MEGAN'S LAW AND HABEAS CORPUS REVIEW: LIFETIME DUTY WITH NO POSSIBILITY OF RELIEF?

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I. INTRODUCTION

The writ of habeas corpus is a federal remedy available to federal and state prisoners who challenge the fact or duration of their confinement and seek release.[1] Habeas corpus relief cures any confinement that is contrary to the Constitution or fundamental law as long as certain requirements are met.[2] First, and most important for purposes of this Note, the petitioner must be in custody.[3] The courts have construed "custody" liberally to include not only actual physical custody but restraints on personal liberty as well.[4] Second, there is a one year limitation on filing.[5] Third, the grounds for the requested relief must be that the confinement violates the Constitution, laws, or treaties of the United States.[6] A violation of federal or state law is not proper grounds for granting the writ unless it amounts to a constitutional violation.[7] Fourth, a state petitioner can only be granted federal habeas corpus relief if he first exhausts all available state remedies.[8]

Starting in the mid-1990s, state legislatures began passing laws designed to protect children from sexually violent predators.[9] These laws, commonly known as Megan's Laws, require sex offenders to register with local law enforcement

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1. *See* David P. Saybolt et al., *Habeas Relief for State Prisoners*, 85 GEO. L.J. 1507, 1507 (1997).
2. *See id.* at 1508.
3. *See id.* at 1509.
4. *See id.*
5. *See id.* at 1510–11.
6. *See id.* at 1511.
7. *See id.* at 1511–12.
8. *See id.* at 1519.
9. *See* W. Paul Koenig, *Does Congress Abuse Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with "Megan's Law"?*, 88 J. CRIM. L. & CRIMINOLOGY 721, 724 (1998).

agencies upon release from confinement.[10] They also provide guidelines for public notification of the offenders' whereabouts and personal information.[11] In 1998, a sex offender in Washington sought habeas corpus review of his conviction after he had been released from confinement but was still required to register under Washington's version of Megan's Law.[12] The Ninth Circuit refused to grant the writ, holding that sex offenders required to register under Megan's Law do not satisfy the custody requirement of the habeas corpus statute.[13]

In contrast to the Ninth Circuit's decision, examination of the habeas corpus statute's history and the United States Supreme Court's interpretation of the statute indicates that sex offenders under Megan's Law satisfy the writ's custody requirement. Analysis of the statute's history reveals that, even in its first statutory form,[14] habeas corpus was not limited to physical imprisonment but was applied broadly, encompassing cases where there was something less than actual physical restraint.[15] Since Megan's Law registrants are not physically imprisoned, this broad application supports the notion that these individuals fall within the purview of the statute.

In addition, Megan's Law registrants satisfy the standards enunciated in the Supreme Court's custody decisions. First, the law imposes a restraint on liberty that is not shared by the public generally by creating a legal disability that limits the registrants' movements.[16] Second, Megan's Law's requirements are unlike collateral legal consequences (such as losing the right to vote or serving as a juror) which no longer satisfy the custody requirement.[17] Rather, the requirements are

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10. *See, e.g.*, CAL. PENAL CODE § 290 (West Supp. 1999) (requiring sex offenders who reside in or are located in California to register with the chief of police or the county sheriff); WASH REV. CODE ANN. § 9A.44.130(1) (West Supp. 2000) (requiring sex offenders who reside in, are employed in, or are a student in Washington to register with the county sheriff and also with the official designated agency at the time of release from custody).

11. *See, e.g.*, ARIZ. REV. STAT. § 13-3826(E) (1998) (stating that community notification guidelines committee shall provide levels of notification based on the risk the sex offender poses to the community); FLA. STAT. ANN. 775.21(4)(a)(1) (West Supp. 2000) (stating that the sheriff or chief of police shall notify members of the community and the public of the sexual predator's presence in a manner the sheriff or chief of police deems appropriate).

12. *See* Williamson v. Gregoire, 151 F.3d 1180, 1181–82 (9th Cir. 1998).

13. *See id.* at 1184–85.

14. The habeas corpus statute was first codified in England in 1679. *See* Habeas Corpus Act, 1679, 31 Car. 2, ch. 2, § 1 (Eng.).

15. *See infra* Part III.B.

16. *See* Jones v. Cunningham, 371 U.S. 236, 242 (1963) (discussing parole order).

17. The Supreme Court acknowledged that collateral legal consequences satisfy the custody requirement as early as 1943 and continued to do so until the Rehnquist Court addressed the doctrine. *See, e.g.*, Carafas v. LaVallee, 391 U.S. 234 (1968); United States v. Morgan, 346 U.S. 502 (1954); St. Pierre v. United States, 319 U.S. 41 (1943). Departing from precedent, the Rehnquist Court found that collateral legal consequences did not satisfy the custody requirement. *See* Maleng v. Cook, 490 U.S. 488, 492 (1989).

more like probation, which the Court has found to satisfy the custody requirement.[18] For these reasons, and in light of the habeas corpus statute's historical broad application, the Ninth Circuit's 1998 *Williamson v. Gregoire*[19] decision is erroneous.

Despite the Ninth Circuit's error, the Supreme Court has denied certiorari on this issue.[20] However, this issue is not settled. It has come up again in the Ninth Circuit [21] and will certainly arise in other circuits since every state has this type of statute.[22] Therefore, the Supreme Court eventually will have to address the custody requirement in relation to Megan's Law as more registrants appeal their conviction and the circuits decide the breadth of the custody requirement.

In an effort to persuade other circuits not to follow the Ninth Circuit's reasoning, this Note proceeds as follows. First, it briefly discusses Megan's Law and its requirements. Megan's Law is a heavily covered topic and it is beyond the scope of this Note to discuss the law itself in any depth. Second, it traces the legislative history of the habeas corpus statute's custody requirement. Changes in the statute's language indicate the legislative intent to broaden the writ's application. Third, this Note traces the Supreme Court's interpretation of the habeas corpus custody requirement to support the contention that Megan's Law registrants satisfy the requirement. This Note focuses on the Warren Court and later Courts because they directly addressed the custody requirement and enunciated standards for determining when the requirement has been satisfied. However, it is worth noting that earlier Supreme Court opinions extended custody beyond the confines of the English common law.[23] Last, this Note applies the

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18. *See, e.g.*, Mabry v. Johnson, 467 U.S. 504 (1984); *Jones*, 371 U.S. at 236; Anderson v. Corall, 263 U.S. 193 (1923).

19. 151 F.3d 1180 (9th Cir. 1998).

20. *See* Williamson v. Gregoire, 119 S. Ct. 824 (1999), *denying cert. to* 151 F.3d 1180 (9th Cir. 1998).

21. The Ninth Circuit has addressed this issue since the *Williamson* decision and has followed its holding as controlling precedent. *See* McNab v. Kok, 170 F.3d 1246, 1246 (9th Cir. 1999) (citing *Williamson* and stating that Oregon's registration statute does not place any greater restraint on personal liberty than does Washington's or California's registration statutes; therefore, Oregon's law does not place petitioner "in custody"); Henry v. Lungren, 164 F.3d 1240, 1242 (9th Cir. 1999) (finding that Oregon's registration statute is similar enough to Washington's statute that *Williamson*'s reasoning is controlling; disagreeing with petitioner's claim that lifetime registration requirement is tantamount to perpetual "custody"); Cozzetti v. State of Alaska, No. 98-35272, 1999 U.S. App. LEXIS 1318, at *2 (9th Cir. Jan. 27, 1999) (citing *Williamson* and stating that petitioner was not "in custody" because his state sentence expired before he filed his petition).

22. *See* Koenig, *supra* note 9, at 724–25 (stating that all fifty states have statutes requiring sex offender registration).

23. The English common law restricted habeas corpus jurisdiction to physically imprisoned petitioners. *See* Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1080 (1995). However, as early as 1888, the Supreme Court applied the writ to petitioners who were not imprisoned. *See* United States v. Jung Ah Lung, 124 U.S. 621, 622–23 (1888) (stating that alien detained on ship pursuant to customs authorities' orders can be granted habeas corpus

Court's definition of custody to the requirements of Megan's Law and concludes that sex offenders under such statutes suffer a sufficient restraint on liberty to satisfy the writ's custody requirement.

II. MEGAN'S LAW

Megan's Law[24] requires convicted sex offenders to register with law enforcement when they are released into the community.[25] This registration is designed to facilitate law enforcement by making such offenders readily available for police surveillance.[26] It is also intended to act as a deterrent in that registered sex offenders will be "less likely to re-offend if they know the police already have their information on file."[27] All fifty states have enacted statutes that require released sex offenders to register with local law enforcement agencies when they enter the jurisdiction.[28] However, these statutes differ in their definition of sex offenders,[29] the type of information the offender must disclose when registering,[30] the extent that this information is disseminated to the public,[31] and the penalty for violating the statute.[32] Most states also require the offender to notify law

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review). *See also infra* Part IV.A.

24. Megan's Law was named after Megan Kanka who was violently raped and murdered by her neighbor, Jesse Timmendequas, who had been twice convicted of committing other child sex offenses. *See* Kelly McMurry, *Delaware Labels Drivers' Licenses of Sex Offenders*, TRIAL, Jul. 1998, at 116.

25. *See, e.g.*, CAL. PENAL CODE § 290 (West Supp. 1999); FLA. STAT. ANN. § 775.21 (West Supp. 2000); N.J. STAT. ANN. § 2C:7-2 (West Supp. 1999); WASH. REV. CODE ANN. § 9A.44.130 (West Supp. 2000).

26. *See* Licia A. Esposito, Annotation, *State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities*, 36 A.L.R.5th 161, § 2[a] (1996).

27. *See* Bernard Menendez, *The Constitutional Implications of Megan's Laws: Permissible Regulations or Unconstitutional Intrusions?*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 249, 252 (1998).

28. *See* Koenig, *supra* note 9, at 724–25.

29. For example, Oregon's sex offender definition includes anyone convicted, adjudicated (for juveniles), or found guilty (except for insanity) for crimes such as rape, sodomy, sexual abuse, incest, child pornography, and compelling or promoting prostitution. *See* OR. REV. STAT. § 181.594(2)–(3) (1997). California's statute, however, sweeps broader. It covers those convicted for commission, attempt, criminal solicitation, and conspiracy to commit such crimes rape, child molestation, indecent liberties (e.g., a physician having sex with a patient during treatment), sexually violating human remains, and voyeurism. *See* CAL. PENAL CODE § 9.94A.030(36) (West Supp. 1999).

30. Generally, the personal information consists of the sex offender's "name, home and work...addresses, motor vehicle information, physical description, and photograph." *See* Menendez, *supra* note 27, at 250.

31. *See id.* at 253 (explaining that some statutes allow for public dissemination and some statutes do not).

32. *See, e.g.*, ARIZ. REV. STAT. §§ 13-3824, -702 (1998) (defining noncompliance as a class 4 felony—imprisonment not exceeding three years); FLA. STAT. ANN. §§ 943.0435(9), 775.082(3)(d) (West Supp. 2000) (defining noncompliance as a felony of the third degree—imprisonment not exceeding five years); WASH. REV. CODE

enforcement of any address changes and to verify his address with law enforcement periodically.[33]

In addition to the registration requirement, Megan's Law statutes often include public notification requirements, which vary in regard to the scope of persons to be notified.[34] Public notification is intended to protect communities by making them aware of the sex offender's presence in the area.[35] In many states, the extent of public notification is determined by the sex offender's risk of recidivism.[36] This means that an offender who is considered likely to re-offend will have his personal information disseminated to his neighbors and anyone else who is likely to encounter him.[37] The method used to reveal this information also varies.[38]

ANN. §§ 9A.44.130(10), .20.021(1)(c), .20.021(2) (West Supp. 2000) (defining noncompliance as a class C felony—confinement not exceeding five years, fine not exceeding $10,000, or both confinement and fine—if conviction was for a felony under Washington law; if conviction was not for a felony, noncompliance is a gross misdemeanor—confinement not exceeding one year, fine not exceeding $5,000, or both confinement and fine).

33. *See, e.g.*, CAL. PENAL CODE § 290(a)(1)(D)–(E) (West Supp. 1999) (requiring annual registration unless adjudicated a sexually violent predator, then every 90 days); N.J. STAT. § 2C:7-2(e) (West Supp. 1999) (requiring verification every 90 days).

34. For example, California authorizes a peace officer to provide information on the sex offender to public and private educational institutions, day care establishments, organizations that serve individuals likely to be victimized by the offender, and other community members at risk, if he or she reasonably suspects the sex offender poses a risk to a child or other person. *See* CAL. PENAL CODE § 290(m)(1) (West Supp. 1999).

35. *See* Esposito, *supra* note 26, at § 3[a].

36. *See, e.g.*, N.J. STAT. § 2C:7-8(c) (West 1995) (stating that if risk of re-offense is low, law enforcement agencies likely to encounter the person must be notified; if the risk is moderate, organization in the community such as schools, religious, and youth organizations must be notified along with law enforcement agencies; if the risk is high, both the previously mentioned groups must be notified as well as members of the public likely to encounter the person). *See id.* The particular level of recidivism is determined by examining relevant factors which are listed in the statute. *See id.* § 2C:7-8(b).

37. *See, e.g.*, N.J. STAT. § 2C:7-8(b). Public notification statutes have been repeatedly upheld against constitutional challenges claiming they violate the right to privacy. *See, e.g.*, People v. Hove, 9 Cal. Rptr. 2d 295 (Ct. App. 1992); People v. Mills, 146 Cal. Rptr. 411 (Ct. App. 1978); Doe v. Poritz, 662 A.2d 367 (N.J. 1995). Also, I use the pronoun "him" throughout this Note to refer to sex offenders simply because most sex offenders are male. *See* Mark J. Neach, *California Is on the "Cutting Edge": Hormonal Therapy (a.k.a. "Chemical Castration") Is Mandated for Two-Time Child Molesters*, 14 T.M. COOLEY L. REV. 351, 353 n.22 (1997).

38. For instance, Washington requires police to post flyers in the offender's neighborhood for "high risk" offenders. *See* Menendez, *supra* note 27, at 253–54. Louisiana requires the sex offenders themselves to notify all residents within a specified geographical area of their name, address, and criminal record. *See id.* Additionally, offenders are required to publish a notice in a local newspaper giving the aforementioned information. *See id.*

III. HISTORY OF THE HABEAS CORPUS STATUTE

A. English Common Law and the Judiciary Act of 1789

Megan's Law registrants do not fall within the intent of the English common law where the habeas corpus writ originated in the 13th century.[39] At its inception, the writ required physical custody for the courts to have jurisdiction.[40] Its purpose was limited to freeing those who were imprisoned without sufficient legal cause.[41] Since the writ was originally used to order sheriffs to bring prisoners before a court, the custody requirement necessarily meant that the petitioner had to be physically confined.[42] Clearly, Megan's Law's requirements do not satisfy the custody requirement under the English common law because the registrants are not physically imprisoned.

Similarly, Megan's Law does not fall within the intent of the first codification of habeas corpus in the United States.[43] Although the Judiciary Act of 1789 no longer governs, it is mentioned to demonstrate the intent of later legislatures that used more inclusive language, thereby broadening the writ's application.[44] The 1789 Act specifically stated that it only applied to prisoners in jail.[45] The intended interpretation of the custody requirement is clearly spelled out in the statute. Therefore, registrants under Megan's Law do not satisfy the 1789 Act's custody requirement since they are not in prison.

B. English Habeas Corpus Act of 1679

In contrast to the language used in the English common law and the Judiciary Act of 1789, the language in the English Habeas Corpus Act of 1679[46] and the Judiciary Act of 1867[47] indicate the legislative intent to broaden the scope

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39. *See* Forsythe, *supra* note 23, at 1080.

40. *See id.*

41. *See id.* at 1089. Habeas corpus required that "detention be justified by law, rather than mere personal whim." *Id.* "[B]y requiring 'sufficient cause' for detention, [it] addressed the factual basis for the legal violation" and "was not directly related to guilt determination." *Id.*

42. *See id.* at 1090.

43. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789) ("[W]rits of habeas corpus shall in no case extend to prisoners in gaol [jail], unless where they are in custody, under or by colour of the authority the United States, or are committed for trial before some court of the same, or are necessarily to be brought into court to testify.").

44. *See infra* Part III.B–C.

45. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789).

46. *See* Habeas Corpus Act, 1679, 31 Car. 2, ch. 2, § 1 (Eng.) ("[W]hensoever any person or persons shall bring any habeas corpus directed unto any sheriffe or sheriffes gaoler minister or other person whatsoever for any person in his or their custody...[he shall] then certifie the true causes of [the person's] detainer or imprisonment.").

47. *See* Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867) ("[T]he several courts of the United States...shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.").

of habeas corpus review. For instance, both statutes used the word "person" rather than "prisoner" when referring to the petitioner.[48] This change in language permits broader interpretation as to who qualifies as in custody. Consequently, registrants under Megan's Law satisfy the custody requirement as stated in these statutes because the statutes no longer require physical imprisonment.

The notion that Megan's Law registrants satisfy the custody requirement in the English Habeas Corpus Act of 1679 is supported by the purpose of the statute which was to preserve personal liberty.[49] This liberty includes the power to move where and when one wants without imprisonment or restraint imposed without due course of law.[50] Although the statute was primarily used to release people held in prison, the English also recognized that the statute could be used when there was restraint that did not amount to physical confinement.[51] For instance, an English court granted a writ in 1722 to decide whether a woman's guardians were keeping her from her alleged husband.[52] In determining that the petitioner satisfied the custody requirement, the court was persuaded by the woman's showing that she had been denied the freedom to go where she wanted.[53] The English court also used the writ to free a girl who had been assigned by her master to another man for impermissible purposes.[54] In addition, the English court used the writ to compel a mother to return her children to their father, even though the children were "not under imprisonment, restraint, or duress of any kind."[55] These cases indicate that the custody requirement, even in its first statutory form, was not limited to physical imprisonment. Rather, custody was interpreted broadly, encompassing cases where there was something less than actual physical restraint.

Considered in light of the statute's broad interpretation, the Megan's Law registration requirement falls within the 1679 Act's purpose and intent. A custody analysis under the 1679 Act would inquire whether a registrant is at liberty to go where he pleases. Although a Megan's Law registrant technically can move where he wants, his movement is accompanied by requirements not faced by a person who is not subject to the statute. He must notify the proper authorities and submit personal information so the authorities can determine the necessary scope of public notification.[56] Since the factors used to determine the extent of public notification vary depending on the jurisdiction,[57] a registrant under Megan's Law

48. *See* statutes cited *supra* notes 45–47.
49. *See* Forsythe, *supra* note 23, at 1099.
50. *See id.*
51. *See* Jones v. Cunningham, 371 U.S. 236, 238 (1963).
52. *See* Rex v. Clarkson, 93 Eng. Rep. 625 (K.B. 1722), *cited in Jones*, 371 U.S. at 239.
53. *See id.*
54. *See* Rex v. Delaval, 97 Eng. Rep. 913 (K.B. 1763), *cited in Jones*, 371 U.S. at 239.
55. *See* Lyons v. Blenkin, 37 Eng. Rep. 842, 848 (1821), *cited in Jones*, 371 U.S. at 239.
56. *See* Menendez, *supra* note 27, at 252–53.
57. *See* Koenig, *supra* note 9, at 725.

could move from a jurisdiction that has minimal notification to one that notifies anyone with whom he may have contact. In this way, the law restrains his decision to move by obligating him to re-register with the local authority which may result in public censure or possible physical danger when the local authority notifies the new community of his presence.[58] If his conviction was obtained unlawfully, this restraint is impermissible and warrants habeas corpus review under the stated intention of the English Act of 1679.

C. Judiciary Act of 1867

Similarly, in the United States, the Judiciary Act of 1867[59] broadened habeas corpus jurisdiction and, consequently, registrants under Megan's Law fall within its habeas corpus review. The 1867 Act expanded the custody requirement by applying the writ to "all cases where *any person may be restrained* of his or her liberty."[60] In contrast, the 1789 Act applied only to "prisoners in [jail]."[61] This change in language broadened habeas corpus review by permitting the writ to be used in situations where the petitioner was not physically imprisoned. Rather than the clear custody requirement of imprisonment, the 1867 Act compelled the courts to decide the meaning of "restrain[t]" within the intent of the statute. For approximately eighty years,[62] the Supreme Court construed the 1867 custody requirement to include petitioners who were not physically confined in prison.[63] For instance, the Court granted the writ to aliens seeking entry into the United States.[64] The Court also found the custody requirement satisfied when a person was on parole, stating that parole is in legal effect imprisonment because the parolee remains in the legal custody and under the control of the warden until the term ends.[65]

Applying the language and intent of the 1867 Act and the Court's interpretation of the custody requirement, Megan's Law registrants are eligible for

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58. Chrisandrea L. Turner, *Convicted Sex Offenders v. Our Children: Whose Interests Deserve the Greater Protection?*, 86 KY. L.J. 477, 497–99 (1997–98) (discussing incidents of vengeance by the public on behalf of the victim following community notification).

59. Judiciary Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 (1867).

60. *See id.* (emphasis added).

61. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (1789). The word "gaol" actually appears in the statute but "jail" was substituted here for easier comprehension.

62. The habeas corpus statute was revised again in 1948, 81 years after the 1867 Act. *See infra* Part III.D.

63. *See infra* notes 80–81.

64. *See* United States v. Jung Ah Lung, 124 U.S. 621, 626–29 (1888) (holding that petitioner met the in-custody requirement because petitioner was in the custody of the master of the ship on which he arrived, pursuant to the custom authorities' orders who, in turn, acted under the Chinese Restriction Act).

65. *See* Anderson v. Corall, 263 U.S. 193, 196 (1923). State courts during this period used the writ to decide parents' custody rights over their children following divorce. *See, e.g.*, Boardman v. Boardman, 62 A.2d 521 (Conn. 1948); Barlow v. Barlow, 81 S.E. 433 (Ga. 1914); *Ex parte* Swall, 134 P. 96 (Nev. 1913).

habeas corpus review. As mentioned earlier, a registrant is "restrained of his or her liberty" by the obligation to re-register upon changing his residence and the accompanying possibility of censure following public notification.[66] Therefore, the 1867 Act's custody requirement, couched in terms of restraint rather than imprisonment, qualifies Megan's Law registrants for habeas corpus review.

D. Sections 2241 and 2254

The 1948 revisions of the habeas corpus statute indicate a possible restriction of its application, but registrants under Megan's Law still fall within its purview. Section 2241, like its statutory predecessors, authorizes the federal courts to grant the writ of habeas corpus.[67] Congress revised the statute and reinstated the word "prisoner" for "person."[68] There are no House or Senate notes on the reasoning behind these changes. However, it is possible that Congress wanted to restrict the broad language it enacted in 1867. Interestingly, the 1948 version of section 2255, which lists the remedies available to petitioners challenging a federal sentence under the habeas corpus statute, also referred to a "prisoner in custody."[69] In contrast, the 1948 version of section 2254, which requires exhaustion of state remedies before qualifying for federal habeas corpus review, referred to "a person in custody."[70] This inconsistency indicates that Congress either may have intended the words to be used interchangeably or did not realize the difference it would make in statutory interpretation. The 1948 versions also replaced "restrained" with "in custody."[71] Despite these changes in statutory language, the Supreme Court continued to grant habeas corpus review to those who were not prisoners, such as aliens seeking entry into the country.[72] This indicates that the Court did not interpret "prisoner" to restrict the custody requirement to physically confined prisoners.

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66. *See supra* note 58 and accompanying text.

67. Writ of Habeas Corpus, ch. 153, § 2241(a), 62 Stat. 964 (1948) ("The writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody....")

68. *See id.*

69. Writ of Habeas Corpus, ch. 153, § 2255, 62 Stat. 967 (1948) (addressing federal custody; remedies on motion attacking sentence).

70. Writ of Habeas Corpus, ch. 153, § 2254, 62 Stat. 967 (1948) (requiring a petitioner to exhaust state remedies before being granted federal review).

71. *See id. See also* Writ of Habeas Corpus, ch. 153, § 2241, 62 Stat. 964 (1948); Writ of Habeas Corpus, ch. 153, § 2255, 62 Stat. 967 (1948).

72. *See, e.g.*, Brownell v. We Shung, 352 U.S. 180, 183 (1956) (stating that "excluded aliens may test the order of their exclusion by habeas corpus"); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953) (addressing situation where alien on Ellis Island was unable to enter this country or any other country; permitting habeas corpus to test the validity of his exclusion because his movements were restrained by authority of the United States); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 537–40 (1950) (granting habeas corpus review to alien wife of a United States citizen who was refused admission into the country without a hearing and dismissing the petition).

The 1948 language remains largely intact today. In 1966, Congress added subsection (a) to section 2254.[73] This section refers to "person in custody" rather than "prisoner."[74] The use of both terms throughout the habeas corpus statute implies that the custody requirement is not limited only to prisoners. The statute's language leaves the courts to determine what constitutes custody within the intent of the statute. Since the courts have not construed the custody requirement as mandating physical imprisonment, Megan's Law registrants should qualify for habeas corpus review.[75] In addition, courts generally refer to the statute's historical legislative intent and the common law before construing the recent statute.[76] This also supports the notion that registrants satisfy the custody requirement since registrants fall within the legislative intent of the English Habeas Corpus Act of 1679[77] and the Judiciary Act of 1867.[78] In addition, as shown in the next section, the common law pertaining to the custody requirement also supports the notion that registrants satisfy the custody requirement.

IV. THE CUSTODY REQUIREMENT DEFINED

A. Early Custody Interpretations

The Supreme Court has not limited habeas corpus review to those in prison. Early cases established a foundation which the Warren Court used to expand the custody requirement. These cases addressed the custody requirement and granted habeas corpus review in cases relating to aliens seeking entry into the country[79] and collateral legal consequences of conviction.[80] These cases illustrate

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73. Writ of Habeas Corpus, 28 U.S.C. § 2254 (1966).

74. *See id.*

75. *See, e.g.*, Hensley v. Municipal Court, 411 U.S. 345, 345–46 (1973) (finding that persons released on personal recognizance are in custody); Jones v. Cunningham, 371 U.S. 236, 243 (1963) (holding that parolees are in custody); *ex rel. Mezei*, 345 U.S. at 213 (deciding that alien seeking entry into the country is in custody).

76. *See Jones*, 371 U.S. at 238 ("To determine whether habeas corpus could be used to test the legality of a given restraint on liberty, this Court has generally looked to common-law usages and the history of habeas corpus both in England and in this country.").

77. *See supra* Part III.B.

78. *See supra* Part III.C.

79. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 537–40 (1950) (granting alien bride of U.S. citizen habeas corpus review); *ex. rel. Mezei*, 345 U.S. at 213 (1953) (finding that alien stranded on Ellis Island by authority of the United States may test the validity of his exclusion by habeas corpus review); United States v. Jung Ah Lung, 124 U.S. 621, 622–23 (1888) (holding that alien detained on ship under the orders of customs authorities can be granted habeas corpus review).

80. *See* St. Pierre v. United States, 319 U.S. 41, 43 (1943) (recognizing that habeas corpus review can be granted to a petitioner after his release from prison when the conviction imposed further penalties or civil disabilities). Such penalties or civil disabilities resulting from a conviction are called collateral legal consequences. Collateral legal consequences may occur under either federal or state law and include the loss of certain rights such as the right to vote, engage in certain businesses, hold public office, or serve as

that the Court historically interpreted the custody requirement broadly. This is important in deciding whether Megan's Law registrants satisfy the custody requirement because courts refer to the history of the custody requirement in the common law.[81] The fact that these early cases interpreted the custody requirement beyond physical imprisonment supports the contention that the registrants under Megan's Law are in custody for purposes of habeas corpus.

B. The Warren Court

Building on a predecessor Court's recognition that collateral legal consequences satisfied the custody requirement,[82] the Warren Court made its first achievement regarding habeas corpus review by using the collateral legal consequences doctrine to expand the situations in which the custody requirement was met. The Court supported the doctrine because, "although the term has been served, the results of the conviction may persist; [s]ubsequent convictions may carry heavier penalties...[or] civil rights may be affected."[83] Therefore, the petitioner was entitled to an opportunity to show the conviction was invalid.[84] Eventually, the Court abandoned all inquiry into the actual existence of specific collateral consequences and, in effect, presumed that they existed.[85] This made it easier for petitioners who were not imprisoned to satisfy the custody requirement because the mere fact of the conviction qualified petitioners as in custody.

A prime example of the Court's application of the collateral legal consequences doctrine occurred in *Carafas v. LaVallee*.[86] The petitioner was sentenced to concurrent terms but was unconditionally discharged before the Supreme Court heard his appeal.[87] The Court stated that the case clearly was not moot because of the conviction's collateral legal consequences.[88] Such consequences included the petitioner's inability to engage in certain businesses, serve as an official in a labor union, serve as juror, or vote.[89] The existence of these collateral legal consequences indicates that a petitioner still has a stake in the judgment regardless of the fact that his sentence has expired.[90] Thus, the Court used the collateral consequences doctrine to support its conclusion that petitioner was still in custody for habeas corpus purposes.

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a juror. *See* Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998).

81. *See* Jones v. Cunningham, 371 U.S. 236, 238 (1963).

82. *See supra* note 80 and accompanying text.

83. *See* United States v. Morgan, 346 U.S. 502, 512–13 (1954).

84. *See id.*

85. *See* Sibron v. New York, 392 U.S. 40, 55 (quoting Pollard v. United States, 352 U.S. 354, 358 (1957)). In *Pollard*, the Court stated that it had jurisdiction to review the case even after the petitioner was released from prison because "convictions may entail collateral legal disadvantages in the future." *Pollard*, 352 U.S. at 358.

86. 391 U.S. 234 (1968).

87. *See id.* at 235–36.

88. *See id.* at 237.

89. *See id.*

90. *See id.*

The Warren Court further applied the collateral legal consequences doctrine in *Sibron v. New York*.[91] Here, the Court stated that a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences could be suffered from the challenged conviction.[92] The Court reiterated that a petitioner has a substantial stake in the judgment as long as there is a possibility of such consequences.[93]

The Warren Court's adherence to the collateral legal consequences doctrine supports the contention that Megan's Law registrants satisfy the custody requirement. As mentioned earlier, Megan's Law's requirements, at a minimum, constitute disabilities resulting from conviction. Therefore, had the issue been before the Warren Court, Megan's Law registrants would have satisfied the habeas corpus custody requirement.

The Warren Court's second achievement regarding habeas corpus review was its establishment of concrete standards for evaluating the custody requirement. The Court made it clear that the test for custody was not whether the petitioner was physically confined in prison.[94] Rather, the test was whether the state imposed significant restraints on petitioner's liberty because of his conviction; restrictions that were greater than those imposed on the general public.[95] The Court adopted this standard by examining the statute's common law usages and the legislative history.[96] As discussed in Part IV, the Court found that the common law recognized the writ as a remedy "even though the restraint is something less than close physical confinement."[97]

The most noted case for establishing a concrete standard for evaluating the custody requirement is *Jones v. Cunningham*.[98] The standard thus enunciated was that a person is in custody when there are restraints on his liberty that are not shared by the public generally and "which have been thought sufficient in the English-speaking world to support the issuance of habeas corpus."[99] Applying this

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91. 392 U.S. 40 (1968).

92. *See id.* at 57.

93. The *Sibron* Court stated:

> [A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. That certainly is not the case here. Sibron "has a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him."

Id. at 57–58 (quoting Fiswick v. United States, 329 U.S. 211, 222 (1946)).

94. *See* Jones v. Cunningham, 371 U.S. 236, 239 (1963). ("[T]he use of habeas corpus has not been restricted to situations in which the [petitioner] is in actual, physical custody.").

95. *See id.* at 242.

96. *See id.* at 238.

97. *Id.*

98. *Id.* at 236.

99. *See id.* at 240. This standard has been referred to in many subsequent habeas corpus decisions. *See, e.g.*, Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 301 (1984); Lehman v. Lycoming County Children's Serv. Agency, 458 U.S. 502, 509 (1982);

standard, the Court held that a person on parole was in custody and, therefore, fell within the scope of the federal habeas corpus statute.[100] In *Jones*, the petitioner was convicted of his third offense and sentenced to ten years in prison.[101] He filed a petition for habeas corpus claiming that his sentence was invalid because it was based on a larceny conviction that was reversed.[102] He was then granted parole while his appeal was pending.[103] The appellate court dismissed the case, claiming the issue was moot since neither the prison superintendent nor the parole board members had custody of the petitioner.[104]

The Supreme Court held that a person on parole is in the custody of the parole board because parole involves significant restraints on his personal liberty that are not imposed upon the public generally.[105] The Court recognized that, although the chief use of the habeas corpus statute was to release those physically imprisoned, the courts have historically used the writ as a proper remedy for restraints that were less than actual confinement.[106] For instance, although a parolee is not physically confined to prison, the conditions of parole significantly restrict his freedom. The restrictions imposed by parole are significant enough for him to be considered in custody for habeas corpus purposes.[107]

The Court's broad language in *Jones* clearly expanded the scope of habeas corpus review. The standard it projects for determining custody is subjective enough to open the door for further expansion of habeas corpus review, beyond the original physical custody requirement. Although earlier cases applied habeas corpus to persons not in physical custody,[108] *Jones* was the first case to establish a concrete standard by which courts can determine whether the custody requirement had been met. Indeed, *Jones* laid the foundation for further expansion of habeas corpus review via the custody requirement.

The Warren Court did not merely enunciate a standard for determining satisfaction of the custody requirement; it also applied that standard and further expanded the definition of custody. For instance, in *Peyton v. Rowe*, the Court held that petitioners serving consecutive sentences satisfied the custody requirement when serving under any one of them.[109] Petitioners were serving the first of two consecutive sentences and challenged the second sentence which they

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Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

100. *See Jones*, 371 U.S. at 243.

101. *See id.* at 237.

102. *See id.*

103. *See id.*

104. *See* Jones v. Cunningham, 294 F.2d 608, 612 (4th Cir. 1961).

105. *See Jones*, 371 U.S. at 242.

106. *See id.* at 238.

107. *See id.* at 242.

108. *See, e.g.*, Brownell v. We Shung, 352 U.S. 180 (1956) (alien case); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206 (1953) (same); Anderson v. Corall, 263 U.S. 193 (1923) (parolee satisfies custody requirement); United States v. Jung Ah Lung, 124 U.S. 621 (1888) (same).

109. *See* Peyton v. Rowe, 391 U.S. 54, 67 (1968).

had not begun to serve. The Court granted habeas corpus review stating that the custody requirement comprehends their status for the entire length of their sentences.[110]

By the end of the Warren Court era, the collateral legal consequences doctrine had acquired further case law support. These precedents buttress the contention that Megan's Law registrants qualify for habeas corpus review since the registration and notification requirements create, at the very least, a disability imposed on the registrants as a result of their conviction. In addition, the Warren Court fashioned a standard by which custody can be determined. Applying this standard to Megan's Law, registrants satisfy the habeas corpus custody requirement because the law subjects them to restraints that are not endured by the public generally. The standards established by the Warren Court guided later courts in determining satisfaction of the custody requirement.

C. The Burger Court

The Burger Court's main achievement regarding the custody requirement of habeas corpus review was applying the standard established by the Warren Court. As a result, the Court continued to expand the custody definition beyond the confines of the English common law. The Burger Court addressed the custody requirement in relation to four circumstances: (1) forum issues, (2) release on personal recognizance, (3) collateral legal consequences, and (4) children in foster homes.

The Burger Court addressed the custody requirement in two cases that dealt with forum issues.[111] In the first case, *Strait v. Laird*, an army reservist applied for discharge as a conscientious objector in California, where he resided.[112] The petitioner sought habeas corpus appeal in California rather than in Indiana, where the personnel office was located.[113] The Court held that the petitioner was in military custody in California where he resided and where his hearing was held.[114] The Court stated that, although his commanding officer resided in Indiana, he was constructively present in California through the officers below him who resided in California.[115] Therefore, the petitioner did not have to apply for the writ in Indiana where the personnel center was located.[116]

The second forum question involving the custody requirement dealt with an interstate detainer. The petitioner in *Braden v. 30th Judicial Circuit Court* was

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110. *See id.* at 64.

111. Forum issues refer to those cases where the question involves the choice of jurisdictions where a petitioner can challenge a sentence under the federal habeas corpus statute. A petitioner is usually physically located in one jurisdiction but has some connection, i.e., a detainer or a subsequent sentence, with another jurisdiction.

112. 406 U.S. 341, 342 (1972).

113. *See id.*at 342.

114. *See id.* at 344.

115. *See id.* at 345.

116. *See id.*

serving a sentence in Alabama which held him pursuant to a Kentucky detainer.[117] The Court held that the petitioner was in custody of the Alabama warden who acted as an agent for Kentucky.[118] Therefore, the petitioner could challenge the Kentucky detainer in Alabama.[119]

In the second circumstance, release on personal recognizance, the Court more explicitly defined custody than in the forum cases. Here, the Burger Court expanded the custody requirement to include petitioners who were released on personal recognizance pending execution of their sentence.[120] The Court applied the test set forth in *Jones v. Cunningham*[121] and found that a petitioner released on his own recognizance was subject to severe "restraints not shared by the public generally."[122] The Court held that because petitioner had to appear before a magistrate at all times and places as ordered by any court, he was subject to severe restraints of the type enunciated in *Jones*.[123] Also, this restraint was severe because disobedience itself was a criminal offense.[124] The Court recognized that a parolee is subject to greater restrictions on his freedom of movement than someone released on his own recognizance but, nevertheless, the restriction for the latter constituted custody for habeas corpus review.[125]

The Burger Court revisited the issue of release on personal recognizance and further expanded the custody requirement to include a person released under a two-tier system.[126] Under Massachusetts' two-tier system, a defendant can elect to undergo a first-tier bench trial and then request a trial de novo in the jury session for a retrial.[127] The petitioner was convicted at the bench trial and then was released on his own recognizance pending the retrial before the jury.[128] However, before the retrial, the defendant moved to dismiss the charge against him, claiming that the prosecution did not prove all the elements of the crime for which he was convicted.[129] The motion was denied and the petitioner appealed, eventually reaching the United States Supreme Court.[130] Relying on *Hensley v. Municipal Court*,[131] the Burger Court held that a person released on his own recognizance under the two-tier system fell within the custody requirement.[132] Again, the Court

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117. *See* Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 486 (1973).
118. *See id.* at 498–99.
119. *See id.* at 499.
120. *See* Hensley v. Municipal Court, 411 U.S. 345 (1973).
121. 371 U.S. 236 (1963).
122. As mentioned previously, this is the *Jones* test. *See Hensley*, 411 U.S. at 351 (quoting Jones v. Cunningham, 371 U.S. 236, 240 (1963)).
123. *See id.*
124. *See id.*
125. *See id.* at 358.
126. *See* Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 301 (1984).
127. *See id.* at 297.
128. *See id.* at 297–98.
129. *See id.* at 298.
130. *See id.*
131. 411 U.S. 345 (1973).
132. *See Lydon*, 466 U.S. at 301.

reasoned that the statute under which the petitioner was released subjected him to restraints not shared by the public generally.[133] The statute required the petitioner to appear at the jury trial and be on good behavior, and prohibited him from departing without court permission.[134] Violation of these provisions constituted a criminal offense.[135] According to the Court, these statutory restrictions were enough for the petitioner to be considered in custody.[136]

The third circumstance the Burger Court dealt with under the auspices of habeas corpus was collateral legal consequences. In *North Carolina v. Rice*,[137] the Court addressed standing to challenge a conviction underlying a sentence already served. The Court set a standard for determining mootness. Put simply, a case is not moot when there may be benefits that result from a successful challenge.[138] The Court remanded the case in order to determine if there were any disability statutes, such as loss of the right to vote or engage in certain businesses, that might affect the petitioner.[139]

The Burger Court's overall trend of expanding the application of the custody requirement did not extend to children in foster homes—the final circumstance addressed by the Burger Court. In *Lehman v. Lycoming*, a natural parent filed for habeas corpus review of a trial court's decision to terminate her parental rights.[140] She sought, among other things, to have her children released from their foster homes and returned to her custody.[141] The Court held that the children were not in custody for habeas corpus purposes because they did not suffer any restrictions imposed by the state criminal justice system, nor did they suffer any unusual restraints not imposed on other children.[142] In other words, there was neither a "restraint on liberty,"[143] nor a collateral legal consequence sufficient to outweigh the need for finality.[144] The Court refused to follow state courts which granted habeas corpus review in child custody cases.[145]

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133. *See id.*

134. *See id.* at 301 (prohibiting petitioner from departing without specifically defining departure).

135. *See id.*

136. *See id.*

137. 404 U.S. 244 (1971).

138. *See id.* at 248.

139. *See id.*

140. *See* Lehman v. Lycoming County Children's Serv. Agency, 458 U.S. 502, 507–08 (1982).

141. *See id.* at 506.

142. *See id.* at 510–11.

143. *Id.* at 511. This term was used to determine custody in *Jones v. Cunningham*, 371 U.S. 236 (1963), and *Hensley v. Municipal Court*, 411 U.S. 345 (1973).

144. *See Lehman*, 458 U.S. at 511. The collateral legal consequences doctrine was used to determine custody in *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968).

145. *See Lehman*, 458 U.S. at 514 (citing Boardman v. Boardman, 62 A.2d 521, 528 (Conn. 1948) and *Ex parte* Swall, 134 P. 96, 97 (Nev.1913)). *See also* Barlow v. Barlow, 81 S.E. 433 (Ga. 1914) (allowing the court to exercise discretion as to the possession of a child upon writ of habeas corpus).

With the exception of the child custody case, the Burger Court continued the Warren Court's trend of expanding habeas corpus review to situations where there was no actual physical imprisonment. The Court established precedents that serve as examples of how to apply the Warren Court's standard for determining custody. The more cases that interpret the custody requirement broadly, the more likely it is that courts will follow suit when addressing Megan's Law. Specifically, the Burger Court's recognition of collateral legal consequences supports the contention that the registrants satisfy the custody requirement. Although most of the Burger Court's custody cases remain intact, the Court's support of the collateral legal consequences doctrine encountered some opposition by the Rehnquist Court. This development does not undermine the custody issue pertaining to Megan's Law, but it certainly alters the type of propositions offered in support of finding the custody requirement satisfied.

D. The Rehnquist Court

At first glance, the Rehnquist Court's holdings appear to continue the Warren and Burger Courts' tradition of expanding the custody requirement. However, upon further examination, the Court's language in its custody opinions construes past decisions more narrowly than was indicated in the actual decisions. Thus, the Rehnquist Court has had two major effects on the writ of habeas corpus custody requirement. First, it renounced the collateral legal consequences doctrine. Second, it set limits beyond which the custody requirement was not satisfied. Despite the Court's decisions limiting the custody requirement, Megan's Law registrants still should qualify as being in custody because the law imposes restraints on their liberty or freedom or movement.

The Rehnquist Court renounced the collateral legal consequences doctrine and thereby restricted the definition of custody in *Lane v. Williams*, where it held that petitioners were not in custody when their parole term ended.[146] Petitioners claimed that their guilty pleas were unconstitutional because they were not told they would be sentenced to a parole term.[147] Petitioners filed for habeas corpus when they were reincarcerated for parole violations.[148] However, by the time the Court granted the writ, their parole term had already expired.[149] The Court stated that petitioners were no longer subject to any direct restraint as a result of the parole term because they could no longer be imprisoned for a parole violation.[150] Further, the Court found no custody existed because their liberty or freedom of movement had not been curtailed by a parole term that had expired.[151]

146. *See* Lane v. Williams, 455 U.S. 624, 631 (1982).
147. *See id.* at 626.
148. *See id.* at 628.
149. *See id.*
150. *See id.* at 631.
151. *See id.*

The Court in *Lane* backed away from the holding in *Carafas* by refusing to find custody based on the possible existence of collateral legal consequences.[152] The Court distinguished *Lane* from *Carafas* by stating that the petitioner in *Lane* was not presently suffering from any civil disabilities, in contrast to the petitioner in *Carafas*.[153] It admitted that some future non-statutory consequences may result from the parole violation, such as being denied employment or being subject to sentence enhancement in a future criminal proceeding.[154] However, the Court emphasized that there needs to be a present consequence from which the petitioner is suffering in order for the Court to conclude that petitioner is in custody.[155] The Court concluded that the mere passage of time had supplied petitioners with the relief they sought.[156]

As Justice Marshall stated in his dissent, the *Carafas* doctrine should apply in *Lane* because petitioners have an interest in future collateral legal consequences that attach to parole violations.[157] Contrary to the majority's claim, parole violations do have future collateral legal consequences. For instance, a sentencing judge can use parole violations as aggravating circumstances when sentencing, and the petitioner can be denied parole in the future based on a prior parole violation.[158] The majority's refusal to acknowledge the existence of collateral legal consequences following a parole violation in *Lane* illustrates the Court's willingness to limit the applicability of *Carafas* to new situations. This willingness makes it more difficult for Megan's Law registrants to meet the custody requirement since the collateral legal consequence argument does not have the same support it had with the Warren and Burger Courts. However, registrants can still successfully claim that the law imposes a restraint on their liberty and, therefore, they are in custody for habeas corpus purposes.

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152. *See id.* at 632 (discussing the holding in *Carafas v. LaValle*, 391 U.S. 234 (1968)). The Rehnquist Court also refused to find custody based on collateral legal consequences in *Maleng v. Cook*, 490 U.S. 488, 492 (1989).

153. *See Lane*, 455 U.S. at 632. The Court explained:

> No civil disabilities such as those present in *Carafas* result from a finding that an individual has violated parole. At most, certain non-statutory consequences may occur; employment prospects, or the sentence imposed in a future criminal proceeding, could be affected. The[se] discretionary decisions[,]...however, are not governed by the mere presence or absence of a recorded violation of parole; these decisions may take into consideration, and are more directly influenced by, the underlying conduct that formed the basis for the parole violation. Any disabilities that flow from whatever respondents did to evoke revocation of parole are not removed—or even affected —by [an] order that simply recited that their parole terms are "void."

Id. at 632–33 (citation omitted).

154. *See id.* at 632.

155. *See id.* at 631.

156. *See id.* at 633.

157. *See id.* at 635 (Marshall, J., dissenting).

158. *See id.* at 640 (Marshall, J., dissenting).

The Court further limited the *Carafas* doctrine in *Maleng v. Cook.*[159] Petitioner was required to first serve a federal sentence and then a state sentence.[160] The state placed a detainer with the federal authorities to ensure that the petitioner would be returned to the state to serve his state sentence at the completion of his federal sentence.[161] The petitioner claimed that his federal conviction, which he had already served, was unlawfully used to enhance his state sentence.[162] The Court held that there was habeas corpus jurisdiction because the accused was in custody by virtue of the state sentence at the time the petition was filed.[163] However, the accused was not found to be in custody under the first (federal) sentence because it expired before his petition was filed.[164]

In deciding *Maleng*, the Rehnquist Court reevaluated some of its prior holdings on the issue of custody. The Court seemed to rewrite *Carafas* by stating that its holding did not rest on the existence of collateral legal consequences.[165] Rather, the Court claimed it rested on the fact that the petitioner was in physical custody under the challenged conviction when the petition was filed.[166] However, *Carafas* did not emphasize the importance of when the petition actually was filed or that petitioner was in physical custody at that time. It did, however, discuss the collateral legal consequences that petitioner must endure because of his conviction and stressed the fact that he still has a substantial stake in the conviction, despite the fact that he is no longer imprisoned.[167] Even more telling, the *Carafas* Court stated that the habeas corpus statute was not limited to relief granted to discharge the petitioner from physical custody but, rather, contemplated the possibility of relief other than immediate release from custody.[168] Further, the Burger Court used *Carafas* to support its holding that a person released on personal recognizance satisfied the custody requirement.[169] In *Hensley v. Municipal Court*, the Court stated that it "would badly serve the purposes and the history of the writ to hold that...petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim."[170] This indicates that the Court's opinion in *Carafas* did not rest on the fact that petitioner was in prison when the petition was filed. The Rehnquist Court not only attempted to rewrite *Carafas* in *Maleng*, but the language of the majority opinion seemed to directly overrule it. For instance, it stated that once the sentence has completely expired,

159. 490 U.S. 488 (1989).
160. *See id.* 489–90.
161. *See id.* at 489.
162. *See id.* at 490.
163. *See id.* at 493.
164. *See id.* at 491.
165. *See id.* at 492.
166. *See id.*
167. *See* Carafas v. LaVallee, 391 U.S. 234, 237 (1968).
168. *See id.* at 239.
169. *See* Hensley v. Municipal Court, 411 U.S. 345, 352 (1973) (citing Carafas v. LaValle, 391 U.S. 234 (1968)).
170. *Id.* at 353.

the collateral legal consequences of that conviction are not themselves sufficient to render a person in custody.[171]

The Rehnquist Court also set boundaries beyond which the custody requirement could not be satisfied. The Court stated that custody does not include a habeas petitioner whose sentence has fully expired at the time his petition is filed, *even* if the conviction was used to enhance a future sentence.[172] Also, custody does not extend to a situation where a petitioner suffers "no present restraint" from a conviction.[173] However, it is difficult to reconcile this statement with its reinterpretation of *Carafas.* The Court claimed that there was custody in *Carafas,* despite the petitioner's unconditional release, because he was in physical custody when the petition was filed.[174] But since the Court disregarded collateral legal consequences as constituting a restraint, there was no "present restraint" from which the petitioner could be released, as *Maleng* required.[175] In this way, the *Maleng* opinion is inconsistent with the Court's prior holdings as well as with statements made in the *Maleng* opinion itself.

In addition to the inconsistencies in *Maleng,* the Rehnquist Court further complicated the custody requirement when it applied the requirement to consecutive sentences.[176] In *Garlotte v. Fordice,* a petitioner serving consecutive sentences sought to challenge the conviction underlying his first sentence because it postponed his eligibility for parole.[177] He had already completed serving the first sentence when the habeas corpus petition was filed.[178] The *Garlotte* Court expanded the decision in *Peyton v. Rowe*[179] by holding that a petitioner remains in custody under all of his consecutive sentences until all of them are served.[180] Therefore, a petitioner can attack the conviction underlying the sentence that ran first, even after it has been served.

The decisions in *Garlotte* and *Peyton* indicate that a petitioner serving consecutive sentences is in custody if a successful challenge would advance his release date.[181] However, a petitioner is not in custody if he challenges a past sentence that was used to enhance a sentence for a later offense.[182] The Court did not shed light on why the definition of custody differs when challenging a conviction that enhanced a sentence as opposed to challenging a conviction for

171. *See Maleng,* 490 U.S. at 492.
172. *See id.* at 491.
173. *Id.* at 492.
174. *See id.*
175. *See id.*
176. *See* Garlotte v. Fordice, 515 U.S. 39 (1995).
177. *See id.* at 41.
178. *See id.*
179. 391 U.S. 54 (1968). The Court in *Peyton* held that "a prisoner serving consecutive sentences is 'in custody' under any one of them" for purposes of habeas corpus jurisdiction. *Id.* at 67.
180. *See Garlotte,* 515 U.S. at 41 (discussing the holding in *Peyton*).
181. *See id.* at 44.
182. *See id.* at 45 (citing Maleng v. Cook, 490 U.S. 488, 492 (1989)).

early release. In both situations the prior sentence expired and the petitioner sought the same goal—release from confinement at an earlier time. The Court makes an unnecessary distinction for custody purposes between a petitioner serving consecutive sentences (as in *Garlotte* and *Peyton*) and a petitioner serving two sentences under two different jurisdictions (as in *Maleng*). As Justice Thomas stated in his dissent in *Garlotte*, *Peyton* should be limited to situations where a petitioner challenges an unexpired sentence; this would be consistent with *Maleng*'s insistence that the habeas corpus statute does not allow prisoners to challenge expired convictions.[183]

The Rehnquist Court's language in the custody requirement cases indicates its intention to restrict the availability of habeas corpus review. The Rehnquist Court has been criticized for transforming the entire habeas corpus landscape in general by overruling several leading habeas corpus cases, which, in turn, has restricted petitioners' access to the federal courts for habeas corpus appeals.[184] And although it has been argued that the custody requirement has been an exception to the Court's handling of habeas corpus review (since many of the holdings permit review),[185] the manner in which the Court handled the collateral legal consequences doctrine and its other limiting language indicates that such is not the case. There is evidence that the custody requirement is encountering restrictions within the Rehnquist Court. Such restrictions will make it more difficult for Megan's Law registrants to be considered in custody because the collateral consequences doctrine is no longer available and the Court is erring on the side of limiting habeas corpus review. However, Megan's Law's registrants still may succeed in satisfying the custody requirement because the law imposes a restraint on their freedom.

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183. *See id.* at 48 (Thomas, J., dissenting).

184. *See* Yale L. Rosenberg, *The Federal Habeas Corpus Custody Decisions: Liberal Oasis or Conservative Prop?*, 23 AM. J. CRIM. L. 99, 100 (1995) (citations omitted). For instance, in *McCleskey v. Zant*, 499 U.S. 467, 494–96 (1991), the Rehnquist Court required the petitioner to show cause and prejudice with respect to successive habeas petitions to avoid a finding of abuse of the writ; this discarded the standards set by the Warren Court in *Sanders v. United States*, 373 U.S. 1 (1963). *See McCleskey*, 499 U.S. at 510 n.2 (Marshall, J., dissenting). Also, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5–6 (1992) overruled *Townsend v. Sin*, 372 U.S. 293 (1963), by applying the standard of cause and prejudice, rather than the deliberate bypass standard, to determine if failure to present evidence in state court was a result of the petitioner's inexcusable neglect. *See Keeney*, 504 U.S. at 10 n.5.

185. *See* Rosenberg, *supra* note 184, at 101.

V. IS A REGISTRANT UNDER MEGAN'S LAW IN CUSTODY?

Despite the limitations the Rehnquist Court imposed on the custody requirement, Megan's Law's registrants still should qualify for habeas corpus review. In *Williamson v. Gregoire*, the Ninth Circuit denied habeas corpus review, holding that Megan's Law's requirements constitute collateral legal consequences that are imposed on the registrant as a result of his conviction as a sex offender.[186] *Williamson* relied on the Rehnquist Court's renouncement of the collateral consequences doctrine, eliminating that doctrine to support the registrants' custody claim.[187] Nevertheless, registrants should satisfy the custody requirement because Megan's Law constitutes a "restraint on liberty."[188] This claim is buttressed by the fact that Megan's Law's requirements are similar to those that have been afforded habeas corpus review. Megan's Law's requirements are analogous to those imposed upon a person on parole or released on personal recognizance, which the Supreme Court has found to satisfy the custody requirement.[189] For these reasons, the Ninth Circuit's holding in *Williamson* was erroneous and registrants under Megan's Law are entitled to habeas corpus review.

In finding the requirements of Megan's Law constituted collateral legal consequences rather than a restraint on liberty,[190] the Ninth Circuit stated that the registration and notification requirements did not significantly restrain the petitioner's physical liberty because they did not impose special requirements on his movement or demand his physical presence at any time or place.[191] In other words, the law does not prevent him from going anywhere nor does the law create such a severe disincentive to move that it qualifies as custody.[192] The court stated that any "chill" on his movement was purely subjective and, therefore, did not satisfy the custody requirement.[193] The court concluded that the sex offender law was "analogous to a loss of the right to vote or own firearms...rather than probation or parole."[194] Therefore, the law involved only a collateral legal consequence which, under *Maleng*, does not satisfy the custody requirement.[195]

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186. *See* Williamson v. Gregoire, 151 F.3d 1180, 1183 (9th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999).

187. *See supra* Part IV.C.

188. Jones v. Cunningham, 371 U.S. 236, 240 (1963).

189. *See* Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) (stating that person released on his own recognizance satisfies the habeas corpus custody requirement); *Jones*, 371 U.S. at 243 (finding that parolee satisfies the habeas corpus custody requirement).

190. *See Williamson*, 151 F.3d at 1183.

191. *See id.* at 1184.

192. *See id.*

193. *See id.*

194. *Id.*

195. *See* Maleng v. Cook, 490 U.S. 488, 492 (1989). The Court in *Maleng* stated: "[O]nce the sentence imposed for a conviction has completely expired, the collateral legal

Despite *Maleng*, a person subject to Megan's Law satisfies the custody requirement because its registration and notification requirements constitute a restraint on liberty. A restraint on liberty exists when a legal disability limits the petitioner's movements.[196] Megan's Law clearly constitutes a legal disability because it imposes a duty to register on a sex offender. Megan's Law further limits the petitioner's movement by requiring registration upon a change of residence and a corresponding possibility that law enforcement will notify the public about his presence in the community and his past offenses.

The Court has recognized that a substantial disincentive to movement may be so severe as to create custody for habeas corpus purposes, even in the absence of an outright prohibition on movement.[197] Megan's Law creates such a disincentive. A Megan's Law registrant must verify his registration information periodically[198] and when he changes his residence.[199] Granted, if he remains within the same jurisdiction, there is little or no "chill" on movement since the notification requirements will not change with his new residence. However, the law may inhibit a person under the statute from moving to a new jurisdiction for fear of different public notification criteria. For instance, Arizona[200] and New Jersey[201] notify the public according to the offender's risk assessment level, which is determined by a committee.[202] In contrast, California allows notification based on the type of crime committed.[203] Jurisdictional variations such as these can discourage movement across state lines in order to avoid possible public notification. Although public notification has been justified by claims of public safety, the sex offender may see it as an open door to public ridicule, humiliation, and possible personal danger due to various vigilante acts.[204] This hindrance on a registrant's movement makes him subject to restraints "not shared by the public

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consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack on it." *Id.*

196. *See Williamson*, 151 F.3d at 1183.

197. *See* Shapiro v. Thompson, 394 U.S. 618, 629 (1969) *construed in Williamson*, 151 F.3d at 1183.

198. For example, California requires a sex offender with no residence address to update his registration no less than once every 90 days, a sex offender with a residence address to register annually, and a sexually violent predator to verify his address every 90 days. *See* CAL. PENAL CODE § 290 (a)(1)(A)–(D) (West Supp. 2000).

199. *See, e.g.*, CAL. PENAL CODE § 290(f)(1) (West Supp. 2000) (requiring a sex offender who changes his residence to re-register within five working days); N.Y. CORRECT. LAW § 168(f)(4) (McKinney Supp. 1999–2000) (requiring sex offender to re-register within 10 days prior to any change of address).

200. *See* ARIZ. REV. STAT. § 13-3826(E) (1998).

201. *See* N.J. STAT. ANN. § 2C:7-8 (West 1995).

202. For instance, the New Jersey statute lists the following factors: conditions of release; physical conditions, i.e., old age or illness; criminal history; psychiatric profiles; response to treatment; recent behavior; and recent threats against persons. *See* N.J. STAT. ANN. § 2C:7-8(b) (West 1995).

203. *See* CAL. PENAL CODE § 290 (n)(1)(A) (West Supp. 2000).

204. *See* Craig Haney, *Riding the Punishment Wave: On the Origins of Our Devolving Standards of Decency*, 9 HASTINGS WOMEN'S L.J. 27, 37–38 (1998).

generally."[205] Therefore, even though Megan's Law does not explicitly prohibit movement, the effect of its provisions constitutes a substantial disincentive to move. This disincentive is severe enough to create custody for habeas corpus purposes.

In addition, Megan's Law is more like parole than collateral legal consequences such as losing the right to vote, engaging in certain businesses, or serving as a juror. First, Megan's Law imposes an affirmative duty on a sex offender to register periodically (usually annually) and when he changes his residence.[206] This affirmative duty to register differs from being unable to do certain things, such as vote or own firearms, because the registrant is required to take some action that will keep law enforcement abreast of his location.[207] A registrant's duty is comparable to a parolee who must periodically report to his parole officer in that both circumstances obligate the petitioner to avail himself to the local authorities.[208] Therefore, registrants should be entitled to habeas corpus review as are petitioners on parole or those released on personal recognizance.

Second, as with parole and release on personal recognizance, the focus of Megan's Law is on the location of the offender. The sex offender registration requirement is designed to facilitate law enforcement by making persons convicted of such crimes readily available for police surveillance.[209] To further illustrate the law's purpose, some states require registration not only from those who reside in the state, but also from those who remain within the jurisdiction temporarily.[210] This emphasis on law enforcement knowing the location of the registrant resembles the conditions of parole and release on personal recognizance. A parolee is generally confined to a particular community so that law enforcement can locate him if necessary.[211] Likewise, a person released on personal recognizance must remain where law enforcement believes him to be because he is required to appear at any time when summoned.[212] The emphasis, again, is on law enforcement being able to locate the petitioner. This focus on a petitioner's location in all three circumstances supports the contention that Megan's Law is more like those situations which the Court has afforded habeas corpus review rather than collateral legal consequences where the location of the petitioner is irrelevant.

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205. Jones v. Cunningham, 371 U.S. 236, 240 (1963).

206. *See, e.g.*, OR. REV. STAT. § 181.597(1) (1997) (stating that sex offenders must register within 10 days of a change of residence and once each year within 10 days of person's birthday, regardless of whether the offender has changed residence).

207. Some jurisdiction allow a registrant to notify the local authorities by mail. *See, e.g*, WASH. REV. CODE ANN. § 9A.44.130(5)(a) (West Supp. 2000). Other jurisdictions, however, require a registrant to appear in person to register. *See, e.g.*, OR. REV. STAT. § 181.597(1) (1997).

208. *See Jones*, 371 U.S. at 242.

209. *See* Esposito, *supra* note 26, at § 2[a].

210. *See, e.g.*, FLA. STAT. ANN. § 943.0435(2) (West Supp. 2000); MICH. COMP. LAWS ANN. § 28.723(3) (West 1998).

211. *See Jones*, 371 U.S. at 241.

212. *See* Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

The final reason Megan's Law is similar to those situations characterized as "in custody," is that noncompliance with the law results in imprisonment.[213] The Supreme Court has used this factor to support a petitioner's entitlement to habeas corpus review.[214] For instance, one of the reasons a parolee satisfied the custody requirement was because violation of parole could result in imprisonment.[215] Similarly, one of the grounds stated when holding that a petitioner released on personal recognizance was in custody was that "disobedience was itself a criminal offense."[216] Likewise, one of the reasons the Court found the petitioner in custody when released on personal recognizance under a two-tier system was because petitioner's "[f]ailure to appear 'without sufficient excuse' constitute[d] a criminal offense."[217] The fact that violation of Megan's Law is a criminal offense makes its provisions similar to those circumstances where the Court has found the petitioner to be in custody. Therefore, registrants under Megan's Law should be entitled to habeas corpus review because the law's provisions make the registrant's situation analogous to those characterized as satisfying the custody requirement.

Megan's Law's restraint on liberty and its similarity to situations which are granted habeas corpus review indicate that the Ninth Circuit's holding in *Williamson* was erroneous. The law's affirmative duty to register, its focus on the offender's location, and the imprisonment that results from noncompliance indicate that the provisions of Megan's Law constitute more than collateral legal consequences of conviction. These provisions fall within the class of situations that have been afforded habeas corpus review. Compounding this is the fact that Megan's Law's requirements are usually applicable for the registrant's entire life;[218] some states make the registrant's case subject to review if the sex offender can prove that he no longer poses a threat to the safety of others.[219] In addition, many states provide public notification of registered sex offenders' information through the internet.[220] These factors contribute to the law's intrusive nature and,

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213. *See, e.g.*, ARIZ. REV. STAT. § 13-3824 (1998) (classifying noncompliance as a class 4 felony); CAL. PENAL CODE § 290 (g)(1)–(2) (West Supp. 2000) (stating that a person who is required to register based on a misdemeanor and fails to do so is guilty of a misdemeanor punishable by imprisonment not exceeding one year; if based on a felony, person is guilty of a felony and shall be imprisoned for 16 months, or two or three years); N.J. STAT. ANN. § 2C:7-2(a) (West Supp. 1999) (designating failure to register as a crime of the fourth degree).

214. *See, e.g.*, Justices of Boston Mun. Court v. Lydon, 466 U.S. 294, 301 (1984); *Hensley*, 411 U.S. at 351; *Jones*, 371 U.S. at 241–42 (1963).

215. *See Jones*, 371 U.S. at 242.

216. *Hensley*, 411 U.S. at 351; *Lydon*, 466 U.S. at 301.

217. *Lydon*, 466 U.S. at 301.

218. *See* CAL. PENAL CODE § 290(a)(1)(A) (West Supp. 1999); Esposito, *supra* note 26, at § 2[a].

219. *See* N.J. STAT. ANN. § 2C:7-2 (f) (West Supp. 1999).

220. *See, e.g.*, *Arizona Department of Public Safety: Sex Offender InfoCenter* (last modified Feb. 23, 2000) <http://www.azsexoffender.com> (allowing search by name or zip code and providing a list of absconders). Apparently concerned about vigilante activity, the Arizona website includes a disclaimer that reads: "The information provided on this site is intended for community safety purposes only and should not be used to threaten,

in effect, place a restraint on liberty. Therefore, a registrant under Megan's Law satisfies the custody requirement and is entitled to habeas corpus review.

VI. CONCLUSION

Whether sex offenders under Megan's Law meet the custody requirement for habeas corpus review is an issue that will continue to arise in the federal circuit courts throughout the next few years. Considering that Megan's Law's requirements vary among the states, it is likely that a circuit will disagree with the Ninth Circuit's classification of Megan's Law's requirements as collateral legal consequences and its denial of habeas corpus review. Whether or not a registrant satisfies the custody requirement depends on state law. Therefore, the Supreme Court will not address this issue until there is conflict among the circuits. Until then, registrants will have to seek recognition of their right to habeas corpus review in the circuits.

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intimidate, or harass. Misuse of this information may result in criminal prosecution." *See id.* For other examples of public notification websites, see *Alabama Criminal Sex Offender Community Notification Information* (visited Feb. 20, 2000) <http://www.gsiweb.net/so_doc/so_index_new.html> (allowing search by name, zip code, city, or country); *Alaska Department of Public Safety Sex Offender Registration Central Registry* (visited Feb. 20, 2000) <http://www.dps.state.ak.us/sorcr> (allowing search by name, address, zip code, and city, and providing list of all offenders); *Florida Department of Law Enforcement* (visited Feb. 17, 2000) <http://www.fdle.state.fl.us./Sexual_Predators/index.asp> (allowing search by name, address, zip code, city, or country).