

Reforming (purportedly) Non-Punitive Responses to Sexual Offending

By Adam Shajnfeld* and Richard B. Krueger**

I. Introduction

Clovis Claxton, who was developmentally disabled and wheelchair-bound after contracting meningitis and encephalitis as a child, was twenty-four years old and living with his family in Washington state in 1991 when he exposed himself to the nine-year-old daughter of a caregiver.¹ Although he had the mental capacity of a ten- to twelve-year-old child, he was charged with first-degree child molestation and served twenty-seven months in prison.² When his family moved to Florida in 2000, Claxton was listed as a sexual offender on the Florida Department of Law Enforcement website, but the website inaccurately indicated he had been charged with the rape of a child.³ Claxton had not been charged with any other offense since his release from prison, but sheriff's deputies in Florida did take him into custody at least five times for threatening suicide.⁴

In 2005, brightly-colored fliers were dropped into mailboxes and pinned to trees around Claxton's neighborhood, where he lived in an apartment adjoining his parents' house.⁵ A

short time before, a county commissioner had urged that warning signs be posted in neighborhoods where convicted sex offenders live.⁶ The fliers displayed Claxton's picture and address, downloaded from the Florida website, and the words "child rapist."

Claxton, distraught and fearing for his life, called the sheriff's office and said he wanted to kill himself.⁷ He was taken for an overnight psychiatric assessment, but released the next day.⁸ The following morning he was found dead, an apparent suicide, with one of the fliers lying next to him.⁹

Alan Groome was eighteen years old when he was convicted of a sex offense.¹⁰ He was paroled after serving a number of years behind bars in the state of Washington. Upon his release, he moved in with his mother, but they were evicted from their apartment when residents learned of his past. They then moved in with his grandmother, but Groome was forced to leave when police officers knocked on the doors of 700 neighbors, handing out fliers with his address and photo.

Groome became homeless, begging for money. "I got the feeling no one cares about me, so why should I care about myself and what I do?" said Groome. One detective described Groome as "a man without a country." His parole officer loaned him money because he believed Groome had "a lot of potential." A little over two years after being

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¹ Cara Buckley, *Town Torn Over Molester's Suicide*, MIAMI HERALD, Apr. 23, 2005, at 1; Daniel Ruth, *Who Was the Real Threat to the Town?* TAMPA TRIB., Apr. 27, 2005, at 2.

² Buckley, *supra* note 1, at 1.

³ *Id.*

⁴ *Id.*; Ruth, *supra* note 1, at 2.

⁵ Buckley, *supra* note 1, at 1; Ruth, *supra* note 1, at 2.

⁶ Buckley, *supra* note 1, at 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ The quotes and facts in this paragraph are taken from Daniel Golden, *Sex-Cons*, BOSTON GLOBE, Apr. 4, 1993, at 12. This article does not address the many issues surrounding juvenile sex offenders. For a treatment of these issues, see Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163 (2003).

released from prison, Groome had not been re-arrested but was living in a homeless shelter, looking for employment.¹¹

As will be discussed, the United States Supreme Court has distinguished between society's punitive and non-punitive responses to sexual offenders, granting society more discretion and affording sexual offenders few protections in conjunction with non-punitive responses. Although all agree that sexual offenses should generally result in punitive sanctions, including prison sentences, the so-called non-punitive responses to sex offenders currently employed by society are not only very punitive in nature, but they are also largely unhelpful in curbing and may even be increasing sexual offending. Sex offender registration and notification requirements, for example, place offenders in physical danger, force offenders out of their homes and cause them to lose their jobs, and create public hysteria.¹²

These requirements often bear little relation to the risk posed by the offender. The label "sex offender" can refer to anyone from a child rapist to an adult involved in a consensual, albeit incestuous, relationship with another adult. These requirements are typically insensitive to differences in motivation and intent, the nature of the offense and its impact on the victim, and the likelihood of recidivism and risk to society. Further, these regimes

¹¹ *Turning Point with Barbara Walters* (ABC News television broadcast Sept. 21, 1994), transcript available on LexisNexis ("Interview with Alan Groome, Transcript #131").

¹² Although this article mainly addresses three particular so-called non-punitive responses: civil commitment, registration, and community notification, there are others, including restrictions on where a sex offender can reside and work. In Virginia, for example, a person convicted of various sex offenses involving children is permanently prohibited from loitering within 100 feet of a primary, secondary, or high school or a child day program (VA. CODE § 18.2-370.2 (2006)), residing within 500 feet of any child day center, or primary, secondary, or high school (VA. CODE § 18.2-370.3 (2006)), or working or engaging in any volunteer activity on property that is part of a public or private elementary or secondary school or child day center (VA. CODE § 18.2-370.4 (2006)).

rarely allow sex offenders who successfully undergo treatment or who can be demonstrated to be highly unlikely to reoffend to be relieved of these requirements before at least many years have passed, if at all.

Legal and societal responses should take better account of what is currently known about sex offenders and be changed accordingly. This Article describes the characteristics of sex offenders (Part II), discusses various registration and notification requirements (Part III), explores Constitutional challenges to registration and notification laws (Part IV), addresses the civil commitment of sex offenders (Part V), analyzes the various problems with current responses to sex offenders (Part VI), reports current options for treating sex offenders (Part VII), provides various recommendations for implementing a more appropriate societal response to sex offenders (Part VIII), and offers some concluding remarks (Part IX).

II. Characteristics of Sex Offenders

"Sex offender" is a legal, not a psychological term.¹³ There is no uniform definition of a sex offender. One who engages or attempts to engage in a sexual act with a minor, or who commits or attempts to commit aggravated sexual battery against a person of any age, is widely considered to be a sex offender.¹⁴ In many states, persons who have been

¹³ Richard B. Krueger & Meg S. Kaplan, *The Paraphilic and Hypersexual Disorders: An Overview*, 7 J. PSYCHIATRIC PRAC. 391, 393 (Nov. 2001).

¹⁴ The federal enactment establishing the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program Act defines "sex offender" as "an individual who was convicted of a sex offense" and defines "sex offense" generally as a criminal offense that has an element involving a sexual act or sexual contact with another, various listed criminal offenses against a minor, or an attempt or conspiracy to commit these offenses. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111 (2006). Many state statutes are more specific. See, e.g., VA. CODE ANN. § 9.1-902 (2006); WASH. REV. CODE § 9A.44.130(9) (2006).

convicted of possessing child pornography are also classified as sex offenders,¹⁵ as are adults engaged in consensual incest,¹⁶ persons who indecently expose themselves,¹⁷ and statutory rapists (for instance, a twenty-two year old who has sex with her sixteen year-old boyfriend).¹⁸ The legal definition of a sex offender includes a very wide range of offenders. From a psychological perspective, though, sex offenders are extremely diverse. The psychological profiles, recidivism rates, and effective treatment modalities of such offenders vary greatly. To appropriately respond to these individuals, a better understanding of these variations is needed.

For example, it is important to distinguish between paraphilic sex offenders and non-paraphilic sex offenders. Paraphilias are psychiatric disorders defined as

recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months.¹⁹

To be diagnosed as having a paraphilia, depending on the type of paraphilia,²⁰ the person must also either have acted on the urge or there must be resulting clinically significant distress or impairment in important areas of functioning.²¹ Those who develop paraphilias tend to lack social skills and suffer from depression, substance abuse, or other co-occurring psychiatric disorders.²² Far more men than women develop paraphilias.²³

Paraphilias need not involve illegal behavior. Transvestic fetishism, where a heterosexual male engages in cross-dressing, is not a crime. Further, not all sex offenders suffer from paraphilias. For example, many rapists commit sex offenses out of anger and desire for domination, not for sexual gratification.²⁴ In one study involving thirty-six convicted male sex offenders, only 58% could be diagnosed with a paraphilia.²⁵

Regardless of these variations, as of 2006, there were roughly 566,700 registered sex offenders in the United States.²⁶ This figure, however, is not a reliable measure of the actual number of sex offenders, as sex offenses are extremely underreported.²⁷ At

¹⁵ FLA. STAT. §§ 775.21(4)(a)1b, 827.071(5) (2006); BURNS IND. CODE ANN. § 35-42-4-4(c) (2006). An Indiana appellate court left open the question of whether that state's statute could be applied to virtual child pornography. *Logan v. State*, 836 N.E.2d 467, 472 (Ind. Ct. App. 2005). The federal law governing sex offender registration and notification was recently expanded to include possession, production, or distribution of child pornography. Adam Walsh Child Protection and Safety Act of 2006 § 111(7)(G).

¹⁶ LA. REV. STAT. ANN. § 14:78 (2006). The statute includes within the definition of incest an uncle and niece either marrying or having sexual intercourse with one another, regardless of how old they are. *Id.*

¹⁷ TEX. PENAL CODE § 21.08 (2006). Under Texas law, a person can be guilty of indecent exposure even if no one else actually sees the defendant's genitals. *Boyles v. State*, No. 05-94-01727-CR, 1996 WL 403992, at *8 (Tex. App. July 12, 1996).

¹⁸ N.Y. PENAL LAW § 130.25(2) (Consol. 2006).

¹⁹ AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: FOURTH EDITION, TEXT REVISION 566 (2000) [hereinafter DSM-IV-TR].

²⁰ The various types of paraphilia include Exhibitionism, Fetishism, Frotteurism, Pedophilia, Sexual Masochism, Sexual Sadism, Transvestic Fetishism, Voyeurism, and Paraphilia Not Otherwise Specified. See *id.* at 569-76.

²¹ *Id.* at 566.

²² SIMON LEVAY & SHARON M. VALENTE, HUMAN SEXUALITY 469 (2002); Krueger & Kaplan, *supra* note 13, at 399-400.

²³ THE MERCK MANUAL OF DIAGNOSIS AND THERAPY, § 15, Ch. 192 (1999-2005), available at <http://www.merck.com/mrkshared/mmanual/section15/chapter192/192d.jsp>.

²⁴ KAREN J. TERRY, SEXUAL OFFENSES AND OFFENDERS: THEORY, PRACTICE, AND POLICY 92 (2006).

²⁵ Krueger & Kaplan, *supra* note 13, at 393 (citing Susan L. McElroy et al., *Psychiatric Features of 36 Men Convicted of Sexual Offenses*, 60 J. CLINICAL PSYCHIATRY 414, 416 (1999)).

²⁶ National Center for Missing and Exploited Children, *Registered Sex Offenders in the United States* (Mar. 6, 2006), at http://www.missingkids.com/en_US/documents/sex-offender-map.pdf.

²⁷ TERRY, *supra* note 24, at 7, 10.

the same time, this number can be mistakenly read to indicate the number of current active sex offenders in this country, a conclusion that fails to take into account the effects of treatment and monitoring, and the fact that many of these offenders are relatively unlikely to reoffend.

One of the most complicated and contested issues regarding sex offenders is that of recidivism.²⁸ Calculating their rate of recidivism is difficult for a number of reasons. First, as noted, sex offenses are underreported.²⁹ Second, sex offenders may continue to re-offend for many years, and thus recidivism rates differ depending on the length of time considered.³⁰ Third, recidivism differs substantially depending on the type of sex offender in question.³¹ For instance, sex offenders who molest a family member (i.e., those who commit incest) are less likely to re-offend than those who molest non-family members.³² Similarly, one study found recidivism rates for rapists and child molesters to be 18.9% and 12.7%, respectively, over an average four to five year follow-up period.³³ Collapsing all sex offenders together into a single category and making generalizations about this diverse range of offenders using this aggregate determination is likely to result in substantial mischaracterizations regarding the risk of re-offending for many of these individuals.

Even though lumping the recidivism rates of all sex offenders together is unhelpful in assessing the risk posed by these offenders, it does shed light on the dubiety of popular claims about sex offender recidivism. One meta-analysis of recidivism studies of over 23,000 sex offenders found the rate of recidivism to be 13.4% on average for a four to five year follow-up period.³⁴ Another study, from the United States Department of Justice, found recidivism for sex offenders released from prison to be 5.3% for a three-year follow-up period.³⁵ In contrast, a Department of Justice report of recidivism rates for nearly 300,000 released prisoners found that 13.4% of those imprisoned for robbery were rearrested for robbery after release, and 22% of those imprisoned for assault were rearrested for assault following release, all within a three-year follow-up period.³⁶ Thus, while recidivism rates are difficult to measure and reported results vary, and there are numerous factors that make recidivism for a particular individual more or less likely,³⁷ the recidivism of sex offenders is neither inevitable³⁸ nor nearly as high as popularly believed.³⁹

A number of studies have reported higher recidivism rates for sex offenders, most prominently the so-called “Abel study” where 561 non-incarcerated paraphiliacs reported that they had committed a total of 291,737

²⁸ For a good review of the recidivism issue, including the results of many studies, see CENTER FOR SEX OFFENDER MANAGEMENT (PRINCIPAL AUTHOR TIM BYNUM), *RECIDIVISM OF SEX OFFENDERS* (May 2001), <http://www.csom.org/pubs/recidsexof.pdf>.

²⁹ TERRY, *supra* note 24, at 7, 10.

³⁰ Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 Nw. U. L. Rev. 1203, 1209 (1998) (citing R. Karl Hanson et al., *Long Term Recidivism of Child Molesters*, 61 J. CONSULTING & CLINICAL PSYCHOL. 646 (1993)).

³¹ *Id.*

³² Hanson et al., *supra* note 30, at 646.

³³ R. Karl Hanson & Monique T. Bussière, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 351 (1998).

³⁴ *Id.* at 357. The meta-analysis included studies that measured recidivism in terms of re-conviction, re-arrest, and offenders' self-reports. *Id.* at 350.

³⁵ PATRICK A. LANGAN ET AL., *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, 1 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf>.

³⁶ PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1994*, NCJ 193427, at 9 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

³⁷ LEVAY & VALENTE, *supra* note 22, at 467.

³⁸ Hanson & Bussière, *supra* note 33, at 357.

³⁹ ROBERT ALAN PRENTKY & ANN WOLBERT BURGESS, *FORENSIC MANAGEMENT OF SEXUAL OFFENDERS* 237 (2000). See also SARAH BROWN, *TREATING SEX OFFENDERS: AN INTRODUCTION TO SEX OFFENDER TREATMENT PROGRAMS* 8 (2005).

“paraphilic acts” against 195,407 victims.⁴⁰ The Abel study suffers from a number of serious problems. First, “paraphilic acts” are defined very broadly, including fetishism, homosexuality, sadism, and masochism.⁴¹ These behaviors, though, are not illegal when they involve a consenting adult, and homosexuality is no longer considered a paraphilia. In fact, the Abel study hints at this confusion, at one point using the term “victim/partner.”⁴² Thus, it is doubtful that the high rate of recidivism is reflective of what is currently thought to be a sex offense. Second, the median values of the number of victims per paraphiliac are significantly lower than the mean (average) values, which indicate that a small percentage of paraphiliacs are responsible for a disproportionately large amount of the sex offenses.⁴³ Broad generalizations from a study such as this one fuel panic, but do not accurately reflect the fact that, although there are outliers who are extreme offenders, recidivism rates are low for most sex offenders.

III. Registration and Notification Laws

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act.⁴⁴ While not imposing mandatory obligations on the states, the Wetterling Act was a significant milestone because it provided significant financial incentives for the states to adopt various provisions pertaining to sex offenders.⁴⁵ For example, it required sex offenders to register for at least ten years with authorities following release from prison or

placement on parole, supervised release, or probation.⁴⁶ Further, state officials were expected to collect and maintain information about offenders, such as their name, home address, photograph, fingerprints, offense history, and documentation of any treatment received for mental abnormality or personality disorder.⁴⁷ In 1996, the Wetterling Act was amended to include a notification provision, known as “Megan’s Law,” which allows states to disclose information collected through registration for “any purpose permitted under the laws of the State.”⁴⁸ Megan’s Law, like many other broad sex offender laws, was enacted in the politically and emotionally charged aftermath of a brutal act against a child.⁴⁹ Currently, all fifty states have enacted some type of Megan’s Law.⁵⁰

Recently, Congress passed a new version of the Wetterling Act as part of the Adam Walsh Child Protection and Safety Act of 2006.⁵¹ The bill expands the sex offender registration and notification requirements previously imposed on the states. First, it broadens the definition of sex offender, divides sex offenders into three tiers (tier III being the most serious) based on the severity of the crime for which the offender was convicted, and requires that all sex offender registries include the offender’s name (including any alias), physical description, current photograph, Social Security number, residential address, vehicle and license plate number, DNA sample, fingerprints, criminal offense, and criminal history; the name and

⁴⁰ Gene G. Abel et al., *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. INTERPERSONAL VIOLENCE 3, 19 (1987).

⁴¹ *Id.* at 18.

⁴² *Id.* at 17.

⁴³ *See id.*

⁴⁴ 42 U.S.C. 14071 (2006). As will be discussed, this law was recently amended. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (2006).

⁴⁵ *Id.* at (g), (i). States that do not comply face a reduction of 10% of funds allocated under § 42 U.S.C. 3751 for criminal justice projects.

⁴⁶ *Id.* at (b)(6).

⁴⁷ *Id.* at (b)(1)(A)(iv), (b)(1)(B).

⁴⁸ Pub. L. No. 104-145 (1996) (codified as 42 U.S.C. § 14071(e) (2006)).

⁴⁹ *See* Michele L. Earl-Hubbard, *Comment: The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U.L. REV. 788, 813 (1996); TERRY, *supra* note 24, at 184.

⁵⁰ Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan’s Laws*, 42 HARV. J. LEGIS. 355, 357 (2005).

⁵¹ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248 (2006).

address of any employer; and the name and address of any school that is being attended.⁵²

Second, it requires all jurisdictions to make virtually all sex offender registry information publicly accessible via the Internet and creates a national sex offender website.⁵³ This generally forces states to broadly disseminate information on every registered sex offender, not just those who pose the greatest risk of re-offending.⁵⁴

A few items cannot be posted, including the identity of any victim, the Social Security number of the sex offender, and any reference to arrests that did not result in conviction, and a few items are left to the discretion of the state, including any information about a tier I sex offender convicted of an offense other than a specified offense against a minor, the name of the employer of the sex offender, and the name of an educational institution where the sex offender is a student.⁵⁵

Third, the bill imposes a registration and Internet notification requirement of fifteen years for a tier I sex offender (with a reduction of five years if a “clean record” is maintained), of twenty-five years for a tier II sex offender, and of life-long duration for a tier III offender.⁵⁶ A tier I offender is required to re-register in person at least once a year, a tier II offender every six months, and a tier III offender every three months.⁵⁷

For purposes of comparison, the following are some existing examples of state registration and notification regimes. In Washington, a sex offender can be relieved of the

requirement to register ten years after the offender has either been released from confinement, or, if there was no confinement, ten years from entry of judgment and sentence.⁵⁸ In Florida, the earliest a sex offender who offended as an adult can be relieved of the requirement to register is twenty years after the offender has been released from sanction, supervision, or confinement, whichever is later.⁵⁹ To be relieved of this requirement after twenty years, the offender cannot have been arrested for any felony or misdemeanor (not just a sexual or related offense) since his release,⁶⁰ and a court must grant the offender’s petition for relief.⁶¹ In Washington and Florida, even if a sex offender no longer poses a risk of re-offending, he must still register as a sex offender until at least either ten or twenty years, respectively, have passed.⁶²

Registration, though, did not necessarily mean that the community would be notified about the sex offender. Under the previous Wetterling Act, states were required to notify the community of certain offenders, while notification for others remained optional.⁶³ State-sponsored Internet sites were routinely used as a means to provide this notification.⁶⁴

⁵² WASH. REV. CODE § 9A.44.140(1)(c) (2006).

⁵³ FLA. STAT. § 943.0435(11)(a) (2006).

⁶⁰ *Id.* at 11(a).

⁶¹ *Id.* at 11.

⁶² In these states, an offender who was a physically castrated quadriplegic suffering from dementia would still have to register for this entire period of time.

⁶³ See 42 U.S.C. 14071(e)(2) (2006), which requires that states release information to the community when “necessary to protect the public concerning a specific person required to register under this section.” The Department of Justice has interpreted this provision to require release of information to the community about the most dangerous offenders, but permits a state to choose not to release information regarding sex offenders it deems are not a threat to public safety. U.S. DEP’T OF JUSTICE, MEGAN’S LAW; FINAL GUIDELINES FOR THE JACOB WETTERLING CRIMES AGAINST CHILDREN AND SEXUALLY VIOLENT OFFENDER REGISTRATION ACT, AS AMENDED, No. RIN 1105-AA56, 582 (1997).

⁶⁴ Of the fifty states, only Rhode Island provides no information about sex offenders on an Internet site.

⁵² *Id.* at §§ 111, 114.

⁵³ *Id.* at §§ 118, 120.

⁵⁴ Some states had already begun to take this step. In Virginia, for example, the General Assembly in 2006 expanded dissemination via the Internet from individuals “convicted of murder of a minor and violent sex offenders” to individuals “convicted of an offense for which registration is required.” See VA. CODE § 9.1-913 (2006).

⁵⁵ Adam Walsh Child Protection and Safety Act of 2006 § 118.

⁵⁶ *Id.* at § 115.

⁵⁷ *Id.* at § 116.

Many states, however, made information regarding *all* sex offenders accessible via the Internet as well.⁶⁵ The amount of information available on a particular offender varied from state to state, but all states included the offender's name, offense, physical characteristics, and age.⁶⁶ Florida's Internet sex offender database also included the offender's photograph and last known address.⁶⁷

Some states employed risk-tiers, with offenders classified by their risk of re-offending. For example, Rhode Island law provided for three risk-tiers: low risk, moderate risk, and high risk.⁶⁸ The level of community notification, if any, depended on the offender's classification.⁶⁹ Law enforcement agents were notified of low risk offenders.⁷⁰ For moderate and high risk offenders, Internet notification was permitted.⁷¹

While community notification today is typically provided via the Internet, this need not be the exclusive means. Louisiana, in addition to having a searchable Internet database of sex offenders,⁷² also has perhaps the strictest and most comprehensive notification requirements of any state.⁷³ Upon release from confinement, a sex offender must supply his name, address, crime information, and photograph to all residences and businesses within a one-mile radius in a rural area, or 3/10 mile radius in an urban area, of the

offender's residence. The offender must also notify all adults also residing in his place of residence and the superintendent of the school district in which he resides of his status.⁷⁴ A court may even require the offender to wear special clothing indicating that he is a sex offender.⁷⁵

IV. Constitutionality of Registration and Notification Laws

The Supreme Court has issued two major rulings on the constitutionality of sex offender registration and notification laws, both in 2003.

A. Procedural Due Process: *Connecticut Department of Public Safety v. Doe*⁷⁶

In 1999, a person (referred to as John Doe) required to register as a sex offender under Connecticut law,⁷⁷ filed a federal lawsuit under 42 U.S.C. § 1983⁷⁸ against the Connecticut agencies responsible for administering the State's sex offender registry. Connecticut's law required certain classes of sex offenders to register, and provided for community notification of the presence of these offenders without regard to the registrant's degree of dangerousness to the community.⁷⁹ Instead, the registration requirement was linked to whether they had been convicted of certain specified sex offenses.⁸⁰

Doe asserted that this registration requirement harmed his reputation and altered his status under state law. Doe alleged, *inter alia*, that the failure to provide him with a pre-registration hearing to determine if he was

See <http://www.klaaskids.org/pg-legmeg.htm> (last visited July 17, 2006).

⁶⁵ For example, Florida provides a searchable Internet database generally listing all convicted sex offenders available at http://www3.fdle.state.fl.us/sexual_predators/ (last visited July 17, 2006).

⁶⁶ Teichman, *supra* 50, at 381.

⁶⁷ See

http://www3.fdle.state.fl.us/sexual_predators/search.asp?sopu=true&PSessionId=819208581& (last visited July 18, 2006).

⁶⁸ R.I. GEN. LAWS § 11-37.1-12 (2006).

⁶⁹ *Id.*

⁷⁰ *Id.* at (b).

⁷¹ *Id.*

⁷² See <http://lasocpr1.lsp.org/> (last visited July 18, 2006).

⁷³ See LA. REV. STAT. ANN. § 15:542 (2006).

⁷⁴ *Id.* at § 15:542(B)(1)(a)-(c).

⁷⁵ *Id.* at § 15:542(B)(3) ("Give any other notice deemed appropriate by the court in which the defendant was convicted of the offense . . . including but not limited to signs, handbills, bumper stickers, or clothing labeled to that effect.").

⁷⁶ 538 U.S. 1 (2003).

⁷⁷ CONN. GEN. STAT. § 54-250-261 (2001).

⁷⁸ This section allows a person to sue, in federal court, for a state's violation of his or her civil rights.

⁷⁹ *Connecticut Department of Public Safety v. Doe*, 538 U.S. at 4-5, 7.

⁸⁰ CONN. GEN. STAT. § 54-258a (2001).

dangerous violated his procedural due process rights under the Fourteenth Amendment because he was deprived of his liberty interests without a hearing.

The Supreme Court found no violation of procedural due process.⁸¹ The Court reasoned that procedural due process only requires a hearing on the existence of a particular fact (or facts) when such fact is relevant under a state statute.⁸² Here, as the statute did not claim that the list was comprised of dangerous sex offenders, but instead merely claimed to be a list of sex offenders regardless of level of danger, Doe was not entitled to a hearing to determine his dangerousness.

In *dicta*, the Court noted that one could still challenge the State's law on substantive due process grounds, an issue not brought up nor addressed in the case.⁸³

B. Ex Post Facto: *Smith v. Doe*⁸⁴

The Ex Post Facto Clause of the Constitution⁸⁵ prohibits the government from imposing punishment for an act that was not a crime at the time it was committed, and from imposing more punishment for an offense than was prescribed by law at the time the crime was committed.⁸⁶

In 1994, Alaska passed its Sex Offender Registration Act (SORA).⁸⁷ SORA contains a registration requirement and provides for community notification.⁸⁸ Alaska makes much of the information it gathers available on the Internet.⁸⁹ Of primary relevance to this lawsuit, however, was that SORA was made retroactive, thereby encompassing sex offenders who committed their crimes before SORA was enacted.⁹⁰ Respondents John Doe I and John Doe II, both convicted of sex offenses before passage of SORA and then, after the passage of SORA, required to register under it, brought an action under 42 U.S.C. § 1983 challenging SORA as it applied to them as a violation of the Ex Post Facto Clause. The Supreme Court found no violation of the Ex Post Facto Clause.⁹¹

The primary question as far as the Court was concerned was whether SORA imposed additional punishment after the fact (i.e., after the crime was committed). The Court determined that if the legislature intended to impose punishment through its legislation, then its retroactive application was indeed a violation of the Ex Post Facto Clause.⁹² If the legislature intended to enact a civil (non-punitive) regulatory scheme through its legislation, however, there was an Ex Post Facto violation only if the statutory scheme was so punitive in its effect as to negate the legislature's stated intent.⁹³ The Court stated that it was required to be deferential to the legislature's stated intent,⁹⁴ requiring the "clearest proof" of punitiveness to overcome a presumption that the legislature had

⁸¹ *Connecticut Department of Public Safety v. Doe*, 538 U.S. at 1.

⁸² *Id.* at 7.

⁸³ *Id.* at 8. A substantive due process claim asserts that the claimant has a fundamental right to some constitutionally-protected interest that is being infringed by the law/action in question, and that the government has to justify abridging that fundamental right. If a fundamental right is implicated, a court strictly scrutinizes the law/action, and a very strong justification is required to overcome a presumption of unconstitutionality. Less strict standards of review are applicable to abridgments of quasi- or non-fundamental rights. See *Gunderson v. Hvass*, 339 F.3d 639, 643-44 (8th Cir. 2003).

⁸⁴ 538 U.S. 84 (2003).

⁸⁵ U.S. CONST. art. I, § 9, cl 3.

⁸⁶ *Cummings v. Missouri*, 71 U.S. 277, 325-26 (1867).

⁸⁷ See 1994 Alaska Sess. Laws page no. 41 (codified at ALASKA STAT. §§ 12.63, 18.65.087 (1994)).

⁸⁸ See *id.*

⁸⁹ *Smith v. Doe*, 538 U.S. at 91.

⁹⁰ 1994 Alaska Sess. Laws page no. 41, § 12.

⁹¹ *Smith v. Doe*, 538 U.S. at 84.

⁹² *Id.* at 92.

⁹³ *Id.* at 92 (citing *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

⁹⁴ *Id.* at 92 (citing *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

accurately depicted the nature of its legislation.⁹⁵

In the case before it, the Court noted that the Alaska legislature had stated that its intent in enacting SORA was to protect public safety.⁹⁶ As a result, the Court found that the stated intent of the legislature was not to impose punishment on sex offenders with the registration requirement.⁹⁷ The Court then proceeded to determine whether the legislation had sufficient punitive effect to undercut this characterization.

The Court discussed five of seven factors previously established,⁹⁸ which, while not “exhaustive or dispositive,”⁹⁹ provided “useful guideposts” in determining if a law is sufficiently punitive in effect to overcome the stated intent of the legislation.¹⁰⁰ The factors were whether the regulatory scheme: (1) has been historically/traditionally regarded as punishment, (2) serves the traditional aims of punishment, (3) imposes an affirmative restraint or disability on the offender, (4) has an alternative (non-punitive) purpose to which it may be rationally connected, and (5) is excessive in relation to the alternative purpose.¹⁰¹

Under this analysis, the Court found no punitive effect sufficient to overcome the legislature’s stated intent.¹⁰² First, while SORA might resemble colonial shaming punishments—in which the offender was held up before others, forced to confront them face-to-face, and sometimes expelled from the community—SORA was substantively different, as public shaming often involved corporal punishment and, even when it did

not, involved more than mere dissemination of information.¹⁰³ Second, the Court found that SORA imposed no physical restraint on the offender, nor did it restrain the activities sex offenders may pursue, such as employment.¹⁰⁴ Third, while the statute might deter crimes, the mere presence of a deterrent effect did not render legislation criminal.¹⁰⁵ Fourth, SORA was determined to have a legitimate, non-punitive purpose, namely, that of promoting and ensuring public safety, and its execution was rationally connected to this purpose.¹⁰⁶ Fifth, SORA was not considered to exceed its non-punitive purpose, even though it was potentially over-inclusive by failing to mandate individual determinations of dangerousness, because Alaska could rationally conclude that a conviction for a sex offense provided evidence of a substantial risk of recidivism.¹⁰⁷

C. Other Potential Constitutional Challenges

By casting Megan’s Law statutes as non-punitive (i.e., they do not impose punishment on sex offenders), the Court has also precluded a constitutional challenge based on an Eighth Amendment “cruel and unusual punishment” theory.¹⁰⁸ In addition, although the Supreme Court has yet to address these issues, federal courts of appeals have generally rejected attacks against registration and notification statutes based on purported violations of substantive due process,¹⁰⁹ privacy,¹¹⁰ and equal protection.¹¹¹ In light of

⁹⁵ *Id.* at 92 (quoting *Hudson v. United States*, 522 U.S. 93, 100, 139 (1997) (quoting *Ward*, 448 U.S. at 249)).

⁹⁶ *Id.* at 93.

⁹⁷ *Id.* at 96.

⁹⁸ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

⁹⁹ *Smith v. Doe*, 538 U.S. at 96 (quoting *Ward*, 448 U.S. at 249).

¹⁰⁰ *Id.* at 96 (quoting *Hudson*, 522 U.S. at 99).

¹⁰¹ *Mendoza-Martinez*, 372 U.S. at 168-69.

¹⁰² *Doe*, 538 U.S. at 105.

¹⁰³ *Id.* at 98.

¹⁰⁴ *Id.* at 100.

¹⁰⁵ *Id.* at 102 (citing *Hudson*, 522 U.S. at 105).

¹⁰⁶ *Id.* at 102-03.

¹⁰⁷ *Id.* at 104.

¹⁰⁸ *See id.* at 102-03.

¹⁰⁹ *Gunderson v. Hvass*, 339 F.3d 639, 643-44 (8th Cir. 2003), *cert. denied* 540 U.S. 1124 (2003) (holding that no fundamental right is implicated by such a statute, and that the statute is rationally related to a legitimate government purpose). *See also In re W.M.*, 851 A.2d 431, 450 (D.C. Cir. 2004), *cert. denied* 125 S. Ct. 885 (2005) (holding that Alaska’s SORA statute does not implicate a fundamental right).

¹¹⁰ *A.A. v. New Jersey*, 341 F.3d 206 (3d Cir. 2003) (stating that any privacy right of a sex offender is

the Court's unwillingness to strike down sex offender registration and notification laws in the two cases it considered, sex offenders would likely face an uphill battle pursuing these other challenges before the Supreme Court.

V. Civil Commitment

Another means widely thought to limit the danger posed by sex offenders is to impose on them civil commitment through "sexually violent predator" (SVP) laws.¹¹² Under this approach, sex offenders are confined to a treatment facility, typically following the completion of their prison term, based on a finding that "because of a mental abnormality or personality disorder, [the person] finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts."¹¹³ "Mental abnormality" or "personality disorder" is frequently defined to mean "a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others."¹¹⁴ This approach employs the civil, rather than the criminal, process and allows a person to be involuntarily hospitalized if, following a hearing, that person is found to pose a risk of self-harm or harm to others.¹¹⁵ This approach permits the state to confine the

person until he or she no longer poses a danger to society.¹¹⁶

In *Kansas v. Hendricks*, the United States Supreme Court upheld a Kansas statute that allowed the involuntary civil commitment of a sex offender who, due to a "mental abnormality or personality disorder," is likely to engage in "predatory acts of sexual violence."¹¹⁷ In *Hendricks*, the respondent was a convicted sex offender whose pedophilia was considered to constitute the requisite "mental abnormality."¹¹⁸

Five years later, the Court issued a second ruling that clarified that *Hendricks* does not require that the state prove that sex offenders are completely incapable of controlling themselves before the state may commit them.¹¹⁹ In *Kansas v. Crane*, the Court established that the state is only required to prove that it would be "difficult" for the person to control his or her dangerous behavior as a predicate to civil commitment.¹²⁰

As of 2006, nineteen states had civil commitment statutes for certain sex offenders.¹²¹ After an initial rapid proliferation of such laws, enthusiasm for additional enactments has waned. In the decade of the 1990s, fifteen state programs were passed; since 2000, only four states have enacted such programs. Reasons for this vary, but prohibitive cost, lack of ability to control costs, better alternative uses of funds and resources, lack of release back into the community resulting in an ever increasing number of

outweighed by the state's compelling interest in protecting public safety (citing *Paul P. v. Farmer*, 227 F.3d 98, 107 (3d Cir. 2000)).

¹¹¹ *Doe v. Moore*, 410 F.3d 1337, 1346-49 (11th Cir. 2005), *cert. denied*, 126 S. Ct. 624 (2005) (finding no equal protection violation).

¹¹² See JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 128 (2005).

¹¹³ VA. CODE ANN. § 37.2-900 (2006).

¹¹⁴ *Id.*

¹¹⁵ ANDREW J. HARRIS, CIVIL COMMITMENT OF SEXUAL PREDATORS: A STUDY IN POLICY IMPLEMENTATION xiii (2005); John Kirwin, *One Arrow in the Quiver--Using Civil Commitment as One Component of a State's Response to Sexual Violence*, 29 WM. MITCHELL L. REV. 1135, 1137 (2003).

¹¹⁶ See, e.g., FLA. STAT. § 394.917(2) (2005).

¹¹⁷ *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (quoting KAN. STAT. ANN. § 59-29a01 (1994)). The phrase "predatory acts of sexual violence" has since been replaced with "repeat acts of sexual violence." KAN. STAT. ANN. § 59-29a01 (2005).

¹¹⁸ *Kansas v. Hendricks*, 521 U.S. at 360.

¹¹⁹ *Kansas v. Crane*, 534 U.S. 407, 411 (2002).

¹²⁰ *Id.* at 411.

¹²¹ Susan Broderick, *Innovative Legislative Strategies for Dealing with Sexual Offenders*, 18(10) AMERICAN PROSECUTORS RESEARCH INSTITUTE UPDATE 1 (2006), http://www.ndaa-apri.org/publications/newsletters/update_vol_18_number_10_2006.pdf.

individuals committed, and lack of demonstrated efficacy are all cited.¹²² As of December 2004, 3,943 people had been confined under these laws, with only 427 of them having been conditionally released (most of them) or discharged.¹²³

Civil commitment is arguably the most draconian of the so-called non-punitive sex offender legislation in that it confines, for an indeterminate and potentially life-long period of time, offenders who have already served their criminal sentences. It confines these offenders essentially because of crimes they might commit in the future. Civil commitment should be used as a last resort and only for offenders whose dangerousness has been established on a case-by-case basis.

VI. Problems with the Current Responses to Sexual Offending

Current sex offender legislation regarding community notification in particular needs to be more focused. The broad range of offenders encompassed by these laws detracts attention and resources away from those offenders that need the greatest attention, monitoring, and supervision, namely, offenders who pose the highest risk of recidivism. As discussed, individuals who commit incest or statutory rape, or who possess child pornography, are often considered to be sex offenders for purposes of community notification. While the putative reason for sex offender legislation is a regulatory one—protecting citizens¹²⁴—notification regimes are not risk-discriminating. For instance, adult relatives who engage in consensual sexual intercourse with one another pose little, if any, risk to the community, yet they can be subject to registration and notification requirements. This broad scope needlessly scares community members by overstating the

¹²² John Q. La Fond & Bruce J. Winick, *Doing More Than Their Time* (op-ed), N.Y. TIMES, May 21, 2006, at sec. 14, p. 13.

¹²³ *Id.*

¹²⁴ See, e.g., N.Y. CORRECT. LAW Art. 6-C Note (2005).

presence of what are perceived to be dangerous offenders, places burdens on offenders who pose little or no risk of harming anyone, and drains financial, law enforcement, and administrative resources.

Notification also makes it difficult for offenders to obtain housing and employment. In a study involving thirty convicted sex offenders subjected to community notification, 83% reported that they had been excluded from a residence and 57% reported that they had lost employment as a result of their status as sex offenders.¹²⁵ In another study, 300 employers were surveyed as to whether they would hire ex-convicts, including offenders who had committed sexual crimes against children or sexual assault against adults.¹²⁶ The overwhelming majority of employers surveyed stated that they would not hire the sex offenders.¹²⁷ Job stability, however, significantly reduces the likelihood that a sex offender will re-offend,¹²⁸ making notification counterproductive in this respect.

Given that landlords are reluctant to house sex offenders, not surprisingly many are homeless.¹²⁹ Ironically, this makes monitoring them more difficult. In addition, with sex offenders forced to move from place to place, even state to state, it becomes harder for offenders to maintain needed ongoing relationships with mental health professionals and family members, friends, or community members and organizations that can provide

¹²⁵ Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?* 18 BEHAV. SCI. & L. 375, 383 (2000).

¹²⁶ Shelley Albright & Furjen Denq, *Employer Attitudes Toward Hiring Ex-Offenders*, 76(2) PRISON J. 118, 124-25 (1996).

¹²⁷ *Id.* at 129-31.

¹²⁸ Candace Kruttschnitt et al., *Predictors of Desistance among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 JUST. Q. 61, 80 (2000).

¹²⁹ See, e.g., Monica Davey, *Iowa's Residency Rules Drives Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1.

support services, which in turn may enhance the likelihood of recidivism.¹³⁰

Vigilantism has also been associated with community notification laws. When communities are notified about the presence of a sex offender, some community members may harass, intimidate, or even violently attack the offenders. In one instance, a teenage offender received death threats and found his dog decapitated on his step.¹³¹ In another instance, arsonists burned down the home where a released sex offender was supposed to live.¹³² One study found that amongst 942 sex offenders in Washington state subject to community notification, there were thirty-three reported incidents of harassment of some form against the offender or his family.¹³³ While this number may seem low, one must keep in mind that such incidents may be underreported, as offenders may not want to call further attention to themselves or their families, and that even the possibility of such vigilantism can cause

¹³⁰ Further exacerbating this dislocation, a number of communities and states prohibit convicted sex offenders from living within a certain distance of designated locations such as schools or child-care centers. See, e.g., IOWA CODE § 692A.2A (2005). These restrictions have had the effect of virtually excluding convicted sex offenders from urban areas, as well as preventing them from living with family members. Davey, *supra* note 129. Interestingly, the Iowa County Attorney's Association, an organization of Iowa prosecutors, has criticized such legislation as being counterproductive, asserting that it causes homelessness and is too broad, and that no research shows that such a restriction reduces sex offenses. IOWA COUNTY ATTORNEYS ASSOCIATION, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA (Jan. 2006), http://spd.iowa.gov/filemgmt_data/files/SexOffender.pdf.

¹³¹ Jan Hoffman, *New Law Is Urged on Freed Sex Offenders*, N.Y. TIMES, Aug. 4, 1994, at B1.

¹³² Joshua Wolf Shenk, *Do 'Megan's Laws' Make a Difference?* U.S. NEWS & WORLD REP., Mar. 9, 1998, at 27.

¹³³ SCOTT MATSON & ROXANNE LIEB, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, COMMUNITY NOTIFICATION IN WASHINGTON STATE: 1996 SURVEY OF LAW ENFORCEMENT, Executive Summary, Doc. No. 96-11-1101 (Nov. 1996), available at <http://www.wsipp.wa.gov/rptfiles/sle.pdf>.

significant worry amongst offenders and their families and hamper treatment efforts.

Another common result of notification is isolation. Social ostracism that the sex offender experiences may push him farther from integrating with society, decrease social skills, and make re-offense more likely.¹³⁴

While community notification increases public anxiety,¹³⁵ an article published in October 2005 noted that in the ten years that such laws have been in place, there has not been a single study that has shown reduced recidivism of sexual violence attributable to notification.¹³⁶ In December of that same year, a report from the Washington Institute of Public Policy did find that sex offenses had decreased in the years since Washington's passage of sex offender legislation that contained registration and notification provisions.¹³⁷

There are a number of problems with drawing conclusions from this decrease, however. First, as the report acknowledges, Washington has increased the length of incarceration for sex offenders during this period.¹³⁸ If offenders are incarcerated for longer periods of time, they have less opportunity to offend. Thus, the decrease in recidivism could be attributable to increased length of incarceration. Second, even if one ignores the incarceration issue, the notification regime in Washington is risk-discriminating in that it provides for community notification only for

¹³⁴ TERRY, *supra* note 24, at 196.

¹³⁵ Mary Bolding, *California's Registration and Community Notification Statute: Does It Protect the Public from Convicted Sex Offenders?*, 25 W. ST. U.L. REV. 81, 81 (1997).

¹³⁶ EXECUTIVE BOARD OF DIRECTORS, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, THE REGISTRATION AND COMMUNITY NOTIFICATION OF ADULT SEXUAL OFFENDERS (Oct. 5, 2005), <http://www.atsa.com/ppnotify.html>.

¹³⁷ ROBERT BARNOSKI, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, SEX OFFENDER SENTENCING IN WASHINGTON STATE: HAS COMMUNITY NOTIFICATION REDUCED RECIDIVISM? Doc. No. 05-12-1202 (Dec. 2005), <http://www.wsipp.wa.gov/rptfiles/05-12-1202.pdf>.

¹³⁸ *Id.*

moderate and high risk offenders,¹³⁹ thus obviating some, but not all, of the inefficiencies and counterproductive components of notification regimes. Those notification regimes that are not risk-discriminating and that are not accompanied by treatment, employment, and housing for offenders are unjust and inefficient. Third, it is notable that with fifty states having enacted community notification laws, this is the only study that we have located that suggests some effect in terms of reducing recidivism. Clearly, more research on the impact of these laws is needed.

Civil commitment as a mechanism for responding to sexual offenders also carries a heavy price. First, a general right to be free from physical restraint and various liberty interests are afforded by the Constitution.¹⁴⁰ There are of course situations where these important guarantees can be tempered, but such restrictions should be limited.¹⁴¹ Second, civil commitment is very expensive. The cost of housing and treating a civilly committed person for one year in Washington is \$138,000.¹⁴² Overall, the cost of operating special facilities for the commitment of sex offenders at the national level is estimated to be \$224 million per year.¹⁴³ Thus, if there are cheaper or less restrictive ways to achieve the goals of civil commitment, namely, protect public safety and promote rehabilitation, they should be pursued.

VII. Treatment Options

¹³⁹ WASH. REV. CODE § 4.24.550 (2006).

¹⁴⁰ See *Kansas v. Hendricks*, 521 U.S. at 356.

¹⁴¹ *Id.*

¹⁴² TERRY, *supra* note 24, at 211.

¹⁴³ ROXANNE LIEB & KATHY GOOKIN, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: COMPARING STATE LAWS, Doc. No. 05-03-1101 (2005), available at <http://www.wsipp.wa.gov/rptfiles/05-03-1101.pdf>. On the other hand, the average cost per year of housing an inmate in state prison is \$22,650. JAMES STEPHAN, U.S. DEP'T OF JUSTICE, STATE PRISON EXPENDITURES, 2001, SPECIAL REPORT, NCJ 202949 (June 2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/spe01.pdf>.

While there is no known cure for inappropriate sexual thoughts and behavior,¹⁴⁴ there are treatments that can significantly reduce their strength and occurrence. Treatments include non-biological therapies such as cognitive behavioral therapy, and biological therapies such as surgical castration and pharmacological (drug) therapy.

Among the non-biological treatments for sex offenders, cognitive-behavioral therapy is the most common.¹⁴⁵ During cognitive-behavioral therapy, offenders may obtain social skills training, sex education, cognitive restructuring, aversive conditioning, and victim empathy therapy.¹⁴⁶

Social skills training attempts to provide the offender with social competency, so that the individual may pursue appropriate social interactions; sex education informs the offender of the risks and practice of sexual behavior; cognitive restructuring helps the offender avoid cognitive distortions that may have provided the offender with a justification for his behavior; aversive conditioning pairs painful, annoying, or unpleasant experiences, such as a bad smell, with an offender's inappropriate sexual fantasy; and victim empathy therapy helps offenders understand the harm they have caused to the victim and that the victim is also a person with feelings.¹⁴⁷ Offenders may also undergo relapse prevention therapy, a type of cognitive-behavioral therapy, where they learn how to identify problematic thoughts and behaviors and stop their progression.¹⁴⁸

¹⁴⁴ TERRY, *supra* note 24, at 139.

¹⁴⁵ *Id.* at 154.

¹⁴⁶ Richard B. Krueger & Meg S. Kaplan, *Behavioral and Psychological Treatment of the Paraphilic and Hypersexual Disorders*, 8 J. PSYCHIATRIC PRAC. 24-25 (2002).

¹⁴⁷ *Id.*

¹⁴⁸ THE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, REDUCING SEXUAL ABUSE THROUGH TREATMENT AND INTERVENTION WITH ABUSERS (1996), <http://www.atsa.com/pptreatment.html> [hereinafter ATSA].

Cognitive behavioral therapy, while often successful in reducing recidivism amongst sex offenders,¹⁴⁹ does not always work, either completely or at all.¹⁵⁰ Thus, it is very important for a mental health professional to determine when cognitive-behavioral therapy is appropriate, and to monitor its effectiveness.

Surgical castration¹⁵¹ involves removal of the testes, which has the effect of significantly reducing circulating testosterone.¹⁵² While surgical castration does decrease sex drive,¹⁵³ it does not always do so completely.¹⁵⁴ Further, many view surgical castration, which they associate with the eugenics movement that sought to sterilize those with undesirable traits thought to be hereditary,¹⁵⁵ with fear and skepticism. Additionally, the reduction of sex drive achieved through surgical castration can be overcome with the use of exogenous androgens, such as testosterone,¹⁵⁶ which may be obtained surreptitiously. Nevertheless, some authorities believe that surgical castration may become more common, as it has achieved the lowest recidivism rate of any treatment.¹⁵⁷

Pharmacological therapy,¹⁵⁸ however, is a viable option for many, particularly those with paraphilias. One of the most noteworthy studies on pharmacological therapy for sex offenders tested the efficacy of triptorelin, a drug that reduces male testosterone levels, in decreasing the deviant sexual desire and behavior of thirty men.¹⁵⁹ All of the men suffered from paraphilias, with twenty-five of them suffering specifically from pedophilia.¹⁶⁰ Before triptorelin use, the men reported an average of forty-eight deviant sexual fantasies per week (with a standard deviation of ten) and five incidents of abnormal sexual behavior per month (with a standard deviation of two).¹⁶¹

During treatment, which involved monthly intramuscular injections of triptorelin, supplemented with regular supportive psychotherapy (one to four sessions a month), all of the men had a prompt reduction in paraphilic activities, with the maximal reduction in the intensity of their sexual desire and symptoms occurring after three to ten months with the exception of one man in whom it was achieved after two years.¹⁶² All of the men reported that their sexual desire decreased considerably, that their sexual behavior became easily controllable, that their deviant sexual fantasies and urges disappeared completely, and that there were no incidents of abnormal sexual behavior during therapy.¹⁶³ Once the maximal effects of treatment were achieved, there were no sexual offenses reported by the men, by their relatives, or by a probation officer.¹⁶⁴ Symptoms returned among those men who stopped treatment, including three who

¹⁴⁹ Polizzi et al., *What Works in Adult Sex-Offender Treatment? A Review of Prison- and Non-Prison Based Treatment Programs*, 43 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 357, 371 (1999).

¹⁵⁰ See ATSA, *supra* note 148.

¹⁵¹ Surgical castration is also referred to as physical castration or orchiectomy.

¹⁵² Kurt Freund, *Therapeutic Sex Drive Reduction*, 62 (Supp. 287) ACTA PSYCHIATRICA SCANDINAVICA 5, 15 (1980). For an updated review of surgical castration, see Richard B. Krueger et al., *Orchiectomy* (in preparation).

¹⁵³ Richard Wille & Klaus M. Beier, *Castration in Germany*, 2 ANNALS SEX RESEARCH 103, 129 (1989).

¹⁵⁴ TERRY, *supra* note 24, at 154.

¹⁵⁵ See Charles Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502, 502 (2003).

¹⁵⁶ J. Michael Bailey & Aaron S. Greenberg, *The Science and Ethics of Castration: Lessons from the Morse Case*, 92 NW. U.L. REV. 1225, 1235 (1998).

¹⁵⁷ Ariel Rosler & Eliezer Witztum, *Pharmacotherapy of Paraphilias in the Next Millennium*, 18 BEHAV. SCI. & L. 43, 44 (2000).

¹⁵⁸ Pharmacological therapy is also referred to as drug therapy or chemical castration.

¹⁵⁹ Ariel Rosler & Eliezer Witztum, *Treatment of Men with Paraphilia with a Long-Acting Analogue of Gonadotropin-Releasing Hormone*, 338 NEW ENG. J. MED. 416 (1998).

¹⁶⁰ *Id.* at 417.

¹⁶¹ *Id.* The study did not include a control group "because the men might have continued to offend while receiving a placebo." *Id.*

¹⁶² *Id.* at 418.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 418-19.

reported intolerable side effects. Further, for three of these men who were subsequently given an alternative medication (cyproterone acetate), two were subsequently prosecuted and received prison sentences for sex crimes.¹⁶⁵ Case studies of another testosterone-reducing drug, leuprolide acetate (brand name Lupron), reported successful results similar to those of triptorelin.¹⁶⁶

Currently, medroxyprogesterone acetate (MPA)¹⁶⁷ is the drug most commonly used to reduce serum testosterone levels.¹⁶⁸ MPA is given by injection and need only be administered once every three months.¹⁶⁹ Each injection costs about \$30 to \$75.¹⁷⁰ Gonadotropin releasing hormone agonists, such as depot-leuprolide acetate, though, are gaining a foothold¹⁷¹ because they have fewer adverse side-effects¹⁷² and are considered

¹⁶⁵ *Id.* 419.

¹⁶⁶ Richard B. Krueger & Meg S. Kaplan, *Depot-Leuprolide Acetate for Treatment of Paraphilias: A Report of Twelve Cases*, 30(4) ARCHIVES SEXUAL BEHAV. 409 (2001). See also Peer Briken et al., *Treatment of Paraphilia with Luteinizing Hormone-Releasing Hormone Agonists*, 27 J. SEX & MARITAL THERAPY 45, 52 (2001); Richard B. Krueger & Meg S. Kaplan, *Chemical Castration: Treatment for Pedophilia*, in 2 DSM-IV-TR CASEBOOK 309, 309 (Michael B. First et al. eds., 2006).

¹⁶⁷ Available under the brand name Depo-Provera.

¹⁶⁸ TERRY, *supra* note 24, at 153.

¹⁶⁹ MPA can also be given orally. Luk Gijs & Louis Gooren, *Hormonal and Psychopharmacological Interventions in the Treatment of Paraphilias: An Update*, 33(4) J. SEX RESEARCH 273, 275 (1996).

¹⁷⁰ JENNIFER JOHNSON, PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., IS THE SHOT RIGHT FOR YOU? (2006), <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/pub-depo-provera.xml>.

¹⁷¹ Fabian M. Saleh & Laurie L. Guidry, *Psychosocial and Biological Treatment Considerations for the Paraphilic and Nonparaphilic Sex Offender*, 31 J. AM. ACAD. PSYCHIATRY & L. 486, 490 (2003).

¹⁷² Krueger & Kaplan, *supra* note 166, at 418 (citing Smith et al., *Clinical Effects of Gonadotrophin-releasing Hormone Analogue in Metastatic Carcinoma of Prostate*, 25 UROLOGY 106 (1985)). Side effects of MPA include hyperglycemia, nightmares, weight gain, and lethargy. Rosler & Witzum, *supra* note 159, at 420. Side effects of leuprolide acetate include hot flashes and decreases in bone density, which can

more effective¹⁷³ than MPA. Although leuprolide acetate is significantly more expensive than MPA,¹⁷⁴ considering its treatment potential, it may well be worth the cost.

Pharmacological therapies are generally given to those with paraphilias, as they have stronger and more intense deviant sexual desires than other sex offenders.¹⁷⁵ As noted, however, pharmacological therapies may induce unpleasant or harmful side effects or for other reasons may be resisted by sex offenders. While the testosterone-reducing effects of drugs like MPA and leuprolide acetate may be overcome by taking exogenous androgens, standard laboratory analyses of blood and urine can be used to test for the presence of such androgens.¹⁷⁶ It is also important to note that pharmacological therapies need not be life-long; these therapies may be employed for short-term treatment that allows offenders to obtain some measure of control over their sexual impulses and enables other forms of treatment, such as behavioral therapy, to become effective.¹⁷⁷

However, pharmacological therapies have their limits. For instance, drugs that reduce

be countered by administering, among other things, alendronate, vitamin D, and calcium. *Id.* at 419-20; Richard B. Krueger et al., *Prescription of Medroxyprogesterone Acetate to a Patient with Pedophilia, Resulting in Cushing's Syndrome and Adrenal Insufficiency*, SEXUAL ABUSE: J. RES. & TREATMENT (forthcoming 2006).

¹⁷³ *Id.* at 420-21.

¹⁷⁴ Although costs vary, the cost of one four-month dose has been set at \$2,660. WALGREENS, LUPRON DEPOT 30MG INJ, <http://www.walgreens.com/library/finddrug/druginfo/1.jsp?particularDrug=Lupron&id=15887> (last visited July 19, 2006).

¹⁷⁵ TERRY, *supra* note 24, at 153.

¹⁷⁶ See Bailey & Greenberg, *supra* note 156, at 1236. For instance, anabolic steroids such as testosterone cypionate, which may help increase sex-drive, are easily detectable, even months after use. Lorenz C. Hofbauer & Armin E. Heufelder, *Endocrine Implications of Human Immunodeficiency Virus Infection*, 75 MED. 262, 271 (1996); Morris B. Mellion, *Anabolic Steroids in Athletics*, 30 AM. FAM. PHYSICIAN 113, 118 (1984).

¹⁷⁷ Krueger & Kaplan, *supra* note 166, at 419.

testosterone levels, like leuprolide acetate and MPA, may not have any effect on nonsexual violence.¹⁷⁸ Thus, for offenders without paraphilias or whose primary problems are non-sexual, or for offenders with paraphilias and nonsexual violence problems, behavioral therapies, either alone or in conjunction with pharmacological therapies, are necessary.

VIII. Recommendations

Before better means to reduce the occurrence of sexual offenses can be established, the potent obstacle of the political process must be recognized. In a representative democracy, elected legislators are responsible to and dependent upon the support of their constituents. Considering the significant inaccuracies in, and overall frenetic nature of, popularly held beliefs and attitudes regarding sex offenders, it is not surprising that legislators often feel they must adopt measures driven by fear rather than sound science or public policy.

In this vein, a Police Chief in Des Moines, Iowa, arguing for the repeal of an Iowa law placing residency restrictions on certain sex offenders that increased their homelessness and subsequently decreased the ability to monitor their whereabouts, worried that state legislators would not re-work the counterproductive statute out of political cowardice.¹⁷⁹ This fear needs to be overcome and the following recommendations implemented.

(1) Current medical practice has embraced “evidence-based medicine,” which is “the conscientious, explicit, and judicious use of current best evidence in making decisions about the care of individual patients.”¹⁸⁰ This approach integrates “individual clinical expertise with the best available external

clinical evidence [drawn] from systematic research.”¹⁸¹ There is a similar need for “evidence-based legislation.” Although recidivism rates are frequently bandied about in the course of legislative debates over proposed sex offender legislation, there is a need for more accurate and precise information on risk and treatment that will enable more appropriate decisions to be made. In general, educational and training programs regarding sex offenders should be made available to legislators and their staff to inform their decision-making.

(2) Sex offender legislation should be preceded by careful study and a projected cost-benefit analysis, rather than rely on speculation and public fears. In addition, any legislation that is enacted should always include a provision mandating and funding a cost-benefit analysis of the legislation and its effects. Building “sunset” provisions into this legislation can provide an opportunity for a systematic review of the cost-benefit analysis and the impact of the legislation, and can be considered in determining whether to modify the legislation.¹⁸²

(3) Sexual offending is a complex behavior and understanding and redressing it is a difficult challenge. Accordingly, proposals to reduce this criminal behavior should be carefully considered and studied. To promote this effort, multidisciplinary commissions should be formed with governmental support and charged to fully evaluate the effects and integration of sex offender-related legislation. These commissions should include mental health professionals, lawyers, criminologists, judges, and legislators. Such commissions should address sex abuse as both a criminal justice and a public health problem. The Centers for Disease Control and Prevention and the World Health Assembly (the decision-making body for the World Health Organization) have declared violence to be a

¹⁷⁸ *Id.*

¹⁷⁹ Lee Rood, *New Data Shows Twice as Many Sex Offenders Missing*, DES MOINES REG. & TRIB., Jan. 23, 2006, at 1A.

¹⁸⁰ David L. Sackett et al., *Evidence Based Medicine: What It Is and What It Isn't*, 312 BRITISH MED. J. 71, 71 (1996).

¹⁸¹ *Id.*

¹⁸² A “sunset” provision provides that the legislation, unless renewed, will expire after a specified period of time or upon a given date.

public health priority, and The Association for the Treatment of Sexual Abusers has suggested that this framework be extended to sexual violence.¹⁸³ The public health model is used to complement the criminal justice approach and strives to prevent the occurrence of crimes through the identification of risk factors and the development of interventions to address these factors.¹⁸⁴ A public health approach can develop not only appropriate post-offense responses, but also generate broader, more systematic, long-term changes that can help prevent the occurrence of sexual abuse and the development of sex offenders.

(4) Risk level classifications should be incorporated into society's responses to sex offenders, particularly with regard to their community notification systems, and a graduated response employed that limits the use of the most "punitive" mechanisms to those offenders that have been shown to pose the greatest risk. This would enable offenders who pose minimal risk and are unlikely to re-offend to reintegrate into society, as well as motivate all offenders to seek and comply with needed treatment programs to obtain this level of classification. Mental health professionals can now identify factors that are related to recidivism and, using sophisticated, empirically-validated instruments, accurately assess the likelihood of future risk.¹⁸⁵ These

¹⁸³ See, e.g., THE ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS, SEXUAL ABUSE AS A PUBLIC HEALTH PROBLEM (2001), <http://www.atsa.com/pppublichealth.html>.

¹⁸⁴ *Id.*

¹⁸⁵ While there are a number of instruments used to predict the likelihood of recidivism, the Static-99 is the most common and most validated. R. KARL HANSON, PUBLIC SAFETY AND EMERGENCY PREPAREDNESS CANADA, THE VALIDITY OF STATIC-99 WITH OLDER SEXUAL OFFENDERS (2005), http://ww2.psepc-sppcc.gc.ca/publications/Corrections/20050630_e.asp. The Static-99 considers ten static factors about an offender, such as the offender's gender and prior sexual offenses, and assigns a score to an offender based on the answers to questions related to these factors. See TERRENCE W. CAMPBELL, ASSESSING SEX OFFENDERS 83-84 (2004). Static-99 shows "moderate predictive accuracy." R. Karl Hanson & David Thornton,

instruments should be used, for example, to determine what level of community notification is employed for various categories of sex offenders. Community notification should be tailored to the risk these offenders present.

(5) Legislative responses to sex offending should incorporate incentives that reward offenders who undergo, comply with, and maintain treatment, such as relieving these offenders of some of the obligations and hardships they would otherwise face. As noted, the strictest measures should be reserved for those offenders who pose the greatest, most difficult-to-reduce risk of re-offending, thereby targeting scarce resources and focusing attention in a more efficient and productive manner. Such incentives will further motivate offenders to seek and comply with needed treatment programs.

(6) Less restrictive alternatives (including both behavioral and pharmacological treatment) should be considered before civilly committing a sex offender and, where appropriate, be offered to the offender.¹⁸⁶ Such treatment should be provided free of charge or at least at an affordable rate. The successful employment of these alternatives can avoid the huge costs associated with civil commitment, while enhancing the likelihood that an offender becomes a productive member of society. At the same time, the availability of civil commitment or other mechanisms can help ensure treatment compliance.

Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales, 24 L. & HUM. BEHAV. 119, 129 (2000). Static-99 has its critics. See, e.g., CAMPBELL, *supra*, at 83-97. It is properly used as a starting point, both in practice and as a springboard for further research. A more comprehensive view of risk would involve considering both static and dynamic (such as current employment stability) factors. Further research is necessary, but risk assessment instruments have experienced steady improvement, improvement that will continue with new research and testing.

¹⁸⁶ Involuntary pharmacological therapy is not addressed here, as it raises numerous constitutional and ethical concerns that merit a separate, thorough analysis.

(7) Government supported opportunities for offenders to obtain employment, housing, treatment, and support services should be enhanced. Offenders cannot reintegrate into society and develop healthy living habits if they have no income, shelter, treatment, or support. Enhancing the likelihood that offenders must or will continually relocate because they lack these opportunities not only virtually ensures that offenders will not improve and exhibit appropriate behavior, but also makes it more difficult to monitor the offender to enhance public safety.

(8) Resources available to treat potential offenders should receive more publicity. Existing state-sponsored websites, publications, and education programs appropriately highlight the resources available to victims, as well as how people can identify and locate sex offenders. There is little or no attention given to advertising how and where a person with a sexual disorder can obtain competent and confidential treatment that will prevent inappropriate behavior from occurring. Governmental funding should be provided to enhance awareness of these services.¹⁸⁷ Additionally, governmental support should be supplied to ensure that people can obtain these resources even when they lack the ability to pay for these services.

(9) Drug and mental health courts have been successfully implemented in some locations.¹⁸⁸ These courts hear mostly or exclusively drug cases or relatively minor criminal cases involving defendants with a mental disorder, respectively, and have thus

¹⁸⁷ Examples of organizations that provide referrals to mental health professionals and programs that treat sex offenders include: The Safer Society Foundation, P.O. Box 340, Brandon, VT, 05733-0340, (802) 247-5141, www.safersociety.org; The Association for the Treatment of Sexual Abusers (ATSA), 4900 S.W. Griffith Dr., Suite 274, Beaverton, OR, 97005, (503) 643-1023, www.atsa.com, atsa@atsa.com.

¹⁸⁸ See, e.g., Jonathan E. Fielding et al., *Los Angeles County Drug Court Programs: Initial Results*, 23 J. SUBSTANCE ABUSE TREATMENT 217, 223 (2002).

developed significant experience and expertise in such matters. Sex offense courts may be a viable mechanism in which judges and parole or probation officers are knowledgeable about sex offenders, the treatment modalities specifically designed for sex offenders, the appropriate mechanisms to prevent recidivism, and how best to monitor and supervise offenders to ensure public safety.

However, there is much debate regarding specialized courts in the literature, and thus the matter needs further study.¹⁸⁹ Regardless of whether such specialized courts are implemented, educational and training programs regarding sex offenders should be made available to judges, as well as probation and parole officers, to inform their decision-making.

(10) Because of the limited knowledge and understanding of sex offending, funding and support for research to enhance this understanding is essential. Further research should focus on improving the collection and analysis of recidivism data; studying the effects on recidivism of existing non-punitive responses to sex offenders and possible alternatives; and examining, evaluating, and improving the efficacy of non-biological and biological treatment.

IX. Conclusion

¹⁸⁹ The issue of specialized sex courts is not a simple one. Scholars have long debated the merits and drawbacks of specialized courts as compared to courts of general jurisdiction. Proponents see specialization as beneficial insofar as the courts can develop significant expertise in the area of specialization and produce efficiencies such as those that economists have noted flow from specialization in the production of goods and services. Opponents worry that specialization can render these courts more susceptible to special interests and bias, and that the monotony (hearing the same cases over and over) and lack of prestige of a specialized judgeship might attract a lower-quality judiciary than a generalized judgeship would. For an excellent review of these issues, consult Jeffrey Stempel, *Two Cheers for Specialization*, 61 BROOK. L. REV. 67 (1995).

Crafting appropriate responses for sex offenders is no easy task. As they are some of the most hated and reviled members of society, legislators (even those who are well-intentioned) fear opposing legislation targeting these offenders, regardless of how misguided the legislation may be. In the long run, however, well-informed and carefully crafted measures will prove more effective than impulsive, ill-conceived responses in reducing sex offenses.

Four principles should guide the development of these responses. First, sex offenders should be recognized to be a heterogeneous group, distinguishable by offense type and risk of re-offense. Second, the law should take into account new pharmacological therapies, such as testosterone-suppressing drugs, as well as other innovations and therapeutic approaches as a means of reducing the likelihood of future offenses.¹⁹⁰ Third, greater efforts should be made to promote offender reintegration into society, thereby improving their chances for successful treatment and diminishing the likelihood that they will reoffend. Fourth, it is critical to assess the effects of such legislation and to invest in research into the causes, treatment, and prevention of sexual violence.

By integrating law and therapeutic efforts, responses can be formulated that prevent future offenses and victimization, offer offenders and potential offenders the optimal opportunity to lead healthy, productive lives, and decrease the cost of sexual offending to society. By implementing the recommendations described above, society can move one step closer to these goals.

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¹⁹⁰ These therapies are not cure-alls. They must be used appropriately, as discussed in this article and in the medical literature.