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MORAL PANIC AND THE POLITICS OF FEAR: THE DUBIOUS LOGIC UNDERLYING
SEX OFFENDER REGISTRATION STATUTES AND PROPOSALS FOR RESTORING
MEASURES OF JUDICIAL DISCRETION TO SEX OFFENDER MANAGEMENT

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ABSTRACT

Existing sex offender management legislation generally represents an emotional response to a few well-publicized incidents involving child-victims. Federal and state legislative initiatives mandating sex offender registration for all defendants convicted of a sexually-oriented offense lack an empirical foundation and should be modified to embrace the scholarly research produced in the past twenty-five years. The abundant research focused on sex offenders, while persuasive, fails to consider the role of the judiciary in sex offender management. Sex offenders can be more effectively supervised by restoring a measure of judicial discretion to offender management. Judicial involvement in sex offender management should include discretion to determine registration duties for low-risk first-time sex offenders, authority to consider individualized risk assessment in the imposition of registration duties and in managing offenders, expanded jurisdiction to authorize deregistration for low-level first-time sex offenders, and the implementation of specialized sex offender courts modeled after other successful problem-solving courts.

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*244 INTRODUCTION

The half-truths of one generation tend at times to perpetuate themselves in the law as the whole truths of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten. Benjamin Cardozo¹

Pervert, pedophile, molester, monster, degenerate, and rapist are all pejorative terms used to describe offenders convicted of a sexual crime. The labels conjure images of a stranger lurking in the dark, ready to attack an unsuspecting prey. The very nature of sex offenses often provokes a visceral response that ignores reason in favor of swift, harsh, and unmerciful reaction. In the early 1990s a swirl of media attention concentrated on child murder cases. Media outlets frequently broadcasted the horrific details and images of the crimes, engendering fear that children were constantly falling prey to sinister criminals. In a race for ratings, media outlets sought out even more sensational stories, often salaciously speculating that the murders were sexually motivated, even when no evidence existed to support the conjecture. The publicity expanded to a fever pitch, even though media accounts often failed to represent demonstrable offending patterns. Television programs devoted to exposing sex offenders, such as NBC's *Dateline: To Catch a Predator*,² perpetuated the hysteria. The fear mongering by the media found motivation, not from any actual increase in sexual offending or recidivism, but in the higher ratings generated by sensationalizing child-victim cases.³

*245 Unfortunately, media accounts of offenses against children frequently present cases without important context and fail to represent a paradigm of sexual offending. Details regularly excluded from public reporting include critical aspects of the offense such as the victim-offender relationship, the perpetrator's prior record, and the specific crime circumstances.⁴ Instead, the media portray offenders as a dangerous and homogeneous assembly of criminals who specialize in sexual offending, who seek strangers as their prey, and who inevitably will reoffend.

Quick to capitalize on the growing public outrage aroused by media accounts of child-victim cases, legislatures responded swiftly and severely to the perceived threat from sex offenders. Legislative strategies adopted the widely-held assumption that a distinct and specialized form of deviant existed: the sex offender.⁵ Research makes clear that the suppositions about sex offenders underlying the most recent legislative trends lack evidentiary support.⁶ The laws enacted to isolate sex offenders have failed to serve their articulated purpose of protecting the public,⁷ and have instead fostered an environment that undermines the potential for convicted offenders to be successfully reintegrated into society. The media frenzy directed toward sex offenders reached a crescendo in the early *246 years of the twenty-first century, culminating in a federal legislative response to sex offenders, the Adam Walsh Act.⁸

This article will begin with an examination of the concept of the moral panic and will then apply moral panic theory to the alarm surrounding sex offenders in the past twenty-five years. This article will then consider the socially constructed myth of the sexual deviant and the research effectively deconstructing the illusions linked with that myth. Next, consideration will be given to the collateral consequences attendant to the status of registered sex offender and modalities of intervention and assessment associated with offender management. Legislative efforts targeting sex offenders will be reviewed. Finally, this article will consider the traditional role of the judiciary in the sentencing and managing of

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convicted sex offenders, and propose changes in existing legislative schemes targeting sex offenders to enforce evidence-based practices that rely on judicial involvement in sex offender management.

I. THE POLITICS OF FEAR

[T]here being no passion so contagious as that of fear. Michel de Montaigne⁹

The fear that generated this nation's obsession with sex offenders and the perceived danger sex offenders present has its genesis in a moral panic. A moral panic represents a “condition, episode, person or group of persons, which emerge to become defined as a threat to societal values and interests.”¹⁰ According to Stanley Cohen, an early proponent of moral panic theory, the mass media, moral entrepreneurs (individuals or groups *247 who campaign for change), the control group (those with institutional power, such as law enforcement, the legislature, and the judiciary), and the public are all crucial agents necessary for a moral panic to take root. While each of the four agents of a moral panic is necessary to the success of the phenomenon, the media serves as the critical force propelling the panic.¹¹

A moral panic evolves through several distinct stages. First, concern arises that the behavior of a distinct group of individuals will negatively affect others. Next, hostility increases toward the defined group, followed by widespread consensus that the identified group poses a threat to the community. The resulting fear and reactions generate a disproportionate response to any actual threat. The identified group comes to symbolize the threat.¹² In the end, the winds of the moral panic begin to blow, and what began as mere concern surrounding an identifiable group grows in such intensity that boundless fear directed at the scourged no longer bears any relation to an actual threat.

The fear engendered by a moral panic commonly lacks evidentiary support and instead “is wildly exaggerated and wrongly directed.”¹³ Emotionally charged and highly sensationalized media coverage fuels and amplifies the panic. Sex offenders provide a particularly provocative target for a moral panic. Unlike other violent crimes, sex offenses--particularly those involving child victims--attract widespread and persistent national media attention because of the fear and anxiety generated when children are at risk. Fear replaces rational consideration of the scope and nature of the offenses.¹⁴ During the moral panic surrounding sex offenders, “concern over sexual abuse provides a basis for extravagant claims-making by professionals, the media, and assorted interest groups, who *248 argue that the problem is quantitatively and qualitatively far more severe than anyone could reasonably suppose.”¹⁵ The anxiety generated by sex offenders led to a natural demand for action by parents, caregivers, the public, legislators and law enforcement officials.

Moral panics frequently serve as the impetus for changes in public policy and laws, and the vigor with which regulations are enforced.¹⁶ Research supports the conclusion that sex offender registration and notification laws proceed from emotion and political posturing to ensure re-election,¹⁷ generated by the moral panic initiated by media coverage, rather than from empirical data.¹⁸ The intersection of public fear, a ratings-driven media, and lawmakers motivated by personal aggrandizement has led to the present, popular yet ill-conceived, political and legislative responses to sex offending. Statutory enactments represent a response to public fear, yet have failed to appropriately and adequately address public safety, or consider individual needs and circumstances of sex offenders. Consequently, sex offender management laws serve largely symbolic *249 rather than effective functions. While symbolic policies operate to appease the public, no effective impact on criminal behavior results.

The moral panic associated with sexual offending coincided with a dramatic spike in media reports recounting misconduct against children. The murders of Adam Walsh in 1981 and of Jessica Lunsford in 2005, both of which occurred in Florida,¹⁹ present an interesting comparison of media interest in child murder cases. At the time of the abduction and murder of Adam Walsh in 1981, the media demonstrated relatively little preoccupation with the crime. The offense provoked a mere thirteen newspaper articles at the time of his disappearance.²⁰ Conversely, after the moral panic surrounding sex offenders took hold, media outlets produced twenty-five hundred newspaper stories about the murder of Jessica Lunsford in 2005.²¹ Researchers estimate a 128% increase in newspaper accounts focusing on sexual offenses between 1991 and 1998, despite an appreciable reduction in actual crime rates.²²

II. EARLY LEGISLATIVE EFFORTS TARGETING SEX OFFENDERS

Until the 1990s the interest in regulating the conduct of convicted sex offenders laid exclusively with state and local officials. The first wave of criminal offender registration laws was enacted in the 1930s, with a focus on controlling and monitoring a perceived gangster element in the *250 population.²³ In 1944, the California legislature narrowed the focus of the state's criminal registration mandates to include only convicted sex offenders.²⁴ Since 1947 California law obligated all offenders convicted of any sex crime to register personal information with law enforcement officials for life.²⁵ No distinction among sexual offenders based upon offense type, details of the offense, or the offender's personal circumstances was contemplated in the California regulations. The articulated purpose²⁶ underlying the sex offender registration statutes generally centers on making criminals convicted of a sex crime more visible to law enforcement and the public,²⁷ conceivably to improve community safety.

For several decades in the mid-twentieth century, the legislative trend shifted to branding convicted sex offenders as mentally ill. Between the 1930s and the 1970s numerous jurisdictions maintained sexual psychopath statutes.²⁸ The statutes were predicated on a then-prevailing belief in the medical community that sexual offenders experienced a *251 discreet psychopathy and presented a high risk for reoffense.²⁹ Sexual psychopath statutes mandated the institutionalization of convicted sex offenders for treatment, steering offenders away from incarceration.³⁰ Institutional commitment terminated only when medical practitioners deemed the offender cured or no longer a danger.³¹ Most sexual psychopath laws categorizing sex offenders as mentally ill were repealed in the 1960s and 1970s, when medical professionals abandoned the theory that sexual offending represented a specific, unique and discernible mental illness,³² and mental health experts established that coercive institutionalization produced no identifiable benefit.³³ By 1986, only five states required sex offenders to register personal information, with the registry data restricted to review by law enforcement officials.³⁴ The 1990s, though, ushered in a new wave of laws designed to label, shame, and single out sex offenders. Riding the wave of the moral panic, thirty-eight states passed sex offender registration laws between 1991 and 1996.³⁵

Significant research has focused on the shaming effect of negatively labeling behavior and societal reaction to the labeled conduct. John Braithwaite theorized that shaming, if communicated effectively, *252 serves as a positive means of deterring crime.³⁶ Shaming operates in either a reintegrative or disintegrative manner. Reintegrative shaming treats the offender as a good person engaged in bad behavior. Communication of reintegrative societal disapproval of the action occurs in a manner that serves to reclaim the deviant into the community by discouraging the offensive behavior while still demonstrating respect for the offender. On the other hand, disintegrative shaming, or stigmatization, treats

both the offense and the offender with disdain. Disintegrative shaming operates to brand the offender as a bad person not worthy of redemption. When shaming degenerates into stigmatization any potential reintegrative effect of the shaming communication dissipates.³⁷ Stigmatization poses a threat to an individual's identity and serves to encourage the offender to internalize the deviant characteristic imposed by the shaming.³⁸ Sex offender registries serve both a reintegrative and a disintegrative function. Registries may deter crime by encouraging compliance with the law to remove the humiliation associated with the stigma and to restore the offender to the ranks of the law-abiding. The mere label of sex offender, and its repugnant connotations, though, may propel the offender to adopt the epithet as his defining characteristic. This can lead to further offending, a self-fulfilling prophecy of sorts.

Sex offender registration and notification statutes (commonly known as SORN laws) undoubtedly assuage public fear because the regulations typically require registrants to periodically report personal identifying information to law enforcement officials and to comply with strict residency restrictions.³⁹ Commencing in the late 1990s and fueled by *253 the moral panic, state legislatures ramped up efforts to ostracize convicted sex offenders. Many of the resulting laws represent memorials named to honor child victims in notorious cases. By 1997, all fifty states had enacted some form of sex offender registration obligation,⁴⁰ with varying responsibilities and manners of identifying offenders subject to the statutory duties. The impetus for the state registration obligations centered on community safety, crime deterrence, and exercising control over persons perceived to be dangerous.⁴¹

III. CONSTRUCTED PERCEPTIONS OF SEX OFFENDERS

The term “sex offender” represents a constructed image, expressing popular sentiment rather than the evidence-based realities associated with individuals who have committed an offense of a sexual nature. In attempting to add precision to the term, the Center for Sex Offender Management defines sex offenders as individuals who have “committed violent sexual assaults on strangers, offenders who have had inappropriate sexual contact with family members, individuals who have molested children, and those who have engaged in a wide range of other inappropriate and criminal sexual behaviors.”⁴² The terms sex offender and sexual predator are frequently used interchangeably, even though the two represent separate and distinct cohorts. The conflation of the terms reflects that the public, the media, and legislators fail to understand that *254 differences exist among offenders.⁴³ Instead, the constructed image of sex offender--as reflected in prevailing community attitudes and statutory trends--ignores the extant evidence, which should provoke concern that existing SORN laws fail to remedy the perceived social harms that initially propelled their enactment and serve only to assuage public fear.

Despite the various efforts to precisely define the term, there is no distinct cohort of sex offenders. Sex offenders and sexual crimes vary widely. Convicted sex offenders may engage in a diversity of criminal activity, or may specialize in only crimes of a sexual nature.⁴⁴ The crimes encompassing sex offenses range from misdemeanors, such as urinating in public, to horrific and brutal crimes, such as sexually motivated murder. Crimes falling within the definition of sexual offenses may be forced or consensual, contact or non-contact, violent or passive. Victims may be known to the aggressor or may be strangers, and include both children and adults.

Beginning in the early 1990s, public perception of sexual offenses generally served as the impetus for initiatives to toughen legislative treatment of sex offenders. Unfortunately, while the public has demanded harsh treatment of sex offenders, the populous remains largely uneducated and misinformed about the scope and dynamic of sexual offending. The media played a primary role in constructing community perceptions of sex offenders. In one survey of public views of sex offenders, the majority of respondents admitted the foundation underlying opinions about sexual offending emanated

from television programming, rather than from scholarly resources.⁴⁵ Despite possessing limited knowledge of the *255 evidence associated with sexual misconduct, community members overwhelmingly support harsh restrictions on sex offenders.⁴⁶ Public concern about sex offenders centers on retribution and, secondarily, incapacitation of the offender.⁴⁷ The community concern over sexual crimes focuses on public safety without consideration for restoring offenders to the ranks of the law-abiding. The populace remains largely unconcerned about treatment and rehabilitation opportunities for sex offenders.⁴⁸

Individual fear of the risk posed by sex offenders correlates highly with personal support for restrictions on convicted offenders.⁴⁹ The notion of “stranger danger” permeates public perceptions of the risk of sexual victimization. Adults and children report greater concern for the potential of sexual assault by a stranger than by a person known to them.⁵⁰ The public overwhelmingly endorses a belief that sex offenders recidivate at a *256 high rate, leading to fear of great danger from convicted offenders.⁵¹ Community members also believe sexual offenders suffer from serious mental illness,⁵² separate and distinct from any other form of mental health concerns. Inexplicably, while a majority of the public believes restrictions on sex offenders contribute to public and personal safety,⁵³ few believe laws designed to monitor offenders actually aid in reducing recidivism.⁵⁴

The perceptions about sex offenders harbored by legislators and other public officials match those of their constituents. Legislators acknowledge laboring under the influence of both the media⁵⁵ and public opinion when regulating sex offenders.⁵⁶ In enacting harsh legislation targeting sex offenders, lawmakers and politicians have largely ignored the research associated with the dynamics of sexual offending, the heterogeneity of sexual offenders and the overall ineffectiveness of severe legislative efforts.⁵⁷ Lawmakers express little support for therapeutic intervention as a means of addressing recidivism and favor stringent monitoring of offenders through registries and notification duties.⁵⁸ Instead, legislators continue to accept the fallacy that sexual perpetrators cannot benefit from supervision or treatment.⁵⁹

For many policy makers, the current legislative approaches to managing sex offenders are simply not harsh enough. In a recent survey of legislators and public officials responsible for sex offender laws, a majority of the respondents “expressed dissatisfaction with the effectiveness of current sex offender laws because they do not promote *257 instantaneous recognition of offenders, they allow for the eventual release of offenders, or they do not intervene earlier in the sex offender's career.”⁶⁰ Legislative action surrounding sex offenders focuses on a preventive state, where social control shifts from solving and punishing crimes “to identifying ‘dangerous’ people and depriving them of their liberty *before* they can do harm.”⁶¹ At the expense of constitutional concerns, lawmakers appear to prefer a legislative approach that seeks to identify some predictor for sexual offending and then isolate all potential and known sex offenders from society.

In spite of their overwhelming support for tough sex offender management legislation, a large majority of lawmakers acknowledge that strict legislative initiatives have led to no appreciable reduction in sexual misconduct.⁶² Instead of enacting laws supported by empirical findings, the legislative reaction to sexual offending continues to focus on assuaging public fear by identifying, publicly labeling and humiliating, and unreasonably restricting the behavior of *all* sex offenders, while anticipating that all sex offenders will inevitably reoffend.⁶³ In so doing, legislators have defied the principles of individualized sentencing and effectively erased opportunities for support, treatment, and reintegration of offenders.

IV. DECONSTRUCTING THE MYTH OF SEX OFFENDERS

*Sometimes what happens is lawmakers don't want to know the facts, or the facts don't make any difference. There really are two things that affect public policy. One is the facts. The other is the feelings and political pressure. There are legislators who will say, "Don't confuse me with the *258 facts. I've made up my mind."* North Dakota State Senator Tim Mathern⁶⁴

The principles reflected in federal legislation and numerous state statutes demonstrate that efforts to regulate sex offenders are controlled by perceptions rather than reality. Coinciding with the surge in legislation targeting sex offenders, research concentrating on sex offenders and sexual offending has burgeoned. The scholarship focuses on a wide variety of issues, including topics ranging from the nature and tendencies of sex offenders as a subset of the general criminal population, to a search for any characteristics common among sex offenders, and to risk assessment tools designed to anticipate or predict recidivism.⁶⁵ Other areas of research emphasis include potential treatment modalities and indirect consequences of sex offender management laws on offenders, their families and supporting relationships. The analytical findings generally negate the perceptions of the public and legislators, as well as media portrayals of sexual crimes, offenders and crime circumstances.

Media accounts, public perception, and legislative initiatives reflect the assumption that all sexual offenders possess common characteristics, harbor characteristics unique among criminals and present a greater danger than other offenders. The perception that sexual deviants specialize by limiting criminal offending to sexual crimes reinforces the notion that sex offenders represent a greater danger than other criminals and must be treated differently.⁶⁶ The legal and mental health systems both *259 treat sex offenders as specialists, rather than as individuals with diverse criminal histories, pathologies and risk variables.⁶⁷

Scholarly research verifies the heterogeneity of sex offenders. No universal characteristic, whether physical, pathological, psychological, or offense-related exists among sex offenders. Despite popular belief, few criminals limit their offending to sexual offenses only.⁶⁸ Instead, sexual crimes occur more often as a component of an offender's broad and extensive criminal history.

There is no particular psychopathology related to sexual offending. Instead, crimes of a sexual nature often develop from a multitude of factors. Sex crimes are associated with general antisocial tendencies, not with more specific or discreet characteristics.⁶⁹ Sexual offending is influenced by a variety of factors, including low self-control, impulsivity, opportunity, and a generally asocial lifestyle.⁷⁰ The impulsivity exhibited by sex offenders does not necessarily lead to the conclusion that sex offenses are distinguished by impetuosity. Instead, sex offenders are often rational decision-makers. Perpetrators frequently engage in painstaking planning, develop strategies to lure their victims, and contrive post-offense behavior designed to discourage victims from reporting their crimes.⁷¹

*260 The misperception that sex offenders most often target strangers pervades popular opinion and sex offender management efforts. Registries presume that the public will utilize the available information for self-protection and to safeguard children and the vulnerable from offenders living nearby. Contrary to popular belief, though, the vast majority of sex offense victims know their offender.⁷² A staggering 93% of child sexual abuse perpetrators are a family member or an acquaintance of the victim.⁷³ Adult victims know their offender in 73% of reported cases.⁷⁴ Sex offender registries

reinforce and perpetuate the misperception that strangers represent the most likely perpetrators of sexual offenses,⁷⁵ arguably leading to a false sense of security with family members and known persons, and fueling unwarranted fear of potential for victimization by a stranger.

While the public generally perceives great danger from sex offenders, overall community attitudes lack scholarly support. Research confirms that sex offenders pose no greater danger to the public than other criminal offenders.⁷⁶ In fact, sex offenders present as the least likely to ***261** reoffend among all criminals.⁷⁷ Recent studies suggest that the recidivism rate for all offenders ranges from 62.5-67.5% within three years of prison release.⁷⁸ Meta-analysis of various recidivism studies demonstrates that conviction for a new sexual offense within an average of four to five years following the initial sex offense conviction reaches only 13.4%.⁷⁹ When recidivism occurs, registrants are more likely to commit a non-sexual offense than they are to commit another sexual offense.⁸⁰ Failure to register represents the single most common recidivist offense committed by sex offenders.⁸¹ Non-compliance with registration duties does not increase the risk of sexual reoffense, but instead relates to underlying deficits and characteristics, such as cognitive impairments, self-regulatory deficits and general rule-violating tendencies.⁸²

***262** Although sex offenders are proportionately more likely than other criminals to reoffend sexually, the great majority of sexual assaults are not committed by registered sex offenders.⁸³ Approximately 71.5% of all arrests for sex crimes involve an individual not previously convicted of a sexual offense.⁸⁴ Instead, a number of factors influence recidivism, and vary considerably even among offenders. Circumstances contributing to repeat sexual offending include primarily, but not exclusively, relative youth of the offender at the time of the first offense, unmarried status, an enduring sexual preference for children, non-acquaintance and male victimization, and a greater number of prior arrests for any type of criminal conduct.⁸⁵ Poor coping skills also correlate with a greater risk of reoffense.⁸⁶ The number of prior sexual crimes and paraphilias both influence the risk of repeat offending.⁸⁷ Recidivism rates among rapists decrease with advancing age, primarily resulting from increased self-control, fewer opportunities and decreased sex drive as offenders mature in years.⁸⁸

***263** Legislators have generally shown little interest in the availability of treatment options for convicted sex offenders. Laws targeting sex offenders rarely provide for mandatory treatment. Successful completion of specialized therapeutic intervention, when coupled with effective supervision, lowers the risk of recidivism among sex offenders.⁸⁹ Available treatment tools may include group, individual and family therapy, psychological and psychosocial evaluations and polygraph examinations.⁹⁰ Specialized sex offender treatment targets a variety of issues associated with recidivism, including “[d]eviant sexual arousal, interests, or preferences; [s]exual preoccupation; [p]ervasive anger or hostility; [e]motional management difficulties; [s]elf-regulation difficulties, or impulsivity; [a]n antisocial orientation; [p]ro-offending attitudes, or cognitive distortions; [and] intimacy deficits and conflicts in intimate relationships.”⁹¹

Determining the most appropriate method of treatment represents an important consideration influencing the likelihood of success from therapeutic intervention. Treatment modalities addressing specific concerns related to sexual offending include cognitive-behavioral therapy, psycho-educational approaches, pharmacological treatment, and physical ***264** therapies, such as surgical castration. Sex offender treatment modalities are not mutually exclusive and often work in tandem. As with any intervention, sex offender treatments must address each individual offender's needs. Scholars suggest that treatment approaches that address the dynamic factors associated with recidivism, when combined with

supervision, produce conditions contributing to the greatest chance for success, particularly because the triggers underlying repeat offending can be altered through intervention.⁹²

Treatment resources, though, must be concentrated on those with the highest probability of reoffense. Regulations in California mandate specialized treatment for *all* convicted sex offenders.⁹³ Requiring treatment for every offender likely results in the devotion of scant resources to low risk offenders who could benefit from other less intensive and less costly modes of assistance designed to support the registrant in developing skills necessary to succeed and overcome the deleterious effects of carrying the label of sex offender.

V. COLLATERAL CONSEQUENCES OF SORN LEGISLATION

Widespread dissemination of offenders' names, photographs, addresses, and criminal history serves not only to inform the public but also to humiliate and ostracize the convicts. It thus bears some resemblance to our shaming punishments that were used earlier in our history to disable offenders from living normally in the community. Supreme Court Justice David Souter⁹⁴

***265** Proponents of increasingly restrictive sex offender management laws neglected to consider the devastating societal and individual consequences of labeling sex offenders. A significant body of research underscores the indirect costs and unintended negative consequences of designating a convicted criminal as a sex offender.⁹⁵ For offenders, the collateral consequences of the label vary in scope, intensity, and duration. Rather than promoting public safety, sex offender registration and notification laws represent rules antithetical to success, resulting from the residual effects linked with the label. Released from confinement or supervision with limited support systems and a scarlet brand, sex offenders are nevertheless expected to be successful, contributing members of society.⁹⁶

The restrictions placed on registered sex offenders represent severe impediments to the maintenance of a pro-social lifestyle and the reduction of recidivism. Stable residence and employment, strong social and familial support, along with effective treatment serve as key conditions necessary for success in the community.⁹⁷ Residential stability is critical, and steadfast employment alleviates financial concerns and contributes to improved self-esteem.⁹⁸ Positive social and familial relationships provide a network of supporters to provide aid and encouragement during periods of stress.⁹⁹ In contrast, lack of stability ***266** exacerbates stress. The loneliness, anxiety, and stigmatization driven by consequences collateral to sex offender registration duties inevitably lead to periods of stress.¹⁰⁰ The risk of recidivism for sexual offending, as with all offending, increases in periods of particular stress.¹⁰¹ Research suggests that “some percentage of offenders will reoffend because of the stress and pressure imposed by a hostile, rejectionist community that has branded the offender as a pariah.”¹⁰² Simply put, the stress of carrying the moniker of sex offender contributes to risk.

As a result of the legislatively-imposed status, sex offenders report experiencing destabilizing events, including disruption in residence, loss of employment, property damage, relationship difficulties, threats, harassment, and feelings of stigmatization and ostracism.¹⁰³ Housing restrictions placed on registered sex offenders increase isolation. Residency restrictions for registered sex offenders can serve as an ***267** impediment to living with or near supportive family members.¹⁰⁴ Added financial hardships ensue when offenders are forced to relocate outside of the familial home. Separation from loved ones also creates emotional hardships.¹⁰⁵ Due to restrictions on residence location, sex offenders

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tend to reside in neighborhoods where poverty, high unemployment, educational disadvantage, limited physical resources, and significant levels of social upheaval prevail.¹⁰⁶ The isolation attendant to the collateral consequences deriving from sex offender registration and residency requirements may engender further feelings of stress, fear, and hopelessness, serving as a potential trigger for relapse or recidivism.¹⁰⁷

Constant financial worries plague many sex offenders. Economic challenges can result from loss of employment as a consequence of the conviction itself. A convicted offender may be excluded from job opportunities because of the perceived risk of employing a sex offender or legal restrictions on hiring, especially for jobs requiring interaction with the public or children.¹⁰⁸ Federal law¹⁰⁹ requires that states maintain a website listing, among other information, each offender's place of employment. Easy internet access to the workplace of registrants likely *268 represents a deterrent to hiring or retaining registered sex offenders, particularly proceeding from the potential negative publicity for employers. By limiting educational and employment opportunities and effectively impeding social and familial support, registries reduce the potential for convicted parties to succeed, which can be especially detrimental to offenders presenting the lowest risk of reoffense.¹¹⁰

The perceived fairness of consequences plays an important role in offender management and the potential for success. Studies¹¹¹ demonstrate a link between criminal offenders' perceptions that the judicially or legislatively-imposed sanctions are fair and increased compliance with the law.¹¹² Conversely, offenders who believe that their individual sanctions are unfair or arbitrarily administered are more likely to reoffend.¹¹³ When offenders view their restrictions as overly-harsh or punitive, their compliance with supervision requirements diminishes.¹¹⁴ While sex offenders generally acknowledge that SORN legislation has some value, when those statutes are applied to themselves, registered offenders voice widespread dissatisfaction with the laws.¹¹⁵ The disclosure of personal information, particularly on the internet, is perceived by many sex offenders as particularly and fundamentally unfair.¹¹⁶ In one investigation of the perceptions of registered sex offenders, study participants expressed concern that SORN laws ignore individual efforts and circumstances, *269 particularly since individual assessment for recidivism, treatment compliance, and other risk factors play no part in registration and notification obligations.¹¹⁷

Offenders are not the only ones who experience collateral consequences of registration and community-notification laws. Family members of registrants face challenges in their supportive roles for the sex offender. The stress of the relative's sex offender status strains the important relationship between the registrant and the primary support system, an integral component of stability, and thus undermines offenders' potential for success. Relatives of registered sex offenders report feelings of stress, isolation, loss of social opportunities, compromised living arrangements, financial strain, loss of contact with friends and family, and to a lesser degree, threats, harassment and shame as a result of their family member's designation as a sexual offender.¹¹⁸

VI. AVAILABLE RISK ASSESSMENT TOOLS

The resurgent movement to place severe restrictions on sex offenders beginning in the early 1990s produced an abundance of research relating to sex offenders. The research includes a robust body of literature devoted to analyzing the reliability and utility of risk assessment tools.¹¹⁹ *270 A significant improvement in the validity and reliability of assessment tools resulted from research provoked by the movement's goal of identifying and restricting the conduct of convicted sex offenders.¹²⁰ For decades, the judiciary has relied on testing instruments to assist in crafting individualized sex offender registration obligations. Courts, corrections officials, and treatment providers now routinely use risk assessment tools in

sentencing, supervision, and treatment for non-sex offenders. A positive correlation exists between risk assessment scores and recidivism among sex offenders.¹²¹ Scholars confirm that meaningful sex offender management requires periodic assessment of risk of re-offense.¹²² Numerous authors advocate for utilizing a risk-assessment model for classifying convicted sex offenders, managing supervision, and determining sentences, including whether registration will benefit individual offenders and, if so, the appropriate length of the offender's registration requirement.¹²³ Despite the empirical evidence, current federal legislation does not incorporate risk assessment results in sex offender classification.

Contrary to prevailing public opinion, risk evaluation serves as a valuable and reliable tool in crafting individualized registration and *271 supervision duties.¹²⁴ Modern testing instruments permit evaluation of both static and dynamic factors of the test subject, providing courts and supervision personnel with a predictable picture of the offender's situation when anticipating risk. Evaluation is not limited to a single snapshot of an offender's needs and circumstances. Instead, periodic risk assessment proves to be a valuable tool in evaluating trends and changes in the offender's circumstances, including treatment needs and compliance, as well as evolving supervision needs.

Several reliable risk assessment instruments have been developed to assist in the effective management of sex offenders. Research finds actuarial risk assessment tools to predict recidivism with greater accuracy than clinical evaluation alone.¹²⁵ The scoring of assessment instruments eliminates much of the subjectivity from offender risk appraisal that is inherent in clinical assessment. Factors potentially measured by risk assessment instruments include both static and dynamic circumstances. Static factors represent historical information not subject to change, such as prior criminal record, previous violations of community supervision, and age at first offense.¹²⁶ Dynamic factors present as "those characteristics, circumstances, and attitudes that can change throughout one's life."¹²⁷ Changeable variables include substance abuse, attitude, maturity, social support, and self-management practices.¹²⁸ Testing *272 instruments weigh dynamic circumstances separately from static issues, as dynamic factors may be amenable to treatment and intervention,¹²⁹ while static circumstances are by their nature immutable.

Studies demonstrate that static, or highly stable factors, provide the strongest predictive indicators of long-term recidivism.¹³⁰ Some dynamic circumstances, though, also link to risk of reoffense, such as insufficient or negative social support, general anti-social lifestyle, poor self-management practices, lack of cooperation with community supervision, and attitudes tolerant of sexual offending.¹³¹ Because both static and dynamic circumstances aid in predicting recidivism, assessment tools that consider both types of risk factors enhance the accuracy, and thus the predictive value, of the instrument as applied to sex offenders.¹³²

Even though research demonstrates that both static and dynamic circumstances correlate with recidivism, the researched risk assessment tools commonly utilized rely generally on static factors. Today, six different researched and validated instruments are widely utilized to aid in measuring risk of both serious criminal recidivism and sexual recidivism. The researched tools commonly employed for assessment purposes are known as VRAG, SORAG, RRASOR, Static-99, Static-2002, and MNSOST-R, and represent actuarial instruments utilizing statistical analyses of groups of released sex offenders with known outcomes, providing a "statistically measured rate of reoffending among a group of sex offenders who share certain characteristics with the individual being *273 assessed."¹³³ Research demonstrates that each of the six instruments is moderately predictive of sexual recidivism.¹³⁴ The instruments differ in the number of variables measured and in predictive value. Some of the risk assessment tools prove more reliable based on original offense type.¹³⁵ For instance, some instruments demonstrate somewhat greater prognostic accuracy with child molesters rather than rapists.¹³⁶ Two factors measured on the Static-2002, age of release from prison and persistence of sexual offending,

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correlate with predicting sexual offending among non-child molesters, while deviant sexual interests provides greater predictive value for re-offense among child molesters.¹³⁷

Several of the available assessment tools demonstrate greater reliability in predicting general recidivism than sexual recidivism specifically. Overall, the SORAG and Static-99 instruments indicate moderate to strong forecasting of general, sexual, and violent recidivism.¹³⁸ Both tools, though, are more accurate in anticipating general recidivism than sexual recidivism.¹³⁹ The Static-99 is the most widely used¹⁴⁰ and widely researched instrument,¹⁴¹ which may correlate to the length of time the instrument has been available and the ease of scoring the instrument,¹⁴² rather than to the supremacy of its predictive value. *274 Research findings indicate, though, that the Static 2002 proves the most effective tool for predicting sexual recidivism.¹⁴³

While the most widely-utilized risk assessment tools rely on static factors for predicting future risk, the California Sex Offender Management Board (CASOMB) recently reported that the state would rely on two dynamic risk assessment instruments, the STABLE-2007 and the ACUTE-2007.¹⁴⁴ CASOMB¹⁴⁵ represents a diverse group of prosecuting attorneys, judges, corrections officials, law enforcement officials, mental health professionals, experts in sexual assault, and local government officials,¹⁴⁶ charged with the responsibility of addressing concerns related to the community management of adult sex offenders.¹⁴⁷

Budget obstacles represent a significant challenge in the implementation of an effective risk assessment policy. Certified training for administrators of the assessment tools, tracking compliance with scoring protocols, and evaluation of data collected from the assessments are necessary for the adequate evaluation of assessment policies.¹⁴⁸

*275 VII. FEDERAL INVOLVEMENT IN SEX OFFENDER MANAGEMENT

The moral panic surrounding sex offenders in the early 1990s provoked a movement to federalize sex offender management policies, culminating in the enactment of the Adam Walsh Act.¹⁴⁹ Prior to federal involvement, even though at the time twenty four states required some form of sex offender registration or notification, the laws suffered from lack of uniformity and consistent application.¹⁵⁰ In jurisdictions with sex offender registries, a registrant needed only move to a community with less burdensome or no regulations. No system existed to track sex offenders' interstate moves.

Federal involvement in sex offender management efforts began with the Jacob Wetterling Act.¹⁵¹ Enacted in 1994, the legislation represented a memorial to an eleven-year-old boy from Minnesota who was kidnapped by a masked gunman in 1989. Jacob was riding his bike home along a rural road, accompanied by his younger brother and a friend, when the three boys were accosted by an armed masked man. The gunman told Jacob's brother and friend to run into the woods, leaving Jacob alone with the stranger. Jacob has never been seen again. The perpetrator of the offense remains unidentified.¹⁵² Despite the lack of evidence that the offense was sexually motivated, the legislation named in Jacob Wetterling's honor focuses squarely on sex offenders.

The Jacob Wetterling Act established the first national standards for sex offender registration and notification, requiring convicted sex offenders to register their addresses with local law enforcement and *276 compelling each state to establish a sex offender registry system. The legislation was considered necessary "to prod all States to enact similar laws and to provide for a national registration system to handle offenders who move from one State to another."¹⁵³ Under the

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Jacob Wetterling Act, the scope of registration duties depended on the “previous number of convictions, the nature of the offense, and the characterization of the offender as a sexual predator.”¹⁵⁴

The brutal murder of Megan Kanka in 1994 served as the compelling event for the establishment of community notification laws. Unlike the disappearance of Jacob Wetterling, a clear sexual motivation surrounded Megan's abduction and murder. Jesse Timmendequas, a twice-convicted sex offender, lured seven-year-old Megan into his home with the promise that she could play with his puppy. Once inside the home, Megan suffered repeated violent sexual assaults and eventual strangulation at the hands of Timmendequas. The day following Megan's disappearance Timmendequas confessed to police and led law enforcement investigators to a park where he had dumped Megan's body.¹⁵⁵

Within a month of Megan Kanka's murder, the New Jersey legislature passed Megan's Law, mandating sex offender registration, creating a statewide database to track offenders, and requiring community notification of all registered sex offenders moving into the area.¹⁵⁶ Critics complained that New Jersey legislators were “pandering to public *277 outrage” in passing the law without meaningful review or analysis.¹⁵⁷ In 1996 Congress amended the Jacob Wetterling Act to include a federal version of Megan's Law, requiring, upon release from incarceration, community notification of the place of residence of any person convicted for a sexually violent offense.¹⁵⁸

The Adam Walsh Act (AWA)¹⁵⁹ was enacted in 2006, expanding the types of sex offenses that fall within the federal mandate, setting standard registration requirements and residency restrictions for sex offenders, and mandating a national sex offender database.¹⁶⁰ The AWA virtually eliminates any potential for judicial discretion in the management of convicted sex offenders. Instead, the AWA imposes registration and notification obligations based strictly upon offense type, ignoring individual offender characteristics and circumstances. The AWA also establishes mandatory sanctions for an offender's failure to register or to notify authorities of changes in the offender's information. Even though the federal legislation now mandates specific sex offender regulations, the financial and physical burden of sex offender registration and monitoring falls on local jurisdictions. While protection from offenders who victimize children and establishment of a comprehensive national system for offender registration served as the stated impetuses for the law, the AWA represents a political and hyperbolic response to a series of highly publicized child murders.¹⁶¹

***278 A. THE RHETORIC OF THE ADAM WALSH ACT**

This is vitally important, common-sense legislation that is going to protect and, indeed, it is going to save lives. Sen. George Allen¹⁶²

The language utilized by the authors of the AWA confirms the emotional, media-driven impetus for the legislation. Remarking on the media's role in the measure, Senator Orrin Hatch stated on the Senate floor, “I want to thank the American press corps for the attention it has given to this issue. News outlets have diligently raised the American public's awareness of the grave threat posed by today's sexual predators.”¹⁶³ The emotion and media-driven moral panic underlying the AWA can be found in the statute's introductory language, which details the abduction and discovery of the body of six-year-old Adam Walsh.¹⁶⁴ The legislation continues, in its “Declaration of Purpose” to describe the details of sexual assault and/or murder of other individuals.¹⁶⁵ Preying further on emotion, the introduction to the Act acknowledges the dedication of Adam's parents, John and Reve Walsh, “to protecting children from child predators,

preventing attacks on our children, and bringing child predators to justice.”¹⁶⁶ Certainly, John Walsh's notoriety as host of *America's Most Wanted*, a television production devoted exclusively to the profiling and apprehending of violent fugitives, helped secure support for and swift passage of the legislation.¹⁶⁷ In statements before the House and Senate, legislators hailed Walsh's celebrity and *279 activism as one of the driving forces behind the expeditious passage of the legislation following its introduction, while emotionally invoking the memory of the Walshs' son.¹⁶⁸ References to the Walsh family's suffering permeated the supporting comments of legislators.¹⁶⁹ Senator Joseph Biden's comments before the Senate were laden with the emotional appeal of the legislation:

This has to be a very bittersweet moment for John Walsh. For what are we doing here today? We are naming a bill that will save the lives of hopefully thousands of other young people after a beautiful young boy who was victimized and killed.¹⁷⁰

While Biden's words and those of many other lawmakers resonated the emotional underpinning of the legislation, lawmakers failed to cite *any* data or empirical research to support the sweeping duties imposed on sex offenders by the AWA.

Not content with describing the horrific death of Adam Walsh, the AWA's introduction continued with the descriptions of the offenses against seventeen other individuals memorialized in portions of the legislation, fourteen of whom were aged sixteen or younger at the time of their victimization.¹⁷¹ In statements made prior to voting for the passage of *280 the AWA, numerous legislators chose to perpetuate the fear linked with sexual offenders by describing the horrific circumstances surrounding the deaths of the other seventeen individuals to whom parts of the legislation served as a memorial.¹⁷² Lawmakers overlooked in their public commentaries the undeniable fact that most sexual misconduct bears no similarity to the gruesome child-murders that inspired the AWA and its eponymic subsections.¹⁷³

The AWA sailed through the U.S. Congress with little substantive debate. A perceived urgency to further vilify sex offenders resonates in the statement made by Sen. Hatch on the Senate Floor:

The bottom line here is that sex offenders have run rampant in this country and now Congress and the people are ready to respond with legislation that will curtail the ability of sex offenders to operate freely. It is our hope that programs like NBC Dateline's "To Catch a Predator" series will no longer have enough material to fill an hour or even a minute. Now, it seems, they can go to any city in this country and catch dozens of predators willing to go on-line to hunt children.¹⁷⁴

Unfortunately, the Congressional Record contains scant evidence that lawmakers even considered the dearth of scholarly support for the AWA. *281 The few opponents of the AWA noted that the law's mandates lacked empirical support,¹⁷⁵ but proponents disregarded the criticisms in favor of demonstrating a swift and severe legislative response to the perceived need to protect the nation's children. Adding to the emotion-laden atmosphere surrounding the AWA's enactment, President George W. Bush signed the legislation into law on July 26, 2006, exactly twenty-five years after the death of its namesake.¹⁷⁶

B. REGISTRATION AND NOTIFICATION DUTIES UNDER THE AWA

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Overall, the AWA amplifies just about every component of prior federal mandates. It casts a bigger net, imposing its mandates on a wider range of individuals and offenses. The AWA lengthens the periods of required registration, and demands that offenders be categorized into three designated tiers according to offense type. The law makes information on sex offenders more readily available to the public and law enforcement, primarily on the internet. States determine the specific crimes to which registration duties apply, provided the offense types set out in the AWA are included in the state's registration statutes.

Generally, the AWA applies to sexual contact offenses against adults, sexual offenses of any nature involving a child, including child ***282** pornography, importuning a child for sexual conduct or contact,¹⁷⁷ and using the internet to facilitate criminal sexual conduct involving a minor.¹⁷⁸ The AWA demands that states enact laws criminalizing an offender's failure to strictly comply with the terms and conditions imposed by the Act.¹⁷⁹ The AWA mandates that state laws require a mandatory prison sentence for any sex offender who is convicted of a subsequent sex crime.¹⁸⁰ Nothing in the AWA precludes states from implementing restrictions exceeding the federal mandate, but the Act prohibits jurisdictions from opting for less burdensome standards without suffering the financial consequences delineated in the legislation.¹⁸¹ The law requires states to link sex offenders' information--including each offender's name, address, birthdate, place of employment, and photograph--to a national database.¹⁸²

The few sexual crimes that are categorically excluded from the AWA's registration requirements relate to sexual acts between consenting adolescents. The AWA excludes from registration duties any offense involving consensual sexual conduct between a victim who is at least ***283** thirteen years of age and an offender who is no more than four years older than the victim.¹⁸³ This omission acknowledges that consensual sexual conduct between adolescents, while often considered criminal, lacks the same level of concern for dangerousness as reflected in other sexual offenses. Indeed, no research links consensual sexual activity as an adolescent with risk for other sexual offending. Some jurisdictions, though, not only treat sexual conduct among adolescents as criminal, but also impose state-sanctioned mandatory sex offender registration for the consensual conduct.¹⁸⁴

The AWA requires offender classification through an offense-based system, in which crimes are grouped into tiers.¹⁸⁵ The management scheme imposed by the AWA considers one, and only one, factor for the classification of sexual offenders: offense type. Researchers acknowledge, though, that myriad variables affect sexual offending, risk and recidivism.¹⁸⁶ Because the classification system relies on a single static factor--prior offense type-- there is a risk of over-including low risk offenders as compared to legislative schemes that focus on the individual offender.¹⁸⁷

Under the AWA, Tier One offenders must register and verify information annually for a period of fifteen years. Tier Two offenders must meet the same requirements for twenty-five years, verifying the information every six months. Tier Three offenders must comply with the registration requirements for life, providing the requisite verification every ninety days.¹⁸⁸ The tiered system of classification neglects any consideration for specific risk factors, crime details, individual circumstances of the offender or the offense, or any other exigencies ***284** traditionally linked to the bedrock of American criminal sentencing, individualized sanctions.

The AWA requires states to either modify existing registration systems to comply with the stringent registration and notification requirements of the federal legislation or risk losing ten percent of the state's federally subsidized Byrne Justice Assistance (BJA) grant.¹⁸⁹ BJA funding represents the leading source of federal funds for a broad range of state and local criminal justice activities. The states that opted to implement the mandates of the AWA overlooked,

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intentionally or inadvertently, the undeniable fact that the cost of implementing the AWA far exceeded any potential loss of BJA funds.¹⁹⁰ Information compiled by the Justice Policy Institute comparing the potential loss of federal grant funds and the anticipated first-year only cost of implementation demonstrates that in *every* state, the estimated first-year cost of compliance with the AWA outweighed the potential loss of BJA grant money.¹⁹¹ The foreseen costs of compliance include software to create a registry, software maintenance, salaries and benefits for personnel to register and monitor offenders, as well as court and administrative costs.¹⁹²

Consider for example, the comparison of costs for the State of Virginia when its policymakers considered whether to comply with the AWA's mandates or lose BJA grant funds. Officials estimated the first-year cost to comply with the AWA at over \$12 million,¹⁹³ while the BJA grant funds potentially lost resulting from non-compliance would amount to approximately \$400,000.¹⁹⁴ Perhaps more germane, the annual ***285** estimated cost for ongoing compliance with the AWA in Virginia exceeds \$8.8 million.¹⁹⁵ Some states have refused to assume the costly demands of the AWA for purely financial reasons. Even after enacting some of the most stringent restrictions for sex offenders in the country, the Texas legislature refused to implement the AWA at the state level, citing the high cost of fulfilling the AWA's mandates.¹⁹⁶ The anticipated cost of instituting the demands of the AWA in Texas in 2009 alone approached \$39 million, while the impact on BJA funds totaled a mere \$1.4 million.¹⁹⁷

Other states chose to accept the BJA penalty for non-compliance with the AWA in order to retain local control over sex offender registration. New York elected to ignore the mandates of the AWA, deciding instead that the state's existing statutory scheme sufficiently provided for effective offender regulation and citizen safety.¹⁹⁸ Officials in Arizona, California, Minnesota, North Carolina, North Dakota, Texas and West Virginia also rejected the AWA, opting to preserve state sovereignty in sex offender management. As of October, 2015, only seventeen states were deemed to be in substantial compliance with the AWA by the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), a division of the Office of Justice Programs of the Department of Justice tasked with evaluating the implementation of the Act.¹⁹⁹

***286** That a non-complying state eschewed implementation of the AWA, though, should not imply that the state adopted an indifferent attitude toward sex offenders. On the contrary, many states--including some jurisdictions that have substantially implemented the mandates of the AWA--nevertheless impose restrictions on sex offenders that are harsher than those demanded by the AWA. At least fourteen states impose lifetime registration duties for *all* registered sex offenders.²⁰⁰ Embracing the moral panic surrounding sex offenders, Illinois lawmakers passed legislation effective in 2013 prohibiting registered sex offenders from participating in public holiday events, including passing out candy on Halloween, as well as dressing up as Santa Claus or the Easter Bunny.²⁰¹ A Wisconsin law, recently found by a state Court of Appeals to violate the First Amendment right to free speech, prohibited registered sex offenders from photographing children in public places.²⁰²

The course of action California legislators chose is instructive of the criticisms leveled against the AWA. Even though California law imposes strict lifetime registration duties on all sex offenders, state officials are exploring an individualized approach to sex offender management. The California Sex Offender Management Board (CASOMB) recommended that the state eschew compliance with the AWA's federal directives, focusing its criticism on the AWA mandates' ***287** inherent lack of individual consideration for offenders. A CASOMB report expressed concern that AWA registration obligations did not incorporate the use of risk assessment instruments to evaluate individual offenders, nor did they allow for any consideration of individual offenders' risk potential.²⁰³ Additionally, CASOMB criticized the AWA

for demanding an expansion of registrable offenses, including the extension of registration for adolescents, when no evidence linked those enlarged registrations to public safety.²⁰⁴ Finally, CASOMB expressed fiscal concerns for the unfunded mandate imposed on states by the federal legislation.²⁰⁵ While the AWA threatened reduction in BJA grants for noncompliance, no corresponding federal financial assistance was made available to underwrite the staggering cost of compliance.²⁰⁶

VIII. ABANDONING THE ONE-SIZE-FITS-ALL APPROACH OF THE AWA

Justice will not come to Athens until those who are not injured are as indignant as those who are injured.

Thucydides²⁰⁷

Congress imposed the sweeping mandates of the AWA despite a lack of empirical evidence demonstrating the effectiveness of sex offender registration and notification laws, particularly in deterring first-time offenders or reducing recidivism.²⁰⁸ Numerous studies have confirmed *288 that sex offender registration and notification laws result in little, if any, positive effect on public safety, deterrence or recidivism rates.²⁰⁹ Scholars have encouraged lawmakers to abandon the AWA's offense-based system in favor of practices focusing on individual offenders and risk of recidivism.²¹⁰ Research undertaken by the Center for Sex Offender Management (CSOM) suggests that available resources should be diverted away from costly all-inclusive registration policies and toward legislative schemes that instead focus on addressing sex offenders who pose the greatest danger to the public.²¹¹

Emphasizing public safety alone mitigates public fear, but the AWA ignores the need to address the circumstances underlying sexual offending. Interventions prove most effective when concentrated on offenders who present the most likely risk to reoffend. While the articulated goals of sex offender legislation focus on protecting the public, criminal sanctioning necessarily centers on the offender. The recognized principles of correctional intervention, though, concentrate on three factors associated with each unique offender: risk, need and responsivity.²¹² The *289 need principle directs focus to an offender's mutable behaviors, or dynamic factors, closely linked to criminal offending. An individual offender's learning style, abilities and other characteristics serve as key considerations in developing an intervention mode appropriate for the specific defendant.²¹³ In order to prove effective, interventions—including sex offender registration and notification duties—must address the unique issues of the individual offender. The mandates of the AWA, and state legislation implementing it, simply ignore the recognized principles of correctional intervention, instead categorically imposing obligations on everyone convicted of a sex offense, and diverting critical funds away from offenders most in need of supervision and monitoring.

Like all convicted criminals, sex offenders require social, psychological, and financial resources to successfully reintegrate into society as productive, pro-social citizens. Branding all defendants convicted of a crime of a sexual nature with the label of sex offender, and the baggage of attendant shame, denies convicted individuals the opportunities and resources vital for successful rehabilitation and reintegration. Instead of serving a reintegrative function, the stigmatizing effect of the sex offender label imposes a counterproductive essential and disintegrative identity on the sex offender.²¹⁴

The AWA should not be abandoned entirely, as the legislation represents an important step in closing gaps through which dangerous sex offenders could slip prior to the federalization of sex offender management. Federal registration mandates can provide for consistency in obligations, management, and enforcement of restrictions on sex offenders, but

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only if all states adopt uniform policies. At some point however, legislative strategies must overcome the moral panic that has *290 overshadowed legislative regulations for the last quarter of a century. The AWA must be amended to reflect what empirical research has revealed about sex offenders and sexual offending.

Simply put, no panacea exists to assuage communal anxiety surrounding sex offenders. No all-encompassing strategy will address the unique concerns of specific offenders. Unfortunately, few who have the power to influence public perceptions are willing to embrace the socially and politically unpopular position of advocating for evidence-based sex offender legislation,²¹⁵ which many would likely perceive as supporting violent criminals. When lawmakers have sought to modify draconian sex offender registration rules by implementing policies supported by empirical findings, the efforts have been thwarted by resort to the moral panic surrounding sex offenders. For example, in 2013, the Missouri legislature voted 153-0 in the House and 28-4 in the Senate to remove juvenile offenders from the state's sex offender website.²¹⁶ Gov. Jay Nixon vetoed the measure, claiming, “[t]he leadership of the House may be ready to help violent sex offenders hide from the public and law enforcement, but their victims, and the millions of Missourians who use these websites to help keep their families safe, are not.”²¹⁷ Fearing political backlash resulting from significant press coverage, as well as suggestions by Gov. Nixon and other politicians that legislators were ignoring safety concerns for citizens, the Missouri legislature abandoned any effort to override Nixon's veto of the proposal.²¹⁸ In 2015 a bill was introduced in the Nevada legislature that would have repealed the *291 legislation passed in 2007 adopting the mandates of the AWA.²¹⁹ As passed by the legislature, the bill would have made changes to the Nevada sex offender laws that would address some of the “one size fits all” challenges to the 2007 regulations.²²⁰ Gov. Brian Sandoval vetoed the measure, stating:

[The bill] removes the prohibition in current Nevada law that Tier III sex offenders cannot be within 500 feet of a school, playground, park, day care, movie theater, athletic field, or other places primarily designated for use by children. [The bill] allows sex offenders who have committed the most heinous sexually-motivated crimes to have greater access to places where children frequent in Nevada. It places our children at greater risk of harm.²²¹

As recent events suggest, the retributive intent of SORN legislation remains the focus, rather than any emphasis on rehabilitation or supportive treatment for offenders.

***292 IX. RESTORING JUDICIAL INVOLVEMENT IN SEX OFFENDER MANAGEMENT**

[Judges] rule on the basis of law, not public opinion, and they should be totally indifferent to the pressures of the times. Chief Justice Warren E. Burger²²²

Since the 1990s when the nation witnessed the infancy of the moral panic surrounding sex offenders, legislative efforts specifically targeting sex offenders have garnered harsh criticism from scholars, primarily because the legislative directives lack empirical support. The research and commentators focusing on the AWA, though, have not yet addressed the role of the judiciary in sex offender management. The mandates of the AWA virtually eliminate the judiciary from exercising any discretion in controlling sex offenders. The AWA prohibits judges from considering each offender as an individual and de-emphasizes individualized risk assessments as a tool for managing and monitoring convicted offenders.

Perhaps legislatures have found it easier to ensure sex offenders will be treated as a homogeneous and dangerous group by imposing mandatory statutory penalties for offenses of a sexual nature, rather than trusting the judiciary

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to exercise appropriate discretion when addressing individual offenders. During a 2011 committee hearing to consider reauthorization of the AWA, Congressman Johnson urged that the AWA be amended to return judicial discretion in the classification and management of individuals convicted of a sex offense.²²³ Unfortunately, Congressman Johnson's insightful suggestion garnered no support from his fellow legislators.

***293** Returning a measure of judicial discretion to the policies and processes of sex offender registration and notification can serve as a step toward infusing evidence-based practices into sex offender management. With safeguards in place to check judicial discretion, revised regulations can provide an opportunity for courts to address offenders as individuals and to provide offenders with tools necessary for effective reintegration and rehabilitation, while still addressing the overriding concern of public safety.

Judges are in a unique position to assist in regulating and managing sex offenders, a fact not contemplated by the AWA. The traditional role of judges includes exercising discretion when determining the appropriate sanction for each individual offender. While legislatures have in recent years limited the long-standing status of judges as arbiters of discretion in sentencing, lawmakers should accept the judiciary as a partner in sex offender management, rather than just the mouthpiece to impose legislative fiat.

The construct of the AWA impinges on the role of the judge in effective offender management by limiting consideration to offense type only. Consistent with the principles of correctional intervention, the dossier of information the judiciary may consider in fashioning individualized sanctioning should be multi-dimensional, whereas the mandates of the AWA rely on a single, static factor, offense type. When designing sanctions for offenders, judges consider a variety of circumstances relating to both the criminal and the crime. Relevant considerations for crafting individualized sanctions include the offender's criminal history; the defendant's relationship to the victim or victims; the nature of the offense; the degree of the defendant's culpability; any physical, psychological or economic harm to the victim; remorse displayed by the offender; the family and social history of the defendant; any history of compliance with supervision; and the defendant's physical and mental health, and issues with substance abuse. Judges must weigh the competing purposes of sentencing, which include rehabilitation, incapacitation, deterrence, and retribution. Sentencing courts must also assess the unique circumstances of each defendant and the offense, with the ultimate objective of applying the purposes of sentencing to the ***294** individual offender and offense. Indeed, the heterogeneity of sex offenders weighs in favor of intervention techniques that contemplate individual threat potential, but the homogeneous categorization of offenders dictated in existing sex offender legislation ignores the recognized principles of correction. While public safety falls within the issues considered in sanctioning a criminal defendant, community protection should not enjoy irrationally greater attention at the expense of other relevant factors. Furthermore, applying risk principles to individualized sentencing allows scant resources to be directed to those at greatest risk for reoffense.²²⁴

There are four strategies which can incorporate scholarly findings into sex offender management practices, all of which necessitate restoring some discretion to the judiciary in sanctioning sex offenders. First, legislation should be modified to authorize judges to determine when individual low-level sex offenders will be subject to registration duties. Second, laws should permit judges to consider risk assessments in managing sex offenders. Third, legislation should enable judges to deregister first time sex offenders after a reasonable period of full compliance with registration obligations. Finally, sex offender management should incorporate the proven practices associated with problem-solving courts.

**A. RESTORE JUDICIAL DISCRETION TO THE DETERMINATION
OF REGISTRATION DUTIES FOR LOW-RISK OFFENDERS**

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Existing SORN laws garner significant criticism for the over-inclusive and unforgiving consequences of the registration requirements. Repeat and violent offenders represent a category of individuals at greater risk for recidivism,²²⁵ and epitomize a category of offenders necessarily *295 falling within the spectrum of individuals for whom mandatory registration duties remain important. However, not all sex offenders present with the same level of dangerousness. While some offenses, particularly violent sexual crimes, may foretell future offending, there is no data linking some other sexual conduct, such as consensual contact between adolescents, with increased risk of reoffense. Wholesale imposition of the onerous burdens of sex offender registration laws on all offenders, though, fails to meet any legitimate legislative or penological purpose. Categorization based on the singular static criteria of offense type neither protects the public nor serves the offender.

Jurisdictions must adopt evidence-based policies designed to gauge personal offender risk when determining which individuals should be included within registration and notification requirements. Each offender should be assessed not only for risk of reoffense, but also for criminogenic needs associated with rehabilitation, with an ultimate goal of reintegrating the offender into the community when possible. Additionally, lawmakers should amend existing legislation to exclude from registration duties any offense that does not present a demonstrable risk to public safety, particularly offenses such as public urination, sexting, and conduct relating to consensual adolescent sexual activity. The exclusion of low-level offenses and low-risk offenders from registration obligations would release resources currently devoted to monitoring registrants, making those funds available for evidence-based objectives, such as treatment, therapeutic interventions and supervision of high risk, violent offenders.

A criticism of early efforts to monitor and regulate sex offenders included the unfettered discretion the judiciary possessed to determine when and if an individual offender would be subject to registration requirements. Similar to the concerns raised over SORN laws enacted by states in the past, unconditional judicial discretion in determining sex offender registration and notification duties would necessarily result in vast disparity in the management of offenders. Unlimited discretion is rarely contemplated in the law. Instead, judicial management of sex offenders should be tempered by employing practices validated by research. Because scholarly inquiry demonstrates that low-level and first- *296 time offenders present a lower risk of recidivism,²²⁶ judicial discretion in determining which individuals to subject to registration requirements must be limited to defendants who present as first-time sex offenders convicted of non-violent low-level offenses. Judges must also consider the results of validated risk assessment tools as applied to individual defendants in determining registration obligations. Finally, lengthier periods of supervision to monitor offenders should be required whenever the sentencing court determines, in its discretion, that a convicted offender will not be required to register as a sex offender. Protracted terms of community supervision present greater opportunity for the court and corrections officials to determine if an offender's risk potential has changed from the initial assessment, thereby authorizing the supervising judge to impose registration and notification duties should an offender's recidivism risk increase.

B. INCLUDE PERIODIC RISK ASSESSMENT IN JUDICIAL OVERSIGHT OF SEX OFFENDERS

For many years prior to the passage of the AWA, courts utilized risk assessment tools in determining the length and breadth of sex offender registration duties for particular offenders. The tiered system of offender classification mandated by the AWA effectively eliminated the utility and legal relevancy of risk assessment tools in sex offender designation. The restoration of judicial discretion to sex offender classification and management necessitates the reintroduction of risk assessment into the process.

In order to not only provide for public safety, but also to address individual offender circumstances correlating with risk--and conversely with success--registered sex offenders should be subject to periodic administration of risk

assessment instruments. Measuring dynamic risk factors can aid in monitoring and measuring risk, particularly at the *297 discreet time of assessment, and assists supervising authorities in identifying strategies and interventions vital to identifying, evaluating, and controlling stressors that influence recidivism.²²⁷ Offenders under supervision should be subject to assessment periodically, utilizing the most appropriate tool for measuring risk for that individual offender. Risk assessment tools must also be employed during periods when research demonstrates the greatest potential for recidivism. Additionally, supervising authorities should be permitted to require assessment any time the convicted offender demonstrates non-compliance with supervision, or behaviors or conditions indicate the potential for stresses research associates with recidivism. Risk assessment practices and protocols should undergo periodic review as new research influences assessment strategies.

Risk assessment represents only one tool in offender management. The reincorporation of validated and tested risk assessment instruments, along with strict supervision and management of offenders, will not eliminate all risk of recidivism. But, research demonstrates the predictive value of risk assessment tools which permits supervising authorities to intervene earlier, thereby reducing the potential for recidivistic behavior.

C. MODIFY DEREGISTRATION LIMITATIONS

Judges have little authority to relieve adult registered sex offenders from the reporting and registration duties imposed by the AWA. The AWA permits the judiciary to authorize deregistration of Tier I offenders only after the registrant demonstrates full compliance with the imposed duties for a period of at least ten years.²²⁸ It does not contemplate *any* reduction in the twenty-five year registration period for Tier II offenders or the lifetime obligation for Tier III offenders.²²⁹ Deregistration is *298 authorized only if a Tier I offender maintains a clean record, which the AWA describes as (1) not being convicted of any offense for which imprisonment for more than one year may be imposed; (2) not being convicted of any sex offense; (3) successfully completing any imposed periods of supervision, and (4) successfully completing a certified sex offender treatment program.²³⁰ The unnecessarily protracted minimum period of time an offender must wait to seek deregistration under the AWA fails to allow for the effective removal of the negative consequences conjured by the label of sex offender.

Scholars support the development of mechanisms for low-risk, law-abiding offenders to be removed from registries.²³¹ Deregistration serves no meaningful purpose if the collateral consequences of the sex offender label have ingrained themselves into the registrant's life and relationships to such an extent that the offender has adopted the stigma as a defining trait and started to act in accordance with that negative trait. Under the AWA, the minimum period of successful compliance required before an offender may seek deregistration prohibits any meaningful potential to shed the effects of years of registration obligations. Any changes to existing SORN laws must permit judges to relieve offenders from the registration and notification requirements after a reasonable period of time, but before irreparable damage occurs to the registrant's ability to successfully reintegrate into society. Any deregistration opportunity must be supported by positive results from an evidence-based risk assessment, successful completion of any recommended treatment and therapeutic requirements of supervision, confirmation of demonstrable support mechanisms to aid in mitigating stress, and a significant period during which the offender displays strict compliance with pro-social norms.

Despite the state's otherwise harsh penalties and restrictions on sex offenders, the Texas legislature recognized in 2005 that deregistration is a necessary tool in the successful rehabilitation of low-risk sex offenders. *299 The Texas penal code now permits sentencing courts to authorize deregistration of certain non-violent, first-time sex offenders who demonstrate successful completion of treatment and all terms of supervision, but only after the minimum registration period for the offense type set by the AWA has been satisfied.²³² Eligible offenders must provide to the court an

assessment of reoffense threat completed by a licensed deregistration specialist.²³³ In 2011 additional legislative changes to the Texas penal code authorized streamlined deregistration or the elimination of initial registration duties for adolescents engaged in consensual sexual activity.²³⁴ In enacting the 2011 revision to the state's sex offender registration laws, the Texas legislature likely recognized that adolescent consensual offenses present a low risk of reoffense.

Expanded opportunities for removal from sex offender registration rolls should not assume an offender would be without supervision. On the contrary, any deregistration opportunity should require a concomitant additional period of supervision following relief from SORN obligations to monitor for stressors associated with recidivism. Any significant violations of supervision duties could then present the potential for the court to reimpose registration duties. Post-deregistration monitoring would provide the offender with an opportunity to shed the negative, stigmatizing collateral consequences of the imposed label of sex offender, and to rejoin the ranks of the community, while concurrently supporting the goal of sex offender registration laws, public safety.

D. ENCOURAGE IMPLEMENTATION OF SEX OFFENDER COURTS

In the past twenty years, problem-solving courts have proven to be an effective means of offender management. Problem-solving courts represent a judicially-supervised team approach to offender sanctioning designed to address the social, mental-health, employment, and other *300 needs of offender-participants through close supervision and monitoring,²³⁵ while also safeguarding the community. Research demonstrates that problem-solving courts, such as the drug-court model, significantly reduce crime rates, while providing services in a cost effective manner.²³⁶ Problem-solving courts present a holistic approach to offender management.

All problem-solving courts trace their lineage to efforts undertaken in the past twenty years to stem the effects of drug addiction through the drug-court model of intervention.²³⁷ Key components of the drug-court model include integrating treatment with criminal supervision, promoting public safety while protecting the unique concerns of the individual offender, providing access to a continuum of treatment and services, consistently monitoring and evaluating participants to measure compliance with supervision, and coordinating immediate, multi-disciplinary responses to compliance lapses.²³⁸ The advent of drug courts grew from community concerns that drug abusers were involved in a revolving door of use, without any reduction in criminal behavior or judicial interest in creating sentencing alternatives to incarceration. The resulting drug-court model combined judicial control with therapeutic intervention, and *301 institutionalized an innovative response to a particular problem of offender management.²³⁹

Specialized sex offender courts present the most effective opportunity for sex offender management. Community supervision aids in reducing all criminal recidivism, including sexual recidivism.²⁴⁰ Public policymakers should consider implementing protocols for sex offender courts for the supervision and monitoring of offenders. Modeled after the successes of drug courts, mental-health courts, and other problem-solving courts, sex offender courts would permit judges to closely monitor offenders, provide individualized treatment and risk assessment, respond promptly to stresses, and facilitate success for the offender, thereby reducing the devastating effects of the current federally-mandated sex offender management system, while still providing for public safety. Indeed, research demonstrates that judicial supervision through problem-solving courts positively affects recidivism rates.²⁴¹

Authorities in New York refused to implement legislation consistent with the mandates of the AWA in favor of adopting a sex offender management scheme relying on judicial involvement. In 2004 New York state courts began researching best practices for problem-solving courts and initiated an extensive planning procedure in anticipation of launching

specialized sex offender courts.²⁴² In 2006 pilot sex offense courts were launched in three New York counties. Integral to the specialized sex offense dockets are (1) a commitment to relying on a unified approach to management, including best practices garnered from *302 available and emerging scholarship, and (2) consistent judicial oversight of offenders. The fundamental principles employed by New York sex offender courts, like most problem-solving courts, include: leadership by a dedicated and trained judge, a committed staff educated in the dynamics of sexual offending and offenders, continuous evaluation and supervision of defendants, immediate judicial response to offender stresses and noncompliance, graduated sanctioning, coordination of services with treatment programs, and provision of needed support services to offenders.²⁴³

Significant and multi-dimensional training of judges presents as a key component of any successful problem-solving court. The requisite instruction includes legal issues as well as education in social science, medical, substance abuse and mental health concerns specifically related to sexual offending. Judges must undertake frequent training augmentation through mandatory continuing judicial education to ensure that, in managing sex offenders, the court considers the most current scholarly findings available and any emerging research trends.

Through the close monitoring of offenders by courts, public safety will be enhanced, as problem-solving courts contemplate immediate intervention to address any lapses in compliance and to monitoring for stressors that signal potential for reoffense. Sex offender courts will also provide the offender with the opportunity to obtain the support and skills necessary to be reintegrated as a law-abiding member of the community.

X. CONCLUSION

When viewed strictly from a political or emotional perspective, substantial reform to SORN laws in the current climate is indefensible. When analyzed, though, from an empirical standpoint, major revisions in sex offender management legislation must be undertaken to address the primary purpose of SORN laws: public safety. The prevailing legislative *303 practices regulating convicted sex offenders fail to meaningfully impact their intended purpose of providing for community security. The power of the moral panic underlying today's sex offender policies could defeat any effort at meaningful legislative reform. The judiciary may need to use its position of influence and legal authority to assist the public in overcoming the moral panic by drawing attention to the flaw in current SORN laws, and by encouraging changes to sex offender management laws. While the judicial role contemplates objective application of laws enacted by the legislature, the judiciary is not without a voice. The appanage of the judiciary must and should include educating the public. By setting legal precedent and applying decisions, disseminating concerns through lectures to the public, and offering testimony to legislative bodies, judges have unique opportunities to refocus the lens through which the media, the public and legislators view sex offenders. Deconstructing the myths associated with sex offenders should open the door for legislative initiatives tailored to meet public safety through measures restoring discretion to the judiciary in managing sex offenders, while fulfilling the individualized intent underlying criminal sanctioning.

Footnotes

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125 Hanson & Morton-Bourgon, *supra* note 91, at 14.

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127 CTR. FOR SEX OFFENDER MGMT., *supra* note 42, at 5.

128 Identified dynamic factors include negative mood (depression, anxiety, frustration, and hostility), general self-regulation and sexual regulation difficulties, substance abuse, association with criminal peers and/or a criminal lifestyle, current non-compliance with supervision, attitudes supporting and condoning sexual interest in children, residing alone, youth, sexual preoccupation, sexual interest in children, emotional identification with children or a child-oriented lifestyle, intimacy deficits, and conflicts with or absence of intimate partners. Fabian, *supra* note 86, at 40.

129 *Id.*

130 Hanson & Bussiere, *supra* note 79, at 358.

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- 143 Looman & Abracon, *supra* note 137, at 802; *see also* Hanson, Helmus & Thornton, *supra* note 141, at 206.
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- 146 CAL. PENAL CODE § 9001 (West 2012).
- 147 CAL. PENAL CODE § 9002 (West 2012).
- 148 *See* CAL. SEX OFFENDER MGMT. BD., *supra* note 121, at 13-14.
- 149 Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).
- 150 For a review of state laws on sex offender registration in existence prior to the Adam Walsh Act, Megan's Law and the Jacob Wetterling Act, *see* MATSON & LIEB, *supra* note 24.
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- 160 *Id.* §§ 101-119.
- 161 *Id.* § 102.
- 162 152 CONG. REC. S8017 (daily ed. July 20, 2006) (statement of Sen. George Allen).
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- 166 § 2, 120 Stat. at 589.
- 167 Michael R. Handler, *A Law of Passion, Not of Principle, Nor Even Purpose: A Call to Repeal or Revise the AWA Amendments to the Bail Reform Act of 1984*, 101 J. CRIM. L. & CRIMINOLOGY 279, 280 (2011).
- 168 *See* 152 CONG. REC. S8012 (daily ed. July 20, 2006) (statements of Sen. Orrin Hatch, Sen. Joseph Biden, Sen. Rick Santorum, Sen. Mitch McConnell, Sen. Arlen Specter); 152 CONG. REC. H5705 (daily ed. July 25, 2006) (statements of Rep. Earl Pomeroy, Rep. Mark Foley, Rep. Robert Cramer).
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- 170 152 CONG. REC. S8012, 8014 (daily ed. July 20, 2006) (statement of Sen. Joseph Biden).
- 171 § 102, 120 Stat. at 590-91 (naming the following victims, whose experiences provided the additional catalyst for the legislation: Jacob Wetterling, 11; Megan Kanka, 7; Pam Lychner, 31; Jetseta Gage, 10; Dru Sjodin, 22; Jessica Lunsford, 9; Sarah Lunde, 13; Amie Zyla, 8; Christy Fornoff, 13; Alexandra Zapp, 30; Polly Klaas, 12; Jimmy Ryce, 9; Carlie Brucia, 11; Amanda Brown, 7; Elizabeth Smart, 14; Molly Bish, 16; Samantha Runnion, 5). *See generally id.* at § 146, 120 Stat. at 607 (establishing the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, known as the SMART Office).
- 172 *See* 152 CONG. REC. S8012 (daily ed. July 20, 2006) (statements of Sen. Johnny Isakson, Sen. Byron Dorgan, Sen. Maria Cantwell, Sen. Mark Pryor, Sen. John Kerry, Sen. Edward Kennedy); 152 CONG. REC. H5705 (daily ed. July 25, 2006) (statements of Rep. James Sensenbrenner, Rep. Mark Green, Rep. Phil Gingrey, Rep. Ginny Brown-Waite).
- 173 Garfinkle, *supra* note 34.
- 174 152 CONG. REC. S8012 (daily ed. July 20, 2006) (statement of Sen. Hatch).
- 175 *Reauthorization of the Adam Walsh Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong. 5-6 (2011) (statement of Hon. Robert C. “Bobby” Scott, Virginia) (considering the reauthorization of the AWA five years after its implementation, Congressman Robert Scott stated that the AWA had proven to be “unworkable” and criticized the original legislation for failing to allow for the use of risk assessments in classifying offenders) (“[R]esearch indicates that the risk assessment is an effective way to monitor offenders. We should all prefer a tool that helps determine who is actually at risk of committing another offense, rather than just telling us who committed one in the past. Failing to distinguish between the two defeats the purpose of the registry and makes us actually less safe, not more safe.”).
- 176 *President Signs H.R. 4472, the Adam Walsh Child Protection and Safety Act of 2006* (July 27, 2006) (transcript available at <http://georgewbushwhitehouse.archives.gov/news/releases/2006/07/20060727-6.html>).
- 177 Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111, 120 Stat. 587, 591-93 (2006) (providing, generally, for any criminal offense, or attempted offense, that includes an element involving a sexual act or sexual contact with another where there is any type or degree of genital, oral, or anal penetration, or any sexual touching of or contact with a person's body, either directly or through the clothing. Specific offenses against minors that fall within the AWA's registration

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mandates include non-parental kidnapping; non-parental false imprisonment; solicitation to engage in sexual conduct; use of a minor in a sexual performance; solicitation to practice prostitution; video voyeurism; possession, production, or distribution of child pornography; criminal sexual conduct involving a minor; use of the internet to facilitate criminal sexual conduct involving a minor; and any conduct that by its nature is a sex offense against a minor. Additionally, specific federal offenses, and their state equivalents, are incorporated into the AWA).

- 178 *Id.*
- 179 *Id.* at § 113, 120 Stat. at 595.
- 180 *Id.* at § 141, 120 Stat. at 601-04.
- 181 *Id.* at § 125, 120 Stat. at 595.
- 182 *Id.* at §§ 119-20, 120 Stat. at 595.
- 183 *Id.* at § 111(5)(C), 120 Stat. at 592.
- 184 *See, e.g.*, OHIO REV. CODE ANN. §§ 2907.04, 2950.01 (West 2014); WISC. STAT. §§ 948.02(2), 301.45(b) (2015).
- 185 § 115, 120 Stat. at 591-93.
- 186 *See, e.g.*, Lussier et al., *supra* note 81 (finding that early and persistent antisocial behavior is a primary factor affecting sexual offending).
- 187 Logan, *supra* note 18, at 269-72.
- 188 § 115, 120 Stat. at 595.
- 189 *Id.* at § 125, 120 Stat. at 595.
- 190 JUSTICE POLICY INST., WHAT WILL IT COST STATES TO COMPLY WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT? (2008), available at http://www.njcn.org/uploads/digital-library/resource_840.pdf.
- 191 *Id.*
- 192 *Id.*
- 193 VA. DEPT OF PLANNING AND BUDGET, 2008 FISCAL IMPACT STATEMENT (2008), available at <https://lis.virginia.gov/cgi-bin/legp604.exe?081+oth+SB590F122+PDF>
- 194 JUSTICE POLICY INST., *supra* note 190; *see also* OFFICE OF JUSTICE PROGRAMS, DEP'T OF JUSTICE, Justice Assistance Grant Program (JAG): FY 2008 Allocations and Disparate Information, <https://www.bja.gov/programs/jag/08jagallocations.html> (last visited Mar. 20, 2016).
- 195 VA. DEPT OF PLANNING AND BUDGET, 2008 FISCAL IMPACT STATEMENT, *supra* note 193.
- 196 Renée C. Lee, *Texas Won't Participate in the National Sex Offender Registry*, HOUS. CHRON. (Oct. 6, 2012), <http://www.chron.com/news/houston-texas/article/Texas-won-t-participate-in-national-sex-offender-3923910.php>.
- 197 JUSTICE POLICY INST., *supra* note 190.
- 198 John Caher, *NY State Opts Out of Compliance with Adam Walsh Act*, NATION INSIDE (Oct. 7, 2011), <http://nationinside.org/campaign/cure/posts/ny-state-opts-out-of-compliance-with-adam-walsh-act/>.

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- 199 As of October, 2015, the following states have been deemed by the SMART Office to have substantially implemented the mandates of the AWA: Alabama, Colorado, Delaware, Florida, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, and Wyoming. Ninety-nine tribal jurisdictions and three U.S. territories have also been determined to have substantially implemented the Act. *Jurisdictions that have substantially implemented SORNA*, OFFICE OF JUSTICE PROGRAMS, available at http://ojp.gov/smart/newsroom_jurisdictions_sorna.htm (last visited Nov. 25, 2015).
- 200 Those states include Alabama, California, Colorado, Florida, Georgia, Hawaii, Idaho, Missouri, New Jersey, Oregon, South Carolina, Tennessee, Virginia, and Wyoming. See WASH. COLL. OF LAW, AM. UNIV., END TO SILENCE: THE PROJECT ON ADDRESSING PRISON RAPE, FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS (last updated Nov. 2010) https://www.wcl.american.edu/endsilence/documents/FiftyStateSurveyofAdultSexOffenderRegist_November2010Update.pdf.
- 201 720 ILL. COMP. STAT. 5/11-9.3 (2014).
- 202 WIS. STAT. § 948.14, invalidated by *State v. Oatman*, 871 N.W.2d 513, 518 (Wis. Ct. App. 2015).
- 203 CAL. SEX OFFENDER MGMT. BD., ADAM WALSH ACT <http://www.casomb.org/docs/Adam%20Walsh%C20Position%20Paper.pdf> (last visited Nov. 25, 2015).
- 204 *Id.*
- 205 *Id.*
- 206 *Id.*
- 207 THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR (431 B.C.).
- 208 KRISTEN ZGOBA, PHILIP WITT, MELISSA DALESSANDRO AND BONITA VEYSEY, NAT'L CRIMINAL JUSTICE REFERENCE SERV., MEGAN'S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY 7 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf>; Sandler et al., *supra* note 73, at 299.
- 209 RICHARD TEWKSBURY, WESLEY JENNINGS & KRISTEN ZGOBA, NAT'L CRIMINAL JUSTICE REFERENCE SERVICE, SEX OFFENDERS: RECIDIVISM AND COLLATERAL CONSEQUENCES (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf>; Jill S. Levenson, *Policy Interventions Designed to Combat Sexual Violence: Community Notification and Civil Commitment*, 12 J. OF CHILD SEXUAL ABUSE 17, 25-29 (2003); Sample & Kadleck, *supra* note 26.
- 210 See Stephanie Buntin, *The High Price of Misguided Legislation: Nevada's Need for Practical Sex Offender Laws*, 11 NEV. L.J. 770, 790-91 (2011).
- 211 CTR. FOR SEX OFFENDER MGMT., U.S. DEPT OF JUSTICE, THE COMPREHENSIVE APPROACH TO SEX OFFENDER MANAGEMENT (2008), available at http://www.csom.org/pubs/Comp_Approach_Brief.pdf; see also CTR. FOR SEX OFFENDER MGMT., U.S. DEPT OF JUSTICE, SEX OFFENDER REGISTRATION: POLICY OVERVIEW AND COMPREHENSIVE PRACTICES (1999), available at <http://www.csom.org/pubs/sexreg.pdf>.
- 212 D.A. Andrews, James Bonta & Robert D. Hoge, *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 CRIM. JUST. & BEHAV. 19 (1990); see also D.A. Andres, James Bonta & J. Stephen Wormith, *The Risk-Need-Responsivity (RNR) Model: Does Adding the Good Lives Model Contribute to Effective Crime Prevention?*, 38 CRIM. JUST. & BEHAV. 735 (2011).
- 213 D. A. ANDREWS & JAMES BONTA, THE PSYCHOLOGY OF CRIMINAL CONDUCT 150-52 (2nd ed., Elsevier 1998).

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- 214 See Hollida Wakefield, *The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?*, 1 J. SEXUAL OFFENDER CIV. COMMITMENT: SCI. & L. 141 (2006).
- 215 See Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17 (2008).
- 216 97 MO. CONG. REC. H3290 (MAY 17, 2013); 97 MO. CONG. REC. S2384-85 (May 17, 2013), available at <http://house.mo.gov/BillActions.aspx?bill=HB301&year=2013&code=R>.
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- 219 Sean Whaley, *Lawyer for 24 Sex Offenders Says Nevada Registration Law is Unconstitutional*, L.V. REV. J. (October 5, 2015), <http://www.reviewjournal.com/news/las-vegas/lawyer-24-sex-offenders-says-nevada-registration-law-unconstitutional>.
- 220 *Id.*
- 221 Letter from Brian Sandoval, Governor of Nevada, to Barbara Cegavske, Nevada Secretary of State (June 10, 2015).
- 222 Charlotte Saikowski, *The Power of Judicial Review*, CHRISTIAN SCI. MONITOR, Feb. 1987.
- 223 *Reauthorization of the Adam Walsh Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Congr. 29 (2011) (statement of Hon. Henry C. Johnson, Georgia).
- 224 The California Sex Offender Management Board recently recommended that the sex offender registration system in California follow the risk principles of correction in order for resources to be directed to those who pose the highest risk of reoffending. See generally CAL. SEX OFFENDER MGMT. BD., *supra* note 121, at 5.
- 225 See generally TEWKSBURY, JENNINGS & ZGOBA, *supra* note 209; Looman & Abracen, *supra* note 137.
- 226 See generally TEWKSBURY, JENNINGS & ZGOBA, *supra* note 209; Looman & Abracen, *supra* note 137.
- 227 See generally R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50 (1998); Hanson, Steffy & Gauthier, *supra* note 77.
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- 229 *Id.*
- 230 *Id.*
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- 233 *Id.* § 62.404.
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- 235 Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1058 (2002).

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- 238 BUREAU OF JUDICIAL ASSISTANCE, U.S. DEPT JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997).
- 239 Dorf & Fagan, *supra* note 237, at 1503-04.
- 240 Levenson et al., *supra* note 82.
- 241 Douglas B. Marlowe, *The Verdict on Drug Courts and Other Problem-Solving Courts*, 2 CHAPMAN J. CRIM. JUST. 57, 66-67, 70-72 (2011).
- 242 THOMFORDE-HAUSER & GRANT, *supra* note 90; see also KRISTINE HERMAN, CTR. FOR COURT INNOVATION, *SEX OFFENSE COURTS: THE NEXT STEP IN COMMUNITY MANAGEMENT*, <http://www.courtinnovation.org/research/sex-offense-courts-next-step-community-management?url=research%2Fbrowse%2Fall&mode=browse&type=all&topic=14&author=All> (last visited Nov. 25, 2015).
- 243 THOMFORDE-HAUSER & GRANT, *supra* note 90, at 4; see also KRISTINE HERMAN, *supra* note 242.

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