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## Of What Consequence?: Sexual Offender Laws and Federal Habeas Relief

Katherine A. Mitchell

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# Of What Consequence?: Sexual Offender Laws and Federal Habeas Relief

KATHERINE A. MITCHELL\*

*New concerns for an old writ. The relatively recent advent of sex offender registries has led to consequences in the habeas corpus context—and they may be more than collateral. In particular, are the restraints imposed on registered sex offenders severe enough to constitute custody for habeas jurisdiction? With a recent split among the federal circuit courts, this Article attempts to decipher which side of the split the Supreme Court will—and should—fall.*

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## INTRODUCTION

*“If you dare to prey on our children, the law will follow you wherever you go—state to state, town to town.”*

President Bill Clinton, 1996<sup>1</sup>

Dating back to the Magna Carta,<sup>2</sup> the tides of time have produced both ebbs and expansions of the Great Writ’s jurisdictional reach. Specifically, in the United States, the Supreme Court’s habeas jurisprudence has transformed considerably—from the Warren Court’s liberalization of habeas procedure<sup>3</sup> to the consequent pushback from the Burger and Rehnquist Courts.<sup>4</sup> And with

<sup>1</sup> Ron Fournier, *Clinton Signs Law on Sex Offenders*, CHI. SUN-TIMES, May 18, 1996, at 12.

<sup>2</sup> Or, more accurately, to the Unknown Charter, drafted almost a month prior to the Magna Carta by a delegation of King John’s discontented barons and “which contained an imperfect transcription” of King Henry I’s Coronation Charter. See Stephen Rohde, *From Discontented Barons to Predator Drones*, L.A. REV. BOOKS (June 14, 2015), <https://lareviewofbooks.org/article/magna-carta-from-discontented-barons-to-predator-drones/>.

<sup>3</sup> See, e.g., *Fay v. Noia*, 372 U.S. 391, 438–39 (1963); *Townsend v. Sain*, 372 U.S. 293, 312–13, 317 (1963); *Sanders v. United States*, 373 U.S. 1, 15–19 (1963) (collectively known as the Habeas Trilogy). See also *Brown v. Allen*, 344 U.S. 443 (1953), which was decided directly before Chief Justice Warren was appointed to the Supreme Court but was nevertheless significant to the series of habeas cases that followed.

<sup>4</sup> See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 87–91 (1977); *Rose v. Lundy*, 455 U.S. 509, 521–22 (1982); *Granberry v. Greer*, 481 U.S. 129, 134, 136 (1987).

Congress's passage of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"),<sup>5</sup> the limits of habeas relief continue to evolve.<sup>6</sup> Nevertheless, at its core, habeas corpus is largely a jurisdictional issue. The "very essence" of habeas corpus contemplates that the petitioner is in custody;<sup>7</sup> therefore, absent custody, a court simply lacks habeas jurisdiction.<sup>8</sup>

At its historical roots, habeas custody was a non-issue. With its Latin name loosely translating to "produce the body," the writ required a jailer (or custodian) to "produce a prisoner in a court of law" to review the basis of his or her detention.<sup>9</sup> A custodian could not produce one who was not confined. Due in part to legislative creativity, however, newly devised sentencing schemes and post-conviction requirements have created various quandaries regarding how to interpret whether a prisoner is "in custody" for habeas purposes.<sup>10</sup> Custody, therefore, is no longer limited to actual physical confinement.<sup>11</sup> One such recent legislative creation is the enactment of various sex offender registration and notification laws, which continue to impact individuals convicted of sexual offenses long after service of their sentences and periods of supervision.<sup>12</sup> In fact, many of these laws were enacted as post-sentencing measures in an attempt to protect and notify the public of sex offenders in their respective communities—specifically envisioning that these offenders would no longer be in physical custody when the requirements attach.<sup>13</sup>

The Supreme Court has yet to announce whether the consequences of these registration provisions amount to custody required

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<sup>5</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217-26 (1996).

<sup>6</sup> Or devolve, based on your view. See Lincoln Caplan, *The Destruction of Defendants' Rights*, NEW YORKER (June 21, 2015), <https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights>.

<sup>7</sup> ANDREA D. LYON ET AL., FEDERAL HABEAS CORPUS 93 (2d ed. 2011).

<sup>8</sup> *Id.*

<sup>9</sup> See Jonathan Shaw, *The War and the Writ: Habeas Corpus and Security in an Age of Terrorism*, HARV. MAG., Jan.–Feb. 2009, at 24–25.

<sup>10</sup> See LYON ET AL., *supra* note 7, at 93.

<sup>11</sup> *Jones v. Cunningham*, 371 U.S. 236, 239 (1963).

<sup>12</sup> LYON ET AL., *supra* note 7, at 104.

<sup>13</sup> See, e.g., Megan's Law, 42 U.S.C. § 14071(e) (permitting states to collect and release "relevant information" about registered sex offenders to extent that it is "necessary to protect the public").

by habeas; the federal judiciary, however, has been far from silent. With the recent advent of a split among the circuits<sup>14</sup>—and the sheer volume of individuals potentially affected by such a decision<sup>15</sup>—this Article attempts to decipher which side of the split the Supreme Court will—and should—fall. This Article argues that as a matter of both common sense and judicial precedent, the restraints imposed on registered sex offenders are sufficiently severe to satisfy habeas custody. Nevertheless, this Article will also discuss potential—and well-founded—concerns that may inhibit the Supreme Court from extending habeas custody beyond its current scope.

### I. “IN CUSTODY” JURISDICTIONAL REQUIREMENT & COLLATERAL CONSEQUENCES

As mentioned, two basic premises underlie habeas corpus: (1) that a court is only capable of providing habeas relief to an individual “in custody,” and (2) this traditional limitation is jurisdictional.<sup>16</sup> Congress codified this common law understanding of the writ, incorporating the “in-custody” requirement into the federal habeas statutory scheme.<sup>17</sup> Specifically, pertinent provisions of Section 2241(c)—establishing the judiciary’s power to grant the writ—provide:

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<sup>14</sup> See *Williamson v. Gregoire*, 151 F.3d 1180, 1183–85 (9th Cir. 1998); *Leslie v. Randle*, 296 F.3d 518, 521–23 (6th Cir. 2002); *Virsnieks v. Smith*, 521 F.3d 707, 717–20 (7th Cir. 2008); *Wilson v. Flaherty*, 689 F.3d 332, 335–39 (4th Cir. 2012); *Calhoun v. Att’y Gen. of Colo.*, 745 F.3d 1070, 1073 (10th Cir. 2014); *Piasecki v. Ct. of Common Pleas*, 917 F.3d 161, 177 (3d Cir. 2019).

<sup>15</sup> See generally *How Many Registered Sex Offenders are There in Your State?*, SAFEHOME.ORG (Jan. 14, 2020), <https://www.safehome.org/data/registered-sex-offender-stats/> [hereinafter *How Many in Your State?*] (estimating 752,000 registered sex offenders across U.S. as of fall 2019).

<sup>16</sup> See LYON ET AL., *supra* note 7, at 93; Case Comment, *The Custody Requirement and Territorial Jurisdiction in Federal Habeas Corpus*: *Word v. North Carolina*, 118 U. PA. L. REV. 629, 631 (1970) (“The availability of the ‘great writ’ has been limited, however, by the traditional requirement that the petitioner be ‘in custody’ under the sentence which he desires to challenge.”); see also *Williamson*, 151 F.3d at 1182 (“Because the ‘in custody’ requirement is jurisdictional, it is the first question we must consider on this appeal.” (internal citations omitted)).

<sup>17</sup> See 28 U.S.C. §§ 2241, 2254–2255.

(c) The writ of habeas corpus *shall not extend to a prisoner unless—*

(1) He is *in custody* under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is *in custody* for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is *in custody* in violation of the Constitution or laws or treaties of the United States . . . .<sup>18</sup>

Section 2241's counterparts for state and federal prisoners—sections 2254 and 2255, used predominantly by prisoners seeking habeas relief—contain similar “in-custody” requirements.<sup>19</sup>

Traditionally, federal courts have narrowly interpreted the “custody” requirement as current, physical confinement.<sup>20</sup> Nevertheless, the Court has recognized a markedly more expansive interpretation over time, highlighting that the Great Writ “never has been a static,

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<sup>18</sup> 28 U.S.C. § 2241(c)(1)–(3) (emphases added).

<sup>19</sup> Section 2255(a) states that

[a] prisoner *in custody* under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (emphasis added). Likewise, section 2254(a) states that [t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (emphasis added).

<sup>20</sup> See, e.g., *Wales v. Whitney*, 114 U.S. 564, 571–72 (1885) (denying habeas petition brought by Navy officer confined to territorial limits of District of Columbia because restraint did not involve “actual confinement or the present means of enforcing it”).

narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.”<sup>21</sup> Therefore, federal habeas review can do more than “reach behind prison walls and iron bars.”<sup>22</sup>

In 1963, the Supreme Court expanded the definition of “in custody” to include prisoners placed on parole subject to restrictive conditions that “significantly restrain [their] liberty to do those things which in this country free men are entitled to do.”<sup>23</sup> The Court pointed to specific restrictions underlying its decision: The parolee was required to remain in “a particular community, house, and job at the sufferance of his parole officer”; obtain permission to drive a vehicle; report to a parole officer and “permit the officer to visit his home and job at any time”; work regularly; and “live a clean, honest, and temperate life.”<sup>24</sup> The Court also highlighted that the parolee was subject to re-arrest at any time.<sup>25</sup>

The Court continued this jurisdictional expansion in *Carafas v. LaVallee*, where the Court examined whether habeas jurisdiction was nullified when a petitioner filed for the writ while incarcerated, yet was unconditionally released prior to the Court’s issuance of certiorari.<sup>26</sup> In a unanimous opinion, the Court found as a threshold matter that the petitioner’s release did not render his cause moot.<sup>27</sup> In so finding, the Court highlighted the derivative social restraints of the petitioner’s conviction:

In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these “disabilities or burdens [which] may flow from” petitioner’s conviction, he has “a substantial stake in the judgment of conviction which survives the satisfaction of

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<sup>21</sup> *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

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

<sup>23</sup> *Id.* at 242–43.

<sup>24</sup> *Id.* at 242.

<sup>25</sup> *Id.*

<sup>26</sup> *Carafas v. LaVallee*, 391 U.S. 234, 236 (1968).

<sup>27</sup> *Id.* at 237.

the sentence imposed on him.” On account of these “collateral consequences,” the case is not moot.<sup>28</sup>

Having found the case justiciable, the Court then determined that the federal habeas statute does not limit relief to those in physical custody; thus, it retained jurisdiction.<sup>29</sup> And because petitioner “[was] suffering, and [would] continue to suffer, serious disabilities,” petitioner’s habeas application was entitled to consideration on the merits.<sup>30</sup>

This holding, however, was significantly undercut in *Maleng v. Cook*, where the Court retreated from its liberalization of the habeas custody requirement.<sup>31</sup> The Court held that the mere “possibility” of a future sentence enhancement is insufficient to establish habeas custody under a conviction after the sentence imposed has fully expired.<sup>32</sup> The Court clarified that its custody finding in *Carafas* “rested . . . *not* on the collateral consequences of the conviction, but on the fact that the petitioner had been in physical custody under the challenged conviction at the time the petition was filed.”<sup>33</sup> Therefore, once a sentence imposed for a conviction has fully expired, “the collateral consequences of that conviction *are not themselves sufficient* to render an individual ‘in custody’” for habeas purposes.<sup>34</sup> Noting that “almost all States have habitual offender

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<sup>28</sup> *Id.* at 237–38 (alteration in original) (citations omitted) (quoting *Fiswick v. United States*, 329 U.S. 211, 222 (1946)).

<sup>29</sup> *Id.* at 238–39.

<sup>30</sup> *Id.* at 239 (quoting *Fiswick*, 329 U.S. at 222); *see also* *Sibron v. New York*, 392 U.S. 40, 50–53 (1968) (decided a few days after *Carafas* and noting that important constitutional problems may arise as a result of minor offenses; therefore, petitioners should not be foreclosed from the availability of constitutional protections—despite their expired sentences).

<sup>31</sup> *See* *Maleng v. Cook*, 490 U.S. 488, 492 (1989) (per curiam).

<sup>32</sup> *Id.*; *cf.* *Lackawanna Cnty. Dist. Att’y v. Coss*, 532 U.S. 394 (2001). In *Coss*, the Court held that a habeas petitioner can satisfy the “in custody” requirement of section 2254 where his petition can be construed as asserting a challenge to a current sentence as enhanced by an allegedly invalid prior conviction. *Id.* at 401–402. The Court nevertheless barred habeas petitioners from using the challenge of a current conviction to concurrently attack the validity of an earlier conviction for which they are no longer in custody, with the sole exception for invalid predicate convictions based on *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Id.* at 404.

<sup>33</sup> *Maleng*, 490 U.S. at 491–92.

<sup>34</sup> *Id.* at 92 (emphasis added).

statutes,” the Court refused to extend the custodial requirement to situations “where a habeas petitioner suffers no present restraint from a conviction.”<sup>35</sup>

Although, taken together, these holdings are somewhat incongruent, they make clear that constructive custody—that is, custody short of physical confinement—may satisfy the habeas statute’s “in-custody” requirement.<sup>36</sup> This is so where a petitioner files while subject to significant restraints on his or her liberties that are not otherwise imposed on the general public.<sup>37</sup> Nevertheless, the Court is disinclined to find—and has in fact explicitly rejected—collateral consequences alone as sufficient for custody where the petitioner’s sentence has fully expired prior to filing the writ.<sup>38</sup> A subtle but significant relationship exists between Article III mootness and the habeas custody requirement: “collateral consequences can preserve habeas jurisdiction, once established, against a claim of mootness, but do not suffice, in and of themselves, in the absence of initial jurisdiction.”<sup>39</sup> Thus, collateral consequences alone may suffice to overcome a mootness challenge. They are not, however, sufficient to “*initiate* a habeas petition.”<sup>40</sup>

## II. THE CONSEQUENCES OF CONVICTION

It is under this framework that the Supreme Court would decide whether the restrictions imposed by sex offender registration and notification laws amount to habeas custody. As we will see, such restrictions are profuse.

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<sup>35</sup> *Id.*

<sup>36</sup> See also *Hensley v. Mun. Ct.*, 411 U.S. 345, 351–52 (1973) (finding habeas petitioner—released on his own recognizance after sentencing but prior to incarceration—“in custody” for purposes of section 2254 because he was “subject to restraints not shared by the public generally” (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963))).

<sup>37</sup> *Cunningham*, 371 U.S. at 240.

<sup>38</sup> See, e.g., *Maleng*, 490 U.S. at 492 (“[O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual ‘in custody’ for the purposes of a habeas attack upon it.”).

<sup>39</sup> Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 157 (2000).

<sup>40</sup> *Id.* (quoting LARRY W. YACKLE, *POSTCONVICTION REMEDIES* § 49, at 219 (1981 & Supp. 2000)).

A. *National Outcry: The Influx of Sex Offender Registration Regulations*

The country's criminal history is rife with so-called "sex crime waves," often produced by widespread media coverage of one or more particularly disturbing—and sometimes sensationalized—sexual offenses.<sup>41</sup> These high-profile sex crimes, especially those committed against children, pervade popular, academic, and legislative discussion, leading to a paroxysm of both public outrage and consequent legislative response.<sup>42</sup>

For example, in 1947—in the midst of one of recent history's purported sex waves—FBI Director J. Edgar Hoover's article, *How Safe is Your Daughter?*, proclaimed, "The most rapidly increasing type of crime is that perpetrated by degenerate sex offenders . . . [It] is taking its toll at the rate of a criminal assault every 43 minutes, day and night in the United States."<sup>43</sup> Several notorious

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<sup>41</sup> See L. Clovis Hirning, *Indecent Exposure and Other Sex Offenses*, 7 J. CLINICAL PSYCH. & PSYCHOTHERAPY 105 (1945); Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Problems*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 137, 138 (2007); Tamara Rice Lave, *Only Yesterday: The Rise and Fall of Twentieth Century Sexual Psychopathy Laws*, 69 LA. L. REV. 549, 551–64 (2009) (discussing a history of sexual psychopathy law and using a clinical approach to examine whether there was, in fact, a "sex crime wave").

<sup>42</sup> See Levenson et al., *supra* note 41, at 138 ("Sex offenders and sex crimes incite a great deal of fear among the general public and as a result, lawmakers have passed a variety of social policies designed to protect community members from sexual victimization.").

<sup>43</sup> J. Edgar Hoover, *How Safe is Your Daughter?*, AM. MAG., July–Dec. 1947, at 32 ("Should wild beasts break out of circus cages, a whole city would be mobilized instantly. But depraved human beings, more savage than beasts, are permitted to rove America almost at will.").

crimes<sup>44</sup> had generated widespread predator panic.<sup>45</sup> Engendered, legislators and law enforcement nationwide set out to crack down on offenders, enacting sexual psychopath laws that allowed for the indefinite commitment and treatment of alleged sexual psychopaths.<sup>46</sup> These laws drew constitutional criticism and were eventually nullified.<sup>47</sup> History reflects, however, that any juncture of societal complacency would be yet again shaken by another eventual bout of unsettling sexual offenses.<sup>48</sup>

For present purposes, in the early 1990s, another “wave”<sup>49</sup> sparked a torrent of legislative action. In 1994, following the abduction, molestation, and murder of eleven-year-old Jacob Wetterling, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, establishing the first national sex offender registry.<sup>50</sup> In July of that same year, seven-year-old Megan Kanka was lured from her front yard with promises of meeting her neighbor’s new puppy—her neighbor, who,

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<sup>44</sup> See, e.g., “Moon Maniac” Killer is Executed, HIST. (Nov. 13, 2009), <https://www.history.com/this-day-in-history/the-moon-maniac> (describing Albert Fish, notorious child serial killer, who was executed for abduction, murder, and cannibalization of ten-year-old Grace Budd); ROBERT A. PRENTKY ET AL., SEXUAL PREDATORS 11 (2015) (“What has been referred to as ‘Horror Week’ occurred in November 1949. Three children, aged 6, 7, and 17 months, were sexually assaulted and murdered, all in less than one week.”); Russell B. Porter, *Hauptmann Guilty, Sentenced to Death for the Murder of the Lindbergh Baby*, N.Y. TIMES (Feb. 18, 1935), <https://archive.nytimes.com/www.nytimes.com/learning/general/onthisday/big/0213.html> (describing trial of the kidnapping and murder of the infant son of aviation pioneer, Charles Lindbergh).

<sup>45</sup> See Lave, *supra* note 41, at 549–51; see also Alan Greenblatt, *Sex Offenders: Will Tough, New Laws do more Harm than Good*, 16 CQ RESEARCHER 721, 721, 730, 733 (2006) (noting media’s tendency to focus coverage on “the worst cases of abduction and abuse,” which incited widespread public fear of sex crimes).

<sup>46</sup> Lave, *supra* note 41, at 571–72 (“By 1967, twenty-six states and the District of Columbia had passed [sexual psychopath] laws.”).

<sup>47</sup> Greenblatt, *supra* note 45, at 733.

<sup>48</sup> See generally *id.* at 730–33 (describing “cycles” that occurred throughout the 20th century with regard to public reaction to sex offenders).

<sup>49</sup> See generally Hirning, *supra* note 41, at 105 (describing occurrence of “sex crime waves”).

<sup>50</sup> See Greenblatt, *supra* note 45, at 731; 42 U.S.C. §§ 14071–14072 (2000).

unbeknownst to Megan's parents, was a convicted sexual predator.<sup>51</sup> The child was raped, murdered, and within twenty-four hours, her body was found dumped in a local park.<sup>52</sup> Public outrage ensued.<sup>53</sup> Within weeks, the state of New Jersey enacted Megan's Law, requiring law enforcement to notify communities when sex offenders moved to or resided in their neighborhoods.<sup>54</sup> By the time Congress enacted a federal counterpart in 1996, Megan's Law had passed in an additional thirty-five states.<sup>55</sup> By the mid-1990s, mainstream media's representation of sexual crimes "became increasingly dominated by the figure of the 'pedophile,' understood as an individual with an incurable and uncontrollable desire for sexual contact with children."<sup>56</sup>

This wave carried over into the new millennium, and from 1996 to 2003, Congress passed a series of bills "to enhance, clarify and strengthen the provisions of the Wetterling Act."<sup>57</sup> In 2006, Congress enacted the Sex Offender Registration and Notification Act ("SORNA"), wholly rewriting the minimum federal standards for sex offender registration and notification by, among other things, expanding the number and types of sex offenses that require registration.<sup>58</sup>

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<sup>51</sup> Olivia B. Waxman, *The History Behind the Law That Created a Registry of Sex Offenders*, TIME (May 30, 2017, 9:30 AM), <http://time.com/4793292/history-origins-sex-offender-registry/>.

<sup>52</sup> *Id.*

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

<sup>54</sup> *Id.*; see also N.J. STAT. ANN. §§ 2C:7-1 to -11 (1994).

<sup>55</sup> Greenblatt, *supra* note 45, at 731, 735; see also 42 U.S.C. §§ 14071(e), 14072(f) (amending Wetterling Act, removing requirement that registry information be kept confidential, and adding a mandatory community notification provision).

<sup>56</sup> Tanya Serisier, *Sex Crimes and the Media*, OXFORD RES. ENCYCLOPEDIA, CRIMINOLOGY & CRIM. JUST. (Jan. 2017), <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-118>.

<sup>57</sup> For an overview of federal sex offender and notification laws, see *Legislative History of Federal Sex Offender Registration and Notification*, SMART OFF., U.S. DEP'T OF JUST. (Mar. 24, 2020), <https://www.smart.gov/legislation.htm>.

<sup>58</sup> See Adam Walsh Child Protection and Safety Act of 2006, 34 U.S.C. §§ 20911–20962.

To make clear, although Congress has its finger in the pie, sex offender registration is primarily conducted at the local level.<sup>59</sup> Every state and territory of the United States, the District of Columbia, and nearly 150 Native American tribes have established their own sex offender registration and notification systems.<sup>60</sup> Each system contains “its own nuances and distinct features,” including individual “determinations about who is required to register, what information offenders must provide, [and] which offenders are posted on the jurisdiction’s public registry website.”<sup>61</sup> Nonetheless, regardless of the jurisdiction and its respective nuances, many of the restraints imposed on registered sex offenders share common characteristics.<sup>62</sup>

### B. *Consequences of Conviction: Sex Offender Restraints*

Generally, sex offenders are required to register and “update their registration in each jurisdiction they live, work, or attend school.”<sup>63</sup> Often, offenders are categorized into tiers based on the severity of their offenses; these tiers in turn determine registration requirements, including how often an offender must report to the

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<sup>59</sup> SMART OFF., U.S. DEP’T OF JUST., SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES 1 (2019), <https://www.smart.gov/caselaw/Case-Law-Update-2019-Compiled.pdf> [hereinafter CURRENT CASE LAW AND ISSUES]; see also SMART OFF., U.S. DEP’T OF JUST., SORNA IMPLEMENTATION DOCUMENTS 2 (2017), <https://www.smart.gov/pdfs/sorna/SORNAImplementationDocs.pdf> (“[J]urisdictions that fail to substantially implement SORNA are subject to a [ten] percent penalty reduction in its Byrne Justice Assistance Grant formula funds.”).

<sup>60</sup> CURRENT CASE LAW AND ISSUES, *supra* note 59, at 1.

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

<sup>62</sup> For the sake of relative brevity, this Article will not address jurisdictional registration differences but will touch upon those commonly imposed. It is important to note—and this Article does recognize—that case law may turn on the individual restrictions—some more severe than others—imposed in a certain state, especially in the context of what amounts to a “significant restraint on liberty” to suffice as “custody” for habeas purposes.

<sup>63</sup> *Sex Offender Registration and Notification Act (SORNA)*, U.S. DEP’T OF JUST., <https://www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna> (last updated May 28, 2020); 34 U.S.C. § 20913 (2018) (originally enacted as part of Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16913 (2006)).

state.<sup>64</sup> Offenders are typically required to provide a verifiable address, place of employment, current photograph, vehicle information, and email address.<sup>65</sup> Most states also impose residential restrictions, prohibiting offenders from residing within a certain zone of “schools, parks, day care centers, bus stops, or other places commonly frequented by children.”<sup>66</sup> Sex offenders report difficulties finding and maintaining employment, threats and physical assault, as well as detrimental familial consequences.<sup>67</sup> Certain states permit the indefinite civil commitment of individuals determined to be sexually violent predators after completion of their prison term.<sup>68</sup> A failure to register, keep current, or comply with registration restrictions subjects eligible offenders to separate charges—“often at

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<sup>64</sup> See Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 702–03 (2008).

<sup>65</sup> See, e.g., *Calhoun v. Att’y Gen. of Colo.*, 745 F.3d 1070, 1072–73 (10th Cir. 2014) (also requiring petitioner to appear annually at local sheriff’s office to be photographed and fingerprinted, as well as to provide any other internet identifiers).

<sup>66</sup> Jill S. Levenson, *Restricting Sex Offender Residences: Policy Implications*, 36 HUM. RTS. 21 (2009), see also *People v. Oberlander*, No. 02–354, 2008 WL 3390455, at \*1 (N.Y. Sup. Ct. June 18, 2008) (discussing case of a convicted sex offender who was unable to live within walking distance of a synagogue as required by Orthodox Jewish religion because he is forbidden to “reside, work or loiter” within [1000] feet of a “public or private, elementary, middle or high school, child care facility, park, playground, public or private youth center, or public swimming pool”).

<sup>67</sup> Sarah W. Craun & David M. Bierie, *Are the Collateral Consequences of Being a Registered Sex Offender as Bad as We Think?*, 78 FED. PROB. June 2014, at 28–29 (“[B]etween 5 percent and 10 percent of registered sex offenders reported being physically assaulted or injured, and 18 percent had their property damaged. Nearly half reported losing a friend due to being discovered as a registered sex offender.” (internal citation omitted)); see generally Ashley Kilmer & Chrysanthi S. Leon, “*Nobody Worries About Our Children*”: *Unseen Impacts of Sex Offender Registration on Families with School-Age Children and Implications for Desistance*, 30 CRIM. JUST. STUD. 181–82 (2017) (discussing impact of sex offender policies on children of registrants).

<sup>68</sup> See Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?*, 14 NEW CRIM. L. REV. 213, 214–15 (2011). These civil commitment statutes will not be discussed for our purposes but are mentioned as an example of the often-severe restraints imposed on convicted sex offenders.

the felony level.”<sup>69</sup> United States Supreme Court Justice David Souter, concurring in the Court’s decision to reject an *ex post facto* challenge to an Alaskan registration law, encapsulated the consequences faced by registered sexual offenders:

[T]here is significant evidence of onerous practical effects of being listed on a sex offender registry. *See, e.g., Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997) (noting “numerous instances in which sex offenders have suffered harm in the aftermath of notification—ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson”); *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997) (“The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of ‘vigilante justice’ are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them”) . . . .<sup>70</sup>

Notably, these observations were made prior to Congress’s enactment of SORNA, which—along with its state counterparts—made “sex offenders’ registration obligations considerably more

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<sup>69</sup> Logan, *supra* note 39, at 162–63 (footnotes omitted).

<sup>70</sup> *Smith v. Doe*, 538 U.S. 84, 109 n.\* (2003) (Souter, J., concurring). In the same decision, Justice Stevens found that the statutes “impose significant affirmative obligations and a severe stigma on every person to whom they apply.” *Id.* at 111 (Stevens, J., dissenting). In addition to residential registration, offenders “may not shave their beards, color their hair, change their employer, or borrow a car without reporting those events to the authorities.” *Id.*

burdensome.”<sup>71</sup> In many states, these requirements may be imposed for the entirety of an offender’s natural life.<sup>72</sup>

### III. DO THE CONSEQUENCES OF SEX OFFENDER REGISTRATION & NOTIFICATION LAWS SATISFY THE “IN CUSTODY” STANDARD FOR HABEAS RELIEF?

Although these consequences are, as described by Justice Souter, “onerous,” whether they suffice to satisfy the habeas corpus “in-custody” requirement remains unsettled.<sup>73</sup> Various federal circuit courts have maintained a uniform stance on the matter, overwhelmingly in agreement that sex offender registration and notification laws do not pose “the type of severe, immediate restraint[s] on physical liberty” required to establish custody.<sup>74</sup> That is, until the Third Circuit weighed in.

#### A. *The Circuit Courts Weigh In*

As the first federal appellate court to address the issue, the Ninth Circuit set the precedential bar in *Williamson v. Gregoire*.<sup>75</sup> In determining this “novel” question, the court “rel[ie]d heavily on the notion of a physical sense of liberty—that is, whether the legal disability in question somehow limits the putative habeas petitioner’s movement.”<sup>76</sup> Highlighting the physicality required for custodial restraints, the Ninth Circuit rejected registration and notification as “significant restraint[s] on Williamson’s physical liberty”<sup>77</sup>:

The sex offender registration and notification provisions apply to Williamson whether he stays in the same place or whether he moves. Indeed, even if

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<sup>71</sup> See *Piasecki v. Ct. of Common Pleas*, 917 F.3d 161, 165 (3d Cir. 2019).

<sup>72</sup> See *id.* at 164.

<sup>73</sup> *Smith*, 538 U.S. at 109 n.\*.

<sup>74</sup> *Henry v. Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999); see also *Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998); *Leslie v. Randle*, 296 F.3d 518, 521–23 (6th Cir. 2002); *Virsnieks v. Smith*, 521 F.3d 707, 717–20 (7th Cir. 2008); *Wilson v. Flaherty*, 689 F.3d 332, 335–38 (4th Cir. 2012); *Calhoun v. Att’y Gen. of Colo.*, 745 F.3d 1070, 1073–74 (10th Cir. 2014).

<sup>75</sup> *Williamson*, 151 F.3d at 1182.

<sup>76</sup> *Id.* at 1182–83.

<sup>77</sup> *Id.* at 1183.

Williamson never leaves his house, he must still verify his address with the sheriff every year. The Washington sex offender law does not require Williamson even to personally appear at a sheriff's office to register; registration can be accomplished by mail. Thus, the law neither targets Williamson's movement in order to impose special requirements, nor demands his physical presence at any time or place. Furthermore, the law does not specify any place in Washington or anywhere else where Williamson may not go.<sup>78</sup>

Because Williamson did not need government pre-approval so long as he complied with the notice requirements, the court distinguished the affirmative physical movements required in situations such as parole and recognizance release, and an outright prohibition on certain physical movements.<sup>79</sup> Therefore, the court held, "Williamson cannot say that there is anywhere that the sex offender law prevents him from going."<sup>80</sup> The court continued by acknowledging that, although Williamson may be disincentivized to move or travel, any such disincentive was the result of a "subjective chill," and thus, was insufficient to establish custody.<sup>81</sup>

Equating registration laws to restitution orders, the Ninth Circuit went on to reject any argument that the "mere potential for future incarceration, without any present restraint on liberty, can satisfy the 'in custody' requirement."<sup>82</sup> Though any such incarceration would undoubtedly limit Williamson's movement, the court emphasized that this potentiality was entirely dependent on Williamson's willingness to obey the law.<sup>83</sup> Lastly, the Ninth Circuit buttressed its decision by reinforcing its previous determination that

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<sup>78</sup> *Id.* at 1184.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1184.

<sup>81</sup> *Id.* ("Certainly, the loss of a driver's license amounts to a much greater limitation on one's freedom of movement than does the Washington sex offender law, but the former does not satisfy the 'in custody' requirement either.").

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

Washington's sex offender law is regulatory rather than punitive.<sup>84</sup> The "civil" nature of the law therefore "bolster[ed] [its] conclusion that the registration and notification provisions are more analogous to a loss of the right to vote or own firearms, or the loss of a professional license, rather than probation or parole."<sup>85</sup> Thus, the petitioner was not in custody for federal habeas purposes.<sup>86</sup>

In sum, the Ninth Circuit's rationale was threefold: (1) the court focused on the physicality of custody, looking to affirmative restraints on a petitioner's "movement"; (2) the "mere potential for future incarceration" is insufficient; and (3) the regulations are remedial rather than punitive.<sup>87</sup>

Until early 2019, the federal appellate bench uniformly applied this rationale throughout the circuits. Relying almost exclusively on the language of *Williamson* and its Ninth Circuit progeny,<sup>88</sup> the Sixth, Seventh, Fourth, and Tenth Circuits have each reaffirmed this trinity of custodial analysis.<sup>89</sup> This is so despite clear factual differences specific to each case—both procedurally and statutorily. For example, the Sixth and Seventh Circuits rejected similar claims from petitioners who were *currently incarcerated* while their petitions for habeas were pending.<sup>90</sup> The Seventh Circuit explained that, because it deemed sex offender registration noncustodial, the court did not have pendent jurisdiction over the claim—despite the fact that registration was required under the same sentence petitioner was currently incarcerated and his habeas petition included an independent

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<sup>84</sup> *Id.* (citing *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997) (determining whether Washington sex offender statute constituted punishment for *ex post facto* purposes)).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See Henry v. Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999).

<sup>89</sup> *See Leslie v. Randle*, 296 F.3d 518, 522–23 (6th Cir. 2002); *Virsnieks v. Smith*, 521 F.3d 707, 719–20 (7th Cir. 2008); *Wilson v. Flaherty*, 689 F.3d 332, 337–39 (4th Cir. 2012); *Calhoun v. Att'y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014).

<sup>90</sup> *Leslie*, 296 F.3d at 522 ("Although Leslie is currently incarcerated, he is not seeking relief from the conviction or sentence upon which his confinement is based."); *Virsnieks*, 521 F.3d at 719–22.

custodial claim.<sup>91</sup> Further, although the *Williamson* court emphasized that the law did not require in-person registration,<sup>92</sup> its sister circuits have summarily extended the holding to statutes that do.<sup>93</sup> As recently as 2016, the Tenth Circuit, while acknowledging Oklahoma’s registration requirements as more restrictive than those it considered in the past, conclusively—that is, without discussion of any statutory specificities—decided that they do not “impose a severe restraint on [petitioner’s] freedom sufficient to satisfy the ‘in custody’ requirement of § 2254.”<sup>94</sup> Sex offender registration and notification schemes have evolved to become increasingly burdensome; however, the judicial system had seemingly turned a blind eye.

In March of 2019, a split emerged. Thus, so too did a glimmer of hope for those wishing to use habeas as a vehicle to challenge their sex offender registration. In *Piasecki v. Court of Common Pleas*, the Third Circuit explicitly departed from its sister circuits, finding registration requirements imposed “severe restraints on . . . liberty not shared by the public generally,” and thus, amounted to custody.<sup>95</sup> Indeed, the court found the question “easily answered.”<sup>96</sup> Emphasizing that post-SORNA restrictions are more onerous than those of earlier decisions, the panel noted specific restraints imposed on the petitioner:

At a minimum, Piasecki was required “to be in a certain place” or “one of several places”—a State Police

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<sup>91</sup> *Virsnieks*, 521 F.3d at 722 (“Given the [habeas] statute’s uniform focus on custodial sentences, ‘there is . . . no reason why the presence of a plausible claim against a custodial punishment should make a noncustodial punishment more amenable to collateral review that it otherwise might be.’” (quoting *Kaminski v. United States*, 339 F.3d 84, 89 (2d Cir. 2003))).

<sup>92</sup> *Williamson*, 151 F.3d at 1184.

<sup>93</sup> *Leslie*, 296 F.3d at 521–22 (holding that Ohio’s sex offender registration, requiring in-person registration, did not constitute custody); *Wilson*, 689 F.3d at 338 (same conclusion for Virginia and Texas statutes); *Calhoun*, 745 F.3d at 1072–73 (same conclusion for Colorado statute); see also *Henry*, 164 F.3d at 1242 (“Registration, even if it must be done in person at the police station, does not constitute the type of severe, immediate restraint on physical liberty necessary to render a petitioner ‘in custody’ for the purposes of federal habeas relief.”).

<sup>94</sup> *Dickey v. Allbaugh*, 664 F. App’x 690, 693 (10th Cir. 2016).

<sup>95</sup> *Piasecki v. Court of Common Pleas*, 917 F.3d 161, 172–72 (3d Cir. 2019).

<sup>96</sup> *Id.* at 170.

barracks—at least four times a year for the rest of his life. The state’s ability to compel a petitioner’s attendance weighs heavily in favor of concluding that the petitioner was in custody . . . . Any change of address, including any temporary stay at a different residence, required an accompanying trip to the State Police barracks within three business days. He was even required to regularly report to police if he had no address and became homeless. In addition, Piasecki could have no “computer internet use.” The SORNA statute also compelled Piasecki to personally report to the State Police if he operated a car, began storing his car in a different location, changed his phone number, or created a new email address.<sup>97</sup>

Accordingly, the court found that petitioner “was not free to ‘come and go as he please[d],’”<sup>98</sup> and these “compulsory, physical restraints not shared by the public generally . . . severely conditioned his freedom of movement.”<sup>99</sup> The court specifically rejected other circuits’ reliance on government “pre-approval” as the litmus for custody and further emphasized that “any failure to abide by the restrictions” subjected Piasecki to felony charges.<sup>100</sup> Therefore, “[g]iven the level of restriction imposed by the registration requirements and the harsh consequences that would result from failing to adhere to them,” the Third Circuit held that these restrictions were “severe” and “clearly r[is]e to the level of ‘custody’ for purposes of [its] habeas jurisdiction.”<sup>101</sup>

#### IV. THE SUPREME COURT COMES CLOSE

The Supreme Court has not yet decided whether the consequences of sex offender registration and notification laws satisfy the

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<sup>97</sup> *Id.* at 170–71 (footnotes omitted) (citing 42 PA. CONS. STAT. § 9799.15(a)–(g) (West 2018)).

<sup>98</sup> *Id.* at 170 (quoting *Hensley v. Mun. Ct.*, 411 U.S. 345, 351 (1973)).

<sup>99</sup> *Id.* (footnotes omitted) (quoting *Hensley*, 411 U.S. at 351).

<sup>100</sup> *Id.* at 171–72.

<sup>101</sup> *Id.* at 171, 173.

“in-custody” standard.<sup>102</sup> With the recent emergence of a circuit split, however, the Supreme Court could undertake the opportunity to resolve the issue. This would not be the Court’s first attempt.

#### A. United States v. Juvenile Male

In 2010, the Court came close. In the per curiam decision of *United States v. Juvenile Male*,<sup>103</sup> the Court, considering the government’s petition for a writ of certiorari, postponed addressing the Ninth Circuit’s determination that SORNA violates the *Ex Post Facto* Clause as applied to juveniles adjudicated delinquent prior to SORNA’s enactment.<sup>104</sup> First, the Court noted, it was required to address its own jurisdictional limitations: the justiciability of the case due to mootness.<sup>105</sup>

For context, in 2005—prior to the enactment of SORNA—the respondent, “Juvenile Male,” was charged with juvenile delinquency in the United States District Court for the District of Montana for “knowingly engaging in sexual acts with a person under 12 years of age.”<sup>106</sup> The respondent pled “true” to the charge and was subsequently adjudicated delinquent.<sup>107</sup> The respondent was sentenced to two years of “official detention and juvenile delinquent supervision until his [twenty-first] birthday.”<sup>108</sup> Additionally, the

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<sup>102</sup> See *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (explaining that, once a petitioner’s sentence has expired, he must show a “collateral consequence” in order to maintain a suit).

<sup>103</sup> *United States v. Juvenile Male*, 560 U.S. 558 (2010) (per curiam).

<sup>104</sup> *Id.* at 560; see *United States v. Juvenile Male*, 590 F.3d 924, 927–28 (9th Cir. 2010).

<sup>105</sup> *Juvenile Male*, 560 U.S. at 560. For a (slightly dated) discussion on federal jurisdictional limitations of mootness, see Sidney A. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125, 125–27 (1946).

In the United States federal courts, this [mootness] limitation is more than a rule of decision; it is a constitutional requirement. Article III, Section 2 of the Constitution confines the jurisdiction of the federal judicial system to “cases” and “controversies.” A lawsuit which is, or has become, moot is neither a case nor a controversy in the constitutional sense and no federal court has the power to decide it.

*Id.* at 125–26 (internal citations omitted).

<sup>106</sup> *Juvenile Male*, 560 U.S. at 559.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

court ordered respondent to “spend the first six months of his juvenile supervision in a prerelease center and to abide by the center’s conditions of residency.”<sup>109</sup>

In the midst of respondent’s sentence, Congress enacted SORNA, which, with respect to juvenile offenders, requires juveniles adjudicated delinquent for certain serious sex offenses to comply with registration requirements in each jurisdiction where they live, work, and attend school.<sup>110</sup> In February of 2007, the Attorney General issued an interim rule that applied SORNA’s requirements “to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [SORNA].”<sup>111</sup> Effectively, this rule mandated that SORNA’s sex

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; see 34 U.S.C. §§ 20901–20945 (Sex Offender Registration and Notification).

<sup>111</sup> Sex Offender Registration and Notification Act, 72 Fed. Reg. 8897 (Feb. 28, 2007) (codified at 28 C.F.R. § 72.3 (2012)). As an aside, the Supreme Court recently issued an opinion in the case *Gundy v. United States*, in which Hernan Gundy challenged the provisions of SORNA that give the United States Attorney General the discretion to decide whether the registration and notifications requirements should apply to offenders convicted pre-enactment. *Gundy v. United States*, 139 S. Ct. 2116 (2019). Gundy argued that those provisions were violative of the nondelegation doctrine, which prohibits Congress from delegating broad legislative functions to the executive branch. Transcript of Oral Argument at 3–6, *Gundy*, 138 S. Ct. 1260 (No. 17-6086). A decision finding the SORNA provision an impermissible delegation of authority to the executive branch could have arguably raised habeas implications. The “‘historical core’ of the writ is tethered to the notion that non-judicial—i.e., executive or legislative—detentions warrant substantive review and oversight by a neutral judicial branch.” LYON ET AL., *supra* note 7, at 9 (quoting *INS v. St. Cyr* 533 U.S. 289, 301 (2007)). There are, of course, nuances about registration requirements that may render this a moot point, such as whether they amount to custody to begin with and whether they are the product of a full hearing, but nevertheless, the broad concept that the Attorney General—a member of the executive branch—is entitled to determine whether pre-enactment offenders must comply by the restrictions would have further support the idea that sex offender registration and notification provisions perhaps fall within the historical scope of habeas corpus as quasi-executive detention.

Alas, the Supreme Court did not so hold. And, thus, any nuanced habeas implications were thereby temporarily extinguished—with emphasis on temporarily. The dissenting Justices, as well as Justice Alito in the concurrence, indicated a strong desire to reconsider the way the Court has analyzed nondelegation arguments over the past eighty-four years. *Gundy*, 138 S. Ct. at 2131 (Alito, J., concurring); *id.* at 2132 (Gorsuch, J., dissenting). And with the Court’s recent

offender registration requirements applied to all sex offenders, including those who were charged with qualifying pre-enactment offenses.<sup>112</sup>

As Murphy's Law would have it, in July 2007, the district court found that Juvenile Male had failed to comply with the requirements of the prerelease program and revoked his supervision, mandating an additional six-month term of detention followed by a period of supervision up until his twenty-first birthday.<sup>113</sup> In addition, the government invoked SORNA's pre-enactment registration provisions, arguing that respondent should also be required to register as a sex offender.<sup>114</sup> The judge agreed, and, as "special conditions" of his supervision, ordered the respondent to register as a sex offender.<sup>115</sup> Respondent appealed this "special condition" of supervision to the Ninth Circuit.<sup>116</sup>

In May 2008, with his appeal pending in the Ninth Circuit, respondent turned twenty-one.<sup>117</sup> Thus, his juvenile supervision expired, including the provisions requiring him to register as a sex offender.<sup>118</sup> Subsequently, without addressing any issue of mootness, the Ninth Circuit held that the retroactive application of SORNA in the juvenile adjudication context violates the *Ex Post Facto* Clause and vacated the sex offender registration requirements imposed by the district court as a condition of respondent's juvenile supervision.<sup>119</sup> Nonetheless, by the time of the Ninth Circuit's decision, respondent had registered as a sex offender in Montana.<sup>120</sup>

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trajectory matching the conservative voices in the dissent, this could indicate a redetermination of the merits of Gundy's arguments. Then again, nondelegation arguments arise in varying contexts—not just under SORNA—so if the Court were to undertake the argument once again, it could very well be in one of these alternative contexts and Gundy's SORNA implications may remain.

<sup>112</sup> See 28 C.F.R. § 72.3; see also Anna Christensen, *SORNA and the Ex Post Facto Clause*, SCOTUSBLOG (Feb. 23, 2010, 9:00 PM), <https://www.scotusblog.com/2010/02/sorna-and-the-ex-post-facto-clause/>.

<sup>113</sup> *Juvenile Male*, 560 U.S. at 559.

<sup>114</sup> *Id.* at 559–60.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*; *United States v. Juvenile Male*, 590 F.3d 924, 927–28 (9th Cir. 2010).

<sup>117</sup> See *Juvenile Male*, 560 U.S. at 560.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; see *Juvenile Male*, 590 F.3d at 927.

<sup>120</sup> *Juvenile Male*, 560 U.S. at 560–61.

Based on these facts, the Supreme Court deferred ruling on the *ex post facto* issue and, instead, certified the following question to the Montana Supreme Court:

Is respondent's duty to remain registered as a sex offender under Montana law contingent upon the validity of the conditions of his now-expired federal juvenile-supervision order that required him to register as a sex offender, or is the duty an independent requirement of Montana law that is unaffected by the validity or invalidity of the federal juvenile-supervision conditions?<sup>121</sup>

Because respondent solely challenged the conditions of his juvenile supervision requiring him to register as a sex offender, and because that term of supervision had since expired, the Court found that the case was likely moot "unless respondent [could] show that a decision invalidating the sex-offender-registration conditions of his juvenile supervision would be sufficiently likely to redress 'collateral consequences adequate to meet Article III's injury-in-fact requirement.'"<sup>122</sup>

#### B. *The Court Throws a Bone*

Though not directly deciding the mootness issue itself, the Court highlighted that "the most likely potential 'collateral consequenc[e]' that might be remedied by a judgment in respondent's favor is the requirement that respondent remain registered as a sex offender under Montana law."<sup>123</sup> Thus, the Court sought to ascertain "whether a favorable decision in [respondent's] case would make it sufficiently likely that respondent 'could remove his name and identifying information from the Montana sex offender registry.'"<sup>124</sup> Essentially, the Court wanted to know whether the separate registration under Montana law derived from, or was caused by, the federal district court's order that had since expired.<sup>125</sup> Was respondent's

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<sup>121</sup> *Id.* at 561 (internal citations omitted).

<sup>122</sup> *Id.* at 560 (quoting *Spencer v. Kemna*, 523 U.S. 1, 14 (1998)).

<sup>123</sup> *Id.* at 560–61.

<sup>124</sup> *Id.* at 561 (quoting Petition for Writ of Certiorari at 29, *Juvenile Male 560* U.S. 558 (No. 09-940)).

<sup>125</sup> *See id.* at 560–61.

Montana sex offender registration a collateral consequence of his federal sentence?<sup>126</sup>

Unfortunately for respondent, the Montana Supreme Court clarified that respondent's "state law duty to remain registered as a sex offender [was] not contingent upon the validity of the conditions of his federal supervision order" and continued to apply regardless of the outcome of his federal appeal.<sup>127</sup> Satisfied, the Supreme Court ruled that respondent's appeal was moot, that as such, the Ninth Circuit lacked any power to decide the *ex post facto* issue, and that the judgment was vacated with remand instructions to dismiss.<sup>128</sup> The Court also rejected respondent's argument against mootness based on "'an independent duty to register as a sex offender' under SORNA itself," finding that "the duty to register under SORNA is not a *consequence*—collateral or otherwise—of the District Court's special conditions of supervision."<sup>129</sup> Respondent's statutory duty to register under SORNA was an obligation independent of his supervision conditions.<sup>130</sup>

In sum, respondent's conviction left him with three distinct duties to register as a sex offender: (1) as a condition of his juvenile supervision pursuant to the district court's order; (2) independently under the requirements of the Montana Sexual or Violent Offender Registration Act; and (3) as an independent statutory duty pursuant to SORNA.<sup>131</sup> His appeal challenged only the first, and thus, when

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<sup>126</sup> *See id.*

<sup>127</sup> *United States v. Juvenile Male*, 255 P.3d 110, 111 (Mont. 2011). The Montana Supreme Court based its ruling on the Montana Sexual or Violent Offender Registration Act ("SVORA"), which was enacted in 1989, and "generally imposes a lifetime requirement, unless relieved by court order, upon sexual offenders to register with a law enforcement agency when present in Montana." *Id.* at 112; *see* MONT. CODE ANN. §§ 46-23-506(1), 46-23-506 (3) (West 2009). Under Montana law, sexual offenders convicted in other jurisdictions for offenses "reasonably equivalent" to state sexual offenses are required to register under SVORA. *Juvenile Male*, 255 P.3d at 112. Therefore, because the court found respondent's federal conviction to be "reasonably equivalent" to Montana's sexual assault on a child offense, respondent's duty to register as a sex offender in Montana was "entirely independent from the registration conditions imposed by his federal supervision order." *Id.* at 115.

<sup>128</sup> *United States v. Juvenile Male*, 564 U.S. 932, 937–39 (2011) (per curiam).

<sup>129</sup> *Id.* at 937–38.

<sup>130</sup> *Id.* at 938.

<sup>131</sup> *See generally id.* at 933–39.

it expired, so too did the justiciability of his appeal.<sup>132</sup> The Court simply lacked Article III jurisdiction.<sup>133</sup>

Despite the Court's narrow dismissal as applied to respondent's appeal, the Court's dicta suggests that sex offender registration requirements—if challenged properly—could suffice as collateral consequences sufficiently restrictive for habeas jurisdiction.<sup>134</sup> Similar to *Carafas* and *Sibron*, *Juvenile Male* can be viewed as a mootness case informed by the habeas “in custody” requirement. Note, however, that the case was not decided in the posture of a habeas petition, nor does the Court mention “custody” in either of its two opinions. But the Court's reliance on *Spencer v. Kemna*—a habeas “in custody” decision—to determine its jurisdictional limits based on a collateral consequence issue could reflect—or imply—the Court's view on whether sexual offender registration requirements are sufficient restraints on liberty to deem an offender “in custody” for habeas purposes.<sup>135</sup>

#### V. THE CONSEQUENCE OF PRECEDENT: REGISTRATION REQUIREMENTS AS A SEVERE RESTRAINT ADEQUATE FOR HABEAS REVIEW?

Should the Supreme Court accept the opportunity to decide the issue, it may find itself in a somewhat self-imposed conundrum.

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<sup>132</sup> *See id.* at 934, 937–38.

<sup>133</sup> *Id.* at 938–39.

<sup>134</sup> *Id.* at 937 (“True, a favorable decision in this case might serve as a useful precedent for respondent in a hypothetical lawsuit challenging Montana's registration requirement on *ex post facto* grounds. But this possible, indirect benefit in a future lawsuit cannot save *this* case from mootness.”). Additionally, the Court noted that SORNA's “continuing obligation [to register] might provide grounds for a preenforcement challenge to SORNA's registration requirements. It does not, however, render the current controversy regarding the validity of respondent's sentence any less moot.” *Id.* at 938.

<sup>135</sup> *See id.* at 935; *Spencer v. Kemna*, 523 U.S. 1, 7, 14 (1998). On the other hand, the Court has denied certiorari in subsequent cases arising from the same, or sufficiently similar, challenges to sex offender registration requirements. *See Calhoun v. Suthers*, 135 S. Ct. 376, 376 (2014) (mem.); Brief for the Petitioner at 5–11, *Calhoun*, 135 S. Ct. 376 (No. 14-216); *Wilson v. Flaherty*, 133 S. Ct. 2853, 2853 (2013) (mem.); Brief for the Petitioner at 1, 8–20, *Wilson*, 133 S.Ct. 2853 (No. 12-986); *Dickey v. Allbaugh*, 137 S. Ct. 2293, 2293 (2016) (mem.); Brief for the Petitioner at 1, 8–12, *Dickey*, 137 S. Ct. 2293 (No. 16-1006).

Based on the Court's custodial jurisprudence, modern sex offender registration requirements, and the restraints thereby imposed, undoubtedly amount to custody for habeas purposes. Nevertheless, the Court's findings in other contexts, paired with well-founded policy concerns, may inhibit the Court from extending its habeas jurisdiction.

A. *Turning a Blind Eye – The Practical Effects of Sex Offender Registries as Habeas Custody*

A finding that the deprivations on liberty incident to modern sex offender registration requirements are anything short of “severe” is patently at odds with the practical effects of such requirements. Even if weight is to be afforded to *Williamson*'s narrow reliance on physical restraints of movement,<sup>136</sup> the increasingly onerous requirements and limitations imposed on sex offenders undoubtedly satisfy this standard<sup>137</sup>—despite the politically and judicially expedient findings of the federal appellate courts.<sup>138</sup> The severity of these restraints—significantly burdensome even at first blush—is compounded by the tangible and intangible effects deriving from such limitations.

As discussed, offenders are required to register and keep the state constantly apprised of their whereabouts, including where they live, work, and travel.<sup>139</sup> However, registration requirements have further evolved to ensure that offenders are in fact limited in their movements, acting in effect to quarantine registrants to designated areas of the community.<sup>140</sup> Residency restrictions, for example, are some of the more egregious aspects of registration requirements in terms of restraints on movement.<sup>141</sup> Empirical data confirms that such “buffer zones,” which prohibit residency within a certain

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<sup>136</sup> See *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998).

<sup>137</sup> See *supra* Part II.B.

<sup>138</sup> See *supra* Part III.A. See generally *Williamson*, 151 F.3d at 1184; *Virsnieks v. Smith*, 521 F.3d 707, 722 (7th Cir. 2008); *Leslie v. Randle*, 296 F.3d 518, 522 (6th Cir. 2002).

<sup>139</sup> See, 34 U.S.C. § 20913; *Sex Offender Registration and Notification Act (SORNA)*, *supra* note 59.

<sup>140</sup> See Jill S. Levenson & Andrea L. Hern, *Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry*, 9 JUST. RSCH. & POL'Y 59, 63 (2007).

<sup>141</sup> See *id.*

proximity to places frequented by children, leave offenders with little housing availability, and often force offenders into isolation, unable to live with their own family members.<sup>142</sup> In the vast majority of metropolitan and suburban areas, one would be hard-pressed to find compliant housing not within close proximity to a school, day care center, park, or bus stop.<sup>143</sup>

For instance, in Orange County, Florida, ninety-nine percent (99%) of all residential properties fall within a buffer zone.<sup>144</sup> In Newark, New Jersey, ninety-three percent (93%) of residences are located within 2,500 feet of a school, and a study of four metropolitan areas in South Carolina found that forty-five percent (45%) of housing is within 1,000 feet of a school or day care center.<sup>145</sup> When Miami-Dade County adopted an ordinance banning sex offenders from living within a 2,500-foot buffer zone, Miami's Julia Tuttle Causeway became a state-sanctioned encampment of tents and shacks specifically designated for such offenders.<sup>146</sup> Homelessness was the sole legal option for those wishing to legally reside in the county.<sup>147</sup>

To claim that offenders subject to such restrictions "cannot say that there is anywhere that the sex offender law prevents [them] from going" is to rule in purposeful disregard of not only the actual, physical restraints imposed on offenders, but of the very explicit language of the restrictions themselves.<sup>148</sup> Blind adherence to the *Williamson* rationale is anachronistic to current reality.

Rather, judicial interpretation of these requirements should aim to keep pace with the ever-increasing burdens imposed by new

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<sup>142</sup> *Id.* at 61–63.

<sup>143</sup> *See generally* Levenson, *supra* note 66.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> Greg Allen, *Sex Offenders Forced To Live Under Miami Bridge*, NPR (May 20, 2009, 2:33PM), <https://www.npr.org/templates/story/story.php?storyId=104150499> (“‘You don’t lose votes by being tough on sex offenders,’ [columnist Fred Grimm] says. ‘We’ve all seen . . . spontaneous homeless camps pop up. But this is a camp created by public policy.’”).

<sup>147</sup> *See id.*

<sup>148</sup> *See Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998); *see also Calhoun v. Att’y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014) (“[Petitioner] is free to live, work, travel, and engage in all legal activities without limitation and without approval by a government official.”).

registration regimes. As Judge Andre Davis of the Fourth Circuit noted, “viewed pragmatically, as they should be, the requirements operate *de facto* as *probationary terms*, the violation of which are expected to lead to the imposition, upon conviction, of custodial sentences.”<sup>149</sup> As such, registration and notification requirements are entitled to the same custodial interpretation as applied to parole,<sup>150</sup> probation,<sup>151</sup> bail,<sup>152</sup> personal recognizance release,<sup>153</sup> pendent consecutive sentences,<sup>154</sup> community service,<sup>155</sup> and fourteen hours of required alcohol rehabilitation classes<sup>156</sup>—all of which have been upheld as sufficiently custodial for habeas purposes.<sup>157</sup> Further, the increased prevalence of in-person registration requirements creates a scheme more analogous to parole, and the *Jones* Court’s illustration of significant restraints on liberty—such as confinement to a particular “community, home, [and] job”—are more in line with the practical realities facing registered sex offenders today than the mere loss of a license as described in *Williamson*.<sup>158</sup> As the Supreme Court has made clear, “[i]t is not relevant that conditions and restrictions such as these may be desirable and important parts of the rehabilitative process; what matters is that they significantly restrain [a] petitioner’s liberty to do those things which in this country free men are entitled to do.”<sup>159</sup>

This conclusion is further bolstered by the legislative origins of sex offender registration regulations, which “were conceived as

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<sup>149</sup> *Wilson v. Flaherty*, 689 F.3d 332, 340 (4th Cir. 2012) (Davis, J., concurring).

<sup>150</sup> *Jones v. Cunningham*, 371 U.S. 236, 242–43 (1963).

<sup>151</sup> See *Cervantes v. Walker*, 589 F.2d 424, 425 n.1 (9th Cir. 1978); *Caldwell v. Dretke*, 429 F.3d 521, 527 (5th Cir. 2005) (holding that probation and deferred probation orders are custodial for habeas purposes); *Jackson v. Coalter*, 337 F.3d 74, 78–79 (1st Cir. 2003) (same); *Malinovsky v. Ct. of Common Pleas*, 7 F.3d 1263, 1265 (6th Cir. 1993) (same).

<sup>152</sup> *Lefkowitz v. Newsome*, 420 U.S. 283, 286 n.2, 291 n.8 (1975).

<sup>153</sup> *Hensley v. Mun. Ct.*, 411 U.S. 345, 346 (1973).

<sup>154</sup> *Peyton v. Rowe*, 391 U.S. 54, 67 (1968).

<sup>155</sup> *Barry v. Bergen Cnty. Prob. Dep’t*, 128 F.3d 152, 161 (3d Cir. 1997).

<sup>156</sup> *Dow v. Cir. Ct. First Cir.*, 995 F.2d 922, 922–23 (9th Cir. 1993) (per curiam).

<sup>157</sup> *Logan*, *supra* note 39, at 153 (collecting cases).

<sup>158</sup> Compare *Jones v. Cunningham*, 371 U.S. 236, 242 (1963), with *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998).

<sup>159</sup> *Jones*, 371 U.S. at 242–43.

means to discourage criminals from locating in an area in the first place, and as a ready basis for arrest should the registration requirement not be met.”<sup>160</sup> As quoted in Professor Logan’s article, an early commentator stated:

The immediate objectives of these ordinances appeared to be the incarceration or expulsion of undesirables, rather than the registration of criminals. It was believed that the individuals affected would move elsewhere to avoid registration. However, as more jurisdictions adopted these ordinances, a convicted person would be less able and less likely to escape registration by moving. Therefore, the principal mode of evasion would tend to become a failure to register with the consequent fulfillment of only the incarceration objective.<sup>161</sup>

Failing to recognize the practical effects of sex offender registration requirements for what they are—and what they were fully intended to be—is tantamount to turning a judicial blind eye to both precedent and reality.

#### B. *Why the Court May Not Budge*

Both instinctually and as a matter of precedent, sex offender registration and notification requirements amount to the breed of severe restraints on liberty sufficient for the jurisdictional reach of habeas custody. To hold otherwise would simply perpetuate a legal fiction. Nonetheless, prudential reasons exist as to why the Supreme Court may either refuse to extend habeas custody to registration, or refuse to address the issue at all, choosing instead to maintain the jurisprudential status quo of the lower courts.

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<sup>160</sup> Logan, *supra* note 39, at 159 (noting that another basic foundation of registration regulations was the idea that sex offenders pose a heightened risk of recidivism).

<sup>161</sup> *Id.* (quoting Note, *Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. PA. L. REV. 60, 63 (1954)).

### 1. THE “PUNISHMENT” HURDLE

As made clear by *Williamson* and its progeny, numerous appellate circuits have determined that sex offender registration and notification laws are remedial rather than punitive.<sup>162</sup> The Supreme Court has repeatedly affirmed this concept,<sup>163</sup> and in fact, has further determined that indefinite civil commitment of sex offenders does not run afoul of the Constitution for similar reasons.<sup>164</sup> In *Smith v. John Doe*, for example, the Court concluded that the legislature intended to create a “civil, nonpunitive regime,” and registration requirements do not impose punitive restraints based largely on the “Act’s rational connection to a nonpunitive purpose”—public safety and concern about recidivism.<sup>165</sup> And, as previously discussed, the lower federal circuits have consistently upheld the finding that these statutory schemes are civil rather than punitive as consonant with the finding that sex offender registration requirements amount to mere collateral consequences insufficient for habeas custody.<sup>166</sup>

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<sup>162</sup> *Williamson*, 151 F.3d at 1184 (citing *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997)).

<sup>163</sup> *Smith v. Doe*, 538 U.S. 84, 91–92, 94–95 (2003).

<sup>164</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (“If detention for the purpose of protecting the community from harm necessarily constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.”); *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (clarifying the *Hendricks* holding that there must be a lack-of-control determination for civil commitment to be considered constitutional).

<sup>165</sup> *Smith*, 538 U.S. at 96, 102–03.

<sup>166</sup> *Williamson*, 151 F.3d at 1184 (“Another reason to find that the Washington sex offender law creates a mere collateral consequence of conviction is . . . that the Washington law is ‘regulatory and not punitive,’ and therefore did not amount to punishment within the meaning of the Ex Post Facto Clause.”) (citing *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997); *Leslie v. Randle*, 296 F.3d 518, 523 (6th Cir. 2002) (“Although ‘the “in custody” requirement may be satisfied by restraints other than criminal punishment,” the Ohio Supreme Court’s conclusion that the sexual-predator statute is a form of civil regulation provides additional support for our conclusion that the classification, registration, and community notification provisions are more analogous to collateral consequences . . . than to severe restraints on freedom of movement such as parole.”) (Clay, J., concurring) (citations omitted) (quoting *Williamson*, 151 F.3d at 1184)); *Virsnieks v. Smith*, 521 F.3d 707, 720 (7th Cir. 2008) (“[T]he Wisconsin sexual offender registration statute is considered remedial, rather than punitive, in nature.”); *Calhoun v. Att’y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014) (“Moreover, the Colorado sex-offender registration requirements are remedial, not punitive.”).

The Supreme Court's potential worry, therefore, is that the inverse may be true. A finding that sex offender registration requirements amount to custody for habeas purposes may belie the Court's findings in the *ex post facto* and double jeopardy contexts that these requirements do not amount to punishment.<sup>167</sup> While the custodial requirement may be satisfied by both civil and criminal restraints,<sup>168</sup> equating registration requirements to probation or parole may consequently give life to the argument that they are in fact punitive criminal sentencing measures and not "remedial" as legislatures claim. Because the Court has gone to great lengths to uphold these schemes, this is a revitalization that the Court is unlikely to resuscitate of its own accord.

In sum, the Court may worry that a finding contrary to *Williamson* may undermine its own precedent, consequently re-exposing sex offender registration laws to constitutional attack as violative punitive regimes.

## 2. CURBED BY CONGRESS: THE GREATNESS OF THE WRIT

Additionally, though many academic and social commentators make much ado about the ideological greatness of the writ of habeas corpus—and argue for expansions of its reach in line with that ideology<sup>169</sup>—such criticisms seem to overlook the engrained understanding that Congress has the power to confer habeas jurisdiction upon the federal judiciary.<sup>170</sup> As discussed, habeas custody *is* jurisdictional.<sup>171</sup> While a discussion of Congress's role in an area that has been stifled judicially<sup>172</sup> may seem tangential, it may also act to inform our understanding of the judiciary's refusal to extend habeas custody beyond the scope already established. That is, though

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<sup>167</sup> See, e.g., *Leslie*, 296 F.3d at 523.

<sup>168</sup> *Williamson*, 151 F.3d at 1184.

<sup>169</sup> See, e.g., Lincoln Caplan, *The Withered Writ*, AM. PROSPECT (July 15, 2013), <https://prospect.org/article/withered-writ> ("The writ of habeas corpus . . . worked like an incantation to break an evil spell."); Emanuel Margolis, *Habeas Corpus: The No Longer Great Writ*, 98 DICK. L. REV. 557, 563 (1994); Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 35 (1990).

<sup>170</sup> See *Ex parte Bollman*, 8 U.S. 75, 83–84 (1807).

<sup>171</sup> See *supra* Part I.

<sup>172</sup> This is true of courts following the *Williamson* rationale. *Williamson*, 151 F.3d at 1184.

Congress has not expressly delineated what does and does not constitute “custody”—meaning it has not statutorily ruled out sex offender registration—the federal judiciary’s overwhelming refusal to extend custody to such requirements may be the consequence of an underlying understanding between both branches that the writ has not been considered “a generally available federal remedy for every violation of federal rights.”<sup>173</sup>

Recent history has “not been generous to habeas.”<sup>174</sup> Congress has remained unsubtle about its aspirations to limit the power of habeas corpus and to establish formalistic procedural hurdles, many of which are often insurmountable for the average prisoner.<sup>175</sup> Its enactment of AEDPA is a manifestation of such aspirations.<sup>176</sup> Broadly, the law bans successive petitions, sets a one-year statute of limitations for habeas claims, narrows the grounds upon which successful habeas claims can be made, and allows claims only to the extent that challenged convictions are contrary to “clearly established federal law” or an “unreasonable determination of the facts in light of the evidence . . . .”<sup>177</sup> The Act’s curtailment of both the procedural and substantive scope of the writ has been—and continues to be—discussed at length by others elsewhere.<sup>178</sup> For our purposes, it is an example that tends to imply that the judiciary’s limited interpretation of its habeas jurisdiction may in fact be more in line with the recent spirit of the writ—which critics consistently claim necessitates evolution on par with the current times.<sup>179</sup> One may argue that these limitations have in fact done just that.

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<sup>173</sup> *Lehman v. Lycoming Cnty. Child.’s Servs. Agency*, 458 U.S. 502, 510 (1982).

<sup>174</sup> Logan, *supra* note 39, at 148.

<sup>175</sup> *See id.*

<sup>176</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1217-26 (1996); *see* Caplan, *supra* note 6 (explaining that AEDPA “gutted the federal writ of habeas corpus”).

<sup>177</sup> 28 U.S.C. § 2254.

<sup>178</sup> *See, e.g.*, Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 5–12 (1997) (discussing various reform proposals for habeas law).

<sup>179</sup> *See, e.g.*, Logan, *supra* note 39, at 149 (“In short, the Article argues that habeas, as it has for centuries, must evolve in a manner sensitive to contemporary methods of social control, in this instance the government’s aggressive use of information to achieve control beyond the walls of prison.”). Other articles have

This is not to say that the Court should inappropriately relinquish its role as the ultimate arbiter of federal liberties to appease congressional whims. Yet, whether or not one may agree with the value of limiting the scope of the Great Writ—especially absent explicit congressional mandate to do so—it is undoubted that the legislature’s clear intent to constrain access to habeas relief will play a role in the Court’s consideration of whether to extend habeas custody to sex offender registration requirements.

Thus, given the recent trajectory of the country’s restrictions on habeas, the evolution of the writ’s “spirit” may lend itself more toward a conservative jurisdictional interpretation of habeas custody.

### 3. FINALITY

Finally, finality. A long-standing antagonist to the Great Writ, the concept of finality has rendered federal courts “reluctant to extend the writ beyond its historic purpose.”<sup>180</sup> Underlying finality concerns are that of federalism.<sup>181</sup> The Supreme Court has consistently emphasized that federal habeas creates a “profound interference with state judicial systems and the finality of state decisions,” and thus, “should be reserved for those instances in which the federal interest in individual liberty is so strong that it outweighs federalism and finality concerns.”<sup>182</sup> A federal habeas scheme that fails to account for finality would “subvert the criminal process itself.”<sup>183</sup>

There are distinctions inherent in sex offender registration and notification regimes that make concerns of finality particularly apparent. For example, as briefly discussed in *Juvenile Male*, sex

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argued that the legislature should itself endeavor to explicitly expand habeas custody to registered sex offenders. See Wendy R. Calaway, *Sex Offenders, Custody and Habeas*, 92 ST. JOHN’S L. REV. 755, 794 (2018). But, as Professor Calaway notes, this is a “futile” and “unlikely” resolution. *Id.*

<sup>180</sup> *Lehman v. Lycoming Cnty. Child.’s Servs. Agency*, 458 U.S. 502, 512–13 (1982).

<sup>181</sup> *Id.* at 515–16.

<sup>182</sup> *Id.* at 516; see Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 525 (1963) (“I rest partly on the federalist premise, that the abrasions and conflicts created by federal interference with the states’ administration of criminal justice should be avoided in the absence of felt need . . .”).

<sup>183</sup> *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).

offender registration laws create independent duties to register once convicted of an applicable sexual offense.<sup>184</sup> That is, though registration requirements are routinely imposed at sentencing “as a mandatory condition of supervised release,”<sup>185</sup> sex offenders are also individually required to register—not as a matter of sentencing per se, but as an independent statutory duty, the violation of which constitutes a separate criminal offense.<sup>186</sup> If the requirements were not imposed expressly as part of a petitioner’s sentence, then the subsequent expiration of the sentence would technically constitute an unconditional release, thereby contrary to the *Jones* Court’s extension of habeas custody to a petitioner whose “release from physical confinement under the sentence in question was not unconditional.”<sup>187</sup> Thus, even if the Court were to find sex offender registration requirements severely restrictive, in order to find them custodial, the Court would arguably have to extend habeas custody to restrictions not actually imposed as part of a criminal sentence.<sup>188</sup> This extension of habeas is surely not in accord with concerns of finality.<sup>189</sup>

This is bolstered by the fact that sex offender registration schemes are often conducted at the local level, and thus, there is an even greater “tension between the State’s interest in finality and the asserted federal interest” of access to habeas relief.<sup>190</sup>

Further, an absence of finality undermines the penological goals of the criminal justice system—namely, the rehabilitative

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<sup>184</sup> See *United States v. Juvenile Male*, 564 U.S. 932, 938 (2011) (per curiam).

<sup>185</sup> See *Wilson v. Flaherty*, 689 F.3d 332, 340 (4th Cir. 2012) (Davis, J., concurring).

<sup>186</sup> See, e.g., *Juvenile Male*, 564 U.S. at 938.

<sup>187</sup> *Maleng v. Cook*, 490 U.S. 488, 491 (1989) (per curiam) (citing *Jones v. Cunningham*, 371 U.S. 236, 242 (1963)).

<sup>188</sup> See *Juvenile Male*, 564 U.S. at 937–38 (“[T]he duty to register under SORNA is not a *consequence*—collateral or otherwise—of the District Court’s special condition of supervision.”).

<sup>189</sup> And is likely not in accord with the Supreme Court’s holding in *Maleng*. See *Maleng*, 490 U.S. at 492 (holding that a habeas petitioner is not “in custody” when sentence for a conviction has already expired even though a possibility remains that “the prior conviction will be used to enhance the sentences imposed for any subsequent crimes”).

<sup>190</sup> *Lehman v. Lycoming Cnty. Child.’s Servs. Agency*, 458 U.S. 502, 512 (1982).

process.<sup>191</sup> The first step in the effective rehabilitation of offenders is a “realization by the convict that he is justly subject to sanction, that he stands in need of rehabilitation.”<sup>192</sup> As Justice Harlan noted,

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.<sup>193</sup>

Arguably, no such restoration may ever occur if our habeas system allowed for perpetual litigation for individuals no longer subject to incarceration and subject to restrictions that the Court has already deemed remedial.<sup>194</sup>

As well as undermining the system’s penological goals, a pervasive lack of finality demonstrates a certain “lack of confidence” in our legal process in its entirety.<sup>195</sup> By permitting “endless redetermination of questions” previously addressed—at multiple levels in the judicial system—we emasculate a general respect for the law.<sup>196</sup> An ineffective system is thereby created where justice is perpetually lingering slightly out of reach.<sup>197</sup> As Professor Bator aptly noted, “Somehow, somewhere, we must accept the fact that human institutions are short of infallible; there is reason for a policy which leaves well enough alone and which channels our limited resources of

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<sup>191</sup> See Bator, *supra* note 182, at 452 (“Furthermore, we should at least tentatively inquire whether an endless reopening of convictions, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders.”).

<sup>192</sup> *Id.*

<sup>193</sup> *Sanders v. United States*, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting).

<sup>194</sup> See *supra* Part V.B.1.

<sup>195</sup> See Bator, *supra* note 182, at 452.

<sup>196</sup> John N. Mitchell, U.S. Att’y Gen., *Restoring the Finality of Justice*, Address Before the Alabama Bar Association (June 25, 1971).

<sup>197</sup> Bator, *supra* note 182, at 452 (“The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibility.”).

concern toward more productive ends.”<sup>198</sup> And such resources are, in fact, limited.

The federal docket is consistently at its brink. Prisoner petitions have inundated the federal court system, and habeas corpus accounts for much of the flooding.<sup>199</sup> According to one study, there are an estimated 752,000 registered sex offenders in the United States.<sup>200</sup> This number continues to rise with each newly entered sex conviction. In light of the federal judiciary’s struggle to keep pace with the flood of petitions from prisoners who are *currently incarcerated*,<sup>201</sup> shall we nevertheless extend habeas custody to hundreds of thousands of registered sex offenders in the system? The Court may well answer that in the negative, agreeing “[w]e should not encourage the flow of petitions by expanding the jurisdiction unless there is a felt need for such expansion.”<sup>202</sup> Such a lack of finality would “seriously distort the very limited resources society has allocated to the criminal process.”<sup>203</sup>

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<sup>198</sup> *Id.* at 453.

<sup>199</sup> See *Federal Judicial Caseload Statistics 2019*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019> (last updated Mar. 31, 2019).

<sup>200</sup> *How Many in Your State?*, *supra* note 15 (reporting from a study done in fall of 2019).

<sup>201</sup> Cf. Andrew Figueroa, *The Standards of Noia, Wainwright, and AEDPA—An Analysis of the Different Standards and a Proposal of a Possible Alternative*, 42 AM. J. TRIAL. ADVOC. 385, 400 (2019) (“The leading criticisms against permissive habeas is the notion that federal courts are overwhelmingly inundated with frivolous habeas petitions and the need to conserve state and federal judicial resources.”); David Owens, *Connecticut Courts Overwhelmed with Inmates’ Petitions for Release*, HARTFORD COURANT (May 10, 2018, 5:35 PM) <https://www.courant.com/breaking-news/hc-habeas-reform-effort-20180502-story.html>.

<sup>202</sup> Bator, *supra* note 182, at 507.

<sup>203</sup> *Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring). As Justice Harlan noted,

While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final.

*Id.*

Proponents of custodial expansion would argue that the Supreme Court has consistently affirmed the indispensable precept that “the principles of comity and finality . . . ‘must yield to the imperative of correcting a fundamentally unjust’” scheme of punishment.<sup>204</sup> Yet, this argument overlooks the critical notion that sex offender registries are not a—at least *de jure*—form of punishment. Further, the liberty interests at stake may not raise the specter necessary to “outweigh[] federalism and finality concerns.”<sup>205</sup> Though sex offender registration requirements are undoubtedly severe, worries about finality are at a low for individuals not actually behind bars. We worry more about the potentially incorrect “final” condemnation of a prisoner facing a long-term jail sentence than one who has been released into the community. Thus, finality interests are strengthened in this context.

#### CONCLUSION

There are practical reasons why the Court may refuse to extend habeas custody to sex offender registration and notification requirements. So too are there reasons why the Court may simply choose to ignore the disarray of the lower courts. Should the Court take the issue under consideration, however, it would be remiss to perpetuate the legal fiction advanced by *Williamson* and its proponents that these registration requirements do not amount to severe “restraints o[f] . . . liberty” not imposed on the public generally.<sup>206</sup> To do so would not only undermine the Court’s own precedent but would more importantly undermine its credibility as the ultimate arbiter of individual liberties.

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<sup>204</sup> *Schlup v. Delo*, 513 U.S. 298, 320–21 (1995) (citing *Murray v. Carrier* 477 U.S. 478, 495 (1986)).

<sup>205</sup> *Lehman v. Lycoming Cnty. Child.’s Servs. Agency*, 458 U.S. 502, 516 (1982).

<sup>206</sup> *See Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998).