registration requirements routinely impact a registrant's life and ability to assimilate back into their community following incarceration. Some states allow law enforcement officers to notify communities when a registered individual moves in.[12] These notifications can not only have extreme negative psychological and social implications, but they also often result in the individual having to move due to backlash from neighbors.[13] Residency restrictions force registrants to live far away from their families, work, and treatment centers.[14] This only further prevents reintegration into society and can even "hinder[] law-enforcement supervision."[15] In a study of registered individuals in Pennsylvania, Texas, and Wisconsin, "more than half of offenders said they[] lost a job due to their [registrant] status."[16] While it is generally legal for employers to deny employment based on an applicant's criminal history, some states have also

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[7] Jane Shim, *Listed for Life*, SLATE (Aug. 13, 2014), https://slate.com/news-and-politics/2014/08/sex-offender-registry-laws-by-state-mapped.html [https://perma.cc/2ACX-GR97].

[8] *Id.* Less serious crimes, such as indecent exposure, only require registrants to check in with law enforcement once a year. *Id.* However, more serious convictions may require updates and check-ins with local police stations every three months. *Id.*

[9] *Sex Offender Residency Restrictions*, SEX OFFENDER ONE STOP RESOURCE, https://sexoffenderonestopresource.com/national-links/sex-offender-residency-restrictions/ [https://perma.cc/2FL4-H9UT].

[10] Shim, *supra* note 7.

[11] *Id.*

[12] Dara Lind, *Why the Sex Offender Registry Isn't the Right Way to Punish Rapists*, VOX (July 5, 2016), https://www.vox.com/2016/7/5/11883784/sex-offender-registry [https://perma.cc/RRM4-593Y].

[13] *Id.*

[14] *US: Sex Offender Laws May Do More Harm Than Good: End Registration of Juveniles, Residency Restrictions and Online Registries*, HUM. RTS. WATCH (Sept. 11, 2007), https://www.hrw.org/news/2007/09/11/us-sex-offender-laws-may-do-more-harm-good [https://perma.cc/X6VC-DJLQ].

[15] *Id.*

[16] Lind, *supra* note 12.

restricted where convicted offenders are able to work, such as a California restriction preventing registrants from working in public parks or from selling hearing aids.[17] Unemployment is one of the biggest contributing factors to recidivism, as financial assistance and support are key to building a new life after incarceration and for successful participation in rehabilitation programs.[18] However, sex offender registries and their accompanying restrictions inadvertently increase the likelihood of unemployment in many situations.[19]

In addition to residency and employment restrictions, there are also currently eight states that require registrants to obtain identification cards (IDs) or driver's licenses with some form of marking or branding on the face of the card showing that they are a registered sex offender.[20] While perhaps not as obviously harmful as employment or residency restrictions, these ID requirements can nevertheless have extreme negative consequences on a registrant's day-to-day life.[21] People are asked to present their IDs or driver's licenses for a plethora of reasons: to enter a bar, to apply for a job, to purchase certain items, etc.[22] During the COVID-19 pandemic, many restaurants required, in addition to vaccination status, proof of ID upon entrance to compare against vaccination cards.[23] Registrants in these eight states are forced to share private, embarrassing, and socially harmful information in order to simply function in society.[24] As a result, these individuals are further ostracized by their communities at the hands of state and federal legislatures that insist that these requirements are necessary

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[17] *Id.*

[18] Tianyin Yu, *Employment and Recidivism*, SOC'Y EVIDENCE-BASED PROS. (Jan. 2018), https://www.ebpsociety.org/blog/education/297-employment-recidivism [https://perma.cc/6RFG-8FEH].

[19] *See* U.S. DEP'T JUST. OFF. SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE 199–200 (Mar. 2017).

[20] Faith P., *The Controversy Behind Labeled IDs for Sex Offenders*, PROBATIONINFO.ORG (May 23, 2022), https://www.probationinfo.org/sor-ids/ [https://perma.cc/L56X-LY7F]. This note will use the terms "identification cards," "driver's licenses," and "IDs" interchangeably. However, they all refer either to photo identification cards or driver's licenses in the more general sense.

[21] *See* Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1325 (M.D. Ala. 2019).

[22] Faith P., *supra* note 20.

[23] Carolyn D. Richmond et al., *Update on 'Key to NYC' Requirements—Proof of Identification Required*, FOX ROTHSCHILD (Aug. 18, 2021), https://www.foxrothschild.com/publications/update-on-key-to-nyc-requirements-proof-of-identification-required [https://perma.cc/H8JY-HJBF].

[24] *See Doe 1*, 367 F. Supp. 3d at 1325–26; Faith P., *supra* note 20.

to protect communities by notifying law enforcement that someone is registered.[25]

Recently, objections to these requirements as violations of the First Amendment have made their way into state courts.[26] The First Amendment protects against compelled speech, preventing the government from altering the content of speech and forcing citizens to say something they would not otherwise say.[27] When a regulation has been identified as compelled speech, the speech is subject to a strict scrutiny analysis, requiring the government to show that its regulation furthers a compelling government interest and is narrowly tailored to serve that interest.[28] The Supreme Court has struck down particular markings on license plates[29] and the forced disclosure of certain charitable contributions[30] as compelled speech, but has declined to determine whether branded driver's licenses, identification cards, and passports for individuals registered as sex offenders fall within First Amendment protection.[31] However, a California district court held that markings on passports for registered sexual offenders were not compelled speech, but rather permissible government speech not protected by the First Amendment.[32]

Comparatively, Louisiana state courts have held that ID requirements were compelled speech. In 2017, the State of Louisiana charged Tazin Ardell Hill with "altering an official identification card to conceal his designation as a registered sex offender, in violation of La. R.S. 15:542.1.4(C)."[33] As a registered sex offender with the Louisiana Bureau of Criminal Identification and Information, Mr. Hill was required to obtain an ID that, on the face of the card, declared that he was a sex offender under section 40:1321(J).[34] The law required the card to have the words "sex offender" pasted in orange, capital letters on the front of the card, and Mr. Hill needed to have it

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[25] *See Doe 1*, 367 F. Supp. 3d at 1329 (holding that "[t]he State has a compelling interest in protecting its citizens from predators").

[26] *See, e.g.*, *id.* at 1327, 1329; State v. Hill, 341 So. 3d 539, 551–52 (La. 2020).

[27] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988).

[28] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

[29] Wooley v. Maynard, 430 U.S. 705, 716 (1977).

[30] *Riley*, 487 U.S. at 795.

[31] *See* Louisiana v. Hill, 142 S. Ct. 311, 311 (2021) (denying Louisiana's petition for writ of certiorari); State v. Hill, 341 So. 3d 539, 542 (La. 2020).

[32] Doe v. Kerry, No. 16-cv-0654-PJH, 2016 WL 5339804, at *18 (N.D. Cal. Sept. 23, 2016).

[33] *Hill*, 341 So. 3d at 543.

[34] LA. REV. STAT. ANN. § 40:1321(J)(1) (West, Westlaw current through the 2023 First Extraordinary, Regular, and Veto Sessions).

on his person at all times.[35] Under section 15:542.1.4(C), anyone who fails to follow the guidelines of section 40:1321(J) or "is in possession of any document required by [section 40:1321(J)] that has been altered with the intent to defraud" will be "fined not more than one thousand dollars and imprisoned at hard labor for not less than two years nor more than ten years without benefit of parole, probation, or suspension of sentence" on first conviction.[36]

Mr. Hill pleaded not guilty to the alteration charge, arguing that sections 15:542.1.4(C) and 40:1321(J) violated the First Amendment's prohibition on compelled speech and were thus unconstitutional.[37] On October 30, 2019, the trial court agreed with Mr. Hill, finding that Louisiana's requirement to have the words "sex offender" printed on the state ID was "not the least restrictive way to further the State's legitimate interest of notifying law enforcement," and in turn, failed the strict scrutiny analysis required for compelled speech under the First Amendment.[38] On appeal, the Supreme Court of Louisiana affirmed the lower court's decision.[39]

As to the merits of Mr. Hill's claims, the Louisiana Supreme Court compared the ID requirement to cases involving license plate and passport requirements in order to determine what category the ID requirement fell into within its First Amendment analysis.[40] The court considered whether the ID requirement constituted compelled speech, which requires a strict scrutiny analysis, or whether it was government speech, which requires a considerably lower amount of scrutiny, if any at all.[41] The court found that license plates are considered a "hybrid" of both compelled and government speech, whereas passports are closer to government speech and, thus, are not necessarily subject to First Amendment scrutiny.[42]

The court rejected the state's argument that an ID is like a passport that "communicates information on behalf of the

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[35] *Id.*

[36] *Hill*, 341 So. 3d at 544 (quoting LA. REV. STAT. ANN. § 15:542.1.4C).

[37] *Id.* at 543.

[38] *Id.* (quoting the district court's oral ruling).

[39] *Id.* at 542.

[40] *Id.* at 550–51. The court first found that section 15:542.1.4(C) and section 40:1321(J) were not severable from one another. *Id.* at 545. The court reasoned that because section 15:542.1.4(C) depended on the obtain-and-carry requirement laid out in section 40:1321(J), severing the two statutes from one another would make the legislature's intentions obsolete. *Id.* Thus, despite the fact that the state had charged Mr. Hill under section 15:542.1.4(C), the court could still assess the constitutionality of section 40:1321(J). *Id.* at 544.

[41] *Id.* at 545; *see infra* Section II.A.2.

[42] *Hill*, 341 So. 3d at 551.

issuing government, not the passport holder."[43] Unlike a passport, the court explained, IDs are "routinely viewed by the public" and "frequently displayed for examination by a cashier, bank teller, grocery store clerk, new employer, or for air travel, hotel registration, and so forth."[44] Further, these cards and licenses prove one's identity and directly link the *person in possession of the card*, not the government, with whatever information is on it.[45] Thus, the court found that the ID requirement was compelled speech and required a strict scrutiny analysis.[46]

The Louisiana ID requirement failed the strict scrutiny test. The court identified that the state had a compelling interest in protecting the public from registrants and easily identifying "a person as a sex offender."[47] However, Louisiana did not adopt "the least restrictive means of doing so," as a "symbol, code, or a letter designation would inform law enforcement that they are dealing with a sex offender."[48] The court concluded that the state could have easily implemented a symbol requirement, rather than the bold orange lettering, which would "reduce the unnecessary disclosure to others during everyday tasks."[49] Thus, Louisiana's ID requirement was found unconstitutional and the lower court's determination was affirmed.[50] On October 4, 2021, the Supreme Court denied a petition for certiorari to address whether such obtain-and-carry provisions were unconstitutional.[51]

This note will argue that by declining to hear *State v. Hill*, the Supreme Court failed to rightfully affirm that branded ID requirements constitute unconstitutional compelled speech that infringes on the First Amendment rights of registrants. As a result, registrants will continue to experience shame, humiliation, and a denial of basic privacy rights, all of which the First Amendment ultimately seeks to protect. This blatant violation of constitutional rights has the potential to increase recidivism rates by hindering opportunities for the rehabilitation and reintegration of registrants post-incarceration.[52] Further, this note will argue that the Supreme Court's failure to address these issues promotes an acceptance and normalization of laws that have historically sought to shame

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[43] *Id.* at 551, 553.
[44] *Id.* at 553.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 550.
[48] *Id.* at 553.
[49] *Id.*
[50] *Id.* at 555.
[51] Louisiana v. Hill, 142 S. Ct. 311, 311 (2021).
[52] *See infra* Section III.B.

registrants, hiding behind the guise of promoting safety. Ultimately, this note proposes that both federal and state registration requirements that expose one's registered status to the public, including branded IDs and community notification practices, should be repealed and replaced with discrete local law enforcement monitoring based on an individualized assessment of a registrant's risk of reoffense, accompanied by community-based comprehensive reintegration plans.

Part I of this note provides a comprehensive breakdown of the current SORNA ID and driver's license requirements across the United States. Part II discusses the history, background, and development of the compelled speech and government speech doctrines under the First Amendment, arguing that the *Hill* court was correct in holding that ID requirements fail a required strict scrutiny analysis. Part III discusses the inaccurate myths surrounding high recidivism rates among perpetrators of sex crimes, and how ID requirements themselves can actually lead to the unintended consequence of increasing the perpetration of sex crimes, as well as cause registrants to experience shame and humiliation on a daily basis. Finally, Part IV proposes that state legislatures get rid of public registries, notifications, and indiscreet and publicly viewable markings on IDs and instead turn the focus to laws and policies that promote rehabilitation and reintegration in order to most effectively manage crime and safety related to registrants. Specifically, it proposes a more individualized scheme of registration laws that assesses one's risk to the community on a case-by-case basis and avoids the unnecessary disclosure of private information to the public at all costs, including the use of technology embedded in IDs to minimize public disclosure of a registrant's status.

I. CURRENT BRANDED IDENTIFICATION CARD AND DRIVER'S LICENSE REQUIREMENTS FOR REGISTERED SEXUAL OFFENDERS IN THE UNITED STATES

There are currently eight states that have some form of required marking on the face of IDs and licenses for registered sex offenders.[53] However, these requirements vary considerably

[53] OKLA. STAT. ANN. tit. 47, § 6-111(E)(1) (West, Westlaw current with legislation of the First Regular Session of the 59th Legislature (2023) and the First Extraordinary Session of the 59th Legislature (2023)); FLA. STAT. ANN. § 322.141(3)(a) (West, Westlaw current with laws, joint and concurrent resolutions and memorials through July 4, 2023, in effect from the 2023 Special B Session and the 2023 first regular session); W. VA. CODE ANN. § 17B-2-3(b)(1) (West, Westlaw Current with legislation of

in terms of what the markings must say and who is subject to them.[54] Markings range from those similar to the Louisiana requirement to display the words "sex offender" on the front of the card, to subtler symbols or codes generally only known to law enforcement.[55]

Some states have fewer specific requirements in terms of what must be shown on the face of the card. Mississippi requires that registrants' IDs "bear a designation identifying the licensee or permittee as a sex offender."[56] Tennessee has similar requirements that the ID of the registrant "bear a designation sufficient to enable a law enforcement officer to identify the bearer of the license or card as a sexual offender, violent sexual offender or violent juvenile sexual offender."[57] In addition to sex offender registrants, Tennessee requires similar designations on licenses of persons convicted of human trafficking offenses.[58] Kansas requires registered sex offenders to have IDs "be readily distinguishable indicating that such person is a registered offender."[59] In practice, Kansas's sample IDs show the words "REGISTERED OFFENDER" printed in capital letters on the front of the card.[60]

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the 2023 Regular Session and First Special Session); KAN. STAT. ANN. § 8-1325a(b) (West, Westlaw current through laws enacted during the 2023 Regular Session); MISS. CODE ANN. § 63-1-35(3) (West, Westlaw current with laws from the 2023 Regular Session effective through July 1, 2023); TENN. CODE ANN. § 55-50-353(a) (West, Westlaw current with laws from the 2023 Regular Session and 1st Extraordinary Session of the 113th Tennessee General Assembly); DEL. CODE ANN. tit. 21, § 2718(e) (West, Westlaw current through ch. 236 of the 152nd General Assembly (2023-2024)); *Sex Offender Driver License Designation*, ALA. L. ENFORCEMENT AGENCY, https://www.alea.gov/sex-offender-driver-license-designation [https://perma.cc/WR8N-E6HF].

[54] Adam Liptak, *Special IDs for Sex Offenders: Safety Measures or Scarlet Letters?*, N.Y. TIMES (June 14, 2021), https://www.nytimes.com/2021/06/14/us/politics/sex-offender-id-louisiana.html [https://perma.cc/5H2F-ZSL5].

[55] *Id.*

[56] MISS. CODE ANN. § 63-1-35(3).

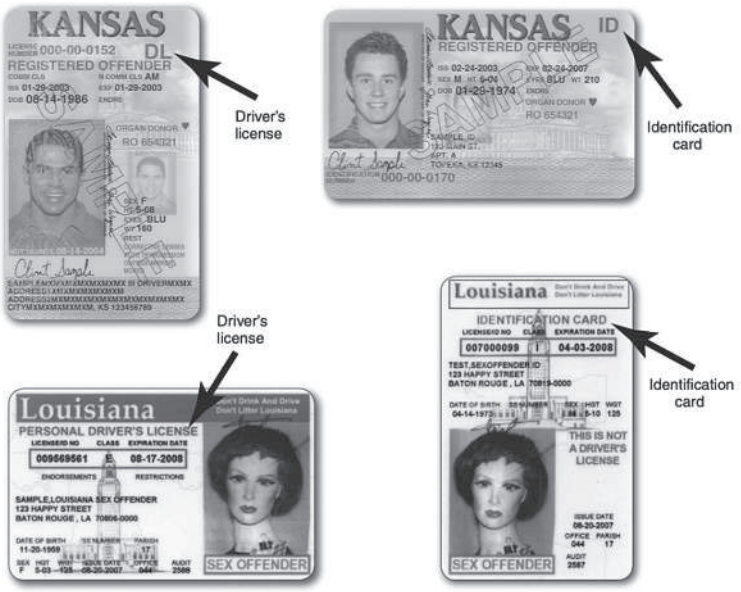
[57] TENN. CODE ANN. § 55-50-353(a).

[58] *Id.* § 55-50-353(b).

[59] KAN. STAT. ANN. § 8-1325a(b).

[60] U.S. GOV'T ACCOUNTABILITY OFF., CONVICTED SEX OFFENDERS: FACTORS THAT COULD AFFECT THE SUCCESSFUL IMPLEMENTATION OF DRIVER'S LICENSE-RELATED PROCESSES TO ENCOURAGE REGISTRATION AND ENHANCE MONITORING 13 (2008), https://www.gao.gov/new.items/d08116.pdf [https://perma.cc/9S7J-K2VV].

Figure 1: Sample Branded Identification Cards and Driver's Licenses in Kansas and Louisiana[61]



Other states, like Delaware, only require registrants to have the symbol "Y" pasted on the front of their IDs.[62] Recently, in 2019, a federal district court in Alabama struck down branded ID requirements that required registered sex offenders to obtain a card with the words "CRIMINAL SEX OFFENDER."[63] As a result, the lettering has been replaced by a code known to law enforcement on the front of the ID.[64] Challenges to similar requirements have arisen in Oklahoma.[65]

Some states require different designations based on conviction. Florida requires individuals who have been identified as sexual predators under Florida law to have the words "SEXUAL PREDATOR" marked on the front of their license or ID.[66] Florida defines "sexual predators" as those who are "[r]epeat sexual offenders, sexual offenders who use physical violence, [or] sexual offenders who prey on children."[67] However,

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[61] *Id.* at 13.

[62] DEL. CODE ANN. tit. 21, § 2718(e).

[63] Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1324, 1327 (M.D. Ala. 2019) (holding ALA. CODE § 15-20A-18 unconstitutional as a violation of the First Amendment's protections against compelled government speech).

[64] Liptak, *supra* note 54.

[65] *See* Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1008 (Okla. 2013); Carney v. Okla. Dep't of Pub. Safety, 875 F.3d 1347, 1350 (10th Cir. 2017).

[66] FLA. STAT. ANN. § 322.141(3)(a).

[67] *Id.* § 775.21(3)(a). "Sexual offender[s]" are those who have been convicted of "committing, or attempting, soliciting, or conspiring to commit" various sex crimes and sexual misconduct. *Id.* § 943.0435(1)(h).

those who are registered only as "sexual offender[s]" in Florida must have "943.0435, F.S." printed on the front of the cards.[68] Similarly, West Virginia requires only those who are deemed "sexually violent predator[s]" to obtain identification that the commissioner codes in a way "to denote the person is a sexually violent predator" free of cost to the registrant.[69] In Oklahoma, registrants who are registered with the Department of Corrections and "who[m] the Department of Corrections designates as an aggravated or habitual offender" are required to obtain "a license or card bearing the words 'Sex Offender.'"[70] Those who are notified of their registration later receive a replacement card with the included markings and have 180 days from the notice date to surrender their old driver's license or ID to the state.[71] Failure to surrender results in card cancellation, and continued use of such cancelled license or card constitutes a misdemeanor, punishable by a fine of twenty-five to two-hundred dollars.[72]

Similar to state laws, the International Megan's Law, incorporated within US federal law, requires that all passports of sex offender registrants contain a "unique identifier" indicating that the holder is a sex offender.[73] The unique identifier is printed inside the back of a passport book and states the following: "'The bearer was convicted of a sex offense against a minor, and is a covered sex offender pursuant to 22 United States Code Section 212b(c)(l).'"[74]

II. FIRST AMENDMENT IMPLICATIONS OF BRANDED ID REQUIREMENTS

The First Amendment plainly protects against the compulsion of speech, yet registered sex offenders in the aforementioned eight states are routinely required to speak private information to the public against their will through branded IDs and driver's licenses. This part breaks down modern First Amendment jurisprudence, discussing the current

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[68] *Id.* § 322.141(3)(b).

[69] W. VA. CODE § 17B-2-3(b)(1).

[70] OKLA. STAT. tit. 47, § 6-111(E)(1).

[71] *Id.* § 6-111(E)(2)–(3).

[72] *Id.* § 6-111(E)(4).

[73] International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders § 240, 22 U.S.C. § 212b(a), (c).

[74] *Passports and International Megan's Law*, U.S. DEP'T OF STATE—BUREAU CONSULAR AFFS., https://travel.state.gov/content/travel/en/passports/legal-matters/passports-and-international-megans-law.html [https://perma.cc/NC2K-YFQW]. This requirement became effective on October 31, 2017. *Id.*

application of the compelled speech and government speech doctrines. It then argues that branded ID requirements are compelled speech subject to a strict scrutiny analysis, which ID-branding laws fail to satisfy, as they are not narrowly tailored to serve a compelling government purpose.

A. First Amendment Jurisprudence

1. Compelled Speech

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."[75] In 1943, the Supreme Court of the United States expanded the First Amendment from protecting against government *restriction* on free speech to "government *interference* with private speech more broadly" in the case of *West Virginia State Board of Education v. Barnette*.[76] In *Barnette*, the Supreme Court held that a public school's mandate that a student salute the flag and recite the Pledge of Allegiance was a violation of the First and Fourteenth Amendments.[77] The Court held that state action that forces citizens to speak in a manner that they do not wish to "transcends constitutional limitations on [the government's] power and invades the sphere of intellect and spirit which . . . is the purpose of the First Amendment."[78] When the government compels individuals to say something they would not otherwise say, the government is "necessarily alter[ing] the content of [their] speech."[79] Such content-based regulation on speech is "'presumptively unconstitutional'" and subject to strict scrutiny.[80] Strict scrutiny can only be satisfied "'if the government proves that [their actions] are narrowly tailored to serve compelling state interests.'"[81]

Thirty-four years after *Barnette*, the Supreme Court held, in *Wooley v. Maynard*, that New Hampshire's statutory requirement that noncommercial vehicle owners obtain license plates printed with the state's motto "Live Free or Die" was

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[75] Wooley v. Maynard, 430 U.S. 705, 714 (1977) (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 643–44 (1943)).

[76] Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2419 (2004) [hereinafter *Curious Relationship*] (emphasis added).

[77] *Barnette*, 319 U.S. at 642.

[78] *Id.*

[79] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988).

[80] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

[81] *Id.* (quoting *Reed*, 576 U.S. at 163).

compelled speech in violation of the First Amendment.[82] In *Wooley*, the Maynards were members of the Jehovah's Witnesses faith and found "New Hampshire['s] [s]tate motto to be repugnant to their moral, religious, and political beliefs."[83] As a result, they covered up the motto on their license plates and Mr. Maynard was issued a fine for doing so.[84] The Court found that the requirement compelled citizens to "use their private property as a 'mobile billboard' for the State's ideological message" and violated the right of citizens under the First Amendment to refuse to display and support an idea to which they may object.[85] The Court distinguished the display of the national motto, "In God We Trust," on currency with that of the license plate requirement by finding that, unlike currency, an automobile is "readily associated with its operator."[86] Further, the Court noted that even if New Hampshire's interest in identifying passenger vehicles was both legitimate as well as substantial, it could be—and in fact was—achieved through the less drastic display of a "specific configuration of letters and numbers" on license plates.[87] The Court held that the state's interest in promoting history and state pride was not sufficiently compelling to justify the motto requirement.[88]

The compelled speech doctrine is not confined to ideological, political, or opinion-based speech; the government is also limited in its regulation of factual speech.[89] In *Riley v. National Federation of the Blind of North Carolina*, the Supreme Court struck down a North Carolina state requirement that professional fundraisers must disclose "the percentage of charitable contributions" actually given to charity.[90] The percentage disclosure requirement was *factual* speech that the Court considered an unconstitutional, content-based regulation on speech, as it was not narrowly tailored to meet the legitimate goals of assuring donation transparency.[91] Thirty years later, in *National Institute of Family and Life Advocates v. Becerra*, the Supreme Court similarly struck down a requirement that certain pro-life centers had to provide notice of "the availability of state-sponsored services," such as

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[82] Wooley v. Maynard, 430 U.S. 705, 716–17 (1977).
[83] *Id.* at 707.
[84] *Id.* at 708.
[85] *Id.* at 715, 717.
[86] *Id.* at 717 n.15.
[87] *Id.* at 716.
[88] *Id.* at 716–17.
[89] Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1324 (M.D. Ala. 2019).
[90] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795, 803 (1988).
[91] *Id.* at 797–98.

abortions.[92] The Court held that to compel pro-life centers to provide *factual* information regarding abortions necessarily altered the content of their speech.[93]

A "sex offender" label on an ID or driver's license, although factual information about the cardholder's legal status, is compelled speech by the government.[94] By requiring registrants to place embarrassing and socially harmful identifying information on their IDs that they would not otherwise expose to the public, regardless of its factuality, the state has necessarily altered the content of the registrant's speech.[95]

2. Government Speech

Government speech arises when the government itself is speaking.[96] Unlike compelled speech, government speech is subject to neither First Amendment limitations nor judicial scrutiny.[97] There are four major circumstances in which the Supreme Court has applied the government speech doctrine: (1) the speech of private actors who receive government funds, (2) the speech of government employees "speaking on matters of public concern," (3) "the compulsion of private party funding for speech with which it disagrees," and (4) the restriction of speech in the public space based on the messages of the speaker.[98] Because of these differences, it is crucial to identify who is speaking in order to identify what level of scrutiny is appropriate when assessing the government and compelled speech doctrines.[99]

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the Supreme Court held that the State of Texas did not violate a citizen's First Amendment rights by refusing to

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[92] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018).

[93] *Id.* (citing *Riley*, 487 U.S. at 795).

[94] *Doe 1*, 367 F. Supp. 3d at 1324–26.

[95] *See id.* at 1324, 1326 (holding that the "branded-identification requirement 'is a content-based regulation of speech,'" and the "harm" of "'being forced to speak . . . does not turn on whether speech is ideological, factual, or something else'") (quoting NIFLA v. Becerra, 138 S. Ct. 2361, 2371 (2018)).

[96] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022) (a "prosecutor's memorandum was government speech because it was speech the government 'itself had commissioned or created'") (quoting Garcetti v. Ceballos, 547 U.S. 410 (2006)).

[97] *See generally* Barry P. McDonald, *The Emerging Oversimplifications of the Government Speech Doctrine: From Substantive Content to a "Jurisprudence of Labels,"* 2010 BYU L. REV. 2071 (2010).

[98] *Id.*

[99] *See Curious Relationship*, *supra* note 76, at 2412, 2417 (explaining that a core part of a government speech analysis is "identifying *who* is speaking").

issue license plates featuring a Confederate battle flag.[100] In this decision, the Court created a three step analysis for identifying whether speech is government speech.[101] First, courts consider whether the medium has been historically used for government speech.[102] Second, courts consider how much the public associates that medium of speech with the government.[103] Finally, courts consider the "extent of the government's control over the message conveyed."[104] Because license plates are a type of government ID and display the name of the state, the Court found that they "indicate that Texas explicitly associates itself with the speech on its plates."[105] Although the Court determined that, in that instance, the license plate design was government speech and not subject to First Amendment limitations, it noted that the ruling did not mean that license plate designs cannot also *compel* speech, thus "implicat[ing] the free speech rights of private persons."[106]

While the Supreme Court has declined to determine whether ID, driver's license, or passport branding for registered sex offenders are plainly government speech, a district court in California held that passport identifiers for registrants under Megan's Law are permissible government speech.[107] The district court noted that it is the government and not the holder of the passport that determines how the passport is issued and what it looks like.[108] Further, the court explained that passports are government property, and a holder may be required to surrender their passport to the government at any time.[109] Thus, the government communicates information not on behalf of the passport holder, but rather "on behalf of the issuing government."[110] The court also noted that the passport "identifier is not a public communication and will not even be displayed to the public."[111]

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[100] Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219–220 (2015).

[101] Alexandra R. Genord, *International Megan's Law as Compelled Speech*, 118 MICH. L. REV. 1603, 1611 (2020).

[102] *Id.*; *see Walker*, 576 U.S. at 214.

[103] Genord, *supra* note 101, at 1611; *Walker*, 576 U.S. at 212.

[104] Genord, *supra* note 101, at 1611 (citing *Walker*, 576 U.S. at 210).

[105] *Walker*, 576 U.S. at 216.

[106] *Id.* at 219 (citing Wooley v. Maynard, 430 U.S. 705, 717 (1977)). As a result, license plates can be considered a "hybrid of [both] compelled and government speech." State v. Hill, 341 So. 3d 539, 551 (La. 2020).

[107] Doe v. Kerry, No. 16-cv-0654-PJH, 2016 WL 5339804 at *14 (N.D. Cal. Sept. 23, 2016).

[108] *See id.* at *16.

[109] *Id.* at *17 (citing 22 C.F.R. §§ 51.7(a), 51.66 (2016)).

[110] *Id.* at *18.

[111] *Id.*

B. Branded ID Requirements Are Compelled Speech Subject to a Strict Scrutiny Analysis

By declining to hear *State v. Hill*, the Supreme Court failed to affirmatively recognize branded IDs and driver's licenses as compelled speech, which would force laws requiring them to undergo a strict scrutiny analysis. When up against such an analysis, these ID requirements clearly fail to satisfy either of the prongs, thus impeding the First Amendment rights and protections of hundreds of thousands of registrants. First, the justifications for sex offender laws, including branded ID requirements, are based on a faulty premise that monitoring and community notification of registrants post-incarceration will reduce their likelihood of reoffense.[112] However, even if this belief is found to be sufficiently compelling under the strict scrutiny framework, ID requirements are not narrowly tailored, as they are unnecessarily invasive, requiring registrants to expose private and socially harmful information to the unsuspecting public.[113]

1. Branded Identification Cards and Driver's Licenses Compel Speech

The ID requirements in Alabama, Oklahoma, Florida, West Virginia, Kansas, Mississippi, Tennessee, and Delaware are all compelled speech that should be subject to a strict scrutiny analysis under the First Amendment, as they force registrants to "speak" or expose personal information about themselves to the public that they would not otherwise expose. IDs and driver's licenses are similar to license plates in that they can be considered government speech, but at the same time, can still be subject to the limitations on compelled speech.[114] Like the license plates in *Walker*, the public readily categorizes IDs and driver's licenses as government-issued documentation, and states have considerable control over what an ID looks like, as well as when and how it is issued.[115] However, similar to the

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[112] Wendy Sawyer, *BJS Fuels Myths About Sex Offense Recidivism, Contradicting its Own New Data*, PRISON POL'Y REFORM, (June 6, 2019), https://www.prisonpolicy.org/blog/2019/06/06/sexoffenses/ [https://perma.cc/5CC7-WS5H].

[113] *See* Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1327, 1328 (M.D. Ala. 2019); State v. Hill, 341 So. 3d 539, 551–52 (La. 2020).

[114] *See Hill*, 341 So. 3d at 551; *Doe 1*, 367 F. Supp. 3d at 1325.

[115] *See Doe 1*, 367 F. Supp. 3d at 1326 ("The words 'CRIMINAL SEX OFFENDER' are *about* [the ID holder]. The ID cards are chock-full of . . . personal information: their full name, photograph, date of birth, home address, sex, height, weight, hair color, eye color, and signature.").

license plate in *Wooley*, the state cannot force citizens to display a message that they would not normally display on an ID without violating the First Amendment.[116] While a sex offender designation symbol or line of text is not a political "message" or opinion and is, rather, factual information regarding a person's criminal conviction history and designation, state-compelled factual information is subject to the compelled speech doctrine under *Riley*.[117]

Further, IDs and driver's licenses are much more "readily associated" with their holders than are license plates and passports.[118] In the 2019 case of *Doe 1 v. Marshall*, an Alabama district court held that requiring registered sex offenders to obtain branded IDs with the words "CRIMINAL SEX OFFENDER" was compelled speech and did not survive strict scrutiny.[119] In comparing *Wooley* to the requirements at hand, the court explained that, similar to *Wooley*, where driving was a "virtual necessity" for Americans, photo IDs are themselves a "virtual necessity."[120] As such, the court found that Alabama was compelling plaintiffs to display the "CRIMINAL SEX OFFENDER" message to the public by placing the message on a document that is needed to become employed, enter certain businesses, purchase particular goods, and more.[121] As compared to the California district court's analysis of passports, IDs and driver's licenses are much more frequently "displayed to the public" and are a form of "public communication" of one's identity.[122]

Central to the compelled speech analysis is identifying the *speaker* of the speech at issue.[123] When it comes to IDs, it is the holder of the card, not the government, who speaks the

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[116] B. Jessie Hill, *Look Who's Talking: Conscience, Complicity, and Compelled Speech*, 97 IND. L.J. 913, 917 (2022).

[117] *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797–98 (1988) (holding that "cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech").

[118] Wooley v. Maynard, 430 U.S. 705, 717 n.15 (1977).

[119] *Doe 1*, 367 F. Supp. 3d at 1324.

[120] *Id.* at 1325.

[121] *Id.* at 1321.

[122] Doe v. Kerry, No. 16-cv-0654-PJH, 2016 WL 5339804 at *18 (N.D. Cal. Sept. 23, 2016). Alexandra Genord argues that the speech in a passport identifier "creates a more immediate type of harm" than the license plate in *Wooley* or the contribution disclosures in *Riley*. Genord, *supra* note 101, at 1615. Genord argues that because passport identifiers "not only" create an "intense stigma associated with" sex offenses, they also "risk [the] denial of entry into a foreign country and perhaps physical assault and injury" and "can prompt retaliation and social ostracization." *Id.* IDs and driver's licenses implicate the same privacy issues identified by Genord, but on an even greater level, due to the more frequent and necessary showing of an ID as compared to a passport.

[123] *See Curious Relationship*, *supra* note 76, at 2417.

information on the card.[124] Unlike a license plate, an ID provides detailed information regarding the holder's name, birthdate, address, height, eye color, signature, gender,[125] and in the states that require it, information regarding whether an individual is registered as a sex offender. All of this information is unique and "fairly attributable" to the holder of the card, not the government.[126] Like in *Wooley*, where the message "Live Free or Die" was readily associated with the driver and the car, the information on an ID is necessarily associated with the holder.[127] In fact, that is the central purpose of the ID: to easily associate the information on the card with the person carrying it.[128]

Thus, sex offender designations on IDs impose a content-based regulation on speech, one that the holder would not want to display to the public, and one that is reflective of that individual and not the government. Even more so than the license plate in *Wooley*, the markings on IDs force registrants to display their status as a "mobile billboard" for the benefit of the state.[129] An ID is usually carried on a person at all times and its use is required in a multitude of scenarios, unlike the license plate that is only displayed through the actual vehicle.[130] It is true that IDs themselves are likely considered government speech, and individual citizens cannot force the government to display something on them such as a Confederate flag or some political or ideological message.[131] The information on the ID becomes *compelled* speech, however, when the government requires an individual to display private information that they do not want displayed on that ID and that will be exhibited to the public on a regular basis.[132] As a result, ID requirements do

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[124] *See Doe 1*, 367 F. Supp. 3d at 1326.

[125] Albert Wong, *Driver's Licenses Contain Too Much Personal Info to Use at a Bar*, SLATE (Apr. 4, 2014), https://slate.com/technology/2014/04/proof-of-age-cards-drivers-licenses-display-too-much-personal-info-to-use-at-a-bar.html [https://perma.cc/4T3H-A4SN].

[126] Hill, *supra* note 116, at 918.

[127] *See Doe 1*, 367 F. Supp. 3d at 1324–26 (finding that "[w]hen people see the brand on Plaintiffs' IDs, they associate it with Plaintiffs. The dirty looks that Plaintiffs get are not directed at the State").

[128] Aurelio Locsin, *What are the Main Purposes of ID Cards?*, HOUS. CHRON. (updated Oct. 16, 2019), https://smallbusiness.chron.com/main-purposes-id-cards-42103.html [https://perma.cc/3D4N-CM56].

[129] Wooley v. Maynard, 430 U.S. 705, 715 (1977).

[130] Ashe Schow, *24 Things That Require a Photo ID*, WASH. EXAM'R (Aug. 14, 2013), https://www.washingtonexaminer.com/24-things-that-require-a-photo-id [https://perma.cc/Q9W3-QGGK].

[131] *See* State v. Hill, 341 So. 3d 539, 551–52 (La. 2020).

[132] *See id.* (finding that "if the government compels private persons to regularly convey its chosen speech, the government forfeits the deference it is normally afforded under the government speech doctrine"); *see also Curious Relationship*, *supra* note 76, at 2422 (finding that "[t]he First Amendment does not bar the government from

not receive the government deference afforded to government speech, but rather are subject to the strict scrutiny analysis required by compelled speech.

2. SORNA's Faulty Premise Regarding Recidivism Rates Undermines the "Compelling Interest" of Identification by Law Enforcement

Strict scrutiny requires the government to identify a compelling governmental interest for its actions.[133] The state governments in *Hill* and *Marshall* identified a compelling interest in allowing law enforcement to identify sex offenders and "conduct essential operation of government" through branded IDs.[134] However, what is missing from both of the courts' analyses is *why* there is a necessity for law enforcement to specifically identify individuals convicted of *sex offenses* through IDs, but not perpetrators of other crimes.

The justification for SORNA and state sex offender registries is based upon the belief that a system of monitoring registrants will protect communities and children by reducing sexual offenses committed by individuals previously convicted of sex crimes.[135] In the monumental 2003 case, *Smith v. Doe*, the Supreme Court addressed whether the Alaska Sex Offender Registration Act was punitive in nature and, in turn, whether its retroactive application violated the *Ex Post Facto* Clause.[136] The Court rejected the Ninth Circuit's determination that the Alaska act was "excessive in relation to its regulatory purpose," finding that "[t]he risk of recidivism posed by sex offenders is

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conveying its messages—ideological or otherwise—as long as they are germane to the underlying program. But where the government compels individuals either to support or to convey a message, the First Amendment requires courts to subject the speech to more exacting scrutiny").

[133] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

[134] *Hill*, 341 So. 3d at 552; Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1327 (M.D. Ala. 2019).

[135] *See* Joshua E. Montgomery, *Fixing a Non-Existent Problem with an Ineffective Solution: Doe v. Snyder and Michigan's Punitive Sex Offender Registration and Notification Laws*, 51 AKRON L. REV. 537, 567–68 (2017).

[136] Smith v. Doe, 538 U.S. 84, 105 (2003). Justice Kennedy wrote the majority opinion, with Justices Thomas and Souter concurring, and Justices Stevens, Ginsburg, and Breyer dissenting. *Id. Ex Post Facto* laws are those that "(1) . . . make[] an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. (2) . . . aggravate[] a crime, or make[] it greater than it was, when committed. (3) . . . change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed. (4) . . . alter[] the legal rules of evidence, and receive[] less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender." Timothy J. Gilbert, *Retroactivity and the Future of Sex Offender Registration in Maryland*, 45 U. BALT. L.F. 164, 170 (2015).

'*frightening and high*,'" and, thus, the broad application of the act was justified.[137] The problem with this analysis is that recidivism rates among sex offenders are, in fact, not as "frightening and high" as perceived, yet courts continue to rely on this proposition.[138]

In *Smith v. Doe*, the Supreme Court relied on a 1997 study released by the Bureau of Justice Statistics in its assertion that recidivism rates among sex offenders are "frightening and high."[139] However, individuals who have committed sex crimes are less likely to recidivate than almost any other criminal offender and "a large majority of sexual crimes (perhaps > 90%) are committed by individuals who have not been previously convicted of a sexual crime."[140] In an updated 2019 study, the Bureau of Justice Statistics found that within a nine-year period after release from prison for committing a sexual offense, 67 percent of sex offenders were arrested "*for any type of crime*."[141] This was lower than that of individuals arrested for robbery (84 percent), assault (83 percent), property crimes (88 percent), drug crimes (84 percent), or public order offenses (82 percent).[142] Additionally, only 7.7 percent of offenders previously incarcerated for "rape or sexual assault" were arrested for subsequent "rape or sexual assault" charges within a nine year period of release.[143] These statistics undermine the proposition that individuals who have committed a sex offense are different than other offenders and require different monitoring schemes by law enforcement.[144]

Some may argue that lower recidivism rates among sex offenders, as opposed to other offenders, actually show that registries are working. Part of the appeal of public registries is that they can equip parents with the tools and information to

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[137] *Doe*, 538 U.S. at 103 (citing McKune v. Lile, 536 U.S. 24, 34 (2002)) (emphasis added). The court held that a state's "determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness," is not a violation of the *Ex Post Facto* Clause when considering the high risks of recidivism among this population. *Id.* at 104.

[138] Montgomery, *supra* note 135, at 553.

[139] *Doe*, 538 U.S. at 103.

[140] Sawyer, *supra* note 112; MARIEL ALPER & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9 YEAR FOLLOW-UP (2005-14) 4 (May 2019), https://bjs.ojp.gov/content/pub/pdf/rsorsp9yfu0514.pdf [https://perma.cc/VF98-BR2A]; Tamara Rice Lave et al., *The Problem with Assumptions: Revisiting "The Dark Figure of Sexual Recidivism*,*"* 39 BEHAV. SCI. L. 279, 293 (2021).

[141] Alper, *supra* note 140, at 4 (emphasis added).

[142] *Id.* The only group that had lower rates of recidivism for any crime were those convicted of homicide crimes, who recidivated at a rate of 60 percent. *Id.*

[143] *Id.* at 5.

[144] Lave et al., *supra* note 140, at 298.

identify registrants in their communities and keep their children away from them.[145] It is widely believed that "monitoring sex offenders at every turn of their lives [will] deter them from recidivating."[146] However, multiple studies have demonstrated that public registries do not have a statistical impact on the reduction of recidivism rates.[147] In fact, an early study on the effectiveness of sex offender registries found that the "effect of the existence of a notification law on the number of offenses is negative and statistically significant."[148] Much of the discrepancy between the public perception of sex offender recidivism and the actual empirical data can be attributed to "the prevalence of arrests for unrelated criminal activities and informal reports that the convicted offender is reoffending," as well as the underreporting of sex crimes.[149]

Additionally, the expanding definition of "sex offense" and the wide variety of crimes that fall under that umbrella have skewed actual recidivism rates.[150] Registries at both the state and federal levels fail to properly distinguish and identify the broad range of convictions that can land an individual on a registry.[151] Registration may be required for a variety of offenses, including nonviolent ones, such as public intercourse, public urination, indecent exposure, and the sexual assault of an animal.[152] While registries are often broken up into tiers based on the severity of the crime, the tier system does not account for the differences in recidivism rates among different offenses or different groups of people.[153] If the goal of the registry is to prevent recidivism, its failure to recognize the discrepancies in actual rates among registrants is inherently problematic.

The *Hill* and *Marshall* courts identified compelling governmental interests in allowing law enforcement to identify registered sex offenders, yet these groups reoffend at lower

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[145] *US: Sex Offender Laws May Do More Harm Than Good*, HUM. RTS. WATCH (Sept. 11, 2007), https://www.hrw.org/news/2007/09/11/us-sex-offender-laws-may-do-more-harm-good [https://perma.cc/D7VV-PTSR].

[146] Montgomery, *supra* note 135, at 550.

[147] *Id.* at 570.

[148] J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 181 (2011).

[149] Jocelyn Ho, *Incest and Sex Offender Registration: Who Is Registration Helping and Who Is It Hurting?*, 14 CARDOZO J.L. & GENDER 429, 442 (2008).

[150] Erin Schoenbeck Byre, *Recalibrating the Sex Offender Registration System*, 18 U. ST. THOMAS L.J. 229, 235–37 (2022).

[151] *Id.* at 234–35.

[152] *Id.*

[153] *Id.* Byre notes that "[i]ncest offenders recidivate at a significantly lower rate than offenders who target victims outside the family," and "[c]hild molesters with male victims recidivate at significantly higher rates than offenders with female victims." *Id.* at 237.

rates than almost any other offender.[154] The supposed necessity for quick and easy identification by law enforcement through ID markings is based on a faulty premise that registered sex offenders are repeatedly reoffending at drastic rates. If the goal of branded IDs is for law enforcement to be able to quickly identify individuals who are at risk of recidivating, then it would follow that drug offenders and those convicted of robbery or theft should have equally descriptive designations on their IDs. Of course, those designations would not pass strict scrutiny muster and would likely result in public outrage and uproar. But it is important to address this serious flaw in Louisiana and Alabama's arguments, one that neither court raised nor questioned.

3. Branded ID Requirements Are Not Narrowly Tailored to Achieve the Government's Objective of Effective Identification and Public Safety

Even if the proposed compelling interest of identifying registrants is not overcome by the discrepancies in recidivism rates, the means of achieving that goal through branded IDs is not narrowly tailored, as it is far too invasive and unnecessary. Society has accepted that there is a certain amount of private information that everyone is willing to share with the public in order to promote safety and efficiency.[155] For instance, it is generally accepted that in order to purchase alcohol, citizens should sacrifice some level of privacy by revealing not only their date of birth to a bartender or cashier, but also information such as their address, height, and weight.[156] Some argue that even having to share that extra information (information other than name, date of birth, and photograph) on a daily basis goes beyond what is necessary and heightens risks of identity theft.[157] One's hair color, eye color, or organ donor status is not "necessary to verify one's age" and does "not serve any useful function" in most everyday scenarios in which an ID is used.[158]

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[154] Alper, *supra* note 140, at 4–9.

[155] *See* Wong, *supra* note 125.

[156] *Id.*

[157] *See id.* Some jurisdictions allow citizens to obtain a "proof of age card" in order to prevent security breaches and identity theft. *Id.* In Western Australia, citizens can apply for a "WA Photo Card" that only contains one's name, date of birth, signature, photograph, and an optional address. *WA Photo Card*, DEP'T TRANSP., GOV'T W. AUSTL., https://www.transport.wa.gov.au/licensing/wa-photo-card.asp [https://perma.cc/3BTJ-W8EC].

[158] Wong, *supra* note 125.

So, what is the justification for the "sex offender" label? Both the *Hill* and *Marshall* courts found that, despite the fact that the states had identified a compelling interest, neither Alabama nor Louisiana used the least restrictive means of achieving the goal of allowing law enforcement to identify someone as a sex offender.[159] The holder of an ID subject to these requirements must share shameful, embarrassing, and unnecessary private information to a hotel concierge, a bouncer at a bar, or a pharmacist. One plaintiff in *Marshall* described the extreme humiliation he experienced when having to show his ID while conducting everyday activities:

> I have never felt so embarrassed and ashamed in all of my life. I would not wish showing this [branded identification] on my worst enemy. It makes me not want to go places where I have to show it, and I try not to go places where I know I will have to [show the branded license]. But every week, there is some places that ask me to show it, and every time, I get them evil looks from people—like I'm a murderer or something. I done paid for what I did over 25 years ago. Nobody should have to carry this [branded license]. It ain't right, but I don't have a way out.[160]

There are much less restrictive, shameful, and infringing ways law enforcement can be notified of someone's registrant status. The *Hill* court noted that a "symbol, code, or a letter designation would inform law enforcement that they are dealing with a sex offender and thereby reduce the unnecessary disclosure" of registrant status to the public.[161] While a symbol requirement, like that in Delaware,[162] *may* reduce the disclosure of humiliating, private information to the public, it is not a complete fix. Unless that symbol is *only* known to law enforcement, the registrant is still at risk of experiencing looks from the public, accompanied by feelings of shame, similar to those experienced by the plaintiffs in *Marshall*. For instance, the symbol in Delaware is publicly known and can be easily discovered with a quick Google search. If the public is made aware of these symbols and their meanings, the symbolic value becomes obsolete, and the same compelled speech issues present themselves as before. In turn, it is in the best interests of both the registrant and state legislatures to do away with any marking or designation readily seen on IDs.

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[159] *See* Doe 1 v. Marshall, 367 F. Supp. 3d 1320, 1326 (M.D. Ala. 2019); State v. Hill, 341 So. 3d 539, 553 (La. 2020).

[160] *Doe 1*, 367 F. Supp. 3d at 1325.

[161] *Hill*, 341 So. 3d at 553.

[162] *See* DEL. CODE ANN. tit. 21, § 2718(e).

III. THE IMPACT OF BRANDED ID REQUIREMENTS ON RECIDIVISM

While much lower than the rates perceived by the public and the courts, recidivism rates among registered sex offenders are nevertheless a valid concern, one that legislatures, parents, and communities will—and should—always aim to combat and resolve. However, it is not clear that current sex offender laws are helping. In fact, as the Sixth Circuit noted, registries and their accompanying restrictions may "actually *increase* the risk of recidivism" by "exacerbat[ing] risk factors for recidivism by making it hard[er] for registrants to get and keep a job, find housing, and reintegrate into their communities."[163] Specifically, branded ID requirements can have direct negative impacts on an individual's ability to effectively reintegrate and avoid reoffense.

A. Risk Factors That Contribute to Recidivism and the Benefits of Social Reintegration

There are many factors, both unique to perpetrators of sex crimes and common across all criminal offenders, that can increase one's probability of reoffending.[164] Static risk factors, or factors that cannot be changed over time, include one's gender, age, criminal history, and familial relationships.[165] For those convicted of sex crimes in particular, additional static risk factors include antisocial personality disorders and antisocial personality traits, such as substance abuse and hostility.[166] Dynamic risk factors that can be addressed through legislation and community-based programs include "motivation, education, development of skills, employment, accommodation, interpersonal relationships, drug and alcohol treatment, mental health care and cognitive behavioral interventions."[167] Programs that focus on these factors aim to promote reintegration into society after incarceration

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[163] Does #1-5 v. Snyder, 834 F.3d 696, 704–05 (6th Cir. 2016) (emphasis in original).

[164] *See* R. Karl Hanson, *Research Summary: The Same Risk Factors Predict Most Types of Recidivism*, PUB. SAFETY CAN. (July 2010), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/smrsk-fctrs/index-en.aspx [https://perma.cc/XTN6-95UA] (finding that even though mentally disordered offenders, sex offenders, and general adult offenders are treated differently by the corrections and health systems, they shared most of the same risk factors).

[165] *See* U.N. OFF. ON DRUGS & CRIME, INTRODUCTORY HANDBOOK ON THE PREVENTION OF RECIDIVISM AND THE SOCIAL REINTEGRATION OF OFFENDERS 140 (2018).

[166] R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCH. 1154 (2005).

[167] U.N. OFF. ON DRUGS & CRIME, *supra* note 165, at 9.

(social reintegration) and can prevent offenders from "getting caught up in a vicious cycle of failed social integration, reoffending, reconviction and social rejection."[168]

Social reintegration policies aim to address the United States' overreliance on the prison system and the lack of resources for incarcerated individuals after release from prison.[169] Over half a million people are released from prisons in America each year, many of whom are "without any personal, educational, or vocational training from which to build a life."[170] Not only does the social stigma of incarceration negatively impact one's ability to find employment, join a community, and participate in certain sectors of society, many formerly incarcerated people are denied government assistance and benefits, resulting in a "banish[ment] from ordinary civic life."[171] This is true for most formerly incarcerated individuals, but even more so for those who committed sex offenses who may be subject to lifetime supervision and public notification.[172]

The ultimate goal of social reintegration policies is to increase rates of desistance—the rates at which "offenders terminate their offending activities and maintain crime-free lives."[173] Central to desistance is the offender's ability to recognize their wrongdoing and achieve the motivation to make positive change in themselves and their lives.[174] However, this is only possible if the individual is able to maintain strong relationships and receive support from their family or community.[175] Further, it is crucial that previously incarcerated individuals achieve a sense of personal empowerment through "strong engagement of communities to bridge the gap between inside and outside prison," in order to reduce the risks of "social alienation and the likelihood of re-offending."[176] An offender's "history of social isolation and marginalization" or "poor interpersonal skills" can hinder their ability to find the

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[168] *Id.* at 3.

[169] *See* Ekow N. Yankah, *The Right to Reintegration*, 23 NEW CRIM. L. REV. 74, 76–77 (2020) (finding that "America imprisons at a rate about five to ten times higher than the norm in other liberal societies").

[170] *Id.* at 77.

[171] *Id.*

[172] Prescott, *supra* note 148, at 168.

[173] U.N. OFF. ON DRUGS & CRIME, *supra* note 165, at 9.

[174] *Id.*

[175] *Id.*

[176] *Promoting Social Reintegration of Violent Extremist Offenders (VEOs)*, U.N. INTERREGIONAL CRIME & JUST. RSCH INST., https://unicri.it/topics/counter_terrorism/reintegration [https://perma.cc/L8DX-BCLK].

motivation to make significant changes in their behavior and avoid the very common cyclical nature of crime.[177]

B. Branded ID Requirements as a Modern Scarlet Letter and the Inevitable Hindrance of Social Reintegration

Requiring registrants to label themselves as "sex offenders" or "sexual predators" on IDs and driver's licenses is an identification tactic used to publicly shame and monitor individuals convicted of sex crimes. Similar card-carrying requirements were implemented in Nazi Germany against the Jewish population, in apartheid South Africa against Black citizens, and in the United States prior to the Civil War against African Americans.[178] The Supreme Court of Oklahoma compared Oklahoma's ID requirement to the infamous punishment discussed in Nathaniel Hawthorne's *The Scarlet Letter*.[179] While the Oklahoma court did not make a determination of the constitutionality of the requirement, it held that the branded ID was "at least analogous to the traditional punishment of shaming."[180] The court reasoned that because the registrant is routinely subject to "unnecessary public humiliation and shame" through frequent "face-to-face encounters when cashing a check, using a credit card, applying for credit, obtaining a job, entering some public buildings," and more, the requirement could be considered punishment.[181] Further, the court considered the requirement "essentially a label."[182]

The labeling of a registrant as an offender after incarceration perpetuates an internal and external belief that the individual is nothing more, and will never be anything more, than that label.[183] Sex offender registries themselves publicly label an offender as such, but ID requirements go well beyond that, requiring registrants to regularly carry and display that label to the public.[184] Some argue that "community notification

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[177] U.N. OFF. ON DRUGS & CRIME, *supra* note 165, at 11; *see also* Ho, *supra* note 149, at 443.

[178] Wayne A. Logan, *Card Carrying Sex Offenders*, FLA. STATE UNIV. COLL. L. 1, 4 (2022).

[179] Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1025 (Okla. 2013). The classic novel describes a world where a woman is forced to publicly wear the letter "A" as punishment for her crime of adultery.

[180] *Id.* at 1026.

[181] *Id.* at 1025.

[182] *Id.*

[183] Ho, *supra* note 149, at 443 ("With no hope of becoming a productive member of society again, the sex offender may begin to believe what the community thinks: once a sex offender, always a sex offender.").

[184] *See* Schow, *supra* note 130.

and public disclosure" of registered sex offenders are not analogous to the scarlet letter-type branding of offenders because they "do not place any physical mark on the offender's body, nor do they otherwise require the physical participation of the offender."[185] While registries themselves may not reach the "label" category of punishment, there is no doubt that branded ID requirements, which *physically mark* registrants, are intended to and do act as a label.[186]

Registries require members of the public to go through the effort of either searching for a specific person online or going through federal or local registries to find registered offenders in their area.[187] ID requirements, on the other hand, showcase the sex offender label in a much more obvious way and to individuals who may not have even been looking for that information, such as the unknowing pharmacist or bartender.[188] This distinction is crucial because it shows how ID requirements go far beyond the constitutionality of, and are fundamentally different than, SORNA's notification and public disclosure format. This public labeling and branding can have incredibly negative and counterintuitive effects on a registrant's ability to create important and necessary social circles of support needed for reintegration and reform.[189]

Even in Norway, a country where perpetrators of sexual offenses are not publicly shamed through public registries or notification requirements, individuals convicted of sex crimes were still negatively impacted by the social stigmas associated with sex offense convictions.[190] In a study of incarcerated Norwegian men convicted of sex offenses, most, if not all, struggled with anxiety and "their self-image because of how they

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[185] Stephen R. McAllister, *"Neighbors Beware": The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 TEX. TECH L. REV. 97, 124 (1998).

[186] *See, e.g.*, Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1327 n.4 (M.D. Ala. 2019) (referring to other states' ID markings as "labels").

[187] *See How We Can Help You: Sex Offender Registry Website*, FBI, https://www.fbi.gov/how-we-can-help-you/safety-resources/scams-and-safety/sex-offender-registry [https://perma.cc/UD5V-CTUB] (providing a step-by-step guide to accessing and searching through the national sex offender registry).

[188] Stephen McAllister argues that community notification and public disclosure requirements do not "generally disclose the offender's history to the majority of people the offender may encounter." McAllister, *supra* note 185, at 125. While true, ID requirements *do* force the offender to disclose their history to individuals they would not otherwise disclose that information to, as well as to individuals who did not ask for or inquire about that information.

[189] Ingeborg Jenssen Sandbukt, *Reentry in Practice: Sexual Offending, Self-Narratives, and the Implications of Stigma in Norway*, INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 931, 933 (2023).

[190] *Id.* at 942.

believed others would see them" if their conviction was disclosed.[191] This population experienced social withdrawal even from the *possibility* of the public's knowledge of their sex offender status, which illustrates how harmful actual, daily disclosure of such status through branded IDs and driver's licenses can be. ID requirements are a form of punishment beyond incarceration; one that is never-ending and infiltrates almost every facet of an offender's social, professional, and personal life.[192] There is "no foreseeable end in sight to the punishment," as many registrants will be required to carry these marked IDs for the rest of their lives.[193] One of the *Marshall* plaintiffs went so far as to say that they felt as though they "don't have a way out" of these requirements.[194] These isolating and othering experiences may exacerbate the tendencies of previously convicted offenders to reoffend.[195]

The impacts of ID requirements are at direct odds with the goals of social reintegration and only increase the dynamic risk factors that have been shown to lead to higher rates of recidivism.[196] One of the *Marshall* plaintiffs explained that he "tr[ies] not to go places where [he] know[s] [he] will have to" show his marked driver's license.[197] Limiting the registrant in where he is able to comfortably go in society may prevent him from building key social support networks and relationships in his community.[198] Ostracization and marginalization by the community and the public "may have a negative effect on any gains the offender [has] made [or will make] in therapy," and can counteract any efforts made by rehabilitation programs during incarceration.[199]

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[191] *Id.*

[192] Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1025 (Okla. 2013); Doe 1 v. Marshall, 367 F. Supp. 3d 1310, 1325 (M.D. Ala. 2019); State v. Hill, 341 So. 3d 539, 553 (La. 2020).

[193] Ho, *supra* note 149, at 443.

[194] *Doe 1*, 367 F. Supp. 3d at 1325.

[195] Daniel Lambright, *Why We Must Rethink the Way We Treat People Convicted of Sex Offenses*, NYCLU (Apr. 28, 2022, 11:00 AM), https://www.nyclu.org/en/news/why-we-must-rethink-way-we-treat-people-convicted-sex-offenses [https://perma.cc/DN2F-PWGE] (finding that sex offender restrictions and requirements "have been shown to stigmatize people convicted of sexual offenses, causing shame and withdrawal from society in ways that could actually make them more likely to commit future crimes").

[196] *See* U.N. OFF. ON DRUGS & CRIME, *supra* note 165, at 120 (finding that "[t]he numerous consequences associated with being convicted for committing a sexual offence, including restrictions in employment, housing and support by the State, are obstacles that can compromise the offenders' efforts to successfully re-enter the community and desist from offending").

[197] *Doe 1*, 367 F. Supp. 3d at 1325.

[198] U.N. OFF. ON DRUGS & CRIME, *supra* note 165, at 63.

[199] Ho, *supra* note 149, at 443.

The prevention of sexual assault, abuse, and crime should be of utmost importance to law- and policymakers. However, public safety cannot be achieved if offenders do not "believe that [they] can be helped, seek out . . . help, and become . . . productive member[s] of our society."[200] As the laws stand now, the psychological and social impacts of branded ID requirements are counterintuitive to the ultimate goals of the requirements in the first place: to protect the public by preventing recidivism.[201]

IV. A PROPOSED SHIFT IN LEGISLATIVE THINKING: LAWS THAT AIM TO REINTEGRATE RATHER THAN SHAME

This note proposes that both federal and state governments should repeal sex offender laws that expose one's registered status to the public—including public registries, community notification, and branded IDs—in order to prevent the social isolation and antisocial behaviors that lead to reoffense. Despite public opposition to such reform, this proposal is crucial to protecting individual rights and communities. By shifting the focus from shaming tactics and punishments that align with largely unfounded public sentiment and fear surrounding sex crimes to concrete solutions that aim to prevent reoffense through a lens of compassion and rehabilitation, legislatures can ensure both the protection of individual liberties and the safety of communities at large.

A. Fear and Hesitancy Surrounding Sex Offender Law Reform

Branded ID requirements are not the only—and are unlikely to be the last—shaming tactic used against registrants. In 2001, a state district judge in Corpus Christi, Texas ordered at least fifteen registrants, as terms of their probation, to "post signs in front of their houses and put bumper stickers on their cars that state, 'Danger. Registered Sex Offender Lives Here,' and 'Danger. Registered Sex Offender in Vehicle.'"[202] Shaming tactics like these are not confined to the acts of courts or state

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[200] Kenya A. Jenkins, *"Shaming" Probation Penalties and the Sexual Offender: A Dangerous Combination*, 23 N. ILL. U. L. REV. 81, 100 (2002).

[201] *See, e.g.*, *Doe 1*, 367 F. Supp. 3d at 1318 (identifying Alabama's interest in "protect[ing] the public, especially children, from recidivist sex offenders" through its restriction requirements).

[202] Jenkins, *supra* note 200, at 82.

legislatures.[203] For instance, in preparation for Halloween each year, one news outlet has implemented an annual tradition of "publishing the names and addresses of people in the communities they cover who are on the sexual offender registry."[204] While perhaps less of an obvious effort to shame registrants, branded ID requirements nevertheless achieve the same result: unnecessary stigmatization and marginalization of a group for the sake of "public safety."

Despite the critique of registries and accompanying requirements since their inception, there has been little support from state legislatures, judges, and the public to lessen restrictions on registrants.[205] In fact, hysteria regarding sex crimes and their perpetrators has only increased in recent years. During the 2022 confirmation hearings of Supreme Court Justice Ketanji Brown Jackson, Justice Jackson was subjected to endless questioning by Republican senator Josh Hawley regarding her sentencing and defense of people convicted of sexual offenses.[206] Justice Jackson explained that, when considering sentencing for these individuals, "she had to rationally balance the individual factors of the case, including society's interest in rehabilitating the convicted person."[207] Despite her explanations and the fact that her sentencing recommendations below the mandatory minimums were in line with those of a majority of district judges, Republican senators insisted that she was far too lenient.[208] Senator Hawley put his concerns plainly: "the American public speaks with one voice: *child pornography offenders should be punished to the*

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[203] Timothy C. Moynahan, *Public Mapping and Shaming of Sex Offenders has no Redeeming Social Value*, CT MIRROR (Oct. 26, 2020), https://ctmirror.org/2020/10/26/public-mapping-and-shaming-of-sex-offenders-has-no-redeeming-social-value/ [https://perma.cc/AF25-6EK4].

[204] *Id.* "[T]he public mapping of sex offenders in this way not only fails to serve any salutary purpose but also is a callous and cruel exercise of the power of the press." *Id.* Those who object to the public mapping base their contentions on "studies which conclude that no benefit is derived by the communities in which they dwell, while substantial harm is inflicted on the offender and innocent family members." *Id.*

[205] *See* Tom Condon, *Sex Offender Registry: More Harm than Good?*, CT MIRROR (May 21, 2018), https://ctmirror.org/2018/05/21/sex-offender-registry-harm-good/ [https://perma.cc/PS4H-SBUT] (noting that "[t]he idea that all sex offenders reoffend has been propagated by politicians, judges, and the media").

[206] Christian Farias, *The Truth Behind Republicans' Vile Questioning of Ketanji Brown Jackson*, VANITY FAIR (Mar. 23, 2022), https://www.vanityfair.com/news/2022/03/the-truth-behind-republicans-vile-questioning-of-ketanji-brown-jackson [https://perma.cc/UFT7-M8BH].

[207] Lambright, *supra* note 195.

[208] Linda Qiu, *Attacks on Judge Jackson's Record on Child Sexual Abuse Cases Are Misleading*, N.Y. TIMES (Mar. 21, 2022), https://www.nytimes.com/2022/03/21/us/politics/judge-jackson-child-sexual-abuse-fact-check.html [https://perma.cc/4X45-TWDP].

fullest extent of the law. . . . [a]nd ordinary Americans are not interested in going soft on sex criminals."[209] This reaction reflects not only the lack of empathy and support for sex offender law reform, but also how unlikely it is for that reform to gain public support.[210]

While it may not be popular, the eight states that currently have branded ID requirements must repeal their laws. Not only do these laws violate protections guaranteed by the First Amendment, but they also inadvertently risk increasing sex crimes through the isolation and marginalization of almost one hundred thousand registered individuals.[211] If the goal of state legislatures is to protect communities by ensuring that individuals who commit heinous sex crimes do not reoffend, branded IDs acting as modern "scarlet letters" are not an effective way to go about achieving that goal.[212] Instead, policymakers and legislatures should focus on sex offender laws that evaluate individualized risk and provide registrants with a comprehensive social reintegration plan that accounts for and aims to manage the various dynamic risk factors of recidivism.[213]

B. Laws That Target Rehabilitation, Reintegration, and Community Support

Public registries, community notification, and branded IDs aim to protect communities by shaming and ostracizing registrants, thereby further isolating this group and potentially making communities less safe. Instead of using outdated and draconian tactics, states should monitor registrants more discretely based on individualized risk assessment plans upon one's release, and provide registrants with accompanying resources to promote social reintegration, rather than applying

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[209] Opinion, Sen. Josh Hawley, *Supreme Court Nominee Judge Jackson's Soft-on-Crime Sentences are Disturbing*, FOX NEWS (Mar. 21, 2022), https://www.foxnews.com/opinion/supreme-court-nominee-judge-jacksons-crime-sentences-sen-josh-hawley [https://perma.cc/ZH2B-RDVL] (emphasis in original).

[210] *See* Ellman, *supra* note 2, at 16 (finding that "most people support websites publicizing registrants' 'sexual offender' status, restrictions on where registrants can live or go, and even their castration, without regard to whether there is any evidence such policies reduce sexual offending").

[211] *See supra* Section II.B.02; Rob Gabriele, *How Many Registered Sex Offenders Are in Your State*, SAFEHOME.ORG (May 3, 2022), https://www.safehome.org/data/registered-sex-offender-stats/ [https://perma.cc/2RAM-BMXE] (providing a breakdown of the number of registrants by state).

[212] *See* Lambright, *supra* note 195.

[213] *Id.*; Hanson, *supra* note 166, at 1158.

blanket registration requirements.[214] States should consider one's age, offense, rehabilitative efforts in prison, employment, and family and financial stability, as well as mental health status, in order to discern what post-incarceration restrictions would best promote deterrence and rehabilitation of the offender. Currently, many registration restrictions, including branded ID requirements, account for no assessment of risk in their application.[215] By applying these laws generally, without considering whether there is an actual need for them, states subject registrants to humiliation and shame without considering the necessity for the particular ID marking or blanket residency ban.

Additionally, states must implement community-based, comprehensive reintegration plans that provide registrants with access to job training, mental healthcare, education, and housing based on their individual needs.[216] The need for these resources and programs to assist with rehabilitation is crucial, as many reintegration programs for previously incarcerated individuals "often exclude those with a sexual offense conviction."[217] Instead of insisting on continuous monitoring and policing of registrants after release, states should encourage attendance and participation in community-based restorative justice programs that allow for open dialogue between offenders, victims, and the community, preventing the isolation and ostracization shown to encourage reoffense.[218] Programs like Circles of Support and Accountability (COSA) aim to provide

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[214] *See* Tamara Rice Lave, *Arizona's Sex Offender Laws: Recommendations for Reform*, 52 ARIZ. ST. L.J. 925, 938 (2020) (finding that "[a] risk-based system, though imperfect, is better at identifying danger" than SORNA's tier-based system based on offense only); *see also* U.N. OFF. ON DRUGS & CRIME, *supra* note 165, at 120–21 (finding that interventions for sex offenders "should be based on the assessment and reassessment of offender risk").

[215] For example, Oklahoma only requires branded IDs for those "who the Department of Corrections designates as an aggravated or habitual offender." OKLA. STAT. tit. 47, § 6-111(E)(1). Florida requires all offenders to have some marking or designation on their ID, but only those identified as "sexual predators" are required to have the words "SEXUAL PREDATOR" marked. FLA. STAT. § 322.141(3)(a). All other offenders are only required to have a numbered designation ("943.0435, F.S.") on the front of the card. FLA. STAT. § 322.141(3)(b). Additionally, West Virginia only requires those who are deemed "sexually violent predator[s]" to obtain a branded ID. W. VA. CODE § 17B-2-3(b)(1).

[216] *See* Lambright, *supra* note 195 (noting that these resources "will allow people to reintegrate into society, avoid re-offenses, and rebuild their lives").

[217] Ellman, *supra* note 2, at 8–9.

[218] *See* Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2289–90 (2020) (identifying the goals of restorative justice: "(1) to promote a mediated discussion between an offender and victim; (2) to give the victim an opportunity to explain the impact of the offense; (3) to give the offender a chance to apologize and reckon with the root causes of the offending behavior; and (4) to develop and then implement a plan to repair the harm and make amends").

support and recovery for those who "have been affected by compulsive sexual behavior" through restorative justice initiatives.[219] COSA is made up of volunteers from the community, from local members to professionals, who assist individuals who have sexually offended by forming strong relationships and providing spaces to discuss the challenges associated with reentry.[220] Research has shown that "re-entry planning, the acquisition of the necessary skills to control their [behavior][,] and the availability of social support . . . are all essential to successful [behavioral] change and the social reintegration" of those convicted of sex crimes.[221]

As for registrant status identification via IDs and driver's licenses, one alternative that would essentially dispel all unnecessary disclosure to the public is the use of Radio Frequency Identification (RFID) chips. RFID chips have been recommended in the context of Megan's Law and passport identifiers for registrants.[222] RFID chips are used in passports, ID cards, credit cards, and more, and transmit information through radio frequencies.[223] They are currently used on passports to "carry information such as the passport bearer's name, date and place of birth, other biographical information, and a biometric identifier."[224] Additionally, states like New York[225] and Vermont[226] offer "Enhanced Driver's Licenses" that contain RFID chips that can essentially replace passports and be used to cross certain borders. When it comes to registrants, states can use RFID technology to add chips to the IDs of registered individuals and transmit their registrant status

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[219] *Welcome to the COSA Program*, COSA-RECOVERY, https://cosa-recovery.org/what-is-cosa/the-cosa-program/ [https://perma.cc/3JSA-47Z6]; Sandbukt, *supra* note 189, at 945–46.

[220] *Circles of Support and Accountability*, JUST. CTR.: COUNCIL STATE GOV'TS (Oct. 2017), https://csgjusticecenter.org/publications/circles-of-support-and-accountability/ [https://perma.cc/Z29F-ZKMP].

[221] U.N. OFF. ON DRUGS & CRIME, *supra* note 165, at 120.

[222] Genord, *supra* note 101, at 1626–27.

[223] *What You Should Know About How RFID Cards Work—and How to Protect Them*, SEATTLE TIMES (Feb. 22, 2021), https://www.seattletimes.com/sponsored/what-you-should-know-about-how-rfid-cards-work-and-how-to-protect-them/ [https://perma.cc/XBU6-JANB].

[224] Genord, *supra* note 101, at 1627.

[225] Priya Ganapati, *New York Offers Drivers License with RFID Tag*, WIRED (Sept. 17, 2008), https://www.wired.com/2008/09/new-york-offers/ [https://perma.cc/Y97P-934V]. Enhanced driver's licenses or identification cards "can be used instead of a passport at border crossings between the U.S., Canada, Mexico, Bermuda and Caribbean." *Id.*

[226] *Enhanced Driver License (EDL/ID) Privacy Information*, VT. DEP'T MOTOR VEHICLES (2023), https://dmv.vermont.gov/licenses/types-of-licenses-ids/enhanced-drivers-license-edl/edl-id-privacy-information [https://perma.cc/DAZ7-9NC4].

through scanning of the chip.[227] The chip can be scanned and the information can be accessed only by law enforcement, thereby relieving the need for any ID brand or mark at all, reducing the risks of unnecessary public disclosure.[228] Once the individual is no longer subject to registration requirements, the state can issue the individual a new, RFID chip-free ID, or remove the registration information from the chip on the back end.

This note does not propose that all individuals convicted of sex crimes should not be required to register with their local law enforcement at all; instead, it argues that the problem is blanket *public* shaming and humiliation through community notification practices. The public labeling of registrants as "predators" will only deter communities from recognizing these individuals as functioning members of society and providing the support that registrants need for successful reintegration.[229] By allowing local law enforcement to monitor and regulate a registrant's behavior upon release through more discreet practices—like the use of RFID chips in IDs—combined with comprehensive, community-based reintegration plans, states can continue to promote their goals of public safety without infringing on the fundamental rights of their citizens.[230]

CONCLUSION

Federal and state legislatures, as well as courts, should always be concerned with protecting communities from perpetrators of sex crimes. Sexual assault, rape, and the circulation of child pornography—although a fraction of the crimes that can require registration[231]—are heinous crimes that can have generational negative impacts on communities, and people who commit these acts should face appropriate consequences. However, it is necessary to always consider the

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[227] Genord, *supra* note 101, at 1626–27.

[228] *See id.* at 1627 (finding that RFID chips "minimize[] the risk[s] of inadvertent disclosure to those who have no right or need to know the information"). RFID technology has been criticized for creating potential privacy breaches. *See* Charles J. Condon, *RFID and Privacy: A Look at Where the "Chips" Are Falling*, 11 APPALACHIAN J.L. 101, 101 (2011). Many are concerned that RFID chips "may remain active" even after use and that "the tiny radio transmitter contained on the chip could conceivably be used to track an individual." *Id.* at 101–02.

[229] *See* Yankah, *supra* note 169, at 108 (finding that "[f]ull reintegration of ex-offenders means just that: allowing an ex-offender eventually to completely resume the status of citizen, unhindered").

[230] *See supra* Section II.B.3.

[231] *See Sex Offender Registerable Offenses*, CITY OF YONKERS (2023) https://www.yonkersny.gov/live/public-safety/police-department/sex-offender-info/registerable-offenses [https://perma.cc/P2ZW-A6HH] (compiling a list of registerable offenses in New York).

ramifications of punishment and acknowledge when it has gone too far. Sex offender laws and registries make people feel safer knowing that perpetrators of these crimes are monitored and tracked, but at what point do these laws actually make communities less safe? At what point is society willing to sacrifice the protections of the First Amendment from government overreach for the sake of *feeling* safer, especially when it is unclear whether these laws actually do what they were intended to do?[232]

By failing to address the constitutionality of branded ID requirements, the Supreme Court has opened the floodgates to further abusive use of government compelled speech by the states. Further, the acceptance and promotion of these notification and branding practices has inadvertently created a greater risk of the one thing these laws aim to prevent: reoffense. Even if society supports the lifetime punishment of individuals convicted of sex crimes, the branding and labeling of hundreds of thousands of people should be a concern for everyone, not just registrants.

Marina D. Barron[†]

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[232] *See* Ellman, *supra* note 2, at 16 (arguing that "adopting laws because they burden people seen as evil, without regard to whether they serve any public policy, is of course the very definition of acting from animus").

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