RECENT CASES

FEDERAL HABEAS CORPUS — CUSTODY REQUIREMENT — FOURTH CIRCUIT DENIES FORUM TO SEX OFFENDER WITH ACTUAL INNOCENCE CLAIM. — *Wilson v. Flaherty*, 689 F.3d 332 (4th Cir. 2012).

Under 28 U.S.C. § 2254(a), habeas corpus petitioners challenging their state law convictions must be "in custody" for federal courts to have jurisdiction over their petitions.[1] Recently, in *Wilson v. Flaherty*,[2] the Fourth Circuit held that the requirements of Virginia's sex offender registration statute did not place a habeas petitioner with an actual innocence claim "in custody." By refusing jurisdiction over the petitioner's claim, the Fourth Circuit signaled that a petitioner must commit an additional offense in order to gain access to a forum in which he can demonstrate his innocence. This "untenable"[3] conclusion results from the intersection of the federal habeas statute, the Supreme Court's habeas jurisprudence, and the requirements of sex offender registration. In the absence of legislative change, the Supreme Court should consider employing a legal fiction to determine that the requirements of sex offender registries place individuals in custody pursuant to a future conviction for failure to register. Though this reading of the habeas statute would be unprecedented, it would provide a small class of petitioners with a path to exoneration without opening the courts to a flood of new claims.

On July 8, 1997, Navy sailor William Bosko returned home to his apartment in Norfolk, Virginia, to find his wife Michelle's seminaked body lying in a pool of blood.[4] Four young sailors — Danial Williams, Derek Tice, Eric Wilson, and Joseph Dick — were apprehended. No physical evidence linked any of the four to the crime.[5] Nonetheless, the four men confessed under police interrogation.[6] Williams and Dick eventually pled guilty to murder and rape, Tice was convicted of both charges, and Wilson was convicted of rape (but not of murder).[7] A fifth man, Omar Ballard, later confessed to the crimes after authorities confronted him with a letter he had written from prison in which he bragged of the murder. DNA taken from Michelle Bosko's vagina,

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[1] 28 U.S.C. § 2254(a) (2006).
[2] 689 F.3d 332 (4th Cir. 2012).
[3] *Id.* at 341 n.2 (Wynn, J., dissenting).
[4] Tice v. Johnson, 647 F.3d 87, 89 (4th Cir. 2011).
[5] *See id.* at 91; *see also* Brief of Appellant at 5–11, *Wilson*, 689 F.3d 332 (No. 11-6919).
[6] *Tice*, 647 F.3d at 93.
[7] *Id.*

from under her fingernails, and from a blanket used to cover the body matched Ballard's sample.[8] He claimed to have acted alone.[9]

Ballard's guilty plea — and the conviction of the lead investigator on unrelated corruption charges involving extortion and lying to the FBI[10] — cast significant doubt on the veracity of the confessions of the four sailors.[11] In light of this doubt, Virginia Governor Tim Kaine issued conditional pardons in 2009 to the three men still in prison; the pardon did not extend to Wilson, who had already fully served his sentence.[12] Since the conditional pardon did not remove the sex offender registration requirement,[13] the four men turned to the courts to free them from the restrictions imposed by sex offender registration.[14]

Eric Wilson filed for a writ of habeas corpus in the Eastern District of Virginia under 28 U.S.C. § 2254 in August of 2010, raising an actual innocence claim.[15] Wilson sought the nullification of his rape conviction, the expungement of records relating to his conviction, and release from his status as a violent sex offender.[16] In order to meet the jurisdictional requirement that the petitioner be "in custody pursuant to the judgment of a State court,"[17] Wilson argued that his status as a registered sex offender created restraints on his liberty sufficient to constitute "custody."[18] Citing the Supreme Court's determination that the "collateral consequences of [a] conviction are not themselves sufficient

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[8] *Id.* at 89.

[9] At one point, Ballard claimed that the other suspects had also been involved. He subsequently testified that the lead investigator had threatened to pursue the death penalty unless Ballard falsely implicated the other suspects. *See* Brief of Appellant, *supra* note 5, at 9.

[10] *Tice*, 647 F.3d at 96 n.2.

[11] Wilson has alleged that police used dubious tactics, including falsely telling suspects that physical evidence linked them to the scene and that they had failed lie-detector tests. *See* Brief of Appellant, *supra* note 5, at 7. At least one of the suspects was questioned after invoking his *Miranda* rights. *Tice*, 647 F.3d at 107.

[12] *Wilson*, 689 F.3d at 334.

[13] *See id.* Registration is mandated by state statute. VA. CODE ANN. § 9.1-902 (West 2010).

[14] For example, in 2011, the Fourth Circuit affirmed a grant of habeas relief to Derek Tice on an ineffective assistance of counsel claim. *Tice*, 647 F.3d at 111. The state subsequently dropped all charges and removed Tice from the sex offender registry. Brief of Appellant, *supra* note 5, at 4.

[15] Wilson v. Flaherty, No. 3:10CV536, 2011 WL 2471207 (E.D. Va. June 20, 2011). Wilson also alleged government suppression of exculpatory evidence and the corruption of the lead police investigator. *Id.* at *1. While an actual innocence claim has never provided a freestanding basis for habeas relief, *see* Herrera v. Collins, 506 U.S. 390, 404 (1993), the suppression of material exculpatory evidence clearly provides such a basis, *see* Banks v. Dretke, 540 U.S. 668, 691 (2004) (discussing Brady v. Maryland, 373 U.S. 83 (1963)).

[16] *Wilson*, 689 F.3d at 334.

[17] 28 U.S.C. § 2254(a) (2006).

[18] *Wilson*, 2011 WL 2471207, at *2. Wilson's particular complaints were that he was forced to register in person with local law enforcement on a yearly basis, that he had to carry a sex offender card at all times, that he was listed as a violent sex offender on the public national sex offender registry, that he was prohibited from working at certain job sites, that he could not leave the country, that he had to notify authorities any time he was away from home for more than twenty-four hours, and that he could not legally adopt his stepson. *Id.*

to render an individual 'in custody,'"[19] the district court noted that a consensus exists among federal courts that sex offender registration statutes impose only such collateral consequences and were therefore insufficient to render Wilson "in custody."[20]

The Fourth Circuit affirmed. Writing for the panel, Judge Niemeyer[21] agreed that the requirements of the sex offender statute were collateral consequences of Wilson's conviction and did not impose "sufficiently substantial restraints on [his] liberty" to impart federal habeas jurisdiction.[22] While noting that *Jones v. Cunningham*[23] and subsequent cases had expanded the definition of custody to cover situations in which the petitioner was not physically confined at the time of the habeas challenge,[24] Judge Niemeyer determined that the Supreme Court had "never held . . . that a habeas petitioner may be 'in custody' under a conviction when the sentence imposed for that conviction has *fully expired*,"[25] nor had any circuit court.[26] Since Wilson had been unconditionally released from prison in 2005, he was no longer restrained by the rape conviction.[27] Drawing on the opinions of sister circuits, Judge Niemeyer concluded that the restrictions placed on Wilson by the sex offender statute itself did not place Wilson in custody for the purposes of the habeas statute.[28] Judge Niemeyer acknowledged that Wilson had "mounted a serious constitutional challenge to his conviction"[29] and suggested that Wilson seek the state court remedy of *coram nobis*.[30]

Judge Davis concurred, fully joining Judge Niemeyer's opinion but writing separately to note that modern sex offender statutes were be-

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[19] *Id.* at *2 (quoting Maleng v. Cook, 490 U.S. 488, 492 (1989) (per curiam)).

[20] *Id.* at *3.

[21] Judge Niemeyer was joined by Judge Davis.

[22] *Wilson*, 689 F.3d at 333.

[23] 371 U.S. 236 (1963).

[24] In *Jones*, the Supreme Court determined that a paroled prisoner remains in custody. *See id.* at 241–43. The Court later extended this holding to petitioners who had been released on their own recognizance. *See* Hensley v. Mun. Court, 411 U.S. 345, 352–53 (1973).

[25] *Wilson*, 689 F.3d at 336 (alteration in original) (quoting Maleng v. Cook, 490 U.S. 488, 491 (1989) (per curiam)) (internal quotation mark omitted). The dissent disputed this characterization, arguing that the Ninth Circuit had allowed a habeas petitioner to attack an expired conviction as a sex offender. *Id.* at 341 n.2 (Wynn, J., dissenting) (citing Zichko v. Idaho, 247 F.3d 1015 (9th Cir. 2001)). The majority distinguished this case by noting that the petitioner in *Zichko* was in custody for failing to register as a sex offender. *Id.* at 337 n.2 (majority opinion).

[26] *Id.* at 337–38 (majority opinion).

[27] *Id.* at 336–37.

[28] *Id.* at 337–38.

[29] *Id.* at 333.

[30] *Id.* at 339. *Coram nobis* is a common law postconviction remedy intended to allow a court to correct its record in certain situations. The writ has been restricted by statute in Virginia and is not available for "newly-discovered evidence or newly-arising facts." Neighbors v. Commonwealth, 650 S.E.2d 514, 517 (Va. 2007) (quoting Dobie v. Commonwealth, 96 S.E.2d 747, 752 (Va. 1957)).

yond the contemplation of the drafters of the federal habeas corpus statutes.[31] Nevertheless, despite his belief that "morally and legally, [Wilson] is clearly entitled . . . to a judicial forum to test the accuracy of his claims," Judge Davis felt compelled by precedent to deny Wilson the opportunity to make his case on habeas review.[32] Judge Davis instead recommended a due process claim under 42 U.S.C. § 1983.[33]

Judge Wynn dissented. Noting that the question presented by Wilson's claim was an issue of first impression in the Fourth Circuit,[34] Judge Wynn argued that the "unjust result" reached by the Court was not dictated by precedent and that the majority had overstated the scope of the prohibition on attacking an expired conviction.[35] Judge Wynn asserted that the Supreme Court had recently contemplated actual innocence challenges to expired sentences. In *Lackawanna County District Attorney v. Coss*,[36] five Justices held that expired convictions could be attacked via a habeas petition only if the petitioner had been denied counsel in the challenged proceeding.[37] A portion of the opinion joined by three Justices, however, would have extended this exception to situations in which petitioners had a substantial claim of actual innocence.[38] Judge Wynn argued that the Supreme Court, as

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[31] *Wilson*, 689 F.3d at 339–40 (Davis, J., concurring).

[32] *Id.* at 340.

[33] *Id.* It is unclear whether Wilson could bring a § 1983 claim in the Fourth Circuit. In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that a prisoner "has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *Id.* at 489. Justice Souter, concurring in the judgment, declined to extend the prohibition to those "who discover (through no fault of their own) a constitutional violation after full expiration of their sentences." *Id.* at 500 (Souter, J., concurring in the judgment). Justice Souter reiterated this position in his concurrence in *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring in the judgment), and a majority of the Justices agreed, *see id.* at 25 n.8 (Stevens, J., dissenting). Despite periodic calls by commentators for the Court to adopt this position, *see, e.g.*, Note, *Defining the Reach of* Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868 (2008), the Court has never held that a § 1983 action can be brought by a former prisoner whose sentence still stands. The circuits are split on whether prisoners whose sentences have expired can bring § 1983 claims, *see* Wilson v. Johnson, 535 F.3d 262, 267 nn.6–7 (4th Cir. 2008) (collecting cases); the Fourth Circuit has held that they can, *id.* at 267–68. The availability of a § 1983 claim in Wilson's case is complicated, however, by the Fourth Circuit's refusal to allow a § 1983 claim where a former probationer could have brought a habeas claim while in custody. *See* Bishop v. Cnty. of Macon, 484 F. App'x 753, 755 (4th Cir. 2012).

[34] *Wilson*, 689 F.3d at 345 (Wynn, J., dissenting).

[35] *Id.* at 341, 344.

[36] 532 U.S. 394 (2001).

[37] *Id.* at 404.

[38] *Id.* at 405 (O'Connor, J., writing for three Justices). The dissenters did not wish to bar petitioners from bringing collateral challenges against expired convictions. *See* Daniels v. United States, 532 U.S. 374, 391 (2001) (Souter, J., dissenting) (arguing, in a dissent that was incorporated by the *Coss* dissent, *see Coss*, 532 U.S. at 408 (Souter, J., dissenting), that the bar on challenging expired convictions used to enhance subsequent sentences "is devoid of support in either statutory language or congressional intention"); *see also id.* at 392 (Breyer, J., dissenting). Were the issue

demonstrated in that opinion and others, "liberally construed" the jurisdictional custody requirement of § 2254.[39] He urged the majority to hold that the in-person registration requirement of the Virginia sex offender registration statute sufficed to "restrain [Wilson's] liberty to do those things which in this country free [people] are entitled to do"[40] and thus constituted custody. Judge Wynn concluded by arguing that equitable principles should overcome proceduralist concerns and that, in the absence of clear guidance from the Supreme Court, the panel had the "authority — indeed, the moral imperative — to grant Wilson the hearing that he seeks."[41]

While the Fourth Circuit reasonably relied on precedent developed by the Supreme Court and the other circuits, a full consideration of that precedent reveals a potential absurdity inherent in the interaction between the innocence exception proposed in *Coss* and certain types of habeas challenges. Innovative solutions may therefore be required in order to avoid perverse results. In the absence of congressional action, the Supreme Court should consider employing a legal fiction to ensure that individuals with actual innocence claims do not have to commit an additional crime to gain access to a habeas forum. By determining that the requirements of sex offender registration operate as probationary terms of a future conviction for failure to register, the Supreme Court could allow this small class of petitioners the opportunity to vindicate their rights.

Though the *Wilson* majority accurately characterized both the Supreme Court's decision in *Coss* and relevant circuit court precedents,[42] it did not fully consider the implications of applying that jurisprudence to situations in which a petitioner challenged a conviction that was a necessary predicate offense to a subsequent conviction.[43] According to

before the Court in *Coss*, therefore, it is likely that seven Justices (Justice O'Connor and the two Justices that joined her, plus the four dissenters) would have allowed such a challenge.

[39] *Wilson*, 689 F.3d at 344 (Wynn, J., dissenting) (quoting Maleng v. Cook, 490 U.S. 488, 492 (1989) (per curiam)).

[40] *See id.* at 348 (alterations in original) (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963)) (internal quotation mark omitted).

[41] *Id.* at 349.

[42] Like the other circuits to consider the *Coss* innocence exception, *see, e.g.*, Abdus-Samad v. Bell, 420 F.3d 614, 630 (6th Cir. 2005); Durham v. Bruce, 117 F. App'x 37, 39 (10th Cir. 2004), the Fourth Circuit has assumed that the *Coss* innocence exception exists, *see* Lyons v. Lee, 316 F.3d 528, 533 (4th Cir. 2003), and the *Wilson* majority did not challenge that assumption, *see Wilson*, 689 F.3d at 337 n.1. As noted by the *Wilson* majority, however, the *Coss* Court did not break new jurisdictional ground when it determined that expired sentences could not be challenged (or in creating exceptions to that rule). *Id.* Following *Maleng*, 490 U.S. 488, the *Coss* Court construed Coss's petition as challenging his current sentence as enhanced by his prior conviction and established jurisdiction based on that determination. *Coss*, 532 U.S. at 401–02. At no point did the Court consider a relaxation of the jurisdictional requirements of § 2254 or the allowance of a habeas challenge directed solely at the expired sentence.

[43] In those situations, the direct challenge would not be brought against a sentence enhanced by a prior conviction, but instead against a sentence *made possible* by an earlier conviction.

the *Wilson* majority, habeas jurisdiction would be appropriate in such a case only if the petitioner was in custody for the subsequent offense at the time of his challenge.[44] In recognizing that Wilson has a serious constitutional claim, the majority acknowledged that he may be able to free himself from the requirements of sex offender registration — but only if he first is arrested for refusing to comply with those requirements.[45] The dissent rightly described this result as "untenable."[46]

Ideally, Congress would pass legislation allowing individuals with actual innocence claims access to the courts in order to free themselves of the requirements of sex offender registration. In drafting the Antiterrorism and Effective Death Penalty Act of 1996[47] (AEDPA), which made significant changes to the federal habeas statute, Congress did not fully specify the extent to which an actual innocence claim should impact a habeas petition.[48] Revisiting AEDPA would provide Congress with the opportunity to provide clarity and to design a system that adequately preserves the finality of state court judgments while avoiding the potential for miscarriages of justice.[49] In practical terms, however, it may be difficult to muster political support for legislation to ensure additional protections for people convicted of sex offenses.[50] If there is to be a remedy, it most likely must be judicial; if Congress does not act, the Supreme Court should.

The Supreme Court could employ a legal fiction to give sex offenders with expired convictions and actual innocence claims their day in

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[44] *See Wilson*, 689 F.3d at 337 n.2. The *Wilson* majority made this observation in disputing the dissent's characterization of *Zichko v. Idaho*, 247 F.3d 1015 (9th Cir. 2001), as a case in which a petitioner was considered to be "in custody" under a fully expired conviction. The petitioner in *Zichko* was arrested and incarcerated for failing to register as a sex offender, and he brought a habeas challenge against the underlying conviction. *Id.* at 1017. The Ninth Circuit determined that it had jurisdiction to consider the challenge but did not determine whether a *Coss* exception applied because Zichko's claim was procedurally barred on other grounds. *Id.* at 1020.

[45] While the majority and concurring opinions suggest alternative forums in which Wilson could attempt to vindicate his constitutional rights, it is unclear whether these forums are actually available to Wilson. *See supra* notes 30, 33.

[46] *Wilson*, 689 F.3d at 341 n.2 (Wynn, J., dissenting).

[47] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

[48] *See, e.g.*, Perkins v. McQuiggin, 670 F.3d 665, 671–72 (6th Cir. 2012) (noting that congressional silence on whether an actual innocence claim equitably tolled the statute of limitations on a habeas petition did not imply that Congress did not intend for the statute to be tolled), *cert. granted*, 133 S. Ct. 527 (2012).

[49] It should be noted that Congress might intend for an individual with an actual innocence claim *not* to be able to access a habeas court; if this is the case, then legislative action could foreclose judicial attempts to enable such access.

[50] While the suggested remedy would allow only individuals with strong actual innocence claims to gain access to habeas review, there is always a significant political risk associated with acting leniently toward a convicted individual. *See, e.g.*, Ari Shapiro, *Tough Turkey: People Have a Harder Time Getting Pardons Under Obama*, NPR (Nov. 20, 2012, 4:27 PM), http://www.npr.org/blogs/itsallpolitics/2012/11/20/165587441/tough-turkey-people-have-a-harder-time-getting-pardons-under-obama.

court. Legal fictions have long been utilized by courts to "extend the law to address unforeseen, and perhaps unintended, situations,"[51] and the Supreme Court has historically acknowledged that "[t]he proper use of legal fiction is to prevent injustice."[52] While the Supreme Court has expressly declined to grant "permission to introduce legal fictions into federal habeas corpus,"[53] the conundrum created by the *Coss* exceptions requires the creation of a legal fiction, the abandonment of the collateral consequences doctrine (and consequent opening of the habeas floodgates),[54] or a judicial command that individuals with certain claims commit crimes in order to gain a forum for those claims. Given those options, the legal fiction might be appropriate to prevent an unjust result.

The legal fiction would function as follows. The Court would hold that the sex offender requirements act as probationary terms of a *future* conviction for failure to register, supporting this decision by noting the essentially automatic nature of a conviction for failure to register.[55] The habeas challenge would therefore be construed as a challenge to a probationary term pursuant to that conviction. While this proposal would bring any convicted sex offender with an expired sentence within the jurisdiction of a federal habeas court, the *Coss* restriction on challenging expired sentences would allow for summary dismissal of any petition that did not either demonstrate a failure to appoint counsel or present a compelling showing of actual innocence.[56]

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[51] Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1, 10 (2010).

[52] Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 208 (1905). A prominent example of a legal fiction employed by the Supreme Court is the *Young* doctrine, which circumvents sovereign immunity and allows private suits against state actors by stripping state officials of their "official" status for the purposes of federal subject matter jurisdiction. *See generally* 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524.3 (3d ed. 2008).

[53] Fay v. Noia, 372 U.S. 391, 439 (1963).

[54] Commentators have suggested acknowledging that the requirements of sex offender registries constitute custody pursuant to the original rape conviction. *See, e.g.*, Kerri L. Arnone, Note, *Megan's Law and Habeas Corpus Review: Lifetime Duty with No Possibility of Relief?*, 42 ARIZ. L. REV. 157, 158–59 (2000). While such an acknowledgment would be the simplest solution, it would, as noted by the *Wilson* majority, allow any sex offender to challenge his conviction at any time and for any reason. *Wilson*, 689 F.3d at 337. If the registry requirements constituted custody under the original conviction, then the original conviction would not be expired, and the limitations imposed by *Coss* would not apply. This solution also has already been rejected by every circuit to consider the issue. *See id.* at 338 (collecting cases).

[55] For example, in Virginia an affidavit from the state police verifying that an individual has failed to register is sufficient for conviction. VA. CODE ANN. § 9.1-907 (West 2010). Failure to register is not a specific-intent crime; if the defendant knows he had a duty to register and fails to do so, he is guilty. *See* Marshall v. Commonwealth, 708 S.E.2d 253, 255 (Va. Ct. App. 2011) (upholding conviction of a convicted sex offender who notified police that his registration would be late). Moreover, the crime requires no action, only inaction.

[56] Some commentators have suggested that the necessity of violating the law by refusing to register functions as a filtering mechanism to ensure that only those individuals with meritorious claims end up before a habeas court. *See* Garrett Ordower, Comment, *Gone, But Not Forgotten?*

Such a solution could have its share of problems. If sex offenders with expired sentences were allowed to challenge their convictions based on a fictional conviction for failure to register, other classes of convicts might argue that they should similarly be allowed to challenge their expired convictions. In many states, felony convictions carry negative collateral consequences that last far beyond the expiration of the sentence,[57] and many types of felony convictions serve as necessary predicates for other crimes.[58] The Court could distinguish these cases by noting that failure to register requires no action on the part of the petitioner; every sex offender is one missed deadline away from returning to a custodial sentence.[59] Employing a legal fiction that attributes lack of action to a class of petitioners might be less objectionable than employing a legal fiction that attributes a particular action to such a class. Moreover, convicted sex offenders face a number of restraints that are unique to their status.[60] The automatic and passive nature of a conviction for failure to register and the substantial burdens placed on sex offenders could give the Court sufficient justification for limiting the scope of the legal fiction here proposed.

Rather than requiring individuals to break the law in order to satisfy the federal habeas statute, the Supreme Court should resolve the tension between the custody requirements of § 2254 and the *Coss* actual innocence exception as applied to necessary predicate offenses. The Court's habeas jurisprudence has created a situation in which an individual's only chance at exoneration may be to commit a crime; in the absence of legislative action, only the Supreme Court can authoritatively resolve this dilemma. The use of a legal fiction such as the one proposed would meet the demands of justice without significantly increasing the burden on the courts.

Habeas Corpus for Necessary Predicate Offenses, 76 U. CHI. L. REV. 1837, 1872–73 (2009). Yet courts already must engage in an inquiry into the adequacy of actual innocence claims in certain circumstances, such as when determining whether to allow a successive habeas petition. *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (2006). It should be within the capacity of the courts to determine which claims are spurious without resorting to a filtering mechanism that requires petitioners to commit felonies.

[57] *See* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–39 (2006).

[58] *See, e.g.*, VA. CODE ANN. § 18.2-308.2 (West 2010) (making it unlawful for felons to possess or transport firearms); WIS. STAT. ANN. § 941.29 (West 2005) (same); IND. CODE ANN. § 35-47-4-5 (West 2012) (same).

[59] *See, e.g.*, *Marshall*, 708 S.E.2d at 255–57 (noting that failure to register, once established, allows no defense).

[60] *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1078–81 (2012) (collecting examples of unduly harsh registration statutes); *see also The Supreme Court, 2002 Term — Leading Cases*, 117 HARV. L. REV. 226, 327–28 (2003) (noting that the sex offender registration laws are restrictive and overbroad).