Predators or Prey: Mandatory Listing of Non-Predatory Offenders on Predatory Offender Registries

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

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

INTRODUCTION

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

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


3 Klaas Kids Foundation, Megan’s Law By State, available at
statutes mandating that convicted sex offenders comply with certain registration requirements following their release from confinement.4


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

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

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

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

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

1) the person was charged with a felony violation of or attempt to violate any of the following, and convicted of that offense or of another offense arising out of the same set of circumstances: i) murder under section 609.185, clause (2); or ii) kidnapping under section 609.25, involving a minor victim; or iii) criminal sexual conduct under section 609.342, subdivision 1, paragraph (a), (b), (c), (d), (e), or (f); 609.343 subdivision 1, paragraph (a), (b), (c), (d), (e), or (f); 609.344 subdivision 1, paragraph (c) or (d); or 609.345; subdivision 1 paragraph (c), or (d); or 2) the person was convicted of a predatory crime as defined in section 609.1352, and the offender was sentenced as a patterned sex offender or the court found on its own motion or that of
The Eighth Circuit, in *Gunderson v. Hvass*, interpreted the 1993 amendments, holding that a defendant cleared of predatory offense charges was nonetheless required to register as a predatory offender.\(^9\) Although extensive forensic evidence failed to substantiate any allegations of sexual assault, the Eighth Circuit upheld Gunderson’s registration requirement because it determined that his ultimate conviction for third-degree assault arose out of the same set of circumstances as the initially charged predatory offense.\(^10\)

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

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

\(^10\) *Id.* at 641-42.

\(^11\) *State v. Newell*, 2002 Minn. App. Lexis 1153 (Minn. Ct. App. 2002) (noting “the enormity of the potential unchecked power this statute, as written, places in the hands of the prosecution who has sole control over which offense to charge”).
This reform safeguards a defendant’s constitutional right to contest the imposition of this stigmatizing label in an adversarial proceeding while still effectuating the primary purpose of the statute—to protect society from predatory offenders.

I. **GUNDERSON v. HVASS**

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

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13 *Gunderson*, 339 F.3d at 645 (noting that the statute and relevant precedent mandate that a defendant charged with both a predatory and a non-predatory offense who proceeds to trial and is acquitted of the predatory offense but convicted of the non-predatory offense must still register as a predatory offender).
15 *Gunderson*, 339 F.3d at 642. See Minnesota v. Kemmer, 2001 Minn. App. LEXIS 379 (Minn. App. 2001) (holding that when it is clear that the charged offense and the offense to which the accused pled guilty “involved the same victim and occurred on the same date at the same place,” then the two offenses are deemed to have arisen from the same set of circumstances). Here, because Gunderson’s charged offense and the offense to which he pled guilty involved the same victim and occurred at the same place and on the same date,
The original complaint charging Gunderson with a sexual offense arose out of an incident involving a woman he met at a bar.\textsuperscript{16} The complainant alleged that Gunderson sexually assaulted her after driving her home.\textsuperscript{17} Gunderson consistently denied any sexual contact with the victim although he admitted that a physical altercation occurred.\textsuperscript{18} Forensic tests on biological samples from the victim corroborated Gunderson’s account.\textsuperscript{19} Based on this forensic evidence, the original complaint, which charged Gunderson with a sexual offense, was dismissed in its entirety.\textsuperscript{20} A new complaint was filed against Gunderson, charging him with third-degree assault from the same incident.\textsuperscript{21} Gunderson pled guilty to the new complaint.\textsuperscript{22} During his plea allocution, however, Gunderson was not informed of his duty to register as a predatory offender.\textsuperscript{23} Indeed, he was not made aware of his duty to register as a predatory offender until he was later incarcerated for a violation of probation less than a year after his conviction.\textsuperscript{24}

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

\textsuperscript{16} Gunderson, 339 F.3d at 641. The incident is alleged to have occurred March 31, 1998. \textit{Id.}

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

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

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.}

\textsuperscript{21} Gunderson v. Hvass, 339 F.3d 639, 641 (8th Cir. 2003).

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

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} at 642.

\textsuperscript{25} \textit{Id.} Gunderson argued that registration as a predatory offender implicates a fundamental right, specifically, the presumption of innocence, and therefore
concluded that Gunderson’s registration under Minnesota’s Predatory Offender Registration Statute did not violate Gunderson’s constitutional rights. The district court determined that the registration requirements were not violative of Gunderson’s procedural due process rights because of the minimal burdens imposed on registrants and because the fundamental right to a presumption of innocence is only implicated in criminal statutes and not regulatory laws like the registration statute. The court then determined that the registration requirement was properly applied to a defendant charged with both predatory and non-predatory offenses who pleads guilty only to a non-predatory offense.

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

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

26 Gunderson, 339 F.3d at 641.
28 Id. at *6.
29 591 N.W.2d 711 (Minn. 1999). This case was the first to examine the 1993 Amendments to Minnesota’s Predatory Offender Registration Statute. Id.
30 Id. at 716. Predatory offenses include murder while committing or attempting to commit criminal sexual conduct in the first-degree or second-degree with force or violence; kidnapping; criminal sexual conduct in the first, second, third, fourth and fifth (felony only) degree; felony indecent exposure; false imprisonment of a minor; soliciting a minor to engage in prostitution or sexual conduct; using a minor in a sexual performance; and possessing pornographic work involving minors. MINN. STAT. § 243.166.1(a)(1)-(2) (2003). See also Minnesota Bureau of Criminal Apprehension, 2000 Predatory Offender Registration Tracking Program: Offenses Requiring Registration, available at http://www.dps.state.mn.us/bca/Invest/Documents/Offenses%20Requiring%0Registration.pdf.
Timothy Boutin was charged with two counts of criminal sexual conduct in the third degree, one count of assault in the third degree, and one count of misdemeanor assault in the third degree.\textsuperscript{31} Boutin’s charges stemmed from allegations made by Denise Rathman, Boutin’s girlfriend, that he physically abused her and forced her to have sexual intercourse with him.\textsuperscript{32} Boutin admitted that he had non-consensual sexual intercourse with Rathman, stating that “she didn’t want to and I still did it I guess.”\textsuperscript{33} Because Rathman later recanted her allegations of sexual assault, Boutin pled guilty to third-degree assault.\textsuperscript{34} Although the criminal sexual conduct charges were dismissed against Boutin, Boutin was nevertheless required to register as a predatory offender.\textsuperscript{35} The Supreme Court affirmed the registration requirement because Boutin was initially charged with an enumerated predatory offense which arose out of the same set of circumstances as the charged predatory offense.\textsuperscript{36}

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

\textsuperscript{31} Boutin, 591 N.W.2d at 713.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 714.
\textsuperscript{36} Id. at 716.
\textsuperscript{37} Gunderson, 339 F.3d at 641. See supra text accompanying notes 15-21.
\textsuperscript{38} Gunderson, 339 F.3d at 642-43.
The court next addressed Gunderson’s constitutional challenges to the statute. First, the court determined that the statute was not violative of Gunderson’s substantive due process rights because no fundamental right was implicated. In a substantive due process analysis, if a fundamental right is implicated, the state must advance a legitimate and compelling governmental interest for interfering with that right. If no fundamental right is implicated, then the standard of review is “less exacting” and the statute will be upheld so long as it was determined to be rationally related to a legitimate governmental purpose. While noting the presumption of innocence to be a fundamental right, the court concluded that such a right is only implicated in either a criminal or punitive law, not a regulatory law. No fundamental right was implicated because the registration statute was found to be non-punitive. Therefore, to withstand any constitutional challenge, the statute only needed to be rationally related to a legitimate governmental objective.

39 Id. at 643. But see Murphy v. Wood, 545 N.W.2d 52, 53-54 (Minn. Ct. App. 1996) (holding that a factual record was necessary to determine whether defendant’s sexual assault charge arose out of the same set of circumstances as his conviction for aggravated robbery and assault).
40 See Gunderson, 339 F.3d at 643.
41 Id. at 643-44. See discussion infra Part III.B.
42 Gunderson, 339 F.3d at 643-44.
43 Id. at 643. “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable basis for the classification.” F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 313 (1993).
44 Gunderson, 339 F.3d at 643. See State v. Edwards, 130 N.W.2d 623, 626 (Minn. 1964) (noting that while the Constitution has not expressly provided the presumption of innocence to be a fundamental right, courts have treated it as such).
45 Gunderson, 339 F.3d at 643 (citing Boutin v. LaFleur, 591 N.W.2d 711, 717 (Minn. 1999) (holding that the registration statute was non-punitive given that registration as a predatory offender is not a permanent requirement and that it does not restrict a registrant’s ability to change residences or to move out of state)).
46 Id.
the court found the registration statute was rationally related to the
government’s legitimate interest in requiring all predatory
offenders to register, “including those who take advantage of
favorable plea agreements.”

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

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47 Id. at 643 (quoting U.S. Magistrate Judge Raymond L. Erickson’s report
to the district court, Gunderson v. Hvass, No. 01-646, 2002 U.S. Dist. LEXIS
21783, at *25 (D. Minn. 2002)). In his report, the Magistrate Judge commented:
Given the realities of the plea bargaining system, by extending the
registration requirements to persons who are charged with a predatory
offense, but plead guilty to a non-predatory charge that arises from the
same circumstances, the Minnesota Legislature was attempting to
insure the inclusion in the registration rolls, of all predatory offenders,
including those who take advantage of favorable plea agreements. The
fact that such a registration policy may, in fact, require the inclusion of
persons who are not predators, is not a fatal Constitutional defect.
Gunderson v. Hvass, No. 01-646, 2002 U.S. Dist. LEXIS 21783, at *25 (D.

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

49 Gunderson, 339 F.3d at 644.

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

51 Gunderson, 339 F.3d at 644.
to local law enforcement;\textsuperscript{52} Gunderson’s only obligation thereafter would be to update his address information annually.\textsuperscript{53} Therefore, because Gunderson failed to identify a protectible property interest, the court rejected his procedural due process claim.\textsuperscript{54} Finding no viable due process challenges to the statute, the court affirmed Gunderson’s obligation to register as a predatory offender.\textsuperscript{55}

II. OVERVIEW OF STATE SEXUAL OFFENDER REGISTRATION STATUTES

The majority of states enacted sexual offender registration laws after Congress passed the Jacob Wetterling Crimes Against Children Act.\textsuperscript{52} Id. at 645. Justice Beam was the only judge to issue a separate opinion from the majority. In his concurrence, he noted that although the police investigation clearly established a lack of sexual contact between Gunderson and the complainant, and that the Minnesota Supreme Court’s decision in \textit{Boutin} would seem to “turn reason and fairness on its head,” he nonetheless agreed with the court that Gunderson asserted no Fourteenth Amendment due process violation. \textit{Id.}

\textsuperscript{55} Id. Gunderson’s duty to register as a predatory offender requires him to register all primary addresses, all secondary addresses, the addresses of all Minnesota property owned, leased or rented by him, the addresses of all locations where he is employed, the addresses of all residences where he resides when attending school, and the make, model, license plate number, and color of all vehicles owned or regularly driven by him. Minn. Stat. § 243.166.4a(b)(1)-(6) (2003). He must provide law enforcement with a fingerprint card, a photograph, and a written consent form allowing a treatment facility to release information to law enforcement. Minn. Stat. § 243.166.4(a). He must also notify law enforcement five days before each residence change. Minn. Stat. § 243.166.3(b) Additionally, he must register as a predatory offender in every other state where he works or attends school. Minn. Stat. § 243.166.3(d). Gunderson must update his information annually. Minn. Stat. § 243.166.4(e)(3). Violation of any of these provisions constitutes a felony, which carries a maximum sentence of five years in prison. Minn. Stat. § 243.166.5(a)-(b). While Minnesota does not automatically provide for the public dissemination of Gunderson’s registration, if he is not in compliance with the registration provisions for over thirty days, his personal information and a photograph may be released to the public. Minn. Stat. § 243.166.7a.
Children and Sexually Violent Offender Registration Act.\textsuperscript{56} This Act, part of the Violent Crime Control and Law Enforcement Act of 1994, encourages states to create registries of offenders convicted of crimes against children or sexually violent offenses.\textsuperscript{57} The Act provides that if a state fails to create a registry within three years of its enactment, the state loses ten percent of its federal crime control grant funds.\textsuperscript{58} Additionally, states that create registries of sexually violent offenders are awarded grants by the Director of the Bureau of Justice Assistance to offset the costs of complying with the registration program.\textsuperscript{59}

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

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


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

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

\textsuperscript{60} Wayne A. Logan, A Study in “Actuarial Justice”: Sex Offender Classification Practice and Procedure, 3 BUFF. CRIM. L. REV. 593, 599 (2000) (noting that the Jacob Wetterling Act “constitute[s] a floor for state programs, not a ceiling”).
enacting their own sex offender registries. The Act provides that “a determination of whether a person is a sexually violent predator... shall be made by a court after considering the recommendation of a board composed of experts in the behavior and treatment of sex offenders, victims’ rights advocates and representatives of law enforcement agencies.” States, however, may waive this requirement if they have established equally or more rigorous alternate procedures or legal standards for designating an individual as a sexually violent predator. At minimum, a state registration program must require each registrant to 1) provide local law enforcement officials with the registrant’s name, address, a photograph, and fingerprints; 2) report any change in address and notify proper authorities of any intention to move to another state; and 3) register in the state where he is employed or attending school. Finally, each registrant must read and sign a document informing him of his duty to register as either a sexually violent offender or an offender convicted of crimes against children. Registration is required for ten years. Lifetime registration, however, is mandated for any individual either classified as a sexually violent predator or convicted of an aggravated offense.

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


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

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


66 Id. § 14071(b)(1)(A)(v).

67 Id. § 14071(b)(6)(A).

68 Id. § 14071(b)(6)(ii)—(iii). “The term 'sexually violent predator’ means
A. States’ Approaches to Registration under the Jacob Wetterling Act

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

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

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

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

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

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

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

Additionally, state registration statutes vary as to whether

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

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

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

after a conviction for sexual conduct with a minor); Fla. Stat. Ann. §
775.21(6)(l) (West 2003) (requiring lifetime registration for sexual predators);
registration requirements for the lifetime of the offender); 34-A Me. Rev. Stat.
Ann. § 11225 (2003) (requiring sex offenders to register for a period of ten
years from the initial date of registration).

See N.Y. Correct. Law § 168-4 (Consol. 2003) (treating a first offense
as class A misdemeanor); N.C. Gen. Stat. § 14-208.11 (2003) (treating any
violation for non-compliance as a Class F felony); S.C. Code Ann. § 23-3-470
(b)(1) (Law Co-op. 2002) (treating a first offense as a misdemeanor with a
mandatory sentence of ninety days incarceration).
registration is compulsory or discretionary. In Massachusetts, a state which employs discretionary classification, anyone convicted of a sex crime is entitled to a hearing before a Sex Offender Registry Board, where the offender can argue against inclusion on the registration list. In contrast, nineteen states including Minnesota employ compulsory classification, whereby a court must classify a defendant as a sexual predator if the defendant satisfies the specified criteria in the statute. In states requiring compulsory classification, the court does not have the ability to modify the person’s duty to register. Alaska, a state that employs the compulsory approach, has rationalized this approach, finding “the fact of an offender’s conviction for a sex offense . . . sufficient reason to include that offender in the registry because of the potential for re-offense.”

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

77 See Logan, supra note 60, at 603.
78 MASS. ANN. LAWS ch. 6 § 178K (2004); see Turner, John C., Megan’s Law: Safety Net or Noose?, CONN. L. TRIB., Dec. 27, 1999. In determining whether to relieve the registrant of his duty to register, the Sex Offender Registry Board shall consider whether the offender’s criminal history indicates a risk of re-offense or a danger to the public as well as whether any physical harm was caused by the offense and whether the offense involved consensual conduct between adults. MASS. ANN. LAWS ch. 6 § 178K (2)(d) (2004).
79 Logan, supra note 60, at 603 (noting that Alabama, Alaska, California, Connecticut, Delaware, Illinois, Kansas, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, and Virginia all employ compulsory classification of sex offenders).
80 See MINN. STAT. § 243.166.2 (2003) (stating that “the Court may not modify the person’s duty to register in the pronounced sentence or deposition order”).
81 Logan, supra note 60, at 605. Similarly, Alabama provides that “certain juveniles and all adults convicted of a ‘criminal sex offense,’ are subject to compulsory registration and community notification by means of a ‘notification flyer,’ which is distributed by hand or regular mail by police.” Id. See ALA. CODE 15-20-21(3) (2003).
82 See, e.g., ALA. CODE § 13A-11-200 (2003) (mandating registration for the following offenses: sexual perversion involving a member of the same or opposite sex, sexual abuse involving any member of the same or opposite sex,
may impose registration for sexually violent offenses that include or exceed aggravated sexual abuse or any offense that involves “engaging in physical contact with another with the intent to commit aggravated sexual abuse or sexual abuse.” Consequently, states have composed varying lists of enumerated offenses that require registration. A minority of states demand registration if the defendant’s offense was “sexually motivated” or committed for a sexual purpose.

B. Minnesota’s Predatory Offender Registration Act

In 1991, Minnesota became the fifteenth state to enact a sex offender registration statute. Although several senators “expressed concern that registration was contrary to the idea that released offenders had paid their debt to society” and “tends to...
deprive people of their freedom of movement and freedom of privacy,” the Predatory Offender Registration Act passed Minnesota’s House and the Senate by a commanding majority.\(^87\)

The original version of the Act mandated registration if an offender had been convicted of any of the following child-related offenses: kidnapping a minor; criminal sexual conduct toward a minor; solicitation of children to engage in sexual conduct; use of minors in a sexual performance; or solicitation of children to practice prostitution.\(^88\) Any violation for non-compliance was considered a misdemeanor.\(^89\)

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

\(^87\) Logan, supra note 5 at 1292-93.
\(^89\) Minn. Stat. § 243.166.5.
\(^90\) Logan, supra note 5, at 1294 (noting that the amendments greatly expanded “the array of criminal behaviors” that would require registration).
\(^91\) Id. at 1294-95 (emphasis added); see Minn. Stat. § 243.166.1(1) (1993).
\(^92\) Logan, supra note 5, at 1295; see Minn. Stat. § 243.166.1(1) (1993).
\(^93\) Minn. Stat. § 243.166.4(c) (1996). To be adjudicated as either “sexually dangerous” or having a “sexual psychopathic personality,” facts must be submitted to the county attorney who will prepare a petition if good cause is shown. Minn. Stat. § 253B.185.1 (2003). A court will then hear the petition alleging that the patient who is subject to commitment at a treatment facility is a sexually dangerous person or is a person with a sexual psychopathic personality. Id. See Logan, supra note 5, at 1306.
\(^94\) Minn. Stat. § 243.166.4(d)(2) (1999); see Logan, supra note 5, at 1308.
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Katie’s Law, a Minnesota statute passed in response to the brutal kidnapping and murder of nineteen year old Katie Poirier, resulted in a further expansion of the state’s registration laws. First, Katie’s Law stiffened the penalties for non-compliance with registration requirements. Registration violations, including failure to register address changes or return annual verification letters, could extend the registration period by an additional five years. The first violation of the statute subjects the offender to a mandatory minimum sentence of one year in prison. A second violation carries a minimum of two years incarceration. Additionally, Katie’s Law provided that if a person subject to the registration requirement is out of compliance for thirty days, the Minnesota Bureau of Criminal Apprehension may disseminate information about the offender, including a photograph, to the public. The information released must be limited to that necessary for the public to assist law enforcement in locating the sex offender.

Commentators have praised Minnesota’s Predatory Offender (noting that the 1999 amendments were a legislative response to the acquittal, for reasons of insanity, of a defendant who was charged with raping a thirteen year-old girl).

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

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

97 MINN. STAT. § 243.166.6(b) (2000).

98 MINN. STAT. § 243.166.5(b).

99 MINN. STAT. § 243.166.5(c).

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

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

In spite of the arguable moderateness of the provisions of Minnesota’s registration statute, the statute as implemented reflects an enduring rigidity.\footnote{106} First, an offender is required to register even if the original sexual offense charges are dismissed or withdrawn and the offender’s remaining charge is a non-registerable offense.\footnote{107} Furthermore, Minnesota’s Bureau of
Gunderson v. Hvass, 339 F.3d 639 (affirming Gunderson’s duty to register as a predatory offender even though his predatory offense charge was dismissed in its entirety).


109 Id.

110 Id.

111 Id.

112 Id.


114 Id.
III. **Viable Due Process Challenges to Minnesota’s Predatory Offender Registration Statute**

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

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

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

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

\(^{118}\) *See* People v. Guillen, 717 N.E.2d 563 (Ill. App. Ct. 1999) (upholding Sex Offender Registration Act against both federal and state ex post facto challenges); *see also* Esposito, *supra* note 115, at *2a (stating that criminal registration statutes have also survived challenges based on bill of attainder, vagueness, right to privacy, right to travel, privilege against self-incrimination, cruel and unusual punishment, double jeopardy, and unreasonable search and seizure).
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statutes, considerable due process concerns are raised when an individual who has never been convicted of a sexual offense must register as a predatory offender. Due process concerns arise when “fundamental procedural fairness” has been denied or when power is exercised “without any reasonable justification” in the pursuit of an otherwise legitimate governmental objective. While the government undoubtedly has a valid objective in protecting the public, the importance of such aims does not justify trammeling constitutional due process protections.

A. Procedural Due Process

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

1. Implication of a Protectible Liberty Interest

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

119 See generally, Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997).
120 People v. Bell, No. 3610-80, 2003 N.Y. Misc. LEXIS 884, at *8-9 (N.Y. Sup. Ct. 2003) (citing Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (asserting that the “central meaning” of procedural due process is clear—“parties whose rights are to be affected are entitled to be heard”); Daniels v. Williams, 474 U.S. 327, 331 (1986) (noting that the Due Process Clause was “intended to secure the individual from the arbitrary exercise of the powers of government”).
123 Id. at *8.
implicated where an inmate was dismissed of sex offense charges and consequently was never given an opportunity to formally challenge the imposition of the “sex offender” label. 125 In that case, Neal was indicted for robbery, kidnapping, sexual assault, terroristic threatening, and attempted murder, but he entered into a plea bargain in exchange for the dismissal of the sex offense charges. 126 Nonetheless, Neal was classified as a sex offender because his indictment alleged that he engaged in sexual misconduct during the course of his offenses. 127 Neal challenged this application, arguing that it violated his due process rights. 128 The court found that indeed, this classification invoked due process protections. 129

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

125 Neal v. Shimoda, 131 F.3d 818, 831 (9th Cir. 1997).
126 Id. at 822. The complaint alleged that Neal, during a two-day period, kidnapped and robbed the victim and forced the victim to perform sexual acts on a juvenile. Id. Additionally, the indictment alleged that Neal sexually assaulted the victim. Id. He was also indicted for kidnapping a second victim and sexually assaulting her as well. Id.
127 Id.
128 Id. at 823.
129 Id. at 831.
130 Id. at 829 (quoting Sandin v. Conner, 515 U.S. 472, 484 (1995)). In Sandin, Conner, a defendant convicted of numerous crimes including murder, alleged that his procedural due process rights were violated because he was denied the ability to present witnesses at a disciplinary hearing. Sandin, 515 U.S. at 474-76. The hearing resulted in Conner being sentenced to thirty days’ disciplinary segregation. Id. at 475. The Supreme Court held that Conner’s discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest. Id. at 486.
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interest.” These “increasingly popular ‘Megan’s laws’” stigmatize individuals classified as sex offenders insofar as such laws require that these individuals register with law enforcement officials and information about the offenders may subsequently be released to the public.

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

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

132 Neal, 131 F.3d at 829.

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


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

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

137 Neal v. Shimoda, 131 F.3d 818, 828-29 (9th Cir. 1997).
offender registration statute authorized correctional officials to classify an inmate as a sex offender without a hearing.\footnote{Id. at 829.} Additionally, inmates classified as sex offenders were required to complete a treatment program and confess to past sex offenses to be eligible for parole.\footnote{Id.} Therefore, the court could “hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling of a prison inmate as a sex offender.”\footnote{Id.}

Using the analysis employed by the court in \emph{Neal}, the \emph{Gunderson} court should have held that because classifying Gunderson as a sex offender imposes substantial burdens on him, a protected liberty interest is implicated.\footnote{Like Minnesota, registrants in Hawaii must provide law enforcement officials with a recent photograph, verified fingerprints, all names and aliases used by the sex offender, the legal address, mailing address, and any temporary residence where the sex offender resides, the names and addresses of current employers, the names and addresses of educational institutions, and the year, make, model, color, and license plate of all vehicles owned or operated by the sex offender. HAW. REV. STAT. ANN. § 845E-2(b)(1)-(2), (5)-(7) (Michie 2003).} Like defendant Neal, Gunderson was required to register as a sex offender, even though all charges of sexual misconduct had been dismissed.\footnote{Gunderson v. Hvass, 339 F.3d 639, 642 (8th Cir. 2003).} Although Gunderson was not required to complete a mandatory treatment program, he still encounters substantial hardships from his duty to register as a predatory offender. First, as a consequence of his duty to register, Gunderson is not only required to register as a predatory offender in Minnesota, but he must also register in each state where he works or attends school.\footnote{MINN. STAT. § 243.166.4a(4)-(5) (2003).} Gunderson’s foreseeable reluctance to register as a sex offender in additional jurisdictions restricts his mobility for the duration of his registration because while Gunderson is not legally prohibited from leaving Minnesota, he must comply with the registration laws of any state to which he moves.\footnote{MINN. STAT. § 243.166.9 (2003) (providing that when Minnesota accepts an offender from another state under the interstate compact, acceptance}
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public dissemination of information contained in the registry, Gunderson will be significantly deterred from leaving Minnesota, which does not provide for automatic public dissemination. 145

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

Furthermore, in Minnesota if a registrant is not in compliance for over thirty days or if he does not provide his primary or secondary address to law enforcement, his information including a photograph can be released to the public. 148 The stigmatizing consequences can certainly be recognized in Gunderson’s case where, although he was dismissed of all charges of sexual assault, he is included on a sex offender registry and information concerning an offense he was never convicted of may be released to the public. 149 As the Minnesota Supreme Court has recognized, is conditional on the offender agreeing to register under Minnesota’s predatory offender registration statute). See also Lewis, supra note 57, at 113 (noting that sex offender laws “burden the ability of released offenders to relocate”).

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

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

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


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


149 Gunderson v. Hvass, 339 F.3d 639 (8th Cir. 2003) (upholding Gunderson’s duty to register under MINN. STAT. § 243.166 (2003)).
“being labeled a ‘predatory offender’ is injurious to one’s reputation.”150 Indeed, “imputing criminal behavior to an individual is generally considered defamatory per se.”151 Minnesota’s sex offender registry clearly stigmatizes offenders on the list insofar as it suggests that they are individuals convicted of predatory offenses.152 In Gunderson’s case, law enforcement authorities have branded him a predatory offender although he was not convicted of a predatory offense.153 Gunderson must acknowledge his status as a predatory offender for ten years in spite of the fact that the complaint charging him with a sexual offense was dismissed in its entirety.154 Therefore, because of the potential for criminal sanction, the limitations on mobility, the additional obligations imposed on Gunderson, and the stigmatizing consequences of being labeled as a sex offender, registration as a predatory offender imposes on Gunderson “atypical and significant hardship,” which the Ninth Circuit held invokes due process protections.155

150 Boutin, 591 N.W.2d 711 at 718.
151 Id. (quoting Paul v. Davis, 424 U.S. at 697). See also Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997) (noting the “stigmatizing consequences of being labeled a sex offender”).
152 See Doe v. Dep’t of Pub. Safety, 271 F.3d 38, 54-55 (2d Cir. 2001), rev’d on other grounds, 538 U.S. 1 (2003) “Publication of the Connecticut Sex Offender Registry plainly stigmatizes the people listed on it insofar as it asserts that they are persons convicted of crimes characterized by the State as sexual offenses.” Id.
154 Doe v. Attorney General, 426 Mass. 136, 149 (1997) (Fried, J., concurring) (noting the distinct constitutional dangers inherent in registration requirements as opposed to community notification provisions). While community notification pertains to action on the part of law enforcement, registration “forces an action on the person required to register. It is a continuing, intrusive, and humiliating regulation of the person himself.” Id. at 150.
155 See Neal v. Shimoda, 131 F.3d 818, 829 (9th Cir. 1997).
2. Gunderson’s Identification of a Protected Liberty Interest Under the Stigma-Plus Test

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

Registration duties imposed on the offender constitute a “plus” factor under the “stigma plus” test when those obligations alter the defendant’s legal status, are “governmental in nature,” and are “extensive and onerous.”161 In addition to the reputational damage suffered by Gunderson, compliance with Minnesota’s sex offender registration statute alters Gunderson’s legal status.162 First,
Gunderson’s relationship with the criminal justice system has been extended for an additional ten years, and “the extent of his contact with the state has increased significantly.” Failure to comply with registration obligations is punishable as an independent felony offense. In addition, Gunderson is likely to be under the constant supervision of local law enforcement officials. While the police cannot arrest a registered sex offender based solely on his inclusion within the registry, they can pressure him to come to the police station and question him as a suspect. For example, if law enforcement is investigating a sexual offense that occurred in the vicinity of Gunderson’s home, there is little to prevent the investigating authorities from questioning Gunderson, a registered predatory offender, in connection with the crime. “If he is suspected in connection with every sex crime in the area where he lives, the costs to [his] liberty as well as the emotional and financial costs are likely to be high.” As a direct consequence of his placement on the predatory offender registration statute, unique burdens are placed on Gunderson that ordinary citizens are not required to endure.

In addition to altering a defendant’s legal status, registration duties are undoubtedly governmental in nature. The Fourteenth (stating that “the imposition on a person of a new set of legal duties that, if disregarded, subject him . . . to felony prosecution, constitute a change of that person’s status under state law”).

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

164 MINN. STAT. § 243.166.5 (2003).

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

166 Id.

167 Id. at 106.

168 Doe v. Dep’t of Pub. Safety, 271 F.3d 38, 50 (2d Cir. 2001). The Due Process Clause was established to guard against abuses in governmental power. Id. at 56.
Amendment is implicated where a government official or agency is able to “impose a loss” because of its unique status. In Doe v. Dep’t of Pub. Safety, the Second Circuit found that registration duties were governmental in nature “insofar as they could not be imposed by a private actor in a position analogous to the state defendants.” Because the BCA is entrusted with ensuring a registrant’s compliance with Minnesota’s Predatory Offender Registration Act and is given authority to “impose a loss” on Gunderson, these registration duties are governmental in nature.

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

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169 Id. at 56.
170 Id.
171 MINN. STAT. § 243.166.4(e)(2), .7a (2003) (providing that all registration information including address verification forms must be submitted to the BCA and if registrants are out of compliance with the statute for over thirty days, the BCA may release registration information to the public).
172 Id. (noting that the provisions of Connecticut’s sex offender law are “extensive and onerous”).
174 Pierce, 794 A.2d at 1133.
175 Id.
176 Id.
177 Id.
178 Id.
five-year prison term if a registered offender fails to abide by any of these obligations.\(^{179}\) The Pierce court found that these “onerous requirements” clearly established a “plus” factor in the stigma-plus analysis.\(^{180}\)

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

\(^{179}\) Pierce, 794 A.2d at 1133.

\(^{180}\) Id.

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

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

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

\(^{184}\) Boutin, 591 N.W.2d 711, 721 (Minn. 1999) (Anderson, J., dissenting). Judge Anderson noted that “the consequences of [Minnesota’s] Section 243.166 are serious” and it is because of grave implications that procedural due process must be followed. Id. Additionally, Judge Anderson made these findings when the penalty for non-compliance was merely a gross misdemeanor and not a felony. Id.
imposed by Minnesota's statute are minimal, the statute, in fact, imposes conditions that are both “rigorous and confining.” Therefore, the registration duties imposed on Gunderson under the Minnesota statute constitute a “plus” factor, and he should be afforded with the procedural protections of due process.

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

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

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

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

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

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

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

191 *Id.* at 7. See also Chad Kinsella, *State Government News* May 1, 2003, *COUNCIL OF STATE GOVERNMENTS* No.5 Vol.46 (May 1, 2003) (noting that the Supreme Court found that the dispositive factor in being listed on Connecticut’s sex offender registry was that an individual had been convicted of committing a sex offense).
192 *Doe*, 538 U.S. at 7.
193 *Id.* at 5.
194 *Id.* at 7.
195 *Id.* (emphasis added).
196 See Murphy v. Wood, 545 N.W.2d 52, 54 (Minn. Ct. App. 1996) (stating that “whether Murphy’s convictions arose from the same set of circumstances as his charged sexual misconduct presents an issue of material fact”).
198 See *Doe*, 538 U.S. at 7.
3. Deprivation of Gunderson’s Procedural Due Process Protections

Given the harmful implications of denying a protected liberty interest, defendants like Gunderson who have never been convicted of an enumerated sexual offense must be accorded due process protections. As noted in Neal, an offender who has an identified protected liberty interest should receive advance written notice of the claimed violation. Gunderson was not notified until nearly a year after his conviction of his obligation to register as a predatory offender. Gunderson’s registration requirement was not stated on the record during his plea colloquy, nor is there any evidence to indicate he was made aware of his obligation to register prior to the execution of his plea bargain. Additionally, an offender should receive a written statement by the fact-finders as to the evidence relied on and the reasons for requiring registration. Gunderson, much like Neal, was classified as a sex offender based solely on the information contained in his indictment and pre-sentence report.

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

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

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

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

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

204 Gunderson, 339 F.3d at 642-43. See Neal, 131 F.3d at 822 (noting that
Gunderson’s record lacked any specific findings as to the reasons for his classification as a sex offender. An indictment, without more, is an insufficient basis for imposing registration requirements. “As tempting as it may be to make . . . finding[s] based upon police reports and unverified statements, to do so is improper.”

**B. Substantive Due Process**

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

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

205 Gunderson, 339 F.3d at 642-43.
206 Neal, 131 F.3d at 831.
207 Boutin, 591 N.W.2d at 721 (Anderson, J., dissenting). See also Murphy v. Wood, 545 N.W.2d 52, 54 (Minn. Ct. App. 1996). The court held that a factual record was necessary to determine whether Murphy’s sexual assault arose from the same set of circumstances as his convictions for aggravated robbery and assault. Id. at 53. The court held that a copy of the criminal complaint which the defendant denied was insufficient to establish a factual record as to whether the sexual assault charge arose from the same set of circumstances as the robbery and assault convictions. Id.
208 Daniels v. Williams, 474 U.S. 327, 331 (1986) (noting that “touchstone of due process is protection of the individual against arbitrary action of government”).
209 Lewis, supra note 57, at 102 (noting that “if the individual liberty interests of former sex offenders outweigh the state interests in crime prevention and law enforcement, the [sex offender registration act] violates the Fourteenth Amendment guarantee of substantive due process”).
210 Gunderson v. Hvass, 339 F.3d 639, 643 (8th Cir. 2003).
REGISTERING NON-PREDATORY OFFENDERS

legitimate governmental purpose.\footnote{The Minnesota Supreme Court held, in \textit{Boutin v. LaFleur}, that the registration statute was non-punitive. 591 N.W.2d 711, 717 (Minn. 1999). To reach this conclusion, the \textit{Boutin} Court, along with most state and federal courts, have applied the \textit{Mendoza-Martinez} balancing test. \textit{Id.} at 717. The \textit{Mendoza-Martinez} balancing approach is utilized to determine whether a statute was intended to be regulatory or punitive when the legislature has not clearly indicated its intent. \textit{Id.} In \textit{Kennedy v. Martinez-Mendoza}, the Supreme Court determined that factors used to determine legislative intent include: whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of a \textit{scirenter}, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose assigned. \textit{Boutin}, 591 N.W.2d at 717 (citing \textit{Kennedy v. Martinez-Mendoza}, 372 U.S. 144 (1963)). In determining that the registration statute was regulatory, the court noted that it does not require an affirmative disability or restraint, but that it only requires the offender to register with law enforcement and to inform the state of any change of address. \textit{Id.} Additionally, such registration statutes have not historically been regarded as punishment. \textit{Id.} The \textit{Boutin} court also noted that the registration statute does not promote the traditional aims of punishment because it does not involve confinement and that it is not intended to exact retribution. \textit{Id.} The court concluded that the statute did not implicate \textit{Boutin}’s fundamental rights. \textit{Id. But see In re Reed}, 33 Cal. 3d 914 (Cal. 1983) (finding California’s sex offender registration statute punitive under the \textit{Martinez-Mendoza} factors).} While keeping track of predatory offenders and protecting public safety are legitimate governmental objectives, Minnesota’s Predatory Offender Registration Statute is irrationally related to these objectives because it mandates registration for individuals like Gunderson whose sex offense charges have been dismissed and withdrawn.

Sex offender registration statutes have been justified on a number of grounds. First, it is asserted that registration laws are necessary because sex offenders have a higher risk of re-offending after release from custody than other criminals.\footnote{See \textit{ARK. CODE ANN.} § 12-12-903 (Michie 2003); \textit{MISS. CODE ANN.} § 45-33-21 (2004). A recent study issued by the Justice Department, however, revealed that sex offenders are less likely to be re-arrested after their release.} Second,
registration laws are considered an invaluable tool in protecting the public from sex offenders.\textsuperscript{213} Third, the privacy interests of convicted sex offenders are considered less important than the government’s interest in public safety.\textsuperscript{214} Each of these justifications, however, presupposes that the individual subject to the registration statute is in fact a sexual offender. It is irrational in light of those objectives to classify an individual as a predatory offender when the complaint charging that individual with a sexual offense has been dismissed and withdrawn by the prosecution.

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

from prison than other criminals. U.S. Department of Justice, Bureau of Justice Statistics, \textit{Recidivism of Sex Offenders Released from Prison in 1994}, (2003) available at http://www.ojp.gov/bjs/pub/pdf/rsorp94.pdf. Of 9,691 men convicted of various sex offenses, only 43 percent were re-arrested within three years as compared to 68 percent for all other former inmates. \textit{Id. See also Mary Ann Farkas & George B. Palermo, The Dilemma of the Sex Offender} 171-72 (Charles C. Thomas 2001) (noting that there is no clear evidence to indicate whether sex offenders have higher recidivism rates than other offenders).


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

\textsuperscript{215} \textit{See} Magistrate’s Report at *25 (asserting that “the fact that such a registration policy may, in fact, require the inclusion of persons who are not predators, is not a fatal Constitutional defect”).

\textsuperscript{216} \textit{See} State v. Reine, 2003 Ohio 50, ¶ 22 (Ohio Ct. App. 2003) (holding that labeling individuals as “sexually oriented offenders” is unreasonable and arbitrary when their offense involved no sexual motivation or purpose”).
purpose of the statute—to protect the public from sex offenders.\textsuperscript{217} Indeed, the primary purpose of the statute is disserved by sweeping within its provisions individuals who are clearly not predatory offenders because these offenders pose no risk to society.\textsuperscript{218} Nothing prevents the legislature from imposing registration requirements on all convicted felons.\textsuperscript{219} However, “it is in the misnaming or mis-characterization, of the offense that is unreasonable and arbitrary.”\textsuperscript{220} Minnesota’s predatory offender registration statute violates substantive due process rights even under a rational basis review because it irrationally classifies an individual as a predatory offender when all predatory offense charges have been withdrawn due to a complete lack of physical evidence.\textsuperscript{221} By enacting the 1993 Amendments, the Minnesota Legislature “was attempting to insure the registration of all predatory offenders including those who take advantage of favorable plea bargains.”\textsuperscript{222} While this is certainly a valid legislative goal, it is highly doubtful that through these amendments the legislature intended to expand the predatory offender registry to include persons who did not commit a sexual offense.

\begin{enumerate}
\item\textsuperscript{217} See Minn. Stat. § 243.166 (2003).
\item\textsuperscript{218} Reine, 2003 Ohio at ¶ 20. As noted by Connecticut State Senator Donald E. Williams, co-chair of the judiciary committee and majority whip, having a registry where 75 percent of those on the list are not sexual predators is not a great help to individual citizens or local law enforcement who are trying to be apprised of those who will be dangerous to the community. Turner, supra note 78.
\item\textsuperscript{219} Reine, 2003 Ohio at ¶ 21.
\item\textsuperscript{220} Id. at ¶ 23 (noting a hypothetical situation where a legislature, in an effort to protect public safety, enacted a statute designating all persons convicted of felonies as “murderers,” with registration and notification requirements so that neighbors would be notified that John Jones, a “murderer,” is living on their block when in fact John Jones was convicted of an esoteric election-law felony).
\item\textsuperscript{221} See Gunderson v. Hvass, 339 F.3d 639, 641 (8th Cir. 2003).
\item\textsuperscript{222} Magistrate’s Report, supra note 47 at *25.
\end{enumerate}
IV. ADDITIONAL IMPLICATIONS OF MINNESOTA’S PREDATORY OFFENDER REGISTRATION STATUTE

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

A. Unfettered Prosecutorial Discretion

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

\begin{itemize}
  \item \textit{See} Minnesota v. Newell, 2002 WL 31253657, at *6 (Minn. Oct. 8, 2002) (affirming the defendant’s duty to register as a predatory offender while appreciating “the enormity of the potential unchecked power this statute, as written, places in the hands of the prosecution”).
  \item \textit{Gunderson}, 339 F.3d at 643 (noting that since Gunderson’s original complaint charged a sexual offense he was required to register as a predatory offender in accordance with Section 243.166).
  \item \textit{Minn. Stat.} § 243.166.1(b)(3) (2003) (requiring an offender to register as a predatory offender until ten years have elapsed since that individual was released from confinement).
\end{itemize}
In some criminal sexual conduct cases, the state’s case against the defendant weakens so significantly that the state will agree to bargain down from a serious sexual-assault charge to a misdemeanor such as simple assault. Defendants may consider it prudent to accept a plea-of-guilty to a lower-level misdemeanor charge rather than go through the uncertainty of trial on an egregious sexual assault charge. Yet, the stigma of the original charge remains (meaning the registration requirement), even though it is now self-evident that the original charge did not result in a conviction. Put another way, this is one of the few times in American jurisprudence where the “charge is the conviction,” meaning that once you are charged with an enumerated felony under the statute, you are convicted of having to register.

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

B. Effects on the Plea Bargaining System

In addition, Minnesota’s Predatory Offender Registration

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

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

\textsuperscript{229} See Turner, supra note 78 (noting that the plea bargaining process will be slowed down by a defendant’s apprehension that he will be required to register as a sex offender).
\textsuperscript{230} Id.
\textsuperscript{231} Kaiser v. State, 621 N.W.2d 49, 53 (Minn. Ct. App. 2001). A direct consequence of a guilty plea is a consequence that flows “definitely, immediately and automatically” from the guilty plea. Id. The court in Kaiser held that because the predatory offender registration requirement is regulatory and non-punitive, it is collateral to the plea agreement, and therefore, a defendant cannot withdraw his plea agreement simply because he was not made aware of his obligation to register as a predatory offender. Id.
\textsuperscript{232} Id.
\textsuperscript{233} Richards, supra note 202, at 161-62.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 168 (noting that “many appellate courts view the consequence of registration as a sexual offender to be collateral, so that a trial court’s failure to advise defendants of the need to register does not constitute grounds for allowing a withdrawal of a guilty plea”). But see In re Birch, 515 P.2d 12, 17 (Cal. 1973) (finding registration as a sex offender to be a direct consequence of a guilty plea, given that registration subjects registrants to “continual police surveillance” and can result in an “ignominious badge” that can last for a lifetime). Because registration prolongs a defendant’s relationship with the state, and because it subjects a defendant to an independent felony offense and to
Unfortunately, the failure to warn a defendant of his duty to register does not allow the defendant to subsequently withdraw his plea.\textsuperscript{236} If states can arbitrarily impose registration requirements on defendants, unbeknownst to them, after a plea bargain has been struck, defendants will be wary of entering into plea negotiations, and will opt instead to seek a jury trial. In an amicus brief filed in the case of \textit{In re Reed}, the Los Angeles City Attorney asserted that the threat of mandatory registration leads defendants to seek jury trials rather than plead guilty, even if evidence of their guilt is overwhelming.\textsuperscript{237} Through a jury trial, a prosecutor is forced to advance evidence of the sexual offense and if the jury finds this evidence unconvincing, a defendant will be relieved of the registration requirement. In a system where approximately 96 percent of cases are resolved through plea bargains, such a disruption could have a devastating effect in terms of judicial economy.\textsuperscript{238} If a state deems it necessary to label a defendant as a sex offender and to subject him to registration requirements, the state should pursue prison terms that correspond to the offense, rather than dismissing sex offense charges pursuant to a plea bargain and yet still subjecting the defendant to registration constant police surveillance, registration should be considered as a direct consequence of a guilty plea. Therefore, defendants should be notified of the requirement to register as a predatory offender prior to entering a guilty plea.

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

\textsuperscript{237} \textit{In re Reed}, 663 P.2d 216, 220 n.7 (Cal. 1983) (holding that California’s registration requirement constituted cruel and unusual punishment).

\textsuperscript{238} Eric Lichtblau, \textit{Ashcroft Limiting Prosecutors’ Use of Plea Bargains}, N.Y. TIMES, Sept. 22, 2003 (noting Attorney General John Ashcroft’s efforts to restrict the ability of federal prosecutors to strike plea bargains in response to the “dangerously lenient practices” of certain federal prosecutors and judges).
requirements as if he were convicted of the sexual offense.

V. RECOMMENDATION

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

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

239 Neal, 131 F.3d at 830.
241 See State v. Johnson, 2000 Minn. App. LEXIS 323 (Minn. Ct. App. 2000). The defendant was charged with one count of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct. Id. at *2. In exchange for his guilty plea to a charge of promotion of prostitution by fraud, the defendant received a stayed sentence and his sexual assault charges were dropped. Id. at *3.
242 Id. See also Gunderson v. Hvass, 339 F.3d 639 (8th Cir. 2003); Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997); Boutin v. LaFleur, 591 N.W.2d 711 (Minn. 1999).
243 Logan, supra note 5, at 1333.
imposed at the court’s discretion. Therefore, all defendants who have not been convicted of an enumerated predatory offense must be provided with a hearing to contest their classification as a predatory offender. At this hearing, the defendant should be provided with an opportunity to call witnesses and present evidence to defend against the charge that his offense arose from the same set of circumstances as a charged predatory offense. Additionally, in determining whether to require registration, the court should consider the offender’s criminal history, his risk of reoffense, the circumstances surrounding the charged sexual offense, whether registration would promote public safety, and any other relevant evidence. Finally, the burden should be on the state to prove that the offense for which the defendant was convicted of arose out of the same set of circumstances as a charged predatory offense.

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

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

245 Neal, 131 F.3d at 831 n.14.


249 For example, in Boutin v. LaFleur, 591 N.W.2d 711, 713 (Minn. 1999), the defendant admitted to police that he had forcible sexual intercourse with the victim, stating that “she said she didn’t want to and I still did it I guess.” Id. Presumably, it was only because the victim recanted her accusations of criminal
discretionary hearing safeguards the due process rights of defendants while promoting the law’s primary goals—“keeping track of predatory offenders and protecting public safety.”

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

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

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


253 KAN. STAT. ANN. § 22-4902(c)(14) (2002). See W. VA. CODE § 15-12-2(c) (2003) (while the statute mandates registration if the crime was sexually motivated, the sentencing judge must make a written finding that the offense was sexually motivated). See Pierce, 794 A.2d at 1128 (noting that under Connecticut’s sex offender registration statute, if the defendant is required to register because the court finds that his crime was committed for a felony purpose, the decision to require registration is discretionary).
crime had a sexual element.254

CONCLUSION

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

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

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

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

256 See discussion supra Part II.A.3.

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

258 United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (dissenting from the majority’s holding that reasonable searches conducted without a search warrant pursuant to an arrest were permissible).
should be provided with a hearing to challenge their classification as a predatory offender. At the hearing, the burden must be on the State to demonstrate by a preponderance of evidence that the crime the defendant was convicted of did in fact arise out of the same set of circumstances as the charged sexual offense. Additionally, the State must make clear what governmental interests are furthered by labeling an individual who has never been convicted of a sexual offense a predatory offender. While ensuring that children do not fall prey to violent sexual predators is of the utmost importance, if states continue to mandate registration of alleged sexual predators without regard to the reality of the offense, American jurisprudence will become the predator and the rights of potentially innocent offenders will become the prey.