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REGISTERING A HOME WHEN HOMELESS: A CASE FOR INVALIDATING WASHINGTON'S SEX OFFENDER REGISTRATION STATUTE

Sarah Kohan*

Abstract: Sex offenders experiencing homelessness face unique challenges in Washington that sex offenders with housing do not. When individuals commit a sex offense, they are required to register as a sex offender by providing the state with a current home address. But what happens if an offender has no home? Currently, Washington's sex offender registration statute forces sex offenders experiencing homelessness to appear in person weekly at the county sheriff's office to meet registration requirements. Failing to appear for even one week can result in a charge for failure-to-register as a sex offender. In contrast, the statute requires non-homeless sex offenders to register yearly. While non-homeless registrants usually have one opportunity in a year to be charged with failure-to-register, registrants experiencing homelessness are vulnerable to failure-to-register charges at least fifty-two times a year.

Washington courts should invalidate Washington's sex offender registration statute because of the statute's harm to registrants experiencing homelessness. Although sex offenders typically do not receive much sympathy from the public, sex offenders experiencing homelessness face serious economic and social challenges. In addition to weekly registration, sex offenders experiencing homelessness carry the burden of worrying about common human necessities such as housing, food, and employment. This Comment argues that the weekly in-person registration requirement for sex offenders experiencing homelessness is harmful and ineffective. This Comment further argues that Washington's registration statute as applied to individuals experiencing homelessness is unconstitutionally cruel punishment.

INTRODUCTION

Imagine the state of Washington charges two people, Alex and Paul,¹ with sexual assault. Both are convicted and serve the same amount of time in prison. Once released from prison, both must register as sex offenders. Alex has a stable home, a job, and a supportive family. Alex registers once a year by appearing at the county sheriff's office. Once Alex fills out a registration form, the registration requirements for the year are met and Alex has no further reporting obligations until the next year. As a result, Alex only faces the possibility of a conviction upon failing to register the following year.

Unlike Alex, Paul experiences homelessness. Paul sleeps on the streets

* J.D. Candidate, University of Washington School of Law, Class of 2021. Thank you to Professor Mary Fan and the Editorial Staff of *Washington Law Review* for their hard work on this Comment. While this Comment argues that certain sex offender laws should be applied more equitably, it does not intend to diminish the experiences of anyone who has experienced sexual assault.

1. These scenarios are fictitious, and these names were chosen at random.

each night, lacks basic necessities, and has no family support. To meet registration requirements, Paul must appear in person at the county sheriff's office each Monday between 8:30 a.m. and noon. Paul must provide the sheriff's office with a list of the locations Paul stayed each night of the prior week. Failure to appear at the sheriff's office for even one week could result in a failure-to-register charge and another conviction on Paul's criminal record. Although Alex and Paul committed the same crime and served the same time, the ramifications are much different based on whether the individual has a stable home.

Sex offender registration requirements for people experiencing homelessness in Washington are much more burdensome than registration requirements for non-homeless sex offenders.² Washington's sex offender registration statute, Revised Code of Washington section 9A.44.130,³ requires all individuals convicted of a sex crime to register as a sex offender by providing the county with a residence address.⁴ To meet registration requirements, those with a "fixed residence," or those who are not experiencing homelessness, appear at the county sheriff's office each year and confirm their residence address.⁵ But what if an offender has no "fixed residence"? Prior to 1999, the state provided no guidance on how individuals experiencing homelessness could meet the registration requirements.⁶ In 1999, the Washington Legislature amended the registration statute to include requirements for people experiencing homelessness.⁷ Individuals who "lack[] a fixed residence," or individuals experiencing homelessness, must currently meet registration requirements by appearing in person at the county sheriff's office each week of the year.⁸ If a person fails to meet registration requirements, the state can charge the individual with failure-to-register as a sex offender, adding a

2. See WASH. REV. CODE § 9A.44.130 (2019). This statute also requires people experiencing homelessness convicted of kidnapping to register weekly in person, but this Comment will not discuss kidnapping offenses.

3. See *id.*

4. See *id.*

5. See *id.*; SEX OFFENDER POL'Y BD., OFF. FIN. MGMT., WASHINGTON'S COMPLIANCE WITH SORNA: FINDINGS AND RECOMMENDATIONS BY THE SEX OFFENDER POLICY BOARD 15 (2016), https://sgc.wa.gov/sites/default/files/public/sopb/documents/sorna_findings_and_recommendations.pdf [<https://perma.cc/FY8P-7VLS>]. The yearly requirement is only for Level I sex offenders. *Id.* at 5. Level II sex offenders must report every six months, and Level III sex offenders must report every three months. *Id.*

6. See H.R. 1004, 56th Leg., 1st Spec. Sess. (Wash. 1999).

7. See *id.*

8. WASH. REV. CODE § 9A.44.130(6)(b).

charge and potential conviction to the offender's criminal record.⁹ Often, this is a felony charge.¹⁰

These burdensome requirements present unique challenges to sex offenders experiencing homelessness. Unsheltered populations face significant economic and social stresses.¹¹ For unsheltered sex offenders, the weekly reporting requirement adds yet another source of stress.

As a result of these hardships faced by unsheltered sex offenders, Washington's sex offender registration statute, and many other states' similar registration statutes, have been challenged on constitutional grounds.¹² Few cases, both federally and in Washington, specifically address sex offender statutes as applied to individuals experiencing homelessness.¹³ As registration statutes across the country—including Washington's—have expanded drastically to include more registerable offenses and greater limitations,¹⁴ it is time for Washington courts and the legislature to reexamine the impacts of registration statutes on individuals experiencing homelessness.

This Comment argues that Washington's sex offender registration statute should be invalidated in Washington courts because it unfairly and cruelly punishes homelessness. Part I discusses the history and expansion of sex offender registration statutes over the last thirty years. Understanding the expansion of sex offender registration helps frame the

9. *See id.* § 9A.44.132.

10. *See id.* The statute states that if the underlying sex conviction is a felony, a charge for failure-to-register as a sex offender is a Class C felony. If the underlying sex conviction was a felony and the individual has two or more prior convictions for failure-to-register, a new failure-to-register charge is a Class B felony. When the underlying sex conviction is not a felony, a failure-to-register charge is a gross misdemeanor. *Id.*

11. Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 PSYCH. PUB. POL'Y & L. 89, 91 (2008).

12. *See Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (holding that the Alaska registration statute did not violate ex post facto clause of federal constitution); *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1232 (D. Colo. 2017) (holding that Colorado's registration statute applied to persons experiencing severe employment difficulties violates Eighth Amendment of federal constitution); *State v. Boyd*, 1 Wash. App. 501, 513, 408 P.3d 362, 369 (2017) (holding that there was no violation on ex post facto grounds of Washington registration statute as applied to defendant experiencing homelessness).

13. Few Washington cases deal with the part of the sex offender registration statute that addresses homelessness. *Contra Boyd*, 1 Wash. App. at 505, 408 P.3d at 365 (holding that there was no violation on ex post facto grounds of Washington registration statute as applied to defendant experiencing homelessness).

14. *See Legislative History of Federal Sex Offender Registration and Notification*, U.S. DEP'T OF JUST. SMART OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING (Mar. 24, 2020) [hereinafter SMART], <https://www.smart.gov/legislation.htm> [<https://perma.cc/H6RJ-XV6U>].

argument that such expansions have gone too far in their application to unsheltered individuals. Part II specifically addresses Washington State's sex offender registration statute, including its history and how it applies to homeless individuals. Part III analyzes several constitutional challenges to sex offender registration statutes across the country, with specific emphasis on Washington court decisions. Part IV examines data and demographics of the homeless sex offender population and discusses the various hardships this group faces on a daily basis. Finally, Part V argues the current registration system as applied to individuals experiencing homelessness is harmful for both these individuals and the state. It further argues that a cruel punishment challenge under article I, section 14 of the Washington Constitution could be successful in Washington courts.

I. THE HISTORY AND EXPANSION OF SEX OFFENDER REGISTRATION LAWS

Sex offender registration statutes have expanded tremendously over the last thirty years.¹⁵ What started as a private law enforcement registry listing only child abusers quickly grew into a massive public registry filled with persons convicted of any sex crime.¹⁶ As legislation expanded, it included a greater number of registerable offenses, harsher restrictions, and burdensome requirements.¹⁷ Examining the history and purpose behind sex offender registration statutes in this country provides important context for analyzing Washington's sex offender registration statute as applied to individuals experiencing homelessness.

A. *The Origins of Sex Offender Registries*

Sex offender registries arose in response to several tragic crimes against children in the 1980s and 1990s.¹⁸ The murders of three children frame the creation of national and state sex offender registries: Jacob

15. *Id.*

16. *Id.*

17. Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1079 (2012).

18. See Elizabeth Esser-Stuart, "*The Irons Are Always in the Background*": *The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 TEX. L. REV. 811, 812 (2018).

Wetterling,¹⁹ Megan Kanka,²⁰ and Adam Walsh.²¹ On October 22, 1989, a man holding a gun approached three young boys riding their bicycles in St. Joseph, Minnesota.²² The man abducted eleven-year-old Jacob Wetterling and released the other two boys.²³ Twenty-seven years after Jacob's disappearance, Danny Heinrich, a man convicted of prior sex crimes, admitted to kidnapping, sexually assaulting, and murdering Jacob Wetterling.²⁴

At the time of Wetterling's kidnapping, no federal law existed requiring any type of registry informing the public about individuals committing sexually violent crimes or crimes against children.²⁵ In response to public lobbying facilitated by Wetterling's parents,²⁶ Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (the Wetterling Act) in 1994.²⁷ This Act created the first type of "registry,"²⁸ requiring people convicted of crimes against children and people convicted of sexually violent offenses to register an address with a state law enforcement agency.²⁹ With this new registration system, law enforcement agencies could track the location of such offenders.³⁰ Notably, the Act created private registries shared only among law enforcement agencies.³¹ The Act generally prohibited public access to the registries and allowed law enforcement to discretionarily release information on a case-by-case basis.³² Additionally, the Act required child

19. Cleve R. Wootson, Jr., *A Minnesota Boy Was Kidnapped at Gunpoint in 1989. Police Have Finally Found His Body*, WASH. POST (Sept. 4, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/09/04/a-minnesota-boy-was-kidnapped-at-gunpoint-in-1989-police-have-finally-found-his-body/> [<https://perma.cc/8UZP-PLYD>].

20. Olivia B. Waxman, *The History Behind the Law That Created a Registry of Sex Offenders*, TIME (May 30, 2017), <https://time.com/4793292/history-origins-sex-offender-registry/> [<https://perma.cc/4DXJ-FWKX>].

21. Carpenter & Beverlin, *supra* note 17, at 1076.

22. Wootson, *supra* note 19.

23. *Id.*

24. Erik Ortiz, *Man Admits to Abducting, Killing Jacob Wetterling, Missing Minnesota Boy in 1989*, NBC NEWS (Sept. 6, 2016), <https://www.nbcnews.com/news/us-news/man-admits-abducting-killing-jacob-wetterling-missing-minnesota-boy-1989-n643506> [<https://perma.cc/6FDM-Y8K9>].

25. SMART, *supra* note 14 ("Prior to 1994, there was no federal law governing sex offender registration and notification in the United States.").

26. Wootson, *supra* note 19.

27. 42 U.S.C. § 14071.

28. SMART, *supra* note 14.

29. *See* 42 U.S.C. § 14071(a)(1).

30. *See* SMART, *supra* note 14.

31. 42 U.S.C. § 14071(d).

32. *Id.* § 14071(d)(3).

abusers and individuals deemed sexually violent predators to register rather than individuals convicted of any sex offense.³³

The second tragic murder—that of Megan Kanka—also spurred the creation of sex offender registration.³⁴ In 1994, seven-year-old Megan Kanka disappeared from her home in Hamilton Township, New Jersey.³⁵ Three years later, Jesse Timmendequas, Megan’s neighbor, was convicted of kidnapping, raping, and murdering Megan.³⁶ Megan’s parents publicly stated that they would have never allowed Megan to play outside had they known their neighbor was a sex offender.³⁷ These statements by Megan’s parents led to public outcry.³⁸ Megan’s parents urged the federal government to amend the Wetterling Act by requiring public notification of sex offender registration.³⁹ In response to this outcry, President Clinton signed Megan’s Law in 1996.⁴⁰

Megan’s Law expanded the Wetterling Act in several respects.⁴¹ Megan’s Law eliminated the Wetterling Act’s discretionary release of information to the public. Instead, Megan’s Law required public disclosure.⁴² This meant that the public—not just law enforcement—could track the location of sex offenders.⁴³ In response to Megan’s Law, every state enacted some type of public sex offender registry.⁴⁴ Consequently, the general public was able to access sex offender registries in all states.⁴⁵

Sex offender registries expanded even further in response to Megan’s Law and public outcry when Congress passed the Sexual Offender Tracking and Identification Act.⁴⁶ This Act expanded the Wetterling Act and Megan’s Law by requiring state law enforcement agencies to immediately transmit sex offender information to a national law enforcement database called the National Sex Offender Registry.⁴⁷

33. *Id.* § 14071(a)(1).

34. Waxman, *supra* note 20.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996); *see also* Waxman, *supra* note 20.

41. SMART, *supra* note 14.

42. *Id.*

43. *Id.*

44. John Does I–VIII v. Munoz, 462 F. Supp. 2d 787, 790 (E.D. Mich. 2006).

45. *See id.*

46. SMART, *supra* note 14.

47. *Id.*

Throughout the 1990s and early 2000s, Congress continued passing legislation that required states to more adequately manage and track sex offenders.⁴⁸ These new management techniques included the Sex Offender Management Assistance Program, a program formed under the Department of Justice to oversee state compliance with national database requirements.⁴⁹ Additionally, the new legislation required sex offenders who were either employed at or students of universities to report their sex offender status to their respective schools.⁵⁰ With each new piece of sex offender legislation, law enforcement agencies across the country were given more comprehensive tools to track sex offenders, thereby increasing offender supervision.⁵¹

A third tragic event—the murder of Adam Walsh—led to the current state of sex offender registration.⁵² In 1981, six-year-old Adam Walsh was abducted while shopping at a California Sears with his mother.⁵³ Walsh’s remains were found sixteen days later.⁵⁴ Adam’s parents then took to the media, lobbying for stricter legislation regarding missing children.⁵⁵ In 2006, President George W. Bush signed the Adam Walsh Child Protection and Safety Act.⁵⁶ Title I of the Adam Walsh Child Protection and Safety Act, named the Sex Offender Registration and Notification Act (SORNA),⁵⁷ completely rewrote Megan’s Law, expanding sex offender registration and notification even further.⁵⁸ SORNA expanded the number of criminal offenses requiring registration, created a national online database allowing public searches for sex offender information, and announced a new federal office to oversee administration of SORNA.⁵⁹

48. See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440 (1997); Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2974 (1998); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

49. See Protection of Children from Sexual Predators Act § 607.

50. Victims of Trafficking and Violence Protection Act § 1601.

51. See SMART, *supra* note 14.

52. See *id.*

53. Olivia B. Waxman, *The U.S. Is Still Dealing with the Murder of Adam Walsh*, TIME (Aug. 10, 2016), <https://time.com/4437205/adam-walsh-murder/> [<https://perma.cc/PVY8-9SQJ>].

54. *Id.*

55. *Id.*

56. SMART, *supra* note 14.

57. SORNA is codified at 42 U.S.C. § 16901.

58. SORNA amended Megan’s Law and the Pam Lychner Sexual Offender Trafficking and Identification Act to expand registration requirements. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 103, 121, 129, 120 Stat. 587, 591, 597, 600–01 (2006); see also SMART, *supra* note 14.

59. SMART, *supra* note 14.

Whereas the Wetterling Act and Megan's Law required only persons convicted of crimes against children or sexually violent predators to register, SORNA requires any person convicted of any sex offense to register.⁶⁰

Many cite the protection and safety of children as driving factors for the expansion of sex offender registration statutes.⁶¹ The murders of Jacob, Megan, Adam, and many other abducted children convinced legislators and the public that the government should closely monitor sex offenders.⁶² The goal of this national legislation was "to prevent recidivism by increasing scrutiny of sex offenders through enhanced law enforcement monitoring and public awareness."⁶³

SORNA is still the law today.⁶⁴ Moreover, SORNA is only "a floor, not a ceiling" for states implementing their own sex offender registration statutes, meaning states may require additional or more stringent registration.⁶⁵ SORNA requires all sex offenders to provide a "residence" for monitoring purposes, meaning homeless sex offenders are expected to register.⁶⁶ However, SORNA provides no guidance to states as to how sex offenders who do not have a residence should register.⁶⁷ In fact, because SORNA compliance is so expensive, many states have instead chosen to enact their own strict sex offender registration laws.⁶⁸ As a result, states have taken different approaches to managing the registration of sex offenders experiencing homelessness.⁶⁹

B. State Responses to National Sex Offender Legislation

In response to federal legislation, states created their own sex offender registration statutes.⁷⁰ Many state registration statutes include a wide array of registerable offenses, lengthy durational registration requirements, invasive personal information requirements, and harsh residency

60. *Id.*

61. Carpenter & Beverlin, *supra* note 17, at 1073.

62. *Id.* at 1076–77.

63. Jill S. Levenson et al., *Failure-to-Register Laws and Public Safety: An Examination of Risk Factors and Sex Offense Recidivism*, 36 LAW & HUM. BEHAV. 1, 1 (2012).

64. SMART, *supra* note 14.

65. Brian Griggs, *Homelessness Is Not an Address: States Need to Explore Housing Options for Sex Offenders*, 79 UMKC L. REV. 757, 769 (2011).

66. *See* Esser-Stuart, *supra* note 18, at 825.

67. *See id.*

68. *See id.* at 824.

69. *See id.*

70. *See* Carpenter & Beverlin, *supra* note 17, at 1078–79.

restrictions.⁷¹ Because SORNA lacks guidance on homeless offender registration, states have taken their own approaches to the issue.⁷²

These state approaches to homeless offender registration take various forms.⁷³ As of 2017, nineteen states and the District of Columbia require sex offenders to register with an address, but do not provide guidance to people experiencing homelessness on how to avoid prosecution for failing to register.⁷⁴ Other states require new registration every time a person moves residences.⁷⁵ This creates a problem for registrants experiencing homelessness who often change sleeping locations.⁷⁶ Thirty-one states, including Washington State, require sex offenders experiencing homelessness to report in person to a law enforcement agency to avoid a failure-to-register charge.⁷⁷ The thirty-one states that require in-person reporting take different approaches to the duration between each required report.⁷⁸ Some states require in-person reporting for offenders experiencing homelessness every ninety days, some require monthly reporting, and some, like Washington, require weekly reporting.⁷⁹ North Dakota requires in-person reporting every three days for homeless registrants.⁸⁰

There currently is no one-size-fits-all approach to managing the registration of sex offenders experiencing homelessness, as evidenced by the various state statutory schemes. However, it is apparent that many states, including Washington State, have expanded on SORNA to provide burdensome registration requirements for offenders experiencing homelessness by forcing them to appear in person often to meet registration requirements.⁸¹

71. *Id.* at 1079.

72. *See* Esser-Stuart, *supra* note 18, at 824–25.

73. *See id.* at 824.

74. *See id.* at 828.

75. *See, e.g.*, GA. CODE. ANN. § 42-1-12 (2019) (stating with every change in sleeping location, address must be updated within seventy-two hours); *Tobar v. Commonwealth*, 284 S.W.3d 133, 135–36 (Ky. 2009) (holding that any change in address must be reported to the authorities). Georgia and New Mexico both require homeless offenders to register with a new address each time they move locations. *See* Esser-Stuart, *supra* note 18, at 860, 866.

76. Esser-Stuart, *supra* note 18, at 825.

77. *Id.* at 833.

78. *Id.* at 833 n.153.

79. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3821(I) (2019) (requiring homeless offenders to report every ninety days); CAL. PENAL CODE § 290.012(c) (Deering 2020) (requiring reporting every thirty days for homeless offenders); WASH. REV. CODE § 9A.44.130(6)(b) (2019) (requiring weekly reporting for homeless offenders).

80. N.D. CENT. CODE § 12.1-32-15(2) (2013).

81. Esser-Stuart, *supra* note 18, at 833 n.153.

II. WASHINGTON STATE'S SEX OFFENDER REGISTRATION STATUTE

In Washington State, any person, including a juvenile, who has been convicted of a sex offense must register with the county sheriff by providing a residential address and other identifying information.⁸² “Sex offense[s]” in Washington include rape, child molestation, sexual misconduct with a minor, voyeurism, incest, indecent liberties, sexual exploitation of a minor, and any felony with a finding of sexual motivation.⁸³ Registration as a sex offender usually means the offender’s address is posted on a public notification website, available for anyone in the public to view.⁸⁴

Once individuals convicted of sex crimes are released from confinement, the Washington State Department of Corrections assigns each sex offender a risk designation.⁸⁵ In Washington, there are three “levels” of sex offender designations.⁸⁶ Factors considered when determining an offender’s risk level include the “offender’s employment pattern” and whether the individual has a “[r]elatively stable” release environment.⁸⁷ Level I offenders are considered to have a low risk to reoffend and their information is generally not shared through the public notification system.⁸⁸ Level II offenders are considered to have a moderate risk to reoffend because they usually have more than one victim and may use threats to commit crimes.⁸⁹ Level III sex offenders are considered to have the highest risk to reoffend and generally may have committed prior violent crimes on multiple victims.⁹⁰

The stated purposes behind Washington’s sex offender registration

82. WASH. REV. CODE § 9A.44.130 (2019).

83. *Id.* § 9.94A.030(48).

84. *See Welcome!*, WASH. ASS’N OF SHERIFFS & POLICE CHIEFS, http://www.communitynotification.com/cap_main.php?office=54528 [https://perma.cc/6K26-88XZ] (explaining that Washington’s sex offender website “shall be available to the public”).

85. WASH. ASS’N OF SHERIFFS & POLICE CHIEFS, GUIDE TO THE WASHINGTON STATE SEX OFFENDER RISK LEVEL: CLASSIFICATION SCREENING TOOL 1, <https://www.waspc.org/assets/SexOffenders/wa%20sex%20offender%20risk%20level%20clasification%20instructions%20-%20juvenile.pdf> [https://perma.cc/7VUX-5AWR].

86. WASH. REV. CODE § 4.24.550(6)(b).

87. WASH. ASS’N OF SHERIFFS & POLICE CHIEFS, *supra* note 85, at 9, 11.

88. *See Sex Offender Registration Information*, KING CNTY., <https://www.kingcounty.gov/depts/sheriff/sex-offender-search.aspx> [https://perma.cc/9TEX-KR49].

89. *Id.*

90. *Id.*

statute mirror those of the federal registration legislation.⁹¹ The Washington legislature reasoned that “sex offenders pose a high risk” of reoffending and law enforcement is “impaired” by failure to track sex offenders in their community.⁹² As such, the state’s reason for imposing sex offender registration requirements is to “assist local law enforcement agencies’ efforts to protect their communities by regulating sex offenders.”⁹³

Washington’s current registration statute, Revised Code of Washington section 9A.44.130,⁹⁴ contains specific instructions for individuals who “lack a fixed residence.”⁹⁵ To lack a fixed residence means “the person does not have a living situation that meets the definition of a fixed residence and includes, but is not limited to, a shelter program . . . , an outdoor sleeping location, or locations where the person does not have permission to stay.”⁹⁶ Offenders without a fixed residence must report to the county sheriff’s office weekly, on a date specified by authorities, with a list of each place they stayed the week prior.⁹⁷

Much like current federal legislation, Washington’s registration statute prior to 1999 provided no guidance for individuals experiencing homelessness on how to meet their registration obligations.⁹⁸ Washington’s previous registration statute required an offender to register with a “residence,” but failed to define the meaning of residence, resulting in uncertainty.⁹⁹ However, this uncertainty ended with the case of *Martin Pickett*.¹⁰⁰ In 1997 *Martin Pickett*, who had a prior sex offense conviction, was living on the streets in the Seattle area.¹⁰¹ The police knew *Pickett* experienced homelessness.¹⁰² When they approached *Pickett* in a park, *Pickett* admitted to lacking a residence address for registration.¹⁰³ As a result of this conversation, the police arrested and charged *Pickett* with

91. See 1990 Wash. Sess. Laws 12–114; 42 U.S.C. § 14071.

92. Wash. Sess. Laws at 25, 49.

93. *Id.* at 50.

94. WASH. REV. CODE § 9A.44.130 (2019).

95. *Id.* § 9A.44.130(6)(a)–(c).

96. *Id.* § 9A.44.128(9).

97. *Id.* § 9A.44.130(6)(a)–(c).

98. See *State v. Pickett*, 95 Wash. App. 475, 479–80, 975 P.2d 584, 587 (1999) (holding that homeless individuals could not comply with the sex offender registration law as previously written).

99. See *id.* at 478, 975 P.2d at 586.

100. See *id.*

101. *Id.* at 476, 975 P.2d at 585.

102. *Id.*

103. *Id.*

failure-to-register as a sex offender.¹⁰⁴

In *State v. Pickett*,¹⁰⁵ Division One of the Washington Court of Appeals concluded that Pickett could not be charged with failure-to-register because the statute required a residence, but there was no evidence that Pickett had any residence to report.¹⁰⁶ After the Washington legislature discovered this loophole in the registration statute, it promptly amended the statute to close the loophole.¹⁰⁷ The 1999 amendment required level I homeless sex offenders to report to a sheriff's office monthly, and level II and III homeless sex offenders to report to a sheriff's office weekly to meet registration requirements.¹⁰⁸

Two years later, the legislature amended the registration statute again, requiring weekly reporting for all offenders experiencing homelessness regardless of level designation.¹⁰⁹ The legislature reasoned that individuals experiencing homelessness "present unique risks to the community."¹¹⁰ This amendment means that all homeless offenders' information is available to the public regardless of risk level.¹¹¹ Legislators argued that the weekly time limit was necessary because, prior to 1999, sex offenders purposely registered as homeless in an attempt to avoid registration with their actual address.¹¹² Those opposing the amendment testified that the weekly requirement would not effectively promote the goal of registration as it places an "onerous burden on the offenders who can least bear it."¹¹³ A legislative witness also argued that transportation to the sheriff's office is a problem that can impact an individual's ability to find employment.¹¹⁴ This weekly reporting requirement, witnesses argued, places a significant burden on offenders who experience homelessness through no fault of their own.¹¹⁵

The 1999 and 2001 amendments show the stark difference in the legislature's treatment of those offenders who experience homelessness

104. *Id.*

105. 95 Wash. App. 475, 975 P.2d 584 (1999).

106. *Id.* at 480, 975 P.2d at 587.

107. *See* 1999 Wash. Sess. Laws 2343-49.

108. *See id.* at 2348.

109. *See* 2001 Wash. Sess. Laws 758.

110. *See id.* at 761.

111. *Id.*

112. S.B. REP. 57-1952, Reg. Sess., at 2 (Wash. 2001).

113. *Id.* (noting the testimony by Heather Lechner of the Washington Defenders Association and Washington Association of Criminal Defense Lawyers).

114. *Id.*

115. *Id.*

and those who do not. Non-homeless offenders must appear in-person at the sheriff's office only once each year following their release from confinement, or when they move residences.¹¹⁶ In contrast, offenders experiencing homelessness must report weekly, in person, to a county sheriff's office on a specified day.¹¹⁷ Additionally, while the information of non-homeless level I offenders is generally not subject to public disclosure, the information of all homeless offenders is publicly available regardless of risk level.¹¹⁸

III. CONSTITUTIONAL CHALLENGES TO SEX OFFENDER REGISTRATION LAWS

In determining how a court could invalidate Washington's sex offender registration statute, it is important to examine constitutional challenges to Washington's and other states' sex offender registration statutes. Evaluating these challenges helps determine the likelihood that a court would find Washington's registration statute unconstitutional as applied to offenders experiencing homelessness. Constitutional challenges to sex offender registration statutes include cruel and unusual punishment, due process, equal protection, and ex post facto challenges.¹¹⁹ Although few constitutional challenges have been made against registration requirements as applied to individuals experiencing homelessness specifically, examining constitutional arguments against sex offender registration statutes in general helps provide a potential framework for challenging Washington's registration requirements.

A. *Cruel Punishment Challenges*

Both the U.S. and Washington Constitutions contain provisions prohibiting cruel punishment.¹²⁰ Notably, Washington courts interpret the state's constitutional protection from cruel punishment as more protective than the Eighth Amendment's protection from cruel and unusual punishment.¹²¹ Thus, if a Washington court does not invalidate a statute based on the state's protection against cruel punishment, then the court

116. See SEX OFFENDER POL'Y BD., OFF. FIN. MGMT., *supra* note 5, at 14, 16.

117. WASH. REV. CODE § 9A.44.130(6)(b) (2019).

118. WASH. REV. CODE § 4.24.550(5)(a)(ii) (2019).

119. See *infra* sections III.A, III.B, III.C, III.D.

120. See U.S. CONST. amend. VIII; WASH. CONST. art. I, § 14.

121. *State v. Fain*, 94 Wash. 2d 387, 392, 617 P.2d 720, 723 (1980).

does not perform a federal Eighth Amendment analysis.¹²²

1. *Federal Eighth Amendment Challenges*

The Eighth Amendment to the U.S. Constitution prohibits cruel and unusual punishment.¹²³ Although the Supreme Court has never established a concrete definition of cruel and unusual punishment, the Eighth Amendment prohibits “barbaric” punishments and sentences disproportionate to the crime committed.¹²⁴

In *Robinson v. California*,¹²⁵ a landmark Supreme Court decision regarding the Eighth Amendment, the defendant was convicted under a California statute which criminalized drug addiction and sentenced to serve jail time.¹²⁶ The Court determined that the California statute inflicted cruel and unusual punishment on the defendant because narcotic addiction is an illness which may be contracted involuntarily or innocently.¹²⁷ In other words, the statute unconstitutionally punished the “status” of narcotic addiction.¹²⁸ The Court stated, “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”¹²⁹

Various courts across the country have found that state sex offender statutes violate the Eighth Amendment as applied to certain offenders.¹³⁰ In *Millard v. Rankin*,¹³¹ three sex offenders challenged Colorado’s Sex Offender Registration Act, arguing that the Act violated the Eighth Amendment.¹³² The plaintiffs experienced major employment challenges due to their public sex offender status.¹³³ For example, one plaintiff’s

122. *State v. Rivers*, 129 Wash. 2d 697, 713, 921 P.2d 495, 502 (1996).

123. U.S. CONST. amend. VIII.

124. *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013) (quoting *Solem v. Helm*, 463 U.S. 277, 284 (1983)).

125. 370 U.S. 660 (1962).

126. *Id.* at 663.

127. *Id.* at 667.

128. *Id.* at 666.

129. *Id.* at 667.

130. *See Does #1–5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016) (holding that Michigan’s registration act retroactively imposed punishment); *Doe v. State*, 189 P.3d 999, 1018 (Alaska 2008) (holding that the same Act at issue in *Smith v. Doe* was so punitive as to overcome legislature’s civil intent); *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015) (holding that New Hampshire’s registration provision so punitive that retroactive application violates constitution).

131. 265 F. Supp. 3d 1211 (D. Colo. 2017). This was a civil case brought under 42 U.S.C. § 1983. *Id.* at 1214.

132. *Id.* at 1211.

133. *Id.*

employer knew the plaintiff was required to register as a sex offender, but allowed the plaintiff to work so long as the public did not find out about the registration status.¹³⁴ When a customer found out the plaintiff was a sex offender, the employer forced the plaintiff to transfer to a different worksite, and the plaintiff had to move residences.¹³⁵ The court held that the registration statute's effects on the plaintiffs were "plainly punitive."¹³⁶ Even if the registration statute served a legitimate legislative purpose in informing communities about sex offenders, the plaintiffs' employment challenges stemming from their registration status negated this purpose.¹³⁷ The court stated, "Public shaming and banishment are forms of punishment that may be considered cruel and unusual."¹³⁸

Federal courts have not addressed whether sex offender registration statutes violate the Eighth Amendment when applied to sex offenders experiencing homelessness. However, one federal court recently held that a statute punishing people for sleeping in public places constituted cruel and unusual punishment as applied to individuals experiencing homelessness.¹³⁹ In *Martin v. City of Boise*,¹⁴⁰ a group of homeless individuals brought a 42 U.S.C. § 1983¹⁴¹ action against Boise's public camping ordinance, alleging that the ordinance, which imposed criminal penalties for individuals who sleep in public places, constituted cruel and unusual punishment.¹⁴² The Ninth Circuit ruled in favor of the plaintiffs, stating, "[C]riminal penalties may not be inflicted upon person[s] for being in a condition [they are] powerless to change."¹⁴³ The court further explained—similar to the Supreme Court's earlier reasoning in *Robinson*—that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if the act is an unavoidable consequence of one's status.¹⁴⁴ Because sitting, lying, and sleeping are unavoidable

134. *Id.* at 1218.

135. *Id.*

136. *Id.* at 1226.

137. *Id.* at 1224.

138. *Id.* at 1226 (citing *Smith v. Doe*, 538 U.S. 84, 109 (2003) (Souter, J., concurring)).

139. See *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019), *cert. denied*, ___ U.S. ___, 140 S. Ct. 674 (2019).

140. 902 F.3d 1031 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019), *cert. denied*, ___ U.S. ___, 140 S. Ct. 674 (2019).

141. This federal statute allows an individual to bring a civil action for deprivation of rights, privileges, or immunities protected by the U.S. Constitution. See 42 U.S.C. § 1983.

142. *Martin*, 902 F.3d at 1048.

143. *Id.* (citations omitted) (quoting *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting)).

144. *Id.*

consequences of being human, criminal penalties imposed for these actions violate the Eighth Amendment.¹⁴⁵ Eighth Amendment arguments similar to those made in *Martin* and *Robinson* could be made in Washington courts when challenging Washington's sex offender registration statute.

2. *Washington State Article I, Section 14 Cruel Punishment Challenges*

Article I, section 14 of the Washington Constitution prohibits cruel punishment.¹⁴⁶ The Washington prohibition against cruel punishment is more protective than the Eighth Amendment.¹⁴⁷ A criminal punishment is "cruel" under the Washington Constitution if it is grossly disproportionate to the offense.¹⁴⁸ When examining disproportionality, Washington courts consider four factors: (1) the nature of the offense; (2) the legislative purpose behind the statute; (3) the punishment the defendant would have received in other jurisdictions; and (4) the punishment for other offenses in the same jurisdiction.¹⁴⁹

Washington courts have not considered whether sex offender registration requirements are unconstitutional under article I, section 14. In typical cases, individuals argue that their terms of confinement constitute cruel punishment.¹⁵⁰ However, sex offender registration differs from a traditional sentence because registration is a requirement placed on convicted sex offenders in addition to incarceration.¹⁵¹ Thus, individuals bringing a sex offender registration challenge would need to argue that a condition of their release, rather than their sentence to incarceration, is cruel punishment. Washington courts have never determined whether sex offender registration statutes are cruel punishment under article I, section 14 in general or as applied to offenders experiencing homelessness.

145. *Id.*

146. WASH. CONST. art. I, § 14. The Washington Constitution does not explicitly provide protection from unusual punishment. Many states left the "unusual" language out of their constitutions because "cruel" and "unusual" were synonyms in the context of punishment, so the need to state both terms was unnecessary. See John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1823 (2008).

147. See *State v. Witherspoon*, 180 Wash. 2d 875, 887, 329 P.3d 888, 894 (2014).

148. See *State v. Moretti*, 193 Wash. 2d 809, 830, 446 P.3d 609, 618 (2019).

149. *Id.* at 830, 446 P.3d at 618–19.

150. See, e.g., *id.* at 814, 446 P.3d at 611 (arguing mandatory life without parole sentence for assault and robbery charges violates article I, section 14).

151. See WASH. REV. CODE § 9A.44.130 (2019).

Cruel punishment challenges in Washington courts would probably vary in likelihood of success on a case-by-case basis using Washington's four-factor analysis. The first factor a court considers is the nature of the offense.¹⁵² In *State v. Moretti*,¹⁵³ the Supreme Court of Washington determined that the nature of a robbery and assault did not support a finding that a sentence of life without parole was cruel punishment under article I, section 14.¹⁵⁴ The case involved extremely violent acts: the accused allegedly beat a man with a bat and stabbed a woman ten times in front of her four-year-old grandchild.¹⁵⁵ The Court determined that the violate nature of the crime rendered a sentence of life without parole proportionate to the crime.¹⁵⁶ With this first *Moretti* factor in mind, the "nature" of sex offenses can vary greatly.¹⁵⁷ Where one sex offense may be a brutal, violent rape, another sex offense may be voyeurism. While it is hard to predict how exactly a Washington court would examine this issue, precedent regarding other crimes indicates that the more violent and serious a crime, the less likely a court is to find a punishment to be cruel in violation of the Washington Constitution.¹⁵⁸

The second factor Washington courts consider when examining whether a sentence is cruel punishment is the legislative purpose behind the statute.¹⁵⁹ The Supreme Court of Washington has made clear that while the legislature has the power to set punishment for criminal offenses, article I, section 14 limits this power.¹⁶⁰ In *Moretti*, the statute at issue was Washington's Persistent Offender statute,¹⁶¹ which states that offenders who commit three "most serious offenses" should be sentenced to confinement for life without parole.¹⁶² The Supreme Court of Washington found that the legislature's purpose in enacting the Persistent Offender statute was to deter criminals and incapacitate them.¹⁶³ The

152. *Moretti*, 193 Wash. 2d at 830, 446 P.3d at 618.

153. 193 Wash. 2d 809, 446 P.3d 609 (2019).

154. *Id.* at 831, 446 P.3d at 619.

155. *Id.*

156. *Id.*

157. *See* WASH. REV. CODE § 9A.44.130 (2019).

158. *See Moretti*, 193 Wash. 2d at 831, 446 P.3d at 619.

159. *Id.* at 830, 446 P.3d at 618.

160. WASH. CONST. art. I, § 14; *State v. Thorne*, 129 Wash. 2d 736, 772, 921 P.2d 514, 531 (1996).

161. The Persistent Offenders statute is codified at section 9.94A.570 of the Washington Revised Code. "Most serious offense[s]" include any Class A felony, as well as other crimes listed under section 9.94A.030(33) of the Washington Revised Code. This is Washington's "Three-Strikes" law.

162. *Moretti*, 193 Wash. 2d at 833–34, 446 P.3d at 620.

163. *Id.* at 832, 446 P.3d at 620.

Court held that Moretti's sentence did not violate article I, section 14 because the legislature's goals of deterrence and incapacitation negated the potential cruel punishment inflicted by a life without parole sentence.¹⁶⁴

In a civil case, *Fernandez v. Kiner*,¹⁶⁵ the Washington Court of Appeals rejected a cruel punishment challenge to Washington's constitutional disenfranchisement of felons.¹⁶⁶ The court held that the constitutional disenfranchisement provision was not cruel punishment because the provision's purpose was to designate a reasonable ground for eligibility of voting.¹⁶⁷ In other words, the court determined that there was a reasonable explanation for the punishment.¹⁶⁸

With the third *Moretti* factor, the court examines what the punishment would be in other jurisdictions for the same crime.¹⁶⁹ In *Fernandez*, the court mentioned that forty-two states had adopted similar disenfranchisement provisions.¹⁷⁰ Because such a great number of states adopted similar disenfranchisement provisions, the court concluded that disenfranchisement is not cruel punishment.¹⁷¹

Finally, under the fourth *Moretti* factor, the court looks at the punishment the offender would have received for a different crime in the same jurisdiction.¹⁷² In *Moretti*, the court concluded that the defendant would have had the same life without parole punishment if they committed any of Washington's "[m]ost serious offense[s]."¹⁷³ The court reasoned that because life without parole was mandatory for anyone convicted of three "[m]ost serious offense[s]," this factor weighed against cruel punishment.¹⁷⁴ Analyzing this factor's application to Washington's sex offender registration statute requires looking at how other similar offenses in Washington are treated. Other types of offenses in Washington that require registration include kidnapping offenses and felony

164. *Id.* at 830, 446 P.3d at 618.

165. 36 Wash. App. 210, 673 P.2d 191 (1983).

166. *See id.* at 213, 673 P.2d at 193; WASH. CONST. art. 6, § 3.

167. *Fernandez*, 36 Wash. App. at 213–14, 673 P.2d at 193.

168. *Id.*

169. *See Moretti*, 193 Wash. 2d at 833, 446 P.3d at 620.

170. *Fernandez*, 36 Wash. App. at 213, 673 P.2d at 193.

171. *Id.*

172. *See Moretti*, 193 Wash. 2d at 833, 446 P.3d at 620.

173. *Id.* at 832, 446 P.3d at 620. Examples of Washington's "[m]ost serious offense[s]" include manslaughter, child molestation, incest, kidnapping, rape, and extortion. *See* WASH. REV. CODE § 9.94A.030(32) (2019).

174. *Moretti*, 193 Wash. 2d at 833–34, 446 P.3d at 620.

firearm offenses.¹⁷⁵

Precedent such as *Moretti* and *Fernandez* provide some insight into whether a cruel punishment argument would be a viable argument to challenge Washington's homeless sex offender registration requirements in Washington courts.

B. Due Process Challenges

Courts have considered whether sex offender registration statutes violate both substantive and procedural due process rights under the Fourteenth Amendment of the U.S. Constitution.¹⁷⁶ However, because courts do not view freedom from registration as a liberty interest, they usually decline to find sex offender registration statutes unconstitutional on due process grounds.¹⁷⁷

1. Substantive Due Process

Article I, section 3 of the Washington Constitution and the Fourteenth Amendment of the U.S. Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."¹⁷⁸ "Substantive due process protects against arbitrary . . . government action . . ."¹⁷⁹ In order to succeed on a substantive due process claim, a fundamental right to liberty must be at stake.¹⁸⁰

In one case, a sex offender challenged Illinois's Sex Offender Registration Act, arguing that the right to be free from a lifetime of "burdensome, intrusive monitoring and restrictions constitutes a fundamental right to liberty."¹⁸¹ This challenge was unsuccessful because the Illinois Supreme Court previously held that the right to be free from the shame, stigma, and embarrassment resulting from a sexual abuse conviction is not the type of right protected under the U.S. Constitution.¹⁸² Using rational basis review, the Court determined that the statute's purpose was rationally related to the Illinois legislature's goal of protecting the public from sex offenders and upheld the statute.¹⁸³ The

175. See WASH. REV. CODE §§ 9A.1.330(32), 9A.44.130 (2019).

176. U.S. CONST. amend. XIV.

177. See *People v. Pollard*, 2016 IL App (5th) 130514, 54 N.E.3d 234, 245.

178. WASH. CONST. art. I, § 3.

179. *Amunrud v. Bd. of Appeals*, 158 Wash. 2d 208, 218–19, 143 P.3d 571, 576 (2006).

180. *Id.* at 219–20, 143 P.3d at 576.

181. *Pollard*, 54 N.E.3d at 244.

182. *Id.* at 245.

183. *Id.* at 246.

Ninth Circuit reached a similar conclusion in regard to Alaska's Sex Offender Registration Act, holding that persons convicted of sex offenses do not have a fundamental right to be free from registration.¹⁸⁴ Courts determining the constitutionality of registration requirements in substantive due process challenges generally do not consider freedom from registration to be a fundamental right protected by either the U.S. Constitution or its state equivalent.¹⁸⁵

One Washington court has heard a substantive due process challenge to Washington's sex offender registration statute. In *State v. B.J.C.*,¹⁸⁶ a juvenile sex offender argued that sex offender registration burdened the fundamental right to travel in violation of substantive due process rights.¹⁸⁷ The Washington Court of Appeals rejected this substantive due process argument, reasoning that the defendant had not proven that the registration requirements actually deterred or penalized the defendant's travel.¹⁸⁸ However, the defendant in *B.J.C.* was not homeless and not subject to the weekly reporting requirements of the registration statute.¹⁸⁹

2. *Procedural Due Process*

Article I, section 3 of the Washington Constitution¹⁹⁰ and the Fourteenth Amendment to the U.S. Constitution also guarantee procedural due process.¹⁹¹ The Washington Constitution's due process protections are coextensive with the Fourteenth Amendment's due process protections.¹⁹² Individuals bringing procedural due process claims argue that the government deprived them of a life, liberty, or property interest without reasonable notice or opportunity to be heard.¹⁹³ Individuals may

184. *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004).

185. *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005) (“[W]e can find no history or tradition that would elevate the issue here to a fundamental right.”); *Gunderson v. Hvass*, 339 F.3d 639, 643 (8th Cir. 2003) (finding Minnesota's predatory offender registration statute nonpunitive in nature and not implicating a fundamental right).

186. No. 45833-1-II, 2015 WL 5027559 (Wash. Ct. App. Aug. 25, 2015).

187. *Id.* (holding the right to travel is a fundamental right protecting travel between states and travel within the same state); *City of Seattle v. McConahy*, 86 Wash. App. 557, 571, 937 P.2d 1133, 1141 (1997).

188. *B.J.C.*, 2015 WL 5027559, at *5.

189. *See id.*

190. WASH. CONST. art. I, § 3.

191. U.S. CONST. amend. XIV; *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003); *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004).

192. *Nielsen v. Wash. State Dep't of Licensing*, 177 Wash. App. 45, 52, 309 P.3d 1221, 1225 (2013).

193. *Didlake v. Wash. State*, 186 Wash. App. 417, 425, 345 P.3d 43, 47 (2015).

bring procedural due process challenges only where these specific interests are implicated and the right to a hearing is paramount.¹⁹⁴

In *Connecticut Department of Public Safety v. Doe*,¹⁹⁵ the accused argued that Connecticut's sex offender registry law violated the procedural due process rights of sex offenders because the Act deprived sex offenders of protected liberty interests without notice or meaningful opportunity to be heard.¹⁹⁶ The United States Supreme Court held that because the "law's requirements turn on an offender's conviction alone," the law did not violate procedural due process requirements.¹⁹⁷ Because courts do not recognize the right to be free from registration as a right invoking procedural due process requirements, invalidating Washington's registration statute on due process grounds would likely be challenging.

C. Equal Protection Challenges

Under the Fourteenth Amendment to the U.S. Constitution, all individuals are guaranteed equal protection of the laws.¹⁹⁸ This means "all persons similarly situated should be treated alike."¹⁹⁹ The standard of review courts use when analyzing an equal protection claim depends on whether the group asserting discrimination is a "suspect class."²⁰⁰ Examples of suspect classes include race and gender.²⁰¹ If the group is a suspect class, courts use a heightened standard of review.²⁰² If not, courts analyze the claim using rational basis review.²⁰³

Like all federal courts, Washington courts do not consider individuals experiencing homelessness to be a suspect class. Lack of suspect class status means that courts subject claims of discrimination against individuals experiencing homelessness to rational basis review.²⁰⁴ Under rational basis review, a statute need only be rationally related to a

194. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972).

195. 538 U.S. 1 (2003).

196. *Id.* at 6.

197. *Id.* at 2.

198. U.S. CONST. amend. XIV.

199. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

200. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457 (1988).

201. Gender is generally considered a "quasi-suspect" class, receiving an intermediate, but still heightened form of judicial scrutiny when compared to rational basis review. *See* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 140 (2011).

202. *Cleburne*, 473 U.S. at 439.

203. *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000).

204. *See id.* at 1357–58.

legitimate government purpose.²⁰⁵ In *City of Seattle v. Webster*,²⁰⁶ the Supreme Court of Washington examined the equal protection ramifications of Seattle's "pedestrian interference ordinance," a law criminalizing an individual's intentional obstruction of pedestrian or vehicular traffic.²⁰⁷ Amicus argued that the Court should recognize individuals experiencing homelessness as a suspect class because pedestrian interference ordinances disparately affect individuals experiencing homelessness.²⁰⁸ The Court disagreed, stating that the Court "found no cases where the homeless have been judicially declared a protected class."²⁰⁹

An equal protection challenge to Washington's homeless sex offender registration statute may be stronger than the challenge in *Webster* but would still face significant obstacles. The ordinance at issue in *Webster* did not distinguish between individuals experiencing homelessness and non-homeless individuals. The Court held that the pedestrian interference ordinance applied equally to all persons.²¹⁰ In contrast, individuals experiencing homelessness are subject to stricter requirements than non-homeless individuals under the sex offender registration statute.²¹¹ However, even though the sex registration statute is not facially neutral like the ordinance in *Webster*, a court would still analyze the sex registration statute under rational basis review, which is a tough standard for the challenger to overcome.²¹²

D. *Ex Post Facto Challenges*

Both the U.S. and Washington Constitutions contain provisions prohibiting ex post facto laws.²¹³ These provisions prohibit the government from enacting a law which imposes punishment for an act which was not punishable when originally committed.²¹⁴ Additionally, they prohibit the government from increasing the punishment of the crime

205. *Id.*

206. 115 Wash. 2d 635, 802 P.2d 1333 (1990).

207. *Id.* at 646, 802 P.2d at 1340.

208. *Id.*

209. *Id.*

210. *Id.*

211. *See* WASH. REV. CODE § 9A.44.130 (2019).

212. *See, e.g.,* *State v. Mathers*, 193 Wash. App. 913, 925, 376 P.3d 1163, 1170 (2016) (stating that successfully winning on rational basis review requires "overcom[ing] the strong presumption of constitutionality" (quoting *In re Det. of Ross*, 114 Wash. App. 113, 118, 56 P.3d 602, 605 (2002))).

213. U.S. CONST. art I, § 10, cl. 1; WASH. CONST. art. I, § 23.

214. *State v. Ward*, 123 Wash. 2d 488, 869 P.2d 1062, 1067 (1994).

from the punishment at the time the crime was committed.²¹⁵ Sex offenders have brought ex post facto challenges against registration statutes when they committed their original crime prior to implementation of the weekly reporting requirement.²¹⁶ In such cases, sex offenders argue that the reporting requirement imposes a greater punishment than their crime originally carried.²¹⁷

1. *Federal Ex Post Facto Challenges*

Article I, Section 10 of the United States Constitution states that “No State shall . . . [pass] any ex post facto Law”²¹⁸ An ex post facto analysis examines whether sex offender registration requirements are punitive in nature.²¹⁹ The Supreme Court has analyzed whether sex offender registration statutes violate the Ex Post Facto Clause.²²⁰

The Court specifically examined an ex post facto challenge to the Alaska Sex Offender Registration Act.²²¹ In *Smith v. Doe*,²²² two defendants were convicted of sex crimes prior to the passage of the Act, which required them to register as sex offenders, submit quarterly registration, and notify authorities of any changes to their registration.²²³ The defendant brought an action under 42 U.S.C. § 1983²²⁴ challenging the constitutionality of the Act under the Ex Post Facto Clause of the U.S. and Alaska Constitutions.²²⁵ The Court framed the issue as whether the legislature meant to impose a punishment or a civil regulatory regime.²²⁶ The Court held that because the legislature meant to establish a civil, nonpunitive regime for tracking offenders, the Ex Post Facto Clause was not violated.²²⁷ Justice Kennedy, writing for the Court, stated, “The policy to alert convicted offenders to the civil consequences of their criminal

215. *Id.*

216. *See, e.g., State v. Boyd*, 1 Wash. App. 2d 501, 507, 408 P.3d 362, 366 (2017) (arguing sex offender registration for homeless registrants violates ex post facto clause because the accused did not have to register weekly in the past).

217. *See id.*

218. U.S. CONST. art. I, § 10, cl. 1.

219. *See Boyd*, 1 Wash. App. at 507, 408 P.3d at 366.

220. *See Smith v. Doe*, 538 U.S. 84, 89 (2003).

221. *Id.*

222. 538 U.S. 84, 89 (2003).

223. *Id.* at 90–91.

224. *See supra* note 141.

225. *Smith*, 538 U.S. at 91.

226. *Id.* at 92.

227. *Id.* at 96.

conduct does not render consequences themselves punitive.”²²⁸

However, Justice Ginsburg would have held that the Alaska Sex Offender Registration Act violated the Ex Post Facto Clause.²²⁹ Justice Ginsburg disagreed with the majority, stating, “However plain it may be that a former sex offender currently poses no threat of recidivism, [they] will remain subject to long-term monitoring and inescapable humiliation.”²³⁰ Justice Ginsburg believed the Act was punitive in nature because it applied to all sex offenders without regard to their future dangerousness.²³¹ The majority ruling meant that even if offenders had been rehabilitated, they were still subject to punitive monitoring and public humiliation for possibly the rest of their lives.²³²

Read broadly, the Court’s holding in *Smith v. Doe* suggests that sex offender registration statutes are not punitive in nature and do not violate the Ex Post Facto clause of the U.S. Constitution.²³³ However, courts have not always applied Justice Kennedy’s holding broadly, and many states have struck down provisions of state sex offender registration requirements on ex post facto grounds.²³⁴ Further, the *Smith v. Doe* decision came down in 2003, three years prior to the enactment of SORNA.²³⁵ Thus, the Supreme Court has not considered whether registration is punishment since the enactment of SORNA and the Act’s expansion of sex offender registration requirements.²³⁶

2. *Washington Ex Post Facto Challenges*

Article I, section 23 of the Washington State Constitution contains a ban on ex post facto laws similar to that of the U.S. Constitution.²³⁷ Washington courts employ a three-factor test to determine whether a state

228. *Id.* at 95–96.

229. *Id.* at 118.

230. *Id.* at 117.

231. *Id.* at 116.

232. *Id.* at 117.

233. *See id.*

234. *See* *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009) (dismissing failure-to-register action against offender who served sentence prior to enactment of Indiana Sex Offender Registration Act as violation of ex post facto clause); *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 62 A.3d 123 (Md. 2013) (dismissing failure-to-register action against offender whose crime was committed prior to enactment of state registration statute as violation of ex post facto clause).

235. *See Smith*, 538 U.S. at 84; SORNA, 42 U.S.C. § 16901.

236. *See Smith*, 538 U.S. at 84.

237. WASH. CONST. art. I, § 23.

law violates the state's ex post facto clause.²³⁸ A law violates the Washington ex post facto clause “if it (1) is substantive, as opposed to merely procedural; (2) is retrospective . . . ; and (3) disadvantages the person affected by it.”²³⁹

In *State v. Ward*,²⁴⁰ the Supreme Court of Washington assumed that Washington's sex offender registration law was substantive rather than procedural, and assumed that the law applies retrospectively.²⁴¹ The Court's main focus was on the third factor of ex post facto analysis: whether the registration law disadvantages the person affected by it.²⁴² In deciding this question, the court looked to legislative history to determine whether the legislature intended for the law to be punitive.²⁴³ In the end, the Court determined that the sex offender registration does not constitute “punishment” because registration is regulatory and not punitive.²⁴⁴ The Court considered the law regulatory because it merely allowed the public to track sex offenders.²⁴⁵ Additionally, the Court examined whether the sex offender registration statute was so punitive as to negate the Legislature's regulatory intent.²⁴⁶ After considering whether sex offender registration involves an affirmative disability or restraint, whether it has been historically regarded as punishment, whether its operation will promote retribution and deterrence, and whether it appears excessive in relation to the crime, the Court still concluded that the sex offender registration statute was not punitive.²⁴⁷ Notably, this decision does not discuss whether the statute is punitive when applied to sex offenders experiencing homelessness.²⁴⁸

However, one Washington court recently performed an ex post facto analysis of Washington's sex offender registration statute as applied to an individual experiencing homelessness.²⁴⁹ In *State v. Boyd*,²⁵⁰ a Washington Court of Appeals denied an ex post facto challenge to

238. *State v. Boyd*, 1 Wash. App. 2d 501, 503, 408 P.3d 362, 368 (2017).

239. *State v. Ward*, 123 Wash. 2d 488, 498, 869 P.2d 1062, 1067–68 (1994) (emphasis omitted).

240. 123 Wash. 2d 488, 869 P.2d 1062 (1994).

241. *Id.* at 498, 869 P.2d at 1068.

242. *Id.* at 498–99, 869 P.2d at 1068.

243. *Id.* at 499, 869 P.2d at 1068.

244. *Id.* at 510–11, 869 P.2d at 1074.

245. *Id.* at 509, 869 P.2d at 1073.

246. *Id.* at 500, 869 P.2d at 1069.

247. *Id.* at 510–11, 869 P.2d at 1074.

248. *See id.*

249. *State v. Boyd*, 1 Wash. App. 2d 501, 505, 408 P.3d 362, 365 (2017).

250. 1 Wash. App. 2d 501, 408 P.3d 362 (2017).

Washington's registration statute by Jason Boyd, a sex offender experiencing homelessness.²⁵¹ In 1998, Boyd was convicted of having sex with a minor and was required to register as a sex offender.²⁵² Nineteen years after Boyd's conviction, the registration statute still required Boyd to register as a sex offender.²⁵³ However, prior to Washington's 1999 amendment, the registration statute did not require Boyd to make weekly, in-person reports.²⁵⁴ In 2014, the state classified Boyd as "lack[ing] a fixed residence" because Boyd stayed with friends or on the streets each night.²⁵⁵ Consequently, the registration statute required Boyd to report in person weekly to the county sheriff's office in order to prevent arrest and conviction for failure-to-register as a sex offender.²⁵⁶ Because Boyd failed to appear at the county sheriff's office during a three week period in the winter months of 2015, the state charged Boyd with failure-to-register as a sex offender.²⁵⁷ Upon conviction for failure-to-register, the trial court sentenced Boyd to forty-five months incarceration and continued Boyd's obligation to register as a sex offender.²⁵⁸

On appeal, Boyd argued that Washington's sex offender registration statute violated the Ex Post Facto Clause of the U.S. and Washington Constitutions.²⁵⁹ Because Boyd committed the original offense prior to the statute's 1999 amendment, Boyd argued that the homeless registration requirements were punitive in violation of the Ex Post Facto Clause.²⁶⁰ The court held that the failure-to-register statute did not violate the Ex Post Facto Clause because Boyd could not prove that the weekly reporting requirement was punitive.²⁶¹ The court did concede that the registration requirements for homeless individuals were "burdensome," but argued these burdens are an incident of an underlying conviction and do not rise to the level of "punitive" required for an ex post facto challenge to succeed.²⁶²

However, Judge Mary Kay Becker wrote a powerful dissent

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 506, 408 P.3d at 365–66.

256. *Id.* at 509–10, 408 P.3d at 367.

257. *Id.* at 506, 408 P.3d at 366.

258. *Id.*

259. *Id.*

260. *Id.* at 510, 408 P.3d at 368.

261. *Id.* at 513, 408 P.3d at 369.

262. *Id.* at 510, 408 P.3d at 368.

questioning the registration statute's constitutionality as applied to offenders experiencing homelessness: "The 1999 amendment requiring weekly in-person reporting makes Washington's statute perhaps the most burdensome in the country."²⁶³ Judge Becker argued that Boyd's case illustrates how the "weekly reporting requirement can readily lead to an unending cycle of imprisonment for transient offenders"²⁶⁴ Judge Becker points out the stark difference in reporting requirements for non-homeless offenders and describes the homeless weekly reporting requirement as "particularly glaring when compared to the minor burden imposed on offenders who register from a fixed residence."²⁶⁵ Judge Becker further argued that the weekly reporting requirement is punishment, stating that "when a homeless offender has to travel in person to the sheriff's office every Monday morning . . . the duty resembles . . . a sanction historically regarded as punishment."²⁶⁶ While Judge Becker's opinion did not win the day, the *Boyd* dissent highlights important problems for courts and the legislature to consider in regard to registration statutes as applied to offenders experiencing homelessness.

IV. THE INTERSECTION OF SEX OFFENDERS AND INDIVIDUALS EXPERIENCING HOMELESSNESS

Sex offenders are typically not a group that receives much sympathy from the public.²⁶⁷ In fact, scholars state that "there are few groups of criminal offenders that incite as much fear and disdain among the public as sex offenders."²⁶⁸ However, sex offenders experiencing homelessness face unique economic and social challenges.²⁶⁹ Understanding these challenges helps provide insight on the impact of the burdensome weekly registration requirements and what kind of impact invalidating the registration law would potentially have on the lives of offenders experiencing homelessness.

A. *Data on Sex Offenders Experiencing Homelessness*

Understanding the demographics of Washington's sex offender

263. *Id.* at 525, 408 P.3d at 375.

264. *Id.*

265. *Id.* at 527–28, 408 P.3d at 376.

266. *Id.* at 526, 408 P.3d at 375.

267. See Laura L. King & Jennifer J. Roberts, *The Complexity of Public Attitudes Toward Sex Crimes*, 12 VICTIMS & OFFENDERS 71, 71 (2017).

268. See *id.*

269. Caldwell et al., *supra* note 11, at 90–91.

population is necessary to understand why Washington should invalidate its registration statute. In Washington State, about 22,000 people experience homelessness each night.²⁷⁰ In 2016, there were 21,923 registered sex offenders in Washington,²⁷¹ but “reliable data describing the nature and magnitude of homeless and transient [registered sex offenders] has remained limited.”²⁷²

Although it is difficult to determine the precise number of sex offenders experiencing homelessness in the state, an examination of county sex offender registries provides some insight. In King County, Washington’s most populous county²⁷³ and the county in which Seattle is located, as of January 2020, 1,658 registered sex offenders appear on the public notification website.²⁷⁴ Of those individuals, about 345 are listed as “transient,” or homeless.²⁷⁵ Offenders listed as “transient” are subject to weekly, in-person reporting requirements.²⁷⁶ This means that “transient” sex offenders make up roughly 20% of King County’s public sex offender database.²⁷⁷ In 2013, it was estimated that over 140 level II and level III sex offenders lived in Pioneer Square, one of Seattle’s downtown neighborhoods.²⁷⁸ Of those registered sex offenders living in Pioneer

270. *Washington Homelessness Statistics*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, <https://www.usich.gov/homelessness-statistics/wa/> [<https://perma.cc/5H5Q-K73F>].

271. NAT’L CTR. FOR MISSING & EXPLOITED CHILD., MAP OF REGISTERED SEX OFFENDERS IN THE UNITED STATES (2017), https://api.missingkids.org/en_US/documents/Sex_Offenders_Map.pdf [<https://perma.cc/EV4U-G5ND>].

272. Andrew J. Harris et al., *Registered Sex Offenders in the United States: Behind the Numbers*, 60 CRIME & DELINQ. 3, 28 (2014).

273. *Washington County Profiles*, MUN. RSCH. & SERVS. CTR. (2020), <http://mrsc.org/home/research-tools/washington-county-profiles.aspx> [<https://perma.cc/X4JY-NH4R>].

274. *Offender Search: Results*, KING CNTY. SHERIFF’S OFF., <http://www.icrimewatch.net/results.php?SubmitAllSearch=1&AgencyID=54473> [<https://perma.cc/H82E-S29N>] (data accessed Jan. 18, 2020). It is important to note that only level II, level III, and transient level I sex offenders are in this database. This means the database does not include non-transient level I sex offenders.

275. *Id.*

276. See WASH. REV. CODE § 9A.44.130(6)(b) (2019) (requiring weekly reporting for homeless offenders).

277. *Offender Search: Results*, *supra* note 274. Notably, King County’s homeless population as of 2018 was the third largest in the U.S. and may not be representative of Washington State as a whole. See Kate Walters, *Seattle Homeless Population Is Third Largest in U.S., After LA and NYC*, KUOW (Dec. 18, 2018, 7:19 PM), <https://www.kuow.org/stories/here-s-how-seattle-and-washington-compare-to-national-homeless-trends> [<https://perma.cc/VLM9-DE6J>]. It is important to remember that non-homeless level I sex offenders are not included in the public database.

278. Amy Clancy, *Police: Nearly 150 Registered Sex Offenders in Pioneer Square*, KIRO 7 NEWS (Nov. 5, 2013, 6:02 PM), <https://www.kiro7.com/news/police-nearly-150-registered-sex-offenders-pioneer/246033392/> [<https://perma.cc/M6DM-9PBH>].

Square, “[d]ozens of them are homeless.”²⁷⁹ Notably, Pioneer Square is home to the King County Sheriff’s Office, where many of Seattle’s homeless sex offenders are required to report weekly to meet their registration obligations.²⁸⁰

The rationale for homeless registration requirements found in many cases and the Washington legislature—that sex offenders have high rates of recidivism—is not supported by data. In *Smith v. Doe*,²⁸¹ Justice Kennedy described the sex offender recidivism rate as “frightening and high.”²⁸² One study found that ninety-one judicial opinions used Justice Kennedy’s exact language.²⁸³ However, this rhetoric is unfounded. In fact, the opposite may be true.²⁸⁴ A 2019 report of data gathered from over 400,000 released prisoners showed that sex offenders were less likely to be arrested following release from confinement than prisoners released for property, drug, and public-order offenses.²⁸⁵ While 83% of all former prisoners were arrested for a new crime, only 67% of sex offenders were rearrested for a new crime.²⁸⁶ Considering the overall recidivism rate is almost 20% higher than the sex offender recidivism rate, Justice Kennedy’s description of the sex offender rate as “frightening and high” seems overstated.²⁸⁷

Furthermore, homelessness is often involuntary.²⁸⁸ The predictors of homelessness include poverty, veteran status, whether or not the person is a domestic violence survivor, lack of affordable housing, and race.²⁸⁹ Lack

279. *Id.*

280. *Id.*

281. 538 U.S. 84, 103 (2003).

282. *Id.* (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

283. Deanna Cann, *Sex Offender Policies that Spin the Revolving Door: An Exploration of the Relationships Between Residence Restrictions, Homelessness, and Recidivism* 25 (2017) (M.A. thesis, University of South Carolina) (Scholar Commons).

284. See MARIEL ALPER & MATTHEW R. DUROSE, U.S. DEP’T OF JUST., NCJ 251773, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005–14)*, at 4 (2019) (stating that sex offenders were less likely to be arrested following release than prisoners released after serving time for property, drug, and public order offenses).

285. *Id.* Historically, sex crimes are underreported compared to other crimes, and thus the significance of this data point may not be entirely accurate. See Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Dangerous?*, 3 *CRIMINOLOGY & PUB. POL’Y* 59, 68 (2003).

286. *Id.*

287. *Smith*, 538 U.S. at 103 (quoting *McKune*, 536 U.S. at 34).

288. Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 *FORDHAM URB. L.J.* 1215, 1223–30 (2003) (noting that both structural and individual factors play a role in causing homelessness, including poverty, lack of affordable housing, and restrictions on public assistance).

289. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES* (2015), https://nlchp.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_

of affordable housing and stable employment opportunities often force people into homelessness because they do not have funds to pay for basic necessities.²⁹⁰ One study indicates that Black individuals are overrepresented in the country's homeless population, finding that 39% of individuals experiencing homelessness and staying in shelters were Black, while only 13% of the total U.S. population is Black.²⁹¹ Because homelessness is usually involuntary, subjecting offenders who experience homelessness to harsher reporting requirements than non-homeless offenders for the same underlying sex offenses is unjust.

B. Unique Challenges that Sex Offenders Experiencing Homelessness Face

In Seattle, officials describe homelessness as a crisis.²⁹² Seattle city officials partially attribute the homelessness crisis to the criminal justice system, stating, "The criminal justice system has failed to attain a comprehensive understanding of the drivers of homelessness."²⁹³ Studies show that post-incarceration compliance requirements, such as sex offender registration, significantly impact the probability of a person becoming homeless.²⁹⁴ One study shows that sex offender registration requirements negatively impact individuals in the areas of housing, employment, and social acceptance.²⁹⁵ Struggles in these areas can increase the likelihood of homelessness.²⁹⁶

Finding housing as a sex offender is often extremely difficult.²⁹⁷ Because landlords want to avoid dealing with public backlash, many low-income apartments refuse to rent to individuals convicted of sex offenses.²⁹⁸ Furthermore, individuals convicted of sex crimes in

Sheet.pdf [https://perma.cc/Q92T-D9GK].

290. *Id.*

291. *Id.*

292. *Homelessness Response: The Roots of the Crisis*, SEATTLE.GOV, <https://www.seattle.gov/homelessness/the-roots-of-the-crisis> [https://perma.cc/2Q57-JMHX] (quoting current Seattle Mayor Jenny Durkan).

293. *Id.*

294. See PATRICIA MCKERNAN, HOMELESSNESS AND PRISONER REENTRY: EXAMINING BARRIERS TO HOUSING STABILITY AND EVIDENCE BASED STRATEGIES THAT PROMOTE IMPROVED OUTCOMES (2017), <https://www.voan.org/homelessness-and-prisoner-reentry> [https://perma.cc/W89V-M5RL].

295. Caldwell et al., *supra* note 11, at 90–91.

296. See NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 289.

297. Caldwell et al., *supra* note 11, at 91.

298. Melanthia Mitchell, *Sex Offenders Find Housing Scarce*, SEATTLE POST-INTELLIGENCER (July 21, 2003, 10:00 PM), <https://seattlepi.com/news/article/Sex-offenders-find-housing-scarce-1119869.php> [https://perma.cc/M938-K4HC].

Washington are not eligible for section 8 housing vouchers.²⁹⁹ The federal government's section 8 housing voucher program "assist[s] very low-income families, the elderly, and the disabled to afford decent, safe, and sanitary housing in the private market."³⁰⁰ This means sex offenders are not eligible to receive subsidized low-income housing assistance from the government.³⁰¹ On top of these hardships, many homeless shelters in Washington forbid sex offenders from staying at their facilities because the shelters allow children to stay in their facilities and they worry about safety.³⁰² This gives sex offenders experiencing homelessness very few opportunities to find "fixed residence[s]" for registration purposes, forcing them to report in person weekly.³⁰³

Not only do sex offenders experiencing homelessness face roadblocks in terms of housing, they also face many problems gaining employment.³⁰⁴ Individuals with any conviction face challenges when trying to find employment, but these challenges multiply for individuals experiencing homelessness with sex offense convictions.³⁰⁵ Although federal law prohibits employers from discriminating against applicants with criminal histories, federal law does not prohibit employers from asking about applicants' criminal histories.³⁰⁶ Under the more protective Washington law, an employer must first determine whether an applicant qualifies for the position before running a background check on the applicant.³⁰⁷ An even more protective Seattle ordinance requires an employer to have a "legitimate business reason" to deny an applicant a job based on a conviction record.³⁰⁸ However, this protective ordinance only applies to Seattle employers, meaning most Washington employers do not need a "legitimate business reason" to deny applicants based on their criminal

299. Washington Appleseed, *Housing: What You Need to Know*, WASH. REENTRY GUIDE, <http://wareentryguide.org/housing/> [<https://perma.cc/SHF2-33VL>].

300. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [<https://perma.cc/A8NE-L3DF>].

301. Washington Appleseed, *supra* note 299.

302. *Id.*

303. *See* WASH. REV. CODE § 9A.44.130(6)(b) (2019).

304. Kevin Brown et al., *The Reintegration of Sex Offenders: Barriers and Opportunities for Employment*, 46 HOW. J. 32, 32 (2007).

305. *Id.*

306. PRE-EMPLOYMENT INQUIRIES AND ARREST & CONVICTION, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm [<https://perma.cc/KNN7-SZZW>].

307. WASH. REV. CODE § 49.94.010 (2019).

308. SEATTLE, WASH., MUN. CODE § 14.17.020 (2013).

histories.³⁰⁹ Scholars believe that unemployment is a significant factor that increases the likelihood of reoffending.³¹⁰ “Being productive is a key component to successful rehabilitation and in preventing recidivism.”³¹¹ Furthermore, individuals experiencing homelessness face barriers to employment due to lack of training and employer stereotyping.³¹² When seeking employment, homeless individuals are often subject to negative stereotypes from potential employers.³¹³ These barriers leave homeless sex offenders with few employment options, increasing their risk of reoffending.

Many sex offenders also face serious mental health challenges.³¹⁴ Sex offenders have a “much higher-than-average” rate of serious mental illness than the general population.³¹⁵ Moreover, it is estimated that at least 45% of the United States’ total homeless population suffers from a mental illness.³¹⁶ Mental health, housing, and employment barriers are significant burdens that sex offenders experiencing homelessness face. Adding onerous registration requirements to the mix adds an additional stressor to homeless sex offenders’ lives and sets them up for more interaction with the criminal justice system.

V. WASHINGTON SHOULD INVALIDATE ITS REGISTRATION STATUTE BECAUSE OF ITS HARM TO INDIVIDUALS EXPERIENCING HOMELESSNESS

It is time for Washington courts to invalidate Washington’s sex offender registration statute and more fairly address the daily realities

309. *Id.*

310. Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 354–55 (2007); Blair Ames, *NIJ-Funded Research Examines What Works for Successful Reentry*, 281 NAT’L INST. OF JUST. J. 1, 1 (2019); Anke Ramakers et al., *Not Just Any Job Will Do: A Study on Employment Characteristics and Recidivism Risks After Release*, 61 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1795, 1795 (2017).

311. Lester, *supra* note 310, at 354–55.

312. *Overcoming Employment Barriers*, NAT’L ALL. TO END HOMELESSNESS (Aug. 21, 2013), <https://endhomelessness.org/resource/overcoming-employment-barriers/> [https://perma.cc/P9TN-T6QF].

313. *Id.*

314. Amy Norton, *Sex Offenders Have Higher Rate of Mental Illness*, REUTERS (May 17, 2007, 9:54 AM), <https://www.reuters.com/article/us-sex-offenders/sex-offenders-have-higher-rate-of-mental-illness-idUSCOL76032420070517> [https://perma.cc/CWK3-RLPE].

315. *Id.*

316. *Homelessness and Mental Illness: A Challenge to Our Society*, BRAIN & BEHAV. MAG., Sept. 2018, at 40 (citing U.S. DEP’T OF HOUS. & URB. DEV., THE 2015 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS: PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS (2015)).

faced by sex offenders experiencing homelessness. With the expansion of sex offender registration laws over the last thirty years, homeless offenders face extreme requirements.³¹⁷ Individuals experiencing homelessness already face significant obstacles to stable housing, employment, and mental health, and Washington's registration statute creates further obstacles through its onerous reporting requirements—requirements that non-homeless offenders do not face to the same extent.³¹⁸ While invalidating the statute would not solve homelessness, it could prevent some individuals who experience homelessness from having more interaction with the criminal justice system. Sex offenders who experience homelessness should, at the very least, be subject to the same yearly registration requirements as non-homeless sex offenders.

A. Courts Should Invalidate Washington's Registration Statute as Applied to Offenders Experiencing Homelessness Because of its Harm to the State and to Homeless Individuals

Invalidating Washington's registration statute would benefit both registrants experiencing homelessness and the state. The Washington State Legislature has stated its interest in analyzing "evidence-based" alternatives to prison to reduce the future need for prison beds, save money for taxpayers, and contribute to low crime rates.³¹⁹ If these are truly the state's goals, Washington courts should recognize that the homeless sex offender registration statute does not match these goals.

First, while the original intentions for sex offender registries were to protect children like Jacob Wetterling, Megan Kanka, and Adam Walsh from being sexually victimized, Washington's homeless registration statute expands well beyond these intentions.³²⁰ The Washington Legislature had a knee-jerk reaction to SORNA's lack of guidance and the *Pickett* Court's ruling regarding registration while homeless.³²¹ The legislature provided no data or adequate justification for the strict restrictions it adopted.³²² It provided vague reasoning that homeless sex

317. *See supra* Part I.

318. *See* WASH. REV. CODE § 9A.44.130 (2019).

319. WASH. STATE INST. FOR PUB. POL'Y, EVIDENCE-BASED PUBLIC POLICY OPTIONS TO REDUCE FUTURE PRISON CONSTRUCTION, CRIMINAL JUSTICE COSTS, AND CRIME RATES (2006), https://www.wsipp.wa.gov/ReportFile/952/Wsipp_Evidence-Based-Public-Policy-Options-to-Reduce-Future-Prison-Construction-Criminal-Justice-Costs-and-Crime-Rates_Full-Report.pdf [<https://perma.cc/CF9V-BEP5>].

320. *See* Waxman, *supra* note 20; Wootson, *supra* note 19.

321. *See* State v. Pickett, 95 Wash. App. 475, 479–80, 975 P.2d 584, 587 (1999).

322. H.R. 1004, 56th Leg., 1st Spec. Sess. (Wash. 1999).

offenders present unique risks to the community without specifying those risks.³²³ The legislature's vague reasoning suggests that the amendment was potentially viewed as a quick solution to homeless registration. If a Washington court considers a case involving the constitutionality of the homeless registration requirement, the court should realize the legislature's strict reaction was unsupported by data.

Second, these burdensome registration requirements position offenders experiencing homelessness to interact more with the criminal justice system.³²⁴ Individuals experiencing homelessness are at a much greater risk of being charged with failure-to-register than non-homeless offenders due to their weekly reporting obligations.³²⁵ Non-homeless offenders can be charged with failure-to-register only once each year, if they fail to notify the state that they moved, or if they fail to notify the state that they are attending or working for a college or university.³²⁶ Sex offenders experiencing homelessness, on the other hand, have at least fifty-two opportunities in a year to be charged with failure-to-register.³²⁷ Thus, offenders experiencing homelessness are much more vulnerable to face failure-to-register charges and interaction with the criminal justice system than offenders with stable housing.³²⁸ If the state is concerned with reducing the need for prisons, saving taxpayer money, and reducing crime, the strict homeless registration requirements do not match these goals.

Third, the homeless registration requirement exacerbates the homelessness crisis. Individuals experiencing homelessness already face significant housing, employment, and mental health issues.³²⁹ The in-person reporting requirement forces sex offenders experiencing homelessness to either reside near the sheriff's office, walk long distances to the sheriff's office, or find transportation to the sheriff's office every week.³³⁰ This might help explain why so many individuals experiencing homelessness in Seattle live in the neighborhood where the sheriff's office

323. See H.R. 1952, 57th Leg., Reg. Sess. (Wash. 2001).

324. See Esser-Stuart, *supra* note 18, at 816. ("Once homeless, states subject registrants to more onerous reporting requirements, which in turn increases the attendant risk of prosecution and future imprisonment.")

325. See WASH. REV. CODE § 9A.44.130 (2019).

326. See *id.*

327. See *id.* There are fifty-two weeks in a year.

328. See Esser-Stuart, *supra* note 18, at 833 ("Thirty-one states expressly require homeless registrants to report in person to law enforcement more frequently than if they were not homeless.")

329. *Overcoming Employment Barriers*, *supra* note 312; Washington Appleseed, *supra* note 299.

330. See WASH. REV. CODE § 9A.44.130; Clancy, *supra* note 278.

is located.³³¹ Offenders, who might already experience transportation obstacles, must plan how they will get to the sheriff's office to meet their registration obligations each week. The risk of not finding a ride or being able to afford public transportation could be a felony conviction for failure-to-register.³³² Sex offenders with stable housing do not come close to facing these obstacles with the same frequency or to the same extent.³³³

Finally, reducing homeless individuals' interaction with the state's criminal justice system would provide significant financial benefits to the government.³³⁴ Several studies indicate that Washington spends significant amounts of taxpayer money on policing, incarcerating, and providing health care to homeless persons.³³⁵ The Washington State Department of Corrections indicates that the state spends \$41,232 on each inmate per year.³³⁶ Considering the average daily population of incarcerated individuals, the state spends about \$725 million per year on incarcerating individuals.³³⁷ Additionally, Seattle Police Department booking data indicates that one in five jail bookings in 2018 was an individual experiencing homelessness.³³⁸ Reducing homeless offenders' interactions with the criminal justice system by invalidating the registration statute could result in less incarceration, thereby lowering the state's expenditures.

Additionally, the need for less funding for prisons could give the state room to budget for housing programs for individuals experiencing homelessness. One Los Angeles study found that investment in housing reduced the city's average monthly spending by 41% per homeless

331. See Clancy, *supra* note 278.

332. See WASH. REV. CODE §§ 9A.44.130, 9A.44.132.

333. See *Id.* § 9A.44.130.

334. Sarah Hammond & Jeff Armour, *States Pressed to Meet Sex Offender Registration Law*, ST. LEGISLATURES MAG., Mar. 2009, at 8, 8–9, <https://www.ncsl.org/research/civil-and-criminal-justice/state-legislatures-magazine-crime-costs.aspx#stat> [<https://perma.cc/QV8P-EYFV>].

335. JOSHUA HOWARD & DAVID TRAN, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE & SPOKANE 13 (Sara K. Rankin ed., 2015); *Ending Chronic Homelessness in 2017*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, https://www.usich.gov/resources/uploads/asset_library/Ending_Chronic_Homelessness_in_2017.pdf [<https://perma.cc/T6NY-322K>].

336. WASH. STATE DEP'T OF CORR., DOC INSTITUTIONAL COSTS, AVERAGE DAILY POPULATION (ADP), AND COST PER INCARCERATED INDIVIDUAL PER DAY 1 (2019), <https://www.doc.wa.gov/docs/publications/reports/200-AR001.pdf> [<https://perma.cc/68HY-BSJX>].

337. *Id.*

338. David Kroman, *In Seattle, 1 in 5 People Booked into Jail are Homeless*, CROSSCUT (Feb. 19, 2019), <https://crosscut.com/2019/02/seattle-1-5-people-booked-jail-are-homeless> [<https://perma.cc/YJ8B-5NAR>].

individual.³³⁹ If the state provided housing, the offender would then have a registration address and would be subject to the same registration requirements as non-homeless offenders. Therefore, it seems in the state's best financial interest to reduce the interaction of homeless offenders with the criminal justice system.

B. Washington Courts Should Invalidate Washington's Registration Statute Because the Statute Inflicts Cruel Punishment on Offenders Experiencing Homelessness

One strategy for invalidating the homeless portion of Washington's sex offender registration statute is to bring a constitutional challenge in Washington courts. Washington case law suggests that most constitutional challenges would be difficult to win.³⁴⁰ However, a compelling case could be made that registration requirements violate article I, section 14 of the Washington State Constitution as applied to homeless individuals.³⁴¹

Although there have been cruel punishment challenges to a state's sex offender registration statute in general, none in Washington have considered sex offender registration as applied to individuals experiencing homelessness.³⁴² Cruel punishment sex offender registration arguments have had some success in various courts around the country and should inform a Washington court's cruel punishment analysis.³⁴³

Applying Washington's four factor cruel punishment test evidences the registration statute's unconstitutionality as applied to offenders experiencing homelessness.³⁴⁴ In analyzing the first factor—the nature of the offense—courts examine the circumstances of the crime when committed.³⁴⁵ Some sex crimes are much more serious and violent than

339. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS, <https://nlchp.org/wp-content/uploads/2018/10/criminalization-one-pager.pdf> [<https://perma.cc/44WN-GLY8>].

340. *See generally* State v. Boyd, 1 Wash. App. 2d 501, 408 P.3d 362 (2017); State v. Ward, 123 Wash. 2d 488, 869 P.2d 1062 (1994).

341. WASH. CONST. art. I, § 14.

342. *See* Millard v. Rankin, 265 F. Supp. 3d 1211 (D. Colo. 2017).

343. *See* Doe v. State, 189 P.3d 999 (Alaska 2008) (holding the Alaska Sex Offender Registration Act (ASORA) was so punitive as to overcome legislature's civil intent); Does #1–5 v. Snyder, 834 F.3d 696 (6th Cir. 2016) (holding Michigan's registration act retroactively imposed punishment); Doe v. State, 111 A.3d 1077 (N.H. 2015) (holding New Hampshire's registration provision so punitive that retroactive application violates state constitution).

344. *See supra* section III.A.2.

345. State v. Moretti, 193 Wash. 2d 809, 830, 446 P.3d 609, 619–20 (2019).

others.³⁴⁶ For example, a level III homeless offender may have committed a brutal rape, while a level I homeless offender committed voyeurism. A court may consider weekly registration a more punitive requirement for the level I offender than the level III offender.³⁴⁷ Thus, homeless offenders with less serious sex offenses likely have a more compelling cruel punishment argument than homeless offenders with level II or level III crimes. Furthermore, level I offenders experiencing homelessness have a compelling argument because the difference in treatment between level I offenders experiencing homelessness and non-homeless level I offenders is drastic, especially when it comes to public notification requirements.³⁴⁸

Second, Washington courts look to the legislative purpose behind the statute.³⁴⁹ The Washington legislature believes sex offender registration is necessary for law enforcement to have updated information about sex offenders residing in their communities regardless of whether that offender experiences homelessness.³⁵⁰ When the legislature added the weekly reporting requirement for offenders who experience homelessness, the only justification it provided was that sex offenders who register as homeless “present unique risks to the community,” making ordinary notification “not feasible.”³⁵¹ However, the legislature added the weekly requirement for all levels of homeless sex offenders without giving any justification.³⁵² There may be reasonable legislative purpose behind registration statutes in general, but the Washington Legislature lacks any reasonable explanation for the weekly reporting requirement specifically. Because the legislature failed to offer justification for the weekly reporting requirement, a court may be more willing to find that weekly reporting for offenders experiencing homelessness is unreasonable and weighs in favor of unconstitutionally cruel punishment.

Third, the court looks at punishment given for similar crimes in other jurisdictions.³⁵³ About ten other states also require homeless registrants to

346. See WASH. REV. CODE ch. 9A.44 (2019).

347. See *Moretti*, 193 Wash. 2d at 828–32, 446 P.3d at 618–20.

348. See WASH. REV. CODE § 4.24.550(5)(a) (2019).

349. *Id.*

350. *State v. Boyd*, 1 Wash. App. 2d 501, 503, 408 P.3d 362, 369 (2017); H.R. 1004, 56th Leg., 1st Spec. Sess. (Wash. 1999).

351. H.B. 1952, 57th Leg., Reg. Sess. (Wash. 2001).

352. See H.B. 1712, 58th Leg., Reg. Sess. (Wash. 2003).

353. See *State v. Moretti*, 193 Wash. 2d 809, 828–32, 446 P.3d 609, 618–20 (2019).

register weekly and one even requires registration every three days.³⁵⁴ However, the majority of other states either do not specify a time period or require registration every thirty days or more.³⁵⁵ This is unlike the situation in *Fernandez*, where an overwhelming consensus of states imposed the same punishment.³⁵⁶ Fewer than one quarter of states have weekly registration requirements.

The Ninth Circuit's decision in *Martin*, though not binding, could inform a Washington court's examination of Washington's third factor.³⁵⁷ Similar to Washington's registration statute, the Boise ordinance in *Martin* criminalized homelessness by punishing individuals experiencing homelessness for a "condition [they are] powerless to change."³⁵⁸ Sleeping in public is a very different crime than failing to register as a sex offender, but the effects of both crimes on homeless persons are similar—they punish people for being homeless. These arguments weigh in favor of finding that the statute imposes cruel punishment on individuals experiencing homelessness.

Finally, Washington courts look at the punishment the offender would have received for a different crime in the same jurisdiction.³⁵⁹ Sex offenses, kidnapping offenses, and felony firearm offenses are the only crimes in Washington that require registration.³⁶⁰ Even the most egregious murders and assaults do not require any type of registration.³⁶¹ Furthermore, no other crime or punishment in the Washington Criminal Code singles out individuals experiencing homelessness like section 9A.44.130 of the Revised Code of Washington. Thus, a court should find that the fourth factor weighs in favor of the statute imposing cruel punishment on offenders who experience homelessness.

Under Washington's cruel punishment analysis, section 9A.44.130 of the Revised Code of Washington is unconstitutional as applied to registrants experiencing homelessness. For Washington courts to consider this argument, an offender experiencing homelessness would need to raise a defense, after being charged with failure-to-register, that the statute imposes cruel punishment as applied.

354. See Esser-Stuart, *supra* note 18, at 835.

355. See *id.* at 833–36.

356. See *Fernandez v. Kiner*, 36 Wash. App. 210, 213, 673 P.2d 191, 193 (1983).

357. *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).

358. *Id.* at 1048 (quoting *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting)).

359. See *State v. Moretti*, 193 Wash. 2d 809, 830, 446 P.3d 609, 619–20 (2019).

360. WASH. REV. CODE §§ 9A.44.130, 9A.41.333(5) (2019).

361. *Id.* § 9A.32.030 (lacking any registration requirement for convicted first degree murderers); *id.* § 9A.36.011 (lacking any registration requirement for individuals convicted with first degree assault).

CONCLUSION

Washington courts should invalidate Washington's sex offender registration statute because of its unequal application to sex offenders experiencing homelessness. The registration statute imposes cruel punishment on offenders experiencing homelessness by placing onerous obligations on them and leaving them more vulnerable to additional criminal charges than non-homeless sex offenders. With the lack of sympathy for sex offenders in the public, adverse court precedent, and an absence of legislative action, invalidation of Washington's registration statute will likely be challenging. Arguing that the weekly registration requirement for offenders experiencing homelessness is cruel punishment in violation of the Washington State Constitution is likely the most compelling way to challenge section 9A.44.130 of the Revised Code of Washington. Modern cases addressing the realities of homelessness provide some hope for the future of statutes that criminalize homelessness. Invalidating the statute, increasing the duration between registration periods, and eliminating the mandatory notification provision would be beneficial both for registrants experiencing homelessness and the state. Registrants experiencing homelessness would likely have more opportunities to overcome housing, employment, and mental health obstacles without further interaction with the criminal justice system, while the state would realize financial benefits.