

ORIGINAL

IN THE SUPREME COURT OF OHIO

ROMAN CHOJNACKI,	:	
	:	Case Nos. 2008-0991 and 2008-0992
Appellant,	:	
	:	On Appeal from the Warren
v.	:	County Court of Appeals
	:	Twelfth Appellate District
RICHARD CORDRAY, Ohio Atty. General,	:	Court of Appeals
in his Official Capacity,	:	Case No. CA200803040
	:	
Appellee.	:	

SUPPLEMENTAL MERIT BRIEF OF APPELLANT ROMAN CHOJNACKI

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I. INTRODUCTION

As Justice Frankfurter poignantly observed more than fifty years ago, “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.” *United States v. Rabinowitz* (1950), 339 U.S. 56, 69 (Frankfurter, J. dissenting). Such an observation acknowledges that voters, and the legislators chosen to represent them, may often prefer tyrannical rule, or more likely, rule that abuses a particular, unpopular minority group. It is in such times that greater vigilance is required by the courts to prevent government tyranny.

When the legislative branch chooses to target a group of scorned and reviled citizens—whether they be supporters of the Confederacy in the late 1860s, immigrants in the late nineteenth century, communist sympathizers in the 1950s, or sex offenders in the present day—it is the judiciary that must ensure that the procedural devices rooted in history and written into our Constitution are employed to assure fairness and justice before any person is deprived of life, liberty, or property. Our constitutional design reflects a common belief that only the courts, uncoerced by political considerations and unbound by popular sentiment, can prevent the Bill of Rights from becoming “an abstract rubric in an elegant code.” *Adams v. United States ex rel. McCann* (1942), 317 U.S. 269, 276.

In a progressive society committed to the rule of law, the right to be represented by counsel without consideration of financial means must be honored. For “it is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No court could be respected, or respect itself, to sit and hear such a trial.” *Betts v. Brady* (1942), 316 U.S. 455, 476 (Black, J., dissenting). Whether such a right emanates from the Sixth Amendment or the

Fourteenth Amendment is of far less concern than whether we continue to demand that effective barriers stand against the unjust deprivation of liberty by the government. It is shocking to our universal sense of justice that an individual could be subject to the onerous burdens of S.B. 10 with no more fanfare than a form letter from the Attorney General. It is even more shocking that we should deny any person the assistance of knowledgeable and skilled counsel in challenging such action.

This is a simple case about the most fundamental of procedural protections embodied in our Constitution—the right to counsel. The issue is not whether sex offenders present a danger to society or whether they are deserving of society’s disdain. Rather, the issue is whether—as citizens of this nation—they deserve the protection of our Constitution, which they unquestionably do. And it is now incumbent upon this Court to say so.

II. LAW AND ARGUMENT

First Supplemental Issue of Law

Sex offender reclassification hearings conducted under the provisions of S.B. 10 are criminal proceedings.

By its own terms, the Sixth Amendment applies to “all criminal prosecutions.” While much ink has been spilled in an effort to delineate the scope and contours of the specific rights expressed in the Sixth Amendment, very little has been devoted to an explanation of what constitutes a “criminal prosecution.” Perhaps, like obscenity, we cannot precisely explain what makes a proceeding “criminal,” instead we simply know it when we see it.

Nonetheless, courts are occasionally called upon to decide whether a particular proceeding, in purpose or effect, is a criminal action. In *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 789, the Supreme Court observed that “a criminal trial under our system is an adversary proceeding with its own unique characteristics.” These characteristics generally include the

extent to which the proceeding is adversarial, the level of formality attendant to the proceeding, whether the proceeding is presided over by a judicial officer, whether the state is represented by a prosecutor, and the type of sanction imposed at the conclusion of the proceedings. *Id.* at 787-90. Often these factors are weighed against the stated purpose of the proceedings in either statute or administrative regulations. See *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144. Thus, the criminal character of a particular proceeding is evidenced in large part by the structure of the proceeding itself.

The Supreme Court engaged in a similar analysis in *In Re Gault* (1967), 387 U.S. 1. In *Gault*, the Court focused on the fact that the juvenile delinquency adjudication bore many indicia of criminal proceedings. See *Gagnon*, 411 U.S. at 789, n. 12 (acknowledging *Gault's* reliance on the fact that such proceedings were “functionally akin to a criminal trial”). But in *Gault*, the Court relied most heavily on two factors: the fact that the child was adjudicated delinquent as a result of alleged illegal conduct and the fact that he could be committed to a State institution upon a finding of delinquency. *Gault*, 387 U.S. at 27. This approach is consistent with the Supreme Court’s broader analysis of what constitutes a criminal proceeding, which has focused almost entirely on the punitive nature of the sanction imposed. See *Kennedy*, 372 U.S. 144; *United States v. Ward* (1980), 448 U.S. 242; and *Dept. of Revenue v. Kurth Ranch* (1994), 511 U.S. 767.

A. S.B. 10 is a quintessentially penal statute; therefore, reclassification hearings, like original classification hearings, are criminal proceedings.

The landmark case of *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, sets out the proper approach for distinguishing between criminal and non-criminal sanctions and proceedings. The *Kennedy* Court, not unlike this Court, was faced with a purportedly civil statute aimed at an especially unpopular group of citizens—draft dodgers. As a result, the Court

expounded on the “imperative necessity” to safeguard constitutional rights in those times when “the pressing exigencies of crisis” create “the greatest temptation to dispense with fundamental constitutional guarantees.” *Id.* at 165. Because, as the Court observed, “[i]n no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.” *Id.* In similar fashion, this Court must not let the runaway passions of the public proscribe the mandates of the Constitution.

1. According to the holding of *Kennedy*, S.B. 10 imposes a criminal sanction and therefore must comport with the Sixth Amendment.

In *Kennedy*, the Court specifically addressed whether forfeiture of citizenship for the act of avoiding the draft constituted a criminal penalty, which triggered the procedural protections of the Fifth and Sixth Amendments. *Id.* at 165-66. The Court concluded that forfeiture of citizenship was intended as a punishment for the crime of avoiding the draft, and “[t]his being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without . . . the procedural safeguards required as incidents of a criminal prosecution.” *Id.* at 168.

The Court in *Kennedy* acknowledged that no absolute test can be applied to determine whether a statute is criminal or civil. Nonetheless, the Court set out a non-exhaustive list of factors, which it described as “useful guideposts” for determining whether a particular statute imposes a penal sanction and therefore qualifies as a criminal proceeding for Fifth and Sixth Amendment purposes. Such factors include: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment, that is, retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally

be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *Id.* at 168-69.

a. Under the factors set out in Kennedy, S.B. 10 is a criminal statute.

At the outset, Mr. Chojnacki acknowledges that this Court has previously weighed the *Kennedy* factors and concluded that other sex-offender registration laws were remedial and civil. See, e.g. *State v. Cook* (1998), 83 Ohio St.3d 404; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202; see, also, *Smith v. Doe* (2003), 538 U.S. 84 (finding Alaska's sex-offender registration law to be civil and remedial). Cf. *Wallace v. Indiana*, No. 49S02-0803-CR-138 (Ind. Apr. 30, 2009) (finding Indiana's version of the Adam Walsh Act to be a criminal statute based upon the *Kennedy* factors). But the statutes at issue in *Cook* and *Wilson* were significantly less onerous than S.B. 10. And at least three current members of this Court have recognized that we cannot "continue to label these proceedings as civil in nature. These restraints on liberty are the consequence of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." *Wilson*, 2007-Ohio-2202, at ¶¶ 45-46 (Lanzinger, J., concurring).

Kennedy, itself, ties the analysis exclusively to the specific statute at issue. Moreover, the flexible nature of the *Kennedy* factors evidences the Supreme Court's recognition that there is a sliding scale between purely remedial and purely punitive statutes, which will require reevaluation of prior pronouncements on similar statutes. Indeed, what arguably began as a legitimate regulatory scheme designed to give the community information necessary to protect itself from sex offenders has expanded significantly in both breadth and scope. Consideration of the *Kennedy* factors with respect to S.B. 10 demonstrates that Ohio's sex-offender registration

law imposes a punitive sanction, and this Court's prior consideration of entirely different statutory schemes cannot alter this conclusion.

i. S.B. 10 imposes an affirmative disability or restraint.

Without question, S.B. 10 imposes significant affirmative obligations in addition to a severe stigma upon every individual to whom it applies. As an initial matter, S.B. 10 imposes significant affirmative obligations, to which few, if any, other citizens are subjected. These obligations, including registration and disclosure of private information, are discharged under threat of criminal prosecution. R.C. 2950.06(F) and 2950.06(G). Moreover, the time periods associated with the affirmative obligation to register are significant and intrusive. For example, more than 90% of reclassified sex-offenders now have to register either every 180 days for 25 years or every 90 days for life.¹ In addition, several counties have instituted a fee that must be paid each time an individual registers. See *Sheriffs to Start Charging Registered Sex Offenders*, Dayton Daily News, Apr. 24, 2009, at A3 (reporting that the Montgomery County Sheriff will charge \$25 per year for Tier I and II offenders and \$100 per year for Tier III offenders). Such obligations cannot be construed as de minimus.

In addition, S.B. 10's residency restrictions impose significant restraints with respect to where registrants can lawfully reside. In fact, in Franklin County alone, sex offenders are effectively barred from 60% of all residential property in the county and more than 80% of property in low-income areas. See Amicus Brief of Cuyahoga County Public Defender at 5 (citing *Assessing Housing Availability Under Ohio's Sex Offender Residency Restrictions* (Mar. 25, 2009)). This constitutes an additional and significant disability for convicted sex offenders.

¹ 54% of reclassified offenders have been placed in the highest tier level, which requires registration every 90 days for life. As an example, a twenty-eight year old offender who lived to an average age of seventy-five, would register in person 188 times.

Finally, the aggressive community notification provisions contained within S.B. 10 subject offenders to profound levels of humiliation and community-wide ostracism. Not only does dissemination of such information subject offenders to serious risk of “vigilante justice” in the form of both threats and actual physical violence, it also directly contributes to lost employment opportunities and other forms of discrimination. Again, such far-reaching and significant consequences must be construed as substantial disabilities for reclassified offenders.

ii. S.B. 10 imposes sanctions that have historically been considered punishment.

Application of this factor is often challenging because sex-offender registration laws are of relatively recent origin and may lack a historical corollary. However, community notification cards, coupled with widespread dissemination of information on the internet, shares a common thread with traditional shaming punishments. In large part, the public notification scheme is designed to mark the offender as one who is to be shunned, which is precisely the goal of shaming punishments in the historical sense. See *Smith*, 538 U.S. at 115-116 (Ginsburg, J., dissenting). In addition, the registration and reporting scheme is virtually indistinguishable from probation, parole, and other forms of supervised release, which have traditionally been considered punishment for criminal acts. See *Wallace* at 12-13. (noting that sex-offender registration and notification bears substantial similarity to supervised probation or parole); see, also, Andrea E. Yang, Comment, *Historical Criminal Punishments, Punitive Aims and Un-“Civil” Post-Custody Sanctions on Sex-Offenders*, 75 U. Cin. L. Rev. 1299, 1328 (2007) (arguing that the supervision of sex offenders actually exceeds that of probationers and parolees).

iii. *S.B. 10 comes into play only on a finding of scienter.*

Because S.B. 10 is tied solely to a criminal conviction, and nearly all of the triggering crimes include a mens rea element, this factor also weighs in favor of finding that the sanction imposed is punitive and part of the criminal sentence.

iv. *S.B. 10 serves the traditional aims of punishment.*

Given the substantial restraints on physical liberty and the ostracism associated with sex-offender registration and notification, it defies reason to suggest that S.B. 10 is not designed in large part to have both a retributive and deterrent effect. While other secondary objectives, including a desire to protect the community, may also be present, the intention to deter future offenders and condemn past offenders cannot be understated. However, there is overwhelming empirical evidence that indicates that sex-offender registration and notification laws do little to protect the community. See, e.g., Lindsay A. Wagner, Note, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 Drexel L. Rev. 175, 195 (2009) (addressing the extent to which residency restrictions actually increase recidivism); Bob Vasquez, *The Influence of Sex Offender Registration and Notification Laws in the Untied States*, 54 Crime & Delinquency 175, 179, 188 (2008) (noting that empirical research indicates that sex-offender legislation seems to have had no uniform and observable influence on the number of rapes reported); JJ Prescott, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* (2008) at <http://www.law.umich.edu/centersandprograms/olin/papers.htm> (no evidence that sex-offender registries reduce recidivism or protect the public). In light of this evidence demonstrating that sex-offender registration laws do not protect the public, and in many instances, increase the risk to the public, the only remaining explanation for the increasingly

harsh sanctions imposed on sex-offenders is the General Assembly's desire to punish and deter crime.

v. *S.B. 10 applies only to behavior which is already a crime.*

The statute applies only to behavior that is already, and in fact, exclusively, criminal. Indeed, the entire category of persons subject to S.B. 10 are individuals previously convicted of certain enumerated criminal acts. Nothing in S.B. 10 contemplates application of its provisions to any form of behavior other than that proscribed as a sexual offense. Because the registration and notification obligations under S.B. 10 are triggered exclusively by the existence of a criminal conviction, it cannot be disputed that this factor weighs in favor of finding the statute to be punitive.

vi. *S.B. 10 does advance a non-punitive interest, but the sanction is excessive in relation to that alternative purpose.*

The final two *Kennedy* factors—whether the statute advances a non-punitive interest and whether the sanction imposed is excessive in relation to the purported non-punitive purpose—must be considered in tandem. Mr. Chojnacki cannot, and does not, dispute that S.B. 10 advances a legitimate, regulatory purpose. To the extent that S.B. 10 seeks to protect the public from dangerous sexual offenders, and therefore promotes public safety, it must be recognized as advancing a non-punitive goal. Thus, the sixth *Kennedy* factor weighs in favor of finding the statute to be remedial and civil.

However, the sanction is excessive in relation to the stated goal of protecting the public. First, S.B. 10 classification is tied solely to the fact of conviction as opposed to any finding of future dangerousness. Thus, for a potentially large number of convicted offenders, there is absolutely no threat to public safety, and imposition of registration duties and community notification cannot reasonably advance the stated goal of protecting the public. Moreover, in

light of empirical evidence that demonstrates the inefficacy of sex-offender registration laws in actually protecting the public from harm, the sanctions imposed are excessive in relation to any public safety goal. Setting aside its rhetoric, S.B. 10 actually does very little to advance public safety. Rather, its primary function is to continue to punish sex-offenders in perpetuity for their past criminal conduct.

Having weighed the seven *Kennedy* factors, only one—advancing a non-punitive purpose—weighs in favor of finding the statute to impose a remedial sanction. On balance, the remaining six factors weigh in favor of finding that the statute imposes criminal punishment. To the extent that the primary purpose of the statute is to impose punishment, it is a criminal statute and must comport with the mandates of Sixth Amendment, including the right to be represented by counsel. Upon establishing that S.B. 10 is criminal in nature, the question then becomes whether a reclassification hearing is a critical stage of a criminal proceeding. Mr. Chojnacki addresses that issue in Part B, below.

B. An S.B. 10 reclassification hearing is a critical stage of the criminal proceedings.

As recognized in *Gideon v. Wainwright* (1963), 372 U.S. 335, a criminal defendant has a constitutional right to the assistance of counsel. Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the Ohio Constitution. The right to counsel is fundamental and must be provided to any defendant who stands in jeopardy of life or liberty regardless of his financial means. *Johnson v. Zerbst* (1938), 304 U.S. 458, 462-63; see, also, *Argersinger v. Hamlin* (1972), 407 U.S. 25; *Gideon*, 372 U.S. 335; *Carnley v. Cochran* (1962), 369 U.S. 506; *Powell v. Alabama* (1932), 287 U.S. 45.

The right to counsel is not confined to representation during the trial on the merits. *Moore v. Michigan* (1957), 355 U.S. 155, 160. Rather, the defendant has the right to have

counsel present during all critical stages of an adversarial encounter with the government. *Mempa v. Rhay* (1967), 389 U.S. 128; *Estelle v. Smith* (1981), 451 U.S. 454, 469. The Supreme Court has explicitly held that the time of sentencing is a critical stage in a criminal case, and counsel's presence is therefore necessary. Following *Mempa*, the Supreme Court further defined the term "critical stage of the proceeding," focusing in large part on the historical purpose and meaning of the Sixth Amendment right to counsel.

For example, in *United States v. Ash* (1973), 413 U.S. 300, the Court decided that a pretrial photographic identification was not a critical stage of a criminal proceeding. In reaching its decision, the Court emphasized the historical interpretation of the Sixth Amendment and indicated that it would only expand the right "when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Id.* at 311. As a result, the court reviewed the Framers' intent behind enacting the Sixth Amendment right to counsel in an effort to define "stage of a criminal proceeding."

In *Ash*, the Court specifically identified two historical developments that were critical in the genesis of the Sixth Amendment right to counsel. The first was the institution of a professional "public prosecutor." *Id.* at 308. According to the Court, the Framers aimed to correct the imbalance that arises when a lay defendant is pitted against a professional prosecutor. *Id.* The second historical fact identified by the Court in *Ash* was the development of a complex procedural judicial system, which gave rise to concerns that "an unaided layman had little skill in arguing the law or in coping with an intricate procedural system." *Id.* at 355. Thus, the right to counsel is primarily, and historically, aimed at "minimiz[ing] the imbalance in the adversary system that otherwise resulted[.]" *Id.* at 307-09; accord *Powell*, 287 U.S. 45; *Gideon*, 372 U.S. at 344-45; and *Argersinger*, 407 U.S. at 31.

S.B. 10 reclassification hearings create many of the same imbalances and dangers the Framers sought to avoid by enacting the Sixth Amendment. Petitioners are forced to confront a prosecutor (mandated by S.B. 10) who is trained in the law, familiar with court procedures, and who handles these types of cases on a daily basis. Cf. *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 789 (probationers are not always entitled to court-appointed counsel at probation revocation hearings because a non-lawyer probation officer represents the state's interest rather than a prosecutor). Petitioners are required to navigate through a complex procedural process that confuses even learned judges. See, e.g., *Gildersleeve v. State*, 8th Dist. Nos. 91515 - 91519 and 91521 - 91532, 2009-Ohio-2031² at ¶56 (citing *In re S.R.B.*, 2d Dist. No. 08-CA-8, 2008-Ohio-6340, ¶6) (commenting that “[t]he enactment of the ‘Adam Walsh Act’ by the Ohio legislature, [has] resulted in a confusing array of very poorly worded statutory provisions that require a trial court to constantly refer to the law in effect prior to the enactment of the Adam Walsh Law in order to apply the current law.”).

Notably, the State's own legal representative previously concluded that reclassification hearings are critical stages of the criminal prosecution. In 1999, the Ohio Attorney General issued a formal opinion concluding that a hearing to determine an offender's classification pursuant to R.C. 2950.09 was a critical stage of the criminal proceedings, thus requiring county public defenders to represent the indigent offender. Attorney General Opinion 99-031 (Apr. 29, 1999). The Attorney General noted that the statute mandates that a condition precedent to the hearing is that a defendant must be charged and convicted of a sexually-oriented offense. *Id.* at 8. Therefore, according to the Attorney General, despite this Court's holding in *Cook*, 83 Ohio St. 3d at 417, “a hearing to determine whether a defendant is a sexual predator is a ‘stage of the

² Not yet journalized.

proceedings following arrest, detention, service of summons, or indictment’ for persons convicted of such offenses . . . for which the penalty includes the potential loss of liberty.” *Id.* at 9, 14.³

Ten years later, the S.B. 10 reclassification hearing presents far more significant dangers than defendants faced in 1999. The reclassification hearing is a complicated proceeding, and both parties require legal representation. In fact, the statute mandates the presence of the prosecutor. R.C. 2950.031. The hearing is a petitioner’s sole mechanism to raise challenges to his or her classification, so it must be a meaningful proceeding. Only by providing for the assistance of counsel will this Court ensure the petitioner a meaningful opportunity to assert claims regarding misclassification and relief from community notification, or to assert constitutional challenges to the application of S.B. 10. In light of the dangers facing an unrepresented petitioner, there is no question that the reclassification hearing is a critical stage of the criminal proceeding—particularly given the historical roots of the Sixth Amendment right to counsel. The appointment of counsel is required to correct the substantial imbalance in these proceedings.

Second Supplemental Issue of Law

Petitioners in S.B. 10 reclassification proceedings are entitled to court-appointed counsel under the Fourteenth Amendment’s Due Process Clause regardless of the civil or criminal nature of those proceedings.

Mr. Chojnacki urges this Court to conclude that S.B. 10 is a criminal statute and that he is therefore entitled to appointed counsel by operation of the Sixth Amendment. However, should

³ The Attorney General explicitly acknowledged Cook’s holding that R.C. 2950 was remedial and not punitive, but nonetheless concluded that counsel had to be appointed for indigent offenders.

this Court conclude that S.B. 10 is a remedial civil statute, due process demands that Mr. Chojnacki be provided appointed counsel at his reclassification hearing.

A. In order to achieve the “fundamental fairness” required by the Due Process Clause, indigent petitioners must be afforded the right to appointed counsel at reclassification hearings.

Due process of law is a necessary and vital component in any civilized system of justice. Indeed, the United States Supreme Court has long recognized the special role of due process in securing our individual liberty and freedom. See *Powell v. Alabama* (1932), 287 U.S. 45, 46 (holding that due process of law “embodies one of the broadest and most far reaching guaranties of personal and property rights”); *In Re Gault* (1966), 387 U.S. 1, 20 (“Due process of law is the **primary and indispensable foundation of individual freedom . . .** which defines the rights of the individual and delimits the powers that the state may exercise.”) (emphasis added). Moreover, due process of law formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions in the Bill of Rights. Its application is less a matter of rule and more a matter of fairness within the facts of a particular case. See *Betts v. Brady* (1942), 316 U.S. 455, 462; *Griffin v. Illinois* (1956), 351 U.S. 12, 21 (Frankfurter, J., concurring) (“Due process is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.”)

But, for all its consequence, “due process” remains an opaque concept. And achieving that fundamental fairness which the Due Process Clause requires remains an uncertain enterprise. As such, courts must “discover what ‘fundamental fairness’ consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.” *Lassiter v. Dep’t. of Soc. Serv’s* (1981), 452 U.S. 18, 24. In the instant case, consideration of “relevant precedents” and “assessment of the interests at stake” compel the

conclusion that indigent petitioners are entitled—as a matter of due process—to appointed counsel at their reclassification hearings.

1. The civil label attached to S.B. 10 reclassification hearings is not dispositive of the issue concerning the right to appointed counsel.

The State will likely argue that petitioners are not entitled to counsel at reclassification hearings simply because such proceedings are civil in nature. But the civil nature of the proceedings is not dispositive of the question as to whether S.B. 10 petitioners are entitled to appointed counsel.⁴ Without question, many procedural safeguards have traditionally hinged upon the designation of a proceeding as “criminal” or “civil.” But such designations should not be decisive. Considerations of fundamental fairness are far more significant than labels such as “criminal” and “civil.”

As discussed in detail above, *Gideon* recognized the importance of counsel to ensure the integrity of the adversary process and the fairness of legal proceedings. The reasoning of *Gideon* applies with equal force in civil proceedings. In short, *Gideon's* recognition that the lack of counsel distorts the adversary process is no less true in the civil context. And the logic that supports the holding in *Gideon*—that the right to be heard means little without the right to be heard by counsel, and that lawyers are necessities, not luxuries—is often as applicable to civil proceedings as it is to criminal ones. Fairness is not a function of the label of the proceedings. A legal proceeding is either fair or it is not. *Gideon's* doctrine may not support the right to counsel in S.B. 10 reclassification hearings, but its logic certainly does.

⁴ The proceedings at issue in this case, S.B. 10 reclassification appeal hearings, defy traditional conceptions of “criminal” and “civil.” As detailed above in Part A, there is a sliding scale between purely criminal and purely civil, and often proceedings that are nominally civil become so punitive that they must be treated as de facto criminal proceedings. Mr. Chojnacki urges this Court to locate S.B. 10 reclassification hearings on the criminal end of the sliding scale.

The fact remains that the presence of lawyers in any proceeding, whether criminal or civil, makes a substantial difference in the outcome. This is why those who can afford lawyers almost always hire them. Additionally, “if in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing and, therefore, of due process in the constitutional sense.” *Powell*, 287 U.S. at 69.

Acknowledging the important role that lawyers play in the adversary process, both the United States Supreme Court and this Court have held that due process not only requires that a litigant be permitted to be heard through counsel, but in some circumstances requires that such counsel be provided at state expense to indigent litigants. See, e.g., *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, paragraph two of the syllabus (right to counsel in parental termination proceedings); *State ex rel. Cody v. Toner* (1983), 8 Ohio St.3d 22, 24 (right to counsel in paternity proceedings); *In Re Fisher* (1974), 39 Ohio St.2d 71, 77-82 (right to counsel in civil commitment proceedings); *Gault*, 387 U.S. at 35-37 (right to counsel in juvenile proceedings); *In Re C.S.* (2007), 115 Ohio St.3d 267, 274 (right to counsel in juvenile proceedings); *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 790 (right to counsel in some cases in probation/parole revocation proceedings); *Lassiter*, 452 U.S. at 31 (right to counsel in some cases in parental termination proceedings).

a. *Due process requires a meaningful opportunity to be heard.*

It has been generally recognized that “whatever is ‘implicit in the concept of ordered liberty’ and ‘essential to the substance of a hearing’ is within the procedural protection afforded by the constitutional guaranty of due process.” *Betts*, 316 U.S. at 475 (Black, J., dissenting) (citing *Palko v. Connecticut* (1937), 302 U.S. 319, 325-27). Therefore, due process at its most

basic level encompasses the right to notice and a hearing. See *Powell*, 287 U.S. at 67 (“it has never been doubted by this Court, or any other so far as we know, that notice and a hearing are the preliminary steps essential to the passing of an enforceable judgment, and that they constitute the basic elements of the constitutional requirement of due process of law.”).

While notice and a hearing form the most basic components of due process, it has never been the rule that these are sufficient, in themselves, to satisfy the constitutional guaranty of due process of law. On the contrary, “the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge* (1976), 424 U.S. 319, 333. And it is equally well-established that “the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” *Powell*, 287 U.S. at 69.

B. S.B. 10 petitioners have an inviolable and absolute right to appointed counsel under the Fourteenth Amendment because they face a loss of personal freedom based upon the outcome of such proceedings.

The United States Supreme Court has recognized an absolute right to appointed counsel in those circumstances in which a litigant faces a loss of personal freedom without consideration of the criminal or civil nature of such proceedings. For example, the Supreme Court has observed that “it is the defendant’s interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel.” *Lassiter*, 452 U.S. at 25 (internal citations omitted). Thus, in *Lassiter*, the Supreme Court held that there is a right to appointed counsel in any case in which the indigent, if unsuccessful, may lose personal freedom. *Id.* at 26-27 (“the Court’s precedents speak with one voice about what ‘fundamental fairness’ has meant when the Court has considered the right to

appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.”)

As discussed in detail in the amicus brief submitted by the Cuyahoga County Public Defender, thousands of sex offenders face significantly enhanced reporting obligations under S.B. 10. See Amicus Brief of Cuyahoga County Public Defender at 4-7. For the duration of their reporting period, which has increased for most offenders from ten years to twenty-five years or life, these individuals face a threat of lengthy incarceration for non-compliance. See R.C. 2950.05; *State v. Mitchell*, 1st Dist. App. No. C-080340, 2009-Ohio-1264. Thus, for many petitioners previously classified as “sexually oriented offenders” or “habitual sex offenders” the threat of incarceration has increased significantly based upon their classification within the S.B. 10 tier classification system. This threat to personal liberty, and the risk of incarceration, is sufficient to trigger the right to counsel under the Fourteenth Amendment.

While petitioners do not necessarily face a new threat of incarceration, because they were also subject to incarceration under Ohio’s previous sex-offender laws, this does not change the analysis due process purposes. In *Vitek v. Jones* (1980), 445 U.S. 480, the Supreme Court considered the due process rights to be afforded to a state inmate being transferred from prison to a state mental institution. The State argued that the inmate was not entitled to any additional process, because he had been afforded procedural protections at trial and he faced no new threat of confinement. The Supreme Court held that before a state prisoner is involuntarily transferred to a state mental hospital, the Fourteenth Amendment Due Process Clause requires certain procedural protections, including the availability of legal counsel, furnished by the state, if the prisoner is financially unable to furnish his own. *Id.* at 483.

Central to the Court's decision in *Vitek* was the fact that the prisoner was subjected to a major change in the conditions of confinement and faced the stigmatizing consequences attendant to a transfer to a mental hospital. *Id.* at 488. Accordingly, the prisoner had a liberty interest sufficient to trigger the protections of the Fourteenth Amendment. The same result obtains in this case. First, petitioners are subject to a significant change in the terms of their registrations duties, which significantly increases the risk of incarceration. Second, many petitioners who were previously found to have a low risk of future dangerousness have been reclassified and placed in the highest tier level. The stigmatizing consequences of this change and the risk of incarceration require that certain procedural protections, including appointed counsel, be afforded to petitioners.

C. S.B. 10 petitioners are entitled to appointed counsel under the Fourteenth Amendment because the rights involved are significant and the proceedings are complex.

Even in those cases in which litigants do not face a direct threat to personal liberty, the Due Process Clause may still require the appointment of counsel. In such cases, the courts generally look to the nature and character of the interests involved and consider whether the effectiveness of the hearing may “depend upon the use of skills which the [petitioner] is unlikely to possess.” *Gagnon*, 411 U.S. at 786-87.

In *Lassiter*, the Supreme Court considered whether an indigent parent was entitled to court-appointed counsel. After reviewing the right to counsel in those instances in which the litigant faces a loss of liberty, the Court considered the contours of the right when no loss of liberty is threatened. Ultimately, the Court concluded that there is a presumption against appointed counsel when the litigant does not directly face confinement, but such a presumption may be rebutted. *Lassiter*, 452 U.S. at 26-27. According to the reasoning in *Lassiter*, a litigant

may be entitled to counsel, as a matter of due process, and that issue must be decided on a case-by-case basis by weighing the factors set out in *Mathews v. Eldridge* (1970), 424 U.S. 319. *Lassiter*, 115 U.S. at 27.

1. The *Eldridge* factors weigh in favor of appointing counsel.

In *Eldridge*, the Supreme Court set out three factors to determine what due process requires in a particular case: (1) the private interests at stake; (2) the government's interest; and (3) the risk that the procedures used will lead to erroneous decisions. *Eldridge*, 424 U.S. at 335. In the instant case, this Court must "balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Lassiter*, 452 U.S. at 27.

a. The private interests at stake are substantial.

All S.B. 10 petitioners have an interest in ensuring that the statute is applied in a manner that respects their constitutional rights. While not directly at issue in this case, Mr. Chojnacki and others subject to reclassification under S.B. 10 have colorable constitutional claims.⁵ Surely, the right to be free from double jeopardy and ex post facto laws is a substantial interest for any citizen. In addition, even if S.B. 10 is constitutionally sound, reclassified sex offenders have an interest in being properly classified under S.B. 10's tier classification system. The consequences of being placed in the wrong tier are substantial, given the varying obligations placed upon offenders within different tier levels. Moreover, a significant number of offenders are entitled to petition the court to relieve them from community notification. Failure to properly contest classification will result in waiver of these significant rights.

⁵ For examples of these constitutional claims, see *State v. Bodyke*, Supreme Court Case No. 2008-2502.

b. *There is a significant risk of erroneous decisions if counsel is not appointed.*

There is a significant risk that erroneous decisions will be rendered in S.B. 10 reclassification hearings if counsel is not provided. The potential errors are detailed extensively in the amicus brief of the Cuyahoga County Public Defender and will not be repeated here. In short, reclassified offenders may argue that S.B. 10 cannot be applied to them because: (1) its retroactive application violates numerous substantive constitutional rights; (2) its retroactive application constitutes a breach of their prior plea agreements with the state; (3) its community notification provisions should not be applied because the petitioner was not subject to community notification under the prior law; and (4) the Attorney General has classified the petitioner incorrectly.

Setting aside the fact that S.B. 10 is an incredibly complex law and that the procedure for challenging classification is very vague, the potential challenges to S.B. 10 involve nuanced arguments of law that the average defendant is unlikely to understand. The complexity of the legal challenges and the unclear procedural process is further compounded by the fact that the State is represented at these hearings by a skilled legal advocate. Without counsel to advocate his or her cause, it is highly unlikely that petitioners can adequately protect their substantive and procedural rights with respect to an S.B. 10 classification challenge.

c. *The State's interest is served by appointing counsel.*

The final factor to be considered under the *Eldridge* test is the governmental interest at stake. Within the narrow question presented by this case—whether S.B. 10 petitioners are entitled to appointed counsel—the State's interest converges in large part with the interests of the petitioners. First, the State's interest favors the accurate classification of offenders in order to ensure that the law is respected and basic fairness prevails. Second, to the extent that S.B. 10 is

intended to apprise the public of potentially dangerous offenders, that goal is significantly undercut if the information contained in the database is incorrect. Thus, as it relates to the appointment of counsel, the only countervailing state interest is financial.

Within the *Eldridge* framework, the financial cost is not a “controlling factor,” but the governmental interest in conserving scarce resources is still “a factor that must be weighed.” *Eldridge*, 424 U.S. at 348. Moreover, cost alone cannot prevent the State from providing a particular procedural safeguard. *Id.* The precise cost associated with the provision of counsel at S.B. 10 reclassification hearings is not known. But it is likely that the erroneous classification of offenders will constitute a serious drain on the State’s resources. The enhanced registration requirements impose a significant financial burden and the State’s fiscal interest may therefore be best served by the provision of counsel.

In total, the *Eldridge* factors weigh in favor of providing counsel to S.B. 10 petitioners. Thus, as a matter of fairness and due process, this Court should hold that appointed counsel is required for indigent petitioners at all S.B. 10 reclassification hearings.

III. CONCLUSION

For the foregoing reasons, Mr. Chojnacki asks this Court to determine that S.B. 10 reclassification hearings are criminal in nature. In the alternative, Mr. Chojnacki asks this Court to find that he is entitled to court-appointed counsel under the Due Process Clauses of the United States and Ohio Constitutions, regardless of whether those hearings are deemed criminal in nature.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **Supplemental Merit Brief of Appellant Roman Chojnacki** was forwarded by regular U.S. Mail, postage prepaid to Benjamin Mizer, Solicitor General, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215 this 4th day of May, 2009.


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IN THE SUPREME COURT OF OHIO

ROMAN CHOJNACKI,	:	
	:	Case Nos. 2008-0991 and 2008-0992
Appellant,	:	
	:	On Appeal from the Warren
v.	:	County Court of Appeals
	:	Twelfth Appellate District
RICHARD CORDRAY, Ohio Atty. General,	:	Court of Appeals
in his Official Capacity,	:	Case No. CA200803040
	:	
Appellee.	:	

APPENDIX TO

SUPPLEMENTAL MERIT BRIEF OF APPELLANT ROMAN CHOJNACKI

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In the
Indiana Supreme Court

No. 49S02-0803-CR-138

RICHARD P. WALLACE,

Appellant (Plaintiff below).

v.

STATE OF INDIANA,

Appellee (Defendant below).

Appeal from the Marion Superior Court,
Criminal Division, No. 49F15-0401-FD-1458
The Honorable Lisa Borges, Judge

On Petition To Transfer from the Indiana Court of Appeals, No. 49A02-0706-CR-498

April 30, 2009

Rucker, Justice.

Summary

The statutes collectively referred to as the Indiana Sex Offender Registration Act ("Act") require defendants convicted of sex and certain other offenses to register with local law enforcement agencies and to disclose detailed personal information, some of which is not otherwise public. In this case we consider a claim that the Act constitutes retroactive punishment forbidden by the Ex Post Facto Clause contained in the Indiana Constitution because it applies to a defendant who committed his offense before the statutes were enacted. We conclude that as applied in this case the Act violates the constitutional provision.

Facts and Procedural History

In 1988, Richard Wallace was charged with one count of child molesting as a Class B felony and one count of child molesting as a Class C felony. Under terms of a plea agreement Wallace pleaded guilty to the Class C felony count on February 15, 1989. The trial court imposed a five-year suspended sentence with various conditions of probation. Wallace completed probation in 1992. Two years later the Indiana Legislature passed the Act that, among other things, required probationers and parolees convicted of child molesting on or after June 30, 1994 to register as sex offenders. In 2001 the Act was amended to require all offenders convicted of certain sex offenses to register as sex offenders regardless of conviction date.

In 2003, Wallace's ex-wife notified authorities that Wallace had been convicted of a sex offense but had never registered as an offender. The Sex Offender Registration Coordinator for the Indianapolis Police Department investigated the matter, concluded Wallace was required to register, and sent Wallace a letter to that effect. Wallace responded to the Coordinator on December 31, 2003, and insisted that he did not have to register as a sex offender because the plea agreement executed in 1989 did not require him to do so.

After Wallace did not register, he was charged with failing to register as a sex offender as a Class D felony. Wallace subsequently filed a motion to dismiss, which the trial court denied. Following a trial by jury on January 31, 2007, he was found guilty as charged. The trial court

sentenced Wallace to 545 days of incarceration, all suspended to probation. He appealed raising three claims: (1) the plea agreement foreclosed the State's ability to prosecute him for failing to register as a sex offender, (2) the evidence was insufficient to support the conviction, and (3) the Act violates the ex post facto provisions of both the Indiana and federal Constitutions. The Court of Appeals affirmed the judgment of the trial court. Wallace v. State, 878 N.E.2d 1269, 1277 (Ind. Ct. App. 2008).

Having previously granted transfer we now reverse the judgment of the trial court on Wallace's ex post facto claim. In all other respects we summarily affirm the opinion of the Court of Appeals.

Background

I. Advent of Sex Offender Registry Statutes

The State of New Jersey gained national recognition after enacting a sex offender registration statute that has become known as "Megan's Law," named after a child abducted, sexually assaulted, and murdered by a known child molester who had moved across the street from the child's family without their knowledge. The constitutionality of the New Jersey legislation was upheld by the New Jersey Supreme Court in Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

In 1994, Congress adopted the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act to encourage individual states to adopt sex offender registration statutes. Under the Wetterling Act, if a state did not adopt some version of Megan's Law with certain provisions, Congress could withhold ten percent of certain grants the state would ordinarily receive for a variety of crime prevention and interdiction programs. See 42 U.S.C. § 14071(f) (1995) (current version at 42 U.S.C. § 14071(g)).

All fifty states and the District of Columbia responded in kind which generated an explosion of litigation challenging the laws under various constitutional provisions including

federal and state ex post facto clauses¹ and inspired vigorous academic debate.² The United States Supreme Court has also weighed in on the subject declaring in 2003 that the registration requirements imposed by the Alaska Sex Offender Registration Act were non-punitive and created a civil regime; therefore, the registration requirement could be applied retroactively without violating the Ex Post Facto Clause of the United States Constitution. Smith v. Doe, 538 U.S. 84, 105-06 (2003).³

II. The Indiana Response

A. Initial Sex Offender Registration Act

The Indiana General Assembly adopted its first version of Megan's Law in July 1994. Referred to as "Zachary's Law,"⁴ the Act required persons convicted of certain sex crimes to register as "sex offender[s]." Act of March 2, 1994, Pub.L. No. 11-1994, § 7 (codified as Indiana Code §§ 5-2-12-1 – 5-2-12-13) (current version at Indiana Code §§ 11-8-8-1 – 11-8-8-

¹ See, e.g., E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997); Fushek v. State, 183 P.3d 536 (Ariz. 2008); Kellar v. Fayetteville Police Dep't, 5 S.W.3d 402 (Ark. 1999); People v. Castellanos, 982 P.2d 211, 215 (Cal. 1999); State v. Seering, 701 N.W.2d 655 (Iowa 2005); State v. Myers, 923 P.2d 1024 (Kan. 1996); Doe v. District Attorney, 932 A.2d 552 (Me. 2007); Garrison v. State, 950 So.2d 990 (Miss. 2006); State v. Ferguson, 896 N.E.2d 110 (Ohio 2008); Commonwealth v. Lee, 935 A.2d 865 (Pa. 2007).

² See, e.g., Michele L. Earl-Hubbard, Comment, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 Nw. U. L. Rev. 788 (1996); G. Scott Rafshoon, Comment, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 Emory L.J. 1633 (1995); Lori N. Sabin, Note, Doe v. Poritz: A Constitutional Yield to an Angry Society, 32 Cal. W. L. Rev. 331 (1996); Simeon Schopf, "Megan's Law": *Community Notification and the Constitution*, 29 Colum. J.L. & Soc. Probs. 117 (1995).

³ Doe thereafter returned to state court and challenged the Act on state law grounds. The Alaska Supreme Court concluded the Act violated the Ex Post Facto Clause of the Alaska Constitution as applied to Doe. See Doe v. State, 189 P.3d 999, 1019 (Alaska 2008) (adopting the analytical approach used by the United States Supreme Court to evaluate ex post facto claims, but declaring, "Our interpretation of a clause in the Alaska Constitution is not limited by the Supreme Court's interpretation of the corresponding federal clause," Doe, 189 P.3d at 1006).

⁴ Zachary's Law was passed in honor of Zachary Snider, a 10-year-old boy from Cloverdale, Indiana who was molested and murdered by a previously convicted child molester. Overview of Zachary's Law, <http://www.allencountysheriff.org/sexoffender/zachary.html> (last visited April 23, 2009). See also Stevens v. State, 691 N.E.2d 412 (Ind. 1997) (upholding Stevens' conviction for the murder of Zachary).

22). The Act contained both registration and notification provisions, i.e., sex offenders were required to take affirmative steps to notify law enforcement authorities of their whereabouts, and that information was then disseminated to the public. In 1994, eight crimes triggered status as a sex offender and the statute applied only to offenders who resided or intended to reside in Indiana. Ind. Code §§ 5-2-12-4, -5 (1994). Registration involved providing limited information to law enforcement agencies where the offender resided and updating that information if the offender moved to a new municipality or county in Indiana. Id. at -8. Notification involved the distribution of a paper registry, updated twice per year and sent automatically to a few select agencies. Id. at -11. Other entities could receive the registry on request, but the home addresses of the registrants were withheld. Id.

B. Subsequent Amendments to the Act

Since its inception in 1994 the Act has been amended several times. What began as a measure to give communities notification necessary to protect children from sex offenders, the Act has expanded in both breadth and scope. We summarize below the amendments most relevant to the case before us.

The number of sex offenses that trigger the registration requirement has increased from eight to twenty-one, and has expanded to include murder, voluntary manslaughter, and under certain circumstances kidnapping and criminal confinement. Ind. Code §§ 11-8-8-5, -7 (Supp. 2008). The length of time in which an offender has a duty to register has also increased. Originally the duty to register was prospective only, and terminated when the offender was no longer on probation or discharged from parole. Ind. Code § 5-2-12-13 (1994). But in 1995 the duty to register expanded to ten years after the date the offender was released from prison, placed on parole, or placed on probation, whichever occurred last. Ind. Code § 5-2-12-13 (1995).

Aside from the registration component of the Act, over the years the notification component of the Act also expanded. Under a 1998 amendment, once an offender is discharged from a correctional facility, the facility is required to provide the local law enforcement authorities with, among other things, the offender's fingerprints, photograph, address where the

offender is expected to live, complete criminal history, and any information concerning the offender's treatment of mental disorders. Ind. Code § 5-2-12-7 (1998). The 2001 amendment also requires information concerning any address at which the offender spends more than seven days, and the name and address of the offender's employment or school attendance. Ind. Code § 5-2-12-5 (2002) (amended January 1, 2003) (current version at I.C. § 11-8-8-7). A 2008 amendment requires the disclosure of any electronic mail address, instant messaging username, electronic chat room username, or social networking web site username that a sex offender uses or intends to use. Ind. Code § 11-8-8-8 (Supp. 2008).

Verification of the disclosed information has also become more expansive. A 1998 amendment to the Act requires local law enforcement to verify the offender's current residence by mailing a form to the offender at least once per year, which the offender must return either by mail or in person. Ind. Code § 5-2-12-8.5 (1998). In 2006, the Act was amended to allow local law enforcement officers to visit personally the offender's address at least once per year. Ind. Code § 11-8-8-13 (2006). Under a 2008 amendment, if the offender uses an electronic mail address, instant messaging username, electronic chat room username, or social networking web site, the offender must sign a consent form authorizing searches of the offender's personal computer or device with Internet capacity at any time and installation of hardware and software to monitor the offender's Internet usage on any personal computer or device with Internet capacity. Ind. Code § 11-8-8-8 (2008).

A 1999 amendment made registry information accessible through the Internet. Ind. Code § 5-2-12-11 (1999). Today, an offender's home address, work address, and links to maps of their locations are also available.⁵ Black letters flash "FAILED TO REGISTER" under the photographs of offenders who have failed to register. *Id.* Red letters flash "SEX PREDATOR" under the photographs of offenders whose crimes qualify them as sexually violent predators.⁶ *Id.* Also available is a search-by-name feature that allows web surfers in any part of the world to

⁵ See Indiana Sheriffs' Sex and Violent Offender Registry, <http://www.insor.org> (last visited April 23, 2009).

⁶ "Sexually violent predator" is defined as "a person who suffers from a mental abnormality or personality disorder that makes the individual likely to repeatedly [commit sex offenses]." Ind. Code § 35-38-1-7.5(a) (2006).

search the entire state of Indiana for people they know or might know. In addition to being available through Indiana's Online Registry, the information is available through the United States Department of Justice. See Dru Sjodin National Sex Offender Public Website, <http://www.nsopr.gov> (last visited April 23, 2009).

Criminal penalties associated with the duty to register have increased as well. When enacted in 1994, the Act classified failure to register as a Class A misdemeanor, or as a Class D felony if the offender had a prior unrelated offense for failure to register. Ind. Code § 5-2-12-9 (1994). Amendments in 1996 made failure to register a Class D felony, or Class C felony if there was a prior unrelated offense for failure to register. Ind. Code § 5-2-12-9 (1996). In addition, since 1996, at least once per year a sex offender must register in person with local law enforcement and be photographed in each location where the offender is required to register. Ind. Code § 11-8-8-14 (2006). Failure to do so is punishable as a Class D felony, or a Class C felony if the offender has a prior unrelated conviction for registration violations. Ind. Code § 11-8-8-17 (2006).

A "sexually violent predator" who is absent for more than 72 hours from his principal place of residence or spends time in a county in which he is not otherwise required to register must inform law enforcement of his absence from his principal place of residence. Failure to do so is punishable as a Class A misdemeanor or Class D felony if the person has a prior unrelated offense for failing to comply with requirements imposed. Ind. Code § 11-8-8-18 (2006).

An offender must also at all times keep in his or her possession a valid driver's license or identification card. Ind. Code § 11-8-8-15 (2006). Failure to do so is punishable as a Class A misdemeanor, or Class D felony if the person is a sexually violent predator or has a prior unrelated conviction for failing to comply with requirements imposed. Id. And offenders cannot change their names except through marriage. Ind. Code § 11-8-8-16 (2006).

In addition to the registration and notification components of the Act, a 2006 amendment to the criminal code made it an offense for sexually violent predators and certain subcategories of sex and violent offenders (those designated "offenders against children") to live within one

thousand feet of a school, youth program center, or public park, or living within one mile of the residence of the victim of the offender's sex offense. Ind. Code § 35-42-4-11 (2006).

Discussion

I.

Wallace contends that as applied to him the Act violates the ex post facto prohibitions of both the Indiana and federal Constitutions because he committed his crime, was sentenced, and served his sentence before any registration or notification was required.

The United States Constitution provides that “[n]o State shall . . . pass any . . . ex post facto Law.” U.S. Const. art. I, § 10. The Indiana Constitution provides that “[n]o *ex post facto* law . . . shall ever be passed.” Ind. Const. art. I, § 24. Among other things “[t]he ex post facto prohibition forbids the Congress and the States to enact any law ‘which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.’” Weaver v. Graham, 450 U.S. 24, 28 (1981) (quoting Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325-26 (1867)) (footnote omitted). The underlying purpose of the Ex Post Facto Clause is to give effect to the fundamental principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties. Armstrong v. State, 848 N.E.2d 1088, 1093 (Ind. 2006).

This Court has never addressed whether the analysis of an ex post facto claim under the Indiana Constitution is the same as under the federal Constitution. The Court of Appeals has determined there is no difference. See, e.g., Wiggins v. State, 727 N.E.2d 1, 5 (Ind. Ct. App. 2000); Douglas v. State, 878 N.E.2d 873, 878 (Ind. Ct. App. 2007); Ridner v. State, 892 N.E.2d 151, 154 (Ind. Ct. App. 2008). But this proposition was first advanced in Spencer v. O’Comor, 707 N.E.2d 1039, 1042 (Ind. Ct. App. 1999). Ultimately concluding that the 1994 version of the Act did not violate the ex post facto provision of the Indiana Constitution, the Court declared, “Both parties acknowledge, and we agree, that the *ex post facto* analysis under Indiana law is the same as under the federal Constitution.” Id. In support the Court of Appeals cited two opinions from this Court, Crawford v. State, 669 N.E.2d 141 (Ind. 1996) and State ex rel. Dorton v.

Circuit Court of Elkhart County, 274 Ind. 373, 412 N.E.2d 72 (1980). See Spencer at 1042. We observe however that although ex post facto challenges were raised in both Crawford and Dorton, neither opinion discussed one way or the other whether ex post facto analysis under the Indiana Constitution is the same as under the federal constitution.

This Court has long observed that even when confronted with similarly worded provisions in the federal constitution, we will nonetheless apply an independent analysis when interpreting provisions in our own constitution. “The Indiana Constitution has unique vitality, even where its words parallel federal language.” State v. Gerschoffer, 763 N.E.2d 960, 965 (Ind. 2002). When we interpret language in our state constitution substantially identical to its federal counterpart, “we may part company with the interpretation of the Supreme Court of the United States or any other court based on the text, history, and decisional law elaborating the Indiana constitutional right.” Ajabu v. State, 693 N.E.2d 921, 929 (Ind. 1998). When interpreting similarly worded provisions in the Indiana Constitution, we often rely on federal authority to inform our analysis, even though the outcome may be different. Collins v. Day, 644 N.E.2d 72, 75 (Ind. 1994).

II.

When a statute is challenged as an alleged violation of the Indiana Constitution, our standard of review is well settled. Every statute stands before us clothed with the presumption of constitutionality until that presumption is clearly overcome by a contrary showing. State v. Rendleman, 603 N.E.2d 1333, 1334 (Ind. 1992). The party challenging the constitutionality of the statute bears the burden of proof, and all doubts are resolved against that party. Id. “If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the legislature violated the constitution unless the unambiguous language of the statute requires that conclusion.” State Bd. of Tax Comm’rs v. Town of St. John, 702 N.E.2d 1034, 1037 (Ind. 1998).

As noted above, the United States Supreme Court concluded that Alaska's Sex Offender Registration Act, which is very similar to Indiana's Act, did not violate the Ex Post Facto Clause of the United States Constitution. See Smith, 538 U.S. at 105-06. In reaching its conclusion, the Court applied the "intent-effects" test derived from its prior decisions to determine whether the statute imposed punishment. Id. at 92. Under this test a court first determines whether the legislature meant the statute to establish civil proceedings. Id. If the intention of the legislature was to impose punishment, then that ends the inquiry, because punishment results. Id. If, however the court concludes that the legislature intended a non-punitive regulatory scheme, then the court must further examine whether the statutory scheme is so punitive in effect as to negate that intention thereby transforming what had been intended as a civil regulatory scheme into a criminal penalty. Id.

Although we reach a different conclusion here than the United States Supreme Court reached in Smith, we agree that the intent-effects test provides an appropriate analytical framework for analyzing ex post facto claims under the Indiana Constitution.⁷ And although a multifactor test is susceptible to different conclusions, the availability of the reported decisions applying the test helps in our analysis.

III.

The intent-effects test ordinarily directs us to determine first whether the Legislature intended the Act to be a regulatory scheme that is civil and non-punitive. But we make two observations. First, as the Indiana Court of Appeals has observed, "[I]t is difficult to determine legislative intent since there is no available legislative history and the Act does not contain a purpose statement." Spencer, 707 N.E.2d at 1043. Second, it is unnecessary to address the first

⁷ In Smith the Court declared, "Because we ordinarily defer to the legislature's stated intent, only the *clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Id. at 92 (internal quotations omitted) (emphasis added). We observe that legislative intent in this case has not been stated. Thus the "clearest proof" standard is not applicable here. But even if legislative intent was clearly discernible, our standard of review for challenges to the constitutionality of a statute has never included a clearest proof element. Instead, a statute is presumed constitutional, and the party challenging its constitutionality has the burden of overcoming the presumption by a contrary showing. Rendleman, 603 N.E.2d at 1334 (Ind. 1992). The heightened standard of clearest proof is not consistent with this State's decisional law.

prong of the test in this instance, because assuming without deciding that the Legislature intended the Act to be non-punitive, we conclude its effects are nonetheless punitive as to appellant Wallace.

In assessing a statute's effects, the Supreme Court indicated that the seven factors listed in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), "provide[] some guidance." United States v. Ward, 448 U.S. 242, 249 (1980). The seven factors are: "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment-retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned." Mendoza-Martinez, 372 U.S. at 168-69 (footnotes omitted). The Supreme Court has not explained the relative weight to be afforded each factor. However, the Court has acknowledged that the factors "often point in differing directions" and that no one factor is determinative. Hudson v. United States, 522 U.S. 93, 101 (1997) (quoting Mendoza-Martinez, 372 U.S. at 169). In any event, "our task is not simply to count the factors on each side, but to weigh them." State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992). We address each factor in turn.

1. Affirmative Disability or Restraint

We first ask "[w]hether the sanction involves an affirmative disability or restraint." Mendoza-Martinez, 372 U.S. at 168. The short answer is that the Act imposes significant affirmative obligations and a severe stigma on every person to whom it applies. First, the Act compels affirmative post-discharge conduct (mandating registration, re-registration, disclosure of public and private information, and updating of that information) under threat of prosecution. Ind. Code §§ 11-8-8-14, -17 (2006). The duties imposed on offenders are significant and intrusive, including allowing in-home personal visitation for verification of the offender's address, id. at -13, carrying a valid identification at all times, id. at -15, and for some offenders, informing local law enforcement authorities of their plans to travel from their principal place of

residence for more than 72 hours, id. at -18. Further, the time periods associated with the Act are intrusive. Sexually violent predators must re-register for the rest of their lives;⁸ all other offenders must re-register annually for a minimum of ten years. Id. at -14, -19 (2006). All sex offenders who change residences must notify local law enforcement within seventy-two hours. Id. at -11. It appears to us that through aggressive notification of their crimes, the Act exposes registrants to profound humiliation and community-wide ostracism. Further the practical effect of this dissemination is that it often subjects offenders to “vigilante justice” which may include lost employment opportunities, housing discrimination, threats, and violence. Spencer, 707 N.E.2d at 1045. See also Doe v. Pataki, 120 F.3d 1263, 1279 (2d Cir. 1997) (noting that “sex offenders have suffered harm in the aftermath of notification – ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson”).

Considered as a whole the Act’s registration and notification provisions impose substantial disabilities on registrants. When the applicable provisions of the Act are considered together, the first Mendoza-Martinez factor clearly favors treating the effects of the Act as punitive when applied to Wallace.

2. *Sanctions that have Historically been Considered Punishment*

We next determine “whether [the sanction] has historically been regarded as a punishment.” Mendoza-Martinez, 372 U.S. at 168. The Act does not expressly impose sanctions that have been historically considered punishment. Because sex offender registration and notification acts are of relatively recent origin, some courts addressing this issue have determined that there is no historical equivalent. See, e.g., Hatton v. Bonner, 356 F.3d 955, 965 (9th Cir. 2004); Cutshall v. Sundquist, 193 F.3d 466, 475 (6th Cir. 1999). Other courts have determined that sanctions imposed are not analogous to the historical punishments of shaming. See, e.g., Russell v. Gregoire, 124 F.3d 1079, 1091-92 (9th Cir. 1997); E.B. v. Verniero, 119 F.3d 1077, 1099-1100 (3d Cir. 1997). But we agree with the Alaska Supreme Court that “the dissemination

⁸ Since 2007, sexually violent predators have been required to re-register every ninety days. Ind. Code § 11-8-8-14 (2007).

provision at least resembles the punishment of shaming” Doe, 189 P.3d at 1012; see also Smith, 538 U.S. at 115-16 (Ginsburg, J., dissenting) (“[The Alaska Act’s] public notification regimen, which permits placement of the registrant’s face on a webpage under the label ‘Registered Sex Offender,’ calls to mind shaming punishments once used to mark an offender as someone to be shunned.”). We observe that the Act’s requirements also resemble historical common forms of punishment in that its registration and reporting provisions are comparable to conditions of supervised probation or parole.⁹ Aside from the historical punishment of shaming, the fact that the Act’s reporting provisions are comparable to supervised probation or parole standing alone supports a conclusion that the second Mendoza-Martinez factor favors treating the effects of the Act as punitive when applied in this case.¹⁰

3. *Finding of Scienter*

Third, we consider “whether [the statute] comes into play only on a finding of *scienter*.” Mendoza-Martinez, 372 U.S. at 168. “The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes.” Kansas v. Hendricks, 521 U.S. 346, 362 (1997). If a sanction is not linked to a showing of *mens rea*, it is less likely to be intended as a punishment.

⁹ For example, persons on probation must report regularly to a probation officer and permit the probation officer to visit the person’s home. Ind. Code § 35-38-2-2.3 (Supp. 2008). The length of time sex offenders and sexually violent predators are on parole mirrors substantially the length of their registration requirement – ten years for sex offenders, and the remainder of the offender’s life for sexually violent predators and those convicted of murder or voluntary manslaughter. Ind. Code § 35-50-6-1(d), (e) (2006).

¹⁰ See also Andrea E. Yang, Comment, *Historical Criminal Punishments, Punitive Aims and Un-“Civil” Post-Custody Sanctions on Sex Offenders: Reviving the Ex Post Facto Clause as a Bulwark of Personal Security and Private Rights*, 75 U. Cin. L. Rev. 1299, 1328 n.199 (2007) (noting that because actual supervision of parolees and probationers is minimal due to high supervisory officer caseloads, only about half of probationers comply with probation requirements and thus suggesting that sex offender restrictions “may actually exceed those of probationers and parolees”).

We acknowledge that the Act applies to a few strict liability offenses.¹¹ However, it overwhelmingly applies to offenses that require a finding of scienter for there to be a conviction. The few exceptions do not imply a non-punitive effect. We conclude that the third Mendoza-Martinez factor slightly favors treating the effects of the Act as punitive when applied here.

4. *The Traditional Aims of Punishment*

We next ask “whether [the statute’s] operation will promote the traditional aims of punishment – retribution and deterrence.” Mendoza-Martinez, 372 U.S. at 168. We first observe that although the Mendoza-Martinez test focuses on retribution and deterrence, under our state Constitution, the primary objective of punishment is rehabilitation. “The penal code shall be founded on the principles of reformation, and not of vindictive justice.”¹² Ind. Const. art. 1, § 18. And there are other objectives including the need to protect the community by sequestration of the offender, community condemnation of the offender, as well as deterrence. Abercrombie v. State, 441 N.E.2d 442, 444 (Ind. 1982).

In Kansas v. Hendricks, the United States Supreme Court determined that the Kansas Sexually Violent Predator Act was not retributive because “it does not affix culpability for prior criminal conduct.” 521 U.S. 346, 362 (1997). The Kansas Act is triggered not by a criminal conviction, but rather by criminal conduct. It applies to persons charged with sexually violent offenses but who may be absolved of criminal responsibility. Id.; see also Kan. Stat. Ann. §§ 59-29a02(a), 59-29a03(a) (2005). As a result the Court declared, “[A]n absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed.” Hendricks, 521 U.S. at 362. Indiana’s Act is dramatically

¹¹ For example, child molesting, as defined by Indiana Code § 35-42-4-3 (2006), requires no scienter where there is sexual intercourse or deviate sexual conduct with a child under fourteen years of age. See also Ind. Code § 35-42-4-9 (2006) (sexual misconduct with a minor).

¹² “Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing ‘justice.’ Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior.” Artway v. Attorney Gen. of N.J., 81 F.3d 1235, 1255 (3d Cir. 1996).

different. As discussed *supra* in the Background section of this opinion the Act applies only to offenders convicted of specified offenses.

It is true that to some extent the deterrent effect of the registration and notification provisions of the Act is merely incidental to its regulatory function. And we have no reason to believe the Legislature passed the Act for purposes of retribution – “vengeance for its own sake,” Artway, 81 F.3d at 1255. Nonetheless it strains credulity to suppose that the Act’s deterrent effect is not substantial, or that the Act does not promote “community condemnation of the offender,” Abercrombie, 441 N.E.2d at 444, both of which are included in the traditional aims of punishment. We conclude therefore that the fourth Mendoza-Martinez factor slightly favors treating the effects of the Act as punitive when applied to Wallace.

5. *Application Only to Criminal Behavior*

Under the fifth factor we consider “whether the behavior to which [the statute] applies is already a crime.” Mendoza-Martinez, 372 U.S. at 168. The fact that a statute applies only to behavior that is already, and exclusively, criminal supports a conclusion that its effects are punitive. When analyzing the Alaska Sex Offender Registration Act, the Supreme Court declared that past criminal conduct is “a necessary beginning point, for recidivism is the statutory concern.” Smith, 538 U.S. at 105. But if recidivism were the only concern, the statute would apply not only to convicted sex offenders, but also to other defendants who might pose a threat to society even if they are not convicted. Doe, 189 P.3d at 1014. For example, the Washington Sex Offender Registration Act, upheld by the Ninth Circuit, includes sex offenders not found guilty – those charged with sex offenses but found incompetent to stand trial, found not guilty by reason of insanity, and those committed to mental health facilities as sexual psychopaths or sexually violent predators – as well as those who are convicted of sex offenses. Russell v. Gregoire, 124 F.3d 1079, 1091 (9th Cir. 1997); Wash. Rev. Code § 4.24.550(1)(c)-(e) (Supp. 2009).¹³

¹³ See also Fenedeer v. Hamm, 227 F.3d 1244, 1251-52, 1255 (10th Cir. 2000) (upholding constitutionality of Utah’s Sex Offender Registration Act which includes offenders found not guilty on ground of mental incapacity).

In this jurisdiction the Act applies only to defendants “convicted” of certain specified offenses. Ind. Code § 11-8-8-5(a) (2006). We find nothing in the Act that anticipates registration and notification for an offender charged with a sex offense who later by reason of an agreement pleads guilty to another charge for which registration is not required. Nor for example does the Act appear to anticipate that a defendant whose conviction for a sex offense is reversed on appeal (for reasons other than sufficiency of the evidence) is required to register despite having obviously engaged in prohibited conduct. In sum, it is the determination of guilt of a sex offense, not merely the fact of the conduct and potential for recidivism, that triggers the registration requirement. Because it is the criminal conviction that triggers obligations under the Act, we conclude that this factor supports the conclusion that the Act is punitive in effect as to Wallace.

6. *Advancing a Non-Punitive Interest*

We next ask whether, in the words of the United States Supreme Court, “an alternative purpose to which [the statute] may rationally be connected is assignable for it.” Mendoza-Martinez, 372 U.S. at 168-69. We agree with the Alaska Supreme Court that this statement is best understood as an inquiry into whether the Act advances a legitimate, regulatory purpose. Doe, 189 P.3d at 1015. The answer is undoubtedly yes. As we indicated earlier in this opinion, “it is difficult to determine legislative intent since there is no available legislative history and the Act does not contain a purpose statement.” Spencer, 707 N.E.2d at 1043. And, what began under the original Megan’s law – or in this state, Zachary’s law – as a measure to give the community notification necessary to protect its children from sex offenders, has become something much greater. Although this expansion supports the view that the effects of the Act are punitive, still the Act advances a legitimate regulatory purpose. We are not looking for a “close or perfect fit with the nonpunitive aims,” Smith, 538 U.S. at 103, but only that the Act advances a legitimate purpose of public safety. Id. at 102-03. We cannot disagree that “[t]he risk of recidivism posed by sex offenders is ‘frightening and high,’” Lee, 935 A.2d at 882 (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)), or that registration systems are a legitimate way to protect the public from repeat offenders. We conclude therefore that the sixth Mendoza-Martinez factor clearly favors treating the effects of the Act as regulatory and non-punitive.

7. *Excessiveness In Relation to State's Articulated Purpose*

Finally we determine “whether [the Act] appears excessive in relation to the alternative purpose assigned.” Mendoza-Martinez, 372 U.S. at 169. A number of courts give greatest weight to this factor. See, e.g., Kellar v. Fayetteville Police Dept., 5 S.W.3d 402, 409 (Ark. 1999) (“It is the seventh and final factor which weighs most heavily in the balance in Arkansas, as in most other states: the question of whether the Act is excessive in relation to its alternative purposes.”); Commonwealth v. Mullins, 905 A.2d 1009, 1017 (Pa. Super. Ct. 2006) (“Most relevant to the issue in the instant appeal [] is the last *Mendoza-Martinez* factor . . . which involves an examination of excessiveness when determining whether a statute has a punitive effect.”); Rodriguez v. State, 93 S.W.3d 60, 75 (Tex. Crim. App. 2002) (“of all the [Mendoza-Martinez] factors, this factor [excessiveness] cuts most directly to the question of which statutes cross the boundaries of civil sanctions, and which do not. Accordingly, we afford this factor considerable weight in deciding whether the amendments are punitive-in-fact”) (internal citations omitted).

As we note above registration systems are a legitimate way to protect the public from sex offenders. Of course if the registration and disclosure are not tied to a finding that the safety of the public is threatened, there is an implication that the Act is excessive. In those jurisdictions that have rejected ex post facto challenges to sex offender registration statutes, courts have specifically noted that disclosure was limited to that necessary to public safety, and/or that an individualized finding of future dangerousness was made. For example, in Pataki, 120 F.3d at 1281-83, 1285, cert. denied, 522 U.S. 1122 (1998), the Second Circuit upheld New York’s sex offender statute based on its tiered structure, which tied the harshness of the registration requirements to an individualized assessment of the risk that each offender posed to the community. Significantly, despite the outcome the court reached, it noted that the question of the statute’s punitive-in-fact aspect was “not free from doubt.” Id. at 1265. See also Cutshall v. Sundquist, 193 F.3d 466, 471, 483 (6th Cir. 1999) (rejecting ex post facto challenge to Tennessee sex-offender registration statute, which provided that the Tennessee Bureau of Investigation or the local law enforcement agency could release relevant information deemed necessary to protect the public concerning a specific sexual offender who was required to register).

In this jurisdiction the Act makes information on all sex offenders available to the general public without restriction and without regard to whether the individual poses any particular future risk. Indeed we think it significant for this excessiveness inquiry that the Act provides no mechanism by which a registered sex offender can petition the court for relief from the obligation of continued registration and disclosure. Offenders cannot shorten their registration or notification period, even on the clearest proof of rehabilitation.¹⁴ Thus, the non-punitive purpose of the Act, although of unquestioned importance, does not serve to render as non-punitive a statute that is so broad and sweeping. We conclude that the seventh Mendoza-Martinez factor favors treating the effects of the Act as punitive.

In summary, of the seven factors identified by Mendoza-Martinez as relevant to the inquiry of whether a statute has a punitive effect despite legislative intent that the statute be regulatory and non-punitive, only one factor in our view - advancing a non-punitive interest - points clearly in favor of treating the effects of the Act as non-punitive. The remaining factors, particularly the factor of excessiveness, point in the other direction.

Conclusion

Richard Wallace was charged, convicted, and served the sentence for his crime before the statutes collectively referred to as the Indiana Sex Offender Registration Act were enacted. We conclude that as applied to Wallace, the Act violates the prohibition on ex post facto laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed. We therefore reverse the judgment of the trial court.

Shepard, C.J., and Dickson, Sullivan and Boehm, JJ., concur.

¹⁴ We note, however, that a sexually violent predator may, after ten years, “petition the court to consider whether the person should no longer be considered a sexually violent predator.” I.C. § 35-38-1-7.5(g) (2006).

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

LEXSTAT ORC 2950.031

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH MAY 1, 2009 ***

*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2950. SEX OFFENDER REGISTRATION AND NOTIFICATION

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ORC Ann. 2950.031 (2009)

§ 2950.031. Attorney general to determine application of new SORN Law to each offender or delinquent child; registered letter to be sent; right to court hearing to contest application

(A) (1) At any time on or after July 1, 2007, and not later than December 1, 2007, the attorney general shall determine for each offender or delinquent child who prior to December 1, 2007, has registered a residence, school, institution of higher education, or place of employment address pursuant to *section 2950.04, 2950.041 [2950.04.1], or 2950.05 of the Revised Code* the offender's or delinquent child's new classification as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008, the offender's or delinquent child's duties under Chapter 2950. of the Revised Code as so changed, and, regarding a delinquent child, whether the child is a public registry-qualified juvenile offender registrant.

(2) At any time on or after July 1, 2007, and not later than December 1, 2007, the attorney general shall send to each offender or delinquent child who prior to December 1, 2007, has registered a residence, school, institution of higher education, or place of employment address pursuant to *section 2950.04, 2950.041 [2950.04.1], or 2950.05 of the Revised Code* a registered letter that contains the information described in this division. The registered letter shall be sent return receipt requested to the last reported address of the person and, if the person is a delinquent child, the last reported address of the parents of the delinquent child. The letter sent to an offender or to a delinquent child and the delinquent child's parents pursuant to this division shall notify the offender or the delinquent child and the delinquent child's parents of all of the following:

(a) The changes in Chapter 2950. of the Revised Code that will be implemented on January 1, 2008;

(b) Subject to division (A)(2)(c) of this section, the offender's or delinquent child's new classification as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008, the offender's or delinquent child's duties under Chapter 2950. of the Revised Code as so changed and the duration of those duties, whether the delinquent child is classified a public registry-qualified juvenile offender registrant, and the information specified in division (B) of *section 2950.03 of the Revised Code* to the extent it is relevant to the offender or delinquent child;

(c) The fact that the offender or delinquent child has a right to a hearing as described in division (E) of this section, the procedures for requesting the hearing, and the period of time within which the request for the hearing must be made.

(d) If the offender's or delinquent child's duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* is scheduled to terminate on or after July 1, 2007, and prior to January 1, 2008, under

the version of *section 2950.07 of the Revised Code* that is in effect prior to January 1, 2008, a summary of the provisions of *section 2950.033 [2950.03.3] of the Revised Code* and the application of those provisions to the offender or delinquent child, provided that this division applies to a delinquent child only if the child is in a category specified in division (C) of *section 2950.033 [2950.03.3] of the Revised Code*.

(3) The attorney general shall make the determinations described in division (A)(1) of this section for each offender or delinquent child who has registered an address as described in that division, even if the offender's duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* is scheduled to terminate prior to January 1, 2008, under the version of *section 2950.07 of the Revised Code* that is in effect prior to that date or the delinquent child is in a category specified in division (C) of *section 2950.033 [2950.03.3] of the Revised Code* and the child's duty to comply with those sections is scheduled to terminate prior to January 1, 2008, under the version of *section 2950.07 of the Revised Code* that is in effect prior to that date. The attorney general shall send the registered letter described in division (A)(2) of this section to each offender or delinquent child who has registered an address as described in that division even if the offender's duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* is scheduled to terminate prior to January 1, 2008, under the version of *section 2950.07 of the Revised Code* that is in effect prior to that date, or the delinquent child is in a category specified in division (C) of *section 2950.033 [2950.03.3] of the Revised Code*, and the child's duty to comply with those sections is scheduled to terminate prior to January 1, 2008, under the version of *section 2950.07 of the Revised Code* that is in effect prior to that date. *Section 2950.033 [2950.03.3] of the Revised Code* applies to any offender who has registered an address as described in division (A)(1) or (2) of this section and whose duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code* is scheduled to terminate prior to January 1, 2008, under the version of *section 2950.07 of the Revised Code* that is in effect prior to that date, or the delinquent child is in a category specified in division (C) of *section 2950.033 [2950.03.3] of the Revised Code*, and the child's duty to comply with those sections is scheduled to terminate prior to January 1, 2008, under the version of *section 2950.07 of the Revised Code* that is in effect prior to that date.

(B) If a sheriff informs the attorney general pursuant to *section 2950.043 [2950.04.3] of the Revised Code* that an offender or delinquent child registered with the sheriff pursuant to *section 2950.04 or 2950.041 [2950.04.1] of the Revised Code* on or after December 1, 2007, that the offender or delinquent child previously had not registered under either section with that sheriff or any other sheriff, and that the offender or delinquent child was convicted of, pleaded guilty to, or was classified a juvenile offender registrant relative to the sexually oriented offense or child-victim oriented offense upon which the registration was based prior to December 1, 2007, within fourteen days after being so informed of the registration and receiving the information and material specified in division (D) of that section, the attorney general shall determine for the offender or delinquent child all of the matters specified in division (A)(1) of this section. Upon making the determinations, the attorney general immediately shall send to the offender or to the delinquent child and the delinquent child's parents a registered letter pursuant to division (A)(2) of this section that contains the information specified in that division.

(C) The attorney general shall maintain the return receipts for all offenders, delinquent children, and parents of delinquent children who are sent a registered letter under division (A) or (B) of this section. For each offender, delinquent child, and parents of a delinquent child, the attorney general shall send a copy of the return receipt for the offender, delinquent child, or parents to the sheriff with whom the offender or delinquent child most recently registered a residence address and, if applicable, a school, institution of higher education, or place of employment address and to the prosecutor who handled the case in which the offender or delinquent child was convicted of, pleaded guilty to, or was adjudicated a delinquent child for committing the sexually oriented offense or child-victim oriented offense that resulted in the offender's or child's registration duty under *section 2950.04 or 2950.041 [2950.04.1] of the Revised Code*. If a return receipt indicates that the offender, delinquent child, or parents of a delinquent child to whom the registered letter was sent does not reside or have temporary domicile at the listed address, the attorney general immediately shall provide notice of that fact to the sheriff with whom the offender or delinquent child registered that residence address.

(D) The attorney general shall mail to each sheriff a list of all offenders and delinquent children who have registered a residence address or a school, institution of higher education, or place of employment address with that sheriff and to whom a registered letter is sent under division (A) or (B) of this section. The list shall specify the offender's or delinquent child's new classification as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008, the offender's or delinquent child's duties under Chapter 2950.

of the Revised Code as so changed, and, regarding a delinquent child, whether the child is a public registry-qualified juvenile offender registrant.

(E) An offender or delinquent child who is in a category described in division (A)(2) or (B) of this section may request as a matter of right a court hearing to contest the application to the offender or delinquent child of the new registration requirements under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008. The offender or delinquent child may contest the manner in which the letter sent to the offender or delinquent child pursuant to division (A) or (B) of this section specifies that the new registration requirements apply to the offender or delinquent child or may contest whether those new registration requirements apply at all to the offender or delinquent child. To request the hearing, the offender or delinquent child not later than the date that is sixty days after the offender or delinquent child received the registered letter sent by the attorney general pursuant to division (A)(2) of this section shall file a petition with the court specified in this division. If the offender or delinquent child resides in or is temporarily domiciled in this state and requests a hearing, the offender or delinquent child shall file the petition with, and the hearing shall be held in, the court of common pleas or, for a delinquent child, the juvenile court of the county in which the offender or delinquent child resides or temporarily is domiciled. If the offender does not reside in and is not temporarily domiciled in this state, the offender or delinquent child shall file the petition with, and the hearing shall be held in, the court of common pleas of the county in which the offender registered a school, institution of higher education, or place of employment address, but if the offender has registered addresses of that nature in more than one county, the offender may file such a petition in the court of only one of those counties.

If the offender or delinquent child requests a hearing by timely filing a petition with the appropriate court, the offender or delinquent child shall serve a copy of the petition on the prosecutor of the county in which the petition is filed. The prosecutor shall represent the interests of the state in the hearing. In any hearing under this division, the Rules of Civil Procedure or, if the hearing is in a juvenile court, the Rules of Juvenile Procedure apply, except to the extent that those Rules would by their nature be clearly inapplicable. The court shall schedule a hearing, and shall provide notice to the offender or delinquent child and prosecutor of the date, time, and place of the hearing.

If an offender or delinquent child requests a hearing in accordance with this division, until the court issues its decision at or subsequent to the hearing, the offender or delinquent child shall comply prior to January 1, 2008, with Chapter 2950. of the Revised Code as it exists prior to that date and shall comply on and after January 1, 2008, with Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on that date. If an offender or delinquent child requests a hearing in accordance with this division, at the hearing, all parties are entitled to be heard, and the court shall consider all relevant information and testimony presented relative to the application to the offender or delinquent child of the new registration requirements under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008. If, at the conclusion of the hearing, the court finds that the offender or delinquent child has proven by clear and convincing evidence that the new registration requirements do not apply to the offender or delinquent child in the manner specified in the letter sent to the offender or delinquent child pursuant to division (A) or (B) of this section, the court shall issue an order that specifies the manner in which the court has determined that the new registration requirements do apply to the offender or delinquent child. If at the conclusion of the hearing the court finds that the offender or delinquent child has proven by clear and convincing evidence that the new registration requirements do not apply to the offender or delinquent child, the court shall issue an order that specifies that the new registration requirements do not apply to the offender or delinquent child. The court promptly shall serve a copy of an order issued under this division upon the sheriff with whom the offender or delinquent child most recently registered under *section 2950.04, 2950.041 [2950.04.1], or 2950.05 of the Revised Code* and upon the bureau of criminal identification and investigation. The offender or delinquent child and the prosecutor have the right to appeal the decision of the court issued under this division.

If an offender or delinquent child fails to request a hearing in accordance with this division within the applicable sixty-day period specified in this division, the failure constitutes a waiver by the offender or delinquent child of the offender's or delinquent child's right to a hearing under this division, and the offender or delinquent child is bound by the determinations of the attorney general contained in the registered letter sent to the offender or child.

If a juvenile court issues an order under division (A)(2) or (3) of *section 2152.86 of the Revised Code* that classifies a delinquent child a public-registry qualified juvenile offender registrant and if the child's delinquent act was committed prior to January 1, 2008, a challenge to the classification contained in the order shall be made pursuant to division (D) of *section 2152.86 of the Revised Code*.

LEXSTAT ORC ANN. 2950.06

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
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*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2950. SEX OFFENDER REGISTRATION AND NOTIFICATION

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ORC Ann. 2950.06 (2009)

§ 2950.06. Periodic verification of current address

(A) An offender or delinquent child who is required to register a residence address pursuant to division (A)(2), (3), or (4) of *section 2950.04 or 2950.041 [2950.04.1] of the Revised Code* shall periodically verify the offender's or delinquent child's current residence address, and an offender or public registry-qualified juvenile offender registrant who is required to register a school, institution of higher education, or place of employment address pursuant to any of those divisions shall periodically verify the address of the offender's or public registry-qualified juvenile offender registrant's current school, institution of higher education, or place of employment, in accordance with this section. The frequency of verification shall be determined in accordance with division (B) of this section, and the manner of verification shall be determined in accordance with division (C) of this section.

(B) The frequency with which an offender or delinquent child must verify the offender's or delinquent child's current residence, school, institution of higher education, or place of employment address pursuant to division (A) of this section shall be determined as follows:

(1) Regardless of when the sexually oriented offense or child-victim oriented offense for which the offender or delinquent child is required to register was committed, if the offender or delinquent child is a tier I sex offender/child-victim offender, the offender shall verify the offender's current residence address or current school, institution of higher education, or place of employment address, and the delinquent child shall verify the delinquent child's current residence address, in accordance with division (C) of this section on each anniversary of the offender's or delinquent child's initial registration date during the period the offender or delinquent child is required to register

(2) Regardless of when the sexually oriented offense or child-victim oriented offense for which the offender or delinquent child is required to register was committed, if the offender or delinquent child is a tier II sex offender/child-victim offender, the offender shall verify the offender's current residence address or current school, institution of higher education, or place of employment address, and the delinquent child shall verify the delinquent child's current residence address, in accordance with division (C) of this section every one hundred eighty days after the offender's or delinquent child's initial registration date during the period the offender or delinquent child is required to register.

(3) Regardless of when the sexually oriented offense or child-victim oriented offense for which the offender or delinquent child is required to register was committed, if the offender or delinquent child is a tier III sex offender/child-victim offender, the offender shall verify the offender's current residence address or current school, institution of higher education, or place of employment address, and the delinquent child shall verify the delinquent child's current residence address and, if the delinquent child is a public registry-qualified juvenile offender registrant, the current school, institution of higher education, or place of employment address, in accordance with division (C) of this section every ninety

days after the offender's or delinquent child's initial registration date during the period the offender or delinquent child is required to register.

(4) If, prior to January 1, 2008, an offender or delinquent child registered with a sheriff under a duty imposed under *section 2950.04 or 2950.041 [2950.04.1] of the Revised Code* as a result of a conviction of, plea of guilty to, or adjudication as a delinquent child for committing a sexually oriented offense or a child-victim oriented offense as those terms were defined in *section 2950.01 of the Revised Code* prior to January 1, 2008, the duty to register that is imposed on the offender or delinquent child pursuant to *section 2950.04 or 2950.041 [2950.04.1] of the Revised Code* on and after January 1, 2008, is a continuation of the duty imposed upon the offender prior to January 1, 2008, under *section 2950.04 or 2950.041 [2950.04.1] of the Revised Code* and, for purposes of divisions (B)(1), (2), and (3) of this section, the offender's initial registration date related to that offense is the date on which the offender initially registered under *section 2950.04 or 2950.041 [2950.04.1] of the Revised Code*.

(C) (1) An offender or delinquent child who is required to verify the offender's or delinquent child's current residence, school, institution of higher education, or place of employment address pursuant to division (A) of this section shall verify the address with the sheriff with whom the offender or delinquent child most recently registered the address by personally appearing before the sheriff or a designee of the sheriff, no earlier than ten days before the date on which the verification is required pursuant to division (B) of this section and no later than the date so required for verification, and completing and signing a copy of the verification form prescribed by the bureau of criminal identification and investigation. The sheriff or designee shall sign the completed form and indicate on the form the date on which it is so completed. The verification required under this division is complete when the offender or delinquent child personally appears before the sheriff or designee and completes and signs the form as described in this division.

(2) To facilitate the verification of an offender's or delinquent child's current residence, school, institution of higher education, or place of employment address, as applicable, under division (C)(1) of this section, the sheriff with whom the offender or delinquent child most recently registered the address may mail a nonforwardable verification form prescribed by the bureau of criminal identification and investigation to the offender's or delinquent child's last reported address and to the last reported address of the parents of the delinquent child, with a notice that conspicuously states that the offender or delinquent child must personally appear before the sheriff or a designee of the sheriff to complete the form and the date by which the form must be so completed. Regardless of whether a sheriff mails a form to an offender or delinquent child and that child's parents, each offender or delinquent child who is required to verify the offender's or delinquent child's current residence, school, institution of higher education, or place of employment address, as applicable, pursuant to division (A) of this section shall personally appear before the sheriff or a designee of the sheriff to verify the address in accordance with division (C)(1) of this section.

(D) The verification form to be used under division (C) of this section shall contain all of the following:

(1) Except as provided in division (D)(2) of this section, the current residence address of the offender or delinquent child, the name and address of the offender's or delinquent child's employer if the offender or delinquent child is employed at the time of verification or if the offender or delinquent child knows at the time of verification that the offender or delinquent child will be commencing employment with that employer subsequent to verification, the name and address of the offender's or public registry-qualified juvenile offender registrant's school or institution of higher education if the offender or public registry-qualified juvenile offender registrant attends one at the time of verification or if the offender or public registry-qualified juvenile offender registrant knows at the time of verification that the offender will be commencing attendance at that school or institution subsequent to verification, and any other information required by the bureau of criminal identification and investigation.

(2) Regarding an offender or public registry-qualified juvenile offender registrant who is verifying a current school, institution of higher education, or place of employment address, the name and current address of the school, institution of higher education, or place of employment of the offender or public registry-qualified juvenile offender registrant and any other information required by the bureau of criminal identification and investigation.

(E) Upon an offender's or delinquent child's personal appearance and completion of a verification form under division (C) of this section, a sheriff promptly shall forward a copy of the verification form to the bureau of criminal identification and investigation in accordance with the forwarding procedures adopted by the attorney general pursuant to *section 2950.13 of the Revised Code*. If an offender or public registry-qualified juvenile offender registrant verifies a school, institution of higher education, or place of employment address, or provides a school or institution of higher education address under division (D)(1) of this section, the sheriff also shall provide notice to the law enforcement agency with jurisdiction over the premises of the school, institution of higher education, or place of employment of the

offender's or public registry-qualified juvenile offender registrant's name and that the offender or public registry-qualified juvenile offender registrant has verified or provided that address as a place at which the offender or public registry-qualified juvenile offender registrant attends school or an institution of higher education or at which the offender or public registry-qualified juvenile offender registrant is employed. The bureau shall include all information forwarded to it under this division in the state registry of sex offenders and child-victim offenders established and maintained under *section 2950.13 of the Revised Code*.

(F) No person who is required to verify a current residence, school, institution of higher education, or place of employment address, as applicable, pursuant to divisions (A) to (C) of this section shall fail to verify a current residence, school, institution of higher education, or place of employment address, as applicable, in accordance with those divisions by the date required for the verification as set forth in division (B) of this section, provided that no person shall be prosecuted or subjected to a delinquent child proceeding for a violation of this division, and that no parent, guardian, or custodian of a delinquent child shall be prosecuted for a violation of *section 2919.24 of the Revised Code* based on the delinquent child's violation of this division, prior to the expiration of the period of time specified in division (G) of this section.

(G) (1) If an offender or delinquent child fails to verify a current residence, school, institution of higher education, or place of employment address, as applicable, as required by divisions (A) to (C) of this section by the date required for the verification as set forth in division (B) of this section, the sheriff with whom the offender or delinquent child is required to verify the current address, on the day following that date required for the verification, shall send a written warning to the offender or to the delinquent child and that child's parents, at the offender's or delinquent child's and that child's parents' last known residence, school, institution of higher education, or place of employment address, as applicable, regarding the offender's or delinquent child's duty to verify the offender's or delinquent child's current residence, school, institution of higher education, or place of employment address, as applicable.

The written warning shall do all of the following:

(a) Identify the sheriff who sends it and the date on which it is sent;

(b) State conspicuously that the offender or delinquent child has failed to verify the offender's or public registry-qualified juvenile offender registrant's current residence, school, institution of higher education, or place of employment address or the current residence address of a delinquent child who is not a public registry-qualified juvenile offender registrant by the date required for the verification;

(c) Conspicuously state that the offender or delinquent child has seven days from the date on which the warning is sent to verify the current residence, school, institution of higher education, or place of employment address, as applicable, with the sheriff who sent the warning;

(d) Conspicuously state that a failure to timely verify the specified current address or addresses is a felony offense;

(e) Conspicuously state that, if the offender or public registry-qualified juvenile offender registrant verifies the current residence, school, institution of higher education, or place of employment address or the delinquent child who is not a public registry-qualified juvenile offender registrant verifies the current residence address with that sheriff within that seven-day period, the offender or delinquent child will not be prosecuted or subjected to a delinquent child proceeding for a failure to timely verify a current address and the delinquent child's parent, guardian, or custodian will not be prosecuted based on a failure of the delinquent child to timely verify an address;

(f) Conspicuously state that, if the offender or public registry-qualified juvenile offender registrant does not verify the current residence, school, institution of higher education, or place of employment address or the delinquent child who is not a public registry-qualified juvenile offender registrant does not verify the current residence address with that sheriff within that seven-day period, the offender or delinquent child will be arrested or taken into custody, as appropriate, and prosecuted or subjected to a delinquent child proceeding for a failure to timely verify a current address and the delinquent child's parent, guardian, or custodian may be prosecuted for a violation of *section 2919.24 of the Revised Code* based on the delinquent child's failure to timely verify a current residence address.

(2) If an offender or delinquent child fails to verify a current residence, school, institution of higher education, or place of employment address, as applicable, as required by divisions (A) to (C) of this section by the date required for the verification as set forth in division (B) of this section, the offender or delinquent child shall not be prosecuted or subjected to a delinquent child proceeding for a violation of division (F) of this section, and the delinquent child's par-

ent, guardian, or custodian shall not be prosecuted for a violation of *section 2919.24 of the Revised Code* based on the delinquent child's failure to timely verify a current residence address and, if the delinquent child is a public registry-qualified juvenile offender registrant, the current school, institution of higher education, or place of employment address, as applicable, unless the seven-day period subsequent to that date that the offender or delinquent child is provided under division (G)(1) of this section to verify the current address has expired and the offender or delinquent child, prior to the expiration of that seven-day period, has not verified the current address. Upon the expiration of the seven-day period that the offender or delinquent child is provided under division (G)(1) of this section to verify the current address, if the offender or delinquent child has not verified the current address, all of the following apply:

(a) The sheriff with whom the offender or delinquent child is required to verify the current residence, school, institution of higher education, or place of employment address, as applicable, promptly shall notify the bureau of criminal identification and investigation of the failure.

(b) The sheriff with whom the offender or delinquent child is required to verify the current residence, school, institution of higher education, or place of employment address, as applicable, the sheriff of the county in which the offender or delinquent child resides, the sheriff of the county in which is located the offender's or public registry-qualified juvenile offender registrant's school, institution of higher education, or place of employment address that was to be verified, or a deputy of the appropriate sheriff, shall locate the offender or delinquent child, promptly shall seek a warrant for the arrest or taking into custody, as appropriate, of the offender or delinquent child for the violation of division (F) of this section and shall arrest the offender or take the child into custody, as appropriate.

(c) The offender or delinquent child is subject to prosecution or a delinquent child proceeding for the violation of division (F) of this section, and the delinquent child's parent, guardian, or custodian may be subject to prosecution for a violation of *section 2919.24 of the Revised Code* based on the delinquent child's violation of that division.

(H) An offender or public registry-qualified juvenile offender registrant who is required to verify the offender's or public registry-qualified juvenile offender registrant's current residence, school, institution of higher education, or place of employment address pursuant to divisions (A) to (C) of this section and a delinquent child who is not a public registry-qualified juvenile offender registrant who is required to verify the delinquent child's current residence address pursuant to those divisions shall do so for the period of time specified in *section 2950.07 of the Revised Code*.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
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*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
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TITLE 29. CRIMES -- PROCEDURE
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ORC Ann. 2950.09 (2009)

§ 2950.09. Repealed.

Repealed, 152 v S 10, § 2 [146 v H 180 (Eff 1-1-97); 147 v H 565 (Eff 3-30-99); 148 v H 502 (Eff 3-15-2001); 149 v S 3 (Eff 1-1-2002); 149 v S 175 (Eff 5-7-2002); 149 v H 485 (Eff 6-13-2002); 149 v H 393. Eff 7-5-2002; 150 v S 5, § 1, eff. 7-31-03; 150 v H 473, § 1, eff. 4-29-05; 151 v S 260, § 1, eff. 1-2-07]. Eff 1-1-08.

[Repealed]



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COMMENT AND CASENOTE: HISTORICAL CRIMINAL PUNISHMENTS, PUNITIVE AIMS AND UN-"CIVIL" POST-CUSTODY SANCTIONS ON SEX OFFENDERS: REVIVING THE EX POST FACTO CLAUSE AS A BULWARK OF PERSONAL SECURITY AND PRIVATE RIGHTS

NAME: Andrea E. Yang*

BIO: * Associate Member, 2005-2006 University of Cincinnati Law Review. I would like to thank David Singleton, Stephen Johnson Grove, and the staff of the Ohio Justice and Policy Center for their suggestion of this topic and for their assistance in the research and writing of this Comment. I also thank Rainer, Annika, and Joschka for their unwavering patience and encouragement throughout law school.

SUMMARY:

... As a result of his guilty plea, he was classified as a sexually oriented offender, Ohio's lowest risk classification. ... In determining whether a practice is punitive, courts have focused on only two of the possible "traditional aims of punishment" - retribution and deterrence - even though the Supreme Court, scholars, and other historical sources also cite prevention (or specific deterrence), rehabilitation or reform, and incapacitation as aims of punishment. ... In applying the historical punishment factor, the Eighth Circuit in *Doe v. Miller* rejected the comparison between Iowa's sex offender residency restriction and banishment. ... Although no other federal cases apply the historical punishment factor to sex offender residency limits, the United States District Court for the Southern District of Ohio found that a city ordinance that excluded persons from a designated drug exclusion zone was analogous to the historical punishment of banishment and therefore weighed in favor of finding the ordinance punitive. ... Thus, for the historical punishment factor to provide any guidance in pointing out punitive effect, it requires a comparison of both form and effects between the modern sanction and historical punishments. ...

HIGHLIGHT:

"The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." n1

TEXT:

[*1299]

I. Introduction

In 2005, on his seventeenth wedding anniversary, Gerry Porter was forced to move out of the Bridgetown, Ohio home where he had lived for fifteen years with his wife and his two teenage sons. n2 In 1999, Mr. Porter had been accused of rape and sexual battery of a teenage girl. n3 In exchange for dropping the rape charge, he pled guilty to a charge of sexual battery believing it would be better for his family if he accepted five years of probation instead of the possibility of twenty-five years in jail. n4 As a result of his guilty plea, he was classified as a sexually oriented offender, Ohio's lowest risk classification. n5 Six years later, after completing his probation, Porter was evicted under a 2003 law that pro-

hibits registered sex offenders from living within 1000 feet of a [*1300] school. n6 "I agreed to certain terms ... moving out of my house wasn't one of them. Now ... they want to go back and change the agreement," said Porter. n7

In recent years, states have increasingly enacted laws to prevent future crimes by placing restrictions, such as exclusion zones and registration and notification laws, on persons who have already been punished under criminal laws. n8 Among the most prominent laws are state-level, post-custody sex offender registration requirements accompanied by myriad, and ever-multiplying, provisions mandating active community and workplace notification, license plates labeled "sex offender," civil commitment, and the new generation of residency limitations. n9 Although these provisions are intended to label and limit the freedom of registrants, thereby allowing the general public to avoid contact with these individuals, courts have found these restrictions "civil" in intent and non-punitive in effect, and therefore not subject to the U.S. Constitution's Article I, Section 10 limits on ex post facto laws, which apply only to criminal laws. n10

The judicial analysis for applicability of ex post facto protection to legislative action, which the Supreme Court laid out in *United States v. Ward*, looks first for a legislative intent to enact a criminal punishment. n11 A finding of punitive intent designates a law as criminal, [*1301] invoking ex post facto protections against retroactive application. n12 However, if the law's stated intent is "non-punitive," the court further examines whether the statute is "so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." n13 The determination of punitive effect is based on an examination of seven factors noted in *Kennedy v. Mendoza-Martinez*. n14 Of these factors, two require a retrospective analysis: 1) whether the sanction has been regarded in our history and traditions as a punishment, and 2) whether the statute promotes the traditional aims of punishment. n15

This Comment examines whether some post-custody restrictions on sex offender residency either so resemble historical punishments in impact or effectively further traditional punitive aims such that they should be subject to constitutional prohibition against retroactive application of laws under the Ex Post Facto Clause. Although the second part of the *Ward* test requires that courts probe beyond a legislature's pronouncements of civil intent into whether the *Mendoza-Martinez* factors indicate a punitive effect, in many cases, courts have dismissed ex post facto challenges to post-custody sex offender restrictions as non-punitive because they are "novel," n16 they do not match to an historical form of punishment, n17 or their primary stated aim is non-punitive. n18 In terms of the regarded-as-historical-punishment factor, federal courts often engage in only a superficial examination of the effects of these restrictions, focusing instead on differences between [*1302] the "modern" sanction's form and that of an historical punishment. Although no historical punishment exactly correlates with residency restrictions, more extreme versions of the restrictions may completely exclude a former sex offender from residing within certain municipalities, prevent him from occupying a house that he owns, and effectively mandate where he lives, thus subjecting him to limits similar to those imposed by such punishments as banishment, exile, exclusion zones, and parole. n19 In determining whether sex offender residency restrictions "serve the traditional aims of punishment" - defined as general deterrence and retribution n20 - some courts have engaged in a balancing test to find that a retributive or deterrent effect was outweighed by the presence of a regulatory or public safety objective. Further, adding to the general chaos and judicial caprice surrounding application of the Ex Post Facto Clause are the confusion between effects and intent of a sanction; ambiguous definitions of "retribution," "deterrence," and specific historical punishments; and the overlap between civil and punitive aims. This Comment examines how federal courts have applied the *Ward* test and its retrospective factors to ex post facto challenges to post-custody sex offender restrictions. Part II examines the reasons for the Constitution's prohibition against ex post facto laws and the current factors for determining if a law is punitive in effect with particular attention to the "historical punishments" and "traditional aims" factors. Part II also explores the theoretical justifications for punishment and their historical evolution. Part III provides an overview of state residency restrictions placed on persons convicted of sex offenses. Part IV reviews judicial application of the *Mendoza-Martinez* "historical punishments" and "traditional aims" factors to classify sex offender residency and other limits as civil or criminal. Part V questions the relevance and weight accorded to historical factors as "guideposts" for determining punitive effect. Despite the inherent complexities in the test, however, this Comment concludes that the *Mendoza-Martinez* guideposts (including the retrospective factors) should be adopted and clarified by the Supreme Court as part of the *Ward* scrutiny of punitive effect in order to bring greater stability to ex post facto jurisprudence, provide essential guidance to legislatures, and uphold the Ex Post Facto Clause as a "constitutional bulwark in favor of personal security and private [*1303] rights." n21 Such a logical and robust application of the *Ward* test and the *Mendoza-Martinez* factors to ex post facto challenges should weigh in favor of finding at least the more stringent versions of sex offender post-custody residency restrictions to be punitive and thus constitutionally barred from retroactive application.

II. Constitution's Prohibition Against Ex Post Facto Laws

Among the few powers that are expressly denied to the states in Article I, Section 10 of the United States Constitution is the power to pass ex post facto laws. n22 As formulated in *Calder v. Bull*, an ex post facto law is one that punishes, as criminal, acts performed before the enactment of the law. n23 The adoption of the Ex Post Facto Clause in the main body of the Constitution and the enactment of similar state constitutional protections reflect an historical concern regarding retroactive legislation dating back to English common law and bolstered by abuses by colonial governments and the Crown. n24 William Blackstone noted that retroactive laws are "cruel and unjust" because the lack of notice makes it impossible for one to avoid punitive consequences when an innocent act is later made criminal by subsequent lawmaking. n25 The prohibition against ex post facto laws was also a [*1304] response to the fear of laws "stimulated by ambition, or personal resentment and vindictive malice." n26 Further, the Ex Post Facto Clause served the structural purpose of reinforcing the separation of powers in the Constitution by prohibiting a form of legislative infringement on judicial power. n27 Commentators have noted that the writings of the founders, the location of the clause among the Article I congressional powers and other legislative anti-retroactivity prohibitions (Bill of Attainder and Contracts Clauses) suggest that the anti-retroactivity of lawmaking was "central to the constitutional bargain" and intended to be absolute. n28

In *Calder v. Bull*, the Supreme Court restricted the application of the ex post facto limit on congressional and state statutes to punishment of criminal acts. n29 Justice Chase named the four types of laws to which the Ex Post Facto Clause applies, which include "every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." n30 This category encompasses the ex post facto challenges to legislation adding post custody restrictions on sex offenders. In most cases, however, the courts have found that the additional requirements on sex offenders impose civil rather than criminal sanctions and therefore do not implicate the Ex Post Facto Clause. n31

[*1305]

A. The Supreme Court's Test for Ex Post Facto Laws

In *U.S. v. Ward*, the Supreme Court articulated the two-part test for considering whether a claim is criminal and therefore subject to prohibition under the Ex Post Facto Clause. n32 The first step requires the court to examine the text and structure of the legislative act for evidence of express or implied intent to impose punishment. n33 If the court determines the statute to be civil in intent, then the second stage of the inquiry examines whether the law is "so punitive either in purpose or effect to negate [the State's] intention' to deem it 'civil.'" n34 The Court has required the "clearest proof" of punitive effect to overcome a legislature's stated presumption of intent such that it may be considered a criminal punishment for constitutional purposes. n35

In *Kennedy v. Mendoza-Martinez*, n36 the Supreme Court laid out seven factors which serve as useful guideposts for analyzing whether a sanction is a "punishment." n37 These factors have been used by the courts to analyze punishment in ex post facto, bill of attainder, double jeopardy, and Sixth and Eighth Amendment contexts. n38 They include whether 1) the sanction involves an affirmative disability or restraint; 2) it has historically been regarded as a punishment; 3) it requires a finding of scienter; 4) its operation will promote the traditional aims of punishment - retribution and deterrence; 5) the behavior to which it applies is already a crime; 6) an alternative purpose to which it may rationally be connected is assignable to it; and 7) it appears excessive in [*1306] relation to the alternative purpose assigned. n39 Among the factors deemed relevant by the court to the ex post facto analysis of post-custody sanctions on sex offenders are the two retrospective factors: whether the sanction has been "regarded in our history and traditions as punishment" and whether it "promotes the traditional aims of punishment." n40 The next section discusses the historical practices and aims of punishment in America, followed by an examination of the application of and the rationale behind these two factors for determining punishment for ex post facto purposes.

B. Historical and Traditional Punishments and Justifications for Punishment

Philosophers name five justifications for punishment: 1) retribution; 2) general deterrence or social control; 3) individual deterrence; 4) rehabilitation or reform; and 5) incapacitation or social defense. n41 Commentators have noted that the form and reasons for punishment have changed throughout history in a pattern of adopting "modifications and changes to previous practices through devising new strategies, but often these new approaches acted to supplement existing strategies rather than to replace them." n42 What emerges from a review of the history of punishment is that penal practices result from a confluence of demographic, economic, political, and religious circumstances; intellectual thought of the time period; and reaction to the real or perceived successes or failures of previous punishment practices or theories. n43 Rather than serving any particular punitive purpose such as retribution or deterrence, similar punishments were

justified by shifting [*1307] and multiple aims, partly due to the necessity of building a consensus around the significant resource allocation for a punitive project. The remainder of this section provides a brief historical overview of the justifications and practices of punishment historically applied in America.

1. Colonial Punishments and Justifications

The predominance of English colonists in early American history resulted in the transfer of many English penal practices to the colonies. The English common law, which had developed in dense urban settings to exert the monarchy's control, prescribed capital punishment for even such offenses as minor forgery. n44 Such extreme punishments were out of place in the small, close-knit, and religious colonial communities where each person played a defined role and were thus applied with greater flexibility and leniency. n45 Instead, American conceptions of crime and punishment practices evolved to reflect the interdependency, lack of social mobility, and local variations in religious beliefs in colonial communities. n46

Colonial community life was ruled by rigid discipline, order, and cohesion with the patriarchal colonial authorities acting as "stern fathers." This order was reinforced by the belief in that individuals were predestined for their social position but that the community's rich and poor had obligations to each other. n47 The most frequently prosecuted crimes were those which disturbed the community order - fornication, public drunkenness and bastardry. n48 Crime and morality overlapped, as both were viewed as resulting from the inherent depravity of mankind and the influence of the devil rather than free will. n49 Since sin or crime could not be cured, punishment was aimed at cleansing the offender of moral failings and encouraging repentance, such that he or she could be integrated into the community. n50

Despite our current perceptions, public shaming punishments and banishments were infrequently applied in the colonial period. n51 Fines [*1308] and whippings were the most common punishments, n52 with mutilation, shaming, banishment and death reserved for more serious offenses and for repeat offenders. n53 Punishments were tailored by the community to the individual and to the severity of the offense. n54 Shaming punishments - stocks, pillory, branding, mild mutilation and public cage - brought ridicule on the offender in order to publicly exert the king's control and deter others from offenses. n55 Banishment was an extremely harsh punishment reserved for recidivists, outsiders, and those viewed as a permanent danger to the community. n56 Because of the insularity of communities, a banished person would likely be alienated and rejected if he or she attempted to gain acceptance into another community without references. n57 With return to the community often punishable by death, banished persons were faced with the challenges of surviving alone outside of a community, making incidental death likely, especially during the winter. n58

2. Penal Reform in the Early American Republic

In the period following the American Revolution, population growth, labor mobility, the westward movement, and urbanization changed America from a land of close colonial communities to one of cities and towns. n59 Punishments such as shaming and banishment, which depended on the close nature of the community, became ineffective because offenders were not identifiable by the many urban residents. n60 In addition, the American republic, influenced by the European Enlightenment, embraced ideas of freedom, tolerance, rejection of religious dogmatism, and its emphasis on reason and science. n61 Men were rational beings, rather than innate sinners, whose criminal acts were explained by free will in seeking pleasure and avoiding pain. n62 American leaders eagerly abandoned irrational Colonial ways especially [*1309] those inherited from the English monarchy, and looked instead to reforms of the penal system influenced by the Enlightenment's questioning of the aims, purposes and forms of punishment. n63 Montesquieu criticized violent punishment disproportionate to the offense as a violation of the rights of citizens inappropriate to democracy. n64 Enlightenment philosopher Cesare Beccaria suggested that crime was an injury to society and that penal reform should be guided by the utilitarian view that social action should assure the greatest happiness for the greatest number of people. n65 "In order that every punishment may not be an act of violence committed by one man or by many against a single individual, it ought to be above all things public, speedy, necessary, the least possible in the given circumstances, proportioned to its crime, dictated by the laws." n66 Deterrence would be the goal of punishment to be accomplished through increased predictability and appearance of fairness through publishing and education, speedy trial, and humane treatment. The principle of a social compact based on individual liberty implied deprivation of liberty (incarceration) as the appropriate deterrent to crime. n67 Thus, corporal and capital punishments were eliminated for most offenses because they were disproportionate to the damage caused by the offender and their retributive nature was not useful to society. n68 In addition, Republican ideals of individual merit and opportunity may have fostered thinking about rehabilitation as an aim of punishment. n69

In addition to changing philosophical reasons for punishment, the centralization of legal institutions influenced the law and systems of punishment. n70 In particular, the concentration of resources enabled incarceration to emerge as an efficient response to crime and with [*1310] penitentiaries as a physical symbol of state power. n71 Combining ideas from English workhouses for the poor and Quaker and Calvinist theories of rehabilitation of offenders through hard labor, discipline and meditation, penitentiaries purported to promote penitence, deterrence, and rehabilitation through work. n72

3. 1830-1880 Age of Penitentiaries

Although reform of penal statutes embraced prison and hard labor, the development of the infrastructure of the system lagged behind. Prison overcrowding led to shocking conditions as well as severe disciplinary issues. n73 Despite these problems, incarceration was considered an improvement over previous punishment practices. n74 Thus, the focus in the period from 1830s-1880s was on improving the penitentiary as a system of punishment.

The continued growth of cities, the westward movement, immigration, and mobility influenced the justifications for punishment. n75 The American elite were empowered by the nation's economic prosperity and participatory democracy. n76 However, in American cities, public disorder crimes, prostitution, gambling and drunkenness, and violent crime became prevalent, especially in the lower class and immigrant communities. n77 Understaffed police forces tended to focus only on controlling property crimes that had spilled over into the wealthy parts of town. n78 Amid this chaos, Dr. Benjamin Rush applied a disease model conceiving of crime as a disease of the "moral faculty," or the ability to distinguish between right and wrong. n79 Believing that [*1311] reform "should be the only end of all punishment," n80 Rush held that criminal habits, like disease, could be cured using solitary confinement, "bodily pain, labor, watchfulness, solitude and silence" to force reflection, teach self control and rehabilitate the person's character. n81 Rush eschewed all corporeal punishments as making the offender angry towards the community, creating public sympathy for the offender and disrespect for the law rather than rehabilitating the individual. n82 By removing the offender from the environment of vice in the city, the spread of crime as a "disease" would be prevented, and the individual would cure himself through solitary reflection and self-control. n83

These influences led to experimentations among prison reformers. The Pennsylvania system aimed to rehabilitate inmates into "model citizens" and compliant workers through reflection, complete solitude, discipline, and work which included literacy, work skills and learning through religious teachings. n84 New York State's Auburn system had inmates working together during the day and separated by night, with total silence throughout. n85 Strict discipline including walking in lockstep, a rigid schedule, whippings and beatings to punish disobedience, and noise - all aimed to break inmates by reducing them to a state of complete submission. n86 As the system took on some retributive aims, some retained the hope of reform through religion and education, while others, including Elam Lynds, a former military official and keeper at Auburn, saw the goal as deterrence through repression and terror. n87 Further, Lynds and others viewed profit from the "silent and insulated working machine" as the Auburn penitentiary's major aim. n88

The reality of prison operations belied these theoretical justifications. "Though heralded as a structure that would reform, deter and punish all at once, [the penitentiary] failed dismally, at least as a vehicle of reform or deterrence." n89 Conceived as a humane development over corporeal punishments, actual operations were rife with physical abuse [*1312] and deplorable health conditions exacerbated by overcrowding and breakdowns in the disciplinary system. n90 As prisons became concentrated with immigrant populations and severe offenders, inhumane treatment was more easily justifiable. n91 Auburn's mediocre officials made for unsuccessful penal administration, noted Alexis de Tocqueville, such that the "complete despotism" of the prisons markedly contrasted with the "most extended liberty" of the remainder of U.S. society. n92 Legislative reports in the 1850s began to recognize penitentiaries as doing little more than incarcerating prisoners in deteriorating conditions. n93 Unsurprisingly, the systems failed to rehabilitate or deter, and recidivism continued to be much more likely than reform. n94

4. Progressive Era Reformatories

From 1880 into the 1930s, industrialization, urbanization, and immigration brought great political, economic, and social change. Industrial development attracted rural Americans and immigrants to factory and other jobs in American cities. n95 However, the economic promise of the swelling cities was also accompanied by poverty, disease, and crime. n96 Energized by their optimism in science, social scientists and government progressive reformers set out to resolve the troubles of [*1313] the cities. n97 Biology, psychology, sociology and philosophy each proposed different scientific theories for the causes and approaches to addressing crime as a scientific problem, rather than as a moral failing, shaping the progressives' preference for rehabilitation as the aim of penal reform. n98

In this spirit of reform, the 1870 Cincinnati Conference of the National Congress on Penitentiary and Reformatory Discipline adopted the influential Declaration of Principles, which focused reform on rehabilitating the offender through individualized, scientifically based treatments. n99 Rejecting the isolation and strict discipline of the penitentiary approach, Zebulon Brockway argued that the pure punishment and retribution of the penitentiary were ineffective in reforming inmates because moral reform could not be detected or measured. He also questioned the assumption that offenders' criminal acts were based on rational motives such that they could be deterred through certain punishment. n100 Instead, a flexible punishment system including the reformatory, indeterminate sentencing, classification, intense instruction and labor, humane discipline, and parole would incorporate diagnosis, treatment, and monitoring of the offender's progress towards rehabilitation. n101

Unlike the penitentiary system, a reformatory system based on "prison science" and a medical treatment model would use expert knowledge to classify inmate "students" or "patients" according to their progress towards reform as measured by their participation in vocational and educational activities including paid work, job training, and exercise. n102 The reformatory would train and develop the individual's mind and body towards self discipline and integration into the industrial labor system. Instead of a fixed sentence related to the crime, offenders were given indeterminate sentences relating the punishment to successful reform of the individual rather than to the offense. n103 Successful adherence to rules was rewarded through a graded system of privileges. n104 Following a minimum sentence, and satisfactory progress, [*1314] a parole board would evaluate the individual's risk of recidivism based on his habits, associations, reputation, academic progress, work record, offense, and other relevant factors, and could release the offender on parole. n105

Parole was not merely an early release but was a community extension of the reformatory disciplinary process under the close supervision of a trained parole officer. n106 Probation arose as an alternative to incarceration in a parallel to the reformatory system. Through a pre-sentence investigation, offenders deemed capable of reform without confinement could receive a suspended sentence under the supervision of the probation officer who would identify problems and individualize treatment within the community. The officer would maintain contact with the offender's employer, family, and community to supervise the molding of the offender into a model citizen. n107

Again, the lofty aims of the progressives were limited by administrative, political, and financial constraints, and by human nature. n108 Though designed for youthful offenders, reformatories received the same seasoned criminals as the penitentiaries. n109 Further, overcrowding and understaffing led to inmate resistance. n110 Poorly trained staff and management administered the same brutal physical punishments and solitary confinement as the staff in the penitentiaries. n111 The system combining classification, treatment, incentive, and merit broke down, and with officials using the indeterminate sentencing scheme to control inmates and relieve overcrowding, resulted in great disparity in sentences for similar offenses. n112

The parole and probation systems also had limited success in rehabilitating offenders and protecting the public, as poorly trained, low-paid parole and probation officers carried unmanageably high caseloads. n113 Ideally, parolees would reintegrate into community, family and work; in reality, however, supervision and guidance were primarily focused on work and limited to a "palpable paper parole" in which parolees were to remain employed, submit regular reports signed by [*1315] their employer, and change jobs only after securing permission. n114 Further, requirements that parolees avoid drinking and undesirable associations often inhibited their reintegration into their community or made violations easy to justify. n115 Although the Progressive Era's "scientific" and individualized treatment and rehabilitation approaches never fully reached their goals, they strongly influenced American penology from the early twentieth century to the 1960s. n116

5. Twentieth Century Rehabilitative Services (1900-1960)

From the 1900s-1960s, the theories of the University of Chicago sociologists dominated thinking regarding the causes of crime and punishment. n117 Moving beyond the Progressive Era's beliefs in addressing the causes of crime through understanding and treating the individual offender, the Chicago school theories focused on the offenders' individual characteristics, group associations, and the "social disorganization" of slums as the causes of criminal behavior. n118 The combination of the disrupted organization of the slum environment with its poor housing and sanitation, rapid population growth and turnover and crime rates, the individual's learning of criminal behavior through his or her associations, and lack of access to achieve one's aspirations explained the offender's drift into criminal behavior. n119 In particular, the rehabilitative ideal under the Chicago school theories was buttressed by four assumptions: 1) an individual's personal history (socioeconomic background, family situation, and other factors) shaped their behavior, including criminal behavior; 2) antecedent causes of criminal behavior could be identified through case history of individual cir-

cumstances (events and associations, childhood abuse, school truancy/failure, neighborhood poverty); 3) treatment plans could target and overcome or counteract the identified causes of criminal human behavior, through counseling and other therapy; and 4) successful rehabilitation would allow the individual to reintegrate and contribute to society by holding a job, paying taxes, and raising a family. n120

These causal theories of crime implied a need for a broader array of prison, parole, and probation options to address the individual treatment [*1316] needs of the offenders. n121 Guided by this need, from 1900 to 1960, penal systems at the federal, state and local level experienced major expansion, professionalization and bureaucratization growth and differentiation of services. n122 These changes included minimum, medium, and maximum security prisons, and teams of professionals - psychologists, caseworkers, sociologists, vocational counselors, and psychiatrists - to test and understand the offender and plan for his or her therapy. n123 In 1929, the Federal Bureau of Prisons was created, with rehabilitation as the fundamental aim and purpose of incarceration. n124 Group therapy, academic training, and vocational training were widely implemented treatment approaches. n125

Although in the nineteenth century, parole was, in reality, a minimally supervised release of inmates with low risk of recidivism, the 1950s saw a revival of the progressive approach in the implementation of the "clinical" model of parole and probation. Instead of the three sided structure (offender, community and agent) which relied on the community as a normalizing and controlling force, parole agents took on a more professionalized role in crafting personalized treatment that operated independently of the community. n126 In theory, the parole process was one in which the parole officer gathered information about the parolee and began to influence, guide, and motivate the parolee in a treatment relationship that would continually evolve. In reality, the relationship was imbued with the tension between treatment (rehabilitation) and control (retribution and deterrence) as the parole or probation officer fulfilled both roles. The control aspect took on particular prominence as officers carried high caseloads, leaving little time for individualized treatment and counseling. n127

[*1317]

6. Current

The inability of law enforcement and penal institutions to respond to the crime and civil rights uprisings of the 1960s led to closer scrutiny of the "disinterested professionalism" of criminal justice officials and exposure of how the self-interested operation of the justice system displaced law and order, due process, and offender rehabilitation goals. n128 Specifically, a 1974 academic evaluation declared that rehabilitation programs had only minimal success in curbing recidivism, spurring politicians to declare that nothing works, and to take up the banner of crime control. n129 Thus, deterrence, incapacitation through long prison sentences, and retribution reflected in "just deserts" punishing replaced rehabilitation goals. n130 Sentencing guidelines were instituted to effectively remove the discretion of judges and the supposed role of individual social and economic circumstances that had been central to the rehabilitation ideal. n131

Thus, punishment practices have been and are continually evolving over time and are justified by multiple and changing theories and strategies. n132 Over the past fifty years, the justifications and approaches for punishment have shifted from reform and rehabilitation to retribution and incapacitation due to disenchantment with the lack of success of rehabilitation and cynicism regarding efficacy of punishment as deterrence. n133 "There are two and only two ultimate purposes to be served by criminal punishment," commented Professor Packer in 1969, "the deserved infliction of suffering on evildoers and the prevention of crime." n134 Further, in 1984, the United States Sentencing Commission excluded rehabilitation as an aim of punishment, stating in the Sentencing Reform Act of 1984 that the purposes of punishment are retribution, education, deterrence, and incapacitation. n135 Today, [*1318] punishment is largely oriented towards retribution and incapacitation as reflected in the rising rate of incarceration. n136 In addition, the wane of rehabilitation as an aim of punishment is evidenced by the abandonment of indeterminate sentencing, which allowed release of prisoner when determined to be "rehabilitated." n137

C. Post-Custody Sex Offenders Sanctions

In the 1990s, following a number of high profile child sexual abuse cases, state legislatures began enacting requirements for sex offender registration and active community notification of the presence of persons who had previously pled guilty to or been convicted of sex offenses. n138 These laws state a remedial purpose. For example, the legislative findings of New Jersey's "Megan's Law" states that "public safety will be enhanced by making information about certain sex offenders ... available to the public." n139 Congress further reinforced this movement by enacting the Jacob Wetterling Act and the federal version of Megan's Law, which tie state receipt of federal anti-crime funds to the state's adop-

tion of a sex offender registry system requiring that states "release relevant information concerning registered child molesters and sexually violent offenders when necessary to protect the public." n140 As of October 2001, some 3,888,000 sex offenders were registered in the U.S. n141

Fueled by public fear and anger at instances of child molestation by repeat offenders, and further enflamed by media coverage and exaggerated reports of recidivism, n142 legislatures continue to respond to [*1319] the public's demands by enacting further restrictions on sex offenders. n143 Residency restrictions are one of the more recent trends in legislative restrictions on sex offenders. At least ten states and numerous municipalities have laws creating a buffer zone in which registered sex offenders may not live around schools, daycares, playgrounds, or other places frequented by children. n144 Typically these laws proscribe a distance limit around the location - from five hundred feet in Illinois to two thousand feet in Iowa - within which the registrant may not reside.

These residency restrictions and controls on sex offenders reflect our current "jurisprudence of prevention" n145 which has almost completely shifted the focus away from rehabilitation and the individual rights of the offender to a zero-tolerance risk management approach. n146 Criminologist Michael G. Petrunik notes that the evolution of the current risk management (or community protection) approach to sex offender control parallels twentieth-century changes in theories and methods of punishment. n147 The offender is viewed as posing an unacceptable risk [*1320] such that "neither punishment nor treatment are [sic] considered to be effective controls and whose perceived enduring danger means they must be under the watchful eye of the state and community for the rest of their lives." n148 Laws implementing this risk management approach claim a public safety purpose. n149 Despite these stated remedial aims, commentators have noted that "from an individual rights perspective, the most troubling scenario is the evolution of a model that uses public health and safety rhetoric to justify procedures that are in essence[] punishment and detention." n150

III. The Historical Guideposts: Do Sex Offender Residency Restrictions Resemble "Historical Punishments" or Promote Traditional Punitive Aims?

In view of the historical practices and aims of punishment, this Part examines how courts have applied the retrospective guideposts in determining whether sex offender residency sanctions and other post-custody sanctions are punitive.

A. Traditional Aims of Punishment

In determining whether a practice is punitive, courts have focused on only two of the possible "traditional aims of punishment" - retribution and deterrence - n151 even though the Supreme Court, scholars, and other [*1321] historical sources also cite prevention (or specific deterrence), rehabilitation or reform, and incapacitation as aims of punishment. n152 However, while prevention, rehabilitation, and incapacitation may serve both civil and punitive purposes, "retribution and general deterrence are reserved for the criminal system alone." n153 These overlapping aims of civil and criminal sanctions have resulted in confusion among the courts in the analysis of whether a restriction is a punishment for constitutional analysis.

For example, in *Kansas v. Hendricks*, the Supreme Court considered whether a state statute which provided that a sex offense conviction or guilty plea would automatically trigger civil commitment proceedings would constitute "punishment" subject to the Ex Post Facto Clause. n154 In applying the *Mendoza-Martinez* factors, the *Hendricks* majority concluded that although incapacitation is a characteristic of criminal incarceration, "incapacitation may be a legitimate end of the civil law"; otherwise all commitments would be considered punishment. n155 However, Justice Kennedy's concurrence cautioned that the overlap between civil and punitive aims could dangerously blur this distinction if mental health officials were to conclude that there is no loss from civil confinement although the person could be put away for life. n156 If the state's definition of "mental abnormality" became too vague a mechanism to determine whether commitment was necessary, civil confinement could be abused for retributive or general deterrence purposes, crossing the line of unconstitutional punishment. n157 In dissent, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, further warned that the fact that incapacitation can also be a civil aim does not lessen its punitive nature. n158

[*1322] While the presence of an aim which is both civil and punitive may be insufficient to find a law punitive, even the fact that a statute might serve general deterrence purposes - one of the aims deemed solely punitive - is not enough to hold a statute punitive. In *Smith v. Doe*, the Supreme Court examined the constitutionality of the Alaska Sex Offender Registration Act under the Ex Post Facto Clause. n159 Despite the State's concession that the registration requirement "might deter future crimes," the Court dismissed the act as non-punitive, explaining that "to hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' ... would severely undermine the Government's ability to engage in effective regulation." n160 In addition, the Court rejected the Court of Appeals' finding that the reg-

istration requirements were retributive because the duration of the requirement was more closely related to the severity of the offense than the risk of recidivism. Instead, the Court held that the requirements were "reasonably related to the danger of recidivism," a civil purpose. n161

In both of these cases, however, the Court misses the entire point of the inquiry. Because a legislature's civil label is not always dispositive, n162 the reason for examination of the Martinez-Mendoza guideposts is to look behind the legislature's express intent in order to determine if the scheme is "so punitive either in purpose or effect as to negate [the State's] intention" to label it non-punitive. n163 Thus, a finding, or State's admission, that a law's "operation will promote the traditional aims of punishment - retribution and deterrence," n164 while not dispositive, n165 should weigh in favor of a finding that the law is punitive.

In *Doe v. Miller*, the Eighth Circuit also ignored the punitive effect of Iowa's sex offender residency limitations in overturning the district court's finding that the statute violated the Ex Post Facto Clause. n166 Iowa's law prohibited persons who had committed a criminal sex [*1323] offense against a minor from residing within two thousand feet of a school or child care facility. n167 At trial, the evidence showed that the restriction encompassed the majority of the available housing in many of the state's cities. n168 Citing the Supreme Court's *Smith v. Doe* decision, the circuit court acknowledged that the law could have a deterrent effect but that this was not determinative of a punitive effect or purpose. Similarly, the Eighth Circuit recognized that the residency restriction, and any restraint or restriction on a person who commits a crime, is "at least potentially retributive in effect" but disregarded this punitive effect because of the legislature's regulatory objective of protecting the health and safety of children. n169

In dissent, Judge Melloy found "clearly a deterrent purpose at work" in the Iowa residency restriction such that the measure promotes a traditional aim of punishment. n170 Criticizing the majority's efforts to minimize the deterrence effect, Judge Melloy stated that the majority's forced distinction between the statute's stated remedial aim of reducing the opportunity for future offenses and a potentially punitive deterrent goal of increasing the negative consequences for an action, was misplaced. Melloy found this distinction unimportant, as the major reason society chooses punishments such as incarceration is to deter - or reduce the risk of future crimes - by depriving the offender of the opportunity to commit those crimes. Although risk reduction might be better categorized as an incapacitation purpose, Melloy's dissent highlights the confusion (or perhaps obfuscation in the case of controversial sex offender restrictions) in judicial analyses where civil and criminal sanctions overlap.

As Justice Breyer's dissent in *Hendricks* notes, a true determination of the purpose of a law cannot be made by simply choosing one of the aims that is both civil and criminal and stating that as the primary aim. n171 For example, corporal punishments may have the "civil" purpose of specific deterrence but should be deemed punitive because these punishments also have a retributive and general deterrent effect. Thus, a court's finding, as in *Hendricks*, that an aim common to both civil and punitive laws exists proves nothing regarding a law's civil or punitive nature. Rather, the court must determine whether the statute could have [*1324] an effect that is punitive, i.e. retribution or general deterrence.

In addition to the difficulty of the overlapping aims of civil and punitive restrictions, courts have also confounded the purpose and effect in the traditional aims review. Although the Supreme Court has repeatedly restated its adherence to the second prong of the test in *United States v. Ward* - that an examination of punitive purposes and effects is necessary even when the legislature states that a regulation is civil n172 - it has essentially abrogated the effects portion of the test in its review of sex offender post custody restrictions. n173 Instead, the Court has substituted a rational basis review, deferring to and focusing solely on the stated civil regulatory purpose. The Court's new test seems to conflate three of the Mendoza-Martinez factors: 1) its operation will promote the traditional aims of punishment - retribution and deterrence; 2) an alternative purpose to which it may rationally be connected is assignable to it; and 3) it appears excessive relative to the alternative purpose assigned. n174 Thus, the Court appears to review each factor individually, but in each case dismisses punitive effect with little consideration, instead looking to whether the provisions of the restriction are reasonably related to the claimed public safety purpose of reducing risk of future offenses. For example, Alaska's admission that its registration statute might have a deterrent effect was dismissed as having little relevance to whether the sanction be considered criminal because forbidding such statutes might hinder effective regulation. n175 Similarly, in *Doe v. Miller*, the appellate court agreed that the Iowa residency restriction could have a deterrent effect but disagreed that this implied that the restriction was punishment. In dismissing retributive effect, the Eighth Circuit acknowledged that any restraint on an offender has potentially retributive effects but quoted the Supreme Court's *Smith v. Doe* decision in emphasizing that the statutory requirements were reasonably related to the danger of recidivism consistent with the regulatory objective of protecting child health and safety. n176 Such cavalier dismissal of deterrent and retribu-

tive effects essentially eviscerates the "traditional aims of punishment" factor as a guidepost in finding a statute punitive.

[*1325] Given that the purpose of the second prong of the Ward test is to prevent states from evading constitutional scrutiny of punitive laws by enacting them under a regulatory guise, n177 courts should more rigorously examine statutes for punitive effect. n178 Because the Court has required "clearest proof" of punitive effect to overcome a stated purpose, and because the Mendoza-Martinez guideposts are not considered exhaustive or dispositive, a closer look at whether a statute effectively serves a traditional aim of punishment would allow the court to honor the Constitution's ex post facto protections while providing a more transparent balancing of Mendoza-Martinez and other relevant factors.

A final difficulty with the traditional-aims guidepost and its application to sex offender residency restrictions is that the criteria for determining whether a sanction has either a deterrent or retributive effect is ill defined. n179 In the case of deterrence, courts have sometimes assumed a deterrent effect, but they have dismissed it as unimportant without discussion of the conditions that merit a deterrence finding. n180 This lack of definition leaves lower courts and legislatures developing civil sanctions with little beyond intuition to determine whether an individual might feel deterred from an act by the sanction. Retributive effect has been "similarly difficult to evaluate." n181 Some courts have attempted to define retribution as the quantum of a sanction beyond that which is justifiable by remedial purposes. n182 In *Smith v. Doe*, the [*1326] Supreme Court seemed to apply this reasoning in finding no retributive effect even where the length of a sex offender reporting requirement was linked to the degree of wrongdoing. n183 The Court reasoned that conviction of a sex offense serves as a proxy for risk of re-offense, making it reasonably related to the danger of recidivism, thus allowing a broad degree of tolerance in finding that proportionality has been exceeded. n184 In the case of sex offender residency requirements, the Eight Circuit in *Doe v. Miller* failed to provide any meaningful analysis of deterrent or retributive effect of the Iowa sex offender residency restriction, n185 leaving us to wonder whether even greater limits on offenders than Iowa's two thousand foot limit - say 2500, 3000, or even 5000 feet from a school - would be deemed not retributive. As Justice Souter noted in *Smith v. Doe*, given the media attention and public outrage regarding sex offenses against children, courts should at least apply some serious consideration to the possibility of retributive intent by looking more closely at the effect, n186 especially given the importance the founders placed on ex post facto protections.

B.

"Regarded in Our History and Traditions as Punishment"

The second retrospective factor in the ex post facto punishment determination focuses on whether a practice has been regarded in our history and traditions as punishment. n187 In *Smith v. Doe*, Justice Kennedy's majority decision explained that "[a] historical survey [of punishments] can be useful because a state that decides to punish an individual is likely to select a means deemed punitive in our tradition." n188 The Court stated that this relationship between modern and historical punishment was important so that the public could recognize the sanction as a punishment. n189 By contrast, a "novel" n190 practice or one "of fairly recent origin" suggests that the measure did not involve a traditional means of punishment and therefore was not meant to be punitive. n191

[*1327] In applying this factor, courts typically compare the challenged restriction with a historical punishment. For example, in *Kennedy v. Mendoza-Martinez*, the Supreme Court noted that a statute divesting an American of citizenship was comparable to historical punishments of banishment, exile and the forfeiture of citizenship used in Ancient Rome and the English empire, and supportive of a holding that it was a "punishment." n192 In *Smith v. Doe*, the Supreme Court found that Alaska's challenged sex offender notification statutes differed from colonial shaming punishments in both purpose and effect. n193 Although respondents argued that the registration and notification provisions, like historical branding and labeling punishments, brought disgrace and possible shunning on offenders by publicizing the offender's name and associated offense, the Court found this argument to be misleading. n194 Instead, the Court required exact correspondence between the historical punishment and the challenged sanction. Thus, the Court distinguished the face-to-face humiliation of historical shaming punishments from the stigma visited on sex offenders by dissemination of public and truthful information. n195 While acknowledging that internet registry listings could subject offenders to social ostracism of a geographic scope far beyond that of colonial shaming, the importance of the primary objective and "effect" of providing information as part of a public safety scheme rendered the humiliation a mere collateral consequence. n196

However, Justices Stevens, Souter, Breyer, and Ginsberg, in three separately filed opinions, found the Alaska registration and notification provisions to be comparable to historical punishments. n197 Justice Souter noted that the dis-

semination of names, photos, addresses, and criminal history of registrants serves to inform as well as to humiliate and ostracize, exposing the offender to exclusion from employment, housing, harassment and physical harm, much as the colonial punishments prevented offenders from living normal lives in their community. n198 In addition to this humiliating effect, Justices Stevens, [*1328] Ginsburg and Breyer found the statute's requirements comparable to those of supervised release or parole. n199

In applying the historical punishment factor, the Eighth Circuit in *Doe v. Miller* rejected the comparison between Iowa's sex offender residency restriction and banishment. n200 Applying the Supreme Court's definition of banishment, the court distinguished Iowa's residency limit because, rather than effecting a permanent expulsion from the community, offenders are limited only in where they may reside, but are allowed access to areas near schools or child care facilities for other purposes. n201 [*1329] The court further found that the new and unique nature of the restrictions suggested that they were not traditional means of punishment. n202

In dissent, Judge Melloy suggested that the statute sufficiently resembled banishment weighing in favor of finding the law punitive. n203 Melloy emphasized the Supreme Court's definition of traditional shaming and banishment in *Smith v. Doe* that included stigmatizing and expelling offenders from the community such that they could "neither return to their original community nor, reputation tarnished, be admitted easily into a new one." n204 The judge pointed to the district court findings that the prohibition from living within two thousand feet of schools and daycares had the effect of completely banning sex offenders from living in many of Iowa's small towns and cities, while in the state's two major cities, Des Moines and Iowa City, offenders could only live in a few industrial areas, expensive developments, or on the outskirts of the cities. n205 Unrestricted areas included only very small towns without services, or farmland. In effect, the judge explained, so few legal housing options remained that offenders were left with the choice of living in rural areas or leaving the state - an effective banishment of offenders from the state's cities and larger communities where they may desire to live. n206

Since the Eighth Circuit's decision, the United States District Courts for the Northern District of Georgia, in *Doe v. Baker*, n207 and the Southern District of Ohio, in *Coston v. Petro*, n208 have considered ex post facto challenges to one-thousand foot residency restrictions in their respective states. On the issue of historical punishment, both courts echoed the Supreme Court's reasoning that because sex offender statutes are of recent origin, they do not involve a traditional means of punishment. n209 Both courts also cited *Miller* in dismissing the similarity to traditional banishment because offenders are not prevented from accessing areas near schools for employment or other purposes. n210 However, the Georgia court noted that while affordable housing outside the one thousand foot limit was readily available in the suburban Cobb County where the plaintiff had found a residence, a more restrictive act that would effectively make it impossible for a registered offender to [*1330] live in the community would likely constitute banishment and therefore punishment subject to ex post facto protections. n211

Although no other federal cases apply the historical punishment factor to sex offender residency limits, the United States District Court for the Southern District of Ohio found that a city ordinance that excluded persons from a designated drug exclusion zone was analogous to the historical punishment of banishment and therefore weighed in favor of finding the ordinance punitive. n212 The Cincinnati ordinance banned persons arrested (or taken into custody) for drug abuse-related crimes in the drug-exclusion zone from returning to the zone within ninety days, but the ordinance allowed variances for residents and persons employed or receiving social services within the zone. Although the exclusion was arguably less restrictive than the Iowa statute because it was limited to only 110 city blocks (less than one square mile) for ninety days, the district court found the exclusion analogous to banishment. n213

C. Problems with the Application of the Retrospective Guideposts

Requiring exact correspondence between a challenged restriction and a historical punishment or pointing to a sanction's recent origin defeats the purpose of including this factor among those used to determine whether a statute is "so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil." n214 Otherwise, the comparison to historical punishment would be relevant only in cases where a legislature passed a restriction so thinly veiled that it was merely renaming an obvious punishment.

As the historical overview has shown, punitive forms have changed as America has evolved from the small, close-knit communities of the colonial period to become an urbanized, mobile, industrialized nation. Population, urbanization, changes in political philosophy, developments in technology, reactions to immigration, and the growth of and centralization of legal institutions have led to the development of new punishments and the abandonment of others. n215 However, while the [*1331] form and means may differ, all punishment relies on certain effects on the individual to

achieve its aims. In *Missouri v. Cummings*, Justice Field wrote that the effects of punishment extended to deprivation of life, liberty, and property including restraints on the person and outrage on the feelings. n216 He noted that punitive effects included deprivation of previously enjoyed civil and political rights such as disqualification from office, lawful avocation, or positions of trust, exile or banishment, perpetual or temporary imprisonment, and confiscation by forfeiture of lands or moveables or the profits of land. n217 Historically, punishments have been chosen to fulfill their retributive or deterrence goals precisely because of their effect in terms of humiliation (shaming, branding), deprivation of freedom (banishment, imprisonment, stocks), infliction of physical pain (whipping, branding), and deprivation of property (fines, forfeiture of land, banishment). n218 Thus, for the historical punishment factor to provide any guidance in pointing out punitive effect, it requires a comparison of both form and effects between the modern sanction and historical punishments. Arguably, the footnote to this factor in *Kennedy v. Menendez Martinez* posits just such an application explaining that the challenged sanction of forfeiture of citizenship, like the historical English punishment of banishment and Ancient Roman punishments of loss of citizenship were related because the means of punishment was through the loss of freedom. n219

If the second prong of the Ward test were in fact to focus on punitive effect or purpose, then the analysis should focus on comparing the challenged statute with a historical analogue in terms of both the form (e.g., comparing how banishment was historically administered with how residency restrictions are administered) and the punitive effect (e.g., whether residency restrictions inflict the same type of deprivations on the offender as banishment). n220 Otherwise, as technology and human [*1332] creativity allow the development of new restrictions on offenders such as chemical castration, electronic monitoring or lethal injection, the search for exact historical comparison will be rendered absurd. n221 Thus, reorienting the historical punishment factor to comparing the punitive effects of a sanction, rather than merely their form, will allow this guidepost to play a meaningful role, balanced against the other Mendoza-Martinez punishment guideposts.

Finally, the historical punishment factor also suffers from a lack of clarity in application regarding the baseline for comparison and the degree of correspondence required between historical punishment and the challenged statute. The Supreme Court has not provided guidance regarding either the historical reference period (referring variously to colonial, ancient Roman, and English punitive practices) or the source for defining the historical practice as punishment. n222 While a few punishments - banishments, shaming, and branding - have been expressly defined as punishment by the Court, the definition of punishment by similarity to historical punishments creates a kind of circularity in reasoning. Clear direction from the Court regarding the required degree of correspondence between the historical punitive form and effect and that of the challenged sanction, as well as the baseline for determining historical punishment is necessary to provide guidance to lower court decisions, to create greater consistency in judicial ex post facto decisions, and to give legislatures better guidance as to the limits of civil sanctions.

[*1333]

D. General Ex Post Facto Problems

The confusion behind the application of the historical punishment guidepost highlights a general level of discord within the Supreme Court regarding the proper test for determining a statute to be criminal or civil. n223 Adding further to the chaos, the question of whether a sanction is punishment is essential to analysis of the Eighth Amendment protections against cruel and unusual punishment and excessive fines, the Fifth Amendment protection against double jeopardy, the Sixth Amendment right to trial by jury for criminal prosecutions, as well as the Ex Post Facto and Bill of Attainder Clauses of Article I of the U.S. Constitution. n224 Despite the range of constitutional rights at stake, the Supreme Court's recent jurisprudence on "punishment" and criminality of a statute has been labeled "so inconsistent that it borders on the unintelligible." n225

In terms of the ex post facto test, the Supreme Court seems somewhat settled on the application of the Ward test for determining whether a statutory sanction is civil or criminal, n226 but has yet to spell out the precise nature of the second level of the test. The Ward test first asks [*1334] whether the legislature expressly or impliedly indicated a preference for labeling the statute as civil or criminal. If the legislature intended a civil penalty, the challenger to the sanction must overcome an initial presumption of non-punitiveness by providing the "clearest proof" that the statute is "so punitive either in purpose or effect as to negate [the state's] intention" to deem it "civil." n227 Although the Court has applied the Mendoza-Martinez factors as a means to reach punitive effect, it has been highly ambivalent regarding their usefulness, qualifying the factors as "useful guideposts" n228 and "neither exhaustive nor dispositive" because of their application to various constitutional contexts. n229

In fact, the Court itself has seemed unconvinced of the usefulness of the Mendoza-Martinez factors. Commentators have noted the "highly selective and ultimately inconsistent" application of the factors and critiqued them as being "so open-ended as to be meaningless." n230 Even the Justices have complained that the factors are highly prone to manipulation. n231 At the least, the Court's application of the Mendoza-Martinez factors has been highly context-specific and deferential to the legislature. In fact, as of 1997, the Court had not found a nominally civil statute to be punitive in effect using the Mendoza Martinez factors. n232 A review of cases confirms that the Court's application of the factors is highly variable. n233 With such muddled direction and [*1335] discretionary application from above, lower court ex post facto decisions are unsurprisingly varied and inconsistent. n234

IV. Rethinking the Ex Post Facto Test and Retrospective Factors and Their Application to Sex Offender Residency Restrictions

As suggested above, the judiciary's application of the Ex Post Facto Clause in general, and the retrospective factors in particular, has suffered from the confusion in the High Court's ex post facto jurisprudence. This suffering extends to the specific defendants who, in the Court's shifting interpretations of the clause, may be left unprotected from newly imposed sanctions on their prior conduct. Further, the Court's seeming ambivalence to the founders' concern that "ex post facto laws ... are contrary to the first principles of the social compact, and to every principle of sound legislation[]" not only hurts those individuals subject to punishment after the fact, but also signifies an unwillingness for the Court to play its role in our constitutional order. n235

The inclusion of the Ex Post Facto Clause among the Constitution's Article I limits on the legislative powers of Congress and the states, rather than among the amendments protecting other individual rights, illuminates the founders' fear of the legislature's potential power to act in retribution and to deprive fair warning to individuals of the consequences of their acts. As Hamilton warned, "nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and [*1336] precedents which afterwards prove fatal to themselves." n236 The clause thus functions to check legislators from using their power to target the politically unpopular, including those convicted of criminal wrongdoing. n237

The legislative rhetoric surrounding the addition of restrictions on sex offenders beyond their criminal sentence indicates that this reaction is exactly the type of passionate and vindictive lawmaking and that the founders feared. For example, minutes from the New York State Assembly debate on the Sex Offender Registration Act included legislators labeling sex offenders as "depraved" and "the human equivalent of toxic waste." n238 Other lawmakers expressed the hope that the law would "force sex offenders out of town, out of state." n239 In addition, the hurried writing and introduction of such laws immediately after a violent act against the child bearing the name of the law strongly suggest the kind of passionate rather than rational lawmaking that the Ex Post Facto Clause prohibits as "manifestly unjust and oppressive." n240 Indeed, fear and the impulse for retribution against sex offenders run high as the April 2006 murder of two persons listed on Maine's sex offender internet registry demonstrates. n241 Many municipalities are also enacting ordinances restricting where sex offenders may live. n242 For example, in New Jersey, where no state residency law has been enacted, at least 113 municipalities have adopted local residency restrictions. n243

A range of tests have been articulated for defining a punishment for ex post facto analysis including heightened scrutiny of legislative [*1337] purpose, n244 the Ward intent-effects test, an "actual purpose" test, n245 and a "sufficient and necessary" condition test. n246 However, agreement among the Supreme Court Justices has been elusive at least prior to the addition of Justices Roberts and Alito to the court. n247 Even within a tentative consensus on application of the Ward intent-effects test, the discord regarding the burden of "clearest proof," and application of the Mendoza-Martinez factors adds further unpredictability to judicial review of ex post facto cases. While these issues are beyond the scope of this Comment, greater direction from the court would provide much needed stability and consistency among lower court decisions.

This stability is of particular importance given the emergence of post-custody sanctions on ex-offenders which state public safety as a purpose and the large number of ex post facto challenges to these laws. n248 As this review of sex offender post-custody sanctions demonstrates, in the [*1338] absence of rigor in the Supreme Court's ex post facto jurisprudence, the historical punishments and traditional aims of punishment factors have become highly malleable guideposts, which fail to provide courts with meaningful direction in determining whether legislation should be subject to the constitutional bar against retroactive punishments.

Public outrage regarding crimes against children ignites precisely the passionate and vindictive legislation that the founders intended the Ex Post Facto Clause to quell. The natural urge to protect children from sexual violence has led

state legislatures to enact increasingly greater limits on all persons categorized as sex offenders - even after they have completed sentences for their crimes. n249 In this vengeful legislative climate, judicial thoroughness in rooting out punitive effect will be vital to prevent public safety from becoming a shield for retributive laws, to preserve the principle that notice of consequences is essential to fairness of punishment of criminal conduct, and to ensure that the constitutional role of the Ex Post Facto Clause is fulfilled.

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law
Congressional Duties & Powers
Ex Post Facto Clause & Bills of Attainder
Bills of Attainder
Constitutional Law
Congressional Duties & Powers
Ex Post Facto Clause & Bills of Attainder
Ex Post Facto Clause
Quantum of Punishment
Constitutional Law
Bill of Rights
Fundamental Rights
Criminal Process
Cruel & Unusual Punishment

FOOTNOTES:

n1. *Lynce v. Mathis*, 519 U.S. 433, 439 (1997) (quoting *Landgraf v. U.S.I. Film Prod.*, 511 U.S. 244, 265 (1994)) (emphasis added).

n2. Terry Kinney, Sex Offender Forced to Move from Home, *Cincinnati Post*, Oct. 24, 2005, at A6.

n3. *Id.*

n4. *Id.*

n5. *Id.*

n6. *Id.*

n7. *Id.*

n8. Wayne A. Logan, The Ex Post Facto Clause and the Jurisprudence of Punishment, 35 *Am. Crim. L. Rev.* 1261, 1264-65 (1998) [hereinafter Logan, *Jurisprudence of Punishment*]; Nicole Stelle Garnett, Relocating Disorder, 91 *Va. L. Rev.* 1075, 1094-98 (2005). Garnett points to restrictions such as public housing exclusion zones (citing *Virginia v. Hicks*, 539 U.S. 113 (2003)) and drug exclusion zones (*Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002)) as examples of post release restrictions on offenders that are justified by public safety; see also Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 *Hastings L. J.* 1325 (1991).

n9. See Recent Legislation, Criminal Law - Sex Offender Notification Statute - Alabama Strengthens Restrictions on Sex Offenders, 119 *Harv. L. Rev.* 939, 939-41 (2006). "Alabama's new law is the most recent example of a national trend: states channeling public outrage about sexual predators who target children into harsh laws of questionable effectiveness." Alabama's newly enacted requirements include reporting of any residence in which the offender stays for three consecutive days or at least ten total days in a month, felony consequences for failure to comply with requirements, prohibition from being employed or loitering within 500 feet of a location designed for children's use, ten years of post-release electronic monitoring, and a requirement that offenders carry state issued identification which indicates their sex offender status. *Id.*

n10. Article I, Section 10, Clause 1 of the U.S. Constitution states that "no state shall ... pass any ... ex post facto Law." In *Calder v. Bull*, the Supreme Court limited the Ex Post Facto Clause's prohibition against retroactive legislation to criminal laws. 3 U.S. 386, 390 (1798).

n11. 448 U.S. 242, 248-49 (1980). See also *Smith v. Doe*, 538 U.S. 84, 92 (2003); *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). This two-level test is referred to in this Comment as the "Ward test." Where a legislature indicates a civil intent, the Court requires the "clearest proof" of punitive effect such that the law would be considered a criminal penalty subject to constitutional dictates. *Ward*, 448 U.S. at 248-49. As discussed infra text accompanying note 226 text, the Supreme Court and lower courts have not always been clear that the Ward test for punishment is the correct one for determining punishment for ex post facto purposes. As recently as 1996, the Third Circuit Court of Appeals applied a different standard for determining if a statute is punishment, dismissing the Ward-Mendoza-Martinez line of cases as applying only to determining "whether a proceeding is sufficiently criminal in nature to warrant criminal procedural protections of the Fifth and Sixth Amendments." *Artway v. Atty Gen. of State of N.J.*, 81 F.3d 1235, 1263 (3d Cir. 1996) (finding New Jersey's Megan's Law sex offender registration requirement was not punishment for ex post facto, bill of attainder and double jeopardy challenges, by examining (1) actual purpose, (2) objective purpose, and (3) effect).

n12. *Ward*, 448 U.S. at 248-49.

n13. *Id.*

n14. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The seven "Mendoza-Martinez factors" include whether: 1) the sanction involves an affirmative disability or restraint; 2) it has historically been regarded as a punishment; 3) it comes into play only on a finding of scienter; 4) its operation will promote the traditional aims of punishment retribution and deterrence; 5) the behavior to which it applies is already a crime; 6) an alternative purpose to which it may rationally be connected is assignable to it; 7) it appears excessive in relation to the alternative purpose assigned. *Id.*

n15. *Id.*

n16. *Doe v. Miller*, 405 F.3d 700, 720 (8th Cir. 2005).

n17. *Id.*; *Smith v. Doe*, 538 U.S. 84, 97-99 (2003).

n18. *Miller*, 405 F.3d at 705 (finding no punitive aim or effect in Iowa's sex offender residency restrictions); *Smith*, 538 U.S. at 105 (finding Alaska's Sex Offender Registration Act to be non-punitive).

n19. *Smith*, 538 U.S. at 111 (Stevens, J., dissenting); *Miller*, 405 F.3d at 724 (Melloy, J., dissenting) (citing findings that Iowa's residency restrictions leave so few legal housing options for sex offenders that many are forced to leave the state).

n20. *Mendoza-Martinez*, 372 U.S. at 168.

n21. Wayne A. Logan, "Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts, 12 *Wm. & Mary Bill Rts. J.* 439, 444 (2004) [hereinafter Logan, Democratic Despotism] (citing *The Federalist* No. 44 at 299 (James Madison)).

n22. U.S. Const. art. I, §10, cl. 1. "No State shall ... pass any ... ex post facto Law." Note that Article I, Section 9, Clause 3 also provides that, "No ... ex post facto Law shall be passed" by Congress.

n23. 3 U.S. 386, 390-91 (1798). Justice Chase cites Blackstone as confirming his limitation of the clause to criminal punishment. *Id.* at 391.

n24. *Id.*; Logan, Democratic Despotism, *supra* note 21, at 444-45. See also Robert G. Natelson, Statutory Retroactivity: The Founders' View, 39 *Idaho L. Rev.* 489 (2003).

n25. William Blackstone, 1 Commentaries 46. Natelson, *supra* note 24, at 499 notes that Blackstone's Commentaries, the most influential law book of the Founding generation, was highly critical of ex post facto lawmaking.

There is still a more unreasonable method than this, which is called making of laws ex post facto; when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement ... it is then the subject's business to be thoroughly acquainted therewith.

Blackstone, 1 Commentaries at 46. See also *Weaver v. Graham*, 450 U.S. 24, 28-29, (1981) ("the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.").

n26. *Calder v. Bull*, 3 U.S. 386, 389 (1798). See also *Weaver*, 450 U.S. at 29 (noting that the Ex Post Facto Clause provides a constitutional safeguard against "arbitrary and potentially vindictive legislation").

n27. Logan, Democratic Despotism, *supra* note 21, at 496-99.

n28. Natelson, *supra* note 24, at 492-94. Natelson's review of founding era historical evidence concludes that the adoption of anti-retroactivity provisions a key component of the constitutional bargain and that the Article I, Section 10 anti-retroactivity policies, including the ex post facto prohibition against retroactive criminal sanctions, were important provisions to be strictly enforced against the states.

n29. *Calder*, 3 U.S. at 390. For other discussions regarding the reasoning for distinguishing between civil and criminal legislation for purposes of Ex Post Facto Clause, see Harold J. Krent, The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking, 84 *Geo. L.J.* 2143 (1996). Krent applies Interest Group theory to argue that the Supreme Court's stringent application of the Ex Post Facto Clause against criminal legislation as compared to civil lawmaking is justified by the ability of individuals to lobby for and against retroactive legislation in the civil context, while majoritarian politics and the differential power between the law enforcement lobby and those previously branded by criminals warrants skepticism of retroactive criminal laws. *Id.* at 2146. Note that Justice Clarence Thomas has suggested that the Ex Post Facto Clause should apply to civil as well as criminal cases. *E. Enterprises v. Apfel*, 524 U.S. 498, 502 (1998) (Thomas, J., concurring).

n30. *Calder*, 3 U.S. at 390 (italics omitted). The three other types of ex post facto laws named by Justice Chase are "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed... 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offence, in order to convict the offender." *Id.* (emphasis omitted).

n31. Logan, Democratic Despotism, *supra* note 21, at 441 n.14 & 494 (noting the "notably dismal recent track record" of ex post facto challenges to sex offender post-custody sanctions before the Supreme Court and documenting the similar lack of success in state court).

n32. 448 U.S. 242, 248-49 (1980). Note that the definition of punishment and criminal sanctions under the Ex Post Facto Clause has common roots with the court's definitions of the terms in cases dealing with Bill of Attainder, the Eighth Amendment prohibition against cruel and unusual punishment, the Fifth Amendment protection against double jeopardy, and Sixth Amendment rights of defendants in criminal prosecutions. *Smith v. Doe*, 538 U.S. 84, 97 (2003). Once a law is found to be criminal or penal, then it will be considered ex post facto if two critical elements are present: 1) the law applies to conduct occurring before its enactment and 2) it disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981).

n33. *Ward*, 448 U.S. at 248-49 (citing *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972)). See also, *Smith*, 538 U.S. at 92 (applying the *Ward* analysis to the Alaska state sex offender registration and notification statute).

n34. *Smith*, 538 U.S. at 92 (originally from *Ward*, 448 U.S. at 248-49).

n35. *Ward*, 448 US at 249. Justice Souter has urged that the heightened "clearest proof" standard for examining the substance of the legislation apply only where legislative intent clearly designates the law as "civil" and that an equivocal expression of civil intent. *Smith*, 538 U.S. at 107-10 (Souter, J., concurring).

n36. 372 U.S. 144, 168-69 (1963).

n37. *Smith*, 538 U.S. at 97.

n38. *Id.*

n39. *Mendoza-Martinez*, 372 U.S. at 168-69. The Court has stated that these factors are "neither exhaustive nor dispositive." *Smith*, 538 U.S. at 97 (citing *Ward*, 448 U.S. at 249). Note that in some ex post facto cases, the Court has disregarded the third factor (requirement for scienter) and the fifth factor (the behavior to which it applies is already a crime). *Smith*, 538 U.S. at 105.

n40. *Smith*, 538 U.S. at 97. An alternative definition of punishment was proposed by Justice Stevens in *Smith v. Doe*. Justice Stevens rejected the Court's "manipulat[ion of] multifactor tests that have been applied in wholly dissimilar cases," advocating for a definition of punishment for ex post facto and other constitutional jurisprudence that defines punishment as a sanction 1) imposed on everyone who commits a criminal offense; 2) is not imposed on anyone else; 3) severely impairs a person's liberty. *Id.* at 113 (Stevens, J., dissenting).

n41. Hugo Adam Bedau, Punishment, *The Stanford Encyclopedia of Philosophy* P 2 (Edward N. Zalta ed., 2005), available at <http://plato.stanford.edu/archives/fall2005/entries/punishment>.

n42. Cyndi Banks, Punishment in America 2 (2005). See also, Thomas G. Blomberg & Karol Lucken, *American Penology: A History of Control* 4 (2000) (arguing that new penal practices have also been used to extend to exert power and control over populations beyond those to whom the theoretical justification for the punishment applies, thereby confounding the relationship between the goals and operation of the punitive practice).

n43. Blomberg & Lucken, *supra* note 42, at 2. See also, Banks, *supra* note 42.

n44. Blomberg & Lucken, *supra* note 42, at 24.

n45. *Id.*

n46. *Id.* at 25-26.

n47. *Id.*

n48. *Id.* at 27-28.

n49. *Id.* at 26.

n50. *Id.*; Banks, *supra* note 42, at 14.

n51. Mark Colvin, *Penitentiaries, Reformatories, and Chain Gangs: Social Theory and the History of Punishment in Nineteenth-Century America* 34 (1997); Blomberg & Lucken, *supra* note 42, at 30-31.

n52. Blomberg & Lucken, *supra* note 42, at 30-31. In colonial Massachusetts, sex offenders made up forty-six percent of those whipped. Stealing, lying and idleness could also result in a whipping sentence.

n53. Banks, *supra* note 42, at 15; Blomberg & Lucken, *supra* note 42, at 30-31.

n54. Blomberg & Lucken, *supra* note 42, at 30-31.

n55. Banks, *supra* note 42, at 15.

n56. *Id.*; Blomberg & Lucken, *supra* note 42, at 30-31.

n57. Blomberg & Lucken, *supra* note 42, at 30-31.

n58. *Id.*

n59. *Id.* at 36.

n60. Banks, *supra* note 42, at 22.

n61. *Id.* at 21-24.

n62. Blomberg & Lucken, *supra* note 42, at 38-39.

n63. Banks, *supra* note 42, at 21-23.

n64. *Id.* at 21, 25; Blomberg & Lucken, *supra* note 42, at 37. The French Enlightenment philosopher and writer Voltaire (a.k.a. Francois Marie Arouet) is widely quoted as suggesting that the punishment of criminals should serve a purpose because "when a man is hanged he is good for nothing." *Id.*

n65. Blomberg & Lucken, *supra* note 42, at 39 (citing Cesare Beccaria, *Essay on Crimes and Punishments* (1764)).

n66. Banks, *supra* note 42, at 28.

n67. Blomberg & Lucken, *supra* note 42, at 43.

n68. *Id.* at 41-44.

n69. Banks, *supra* note 42, at 23.

n70. Colvin, *supra* note 51, at 41, 47. In the early American republic, penal reform tended to reduce the power of the local community and increase the centralization and institutionalization of punishment, paralleling the transformation of the economy to a larger market-oriented system which was enabled by the development of uniform contractual and labor laws. Similarly, judicial rules became more standardized and the power of judges increased as compared to the jury.

n71. Some writers have viewed the growth of incarceration as based on the belief among the elite of a need for further social control in the post revolutionary period. The rise of incarceration as a punishment contrasts markedly with the use of jails in the colonial period as places to house persons awaiting trial. The rare colonial jail sentences were usually twenty-four hours. Blomberg & Lucken, *supra* note 42, at 32.

n72. Banks, *supra* note 42, at 30. French philosopher and historian Michel Foucault traces the rise of the penitentiary as the emergence of a modern technology of power designed to punish and discipline.

n73. Blomberg & Lucken, *supra* note 42, at 44, 56-59.

n74. *Id.* at 44.

n75. *Id.* at 48-49. By 1860, thirty percent of the population lived in or around urban areas, while fifty percent of the population lived outside the original colonies. Five million immigrants came to America from between 1820 and 1860.

n76. Colvin, *supra* note 51, at 51; Blomberg & Lucken, *supra* note 42, at 53.

n77. Blomberg & Lucken, *supra* note 42, at 48-49.

n78. *Id.* at 51.

n79. Colvin, *supra* note 51, at 50; Blomberg & Lucken, *supra* note 42, at 52.

n80. Colvin, *supra* note 51, at 52.

n81. Banks, *supra* note 42, at 49-50; Blomberg & Lucken, *supra* note 42, at 52; Colvin, *supra* note 51, at 52.

n82. Banks, *supra* note 42, at 49.

n83. Blomberg & Lucken, *supra* note 42, at 53.

n84. Colvin, *supra* note 51, at 83, 88.

n85. Banks, *supra* note 42, at 42-43.

n86. Colvin, *supra* note 51, at 94.

n87. *Id.* at 91.

n88. *Id.* The Auburn system was favored in many states because the efficiency of group based production promised legislators an economically self sufficient prison system with the possibility of profits to the state.

n89. Blomberg & Lucken, *supra* note 42, at 56.

n90. *Id.* Hidden behind the walls of the penitentiary, prisoners were whipped, forced to wear a ball and chain, suspended by their toes or thumbs, stretched by their feet and hands or had buckets of cold water thrown on them as they were tied up outside in the winter. Numerous prisoners died from brutality and diseases. An 1867 report on New York prisons found one third of prisoners double celled; while in New Jersey a four-to a seven-by-twelve foot cell was not uncommon.

n91. *Id.* at 59.

n92. Banks, *supra* note 42, at 45. Alexis de Toqueville described the silence of U.S. prisons as deathlike, finding half the Cincinnati inmates imprisoned with irons and overcome by disease. Blomberg & Lucken, *supra* note 42, at 56. Charles Dickens commented that

those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing... I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body.

Charles Dickens, American notes 114-15 (1842), available at <http://wsrv.clas.virginia.edu/~jlg4p/dickens/amnotes/dkstc.html>.

n93. Blomberg & Lucken, *supra* note 42, at 57.

n94. *Id.*

n95. *Id.* at 67. Brooklyn grew from 2.5 to 5.6 million, while Chicago's population increased from one million to 2.7 million.

n96. *Id.* at 63.

n97. Id.

n98. Id. at 68-70. Biology explained criminal tendencies by genetics, leading to the Eugenics movement. Psychology, as influenced by Freud, conceived of a subconscious idea or impulse as underlying criminal acts. Sociologists saw the urban backdrop of poverty, disease and overcrowded living conditions as driving the "overworked and underpaid victims of capitalism[]" to crime. Id. at 69.

n99. Id. at 70.

n100. Id.

n101. Id. at 70-71.

n102. Id.

n103. Id. at 73.

n104. Id. at 72. First grade carried such privileges as comfortable blue uniforms, spring mattresses, better food, increased writing, library, and bedtime privileges. Third grade resulted in coarse red uniforms, lockstep marching and denial of mail, library and visitation privileges.

n105. Id. at 73.

n106. Id. at 73-74.

n107. Id. at 75.

n108. Id.

n109. Id. at 76.

n110. Id.

n111. Id.

n112. Id. at 77; Banks, *supra* note 42, at 71.

n113. Blomberg & Lucken, *supra* note 42, at 78.

n114. Id. at 78-79; Banks, *supra* note 42, at 71.

n115. Blomberg & Lucken, *supra* note 42, at 79.

n116. Id. at 80, 98.

n117. *Id.* at 99.

n118. *Id.*

n119. *Id.* at 105-06.

n120. *Id.* at 101.

n121. *Id.* at 107.

n122. *Id.*

n123. *Id.* at 108. Reforms included instituting a centralized recordkeeping and a merit-based system for selecting and promoting staff, improving professionalism, and reducing political patronage.

n124. *Id.* at 109. The American Prison Association, a professional organization for corrections professionals, also emphasized its rehabilitative purpose by changing its name to the American Correctional Association and stating treatment as its mandate. The Association suggested labeling punishment blocks as "adjustment centers."

n125. *Id.* at 108. Elementary and high school curricula were instituted in most prison systems. Some systems also arranged for college correspondence courses for inmates.

n126. *Id.*

n127. *Id.* While thirty-five parolees per officer was thought to be the optimum number for effective supervision and treatment, caseloads often exceeded one hundred parolees per officer.

n128. *Id.* at 2-3.

n129. Banks, *supra* note 42, at 95.

n130. *Id.* at 96.

n131. *Id.*

n132. *Id.*

n133. Bedau, *supra* note 41 (noting that disenchantment with the lack of success of rehabilitation and deterrence has left sociologists, criminologists, and penologists with only social defense through incapacitation and retribution as justification for the practices of punishment).

n134. Jon A. Brilliant, Note, *The Modern Day Scarlet Letter: A Critical Analysis of Modern Probation Conditions*, 1989 *Duke L.J.* 1357, 1357-58 (quoting H. Packer, *The Limits of Criminal Sanction* 36 (1968)).

n135. *Id.* at 1358 (citing Sentencing Reform Act of 1984, 18 U.S.C. §§3551-86 (1982 & Supp.V), 28 U.S.C. §§991-98 (1982 & Supp.V)). The sentencing guidelines were upheld by the Supreme Court in *Mistretta v. United States*, 488 U.S. 361 (1989). See also Federal Sentencing Guidelines Manual, Ch.1-A-2 (2005), available at http://www.ussc.gov/2005guid/tabcon05_1.htm (stating that the basic purposes of criminal punishment are "detering crime, incapacitating the offender; providing just punishment, and rehabilitating the offender").

n136. Bedau, *supra* note 41.

n137. *Id.*

n138. Banks, *supra* note 42, at 141-42.

n139. *N.J. Stat. Ann. §2C:7-12* (West 2005). The passage of New Jersey's "Megan's Law" was a response to the 1994 sexual assault and killing of seven-year-old Megan Kanka. Joseph F. Sullivan, Whitman Approves Stringent Restrictions on Sex Criminals, *N.Y. Times*, Nov. 1, 1994, at B1.

n140. Press Release, Department of Justice, Justice Department Releases Megan's Law Guidelines (April 7, 1997), available at <http://www.usdoj.gov/opa/pr/1997/April97/140vaw.htm>. The Wetterling Act is codified at 42 U.S.C. §14071 (2006) and has been amended at §14071(d) by Megan's Law.

n141. Banks, *supra* note 42, at 144.

n142. For example, following Alabama's categorization on the O'Reilly Factor as a state that "doesn't seem to care about this issue [of sex offender punishment] at all," Alabama's governor convened a special session of the legislature to consider a number of bills, one of which prohibited sex offenders from living with 2000 feet of a school or daycare, working with 500 feet of a facility for children, and restricting an offender who has ever been convicted of a criminal sex offense with a child from living with his own child, grandchild, or stepchild. Recent Legislation, *supra* note 9, at 942 (discussing Alabama's Sex Offender Act, sec.1, §15-20-26 (2006)).

n143. Commenting on Ohio's residency restrictions, Ohio Rep. John Hagan (R) commented that "I have constituents, people who write me letters, who think we should send them to the moon or lock them up forever ... my answer to [sex offenders] is, is it your preference to spend some time in jail or be outside with some restrictions." Kinney, *supra* note 2. In support of the New York State Sex Offender Registration and Notification Law, members of the New York State legislature referred to sex offenders as "depraved," "the lowest of the low," "animals," and "the human equivalent of toxic waste." One member flatly stated: "We are coming out to get them." *Doe v. Pataki*, 940 F.Supp. 603, 605 (S.D.N.Y.1996), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997) (quoting N.Y.State Assembly Debate Minutes, June 28, 1995, at 360-61, 393, 417).

n144. The following states restrict persons who have served sentences for sex offenses from residing near schools and other institutions frequented by children: Alabama (*Ala. Code §15-20-26* (Supp. 2004)), Arkansas (*Ark. Code Ann. §12-12-904* (2006)), Georgia (*Ga. Code Ann. §42-1-13* (2006)), Iowa (*Iowa Code Ann. §692A.2A* (2006)), Illinois (*720 Ill. Comp. Stat. Ann. 5/11-9.4* (2006)); Kentucky (*Ky. Rev. Stat. Ann. §17.495* (2005)), Michigan (*Mich. Comp. Laws §28.735* (2006)), Ohio (*Ohio Rev. Code Ann. §2950.031* (West 2006)), Oklahoma (*Okla. Stat. tit. 57, §590* (2006)), and Tennessee (*Tenn. Code Ann. §40-39-211* (2006)). See Sex Offender Registration, 50 State Statutory Surveys (Thomson West, Jan. 2006).

n145. Logan, *Jurisprudence of Punishment*, *supra* note 8, at 1263 (citing Edward P. Richards, *The Jurisprudence of Prevention: The Right of Societal Self Defense Against Dangerous Individuals*, 16 *Hastings Const. L.Q.* 329 (1989)).

n146. Banks, *supra* note 42, at 144.

n147. Michael Petrunik, *Managing Unacceptable Risk: Sex Offenders, Community Response and Social Policy in the United States and Canada*, 46 *Int'l J. Offender Therapy & Comp. Criminology* 483, 486 (2002). Petrunik describes the 1930s-50s as having been dominated by a clinical approach to dealing with "sexual psychopaths." Adopted in twenty-five states these statutes were a hybrid of civil mental health and criminal controls authorizing involuntary indeterminate commitment for dangerous sex offenders with mental disorders. Sexually deviant behavior was believed to have been caused by a diagnosable and curable psychopathology such that the commitment would protect the public and allow the cure and release of a productive safe individual into society. Research findings that suggested only limited success of sex offender treatment programs in reducing recidivism, as well as findings that found an over-diagnosis of persons at high risk to offend cast doubt on this clinical approach. Responding to these findings and civil liberties concerns regarding indeterminate civil commitment, the justice approach of the 1980s brought fixed sentencing and consent requirements for treatment. Petrunik argues that the current emergence of victims rights and public safety as major social issues along with computer capacities which allow statistical characterizations of risk have led to a risk management, community protection, approach whose objective is "neither rehabilitation nor fair and just punishment" but rather identifying and managing individuals as risks.

n148. *Id.* at 485. Residency restrictions bear a similarity to disorder relocation strategies such as exclusion zones. See Garnett, *supra* note 8. Garnett notes the increasing use of *ex ante* land management tools as a "legally safer" means to promote order. In contrast to discretionary enforcement of public order statutes, Garnett states that courts give broad deference to the executive as regulator in determining who is a risk and where the risk should be banned or located.

n149. See *Ohio Rev. Code §2950.02 (B)* (2006). The legislative findings of the sex offender registration and notification statute note that the general assembly's intent is "to protect the safety and general welfare of the people ... and that the exchange or release of that information is not punitive." *Id.*

n150. Logan, *Jurisprudence of Punishment*, *supra* note 8, at 1263 n.18: (citing Richards *supra* note 145).

n151. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). See *Smith v. Doe*, 538 U.S. 84, 97 (2003). Black's Law Dictionary (8th ed. 2004) defines deterrence as "the act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear of punishment." Retribution is defined as: 1) "Punishment imposed as repayment or revenge for the offense committed; requital" or 2) "something justly deserved; repayment; reward." *Id.*

n152. *Kansas v. Hendricks*, 521 U.S. 346, 379 (1997) (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (quoting *United States v. Brown*, 381 U.S. 437, 458 (1965)) ("Punishment serves several purposes: retributive, rehabilitative, deterrent - and preventative. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.").

n153. *Id.* at 373 (Kennedy, J., concurring) (agreeing with the majority holding that civil commitment of sex offenders with "mental abnormality" was not punitive for purposes of *ex post facto* and double jeopardy protections, but with the caveat that such a law might become punitive in practice if civil commitment became a mechanism for retribution or general deterrence).

n154. *Id.*

n155. *Id.* at 365-66 (citing *Allen v. Illinois*, 478 U.S. 364, 373(1986) (proceedings under Illinois Sexually Dangerous Persons Act were not "criminal" within meaning of Fifth Amendment's guarantee against compulsory self-incrimination); *U.S. v. Salerno*, 481 U.S. 739, 748 (1987)).

n156. *Id.*

n157. *Id.* at 373 (Kennedy, J., concurring).

n158. *Id.* at 379-80 (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting) (citing *United States v. Brown*, 381 U.S. 437 (1965)). The dissent argued that a law with the aim of incapacitation might be found punitive if the confinement did not reasonably fit a medically oriented treatment objective. Alternatively, as in *Hendricks*, a sanction might be labeled punitive if the state cites treatment as a reason for confinement but requires commitment and treatment only after completion of a jail term, or if commitment proceedings fail to consider less restrictive alternatives. *Id.* (citing *Allen*, 478 U.S. at 369).

n159. *Smith v. Doe*, 538 U.S. 84 (2003).

n160. *Id.* at 102 (quoting *Hudson v. U.S.*, 522 U.S. 93, 105 (1997)).

n161. *Id.* at 87.

n162. *Allen v. Illinois*, 478 U.S. 364, 369 (1986).

n163. *Hendricks*, 521 U.S. at 361 (quoting *United States v. Ward*, 448 U.S. 242, 248-249 (1980)) (emphasis added).

n164. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963).

n165. *Allen*, 478 U.S. at 369 (stating that the *Mendoza-Martinez* factors are "neither exhaustive nor dispositive").

n166. *Doe v. Miller*, 405 F.3d 700 (8th Cir., 2005).

n167. *Id.* at 705 n.1 (quoting *Iowa Code §692A.2A* (2005)).

n168. For example, seventy-seven percent of the housing in Carroll County, Iowa was off-limits to sex offenders under section 692A.2A. *Id.* at 706 n.2.

n169. *Id.* at 720.

n170. *Id.* at 725 (Melloy, J., concurring and dissenting).

n171. *Kansas v. Hendricks*, 521 U.S. 346, 381 (1997) (Breyer, Stevens, Souter & Ginsburg, JJ., dissenting).

n172. *Smith v. Doe*, 538 U.S. 84, 92 (2003) (citing *Hendricks*, 521 U.S. at 361).

n173. See *Hendricks*, 521 U.S. at 368-69; *Smith*, 538 U.S. at 97-98; *Miller*, 405 F.3d at 719-21.

n174. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). The Court has elaborated that these factors are "neither exhaustive nor dispositive." *Smith*, 538 U.S. at 97 (citing *United States v. Ward*, 448 U.S. 242, 249 (1980)).

n175. *Smith*, 538 U.S. at 102 (stating that respondents' argument that Alaska's concession that the statute could have a deterrent, and therefore punitive effect "proves too much").

n176. *Miller*, 405 F.3d at 719.

n177. *Ward*, 448 U.S. at 248.

n178. In *Artway v. Attorney General of N.J.*, the Third Circuit Court of Appeals closely examined the effects of New Jersey's Megan's Law on sex offenders to determine if the law's negative repercussions were so harsh as to indicate that the law should be considered a punishment for purposes of ex post facto, bill of attainder and double jeopardy protections under the U.S. Constitution. 81 F.3d 1235, 1263 (3d Cir. 1996). The Artway court applied a three-prong test which examined the actual purpose, objective purpose, and effects of the New Jersey sex offender registration law. Finding the actual and objective purposes of the statute to be civil, the court examined the law's effects stating that if the negative repercussions were great enough, the measure must be considered punishment. *Id.* (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499, 508-09 (1995)). The court ultimately found the registration requirement did not "sting" to such a degree that it should be considered punishment under the relevant constitutional provisions. Although the Artway-Morales test differs from the Ward test, the Court appears to apply the Artway-Morales test only to determine whether a legislative change in processes results in an increase in punishment.

n179. *Id.* at 1255 (noting the importance of a clear definition of what constitutes "retributive," "deterrent," and "remedial" aims, and attempting to divine the Supreme Court's use of the terms, the Artway court defined "retributive" as vengeance for own sake, "deterrence" as the threat of negative repercussions to generally discourage the behavior, and "remedial" as solving a problem).

n180. *Smith*, 538 U.S. at 102 (stating that even though the state conceded that a sex offender registration requirement might deter future crimes, many government programs deter crime without punishment); *Miller*, 405 F.3d at 720 (agreeing with the lower court without analysis that the law could have a deterrent effect but finding no inference of punishment).

n181. *Miller*, 405 F.3d at 720.

n182. *Artway*, 81 F.3d at 1256.

n183. 538 U.S. at 102-03.

n184. *Smith*, 538 U.S. at 103-04 (citing studies showing sex offenders as re-offending more often than other offenders).

n185. *Miller*, 405 F.3d at 719.

n186. *Smith*, 538 U.S. at 108.

n187. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

n188. *Smith*, 538 U.S. at 97.

n189. *Id.*

n190. *Miller*, 405 F.3d at 720.

n191. *Smith*, 538 U.S. at 97 (affirming Alaska's sex offender registration and notification requirements, and quoting the reasoning of the Court of Appeals in *Doe I v. Otte*, 259 F.3d 979, 989 (2001)).

n192. 372 U.S. at 168-69 n.23 (noting that banishment, exile, and the associated loss of citizenship were historical means of punishment in England and Ancient Rome in support of the Court's holding that revoking citizenship for leaving or remaining outside of the country to evade required military service during time of war was a punishment).

n193. 538 U.S. at 98-99.

n194. *Id.* at 97-99.

n195. *Id.* at 98-99.

n196. *Id.*

n197. *Id.* at 107-18 (Stevens, J., dissenting and concurring in part; Souter, J., concurring; Breyer & Ginsberg, JJ., dissenting).

n198. *Smith*, 538 U.S. at 109 (Souter, J., dissenting). Justice Souter noted "significant evidence of onerous practical effects of being listed on a sex offender registry." *Id.* at 109 n.. ("The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost... Family and other personal relationships have been destroyed or severely strained. Retribution has been visited by private, unlawful violence and threats." (quoting *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997), rehearing en banc denied, 127 F.3d 298 (3d Cir. 1997))) (There have been "numerous instances in which sex offenders have suffered harm in the aftermath of notification - ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson." (quoting *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir. 1997))). More recent events in which public access to registries have been implicated in violence against registrants include the April 16, 2006 killing of Maine residents Joseph L. Gray, 57, and William Elliott, 24, each of whom was shot and killed in his home. Maine authorities said that Canadian citizen Stephen A. Marshall, 19, obtained information about the men from the Maine online sex offender registry. Two Sex Offenders Shot to Death in Their Homes, N.Y. Times, Apr. 17, 2006, at A14.

n199. *Smith*, 538 U.S. at 111-12 (Stevens, J., dissenting and concurring in part). Without elaboration, Justice Ginsberg noted that the sex offender registration and disclosure requirements may be quite similar to and perhaps more severe than existing parole or probation requirements. *Id.* at 115-16 (Ginsburg & Breyer, JJ., dissenting). Probation is a sentence served under supervision in the community in lieu of incarceration, while parole is the conditional early supervised release for the remaining of the offender's prison term. Joan Petersilia, Community Corrections: Probation, Parole and Intermediate Sanctions 1, 19-24 (Oxford 1998). In 1995, more than 80% of U.S. offenders were serving sentences in the community under probation or parole supervision, while less than 20% were serving their sentences in prison. *Id.* In contrast to the challengers to sex offender sanctions who

have completed and been released from their sentences, offenders on parole or probation are serving current sentence. However, the actual supervision of parolees and probationers is minimal because of high supervisory officer caseloads. *Id.* The national average supervisory officer caseloads of 150:1 for probation and 80:1 for parole far exceed the recommended 30:1. *Id.* The Bureau of Justice Statistics reports that 60% of felony probationers actually see a probation officer less than once a month, with 60% of Los Angeles County probationers being tracked solely by computer with no officer contact and ninety-percent of Texas's probationers seen once every three months. *Id.* Although probationers may have requirements such as restitution payments to victims, house arrest, community service, or substance abuse counseling, only about half of probationers comply with these requirements. *Id.* By comparison, sex offender registration requirements, such as Alaska's Megan's law, may require registration of name address and other information with local law enforcement and may last for ten years to a lifetime. *Smith, 538 U.S. at 111.* Alaska requires quarterly information verification, with name, aliases, address, photograph, physical description, license plate numbers, place of employment, and publication of the date, place, and crime on internet. *Id.* Sex offenders are required to notify local law enforcement within one day of changes of address, borrowing a car, shaving a beard, or changing jobs. *Id.* Thus, the registration, notification, and residency limitations on persons who have already served sentences for sex offenses may actually exceed those of probationers and parolees.

n200. *Doe v. Miller, 405 F.3d 700, 719-20 (2005).*

n201. *Id.*

n202. *Id.*

n203. *Id.* (Melloy, J., dissenting).

n204. *Id. at 724* (Melloy, J., dissenting).

n205. *Id.*

n206. *Id. at 724-25.*

n207. No. Civ.A. 1: 05- CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006).

n208. 398 F.Supp.2d 878 (S.D. Ohio 2005).

n209. *Doe v. Baker, 2006 WL 905368, at 3-4; Coston v. Petro, 398 F.Supp.2d at 885-86.*

n210. *Doe v. Baker, 2006 WL 905368, at 3-4; Coston v. Petro, 398 F.Supp.2d at 885-86.*

n211. *Doe v. Baker, 2006 WL 905368, at 4* (granting the Georgia Attorney General's motion to dismiss).

n212. *Johnson v. Cincinnati, 119 F.Supp.2d 735 (S.D. Ohio 2000), aff'd, 310 F.3d 484 (6th Cir. 2002)* (on right to travel and freedom of association grounds without addressing the punishment issue). The District Court found that restriction to be a punishment for the purposes of a double jeopardy challenge.

n213. *Id. at 748.*

n214. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

n215. See *infra* pp. 6-17.

n216. 71 U.S. 277, 320 (1866). Field elaborated:

The theory upon which our political institutions rest is, that all men have certain inalienable rights - that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Id. at 321-22.

n217. *Id.*

n218. The Supreme Court has held that fines and confiscation of property are not punitive. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *United States v. Ursery*, 518 U.S. 267 (1996).

n219. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 n.23 (1963).

n220. In *Doe v. Pataki*, the district court applied the historical punishment factor to find that New York's sex offender registration and notification provisions were punitive because of they were the "modern-day equivalent of branding and banishment" and shaming using the "invisible whip of public opinion" to deter the sex offender from future wrongdoing. 940 F.Supp. 603, 605, 624 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 120 F.3d 1263 (2d Cir. 1997). The district court further noted the intent among some members of the New York legislature that the law would force sex offenders "out of town, out of state." *Id.* (citing New York State Assembly Debate Minutes, June 28, 1995, at 388-89). While stating that "we fully understand" how the district court concluded the notification measures to be punitive, the Second Circuit reversed, focusing on the difference from historical shaming which required offender physical participation while notification does not. *Doe v. Pataki*, 120 F.3d 1263, 1284 (2d Cir. 1997).

n221. For example, an exacting form-based comparison of death by lethal injection might not reveal a historical analogue, but the effect of inflicting death is most certainly comparable to the historical sentence of death, whether by hanging, firing squad, or the electric chair.

n222. Blackstone has referred to confiscation and forfeiture of land as punishment. William Blackstone, 4 Commentaries 377 (cited by *Cummings v. Missouri*, 71 U.S. 277, 321 (1866)). However, the Supreme Court has rejected this definition because in rem forfeitures are traditionally civil procedures. *One Assortment of 89 Firearms*, 465 U.S. at 363. See also *Mendoza-Martinez*, 372 U.S. at 168 n.23 (citing the similarity of deprivation of U.S. nationality to both ancient Roman and English banishment practices to support a finding that deprivation of nationality as punishment). Further confusion in the Court's definition of punishment is created as it draws on and rejects definitions of punishments by philosophers, sociologists and criminal justice experts. See *supra* at 6-7. Finally, as this historical review shows, expert definitions of punishment are constantly changing. *Supra* at 6-17.

n223. In *Smith v. Doe*, four separate opinions were filed with differing views on the test for *ex post facto*. The majority applied the *Ward* test, requiring each *Mendoza-Martinez* factor to meet the clearest proof of puni-

tive effect. Justice Souter also applied the Ward and the Mendoza-Martinez factors, but balanced the positive and negative factors at the end, and disagreed with the application of the clearest proof burden where legislative civil intent was not clear. Justice Thomas objected to the implementation-based challenge and would allow only those ex post facto challenges based on the statutory text. Justice Stevens would have applied a completely different test to the Smith case which would find a sanction punitive if conviction is sufficient and necessary condition of sanction proposing the following test: the sanction 1) constitutes a severe deprivation of offender liberty, 2) is imposed on everyone convicted of a relevant criminal offence, and 3) is imposed only on those criminals. 538 U.S. 84, 97 (2003).

n224. *Id.* at 97 (noting the origins of the Mendoza-Martinez factors in double jeopardy, Sixth and Eighth Amendment jurisprudence, as well as the ex post facto and bill of attainder cases). See also Logan, *Jurisprudence of Punishment*, supra note 8, at 1280; Erwin Chemerinsky, *The Constitution and Punishment*, 56 *Stan. L. Rev.* 1049 (2004) (discussing the inconsistencies in the Supreme Court's approaches to constitutional issues dealing with punishment).

n225. Logan, *Jurisprudence of Punishment*, supra note 8, at 1280. In a review of Supreme Court cases defining punishment for constitutional provisions, Professor Logan noted that the Court had largely applied the Mendoza-Martinez factors until 1989 when it began to develop and apply different analyses for specific constitutional provisions, variously applying "effect," "excessiveness," and historical punishment tests in different constitutional contexts.

n226. As recently as 1996, the district court in *Doe v. Pataki* hinted at the turmoil in the Court's punishment jurisprudence, noting that the Supreme Court has not established, nor have the lower courts reached consensus on a definitive "test" for determining whether a government action constitutes punishment for purposes of the *Ex Post Facto Clause*. 940 *F.Supp* 603 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 120 *F.3d* 1263 (2d Cir. 1997). In the Second Circuit's review of the case, the court concluded that the two-part Ward inquiry for punishment applied to ex post facto challenges. 120 *F.3d* 1263 (2d Cir. 1997). Subsequent Supreme Court decisions have confirmed this assessment. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997); *Smith v. Doe*, 538 U.S. 84, 96 (2003).

n227. *Smith*, 538 U.S. at 92 (originally from *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

n228. *Smith*, 538 U.S. at 96 (citing *Hudson v. United States*, 522 U.S. 93, 99 (1997)).

n229. *Id.* at 97 (citing *Ward*, 448 U.S. at 249).

n230. Logan, *Jurisprudence of Punishment*, supra note 8, at 1282 (internal quotes omitted).

n231. *Smith*, 538 U.S. at 113 (Stevens, J., dissenting) (stating that "no matter how often the Court may repeat and manipulate multifactor tests ... [I will never be persuaded] that the registration and reporting obligations that are imposed on convicted sex offenders and no one else as a result of their convictions are not part of their punishment."); *Bell v. Wolvish*, 441 U.S. 520, 565 (1979) (Marshall, J., dissenting) (noting that the Mendoza-Martinez factors have been manipulated to the point of "lacking any real content.").

n232. Logan, *Jurisprudence of Punishment*, supra note 8, at 1282 (citing Gregory Y. Porter, Note, *Uncivil Punishment: The Supreme Court's Ongoing Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 *S. Cal. L. Rev.* 517, 557 (1997)).

n233. In *Smith*, the majority reviewed and individually dismissed each of the factors as failing to meet the clearest proof of punitive purpose or effect. 538 U.S. at 97-106. In his concurrence, Justice Souter balanced factors pointing in different directions at the end. *Id.* at 107-10. See also supra note 225; *Doe v Pataki*, 120 *F.3d*

1263, 1275-76 (2d Cir. 1997) (reviewing the Supreme Court's application of the Mendoza-Martinez and finding great inconsistencies, with Justices picking and choosing between factors considered dispositive of punitive nature and ignoring or discounting them in others); *United States v. Ursery*, 518 U.S. 267, 281, 291 (1996) (finding forfeiture to be civil because it 1) is not historically a punishment, 2) does not require scienter, despite deterrent purpose and the that the behavior to which it applies is a crime, while disregarding the law's deterrent purpose as serving both civil and criminal goals, and 3) dismisses the fact that the reviewed proceedings were triggered by to criminal activity); *Kansas v. Hendricks*, 521 U.S. 346 (1997) (supporting a finding of commitment to be a civil sanction, by noting that criminal conviction is not a prerequisite for commitment and no finding of scienter is required, while ignoring the use of criminal proceedings as safeguards in the commitment process and the fact that commitment involves affirmative restraint).

n234. In the case of ex post facto challenges to post-custody sex offender sanctions, lower courts have engaged in similar variation in reasoning, especially in cases preceding *Smith v. Doe*, 538 U.S. 84 (2003). In *Doe v. Pataki*, the District Court found the New York Sex Offender Registration Act to be punitive. 940 F.Supp. 603 (S.D.N.Y. 1996), aff'd in part, rev'd in part, 120 F.3d 1263 (2d Cir. 1997). On review, the Second Circuit found the provisions to be non-punitive, noting that "we fully understand how [the district court judge] reached his conclusion" that the provisions are punitive, but after careful consideration "as we believe the Supreme Court has enunciated them," that the plaintiffs failed to meet the clearest proof standard. 120 F.3d 1263 (2d Cir. 1997). See also *Doe v. Miller*, in which the district court found Iowa's residency limits to resemble the historical punishment of banishment in that the effect of Iowa's residency limits was to banish sex offenders completely from many of the states' small cities and towns, leaving the rural areas and small towns with few services as the only legal housing options. 298 F.Supp.2d 844, 869 (S.D. Iowa 2004), rev'd, 405 F.3d 700 (8th Cir. 2005). On review, the Eighth Circuit found the restrictions to be unlike banishment in that the offender was merely limited in where he could live, not for other purposes such as employment. *Doe v. Miller*, 405 F.3d 700, 719-20 (8th Cir. 2005).

n235. Logan, Jurisprudence of Punishment, supra note 8, at 1275 (quoting The Federalist No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961)).

n236. Id. at 1277 (John C. Hamilton, History of the Republic of the United States 34 (1859) (quoting Alexander Hamilton)).

n237. Logan, Democratic Despotism, supra note 21, at 496.

n238. *Doe v. Pataki*, 940 F.Supp. 603, 605 (S.D.N.Y. 1996) (quoting N.Y. State Assembly Debate Minutes, June 28, 1995, at 360-61, 393, 417). See also supra note 143.

n239. *Pataki*, 940 F.Supp. at 605 (quoting N.Y. State Assembly Debate Minutes, June 28, 1995, at 388-89). In Alabama, the Governor introduced several sex offender bills one week after talk show host Bill O'Reilly commented that Alabama was a state that didn't seem to have a commitment to punishing those who commit sex crimes against children. Recent Legislation, supra note 9, at 942.

n240. *Calder v. Bull*, 3 U.S. 386, 391 (1798).

n241. David A. Fahrenthold, Online Registry, or Target List? A Stranger Kills 2 Sex Offenders He Looked Up in Maine, Wash. Post, April 21, 2006. Fahrenthold reports that a study by Richard Tewksbury of the University of Louisville found that half of registered offenders had been harassed in person, while over one-fourth had been threatened by telephone, letters or e-mail. Id.

n242. Marcus Nieto & David Jung, The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review, California Research Bureau 06-008, at 21 (Aug. 2006),

available at <http://www.library.ca.gov/crb/06/08/06-008.pdf#search=%22iowa%20sex%20offender%20residency%20restriction%22>. Over 400 municipalities are estimated to have enacted sex offender residency restrictions.

n243. *Id.* One New Jersey mayor predicted that all the state's municipalities would "get involved" in a game of one-upmanship.

n244. Logan, *Jurisprudence of Punishment*, *supra* note 8, at 1261.

n245. *Artway v. Att'y. Gen. of State of N.J.*, 81 F.3d 1235, 1263 (3d Cir. 1996), hearing en banc denied, 83 F.3d 594 (3d Cir. 1996). The Artway Court synthesized a three-prong analysis for ex post facto punishment from previous Supreme Court cases. The test examines (1) actual purpose, (2) objective purpose, and (3) effect to determine if the sanction is a punishment. In the first prong, the actual purpose or legislative aim is examined for intent to punish. If no punitive aim is found, then the second prong requires scrutiny of the objective purpose by asking three questions. First, is the law explainable by solely by a remedial, and therefore, civil purpose? If not the law would be considered punishment. Second,

even if some remedial purpose can fully explain the measure, does a historical analysis show that the measure has traditionally been regarded as punishment? If so, and if the text or legislative history does not demonstrate that this measure is not punitive, it must be considered "punishment." Third, if the legislature did not intend a law to be retributive but did intend it to serve some mixture of deterrent and salutary purposes, we must determine (1) whether historically the deterrent purpose of such a law is a necessary complement to its salutary operation and (2) whether the measure under consideration operates in its "usual" manner, consistent with its historically mixed purposes. Unless the partially deterrent measure meets both of these criteria, it is "punishment." If the measure meets both of these criteria and the deterrent purpose does not overwhelm the salutary purpose, it is permissible.

Id. (citations omitted).

n246. *Smith v. Doe*, 538 U.S. 84, 97 (2003) (Stevens, J., dissenting) (stating that a sanction should be considered a punishment if 1) it is imposed on everyone who commits a criminal offense, 2) it is not imposed on anyone else, and 3) it severely impairs a person's liberty).

n247. Note that in *Artway*, then-Judge Alito filed a dissent which argued that the *Artway* decision should have been reviewed en banc. 83 F.3d 594 (3d Cir. 1996), reh'g en banc denied 81 F.3d 1235 (3d Cir. 1996). Judge Alito was particularly troubled by the Third Circuit panel's decision that "a measure may constitute 'punishment' if its 'effects' or negative repercussions - regardless of how they are justified - are great enough." *Id.* at 596.

n248. Logan, *Democratic Despotism*, *supra* note 21, at 469 (finding that challenges to post-custody sanctions, encompassing 168 of 1026 cases, were the third largest category of ex post facto challenges in state courts from 1992-2002. These include ninety-one challenges to registration requirements based on convictions for sex offenses and drug offenses, gang affiliations and felon status, and thirty-nine challenges to sex offender commitment laws).

n249. See, e.g., *Recent Legislation*, *supra* note 9, at 939-41.

LEXSEE 1999 OHIO AG LEXIS 31

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO

OPINION No. 99-031

1999 Ohio Op. Atty Gen. 206; 1999 Ohio Op. Atty Gen. No. 31; 1999 Ohio AG LEXIS 31

April 29, 1999

SYLLABUS:

[*1]

Pursuant to *R.C. 120.16* and *R.C. 2950.09*, a county public defender is required to represent an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of the provisions of R.C. Chapter 2950, unless the defendant waives his right to counsel or the court pursuant to *R.C. 120.16(E)* appoints counsel other than the county public defender or allows the defendant to select his own personal counsel to represent him.

REQUESTBY:

James F. Stevenson, Shelby County Prosecuting Attorney, Sidney, Ohio

OPINIONBY:

Betty D. Montgomery, Attorney General

OPINION:

You have requested an opinion whether a county public defender is required to represent an indigent defendant at a hearing to determine whether he is a sexual predator for purposes of the provisions of R.C. Chapter 2950. Information in your letter indicates that in Shelby County legal representation of indigent defendants is provided by a county public defender pursuant to the provisions of *R.C. 120.13-18*. n1

n1 A county may provide legal representation to indigent defendants through the state public defender, *R.C. 120.04-.06*, a county public defender system, *R.C. 120.13-18*, a joint county public defender system, *R.C. 120.23-28*, or a system of appointed counsel, *R.C. 120.33*.

[*2]

R.C. Chapter 2950 sets forth provisions for the registration of sexual predators and for community notification regarding sexual predators who are about to be or have been released from imprisonment, a prison term, or other confinement and who will live in or near a particular neighborhood or who otherwise will live in or near a particular neighborhood. n2 *R.C. 2950.04* requires a sexual predator to register with the sheriff of the county in which he resides or is temporarily domiciled for more than seven days. As part of the registration, a sexual predator is required to provide the county sheriff with his current residence address, the name and address of his employer, if he is employed at the time of registration or if he knows at the time of registration that he will be commencing employment with that employer subsequent to registration, and any other information required by the Bureau of Criminal Identification and Investigation. *R.C. 2950.04(C)*. n3 In addition, a sexual predator who is required to register pursuant to *R.C. 2950.04* is required to provide written notice of any residence address change to the county sheriff with whom he most recently registered, *R.C. 2950.05*, [*3] and to periodically verify his current residence address with the county sheriff with whom he most recently registered, *R.C. 2950.06*.

n2 R.C. Chapter 2950 also contains provisions pertaining to the registration of habitual sex offenders and other offenders who have committed sexually oriented offenses and community notification regarding the release of habitual sex offenders.

n3 The registration form to be signed by a sexual predator must include his photograph. *R.C. 2950.04(C)*.

R.C. 2950.09 sets forth the procedures for classifying a defendant as a sexual predator for purposes of R.C. Chapter 2950. n4 In this regard, *R.C. 2950.09(A)* provides:

If a person is convicted of or pleads guilty to committing, on or after January 1, 1997, a sexually oriented offense that is a sexually violent offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging the sexually violent offense, the conviction of [*4] or plea of guilty to the specification automatically classifies the offender as a sexual predator for purposes of this chapter. If a person is convicted of or pleads guilty to a sexually oriented offense in another state, or in a federal court, military court, or an Indian tribal court and if, as a result of that conviction or plea of guilty, the person is required, under the law of the jurisdiction in which the person was convicted or pleaded guilty, to register as a sex offender until the person's death and is required to verify the person's address on at least a quarterly basis each year, that conviction or plea of guilty automatically classifies the offender as a sexual predator for the purposes of this chapter, but the offender may challenge that classification pursuant to division (F) of this section. In all other cases, a person who is convicted of or pleads guilty to, or has been convicted of or pleaded guilty to, a sexually oriented offense may be classified as a sexual predator for purposes of this chapter only in accordance with division (B) or (C) of this section.

n4 *R.C. 2950.01(E)* provides that, for purposes of R.C. Chapter 2950, unless the context clearly requires otherwise, the term "sexual predator" means a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses."

[*5]

R.C. 2950.09(B)(1) authorizes a judge to conduct a hearing to determine whether a defendant who, on or after January 1, 1997, was sentenced for a sexually oriented offense that is not a sexually violent offense or for a sexually oriented offense that is a sexually violent offense and a sexually violent predator specification was not included in the indictment, count in the indictment, or information charging the sexually violent offense is a sexual predator. Under *R.C. 2950.09(C)(2)*, a court, upon the recommendation of the Department of Rehabilitation and Correction, may conduct a hearing to determine whether a defendant in the custody of the Department for the commission of a sexually oriented offense committed prior to January 1, 1997, is a sexual predator. Accordingly, pursuant to divisions (B)(1) and (C)(2) of *R.C. 2950.09*, a court is authorized to conduct a hearing to determine whether a defendant who has been convicted of, or pleaded guilty to, a sexually oriented offense is a sexual predator for purposes of R.C. Chapter 2950.

At such a hearing, a defendant has a statutory right to be represented by counsel. *R.C. 2950.09(B)(1), (C)(2); State v. Cook, 83 Ohio St. 3d 404, 407, 423, 700 N.E.2d 570, 575, 586 (1998), [*6] cert. denied, 119 S. Ct. 1122 (1999); see also State v. Cady, 3-98-14, 1998 Ohio App. LEXIS 5491 (Crawford County Nov. 5, 1998) (a hearing to determine whether a defendant should be classified as a sexual predator does not comport with the dictates of due process unless the defendant is represented by counsel at the hearing or informed of his right to counsel under *R.C. 2950.09(C)(2)* and waives such right). Moreover, if the defendant is indigent, he has a statutory right to have counsel appointed to represent him at such a hearing. *R.C. 2950.09(B)(1), (C)(2); State v. Cook, 83 Ohio St. 3d at 423, 700 N.E.2d at 586.**

R.C. 2950.09 does not expressly require a county public defender to provide legal representation to an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of R.C. Chapter 2950. Nevertheless, it is a general rule that whenever an indigent defendant is constitutionally or statutorily entitled to court-appointed legal representation, the representation is provided through one of the systems established by R.C. [*7] Chapter 120. See 1997 Op. Atty Gen. No. 97-040; 1985 Op. Atty Gen. No. 85-090; 1984 Op. Atty Gen. No. 84-023. R.C. Chapter 120 authorizes a county to provide legal representation for indigent defendants through the state public defender, *R.C. 120.04-.06*, a county public defender system, *R.C. 120.13-.18*, a joint county public defender system,

R.C. 120.23-28, or a system of appointed counsel, *R.C. 120.33*. 1997 Op. Atty Gen. No. 97-040 at 2-234 n.1; 1984 Op. Atty Gen. No. 84-023 at 2-72.

As indicated previously, your county provides legal representation to indigent defendants pursuant to the county public defender system. Under a county public defender system, the county public defender is vested with the responsibility for providing legal representation to indigent defendants. *See R.C. 120.15-17*. *R.C. 120.16* sets forth the circumstances under which a county public defender is required to provide legal representation to indigent defendants, stating in pertinent part:

(A)(1) The county public defender shall provide legal representation to indigent adults and juveniles who are charged with *the commission of an offense or act that is a violation of a state statute and* [*8] *for which the penalty or any possible adjudication includes the potential loss of liberty and in postconviction proceedings as defined in this section.*

(B) The county public defender shall provide *the legal representation authorized by division (A) of this section at every stage of the proceedings* following arrest, detention, service of summons, or indictment. (Emphasis added.)

Accordingly, pursuant to *R.C. 120.16(A)(1)* and (B), a county public defender is required to provide legal representation (1) at every stage of a proceeding in which an indigent defendant is charged with the commission of an offense or act, (2) that is a violation of a state statute, and (3) for which the penalty or any possible adjudication includes the potential loss of liberty. Let us therefore examine each of these criteria and determine whether they are present in the case of a hearing that is held by a court to determine an indigent defendant's sexual predator status.

As provided in *R.C. 2950.09*, a hearing to determine whether a defendant is a sexual predator is conducted by a court after a defendant is convicted of, or pleads guilty to, a sexually oriented offense. It is axiomatic that [*9] before a defendant may be convicted of, or plead guilty to, a sexually oriented offense, the defendant must be charged with the commission of a sexually oriented offense. *See generally Ohio R. Crim. P. 5(A)* (at a defendant's initial appearance, a judge or magistrate must inform the defendant of the nature of the charge against him); *Ohio R. Crim. P. 7(B)* (an indictment or information shall contain a statement that the defendant has committed a public offense specified in the indictment or information). Charging a defendant with a sexually oriented offense thus is a condition precedent to the holding of a hearing to determine whether the defendant is a sexual predator. Further, such a hearing arises only because a defendant who is charged with the commission of a sexually oriented offense is convicted of that offense or a lesser-included sexually oriented offense. Therefore, a hearing to determine whether a defendant is a sexual predator is a "stage of the proceedings following arrest, detention, service of summons, or indictment" for persons convicted of such offenses. *R.C. 120.16(B)*.

As used in *R.C. 2950.09*, unless the context clearly requires otherwise, "sexually oriented [*10] offense" means any of the following offenses:

- (1) Regardless of the age of the victim of the offense, a violation of *section 2907.02, 2907.03, or 2907.05 of the Revised Code*;
- (2) Any of the following offenses involving a minor, in the circumstances specified:
 - (a) A violation of *section 2905.01, 2905.02, 2905.03, 2905.04, n5 2905.05, or 2907.04 of the Revised Code* when the victim of the offense is under eighteen years of age;
 - (b) A violation of *section 2907.21 of the Revised Code* when the person who is compelled, induced, procured, encouraged, solicited, requested, or facilitated to engage in, paid or agreed to be paid for, or allowed to engage in the sexual activity in question is under eighteen years of age;
 - (c) A violation of division (A)(1) or (3) of *section 2907.321 or 2907.322 of the Revised Code*;
 - (d) A violation of division (A)(1) or (2) of *section 2907.323 of the Revised Code*;
 - (e) A violation of division (B)(5) of *section 2919.22 of the Revised Code* when the child who is involved in the offense is under eighteen years of age.

(3) Regardless of the age of the victim of the offense, a violation of *section 2903.01, 2903.02, 2903.11, or 2905.01 of the Revised Code*, or of division [*11] (A) of *section 2903.04 of the Revised Code*, that is committed with a purpose to gratify the sexual needs or desires of the offender;

(4) A sexually violent offense; n6

(5) A violation of any former law of this state that was substantially equivalent to any offense listed in division (D)(1), (2), (3), or (4) of this section;

(6) A violation of an existing or former municipal ordinance or law of another state or the United States, a violation under the law applicable in a military court, or a violation under the law applicable in an Indian tribal court that is or was substantially equivalent to any offense listed in division (D)(1), (2), (3), or (4) of this section;

(7) An attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (D)(1), (2), (3), (4), (5), or (6) of this section. (Footnotes added.)

R.C. 2950.01(D).

n5 *R.C. 2905.04* has been repealed. 1995-1996 Ohio Laws, Part IV, 7136 (Am. Sub. S.B. 2, eff. July 1, 1996).

n6 For purposes of *R.C. Chapter 2950*, "sexually violent offense" has the same meaning as in *R.C. 2971.01*. *R.C. 2950.01(H)*. *R.C. 2971.01(G)* defines "sexually violent offense" as "a violent sex offense, or a designated homicide, assault, or kidnapping offense for which the offender also was convicted of or pleaded guilty to a sexual motivation specification." *R.C. 2971.01*, in turn, defines the terms "sexual motivation specification" and "violent sex offense" as follows:

(K) "Sexual motivation specification" means a specification, as described in *section 2941.147 of the Revised Code*, that charges that a person charged with a designated homicide, assault, or kidnapping offense committed the offense with a sexual motivation.

(L) "Violent sex offense" means any of the following:

(1) A violation of *section 2907.02, 2907.03, or 2907.12* or of division (A)(4) of *section 2907.05 of the Revised Code*;

(2) A felony violation of a former law of this state that is substantially equivalent to a violation listed in division (L)(1) of this section or of an existing or former law of the United States or of another state that is substantially equivalent to a violation listed in division (L)(1) of this section;

(3) An attempt to commit or complicity in committing a violation listed in division (L)(1) or (2) of this section if the attempt or complicity is a felony.

[*12]

A review of the offenses included within *R.C. 2950.01(D)*'s definition of "sexually oriented offense," as used in *R.C. 2950.09(B)(1)* and (C)(2), discloses that a person who is convicted of, or pleads guilty to, one of those offenses has committed an offense that "is a violation of a state statute." *R.C. 120.16(A)(1)*. As defined in *Black's Law Dictionary* 1410 (6th ed. 1990), a "statute" is "an act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state." In Ohio, the legislative power of the state rests with the General Assembly. Ohio Const. art. II, § 1. The General Assembly thus is empowered to enact state statutes that prohibit certain specified conduct by persons and impose penalties for that conduct. *See id.* State statutes enacted by the General Assembly of a permanent and general nature are set forth in the Revised Code. *R.C. 1.01*.

Each offense listed in *R.C. 2950.01(D)* as a "sexually oriented offense," for purposes of *R.C. 2950.09(B)(1)* [*13] and (C)(2), constitutes conduct that is prohibited by a statute of the Revised Code. n7 *See, e.g., R.C. 2903.01; R.C. 2903.02; R.C. 2903.04(A); R.C. 2903.11; R.C. 2905.01; R.C. 2905.02; R.C. 2905.03; R.C. 2905.05; R.C. 2907.02; R.C. 2907.03; R.C. 2907.04; R.C. 2907.05; R.C. 2907.21; R.C. 2907.321(A)(1), (3); R.C. 2907.322(A)(1), (3); R.C. 2907.323(A)(1), (2); R.C. 2919.22(B)(5); R.C. 2923.01; R.C. 2923.02; R.C. 2923.03.* Accordingly, a person who commits one of those offenses commits an offense that "is a violation of a state statute." *R.C. 120.16(A)(1)*.

n7 Pursuant to *R.C. 2950.01(E)(6)*, "sexually oriented offense" means "[a] violation of an existing or former municipal ordinance or law of another state or the United States, a violation under the law applicable in a military court, or a violation under the law applicable in an Indian tribal court that is or was substantially equivalent to any offense listed in division (D)(1), (2), (3), or (4) of this section." None of the violations listed in *R.C. 2950.01(E)(6)* is a violation of a statute of this state. However, since none of the violations listed therein will give rise to a hearing under *R.C. 2950.09(B)(1)* or (C)(2), such violations are not included within the definition of "sexually oriented offense," as used in the context of *R.C. 2950.09(B)(1)* and (C)(2).

[*14]

Moreover, each offense enumerated in *R.C. 2950.01(D)* is classified as either a felony or misdemeanor. *See R.C. 2903.04(C); R.C. 2903.11(B); R.C. 2905.01(C); R.C. 2905.02(B); R.C. 2905.03(B); R.C. 2905.05(C); R.C. 2907.02(B); R.C. 2907.03(B); R.C. 2907.04(B); R.C. 2907.05(B); R.C. 2907.21(B); R.C. 2907.321(C); R.C. 2907.322(C); R.C. 2907.323(B); R.C. 2919.22(E); R.C. 2923.01(J); R.C. 2923.02(E); R.C. 2923.03(F); R.C. 2929.02.* Pursuant to *R.C. 2929.14* and *R.C. 2929.21*, respectively, a court may impose a prison term on a person convicted of, or pleading guilty to, a felony or misdemeanor. The penalty for each offense listed in *R.C. 2950.01(D)* as a "sexually oriented offense," for purposes of *R.C. 2950.09(B)(1)* and (C)(2), thus "includes the potential loss of liberty," *R.C. 120.16(A)(1)*, insofar as a prison term may be imposed on a person convicted of, or pleading guilty to, one of those offenses. Accordingly, for purposes of *R.C. 2950.09(B)(1)* and (C)(2), a sexually oriented offense is a violation of a state statute for which the penalty includes the potential loss of liberty.

In light of the foregoing, it is our conclusion that a hearing to determine whether a defendant is a sexual [*15] predator is a stage in a proceeding that is instituted against a defendant charged with the commission of a violation of a state statute for which the penalty includes the potential loss of liberty. This conclusion should not be interpreted to suggest that the sexual predator hearing itself results in the imposition of punishment. Indeed, the Ohio Supreme Court has already ruled that *R.C. Chapter 2950* is "remedial, not punitive" in both its intent, *State v. Cook*, 83 Ohio St. 3d at 417, 700 N.E.2d at 581, and its effect, *id. at 423, 700 N.E.2d at 585*, and the registration and community notification provisions in *R.C. Chapter 2950* are specifically described as "not punitive" by the General Assembly, *R.C. 2950.02(B)*. Rather, this conclusion follows from the fact that *R.C. 120.16* requires a county public defender to provide legal representation at every stage of a proceeding in which an indigent defendant is charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty. A sexual [*16] predator hearing is one stage of such a proceeding, even though persons convicted of sexually oriented offenses face no potential loss of liberty at the sexual predator hearing. It follows, therefore, that a county public defender is required to represent an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of the provisions of *R.C. Chapter 2950*. n8

n8 In your letter, you state that *State v. Castro*, 67 Ohio App. 2d 20, 22, 425 N.E.2d 907, 909 (*Cuyahoga County 1979*), held that court appointed "counsel for postconviction proceedings is not a matter of right in Ohio, neither constitutional, nor statutory." Rather, "the appointment of counsel for postconviction proceedings is a matter of judicial discretion which may be exercised pursuant to the public defender statutes, specifically *R.C. 120.16* and *120.26*." *Id.* By its enactment of *R.C. 2950.09(B)(1)* and *R.C. 2950.09(C)(2)*, however, the General Assembly has granted a defendant a statutory right to be represented by counsel at a hearing held to determine whether the defendant is a sexual predator. In addition, a hearing to determine the sexual predator status of a sexually oriented offender is not a postconviction proceeding. Thus, the decision of the court of appeals in *State v. Castro* is inapposite and does not affect the conclusion we have reached in this opinion.

[*17]

There are two exceptions, however, to the foregoing requirement. A county public defender is not required to provide legal representation to an indigent defendant when the indigent defendant has waived his right to legal counsel n9 or the court pursuant to *R.C. 120.16(E)* n10 has appointed counsel other than the county prosecuting attorney or allowed an indigent defendant to select his own personal counsel to represent him. See 1997 Op. Atty Gen. No. 97-040 at 2-237. Accordingly, pursuant to *R.C. 120.16* and *R.C. 2950.09*, a county public defender is required to represent an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of the provisions of *R.C. Chapter 2950*, unless the defendant waives his right to counsel or the court pursuant to *R.C. 120.16(E)* appoints counsel other than the county public defender or allows the defendant to select his own personal counsel to represent him.

n9 In *State v. Gibson*, 45 Ohio St. 2d 366, 345 N.E.2d 399 (1976), the Ohio Supreme Court held that a defendant may waive his right to legal counsel when he voluntarily, knowingly, and intelligently elects to waive such right.

[*18]

n10 *R.C. 120.16(E)* states, in pertinent part, that nothing in *R.C. 120.16* "shall prevent a court from appointing counsel other than the county public defender or from allowing an indigent person to select the indigent person's own personal counsel to represent the indigent person."

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to *R.C. 120.16* and *R.C. 2950.09*, a county public defender is required to represent an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of the provisions of *R.C. Chapter 2950*, unless the defendant waives his right to counsel or the court pursuant to *R.C. 120.16(E)* appoints counsel other than the county public defender or allows the defendant to select his own personal counsel to represent him.

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The Influence of Sex Offender Registration and Notification Laws in the United States

A Time-Series Analysis

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Although federal legislation for the implementation of sex offender registration and notification systems is now a decade old, empirical studies on the efficacy of this policy are relatively nonexistent. This article explores the impact of registration legislation on the incidence of forcible rapes. Using monthly count data of rapes aggregated at the state level, this analysis uses Box-Jenkins autoregressive integrated moving average (ARIMA) models to conduct 10 intervention analyses on the enforcement of Megan's Law. The results of the analyses are mixed on whether the enforcement of sex offender registration had a statistically significant effect on the number of rapes reported at the state level. Although several states showed a nonsignificant increase in the number of rapes, only three states had a significant reduction in rapes. Policy implications are discussed in terms of the efficacy of sex offender registration and whether changes in these laws should be considered.

Keywords: *sex offender registration and notification laws; sex offenders; interrupted time-series analysis; ARIMA*

Throughout the 1990s, laws intending to address the threat of sex offenders to the public were instituted in all 50 states in the United States. These legislative solutions came in the form of sex offender registration and

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notification laws, and usually stemmed from a series of highly publicized sex crimes against a child in which the perpetrator had some previous record of committing sex offenses and where the crime often resulted in the murder of the child. Public perception that sex offenders, when compared to other types of offenders, pose a much higher risk of reoffending also helped spur the passage of registration and notification laws.

Because sex offender laws are relatively new, however, empirical research that examines the efficacy of these laws is limited. Studies have chiefly described (a) the characteristics of currently registered sex offenders (Sample, 2001; Walker & Ervin-McLarty, 2000), (b) law enforcement and public perceptions of registration and notification (Matson & Lieb, 1996; Phillips, 1998; Zevitz & Farkas, 2000), and (c) sex offender recidivism through official data sources and rehabilitation treatment data (Petrosino & Petrosino, 1999; Schram & Milloy, 1995).

This article adds to this area of study by taking advantage of the natural or quasi experiment that took place as a result of the implementation of the legislation. In response to this "natural" design, the interrupted time series analysis technique is used to compare the number of monthly rapes reported to the Uniform Crime Report (UCR) at the state level before the intervention to the number being reported after the intervention. This technique allows us to test the general deterrence hypothesis, that is, the hypothesis that sex offender registration and notification laws reduce the overall incidence of rapes.

Review of the Literature

Current sex offender policies are based on three related assumptions. First, sex offenders are much more likely to recidivate than other offenders. The community, therefore, should be especially aware of these individuals. Second, by providing the means of surveillance, registries are thought to help protect communities from sex offender residents. Third, the offender is deterred in the presence of a community that is aware of their sex offender status. We review the literature and evidence surrounding these assumptions. Although questions concerning repeat offending cannot be answered with the data we use in this article, sex offender recidivism is discussed briefly. Findings from recidivism studies illuminate the problematic measurement and definitional issues involved in sex offender research. We then provide a review of evidence concerning the effect of sex offender registration and notification laws.

Sex Offenders and Recidivism

The assumption that sex offenders recidivate more than other offenders is a central motivation for registration and notification laws. Evidence to support the arguments that when compared with other types of offenders, sex offenders pose either a greater or lesser threat of recidivism exists in the literature (e.g., Furby, Weinrott, & Blackshaw, 1989; Greenfeld, 1997; Hall & Proctor, 1987; Hanson & Bussiere, 1998; Hanson & Morton-Bourgon, 2005; Langevin et al., 2004; Maddan, 2005; Meloy, 2005; Nisbet, Wilson, & Smallbone, 2004; Sample, 2001; Seto, 2005). The general evidence-based conclusion, however, is that there is no general conclusion regarding reoffending habits among sex offenders.

In their review of 49 articles principally concerned with sex offender recidivism, Furby et al. (1989, p. 27) note the "truly remarkable" difference in reported recidivism across studies. Some studies report recidivism rates above 50% whereas other findings suggest a marginal reoffending rate. This wide range of rates is not a discovery. In a prior literature review of recidivism among only rapists, Quinsey's (1984) conclusion resonates even today (e.g., Furby et al., 1989; Sample & Bray, 2006) and applies to sex offender recidivism knowledge in general. He states, "The difference in recidivism across these studies is truly remarkable; clearly by selectively contemplating the various studies, one can conclude anything one wants" (p. 101).

Criminologists simply do not know whether sex offenders are more or less likely to recidivate than other classifications of offenders. Bynum (2001) argues that the special case of sex offender recidivism, in relation to recidivism in general, has been defined and measured in three primary ways: subsequent arrest, subsequent conviction, and subsequent incarceration. Reliance on "measures of recidivism as reflected through official criminal justice system data obviously omit offenses that are not cleared through an arrest or that are never reported to the police" (Bynum 2001, p. 2). And although "methodological difficulties, differences in sample size, and variability in follow-up lengths" are also cited as reasons for inconsistent recidivism rates (Sample, 2001, p. 106), the more basic and obvious problem is that such a wide span of conclusions is simply an expected by-product of assuming sex offenders are homogeneous while systematic differences across both offenders and offenses are likely.

A violent rapist, for an intuitive example, is likely to be fundamentally distinct from an adult offender whose victim is their 10-year-old family member. The difficult task of identifying these differences must receive considerable attention so that subtypes can be measured and highlighted in

analyses. The casual use of the term *sex offender* leads to a definitional and measurement problem and one that necessarily obscures any differences among offenders and offenses. Beyond scientific investigation, policy makers as well as the community in general may benefit from knowing whether different types of sex offenders respond differently to various treatments or community responses to them. By recently adding other sex offenses (e.g., sex crimes against adults and possessing child pornography) warranting the same societal response (i.e., community notification), however, sex offender legislation implies similarity across all types of sex offenders and offenses regardless of type of offense, age of victim, or age of offender in relation to victim.

Whether all sex offenders share the same pattern of recidivism regardless of offense has been investigated (e.g., Furby et al., 1989; Quinsey, 1984; Sample & Bray, 2006; see also Craig, Browne, Stringer, & Beech, 2005; Langan, Schmitt, & Durose, 2003). In the most extensive review of the evidence and using Illinois sex offender data, Sample and Bray (2006) conclude that sex offenders are not the homogeneous group of offenders that laws seem to assume. In terms of general recidivism, where general recidivism is measured with any felony-related rearrest within 5 years of the qualifying sex offense, offenders in the child molestation category (i.e., the touching or fondling of victims younger than 18 years) had the highest rate of recidivism at 51.9% (Sample & Bray, 2006). Offenders in the pedophilia category, which includes offenses involving sexual penetration of victims 12 and younger, had a much lower recidivism rate at 31.4% (Sample & Bray, 2006). Among offenses involving sexual penetration, those who victimized adults 18 and older (rape) had higher recidivism rates than offenders who victimized children (pedophilia) and teens (hebophilia). Sample and Bray, in short, report statistically significant differences in recidivism rates across different types of offenders.

Studies analyzing a variety of sex offenders while assuming homogeneity are likely to produce misleading conclusions. In addition, there seems to be definitional inconsistency in measuring recidivism. For example, Furby et al. (1989, p. 7) note that to "recidivate is to relapse into former patterns of behavior," although the recommitment of any criminal offense seems to be recidivism as well. There is "no single best definition of what constitutes recidivism for sex offenders," but "in the majority of cases it will be advisable to define recidivism as the re-commission of any sex offense" (p. 7). Furthermore, the homogeneity assumption suggests that sex offenders are particularly likely to recommit their specific offenses (Sample & Bray, 2006).

With regard to sexual recidivism, Sample and Bray (2006) report that within the 5-year period studied, those in the rape category have the highest same-offense rearrest rate (5.8%). As the authors state, "This evidence suggests that rapists recommit rape with greater frequency than pedophiles recommit pedophilia or hebophiles recommit hebophilia, again suggesting that sex offenders are not the homogeneous group that sex offender laws lead us to believe" (p. 94). When compared to general recidivism, same-offense rearrest rates are fairly small. Walker and McLarty (2000) examined the characteristics of sex offenders in the Arkansas sex offender registry from 1997 to 1999 and found that most (73%) sex offenders were first-time offenders. Either the sex offense was the first or the first to be reported.

Because of empirical and theoretical differences across sex offenders, analyses using specific offense data are more worthwhile. In the current article, for example, rapists and rapes are central; rape involves the carnal knowledge of a female forcibly and against her will (Federal Bureau of Investigation [FBI], 2004). For reasons discussed earlier, conclusions are not generalizable to other offenses.

Research on the Efficacy of Sex Offender Registration Laws

Proponents of sex offender registration and notification laws argue that such laws are effective because they inform the public of the presence of sex offenders and therefore danger in the community. These laws are also thought to reduce sex crimes because the public is able (and more likely) to report suspicious behavior by sex offenders. These viewpoints are supported by Phillips (1998), who reports that more than 60% of survey respondents agree that (a) sex offender laws make sex offenders "behave better" than they would have if their criminal history was not known, and (b) the majority of respondents feel safer with the laws in place.

Using a qualitative design, Matson and Lieb (1996) conducted a survey of law enforcement officials in the State of Washington. Answers from the survey instrument were categorized into advantages and disadvantages. Surveyed officials noted several advantages to sex offender registration and notification: They felt the laws provided better community surveillance, created better public awareness, deterred future crimes by the offender, and promoted child safety (Matson & Lieb, 1996). Although law enforcement agents found several advantages to the registration and notification laws, they noted several disadvantages. Law enforcement agents felt that the laws created more work. Adding to this were the problems inherent in collecting

information from courts and other agencies dealing with sex offender registration. Matson and Lieb found that overreactions to the notification in neighborhoods were possible. This could lead to harassment and embarrassment of sex offenders or their families.

As indicated by Zevitz and Farkas (2000), empirical research in this area has been limited. In a study of Washington's laws and in an effort to gain some basic demographic descriptions and differences across sex offenders, Schram and Milloy (1995) compared 139 Level 3 sex offenders with 90 sex offenders who were not subject to notification. The demographic characteristics of both juvenile ($N = 14$) and adult ($N = 125$) Level 3 sex offenders were obtained. Most of the juveniles in the sample were White and had histories of both sex and nonsex offenses. The sexual offending usually consisted of a single incident involving a child victim. Adult offenders were generally unemployed White males in their mid-30s who had never been married and who had a history of various offenses. They were typically child molesters and they had likely committed other sex offenses for which they had not been convicted.

Recidivism among both juvenile and adult Level 3 sex offenders was also examined. The vast majority (79%) of the juvenile offenders reoffended generally whereas fewer (43%) repeated sex offenses. The recidivism rates for adults were lower. Still, 42% of offenders recommitted either a general or a sex offense, and 14% of the offenders committed a sex offense. When the entire Level 3 sample was compared with a control group of sex offenders who were not notification eligible, Schram and Milloy (1995) found that community notification seemed to have little effect on sex offender recidivism. Furthermore, "the estimated rates for sex offenses are remarkably similar for each group throughout the follow-up period" (Schram & Milloy, 1995, p. 17). They concluded that community notification had little effect but conceded that their report is preliminary and that with a longer follow-up period and a larger sample, findings are likely to be different. Replication, therefore, is especially useful.

Petrosino and Petrosino (1999) presented an extensive study of the potential influence of registration and notification on sex offenders. They evaluated how well sex offender laws would work on a sample of 136 offenders in Massachusetts. Criminal history records of each offender were examined and the data were used to "determine how many of the serious sex offenders would have been in the registry before the instant offense, . . . how many of the offenders committed stranger-predatory instant offenses, . . . and if the Massachusetts Registry Law might have prevented them" (p. 146).

The offenders were all male and mostly White, and most offenses involved children. Cumulatively, Petrosino and Petrosino's (1999) sample contained 291 prior arrests (0–19 per offender), which ranged from property to sexual to nonsex violent offenses. Only 74 of the 291 prior arrests were for sexual offenses. Only 27% of the offenders would have been eligible for registration; thus, "prevention by notification or police investigation could not have occurred for most cases" (p. 148). Petrosino and Petrosino concluded that "the public safety potential of the Massachusetts Registry Law to prevent stranger-predatory crimes . . . is limited" (p. 154). Furthermore, of the "instant offenses committed by 136 serious sex offenders, [they] rated the potential of notification reaching the eventual victim as good in only four stranger-predatory cases and as poor to moderate in two others" (p. 154).

Sample and Bray (2003) examined two of the underlying assumptions of sex offender registration and notification laws. The first assumption is that sex offenders are more likely to recommit their crimes (i.e., sex crimes) than other types of criminals. The second assumption is that some types of crime (drug use, burglary, etc.) serve as gateway offenses that lead to sexual offending. From an analysis of official criminal data in Illinois from 1990 to 1997, Sample and Bray found that of the sex offenders in Illinois, 93% were not rearrested for another sex offense. In terms of the latter preconceived notion, only 3% of offenders who were convicted of a nonsex offense were rearrested for a sex offense. Although the findings from this study may not be generalizable to other states, they do serve as a baseline for comparisons between other states' analyses of their sex offender registries.

Maddan's (2005) research indicates that sex offender registration and notification laws have no effect on sex offenders' recidivism rates. Using a quasi-experimental design in Arkansas, the author compared (a) three waves of sex offenders registered with the potential for community notification (i.e., treatment) to (b) three waves of sex offenders convicted a decade earlier. The group of sex offenders subject to community notification sexually recidivated 9.5% of the time whereas the group of sex offenders not subject to community notification recidivated 10.9% of the time. Maddan's findings indicate no support for the efficacy of sex offender registration and notification laws but he did report higher general recidivism among those in the treatment group.

As stated earlier, a major theme of the public support of sex offender notification laws is that because sex offenders pose a higher threat of danger and repeat offending, registration should be required. Once the laws are in place and the community becomes aware of sex offender residents, sex

crimes will reduce for two reasons. First, an aware community reacts by minimizing opportunities for victimizations. Second, registered sex offenders, as opposed to nonregistered sex offenders, will be deterred as a result of perceiving a heightened level of community attention. The hypothesis to be tested in this article is that for various reasons and assumptions, sex offender registration and notification laws reduce sex crimes. We now turn to the empirical test of this hypothesis.

Research Method

The current research uses a quasi-experimental design to evaluate the general deterrent effect stemming from the notification component of sex offender registration laws. Interventions taking place in all U.S. states as well as the District of Columbia were the initial focus. For reasons discussed next, laws in only 10 states were analyzed.

Data

To define the before and after periods, we obtained the time when each state implemented a sex offender registry that included a notification strategy. Table 1 provides the year each state implemented a notification component.

Most of the states generated these laws after the passage of Megan's Law in 1996. Because of federal mandates and judicial decisions, however, the nature of registration and notification is fairly uniform across states.

Monthly state-level UCR rape data come directly from the FBI. As discussed earlier, the definition and operationalization of any concept deserves close attention. The definition of rape in these data is "the carnal knowledge of a female, forcibly and against her will." Statutory offenses are excluded (FBI, 2004, p. 19). Because rape is a Type I offense in the UCR, monthly counts were almost always readily available to the research team. The FBI supplied data from 1990 to 2000 for most states; before 1990, the data were either missing or unavailable. States with data from at least 3 years before and 3 years after could be included in the analysis.

With this strategy, some states lacked available data. Although efforts were made to collect data from the state in these cases, we were not entirely successful. As a result of poor or insufficient data, 13 states and the District of Columbia were excluded for three reasons. First, when states implemented legislation in the early 1990s, it was not possible to obtain an adequate number of preintervention observations. Second, when states implemented

Table 1
Sex Offender Registration and Notification Implementation
Dates by State or District

State	Year	State	Year
Alabama	1998	Nebraska	1997
Alaska	1994	Nevada	1998
Arizona	1996	New Hampshire	1996
Arkansas	1997	New Jersey	1993
California	1996	New Mexico	1995
Colorado	1998	New York	1995
Connecticut	1998	North Carolina	1996
Delaware	1994	North Dakota	1995
Florida	1997	Ohio	1997
Georgia	1996	Oklahoma	1998
Hawaii	1998	Oregon	1993
Idaho	1993	Pennsylvania	1996
Illinois	1996	Rhode Island	1996
Indiana	1998	South Carolina	1999
Iowa	1995	South Dakota	1995
Kansas	1994	Tennessee	1997
Kentucky	1994	Texas	1999
Louisiana	1992	Utah	1996
Maine	1995	Vermont	1996
Maryland	1995	Virginia	1997
Massachusetts	1999	Washington	1990
Michigan	1995	Washington, DC	1999
Minnesota	1998	West Virginia	1993
Mississippi	1995	Wisconsin	1997
Missouri	1995	Wyoming	1999
Montana	1995		

relevant legislation in the late 1990s, an adequate number of postintervention observations were not yet available. Third, some states did not report rape data in monthly format. Eight states¹ and the District of Columbia lacked data, and five states did not have data in monthly format.² After excluding these states, 37 states were left for examination. Discussed next are additional states that were excluded because of the behavior of the data.

Design and Technique

Given time-series data and the lasting nature of the intervention, the design that results is the time-series experiment. It is the type of quasi experiment that is sometimes called a natural experiment (Campbell &

Stanley, 1963). The strength of the present study is in the design and not the statistical technique that conventionally accompanies this design. In the time-series experiment, as opposed to a classical experiment where one defines treatment and control groups, the participant experiences an interruption (albeit in theory). In this case, the interruption is legislative and defines the before and after periods, where the before is viewed as the baseline period and the after is viewed as the treatment period, to which the baseline is compared. Campbell and Stanley (1963) use an iron bar being dipped into nitric acid as their example of a time-series experiment. The question becomes: Is there a difference between the bar before and after the exposure? In much the same way, we assess whether there is a difference in rape counts before and after the sex offender registration laws.

Because the rape data are kept as monthly counts and we are interested in analyzing each intervention separately, we refrain from using a fixed-effects panel model. Although it is the difference within each state as opposed to the averaged internal difference across states that we seek to measure, analyzing the effect of an intervention across varying places and times strengthens the design and can minimize chance error and historical threats (Campbell & Stanley, 1963; see also Shadish, Cook, & Campbell, 2002). Assume, for example, a significant reduction in reported rape counts is associated with the passage of the sex offender legislation. One would like to believe that the legislation is responsible for the decrease. Yet it is also possible that this decrease is simply due to chance error or is confounded with some third contemporaneously occurring mechanism. If, however, different states implementing the law at different times experience a decrease after the law, the likelihood of chance error or simultaneity being the true explanation for the decline is reduced.

The statistical technique conventionally applied with this design is the interrupted time-series analysis. For three reasons, this type of analysis focuses on within-series variation. First, the series may be nonstationary; in which a long-term mean or equilibrium is undefined. Because the before and after comparison is of the means of the two periods, a comparison involving a nonstationary series is impossible. Differencing the series, however, removes nonstationarity and yields a series with a well-defined mean.

Second, the before and after portions of the series are likely to be correlated; the observations in the after period are likely to be a function of observations in the before period. An independent comparison, therefore, is not possible. Third, serial correlation leads to the well-known adverse effects of negatively biased standard error estimates and, as a result, an increased likelihood of Type I errors. It has been noted that when using biased standard

error estimates, the resulting t statistic can be inflated by 300% or more (McDowall, McCleary, Meidinger, & Hay, 1980). As a result, the statistical significance of an intervention's effect is vastly overstated.

To overcome this known shortcoming, we use univariate autoregressive integrated moving average (ARIMA) processes as noise models for this variation, thereby controlling for serial correlation. These models are commonly referred to as Box-Jenkins models (Box & Jenkins, 1976; see also McDowall et al., 1980). In addition to contributing to the development of ARIMA models, Box and Jenkins (1976) popularized a three-stage model selection process (Enders, 2003, p. 76). This three-stage iterative process consisting of identification, estimation, and diagnosis phases was used to analyze the monthly rape data. As a result of the inadequate noise models and the ill-behaved data discussed in the Appendix, additional states were excluded. In the end, 10 states were kept for analysis: Arkansas, California, Connecticut, Hawaii, Idaho, Nebraska, Nevada, Ohio, Oklahoma, and West Virginia.

In these states, ARIMA models were used to control for systematic variation in the residual term. When series were nonstationary in their means, both the intervention and the series were differenced.³ After estimating an adequate noise model, all 10 series fail to reject the joint null of the Jarque-Bera test; therefore, the stochastic component is independently and normally distributed. Although the data are in the form of counts, all technical issues that are of major importance in normal theory regression have been addressed.

For ease of replication, Table 2 contains all relevant univariate information. Each state is listed in alphabetical order with noise models noted immediately to the right of the state name. Also included in Table 2 is the number of months analyzed. The samples are symmetric in terms of the number of preintervention and postintervention observations. A sample size of 120 months in Arkansas indicates there are 60 preintervention observations and 60 postintervention observations. The year the enforcement of the sex offender notification laws began in each state is noted in the table.

Analysis and Findings

The results of the interrupted time-series analyses are mixed with regard to whether the introduction of Megan's Law had a reductive effect on the number of reported rapes. Table 3 presents the results of these analyses.

Six states experienced no statistically significant change in the monthly incidence of rapes: Arkansas, Connecticut, Nebraska, Nevada, Oklahoma,

Table 2
Univariate Statistics of States Included in the Analysis

State	Noise Model	Sample Size	Intervention Year
Arkansas	ARIMA (2,0,0)(1,0,0) ₁₂	<i>n</i> = 120	1997
California	ARIMA (0,0,0)(2,0,0) ₁₂	<i>n</i> = 120	1996
Connecticut*	ARIMA (0,0,1)(0,0,0) ₁₂	<i>n</i> = 72	1998
Hawaii	ARIMA (0,0,0)(0,0,0) ₁₂	<i>n</i> = 72	1998
Idaho*	ARIMA (0,0,0)(0,0,0) ₁₂	<i>n</i> = 120	1993
Nebraska*	ARIMA (0,0,0)(1,0,0) ₁₂	<i>n</i> = 96	1997
Nevada	ARIMA (0,0,0)(0,0,0) ₁₂	<i>n</i> = 72	1998
Ohio	ARIMA (0,0,0)(0,1,1) ₁₂	<i>n</i> = 96	1997
Oklahoma	ARIMA (0,0,0)(0,0,0) ₁₂	<i>n</i> = 72	1998
West Virginia	ARIMA (2,0,0)(0,0,0) ₁₂	<i>n</i> = 120	1993

Note: ARIMA = autoregressive integrated moving average.

*Indicates the data have been logarithmically transformed.

and West Virginia. Although some of these six states experienced an increase in the incidences of rape after the sex offender notification laws, we report that the sex offender notification laws in these six states had no effect on the number of monthly rapes. This suggests that the sex offender registration and notification laws did not deter potential and repeat rapists from committing rapes in these six states.

The rape incidences in Hawaii, Idaho, and Ohio, however, significantly decreased after the introduction of the sex offender notification laws. With regard to chance error and design, it is important to note that these three states implemented the notification laws at different time points. The idea that chance error or simultaneity took place in three states at three different time points is difficult to argue. Particularly because a known intervention was implemented at this time point, this analysis provides evidence for the hypothesis that sex offender notification laws either deter potential sex offenders from offending or at least in some way cause the observed decrease in rapes. This scenario is ideal for providing support for the notion that sex offender registration and notification laws deter sex offenders.

However, we are not examining these three states independently of the other seven states. Only three of the nine states experienced any significant decrease from the time of the intervention. The rape incidences in California, the 10th state, significantly increased after the introduction of the sex offender notification laws. The number of rapes reported monthly in California increased by an average of approximately 41 rapes per month ($t = 2.35, p < .05$); with regard to the design, this increase occurs at yet another time point.

Table 3
ARIMA Models for Each State

State	Coefficient of Intervention	SE	<i>t</i> value	Probability
Arkansas	9.91	8.91	1.11	0.27
California	41.63	17.69	2.35*	0.02
Connecticut ^a	0.25	0.16	1.54	0.13
Hawaii	-1.72	0.87	-1.98†	0.05
Idaho ^a	-0.18	0.08	-2.27*	0.02
Nebraska ^a	0.26	0.19	1.36	0.18
Nevada	-0.22	1.40	-0.16	0.87
Ohio	-37.49	17.19	-2.18*	0.03
Oklahoma	2.36	6.41	0.37	0.71
West Virginia	-2.10	3.23	-0.65	0.52

Note: ARIMA = autoregressive integrated moving average.

^aIndicates logarithmically transformed data.

† $p < .10$. * $p < .05$.

In sum, five states showed decreases in the number of monthly rape counts associated with the implementation of sex offender notification laws. Three of these five had statistically significant decreases. Data from the five remaining states show increases in the monthly number of rapes after the implementation of the laws. One state had a statistically significant increase. Although possible explanations for these results are discussed in the next section, the evidence does not offer a clear or unidirectional conclusion as to whether sex offender notification laws reduce rapes.

Discussion and Conclusions

Because sex offender registration and notification policies are a relatively recent development in the criminal justice system, this research has attempted to overcome the lack of empirical research on the effect of this legislation measured by monthly reported rapes across the United States. A potential problem inherent in this analysis is how to interpret the results and how to define rape. Although the definition of rape has been discussed, it should be emphasized that the data come from official sources. They are necessarily subject to the constraints associated with official data and are by definition offenses known to the police (see Biderman & Reiss, 1967). With these data and the preceding findings, a few scenarios are possible.

First, it remains possible that these laws present a deterrent effect on both sex offenders and potential sex offenders. This does not seem to uniformly be the case, however. Second, it is possible that as more attention is placed on potential sex offenders, their activities are more readily brought to the attention of the criminal justice system and the number of sex crimes seems to increase. This situation could be a result of an increase in the sensitivity of the measure and in turn results in the appearance of an increase in crime. A third possibility is that these two competing outcomes offset one another—a reduction in the number of offenses occurs but a higher proportion of offenses is discovered.

The empirical finding of this research is that the sex offender legislation seems to have had no uniform and observable influence on the number of rapes reported in the states analyzed. Most of the states in our sample (6 of 10) showed no significant change in the average number of reported rapes before and after the sex offender laws. Of the 4 states that did experience statistically significant changes after the legislation, 3 experienced a decrease in the number of rapes and 1 experienced a steep increase. Taken collectively, the findings reported here indicate that sex offender registration and notification laws may have had little general deterrent effects on the incidence of rape offenses analyzed.

As Sample (2001) indicates, it is possible that this was knee jerk legislation that simply became more attractive as public support increased. There is no doubt that these notification schemes provide effective means for surveillance and, legally speaking, regulation. If one were analyzing the legislation from the perspective of arming a community to reduce offenses as opposed to legislation that deters offenders, however, one would need to consider the possibility that when communities do not actively use sex offender registries to protect their members, the legislation fails to affect offenses.

It is also possible that increases in the average number of sex offenses may reflect an increased scrutiny from both communities and the police, who are continually updated on the presence of sex offenders. Because there is an increase in the average number of sex offenses in half of the states examined here, police practices in concert with community support may now be focusing more on sex offenders. This would lead to an increase in the average number of sex offenses because law enforcement effort is now focused on a predetermined population that is relatively easy to find.

Based on the findings of this study and the potential conflicting explanations, future research on sex offender registration and notification policies should explore several different paths. Because aggregate-level time-series data suffer greatly because of binning, for instance, smaller

“bins,” such as cities, might give more insight. Differences in law enforcement notification practices and dissemination (e.g., the Internet, community meetings, fliers, and postcards) are more detectable with such units. In addition, sex offender registration may be more effective on repeat offenders or certain classes of offenders. Future research should focus on sex offender recidivism before and after the sex offender laws while considering offender and offense type.

Finally, no study design or statistical technique can control for all excluded variables. In the preceding analysis, within-series variation (i.e., the data-generating process) is explicitly modeled and held constant. Analyzing an intervention differing in place and time reduces historical threats; it does not eliminate all possible confounding variables. Future studies may examine this possibility with the use of “control” series. To more thoroughly understand effects of sex offender policy, additional empirical investigation is needed before evidence-based policy changes can be suggested.

Appendix

Although the identification phase consists solely of examining the autocorrelation function (ACF) or correlogram, we formally test for unit roots in the series with the augmented Dickey–Fuller test. We then identified a preliminary autoregressive integrated moving average (ARIMA) $ARIMA(p,d,q;P,D,Q)_2$ process based on the behavior of the ACF. After focusing on states whose autocorrelation processes could be reasonably modeled with conventional ARIMA patterns, we estimated the model. In the third phase, we examined the ACF and the Ljung–Box Q statistics to diagnose the adequacy of the model. The Jarque–Bera test was used to assess whether the estimated disturbance term was normally distributed with regard to its skewness and kurtosis. If the model adequately mimics the true data-generating process, the residuals exhibit independence and normality. In these cases, the state was considered for the interrupted time-series analysis. If we could not identify an adequate noise model, the state was excluded from later analyses.

Initially, only 7 states had adequate noise models and residuals that reflected normality. The remaining 30 states either had unconventional ACF patterns, highly skewed residuals, or both. Although the serial correlation for the data from Connecticut, Idaho, and Nebraska could be modeled adequately, the distributions were skewed. A logarithmic transformation reduced skews to normal levels. Each monthly observation in these states was not less than unity; therefore, adding an arbitrary value was not necessary for the transformation.

In all, 10 states remained for the interrupted time-series analysis: Arkansas, California, Connecticut, Hawaii, Idaho, Nebraska, Nevada, Ohio, Oklahoma, and West Virginia. In each of the 10 interrupted time-series analyses, the law was modeled as a dummy variable, where zero indicates the absence of the law. This variable, a transfer function, measures the abrupt and permanent change that is consistent with an analysis principally concerned with a before and after comparison.

Notes

1. These states are Kentucky, Louisiana, Massachusetts, New Jersey, South Carolina, Texas, Washington, and Wyoming.
2. These states are Florida, Illinois, Montana, Kansas, and Wisconsin.
3. Difference nonstationary processes are the most logical nonstationary processes that criminological time-series data follow.

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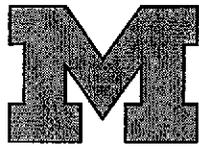
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Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?

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In recent decades, sex offenders have been the targets of some of the most far-reaching and novel crime legislation in the U.S. Two key innovations have been registration and notification laws which, respectively, require that convicted sex offenders provide valid contact information to law enforcement authorities, and that information on sex offenders be made public. Using detailed information on the timing and scope of changes in state law, we study how registration and notification affect the frequency of sex offenses and the incidence of offenses across victims, and check for any change in police response to reported crimes. We find evidence that registration reduces the frequency of sex offenses by providing law enforcement with information on local sex offenders. As we predict from a simple model of criminal behavior, this decrease in crime is concentrated among “local” victims (e.g., friends, acquaintances, neighbors), while there is little evidence of a decrease in crimes against strangers. We also find evidence that community notification deters crime, but in a way unanticipated by legislators. Our results correspond with a model in which community notification deters first-time sex offenses, but increases recidivism by registered offenders due to a change in the relative utility of legal and illegal behavior. This finding is consistent with work by criminologists suggesting that notification may increase recidivism by imposing social and financial costs on registered sex offenders and making non-criminal activity relatively less attractive. We regard this latter finding as potentially important, given that the purpose of community notification is to reduce recidivism.

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1. Introduction

Criminal recidivism poses a serious risk to public safety. According to a recent Bureau of Justice Statistics study, over two-thirds of released inmates will return to prison within a few years, often for committing serious offenses (BJS (2002)). National Corrections Reporting Program data show that approximately 40 percent of all criminals sent to prison in the U.S. over the last twenty years had already been convicted of a felony. Recently, victims' advocates and others have argued that persons convicted of sex offenses are highly likely to "same crime" recidivate (Langan et al. (2003)). Although criminal behavior declines steeply with age after the early twenties for most types of crime, the decline for sex offenses appears to be more gradual (Hanson (2002)). Partly for these reasons, and because of a number of high-profile crimes in the late 1980s and early 1990s, sex offenders have become the focus of considerable legislation and public spending aimed at reducing recidivism.

In the 1990s, two sets of laws targeting sex offenders emerged across the United States. A federal mandate in 1994 (the Jacob Wetterling Act, named after the victim of a crime in Minnesota) required that states create registries of sex offenders for use by law enforcement. Another federal mandate in 1996 (Megan's Law, named after a victim in New Jersey, Megan Kanka) required that states provide public notification of the location of sex offenders to local residents or other "at risk" groups. The basic motivations for registration and notification were, respectively, to aid law enforcement in supervising and apprehending sex offenders who may recidivate and to help local households protect themselves through monitoring and avoiding offenders in their neighborhoods. However, despite the similar motivations of state legislatures, there was considerable variation in the timing with which states passed these laws, and states were given considerable discretion concerning many important details of this legislation.

Despite the proliferation of sex offender registration and notification laws, it is unclear whether they have been successful in reducing crime by sex offenders, or whether they have achieved other goals (e.g., increasing the probability of capture). It is also unknown whether sex offenders respond (or are able to respond) to these laws in other ways (e.g., adjusting how they select their victims). The answers to these questions are important not only for evaluating the

costs and benefits of registration and notification laws, but also for understanding how an important group of convicted criminals responds to changes in legal sanctions.¹

The first studies that sought to measure the impact of registration and notification laws (Schram and Milloy (1995) and Adkins et al. (2000)) compared recidivism rates of offenders in Iowa and Washington State released just before and just after registration and notification laws became effective.² While neither study found a statistically significant difference in future arrests for sex offenses between these two arguably comparable groups, both studies relied on small samples of offenders. More recent studies have examined the relationship between the timing of laws' passage and changes in the annual frequency of sex offenses across states using data from the FBI's Uniform Crime Reports (Walker et al. (2005), Shao and Li (2006), and Agan (2007)). Taken together, these studies find little evidence that these laws had a significant impact on sex offenses.³

While we also use the timing of changes in state laws to study the impact of those laws on criminal behavior, we are able to offer new evidence on a number of different questions because our analysis differs significantly from earlier work in both the data we use and the methodology we employ. First, we conducted extensive research into the sex offender legislation of various states, and found that earlier studies had in many cases used incorrect legal dates or incorrectly described the nature of these laws. Understanding the timing and scope of this body of law is not an easy task, partially because sex offender laws have changed over time due to legislative amendments and judicial decisions.⁴ We also take advantage of information on the exact dates when laws became effective by using monthly data and allowing for variation in crime frequency within years, in contrast to the earlier work using annual data.

¹ Empirical work provides some support for the claim that criminals in general react to changes in expected punishment (e.g., Levitt (1998), Kessler and Levitt (1999), Nagin (1998)). However, it is unclear whether this is true for all types of individuals (see McCrary and Lee (2005) on juvenile offenders), and whether these results extend to sex offenders in particular is unknown (see Bachman et al. (1992)).

² Unlike many other states, registration and notification laws in Washington and Iowa were passed at the same time.

³ Only Shao and Li (2006) report any evidence that offender registration laws caused a statistically significant reduction in sex offenses. However, their findings are sensitive to empirical specification and they group registration and notification laws together as a single treatment. Agan (2007) offers some evidence that posting sex offender information on the internet reduced the number of arrests for sex offenses, but her results are similarly sensitive and open to alternative interpretations.

⁴ We describe the history of sex offender registration and notification laws in detail in Section 2 and provide basic information on these enactments in the Appendix.

Second, unlike existing work, our analysis distinguishes between sex offender registration and notification laws. Notification laws require the dissemination of information about sex offenders (e.g., criminal history, physical description, home address, and other information). Registration laws, in contrast, require that sex offenders register their residential locations with a public authority (usually local police), but this information is otherwise kept confidential. While registration requirements were intended solely to help law enforcement track and apprehend recidivist offenders, notification laws aimed both at reducing crime through greater public awareness and increasing the likelihood of capture conditional on the commission of a crime (Prentky (1996), Pawson (2002), Levenson and D'Amora (2007)). We also differentiate among the various features of different notification laws, e.g., access to paper registry, internet access to information, or proactive community notification.⁵

Third, we make a methodological contribution to the sex offender and recidivism literatures by using variation in the number of offenders actually registered with authorities to separately identify the various ways in which registration and notification may influence criminal behavior and police responsiveness. As a result, we are able to test several specific hypotheses regarding the laws' impacts on criminal behavior. For example, notification laws are aimed at protecting the public against recidivists, but may also have a separate deterrent effect for potential sex offenders who have not yet been convicted. The institution of a notification law raises the expected punishment to potential first-time sex offenders because their crimes and personal information will be made public upon release if they are caught and convicted. This effect should be invariant to the number of offenders actually registered. In contrast, the effect of registration on recidivism should be stronger when the registry contains information on a larger number of sex offenders.

Last, but not least, we examine the effects of these laws on the relationship mix between offenders and victims in addition to the overall frequency of reported sex offenses. Neither registration nor notification were intended to affect the "incidence" of sex offenses across different types of victims, but some observers have suspected that notification laws might simply displace crime (see Prentky (1996), Filler (2001)) by changing the population of victims targeted

⁵ Agan (2007) examines registration and the availability of information via the internet, but this is the only instance that we are aware of in which existing work on sex offender laws makes a distinction between registration and notification.

by sex offenders. For example, if notification laws cause offenders to seek victims outside of their neighborhoods, one might expect to see little overall reduction in crime, but a significant change in the relationships between victims and offenders. We also study changes in the probability that an arrest is made given a reported sex offense, or that the offense report is “cleared exceptionally” because the victim refused to cooperate or the prosecution declined to pursue the case. This last piece of our analysis serves as a robustness check and aids the interpretation of our results on crime frequency.

We find evidence that sex offender registration and notification laws decreased the total frequency of sex offenses in the states we examine. The registration of released sex offenders alone is associated with a significant decrease in the frequency of crime. This is in line with predictions from a simple model of criminal behavior in which the provision of information on registered offenders to local authorities increases monitoring and the expected punishment for recidivism. Moreover, as predicted by the model, the drop in the overall frequency of reported sex offenses associated with registration is due primarily to reductions in attacks against “local” victims who are known to an offender (i.e., a family member, friend, acquaintance, or neighbor). Importantly, sex offenses by strangers appear unaffected by registration, indicating little or no substitution of crimes from local to more distant victims.

In addition, we find that the creation of a community notification law (regardless of the number of registered offenders) is associated with a reduction in the overall frequency of sex offenses. One potential explanation for this effect, again consistent with our model, is that notification raises the expected punishment for future offenders. Importantly, we find no evidence that notification laws (as opposed to registration laws) reduced crime by lowering recidivism. While notification is associated with a decrease in crime, this estimated effect is actually *weaker* when a large number of offenders are on the registry. This finding is potentially consistent with a number of explanations. But, as we show below, the evidence on balance supports the existence of a significant “relative utility” effect, in which convicted sex offenders become more likely to commit crime when their information is made public because the associated psychological, social, or financial costs make crime more attractive.

The rest of the paper proceeds as follows. In Section 2, we provide a description of the variation in the timing and scope of states’ registration and notification laws. Section 3 lays out

the potential effects of registration and notification using a simple model of criminal behavior and presents our basic empirical methodology. In Section 4, we describe our data, and we explain our empirical approach in Section 5. We present our main results in Section 6 and a series of robustness checks in Section 7. Section 8 concludes.

2. The Evolution of Sex Offender Registration and Notification Laws

To characterize the sex offender registration and notification laws properly for the empirical work below, we conducted legal research into the evolution of these laws in states covered by the National Incident Based Reporting System (NIBRS) in the 1990s, the data used in our analysis below. We constructed a detailed legal timeline for each state, relying principally on paper legislative sources, legal databases containing statutory language and judicial opinions, news releases and stories, and conversations and email communications with state employees. We catalogued enactment dates, effective dates, and compliance dates for each legal change, and verified, where possible, that such changes took place in reality, as opposed to simply on paper. We cross-checked our research with other sources containing compilations of sex offender laws and resolved all conflicts. Finally, we recorded the precise content of these legal changes, which is particularly necessary with sex offender notification laws because they differ across states on various dimensions.

Determining the timing with which sex offender registration and notification laws became effective proved to be a difficult task. Table 1 illustrates this by showing the dates used by Shao and Li (2006), Agan (2007), and Walker et al. (2005) in their analyses of the impact of registries on crime rates, in addition to our own legal analysis.⁶ Comparisons of these dates across research studies show a fairly low rate of agreement. There are only 15 states for which all studies agreed on the exact date, and only 16 for which all dates fell within the same calendar year. For example, consider the state of Utah, for which none of the four studies agree on the

⁶ Shao and Li (2007) and Walker et al. (2005) are more liberal in how they define a “registration” law, and, as practical matter, appear to treat registration and notification as the same thing. Shao and Li refer to laws that include notification provisions as well registration laws. Walker et al. state explicitly that they examine both “registration and notification” laws, but do not distinguish between the two in their empirical work. Agan (2007), on the other hand, recognizes the distinction with respect to internet availability of registry information, but nevertheless does not include or consider other kinds of notification. This can lead to questionable coding as well as interpretation problems. For example, Iowa enacted registration and a limited form of public access at the same time, and Agan’s work attributes any change entirely to the registration law.

effective registry date. We place this moment on March 30, 1983, when Utah's first generally applicable sex offender registry became effective. Shao and Li use May 19, 1987, a date we cannot locate in legislative history, but which is quite close to the enactment (as opposed to effective) date of a 1987 law that re-codified and amended the registration law then in place. Agan uses July 1, 1984, which likely refers to a 1984 law that also amended the original 1983 enactment, but the effective date for that law was February 16, 1984. Walker et al. use the year 1996, the year that Utah passed a notification law granting public access to the registry information.

We divide the legal changes we study into four categories: registration, public access, internet availability, and active notification. Registration laws are invariably the first strategy states employ to protect against sex offender recidivism. These laws require that sex offenders (always at least the violent and habitual ones) provide state authorities with information on their demographics (e.g., age, race, distinguishing features) and location (e.g., home, work, or school address), as well as criminal history, upon release from custody or probation. Until notification laws were enacted, this information was held confidential by law enforcement. In theory, registration laws may lower sex offense rates through increased police surveillance or by reducing the expected payoff of committing a new sex offense via increased probability of punishment. Registration can make sex offenses easier to solve because a set of likely offenders will have already been identified, and authorities will know where to locate (and apprehend) that set of offenders.

The remaining three categories of laws – public access, internet availability, and active notification – are designed to make information about offenders (identity and location) available to the public, rather than to assist police directly. As we explain in more detail below, the public can, in theory, reduce sex offender recidivism by avoiding convicted offenders (reducing the number of potential target victims) or through “community policing” (e.g., reporting suspicious behavior). Most states began this process by providing public access to their registration databases, but varied in the restrictions they placed on access to this information. Some states (e.g., Idaho) only allowed the public to make information requests in writing or about specific suspected persons. Others made information available about all sex offenders in the area and allowed them to be openly inspected at police departments or other government agencies (e.g.,

Michigan). Both approaches to public access assume that potential victims or witnesses will make use of these opportunities despite their nontrivial travel and time costs.

Over time, restrictive states loosened their access restrictions, and all states eventually moved registration information onto the internet to minimize transactions costs and maximize information dissemination. Sex offender “web registries” allow the public to search for offenders using a suspected individual’s information (e.g., a name or alias) or by entering a specific address into a search algorithm to determine whether registered offenders live nearby. Many states also implemented some form of “active notification” of individuals likely to be victimized. Active notification laws require that state officials do more than simply release information to someone who inquires. Examples include announcing the release or residential move of a sex offender through a notice placed in a newspaper, by personal visits or letters to neighbors, former victims, or others likely to have direct contact with the offender, and opt-in provisions, which allow former victims or members of the public to request notification if a certain sex offender or one satisfying certain conditions is released or moves. Both of these developments were designed to reduce the information costs for potential victims.⁷

Figure 1a shows the timing of adoption of registration, public access, internet availability, and active notification for each NIBRS state (see also Appendix Table 1), as well as the year in which agencies from each state began reporting to NIBRS. While a similar evolution of sex offender laws from confidential registries to searchable internet sites and active notification occurred across all states, there is significant variation in the timing of the passage of these laws. For example, Idaho began registration and (limited) public access simultaneously in 1993, but did not have an internet registry live until 2001 and did not have community notification until 2003. Texas, in contrast, began registration in 1991, started both public access and community notification in 1995, and launched an internet site in 1999. This type of variation provides the basis for our identification strategy.

Although typically a concern in studies that use variation in the timing of state laws to identify their causal effects, endogeneity is unlikely to be a problem in this context for two

⁷ Michigan provides an example of a fairly typical sex offender law “timeline.” Michigan passed its first sex offender registration law in July 1994 (effective October 1995), enacted its first public access law in January 1997 (effective April 1997), went online with its sex offender information in February 1999, and finally enacted an active notification requirement in March 2006 (effective January 2007).

reasons. First, unlike criminal law in general, where rising crime rates might lead to increases in penalties or police spending, many state sex offender laws were passed quickly, in response to one or two well-publicized and usually gruesome incidents and not to a rising trend in sex offenses. Indeed, many sex offender laws are named after the victim in the case that sparked the legislative effort, and there is little evidence to suggest that legislative actions were motivated by rising aggregate trends in sex offenses. Sex offense rates (like other violent crime rates) actually declined over the period in which most of these laws were passed. Second, two federal laws passed in 1994 and 1996 (motivated at least in part by specific crimes against individual children in Minnesota and New Jersey) mandated that states pass registration and notification laws. These federal laws left states with discretion as to substance and timing, but had minimum requirements and did impose deadlines. Finally, the timing of passage was also partly dictated by the pre-existing legislative schedule (e.g., Kentucky, North Dakota and Texas have legislatures that meet only once every two years) rather than by changing sex offense trends.

We also collected information on the retroactivity of the registration and notification laws of the states in our sample. Retroactivity provisions specify which offenders are covered by the laws in light of the *timing* of their conviction or their release from custody. For example, Massachusetts' first registration law was not effective until October 1, 1996, but anyone convicted on or after August 1, 1981, of a qualifying sex offense was nonetheless required to register. As a result, in October 1996, Massachusetts already had fifteen years' worth of released sex offenders who were required to be registered.⁸ Michigan, on the other hand, made its sex offender laws prospective. Michigan's first registration law became effective on October 1, 1995, but it only required registration of individuals "convicted or released" on or after October 1, 1995. As a result, when the law became effective, Michigan's registry was empty.⁹ We use the size of the sex offender registry as an additional source of variation by which to identify the causal effect of sex offender registration laws, and, with respect to notification laws, to

⁸ Indeed, close to 8,000 offenders were already registered when the Massachusetts registry became effective in October, 1996 (Boston Globe (1996a, 1996b)). The total number of offenders estimated by the Massachusetts Department of Public Safety to be required to register was 10,000.

⁹ Although we do not have data from the start of the Michigan registry, we have good historical data on registrations in North Carolina and Kentucky since the inception of their laws. Neither of these states' laws applied retroactively, and, as we would expect, their registries started from almost nothing and grew gradually (and roughly linearly) over time. See Appendix Figure 1.

separately identify deterrence of all potential offenders and “incapacitation” (by public awareness) of recidivists, as we explain more fully below.¹⁰

3. Conceptual Model and Empirical Framework

We consider the potential effects of registration and notification on crime through a simple model of behavior wherein individuals weigh the benefits and costs of crime commission. Criminal offenses committed by individual i (O_i) are governed by the probability of punishment (p_i), the punishment he faces if convicted (f_i), and the utility he receives from committing crime, relative to other legal behaviors (u_i).¹¹ We add a subscript j for each potential victim, and a term c_j that reflects the cost to offender i of targeting victim j . Sex offenses require victims, and the laws we consider were specifically intended to make it difficult for offenders to victimize people in their vicinity – neighbors, acquaintances, and friends. By assumption, offenses are increasing in the relative utility of commission, and decreasing in the cost of targeting a victim, the probability of punishment, and the severity of punishment. For simplicity, we assume that punishment and the relative utility of criminal behavior are invariant across victims.

$$O_{ij} = O_{ij}(c_{ij}, p_{ij}, f_i, u_i) \quad (1)$$

Equation 1 suggests that registration and notification laws are likely to influence the number of offenses through several specific channels. First, registration may increase the ability of police to monitor and apprehend registered sex offenders (RSOs), meaning p_{ij} would rise for RSOs and particularly so in the case of local victims. Indirectly, this feature of registration may also affect forward-looking, unregistered individuals, for whom the punishment (f_i) now includes a higher future probability of detection.¹² However, so long as registry information remains

¹⁰ The choice whether to make a sex offender law retroactive is also unlikely to be endogenous to crime rates. Under certain conditions, criminal laws with retroactive features can violate the U.S. and state constitutions. The decision of whether to make a law retroactive in any particular state turned in significant part on governing judicial opinions in the state.

¹¹ This model follows the structure of Becker (1968). The utility term should be considered an analog to Becker’s concept of the individual’s “willingness to commit an illegal act.”

¹² It has been suggested to us that the registry might also lower the probability of punishment (p) for first-time offenders if police must shift significant resources towards monitoring registered offenders. This is theoretically possible and though we do not find evidence for this in our analysis we cannot determine whether this occurs.

confidential, it seems unlikely that it would alter the cost to targeting victims or the utility of crime commission.

Notification—either via public access to registry information, an internet registry, or active community notification—may further affect criminal behavior. First, the punishment for sex offenses now includes public airing of personal information and one’s criminal history. This publicity has been shown to have negative consequences for RSOs along several dimensions, including loss of employment, housing or social ties, harassment from neighbors, and psychological costs such as increased stress, loneliness, and depression (see Zevitz and Farkas (2000a), Tewksbury (2005), and Levenson and Cotter (2005)). Thus, for individuals other than RSOs, f_i would be higher.¹³

In contrast, RSOs would already face the costs associated with notification, so committing another offense only has the effect of prolonging their presence on the registry. However, this may exert a relatively small influence on their behavior given that most RSOs face an extended registration period (the federal requirement is 10 years, but a number of states have lifetime registration for some or all types of offenses). Moreover, some researchers have proposed that the negative consequences of notification may cause RSOs to commit more crime (Freeman-Longo (1996), Prentky (1996), Winick (1998), Presser and Gunnison (1999), Edwards and Hensley (2001)). In the context of our model, punishment (f_i) would stay constant for RSOs (or perhaps rise slightly), while the relative utility of criminal behavior (u_i) would rise.¹⁴

In addition, by allowing local residents, friends, and acquaintances to identify and avoid registered offenders, notification may increase the costs of targeting this subset of potential victims. Indeed, a major motivation for the passage of Megan’s Law was the presumption that Megan Kanka would have avoided her fate had her parents been notified of her eventual

¹³ We believe this is, in all likelihood, correct. However, we note an argument made by Teichman (2005) that the imposition of non-legal punishments for sex offenses could lead to lower expected punishment levels. Non-legal punishments cause fewer offenders to be willing to plead guilty to sex offenses and allow them to commit credibly to go to trial. Prosecutors with limited resources—who previously pled out most sex offenses—may optimally respond by taking a few cases to trial and accepting many pleas for other, less serious offenses.

¹⁴ Although we conceive of these burdens on offenders as raising the relative utility of criminal behavior, one could also think of them as lowering punishment levels because they make life in prison seem relatively more attractive than life on the outside. Both of these effects would increase offenses committed by registered sex offenders. We thank David Autor for this observation.

attacker's presence in the neighborhood.¹⁵ However, even if local residents can avoid victimization, it is unclear to what degree this will mitigate sex offenses overall. Prentky (1996) makes this point succinctly:

“Although the immediate neighbors will be able to warn their children to stay away from an offender, there is nothing to prevent the offender from going to the adjacent community, or getting into his car and driving to an even more distant community. In other words, we will accomplish nothing more than changing the neighborhood in which the offender looks for victims. For those with a rudimentary appreciation of the forces that motivate repetitive sex offenders, it is all too obvious that notifying the neighbors will serve no purpose if the man is intent on finding a victim.”

If offenders can easily target victims outside of their neighborhood who are unaware of their presence, then notification may change the relationships of offenders and victims but have a negligible impact on overall crime rates. In other words, the response of criminals to notification may result in crime displacement, rather than crime reduction.¹⁶

In addition to raising the cost of targeting local victims, there may also be a “community policing” effect of notification (Lieb (1996)) that increases the likelihood that an offender is apprehended if he attacks a local victim (e.g., by increasing vigilance and knowledge of an offender's actions within the neighborhood). Again, if the likelihood of punishment only rises for crimes against local victims, offenders may simply offend in other neighborhoods.

The ideas laid out above help us consider ways in which the effects of these laws can be identified and distinguished with aggregate crime statistics. In particular, we can use the fact that the measurable effect that registration and notification laws have on registered sex offender behavior is likely to be proportional to the size of the registry, while any impact on other individuals should not be sensitive to registry size. As a result, the effect of registration on crime via increased probability of punishment (due to improved police surveillance and apprehension)

¹⁵ Though no legislators disputed this claim, other neighbors claimed that local households, including her parents, did know that the house where Megan was killed contained a sex offender. See Filler (2001).

¹⁶ Crime displacement has been an important consideration in other empirical research on criminals' responses to changes in their environments. For example, Jacob et al. (2004) consider displacement of crime along a temporal dimension due to weather shocks, and Di Tella and Schargrodsky (2004) test for geographic crime displacement in their study of the effect of police on crime. Iyengar (2007) makes a related argument that changes in the relative punishments for crimes under California's “Three Strikes” Law caused a form of “displacement” (from less severe to more severe crimes) through reduced marginal deterrence.

should be small when relatively few offenders are registered, and should grow in proportion to the relative size of the registry. The potential impact of registration on the punishment level (f_i) for forward-looking, unregistered individuals, however, would not depend on the size of the registry.

Likewise, notification may raise the expected punishment (f_i) for individuals other than registered sex offenders, and this would have a negative impact on aggregate crime, irrespective of the size of the sex offender registry.¹⁷ Notification may also have several, offsetting effects on registered sex offenders: increasing the cost to targeting local victims (c_{ij}), increasing the probability of punishment for local crimes (p_{ij}), slightly increasing expected punishments (f_i), and increasing offenders' relative utility of crime commission (u_i). The combined effect on overall crime frequency is indeterminate, but is likely to grow with the size of the registry.

Our simple model and the discussion above give rise to the empirical specification we use in this paper. To examine the crime frequency, we estimate a reduced form equation:

$$C_{jt} = \alpha_j + \gamma_t + \lambda X_{jt} + \sum_s D_j^s (\beta_0 Rg_t^s + \beta_1 Nt_t^s + (\beta_2 Rg_t^s + \beta_3 Nt_t^s) * RgSize_{jt}) + \varepsilon_{jt} \quad (2)$$

C_{jt} is a measure of crime frequency (e.g., offenses per 10,000 people) for reporting area j in time period t .¹⁸ α_j is a reporting area fixed effect to capture any persistent heterogeneity in crime across areas, γ_t is a time effect to capture secular changes in crime over time, and X_{jt} are time varying reporting area characteristics that are likely to impact crime. The variables “ Rg_t^s ” and “ Nt_t^s ” are vectors of dummy variables indicating which states had a sex offender registry or a notification law in place during time period t , and “ $RgSize_{jt}$ ” is a vector measuring the size of the offender registries in area j in time period t .¹⁹ D_j indicates the state of reporting area j .

¹⁷ This response may in turn affect aggregate offender-victim relationships if offenders' probability of punishment is correlated with their relationship to victims. For example, the reporting rate to police, and hence the probability of punishment, may be significantly lower for crimes committed against children within families (see Filler (2001)).

¹⁸ Our analysis can be done at various levels of geographic and time aggregation, so we use the phrases “reporting area” and “time period” for generality here.

¹⁹ We present a specification with a general notification law for simplicity. In reality, there are different types of notification, including access to a paper registry, public internet access, and proactive community notification. To the extent possible given our data, we explore variation in the impacts of these different types of laws.

The coefficient β_0 represents the impact of an offender registry on individuals other than RSOs. If the registry increases expected punishment for unregistered individuals (due to future registration) then this coefficient would be negative. A stronger prediction of our model, however, is that β_2 should be negative – an increase in the probability of punishment for RSOs should lower crime by more when relatively larger numbers of offenders are registered.

Similarly, β_1 indicates the effect of a sex offender notification law on individuals other than RSOs. We hypothesize that this coefficient should be negative, reflecting higher expected punishment for unregistered individuals from notification. In contrast, we do not have a clear prediction for β_3 due to notification’s offsetting effects on RSO behavior. A finding that β_3 is negative would indicate that notification reduces the availability of victims. Such a finding would bolster claims made by proponents of notification, as protecting the public from recidivism was the law’s intended effect. However, if offenders shift to more distant victims or commit more crime in response to an increase in the relative utility of crime commission then we could find an estimate for β_3 close to zero or even positive.

We can also use the specification in Equation 2 to examine the impact of registration and notification on the relationship between victims and offenders. If a sex offender law increases expected punishment for non-RSOs (β_0 and β_1), the effect should be similar across victims. However, the impact of the registry on RSOs should be greatest (β_2 most negative) for offenses against “local” victims. We would expect to find a much smaller negative effect with respect to distant relationship offenses (e.g., crimes against strangers) or, potentially, a positive effect if offenses are being displaced from local to distant victims. How the effect of notification on RSO crimes (β_3) should vary across victims is unclear. If the increased cost of targeting local victims is a dominant effect, then a negative effect for local victims and a zero or positive effect for distant victims is likely. However, if the increased relative utility of crime commission is the dominant effect, then we might see a positive effect across all victims.

When examining arrests and crime clearance, we use incident-level data to estimate a similar equation:

$$A_{it} = \sum_j D_j^i \alpha_j + \gamma_i + \lambda X_{it} + \sum_s D_s^i (\delta_0 Rg_t^s + \delta_1 Nt_t^s + (\delta_2 Rg_t^s + \delta_3 Nt_t^s) * RgSize_{st}) + \varepsilon_{it} \quad (3)$$

We add a subscript i to denote an incident within reporting area j , and use A_{it} to denote the outcome of interest. The incident level variables (X_{it}) include all relevant factors known to police regarding the crime and reported in the NIBRS. These include the characteristics of the victim, offender, and their relationship, the type of offense committed, the number of victims and offenders involved, etc. Other variables follow notation from Equation 2.

When predicting the effect of registration and notification laws on arrests, both police and offender behavior become relevant. A registry or a notification law should not influence the likelihood of arrest for individuals other than RSOs (δ_0 and δ_1) via changes in police behavior because police have no additional information on these individuals. However, changes in criminal behavior may affect arrest statistics. In Equation 1, if the punishment level (f) rises, then individuals offend less by substituting away from marginal victims where the probability of punishment (p) is relatively high. Thus, we may see a negative effect of registries and notification laws on the likelihood of arrest (δ_0 and δ_1), but any effects should be of the same sign as any effects on the frequency of offenses (β_0 and β_1).

The predicted effect on arrests rates for crimes committed by RSOs is also unclear. The direct effect of the registry (δ_2) should be to increase arrest rates, reflecting increased monitoring and apprehension. However, RSOs may respond by forgoing offenses committed against victims where the probability of arrest is high. Therefore, the effect on arrests should be positive if there is no change in recidivism, but small if RSOs reduce offenses or shift towards another population of victims where the probability of punishment has not risen.

A similar analysis applies to notification. A direct effect (δ_3) on RSOs via “community policing” should lead to an increase in arrest probability. However, if local victims use notification to avoid RSOs and thereby increase targeting costs (c), offenders will only attack local victims with low probabilities of punishment, and average *observed* arrest rates will decrease. The other potential effect of notification is an increase in offenses due to a rise in the relative utility of crime commission (u). This would lead to increases in arrest probability, theoretically, as offenders victimize those for whom the probability of punishment was previously too great. Thus, the impact of these policies on arrest probability must be interpreted in light of their impact on overall crime frequency. Table 2 gives the predicted relationships

between the registration and notification variables in Equations 2 and 3 and the model parameters and outcomes of interest.²⁰

4. Data

The primary source of data we use in our analysis is the National Incident Based Reporting System (NIBRS). NIBRS is a part of the FBI's Uniform Crime Reporting Program (UCR), but presents several opportunities for research that are unavailable with standard UCR crime data.²¹ First and foremost, NIBRS links information on victims, offenders, and arrestees for each incident in the dataset. Thus, in addition to examining the impact of registration and notification on reported crime frequency, which previous studies have sought to do using UCR data, we are able to examine effects on the relationship mix between offenders and victims (or the "incidence" of sex offenses) and on the ability of police to secure an arrest given that a crime has been reported.²² In addition, the information on the timing of each incident is superior in the NIBRS data, allowing us to better exploit within-year variation in the timing of sex offender laws to identify our results. While UCR data are available by month, the UCR date reflects when an incident was reported, not (necessarily) the month in which it occurred. In contrast, the NIBRS reports the date on which an incident occurred.²³

²⁰ Note that, in addition to arrests, we also examine clearance of crimes due to non-cooperation by victims or decisions by prosecutors not to pursue the case. These variables are available in the NIBRS and are of interest to us, but victim cooperation and prosecutorial decisions are not part of our model and we leave discussion of these issues until we present results in Section 7.

²¹ Like UCR, NIBRS identifies the agency reporting each incident. Because agencies cover a relatively small area (i.e., a county or city) we can control for relevant fixed and time varying local characteristics.

²² NIBRS also contains information on whether an arrestee resides within the boundaries of the agency reporting the crime, but the rate with which this variable is missing is high in some states and years and we do not include it in our analysis.

²³ If the date of occurrence is not known to the police (which occurs for about 20 percent of sex offenses) the NIBRS reports the date on which the crime was reported to the police. Unfortunately, the NIBRS does not report both dates, so we cannot directly measure the lag between occurrence and report. However, we can get a rough sense of the gap between incident and report dates by exploiting the fact that a subset of crimes reported in the NIBRS took place in a prior calendar year (i.e., some crimes that occurred in year T are reported in the data from year T+1). We examine all sex offenses (excluding 2005) by the calendar month in which they took place and measure the fraction reported in the following year. Of the sex offenses that took place in December, 11 percent were reported the year after, while the corresponding figures for November, July, and March were 7, 2 and 1 percent, respectively. Thus, it is likely that most crimes are reported to the police within a few months after they take place but that a non-trivial fraction reported with a considerable lag. In any case, our qualitative results are not sensitive to dropping crimes for which an incident date is unavailable.

While several features of the NIBRS are useful for our analysis, it does suffer from significant limitations. First, like most data on crime, NIBRS only contains information on incidents recorded by police. Changes in reported crime may be driven by true changes in victimization or by changes in reporting by victims.²⁴ We return to this issue when interpreting our findings. Another limitation is that the first year for which NIBRS data are available (from the ICPSR) is 1995—one year after the federal government required that states create sex offender registries and one year before it required the registry information to be public. To address this problem, we requested additional data, available for some states, back to 1991 from the FBI, and have incorporated that data into our analysis below.²⁵ A further difficulty with NIBRS is that only a subset of states participates in the program. In 1995, there were just nine states; by 1998, eight more states joined, and 30 states were included as of 2004. Our analysis focuses on 15 states that were in the NIBRS by 1998: Colorado, Connecticut, Idaho, Iowa, Kentucky, Massachusetts, Michigan, Nebraska, North Dakota, Ohio, South Carolina, Texas, Utah, Vermont, and Virginia.²⁶ These states are geographically spread across the U.S. (see Figure 2), but they do not include any states from the far west (e.g., California) or the “deep” South (e.g., Mississippi).

In addition to the complexity of new states joining NIBRS during our sample period, the participation of law enforcement agencies can vary within a state. Agencies are identified in NIBRS by an “Originating Agency Identifier” (ORI) code, and, within a state, the number of reporting ORIs increases over time. For example, the number of reporting ORIs from Nebraska more than quintupled between 1998 (the first reporting year) and 2005. We include ORI fixed effects in all of our regressions. Thus, in addition to taking account of the growth in reporting agencies over time, we also control for persistent heterogeneity in ORI characteristics.

Another data issue is that, although the NIBRS surveys ORIs on a monthly basis, an ORI may not complete every report in a year. We exert considerable effort to ensure that our results

²⁴ This issue runs throughout most empirical research on crime. There does exist a large, publicly available data set on crime as reported by victims—the National Crime Victimization Survey (NCVS)—but it does not contain geographic identifiers that would allow us to link registration and notification laws to crime incidents. Although we cannot examine reporting issues directly, it is encouraging that national crime rates reported in the NCVS have tracked UCR crime rates fairly well since the early 1990s.

²⁵ The results with this additional data generally confirm results generated using only the 1995-2005 ICPSR data.

²⁶ Tennessee and West Virginia also joined the NIBRS in 1998. However, both had passed registration and notification laws by that time, and we therefore did not pursue collection of detailed legal data on these states.

are not driven by bad reporting. First, we use the indicators provided in NIBRS for whether an ORI reported crime in a given month. Among ORIs reporting crime during any month of each year, the fraction reporting for all twelve months ranged from 68 percent in 1995 to 89 percent in 2004. We limit our analysis to crimes that took place during months when the ORI reported crime in the previous month, the current month, and the next four months. This restriction causes us to drop less than 5 percent of sex offenses that occurred between February 1991 and August 2005, and all offenses occurring outside this period.

Despite this initial cleaning of the data, we found a number of instances of apparent underreporting of crimes in NIBRS.²⁷ We also observe agencies that, according to the NIBRS indicators, started reporting officially on a given month, but do not start reporting crime until several months later. To address these concerns, we implement an algorithm to identify these kinds of misreporting. First, we take all agency-period cells with a given number of crimes reported, then we calculate the variance of the number of crimes reported in periods a given length of time from the current period, and then we flag all observations that are outliers given this variance (i.e., the observation has very small chance of occurring, assuming reports are normally distributed with given variance).²⁸ We also flag all adjacent months, to guard against the possibility that underreporting in one month leads to over-reporting in others.

Multiple offenses can be reported in a single incident, and we classify an incident as a sex offense if any of the reported offenses fell under one of three sex offense categories: rape and sexual assault, sexual molestation (called “forcible fondling” in NIBRS), and other non-violent sex offenses (i.e., “incest” and “statutory rape”).²⁹ An additional complication is the non-trivial number of sex offenses with multiple victims (8 percent) or multiple offenders (8 percent). The

²⁷ For example, an agency might report about 500 crimes every month for many months, then report few or no crimes for one month, and then return to the previous pattern of 500 crimes.

²⁸ We repeat this process for reports up to six periods away and flag observations twice: first with 1 in one million chances and second with 1 in one hundred thousand chances. The two-stage process is helpful because it allows us to recalculate the variance after eliminating very distant outliers.

²⁹ Incidents of other crimes are used in our analysis to control for other time varying factors that cause changes in crime rates within an ORI over time. We classify other crimes as either ordinary assault or “other” crime, in order to control for overall rates of crime and a type of violent crime arguably more similar to sex offenses. We classify an incident as an assault if one of the offenses listed fell under an assault category but none of the offenses were a sex offense. This latter condition affected only a small number of incidents: only 0.3 percent of incidents with a sex offense also had an assault and just 0.02 percent of assaults also had a sex offense. Likewise, incidents of other crime do not contain either a sex offense or an ordinary assault.

indicators we create for the relationship between the offender and the victim include all victims' relationships. For example, if there were two victims, a family member and a friend of the offender, both the family member and friend indicators are set equal to one.³⁰ When we examine arrests, we include the characteristics of the victim and offender as control variables. For incidents with multiple victims or multiple offenders we record the characteristics of the first victim and first offender listed. These variables are only used in our analysis of arrests.

Table 3 shows summary statistics on the sample of incidents we examine. For purposes of comparison, we also include information on ordinary assaults. In general, assault is a more common crime than sex offense in our data, with more than 14 assaults for every sex offense. Reporting of incident dates, arrest rates and time until arrest are quite different for the two types of crime. The frequency with which incident dates are not reported (and only a report date is available) is higher for sex offenses (19 vs. 13 percent). Arrests are less common for sex offenses (26 vs. 37 percent) and the time to arrest—conditional on the arrest occurring at least one day after the incident—is considerably longer (24 vs. 14 days).

The relationship between offenders and victims is similar for sex offenses and assaults, with family members and acquaintances as the two most common categories of offenders. The overall fraction of (reported) incidents with an acquaintance is somewhat higher for sex offenses (31 vs. 24 percent) but incidents of sex offense are less common between family members (25 vs. 29 percent) and significant others (8 vs. 18 percent).³¹ For both sex offenses and ordinary assaults, in about 20 percent of incidents the victim claimed that the offender was a stranger or did not know his/her relationship to the offender.

Assaults and sex offenses differ substantially in the demographic characteristics of victims. While 51 percent of sex offense victims were below age 15, the corresponding figure for assault is only 9 percent. Sex offense victims are also more likely to be female (87 vs. 58 percent) and white (78 vs. 68 percent). Offender characteristics between the two crimes also differ. The age distribution of sex offenders is wider than for assault, with more mass in both the

³⁰ The decision to code relationships in this way, as opposed to using only the relationship of the “closest” offender, had no appreciable effect on our results.

³¹ Recall that a small portion of incidents have multiple offenders and/or victims, and we code all relationships existing for each incident, so that these percentages can sum to greater than one.

youngest and oldest age groups. Reported sex offenders are much more likely to be male (96 vs. 77 percent) and somewhat more likely to be white (69 vs. 62 percent).

In addition to the information on victims, offenders, and arrestees from NIBRS, we employ annual, county-level demographic data from the U.S. census on the fraction of the population in 18 age categories and five ethnicities as well as annual county-level data on income per capita, employment rates, and unemployment rates as controls in our regressions. While some ORIs are smaller than counties, we believe these are the best annual data available to control for any demographic shifts that may have occurred in ORIs over our sample period. Two percent of ORIs are located in multiple counties. We assign to these ORIs a weighted average of county characteristics based on the population of the ORI in each county.

Next, we use our legal research to classify each incident based on the laws in effect and the number of offenders on the offender registry at the time of the incident. We mark each incident with a set of dummy variables for the state of the registration and notification provisions in effect in the state.³² Marking each incident with a value for the number of offenders on the registry at the time of the incident is more difficult. Unfortunately, historical data on the size of registries across states is very hard to find, particularly for the early years of registries' existence. We were able to find incomplete information on the number of registered offenders in each state in governmental publications and elsewhere.³³ In addition, we know that a number of states did not apply their laws retroactively, and, for any such state, we are able to include a zero at the start of the registry. This allows us to make some progress in determining the historical size of the registries for the NIBRS states at the state level. In addition, we have a fairly comprehensive data set on registered offenders nationwide as of August, 2007. This data set was compiled by a private company (www.familywatchdog.com) that provides sex offender information to the

³² For example, an incident that occurred on July 1, 1995 in Michigan would have a registration law enacted, but no registration or notification laws in effect at the time, while another incident occurring on July 1, 1999 in Michigan would have registration, public access, and internet access in effect.

³³ Two reports from the National Institute of Justice provide us with states' registry sizes at the end of 1998 and 2001 (Bureau of Justice Statistics (2002)). In addition, we have been able to gather documents posted on-line by the National Center for Missing and Exploited Children that provide counts of offenders registered in each state at several points in time from 2003 through 2007. The exact dates when the information was gathered varied by state, but, in general, this gives us a snapshot of registry sizes in 2003, 2005, 2006 and 2007. We also add additional data points from news articles and government reports for specific states. It is our hope to be able to uncover more data and improve our estimates of registry size in a future revision.

public, and was given to us for the purposes of research. From this data we calculate the number of registered sex offenders by county within each NIBRS state.

In order to use these two sources of information in our analysis, we first run a least squares regression of registry size on quadratic function of date, allowing for state specific intercepts and slopes and using all data points available for each state. We then use the predicted values from this regression as measures of the state registry size for each month. The results of these regressions are depicted in Figure 3.³⁴ We then allocate sex offenders to each county under the assumption that the fraction of offenders by county today is reflective of the fractions by county in past years.

One concern with the use of registry size is the potential for “reverse causation” by changes in sex offense frequency. Registry size is largely a function of how long the registry has been in existence, the degree to which the registration law applied retroactively to previously released offenders, the inclusion or exclusion of offenders convicted of less serious crimes, and overall compliance with the registration law. However, it is also clearly influenced by the number of sex offenses committed in the past, since new offenders are added to the registry upon their release. Fortunately, the lag with which new offenders are added to the registry is likely to be quite long. For individuals sent to prison in 2002 whose first listed offense was Rape, Sexual

³⁴ An alternative method for gauging the size of sex offender registries is to rely only on timing and retroactivity provisions of each registry. For example, one could estimate registry size using the equation

$$RgSize_{ist} = \frac{t - t_{retro}}{365.25},$$

where the size of the registry when incident i is committed on day t in state s ($RgSize_{ist}$) is measured by the difference between the date of the incident and the date to which the registration law is retroactive (t_{retro}). This relies on the intuition that registries start very small in states which had non-retroactive laws but states with retroactive provisions will have larger registries, all else equal, from the start. From this point, all registries should grow steadily over time as more offenders fall under the law’s requirements. This measure of $RgSize$ roughly approximates the number of “cohorts” of sex offenders required to register. Although some offenders will eventually qualify to be removed from the registry, under federal law, violent offenders and offenders who commit crimes against minors (a large percentage of sex offenders) must register for a minimum of ten years, and in many states even non-violent offenders must register for a minimum of ten years and violent and repeat offenders must register for life. In practice, this formulaic measure is somewhat similar to our empirical measure. For example, both measures show that Michigan’s registry started small and grew steadily over time. However, the legal formula predictions for some states diverge considerably from the empirical predictions. In particular, states that instituted significant retroactivity clauses after their registry began (e.g., Connecticut, North Dakota, and Texas) did not see a sharp rise in the number of offenders registered, as the legal formula would imply. Presumably, this is due to difficulty in registering sex offenders no longer on probation (and whose whereabouts may be unknown) in a short period of time. Because of the divergence of the formulaic and empirical registry size estimates, we rely on the empirical predictions to avoid bias due to measurement error.

Assault, and Child Molestation, the median sentence length was 120, 72, and 68 months, respectively, and the fraction with a sentence of one year or less was 1.7, 2.5, and 1.8 percent, respectively.³⁵ Thus, only a very small amount of registry size growth is due to recent convictions, and any short-run change in the frequency of sex offenses driven by other factors is unlikely to be correlated with short-run changes in registry size.

5. Empirical Methodology

We estimate the effects of registration and notification laws using the regression specifications outlined in Section 3. All regressions include ORI fixed effects, year and month fixed effects, and control for annual per-capita income, unemployment, and poverty rates and the fraction of the population in five ethnicity categories and five-year age categories at the county level. In addition, for some specifications, we include the number of ordinary assaults and of other crimes committed per 10,000 persons as proxies for ORI-specific time-varying factors that influence crime rates and may be correlated with the legal variables. Though we do not report the coefficients, both assault rates and “other crime” rates are always positively related to sex offenses and are highly statistically significant.³⁶

The registry indicator signifies that the state has an active offender registry, and registry size is measured using our empirical estimates, as explained in Section 4. For notification, we have a number of potential measures because the details of these laws varied considerably by state. Recall that there are three types of notification: public access, internet access, and community notification. Within these categories, we focus on statutes that implied widely available or “full” access to sex offender information by the public.

In particular, full public access refers below to a law in which access is not subject to the discretion of local authorities and where the public can inquire about local offenders in general, as opposed to making an inquiry regarding a specific person. Full internet access indicates that

³⁵ Authors’ calculations using data from the National Corrections Reporting Program, 2002.

³⁶ One could argue that including assault and other crime may be problematic in that these may also be decreased or increased by sex offender laws, depending on their substitutability/complementary. However, their inclusion turns out to have little influence on our results and, if anything, decreases the size of our estimated coefficients. We therefore view them as appropriate controls for time-varying unobservable factors.

the internet registry is on-line and generally complete.³⁷ Full community notification means a law that makes notification mandatory and requires either neighbors or the media be provided with sex offender information. Figure 1b shows the timing of the full versions of community notification laws. In our regressions below, we define having a notification law to mean that at least one of these “full” versions of notification is in place and effective.³⁸

Two important issues regarding statistical inference in our analysis are that our sample includes a small number of states and that our registry size variable is estimated from a first stage regression. As noted by Donald and Lang (2007) and Cameron et al. (2007), clustering at the group level (i.e., states in our sample) can lead to biased standard errors when the number of groups is small. In addition, using regression estimates as independent variables will also typically lead to underestimated standard errors (Murphy and Topel (1985)).

We use a bootstrap procedure to correct our standard errors for both of these problems. Specifically, we repeat each regression in our analysis 100 times and calculate our standard errors using the variance of the resulting estimates.³⁹ Let β_i be the estimated vector of coefficients from repetition i . Our variance estimate is $\hat{\sigma}_{\beta^*}^2$, where

$$\sigma_{\beta^*}^2 = \frac{1}{N-1} \sum_i^N (\beta_i - \bar{\beta})^2, N = 100$$

In addition to sampling our states (with replacement) in each repetition, we take account of any additional bias due to estimated regressors by using values for registry size calculated

³⁷ We located news articles in six states suggesting that the internet registry was incomplete when launched, i.e., it was missing information on a large share of registered offenders. For two of these states, we found notice of when the web registry was completed. For the four states where we have an indication of incompleteness but do not have any notice of completion, we consider the internet to be fully available three months after the site was launched.

³⁸ Given the limited number of states and the fact that notification laws are designed to work in a similar fashion – lowering information costs and increasing dissemination – our primary specification uses any full notification law in effect. One complication that arises from this framework is that two states in our sample (Texas and Ohio) had registration and notification laws in place prior to the start of the NIBRS data period. Thus, variation in crime frequency within these states does not contribute to the identification of the main effects of these laws. Dropping these states from our sample has very little impact on our results, and we report replications of our main results with a restricted 13 state sample in Appendix Table 2.

³⁹ In the simulations carried out by Cameron et al. (2007), this technique, which they term “paired bootstrap-se,” does not perform as well as other techniques, such as “wild bootstrap,” in the sense that it finds a placebo to have a statistically significant relationship with the dependent variable at the 0.05 level in around 10 percent of their simulations. However, it is not clear from their work whether this difference is reflective of a general result that would apply to our situation, i.e., an unbalanced panel with groups of differing size and independent variables that have different variance across groups. We find the standard errors from a wild bootstrap are smaller than those from the paired bootstrap, and we therefore use the paired bootstrap estimates.

from randomly drawn values from the distribution of our estimator in the “first stage” where we estimate registry size. Specifically, we take the estimator of the K parameters from the first stage (γ_0) and use the Cholesky decomposition of the variance-covariance matrix (V) to draw a new vector (γ_i) where $\gamma_i = \gamma_0 + V^{1/2}R$, $R = [r_1 \dots r_K]$, $r_i \sim i.i.d.N(0,1)$. We then use this vector of coefficients to re-estimate registry size for each regression.

The unit of observation in our analysis is an ORI-by-month cell, and the dependent variable is measured as *annualized* incidents per 10,000 persons covered by the ORI (i.e., we multiply monthly incident rates by 12, for ease of interpretation).⁴⁰ For the purposes of analyzing data aggregated to the ORI-month level, our legal variables reflect the law as of the 15th day of the calendar month, even though our legal variables can vary within months in the incident level data. The regressions are weighted by ORI population coverage so that the coefficients reflect average changes in crime risk faced by a typical person covered by the NIBRS sample, and to take account of likely heteroskedasticity.⁴¹

6. Crime Frequency and Relationship Mix Results

Our results for the overall frequency of sex offenses are shown in Table 4. With respect to the consequences of sex offender registry laws, we find no evidence that registries deter first time sex offenders. Specifically, the impact of an (empty) sex offender registry is estimated to be positive, but that estimate is not statistically significant. Importantly, however, we do find support for the claim that requiring registration reduces *recidivism*, presumably by increasing monitoring and the likelihood of punishment for potential recidivists. The interaction of the

⁴⁰ Studies of crime frequency often examine the natural log of crime as a dependent variable in regression analysis (see, e.g., Shao and Li (2007)). This transformation is problematic in our case because we use monthly data from very disaggregate areas and therefore have many observations in which zero sex offenses occur. However, for comparison purposes, we present results in a number of our tables where the dependent variable is the natural log of offenses plus one per 10,000 persons. The results from these specifications are quite similar in sign and significance to our measure of crime per 10,000 persons, and we therefore do not discuss them. The similarity of the results is not surprising, given that we weight our analysis by covered population, hence relying more on larger areas that are unlikely to have months without the occurrence of at least one sex offense.

⁴¹ To illustrate the heteroskedasticity issue, suppose we have two ORIs, each with ten sex offenses per 10,000 persons in a given month, but one ORI has 1000 persons and another has 100,000. These two values correspond roughly to the 5th and 95th percentile of covered population among ORIs in our sample. The smaller ORI in this example had only one sex offense, and would drop to zero per 10,000 persons if there are no crimes the following month (which is quite likely to happen given sampling variation). In contrast, the large ORI had 100 sex offenses during the month, and is much less likely to drop to zero per 10,000 due to sampling error.

registry indicator with the size of the registry is negative and statistically significant, as predicted by our simple model of criminal behavior. The interaction estimate in column (2) of -0.10 implies that each additional sex offender registered per 10,000 people reduces reported annual sex offenses per 10,000 by 0.10 crimes. This is a substantial (1.1 percent) reduction and, if correct, would give support to the idea that placing information on offenders in the hands of local law enforcement helps reduce the frequency of sex offenses.

Notification laws also appear to affect the frequency of sex offenses. The estimates in Table 4 suggest that notification makes a difference in criminal behavior, but not in the way that proponents of these laws intended. The estimated effect of the *existence* of a law that requires community notification on the frequency of sex offenses is negative and statistically significant. The coefficient estimate in column (2) suggests that community notification laws reduce crime frequency by -1.07 crimes per 10,000 persons per year (about 11.6 percent) via a deterrent effect on individuals not currently registered as sex offenders. However, the interaction of notification with registry size is positive and statistically significant. This implies that any beneficial impact of registration (as discussed above) on recidivism by registered sex offenders is dampened by the use of notification. This also suggests that the punitive aspects of notification laws may create perverse effects (as discussed in Section 3). Our results indicate that a basic trade-off may apply in the sex offender notification context—while some first time offenders are deterred by notification sanctions, the imposition of those sanctions on convicted offenders *ex post* may make them more likely to recidivate.⁴² We explore the reliability of the estimated coefficient on the notification-registry size interaction further in Section 7.

How should a legislature approach this trade-off? For a simple back-of-the-envelope analysis, imagine a state that must decide 1) whether to enact a registration law, 2) whether to enact a notification law, and 3) how many offenders to cover with these laws. Because we find no evidence that an empty registry has any effect on crime and a larger registry (absent

⁴² Another possible explanation for the increase in crime frequency associated with an increase in registry size is that either the state authorities or citizens become overwhelmed with the number of offenders as the registry size grows. This strikes us as unlikely. First, with respect to the police, we continue to see a reduction in the number of offenses as the registry grows under a registration regime, suggesting that, although surely costly, police are not being overwhelmed to the point where an additional registrant actually reduces the overall effectiveness of the system. Second, notification regimes are primarily local. Therefore, most of the increase in registry rolls amounts to an increase from zero registered offenders to two or three in a neighborhood or zip code. Citizens are not expected to track thousands of offenders, and, indeed, notification systems are not designed to work that way.

notification) appears to reduce crime, our findings imply that a state should always employ a registry (the optimal size of the registry depends on the shape of the relationship between sex offense frequency and registry size). On the other hand, our results also suggest that notification laws are only attractive when the size of the registry is relatively small. We estimate that putting a notification law in place deters -1.07 yearly sex offenses per 10,000 people, but a notification law that covers 14.79 sex offenders per 10,000 people (the sample mean) leads to 1.3 additional *recidivist* sex offenses per 10,000 people.

If a state is required (as it is under federal law) to use both registration and notification, the level of coverage turns out to be somewhat unimportant to the total number of crimes committed. This is because the notification interaction coefficients are similar in magnitude to the registration interaction coefficients, and the differences are not statistically significant. As a result, because the interaction effects are not different from each other, our data do not indicate that a larger registry – when combined with notification – reduces crime.

Given the significant costs of maintaining a large registry (both to the state and to those required to register), one possible implication of these estimates is that states should consider a narrow notification regime, in which all or most sex offenders are required to register, but only a small subset of those offenders are subject to community notification. Alternatively, states might consider notification substitutes capable of similar deterrence gains, but that avoid notification-related increases in recidivism. Because notification laws were enacted not to deter, but to protect against recidivism, our results suggest a reevaluation of notification may be needed.

Table 5 presents estimates from regressions in which we disaggregate our previously singular notification measure into three different types of notification regimes – full public access, full internet access, and full active notification. As one would expect, disaggregating results in less precision, and yet the basic pattern remains. Again, we find statistically significant evidence that registration laws reduce recidivism. The coefficients on all three types of notification laws and their interactions with registry size are the same sign—negative main effect, positive interaction—and the standard errors are too large to reject the hypothesis that they are equal to each other. Nevertheless, we find it interesting that the coefficient on the main effect of active community notification is noticeably larger in magnitude, implying greater deterrence of first-time offenders. The strength of the active notification result makes sense in

the context of our model, as active notification may be perceived as the most intrusive form of notification and therefore may have particular deterrence value.

In Table 6, we investigate the extent to which registration and notification laws may have affected the relationship mix of offenders and victims. To carry out this exercise, we divide victims into three groups based on the intimacy of their relationship with the offender: “close,” “near,” and “stranger.” The close group includes family members, significant others, and friends; the near group includes neighbors, acquaintances, or offenders “otherwise known,” and the stranger group includes incidents where the victim claimed the offender was a stranger or where the offender-victim relationship was unknown to the victim.⁴³ Again, in theory, notification laws are designed specifically to protect individuals who know offenders or come into contact with them in their local area by helping these potential targets avoid situations in which they or their friends and relatives could be victimized. Accordingly, we examine whether (as lawmakers hoped) the frequency of victims who were close or near to the offender drops, and whether (as lawmakers had not hoped) the frequency of “stranger” sex offenses increases due to crime displacement.

The results of this incidence analysis support the interpretation of the results in Table 4 above. According to our simple model (see Table 2), the deterrent effect of registration and notification laws (the main effects) should not alter the relationship mix of sex offenses because, by definition, first-time offenders are not currently registered (so neighbors, for example, cannot protect themselves). The results in Table 6 are consistent with this prediction – notification has a deterrent effect that is, percentage-wise, similar in magnitude across relationship groups, although the estimate for strangers is not precisely estimated. In any event, there is no evidence that the effect differs across groups, and, for all groups, the estimated coefficients on the indicator for having a registry are not statistically significant.

However, as expected, and consistent with the hopes of policymakers and our prediction in Table 2, the interactions between the registration law indicator and the size of the registry are negative and of similar magnitude for both the close and near victim groups. In contrast, the estimated interaction for the stranger group is slightly positive, and, though statistically indistinguishable from zero, fairly precisely estimated. The effects in Table 6 for “close” and

⁴³ Note this is distinct from instances in which the relationship variable is missing in NIBRS.

“near” victims are marginally significantly different from zero (p-values of 0.15 and 0.08, respectively). These results line up well with the idea that the benefits of registration help reduce crime by local offenders against local victims. The magnitude of the coefficient estimates implies that each additional registered sex offender per 10,000 persons reduces these group specific sex offense rates, in total, by 0.07 per 10,000 persons. Our results do not support the notion that registration of sex offenders with local law enforcement reduces crimes committed against more distant individuals, but, perhaps more importantly, the estimated coefficient in column (4) does not suggest a significant increase in sex offenses against strangers due to displacement, as some critics of these laws feared might happen.

Our model provides two possible predictions for the effect of the interaction between the notification law indicator and the size of the registry. If notification laws make it more costly for a sex offender to target local victims (raising c_{ij}), then we should see negative effects on the frequency of sex offenses for near and close victims, but less of a reduction or even an increase (if there is displacement) for stranger victims. On the other hand, if notification laws instead primarily reduce the relative utility of legal behavior for RSOs – by making life outside of prison significantly less attractive – we could see an increase in the frequency of crime as the registry size grows. Furthermore, if notification laws do not alter the relative cost of attacking certain victims, the growth in crime should be similar across groups. The estimated coefficients in Table 6 favor this last scenario. The notification-registry size interaction is positive and statistically significant across all groups, and, as percentages, the increases are almost identical (with stranger crimes increasing by 0.82 percent, while crimes against close and near victims rose by 0.88 percent and 0.72 percent respectively). These results shore up the claim that notification may serve as a crime deterrent against non-registered offenders, but may be less effective at reducing recidivism among offenders on the registry by allowing local victims to protect themselves. Indeed, the evidence bolsters the plausibility of a relative utility effect, one that increases recidivism of registered sex offenders.

The estimated effects of registration and notification laws on various arrest variables for all sex offenses are shown in Table 7.⁴⁴ Neither of the arrest variables shows a statistically

⁴⁴ For analysis of arrests and clearance, we make several changes to our regression specification, as noted in Section 3. First, we examine incident level data instead of ORI-month aggregates. Second, we drop the controls for assaults and other crimes (which are aggregate statistics) and include incident specific variables in addition to the controls

significant relationship with either type of law. If the decrease in crime frequencies associated with registration was indeed caused by increased probability of punishment, the response by offenders to this changed probability must undo (in equilibrium) any detectable change in arrest probability and in the time to arrest. The notification coefficients show the same pattern. A notification law may reduce the number of crimes, but does not appear to increase the probability of arrest. The coefficient on the interaction of notification with registry size is also statistically insignificant. The estimate is positive, as would be predicted by a change in crime due to a relative utility effect, but it is also very imprecisely estimated.

With respect to dropped cases, we find little evidence that the probability a victim would not cooperate was associated with the registration and notification variables. Looking at the probability that the prosecution decides not to prosecute someone for lack of evidence, we find suggestive evidence that this occurred more frequently in areas with a registry in place but few registered offenders, but less frequently as the number of registered offenders rose, at least until the advent of community notification. One could certainly tell a story that would substantiate this type of result. For example, prosecutions may suffer at the start of a registration regime as police personnel are used and criminal justice resources are spent on the construction and introduction of the registry, but as the number of registered offenders rises, police may have access to more and better information about local offenders, leading to stronger average cases. Later, with the arrival of notification, prosecutors may have found that the advantages of registration information to the state became degraded when community members also had this information, perhaps because of false accusations (to which we will return). However, the evidence here is clearly not strong enough to say anything conclusive.

At a minimum, our analysis provides some evidence to support the claims of those who argue that registration and notification laws matter. Registration laws seem to reduce recidivism, and notification laws appear to deter those not currently registered. Our work also suggests that notification laws may harden registered sex offenders, however, making them more likely to

mentioned earlier: victim and offender age indicators (in five-year categories), victim and offender sex and ethnicity indicators, indicators for the type of offender-victim relationship, indicators for the number of victims and the number of offenders (capped at four), and indicators for the type of sex offense (i.e., rape and sexual assault, sexual molestation, other non-violent sex offense). The motivation for this added set of covariates is to control (as best we can) for the information available to law enforcement authorities and to examine law enforcement performance conditional on this information.

The crimes we selected for this purpose are auto theft, drug offenses, fraud, weapons violations, forgery, and larceny. While our intuition is that these crimes are quite different from sex offenses, many of them occur with roughly similar frequency. The results from these regressions are shown in Table 8 and are calculated using the same framework used to estimate the impact of these laws on sex offenses. Of the 24 coefficients we estimate, we find only two statistically significant relationships between reported crime rates in these non-sex offense categories and our registration and notification variables (which might easily occur randomly). One of these estimates, for weapons crimes in column (1), does not “mimic” our basic results because that coefficient is on the indicator for whether a registry is effective. Recall that, in Table 4, we found no evidence that the existence of a registry law alone had any effect on the frequency of sex offenses. We also find a significant effect of registry size on the number of larceny crimes (column (6)), but, again, the result does not suggest our findings on sex offenses are spurious -- the larceny effect has the wrong sign. More importantly, the signs and magnitudes of all of the coefficients increase our confidence that our earlier results are not driven by spurious correlation with general trends in crime. For example, the coefficients on registry size are all positive or very close to zero in these specifications. These results support the conclusion that the estimates in Table 4 are not driven by correlations between the registration and notification variables and omitted variables or trends in the data.

Another concern when dealing with relatively few states in a quasi-experimental setting like ours is that one large state might plausibly account for all of the relevant results (see Currie and MacLeod (2007)). We check the robustness of our findings to this possibility by running a series of regressions in which one state is dropped from the sample. We do not report the results of this exercise, but the coefficients generated remain remarkably robust to the exclusion of each state. The point estimates change somewhat for different combinations, but the basic pattern of results and the statistical significance of the coefficients is unaffected.

Our analysis controls for ORI effects, month and year effects, local economic and demographic characteristics, and for contemporaneous crime trends. But, it is always possible that our approach attributes the consequences of some unknown trend to our registration and

constitute a relatively small portion of all released criminals, it seems likely that the portion of incidents committed by sex offenders in these “placebo” categories is very low.

notification variables. Up to this point, we have not included state-specific trends in our analysis because one of our key variables – registry size – closely approximates a state trend (see Figure 3). Therefore, by including a state trend as a control variable, our empirical approach would essentially identify off of cross-county variation and non-linearities in registry growth, as described in Section 3. This requires that we, in effect, throw away a great deal of information in an attempt to account for a possible, unknown state-level linear trend. Nevertheless, it is a useful exercise, even though we view our earlier results as more reliable.

In Table 9, we present our original results, along with a specification that includes state-specific linear trends (in columns (3) and (6)). Our basic results are fairly robust to the inclusion of the trends. The magnitude of the direct notification effect drops, but remains marginally statistically significant (p-value of 0.15).⁴⁶ The coefficient on registry size is smaller but similar in magnitude relative to the other specifications and marginally significant (p-value of 0.12). The interaction of notification and registry size remains highly significant regardless of the specification. The inclusion of linear state-specific trend controls thus changes the picture slightly, but, in most important respects, the basic results from Table 4 remain robust.

7.2. Reporting Behavior

The coefficients we estimate provide, we believe, important evidence about the likely effects of two important and pervasive sex offender laws. Across all specifications and samples, registration reduces the number of sex offenses, presumably by providing law enforcement with information on local sex offenders. Notification appears to deter non-registered sex offenders by imposing an unpleasant shaming penalty, but seems to contribute to recidivism by reducing the attractiveness of legal behavior.

There are, of course, other ways in which our findings can be interpreted. We can only examine the frequency of *reported* crime, and it is therefore possible that our findings are affected by changes in victim reporting behavior.⁴⁷ For example, the sanction of notification

⁴⁶ It is worth noting that the coefficient on notification is statistically significant at the 5% level when we restrict our sample to the 13 states that actually passed a notification statute during our sample period. With the addition of state-specific linear trends as controls, it makes less sense to include the two states (Texas and Ohio) for which there is no legal variation in registration and full notification during our sample period.

⁴⁷ Data from the National Crime Victimization Survey (1996-2005) indicate that less than 50 percent of rape and sexual assault victimizations are reported to the police. While reporting rates do not vary greatly by the age of victim in the NCVS, it is important to note that this survey does not include victims below age 12.

may reduce reporting by victims who have a personal relationship with the offender and consider the new punishment too harsh. But this seems unlikely to be the entire story, given the effects we find for the “near” group of victims, which includes neighbors and acquaintances, and that we find a decrease in crime associated with registration alone.⁴⁸ Another possibility is that registration and notification laws may cause offenders to move away from family, friends, and acquaintances due to a “shaming” effect. Thus, a decrease in crimes against these groups could be explained by their reduced contact with offenders. However, it seems more likely, *a priori*, that this type of mechanical change in the relationship mix of reported offenses would be greater for community notification laws, since registration laws are likely to involve little or no shaming. Moreover, it is important to recall that our results do not provide any evidence that notification decreases recidivism, only deterrence of unregistered offenders. Finally, another story one could tell whereby a community notification law decreases sex offenses regardless of the number of registered offenders is that the law increases awareness of sex offenses in general and makes all potential victims more cautious. Unfortunately, we do not know of any data available that would allow us to test this hypothesis directly.

More importantly, our finding that the interaction of notification and registry size is associated with an increase in crime could be generated by two different plausible changes in reporting behavior. First, as a registry grows and an increasing number of individuals are notified that a sex offender lives nearby, notification could lead to an increase in frivolous reporting of sex offenses, because the proximity of a sex offender is made known and salient. Second, the passage of notification laws and knowledge that a sex offender lives nearby might increase the number of true reports for crimes that, prior to the implementation of notification, would have gone undetected. Both of these hypotheses are possible, but we find little evidence to support them in the data.

If frivolous reports of sex offenses had increased, holding offender behavior constant, we would expect to see either a reduction in the likelihood that a report led to an arrest (because the average case reported has, all else equal, less merit) and/or an increase in the probability that a

⁴⁸ Changes in reporting behavior might also lead us to underestimate the negative effects of registration of recidivism. For example, if registration leads victims to believe that their reports are more likely to lead to an arrest, they might be more likely to report crimes. We do not regard this story as likely. While victims may know of a registry’s existence, they are probably unlikely to know whether their assailant is registered. However, the estimated effect of simply having a registry, while positive, is never statistically significant.

case was dismissed by the prosecutor, because the average case became weaker. In our analysis (Table 7) we found only mixed evidence: the estimated interaction of notification with registry size was positive for the prosecutorial dismissal rate but estimate for the arrest rate was exactly the same size. Thus, it is hard to reconcile our results on the interaction of notification and registry size with a simple story about reporting bias.

If shifts in reporting behavior affect different types of sex offenses differently, we can use that fact to test further the robustness of our results. While registration and notification laws apply uniformly to rapists and child molesters, one might hypothesize that both types of reporting biases described above (frivolous reporting and meritorious reporting of previously undetected crime) are a concern primarily in the child molestation (fondling) context. Information that a sex offender lives nearby may cause parents to be more aware of their children's behavior or whereabouts. It may also lead parents to investigate their suspicions more than they otherwise would have done without that information. But knowledge of the proximity of sex offender alone may be less likely, all else equal, to change reporting behavior substantially in the case of forcible rape.

In Table 10, we divide our sample into three sex offense groups: sex offenses (reproduced from Table 4), forced fondling, and forcible rape. Rape and forced fondling constitute the bulk of all sex offenses (see Table 3). If either form of increased reporting were driving the recidivism findings, we would expect to see the notification-registry size interaction effect only in forced fondling cases, or at least primarily in those cases. But, we actually see almost identical point estimates (both statistically significant) for both types of sex offenses. The notification-registry interaction effect (in percentage terms) is somewhat higher for fondling than it is for rape, but that difference is small. These results do not support the idea that our findings are driven primarily by changes in reporting behavior.

8. Conclusion

Using detailed data on state laws and incident-level crime data from NIBRS, we examined the effect of registration and notification laws on the total frequency of crime, the incidence of that crime on various victim groups, and on police performance, conditional on a crime occurring. We find evidence suggesting that registration laws reduce the frequency of sex

offenses, particularly for local victims, by providing information on convicted sex offenders to local authorities. Our results also suggest that the reduction in crime was locally concentrated, in line with policymakers' intentions, with reductions generally greater among victims with a personal connection to offenders. We did not find evidence of any crime displacement that would increase victimizations of strangers. We also find evidence that notification laws reduce crime, but do so by deterring potential criminals, not necessarily recidivists. In fact, our results suggest that registered offenders might be more likely to commit crime in a state that imposes a set of notification requirements, perhaps because of heavy social and financial costs associated with the public release of their information.

Though researchers are still in the process of measuring the benefits of registration and notification laws, the costs have been well documented. A number of researchers have documented financial, physical, and psychological damage done to registered sex offenders and their families (e.g., Zevitz and Farkas (2000a), Tewksbury (2005), and Levenson and Cotter (2005)). The labor and capital costs to law enforcement agencies who are required to monitor offenders can also be substantial (Zevitz and Farkas (2000b)). Moreover, there is evidence that these laws have created financial and psychological costs for neighbors of registered sex offenders. Linden and Rockoff (2006) and Pope (2006) document declines in property value for households living close to registered offenders, and several studies find little evidence that community notification alleviates concerns among community members who have been notified of an offender's presence (Zevitz and Farkas (2000b), Beck and Travis (2004) (2006)).

The lack of empirical evidence on the benefits of registration and notification has not stopped politicians and policymakers from further regulation of sex offenders. Registration and notification laws are, in some sense, old technology. Today, states are in the midst of imposing ever more draconian laws, such as residency restrictions and civil commitment, as a means to reduce recidivism of sex offenders. These more restrictive policies clearly impose higher costs on sex offenders and their families than registration and notification laws, and future research is needed to understand the impact of these policies on criminal behavior.

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Table 1: Disagreement Among Researchers on "Registry Dates"

Definition:	Prescott and Rockoff (2008)	Shao and Li (2006)	Agan (2007)	Walker et al. (2005)	Researchers All Agree	Researchers Agree Within Calendar Year
	<i>Registration Effective</i>	<i>Registry Effective</i>	<i>"Registry Begins"</i>	<i>"Registration and Notification Implementation"</i>		
Alabama		1967	5/26/1996	1998	No	No
Alaska		8/10/1994	8/10/1994	1994	Yes	Yes
Arizona		1951	6/1/1996	1996	No	No
Arkansas		8/1/1987	8/1/1997	1997	No	No
California		1944	1955	1996	No	No
Colorado	7/1/1991	7/1/1991	1996	1998	No	No
Connecticut	01/01/1995	10/1/1994	1998	1998	No	No
Delaware		6/27/1994	6/27/1994	1994	Yes	Yes
D.C.			6/1/2000	1999	No	Yes
Florida		10/1/1993	10/1/1993	1997	Yes	No
Georgia		7/1/1994	7/1/1996	1996	No	No
Hawaii		6/14/1995	7/1/1997	1998	No	No
Idaho	7/1/1993	7/1/1993	7/1/1993	1993	Yes	Yes
Illinois		8/15/1986	1/1/1996	1996	No	No
Indiana		7/1/1994	7/1/1994	1998	No	No
Iowa	7/1/1995	7/1/1995	7/1/1995	1995	Yes	Yes
Kansas		7/1/1993	7/1/1993	1994	No	No
Kentucky	1/1/1995	7/15/1994	7/15/1994	1994	No	Yes
Louisiana		6/18/1992	6/18/1992	1992	Yes	Yes
Maine		7/13/1992	9/1/1996	1995	No	No
Maryland		10/1/1995	10/1/1995	1995	Yes	Yes
Massachusetts	10/1/1996	10/1/1996		1999	No	No
Michigan	10/1/1995	10/1/1995	10/1/1995	1995	Yes	Yes
Minnesota		7/1/1994	7/1/1991	1998	No	No
Mississippi		8/1/1991	1994	1995	No	No
Missouri		1/1/1995	7/1/1979	1995	No	No
Montana		7/1/1989	1989	1995	No	No
Nebraska	1/1/1997	7/1/1997	1/1/1997	1997	No	Yes
Nevada		1961	1/1/1998	1998	No	No
New Hampshire		1/1/1993	1993	1996	No	No
New Jersey		10/31/1994	10/31/1994	1993	No	No
New Mexico		7/1/1995	7/1/1995	1995	Yes	Yes
New York		1/21/1996	1/21/1996	1995	No	No
North Carolina		1/1/1996	1/1/1996	1996	Yes	Yes
North Dakota	7/1/1993	8/1/1991	1991	1995	No	No
Ohio	7/1/1997	1963	7/1/1997	1997	No	No
Oklahoma		11/1/1989	11/1/1989	1998	No	No
Oregon		1/1/1990	10/3/1989	1993	No	No
Pennsylvania		4/21/1996	4/21/1996	1996	Yes	Yes
Rhode Island		7/1/1992	1992	1996	No	No
South Carolina	7/1/1994	7/1/1994	7/1/1994	1999	No	No
South Dakota		7/1/1994	1994	1995	No	No
Tennessee		1/1/1995	1/1/1995	1997	No	No
Texas	9/1/1991	9/1/1991	9/1/1991	1999	No	No
Utah	3/30/1983	5/19/1987	7/1/1984	1996	No	No
Vermont	9/1/1996	9/1/1996	7/1/1996	1996	Yes	Yes
Virginia	7/1/1994	7/1/1994	7/1/1994	1997	No	No
Washington		6/7/1990	2/28/1990	1990	Yes	Yes
West Virginia		7/10/1993	1993	1993	Yes	Yes
Wisconsin		12/25/1993	6/1/1997	1997	No	No
Wyoming		1/1/1995	1994	1999	No	No

Note: Dates given by Matson and Lieb (1996) are not shown; they review state laws but do not examine criminal behavior.

Table 2: Model Predictions for Registration and Notification Coefficients

	Variable of Interest			
	Registration Law	Notification Laws	Registration Law * Registry Size	Notification Laws * Registry Size
Model Parameters	p↑ non-RSOs	f↑ non-RSOs	p↑ (local) RSOs	p↑/c↑ (local) RSOs u↑ RSOs
Overall Frequency of Offenses	Negative	Negative	Negative (Zero w/ Displacement)	p↑/c↑ Negative (Zero w/ Displacement) u↑ Positive
Relationship Mix	No Differences Across Relationships	No Differences Across Relationships	Stronger Local Effects	c↑ Stronger Local Effects u↑ No Differences
Probability of Arrest	Same Sign as Frequency	Same Sign as Frequency	Negative (But Moves to Zero as Frequency Declines or Crime Displaced)	p↑ Positive (Zero w/ Displacement) c↑ Negative (Zero w/ Disp.) u↑ Positive

Note: For details on how these predictions were made, see text of Section 3.

Table 3: Summary Statistics on Reported Crime Incidents

	Sex Offenses	Assaults
Total Number of Incidents in Sample	328,260	4,757,118
Rape and Sexual Assault	37.9%	<i>n/a</i>
Sexual Molestation	41.8%	<i>n/a</i>
Other Non-Violent Sex Offenses	20.3%	<i>n/a</i>
Percent of Incidents with Report Date	18.9%	12.8%
Percent of Incidents Leading to Arrest	25.7%	37.3%
Average Days to Arrest	24.3	13.7
Prosecution Drops Charges	7.1%	4.8%
Victim Refuses to Cooperate	5.1%	6.6%
Offender-Victim Relationship		
Family Member	25.0%	29.2%
Friend	7.0%	2.8%
Significant Other	8.0%	17.6%
Acquaintance	31.0%	23.7%
Neighbor	2.4%	1.8%
Otherwise Known	9.6%	9.3%
Stranger	8.4%	9.7%
Relationship Unknown	11.8%	10.2%
Missing Relationship Information	4.3%	4.5%
Victim Characteristics		
Female	86.5%	58.4%
White	77.6%	68.2%
Black	17.9%	28.3%
Aged 0-4	8.7%	0.7%
Aged 5-9	14.8%	1.6%
Aged 10-14	27.1%	6.9%
Aged 15-19	23.8%	15.3%
Aged 20-29	13.1%	30.2%
Aged 30-39	7.2%	24.0%
Aged 40-49	3.6%	14.5%
Aged 50-65	1.1%	5.6%
Aged 65+	0.5%	1.3%
Offender Characteristics		
Male	95.9%	76.8%
White	69.0%	61.5%
Black	24.1%	33.9%
Aged 0-9	2.3%	0.5%
Aged 10-14	11.2%	6.2%
Aged 15-19	20.1%	15.9%
Aged 20-29	25.5%	31.3%
Aged 30-39	20.5%	25.4%
Aged 40-49	12.0%	14.5%
Aged 50-65	6.5%	5.1%
Aged 65+	1.9%	0.9%

Notes: Sample includes all sex offenses and assaults reported in the 15 NIBRS states that we include in our analysis. Relationships total to more than 100% in this table because some incidents involved more than one relationship.

Table 4: Effects of Registration and Notification on Sex Offense Frequency

	Sex Offenses per 10,000	Sex Offenses per 10,000	ln (Sex Offenses per 10,000)	ln (Sex Offenses per 10,000)
	(1)	(2)	(3)	(4)
Registry Effective	0.341 (0.436) [.45]	0.309 (0.482) [.54]	0.028 (0.032) [.39]	0.026 (0.034) [.46]
Registry Effective * Registry Size	-0.083 (0.034) [.03]	-0.100 (0.041) [.03]	-0.006 (0.002) [.03]	-0.007 (0.003) [.03]
Notification	-1.153 (0.363) [.01]	-1.069 (0.367) [.02]	-0.079 (0.028) [.02]	-0.075 (0.027) [.02]
Notification * Registry Size	0.084 (0.029) [.02]	0.088 (0.032) [.02]	0.006 (0.002) [.02]	0.006 (0.002) [.02]
Assault/Crime Controls		✓		✓
Mean Offense Frequency	9.17	9.17	9.17	9.17
Mean Registry Size	14.79	14.79	14.79	14.79
Observations	210,209	210,209	210,209	210,209
R-squared	0.35	0.36	0.68	0.68

Notes: The dependent variable is annualized incidents per 10,000 persons in columns (1)-(2). In columns (3)-(4), the dependent variable is the natural log of annualized incidents plus one per 10,000 persons. The unit of observation is a reporting agency (ORI) by month cell. Registry size is measured in offenders per 10,000 persons (mean registry size is reported). The notification laws represent "full" access by the public to information on offenders; for more details see the text in Section 5. Registry size is empirically estimated from registry data, as explained in the text in Section 3. All regressions control for county income and demographics, ORI fixed effects, year fixed effects, and month fixed effects. Columns, as indicated, also control for rates of assault and other crime. Regressions are weighted by the covered population in each ORI. Standard errors (in parentheses) are estimated via bootstrapping. P-values shown in brackets.

Table 5: Effects of Registration and Notification on Sex Offense Frequency

	Sex Offenses per 10,000	Sex Offenses per 10,000	ln (Sex Offenses per 10,000)	ln (Sex Offenses per 10,000)
	(1)	(2)	(4)	(5)
Registry Effective	0.236 (0.402) [.57]	0.179 (0.42) [.68]	0.014 (0.026) [.59]	0.011 (0.027) [.68]
Registry Effective *				
Registry Size	-0.099 (0.033) [.01]	-0.121 (0.037) [.01]	-0.007 (0.002) [.01]	-0.008 (0.002) [.01]
Public Access	-0.423 (0.442) [.36]	-0.301 (0.376) [.44]	-0.039 (0.036) [.31]	-0.032 (0.032) [.35]
Public Access *				
Registry Size	0.046 (0.029) [.15]	0.059 (0.031) [.08]	0.004 (0.002) [.09]	0.005 (0.002) [.05]
Internet	-0.274 (0.222) [.24]	-0.201 (0.234) [.41]	0.002 (0.02) [.94]	0.006 (0.021) [.79]
Internet *				
Registry Size	0.036 (0.013) [.02]	0.035 (0.013) [.03]	0.001 (0.001) [.28]	0.001 (0.001) [.31]
Active Notification	-1.896 (0.775) [.03]	-1.541 (0.601) [.03]	-0.139 (0.064) [.05]	-0.120 (0.052) [.04]
Active Notification *				
Registry Size	0.069 (0.075) [.38]	0.047 (0.069) [.51]	0.004 (0.006) [.46]	0.003 (0.005) [.57]
Assault/Crime Controls		✓		✓
Mean Offense Frequency	9.17	9.17	9.17	9.17
Mean Registry Size	14.79	14.79	14.79	14.79
Observations	210,209	210,209	210,209	210,209
R-squared	0.35	0.36	0.68	0.68

Notes: The dependent variable is annualized incidents per 10,000 persons in columns (1)-(2). In columns (3)-(4), the dependent variable is the natural log of annualized incidents plus one per 10,000 persons. The unit of observation is a reporting agency (ORI) by month cell. Registry size is measured in offenders per 10,000 persons (mean registry size is reported). The notification laws represent "full" access by the public to information on offenders; for more details see the text in Section 5. Registry size is empirically estimated from registry data, as explained in the text in Section 3. All regressions control for county income and demographics, ORI fixed effects, year fixed effects, and month fixed effects. Columns, as indicated, also control for rates of assault and other crime. Regressions are weighted by the covered population in each ORI. Standard errors (in parentheses) are estimated via bootstrapping. P-values shown in brackets.

Table 6: Effects of Registration and Notification on Sex Offense Frequency and Relationship Mix

	All Victims	"Close" Victims	"Near" Victims	"Stranger" Victims
	(1)	(2)	(3)	(4)
Registry Effective	0.309 (0.482) [.54]	0.032 (0.172) [.86]	0.162 (0.212) [.46]	-0.116 (0.171) [.51]
Registry Effective * Registry Size	-0.100 (0.041) [.03]	-0.032 (0.021) [.15]	-0.034 (0.017) [.08]	0.004 (0.01) [.68]
Notification	-1.069 (0.367) [.02]	-0.330 (0.1) [.01]	-0.315 (0.163) [.08]	-0.255 (0.127) [.07]
Notification * Registry Size	0.088 (0.032) [.02]	0.030 (0.013) [.05]	0.027 (0.014) [.08]	0.015 (0.007) [.06]
Mean Offense Frequency	9.17	3.41	3.78	1.83
Mean Registry Size	14.79	14.79	14.79	14.79
Observations	210,209	210,209	210,209	210,209
R-squared	0.36	0.20	0.21	0.29

Note: The unit of measurement for the dependent variables is annualized incidents per 10,000 persons, and the unit of observation is a reporting agency (ORI) by month cell. Registry size is measured in offenders per 10,000 persons. The notification laws represent "full" access by the public to information on offenders; for more details see the text in Section 5. Registry size is empirically estimated from registry data, as explained in the text in Section 3. The regressions control for rates of assault and other crime, county income and demographics, ORI fixed effects, year fixed effects, and month fixed effects, as described in the text. In Columns 2 to 4, the assault and other crime variables are specific to incidents with the same offender-victim relationship as the dependent variable. Regressions are weighted by the covered population in each ORI. Standard errors (in parentheses) are estimated via bootstrapping. P-values shown in brackets.

Table 7: Effects of Registration and Notification on Arrest Outcomes

	Arrest Made	Time to Arrest (in days)	Victim Refuses to Cooperate	Prosecution Drops Charges
	(1)	(2)	(3)	(4)
Registry Effective	-0.001 (0.038) [.97]	-1.631 (1.556) [.32]	0.019 (0.013) [.16]	0.051 (0.018) [.02]
Registry Effective * Registry Size	-0.001 (0.005) [.88]	0.024 (0.111) [.83]	-0.001 (0.001) [.34]	-0.004 (0.002) [.08]
Notification	-0.015 (0.038) [.70]	0.440 (2.38) [.86]	-0.017 (0.014) [.26]	0.002 (0.022) [.93]
Notification * Registry Size	0.003 (0.003) [.36]	-0.047 (0.112) [.68]	0.002 (0.001) [.12]	0.003 (0.002) [.10]
Observations	287,789	65,702	287,789	287,789
R-squared	0.10	0.12	0.10	0.14

Notes: The unit of observation is a reported sex offense. The dependent variables in columns (1), (3), and (4) are zero-one indicators, respectively, for whether an arrest was made in connection with a report, for whether the report was cleared because the prosecution declined to pursue the case, and for whether it was cleared because the victim did not cooperate. In column (2), the sample is restricted to reported sex offenses that lead to an arrest, and the dependent variable is the number of days from the report/occurrence of an incident until an arrest was made. The regression includes controls for victim and offender characteristics, victim-offender relationship, type of sex offense, ORI fixed effects, year fixed effects, and month fixed effects, as described in the text. Standard errors (in parentheses) are calculated via bootstrapping. P-values are given in brackets.

Table 8: Falsification Tests: Effects of Registration and Notification on the Frequency of Other Crimes

	Weapons	Forgery	Fraud	Auto Theft	Drugs	Larceny
	(1)	(2)	(3)	(4)	(5)	(6)
Registry Effective	-1.790 (0.739) [.04]	-2.434 (1.279) [.09]	-2.293 (1.81) [.23]	1.263 (1.239) [.33]	-2.837 (1.945) [.18]	2.884 (8.581) [.74]
Registry Effective * Registry Size	0.068 (0.067) [.33]	0.182 (0.141) [.23]	0.087 (0.16) [.60]	-0.100 (0.099) [.33]	0.349 (0.253) [.20]	1.393 (0.627) [.05]
Notification	0.565 (0.741) [.46]	2.165 (1.789) [.25]	0.778 (1.458) [.61]	0.219 (1.333) [.87]	-2.283 (2.031) [.29]	2.461 (5.39) [.66]
Notification * Registry Size	-0.060 (0.058) [.33]	-0.131 (0.117) [.29]	-0.083 (0.123) [.51]	0.030 (0.066) [.65]	0.080 (0.164) [.63]	-0.070 (0.458) [.88]
Mean Offense Frequency	6.58	12.32	16.06	29.58	41.91	241.41
Mean Registry Size	14.79	14.79	14.79	14.79	14.79	14.79
Observations	210,209	210,209	210,209	210,209	210,209	210,209
R-squared	0.39	0.52	0.54	0.80	0.60	0.86

Notes: The unit of measurement for the dependent variables is annualized incidents per 10,000 persons, and the unit of observation is a reporting agency (ORI) by month cell. Registry size is measured in offenders per 10,000 persons. The notification laws represent "full" access by the public to information on offenders; for more details see the text in Section 5. Registry size is empirically estimated from registry data, as explained in the text in Section 3. The regressions control for county income and demographics, ORI fixed effects, year fixed effects, month fixed effects, and rates of assault and other crime. Regressions are weighted by the covered population in each ORI. Standard errors (in parentheses) are estimated via bootstrapping. P-values shown in brackets.

**Table 9: Robustness of Registration and Notification Effects
on Sex Offense Frequency**

	Sex Offenses per 10,000	Sex Offenses per 10,000	Sex Offenses per 10,000	ln (Sex Offenses per 10,000)	ln (Sex Offenses per 10,000)	ln (Sex Offenses per 10,000)
	(1)	(2)	(3)	(4)	(5)	(6)
Registry Effective	0.341 (0.436) [.45]	0.309 (0.482) [.54]	-0.185 (0.289) [.54]	0.028 (0.032) [.39]	0.026 (0.034) [.46]	-0.009 (0.021) [.68]
Registry Effective * Registry Size	-0.083 (0.034) [.03]	-0.100 (0.041) [.03]	-0.061 (0.036) [.12]	-0.006 (0.002) [.03]	-0.007 (0.003) [.03]	-0.005 (0.002) [.05]
Notification	-1.153 (0.363) [.01]	-1.069 (0.367) [.02]	-0.440 (0.285) [.15]	-0.079 (0.028) [.02]	-0.075 (0.027) [.02]	-0.025 (0.024) [.32]
Notification * Registry Size	0.084 (0.029) [.02]	0.088 (0.032) [.02]	0.056 (0.019) [.02]	0.006 (0.002) [.02]	0.006 (0.002) [.02]	0.004 (0.001) [.02]
Assault/Crime Controls State Linear Trends		✓	✓ ✓		✓	✓ ✓
Mean Offense Frequency	9.17	9.17	9.17	9.17	9.17	9.17
Mean Registry Size	14.79	14.79	14.79	14.79	14.79	14.79
Observations	210,209	210,209	210,209	210,209	210,209	210,209
R-squared	0.35	0.36	0.36	0.68	0.68	0.68

Notes: The dependent variable is annualized incidents per 10,000 persons in columns (1)-(3). In columns (4)-(6), the dependent variable is the natural log of annualized incidents plus one per 10,000 persons. The unit of observation is a reporting agency (ORI) by month cell. Registry size is measured in offenders per 10,000 persons (mean registry size is reported). The notification laws represent "full" access by the public to information on offenders; for more details see the text in Section 5. Registry size is empirically estimated from registry data, as explained in the text in Section 3. All regressions control for county income and demographics, ORI fixed effects, year fixed effects, and month fixed effects. Columns, as indicated, also control for rates of assault and other crime and state-specific linear trends. Regressions are weighted by the covered population in each ORI. Standard errors (in parentheses) are estimated via bootstrapping. P-values shown in brackets.

Table 10: Effects of Registration and Notification on the Frequency of Various Sex Offenses

	Sex Offenses per 10,000	Sex Offenses per 10,000	Fondling Offenses per 10,000	Fondling Offenses per 10,000	Rape Offenses per 10,000	Rape Offenses per 10,000
	(1)	(2)	(3)	(4)	(5)	(6)
Registry Effective	0.341 (0.436) [.45]	0.309 (0.482) [.54]	0.087 (0.227) [.71]	0.071 (0.248) [.78]	0.207 (0.206) [.34]	0.196 (0.23) [.41]
Registry Effective * Registry Size	-0.083 (0.034) [.03]	-0.100 (0.041) [.03]	-0.051 (0.022) [.04]	-0.058 (0.024) [.04]	-0.022 (0.017) [.23]	-0.031 (0.021) [.17]
Notification	-1.153 (0.363) [.01]	-1.069 (0.367) [.02]	-0.338 (0.216) [.15]	-0.300 (0.213) [.19]	-0.739 (0.291) [.03]	-0.700 (0.303) [.04]
Notification * Registry Size	0.084 (0.029) [.02]	0.088 (0.032) [.02]	0.042 (0.015) [.02]	0.044 (0.015) [.01]	0.043 (0.018) [.04]	0.046 (0.02) [.05]
Assault/Crime Controls		✓		✓		✓
Mean Offense Frequency	9.17	9.17	3.85	3.85	4.71	4.71
Mean Registry Size	14.79	14.79	14.79	14.79	14.79	14.79
Observations	210,209	210,209	210,209	210,209	210,209	210,209
R-squared	0.35	0.36	0.23	0.24	0.28	0.29

Notes: The dependent variable is annualized incidents per 10,000 persons in columns (1)-(3) and is the natural log of this value in columns (4)-(6). The unit of observation is a reporting agency (ORI) by month cell. Registry size is measured in offenders per 10,000 persons (mean registry size is reported). The notification laws represent "full" access by the public to information on offenders; for more details see the text in Section 5. Registry size is empirically estimated from registry data, as explained in the text in Section 3. All regressions control for county income and demographics, ORI fixed effects, year fixed effects, and month fixed effects. Columns, as indicated, also control for rates of assault and other crime and state-specific linear trends. Regressions are weighted by the covered population in each ORI. Standard errors (in parentheses) are estimated via bootstrapping. P-values shown in brackets.

Appendix Table 1: Evolution of Registration and Notification Laws, by State

	(1) reg-eff-date	(2) pubacc-eff	(3) pubacc-disc	(4) pubacc-mand	(5) pubacc-writreq	(6) pubacc-specific	(7) internet-live	(8) comm-eff-date	(9) comm-disc	(10) comm-mand	(11) comm-opt-in	(12) comm-victim	(13) comm-neighbor	(14) comm-media
Colorado	07/01/1991	06/05/1995	06/05/1995 ^a	07/01/1999	N/A	N/A	07/30/2001	12/01/1999	12/1/1999 ^b	05/30/2006	N/A	N/A	12/01/1999	N/A
Connecticut	01/01/1995	10/1/1998 ^c	N/A	10/1/1998 ^c	N/A	N/A	1/1/1999 ^c	10/01/1995	10/01/1995 ^c	N/A	N/A	N/A	10/01/1995 ^c	N/A
Idaho	07/01/1993	07/01/1993	N/A	07/01/1993	07/01/1993 ^d	07/01/1993 ^e	07/01/2001	07/01/2003	N/A	07/01/2003	N/A	N/A	N/A	07/01/2003
Iowa	07/01/1995	07/01/1995	N/A	07/01/1995	07/01/1995	07/01/1995 ^e	03/16/2000	07/01/1998	07/01/1998	N/A	N/A	N/A	07/01/1998	N/A
Kentucky	01/01/1995	N/A	N/A	N/A	N/A	N/A	04/11/2000	01/01/1999 ^f	07/12/2006	01/01/1999 ^g	01/01/1999 ^g	01/01/1999 ^g	01/01/1999 ^f	01/01/1999 ^g
Massachusetts	10/01/1996	10/01/1996	N/A	10/01/1996	10/01/1996	N/A	08/03/2004	09/10/1999	09/10/1999	N/A	N/A	N/A	09/10/1999	N/A
Michigan	10/01/1995	04/01/1997	N/A	04/01/1997	N/A	N/A	02/01/1999	01/01/2007	N/A	N/A	01/01/2007	N/A	N/A	N/A
Nebraska	01/01/1997	N/A	N/A	N/A	N/A	N/A	03/30/2000	07/15/1998	7/15/1998 (lower risk)	7/15/1998 (high risk)	N/A	N/A	07/15/1998	07/15/1998
North Dakota	07/01/1993	08/01/1995	N/A	08/01/1995	N/A	N/A	11/06/2001	08/01/1995	08/01/1995 ^h	08/01/1997	N/A	08/01/2001	08/01/1995	N/A
Ohio	07/01/1997	07/01/1997	N/A	07/01/1997	N/A	N/A	12/18/2003	07/01/1997	N/A	07/01/1997	07/01/1997 (victim only)	07/01/1997 (opt-in)	07/01/1997	N/A
South Carolina	07/01/1994	06/18/1996	N/A	06/18/1996	06/18/1996	06/18/1996	11/22/1999	06/18/1996	6/18/1996 ⁱ	6/30/1999 (newspapers)	N/A	N/A	06/18/1996	06/30/1999
Texas	09/01/1991	09/01/1995	N/A	09/01/1995	09/01/1995 ^j	N/A	01/11/1999	09/01/1995	09/01/2005 (newspapers)	09/01/1995 ^k	N/A	N/A	09/01/1999	09/01/1995 ^l
Utah	03/30/1983	04/29/1996	03/15/1996 ^e	07/01/1998	03/15/1996 ^e	03/15/1996 ^e	07/01/1998	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Vermont	09/01/1996	05/29/2000	N/A	05/29/2000	N/A	N/A	10/01/2004	09/01/1996	05/26/2006	N/A	09/01/1996 (victim only)	09/01/1996 (if opt-in)	05/26/2006	N/A
Virginia	07/01/1994	07/01/1998	N/A	07/01/1998	07/01/1998	07/01/1998	01/01/1999	07/01/2006	N/A	N/A	07/01/2006	N/A	N/A	N/A

Notes: a: repealed 07/1/1999; b: repealed 05/30/2006; c: enjoined 05/17/2001 until 05/03/2003; d: repealed 07/01/2001; e: repealed 07/01/1998; f: repealed 04/11/2001, reeffective 07/12/2006; g: repealed 04/11/2001; h: repealed 08/01/1997; i: except for newspapers as of 06/30/1999; j: repealed 09/01/1997; k: repealed 09/01/2005 for newspapers; l: discretionary after 09/01/2005.

Columns (1)-(7): (1) the effective date of the first registration law; (2) the effective date of the first public access law of any kind; (3) the date that a discretionary public access law, if applicable, became effective; (4) the date that mandatory public access law, if applicable, became effective; (5) the date on which a "written request" requirement, if applicable, became effective; (6) the date on which "specific person request only" restriction, if applicable, became effective; (7) the date on which public access was moved onto the internet, thereby removing all previous access restrictions.

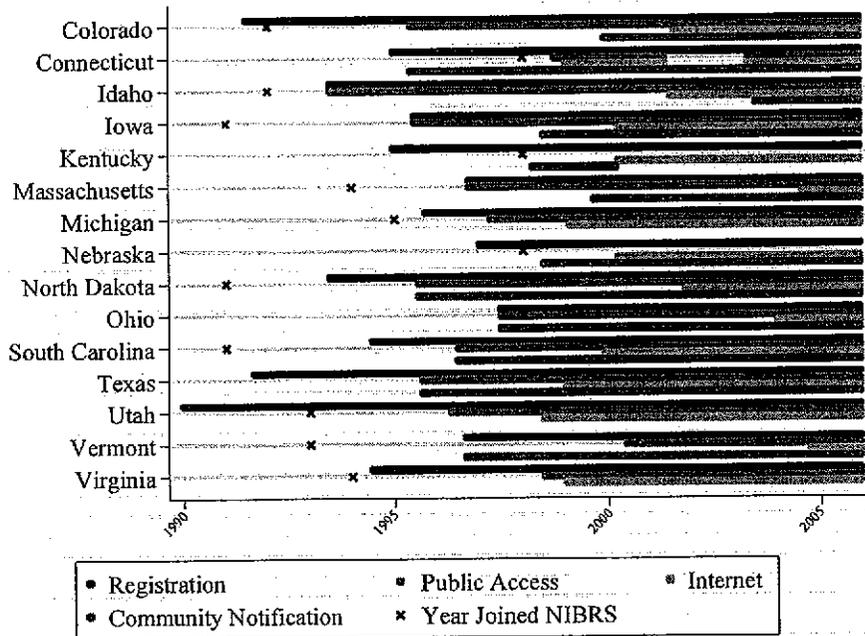
Columns (8)-(14): (8) the effective date the first active community notification provision; (9) the date the notification law, if discretionary, became effective; (10) the date the notification law, if mandatory, became effective; (11) the date that a notification law that required that people "opt-in" to the notification system, if applicable, became effective; (12) the date that notification law that notified former victims, if applicable, became effective; (13) the date that a notification law that informed neighbors specifically, either by a written notice or by a personal visit, became effective, if applicable; (14) the date that a notification law that used the media to deliver any notification, if applicable, became effective.

**Appendix Table 2: Effects of Registration and Notification
on Sex Offense Frequency
(13 State Sample)**

	Sex Offenses per 10,000	Sex Offenses per 10,000	ln (Sex Offenses per 10,000)	ln (Sex Offenses per 10,000)
	(1)	(2)	(3)	(4)
Registry Effective	0.328 (0.414) [.45]	0.266 (0.458) [.57]	0.031 (0.031) [.34]	0.028 (0.033) [.43]
Registry Effective *				
Registry Size	-0.075 (0.036) [.06]	-0.092 (0.044) [.06]	-0.006 (0.002) [.04]	-0.007 (0.003) [.03]
Notification	-1.131 (0.38) [.01]	-1.065 (0.36) [.01]	-0.077 (0.026) [.01]	-0.073 (0.025) [.01]
Notification *				
Registry Size	0.086 (0.029) [.01]	0.090 (0.031) [.02]	0.006 (0.002) [.02]	0.006 (0.002) [.02]
Assault/Crime Controls		✓		✓
Mean Offense Frequency	9.20	9.20	9.20	9.20
Mean Registry Size	14.66	14.66	14.66	14.66
Observations	173,706	173,706	173,706	173,706
R-squared	0.30	0.31	0.61	0.62

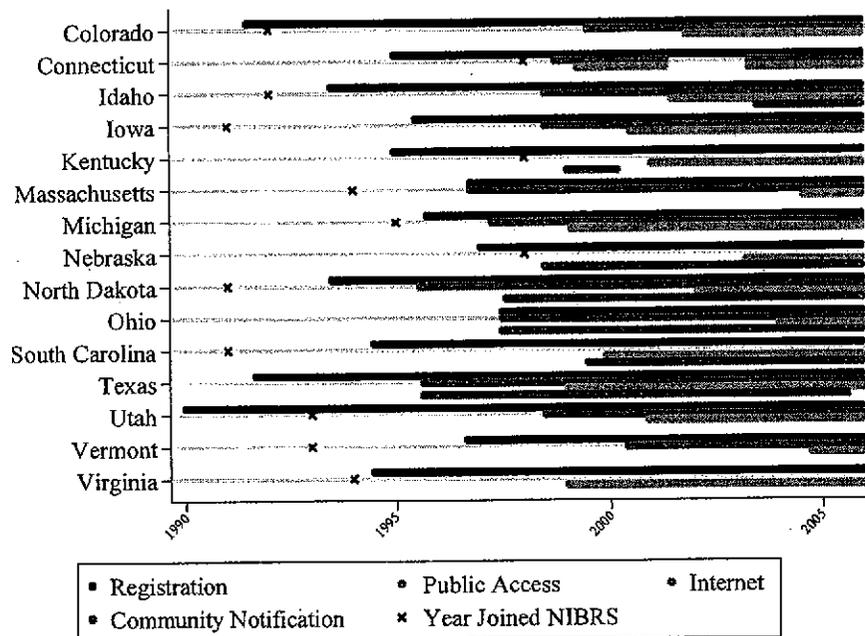
Notes: The dependent variable is annualized incidents per 10,000 persons in columns (1)-(2). In columns (3)-(4), the dependent variable is the natural log of annualized incidents plus one per 10,000 persons. The unit of observation is a reporting agency (ORI) by month cell. Registry size is measured in offenders per 10,000 persons (mean registry size is reported). The notification laws represent "full" access by the public to information on offenders; for more details see the text in Section 5. Registry size is empirically estimated from registry data, as explained in the text in Section 3. All regressions control for county income and demographics, ORI fixed effects, year fixed effects, and month fixed effects. Columns, as indicated, also control for rates of assault and other crime. Regressions are weighted by the covered population in each ORI. Standard errors (in parentheses) are estimated via bootstrapping. P-values shown in brackets.

Figure 1a: Registration and Notification Laws in NIBRS States



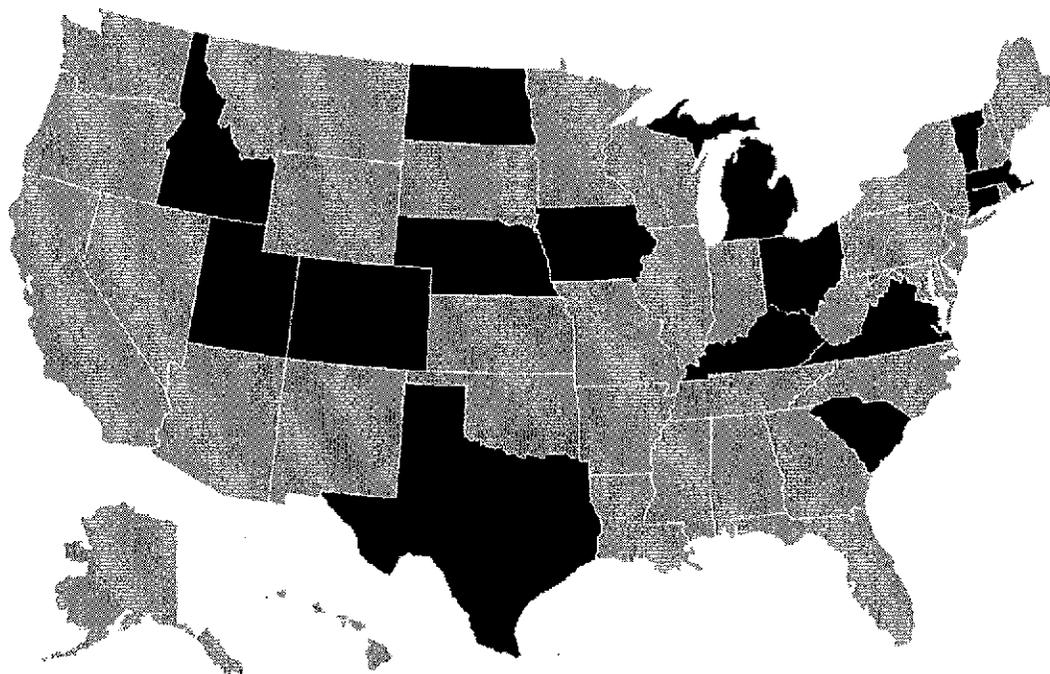
Note: Depicted are dates when registration, public access, and community notification laws are effective, and when an internet site goes live. These include all laws, regardless of special restrictions. Utah's registration law was effective in 1983. For details see Appendix Table 1.

Figure 1b: Registration and "Full" Notification Laws in NIBRS States



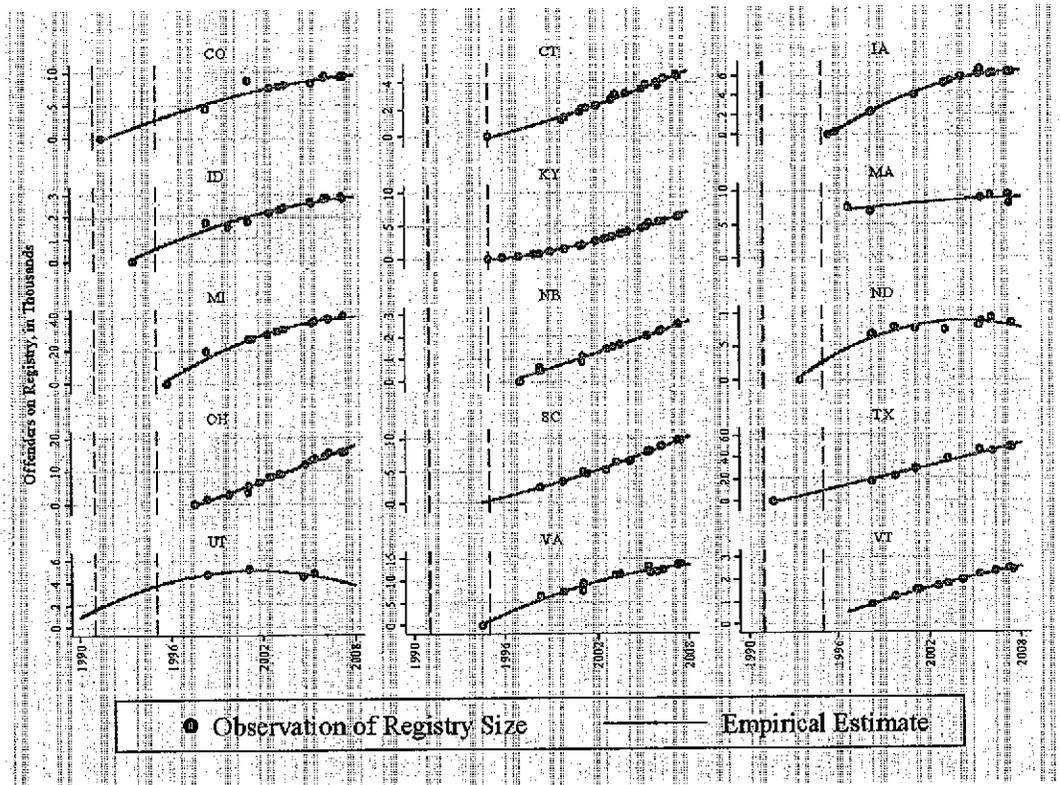
Note: Depicted are dates when 'full' versions registration, public access, and community notification laws are effective, and when a complete internet registry site goes live. Utah's registration law was effective in 1983. For details see Appendix Table 1 and the text in Section 5.

Figure 2: States Included in NIBRS Data Analysis



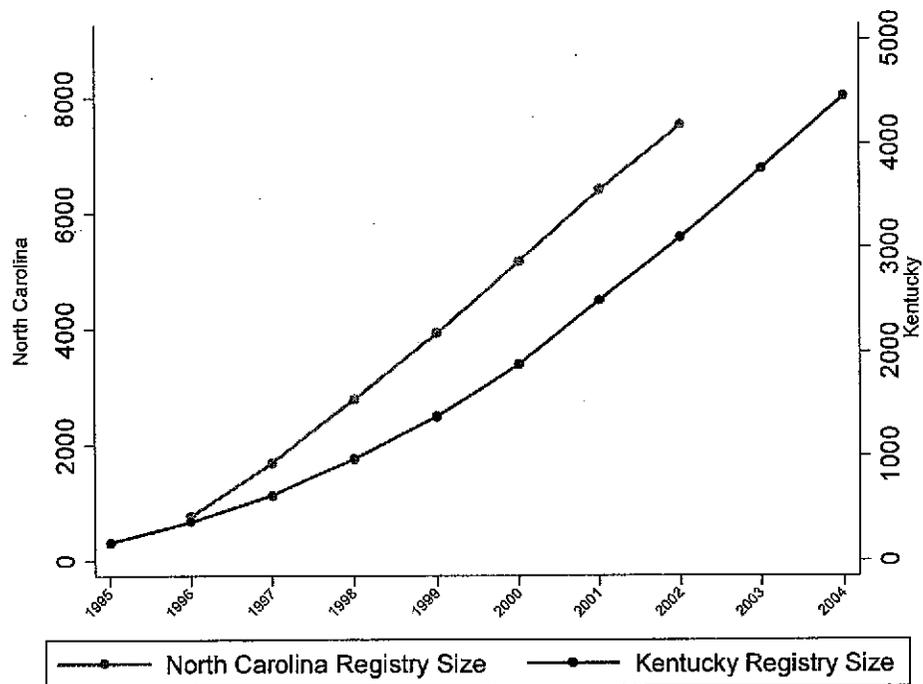
Note: Shaded states are those included in our analysis. They include: Colorado, Connecticut, Idaho, Iowa, Kentucky, Massachusetts, Michigan, Nebraska, North, Dakota, Ohio, South, Carolina, Texas, Utah, Vermont, and Virginia.

Figure 3: Observations of Registry Size and Empirical Estimates



Notes: This figure depicts our empirically estimated registry sizes for the NIBRS states in our sample. To calculate these registry sizes, we ran a least squares regression of registry size on quadratic function of date, allowing for state specific intercepts and slopes and using all data points available for each state. We then use the predicted values from this regression as measures of the state registry size for each month.

Appendix Figure 1: North Carolina and Kentucky Registry Counts, 1995-2004



Notes: This figure depicts the number of registered sex offenders in North Carolina and Kentucky at the end of each year following the start of these registries in January of 1996 and 1995, respectively. The North Carolina numbers are from reports available on the internet registry website and the Kentucky figures are taken from a report by Luallen (2004). Unlike North Carolina, offenders in Kentucky had to be both released and convicted after the law's passage to be required to register.

SEX OFFENDER RESIDENCY RESTRICTIONS: HOW COMMON SENSE PLACES CHILDREN AT RISK

*Lindsay A. Wagner**

I. INTRODUCTION

Sex offender residency restrictions (SORRs) are a manifestation of the American public's retributivist attitudes and biased fears¹—attitudes and fears that ultimately result in ineffective policy choices. Over the last quarter century in the United States there has been a reemergence of “just deserts” as a generalized theory of policy. This retributivist policy is particularly salient in recent civil sanctions levied against sex offenders after their release from prison. Sex offenders, as a group, incite the public's fear and hatred, and politicians seeking to curry electorate favor often support increasingly harsh sanctions against these “political pariahs of our day.”² Most recently, in an attempt to keep communities safe, at least twenty-two states³ and hundreds of local municipalities have placed severe restrictions on where sex offenders may live after being released from prison. These restrictions typically exclude sex offenders from living within 1000 to 2500 feet of schools, parks, day care centers, and other areas where children con-

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1. See Part II.A for a brief discussion regarding research indicating that morals and prejudice rather than fear may actually motivate the public's retributivist attitudes. For simplicity, this paper will refer to public attitudes as “fear-driven” with the caveat that research supports other motivators as contributing factors.

2. *Kentucky v. Baker*, No. 07-M-00604, slip op. at 9 (Kenton Dist. C. filed Apr. 20, 2007), available at http://theparson.net/so/residencyrestrictions.source.prod_affiliate.79.pdf, cert. granted, 2007-SC-000347 (Ky. Aug. 23, 2007).

3. See GARRINE P. LANEY, DOMESTIC SOC. POLICY DIV., CRS REPORT FOR CONGRESS: RESIDENCE RESTRICTIONS FOR RELEASED SEX OFFENDERS 18-27 (2008), available at http://www.criminallawlibraryblog.com/CRS_RPT_DomesticViolence_02-05-2008.pdf. The report includes a table detailing the state statutes. Since the report was published, Indiana's statute was invalidated as ex post facto punishment by Indiana's Appellate Court in *State v. Pollard*, 886 N.E.2d 69 (Ind. Ct. App. 2008).

gregate.⁴ However, research indicates that these fear-driven laws are ill-advised policy choices based on faulty reasoning. They aggravate recidivism risk factors, and hence may actually make communities *less* safe.⁵

By framing these public safety laws in the context of modern criminal policy, this paper highlights the possible mechanisms responsible for the restrictions' development and proliferation despite the growing body of research evidencing their counterproductivity. Understanding the context in which these laws have developed will help shed light on the most useful avenues of sex offender legislation reform. Instead of focusing on the constitutional rights of sex offenders, as most legal scholars have done, strategies for sex offender legislation reform need to focus on uniting the political and legal aspects of the reform effort. More effective reform can be sought through a better informed public, rather than a protective judiciary.

II. CRIME, POLITICS, AND THE ELECTORATE

Recent American crime policy has been largely driven by a focus on punishment and a reemergence of retribution as a viable theory of punishment. This reemergence has come on the heels of a "decline of the rehabilitative ideal," which characterized the late 1960s and early 1970s criminal policy.⁶ By the 1980s, even amidst stable crime rates, America's criminal policy became increasingly punitive as legislators rediscovered the political power of the "tough on crime" image.⁷ A prime example of this punitive policy can be seen in congressional sentencing legislation. During this time, Congress began steadily increasing mandatory minimums and expanding "three strikes and you're out" legislation—a trend that continues today. The result of this shift in crime policy has earned Ameri-

4. See, e.g., ALA. CODE § 15-20-26 (2007) (prohibiting sex offenders from living within 2000 feet of schools and child care facilities); DEL. CODE ANN. tit. 11, § 1112(a) (2007) (prohibiting sex offenders from living within 500 feet of school property); OHIO REV. CODE ANN. § 2950.031 (LexisNexis Supp. 2007) (prohibiting sex offenders from living within 1000 feet of schools).

5. See *infra* Part III.C.

6. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8 (2001) (quoting FRANCIS ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL* (1961)).

7. *Id.*

ca the "preeminent distinction as a punisher . . . regularly leading the world in imprisonment rates."⁸

A. *Fear-Driven Criminal Policy*

The 1960s were marked as a decade of civil disorder, protest, and violence.¹ Scholars warned against the use of force as a means of social control in response to these protests.⁹ They argued it would result in a destructive, self-defeating position, because force could not address recurrent longstanding grievances in a democratic society.¹⁰ Criminologist Jerome Skolnick contends that "durable social control arises not from the pain and suffering punishment imposes, but by binding the individual to the social group, 'by making his society an integral part of him, so that he can no more separate himself from it than from himself.'"¹¹ President Lyndon Johnson agreed. President Johnson's crime policy focused on stabilizing the lives of criminals and protestors through "jobs, education and hope."¹² Employment and education were seen as ways to structure and stabilize one's life and instill a sense of responsibility.¹³ These factors, it was argued, had the potential to both prevent crime and rehabilitate criminals.¹⁴

However, escalating crime throughout the 1970s and an explosion in media attention to crime resulted in a decline in rehabilitative efforts of the Johnson era.¹⁵ Instead of focusing on the complex causes and effects of crime, "crime [had] emerged as a 'hot button' political issue, driven by the anxieties of the

8. Wayne A. Logan, *Constitutional Collectivism and Sex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 5 (2006).

9. JEROME H. SKOLNICK, *POLITICS OF PROTEST: A TASK FORCE REPORT SUBMITTED TO THE NATIONAL COMMISSION ON THE CAUSE AND PREVENTION OF VIOLENCE UNDER THE DIRECTION OF JEROME H. SKOLNICK* 326 (1969).

10. *Id.*

11. Jerome H. Skolnick, *What Not To Do About Crime: The American Society of Criminology 1994 Presidential Address*, 33 CRIMINOLOGY 1, 3 (1995) (quoting EMILE DURKHEIM, *MORAL EDUCATION: A STUDY IN THE THEORY AND APPLICATION OF THE SOCIOLOGY OF EDUCATION* 277 (1961)).

12. NAOMI MURAKAWA, *ELECTING TO PUNISH: CONGRESS, RACE, AND THE AMERICAN CRIMINAL JUSTICE STATE* 1 (2005) (quoting Lyndon B. Johnson's 1965 crime policy message to Congress).

13. Skolnick, *supra* note 11.

14. *Id.*

15. GARLAND, *supra* note 6.

moment [and] the politics of resentment."¹⁶ A generalized fear of violence and crime had become part of the culture of society—a fear that remains today.¹⁷ As sociologist David Garland describes the situation, "what was once regarded as a localized, situational anxiety, afflicting the worst-off individuals and neighbourhoods [sic], has come to be regarded as a major social problem and a characteristic of contemporary culture."¹⁸

The origin of this exaggerated fear is difficult to pinpoint. Scholars have differing opinions as to whether the fear originated in the media, among the public, or from the politicians themselves. Although the exact role the media played in perpetuating this fear is debatable, most researchers agree that media coverage of crime played a part in exacerbating the public's fear of crime. For example, network television coverage of crime increased 83% from 1990 to 1998, even though the national crime rates had actually decreased 20%.¹⁹ News coverage of crime also tends to dwell on the most newsworthy crimes—those that are unusual or particularly heinous—while "common cases receive little or no attention."²⁰ Reporting that exalts the unusual turns the most uncommon, brutal crimes into crimes that seem common. This type of reporting helped fuel an unwarranted public fear of crime across the nation in the 1980s.²¹ While researchers disagree as to whether media coverage creates public fear or simply responds to public fear,²² evidence suggests the news images aggravate the public's insecurities and anxiety, and lead to public outrage at the perceived increasing crime rates.²³

This state of panic creates a background effect of "collective

16. Skolnick, *supra* note 11.

17. GARLAND, *supra* note 6, at 10.

18. *Id.*

19. David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L.J. 600, 602 (2006).

20. Ross E. Cheit, *What Hysteria? A Systematic Study of Newspaper Coverage of Accused Child Molesters*, 27 CHILD ABUSE & NEGLECT 607, 620 (2003).

21. Skolnick, *supra* note 11.

22. Compare Greg Barak, *Between the Waves: Mass Mediated Themes of Crime and Justice*, 21 SOC. JUSTICE 133, 135 (1994) (detailing a top-down media effect), with Richard V. Ericson, *Mass Media, Crime, Law and Justice*, 31 BRITISH J. OF CRIMINOLOGY 219, 237 (1991) (finding a reciprocal relationship between the media and the public).

23. MURAKAWA, *supra* note 12, at 171; Skolnick, *supra* note 11; LORD WINDLESHAM, *POLITICS, PUNISHMENT AND POPULISM* 4 (1998).

anger" and a "righteous demand for retribution," which has led to an increase of social control and the reemergence of the theory of "just deserts" in crime policy.²⁴ According to criminologists Feeley and Simon, this "new penology" is rooted in preemptive practices such as surveillance and containment. Because proponents of new penology believe rehabilitation is not possible, they seek to minimize the risk to the public posed by "deviant" offenders.²⁵ Many researchers believe "the public's concerns about crime are more likely to be driven by the politicians and by policy initiatives than vice versa."²⁶ Thus, these punitive policy choices may be fueling public fears rather than responding to them, but, at least ostensibly, politicians act as though they are addressing the community's need for security and containment of danger through measures of greater social control.²⁷ These measures then become prominent issues in electoral competition, with politicians trying to outdo one another with their "tough on crime" stances.²⁸ As a result, national crime policy is being driven by public fear and the political response.

While the description above is an oversimplification of a very complex and oft-disputed situation, significant research exists that supports this view of the "democraticization" of punishment.²⁹ Evidence of democratized punishment can be found in what scholars have called "electoral cycles." These cycles show a strong correlation between the passage of punitive legislation and election proximity. For example, Naomi Murakawa identified electoral cycling in the passage of mandatory minimum sentencing legislation.³⁰ She noted that an overwhelming majority of the increases in sentencing were passed within two months of election time.³¹ Given the political and social climate of current crime policy, there have been

24. GARLAND, *supra* note 6, at 9-11.

25. Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law*, in *THE FUTURES OF CRIMINOLOGY* 173, 174-85 (David Nelken ed., 1994).

26. Stuart A. Scheingold, *Constructing the New Political Criminology: Power, Authority, and the Post-Liberal State*, 23 *LAW & SOC. INQUIRY* 857, 875 (1998) (citing KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 23-26 (1997)).

27. *Id.* at 12.

28. MICHAEL TONRY, *SENTENCING MATTERS* 160 (1996); GARLAND, *supra* note 6, at 12.

29. MURAKAWA, *supra* note 12, at 140.

30. *Id.* at 147.

31. *Id.*

no countervailing forces to deescalate this continual rise in sentencing.³² As a result, the number of mandatory minimum sentencing laws has increased dramatically, from 61 laws in 1983 to 168 laws in 2000.³³ Levitt noted a similar cycle in the number of police officers commissioned during gubernatorial and mayoral election years.³⁴ And finally Huber and Sanford have found that trial judges in Pennsylvania tend to impart longer criminal sentences as their reelection day approaches.³⁵ Due to increasingly punitive measures such as these, imprisonment rates in America doubled in the 1970s and tripled in the 1980s. As of 2005, America had the highest prison population rate in the world³⁶ and has earned the "preeminent distinction as a punisher."³⁷

B. *The Punitive Response: Common Sense or Political Self-Interest?*

Some argue that it is just plain common sense to lock up criminals—it is something "everyone intuitively knows"—and it works.³⁸ Garland notes that "[t]here is now a distinctly populist current in penal politics that denigrate[s] the expert and professional elites and claims the authority of the 'the people', of common sense, of 'getting back to basics.'"³⁹ The dominant voices are that of the fearful, anxious public and that of the victim.⁴⁰ Intuition dictates that incarceration and punishment are the ways to keep the public safe and to satisfy the urge to retaliate.⁴¹

However, criminal policy that focuses on a "common sense" approach does so at the expense of expert opinion and re-

32. *Id.* at 141.

33. *Id.* at 146.

34. Steven Levitt, *Using Electoral Cycles in Police Hiring to Estimate the Effect of Police on Crime*, 87 AM. ECON. REV. 270 (1997).

35. Gregory A. Huber & Sanford C. Gordon, *Directing Retribution: On the Political Control of Lower Court Judges*, 23 J.L. ECON. & ORG. 386 (2007).

36. ROY WALMSLEY, KING'S COLL LONDON, WORLD PRISON POPULATION LIST 1 (6th ed. 2005).

37. Logan, *supra* note 8, at 5.

38. Skolnick, *supra* note 11 (summarizing an argument by Ben Wattenberg in an article in the *Wall Street Journal*).

39. GARLAND, *supra* note 6, at 13.

40. *Id.*

41. Skolnick, *supra* note 11.

search. The result is a policy that is based on faulty assumptions and that often leads to unintended consequences. For instance, in the 1980s, Congressional legislation designed to address the "crack epidemic" was based on three faulty assumptions: (1) that "crack is instantly addictive;" (2) that "crack makes people violent;" and (3) that "women addicts often trade sex for crack, and their children present a new kind of menace."⁴² By 1995, the Sentencing Commission had issued a special report detailing its research on the dangers of crack-cocaine and the resulting epidemic.⁴³ The Commission found all of these assumptions to be unwarranted and unsupported by the research, and presented a formal amendment to Congress based on their findings.⁴⁴ Congress rejected the amendment.⁴⁵ In defense of their rejection, many members of Congress issued statements in which they continued to rely on the faulty assumptions proposed in the 1980s.⁴⁶ Public opinion and supposed "common sense" had triumphed over the research and empirical data.

Jerome Skolnick gives an example of the unintended consequences that can arise when crime policy focuses solely on punishment in what he calls the "Felix Mitchell paradox."⁴⁷ Skolnick describes the aftermath of the arrest, conviction, and subsequent death of Felix Mitchell, the "most notorious drug kingpin" of the West Coast:

Drug sales continued and, with Mitchell's monopolistic pricing eliminated, competition reduced the price of crack-cocaine. The main effect of Mitchell's imprisonment was to destabilize the drug market, lowering drug prices and increasing violence as rival gang members challenged each other for market share. The aftermath saw a rise in drive-by shootings, street homicides, and felonious assaults. By indirection, effective law enforcement, followed by incapacitation, had

42. MURAKAWA, *supra* note 12, at 159-60.

43. *Id.* at 161 (citing U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995)).

44. *Id.* at 162.

45. *Id.*

46. *Id.* at 162-63.

47. Skolnick, *supra* note 11.

stimulated serious random violence.⁴⁸

Despite the research and unintended consequences such as the Felix Mitchell paradox, current crime policy continues to focus almost exclusively on incarceration and increased punishment.

Many scholars theorize that continued adherence to a punitive policy despite the research is the result of political self-interest. As Tonry states:

Positively put, elected officials want to reassure the public generally that their fears have been noted and that the causes of their fears have been acted on. Negatively put, officials want to curry public favor and electoral support by pandering, by making promises that the law can at best imperfectly and incompletely deliver.⁴⁹

Windlesham identified the prevalence of political self-interest in the passage of the 1994 federal crime bill stating that "elected officials almost without exception recognized an imperative need to respond to [the generalized fear of crime which had developed], and in many cases sought to exact political advantage from a fearful, sometimes vindictive, public."⁵⁰

Support for these theories can be found in the responses of the politicians themselves when asked why they voted for certain ill-advised crime measures. Although expressing a reservation about the effectiveness of the mandatory minimum provisions of the 1986 Anti-Drug Abuse Act, Representative Nick Rahall II of West Virginia lamented, "How can you get caught voting against them?"⁵¹ Senator Daniel J. Evans of Washington, expressing his dissatisfaction with the bill, said he felt as though a "congressional lynch mob" had set off a "sanctimonious election-year stampede which will probably trample our Constitution."⁵² Similarly, after voting for the 1994 Violent Crime Control and Law Enforcement Act, Senator Sam Nunn of Georgia said, "In an election year rush to

48. *Id.*

49. TONRY, *supra* note 28, at 160.

50. WINDLESHAM, *supra* note 23, at 12.

51. Karen Tumulty, *Tough Anti-Drug Bill Passes House Despite Qualms*, L.A. TIMES, Sept. 12, 1986, at 1.

52. Karen Tumulty & Robert Rosenblatt, *Anti-Drug Bill Readied by Senate Leaders*, L.A. TIMES, Sept. 26, 1986, at 22.

enact tough anti-crime measures, I am concerned the Congress may be creating quick fixes that may sound good but, too often raise unrealistic expectations in the public's mind."⁵³ These statements evidence the political pressures felt by many politicians—pressures that force them to vote for a crime policy with which they do not necessarily agree. This approach to crime policy has been described by some politicians as "legislation by political panic."⁵⁴

The foregoing discussion outlined modern crime policy's reliance on democratized punishment. The overly simplified pattern that emerges looks like this: public fear and emotionalism demands a legislative response; the form of that response becomes an election issue; "tough on crime" legislators promote simplistic, "common sense" measures that forsake expert opinion and research for political gain. It is within this culture of "legislation by political panic" that ever increasing restrictions are being levied upon sex offenders—a group of individuals who conjure fear and loathing among the public.

III. RECENT SEX OFFENDER LEGISLATION: RESIDENCY RESTRICTIONS

The same pattern that marks democratized crime policy can be seen in the development and proliferation of the most recent public safety measures taken against sex offenders—SORRs. In the last twenty years, the fear of sex offenders has grown nationwide due to policy initiatives and media reporting on a number of brutal, if unusual, high profile attacks on children⁵⁵—Adam Walsh, Jacob Wetterling, Jessica Lundsford, and Megan Kanka, to name a few. Despite the irregularity of such cases, a wave of public fear and political pressure forced legislatures into action, levying additional restrictions and regulations on sex offenders after their release from prison. Some of the restrictions include registration requirements,⁵⁶

53. 140 CONG. REC. S12,457 (daily ed. Aug. 24, 1994).

54. Brian Duffy with James M. Hildreth, Andy Plattner & Kenneth T. Walsh, *War on Drugs: More than a Short-Term High?*, U.S. NEWS & WORLD REP., Sept. 29, 1986, at 28.

55. *Misguided Measures: New Sex Offender Laws May Cause Bigger Problems than They Prevent* (ABC news broadcast Mar. 7, 2007), available at <http://www.abcnews.go.com/TheLaw/story?id=2931817&page=1>.

56. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, 108 Stat. 2038 (1994).

community notification,⁵⁷ civil commitment,⁵⁸ GPS monitoring and tracking,⁵⁹ and SORRs.⁶⁰ These “common sense” measures continue to proliferate even though research indicates that these types of social control are ineffective and perhaps even counterproductive. This Part will examine the development and proliferation of SORRs within the framework of democratized punishment.

A. *Predators Are Everywhere*

As was seen in Part II, modern crime policy can be fueled by the public’s fear of crime and demand for retribution, or at the very least, fueled by politicians’ conceptions of public fear. Similarly, the development of SORRs can be linked to public fears and the political response. Rare, isolated incidents of kidnapping and sexually charged murders of children are reported by the media, and viewed as a prevalent occurrence. Communities cry out for protection from the seemingly omnipresent danger (or, as discussed in Part IIA, perhaps policy initiatives create the sense of danger). Politicians, in turn, react swiftly passing sweeping restrictions with little debate or research to support such actions. This pattern exhibits the hallmarks of democratized punishment seen in Part II—acquiescence to short-term emotionalism, truncated deliberation, and the passage of harsh simplistic measures for electoral gain.⁶¹

The media’s coverage of high profile kidnappings and sexual assaults has contributed to the fear that dangerous, unknown predators were lurking everywhere. Similar to the news coverage of most crime, news reports on sex offenses

57. Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program, 42 U.S.C.A § 16921 (West Supp. 2008).

58. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

59. JESSE JANNETTA, CTR. FOR EVIDENCE-BASED CORR., GPS MONITORING OF HIGH-RISK SEX OFFENDERS, available at http://ucicorrections.seweb.uci.edu/pdf/WorkingPaper5106_B.pdf (describing California’s pilot program).

60. See, e.g., ALA. CODE §15-20-26 (Supp. 2007) (convicted sex offenders cannot live or work within 2000 feet of school or child care facility); IOWA CODE § 692a.2a (2007) (convicted sex offender of minor cannot live within 2000 feet of a school or child care facility); TENN. CODE ANN. §40-39-211 (2006) amended by 2008 Tenn. Pub. Acts 1164 (sex offenders cannot live within 1000 feet of school, child care facility, or victim).

61. MURAKAWA, *supra* note 12.

tend to focus on the atypical. A study of the newspaper coverage of child molesters arrested over the course of one year found that media coverage tended to focus on the "the extreme and unusual," while the reporting of typical cases, such as those involving family members or acquaintances, was infrequent to non-existent.⁶² Of the 187 persons charged with child molestation, thirteen of these defendants accounted for over 57% of all the news coverage on sex offenses. The analysis found that these thirteen cases tended to involve either unusual circumstances or multiple victims. The study concluded, as others had, that by dwelling on these atypical cases, "the coverage of child sexual abuse gives an exaggerated sense of 'stranger danger.'"⁶³

Other scholars have noted an increase in the media's coverage of child abductions and sexual assaults. By performing searches of newspaper article databases, David Singleton shows how the newspaper coverage of the most publicized child abductions and murders rose dramatically from 1981 to 2005.⁶⁴ The database search revealed that articles covering the 1981 abduction and murder of Adam Walsh numbered only thirteen, compared to the more than 2500 articles reporting on the 2005 murder of Jessica Lundsford.⁶⁵ While Singleton's selective search of new databases was not statistically analyzed, the numbers are at least evidence of the media's growing coverage of the most unusual and heinous crimes committed against children. This increased attention to child sex crimes contributes to the perception that violent sex crimes are on the rise, when in reality, substantiated cases of child sex abuse decreased by approximately 40% between 1990 and 2000.⁶⁶ These images aggravate the public's insecurities and anxiety, leading to anger and outrage at the perceived increasing crime rates.⁶⁷

In addition to these images increasing the public's fear and concern, the political push to pass sex offender legislation,

62. Cheit, *supra* note 20, at 611-12.

63. *Id.* at 619.

64. Singleton, *supra* note 19, at 606.

65. *Id.*

66. DAVID FINKELHOR & LISA M. JONES, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, EXPLANATIONS OF THE DECLINE IN CHILD SEXUAL ABUSE CASES 1 (2004).

67. WINDLESHAM, *supra* note 23.

such as Megan's Law and the Adam Walsh Act contribute to public fears. The availability of internet databases revealing the location of offenders antagonizes concerned parents when they find an offender living nearby. Already startled by media images, these parents demand that legislators react.⁶⁸ They contact their representatives demanding something be done.⁶⁹ Iowa State Senator Jerry Behn received such a phone call from an angry mother, upset that a sexual predator with a history of abusing six-year-old girls was living in an apartment overlooking a grade school playground.⁷⁰ Senator Behn quickly went to work, passing a statewide restriction excluding registered sex offenders from living within 2000 feet of schools or daycare centers. Senator Behn admits that not much research was done into the law's effectiveness; "We all just, frankly, took it for granted that it would have some benefit. . ."⁷¹ The passage of restrictions in other states and cities can be similarly linked to the public's reaction to news of sex offender crimes. For instance, in California, balloting initiative Proposition 83, which contains a SORR provision, was the result of the murders of Jessica Lundsford and Courtney Sounce.⁷² In Florida, the murders of three girls from 2004-2005 led many cities and towns to pass more stringent restrictions, increasing the protections of the statewide SORR already in place.⁷³

Here we can see the beginning of democratized crime policy—the demand for public safety from a perceived threat causing legislators to jump into action. As the next section will show, the legislative response takes the form of "common-sense" social control measures that favor political gain over empirical evidence.

68. Shanna Hogan, *Too Close for Comfort*, TRIB. (Mesa, Ariz.), Mar. 18, 2006, at A1; Laura Pace, *More Limits Sought on Sex Offenders: Legislators Ponder Restrictions on Residency*, PITTSBURGH POST-GAZETTE, June 21, 2007, at A1.

69. Jim Saunders, *Lawmakers Grapple with Sex Offender Laws*, DAYTONA NEWS-J., Feb. 27, 2006, at 2; Dave Sheeley, *Falls May Put Limits on Sex Offenders: Input Sought from Village Residents on Potential Restrictions*, MILWAUKEE J. SENTINEL, Mar. 6, 2007, at B7; *Laws Based More on Myth Than Fact* (Minnesota Public Radio June 19, 2007), available at <http://minnesota.publicradio.org/display/web/2007/06/11/sexoffender2/> [hereinafter *Myth*].

70. *Myth*, *supra* note 69.

71. *Id.*

72. Jeff Warren, *Laws Tighten Rules for Sex Offenders*, L.A. TIMES, Sept. 21, 2006, at B1.

73. Todd Leskanic, *More Cities Limit Residences of Sex Offenders*, TAMPA TRIB., May 14, 2006, at 1.

B. *Legislative Response and SORR Proliferation: Safety, Politics, and the "Domino Effect"*

Just as politicians claimed increased punishment was a common sense approach to solving the nation's crime problem, legislators likewise claim SORRs are necessary to ensure the public's safety. Some politicians admit that political pressures and fear of being seen as "soft on sex offenders" forced them to vote in favor of the rather ill-advised restrictions. Meanwhile, other legislators felt compelled to pass legislation because neighboring towns had enacted restrictions. These politicians feared sex offenders would flee areas with restrictions into their unrestricted towns. All of these factors have contributed to a proliferation of SORRs across the nation.

Many politicians and parents alike insist that residency restrictions are necessary for the safety of children. As one legislator puts it, "common sense tells you that if you can keep sexual predators physically away from children, then they are going to victimize children less often."⁷⁴ Legislators also point to the low rehabilitation rates of sex offenders and their correspondingly high recidivism rates as reasons for needing the restrictions.⁷⁵

Even when faced with research suggesting the laws are ineffective, many legislators continue to support such restrictions, claiming safety is paramount. Speaking out in favor of local restrictions in East Rockaway Village, New York, trustee Edward Sieban commented, "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."⁷⁶ When Kansas state officials held hearings regarding the state's moratorium on local restrictions, they heard the same sentiment echoed by citizens. People in the hearing would say, "Yes, I hear all the data. Yes, I know what the research is saying. But you know what, this makes me feel safer."⁷⁷ These statements clearly evidence a preference for the

74. John Ingold, *Lyons Debating Sex-Offender Residency Rules*, DENVER POST, Apr. 16, 2007, at B1 (quoting state Rep. David Balmer, R-Centennial); see also *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005).

75. Stephanie Simon, *Ex-Cons Exiled to Outskirts*, L.A. TIMES, Dec. 5, 2002, at 1; Daniel Walsh, *Limit Sex Offenders, Freeholders Urge Towns*, PRESS OF ATLANTIC CITY, Oct. 10, 2005, at 1.

76. Erik German, *Sex Offenders Face Tighter Rules*, NEWSDAY, Dec. 5, 2006, at 42.

77. *Kansas Rejects Buffer Zones*, THE KANSAN.COM, Feb. 12, 2007, <http://thekansan.com/>

expression of public interest over empirical research—a common theme in modern democratized crime policy.⁷⁸

Besides appealing to people's common sense, SORRs have proliferated because politicians can use the restrictions to promote a "tough on sex offenders" image. Simon, of the ACLU of Florida, calls the local ordinances a "shameless exploitation by politicians"⁷⁹—politicians taking advantage of the "fearful, sometimes vindictive, public."⁸⁰ Many politicians admit there is little research to support the restrictions, but they feel as though they cannot vote against them. In New Jersey, one politician, who refused to be identified, called SORRs "feel-good legislation," but he stated that politicians would not publically speak out against the restrictions for fear of being seen as soft on sex offenders.⁸¹ Iowa State Senator Behn recognizes that Iowa SORR probably needs to be changed.⁸² Yet Senator Behn and other legislators "[cannot] vote for any law that appears to give sex offenders a break, for fear of giving political opponents ammunition."⁸³ This political pressure on legislators is immense. In Iowa, prosecutors, public defenders, and law enforcement officials alike have all urged the repeal of the residency restrictions, yet the legislature has refused to act. The Iowa County Prosecutor's Office states, "Very seldom do we have something like this where every attorney in the state says repeal it, the police say repeal it, and [the legislature] still [doesn't] do it."⁸⁴

While safety and political concerns are motivating factors at both the state and local levels, local legislators face an additional concern—fear of offenders moving from areas with restrictions into unprotected areas.⁸⁵ Restrictions of 2500 feet severely limit the housing options for sex offenders, especially in

stories/021207/topstories_021207006.shtml (quoting Roger Werholtz, secretary of the Kansas Department of Corrections and member of the Kansas Sex Offender Policy Board).

78. GARLAND, *supra* note 6, at 9.

79. Leskatic, *supra* note 73.

80. WINDLESHAM, *supra* note 23, at 12.

81. Walsh, *supra* note 75.

82. *Myth*, *supra* note 69.

83. *Id.*

84. Dustin Lemmon, *Tracking Sex Offenders Becomes 'Nightmare' for Police*, QUAD-CITY TIMES (Ill.), Nov. 13, 2006, <http://www.qctimes.com/articles/2006/11/13/news/local/doc45581a6ad5f57192445248.txt>.

85. Jim Collar, *Residency Limits Weighed for Sex Offenders*, POST-CRESCENT (Wis.), June 18, 2007; Hogan, *supra* note 68.

densely populated areas and small towns.⁸⁶ When one town enacts an SORR, neighboring towns fear offenders, desperate to find housing, will flood their neighborhoods.⁸⁷ For instance, when Iowa restricted sex offenders from living within two-thousand feet of schools, parks, and playgrounds, a border town in Nebraska had twenty-eight offenders move in from Iowa.⁸⁸ Whether or not this migration of offenders is typical, the fear of such migration is a motivating factor for many politicians when considering the law.⁸⁹

Legislatures feel they must move quickly to prevent this migration of sex offenders into their towns. In New York, majority leader Judith Dagostino of the Schenectady County legislature, responded to the criticism that the county's legislation was rushed, saying fast action was necessary due to restrictions in nearby counties.⁹⁰ Jim Lundrigan, the custodian of Madison County's sex offender registry and a retired captain with the sheriff's office, said "It is just a matter of time before every county in [New York] has a residency restriction to prevent the migration of sex offenders from counties where laws are in place."⁹¹ This fear of sex offender migration creates a "domino effect" of legislation. One town restricts offenders and neighboring towns feel pressure to enact similar restrictions to prevent offenders from flooding into their town. For instance, in Miami-Dade and Broward Counties in Florida, the contiguous cities of Miami Beach, North Bay Village, and Miami Gardens passed restrictions within two weeks of one another.⁹² Within four months, at least another seventeen mu-

86. COLO. DEP'T OF PUB. SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY 37 (2004), available at http://dcj.state.co.us/odvsom/sex_offender/SO_Pdfs/FullSLAFinal.pdf; see also Brandon Bain, *What If There's No Space? Residency Limits on Sex Offenders May Need to be Adjusted*, NEWSDAY, Nov. 23, 2006, at A18; John Pain, *Miami Sex Offenders Get OK to Live Under a Bridge: Law Makes Housing All But Unobtainable*, CHI. TRIB., Apr. 7, 2007, at 25.

87. German, *supra* note 76; Leskanic, *supra* note 73; *Myth*, *supra* note 69.

88. Hogan, *supra* note 68.

89. German, *supra* note 76; Hogan, *supra* note 68; Leskanic, *supra* note 73; Walsh, *supra* note 75.

90. Judith Diagostino, Majority Leader Schenectady County Legislature, Letter to the Editor, *Schenectady County Sex Offender Measure Met with Misconceptions*, ALBANY TIMES UNION, July 12, 2007, A12.

91. Aaron Gifford, *Sex Offender Laws Increase Despite Challenge in Binghamton, Municipalities Adopt Residence Restrictions*, POST STANDARD (Syracuse), Jan. 21, 2007, at B1.

92. *Id.*

municipalities in the area had passed restrictions.⁹³ Similar fears and patterns have been noted in New Jersey,⁹⁴ Nebraska,⁹⁵ Arizona,⁹⁶ Texas,⁹⁷ Pennsylvania,⁹⁸ Massachusetts,⁹⁹ and Wisconsin.¹⁰⁰

As this section highlighted, SORRs have proliferated for numerous reasons. Some legislators believe they are necessary for the safety of children, while critics believe the restrictions have flourished because politicians see an easy way to boost their popular appeal. Other legislators, not particularly convinced of the restriction's effectiveness, feel compelled to defend their town from a restriction-induced migration of sex offenders. As will be seen in the following discussion, the policy of restricting where sex offenders live is based upon faulty assumptions about the nature of sex offenses and the recidivism rates of sex offenders.

C. *Flawed Common Sense: Stranger Danger, Proximity, and Recidivism*

Part II highlighted modern crime policy's general tendency to champion common sense measures of social control over empirical evidence and research. Likewise, SORRs continue to be supported despite the growing body of evidence indicating they are an ineffective safety measure and perhaps even counterproductive. According to proponents, the restrictions are

93. *Id.*

94. Walsh, *supra* note 75 (quoting Fairfield Township Mayor Thomas of N.J., "We certainly don't want to see our municipality become a haven for people other communities have pushed out.").

95. Nate Jenkins, *Senators Urge City to Wait as They Mull Sex Offender Bills*, LINCOLN J. STAR (Neb.), Jan. 6, 2006, at A1 (claiming South Sioux City and South Sioux passed restrictions because of offenders that may flee Iowa).

96. Hogan, *supra* note 68.

97. Wendy Hundley, *Richardson Weighs Sex Offender Zones*, DALLAS MORNING NEWS, Oct. 15, 2006, at 7B; Beth Wilson, *Two Towns to Restrict Offenders' Residence*, CORPUS CHRISTI CALLER-TIMES, Jan. 16, 2007.

98. Tom Coombe, *Sex Offenders Face More Local Restrictions: As Municipalities Look to Limit Where They Can Live, Some Say Actions Would be Misguided and Illegal*, MORNING CALL (Allentown, PA), Apr. 1, 2007.

99. Elaine Thompson, *1000ft Buffer Is Closer to Law: Marlboro May Tighten Rules for Sex Offenders*, WORCESTER TELEGRAM & GAZETTE, May 8, 2007.

100. Collar, *supra* note 85; Mike Johnson, *1,500 Feet Would Separate Falls' Kids, Sex Offenders: Village Board Adopts Limits on Residences, Movement*, MILWAUKEE J. SENTINEL, June 18, 2007, at 3.

necessary to protect children from unknown predators. Common sense dictates that keeping offenders away from the places children congregate will decrease the risk of recidivism. Proponents point to the extraordinarily high recidivism rates of sex offenders and the low rehabilitative success as further reasons why the restrictions are necessary. However, the research available does not substantiate any of these rationales. But, as is common with democratized punishment, research and expert opinion are often sacrificed for the "common sense" approach.

SORRs are designed to protect children from the unknown assailant lurking in the schoolyard or on the playground, an idea commonly referred to as "stranger danger." However, the assumption that these kinds of sex offenders pose a great risk to children is not supported by data.¹⁰¹ While sexual assaults and kidnappings committed by strangers are indeed tragic, research shows they are actually an infrequently occurring event. According to a national survey conducted by the National Institute of Justice, of the children ages ten to sixteen that reported being sexually abused, most were victimized by someone they knew and trusted – nearly 74%.¹⁰² A study done in Utah reports that 90% of child victims under the age of twelve knew the offender.¹⁰³ Another study showed incest alone accounted for 46% of the convictions for sexual assaults committed against children under twelve years of age.¹⁰⁴ In that same study, 70% of imprisoned rapists who victimized a child under the age of twelve reported that their victim was a family member.¹⁰⁵ A Minnesota study that analyzed sex offender recidivism from 1990-2005 found that 65% of the offenders victimized family members or acquaintances they met through another adult, for instance a girl friend or co-worker.¹⁰⁶ Furthermore, "sexual murders are . . . more than

101. Jill Levenson, Kristen Zgoba & Richard Tewksbury, *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, 71 *FED. PROBATION* 2, 5 (Dec. 2007).

102. NAT'L INST. OF JUSTICE, *YOUTH VICTIMIZATIONS: PREVALENCE AND IMPLICATIONS* 5 (2003).

103. UTAH COAL AGAINST SEXUAL ASSAULT, RAPE AND SEXUAL VIOLENCE RESEARCH REPORT 4 (2006).

104. PATRICK LANGAN & CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, *CHILD RAPE VICTIMS* (1992), <http://www.ojp.usdoj.gov/bjs/pub/ascii/chilrape.txt>.

105. *Id.*

106. MINN. DEP'T OF CORR., *RESIDENTIAL PROXIMITY AND SEX OFFENSE RECIDIVISM IN*

three times as likely to be committed by someone known to the victim than by a stranger."¹⁰⁷ All of these studies support the conclusion that the majority of sex offenses committed against children are perpetrated by someone known to the child, not a stranger.

Child abductions by strangers are also an infrequent event. For instance, in the *New England Journal on Criminal and Civil Confinement*, Richard Wright details the statistics on kidnapping:

Of those estimated 150,000 abducted children, 78% were abducted by family members, while 22% were abducted by non-family members, including strangers. Of those children abducted by non-family members, nearly 50% were sexually assaulted. The National Incidence Studies of Missing, Abducted, Runaway, and Thrownaway Children (NISMA^{RT}) research team estimated that 115 children were the victims of a stereotypical kidnapping, the kind often associated with sex-offender cases.¹⁰⁸

According to these statistics, of the estimated 150,000 cases of abducted children in 1999, approximately 115, or 0.08% are the kinds of abductions associated with sex-offender cases.¹⁰⁹ Hence, the restrictions focus on a relatively small fraction of the offenses committed against children, and completely ignore the most prevalent forms of sexual assault and kidnapping. Some proponents argue that the restrictions are worthwhile to save just one child, but, as will be discussed later, the restrictions may actually pose an increased risk to child safety.¹¹⁰

The second faulty assumption upon which SORRs are premised is the idea that residential proximity to areas where children gather is a factor in recidivism. While some experts endorse the idea that "limiting the frequency of contact between sex offenders and areas where children are located is

MINNESOTA 17 (2007).

107. Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267, 292 (2006).

108. Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 22 (2008) (citations omitted).

109. *Id.*

110. See *infra* notes 119-29 and accompanying text.

likely to reduce the risk of an offense,"¹¹¹ many experts emphasize that social proximity to the child, not residential proximity, is the most significant factor in sex offender recidivism.¹¹² Studies have concluded that residence proximity to schools, parks, and other areas where children congregate has little impact on re-offense.¹¹³ In one Minnesota Department of Corrections study, officials scrutinized the circumstances surrounding sex offender re-offense and concluded that "[n]one of the new crimes occurred on the grounds of a school or was seemingly related to a sex offender living within close proximity to a school."¹¹⁴ Two crimes did occur near parks, however, in both cases, the parks were not located near the offenders' residences.¹¹⁵ Similarly, the Colorado Department of Public Safety concluded that residency restrictions "are unlikely to deter sex offenders from recommitting sex crimes, and that such policies should not be considered a feasible strategy for protecting children."¹¹⁶ In a survey of 185 sex offenders, most said that "the restrictions would not factor much or at all into whether they would re-offend."¹¹⁷ Moreover, many of the respondents said when they re-offended in the past, "they were careful to steer clear of their own neighborhoods."¹¹⁸ Again, we see that the restrictions, while promising child safety, actually focus on a relatively small portion of the sex offenses committed against children.

The third faulty belief underlying SORRs involves offender recidivism. Proponents of SORRs contend sex offenders have exceedingly high recidivism rates; however, studies actually reveal that recidivism rates among sex offenders are actually lower than commonly believed.¹¹⁹ Within a three-year follow-up period, the Bureau of Justice Statistics found a 5.3% recidiv-

111. *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir. 2005) (discussing expert testimony in the district court).

112. Levenson, Zgoba & Tewksbury, *supra* note 101, at 3.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Leskanic, *supra* note 73 (citing to research in INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY).

118. *Id.*

119. Levenson, Zgoba & Tewksbury, *supra* note 101, at 3.

ism rate amongst 9691 sex offenders released from prison.¹²⁰ While statistics tend to underestimate the prevalence and incidents of sexual assaults, these rates are quite lower than recidivism rates for non-sexual offenses.¹²¹ Furthermore, the Bureau of Justice Statistics reported that of all the new sex offenses committed by released prisoners, released sex offenders accounted for only 13% of those offenses, while released non-sex offenders accounted for 87% of the sex crimes committed by released prisoners.¹²² These statistics underscore the fact that the restrictions are targeting only a small fraction of sex offenses while promising broad protections to the public.

Finally, proponents of SORRs cite to the low rehabilitation rates of sex offenders as a reason for restricting where sex offenders live. However, the residency restrictions actually aggravate factors which *increase* the risk of recidivism. In many urban areas SORRs make it difficult for offenders to find compliant housing, and experts warn that finding and maintaining housing is one of the most important factors in preventing recidivist activity.¹²³ While the impact of SORRs on the ability of offenders to find housing is largely unknown, studies indicate SORRs make it difficult for offenders to find housing. In one study, one quarter of the offenders were forced to move from a home they owned or rented.¹²⁴ Nearly half reported that they were unable to live with supportive family members.¹²⁵ More than half reported having trouble finding compliant, affordable housing. Other studies reported that 22% of offenders were forced to move multiple times as a result of the restrictions, and almost half the offenders report that landlords refused to rent to them.¹²⁶ In Iowa, within six months of the implementation of statewide restrictions, thousands of sex of-

120. PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, at 1, 24 (2003), available at http://www.ipce.info/library_3/pdf/rsorp94.pdf.

121. Levenson, Zgoba & Tewksbury, *supra* note 101 (comparing offenders who were rearrested for committing the same crime).

122. LANGAN, SCHMITT & DUROSE, *supra* note 120, at 24.

123. Levenson, Zgoba & Tewksbury, *supra* note 101, at 3.

124. 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, 173 (2005).

125. *Id.*

126. Levenson, Zgoba & Tewksbury, *supra* note 101.

fenders became homeless.¹²⁷ In California, the incidence of homelessness among registered sex offenders has increased 27% since California's restrictions took effect in November 2006.¹²⁸ Overall, the studies conclude that SORRs are associated with transience, homelessness, reduced employment opportunities, and further distance from social services and mental health treatment.¹²⁹

According to experts, all of these factors increase the risk of recidivism. Many scholars have identified housing as the most important factor in offender reintegration.¹³⁰ "Housing is the linchpin that holds the reintegration process together. . . . [I]n the end, a polity that does not concern itself with the housing needs of returning prisoners finds that it has done so at the expense of its own public safety."¹³¹ Likewise, scholars have noted that "[s]ex offenders who maintained social bonds to communities through stable employment and family relationships had lower recidivism rates than those without jobs or significant others."¹³² For instance, the Colorado Department of Public Safety found that offenders who had a positive support system had significantly lower recidivism than offenders with no support.¹³³ With so many sex offenders struggling to find suitable housing and being pushed away from their social networks, the restrictions may actually be placing communities at an increased risk. Instead of binding the individual to the community like criminologists recommend, SORRs further alienate the offenders.¹³⁴

In addition to having an alienating effect, SORRs have increased enforcement and monitoring problems. Offenders who are unable to find suitable housing often lie about where they are living or stop registering all together, making it diffi-

127. *Id.* at 4.

128. LANEY, *supra* note 3, at 13.

129. Levenson, Zgoba & Tewksbury, *supra* note 101, at 5.

130. NANCY G. LA VIGNE, CHRISTY VISHER & JENNIFER CASTRO, URBAN INST., CHICAGO PRISONERS' EXPERIENCES RETURNING HOME 16 (2004), available at http://www.urban.org/uploadedPDF/311115_ChicagoPrisoners.pdf.

131. KATHARINE H. BRADLEY ET AL., CMTY. RES. FOR JUSTICE, NO PLACE LIKE HOME: HOUSING AND THE EX-PRISONER 7 (2001), available at <http://www.crjustice.org/hmbrief.htm>.

132. Levenson, Zgoba & Tewksbury, *supra* note 101 (citing Candace Kruttschnitt, Christopher Uggen & Kelly Shelton, *Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Controls*, 17 JUST. Q. 61 (2000)).

133. COLO. DEP'T OF PUB. SAFETY, *supra* note 82, at 31.

134. See *supra* note 9 and accompanying text.

cult for law enforcement officials to supervise them.¹³⁵ Reportedly, Mike Jimenez, president of the California parole officers union, has stated that, "It will be impossible for parole agents to enforce Jessica's Law in certain areas, and encouraging 'transient' living arrangements just allows sex offenders to avoid [registering] altogether."¹³⁶ After Iowa enacted restrictions, the number of sex offenders who registered reportedly declined. "The *Des Moines Register* reported that the number of sex offenders who failed to register in the state increased from 142 in June 2005 to 346 in December 2006."¹³⁷ In Cedar Rapids, Iowa, officials are finding it impossible to keep track of individuals registered in the county.¹³⁸ Sheriff Don Zeller told ABC news, "Five years ago, we knew where about 95% of those individuals were. Now we're lucky if we know where 50, 55% of them are."¹³⁹

In the end, what seems like common sense turns out to be premised on faulty assumptions and has potentially dangerous consequences. The restrictions apply to a broad range of sex offenders while designed to target only a small fraction. By focusing on strangers and geography, the restrictions ignore the greatest source of harm to children—those adults the child knows and trusts.¹⁴⁰ The public and political attention being given to SORRs turns a blind eye on the majority of child sex assault victims and leaves them virtually unprotected. Many critics claim "[p]reventative policies that truly sought to protect the greatest number of children from the greatest source of harm would instead prioritize intrafamilial abuse, not predation by strangers."¹⁴¹ Moreover, the restrictions end up excluding offenders from communities and aggravating factors that have been shown to increase offender recidivism. As is common in modern crime policy, some politicians continue to support the restrictions despite the coun-

135. Greg Bluestein, *Sex Offender Challenges GA Residency Restrictions*, WASH. POST (July 16, 2006); Pain, *supra* note 86; Myth, *supra* note 69.

136. LANEY, *supra* note 3, at 12.

137. *Id.*

138. Jim Avila, Mary Harris & Chris Francescani, *Misguided Measures: New Sex Offender Laws May Cause Bigger Problems than They Prevent*, ABC News, Mar. 7, 2007, available at <http://abcnews.go.com/TheLaw/story?id=2931817&page=1>.

139. *Id.*

140. Corrigan, *supra* note 107, at 291.

141. *Id.*

tervailing evidence.

This Part has attempted to highlight the trademarks of democratized punishment that can be seen in the development and proliferation of SORRs across the nation. It starts with a general societal fear and results in simplistic measures that champion politics over empirical data. Many offenders have challenged these restrictions in court. However the vast majority have not been successful. Part IV will examine the judiciary's highly deferential response to SORRs.

IV. JUDICIAL RESPONSE: COMMON SENSE AND RATIONAL BASIS REVIEW

The overwhelming judicial response to SORR challenges has been to defer to legislative decision making. The leading case analyzing the constitutionality of SORRs comes from the Eighth Circuit's *Doe v. Miller*.¹⁴² According to the reasoning in *Doe*, Iowa's statewide SORR did not violate procedural or substantive due process.¹⁴³ Nor did the restriction compel self-incrimination or contravene the Constitution's Ex Post Facto Clause.¹⁴⁴ Given the court's findings, Iowa's SORR was only subject to the highly deferential rational basis review, a standard the restriction easily met. Overcoming rational basis review is a substantial obstacle for anyone wishing to challenge the restrictions. In general, the judiciary's failure to subject SORRs to heightened scrutiny has left legislatures unchecked in subjecting this unpopular group to additional restrictions. Despite these obstacles, some state courts have handed down favorable rulings, enjoining the retroactive application of the restrictions and finding local ordinances to be in violation of state law.¹⁴⁵ But the overwhelming majority of opinions have followed the precedent set in *Doe*.¹⁴⁶

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

143. *Id.* at 709, 714.

144. *Id.* at 716, 721.

145. *See, e.g.*, *State v. Pollard*, 886 N.E.2d 69 (Ind. Ct. App. 2008) (invalidating Indiana's statewide restriction as *ex post facto* punishment); *G.H. v. Galloway Twp.*, 951 A.2d 221 (N.J. Super. Ct. App. Div. 2008) (finding local ordinances to be preempted by New Jersey's Megan's Law); *Nasal v. Dover*, 862 N.E.2d 117 (Ohio 2007) (holding retroactive application which required an offender to move who owned home for several years prior to enactment was unconstitutional).

146. *See, e.g.*, *Boyd v. State*, CR-04-0936, 2006 WL 250832 (Ala. Crim. App. Feb. 3, 2006); *Doe v. Baker*, No. Civ.A. 1:05-CV-2265, 2006 WL 905368 (N.D. Ga. Apr. 5, 2006); *People v. Le-*

In *Doe v. Miller*, the Eighth Circuit upheld Iowa's statewide restriction that prevented sex offenders from living within 2000 feet of any school or child care facility.¹⁴⁷ Overturning the district court's ruling, the Eighth Circuit found that the restrictions did not violate the Fifth Amendment, the Fourteenth Amendment, or the Ex Post Facto Clause of the Constitution.

Judge Colloton, writing the majority opinion for the court, first dismissed the argument that the restriction violated procedural due process under the Fourteenth Amendment because the law "fails to provide notice of what conduct is prohibited, and because it does not require an individualized determination whether each person covered by the statute is dangerous."¹⁴⁸ The court found that the failure of some cities to provide information about the location of restricted areas and the difficulty in measuring such restricted areas did not render the law "impermissibly vague in all of its applications."¹⁴⁹ Likewise, the law did not violate procedural due process by foreclosing an "opportunity to be heard."¹⁵⁰ In dismissing the claim, Judge Colloton stated:

The restriction applies to all offenders who have been convicted of certain crimes against minors, regardless of what estimates of future dangerousness might be proved in individualized hearings. Once such a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals who seek to prove that they are not individually dangerous or likely to offend against neighboring schoolchildren.¹⁵¹

Judge Colloton then moved on to discuss and dismiss the substantive due process claims, finding that the restrictions did not infringe upon any established fundamental rights. According to Judge Colloton, the restrictions did not infringe upon the right to live with family members, because the law did not regulate family relationships and any effect on the

roy, 828 N.E.2d 769 (Ill. App. Ct. 2005); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005).

147. IOWA CODE ANN. § 692A.2A (West 2003).

148. *Miller*, 405 F.3d at 708.

149. *Id.* (citing *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 497 (1982)).

150. *Id.*

151. *Id.* at 709.

family was only "incidental or unintended."¹⁵² Likewise, Judge Colloton rejected the claim that the law infringed upon the constitutional right to travel, because the statute did not impose an "obstacle to a sex offender's entry into Iowa, and it does not erect an actual barrier to interstate movement."¹⁵³ Nor was it found that the law treated nonresidents differently than current residents.¹⁵⁴ Judge Colloton next addressed the appellees' claims that the restrictions infringed upon the right to intrastate travel, finding that the right to intrastate travel, if such a right even existed, was not implicated in the case.¹⁵⁵ Finally, Judge Colloton declined to expand current substantive due process to recognize a fundamental right "to live where you want."¹⁵⁶

Since the law did not infringe upon any fundamental rights, the court applied rational basis review. Despite the absence of evidence showing the laws actually fulfilled Iowa's stated interest of child safety, the court found the law within the state's police power authority to protect the health and welfare of its citizens.¹⁵⁷ Out of respect for separation of powers, the court deferred to the legislature stating that the "[l]egislature is equipped to weigh the benefits and burdens" of such policies, not the courts.¹⁵⁸ Since, as one expert put it, "it is just 'common sense' that limiting the frequency of contact between sex offenders and areas where children are located is likely to reduce the risk of an offense," Judge Colloton concluded that Iowa was entitled to use this 'common sense' in employing residence exclusion as a social control strategy.¹⁵⁹

After disposing of the appellees' substantive due process claims, the court addressed the claim that the restriction, combined with the state's registration requirements, compels sex offenders to incriminate themselves in violation of the Fifth and Fourteenth Amendments. Judge Colloton dismissed this claim, stating that the restrictions in no way compelled an offender "to be a witness against himself or a witness of any

152. *Id.* at 710.

153. *Id.*

154. *Miller*, 405 F.3d at 710.

155. *Id.* at 713.

156. *Id.* at 713-14.

157. *Id.* at 714.

158. *Id.* at 716.

159. *Id.* at 715-16.

kind."¹⁶⁰ The residency restrictions do not require sex offenders to provide any information that may be used against them in court, therefore the statute does not violate the constitutional protection from compelled self-incrimination.¹⁶¹

Finally, the court moved on to address the appellees' last claim—that Iowa's residency restriction violates the Ex Post Facto Clause of Article I, Section 10 of the Constitution by imposing "retroactive punishment on those who committed a sex offense prior to [the statute's enactment]."¹⁶² First, the court concluded that the Iowa General Assembly intended to create "a civil, non-punitive statutory scheme to protect the public."¹⁶³ Next, using the guideposts established in *Kennedy v. Mendoza-Martinez*,¹⁶⁴ the court addressed whether the law was nonetheless so punitive in effect as to negate the legislature's intent.¹⁶⁵

The guideposts required the court to focus on five factors: "whether the law has been regarded in our history and traditions as punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a nonpunitive purpose, and whether it is excessive with respect to that purpose."¹⁶⁶ Applying these factors to the case at hand, Judge Colloton first rejected the appellee's argument that the restrictions resemble the traditional punishment of banishment, because the law "does not 'expel' the offenders from their communities."¹⁶⁷ Addressing the second factor, Judge Colloton recognized that the laws may have a deterrent and retributive effect, but nonetheless determined that the statute was more aligned with the regulatory objective of protecting the health and safety of children rather than the traditional aims of punishment.¹⁶⁸

Turning to the remaining factors, Judge Colloton acknowledged that the laws imposed an "affirmative disability or re-

160. *Miller*, 405 F.3d at 716.

161. *Id.*

162. *Id.* at 718.

163. *Id.*

164. 372 U.S. 144, 168-69 (1963).

165. *Miller*, 405 F.3d at 719.

166. *Id.*

167. *Id.*

168. *Id.*

straint," but this impact was outweighed by the final, most significant factor—the law had a "rational connection to a nonpunitive purpose."¹⁶⁹

This final factor—whether the regulatory scheme has a "rational connection to a nonpunitive purpose"—is the "most significant factor" in the *ex post facto* analysis. The requirement of a "rational connection" is not demanding: A "statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." The district court found "no doubt" that [the Iowa statute] has a purpose other than punishing sex offenders and we agree. In light of the high risk of recidivism posed by sex offenders the legislature reasonably could conclude that [the Iowa statute] would protect society by minimizing the risk of repeated sex offenses against minors.¹⁷⁰

Thus the court determined that the laws were not so punitive as to render them a violation of the Ex Post Facto Clause of the Constitution. Ultimately the court found the restriction to be a rational policy choice that the legislature was entitled to make and the court was not in a position to oppose.¹⁷¹

As *Doe* demonstrates, generally most courts' rational basis review and *ex post facto* analysis ultimately turn on "common sense" and "rational connections"—factors which do not have to be substantiated by empirical data. These highly deferential standards present an enormous obstacle for offenders and opponents of the law who advocate for a policy based on evidence rather than faulty common sense. Also highlighted in *Doe* is the fact that the standards used by the court are based on the premise that the legislature has the ability to research and investigate different policy choices. Yet, as the foregoing discussions regarding modern crime policy and SORRs illustrate, that reasoned legislative approach does not always occur. As Parts II and III showed, public fear and ignorance coupled with political tactics can cloud judgment, and rash decisions based on a sometimes illusory "common sense" can dictate policy. *Doe* illustrates that respect for separation of

169. *Id.* at 721.

170. *Id.* (citations omitted).

171. *Miller*, 405 F.3d at 721.

powers dictates judicial deference to those policy choices, regardless of their origin and efficacy.

V. MOVING PAST *DOE*: TRADING COMMON SENSE FOR EDUCATION

Several possibilities exist for overcoming the precedent set in *Doe v. Miller*. Legal scholars have attacked different aspects of the *Doe* ruling; some focus on the parallels between SORRs and banishment, while others scrutinize the court's ex post facto analysis. Still others argue for a more stringent rational basis review when laws appear to be the result of fear-based policy. While legal efforts to overturn *Doe* serve an important purpose, this author would argue they are insufficient if not coupled with an attack on the policy that made such counter-productive and short-sighted laws a reality in the first place.

A. Arguments Proposed by Legal Scholars

Some legal scholars argue that *Doe* and subsequent cases decided along similar lines were wrongly decided.¹⁷² Rayburn Young and Durling both argue that these laws are truly punitive in intent and effect, and as such they violate the Ex Post Facto Clause of the Constitution.¹⁷³ Rayburn Young relies on a comparison between the traditional punishment of banishment and SORRs, while Durling scrutinizes the ex post facto analysis applied in *Smith v. Doe* and relied on in *Doe*. Both scholars come to the same conclusion, that SORRs are punitive and a violation of the Ex Post Facto Clause. However, ex post facto analysis calls for the "clearest proof" of the statute's punitive effects,¹⁷⁴ and whether or not the evidence put forth by these scholars rise to the level of "clearest proof" remains to be seen.

Other legal scholars find the laws to be contrary to the "collectivist traditions" upon which the Constitution was

172. See, e.g., Caleb Durling, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions and Reforming Risk Management Law*, 97 J. CRIM. L. & CRIMINOLOGY 317 (2006); Corey Rayburn Young, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007).

173. Durling, *supra* note 172, at 346; Young, *supra* note 172, at 153.

174. *Miller*, 405 F.3d at 719.

founded.¹⁷⁵ Logan poses an interesting argument against SORRs using the Supreme Court's decisions in *Edwards v. California*¹⁷⁶ and *City of Philadelphia v. New Jersey*.¹⁷⁷ In *Edwards*, the Court struck down a California law that made it illegal to bring an out-of-state impoverished person into the state;¹⁷⁸ while in *City of Philadelphia*, the Court found a state could not isolate itself from a nation-wide societal problem—trash.¹⁷⁹ Logan draws an obvious parallel between the laws at issue in these two cases and the states' current efforts to exclude sex offenders.¹⁸⁰ According to Logan, ex-offenders are a "problem to be shared by all,"¹⁸¹ and "the common responsibility and concern of the whole nation;"¹⁸² and as such, no state is entitled to isolate itself from this common problem.¹⁸³

Other legal scholars advocate for a more stringent standard of review when analyzing these types of laws. David Singleton, an adjunct professor of Law at Northern Kentucky University, cites to *Doe* as an example of the need for a more rigorous standard when reviewing laws "driven primarily by fear and dislike" rather than reasoned analysis.¹⁸⁴ Singleton lays out a framework in which courts could determine if a public safety law is rooted in fear despite its seeming "common sense" approach.¹⁸⁵ According to Singleton's plan, if the law was found to be driven by community fear, the court would subject the law to a higher level of scrutiny.¹⁸⁶ Singleton argues that SORRs would fail to survive heightened scrutiny.

175. See, e.g., Logan, *supra* note 8.

176. *Edwards v. California*, 314 U.S. 160 (1941).

177. *City of Phila. v. New Jersey*, 437 U.S. 617 (1978).

178. *Edwards*, 314 U.S. at 175.

179. *City of Phila.*, 437 U.S. at 622.

180. Logan, *supra* note 8, at 27-28.

181. *Id.* (quoting *City of Phila.*, 437 U.S. at 629).

182. *Id.* (quoting *Edwards*, 405 U.S. at 175).

183. Logan, *supra* note 8, at 29.

184. Singleton, *supra* note 19, at 601.

185. *Id.* at 623-26.

186. *Id.*

B. *The Limitations of Courts*

While these arguments are convincing, focusing on legal battles may prove to be futile. Many scholars have pointed out limitations of courts when dealing with matters of social policy. Court battles can be time consuming, costly, and are still subject to reversal by the political process. Limitations such as these can make a litigation strategy futile and frustrating.

Court cases and precedent building take a tremendous amount of time and money, and in the end may only end up affecting a limited area.¹⁸⁷ As illustrated in Tushnet's account of the NAACP's legal attack on school segregation, the legal process literally took decades. The development of a legal strategy began in the 1920s, but *Brown v. Board* was not decided until 1954.¹⁸⁸ Even after the *Brown* decision, the implementation of school desegregation took many more decades and, in some instances, still continues today.

While turning to courts of law may be an alternative to fighting for policy change through the political process in some cases, it is important to understand that law is rooted in politics.¹⁸⁹ Politicians make the law and have the ability to react to judicial decisions by enacting new laws. Given the current climate of sex offender policy, it is likely legislatures will respond to any court decisions with new laws and restrictions. For example, in late November 2007, the Georgia Supreme Court struck down the state's SORR as an unconstitutional taking as applied to an offender who was forced to move out of his home after a new daycare center opened within 1,000 feet of his home.¹⁹⁰ By early April 2008, the Georgia legislature had already sent an amended SORR to the governor for signing.¹⁹¹ Legislatures have numerous control meas-

187. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (2d ed., Univ. of Mich. Press 2004) (1974); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

188. TUSHNET, *supra* note 187.

189. SCHEINGOLD, *supra* note 187.

190. *Mann v. Ga. Dep't of Corr.*, 653 S.E.2d 740, 755 (Ga. 2007).

191. Jake Armstrong, *New Sex Offender Restrictions Head to Governor*, GA. PUB. BROAD. NEWS, Apr. 4, 2008, http://news.mywebpal.com/news_tool_v2.cfm?show=localnews&pnpID

ures at their disposal. As Wright enumerates in his article in the *New England Journal on Crime & Civil Confinement*, sex offenders are subject to a host of post-incarceration sanctions: registration, notification, GPS monitoring and tracking, civil commitment, chemical castration, and loitering laws.¹⁹² Politicians will be continually pressured to address the public's fears in some manner and will likely resort to another form of social control.

Furthermore, one of the most debilitating aspects of using the courts to fight for sex offender legislation reform is that the courts are limited by the Constitution. Legal arguments need to be framed in terms of "rights."¹⁹³ Courts strip the issues down to a narrow legal question. This has several important implications for sex offender legislation reform. Advocates of reform must attack residency restrictions in terms of sex offender rights. This framing of the issue, in turn, creates a social and political backlash. It is not socially or politically popular to be supporting "sex offender rights," so politicians and society in general refuse to support a legal battle to vindicate such abhorred rights. Therefore, even if a court decision strikes down the law, as seen in the preceding discussion, politicians feel the need to counteract the decision with additional measures to control the "risk" presented by sex offenders. Therefore, attempts to reform sex offender legislation through the court system may not result in the effective policy measures one would hope.

C. *New Proposals: Coherence and Education*

Given the limitations of the court system and the context in which these laws were promulgated, this author argues that sex offender reform can benefit from reframing the issue. If the courts are to be used as a tool in the battle for reform, more of an effort needs to be made to match legal rhetoric with more politically popular rhetoric than "the rights of sex offenders." Achieving coherence between legal and political rhetoric is not an easy task in the case of sex offender legislation reform, but important lessons can be learned from other

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192. Wright, *supra* note 108, at 29-47.

193. Rosenberg, *supra* note 187; Scheingold, *supra* note 187.

difficult reform efforts, such as the Kentucky school finance reform discussed below. Another possible strategy could be addressing the underlying source of the problem: the democratization of punishment.

As discussed in the preceding section, legal analysis of social issues generally focuses on "rights." In his study of school finance reform in Kentucky, scholar Michael Paris discusses how effective "translation" of a social issue into a cognizable legal claim is important.¹⁹⁴ In Kentucky, an ardent anti-taxation state, proponents of school finance reform took the focus off taxes and "Robin Hoodesque" equality, and instead focused the reform rhetoric on achieving an adequate, constitutionalized, "Kentuckian" education called for under the Kentucky Constitution.¹⁹⁵ The "translation" of what was essentially a tax issue into an issue about adequate education helped reformers gain support amongst the politicians and the public. This creates what Paris terms "cohesion."¹⁹⁶ Cohesion between the legal arguments and political rhetoric allowed the reform movement to gain support. This cohesion further helped the reform after a court struck down the entire Kentucky school system, because it allowed the executive and legislative branches to work together with reformers to carry out the court's decision.

Similarly, advocates of sex offender legislation reform need to translate the issue of "sex offender rights" into more politically popular rhetoric. As discussed in Parts II and III, rehabilitation and sex offender rights are not popular issues, whereas community safety and effective law enforcement are much more rhetorically powerful issues. Whether or not these topics are the best issues on which to focus is arguable, what is important is that legal mobilization efforts need to consider how the legal argument is framed and what impact that framing, or translation, has on the public at large and support for sex offender legislation reform. Articulating a cognizable legal right that also carries a powerful political punch when it comes to sex offender legislation may be difficult. Whereas the Kentucky Constitution provided a fundamental right to an "effi-

194. Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984-1995*, 26 L. & SOC. INQUIRY 631, 639 (2001).

195. *Id.*

196. *Id.* at 635-36.

cient" education, not many rights spring to mind that do not encompass sex offender rights in some way. Is there a right to "child safety" or "community safety?" Is there a right to "efficient law enforcement?" Advocates of sex offender legislation reform need to concentrate their efforts on creatively transforming "sex offender rights" into an acceptable political message *and* a viable legal argument.

Paris's article also points out another obstacle many reform efforts face when using litigation: the public perception that reformers are trying to "short circuit" the democratic process. In Kentucky, the Council for Better Education met this challenge in several ways, one of course being that they structured their argument in such a way as to appeal to the majority. But another strategic move helped combat this perception—selecting Bert T. Combs, a former governor of Kentucky, as lead counsel. As Paris notes, Combs had "an outstanding personal reputation for probity and honesty."¹⁹⁷ This selection no doubt helped curb the perception that reformers were using the legal process to short-circuit the legitimizing democratic process. Sex offender legislation reformers can learn a valuable lesson from the Council's careful selection of lead counsel. Currently, many of the lawsuits challenging residency restrictions have been brought by the ACLU. While the ACLU is a highly respected organization, it is also a polarizing organization at times. That polarization can hamper the kind of cohesiveness which made the Kentucky reform such a success. Victims' rights groups who do not agree with the restrictions could be a particularly powerful resource here. Legal mobilization efforts from these groups will likely not be perceived in the same negative light as efforts by the ACLU, and some of the stigmatization that comes with using the countermajoritarian courts can be assuaged.

One last lesson that may be taken from the example of school finance reform in Kentucky was the approach taken by the Prichard Committee in evaluating and studying the Kentucky school system. Paris describes the Prichard Committee's approach to school reform in contrast to the approach used by a majority of the nation. Paris describes the Prichard Committee's approach as well-deliberated and thoroughly studied,

197. *Id.* at 644.

embracing the idea of a common experience of all Kentucky school children, rather than the "meritocratic 'get tough' outlook" being promoted on the national stage in the 1980s.¹⁹⁸ Paris describes the general efforts of the rest of the nation as a "rush to reform" while the committee took time to deliberate and study.¹⁹⁹ Ultimately, Paris attributes much of the reform success to these early "deliberate" mobilization efforts which helped build a network of those committed to education reform.

The national "rush to reform" and "get tough outlook" of which Paris speaks exactly describes the atmosphere of reform when it comes to sex offenders. If the Prichard Committee's deliberate mobilization was able to counteract the national current of "get tough" education reform, that strategy of study and deliberation may be helpful in the context of sex offender legislation reform. The intensive study of sex offender legislation involving participants from many different social and political groups may be useful in bringing about political support for a new approach to sex offender legislation.

If all of these strategies prove to be unworkable, efforts can be made to use the democratized system of criminal policy to enact effective, well-researched legislation. Advocates of crime policy reform often argue that educating the public is paramount in crime policy reform. Criminologist Jerome Skolnik, urges crime policy reform is possible; but advocates need to make a strong effort to "change public opinion even in this controversial sphere."²⁰⁰ SORRs, like crime policy, are "a matter to be thought about, to be reasoned about, and argued, and not merely a matter to be left to feelings and sentiment."²⁰¹ Skolnik points to public opinion research which distinguishes between "raw opinion" in the early stages of public debate, and responsible public judgment, when the public has the opportunity to consider alternatives and payoffs.²⁰² Opponents of the current sex offender policies need to inform the public of the alternatives and payoffs.

There is evidence that mobilization against the restrictions is

198. *Id.* at 652.

199. *Id.*

200. SKOLNIK, *supra* note 9.

201. *Id.*

202. *Id.*

happening. Patricia Wetterling, the mother of abducted child Jacob Wetterling, has said residency restrictions are an example of laws that "go too far" and are an example of politicians trying to "out-tough" one another.²⁰³ Victims' rights groups have also started speaking out against the restrictions.²⁰⁴ Because of their unique position supporting the *victims* of sex offenses, these groups have the potential to effectively deliver information regarding SORRs and the negative impact the restrictions have. Research and education efforts need to continue if effective public and criminal policy is what is desired.

VI. CONCLUSION

This paper has outlined modern crime policy's shift toward the democratization of punishment and the "simplistic and overly harsh" policies that have resulted from the American public's fear of crime. SORRs have been presented as a prime example of this democratized policy. By framing SORRs in this context, this Note highlights the mechanisms responsible for the restrictions' development and proliferation despite the evidence of their counterproductivity. Understanding the context in which these laws have developed will help shed light on the most useful avenues of sex offender legislation reform. Instead of focusing on sex offender rights, reform efforts need to be aimed at rhetoric which has both legal and political currency. Shaping the reform in a way which captures the most political and public support will ultimately make for a successful effort.

203. *Sex Offender Laws Have Unintended Consequences* (Minn. Public Radio June 18, 2007), available at <http://minnesota.publicradio.org/display/web/2007/06/11/sexoffender1/>.

204. Jenifer Warren, *Sex Crime Residency Laws Exile Offenders: California Voters Weigh Restrictions Similar to Those Passed in Iowa*, L.A. TIMES, Oct. 30, 2006, at A1.

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DAYTON — The Montgomery County Sheriff's Office will soon start charging sex offenders when they register in the county, Sheriff Phil Plummer said Thursday, April 23. Tier I and Tier II sex offenders will be charged \$25 a year, he said, and Tier 3 — the most serious offenders — will be charged \$100 since they must register four times a year.

There are more than 1,500 registered offenders in the county, and more than 500 are Tier III, he said.

"They created their problem and this shouldn't be an expense left to the taxpayer," Plummer said.

His office spends \$85,000 a year in postage and registry cards sent to convicted sex offenders. He said there are four employees dedicated to keeping track of registered sex offenders and maintaining the registry Web site, costing his office another \$300,000 in salary and benefits.

"It's an enormous amount of money when you look at all the factors," Plummer said.

A state law passed in January 2008 allows sheriffs to charge fees to offenders. An offender can be charged for initial registration, for registering a new residence, and for address verification.

Plummer said he has talking with county Prosecutor Mathias H. Heck Jr. since the beginning of the year to work out language for the fee program.

Butler County Sheriff Richard Jones said Thursday he, too, will start charging sex offenders a registration fee. Hamilton and Warren counties have been charging fees for about a year.

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- Richard Jones Butler County sheriff

Phil Plummer Montgomery County sheriff
