

COMMENT

Let the Burden Fit the Crime: Extending Proportionality Review to Sex Offenders

Draconian restrictions on the activities and privacy of convicted sex offenders are a new, and troublesome, trend. In 1994 and 2006, following a national dialogue about crimes against children sparked by several high-profile incidents, Congress passed two laws requiring states to register and regulate sex offenders residing within their borders.¹ States and municipalities soon caught on, and deepened restrictions. In the last five years alone, local governments have forbidden sex offenders to live within 2,000 feet of schools;² “be” within 500 feet of parks or movie theaters;³ enter public libraries;⁴ drive buses or taxis;⁵ photograph or film minors;⁶ and use social networking websites like Facebook.⁷ Others have required sex offenders to advertise their

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1. See Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, §§ 101-31, 120 Stat. 587, 590-601 (2006) (to be codified at 42 U.S.C. §§ 16901-29); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038-42 (1994), *repealed by* Adam Walsh Child Protection and Safety Act § 129, 120 Stat. at 600.
 2. See IOWA CODE ANN. § 692A.114 (West 2009) (imposing this restriction on sex offenders who have committed an aggravated offense against a minor).
 3. See NEV. REV. STAT. ANN. § 213.1243(4) (West 2009) (imposing this restriction on “Tier 3” sex offenders who lack the permission of their “parole and probation officer”).
 4. See *Doe v. City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012) (striking down on First Amendment grounds a 2008 Albuquerque “administrative instruction” that banned registered sex offenders from using public libraries).
 5. LA. REV. STAT. ANN. § 15:553(A) (2012).
 6. KY. REV. STAT. ANN. § 17.546(3) (West 2013).
 7. *Id.* § 17.546; N.C. GEN. STAT. ANN. § 14-202.5 (West 2009) (imposing this restriction on those convicted of sexually violent offenses or crimes against children).

status on driver's licenses⁸ or social networking profiles;⁹ wear GPS bracelets at their own expense;¹⁰ notify local police when present in any county within the state for longer than ten days;¹¹ provide notice to all new neighbors within a roughly quarter-mile radius when they move;¹² and pay up to \$100 annually to maintain sex offender registries.¹³ These burdens typically last for a decade or for life, depending on the jurisdiction and the type of crime committed.¹⁴

Some sex offender restrictions (SORs) can be harder to comply with than is apparent at first glance. Residency restrictions, for example, can create overlapping forbidden zones that bar sex offenders from living in entire cities.¹⁵ A few years ago in Miami, sex offenders were known to camp under a bridge, one of few locations outside all exclusion zones.¹⁶ Violating these restrictions can result in a felony conviction and as many as ten years in prison.¹⁷

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8. LA. REV. STAT. ANN. § 32:412(I)(1) (2013).
 9. *Id.* § 15:542.1(D)(1).
 10. CAL. PENAL CODE § 3004(b)-(c) (West 2011).
 11. ARIZ. REV. STAT. ANN. § 13-3821(A) (2012).
 12. LA. REV. STAT. ANN. § 15:542.1(A)(1)(a) (2012).
 13. WIS. STAT. § 301.45(10) (2012). Several of these statutes were enjoined on constitutional reasoning that the Supreme Court, as explained later in the Comment, might find dubious. *See, e.g., Doe v. Raemisch*, 895 F. Supp. 2d 897 (E.D. Wis. 2012) (holding that a \$100 annual fee on sex offenders violates the Ex Post Facto Clause); *ACLU of Nev. v. Cortez Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008) (holding that the retroactive application of residency and other restrictions violates the Ex Post Facto, Double Jeopardy, and Due Process Clauses of the Constitution). Other restrictions limiting sex offenders' free expression have been overturned as violations of the First Amendment. *See, e.g., Doe v. City of Albuquerque*, 667 F.3d 1111 (10th Cir. 2012) (striking down a city ban on sex offenders' use of public libraries); *Doe v. Jindal*, 853 F. Supp. 2d 596 (M.D. La. 2012) (enjoining a state ban on sex offenders' use of social networking sites as facially overbroad and a violation of their First Amendment rights); *State v. Packingham*, 748 S.E.2d 146 (N.C. Ct. App. 2013) (invalidating a similar North Carolina ban on sex offenders' use of social networking sites for vagueness and for violating the First Amendment).
 14. *See, e.g., IOWA CODE* § 692A.106 (2013) (ten years by default, life for "sexually violent predator[s]"); *NEB. REV. STAT.* § 29-4005 (2010) (fifteen years, twenty-five years, or life, depending on the crime).
 15. *See Corey Rayburn Yung, Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 104 (2007).
 16. Greg Allen, *Sex Offenders Forced to Live Under Miami Bridge*, NPR, May 20, 2009, <http://www.npr.org/templates/story/story.php?storyId=104150499>.
 17. For example, a first-time registration violation in Louisiana bears a penalty of two to ten years in prison. LA. REV. STAT. ANN. § 15:542.1.4 (2012). Failing to register in Missouri is a Class D felony for a first offense. MO. REV. STAT. § 589.425 (2011).

Legislators often justify SORs on the grounds of preventing recidivism and see child molesters as the main targets.¹⁸ The theory is that if the public is notified of dangerous past offenders in their neighborhood, and those offenders are barred from entering public areas frequented by vulnerable persons, then future sexual assaults can be prevented. The argument seems to be persuasive to much of the public, for SORs are popular with constituents.¹⁹ Yet very few sex offenders—including child molesters—are recidivists.²⁰ Of those convicted of offenses against children, even fewer pose threats to the public at large because victims are often a member of the offender’s own family.²¹

These restrictions often indiscriminately reach all sex offenders, irrespective of their dangerousness. Many SORs apply to first-time offenders and those convicted of minor offenses.²² An eighteen-year-old who had consensual sex

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18. *E.g.*, 151 CONG. REC. 7,394 (2005) (statement of Rep. Mark Foley) (“There is a ninety percent likelihood of recidivism for sexual crimes against children.”); 142 CONG. REC. 10,312 (1996) (statement of Rep. Charles Schumer) (“[W]hen these folks come out of prison, the odds are extremely high that they will commit the same or a similar crime again.”); 140 CONG. REC. 22,520 (1994) (statement of Rep. Jennifer Dunn) (“The rate of recidivism for these crimes is astronomical because these people are compulsive.”); 139 CONG. REC. 30,580 (1993) (statement of Sen. Joseph Biden) (“[T]hese offenders are a group especially prone to recidivism.”); *see also* N.C. GEN. STAT. § 14-208.5 (2012) (“The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment”); *Proposition 83*, CAL. SECRETARY ST. § 2(b) (2006), http://vote2006.sos.ca.gov/voterguide/pdf/prop83_text.pdf (stating on the ballot for a sex offender residency restriction that “[s]ex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon,” that they “prey on the most innocent members of our society,” and that “[m]ore than two-thirds of the victims of rape and sexual assault are under the age of 18”).
19. Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL’Y 1, 3-4 (2007) (surveying local American and British polls showing majority support for community notification laws).
20. An FBI study found that only 3.5% of nearly 10,000 sex offenders released in 1994 were reconvicted for a new sex offense within three years of release from prison; the numbers for rapists, sexual assaulters, and child molesters were 3.2%, 3.7%, and 3.5%, respectively. Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, BUREAU JUST. STAT. 24 (2003), <http://www.bjs.gov/content/pub/pdf/rsorp94.pdf>.
21. Among the victims of sexual assaulters serving their sentences in state prison in 1997, roughly 46.5% were assaulted by members of their own family; only 6.7% were strangers to their assaulter. *Id.* at 36.
22. *See, e.g., Sex Laws: Unjust and Ineffective*, ECONOMIST, Aug. 6, 2009, <http://www.economist.com/node/14164614> (reporting that, as of publication, twenty-nine states registered teenagers who are designated as sex offenders for having consensual sex with another teenager).

with his sixteen-year-old girlfriend and was convicted of statutory rape in Arizona could be required to register as a sex offender, depending only on his and her exact birth dates.²³ Or someone convicted of urinating in public in California today might be forced to live in an isolated corner of Sacramento.²⁴

SOR statutes, however carelessly drawn, largely evade constitutional checks. They ordinarily meet the rational basis test, for legislators can always allege that sex offenders pose *some* threat of recidivism, and that restricting their movements or privacy reduces the threat, even when they fail to target the sex offenders who pose an actual danger. Courts have condoned SOR statutes under rational-basis review even when legislators acted on erroneous information about recidivism rates among sex offenders.²⁵ And the Supreme Court has explicitly limited other constitutional review of SORs. In *Smith v. Doe*, the Court held that community notification laws for sex offenders do not violate the Ex Post Facto Clause because post-sentence restrictions on sex offenders are “civil” rather than “criminal.”²⁶ Presumably this means SORs cannot be reviewed under the Cruel and Unusual Punishment²⁷ or Double Jeopardy Clauses, either. Because SORs typically enroll sex offenders automatically based on prior convictions at trial, the Court held in a companion case to *Smith* that the Due Process Clauses do not require the government to hold individualized hearings to determine whether an offender should be subject to SORs.²⁸

The lack of constitutional checks might be surprising given that courts review some civil sanctions for “proportionality” with the underlying wrongdoing under the Due Process Clauses. In the landmark case *BMW of*

23. ARIZ. REV. STAT. ANN. §§ 13-3821(A)(4), 13-1405(A) (2010). A defense is available to individuals who are under nineteen and accused of sexual misconduct based on consensual sex with a partner who was fifteen, sixteen, or seventeen, but only if the age difference between the two sexual partners is no more than twenty-four months. *Id.* § 13-1407(F).

24. See CAL. PENAL CODE §§ 314(1)-(2), 290(c) (West 2008).

25. Compare *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (“[W]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.” (quoting *McKune v. Lile*, 536 U.S. 24, 32-33 (2002))), with *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, HUM. RTS. WATCH 4 (May 2013), http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf (reciting a recidivism rate for all offenses of 40%, for adult sex offenders of 13%, and for juvenile sex offenders of 4-10%).

26. *Smith v. Doe*, 538 U.S. 84, 105-06 (2003).

27. See *Trop v. Dulles*, 356 U.S. 86, 95-96 (1958).

28. *Conn. Dep't of Pub. Safety*, 538 U.S. 1.

North America, Inc. v. Gore,²⁹ the Supreme Court invalidated a punitive damage award in a civil lawsuit as “grossly excessive” compared to the injury done.³⁰ The Court developed three “guideposts” for assessing proportionality that resemble the factors in cruel-and-unusual-punishment analysis under the Eighth Amendment.³¹

This Comment argues that the justifications the Court appealed to in the punitive damages context militate with equal or greater force for a comparable requirement for SORs, and then proceeds to show that the test the *BMW* Court outlined easily translates into the SOR context. While scholars have proposed constitutional review of SORs under doctrines other than the one articulated in this Comment, proportionality offers unique advantages. Unlike review under the Ex Post Facto Clause³² or Eighth Amendment,³³ proportionality does not flout *Smith’s* judgment that SORs are civil regulations. Unlike review for violation of particular constitutional liberties, such as free speech,³⁴ proportionality can be used to review *all* SORs, not just

29. 517 U.S. 559 (1996).

30. *Id.* at 568 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456 (1993)).

31. *Id.* at 574-85. Here, the Court developed a list of proportionality factors strikingly similar to those used in the criminal sentencing context. See *Solem v. Helm*, 463 U.S. 277, 292 (1983) (naming as guiding criteria for Eighth Amendment proportionality analysis “(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions”).

32. See, e.g., Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1076 (2012) (arguing that a “serially amended” sex offender statute might be classified as “punitive”); Brian P. LiVecchi, “*The Least of These: A Constitutional Challenge to North Carolina’s Sexual Offender Laws and N.C. Gen. Stat. §14-208.18*,” 33 N.C. CENT. L. REV. 53, 74-75 (2010) (“These very recent cases may be suggestive of a trend in courts finally reaching a breaking point when it comes to *ex post facto* registration requirements.”).

33. See, e.g., Elizabeth P. Bruns, Comment, *Cruel and Unusual?: Virginia’s New Sex Offender Registration Statute*, 2 WM. & MARY J. WOMEN & L. 171 (1995); Rebecca Shepard, Note, *Does the Punishment Fit the Crime?: Applying Eighth Amendment Proportionality Analysis to Georgia’s Sex Offender Registration Statute and Residency and Employment Restrictions for Juvenile Offenders*, 28 GA. ST. U. L. REV. 529 (2012); Emily J. Stine, Comment, *When Yes Means No, Legally: An Eighth Amendment Challenge to Classifying Consenting Teenagers as Sex Offenders*, 60 DEPAUL L. REV. 1169 (2011).

34. See, e.g., Jasmine S. Wynton, Note, *Myspace, Yourspace, but Not Theirspace: The Constitutionality of Banning Sex Offenders from Social Networking Sites*, 60 DUKE L.J. 1859 (2011) (arguing that networking-site restrictions violate the First Amendment unless they are narrowly tailored).

those that infringe particular substantive rights. Proportionality analysis also drives to the heart of the problem with many recent SORs: that they target more people, more harshly, than is necessary to achieve their objectives. It could therefore go a long way toward curbing SORs of great severity or duration that are imposed indiscriminately on many or all categories of sex offenders, including those convicted of non-violent crimes.

I. PROPORTIONALITY REVIEW OF PUNITIVE DAMAGES

Courts review criminal punishments under the Eighth Amendment for proportionality, meaning that punishments must bear some reasonable relationship to the crimes that trigger them.³⁵ While early twentieth-century precedents hinted that due process requires civil penalties, too, to be proportionate, the Court did not invalidate a single civil damages award for disproportionality from the *Lochner* era until 1996.³⁶ Due process regulated only the *procedures* used to deprive a person of life, liberty, or property, imposing no substantive limit on the *amount* of that deprivation.

The early hint that proportionality might be a “substantive” due process right was confirmed in 1993 in *TXO Production Corp. v. Alliance Resources Corp.*, when a plurality of the Court extended proportionality review to punitive damages.³⁷ Punitive damages may be imposed in civil lawsuits, in addition to compensatory damages, to further state interests in punishment and deterrence.³⁸ Generally they are available only for reckless, malicious, or

35. *Weems v. United States*, 217 U.S. 349, 365-67, 378-79, 381 (1910).

36. *See St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (finding the penalty at issue not excessive); *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915) (finding the penalty excessive); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111-12 (1909) (finding the penalty not excessive); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 479 (1993) (O'Connor, J., dissenting) (citing no cases later than these for the application of proportionality review to punitive damages); *Gore*, 517 U.S. at 599 (Scalia, J., dissenting) (explaining that the majority's opinion invalidated a state-court punitive damages award as excessive for the first time in the Court's history); Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 OHIO ST. L.J. 859, 870-71 (1991).

37. 509 U.S. at 453-58 (plurality opinion). The Court had also suggested earlier, in *Pacific Mutual Life Insurance Co. v. Haslip*, that excessive punitive damages awards might be subject to due process limits. 499 U.S. 1, 18 (1991) (“[U]nlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.”).

38. *Gore*, 517 U.S. at 568.

oppressive conduct.³⁹ *TXO* established that a punitive damages award violates the Fourteenth Amendment's Due Process Clause if it is "grossly excessive" relative to the state's legitimate purposes.⁴⁰ The Court has not applied due process proportionality to any other civil penalty.⁴¹

When the Court first overturned a punitive damages award as "grossly excessive," in *Gore* in 1996, it articulated three "guideposts" for excessiveness: the reprehensibility of the conduct; the disparity between the punitive and compensatory damages; and the difference between the punitive damages and other civil penalties for similar misconduct, in the same or other jurisdictions.⁴² This review is stricter than rational basis but falls short of heightened scrutiny.⁴³ Using the *Gore* factors, the Court has invalidated punitive damages with ratios to compensatory damages of 500:1⁴⁴ and 145:1.⁴⁵ In 2003, the Court refined the test into a near-categorical principle: "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."⁴⁶

The Court has offered several justifications, express and implied, for applying proportionality review to punitive damages. On the cursory reasoning of the early 1900s civil proportionality cases, cited by *Gore*, deprivations of property that are "plainly arbitrary and oppressive"⁴⁷ or "grossly excessive"⁴⁸ compared to what is required to achieve any government purpose are presumably issued without due process. In and since *Gore*, the Court has identified specific features of punitive damages that raise special due process concerns triggering proportionality review: they (1) may not give fair notice to

39. 9TH CIR. MANUAL OF MODEL JURY INSTRUCTIONS: CIVIL § 5.5 (2007).

40. 509 U.S. at 458 (plurality opinion). A majority of the Court agreed that due process requirements apply to punitive damages. *Id.* at 466 (Kennedy, J., concurring); *id.* at 471 (Scalia, J., concurring in the judgment).

41. *Cf.* *United States v. Bajakajian*, 524 U.S. 321 (1998) (applying proportionality analysis under the Excessive Fines Clause to a civil forfeiture of property); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (applying "rough proportionality" under the Takings Clause to conditions placed by a city on the development of commercial land).

42. 517 U.S. at 574-75.

43. *TXO*, 509 U.S. at 456.

44. *Gore*, 517 U.S. at 582.

45. *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 412 (2003).

46. *Id.* at 425.

47. *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915).

48. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909).

potential offenders of the penalties for their conduct; (2) are imposed through an adjudication designed for a different purpose; and (3) are imposed with so much discretion and against such disfavored groups that the risk of arbitrary enforcement is high. Additionally, while the Court has not expressly observed it, a fourth feature unites punitive damages with other sanctions reviewed for proportionality under other constitutional provisions: they serve to punish, a function that implicates traditional retributive limiting principles like proportionality.

II. THE PARALLEL BETWEEN PUNITIVE DAMAGES AND SEX OFFENDER RESTRICTIONS

The four justifications listed above for applying a proportionality principle to punitive damages can readily be applied in other contexts. Below, I elaborate on these justifications and explain how they apply with equal or greater force to SORs. Conveniently, a 2003 opinion by Chief Justice Rehnquist suggests that a “substantive due process” challenge to SORs remains open.⁴⁹

First, both punitive damages and SORs raise concerns about adequate notice. The Court’s primary reason for imposing a proportionality requirement in *Gore* was that, without it, potential offenders would lack “fair notice” of the legal consequences of their conduct.⁵⁰ Under fair notice doctrine, due process demands that the law state explicitly and precisely what conduct is forbidden.⁵¹ But the Court has gone further in punitive damages cases, observing in *Gore* that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct

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49. *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003) (stating that a state’s classification of dangerous and non-dangerous sex offenders alike “‘must ultimately be analyzed’ in terms of substantive, not procedural, due process,” and declining to express an opinion on whether the community notification law “violates principles of substantive due process” (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989))); *see also id.* at 9 (Souter, J., concurring). The argument that the plaintiff raised in *Doe* was that he was entitled to a hearing on his dangerousness, because his inclusion in a public registry effectively branded him as dangerous. *Id.* at 6. While Chief Justice Rehnquist may not have meant that *Doe* could make a substantive due process argument based on *proportionality*, his observation reveals that the Court did not see its opinions in *Doe* and *Smith* as decisively settling the constitutional controversy over SORs.
50. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1995); *see also Campbell*, 538 U.S. at 417 (quoting the same language from *Gore*).
51. *See, e.g., FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2317 (2012) (civil law); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (criminal law).

that will subject him to punishment, but also of the severity of the penalty that a State may impose.”⁵² Amounts of punitive damages will be hard for a tortfeasor to predict, because—absent proportionality—those damages need not be anchored to any reasonably knowable facts, like the actual or foreseeable injury caused. Often juries may calculate punitive damages to deter future misconduct not just by the tortfeasor on trial, but also by other *potential* defendants, about whom the tortfeasor will ordinarily lack information.

SORs may create an even greater fair notice problem than punitive damages, because SORs are harder to predict. A prospective offender should be able to roughly determine the *criminal* sentences he could face,⁵³ but he can only guess about SORs yet to be enacted. Legislatures may restrict new liberties of sex offenders long after their crimes and even after their prison sentences,⁵⁴ and across many different aspects of their lives; legislators are growing more creative. For those convicted of minor sex offenses—such as teenagers convicted under harsh statutory rape laws—SORs may be worse than their criminal sentence of a few months in prison. If we take seriously the fair notice logic of *Gore*, SORs should have some limiting principle so that potential sex offenders—like tortfeasors—can predict the range of legal consequences that could result from their misconduct. Proportionality would provide that limiting principle.

The principle that criminal defendants should have notice of civil as well as criminal consequences of their crimes is already implicit in the Court’s jurisprudence. *Padilla v. Kentucky* recently held that criminal defendants engaged in plea bargaining have a constitutional right to be informed by counsel that a conviction might result in the *civil* consequence of deportation, in part because of recent expansions in deportation-eligible offenses.⁵⁵ Admittedly, pleading guilty is a different decision than committing the crime, the decision with which fair notice doctrine is concerned. But *Padilla* implies that a person considering committing or admitting to a crime may find the legal consequences of that crime relevant, regardless of their classification as civil or criminal, because of the hardship they would inflict on that person.

52. 517 U.S. at 574.

53. The Federal Sentencing Guidelines, case law, and statutory maximum penalties all provide guidance.

54. *Smith v. Doe*, 538 U.S. 84 (2003) (holding that sex offender registration does not violate the Ex Post Facto Clause because it is nonpunitive).

55. 559 U.S. 356 (2010).

Second, both punitive damages and SORs are imposed as a result of an ill-fitting process. The trial deemed “due process” for imposing each sanction is designed to make a factual determination different than the one that justifies imposing the sanction. A civil jury is primarily tasked with deciding questions of duties, causation, and valuation. Awarding punitive damages is a task more akin to penal policy-setting: how much money is necessary to *punish* the defendant, and to *deter* his and others’ misconduct?⁵⁶ Yet, because liability and compensation are a trial’s focus, the jury may not receive evidence about the amount of punitive damages needed to meet these policy objectives.⁵⁷ Often the only relevant evidence presented at trial concerns the defendant’s *mens rea*, a precondition for punitive damages. As the Court explained in a punitive damages case, “evidence of culpability warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing.”⁵⁸

The mismatch between SORs and their “due process” is greater. Almost all sex offender restrictions are justified by state legislatures as preventing crime, or allaying community fear of it.⁵⁹ Legislators often cite the erroneous but common belief that sex offenders have higher recidivism rates than other types of criminals.⁶⁰ Many SORs primarily aim to protect children against this recidivism. The major pieces of federal legislation that enact SORs are the Jacob Wetterling Act and the Adam Walsh Act, both named after child victims of violent crime.⁶¹ Yet a trial for a sex offense is a poor process for determining whether a sex offender is a future danger to anyone—much less a danger to children in particular. Juries are not asked to determine whether defendants are likely to re-offend, or against whom. The Court itself admitted this inadequacy of trials, suggesting that an SOR statute that imposes a severe restriction and

56. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (“[P]unitive damages are imposed for purposes of retribution and deterrence.” (citing *Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060, 1076 (Ala. 1984))).

57. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (“Our concerns are heightened when the decisionmaker is presented . . . with evidence that has little bearing as to the amount of punitive damages that should be awarded.”); *see also Gore*, 517 U.S. at 573 (noting the inadequacy of the evidence presented to the jury for assessing punitive damages).

58. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 429 (1994).

59. *See, e.g., Mary Ann Farkas & Amy Stichman, Sex Offender Laws: Can Treatment, Punishment, Incapacitation, and Public Safety Be Reconciled?*, 27 CRIM. JUST. REV. 256, 257 (2002).

60. *See Raised on the Registry*, *supra* note 25, at 4.

61. *Carpenter & Beverlin*, *supra* note 32, at 1076-78.

acknowledges an aim to incapacitate “particularly dangerous” offenders might, to satisfy due process, need an additional individualized adjudication of dangerousness.⁶² This is a strange twist of logic, implying that a less transparent legislature that relies on generalizations or even false information that *all* sex offenders pose a future danger—and therefore that fails to isolate “particularly” dangerous offenders as its target—may be effectively insulated from a due process challenge.

Third, the wide discretion given juries in imposing punitive damages creates an unusual risk of arbitrary and prejudicial enforcement.⁶³ The Court sees the disfavored and vulnerable group as big business, whose deep pockets may be tempting targets for outsized punitive damages.⁶⁴ The Court has interpreted disproportionate awards as evidence of such prejudice.⁶⁵ But big business is hardly a singularly vulnerable group. Sex offenders are more unpopular, and their unpopularity is often based on untenable assumptions about their crimes, their psychology, or their future danger.⁶⁶ Legislators pressured to be tough on crime face few drawbacks but many rewards for restricting released sex offenders. Like juries determining punitive damages, legislators operate mostly unchecked in passing SORs; for example, they may pass them retroactively and with no process beyond the original trial. This combination of legislative discretion and offender vulnerability may have contributed to the spate of carelessly drawn SORs that sweep in minor and serious sex offenders alike.

Fourth, SORs can be sufficiently punitive in nature to invoke proportionality as a traditional retributive limiting principle of punishment. If one characteristic unites most types of sanctions—both criminal and civil⁶⁷—to which the Court has applied constitutional proportionality review, it is their punitive nature. In addition to punitive damages and punishment itself, the Court has applied proportionality to “punitive” forfeitures under the Excessive

62. *Smith v. Doe*, 538 U.S. 84, 104 (2003).

63. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (“Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.” (quoting *Honda Motor Co.*, 512 U.S. at 432)).

64. *See id.* at 417, 427–28; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993).

65. *See Campbell*, 538 U.S. at 417, 426–28; *TXO*, 509 U.S. at 462.

66. *See Raised on the Registry*, *supra* note 25, at 4, 6–7.

67. *United States v. Halper*, 490 U.S. 435, 447–48 (1989).

Fines Clause.⁶⁸ Proportionality as a retributive limiting principle on the severity of punishment means that, regardless of the state's penal aims, it cannot dole out its punishment to an offender except in proportion to his actual wrongdoing. For example, though deterrence may be a penal aim, it is limited in any given case by proportionality.⁶⁹ To the extent SORs are punitive, they should be subject to retributive proportionality.

The Court evaluates whether a sanction is "punitive" using the *Kennedy v. Mendoza-Martinez* factors.⁷⁰ These are neither exhaustive nor definitive, but in examining Alaska's sex offender registration and community-notification laws in 2003, the Court stressed the question "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose."⁷¹ Applying these factors, the Court found Alaska's scheme nonpunitive. But the Court's analysis emphasized the "minor and indirect" nature of the "disability or restraint," which left sex offenders "free to move where they wish and to live and work as other citizens, with no supervision."⁷² Compared to the current infringements of privacy and mobility that sex offenders face, the Alaskan scheme was mild.⁷³

If we accept that an SOR imposes an "affirmative disability or restraint," then the key remaining *Mendoza-Martinez* factors will be whether the SOR has been traditionally regarded as a punishment, and whether it rationally serves a punitive purpose or is excessive vis-à-vis its nonpunitive purpose. As other

68. *United States v. Bajakajian*, 524 U.S. 321 (1998) (holding that *punitive* forfeiture violates the Excessive Fines Clause if grossly disproportional to a defendant's offense); see also Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 425-35 (2012) (arguing that immigration removal orders and re-entry bars are punitive and subject to proportionality review). *But see* *Dolan v. Tigard*, 512 U.S. 374 (1994) (requiring proportionality for a nonpunitive taking).

69. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 9 (1968); see also Emad H. Atiq, *How Folk Beliefs About Free Will Influence Sentencing: A New Target for the Neuro-Determinist Critics of Criminal Law*, 16 NEW CRIM. L. REV. 449, 468 (2013) (explaining how prevailing moral theories and practice endorse proportionality as a limitation on just punishment).

70. 372 U.S. 144, 168-69 (1963).

71. *Smith v. Doe*, 538 U.S. 84, 97 (2003).

72. *Id.* at 100-01.

73. The Alaska scheme required offenders to contribute personal information to a state registry and verify the information periodically, annually for fifteen years, or quarterly for life depending on the type and number of offenses; the offenders' names, photos, addresses, places of employment, and other information were published online. *Id.* at 90-91.

scholars have discussed, the types of disabilities imposed by SORs—including near-banishment and other social exclusion—have historically been used to punish in the United States.⁷⁴ Perhaps authorities will argue that their SORs serve public-safety purposes, not punitive purposes. Excess should constitute strong evidence of at least a partial punitive purpose, for the excess will be harder to justify on grounds other than the “traditional aims of punishment,” retribution and deterrence. SORs may be punitive only in certain cases, for “a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment.”⁷⁵ This would be the case, for example, where the SOR applies to *all* sex offenders even though the regulatory purpose implicates only a subset of offenders. That an SOR, as applied, is sufficiently punitive to require proportionality review—itself merely a test, not a conclusion—does not mean it will be deemed punishment subject to other constitutional restraints.

As an example, residency restrictions that, banishment-like, all but exclude sex offenders from living in a city should be found punitive. These restrictions ban sex offenders from living within a certain distance—typically 1,000 to 2,000 feet—of a school, park, or other facility frequented by children. Given the density of children’s facilities, this restriction often effectively banishes sex offenders from all city real estate. Banishment has a long history as a form of punishment in the United States.⁷⁶ Ostensibly, residency restrictions serve the nonpunitive purpose of keeping children safe from sexual predators. Yet they typically apply to many sex offenders other than those who have assaulted children. Banishing a person who streaked as a high school student⁷⁷ is excessively burdensome given that it does nothing to protect children but imposes a heavy cost on the delinquent minor. When a law like this fails to achieve its safety objective in many individual cases, the only conceivable objective it serves in those cases is punitive. It is retributive, inflicting suffering on a person who has inflicted suffering on others; and its severity may deter, if sex offenders are aware that their acts could gravely disrupt their lives even after they have served their sentences.

74. See Yung, *supra* note 15, at 112-19. While the Court in *Smith* explained that registration and notification requirements, alone, do not rise to the historic level of shaming punishments, many other SORs will. See *Smith*, 538 U.S. at 97-99.

75. *United States v. Halper*, 490 U.S. 435, 448 (1989).

76. Yung, *supra* note 15, at 112-19.

77. See CAL. PENAL CODE § 314 (West 2008) (indecent exposure); CAL. PENAL CODE § 3003.5(a)-(b) (West 2011) (residency exclusion for lifetime sex registrants, including those convicted of indecent exposure).

A skeptic of my argument might contend that penalties issued by *juries*—but not, as in the case of SORs, by legislatures—uniquely warrant due process review for excessiveness.⁷⁸ Distrust of juries appears to be a principal motivation in the Court’s proportionality review of punitive damages. But distrust of all actors may be prudent, given the broader concerns underpinning proportionality review. Fair notice, the primary justification for proportionality review cited in *Gore*, is as important for legislative penalties as for those imposed in civil trials. The other justifications, as I’ve explained above, apply in both contexts. Indeed, several of the early twentieth-century cases hinting at proportionality review for punitive damages involved statutorily set penalties.⁷⁹ Moreover, it is simply not true that legislators command more deference than juries. Juries are highly respected in the American judicial system, and their pronouncements carry the enhanced due process guarantee of individualized consideration. Jury verdicts are generally upheld if supported by any “legally sufficient evidentiary basis,”⁸⁰ a standard of review hardly more demanding than the rational basis sought in legislation.

III. APPLYING *BMW V. GORE* TO SEX OFFENDER RESTRICTIONS

While *Gore*’s proportionality test was designed for punitive damages, it can easily be adapted to the SOR context. To determine whether a deprivation of liberty is proportionate, as due process requires, the Court should inquire whether it is “grossly excessive” to achieve the legitimate state objectives of punishment.⁸¹ To reiterate, the *Gore* “guideposts” for evaluating the excessiveness of punitive damages are (1) the reprehensibility of the misconduct, (2) the disparity between the punitive and actual damages awards, and (3) the difference between the punitive damages and other sanctions for like misconduct, in the same and other jurisdictions.

78. See Pamela S. Karlan, “Pricking the Lines”: *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880 (2004).

79. See *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (holding not to be excessive the amount of a penalty within a statutorily prescribed range); *Missouri Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 350-51 (1913) (holding to be excessive the amount of a statutory liquidated damages penalty for violating maximum-rate regulation); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) (holding statutory penalties not to be excessive).

80. FED. R. CIV. P. 50(a)(1).

81. As a preliminary matter, courts will want to determine whether an SOR constitutes a deprivation of liberty or property—a question unnecessary for punitive damages, because money damages are clear property deprivations.

The first factor cleanly translates to the SOR context: where *Gore* examines reprehensibility of the misconduct, a court reviewing an SOR examines reprehensibility of the sex crime. This factor should cast suspicion on statutes that severely penalize petty criminals, such as public urinalators, or that penalize minors for life.⁸²

The second factor presents the greater challenge, for *Gore* compares the *monetary* value of harm the defendant actually or potentially inflicted with the *money* he may be forced to pay as punishment. The items compared are pre-quantified for the court. For SORs, the court must instead compare the harm that the sex crime inflicted on society with the harm that society may inflict in return. This will require quantification of harm, but courts are well-acquainted with this sort of analysis as part of their sentencing function,⁸³ and anyway it surely would not prevent detection of extreme disparities.

Where an SOR is triggered by any sex crime conviction,⁸⁴ the second factor also might require aggregation that is not necessary for punitive damages: the court should consider *all* of the crimes of the repeat offender; and, for consistent logic, *all* of the restrictions imposed on the offender by states and localities.⁸⁵ This aggregation aligns with courts' approach to punitive damages, which are often awarded in greater amounts where the defendant is more likely to recidivate or has already recidivated.⁸⁶ Moreover, the interactive effects of these restrictions may need to be examined. For example, where overlapping residency exclusion zones exclude an offender from living in most parts of a city, that effect should be considered in the calculus.

The third factor translates nearly as cleanly as the first. Rather than looking merely to the severity of other sanctions for comparable misconduct, the court

82. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (observing the reduced reprehensibility of juvenile misconduct).
83. Cf. *Solem v. Helm*, 463 U.S. 277, 292 (1983) (“Application of [sentencing proportionality] factors assumes that courts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments—just as legislatures must make them in the first instance.”).
84. Compare CAL. PENAL CODE § 3004(b) (West 2011) (applying a residency exclusion to all registered sex offenders), with N.C. GEN. STAT. § 14-202.5(a) (2012) (applying social networking restrictions only to those convicted of sexually violent offenses or crimes against children).
85. By contrast, where the SOR is triggered by a specific class of sex crime conviction, then aggregation would only be necessary across the offender’s convictions in that class.
86. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (discussing the importance of “prior transgressions” in assessing punitive damages).

can compare among jurisdictions both the scope and severity of civil restrictions and criminal sentences for similar sex offenses. SORs might also be compared to penalties imposed for non-sex offenses of a similar nature. For example, SORs imposed on minors convicted under laws criminalizing sex between minors might be compared to penalties imposed for other juvenile offenses. This branch of the inquiry should undermine SORs drawn with an unusual degree of carelessness or imprecision.

Finally, proportionality review of SORs should include an additional factor: a comparison between the offender's crime and the state's purpose for the SOR. In almost every case, the state's purpose will match the traditional penal purposes of deterrence, incapacitation, retribution, and, less often, rehabilitation. Wide disparities between the purpose and the type of offender targeted should constitute strong evidence that a sanction is disproportionate. Some SORs, though only slightly burdensome, may do little to nothing to advance the state's purpose when applied to particular sex offenders, or to a particular class of sex offenders. For example, regulations that restrict sex offenders' access to areas frequented by children will do little to prevent child predation when applied to offenders unlikely to victimize children—perhaps such as those who have only ever victimized adults. While resembling rational basis review, this analysis differs because it examines whether the law's general justification holds as applied to *this* sex offender. The analysis would not require legislatures to use least-restrictive means, but would only permit courts to consider the overbroad scope of an SOR as one factor suggesting its gross excess.

While this extra factor is not one of the *Gore* three, it finds grounding in the Court's discussion of the second factor, comparing punitive and compensatory damages, and in the Court's application of retributive limiting principles to punitive sanctions. The Court emphasizes that excessive punitive awards are arbitrary and fail to serve the state's punitive interest in retribution or deterrence.⁸⁷ Presumably, awards would not be excessive if their full amount served both of the state's legitimate interests. The question of excess in the punitive damages context is necessarily only a question of magnitude. For SORs, however, the excess can take the form of suffering of an unwarranted type. In rejecting the punitive damages award in *Campbell*, the Court observed: “[A] more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the [state] courts should have

87. *Id.* at 417.

gone no further.”⁸⁸ That is an excellent slogan for reviewing sex offender restrictions for proportionality.

Let me close by offering a fairly typical sample case. Many cities in Texas have passed ordinances restricting the areas in which registered sex offenders may live. To take just one example, the city of Burleson’s ordinance forbids any sex offender required to register in Texas, whose victim was younger than seventeen years old, to “establish a permanent residence or temporary residence within 1000 feet of any defined premise where children commonly gather, including a playground, school, day-care center, video arcade facility, public or private youth center, park, or community swimming pool.”⁸⁹ Given the Texas registration scheme, the ordinance applies to, among others, teenagers convicted of having consensual sex with other teenagers.⁹⁰ An eighteen-year-old still in high school could be convicted under Texas law for having sex with his fourteen-year-old freshman girlfriend. As a result, he might be banned for ten years from living in certain Texas cities with tight residency restrictions and a high density of schools and public parks, like Burleson.⁹¹

Under the *Gore* analysis, a court reviewing this law would (1) consider the reprehensibility of the consensual sex in this case; (2) compare the harm inflicted on society by that act to the severity of the sanction against the offender; (3) compare the sanction against consensual sex between minors here to other sanctions for the same infraction; and (4) determine whether the sanction serves the purpose of protecting public safety, which was arguably the purpose of the residency restriction.⁹² Such a court should conclude that consensual sex between teenagers is one of the least reprehensible sex offenses,

88. *Id.* at 419-20.

89. BURLESON, TEX., CITY CODE § 54-150 (2013), <http://www.burlesontx.com/DocumentCenter/View/6338>.

90. TEX. PENAL CODE ANN. § 22.011(a)(2)(A), (c)(1), (e)(2) (West 2011) (defining the crime of sexual assault to include sexual penetration of a minor under seventeen years old, where an affirmative defense is that the victim was at least fourteen years old and the perpetrator was no more than three years older than the victim); TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(A) (West 2006) (making a violation of § 22.011 a registrable offense).

91. *See* TEX. CODE CRIM. PROC. ANN. art. 62.101 (requiring registration for ten years for someone convicted under § 22.011).

92. *Proposition 83*, *supra* note 18, at § 2(b) (stating on the ballot for a sex offender residency restriction that “[i]t is the intent of the People in enacting this measure to help Californians better protect themselves, their children, and their communities; it is not the intent of the People to embarrass or harass persons convicted of sex offenses”).

insofar as it involves no violence or abuse, and inflicts minimal harm on society. The decade-long residential exclusion of the SOR is a penalty far exceeding the misdemeanor penalties in other jurisdictions for consensual sex between young people three or fewer years apart in age.⁹³ Indeed, many jurisdictions do not outlaw similar acts at all.⁹⁴ Finally, the penalty is ill-designed to protect the public from sexual predators of young children, given that teenagers who have *consensual* sex with a girlfriend or boyfriend do not seem uniquely subject to sexual temptation by very young children from their residential neighborhood.⁹⁵ All factors support the conclusion that Burleson's residency restriction, applied to this crime, is "grossly excessive" in violation of due process.

CONCLUSION

The Supreme Court's serious due process concerns about punitive damages awards against large corporations—regarding fair notice and an ill-fitting, potentially prejudiced implementation process—apply just as powerfully to harsh civil regulations imposed on sex offenders after their criminal sentences. And any procedural inadequacies promise to take a heavier human toll for sex

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93. See, e.g., CAL. PENAL CODE § 261.5(a) (2008) (providing that sex with a minor who is not more than three years younger or older than the perpetrator is a misdemeanor); LA. REV. STAT. § 14:80.1(A) (2012) (providing that a person age seventeen or older commits a misdemeanor by having sex with a minor at least thirteen years old if the perpetrator is no less than two but no more than four years older).
94. With so-called "Romeo and Juliet laws," many states exempt from prosecution for statutory rape minors with an age difference less than four years, if the victim is at least thirteen or fourteen. See, e.g., COLO. REV. STAT. § 18-3-402(d) (2013) (permitting statutory rape charges only where the victim is younger than fifteen or the age difference between perpetrator and victim is four years or more); N.Y. PENAL LAW § 130.30 (McKinney 2009) (providing an affirmative defense to statutory rape that the perpetrator was no more than four years older than the victim); OR. REV. STAT. § 163.345 (2011) (providing an affirmative defense to statutory rape that the perpetrator was less than three years older than the victim at the time of the offense).
95. The Burleson ordinance was passed with legislative findings that "the recidivism rate for released sex offenders is significant, especially for those who commit their crimes against children" and that "the proximity of sex offenders to schools or other facilities that might create temptation to repeat offenses are one way to minimize risk of recidivism." See Burleson, Tex., City Ordinance No. B-803-13 (Feb. 18, 2013), <http://www.burlesontx.com/DocumentCenter/View/6338>. The ordinance also bans sex offenders from locations that appear to be frequented by very young children, as opposed to high school students—such as day-care centers, playgrounds, and parks. *Id.*

offenders than they do for big business. This Comment has proposed a straightforward doctrinal solution to these dangers for sex offenders' due process rights: extending proportionality review, already applied to punitive damages awards, to sex offender restrictions. Proportionality principles should—and practically can—be applied to stem the tide of prejudicial and ill-informed burdens imposed indiscriminately on all sex offenders.

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