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An examination of the history and effect of American sex offense laws and offender registration

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AN EXAMINATION OF THE HISTORY AND EFFECT OF AMERICAN SEX OFFENSE LAWS AND OFFENDER REGISTRATION.

by

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Abstract

America's Sex Offense statutes and cases are some of the most controversial sections of modern law, both for the extreme sensitivity of their subject matter as well as the scope and application of those laws. This thesis is an analysis and overview of both the objective and subjective issues posed by the current state of those very laws: the subjective portion explored the development of current laws and the diverse attendant legal issues such as over-broadness and excessive or misdirected effect as compared to the Legislative and public intent which directly led to the development of these laws. Additionally a more objective study of their efficacy was conducted through the use of data regarding offense rates by locality. This objective data was procured from both the United States Census and Bureau of Justice statistics, which contained national averages such as the overall violent crime rate, and from the Florida Department of Law Enforcement Statistics and was supplemented with additional data from other academic sources.

It is both the subjective conclusion and the interpretation of objective data that while the rate of sex offenses has lowered in recent decades this effect is a part of the overall trend of reduction in *all* violent offenses, and that the extreme stance of modern sex offense laws have arguably resulted in the net-negative of creating a class of individuals ostracized from all but other sex offenders who are virtually incapable of supporting themselves or at times of even finding legal habitation post-release. With little to no chance of a productive life, there is the strong possibility of recidivism and little incentive to avoid re-offending.

Dedication

For those who stood by me

For the few that thought I was worth teaching, worth saving

For the single person that has always fought for me against all odds

Even when I would not, did not, and wanted it all to end…

It would have a long time ago but for all of you.

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capable of what I am today.

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It is a debt that I can never pay off, only forwards.

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Introduction

In American society sexual or sex-related offenses are considered especially severe, it is not an undue generalization to state that on the whole those committed against children quite possibly considered the most heinous crime an individual may commit. It is not an improper conclusion to state that this very abhorrence has been a direct motivating factor in the development of the current system of laws, regulations, and restrictions pertaining to sex offenses and the perpetrators thereof… or perhaps more rather it is a (if not *the*) motivating factor in the particularly extreme nature of said laws.

In order to understand and explore the issues presented by these laws it is necessary to examine their developmental history. The current state of jurisprudence in this area did not spring forth whole and complete from the federal legislature as Athena from the head of Zeus; it evolved over a great deal of time, in fits and starts, first at the state level and then concurrently with (or at the direction of) interrelating federal legislation. Throughout their many iterations these laws (federal and state) received either direct legal challenges leading to their alteration or were influenced in their development by contemporaneous cases in other jurisdictions, binding or otherwise.

However, before returning to the beginning it will be easier to recognize the parallels and significance of various developments if the reader has in mind where the

law stands today: In current day America there exists a standardized system[1] of public registration and interstate information sharing for all registered sex offenders. Data is collected (most often at the state level) in the processing of offenders and the federal government has established a codified system of standards for publication and interstate information sharing, as well as the proscribed registration schedules for various classes of sex offenders. This system of laws comes primarily from the Adam Walsh Protection Act, signed into law in 2006 by then President George W. Bush, and is also known as the Sex Offender Registration and Notification Act (hereafter SORNA). SORNA was drafted to deal with the morass of diverse state laws, offender classifications, and inconsistent information formats which it superseded.

[1] 42 USC §16911 et seq.

Genesis

The practice of compiling lists of individuals convicted of certain crimes and of compelling them to register their whereabouts with local law enforcement is not a new one; the concept itself began, or at least grew to significance, as early as 1931 in Californian cities. Originally these registries, created to deal with what was at the time considered to be a grave threat to the American public, were not comprised of sex offenders but rather registered those convicted of various criminal acts which were commonly (or at least thought to be) connected with *organized crime*[2] and ostensibly provided law enforcement with a way to essentially ban convicted gangsters from their city. Shortly thereafter the state of California expanded these registrations to include sex offenses, creating in 1947 the first statewide law[3] requiring that anyone convicted of certain crimes be compelled to provide fingerprints and a photograph to the Sheriff's office, as well as a written update on their location within five days of changing residence. Though on the surface this would seem to be an almost perfect parallel to SORNA right out of the gate, in function if not in subject matter, there is one particular and fundamental difference: in contrast to today's laws information which was registered under that system was explicitly forbidden to any members of the public, only a "regularly employed peace or other law enforcement officer" was permitted to inspect the material[4].

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[2]Los Angeles, California, County Ordinance No. 2339 (1993), http://www.solresearch.org/~SOLR/cache/gov/US/loc/CA-LA/19330911-file4788.pdf
[3] Cal. Pen. Code Article IX Ch. 1-8 (1947), http://www.solresearch.org/~SOLR/cache/gov/US/st/CA/legis/code/Penal-1947-sex.pdf
[4] California Penal Code Article IX Ch.5 §290 (1947)

With a focus almost entirely on organized crime at this point rather than sexual offenses the question becomes one of how legislation migrated from the former to the latter. The answer is both predictable and not. Predictably over time the registrable offenses were expanded to sex offenses in addition to those related to organized crime, but in a somewhat surprising move in 1960 the California Supreme Court struck down all of the state's criminal registration laws in *Abbott v. Los Angeles*[5]… *except* for sex offenses. Perhaps having withstood a State Supreme Court ruling these laws were somehow legitimized, or perhaps it was merely an issue of publicity or even sheer happenstance; Whatever the cause the ball had been set rolling and over the next three decades a handful of states, some mindful of the conspicuous exception to the court's actions in *Abbott* and others more broad, would pass laws creating statewide offender registries of some kind or another.

The First Wave

These laws, enacted over the years from 1944-1993, have the notable distinction of being the only offender registries designed and passed without direction or mandate by the federal government. They instead grew organically out of the needs or desires of the states which passed them, and as such are as diverse in character and effect as the states which enacted them.

[5] *Abbott v. Los Angeles* 53 Cal. 2d 674, (Cal. 1960)

As has been stated the progenitor-law of this field was California's 1944 addition to the penal code[6], which was followed within the decade by Arizona in 1951 (later replaced by an 1985 statute). After these two states the next burst of legislation would begin in 1957 with a notable law in Florida requiring all convicted felons to register; though in 1993 a later addition to the state statutes would be made specifically concerning sex offenders. From there Nevada would pass its registry in 1961 with Ohio following suit a mere two years later in 1963. Alabama, being the last state to pass any form of sex offender registration law for 16 years in 1967, would become the bookend of a curious legislative gap until in 1984 at which point within the next decade twenty six more states ranging from Utah to Rhode Island would pass their own offender registries… the majority of them in a mere 6 years. A surprising wave of activity to be sure, particularly in its later years as the pace of legislation rapidly accelerated, but despite this barely more than half of the United States would have created their own registries by the time the federal government stepped in and forced the issue.

[6] California Penal Code Article IX Ch.5 §290 (1947)

Opening the Floodgates

Whatever it was which led to the initially glacial pace of legislation on this matter it soon gave way as a series of highly publicized assaults on children rocked the nation over the following three years. The remaining half of the states of the Union which had not yet created a sex offender registry now had no choice in the matter. They would have to design a registry meeting federally mandated requirements by 1997, the deadline set by the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act[7] of 1994. In the Wetterling Act all states were required to form a registry of sexually violent offenders and those who committed sexual offenses against children, as well as verify the address of registered offenders on an annual basis for ten years and sexually violent offenders on a quarterly basis for life. During the time the unamended Wetterling Act was in effect little was standardized among these registries and beyond the residence verification requirements much of what to do with a registry was left to the discretion of the state in possession of it. Of particular note is that even under this act there was no mandatory publication of offenders or offense data, nor were the classifications of various offenses standardized. At this time such things were still dealt with exclusively at the state or even local level.

Wetterling Amended: Megan's Law

Once again change would be brought by tragedy. The lack of a publication requirement would change when in 1996, a mere two years after the Wetterling Act

[7] 42 USC § 14071 et seq

passed, seven year old Megan Kanka of New Jersey was raped and murdered by a previously convicted sex offender who had been living across the street from her family the entire time. Public outrage and fear at the thought of released sex offenders living anonymously among the general public drove the passing of an amendment to the Wetterling Act named after Megan. The newly amended Wetterling Act, now bearing Megan's Law, would require law enforcement to release information from their local sex offender registries deemed relevant to protecting the public… though as with the Wetterling Act's registries themselves what precisely would be deemed relevant and in what format such information should be released was once again left to the states. By the end of 1996 the last of the states, save only for Massachusetts, finally constructed their own sex offender registries in order to meet the deadline set a mere four years prior by the Wetterling Act. But though the Wetterling Act and Megan's Law amendment bore a great resemblance to the modern standard in many ways, chiefly among them mandatory registration, a rough degree of offender classification, and publicly viewable registries, there was still little true standardization as what exact information was released, in what format it was made available, and even the precise nature of said offender classifications were all left to the discretion of the states [8].

Piecemeal Progress

In short order it likely became apparent to all involved that a lack of communication would be a major loophole in these laws; given the technology of the mid-90s and the disparate standards and protocols of the states someone convicted and registered as a

[8] 42 U.S.C. § 14071 (1996)

sex offender had an all too effective means of evading their infamy simply by moving to another state. Mere months after passing the Megan's Law amendment the federal government would address this problem in what was a radical departure from their previous legislation's deference to the discretion of the states. Up until this point each state had been required to have their own individual sex offender registry, but, by and large they were allowed to design and run those registries as they saw fit; a system which by its very nature included little standardization, and as evinced by the apparent necessity of legislating such a bold solution likely allowed for even less communication and oversight. The United States Government's solution to this problem was the Pam Lychner Sex Offender Tracking and Identification Act of October 1996. Along with the soon to follow Jacob Wetterling Improvements Act of 1997 this back to back burst of federal legislation would form what is possibly the closest analogue to SORNA at the federal level before the actual Adam Walsh act itself.

As part of the Lychner Act's efforts to combat the Wetterling Act's greatest weakness the Attorney General was directed to establish the *National* Sex Offender Registry (NSOR), which would allow the Federal Bureau of Investigation to track sex offenders across the entirety of the United States. The law acted as both a patch and a facilitator; the FBI was empowered to directly handle the registration of sex offenders living in states with insufficient registries and to perform its own address verifications

thereof, disseminate information "necessary to protect the public"[9] to any involved law enforcement officials (federal, state, or local), and most importantly notify relevant federal and state agencies when a given offender moved to another state.

The key pieces of SORNA were beginning to fall into place: Every state had a sex offender registry meeting at least certain minimum functional requirements, data from those registries was published for consumption by the general public, and at this point a national registry curated by the FBI and Attorney General served to facilitate the tracking of offenders across state lines. Still, there was something missing.

That final, vital, piece to the puzzle would be provided by the 1997 Jacob Wetterling Improvements Act. Where the Lychner Act cut broadly across a widespread issue this law would be an act of refinement, a surgical legislative strike of depth and precision. More loopholes were closed such as requiring the relevant offenders to register in states where they worked or attended school (if that was not their state of residence), requiring offenders who moved to re-register under their new state of domicile's laws, and compelling states to put in place procedures for various situations involving non-resident offenders. Additionally, to deal with the ever broadening morbid creativity of the criminal element, States were also given the discretion to register individuals convicted of offenses not specifically included in the original Wetterling Act. They were also given permission to create an agency outside of ordinary law

[9] The Pam Lychner Sex Offender Tracking and Identification Act of 1996, Pub. L. no. 104-236, 110 Stat 3094 (1996). PDF

enforcement to handle their burgeoning responsibilities of notification and registration. Lest it be thought that this legislation was entirely one sided it should be noted that the federal government was not without its additional share of responsibilities as well, it bearing the requirement for the Bureau of Prisons to notify the states of paroled federal offenders and for the Secretary of Defense to ensure the proper registration of those same offenders. But most importantly of all was a single clause, one which would have the most profound effect out of all changes and laws since the original mandate of the Wetterling Act:

> "(A) STATE REPORTING.—State procedures shall ensure that the registration information is promptly made available to a law enforcement agency having jurisdiction where the person expects to reside and entered into the appropriate State records or data system. State procedures shall also ensure that conviction data and fingerprints for persons required to register are promptly transmitted to the Federal Bureau of Investigation." [10]

In less than 70 words the Wetterling Improvements Act ordered every state to communicate data on offenders to other states when an offender changes residence, and to ensure that the data regarding their conviction and a means of identification of every sex offender, in every state, is added to a single unified National Sexual Offender Registry. Though federal law would not explicitly state the requirement for unified communications protocols for another nine years this single clause of the Wetterling Improvements Act constitutes a de facto attempt at implementing what would later become SORNA's primary goal. The requirement to readily share information with fellow states, and proactively with the federal government, would by its very nature create a

[10] 1997 - The Jacob Wetterling Improvements Act of 1997, Pub. L. no. 105-119, 111 Stat 2440. PDF

powerful impetus towards standardization of laws and protocols across the United States.

The Dawn of the Modern Legal Era

Respect for the historical and legal significance of this legislation should not be taken as praise, however, as the Wetterling Improvements Act is not without controversy and brings with it the possible birth of a multitude of hard legal questions which have yet to be satisfactorily answered. The creation of this new system of communication now meant that being branded a sex offender was truly an inescapable scar on one's person, as sure as a scarlet letter, and one which would with the dawn of the information age become a source of ostracism and at times even personal danger wherever they went within the United States. Furthermore the decision to allow victim's advocates and law enforcement representatives to testify as to whether an offender should be considered sexually violent or not, rather than relying exclusively on the empirical testimony of experts in relevant medical and criminal fields, may well have had a profound effect on the disproportionate growth of sex offender registries versus the actual rate of crime as courts were now open to be swayed by impassioned testimony rather than merely informed by empirical statistics and data.

It can be argued that the Wetterling Improvements Act marked the turning point where legislative concern for safety and the efficacy of law enforcement took a back seat in favor of garnering political capital through ever "tougher" and

more public treatment of sex offenders… a strategy which by its very nature necessitated a continual presence of The Predator in the public consciousness even as the overall rate of sexual offenses (and indeed all crime) rapidly plummeted[11]. The legal and in particular constitutional concerns raised by this change of pace will be discussed later in this work along with a number of notable cases regarding sex offender registration laws.

There would be a number of additional acts passed by the federal government from 1997 until SORNA's debut, ranging from federal assistance programs to help states comply with the increasingly complicated mandates through the adoption of the World Wide Web for the publication of sex offender registries all the way to requiring special notice be given to universities (and the students therein) when a registered sex offender enrolled or was hired as faculty. None would have any truly significant effect on the overall character of this area of law, though they would add to the increasingly opaque wall of requirements and mandates, further aggravating the problems caused by a lack of any real standardization among the states who once again had their own ideas of how to best fulfill the very general requirements of the various federal acts passed.

The legal morass that America's sex offender laws had become would be the status quo until, finally, legislation to put everyone on the same page once and for all

[11] Florida Department of Law Enforcement, (n.d.). *Ucr offense statistics* (1971-2010)

was passed in the form of the previously mentioned Adam Walsh Protection Act[12] of 2006. In addition to the (by this time) predictable and always politically popular move of increasing sentences for most sex related crimes SORNA also created and retroactively applied a nationwide uniform set of standards for the classification, registration, and publication of both sex offenders and child abusers. The benefits of this standardization are difficult to overstate; even for the offenders there was a sort of cold boon as at one time it was possible for an arbitrary number of states to have differing registration requirements and classifications for the same individual. Under SORNA however even an offender could at least be sure of their status from one state to the next, providing at least a consistent standing under the law. It would be local law enforcement departments however which would derive the greatest tangible benefit from the change. The new communication protocols and standardized classifications, in tandem with just shy of a decade's (voluntary or not) cooperation with the NSOR, would suddenly give police departments the ability to track and manage offenders in their jurisdictions like never before. Where in the past an out of state offender of a given classification may have only been identifiable by comparing fingerprints with the federal database or slip by entirely, under SORNA the offender's data would (at least in theory) be readily and immediately available in a compatible format and would be immediately comparable to their own local laws and regulations.

[12] 42 U.S.C. § 16911 et seq

Furthermore in a unique twist of the federal government adopting a state invented construct SORNA would include, in what is quite possibly its most constitutionally controversial component, an extension of the long standing state laws concerning civil commitment; the Adam Walsh Protection Act allowed for a federal judge to commit anyone meeting certain criteria[13] to involuntary confinement and treatment in a civil mental health institution, even if the offender in question had completed their original sentence, so long as a judicial review was held every six months if requested by either the federal treatment program or council. The long standing trend of ever harsher and more constitutionally questionable post-release "punishments" had finally reached what may be considered the inevitable conclusion: the ability to simply lock away those considered too abhorrent to be allowed to live in the world and throw away the key.

[13] 42 U.S.C. § 16971

The Elephant in the Room: Legal Challenges

As stated once before SORNA and its precursors were some of the most constitutionally controversial legislative acts outside of those referring to aliens and sedition. Seeing its history laid out thusly allows for the 20/20 of hindsight to be put to healthy use; Controversial aspects of that development now may be addressed with greater academic rigor with respect to issues of liberty and constitutionality than during the midst of the meteoric rise of Sexual Predator Politics.

It was inevitable that such far reaching legislation over the decades would have equally far reaching and significant legal questions for the courts to settle, and indeed the various laws proscribing and regulating sex offender registration were challenged in the courts at both the state and federal level across the decades; sometimes successfully and sometimes not, and often making for persuasive if not always binding precedents. It was in this environment of ever changing and historically ever broadening precedent which SORNA and all its attendant laws and amendments evolved, not in a vacuum. For the purposes of this examination it is best to discuss these legal challenges in chronological order so as to facilitate the comparison between legislative and judicial developments.

As previously mentioned the first wave of federal legislation carried with it the deadline that by 1997 all states must be in compliance with the Wetterling Act or face a

significant reduction in federal aid[14]. Faced with such an ultimatum a flurry of state legislation followed the original Wetterling Act, with fully half of the states drafting their own sex offender legislation shortly after the Wetterling Act was signed into law. As with all sudden and profound changes there were bound to be equally profound repercussions, and repercussions there were, beginning with *Kansas v. Hendricks*[15] in 1997.

Kansas v Hendricks: …and Throw Away the Key

In order to meet the Wetterling Act's mandate Kansas passed the Sexually Violent Predator Act in 1994 which, in addition to meeting the registration requirements of the Wetterling Act, also contained some of the earliest provisions for the civil commitment of "any person who, due to "mental abnormality" or "personality disorder" is likely to engage in "predatory acts of sexual violence"[16]. This is not to be confused with the legal option to commit the mentally *ill* to involuntary treatment, as the SVPA's preamble states: this legislation was explicitly written to deal with "[a] small but extremely dangerous group of sexually violent predators exist who do not have a mental disease or defect that renders them appropriate for involuntary treatment"[17].

Enter Leroy Hendricks, a convicted sex offender with an extensive history of sexually molesting children, having committed numerous instances of the crime from 1960 up until his most recent incarceration in approximately 1972. Hendricks had been

[14] 42 USC § 14071 et seq
[15] *Kansas v. Hendricks* 521 U.S. 346 (1997)
[16] *Kansas v. Hendricks* 521 U.S. 346 (1997), Justice Thomas delivering the majority opinion
[17] Kan. Stat. Ann. §59-29a01 (1994)

in and out of both prison and mental health facilities for some time and had in fact been determined, prior to his final incarceration preceding this case, to be "safe to be at large"[18]. As Hendricks was nearing his release date of his most recent prison sentence in September of 1994 Kansas filed a petition to commit him to a civil treatment facility involuntarily. In response Hendricks challenged the constitutionality of the SVP Act and demanded a trial by jury; a request which the court granted though it refused judgment on the matter of constitutionality. During this trial Hendricks admitted that when "stressed out"[19] he continues to feel the uncontrollable urge to molest children and openly agreed with the state physician's diagnosis that he was not cured of his pedophilia, going so far as to state that "treatment is bullshit". The Jury evidently agreed and found him to be a sexually violent predator, while the court determined pedophilia to be a "mental abnormality" and proceeded with plans for commitment. On appeal Hendricks reiterated his challenge that the SVPA was a violation of his right to Due Process and protection from Double Jeopardy, as well as constituting an *Ex Post Facto* law.

The Kansas state Supreme Court granted certiorari, accepting that appeal, and found in favor of Hendricks. The Kansas Supreme Court found that the standard of a "mental abnormality" as opposed to a "mental illness" failed to satisfy Substantive Due Process in light of the penalty of involuntary civil commitment, but declined to address the issues of *Ex Post Facto* and double jeopardy. Unwilling to accept this outcome

[18]*Kansas v. Hendricks* 521 U.S. 346 (1997), Writ of Certiorari
[19]*Kansas v. Hendricks* 521 U.S. 346 (1997), Writ of Certiorari

Kansas appealed to the United States Supreme Court , and was granted certiorari as *Kansas v. Hendricks*[20]. The United States Supreme Court was not as amenable to Hendricks' arguments and in what would become the future precedent for involuntary civil commitment in the United States despite being split 5-4 proceeded to eviscerate Hendricks' arguments. On the grounds of civil commitment the court flatly stated that a defendant's liberty interests "may be overridden even in the civil context"[21] and proceeded to declare that the SVPA clearly set forth the necessary "procedures and evidentiary standards" such that it does not constitute a violation of Hendricks' Substantive Due Process rights. The argument of a "mental illness" versus a "mental abnormality" was openly dismissed as a matter of clerical preference as "The legislature is therefore not required to use the specific term "mental illness" and is free to adopt any similar term."

Most controversially of all though is the United States Supreme Court's opinion with respect to Hendricks' cross petition. Hendricks claimed that civil commitment constitutes a "newly enacted punishment… predicated upon past conduct for which he has already been convicted and forced to serve a prison sentence". The Court was "unpersuaded" by this claim and stated "Nothing on the face of the statute" even suggested that the SVPA's civil commitment program was designed for any purpose beyond protecting the public from harm rather than criminal law's primary objectives of "retribution or deterrence". The Court continued to examine a number of factors

[20] *Kansas v. Hendricks* 521 U.S. 346 (1997)
[21] *Kansas v. Hendricks* 521 U.S. 346 (1997)

differentiating Kansas' civil commitment program from a criminal proceeding, such as a lack of a scienter, criminal responsibility being unnecessary for commitment, and the assumed lack of any deterrent effect as it is presumed that those with a "mental abnormality" will not be deterred by the threat of confinement. The Court furthermore rejected the argument that the indefinite duration of commitment was evidence of a punitive nature, finding instead that "the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others" and that the consistent judicial reexamination of the necessity of that confinement satisfies Due Process; finding that safeguard reasonably allows for confinement so long as someone is a "menace to the health and safety of others". Even Hendricks' most convincing argument, that combined with the utter lack of legitimate attempts at treatment the totality of the circumstances proved that commitment was nothing more than a disguised prison sentence, was rejected with the argument that "incapacitation may be a legitimate end of the civil law" where even those with untreatable conditions or for whom treatment is "not the state's overriding concern" are concerned.

Hendricks may thus be summed as an individual claiming that what looks like a criminal case, sounds like a criminal case, has an almost indistinguishable end result from a criminal case, and possesses none of the alleged characteristics of a civil

commitment for one's own and the public's "greater good"[22] *must* be a criminal case versus the rebutting argument that civil commitment is not a punitive measure or criminal in nature because… it is not a punitive measure or criminal in nature. That virtually tautological argument was also the basis for rejecting Hendricks' complaint that the SVPA constituted a violation of his protection against Double Jeopardy and Ex Post Facto; such complaints are inherently related to a criminal proceeding or punitive measures and simply do not apply to a civil action which by definition can not be a second trial or a punitive measure.

Kansas v. Crane: Token Safeguards

Following quickly on the heels of *Hendricks* from the same state was *Kansas v. Crane*[23]. Unlike the preceding case *Crane* did not make a sweeping challenge to the SVPA itself but rather the case hinged on a point of interpretation regarding the necessary attributes of an offender in order to qualify for involuntary commitment. The case began when Michael Crane pleaded guilty to aggravated sexual battery and (following his plea) the state entered a request that he be evaluated for possible commitment under the SVPA. With the SVPA firmly vindicated by the Supreme Court of the United States' decision in *Hendricks* the question at this point was one of qualification; Did Michael Crane meet the standard of a "mental abnormality" or "personality disorder" possessing him of either an "emotional or volitional capacity which predisposes the person to commit sexually violent offenses" or "which makes the

[22] A particularly notable point, as more individuals have died of natural causes since the program's inception than have been released according to Larned superintendant Chris Burke in testimony given to the Kansas House Social Services Budget Committee on January 26 of 2011.
[23] *Kansas v. Crane,* 534 U.S. 407 (2002)

person likely to engage in repeat acts of sexual violence."[24] In the state's opinion[25] Crane's exhibitionism in and of itself did not qualify under the SVPA for commitment, but in combination with his antisocial personality disorder showed a pattern of "increasing frequency of incidents involving [respondent], increasing intensity of the incidents, [respondent's] increasing disregard for the rights of others, and… increasing daring and aggressiveness." which was found to be a combination of "willful and unlawful" behavior qualifying Crane for commitment under the SVPA even though his disorders were *not* found to negatively affect his "volitional control" in a manner significant enough to prevent him from "[controlling] his dangerous behavior". Following this evaluation Crane was ordered to be committed by the Kansas District Court, a decision which Crane naturally appealed. As in *Hendricks* the Kansas Supreme Court erred in favor of the defendant, interpreting the decision of *Hendricks* to require finding that a defendant has an inability to control the dangerous behavior in question *even* if they have an emotional or personality disorder rather than one of volitional control.

Once again Kansas appealed to the United States Supreme Court, which granted certiorari, and settled the matter. Unlike *Hendricks* however this time the United States Supreme Court handed down a decision which was neither entirely in favor of Kansas' attempts at commitment nor entirely against Crane. Being a much narrower case, concerning itself almost solely with the question of self-control (or rather a lack thereof justifying commitment), the decision was likewise narrower and at the same time

[24] Kan. Stat. Ann. §§59-29a02(a), (b) (2000 Cum. Supp.)
[25] In re Crane, 269 Kan. 578, 579, 7 P. 3d 285, 287 (2000)

more refined. The Court did agree with Kansas that *Hendricks* did not require finding an individual to have an *absolute* inability to control their actions before committing them under the SVPA, clarifying that the standard in *Hendricks* was that an individual finds it "*difficult*, if not impossible, for the [dangerous] person to control his dangerous behavior"[26], a significant distinction as it is plainly evident that even the most disturbed of individuals retain at least some ability to control their actions. At the same time the Supreme Court also stated that a lack of any determination regarding an offender's self-control is in plain violation of the standard set forth in *Hendricks* which the Court felt emphasized the constitutional significance of properly distinguishing those offenders most suited to commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings." In its decision in *Crane* the court pointed out that the ambiguity of this standard was not an oversight, but a deliberate attempt to provide only a more general framework for the topic at hand as constitutional safeguards with relation to mental illness "are not always best enforced through precise bright-line rules." because of the ever evolving nature of psychiatry as well as the discretion which the states have in enumerating what precisely constitutes a given mental abnormality or illness within their jurisdiction. In summation of their opinion the Supreme Court of the United States felt it most proper to point out that there is inherent overlap between volitional, cognitive, and emotional abnormalities and that in "ordinary English" individuals with these families of disorders are “unable to control their dangerousness” and likewise for constitutional purposes it is unnecessary to distinguish

[26] *Kansas v. Hendricks,* 521 U.S. 346

between them so long as an examination is made and that standard of at least substantially uncontrollable dangerousness is met. Having clarified the requirements of due process and the new standard for the controllability of dangerous behaviors the case was officially found in favor of Kansas with regards to Crane in particular and remanded for further proceedings consistent with the Court's opinion.

Smith v. Doe: Stirrings of Dissent

The next case of note is *Smith v. Doe*[27], which continued the line of *Ex Post Facto* challenges to sex offender registration laws. The case began in Alaska as two John Does challenged the retroactive nature of Alaska's sex offender registration law, which required *all* sex offenders who entered the state to register with local law enforcement or the state Department of Corrections within one day of entering Alaska. John Doe I and II, who had been convicted of sexually abusing minors before the passage of the Alaska Sex Offender Registration Act (ASORA), filed suit on grounds that applying the registration requirement retroactively was a punitive measure in violation of their constitutional protections[28] and seeking relief from the application of that act. Similar to both of the cases from Kansas previously discussed the Does were first ruled against and then the appellate court found in their favor.

[27] *Smith v. Doe,* 538 U.S. 84 (2003)
[28] U.S. Const. art. I, § 10

The United States Supreme Court accepted the case in 2001 when Alaska appealed the Circuit Court's decision that the act was by nature punitive and therefore in violation of *Ex Post Facto* restrictions. Justice Kennedy delivered the majority opinion in 2003 in which, for the first time, the Court directly asked the question of whether a sex offender registration program was in violation of constitutional prohibitions on *Ex Post Facto* laws rather than sidestepping all argument altogether through taking as a given that the law in question was civil in nature. To answer this question the Court decided to follow a multi-pronged analysis of the law, asking whether the act in question was initially punitive in nature (thus settling the matter immediately) or if it instead intended to create civil proceedings of a regulatory nature. If the latter was found to be the case a second step was to be taken, analyzing whether the act was in actuality "so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[29]

In answer to that first question the Court, despite being willing to discuss the issue now, still followed its previous logic in the two cases from Kansas; essentially, starting with a civil nature being a foregone conclusion and from there setting the bar for overcoming this presumption to be so high that "'only the clearest proof ' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."[30] Following this standard of deference to legislative intent the Court naturally found it most expedient to cite directly the Alaskan Legislature's explicit

[29] *Smith v. Doe,* 538 U.S. 84 (2003), Justice Kennedy quoting 448 U. S. 242 (1980)
[30] *Smith v. Doe,* 538 U.S. 84 (2003), Justice Kennedy quoting 522 U. S. 93 (1997) in turn quoting 448 U. S. 242 (1980)

statement of intent in ASORA to "[protect] the public from sex offenders"[31] by the "release of certain information… to public agencies and the general public". With this legislative intent being so expressly stated the Court returned to its opinion in *Hendricks*, finding in this case as it did previously the "imposition of restrictive measures"[32] to be the "legitimate *nonpunitive* governmental objective" (emphasis added) of "a civil ... scheme designed to protect the public from harm".

Previous to this point it has been commented that the Court's actions and rationale may show an underlying bias in favor of sex offender registration, it is at this point that bias is demonstrated openly as the Court blatantly engages in an act of doublethink, citing at once *Hendricks* as a binding precedent and yet at the same time directly contradicting that precedent when it proves inconvenient in the current case: Where before the Court held that it was a virtual certainty that the "objective to create a civil proceeding is evidenced by its placement of the [SVPR] within [Kansas'] probate code, instead of the criminal code"[33] the Court, now reading an act held within a state's criminal code in *Smith v. Doe*, reversed its position and argued that "The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one."[34]. It is at once the position of the Supreme Court of the United States that the placement of an offender registration act within the civil code of a state is sufficient

[31] 1994 Alaska Sess. Laws ch. 41, §1
[32] *Kansas v. Hendricks,* 521 U.S. 346
[33] *Kansas v. Hendricks,* 521 U.S. 346
[34] *Smith v. Doe,* 538 U.S. 84 (2003)

evidence that said act is civil in nature, and that the placement of an offender registration act within the criminal code of another state is immaterial to the act's nature.

With the issue of legislative classification thus settled the Court continued on to answer the question of whether or not, as the Does alleged, ASORA was still in *effect* a punitive measure despite professing to be a mere civil regulatory scheme. To open this analysis the Court referred first to a test of seven factors from *Kennedy v. Mendoza-Martinez*[35]; Specifically the five factors of whether the topic of examination "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose"[36]. The majority opinion, which would meet bitter disagreement from Justice Ginsburg and Stevens' dissents, examined each factor in turn:

In regard to the history and traditions of punishment, particularly relevant as the Does alleged ASORA "resemble[d] shaming punishments of the colonial period", the Court felt that "Any initial resemblance to early punishments is, however, misleading." It was the majority's argument that the "dissemination of accurate information about a criminal record, most of which is already public" is not analogous to the punishments of colonial times as it does not "[stage] a direct confrontation between the offender and the public" nor qualifies as punishment as it is in "furtherance of a legitimate governmental

[35] *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963)
[36] *Smith v. Doe, 538* U.S. 84 (2003)

objective". The argument at its core was that the State did not intentionally produce publicity and stigma as "an integral part of [ASORA's] objective" and that any humiliation or ostracism was a "collateral consequence".

An astute observer will at this point notice a pattern of growing polarization with regard to registered sex offenders… a schism between the opinions of those who find themselves questioning the efficacy and constitutionality of the increasingly harsh and public measures and those who display a growing callousness and utter disregard for, or perhaps disconnection from, the consequences of registration. The latter, being the majority in this case, argued that the utter ostracism, loss of any real employment prospects, and constant (wholly justified) fear of vigilante attacks was a mere "collateral consequence" not because it was truly an unpredictable byproduct but because the State did not *intentionally* seek to provoke these reactions as their primary focus with ASORA; a position analogous to the teacher who punishes an entire class specifically for the actions of a single student and later proclaims ignorance when that same student is violently attacked in revenge.

Continuing in the *Mendoza-Martinez* analysis the next factor examined by the Court was the issue of whether or not ASORA subjected the Does to an "affirmative disability or restraint."[37] As the process of registration is obviously not an act of incarceration there is unarguably no issue of affirmative restraint. However, the Court

[37] *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963)

also felt that ASORA's obligations are less harsh or restrictive than other legislative acts which debar individuals from a given occupation, and that furthermore "The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." Once again the majority opinion's interpretation was severely disputed in a dissenting opinion from Justices Ginsburg and Stevens who flatly disagreed, stating respectively "Beyond doubt, the Act involves an 'affirmative disability or restraint.' 372 U. S., at 168" and "The statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply". Justice Stevens additionally made note of the true significance of the burden placed on registrants under ASORA: An applicable offender was required to provide (as listed in Justice Stevens dissent) "his address, his place of employment, the address of his employer, the license plate number and make and model of any car to which he has access, a current photo, identifying features, and medical treatment" at least once a year for 15 years and up to four times a year for life; nor may an offender shave, color their hair, change employers, or borrow a car without notifying the authorities. And in all cases an offender is given a *single working day* to provide updated information to the authorities. Thus while the majority is indeed accurate in saying that offenders under ASORA are "free to change jobs or residences", it is once again disingenuously ignoring the actuality of the situation in the same sense as suggesting that a prisoner within a minefield is free to simply walk away; While it is technically possible in that it is not explicitly forbidden, it is clear to any observer that the circumstances are such as to make such an action as arduous and trying as possible in

order to motivate the supposedly free individual to *voluntarily* refrain from exercising that same alleged freedom.

The third *Mendoza-Martinez* factor examined was whether the act "promotes the traditional aims of punishment"[38] and while the State of Kansas did agree that registration provides some manner of deterrent effect it is obvious on its face that virtually any non-punitive regulatory program must inherently have some ability to deter or be left utterly incapable of meaningful function. More arguable is the Does' argument that since registration times are connected to the offense committed and not to actual danger posed to the public[39] the act is retributive in nature. The Court did not find this convincing however and claimed that the length of the reporting requirement was "reasonably related" to the possibility of recidivism, a concern which will be addressed later in this work.

Next the Court examined what it felt to be the "most important"[40] factor: whether ASORA could be rationally connected to a legitimate nonpunitive purpose. The Supreme Court of the United States accepted that it had already been established by the Court of Appeals that the matter of public safety, so served by notifying the public of the "risk of sex offenders in their community"[41], was a legitimate and nonpunitive goal

[38] *Smith v. Doe,* 538 U.S. 84 (2003)
[39] Alaska Stat. §12.63.020(a)(1) (2000)
[40] *Smith v. Doe,* 538 U.S. 84 (2003) citing to 518 U.S. 267 (1996)
[41] *John Doe I, Jane Doe, and John Doe Ii, Plaintiffs-appellants, v. Ronald O. Otte and Bruce M. Amended Botelho,* 259 F.3d 979 (9th Cir. 2001)

and indeed the Does themselves agreed that purpose was "valid, and rational."[42] Where the Does disagreed with ASORA on this point was whether or not it had a necessary regulatory connection to that legitimate purpose, as the Does felt that the Act was not "narrowly drawn to accomplish the stated purpose."[43] The Court disagreed on this matter, finding that the Act did not require a "close or perfect fit" to its nonpunitive aims in order not to be considered a "sham or mere pretext."[44]

The final *Mendoza-Martinez* factor examined, and fundamental to the issue of whether or not the Act was punitive in actuality if not in name, was whether or not the Act was "excessive in relation to its regulatory purpose"[45]. The Ninth Circuit Court of Appeals was significantly motivated to decide in favor of the Does by two factors: that ASORA applies to all offenders regardless of the danger they pose in the future and that there are no limits or restrictions on accessing the information offenders report. The United States Supreme Court on the other hand was unconvinced, stating only that it found "Neither argument… persuasive."[46]

Coming to the end of the *Mendoza-Martinez* factors the Court argued that the State of Alaska was within its right to legislate with regard to sex offenders as a class, as the *Ex Post Facto* clause does not "preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular

[42] *Smith v. Doe,* 538 U.S. 84 (2003) citing Brief for Respondents
[43] *Smith v. Doe,* 538 U.S. 84 (2003) citing Brief for Respondents
[44] *Kansas v. Hendricks,* 521 U. S. 346 (1996) (Kennedy, J., concurring)
[45] *Smith v. Doe,* 538 U.S. 84 (2003)
[46] *Smith v. Doe,* 538 U.S. 84 (2003)

regulatory consequences."[47] Furthermore the Court buttressed the legitimacy of classifying sex offenders as a class to be inherently dangerous quoting a previous case which characterized the risk of recidivism as "frightening and high" as well as claiming that "[sex offenders] are much more likely than any other type of offender to be rearrested for a new rape or sexual assault"[48], basing these claims on crime statistics from 1997.

Concluding the majority opinion the Court answered one last concern regarding the registration mandate's lack of dangerousness assessments in light of the *Hendricks* decision. It was the Court's opinion that the magnitude of *Hendricks*' restraint on an individual is what required an individual finding of dangerousness, whereas the "minor condition of registration"[49] may forego individual assessments in lieu of allowing the public to make that assessment on a private basis using the published information. Arguments regarding the breadth of the internet's reach also fell short in as it was argued that individuals must by the nature of the internet *choose* to visit a website and seek out that same published information. ASORA was admitted to be less than ideal, but as Justice Kennedy stated in closing the question before the Court was not whether the Alaskan State Legislature had "made the best choice possible" but whether or not ASORA was "reasonable in light of the nonpunitive objective", and the answer

[47] *Smith v. Doe,* 538 U.S. 84 (2003)
[48] *Mckune v. Lile,* 536 U. S. 24, 34 (2002), itself citing U. S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U. S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)
[49] *Smith v. Doe,* 538 U.S. 84 (2003)

according to the majority of the 6-3 split was Yes: "The Act is nonpunitive, and its retroactive application does not violate the Ex Post Facto Clause".

Smith v. Doe marked a turning point in sex offender cases, not just for answering the *Ex Post Facto* question directly for the first time but also for being the first case in which dissenting opinions begin to openly refer to these laws as punitive and pay more than lip service to the burden they place on an offender. Most notably of these is Justice Stevens' landmark dissent in which he states:

> "It is also clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals. Unlike any of the cases that the Court has cited, a criminal conviction under these statutes provides both a sufficient and a necessary condition for the sanction."

As was just discussed the majority opinion went to extreme lengths to find a means, no matter how tenuous or contrived, to find ways to justify these laws in light of their criminal appearance going so far throughout various cases as to tautologically claim a law is civil because it is civil[50]. In this landmark dissent Justice Stevens plays the role of the child pointing out that the emperor is not in fact wearing any clothes, openly and fervently pointing out that no matter how many logical fallacies or contrived constructs of language are used to hold up an obviously punitive measure as regulatory or civil somehow, when a law has every characteristic of a criminal punishment it is not

[50] See analysis of *Hendricks* on page 18

sufficient to merely state that it is a civil matter by bare assertion. Justice Stevens furthermore refused to downplay or brush aside the profound impact which registration has on the lives of offenders, stating ASORA "[imposes] significant affirmative obligations and a severe stigma on every person to whom [it applies]". This dissent presents one of the harshest and to date one of very few open criticisms to the concept of a public sex offender registry.

Justice Ginsburg (joined by Justice Breyer) also dissented with equal vehemence, stating the act imposed "onerous and intrusive obligations on convicted sex offenders" and "[exposed] registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism."[51] Additionally Justice Ginsburg did not follow the majority on the reasonability of considering sex offenders as a class to be dangerous by default and felt the "touchstone" which triggered the act being solely a past crime and not current dangerousness to be evidence of the act's penal nature. Justice Ginsburg's opinion on class versus individual dangerousness would also be a key factor in finding the act to be excessive, which she felt to be where the act ultimately crossed from nonpunitive to openly penal. Proving that point she argued that the act's reporting requirements were in and of themselves "exorbitant" before anything else was even considered, and most significantly of all in her opinion was the absolute lack of any possibility for rehabilitation under the law; once so branded

[51] *Smith v. Doe,* 538 U.S. 84 (2003) (Ginsburg, J., Dissenting)

a sex offender would be subject to "inescapable humiliation" without the chance of ever shortening or being released from their registration requirements.

At the same time as *Smith v. Doe* the United States Supreme Court was also hearing *Connecticut Dept. of Public Safety v. Doe*[52], a case regarding the Connecticut Department of Public Safety's website which provided data on registered sex offenders. A John Doe challenged the law in federal court claiming that the law behind the Connecticut Department of Public Safety's website (and information collections for said website) was a violation of his fourteenth amendment right to Due Process. The District Court of Appeals decided in the Doe's favor on the grounds that hearings were not provided prior to public disclosure, but the state appealed and the United States Supreme Court accepted the case.

The United States Supreme Court decided unanimously that "due process does not require the opportunity to prove a fact that is not material to the state's statutory scheme." and that even a defamatory injury "does not constitute the deprivation of a liberty interest."[53] With this decision arguments at the federal level regarding a public sex offender registry were effectively silenced. The Supreme Court had ruled that such registries were non-punitive civil measures, not subject to the prohibition of *Ex Post Facto* laws, that registration was not a violation of due process even without a hearing

[52] *Connecticut Dept. of Public Safety v. Doe,* 538 U.S. 1 (2003)
[53] as held in *Paul* v. *Davis,* 424 U. S. 693 (1976)

before publication, and that the damage to a registered offender's reputation did not constitute a loss of a liberty interest.

The only aspect of the modern system of sex offender legislation not yet challenged was brought into existence in 2006 with the passing of the Adam Walsh Act: Whether the federal government could order the continued incarceration of a registered sex offender beyond the term of their actual prison sentence through civil commitment and if so in what way. The inevitable challenge would be brought in 2010 by *United States v. Comstock*[54].

In *United States v. Comstock*[55] then attorney general Alberto Gonzales certified that Graydon Comstock was a "sexually dangerous person" six days before the conclusion of Comstock's prison sentence. Under the terms of the Adam Walsh Act this gave the federal government the ability to commit Comstock to a civil institution, a power which was challenged by Comstock on the grounds that it fell outside of the Enumerated Powers of Congress. The lower courts agreed with Comstock's challenge and ruled the law which Gonzales was applying as unconstitutional, and the federal government appealed. The United States Supreme Court accepted the case and, limiting their decision to the issue of Congressional Authority, ruled 7-2 that under the Necessary and Proper Clause Congress had the authority to enact the provisions

[54] *United States v. Comstock,* 560 U.S. ___ (2010)
[55] *United States v. Comstock,* 560 U.S. ___ (2010)

challenged. Justice Breyer delivered the opinion of the Court and laid out "five considerations" by which the law was constitutional:

> First, the Necessary and Proper Clause grants Congress broad power to enact laws that are "reasonably related" to executing the other enumerated powers. Second, the statute at issue "constitutes a modest addition" to related statutes that have existed for many decades. Third, the statute in question reasonably extends longstanding policy. Fourth, the statute properly accounts for state interests, by ending the federal government's role "with respect to an individual covered by the statute" whenever a state requests. Fifth, the statute is narrowly tailored to only address the legitimate federal interest.

The five considerations are the circumstances and context of the Adam Walsh Act which altogether satisfy a nexus of valid Congressional authority. When the five considerations are taken individually their interplay in this nexus can be examined through its component parts: The first consideration, that of a respected use of the Necessary and Proper Clause, is justified by the nature of the Adam Walsh Act as being primarily a system of standards for states to tailor their already existing laws to. This nature also satisfies the second consideration that the Adam Walsh Act composes a "modest addition" to various related statutes which have existed for decades, as well as the third consideration that the specific statute in question is merely the logical continuance of a "longstanding policy"; a policy taken directly from existing state level laws and which had come before the United States Supreme Court previously[56].

[56] *Hendricks* and *Crane* most notably

The remaining two considerations are born of another line of logic relating to the proper relation between the federal government and the states. In the fourth consideration the federal government has in place procedures to effectively "hand off" any case to a state with proper jurisdiction; effectively federal involvement is voluntary and only at the sufferance of the states. Finally in the fifth consideration the statute is in and of itself found by the United States Supreme Court to be both "narrowly tailored" and dealing with an issue in which there is a "legitimate federal interest".

Outliers: Unique Circumstances

Firstly, there is the matter of a significant legal outlier: Missouri. Of all states Missouri has produced some of the most unique trials and decisions with regards to this topic, due in large part to a constitutional provision which states that "no *Ex Post Facto* law… or [law] retrospective in its operation… can be enacted." [57] Bolstered by this surprisingly rare constitutional prohibition on *Ex Post Facto* legislation a number of sex offenders have made various challenges over the years to everything from registration itself to a statute regarding Halloween activities[58]. Perhaps more extraordinary than the breadth and number of legal challenges brought in this state is the rate of success which its residents enjoy, many of these challenges have been successful even if only to the extent that the courts render a decision applicable only to a given individual plaintiff[59].

[57] M.O. Const. Article 1 § 13
[58] 589.426 RSmo 2008
[59] *State of Missouri v. Raynor,* 301 S.W.3d 56 (2010) notably

The most significant of these challenges arises as a direct challenge to the Missouri Megan's Law. In the case which would eventually become *Doe v. Phillips*[60] when it reached the Missouri Supreme Court a number of male and female resident sex offenders (but none adjudicated Sexually Violent Predators) alleged that, in the words of Justice Laura Stith, "while it may be proper to apply the registration and notification requirements to SVPs and other violent sexual offenders, it is unconstitutional to apply it to relatively minor offenders such as [the plaintiffs]". In addition to these grounds the Does, those whose standing had not been rendered moot when a bill altering Missouri's laws to expand the categorization of SVPs and alter which offenses are permitted to petition for removal[61] , buttressed their argument with a number of other significant complaints as well, even going so far as to cite the United States Constitution's prohibition against state bills of attainder[62]. The primary thrust of these additional grounds was one of Due Process, Missouri's Megan's Law was argued to be a violation of the Does' substantive due process rights, specifically their personal choices and freedoms once released from custody as well as their right to privacy and freedom from a particularly abhorrent stigma. The Does, or rather a particularly inventive member of their legal counsel, also proffered the curious interpretation of Equal Protection: They argued their right to such was violated by the indiscriminate application of the Law's registration requirements and personal restrictions to both significant and violent

[60] *Doe v. Phillips,* 194 S.W.3d 837 (Mo. banc 2006)
[61] H.B. 1698, 93rd Gen. Assem., 2nd Reg. Sess. (Mo.2006)
[62] U.S. Const. art. I, § 10, cl. 1.

offenders, and those who either pled out to lesser crimes or otherwise had attached to them no proof of future dangerousness.

The Missouri Supreme Court, though bound by both the federal and state constitutions, nevertheless found grounds on which to deny the Does' arguments of Equal Protection, Due Process, and *Ex Post Facto* effect through the ruling of *State v. Rushing*[63] where a previous sitting of the Court believed analysis of the federal constitution to be "strongly persuasive" to the interpretation of comparable sections of the state's constitution, finding a persuasive reason not to expand upon Missouri's constitutional equivalent to the federal Fourth Amendment. The *Phillips* court, respecting this precedent, thus found the Does to have provided no persuasive reason to interpret Missouri's constitutional provisions with greater latitude than those "nearly identical" in the federal constitution[64].

In deciding *Doe v. Phillips* the Supreme Court of Missouri ruled that it was unconstitutional to place on the registry anyone convicted of (or who had pleaded guilty to) a registrable offense prior to January 1st 1995 and remanded the case back to the lower Jackson County Circuit Court… which promptly ordered the removal of anyone placed on the registry retroactively. This resulted in two immediate reactions: First a defendant (James Keathley) appealed back to the Missouri Supreme Court and second the Missouri state legislature attempted to pass a constitutional amendment specifically

[63] *State v. Rushing,* 935 S.W.2d 30 (Mo. banc 1996)
[64] *Doe v. Phillips,*194 S.W.3d 837 (Mo. banc 2006)

exempting sex offender laws from the ban on retrospective laws. The Legislature's attempts failed two sessions in a row in 2007 and 2008 due to the Missouri House of Representatives failing to pass the bill as the Senate had, while Keathley's appeal was accepted by the Missouri Supreme Court and the case (*Doe v. Keathley* now) was heard in 2009. In this decision, occurring after the Adam Walsh Act had been signed into law, it was ruled that though Missouri's constitution itself exempt certain offenders from registration the injunction of *Doe v. Phillips* could not exempt sex offenders from that same requirement under the separate federal obligation[65] imposed by SORNA. Now held under a federal obligation outside of the purview of the Missouri constitution all sex offenders who had previously been exempt by the *Doe v. Phillips* injunction were required to register once again.

This requirement would in 2010 be overturned in part but not in whole when a Cole County Circuit Judge ruled that those who had *pleaded* guilty to a sex offense prior to the original Missouri registration law were not required to register themselves as the applicable federal laws in *Keathley* did not apply in their cases, carving a narrow exception to the *Keathley* ruling. As stated previously the nature of Missouri's unique constitutional provisions provide a rare legal climate in which challenges to registration or other post-release restrictions have unusually persuasive constitutional grounds on which to stand. As such there have been numerous additional cases in Missouri related to restrictions on residence or other activities which resulted in relief only for the

[65] 42 U.S.C. § 16913

individual plaintiff in the case; these cases are not particularly significant except for their success in and of itself and being so narrowly construed as to literally apply to one individual are unlikely to be especially persuasive precedents[66], therefore beyond this degree they merit no further discussion here.

One other state-limited case of note, especially as it was decided concurrently with the opening arguments of *Kansas v. Crane*, is Hawaii's *State v. Bani*[67] of 2001; in which the Hawaii State Supreme Court ruled that the state's sex offender registry violated the Due Process clause of Hawaii's state constitution as it required "public notification of (the potential registrant's) status as a convicted sex offender without notice, an opportunity to be heard, or any preliminary determination of whether and to what extent (he) actually represents a danger to society." *Bani* also had the unique notability of deciding in favor of a challenge that a sex offense law was in violation of the right to Due Process at the same time that arguments were being heard regarding a similar issue of Due Process in a United States Supreme Court case[68], *Kansas v. Crane*, as previously discussed.

While the status of sex offender legislation at the state level was in all likelihood entrenched with the decisions of *Crane* and *Smith v. Doe* it was likely that the decision in *Comstock*, finding the most comprehensive and far reaching federal legislation to be

[66] *F.R. v. St. Charles County Sheriff's Department* and *state of Missouri v. Charles A. Raynor* as examples
[67] *State v. Bani,* 36 P.3d 1255 (Haw. 2001)
[68] *Crane*, discussed on page 6

a valid exercise of congressional authority, has secured the future of sex offender legislation in the nation. Short of a significant legislative reversal or a radical alteration of the United States Supreme Court's judicial makeup it is unlikely that any further challenges to the primary aspects of the modern SORNA system, i.e. registration, publication of personal information, and civil commitment, would be successful.

Objective Analysis

As previously stated it is a common fact that for some time politicians and other involved parties have claimed the progressive iterations of sex offender legislation, particularly the increasingly penal nature and growing harshness of the law, has been the direct root of any successes in lowering the overall rate of sex crimes and colloquially making the nation "safer" in that respect. It is also a common fact that, despite the previous claim, the political rhetoric on the subject (as well as the position of the mainstream media) has been one of Fear, Uncertainty, and Doubt. Threats and dangerous predators lurk around every corner waiting to snatch any child within and commit unspeakable crimes. Spending even a small amount of time listening to virtually any major news network and it becomes immediately apparent that this imagery and rhetoric, the boogeyman of The Sexual Predator, permeates the public consciousness and likely provides a substantial justification for the cycle of continually harsher sex offender legislation.

A firm judicial or legislative standing is not a license to simply accept the status quo and take all arguments in support of it for granted, particularly when confronted with an issue this sensitive and prone to inflammatory rhetoric and politicization. It is a civil, moral, and academic imperative to examine the facts and objectively determine the efficacy of the status quo in light of its supposed goals and whether the evidence supports the continued political claims with regard to these laws. In order to avoid numerous experimental difficulties, and in keeping with the nature of this work as well as decades old wisdom[69], the methodology of this analysis is as follows.

Methodology

Accepted as given: First, the political rhetoric regarding sex offender registration and the accompanying restrictions are commonplace in the general media and in general may be summed up as stating that the various iterations of registration laws over the years have directly resulted in increased "safety", which will be translated as decreased incidences of sexual crimes as defined by the Uniform Crime Reporting system. Second, as the federal and state governments have an inherent motivation to keep accurate data regarding criminal offenses in general and sexual offenses in particular, that same data will be considered to be reliable by default despite counting Forcible Rape only against women. The National Crime Victimization Survey, being extrapolated from a sample size rather than directly reported national data, have been foregone in favor of the Uniform Crime Report.

[69] "If you can't explain it simply, you don't understand it well enough" - Albert Einstein

Within that framework, and thanks to the abundance of statistical data from 1971 until 2009, it is a simple matter to compare the significant dates of the major sex offender registration laws such as the 1997 compliance deadline of the original Wetterling Act against the real number and population adjusted rate of sexual offenses both at the national level and within the State of Florida. For control purposes the overall rate of violent crimes not falling under the purview of these acts will also be considered. On the following pages are three tables of data which collectively show the rates of violent crime and sex crimes at the national level and within the State of Florida.

Table 1: Estimated crime in United States-Total

Year	Population	Violent crime total	Murder and nonnegligent Manslaughter	Forcible rape	Aggravated assault	Violent Crime rate	Murder and nonnegligent manslaughter rate	Forcible rape rate	Aggravated assault rate
1971	206,212,000.0	816,500.0	17,780.0	42,260.0	368,760.0	396.0	8.6	20.5	178.8
1972	208,230,000.0	834,900.0	18,670.0	46,850.0	393,090.0	401.0	9.0	22.5	188.8
1973	209,851,000.0	875,910.0	19,640.0	51,400.0	420,650.0	417.4	9.4	24.5	200.5
1974	211,392,000.0	974,720.0	20,710.0	55,400.0	456,210.0	461.1	9.8	26.2	215.8
1975	213,124,000.0	1,039,710.0	20,510.0	56,090.0	492,620.0	487.8	9.6	26.3	231.1
1976	214,659,000.0	1,004,210.0	18,780.0	57,080.0	500,530.0	467.8	8.7	26.6	233.2
1977	216,332,000.0	1,029,580.0	19,120.0	63,500.0	534,350.0	475.9	8.8	29.4	247.0
1978	218,059,000.0	1,085,550.0	19,560.0	67,610.0	571,460.0	497.8	9.0	31.0	262.1
1979	220,099,000.0	1,208,030.0	21,460.0	76,390.0	629,480.0	548.9	9.8	34.7	286.0
1980	225,349,264.0	1,344,520.0	23,040.0	82,990.0	672,650.0	596.6	10.2	36.8	298.5
1981	229,465,714.0	1,361,820.0	22,520.0	82,500.0	663,900.0	593.5	9.8	36.0	289.3
1982	231,664,458.0	1,322,390.0	21,010.0	78,770.0	669,480.0	570.8	9.1	34.0	289.0
1983	233,791,994.0	1,258,087.0	19,308.0	78,918.0	653,294.0	538.1	8.3	33.8	279.4
1984	235,824,902.0	1,273,282.0	18,692.0	84,233.0	685,349.0	539.9	7.9	35.7	290.6
1985	237,923,795.0	1,327,767.0	18,976.0	87,671.0	723,246.0	558.1	8.0	36.8	304.0
1986	240,132,887.0	1,489,169.0	20,613.0	91,459.0	834,322.0	620.1	8.6	38.1	347.4
1987	242,288,918.0	1,483,999.0	20,096.0	91,111.0	855,088.0	612.5	8.3	37.6	352.9
1988	244,498,982.0	1,566,221.0	20,675.0	92,486.0	910,092.0	640.6	8.5	37.8	372.2
1989	246,819,230.0	1,646,037.0	21,500.0	94,504.0	951,707.0	666.9	8.7	38.3	385.6
1990	249,464,396.0	1,820,127.0	23,438.0	102,555.0	1,054,863.0	729.6	9.4	41.1	422.9
1991	252,153,092.0	1,911,767.0	24,703.0	106,593.0	1,092,739.0	758.2	9.8	42.3	433.4
1992	255,029,699.0	1,932,274.0	23,760.0	109,062.0	1,126,974.0	757.7	9.3	42.8	441.9
1993	257,782,608.0	1,926,017.0	24,526.0	106,014.0	1,135,607.0	747.1	9.5	41.1	440.5
1994	260,327,021.0	1,857,670.0	23,326.0	102,216.0	1,113,179.0	713.6	9.0	39.3	427.6
1995	262,803,276.0	1,798,792.0	21,606.0	97,470.0	1,099,207.0	684.5	8.2	37.1	418.3
1996	265,228,572.0	1,688,540.0	19,645.0	96,252.0	1,037,049.0	636.6	7.4	36.3	391.0
1997	267,783,607.0	1,636,096.0	18,208.0	96,153.0	1,023,201.0	611.0	6.8	35.9	382.1
1998	270,248,003.0	1,533,887.0	16,974.0	93,144.0	976,583.0	567.6	6.3	34.5	361.4
1999	272,690,813.0	1,426,044.0	15,522.0	89,411.0	911,740.0	523.0	5.7	32.8	334.3
2000	281,421,906.0	1,425,486.0	15,586.0	90,178.0	911,706.0	506.5	5.5	32.0	324.0
2001	285,317,559.0	1,439,480.0	16,037.0	90,863.0	909,023.0	504.5	5.6	31.8	318.6
2002	287,973,924.0	1,423,677.0	16,229.0	95,235.0	891,407.0	494.4	5.6	33.1	309.5
2003	290,788,976.0	1,383,676.0	16,528.0	93,883.0	859,030.0	475.8	5.7	32.3	295.4
2004	293,656,842.0	1,360,088.0	16,148.0	95,089.0	847,381.0	463.2	5.5	32.4	288.6
2005	296,507,061.0	1,390,745.0	16,740.0	94,347.0	862,220.0	469.0	5.6	31.8	290.8
2006	299,398,484.0	1,418,043.0	17,030.0	92,757.0	860,853.0	473.6	5.7	31.0	287.5
2007	301,621,157.0	1,408,337.0	16,929.0	90,427.0	855,856.0	466.9	5.6	30.0	283.8
2008	304,374,846.0	1,392,629.0	16,442.0	90,479.0	842,134.0	457.5	5.4	29.7	276.7
2009	307,006,550.0	1,318,398.0	15,241.0	88,097.0	806,843.0	429.4	5.0	28.7	262.8

National or state offense totals are based on data from all reporting agencies and estimates for unreported areas.

Rates are the number of reported offenses per 100,000 population

The 2,823 murder and nonnegligent homicides that occurred as a result of the events of September 11, 2001, are not included in the national estimates.

United States-Total - The 168 murder and nonnegligent homicides that occurred as a result of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995 are included in the national estimate.

Sources: FBI, Uniform Crime Reports, prepared by the National Archive of Criminal Justice Data

Date of download: Mar 12 2012

Uniform Crime Reporting Statistics - UCR Data Online

http://www.ucrdatatool.gov/

Table 2: Statewide Sex Offenses for Florida, 1971 - 2010.

Year	Population	Rape by Force	Attempted Rape	Total Forcible Rape	Forcible Rape Rate per 100,000	Percent Change Rape Rate	Percent Change Rape Number	Forcible Sodomy	Forcible Fondling	Total Forcible Sex Offenses	Forcible Sex Offenses Rate per 100,000	Percent Change Sex Offenses Rate per 100,000
1971	7,041,074	1,191	517	1,708	24.3	--	--	--	--	--	--	--
1972	7,441,545	1,382	537	1,919	25.8	6.3	12.4	--	--	--	--	--
1973	7,845,092	1,792	658	2,450	31.2	21.1	27.7	--	--	--	--	--
1974	8,248,851	2,153	751	2,904	35.2	12.7	18.5	--	--	--	--	--
1975	8,485,230	2,158	827	2,985	35.2	-0.1	2.8	--	--	--	--	--
1976	8,551,814	2,255	796	3,051	35.7	1.4	2.2	--	--	--	--	--
1977	8,717,334	2,532	810	3,342	38.3	7.5	9.5	--	--	--	--	--
1978	8,967,206	3,024	936	3,960	44.2	15.2	18.5	--	--	--	--	--
1979	9,245,231	3,541	1,032	4,573	49.5	12.0	15.5	--	--	--	--	--
1980	9,579,497	4,230	1,205	5,435	56.7	14.7	18.8	--	--	--	--	--
1981	10,097,754	4,460	1,247	5,707	56.5	-0.4	5.0	--	--	--	--	--
1982	10,375,332	4,278	1,308	5,586	53.8	-4.7	-2.1	--	--	--	--	--
1983	10,591,701	3,952	1,218	5,170	48.8	-9.3	-7.4	--	--	--	--	--
1984	10,930,389	4,320	1,256	5,576	51.0	4.5	7.9	--	--	--	--	--
1985	11,278,547	4,824	1,180	6,004	53.2	4.4	7.7	--	--	--	--	--
1986	11,657,843	4,903	1,250	6,153	52.8	-0.9	2.5	--	--	--	--	--
1987	12,043,608	4,823	1,194	6,017	50.0	-5.3	-2.2	--	--	--	--	--
1988	12,417,606	--	--	--	--	--	--	--	--	--	--	--
1989	12,797,318	5,599	700	6,299	49.2	--	--	1,531	3,367	11,197	87.5	--
1990	13,150,027	6,004	663	6,667	50.7	3.0	5.8	1,593	3,770	12,030	91.5	4.6
1991	13,195,952	6,379	590	6,969	52.8	4.2	4.5	1,509	3,912	12,390	93.9	2.6
1992	13,424,416	6,598	682	7,280	54.2	2.7	4.5	1,740	4,409	13,429	100.0	6.5
1993	13,608,627	6,713	550	7,263	53.4	-1.6	-0.2	1,948	4,541	13,752	101.1	1.0
1994	13,878,905	6,630	584	7,214	52.0	-2.6	-0.7	2,009	4,190	13,413	96.6	-4.4
1995	14,149,317	6,299	525	6,824	48.2	-7.2	-5.4	1,678	3,757	12,259	86.6	-10.4
1996	14,411,563	6,964	544	7,508	52.1	8.0	10.0	1,509	3,925	12,942	89.8	3.7
1997	14,712,922	7,142	530	7,672	52.1	0.1	2.2	1,680	3,872	13,224	89.9	0.1
1998	15,000,475	6,858	535	7,393	49.3	-5.5	-3.6	1,561	3,748	12,702	84.7	-5.8
1999	15,322,040	6,429	536	6,965	45.5	-7.8	-5.8	1,582	4,036	12,583	82.1	-3.0
2000	15,982,378	6,480	472	6,952	43.5	-4.3	-0.2	1,485	3,951	12,388	77.5	-5.6
2001	16,331,739	6,175	455	6,630	40.6	-6.7	-4.6	1,587	4,539	12,756	78.1	0.8
2002	16,674,608	6,276	428	6,704	40.2	-0.9	1.1	1,559	4,547	12,810	76.8	-1.6
2003	17,071,508	6,323	401	6,724	39.4	-2.0	0.3	1,596	4,436	12,756	74.7	-2.7
2004	17,516,732	6,168	441	6,609	37.7	-4.2	-1.7	1,490	4,328	12,427	70.9	-5.1
2005	17,918,227	6,156	420	6,576	36.7	-2.7	-0.5	1,507	4,147	12,230	68.3	-3.7
2006	18,349,132	6,102	369	6,471	35.3	-3.9	-1.6	1,360	3,736	11,567	63	-7.7
2007	18,680,367	5,762	383	6,145	32.9	-6.8	-5	1,402	3,667	11,214	60	-4.8
2008	18,807,219	5,606	356	5,962	29.8	-9.4	-3.0	1,301	3,560	10,823	57.5	-4.1
2009	18,750,483	5,170	324	5,494	29.3	-1.7	-7.8	1,306	3,427	10,227	54.5	-5.2

SOURCE: Florida Statistical Analysis Center: FDLE (1971-2010). Crime in Florida, Florida uniform crime report [Computer program]. Tallahassee, FL.

Table 3: Florida's Crime Rate, 1971 - 2010

Year	Population	Total Index Crime	Total Violent Crime	Total Nonviolent Crime	Index Rate per 100,000	Population Percent Change	Index Crime Percent Change	Index Rate Percent Change
1971	7,041,074	399,055	38,571	360,484	5,667.5	--	--	--
1972	7,441,545	390,319	40,268	350,051	5,245.1	5.7	-2.2	-7.5
1973	7,845,092	457,882	46,430	411,452	5,836.5	5.4	17.3	11.3
1974	8,248,851	597,667	54,852	542,815	7,245.5	5.1	30.5	24.1
1975	8,485,230	645,338	57,663	587,675	7,605.4	2.9	8.0	5.0
1976	8,551,814	590,104	54,543	535,561	6,900.3	0.8	-8.6	-9.3
1977	8,717,334	568,878	57,957	510,921	6,525.8	1.9	-3.6	-5.4
1978	8,967,206	607,291	65,784	541,507	6,772.4	2.9	6.8	3.8
1979	9,245,231	680,896	73,866	607,030	7,364.8	3.1	12.1	8.7
1980	9,579,497	803,509	94,088	709,421	8,387.8	3.6	18	13.9
1981	10,097,754	816,439	98,090	718,349	8,085.4	5.4	1.6	-3.6
1982	10,375,332	777,517	93,406	684,111	7,493.9	2.7	-4.8	-7.3
1983	10,591,701	724,247	88,298	635,949	6,837.9	2.1	-6.9	-8.8
1984	10,930,389	749,231	95,368	653,863	6,854.6	3.2	3.4	0.2
1985	11,278,547	860,957	106,980	753,977	7,633.6	3.2	14.9	11.4
1986	11,657,843	960,374	120,977	839,397	8,238.0	3.4	11.5	7.9
1987	12,043,608	1,021,283	123,030	898,253	8,479.9	3.3	6.3	2.9
1988	12,417,606	--	--	--	--	--	--	--
1989	12,797,318	1,120,515	145,473	975,042	8,755.9	--	--	--
1990	13,150,027	1,122,935	160,554	962,381	8,539.4	2.8	0.2	-2.5
1991	13,195,952	1,129,704	158,181	971,523	8,561.0	0.3	0.6	0.3
1992	13,424,416	1,112,746	161,137	951,609	8,289.0	1.7	-1.5	-3.2
1993	13,608,627	1,116,567	161,789	954,778	8,204.8	1.4	0.3	-1.0
1994	13,878,905	1,130,875	157,835	973,040	8,148.2	2	1.3	-0.7
1995	14,149,317	1,078,619	150,208	928,411	7,623.1	1.9	-4.6	-6.4
1996	14,411,563	1,079,623	151,350	928,273	7,491.4	1.9	0.1	-1.7
1997	14,712,922	1,073,757	150,801	922,956	7,298.1	2.1	-0.5	-2.6
1998	15,000,475	1,025,100	139,673	885,427	6,833.8	2	-4.5	-6.4
1999	15,322,040	934,349	128,859	805,490	6,098.1	2.1	-8.9	-10.8
2000	15,982,378	895,708	128,041	767,667	5,604.3	4.3	-4.1	-8.1
2001	16,331,739	911,292	130,323	780,969	5,579.9	2.2	1.7	-0.4
2002	16,674,608	900,155	127,905	772,250	5,398.4	2.1	-1.2	-3.3
2003	17,071,508	881,615	124,236	757,379	5,164.2	2.4	-2.1	-4.3
2004	17,516,732	850,490	123,697	726,793	4,855.3	2.6	-3.5	-6.0
2005	17,918,227	838,063	125,825	712,238	4,677.2	2.3	-1.5	-3.7
2006	18,349,132	849,926	129,501	720,425	4,632.0	2.4	1.4	-1
2007	18,860,367	876,981	131,781	745,200	4,694.7	2.8	3.2	1.4
2008	18,807,219	883,905	126,072	757,833	4,699.8	0.7	0.8	0.1
2009	18,750,483	824,559	113,415	711,144	4,397.5	-0.3	-6.7	-6.4

SOURCE: Florida Statistical Analysis Center: FDLE, Crime in Florida, Florida uniform crime report, 1971-2010. Tallahassee, FL.

Analysis

The data begins in 1971, showing a national violent crime rate of 396 violent crimes per 100,000 individuals[70] and the Florida violent crime rate of 5,667.5 per 100,000 individuals[71]. From here it is important to note that of use to this work is not the exact rate of offenses but the overall trend of that rate over time. The rate of violent crime not including sex offenses may seem irrelevant at first however it is in fact a vital baseline. As there has been no SORNA or comparable legislation (let alone the ordered progression thereof) for violent crimes such as aggravated assault, murder, and the like violent crime should be affected only by the overall state of society rather than artificially suppressed through directed legislative efforts. If the rhetoric is valid, and legislation such as SORNA and its predecessors are indeed responsible for suppressing both initial sexual offenses and recidivism, then the rate of sexual crimes should show a marked difference from the baseline rate of "ordinary" (violent and personal) predatory crimes which at least correlates to the dates where major legislation took effect.

With that in mind the most significant dates may be considered to be the primary landmarks of federal legislation: The 1994 Wetterling Act, the 1996 Megan's Law and Pam Lychner acts, the 1997 Wetterling Improvements Act, and the 2006 Adam Walsh Protection Act (SORNA). Following this timeline, if the rhetoric holds true to its claims, sexual crimes should show a marked decrease as compared to the baseline rate of

[70] Table 1
[71] Table 3

violent crime starting in approximately 1995 after the Wetterling Act would have had time to begin to take effect… and at first glance it would seem to be the case that this holds true. Beginning in 1994 the national rate of forcible rape began a slow but steady decline, and in the State of Florida the rate of forcible sex crimes began to decrease irregularly yet markedly from what had appeared to be a 5 year upward trend going back to the beginning of recorded data in 1989. Interestingly however the rate of forcible rape in the State of Florida continued to hold steady around approximately 50 per 100,000 individuals for another four years, making for a 20 year high beginning in 1979 and lasting until 1998.

All of this appears to point to a reductive effect coinciding with federal legislation; however there are two issues with this interpretation. First, recall the significance assigned to the overall trends of the violent and sexual crime rates. The rate of sexual crimes, and of forcible rape, does decline beginning in 1994, however so does the rate of violent crime in almost identical proportions. Furthermore as additional national UCR data contained in the appendices shows this trend extends beyond violent crime into the national rate of robberies per 100,000 people as well… a crime well beyond the purview of federal sex offender legislation. In fact the reduction in *all* crime is so profound that it outstrips population growth and even in Table 3's list of Total Nonviolent Crime, which is not a population adjusted figure, *still* holds true to the trend.

Now, perhaps the legislative fervor of the Houses of Congress singlehandedly

frightened the entirety of the criminal world within the United States of America into submission in 1994 with the Wetterling Act, it is not impossible that the sheer quantity of attention directed at this one area of criminal behavior led to the rest of America's less than upstanding citizens deciding *en masse* that it would be best to find a more publically acceptable occupation or hobby before they drew too much attention. It is decidedly more likely though that there was already a pre-existing trend to the reduction of all crime and the measured reduction in sex offenses was nothing more than this trend showing through in a class of crime under such intense and myopic scrutiny (or subject to such disingenuous political opportunism) that the greater trend went uncredited. It strains credulity to claim that legislation on a single family of offenses, even legislation as high profile as sex offender registration's many iterations, could have such a widespread impact that even the rate of robberies in the United States of America would be nearly *halved* along the same timeline as the reduction in sexual offenses[72].

Unforeseen Consequences

If, then, these laws did not accomplish their stated goal and merely had the appearance of correlation rather than any true causation, the question then becomes what *were* the results of these laws. The consensus, as summarized[73] by George B. Palermo in the International Journal of Offender Therapy and Comparative Criminology,

[72] Table 1: 256 robberies per 100,000 people in 1993 descending to 133 in 2009; 51.9% of the 1993 value.
[73] Palermo summarizing Applebaum, Farkas, Levenson, Palermo & Farkas, Prescott and Zevitz

is that registration has had an effect… but not remotely the desired one. It is a fact often lost in the dryness of academia and the fervor of political rhetoric that registration does not occur in a vacuum. These lists are not magic scrolls within sealed containers acting as talismans against those whose names and crimes are enumerated within, they are public, inflammatory, and to the offenders listed in them terribly effective at publicizing their contents. Now if the issues of cost, efficacy and constitutional erosion, are not enough to induce a healthy skepticism of the value of these registries as they exist then perhaps the opinions of mental health professionals (the experts tasked with handling and treating offenders) on the topic of community notification, an integral and arguably defining part of a modern sex offender registry, should be considered as holding considerable weight. In results collected[74] from another work which surveyed 499 mental health professionals 36% may have voiced some support for the efficacy of community notification in increasing community safety but a larger 40% felt that there was no effect at all and 26% actually believed the registries to be less safe. In two more surveys cited by the same work 70% and 74% of surveyed mental health professionals felt community notification gave a false sense of security.

Their skepticism is not without good cause. Registered sex offenders face not a lifetime of ostracism and harassment to such an extent that for many it may well be impossible for them to ever reintegrate into society or even live within it at all. In a study

[74] Lasher & McGrath citing McGrath, Cumming, Burchard, Zeoli, & Ellerby; Malesky and Keim; and Levenson, Fortney, and Baker internally

which sought to collect and analyze the collective body of research in this field[75] the results showed up to 1/3rd of sex offenders reported losing their jobs, slightly less than 1/10th reported violent attacks, and the reports of surveyed families painted an even bleaker picture; a staggering 82% reported financial hardship, 44% reported harassment, and 7% reported being assaulted or injured just by virtue of their relationship with a registered offender. It should be no wonder then that some regions have found themselves holding released sex offenders in out of the way motels while they desperately attempt to find housing and employment that meets the restrictions placed on them[76], though in other less hospitable districts there have been cases of offenders being forced into homelessness[77] by residency restrictions and thereafter arrested for failing to register an address.

[75] Lasher & McGrath
[76] Langhorne
[77] Dewan

Conclusion

It is these kinds of consequences, often dismissed as acceptable collateral damage for a class of people so publically reviled, which in actuality prove registries and notification to be counter-productive. Evidence has been found which links these supposedly acceptable side-effects to increased recidivism[78], a conclusion which should surprise no one. It does not take a rigorous graduate education to know that creating an ostracized and reviled subclass with no prospects for employment, ever shrinking opportunities for shelter, subject to constant harassment and even assault, is not a productive means of discouraging recidivism. The evidence speaks for itself: sex offender registries as they exist today are a product of political profiteering and public hysteria ineffective at their stated purpose and increasingly found to be openly counter-productive and damaging; With the current legal trend towards ever-increasing restrictions and punishments the (alleged) outlier result of involuntarily homeless and jobless sex offenders is fast becoming the new reality. The moral panic which propelled the myth of the lurking predator into power came from a handful of high profile cases which ordinarily only exist in Hollywood's imagination as the vast majority of sex offenses are committed by relations and acquaintances. It is time for a reform of these laws; this time founded on evidence based reasoning and rigorous study rather than moral panic and political grandstanding. The status quo is simply untenable.

[78] Lasher and McGrath internally citing Freeman & Sandler, 2010; Hanson et al., 2009

Limiting Factors

There are a number of limiting or confounding factors which deserve to be recognized. First and foremost the lack of national UCR data for the broader category of sexual offenses other than forcible female rape is a significant limiting factor for nationwide analysis. Secondly, and merely limiting, is the lack of comparably formatted UCR data from other states. Comparing the trend of sexual offenses over time across multiple states, particularly in the pre-SORNA years, would allow for greater specificity than an overall national average. Lastly an in-depth comparison of the trends of sexual offenses over time in regions with differing post-release restrictions would be an excellent measurement of efficacy, but given the nature of research involved and the confounding factors of development and demographics would likely require exorbitant man-hours to perform.

Appendix: Sex Offender Registration Laws by State Pre-Standardization, 1996

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