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SEX OFFENDERS, CUSTODY AND HABEAS

WENDY R. CALAWAY[†]

INTRODUCTION

The conventional rhetoric surrounding discussions of habeas corpus, as the great instrument for the protection of freedom, often ignores the realities of how access to habeas corpus is granted or, more importantly, denied. The legislature has taken great efforts to limit state petitioners' access to the federal courts.¹ Generally, courts have enforced the procedural rules and regulations, making access to courts for state petitioners cumbersome and complicated;² however, in at least one respect, the jurisdictional requirement of custody, courts have taken a more liberal view.

To obtain federal habeas review of a petitioner's state conviction, the petitioner must be in custody.³ The Supreme Court's determination of the meaning of the custody requirement has revolved around restraints on liberty.⁴ Petitioners need not be physically confined to demonstrate custody, but must suffer significant restraints on their liberty.⁵ Using this paradigm, the Supreme Court has extended the definition of custody to those on parole, those on probation, and those out on bond awaiting trial.⁶ Lower courts have extended this reasoning even further;⁷

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¹ Anne M. Voigts, Note, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1111–12 (1999) (discussing legislative limitations on access to habeas relief).

² See generally Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868 (1997).

³ 28 U.S.C. § 2254(a) (2012).

⁴ *Jones v. Cunningham*, 371 U.S. 236, 239–40 (1963).

⁵ *Id.* at 242–43.

⁶ *Id.*

⁷ *E.g.*, *Barry v. Bergen Cty. Prob. Dep't*, 128 F.3d 152, 161 (3d Cir. 1997) (finding that 500 hours of community service performed by the petitioner constituted custody).

however, courts have failed to apply the custody requirement to sex offenders seeking habeas review in a coherent, realistic manner.

Most courts have determined that once a person's prison sentence has expired, she is no longer considered to be in custody for purposes of habeas review, even if she has to comply with sex offender requirements.⁸ Using a variety of standards and factors, courts have determined that the sex offender requirements are not significant restraints on physical liberty.⁹ In doing so, courts have failed to consider the particulars of the sex offender legislation compared to those of other jurisdictions and have failed to consider the data produced by social scientists on the implications of the sex offender designation. The reality is that sex offenders from many states are burdened by restrictions and requirements far more onerous than individuals on probation or parole. Further, like individuals on probation or parole, sex offenders are subject to severe criminal penalties for violation of the requirements. Failure to acknowledge these realities leads to a result that is required by neither Supreme Court precedent nor by the habeas statute.

This Article focuses on habeas petitioners under a conviction from state court seeking federal habeas review. First, Part I will discuss the historical context of the writ of habeas corpus and the development of its purpose and scope. Part I also examines the current status of habeas corpus law, recent legislative efforts to limit its reach, and, specifically, the idea of custody as a prerequisite to habeas relief. Part II explores the evolution of the custody requirement both at the Supreme Court and in lower federal courts. In particular, this section looks at how the meaning of custody has evolved over time from physical custody to more intangible restrictions on liberty. Part III addresses the application of custody jurisprudence to the issue of sex offenders. The Supreme Court has not directly addressed this issue, but several circuit courts have, and Part III addresses the implications of these decisions. Part IV examines sex offender legislation by discussing the particulars of various state statutes and reviewing social science research regarding the effect of the legislative requirements. Finally, Part V looks at the standard applied by courts when discussing sex offender designation as

⁸ See, e.g., *Williamson v. Gregoire*, 151 F.3d 1180, 1183–84 (9th Cir. 1998).

⁹ *Id.*

“custody.” This Article argues that the standard has shifted and been analyzed inconsistently. The conclusion contends that, consistent with Supreme Court and lower court precedent on the issue of custody, individuals in many states subject to sex offender laws suffer significant restraints on their liberty and, therefore, meet the jurisdictional requirement for habeas review.

I. THE LEGAL FRAMEWORK OF HABEAS CORPUS

Often considered “the most celebrated writ in the English law”¹⁰ and “[t]he most important human rights provision in the Constitution,”¹¹ the writ of habeas corpus has been for centuries esteemed as the preeminent means by which people of a free society maintain their liberty.¹² Chief Justice Salmon Chase characterized habeas as “the best and only sufficient defence of personal freedom.”¹³ The idea of habeas corpus traces its roots to England in the thirteenth century.¹⁴ At its most basic, habeas corpus provides a mechanism for a criminal defendant to be physically present before the court.¹⁵ The traditions in England connected habeas corpus not to concepts of liberty, but to a mechanism for having the defendant in court to answer for charges.¹⁶ The historical purpose and scope of the law of habeas corpus in England has been well documented elsewhere;¹⁷ however, the development of habeas corpus in the United States has diverged from the historical underpinnings in England. Rather than using habeas corpus as a mechanism for securing a defendant’s appearance in court, the concept of habeas corpus in the United States has been used by defendants to secure their liberty.¹⁸ Habeas corpus is enshrined in the United States

¹⁰ See 3 WILLIAM BLACKSTONE, COMMENTARIES *130.

¹¹ Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 143 (1952).

¹² *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (quoting *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868)).

¹³ *Yerger*, 75 U.S. (8 Wall.) at 95.

¹⁴ See, e.g., 1 SELECT PLEAS OF THE CROWN A.D. 1200–1225, at 67 (n.p., Frederic W. Maitland ed., Selden Soc’y 1887); 8 CURIA REGIS ROLLS 308 (C.T. Flower ed., 1938) (1219–1220).

¹⁵ FREDERICK POLLOCK & FREDERIC W. MAITLAND, 2 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 591–94 (Cambridge, Cambridge Univ. Press, 2d ed. 1898).

¹⁶ ROBERT S. WALKER, THE CONSTITUTIONAL AND LEGAL DEVELOPMENT OF HABEAS CORPUS AS THE WRIT OF LIBERTY 14, 20 (1960).

¹⁷ See JUDITH FARBEY & R. J. SHARPE WITH SIMON ATRILL, THE LAW OF HABEAS CORPUS 1, 18 (3d ed. 2011).

¹⁸ *Boumediene v. Bush*, 553 U.S. 723, 739–40 (2008).

Constitution as a mechanism of review for cases of illegal confinement;¹⁹ thus, habeas corpus became less of a tool to compel the behavior of defendants and more of an instrument for defendants to compel the action of the courts. Through this shift habeas corpus became, in theory, the great protector of individual liberty.

Article I, § 9 of the United States Constitution provides that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”²⁰ The writ’s purpose is to provide a mechanism for individuals to hold the government accountable for violations of the law.²¹ At first, the right to habeas corpus existed only for cases in which a federal petitioner was imprisoned²² or the jurisdiction of the court was challenged.²³ But, in 1867, Congress extended federal habeas corpus protection to prisoners held in state custody.²⁴ The Supreme Court noted the breadth of habeas protection, finding that Congress extended habeas corpus jurisdiction to “every court and of every judge every possible case” of liberty deprivation.²⁵ Historically, courts explicitly and tacitly acknowledged the importance of habeas corpus, expanding both the access and the scope of the writ.²⁶

¹⁹ See *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1040 (1970); see also Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1016–23 (1924).

²⁰ U.S. CONST., art. I, § 9, cl. 2.

²¹ See *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 325–26 (1867).

²² *McCleskey v. Zant*, 499 U.S. 467, 477–78 (1991) (citing *Ex parte Wells*, 59 U.S. (18 How.) 307, 307 (1855)).

²³ *Id.* (citing *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201–03 (1830)).

²⁴ Act of Feb. 5, 1867, ch. 27, 14 Stat. 385 (codified as amended at 28 U.S.C. §§ 2241–55 (2012), partially invalidated by *Boumediene v. Bush*, 553 U.S. 723 (2008)).

²⁵ *McCardle*, 73 U.S. (6 Wall.) at 325–26.

²⁶ See, e.g., *Frank v. Mangum*, 237 U.S. 309, 325–29 (1915); *Ex parte Siebold*, 100 U.S. 371, 376–77 (1879) (explaining jurisdictional limitations where charges were based on a statute later found unconstitutional); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176–78 (1873); Henry M. Hart, Jr., *The Supreme Court 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 103–04 (1959) (detailing the “process of expansion of the concept of a lack of jurisdiction.”); see generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.1, at 940–41, § 15.2, at 947–52 (7th ed. 2016) (discussing the changes in constitutional interpretation that led to a new habeas law); Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 564–566 (1994) (outlining the Supreme Court precedent that expanded the scope of habeas corpus relief).

However, reference to more recent congressional action and Supreme Court jurisprudence has repeatedly imposed new procedural hurdles and restricted availability of habeas review.²⁷ The statute of limitations requires that petitioners file within one year of when the conviction becomes final in state court or when the time for seeking such review expires.²⁸ Petitioners must exhaust all claims in state court before they are presented in a federal habeas petition.²⁹ Exhaustion requires petitioners to provide the state's highest court with an opportunity to review both the factual basis and the constitutional principle underlying the claim.³⁰ When a claim has not first been presented in state court, it is procedurally defaulted and barred from review in federal court.³¹ Even when these procedural hurdles are cleared, the standard of review for habeas claims is narrow. Federal habeas relief cannot be granted unless a petitioner demonstrates that the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented."³² In addition to these statutory requirements, the availability of habeas relief is curtailed by the jurisdictional requirement that the petitioner be in custody at the time the petition is filed.³³

²⁷ See, e.g., *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578, 1578 (1998); Margolis, *supra* note 26, at 574, 576–77; Frank J. Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Altars of Expediency, Federalism and Deterrence*, 16 N.Y.U. REV. L. & SOC. CHANGE 339, 339–40 (1987–88); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus*, 59 GEO. WASH. L. REV. 362, 362–64 (1991); Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 325, 328; Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 13–14, 32–33 (1990). Those convicted in both state court and federal court have the ability to seek habeas review, however, the procedural restrictions and requirements are different. This Article focuses on state habeas petitioners.

²⁸ 28 U.S.C. § 2244(d)(1)(A) (2012).

²⁹ *Id.* § 2254(b)(1). See also *Day v. McDonough*, 547 U.S. 198, 205–06 (2006).

³⁰ *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995) (per curiam); *Rose v. Lundy*, 455 U.S. 509, 514–15 (1982).

³¹ *Wainwright v. Sykes*, 433 U.S. 72, 83–84 (1977).

³² 28 U.S.C. § 2254(d).

³³ *Id.* § 2254(a).

Habeas corpus is the exclusive remedy for a state defendant who challenges the fact or duration of her confinement and seeks release.³⁴ Federal habeas relief is available to state prisoners to correct violations of the United States Constitution, federal laws, or treaties of the United States.³⁵ To obtain relief under 28 U.S.C. § 2254(a), the petitioner must be in custody.³⁶ The term custody encompasses not only individuals subject to immediate physical imprisonment, but also those subject to restraints that significantly confine and restrain freedom and are not shared by the public generally.³⁷ Each claim in a petition must satisfy the custody requirement.³⁸ Courts determine whether a habeas corpus petitioner is in custody for purposes of §§ 2241 and 2254 at the time that the petition is filed.³⁹ “Although [the] petitioner’s release from custody subsequent to the filing of the complaint may render his case moot,” such a release does not impact the threshold question of custody.⁴⁰

II. JUDICIAL DETERMINATIONS OF CUSTODY

The earliest interpretations of custody required that a petitioner be physically confined.⁴¹ The Court’s interpretation relied on the literal translation of habeas corpus, “you have the body,” and thus, it was necessary to have the body in order to release it.⁴² As time evolved, so did the Court’s interpretation of the custody requirement. In *Jones v. Cunningham*, the Court held that the right to habeas corpus should not be constricted by this ritualistic formula.⁴³ The Court was careful to specifically declare the importance of habeas corpus in protecting individuals

³⁴ See *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973).

³⁵ 28 U.S.C. § 2254(a).

³⁶ *Id.*

³⁷ See *Lehman v. Lycoming Cty. Children’s Serv. Agency*, 458 U.S. 502, 508–10 (1982); see also *Jones v. Cunningham*, 371 U.S. 236, 239–43 (1963).

³⁸ *Kaminski v. United States*, 339 F.3d 84, 88–89 (2d Cir. 2003); *United States v. Thiele*, 314 F.3d 399, 401 (9th Cir. 2002); *United States v. Hatten*, 167 F.3d 884, 887 (5th Cir. 1999); *Barnickel v. United States*, 113 F.3d 704, 706 (7th Cir. 1997).

³⁹ See *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968); *Sevier v. Turner*, 742 F.2d 262, 268 (6th Cir. 1984).

⁴⁰ *Sevier*, 742 F.2d at 268–69.

⁴¹ *Wales v. Whitney*, 114 U.S. 564, 571–72 (1885). See 1 BRIAN R. MEANS, *POSTCONVICTION REMEDIES* § 7:2 (2018 ed.), for a general discussion of the history and development of the custody requirement.

⁴² CARY FEDERMAN, *THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE* ix (2006).

⁴³ 371 U.S. 236, 243 (1963).

against intrusions on their liberty.⁴⁴ In this case, the Court determined a petitioner on parole satisfied the custody requirement.⁴⁵ There, the petitioner was convicted and sentenced to ten years in prison because it was his third offense.⁴⁶ He challenged his status as a third time offender, alleging that one of the three prior convictions was invalid.⁴⁷ While the case was pending, he was paroled and placed under the custody of the parole board with certain terms and conditions to follow.⁴⁸ He was required to live at a certain address, to obtain permission before moving or leaving the jurisdiction, to allow the parole officer to visit his home or place of employment, and to follow the parole officer's "instructions and advice."⁴⁹ He was subject to potential reincarceration for violation of the conditions of parole.⁵⁰ The court of appeals dismissed the case as moot because the petitioner was no longer in custody;⁵¹ however, the Supreme Court overturned, finding that the conditions of parole significantly restricted the petitioner's "liberty to do those things which in this country free men are entitled to do."⁵²

Subsequent to *Jones*, the Court decided a series of cases addressing the timing of the custody requirement rather than the conditions that qualify as custody.⁵³ For example, in *Carafas v. LaVallee*, the petitioner filed a petition for habeas relief while he was incarcerated, but his sentence expired while the petition was pending.⁵⁴ The government relied on *Parker v. Ellis* in arguing that the expiration of the sentence invalidates federal

⁴⁴ *Id.* Historically speaking, the requirement that a petitioner be in custody for purposes of habeas relief has been one that the Court was willing to construe liberally. Even when the Warren Court gave rise to the Rehnquist Court, and legislative access to habeas corpus relief became narrower, the Court generally made allowances in interpreting the meaning of custody. See Yale L. Rosenberg, *The Federal Habeas Corpus Custody Decisions: Liberal Oasis or Conservative Prop?*, 23 AM. J. CRIM. L. 99, 101–02 (1995).

⁴⁵ *Jones*, 317 U.S. at 243.

⁴⁶ *Id.* at 237.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 242.

⁵¹ *Id.* at 237–38.

⁵² *Id.* at 243.

⁵³ See Garrett Ordower, Comment, *Gone, but Not Forgotten? Habeas Corpus for Necessary Predicate Offenses*, 76 U. CHI. L. REV. 1837, 1842–55 (2009) (discussing the evolution of the custody requirement).

⁵⁴ *Carafas v. LaVallee*, 391 U.S. 234, 236 (1968).

jurisdiction.⁵⁵ In *Parker*, the Supreme Court explicitly held that when a prisoner is released from prison, after serving his sentence, the federal habeas case is moot.⁵⁶ In reassessing this holding in *Carafas*, the Court emphatically rejected the notion that the petitioner's claims became moot.⁵⁷ The Court noted that, consequent to the conviction, the petitioner could not engage in certain business, serve as an official of a labor union, vote in state elections, or serve as a juror.⁵⁸ As a result of the "disabilities or burdens (which) may flow from [the] petitioner's conviction, he has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."⁵⁹ The Court reversed the decision in *Parker* and determined that a petitioner satisfies the custody requirement if he is in custody at the time the petition is filed.⁶⁰

In *Peyton v. Rowe*, the Court also addressed the issue of custody as it relates to the timing of the petition.⁶¹ In this case, the petitioner was sentenced to serve thirty years for a rape conviction.⁶² He subsequently pled guilty to felonious abduction and was sentenced to serve a twenty-year sentence consecutive to the thirty-year sentence for the rape conviction.⁶³ The petitioner filed a habeas petition challenging the felonious abduction conviction on double jeopardy grounds but did not challenge the rape conviction.⁶⁴ Following Supreme Court precedent in *McNally v. Hill*,⁶⁵ the district court dismissed the petition in *Peyton*, finding that the petitioner was not in custody because he

⁵⁵ *Id.* at 237.

⁵⁶ *Parker v. Ellis*, 362 U.S. 574, 575 (1960), *overruled by Carafas*, 391 U.S. 234 (1968).

⁵⁷ *Carafas*, 391 U.S. at 237.

⁵⁸ *Id.*

⁵⁹ *Id.* (internal quotations omitted) (quoting *Fiswick v. United States*, 329 U.S. 211, 222 (1946)). The Court's discussion of these collateral consequences was provided to refute the argument that the petitioner's claims were moot. The Court's decision regarding custody seemed to hinge on when the petition was filed, meaning that at the time the petition was filed, he was in prison. *Id.* at 236-37. Because he was in custody at the time of filing, the Court retained jurisdiction even if he was later released. *Id.* at 237-38.

⁶⁰ *See id.* at 239-40.

⁶¹ 391 U.S. 54, 55 (1968).

⁶² *Id.*

⁶³ *Id.* at 55-56.

⁶⁴ *Id.* at 56.

⁶⁵ 293 U.S. 131, 133-36 (1934) (holding that a petitioner sentenced to serve a third conviction consecutive to the first two was not in custody for habeas review because he had not yet begun to serve the third prison term and was not challenging the convictions for counts one and two).

had not begun to serve the felonious abduction sentence he sought to challenge.⁶⁶ Considering both judicial economy and practicality, the Court overruled *McNally* and held that “a prisoner serving consecutive sentences is ‘in custody’ [for] any one of them for purposes of” habeas relief.⁶⁷

In addition, the Court addressed the issue of where a petitioner must be located to meet the statutory requirement for custody. The statute dictates that jurisdiction to review a habeas petition is limited to the petitioner and must be filed by persons physically present within the territorial limits of the district court.⁶⁸ In *Braden v. 30th Judicial Circuit Court*, the petitioner was imprisoned in Alabama at the time he filed the petition in the Western District of Kentucky.⁶⁹ His habeas petition alleged a denial of his right to a speedy trial on a three-year-old case pending in Kentucky.⁷⁰ Again relying on considerations of practicality—time, convenience, and expense—the Court rejected a “slavish” interpretation of § 2241(a).⁷¹ The Court held that the petitioner’s filing in the Western District of Kentucky did not deprive the court of jurisdiction.⁷² This case affirmed the Court’s approach to the custody requirement as liberal—not bound by a technical reading of the statute.

Ten years after *Jones*, the Court again examined the substantive question of what it means to be in custody for purposes of habeas review. In 1973, the Court reviewed a case

⁶⁶ *Peyton*, 391 U.S. at 56.

⁶⁷ *Id.* at 67.

⁶⁸ 28 U.S.C. § 2241(a) (2012).

⁶⁹ 410 U.S. 484, 485 (1973).

⁷⁰ *Id.*

⁷¹ *Id.* at 499.

⁷² *Id.* at 500. In making this determination, the Court declined to follow *Ahrens v. Clark*, which held that the court’s jurisdiction is confined to a petitioner who is confined in the jurisdiction where he seeks relief. *Id.* at 499–500; *Ahrens v. Clark*, 335 U.S. 188, 192–93 (1948). The Court cited *Peyton*, *Carafas*, and *Jones*, noting: [C]ritical development since our decision in *Ahrens* is the emergence of new classes of prisoners who are able to petition for habeas corpus because of the adoption of a more expansive definition of the “custody” requirement of the habeas statute. The overruling of *McNally v. Hill* made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of the prisoner’s attack on the detainer. *Braden*, 410 U.S. at 498–99 (italics added) (internal citations omitted).

where the defendant was out on a recognizance bond⁷³ pending the imposition of a sentence after a conviction for a misdemeanor offense.⁷⁴ After exhausting his state remedies, the petitioner sought relief from his conviction in federal district court. The district court denied the petition and the Ninth Circuit affirmed, finding that release on his own recognizance pending execution of sentence was not custody for purposes of habeas review.⁷⁵ In reversing this decision, the Supreme Court noted that a recognizance bond carried certain terms and conditions that restricted the freedom of the petitioner.⁷⁶ Specifically, the Court noted that the petitioner was required to appear at all times and places required by the court and could be rearrested at any time.⁷⁷ In finding that this qualifies as custody, the Court reasoned that the petitioner was "subject to restraints 'not shared by the public generally.'"⁷⁸ The Court went on to note that he could not move about as he pleased and that his freedom depended on the decisions of judicial officers.⁷⁹ The Court went to some lengths to specifically limit the scope of the holding in *Hensley v. Municipal Court*, emphasizing that the decision did not extend to those on a recognizance bond awaiting trial;⁸⁰ however, this case did signal an expansion of the habeas doctrine well beyond that previously envisaged.

In *Justices of Boston Municipal Court v. Lydon*, the Supreme Court had an opportunity to examine just how far the *Hensley* decision would reach.⁸¹ The petitioner faced retrial on charges, which he alleged constituted double jeopardy.⁸² The petitioner was out on a recognizance bond while challenging the validity of

⁷³ The recognizance bond did not require the payment of money. The defendant was released on his promise to appear in court. Failure to appear for court hearings when directed could result in the revocation of the recognizance bond and the defendant's incarceration pending the resolution of the case.

⁷⁴ *Hensley v. Municipal Court*, 411 U.S. 345, 346-47 (1973).

⁷⁵ *Id.* at 345-46.

⁷⁶ *Id.* at 351-53.

⁷⁷ *Id.* at 351-52.

⁷⁸ *Id.* at 351 (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 353.

⁸¹ See 466 U.S. 294, 300-01 (1984). Both the district court and the First Circuit agreed that petitioner met the jurisdictional threshold and agreed that retrial was barred by double jeopardy. *Id.* at 299-300. The Supreme Court upheld the custody determination, however, reversing the circuit court's determination that double jeopardy barred a retrial. *Id.* at 301, 303.

⁸² *Id.* at 296-97.

a second trial in state and federal court.⁸³ The state challenged the federal court's jurisdiction to hear the habeas petition, alleging that the petitioner was not in custody.⁸⁴ Notwithstanding the Court's limiting language in *Hensley*, the *Lydon* Court ruled that the petitioner's status, on recognizance, awaiting retrial, satisfied the custody requirement.⁸⁵ The Court analogized the petitioner's circumstances to those of the petitioner in *Hensley*, finding that they were not identical, but not "sufficiently different to require a different result."⁸⁶ Quoting *Hensley*, the *Lydon* Court found that the petitioner satisfied the custody requirements because he was subject to "restraints not shared by the public generally."⁸⁷

After expanding and refining the definition of "custody" for several years, in 1989 the Supreme Court pulled back in *Maleng v. Cook*.⁸⁸ In *Maleng*, the Court addressed a situation where the petitioner was sentenced to serve a prison term, the length of which had been enhanced by a prior conviction.⁸⁹ The petitioner attempted to attack the prior conviction in a federal habeas petition. The issue the Court addressed was whether a habeas petitioner remains in custody under a conviction for which the sentence has expired because of the possibility that it may be used to enhance a sentence imposed for a future crime.⁹⁰ The Court acknowledged that it had historically taken a liberal view of the custody requirement, but drew the line at sentences that had completely expired by the time the habeas petition was filed.⁹¹ The Court reasoned that it had "never extended [custody] to the situation where a habeas petitioner suffers no present restraint from a conviction."⁹² The Court, however, was careful to contrast *Maleng* with *Carafas*.

In *Carafas*, the Court noted that even though the petitioner's conviction expired, he was still subject to collateral consequences as a result of his conviction: inability to vote; to serve on juries;

⁸³ *Id.* at 297–98.

⁸⁴ *See id.* at 300.

⁸⁵ *Id.* at 300–01.

⁸⁶ *Id.* at 301.

⁸⁷ *Id.* (quoting *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973)).

⁸⁸ *See* 490 U.S. 488, 493–94 (1989) (per curiam).

⁸⁹ *Id.* at 489–90.

⁹⁰ *Id.*

⁹¹ *Id.* at 492.

⁹² *Id.*

and to engage in other business;⁹³ however, the Court in *Maleng* specified that the custody decision in *Carafas* rested on timing of when the petition was filed, not on the collateral consequences suffered by the petitioner.⁹⁴ In *Carafas*, the petitioner filed his petition before he was released from prison.⁹⁵ In contrast, the petitioner in *Maleng* did not file his petition until the conviction had expired, so notwithstanding the collateral consequences of his conviction—including future sentencing enhancements—he did not meet the custody requirements.⁹⁶ As will be discussed in detail below, it is the Court's decision in *Maleng*, to the exclusion of the other Supreme Court precedent discussed here, that interpreting courts have used to deny relief to sex offenders seeking habeas review.⁹⁷

In *Garlotte v. Fordice*, the petitioner sought to thread a needle similar to the petitioner in *Maleng*, but reached a more favorable result.⁹⁸ In this case, the petitioner challenged a marijuana conviction, which had expired at the time the habeas petition was filed.⁹⁹ The petitioner was concerned the marijuana conviction would delay his parole eligibility on charges for which he was currently serving a prison sentence.¹⁰⁰ Rather than adhering to *Maleng*, the Court relied on *Peyton* in finding that the petitioner satisfied the custody requirement.¹⁰¹ The Court cited *Peyton* and reaffirmed the commitment to the constitutional protections of habeas corpus review.¹⁰² The petitioner in *Garlotte* was serving consecutive sentences like the petitioner in *Peyton*. The distinguishing feature between these two cases was that, in *Garlotte*, the petitioner's conviction *had expired*, and he was serving time on unrelated but consecutive sentences. In contrast, the petitioner in *Peyton* challenged a conviction that he was going to serve *in the future* while he served time on unrelated, consecutive sentences.¹⁰³ The *Garlotte* Court held that

⁹³ See *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968).

⁹⁴ See *Maleng*, 490 U.S. at 492–93. Again, the Court drew a distinction between whether a petitioner's argument is moot and whether a petitioner is in custody for habeas purposes.

⁹⁵ *Carafas*, 391 U.S. at 236.

⁹⁶ *Maleng*, 490 U.S. at 490–91.

⁹⁷ See *infra* notes 243–61 and accompanying text.

⁹⁸ 515 U.S. 39, 45–46 (1995).

⁹⁹ *Id.* at 42–43.

¹⁰⁰ *Id.* at 41.

¹⁰¹ *Id.* at 45–46.

¹⁰² *Id.* at 44.

¹⁰³ *Peyton v. Rowe*, 391 U.S. 54, 55–58 (1968).

consecutive sentences were viewed in the aggregate and that the petitioner was in custody.¹⁰⁴ While this seems to be a departure from *Maleng*, leaving the door open for federal review of convictions that have fully expired, courts have not extended this analysis to those affected by sex offender statutory requirements.

In summarizing what it means to be in custody for purposes of 28 U.S.C. § 2241, historically, both the Supreme Court and lower courts have taken a broad view. Certainly, incarceration pursuant to the conviction or sentence challenged in the petition satisfies the custody requirement;¹⁰⁵ however, incarceration is not required to establish custody, and courts have made the determination that the custody requirement is satisfied on far less serious infringements of a person's liberty.¹⁰⁶ As discussed above, a release on a personal recognizance bond without the obligation to post a financial surety, pending retrial, is considered custody because the restraints on the petitioner's liberty were significant.¹⁰⁷ The obligations imposed on the petitioner subjected him to "restraints 'not shared by the public generally.'" ¹⁰⁸ Further, the petitioner is considered in custody when he is released on his own recognizance—between conviction and the imposition of sentence.¹⁰⁹

In addition to those awaiting trial or sentencing, those on probation or parole are also considered to be in custody.¹¹⁰ The custody requirement has been expanded to include those serving consecutive sentences, and habeas petitions may proceed when a petitioner is challenging a sentence scheduled to run first, even if

¹⁰⁴ *Garlotte*, 515 U.S. at 41.

¹⁰⁵ *See, e.g., Withrow v. Williams*, 507 U.S. 680, 715–16 (1993) (Scalia, J., concurring in part and dissenting in part). Even incarceration on convictions not being challenged in the instant petition can satisfy the custody requirement where the petitioner seeks to prevent a retrial on double jeopardy grounds. *See Wilson v. Belleque*, 554 F.3d 816, 821–24 (9th Cir. 2009).

¹⁰⁶ *Wilson*, 554 F.3d at 822.

¹⁰⁷ *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 300–01 (1984).

¹⁰⁸ *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963)).

¹⁰⁹ *See id.* at 349, 351.

¹¹⁰ *Jones*, 371 U.S. at 241–43 (holding that parole satisfies the custody requirement); *Caldwell v. Dretke*, 429 F.3d 521, 527 (5th Cir. 2005) (finding that probation and deferred probation orders satisfy the in custody requirement); *Jackson v. Coalter*, 337 F.3d 74, 79 (1st Cir. 2003) (“[The petitioner] remains under supervised probation. Thus, he is still sufficiently ‘in custody’ to pursue federal habeas relief.” (citing *Lefkowitz v. Fair*, 816 F.2d 17, 19 (1st Cir. 1987))); *Malinovsky v. Court of Common Pleas*, 7 F.3d 1263, 1265 (6th Cir. 1993) (“Malinovsky is in custody, although he has been released on a personal recognizance bond.”).

it has already expired.¹¹¹ Likewise, those who have been sentenced to community service¹¹² or rehabilitation programs,¹¹³ have faced deportation,¹¹⁴ or have suspended or stayed sentences are considered to be in custody.¹¹⁵ The Supreme Court has defined custody as a restriction imposed, which “significantly restrain[s] [a] petitioner’s liberty to do those things which in this country free men are entitled to do.”¹¹⁶ The following Parts will examine how this precedent is applied to those under sex offender laws.

III. SEX OFFENDER LAWS AND CUSTODY DETERMINATIONS

Despite the expansive position taken with regard to the application of the custody requirement, courts have almost universally refused to extend the custody requirement to those under a sex offender registration.¹¹⁷ This trend started early in the circuit courts’ review of habeas petitions filed by sex offenders seeking review of their convictions in state court. In *Williamson v. Gregoire*, the Ninth Circuit addressed the issue in a case involving restrictions imposed under Megan’s Law.¹¹⁸ The court determined that the obligations and restraints imposed by the sex offender designation amounted to collateral consequences of the conviction.¹¹⁹ The court focused analysis on the restraints on the petitioner’s liberty, noting that the statute at issue did not require in person registration, did not contain any prohibitions

¹¹¹ *Garlotte v. Fordice*, 515 U.S. 39, 46–47 (1995).

¹¹² *Barry v. Bergen Cty. Prob. Dep’t*, 128 F.3d 152, 161 (3d Cir. 1997).

¹¹³ *Dow v. Circuit Court*, 995 F.2d 922, 923 (9th Cir. 1993) (per curiam).

¹¹⁴ *Mustata v. U.S. Dep’t of Justice*, 179 F.3d 1017, 1022–23 (6th Cir. 1999).

¹¹⁵ *McVeigh v. Smith*, 872 F.2d 725, 727 (6th Cir. 1989) (citing *Hensley v. Municipal Court*, 411 U.S. 345, 348–49 (1973)).

¹¹⁶ *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

¹¹⁷ *Bonser v. Dist. Att’y Monroe Cty.*, 659 F. App’x 126, 128–29 (3d Cir. 2016); *Dickey v. Allbaugh*, 664 F. App’x 690, 692–94 (10th Cir. 2016); *Calhoun v. Att’y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014); *Wilson v. Flaherty*, 689 F.3d 332, 338 (4th Cir. 2012); *Virsnieks v. Smith*, 521 F.3d 707, 717–20 (7th Cir. 2008); *Leslie v. Randle*, 296 F.3d 518, 521–24 (6th Cir. 2002); *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam); *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998); see also *Dickey v. Patton*, No. Civ-15-685-M, 2015 WL 8592709, at *5 (W.D. Okla. Sept. 28, 2015) (report and recommendation), adopted by 2015 WL 8494009 (W.D. Okla. Dec. 10, 2015). But see *Piasecki v. Court of Common Pleas*, No. 16-4175, 2019 WL 960003, at *6–7 (3rd Cir. Feb. 27, 2019).

¹¹⁸ 151 F.3d at 1182–84. Megan’s Law has generally been superseded by the Adam Walsh Act, discussed in more detail below. See *infra* notes 168–70 and accompanying text.

¹¹⁹ *Williamson*, 151 F.3d at 1184.

on where the petitioner was allowed to go, and did not impose obligations demanding his presence at any place at any time.¹²⁰ Under the Washington statute, “registration [could] be accomplished by mail.”¹²¹ In *Williamson*, the court thoroughly examined the sex offender statute and discussed the implications of its restrictions.¹²² Because the statute did not have any restrictions on where the petitioner could loiter, travel, live, or move, the court determined that it did not contain restraints on liberty significant enough to qualify as custody.¹²³ As the following discussion will demonstrate, subsequent courts have relied on the reasoning of *Williamson*, without applying the custody standard to the particular statute at issue. This has resulted in a body of jurisprudence that treats sex offender requirements as collateral consequences and as civil or remedial rather than punitive,¹²⁴ however, as sex offender legislation has become more burdensome, restrictive, and punitive, the legal analysis has failed to keep pace.

Most recently, the Sixth Circuit affirmed this analytic trend.¹²⁵ In *Hautzenroeder v. Dewine*, the petitioner, a high school teacher, was convicted in state court for having consensual, but unlawful, sexual contact with a student.¹²⁶ She was sentenced to serve two years in prison and, as part of her sentence, was classified under Ohio’s sex offender statute as a Tier III sex offender.¹²⁷ The petitioner served a portion of her prison sentence and was released on community control while her appeal was pending.¹²⁸ She exhausted state remedies challenging her conviction and sentence and finally filed a petition for habeas relief in federal court.¹²⁹ Prior to filing the habeas petition, the community control requirements were satisfied and discharged, but she still remained subject to the requirements of the Tier III sex offender designation.¹³⁰ The

¹²⁰ *Id.* at 1183–84.

¹²¹ *Id.* at 1184.

¹²² *Id.* at 1181–82, 1184.

¹²³ *Id.* at 1183–84.

¹²⁴ *See, e.g.*, *Calhoun v. Att’y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014); *Virsnieks v. Smith*, 521 F.3d 707, 720 (7th Cir. 2008); *Leslie v. Randle*, 296 F.3d 518, 523 (6th Cir. 2002); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (*per curiam*).

¹²⁵ *See Hautzenroeder v. Dewine*, 887 F.3d 737, 739 (6th Cir. 2018).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 739–40.

¹³⁰ *Id.* at 739.

respondent filed a motion to dismiss, alleging that the petitioner did not meet the jurisdictional requirements for habeas relief because she was not in custody as required by 29 U.S.C. § 2241. The petitioner argued that the sex offender designation requirements were custodial for purposes of the statute.¹³¹ On appeal to the Sixth Circuit, the petitioner argued that the sex offender designation posed significant restraints on her liberty. Previous iterations of sex offender legislation included registration requirements; however, new versions of sex offender designation schemes had been enacted in Ohio and elsewhere with far more burdensome requirements.¹³² Under the current Ohio statute, the petitioner was subject to the following restrictions: She was prohibited from establishing a residence within 1,000 feet of a school, daycare or preschool; designated permanently as a sexual predator; mandated to register in person every ninety days, in each county where she worked, lived and went to school; required to divulge certain personal identifiers and information, which would be publicly disclosed; forced to disclose to the sheriff her address to verify housing information with the landlord; and prohibited from travelling outside the jurisdiction for more than three days without going to the sheriff in that county and registering.¹³³ Further, these were lifetime requirements, which were part of the criminal sentence, imposed by the sentencing court.¹³⁴ If the petitioner failed to comply, she was subject to a felony charge carrying a potential three-year prison sentence.¹³⁵

The petitioner argued that these restrictions constituted significant restraints on her liberty as contemplated in *Jones v. Cunningham*;¹³⁶ however, the court determined that she had not demonstrated that Ohio's residency restrictions amounted to governmental control over her movements.¹³⁷ In rejecting the petitioner's claim, the court distinguished between a parolee—whose restrictions and punishment are based on his original

¹³¹ *Id.* at 742–44. The petitioner urged the court to overrule its previous decision in *Leslie v. Randle* because the Ohio sex offender laws had changed since that decision. *Id.* She also argued that the new laws imposed more significant restraints on the freedoms of designees. *Id.* The district court dismissed the petition. *Id.*

¹³² See Brief of Appellant at 9, *Hautzenroeder*, 887 F.3d 737 (No. 17-3395).

¹³³ *Id.* at 17–21.

¹³⁴ *Id.* at 21.

¹³⁵ *Id.*

¹³⁶ *Id.* at 22; *Jones v. Cunningham*, 371 U.S. 236, 241–42 (1963).

¹³⁷ *Hautzenroeder*, 887 F.3d at 741.

conviction—and someone convicted under the Ohio sex offender laws—whose punishment would be based on a new offense.¹³⁸ In doing so, the Sixth Circuit followed its prior decisions on this issue as well as other circuit courts on sex offender registration.¹³⁹

In *Wilson v. Flaherty*, a previous case with even more troubling implications, the Fourth Circuit addressed the issue on facts involving claims of actual innocence.¹⁴⁰ There, the petitioner was a part of the “Norfolk Four,” a group of four navy sailors convicted of the rape and the murder of another sailor’s wife.¹⁴¹ The court acquitted the petitioner of murder but convicted him of rape; he was sentenced to a term of imprisonment and required to comply with the state’s sex offender laws.¹⁴² After completing his prison sentence, evidence came to light that called the validity of the petitioner’s conviction into serious question.¹⁴³ Forensic evidence revealed another individual as the most likely perpetrator of the crimes.¹⁴⁴ Further, the post-conviction evidence suggested police misconduct significantly contributed to the petitioner’s wrongful conviction.¹⁴⁵ By the time this evidence came to light, the petitioner had served his prison sentence but remained a designated sex offender, which involved lifetime obligations requiring him to regularly provide detailed personal information to the government and, among other things, limiting where he may live and travel.¹⁴⁶ Finding that the sex offender registration requirements did not have a substantial impact on petitioner’s liberty, the Fourth Circuit found that the petitioner was not in

¹³⁸ *Id.*

¹³⁹ *Id.* at 743–44 (citing *Dickey v. Allbaugh*, 664 F. App’x 690, 693–94 (10th Cir. 2016); *Calhoun v. Att’y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014); *Wilson v. Flaherty*, 689 F.3d 332, 338 (4th Cir. 2012); *Leslie v. Randle*, 296 F.3d 518, 523 (6th Cir. 2002); *Henry v. Lungren*, 164 F.3d 1240, 1241–42 (9th Cir. 1999); *Dickey v. Patton*, No. Civ-15-685-M, 2015 WL 8592709, at *3–4 (W.D. Okla. Sept. 28, 2015) (report and recommendation), *adopted by* 2015 WL 8494009 (W.D. Okla. Dec. 10, 2015)).

¹⁴⁰ 689 F.3d at 339.

¹⁴¹ *Id.* at 333.

¹⁴² *Id.*

¹⁴³ *Id.* at 334.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 333–35 (citing VA. CODE ANN. §§ 9.1-903 to -904 (West 2018)).

custody, holding that “[t]o rule otherwise would drastically expand the writ of habeas corpus beyond its traditional purview and render [the] ‘in custody’ requirement meaningless.”¹⁴⁷

Dissenting, Judge Wynn noted concerns about the petitioner’s strong claims of actual innocence and disagreed with “the majority opinion’s contention that the deprivations on liberty incident to [the petitioner’s] sexual offender registration requirements [were] too trivial and too collateral to satisfy the requirement that a habeas petitioner be in custody.”¹⁴⁸ In addition, he argued that the petitioner was “subject to a litany of in-person reporting requirements . . . that demand[ed] his presence at a particular place and particular time, and such obligations w[ould] extend the duration of [his] natural life.”¹⁴⁹ Although this decision drew wide criticism, the Supreme Court declined to hear the case.¹⁵⁰

In a similar vein, the Tenth Circuit revisited the issue of custody and sex offenders in *Dickey v. Allbaugh*.¹⁵¹ In this case, the petitioner was convicted in Oklahoma of child sex abuse and sought review of his conviction in a federal habeas petition.¹⁵² The petitioner argued that the restrictions imposed by Oklahoma’s statutory scheme were far more burdensome than those in *Calhoun*.¹⁵³ For example, unlike the petitioner in *Calhoun*, the petitioner here was forbidden from working with children or at a school and was prohibited from living within 2,000 feet of a school, playground, park, or child-care center.¹⁵⁴ Despite the significant differences in the statutory schemes in *Calhoun* and *Dickey*, the court cited its holding in *Calhoun* in denying dismissing the petition.¹⁵⁵ The court found that the sex offender obligations and restrictions were “collateral

¹⁴⁷ *Id.* at 338.

¹⁴⁸ *Id.* at 344–45 (Wynn, J., dissenting).

¹⁴⁹ *Id.* at 346.

¹⁵⁰ See, e.g., J. Clay Douglas, *The “Innocence and Redressability” Exception: A Fair Alternative to Habeas Jurisprudence’s Direct Versus Collateral Consequence Dichotomy*, 92 N.C. L. REV. 690, 709, 712, 716 (2014); Recent Case, *Wilson v. Flaherty*, 689 F.3d 332 (4th Cir. 2012), 126 HARV. L. REV. 2105, 2105, 2109–10 (2013). See also *Wilson v. Flaherty*, 570 U.S. 917 (2013).

¹⁵¹ 664 F. App’x 690, 691–92 (10th Cir. 2016).

¹⁵² *Id.*

¹⁵³ *Id.* at 692–93. See also *Calhoun v. Att’y Gen. of Colo.*, 754 F.3d 1070, 1074 (holding that the Colorado sex offender statutory requirements did not give rise to custody for habeas purposes); Brief of Appellant at 16, *Dickey*, 664 Fed. App’x 690 (No. 15-6234).

¹⁵⁴ Brief of Appellant, *supra* note 153, at 16.

¹⁵⁵ *Dickey*, 664 F. App’x at 693–94.

consequences of [the] conviction and not a continuation of punishment.”¹⁵⁶ In reaching this decision, the court found that the petitioner retained the same freedom of movement and association enjoyed by those not under the restrictions.¹⁵⁷ As will be discussed below, these conclusions are patently at odds with the restrictions, obligations, and punishments regulating the conduct of sex offenders.

The disconnect between the conclusions drawn by courts and the realities faced by the individuals laboring under sex offender restrictions was recognized by the Third Circuit in *Piasecki v. Court of Common Pleas*.¹⁵⁸ There the court found that the majority of cases analyzing sex offender registration schemes did so under older versions of statutes that were less onerous than those at issue today.¹⁵⁹ The sex offender requirements imposed under the statute in Pennsylvania included in person registration every ninety days and for other events, such as changing residences, beginning a new job or getting a new car.¹⁶⁰ The Pennsylvania statute also required preapproval for international travel.¹⁶¹ The sex offender designation was included as part of the sentence.¹⁶² The *Piasecki* court found that these restrictions were significant restraints on the petitioner’s liberty.¹⁶³

IV. EXAMINING THE LAW AND CONSEQUENCES OF SEX OFFENDER REGISTRATION

Sex offender registration laws and regulations were originally enacted in an effort to reduce the prevalence of sexual crimes.¹⁶⁴ Originally, the Jacob Wetterling Crimes Against

¹⁵⁶ *Id.* at 694.

¹⁵⁷ *Id.* at 693.

¹⁵⁸ No. 16-4175, 2019 WL 960003, at *11 (3rd Cir. Feb. 27, 2019).

¹⁵⁹ *Id.* at *7.

¹⁶⁰ *Id.* at *1–2.

¹⁶¹ *Id.* at *2.

¹⁶² *Id.* at *1.

¹⁶³ *Id.* at *8.

¹⁶⁴ Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 413 (2010). These laws appear to have been adopted, at least in part, based on the idea that sex offenders recidivate at higher rates than other offenders. *Id.* This assumption has been called into question. See, e.g., Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 57–58 (2010); Wayne A. Logan, *Megan’s Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 393–95 (2011) (explaining the factors that may account for the claim of

Children Act and Sexually Violent Offender Registration Act were created to help law enforcement officials track sex offenders and decrease the likelihood that they would recidivate.¹⁶⁵ Under these regulatory laws, convicted sex offenders were obligated to register and verify their current names and addresses with local police.¹⁶⁶ Megan's Law followed, amending the initial law and focusing on creating public access to registration information.¹⁶⁷ The Adam Walsh Act, enacted approximately eleven years later, made sweeping changes to registration, reporting, information collection requirements, and penalties.¹⁶⁸ States were required to adopt certain portions of this federal law or risk losing access to certain federal funds.¹⁶⁹ While sex offender registration laws have not been uniformly enacted, the requirements, restrictions, and penalties are on the books in all fifty states.¹⁷⁰

The federal Adam Walsh Act is an example of the kind of sex offender laws that have been enacted in other jurisdictions. The Act requires classifying sex offenders by tier based on three offense levels: lower, moderate, and higher offenses.¹⁷¹ Offenders must register in all jurisdictions where they live, work, and attend school.¹⁷² These registrations must be verified, once a year for low-level offenders, twice a year for mid-level offenders and four times a year for high-level offenders.¹⁷³ Failure to register is a felony offense that carries a potential prison sentence.¹⁷⁴ The information that law enforcement collects

higher recidivism rates); Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355, 382–83 (2005).

¹⁶⁵ Logan, *supra* note 164, at 377–78; *see, e.g.*, Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038–41 (1994), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, sec. 129, § (a), 120 Stat. 587 .

¹⁶⁶ Logan, *supra* note 164, at 373–74.

¹⁶⁷ Megan's Law, Pub. L. No. 104-145, sec. 2, § 170101(d), 110 Stat. 1345 (1996).

¹⁶⁸ Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1078 (2011–2012).

¹⁶⁹ *Id.* at 1077.

¹⁷⁰ *See* Smith v. Doe, 538 U.S. 84, 90 (2003). The Sex Offender Registration and Notification Act sets minimum national standards for gathering, updating, and publicizing information about sex offenders. *See* 34 U.S.C.A. § 20901 (West 2017); *see also* Reynolds v. United States, 565 U.S. 432, 434–36 (2012).

¹⁷¹ 34 U.S.C.A. § 20911; 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.

¹⁷² Enniss, *supra* note 171, at 704; *see also* 34 U.S.C.A. § 20913(a).

¹⁷³ 34 U.S.C.A. § 20918.

¹⁷⁴ *See* Enniss, *supra* note 171, at 702, 705; *see also* 34 U.S.C.A. § 20913(e).

includes the offenders' criminal history, fingerprints, palm prints, and DNA.¹⁷⁵ The registry is publically available on the Internet and communities are notified of an offender's presence.¹⁷⁶ Registration requirements remain in effect for fifteen years for low-level offenders, twenty-five years for mid-level offenders, and life for high-level offenders.¹⁷⁷ One of the more controversial aspects of the Adam Walsh Act is that it provides sex offender designations and requirements for juveniles.¹⁷⁸ Many states also have restrictions on where sex offenders are permitted to establish residency.¹⁷⁹ The statute also provides for a civil commitment scheme for those designated as sex offenders under the Act.¹⁸⁰

The practical effect of this legislation is instructive in analyzing the application of the jurisdictional custody requirement to individuals under a sex offender designation law.¹⁸¹ The inability to obtain or maintain housing is among the

¹⁷⁵ Enniss, *supra* note 171, at 704 n.68.

¹⁷⁶ See 34 U.S.C.A. § 20920(a); Enniss, *supra* note 171, at 701–02.

¹⁷⁷ 34 U.S.C.A. § 20915(a).

¹⁷⁸ See Editorial Board, *Sex Offenders Registry Requires Reboot in Ohio and the Nation: Editorial*, CLEVELAND.COM, (Nov. 19, 2015) https://www.cleveland.com/opinion/index.ssf/2015/11/sex-offender_registry_requires_reboot_in_ohio_and_the_nation_editorial.html.

¹⁷⁹ See, e.g., ALA. CODE § 15-20A-11 (2018), ARK. CODE ANN. §§ 5-14-128, -131 (West 2018); DEL. CODE ANN. tit. 11, § 1112 (West 2018); FLA. STAT. ANN. § 775.215 (West 2018); GA. CODE ANN. §§ 42-1-15 to -17 (West 2018); IDAHO CODE ANN. § 18-8331 (West 2018); 730 ILL. COMP. STAT. ANN. 150 / 8 (West 2018); IND. CODE ANN. § 11-13-3-4 (West 2018); IOWA CODE ANN. §§ 692A.101, 692A.114 (West 2018); KY. REV. STAT. ANN. § 17.545 (West 2018); LA. STAT. ANN. § 14:91.2 (2018); MICH. COMP. LAWS. ANN. §§ 28.734–28.736 (West 2018); MISS. CODE ANN. § 45-35-25 (West 2018); MO. ANN. STAT. § 566.147 (West 2018); N.C. GEN. STAT. ANN. § 14-208.16 (West 2018); OHIO REV. CODE ANN. § 2950.034 (West 2018); OKLA. STAT. ANN. tit. 21, § 1125 (West 2018); OR. ADMIN. R. 291-202-0040 (2018); S.C. CODE ANN. § 23-3-535 (West 2018); S.D. CODIFIED LAWS § 22-24B-23 (West 2018); TENN. CODE ANN. § 40-39-211 (West 2018); UTAH CODE ANN. § 77-27-21.7 (West 2018); VA. CODE ANN. § 18.2-370.3 (West 2018); WASH. REV. CODE ANN. §§ 9.94A.030, 9.94A.703 (West 2018); W. VA. CODE ANN. § 62-12-26 (West 2018), WYO. STAT. ANN. § 6-2-320 (West 2018).

¹⁸⁰ Emily Eschenbach Barker, Note, *The Adam Walsh Act: Un-Civil Commitment*, 37 HASTINGS CONST. L.Q. 141, 145–46 (2009). See generally Stephen C. Dries, *Sex Predators and Federal Habeas Corpus: Has the Great Writ Gone AWOL?*, 39 SUFFOLK U. L. REV. 673 (2006) (discussing the application of the custody requirement to sex offenders and civil commitments).

¹⁸¹ A range of collateral consequences may accompany any criminal conviction. Some of these consequences may directly result from the sanction imposed (loss of voting rights, loss of ability to possess a firearm, deportation, etc.). See generally Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION, Sept. 1987, at 52. Other

most serious consequences. Empirical research suggests that at least 44% of individuals subject to a sex offender law reported that they were unable to live with family members.¹⁸² In addition, 57% said that affordable housing was in short supply, and 60% reported emotional distress resulting from housing restrictions.¹⁸³ For example, in Indiana, 26% of those surveyed indicated that they were unable to return to their homes after being released from prison, 37% were unable to live with family; and close to one-third reported that a landlord refused to rent to them or to renew a lease agreement.¹⁸⁴ Many respondents said that due to restrictions on where they could live, affordable housing was less available, and they were forced to live further away from work, social services, and mental health treatment.¹⁸⁵

In addition to the housing difficulties faced by those subject to sex offender registration laws, many registered sex offenders have lost jobs and have been subject to harassment or property damage.¹⁸⁶ Policies such as community notification lead to the

collateral consequences, however, are social in nature (stigma, ostracism, financial, etc.). See Mary Dodge & Mark R. Pogrebin, *Collateral Costs of Imprisonment for Women: Complications of Reintegration*, 81 PRISON J. 42, 42–43 (2001). However, the collateral consequences of a conviction for an individual convicted of a sex-related criminal offense are particularly acute in all of these areas. Not only are a number of the collateral consequences written into the sex offender registration statutes, but the stigma of such a conviction is directed more specifically, by the public, at defendants with such convictions.

¹⁸² Jill S. Levenson & Andrea L. Hern, *Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry*, 9 JUST. RES. & POL'Y, no. 1, 2007, at 59, 63.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 64–65.

¹⁸⁵ *Id.* at 66. The available data confirms reports that residence restrictions greatly diminish housing availability. For example, researchers found, through the use of geographical information system mapping technology, in one Florida county that nearly 23% of the 137,944 properties zoned for residential use were located within 1,000 feet of schools and nearly 64% fell within 2,500 feet, reducing the number of available residences to 106,888 and 50,108, respectively. See Paul A. Zandbergen & Timothy C. Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restriction Laws Using GIS*, 8 JUST. RES. & POL'Y, no. 2, 2006, at 1, 18. When controlled for multiple types of restrictions often employed in legislation (schools, parks, daycare centers, and bus stops), the number of dwellings available for sex offenders was reduced to 4,233 within 1,000-foot buffer zones and thirty-seven within 2,500-foot buffer zones. *Id.*

¹⁸⁶ Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 56 (2005); Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 76 (2005).

loss of social relationships and the isolation of individuals.¹⁸⁷ Researchers have noted that the laws appear to create obstacles for reintegration, which may ultimately undermine goals related to public protection.¹⁸⁸ Beyond the significant tangible consequences of registration and notification, the laws carry a litany of other intangible consequences, with effects arguably more restrictive on liberty than those just discussed. These consequences are no less restrictive on a registrant's liberty interests. Sex offender registration requirements "raise the likelihood—indeed, seek to ensure—that their subjects will be expelled from everyday society. In contrast to being permitted to live anonymously with their ex-offender status, registrants are publicly and affirmatively singled out by the government as 'sex offenders,' a distinctly odious label in contemporary America."¹⁸⁹ As a result, beyond the severe and tangible outcomes resulting from vigilantism and harassment, offenders experience banishment from their customary social, physical, and economic worlds for life.¹⁹⁰ According to Chief Judge Edward Becker of the Third Circuit,

¹⁸⁷ See Richard Tewksbury, *Experiences and Attitudes of Registered Female Sex Offenders*, 68 FED. PROBATION, Dec. 2004, at 30, 30–33 (discussing the negative collateral consequences of sex offender registration including social stigmatization, economic losses, and daily living challenges). Community notification includes inclusion of offenders in a public database and direct mailings to individuals living in the neighborhood.

¹⁸⁸ See Jill S. Levenson et al., *Megan's Law and Its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 593–99 (2007) (discussing the negative collateral consequences of community notification policies, and recommending policy changes that better inform the public about sex offenders while minimizing the obstacles that interfere with community reintegration).

¹⁸⁹ Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 190 (2000). Arguments have been made to address this issue by citation to *Smith v. Doe*, 538 U.S. 84, 98 (2003). See, e.g., Brief of Respondent-Appellee at 23, *Hautzenroeder v. Dewine*, 887 F.3d 737 (6th Cir. 2018) (No. 17–3395). However, reliance on this case is mistaken. In *Smith*, the Supreme Court examined sex offender registration requirements of Megan's Law as enacted in Alaska and determined that the statute was not punitive, but civil in nature and therefore did not violate the *ex post facto* clause of the Constitution. 538 U.S. at 105–06. However, in a later case, the Ohio Supreme Court determined that a similar statute at issue was punitive. See *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011). Furthermore, the Sixth Circuit reached a similar conclusion when reviewing an offender registration scheme in Michigan. See *Doe v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016).

¹⁹⁰ See *Snyder*, 834 F.3d at 698 (discussing the effects of the Michigan sex offender registration statute on registrants).

[T]he burden imposed by the collective weight of all these effects is borne by the offender in all aspects of his life. At worst, the offender is literally cut off from any interaction with the wider community. He is unable to find work or a home, cannot socialize, and is subject to violence or at least the constant threat of violence Although perhaps some people will hire him or rent him a home, his social intercourse with others is all but non-existent. The effects of notification permeate his entire existence.¹⁹¹

Litigants have argued that Ohio's sex offender registration "laws impose a *de facto* (if not *de jure*) banishment, a restraint manifestly not 'shared by the public generally.'"¹⁹² For example, in *Hautzenroeder v. Dewine*, the petitioner argued that exclusion from society was more than a speculative or imagined harm.¹⁹³ There, the petitioner was "banned from the school premises which her daughter attend[ed]" and barred from attendance at all school functions.¹⁹⁴ She argued that interference with parental duties was a restraint on liberty because it prevented her from performing her parental duties.¹⁹⁵

Despite these substantial infringements and restraints, courts have rejected the claims that the burden of sex offender laws amounts to custody. Courts have dismissed these restrictions as merely "collateral consequences,"¹⁹⁶ as a "serious nuisance,"¹⁹⁷ as "remedial as opposed to punitive,"¹⁹⁸ and as designed to protect the public. Courts have analogized the restrictions to the loss of voting rights,¹⁹⁹ of a medical license,²⁰⁰ and of a driver's license.²⁰¹

¹⁹¹ *E.B. v. Verniero*, 119 F.3d 1077, 1125 (3d Cir. 1997) (Becker, C.J., concurring in part and dissenting in part).

¹⁹² *Logan*, *supra* note 189, at 194 (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963)).

¹⁹³ See Brief of Respondent-Appellee, *supra* note 189, at 11–12.

¹⁹⁴ Brief of Appellant, *supra* note 132, at 20.

¹⁹⁵ *Id.* at 27.

¹⁹⁶ *Henry v. Lungren*, 164 F.3d 1240, 1242 (9th Cir. 1999).

¹⁹⁷ *Hautzenroeder v. Dewine*, 887 F.3d 737, 741 (6th Cir. 2018).

¹⁹⁸ See *Leslie v. Randle*, 296 F.3d 518, 522 (6th Cir. 2002). *But see Doe v. Snyder*, 834 F.3d 696, 705–06 (6th Cir. 2016) (holding that Michigan sex offender registration laws were punitive and therefore violated the *ex post facto* clause of the Constitution).

¹⁹⁹ See *Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987).

²⁰⁰ See *id.*

²⁰¹ See *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998).

V. THE CASE FOR CUSTODY

A. *Circuit Court Precedent*

In adjudicating the question regarding whether a sex offender is in custody, courts generally cite to the Supreme Court's decision in *Jones v. Cunningham* and discuss restraints on liberty.²⁰² Although courts have reached the same results—that sex offender status does not qualify as custody—the reasoning has been inconsistent with Supreme Court precedent. The Supreme Court has indicated in explicit terms that access to habeas corpus is not to be restricted to “narrow,” “formalistic,” or “static” interpretation.²⁰³ The habeas statute does not limit that relief may be granted to those in physical custody. As the *Carafas v. LaVallee* Court noted, the statute is “broad with respect to the relief that may be granted.”²⁰⁴ “It provides that ‘[t]he court shall . . . dispose of the matter as law and justice require.’”²⁰⁵ Specifically, the Court has interpreted custody to mean significant restraints on liberty of the type not shared by the public.²⁰⁶ Despite the Supreme Court's historically generous approach to habeas access, lower courts have failed to discuss this precedent in reaching their conclusions regarding custody and sex offenders.²⁰⁷ While focusing on the concept of liberty, lower courts have engaged in an ever-shifting discussion on whether sex offender laws are punitive or remedial and whether the restrictions imposed on sex offenders are collateral consequences or part of the criminal sentence.²⁰⁸ As will be discussed below, this analysis creates an inconsistent and unrealistic body of law.

One issue that has permeated the analysis of custody as applied to sex offenders, is courts' reliance on precedent, which involved examination of sex offender statutes that were not reflective of those analyzed in the new case. Often courts' conclusions belie the text of the statute at issue and the very real

²⁰² See, e.g., *Leslie*, 296 F.3d at 523; *Williamson*, 151 F.3d at 1183.

²⁰³ *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

²⁰⁴ 391 U.S. 234, 239 (1968).

²⁰⁵ *Id.* (alteration in original) (quoting 28 U.S.C. § 2243 (2012)).

²⁰⁶ *Jones*, 371 U.S. at 242.

²⁰⁷ See *supra* Part III.

²⁰⁸ See, e.g., *Dickey v. Allbaugh*, 664 F. App'x 690, 693–94 (10th Cir. 2016); *Calhoun v. Att'y Gen. of Colo.*, 745 F.3d 1070, 1074 (10th Cir. 2014); *Leslie v. Randle*, 296 F.3d 518, 522–23 (6th Cir. 2002).

liberty interests infringed by the sex offender restrictions.²⁰⁹ Courts generally cite to a series of cases across the circuits that have declined to expand the definition of custody to individuals under a sex offender registration law.²¹⁰ The issue with this analysis is that the statutory schemes at issue across the states vary markedly in their restrictions and requirements. For example, in *Wilson v. Flaherty*, the Fourth Circuit referenced a unanimous body of precedent on the issue of custody as applied to sex offenders.²¹¹ In *Hautzenroeder v. Dewine*, the Sixth Circuit stated that “no court of appeals has held otherwise.”²¹²

For another example, the Wisconsin statute in *Virsnieks v. Smith*, on which the *Wilson* court relied, placed only “minimal restrictions” on liberty through a requirement of location updates that could be accomplished by mail and telephone.²¹³ Based on prior case law, the court concluded that the laws at issue did not impose significant restraints, physical or otherwise.²¹⁴ The Washington state sex offender law, discussed in both *Williamson v. Gregoire* and in *Wilson*, does not require the petitioner to personally appear at a sheriff’s office to register because registration can be accomplished by mail.²¹⁵ The court in *Williamson* specifically noted that the sex offender “law neither targets [the offenders] movement in order to impose special requirements, nor does it demand his physical presence at any time or place. Furthermore, the law does not specify any place in Washington or anywhere else where [the offenders] may not

²⁰⁹ See Tina D. Santos, Note, *Williamson v. Gregoire: How Much Is Enough? The Custody Requirement in the Context of Sex Offender Registration and Notification Statutes*, 23 SEATTLE U. L. REV. 457, 477–79 (1999).

²¹⁰ See *Bonser v. Dist. Att’y Monroe Cty.*, 659 F. App’x 126, 128 (3d Cir. 2016); *Dickey*, 664 F. App’x at 693–94; *Calhoun*, 745 F.3d at 1073–74; *Wilson v. Flaherty*, 689 F.3d 332, 336, 338 (4th Cir. 2012); *Virsnieks v. Smith*, 521 F.3d 707, 713–14 (7th Cir. 2008); *Leslie*, 296 F.3d at 522; *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001); *McNab v. Kok*, 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam); *Williamson v. Gregoire*, 151 F.3d 1180, 1183–84 (9th Cir. 1998).

²¹¹ *Wilson*, 689 F.3d at 337.

²¹² *Hautzenroeder v. Dewine*, 887 F.3d 737, 741 (6th Cir. 2018). *But see* Piasecki v. Court of Common Pleas, No. 16-4175, 2019 WL 960003, at *7–9 (3rd Cir. Feb. 27, 2019) (finding that the sex offender requirements could support habeas corpus jurisdiction because such requirements constituted “custody”).

²¹³ *Virsnieks*, 521 F.3d at 719–20; *see also Wilson*, 689 F.3d at 337–38. Likewise, in *McNab v. Kok*, the Ninth Circuit found that Oregon’s law does not place the petitioner in custody because the law does not place restraint on physical liberty. *See* 170 F.3d at 1247.

²¹⁴ *Virsnieks*, 521 F.3d at 719–20.

²¹⁵ *Wilson*, 689 F.3d at 338; *Williamson*, 151 F.3d 1180, 1184 (9th Cir. 1998).

go.”²¹⁶ Washington’s sex offender law is particularly troubling because it is so drastically different from more recent sex offender registration laws;²¹⁷ however, courts continue to cite to and rely upon it.²¹⁸ In assessing these cases, it seems that if specific restrictions lacking in *Williamson* were present in other state statutes, then those conditions would qualify as custody. All of these restrictions were present in the Ohio statute under review in *Hautzenroeder*.²¹⁹ There, the petitioner needed to personally appear before the sheriff to register every ninety days; could not establish her residence within 1,000 feet of a school, day care, or preschool; and could not leave the jurisdiction for more than three days without registering in the county to which she traveled;²²⁰ however, courts have failed to extend the custody analysis to petitioners subject to those restrictions and requirements. For example, in *McNab v. Kok*, the Ninth Circuit reviewed a statute from Oregon and rested upon prior conclusions that the laws at issue did not impose significant restraints, physical or otherwise.²²¹ In contrast, the Washington sex offender law did not require offenders to personally appear at a sheriff’s office to register because registration could be accomplished by mail.²²²

The requirements at issue in *Calhoun v. Attorney General of Colorado* were much less restrictive than those discussed in *Wilson* or cited to in *Hautzenroeder*.²²³ The requirements at issue in *Calhoun*, under Colorado law, required a person convicted of a qualifying sex offense to perform the following: (1) “appear annually in person before the local sheriff to be photographed and fingerprinted,” (2) “provide [a] physical address, place of employment, vehicle information, and e-mail and other internet identifiers,” and (3) “reregister within five days of any change.”²²⁴

²¹⁶ 151 F.3d at 1184.

²¹⁷ See, e.g., OHIO REV. CODE ANN. §§ 2950.034, 2950.04, 2950.07 (West 2018). The Ohio sex offender law contains all of the restrictions referenced in *Williamson*. See 151 F.3d at 1183–84.

²¹⁸ See, e.g., *Wilson*, 689 F.3d at 337–38.

²¹⁹ See Brief of Appellant, *supra* note 132, at 17–18; OHIO REV. CODE ANN. § 2950.034, 2950.04, 2950.07. Similar laws have been enacted elsewhere. See also VA. CODE ANN. §§ 9.1-903, -906 to -907 (West 2018); *Wilson*, 689 F.3d at 334.

²²⁰ See *supra* notes 133–34 and accompanying text.

²²¹ 170 F.3d 1246, 1247 (9th Cir. 1999) (per curiam); see also, *Williamson*, 151 F.3d at 1184.

²²² *Williamson*, 151 F.3d at 1184.

²²³ 745 F.3d 1070, 1072–73 (10th Cir. 2014).

²²⁴ *Id.* at 1073.

Furthermore, the sheriff must verify any changes in a qualified convicted sex offender's information.²²⁵ The Colorado statute contained no residency restrictions or annual verification, unlike Ohio's required verification every ninety days—in two jurisdictions for the petitioner in *Hautzenroeder*—as well as wide public dissemination requirements.²²⁶

The statute at issue in Oklahoma more closely resembles the statute in Ohio. In reviewing Oklahoma's sex offender statute in the context of the custody requirement, the Tenth Circuit concluded that registrants were "free to live, work, travel, associate, and engage in lawful activities without government approval."²²⁷ This finding is curious given the scope of the requirements in the Oklahoma registration statute.²²⁸ In Oklahoma, sex offenders are banned from living within 2,000 feet of a school, "educational institution," campsite used for children, park, or child care facility.²²⁹ Registrants are also banned from living in the same house together.²³⁰ Those subject to these requirements are prohibited from loitering within 500 feet of a school, child care center, playground, or park.²³¹ Offenders are required to register depending on how they have been categorized.²³² This registration requirement could be as often as every ninety days for life.²³³ Registrants must apprise the sheriff, in person, within three days of establishing a new residence, changing jobs, or enrolling in school.²³⁴ The breadth of the information registrants are required to disclose is expansive—as are the dissemination protocols.²³⁵ Further, in Oklahoma certain

²²⁵ *Id.*

²²⁶ OHIO REV. CODE ANN. § 2950.06(B)(3) (West 2018).

²²⁷ *Dickey v. Allbaugh*, 664 F. App'x 690, 693 (10th Cir. 2016). Although the Tenth Circuit's discussion does not discuss the details of the statute at length, the Report and Recommendation of the Magistrate Judge does focus on the law. *Dickey v. Patton*, No. Civ-15-685-M, 2015 WL 8592709, at *2-3 (W.D. Okla. Sept. 28, 2015) (report and recommendation), *adopted by* 2015 WL 8494009 (W.D. Okla. Dec. 10, 2015). The court appears to read a restriction on travel requirement into the custody requirement of 28 U.S.C. § 2254, which is neither in the habeas statute, nor in Supreme Court precedent. *Id.* at *3.

²²⁸ *See generally* OKLA. STAT. ANN. tit. 21, § 1125 (West 2018); *id.* tit. 57, §§ 581–590.2.

²²⁹ *Id.* § 590.

²³⁰ *Id.* § 590.1(A).

²³¹ *Id.* tit. 21, § 1125(A)(1).

²³² *Id.* tit. 57, § 583(C)–(D).

²³³ *Id.* §§ 583(C), 584(5)(c).

²³⁴ *Id.* § 583(F).

²³⁵ *Id.*

classes of offenders are required to obtain a special driver's license identification card that is branded with the words "sex offender."²³⁶ Failure to comply with the statutory residency requirements results in a felony charge carrying one to three years in prison.²³⁷ A court's finding that registrants are free to work, travel, and engage in lawful activities without government approval is contradicted by the requirements of the Oklahoma registration statute.

As discussed above, many registrants are not free to live where they choose and are restricted as to where and how they can go about the other normal functions in their lives. The Third Circuit analyzed the Pennsylvania statute in *Bonser v. District Attorney Monroe County*.²³⁸ There, the court focused solely on the duty to register.²³⁹ None of the other liberty restrictions discussed above were present in that case. All of these cases, routinely cited by courts, are distinguishable on the face of the statutes.

In denying sex offender petitioners access to habeas review, the circuit courts have cited to each other in reaching their uniform determination that courts lack jurisdiction; however, references to the realities of sex offender registration obligations and restrictions call into question the courts' conclusions. Sex offender laws differ across the states: Many states impose restrictions and requirements that significantly restrain an individual's liberty. Also, courts have failed to acknowledge the social science research regarding the impact of sex offender restrictions. Reference to the actual requirements of the particular statute at issue and an authentic evaluation of the practicalities of the requirements are necessary in order to achieve the justice envisioned by constitutional guarantees to habeas corpus.

B. Collateral Consequences

In addition to the courts' failure to consider the statutory distinctions in the cases relied upon, the legal analysis around the issue is a moving target. For example, the Ninth Circuit found that the Washington state statute was "regulatory and not

²³⁶ *Id.* tit. 47, § 6-111(E).

²³⁷ *Id.* tit. 57, § 590(D).

²³⁸ 659 F. App'x 126, 127 (3d Cir. 2016).

²³⁹ *Id.* at 128–30.

punitive,” signaling that this was a relevant consideration.²⁴⁰ The Tenth Circuit declared that Oklahoma’s statute was “not a continuation of punishment.”²⁴¹ In *Leslie v. Randle*, the Sixth Circuit focused on the fact that the sex offender law at issue was not punitive, but remedial.²⁴² In denying the petitioner’s right to habeas because the petitioner was not in custody, the court held that the sex offender statute was a form of civil regulation.²⁴³ To make this determination, the court relied on the interpretation of the Ohio Supreme Court that the statute was remedial rather than punitive.²⁴⁴ Subsequently, the Ohio Supreme Court reversed *State v. Cook* after the legislature enacted a new, more restrictive, sex offender registration and requirement statute.²⁴⁵ In *State v. Williams*, the court found that the sex offender law in Ohio was punitive.²⁴⁶ While the Sixth Circuit acknowledged this change in *Hautzenroeder*, it declined to change its position on the issue of custody.²⁴⁷ Instead, the court in *Hautzenroeder* found the petitioner’s appeal did not “hinge on the punitive nature of the statute.”²⁴⁸ Therefore, the Ohio Supreme Court’s determination of punitiveness was irrelevant because the issue in *Williams* was whether the sex offender statute violated the *ex post facto* clause.²⁴⁹

At other times, courts have determined that the sex offender statute at issue was a collateral consequence of the conviction.²⁵⁰ Historically, Supreme Court precedent allowed that legal consequences, which arose outside of the conviction, satisfied the custody requirement;²⁵¹ however, the *Maleng v. Cook* Court

²⁴⁰ *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998).

²⁴¹ *Dickey v. Allbaugh*, 664 F. App’x 690, 694 (10th Cir. 2016).

²⁴² 296 F.3d 518, 522 (6th Cir. 2002).

²⁴³ *Id.* at 523.

²⁴⁴ *Id.* at 522–23; see *State v. Cook*, 700 N.E.2d 570, 585 (Ohio 1998) (holding that the Ohio sexual-predator statute “serves the solely remedial purpose of protecting the public” and that “there is no clear proof that [the statute] is punitive in its effect.”).

²⁴⁵ See *State v. Williams*, 952 N.E.2d 1108, 1112–13 (Ohio 2011).

²⁴⁶ *Id.* at 1112.

²⁴⁷ *Hautzenroeder v. Dewine*, 887 F.3d 737, 744 (6th Cir. 2018).

²⁴⁸ *Id.*; see also Kerri L. Arnone, Note, *Megan’s Law and Habeas Corpus Review: Lifetime Duty with No Possibility of Relief*, 42 ARIZ. L. REV. 157, 166–77 (2000) (discussing the Court’s changing standards for custody determinations).

²⁴⁹ *Hautzenroeder*, 887 F.3d at 744.

²⁵⁰ *Virsnieks v. Smith*, 521 F.3d 707, 718 (7th Cir. 2008).

²⁵¹ See, e.g., *United States v. Morgan*, 346 U.S. 502, 510–11 (1954); *St. Pierre v. United States*, 319 U.S. 41, 43 (1943) (per curiam) (holding that requiring a person

departed from this interpretation and determined certain consequences of a conviction to be collateral, namely those that are not part of a criminal conviction.²⁵² Consequences such as the loss of voting rights and the loss of the right to serve on a jury, among others, do not satisfy the custody requirements of 28 U.S.C. § 2241.²⁵³ The Supreme Court explored this issue in *Maleng*, finding that once a sentence has completely expired, the collateral consequences of the conviction do not give rise to custody.²⁵⁴ Collateral consequences are considered civil in nature²⁵⁵ and have been defined as those that arise by operation of law, and are thus outside the purview of the sentencing court.²⁵⁶ Further, a person given an “unconditional discharge” is no longer in custody.²⁵⁷ Also, a petitioner is not in custody simply because of the potential that the prior conviction may be used to enhance sentences imposed for any subsequent crimes of which he is convicted.²⁵⁸ This is true because such “a habeas petitioner suffers no present restraint from a conviction.”²⁵⁹ In contrast, a

to testify before the grand jury or be committed if he refuses satisfies the custody requirement).

²⁵² See 490 U.S. 488, 492 (1989) (per curiam); see also *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002) (“A collateral consequence is one that ‘remains beyond the control and responsibility of the district court in which the conviction was entered.’” (quoting *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000))).

²⁵³ *El-Nobani*, 287 F.3d at 421; *Lillios v. New Hampshire*, 788 F.2d 60, 61 (1st Cir. 1986) (per curiam) (concerning the denial of a driver’s license); see also *Lefkowitz v. Fair*, 816 F.2d 17, 20 (1st Cir. 1987) (addressing the loss of a professional license); *Harts v. Indiana*, 732 F.2d 95, 96–97 (7th Cir. 1984) (per curiam); *Ginsberg v. Abrams*, 702 F.2d 48, 49 (2d Cir. 1983) (per curiam); *Harvey v. South Dakota*, 526 F.2d 840, 841 (8th Cir. 1975) (per curiam); *Edmunds v. Won Bae Chang*, 509 F.2d 39, 41 (9th Cir. 1975) (discussing economic loss that resulted from a conviction); *Westberry v. Keith*, 434 F.2d 623, 624–25 (5th Cir. 1970) (per curiam).

²⁵⁴ *Maleng*, 490 U.S. at 492. The breadth of collateral consequences to which criminal defendants can be subjected is broad, including permanent changes in legal status, disenfranchisement, registration, community notification, ineligibility to work or live in certain places, loss of professional licenses, and loss of child custody. Professor Gabriel J. Chin has referred to these consequences as civil death. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012). Given the rise in collateral consequences since *Maleng*, it may be time to re-examine the Court’s position that collateral consequences in general are an insufficient restraint on liberty to satisfy the custody requirement.

²⁵⁵ *United States v. Ward*, 448 U.S. 242, 249, 254 (1980).

²⁵⁶ See *El-Nobani*, 287 F.3d at 421.

²⁵⁷ See *Maleng*, 490 U.S. at 491–92 (citing *Carafas v. LaVallee*, 391 U.S. 234, 237–38 (1968)).

²⁵⁸ *Id.* at 492.

²⁵⁹ *Id.*

person like the parolee in *Jones*, whose release from physical confinement under the sentence in question is not unconditional and who faces ongoing restraints, may seek habeas relief.²⁶⁰

In making a determination that the sex offender designation was a collateral consequence, neither the Fourth Circuit nor the Sixth Circuit addressed the fact that the sex offender requirements were part of the criminal sentence.²⁶¹ Both the Virginia statute and the Ohio statute required the sex offender designation be imposed as part of the sentencing entry as a condition precedent to the imposition of the obligation.²⁶² Similarly, a recent Tenth Circuit case found that the sex offender designation was a collateral consequence without discussion of, or application to, the statute at issue in the case.²⁶³ But the application of the collateral consequence doctrine to sex offender registrants is not appropriate in all cases. In many states, sex offender restraints and restrictions are part of the sentencing entry and remain in the purview of the sentencing court. The restrictions are not mere nuisances and cannot be analogized to the loss of voting rights or the right to serve on a jury. A court's reliance on the collateral consequence analysis is no longer suitable for many of these statutes.

C. *Restraints on Liberty*

Although the Supreme Court has described certain consequences of a conviction as collateral, it has not held that nonphysical restraints are irrelevant to the custody determination. Substantial, but nonphysical, restraints on liberty are relevant. The *Carafas* Court found that when a conviction leaves a habeas petitioner in a position where “[h]e is suffering, and will continue to suffer, serious disabilities,” such a person is entitled to habeas consideration on the merits.²⁶⁴ The *Carafas* Court went on to say that “[t]here is no need in the statute, the Constitution, or sound jurisprudence for denying to [the]

²⁶⁰ See *id.* at 491 (citing *Jones v. Cunningham*, 371 U.S. 236 (1963)).

²⁶¹ *Hautzenroeder v. Dewine*, 887 F.3d 737, 741–42 (6th Cir. 2018); *Wilson v. Flaherty*, 689 F.3d 332, 338 (4th Cir. 2012).

²⁶² OHIO REV. CODE ANN. § 2929.19(B)(3)(a) (West 2018); VA. CODE ANN. § 9.1-903(B) (West 2018).

²⁶³ See *Dickey v. Allbaugh*, 664 F. App'x 690, 693–94 (10th Cir. 2016); see also *Dickey v. Patton*, No. CIV-15-685-M, 2015 WL 8592709, at *3–4 (W.D. Okla. Sept. 28, 2015) (report and recommendation), *adopted by* 2015 WL 8494009 (W.D. Okla. Dec. 10, 2015).

²⁶⁴ *Carafas v. LaVallee*, 391 U.S. 234, 239 (1968).

petitioner his ultimate day in court.”²⁶⁵ Or, put another way, the Great Writ “is not now and never has been a static, 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 [sic].”²⁶⁶

Courts have recognized that while an individual’s custody may begin when he is sent to prison, it extends beyond those confines. Where the state actively supervises a person’s movements even though he is not physically restrained, “[h]e cannot come and go as he pleases.”²⁶⁷ The thrust of the decision in *Jones* is that the restrictions imposed on the petitioner “significantly restrain [the] petitioner’s liberty to do those things which in this country free men are entitled to do.”²⁶⁸ The courts have affirmatively determined that persons released on their own personal recognizance pending trial are in custody. While a “parolee is generally subject to greater restrictions on his liberty of movement than a person released on bail or his own recognizance,”²⁶⁹ petitioners in the latter category nonetheless remain in custody because their freedom “rests in the hands of state judicial officers.”²⁷⁰ In *Jones* and *Hensley v. Municipal Court*, the imposition on the petitioner’s free movement was magnified by the state’s active oversight regime, including the threat of future imprisonment.²⁷¹ In both cases, the petitioners were subject to rearrest for failure to appear as required.²⁷²

²⁶⁵ *Id.*

²⁶⁶ *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

²⁶⁷ *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973).

²⁶⁸ *Jones*, 371 U.S. at 243. In applying this understanding, the Court followed the common law tradition that recognized liberty restraints to encompass both physical imprisonment and substantial oversight by the state or a private party. MATTHEW BACON WITH HENRY GWYLLIM & CHARLES EDWARD DODD, 4 A NEW ABRIDGMENT OF THE LAW 563 (Philadelphia, T. & J. W. Johnson & Co. 1876). The British Habeas Corpus Act of 1679 provided that “any Sheriffe or Sheriffes Goaler Minister or other Person whatsoever for any person in his or their Custody” could be required to bring a “[p]artie soe committed or restrained” before a magistrate to review the legality of his custody. Habeas Corpus Act of 1679, 31 Car. 2, c. 2 (Eng.). Habeas corpus thus has been used by a husband to win the release of his wife from the supervision of her guardians, by a father seeking the release of his underage son from the supervision of the military, and by guardians seeking the return of wrongfully taken children. BACON ET AL., *supra*, at 570 (quoting *United States v. Anderson*, 24 F. Cas 813 (C. C. D. Tenn. 1812) (No. 14, 449)).

²⁶⁹ *Hensley*, 411 U.S. at 348.

²⁷⁰ *Id.* at 351.

²⁷¹ *Id.*; *Jones*, 371 U.S. at 241–43.

²⁷² *See Hensley*, 411 U.S. at 348; *Jones*, 371 U.S. at 242.

Similarly, many sex offender registrants are subject to rearrest and face potential prison time for failing to comply with the sex offender registration requirements.²⁷³ A unanimous Court in *Jones* focused the inquiry on whether the petitioner faced restraints on liberty “because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally.”²⁷⁴ In determining whether restrictions associated with parole satisfy the custody requirement, the Court considered both physical and nonphysical restrictions: restrictions on travel; permission to drive a car; “periodical[] report[s]” to a parole officer; and the “admonish[ment] to keep good company and good hours, work regularly, keep away from undesirable places, and live a clean, honest, and temperate life.”²⁷⁵ The Court also emphasized the threat of criminal consequences for non-compliance.²⁷⁶

Although the Supreme Court and lower courts have determined that probation, parole, and release on bond awaiting trial all satisfy the requirements of the habeas statute, many of the sex offender registration schemes enacted by state statute impose a more significant restraint on liberty; indeed, the Sixth Circuit examined a substantially similar registration scheme in the state of Michigan and made significant findings.²⁷⁷ Specifically, that Court found that the sex offender registration law at issue resembled the “punishment of parole/probation.”²⁷⁸ The Sixth Circuit relied on a previous Supreme Court case that seriously considered the claim that an Alaska statute resembled parole/probation although that statute involved nothing more than reporting requirements.²⁷⁹ The Court acknowledged the argument had some force, but concluded that it was ultimately dissimilar because, unlike parolees, “offenders subject to the [Alaska statute] are free to move where they wish and to live and work as other citizens, with no supervision.”²⁸⁰ In reviewing a

²⁷³ See, e.g., OHIO REV. CODE ANN. § 2950(f) (West 2018); VA. CODE ANN. § 9.1-900 (West 2018).

²⁷⁴ *Jones*, 371 U.S. at 242.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Doe v. Snyder*, 834 F.3d 696, 703 (6th Cir. 2016). While this case involved the determination that the Michigan sex offender registration statute is punitive and, thus, cannot be applied retroactively, it is instructive in analyzing this Court’s discussion regarding the statute’s severe restraints on liberty. *Id.* at 701–03.

²⁷⁸ *Id.* at 702–03.

²⁷⁹ *Smith v. Doe*, 538 U.S. 84, 101 (2003).

²⁸⁰ *Id.*

more recent sex offender law in Michigan, the Sixth Circuit drew a contrast to the Alaska law.²⁸¹ Specifically, the Sixth Circuit noted:

registrants [in Michigan] [were] subject to numerous restrictions on where they can live and work and, much like parolees, they must report in person, rather than by phone or mail. Failure to comply can be punished by imprisonment, not unlike a revocation of parole. And while the level of individual supervision is less than is typical of parole or probation, the basic mechanism and effects have a great deal in common. In fact, many of the plaintiffs have averred that [the sex offender statute's] requirements are more intrusive and more difficult to comply with than those they faced when on probation.²⁸²

Many states have statutes that reflect the very regulatory oversight described. For example, the Ohio sex offender registration scheme restrains a petitioner's liberty to choose where to live.²⁸³ A designated sex offender is prohibited from establishing a residence or occupying residential premises within 1,000 feet of school premises, day cares, or preschools.²⁸⁴ This limits a petitioner's freedom of movement in the most fundamental way, restricting her habitation to certain segments of society. This restriction is far greater than that imposed on probationers or those awaiting trial who are free to decide where to establish their residence.

In most legislative schemes, registration is compulsory and violators are subject to substantial prison time for failure to register.²⁸⁵ In Ohio, those subject to the law must register in person with the sheriff of the county in which they reside, work, and go to school every ninety days for life.²⁸⁶ If a petitioner were to work in one county, live in another and go to school in a third that would require three visits to separate sheriff's offices every ninety days. As one judge noted, the practical implications of this requirement amount to a "continuing, intrusive, and humiliating regulation of the person himself."²⁸⁷ In-person

²⁸¹ *Snyder*, 834 F.3d at 703.

²⁸² *Id.*

²⁸³ OHIO REV. CODE ANN. § 2950.034(A) (West 2018).

²⁸⁴ *Id.*

²⁸⁵ *See, e.g.*, VA. CODE ANN. §§ 9.1-901, -902, -903, -904, 18.2-472.1 (West 2018).

²⁸⁶ OHIO REV. CODE ANN. § 2950.11(D)(2) (West 2018).

²⁸⁷ *Doe v. Att'y Gen.*, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring) ("To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle

reporting requirements dictate that the offender must appear in particular places at particular times; this requirement is indicative of those requirements imposed on probationers and parolees.²⁸⁸ The impact of these restrictions should be discussed and acknowledged by the courts analyzing the issue of custody. As noted by Professor Logan, a scholar in criminal law, criminal procedure, and sentencing, "[t]he constant necessity to apprise law enforcement of one's whereabouts under threat of prosecution represents a unique encumbrance, which chills registrants' freedom of movement, affecting temporary visits to other jurisdictions and most certainly permanent moves."²⁸⁹

Furthermore, the right to travel is a fundamental right.²⁹⁰ Under many registration laws, offenders may not leave the county for more than three days without registering in person with the county where they travel, further restricting their freedom of movement.²⁹¹ "It is inconceivable to think that one who must, as his first act, go to local law enforcement and announce that he is a felon convicted of a sex offense will not be deterred from moving in order to avoid divulging that ignominious event."²⁹² The Supreme Court has recognized that a

quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government."

²⁸⁸ See *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973) (discussing the requirement in the context of a defendant, who was in custody, released on his own recognizance pending imposition of a sentence and who was obligated to appear at times and places ordered by the court); *Jones v. Cunningham*, 371 U.S. 236, 242–43 (1963) (stating that a parolee, who was in custody, "must periodically report" to a parole officer).

²⁸⁹ Logan, *supra* note 189, at 184–85.

²⁹⁰ See, e.g., *Jones v. Helms*, 452 U.S. 412, 417–19 (1981) (describing cases about the right, and stating that it is "well settled that the right of a United States citizen to travel from one State to another and to take up residence in the State of his choice" is constitutionally protected and that the right's "fundamental nature has consistently been recognized"); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 254–55 (1974) ("The right of interstate travel has repeatedly been recognized as a basic constitutional freedom.").

²⁹¹ See, e.g., OHIO REV. CODE ANN. § 2950.04 (West 2018); VA. CODE ANN. § 9.1-905 (West 2018); WYO. STAT. ANN. § 7-19-302 (West 2018) (within three days). See also CAL. PENAL CODE § 290 (West 2018) (within five days); COLO. REV. STAT. § 16-22-108 (West 2018) (within five days).

²⁹² *State v. Taylor*, 835 P.2d 245, 250 (Wash. Ct. App. 1992) (Agid, J., dissenting); cf. *City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (identifying the "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution." (quoting *Williams v. Fears*, 179 U.S. 270, 274 (1900))). See generally Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification*

substantial burden on movement might be so severe as to create “custody” for habeas purposes, even in the absence of an outright prohibition on movement.²⁹³ Despite this infringement on registrants’ liberty interests, courts have failed to acknowledge this reality in assessing the impact of sex offender laws.²⁹⁴

Parental rights and the parent-child relationship are also fundamental liberty interests.²⁹⁵ Many sex offender registration schemes contain presence restrictions, which prohibit offenders from entering schools, parks, playgrounds, or other locations where children are likely to be present.²⁹⁶ While serving to limit a registrant’s freedom of movement to areas that free people are allowed to visit, these restrictions are also severe restraints on fundamental liberty interests individuals have in parenting their children. Even in states where presence restrictions are not written into the statute, offenders are banned from certain locations by the rules of the organization or institution.²⁹⁷

Laws, 89 J. CRIM. L. & CRIMINOLOGY 1167 (1999) (discussing generally the similar impact of community notification laws).

²⁹³ *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (recognizing that a financial disincentive to move can implicate the fundamental right to travel).

²⁹⁴ *See, e.g., Hautzenroeder v. Dewine*, 887 F.3d 737 (6th Cir. 2018) (failing to discuss the requirement under Ohio law that registrants must register within three days of entering a new jurisdiction).

²⁹⁵ *E.g., Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“[F]reedom of personal choice in matters of family life is a fundamental liberty interest”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the Fourteenth Amendment protects “the right of the individual . . . to marry, establish a home[,] and bring up children,”); *see also Bowen v. Gilliard*, 483 U.S. 587, 612 (1987) (Brennan, J., dissenting) (“We have . . . been vigilant in ensuring that government does not burden the ability of parent and child to sustain their vital connection” because their relationship is fundamental to family life).

²⁹⁶ *See, e.g., ALA. CODE § 15-20A-17* (2018) (prohibiting adult sex offenders convicted for sex offenses involving a minor from “loitering” within 500 feet of a school, child care facility, playground, park, athletic field or facility, school bus stop, college or university, or any child-focused business); *ARK. CODE ANN. §§ 5-14-132 to 134* (West 2018) (prohibiting certain offenders from knowingly entering swimming areas and playgrounds in state parks, local government operated water parks, and in certain circumstances, public schools); *CAL. PENAL CODE §§ 626.81, 3053.8* (West 2018) (prohibiting registrants from entering schools without permission and parolees with convictions involving minors under 14 from entering parks without permission); *DEL. CODE ANN. tit. 11, § 1112* (West 2018) (stating that sex offenders may not reside or loiter within 500 feet of school property).

²⁹⁷ *See* Brief of Appellant, *supra* note 132, at 20 (arguing that the petitioner was banned from the premises of her daughter’s school).

In sum, sex offenders often face more substantial restraints on liberty than persons on parole or probation, who, since *Jones*, are routinely held to be in custody;²⁹⁸ indeed, even persons with more limited and transitory restraints on liberty have been held "in custody." For example, the Third Circuit found that a person sentenced to community service was in custody, notwithstanding the following: a lack of continual supervision; a three-year period in which to complete the sentence; options as to type and hours of service; and no threat of incarceration for non-performance.²⁹⁹ The Ninth Circuit found that an individual sentenced to fourteen hours at an alcohol rehabilitation program, which could be scheduled over several days, satisfied the custody requirement because it required petitioner's "physical presence at a particular place."³⁰⁰ Sex offender registration laws limit where offenders can live and where they can go, and these laws require their presence at the sheriff's office on a regular basis for life.³⁰¹ The extension of reporting requirements from a fixed period of time to a lifetime obligation is one example of how the increasingly pervasive and severe restraints on sex offenders go beyond the restraints imposed on probationers and parolees for other crimes.

V. REMEDIES

Courts' unwillingness to acknowledge the realities of the sex offender requirements creates an untenable condition for offenders seeking relief from those restrictions. The only means

²⁹⁸ See *Jones v. Cunningham*, 371 U.S. 236, 240–43 (1963). Others have argued this position and called upon the courts to reevaluate the application of the custody requirement in light of the realities of the actual liberty restraints imposed by sex offender registration requirements. See Kimberley A. Murphy, Note, *The Use of Federal Writs of Habeas Corpus to Release the Obligation To Report Under State Sex Offender Statutes: Are Defendants "in Custody" for Purposes of Habeas Corpus Review?*, 2000 L. REV. M.S.U.-D.C.L. 513, 517–18, 541 (arguing that sex offenders should be able to use federal habeas review to attack sex offender registration requirements); Santos, *supra* note 209, at 459 (arguing that the court erred in holding that a petitioner subject to Washington's sex offender registration was not "in custody" for habeas purposes).

²⁹⁹ See, e.g., *Barry v. Bergen Cty. Prob. Dep't*, 128 F.3d 152, 161–62 (3d Cir. 1997).

³⁰⁰ *Dow v. Circuit Court*, 995 F.2d 922, 922–23 (9th Cir. 1993) (per curiam).

³⁰¹ For example, in Ohio the law was amended from a regiment that required registration for a specific number of years and/or that allowed offenders to petition for release from the requirements to a system that required compliance with the restrictions and registration requirements for life. See *State v. Williams*, 952 N.E.2d 1108, 1115–17 (Ohio 2011) (O'Donnell, J., dissenting) (discussing revisions to the statutory scheme and finding the new statute to be punitive rather than remedial).

left available to sex offenders seeking habeas relief to attack the conviction is to violate the terms of the sex offender registration requirement, which establishes a new conviction and a new prison or probation sentence.³⁰² The Ninth Circuit determined that a “habeas petitioner is ‘in custody’ for the purposes of challenging an earlier, expired rape conviction, when he is incarcerated for failing to comply with a state sex offender registration law because the earlier rape conviction ‘is a necessary predicate’ to the failure to register charge.”³⁰³ Not only does this undermine judicial economy and finality of convictions that the Court has espoused as important considerations, but also it violates notions of fundamental fairness. This is especially true in cases like *Wilson v. Flaherty* where the petitioner has demonstrated claims of actual innocence.³⁰⁴ The petitioner in *Wilson* aptly characterized this result as a “Kafkaesque regime” where a potentially innocent petitioner is only permitted to challenge the burdens of a sex offender statute by committing a new crime.³⁰⁵ As the legal analysis is currently positioned, this is the only avenue available to individuals under a sex offender registration law.

Courts created a legal fiction to address the issue.³⁰⁶ The legal fiction would treat sex offender registration requirements as terms of probation and extend habeas review to petitioners.³⁰⁷ This resolution was offered in the wake of the Fourth Circuit’s decision in *Wilson* as a way to bring habeas claims of actual innocence within the purview of the court and to avoid the unjust result in that case.³⁰⁸ While this solution would be feasible, the author notes that the Supreme Court has expressly declined to allow for the use of legal fiction in the context of habeas litigation.³⁰⁹

³⁰² See *Zichko v. Idaho*, 247 F.3d 1015, 1019 (9th Cir. 2001).

³⁰³ *Id.* But see *Daniels v. United States*, 532 U.S. 374 (2001) (holding that previous convictions used to enhance a new sentence could not be used to attack a federal sentence enhancement where the petitioner was no longer in custody under the previous convictions); *Lackawanna Cty. Dist. Att’y v. Coss*, 532 U.S. 394 (2001).

³⁰⁴ *Wilson v. Flaherty*, 689 F.3d 332, 339 (4th Cir. 2012).

³⁰⁵ See Petition for Writ of Certiorari at 18, *Wilson*, 689 F.3d 332 (No. 12-986).

³⁰⁶ Recent Case, *Wilson v. Flaherty*, *supra* note 150, at 2105.

³⁰⁷ *Id.* at 2111.

³⁰⁸ *Id.* at 2105.

³⁰⁹ *Id.* at 2111 (citing *Fay v. Noia*, 372 U.S. 391, 439 (1963)).

This conundrum could be resolved by action on the part of the legislature. Congressional action could be taken to expand the definition of custody and the jurisdictional reach of the federal courts. The revised statute could explicitly include certain types of sex offender registration schemes in the definition of custody; however, this approach may be as inadvisable as it is unlikely. Given the ever-changing scope and reach of sex offender laws and legal consequences of convictions, determinations about what precisely satisfies the requirement may be properly left in the hands of courts. Also, considering the legislature's demonstrated desire to limit access to habeas relief for state petitioners, coupled with the inability of the legislature as it is currently constituted to pass meaningful legislation, this resolution appears to be a futile one.³¹⁰

The most reasonable solution is that courts acknowledge the real restrictions and requirements of many states' sex offender laws. The current practice of citing to precedent that contains legislation, which is materially different from that before the court, results in incongruous and unjust results. Social science researchers, legal commentators, practitioners and those subjected to these laws have provided data and analysis to demonstrate that sex offender designation laws are more than a mere nuisance. Using the framework established by the Supreme Court in *Jones v. Cunningham*, and its progeny, courts can and should recognize the very real similarities between probation, parole, and sex offender requirements. The lifetime restraints on liberty for the sex offender designee are more burdensome than those suffered by individuals required to perform community service or to attend alcohol rehabilitation classes, and courts should recognize them as such.

CONCLUSION

The jurisprudence created by the federal circuit courts has failed to keep pace with the constantly changing sex offender statutes. These statutes have consistently evolved in a direction that is more punitive, wider in scope, and of a longer duration. The majority of the circuit courts' current application of the

³¹⁰ See Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 10–11, 55–56 (2010) (discussing AEPDA implementation and implications); Dina Titus, *Is Congress the "Broken Branch" of Government?*, 49 POL. SCI. & POL. 490, 493–94 (2016) (arguing that increasing partisanship prevents congressional action generally).

custody requirement to sex offender registrants is incompatible with the Supreme Court's interpretations of custody and ignores the reality of the restraints imposed by sex offender legislation. The restrictions and obligations imposed on registrants are burdensome and have significant restraints on their liberty interests. This condition satisfies the jurisdictional requirement of custody, and those laboring under these designations should have access to federal review.