GOVERNMENTAL AUTHORITY TO COMPEL THE CARRYING OF STIGMATIZING DOCUMENTS

Wayne A. Logan†

Among the beliefs Americans hold most dear is that they have never been required to carry government-issued personal identification documents. The belief, however, is incorrect. Over time, select subpopulations have in fact been required to carry documents, including free-born and emancipated African Americans until after the Civil War. This article examines the targeting of yet another sub-population: individuals convicted of sex offenses.

Today, several states require that convicted sex offenders obtain and carry identification cards or driver's licenses declaring their status. Often, the branding is overt, such as a stamp of "SEXUAL PREDATOR" in brightly colored lettering. At other times, it is more subtle, such as use of a "U," denoting "Sexual Deviant" status. The documents must be produced to police upon demand, under threat of punishment, as well as when requested by myriad individuals in daily life, such as bank tellers and pharmacy staff. The federal government, for its part, requires that passports display a "unique identifier" stamped in a "conspicuous location," which must be shown to airport and customs officials, as well as to various individuals during transactions when traveling abroad.

To date, the few courts addressing challenges have condoned branding in principle, yet required less graphic signifiers, based on First Amendment government-compelled speech grounds. While important, the decisions have failed to address other constitutional concerns, such as the right of free association. Even more important, the decisions have ignored the many troubling ramifications of governments forcing individuals to self-stigmatize and facilitate their own surveillance, perhaps for their lifetimes, which the article illuminates.

INTRODUCTION 221
I. HISTORY 224
A. Making "Otherness" Legible 225
B. Targeting the Criminal Threat 229
II. MODERN DOCUMENT BRANDING LAWS 233
A. Scope and Requirements 234

† Steven M. Goldstein Professor, Florida State University College of Law. Thanks to Alessandro Corda, Eric Janus, Sarah Lageson, Jake Linford, Steve Schulhofer, Laurent Sacharoff, Jonathon Simon, Nat Stern, Chris Slobogin, and Lior Strahlevitz for their very helpful input, and Brad Fehrenbach and Kat Kelpher for their excellent research assistance.

B. Purported Benefits 236
C. Judicial Challenges 238
1. Driver's licenses and identification cards.......... 238
i. Branding as unconstitutional "punishment"........ 238
ii. Branding as an Equal Protection violation 239
iii. Branding as a First Amendment violation........... 239
2. Passports............ 244
III. ASSESSING THE BOUNDS OF GOVERNMENTAL AUTHORITY............. 246
IV. BROADER CONSEQUENCES OF DOCUMENT BRANDING.................. 255
A. Autonomy and Personhood............ 255
B. Conscription into Self-Surveillance............ 260
C. Balancing Privacy............ 262
CONCLUSION............ 264

"Am I not what I am, to some degree, in virtue of what others think and feel me to be?"[1]

INTRODUCTION

In 1941, the Supreme Court made clear its concern over governments requiring individuals to carry identification cards, stating that "[t]he requirement that cards be carried and exhibited has always been regarded as…a feature that best lends itself to tyranny and intimidation."[2] Testament to the potency of the requirement, Senator Joseph McCarthy garnered national attention a decade later when witnesses were asked whether they were "card-carrying Communist[s]."[3] More an epithet than a question, an affirmative response had dire consequences for careers and sometimes lives.[4]

Requiring that certain individuals carry identification has a long history. Free-born and emancipated African Americans before the Civil War and Chinese

1 SIR ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY 155 (1st ed. 1969).

2 Hines v. Davidowitz, 312 U.S. 52, 71 n.32 (1941).

3 *See, e.g.,* Staff of S. Comm. on Governmental Affairs Committee Print 107-84, Vol. 2 at 1469: Executive Sessions of the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations (McCarthy Hearings, 1953-54) (January 2003) (testimony of James Benjamin Phillips); *id.* at 1789 (testimony of John Lautner); *id.* at v. 4, at 3335-36 (testimony of Martin Schmidt).

4 *See* ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA 360-368 (1998). In the 1998 presidential election, Republican Party strategists sought to brand opponent Democratic Massachusetts Governor Michael Dukakis as a "card carrying member of the American Civil Liberties Union." Richard Cohen, *Why is Bush Saying Those Things About Dukakis?*, WASH. POST, Sept. 1, 1988, at A23.

immigrants in the 1890s, for instance, were forced to carry identification documents, to be produced upon demand.[5] Opposing the federal law targeting Chinese, Congressman Robert Hitt (R-Illinois) likened the requirement to "tagging a man, like a dog to be caught by the police and examined, and if his tag or collar is not all right taken to the pound or drowned or shot."[6]

Today, the ignominy of being required to obtain, carry, and present upon demand identification is being visited upon another disfavored population: individuals convicted of sex offenses. Building upon laws in effect nationwide requiring that such individuals register with governmental authorities,[7] several states now require that registrants obtain and carry either a driver's license or identification card declaring their registrant status.[8] The federal government, for its part, requires that registrants wishing to travel abroad obtain a passport stamped with a "unique identifier," placed in a "conspicuous location," signifying that the passport holder committed a sex offense and is a registrant.[9]

States advance a variety of justifications for their laws. Foremost is the desire to alert others that document holders have been convicted of a sexual offense, conveying risk of possible recidivism. In this respect, the laws complement community notification laws, which make registrants' identifying information (home, work, and school addresses, etc.) publicly available, mainly by means of government-run websites.[10] The current wave of document branding laws, however, achieves notification in a far more direct and personal way, requiring that registrants themselves obtain (and pay for) the branded document, secure a new document in the event of any changes in their data, and produce it upon demand. And they must do so not only to police, under threat of punishment, but also to myriad others during everyday transactions, such as when depositing a check at a bank or joining a gym. The federal passport requirement, intended to combat "sex trafficking and sex tourism," also significantly stigmatizes individuals, not only at points of travel but also in the many instances when passports are required during international travel such as when renting a hotel room, purchasing a train ticket, renting a car, or exchanging money.[11] Together, the laws represent a troubling new development in social control, raising fundamental questions over the authority of government to single out individuals for shaming, very often for

5 *See infra* section I(A).

6 *See* 23 Cong. Rec. 3, at 3923 (1892) (statement of Rep. Hitt); *see also* 25 Cong. Rec. H2450 at 2495 (1893) (statement of Rep. Morse) (stating that the law "proposes to collar, and label, and number like dogs, 85,000 Chinese residents of this country").

7 *See generally* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA, Chs. 3-4 (2009) [hereinafter LOGAN, KNOWLEDGE AS POWER].

8 *See infra* notes 90-103 and accompanying text.

9 *See infra* notes 110-12 and accompanying text.

10 LOGAN, KNOWLEDGE AS POWER, *supra* note 7, at 74-79.

11 *See* Pub. L. No. 114-119, 130 Stat. 15 (2016) (stating in a synopsis of International Megan's Law that the law's purpose is "[t]o protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism . . . . ").

their lifetimes.

The discussion here proceeds as follows. Part I provides historical background on the practice of requiring that particular individuals carry identification documents. Overseas, multiple troubling instances exist, such as in Nazi Germany and apartheid South Africa, where mandatory identifying documents played a key role in facilitating oppression and committing atrocities. In the U.S., despite recurring, vociferous objections in public discourse over requiring the carrying of identification documents,[12] particular sub-populations have been singled out, including free and emancipated African Americans until after the Civil War and Chinese immigrants in the late nineteenth century.

As of the mid-twentieth century, a handful of U.S. jurisdictions required that individuals convicted of crimes (not only sex offenses) register with governmental authorities and obtain and carry a card signifying their registrant status. By the 1980s, however, the few laws in existence fell into disuse, only to recently reemerge targeting convicted sex offenders in particular. Part II discusses this spate of new-generation laws and the constitutional challenges they have prompted, which center on the question of whether they constitute permissible government speech or impermissible government-compelled private speech.

Part III considers whether governments can, constitutionally, and should, as a normative matter, require that individuals convicted of offenses obtain, carry, and produce upon demand documents branded with stigmatizing information, potentially for their lifetimes, and impose criminal liability for failure to comply. From the government's perspective, document branding promotes public safety by providing factual information about the bearer's registrant status. If this is so, it would seem that the government could also require that documents be branded with other stigmatizing, but also factual information, including that an individual has a potentially transmissible medical condition such as HIV/AIDS.

Part IV explores the broader consequences of document branding (including use of such labels such as "sexual predator" and "sexual deviant"). The laws impose one of the most stigmatizing labels one can have in modern society—

---

12 For instance, during the debates regarding the Simpson-Mazzoli immigration reform bill, controversy centered on a provision stating that it "may be necessary to establish a secure system to determine employment eligibility. . . ." H.R. 1510, 98th Cong. (2d Sess. 1984); 130 CONG. REC. 5658 (daily ed. June 12, 1984). Various representatives believed that the provision authorized the creation of a national identification system and strongly opposed the prospect. *See, e.g., id.* at H5659 (statement of Rep. Mitchell) ("[f]or God's sake . . . on this issue, let us move . . . to prevent the establishment of [a] national identification system which . . . is inimical to the democratic system."); *id.* at H5669 (statement of Rep. Richardson) ("[n]ational identifiers endanger our right to privacy. . . and there can be no freedom without privacy"); *id.* ("a national ID card would violate the right of the individual to live and work free from the shadow of government surveillance"). More recently, the resistance was evidenced in outrage over the prospect of being required to carry a COVID-19 "vaccine passport." *See, e.g.,* Elliott Davis, Jr., *Which States Have Banned Vaccine Passports*, U.S. NEWS & WORLD REPORT (June 1, 2021), https://perma.cc/E8KV-XVYT.

convicted sex offender—and do so by requiring that individuals disclose the stigmata to others upon demand.[13] Worse yet, the potentially lifelong branding can begin when individuals are juveniles,[14] and, because state registration and notification laws are typically retroactive in coverage, can be based on convictions from the distant past.[15] Furthermore, because registration laws sweep up disproportionate numbers of African American and LGBTQ individuals, document branding has troubling disparate impact.[16] Part IV closes with an evaluation of the purported benefits of branding, which while arguably not nonexistent, are less significant than they appear because, much like registration and community notification themselves, they are premised upon a regime where information is problematically mistaken for useful knowledge.

I. HISTORY

Governments have long gathered and stored information on their subjects, creating a "legible" population more readily capable of being governed.[17] Achieving legibility also mitigated the increasing social anxiety bred by growing populations, urbanization, and increased access to transportation. Jeremy Bentham captured this anxiety in his plaintive query in 1843: "Who are you, with whom I have to deal?"[18] To relieve this anxiety, Bentham advocated inscribing individuals' names on their wrists, contending that if the practice were to "become universal, it would be a new spring for morality, a new source of power for the laws."[19]

---

13 As the Middle District of Alabama recognized several years ago:

> While it might seem that a convicted felon could have little left of his good name, community notification . . . will inflict a greater stigma than would result from conviction alone. Notification will clearly brand the plaintiff as a "criminal sex offender". . .a "badge of infamy" that he will have
> to wear for at least 25 years—and strongly implies that he is a likely recidivist and a danger to his
> community.

Doe v. Pryor, 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999).

See also, e.g., Pierre v. Vasquez, No. 20-51032, 2022 WL 68970 *3 (5th Cir. Nov. 6, 2022) (noting the "damaging reputational consequences of bearing the sex offender [registrant] label"); Does # 1-5 v. Snyder, 834 F.3d 696, 698 (6th Cir. 2016) (recognizing "the stigma of simply being identified as a sex offender on a public registry").

14 As in Florida, which requires juveniles, whether convicted in adult court or adjudicated as a delinquent in juvenile court, to register for life. *See* Florida Dep't of Law Enforcement, *Frequently Asked Questions*, SEXUAL OFFENDERS AND PREDATORS SEARCH, https://perma.cc/E3T7-LVAK.

15 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 7, at 71 (discussing the broad retroactive coverage of modern registration laws).

16 *See infra* notes 267-69 and accompanying text.

17 JAMES SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED 65 (1998).

18 1 JEREMY BENTHAM, *Principles of Penal Law*, *in* WORKS OF JEREMY BENTHAM 557 (John Hill Burton et al. eds, Russell & Russell, Inc. 1962) (1843).

19 *Id. Cf.* Harold R. Issacs, *Basic Group Identity: The Idols of the Tribe*, *in* ETHNICITY:

A. Making "Otherness" Legible

Over time, governments have utilized a variety of identification methods, including the requirement that individuals carry documents signifying their membership in particular suspect groups. In the early 1900s, for instance, the French government targeted "Gypsies" (people of Romani descent), whose nomadic lifestyle threatened the established social order and were thought to engage in barbarities such as child theft. Individuals over age thirteen were required to carry at all times a passbook containing a photo and physical description, which must be shown to police upon demand.[20] In the 1930s, the Soviet Union required that individuals over age sixteen have an internal passport, which indicated nationality, employer's name, employment starting and ending dates, and criminal history.[21]

Around the same time, Germany required that Jews and other subpopulations obtain and carry identification cards. The cards, along with two censuses identifying Jews, enabled the Third Reich to readily identify and round up card carriers for deportation to concentration and extermination camps.[22] In 1940, cards were used by the collaborationist Vichy Government in France to identify Jews for deportation to camps.[23] Starting in 1959, apartheid South Africa required that all

---

THEORY AND EXPERIENCE (Nathan Glazer & Daniel P. Moynihan, eds., 1975) (quoting Helen Lynd: "The wood in Through the Looking Glass where no creature bears a name is a place of terror").

20 Martine Kaluszynski, *Republican Identity: Bertillonage as Government Technique*, *in* DOCUMENTING INDIVIDUAL IDENTITY: THE DEVELOPMENT OF STATE PRACTICES IN THE MODERN WORLD 131–37 (Jane Kaplan & John Torpey, eds., 2001) [hereinafter DOCUMENTING INDIVIDUAL IDENTITY].

21 Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J.L. & TECH. 319, 347 (2002).

22 RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 173-74 (3d ed. 2003). *See also* Jim Fussell, *Genocide and Group Classification on National ID Cards*, *in* NATIONAL IDENTIFICATION SYSTEMS: ESSAYS IN OPPOSITION 55, 55 (Carl Watner & Wendy McElroy, eds., 2004) (noting that as of July 1938 "J-stamps" appeared on the identification cards and passports of Jews, which preceded the required wearing of yellow Star of David patches) [hereinafter NATIONAL IDENTIFICATION SYSTEMS]. Nazis also resorted to other makings to manifest otherness:

> In Auschwitz, serial numbers were tattooed on the left arm of all Jews and Gypsies . . . An elaborate "sumptuary" color code to mark the sub-sets of prisoners was introduced. In addition to
> the well-known Jewish star of David, sewn on the left breast and the right trouser leg, there were a
> series of triangles (apex down) affixed to clothing to make the taxonomy of prisoners legible at a
> glance: brown for gypsies, green for "criminals," red for "political," and black for "asocial" elements.

James C. Scott et al., *Government Surnames and Legal Identities*, 11, 47, *in* NATIONAL IDENTIFICATION SYSTEMS, *supra* note 22. *See also* Robert M.W. Kempner, *The German National Registration System as Means of Police Control of Population*, 36 J. CRIM. L. & CRIMINOLOGY 362 (1946).

23 DAVID LYON, IDENTIFYING CITIZENS: ID CARDS AS SURVEILLANCE 3 (2009).

Black citizens carry passes limiting where they could travel within the country, with violation resulting in arrest.[24] More recently, in Rwanda, members of the Tutsi ethnic group had their identification cards stamped, facilitating their killing during the 1994 genocide.[25]

U.S. history also contains several instances of required card carrying. From the late 1700s until the end of the Civil War, both free-born and emancipated African Americans were required to register with authorities and carry proof of their status, along with a description of their physical traits.[26] For example, an 1847 North Carolina statute, provided:

> That no free person of color shall work . . . in the said swamp without . . . keeping and having ready to produce the copy of [identification papers] certified by the [court] clerk . . . and any free person of color found employed . . . in the said swamp without such copy, shall bedeemed guilty of a misdemeanor, may be arrested and committed, or bound over to thenext court of the county . . . and on conviction may be punished by fine, imprisonment and whipping, all or any of them at the discretion of the court.[27]

Requiring the carrying of identification mitigated the "great inconvenience" of distinguishing free from enslaved individuals.[28] The laws, which mainly existed in the South, but occasionally in the North,[29] sought to monitor freedmen, discourage their entry into a jurisdiction, and encourage their exit.[30] Violation in the South resulted in individuals being sold into bondage.[31] Enslaved individuals hired out to work (with wages paid to their masters) in Charleston, South Carolina were also subject to monitoring and control. They were required to wear tin "tags" or "slave hire badges" that stamped the date of issuance, the individual's

---

24 *Id*. at 25-26. In 1985, all South Africans were required to carry identification cards, but between 1984 and 1993, when the apartheid regime collapsed, only Black South Africans were arrested. *Id.*

25 Fussell, *supra* note 22, at 55-56.

26 A 1793 Virginia statute, for instance, provided that the document specify the "age, name, colour and stature, by whom and in what court the said negro or mulatto was emancipated; or that such negro or mulatto was born free." A. Leon Higginbotham & Greer C. Bosworth, *"Rather than the Free": Free Blacks in Colonial and Antebellum Virginia*, 26 HARV. C.R.-C.L. L. REV. 17, 29 (1991) (citing Ch. 22 Va. Stat. 27 (1793)).

27 JOHN HOPE FRANKLIN, THE FREE NEGRO IN NORTH CAROLINA 1790-1860, at 74 (1943) (alteration in original) (citation omitted). *See also* IRA BERLIN, SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTEBELLUM SOUTH 317, 319 (1976) (discussing laws requiring identification to be carried at all times).

28 LETITIA W. BROWN, FREE NEGROES IN THE DISTRICT OF COLUMBIA, 1790-1846, at 56 (1972).

29 *See* Paul Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 RUTGERS L.J. 415, 433 (1986).

30 *See* Edgar F. Love et al., *Registration of Free Blacks in Ohio: The Slaves of George C. Mendenhall*, 69 J. OF NEGRO HIST. 38 (1984).

31 *See* WILLIAM GOODELL, THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE: ITS DISTINCTIVE FEATURE SHOWN BY ITS STATUTES, JUDICIAL DECISIONS, AND ILLUSTRATIVE FACTS 227, 275-80 (1853).

occupation, and a number to record payment of an annual slave tax.[32]

Immigrants to the U.S. have also been targeted, especially individuals of Chinese ancestry. In 1892, Congress passed the Geary Act, which required all Chinese laborers to obtain and carry a "certificate of residence."[33] Those lacking a certificate were subject to arrest and deportation unless they could show good cause or membership in an exempt class (e.g., a non-laborer, or those entering before 1882).[34] Later, at the start of World War I,[35] non-naturalized U.S. residents who were "natives, citizens, denizens, or subjects of [a] hostile nation or government" were deemed "alien enemies,"[36] and required to carry draft registration cards.[37] Individuals failing to register or possess a card were threatened with internment.[38] At the dawn of World War II, the Alien Registration Act of 1940required that virtually all non-citizens register with the federal government and provide fingerprints, and later required "alien enemies" to carry identification cards.[39] After the war, amid national anxiety over Communism, Congress enacted the Immigration and Nationality Act of 1952, requiring that "aliens"

32 CHRISTIAN PARENTI, THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR 25 (2003).

33 Geary Act, 1892, ch. 60, § 6, 27 Stat. 25, 25 (repealed 1943).

34 *See id.* The Supreme Court upheld the validity of the Geary Act in Fong Yue Ting v. United States, 149 U.S. 698, 714 (1893), stating that Congress had authority to "expel aliens of a particular class," that it therefore could "provide a system of registration and identification of the members of that class within the country."

35 *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925, at 234-60 (1995).

36 *See* Proclamation of Nov. 16, 1917, 40 Stat. 1716, 1716-18 (1917).

37 *See id.* ("All alien enemies are hereby required to register at such times and places and in such manner as may be fixed by the Attorney General of the United States . . . . "); *id.* at 1718 (authorizing Attorney General to "provide . . . for the issuance of registration cards to alien enemies" and providing that "an alien enemy shall not be found within the limits of the United States, its territories or possessions, without having his registration card on his person" after a date set by the Attorney General).

38 *See* Adam Hodges, *"Enemy Aliens" and "Silk Stocking Girls": The Class Politics of Internment in the Drive for Urban Order During World War I*, 6 J. GILDED AGE & PROGR. ERA 431, 433-34 (2007). Objecting to the provision, one member of Congress opined that requiring registration and identification would result in intrusive "general police supervision of immigrants all over the country" and fall on American citizens as well because "the man who had already become an American citizen would also have to carry his papers to show to the police that he is a citizen and no longer an alien" *Percentage Plans for Restriction of Immigration: Hearings Before the House Comm. on Immigration & Naturalization*, 66th Cong. 57, 62 (1919) (testimony of Rev. Sidney Gulick, head of the National Committee for Constructive Immigration Legislation).

39 *See* Alien Registration Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (repealed 1952); Proclamation No. 2537, Regulations Pertaining to Alien Enemies, 7 Fed. Reg. 329 (Jan. 17, 1942).

carry registration cards.[40] Failure to comply was punishable by fine, imprisonment, or both.[41] In 1960, the policy was abandoned following uneven enforcement and diplomatic pressure.[42] Today, legal entrants into the U.S. must carry an "alien" registration card or other immigration documents on their person,[43] but the obtain and carry requirement is less clear with respect to individuals who entered the country unlawfully and those who were never issued documentation.[44]

Draft registration also required the carrying of documents. In 1917, the federal government required that all men within a specified age group register and carry a card, with anyone not in possession of one deemed a "slacker" subject to a jail sentence.[45] As Professor Jonathan Weinberg puts it, the requirement was "a way of exerting control over citizens—in particular, transient young working-class men—to ensure that they performed their citizenship obligations."[46] Later, with the nation's entry into World War II, card-carrying was again required in the draft context, with violations targeting what the Federal Bureau of Prisons described as "mostly socially inadequate individuals of low intelligence . . . ar-

40 *See* Immigration and Nationality Act of 1952 (McCarran-Walter Act), Pub. L. No. 82-414, § 264, 66 Stat. 224, 224-25 (codified at 8 U.S.C. § 1304).

41 *Id.* § 264(e), 66 Stat. at 225.

42 Nancy Morawetz & Natasha Fernandez-Silber, *Immigration Law and the Myth of Comprehensive Registration*, 48 U.C. DAVIS L. REV. 141, 166-68 (2014). Despite the rescinding of the federal registration requirement, several states have "stop and verify" provisions that "presume that non-citizens carry proof of status on them at all times, enabling them to dispel suspicion with respect to their immigration status, and that local authorities will be able to ascertain, on the spot, the immigration status of persons without papers by reference to some comprehensive federal database." *Id.* at 185-86. According to Morawetz and Silber, the laws rely on the "myth" that the early registration and carry requirements are still in effect. *Id.* at 186.

43 *See, e.g.,* United States v. Ritter, 752 F.2d 435, 437 (5th Cir. 1985) (explaining that Section 1304(e) "makes it a criminal offense for a documented alien to fail to carry his or her alien registration card or other immigration documents"). The Immigration and Nationality Act directs "every alien now or hereafter in the United States" to "apply for registration and to be fingerprinted." 8 U.S.C. § 1302(a) (1994). Following registration, the federal government must issue the individual a "certificate of alien registration or an alien registration receipt card." 8 U.S.C. § 1304(d). Federal law directs "every alien, eighteen years of age and over, [to] at all times carry with him and have in his personal possession any certificate of alien registration or alien registration receipt card issued to him." *Id.* Violation is punishable as a misdemeanor, a fine up to $100, or both. *Id.*

44 Jonathan Weinberg, *Demanding Identity Papers*, 55 WASHBURN L.J. 197, 210-14 (2016).

45 *See Big Task of War Registration Well in Hand in Oregon*, SUNDAY OREGONIAN (June 3, 1917), at 8 (explaining that possession of the paperwork plays "an important part in keeping young men of military age out of trouble with the Government and military authorities . . . Any young man of military age who fails to produce this card necessarily will be branded a 'slacker' and will have no alternative other than a jail sentence unless he can prove his registration").

46 Weinberg, *supra* note 44, at 762.

rest[ed] for vagrancy or on other . . . charges," whose violations of the requirement were discovered post-arrest.[47] During the Vietnam War, draft-age men were again required to register with Selective Service and carry cards,[48] a requirement enforced "almost entirely against dissidents" (who had returned or burned their draft cards).[49]

B. Targeting the Criminal Threat

Over time, individuals convicted of crimes have also been the target of government identification efforts.[50] Initially, it was common to do so through physical branding or mutilation, such as in colonial Massachusetts, where the foreheads of convicted burglars were branded with the letter "B."[51] Physical disfigurement eventually fell out of favor, leading to approaches whereby "stigma was no longer directly inscribed on the body of the perpetrator, but rather was administered in collection of data by the police."[52] In England, London's court at Bow Street in the 1750s kept a registry of individuals suspected of criminal activity,[53] and by the late 1860s Germany had its *Meldewesen*, which required all citizens to register with authorities, allowing jurisdictions to monitor and exclude those with a criminal history.[54] In Colonial India, the British required that "criminal tribes" register with authorities, subjecting those targeted

---

47 TOM C. CLARK, BUREAU OF PRISONS, FEDERAL PRISONS 1946, at 14 (1947).

48 *See* Alan Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants*, 1 SEL. SERV. L. REP. 4029, 4029, 4036 (1968).

49 Weinberg, *supra* note 44, at 777.

50 Jeremy Bentham was one early proponent, averring that "[e]verything which increases the facility of recognizing and finding individuals, adds to the general security. . .Imprisonment, having for its only object the detention of individuals, might become rare, when they were held as it were by an invisible chain." *Id.* Echoing Bentham, one police chief asserted in 1930 that with universal identification police would be able "to say to a suspected person: 'Who are you? Where do you belong? Where is your card?'" Anthony Vachris, *The Citizen Identification Card*, *in* IDENTIFICATION WANTED: DEVELOPMENT OF THE AMERICAN CRIMINAL IDENTIFICATION SYSTEM, 1893-1943, at 214 (Donald Dilworth ed., 1977).

51 Mass. Colonial Laws 12-13 (Whitmore 1887). For discussion of the historical use of body tattoos to signify and stigmatize individuals convicted of crimes, *see, e.g.*, Clare Anderson, *Godna: Inscribing Indian Convicts in the Nineteenth Century*, *in* WRITTEN ON THE BODY: THE TATTOO IN EUROPEAN AND AMERICAN HISTORY 102 (Jane Caplan ed., 2000); Abby M. Schrader, *Branding the Other/Tattooing the Self: Bodily Inscription Among Convicts in Russia and the Soviet Union* 174, in Caplan, *supra*, at 174.

52 Peter Becker, *The Standardized Gaze: The Standardization of the Search Warrant in Nineteenth Century German*, 155, in DOCUMENTING INDIVIDUAL IDENTITY, *supra* note 20, at 155.

53 LEON RADZINOWITZ, 8 A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 46-47 (1956).

54 RAYMOND B. FOSDICK, EUROPEAN POLICE SYSTEMS, 6 J. AM. INST. CRIM. L. & CRIMINOLOGY 354-60 (1915); Matthew Deflem, *Surveillance and Criminal Statistics*, *in* 17 STUDIES IN LAW, POLITICS AND SOCIETY 149, 161 (Austin Sarat & Patricia Ewick eds., 1997).

to residence and travel limits, enforced by "rigorous punishment" for violations.[55]

In the U.S., a similar evolution occurred. In 1829, Gustave de Beaumont and Alexis de Tocqueville, visiting the country under the auspices of the French government to study American penal reforms, observed that in America "[n]othing is easier than to pass from one state to another, and it is the criminal's interest to do so."[56] In response, governments later employed various strategies such as use of photographs and bodily measurements of convicted individuals (known as anthropometry).[57]

In the early 1930s, a number of local governments in the Los Angeles area began requiring that individuals convicted of specified crimes register with authorities, providing information such as name, address, and criminal history.[58] Motivated by concern that "gangsters" from the East Coast and Midwest were anonymously entering their locales,[59] the laws were touted by local officials as an "ace card" in the effort to avoid the "possible reign of gangsterism."[60] Other localities later enacted their own registration laws that targeted individuals convicted of a broad array of offenses (including, in two Florida towns, miscegenation).[61] The laws required those entering town and current residents to register under pain of misdemeanor punishment if they did not.[62] By 1969, registration laws existed in at least fifty-two state and local jurisdictions.[63]

Several registration laws required that individuals carry identification cards,

---

55 Anand A. Yang, *Dangerous Castes and Tribes: The Criminal Tribes Act and the Magahiya Doms of Northeast India*, *in* CRIME AND CRIMINALITY IN BRITISH INDIA 109 (Anand A. Yang ed., 1985). The law remained in effect until 1952. *Id.* at 110.

56 GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE 101 (Francis Leiber trans., 1964) (1833). Their concern stemmed from the vast differences between the highly migratory United States and the sedentary French populations, and the fact that French prison releasees were required to return to the village where the crime occurred until allowed by police to relocate. *Id.* at 131.

57 *See* Wayne A. Logan, *Policing Identity*, 92 B.U. L. REV. 1561, 1567-73 (2012).

58 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 7, at 22-37.

59 *See Registry Laws for Felons*, L.A. TIMES, Sept. 13, 1933, at A4 ("The ordinance has been adopted as an emergency measure in face of the recent migration to the Coast of marked gangsters from other States and a sudden spurt in crimes involving violence and bloodshed, consequent to this undesirable influx."); *Gangsters to Be Fought with Registration Law*, L.A. TIMES, Sept. 23, 1931, at A1 (noting that the law was "a means of striking at the steady inflow of gangsters and their followers").

60 *Los Angeles County Registers Felons in a Drastic Move to Wipe Out Gangs*, N.Y. TIMES (Sept. 13, 1933).

61 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 7, at 29 (noting miscegenation provisions in Miami Beach, Pensacola and St. Petersburg, Florida).

62 *See id.* 22-30.

63 *Id.* at 28 (citing Robert H. Dreher and Linda Kammler, *Criminal Registration Statutes and Ordinances in the United States: A Compilation* 32 (Center for the Study of Crime, Delinquency, and Corrections, Southern Illinois University, 1969), based on a national survey of 384 localities).

imposing misdemeanor punishment for failure to present them upon police demand.[64] For example, the Camden, New Jersey, ordinance provided that:

> Every person so registered shall be given a card of identification by the Chief of Police,
> to which shall be annexed a copy of his photograph. There shall also be written on such card his registry number, the date thereof and the date or length of his proposed stay in this City, and such other data as the Chief of Police may deem necessary. Every such person
> so registered shall carry with him such card of identification and any failure to have or present the same when requested by any police officer shall be deemed a violation of this ordinance.[65]

According to a contemporary newspaper report, an individual required to register who was "seized in a raid and cannot show a registration card" could "be taken before a police judge and sentenced immediately to a ninety-day jail term or fined $200."[66]

Although Philadelphia's registration ordinance itself did not require carrying a card, police there issued registrants an identification card indicating their status, which had wording on its back stating that the card was to be carried at all times.[67] According to a 1953-1954 study undertaken by the *University of Pennsylvania Law Review*, Philadelphia police wrongly believed the city ordinance had a carry requirement[68] and charged many registrants for not carrying a card.[69] Detectives supported the purported policy because it:

> kept criminals out of town, [gave] the impression among registered criminals that they were under constant police surveillance, and informed local police of a transient criminal's entry into the city. Other detectives were in favor . . . because they could use it occasionally and selectively "to make it rough on a fellow" they know is "wrong," or to hold a man until they can check the details regarding a more serious crime.[70]

California adopted the nation's first state-wide registration requirement in

64 *Id.* at 29. Another study of the time concluded that in New Jersey alone thirty-four localities had registration laws, of which thirty-two had card carry requirements. Eileen M. Cornell & Carolyn Wilson, *Criminal Registration Ordinances*, 2 SETON HALL L.J. 239, 240 n.4 (1969).

65 *Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. PA. L. REV. 60, 77 n.92 (1954) [hereinafter *Police Control*]; *see also id.* at 77, n.93 (noting that police in Allentown, Pennsylvania issued a "Civilian Identification Card" with the typewritten notation "(Registered)").

66 Lawrence Davies, *Camden No Longer Criminals' Haven*, N.Y. TIMES (July 15, 1934).

67 *Police Control*, supra note 65, at 85.

68 *See id.* (footnote omitted) ("A considerable majority of the detectives interviewed believed that failure to carry a registration card was a violation of the ordinance, and several persons were officially charged with such a violation.").

69 The charges, however, were regularly dismissed. *See Police Control, supra* note 66, at 90.

70 *Id.* at 86-87.

1947, singling out individuals convicted of sex offenses in particular.[71] By 1989, twelve states had criminal registration laws.[72] Although convicted sex offenders were a common target, states also singled out others such as those convicted of drug offenses. New Jersey had a drug-focused law from 1952 until 1971 that required individuals who intended to remain in the state for more than twenty-four hours to submit to being photographed and fingerprinted and to carry a card containing a "registry number" and other identifying information.[73] Covered individuals wishing to visit another New Jersey locality had to report to local police, show their identification card, and "furnish such information relating to his intended residence or whereabouts within such municipality and such other information" that police demanded.[74] Violation resulted in punishment as a "disorderly person."[75] In justifying the state law a New Jersey county court opined:

> The act of carrying the card is indeed a simple requirement when it is considered as an act divorced from any considerations either emotional or intellectual relating to such matters pertaining to the general registration of citizens usually associated with a police state. The reason for the Narcotic Control Act is obvious. The benefit to be derived therefrom neednot be expounded. The interest of the public in the control of narcotics traffic and the elimination of narcotics addiction certainly outweighs the right of one who has been involved in offenses against the narcotics laws.[76]

Illinois enacted a law in 1953 requiring registration of "drug addicts," defined as "any person who repeatedly uses narcotic drugs."[77] The law, repealed in 1957, required individuals to register with authorities and carry a card containing their name, address, occupation, and the length of time they had "been an addict and the type of narcotic drugs used."[78] Registrants were required to carry the card at all times, with violations resulting in a fine from $1 to $100, a prison term not to exceed one year, or both.[79] Alabama had a statute in the late 1960s requiring lifetime registration of individuals convicted of more than two felonies and the carrying of a card.[80]

---

71 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 7, at 30-31.

72 *Id.* at 31.

73 *Id.* at 32 (discussing N.J. Stat. 2A:169A1-8 (1953)).

74 *Id.*

75 *Id.*

76 State v. Haynes, 187 A.2d 383, 386 (N.J. Super. 1962). The court, however, concluded that punishment for the apparently unintended failure to possess the card (six months imprisonment) was too severe. *Id.* at 387. *See also* State v. Garland, 240 A.2d 41, 42-44 (N.J. Super. 1968) (upholding conviction for failure to carry an identification card and denying due process and self-incrimination challenges).

77 Ill. Stat. ch. 38 § 192.29 (1953).

78 *Police Control*, *supra* note 65, at 81 n.120 (citing and discussing Ill. Stat. ch. 38 § 192.32 (1953)).

79 Of note, the statute provided different penalties for failure to register and failure to carry the card (the latter punished more severely). *Id.*

80 The law stated that:

It shall be unlawful for anyone who is required to register under the provisions of this Act to

On the national level, from 1956 to 1970, the U.S. Government required that a drug "user" or person convicted of a drug offense register with customs before entering or leaving the country.[81] Individuals were required to provide their name; social security number; address; status as a "user" or convict; conviction-related information; expected port, date, and means of return; signature; and date of registration. Upon registering, individuals received a certificate that they were required to show upon reentry. Violation was a felony.[82]

As a practical matter, early generation criminal registration laws, and the identification cards they at times required, never played much of a role in policing, and fell out of common use. This was due to a variety of factors, including persistent criticism over the accuracy and completeness of registry information, the cost of collecting the information, concern that registration stigmatized and hindered rehabilitation, and the apparent lack of public safety utility.[83]

II. MODERN DOCUMENT BRANDING LAWS

Registration desuetude radically reversed course in the early 1990s. Sparked by several high-profile sexual assaults and murders of children by convicted sex offenders living in their communities, states enacted a new wave of registration laws exclusively targeting individuals convicted of sex offenses.[84] Jurisdictions also adopted a new strategy known as community notification, which made registry information publicly available in the name of empowering individuals to take protective measures.[85]

Today, registration and community notification laws are in effect nationwide, with notification mainly effectuated by government-sponsored internet websites containing photos and identifying information on hundreds of thousands of individuals.[86] New-generation registration laws are far more onerous, often imposing lifetime registration retroactively, reaching back decades to aged convictions, and requiring more information that must be verified and updated

---

be within any county in the State without having in his immediate possession a registration card as provided herein. It shall be the duty of such person to carry the card with him at all times while he is within the county and to exhibit the same to any officer of a municipality, a county, or the State upon request. . ..

Clifford L. Reeves, *Alabama Felon Registration Act*, 19 ALA. L. REV. 578, 578 (1967) (reprinting Ala. Act. No. 421 (1966 Spec. Sess. Ala. Leg.)).

81 *See* 18 U.S.C. §§ 1401 to 1407 (1956).

82 *Id.*

83 LOGAN, KNOWLEDGE AS POWER, *supra* note 7, at 38-40.

84 *Id.* at 49-55.

85 *Id.* at 53. For discussion of the empirical consequences of the laws, including whether they reduce the incidence of sexual offending and their adverse impact on registrants, *see* SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION (Wayne A. Logan & J.J. Prescott eds. 2021).

86 LOGAN, KNOWLEDGE AS POWER, *supra* note 7, ch. 3.

in person (up to four times a year).[87] Current laws also differ in that registration failures are typically punished as a felony and vigorously enforced by police, resulting in thousands of convictions annually.[88] This part examines the spate of new-generation laws that resurrect the mid-twentieth century practice of requiring that individuals carry branded documents forcing them to self-identify as registrants.

A. Scope and Requirements

In 1998, Delaware became the first state to require that individuals on a sex offender registry a carry a branded document.[89] Today, several states have branding laws, with violations of the carry requirement typically punished as a felony:[90]

> **Delaware**: a driver's license or identification card with a "Y,"[91] which requires payment of an additional fee,[92] with the meaning explained on the back of the license along with "the usual explanations of driving restrictions, such as the need to wear eyeglasses."[93]
> **Florida**: an identification card or driver's license stamped in with "SEXUAL PREDATOR" (as designated by a court) in blue lettering; for other registrants, the designation "943.0435, F.S." (the provision concerning registration of "sex offenders") in blue lettering.[94]

---

87 *Id.*

88 *See* Jill S. Levenson et al., *Failure-to-Register Laws and Public Safety: An Examination of Risk Factors and Sex Offense Recidivism*, 36 L. & HUM. BEHAV. 555, 555-56 (2012).

89 *See* H.B. 341, 139th Gen. Assem, 2d Reg. Sess., 1998 Del. Laws. Ch. 261(effective Apr. 20, 1998).

90 *See, e.g.,* Ala. Code § 15-20A-18(f); Fla. Stat. § 775.21(10); Tenn. Code Ann. § 40-39-213(b).

91 Del. Code tit. 21, § 2718(E); *see also* Michael Janofsky, *Delaware's Driver's Licenses to Note Sex Offenders*, N.Y. TIMES (Apr. 21, 1998) (noting that the legislation passed unanimously in the state house and by "an overwhelming majority" in the senate).

92 Delaware Division of Motor Vehicles, *Drivers License/Identification Cards*, DELWARE.GOV, https://perma.cc/46LR-W7DW.

93 *Driver's License Identify Sex Offenders in Delaware*, DESERET NEWS (Apr. 21, 1998), https://perma.cc/2H8W-7Y8L.

94 Fla. Stat. § 322.141(3); *see also* Florida Highway Safety and Motor Vehicles, *Florida's NEW Driver's License and ID Card*, https://perma.cc/F6TW-S7QB. Originally, both registrant populations were branded by statutory citations, but in 2014 the "SEXUAL PREDATOR" designation replaced the statutory citation. *See* Ryan Mills, *New Florida Driver's License IDS Registered Sex Offenders*, NAPLES DAILY NEWS (July 31, 2007) (describing the earlier requirement that a statutory citation be marked on a registrants' ID). In Spring 2023, Florida legislators considered, but did not adopt, a provision requiring that all data appearing on registrants' licenses be inscribed in red, and that their car license plates be in fluorescent green. Fla. CS for SB 1252, § 17 (2023), https://perma.cc/22FS-UU84; Fla. CS for CS for SB 1252 (floor amendment by Sen. Book, Apr. 25, 2023, withdrawn Apr. 30, 2023), https://perma.cc/L5MZ-GDLW.

Kansas: a "readily distinguishable" marker on a driver's license or identification card[95]; the marker "shall be assigned a distinguishing number by the division which will readily indicate to law enforcement officers that such person is a registered offender"[96] and more generally "shall be readily distinguishable indicating that such person is a registered offender."[97]
Mississippi: a driver's license or identification card that bears a "designation identifying the cardholder as a sex offender."[98]
Oklahoma: a "license or [identification] card bearing the words 'Sex Offender.'"[99]
Tennessee: a license or ID card shall "bear a designation sufficient to enable a law enforcement officer to identify the bearer of the license or card as a sexual offender, violent sexual offender or violent juvenile sexual offender."[100]
West Virginia: requires that individuals judicially determined to be sexually violent predators carry a license or card "coded by the commissioner to denote that he or she is a sexually violent predator."[101] According to the Driver's Handbook, the license or card is to be stamped "U" for "Sexual Deviant."[102]

Other states adopt a less overt approach. Arizona, for instance, requires that registrants obtain and carry a "nonoperating identification license or a driver license,"[103] which "looks identical to any other license except when a law enforcement officer official checks the status of the credential it indicates that the individual is subject to sex offender registration."[104] South Dakota allows, but does not require, a bar code indicating to law enforcement that the driver's license card holder is required to register.[105]

Several other states do not brand registrants but require that they obtain a driver's license or identification card when they might otherwise not elect to do so.[106] The laws also sometimes impose more frequent card renewal requirements,

---

95 Kan. Stat. § 8-243(d), 1325a(b).

96 *Id.* § 8-243(d).

97 *Id.* § 8-125a(b). The requirement applies to all Kansas registrants, a group which by law includes individuals convicted of specified sexual, violent, and drug offenses. The category of sexual offenses includes individuals convicted of adultery (if one party is less than 18 years of age) and patronizing a prostitute (if one party is less than 18 years of age). *See Frequently Asked Questions*, KANSAS BUREAU OF INVESTIGATION, https://perma.cc/TL87-T7VN.

98 Miss. Code § 45-35-3(2); *see also* § 63-1-35(3) ("shall bear a designation identifying the licensee or permittee as a sex offender").

99 Okla. Stat. tit. 47, § 6-111(E)(1).

100 TENN. CODE ANN. § 55-50-353 (West 2022).

101 W. VA. CODE R. § 17B-2-3(b) (2006).

102 W. VA. DEP'T TRANSP., DRIVER'S LICENSING HANDBOOK 12, https://perma.cc/52QL-TRAU (archived May 10, 2024).

103 ARIZ. REV. STAT. § 13-3821(J) (2021).

104 *Arizona Sex Offender Information*, ARIZ. DEP'T PUB. SAFETY, https://perma.cc/7FP5-VRKS (archived May 10, 2024). Failure to obtain the credential is a Class 6 felony and a mandatory $250 assessment. *Id.*

105 S.D. CODIFIED LAWS § 32-12-17.7 (2024).

106 *See* IND. CODE § 11-8-8-15 (2023); MICH. COMP. LAWS § 28.725a(7) (2022); TEX. CODE CRIM. PROC. ANN. art. 62.060, 42.016 (West 2021); UTAH CODE ANN. § 53-3-806.5 (West 2020).

require that registrants renew in person at government offices (for example, in Mississippi, every 90 days),[107] and demand that registrants apprise authorities when any identifying information changes.[108]

The federal government requires that passports of registrants be stamped with a "unique identifier" appearing in a "conspicuous location,"[109] which reads that "[t]he bearer was convicted of a sex offense against a minor, and is a covered sex offender pursuant to 22 United States Code Section 2112b(c)(1)."[110] Because the message is too lengthy to fit on the smaller passport card, registrants must obtain the more detailed and more expensive passport book.[111]

B. Purported Benefits

State government officials maintain that document branding has several benefits. Chief among these is that it puts police and community members on notice that the individual is a registrant, allowing them to take action when they suspect the cardholder is engaged in sexual abuse.[112] Advocates point to an incident in Oklahoma where a store clerk noticed that a male customer had "Sex Offender" emblazoned on his driver's license. The stamp caught the clerk's attention, and he noted that the cardholder was "acting strange and buying coloring books and crayons."[113] Acting on a tip from the clerk, police thereafter intervened and rescued an 8-year-old the registrant allegedly kidnapped.[114]

Another posited benefit is that employers can ensure that registrants are not working in at-risk environments such as daycare centers.[115] As one legislator stated in support of Oklahoma's legislation, the designation would be especially helpful to vendors or delivery services doing business with such environments:

> These drivers aren't direct employees of the school or daycare they might be making deliveries to, so they don't fall under any of the requirements for background checks. This legislation will give the public greater protection by help-

---

107 MISS. CODE ANN. § 45-33-31 (2021); *see also, e.g.,* KAN. STAT. ANN. § 8-1325a(a) (2024); *id.* § 8-1325 (2021) (non-registrants must renew every six years).

108 *See, e.g.*, Fla. Stat. Ann. § 943.0435(3)(a)-4(a) (West 2021).

109 22 U.S.C. § 212(b).

110 U.S. Dep't of State, *Passports and International Megan's Law*, TRAVEL.STATE.GOV., https://perma.cc/UH9X-LF9R.

111 *Id.*

112 *See* Jennifer Easton, *New Law Requires Sex Offenders to Carry I.D.,* THE TENNESSEAN (NASHVILLE) (May 23, 2008), https://perma.cc/WA6G-YT94; Brief of Oklahoma, Arizona, Arkansas, Idaho, Kentucky, Mississippi, Montana, South Carolina, Utah, and West Virginia as Amici Curiae in Support of Petitioner at 16-17, State of Louisiana v. Hill, 142 S.Ct. 311 (Mem) (2021).

113 Lori Fullbright, *Oklahoma Requires Aggravated Sex Offenders to Have It Printed on License*, NEWS ON 6 (May 6, 2014, 7:51 PM), https://perma.cc/B566-43UW.

114 *Id.*

115 Barbara Hoberock, *Senate Roundup; Bills on Microchips, Driver's Licenses, DNA Passed*, Mar. 6, 2007.

ing businesses identify workers who shouldn't be around children or other vulnerable individuals.[116]

Law enforcement officials have spoken forcefully in favor of the laws. In Florida, a supervisor for a county sheriff's office reasoned that "when you're checking an ID at the county fair…and you don't have that raised level of suspicion to run the [website registry] query, this will immediately let you know that this is a person of concern."[117] A Mississippi sheriff stated that a registrant "could have a child in the car and be planning on doing harm and unless they have a warrant out on them, they could be let go,"[118] or "[t]here could be something going on at a house with a child or something that the officer doesn't pay any attention to because they don't know what to look out for."[119]

Other purported benefits are more bureaucratic. One is that cross-validation between license/card databases and registries helps ensure consistency between the state agencies responsible for the cards and the registry.[120] Others are to assist other states in the event the registrant moves and must surrender his license/card when obtaining identification in the new home state[121] serving a backup role if a registry malfunctions.[122] Louisiana, when considering its requirement in 2006 (a law later invalidated on First Amendment grounds, as discussed *infra*), identified another benefit: the state anticipated "collecting an additional $116,000 each year because of the requirement for annual renewal of those licenses."[123]

---

116 Press Release, Oklahoma Senate, Senate Approves Bill to Require Sex Offender Info on Licenses, News Release (Mar. 5, 2007) https://perma.cc/48MD-LDLB.

117 Mills, *supra* note 94.

118 Chris Elkins, *Police Want to See More for Sex Offender Registry*, NE MISS. DAILY J. (Oct. 4, 2009), https://perma.cc/Y4JP-AKE8.

119 *Id.*; *see also id.* (quoting a sheriff, who explained "If I get dispatched to a home and I know it's a convicted sex offender, then I know if I see children in the home that don't belong to that person, something may be wrong . . . . That's why we have to find a way for officers to identify sex offenders as soon as they come across one. The safety of the community depends on it."). Similarly, after Alabama's law took effect in 2006 (a law later invalidated on First Amendment grounds, as discussed below) a spokesman for the Birmingham Police Department stated that the law would "give us the ability to track [registrants] better. It's not uncommon for our officers to stop people and field-interview them. If they seem suspicious or are in close proximity to a victim, it would certainly give us reason to further investigate them in connection to the situation." *Sex Offenders Get Marked IDS*, MONTGOMERY ADVERTISER (Sept. 2, 2006), https://perma.cc/EW7S-GX7Y.

120 U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-116, CONVICTED SEX OFFENDERS: FACTORS THAT COULD AFFECT THE SUCCESSFUL IMPLEMENTATION OF DRIVER'S LICENSE-RELATED PROCESSES TO ENCOURAGE REGISTRATION AND ENHANCE MONITORING 11 (2008).

121 Janofsky, *supra* note 91.

122 Easton, *supra* note 112.

123 John Hill, *Bill Would Mark License of Sex Offenders*, THE TIMES (SHREVEPORT, LA.) (May 19, 2006), https://perma.cc/8DPF-CJJG. As noted *infra*, in 2020 the Louisiana Supreme Court invalidated the law on First Amendment grounds. To date, the state has not imposed a new requirement.

The 2016 federal passport branding law, colloquially known as "International Megan's Law" (IML) has several avowed purposes. By refusing passports to individuals convicted of a sex offense against a minor unless their passports are stamped, the federal government seeks to "protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism."[124] By requiring that passports be stamped, and notifying a destination country of the intended travel of the passport holder, the IML prevents individuals "from thwarting [] notification procedures by country hopping to an alternative destination not previously disclosed."[125]

C. Judicial Challenges

To date, the laws have been subject to only limited judicial scrutiny.

1. Driver's licenses and identification cards

i. Branding as unconstitutional "punishment"

In *McGuire v. Strange*,[126] Judge Keith Watkins of the Middle District of Alabama addressed an Ex Post Facto Clause challenge against an Alabama law requiring that registrants obtain and carry an identification card or driver's license bearing the inscription "CRIMINAL SEX OFFENDER" in red lettering. The court held that the requirement did not constitute punishment,[127] a threshold requirement for an ex post facto challenge.[128] The court reasoned that the branding was not akin to colonial era shaming: although it was humiliating, defendants in colonial times were "without any power to contain or control the extent or timing of the humiliation."[129] Alabama registrants, Judge Watkins reasoned, had "some degree of control over when and where to present an identification."[130]

---

124 International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Preamble, Pub. L. No. 114-119, 130 Stat. 15 (2016) (codified at 18 U.S.C. § 2250 and in scattered sections of 42 U.S.C. 16935).

125 162 CONG. REC. 387, 390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith).

126 McGuire v. Strange, 83 F. Supp. 3d 1231 (M.D. Ala. 2015), *aff'd and rev'd in part*, 50 F.4th 986 (11th Cir. 2022) (addressing Ala. Code § 15-20A-18(a)).

127 *Id.* at 1269-70.

128 WAYNE A. LOGAN, THE EX POST FACTO CLAUSE: ITS HISTORY AND ROLE IN A PUNITIVE SOCIETY 112-146 (Oxford Univ. Press 2022).

129 *McGuire*, 83 F. Supp. 3d at 1254.

130 *Id.* The accuracy of this view is doubtful. Asserting that individuals have "some degree of control over when and where to present an identification" is correct only insofar an individual elects never to leave their home, a rather unrealistic expectation. *Cf.* Carpenter v. United States, 585 U.S. 296, 315 (2018) (noting the ubiquitous personal possession of cell phones and positing that "[a]part from disconnecting the phone from the network, there is no way to avoid leaving behind a trail of location data").

Two years later, in *Carney v. Oklahoma Department of Public Safety*,[131] the Tenth Circuit Court of Appeals rejected an Eighth Amendment cruel and unusual punishment challenge against Oklahoma's law, which requires that a card or license be emblazoned with "Sex Offender." The court passed over the issue of whether the brand qualified as punishment and concluded that it was not a grossly disproportionate sanction compared to instances where the Supreme Court condoned very lengthy periods of imprisonment.[132]

ii. Branding as an Equal Protection violation

The Tenth Circuit in *Carney* also concluded that the Oklahoma law did not violate equal protection. This was because the petitioner was classified as an aggravated sex offender, and therefore was not "similarly situated to ordinary sex offenders and others that are required to enroll in public registries. He also has not shown that he is being treated differently than other aggravated sex offenders."[133] Moreover, the law satisfied Fourteenth Amendment rational basis review because Oklahoma advanced a rational basis for the law (public safety).[134]

iii. Branding as a First Amendment violation

To date, the most in-depth and critical judicial analyses of branding have concerned First Amendment government-compelled speech claims.

In 2019, in *Doe 1 v. Marshall*,[135] Judge Watkins addressed a First Amendment challenge against an Alabama law requiring the inscription "CRIMINAL SEX OFFENDER" in red lettering. The court held that the branding violated the First Amendment because it constituted government-compelled private speech, triggering strict scrutiny, and that the branding was not the least restrictive means of advancing a compelling state interest.[136]

In resolving the First Amendment question, Judge Watkins first asked whether the branding qualified as compelled speech, based on four factors: (1) is it in fact speech (2) to which the plaintiff objects (3) that is compelled and (4) is readily associated with the plaintiff?[137] The court concluded that the inscription qualified as speech, likening it to the branding by New Hampshire on car license plates of "Live Free or Die," which the Supreme Court invalidated on First Amendment grounds in *Wooley v. Maynard*.[138] In so holding, Judge Watkins

---

131 Carney v. Oklahoma Dep't of Pub. Safety, 875 F.3d 1347 (10th Cir. 2017).

132 *Id.* at 1352 (citing Ewing v. California, 538 U.S. 11, 28 (2003), Harmelin v. Michigan, 501 U.S. 957, 961(1991), and Hutto v. Davis, 454 U.S. 370, 370 (1982)).

133 *Id.* at 1353.

134 *Id.* at 1354.

135 Doe 1 v. Marshall, 367 F. Supp. 3d 1310 (M.D. Ala. 2019).

136 *Id.* at 1326-27.

137 *Id.* at 1324 (citing Cressman v. Thompson, 798 F.3d 938, 949-51 (10th Cir. 2015)).

138 *Id.* (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

addressed the government's argument that *Maynard* concerned only "ideological speech," whereas the Alabama branding was factual and therefore not subject to First Amendment oversight. After questioning this contention,[139] the court stated that First Amendment protection "does not turn on whether speech is ideological, factual, or something else,"[140] and concluded that the "message here is indeed government speech. After all, the State issues the ID cards and controls what is printed on them."[141]

After establishing that the plaintiffs disagreed with the "CRIMINAL SEX OFFENDER" branding, Judge Watkins elaborated on his conclusion that the speech was compelled by government. He noted that the plaintiffs were required to obtain and carry the identification at all times and were prohibited from possessing a non-qualifying identification card. Furthermore, Judge Watkins emphasized that a "State-issued photo ID is a virtual necessity these days. One must show ID to enter some businesses, to cash checks, to get a job, to buy certain items, and more."[142] He likened the situation to that in *Maynard*: "Although New Hampshire did not force George Maynard to drive a car, driving was (and is) 'a virtual necessity for most Americans,' so the license plate message was compelled speech. Here, the State has similarly conditioned a virtual necessity of everyday life on displaying a message to others."[143]

Finally, Judge Watkins found that the branded cards were "readily associated" with plaintiffs:

> The words "CRIMINAL SEX OFFENDER" are about Plaintiffs. The ID cards are chock-full of Plaintiffs' personal information: their full name, photograph, date of birth, home address, sex, height, weight, hair color, eye color, and signature. Just as George Maynard was associated with his station wagon, Plaintiffs are associated with their licenses. When people see the brand on Plaintiffs' IDs, they associate it with Plaintiffs. The dirty looks that Plaintiffs get are not directed at the State.[144]

Having determined that Alabama compelled content-based speech, Judge Watkins addressed whether the branding requirement satisfied strict scrutiny. Although the government satisfied the first step in strict scrutiny review—the law served a compelling state interest ("enabling law enforcement to identify a

---

139 *See id.* (noting that "the words here call to mind philosophical and moral messages about crime, victims, retribution, deterrence, and rehabilitation"). *See also* Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014) ("While it is true that the words the state puts into the [speaker's] mouth are factual, that does not divorce the speech from its moral or ideological implications. Context matters.").

140 *Id.* at 1324.

141 *Id.* at 1324-25.

142 *Id.* at 1325.

143 *Id.* (citations omitted). The court also rejected the government's argument that plaintiffs could instead use a passport for identification, reasoning that "a passport is a poor substitute for a state-issued ID. Passports are cumbersome . . . They also cost money." *Id.* at 1325-26. "[T]he State cannot force someone to choose between carrying a government message and paying extra money . . . ." *Id.* at 1326 (citations omitted).

144 *Id.*

person as a sex offender")—it failed to employ the least restrictive means of satisfying that interest.[145] In particular, by using "CRIMINAL SEX OFFENDER" rather than "a single letter, the State goes beyond what is necessary to achieve its asserted interest."[146] Judge Watkins noted that the government agreed that a single letter would achieve its goal of identifying registrants, and that "law enforcement officers would know what that single letter meant. Yet the general public most likely would not know what that single letter meant. Thus, using one letter would keep officers informed while reducing the unnecessary disclosure of information to others."[147]

More recently, in *State v. Hill*,[148] the Supreme Court of Louisiana by a 6-1 vote invalidated on compelled speech grounds Louisiana's law, which required registrants to have a driver's license or card inscribed with "SEX OFFENDER" in orange lettering. At the outset, the majority framed the issue as whether the "obligation amounts to government speech or compelled speech. If compelled speech, the branded identification card faces strict scrutiny. If government speech, the branded identification card faces little to no scrutiny."[149]

Citing *Doe I v. Marshall*, as well as the U.S. Supreme Court's decision in *Maynard*, the majority held that the parameters of unconstitutional compelled speech extend beyond ideological messages (as in *Maynard*'s with "Live Free or Die" on car license plates), to cover compelled facts (as in *Riley v. National Federation of the Blind*,[150] which concerned a state law requiring fundraisers for a charitable organization to disclose the percentage of donated funds that went directly to the charity). "Even more so than a license plate on a car," the court reasoned, "an identification card is personalized to such an extent that it is readily associated with the bearer."[151]

Like Judge Watkins in *Doe I v. Marshall,* the court stated that the First Amendment covers government-compelled ideological as well as factual speech.[152] Moreover, rather than simply requiring the reporting of "basic facts…necessary to conduct essential operations of government,"[153] such as his residence, the challenged law required that Hill display the words "sex offender" on his card or license. As a result, "[i]n performing everyday tasks, he will have to show that identification card to the public. That identification card is branded with the words 'sex offender,' and, along with his name, picture, address, and

145 *Id.*

146 *Id.*

147 *Id.* at 1326-27. Although the state signaled its intent to utilize a more subtle marker, as suggested by the court, no attempt appears to have been made in this regard, as of the time of the article's publication.

148 State v. Hill, 341 So. 3d 539 (La. 2020), *cert. denied*, 142 S. Ct. 311 (Oct. 24, 2021).

149 *Id.* at 545.

150 Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988).

151 *Hill*, 341 So. 3d at 549.

152 *Id.* at 551.

153 *Id.* at 546.

other identifying characteristics, that branded identification card is 'readily associated' with him."[154]

Finally, the court reasoned that the identification was unlike a passport because "[p]assports are not routinely viewed by the public, and they serve as a 'letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer' and as a 'travel control document.'"[155] The card or driver's license was also not like currency, which contains the words "In God We Trust" printed on it because

> that message is not personalized, as is the case with an identification card. Furthermore, currency is simply exchanged, as the currency passes through many hands. Identification cards, on the other hand, are proof of identity and are frequently displayed for examination by a cashier, bank teller, grocery store clerk, new employer, or for air travel, hotel registration, and so forth.[156]

Having concluded that the branding was a content-based regulation compelling speech, the court turned to whether it passed strict scrutiny. The *Hill* majority agreed that the state had a compelling interest "in protecting the public and enabling law enforcement to identify a person as a sex offender," but found that it had not used the least restrictive means of doing so:

> A symbol, code, or a letter designation would inform law enforcement that they are dealing with a sex offender and thereby reduce the unnecessary disclosure to others during everyday tasks. The sex offender registry and notification [website] is available to those who have a need to seek out that information, while also not unnecessarily requiring disclosing that information to others via a branded identification. As Louisiana has not used the least restrictive means of advancing its otherwise compelling interest, the branded identification requirement is unconstitutional.[157]

Dissenting, Justice Crain viewed the branding requirement as government speech, not government-compelled private speech: "the words are stamped by a governmental agency on a government-issued identification card in accordance with a government-enacted statute. This is the embodiment of government speech."[158] As such, "[t]he only issue is whether this government speech is presented so as to lead an observer to incorrectly conclude the speaker is the cardholder. If so, the government speech crosses the line into 'compelled [private party] speech,' which is subject to strict constitutional scrutiny."[159] Given the "pejorative nature of the speech," Justice Crain reasoned, "[n]o reasonable observer…will conclude the defendant chose to promote his status as a convicted

154 *Id.* at 553.

155 *Id.* at 549 (citation omitted).

156 *Id.* at 553.

157 *Id.*

158 *Id.* at 557 (Crain, J., dissenting).

159 *Id.*

sex offender by voluntarily procuring and personalizing a state-issued identification card to declare that information for the world."[160] Elaborating, Justice Crain reasoned that under the majority's approach:

> [a] driver's weight, age, height, and address are all compelled speech that…requires
> the state to prove the inclusion of the information is the least restrictive means of
> achieving a compelling state interest.
> This case turns on a single determinative question: who is the speaker? Any reasonable observer of the defendant's state-issued identification card would readily
> ascertain the speaker is the government, not the defendant.[161]

Hill was decided on October 20, 2020, and Louisiana thereafter petitioned the U.S. Supreme Court for certiorari.[162] While the petition was under consideration, ten states (including several with branding requirements) filed an amicus brief in support,[163] stating:

> Amici States have strong interests in communicating vital and accurate information about our citizens through government identification documents. We create and control these documents, and we rely on our ability to effectively communicate information within our own respective agencies and with each other.
> Amici States also have strong interests in protecting the public against convicted sex offenders. States have a long history of registering sex offenders and communicating registered information to affected communities. Several of Amici States also have a
> particular interest in driver's license notation laws like the one at issue here. *See, e.g.,* Okla. Stat. tit. 47, § 6-111. Our ability to effectively notify law enforcement, each other,
> and the public of sex offenders does not violate the First Amendment.[164]

Later, in a reply brief, amici stated that the "Louisiana Supreme Court…twisted[ed] the compelled-speech doctrine into an unrecognizable rule that essentially wipes out government's ability to speak for itself through government-issued documents."[165] In characterizing the stakes, amici wrote:

---

160 *Id.*

161 *Id.* at 558. Recently, relying on *Hill*'s invalidation of Louisiana law regarding branded identification cards, the Middle District of Louisiana recently invalidated the state's law requiring branding of driver's licenses. Nelson v. Landry, F. Supp.3d, 2024 WL 409385 (M.D. La. 2024) (noting *Hill*'s focus upon La. Stat. § 40:1321(J), regarding branding of identification cards, and focusing its decision on § 32:4121(I), requiring branding of driver's licenses).

162 Petition for Writ of Certiorari, Louisiana v. Hill, No. 20-1587-20, 2021 WL 1966520 (U.S. May 10, 2021).

163 *See* State Amicus Brief, *supra* note 112.

164 *Id.* at 1.

165 Reply Brief in Support of the Petition for Writ of Certiorari at 1, Louisiana v. Hill, No. 20-1587-20, 2021 WL 1966520 (U.S. Aug. 25, 2021), available at https://perma.cc/CM5N-9888.

> It is difficult to overstate the far-reaching impacts of expanding First Amendment compelled-speech doctrine that prevent a State from communicating publicly known facts
> on a State ID. The Louisiana Supreme Court's decision strikes at the State's ability to speak
> for itself and warn constituents of danger.[166]

On October 4, 2021, the Supreme Court denied the petition for certiorari.[167]

2. Passports

In *Doe v. Kerry*,[168] Judge Phyllis Hamilton of the Northern District of California addressed a challenge to the International Megan's Law (IML).[169] As noted earlier, the IML requires that passports of registrants display a "unique identifier" in a "conspicuous" place indicating the bearer's sex offense conviction. Judge Hamilton ultimately dismissed the case for lack of standing and ripeness,[170] but in dictum stated that the IML did not violate the First Amendment because it "unquestionably" constituted government speech.[171] She reasoned that "[t]he United States–not the passport holder–controls every aspect of the issuance and appearance of a U.S. passport. A U.S. passport is a government-issued document."[172] Furthermore:

> Passports remain government property even when held by individuals, and must be surrendered to the U.S. government upon demand. Individuals have no editorial control over the information in a passport; only the U.S. government may amend a passport. Indeed, criminal penalties are imposed on individuals who mutilate or alter their passports.[173]

Adopting a narrower view of First Amendment coverage than Judge Watkins in *Doe I v. Marshall*, Judge Hamilton reasoned that the passport notation was not constitutionally problematic because it was "factual" not "ideological," unlike the license plate motto condemned in *Maynard:*

166 *Id.* at 4.

167 Louisiana v. Hill, 142 S. Ct. 311 (2021). Although the state signaled its intent to utilize a more subtle marker, as suggested by the court, no attempt appears to have been made in this regard, as of the time of the article's publication.

168 Doe v. Kerry, No. 16-cv-0654-PJH, 2016 WL 5339804 (N.D. Cal. Sept. 23, 2016).

169 International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, Pub. L. No. 114-119, 130 Stat. 15 (Feb. 8, 2016).

170 Both because the IML had not yet taken effect and because provisions of the IML challenged did not significantly change existing practices that predated the law, and the plaintiffs' alleged injury was therefore not redressable by the injunction they sought against enforcement of the IML. Doe v. Kerry, *supra* note 168, at *11. Judge Hamilton also rejected claims sounding in substantive and procedural due process, equal protection, and ex post facto. *Id.* at *19-26.

171 *Id.* at *16.

172 *Id.*

173 *Id.* at *17 (statutory citations omitted).

> [the branding] is a statement of fact which does not communicate any ideological or political message. Factual information regarding a criminal conviction is not equivalent to an ideological message on a license plate or a ballot. A mark on a passport identifying the holder as a registered sex offender is neither an "opinion" which is being attributed to the passport holder, nor a misleading statement. Registered sex offenders had a full and fair opportunity to challenge the criminal charges at the time they were brought. They cannot now argue that there is any dispute regarding their status as offenders.[174]

Nor, unlike the license plate motto in *Maynard*, could the branding "reasonably be interpreted as an expression of agreement with the government's position regarding sex trafficking."[175]

Finally, to the extent that precedent condemned compelled "factual" information, the "cases are distinguishable because the laws or regulations at issue required the speaker to communicate the government's message relating to controversial social or political issues, not mere facts relating to criminal convictions."[176] The passport identifier was akin to other descriptive information commonly inscribed on government-issued documents such as the "name, date of birth, height, weight, or eye color."[177] Ultimately, Judge Hamilton reasoned, "the identifier is not a public communication and will not even be displayed to the public. The U.S. passport itself is not speech, and the passport identifier does not suggest or imply that the passport-holder has adopted or is sponsoring an ideological or political point of view."[178]

In a subsequent decision, *Dhingra v. United States*,[179] Chief Magistrate Judge Joseph Spero, also of the Northern District of California, dismissed a similar challenge on the merits, relying on *Doe v. Kerry* and concluding that the plaintiff had "not stated and cannot state a claim that the United States' dissemination of truthful information regarding his criminal conviction, whether through direct notification or endorsement of a passport, violates his rights under the United States Constitution."[180] Later, in an unpublished memorandum opinion concerning *Dhingra*, the Ninth Circuit summarily rejected as "without merit the plaintiff's contentions regarding *Doe v. Kerry*…."[181]

174 *Id.* at *18.

175 *Id.*

176 *Id.* (citations omitted).

177 *Id.* at *18.

178 *Id.* The court also dismissed as baseless plaintiffs' claims sounding in substantive and procedural due process, equal protection, and ex post facto. *See id.* at *21-26. The Ninth Circuit did not have an opportunity to consider *Doe v. Kerry*, as the plaintiffs voluntarily dismissed their appeal of Judge Hamilton's order dismissing the case. Doe v. Kerry, No. 16-700, 2017 WL 5514566 (9th Cir. Mar. 30, 2017) (order granting motion for voluntary dismissal).

179 Dhingra v. United States, No. 19-cv-00360, 2019 WL 3577014 (N.D. Cal. Aug. 6, 2019).

180 *Id.* at *10.

181 Dhingra v. United States, 854 Fed. Appx. 130, 131 (9th Cir. 2021) (Mem). *See also* Alliance for Constitutional Sex Offense Laws, Inc. v. Dep't of State, No. CV 18-256-JFW(PLAx), 2018 WL 6011543 (C.D. Cal. July 12, 2018) (dismissing challenge based on

Most recently, in *Deck v. California*,[182] the IML figured in a Central District of California trial court decision addressing a federal habeas corpus claim brought by a California registrant. The court held that the IML's branding and advance travel notification requirements did not satisfy the legal prerequisite that a habeas petitioner be in "custody," reasoning that the "requirements neither prohibit petitioner from traveling nor require approval prior to travel. Instead, the federal government is communicating publicly available information to a foreign country. While some countries may deny a registered sex offender entry upon notification, it is the sovereign right of that country to decide the conditions of entry, including, among other things, whether a person is a convicted felon or has the proper vaccines."[183]

III. ASSESSING THE BOUNDS OF GOVERNMENTAL AUTHORITY

The foregoing discussion permits several observations. First and most important, no court to date has deemed document branding constitutionally problematic in principle. Under one view, governments can single out registrants so long as the signifier utilized is the least restrictive means of doing so, a view voiced in *Doe I* and *Hill*; under another view, embraced in *Doe v. Kerry* (addressing the IML), branding is permissible government speech. It remains to be seen how courts in other jurisdictions will respond.

The decisions also highlight basic difficulties in distinguishing permissible government speech from impermissible government-compelled private speech,[184] and the right of individuals to refrain from speech more generally ("negative speech").[185] Justice Crain in his *Hill* dissent made a persuasive case that Louisiana was speaking when it inscribed "SEX OFFENDER" on a government-issued document.[186] Indeed, "[a] government entity," the U.S. Supreme Court has held, "has the right to 'speak for itself.'"[187] Moreover, stating the "fact"

---

violation of the federal Administrative Procedure Act).

182 *See* Deck v. California, Case No. 8:21-cv-01525-MWF, 2022 WL 4486138 (C.D. Cal. Sept. 1, 2022).

183 *Id.* at *5.

184 *See, e.g.,* Clay Calvert, *The Government Speech Doctrine in* Walker's *Wake: Early Rifts and Reverberations on Free Speech, Viewpoint Discrimination, and Offensive Expression*, 25 WM. & MARY BILL RTS. J. 1239 (2017); Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc., 942 F.3d 1215, 1230 (11th Cir. 2019) (noting lack of "precise test" for addressing government speech claims).

185 *See generally* Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847 (2011).

186 Justice Crain's contention that government speech is compelled only when the speech appears to be "endorsed" by a complainant, however, is less persuasive because *Maynard* contains no endorsement requirement. Rather, *Maynard* condemned the "Live Free or Die" license plate because it required the plaintiff to "participate in the dissemination of an ideological message," by use of his property, unwillingly. Wooley v. Maynard, 430 U.S. 705, 713 (1977)).

187 Pleasant Grove v. Summum, 555 U.S. 460, 467 (2009) (citation omitted).

of a prior conviction would complement community notification, which also singles out registrants for public attention, and has been condoned by the U.S. Supreme Court on two occasions.[188] Government branding of documents, from this perspective, is simply another method of enabling government officials and community members to be co-producers of community safety.

Similarly, the position of government amici in the *Hill* certiorari petition has some apparent merit. Why should governments not be able to inscribe the "fact" of a conviction on an identification card or a driver's license,[189] much like they display home address, date of birth, and the like?[190] If individuals can demand a more subtle identifier, such as required in *Hill* and *Doe I*, does this mean that

188 *See* Smith v. Doe, 538 U.S. 84 (2003) (deeming registration and community notification civil in nature and denying an ex post facto challenge on that basis); Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (holding that government registry website need not specify individual risk presented by registrants, because the website did not state that they posed risk, rejecting procedural due process claim). *See also* United States v. Arnold, 740 F.3d 1032, 1035 (5th Cir. 2014) (rejecting First Amendment claim, reasoning that the Constitution does not provide a sex offender "with a right to keep his registry information private"); United States v. Fox, 286 F. Supp. 3d 1219, 1223-24 (D. Kan. 2018) (concluding that providing the government with registration "facts" does not offend the First Amendment because even though it compelled the defendant to speak it serves a compelling government interest in a narrowly tailored fashion).

189 This begs the important question of whether a "fact" is indeed inscribed. An individual convicted of a statutorily enumerated sex offense, the argument would go, is a "SEX OFFENDER." In Florida, individuals designated by a court as a "sexual predator" have their identification stamped "SEXUAL PREDATOR." Advocates of the laws will likely argue that the statutory and judicial designations are legal facts, while opponents would maintain that the label is a value-laden, subjective assessment expressing disdain for particular individuals convicted of sexual offenses. Less ambiguous is the non-legal referent "Sexual Deviant" used in West Virginia.

190 *See, e.g.*, Carney v. Okla. Dep't of Pub. Safety, 875 F.3d 1347, 1354 (10th Cir. 2017) (rejecting a Fourteenth Amendment equal protection challenge to Oklahoma's law and stating that "the license requirement does not stray from what state governments do each and every day: communicate important information about its citizens on state-issued IDs.").

members of the public can dictate what is inscribed on government-issued identification cards,[191] such as a more flattering one-time body weight?[192]

Yet even presuming Justice Crain and amici in *Hill* were correct—that branding is factual government speech, and therefore exempt from challenge[193]—should that necessarily doom a constitutional challenge? Is there really no limit on the "facts" that a government can inscribe on documents it issues?

The opportunistic use by government of driver's licenses and identification cards—and requiring that they be obtained and carried by individuals targeted, under pain of punishment[194]—could very well expand beyond convicted sex offenders to other registrant populations, including individuals convicted of drug offenses and homicides,[195] and solicitation of prostitution.[196] Moreover, is it not hard to imagine a government, asserting a public health need, requiring the branding of identification documents of individuals with "HIV-AIDS" in red lettering, much as lepers in the Middle Ages were forced to wear bells and distinctive clothing.[197] The federal government's use of passports to communicate other than purely personal identifying information deviates from international standards,[198] perhaps providing a precedent for inclusion of religious affiliation,

---

191 A recent decision from a federal trial court in Minnesota highlights the potential line-drawing difficulty. *See* Benson v. Fischer, No. 16-cv-509 (DWF/TNL), 2019 WL 3562693, at *1 (D. Minn. Aug. 6, 2019), adopting report and recommendation as modified, 2017 U.S. Dist. LEXIS 158017 (D. Minn. Mar. 31, 2017). In *Benson*, plaintiff, an involuntary committee at Minnesota's secure facility for "sexually dangerous persons," challenged on compelled speech grounds the requirement that he wear a badge stating "Minnesota Sex Offender Program." The court rejected the claim, reasoning that

> there is no "speech" being forced upon Plaintiff. The purportedly offensive phrase. . .does not "express a message," or require Plaintiff to "express a certain point of view. Rather, the words simply identify the state facility to which Plaintiff is civilly committed. The fact that the term "sex offender" is included in the name of the facility does not transform the entire phrase into a stigmatizing label. In context, the placement of the words "Minnesota Sex Offender Program" on the identification badges cannot be plausibly understood to convey a message implicating concerns over compelled speech.

Id. at *5. Use by an institution of a badge to identify one of its committees, to institutional staff, as incident to committee status, however, is distinct from requiring a card used to identify oneself to the public at-large. *Cf.* Youngberg v. Romeo, 457 U.S. 307, 319-21 (1982) (noting that committees are subject to a variety of infringements on their rights).

192 For discussion of the issue of whether states can regulate gender identity specified on driver's licenses, having particular impact on transgender and nonbinary individuals, *see* Lexi Meyer, *License & (Gender) Registration, Please: A First Amendment Argument Against Compelled Driver's License Gender Markers*, 91 FORDHAM L. REV. 1983 (2023).

193 *See* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech . . . is exempt from First Amendment scrutiny.").

194 *See supra* note 91 and accompanying text.

195 LOGAN, KNOWLEDGE AS POWER, *supra* note 7, at 74.

196 Fla. Dep't of Law Enforcement, *Soliciting for Prostitution Public Database*, https://perma.cc/P4SV-CUJC.

197 Joseph Allen Garmon, Comment, *The Laws of the Past Versus the Medicine of Today: Eradicating The Criminalization of HIV/AIDS*, 57 HOW. L.J. 665, 682 (2014).

198 *See* Daniel Cull, Note, *International Megan's Law and the Identifier Provision—An Efficacy Analysis*, 17 WASH. U. GLOBAL STUD. L. REV. 181, 181 (2018) (noting that "by using

a troubling development given experience with the practice in other countries.[199]

Ultimately, the dispute over whether the issue is one of government speech, a "recently minted" doctrine,[200] or government-compelled private speech,[201] highlights a significant taxonomic difficulty in First Amendment doctrine. As Frederick Schauer observed, historically "[w]e may not always have known how to resolve First Amendment cases, but at least we knew them when we saw them."[202]

These points notwithstanding, the decisions to date are wanting for several other significant reasons. First, they ignore the basic concern that not only is the government arguably compelling individuals to speak, but also to act. Registrants must obtain either a drivers' license or identification card, even if they do not wish to do so, under pain of serious punishment if they do not. They must also pay for the privilege, update the document as necessary, and renew it on at least annually (often at more frequent intervals than non-registrants).[203]

Nor is it convincing to point to community notification as precedent, which

---

the passport to communicate things other than purely identificatory information, the United States moves away from near-universal international passport standards which other countries may use as precedent for improper purposes").

199 In 2016, for instance, the Pakistani government indicated whether a passport holder is a Muslim, a non-Muslim, or a non-Muslim Ahmadi. The latter designation reflected the view of the Sunni Muslim majority in the country, which considers Ahmadi Muslims non-Muslim (indeed, referring to them as Muslim is unlawful). Cull, *supra* note 198, at 190. Turkey discontinued its policy of stamping religion on national identification cards (although Muslim affiliation is evidence on a chip contained on the card). *See* Alex Macdonald, *Turkey Ditches Religion from ID Cards as It Eyes EU Membership*, MIDDLE EAST EYE (Feb. 17, 2016), https://perma.cc/5SGJ-SKXL.

200 Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring); *see also* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("The government-speech doctrine is relatively new, and correspondingly imprecise."). *See generally* Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2432 (2004) ("The government speech line of cases remains the ugly stepchild of First Amendment doctrine. . ..The Supreme Court should consider shifting its focus from who is speaking to what rights, if any, are implicated in a particular arrangement.").

201 *See* Stern, *supra* note 185, at 849 (noting the "unacknowledged vulnerability of negative First Amendment rights"); *id.* at 933 (recognizing that "doctrinal incoherence has obscured and fostered the vulnerability of negative speech rights"); Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 356 (2018) (noting that the parameters of compelled speech can be "hard to pin down").

202 Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1766 (2004).

203 In these respects, licenses and identification cards differ from the IML passport identifier requirement: with passports, the federal government does not require any individual to get a passport. A passport is only required if one wishes to leave the country. This of course is not to ignore the important freedom to travel internationally, which the Court has described as "basic in our scheme of values" and an "important aspect of the citizen's 'liberty.'" Califano v. Aznavorian, 439 U.S. 170, 175-76 (1978) (citation omitted).

the Supreme Court condoned in *Smith v. Doe*.[204] *In Smith*, the Court distinguished sex offender registration and community notification (now mainly by means of government-run internet websites) from colonial-era shaming because the latter was a "scheme forcing an offender to appear in public with some visible badge of past criminality,"[205] and involved a "direct confrontation between the offender and the public," a "face-to-face shaming."[206] Yet this is precisely what modern laws in fact do: they coerce face-to-face public shaming, every time identification is requested or demanded.[207] Moreover, unlike colonial-era shaming, which had a temporal limit,[208] today's laws can impose shame for life.

Community notification, moreover, is far less intrusive in that it typically requires affirmative behavior by police and community members who must access registry information.[209] Document branding laws require that registrants self-stigmatize and punish them if they do not. Like the petitioners in *Maynard* who challenged a government-issued car license plate, card-carriers are legally required to serve as a "mobile billboard," "courier," or "instrument" of the government's message[210]: that individuals convicted of sex offenses (however broadly conceived) are worthy of being singled out for public fear and disdain. Individuals risk being targeted whenever they wish to lawfully operate a car in public or are asked for identification during everyday undertakings,[211] very often

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

205 *Id.* at 98.

206 *Id.*

207 When assessing whether the Oklahoma law constituted an affirmative disability or restraint, part of the test for whether a sanction is punitive for ex post facto purposes, the Oklahoma Supreme Court stated that

> [s]howing one's driver's license is frequently necessary in face-to-face encounters when cashing a check, using a credit card, applying for credit, obtaining a job, entering some public buildings, and in air travel as a few examples. This subjects an offender to unnecessary public humiliation and shame and is essentially a label not unlike a "scarlet letter."

Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1025 (Okla. 2013)*; see also* Doe v. Rausch, 461 F. Supp. 3d 747, 763 (E.D. Tenn. 2020) (quoting *Smith*, 538 U.S. at 99) (concluding that Tennessee's law "compels registrants to "'appear in public with some visible badge of past criminality'").

208 *See* ADAM J. HIRSCH, THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA 33-34, 44 (1992).

209 *See Smith,* 538 U.S. at 99 (noting with respect to state use of an internet website that "[a]n individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information."). In some jurisdictions, notification is also provided to community members directly by the government and/or the registrants themselves. *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 7, at 78.

210 Wooley v. Maynard, 430 U.S. 705, 715 (1977)). ; *see also* Rumsfeld v. F. for Acad. and Instit. Rts., 547 U.S. 47, 63 (2006) (stating that the Court's "compelled speech cases are not limited to the situation in which an individual must personally speak the government's message. We have also . . . limited the government's ability to force one speaker to host or accommodate another speaker's message.").

211 Much as experienced by Jean Valjean, protagonist in Victor Hugo's classic work

for their lifetimes. As the D.C. Circuit recently recognized in another context, requiring that a party "publicly condemn itself is undoubtedly a more 'effective' way for the government to stigmatize and shape behavior than for the government to convey its views itself, but that makes the requirement more constitutionally offensive, not less so."[212]

Equally fundamental, there is reason to question whether courts are justified in presuming that the laws serve a compelling governmental interest. Although of course a compelling governmental interest exists in guarding against recidivist sexual offending, this is distinct from positing that there is a compelling governmental interest in requiring that registrants obtain and carry branded identification.[213] As noted in the 1954 *University of Pennsylvania Law Review* study of early generation provisions:

> it is difficult to see how the card-carrying provision in the criminal registration ordinances
> is useful.... It cannot be determined that a person is in violation of the ordinance because
> he does not have a registration card, since his record must first be inspected in the police
> file. This inspection would also disclose whether or not the person is registered. Therefore,
> the utility of the provision is limited.[214]

Moreover, unlike in the 1950s, police today with just a few computer keystrokes can immediately determine whether an individual is on their jurisdiction's registry,[215] and can access registries of jurisdictions nationwide via the National Crime Information Center database[216] or the Dru Sjodin National Sex Offender Public Website.[217] In the event an individual provides a false name, use

---

Les Miserables, who after release from prison was required to carry a yellow passport signifying his ex-convict status, which resulted *inter alia* in being barred from securing a room at an inn. VICTOR HUGO, LES MISÉRABLES (Julie Rose trans., Random House 2008) (1862). Thanks to Alessandro Corda for reminding me of the parallel.

212 Nat. Ass'n of Mfrs. v. S.E.C., 800 F.3d 518, 530 (D.C. Cir. 2015).

213 *See* Republican Party of Minn. v. White, 56 U.S. 765, 775 (2002) (stating that "[c]larity on [identifying the state's interest] is essential before we can decide whether [the purported interest] is indeed a compelling state interest . . . ."). *Cf.* Wis. v. Yoder, 406 U.S. 205 (1972) (holding that the state had a compelling interest in ensuring an adequately educated citizenry, but no such interest in requiring that a family keep their children in school beyond the tenth grade). *See also generally* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932-37 (1988) (noting the critical importance of identifying the governmental interest properly and that the courts often fail to do so).

214 *Police Control, supra* note 65, at 78.

215 *See, e.g.*, *Sex Offender Registry Website*, FED. BUREAU OF INVESTIGATION, https://perma.cc/DTB4-8AP4.

216 *National Crime Information Center (NCIC)*, FED. BUREAU OF INVESTIGATION, https://perma.cc/42Y9-TNGE.

217 *Dru Sjodin National Sex Offender Public Website*, U.S. DEP'T OF JUST., https://perma.cc/8WZF-4MWP.

of an identification document lacking a stigmatizing brand—but with a photo—would preclude this possibility.

Equally untenable are the arguments that a document brand—even a discrete one, such as the "Y" used in Delaware—is needed because it enables government officials in another jurisdiction to discern an individual's registrant status,[218] enables a facility to determine that an individual is a registrant,[219] or enables care providers to determine whether a prospective babysitter is a registrant.[220] This is because registries are freely available to the public, nationwide,[221] and criminal background checks provide information regarding both individuals publicly registered and those who are not on publicly available registries.[222] If an individual fails to register, they commit a crime, subject to independent prosecution and punishment.[223]

What of the purported compelling governmental need to inform the public (as opposed to only police) about an individual's registrant status? Supporters point to the Oklahoma anecdote recounted earlier involving a store clerk whose suspicions were raised when a customer had a branded identification card, resulting in his arrest by police for suspected child kidnapping.[224] Yet the Louisiana Supreme Court in *Hill* and the Northern District of Alabama in *Doe I v. Marshall* concluded that no compelling governmental interest exists in such non-law enforcement use when they held that a signifier known only to police was constitutionally appropriate. Moreover, the public safety utility of public branding is questionable based on what is known about the utility of registration and notification more generally.[225] Finally, any asserted compelling need by a government to require document branding, in large bold lettering, is undercut by the fact that some governments use more subtle identifiers (such as a designated letter), as

218 State Amicus Brief, *supra* note 112, at 16.

219 *See* Janofsky, *supra* note 91, and accompanying test.

220 Adam Liptak, *Special IDs for Sex Offenders: Safety Measures or Scarlet Letters*, N.Y. TIMES (June 14, 2021), https://www.nytimes.com/2021/06/14/us/politics/sex-offender-id-louisiana.html.

221 *See* McClendon v. Long, 22 F.4th 1330, 1338 (11th Cir. 2022) (invalidating on First Amendment compelled speech grounds local government policy of posting warning signs in the front yards of all registrants on Halloween in part because the website registry "diminish[es] the need to require residents to disseminate the same information in yard signs on their private property"). *Cf.* Liptak, *supra* note 220 (discounting government argument that cards are needed by Halloween trick-or-treaters because "asking to see ID before accepting candy is not commonplace").

222 *See, e.g.,* La. Stat. § 943.0542 (2022); 23 Pa. Cons. Stat. Ann. § 6344 (2022) et seq.

223 *See* LOGAN, KNOWLEDGE AS POWER, *supra* note 7, at 70.

224 *See supra* note 114 and accompanying text.

225 *See* Amanda Agan & J.J. Prescott, *Offenders and SORN Laws,* 102, 109-21, *in* SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EVALUATION (Cambridge Univ. Press, 2021, Wayne A. Logan & J.J. Prescott eds.); Kristen M. Zgoba & Meghan M. Mitchell, *The Effectiveness of Sex Offender Registration and Notification: A Meta-Analysis of 25 Years of Findings*, 19 J. OF EXPERIMENTAL CRIMINOLOGY 71, 89 (2023).

well as the fact that a significant majority of states refrain from branding altogether.

Branding of passports by the federal government likewise lacks public safety utility. For one thing, the IML does not target only individuals convicted of international "sex trafficking and sex tourism" offenses, as this population is denied a passport altogether.[226] Moreover, the federal branding is unnecessary because registrants otherwise must advise authorities of their intent to travel internationally within twenty-one days of doing so,[227] or face up to ten years imprisonment.[228] The Marshall's Service then provides "the notification information to INTERPOL Washington, who will then communicate it to law enforcement partners at the intended foreign travel destination(s)."[229] Moreover, as with state document branding, the IML fails to inform the viewer of when the conviction occurred, whether the passport holder was a juvenile when adjudicated delinquent, or poses a risk to others. These deficits undercut the government argument that the branding is narrowly tailored.[230]

Finally, document branding laws potentially implicate three other fundamental constitutional rights yet to be litigated. The first is the First Amendment right of free association. A growing body of research shows the chilling effect that dissemination of criminal records has on social, professional, and institutional engagement.[231] With document branding, a cardholder might be discour-

226 22 U.S.C. § 212a(b). As for the concern over "country-hopping," noted earlier as one of the rationales of the IML, Cull observes:

> the United States could replicate the effects of a passport identifier using machine-reading. A system of cross-checking passports by machine-readers against the National Sex OffenderRegistry would accomplish the aims of preventing country-hopping without exposing cooperating travelers to local danger. Cross-checking databases are already used to combat sex trafficking and
> sex tourism domestically.

Cull, *supra* note 198, at 194.

227 *Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART)*, U.S. DEP'T OF JUST., https://perma.cc/B7Q9-CF3N.

228 18 U.S.C. § 2250(b)(2)(3).

229 U.S. DEP'T OF JUST., *supra* note 227.

230 *Cf. McClendon*, 22 F.4th at 1338 (invalidating on First Amendment compelled speech grounds local government policy of posting warning signs in the front yards of all registrants on Halloween because (1) the government failed to show that registrants "actually pose a risk to trick-or-treating children or that the[] signs would serve to prevent such danger" and (2) the website registry "diminish[es] the need to require residents to disseminate the same information in yard signs on their private property"); *see* Sanderson v. Bailey, No. 4:23CV1242, 2023 WL 7112323 (E.D. Mo. 2023), *appeal dismissed*, No. 23-3394, 2023 WL 11159779 (8th Cir. 2023) (invalidating on compelled government speech grounds a Missouri law requiring that registrants post Halloween sign stating "No candy or teats at this residence").

231 *See, e.g.*, AMY LERMAN & VESLA WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL (2014); Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AMER. SOCIO. REV. 367 (2014).

aged from attending a political or social gathering requiring identification or appear in-person to vote (should photo identification be required).[232]

The second is the Fourth Amendment protection against unreasonable searches and seizures. The Supreme Court has held that police can demand that an individual provide their name when police have reasonable suspicion that they have committed or are committing a criminal offense,[233] but the Supreme Court has never held that police can otherwise demand written documentation of identity.[234] With a branding requirement in place, police possess discretion to detain a known or suspected registrant to demand a license or card to confirm compliance with the law,[235] much as police did in jurisdictions with registrant card requirements in the 1950s.[236] Providing police an incentive to "show me your papers" is an especially troubling development given the virtually limitless discretion modern police already have to stop (and arrest) individuals, for serious and non-serious offenses alike (e.g., failing to wear a seatbelt), even when doing so is pretextual.[237]

Third, document branding laws potentially implicate the Fifth Amendment privilege against compelled self-incrimination. In *Hiibel v. Sixth Judicial District Court of Nevada*,[238] the Court upheld against a Fourth Amendment challenge a Nevada law making it a crime for lawfully detained individuals to refuse to identify themselves. The Court concluded that requiring Hiibel to disclose his name presented no danger of self-incrimination under the instant facts but added that providing "one's name may qualify as an assertion of fact relating to identity. Production of identity documents might meet the definition as well."[239] The

---

232 *See, e.g.*, Doe I v. Marshall, 367 F. Supp. 3d 1310, 1325 (N.D. Ala. 2019) (noting one plaintiff's statement that he "tr[ies] not to go places where [he] know[s] [he] will have to" show his marked driver's license).

233 *See* Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 187 (2004); *see also* Barrera v. City of Mount Pleasant, 12 F.4th 617, 622 (6th Cir. 2021) (citing *Hiibel* for the proposition that "a *Terry* stop suspect does not have a Fourth Amendment right to refuse [a police officer] request" that he identify himself).

234 *See* WAYNE R. LAFAVE, 4 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.6(g) (6th ed. 2020).

235 For discussion of the significance of police securing a person's name, which enables them to access massive government databases, which *inter alia* contain sensitive personal information concerning individuals, *see* Wayne A. Logan, *Policing Police Access to Criminal Justice Databases*, 104 IOWA L. REV. 619 (2019).

236 *See supra* notes 68-71 and accompanying text. *See also Police Ordinances*, *supra* note 66, at 104 ("The fact that the police can arrest an individual for failure to comply with the ordinance permits them to detain him on 'suspicion' for purposes of investigation with respect to a more serious crime for which they have no evidence to hold him."); *id.* (individuals "may be incarcerated whenever the police feel that they should be kept off the streets. The pattern of selective prosecution which was discerned in some communities enables local authorities to use the ordinances as an additional effective harassing weapon").

237 *See generally* Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 72-73 (2011).

238 *See* Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177 (2004).

239 *Id.* at 189.

Court concluded by saying that

> a case may arise where there is a substantial allegation that furnishing identity at the time
> of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow.[240]

A police demand to see the license or identification card of a registrant could present such a Fifth Amendment problem. For example, an officer, suspecting that a jaywalking pedestrian is a registrant, may demand to see their branded identification or a license, which the registrant concedes they lack. In such a situation, the individual would be compelled to provide more than "a link in the chain of evidence needed to convict the individual of a separate offense"; the lack of branded identification would be evidence of a crime in itself.[241]

IV. BROADER CONSEQUENCES OF DOCUMENT BRANDING

The foregoing examination of the permissible legal bounds of document branding fails to take into account the very significant broader consequences of governments requiring that particular individuals (1) obtain, pay for, update, and renew an identification document branded with stigmatizing information and (2) show it upon demand, under threat of punishment. This part explores these broader consequences.

A. Autonomy and Personhood

Historical and current document branding laws alike seek to designate document holders as "others." And not just any others, or even individuals convicted of criminal offenses, itself a stigmatized group,[242] but persons convicted of sexual offenses, a subpopulation that today evokes unique contempt, hatred, and disdain.[243] Even more damning, individuals are often branded with especially

---

240 *Id.* at 191.

241 *See* United States v. Garcia-Cordero, 595 F. Supp. 2d 1312, 1315-17 (S.D. Fla. 2009) (discussing Supreme Court precedent finding Fifth Amendment concern when compelled disclosure concerns "a highly selective group inherently suspect of criminal activities" and an "area permeated with criminal statutes," such as sex offender registration and community notification).

242 *See* Reno v. ACLU, 521 U.S. 844, 872 (1997) (noting the "opprobrium and stigma of a criminal conviction"); Rutledge v. United States, 517 U.S. 292, 302 (1996) (noting the "societal stigma accompanying any criminal conviction"); Michelle Alexander notes that "[o]nce a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and the privileges of citizenship. . . are off-limits. . . . It is the badge of inferiority. . . that relegates people for their entire lives, to second-class status." MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 92 (2019).

243 *See* CONG. REC., *supra* note 12 and accompanying text. *See also generally* Craig A.

pejorative terms, such as “sexual predator” (in Florida) or a “violent juvenile sexual offender” (in Tennessee).

The designations plainly and quite purposely differ from neutral identification data such as eye color, height or weight, data typically found on government documents. As Professor Seth Kreimer observed, “[n]o one doubts that Hester Prynne’s scarlet letter provided more than neutral information, or that the effort of Senator Joseph McCarthy to ‘expose’ the background of his political opponents was not simply public education.”[244]

Allowing governments to legally compel actions—requiring that individuals obtain, pay for, renew, update, and carry identification documents, unassociated with a regulated activity, and punish violations—is itself problematic in principle.[245] It compels what legal philosopher J.L. Austin termed a “speech act,”[246] a public “performative”[247] whereby “to say something is to do something.”[248] Showing the document upon command has a perlocutory effect, impacting the sentiment, mental/emotional state, or responses of third parties receiving the message.[249] Individuals subject to the laws are forced to self-stigmatize in their daily lives, such as when asked to present their identification to a bank teller, a cashier at the supermarket, at an establishment that serves alcohol, election officials before casting a vote (in many states), and when they go on a domestic airplane flight or rent a car. For understandable reason, a branded individual might be reluctant to visit a pharmacy to secure medication, for fear of being

---

Harper et al., *Are Sex Offending Allegations Viewed Differently? Exploring the Effect of Offense Type and Conviction Status Upon Criminal Victimization*, 36, SEXUAL ABUSE 33, 33-58 (2023); Kelly Socia et al., *Punitive Attitudes Toward Individuals Convicted of Sex Offenses: A Vignette Study*, 38 JUST. QTLY. 28 (2019).

244 Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 7 (1991).

245 *Cf.* Lambert v. California, 355 U.S. 225, 228-29 (1957) (invalidating on due process/notice grounds early generation local criminal registration law because violation of the provision “was unaccompanied by any activity whatsoever, mere presence in the city being the test”).

any activity whatsoever, mere presence in the city being the test”).

246 *See generally* J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & Marina Sbisa eds., 2d ed. 1975); *see also* Peter Meijes Tiersma, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 CAL. L. REV. 189, 194 (1986) (describing speech act theory as a methodology that “attempts to explain how the utterances of a speaker are related to the surrounding world”).

247 AUSTIN, *supra* note 246, at 6-7.

248 *Id.* at 121.

249 *Id.* at 116-17; *See also* Peter Meijes Tiersma, *The Language of Perjury: Literal Truth, Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373, 380 (1990) (noting that the “crucial question” in speech act theory is “[h]ow does the speaker intend the hearer to understand the utterance?”); Jonathan Yovel, *What Is Contract Law “About”? Speech Act Theory and a Critique of “Skeletal Promises,”* 94 NW. U. L. REV. 937, 938 (2000) (citation omitted) (“Theories of performative language all share the basic insight: that language is not primarily about meaning . . . Rather, . . . language is primarily about action—— speech and texts are acts, and they perform things in the social world and bring about different kinds of effects.”).

asked for identification. Exacerbating matters, the person seeing the brand will not know whether the individual was convicted of an aggravated sexual assault or a comparatively benign "Romeo and Juliet" sexual encounter with a fellow teen, or that the conviction is decades old.[250] Branding of passports imposes similar burdens. Although passports are not legally required, like driver's licenses and identification cards, they are essential for most international travel.[251] When travelling abroad, passports also serve as a staple identification method (and often collateral) with hotel staff and are needed for ordinary transactions such as purchasing a train ticket or exchanging money.[252]

The stigmatization associated with branding, by whatever documentary means, has significant adverse consequences for registrants. In line with sociologist Erving Goffman's recognition that stigmatized individuals are regarded as "not quite human,"[253] it is well known that publicly identified registrants experience acute social stigma and disdain, resulting in ostracism and even vigilantism.[254] As noted by the New York Court of Appeals, the labeling is "[m]ore than 'name calling by public officials,'" and "can have a considerable adverse impact on an individual's ability to live in a community and obtain or maintain employment."[255] Illustrative of the personal impact is the case of a Florida

---

250 The branding can also result in the public disclosure of an individual's registrant status when state law otherwise requires that the individual's information not be made publicly available on a government internet registry. *See, e.g.*, Delaware State Police, *Delaware Sex Offender Central Registry*, https://perma.cc/EBB5-6C3W (noting policy in Delaware, which does not make publicly available information regarding Level I registrants).

251 U.S. Customs and Border Protection, *Western Hemisphere Travel Initiative*, https://perma.cc/HS8Q-HQGT.

252 Moreover, as one commentator has noted:

> [i]n countries where shakedowns are frequent against foreigners, the stigma of sex offenses provides huge leverage to local officials. In parts of the world where civic bribery is common, officials will expect a standard bribe in all encounters and demand a higher bribe as their leverage increases. Because sex offenses are highly stigmatized, the amount of a bribe a police officer can extract is much higher than for the regular traveler.

Cull, *supra* note 198, at 192-93 (footnotes omitted).

253 ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 5 (1963). For other classic treatments of the disabling effects of social stigma more generally see GIORA SHOHAM & GIORA RAHAV, THE MARK OF CAIN: THE STIGMA THEORY OF CRIME AND SOCIAL DEVIANCE (2d ed., 1982). *Cf.* 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 261 (Phillips Bradley ed., 1985) (1840) ("In a democratic country . . . public favor seems as necessary as the air we breathe, and to live at variance with the multitude is, as it were, not to live.").

254 *See* Kelly Socia, *The Ancillary Consequences of SORN*, 78, at 86-88, in LOGAN & PRESCOTT, *supra* note 225; Michelle A. Cubellis et al., *Sex Offender Stigma: An Exploration of Vigilantism Against Sex Offenders*, 40 DEVIANT BEHAV. 225 (2019).

255 People v. David W., 733 N.E.3d 130, 137 (N.Y. 2000) (citation omitted). In other contexts, the Supreme Court has repeatedly signaled its sensitivity to the causal relation between the release of information and the dangers presented by the predictable reactions of third parties. *See, e.g.,* Thornburgh v. Am. College of Obstetricians & Gynecologists, 476 U.S. 747, 766-67 (1986) (regarding the possible harassment of women seeking abortions as a result of the government's disclosure of their identities); Brown v. Socialist Workers '74 Campaign

woman whose driver's license, unbeknownst to her, was mistakenly branded with "SEXUAL PREDATOR," resulting in significant public embarrassment and emotional trauma when she realized why cashiers and others had disdained her or refused services.[256]

The self-stigmatization has a significant impact on another, more internal aspect of individual identity: personal autonomy.[257] Just as compelled speech, in the Supreme Court's words, interferes with a speaker's "autonomy to choose the content of his own message,"[258] and "refrain from speaking,"[259] requiring that individuals obtain, carry, and present upon demand a document that classifies them in a derogatory manner significantly undermines personal autonomy.[260] By denying individuals their interest in managing their personal identities,[261] the laws compel a loss of "self-ownership," a personal instantiation that which Jeffrey Reiman notes flows from unlicensed informational disclosure:

> Privacy conveys to the individual his self-ownership precisely by the knowledge that the individual gains of his ability and his authority to withdraw himself from the scrutiny of others. Those who lose this ability and authority

---

Comm., 459 U.S. 87, 92-93 (1982) (regarding possible threat of harassment of political contributors as a result of disclosing their names).

256 *Woman: Driver's License Mistakenly Labeled Me a Sex Offender*, CBS NEWS (May 8, 2015), https://perma.cc/7CCD-PFRJ.

257 *See* Shaktman v. State, 553 So. 2d 148, 150 (Fla. 1989) (recognizing that privacy ensures the right of individuals to "determine for themselves when, how and to what extent information about them is communicated to others" (citation omitted)); *See also, e.g.,* JOHN A. HALL, LIBERALISM: POLITICS, IDEOLOGY AND THE MARKET 86-87 (1988) (observing that "two facts give the individual a meaningful sense of freedom: his ability to control information about himself and his right to choose to separate the audiences before whom he can play separate roles"); Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 454 (1983) (autonomy entails the right to decide "what personal information to disclose" to others).

258 *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995); *see also* Rumsfeld v. F. for Acad. and Instit. Rts., 547 U.S. 47, 64 (2006) (forcing an individual to host a government message "violates the fundamental rule of protection . . . that a speaker has the autonomy to choose the content of his own message"); Note, *Two Models of the Right to Not Speak*, 133 HARV. L. REV. 2359, 2362 (2020) ("the speech production model is largely one concerned about speaker autonomy.").

259 Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

260 For a summary of the extensive scholarship assessing how informational privacy and affects dignity and autonomy see Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 165-75 (2015).

261 The laws thus exacerbate in the physical world the loss of identity ownership occurring in its digital counterpart, with the unprecedented profusion of criminal records, not only by government efforts, but by "digital punishment entrepreneurs" seeking eyeballs and profits by means of the acquisition, repackaging, and dissemination of registry information, which is "pushed" to members of the public, who might not even intend to access it, but do so with an internet search. *See* SARAH E. LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN JUSTICE 164, 171 (2020). Troublingly, research shows that errors and omissions frequently exist in criminal justice databases, which are perpetuated indefinitely in the online world. *See* Wayne A. Logan & Andrew Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541 (2016).

> are thereby told that they don't belong to themselves; they are specimens belonging to those who would investigate them.[262]

In doing so, the laws force individuals to self-impose what Goffman called a "spoiled" social identity, which isolates them "from society and from himself so that he stands [as] a discredited person facing an unaccepting world,"[263] an outcome crime desistance scholars recognize as a major impediment to "making good."[264] Moreover, because the laws have their greatest effect when individuals are in public, where they must be shown on demand, they in effect serve as a condition of mobility, much as encoding of race on driver's licenses did for African American motorists during much of the twentieth century.[265]

Finally, document branding is problematic because of its disparate impact. A chief reason for disparity stems from the fact that branding itself is triggered by registration—and registration is known to sweep up disproportionate numbers of African Americans[266] and individuals identifying as LGBTQ.[267] Moreover,

---

262 Jeffrey H. Reiman, *Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future*, 11 SANTA CLARA HIGH TECH. L.J. 27, 39 (1995). *See also* Briscoe v. Reader's Digest Ass'n, 483 P.2d 34, 37 (Cal. 1971) (citations omitted) ("Loss of control over which 'face' one puts on may result in literal loss of self-identity, and is humiliating beneath the gaze of those whose curiosity treats a human being as an object."); Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine*, 77 TUL. L. REV. 163, 191-92 (2002) ("The essence of the injury is the deprivation of the individual's freedom to decide how she will present herself to the world, by depriving her of the ability to control the messages she presents.").

263 GOFFMAN, *supra* note 253, at 19; *see also* JOHN STUART MILL, ON LIBERTY AND OTHER WRITINGS 8 (Stefan Collini ed., 1995) (1859) (observing that social opprobrium imposes "a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself"). Indeed, the impact of the branding is such that it can quite literally crowd out other identities. In Louisiana, for instance, military veterans, if a registrant, could not have "veteran" inscribed on their license or card because the sex offender designation consumed the space for the former. Louis. Admin. Code Ann. Tit. 55, Part III, § 110(C)(3).

264 *See* SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES (2001). On the problematic effects of labeling in this context more generally *see, e.g.*, William Mingus & Keri B. Burchfield, *From Prison to Integration: Applying Modified Labeling Theory to Sex Offenders*, 25 CRIM. JUST. STUDIES 97 (2012).

265 *See* Cassius Adair, *Licensing Citizenship: Anti-Blackness, Identification Documents, and Transgender Studies*, 71 AMER. QTLY. 569, 571 (2019).

266 *See* Alissa R. Ackerman, *Registries and Registrants: Research on the Composition of Registries,* 35, 38-40, in SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS: AN EMPIRICAL EXAMINATION (Wayne A. Logan & J.J. Prescott eds., 2021). Furthermore, because duration of the document requirement is typically tied to the duration of individuals' registration period, racial disparity again manifests, based on research showing that Black registrants are far more likely than White registrants to be over-classified in terms of risk (which typically determines registration duration). *See, e.g.,* Bobbie Ticknor & Jessica J. Warner, *Evaluating the Accuracy of SORNA: Testing for Classification Errors and Racial Bias*, 31 CRIM. JUST. POL'Y REV. 3 (2020) (discussing results of study showing that Blacks were two-and-one-times more likely to be overclassified than Whites).

267 Ilan H. Meyer et al., UCLA School of Law Williams Institute, *LGBTQ People on Sex Offender Registries in the U.S.* 14 (May 2022) (reporting results of survey indicating that

branding has disparate impact in another sense: requiring that individuals obtain and carry personal identification does not equally affect the U.S. population as a whole. Research shows that African Americans (and poor individuals) more often lack photo identification,[268] resulting in a statistically greater likelihood of individuals less inclined to obtain identification to obtain it, in the absence of government compulsion.

B. Conscription into Self-Surveillance

Another important consequence of branding laws is that they compel individuals to be complicit in their own surveillance. From its origin, registration has sought to instill in individuals the sense that they are being watched. As one 1950's Philadelphia detective put it, registration "led the 'criminals' to believe that they were under the surveillance of the police department. The registrant's feeling of constant surveillance and obligation to notify the police of any change of address might impose some regimentation upon the criminals."[269] The study also recounted that "[i]n one case a Negro woman came into the Identification Division of the Philadelphia Police department to report that she was leaving the city for four days to attend her mother's funeral and wanted to notify the police so that she would not be in trouble when she returned. . . ."[270] In yet another instance, an "individual reported that he had lost his registration card and had come to the police right away because he did not want to get in trouble."[271]

A more recent example of this surveillance effect occurred in Tennessee, where registrants must obtain and "always have" their license or identification card,[272] which "shall bear a designation sufficient to enable a law enforcement officer to identify the bearer of the license or card as a sexual offender, violent

---

20% of registry sample population identified as LGBTQ, well over the estimated national population of 5.6% of adults identifying as LGBTQ), https://perma.cc/7574-ZPBQ.

268 *See* BRENNAN CTR. FOR JUST., CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION 3 (2006), https://perma.cc/G9BX-U4T4 (noting that among citizens surveyed 25 percent of Black voting-age citizens had no current photo ID, compared to just 8 percent of white voting-age citizens, and that citizens with low incomes were less likely to possess photo ID).

269 *See Police Control, supra* note 65, at 64.

270 *Id.* at 64 n.24; *see also* Current Note, *Criminal Registration Law*, 27 J. CRIM. L. & CRIMINOLOGY 295, 295-96 (1936) (criticizing early generation registration because of "the psychic effect which it has on every man who has committed a crime. It opens up old sores. It re-affirms the conviction that exists in the minds of too many of these people that the police are anxious to get something on them. The fact that this is not so does not matter. The important thing is that this group of individuals feels that it is so").

271 *See Police Control, supra*, note 65, at 64 n.24. The individual reacted in this manner even though as a technical matter he was under no legal obligation to carry a card, based on state or local law. Apparently, the mistaken view stemmed from the fact that Philadelphia police, on their own, issued cards. *See Police Control, supra* note 65 and accompanying text.

272 Tenn. Stat. § 40-39-213(a).

sexual offender or violent juvenile sexual offender."[273] Upon seeing the designation during a traffic stop an officer unrelatedly inquired whether the driver was aware of "your rules" and "what you are supposed to do.'"[274]

Branding thus figures in the broader modern-day effort to "diffuse the surveillance of the prison to the community at large,"[275] achieving an effect sought by philosopher Jeremy Bentham's mythical Panopticon, with its central tower and inspector's lodge.[276] The branding instills in those targeted the sense that they are being watched, which seeks, as Michel Foucault observed, to induce "a state of conscious and permanent visibility that assures the automatic functioning of power. So to arrange things that the surveillance is permanent in its effects, even if it is discontinuous in its action."[277] Targeted individuals know that they must carry their branded identification because if they do not, and they are detained by police for whatever reason (including suspicion that they are not carrying the document), they can be charged with a criminal offense (often a felony).[278] Even if they are not stopped, the self-awareness resulting from the compelled carrying of the identification "trains" them to be both "objects" and "instruments" of their own surveillance.[279] A similar method of discipline operates anytime document holders engage in everyday activities, as they know that any request for identification will reveal their stigmatized status. Document branding, in short, and the registration systems on which it relies, are emblematic of the increasingly expansive "punitive surveillance" governments employ, occurring beyond brick-and-mortar prison and jails.[280]

---

273 *Id.* § 55-50-353.

274 Doe v. Rausch, 461 F. Supp. 3d 747, 763 (E.D. Tenn. 2020) (citations from record omitted).

275 GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 220 (1988); *see also* Alessandro Corda & Sarah E. Lageson, *Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and the Rise of a New Penal Entrepreneurialism*, 60 BRIT. J. OF CRIMINOLOGY 245, 248 (2020) (recognizing emergence of a penality "not limited to formal, legal punishment but also encompassing institutions, processes and practices that stem from the penal realm without being formally part of it").

276 *See* JEREMY BENTHAM, THE PANOPTICON WRITINGS (Miran Bozovic ed., Vers. 1995) (1791). Panoptic correctional houses were actually constructed in the United States: in 1800, Virginia utilized a semi-Panoptic design for its prison; Pennsylvania and Illinois built Panoptic prisons in 1826 and 1919, respectively. JOHN W. ROBERTS, REFORM AND RETRIBUTION: AN ILLUSTRATED HISTORY OF AMERICAN PRISONS 55 (1997).

277 MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 201 (Alan Sheridan trans., Vintage Books 1979); *see also id* at 203 (noting that panopticism is concerned with "individualizing observation, with characterization and classification").

278 *See* Cass Sunstein, *The Ethics of Nudging*, 32 YALE J. REGUL. 413, 440 (2015) (noting that "the antonym of autonomy is coercion; the antonym of dignity is humiliation").

279 *Id.* at 170; *cf.* Does #1-5 v. Snyder, 834 F.3d 696, 703 (6th Cir. 2016) (describing the looming possibility of imprisonment for failure to comply with registration that the "irons are always in the background since failure to comply with these restrictions carries with it the threat of serious punishment, including imprisonment").

280 *See* Kate Weisburd, *Punitive Surveillance*, 108 VA. L. REV. 147 (2022) (discussing

Finally, document branding laws are significant because of their approach to governance. As with prior government efforts requiring that particular individuals carry identification, noted earlier, modern branding laws are motivated in Professor Jonathan Weinberg's words by the "foundational belief that [individuals] will lie if asked about their identities," betraying "a fundamental distrust and disconnect between government and people."[281] The laws create "a hierarchical power relationship, in which police can demand papers because they are dominant, and citizens must provide them because they are subordinate."[282] And like prior strategies, current document branding laws empower police to stop and question individuals, a troubling development in a liberal democratic society where police already have expansive discretionary authority to detain individuals.[283]

C. Balancing Privacy

Before concluding, it is worthwhile to consider the potential costs of denying government the ability to require that individuals obtain and carry branded documents.

Proponents of informational disclosure more generally posit that the value of data availability trumps any countervailing individual interest in nondisclosure. With respect to criminal records in particular, advocates maintain that disclosure is socially efficient because it permits individuals to make informed decisions about one another, lessening the likelihood of inter-personal evasion and misperception, which can be tantamount to fraud.[284] As Professor Richard Epstein put it, "the plea for privacy is often a plea for the right to misrepresent one's self to the rest of the world."[285]

The "more is better" argument, however defensible it might be in abstract principle, can be problematic in its application. As privacy law scholar Daniel Solove recognized, a central problem with the view stems from its underlying premise that "more disclosure will generally yield more truth" and that more information ensures "more accurate judgments about others."[286] In reality, however, "the 'truth' about a person is much more difficult to ascertain than the truth

---

broad array of non-community-based surveillance methods, including electronic ankle monitoring and registration, enabling punitive surveillance).

281 Weinberg, *supra* note 44, at 791.

282 *Id.* (footnotes omitted); *see also* JOHN TORPEY, THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP, AND THE STATE 166 (Chris Arup et al. eds., 2000) (stating that requiring possession of identity documents entails "a massive illiberality, a presumption of their bearers' guilt when called upon to identify themselves").

283 *See supra* note 236 and accompanying text.

284 *See, e.g.,* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 46, 660-63 (5th ed, 1998).

285 Richard A. Epstein, *The Legal Regulation of Genetic Discrimination: Old Responses to New Technology*, 74 B.U. L. REV. 1, 12 (1994).

286 Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 1033, 1035 (2003).

about a product or thing. People are far more complex than products."[287] Put another way, the unhindered information market mentality risks "mistaking information for knowledge."[288]

This is very much the case with document branding. Public identification of a registrant, especially by use of derogatory terms such as "sexual predator" or "sexual deviant," suffocates the possibility that the individual can be regarded as anything other than a fiendish, compulsive individual who preys on the vulnerable. Branding, in this sense, suffers from the same deficits as registration and community notification in general, which are predicated on false empirical bases. The first is that sex offenders as a group have markedly higher recidivism rates than other offender populations, which is not accurate.[289] The second is that the community awareness that notification in particular seeks to provide is needed because most sex offenses are committed by strangers who are recidivists. In reality, however, most sexual abuse victims know the identity of their victimizer[290] and the vast majority of sex offenses are committed by first-time offenders, who by definition are not on registries and who know their victims.[291] Moreover, the broad reach of registration eligibility makes it likely that an inference of imminent criminal sexual misconduct is incorrect, a risk exacerbated by the fact that most state laws are based solely on the basis of having a prior conviction, sweeping up individuals "currently dangerous or not."[292] Worse yet, registration laws are very often retroactive in their reach, sweeping up aged convictions of individuals despite their long-term law abidingness in society,[293] again contrary

287 *Id.* at 1035.

288 JEFFREY ROSEN, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA 200 (2000).

289 *See* Ira M. Ellman & Tara Ellman, *'Frightening and High': The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 508 (2015).

290 *See* Jennifer L. Truman, *National Crime Victimization Survey 2010*, BUREAU OF JUST. STATISTICS (September 2011), https://perma.cc/K7N3-WVWB.

291 *See, e.g.,* Jeffrey C. Sandler et al., Naomi J. Freeman, & Kelly M. Socia, *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL., PUB. POL'Y, & L. 284, 295 (2008) (concluding that in New York State 95% of sex-offense arrestees between 1986 and 2006 were first-time sex offenders).

292 Conn. Dep't of Pub. Safety v. Doe 538 U.S. 1, 7 (2003) (upholding registration and notification law that posted information regarding "all sex offenders-currently dangerous or not").

293 For instance, before the Supreme Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), invalidating on constitutional grounds laws criminalizing adult consensual sodomy, several states required registration for such offenses when they occurred in the distant past. 539 U.S. 558 (2003). *See* Robert L. Jacobson, Note, *"Megan's Laws" Reinforcing Old Patterns of Anti-Gay Police Harassment*, 87 GEO. L.J. 2431 (1999) (chronicling how early generation registration laws swept up men convicted of consensual sodomy and solicitation, reflecting "anti-gay harassment by the police," and that retroactive coverage of later registration laws required that they register). Even after *Lawrence,* an earlier conviction for consensual homosexual sodomy has required registration in several states, requiring registrants to seek relief in federal court. *See, e.g.*, Doe v. Wasden, 558 F. Supp. 3d 892 (D. Idaho 2021).

to social science research regarding recidivism.[294]

CONCLUSION

Americans have long vigorously resisted government efforts to mandate carrying of personal identification documents. Even in the wake of September 11, 2001, when the nation was gripped by fear about another terrorist bombing by undetected agents, Americans resisted such a requirement,[295] in keeping with long-accepted wisdom that Americans have steadfastly resisted any government requirement to carry identification.[296] Historically, however, during the nation's history select subpopulations have in fact been required to carry identification, including free-born and emancipated African Americans until after the Civil War. This article examines the targeting of another subgroup: individuals on sex offender registries, a population subject to unique disdain in contemporary times.

Today, several states and the federal government require that registrants obtain, pay for, and carry documents declaring their registrant status. Often, the designation is very overt, identifying an individual as a "Sex Offender" or "SEXUAL PREDATOR." At other times, the branding is more subtle, perhaps using a letter—as in West Virginia, which displays a "U" that the back of the card denotes that the cardholder as a "Sexual Deviant." The documents not only must be shown upon demand by police, under threat of serious punishment for noncompliance, but also in myriad daily activities such as when depositing money at a bank, cashing a check at a store, or joining a gym.

To date, only a few courts have addressed constitutional challenges to the laws, focusing on whether document banding violates the First Amendment prohibition of government compelled private speech. While noteworthy, the decisions have left unaddressed other important constitutional concerns sounding in the First Amendment right of association, the Fourth Amendment protection against unreasonable searches and seizures, and the Fifth Amendment privilege against compelled self-incrimination. Equally important, the decisions have failed to address many important broader concerns of requiring individuals to

294 *See* R. Karl Hanson et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 PSYCHOL., PUB. POL'Y, & L. 48 (2017). For rebuttal of the recurring claim that acknowledged low recidivism rates of convicted sex offenders are misleading because they fail to record unreported sex crimes (the so-called "dark figure" of recidivism), *see* Ira M. Ellman, *When Animus Matters and Sex Crime Underreporting Does Not: The Problematic Sex Offender Registry*, 7 U. PA. J. OF L. & PUB. AFF. 1, 25-34 (2021) (discussing studies refuting the claim).

295 *Does America Need a National Identifier? Hearing Before the Subcomm. on Gov't Efficiency, Fin. Mgmt. & Intergovernmental Rels., of the H. Comm. Gov't Reform*, 107th Cong. (2001), available at 2001 WL 1469942 (F.D.C.H.).

296 *See, e.g.,* Russell Berman, *The Obvious Voting-Rights Solution That No Democrat Will Propose*, THE ATLANTIC(Aug. 30, 2021) ("In the American psyche. . . , a national ID card conjures images of an all-knowing government, its agents stopping people on the street and demanding to see their papers.").

self-identify publicly as convicted sex offenders and compelling them, under threat of punishment, to be complicit in their own surveillance and stigmatization.

Almost ninety years ago, Judge Frederick Crane wrote that "[p]ersons who have been convicted of crime and served the sentence imposed are not thereafter barred from society or intercourse with other human beings; they are not outcasts, nor to be treated as such."[297] The document branding laws discussed here, targeting individuals convicted of sexual offenses in particular, make clear that this hope remains unattained, raising the specter of the emergence of a broader governance strategy targeting anyone deemed worthy of stigmatization and monitoring, possibly for their lifetimes.

297 People v. Pieri, 269 N.Y. 315, 327 (N.Y. 1936).