

## THE PROCEDURAL DUE PROCESS RIGHTS OF THE STIGMATIZED PRISONER

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### ABSTRACT

*This Article addresses the role of stigma in procedural due process claims brought by prisoners. In particular, the Article focuses on inmates whom prisons have classified as sexual offenders although they have never been convicted of a sex offense. Prisons label these inmates—identified here as the “branded class”—as sexual offenders based on information outside of the inmates’ conviction histories, including charges that ended in dismissal or acquittal. As a result of the sex offender classification, prisons impose upon the branded class a wide range of sex offender-specific conditions, including mandatory treatment and sex offender registration.*

*In addressing procedural due process claims raised by members of the branded class, courts must decide whether either the stigma of the sex offender label or the conditions imposed on the inmate (or both) trigger a liberty interest requiring procedural due process protections. In so doing, courts apply either the “stigma plus” test of Paul v. Davis or one of the two liberty interest tests articulated in Sandin v. Conner—what this Article terms the “atypical and significant” or “exceeds the sentence” standards.*

*Paul sharply limited the circumstances in which stigma can implicate a liberty interest. This Article explains why the liberty interest analysis articulated in Sandin—when informed by the stigma-focused holding of Vitek v. Jones—provides a greater opportunity for courts to treat stigma as a deciding factor in determining whether prison classification decisions implicate a liberty interest under the Due Process Clause. Further, the Article contends that courts should treat stigma as a significant factor when making such determinations.*

*Towards this end, this Article posits a definition of “stigma” that incorporates and expands on the notion of stigma found in existing cases. Specifically, it suggests that courts should always find that stigma is present when a prison imposes a label on an inmate that: (a) implies that he has committed a criminal act or has a mental disorder; (b) is unrelated to the elements of his crimes of conviction; and (c) carries a significant risk of adverse consequences to the inmate. In addition to adding clarity and consistency to the Sandin-based procedural due process analysis, this definition strengthens the role of stigma as a source of liberty interests behind bars.*

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## I. INTRODUCTION

In a very real sense, a prisoner’s experience in the U.S. prison system is defined by who the prison says he is.<sup>1</sup> Once a person is incarcerated, the

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<sup>1</sup> See Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 353 (2009) (“Prison and jail policies affect almost every area of prisoners’ lives. Classification, disciplinary, and grievance policies all have a tremendous impact on how prisoners serve their sentence and what recourse they have to courts and other authorities.” (footnotes omitted)).

prison assigns him<sup>2</sup> a security classification based on a prison official's assessment of the inmate's history of escape, tendencies towards violence, level of sexual deviancy, and a host of other factors not necessarily related to the crime for which he is serving his sentence.<sup>3</sup> This classification level defines the prisoner's world in almost every conceivable way—from the level of security to which he is subjected to the types of prison programs in which he is permitted, or required, to participate.<sup>4</sup>

This Article focuses on a particular type of classification: the practice of labeling an inmate as a sex offender despite the fact that he has never been convicted of a sexual offense or been accused of sexual misconduct within the prison. Once the prisoner is thus classified, he is treated by the prison, and on parole, as a sex offender.<sup>5</sup> For ease of reference, such inmates—

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<sup>2</sup> While both male and female prisoners may be affected by the policies described in this Article, this Article primarily addresses a class of prisoners that is overwhelmingly male; reflecting this fact, and for simplicity's sake, masculine pronouns will be used in this Article to refer to inmates in general.

<sup>3</sup> See, e.g., FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION ch. 4, at 6–13 (2006) [hereinafter INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION] (providing that the prison determines the federal inmate's security level using factors including length of sentence, severity of current offense, criminal history score, history of violence, history of escape or attempts, type of detainer, age, educational level, and drug or alcohol abuse; the prison also considers a host of "public safety factors," including a male inmate's involvement in a "disruptive group," the inmate's greatest severity offense, whether the prisoner is a sex offender, was involved in a serious escape, a prison disturbance, or committed "serious telephone abuse," among other factors).

<sup>4</sup> Lawrence L. Bench & Terry D. Allen, *Investigating the Stigma of Prison Classification: An Experimental Design*, 83 PRISON J. 367, 367 (2003) (noting that the "consequences of the classification decision have far-reaching implications for the lives of offenders, including mental health services, substance abuse counseling, program needs, and vocational training").

<sup>5</sup> At times, a "sex offender" classification imposed by a prison on an inmate follows that inmate into parole. See, e.g., *Gwinn v. Awmiller*, 354 F.3d 1211, 1214–15 (10th Cir. 2004). In *Gwinn*, Mr. Gwinn was originally charged with robbery, aggravated robbery, and sexual assault, but pled guilty only to robbery. *Id.* Based on the dismissed sexual assault charge, the prison required him to participate in sex offender treatment while incarcerated. Mr. Gwinn was granted parole on the condition that he register as a sex offender and participate in sex offender treatment. *Id.* See also *Jones v. Lane*, No. CIVA06CV00116EWNMEH, 2006 WL 4451913, at \*1–2 (D. Colo. Oct. 4, 2006), where Mr. Jones was serving a prison sentence for a drug-related offense when the Colorado Department of Corrections classified him as a sex offender based on a sex offense charge that had been dismissed by the prosecution nine years earlier. When released on parole, Mr. Jones' parole officer required him to take part in sex offender treatment as a condition of parole; when he refused to do so, the Colorado Parole Board revoked his parole. *Id.* At other times, it is a parole officer who labels a parolee as a "sex offender," despite the fact that he had not been so classified while in prison. Courts have not always distinguished between the source of the sex offender label—a prison official or a parole officer—when evaluating procedural due process claims brought by members of the branded class. See, e.g., *Coleman v. Dretke*, 395 F.3d 216, 221–22 (5th Cir. 2004)

those who prisons classify as sexual offenders although they have never incurred a sexual offense conviction—will be referred to here as the “branded class.” This practice affects a significant number of inmates: one state prison system classified approximately 11% of its total male prison population as sexual offenders, or eligible to be classified as sexual offenders, despite having never been convicted of a sex offense.<sup>6</sup> Another estimate indicates that almost 7000 inmates were eligible for inclusion in the branded class.<sup>7</sup> This is so because federal and state prison classification procedures require that prison officials classify inmates as sex offenders based on information that extends beyond their criminal records.<sup>8</sup> As a result, prison officials often make individual determinations of an inmate’s

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(applying both *Sandin v. Conner*, 515 U.S. 472 (1995) and *Vitek v. Jones*, 445 U.S. 480 (1980), cases addressing procedural due process rights in prison, to a procedural due process claim stemming from a parole panel’s imposition of sex offender registration and therapy conditions on a parolee with no sex offense convictions; noting that “as in the prison context, a condition may present such a ‘dramatic departure from the basic conditions’ of a parolee’s sentence that the state must provide some procedural protections prior to its imposition” (footnote omitted)); *Williams v. Ballard*, No. 3-02-CV-0270-M, 2004 WL 1499457, at \*4–5 (N.D. Tex. June 18, 2004) (applying an amalgam of the *Paul* “stigma plus” test and the *Sandin* liberty interest standards to the imposed parole conditions).

<sup>6</sup> According to a statistical report by the Colorado Department of Corrections, out of a total of 20,569 male inmates, the Department of Corrections had classified 1234 male inmates as “S4”—Administratively Determined Sex Offender—meaning that the prisoners at issue had never been convicted of a sexual offense, but the prison found them to be sex offenders through “sexual violence needs classification review procedures” within the prison. Another 1028 male inmates were classified as “S2,” meaning that they had not been convicted of a sexual crime but rather had an “[i]ndication of sexually abusive behavior that has not been determined to be a sex offense through a due process procedure.” In total, then, 2262 male inmates in the Colorado system were either classified as sexual offenders, or eligible to be classified as sexual offenders, despite having never been convicted of a sex offense. In contrast, 3908 male inmates were classified as “S5,” meaning that they either had been convicted or adjudicated as a sex offender, or the “court made a finding of sexual factual basis or registration as a sex offender.” BONNIE L. BARR, CHICK R. GILBERT & MAUREEN L. O’KEEFE, STATISTICAL REPORT: FISCAL YEAR 2010, COLO. DEP’T OF CORR. 22, 37 (2011), available at [http://www.doc.state.co.us/sites/default/files/opa/StatRprt\\_FY10\\_0.pdf](http://www.doc.state.co.us/sites/default/files/opa/StatRprt_FY10_0.pdf) (compiling statistical data which is analyzed in this footnote); COLO. DEP’T OF CORR., SEXUAL VIOLENCE NEEDS CLASSIFICATION, ADMIN. REG. 750-02, at 1–3 (Oct. 15, 2010), available at [http://www.doc.state.co.us/sites/default/files/ar/0750\\_02\\_110111.pdf](http://www.doc.state.co.us/sites/default/files/ar/0750_02_110111.pdf) [hereinafter SEXUAL VIOLENCE NEEDS CLASSIFICATION] (outlining definitions of S1–5 designations).

<sup>7</sup> *Meza v. Livingston*, 607 F.3d 392, 400 (5th Cir. 2010), clarified on denial of reh’g, *Meza v. Livingston*, No. 09-50367, 2010 WL 6511727 (5th Cir. 2010) (“Moreover, at trial, an Administrator for the [Texas Parole] Board testified that as many as 6,900 current inmates are subject to have sex offender conditions, including sex offender registration, imposed upon them in the future, despite the fact that they have not been convicted of a sex crime.”). The quote at issue stems from trial testimony that appears to have taken place around 2005.

<sup>8</sup> See, e.g., SEXUAL VIOLENCE NEEDS CLASSIFICATION, *supra* note 6, at 1–3.

level of sexual deviancy based on data derived from a wide range of extra-judicial sources unrelated to his conviction history.

A sex offender classification is a severely demeaning label<sup>9</sup> which results in a wide variety of institutional consequences, including sex offender registration and sex offender treatment, for inmates in the branded class. While these prisoners have protested their classification and treatment as sexual offenders on a variety of constitutional bases—from ex post facto,<sup>10</sup> to Eighth Amendment,<sup>11</sup> to equal protection claims<sup>12</sup>—it is only through procedural due process challenges that these inmates have found any measure of relief. In adjudicating procedural due process claims raised by members of the branded class, courts must decide whether either the stigma of the sex offender label or the conditions imposed on the inmate (or both) trigger a liberty interest requiring procedural protections under the Due Process Clause.

In making such determinations, courts rely on either the “stigma plus” test set forth in *Paul v. Davis*,<sup>13</sup> or one of the two liberty interest tests articulated by *Sandin v. Conner*—the “atypical and significant” standard or the “exceeds the sentence” standard.<sup>14</sup> *Paul* centers its liberty interest standard on stigma, but it severely limited the importance of stigma in procedural due process claims by holding that individuals have no liberty interest in avoiding a government-imposed stigmatizing label.<sup>15</sup> *Sandin* has

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<sup>9</sup> See Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 17 (2008) (describing how “American society has decided that there is no greater villain than the sex offender. Terrorists, drug dealers, murderers, kidnappers, mobsters, gangsters, drunk drivers, and white-collar criminals do not elicit the emotions and evoke the political response that sex offenders do”—nor have they prompted the variety and breadth of legislative measures to which sexual offenders are subjected); see also W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In Re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 176 (2011) (“[F]ew would disagree that no matter how one describes stigma, sex offenders are stigmatized: they commit as close to a permanent and unforgivable offense as we have today.” (footnote omitted)). The consequences of a sex offender conviction or label, both institutional and social, are discussed in this Article. See *infra* Part I.

<sup>10</sup> See, e.g., *Neal v. Shimoda*, 131 F.3d 818, 824 (9th Cir. 1997).

<sup>11</sup> See, e.g., *Gwinn v. Awmiller*, 354 F.3d 1211, 1227–28 (10th Cir. 2004); *Tinsley v. Goord*, No. 05-Civ. 3921, 2006 WL 2707324, at \*3–4 (S.D.N.Y. Sept. 20, 2006).

<sup>12</sup> See, e.g., *Awmiller*, 354 F.3d at 1227–28.

<sup>13</sup> 424 U.S. 693, 711–12 (1976).

<sup>14</sup> 515 U.S. 472, 484 (1995).

<sup>15</sup> *Paul*, 424 U.S. at 711–12 (“It was this alteration, officially removing the interest from the recognition and protection previously afforded by the State, which we found sufficient to invoke the procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment . . . . [T]he interest in reputation alone which the respondent seeks to vindicate in this action in federal court is quite different from the ‘liberty’ or ‘property’ recognized in [prior] decisions . . . . For these reasons we hold that the interest in

no overt focus on stigma, but concentrates instead on whether prison conditions “exceed the [inmate’s] sentence” or are “atypical and significant” without providing clear guidelines to assist courts in making either determination.<sup>16</sup> This Article attempts to explain why, despite the limitations that *Paul* places on stigma-centered procedural due process claims, the liberty interest analysis articulated in *Sandin v. Conner*—informed by the stigma-focused analysis of *Vitek v. Jones*—provides an opportunity for courts to treat stigma as a deciding factor in determining whether prison classification decisions implicate a liberty interest under the Due Process Clause.

Further, this Article contends that courts *should* treat stigma as a significant factor when deciding whether a condition imposed by prisons on inmates triggers a liberty interest deserving of procedural protections. This is not to say that stigma must be present in order for a liberty interest to exist—prison conditions can certainly implicate liberty interests even if they are not stigmatizing, and there is no need to add an additional requirement when prisoners are raising condition-focused procedural due process claims. However, when stigma is considered as a source of liberty interests, prisoners in the branded class may benefit from expanded procedural due process protections. And, while a prison’s interest in labeling and treating inmates as sex offenders based on information other than their conviction history is understandable, and perhaps even desirable in some cases, this Article proceeds from the position that meaningful procedural protections will better ensure that the inmates thus labeled are deserving of both the stigma and the consequences imposed.<sup>17</sup>

This Article is the first to address the role that stigma can play in liberty interest determinations behind prison walls under *Sandin v. Conner*. In so doing, it builds upon prior research addressing the role of stigma in liberty interest claims in general,<sup>18</sup> and synthesizes that literature with the literature

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reputation asserted in this case is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.”).

<sup>16</sup> *Sandin*, 515 U.S. at 483–84 (“[W]e recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” (internal citations omitted)).

<sup>17</sup> See, e.g., Ball, *supra* note 9, at 151 (“The difference between stereotyping and risk assessment has to do with the quality of deliberation—ensuring that the stigma that attaches itself to the term ‘sex offender’ matches up to an individual’s risk. This is precisely what due process protections are designed to ensure.”).

<sup>18</sup> See, e.g., *id.* at 119 (arguing that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), should apply to all cases, whether civil or criminal, that involve the imposition of stigma and the deprivation of liberty); Marissa Ceglian, *Predators or Prey: Mandatory Listing of Non-Predatory*

discussing the challenges of procedural due process considerations in prisoner-brought cases.<sup>19</sup> Towards this end, this Article adopts a definition of “stigma” in the context of prison classifications that incorporates and expands upon the notion of stigma found in existing cases. Specifically, the Article argues that courts should always find that stigma is present when a prison imposes a label on an inmate that: (a) implies that he has committed a criminal act or has a mental disorder; (b) is unrelated to the elements of his crimes of conviction; and (c) carries a significant risk of adverse consequences to the inmate. When such stigma exists, courts should consistently find that the inmate at issue has a liberty interest in avoiding the stigmatizing label and its attendant conditions that requires procedural due process protections. This definition of “stigma” would facilitate more robust procedural due process protections and more consistent application of

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*Offenders on Predatory Offender Registries*, 12 J.L. & POL’Y 843, 844–45 (2003) (discussing procedural and substantive due process challenges to Minnesota’s sex offender registration statute, which required persons who had not been convicted of sexual offenses to register as sex offenders if their convictions arose “out of the same set of circumstances” as a sexual crime enumerated in the statute); Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 79 (2009) (arguing that the *Paul* “stigma plus” standard should be revisited to allow reputational harm, alone, to serve as a liberty interest deserving of procedural due process protections, both because reputation should be “conceptualized as a critical site for autonomous identity formation,” and because of the serious labels the government is now imposing on its citizens); Ofer Raban, *Be They Fish or Not Fish: The Fishy Registration of Nonsexual Offenders*, 16 WM. & MARY BILL RTS. J. 497, 511 (2007) (arguing that when persons who have been convicted of nonsexual crimes are required to register as sex offenders, this act violates the “fundamental right . . . not to be publicly identified by the government as something that they are not—namely, sex offenders,” in violation of their substantive due process rights).

<sup>19</sup> See, e.g., Donna H. Lee, *The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner*, 72 FORDHAM L. REV. 785, 785 (2004) (arguing that courts should examine the typicality of prison conditions under *Sandin v. Conner* by applying a balancing test that “weighs typicality based on actual state practices, significance as a de minimis threshold, and state positive law as an evidentiary tool in determining whether a liberty interest is at stake”); Scott N. Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CALIF. L. REV. 1115, 1120 (1995) (arguing that inmates should only be segregated if they have broken prison rules, not based on the gang affiliation alone); Robert M. Ferrier, Note, “An Atypical and Significant Hardship”: *The Supermax Confinement of Death Row Prisoners Based Purely on Status—A Plea for Procedural Due Process*, 46 ARIZ. L. REV. 291, 293 (2004) (describing the basis for a liberty interest requiring procedural due process protections in avoiding Supermax confinement for death row prisoners); Andrew J. Theis, Note, *The Gang’s All Here: How the Supreme Court’s Unanimous Holding in Wilkinson v. Austin Utilizes Supermax Facilities to Combat Prison Gangs and Other Security Threats*, 29 HAMLINE L. REV. 145, 149 (2006) (contending that prisons should not be burdened with additional procedural due process requirements in prison transfer cases, as prisons require flexibility in administrative segregation decisions in order to combat prison gangs).

those protections when prisons wish to classify inmates in a deeply stigmatizing manner.

Part II of this Article addresses how inmates become part of the branded class and describes the consequences that unfold once a member of the branded class is classified as a sexual offender. Part III discusses the role of stigma in cases applying the liberty interest standards of *Paul* and *Sandin* to members of the branded class. This Part also addresses the ways in which *Sandin* provides a greater opportunity for courts, when considering procedural due process claims raised by members of the branded class, to consider stigma as a meaningful part of a liberty interest analysis. Part IV suggests a definition of “stigma” that would add consistency and clarity to *Sandin*-based procedural due process claims based on prison classification decisions. Part V discusses what process is sufficient to protect the liberty interests of members of the branded class. Part VI concludes.

## II. THE ORIGINS OF THE BRANDED CLASS, AND THE CONSEQUENCES OF CLASS MEMBERSHIP

There are multiple routes by which inmates find themselves within the branded class. Prisons have classified prisoners as sexual offenders in cases when the inmate was once arrested or charged with a sexual offense, only to have the case dismissed;<sup>20</sup> or was originally charged with a sexual crime, but pled guilty to a non-sexual offense;<sup>21</sup> or, in the prison’s view, the underlying

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<sup>20</sup> See, e.g., *Chambers v. Colo. Dep’t of Corr.*, 205 F.3d 1237, 1238 (10th Cir. 2000) (inmate classified as an S-2 sex offender, meaning one who had “committed a sex offense but was not convicted of a sex offense charge,” based on case that had been dismissed); *Kirby v. Siegelman*, 195 F.3d 1285, 1288 (11th Cir. 1999) (inmate classified as sex offender based on a prior sex offense charge that was “no billed” by a grand jury, and another prior sexual assault charge that was nolle prossed in the trial court); *Perales v. Hickman*, No. CIV S-06-0358, 2007 WL 2225793, at \*1 (E.D. Cal. July 31, 2007) (inmate classified as sex offender and denied visitation with grandchildren based on a prior sexual assault charge that had been dismissed); *Brack v. Ortiz*, No. 05-cv-02658, 2007 WL 867992, at \*3 (D. Colo. Mar. 20, 2007) (inmate classified as sex offender and given sex offender-specific conditions of parole based on two prior arrests for sexual crimes as well as the results of a polygraph test); *Wisconsin ex rel Matlouck v. Hepp*, No. 2006AP445, 2006 WL 2772684, at \*1 (Wis. Ct. App. Sept. 28, 2006) (inmate classified as sex offender and ordered to participate in sex offender treatment based on a prior sexual assault charge that had been dismissed).

<sup>21</sup> See, e.g., *Williams v. Ballard*, 466 F.3d 330, 332 (5th Cir. 2006) (inmate classified as sex offender based on a sexual assault charge that was dismissed in exchange for a plea of guilty to aggravated assault); *Coleman v. Dretke*, 395 F.3d 216, 219 (5th Cir. 2004) (inmate required to register as sex offender and complete sex offender therapy based on a charge of aggravated sexual assault of a child and a charge of indecency with a child by contact, both of which were dismissed in exchange for a plea of guilty to simple assault); *Gwinn v. Awmiller*, 354 F.3d 1211, 1214 (10th Cir. 2004) (inmate required to complete sex offender treatment based on sexual assault charge that was dismissed in exchange for a plea of guilty to robbery); *Gunderson v. Hvass*, 339 F.3d 639, 641–42 (8th Cir. 2003)

facts of an entirely non-sexual conviction included a “sexual component.”<sup>22</sup> Indeed, prisons have classified some incarcerated people as sexual offenders based on sexual charges for which they were acquitted.<sup>23</sup> These classifications may be security measures, but they cannot be disciplinary ones: the prisoners in the branded class (as defined here<sup>24</sup>) have not been accused of sexual wrongdoing while in the correctional facility. Rather, the prisons’ decision to label and treat inmates in the branded class as sexual offenders is based on inferences drawn from evidence outside the correctional institution, such as police reports, sentencing documents, or other records that may indicate to prison officials that the prisoner escaped a conviction for sexual assault through, for example, a savvy plea bargain or poor prosecutorial charging decisions. Such external evidence can be quite compelling,<sup>25</sup> although at other times the prisons’ justifications for their decisions in these cases are less persuasive.<sup>26</sup>

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(inmate required to register as sex offender based on a sexual assault charge that was dismissed in exchange for a plea of guilty to third degree assault); *Talouzi v. O’Brien*, No. Civ.A. 05-CV-235-HRW, 2006 WL 625292, \*1–2 (E.D. Ky. Mar. 10, 2006) (inmate classified as sex offender based on two counts of first degree sexual abuse, both of which were dismissed in exchange for a plea of guilty to two misdemeanor counts of battery); *Jones v. Puckett*, 160 F. Supp. 2d 1016, 1018 (W.D. Wis. 2001) (inmate required to complete sex offender treatment based on a sex offense charge that was dismissed in exchange for a plea of guilty to attempted murder and kidnapping).

<sup>22</sup> *See, e.g., Renschenski v. Williams*, 622 F.3d 315, 322 (3d Cir. 2010) (inmate convicted of murder required to complete sex offender treatment because the crime included “a sexual component”).

<sup>23</sup> *See, e.g., Vega v. Lantz*, 596 F.3d 77, 79 (2d Cir. 2010) (inmate classified as sex offender based on a sexual assault charge for which he was acquitted at trial); *Tinsley v. Goord*, No. 05 Civ. 3921, 2006 WL 2707324, at \*1 (S.D.N.Y. Sept. 20, 2006) (inmate required to participate in sex offender treatment based on a sexual assault charge for which he was acquitted at trial); *Thomas v. Warden*, 891 A.2d 1016, 1018 (Conn. Super. Ct. 2005) (inmate classified as sex offender based on a sexual assault charge for which he was acquitted at trial).

<sup>24</sup> Certainly inmates do commit sexual offenses in prison, with attendant consequences and procedural due process implications, but those inmates and their claims are not included in the branded class. As defined in this Article, the branded class is composed of inmates who have not been convicted of sexual offenses nor accused of sexual misconduct within the correctional facility.

<sup>25</sup> The facts underlying some of these cases, while not proven in court, are disturbing and raise understandable and serious questions about the sexual treatment needs of the inmates at issue. A grisly example is the case of *Grennier v. Frank*, 453 F.3d 442, 444 (7th Cir. 2006), in which Richard Grennier was charged with and convicted of first degree murder, but the prison’s review of the police reports in the case revealed evidence that the victim’s corpse had been sexually assaulted. Similarly, in *Meza v. Livingston*, 607 F.3d 392 (5th Cir. 2010), Raul Meza pled guilty to murdering a nine-year-old girl. Although Meza was charged with and convicted of murder alone, evidence in that case indicated that the child had been raped before she was killed.

<sup>26</sup> In *Garcia v. Henry*, for example, the Ninth Circuit held that evidence that an inmate had previously been arrested and charged with sex crimes constituted sufficient evidence supporting his sex offender classification under “any possible burden of proof,” despite

Once inmates have been classified, prison and parole officials generally treat members of the branded class the same as prisoners convicted of sex crimes. Prisons require such prisoners to participate in sex offender treatment, including individual and group therapy and polygraph and

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the fact that the inmate had not been convicted of the crimes at issue. 13 F. App'x 579, 580–81 (9th Cir. 2001). If, at times, prisons seem to be adopting a “better safe than sorry” attitude, they are in step with a variety of legislative efforts aimed at sex offenders, or persons suspected of being sex offenders. This is a time in the United States in which antagonism towards sex offenders is particularly acute. This enmity is reflected in a wide variety of laws aimed at sex offenders. See, e.g., *Smith v. Doe*, 538 U.S. 84, 105–06 (2003) (holding that Alaska’s Sex Offender Registration Act is not punishment); *Seling v. Young*, 531 U.S. 250, 267 (2001) (holding that civil commitment statute aimed at “sexually violent predators” was civil, not criminal, and thus “cannot be deemed punitive ‘as applied’ to a single individual in violation of the Double Jeopardy or *Ex Post Facto* Clauses”); *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997) (holding that Kansas’s Sexually Violent Predator Act, which allowed the state to subject to involuntary civil commitment those persons found likely to engage in “predatory acts of sexual violence” because they suffered from a “mental abnormality” or a “personality disorder,” did not violate Hendricks’ substantive due process rights, nor did it constitute punishment). For an overview of legislation aimed at sex offenders, see Wright, *supra* note 9, at 29–48 (reviewing laws regarding sex offender registration, notification, GPS monitoring and tracking, civil commitment, residency restrictions, and chemical castration, including the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act and the Adam Walsh Act, among others); HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US (2007), <http://www.hrw.org/en/reports/2007/09/11/no-easy-answers> (providing a comprehensive study of U.S. sex offender policies). Many of these laws impose consequences on a broad group rather than determining if all members of the group deserve, or would benefit from, the condition at issue. See, e.g., *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 6–7 (2003) (holding that a convicted sex offender did not have a right to a due process hearing to prove his “current dangerousness” before inclusion in Connecticut’s Sex Offender registry because that finding “is of no consequence” under Connecticut’s registration law, which was based on conviction for a sexual assault and nothing more). But see *Kansas v. Crane*, 534 U.S. 407, 412 (2002) (holding that the state cannot civilly commit a sex offender without determining that it would be difficult for the offender to control his behavior). Laws targeting sex offenders often include non-sexual offenses—such as public urination or kidnapping—in the list of sexual crimes to which the law applies. See *People v. Knox*, 903 N.E.2d 1149, 1150 (N.Y. 2009) (“Defendants . . . committed, or attempted to commit, kidnapping and unlawful imprisonment. Their victims were children, and defendants were not their victims’ parents. We hold that the State did not violate defendants’ constitutional rights by compelling them to register as ‘sex offenders,’ even though there was no proof that their crimes involved any sexual act or sexual motive.”); Steven J. Costigliacci, *Protecting Our Children From Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180 (2008) (discussing the Adam Walsh Act’s inclusion of kidnapping and false imprisonment on the list of offenses requiring sex offender registration, without requiring that either crime have a sexual component); see also Marissa Ceglian, Note, *Predators or Prey: Mandatory Listing of Non-Predatory Offenders on Predatory Offender Registries*, 12 J.L. & POL’Y 843, 846 (2004) (arguing that persons, like Brian Gunderson in *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003), who have not been convicted of sexual offenses are entitled to procedural due process protections before they are required to register as sex offenders).

plethysmograph testing.<sup>27</sup> The prison may place restrictions on the inmate's prison visitation, work, or other privileges.<sup>28</sup> If an offender is released on parole, his parole officer may direct him to comply with sex offender-specific conditions, including sexual offender treatment, sex offender registration, restrictions on where and with whom the parolee may live, limitations on the use or ownership of computers with internet access, and prohibitions regarding possession of any sexually-oriented materials.<sup>29</sup> Both in prison and on parole, the prisoner may be required to accept responsibility for the alleged behavior underlying his classification or face a variety of negative consequences, including being denied eligibility for parole or having his parole revoked altogether.<sup>30</sup>

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27 A plethysmograph is a device that is placed around a man's penis while he is shown a series of sexual images in order to monitor his erectile responses. For a description of the plethysmograph, see Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders*, 14 TEMP. POL. & CIV. RTS. L. REV. 1, 8 (2004).

28 See, e.g., *Perales v. Hickman*, No. CIV S-06-0358, 2007 WL 2225793, at \*1 (E.D. Cal. July 31, 2007) (describing an inmate who was denied visits with his grandchildren based on his sex offender classification).

29 See, e.g., *Williams v. Ballard*, No. 3-02-CV-0270-M, 2004 WL 1499457, at \*1-2 (N.D. Tex. June 18, 2004) (discussing Mr. Williams, who had never been convicted of a sexual offense, yet had the following prohibitions imposed upon him when he was released to mandatory supervision, based on a sexual assault charge that had been dismissed: "1. Going in, on, or within 500 feet of premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility; 2. Supervising or participating in any program that includes participant or recipient persons who are 17 years of age or younger and that regularly provides athletic, civic, or cultural activities; 3. Operating, causing to operate, securing employment in, participating in, or attending, going in, on, or within 500 feet of any sexually oriented business, including adult bookstores, massage parlors, adult video stores, or any business that provides adult entertainment, such as nude or partially-nude service, dancing, or exhibition; 4. Residing with, contacting, or causing to be contacted, any person 17 years of age or younger, in person, by telephone, correspondence, video or audio device, third person, media, or any electronic means, without the approval of his supervising parole officer; 5. Dating, marrying, or establishing a platonic relationship with any person 17 years of age or younger, or with any person who has children 17 years of age or younger, without the approval of his supervising parole officer; 6. Having any unsupervised contact with persons 17 years of age or younger; 7. Possessing, purchasing, or subscribing to any literature, magazines, books, or videotapes that depict sexually explicit images; 8. Communicating with a person for sexually explicit purposes through telecommunications or any other electronic means, including 1-900 services; 9. Subscribing to, operating, using, or communicating on or by computer or otherwise Internet services, fax services, or electronic bulletin boards; 10. Owning, maintaining, or operating computer equipment without a declared purpose and authorization from his supervising parole officer; and 11. owning, maintaining, or operating photographic equipment, to include instamatic, still photo, video, or any electronic imaging equipment.").

30 See, e.g., *Jones v. Lane*, No. CIV06CV00116EWNMEH, 2006 WL 4451913, at \*2 (D. Colo. Oct. 4, 2006) (alleging that the plaintiff was subjected to arrest and a parole revocation

Further, from the “sex offender” label unfold a wide variety of adverse consequences that are not necessarily prison-prescribed. Sex offenders occupy the lowest rung in the prison hierarchy.<sup>31</sup> As a result, inmates labeled as sex offenders are at heightened risk for violent, sometimes sexual,<sup>32</sup> attacks within prison. Outside of prison, individuals labeled as sex offenders often experience difficulty finding employment and housing, and may find themselves the targets of community outrage ranging from having their homes vandalized to suffering physical assaults.<sup>33</sup> One study found that, in a state that broadcasts the names of all felony sex offenders on the internet and allows for other types of community notification, “one-third to one-half of sex offenders . . . reported ‘dire consequences’ such as the loss of

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hearing for failure to admit to being a sex offender, register as a sex offender, and undergo sex offender treatment).

- <sup>31</sup> See Charles Schwaebe, *Learning to Pass: Sex Offenders’ Strategies for Establishing a Viable Identity in the Prison General Population*, 49(6) INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 614, 618 (2005) (discussing the results of a study of ten prisoners enrolled in a six-month sex offender treatment program in prison and finding that: “All the men in this study recognized the basic fact that as sex offenders they were members of a highly stigmatized group and thus vulnerable to harassment and assault. In addition, larger, stronger, or more aggressive inmates habitually preyed on the weaker, smaller, or less aggressive inmates as a matter of course. Self-protection was best achieved by any combination of strategies, including the establishment of a reputation as one capable of self-defense, denial of status as a sex offender, involvement in a gang or other protective clique, and prudent choices regarding associates and disclosure of one’s offense.”).
- <sup>32</sup> See Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 159–60 (2006) (noting that sex offenders are a “distinct and disfavored category within prison populations, subject to heightened abuse from both corrections officers and fellow inmates,” and may also be more likely to be sexually victimized themselves (citing Philip H. Witt & Natalie Barone, *Assessing Sex Offender Risk: New Jersey’s Methods*, 16 FED. SENT’G REP. 170 (2004), and Marsha Weissman & Richard Luciani, *Sentencing the Sex Offender: A Defense Perspective*, in NAT’L CONFERENCE ON SENTENCING ADVOCACY, 150 LITIGATION AND ADMINISTRATIVE PRACTICE SERIES: CRIMINAL LAW AND URBAN PROBLEMS COURSE HANDBOOK SERIES 272–73 (1989), but also noting that one author, Daniel Lockwood, *Issues in Prison Sexual Violence*, in PRISON VIOLENCE IN AMERICA 97, 99 (Michael C. Braswell et al. eds., 2d ed. 1994), found no evidence that child sex offenders were “more likely to be raped in prison”)); see also NAT’L CRIMINAL JUSTICE REFERENCE SERV., U.S. DEP’T OF JUSTICE, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 75 (2009), available at <https://www.ncjrs.gov/pdffiles1/226680.pdf> (citing “prior convictions for sex offenses against an adult or child” in a list of factors that the report states prisons should use to identify inmates at heightened risk of being sexually victimized, along with “mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, . . . sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity), prior sexual victimization, and the inmate’s own perception of vulnerability”).
- <sup>33</sup> See HUMAN RIGHTS WATCH, *supra* note 26, at 78–79 (“Registered sex offenders face ostracism, job loss, eviction or expulsion from their homes, and the dissolution of personal relationships. They confront harassment, threats, and property damage. Some have endured vigilantism and violence. A few have been killed. Many experience ‘despair and hopelessness;’ some have committed suicide.” (footnotes omitted)).

a job or home, threats or harassment, or property damage,” while about 16% reported being physically assaulted.<sup>34</sup>

### III. LIBERTY INTEREST ANALYSIS AND THE BRANDED CLASS

The Due Process Clause of the Fourteenth and Fifth Amendments protects persons against deprivations of life, liberty, or property. A liberty interest may arise from the Constitution itself, by “reason of guarantees implicit in the word ‘liberty,’” or it may arise from an expectation or interest created by state law or policies.<sup>35</sup> While many of the rights and liberties one enjoys in free society are lost or significantly truncated upon conviction and incarceration, the Supreme Court has made clear “[t]here is no iron curtain drawn between the Constitution and the prisons of this country,” and held that prisoners may claim the protections of the Due Process Clause, such that they may not be deprived of life, liberty or property without due process of law.<sup>36</sup> Although the Supreme Court has held that a change in the conditions of prison confinement may have a “substantial adverse impact” on an inmate without invoking a liberty interest requiring procedural due process protections, a liberty interest may nevertheless exist when a particular label and condition exceeds “the normal limits or range of custody which the conviction has authorized the State to impose.”<sup>37</sup>

As with all procedural due process claims, courts determining whether prison inmates have suffered a violation of their procedural due process rights must decide, first, whether the state has interfered with an inmate’s protected liberty or property interest, and, if so, whether the procedural safeguards in place were constitutionally sufficient to protect the liberty interest at stake.<sup>38</sup> In undertaking the first determination with regard to the

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<sup>34</sup> *Id.* at 79 (citing Jill S. Levenson & Leo P. Cotter, *The Effects of Megan’s Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 1, 49–66 (2005), available at [http://www.royalcreations.com/fatsa/Megans\\_Law\\_Impact\\_JCCJ.pdf](http://www.royalcreations.com/fatsa/Megans_Law_Impact_JCCJ.pdf) (summarizing the inconclusive data on the effects of Megan’s Law)).

<sup>35</sup> *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

<sup>36</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

<sup>37</sup> *Meachum v. Fano*, 427 U.S. 215, 216–17, 224, 225 (1976) (addressing the re-classification of prisoners to a prison with “substantially less” favorable living conditions, based on allegations of misconduct within the prison, and holding that “the Due Process Clause in and of itself [does not] protect a duly convicted prisoner against transfer from one institution to another within the state prison system . . . . That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.”); *see also* *Trujillo v. Williams*, 465 F.3d 1210, 1225 (10th Cir. 2006) (stating that classifications decisions usually do not constitute a deprivation of a liberty interest protected by the Due Process Clause, but a liberty interest may be at stake if prison conditions are atypical and significant).

<sup>38</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

branded class, courts rely on the liberty interest tests articulated by the Supreme Court in *Paul v. Davis* and *Sandin v. Conner*. An analysis of the *Paul* and *Sandin* liberty interest tests in relation to members of the branded class illustrates the differences between these approaches and demonstrates the ways in which stigma may play a more robust role in liberty interest determinations under *Sandin* than under the overtly stigma-focused *Paul*.

#### A. *Paul v. Davis and the Branded Class*

In 1976, the Supreme Court in *Paul v. Davis* addressed whether government-imposed stigma—in that case, listing Mr. Davis, who had been arrested for but not convicted of shoplifting, on a police-issued flyer entitled “Active Shoplifters”—implicated a liberty interest under the Due Process Clause.<sup>39</sup> Now known as the “stigma plus” standard, the holding in *Paul* established that government-imposed injury to reputation alone does not implicate a liberty interest requiring procedural due process protections.<sup>40</sup> While the Court did not define “stigma” in *Paul*, subsequent cases applying *Paul* have defined a stigmatizing label as one that “is sufficiently derogatory to injure [a person’s] reputation, that is capable of being proved false, and that he or she asserts is false.”<sup>41</sup> *Paul* established that a liberty interest is at stake only if the stigmatizing label is accompanied by the government’s alteration or obliteration of “a right or status previously recognized by state law.”<sup>42</sup> Under *Paul*, in other words, it is only this particular type of added burden that adds constitutional significance to what is otherwise (according to *Paul*) harmless government-imposed stigma.

Prisoners in the branded class face considerable challenges in meeting the *Paul* standard, as courts have shown reluctance both in finding the sex offender label stigmatizing and in finding that the conditions imposed upon these prisoners altered or eliminated a state-recognized right. In the first instance, courts have ruled that the label was not stigmatizing because either it was not made public<sup>43</sup> or the prisoner did not affirmatively assert that the label was false.<sup>44</sup> In *Vega v. Lantz*, for instance, the Second Circuit held that

<sup>39</sup> *Paul v. Davis*, 424 U.S. 693, 695–96, 709 (1976). Like Mr. Paul, inmates in the branded class are given a label that implies that they have committed a criminal act for which they have not been convicted.

<sup>40</sup> *Id.* at 712 (“[W]e hold that the interest in reputation asserted in this case is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.”).

<sup>41</sup> *See, e.g.*, *Gwinn v. Awwmiller*, 354 F.3d 1211, 1216 (10th Cir. 2004).

<sup>42</sup> *Paul*, 424 U.S. at 711.

<sup>43</sup> *See, e.g.*, *Gunderson v. Hvass*, 339 F.3d 639, 644 (8th Cir. 2003) (stating that Mr. Gunderson was not stigmatized by registering as a sex offender, as the information in the registry was “private” and was used only by law enforcement).

<sup>44</sup> *See, e.g.*, Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, 1225 (arguing that government blacklists trigger a liberty interest under the constitutional

Mr. Vega, who was convicted of assault and kidnapping but acquitted of a sexual assault charge at trial, failed to establish that he was stigmatized by the prison's sex offender classification because he did not deny that the conduct underlying the classification occurred,<sup>45</sup> nor did he assert that the prison was "unreasonable" in classifying his assault conviction as a sexual offense.<sup>46</sup>

Alternatively, courts applying *Paul* to liberty interests claims raised by members of the branded class may acknowledge the stigma of the sexual offender label but rule that the condition imposed by a prison as a result of the label did not satisfy the "plus" requirement of the "stigma plus" test. For example, in *Grennier v. Frank*, Mr. Grennier, an inmate serving a life sentence for murder, complained that he was repeatedly denied parole because he had not successfully completed a sex offender treatment program the prison imposed upon him because of evidence that he had sexually assaulted his victim.<sup>47</sup> Mr. Grennier did not have a liberty interest under *Paul*'s "stigma plus" standard, the Seventh Circuit held, because parole is discretionary for persons serving life sentences under Wisconsin law, and thus no state-established right had been altered or eliminated.<sup>48</sup> Similarly, in *Gunderson v. Hvass*, the Eighth Circuit held that a prisoner who had been originally charged with a sexual offense but pled guilty to a non-sexual misdemeanor did not have a liberty interest in avoiding registration as a sexual offender, because the burden of sex offender registration was "a minimal one."<sup>49</sup>

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guarantee against bills of attainder, and noting that "[c]ases rejecting a liberty interest [under *Paul v. Davis*] tend to take one of two forms. Most will assume arguendo that a given label is stigmatizing, but resolve the case on lack of a plus. Others will deny the presence of stigma because the allegedly derogatory statement was not published, or because it was not alleged to be false." (footnotes omitted)). Sometimes courts find that the plaintiff was not stigmatized because he had not been formally classified as a sex offender. See, e.g., *Mitchell v. Nix*, No. 1:05-CV-2349, 2007 WL 779067, at \*6-7 (N.D. Ga. Mar. 8, 2007) (holding that the fact that Mr. Mitchell was required to participate in sex offender treatment as a precondition to parole eligibility, based on the Parole Board's belief that his murder conviction contained a sexual component, did not trigger due process protections under *Paul* because the prison never formally classified Mitchell as a sex offender).

<sup>45</sup> *Vega v. Lantz*, 596 F.3d 77, 82 (2d Cir. 2010) (stating that the "conduct underlying his conviction for assault [was] the removal of a teenage girl's nipple and . . . forcing her to swallow it").

<sup>46</sup> *Id.*

<sup>47</sup> *Grennier v. Frank*, 453 F.3d 442, 444 (7th Cir. 2006).

<sup>48</sup> *Id.*

<sup>49</sup> *Gunderson v. Hvass*, 339 F.3d 639, 644 (8th Cir. 2003) (noting that registration required Mr. Gunderson to provide the state with his fingerprints, a photograph, and current information about his address, employment, and vehicle). The court also held that Mr. Gunderson was not stigmatized by the registration, as the information was used only by law enforcement. *Id.*; see also *McCormick v. Hamrick*, No. CIV-09-0054-HE, 2010 WL

### B. *Sandin v. Conner and the Branded Class*

While *Paul* has understandably played a role in courts' consideration of procedural due process claims raised by members of the branded class, most courts apply the prison-specific liberty interest tests established in 1995 by the Supreme Court in *Sandin v. Conner*. In *Sandin*, the Court held that a deprivation within prison does not implicate a liberty interest and thus does not require procedural due process protection unless it meets one of two tests. The first applies even if no state statute or prison regulation is implicated in the liberty interest claim and requires a finding that the condition at stake implicates the Due Process Clause by "exceeding [the prisoner's] sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force" (referred to here as the "exceeds the sentence" standard).<sup>50</sup> This standard did not forge new ground; in citing it, *Sandin* reinforced a longstanding Court approach to liberty interest analysis.<sup>51</sup>

The second test was the novel one: it required courts to assess whether a condition imposed by state laws or prison policies creates an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" (referred to here as the "atypical and significant" standard).<sup>52</sup> In creating the "atypical and significant" standard, the Supreme Court admonished lower courts to find liberty interests only in "real concerns undergirding the liberty protected by the Due Process Clause," not in circumstances that it characterized as the "fine-tuning of the ordinary incidents of prison life."<sup>53</sup> The Court intended this standard to refocus

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5301012, at \*1 (W.D. Okla. Dec. 20, 2010) (holding that the inmate who had prior arrests but no convictions for sexual offenses had no liberty interest in avoiding registration as a sex offender, as he had not "offered evidence demonstrating the 'plus'" of the "stigma plus" standard).

50 *Sandin v. Conner*, 515 U.S. 472, 484 (1995). This standard has also been referred to as the "independent due process liberty interest." *See, e.g., Renchenski v. Williams*, 622 F.3d 315, 325 (3d Cir. 2010) ("A prisoner may be deprived of a liberty interest in violation of the Constitution in two ways: (1) when severe changes in conditions of confinement amount to a grievous loss that should not be imposed without the opportunity for notice and an adequate hearing . . . . The first is the so-called independent due process liberty interest . . . .").

51 *Sandin*, 515 U.S. at 479 n.4 (citing *Vitek v. Jones*, 445 U.S. 480, 493–94 (1980), and *Washington v. Harper*, 494 U.S. 210, 221–22 (1990), for the principle that "the Due Process Clause itself confers a liberty interest in certain situations").

52 *Id.* at 484. This standard has also been referred to as the "state-created liberty interest." *See, e.g., Renchenski*, 622 F.3d at 325.

53 *Sandin*, 515 U.S. at 483–84. The plaintiff in *Sandin*, DeMont Conner, who was serving a life sentence for murder, challenged the sufficiency of a disciplinary hearing that led to a thirty-day segregation in a Special Holding Unit on procedural due process grounds. *Id.* at 474–76. The Court denied him relief, noting that the disciplinary segregation he endured "with insignificant exceptions, mirrored those conditions imposed upon inmates

lower courts on the “nature of the deprivation” rather than the “language of a particular [prison] regulation,” with the goal of allowing prisons to operate with greater freedom by removing the yoke of judicial oversight that had previously veered, in the Court’s eyes, into micromanagement.<sup>54</sup>

Courts have applied both the “exceeds the sentence” and the “atypical and significant” tests in determining whether inmates in the branded class have a liberty interest in avoiding classification and treatment as sexual offenders. When courts applying either *Sandin* standard focus on the conditions prisons impose on members of the branded class separately from the stigma of the sex offender label, they generally fail to find that prisoners have a liberty interest in avoiding the application of the conditions to themselves. Courts taking this approach can find support in cases holding that prisoners have no liberty interest in particular prison conditions, such as visitation with family or friends or being held in a particular prison.<sup>55</sup> After a review of the cases applying *Sandin*’s standards to the branded class, it appears that only by focusing on stigma have courts consistently found that these prisoners have a liberty interest in avoiding classification and treatment as sexual offenders.

Before addressing the significance of stigma in these cases, it is useful to take a closer look at why conditions, standing alone, have not been a reliable basis for liberty interest claims raised by members of the branded class under either of *Sandin*’s liberty interest tests.

### *1. Analyzing Prison Conditions Under the “Atypical and Significant” Standard*

Prison conditions can, of course, be “atypical and significant” regardless of stigma. In *Wilkinson*, the Supreme Court held that incarceration in a Supermax facility “imposes an atypical and significant hardship under any plausible baseline.”<sup>56</sup> But the fact that the Court has not defined how such

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in administrative segregation and protective custody” and thus was neither atypical nor significant. *Id.* at 486.

<sup>54</sup> *Id.* at 481.

<sup>55</sup> *See, e.g.*, *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 461 (1989) (“The denial of prison access to a particular visitor is ‘well within the terms of confinement ordinarily contemplated by a prison sentence’ and therefore is not independently protected by the Due Process Clause.” (internal citations omitted)); *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (“The Constitution does not require that the State have more than one prison for convicted felons; nor does it guarantee that the convicted prisoner will be placed in any particular prison . . .”).

<sup>56</sup> *Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005) (relying on the following factors in making its “atypical and significant” finding: highly restricted human contact in Supermax facilities; constant light; limited exercise; indefinite duration with limited review; and the fact that inmates in the facility are ineligible for parole).

baselines, plausible or otherwise, should be drawn leaves lower courts at a loss as to how best to make determinations of atypicality and significance.<sup>57</sup> In determining whether a condition is atypical or significant, courts therefore variously look to everything from the commonality of the condition in the prison system, to its effect on the length of the prisoner's sentence, to what other courts have said about the type of condition at issue.<sup>58</sup>

As a result, courts applying *Sandin's* "atypical and significant" standard to conditions imposed on members of the branded class have found that no liberty interest was implicated by conditions as diverse as restricted visitation with child family members;<sup>59</sup> sexual offender treatment in prison in general;<sup>60</sup> or sexual offender treatment as a precondition of parole eligibility.<sup>61</sup> For example, in *Cooper v. Garcia*, the prison classified Mr. Garcia as a sex offender based on a prior arrest for a sexual assault charge that was ultimately dismissed. Mr. Garcia asserted that he had a liberty interest in avoiding the restrictions on visitation with his wife and children that arose as a result of the sex offender classification.<sup>62</sup> The Court held that this

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<sup>57</sup> In *Wilkinson*, the Court itself acknowledged, but did not attempt to resolve, the fact that *Sandin's* holding had led lower courts to develop conflicting methods for, in the Court's words, "identifying the baseline from which to measure what is atypical and significant in any particular prison system." *Id.* at 223. By way of example, in *Hill v. Fleming*, the Tenth Circuit noted that "[w]hen considering whether the conditions, duration or restrictions are atypical as compared to other inmates, we have considered as a baseline whether the segregation at issue mirrors that imposed on inmates *in the same segregation*, while at other times we have made comparisons with the *general prison population*." 173 F. App'x 664, 669-70 (10th Cir. 2006) (footnotes omitted).

<sup>58</sup> See Lee, *supra* note 19, at 788, 828. Professor Lee describes the federal circuit courts as falling into one of four categories of liberty interest analysis: those taking a "fact-based" approach to the *Sandin* test (looking at data supporting or refuting the commonality of a particular condition); those taking a "law-based" approach (relying on case law discussing particular conditions rather than empirical data); those adopting a "narrow" approach ("equivalent to having a bright-line rule against finding a state-created liberty interest except in those rare circumstances where it appears certain that a prisoner's period of incarceration was lengthened as a result of the challenged action"); and those taking a "broad" approach (neither consistently relying on case law nor consistently relying on empirical evidence when applying the *Sandin* test). See also Myra A. Sutanto, *Wilkinson v. Austin and the Quest for a Clearly Defined Liberty Interest Standard*, 96 J. CRIM. L. & CRIMINOLOGY 1029, 1047 (2006) (describing four different baselines that the federal circuit courts have applied when making determinations regarding the typicality and significance of prison conditions: "(1) the effect on the length of sentence, (2) the conditions faced by typical inmates, (3) the most restrictive prison conditions statewide, and (4) the conditions faced in administrative segregation").

<sup>59</sup> See, e.g., *Cooper v. Garcia*, 55 F. Supp. 2d 1090, 1100 (S.D. Cal. 1999).

<sup>60</sup> See, e.g., *Tinsley v. Goord*, No. 05 Civ. 3921, 2006 WL 2707324, at \*5 (S.D.N.Y. Sept. 20, 2006).

<sup>61</sup> See, e.g., *Mitchell v. Nix*, No. 1:05-CV-2349-JOF, 2007 WL 779067, at \*6-7 (N.D. Ga. Mar. 8, 2007).

<sup>62</sup> *Garcia*, 55 F. Supp. 2d at 1100.

condition did not constitute an “atypical and significant” hardship because many inmates experience restrictions on family visitation during their time in prison.<sup>63</sup> Similarly, in *Tinsley v. Goord*, the court held that New York state law and prison regulations did not create a liberty interest in avoiding sex offender classification, nor did requiring an inmate to participate in sexual offender treatment constitute an atypical or significant hardship such that a prisoner’s constitutional due process rights were implicated under *Sandin*—even in the case of a prisoner like Mr. Tinsley, who had been acquitted by a jury of sexual assault charges.<sup>64</sup>

## 2. Analyzing Prison Conditions Under the “Exceeds the Sentence” Standard

When courts apply the “exceeds the sentence” standard to procedural due process claims brought by members of the branded class, they rely on the pre-*Sandin* case *Vitek v. Jones*, which *Sandin* cites for the principle that liberty interests may arise from the Due Process Clause.<sup>65</sup> In *Vitek*, the Court found that the “stigmatizing consequences” of involuntary commitment to a mental hospital, when accompanied by “mandatory behavior modification as a treatment for mental illness,” are deprivations that deviate so drastically from the types of confinement conditions warranted by a prison sentence that their imposition constitutes a “grievous loss” to the inmate.<sup>66</sup> It is that combination of factors—the labeling of an inmate as mentally ill coupled with the physical transfer of the inmate to a mental hospital—that, in the Court’s eyes, implicate a liberty interest that could not be infringed upon without due process.<sup>67</sup>

The *Vitek* Court, like *Paul*, found a liberty interest in the combination of stigma and a specific type of consequence—the “mandatory behavior modification” involved in mental health treatment—associated with that stigma.<sup>68</sup> As under *Paul*, stigma must accompany the condition, just as a

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<sup>63</sup> *Id.*

<sup>64</sup> *Goord*, 2006 WL 2707324, at \*4–5 (noting that “[s]ome circuits have held that a prisoner’s classification as a sex offender during imprisonment implicates a liberty interest,” but the Second Circuit was not among them); *see also* *Lucas v. Dickman*, No. 08-cv-01310-ZLW-KMT, 2009 WL 1810916, at \*6 (D. Colo. June 23, 2009) (concluding that an inmate classified as a sex offender based on a dismissed sexual assault charge had no liberty interest in avoiding the consequences he experienced as a result; fear of bodily injury and loss of job opportunities were not atypical and significant hardships).

<sup>65</sup> *Sandin v. Conner*, 515 U.S. 472, 479 n.4 (1995).

<sup>66</sup> *See Vitek v. Jones*, 445 U.S. 480, 488, 493–94 (1980) (“Our cases . . . reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual.”).

<sup>67</sup> *Id.* at 494.

<sup>68</sup> *Id.*

particular type of condition must accompany the stigma, in order for a liberty interest to exist. In *Vitek*, the Court noted that the conditions that Mr. Vitek experienced in the mental institution in which he was confined, considered alone, “might not constitute the deprivation of a liberty interest retained by a prisoner.”<sup>69</sup>

Courts applying *Sandin* to procedural due process claims brought by members of the branded class have demonstrated that they will find liberty interests only in conditions comparable to those found in *Vitek*—conditions that are mandatory and/or involve behavior modifying attributes<sup>70</sup>—and that those conditions would be insufficient to create a liberty interest in and of themselves. For example, in *Kramer v. Donald*, the Eleventh Circuit held that Mr. Kramer, who was serving time for a non-sexual offense, had no liberty interest in avoiding mandatory participation in sex offender counseling because he was not formally classified as a sex offender; the counseling alone had no liberty interest implications.<sup>71</sup> In *Neal v. Shimoda*, the Court suggested in dicta that if the prison simply required an inmate in the branded class to complete a sexual offender treatment program, without

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<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.*, *Stevens v. Robles*, No. 06CV2072-LAB, 2008 WL 667407, at \*8 (S.D. Cal. Mar. 7, 2008) (holding that the prison’s imposition of a sex offender label on Mr. Stevens, although he had never been convicted of a sexual offense, and the resulting denial of family visitation due to that label, did not trigger a liberty interest as “Stevens alleges no facts from which it may be inferred that his parole eligibility or good time credits or any other effect that could impact the fact or duration of his conviction and sentence is implicated, nor that he is compelled to complete a sex offender program before he can be parole-eligible, nor that he confess to past sex offenses or the like, from which a combination of factors could be found to trigger a liberty interest”); *see also* *Cooper v. Garcia*, 55 F. Supp. 2d 1090, 1102 (S.D. Cal. 1999) (holding that “[b]ased on statements by the courts in *Vitek* and *Neal*, the liberty interest at stake must be more than a mere ‘sex offender’ classification or a ‘mental illness’ classification”). *Garcia* clarifies that the classification must also be “‘coupled with’ some *mandatory, coercive treatment* which affects a liberty interest, such as parole release as in *Neal*, or a physical transfer to a mental hospital for involuntary confinement as in *Vitek*.” *Id.* “In this case, however, the sex offender classification is coupled with the denial of family visitation ‘privileges,’ the latter not rising to a liberty interest.” *Id.* In *Williams v. Ballard*, 466 F.3d 330, 332 n.2, 335 n.10 (5th Cir. 2006), the Fifth Circuit noted that the *Coleman* cases were limited to situations involving “registration and therapy conditions,” not the denial of participation in a computer skills program of which, among other circumstances, Mr. Williams complained.

<sup>71</sup> *See Kramer v. Donald*, 286 F. App’x 674, 677 (11th Cir. 2008) (explaining that Mr. Kramer had not been classified as a sex offender, but that the Parole Board “determined only that the non-sexual offense for which Kramer has been imprisoned also had a sexual component that warrants counseling; neither the Board nor the Georgia Department of Corrections has classified or otherwise labeled Kramer as a sex offender”—and thus this action was “insufficiently stigmatizing” to implicate a liberty interest). The Eleventh Circuit so held despite the fact that, in *Kirby v. Siegelman*, 195 F.3d 1285 (11th Cir. 1999), decided almost a decade before *Kramer*, it found that Mr. Kirby had a liberty interest in avoiding classification as a sex offender when that classification was accompanied by sex offender treatment. *See infra* notes 76–78 and accompanying text.

an accompanying sex offender classification, that obligation would not, by itself, implicate a liberty interest.<sup>72</sup>

### 3. *How Stigma Impacts Liberty Interest Analysis Under Sandin v. Conner*

Courts, as we have seen, generally do not find that members of the branded class have a liberty interest at stake when considering prison conditions alone under *Paul* or *Sandin*. *Paul* clarified that stigma by itself can never give rise to a liberty interest deserving of procedural due process protections. But courts have identified liberty interests deserving of procedural due process protection for the branded class when, citing *Vitek*, they incorporate considerations of stigma into *Sandin*'s "atypical and significant" and "exceeds the sentence" tests. Although *Vitek*'s stigma-plus-condition approach to liberty interest identification looks like *Paul*'s "stigma plus" approach, in practice *Vitek* gives courts greater latitude both in defining "stigma" and in identifying what types of associated prison conditions give rise to a liberty interest than *Paul*.

Five federal circuit courts—the Third, Fifth, Ninth, Tenth, and Eleventh—have held that inmates who have never been convicted of a sexual offense have a liberty interest in avoiding classification and treatment as sexual offenders.<sup>73</sup> In each of these cases, it is the court's focus on the stigma of the sex offender classification, rather than the prison or parole conditions alone, that significantly contributed to its liberty interest determination. A closer look at each of these cases illuminates the role that stigma played in the court's conclusion that members of the branded class

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<sup>72</sup> *Neal v. Shimoda*, 131 F.3d 818, 830 (9th Cir. 1997) ("The liberty interest implicated by the establishment of the [Sex Offender Treatment Program] is not merely the requirement that sex offenders complete the specified treatment program. If that were all that was at stake, we could probably not say that a liberty interest had been created, given the fact that prisons frequently maintain treatment and behavioral modification programs (such as anger management or alcohol abuse classes) that have long withstood legal challenge. The liberty interest at stake in this case is similar in form and scope to the interest at stake in *Vitek*: the stigmatizing consequences of the attachment of the 'sex offender' label coupled with the subjection of the targeted inmate to a mandatory treatment program whose successful completion is a precondition for parole eligibility create the kind of deprivations of liberty that require procedural protections.").

<sup>73</sup> No other federal circuit courts have so held, although lower courts have relied on these decisions in finding liberty interests for members of the branded class. *See, e.g.*, *Gilmore v. Bostic*, 636 F. Supp. 2d 496, 511–12 (S.D. W. Va. 2009) ("Like the Fifth, Ninth, Tenth, and Eleventh Circuits, the court concludes that a sex offender treatment program could constitute a change in the conditions of confinement so severe as to essentially exceed the sentence imposed by the court."). The court also noted that the plaintiff has a liberty interest in parole under the West Virginia Constitution. *Id.*

were entitled to procedural due process protections before prisons can designate them as sex offenders and treat them accordingly.

In *Neal v. Shimoda*, the Hawaiian Department of Public Safety classified Neal, who was originally charged with sexual assault but pled guilty to a non-sexual offense, as a sexual offender based on allegations that he had engaged in sexual misconduct during the course of his crime.<sup>74</sup> Analogizing Mr. Neal's situation to that in *Vitek*, and concluding that "[w]e can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender," the Ninth Circuit held that it was the combination of this stigmatizing label and the fact that Neal was required to take part in mandatory sexual offender treatment in order to be considered for parole that implicated a liberty interest requiring procedural due process protections under *Sandin's* "atypical and significant hardship" standard.<sup>75</sup>

The Eleventh Circuit followed a similar line of reasoning in *Kirby v. Siegelman*.<sup>76</sup> In *Kirby*, one of the plaintiffs was serving a sentence for a non-sexual offense, but was classified as a sex offender by the Alabama Department of Corrections based on two prior sexual assault charges that had been dismissed.<sup>77</sup> The Eleventh Circuit enumerated the consequences of this classification—participation in group therapy sessions of Sexual Offenders Anonymous as a prerequisite to parole eligibility and ineligibility for minimum security classification (which prevented him from being considered for some work-release and community programs)—and, in holding that the plaintiff had a liberty interest at stake under *Sandin's* "exceeds the sentence" standard, followed *Neal's* lead in analogizing the situation to that in *Vitek*.<sup>78</sup>

In *Chambers v. Colorado*, the Tenth Circuit addressed the Colorado Department of Corrections' ("CDOC") practice of assigning sex offender status to persons who had never been convicted of a sexual offense.<sup>79</sup> Mr. Chambers was serving a sentence for a non-sexual offense when the CDOC

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<sup>74</sup> See *Neal*, 131 F.3d at 822.

<sup>75</sup> *Id.* at 829–30 ("The classification of an inmate as a sex offender is precisely the type of 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life' that the Supreme Court held created a protected liberty interest.").

<sup>76</sup> *Kirby*, 195 F.3d at 1285.

<sup>77</sup> *Kirby v. Siegelman*, 195 F.3d 1285, 1288 (11th Cir. 1999).

<sup>78</sup> *Id.* at 1291–92. The *Kirby* Court elected the "exceeds the sentence" standard because it found that Alabama "has not created a liberty interest in not being classified as a sex offender absent a conviction for a sex related crime. Indeed, the [Alabama Department of Corrections'] regulations specifically declare otherwise." *Id.*

<sup>79</sup> See *Chambers v. Colorado Dep't of Corr.*, 205 F.3d 1237 (10th Cir. 2000) (deciding whether classifying an inmate as a sex offender and ordering him to take part in a sex offender treatment program involves a liberty interest under the Fourteenth Amendment).

classified him as a sexual offender based on a prior dismissed sexual assault charge.<sup>80</sup> After he was so classified, Mr. Chambers continued to receive good time and earned time credits.<sup>81</sup> These earned time credits were reduced, however, when Mr. Chambers denied having committed the sexual assault, thus rendering him ineligible to participate in sexual offender treatment.<sup>82</sup> The Tenth Circuit held that because Mr. Chambers received earned time credits for many years after he was labeled as a sexual offender, removing those credits, when coupled with a mandatory sexual offender label “replete with inchoate stigmatization,” required procedural scrutiny under the Due Process Clause.<sup>83</sup> While the Court cited *Sandin*, *Vitek*, *Neal*, and *Kirby*, it did not specify which of *Sandin*’s liberty interest tests it was applying to Mr. Chambers’ claim.

The Fifth Circuit addressed the liberty interests involved in the classification of an inmate as a sexual offender in the absence of a conviction for a sexual offense in the two *Coleman v. Dretke* cases.<sup>84</sup> Mr. Coleman was on parole for a non-sexual offense when the state of Texas indicted him on a charge of sexual assault on a child. The prosecution eventually dismissed the sexual assault charge in exchange for Mr. Coleman’s plea of guilty to misdemeanor assault.<sup>85</sup> His parole was revoked as a result of this plea, but when he was re-released on parole, the parole panel required him to register as a sex offender and attend sex offender therapy.<sup>86</sup> Again relying on the Supreme Court’s analysis in *Vitek*, the Fifth Circuit held that the stigmatizing sex offender label coupled with compelled sexual offender treatment as a condition of parole—treatment that involved “intrusive and behavior-modifying techniques” and was “qualitatively different” from the other types of counseling or treatment required of inmates upon their release on parole<sup>87</sup>—created a liberty interest in freedom from sexual offender

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80 *Id.* at 1238–39.

81 *Id.*

82 *Id.* at 1239.

83 *Id.* at 1242. Interestingly, in *Gwinn v. Aumiller*, a case discussing the procedural due process protections due to members of the branded class post-*Chambers*, the Court indicated it had found a liberty interest in *Chambers* under *Paul*’s “stigma plus” standard. 354 F.3d 1211, 1216–17 (10th Cir. 2004) (citing *Paul v. Davis*, 424 U.S. 693 (1976); *Chambers*, 205 F.3d at 1237). This is surprising, as the *Chambers* decision did not cite to *Paul* or the “stigma plus” standard, but rather relied on *Sandin* and cases interpreting *Sandin* as it applied to members of the branded class (although it did, at one point, reference the Department of Corrections’ reliance on “the ‘stigma plus’ the Court required in *Sandin v. Conner* to implicate a liberty interest”). *Chambers*, 205 F.3d at 1241 (citing *Sandin v. Conner*, 515 U.S. 472 (1995); *Paul*, 424 U.S. at 693).

84 See *Coleman v. Dretke* (Coleman I), 395 F.3d 216 (5th Cir. 2004), *reh’g denied*, (Coleman II), 409 F.3d 665 (5th Cir. 2005).

85 See *Coleman I*, 395 F.3d at 219.

86 *Id.*

87 *Id.* at 223.

classifications and conditions under *Sandin*'s "exceeds the sentence" standard.<sup>88</sup> In the second *Coleman* case, the Fifth Circuit further explained that "by requiring [Coleman] to attend sex offender therapy, the state labeled him a sex offender—a label which strongly implies that Coleman has been convicted of a sex offense and which can undoubtedly cause 'adverse social consequences.'"<sup>89</sup>

Finally, in *Renchenski v. Williams*, the Third Circuit addressed the procedural due process claims raised when the Pennsylvania prison system classified Mr. Renchenski, who was serving a sentence for murder, as a sex offender even though he had no sexual assault conviction history.<sup>90</sup> The prison based the classification on evidence in the Pre-Sentence Report concerning the circumstances of the homicide, and on the same Report's conclusion that sex was an issue of concern for Mr. Renchenski.<sup>91</sup> Based on this information, a prison counselor classified him as a sexual offender and required him to take part in three sex offender treatment programs.<sup>92</sup> The court held that the prison's classification of Renchenski as a sexual offender was stigmatizing.<sup>93</sup> Further, the court noted that the sex offender program to which Renchenski was subjected was analogous to the "compelled treatment in the form of mandatory behavior modification programs" at issue in *Vitek*.<sup>94</sup> The court thus held that the combination of stigma and the mandatory sex offender therapy evoked a liberty interest under the "exceeds the sentence" standard that required procedural due process protections.<sup>95</sup>

The Third, Fifth, Ninth, Tenth, and Eleventh Circuits all considered the nature of the conditions imposed upon the prisoners, and it was the conditions themselves—the "qualitatively different" nature of sex offender therapy, the removal of good time credits that the prisoner had enjoyed for years—that played a significant role in the courts' conclusion that a liberty interest requiring procedural due process protections was at stake. However, the courts' analysis of the conditions also takes into account the

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88 *Id.* at 222–24.

89 *Coleman II*, 409 F.3d at 668.

90 622 F.3d 315, 320 (3d Cir. 2010).

91 *Id.* at 320–21. The Pre-Sentence Report noted that the homicide victim was found "in an isolated rural area, and that 'the body . . . was clad only in a bra (which was unbuttoned and pulled over the breasts), a blouse which was also above the breasts, and socks.'" *Id.* The Report went on to note injuries to the victim's body and genitals, including the mutilation of one of her breasts, and noted "sexual" as a "past or present problem area" for Renchenski. *Id.*

92 *Id.* at 321–22 (describing the Sex Offender Treatment Program in Pennsylvania's prison system as "a seven-phase behavioral modification course" that involves weekly group therapy over a two-year period).

93 *Id.* at 326.

94 *Id.*

95 *Id.* at 328.

stigma imposed on the prisoners at issue, and it is this stigma that played an essential role in the courts' finding that the condition implicated a liberty interest requiring procedural due process protections.

Although the *Kirby*, *Chambers*, *Neal*, *Coleman*, and *Renchenski* decisions equated the sex offender label and associated conditions to the "mental illness" label and mental hospital transfer in *Vitek*, this is as far as they take us in terms of clarifying the nature of the stigma and accompanying prison conditions necessary to trigger a liberty interest under either *Sandin* standard. What, exactly, did the courts mean by "stigma?" And when "stigma" exists, what types of conditions must accompany that stigma in order to implicate a liberty interest under the Due Process Clause?

#### IV. WHAT DOES STIGMA MEAN IN THE PRISON SETTING?

When *Kirby*, *Chambers*, *Neal*, *Coleman*, and *Renchenski* rely on stigma as a source of liberty interests behind prison walls, they define a label as "stigmatizing" based on the outcomes it may engender.<sup>96</sup> *Vitek* located stigma in a label with "adverse social consequences."<sup>97</sup> In *Neal*, the court took its cue from *Vitek*, pointing to mandatory registration laws aimed at sex offenders as one of the "stigmatizing consequences" of sex offender

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<sup>96</sup> The courts do not adopt the definition of stigma that courts have applied to the *Paul* "stigma plus" test—that is a label that is derogatory enough to damage a person's reputation, that the person to whom it is applied claims is false, and that can be proven false. See, e.g., *Gwinn v. Awmiller*, 354 F.3d 1211, 1216 (10th Cir. 2004) (citing *Paul v. Davis*, 424 U.S. 693 (1976)). Compare this definition with the concept of reputation as a "critical site for autonomous identity formation" posited by Eric J. Mitnick, citing to Anthony Appiah's concept of social labeling that consists of three parts: 1) a recognized social label attached to a group of persons, centered around "an external social consensus that those who fall within a particular class are alike in certain ways, either in terms of appearance, presumed behavior, or other socially detectable tendencies"; 2) the "internalization" of the label by those identified by it; 3) "the existence of patterns of behavior towards [the labeled group]." Mitnick also references Robert Post's "conceptions of reputation as property, as honor, and as dignity." See Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 101, 111–13 (2009) (citing Kwame Anthony Appiah, *THE ETHICS OF IDENTITY* 65–71 (2005); Robert C. Post, *New Perspectives in the Law of Defamation: The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691, 693 (1986)); see also Ball, *supra* note 9, at 146 (discussing Bruce Link and Jo Phelan's "five components of stigma—'labeling, stereotyping, separation, status loss, and discrimination,'" that occur "in a power situation that allows the components to take hold") (citing Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 377 (2001)).

<sup>97</sup> See *Vitek v. Jones*, 445 U.S. 480, 492 (1980) ("It is indisputable that commitment to a mental hospital 'can engender adverse social consequences to the individual' and that '[w]hether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual." (internal citations omitted)).

classification.<sup>98</sup> The *Neal* court's "stigmatizing consequences" language was cited in *Kirby*, while the *Chambers* court cited both the existence of mandatory sex offender registration laws and the danger of mislabeling an inmate as a convicted sexual offender in support of its assertion that a sex offender label is "replete with inchoate stigmatization."<sup>99</sup> In *Coleman II*, the court noted that "adverse social consequences" would "undoubtedly" unfold from the imposition of a sex offender label.<sup>100</sup> *Renchenski*, also citing to *Vitek*'s "adverse consequences" standard, pointed to studies indicating that sex offenders are particularly vulnerable to sexual and physical violence in prison in support of its finding that *Renchenski* was stigmatized by the sex offender label.<sup>101</sup>

These courts, as they seek to identify a liberty interest for prisoners in the branded class, associate the stigma of a label with its risk of adverse effects on the person labeled. But they actually mean something more than that. It is well established that persons who have been convicted of sexual offenses have no liberty interest in avoiding classification as a sexual offender<sup>102</sup> or avoiding sex offender conditions, including registration and sex offender treatment.<sup>103</sup> Prisons therefore do not "stigmatize" prisoners in ways forbidden by the Due Process Clause when they classify inmates in ways consistent with the offenses for which they were convicted, although those

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98 See *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) (citing *Vitek*, 445 U.S. at 480). The court also cited to the fact that, like mental illness at the time that *Vitek* was decided, the origins of sexual deviancy remain largely a scientific mystery as a source of stigma.

99 See *Chambers v. Colorado Dep't of Corr.*, 205 F.3d 1237, 1242 n.13 (10th Cir. 2000) (emphasizing that a label of "sex offender" is one with emotional connotations and noting that "the possibilities for mischaracterization and mischief are always present when such a label is affixed").

100 See *Coleman v. Dretke* (*Coleman II*), 409 F.3d 665, 668 (5th Cir. 2005) (further clarifying that a label with such consequences can be stigmatizing even if it is not made public).

101 See *Renchenski v. Williams*, 622 F.3d 315, 326 (3d Cir. 2010) (providing evidence that sex offenders are subject to intense beatings and sexual abuse inside of prisons).

102 See, e.g., *Rainge-El v. Moschetti*, No. 05-cv-01831-PSF-CBS, 2006 WL 1876632, at \*2-4 (D. Colo. July 6, 2006).

103 See, e.g., *Neal*, 131 F.3d at 831 (rejecting the procedural due process and ex post facto challenges to Hawaii's sex offender treatment program raised by Marshall Martinez, who was serving a prison sentence after having been convicted of attempted rape. Mr. Martinez also had two prior convictions for rape and attempted sexual assault. The court held that "[a]gainst this background, it is clear that Martinez received all the process to which he was due . . . . An inmate who has been convicted of a sex crime in a prior adversarial setting, whether as the result of a bench trial, jury trial, or plea agreement, has received the minimum protections required by due process. Prison officials need do no more than notify such an inmate that he has been classified as a sex offender because of the prior conviction for a sex crime."); see also, *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (holding that plaintiff had no right, under the Due Process Clause, to contest inclusion in a sex offender registry because he had been convicted of a sexual offense; "[T]he law's requirements turn on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest").

classifications may have an impact on the inmates' well-being, social status, and even physical safety. *Kirby, Chambers, Neal, Coleman, and Renchenski* were therefore not just concerned about adverse consequences of the sex offender label; they were concerned about the possible imposition of those consequences on a prisoner in the *absence* of a conviction for a sexual offense.

*Vitek* found that the state's labeling of an inmate as mentally ill and committing him against his will to a mental hospital was a combination of factors "qualitatively different from the punishment characteristically suffered by a person convicted of crime."<sup>104</sup> What makes a "sex offender" label stigmatizing in *Kirby, Chambers, Neal, Coleman, and Renchenski* also has to do with its qualitative differences—not from what is characteristically suffered by a person convicted of "crime" in general, but from what an inmate convicted of a *non-sexual* crime can be expected to endure.<sup>105</sup> Just as adverse prison conditions carry no liberty interest implications "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him,"<sup>106</sup> a label imposed by a prison on an inmate only has liberty interest implications if the label is untethered to the inmate's conviction history. It is this type of stigmatizing classification, when associated with prison conditions equivalent to the "[c]ompelled treatment in the form of mandatory behavior modification programs" found in *Vitek*,<sup>107</sup> that *Kirby, Chambers, Neal, Coleman, and Renchenski* held to implicate a liberty interest requiring procedural due process protections.

These decisions reflect, then, a concern about a certain type of government-imposed stigma—accusing an individual of committing a criminal act—that has roots in Supreme Court jurisprudence. The dissenting Justices in *Paul*<sup>108</sup> pointed to the Court's decisions in *In Re Winship*<sup>109</sup> and *Jenkins v. McKeithen*<sup>110</sup> as evidence that the Court had previously been protective of the rights of the individual to be free of government-imposed accusations of crime without due process.<sup>111</sup> In *Winship*, the Court held that the proof beyond a reasonable doubt standard should be applied to juvenile adjudications, citing both the child's interest

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<sup>104</sup> *Vitek v. Jones*, 445 U.S. 480, 493 (1980).

<sup>105</sup> The Fifth Circuit made this clear in *Coleman II*, when it found that the prison's imposition of certain sex-offender-specific conditions on an inmate with no sex offense convictions was stigmatizing precisely because that action "strongly implies" that the inmate "has been convicted of a sex offense." 409 F.3d at 668.

<sup>106</sup> *Vitek*, 445 U.S. at 493 (quoting *Montanye v. Haymes*, 427 U.S. 236, 242 (1976)).

<sup>107</sup> *Id.* at 492.

<sup>108</sup> *Paul v. Davis*, 424 U.S. 693, 714–35 (1976) (Brennan, J., dissenting).

<sup>109</sup> 397 U.S. 358, 363–64 (1970).

<sup>110</sup> 395 U.S. 411, 424 (1969).

<sup>111</sup> *Paul*, 424 U.S. at 724–26 (Brennan, J., dissenting).

in his potential loss of liberty and “the certainty that he would be stigmatized by the conviction.”<sup>112</sup> In *Jenkins v. McKeithen*, the Court held that persons investigated by a state-created commission with the power to make findings regarding criminal activity<sup>113</sup> should be entitled to the right to confront and cross-examine witnesses, and the right to present evidence in his or her own defense.<sup>114</sup> The Court held that both rights are “particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime.”<sup>115</sup> In light of this history, the dissent in *Paul* was seemingly dumbfounded by the majority’s failure to find that Mr. Paul had a liberty interest in avoiding being labeled an “active shoplifter” by the police—an act that imposed upon Mr. Paul “the stigmatizing label ‘criminal’ without the salutary and constitutionally mandated safeguards of a criminal trial.”<sup>116</sup>

The cases finding a liberty interest for inmates in the branded class demonstrate that the concern about this particular type of stigma—government accusations of criminal acts leveled against its citizens—lives on in *Sandin*, despite *Paul*’s holding that such an accusation, standing alone, has no liberty interest implications.<sup>117</sup> Although *Vitek*, when applied to either *Sandin* test, requires that “stigma” be accompanied by a specific sort of condition in a way reminiscent of *Paul*’s “stigma plus” standard, this approach departs from *Paul* in that it provides an opportunity for an expanded definition of the type of labels and consequences that deserve procedural due process protections behind bars. Further, *Vitek* reminds us that a label can be stigmatizing even if it does not implicate an individual in a criminal act. If stigma is part of what makes a prison condition “atypical

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112 *In re Winship*, 397 U.S. at 363–64; see also, Ball, *supra* note 9, at 137 (“*Winship* identifies two liberty interests—first, the interest in avoiding a commitment to reform school, and second, the stigma of being adjudged a delinquent. This stigmatic interest is a liberty interest in its own right, one which *Apprendi* also identifies separately . . . I argue that the presence or absence of stigma explains the difference between deprivations which require *Apprendi*/*Winship* protections and those which do not.” (footnotes omitted)).

113 The Louisiana Labor-Management Commission of Inquiry was created by the state to investigate and make findings regarding potential violations of criminal laws related to labor-management relations. *Jenkins v. McKeithen*, 395 U.S. 411, 414 (1969).

114 *Id.* at 428–29 (emphasizing that the right to confront and cross-examine witnesses is a “fundamental aspect of procedural due process,” and that “[t]he right to present evidence is, of course, essential to the fair hearing required by the Due Process Clause”).

115 *Id.* at 429.

116 *Paul v. Davis*, 424 U.S. 693, 718 (1976) (Brennan, J., dissenting).

117 Of course, *Paul* itself didn’t say that the accusation at issue—that Mr. Paul was an “active shoplifter,” although he had never been convicted of such an offense—was not injurious to his reputation. *Id.* at 706. It held instead that the label alone did not implicate a liberty interest under the Due Process Clause. *Id.* It is the definition of “stigma” applied to the “stigma plus” analysis under *Paul*, along with the limitations on what conditions constitute a sufficient “plus,” that poses problems for inmates in the branded class.

and significant,” or what causes a prison condition to “exceed the sentence” in a way deserving of procedural due process protections, then courts would benefit from clear guidelines specifying the source of this constitutionally significant stigma. Courts, as well as prisons and inmates, would also benefit from allowing a broader range of conditions to trigger liberty interests when those conditions are accompanied by a stigmatizing label. We turn first to a definition of stigma, and then to the question of conditions.

#### A. *The Definition of Stigma*

The case law gives rise to the following definition: stigma is present when a prison imposes a label on an inmate that (a) implies that he has committed a criminal act or has a mental disorder; (b) is unrelated to the elements of his crimes of conviction; and (c) carries a significant risk of adverse consequences to the inmate.

This definition incorporates both a prison designation of any inmate as “mentally ill” and the designation of inmates in the branded class as “sexual offenders,” while giving greater guidance to courts addressing inmate liberty interests arising from other circumstances. Further, this definition ensures that only specific types of stigmatizing labels—those that degrade and defame in a particular way, with significant risks associated with them—have liberty interest implications, preventing courts (and prisons) from being overwhelmed with procedural due process claims based on stigmatizing labels without constitutional significance. Finally, this definition serves to create a framework within which courts should *always* find that stigma with liberty interest implications is present; this is not to say that courts could not find stigma elsewhere, in other types of labels, in circumstances unconsidered by the definition posited here.

Courts adopting this definition when analyzing procedural due process claims within prisons would thus ask three threshold questions. First, the court would ask whether the prison (either implicitly<sup>118</sup> or explicitly) imposed a label on a prisoner that implies that he has committed a criminal act or has a mental disorder. If so, the court would then ask if the label is based on the elements of his crimes of conviction. In so doing, the court should consider whether there is a clear nexus between the label the prison imposed upon the prisoner and the elements of the offenses for which he sustained convictions in court. If no such nexus exists, the court should

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<sup>118</sup> The lack of a formal prison-imposed classification is not dispositive; in line with the approach taken by *Coleman II*, if the prison imposes conditions on an inmate that are strongly associated with a particular status—i.e., sex offender treatment—that action is the functional equivalent of labeling an inmate as a sex offender and should be analyzed in the same way.

next ask whether the label at issue carries a significant risk of adverse consequences. If the answer to this final question is yes, courts should find that the label is stigmatizing. When such stigma is present, courts should find that the inmate at issue has a liberty interest in avoiding the stigmatizing label and its attendant consequences under either *Sandin* standard.<sup>119</sup>

A close look at the Federal Security Designation and Custody Classification Manual demonstrates how this definition of stigma might apply to inmates other than those in the branded class. It also illuminates the complexity involved in prison classification systems, which brings an added challenge to the application of the stigma test described above. The Manual establishes the factors required to achieve the Bureau of Prisons' ("BOP") objective of placing inmates in the "most appropriate security level institution" to meet both the inmate's individual needs and protect society.<sup>120</sup> The prison first assigns a numerical score to an inmate that indicates "security level institution" to which they will be assigned—ranging from a minimum to high level of security.<sup>121</sup> The scores are based on a range of factors, including program recommendations made by the court at sentencing, the length of the sentence, the "severity of the current offense," the inmate's history of violence, history of escapes and attempts, drug or alcohol abuse, and the inmate's age.<sup>122</sup> A series of "Management Variable" factors—including prison concerns like population management, or moving the inmate to another facility for participation in a particular program<sup>123</sup>—can impact the inmate's security level, as can a host of "Public Safety Factors," including the inmate's membership in a "disruptive group,"

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119 Although *Vitek*, a pre-*Sandin* case, applied the "exceeds the sentence" standard, its principles should not be limited to that test; courts can find that a stigmatizing label contributes to the "atypicality and significance" of a prison condition, or that it "exceeds the sentence" in an unexpected manner, because, in addition to the adverse consequences the label engenders, it is disconnected from the prisoner's crimes of conviction. Indeed, *Neal* explicitly applied *Vitek* to *Sandin*'s "atypical and significant" standard. See *Neal v. Shimoda*, 131 F.3d 818, 828–29 (9th Cir. 1997) ("Our analysis is aided substantially by the Supreme Court's opinion in *Vitek v. Jones* . . . . The parallels between *Vitek* and this case are striking . . . . The classification of an inmate as a sex offender is precisely the type of 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life' that the Supreme Court held created a protected liberty interest." (citation omitted)).

120 INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION, *supra* note 3, at 1.

121 *Id.* at ch. 1, at 2 (depicting a chart of security and custody levels based on inmates' numerical scores by gender).

122 *Id.* at ch. 4, at 5–16 (detailing the factors used to determine an inmate's security level).

123 *Id.* at ch. 5, at 1–6 (listing "Management Variable" codes and corresponding descriptions).

designation as a sex offender, sentence length, violent behavior, or involvement in a prison disturbance.<sup>124</sup>

The Manual emphasizes that, although the classification system is “objective and consistent,” it also allows prison officials to exercise their discretion in making classification decisions.<sup>125</sup> In assessing the factors applicable to a particular inmate, the Manual sometimes requires prison officials to take into consideration only those acts for which the inmate has been found culpable in a prior proceeding. When evaluating the inmate’s history of violence, for example, the prison official may consider “only those acts for which there are documented findings of guilt.”<sup>126</sup> At other times, the prison official is not so limited;<sup>127</sup> and it is here that considerations of stigma may come into play. Two examples illustrate this point: the BOP’s assessment of the “severity” of an inmate’s “current offense” and its assessment of whether an inmate is a drug or alcohol abuser.

The Manual requires prison officials determining the severity of the inmate’s current offense—a factor that impacts the inmate’s security level score—to enter the “number of points that reflect the most severe documented instant offense behavior regardless of the conviction offense.”<sup>128</sup> By way of example, the Manual states that when evaluating an

<sup>124</sup> *Id.* at ch. 5, at 7–13 (“A Public Safety Factor (PSF) is relevant factual information regarding the inmate’s current offense, sentence, criminal history or institutional behavior that requires additional security measures be employed to ensure the safety and protection of the public.”).

<sup>125</sup> *Id.* at 1 (“2. Program Objectives. The expected results of this Program Statement are: a. Each inmate will be placed in a facility commensurate with their security and program needs through an objective and consistent system of classification which also allows staff to exercise their professional judgment . . .”).

<sup>126</sup> *Id.* at ch. 4, at 9 (noting that findings of guilt could have occurred in a variety of settings, from court to parole violation proceedings, and include “the individual’s entire background of criminal violence”). Findings of guilt are also required in order for prison officials to find that an inmate has an escape history or has been involved in a prison disturbance. *See id.* at ch. 4, at 10 (“Enter the appropriate number of points that reflect the escape history of the individual considering only those acts for which there are documented findings of guilt . . .”); *see also id.* at ch. 5, at 10 (“A male or female inmate who was involved in a serious incident of violence within the institution and was found guilty of the prohibited act(s) of Engaging, Encouraging a Riot, or acting in furtherance of such . . .” (emphasis omitted)).

<sup>127</sup> *Id.* at ch. 5, at 8. As another example, it is perhaps, at this point in the Article, unsurprising to learn that “[a] conviction is not required” in order for a prison official to label an inmate as a sex offender, so long as the Presentence Investigation Report (“PSR”), “or other official documentation, clearly indicates” that one of an enumerated list of sexual crimes occurred. The Manual further explains that a prior case that was dismissed or nolle prosequi cannot be considered, but “in the case where an inmate was charged with an offense that included one of the following elements, but as a result of a plea bargain was not convicted, application of this [Public Safety Factor] should be entered.” *Id.*

<sup>128</sup> *Id.* at ch. 4, at 6–7.

inmate who was “involved in an Assault with Serious Injury” (which carries seven points on the severity scale) “but pled guilty to a Simple Assault” (carrying three points on the severity scale), the prison should assign the inmate seven points because this score reflects the “more severe documented behavior.”<sup>129</sup>

A court assessing whether this inmate had been stigmatized by this classification would first ask if the prison has labeled the inmate in a way that implies that he committed a criminal act. Here, the prison official assigned the inmate seven points based on a finding that the inmate was “involved with” an “Assault with Serious Injury”; thus the first prong is satisfied. The court would then inquire as to whether the label is related to the elements of the crime to which he pled guilty—a simple assault that did not involve serious injury—and, here, too, the inmate should prevail. The elements of simple assault conviction do not contain any mention of serious bodily injury, thus there is no nexus between the simple assault conviction and the assault with serious injury label. Finally, the court must decide if the label carries a significant risk of adverse consequences; any negative repercussions related to being labeled as a person who committed a serious assault should be taken into consideration by the court here. For example, the court might find that being known in the prison as a person culpable of serious assaults exposes inmates to violent attacks or unwanted pressure to join prison gangs, or that the additional points will result in the prison placing the inmate in a prison environment where he is more likely to be victimized in some way. The court might also consider the impact of this classification on the prisoner on parole, or on his reputation in the community. Here, the inmate’s claim would rise or fall depending on the court’s assessment of both the likelihood and the seriousness of any consequences associated with the label at issue.

This definition of stigma, because it requires the government-imposed label to relate to criminal acts or mental illness, and because that label must also carry a significant risk of adverse effects, does not extend procedural due process protections every time a prison labels an inmate in a way inconsistent with the elements of his conviction. Consider another factor used to assess an inmate’s security level within the BOP: the inmate’s abuse of drugs or alcohol.<sup>130</sup> A prisoner with no drug or alcohol abuse issues is given zero points; one with drug or alcohol issues is given one point. In assessing whether a particular inmate has abused drugs or alcohol, a prison official is permitted to consider factors ranging from convictions for a drug

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<sup>129</sup> *Id.* at ch. 4, at 7.

<sup>130</sup> *Id.* at ch. 4, at 13.

or alcohol related offense to a positive drug test to a finding that the inmate went through “detoxification.”<sup>131</sup>

An inmate convicted of theft, with no drug or alcohol related convictions, could thus nevertheless have a prison official determine that he had an issue with alcohol abuse based, for example, on a statement in a police report that the defendant was believed to be drunk at the time the theft occurred. In making this determination, and imposing the additional point on this hypothetical inmate, the prison may fairly be said to have labeled him an “alcoholic.” The inmate may feel stigmatized by this label, and frustrated by the added point, and may therefore wish to raise a procedural process claim. Under the definition of stigma posited above, however, this claim is unlikely to be successful. The “alcoholic” label, while unrelated to the elements of the inmate’s conviction, does not imply that the inmate committed a criminal act or had a serious mental disorder. Such a label is also not likely to bring about adverse consequences, as a reputation for alcohol addiction is not one that generally triggers negative outcomes such as social ostracism or violence—although certainly the inmate thus labeled could argue otherwise.<sup>132</sup> It is, therefore, probably not “stigmatizing” in the constitutionally significant sense of that word. Further, stigma aside, it is unlikely that courts would find that the conditions likely to be associated with an “alcohol abuse” classification (substance abuse classes or similar types of treatment) trigger liberty interest concerns under either *Sandin* test.

There are a variety of other prison classifications to which the three-part stigma test might be applied—the prison classification of an inmate as a gang member or member of another “disruptive group,” for example<sup>133</sup>—

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131 *Id.* (“Examples of drug or alcohol abuse include: a conviction of a drug or alcohol related offense, a parole or probation violation based on drug or alcohol abuse, positive drug test, a DUI, detoxification, etc.”).

132 To give another example, while a prison could place an inmate in a parenting class based on information that is not supported by the elements of his crimes of conviction (a person convicted of theft might be placed in such a class, for example), it is highly unlikely that inclusion in that class implies that the inmate has committed a criminal act or is mentally ill, nor is it likely to carry a significant risk of adverse consequences. This is not to say that a prisoner could not make a case that the condition should fall into the class of prisoners described by the three questions. An inmate could argue, for example, that the parenting class at issue in his case was known throughout the prison to be exclusively assigned to prisoners who have abused children. An inmate with no child abuse convictions might, therefore, have a successful claim that his assignment to this particular parenting class was stigmatizing because it carried the implication that he was a child abuser, a label that is both unrelated to elements of his crime of conviction and one that carries adverse social consequences.

133 *See, e.g., Farr v. Rodriguez*, 255 F. App’x 925, 926–28 (5th Cir. 2007) (holding that an inmate had not been deprived of a liberty interest when the prison identified him as a member of the “Aryan Circle” gang and placed him in administrative segregation as a result; finding that the stigma of the classification was “insufficient to raise a constitutional claim,” and the conditions of administrative segregation did not rise to the

but the stigma definition proposed here will not attach constitutional significance to all of them. It does, however, establish parameters for judicial assessment of stigma that can bring consistency to liberty interest determinations such that persons stigmatized in ways that implicated liberty interests in cases from *Vitek* to *Renchenski* would receive the procedural due process protections afforded the plaintiffs in those cases.

While the presence of stigma provides a source of liberty interests for inmates, it is important to remember that stigma is not required in order for a prison condition to implicate a liberty interest under either one of the *Sandin* standards.<sup>134</sup> Even if a prisoner could not satisfy the three-part stigma test outlined above—when, for example, a classification is based on the crime for which he was convicted—the prisoner could still make a successful procedural due process claim. The inmate may argue, for example, that the nature of the condition itself was atypical and significant enough, or exceeded his sentence to a sufficient degree, to give rise to a liberty interest—that the sex offender treatment to which he was subjected was particularly unusual, disturbing, or unnecessarily intrusive.<sup>135</sup> The presence of stigma adds weight to prisoner-brought procedural due process claims, but its absence does not create a barrier for inmates seeking to establish liberty interests behind bars.

### B. *The Conditions at Issue*

In prison, as in free society, courts have held that stigma alone is not enough to trigger a liberty interest; it is the intertwining of stigma and prison conditions that gives rise to a liberty interest. While *Vitek* located a liberty interest in the pairing of a stigmatizing label with mandatory, behavior modifying treatment, and the *Kirby*, *Chambers*, *Neal*, *Coleman*, and *Renchenski* courts analogized sex offender treatment to the mental health treatment in *Vitek*, this section argues that courts should not limit themselves

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extreme deprivation experienced by inmates in Supermax prisons addressed in *Wilkinson*); see also *Bruce v. Ylst*, 351 F.3d 1283, 1287–88 (9th Cir. 2003) (holding that the “some evidence” standard applies to prison administrative hearings “assigning suspected gang affiliates to the Security Housing Unit,” and stating that a probation report, police report, and statement from a confidential prison informant indicating that an inmate was gang-affiliated all independently satisfied this standard).

134 See, e.g., *Washington v. Harper*, 494 U.S. 210, 236 (1990) (holding that an inmate has a liberty interest, arising from the Due Process Clause and independent of stigma concerns, in avoiding the forced administration of psychotropic drugs).

135 Even a convicted sex offender might have a liberty interest in avoiding the use of a penile plethysmograph. See, e.g., *United States v. Weber*, 451 F.3d 552, 570 (9th Cir. 2006) (holding that the Probation Office’s requirement that Mr. Weber, who was convicted of possession of child pornography, submit to the imposition of penile plethysmograph testing as a condition of supervised release triggered a liberty interest requiring procedural due process protections).

to considering only these types of conditions as a source of liberty interests when stigma is present. Nor should courts resort to *Paul*'s requirement that stigma be accompanied by the government's alteration or obliteration of "a right or status previously recognized by state law."<sup>136</sup> Rather, courts should find that if the prison labels an inmate in the stigmatizing way outlined above—one that implies that he has committed a criminal act or has a mental disorder, that is unrelated to the elements of his crime(s) of conviction, and that carries a significant risk of adverse consequences—the inmate has a liberty interest in avoiding the label and any conditions that the prison imposed as a consequence of the label itself.

*Sandin* requires courts to determine whether a prison condition is atypical and significant, or exceeds the inmate's sentence, in a way requiring procedural due process protections. *Sandin* provides little insight as to how such determinations should be made, and courts have struggled to identify a baseline to which conditions can be compared when making liberty interest determinations. The definition of stigma proposed here provides a point of comparison for courts in their liberty interest determinations: the bottom line is the crime for which the inmate was convicted. Under this definition, a prison-imposed label is only stigmatizing if (among other considerations) it is unrelated to the elements of the inmate's criminal conviction. The stigma sets the prisoner apart from others who were convicted of the same offense. Conditions imposed as a result of this label are thus atypical and significant, or exceed the inmate's sentence, for the same reason: they are unrelated to the crime for which the inmate was convicted. If a prison would not have imposed a condition on an inmate but for the stigmatizing label, the condition is atypical and significant as applied to that prisoner, or exceeds that prisoner's sentence by nature of its complete lack of connection to the crime for which he suffered a conviction.

This approach gives stigma the significance it is due. It also acknowledges the fact that when a prison's classification of an inmate falls within the definition of "stigma" proposed here, that inmate is already being treated substantially differently than he would have been were the label not imposed. It also adds clarity to liberty interest determinations under *Sandin* in cases where stigma is present. When courts select between conditions in making liberty interest determinations—finding, for example, that a stigmatizing label plus sex offender registration triggers a liberty interest, but a stigmatizing label plus mandatory polygraph exams does not<sup>137</sup>—it is

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<sup>136</sup> *Paul v. Davis*, 424 U.S. 693, 711–12 (1976).

<sup>137</sup> *See, e.g., Branch v. Collier*, No. Civ.A. 302CV0021–BF, 2004 WL 942194, at \*5–6 (N.D. Tex. Apr. 30, 2004) (holding that member of the branded class had a liberty interest in avoiding sex offender registration on parole, but no liberty interest in avoiding "involuntary psychological counseling and periodic polygraph examinations").

difficult to discern the rationale for the distinction. Rather than attempting to draw fine lines between prison conditions, courts should simply ask whether the condition at issue arose as a direct result of the stigmatizing label. If a prison labels an inmate as a sex offender and then requires him to participate in sex offender treatment, take a polygraph test, and avoid contact with children under eighteen, the inmate has a liberty interest in avoiding the label and *all* such consequences, so long as the consequences would not have been imposed but for the stigmatizing label. Once such a stigmatizing label has been imposed, therefore, it should add constitutional weight to any condition arising from it.

## V. WHAT PROCESS IS DUE?

A prisoner who has successfully run the gauntlet of liberty interest analysis faces a second challenge: the determination of what process is sufficient to protect that interest. Courts finding a liberty interest for members of the branded class have granted such prisoners no more than the procedural rights guaranteed to inmates facing disciplinary hearings under *Wolff v. McDonnell*.<sup>138</sup> Some courts have granted fewer procedural due process protections.<sup>139</sup> This section briefly argues that inmates in the branded class (and those similarly situated) deserve greater procedural due process protections than those guaranteed under *Wolff*, and specifically should be granted the right to counsel, a neutral hearing body, the right to cross-examine and confront witnesses, and a government-held burden of proof.<sup>140</sup> Notably, except for the guaranteed right to counsel, these are the

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138 See, e.g., *Neal v. Shimoda*, 131 F.3d 818, 831 (9th Cir. 1997) (holding that Mr. Neal, “as an inmate who has never been convicted of a sex offense, is entitled to the procedural protections outlined by the Supreme Court in *Wolff*”); *Gwinn v. Awmiller*, 354 F.3d 1211, 1218–19 (10th Cir. 2004) (adopting *Neal*’s conclusion that the *Wolff* procedures were sufficient, noting further that due process also requires that the hearing panel’s decision be supported by “some evidence” and conducted by an impartial decisionmaker).

139 For example, in *Jones v. Puckett*, a United States District Court within the Seventh Circuit held that the plaintiff received adequate process because he had notice of a hearing and of a staff psychologist’s recommendation that he be identified and treated as a sex offender, an opportunity to be heard, and receipt of a written decision explaining the hearing committee’s decision. 160 F. Supp. 2d 1016, 1024 (W.D. Wis. 2001). Although the prisoner did not have the psychologist’s written report prior to the hearing, and “probably did not have the right to call witnesses in his behalf,” the Court concluded that the procedures he received were constitutionally sufficient to protect “any liberty interest” he had in the prison’s decision to require him to participate in sexual offender treatment. *Id.*

140 In so doing, this section echoes the sentiments of a 1998 Harvard Law Review case note criticizing the limitation of the Ninth Circuit’s due process protections in *Neal*. See Case Note, *Criminal Procedure—Ninth Circuit Provides Inadequate Due Process Protections for Accused Sex Offenders—Neal v. Shimoda*, 131 F.3d 818 (9th Cir. 1997), 111 HARV. L. REV. 2438 (1998) (comparing the procedures of *Wolff* to those of *Morrissey v. Brewer* and *Gagnon v.*

procedural due process protections that *Vitek* granted to the stigmatized prisoner at issue in that case.<sup>141</sup>

In *Wolff*, the Court noted that disciplinary hearings are not part of a criminal prosecution, and thus the prisoner is not due all the protections of the pre-conviction process. The Court concluded that such hearings require some procedural protections—including advance written notice of the claimed violation and permission for the inmate to call witnesses and present documentary evidence when such permission will not be “unduly hazardous to institutional safety or correctional goals”<sup>142</sup>—but inmates are not entitled to counsel, confrontation, or cross-examination.<sup>143</sup> Further, in *Superintendent v. Hill*, the Court held that constitutional due process does not require that decisions of a prison disciplinary panel be supported by evidence “that logically precludes any conclusion but the one reached by the disciplinary board,” but rather due process “in this context requires only that there be some evidence to support the findings made in the disciplinary

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*Scarpelli*, Supreme Court cases analyzing the procedures required for parole and probation revocation proceedings). *Morrissey*, the article notes, included all the procedures later cited in *Wolff*, in addition to requiring a neutral hearing body and the ability to confront and cross-examine witnesses, while *Scarpelli* also stated that the right to counsel would be mandatory in certain circumstances. The note concludes that because “the classification and its consequences are so severe, prisoners who have not been afforded a full trial on sex offense charges need the heightened procedural requirements of *Morrissey* and *Scarpelli*.” *Id.* at 2441 (footnote omitted). The article further notes that *Vitek* provided prisoners with the type of process provided for in *Morrissey*. *Id.* at 2441–42. By granting inmates in the branded class the procedural protections of *Wolff*, the note argued, the Ninth Circuit ignored the inherent adversarial nature of a process designed to make a factual determination regarding whether the prisoner had committed a sexual crime, a determination with serious consequences that demanded “accurate and just results.” *Id.* at 2442–43 (citing *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 28 (1981)). Such results could be obtained only by heightened procedural protections, including the right to counsel and the placement of the burden of proof on the government. *Id.*

<sup>141</sup> See *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980); see also *Meza v. Livingston*, 607 F.3d 392, 407 (5th Cir. 2010) (noting that “except for the right to counsel, the *Vitek* Court granted the inmate facing involuntary transfer to and confinement in a mental hospital the full panoply of due process rights available to a defendant facing a criminal trial”). However, in *Wilkinson v. Austin*, 545 U.S. 209, 226–29 (2005), the Court held that Ohio’s procedural safeguards before confining an inmate in a Supermax facility—including a summary of the factual basis for the classification, allowing the inmate an opportunity for rebuttal and an opportunity to submit objections, and “multiple levels of review for any decision recommending [Ohio State Penitentiary] placement, with power to overturn the recommendation at each level,” including a review within thirty days of the inmate’s assignment to the unit—were sufficient to protect the inmate’s liberty interest in avoiding confinement in a Supermax facility.

<sup>142</sup> *Wolff v. McDonnell*, 418 U.S. 539, 555, 563–66 (1974).

<sup>143</sup> *Id.* at 567–69 (“If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls.”).

hearing,” meager though it may be.<sup>144</sup> Inmates have no constitutional right to appeal the decision of the disciplinary board.<sup>145</sup>

Putting aside the fact that inmates in the branded class are not accused of committing disciplinary violations within prison, when courts grant these inmates the limited protections guaranteed under *Wolff*, they underestimate the importance of creating due process protections that actually *work*.<sup>146</sup> Prison safety and effective prisoner rehabilitation and treatment depend on a process that allows prisons to make informed conclusions based on evidence that has been meaningfully tested. Money and time are wasted when, for example, prisons place inmates who have no need for sex offender treatment programs into such programs, and overcrowding in those programs reduces space for inmates who are truly in need of treatment. A fear of overburdening prisons with procedural requirements thus may create unintended negative consequences for the prison system, both in terms of financial impact and in regard to the effect of misclassifying inmate behavior.<sup>147</sup> Finally, there should be ethical concerns when prisons label an inmate in a way that satisfies the definition of stigma proposed in this Article, without providing sufficient process to test the underlying facts upon which the label is based.

The minimal process that has been afforded members of the branded class reflects our society’s antipathy towards suspected sexual offenders, but it also seems to reflect a deep distrust of our criminal justice system. Prisons classify these prisoners as sexual offenders based on charges that have been dismissed by the prosecution, or for which they have been acquitted by a jury. In *Gunderson v. Hvass*, for example, the Eighth Circuit found no constitutional impediment to a statute requiring Gunderson to register as a sexual offender, despite the fact that the prosecution had dismissed the original complaint charging Gunderson with a sexual offense in its entirety,

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<sup>144</sup> *Superintendent, Mass. Corr. Inst. at Walpole v. Hill*, 472 U.S. 445, 457 (1985).

<sup>145</sup> *See, e.g., Salazar v. Colo. Dep’t of Corr.*, No. 10–CV–02797–BNB, 2011 WL 149279, at \*3 (D. Colo. Jan. 18, 2011) (quoting *Murphy v. Colo. Dept. of Corr.*, 381 F. App’x 828, 832 (10th Cir. 2010) (“[A]n inmate in state prison does not have a constitutional right to appeal his sex offender classification in a prison administrative proceeding.”)).

<sup>146</sup> *See Donald F. Tibbs, Peeking Behind the Iron Curtain: How Law “Works” Behind Prison Walls*, 16 S. CAL. INTERDISC. L.J. 137, 177–78 (2006) (presenting the results of an ethnographic study of inmate disciplinary process at Wisconsin prisons, as well as conclusions about what aspects of the disciplinary process “work,” noting that when “real proof that the inmate committed an institutional infraction must be provided,” a system “challenges arbitrary applications of power along with the exercise of discretion in the absence of accountability”).

<sup>147</sup> *See Bench & Allen, supra note 4*, at 368, 378 (noting that “overclassification is both inefficient and costly,” and stating that the authors’ empirical study on the impact “specific classification designations have on offender behavior” found that “inmate behavior may be influenced by the stigma associated with a particular correctional environment”).

and instead filed a new complaint charging him with misdemeanor assault.<sup>148</sup> Rather than trusting the outcome of the court process, prisons are permitted to circumvent the judicial process altogether and impose consequences for dismissed or acquitted charges with little procedural protection. Ethical prosecutors are thus precluded entirely from rectifying charging errors, and defense attorneys must worry about the import of charges raised and later dismissed, as the minimal process required to impose sexual offender classifications within prisons permits the consideration of charges that have been renounced by prosecutors, judges, and juries alike. Greater procedural protections for members of the branded class and those like them would assist in resolving these concerns.

All these issues could be settled, of course, by requiring that prisons base their classification decisions solely on elements of crimes for which inmates have been convicted. Under such an approach, for example, only a person convicted of a sex offense could be classified and treated as a sexual offender. As the likelihood of judicial adoption of this type of perspective is slim—the judicial reluctance to meddle in the daily affairs of correctional institutions is deep-rooted—we turn to the question of what process is sufficient to protect the liberty interests of inmates in the branded class, as well as other stigmatized prisoners.

The requirements of due process are relative, calling for “such procedural protections as the particular situation demands.”<sup>149</sup> In *Mathews v. Eldridge*, the Supreme Court established three factors that courts must consider in evaluating the sufficiency of particular procedures:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>150</sup>

Application of the *Mathews v. Eldridge* due process test to members of the branded class reveals that these inmates are entitled to far more, and more meaningful, process than they have been awarded thus far.

The private interest that will be affected by the official action is significant, as it involves persons who have never been convicted of a specific crime being classified and treated as if they have been so convicted, with the attendant risks, derision, humiliation, and restrictions involved. The risk of an erroneous deprivation of such interest through the procedures used is also substantive, as that risk involves the subjection of an innocent person to

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148 See *Gunderson v. Hvass*, 339 F.3d 639, 642 (8th Cir. 2003).

149 See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

150 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

the travails mentioned. The probable value, if any, of additional or substitute procedural safeguards, such as the right to counsel and cross-examination and burden of proof placed on the government, would be significant, as it would remove these classification procedures from the back room and thrust them into the light of the adversarial process. Finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail, is de minimis when compared to the risks of subjecting wrongly accused persons to the multiple deprivations associated with, for example, sexual offender classification and treatment. Courts must thus add to the *Wolff* standards the right to counsel, a neutral hearing body, the right to cross-examine and confront witnesses, and a government-held burden of proof in cases where constitutionally significant stigma is present.<sup>151</sup>

## VI. CONCLUSION

Serving a prison sentence is stigmatizing, as is being convicted of a crime, but the fact that inmates are demeaned in these ways should not deprive them of a liberty interest in avoiding further stigma. The definition of "stigma" proposed here would add consistency to liberty interest determinations and expand procedural due process protections to stigmatized prisoners. When a prison imposes a label on a prisoner that implies that he has committed a criminal offense or is mentally ill, and is unrelated to the elements of the crimes for which he was convicted, and carries a significant risk of adverse consequences to the prisoner, courts should find that the inmate has a liberty interest in avoiding the stigmatizing label and the conditions associated with it. Providing procedural due process protections to prisoners who are thus stigmatized is a step towards ensuring that prisons classify and treat inmates for what they have done, not based on who the prison system imagines them to be.

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<sup>151</sup> *Meza v. Livingston* is an example of a case where the court found that an inmate was entitled to additional protections before the prison could label him as a sex offender. In *Meza*, the Fifth Circuit held that if Mr. Meza were incarcerated, he would be entitled to the procedural due process protections of *Wolff* before he could be classified as a sex offender, but because he was on parole he was owed additional protections, namely: (1) written notice that sex offender conditions may be required under mandatory supervision; (2) disclosure of evidence against him; (3) a hearing at which he could appear, present evidence, and call witnesses; (4) the right to confront and cross-examine, unless good cause was shown as to why this should not occur; (5) an impartial decisionmaker; (6) written statement of factfinder regarding evidence relied on and reasons that sex offender conditions were attached to his mandatory supervision. *Meza v. Livingston*, 607 F.3d 392, 407, 409 (5th Cir. 2010).