

GANGSTERS TO GREYHOUNDS: THE PAST, PRESENT, AND FUTURE OF OFFENDER REGISTRATION

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I.

INTRODUCTION

Contrary to popular belief, offender registries are not a recent phenomenon. Offender registries are government-controlled systems that track the movements and other activities of certain persons with criminal convictions. While today they are most commonly used for sex offenders, registries have been adopted since the 1930s to regulate persons convicted of a wide variety of offenses including embezzlement, arson, and drug crimes. Early registries were widely criticized as ineffective and overly punitive, and many were eliminated through litigation or legislative repeals. Others simply fell into disuse over the course of the 20th century. Now, there is a growing body of research that demonstrates that modern sex offender registries are similarly ineffective at reducing crime. Sex offender registries are costly, vastly overbroad, and error-ridden.¹ Even worse, the overwhelming stigma of public notification provisions may actually increase recidivism among offenders.² Despite their repeated history of failure, enthusiasm for publicly available, internet-based registries for every offense imaginable has only grown in recent years. There have been proposals across the country to register those found guilty of animal abuse, arson, drug offenses, domestic violence, and even failure to pay child support. Existing registries are expanding and becoming increasingly punitive. Without a concerted effort to stop the tide of offender registration, we are at risk of repeating past mistakes on a much larger and more treacherous scale.

This article will critically examine the past, present, and future of offender registries. In Part II, I describe the failed experiment of early registries. In Part III, I examine the explosion of sex offender registries in the 1990s and the

1. See *infra* notes 178–203 and accompanying text.

2. See *infra* notes 156–161 and accompanying text.

current trend of non-sex offender registration. In Part IV, I outline policy arguments against offender registries, explaining that, despite their popularity with legislators and the public, they have failed to live up to their promise of making us safer. In Part V, I evaluate past and current legal challenges to offender registries. There is already a substantial body of work criticizing the law and policy of modern sex offender registries, which I will rely on heavily and attempt to synthesize.³ Relatively little has been written on other types of registries.⁴ Finally, in Part VI, I offer some modest suggestions on how to curtail the increasing use of offender registries. By drawing on their long history of use, abandonment, and revival, I hope to demonstrate how a massive public education and advocacy campaign may be necessary to curb the spread of offender registries for good.

II.

THE HISTORY OF EARLY REGISTRIES, 1930S–1980S

Offender registries are generally thought of as a recent phenomenon. However, the first registry laws in the U.S. were passed in the early 1930s, in response to fears about organized crime.⁵ One of the earliest mentions of registration in an American newspaper occurred in 1931. In a two-day series

3. See, e.g., Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071 (2012); Steven J. Costigliacci, *Protecting Our Children from Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180 (2008) (arguing that the inclusion of nonsexual crimes under the AWA makes registries less effective and is a waste of resources); Jacob Frumkin, *Perennial Punishment? Why the Sex Offender Registration and Notification Act Needs Reconsideration*, 17 J. L. POL'Y 313 (2008) (critiquing various aspects of the Adam Walsh Act, particularly notification provisions); Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises Constitutional Questions*, 46 HARV. J. ON LEGIS. 369 (2009) (arguing that the federal sex offender registration law violates the Constitution, including the Ex Post Facto Clause and procedural due process). For articles focusing on the effects of offender registration on juveniles, see Brittany Enniss, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697 (2008); Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles*, 91 CAL. L. REV. 163 (2003).

4. But see, e.g., Brian A. Loendorf, *Methamphetamine Offender Registries: Are the Rights of Non-Dangerous Offenders Cooked?*, 17 KAN. J.L. & PUB. POL'Y 542 (2008); Stacy A. Nowicki, *On the Lamb: Toward a National Animal Abuser Registry*, 17 ANIMAL L. 197 (2010); Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 LA. L. REV. 509 (2013) (arguing that the popularity of offender registries is due to their psychological appeal rather than their effectiveness).

5. See WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 25 (2009). See also *Criminal-Registry Law Passed by Supervisors*, L.A. TIMES, Sept. 12, 1933; *Gangster Law Threshed Out*, L.A. TIMES, Oct. 28, 1931, at A1 ("Los Angeles county is facing a real menace and a crisis in the manner of organized crime and if something drastic is not done this area will be as helpless as Chicago within another year, according to Dist.-Atty. Fitts. . ."); *Registry Laws for Felons*, L.A. TIMES, Sept. 13, 1933, at A4 ("The ordinance has been adopted as an emergency measure in face of the recent migration to the Coast of marked gangsters from other States and a sudden spurt in crimes involving violence and bloodshed, consequent to this undesirable influx.").

entitled "How Can We Halt Rising Flood of Crime Here?," the Los Angeles Times put that question to a number of "prominent local men, whose training and experience qualify them to speak."⁶ Various responses suggested deporting illegal immigrants, "strengthening of public morals" or "the work of the church," providing job training in prisons, minimizing unemployment, improving and expanding police forces, introducing vagrancy laws, and abolishing the presumption of innocence standard. Benjamin F. Bledsoe, a former federal district judge, wrote that "[i]n the curbing of professional crime there may be some merit in the continental method of individual registration."⁷ The same year, a criminal registry was proposed in Los Angeles "as a means of striking at the steady inflow of gangsters and their followers."⁸

The registration ordinance put forward in 1931 required that all persons convicted in federal or state court of certain crimes—including theft, larceny, embezzlement, extortion, arson, murder, and kidnapping—report to the Sheriff within forty-eight hours upon entry in Los Angeles. Failure to do so could result in fines or imprisonment.⁹ Initially, hopes were high that the new law would enjoy broad support and be proven effective. The statement of purpose issued from the drafters of the original ordinance explained, "It is not too much to say that this ordinance, if passed, will do as much as any one thing can possibly do to make safe this community from this menacing class of social outlaws."¹⁰ The drafters dismissed the possibility of public opposition to the ordinance, except from "those who seek to carry on their several 'rackets' in Los Angeles."¹¹

Contrary to expectations, however, public reactions to the registry were lukewarm.¹² Attorney S.S. Hahn, a spokesman for a delegation of citizens opposed to the law, appeared before the Board of Supervisors to argue that the ordinance was "vicious" and "place[d] in the hands of ignorant police officers too much power."¹³ He warned, "It appears to be a harmless law, but we have too many harmless laws now that appeared to be harmless until adopted, when

6. *How Can We Halt Rising Flood of Crime Here?: Experts Discuss Means to Help the Authorities in Dealing with Our Gravest Problem (Part One)*, L.A. TIMES, Jan. 18, 1931 & Jan. 19, 1931, at A1; *How Can We Halt Rising Flood of Crime Here?: Experts Discuss Means to Help the Authorities in Dealing with Our Gravest Problem (Part Two)*, L.A. TIMES, Jan. 19, 1931, at A1.

7. *How Can We Halt Rising Flood of Crime Here?: Experts Discuss Means to Help the Authorities in Dealing With Our Gravest Problem (Part One)*, *supra* note 6.

8. *Gangsters to be Fought with Registration Law*, L.A. TIMES, Sept. 23, 1931, at A1.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Delay on Crime Edict Probable*, L.A. TIMES, Sept. 27, 1931, at A6 ("Scores of letters, some protesting, others favoring the law have been pouring into the offices of the board since it was announced several days ago . . ."); *Felon Registry Law Softened*, L.A. TIMES, Sept. 26, 1931, at A1; *Gangster Law Threshed Out*, *supra* note 5. ("While a score of speakers expressed their belief that something should be done to curb gang activities and enforce the laws, there was a difference of opinion on the ordinance.").

13. *Board Delays Gang Check*, L.A. TIMES, Sept. 29, 1931, at A1.

they became dangerous weapons in the hands of certain interests.”¹⁴ Decisions regarding the proposal were repeatedly delayed and the bill was largely abandoned by the end of the year.¹⁵

Despite this early opposition, support for criminal registration picked up again two years later, in 1933. In September of that year, August Vollmer, Professor of Police Administration at the University of California, published an article in *The Washington Post* extolling both universal registration (for all citizens, regardless of whether they had been convicted of a crime) and criminal registration systems in place in Europe.¹⁶ It is interesting to note the lack of concern for individual liberty or privacy that Vollmer attributed to the typical U.S. citizen, writing:

The discerning American tourist who visits Europe . . . finds that he cannot go about with the same freedom that he is accustomed to in the United States. He must show his papers, explain his business. He feels before long that his every move is watched. He sees police everywhere, and always they seem to be waiting for some one to commit an offense against the law. Nothing seems to escape their attention. “If only our own police were as efficient!” sighs the American¹⁷

To this end, Vollmer advocated for a national registration system.¹⁸ While acknowledging forensic science—“[t]he use of the microscope and all that sort of thing”—in criminal investigations, he bestowed greater praise on local police forces “knowing ‘who’s who.’”¹⁹ He elaborated, “[t]here is much to be said for the detective who, upon learning the details of a crime, takes a chew of tobacco and says out of the corner of his mouth ‘Jones did it.’”²⁰ Only two days after this article was published in D.C., a criminal registration ordinance was finally passed in Los Angeles.²¹ This time around, enthusiasm for the registry was somewhat dampened. Press reports about the ordinance acknowledged its faults, conceding that while “no law can be perfect,” nevertheless “[i]n an emergency, we must use as well as we can whatever emergency weapons are available.”²²

14. *Id.*

15. *Id.* See also ‘Gangster Law’ Vote Due Today, L.A. TIMES, Oct. 5, 1931, at A1 (discussing delay); *Gangster Law Threshed Out*, *supra* note 5 (discussing opposition to the ordinance).

16. See August Vollmer, *Police Methods Need Changes*, WASH. POST, Sept. 10, 1933, at SM2.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Criminal-Registry Law Passed by Supervisors*, *supra* note 5.

22. *Registry Laws for Felons*, *supra* note 5. The article acknowledges the possibility that the ordinance will unduly harm some reformed criminals while failing to include others who do pose a public danger. The article nevertheless praises the law as balanced, noting that, because its primary purpose is to prevent an influx of criminals, it exempts in-state parolees and probationers from registration duties and penalties. In contrast, an article published in the *New York Times* reported

As conceived, the ordinance was not actually expected to result in voluntary registration. Rather, the threat of fines and incarceration for failure to register was supposed to act as "a real deterrent and one which [would] advertise [L.A.] county as an unhealthy place of residence for members of the underworld."²³ Proponents of the legislation hoped the ordinance would "make their [gangsters'] lives so miserable that they [would] have to move on."²⁴ Others expressed the view that registries would aid law enforcement agencies in "locating and following the activities of probable recidivists" and would act as a crime deterrent.²⁵

Despite mixed feelings about the ordinance within L.A., registries spread quickly throughout the country, with cities from Miami to Seattle enacting measures to require that ex-convicts report their movements to the police.²⁶ These laws varied widely in terms of who was required to register, what information was requested, and how much time offenders were given to register before incurring penalties.²⁷ Several local ordinances additionally required registrants to carry identification cards. Failure to carry the card carried the same penalty as failure to register.²⁸ In 1937, Florida passed the first statewide registration law, although it only required offenders living in counties of over 150,000 citizens to register.²⁹

Arguments against offender registries of the 1930s were remarkably similar to those made today. Attorneys, politicians, law enforcement, and the public questioned the constitutionality of registry laws and expressed concerns that registration would hinder rehabilitation, impose unnecessary collateral consequences on offenders, and prove ineffective since truly hardened criminals would simply decline to register.³⁰ Other criticisms pointed to registry laws'

that the law "is considered by officials their ace card." *Los Angeles County Registers Felons in a Drastic Move to Wipe Out Gangs*, N.Y. TIMES, Sept. 13, 1933, at 20.

23. *Registry Laws for Felons*, *supra* note 5. See also *Criminal Registration Ordinances: Police Control over Potential Recidivists*, 103 U. PA. L. REV. 60, 63 (1954) [hereinafter *Criminal Registration Ordinances*].

24. *Registry Laws for Felons*, *supra* note 5.

25. *Criminal Registration Ordinances*, *supra* note 23, at 63. See also *Felon Listing Starts Today*, L.A. TIMES, Sept. 13, 1933, at A1 ("Chief Davis informed the Council that the Police Commission urged adoption of the ordinance as an emergency measure and stated that it will drive out of the city 95 percent of the ex-convicts here from the other forty-seven States."); *Felon Registry Law Softened*, *supra* note 12 (quoting a letter from Los Angeles County District Attorney Buron Fitts, which stated that the criminal registration ordinance "will be an effectual deterrent to...criminal activities"); *Registry Laws for Felons*, *supra* note 5 ("The ordinance . . . should prove an extremely useful weapon in the hands of authorities for discouraging the residence here of persons with known criminal records.").

26. LOGAN, *supra* note 5, at 28-29.

27. ROBERT H. DREHER & LINDA KAMMLER, *CRIMINAL REGISTRATION STATUTES AND ORDINANCES IN THE UNITED STATES: A COMPILATION* 11-15 (1969).

28. See *Criminal Registration Ordinances*, *supra* note 23, at 77.

29. See LOGAN, *supra* note 5, at 30.

30. *Id.* at 24, 40. See also *Gangster Law Threshed Out*, *supra* note 5 (reporting on some of the critiques of the ordinance expressed at a public hearing before the Board of Supervisors). Many

ambiguity in who was required to register, insufficient focus on “recidivistic crimes,” over- and under-inclusiveness, and lack of any process for removal from a registry.³¹ Still others predicted that the law would be difficult to enforce.³² Some critics did not think the ordinances went far enough, and advocated universal registration, although this was never seriously considered.³³

Interest in offender registries largely waned in the 1940s, only to crop up again in a wave of legislation in the 1950s and 1960s, including statewide registries created in California (1947), Arizona (1951), New Jersey (1952), Illinois (1953), Nevada (1961), Ohio (1963), and Alabama (1967).³⁴ A third wave of registry laws occurred in the late 1980s, with the passage of legislation

social welfare workers, for example, were “of the belief . . . that the measure as drafted at present will work a hardship on the man at one time convicted but who is now attempting to go straight.” *Id.* The supervisor of probation expressed a similar concern that “the ex-convict now going straight would be penalized . . . while the man who is breaking the law now will keep on breaking it and will evade registering.” *Id.* An employee of the State Department of Welfare expressed concern for “ex-convicts’ mothers, wives, and little children, who never committed a crime but who would have to suffer if the man in the house had to expose his past.” *Id.* For substantially similar arguments regarding criminal registries of the 1950s, see *Criminal Registration Ordinances*, *supra* note 23, at 61 n. 5 (quoting a letter written by the City Solicitor of Canton, Ohio in 1953) (“I am of the opinion that even though such legislation may be of value in checking upon hardened criminals, that it works a definite hardship on an individual who has paid his debt to society and is attempting to rehabilitate himself.”).

For arguments against the use of registries by law enforcement officials, see *id.* at 86 (outlining several compelling arguments against registries from Philadelphia detectives, including the concern that “only indigent defendants ever serve time on a violation of the ordinance because it is not constitutional and will never be sustained against a defendant who has a lawyer”). For modern criticisms of registries by legislators, see Erica Goode, *States Seeking New Registries for Criminals*, N.Y. TIMES, May 21, 2011, at A1 (quoting Illinois Representative Monique Davis) (“I just don’t think that a murderer registry is of much value to anyone except those getting paid to set it up.”); Joe Dignan, *Leno Linked to Child Molesters by Right Wing Propagandists*, S.F. BAY TIMES (Feb. 16, 2006), http://www.sfbaytimes.com/?sec=article&article_id=4638.

31. See *Criminal Registration Ordinances*, *supra* note 23, at 66–67. This note explains the lack of connection between purported purpose of ordinances in curbing recidivism with the inclusions of nonrepetitive crimes, such as miscegenation, and the noninclusions of others, such as attempted crimes. It also explains the confusion of some registration laws, for example:

A possible interpretation of the Norfolk, Virginia, ordinance would require registration of anyone who had committed an offense punishable as a felony anywhere outside the state; this interpretation would make the ordinance of questionable validity since it would appear to place the burden upon the prospective registrant of knowing the law regarding the nature of a felony of every jurisdiction in the world.

Criminal Registration Ordinances, *supra* note 23, at 69.

32. *Id.* at 86 (“[D]etectives are too busy to check an individual’s record for the information necessary to sustain the charges.”); *Gangster Law Threshed Out*, *supra* note 5 (quoting M.D. Benesh, statistician at the L.A. County Jail) (“It will be a law that will be very difficult to enforce.”).

33. See *Fingerprints for All Held Wise*, L.A. TIMES, Jan. 14, 1931, at 6 (“[Police officials] agreed that police handling of so-called ‘crime waves’ would be far less difficult if identifications could be made through universal registry of all citizens”); *Gangster Law Threshed Out*, *supra* note 5 (“[W.M. Potter] believed that it should go farther, that every person in the United States should be required to register and carry a card similar to his automobile license.”).

34. See LOGAN, *supra* note 5 at 30.

in Arkansas (1987), Utah (1987), Montana (1989) and Oklahoma (1989).³⁵ These registries varied in their purported purposes and targets. Many registries, including those adopted in California, Arizona, Nevada, Ohio, and Alabama, required only sex offenders to register with the local county sheriff or chief of police.³⁶ Some, including those in New Jersey and Illinois, targeted only narcotics offenders.³⁷ Other registries covered all felony offenders, those who committed "crimes of moral turpitude," or some combination of any of these offenses.³⁸

As states began to enact registries, federal and state courts began to strike down local ordinances. In the 1957 case *Lambert v. California*, the Supreme Court held that the Los Angeles felon registration ordinance violated the Due Process Clause of the Fourteenth Amendment when applied to offenders who were not informed of their duty to register.³⁹ Other local ordinances were found to be preempted by state law.⁴⁰ While these cases "sounded the death knell for local registration laws," they did not challenge the constitutionality of criminal registration more broadly.⁴¹ Other lower court cases that restricted certain aspects or applications of registration laws, such as two California cases which found registration for some low-level sex offenses to be a violation of the state constitution's prohibition of cruel and unusual punishment, similarly failed to address the issue of registries' general constitutionality.⁴²

Despite their popularity with legislators, evidence suggests that most state and local registries were largely ineffective and underenforced due to expense, misunderstanding of registry laws, or lack of support for registries from police officers and prosecutors.⁴³ Concerns over offender registries were expressed by several prominent law enforcement officials. California's Director of Corrections, for example, warned that "[b]efore embarking on this new practice

35. See LOGAN, *supra* note 5, at 31.

36. See DREHER & KAMMLER, *supra* note 27, at 11-15; LOGAN, *supra* note 5, at 31-32.

37. LOGAN, *supra* note 5, at 31-32.

38. *Id.*

39. *Lambert v. California*, 355 U.S. 225, 229-30 (1957).

40. *Abbott v. Los Angeles*, 349 P.2d 974, 983-84 (Cal. 1960) (finding that Los Angeles's criminal registration law was an attempt to regulate a field occupied by the state, and therefore violated the state constitution); *State v. Ulesky*, 253 A.2d 720, 723 (N.J. 1969) (finding that a criminal registration ordinance of the Borough of Belmar was preempted by state legislation).

41. See LOGAN, *supra* note 5, at 45.

42. See, e.g., *In re Reed*, 663 P.2d 216 (1983) (finding that sex offender registration for conviction of soliciting lewd conduct violates California constitution); *In re King*, 204 Cal. Rptr. 4 (Cal. Ct. App. 1984), *abrogated by* *People v. Noriega*, Cal. App. 4 Dist. (2004) (finding that sex offender registration for conviction of indecent exposure violates the California constitution).

43. See LOGAN, *supra* note 5, at 37-40. For an example of how a lack of officer knowledge of registry laws contributed to their nonenforcement, Logan describes a 1954 study which determined that in Philadelphia, "[m]ost officers and detectives were aware that a registration law existed but 'did not seem to know the specific content of the ordinance.'" *Id.* at 37. Logan then gives an overview of the lack of arrests and prosecutions nationwide under offender registry laws. *Id.* at 37-38.

with a particularly offensive group of individuals, we should not overlook the fact that we may be opening the door to similar practices for other groups as time goes on.”⁴⁴ Utah’s Attorney General expressed the belief that that registries were of “questionable constitutionality.”⁴⁵ Many of those charged with day-to-day enforcement of the registries were also uneasy about registration laws. A 1958 nationwide study of administrators charged with overseeing the interstate transfer of probationers and parolees found that sixty-three percent of respondents opposed registration.⁴⁶ One expressed the belief that registration “is wrong and smacks of a Communistic or Nazi police state,” while another commented that registration “represents fear and rejection on the part of society of the persons affected.”⁴⁷

Many cities with registry laws failed to prosecute offenders for not registering.⁴⁸ In the course of collecting data regarding registry laws from states and counties, two researchers in 1969 discovered that “[o]ne city, best left unnamed, recently enacted a felon and narcotic registration ordinance only to find that it had had such a requirement for felons since the 1950’s. The ordinance had fallen into disuse and had been forgotten.”⁴⁹ An article published in the Los Angeles Times in 1986 found that thousands of sex offenders required to register under state law were not doing so, and that as much as ninety percent of the information contained in the registry was false.⁵⁰ The article also quoted various law enforcement officials expressing concerns about registry cost and effectiveness, and questioned assumptions about the prevalence of offender recidivism.⁵¹ While it appears that the few state offender registries that existed in the late 1980s were not formally repealed, their utility remained highly

44. See LOGAN, *supra* note 5, at 39–40.

45. See LOGAN, *supra* note 5, at 39–40.

46. See W. Keith Wilson, William McPhee & LeGrande Magleby, *Are Criminal Registration Laws Sound?*, 4 CRIME & DELINQ. 271, 272 (1958).

47. *Id.* at 273–74.

48. See LOGAN, *supra* note 5, at 37.

49. See DREHER & KAMMLER, *supra* note 27, at 22.

50. See Kenneth Reich, *Many Simply Ignore Law: Sex Offender Registration Law Now Working, Experts Say*, L.A. TIMES, Aug. 8, 1986, at B1.

51. *Id.* Reich offers criticisms of the sex offender registry from a handful of law enforcement personnel. John Kolman, captain in charge of records and statistics for the Los Angeles County Sheriff’s Department, was quoted saying, “It’s totally impractical to follow up to the degree that we’d be able to know where they all are . . . It’s a matter of workload and numbers.” *Id.* Glenn Craig, Director of the Attorney General’s Division of Law Enforcement, was quoted saying, “[T]he question is, how much is gained? Suppose we had a file that was 100% accurate. What use is that file? How effective is that file in combating the sex crime problem? I’m not sure that anyone has really done that kind of analysis. We don’t know how many crimes we would solve, or prevent.” *Id.* Finally, Reich introduces a limited study by the state Department of Corrections indicating that “fewer released sex offenders were being returned to prison within two years than the average for the overall prison population.” *Id.* The study showed only 8.2% of those originally convicted of lewd and lascivious behavior and 13.4% of rapists returning within two years, while the rate of return among the general prison population was 24%. *Id.*

questionable and they were not rigorously enforced.⁵²

The earliest offender registries adopted in the U.S. were accompanied by virulent criticism of their effectiveness and constitutionality, often coming from the very parties that were charged with enforcing them. These criticisms eventually prevailed, as registries proved to be cumbersome to enforce and maintain and were phased out of existence. Unfortunately, rather than learn from these experiments, legislatures and the public have largely forgotten about the early use, and failure, of offender registries.

III.

MODERN REGISTRIES

A. The Rebirth of Registries: Sex Offender Registries of the 1990s

Despite the failure of early registries, offender registration made an overwhelming comeback in the 1990s. Current sex offender registries originate from a slew of state legislation enacted in response to several horrific and heavily publicized crimes against children, some committed by persons previously convicted of sex offenses.⁵³ State sex offender registration laws passed during this time varied in their requirements, ranging from registration only, to discretionary community notification, to mandatory notification.⁵⁴ In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which required states to pass registration laws in order to avoid losing ten percent of their Byrne Formula Grant Program funding.⁵⁵ Under the Act, states were required to register sex offenders and subject those who knowingly violated the law to criminal penalties, and were allowed but not mandated to include a notification provision.⁵⁶ Among the first state laws to mandate community notification was New Jersey's "Megan's Law," passed rapidly in 1994 in response to the rape and murder of seven-year-old Megan Kanka by a twice-convicted sex offender.⁵⁷

52. See LOGAN, *supra* note 5, at 48.

53. See LOGAN, *supra* note 5, at 49–54; Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law*, 89 IOWA L. REV. 1535, 1541–46 (2004) (describing the attacks of William and Cole Neer, Lee Joseph Islei, Polly Klaas, Ashley Estell, Amber Hagerman, and others); Daniel J. Schubert, *Challenging Ohio's Adam Walsh Act: Senate Bill 10 Blurs the Line Between Punishment and Remedial Treatment of Sex Offenders*, 35 U. DAYTON L. REV. 277, 279–81 (2010) (describing the murders of Jacob Wetterling, Megan Kanka, and others).

54. See LOGAN, *supra* note 5, at 53–55.

55. See *Id.* at 58–59. The Byrne program provided funds for various purposes related to law enforcement and the prosecution of drug-related and violent crimes. See Terence Dunworth, Peter Haynes & Aaron J. Saiger, *National Assessment of the Byrne Formula Grant Program*, National Institute of Justice (1997), available at <http://www.abtassociates.com/reports/byrne-formula.pdf>.

56. See LOGAN, *supra* note 5, at 58–59.

57. See *Sorting it Out: Megan's Law and More*, N.Y. TIMES, Nov. 1, 1994, at B6; Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, N.Y. TIMES, Nov. 1, 1994, at B1.

In the rush to pass registry legislation, anti-sex-offender rhetoric was at a fever pitch and careful consideration of the actual consequences of such laws was often discouraged.⁵⁸ In support of the New Jersey bill, one state legislator explained, "I'd rather err on the side of potential victims and not on the side of criminals We can lock away these animals and take out of our minds the doubts that our children will be the next victims."⁵⁹ In a subsequent debate in New York over its own registration law, Assembly members referred to sex offenders as "depraved," "animals," and the "human equivalent of toxic waste."⁶⁰

In May 1996, President Bill Clinton signed a federal version of Megan's Law, which made community notification mandatory for the receipt of Byrne Grant funds.⁶¹ Congress subsequently expanded and strengthened sex offender registration and notification requirements in the Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, and in numerous additional laws passed between 1997 and 2005.⁶² In 2006, the Adam Walsh Child Protection and Safety Act of 2006 (AWA) was signed by George W. Bush, replacing prior registration and notification legislation.⁶³ The AWA greatly expanded the number of crimes covered by registration laws. It then organized these crimes into a rigid, tiered classification system, with Tier III offenders considered the highest risk and Tier I the lowest, rather than permitting states to individually assess offenders' risk levels. It included juvenile offenders, and applied retroactively to persons convicted prior to the law's enactment.⁶⁴ Finally, it subjected all offenders to online community notification, and imposed harsh penalties on registration violations.⁶⁵ Many states are not fully compliant with the AWA,⁶⁶ and state officials have aggressively criticized the Act for being overinclusive and prohibitively expensive.⁶⁷ Nevertheless, state legislatures continue to pass ever-harsher registration provisions for sex offenders and expand the use of registries to those convicted of other crimes.⁶⁸

58. See Kimberly J. McLarin, *Trenton Races to Pass Bills on Sex Abuse*, N. Y. TIMES, Aug. 30, 1994, at B1. Regarding the hurried action around the New Jersey law, for example, Democrat Wayne R. Bryant of Camden complained that "[t]here is no rational reason for us to be considering any of these bills without public hearings." *Id.*

59. See *id.*

60. See Robert L. Jacobson, "Megan's Laws" Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 GEO. L. J. 2431, 2445 (1999).

61. See LOGAN, *supra* note 5, at 60.

62. *Id.* at 61–62.

63. *Id.* at 62.

64. *Id.* at 63–64.

65. *Id.* at 64.

66. For information on state compliance with the AWA, see National Conference of State Legislatures, *Adam Walsh Child Protection and Safety Act*, <http://www.ncsl.org/issues-research/justice/adam-walsh-child-protection-and-safety-act.aspx>.

67. *Id.* at 65.

68. See *infra* notes 74–107 and accompanying text.

Many of the arguments put forth in the 1930s against non-sex-offender registries cropped up again during the 1990s. Numerous news and law review articles claimed that registration and notification laws infringed on civil liberties and were overbroad, expensive, ineffective, and potentially unconstitutional.⁶⁹ Just as earlier critics had argued that hardened criminals would simply ignore anti-gangster ordinances, “social service workers [worried] that the fear of public exposure [might] drive the most dangerous offenders further underground” while simultaneously “decreas[ing] the possibility that less dangerous offenders [could] be rehabilitated through a stable life.”⁷⁰

In courts, registration and notification laws faced numerous challenges, a few of which were initially successful.⁷¹ In addition, new arguments against registries arose that were specific to sex offenses. Some were worried, for instance, that registration would reduce reporting, since “teen-age girls are less willing to turn in family members who molest them for fear their friends will find out.”⁷² Others feared the laws would serve to further oppress sexual minorities.⁷³ Despite these concerns, the move to make offender registries broader and more punitive continues unabated.

B. Current and Proposed Non-Sex Offender Registries

While the most recent wave of registries initially focused exclusively on sex crimes, the use of registries has begun to expand to include a number of additional crimes. Since the passage of Megan’s Law, state and county legislatures have passed a host of statutes creating a variety of registries for crimes such as arson,⁷⁴ murder,⁷⁵ animal abuse,⁷⁶ child abuse,⁷⁷ elder abuse,⁷⁸

69. See, e.g., Sheila A. Campbell, *Battling Sex Offenders: Is Megan’s Law an Effective Means of Achieving Public Safety?*, 19 SETON HALL LEGIS. J. 519 (1995); Filler, *supra* note 53, at 1573; *Sex-Offender Registration Laws Pit Victims’ Rights Against Civil Rights*, N.Y. TIMES, Feb. 20, 1993, at 5 (“Critics of the laws say they allow states to continue to punish offenders long after they have paid for their crimes, by essentially revoking their right to privacy.”); Nadine Strossen, *Critical Perspectives on Megan’s Law: Protection vs. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 1, 56–87 (1996) (statements of John J. Gibbons and Ronald K. Chen); Sullivan, *supra* note 57 (noting criticism of Megan’s law by the ACLU and the New Jersey State Bar Association).

70. Todd S. Purdum, *Registry Laws Tar Sex-Crime Convicts with Broad Brush*, N.Y. TIMES, July 1, 1997, at A19, available at <http://www.nytimes.com/1997/07/01/us/registry-laws-tar-sex-crime-convicts-with-broad-brush.html>.

71. See Sullivan, *supra* note 57. One federal judge in New Jersey ordered the state to stop issuing community notifications, explaining, “Even without considering the potential to incite vigilante activity, dissemination of this information could severely disrupt the lives of the plaintiffs and reduce their ability to maintain gainful employment.” Robert Hanley, *Mounting Legal Assault Against ‘Megan’s Law’: Class-Action Status Leaves Law in Limbo*, N.Y. TIMES, Mar. 16, 1996, at A27. See also Campbell, *supra* note 69, at 549–59 (outlining various state and federal challenges to registries).

72. See Sloppy “Megan’s Laws” Hinder Goal of Boosting Public Safety, USA TODAY, May 12, 1998, at 12A.

73. See Jacobson, *supra* note 60.

74. See CAL. CODE REGS. tit. 15, § 3653 (2009); LA. REV. STAT. ANN. § 15:562.3 (2010); OH. REV. CODE ANN. § 2909.15 (2013).

and methamphetamine-related offenses.⁷⁹ Additional states and legislators have proposed registries for these crimes and others, including hate crimes, drunk driving, and gun offenses.⁸⁰ The federal government and several states have registries to help track down “deadbeat” parents.⁸¹ Virginia even has a registry for dangerous dogs.⁸² While not technically registration schemes, many states have created publicly accessible, online offender search systems that include information and photographs of persons convicted of almost every crime.⁸³ In

75. See H.B. 0263, 97th Gen. Assembly (Ill. 2011), available at <http://www.ilga.gov/legislation/publicacts/97/PDF/097-0154.pdf>.

76. See SUFFOLK, N.Y., CODE §§ 299-25 to 299-33 (updated 2010), available at <http://www.ecode360.com/14944149>.

77. See CONN. GEN. STAT. ANN. § 17a-101k (West 2011); IOWA CODE ANN. § 235A.14 (West 2012); VT. STAT. ANN. tit. 33, § 4916 (West 2012).

78. See, e.g., ALASKA STAT. ANN. § 47.24.011(6) (West 2012); ARK. CODE ANN. § 12-12-1716 (West 2009); UTAH CODE ANN. § 62A-3-311.1 (West 2008). For a list of additional state elder abuse registries, see Lori Stiegel & Ellen Klem, *Abuse Registries: Comparison Chart of Provisions in Adult Protective Services Laws with Citations, by State*, AM. BAR ASS’N (2007), <http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/AbuseRegistriesComparisonChart.authcheckdam.pdf>.

79. See, e.g., MONT. CODE ANN. § 46-23-502(13)(a) (2012) (including MONT. CODE ANN. § 45-9-132 as a violent offense subject to registration). The Montana Sexual or Violent Offender Registry is available at <http://svcalt.mt.gov/svor/search.asp>. See also TENN. CODE ANN. § 39-17-436 (2006) (the Tennessee Meth Offender Registry Database is available online at <https://apps.tn.gov/methor>); ILL. ADMIN. CODE tit. 20, § 1284.10 (2007) (the Illinois Convicted Methamphetamine Manufacturer Registry is available at <http://www.isp.state.il.us/meth>); Minn. Exec. Order 06-09 (July 27, 2006), available at <http://www.leg.mn/archive/execorders/06-09.pdf> (the Minnesota Meth Offender Registry is available online at <https://mor.state.mn.us>).

80. See Goode, *supra* note 30 (“In Maine, legislators are debating an online registry of drunken drivers.”); Mal Leary, *Maine Rep. Proposes Online Registry of Drunken Drivers*, BANGOR DAILY NEWS (Apr. 4, 2011, 8:14 AM), <http://bangordailynews.com/2011/04/03/politics/drunken-driver-website-proposal-stirs-debate>; Bill Murphy, *Lawmaker Wants Hate Crime Registry*, HOUSTON CHRON. (May 9, 2006), <http://www.chron.com/news/houston-texas/article/Lawmaker-wants-hate-crime-registry-1507105.php>. For information on attempts to create various state methamphetamine offender registries see Loendorf, *supra* note 4. Several states have proposed creating registries for methamphetamine offenders. See A. 439, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A00439&term=2013&Summary=Y&Memo=Y&Text=Y; H.B. 793, 2006–2007 Gen. Assemb. (Ga. 2007), available at http://www1.legis.ga.gov/legis/2007_08/fulltext/hb793.htm; Press Release, Okla. State Legis., House Votes to Create Meth Offender Registry (Mar. 10, 2010), http://www.okhouse.gov/Media/News_Story.aspx?NewsID=3490; Ruben Diaz, Jr., *New York Needs a Gun Offender Registry*, THE HUFFINGTON POST (May 3, 2013), http://www.huffingtonpost.com/ruben-diaz-jr/new-york-city-needs-a-gun_b_3202687.html.

81. See 2012 La. Sess. Law Serv. 6:333 (West); *Location Systems*, OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/programs/cse/newhire/fcr/fcr.htm> (last visited June 7, 2013). It is important to note that while most offender registries target those who have been convicted of an offense in the past, “deadbeat dad” registries target those who are currently offending by not paying child support.

82. See 2012 Va. Legis. Serv. § 3.2-6540 (West).

83. See, e.g., *Find an Offender*, GA. DEP’T OF CORR., <http://www.dcor.state.ga.us/GDC/OffenderQuery/jsp/OffQryForm.jsp> (last visited Sep. 28, 2013); *Offender Search*, OHIO DEP’T OF REHABILITATION AND CORR., <http://www.drc.ohio.gov/OffenderSearch/Search.aspx> (last visited Sep. 28, 2013); *Offender, Information Tracking System*, MICH. DEP’T OF CORR.,

New York, there are currently two bills pending to create domestic violence offender registries (including “Danielle DiMedici and Jessica Tush’s Law,”)⁸⁴ and two bills to create an animal abusers registry (an amendment of “Buster’s Law”),⁸⁵ as well as bills to create a senior abuse registry,⁸⁶ a violent felony offenders registry (“Brittany’s Law”),⁸⁷ a registry of medical personnel terminated for cause,⁸⁸ and a methamphetamine manufacturing registry.⁸⁹ There is also a bill pending for the establishment of a registry of persons with disabilities who may need help during an emergency evacuation,⁹⁰ and a bill to require the micro-chipping and registration of dogs.⁹¹

Not only are new offender registries being created, but legislatures across the country are introducing legislation on a state, city, and county level to make the collateral consequences of existing registries, especially sex offender registries, increasingly harsh.⁹² While collateral consequences of all criminal convictions are becoming broader and more severe, consequences of registration are distinct in that they are imposed automatically based on one’s status as a registrant rather than on an individual risk assessment, type of conviction, or

<http://www.michigan.gov/corrections/0,4551,7-119-1409---,00.html> (last visited Sep. 28, 2013); *Offender Search*, N.C. DEP’T OF PUB. SAFETY <http://webapps6.doc.state.nc.us/opi/offendersearch.do> (last visited Sep. 28, 2013); *Offender Search Form*, N.J. DEP’T OF CORR., https://www6.state.nj.us/DOC_Inmate/inmatefinder?i=I (last visited Sep. 28, 2013).

84. S.2983, 2013–2014 S., Reg. Sess. (N.Y. 2013), *available at* <http://open.nysenate.gov/legislation/bill/S2983-2013>; A.2454, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A02454&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

85. S.1594-A, 2013–2014 S., Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S01594&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y; S.2305, 2013–2014 S., Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S02305&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

86. A.133, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A00133&term=2013&Summary=Y&Actions=Y&Text=Y.

87. A.2686, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A02686&term=&Summary=Y&Actions=Y&Memo=Y&Text=Y.

88. A.329, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A00329&term=2013&Summary=Y&Actions=Y&Votes=Y&Text=Y.

89. A.439, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A00439&term=2013&Summary=Y&Memo=Y&Text=Y.

90. S.3059, 2013–2014 S., Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S03059&term=2013&Summary=Y&Memo=Y&Text=Y. While such a measure is not necessarily harmful, like any registry, it contains the potential for abuse.

91. A.3611, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A03611&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

92. See Ian Lovett, *Public Place Laws Tighten Reign on Sex Offenders*, N.Y. TIMES, May 30, 2012, at A15.

facts of the crime committed.⁹³ Although registrants include those convicted of very different types of crimes, they are generally treated as a uniform group for the purpose of imposing collateral consequences, often with devastating consequences. Among the most common measures are laws imposing residency and movement restrictions on registrants, despite increasing attention to and criticism of this tactic.⁹⁴ Other passed or proposed laws have required sex offenders to wear GPS tracking devices, publicly identify themselves by post and email and on state identification, license plates, and lawn signs; submit to searches of their personal computers; be restricted or forbidden from accessing the internet; and be banned from participation in Halloween, festivals, or other public celebrations where children may be present.⁹⁵ In New York, a search of the term “sex offender” on the New York State Bill search page reveals over 150 proposals.⁹⁶ Among them are bills pending to prohibit sex offenders from entering the children’s section of a public library,⁹⁷ working at an amusement park⁹⁸ or as a building superintendent,⁹⁹ obtaining a license as a real estate appraiser¹⁰⁰ or a commercial driver,¹⁰¹ living within five hundred feet of a state- or municipal-owned park¹⁰² or in a college dormitory,¹⁰³ or serving as a volunteer firefighter.¹⁰⁴ Other bills require that state drivers’ licenses identify whether the holder is a registered sex offender,¹⁰⁵ mandate that sex offenders

93. See LOGAN, *supra* note 5, at 79.

94. These statutes have continued to proliferate in spite of persistent criticism. See Julie Wartell, *Residency Restrictions: What’s Geography Got to Do with It?*, 2 GEOGRAPHY & PUB. SAFETY 1, 2 (2009), available at <http://www.nij.gov/maps/gps-bulletin-v2i1.pdf> (“Although most research findings imply that the effects of residency restrictions are negative, many states and local jurisdictions continue to implement new laws.”).

95. See Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 448–50 (2010); LOGAN, *supra* note 5, at 78. For an example of a local festivals ban, see Commerce, Tex., Code of Ordinances ch. 66, art. IV, s 66-102(2) (2007).

96. *Open Legislation*, N.Y. STATE SENATE <http://www.nysenate.gov/legislation> (type “sex offender” into text box, and click “search”) (last visited July 14, 2013).

97. See S.88, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S88-2013>.

98. See A.387, 2013–14 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/A387-2013>.

99. See A.1122, 2013–2014 Assemb., available at <http://open.nysenate.gov/legislation/bill/A1122-2013>.

100. See A.716, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/A716-2013>.

101. See A.5532, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/A5532-2013>.

102. See A.1993, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/A1993-2013>.

103. See S.1020, 2013–2014 S., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S1020-2013>.

104. See S.1885-A, 2013–2014 S., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S1885A-2013>.

105. See S.3917, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S3917-2013>.

wear electronic monitoring devices,¹⁰⁶ and provide that a parent or guardian legally charged with the care or custody of a child is convicted of endangering the welfare of a child if he or she knowingly allows a registered sex offender to reside within the household.¹⁰⁷ Even if most of these bills will never be passed, they demonstrate the depth and breadth with which we attempt regulate the everyday lives of registrants. They also reveal the frequency with which politicians attempt to use sex offender regulations as a quick and easy way to garner support from constituents.

IV.

POLICY ARGUMENTS AGAINST THE ADOPTION OF REGISTRIES

A. Legislative and Public Support for Offender Registries

One of the reasons registries have become so prolific is that, despite empirical evidence that belies their effectiveness, they are extremely popular with legislators, who use them as a politically safe means of demonstrating that they are taking steps to reduce crime and protect communities. Law professor Wayne Logan, author of a book on the subject, has deemed offender registries “legislative catnip.”¹⁰⁸ Forensic psychologist and law professor Charles P. Ewing called them “cheap laws that can be passed to make people feel good,”¹⁰⁹ and California Assemblyman Mark Leno argued that “the issue of sex offenders [is] red meat for [] reelection.”¹¹⁰ Even Patty Wetterling, a former advocate for the creation of offender registries whose son, Jacob, was abducted in 1989, has criticized legislators for their unquestioning support of new measures. “Everybody wants to out-tough the next legislator,” she explained, “‘I’m tough on crime,’ ‘No, I’m even more tough.’ It’s all about ego and boastfulness.”¹¹¹ The number of registry laws proposed across the country is almost too great to keep track of, and for some legislators no regulation seems to be too trivial or too harsh.

Legislators who propose offender registries rarely attempt to prove that they

106. See A.3225, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/A3225-2013>; S. 3919, 2013–2014 S., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S3919-2013>.

107. See A.2004, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/A2004-2013>.

108. Goode, *supra* note 30.

109. See Lovett, *supra* note 92. A similar statement was made by Bill Piper, director of national affairs at the nonprofit Drug Policy Alliance, who called meth registries “symbolic,” saying they “[make] politicians who are really not doing anything look like they are.” See Kari Huus, *Click Here for Drug Offenders in Your Area: Internet Listings Have Popular Appeal, but Do They Really Protect the Public?*, MSNBC.COM (Dec. 7, 2006, 12:47 PM), http://www.msnbc.msn.com/id/15971396/ns/us_news-crime_and_courts/t/click-here-drug-offenders-your-area.

110. See Dignan, *supra* note 30.

111. Dan Gunderson, *Sex Offender Laws Have Unintended Consequences*, MINN. PUB. RADIO NEWS (June 18, 2007), <http://minnesota.publicradio.org/display/web/2007/06/11/sexoffender1>.

actually work, despite their high financial cost. Instead, they often rely on widespread myths and supposed “common sense” explanations. To offer just a few examples: in Oklahoma, State Representative Randy Terrill argued for the creation of a state methamphetamine offender registry, stating, “[t]his is a common-sense reform that will help us eliminate the scourge of methamphetamine production in Oklahoma”;¹¹² Kentucky State Representative Brent Yonts called a registry bill a “common sense middle ground solution to the problem of the scourge of meth that pollutes our society” (despite the fact that the Executive Director of the Kentucky Narcotic Officers’ Association noted that the number of meth labs discovered in Oklahoma shot up after that state instituted a meth registry);¹¹³ Colorado State Representative David Balmer said of a residency restriction for registered sex offenders, “[c]ommon sense tells you that if you can keep sexual predators physically away from children, then they are going to victimize children less often”;¹¹⁴ Wisconsin State Representative Cory Mason said of a similar residency restriction “[t]his bill contains common sense housing restrictions”;¹¹⁵ and in New York, Assemblyman Anthony J. Brindisi, sponsor of two measures to expand registry requirements and increase civil commitment of sex offenders, said “[t]hese laws are common sense measures that will help protect New Yorkers from violent sex offenders who . . . are not mentally fit for release from incarceration.”¹¹⁶ In legislative bodies across the country, so-called “common sense” has all but eliminated the need for research and debate on the issue of offender registries and their accompanying consequences. This is the case even when legislators are confronted with evidence demonstrating the ineffectiveness of registry laws.¹¹⁷ As Mark Leno quipped, “[w]e’ve left the realm of sensibleness, reason and rationality.”¹¹⁸

Any opposition to registries is quickly spun as expressing sympathy for

112. Press Release, Okla. State Legis., House Votes to Create Meth Offender Registry (Mar. 10, 2010), http://www.okhouse.gov/Media/News_Story.aspx?NewsID=3490.

113. *Kentucky State Representative Advocates Meth offender Registry*, WDRB.COM (Nov. 22, 2011 4:23 PM), <http://www.wdrb.com/story/16103841/kentucky-state-representative-advocates-meth-offender-registry>.

114. John Ingold, *Lyons Debating Sex-offender Registry Rules*, DENVER POST (Apr. 16, 2007 1:00 AM), http://www.denverpost.com/newsheadlines/ci_5675257.

115. Derica Williams, *Lawmakers Push to Change Law Regarding Accused Sex Offenders*, FOX6NOW.COM (Apr. 22, 2013 5:26 PM), <http://fox6now.com/2013/04/22/lawmakers-push-to-change-law-regarding-accused-sex-offenders>.

116. Rick Karlin, *Cracking Down on Sex Offenders*, CAPITOL CONFIDENTIAL (Aug. 2, 2012, 3:44 PM), <http://blog.timesunion.com/capitol/archives/142869/cracking-down-on-sex-offenders>.

117. See Lindsay A. Wagner, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 DREXEL L. REV. 175, 187-88 (2009) (quoting Edward Sieban, trustee of East Rockaway Village, New York) (“I’d rather err on the side of keeping sex offenders as far from our children as possible than worry about what an expert who doesn’t live in my village has to say.”). See also Paula Reed Ward, *Residency Restrictions for Sex Offenders Popular, but Ineffective*, PITTSBURGH POST-GAZETTE (Oct. 26, 2008 12:00 AM), <http://www.post-gazette.com/stories/local/region/residency-restrictions-for-sex-offenders-popular-but-ineffective-618411/>.

118. See Dignan, *supra* note 30.

vicious criminals. Representative Monique Davis, the only member of the Illinois General Assembly to oppose the recent creation of a state murder registry, explained that opposing a registry is "very difficult to do, because sometimes the public perceives you as being soft on crime."¹¹⁹ Mark Leno went further, arguing that "[t]his is the new McCarthyism, that if you dare to challenge or even criticize their ridiculous approach to dealing with this issue . . . they'll attempt to destroy you."¹²⁰ Because of this political dynamic, even those legislators who are wary of offender registries are often hesitant to openly oppose them lest they be deemed pro-criminal, a pervert, or even a "danger to society," as California Republican Party's Communications Director Karen Hanretty called Assemblyman Leno.¹²¹ While some prosecutors and law enforcement officials have spoken out against offender registry laws,¹²² extremely few legislators have been willing to spend precious political capital taking a strong public stand against such laws.¹²³

Several commentators have attempted to discern why offender registries garner such strong public support despite their lack of proven effectiveness.¹²⁴ Molly J. Walker Wilson, a law and psychology professor, has suggested that the reason for registries' enduring popularity in the face of a "wealth of evidence" against their use is that registries make the public "feel safer by providing an increased sense of control over the sources of risk that seem most threatening."¹²⁵ Wilson points out that "Americans maintain a relatively high level of anxiety about being victims of crime."¹²⁶ She uses evidence from the behavioral sciences to show that, regardless of its effectiveness, community notification of sex offenders is "psychologically appealing because it allows members of society to assume partial control over protecting their neighborhoods."¹²⁷ Law professor Allegra M. McLeod similarly proposes that

119. Goode, *supra* note 30.

120. Dignan, *supra* note 30.

121. *Id.*

122. See, e.g. Ward, *supra* note 117; Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES (Mar. 15, 2006), <http://www.nytimes.com/2006/03/15/national/15offenders.html?pagewanted=all> (outlining criticism of Iowa offender residency restriction laws, including from Chief Deputy for the Dubuque County Sheriff's Office, Don Vrotsos, Don Zeller, Linn County Sheriff, and others in law enforcement); *Sex Offender Notification and Registration Act (SORNA): Barriers to Timely Compliance by States: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 58 (2009) [hereinafter Devillier Statement] (statement of Emma J. Devillier, Assistant Att'y Gen., Criminal Div., Office of the Att'y Gen. of Louisiana, Chief, Sexual Predator Unit, Baton Rouge, La.).

123. See Wagner, *supra* note 117, at 187-88 ("Many politicians admit there is little research to support the restrictions, but they feel as though they cannot vote against them . . ."); Goode, *supra* note 30.

124. See, note 121-127 and accompanying text.

125. Wilson, *supra* note 4, at 509, 513.

126. *Id.* at 542.

127. *Id.* at 541.

registries “alleviate[] social anxiety” about the difficulty of addressing far more common instances of sexual harm in schools, families and churches.¹²⁸ McLeod theorizes that by publicly identifying and physically separating “sexually dangerous strangers,” we are able to “reinforce[] a collective fantasy about sexual pathology as external and about the sexual normalcy of conventional family structures and social institutions.”¹²⁹ In doing so, we justify a status quo that has proven ineffective at preventing sexual harm.¹³⁰ Criminal Law professor Catherine L. Carpenter has linked the rapid growth of sex offender registration laws to a number of social forces, including compelling spokespersons and increased media reporting of child sexual abuse involving previously convicted sex offenders.¹³¹ Regardless of whether support for registries is rooted in psychology, cultural factors, or mere misinformation, it is clear that broad criticism of offender registries, and even empirical evidence that suggests they are ineffective, has thus far been insufficient to turn legislatures and the public against their use.¹³²

B. Intent of Offender Registries

Although their effectiveness is ill-supported, registries are intended to reduce crime and protect the public in a number of ways. I have outlined below the main rationales put forth in support of offender registries. Supporters of sex offender registries originally claimed that they were necessary to monitor sex offenders because of their unique characteristics, including high rates of recidivism. Now, these claims have been applied to a wide swath of offenders, including those convicted even of minor, nonviolent offenses such as drug crimes. As New York State Senator Eric Adams said of a proposed domestic violence registry, “we already have the wheel invented—we’re just adding a new spoke.”¹³³

1. Informing Individuals About Criminals in Their Neighborhood

By providing information to the public about potentially dangerous predators in one’s midst, registries allow “innocent” citizens to take measures to protect themselves and their families. The legislative memo for the proposed New York violent offender registry (“Brittany’s Law”) claims the measure will

128. See Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Inmates and Social Institutional Reform* (2013) (unpublished law review article) (on file with author).

129. *Id.*

130. *Id.*

131. See Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 29, 38 (2010) (“[T]he credibility of the message [for community notification statutes] came from Megan’s parents themselves. Their tragic loss and suffering made them credible spokespersons . . .”).

132. See *supra* notes 117–123 and accompanying text.

133. Garth Johnston, *NY Lawmakers Propose Domestic Violence Registry*, GOTHAMIST (Apr. 18, 2011 6:10 PM), http://gothamist.com/2011/04/18/pols_propose_domestic_violence_regi.php.

“protect individuals from victimization” and “provide[] important information to communities since violent felony offenders pose a high risk of reoffending once released from custody.”¹³⁴ Advocates of domestic abuse registries have claimed that their proposals would “empower potential victims of domestic violence with information so that they themselves can make choices that will avoid years of suffering and abuse.”¹³⁵ In defending Minnesota’s meth offender registry, Governor Tim Pawlenty argued, “When you have public awareness of the presence of these individuals, there will be further accountability by neighbors, by people who are interested in making sure that their areas of work or residence are safe.”¹³⁶ A spokesperson for Pawlenty explained, “[w]e want to arm citizens with information, so they can protect themselves and their communities.”¹³⁷ Georgia State Representative Mike Coan, who has advocated for a meth offender registry, has commented, “If there’s one living near me, I want to know it.”¹³⁸ Representative Dennis Reboletti, chief House sponsor of Illinois’s murder registry, echoed these sentiments, explaining “I think it would serve to allow all of our communities to know who resides there, who our family members are associated with, who our children are dating . . . so that we know where these murderers live, that we are able to track their movement.”¹³⁹ Relying more on

134. Legislative Memorandum, S.1850A, 2013–2014 S., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S1850A-2013#Memo>

135. Elaine M. Chiu, *That Guy’s a Batterer! A Scarlet Letter Approach to Domestic Violence in the Information Age*, 44 FAM. L.Q. 255, 257 (2010). See Joyce Y. Young, *Three Strikes and You’re In: Why the States Need Domestic Violence Databases*, 90 TEX. L. REV. 771, 776 (2012) (“The database provides information crucial to a woman’s decision of whether to embark on a relationship with an individual.”).

136. Laura McCallum, *Pawlenty’s Meth Registry: Good Policy or a Gimmick?*, MINN. PUB. RADIO NEWS (July 27, 2006), <http://minnesota.publicradio.org/display/web/2006/07/27/methregistry>.

137. Donna Leinwand, *States List Meth Offenders on the Web*, USA TODAY (Aug. 23, 2006, 12:15 AM), http://usatoday30.usatoday.com/news/nation/2006-08-22-meth-registries_x.htm. See Minn. Exec. Order 06-09 (July 27, 2006), available at <http://www.leg.mn/archive/execorders/06-09.pdf> (“[A] publicly-accessible registry of the most serious methamphetamine offenders, will provide citizens with useful information on persons convicted of manufacturing or selling methamphetamine in their communities and allow members of the public to better protect themselves and their communities.”).

138. See Huus, *supra* note 109.

139. Stephen Di Benedetto, *Should Murderers Have to Register as Sex Offenders Do?*, HERALD NEWS (Apr. 6, 2011, 4:44 PM), <http://heraldnews.suntimes.com/news/4690199-418/should-murderers-have-to-register-as-sex-offenders-do.html>. Despite these claims, the link between knowledge of offender identities and protection from crime seems tenuous and legislators rarely offer data supporting their assumption that any such link exists. The legislative memo for New York’s proposed domestic Violence Registration Act reads, “Many people get into relationships without knowing those they are dating full history [sic]. This type of situation is especially true of those who get involved domestic violence offenders [sic]. In addition there seems to be a pattern of those who are victims of domestic violence getting involved with people who have this history.” Besides its obvious grammatical errors and strange wording, this explanation is inadequate to justify the proposed registry since it does not give any reason to believe that mere knowledge of a potential partner’s history of domestic violence will in fact protect victims from future violence. See Legislative Memorandum, A.7275, 2011–2012 Assemb.,

assumption than research, legislators repeatedly claim that access to information about convicted offenders, including their home addresses, will prevent harm.

2. Strengthening Police Ability to Solve Crime

Registries are supposed to aid law enforcement, presumably by providing them with a list of potential suspects for crimes committed in a particular geographic area. The legislative memo for New York's proposed Brittany's Law contends that the registry will "provide law enforcement . . . with a valuable investigative tool in the fight against violent crime."¹⁴⁰ Minnesota's meth offender registry executive order states "a centralized registry of persons convicted of manufacturing and/or selling methamphetamine would assist law enforcement."¹⁴¹ In a slightly different argument, the legislative memo for New York's proposed domestic violence registry claims that "[t]he information collected in that registry will provide law enforcement with data necessary to track these patterns of behavior and to determine rates of recidivism."¹⁴² Ironically, many members of law enforcement have spoken out against current registries, explaining that they consume enormous resources with little clear benefit.¹⁴³ Nevertheless, legislators continue to claim that registry laws will aid law enforcement in solving and preventing crime.

3. Deterring Offenders

Registries are intended to deter would-be first-time offenders who do not wish to be entered into the registry, as well as those who have already been convicted and know that the police have their information and will seek them out if a crime occurs.¹⁴⁴ Texas State Representative Jason Villalba, one of the

Reg. Sess. (N.Y. 2011), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A1099&term=&Memo=Y.

140. Legislative Memorandum, A. 9019, 2011–2012 Assemb., Reg. Sess. (N.Y. 2011), available at http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A9019&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

141. Minn. Exec. Order 06-09 (July 27, 2006), available at <http://www.leg.mn/archive/execorders/06-09.pdf>.

142. Legislative Memorandum, A. 2454, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A2454&term=2013&Memo=Y; S. 5896, 2013–2014 S., Reg. Sess. (N.Y. 2013), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A02454&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

143. See, e.g., Ward, *supra* note 117; Davey, *supra* note 122; Devillier Statement, *supra* note 122.

144. Minn. Exec. Order 06-09 (July 27, 2006), available at <http://www.leg.mn/archive/execorders/06-09.pdf> ("[P]ublic exposure of methamphetamine manufacturers and dealers is likely to have a deterrent effect on prospective manufacturers and sellers of this harmful and toxic drug."). See A.439, 2011–2012 Assemb., Reg. Sess. (N.Y. 2011), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A00439&Summary=Y&Actions=Y&Memo=Y ("By making their prior activities known to their neighbors and by making the details of their convictions widely available to the public via the internet we believe that this program can act as effective deterrent against methamphetamine use and manufacture in this

authors of a proposed domestic violence registry, explains that the registry and other measures send “a powerful message to repeat abusers—domestic violence will have severe, long-term consequences You could wind up on the domestic violence offender registry Think before you act.”¹⁴⁵ Similarly, the legislative memo for New York’s domestic violence registry claims that it will serve as a “disincentive for additional abusive behavior, violati[on of] an order of protection or future violent behavior.”¹⁴⁶ The bill claims that since “[r]esearch has shown that ‘offenders with higher stakes in conformity are less likely to recidivate,’ the threat of public disclosure of this behavior, may, therefore, be an effective deterrent in some cases.”¹⁴⁷ According to the Minnesota executive order, “public exposure of methamphetamine manufacturers and dealers is likely to have a deterrent effect on prospective manufacturers and sellers.”¹⁴⁸ The legislative memo for New York’s proposed meth offender registry urges the state to “be proactive toward curbing the manufacture of Methamphetamine by adding additional deterrents”¹⁴⁹ More specifically, its author claims that “[b]y making their prior activities known to their neighbors and by making the details of their convictions widely available to the public via the internet we believe that this program can act as effective deterrent against methamphetamine use and manufacture in this state.”¹⁵⁰ As I will discuss later in the article, evidence shows that offender registries, and the crushing collateral consequences that often accompany them, may actually increase rather than deter the incidence of recidivism.¹⁵¹

4. Limiting Access to Victims

Statutes that impose residency and other restrictions on registrants, as well as registries themselves, are supposed to minimize opportunities to reoffend. In theory, parents who are aware of the presence of a sex offender in their neighborhood will teach their children to avoid him or her. This purpose does not apply solely to sex offense registries. For example, the legislative memo for New York’s proposed animal abuse registry explains “[t]he thinking behind establishment of animal abuser registries is that it would prevent access to those convicted of animal abuse of adopting or purchasing animals as it would prohibit

state.”).

145. Press Release, Rep. Jason Villalba, Rep. Villalba Announces Four Bills Combating Domestic Violence in Texas (Mar. 6, 2013), http://www.house.state.tx.us/news/press-releases/?id=4378&session=83&district=114&bill_code=2855.

146. Legislative Memorandum, A. 2454, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/A2454-2013>.

147. *Id.*

148. Minn. Exec. Order 06-09 (July 27, 2006), available at <http://www.leg.mn/archive/execorders/06-09.pdf>.

149. A. 439, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/A439-2013>.

150. *Id.*

151. See *infra* notes 156–169 and accompanying text.

pet stores and animal shelters from selling pets or allowing them to be adopted by individuals on the Animal Abuse registry.”¹⁵² New York’s domestic violence registry is intended to protect both past and potential victims from abusers. According to its legislative memo, the registry will “allow domestic abuse victims to know the location of their past offenders and will assist in empowering the victim to feel—and be safer [sic].”¹⁵³ With regards to future victims, the registry is intended to notify “potential victims if someone they are becoming involved with has a history of dangerous behavior,” which the memo claims “has the potential to save lives.”¹⁵⁴ Despite the fact that many offenses are committed by victims’ relatives, teachers, or classmates, and other community members, legislators argue that labeling and physically separating registered offenders will protect victims from dangerous predators.

5. *Creating an Additional Penalty to Crime*

As will be discussed more thoroughly in the legal portion of this memo, courts and legislators deny that registries are a form of punishment.¹⁵⁵ This, however, is a legal fiction—the breadth of the consequences imposed by registration laws as well as the vehemence displayed towards offenders, especially sex offenders, by legislators and the public reveals an unvoiced intent to punish registrants.

C. *Efficacy*

The efficacy of existing registries is highly contested. While politicians continue to extol them, recent studies have found that registries are largely based on faulty assumptions and flawed logic, making them at best only minimally effective to the public and law enforcement.¹⁵⁶ Even more troubling, registries may create various perverse incentives for offenders to recidivate, judges and prosecutors to alter charges, and victims to under-report, and additionally may make it easier for drug users to find local drug dealers.¹⁵⁷ The existing data is based solely on sex offender registries. There is reason to believe these findings would apply to other kinds of registries, however, since creation of these newer registries is not based on independent research. Rather, they are predicated on the same untested, “common sense” arguments that motivated sex offender

152. See Legislative Memorandum, A.299, 2011–2012 Assemb., Reg. Sess. (N.Y. 2011), available at http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A299&term=2011&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

153. Legislative Memorandum, A. 2454, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://open.nysenate.gov/legislation/bill/S2983-2013>; S.B. 5896, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A02454&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

154. *Id.*

155. See *infra* notes 274–291 and accompanying text.

156. See *infra* notes 158–178 and accompanying text.

157. See *infra* notes 266–273 and accompanying text.

registration requirement. I would encourage researchers interested in the expansion of offender registries to conduct new research studying the effectiveness of meth offender, domestic violence, and other registries.

1. *Studies Show that Registration and Notification Laws Do Not Prevent Crime*

Two studies, both published in 2011 by the University of Chicago Journal of Law & Economics, reveal that sex offender registration and notification may have little effect on, or even increase, the number of sex offenses committed. The first study analyzed data from the National Incident-Based Reporting System, and found that while sex offender registration appears to lower the overall number of sex offenses by deterring those not already on registries, offender notification has the perverse effect of increasing recidivism among registered sex offenders.¹⁵⁸ The authors suggest that this result follows from the fact that “notification imposes severe costs that offset the benefits to offenders of forgoing criminal activity.”¹⁵⁹ These costs include social stigma and limitations on where offenders may find housing and employment, which in turn cause psychological stress and hinder rehabilitation.¹⁶⁰ The study suggests that since the positive deterrence effect and negative recidivism effect of laws that combine registration and notification requirements tend to balance each other out, such laws may not be worth their high economic and societal costs.¹⁶¹

The second study looked at three different data sets, none of which suggest

158. See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 181 (2011) (“[W]hereas some nonregistered or potential offenders may be deterred by the threat of notification and its associated costs, the ex post imposition of those sanctions on convicted offenders may make them more likely to recidivate.”).

159. *Id.* at 161.

160. Jill S. Levenson, David A. D’Amora & Andrea L. Hern, *Megan’s Law and its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCI. & L. 587, 598 (2007) (“[S]ocial policies that ostracize and disrupt the stability of sex offenders are unlikely to be in the best interest of public safety.”); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207, 213 (2011) (“[C]ommunity notification may increase recidivism through increased stress caused to offenders by ‘threats of bodily harm, termination of employment, on-the-job harassment, and forced instability of residence. . . .’”). See ELIZABETH J. LETOURNEAU, JILL S. LEVENSON, DIPANKAR BANDYOPADHYAY, DEBAJYOTI SINHA & KEVIN S. ARMSTRONG, EVALUATING THE EFFECTIVENESS OF SEX OFFENDER REGISTRATION AND NOTIFICATION POLICIES FOR REDUCING SEXUAL VIOLENCE AGAINST WOMEN 4, 9–10 (2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf> (“Psychosocial stressors such as shame, embarrassment, depression, or hopelessness are frequently reported by sex offenders as common byproducts of public disclosure . . . the negative impact of these laws on offender reintegration might increase recidivism rates.”). This perverse effect was also discussed by Assistant Attorney General of Louisiana, Emma Devillier, in testimony before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. See Devillier Statement, *supra* note 122. Devillier noted that “[s]ome States are concerned that the inclusion of the sex offender’s employment address and school address will impede reintegration of sex offenders into the community by making it much more difficult to obtain employment, de-stabilize offenders and be counter productive to public Safety.” *Id.*

161. See Prescott & Rockoff, *supra* note 158, at 182.

that registries are effective in deterring sex crimes.¹⁶² Comparing national crime statistics with the date of registry implementation in forty-eight states, the study did not find any significant decrease in the rate of rape or the arrest rate for sexual abuse following registration or notification mandates.¹⁶³ Data from the Bureau of Justice Statistics that tracked individual sex offenders did not show that registration reduced rates of recidivism.¹⁶⁴ Finally, an analysis of crime rates in Washington, D.C. suggested that “knowing where a sex offender lives does not reveal much about where sex crimes, or other crimes, will take place.”¹⁶⁵

A third study on South Carolina’s sex offender registry law, which is one of the most broad and punitive in the nation,¹⁶⁶ was done by the Medical University of South Carolina. It showed some deterrence effect on first-time offenders but no effect on recidivism.¹⁶⁷ In a fourth study, a comparison of the rates at which sex crimes were committed in ten states before and after they passed notification and registration laws showed that “sex offender legislation seems to have had no uniform and observable influence on the number of rapes reported in the states analyzed.”¹⁶⁸ Numerous other studies have found similar results.¹⁶⁹

Critiques of the collateral consequences of offender registration, particularly residency restrictions, cite similar failures. A multitude of studies, including several published or promoted by state law enforcement, have found that residency restrictions do not protect communities since there is “no relationship between sex offending and residential proximity to locations where children congregate.” Residency restrictions prevent offenders from accessing treatment,

162. Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207 (2011).

163. *Id.* at 219–25.

164. *Id.* at 225–31.

165. *Id.* at 234.

166. See LETOURNEAU, LEVENSON, BANDYOPADHYAY, SINHA & ARMSTRONG, *supra* note 160, at 19 (“South Carolina’s registration policies . . . are of interest because they exceed, in nearly every respect, the original federal registration and community notification requirements established by the Jacob Wetterling, Megan Kanka, and Pam Lychner Acts in the 1990’s . . . and continue to exceed many of the expanded requirements more recently established by the Adam Walsh Act.”) (citations omitted).

167. *Id.* at 4–5.

168. Bob Edward Vásquez, Sean Madden & Jeffery T. Walker, *The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQUENCY 175, 188 (2008).

169. For a review of the literature on this subject, see *id.* at 176–82. See also Richard Tewksbury, Wesley G. Jennings & Kristen Zgoba, *Final Report on Sex Offenders: Recidivism and Collateral Consequences*, National Institute of Justice, 60 (Sep. 30, 2011), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf> (outlining the results of two studies which suggest that SORNA “is not likely an effective deterrent for sex offender recidivism (which by itself is not a highly likely occurrence) and may produce an environment with specific collateral consequences that inhibit reintegration efforts post-prison release for sex offenders”).

and “[w]ithout treatment, offenders are more likely to commit new crimes.”¹⁷⁰ Julie Wartell of the San Diego District Attorney’s Office called for a more evidence-based approach to sex offender legislation, explaining that “[a]lthough most research findings imply that the effects of residency restrictions are negative, many states and local jurisdictions continue to implement new laws.”¹⁷¹ Kristin Preston of the Pinellas County, Florida, Sheriff’s Office warned, “[r]esidency restrictions may do more harm than good, and waste law enforcement resources when probation officers must monitor offenders for compliance.”¹⁷² A variety of persons involved in law enforcement and prosecution echo these sentiments.¹⁷³

As registries expand, they become even less useful to both the public and law enforcement. The vast overinclusiveness of many registries, discussed in more detail below, makes it harder for police officers to identify and monitor those offenders who actually pose a public safety risk.¹⁷⁴ AAG Emma Devillier testified that “as a prosecutor who has specialized in sex crimes, I can tell you that SORNA’s offense-based . . . retroactive system is overinclusive, overly burdensome on the state, exorbitantly costly, and will actually do more to erode community safety than to strengthen it.”¹⁷⁵ Devillier went on to say that this

170. Ron Wilson, *Geographic Research Suggests Sex Offender Residency Laws May Not Work*, 2 GEOGRAPHY & PUB. SAFETY 11 (2009).

171. Wartell, *supra* note 94, at 2.

172. Kristin Preston, *Right Place, Right Time: GPS Monitoring in Pinellas County*, 2 GEOGRAPHY & PUB. SAFETY 3 (2009).

173. See, e.g., *id.* (“[H]ousing restrictions have minimal effect on sex offenders’ recidivism rates and could prevent them from stably reintegrating into society”); CAL. SEX OFFENDER MGMT. BD., HOMELESSNESS AMONG REGISTERED SEX OFFENDERS IN CALIFORNIA: THE NUMBERS, THE RISKS, AND THE RESPONSE 2, 27 (2008), available at <http://www.casomb.org/docs/Housing2008Rev15FINAL.pdf> (“The evidence shows an unmistakable correlation between the implementation of residency restrictions and the increase in homelessness among registered sex offenders. The evidence shows that homelessness increases the risk that a sex offender may reoffend.”); COLO. DEP’T OF PUB. SAFETY, DIV. OF CRIMINAL JUSTICE, SEX OFFENDER MGMT. BD., REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATIONS OF SEX OFFENDERS IN THE COMMUNITY 4 (Mar. 15, 2004), available at http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf (“Placing restrictions on the location of correctionally [sic] supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism.”); IOWA CNTY. ATTORNEYS ASS’N, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA 1 (2006), available at <http://www.iowa-icaa.com/ICAASTATEMENTS/SexOffenderResidencyStatementDec1106.pdf> (“Research shows that there is no correlation between residency restrictions and reducing sex offenses against children or improving the safety of children.”); Grant Duwe, *Residency Restrictions and Sex Offender Recidivism: Implications for Public Safety*, 2 GEOGRAPHY & PUB. SAFETY 6 (2009) (“[R]ecent research suggests that [residency] restrictions have almost no impact on sex offender recidivism and may compromise public safety.”); Ron Wilson, *supra* note 170 (explaining, from the perspective of an analyst for the National Institute of Justice, why residency restrictions limit offenders from getting treatment and do not prevent crime).

174. HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE U.S. 9, 9–10 (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf> [hereinafter NO EASY ANSWERS].

175. Devillier Statement, *supra* note 122, at 55.

problem was not unique to her state, and that several states “are concerned that quarterly registration will divert law enforcement resources away from the more important public safety task of compliance checks to do less important administrative tasks.”¹⁷⁶ This concern was repeated in testimony by Detective Shilling of the Seattle Police, who argued that more nuanced risk assessments of offenders are needed to “put precious public safety resources where they are needed the most, monitoring the highest-risk offenders.”¹⁷⁷ Despite these calls to pare down registries, the number and scope of registry laws continue to grow.¹⁷⁸

2. *The Myth of the Incurable Offender*

One of the most-cited justifications for registries, repeated time and time again by courts and legislators, is certain offenders, particularly sex offenders, have very high rates of recidivism or even are “incurable.”¹⁷⁹ Several studies have cast doubt on this assumption, and found that most convicted sex offenders do not reoffend and do not commit the vast majority of sex crimes.¹⁸⁰ Rates of recidivism are particularly low for juvenile offenders.¹⁸¹ Even some who

176. *Id.* at 58.

177. *Sex Offender Registration and Notification Act (SORNA): Barriers to Timely Compliance by States: Hearing Before the Subcomm. on Crime, Terrorism and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 89 (2009) [hereinafter Shilling Statement] (statement of Robert Shilling, Seattle Police Dep’t, Sex & Kidnapping Offender Detail, Sexual Assault & Child Abuse Unit, Seattle, Wash.).

178. See *supra* notes 74–107 and accompanying text.

179. See *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 32–33) (“[W]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault.”); *Smith v. Doe*, 538 U.S. 84, 93 (2003) (“Here, the statutory text states the legislature’s finding that sex offenders pose a high risk of reoffending.”); *Cutshall v. Sundquist*, 193 F.3d 466, 476 (6th Cir. 1999) (“[S]tudies have indicated that sexual offenders have high rates of recidivism.”); *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005) (“Sex offenders have a high rate of recidivism”); *id.* at 721 (“In light of the high risk of recidivism posed by sex offenders, . . . the legislature reasonably could conclude that [a statute governing Iowa sex offender residence] would protect society by minimizing the risk of repeated sex offenses against minors.”); *Russell v. Gregoire*, 124 F.3d 1079, 1087 (9th Cir. 1997) (quoting the Community Protection Act, 1990 Wash. Laws, ch. 3, § 401) (“The legislature finds that sex offenders often pose a high risk of reoffense”).

180. A study prepared for the Department of Justice by researchers at the Medical University of South Carolina notes the following:

[T]he rate of recidivism is lower than generally expected. For example, the 3-year sexual rearrest rate for a large sample ($N > 9,000$) of previously incarcerated U.S. sex offenders was 5.3% (Bureau of Justice Statistics, 2003). Recidivism rates vary with followup periods, but it has been found that even over periods of up to 20 years, the majority of convicted sex offenders are not subsequently rearrested for new sex crimes.

LETOURNEAU, LEVENSON, BANDYOPADHYAY, SINHA & ARMSTRONG, *supra* note 160, at 7. See also NO EASY ANSWERS, *supra* note 174; Roger N. Lancaster, *Sex Offenders: The Last Pariahs*, N.Y. TIMES, Aug. 21, 2011, at SR6 (“Only a tiny proportion of sex crimes are committed by repeat offenders.”).

181. NO EASY ANSWERS, *supra* note 174, at 9 (discussing a study showing a recidivism rate of only four percent for youth arrested for sex crimes, a general trend of low recidivism rates among

previously claimed that sex offenders were incurable have publicly acknowledged this new data. Victims' rights advocate Robert Longo, who "remembers appearing on 'Donahue' and 'Oprah' in the 1980s, making pronouncements like: 'Sex offenders can't be cured,'" now admits that such statements were not based on good research.¹⁸² "We were desperately trying to bring attention to the issue . . . and we went way overboard," Longo explains.¹⁸³ The inevitable conclusion is that registries incite public fear and impose heavy burdens on offenders without any evidence that sex offenders are particularly likely to reoffend in the absence of registration and notification requirements.

Legislators seeking to create new registries have adopted the myth of the incurable offender and applied it to other types of crime—notably violent offenses and drug crimes.¹⁸⁴ Georgia Representative Mike Coan, in fighting for a meth offender registry, has claimed, "the likelihood of them going back and doing it again is high."¹⁸⁵ A failed attempt at establishing a national meth offender registry received support from the Fraternal Order of the Police, who cited "high rates of recidivism among crack and meth dealers."¹⁸⁶ The legislative memorandum for New York's proposed violent offender registry claims that "violent felony offenders . . . research indicates . . . are likely to repeat violent crimes upon release from prison."¹⁸⁷ As legislators, citing inflated recidivism rates, introduce more and more types of public offender registries, helping offenders move past their crimes and reenter society becomes increasingly difficult.

3. Registries Are Both Overinclusive and Underinclusive

Existing registries include, either intentionally or by clerical error, many individuals who no longer or at no point posed any public danger whatsoever. In the case of sex offense registries, the decision to include someone on a registry is often not based on a fact-specific assessment of their risk level. Rather, registration in many states is automatically imposed upon conviction of an ever-

youth sex offenders, and a majority of adult offenders who were not formerly youth offenders); LOGAN, *supra* note 5, at 127 ("[J]uveniles, compared to adults, have substantially lower rates of recidivism, show a greater response to treatment, and are less likely to reoffend if given treatment.").

182. Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid with Real Boundary Problems?*, N.Y. TIMES MAG., July 22, 2007, available at http://www.nytimes.com/2007/07/22/magazine/22juvenile-t.html?_r=2&oref=slogin&.

183. *Id.* at 36.

184. See A. 2686, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A02686&term=&Summary=Y&Actions=Y&Memo=Y&Text=Y; Huus, *supra* note 109.

185. See Huus, *supra* note 109.

186. *Id.*

187. A. 2686, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A02686&term=&Summary=Y&Actions=Y&Memo=Y&Text=Y.

increasing number of crimes that could *potentially* involve a sex offense, even if a particular registrant's actions were not sexual in nature.¹⁸⁸ State laws may require registration of persons convicted of nonviolent crimes such as public urination,¹⁸⁹ buying or selling sex,¹⁹⁰ adult incest,¹⁹¹ bestiality,¹⁹² "sexting,"¹⁹³ and even consensual sex between teens close in age.¹⁹⁴ Other states register persons convicted of crimes against children performed with no sexual motivation or sex act.¹⁹⁵ Despite the holding of *Lawrence v. Texas*, which found criminal sodomy laws to be unconstitutional, some persons are still included on

188. See Carpenter & Beverlin, *supra* note 3, at 1079 ("The revised registration schemes include an ever-increasing number of registerable offenses . . . and the systematic elimination of individualized risk assessment . . .").

189. See NO EASY ANSWERS, *supra* note 174, at 39; Yung, *supra* note 95, at 456.

190. See NO EASY ANSWERS, *supra* note 174, at 39; Yung, *supra* note 95, at 476.

191. See UTAH CODE ANN. § 77-41-102(14)(a)(xvii) (West 2012) (including persons convicted of incest in the statutory definition of "sex offender"); Yung, *supra* note 95, at 455.

192. See Nowicki, *supra* note 4, at 200 ("[S]ome state statutes include provisions requiring animal sexual abusers to register" as sex offenders."); Yung, *supra* note 95, at 455. While bestiality may rise to the level of animal cruelty in some cases, it is not by definition a violent crime. In fact, at least one registered sex offender has been convicted for committing bestiality on an animal that was already dead. *Wisconsin v. Hathaway*, 747 N.W.2d 529 (Wis. Ct. App. 2008).

193. See Stephanie Gaylord Forbes, *Sex, Cells, and SORNA: Applying Sex Offender Registration Laws to Sexting Cases*, 52 WILLIAM & MARY L. REV. 1717, 1725-27 (2011). The author describes prosecutions of teens for owning or sending sexually explicit text messages of other teens ("sexts"), including the prosecution and subsequent registration of Jorge Canal, Jr., who is currently listed on the Iowa Sex Offender Registry. At nineteen, Jorge was convicted for "sending a fourteen-year-old female friend a picture of his erect penis 'after [the girl] asked him to send a photograph of his penis three or four times.'" *Id.* at 1726.

194. For example, the plaintiffs in the class action *Whitaker v. Perdue*, challenging Georgia's sex offender registry law, included Wendy Whitaker, who at seventeen had consensual oral sex with a fifteen-year-old, Joseph Linaweaver, who at sixteen had consensual oral sex with a fourteen-year-old, and Jefferey York, who at seventeen had consensual oral sex with a fifteen-year-old. See Amended Complaint—Class Action for Injunctive Relief, *Whitaker v. Perdue*, No. 4:06-cv-140-CC, 2006 WL 2378219 (N. D. Ga. July 7, 2006) [hereinafter *Whitaker Complaint*]. There are numerous other juveniles who have been required to register as sex offenders for having consensual sex with their peers. For several stories of these registrants, see Stephanie Chen, *After Prison, Few Places for Sex Offenders to Live*, WALL ST. J., Feb. 19, 2009, at A16, available at <http://online.wsj.com/article/SB123500941182818821.html> (writing about Christopher Noles, who at seventeen was convicted for having consensual sex with his fourteen-year-old girlfriend, whom he later married); Abigail Pesta, *The Accidental Sex Offender*, MARIE CLAIRE, August 2011, at 102 (writing about Frank Rodriguez, who at nineteen was convicted for having consensual sex with his sixteen-year-old girlfriend, whom he later married); Abigail Pesta, *Laws Gone Wild: As Teen Sweethearts Go to Prison for Sex, Mothers Rebel*, THE DAILY BEAST (Jan. 25, 2012, 4:45 AM), <http://www.thedailybeast.com/articles/2012/01/25/should-teens-be-jailed-for-sex-offenses-a-growing-parental-rebellion-says-no.html> (writing about Ken Thornsberry, who at eighteen was convicted for having consensual sex with his fourteen-year-old girlfriend. The two continued dating after he returned from jail, and Thornsberry was convicted and sentenced to jail a second time).

195. See Carpenter & Beverlin, *supra* note 3, at 1084 ("Today, however, registration schemes include mandatory registration for crimes committed against minors, even when there is no sexual purpose or contact."). The authors offer several examples of this phenomenon, including the sex offender registration of a person who had robbed a minor, and a man who had kidnapped his granddaughter for financial gain. *Id.* at 1085-86.

sex offender registries for consensual sodomy convictions that occurred prior to the Supreme Court's decision.¹⁹⁶ Individuals listed on state sex offender registries have included a seventeen-year-old boy who falsely imprisoned another seventeen-year-old boy to collect money related to a drug trade,¹⁹⁷ a mother who permitted her fifteen-year-old daughter to have sex,¹⁹⁸ and a man who went skinny-dipping in a hotel pool with his girlfriend.¹⁹⁹ While the seriousness of such offenses is of course debatable, such offenders do not reflect the image of the predatory, repeat child abuser for whom sex offender registries were originally intended.

Even some supporters of offender registration have condemned the breadth of modern registries, and have made some modest efforts to curtail their growth. In New Hampshire, for example, two state legislators spoke out against a proposed law that would have made a second conviction for public urination a registerable offense.²⁰⁰ A Missouri legislator, who sponsored a bill to remove some offenders from that state's registry, argued that many on the list were convicted merely of being "young, dumb and stupid."²⁰¹ Another Missouri bill, which would have allowed offenders convicted as juveniles to petition for removal from the registry after five years, was vetoed in August of 2013 by Governor Jay Nixon.²⁰² That bill's sponsor cited examples of youths having to register because of minor offenses, such as consensual sex between 14- and 17-year-olds or public urination. Nixon defended the existing registry, citing "broad, consistent and bipartisan support" for the system and concluding "[t]his stuff works, okay?"²⁰³ While in general lawmakers have been eager to expand and strengthen offender registries, at least a few state legislators have made modest attempts to reign in the most egregious uses of registries.

As discussed above, the belief that sex offenders present a particularly high risk of recidivism is more myth than fact. Nevertheless, even if one accepts the myth of the incurable, sexually violent predator as a justification for registries, there remains no logical reason to register those convicted of crimes that were both nonviolent and nonsexual. While it is conceivable that a crime like public

196. Yung, *supra* note 95, at 455.

197. *See* State v. Smith, 780 N.W.2d 90, 106 (Wis. 2010) (Bradley, J., dissenting).

198. *See* Whitaker Complaint, *supra* note 194, at 10.

199. *See* Wiesart v. Stewart, 665 S.E.2d 187, 187–88 (S.C. Ct. App. 2008).

200. *See* Gordon Fraser, *Lawmakers: Public Urination Shouldn't Lead to Sex Offender Status*, EAGLE-TRIBUNE (Jan. 31, 2008), <http://www.eagletribune.com/newhampshire/x1876416971/Lawmakers-Public-urination-shouldnt-lead-to-sex-offender-status>.

201. *See* Valerie Schremp Hahn, *Proposed Law May Help Some Sex Offenders Get Off Registry*, ST. LOUIS POST-DISPATCH (Mar. 29, 2012 9:45 AM), http://www.stltoday.com/news/local/crime-and-courts/proposed-law-may-help-some-sex-offenders-get-off-registry/article_da054c88-defc-5c00-abda-2533c350ba69.html.

202. *See* Brittany Ruess, *Governor Defends Veto of Sex Offender Registry Bill*, THE MISSOURI TIMES (Aug. 22, 2013), <http://themissouritimes.com/6277/governor-defends-veto-of-sex-offender-registry-bill/>.

203. *Id.*

urination might involve some form of sexual harassment, it is equally clear that not everyone convicted of this crime, if individually considered, would be found to present a high risk of committing rape or child sexual abuse in the future.²⁰⁴ Similarly, consensual sex acts, such as sex between minors or between related adults, simply do not present the broad risk to public safety that registries were established to address.

Overinclusiveness is not a problem limited to sex offender registries. Drug offender registries may include former addicts who have successfully undergone treatment and who are trying to put their lives back together.²⁰⁵ For these recovered and nondangerous offenders, registration serves more to impose stigma than protect the public.²⁰⁶ Domestic violence registries, if enacted, could potentially include victims where police erroneously perform double-arrests. Many registries are riddled with misinformation and clerical errors.²⁰⁷ These errors can be extremely difficult, if not impossible, to correct, since information posted on the internet is permanently, as one judge explained, “etched in cyberspace.”²⁰⁸

At the same time, offender registries may fail to capture many perpetrators of sexual abuse and other crimes, or may over- or under-represent certain populations. The data shows that most sex crimes (about ninety percent) are committed by persons known to the victims—often family members, but also teachers, religious leaders, and others.²⁰⁹ Since these crimes often go unreported

204. This author was unable to find any studies finding a link between public urination and violent sex crimes. It was also not possible to find any statements by state legislators justifying the inclusion of this crime as a registerable offense.

205. See Loendorf, *supra* note 4, at 560 (“Current meth legislation includes no express provisions granting rehabilitated offenders an opportunity to argue against inclusion.”).

206. *Id.* at 560–61.

207. See, e.g., *Indiana Sex Offender Registry Full of Errors*, CHESTERTON TRIB. (Apr. 23, 2010), http://chestertontribune.com/PoliceFireEmergency/423122indiana_sex_offender_registry_fu.htm (“Inaccuracies in Indiana’s online sex offender registry that show offenders living in places that no longer exist or include outdated information undermine the registry’s purpose and make it difficult to protect the public from sexual predators, state lawmakers and national experts say.”); Cameron McWhorter, *Georgia Sex Crime Registry Filled with Errors*, ATLANTA J.-CONST. (Aug. 29, 2010, 12:17 PM), <http://www.ajc.com/news/georgia-sex-crime-registry-601949.html> (“A new state audit has found that the state registry is flawed with error-ridden, out-of-date and incomplete information. In a 53-page report, auditors faulted outdated computers, underfunding, understaffing and poor communication between government agencies.”); Jack Thurston, *Errors Delay Expansion of Vt. Sex Offender Registry*, WCAX NEWS (June 30, 2010), <http://www.wcax.com/Global/story.asp?S=12735128> (“‘The condition of this registry in February was probably an F,’ said Tom Salmon, R-Vt. State Auditor.”). See also LOGAN, *supra* note 5, at 111 (discussing errors and missing information in registries across the country). For example, “an analysis of Florida’s registry, ranked by one organization as the nation’s third-best Web registry . . . revealed that of the over thirty thousand individuals registered in November 2005, nearly 50% were not residing in their stated address or were dead, incarcerated, or living outside the state.” LOGAN, *supra* note 5, at 111.

208. See *Doe v. Dist. Att’y*, 932 A.2d 552, 568 n.21 (Me. 2007) (Alexander & Silver, JJ., concurring).

209. See *Child Sexual Abuse: What Parents Should Know*, AMERICAN PSYCHOLOGICAL

for years, if not forever, their perpetrators may never be charged and will not have to register as sex offenders. Registries may lead to a false sense of security from random attacks, or so-called “stranger-danger,” while failing to protect children from those who pose a much higher statistical likelihood of harming them—their parents, relatives, teachers, and other people they know and trust. Several law enforcement officials, including some supporters of registries, have acknowledged this significant limitation.²¹⁰ Even New Jersey Governor Christine Todd Whitman, who signed the original Megan’s Law, has admitted that the “government cannot legislate away the problem of sexual offenses.”²¹¹ Knowing that sex offenders are technically barred from parks, schools, and playgrounds may feel comforting, but does little to protect children where they are most at risk. Even worse, as Professor Allegra McLeod has proposed, these measures may actually prevent communities from enacting more effective policies that would address sexual violence within institutions, such as in schools, houses of worship, college campuses, or the military.²¹²

Additionally, offender registries may exacerbate existing class- and race-based disparities within the criminal justice system.²¹³ One commentator, Law Professor Daniel M. Filler, has argued that sex offender registries are uniquely harmful to communities of color, and particularly African American communities, in multiple ways.²¹⁴ First, after conducting a survey of twenty-eight states and the District of Columbia, Filler determined that people of color are “grossly over-represented on notification rolls.”²¹⁵ Second, by “including offenders convicted before several landmark anti-discrimination cases, and during periods of documented informal discrimination, registries perpetuate historical racism.”²¹⁶ Third, since many communities of color are “already

ASSOCIATION, <http://www.apa.org/pi/families/resources/child-sexual-abuse.aspx> (last visited July 10, 2012).

210. See, e.g., Ryan Mills, *New Florida Driver’s License IDs Registered Sex Offenders*, NAPLES NEWS (July 31, 2007, 11:41 PM), http://www.naplesnews.com/news/2007/jul/31/new_florida_drivers_license_ids_registered_sex_off (quoting Lieutenant Tom Smith, supervisor of the Collier County, Florida, Sheriff’s Office’s Special Crime Bureau) (“If parents are looking for the one thing to protect their children from friends, acquaintances, strangers, Internet exploitation, they’ve got to open a line of communication with their children.”); Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia*, 42 HARV. C.R.–C.L. L. REV. 513, 526 (2007) (quoting J. Tom Morgan, former District Attorney of DeKalb County, Georgia) (“I never prosecuted a case where a child was molested at a school bus stop. I did prosecute many, many cases where children were molested in the privacy of their own bedrooms.”).

211. See Sullivan, *supra* note 57.

212. For a fascinating analysis on the ways that offender registries re-enforce the status quo while ignoring the more prevalent sources of sexual harm, see McLeod, *supra* note 128.

213. For a brief overview of evidence on race disparities in the criminal justice system, see Filler, *supra* note 53, at n. 5.

214. See Filler, *supra* note 53.

215. *Id.* at 1538. While Filler’s study does establish the over-representation of African-Americans subject to notification, it “does not explain the root of this disparity.” *Id.* at 1557.

216. Filler, *supra* note 53.

devastated by the social consequences of mass incarceration, the side effects of Megan's Laws—shame, social disconnection and exclusion—take a uniquely high toll” on them.²¹⁷ Considering the significant racial disparities for other types of convictions, there is every reason to believe that increasingly broad and punitive registries will have the effect of further reinforcing racial injustices within the criminal justice system.

4. Direct and Collateral Consequences of Registration

Registrants face a variety of barriers to reentry, both as a direct result of registration and notification provisions and because of additional collateral consequences imposed on registrants by statute. These barriers are broad and affect nearly all aspects of registrants' lives. For many, they are lifelong, as registries often have little or no mechanism for removal.²¹⁸ They include:

a. Stigma, Ostracism, and Violence

Early registries only made information that was already publicly available more readily accessible. In contrast, modern registries publish online a host of otherwise private information about offenders, including photographs and sometimes email addresses and social networking usernames, where it is free to be perused by anyone at any time. Many states impose stigmatizing methods of public notification above and beyond internet registries. For example, several states require registrants to carry driver's licenses that clearly identify them as sex offenders.²¹⁹ In Kansas, drug offenders are included in the state sex and violent offender registry and must have “Offender” stamped on their drivers licenses.²²⁰ A recently passed law requires Louisiana sex offenders to disclose their status on their Facebook pages.²²¹ Texas is considering a similar law, and New Mexico is considering banning sex offenders from Facebook and other social networking sites entirely.²²² At least three states have considered

217. *Id.*

218. See Carpenter & Beverlin, *supra* note 3, at 1095.

219. *Id.* (“Today, a new law goes into effect that will require all registered sexual offenders and sexual predators in Florida to get a new driver license or state identification card with a special marking that will allow residents to identify them.”). See also *Drivers Licenses to Identify Sex Offenders*, OKLA. DEP'T OF PUB. SAFETY, <http://www.dps.state.ok.us/dls/newrelease.pdf> (last visited July 12, 2012); *Registration Requirements*, LA. STATE POLICE PUB. SAFETY SERVS., <http://www.lsp.org/socpr/registration.html> (last visited July 12, 2012).

220. See Jeff Lambert, *Tennessee's Meth Offender Registry Copied and Reviled*, KINGSFORT TIMES-NEWS (Aug. 24, 2008, 12:00 AM), <http://www.timesnews.net/article/9007847/tennessees-meth-offender-registry-copied-and-reviled>.

221. See Michael Martinez, *New LA Law: Sex Offenders Must List Status on Facebook, Other Social Media*, CNN.COM (June 20, 2012, 12:49 PM), http://articles.cnn.com/2012-06-20/tech/tech_louisiana-sex-offenders-social-media_1_social-networking-offender-registration-facebook-and-myspace.

222. See Mike Jaccarino, *New Mexico Mulls Facebook Ban on Sex Offenders as Texas Ponders Law Forcing Them to Reveal Their Crime in Profiles*, MAILONLINE (Jan. 14, 2013, 8:37

requiring sex offenders to display special license plates.²²³

These methods of notification, in combination with the general abhorrence expressed towards offenders, especially sex offenders, have led to registrants being targets of public scorn, harassment, and, in some cases, violence. Mark Perk, convicted in Illinois for having consensual sex with a fifteen-year-old whom he later married, complained “[m]y wife and I get pulled over constantly because our license is registered to a sex offender” and says he has “received telephone calls from people calling him a child molester and threatening his life.”²²⁴ Ricky, a seventeen-year-old boy who had consensual sex with a thirteen-year-old girl who had claimed to be sixteen, was kicked out of school as a result of his sex offender status.²²⁵ Other juvenile offenders are “ostracized by their peers and neighbors, kicked out of extracurricular activities or physically threatened by classmates.”²²⁶ Another registered offender, convicted at seventeen of having consensual sex with his fourteen-year-old girlfriend, described having feces left at his door, and a stone thrown through his window with a note telling him to watch his back.²²⁷

The stigma and ostracism many sex offenders face may culminate in violence, either through self-harm or vigilantism. In 2005, Clovis Claxton, a registered sex offender who was wheelchair-bound and had not offended in eighteen years, committed suicide after signs were posted around his neighborhood calling him a “child rapist.”²²⁸ Claxton’s parents said he was developmentally disabled and had the mental age of twelve when he exposed himself to his babysitter’s 9-year-old daughter in 1991.²²⁹ Claxton had previously called the Sheriff’s department about the signs saying he felt “extremely scared” and believed people in the neighborhood were “out to possibly hurt him.” He claimed that “after seeing these fliers, he just wanted to end it all.”²³⁰ Clovis’s story, while tragic, is not unique, as there have been many

AM), <http://www.dailymail.co.uk/news/article-2261920/New-Mexico-mulls-Facebook-ban-sex-offenders-Texas-ponders-law-forcing-reveal-crime.html>. See also Mike Trinh, *Quincy Lawmaker Files Bill to Require Sex Offenders to Register Social Media Names*, PATRIOT LEDGER (Feb. 28, 2013 2:54 AM), <http://www.patriotledger.com/news/x1433789953/Quincy-lawmaker-files-bill-to-require-sex-offenders-to-register-social-media-names> (describing a Massachusetts lawmaker’s efforts to require registered sex offenders to disclose their social network usernames).

223. See Ben Jones, *States May Require Sex Offenders to Use Special License Plates*, USA TODAY (May 2, 2007, 8:24 AM), http://www.usatoday.com/news/nation/2007-05-01-sex-offender-tags_N.htm (discussing proposed laws in Wisconsin, Ohio, and Alabama).

224. See Libby Lewis, *Murders Put Focus on Sex-Offender Registry Policies*, NPR (Apr. 21, 2006, 3:33 PM), <http://www.npr.org/templates/story/story.php?storyId=5355980>.

225. See Gunderson, *supra* note 111.

226. See Jones, *supra* note 182, at 32.

227. See NO EASY ANSWERS, *supra* note 174, at 6.

228. See Mabel Perez, *Sex Offender Kills Himself over Signs*, THE GAINESVILLE SUN (Apr. 22, 2005, 6:01 AM), <http://www.gainesville.com/apps/pbcs.dll/article?AID=/20050422/LOCAL/204220346/1078/news>.

229. *Id.*

230. *Id.*

other reports of sex offenders committing suicide.²³¹ In 2006, two sex offenders were murdered in Maine, one of whom had been convicted for having sex with his girlfriend before she turned sixteen.²³² In June of 2012, another two sex offenders were shot and killed in Washington State.²³³ The perpetrator left a note explaining that he hated sex offenders and “it had to be done.”²³⁴ In July of 2013, a man killed a sex offender, and the offender’s wife, after randomly selecting him off the registry.²³⁵ After his arrest, he told law enforcement officials that he had planned to kill other registrants.²³⁶ As with suicide, there have been many other cases of sex offenders being harassed, beaten and murdered as a result of their being publicly listed on registries.²³⁷ Fear of violence even leads some offenders to decide not register, since as one registrant put it, “they don’t want people to know who they are and come and kill them.”²³⁸

b. Employment Discrimination and Restrictions

The U.S. Department of Justice acknowledges that “[r]esearch has shown that meaningful employment can provide a stabilizing influence by involving offenders in pro-social activities and assisting them in structuring their time,

231. See, e.g., Lara Greer Farley, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 471–72 (2008) (describing the story of Evan B., who committed suicide at age 19 from the stress of his registration. Evan had been placed on the registry after exposing himself to a classmate while in high school); Todd S. Purdum, *Death of Sex Offender Is Tied to Megan’s Law*, N.Y. TIMES, July 9, 1998, at A16, available at <http://www.nytimes.com/1998/07/09/us/death-of-sex-offender-is-tied-to-megan-s-law.html?pagewanted=all&src=pm>; Russ Buettner, *Former City Official’s Blog Chronicled His Fall from Grace and Plans for Suicide*, N.Y. TIMES, Oct. 7, 2012, at A17, available at <http://www.nytimes.com/2012/10/08/nyregion/russell-hardings-blog-chronicled-his-fall-from-grace-and-plans-for-suicide.html>. Before committing suicide, Buettner wrote that he had been “unable to find new work because of his status as a felon and registered sex offender. He said he could not face losing his apartment and becoming homeless and found his lonely existence unbearable.” *Id.*

232. See No Easy Answers, *supra* note 174, at 91.

233. See Doug Esser, *Two Sex Offenders Shot to Death on Olympic Peninsula*, THE SEATTLE TIMES (June 4, 2012, 10:13 AM), http://seattletimes.nwsources.com/html/localnews/2018353214_apwasexoffenderkillings1stldwritethru.html.

234. *Id.*

235. Jeremy Moody, *S.C. Man, Killed Registered Sex Offender, Planned to Target Other Offenders, Police Say*, CBS.COM (July 25, 2013), http://www.cbsnews.com/8301-504083_162-57595477-504083/jeremy-moody-s.c-man-killed-registered-sex-offender-planned-to-target-other-offenders-police-say.

236. *Id.*

237. See, e.g., *Vigilantism and Megan’s Law*, N.Y. TIMES, June 19, 1998, at A28, available at <http://www.nytimes.com/1998/06/19/opinion/vigilantism-and-megan-s-law.html>; Keach Hagey, *Did Sex Offender Listing Lead to Murder?*, CBS NEWS (Feb. 11, 2009, 3:45 PM), http://www.cbsnews.com/2100-501203_162-3597422.html (reporting the murder of Michael Dodele in California by a neighbor).

238. See MICHELLE L. MELOY, SEX OFFENSES AND THE MEN WHO COMMIT THEM: AN ASSESSMENT OF SEX OFFENDERS ON PROBATION 125–126 (2006).

improving their self-esteem, and meeting their financial obligations,” and is likely to help prevent recidivism.²³⁹ Despite this, many states offer no remedy against employment discrimination based on prior conviction.²⁴⁰ Thus, in much of the country registrants may be denied jobs based on their offender status, even where the job involves no contact with children (in the case of sex offenders), with controlled substances (in the case of drug offenders), or otherwise have any other possible connection to the registrant’s convicted crime. A study conducted in 2008 found that fifty-two percent of Tier II and Tier III sex offender registrants in New Jersey reported having lost jobs as a result of community notification.²⁴¹ Additionally, registrants may be barred by statute from certain types of employment such as jobs at schools, day care centers, or the ambiguous “any . . . place where children regularly congregate.”²⁴² Residency restrictions on where an offender may live, discussed below, often apply equally to where an offender may work.²⁴³

c. Housing Discrimination and Restrictions on Residency and Movement

As with employment, registrants face housing discrimination by landlords and harassment from neighbors, forcing many to live in shelters or be rendered homeless.²⁴⁴ This type of private discrimination is not limited to sex offenders, but affects those listed on drug and other registries.²⁴⁵ Moreover, many states have laws which strictly limit where sex offender registrants can live, forbidding them from homes within “buffer zones” up to 2,500 feet from schools, parks, arcades, and bus stops.²⁴⁶ These zones can push offenders out of entire communities and into more rural areas or even into sex offender “ghettoes,”²⁴⁷ where they may not be able to access treatment. In South Florida, for example, a community of sex offenders famously lived for years in tents and makeshift shacks under the Julia Tuttle Causeway, a large bridge, since there was no location in the entire area where they could legally reside.²⁴⁸ As of February

239. See CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUSTICE, TIME TO WORK: MANAGING THE EMPLOYMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION 1 (2002), available at www.csom.org/pubs/timetowork.pdf.

240. Such protection exists in New York, however, unless “there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual.” See N.Y. CORRECT. LAW § 752 (McKinney 2007).

241. See LOGAN, *supra* note 5, at 126.

242. See FLA. STAT. § 775.21(10)(b) (2006). For a chart of state employment restrictions, see Joseph Lester, *Off to Elba: The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 385 (2007).

243. See Lester, *supra* note 242, at 385.

244. See LOGAN, *supra* note 5, at 126.

245. See Loendorf, *supra* note 4, at 106.

246. See Carpenter & Beverlin, *supra* note 3, at 1096–97.

247. See LOGAN, *supra* note 5, at 127; Duwe, *supra* note 173, at 6.

248. See Carpenter & Beverlin, *supra* note 3, at 1080.

2013, there were roughly forty sex offenders living together in Southampton, New York, in two trailers that were set up as temporary housing almost six years prior.²⁴⁹ Among those affected by residency laws are many elderly or disabled registrants who no longer pose a risk to anyone, but who nonetheless are forced to abandon nursing homes where they receive crucial care.²⁵⁰ Some laws go beyond regulating where offenders may live and restrict their movement altogether.²⁵¹ Such drastic laws make having a normal life nearly impossible for many offenders, and prevent them from living with their families, travelling to work or school, or seeking treatment.²⁵²

d. Restrictions on Privacy and Speech

Under the AWA, all sex offender registrants must verify their identifying information in person rather than by responding to a mailed inquiry in order to keep their registration current.²⁵³ Some states have gone far beyond this invasion of registrants' privacy by allowing searches of their computers, meaning that registrants' "every online move and communication can be fully surveyed for the rest of their lives."²⁵⁴ As many as thirty-nine states allow some form electronic monitoring of sex offenders, and some states require it.²⁵⁵ These restrictions have clear free speech implications, as do statutes banning offenders from libraries, at least one of which has been struck down as a violation of the First Amendment.²⁵⁶

e. Additional Consequences

Proposed and enacted federal and state legislation may impose further consequences on registrants. Examples include limiting or revoking registrants' passports, requiring them to register with campus police if attending school, and barring them from participating in Halloween celebrations or attending

249. See Michael Schwartz, *In Two Trailers, the Neighbors Nobody Wants*, N.Y. TIMES (Feb. 4, 2013), <http://www.nytimes.com/2013/02/05/nyregion/suffolk-county-still-struggling-to-house-sex-offenders.html>.

250. See Geraghty, *supra* note 210, at 528.

251. See Lovett, *supra* note 92.

252. For example, one study of Florida registrants subject to a residency restriction found that the restriction forced many of them to live apart from their family, suffer financial hardship, and suffer from emotional distress. See 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. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 168, 172–73 (2005). For a summary of other studies on the effects of residency restrictions, see *id.* at 169.

253. See LOGAN, *supra* note 5, at 63.

254. See Yung, *supra* note 95, at 449.

255. See Carpenter & Beverlin, *supra* note 3, at 1098.

256. See Keith Coffman, *U.S. Appeals Court Says Sex Offenders Have Right to Libraries*, REUTERS, Jan. 20, 2012, available at <http://www.reuters.com/article/2012/01/21/us-sexoffenders-libraries-idUSTRE80K05S20120121>.

festivals.²⁵⁷ President Obama recently signed into law the “Hallowed Grounds Act,” which excludes Tier III sex offenders who are veterans from receiving certain burial-related benefits and honors—a measure that can bear no possible relation to enhancing public safety.²⁵⁸

f. Effect on Children and Families

The collateral consequences discussed above do not affect only registrants, but also their friends, families, and especially their children, who may be subject to frequent changes of location, homelessness, and harassment. Melissa Ostman, who reported the man who would later become her son-in-law to the police for having consensual sex with her teen daughter, expressed concern for her granddaughters, confessing, “I walk around every day with this guilt. We don’t know yet what kind of effect [Frank’s registration] is going to have on the girls . . . Kids can be so mean.”²⁵⁹ Some statutes have a more direct effect on children, including a Washington law that makes it a crime for parents to leave their children in the care of a nonparent registered sex offender.²⁶⁰ New York has a similar bill pending.²⁶¹ Considering the overinclusiveness of registries discussed above, this means that parents could face criminal charges for leaving their children in the care of a grandfather who had been convicted of public urination or a teenage babysitter convicted of consensual sex with a fellow teen. Families can serve an important stabilizing role by providing support for offenders and assisting their reentry. The collateral consequences of registration instead punish families, however, by decreasing their financial security and limiting their access to housing.²⁶² As studies have shown, this instability increases the rate of fear, anxiety, depression, and anger in the families of registered sex offenders.²⁶³

g. Juvenile Sex Offenders

Finally, there are many juveniles who have been convicted of sex crimes

257. See Carpenter & Beverlin, *supra* note 3, at 1100.

258. 38 U.S.C. § 2411 (2013). See also Press Release, Office of Rep. Vicky Hartzler, President Signs Bill Containing Hartzler’s Hallowed Grounds Act (Jan. 10, 2013), available at <http://hartzler.house.gov/press-release/president-signs-bill-containing-hartzlers-hallowed-grounds-act>.

259. See Pesta, *The Accidental Sex Offender*, *supra* note 194.

260. See WASH. REV. CODE ANN. § 9A.42.110 (West 2002).

261. See A. 2004, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at <http://assembly.state.ny.us/leg/?bn=A02004&term=2013>.

262. See Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, AM. J. OF CRIM. JUSTICE 54, 62–64 (2009), available at http://www.opd.ohio.gov/AWA_Information/AW_levenson_family_impact_study.pdf (collecting data from 584 family members living with a registered sex offender on the impact of offender registration and notification laws).

263. See *id.* at 62–64 (collecting data from 584 family members living with a registered sex offender on the impact of offender registration and notification laws).

and subjected to registration requirements for actions they may not have fully understood.²⁶⁴ One father whose ten-year-old son was convicted for touching the genitals of his younger cousin explained, “[m]y son doesn’t really understand what sex is, so it’s hard to help him understand why he has to register as a sex offender.”²⁶⁵ Other juveniles have been subject to registration for flashing or other behavior that, while inappropriate, falls far short of rape or violence. The public nature of registries makes it impossible for registrants to escape mistakes made at a very young age. In the case of drug offender registries, adults who have successfully overcome an addiction may be haunted by actions they took as a juvenile. Similarly, in the case of violent offender registries, the burdens and stigma of registration may limit youth’s ability to move past a history of violence, such as participation in a gang. Rather than encouraging juveniles to access treatment, education, and job skills, offender registries brand them, often for life, as incurable outcasts.

5. Unintended Consequences of Registries

The direct and collateral consequences of offender registration can make it enormously difficult for registrants to find housing and employment and create meaningful ties to a community after conviction. There is no evidence that these laws enhance community safety—to the contrary, they may cause registrants to feel isolated and impede them from seeking treatment, which may make them more likely to reoffend.

Moreover, not all consequences of offender registries are intended, and some may even conflict with a registry’s stated purpose. For example, publicly accessible registries for drug offenders may make it easier for teens and others to access illegal drugs by providing them with the names and contact information for people who are likely to know or be dealers.²⁶⁶ Attacking Governor Tim Pawlenty’s meth offender registry, Minnesota Attorney General Mike Hatch suggested “the registry will become the ‘Simon Delivers’ for meth addicts looking for a dealer—referring to the online grocery service.”²⁶⁷ He continued, “[i]f you’re a meth addict, what are you going to do? What better place to find a

264. See LOGAN, *supra* note 5, at 172 (discussing treatment of juvenile offenders under state registries and the AWA, and recounting the case of a twelve-year-old boy who was required to register for life for having “sexually experimented with his younger brother with a douche bottle”); Laura Mansnerus, *Ten-Year-Old’s Crime Tests Limits of Megan’s Law*, N.Y. TIMES, June 16, 2001, at A1, available at <http://www.nytimes.com/2001/06/16/nyregion/10-year-old-s-crime-tests-limits-of-megan-s-law.html>.

265. See NO EASY ANSWERS, *supra* note 174, at 9.

266. See David Borden, Editorial, *Do We Really Want to Help Kids Find the Drug Dealers?*, DRUG WAR CHRONICLE (July 21, 2006, 2:21 AM), http://stopthedrugwar.org/chronicle/2006/jul/21/editorial_do_we_really_want_help; Jack Shafer, *How to Find a Meth Dealer: The States Establish Search Engines for Your Shopping Convenience*, SLATE (July 31, 2006, 6:56 PM), http://www.slate.com/articles/news_and_politics/press_box/2006/07/how_to_find_a_meth_dealer.html.

267. See McCallum, *supra* note 136.

meth dealer than on an Internet Web site.”²⁶⁸ At the same time, registration may make it harder for former meth manufacturers and dealers to find legal work and increase their chances of returning to the drug trade.

Another unintended consequence of registration is that it may affect the plea bargaining process. The study of South Carolina’s registry law mentioned earlier found that an increased number of defendants were allowed to plead non-sex-offense charges after the implementation of the state registry law.²⁶⁹ This result, which may decrease punishment for some offenders, is clearly in conflict with the intent of the registry law. Online notification “was associated with even increased likelihood of plea bargains (relative to original registration and notification practices) and was uniquely associated with reduced likelihood of final guilty determinations for defendants charged with sex crimes.”²⁷⁰ This practice belies any claim that registries enhance public safety through increased deterrence, since the existence of registries causes at least some offenders to obtain better plea deals than they would have absent the registry.

Finally, registries may discourage reporting by victims of certain offenses, particularly sex crimes, child abuse, and domestic violence. Detective Robert Shilling of Seattle’s Sexual Assault and Child Abuse Unit, also a survivor of childhood sexual abuse explains,

When we know that most victims of sexual abuse know their abuser, and in a large proportion of cases it’s a family member, Internet notification increases the likelihood that the victim will be identified. Victims tell us that their greatest concerns are their family knowing about the assault (71%), and people outside the family knowing about the assault (68%). *The last thing we want to do is create disincentives to victims and their families to report.*²⁷¹

While all criminal reporting becomes a matter of public record, the increased access to this information created by registration and notification laws makes it more likely that victims will be widely identified in their communities. If victims prefer not to report a rape or assault in order to maintain their own privacy, mandating registration and notification for these crimes is in direct conflict with the goal of protecting victims. For this reason, many victims’ rights groups have spoken out against a proposed domestic violence registry in New

268. *Id.* (internal quotation marks omitted).

269. See LETOURNEAU, LEVENSON, BANDYOPADHYAY, SINHA & ARMSTRONG, *supra* note 160, at 4 (“Defendants were more likely to have charges reduced from sex to nonsex crimes over time, with a 9% predicted probability of reduced charges from 1990–1994 (pre-SORN), a 15% predicted probability of reduced charges from 1995–1999 (corresponding with initial implementation of SORN) and a 19% predicted probability after 1999 (corresponding with implementation of Internet notification).”).

270. *Id.* at 53.

271. See Shilling Statement, *supra* note 177, at 91–92.

York.²⁷² The New York Coalition Against Domestic Violence, for example, issued a statement explaining that “[n]otifying the public about the identity of domestic violence offenders will most likely mean that the domestic violence victim by the intimate nature of the relationship to the offender—cannot remain anonymous.”²⁷³ In a cruel irony, registries intended to warn the public about dangerous offenders may actually protect perpetrators of physical and sexual assault from being reported at all.

Despite numerous adverse consequences of offender registries, both intended and unintended, the movement to create more and more offender registries continues. While evidence tells us that registries are overbroad, excessively punitive, difficult to enforce, and have little or even a harmful effect on offender recidivism, politicians continue to call such measures “common sense” solutions to the broad social problems of sexual violence and other crimes. Facing huge barriers to offender registry reform in the legislative branch, many activists have instead turned to the courts to challenge some of the nation’s most egregious registry laws.

V.

LEGAL ARGUMENTS AGAINST REGISTRIES

A. Early and Contemporary Challenges

As discussed above, offender registries are enormously popular with legislators and it is difficult for advocates to speak out against them without facing fervent backlash and accusations of being soft on crime. Thus a significant amount of pushback against offender registries has come from post-enactment litigation, brought by both individual and class action lawsuits. Litigation challenging offender registries has generally involved three constitutional claims: that registries conflict with the Ex Post Facto Clause, procedural due process, and substantive due process. Additional claims have included violations of the Fifth Amendment, Sixth Amendment, Eighth Amendment, Bill of Attainder, Equal Protection Clause, Commerce Clause, nondelegation doctrine, Tenth Amendment, Eleventh Amendment, Takings Clause, right to travel, and Contracts Clause. Because sex offender registries have existed far longer than other currently active registries, the great majority of litigation has challenged sex offender registration. Nearly all of the following legal arguments, however, would be relevant to a challenge to other types of registries. The arguments that apply only to federal law would of course be inapplicable to state-mandated registries.

272. See Jessica Cain, *State Lawmakers Push for Domestic Violence Registry*, CNY CENTRAL (Apr. 18, 2011, 1:30 PM), <http://www.cnycentral.com/news/story.aspx?id=606847>.

273. *Id.*

1. The Ex Post Facto Clause

The Ex Post Facto Clause prohibits legislatures from passing any statute that imposes a new punishment on persons convicted before the statute was enacted.²⁷⁴ Therefore the Ex Post Facto Clause may only be used to challenge registry laws that require registration of persons convicted *prior* to the statute's enactment, or that impose new collateral consequences on previously registered offenders. Additionally, the Ex Post Facto Clause only prohibits retroactive measures that are considered criminal punishments, rather than those that are merely civil regulations.²⁷⁵ In determining whether a law is punitive, the court will first look to its stated purpose. If it finds that the legislature expressly or impliedly intended the law to serve as a punishment, this ends the inquiry and the court will not examine the law's effect.²⁷⁶ If, however, the Act's stated purpose is determined to be regulatory, the reviewing court will next examine whether the statute is "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'"²⁷⁷ The factors most relevant to this analysis in the registry context are:

[W]hether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose.²⁷⁸

If a court finds that a law has neither the purpose nor the effect of imposing a punishment, it will not violate the Ex Post Facto Clause even if imposed retroactively.

In *Smith v. Doe*, the Supreme Court held that an Alaska sex offender registry was a civil measure enacted to protect the public rather than to punish offenders, even though some of its effects could be characterized as punitive.²⁷⁹ Despite some evidence to the contrary, including the codification of parts of the registry in Alaska's criminal code, the Court determined that Alaska's legislature had enacted the law to serve a nonpunitive purpose, namely that of protecting the public from offenders who allegedly posed a high risk of reoffending.²⁸⁰ Next, guided by the five factors listed above, the Court analyzed whether the registry law was so punitive in effect as to belie this stated civil purpose.²⁸¹

274. U.S. CONST., art. I, sec. 9(3); see also Carpenter & Beverlin, *supra* note 3, at 1105.

275. See *Smith v. Doe*, 538 U.S. 84, 92 (2003).

276. *Id.* at 93.

277. See *Smith v. Doe*, 538 U.S. at 92 (2003) (quoting *United States v. Ward*, 448 U.S. 242, 248 (1980)).

278. *Id.* at 97.

279. *Id.* at 105–06.

280. *Id.* at 94–96.

281. *Id.* at 92, 97.

The Court first determined that registries were unlike early forms of punishment such as public shaming, humiliation, and banishment, since those measures “involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community.”²⁸² Second, the court held, registries did not impose an affirmative disability or restraint since, unlike modern probation or parole, registrants remained “free to move where they wish[ed] and to live and work as other citizens, with no supervision.”²⁸³ Third, the registry did not promote the traditional aims of punishment because, while it may have some deterrent effect, “[a]ny number of governmental programs might deter crime without imposing punishment.”²⁸⁴ Fourth, the Act had a rational, albeit not perfectly tailored, connection to the nonpunitive purpose of promoting public safety.²⁸⁵ Fifth, the law was not excessive in relation to this civil purpose because, in light of the “frightening and high”²⁸⁶ risk of recidivism posed by sex offenders, the duration of the reporting requirements and the means of notification were “reasonable.”²⁸⁷ Having concluded that Alaska’s sex offender registry was a civil rather than a punitive measure, the Court held that its retroactive application did not violate the Ex Post Facto Clause.²⁸⁸

Lower courts that have addressed this issue both before and after *Smith* have used similar reasoning to deem other retroactive state registries civil rather than punitive, and thus not in violation of the Ex Post Facto Clause.²⁸⁹ As discussed in more detail below, however, many of these decisions applied to registry schemes that were much less harsh and more narrowly tailored than are current registries.²⁹⁰ Past opinions have also generally treated reputational injury as the predominant harm suffered by registrants, which may no longer be the case in light of the housing and employment restrictions now imposed on them.²⁹¹

282. *Id.* at 98.

283. *Id.* at 101.

284. *Id.* at 102.

285. *Id.* at 102–03.

286. *Id.* at 103 (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

287. *Id.* at 105.

288. *Id.* at 105–06.

289. See, e.g., *United States v. Leach*, 639 F.3d 769, 773 (7th Cir. 2011) (“[The plaintiff] has not identified any aspects of SORNA’s registration provisions that distinguish this case from *Smith*.”); *Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999).

290. See *Cutshall*, 193 F.3d at 474 (“[The plaintiff] is free to live where he chooses, come and go as he pleases, and seek any employment he wishes.”); *E.B. v. Verniero*, 119 F.3d 1077, 1098 (3d Cir. 1997) (“[T]hese goals have not been pursued in a way that has imposed a burden on registrants that clearly exceeds the burden inherent in accomplishment of these goals. The statutory scheme is a measured response to the identified problem that does not subject all registrants to dissemination of information beyond law enforcement personnel.”); *Russell v. Gregoire*, 124 F.3d 1079, 1087, 1090 (9th Cir. 1997) (“[The Act] places no restraint on the offender’s movements The law contains careful safeguards to prevent notification in cases where it is not warranted and to avoid dissemination of the information beyond the areas where it is likely to have the intended remedial effect.”).

291. See *Verniero*, 119 F.3d at 1102 (“The primary sting from Megan’s Law notification

While the vast majority of state registry laws have withstood *ex post facto* challenges, the extremely harsh nature of more recent laws may allow lower courts to distinguish their decisions from *Smith* and deem these measures punitive.

2. Other Claims Based on Registries as Punishment

The categorization of sex offender registration as nonpunitive also affects claims based on the Fifth Amendment prohibition on double jeopardy, the Sixth Amendment right to a trial by jury, the Eighth Amendment prohibition against cruel and unusual punishment, and the Bill of Attainder Clause. Since registries are treated as nonpunitive, the double jeopardy clause, which prohibits the imposition of multiple punishments for the same offense, does not apply.²⁹² The right to a trial by jury is similarly inapplicable to civil measures. Thus, factual elements that may affect a registration determination in some states, such as whether a crime was "sexually motivated," may be made by a judge.²⁹³ The prohibition against cruel and unusual punishment obviously does not apply to schemes that are not considered to be punishment.²⁹⁴ Finally, the Bill of Attainder Clause, which prohibits legislatures from punishing individuals or easily ascertainable groups without a trial, is not implicated where the statutory scheme is not found to constitute punishment.²⁹⁵ If courts begin to reverse course and find new registration schemes to be punitive, all of these claims may be brought against offender registries.

3. Procedural Due Process

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the state from burdening a person's liberty interest without affording them procedural protections, such as notice and an opportunity to contest the action.²⁹⁶ Procedural due process challenges to sex offender registries have been largely curtailed by the Supreme Court's decision in *Connecticut Department of Public Safety v. Doe* (CDP). In CDP, the Court overturned a Second Circuit decision enjoining Connecticut's sex offender registry on the grounds that it deprived offenders of a liberty interest—namely, their reputation—without prior notice or a hearing to determine whether they were likely to be dangerous.²⁹⁷ In an opinion by Chief Justice Rehnquist, the Court held that the Due Process

comes by way of injury to what is denoted in constitutional parlance as reputational interests. This includes the burdens of isolation, harassment, loss of opportunities, and the myriad of more subtle ways in which one is treated differently by virtue of being known as a potentially dangerous sex offender.").

292. See *Cutshall*, 193 F.3d 466; *Verniero*, 119 F.3d at 1092.

293. See LOGAN, *supra* note 5, at 135.

294. *Cutshall*, 193 F.3d at 477.

295. *Id.*

296. See *Mathews v. Eldridge*, 424 U.S. 319, 333–34 (1976).

297. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 6 (2003).

Clause was not violated by the program since registration was imposed automatically upon an offender's conviction at trial or through a plea bargain and was not explicitly intended to be a measure of dangerousness.²⁹⁸ While the Court conceded that due process in some cases required a factual hearing, it explained "the fact that respondent seeks to prove—that he is not currently dangerous—is of no consequence under Connecticut's Megan's Law" and therefore any hearing on the matter would not affect his registration requirement.²⁹⁹ Lower courts deciding this issue have relied on *CDP* to dismiss due process challenges to similar state registry laws.³⁰⁰ Some courts have found that state registries which do propose to assess a registrants' level of dangerousness must provide a hearing.³⁰¹ However this issue is now irrelevant in the case of sex offender registries in those states striving to comply with the AWA, since the Act mandates the category-based approach discussed in *CDP*.³⁰²

Some courts have found that state registration laws not regulated by the AWA violate federal or state procedural due process requirements. In *Matter of W.B.M.*, the North Carolina Court of Appeals found a due process violation under, at a minimum, the North Carolina Constitution for a registry that placed individuals suspected of child abuse on a Responsible Individuals List without a prior opportunity to be heard.³⁰³ Inclusion in this registry, unlike the one at issue in *CDP*, was not predicated on the fact of conviction.³⁰⁴ So long as most registries are based solely on the fact of conviction, they will likely remain immune to procedural due process challenges.

4. Substantive Due Process

The doctrine of substantive due process prohibits states and the Federal government from depriving persons of life, liberty or property without an adequate justification.³⁰⁵ Most laws will be upheld so long as they pass the weak

298. *Id.* at 7–8.

299. *Id.*

300. See *United States v. Ambert*, 561 F.3d 1202, 1208 (11th Cir. 2009) ("The Supreme Court's precedent . . . essentially forecloses Ambert's procedural due process claim . . ."); *Fullmer v. Mich. Dep't of State Police*, 360 F.3d 579, 582–83 (6th Cir. 2004); *Doe v. Tandeske*, 361 F.3d 594, 596 (9th Cir. 2004) (per curiam) ("Like the Connecticut law, Alaska's sex offender statute bases the registration and notification requirements on the sole fact of plaintiffs' convictions. Accordingly, bound by Connecticut Department of Public Safety, we hold that Alaska's sex offender registration law does not deprive the Does of procedural due process.").

301. *E.B. v. Verniero*, 119 F. 3d 1077, 1111 (3d Cir. 1997); *People v. David W.*, 733 N.E.2d 206, 213 (N.Y. 2000). See also *State v. Bani*, 36 P.3d 1255, 1268 (Haw. 2001).

302. See *LOGAN*, *supra* note 5, at 63–64 ("The centerpiece of the AWA is its tier classification system. Whereas in the past federal law left to states how individuals were to be distinguished, . . . the AWA specifies that a conviction-based regime must be employed.").

303. See *Matter of W.B.M.*, 690 S.E. 2d 41, 43 (N.C. App. 2010).

304. *Id.* at 44.

305. This doctrine is derived from the Fifth and Fourteenth Amendments. U.S. CONST. amend. XIV, § 1 (applies to state governments); U.S. CONST. amend. V (applies to the federal

rational basis review test, and are found to be "rationally related to a legitimate government" interest.³⁰⁶ Those laws that implicate a fundamental right, however, are judged by the considerably more rigorous strict scrutiny standard, and will be struck down unless the state can prove that they are "narrowly tailored to a compelling government interest."³⁰⁷ The Supreme Court has described fundamental rights as "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment."³⁰⁸ Those seeking to challenge offender registries have argued that such laws infringe on a variety of fundamental rights, including the right to privacy,³⁰⁹ "the presumption of innocence,"³¹⁰ the "liberty interest in good reputation,"³¹¹ and others.³¹² Substantive due process challenges to sex offense registries have been heard in the Third, Sixth, Eighth, Ninth, and Eleventh Circuit Courts of Appeals.³¹³

With one narrow exception in the Third Circuit, federal appellate courts have found that sex offender registries do not implicate any fundamental right.³¹⁴ Thus, almost all courts have determined the constitutionality of registries under the undemanding rational basis review test.³¹⁵ Sex offender registries have passed this test in every circuit in which this question has been

government).

306. See *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997).

307. *Id.* at 766-67.

308. See *Glucksberg*, 521 U.S. at 727.

309. See *Paul P. v. Verniero*, 170 F.3d 396, 398 (3d Cir. 1999) ("[The plaintiffs] argue that the statutory requirement that the class members provide extensive information to local law enforcement . . . and the subsequent community notification is a violation of their constitutionally protected right to privacy."); *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997) ("[T]he accumulation and dissemination of information about [sex offenders] violated their right to privacy.");

310. *Gunderson v. Hvass*, 339 F.3d 639, 643 (8th Cir. 2003).

311. *Doe v. Moore*, 410 F.3d 1337, 1341 (11th Cir. 2005).

312. *Id.* at 1341 (asserting a variety of due process interests, including the right to travel, privacy, employment, and freedom of religious association).

313. See *Doe v. Michigan Department of State Police*, 490 F.3d 491 (6th Cir. 2007); *Doe v. Moore*, 410 F.3d 1337 (11th Cir. 2005); *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004); *Hvass*, 339 F.3d 639 (8th Cir. 2003); *Verniero*, 170 F.3d at 398 (3d Cir. 1999); *Gregoire*, 124 F.3d 1079 (9th Cir. 1997).

314. See *Verniero*, 170 F.3d at 405 ("Megan's Law does not restrict plaintiff's freedom of action with respect to their families and therefore does not intrude upon the aspect of the right to privacy . . ."); *Doe v. Mich. Dep't of State Police*, 490 F.3d 491, 500 (6th Cir. 2007) ("[T]he right asserted here is not a fundamental right deeply rooted in our Nation's history."); *Moore*, 410 F.3d at 1345 ("[W]e can find no history or tradition that would elevate the issue here to a fundamental right."); *Tandeske*, 361 F.3d at 597 ("[W]e are forced to conclude that persons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements set forth in the Alaska statute."); *Hvass*, 339 F.3d at 643 ("[A] fundamental right is not implicated. . ."); *Gregoire*, 124 F.3d at 1094 ("The collection and dissemination of information under the Washington law does not violate any protected privacy interest, and does not amount to a deprivation of liberty or property.");

315. See *Moore*, 410 F.3d at 1345.

litigated, although some courts have expressed concerns that registries are overbroad.³¹⁶ The one exception mentioned above is a Third Circuit case that did find “some nontrivial [privacy] interest in one’s home address”³¹⁷ being disclosed by a registry. The case was subsequently remanded and went before the Third Circuit again after the state Attorney General had issued guidelines containing “stringent delivery and notification procedures” regarding registrants’ home addresses.³¹⁸ The Third Circuit upheld the registry system in its entirety despite the burden on registrants’ privacy interest.³¹⁹ Having concluded that the “government’s interest in preventing sex offenses [was] compelling”³²⁰ and offenders’ addresses are “not released willy-nilly to the general public,”³²¹ the court was satisfied that the scheme was constitutional.³²² Despite this extensive case law, a later Third Circuit opinion quickly dismissed a substantive due process challenge to the online dissemination of offenders’ home addresses, writing “it is clear that a registrant’s right to privacy in his or her home address gives way to the State’s compelling interest to prevent sex offenses.”³²³ The court additionally found that internet notification was justified by the “State’s interest in expanding the reach of its notification to protect additional members of the public.”³²⁴ Thus even in the one circuit that found registry laws to implicate some privacy interest, registration and internet notification laws have been uniformly upheld.

Even some newly enacted amendments creating additional burdens on sex offenders have withstood substantive due process challenges. For example, the Eighth Circuit upheld a restriction forbidding offenders from residing within 2,000 feet of a school or childcare facility.³²⁵ Nevertheless, as state registries become increasingly punitive, new substantive due process challenges are likely to arise, and states may be more willing to find that a fundamental right is being unfairly restricted.³²⁶

316. See *Doe v. Mich. Dep’t of State Police*, 490 F.3d at 501 (“Although we believe that the State’s justification sweeps too broadly, . . . we are constrained to conclude that the rationale articulated in the statute itself satisfies the rational-basis standard.”); *Moore*, 410 F. 3d at 1345–46; See *Verniero*, 170 F.3d at 404; *Tandeske*, 361 F.3d at 597; *Hvass*, 339 F.3d at 644 (“Since the statute is rationally related to a legitimate government purpose, Gunderson’s substantive due process claim fails.”).

317. *Verniero*, 170 F.3d at 404.

318. See *Paul P. v. Farmer*, 227 F.3d 98,106–7 (3d Cir. 2000).

319. *Verniero*, 170 F.3d at 404.

320. *Id.*

321. See *Farmer*, 227 F.3d at 107.

322. *Id.* at 106.

323. *A.A. ex. Rel. M.M. v. New Jersey*, 341 F.3d 206, 211–12 (2003).

324. *Id.* at 213.

325. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005).

326. See *Carpenter & Beverlin*, *supra* note 3, at 1132 (“Recent stirrings in state court offer hope of retrenchment.”).

5. Equal Protection Clause

The Equal Protection Clauses of the Fifth and Fourteenth Amendments guarantee equal protection of the laws, and prohibit states and the federal government from adopting discriminatory laws without a valid justification.³²⁷ Most laws are subject only to rational basis review unless they involve a suspect classification, such as those based on race or sex, which trigger heightened scrutiny.³²⁸ Equal protection challenges to registries have been heard in the Sixth and Eleventh Circuits.³²⁹ Neither of these courts found that sex offender registries implicated a suspect class, and they therefore evaluated registry laws using the rational basis test.³³⁰ Even where distinctions in registry requirements were based solely on the date of conviction, sex offender registry laws have withstood this minimal scrutiny.³³¹ Some courts have predicated their holdings on the belief that sex offenders “pose a particular threat of reoffending.”³³² Even as increased data demonstrates that sex offenders do not pose an inordinately high risk of recidivism,³³³ courts are likely to remain highly deferential to legislative findings and equal protection challenges to offender registries are unlikely to succeed.

327. U.S. CONST. amend XIV, § 1; U.S. CONST. amend V. While the Fifth Amendment does not contain an explicit equal protection provision, the Supreme Court has held that the denial of equal protection “may be so unjustifiable as to be violative of [Fifth Amendment] due process.” *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

328. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.”).

329. *Doe v. Mich. Dep’t of State Police*, 490 F.3d 491, 502 (6th Cir. 2007); *Cutshall v. Sundquist*, 193 F.3d 466, 482 (6th Cir. 1999).

330. *Doe v. Mich. Dep’t of State Police*, 490 F.3d at 503 (“[T]he classification raised by the plaintiffs does not implicate a suspect class”); *Doe v. Moore*, 410 F.3d 1337, 1346 (11th Cir. 2005) (“[S]ex offenders are not considered a suspect class . . . and the various sub-classifications presented by the Appellants do not implicate a suspect class”); *Cutshall*, 193 F.3d at 482 (“Convicted sex offenders are not a suspect class.”).

331. *See Doe v. Mich. Dep’t of State Police*, 490 F.3d at 505 (finding a rational basis in exempting sex offender registration based on date of conviction so that the state may monitor recidivism before further expanding exemptions); *Moore*, 410 F.3d at 1347–48 (finding a rational basis in offense-based and other differences in reporting requirements based on risk of recidivism, ability to deter future behavior, state budget concerns, and other factors.).

332. *Cutshall*, 193 F.3d at 483. *See also Moore*, 410 F.3d at 1347 (“The increased reporting requirements based on evidence of increased recidivism among a class of felons is rationally related to the state’s interest in protecting its citizens”).

333. *See supra* note 180 and accompanying text.

6. *Challenge to Registries Created by Federal Law: The Commerce Clause, Nondelegation Doctrine and the Tenth Amendment*

Federal registry laws, and in particular the Sex Offender Registration and Notification Act (SORNA, part of the AWA), have been subject to largely unsuccessful challenges under the Commerce Clause, the nondelegation doctrine, and the Tenth Amendment. The Commerce Clause gives the federal government broad, but not unlimited, power to enact laws that have an effect on interstate commerce.³³⁴ In *United States v. Guzman*, the Second Circuit joined several of its sister circuits in determining that SORNA was sufficiently related to interstate commerce so as not to violate the Commerce Clause, citing its requirement that offenders register if they travel in interstate commerce.³³⁵ It then concluded that since intrastate registration was part of a larger, national regulatory scheme, SORNA as a whole was constitutional under the Necessary and Proper Clause.³³⁶

Several circuit courts have also determined that the amount of authority given to the U.S. Attorney General under SORNA does not violate the nondelegation doctrine, which limits Congress's power to delegate legislative authority to other branches of government.³³⁷ In addition to nondelegation claims, at least one writer has argued that applying SORNA retroactively violates the separation of powers by "encroach[ing] on judicial power by changing offenders' registration requirements that had been adjudicated by a court based on the offenders' risk level."³³⁸ Finally, at least one case has found that SORNA did not violate the Tenth Amendment prohibition on commandeering, which forbids the federal government from requiring state officials to administer federal law.³³⁹ The court's conclusion was based on the fact that those challenging SORNA had "not shown that any of the states involved in their interstate travel [had] taken any steps to implement SORNA,"³⁴⁰ however, which leaves open the possibility of future commandeering claims.

334. See U.S. CONST. art. I, § 8(c); *United States v. Guzman*, 591 F.3d 83, 89–90 (2d Cir. 2010).

335. See *Guzman*, 591 F.3d at 90 (2d Cir. 2010); *United States v. Ambert*, 561 F.3d 1202, 1211–12 (11th Cir. 2009).

336. See *Guzman*, 591 F.3d at 90–91.

337. See, e.g., *Guzman*, 591 F.3d at 92–93; *Ambert*, 561 F.3d at 1213–14. Some courts have dismissed nondelegation doctrine challenges on standing grounds, determining that SORNA did not in fact delegate to the Attorney General the power to determine whether the Act was retroactive. See *Guzman*, 591 F.3d at 92.

338. Rebecca L. Visgaitis, *Retroactive Application of the Sex Offender Registration and Notification Act: A Modern Encroachment on Judicial Power*, 45 COLUM. J.L. & SOC. PROBS. 273, 295 (2011).

339. See *Guzman*, 591 F.3d at 94.

340. *Id.* at 94.

B. New Challenges to State Registries

Several recent lower-level decisions provide some hope that courts are beginning to recognize how punitive and overbroad many state registration and notification schemes have become. In 2010, a district court examined newly enacted sections of Nebraska's sex offender registration law. The law mandated that offenders disclose their remote communication device identifiers, email addresses, and other internet identifiers; consent to the search and installation of monitoring hardware and software on their computers; and made it a crime to use internet social networking sites or other internet communication services that are accessible by minors.³⁴¹ With respect to the mandatory consent to search and computer monitoring provisions of the law, the court granted summary judgment, finding a violation of the Fourth Amendment as applied to persons not under some form of state supervision.³⁴² The court determined that a trial was necessary to consider other challenges to the registry laws.

After the trial, the court issued a lengthy and colorful opinion holding that the law's website ban was overbroad,³⁴³ vague,³⁴⁴ left open insufficient alternative channels of speech³⁴⁵ and therefore violated both registrants' First Amendment right to free speech and the Fourteenth Amendment Due Process Clause.³⁴⁶ It found that the provision requiring registrants to disclose remote communication devices and other internet identifiers also violated the First Amendment and chilled offenders' speech.³⁴⁷ Finally, the court found that several sections of the new law were intended to be punitive rather than civil measures, and their retroactive application therefore violated the Ex Post Facto Clause.³⁴⁸ In coming to this conclusion, the judge noted that the legislator who introduced the bill "admitted that he was driven by 'rage' at, and 'revulsion' for, the sex offenders who were the targets of these extraordinary measures."³⁴⁹ Considering the rage and revulsion openly expressed towards sex offenders and other registrants by legislators across the country, this opinion could ignite a new wave of Ex Post Facto challenges to offender registries.

Two state supreme courts have found other registry laws unconstitutional under the Ex Post Facto Clause. A 2009 Maine Supreme Court case determined that a retroactive measure mandating quarterly, in-person registration was a

341. *See Doe v. Nebraska*, 734 F. Supp. 2d 882, 897 (D. Neb. 2010).

342. *Id.* at 903.

343. *See Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1119 (D. Neb. 2012).

344. *Id.* at 1112 ("The statute is so expansive and so vague that it chills offenders . . . from using those portions of the Internet that the defendants claim are open to them.").

345. *Id.* at 1117 ("Frankly, this is a little like banning the use of the telephone and then arguing that First Amendment values are preserved because the user can (perhaps) resort to a walkie-talkie.").

346. *Id.*

347. *Id.* at 1120.

348. *Id.* at 1125.

349. *Id.* at 1126.

violation of that provision. The court distinguished Maine's registry law from the Alaska law in *Smith* which did not involve in-person reporting and was therefore, the court explained, not an affirmative disability.³⁵⁰ The same year, the Kentucky Supreme Court determined that retroactive restrictions on housing were punitive, compared the measures to historical banishment, and deemed them irrational and excessive.³⁵¹

Other courts have used their state constitutions to overturn registration schemes that would likely be upheld under the Constitution. Two Indiana cases ruled that retroactive registration laws, including one that extended what offenses qualified as sex offenses for the purpose of registration, violated that state constitution's ex post facto provision.³⁵² An Ohio court took the same position, acknowledging that changes made to the state's registration scheme, when considered in the aggregate, made it far more onerous than prior versions.³⁵³ A Missouri case held unconstitutional two laws forbidding registrants from residing within 1,000 feet of a school or childcare facility and mandating that they stay inside on Halloween, at least as applied to the defendants in that case. The court found that these laws violated a state constitutional provision forbidding retrospective laws.³⁵⁴

Although not directly interpreting a registry law, a recent Massachusetts decision determined that the GPS monitoring of a sex offender and probation condition forbidding him from entering geographic exclusion zones were "so punitive in effect as to increase significantly the severity of the original probationary conditions."³⁵⁵ By noting the extremely punitive effect of electronic monitoring, this decision could push courts to acknowledge the punitive nature of similarly intrusive registration requirements. This would in turn impact future ex post facto, double jeopardy, and other challenges to conditions enacted as part of a registry scheme.

C. Distinguishing Prior Case Law

New challenges to registries may succeed, despite extensive unfavorable case law, by distinguishing recently enacted and extremely punitive measures from older statutes. In the face of an ex post facto challenge, *Smith* found that registries were not punitive because registrants were "free to move where they

350. See *State v. Letalien*, 985 A.2d 4, 18, 24–25 (Me. 2009) ("[I]t belies common sense to suggest that a . . . lifetime obligation to report to a police station every ninety days . . . is not a substantial disability or restraint on the free exercise of individual liberty.").

351. See *Commonwealth v. Baker*, 295 S.W.3d 437, 444–46 (Ky. 2009).

352. See *Hevner v. State*, 919 N.E.2d 109, 113 (Ind. 2010).

353. See *State v. Williams*, 952 N.E.2d 1108, 1112–13 (Ohio 2011) ("R.C. Chapter 2950 is punitive. The statutory scheme has changed dramatically since this court described the registration process imposed on sex offenders as an inconvenience 'comparable to renewing a drivers license.'").

354. See *F.R. v. St. Charles Cnty. Sheriff's Dept.*, 301 S.W.3d 56, 66 (Mo. 2010) (en banc).

355. *Commonwealth v. Goodwin*, 933 N.E.2d 925, 935 (Mass. 2010).

wish and to live and work as other citizens, with no supervision,” and noted that there was “no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords.”³⁵⁶ With the recent popularity of stringent residency restrictions and GPS monitoring, this is simply no longer the case in many states and counties. This is especially true for densely populated locations with numerous schools, bus stops, and other locations that are off-limits to sex offenders.³⁵⁷ The *Smith* court also noted that registrants did not have to update their information in person,³⁵⁸ which is no longer the case under the AWA.³⁵⁹

As registries become more intrusive, courts may also become more willing to strike down burdensome registration laws under the doctrine of substantive due process. They may do this either by finding that registry laws implicate a fundamental right and applying heightened scrutiny or by finding that state statutes have become so unreasonable that they do not even meet rational basis review. Finally, the explosion of law regulating registrants’ online activities may elicit new First Amendment challenges to registry laws. Despite the unfavorable precedent, advocates continue to find new and creative ways to challenge registry laws under the federal and state constitutions.

VI.

RECOMMENDATIONS

While there are obviously great hurdles to overcome in the fight for more thoughtful, fair, and evidence-based approaches to reducing crime, there have been a few important legislative and judicial successes in curbing the creation and use of offender registries. Lawsuits continue to challenge offender registries on a host of legal grounds.³⁶⁰ Critiques are published regularly in both academic

356. *Smith v. Doe*, 538 U.S. 86, 100–01 (2003).

357. See Ron Wilson, *supra* note 170 (“These large buffers [where sex offenders are not allowed to live] take up a lot of residential space and leave few places for sex offenders to live, meaning that sex offenders may be forced to live in rural or socially disorganized neighborhoods.”).

358. See *Smith*, 538 U.S. at 101.

359. See LOGAN, *supra* note 5, at 63 (“[Under the AWA], no longer can registrants verify their identifying information by responding to a mailed inquiry; they must do so in person.”).

360. See, e.g., John H. Ticker, *Durham Man Challenges Law on Sex Offenders and Social Networking Sites*, INDY WEEK (May 29, 2013), <http://www.indyweek.com/indyweek/durham-man-challenges-law-on-sex-offenders-and-social-networking-sites/Content?oid=3645173> (describing a challenge to the constitutionality of North Carolina’s ban on social networking website use by registered sex offenders); *Former Child Sex Offenders Challenge Colorado Registry Law*, UPI.COM (Sep. 10, 2013 2:05 PM), http://www.upi.com/Top_News/US/2013/09/10/Former-child-sex-offenders-challenge-Colo-registry-law/UPI-10561378836326/ (describing challenge raised to Colorado registry brought by offenders who were convicted as juveniles); Justin George, *Sex Offender Registration Requirement Challenged*, THE BALTIMORE SUN (May 26, 2013), http://articles.baltimoresun.com/2013-05-26/news/bs-md-sex-offender-registry-20130526_1_robert-merle-haines-jr-offender-registry (describing a Maryland law suit which

journals and the popular press.³⁶¹ Some advocates have taken a piecemeal approach, attempting to limit the registration of juvenile offenders,³⁶² or targeting only certain types of registry laws, such as movement restrictions or internet bans.³⁶³ A few proposed registries have failed merely because of cost concerns. For example, attempts to create a domestic violence registry in Texas never gained momentum because, according to the Director of Public Policy for the Texas Council on Family Violence, “[d]uring these difficult economic times, in order to fund a registry, policy makers must weigh the value of the registry against the importance of having a domestic violence shelter”³⁶⁴ These successes are highly tenuous, as increased funding could provide the final push to turn previously unsuccessful bills into law.

I do not propose any one legal or legislative tactic to end the propagation of offender registries. Looking to the history of registries, however, I fear that even if enthusiasm for offender registries is dampened in the short term because of their cost or difficulty of implementation, they may eventually return with a vengeance unless thoroughly discredited. A long-term strategy of engaging the public on the extremely difficult topics of stigma, recidivism rates, and rehabilitation is absolutely necessary to ending the practice of criminal

alleges that making individuals who committed sex crimes prior to the registry’s existence participate in the system is a form of unconstitutional retroactive punishment); Vik Jolly, *Sex Offenders Challenge Ban from Parks*, ORANGE COUNTY REGISTER (Aug 21, 2013 1:17 PM), <http://www.ocregister.com/articles/sex-508569-law-offenders.html> (describing a pre-emption based challenge to a local ordinance banning sex offenders from Santa Ana parks); Paul Larocco, *Two Sex Offenders Challenging Suffolk Law*, LONG ISLAND NEWSDAY (May 19, 2013 9:54 PM), <http://www.newsday.com/long-island/suffolk/2-sex-offenders-challenging-suffolk-law-1.5295392> (describing a lawsuit challenging the monitoring and warehousing of sex offenders in Suffolk County, New York).

361. See, e.g., Molly Wilson, *supra* note 4 (attributing the popularity of registries to their psychological appeal rather than efficacy); Carpenter & Beverlin, *supra* note 3 (arguing that the increasingly broad and harsh consequences of registration are unconstitutional); McLeod, *supra* note 128 (describing how registries’ emphasis on “stranger danger” may hinder public safety); Kevin O’Hanlon, *Study: Sex Offender Registry Might Not Increase Public Safety*, LINCOLN JOURNAL STAR (Aug. 12, 2013 3:25 PM), http://journalstar.com/legislature/study-sex-offender-registry-might-not-increase-public-safety/article_c418d90a-e3c5-5750-bc4d-dfc581b1876a.html (describing a study commissioned by the Colorado State Legislature that called into question the efficacy of a recent expansion to that state’s notification provision); Emily DePrang, *Conservative Think Tank Supports Less Sex Offender Disclosure*, TEXAS OBSERVER (Apr. 13, 2013), <http://www.texasobserver.org/conservative-think-tank-supports-less-sex-offender-disclosure> (noting that “[n]o research has ever suggested, let alone proved, that public sex offender registries prevent crime or reduce recidivism”); Christopher Moraff, *Sex Offender Registries: Good Idea Gone Bad?*, THE PHILLY POST (May 13, 2013), http://blogs.phillymag.com/the_philly_post/2013/05/31/sex-offender-registries-good-idea-bad/ (critiquing the overbreadth of registries and explaining “[i]f the public is unable to discern genuine risk from a public sex offender database, the system is no longer working”).

362. See, e.g., *Former Child Sex Offenders Challenge Colorado Registry Law*, *supra* note 360; Emily DePrang, *Life on the List*, TEXAS OBSERVER (MAY 31, 2012), <http://www.texasobserver.org/life-on-the-list/>.

363. See, e.g., Jolly, *supra* note 360; Ticker *supra* note 360.

364. See Aaron Setliff, *Context: Family Violence Databases and Registries*, 90 TEX. L. REV. 193, 200–01 (2012).

registration for good. As long as legislators can count on garnering votes from their constituents by targeting offenders, many will continue to do so. As long as lower court judges can rely on two outdated Supreme Court cases to uphold even the most punitive new registry laws without garnering much criticism, many will continue to do so. Therefore both legal challenges and legislative advocacy may not be successful until advocates can change public opinion on offender registries, and on offenders themselves.

Crucial to the effort to stop the uncritical adoption of offender registry laws will be two types of empirical research. First, studies on the effects, intended and unintended, of new registration laws will likely provide additional statistical support for claims that registries are overly broad and overly punitive. While there has already been extensive research on sex offender registries, there is less information on nonsex registries, or new types of registry restrictions such as internet bans. Even more important will be ensuring that this research is broadly disseminated in the media. News media is a primary source of information about crime and criminals for most citizens.³⁶⁵ Even politicians have reported that they rely heavily on the media when making decisions about sex offender policies.³⁶⁶ Unfortunately, media reports are “not always grounded in current statistics, research, and accurate information,”³⁶⁷ and it appears that research on offender registration has yet to enter the public consciousness.

For example, according to a 2010 study by the U.S. Department of Justice (DOJ), the public continues to believe that sex offenders have unusually high rates of recidivism.³⁶⁸ Seventy-two percent of the study’s respondents predicted that over half of convicted sex offenders would commit additional sex crimes in the future.³⁶⁹ Furthermore, seventy-nine percent believed that registration and notification laws reduced recidivism.³⁷⁰ Similar results have been found in other studies.³⁷¹ One poll found that misconceptions about sex offenders and registries

365. CENTER FOR SEX OFFENDER MANAGEMENT, U.S. DEPARTMENT OF JUSTICE, *Exploring Public Awareness and Attitudes about Sex Offender Management: Findings from a National Public Opinion Poll 2* (Aug. 2010), available at <http://www.csom.org/pubs/CSOM-Exploring%20Public%20Awareness.pdf> [hereinafter DOJ Study].

366. *Id.* at 1–2.

367. *Id.* at 2.

368. *Id.* at 2–3; see also Jill S. Levenson, Yolanda N. Brannon, Timothy Fortney & Juanita Baker, *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOCIAL ISSUES & PUB. POL. 1, 12 (2007), available at <http://ccoso.org/library%20articles/PublicPerceptions%20ASAP%207.pdf>

369. DOJ Study, *supra* note 365 at 2–3.

370. *Id.* at 4. See also Levenson, Brannon, Fortney & Baker *supra* note 368, at 12–13.

371. See generally, Stacey Katz-Schiavone, Jill S. Levenson & Alissa R. Ackerman, *Myths and Facts About Sexual Violence: Public Perceptions and Implications for Prevention*, 15 J. OF CRIM. JUSTICE & POPULAR CULTURE 291 (2008), available at <http://www.albany.edu/scj/jcipc/vol15is3/KatzSchiavoneLevensonAckerman.pdf> (outlining prior findings on public misinformation about sex offenders, and offering new data to the same effect). For another overview of public opinion studies on sex offenders, see Jessica Duncan, *Public Perceptions Regarding Sex Offenders and Sex Offender Management* 15–19 (Dec. 2012), available

were pervasive even among university-level students of criminal justice.³⁷² Additional research on registries will therefore have only minimal effect on the public unless this research is reflected in media reporting.

Second, public opinion research is needed to determine the best ways to educate citizens about the failure of registry laws, and to shift public support towards more effective measures. Despite the misinformation discussed above, the DOJ study suggests that the public is interested in obtaining more accurate information about offenders and crime.³⁷³ An overwhelming eighty-three percent of respondents expressed a desire for more information on how to prevent sex offenses.³⁷⁴ Most respondents wanted their legislators to base sex offender policy on empirical research, although only a minority believed that research was currently a significant influence on lawmakers.³⁷⁵ Whether access to more accurate information would change public opinions on offender registries is not clear.³⁷⁶ One Florida study on attitudes towards sex offender policy disturbingly found that “the majority of participants would continue to support community protection policies even if their effectiveness remained unproven.”³⁷⁷ Notwithstanding this finding, there is relatively little information on the effects of education on public support for offender registries. It remains an open question whether education, including a change in media reporting, could dampen enthusiasm for these punitive measures. Additional public opinion polling could greatly help advocacy groups determine the most impactful ways to engage the public on the failures of registration and notification laws.

While too often research on criminal justice policy is not widely published or falls on deaf ears, a few legislators have begun to realize that in their haste to implement offender registries, insufficient research was undertaken to determine whether these measures would actually reduce crime. For example, there is currently a bill in New York that would create a Commission on Sex Offender Supervision and Management.³⁷⁸ This Commission would analyze current laws and treatment of sex offenders and issue a report with recommendations. Another New York bill would prohibit law enforcement from releasing level one sex offender information to the general public over the internet, signaling a possible realization among some legislators that offender registries have swept in too many people without a clear purpose.³⁷⁹ By encouraging these small steps,

at <http://dc.etsu.edu/cgi/viewcontent.cgi?article=2700&context=etd> (unpublished M.A. thesis, East Tenn. State University).

372. See Duncan, *supra* note 371, at 83–84.

373. DOJ Study, *supra* note 365, at 5.

374. *Id.* at 5.

375. *Id.* at 3.

376. *Id.* at 5.

377. Levenson, Brannon, Fortney & Baker, *supra* note 368, at 19.

378. See S.507, 2013–2014 S., Reg. Sess. (N.Y. 2013), available at http://assembly.state.ny.us/leg/?default_fld=&bn=S00507&term=2013&Summary=Y&Memo=Y&Text=Y.

379. See A.4587, 2013–2014 Assemb., Reg. Sess. (N.Y. 2013), available at

advocates can gain allies in the legislature who may be more willing to speak up against the “common sense” registry laws continually proposed by their peers.

VII. CONCLUSION

The first offender registry in the U.S. was adopted in L.A. in 1933, not to reduce the actual causes of crime, but to make life so difficult for gangsters that they would be forced to move outside the city. We have since come full circle in our use of registries. States are competing with each other in a race to the bottom to register more and more offenders, and place increasingly burdensome restrictions on registrants. One of the most honest explanations of this practice was uttered by Speaker Jerry Keen of the Georgia House during the vetting process for what became one of the most stringent sex offender regulations in the country. Keen explained, “If it becomes too onerous and too inconvenient, [sex offenders] just may want to live somewhere else And I don’t care where, as long as it’s not in Georgia.”³⁸⁰ While nearly all the data suggests the offender registries are ineffective at reducing, and may even increase crime, registry laws continue to be passed by legislators and upheld by courts.

The problems plaguing current registries will apply equally to future registries for any type of crime including domestic violence, animal abuse and drug crimes. Persons convicted of relatively minor crimes may face lifelong inclusion on offender registries, making these registries so large as to be prohibitively expensive and ineffective while at the same time depriving thousands of their civil liberties long after their sentences have been served. This is especially problematic in the case of juvenile offenders, who pose the lowest risk of reoffending. In the absence of any data that registries help to reduce crime, these laws do nothing more than stir up community fears and impose barriers to offenders trying to overcome their past and reenter society.

Offender registries are backwards, punitive measures that do not make communities safer. Unfortunately, those in favor of more nuanced, data-driven methods of reducing violence and sexual abuse face substantial barriers in overcoming precedent from years when registries were far narrower in scope than they are today. Advocates must work to distinguish current registries from their predecessors, educate legislators and the public on the ineffectiveness and perverse consequences of offender registries, and continue to conduct research to determine what actually works to prevent harm. While it is an uphill battle, we may take comfort that the facts are on our side.

http://assembly.state.ny.us/leg/?default_fld=&bn=A04587&term=2013&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y.

380. Nancy Badertscher, *Law to Track Sex Offenders Studied*, ATLANTA J.-CONST., Aug. 16, 2005, at B1 (quoting Rep. Keen).