
COMMENT

They're Making a List, but Are They Checking It Twice? How Erroneous Placement on Child Offender Databases Offends Procedural Due Process

Shaudee Navid*

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* Senior Articles Editor, UC Davis Law Review, J.D. Candidate, UC Davis School of Law, 2011; B.A., Communication Studies, UCLA, 2007. Many thanks to Alexis Alvarez, Nathalie Skibine, Susan Ye, Jack Rubin, Aylin Bilir, Errol Dauis, and Sue Jones for their outstanding editorial assistance. Special thanks to Roey Rahmil for his patience, encouragement, and unwavering support throughout the writing process and beyond. Thanks to my friends and family for their love and support. Thanks to Camellia, Jana, and Eugenia for always keeping me grounded. Thanks to my brother for his incredible insight and nurturing. Most of all, thanks to my parents for always believing in me and giving me a world of opportunities.

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INTRODUCTION

Craig and Wendy Humphries endured a parenting nightmare.¹ Their rebellious teenage daughter fled to another state and falsely reported that the Humphries had abused her.² Four days later, police officers arrested the Humphries and child protective services placed their two younger children in foster care.³ The next day, the California Department of Justice entered the couple's names into the California Child Abuse Central Index ("CACI").⁴ Although the courts eventually dismissed both the criminal case and the juvenile case against them, the Humphries' nightmare was only beginning.⁵ The government's erroneous placement of the Humphries on CACI deprived them of important legal rights.⁶

The Humphries' situation is not uncommon.⁷ California's penal code requires that the Department of Justice wait at least ten years to remove a person's name from CACI, even when a court has found that individual factually innocent.⁸ Information in CACI is available to a

¹ *Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1175 (9th Cir. 2009), *rev'd*, 131 S. Ct. 447 (2010). In reversing the Ninth Circuit, the Supreme Court temporarily relieved Los Angeles County from liability because a municipal custom did not cause the Humphries' injury. The Supreme Court reached this decision without reaching the issue of whether erroneous placement on a child offender database deprived the Humphries of a liberty interest. However, erroneous placement on child offender databases continues to raise pressing concerns. See David G. Savage & Carol J. Williams, *County Shielded Over Abuse Listing; The Supreme Court Returns Craig and Wendy Humphries' Case to an L.A. Judge*, L.A. TIMES, Dec. 1, 2010, at AA2; see also Carol J. Williams, *Abuser List Tags Innocents, Too*, L.A. TIMES, Dec. 7, 2008, at B1, available at <http://articles.latimes.com/2008/dec/07/local/me-abuser-list7>.

² *Humphries*, 554 F.3d at 1175, 1180; see also Williams, *supra* note 1, at B1.

³ *Humphries*, 554 F.3d at 1180; see also Williams, *supra* note 1, at B1.

⁴ *Humphries*, 554 F.3d at 1180.

⁵ *Id.* at 1181-82.

⁶ *Id.* at 1187-88.

⁷ See Williams, *supra* note 1, at B1; see also John Crewdson, *The Stigma, Being Wrongly Accused of Child Sex Abuse*, CHI. TRIB., Feb. 24, 1985, at C1 (discussing case of nine-year-old girl who accused individual of sexually abusing her, but court found witness unreliable); Eugene L. Meyer, *Md. Woman Caught in Wrong Net, Data Errors Link Her to Probes, Cost 3 Jobs*, WASH. POST, Dec. 15, 1997, at C1 (describing story of woman who lost multiple jobs after background checks revealed officials had mistakenly placed her in child abuser database); Tony Perry, *San Diego County to Scrutinize State Child Abuse Index for Errors*, L.A. TIMES, Sept. 8, 2000, at A3, available at <http://articles.latimes.com/2000/sep/08/news/mn-17587> (discussing concerns that individuals remain on CACI even though allegations are meritless).

⁸ See CAL. PENAL CODE § 11170(a)(3) (2009) (explaining that Child Abuse and Neglect Reporting Act ("CANRA") deletes individuals listed on CACI with inconclusive or unsubstantiated reports after ten years); *Humphries*, 554 F.3d at 1179;

variety of entities, including individuals conducting pre-employment investigations and out of state agencies.⁹ In some states, statutes require government agencies to check child abuser databases before granting state-issued licenses and benefits.¹⁰ Thus, reputational harm resulting from placement in a child abuser database can have significant negative effects.¹¹

The circuits do not agree that erroneous placement on a child offender database deprives the listed person of a liberty interest.¹² In *Smith ex rel. Smith v. Siegelman*, the Eleventh Circuit Court of Appeals found no violation when Alabama's agencies could check its child abuser database.¹³ In *Humphries v. County of Los Angeles*, the Ninth Circuit Court of Appeals held the opposite, and allowed the Humphries' lawsuit to go forward.¹⁴

This Comment argues that the government's erroneous placement of individuals on a child abuser database violates a liberty interest and

Miller v. California, 355 F.3d 1172, 1177 (9th Cir. 2004) (explaining that California Penal Code Section 11170(a)(3) requires CACI to retain names for ten years).

⁹ § 11170(b)(4) (making information on CACI available to State Department of Social Services and to any county licensing agency granting licenses for child related employment); *Humphries*, 554 F.3d at 1177 (explaining that information on CACI is available to State Department of Social Services and county licensing agencies issuing licenses to work with children); *Valmonte v. Bane*, 18 F.3d 992, 995 (2d Cir. 1994) (explaining that information on New York Central Register requires employers in childcare field to determine whether potential employees are listed on Register).

¹⁰ See, e.g., § 11170(b)(7)-(9) (providing information to entities making inquiries for purposes of pre-employment background investigations for peace officers, childcare licensing or employment, adoption, or child placement access to CACI); *Humphries*, 554 F.3d at 1177 (explaining that state licensing agencies consult CACI before granting licenses to work with children); *Valmonte*, 18 F.3d at 995 (explaining that statutory provisions require certain employers in childcare field to check New York Central Register).

¹¹ See *Humphries*, 554 F.3d at 1186-87 (characterizing child abuser label as moral leprosy which prevented Mrs. Humphries from renewing her teaching license); Williams, *supra* note 1, at B1. See generally Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 UC DAVIS L. REV. 79, 124 (2009) (explaining that damage from stigmatizing state instituted labels is proportional to individual's actual danger).

¹² Compare *Humphries*, 554 F.3d at 1191 (holding that state violates liberty interest when it requires agencies to check CACI before issuing benefits), and *Valmonte*, 18 F.3d at 1002 (holding that government deprives individual of liberty interest when defamatory aspect of state instituted label of child abuser creates impediment to employment), with *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 1296-98 (11th Cir. 2003) (holding that state does not violate liberty interest when statutes allow, but do not require, agencies to consult child abuser database prior to granting rights).

¹³ *Smith*, 322 F.3d at 1296-98.

¹⁴ *Humphries*, 554 F.3d at 1191.

thus requires procedural due process.¹⁵ Part I examines the historical and legal background of liberty interests, procedural due process rights, and child abuser databases.¹⁶ Part II explores the circuit split through the Eleventh Circuit's holding in *Smith* and the Ninth Circuit's decision in *Humphries*.¹⁷ Part III argues that *Humphries* is correct, and that the government violates a liberty interest when it erroneously places individuals on child abuser databases.¹⁸ Moreover, states whose child abuser databases lack efficient formal removal processes violate the Fourteenth Amendment.¹⁹ Finally, allowing expeditious removal of erroneous listings allows the government to protect children while respecting individuals' liberty interests.²⁰

I. BACKGROUND

Child abuser databases are a governmental response to the growing number of child maltreatment cases.²¹ Child abuse is a significant problem; state agencies referred 3.2 million instances of child maltreatment to child protection agencies in 2007.²² However, child abuse is not a new phenomenon.²³

¹⁵ See *infra* Part III. See generally Alisha M. Santana, Comment, *A Pointer System that Points to the Nonexistent: Problems with the Child Abuse Central Index (CACI)*, 4 WHITTIER J. CHILD & FAM. ADVOC. 115 (2004) (describing fallacies with CACI that create procedural due process claims).

¹⁶ See *infra* Part I.

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part III.

²⁰ See *infra* Part III.

²¹ See Douglas J. Besharov, "Doing Something" About Child Abuse, 8 HARV. J.L. & PUB. POL'Y 539, 554 (1985) (explaining that government action is only way to protect children, but this protection often ignores parents' rights); Jill D. Moore, Comment, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2068 (1995) (describing how emergence of phrase "battered child syndrome" in 1962 prompted nationwide movement towards enacting child abuse reporting laws). See generally NATIONAL COMMITTEE FOR PREVENTION OF CHILD ABUSE, A SURVEY OF PUBLIC PERCEPTIONS OF CHILD ABUSE: THE STATE OF THE ECONOMY, RISK INVOLVEMENT IN JUVENILE AND ADULT CRIME, AND WHAT THE INDIVIDUAL CAN DO TO PREVENT ABUSE (1982) (finding, through national survey, that increasing number of individuals emphasized role of government in reducing child maltreatment and creating social services to address child abuse).

²² See ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEPARTMENT OF HEALTH & HUMAN RESOURCES, CHILD MALTREATMENT, at xii (2007), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf> [hereinafter CHILD MALTREATMENT] (estimating that 794,000 children were victims of abuse or neglect).

²³ Besharov, *supra* note 21, at 540-50 (outlining history of state's role in protecting abused children); Moore, *supra* note 21, at 2066 (explaining that child abuse has been

As a response to the increase in child maltreatment cases, state governments began enacting child abuse reporting laws in the mid-1960s.²⁴ In 1974, Congress enacted the Child Abuse Prevention and Treatment Act, which requires states to report child maltreatment information to the National Criminal Background Index.²⁵ Accordingly, all fifty states require daycare providers, health care workers, and teachers to report suspected abuse to child protection services agencies.²⁶

While they act to protect children, state governments must also protect the rights of alleged child abusers.²⁷ The Constitution prohibits the government from depriving an individual of a liberty interest without providing procedural due process.²⁸ However, the Supreme

occurring for as long as humans have been reproducing); Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 293-99 (1972) (describing instances of child maltreatment in ancient civilization and documentation of such abuse in religious texts and fairy tales).

²⁴ See generally Besharov, *supra* note 21 (describing first instances of government involvement in monitoring child abuse); Moore, *supra* note 21, at 2068 (describing government solutions to child maltreatment as fairly new).

²⁵ See 42 U.S.C.A. § 5119a (West 2009) (requiring each state to report or index child abuse crime information in national criminal history background check system); see also CHILD MALTREATMENT, *supra* note 22, at xi (explaining that 1988 Child Abuse Prevention and Treatment Act required Department of Health and Human Services to create national data collection and analysis program); Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 286-87 (2009) (explaining that Congress offered states funding for child abuse programs in exchange for enacting child abuse reporting laws).

²⁶ See CHILD MALTREATMENT, *supra* note 22, at xii (determining that child abuse reporting agencies estimated 794,000 children were victims of abuse or neglect); Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 6-7 (2001) (recounting nationwide movement to enact legislation to intervene in homes where parents allegedly abused children); Moore, *supra* note 21, at 2068 (explaining action to solve problem of child abuse started in late 1960s and evolved into every state having its own procedure for investigating child abuse).

²⁷ See CHILD MALTREATMENT, *supra* note 22, at xi (explaining that all fifty states have mandatory child abuse and neglect reporting laws requiring certain professionals to report instances of maltreatment to child protective services); Michael R. Phillips, Note, *The Constitutionality of Employer-Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting*, 92 MICH. L. REV. 139, 139 (1993) (explaining that every state has enacted legislation allowing governmental intervention to protect children from abuse). See generally *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) (establishing fundamental right to familial autonomy); *Meyer v. Nebraska*, 262 U.S. 390, 390 (1923) (holding that Fourteenth Amendment Due Process Clause protects individual's right to raise children).

²⁸ See U.S. CONST. art. 14, § 1; see also *Zinermon v. Burch*, 494 U.S. 113, 125

Court has not exhaustively defined the liberty interests the Constitution protects.²⁹ To determine the procedures that states must follow before they can deprive an individual of a liberty interest, courts use a balancing test established in *Mathews v. Eldridge*.³⁰

A. Procedural Due Process

The Fourteenth Amendment provides that no state can deprive an individual of life, liberty, or property without due process of law.³¹ It is not per se unconstitutional, however, for the government to deprive an individual of a protected interest.³² Rather, the government must follow sufficient procedures before divesting an individual of a fundamental right.³³ When the government violates a liberty interest without providing sufficient procedural safeguards, the individual it affects has a procedural due process claim.³⁴

(1990); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70 (1972).

²⁹ See *Roth*, 408 U.S. at 572 (stating Court has eschewed formalistic limitations on liberty but has still instituted some boundaries); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (stating that Court has not specifically defined liberty); *Meyer*, 262 U.S. at 399 (stating that Court has not attempted to define liberty precisely).

³⁰ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); see, e.g., *Bohn v. Cnty. of Dakota*, 772 F.2d 1433, 1438-39 (8th Cir. 1985) (stating courts utilize *Mathews* test to determine sufficiency of procedures government affords alleged child abusers); Marc A. Bernstein, Note, *Mathews v. Eldridge Reviewed: A Fair Test on Balance*, 67 GEO. L.J. 1407, 1407 (1979) (stating that courts predominantly use *Mathews* test to determine procedural requirements).

³¹ U.S. CONST. art. 14, § 1; see, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (explaining that due process requires government to give individual adequate notice of proceedings, to give hearing, and to provide impartial decision maker); *Snyder v. Massachusetts* 291 U.S. 97, 105 (1934) (holding that government violates due process if it offends rights so deeply rooted in tradition as to be fundamental).

³² See *Zinermon*, 494 U.S. at 125 (clarifying that state deprivation of protected right is only unconstitutional without due process of law); see also *Carey v. Piphus*, 435 U.S. 247, 259 (1978) (explaining that procedural due process protects individuals not from government's mere deprivation of rights, but from government's mistaken deprivation of those rights); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (requiring notice and hearing to prevent government from mistakenly depriving individual of constitutionally protected liberty interest, thereby preserving procedural due process).

³³ See *Roth*, 408 U.S. at 569-70; see, e.g., *Bell v. Burson*, 402 U.S. 535, 542 (1971) (stating that Due Process Clause requires state to provide notice and opportunity for hearing before depriving individual of constitutionally protected right); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (stating that government must provide some type of hearing before government deprives individual of constitutionally protected interest).

³⁴ See *Zinermon*, 494 U.S. at 125 (stating that deprivation is not complete until state fails to provide due process); see also *Carey*, 435 U.S. at 259; *Fuentes*, 407 U.S. at 81.

Thus, to determine whether a plaintiff has stated a procedural due process claim, courts engage in a two-step inquiry.³⁵ First, the court determines whether the state has deprived the plaintiff of a protected liberty or property interest.³⁶ Second, if the court finds a violation, it determines whether the procedures enabling that deprivation are constitutionally sufficient.³⁷

B. *Recognized Liberty Interests*

To establish a due process claim, a plaintiff must first show that the government has violated a recognized liberty interest.³⁸ The Supreme Court long ago expanded the scope of protected liberties to include more than the right to be free from physical restraint.³⁹ By the early twentieth century, the Court's conception of liberty included all the rights the Court deemed essential for one to pursue happiness.⁴⁰ Consistent with this approach, the Court has construed liberty's meaning broadly.⁴¹

³⁵ See *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989); see also *Roth*, 408 U.S. at 570-71; *Rodi v. Ventetuolo*, 941 F.2d 22, 24-25 (1991) (applying two-step analysis from *Thompson* to determine whether plaintiff stated procedural due process claim).

³⁶ See *Thompson*, 490 U.S. at 460; *Roth*, 408 U.S. at 570-71; see also *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465-66 (1981) (explaining that constitutional entitlement does not exist where state privileges might appear to grant such rights).

³⁷ See *Thompson*, 490 U.S. at 460; *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) (analyzing whether procedures accompanying deprivation are constitutionally sufficient, and emphasizing that procedural due process requirements are flexible and vary depending on situation); *Roth*, 408 U.S. at 570-71.

³⁸ See *Thompson*, 490 U.S. at 460; *Paul v. Davis*, 424 U.S. 693, 711 (1976) (clarifying that procedural due process protections apply when individual suffers stigma from state instituted reputational harm that results in loss of certain rights); *Roth*, 408 U.S. at 570-71.

³⁹ See *Meyer v. Nebraska*, 262 U.S. 390, 400-03 (1923) (holding that state law prohibiting teacher from teaching foreign language violated procedural due process); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (holding that states may not prohibit individuals from contracting insurance out-of-state because of constitutional right to freedom of contract); *Wyeth v. Thomas*, 86 N.E. 925, 927 (Mass. 1909) (holding that government's refusal to grant plaintiff license to become undertaker implicated right to pursue any vocation).

⁴⁰ *Meyer*, 262 U.S. at 399 (holding constitutionally protected liberty interests to include rights necessary to pursue happiness); *Allgeyer*, 165 U.S. at 591 (noting that right to pursue one's calling includes right to make all necessary contracts in relation to that profession); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (holding that racially discriminatory application of racially neutral statute offends material rights essential to enjoyment of life).

⁴¹ *Roth*, 408 U.S. at 572 (citing *Meyer*, 262 U.S. at 399) (emphasizing that protected liberty interests include rights to contract, to engage in employment, to

Despite its broad conception of liberty, the Court has produced two inconsistent decisions regarding whether reputational harm the government causes implicates a liberty interest.⁴² First, in *Wisconsin v. Constantineau*, a police chief prohibited local shopkeepers from selling liquor to the plaintiff, an alleged alcoholic.⁴³ The Court held that when government action jeopardizes an individual's reputation, due process requires notice and a predeprivation hearing.⁴⁴ Because the police chief's action ridiculed the plaintiff, the Court held the plaintiff was entitled to notice and a hearing.⁴⁵

However, in *Paul v. Davis*, the Court held that reputational harm alone does not violate an individual's liberty interest.⁴⁶ In *Paul*, a police officer circulated a flyer that contained information about convicted shoplifters that included the plaintiff's name.⁴⁷ The Court held that although the plaintiff suffered reputational harm, the government did not violate a liberty interest.⁴⁸ The Court reconciled its decision with *Constantineau's* holding by explaining that the government's action in *Constantineau's* case, in fact, caused more than just reputational harm.⁴⁹ Therefore, the Court explained, it would have found a violation in *Constantineau* under *Paul's* rule as well.⁵⁰ Finally, the Court emphasized that only the Constitution or state law can create liberty interests.⁵¹ Thus, to state a claim, a plaintiff must articulate the specific legal right he or she lost.⁵²

marry, to have family, and to practice religion freely); *see, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing right to conceive and raise one's children as indispensable); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (explaining that court has not attempted to define liberty).

⁴² Compare *Goss v. Lopez*, 419 U.S. 565 (1975) (holding that public schools violate student's liberty interest when they suspend students, as suspensions damage student's reputation), and *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (holding that police officer's notice in liquor stores to prohibit sales to certain individual violates liberty interest), with *Paul*, 424 U.S. 693 (holding that reputational harm, alone, is not deprivation of liberty interest).

⁴³ *Constantineau*, 400 U.S. 433.

⁴⁴ *Id.* at 436; *see also* *Chilingirian v. Boris*, 882 F.2d 200, 205 (6th Cir. 1989); *Constantineau v. Grager*, 302 F. Supp. 861, 864 (D.C. Cir. 1969).

⁴⁵ *Constantineau*, 400 U.S. at 435-36.

⁴⁶ *See Paul*, 424 U.S. at 701.

⁴⁷ *Id.* at 695.

⁴⁸ *Id.* at 701; *see also* *Kelly v. Borough of Sayreville, N.J.*, 107 F.3d 1073, 1078 (3d Cir. 1997); *Ersek v. Twp. of Springfield*, 102 F.3d 79, 83 n.5 (3d Cir. 1996).

⁴⁹ *Paul*, 424 U.S. at 708-09.

⁵⁰ *See id.*

⁵¹ *Id.* at 711-12.

⁵² *Id.*

The Court recognized one caveat to its holding.⁵³ Reputational harm, the Court explained, can cause a constitutional violation if it accompanies an official action that alters a right the state previously recognized.⁵⁴ Courts call this two-step analysis the stigma-plus test.⁵⁵ For example, the Court has recognized the “plus” the test requires when a plaintiff loses employment because of the government’s stigmatizing conduct.⁵⁶

Since *Paul*, the Court has generally identified a liberty interest in pursuing one’s profession.⁵⁷ The Court has not defined the contours of this right.⁵⁸ However, one thing is clear: the government violates a liberty interest when it flatly prohibits individuals from engaging in a profession.⁵⁹ The Ninth Circuit has held that government action only

⁵³ *Id.* See generally *Owen v. City of Independence*, 445 U.S. 622 (1980) (holding that when official action causes both reputational harm and tangible loss, due process is mandatory); *Codd v. Velger*, 429 U.S. 624 (1977) (explaining that stigmatizing information officials placed in police officer’s personnel file damaged his employment prospects and warranted due process).

⁵⁴ *Paul*, 424 U.S. at 711; see also *Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1187 (9th Cir. 2009) (holding that government’s inclusion of Humphries on CACI altered their rights in several ways), *rev’d*, 131 S. Ct. 447 (2010); *Valmonte v. Bane*, 18 F.3d 992, 1002 (2d Cir. 1994) (holding government’s placement of Valmonte on New York Central Register created statutory impediment to employment, altering her rights).

⁵⁵ See *Hart v. Parks*, 450 F.3d 1059, 1070 (9th Cir. 2006); see also *Cooper v. Dupnik*, 924 F.2d 1520, 1532 (9th Cir. 1991) (defining stigma-plus test and defining plus element); *Neu v. Corcoran*, 869 F.2d 662, 667 (2d Cir. 1989) (referring to holding in *Paul* as stigma-plus test).

⁵⁶ See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573 (1972). See generally *Owen*, 445 U.S. 622 (holding that due process requires hearing when employer terminates employee after employer has disseminated false impressions about conditions of termination); *Bell v. Burson*, 402 U.S. 535 (1971) (holding that because state’s issuance of drivers license entitles citizens to operate motor vehicles, state’s revocation of that right triggers due process).

⁵⁷ See *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999) (holding that liberty component of Fourteenth Amendment Due Process Clause includes generalized right to choose one’s field of private employment); see, e.g., *Traux v. Raich*, 239 U.S. 33, 38 (1915) (explaining that right to earn livelihood and to pursue employment warrants protection); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) (pointing out that government prohibiting individual to practice chosen profession deprives individual of liberty interest found in pursuing one’s profession).

⁵⁸ *Roth*, 408 U.S. at 572 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)) (emphasizing protected liberty interests in right to engage in employment); see also *Conn*, 526 U.S. at 291-92; *Dent*, 129 U.S. at 121.

⁵⁹ See *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999); see also *Conn*, 526 U.S. at 291-92 (stating that liberty component of Fourteenth Amendment Due Process Clause includes right to choose one’s field of employment); *Wedges/Ledges of Cal. Inc., v. City of Phx.*, 24 F.3d 56, 65-66 (9th Cir. 1994) (stating that Constitution creates liberty interest in pursuing any profession).

implicates this liberty interest when it completely prohibits individuals from entering their preferred career.⁶⁰

Even highly stigmatizing government conduct does not violate a liberty interest if it does not cause the plaintiff to lose such a tangible right.⁶¹ The Court illustrated this principle when it upheld sex offender community notification laws in *Connecticut Department of Public Safety v. Doe*.⁶² The Court held that because Connecticut law required all sex offenders to register, the registry did not suggest that listed individuals were especially dangerous.⁶³ Thus, the Fourteenth Amendment did not require a preregistration hearing.⁶⁴

C. *Striking a Balance Between a Private Interest, the Likelihood of Erroneous Deprivation, and a Governmental Interest*

Once a plaintiff has established that the government violated a liberty interest, courts must determine whether the government employed adequate predeprivation procedures.⁶⁵ In *Mathews v. Eldridge*, the Supreme Court established three factors that courts must balance to determine whether those procedures are adequate.⁶⁶ First, courts consider the governmental action's effect on the individual's

⁶⁰ *Dittman*, 191 F.3d at 1029-30; see also *Conn*, 526 U.S. at 291-92; *Wedges/Ledges of Cal. Inc.*, 24 F.3d at 65 n.4.

⁶¹ See *Paul v. Davis*, 424 U.S. 693, 701 (1976) (recognizing injurious effect of police officer's inclusion of plaintiff on stigmatizing list, but denying due process claim because plaintiff failed to satisfy "plus" prong); *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1130 (W.D. Wash. 2005) (acknowledging that government placement of individuals on No-Fly list creates stigma but does not satisfy stigma-plus test). But see *Owen*, 445 U.S. at 622 (holding when employer terminates employee after employer has disseminated false information about reasons of termination, due process requires hearing).

⁶² See generally *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (recognizing stigma associated with sex offender registration but holding that mandatory registration does not violate liberty interest or due process).

⁶³ See *id.*

⁶⁴ *Id.*

⁶⁵ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (evaluating whether procedural due process requires right to hearing before Social Security Administration terminates individual's benefits); see, e.g., *Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1193 (9th Cir. 2009) (utilizing *Mathews* test to evaluate process California provides individuals it lists on CACI) *rev'd*, 131 S. Ct. 447 (2010); *Valmonte v. Bane*, 18 F.3d 992, 1003 (2d Cir. 1994) (using *Mathews* to determine constitutionality of procedures New York provides individuals on Central Register).

⁶⁶ *Mathews*, 424 U.S. at 335; see also *Humphries*, 554 F.3d at 1193 (stating that courts use three-part test from *Mathews* to determine process due to individuals state places on CACI); *Valmonte*, 18 F.3d at 1003 (evaluating constitutionality of New York child abuser database's delisting procedures).

private interest; courts require more stringent procedural safeguards when the interest is important.⁶⁷ Second, courts consider the likelihood of erroneous deprivation, and the resulting necessity of procedural safeguards.⁶⁸ Third, courts consider the governmental interests at stake, including the burden of implementing and funding additional procedural safeguards.⁶⁹

Courts use *Mathews* to determine whether the government provides sufficient procedural safeguards for accused child abusers.⁷⁰ More specifically, courts have used *Mathews* to evaluate states' procedures for removing innocent individuals from child abuser databases.⁷¹ In *Valmonte v. Bane*, the Second Circuit Court of Appeals found a liberty violation when New York erroneously listed Valmonte in a child abuser database.⁷² The Second Circuit found that the erroneous listing

⁶⁷ *Mathews*, 424 U.S. at 332 (recognizing entitlement to government benefits as important private interest). See generally *Santosky v. Kramer*, 455 U.S. 745 (1982) (finding that combination of strong private interest, substantial risk of error, and marginal governmental interest in state's action offended Due Process Clause); Phillips, *supra* note 27, at 181 (explaining application of *Mathews* factors as placing government and private interests on either end of beam, with risk of error as fulcrum).

⁶⁸ See *Mathews*, 424 U.S. at 335, 340-41 (holding that administrative procedures did not violate procedural due process because they offered plaintiff several opportunities to address government's termination of benefits); see also *Humphries*, 554 F.3d at 1195-94 (discussing likelihood, under current process, of state erroneously labeling individuals as child abusers). See generally Phillips, *supra* note 27, at 181 (explaining that decrease in risk of error shifts fulcrum toward private interests).

⁶⁹ See *Mathews*, 424 U.S. at 335, 348 (explaining that cost of instituting additional safeguards can outweigh benefits of those additional procedures); see also *Humphries*, 554 F.3d at 1194 (recognizing compelling governmental interest in protecting children, but also recognizing noncompelling state interest in continuing to retain false information). See generally Phillips, *supra* note 27, at 181 (explaining that if there is greater risk of error, government interest must outweigh individual's interest to render government action constitutional).

⁷⁰ See *Santosky*, 455 U.S. at 769 (explaining clear and convincing evidence standard of proof is necessary to reduce risk of erroneous factfinding). See generally *Humphries*, 554 F.3d at 1170 (applying *Mathews* test to determine constitutional viability of state's child abuser index); *Valmonte*, 18 F.3d 922 (applying *Mathews* test and concluding that New York's enlistment scheme of child abusers was prone to error); *Finch v. N.Y. State Office of Children and Family Servs.*, 499 F. Supp. 2d 521 (S.D.N.Y. 2007) (applying *Mathews* test to determine whether procedural safeguards were sufficient).

⁷¹ See, e.g., *Humphries*, 554 F.3d at 1188 (applying *Mathews*, court concluded that CACI provided insufficient procedural safeguards for erroneous CACI listings); *Valmonte*, 18 F.3d at 1003; *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1135 (D. Ill. 2001) (applying *Mathews* test to determine whether state's inclusion of childcare worker on child abuser registry violated procedural due process).

⁷² *Valmonte*, 18 F.3d at 999-1003.

violated the plaintiff's liberty interests in employment and reputation.⁷³

The court then applied *Mathews*.⁷⁴ First, the court found Valmonte's private interest in obtaining work in childcare to be serious and legitimate.⁷⁵ Second, the court acknowledged the state's strong interest in protecting children from harm.⁷⁶ Finally, the court found that the database had a high risk of error for two reasons.⁷⁷ First, the Registry used an extremely low standard of proof.⁷⁸ An administrative finding of *some* credible evidence to support the allegations warranted inclusion in the list.⁷⁹ Second, although the Registry provided expungement procedures, its administrative removal hearings took several years.⁸⁰ If a hearing was unsuccessful, the Registry expunged the entry ten years after the youngest victim on the report turned eighteen.⁸¹ Because both Valmonte's interest and the government's interest were important, the court relied on the last *Mathews* factor to conclude the available procedures were insufficient.⁸²

Thus, in evaluating child abuser databases, the deciding *Mathews* factor is often the likelihood of erroneous deprivation.⁸³ To evaluate that factor, courts must often evaluate the risk of false positives.⁸⁴ However, agencies do not routinely record the number of their

⁷³ *Id.*

⁷⁴ *Id.* at 1003.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1003 (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

⁷⁷ *Id.*

⁷⁸ *See id.* at 1004 (describing standard of evidence that allows any credible evidence to substantiate claim is inflammatory and ambiguous).

⁷⁹ *See id.*

⁸⁰ *See generally id.* at 997-98 (noting that it took plaintiff from 1989 to 1993 to clear her name from Registry); *Finch v. N.Y. State Office of Children & Family Servs.*, 499 F. Supp. 2d 521, 529 (S.D.N.Y. 2007) (documenting number of years it took Registry to remove Finch).

⁸¹ *See Valmonte*, 18 F.3d at 997 (describing consequences of indicated report that individual or state did not previously expunge).

⁸² *Id.* at 1004.

⁸³ *See Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1135-36 (D. Ill. 2001) (explaining that private interest and government interest are equally important, thus court must focus on risk of error inherent in current system or procedure). *See generally Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1194 (9th Cir. 2009) (recognizing risk of erroneous deprivation as most important *Mathews* factor), *rev'd*, 131 S. Ct. 447 (2010).

⁸⁴ *Humphries*, 554 F.3d at 1195; *see, e.g., Valmonte*, 18 F.3d at 1003-04 (evaluating New York Central Register's risk of erroneous listings); *Dupuy*, 141 F. Supp. 2d at 1136 (discussing high risk of error rate in Illinois' State Central Register).

databases' erroneous listings.⁸⁵ Therefore, it is difficult for courts to quantify agencies' errors.⁸⁶

In 2004, the California Child Abuse and Neglect Reporting Act ("CANRA") Task Force attempted to quantify erroneous listings in San Diego's database.⁸⁷ CANRA determined that San Diego should purge fifty percent of its initial CACI listings because they were erroneous.⁸⁸ Extrapolating from its research, the task force concluded that roughly half of California's statewide listings were inaccurate.⁸⁹

II. STATE OF THE LAW

The circuits are in conflict over whether a state violates a liberty interest when it erroneously places an individual on child abuser databases.⁹⁰ The Eleventh Circuit has held that individuals have no right to be free from erroneous placement, even if state agencies check child abuser databases before granting benefits.⁹¹ Conversely, the Ninth Circuit has held that the government violates a liberty interest when it erroneously places individuals on a child abuser database.⁹²

⁸⁵ See *Humphries*, 554 F.3d at 1195 (noting CANRA lacks any formal study of error rates). Child testimony can also lead to erroneous listings. See generally *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663 (2008) (discussing unreliability of child testimony); *Broam v. Bogan*, 320 F.3d 1023 (9th Cir. 2003) (imprisoning appellants for eight years based on child's false allegations of abuse).

⁸⁶ See *Humphries*, 554 F.3d at 1195 (noting CANRA lacks any formal study of error rates).

⁸⁷ CHILD ABUSE AND NEGLECT REPORTING ACT TASK FORCE REPORT 24 (2004) [hereinafter CANRA REPORT], available at <http://ossh.com/publications/childabuse.pdf>.

⁸⁸ *Id.*

⁸⁹ See *id.* See generally *Humphries*, 554 F.3d at 1195 (pointing out low threshold Department of Justice utilizes when placing individuals on CACI); *Valmonte*, 18 F.3d at 1003-04 (stating that seventy-five percent of individuals who seek expungement are successful, and concluding that New York's initial determination of individuals as child abusers is flawed); LAURA RADEL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, INTERIM REPORT TO THE CONGRESS ON THE FEASIBILITY OF A NATIONAL CHILD ABUSE REGISTRY (2009), available at <http://aspe.hhs.gov/hsp/09/ChildAbuseRegistryInterimReport/index.shtml> (utilizing CANRA's study to discuss infeasibility of creating national child abuse registry).

⁹⁰ Compare *Humphries*, 554 F.3d at 1170 (recognizing protected liberty interest), and *Valmonte*, 18 F.3d at 922 (recognizing protected liberty interest because inclusion on database deprived Valmonte of opportunity to seek employment), with *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290 (11th Cir. 2003) (refusing to recognize protected liberty interest where state allows agencies to consult stigmatizing list).

⁹¹ *Smith*, 322 F.3d at 1296-98.

⁹² *Humphries*, 554 F.3d at 1188. See generally *Valmonte*, 18 F.3d at 922 (finding New York Central Register removal procedures constitutionally insufficient).

A. *Smith ex rel. Smith v. Siegelman*

In *Smith*, the Eleventh Circuit held that Alabama did not violate a liberty interest when it listed the plaintiff on a child abuser database.⁹³ After a state agency administratively determined that Smith had sexually abused a minor, a county agency entered him in Alabama's child abuser database.⁹⁴ Smith demanded a hearing to contest his inclusion but the state refused, stating that it had administratively verified the allegations against him.⁹⁵ The information on the database, per Alabama law, is widely available to private and public entities.⁹⁶

Smith sued in federal court, alleging that the state denied him due process by labeling him a child abuser without providing him a hearing.⁹⁷ The district court found that Smith had a liberty interest in the government not erroneously placing him on a public database.⁹⁸ The district court further concluded that because Alabama law made the stigmatizing information available to potential employers, Smith's claim satisfied the stigma-plus test.⁹⁹ Thus, Alabama had deprived Smith of liberty without providing him procedural due process.¹⁰⁰

The Eleventh Circuit reversed, holding that the government had not deprived Smith of a liberty interest.¹⁰¹ The court acknowledged that allegations of child abuse can create stigma.¹⁰² Nevertheless, the court explained that reputational harm alone does not satisfy the stigma-plus test.¹⁰³

The court held that Smith's claim failed the stigma-plus test because Smith could not demonstrate diminished employment opportunities.¹⁰⁴ Smith's presence on the registry only deprived him of his right against the state labeling him a child abuser.¹⁰⁵ Moreover, the

⁹³ *Smith*, 322 F.3d at 1296-97.

⁹⁴ *Id.* at 1292-93.

⁹⁵ *Id.* at 1292.

⁹⁶ *Id.* at 1292-93.

⁹⁷ *Id.* at 1293.

⁹⁸ *Id.* at 1294.

⁹⁹ *See generally id.* (holding that Smith had liberty interest against government labeling him as child abuser and publicizing that label).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1296. The court implicitly assumed that Smith was innocent for the purposes of its due process analysis.

¹⁰² *See id.* (citing *Hardiman v. Jefferson Cnty. Bd. of Educ.*, 709 F.2d 635, 638 (11th Cir.1983)) (stating that government allegations of child abuse are stigmatizing).

¹⁰³ *See id.* at 1296-97.

¹⁰⁴ *Id.* at 1297.

¹⁰⁵ *Id.*

court reasoned that a tangible rights violation usually manifests in loss of employment or salary.¹⁰⁶ Smith demonstrated neither.¹⁰⁷

The court further explained that any harmful effects from stigma, such as inferior employment prospects, do not satisfy the stigma-plus test.¹⁰⁸ Because Smith's presence on the database did not alter his preexisting status, the court concluded that Alabama did not deprive him of a liberty interest.¹⁰⁹ Therefore, the court conducted no procedural due process analysis.¹¹⁰

B. *Humphries v. County of Los Angeles*

In contrast, the Ninth Circuit held that Los Angeles County violated the Fourteenth Amendment when it erroneously placed the Humphries on a child abuser database.¹¹¹ Their teenage daughter fled from home and told authorities that her parents had abused her.¹¹² Police officers arrested the Humphries and took their other children into protective custody.¹¹³ Detectives reported the incident to the California Department of Justice, which immediately listed the Humphries on CACI.¹¹⁴

The prosecutor then determined that the marks on the girl's body were the result of a medical procedure, not evidence of abuse.¹¹⁵ A state court dismissed the Humphries' criminal case and declared them factually innocent, finding no reasonable cause to believe that they had abused their daughter.¹¹⁶ Additionally, the juvenile court allowed the Humphries to retain custody of their children.¹¹⁷ Despite the courts' determination of the Humphries' innocence, CACI continued to include their name on the database.¹¹⁸

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1298.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1296-97.

¹¹¹ See *Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1189, 1191 (9th Cir. 2009), *rev'd*, 131 S. Ct. 447 (2010).

¹¹² See *id.* at 1180; see also Williams, *supra* note 1, at B1.

¹¹³ See *Humphries*, 554 F.3d at 1180-81.

¹¹⁴ *Id.* at 1180.

¹¹⁵ *Id.* at 1181.

¹¹⁶ *Id.* at 1181-82.

¹¹⁷ *Id.* at 1182.

¹¹⁸ *Id.*

When California erroneously includes an individual in CACI, the individual has three ways to seek removal.¹¹⁹ First, the individual can attempt to persuade the investigator who initiated the report to purge the entry.¹²⁰ Second, the individual can wait for an agency to receive the investigator's report and independently confirm the report's veracity.¹²¹ Third, the individual can appeal an agency's decision in state court.¹²² The Humphries sought relief via all three avenues, but were unsuccessful in securing their removal from CACI.¹²³

The Humphries sued Los Angeles County in federal court.¹²⁴ The district court dismissed the claims arising from the Humphries' ongoing listing in CACI.¹²⁵ The district court reasoned that the Humphries' claim did not satisfy the stigma-plus test.¹²⁶

The Ninth Circuit reversed.¹²⁷ First, the court held that the County caused stigma and committed defamation when it erroneously listed the Humphries in CACI.¹²⁸ Second, the court found that state law requires certain offices and agencies to consult CACI.¹²⁹ Because of these statutory requirements, the Humphries' claim passed the stigma-plus test.¹³⁰ Neither of the Humphries could obtain a license to provide childcare, work in a child-related field, or obtain employment as a peace officer.¹³¹ Specifically, Wendy Humphries could not volunteer at schools or renew her teaching credentials.¹³²

Next, the court held that California's removal procedures violated the Fourteenth Amendment.¹³³ Applying *Mathews*, the court determined that the Humphries had an important liberty interest at stake because the government's action altered their legal rights.¹³⁴ The court further held that the government had not demonstrated a

¹¹⁹ See *id.* at 1196 (citing three options available to individuals who believe they appear on CACI erroneously).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 1199-1200.

¹²⁴ *Id.* at 1183-84.

¹²⁵ *Id.* at 1184.

¹²⁶ *Id.* at 1184-85.

¹²⁷ *Id.* at 1184.

¹²⁸ *Id.* at 1186.

¹²⁹ *Id.* at 1189.

¹³⁰ *Id.* at 1188.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See *id.* at 1200.

¹³⁴ *Id.* at 1193; see *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

significant interest in limiting removal procedures.¹³⁵ Finally, the court found that the risk of erroneous deprivation was high.¹³⁶ The risk was high because the CACI system presumed individuals to be guilty unless investigators determined that the allegations of abuse were false.¹³⁷ Thus, the court concluded that CACI's lack of adequate procedural safeguards violated the Humphries' procedural due process rights.¹³⁸

The Ninth Circuit's holding conflicts with the Eleventh Circuit's holding in *Smith*.¹³⁹ Both plaintiffs alleged that the government had erroneously labeled them child abusers, yet the circuits disagreed over whether that action violated a liberty interest.¹⁴⁰ Because the courts' views are irreconcilable and because citizens' constitutional rights are at stake, the Supreme Court should provide guidance.¹⁴¹

III. ANALYSIS

A state violates individuals' liberty interests when it requires its agencies to consult stigmatizing lists with inadequate removal procedures.¹⁴² Because information on lists like CACI is widely available, listed individuals will inevitably experience diminished employment opportunities.¹⁴³ To mitigate this deprivation, states can

¹³⁵ *Humphries*, 554 F.3d at 1194.

¹³⁶ *Id.* at 1195, 1200.

¹³⁷ *Id.* at 1194-95.

¹³⁸ *Id.* at 1200.

¹³⁹ Compare *id.* at 1191 (holding that state violates liberty interest when it requires agencies to check CACI before issuing benefits), with *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 1296-98 (11th Cir. 2003) (indirectly implying that state does not violate liberty interest when statutes allow, but do not require, agencies to consult child abuser database prior to granting rights).

¹⁴⁰ See *Humphries*, 554 F.3d at 1193, 1200; *Smith*, 322 F.3d at 1297-98.

¹⁴¹ See *Humphries*, 554 F.3d at 1191 (noting its disagreement with Eleventh Circuit's holding in *Smith*).

¹⁴² *Id.* at 1185. See generally *Valmonte v. Bane*, 18 F.3d 992, 999-1001 (2d Cir. 1994) (holding that state's placement of Valmonte on child abuser registry deprived Valmonte of protected liberty interest in seeking employment in child related fields); Moore, *supra* note 21, at 2066 (arguing that government's placement of individuals on child abuser database implicates liberty interest).

¹⁴³ See DONALD T. DICKSON, CONFIDENTIALITY AND PRIVACY IN SOCIAL WORK: A GUIDE TO THE LAW FOR PRACTITIONERS AND STUDENTS 224 (1998) (explaining that many programs, such as foster care and group homes, routinely check child protective service files before hiring new employees); see also *Humphries*, 554 F.3d at 1177 (explaining that CANRA allows Department of Justice to make information in CACI available to broad range of third parties); *Valmonte*, 18 F.3d at 995-96 (discussing statutory provisions that require childcare employers to determine whether future

provide procedural due process by instituting effective removal procedures.¹⁴⁴ Moreover, adopting *Humphries*' approach minimizes frivolous litigation and allows states to use their limited resources to identify actual child abusers.¹⁴⁵

A. *Publicizing Erroneous Information in Child Abuser Databases Deprives Individuals of the Opportunity to Seek Employment, and Thus Violates a Liberty Interest*

The right to pursue employment is essential to liberty.¹⁴⁶ States violate this right when they allow employers to learn of an individual's presence in a child abuser database.¹⁴⁷ States ensure such a violation when they require employers to investigate an individual's reputation before hiring that individual.¹⁴⁸

1. *Child Abuser Databases Are More Harmful than Sex Offender Community Notification Laws*

While listed child abusers and registered sex offenders experience stigma, child abuser databases create everlasting negative legal and societal effects.¹⁴⁹ Sex offender registration, however, only causes

employees are on database and extent of confidentiality measures for such information).

¹⁴⁴ See *infra* Part III.B.1.

¹⁴⁵ See *infra* Part III.C.

¹⁴⁶ See generally *Conn. v. Gabbert*, 526 U.S. 286, 291-92 (1999) (explaining that liberty component of Fourteenth Amendment Due Process Clause includes generalized right to choose one's field of private employment); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972); *Dent v. West Virginia*, 129 U.S. 114, 121 (1889) (pointing out that complete government prohibition of individual's practice of chosen profession deprives individual of liberty interest).

¹⁴⁷ *Valmonte*, 18 F.3d at 999; see, e.g., *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1134 (D. Ill. 2001) (holding that plaintiff's inclusion on child abuser registry was reason for termination from current job and rejection from subsequent opportunities); see also *Humphries*, 554 F.3d at 1188.

¹⁴⁸ *Valmonte*, 18 F.3d at 1001 (stating that state's inclusion of Valmonte would prevent her from gaining employment); see, e.g., *Dupuy*, 141 F. Supp. 2d at 1134 (agreeing that pursuit of one's chosen profession constitutes recognizable and protected liberty interest, and holding that state deprived plaintiffs of such interest); see also *Humphries*, 554 F.3d at 1187-88 (stating that state's inclusion of Humphries on CACI alters their legal status and creates impediment to gain employment).

¹⁴⁹ See Mitnick, *supra* note 11, at 135 (explaining that horrific nature of sex offenses contributes to magnitude of stigmatic harm wrongfully labeled individuals suffer); Kimberly B. Wilkins, Comment, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH. L. REV. 1245, 1258 (2003) (describing reputational harm from sex offender label as government deliberately

reputational harm.¹⁵⁰ Information regarding sex offenders is accessible on the Internet, but registration does not violate a protected liberty interest and follows a criminal conviction.¹⁵¹ No violation occurs because there is no liberty interest in being free from having to

characterizing individual as outcast); *see also* Wayne A. Logan, *Criminal Law: Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1193-94, 1202-03 (1999) (comparing far more traumatizing effects of sex offender label to label of shoplifter or alcoholic). *See generally* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, 42 U.S.C. § 14071 (2006) (requiring all states to create sex offender registries as incentive to not lose federal funding for state law enforcement); Sex Offender Registration Act ("Megan's Law"), N.J. STAT. ANN. § 2C:7-5 (West 2006) (explaining that sex offender registry allows law enforcement to identify and notify public when necessary for public safety).

¹⁵⁰ *See, e.g.*, Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 6-7 (2003) (holding that if state law deprived sex offenders of liberty interest, due process does not require hearing to determine irrelevant fact, like individual's dangerousness); Creekman v. Att'y Gen. of Tex., 341 F. Supp. 2d 648, 664 (E.D. Tex. 2004) (reaffirming that plaintiff was unable to satisfy stigma-plus test based on defendant's false statements that damaged reputation only; however, court upheld claim on other grounds); Boutin v. La Fleur, 591 N.W.2d 711, 718 (Minn. 1999) (conceding that sex offender label injures reputation, but holding that plaintiff's claim failed to pass stigma-plus). *But see, e.g.*, Doe v. Pataki, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998) (holding that burden of registration for convicted sex offenders permanently alters individual's status, satisfying stigma-plus test); Doe v. Portiz, 662 A.2d 367, 420 (N.J. 1995) (holding that stigma flowing from state's inclusion of individual on sex offender database constituted due process violation). *See generally* Logan, *supra* note 149, at 1193 (explaining that most courts concede that sex offender registration and notification laws adversely impact individuals' reputations).

¹⁵¹ *See* 42 U.S.C. § 14071 (b)(1)(A)(iii)-(iv), (b)(6)(A) (2006) (requiring registries to include listed individuals' names, addresses, fingerprints, and photographs, in addition to including listing for minimum of ten years post-release); *see, e.g.*, Conn. Dep't of Pub. Safety, 538 U.S. at 6-7 (holding that if state law deprived sex offenders of liberty interest, due process does not require hearing to determine irrelevant fact, like individual's level of danger); Doe v. Moore, 410 F.3d 1337, 1342-45 (11th Cir. 2005) (rejecting right against reputational harm as protected liberty interest); Welvaert v. Neb. State Patrol, 683 N.W.2d 357, 366 (Neb. 2004) (holding that effect of state's inclusion of individual on sex offender registry flows from conviction itself, which is already public record); State v. White, 590 S.E.2d 448, 450, 456 (N.C. App. 2004) (holding that stigma following state's inclusion of individual on sex offender database is result of public records unrelated to registration); Boutin, 591 N.W.2d at 718 (conceding that sex offender label injures reputation, but holding that plaintiff's claim failed to pass muster under stigma-plus); Meinders v. Weber, 604 N.W.2d 248, 257 (S.D. 2000) (holding that information in sex offender registry is very similar to information already available through public records). *See generally* Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 364-65 (2006) (collecting cases in which courts either found liberty interest or characterized effect of sex offender registration as only reputational harm).

provide address information.¹⁵² Therefore, as the Supreme Court explained in *Connecticut Department of Public Safety*, sex offender registration does not create a procedural due process claim.¹⁵³

The stakes are higher for individuals in child abuse databases.¹⁵⁴ Governments widely disseminate the databases' contents to employers and licensing agencies.¹⁵⁵ State agencies, by operation of law, consult databases like CACI before conferring certain benefits, and deny those benefits to listed individuals.¹⁵⁶ In contrast, sex offender notification laws simply allow communities to acquire information.¹⁵⁷ Therefore, claims of erroneous CACI listings pass the stigma-plus test because state agencies routinely consult the databases in making benefit conferral determinations.¹⁵⁸

¹⁵² See *U.S. v. Ambert* 561 F.3d 1202, 1208-09 (11th Cir. 2009); see also *Moore*, 410 F.3d at 1345; *Boutin*, 591 N.W.2d at 718.

¹⁵³ See *Conn. Dep't of Pub. Safety*, 538 U.S. at 7; see also *Ambert*, 561 F.3d at 1208-09. See generally *Carpenter*, *supra* note 151, at 364-65 (collecting cases in which courts either found liberty interest or characterized effect of sex offender registration as only reputational harm).

¹⁵⁴ See *Humphries v. Cnty. of L.A.*, 554 F.3d 1170, 1188 (9th Cir. 2009) (explaining that state's inclusion of *Humphries* on CACI altered their legal rights), *rev'd*, 131 S. Ct. 447 (2010); see also *Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994) (stating that *Valmonte's* inclusion on New York Registry statutorily barred her from working in certain professions). *But cf.* *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (recognizing right to travel as liberty interest that government cannot deprive without due process); Peter M. Shane, *The Bureaucratic Due Process of Government Watch Lists*, 75 GEO. WASH. L. REV. 804, 842 (2007) (analyzing government watch list within stigma-plus framework); James Fisher, Comment, *What Price Does Society Have to Pay for Security? A Look at the Aviation Watch Lists*, 44 WILLAMETTE L. REV. 573, 587-88 (2008) (arguing that plaintiffs challenging government's No-Fly list satisfy "plus" prong of stigma-plus test); Justin Florence, Note, *Making the No-Fly List Fly: A Due Process Model for Terrorist Watchlists*, 115 YALE L.J. 2148, 2164-65 (2006) (arguing federal government's use of watch lists can violate individual's fundamental right to travel).

¹⁵⁵ See *Humphries*, 554 F.3d at 1177; *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 1292-93, 1293 n.6 (11th Cir. 2003); *Valmonte*, 18 F.3d at 995-96.

¹⁵⁶ See, e.g., CAL. HEALTH & SAFETY CODE § 1596.877(b) (2008) (requiring licensing agencies to check CACI prior to granting licenses); *Humphries*, 554 F.3d at 1187; *Valmonte*, 18 F.3d at 1001.

¹⁵⁷ See, e.g., MINN. STAT. § 243.166, subd. 7 (1998) (restricting sex offender registration information to law enforcement purposes); OR. REV. STAT. § 181.592 (2)(a) (2011) (requiring that information on registry be public and obtainable by request); *Boutin*, 591 N.W.2d at 718 (emphasizing difference between mere presence and active dissemination of information on registry).

¹⁵⁸ See *Humphries*, 554 F.3d at 1190-91; *Valmonte*, 18 F.3d at 1001; see also *Finch v. N.Y. State Office of Children & Family Servs.*, 499 F. Supp. 2d 521, 534 (S.D.N.Y. 2007) (discussing state's failure to clear individual's name from child abuser registry satisfied stigma-plus test).

2. Inclusion on the Registry Means Exclusion from Employment

This mandatory consultation means that a state adversely affects citizens' family lives, employment prospects, and legal entitlements when it lists citizens in child abuser databases.¹⁵⁹ These harms flow from the fact that labeling an individual a child abuser is highly stigmatizing and can lead to diminished employment prospects.¹⁶⁰ Indeed, courts have recognized that less serious accusations, like shoplifting, cause stigma.¹⁶¹ The label of "child abuser" carries more severe negative connotations because of children's value and vulnerability.¹⁶² Additionally, the stigma of child abuse allegations causes accused individuals to feel a sense of social degradation within the community.¹⁶³ Thus, placing an individual in a child abuser

¹⁵⁹ See, e.g., *Humphries*, 554 F.3d at 1183 (discussing how CACI burdens *Humphries* in pursuing their goals and normal activities); *Valmonte*, 18 F.3d at 1001 (holding that New York's inclusion of *Valmonte* on registry deprived her of opportunity to seek employment by operation of law); *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1134 (N.D. Ill. 2001) (holding that state's inclusion of childcare worker on child abuse registry violated due process because choosing to work in one's field is liberty interest); *Cavarretta v. Dep't of Children & Family Servs.*, 660 N.E.2d 250, 255 (Ill. App. Ct. 1996) (holding that prohibiting plaintiff from working in childcare violates constitutionally protected liberty interest); *Petition of Preisendorfer*, 719 A.2d 590, 592 (N.H. 1998) (holding that state deprives individual of protected liberty interest if it prevents individual from working in occupation available to similarly educated individuals); *In re Lee TT v. Bane*, 664 N.E.2d 1243, 1250 (N.Y. 1996) (holding that government's listing of petitioner in child abuse database significantly jeopardized future career prospects in his field).

¹⁶⁰ See *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 999 (9th Cir. 2008); *Miller v. California*, 355 F.3d 1172, 1178 (9th Cir. 2004); *Valmonte*, 18 F.3d at 1000.

¹⁶¹ See also *Wisconsin v. Constantineau*, 400 U.S. 433, 433 (1971) (recognizing violation of liberty interest when police officer prohibited local shopkeepers from selling liquor to plaintiff); *United States v. Lovett*, 328 U.S. 303, 314 (1946) (recognizing liberty interest when government labeled government employee disloyal). See generally *Paul v. Davis*, 424 U.S. 693 (1976) (recognizing stigmatizing effects when city official distributed flyer containing information and pictures of alleged shoplifters).

¹⁶² See *Humphries*, 554 F.3d at 1186 (describing accusation of child abuse as kind of moral leprosy); see also *Valmonte*, 18 F.3d at 1000 (explaining that state's erroneous inclusion of *Valmonte* on child abuser database damaged her reputation by branding her as child abuser); *Hardiman v. Jefferson Cnty. Bd. of Educ.*, 709 F.2d 635, 638 (11th Cir. 1983) (recognizing state allegations of child abuse create stigma and give rise to liberty interests).

¹⁶³ See MICHAEL ROBIN, ASSESSING CHILD MALTREATMENT REPORTS: THE PROBLEM OF FALSE ALLEGATIONS 24 (1991), available at http://books.google.com/books?id=tqBVMUIMPLIC&printsec=frontcover&source=gbs_v2_summary_r&cad=0#v=onepage&q=&f=false (describing trauma of false child abuse allegation as degrading individual's societal and moral status); Mitnick, *supra* note 11, at 110-11 (recognizing that state's label serves as social marker which contributes to individual's social

database is far more debilitating than alleging that the individual committed a minor offense, like theft.¹⁶⁴

Valmonte, although it expressly confined its holding to its facts, demonstrates how stigma from being included on a child abuser registry forecloses job opportunities.¹⁶⁵ The court assumed that the plaintiff wanted to work in a child related field, and this assumption drove its holding.¹⁶⁶ However, for *Valmonte*'s holding to be consistent, it must protect any individual alleging present or future harm, regardless of their current career plans.¹⁶⁷ This is so because erroneous listing inherently causes a constitutional injury before any pecuniary injury occurs.¹⁶⁸

Valmonte's reasoning requires the conclusion that an individual does not have to suffer a discrete employment deprivation before receiving due process.¹⁶⁹ A state causes constitutional injury when it includes an individual on a child abuser database because doing so inherently damages an individual's employment prospects.¹⁷⁰ Therefore, the *Smith*

identity); see also Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. SOC. 363, 365 (2001) (quoting J. Crocker et al., *Social Stigma*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 504, 505 (D.T. Gilbert et al. eds., 1998)) (describing how stigmatized individuals convey devalued social identity to society). See generally ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 2-3 (1963) (describing stigma and its relationship to social identity).

¹⁶⁴ See generally *Constantineau*, 400 U.S. 433 (recognizing liberty interest when city official distributed flyer containing information and pictures of alleged shoplifters); *Humphries*, 554 F.3d at 1194 (explaining high cost of child abuser label on not only alleged individuals, but family members, neighbors, and their employers as well); Mitnick, *supra* note 11, at 82 (explaining how evolution of government lists from lists of alleged shoplifters to lists of alleged terrorists has raised level of reputational harm to McCarthy era levels).

¹⁶⁵ *Valmonte*, 18 F.3d. at 999.

¹⁶⁶ *Id.*

¹⁶⁷ See *Humphries*, 554 F.3d at 1190; *Dupuy v. Samuels*, 397 F.3d 493, 503-04, 509-10 (7th Cir. 2005). But see *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 1297-98 (11th Cir. 2003) (disregarding *Smith*'s claim for future loss of employment).

¹⁶⁸ *Humphries*, 554 F.3d at 1187-88 (stating *Humphries*' CACI listing alters their rights in two ways); *Dupuy*, 397 F.3d at 511-12 (explaining that state placement of individual on child abuser registry forecloses careers in child related field for substantial amount of time); *Valmonte*, 18 F.3d at 1001 (stating *Valmonte*'s placement on child abuser registry specifically deprives her of opportunity to seek employment).

¹⁶⁹ See, e.g., *Humphries*, 554 F.3d at 1187 (describing *Humphries*' foreclosed employment opportunities and characterizing that loss as alteration of legal status); *Valmonte*, 18 F.3d at 1001 (pointing out that opinion only holds that state statutes, by operation of law, deprive *Valmonte* of her ability to seek employment). But cf. *Smith*, 322 F.3d at 1298 (stating that procedural due process claim fails without showing loss of current employment or current status alteration).

¹⁷⁰ See *Humphries*, 554 F.3d at 1187-88; see also *Siebert v. Gilley*, 500 U.S. 266,

court incorrectly made Smith's failure to demonstrate lost employment opportunities dispositive.¹⁷¹ Under *Valmonte's* implicit holding, which both the *Smith* and *Humphries* courts should have expressly adopted, Smith's claim should satisfy the stigma-plus test.¹⁷²

The *Smith* court overlooked the fact that Smith's rights had changed.¹⁷³ Smith lost a right that state law previously recognized: the right to obtain a state license to work with children.¹⁷⁴ This adverse impact is precisely the type of harm that warrants due process.¹⁷⁵

The laws of states outside the plaintiff's home state compound the violation.¹⁷⁶ *Smith* focused on Alabama law, which does not require state agencies to consult lists before conferring government benefits.¹⁷⁷

241-42 (1991) (Marshall, J., dissenting) (criticizing majority opinion for characterizing reputational harm as depriving individual of present employment and not future employment); *Finch v. N.Y. State Office of Children & Family Servs.*, 499 F. Supp. 2d 521, 534 (S.D.N.Y. 2007) (finding that state's inclusion of petitioners on Central Register forecloses petitioners from future employment).

¹⁷¹ See *Smith*, 322 F.3d at 1297 (discussing Smith's failure to demonstrate change of status or employment other than his characterization as child abuser); see also *Humphries*, 554 F.3d at 1187-88 (stating that state's inclusion of Humphries on CACI diminishes future employment by operation of licensing statutes); *Valmonte*, 18 F.3d at 1001 (noting that Valmonte's potential employers will refuse her candidacy because of her inclusion on Central Register).

¹⁷² See *Smith*, 322 F.3d at 1296-97 (overlooking fact that information on registry adversely affected Smith's ability to work as teacher, constituting more than just reputational harm). See generally *Humphries*, 554 F.3d at 1187-88 (acknowledging Humphries' loss of potential employment was sufficient to establish claim); *Valmonte*, 18 F.3d at 1001 (acknowledging that Valmonte's loss of future employment was sufficient to establish claim).

¹⁷³ See *Smith*, 322 F.3d at 1296-97 (stating that government inclusion on child abuser registry that creates loss of future employment does not satisfy "plus" prong of stigma-plus test); cf. *Humphries*, 554 F.3d at 1191 (holding that loss of future employment was sufficient to satisfy stigma-plus test); *Valmonte*, 18 F.3d at 1002 (mentioning briefly that there is no significant distinction between losing one's current position in employment and losing one's potential position in employment).

¹⁷⁴ See *Smith*, 322 F.3d at 1297.

¹⁷⁵ See *Paul v. Davis*, 424 U.S. 693, 711 (1976). See generally *Zinerman v. Burch*, 494 U.S. 113, 125 (1990) (holding that state deprivation of liberty interest without due process of law is unconstitutional); *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (stating that court determines viability of procedural due process claim by determining whether liberty interest exists and whether procedural safeguards available are sufficient).

¹⁷⁶ *Humphries*, 554 F.3d at 1191; see, e.g., CAL. HEALTH & SAFETY CODE § 1522.1(a) (2008) (stating that prior to granting license or approving any individual to work with children, agency must consult CACI); N.Y. SOC. SERV. LAW § 424-a (1)(a) (McKinney 2009) (requiring numerous state agencies, private businesses, and licensing agencies to determine whether applicants are on Central Registry).

¹⁷⁷ *Humphries*, 554 F.3d at 1191; see also ALA. CODE § 26-14-8d (1998) (stating that

However, other states' agencies must consult out-of-state databases in a broader range of circumstances.¹⁷⁸ Alabama provides unfettered access to its database, which other states require their agencies to check.¹⁷⁹ This interaction could result in government deprivation of protected liberty interests if, for example, Smith ever applied for a teaching credential in California.¹⁸⁰

3. Whether State Law Requires or Suggests Consultation of These Stigmatizing Lists Is Irrelevant

Critics of *Humphries*' approach may argue that the government's denial of one kind of job is simply a form of reputational harm.¹⁸¹ An individual could successfully pursue a career that does not involve working with children.¹⁸² For this reason, placement on a child abuser database does not completely terminate an individual's employment rights.¹⁸³ Thus, child abuser database listings do not create "stigma-plus" and do not deprive individuals of a liberty interest.¹⁸⁴

information in registry may be available to employers but not requiring employers to consult child abuser databases prior to offering employment).

¹⁷⁸ *Humphries*, 554 F.3d at 1191; see also § 26-14-8d (stating that information in registry may be available to employers but not mandating all employers to consult child abuser database prior to offering employment); § 424-a(1) (stating that statute mandates numerous state agencies to consult child abuser registry).

¹⁷⁹ See ALA. CODE § 26-14-8(b) - (c) (1975); *Humphries*, 554 F.3d at 1191.

¹⁸⁰ See *Humphries*, 554 F.3d at 1191; see also CAL. PENAL CODE §11170(b)(4) (2009) (stating that information in CACI is available to licensing agencies with regard to employment positions that deal with children).

¹⁸¹ See *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 1297 (11th Cir. 2003) (noting that Smith failed to produce evidence demonstrating that his Registry inclusion deprived him of all employment opportunities); see also CAL. PENAL CODE § 11170(b)(10)(A) (2009) (noting that while potential employers or licensing agencies must consult CACI, entities must draw independent conclusions regarding quality of entries); *Humphries*, 554 F.3d at 1188 (recognizing that government's inclusion of *Humphries* on CACI does not fully extinguish their rights to employment).

¹⁸² See generally § 11170(b)(10)(A) (noting that while potential employers or licensing agencies must consult CACI, entities must draw independent conclusions regarding quality of entries); *Glasford v. N.Y. State Dep't of Soc. Servs.*, 787 F. Supp. 384, 388 (S.D.N.Y. 1992) (stating that father's inclusion on Central Registry did not negatively impact his employment prospects).

¹⁸³ See § 11170(b)(10)(A) (stating agencies that consult CACI can draw independent conclusions regarding quality of evidence disclosed); see also *Humphries*, 554 F.3d at 1187-88; *Smith*, 322 F.3d at 1297; *Glasford*, 787 F. Supp. at 388.

¹⁸⁴ See *Smith*, 322 F.3d at 1297-98 (concluding that government's inclusion of Smith on Alabama child abuser database does not deprive Smith of liberty interest); *Howard v. Malac*, 270 F. Supp. 2d 132, 141 (D. Mass. 2003) (holding that individual's placement on child abuser registry did not implicate protected liberty interest); *Glasford*, 787 F. Supp. at 388 (stating that state's placement of plaintiff on child abuser

These critics fail to recognize, however, that the foundation of the stigma-plus test is the “plus” element.¹⁸⁵ Under this test, courts do not count how many legal rights an individual may have lost.¹⁸⁶ Plaintiffs must simply establish that the government has altered or terminated one right or status that state law once recognized.¹⁸⁷ That an individual may enter another field of work does not remedy the fact that the individual still may not work with children.¹⁸⁸ This deprivation constitutes an alteration of a status or right the law previously recognized.¹⁸⁹ Thus, the government must provide procedural due process before it deprives an individual of the ability to work with children.¹⁹⁰

registry did not implicate protected liberty interest).

¹⁸⁵ See *Paul v. Davis*, 424 U.S. 693, 711 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433, 436-37 (1971); see, e.g., *Bishop v. Wood*, 426 U.S. 341, 348 (1976) (demonstrating strength of “plus” prong as Court held that official action against individual must somehow be public before such harm can create due process claim).

¹⁸⁶ *Paul*, 424 U.S. at 711; see also *Humphries*, 554 F.3d at 1187 (explaining that whether licensing agencies will ultimately deny *Humphries* licenses is unimportant because investigation prior to granting license inherently alters legal status); *Dupuy v. Samuels*, 397 F.3d 493, 503-04, 509-11 (7th Cir. 2005) (stating that once information from child abuser registries prohibit individual from working in childcare field, protected liberty interest is at stake).

¹⁸⁷ *Paul*, 424 U.S. at 711; see, e.g., *Humphries*, 554 F.3d at 1189 (holding that where state statute creates stigma and tangible burden on legal right or status, statute violates individual’s liberty interest); *Valmonte*, 18 F.3d at 1001 (recognizing that Central Registry produced specific deprivation of *Valmonte*’s legal right to pursue employment in childcare).

¹⁸⁸ See, e.g., *Humphries*, 554 F.3d at 1188 (explaining how *Humphries*’ inability to work with children trumps fact that *Humphries* retained other rights); *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1134 (N.D. Ill. 2001) (recognizing that including childcare worker on child abuser database violates procedural due process because pursuit of work in desired field is protected liberty interest); *Cavarretta v. Dep’t of Children & Family Servs.*, 660 N.E.2d 250, 255 (Ill. App. Ct. 1996) (stating that individual’s inability to pursue employment in childcare field violated protected liberty interest).

¹⁸⁹ See *Finch v. N.Y. State Office of Children & Family Servs.*, 499 F. Supp. 2d 521, 533-34 (S.D.N.Y. 2007) (recognizing fundamental liberty interest in pursuing one’s employment of choice); see also *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 574 (1972) (holding that liberty interest in employment prohibits states from regulating eligibility for type of employment in manner that violates due process).

¹⁹⁰ Cf. *Humphries*, 554 F.3d at 1200 (stating that CACI’s lack of effective removal procedures violates *Humphries* due process rights); *Dupuy*, 141 F. Supp. 2d at 1134 (recognizing that including childcare worker on child abuser database violates procedural due process because pursuit of work in desired field constitutes protected liberty interest); *Cavarretta*, 660 N.E.2d at 255, 258 (stating individual’s inability to pursue employment in childcare field is protected liberty interest).

B. *A System that Effects Timely Removal from Child Abuser Databases Satisfies Due Process*

These conflicting decisions do not provide states with clear guidance about what kinds of delisting procedures to implement. Registries like those used in California and New York, both of which violate a liberty interest, do not satisfy the *Mathews* test and provide guidance as to why certain procedures may be unconstitutional.¹⁹¹ Both systems use lengthy delisting procedures, and neither system incorporates judicial findings of innocence.¹⁹² Moreover, some systems, like the Alabama Registry, lack formal delisting mechanisms.¹⁹³ States can remedy these shortcomings by establishing procedures that promptly remove obviously erroneous listings.¹⁹⁴

1. *Delayed Delisting Procedures Jeopardize Due Process*

California, New York, and Alabama employ inadequate delisting procedures.¹⁹⁵ California's procedures are insufficient for two reasons.¹⁹⁶ First, even if listed individuals successfully establish their innocence, current procedures fail to effect electronic removal from

¹⁹¹ This section refers to statutes as they existed when the Ninth Circuit decided *Humphries*. As of this writing, a modification to California Penal Code Sections 11169 and 11170 is pending. See Assem. B. 717 (Cal. 2011). This Comment does not address that amendment. Examining the deficiencies of former systems provides important guidance for determining whether procedures meet or do not meet constitutional standards. See *Humphries*, 554 F.3d at 1202; *Valmonte*, 18 F.3d at 1004; *Finch*, 499 F. Supp. 2d at 535; see also *Dupuy*, 141 F. Supp. 2d at 1134 (holding state's inclusion of childcare worker on child abuser registry violates due process because choosing to work in one's field is constitutionally protected interest); *Cavarretta*, 660 N.E.2d at 258 (holding inability to work in childcare field violates constitutionally protected liberty interest); *Petition of Preisendorfer*, 719 A.2d 590, 592 (N.H. 1998) (holding that state deprives individual of protected liberty interest if it prevents individual from working in occupation available to similarly educated individuals); *In re Lee TT v. Bane*, 664 N.E.2d 1243, 1250 (N.Y. 1996) (holding that government's listing of petitioner in child abuser database significantly jeopardizes future career prospects in petitioner's field).

¹⁹² See *Humphries*, 554 F.3d at 1192-1200 (discussing inadequacy of procedural safeguards); see also *Valmonte*, 18 F.3d at 1003-04 (describing New York Central Registry's delisting procedures and its unreliable standard of proof).

¹⁹³ See *Smith*, 322 F.3d at 1295-96 (stating that Smith's attorney had to demand due process hearing, and that agency denied attorney's request).

¹⁹⁴ See *infra* Part III.B.1-2.

¹⁹⁵ See generally *Humphries*, 554 F.3d at 1199-1200 (demonstrating CACI's flaws); *Smith*, 322 F.3d 1290 (demonstrating Alabama lacks formal delisting procedures); *Valmonte*, 18 F.3d at 995-97, 1003-04 (describing inadequate delisting procedures is primary source of erroneous listings).

¹⁹⁶ See *Humphries*, 554 F.3d at 1192-1201.

the CACI database.¹⁹⁷ Second, the time it takes to comply with the removal procedures merely prolongs the deprivation.¹⁹⁸ CACI still contains the individual's name while removal proceedings are underway.¹⁹⁹ *Humphries* illuminates these insufficiencies: the Humphries pursued all three ways to remove themselves, yet their names remained on CACI.²⁰⁰

New York's Central Registry has similar shortcomings.²⁰¹ The Registry utilizes an extremely low standard of proof, thus any credible evidence can warrant inclusion.²⁰² This standard allows an investigator's subjectivity to determine listing, which heightens the risk of erroneous deprivation.²⁰³ Second, in the time it takes to pursue an administrative removal hearing, individuals cannot engage in their preferred professions.²⁰⁴ The inability to engage in one's desired profession is worse in states like Alabama, where child abuser registries lack more formal delisting procedures.²⁰⁵

In California, for some innocent individuals, removal from CACI can take well over ten years.²⁰⁶ Statutes mandating that determinations of factual innocence effect automatic removal would reduce the time it takes to expunge erroneous listings and satisfy due process.²⁰⁷ Such

¹⁹⁷ *Id.*

¹⁹⁸ *See generally id.* at 1179-84 (outlining Humphries' inclusion in CACI from 2001 to 2008).

¹⁹⁹ *See id.* (discussing Humphries' unsuccessful attempts at delisting despite undergoing CACI's available procedures).

²⁰⁰ *Id.*

²⁰¹ *See Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994) (citing credible evidence standard for entering names on registry as insufficient standard of proof for presence of child maltreatment); *Finch v. N.Y. State Office of Children & Family Servs.*, 499 F. Supp. 2d 521, 529-30 (S.D.N.Y. 2007) (describing how delays caused by child maltreatment database impact individual's pursuit of employment).

²⁰² *See Valmonte*, 18 F.3d at 1004 (citing standard of evidence that allows any credible evidence to substantiate claim is inflammatory and ambiguous).

²⁰³ *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 762 (1982)) (describing effect of investigator's subjectivity in evaluating instances of alleged child abuse).

²⁰⁴ *See Humphries*, 554 F.3d at 1200; *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 1297 (11th Cir. 2003); *Valmonte*, 18 F.3d at 1001, 1004.

²⁰⁵ *See Smith*, 322 F.3d at 1293-94.

²⁰⁶ *See Humphries*, 554 F.3d at 1179 (stating that after ten years, state purges CACI of individuals on database who have inconclusive reports; however, individuals with substantiated reports remain in CACI permanently).

²⁰⁷ *See generally id.* (holding that CACI violates procedural due process); *Valmonte*, 18 F.3d 992 (holding that New York Central Registry violates procedural due process).

schemes would also relieve affected individuals of the burden of bringing lengthy, and often unpredictable, due process claims.²⁰⁸

2. Judicial Findings of Innocence Should Immediately Remove CACI Listings

Humphries' critics may argue that a determination of factual innocence should not automatically remove an individual from CACI because it does not rule out guilt.²⁰⁹ Continual listing ensures that if the individual actually abused a child, the government can mitigate the possibility of recidivism.²¹⁰ For example, continual CACI listing prohibits individuals from working in a child related field.²¹¹ Excluding such individuals from environments where they might recidivate achieves the government's legitimate interest in keeping children safe.²¹²

However, these critics ignore fundamental constitutional principles.²¹³ The standard to prove actual innocence is high.²¹⁴ To

²⁰⁸ See generally *Humphries*, 554 F.3d at 1179 (describing CACI's lengthy delistment procedures); *Valmonte*, 18 F.3d at 1001-04 (describing New York's lengthy expungement procedures).

²⁰⁹ Cf. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (recognizing that states have urgent interest in protecting children); *Humphries*, 554 F.3d at 1193-94 (stating that California has vital interest in protecting children from child abusers); *Valmonte*, 18 F.3d at 1003 (explaining that as *parens patriae*, state has significant interest in protecting children from maltreatment). See generally Moore, *supra* note 21, at 2081 (discussing why child maltreatment databases would retain individuals' names even after court determines factual innocence).

²¹⁰ Cf. *Humphries*, 554 F.3d at 1194 (acknowledging that California has interest in retaining unsubstantiated reports of child abuse because such reports can reveal patterns of abuse helpful for law enforcement); *Hodge v. Jones*, 31 F.3d 157, 166 (4th Cir. 1994) (explaining that state's retention of unsubstantiated reports serves legitimate state interest in welfare of children). See generally Moore, *supra* note 21, at 2080-81 (discussing why states have interest in retaining unsubstantiated reports to assess level of risk for particular children).

²¹¹ See generally *Humphries*, 554 F.3d at 1191-92 (explaining state's inclusion of individuals on CACI places added burden on entities that grant legal rights or benefits).

²¹² See generally *Hodge*, 31 F.3d at 166 (explaining that retention of unsubstantiated reports assists risk assessment for certain children who might suffer from emotional abuse); Jeanne Giovannoni, *Substantiated and Unsubstantiated Reports of Child Maltreatment*, 11 CHILD. & YOUTH SERVS. REV. 299, 299 (1989) (stating that purpose of child abuser database is three fold: to initiate investigation, to establish databases that catch repeat offenders, and to collect statistical data); Moore, *supra* note 21, at 2080 (gathering information regarding family history requires retention of unsubstantiated reports).

²¹³ See *In re Winship*, 397 U.S. 358, 364 (1970); see also *Mullaney v. Wilbur*, 421 U.S. 684, 685 (1975); *Francis v. Franklin*, 471 U.S. 307, 313 (1965).

establish actual innocence, there must be no reasonable cause to think that the arrestee committed the crime.²¹⁵ Thus, a finding of actual innocence means that there is substantial proof that the individual did not commit the offense.²¹⁶ Therefore, child abuser databases should immediately purge defendants with judicial findings of innocence from their listings.²¹⁷ Today, despite two courts' rejection of the charges against them, CACI still includes the Humphries' names.²¹⁸ This injustice continues to infringe on the Humphries' constitutionally protected rights.²¹⁹

To protect those rights, states should enact immediate and timely removal procedures that aptly balance the *Mathews* factors.²²⁰ As *Humphries* demonstrates, the deciding *Mathews* factor is the likelihood of erroneous deprivation because the private and governmental interests at stake are in equipoise.²²¹ Instituting expedited

²¹⁴ See CAL. PENAL CODE § 851.8(b) (2009); see also *Wilbur*, 421 U.S. at 685; *Francis*, 471 U.S. at 313.

²¹⁵ See § 851.8(b) (stating that finding of factual innocence is contingent upon court finding that no reasonable cause exists to believe that arrestee committed offense); see also *Wilbur*, 421 U.S. at 685; *Francis*, 471 U.S. at 313.

²¹⁶ See *In re Winship*, 397 U.S. at 364 (holding that jury can only convict accused if it can prove every element beyond reasonable doubt); cf. § 851.8(b) (explaining finding of factual innocence means there is no reason to believe arrestee committed crime); *Humphries*, 554 F.3d at 1181 (stating that criminal court found Humphries factually innocent).

²¹⁷ *Contra Humphries*, 554 F.3d at 1179 (describing CACI's inadequate removal provisions). See generally *Valmonte*, 18 F.3d at 1004 (explaining that Central Register loses effectiveness when state erroneously places individuals on Register); *Finch v. N.Y. State Office of Children & Family Servs.*, 499 F. Supp. 2d 521, 535 (S.D.N.Y. 2007) (stating that twelve to twenty-three month delay before state initiates removal is constitutionally unacceptable).

²¹⁸ *Humphries*, 554 F.3d at 1182.

²¹⁹ *Id.*; see also *Williams*, *supra* note 1, at B1 (describing Humphries' inability to pursue career in childcare). See generally CAL. HEALTH & SAFETY CODE §§ 1522.1(a), 1596.877(b) (2008) (stating licensing agencies must search CACI prior to granting approval to care for children or gain employment with children); CAL. PENAL CODE § 11170(b)(7)-(9) (2009) (stating that information on CACI is available to individuals conducting pre-employment investigations for peace officer employment, childcare licensing or employment, adoption, or child placement).

²²⁰ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (identifying three factors: private interest, governmental interest, and risk of erroneous deprivation). See generally *Humphries*, 554 F.3d 1170 (citing CACI's delayed removal procedures as raising risk of erroneous deprivation); *Valmonte*, 18 F.3d 992 at 1004 (describing New York Central Registry's lengthy delisting procedures as increasing risk of erroneous deprivation).

²²¹ See *Mathews*, 424 U.S. at 335; *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1135-36 (D. Ill. 2001) (explaining that private interest and government interest are equally important; thus, court must focus on risk of error inherent in current system or

expungement procedures and allowing judicial findings of innocence to effectuate prompt removal from child abuser databases reduces erroneous inclusions, protects liberty interests, and provides due process.²²²

C. *The Stigma-Plus Test Prevents Frivolous Litigation and Ensures that States Provide Due Process*

Finally, the stigma-plus test prevents superfluous litigation while allowing courts to preserve due process and protect liberty interests.²²³ The *Smith* court feared that allowing Smith's defamation claim to satisfy the stigma-plus test would cause frivolous litigation.²²⁴ However, courts and states alike will benefit from applying the stigma-plus test in the manner this Comment suggests.²²⁵ When courts correctly analyze stigma-plus claims, the "plus" prong ensures due process and quickly ends frivolous litigation.²²⁶ Moreover, automatic delistment allows for a more efficient use of state resources.²²⁷

procedure). See generally *Humphries*, 554 F.3d at 1170 (recognizing risk of erroneous deprivation as most important *Mathews* factor).

²²² See *Mathews*, 424 U.S. at 335, 340-41.

²²³ See *Humphries*, 554 F.3d at 1189-90 (differentiating between fear Court expressed in *Paul* and effect of recognizing due process right in *Humphries*). See generally *Paul v. Davis*, 424 U.S. 693, 701 (1976) (explaining fear of frivolous litigation if stigma alone creates due process right); *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971) (explaining that Fourteenth Amendment does not apply to all tortious interference with rights of others).

²²⁴ See *Smith ex rel. Smith v. Siegelman*, 322 F.3d 1290, 1297, 1298 (11th Cir. 2003) (emphasizing several times that recognizing protected liberty interest fails "plus" prong of test set forth in *Paul*). See generally *Paul*, 424 U.S. at 701, 710 (describing Court's concern that mere reputational harm might construe every police insult into due process claim requiring hearing). But see *Humphries*, 554 F.3d at 1190-91 (decision to recognize procedural due process in situations where defamatory conduct and tangible burden on rights are statutorily created does not create superfluous claims).

²²⁵ Compare *Howard v. Malac*, 270 F. Supp. 2d 132, 141 (D. Mass. 2003) (holding that plaintiff's inclusion on government maintained domestic violence registry did not implicate protected liberty interest), and *Vaccaro v. Vaccaro*, 680 N.E.2d 55, 161-62 (Mass. 1997) (conducting stigma-plus analysis and determining that respondent's alleged reputational harm from inclusion in statewide domestic violence database did not jeopardize his liberty interest because database was confidential), with *Valmonte*, 18 F.3d at 992 (holding that government's inclusion of Valmonte on child abuse registry violated liberty interest because government routinely disseminated registry information to potential employers), and *Glasford v. N.Y. Dep't of Soc. Servs.*, 787 F. Supp. 384, 385, 388-89 (S.D.N.Y. 1992) (holding that government's inclusion of plaintiff on child abuser database failed to implicate constitutionally protected liberty interest).

²²⁶ *Humphries*, 554 F.3d at 1189-90; see also *Finch v. N.Y. State Office of Children*

1. A “Plus” for the Courts

Well-founded concerns about frivolous litigation should not lead courts to alter constitutional analysis; therefore, courts should not make stigma-plus standard higher than it already is.²²⁸ In fact, the stigma-plus test can alleviate the courts’ fear.²²⁹ The *Paul* Court created the “plus” prong to ensure that the Fourteenth Amendment did not enable frivolous litigation.²³⁰

In addition to the stigma-plus test’s benefits, a clear rule such as *Humphries*’ allows plaintiffs to predict their probability of success, which reduces unnecessary litigation.²³¹ Only a tangible burden on a statutory legal right will satisfy the stigma-plus test.²³² This

& Family Servs., 499 F. Supp. 2d 521, 534 (S.D.N.Y. 2007) (noting that delay in delisting procedures could result in losing several jobs); *Bursac v. Suozzi*, 868 N.Y.S.2d 470, 481 (2008) (holding that police officer’s posting of petitioner’s DUI arrest information on public website named “Wall of Shame” can satisfy “plus” criterion).

²²⁷ See *Humphries*, 554 F.3d at 1194.

²²⁸ See John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 433-35 (1986); see also Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997) (explaining widespread belief that frivolous litigation is out of control and plagues litigation system). See generally Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993) (stating common complaint that courts are overflowing with frivolous litigation).

²²⁹ See *Paul*, 424 U.S. at 701. Compare *Humphries*, 554 F.3d at 1188 (holding that state placement on CACI violates liberty interest as it creates stigma and alters previously existing right or status), with *Vaccaro v. Vaccaro*, 680 N.E.2d 55, 161 (Mass. 1997) (stating that placement on domestic violence registry does not implicate liberty interest or satisfy stigma-plus test).

²³⁰ See *Paul*, 424 U.S. at 701; see also Rodney A. Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Co.*, 1982 U. ILL. L. REV. 831, 840-41 (stating that *Paul*’s holding prevents every tortious state action from establishing due process claim); cf. *Vaccaro*, 680 N.E.2d at 161 (stating procedural due process claim fails because state’s placement of defendant on domestic violence registry only creates generalized fear of injury to defendant’s reputation).

²³¹ See *Humphries*, 554 F.3d at 1189-90 (explaining how parties can satisfy stigma-plus test while alleviating potential fear of unnecessary litigation). But see *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (stating that individual’s claim does not satisfy stigma-plus test because government action has no effect other than reputational harm); *Green v. Transp. Sec. Admin.*, 351 F. Supp. 2d 1119, 1130 (W.D. Wash. 2005) (stating that placement on No-Fly list fails stigma-plus test because confidential nature of No-Fly list prevents deprivation of liberty or property).

²³² See *Humphries*, 554 F.3d at 1189; *Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994) (holding state’s placement of Valmonte on child abuser registry placed tangible burden on her employment prospects). But see *Conn. Dep’t of Pub. Safety*, 538 U.S. at 7 (holding that state’s placement of individuals on sex offender registry does not create

requirement prevents every insult from a government official to amount to a due process claim.²³³ Adopting *Humphries*' reasoning will assist plaintiffs in assessing the likelihood that their claims will withstand litigation.²³⁴

2. A "Plus" for the States

In addition to striking a *Mathews* balance, automatic delisting would greatly increase system-wide efficiency.²³⁵ According to the 2004 CANRA study, California should purge as many as half of the 800,000 records in CACI.²³⁶ Maintaining erroneous listings is not only expensive, but defeats the purpose of establishing a database that seeks to identify dangerous individuals and protect children.²³⁷ Erroneous listings only decrease the effectiveness of the system, because errors make targeting true offenders difficult.²³⁸

Expediently removing erroneously listed individuals simultaneously benefits individuals and the state.²³⁹ This solution protects the constitutional interests of individuals the state places on child abuser registries, alleviates limited state resources, and increases the

tangible burden on statutory right).

²³³ *Humphries*, 554 F.3d at 1189. *But see* *Nuttle v. Ponton*, 544 F. Supp. 2d 175, 177 (W.D.N.Y. 2008) (stating that student's complaint about professor's stigmatizing comments failed stigma-plus because professor did not publicize damaging comments). *See generally* Smolla, *supra* note 230, at 840-41 (stating that plus prong of stigma-plus prevents every tortious state action from implicating Constitution).

²³⁴ *See Humphries*, 554 F.3d at 1189-90 (explaining how parties can satisfy stigma-plus test while alleviating potential fear of unnecessary litigation). *But see Conn. Dep't of Pub. Safety*, 538 U.S. at 7 (stating that individual's claim does not satisfy stigma-plus test because government action has no effect other than reputational harm); *Vaccaro*, 680 N.E.2d at 161 (stating that extremely confidential nature of domestic violence registry prevents government from disseminating registries' records).

²³⁵ *See generally Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (discussing risk of erroneous deprivation); *Humphries*, 554 F.3d at 1194; CANRA REPORT, *supra* note 87, at 48.

²³⁶ CANRA REPORT, *supra* note 87, at 24.

²³⁷ *See Humphries*, 554 F.3d at 1194; CANRA REPORT, *supra* note 87, at 48; *see also* Moore, *supra* note 21, at 2080 (stating one purpose of child abuse reports, whether substantiated or not, is to assess whether child is at risk of repeated abuse).

²³⁸ *See Humphries*, 554 F.3d at 1194; CANRA REPORT, *supra* note 87, at 48.

²³⁹ *See* CANRA REPORT, *supra* note 87, at 48. *See generally Humphries*, 554 F.3d at 1187-88 (stating that state's inclusion of *Humphries* on CACI prevents them from pursuing certain career paths and implicates protected liberties); *Valmonte v. Bane*, 18 F.3d 992, 1001-02 (11th Cir. 2003) (explaining that *Valmonte*'s inability to work with children implicated liberty interests).

databases' efficiency.²⁴⁰ Automatic delisting thus allows states to use their resources towards screening actual child abusers.²⁴¹

CONCLUSION

The government violates a liberty interest when it both stigmatizes an individual and creates a material burden on his or her legal rights.²⁴² States that require agencies to consult child abuser databases without providing effective removal procedures thus violate the Fourteenth Amendment.²⁴³ Disseminating information on these databases deprives innocent individuals of employment opportunities.²⁴⁴

Thus, states should enact procedures to remove erroneously listed individuals from child abuser databases promptly.²⁴⁵ Prompt removal of factually innocent individuals will allow states to use resources more efficiently while recognizing an individual's protected liberties.²⁴⁶ The stigma-plus test allows courts to prevent unnecessary litigation while ensuring that states preserve due process.²⁴⁷ Given child abuser databases' unacceptable error rate, the Supreme Court should adopt *Humphries*' approach.²⁴⁸

²⁴⁰ See *Humphries*, 554 F.3d at 1194; cf. *Mathews*, 424 U.S. at 335 (describing balancing of three factors to ensure administrative procedures satisfy procedural due process).

²⁴¹ See *Humphries*, 554 F.3d at 1194.

²⁴² See *id.* at 1200 (holding that CACI violates procedural due process). See generally *Valmonte*, 18 F.3d 992 (holding that New York Central Registry violates procedural due process); *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1134 (D. Ill. 2001) (holding state's inclusion of plaintiff on registry violated procedural due process).

²⁴³ See *supra* Part III.

²⁴⁴ See *supra* Part III.A.

²⁴⁵ See *supra* Part III.B.

²⁴⁶ See *supra* Part III.C.

²⁴⁷ See *supra* Part III.C.

²⁴⁸ See *supra* Parts I-IV.