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The Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes – 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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The Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes – Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*

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

I. Introduction

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, resulting in the broadcast of the horrific details and images of the crimes, and engendering fear that children fall as the constant prey of 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

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1 Alleghany College v. National Chautauqua County Bank, 246 N.Y. 369, 373 (1927), Cardozo, C.J.
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 sought-after higher ratings generated by sensationalizing child-victim cases.3

Unfortunately, media accounts frequently presented cases without important contextual features, such as the victim-offender relationship, the perpetrator’s prior record, and the specific crime circumstances.4 Instead, the media portrayed the offenders as a dangerous and homogeneous group of criminals specializing in sexual offending and seeking strangers as their prey, and who inevitably would reoffend.

Quick to capitalize on the growing public outrage aroused by media accounts of child-victim cases, legislators responded severely to the perceived threat from sex offenders. The resulting legislative strategies adopted the widely-held assumption that a distinct and specialized form of deviant existed, the sex offender. Legislative enactments targeting sexual offenders reflect the portrait of individuals committing sex crimes painted by the media. The assumptions surrounding sexual crimes demanded that swift legislative action must ensue or the public, particularly children, remained at risk.5

Scientific research makes clear that the suppositions underlying most recent sex offender

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legislation are not accurate. The laws enacted to isolate sex offenders fail to serve the articulated purpose of protecting the public, but instead support an environment that undermines the potential for convicted offenders to be reintegrated into society as successful and law-abiding members.

This thesis 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 thesis will then consider the socially-constructed myth of the sex deviant, followed by a review of research effectively deconstructing the illusion of sexual offender. Next, this thesis will review the consequences of sex offender registration laws and validated risk assessment tools available to predict risk of recidivism in offenders. This thesis will then scrutinize federal involvement in sex offender management and the rhetoric surrounding legislative efforts to restrict the activities of convicted sex offenders. Finally, this thesis will consider the traditional role of the judiciary in the sentencing and managing of convicted offenders and propose changes in the existing legislative scheme imposing severe restrictions and duties on sex offenders to enforce evidence based practices relying on judicial involvement sex offender management.

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II. The Politics of Fear

*There is no passion so contagious as that of fear.* Michel de Montaigne

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 has been described as a “condition, episode, person or group of persons, which emerge to become defined as a threat to societal values and interests.”

According to Stanley Cohen, an early proponent of moral panic theory, the mass media, moral entrepreneurs (individuals or groups 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 provide necessary components of the phenomenon, the success of a moral panic depends on the media as the primary actor driving the panic.

Several distinct features present in a moral panic. 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 the reactions generated represent a disproportionate response to any actual threat. The identified group comes to

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9 Cohen, supra note 8.
symbolize the threat.\textsuperscript{10} Thus, once the winds of the moral panic begin to blow, what began as mere concern surrounding an identifiable group grows in such intensity that boundless fear directed at the band of outsiders no longer bears any relation to actual threat.

The fear engendered by a moral panic commonly lacks evidentiary support and instead “is wildly exaggerated and wrongly directed.”\textsuperscript{11} Emotionally charged and highly sensationalized media coverage fuels and amplifies the panic. Unlike other violent crimes, sex offenses and 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 understanding of the scope and nature of the offenses.\textsuperscript{12} 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 argue that the problem is quantitatively and qualitatively far more severe than anyone could reasonably suppose.”\textsuperscript{13} The fear led to a natural demand for action by parents, caregivers, the public, legislators and law enforcement officials. A vicious circle then ensued. Sensational crimes begat media attention. Exaggerated claims of rampant sexual offending ensued. The claims escalated fear. The outcry for


\textsuperscript{11} Phillip Jenkins, \textit{Moral Panic: Changing Concepts of the Child Molester in Modern America} 6-7 (Yale Univ. Press 1998).

\textsuperscript{12} Zgoba, supra note 5.

\textsuperscript{13} Jenkins, supra note 11.
action generated by escalated fear drew more attention from the media. Increased media coverage provoked a surge in fear. Thus, the panic widened.\textsuperscript{14}

Moral panics frequently serve as the impetus for changes in public policy and laws and the rigidity with which regulations are enforced.\textsuperscript{15} Research supports the hypothesis that sex offender registration and notification laws proceed from emotion and political posturing to ensure re-election,\textsuperscript{16} generated by the moral panic initiated by media coverage, rather than from empirical data.\textsuperscript{17} The intersection of public fear, media ratings and lawmakers motivated by personal aggrandizement led to the present popular yet ill-conceived political and legislative responses to sex offending. The statutory enactments fail to appropriately and adequately address public safety, nor consider individual needs and circumstances of sex offenders. As a result, sex offender management laws serve largely symbolic rather than effective functions. While symbolic policies operate to appease the public, no effective impact on criminal behavior results.

\textsuperscript{16} Zgoba, supra note 5 at 388.
\textsuperscript{16} Goode & Ben-Yehuda, supra note 10.
The moral panic associated with sexual offending coincided with a dramatic spike in media reports detailing offenses against children. The murders of Adam Walsh in 1981 and that of Jessica Lunsford in 2005, both of which occurred in Florida, present an interesting comparison of media attention to child murders. At the time of the abduction and murder of Adam Walsh in 1981, the media demonstrated relatively little interest in the crime. The offense provoked a mere thirteen newspaper articles at the time of his disappearance.\(^8\) Conversely, media outlets produced twenty-five hundred newspaper stories in 2005 surrounding the murder of Jessica Lunsford.\(^9\) Researchers estimate a 128% increase in newspaper accounts focusing on sexual offenses between 1991 and 1998, despite crime rates reducing appreciably.\(^{20}\)

### III. Early Legislative Efforts Targeting Sex Offenders

Until the 1990s the interest in regulating the conduct of convicted sex offenders lay with state and local officials. The first wave of criminal offender registration laws were passed in the 1930s. The objective of the legislation focused on controlling and monitoring violent criminals. In 1944 the California legislature narrowed the focus of the state’s registration mandates to convicted sex offenders.\(^{21}\) The California law obligated all offenders convicted of any sex crime, no matter the nature or circumstance of the

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\(^{19}\) Id.


offense, to register personal information with law enforcement officials for life.\textsuperscript{22} The purpose underlying the registration duties centered on making criminals convicted of a sex crime more visible to law enforcement and the public,\textsuperscript{23} conceivably to support community safety.

For several decades in the mid-twentieth century, a legislative trend focused on branding sex offenders as mentally ill. Between the 1930s and the 1970s many jurisdictions maintained sexual psychopath statutes predicated on a then-prevailing belief in the medical community that sexual offenders experienced a discreet psychopathy and presented a high risk for reoffense.\textsuperscript{24} The sexual psychopath statutes required the institutionalization of convicted sex offenders for treatment,\textsuperscript{25} steering offenders away from incarceration. Commitments terminated only when medical practitioners determined the offender was cured. Most sexual psychopathy laws requiring mandatory institutionalization were repealed in the 1960s and 1970s when medical professionals abandoned the theory that sexual offending represented a specific, unique and discernible mental illness\textsuperscript{26} and mental health experts established that no identifiable benefit prevailed from coercive institutionalization.\textsuperscript{27} By 1986, only five states required sex

\textsuperscript{22} Cal. Penal Code §290.
\textsuperscript{23} Matson & Lieb, supra note 21.
\textsuperscript{26} LaFond, supra rote 24. Renewed efforts at enacting sexual psychopath laws emerged in the 1980's and 1990's in the form of sexual offender civil commitment statutes. The U.S. Supreme Court limited the application of civil commitment statutes to convicted sex offenders demonstrating a current mental abnormality or personality disorder that makes it likely the offender will commit a future sexual offense. Kansas v. Hendricks, 521 U.S. 346 (1997).
offenders to keep authorities apprised of personal identifying and residence information, with the registry data available to law enforcement officials only.\textsuperscript{28}

The 1990s 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, with twenty-six states enacting laws targeting sex offenders for registration duties between 1994 and 1996.\textsuperscript{29} 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, serves as a positive means of deterring crime. 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 the offense and the offender with cisdain. 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. Stigmatization poses a threat to an individual’s identity and serves to encourage the offender to accept the deviant character imposed by the shaming.\textsuperscript{30} Sex offender registries serve both a reintegrative and a disintegrative function. Registries may deter crime by encouraging


\textsuperscript{29} Matson & Lieb, supra note 21.

compliance with the law to remove the humiliation associated with the stigma and 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.

Sex offender registration and notification statutes (commonly known as SORN laws) undoubtedly assuage public fear since the legislation generally requires registrants to periodically report personal identifying information to law enforcement officials and comply with strict residency restrictions. Commencing in the late 1990s, and fueled by the moral panic, state legislatures ramped up efforts to ostracize convicted sex offenders. Many of the family of resulting sex offender laws represent memorials named to honor child victims in notorious cases. All fifty states enacted some form of sex offender registration obligations by 1997, although the responsibilities and manner of identifying offenders subject to statutory duties varied. The impetus for the state registration obligations centered on community safety, crime deterrence, and exercising control over persons perceived to be a danger to the populace.

IV. Constructed Perceptions of Sex Offenders

The term “sex offender” represents a constructed image, expressing popular sentiment, rather than expressing the realities associated with individuals who have committed an offense of a sexual nature. In attempting to add precision to the term, the

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31 Logan, supra note 17 at 6.
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. 33 The terms sex offender and sexual predator are often used interchangeably,
but have distinct meanings. The conflation of the terms reflects that the public, the
media, and legislators fail to understand the differences among offenders. 34 Instead, the
constructed image of sex offender prevailing in community attitudes and reflected in
statutory trends fails to consider the extant evidence, which should provoke concern that
legislative efforts to oversee sex offenders are failing to fulfill the purposes underlying
SORN laws.

Despite the attempts to arrive at a specific definition of the term, there is no distinct
cohort of sex offenders. Sex offenders and sexual crimes vary widely. 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 strangers, and include children or
adults.

33 Center for Sex Offender Management, Recidivism of Sex Offenders, U.S. DEP’T OF JUSTICE (May 2001),
34 James F. Quinn Craig J. Forsyth & Carla Mullen-Quinn, Societal Reaction to Sex Offenders: A Review of
the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability, 25 DEViant
Public perception served as impetus for initiatives to toughen public policy toward sex offenders. Unfortunately, the public remains largely uneducated and misinformed about sexual offending. The media played the primary role in constructing community perceptions of sex offenders. In one survey of public views of sex offenders, the majority of respondents admitted forming opinions about sexual offending based upon information received from television programming, rather than from scholarly resources.\textsuperscript{35} Despite possessing limited knowledge of the evidence associated with sexual misconduct, community members overwhelmingly support restrictions on sex offenders.\textsuperscript{36} Public concern about sex offenders focuses on retribution and, secondarily, incapacitation of the offender.\textsuperscript{37} The community focuses concern over sexual crimes 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.\textsuperscript{38}

The sex offender as an individual conjures little concern from the public. Community members express little sympathy for registrants or the obstacles they face. Public attitudes ignore the effect of the negative consequences flowing from SORN obligations. Community members express belief that sex offender registration requirements present

\textsuperscript{35} Stacey Katz-Schiavone, Jill S. Levenson & Alissa R. Ackerman, Myths and Facts About Sexual Violence: Public Perceptions and Implications for Prevention, 15 J. CRIM. JUST. & POPULAR CULTURE 291 (2008).
\textsuperscript{37} Carlsmit, Morahan & Evans, supra note 32; Kevin M. Carlsmit, The Roles of Retribution and Utility in Determining Punishment, 42 J. EXPERIMENTAL SOC. PSYCHOL. 437(2006).
\textsuperscript{38} Michelle Cohen & Elizabeth L. Jeglic, Sex Offender Legislation in the United States: What Do We Know?, 51 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 369 (2007).
no impediment to an offender’s opportunities, including employment prospects.\(^{39}\) For most of the community, the right of citizens to feel safe prevails over any rights that might otherwise inure to a sex offender. The public accepts that sex offenders have forfeited any rights, especially the right to privacy. Thirty-seven percent of the respondents believe offenders who commit a sex offense simply have no rights.\(^{40}\) A 2009 study revealed that a majority of community respondents believe that offender registries serve as an effective means of ensuring community safety and that the public has a right to know a sex offender’s personal information.\(^{41}\) Three-quarters of the study respondents endorsed the belief that registration and notification laws do not violate a sex offender’s right to privacy.\(^{42}\) Community members do not harbor the belief that sex offenders, like other members of society, are entitled to an inherent right to dignity or security. Instead, a significant portion of the public feel acceptable conduct toward sex offenders includes harassment, and infliction of injury or damage to the property of a registrant.\(^{43}\)

Individual fear of the risk posed by sex offenders highly correlates with personal support for restrictions on convicted offenders.\(^{44}\) 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 from a stranger than from a

\(^{39}\) Katz-Schiavone & Jelic, supra note 36.

\(^{40}\) Id.

\(^{41}\) Id.

\(^{42}\) Id.

\(^{43}\) Id. Thirty-seven percent of the public responding to the survey expressed feelings that sex offenders have no rights; 44% believe it is acceptable to harass a registered sex offender; 35% find it acceptable to inflict injury on an offender; 28% believe there is justification in damaging the property of registered sex offenders, simply because of registration status. Id.

known perpetrator.\textsuperscript{45} The public overwhelmingly endorses the belief that the recidivism rate among sex offenders is high, leading to great danger from convicted offenders. In a study of community perceptions of sex offenders, a staggering 98% of the citizens surveyed admitted belief that sex offenders pose a high risk of re-offense.\textsuperscript{46} Community members also believe sexual offenders suffer from serious mental illness,\textsuperscript{47} separate and distinct from any other form of mental health concerns. The public overwhelmingly accepts the constructed caricature of sex offenders, but lacks confidence in the efficacy of legislatively imposed restrictions on sex offenders. Illogically, while a majority of the public believes restrictions on sex offenders contribute to public and personal safety,\textsuperscript{48} few believe laws designed to monitor offenders actually help reduce recidivism.\textsuperscript{49}

The perceptions harbored by legislators and other public officials about sex offenders match those of their constituents. For lawmakers, victims and public perceptions play a central role in the implementation of harsh sex offender policies. Legislators acknowledge that the motivation for strict rules for sex offenders lies in a desire to acknowledge public fears and demonstrate commitment to address the perceived


\textsuperscript{46} Katz-Schiavone, Levenson & Ackerman, supra note 35.


\textsuperscript{48} Id.; Freeman-Lcngo, supra note 17.

\textsuperscript{49} Katz-Schiavone & Jelic, supra note 36.
onslaught of sexual misconduct.\textsuperscript{50} Media attention to crime committed against children influences lawmakers when confronted with sex offender management proposals.\textsuperscript{51} Despite addressing sex offender restrictions through legislative initiatives, lawmakers and politicians remain uneducated about the dynamic of sexual offending, individual sexual offenders and the ineffectiveness of legislative efforts.\textsuperscript{52} Legislators express little support for therapeutic intervention as a means of addressing recidivism and favor stringent monitoring of offenders through registries and notification duties.\textsuperscript{53} Instead, motivation for harsh legislative restrictions for sex offenders lay in a perceived inability of the perpetrators to benefit from supervision or treatment.\textsuperscript{54}

For many policy makers, the current legislative schemes for managing sex offenders simply fail to be 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 instantaneous recognition of offenders, they allow for the eventual release of offenders, or they do not intervene earlier in the sex offender's career."\textsuperscript{55} 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

\textsuperscript{50} Sample & Kadleck, \textit{supra} note 20; Michelle Meloy, Kristin Curtis & Jessica Boatwright, \textit{The Sponsors of Sex Offender Bills Speak Up: Policy Makers' Perceptions of Sex Offenders, Sex Crimes, and Sex Offender Legislation}, 40 CRIM. JUST. & BEHAV. 438 (2013).
\textsuperscript{51} Meloy, Curtis & Boatwright, \textit{supra} note 50.
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} Quinn, Forsyth & Mullen-Quinn, \textit{supra} note 34.
\textsuperscript{55} Sample & Kadleck, \textit{supra} note 20.
them of their liberty before they can do harm. 56 Lawmakers appear to struggle in balancing constitutional concerns with a preference to identify some harbinger of sexual offending and then isolate all potential and known sex offenders from society.

A significant incongruity exists in the perceived need for regulations on sex offenders expressed by legislators and politicians and policymakers’ confidence in the potential for sex offender registration and notification laws to actually affect changes in the behavior of targeted offenders or to impact recidivism. Public safety is cited by lawmakers as the primary goal underlying legislation affecting sex offenders.57 Two thirds of law makers responding to a recent survey agreed that sex offender laws play a critical role in deterring future sex crimes.58 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.59 Instead of enacting laws supported by empirical findings, the legislative reaction to sexual offending focuses on assuaging public fear by identifying, publically labeling and humiliating, and unreasonably restricting the behavior of all sex offenders, while anticipating that all sex offenders will inevitably reoffend.60 In so doing, legislators have defied the principles of individualized sentencing and effectively erased opportunities for support, treatment and reintegration of offenders.

57 Meloy, Curtis & Boatwright, supra note 50.
58 Id.
59 Sample & Kadleck, supra note 20.
60 See Janus, supra note 56.
In the spectrum of criminal defendants, all sex offenders are lumped together as the worst of deviants. Convicted criminals even harbor misperceptions about sex offenders. As a general category, sex offenders are vilified even by other convicted criminals. In the institutional setting, sex offenders are considered acceptable targets for violence, sexual assault and ostracism, even by criminals incarcerated for much more violent or serious offenses.\textsuperscript{61}

V. Deconstructing the Myth of Sex Offenders

The principles reflected in federal legislation and numerous state statutes demonstrate that efforts regulating sex offenders are controlled by perceptions rather than reality. Coinciding with the surge in legislation targeting sex offenders, research associated with sex offenders and sexual offending burgeoned in the past twenty-five years.\textsuperscript{62} The scholarship focuses on a range of topics, including the nature and tendencies of sex offenders as a subset of the general criminal population, a search for any characteristics common among sex offenders, and risk assessment tools designed to anticipate or predict recidivism. 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 research findings generally negate the perceptions of the public and legislators, as well as media portraits of sexual crimes, offenders and crime circumstances.

\textsuperscript{61} David P. Connor and Richard Tewksbury, Examining Prison Wardens’ Perceptions of Inmates Incarcerated for Sex Offenses, 75 CORRECTIONS TODAY 50 (2013).

\textsuperscript{62} Prior to the 1990s, the scholarly research relating to sex offenders was scant; the scholarship relating to recidivism into the 1980s was described by one author as “confused” and “astonishingly slight.” Vernon L. Quinsey, Men Who Have Sex With Children, in L. & MENTAL HEALTH: INT’L PERSP. 140-172 (D.N. Weisstub ed., 1986).
Media accounts, public perception and legislative initiatives reflect the assumption all sexual offenders possess common characteristics, harbor unique characteristics among criminals and present 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. The legal and mental health systems both treat sex offenders as specialists, rather than as individuals with diverse criminal histories, pathologies and risk variables.

Scholarly research verifies the heterogeneity of sex offenders. No universal characters, whether physical, pathological, psychological or offense-related exist among sex offenders. Despite popular belief, pure sex offenders are rare. Few criminals limit offending to sexual offenses only. Instead, sexual crimes occur more often as part of an offender's broad and extensive criminal history. Violent sexual offenders tend to experience more variety in their criminal history than individuals selecting children as victims. Rapis demonstrate the most versatility in criminal offending among sex offenders, likely because the crime proceeds from a violent intent, rather than a purely sexual motivation. Child molesters, though, generally operate as specialists, committing only sexual offenses rather than engaging in other forms of criminal activity.

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63 Bonita M. Veysey & Kristen M. Zgoba, Sex Offenses and Offenders Reconsidered: An Investigation of Characteristics and Correlates Over Time, 37 CRIM. JUST. & BEHAV. 583 (2010).
64 Keith Soothill, Erian Francis, Barry Sanderson, and Elizabeth Ackerley, Sex Offenders: Specialists, Generalists — or Both? 40 Brit. J. CRIMINOLOGY 56, 57 and 66 (2000).
conduct.\textsuperscript{67} Offenders selecting opposite sex victims present more versatility in their criminal offending patterns, while deviants targeting same sex victims are less likely to commit a non-sexual crime, but generally only reoffend within the spectrum of sexual crimes.\textsuperscript{68}

There is no particular psychopathy related to sexual offending. Instead, crimes of a sexual nature develop from a multitude of factors. Sex crimes are associated with general antisocial tendencies and not more specific or discreet characteristics.\textsuperscript{69} A 2002 study of sex offenders found that some important factors influencing sexual crimes include low self-control, impulsivity, opportunity, and general asocial lifestyle.\textsuperscript{70} The impulsivity present in some sex offenders does not mean, though, that sex offenses are distinguished by impetuous actions. Instead, sex offenders are often rational decision makers. A 2007 research study of sex offender decision-making found that perpetrators frequently engage in painstaking planning, develop strategies to lure the victim, and contrive post-offense behavior designed to discourage the victim from reporting the crime.\textsuperscript{71}

The misperception that sex offenders most often target strangers pervades offender management efforts. Registries presume the public will utilize the available information for self-protection and to safeguard children and the vulnerable from strangers and

\textsuperscript{67} Simon, supra note 4.
\textsuperscript{68} Scothill, Francis, Sanderson & Ackerley, supra note 64.
\textsuperscript{69} Patrick Lussier, Jean Proulx & Marc LeBlanc, Criminal Propensity, Deviant Sexual Interests and Criminal Activity of Sexual Aggressors Against Women: A Comparison of Explanatory Models, 43 CRIMINOLOGY 249 (2005).
\textsuperscript{70} R. Karl Hanson, Recidivism and Age: Follow-Up Data From 4,673 Sexual Offenders, 17 J. INTERPERSONAL VIOLENCE 1046 (2002).
offenders living nearby. Contrary to popular belief, though, the vast majority of victims know the offender.\textsuperscript{72} Two separate studies, one completed in 1995, the other in 2000, found that a staggering 93% of child sexual abuse perpetrators are a family member or an acquaintance of the victim.\textsuperscript{73} Adult victims know the offender in 73% of reported cases.\textsuperscript{74}

Opening sex offender registries to individuals outside law enforcement arouses unwarranted community concerns. Unfettered public access to sex offender registries perpetuates fears that personal and familial protection depends upon identifying potential perpetrators lurking nearby. Numerous internet sites are devoted to aiding families in locating registered sex offenders, with the claimed goal of educating families on possible dangers in their neighborhood or areas families plan to visit.\textsuperscript{75} One research study found that the information contained in sex offender registries reinforces the misperception that strangers present the most likely danger to sexually offend,\textsuperscript{76} arguably leading to a false sense of security with family members and known persons, and arousing unwarranted fear of potential for victimization by a stranger.

\textsuperscript{72} Carol VanZile-Tamsen, Maria Testa & Jennifer A. Livingston, \textit{The Impact of Sexual Assault History and Relationship Context on Appraisal of and Responses to Acquaintance Sexual Assault Risk}, 20 J. INTERPERSONAL VIOLENCE 813 (2005).


\textsuperscript{74} Snyder, supra note 73. Winick found that more than 75% of sex offenses are committed by either a family member or someone known to the victim. Bruce J. Winick, \textit{Sex Offender Law in the 1990's: A Therapeutic Jurisprudence Analysis}, 4 PSYCHOL. PUB. POL'Y & L. 505 (1998).

\textsuperscript{75} For example, Family Watchdog advertises as "a free service to help locate registered sex offenders in your area. We encourage you to use our site to help educate your family on possible dangers in areas they visit." http://www.familywatchdog.us/ (last visited February 23, 2015).

Public sentiment surrounding the danger posed by registered sex offenders lacks scholarly support. Research confirms that sex offenders pose no greater danger than other criminal offenders.77 In fact, sex offenders present as the least likely to reoffend among all criminals.78 When recidivism occurs, registrants are more likely to commit a non-sexual offense than reoffend sexually.79 Failure to register represents the most common recidivist offense committed by sex offenders.80 Non-compliance with registration duties relates to underlying deficits and characteristics, such as cognition, and self-regulatory deficits and general rule-violating tendencies, but does not raise the risk of reoffense.81

The nature and circumstance of an offender’s sexual crime influences the risk of reoffense. Recidivism rates tend to vary based on the primary sexual offense. Incest offenders amass the lowest rates of recidivism, ranging from between four and ten percent. Conversely, recidivism occurs with between forty-one and seventy-one percent

77 Lisa L. Sample & Timothy M. Bray, Are Sex offenders Dangerous? 3 CRIMINOLOGY & PUB. POL’Y 59 (2003).
78 Lisa L. Sample & Timothy M. Bray, Are Sex Offenders Different? An Examination of Rearrest Patterns, 17 CRIM. JUST. POL’Y REV. 83 (2006); R. Karl Hanson, Richard A. Steffy & Rene Gauthier, Long-Term Recidivism of Child Molesters. 61 J. CONSULTING & CLINICAL PSYCHOL. 646 (1993).
80 Grant Duwe & William Donnay, The Effects of Failure to Register on Sex Offender Recidivism, 37 CRIM. JUST. & BEHAV. 5, 520 (2010).
81 Jill S. Levenson, Jeffrey C. Sandler & Naomi J. Freeman, Failure-to-Register Laws and Public Safety: An Examination of Risk Factors and Sex Offense Recidivism, 36 LAW & HUM. BEHAV. 477 (2012); Kristen M. Zgoba & Jill Levenson, Failure to Register as a Predictor of Sex Offense Recidivism: The Big Bad Wolf or a Red Herring? 24 SEXUAL ABUSE 328 (2012); Duwe & Donnay, supra note 80; Jill S. Levenson, Elizabeth Letourneau, Kevin Armstrong & Kristen M. Zgoba, Failure to Register as a Sex Offender: is it Associated with Recidivism, 27 JUST. Q. 305 (2010).
of exhibitionists. In a 2003 study of the recidivism rate among sex offenders released from prison in 1994, only 5.3% of the offenders were reconvicted for a sex crime within a three-year follow-up period. Other studies present somewhat different results. A 1998 meta-analysis of sixty-one research studies revealed that the rate of reconviction for another sex offense among registered offenders averages 18.9 percent for rapists and 12.7 percent for child molesters over a four to five year period. A 2005 study found recidivism rates of 13.7% for a new sex offense after five years.

Sex offender registries find justification in the assumption that convicted offenders present a great risk of reoffense. 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. Approximately 71.5% of all arrests for sex crimes involve an individual not previously convicted of a sexual offense. Instead, a number of factors influence recidivism and certainly vary considerably among offenders. Circumstances contributing to repeated sexual offending include primarily, but not exclusively, age of the offender at the time of the first offense, unmarried status, an enduring sexual preference for children, non-acquaintance and male victimization, and

87 Langan, Schmitt & Durose, supra note 83.
the number of prior arrests for any type of criminal conduct. Poor coping skills correlate with risk of reoffense. The number of prior sexual crimes and paraphilias both influence the risk of repeat offending. Offenders who select only female relatives as their victims represent the least likely to reoffend.

For sex offenders, risk of recidivism is greatest in the first few years following release from prison. Among violent sexual offenders, risk of repeat offending decreases as the post-release period progresses. Recidivism rates among sex offenders decrease with advancing age, primarily resulting from increased self-control, fewer opportunities and decreased sex drive as offenders mature in years. Lawmakers often cite the reduction in risk of recidivism as justification for placing residency restrictions on registered sex offenders. SORN laws generally prohibited registered offenders from living within the proximity of a school or daycare. The limitation is premised on an assumption that if convicted sex offenders live near a facility where a large number of children may be concentrated, victimization risk increases. Lawmakers, though, apparently assumed that

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88 Veysey & Zgoba, supra note 63; Naomi J. Freeman & Jeffrey C. Sandler, The AWA: A False Sense of Security or an Effective Public Policy Initiative? 21 CRIM. JUST. POL’Y REV. 31 (2009); Hanson, Steffy & Gauthier, supra note 78. For detailed evidence relating to factors influencing recidivism, see Langan, Schmitt & Durose, supra note 80.
90 Robert A. Prentky, Raymond A. Knight & Austin F.S. Lee, Risk Factors Associated With Recidivism Among Extrafamilial Child Molesters, 65 J. CONSULTING & CLINICAL PSYCHOL. 141 (1997). Paraphilias has been defined as “socially deviant, repetitive, highly arousing sexual fantasies, urges, and activities enduring at least 6 months and accompanied by clinically significant distress or social impairment.” Martin P. Katka, Hypersexual Desire in Males: An Operational Definition and Clinical Implications for Males with Paraphilias and Paraphilia-Related Disorders, 26 ARCH. SEX. BEHAV. 505 (1997).
92 R. Karl Hanson, Andrew J. Harris, Leslie Helmus & David Thornton, High Risk Sex Offenders May Not Be High Risk Forever, 27 J. INTERPERSONAL VIOLENCE 2792 (2014).
93 Hanson, supra note 70.
sex offenders suffer from an inability to be mobile and lack the means or opportunity to travel to an area where children may be found. No matter what the rationale for the residency restrictions on sex offenders, research studies fail to identify a correlation between residence location and risk of recidivism.94

Treatment designed to assist convicted sex offenders generally presents little concern for legislators. Legislation targeting sex offenders rarely includes mandatory treatment for convicted sexual criminals. The completion of specialized sex offender therapeutic intervention, when coupled with effective supervision, positively impacts risk of recidivism among sex offenders.95 Tools utilized in treatment interventions may include group, individual and family therapy, psychological and psychosocial evaluations and polygraph examinations.96 Treatment goals focus on acceptance of responsibility for the criminal behavior and the development of skills to encourage pro-social behavior and dissuade recidivism. Specialized sex offender treatment targets a variety of issues that are associated with recidivism, including “deviant sexual arousal, interests, or preferences; sexual preoccupation; pervasive anger or hostility; emotional management difficulties; self-regulation difficulties, or impulsivity; antisocial orientation; pro-

95 Candace Krutschnitt, Christopher Uggen & Kelly Shelton, Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls, 17 JUST.Q. 61 (2000).
offending attitudes, or cognitive distortions; and intimacy deficits and conflicts in intimate relationships.\textsuperscript{97}

The manner of treatment delivery presents an important circumstance in the success of therapeutic intervention. Treatment modalities addressing specific concerns related to sexual offending include cognitive-behavioral therapy, psycho-educational approaches, pharmacological treatment and physical therapies, such as surgical castration. Cognitive-behavioral approaches to treatment emphasize modification of thinking patterns associated with criminal behavior and sexual deviancy. Recently cognitive-behavioral approaches to sex offender treatment include a relapse prevention element. Relapse prevention efforts emphasize identifying and self-monitoring for stresses related to criminal behavior as a means of avoiding reoffense.\textsuperscript{98} Relapse prevention techniques grew out of research associated with addictive disorders, but have been found to represent successful strategies for long-term behavior management.\textsuperscript{99} The psycho-educational approach encourages offender contemplation of risk factors linked to offending, emphasizes empathy for the victim, and focuses on offender acknowledgment of personal responsibility for the offense. Pharmacological interventions utilize medication to modify hormonal balances to reduce sexual interest. Sex offender treatment modalities

\textsuperscript{97} Center for Sex Offender Management, Understanding Treatment for Adults and Juveniles Who Have Committed Sex Offenses, U.S. DEP’T OF JUSTICE (Nov. 2006) 4, available at http://www.csom.org/pubs/treatment_brief.pdf (last visited February 23, 2015). See also Hanson & Morton-Bourgon, supra note 85; R. Karl Hanson & Andrew J.R. Harris, Where Should We Intervene? Dynamic Predictors of Sexual Offense Recidivism, 27 CRIM. JUST. & BEHAV. 6 (2000); Hanson & Bussiere, supra note 84.


\textsuperscript{99} Center for Sex Offender Management, supra note 97.
are not mutually exclusive and often work in tandem. As with any intervention, sex offender treatment design must address the specific concerns associated with each individual offender.

Research findings vary on the effectiveness of treatment as applied to sex offenders. Overall, studies verify the positive effect of specialized treatment for sex offender. Cognitive-behavioral therapy and hormonal treatment appear as the most impressive interventions.\textsuperscript{100} Offenders who participate in cognitive behavioral sex offender treatment present a lower sexual reoffense rate and a significantly lower overall recidivism rate for all criminal offenses.\textsuperscript{101} Scholars suggest that treatment addressing the dynamic factors associated with recidivism, along with supervision, demonstrate the conditions contributing to the greatest success, particularly since dynamic conditions are subject to altering through intervention.\textsuperscript{102} 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. Sex offender treatment programs in California require certification in accordance with standards developed by the California Sex Offender Management Board (CASOMB).\textsuperscript{103} CASOMB\textsuperscript{104} represents

\textsuperscript{100} Friedrich Losel & Martin Schmucker, \textit{The Effectiveness of Treatment for Sexual Offenders: A Comprehensive Meta-Analysis}, \textit{J. EXPERIMENTAL CRIMINOLOGY} 117 (2005).

\textsuperscript{101} Hanson, \textit{supra} note 70. Sex offenders who complete treatment have a recidivism rate of approximately 10%, while registered sex offenders who do not participate in specialized sex offender treatment reoffered at a rate of approximately 17%. R. Karl Hanson, Arthur Gordon, Andrew J.R. Harris, Janice K. Marques, William Murphy, Vernon L. Quinsey & Michael C. Seto, \textit{First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders}, 14 \textit{SEXUAL ABUSE: J. RES. & TREATMENT} 169 (2002).

\textsuperscript{102} See Hanson, Gordon, Harris, Marques, Murphy, Quinsey & Seto, \textit{supra} note 101.


\textsuperscript{104} The California Sex Offender Management Board was created as a result of legislation passed in 2006. The Board’s was charged by the legislation with the responsibility of addressing any issues, concerns, and
a diverse group of prosecuting attorneys, judges, corrections officials, law enforcement
officials, mental health professionals, experts in sexual assault, and local government
officials, charged with the responsibility of addressing concerns related to the community
management of adult sex offenders. Requiring treatment for all offenders, though, likely
results in the devotion of scant resources to low risk offenders who could benefit from
other 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.

VI. Collateral Consequences of SORN Legislation

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. For offenders, the
collateral consequences of the appellation vary in scope, intensity and duration. Rather
than promoting public safety, sex offender registration and notification laws represent
rules antithetical to success because of the residual effects associated with the label.
Released from confinement or supervision with few support systems and a scarlet brand,
sex offenders are still expected to succeed.

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105 See Jill Levenson & Richard Tewksbury, Collateral Damage: Family Members of Registered Sex
106 Id.
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, employment, strong social or familial support, along with effective treatment serve as key conditions necessary for success in the community and managing risk. Stability represents a key condition essential to success. Employment addresses financial concerns and contributes to improved self-esteem. Positive social and familial relationships provide a network of supporters to assist during periods of stress. On the other hand, lack of stability breeds stress. The loneliness, anxiety, and stigmatization driven by consequences collateral to sex offender registration duties represent precursors to periods of stress. The risk of recidivism for sexual offending, as with all offending, increases in periods of particular stress. 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." Simply put, the stress of carrying the moniker of sex offender contributes to risk.

SORN obligations create an environment for sex offenders that discourages success. As a result of the legislatively-imposed status, sex offenders report experiencing

107 Georgie Cumming and Maureen Buell, SUPERVISION OF THE SEX OFFENDER (Brandon, VT: Safer Society 1997); Levenson & Tewksbury, supra note 105; Hanson & Morton-Bourgon, supra note 85; Kruttschnitt, Uggen & Shelton, supra note 95.
110 Kruttschnitt, Uggen & Shelton, supra note 95.
111 Hanson & Morton-Bourgon, supra note 85.
112 Prentky, supra note 17.
destabilizing events, including disruption in residence, loss of employment, property
damage, relationship difficulties, threats, harassment and feelings of stigmatization and
ostracism. Housing restrictions placed on registered sex offenders increase isolation.
A majority of registered sex offenders report residency restrictions prevent them from
living with supportive family members. Added financial hardships ensue when offenders
are forced to relocate outside of the home of family members. Separation from loved
ones also creates emotional hardships. Due to restrictions on residence location, sex
offenders tend to reside in neighborhoods where poverty, high unemployment,
educational disadvantage, lack of physical resources, and significant levels of social
upheaval prevail.

Constant financial worries plague many sex offenders. Economic challenges result
from loss of employment or exclusion from opportunities because of the perceived risk of
employing a sex offender or legal restrictions on hiring, particularly if job duties would

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114 Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?* 49 Int’l J. Offender Therapy & Comp. Criminology 168 (2005); Richard Tewksbury & Kristen M. Zgoba, *Perceptions and Coping With Punishment: How Registered Sex Offenders Respond to Stress, Internet Restrictions, and the Collateral Consequences of Registration*, 54 Int’l J. Offender Therapy & Comp. Criminology 537 (2010); Kruttschnitt, Uggen & Shelton, supra note 95.

require the offender to interact with the public or children.116 The national database listing the offender’s place of employment represents a likely deterrent to the hiring or retention of registered sex offenders. Employers face the loss of income or damage to reputation when consumers learn the business employs a registered sex offender. By limiting educational and employment opportunities and effectively impeding social and familial support, registries reduce the potential for offenders to succeed, especially those that are generally at lower risk to reoffend.117

The perceived fairness of consequences plays an important role in offender management and the potential for success. Studies demonstrate a link between positive offender perceptions of sanctions and increased future compliance with the law.118 Conversely, a negative correlation exists between increased criminal conduct and offender belief that sanctions are unfair or arbitrarily administered.119 When offenders identify restrictions as overly-harsh or punitive, conformity with supervision requirements diminishes. One recent study of sex offender perceptions reveals that registrants find some value in SORN legislation. Relating to personal circumstances, though, registered offenders voice widespread dissatisfaction with the laws, particularly because all convicted sex offenders are treated as members of one defined group, rather than as individuals presenting unique needs and risk potential. Offenders express concern that SORN laws ignore individual efforts and circumstances, particularly since

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116 Tewksbury & Lees, supra note 113.
117 Levenson & Catter, supra note 114; Tewksbury, supra note 113.
118 Fabian, supra note 89.
individual assessment for recidivism, treatment compliance, and other risk factors play no part in registration and notification obligations.¹²⁰

The collateral consequences of registration and community notification laws are not restricted to only the offender. Family members of registrants face challenges in their supportive roles for the sex offender. The stigma of a loved one’s sex offense conviction, and public access to registry information, negatively impacts the registrant’s support system. Relatives of registered sex offenders report feelings of stress, isolation, loss of social opportunities, compromised living arrangement, financial strain, loss of contact with friends and family, and to a lesser degree, threats, harassment and shame.¹²¹ The stress of the relative’s sex offender status threatens the important relationship between the registrant and the primary support system integral to stability, and thus undermines the potential for success.

VII. 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, including a robust body of literature devoted to analyzing the reliability and utility of risk assessment tools. A significant improvement in the validity and reliability of assessment tools resulted from research provoked by the movement to identify and restrict the conduct of convicted sex offenders. Courts, corrections officials, and treatment providers routinely utilize risk assessment tools in evaluating criminal offenders for purposes of sentencing,

¹²¹ Tewksbury & Levenson, supra note 113.
supervision and treatment. Prior to the implementation of the mandates of the Adam Walsh Act, the judiciary customarily relied upon testing instruments to aid in crafting individualized sex offender registration obligations. A positive correlation exists between increased risk assessment scores and recidivism among sex offenders.\textsuperscript{122} Scholars confirm that meaningful sex offender management requires assessment of risk of re-offense.\textsuperscript{123} Numerous authors advocate for utilizing a risk-assessment model for classifying convicted sex offenders and managing supervision and sentencing, including the utility of registration for individual offenders and any concomitant registration periods.\textsuperscript{124} Despite the empirical evidence, few legislative initiatives contemplate consideration of risk assessment results in the classification and supervision of convicted sex offenders.

Risk evaluation serves as a valuable and reliable tool in crafting individualized registration and supervision duties.\textsuperscript{125} Available researched testing instruments permit the evaluation of both static and dynamic factors associated with the test subject, providing cours and supervision personnel with a predictable picture of the offender’s situation when anticipating risk. Evaluation is not limited to a single assessment though.

\textsuperscript{122} Levenson, D'Amora & Hern, supra note 113.
\textsuperscript{123} Hanson, Steffy & Gauthier, supra note 78.
\textsuperscript{125} Terry Thomas, The Sex Offender Register: Some Observations on the Time Periods for Registration, 48 HOWARD J. CRIM. JLST. 257 (2009).
Instead, periodic risk assessment proves important in evaluating changing circumstances, including treatment need and compliance, as well as appraisal of supervision needs.

Several reliable risk assessment instruments have been developed to assist in the effective management of sex offenders. Actuarial risk assessment tools have been found to predict recidivism with greater accuracy than clinical evaluation alone. The scoring of assessment instruments eliminates much of the subjectivity from offender risk appraisal which 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, violation of community supervision, or age at first offense. Dynamic factors present as “those characteristics, circumstances, and attitudes that can change throughout one’s life.” Changeable variables include substance abuse, attitude, maturity, social support, and self-management practices. Testing instruments weigh dynamic circumstances

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127 Some of the measured static factors include: number of prior sexual offenses, prior violent and non-violent offenses, age of first sexual offending, deviant victim choices (unrelated and stranger as well as male victims), antisocial personality disorder and other psychopathy, early termination from sex offender treatment, sexual deviancy, substance abuse associated with sexual offending, status as unmarried, violation of community supervision sanctions, history of strong sexual drive, and history of planning offenses. Fabian, supra note 89.

128 Center for Sex Offender Management, supra note 33.

129 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, non-compliance with supervision, attitudes supporting and condoning sexual interest in children, younger age, residing alone, sexual preoccupation, sexual interest in children, emotional identification with children, or a child-oriented lifestyle, intimacy deficits, and conflicts or absence of intimate partners. Fabian, supra note 89 at 40.
separately from static issues, as dynamic factors may be amenable to treatment and intervention,\textsuperscript{130} 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.\textsuperscript{131} Some dynamic circumstances, though, also link to risk of reoffense, such as insufficient or negative social support, a general anti-social lifestyle, poor self-management practices, and lack of cooperation with community supervision, and attitudes tolerating sexual offending.\textsuperscript{132} Since both static and dynamic circumstances aid in predicting recidivism, assessment tools that consider both types of risk factors enhance the predictive value of the instrument.\textsuperscript{133} In 2010, legislation passed in the State of California required the use with all sex offenders risk assessment tools measuring both static and dynamic risk factors. A legislatively created committee in California found that the combined evaluation of static and dynamic risk factors increases the overall accuracy of risk assessment as applied to sex offenders.\textsuperscript{134}

Even though research demonstrates both static and dynamic circumstances correlate with predicting 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 the prediction of both serious criminal recidivism and sexual

\textsuperscript{130} Id.
\textsuperscript{131} Hanson & Busièr, supra note 84.
\textsuperscript{132} Hanson & Harris, supra note 97.
\textsuperscript{134} California Sex Offender Management Board, supra note 103.
recidivism. The researched tools commonly employed for assessment purposes are known as VRA\(G\), 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 assessed."\(^{135}\) Research demonstrates that each of the six instruments is significantly predictive of sexual recidivism.\(^{136}\) The instruments vary in the number of variables measured and in predictive value. Some of the risk assessment tools prove more reliable based on original offense type.\(^{137}\) For instance, some instruments demonstrate greater prognostic accuracy with rapists than with child molesters. Two factors measured on the Static 2002, age of release from prison and persistence of sexual offending correlate with predicting sexual offending among non-child molesters, while deviant sexual interests provides greater predictive value for reoffense among child molesters.\(^{138}\)

Several of the available assessment tools present greater reliability in predicting general recidivism, rather than sexual recidivism. Overall, the SORAG and Static-99 instruments demonstrate moderate to strong forecasting of general, sexual and violent recidivism. Both tools, though, have been found to possess greater accuracy in

\(^{135}\) Fabian, supra note 89.


anticipating general recidivism, rather than sexual recidivism.\footnote{id} The Static-99 is the most widely used and widely researched instrument,\footnote{Hanson & Morton-Bourgon, supra note 85.} which may correlate to the length of time the instrument has been available, rather than to the supremacy of its predictive value. Research findings indicate, though, that the Static 2002 proves the most effective tool for predicting sexual recidivism.\footnote{Looman & Abracon, supra note 138. See also R. Karl Hanson, Leslie Helmus & David Thornton, Predicting Recidivism Amongst Sexual Offenders: A Multi-site Study of Static-2002, 34 L. & HUM. BEHAV. 198 (2010).}

VIII. Federal Involvement in SexOffender Management

Provoked by the moral panic surrounding sex offenders, in the early 1990s a movement developed to federalize sex offender management policies. 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. Over half of the states failed to legislatively manage sex offenders. In jurisdictions with sex offender registries, a registrant need only move to a community with less burdensome or no regulations. No system existed to track sex offender moving between states.

Federal involvement in sex offender management efforts began with the Jacob Wetterling Act\footnote{42 U.S.C. §14071-14073. The full title of the law is the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.} passed in 1994. The legislation represented a memorial to an eleven year old Minnesota boy who was kidnapped in 1989 by a masked gunman. 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 not been seen again and his whereabouts remain unknown. The perpetrator of the offense remains unidentified and at large.\textsuperscript{143} 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 address with local law enforcement and compelling each state to establish a sex offender registry system. The legislation was deemed 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.”\textsuperscript{144} The law required the registration of any individual convicted of a criminal offense against a minor,\textsuperscript{145} convicted of a sexually violent offense,\textsuperscript{146} or designated by the sentencing court as a sexually violent predator.\textsuperscript{147} Under the 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.”\textsuperscript{148}

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

\textsuperscript{146} 42 U.S.C. § 14071(a)(3)(B).
\textsuperscript{147} 42 U.S.C. § 14071(a)(3)(C).

Within a month of Megan Kanka’s murder, the New Jersey legislature passed Megan’s Law, mandating sex offender registration, a statewide database to track offenders, and requiring notification to the community of all registered sex offenders moving into the area. The bill also imposed a life prison sentence for any repeat sex offenders.\footnote{N.J. Rev. Stat. §§2C:7-1 through 2C:7-11 (1994).} Critics complained New Jersey legislators were “pandering to public outrage” in passing the law without meaningful review or analysis.\footnote{Michelle Ruess, Assembly Approves Megan’s Law, The Record, August 30, 1994, available at http://www.highbeam.com/doc/1P1-22554738.html (last visited February 9, 2015).} In 1996 the U.S. Congress amended the Wetterling Act by enacting a federal version of Megan’s Law requiring community notification of the residence of any person convicted for a sexually
violent offense when released from incarceration. The community notification period extended for fifteen years following the offender’s prison release.\textsuperscript{152}

The enactment in 2006 of the Adam Walsh Act (AWA)\textsuperscript{153} broadened the category of sex offenses falling within the federal mandate and set standard registration requirements and residency restrictions for sex offenders. The legislation also mandates a national sex offender database.\textsuperscript{154} The Act also virtually eliminates any potential for judicial discretion in the management of convicted sex offenders. Instead, the legislation imposes registration and notification obligations strictly based upon offense type and ignores individual offender circumstances. The AWA also establishes mandatory sanctioning for failure to register or notify authorities of changes in offender information. The protection of the public from sex offenders and individuals who victimize children, to establish a comprehensive national system for the registration of offenders, but also to respond to a series of highly publicized child murder cases represent the declared legislative purposes underlying the AWA.\textsuperscript{155}

A. The Rhetoric of the Adam Walsh Act

The language utilized by the authors of the AWA confirms the emotional, media-driven impetus for the legislation. In remarking on the media’s role in the measure, Sen. Orin 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

\textsuperscript{152} 42 U.S.C. 13701 et seq. (1996).
\textsuperscript{154} Id. at §119.
\textsuperscript{155} Id. at §102.
The media-driven moral panic underlying the Act can be found in the introductory language which graphically details the abduction and discovery of the body of six-year-old Adam Walsh, in whose memory the legislation is named. Preying further on emotion, the introduction 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.” Certainly, John Walsh’s notoriety as host of America’s Most Wanted, a Fox network production devoted exclusively to the profiling and apprehension of violent fugitives, helped secure support for and swift passage of the legislation. In statements before the House and Senate, legislators hailed Walsh’s celebrity and activism as one of the driving forces behind the expeditious passage of the legislation following its introduction, while emotionally invoking the memory of the Wash’s son. References to the Walsh family’s suffering permeate the supporting comments of legislators. Sen. 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.\(^{161}\)

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

Not content with describing the horrific death of Adam Walsh, the Act’s introduction continues with the descriptions of the offenses against seventeen other individuals for whom portions of the legislation were named, fourteen of whom were aged sixteen or younger at the time of their victimization.\(^{162}\) In statements made prior to voting for the passage of 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 for whom parts of the legislation served as memorials.\(^{163}\) 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 eponymous subsections.\(^{164}\)

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\(^{162}\) Section 102 of the AWA specifically names the following victims, whose experiences provided the additional catalyst for the legislation: Jacob Wetterling, 11; Megan Kanka, 7; Pam Lychner, 31; Jetsetta 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 Runion, 5. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006), §102. The Act also establishes the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking, known as the SMART Office. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006), §146.


\(^{164}\) Garfinkle, supra note 28.
The AWA sailed through the U.S. Congress with little substantive debate. When the law was proposed, legislators announced a call for immediate action on the bill. The 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.¹⁶⁵

Unfortunately, the Congressional Record contains scant evidence lawmakers considered the dearth of scholarly support for the Act. Few legislators questioned or acknowledged the ramifications of instituting the far-reaching restrictions contained within the AWA. The few opponents of the Act acknowledged the law’s mandates lacked empirical support,¹⁶⁶ but proponents ignored the criticisms in favor of demonstrating to the public that the legislature responded swiftly and severely to protect the nation’s children.

Adding to the emotion-laden atmosphere surrounding the AWA, Pres. George W. Bush

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¹⁶⁶ At a hearing of the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary to consider the reauthorization of the AWA, Congressman Robert Scott stated five years after its implementation, 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. Cong. Scott voiced the criticism that has plagued the AWA, “(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.” Reauthorization of the AWA: Hearing on H.R. Before H. Comm. on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security, 112th Cong. 6 (2011)(statement of Hon. Robert Scott, Virginia).
signed the legislation into law on July 26, 2006, exactly twenty-five years after the death of its namesake.\textsuperscript{167}

\textbf{B. Registration and Notification Duties Under the AWA}

Overall, the AWA casts a net over a wider range of individuals than prior registration laws, lengthens the periods of required registration, and mandates categorization of offenders among three tiers according to offense type. The legislation makes information on sex offenders more readily available to the public and law enforcement, primarily through websites. States determine the specific crimes to which registration duties apply, provided the offense types set out in the Act are included in the jurisdiction’s registration statutes.

Generally, the AWA applies to contact offenses, sexual offenses of any nature involving a child, acts involving child pornography, and acts importuning a child for sexual conduct or contact.\textsuperscript{168} The federal law requires that all crimes involving any type


\textsuperscript{168} Generally speaking, 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 provided within the act’s registration mandates include non-parental kidnapping, non-parental false imprisonment, solicitation to engage in sexual conduct; use 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 in the act, including sex trafficking of children (18 U.S.C. §1591), aggravated sexual abuse (18 U.S.C. §2241), sexual abuse (18 U.S.C. §2242), sexual abuse of a minor (18 U.S.C. §2243), abusive sexual contact (18 U.S.C. §2244), offenses resulting in death (18 U.S.C. §2245), sexual exploitation of children (18 U.S.C. §2251), selling or buying of children (18 U.S.C. §2251A), material involving the sexual exploitation of minors (18 U.S.C. §2252), material containing child pornography (18 U.S.C. §2252A), misleading domain names on the Internet (18 U.S.C. §2252B), misleading words or digital images on the Internet (18 U.S.C. §2252C), production of sexually explicit depictions of a minor for import into the United States (18 U.S.C.
or degree of genital, oral, or anal penetration, as well as any act of sexual touching of or contact with a person’s body, either directly or through the clothing, must be incorporated within each state’s list of registrable offenses. Any conduct that by its nature constitutes a sex offense against a minor is included within the mandates of the Act. Possession, production or distribution of child pornography, as well as internet use to facilitate criminal sexual conduct involving a minor, also fall under the Act’s parameters.\textsuperscript{169} The AWA demands that states enact laws criminalizing failure to timely register or notify law enforcement officials of required information, subject to harsh, often mandatory, penalties. The Act permits states to implement restrictions exceeding the federal mandate, but does not envision jurisdictions reducing the burdens imposed by the AWA. The law requires states to link information on sex offenders to a national database. The information required to be shared in the database includes each offender’s name, address, date of birth, place of employment, and photograph.

The few sexual crimes categorically excluded from registration requirements imposed by the AWA relate to sexual acts between consenting adolescents. The Act excludes from registration duties any offense involving consensual sexual conduct between a victim who is at least thirteen years of age and an offender who is no more

than four years older than the victim. The exclusion from the onerous label of sex offender of anyone convicted of consensual sexual conduct between adolescents acknowledges that the behavior, while often considered criminal, lacks the same level of concern for dangerousness as reflected in other sexual offenses. Indeed, no research links adolescent consensual sexual activity with risk for other sexual offending. Some jurisdictions, though, treat sexual conduct among adolescents as not only criminal, but include the offenses among the state-sanctioned mandatory registration offenses. In Ohio, for instance, the offense of unlawful sexual conduct with a minor, which involves consensual sexual conduct between an individual over the age of eighteen and another who is between thirteen and fifteen years of age, falls within the list of required registrable offenses when the defendant is four or more years older than the younger consenting party. Ohio law designates unlawful sexual conduct with a minor as either a Tier I or Tier II sex offense, depending on certain factors, subjecting the adolescent to registration duties for either fifteen or twenty-five years.

Florida law takes a more forgiving approach to consensual youthful sexual conduct. In 2007 the Florida legislature approved a process for individuals convicted of consensual sexual conduct to be either excluded from or removed from the state's sex offender registry, provided the conviction related to a consensual act with another who

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was between the age of fourteen and seventeen, and the offender was less than four years older than the consenting party.\textsuperscript{173}

The management scheme imposed by the AWA considers one discrete factor for the classification of sexual offenders: offense type. Researchers acknowledge, though, that a myriad of variables affect sexual offending, risk and recidivism.\textsuperscript{174} The classification system relies on "a single static factor, prior offense seriousness, and thus risks vast over-inclusiveness compared to the 'offender-based' approaches"\textsuperscript{175} of earlier sex offender management legislation. The Act requires offender classification through an offense-based system of three categories or tiers. 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.\textsuperscript{176} The tiered system of classification neglects any consideration for specific risk factors, crime details, personal circumstances of the offender or the offense, or any other exigencies traditionally linked to the bedrock of American criminal sentencing, individualized sanctioning.

The AWA mandates severe consequences for the knowing failure to timely register or update required information, including a mandatory fine and/or prison sentence of not more than ten years. Pursuant to the provisions of the Act, a registered

\textsuperscript{173} 943.04354, Florida Statutes (2007).
\textsuperscript{174} Lussier, Proulx & LeBlanc, supra note 69. The primary factors affecting sexual offending include persistent early and persistent antisocial behavior. \textit{Id.}
\textsuperscript{175} Logan, supra note 17.
offender who commits a subsequent crime of violence is subject to a mandatory prison sentence of not less than five years and not more than thirty years to be served consecutively to any other imposed sentence.177

Under the AWA, states must modify existing registration systems to comply with the stringent registration and notification requirements of the federal legislation or risk losing 10% of the state’s federally subsidized Byrne Justice Assistance grant.178 Byrne grant funding represents the leading source of federal funds supporting a broad range of state and local criminal justice activities. In implementing the mandates of the AWA, states overlooked, intentionally or inadvertently, the undeniable fact that the cost of implementing the Act far exceeded any potential loss of Byrne Justice Assistance funds.179 The Justice Policy Institute compiled information comparing the potential loss of federal grant funds and the anticipated first year only cost of implementation. As the data in Table 1 reveals, in every state, the estimated first-year cost of compliance with the AWA outweighed the potential loss of Byrne grant money. The anticipated 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

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177 Id. at §2250.
178 Id. At §125.
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\(^{180}\) id.
administrative costs.\textsuperscript{181} Consider the consequences for the State of Virginia when implementing the AWA. Officials in Virginia estimated the first year cost to comply with the Act at over $12 million, while potential lost Byrne grant funds totaled only $400,000.\textsuperscript{182} The annual estimated cost for ongoing compliance with the AWA in Virginia exceeds $8.8 million.\textsuperscript{183} Even after enacting some of the most stringent restrictions for sex offenders in the country, the Texas legislature refused to implement the demands of the AWA, citing the high cost of fulfilling the Act’s mandates.\textsuperscript{184} The anticipated cost of implementing the demands of the AWA in Texas in 2009 alone approached $39 million, while the impact on Byrne funds totaled a mere $1.5 million.\textsuperscript{185}

Some states chose to forego the Byrne grant funds in order to retain local control over sex offender registration. The administration of Gov. Andrew Cuomo in 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.\textsuperscript{186} A key component of the New York sex offender management system includes individual risk assessment of offenders. Officials in Arizona, California, Minnesota,
North Carolina, North Dakota, Texas and West Virginia also opted to preserve state sovereignty in sex offender management rather than adopt the provisions of the AWA.

ELECTING TO ESCHEW IMPLEMENTATION OF THE AWA, THOUGH, DOES NOT MEAN THAT NON-COMPLYING STATES ADOPT AN INDIFFERENT ATTITUDE TOWARD SEX OFFENDERS. ON THE CONTRARY, MANY STATES BOTH IN COMPLIANCE AND OTHERS NOT ADHERING TO THE AWA IMPOSE RESTRICTIONS ON SEX OFFENDERS EXCEEDING THE MANDATES OF THE AWA. AT LEAST FOURTEEN STATE STATES IMPOSE LIFETIME REGISTRATION DUTIES FOR ALL CONVICTED SEX OFFENDERS. 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.

The course of action chosen by legislators in the State of California serves as an instructive example of the criticisms leveled against the AWA. Even though California law currently imposes strict lifetime registration duties on all sex offenders, the state is exploring an individualized approach to sex offender management. CASOMB recommended to the California legislature that the state eschew compliance with the federal mandates included in the AWA. CASOMB’s criticism of the AWA focused on the lack of individual consideration for offenders inherent in the Act’s mandates. A CASOMB report expressed concern that registration obligations remain uninfluenced by

188 720 ILCS/11-5.3 (2014).
risk assessment instruments available to be administered to offenders in considering individual risk potential. Additionally, CASOMB criticized the federal law for demanding an expansion of the list of registrable offenses, including the extension of juvenile registration, when no evidence linked the enlarged registration obligations to public safety. Finally, CASOMB expressed fiscal concerns for the unfunded mandate imposed on states by the federal legislation. While the AWA threatened the reduction in Byrne Justice Assistance grants for non-compliance with the Act, no corresponding federal financial assistance to states is available to underwrite the staggering cost of compliance with the Act.  

IX. Abandoning the One-Size Fits All Approach of the AWA

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. Numerous studies verify that sex offender registration and notification laws demonstrate little, if any, positive effect on public safety, deterrence or recidivism rates. Scholars have encouraged lawmakers to abandon the AWA in favor of practices focusing on individual

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offenders and risk of recidivism,\textsuperscript{192} rather than on the offense-based system imposed by the Act. Research undertaken by the Center for Sex Offender Management (CSOM), supported by funding from the U.S. Department of Justice, suggests that available resources should be diverted from costly all-inclusive registration policies in favor of legislative schemes that reserve resources to addressing sex offenders who pose the greatest danger\textsuperscript{193}

Interventions prove most effective when concentrated on offenders who present the most likely risk to reoffend. The articulated goals of sex offender legislation focus on protecting the public from future risk. 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. The risk principle of offender management suggests that interventions prove most effective when concentrated on defendants presenting the most likely risk to reoffend. The need principle directs focus to an offender's mutable issues, or dynamic factors, closely linked to criminal offending. The responsivity component acknowledges an individual offender's learning style, abilities and other characteristics as key considerations in developing an intervention mode appropriate for the specific defendant.\textsuperscript{194} In order to prove effective, interventions, including sex offender registration and notification duties,

\begin{itemize}
\item \textsuperscript{192} Buntin, \textit{supra} rote 124.
\item \textsuperscript{194} Donald A. Andrews & James Bonta, \textit{The Psychology of Criminal Conduct} (Elsevier, 2010).
\end{itemize}
must address the unique issues of the individual offender. Targeting public safety alone mitigates public fear, but ignores the need to addressing circumstances underlying sexual offending. The mandates of the AWA and state implementation legislation simply ignore the recognized principles of correctional intervention in favor of the categorical imposition of obligations on all defendants convicted of a sex offense.

Like all convicted criminals, sex offenders require social, psychological and financial resources to successfully re integrate into society as productive, pro-social citizens. Further, branding all defendants convicted of a crime of a sexual nature with the label of sex offender, and all of its implications and connotations, serves to deny convicted individuals of the opportunities and resources vital for successful rehabilitation and reintegration. Instead of serving a reintegrative function, the shaming effect of the sex offender label imposes an essential and disintegrative identity on the sex offender.\footnote{195}{Hollinda Wakefield, The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?, 1 J.
SEXUAL OFFENDER CN.
COMMITMENT: SCI.
& L. 141 (2006).}

Contrary to the purposes underlying restrictions on convicted sex offenders, current federal offender management policies succeed only in “providing an illusion of public safety.”\footnote{196}{Levenson, supra note 191.} Arguments that enhanced public safety result from SORN requirements fail when confronted with the indisputable evidence that the vast majority of arrestees for sex offenses are not included in the population already on the registry. In 2003 the Bureau of Justice Statistics found that 86.1% of the individuals arrested for a sex offense had no prior sexual convictions.\footnote{197}{Langan, Schmitt & Durose, supra note 83.}
The AWA should not be completely abandoned, as it 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 consistent obligations, management and enforcement of restrictions on sex offenders, but only if all states adopt uniform policies. At some point reality must impinge on the mere perceptions about sex offenders of the media, public and legislators that have overshadowed legislative regulations in the last quarter century. The AWA must be amended to reflect the evidence research demonstrates 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 with an influential voice embrace the socially and politically unpopular position of advocating for evidence-based sex offender legislation,198 which would likely be perceived as supporting violent criminals. The retributive intent of SORN legislation remains the focus, rather than any emphasis on rehabilitation or supportive treatment for offenders.

X. Restoring Judicial Involvement in Sex Offender Management

Since the 1990s when the nation witnessed the infancy of the moral panic surrounding sex offenders, laws specifically targeting sex offenders have garnered harsh criticism from scholars primarily since the legislative directives lack empirical support.

None of the research or commentators focusing on the AWA, though, has yet to address 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 Act prohibits judges from considering individual risk assessments for offenders and any discretion in imposing registration and notification duties.

Perhaps legislatures have found it easier to ensure sex offenders will be treated as one homogeneous and dangerous band by imposing mandatory statutory penalties on convicted offenders, rather than trusting the judiciary to exercise appropriate discretion when addressing individual offenders. During a 2011 hearing of the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary considering the reauthorization of the AWA, Congressman Johnson of Georgia urged that the AWA be amended to return judicial discretion to the classification and management of individuals convicted of a sex offense.\textsuperscript{199} Unfortunately, Congressman Johnson’s insightful suggestion garnered no support from his fellow legislators.

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 offenders to be addressed as individuals and provided with tools for effective reintegration and rehabilitation, while still addressing the overriding concern of public safety.

Judges sit 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 determining sanctions appropriate for each individual offender. While legislatures have in recent years limited the long-standing status of judges as the 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 is multi-dimensional, while the mandates of the AWA rely on a single, static factor, offense type. When crafting sanctions judges consider a variety of circumstances relating to the offender and the offense. Relevant considerations for the court in crafting individualized sanctions include, among others, the offender’s criminal history, the defendant’s relationship to the victim, 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 prior history of compliance with supervision, the defendant’s physical and mental health, and history of substance abuse. A judge must weigh the competing purposes of sentencing, which include rehabilitation, incapacitation, deterrence and retribution. A sentencing court must also assess the unique circumstances of each defendant and the offense, with the ultimate objective of satisfying the purposes of sentencing as applied to the individual offender. 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 enjoys no greater attention than any other relevant factor associated with sentencing.

There are four strategies which can be incorporated into sex offender practices that provide opportunities to integrate scholarly findings into offender management, all of which necessitate restoring some discretion to the judiciary in sanctioning sex offenders. First, legislative modifications should be made to authorize judges to determine when individual low-level sex offenders are 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, jurisdictions should incorporate the practices associated with problem solving courts into sex offender management.

A. Restore Judicial Discretion to the Determination of Registration Duties for Low-Risk Offenders

Existing SORN laws garner significant criticism for the over-inclusive and unforgiving consequences of the registration requirements. While repeat offenders represent a category of individuals at greater risk for recidivism, not all sex offenders present with the same level of dangerousness. Some offenses, particularly violent sexual crimes, may foretell future offending. Repeat and violent offenders necessarily fall
within the spectrum of offenders for whom mandatory registration duties remain important. Wholesale inclusion of all sex offenders within the onerous burdens of sex offender registration laws, though, fails to meet any legitimate legislative purpose. Categorization based on the singular static criteria of offense type does not protect the public nor serve the offender.

Jurisdictions must adopt evidence-based policies designed to gauge personal offender risk when determining individuals to include within registration and notification requirements. Each offender should be assessed for not only risk of reoffense, but for criminogenic needs associated with rehabilitation, with a goal of re integrating the offender into the community if 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 and low-risk offenses from registration obligations would release resources currently devoted to monitoring registrants for important objectives, such as treatment, therapeutic interventions and supervision for high risk offenders.

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. Since scholarly inquiry demonstrates that low-level and first-time offenders present a lower risk of recidivism, judicial discretion in determining the individuals
subject to registration requirements must be limited to defendants who present as first-time sex offenders convicted of a low-level offense. 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 court determines, in its discretion, a convicted offender will not be required to register as a sex offender. Protracted terms of community supervision present greater opportunity for the court 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 if recidivism risk increases.

**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 of risk assessment tools in sex offender designation. The restoration of judicial discretion to sex offender oversight necessitates the reintroduction of risk assessment into the process of offender classification and management.

In order to not only provide for public safety, but also to address individual offender circumstances correlating with risk, and conversely success, registered sex offenders should be subject to periodic administration of risk assessment instruments. The testing results aid in determining current risk, but assists supervising authorities in identifying strategies and interventions vital to checking stressors that influence recidivism. Offenders should be subject to assessment on a periodic schedule determined by research
as the most appropriate for measuring risk. Risk assessment tools must also be employed during the periods presenting the greatest potential for recidivism as demonstrated by research. Additionally, supervising authorities should be permitted to require assessment any time the convicted offender demonstrates non-compliance with supervision or behavior or conditions indicate the potential for stresses research associates with recidivism. Risk assessment practices and protocols should undergo periodic review as new research findings are presented that may influence assessment strategies.

Risk assessment represents merely one tool in offender management. The utilization 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 to reduce the potential for recidivistic behavior.

C. Modify Deregistration Limitations

Pursuant to the current mandates imposed by the AWA, judges possess little authority to relieve adult registered sex offenders from the duties imposed by the Act. 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. The AWA does not contemplate any reduction in the twenty-five year period of registration mandated for Tier II offenders or the lifetime obligation for Tier III offenders.\textsuperscript{200} Deregistration is authorized only if the Tier I offender maintains a clean record, which the Act 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. The 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. Deregistration serves no meaningful purpose when the collateral consequences of the sex offender label have been imprinted on the registrant’s life and relationships. Under the AWA, the minimum period of success before any offender may seek deregistration prohibit 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 thwart 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 available to aid in mitigating stress, and a significant period during which the offender displays strict compliance with pro-social norms.

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201. id.
Despite the state’s otherwise harsh penalties and restrictions on sex offenders, the Texas legislature recognized in 2005 that deregistration represents a necessary tool in the successful rehabilitation of low-risk sex offenders. The Texas Penal Code now permits the sentencing court to authorize deregistration of certain non-violent first-time sex offenders who demonstrate successful completion of treatment and any term of supervision, but only after the minimum registration period for the offense type set by the AWA has been satisfied.\(^{203}\) Eligible offenders must provide to the court an assessment completed by a licensed deregistration specialist of the threat of reoffense completed by a licensed deregistration specialist. In 2011 additional legislative changes to the Texas Penal Code authorize streamlined deregistration or the elimination of any initial registration duties for adolescents engaged in consensual sexual activity. The Texas legislature recognized that adolescent offenses often reflect teenage culture, but present a low risk of reoffense.\(^{204}\) Under the Texas laws, the court has wide discretion in determining whether to grant the deregistration application. Deregistration serves to remove the applicant’s information from the sex offender database and terminates the duty to register, but does not modify any other legal duties of the offender.

Deregistration would not expunge the criminal conviction, nor remove certain prohibitions against employment where the offender would have access to children and the duty of any convicted sex offender to advise a potential employer of the conviction.

Expanded opportunities for removal from sex offender registration rolls should not assume an offender would be without supervision. On the contrary, any deregistration

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opportunity should require a concomitant additional period of supervision following relief from SORN obligations to monitor the offender's circumstances for the presence of stress associated with recidivism. Any significant violations of supervision duties could then present the potential for the court to reimpose registration duties. Monitoring following deregistration would provide the offender with an opportunity for restoration into the ranks of community and to shed the negative collateral consequences of the imposed label of sex offender, while concurrently supporting the goal of sex offender registration laws, public safety.

D. Encourage the 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 special needs of participants through close supervision and monitoring,\textsuperscript{205} while also safeguarding the community. Research demonstrates that problem-solving courts, such as the drug court model of offender management, significantly reduce crime rates, while providing services in a cost effective manner.\textsuperscript{206} Problem solving courts present a holistic approach to offender management.

All problem solving courts trace their lineage to the research and efforts undertaken in the past twenty years to stem the effects of drug addiction through the drug court model of intervention. 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, access to a continuum of treatment and services, and consistent monitoring and evaluation to measure compliance with supervision and a coordinated and immediate response to compliance lapses. The advent of drug courts grew from particular concerns of the community over drug abusers involved in a revolving door of use without any reduction in criminal behavior and judicial interest in creating sentencing alternatives to incarceration. The resulting drug court model combined judicial control with therapeutic intervention to institutionalize an innovative response to a recognized problem of offender management.

Specialized sex offender courts present the most effective opportunity for sex offender management. Community supervision aids in reducing all criminal recidivism, including sexual recidivism. Public policymakers should consider implementing a protocol of 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 effect of the current federally-
mandated sex offender management system, while still providing for public safety. Indeed, research demonstrates that judicial supervision positively affects recidivism rates.\(^{210}\)

Authorities in the State of 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 the New York State Court System, with the support of the Center for Court Innovation, began researching best practices for problem solving courts and initiated an extensive planning procedure in anticipation of launching specialized sex offender courts. In 2006 pilot sex offense courts were launched in three New York counties. Integral to the specialized sex offense dockets is a commitment to relying on a unified approach to management, including best practices garnered from available and emerging scholarship, and 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 on the dynamic of sexual offending and offenders, continuous evaluation and supervision of defendants, immediate judicial response to offender stresses and non-compliance, graduated sanctioning, coordination of services with treatment programs, and provision of needed support services to offenders.\(^{211}\)

\(^{210}\) Id.

Significant and multi-dimensional training of judges presents as a key component of any successful problem solving court. The requisite instruction includes not only a legal component, but specific 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 data or trends revealed by the research.

The New York State Court System and the Center for Court Innovation have undertaken research efforts into the efficacy and appropriate protocols for specialized sex offender courts. Considering the relatively short period of time the sex offender courts have been in operation, though, more research is necessary. Further study must be undertaken to refine and implement standards and best practices for sex offender courts to effectively supervise specific concerns related to sex offenders.

Through the close monitoring of offenders by courts, public safety will be enhanced, since the model of problem-solving courts contemplates immediate intervention to address any lapses in compliance and monitoring for the 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.
XI. Conclusion

When viewed purely from a political or emotional perspective, substantial reform to SORN laws in the current climate is indefensible. When analyzed, though, from an empirical attitude, major revisions in sex offender management legislation must be undertaken in order to address the underlying primary purpose of SORN laws: public safety. The prevailing legislative practices regulating convicted sex offenders fail in the 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 have to overcome the moral panic by encouraging and demanding changes in sex offender management laws. While the judicial role contemplates applying the law enacted by the legislature, the judiciary is not without a voice. The appanage of the judiciary must and should include educating the public. Judges, through the precedent and application of decisions, the opportunity to disseminate concerns through lectures to students and the public, and offering testimony to legislative bodies, can aid in reconstructing the perception of the media, the public and legislators about sex offenders. Deconstructing the myths associated with sex offenders should result in 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.
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