The Digital Wilderness: A Decade of Exile & the False Hopes of Lester Packingham

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Abstract

The United States Supreme Court's decision in *Packingham v. North Carolina* announced that people who have been convicted of sex offenses have a First Amendment right to access social media platforms. In reaching its conclusion, the Court reasoned that the public square—and the communicative activity that the First Amendment protects—now exists on these platforms "in particular." Despite *Packingham's* promise of free speech for arguably the most despised, feared, and misunderstood group of people in America, it did not directly address ways in which both the state and private actors keep *Packingham's* beneficiaries in digital darkness. As the rolls of America's sex offense registries grew to nearly one million people in 2018, sustained exclusion from platforms that society increasingly relies on for civic engagement functionally cripples the ability of an enormous population of people to reintegrate, participate, and effectively challenge laws and policies that target them long after they have exited the criminal justice system. Far from being dangerous or illicit, the voices of people directly impacted are necessary to properly balance a system which has all but foreclosed the possibility of redemption. Thus, their inclusion gives life not only to the values at the heart of *Packingham*, but to our conception of justice as well.

> What do we mean when we say that first of all we seek liberty? I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[1]

I. INTRODUCTION

Of human traditions, banishment as punishment for a crime is as ancient as any.[2] Sporting antediluvian roots[3] that span societies and cultural divides,[4] banishment continues to inform our law, policy, and thinking in this hyper-connected age. Historically, banishment "involved the complete expulsion of an offender from a socio-political community,"[5] where one becomes "dead in law [and] entirely cut off from society."[6] While banishment has been practiced in many different forms, its essential form has remained the same: society reserves for itself the right to expel into the proverbial wilderness those whom it deems undesirable.

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[1] Judge Learned Hand, "I Am an American Day" Address in New York, New York (May 21, 1944).

[2] *See, e.g.*, *Genesis* 3:1–24 (describing when Adam and Eve were expelled from the Garden of Eden).

[3] *Id.*

[4] Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85, 95 (2007); Clare Lyon, *Alternative Methods for Sentencing Youthful Offenders: Using Traditional Tribal Methods as a Model*, 4 AVE MARIA L. REV. 211, 220 (2006) (noting that in colonial America, banishment was an official sanction for political disloyalty. Amish communities typically have practices shunning, another form of banishment. The North American Cheyenne imposed banishment as a punishment for murder); *cf.* Guy Hamilton-Smith & Matthew Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 408, 408–10 (2012) (discussing the ancient Greek practice known as *atimia*, which functioned as a type of exile where those subject to it were unable to effectively participate in public life. In Medieval Germany, outlawry was practiced whereby people would be forced from society and had to live amongst the animals in the forest).

[5] Shaw v. Patton, 823 F.3d 556, 566 (10th Cir. 2016).

[6] Does v. Snyder, 834 F.3d 696, 701 (6th Cir. 2016) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *132).

Our modern practices of banishment *qua* punishment are not limited to a physical imprisonment, nor in our modern era, limited to physical space at all.[7] While imprisonment is perhaps the most visible form of modern-era banishment, less obvious forms of banishment persist well after wrongdoers have shed their prison garb.[8] Despite being free, people returning to society nevertheless find themselves branded with the proverbial mark of Cain—a criminal record that makes the struggle for employment, housing, and reintegration all the more difficult.[9] While these are regarded as "civil" and not "criminal" effects, the line between what we call criminal and what we call civil is often so fine as to be rendered a distinction without difference.[10]

Membership in this underclass is imposed on all who break criminal laws, though this membership becomes supplemented with American exceptionalism in regards to lust for punishment for those who have committed a sexual offense. Writing from the Reading Gaol, a former English prison, during his own imprisonment for homosexuality at the end of the 19th century, Oscar Wilde observed that:

> Society takes upon itself the right to inflict appalling punishment on the individual, but it also has the supreme vice of shallowness, and fails to realise what it has done. When the man's punishment is over, it leaves him to himself; that is to say, it abandons him at the very moment when its highest duty towards him begins.[11]

Far from being merely abandoned, people convicted of sex offenses and released back into the community are subsequently captured and hunted—usually metaphorically, though sometimes literally—by way of inclusion on sex offense registries: public lists of people who have been found guilty of some kind of a sexual offense, along with their home, and sometimes work, addresses.[12]

While America's sex offense registries (in part) owe their existence to a lurid history of moral-sexual panic,[13] they also owe their modern form, in large measure, to the United States Supreme Court's decision in

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[7] *See, e.g.*, *infra* Part III.

[8] *Id.*

[9] Webb Hubbell, *The mark of Cain*, S.F. CHRON. (June 10, 2001), https://www.sfgate.com/opinion/article/The-mark-of-Cain-2910287.php [https://perma.cc/Q5LD-GZER].

[10] *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1231 (2018) (Gorsuch, J., concurring) ("Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than when it wishes to subject a citizen to indefinite civil commitment, strip him of a business license essential to his family's living, or confiscate his home? I can think of no good answer.").

[11] OSCAR WILDE, DE PROFUNDIS 22 (Robert Ross ed., Methuen and Co., London, 1905).

[12] *See* Dale Spencer, *Sex Offender as Homo Sacer*, 11 PUNISHMENT & SOCIETY 219, 219 (2009); *see also infra* Part IV.

[13] *See* Emily Horowitz, *Timeline of Panic: A Brief History of Our Ongoing Sex Offense War*, 47 SW. L. REV. 33, 33 (2017).

Smith v. Doe.[14] In *Smith*, the Court was confronted with the question of whether Alaska's sex offense registry constituted punishment.[15] Justice Kennedy, writing for the Court, characterized its operation as a civil regulation—a conclusion based in no small part on the Court's deeply flawed reliance on unsupported assertions[16] regarding risk of reoffending.[17] In holding that these registries were civil regulations rather than criminal punishments, important constitutional protections, such as the Ex Post Facto Clause,[18] were rendered inapplicable.[19] *Smith*, in turn, led to the development of "super-registration" schemes that have been serially amended over time to become more and more onerous.[20]

These modern registries tangle people in a knot of increasingly complex legal requirements that have become tantamount to a prison *sans* bars.[21] Consider the following colloquy given to a mentally challenged juvenile in Ohio in 2012:

> You are required to register in person with the sheriff of the county in which you establish residency within three days of coming into that county, or if temporarily domiciled for more than three days. If you change residence address you shall provide written notice of that residence change to the sheriff with whom you are most recently registered and to the sheriff in the county in which you intend to reside at least 20–days prior to any change of residence address. You are required to provide to the sheriff temporary lodging information including address and length of stay if your absence will be for seven days or more. Since you are a public registry qualified juvenile offender registrant you are also required to register in per-

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[14] *See* Smith v. Doe, 538 U.S. 84 (2003) (finding that sex offender registries are civil regulations rather than criminal punishments and therefore some criminal constitutional protections do not apply to them).

[15] *Id.* at 89.

[16] *See* Ira Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 507 (2015) ("The simple fact is that the risk level, for nearly everyone on the registry, is nowhere near the 'frightening and high' rate assumed by *Smith* and *McKune* and all the later decisions that rely on them."); *see also* Does v. Snyder, 834 F.3d 696, 703 (6th Cir. 2016) ("In *Smith*, which involved nothing more than reporting requirements, the Court took seriously the claim that the Alaska statute resembled parole/probation, acknowledging that '[t]his argument has some force,' but 'concluding that it was ultimately dissimilar because, unlike parolees, "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision."'); *see also* UNTOUCHABLE (Panopticon Productions LLC 2016) (featuring various experts discussing the Supreme Court's error, as well as recidivism rates more generally).

[17] *Smith*, 538 U.S. at 96.

[18] The Ex Post Facto Clause prohibits punishing conduct that was lawful at the time of commission, or retroactively increasing the punishment for a crime. U.S. CONST. art. I § 9.

[19] *Id.* at 105–06; *see also* Ellman & Ellman, *supra* note 16, at 496.

[20] *See* Catherine Carpenter & Amy Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1071 (2012).

[21] Guy Hamilton-Smith, *Sex Registries as Modern-Day Witch Pyres: Why Criminal Justice Reform Advocates Need to Address the Treatment of People on the Sex Offender Registry*, APPEAL (Dec. 12, 2017), https://theappeal.org/sex-registries-as-modern-day-witch-pyres-why-criminal-justice-reform-advocates-need-to-address-the-aca3aaa47f03/ [https://perma.cc/X3LA-J4ET].

> son with the sheriff of the county in which you establish a place of education immediately upon coming to that county. You are also required to register in person with the sheriff of the county in which you establish a place of employment if you have been employed for more than three days or for an aggregate of 14 days in a calendar year. Employment includes voluntary services. As a public registry qualified juvenile offender registrant, you also shall provide written notice of a change of address or your place of employment or your place of education at least 20 days prior to any change and no later than three days after the change of employment. [Y]ou shall provide written notice within three days of any change in vehicle information, e-mail addresses, internet identifiers or telephone numbers registered to or used by you to the sheriff with whom you are most recently registered. [Y]ou are required to abide by all of the above described requirements for your lifetime as a Tier III offender with in person verification every 90–days. That means for the rest of your life every three months you're going to be checking in with [the] sheriff where you live or work or both. Failure to register, failure to verify on the specific notice and times as outlined here will result in criminal prosecution.[22]

Failure to observe hyper-technical compliance with laws *malum prohibitum* can trigger hefty criminal penalties.[23] Because of the complexity and severity of modern registries, some courts in recent years have concluded that they violate the federal Constitution's prohibition on cruel and unusual punishment;[24] as banishment for the modern era, placement on the registry now arguably represents "what puritan judges would've done to Hester Prynne had laptops been available."[25]

As registries evolved, so did technology. Social media, and Facebook in particular, became modes of communication resembling the telephone in terms of ubiquity and utility.[26] Parents' anxieties about the safe-

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[22] *In re* C.P., 967 N.E.2d 513, 515–16 (Ohio 2012).

[23] *See, e.g.*, Commonwealth v. Williams, No. 1414 MDA 2017, 2018 WL 3055564 (Pa. Super. Ct. 2018) (sentencing the defendant to fourteen years in prison for failing to re-register in July, because he mistakenly believed that his May 2016 change of address would suffice. His conviction was reversed on other grounds).

[24] *See* Millard v. Rankin, 265 F. Supp. 3d 1211, 1235 (D. Colo. 2017) (holding in an as-applied challenge that Colorado's sex offender registry constituted, *inter alia*, cruel and unusual punishment under the Eighth Amendment).

[25] *See* Nathan Goetting, *Editor's Preface*, 71 NAT'L LAW. GUILD REV. i, iii (2014); *see also* David Goldberg & Emily Zhang, *Our Fellow American, the Registered Sex Offender*, 2017 CATO SUP. CT. REV. 59, 60 (2017) ("[Laws targeting people on the registry] have come to be understood by legislators and judges as a sign that people on sex-offender registries have a degraded citizenship status, and that there is no real constitutional limit on the disabilities that may be imposed in the interest of community safety.").

[26] Doe v. Nebraska, 898 F. Supp. 2d 1086, 1117 (D. Neb. 2012) (observing that "[t]he defendants respond that the use of the Internet is not entirely foreclosed. Frankly, this is a little like banning the use of the telephone and then arguing that First Amendment values are preserved because the user

ty of their children on these sites kept pace with the rise of social media as the dominant global communication platform.[27] Entertainment of the era, such as Dateline's *To Catch a Predator*, depicted horror stories about predators lurking in digital shadows, waiting to strike. To assuage these fears—and shore up child protection bonafides[28]—some states in the late 2000s passed laws either outright banning those on registries from using social media platforms[29] or placing so many restrictions on their use that together they amounted to a functional ban.[30] As with real-world residency restrictions that force people on registries and their families to sometimes reside in actual wildernesses,[31] so did these laws consign them to a digital one.

Meanwhile, the internet and social media revolutionized the world. Social media platforms such as Twitter and Facebook played pivotal roles in political flash-points like the Arab Spring,[32] Occupy Wall Street, and Black Lives Matter. These platforms became important, if not essential, for community organizing and even direct political engagement.[33]

Lower courts decisions eventually began to signal a willingness to eye these social-media bans skeptically.[34] A definitive answer on the constitutionality of these bans, however, would remain elusive until a North Carolina man gave thanks on his Facebook page for how fortune had favored him, at least for the moment:

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can (perhaps) resort to a walkie-talkie").

[27] *See generally* Charlotte Chang, *Internet Safety Survey: Who Will Protect the Children*, 25 BERKELEY TECH. L.J. 501 (2010) (discussing how children using the internet without adult supervision can be dangerous due to the presence of cyberbullies and sexual predators).

[28] *See generally* EMILY HOROWITZ, PROTECTING OUR KIDS? HOW SEX OFFENDER LAWS ARE FAILING US 25–44 (2015) (arguing that laws that target registrants do a poor job of protecting children from harms, sexual or otherwise, while allowing society writ-large to claim credit for protecting children more generally).

[29] *See, e.g.*, LA. REV. STAT. § 14:91.5 (2012); NEB. REV. STAT. § 28-322.05 (2009); KY. REV. STAT. § 17.546 (2009); N.C. GEN. STAT. § 14-202.5 (2008); IND. CODE § 35-42-4-12 (2008).

[30] *See, e.g.*, CAL. PENAL CODE § 290.015 (2012); N.Y. CORRECT. LAW § 168-b (2008) (placing significant restrictions on social media); LA. REV. STAT. § 14:91.5 (2012) (requiring the person to announce that they were a sex offender publicly in the wake of Doe v. Jindal, 853 F.Supp.2d 596 (2012)); *see also* Press Release, N.Y. Governor Andrew Cuomo, Governor Cuomo Announces e-Stop Law Leads to Removal of More than 24,000 Social Networking Accounts and Profiles Linked to Registered Sex Offenders (Apr. 28, 2011), https://www.governor.ny.gov/news/governor-cuomo-announces-e-stop-law-leads-removal-more-24000-social-networking-accounts-and [https://perma.cc/5MCD-2567].

[31] Jerry Iannelli, *ACLU Sues to Stop Miami Homeless Sex-Offender Camp Evictions*, MIAMI NEW TIMES (May 8, 2018), https://www.miaminewtimes.com/news/aclu-sues-to-stop-miami-homeless-sex-offender-camp-evictions-near-hialeah-10330068 [https://perma.cc/6J2H-V6WK] (showcasing a glaring example of how residency restrictions left people—even people with homes and family—with nowhere to legally reside in Miami-Dade County, Florida. One the few places legally available to them as residences was under the Julia-Tuttle Causeway. The homeless camp was shuttered after authorities received international condemnation for it, though the underlying problem of forced homelessness for people on the registry in Miami continues today due to the restrictions).

[32] *See* John Hitz, *Removing Disfavored Faces from Facebook: The Freedom of Speech Implications of Banning Sex Offenders from Social Media*, 89 IND. L.J. 1327, 1329 (2014).

[33] *Id.* at 1332 ("Social media has morphed into a tool that a respectable percentage of individuals see as critical to their active and competent participation in the political process.").

[34] *See, e.g.*, Doe v. Prosecutor, Marion Cty., Ind., 705 F.3d 694, 695 (7th Cir. 2013); Doe v. Nebraska, 898 F. Supp. 2d 1086, 1093 (D. Neb. 2012); Doe v. Jindal, 853 F. Supp. 2d 596, 607 (M.D. La. 2012).

> Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . Praise be to GOD, WOW! Thanks JESUS![35]

Thus exclaimed the titular Lester Packingham, though neither God—nor the North Carolina judiciary—was finished with him. Almost a decade prior to his celebratory post, Packingham "had sex with a thirteen-year-old girl" when he was a twenty-one-year-old college student, and pled guilty to a charge of taking indecent liberties with a minor.[36] Consequently, he was listed on North Carolina's sex offense registry and later barred by a 2008 North Carolina law banning people on sex offense registries from using an untold number of websites, including Facebook.[37]

North Carolina law enforcement discovered his Facebook post and arrested Packingham, charging him with a felony for allegedly violating the ban, as it had with over 1,000 other people.[38] A jury convicted him at trial, but after appellate review, Justice Kennedy announced that the Supreme Court would not tolerate such an intrusion into the rights of ex-convicts:

> Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."
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> To foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world

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[35] Packingham v. North Carolina, 137 S. Ct. 1730, 1734 (2017).

[36] *Id.*

[37] *Id.* at 1731, 1733–34 (noting that given the breadth of many of these bans, including North Carolina's, it was often difficult to tell exactly which sites were off limits).

[38] *Id.* at 1734.

> of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.[39]

The Court in *Packingham,* therefore, sought to restore to the digital franchise those voices deemed too monstrous to be present, much less heard.

In this article, I explore two issues which threaten to render Kennedy's eloquent endorsement of free speech more saccharine than substantive. First, even though governments are no longer free to criminalize speech outright, some state legislatures have conditioned the discharge of that speech on compliance with inscrutable statutes which criminalize speech as a matter of fact, if not law. Stated differently, speaking online becomes not unlike strolling through a metaphorical minefield—while you may speak, you do so at your own peril.

Second, while *Packingham* makes plain that social media is now the "modern public square,"[40] less clear are the implications of that fact when those digital spaces are operated not by governmental entities, but private actors who are free to—and do—silence the very voices *Packingham* endeavors to amplify. In this constitutional vacuum, a paradox threatens to cement a digital underclass: permanent pariahs who, despite being given voice, have no mouth from which it can issue.

Considered in the context of a group of people who are widely reviled, feared,[41] and misunderstood,[42] the imposition of silence serves to reinforce a narrative that denies basic humanity to those it paints as monstrous,[43] arguably perpetuates the very sexual harms that these laws and policies are intended to eradicate,[44] and hamstrings a deeply unpopular struggle for civil and human rights.

In the United States, periods of public registration are lengthy—sometimes for life.[45] The same Supreme Court which justified these lists in part on the basis of *purported* dangerousness[46] also concluded that *actual* dangerousness of an individual is not a material consideration for inclusion on them.[47] Every year, the number of people on sex registries increases.[48] In 2018, America's sex offense registries contained the

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[39] *Id.* at 1737 (internal citations omitted).

[40] *Id.*

[41] *See, e.g.*, Goldberg & Zhang, *supra* note 25, at 72 ("[L]ike Communists in the mid-20th century (but unlike, say, Jehovah's Witnesses), sex offenders are not only despised, they are feared.").

[42] *See generally infra* Part III (discussing common misconceptions related to recidivism rates).

[43] While, to be sure, crimes committed by some on registries are monstrous, such as the offenses that occasioned the birth of registries. Other crimes are much less serious, yet still treated with equal weight without concern for whatever the particulars of an offense may be.

[44] *See infra* note 91 and accompanying text.

[45] Jane Shim, *Listed for Life*, SLATE (Aug. 13, 2014), https://slate.com/news-and-politics/2014/08/sex-offender-registry-laws-by-state-mapped.html [https://perma.cc/V3GG-XCHG].

[46] *Infra* note 77 and accompanying text.

[47] *See* Connecticut Dep't of Public Safety v. Doe, 538 U.S. 1, 7–8 (2003) ("In short, even if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of all sex offenders—currently dangerous or not—must be publicly disclosed. Unless respondent can show that that substantive rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise.").

[48] Hamilton-Smith, *supra* note 21.

names of more than 900,000 men, women, and children.[49]

My name is among them. In 2006, I was arrested for possession of unlawful images of a minor after I spent my teenage years in the grips of a progressively worsening online pornography habit. I pled guilty in state court the following year, and received a suspended sentence, which ended in 2010. My arrest and prosecution occasioned my application to law school. The thought of becoming a lawyer had not been on my radar prior to my own experiences with the justice system. While many of the details of my story are beyond the scope of this piece, for better or worse, I am and have been open about my experience. I have written about my story elsewhere[50] and conducted an Ask-Me-Anything session on the social news site Reddit.[51]

I debated for a good while whether to include my story in this article. While the issues I present are broader than what I have personally experienced, I have many identities when it comes to this topic and feel as though I cannot do the subject justice without their inclusion. I am sensitive to the fact that I committed a crime, and that my actions harmed others. Nothing I write is intended to minimize either my own actions or those of anyone else.

I believe that any conception of justice that disregards accountability is a sham. To be accountable, in my view, is to atone and make amends. At every moment along my journey, from the interrogation room to writing these words, I have always accepted responsibility for my actions and I always will.

Of equal importance to justice is the opportunity for redemption, which seems largely forgotten in America. Our punishments—especially, though not exclusively, when it comes to the intersection of sex and criminal justice—are largely untethered from any notion of proportionality, mercy, or reintegration, and thus resemble something closer to blind, casual cruelty. Rather than making people whole, any punishment which lacks these ingredients becomes little more than poison, through which we all—victims, offenders, and our communities—are diminished.

I am ultimately an idealist in our systems of crime and punishment. Properly balanced, I believe these systems can be an immense force for good by bringing together all those who are affected by a crime, and

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[49] RECORDS AND ACCESS UNIT OF THE NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN (NCMEC), REGISTERED SEX OFFENDERS IN THE UNITED STATES AND ITS TERRITORIES PER 100,000 POPULATION 1 (2018), *available at* http://www.missingkids.com/content/dam/pdfs/SOR%20Map%20with%20Explanation.pdf [https://perma.cc/AUH2-4NFJ]; *see also* HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 33 (2013), *available at* https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf [https://perma.cc/UY4M-JLKP] (noting that children are sometimes as young as nine years old).

[50] Guy Hamilton-Smith, *Dear Gay*, MEDIUM (May 17, 2018), https://medium.com/@guy.hamilton.smith/dear-gay-3f1e779293c4 [https://perma.cc/6S93-RR3A].

[51] Guy Hamilton-Smith (@gphs), REDDIT, https://www.reddit.com/r/IAmA/comments/77n82n/my_name_is_guy_hamiltonsmith_i_am_a_law_school/ [https://perma.cc/Q4UE-FXAH] (last visited Jan 1, 2019).

leaving everyone better than how it found them.

As Americans, ours is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[52] Rarely heard on the subjects herein is the voice of the contrarian; far rarer are those voices with lived experience. If there is a broader question that lurks amongst the issues that I raise in this piece, it is this: by the inclusion of voices perhaps some would be more comfortable assuming do not exist, it is possible that we could find our "appalling punishments"[53] reflect as much on those who inflict them as those afflicted by them?

II. WEB 2.0

After the turn of the millennium and abatement of fears of a Y2K bug, the interactive potential of the internet was about to be truly tapped.[54] From its beginnings as a "'Hot or Not' clone for Harvard,"[55] Facebook, along with social media writ large, evolved into something that perhaps few could have foreseen:

> The volume of communicative activity taking place on social networking services every day is staggering — especially for such a new technology. Nearly 7 in 10 American adults regularly use at least one Internet social networking service. Facebook alone has more than 1.79 billion monthly active users who view more than 8 billion videos every day. Twitter has over 310 million monthly active users, who publish more than 500 million "tweets" each day. Instagram has over 600 million monthly users, who upload over 95 million photos every day. Snapchat has over 100 million daily users who send and watch over 10 billion videos per day . . . [e]xclusion from social networking services would be tantamount to "banishment": the 2.14 billion users of such services are a population larger than six continents.[56]

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[52] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[53] Wilde, *supra* note 11, at 22.

[54] *See generally* Michael Hirschorn, *The Web 2.0 Bubble*, ATLANTIC, https://www.theatlantic.com/magazine/archive/2007/04/the-web-20-bubble/305687/ [https://perma.cc/R5HD-XHUF] (describing the multitude of ways individuals and companies have capitalized on the far-reaching digital hand of social media to bolster businesses and personal brands, and how the advent of utilizing new and existing social networks popularize websites is the latest trend).

[55] Nicolas Carlson, *At last—the full story of how Facebook was founded*, BUS. INSIDER (Mar. 5, 2010), https://www.businessinsider.com/how-facebook-was-founded-2010-3 [https://perma.cc/VR7K-GANX].

[56] Amicus Curiae Brief of Electronic Frontier Foundation, Public Knowledge, and Center for Democracy & Technology in Support of Petitioner as Amici Curiae Supporting the Petitioner at 5–7, Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (No. 15-1194) [hereinafter Amicus Curiae

Supplementing its popularity, social media also boasted a surprising versatility: as it turned out, social media was just as proficient at sharing cat videos as it was at fomenting bare-knuckle political revolution in the streets. Due in large measure to "sophisticated use of social networking" by political activists in Tunisia to circumvent traditional government-controlled media outlets, the world bore witness to the Arab Spring.[57] Social media also became an indispensable tool of domestic political movements—such as the Tea Party,[58] Occupy Wall Street,[59] and Black Lives Matter[60]—due to the fact that people "can instantaneously communicate with large, geographically diverse followings . . . and reach enormous audiences."[61] This is, of course, to say nothing of the ways in which social media has become important for direct political engagement,[62] employment,[63] or, as Mr. Packingham endeavored to share with the world, religious worship.[64]

Platforms like Facebook fundamentally altered the ways in which we engage and interact with our friends, families, and communities.[65] Thus, the impact of these platforms—and of banishing people from them wholesale—is difficult to overstate; as the amicus curiae brief in *Packingham* noted, "it is difficult to imagine full and robust participation in the civic life of this country without access" to social media.[66]

As social media became the dominant global communication platform, there were three noteworthy phenomena: (1) advertising firms' signaled their eagerness to appeal to the coveted teenaged demographic,[67] (2) social media platforms signaled their eagerness to pocket advertising dollars,[68] and (3) parents signaled their fears that their children

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Brief in Support of Petitioner].

[57] Amicus Curiae Brief in Support of Petitioner, *supra* note 56, at 9; Jessi Hempel, *Social Media Made the Arab Spring, But Couldn't Save It*, WIRED (Jan. 26, 2016), https://www.wired.com/2016/01/social-media-made-the-arab-spring-but-couldnt-save-it/ [https://perma.cc/J73T-S4YB]

[58] Deana A. Rohlinger and Leslie Bunnage, *Did the Tea Party Movement Fuel the Trump-Train? The Role of Social Media in Activist Persistence and Political Change in the 21st Century*, *Social Media + Soc'y*, Apr.-June 2017, at 2, https://journals.sagepub.com/doi/pdf/10.1177/2056305117706786 [https://perma.cc/XP35-BHMT]

[59] Craig Kanalley, *Occupy Wall Street: Social Media's Role In Social Change*, HUFFINGTON POST (Oct. 6, 2011), https://www.huffingtonpost.com/2011/10/06/occupy-wall-street-social-media_n_999178.html [https://perma.cc/6CY8-L4SC]

[60] Bijan Stephen, *Social Media Helps Black Lives Matter Fight the Power*, WIRED (Oct. 21, 2015), https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/ [https://perma.cc/X58E-3KZ8]

[61] Amicus Curiae Brief in Support of Petitioner, *supra* note 56, at 10–11.

[62] *Id.* at 14.

[63] *Id.* at 21–23.

[64] *Id.* at 18.

[65] *See, e.g.*, *id.* at 9–10.

[66] *Id.* at 23.

[67] These firms after all rely primarily or entirely on advertising dollars to stay afloat, and the most valued age range for advertisers is the teenaged one. Issie Lapowsky, *Why Teens are the Most Elusive and Valuable Customers in Tech*, INC (Mar. 3, 2014), https://www.inc.com/issie-lapowsky/inside-massive-tech-land-grab-teenagers.html [https://perma.cc/MZ78-4XTF].

[68] The primary source of revenue for these platforms has been advertising. *See* Hirschorn, *supra* note 54 ("Indeed, the value of MySpace and the other 2.0 sites is built on their ability to monetize—

would be vulnerable to dangers lying in wait in the digital shadows.[69] Facebook and MySpace in particular were braced to demonstrate that they took child protection seriously to allay fears of parents.[70]

In consideration of these motivations, social media platforms embarked on a publicized campaign to oust people who had been convicted of sex offenses from the platforms.[71] Importantly, these expulsions did not happen because of allegations that these people were involved in any sort of illicit or otherwise questionable behavior on the platforms.[72] Rather, the policies were simply based on one's *status*.[73] However, there is a gulf between *having* such policies and *enforcing* them, which depends perhaps largely on the willingness of law enforcement to cooperate by providing the information needed to identify those on the registry, and thus cast them into the digital wilderness.[74] These quasi-private efforts would soon become augmented by more muscular legislative ones.

III. GOING DARK

Proposals enacting new restrictions for people who had been convicted of sex offenses are perennial fixtures in statehouses, though there is no requirement that such legislation be the product of dispassionate analysis:

> In the *Doe* cases, the [the Supreme Court] seemed to envision registration (and public disclosure) as the stopping point, utterly failing to foresee that registrant status would become a legal category, on which transient anxieties and antipathies could find ready legislative expression. The latest panic—for example, might predators use drones to watch children?[75]

To be sure, efforts to bolster the safety of children are laudable and no-

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through ad sales and marketing, among other streams—the traffic generated by their users.").

[69] Chris Johnston, *Social media is parents' greatest online fear, research says*, GUARDIAN (Nov. 12, 2014), https://www.theguardian.com/technology/2014/nov/12/social-media-children-parents-safety-bullying [https://perma.cc/X3JE-Y8XV].

[70] Marlon A. Walker, *Facebook gives sex offenders the boot*, NBC NEWS, (Feb. 19, 2009), https://nbcnews.to/2O3uQoS [https://perma.cc/KJ47-UDDK] (in addition to Facebook, also noting "MySpace announced it had removed 90,000 sex offenders in a two-year period")

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *See, e.g.*, People v. Ellis, 162 A.D.3d 161 (2018) ("E-Stop 'enables New York to combat misuse of the [I]nternet by convicted sex offenders by requiring sex offenders to register their [I]nternet identifiers with law enforcement, permitting social networking websites to access the [I]nternet identifiers of convicted sexual predators in order to prescreen or remove them from services used by children and notify law enforcement of potential violations of law, and prohibiting certain high risk sex offenders from using the [I]nternet to victimize children.'"); *see also* Walker, *supra* note 70 (noting reliance in part on user reports for removal of sex offenders from social media platforms).

[75] Goldberg & Zhang, *supra* note 25, at 82.

ble, though it should concern us all that such efforts have traditionally relied on a badly flawed understanding of how victimization occurs,[76] and come at substantial constitutional, human, and financial cost.

Justification for sex offense registration and its attendant restrictions are based on the belief that recidivism rates are "frightening and high."[77] Despite a growing recognition that this conclusion is not supported by research,[78] the notion continues to resemble something of an axiomatic, inalterable truth amongst courts, legislatures, and the public.[79] And thus, within the context of social media, the ostensible fear became that those on the registry would flock to social media platforms to solicit children unless they were banned.[80]

Of course, this fear ignores that soliciting children was already a criminal offense,[81] and thus for someone determined to commit a crime in the first place, it seems peculiar to suggest they would be foiled by a ban. Indeed, this was precisely the point raised by the Seventh Circuit Court of Appeals in reversing a district court holding that Indiana's social media ban was constitutional:

> The legislature attached criminal penalties to solicitations in order to prevent conduct in the same way decade-long sentences are promulgated to deter repeat drug offenses. Perhaps the state suggests that prohibiting social networking deprives would-be solicitors [sic] the opportunity to send the solicitation in the first place. But if they are willing to break the existing anti-solicitation law, why would the social networking law provide any more deterrence? By breaking two laws, the sex offender will face increased sentences; however, the state can avoid First Amendment pitfalls by just increasing the sentences for solicitation—indeed, those laws already have enhanced penalties if the defendant uses a computer network.[82]

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[76] *Infra* note 91 and accompanying text.

[77] Smith v. Doe, 538 U.S. 84, 103 (citing McKune v. Lile, 536 U.S. 24, 34 (2002)); *see also* McKune, 536 U.S. at 33–34 (citing, among other things, U.S. DEPT. OF JUSTICE, NAT. INSTITUTE OF CORRECTIONS, A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER xiii (1988) and relying on that source to remark that "the rate of recidivism of untreated offenders has been estimated to be as high as 80%," that the rate for treated offenders is conversely about 15%, and quoting that source as stating that "[e]ven if both of these figures are exaggerated, there would still be a significant difference between treated and untreated individuals").

[78] *See, e.g.*, Ellman & Ellman, *supra* note 16, at 503 n.29.

[79] *See, e.g.*, Vasquez v Foxx, 895 F.3d 515, 522 (7th Cir. 2018) (citing to *Smith v. Doe* for the proposition of danger of recidivism being an important consideration in affirming constitutionality of Illinois' residency banishment laws)

[80] *See, e.g.*, Press Release, Office of the Attorney General for Kentucky, Gov. Beshear Signs Bill To Help Protect Kentuckians From Cybercrimes (Mar. 26, 2009), *available at* http://migration.kentucky.gov/Newsroom/ag/cybercrimesbillsigning.htm [https://perma.cc/QUD2-ESN2]) ("This measure has the ability to help protect children in every corner of our Commonwealth, and I look forward to working with law enforcement officers and prosecutors to continue making Kentucky a safer place to live, work and raise a family.").

[81] *See, e.g.*, KY. REV. STAT. § 510.155 (2006); TEX. PENAL CODE § 33.021 (2009).

[82] Doe v. Prosecutor, Marion Cty., Ind., 705 F.3d 694, 700 (7th Cir. 2013).

A full discussion of the robust research on recidivism rates is well beyond the scope of my writing here, but suffice it to say that the research done into the question has consistently found that such rates are far different from the "frightening and high" characterization adopted by the Supreme Court.[83] Indeed, recidivism rates have been found to be quite low,[84] and certainly lower than recidivism rates for some other classes of crime.[85] For example, a 1994 study from the United States Department of Justice found that within three years of release just 5.3% of released offenders were arrested for a new sex offense and 3.5% were convicted for a new sex offense.[86] These rates are consistent with the other studies on the subject.[87]

A common response to findings of low rates of recidivism is that sex offenses are underreported, and so naturally there are offenses that are undetected by authorities and thus would not be captured by traditional recidivism studies.[88] However, studies that do not rely on traditional methodology to analyze recidivism also indicate that rates are low, or at least lower than commonly believed. For example, in a multiyear study examining over 170,000 reported sex offenses, 95.8% of those were attributable to people who had no prior record of committing sexual offenses, and thus would not have been on a registry at all.[89] Assuming that the rate of detection is the same for both first-time and recidivistic offenders, such a finding is consistent with the notion that recidivism rates are low, underreporting of offenses notwithstanding. Indeed, there are compelling reasons to believe that detection rates would be *higher* for those on public registries, considering that near-constant surveillance is amongst registration's essential features.

There are similar observations in the digital sphere as well. A 2006 study, for example, found that of all technologically facilitated offenses against minors, 96% were committed by people not on a registry.[90] As

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[83] Melissa Hamilton, *Briefing the Supreme Court: Promoting Science or Myth?*, 67 Emory L.J. Online 2021 (2017), 2025–2028 (discussing recidivism risk more generally).

[84] *See, e.g.*, Ellman & Ellman, *supra* note 16, at 503 n.29 (discussing sources).

[85] *See* PATRICK LANGAN, ERICA SCHMITT, & MATTHEW DUROSE, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002), *available at* https://www.bjs.gov/content/pub/pdf/rpr94.pdf [https://perma.cc/CC56-WDMN] (noting arrest charges for prisoners by type of charge).

[86] *See id.* at 24. It is also worth noting that even these figures may artificially inflate risk in that these are adult offenders who were sentenced to prison. By contrast, many people on the registry were never given a prison sentence or were juveniles when put on the registry.

[87] Ellman & Ellman, *supra* note 16, at 502–03 (noting that this study only considered felons with no known history of sex offenses).

[88] *See, e.g.*, Brief of the States of Oklahoma, Kansas, New Mexico, Utah, and Wyoming as Amici Curia, Millard v. Rankin at 15–16, on appeal from the United States District Court of Colorado (2018) (No. 17-1333) [hereinafter Brief of Certain States as Amici Curia].

[89] Jeffrey Sandley, Naomi Freeman & Kelly Socia, *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCH. PUB. POLICY AND L. 284, 297 (2008).

[90] JANIS WOLAK, DAVID FINKELHOR & KIMBERLEY MITCHELL, TRENDS IN ARRESTS OF "ONLINE PREDATORS" 8–9 (2009), *available at* https://scholars.unh.edu/cgi/viewcontent.cgi?article=1051&context=ccrc [https://perma.cc/K8RD-CART]. The same analysis also found that of arrests for soliciting undercover officers, ninety-eight percent involved people who were not on a registry. *See also* Goldberg & Zhang, *supra* note 24, at

such, even if one assumes that bans like those considered by *Packingham* are effective policy in the first place, they do not address the vast majority of sexual offenses against youth.

In light of the data indicating that almost all such offenses are committed by people not on registries, it seems reasonable to conclude that these laws targeting people on registries would have little impact on preventing them. However, the data illuminates a much more profound and troubling implication: arguably these laws paradoxically perpetuate the very sexual harms that they seek to address by adopting and reinforcing a narrative about how sex offenses happen[91] that is unsupported by evidence. These flawed, but popular, narratives divert public safety resources, attention, and discussion away from far more common sexual harms, systemic causes of sexual and gendered violence, and ultimately fail to apprehend the broader harms that people in American society routinely face.[92]

Regardless, social-media bans for people convicted of any kind of sexual offense became popular pieces of statehouse legislation. In 2008, then-Kentucky Attorney General Jack Conway billed cyber safety as one of his top priorities and drafted legislation that proposed criminalizing the use of social media sites, instant messaging, or chat programs for those on the registry.[93] Broader than North Carolina's statute at issue in *Packingham*,[94] the legislation cleared the Kentucky Senate and House with no opposition.[95] Governor Steve Beshear quickly signed it into law, remarking that the legislation was "a critical step toward protecting Kentuckians from the very real threats that come with 21st century innovations."[96] Similar legislation[97] passed in several other states, including

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92 ("[The concurrence in *Packingham*] undertook its own Westlaw research to find lurid cases to show that social networking websites are—or at least can be—used in sexual offenses against minors (though several of these anecdotal examples appear to involve perpetrators who were not previously on registries)").

91 *See, e.g.*, Rose Corrigan, *Making Meaning of Megan's Law*, 31 L. & SOC. INQUIRY 267, 292 (2006) (noting that "[a]ntirape activists argued that rape was the product of social conditions that normalized sexual violence" but that "Megan's Law [instead] depicts sexually violent behavior as the product of individual mental defects and pathology").

92 *See generally id.* (discussing how sexual predator laws are counterproductive and fail to reduce sexual violence despite their large public support); *see also* HOROWITZ, *supra* note 28 (arguing that laws that target registrants do a poor job of protecting children from harms, sexual or otherwise, while allowing society writ-large to claim credit for protecting children more generally); Erica Meiners, *Never Innocent: Feminist Trouble With Sex Offender Registries and Protection in a Prison Nation*, 1 MERIDIANS 31 (2009).

93 Office of the Attorney General for Kentucky, *supra* note 80.

94 Packingham v. North Carolina, 137 S. Ct. 1730, 1734 (2017) (noting North Carolina's statute at issue in that case expressly exempted sites and services from the ban which were covered under Kentucky's).

95 H.B. 315, 2009 Gen. Assemb., Reg. Sess. (Ky. 2009); COMMONWEALTH OF KENTUCKY, VOTING HISTORY OF H.B. 315 1–2 (2009), *available at* http://www.lrc.ky.gov/record/09rs/HB315/vote_history.pdf [https://perma.cc/ER2L-Q6TE]; *see also* Chuck Truesdell, *General Assembly's 2009 session ends,* 20 INTERIM LEGIS. REC. 4, 1 (2009), *available at* http://www.lrc.ky.gov/record/Interim_apr09.pdf [https://perma.cc/9D7Y-ADLV] (noting that "[t]he General Assembly's 2009 Regular Session gaveled to an end on March 26" and that "[a]mong the laws hitting the books" is H.B. 315).

96 Office of the Attorney General for Kentucky, *supra* note 80.

Minnesota, Louisiana, Indiana, North Carolina, Nebraska, New York, and Texas.[98] As bans declaring social media off limits to registrants became more popular, social media began to hit its stride as the dominant global communications platform, surpassing even e-mail as people's favored method of communication.[99]

IV. A THOUSAND CUTS

In addition to these bans, many states also passed legislation which required people on registries to disclose their "internet identifiers" to state authorities.[100] Not before the Court in *Packingham*, these laws therefore went unaddressed, but result in substantial burdens on the same speech that the Court endeavored to unshackle. Arguably, they accomplish as a *de facto* matter what *Packingham* declared legally forbidden.[101] The idea underlying these laws is that since those on the registry already have to report their physical addresses, why not require them to report their digital ones as well? Such a proposition bears a surface simplicity and reasonableness that belies a deep, byzantine technicality that amount to legal traps that would make Caligula blush.[102] Stated differently, for those who seek to "make his or her voice heard,"[103] these legal requirements produce significant risks of both criminal prosecution for failing to adhere to complicated requirements, reprisal from private citizens, or both.

The laws requiring registrants to report online identifiers generally have unforgiving time limits in regard to what must be reported when are

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[97] Ky. Rev. Stat. § 17.546(1) (2012) (defining social media as "an internet web site that: (a) Facilitates the social introduction between two (2) or more persons, (b) allows a person to create a Web page or a personal profile; and (c) Provides a person who visits the Web site the opportunity to communicate with another person." Instant messaging and chat programs were also included in the ban).

[98] Hitz, *supra* note 32, at 1358–59.

[99] Geelan Fahimy, *Liable for your Lies: Misrepresentation Law as a Mechanism for Regulating Behavior on Social Networking Sites*, 39 PEPP. L. REV. 367, 384 (2012).

[100] *See, e.g.*, ALA. STAT. § 15-20A-7(a)(9) (2018); 730 ILL. COMP. STATS. § 150/3(a) (2016); UTAH CODE ANN. § 77-41-105(8)(i) (West 2016); IDAHO CODE § 18-8309(3) (2011) (noting that while the code does not explicitly say the government will collect identifiers, it is an appropriate assumptive given the language that says identifiers will not be shared with the public); TEX. CRIM. PROC. CODE ANN. art. 62.051(a) (West Supp. 2009); ALA. STAT. § 12.63.10(b)(1)(I) (2008). Federal law also contemplates a system for the sharing of internet identifiers with social media platforms. 34 U.S.C. § 20917(a)(1) (2012).

[101] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 565–566 (2000) ("[T]he 'distinction between laws burdening and laws banning speech is but a matter of degree.'" (internal citations omitted)).

[102] The Roman emperor Caligula had a habit of punishing people for breaking laws that he had not made public. In response to critics, he would have "the law posted up, but in a very narrow place and in excessively small letters, to prevent the making of a copy." C. Suetonius Tranquillus, The Lives of the Twelve Caesars 469–471 (Loeb Classical Library 1913), *available at* http://penelope.uchicago.edu/Thayer/e/roman/texts/suetonius/12caesars/caligula*.html [https://perma.cc/T68M-4FUA]. In this context, the effect of making technical a law available that is so vague is the same as not making it available at all.

[103] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

common. For example, Idaho's statute requires that registrants *immediately* notify of "changes in designations used for self-identification or routing in internet communications or postings or telephonic communications."[104] Kentucky's law required registrants to report in person their "internet communication name identities . . . on or before" the day it is used.[105] Because the Kentucky law required in-person registration on or before the same day that the identifier is used to communicate over the internet, the only way to comply would have been to make a same-day trip to the registration office, or if the office was closed, waiting to speak.[106]

To the extent that a state forces a choice between complying with onerous reporting requirements and simply not speaking, a constitutional problem arises. The Ninth Circuit Court of Appeals struck down similar reporting requirements of California's ill-fated CASE Act as unconstitutional based in part on this problem, noting *inter alia*:

> [T]here can be little doubt that requiring a narrow class of individuals to notify the government within 24 hours of engaging in online communication with a new identifier significantly burdens those individuals' ability and willingness to speak on the Internet.[107]

Some states have more generous time provisions. Texas generally provides up to seven days to report any changes to internet identifiers.[108] Illinois allows for people to retroactively register any such identifiers they have used since the last in-person registration.[109] While more generous time windows for reporting information can potentially mitigate some of the constitutional concerns, even good faith efforts at compliance can result in the commission of new crimes.[110]

Indeed, while most people on registries never commit another sexual offense, an exceedingly common reason for a return trip to prison is

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[104] IDAHO CODE § 18-8309(3) (2011).

[105] KY. REV. STAT. § 17.510 (2017).

[106] Theoretically, one could also have reported on a Monday the communicative identities that they planned to use or create on Tuesday, though this such a proposition strains credulity.

[107] Doe v. Harris, 772 F.3d 563, 572 (9th Cir. 2014).

[108] TEX. CODE CRIM. PROC. art. 62.0551(a) (2009) ("If a person required to register under this chapter changes any online identifier included on the person's registration form or establishes any new online identifier not already included on the person's registration form, the person, not later than the later of the seventh day after the change or establishment or the first date the applicable authority by policy allows the person to report, shall report the change or establishment to the person's primary registration authority in the manner prescribed by the authority.").

[109] 730 ILL. COMP. STATS. § 150/3 (2016).

[110] *See* Jon Brandt, *Failure to Register: Are Violations Overblown?*, BLOG FOR ATSA J. SEXUAL ABUSE (June 13, 2013, 10:25 AM ET), https://sajrt.blogspot.com/2013/06/failure-to-register-are-violations.html [https://perma.cc/4YV8-UTQ3] ("FTR is a crime of omission. Because registerable events are inherently benign, unlike say the commission of accessing child pornography or using illicit drugs, it is easy for registrants to be less than appropriately cautious about the omission of FTR. Registration may seem akin to completing a change of address card for the post office but, of course, of immeasurably greater import. As a status offense, each failure to report ordinary life events is an opportunity for registrants to commit a new felony.").

for failing to comply with reporting requirements[111] that have increased in breadth and complexity so as to resemble a legislative death by a thousand cuts. In one Pennsylvania county, for example, over three times as many people faced charges for failing to obey registry requirements as opposed to arrests for new sex crimes.[112]

In this context, even good-faith attempts at compliance can nevertheless result in prosecution. Consider Mark Minnis. When Minnis was sixteen-years-old, he had sex with a girl who was two years his junior. Under Illinois law, he was adjudicated as a delinquent minor of a misdemeanor offense.[113] He was subsequently required to register as a sex offender.[114] Among the requirements that came with that designation were requirements for Minnis to:

> [R]egister in person and provide accurate information as required by the Department of State Police. Such information shall include . . . all e-mail addresses, instant messaging identities, chat room identities, and other Internet communications identities that the sex offender uses or plans to use, all Uniform Resource Locators (URLs) registered or used by the sex offender, all blogs and other Internet sites maintained by the sex offender or to which the sex offender has uploaded any content or posted any messages or information.[115]

Failure to adhere to these provisions would result in a new felony conviction, with attendant mandatory minimum terms of imprisonment.[116]

Between reporting periods, Minnis kept a Facebook account and updated his cover photo, triggering a requirement to report his profile as "an Internet site [] which he had uploaded content to."[117] On Minnis' next registration, he forgot[118] to again include his Facebook account on the registration form.[119] As a result, Minnis was indicted for "not regis-

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[111] Brandt, *supra* note 110; *see generally* Grant Duwe & William Donnay, *The Effects of Failure to Register on Sex Offender Recidivism*, 37 CRIM. JUST. & BEHAV. 520 (2010) (noting in some jurisdictions, failure to comply offenses are the *leading* reason why those on the registry are returned to prison).

[112] Joshua Vaughn, *Failure-to-Comply Arrests Reveal Flaws in Sex Offender Registries*, APPEAL (Aug. 1, 2018) https://theappeal.org/skyrocketing-charges-for-failing-to-comply-with-sex-offender-registries-reveal-their-flaws/ [https://perma.cc/6Z3G-ERKN].

[113] People v. Minnis, 67 N.E.3d 272, 279 n.1 (Ill. 2016); *see also* Brief of Amicus Curiae the American Civil Liberties Union of Illinois and the Electronic Freedom Foundation at 1, *Illinois v. Minnis*, 2016 IL 119563 (Ill. 2016) (No. 119563).

[114] *Minnis*, 67 N.E.3d at 279.

[115] 730 ILL. COMP. STATS. § 150/3 (2016).

[116] 730 ILL. COMP. STATS. § 150/10(a) (2016).

[117] *Minnis*, 67 N.E.3d at 279.

[118] Forgetting seems the most likely explanation. Were he trying to 'nefariously' use Facebook, it would stand to reason he would not have a profile under his own name, nor make it publicly available, nor have informed authorities previously as to its existence, which is presumably how they knew to examine it for changes in the first place, thus resulting in his prosecution. *See Minnis*, 67 N.E.3d at 279 (noting defendant's inclusion of his Facebook account on previous registration forms).

[119] Brief of Amicus Curiae the American Civil Liberties Union of Illinois and the Electronic Freedom Foundation, *supra* note 113, at 4.

ter[ing] an Internet site, a Facebook page, which he had uploaded content to."[120]

While the trial court struck down the quoted statute as being overbroad under the First and Fourteenth Amendments, the Illinois Supreme Court reversed the decision, finding that the statute was narrowly tailored to the governmental objective of protecting children online.[121]

Even if Minnis were to have complied with the Illinois statute, dodging a criminal prosecution is not the only concern here—having the ability to speak anonymously is another. Disclosure of one's online identity and presence is often an unintended consequence of these laws, and in states like Illinois, *is* the intended consequence. The Illinois Supreme Court explained that the statutory purpose of the wide public disclosure of one's online identity and presence is to "empower the public, if it wishes, to make the informed decision to avoid such interactions [with people on the registry]. The information required for the public to protect itself is broad because any communication by a sex offender with the public is related to th[at] statutory purpose."[122]

Some states have gone much further than Illinois, and require that people announce their status proactively. Louisiana—ironically one of the first states to have its social media ban struck down by federal courts[123]—requires that people on the registry disclose in any social networking profiles that they use:

> that he is a sex offender or child predator and shall include notice of the crime for which he was convicted, the jurisdiction of conviction, a description of his physical characteristics as required by this Section, and his residential address. The person shall ensure that this information is displayed in his profile for the networking website and that such information is visible to, or is able to be viewed by, other users and visitors of the networking website.[124]

Failure to comply with these provisions is a felony offense, carrying with it a mandatory minimum term of imprisonment "without benefit of parole, probation, or suspension of sentence."[125]

The existence of these statutes notwithstanding, the ability to speak anonymously is protected by the First Amendment. As the Fourth Circuit Court of Appeals observed in 2007:

> The First Amendment protects anonymous speech in order to prevent the government from suppressing expression through

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[120] *Minnis*, 67 N.E.3d at 279.
[121] *Id.* at 291.
[122] *Id.* at 290.
[123] *Doe v. Jindal*, 853 F.Supp.2d 596 (M.D. La. 2012).
[124] LA. STAT. ANN. § 15:542.1(D)(1) (2015) (emphasis added).
[125] LA. STAT. ANN. § 15:542.1.4(A)(1) (2015).

> compelled public identification. Forced public revelation discourages proponents of controversial viewpoints from speaking by exposing them to harassment or retaliation for the content of their speech. Speech is chilled when an individual whose speech relies on anonymity is forced to reveal his identity as a pre-condition to expression.[126]

In the context of the public disclosure of this identifying information, the ability of people on the registry to be able to speak anonymously is effectively foreclosed—which, as the Illinois Supreme Court noted in *Minnis*, and as the Louisiana statute makes quite clear, is the intended objective of these laws.

For groups of people who are deeply unpopular, "[a]nonymity is a shield from the tyranny of the majority."[127] Few need a shield from the tyranny of the majority more than those on registries. As the Supreme Court observed in the context of a case considering the constitutionality of a Los Angeles ordinance banning the distribution of anonymous literature:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. *Persecuted groups and sects from time to time throughout history* have been able to criticize oppressive practices and laws either anonymously or not at all. . . . It is plain that anonymity has sometimes been assumed for the most constructive purposes.[128]

To make electronic identifiers publicly known is to effectively deny people on registries the ability to speak anonymously in the modern public square. In light of the risks that come with being marked through history in similar fashion, this required public disclosure implicates the ability to speak at all.

Generally, position of courts and government attorneys[129] is essentially that public registries are no different from publicly available criminal records.[130] Such a contention, however, is so blind to the ultimate effects of such a listing as to be a product of a deep ignorance or deeper animus. Contained on these registries, for instance, are warnings not to

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[126] *See, e.g.*, Peterson v. Nat'l Telecomm. & Info. Admin., 478 F.3d 626, 632 (4th Cir. 2007) (citations omitted).

[127] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

[128] Talley v. California, 362 U.S. 60, 64–65 (1960) (emphasis added).

[129] *E.g.*, Millard v. Rankin, 265 F. Supp. 3d 1211, 1224 (D. Colo. 2017) (citing Smith v. Doe, 538 U.S. 84 (2003)); Brief of Certain States as Amici Curia, *supra* note 88, at 21 (noting that the brief was written by the attorneys general of five other states and arguing that "[p]ublication of already-public information, regardless of public reaction, cannot violate the Constitution any more than publication of this Court's opinion would[.]").

[130] *See* Smith v. Doe, 538 U.S. 84, 101 (2003) ("Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record.").

use the information provided to commit crimes against anyone listed on them.[131] Such a warning signals the state's awareness of the potential consequences of state-mandated "doxxing" of hated and feared individuals,[132] though ultimately betrays the position that it is nothing more than making available public records.

Unsurprisingly, the disclosure of one's identity in this context can herald a much more literal kind of thousand cuts than those of the legislative variety:

> A quick search for stories about the reactions of communities to the public registry reveals many examples of such unintended consequences. For example, in Michigan a registered sex offender was beheaded and his body burned by a group of teenagers. In Helenwood, Tennessee, in September 2007, the wife of a man died after 2 neighbors set their house on fire, an acti Talley v. California, 362 U.S. 60, 64–65 (1960) (emphasis added).on prompted by the man's recent arrest for possession of child pornography. In April 2006, a man traveled from Canada to Maine intending to kill registered sex offenders whose names he had collected from the Maine Sex Offender Registry. He murdered 2 of them before he was caught.[133]

While a full accounting of violence and killings is beyond the scope of this piece, suffice it to say that registration is intended to benefit the safety of all except those who find themselves on it, and their families. Much less dramatic, but much more common, are pedestrian instances of harassment, loss of a job, eviction, or being threatened.[134]

To be sure, there are some states where internet identifiers are treated as non-public information, and thus not present on the searchable registries.[135] However, the mere act of providing one's communicative identities to government can burden free speech. As noted in a similar context

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[131] *See, e.g.*, *Sex Offender Registry Research*, TENN. BUREAU OF INVESTIGATION, https://www.tn.gov/tbi/general-information/redirect-tennessee-sex-offender-registry-search/sex-offender-registry-search.html [https://perma.cc/BS3Y-ZEPS] (last visited Oct. 24, 2018) ("Pursuant to Tennessee Code Annotated Section 40-39-201, members of the public are not allowed to use information from the registry to inflict retribution or additional punishment to offenders. Harassment, stalking, or threats against offenders or members of their families are prohibited and doing so may violate both Tennessee criminal and civil laws.").

[132] Jasmine McNealy, *What is doxxing, and why is it so scary?*, CONVERSATION (May 26, 2018), https://theconversation.com/what-is-doxxing-and-why-is-it-so-scary-95848 [https://perma.cc/762N-5KLQ] (explaining that doxxing refers to the practice of public disclosure of one's identity online, and is typically regarded in circles outside of this one as something done maliciously. The author notes that "[d]oxxing, ultimately, makes data into a weapon." In this context, doxxing is officially justified on the basis of presumed and irrefutable danger, and is tolerated by the public on either a public safety or just-deserts philosophy).

[133] Kelly Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. PUB. HEALTH 412, 417 (2010).

[134] *Id.* (citing examples).

[135] *See, e.g.*, ALA. CODE § 15-20A-8(b)(5) (2018) (noting that emails and instant messaging addresses will not be disclosed on registries); IDAHO CODE § 18-8323(2) (2018) (limiting information available on registries to data not including online identifiers).

of GPS monitoring, "[a]wareness that the government may be watching chills associational and expressive freedoms."[136] How many would be willing to vociferously criticize the very officers responsible for making decisions about their freedom if they knew those same officers were tracking their every post?

The perhaps obvious objection is that by allowing those on registries to have online anonymity, the purpose of these laws in facilitating law enforcement surveillance and "empower[ing] the public . . . to make the informed decision to avoid such interactions" is defeated.[137] Such a contention, though, ignores the likelihood that someone who sought to take to the internet to commit crimes might, quite simply, lie about their identity to both those they sought to victimize and to authorities. Obviously such a lie in combination with a new offense would mean they would commit two crimes, but as the Seventh Circuit noted, the legislature could avoid any First Amendment problems by simply adding enhanced penalties for use of a computer to commit a crime by someone on the registry.[138]

In the wake of *Packingham*, the extent to which internet-identifier requirements will be tolerated remains be seen. The Supreme Court has, however, given a bit of a clue. On June 26, 2017, the Court denied Minnis's petition for certiorari.[139] *Packingham*, with its glowing endorsement of free speech for some of the most hated people in America, was decided exactly seven days prior.[140]

When considered against the odds of either prosecution by public officials, or of persecution at the hands of private parties, an outpouring of piety such as Lester Packingham's becomes more properly viewed as an endeavor of either radical fortitude, or one of supreme naivete. These optics raise a crucial, if rhetorical, question: *Packingham* provides the *right* to speak, but how badly, exactly, do you want to exercise it? The foregoing would tend to suggest the very silence that *Packingham* supposedly shattered.

However, for those who nevertheless seek to climb atop a digital soapbox, their bravery or recklessness does not end the inquiry. Because first, you need a soapbox.

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[136] United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring); *see also* White v. Baker, 696 F. Supp. 2d 1289, 1312–13 (N.D. Ga. 2010) (noting chilling effects from denial of anonymous speech).

[137] *See, e.g.*, People v. Minnis, 67 N.E.3d 272, 279 (Ill. 2016).

[138] *See, e.g.*, Doe v. Prosecutor, 705 F.3d at 700 ("By breaking two laws, the sex offender will face increased sentences; however, the state can avoid First Amendment pitfalls by just increasing the sentences for solicitation — indeed, those laws already have enhanced penalties if the defendant uses a computer network").

[139] People v. Minnis, 67 N.E.3d 272, 279 (Ill. 2016), *cert. denied*, 137 S. Ct. 2294 (2017).

[140] Packingham v. North Carolina, 137 S. Ct. 1730, 1730 (2017).

V. THE FALSE HOPES OF LESTER PACKINGHAM

While social media now represents the digital equivalent of the public square,[141] profound implications arise in an era where the private entities that operate these spaces have "tenuous, if not nonexistent" connection to state actors.[142] Indeed, this disconnect has already begun to surface in the context of politicians who—despite using social media to communicate with constituents—block certain people with whom they disagree from viewing their profile, creating new First Amendment headaches for courts.[143] This sort of problem is a product of the First Amendment—and the Bill of Rights more generally—being directed at prohibiting governmental,[144] and not private, conduct:

> To be sure, *Packingham* did not—and could not—hold that Facebook.com is a "public forum." Facebook is "public" in the sense that everyone (and their moms) are on it; but it is also the property of an (enormous) private corporation; and, broadly speaking, no one has a "First Amendment" right to post anything on Facebook if Facebook, Inc., does not want them there (think about restrictions on "offensive" posts).[145]

In the context of who to admit to their platforms, then, social media companies such as Facebook are under no obligation to provide that which the government is prohibited from depriving—a spot in the square.Despite Facebook CEO Mark Zuckerberg imagining connectivity as a human right,[146] Facebook's policies make it clear that he does not apparently mean *every* human.[147]

As discussed earlier, social media platforms, and Facebook in par-

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[141] *Id.* at 1732 ("With one broad stroke, North Carolina bars access to . . . speaking and listening in the modern public square[.]").

[142] Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—or Lack Thereof—to Third Party Platforms*, 32 BERKELEY TECH. L.J. 989, 999–1000 (2017) ("In light of that background, it might seem strange to apply the First Amendment to privately owned spaces. Doing so creates a tension between property rights and expressive rights. So far, however, those rights have coexisted relatively peacefully because "spaces traditionally understood to be public have historically been publicly owned," a reality that today is changing. New forums for public expression are developing apart from the classic public square, and their connection to state actors is tenuous, if not nonexistent).

[143] Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (holding that the President may not block someone from viewing his Twitter profile without offending the First Amendment); *see also* Rodney A. Smolla, *The First Amendment and Public Officials' Social-Media Accounts*, 36 DEL. LAW. 22, 22 (2018) (discussing *Knight First Amendment Inst. at Columbia Univ. v. Trump* and the consequences of viewing social media as a political forum).

[144] Peters, *supra* note 142, at 994 (noting also that "as the doctrine evolved, it came to apply far more widely—even to actions of private individuals and entities").

[145] Goldberg & Zhang, *supra* note 25, at 95.

[146] Mark Zuckerberg, *Is Connectivity a Human Right?*, FACEBOOK, https://www.facebook.com/isconnectivityahumanright (last visited Oct. 25, 2018).

[147] *See How Can I Report a Convicted Sex Offender*, FACEBOOK, https://www.facebook.com/help/210081519032737?helpref=uf_permalink [https://perma.cc/N6VN-G85T] (last visited Jan. 1, 2019) ("Convicted sex offenders aren't allowed to use Facebook.").

ticular, have blanket policies excluding people on sex registries from admission to and participation on their platforms.[148] Within this constitutional twilight a far more intractable problem than internet-identifier requirements arises: a pariah class that, their freedom of speech notwithstanding, lacks any meaningful opportunity to exercise it.[149]

Singling out Facebook is not merely for convenience's sake. In *Packingham*, Justice Kennedy noted Facebook is "[o]ne of the most popular of these sites" and "has 1.79 billion active users."[150] Facebook is the proverbial 800-pound gorilla in the social media sandbox,[151] despite recent black eyes involving leaked private data,[152] fake news,[153] and holocaust denials,[154] resulting in criticism for the site's "strained neutrality."[155]

While the perhaps obvious answer to being banned from Facebook is to simply use another platform, the problem is deeper than that: "The web is made up of third-party apps and systems, many of which rely on being fully integrated with your personal Google or Facebook account. . . . [M]any mobile and web-based apps actually *require* you to have a Facebook account—and only a Facebook account—before you can use the app to begin with."[156] Thus, if one is banned from Facebook, it is not just Facebook that is rendered inaccessible, but also any application or service that requires a Facebook account as a necessary precondition for utilizing it. Even where Facebook is not a *necessary* precondition, it has increasingly become a "soft requirement" in modern society:

> [I]n a fully digital society, there are a vast and increasing number of jobs that [the] stipulation [of using Facebook] applies to: marketers, web developers, social media managers,

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[148] *See, e.g., id.*

[149] While this analysis focuses on sex-offender registries, it is at least worth pointing out that this analysis potentially impacts any class of unpopular or marginalized people. *See, e.g.*, Allison Tierney, *Sex Workers Say They're Being Pushed Off Social Media Platforms*, VICE (Apr. 2, 2018), https://www.vice.com/en_us/article/3kjawb/sex-workers-say-theyre-being-pushed-off-social-media-platforms [https://perma.cc/X2AW-DXQL] (explaining sex workers and people who advocate for decriminalization and regulation of that industry have long complained that their views are targeted by platforms because of who they are, even when they comport with community guidelines); *see also, e.g.*, Complaint, Taylor v. Twitter, Inc., No. CGC-18-564460 (Cal. Super. Mar. 14, 2018) (alleging that Twitter violated the rights of Jared Taylor when it banned his account).

[150] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

[151] Hitz, *supra* note 32, at 1330 (noting that while other social media platforms are popular, none rival the ubiquity and popularity of Facebook).

[152] Mallory Locklear, *Facebook's Cambridge Analytica woes continue with UK lawsuits*, ENGADGET (July 31, 2018), https://engt.co/2O5aUlD [https://perma.cc/23M8-TPTG].

[153] David Kirkpatrick, *Facebook Is Failing To Aid Inquiry Into 'Fake News,' British Lawmakers Say*, N.Y. TIMES (July 28, 2018), https://nyti.ms/2O4yO0t [https://perma.cc/W6CC-T24Y].

[154] Maya Kosoff, *Zuckerberg's Holocaust Gaffe Reveals an Ugly Truth About Facebook*, VANITY FAIR (July 19, 2018), https://www.vanityfair.com/news/2018/07/zuckerbergs-holocaust-gaffe-reveals-an-ugly-truth-about-facebook [https://perma.cc/GL2Z-SV9E].

[155] *Id.*

[156] Aja Romano, *How Facebook made it impossible to delete Facebook*, VOX (Mar. 22, 2018), https://www.vox.com/culture/2018/3/22/17146776/delete-facebook-difficult [https://perma.cc/9WBW-9AER].

> publicists, anyone wishing to effectively promote personal or professional projects, and so on. . . . All of this reliance on Facebook once again means the assumption that everyone is already on Facebook marginalizes anyone who's not on Facebook, making it harder for anyone not using the platform to access the same degree of communication and information sharing. That's vital for any job or education system where Facebook is involved. But it's also vital where social communities are concerned.[157]

When one considers that Facebook rolls out its policy with respect registrants to other platforms that they acquire, the full scope and nature of this problem begins to take shape. Instagram, which boasts 600 million monthly users,[158] began barring people convicted of sex offenses after Facebook acquired it.[159] Presumably, should Facebook wind up acquiring any other platform, the same policy would apply.

Smaller social media and quasi-social media platforms also engage in the wholesale exclusion of people on registries. Dating websites such as OkCupid,[160] Tinder,[161] and Match.com[162] have terms that exclude anyone on the registry. Airbnb excludes from participation those on registries, but also more broadly, even people convicted of non-sexual and decades-old offenses.[163] The social-neighborhood platform NextDoor bans anyone who even *resides* at the same address of someone on the registry from using its service.[164] For many popular platforms, exclusion seems to be the presumed policy choice.[165]

In considering both the speed and ubiquity with which these tech-

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[157] *Id.* (emphasis added).

[158] Amicus Curiae Brief in Support of Petitioner, *supra* note 56, at 6.

[159] *Instagram now bans registered sex offenders*, FLA. ACTION COMM., (Apr. 30, 2018), https://floridaactioncommittee.org/instagram-now-bans-registered-sex-offenders/ [https://perma.cc/CQE3-W924]; *see also Help Center*, INSTAGRAM, https://web.archive.org/web/20131120082816/https:/help.instagram.com/131932550339730 [https://perma.cc/86X6-M3F2] (last visited Nov. 29, 2018) ("Convicted sex offenders are not allowed to use Instagram.").

[160] *Legal Information: Terms & Conditions*, OKCUPID, https://www.okcupid.com/legal/terms [https://perma.cc/K5Q9-AMN5] (last visited Aug. 1, 2018).

[161] *Terms of Use*, TINDER, https://tinde.rs/2vrmfoo [https://perma.cc/8JHZ-Z5UA] (last visited Aug. 1, 2018).

[162] *Match.com Terms of Use Agreement*, MATCH.COM, https://www.match.com/dnws/registration/membagr.aspx [https://perma.cc/86Q7-ZEM7] (last visited Aug. 1, 2018).

[163] *Terms of Service*, AIRBNB, https://www.airbnb.com/terms [https://perma.cc/S36H-UPZ5] (last visited Oct. 24, 2018); Hanna Kozlowska, *Airbnb is grappling with how to treat people with criminal convictions*, QUARTZ (July 15, 2018), https://qz.com/1322785/airbnb-has-a-dilemma-with-how-to-treat-people-with-criminal-convictions/ [https://perma.cc/2GSG-DEYP].

[164] Member Agreement, NEXTDOOR, https://legal.nextdoor.com/us-member-agreement/ [https://perma.cc/FB6V-2TC4] (last visited May 1, 2018).

[165] *See* Kashmir Hill, *So Which Social Networking Sites Can Sex Offenders Actually Use?*, FORBES (June 21, 2012), https://www.forbes.com/sites/kashmirhill/2012/06/21/so-which-social-networking-sites-can-sex-offenders-actually-use/#59117de74cba [https://perma.cc/7HGX-39AC] ("Increasingly the digital space is getting as difficult to navigate for sex offenders as the real world can be given laws on where they can live.").

nologies have intertwined themselves with modern life, and *Packingham*'s relative inability to force the hand of private actors, it is not difficult to imagine a future where people on the registry are frozen out of participation in modern society altogether.

The television series *Black Mirror* deftly explores this idea in an episode where, in the near future, people have the ability to "block" others in real life, as well as online.[166] Anyone who is blocked is rendered, visually and aurally, something akin to white static on a television screen.[167] In the episode, a character played by John Hamm is added to the sex offense registry.[168] In the final moments of the episode, Hamm's character steps out of a police station on Christmas into a market square bustling with families shopping and vendors selling wares.[169] The viewer sees the market through the eyes of Hamm's character: all those around him are muted, their appearance blanked out by gray, and their voices garbled and incomprehensible.[170] He is effectively banished from any human connection.

The viewer's perspective then changes to that of the people in the market square.[171] To them, Hamm's character is also muted—no one can see his features or hear his voice.[172] His only distinguishing feature is that his silhouette is red, as opposed to gray,[173] presumably indicating his status as being on the sex offense registry. In addition to his constructive, digital banishment, he lacks any ability to challenge the characterization that the color of his silhouette would seem to impart to those around him. His monstrousness is both presumed and irrefutable, regardless of the underlying facts.

New constitutional principles, or at least old ones applied to a modern era, are needed to realize the promise that *Packingham* holds. Perhaps the strongest legal argument lays with the Supreme Court's 1946 decision in *Marsh v. Alabama*.[174] In *Marsh*, a Jehovah's witness received a criminal conviction for distributing religious literature on a sidewalk that was privately owned by a corporate ship-building town in Chickasaw, Alabama.[175] While the First Amendment guaranteed Marsh's right to hand out such literature on public property, ordinances of the private

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[166] *Black Mirror: White Christmas*, NETFLIX (Dec. 25, 2015), https://www.netflix.com/watch/80073158; *see also Black Mirror | Netflix Official Site*, NETFLIX, https://www.netflix.com/title/70264888 [https://perma.cc/9JBX-ZRBE] (last visited Jan. 15, 2019) (stating that "[t]his sci-fi anthology series explores a twisted, high-tech near-future where humanity's greatest innovations and darkest instincts collide").

[167] *Black Mirror: White Christmas*, *supra* note 166.

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *See generally* Marsh v. Alabama, 326 U.S. 501 (1946).

[175] *Id.* at 503.

town prohibited it.[176] Marsh was convicted of violating the ordinance and appealed, claiming that the private rule offended the First Amendment.[177] The Court reversed Marsh's conviction:

> The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We can not accept that contention. *Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.* Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation . . . . Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.[178]

In assessing the importance of the rights secured by the First Amendment, the Court found free speech "lies at the foundation of free government by free men."[179] The Court explicitly acknowledged that properly informed decisionmaking requires access to uncensored information.[180] Arguably, these words would not have been out of place if found in the *Packingham* decision. *Marsh* should apply in this context to require Facebook and other platforms that are open for public use to admit classes of unpopular people, including people on sex offense registries.

The applicability of *Marsh*—or lack thereof[181]—notwithstanding, there are deeper moral arguments to consider. Civil rights activists of previous eras availed themselves of the public square to shift public opinion, to challenge narratives being told without the input or consent of those deprived of rights, and to humanize people against hostile crowds that would've much preferred silence to challenging debate.

The importance of access to the public square undergirds the holding of *Packingham*,[182] is at the heart of how we conceive of some of our most important freedoms in America, and is essential to healthy demo-

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[176] *Id.* at 504.

[177] *Id.*

[178] *Id.* at 505–06 (emphasis added).

[179] *Id.* at 509.

[180] *Marsh*, 326 U.S. at 508 ("To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.").

[181] *Cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358–59 (1974) (holding that despite state regulation, termination of utility service did not represent state action sufficient for judicial scrutiny).

[182] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017).

cratic processes. Our history is abound with examples of how our commitment to principles of free and open discussion pushed an otherwise lethargic body politic into the recognition of civil and human rights.[183]

Court decisions green-lighting discrimination and hatred have not been issued in political vacuums; rather, democratic engagement *outside* the courtroom is arguably just as important as the legal arguments that gave those decisions life.[184] While obviously imperfect, there is a loose analogy to be taken from the struggle for gay rights in America.[185] In America, LGBT people were historically regarded as dangerous, perverted, and depraved.[186] Laws were deployed to engage in wholesale discrimination against them.[187] Sex registries and associated criminal laws were originally deployed, in part, to target them.[188] Moral panic saw people be denied the ability to marry their partners, adopt children,[189] and being regarded as "perverts" who threatened safety of the youth—owing in large part to a historical conflation of pedophilia with homosexuality.[190]

People started coming out—announcing to their family, friends, and sometimes television audiences that they were gay.[191] More and more Americans all of a sudden *knew* someone who was gay. Personal experience challenged and changed thinking about the issues in ways that flowery language or statistical analysis could never hope.[192] Demagogues had told us that gay people were depraved, but our friends had families and worked hard. Preachers told us that gay people were sinful and abhorrent to God, but that message became harder to reconcile with the

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[183] *See, e.g.*, *infra* text accompanying notes 191–95 (describing how the LGBT community was able to use their personal experiences and voices to advocate for equal rights).

[184] DAVID COLE, ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW 221–25 (2016).

[185] I do not mean to suggest that the analogy is perfect—people who are on sex registries have sometimes wrought great harm onto others, whereas people who are gay have done little except be themselves. It is worth noting that the criminal law, registries, and civil commitment have historically been brought to bear against LGBT individuals. *See also* Meiners, *supra* note 92, at 34 (noting that LGBT activists have been silent on the ineffectiveness of sex-offender registries, even though they are "a population historically defined as sex offenders").

[186] *See, e.g.*, ROGER LANCASTER, SEX PANIC AND THE PUNITIVE STATE 33–34 (2011).

[187] John Pratt, *The Rise and Fall of Homophobia and Sexual Psychopath Legislation in Postwar Society*, 4 PSYCHOL. PUBLIC POLICY AND L. 25, 38 (1998).

[188] *See* Meiners, *supra* note 92, at 37; Lawrence v. Texas, 539 U.S. 558 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional. Up until this case, criminal laws continued to target LGBT people).

[189] LANCASTER, *supra* note 186, at 14.

[190] *Id.*

[191] *Celebrate National Coming Out Day with HRC!*, HUMAN RIGHTS COUNCIL 14 (Sept. 24, 2011), https://www.hrc.org/resources/national-coming-out-day ("[O]ne of our most basic tools is the power of coming out . . . when people know someone who is LBGTQ, they are far more likely to support equality under the law.").

[192] *See generally* Gregory Lewis, *Personal Relationships and Support for Gay Rights*, Andrew Young School of Policy Studies, (Andrew Young Sch. Pol'y Studies, Working Paper No. 07-10, 2007), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=975975. [https://perma.cc/Z24T-ZQMT] ("[E]ven when we control for as many factors as possible that might influence both people's attitudes toward homosexuality and gay rights and their likelihood to know LGBs, actually knowing a gay man or lesbian has a noticeable impact on their support for gay rights.").

people that we knew and loved.

As people found their voices, they were able to challenge the narrative being told *about* them, and instead tell their own stories.[193] These opportunities enabled them to reveal the truth about themselves: far from the caricatures that they were portrayed as, these people were no different from anyone else. They were, at the end of the day, human beings. As some commentators have suggested, the process of people revealing their underlying humanity in such a fashion was an essential piece of this struggle.[194] Public opinion on the issues began to shift. The narrative of depravity and dangerousness that undergirded decades of discrimination and hatred began to melt. Love won.[195]

Social media, of all that can be said about it, "enable[s] governments, corporations, leaders, and anyone else to tell their own story in their own words."[196] In this modern era, it is "perhaps the most powerful mechanism available to a private citizen to make his or her voice heard,"[197] and is increasingly indispensable for political organizing and engagement.[198]

Ultimately, when one considers the ways in which some civil rights struggles of the past have been fought, the necessity of direct engagement with public opinion becomes quite plain. In this context, however, a catch-22 presents itself—the same ingredient that is essential to challenge the wisdom, effectiveness, and humanity of laws targeting people on the registry is also effectively foreclosed by them: voice.

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[193] *See e.g.* Jonathan Capehart, *From Harvey Milk to 58 Percent*, WASH. POST (Mar. 18, 2013), https://www.washingtonpost.com/blogs/post-partisan/wp/2013/03/18/from-harvey-milk-to-58-percent/?utm_term=.883f3c0ae45d [https://perma.cc/849V-UF9K] (describing Harvey Milk encouraging people to come out to family friends and live openly, quoting Milk as saying that "[o]nce they realize that we are indeed their children, that we are indeed everywhere, every myth, every lie, every innuendo will be destroyed once and for all").

[194] *See* Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753, 1755–56 ("Courts interpret the Equal Protection Clause to require a three-prong inquiry to determine whether a group deserves heightened scrutiny. That inquiry asks (1) whether the group has suffered a history of discrimination, (2) whether the group is politically powerless, and (3) whether the group is marked by an immutable characteristic. Just as the first prong resonates with the pink triangle, the other two prongs resonate with symbols common in the gay-rights movement. The political-powerlessness prong implicates the symbol of the closet insofar as the closet captures the invisibility and isolation that hinder gays in their political mobilization. The immutability prong implicates the symbol of the body insofar as the body traditionally has been a way of conceiving of both immutability and sexual deviance. In all three instances, judicial discussions of these prongs as applied to gays have not adverted to these symbols.").

[195] *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding the right to marry is a fundamental right protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and same-sex couples may not be denied the right to marry).

[196] Brian Kane, *Social Media is the New Town Square: The Difficulty in Blocking Access to Public Official Accounts*, 60 ADVOC. (IDAHO) 31 (2018).

[197] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

[198] Hitz, *supra* note 32, at 1332; Goldberg & Zhang, *supra* note 24, at 68 (noting the incredulity of asserting otherwise "[i]n an era where the president is announcing Supreme Court nominations on Twitter").

VI. CONCLUSION – O.T.S.

I narrowly avoided a felony arrest—ironically enough—during my criminal procedure class in law school. Separate law enforcement agencies had different interpretations of Kentucky's statute[199] specifying which internet identifiers those on the registry were required to report, and thus what was required of me—my own good faith efforts at compliance notwithstanding.[200] Despite the confusion being resolved amicably,[201] I lost sleep over whether I had adequately complied with the law and whether some other law enforcement agency would decide that I had not and seek my arrest. The prospect of trying to comply with a law whose basic meaning eludes even those who are charged with enforcing it is, to be sure, a terrifying one.

I spent years getting amazed, if not suspicious, looks from people when I told them I was not on Facebook. I missed wedding and party invitations. I lost touch with relatives. I was offered a marketing position before having to turn it down, explaining that I could not use social media. In investigating witnesses as a part of my position with a criminal defense firm, I found that I was seriously hampered by not being able to view their social media profiles, or even investigate what their social media presence was, lest I commit a criminal offense.

These experiences stuck with me. After graduation, my best friend from law school and I were studying for the bar exam. We would meet at his home, outline, quiz one another, make flashcards, and often take breaks on his front porch. Occasionally with cigars, we would talk well into the night about our plans. Though I was studying, I was still waiting to find out whether—because of my conviction—I would be allowed to sit for the bar exam. I knew when I started law school that outside of a hefty student-loan balance there would be no guarantees.[202]

We began talking about what I would do if I were not allowed to sit for the exam. Over the course of several weeks, my friend and I arrived at the important realization that, licensure or not, I had two[203] valuable

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[199] KY. REV. STAT. § 17.510(10)(c) (2016) ("If the electronic mail address or any instant messaging, chat, or other Internet communication name identities of any registrant changes, or if the registrant creates or uses any new Internet communication name identities, the registrant shall register the change or new identity, on or before the date of the change or use or creation of the new identity, with the appropriate local probation and parole office in the county in which he or she resides.").

[200] To make a long and complicated story short, I had provided a list of every conceivable such identifier—including my Westlaw login—to state police and to local law enforcement. State police believed all those identifiers had to be registered, whereas local law enforcement did not and refused to do so. When evidence of registration of those same identifiers was not forthcoming from local law enforcement, state police had assumed that I had simply failed to comply and sought my arrest.

[201] By amicably, I mean without arrest or any other action on my part.

[202] To again make a very long story short, the Kentucky Supreme Court eventually denied my ability to sit for the bar for so long as I remain on Kentucky's registry. Assuming the law does not change, I will be allowed to reapply in 2032. I will be 48 years old. If I am still drawing breath, they will hear from me again then.

[203] Three, if you count how stubborn I am.

things: my education and Article III standing.

On a humid Kentucky summer night, O.T.S.[204] was born. O.T.S. was the code name that we gave to our plan to attack a state law that we both believed was unconstitutional: a federal lawsuit challenging Kentucky's social-media ban, as well as the identifier provisions which nearly led to my arrest during my second year in law school.

Doe v. Kentucky ex rel. Tilley[205] was the product of our discussions. I was John Doe. As fate—or perhaps luck—would have it, *Tilley* was finally ready for a decision on the merits when the Supreme Court granted the cert petition in *Packingham*. The decision in *Tilley* was held in abeyance, pending the outcome of *Packingham*. After *Packingham*, it took several more months for a decision in *Tilley*. Ultimately, and unsurprisingly, *Packingham* was dispositive of the social-media claim. What remained on the table were the provisions that nearly led to my arrest:

> To its detriment, KRS § 17.510(10) does not define the "Internet communication name identities" it requires sex offenders to register. In an effort to downplay this, the Defendants argue the Court should read "Internet communication name identities" to include only those internet identifiers "that are primarily used for online communication with members of the public (as are e-mails and instant messaging)." . . . But just like in *Packingham*, the statute is not susceptible to such a narrowing construction. It may be true that the General Assembly meant the law to apply only to a sex offender's new Facebook profile, but the law as written might as well apply to usernames created to engage in online dialogue over Amazon.com products of Washingtonpost.com news stories.
>
> Additionally, the statute fails to explain how, exactly, a sex offender must register a change in his or her identities. At oral argument, the Commonwealth conceded the reporting requirement was an immediate one but was otherwise unable to explain to the Court whether registration of a new identity must be accomplished online, through a phone call, via some sort of written communication, or in person. This vagueness is troubling because "the ambiguities in the statute may lead registered sex offenders either to overreport their activity or underuse the Internet to avoid the difficult questions in understanding what, precisely, they must report." As a result, just as KRS § 17.546(2) violates Doe's constitutional rights, KRS §§ 17.510(10) and (13) do, too.[206]

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[204] As for what it stands for, I will assure you, it is both very witty, and very vulgar.

[205] Doe v. Kentucky ex rel. Tilley, 283 F.Supp.3d 608, 616 (E.D. Ky. 2017).

[206] *Id.* at 614–15.

The day of the decision, I did a public Ask me Anything (AMA)[207] on Reddit and sent my first tweet.[208] My wife had to explain to me the significance of "likes" and "retweets," and what it meant to "follow" someone, or if they "followed" you. For years, I had wanted to connect and speak with criminal-justice reformers across the country who I had no way of contacting because the only way I saw to do it was via social media. After *Tilley*, not only did I connect with them, but I encountered others who knew who I was before I knew who they were. I was welcomed into a criminal-justice community.

It was through that community that I came to be introduced to Harvard Law's Fair Punishment Project and had the honor of writing for them on issues related to sex offense policy.[209] My writing attracted attention and I received invitations to speak at conferences. Speaking at conferences has introduced me to people I never would have met otherwise, who then introduced me to ideas that revolutionized my own thinking about these issues.[210] It was through a conversation on Twitter that the idea for writing this article was born, and thus is the reason that you are even reading these words at all.[211] When the position that I now hold became available, I was first notified of it through social media. One rotation leads to another.[212]

Above, I gave several examples of times over the last ten years where the impact of these laws on my daily life became clear, in sometimes small, sometimes large ways. Underneath them are larger questions: but for this digital exile that was imposed just as social media hit its stride, who are the people that I would have met? The ideas that I would have been exposed to? The connections in thought and community that I would have made? The relationships that I would have built? Answers to these questions are inaccessible to me. Such is the nature of exclusion.

Regardless, my experiences since joining social media the day *Tilley* was decided have illustrated that I am, perhaps, living proof of Justice Kennedy's observation that "even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and pursue lawful and rewarding lives."[213]

I have, it would seem, a lot of catching up to do.

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[207] REDDIT, *supra* note 51.

[208] Guy Hamilton-Smith (@G_Padraic), TWITTER (Oct. 20, 2017 7:56 A.M.), https://twitter.com/G_Padraic/status/921389720558624769 [https://perma.cc/VFP9-YGQE] (tweeting a quote by Frederick Douglas).

[209] *See, e.g.*, Hamilton-Smith, *supra* note 21.

[210] For example, though I had originally believed that victims and victims' advocates would be opposed to reforms that I sought, I began to realize that we were largely on the same side. *See, e.g.*, Corrigan, *supra*, note 92, at 2 (acknowledging that Megan's Law's breadth makes it contrary to feminism efforts to fight sexual assault).

[211] Thank you, Marissa Latta.

[212] JOYWAVE, TRAVELING AT THE SPEED OF LIGHT (Hollywood Records 2015).

[213] Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

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Courts do not lead; they follow.[214] Rights are not given; rather, they are the product of political organizing, effort, and activism as much as they are products of litigation and briefs.[215] As Judge Learned Hand remarked to a crowd of new Americans in Central Park nearly seventy years ago, liberty does not live in the law, the courthouses, the constitutions; it is in our streets, our communities, parks, and schools. Liberty is in our hearts. It lives, and it dies, with you and I.[216] As The Clash frontman Joe Strummer more recently observed, the future is unwritten.[217]

The narrative that paints the nearly million people now on sex registries in the United States as immutable monsters is not only inaccurate as to the characteristics that they—and I, and perhaps you[218]—share, but toxic with shame that kills in more ways than one. It facilitates what-should-be-obvious human rights abuses that are perpetrated on the fevered belief that such practices somehow make our families safer.[219] While most would perhaps be amenable to the purchase of safety by way of brutality, there are compelling reasons to believe that such an approach perpetuates the very harms that we seek to vanquish.[220]

For each of the names and faces on these lists, there are also wives, husbands, children, mothers, fathers, brothers, sisters, friends, employers, and landlords—all who share in the burdens that come along with registration.[221] While there are a number of heroic lawyers, law professors, and other advocates who work to assail civil veneers for unapologetic tortures, noise generated both *about* and *by* us is notably muted. Despite boasting numbers that are beginning to be comparable to those of Ameri-

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[214] *See generally* Catherine Carpenter, Presentation to Alliance for Constitutional Sex Offense Laws (ACSOL) (June 16, 2018), *available at* https://www.youtube.com/watch?v=8p7On0nvtPI&feature=youtu.be [https://perma.cc/R9KH-3GLF] (discussing after the Court's decision in *Smith v. Doe*, she responded by writing about the impact of sex offense registries to speak against injustice); COLE, *supra* note 184.

[215] *See, e.g.*, Todd Spangler, *Treatment of sex offenders depends on whether they've challenged rules*, DET. FREE PRESS (June 7, 2018), https://on.freep.com/2vuzGUr [https://perma.cc/4ADZ-9A8P] (explaining that despite the Sixth Circuit's decision in *Does v. Snyder* being one of the most bruising and significant opinions against registries, little has changed in the two years since it declared aspects of Michigan's law unconstitutional).

[216] *See* Hand, *supra* note 1.

[217] THE FUTURE IS UNWRITTEN (IFC Films 2007).

[218] Perhaps you, reading this, are on a registry—in which case I have this to say: keep your head up. You are a human being, and you have as much right to be here as anyone else. Or, perhaps you are merely one of the significant number of people that, had you been caught for everything that you had ever done (especially as a teen), you would be on one.

[219] Hamilton-Smith, *supra* note 21.

[220] *See supra* note 84 and accompanying text.

[221] I could provide many, many examples of this anecdotally. On this topic, my wife recently tried to sign up for the social platform NextDoor after our cat ran away so that she could ask our neighborhood to be on the lookout. She could not make an account, because she lived with me. They presumably could not be sure that I would not be able to access the platform, ostensibly to commit various misdeeds. The cat, by the way, came back on its own accord about a week later, a couple pounds lighter, but none the worse for wear.

ca's prison population,[222] people on sex registries represent an enormous population of people that few are paying any attention to at all.[223]

Despite *Packingham* opening a door, the concurrence doubled down on the ostensible need for these laws in regard to purported danger,[224] essentially ignoring that there was even a controversy about that point.[225]What remains badly needed is space—both legally and culturally—for people and families who are directly impacted to be able to "tell [our] own stories in [our] own words."[226]

O.T.S. has taken an enormous amount of work and planning that has spanned several years now. Unnumbered days and nights of research, writing, talking, rewriting. Recruiting expert witnesses willing to serve *pro bono*. Waiting. Heartbreak. Yet more waiting. In fact, the work is still underway. *Tilley* was just the first phase of the plan. You, by reading what I have written, have helped with the second.

What good is being given a voice only to persist in silence? Of what value does speaking hold if one is forced to do so only amongst the trees, or to the choir?

It may be that you find what I have written to be detestable, nonsensical, and even dangerous. If so, you will undoubtedly find me up for a robust debate.[227] Whatever your reaction, you will surely agree with the fact that I was even afforded the opportunity to write the words you find so objectionable,[228] and thus for you to be aggrieved by them, is in itself, nothing short of a small miracle.

And with that, God is good indeed, Mr. Packingham.[229]

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[222] *How many people are locked up in the United States?*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/graphs/pie2018.html [https://perma.cc/9ZHE-3DHR] (last visited Oct. 25, 2018).

[223] Sarah Sloat, *The War on Sex Offenders is the New War on Drugs, Which Means It's About Race*, INVERSE (May 25, 2016), https://www.inverse.com/article/16109-the-war-on-sex-offenders-is-the-new-war-on-drugs-which-means-it-s-about-race [https://perma.cc/DCF3-7QLH] (noting observations by sociologist Trevor Hoppe).

[224] Packingham v. North Carolina, 137 S. Ct. 1730, 1739 (2017) (Alito, J., concurring).

[225] *See generally* Michelle Ye Hee Lee, *Fact Checker: Justice Alito's misleading claim about sex offender rearrests*, WASH. POST (June 21, 2017), https://wapo.st/2vuAwAz [https://perma.cc/YPY5-V7NV] (fact-checking Justice Alito's claims about sex-offender recidivism).

[226] Kane, *supra* note 196.

[227] *See generally, Sullivan*, supra note 52.

[228] As mentioned above, this article would not have been possible without *Packingham*, *Tilley*, and Marissa Latta. So, thank or blame them as you prefer.

[229] *See Packingham*, 137 S. Ct. at 1734 (referring to Mr. Packingham's Facebook post).