

2011

Megan's Laws as a Case Study in Political Stasis

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Wayne A. Logan, *Megan's Laws as a Case Study in Political Stasis*, 61 *SYRACUSE L. REV.* 371 (2011),
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Citation: 61 Syracuse L. Rev. 371 2010-2011



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MEGAN’S LAWS AS A CASE STUDY IN POLITICAL STASIS

Wayne A. Logan[†]

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INTRODUCTION

Sex offender registration and community notification laws constitute a remarkable political success story. While only a handful of states had registration laws of any kind as of the late 1980s, and none had community notification laws, by the end of 1990s both registration and notification laws, focusing almost exclusively on convicted sex offenders, were in effect nationwide. To students of the field, the laws—often enacted unanimously and without meaningful debate—serve as object lessons in legislative panic. Unlike earlier panics, however, including those relative to sex offenders, the panic has not dissipated.¹ Indeed, registration and community notification laws have endured and been significantly expanded upon during the past decade, despite research findings casting considerable doubt on their utility and public safety efficacy.²

This Article examines how and why the laws persist in the face of

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1. See *infra* notes 146-147 and accompanying text (discussing “sexual psychopath” laws taking root in 1930s but subsequently disavowed).

2. See *infra* notes 211-239 and accompanying text (summarizing research findings).

these obstacles. Part I provides an overview of the genesis and evolution of registration and community notification laws. Part II situates the laws' saga in the broader literature concerning modern criminal justice politics, dominated by tough-on-criminal offender initiatives. Registration and notification, however, provide a prime opportunity to illuminate the related yet distinct phenomenon of how one such initiative, despite its questionable benefit, has been inured to legislative reconsideration.³ Part III explores several chief reasons behind this stasis, drawing parallels to the political science literature on path dependence and lock-in. The Article concludes with some thoughts on the broader implications of the laws' staying power.

I. ORIGINS AND EVOLUTION

A. *Origins*

The main animating impulse behind modern-day sex offender registration and community notification laws is ancient and eminently understandable. Individuals have always felt a potent need to know of potentially dangerous persons in their midst.⁴ As populations increased in size and became ever-more transitory, as a result of technological advances in transportation options, apprehension over anonymity intensified.⁵ In response, governments in eighteenth and nineteenth century Europe, no longer able to single out the criminally convicted by means of physical disfigurement, began collecting, organizing, and storing information on convicts.⁶ Bertillonism, a complex system entailing recorded physical measurements of individuals and their conviction histories, popular at the turn of the twentieth century, marked perhaps the zenith of the urge.⁷

In the United States, Bertillonism, as well as "rogues galleries," in which early photographic techniques were deployed to array convicts' photos in police stations, enjoyed popularity for a time.⁸ Fingerprinting

3. See Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 B.U. L. REV. 813, 827 (1998) (discussing posited superior institutional responsiveness of legislatures based on access to expert opinion and fact-finding).

4. For a fuller discussion of the historical antecedents of and motivating forces behind registration and community notification laws, see WAYNE A. LOGAN, *KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA* 1-19 (Stanford Univ. Press 2009).

5. *Id.* at 3.

6. *Id.* at 2-5.

7. *Id.* at 9-12.

8. *Id.* at 10-11, 19.

came to enjoy even wider use.⁹ In the early 1930s, however, authorities in the Los Angeles County, California area, concerned about the infusion of “gangsters” from east coast and Midwestern cities, began pushing for provisions requiring that persons convicted of specified crimes register.¹⁰ The idea, which bore the unmistakable imprint of antecedent European efforts, had the added advantage of requiring that ex-convicts make affirmative effort to register, unlike the passive collection methods previously used.¹¹ Over the next fifty years, registration laws were enacted in dozens of localities nationwide, and even several states, targeting a wide variety of persons convicted of crimes (including miscegenation).¹² By the mid-1980s, however, amid persistent criticisms over the quality and comprehensiveness of information contained in registries, as well as its perceived lack of public safety utility, interest in registration flagged, and the laws for all practical purposes existed in name only.¹³

At the end of the 1980s, however, this disinterest experienced a radical reversal, as several widely reported child victimizations, in Washington State and Minnesota in particular, triggered resurgent interest in registration.¹⁴ States, not localities, were now the prime movers behind the laws, which unlike predecessor provisions, typically targeted sex offenders and a cluster of crimes thought related to sexual victimization (e.g., kidnapping).¹⁵ Washington's Community Protection Act of 1990, motivated by fear of especially high risk of sex offender recidivism, contained a registration provision, yet also inaugurated a new complementary social control strategy: community notification, which disseminated registrants' (referred to as “sexual predators”) background and identifying information to the public at-large.¹⁶ According to the Washington Legislature:

Persons found to have committed a sex offense have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government. Release of information about sexual predators to public agencies and under limited circumstances, the general public, will further the governmental interests of public safety and public scrutiny of the criminal and

9. LOGAN, *supra* note 4, at 13.

10. *Id.* at 22-28.

11. *Id.*

12. *Id.* at 12-19.

13. *Id.* at 46-47.

14. LOGAN, *supra* note 4, at 49-55.

15. *Id.* at 66-69.

16. *See* WASH. REV. CODE §§ 9A.44.130, 9A.144.030, 9.94A.030 (West 1990).

mental health systems¹⁷

Washington's law was hugely significant. It drew the nation's attention to registration, and public sentiment and policy quickly awakened to the perceived benefits of empowering police with readily accessible information on criminally risky individuals. With community notification, moreover, such information was not to be monopolized by police but rather was to be actively provided to communities. At the same time, Washington's law underscored the political power of an outraged community, galvanized by the belief that crucial information was being withheld by government officials, information that could be used to defend against recidivist sex offenders.

Similar outrage soon spawned laws elsewhere but none had the impact of the July 1994 rape and murder of seven-year-old Megan Kanka in Hamilton Township, New Jersey by Jesse Timmendequas, a twice-convicted sex offender who lived nearby.¹⁸ While local police were aware of Timmendequas's history, his neighbors reportedly were not.¹⁹ Voicing a sentiment that would come to define modern registration and notification laws, Megan's mother, Maureen Kanka, asserted that "if [she and her family] had known there was a pedophile living on our street, [Megan] would be alive today."²⁰

In the wake of a rapid-fire successful signature petition, the Speaker of the Assembly Garabed "Chuck" Haytaian, running for the U.S. Senate, declared a legislative emergency, bypassing customary committee debate and forcing sex offender registration and community notification proposals to move directly to the floor for consideration.²¹ After winning unanimous support in both the state houses, on October 31, 1994, three months and two days after Megan Kanka was murdered, Governor Christine Todd Whitman (with Maureen Kanka at her side) signed Megan's Law.²² With its passage, New Jersey became the fifth state to allow for some form of community notification.²³

17. *Id.* § 71.05.670.

18. Michelle Ruess, *A Mother's Plea: Pass Megan's Bill - Panel OKS Compromise*, RECORD (N.J.), Sept. 27, 1994, at A1.

19. *Id.*

20. *Id.*

21. Michelle Ruess, *Megan's Law Moving Fast in Assembly - Crackdown on Sex Offenders*, RECORD (N.J.), Aug. 16, 1994, at A1.

22. Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, N.Y. TIMES, Nov. 1, 1994, at B1.

23. PETER FINN, NAT'L INST. OF JUST., SEX OFFENDER COMMUNITY NOTIFICATION 3-4 (Feb. 1997), <http://www.ncjrs.gov/pdffiles/162364.pdf> (noting Alaska, Louisiana, New Jersey, Tennessee and Washington).

The state-level developments did not escape the attention of Congress. Indeed, the October 1989 disappearance of Jacob Wetterling in Minnesota prompted U.S. Senator David Durenberger (R-MN), in May 1991 to push for adoption of the "Crimes Against Children Registration Act."²⁴ As Durenberger told his Senate colleagues:

The reasons for enacting this legislation on the national level are clear: sexual crimes against children are widespread; the people who commit these offenses repeat their crimes again and again; and local law enforcement officials need access to an interstate system of information to prevent and respond to these horrible crimes against children.²⁵

Even though there was no evidence that Jacob had been sexually abused (the case remains unsolved), Durenberger stressed that if law enforcement "had been aware of the presence of any convicted sex offenders in the community, it would have been of invaluable assistance during those first critical hours of investigation."²⁶ Ultimately, however, despite the backing of the Wetterling Foundation, and bipartisan support in both houses of Congress, registration failed to gain Senate approval after conference.²⁷

Undaunted, Durenberger continued his push for legislation. In November 1993, the campaign was advanced in the House by Representative Jim Ramstad (R-MN), who, along with many colleagues, emphasized the need for a registration law in light of the purported high recidivism risk of sex offenders.²⁸ Again, registration was touted by Ramstad and others for its capacity to provide law enforcement with access to information on convicted offenders in the immediate wake of a child being abducted or otherwise harmed.²⁹ Registration was also lauded for its perceived value as a deterrent to

24. *Jacob's Parents Urge Support for Abuser Bill*, STAR TRIB. (Minneapolis-St. Paul), May 26, 1991, at B7.

25. *Id.*

26. *Id.*

27. 140 CONG. REC. S2825-26 (daily ed. Mar. 10, 1994) (statement of Sen. Durenberger) (recounting legislative history).

28. See 139 CONG. REC. H10319-22 (daily ed. Nov. 20, 1993) (statement of Rep. Ramstad) ("We know that child sex offenders are repeat offenders . . . Child sex offenders repeat their crimes again and again and again to the point of compulsion."); *id.* at H10322 (statement of Rep. Grams) ("Studies have shown that child sex offenders are some of the most notorious repeat offenders . . . this bill gives society the right to know where these convicted offenders reside.").

29. See *id.* at H10320 (statement of Rep. Sensenbrenner); *id.* at H10321 (statement of Rep. Ramstad).

criminal activity.³⁰ According to Ramstad, registration would put an individual “on notice that when subsequent sexual crimes are committed in the area where he lives, he may well be subject to investigation. This may well have a prophylactic effect, deterring him from future sexual crimes.”³¹

Although twenty-four states at the time had registration laws, a federal “stick”³² was needed “to prod all States to enact similar laws and to provide for a national registration system to handle offenders who move from one State to another.”³³ Federal law would do so by threatening to withhold crime-fighting funds from states that failed to adopt registration requirements prescribed by Congress.³⁴

In its original incarnations, starting in 1991, what was to become the Jacob Wetterling Act, treated registrants’ information as “private data,” available only to law enforcement for investigative purposes and government agencies for confidential background checks on persons working with children.³⁵ As history would have it, however, the victimization of Megan Kanka occurred while the bill progressed through the legislative process, prompting a sea-change in the chambers. Representative Jennifer Dunn (R-WA) rose to speak in the House “with a deep sense of outrage” over the omission of a notification provision intoning that:

Seven-year-old Megan Kanka of New Jersey is dead, Mr. Speaker. Sexual predators were released into her community and they lured that precious little girl to a grisly death. Conferees who worked to protect the rights of sexual predators should understand this: The next little girl killed by a released predator will haunt them. Mr. Speaker, it is outrageous that a few conferees have supplanted their will for the will of the House. It is outrageous that this bill effectively denies notification to the next Megan Kanka . . . or to your mother or sister or daughter. And it is outrageous that we would place the rights of criminals over the rights of victims.³⁶

Representative Dick Zimmer (R-NJ) made the absence of notification a key rallying point, and Chris Smith (R-NJ), representing the township in which Megan Kanka lived, condemned the “arrogance”

30. *Id.* at H10321 (statement of Rep. Ramstad).

31. 139 CONG. REC. H10321.

32. *Id.* at H10320 (statement of Rep. Sensenbrenner).

33. *Id.* at H10321 (statement of Rep. Ramstad).

34. *Id.* at H10320 (statement of Rep. Sensenbrenner).

35. 137 CONG. REC. S6704 (daily ed. May 23, 1991) (statement of Sen. Durenberger); 139 CONG. REC. H10320 (statement of Rep. Schumer).

36. 140 CONG. REC. H7939-40 (daily ed. Aug. 11, 1994) (statement of Rep. Dunn).

of the conferees and demanded that notification be permitted.³⁷ Smith stated “[n]o one in the community knew the killer’s sordid past, Mr. Speaker. Had Megan’s grieving parents known that their neighbor was a dangerous person, they would have taken steps to protect their precious child. Megan’s parents had a right to know.”³⁸ The redoubled effort to include a notification provision soon proved a success, and President Bill Clinton signed the legislation into law (with Maureen Kanka at his side)³⁹ as part of the massive \$30 billion Omnibus Anticrime Crime Bill on September 13, 1994.⁴⁰

The resulting law, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (“Wetterling”), required states to adopt its provisions if they wished to avoid losing ten percent of their Byrne Formula Grant Program criminal justice funds, the main general federal funding source for state criminal justice programs.⁴¹ States had to do so within three years of the law’s enactment, subject to a two-year extension for states making “good faith efforts,” and any undistributed funds resulting from a state’s failure to comply were to be reallocated to compliant states.⁴²

In its final form, Wetterling required registration of persons “convicted of a criminal offense against a victim who is a minor”⁴³ or “a sexually violent offense,”⁴⁴ as well as persons designated by the sentencing court as a “sexually violent predator.”⁴⁵ Registration was required upon release from prison or when placed on probation, parole, or supervised release after the Act’s implementation, with ten days to comply.⁴⁶ Sexually violent predators were subject to lifetime registration and were required to verify their residential addresses every ninety days; the other two categories of registrants had to register for ten years and annually verify their addresses.⁴⁷ Individuals who knowingly violated the law were “subject to criminal penalties in any

37. *Id.* at H7950 (statement of Rep. Smith).

38. *Id.*

39. Jennifer Bucksbaum, *NJ Victims’ Parents See Crime Bill Signed*, RECORD (N.J.), Sept. 14, 1994, at A17.

40. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

41. 42 U.S.C. § 14071(g)(2)(A) (1994).

42. *Id.* § 14071(g).

43. *Id.* § 14071(a)(1)(A).

44. *Id.*

45. *Id.* § 14071(a)(1)(B).

46. 42 U.S.C. § 14071(b)(1).

47. *Id.* § 14071(b)(1), (3), (6).

State” in which the violation occurred.⁴⁸

Congress elected to make community notification permissive, not mandatory.⁴⁹ Wetterling specified that law enforcement “may release relevant information that is necessary to protect the public” regarding a registrant, and provided officials immunity from civil liability for actions taken in “good faith” pursuant to the law.⁵⁰

Wetterling further provided that the Attorney General was to issue implementing guidelines, and in April 1996, final guidelines were released,⁵¹ emphasizing that federal law specified only minimum requirements for states (constituting “a floor . . . not a ceiling”).⁵² The states enjoyed similar latitude with respect to community notification, enjoying specific authorization to engage in either “particularized determinations” of risk or “categorical judgments” based on nature of conviction.⁵³

Not long thereafter, Representative Zimmer introduced what was to become the federal Megan’s Law, H.R. 2137, mandating that states utilize community notification, again under threat of losing federal funds.⁵⁴ Prompted by concern that states were “reluctant” to release information on registrants,⁵⁵ and that a lack of community notification in some twenty states might leave communities vulnerable and encourage sex offenders to migrate in search of anonymity,⁵⁶ the bill won unanimous support in both Houses of Congress.⁵⁷ In May 1996, President Clinton signed the bill into law.⁵⁸

With Megan’s Law, the federal government did not merely permit community notification. Rather, states were instructed that they “*shall*

48. *Id.* § 14071(c).

49. *Id.* §14071(b).

50. *Id.* § 14071(d)-(e).

51. Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 61 Fed. Reg. 15,110 (Apr. 4, 1996).

52. *Id.* at 15,112.

53. *Id.* at 15,116.

54. See H. Comm. on the Judiciary, H.R. REP. NO. 104-555, at 2 (1996) (“It has been brought to the attention of the Committee . . . that notwithstanding the clear intent of Congress that relevant information about these offenders be released to the public . . . some law enforcement agencies are still reluctant to do so.”). See also 142 CONG. REC. H4452 (daily ed. May 7, 1996) (statement of Rep. Conyers).

55. See 142 CONG. REC. H4452 (daily ed. May 7, 1996) (statement of Rep. McCollum).

56. *Hearing on H.R. 2137 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th Cong. 99-100 (2d Sess. 1996) (statement of Rep. Zimmer).

57. See LORD WINDLESHAM, POLITICS, PUNISHMENT, AND POPULISM 179-80 (1998).

58. Megan’s Law, Pub. L. No. 104-145, § 2, 1996 U.S.C.C.A.N. (110 Stat.) 1345, 1345 (1996) (amending 42 U.S.C. § 14071(d) (1994)).

release relevant information that is necessary to protect the public concerning a specific person required to register.”⁵⁹ “Information must be released to members of the public as necessary to protect the public from registered offenders.”⁶⁰

Since the enactment of Megan's Law, the federal government has imposed an ongoing series of registration and notification requirements, backed by federal funding threats. In October 1996, less than five months after Megan's Law was enacted, came the Pam Lynchner Sexual Offender Tracking and Identification Act of 1996,⁶¹ named after a Houston real estate agent who was sexually assaulted by a twice-convicted felon.⁶² Lynchner expanded the lifetime registration requirement beyond designated sexually violent predators to also include offenders (1) twice convicted of committing a criminal offense against a minor, (2) twice convicted of committing a sexually violent offense, or (3) convicted of aggravated sexual abuse.⁶³

Over the next decade came other laws, each modifying or in some way broadening registration and notification: in 1997,⁶⁴ 1998 (two laws),⁶⁵ 2000,⁶⁶ 2003,⁶⁷ and 2005.⁶⁸ The most significant change to date, however, came in 2006, when by voice votes in both the House and Senate, and with more than three dozen cosponsors, Congress adopted the Adam Walsh Child Protection and Safety Act of 2006 (AWA).⁶⁹ The bill was signed by President Bush on July 27, 2006, twenty-five years to the day after six-year-old Adam Walsh disappeared

59. 42 U.S.C. §14071(d) (1994) (emphasis added).

60. Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 62 Fed. Reg. 39,009, 39,019 (July 21, 1997).

61. Pub. L. No. 104-236, 1996 U.S.C.C.A.N. (110 Stat.) 3093, 3093 (codified at 42 U.S.C. § 14072 (2006)).

62. Alan D. Scholle, *Sex Offender Registration*, FBI LAW ENFORCEMENT BULLETIN, July 2000, at 17.

63. 42 U.S.C. §14072(d)(2) (2006).

64. Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Improvements Act of 1997, Pub. L. No. 105-119, § 115, 111 Stat. 2440, 2461-71.

65. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 105-119, 111 Stat. 2461 (1998); An Act, Pub. L. No. 105-277, § 123, 112 Stat. 2681-72, 73 (1998).

66. Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, 114 Stat. 1537-38 (2000) (codified at 20 U.S.C. § 1092(f) (2006) and 42 U.S.C. § 14071(j) (2006)).

67. PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

68. 151 CONG. REC. S3731 (daily ed. Apr. 15, 2005) (statement of Rep. Dorgan) (directing the attorney general to make available a national registry via the Internet).

69. Pub. L. No. 109-248, 120 Stat. 587 (2006) (codified at 42 U.S.C. § 16901 (2006)).

from a Florida shopping mall.⁷⁰

While named after Adam Walsh and enacted in recognition of the advocacy work of his parents John and Reve Walsh (the former became host of the popular television show “America’s Most Wanted”),⁷¹ the AWA formally established the Jacob Wetterling, Megan Nicole Kanka, and Pam Lynchner Sex Offender Registration and Notification Program.⁷² The AWA substantially overhauled federal registration and notification policy, expressly repealing Wetterling, Megan’s Law, and Lynchner.⁷³ It seeks, in the words of Congress, to establish a “comprehensive national system for the registration of [sex offenders and offenders against children].”⁷⁴

Like Megan’s Law in 1996,⁷⁵ the AWA was motivated by concern over the diversity of state regimes, which advocates asserted created “loopholes” and “deficiencies,” allowing thousands of registrants to become “lost.”⁷⁶ The AWA heightened requirements across the board, including the range of registerable offenses. All persons convicted of a “sex offense” were required to register, a category encompassing several expansive subcategories,⁷⁷ including criminal offenses having “an element involving a sexual act or sexual contact with another,”⁷⁸ “[v]ideo voyeurism”; the possession, production, or distribution of child pornography and; “[a]ny conduct that by its nature is a sex offense against a minor.”⁷⁹

The AWA also contains several significant policy changes, including a requirement that specified juvenile offenders register and requiring that registrants verify information in person (as opposed to mailing in verification).⁸⁰ Moreover, individuals now must register, keep their registration current, and provide a new photo, in each place

70. *Id.*

71. *Id.* § 2.

72. 42 U.S.C. §16902 (2006).

73. Pub. L. No. 109-248, 120 Stat. 587, 600-01.

74. 42 U.S.C. §16901 (“Declaration of Purpose”).

75. In addition to the references above, see, for example, 142 CONG. REC. H4453 (daily ed. May 7, 1996) (statement of Rep. Zimmer), urging adoption of the Megan’s Law “so that all 50 states [would] be held to a common standard of community notification.”

76. See, e.g., H.R. REP. No. 109-218, pt. 1, at 23-24 (2005); 151 CONG. REC. H7889 (daily ed. Sept. 14, 2005) (statement of Rep. Green); 152 CONG. REC. S8018 (daily ed. Jul. 20, 2006) (statement of Sen. Allen); *id.* at S8022 (statement of Sen. DeWine); *id.* at S8030 (statement of Sen. Frist).

77. 42 U.S.C. §16911(5) (2006).

78. *Id.* §16911(5)(A)(i).

79. *Id.* § 16911(7)(F)-(I).

80. See *id.* §§ 16911(8), 16913(c).

they live, go to school, and work.⁸¹ When they register, far more information is to be collected for inclusion in state registries, including social security number, employment and school location information, finger and palm prints, a DNA sample, and vehicle license plate number and description.⁸² Finally, if they intend to leave their jurisdiction of residence for seven days or more, registrants must inform their home jurisdiction as well as the jurisdiction they intend to visit.⁸³

The centerpiece of the AWA is its tier classification system.⁸⁴ Whereas in the past federal law left to states how individuals were to be distinguished for purposes of registration and community notification, the AWA specifies that a conviction-based regime must be employed.⁸⁵ Unlike risk-based tier systems, such as employed in Washington State and New Jersey, the AWA expressly eschews individualized risk assessments.⁸⁶ All statutorily eligible registrants must register, and no basis exists to challenge the registration requirement for the specified duration, which varies from a minimum period of fifteen years (and annual verification) to life-long (and quarterly verification).⁸⁷

Under the AWA, all registrants are automatically subject to community notification by means of internet websites that states are required to create and maintain⁸⁸ and registrants' information is made available for public view on the Dru Sjodin National Sex Offender Public Website maintained by the attorney general.⁸⁹ Information must also be provided to community entities such as schools, public housing agencies, and child social service organizations.⁹⁰ The AWA also adds new and harsher penalties for registration violations, for the first time specifying a minimum penalty that states must impose—a term of imprisonment in excess of one year.⁹¹

As with prior federal demands, Congress afforded states a period of time to comply with new federal mandates. The AWA specified that jurisdictions had until July 27, 2009 to comply and thus avoid losing ten percent of Byrne Grant funds.⁹² Although the deadline has been

81. *Id.* §§ 16913(a), 16914(b)(4).

82. 42 U.S.C. § 16914(a)-(b).

83. *Id.*

84. *Id.* § 16911.

85. *Id.* § 16912.

86. *See id.* § 16911(1)-(4).

87. 42 U.S.C. § 16915(a).

88. *Id.* § 16918(a).

89. *Id.* § 16920.

90. *Id.* § 16921(b).

91. *Id.* § 16913(e).

92. 42 U.S.C. §§ 16924(a), 16925(a).

extended on several occasions, as of this writing only six jurisdictions (four states and two tribes) have achieved “substantial compliance,” according to the Department of Justice.⁹³ State resistance has, in the main, been based on state government estimates indicating that the costs associated with compliance far outweighed the threatened loss in Byrne Grant funds and, in some instances, principled policy objections (for instance, over registration of juveniles).⁹⁴

If past experience can serve as a guide, however, federal pressure will ultimately prove effective in satisfying congressional will. With financial pressure imposed by Wetterling in 1994, all states had registration laws by 1996.⁹⁵ Likewise, nationwide compliance with the community notification requirement contained in Megan’s Law in 1996 was achieved in 1999.⁹⁶

B. Evolution

If AWA compliance occurs, state laws will become broader and more onerous in numerous respects, including the scope of offenses covered; duration of registration; frequency and methods that registration and updates must occur (in person); and extent of registrants subject to community notification (based on conviction, not individual risk). In addition, Indian tribes and semi-sovereign governments within the federal orbit will, for the first time, be expected to create and maintain registries and make registrants’ information available to the public.⁹⁷ As a result, tribal registries will augment those already existing in all fifty states, the District of Columbia, and the territories of American Samoa, Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.⁹⁸

While hugely significant, federal directives have never had definitive effect, however. Indeed, as registration itself originated in

93. See Press Release, Department of Justice, Justice Department Announces Sixth Jurisdiction to Implement Sex Offender Registration and Notification Act (Sept. 10, 2010), <http://www.ojp.usdoj.gov/newsroom/pressreleases/2010/SMART10120.htm> (citing Delaware, Florida, Ohio, South Dakota, Confederated Tribes of the Umatilla Indian Reservation, and Confederated Tribes and Bands of the Yakama Nation).

94. See Andrew J. Harris et al., *Widening the Net: The Effects of Transitioning to the Adam Walsh Act’s Federally Mandated Sex Offender Classification System*, 37 CRIM. JUST. & BEHAV. 503, 504-06 (2010); Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 91-94 (2008).

95. Doris Sue Wong, *Weld Signs Bill Creating Sex-Offender Registry—Those Convicted Have to Register*, BOSTON GLOBE, Aug. 6, 1996, at B2.

96. *Roundhouse Roundup (Legislature)*, ALBUQUERQUE TRIB., Mar. 13, 1999, at D5.

97. See 42 U.S.C. § 16911(10) (1996).

98. *Id.*

municipalities in the early 1930s, and later was embraced by the states (albeit sporadically), the federal government remained uninvolved until 1994, with the Wetterling Act—when thirty-eight states had laws.⁹⁹ Moreover, community notification originated in the state of Washington in 1990 and was thrust onto the national stage as a result of New Jersey's Megan's Law, enacted in 1994.¹⁰⁰

Because federal law has prescribed only minima, states adopted independent policies and criteria. While states as a rule have required that persons convicted of serious sexual and child-victim offenses register, and registries are dominated by such registrants, it is also the case that registration criteria have been expansive.¹⁰¹ Since the early 1990s, states have at various times specified such offenses as adult prostitution involving solicitation of sodomy (Louisiana); posting an obscene bumper sticker or writing (Alabama); adultery, if one of the parties is under eighteen years of age; public urination (numerous states); and peeping (South Carolina) as warranting registration.¹⁰² "Romeo and Juliet" sexual encounters between juveniles have also been the frequent target of state registration.¹⁰³

State registration laws have also often extended beyond the gamut of offenses specified by legislatures. Several states, concerned that offenders will plead to non-registerable offenses, have criteria that permit courts to exercise judgment on registration. Kansas, for instance, allows registration if a conviction is based on a "sexually motivated" crime,¹⁰⁴ which one court used to require registration of an offender who pled guilty to burglary and misdemeanor theft in relation to his

99. James Popkin et al., *Natural Born Predators*, U.S. NEWS & WORLD REP., Sept. 19, 1994, at 64.

100. LOGAN, *supra* note 4, at 49-55.

101. By way of example, as of late November 2003, of the over 18,000 registrants in Illinois, seventy-eight percent were convicted of aggravated criminal sexual abuse, aggravated criminal sexual assault, or criminal sexual assault. *Sex Offender Registration in Illinois*, ILLINOIS STATE POLICE 5 (2003) (on file with author).

102. See Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 281-82 (2005).

103. See, e.g., Roberto Suro, *Town Faults Law, Not Boy in Sex Case*, WASH. POST, May 11, 1997, at A1 (discussing the case of an 18-year-old Wisconsin boy forced to register as a result of having consensual sex with his 15-year-old girlfriend). For a discussion of statutory rape as a basis for registration, including the twenty-eight jurisdictions allowing registration to stem from strict liability-based convictions, see Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 309-25 (2006).

104. KAN. STAT. ANN. § 22-4902(c)(16) (2009) (defined as meaning that "one of the purposes for which the defendant committed the crime was for the purpose of the defendant's sexual gratification.").

taking several items of female underwear.¹⁰⁵ Other state laws contain similar provisions, requiring registration when an offense is committed “for the purpose of sexual gratification” (California and Washington)¹⁰⁶ or “vicarious sexual gratification” (Indiana).¹⁰⁷ In Minnesota, registration is warranted if a conviction “aris[es] out of the same set of circumstances” as a charged offense that statutory law specifies as requiring registration.¹⁰⁸

Expansiveness has manifested in several other ways as well. For instance, the predisposition is seen in the increasing tendency of state laws to focus on inchoate offenses (attempts, conspiracies, solicitations, and instances of aiding or abetting). Also, while all states regard lawful convictions as a basis for registration, they also (unlike past registration criteria) usually include other dispositions, requiring registration of persons found not guilty by reason of insanity, found guilty but mentally ill, or when subject to state involuntary civil commitment provisions.

In sum, registration and notification laws have proved highly attractive to political bodies. Congress, for its part, since 1994 has regarded registration and notification as the equivalent of legislative catnip, perennially (often in tandem with election cycles) revising federal expectations. In states, registration and notification laws have been quickly and often unanimously adopted, and laws have been regularly revisited and expanded.¹⁰⁹ Experience in Illinois is a case in point.¹¹⁰ At its origin in 1986, before the 1990s political resurgence, only four sexual offenses triggered registration, itself required only after conviction of a second or subsequent offense.¹¹¹ In 1995, however, in the wake of the kidnapping and murder of a six-year-old girl, the legislature unanimously amended Illinois law without debate to require registration after a first offense and target all sex offenders, not merely

105. See *State v. Patterson*, 963 P.2d 436, 440 (Kan. Ct. App. 1998) (upholding registration requirement). The court noted that it had “some concern over the possibility that this statute could be extended beyond reason. For instance, would a defendant fall under the provisions of the [Act] if he or she stole contraceptives or engaged in disorderly conduct by shouting sexually explicit words?” *Id.*

106. CAL. PENAL CODE § 290.006 (West 2008); WASH. REV. CODE ANN. §§ 9A.44.130, 9.94A.030(43) (West 2010).

107. IND. CODE ANN. § 11-8-8-4.5(a)(5) (LexisNexis 2010).

108. MINN. STAT. ANN. § 243.166(1b)(a)(1) (West 2010).

109. See HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 48-49 (Sept. 2007) (noting enactments in Florida, Illinois, Virginia, and Washington).

110. See Michelle Olson, Note, *Putting the Brakes on the Preventive State: Challenging Residency Restrictions on Child Sex Offenders in Illinois Under the Ex Post Facto Clause*, 5 NW. J.L. & SOC. POL’Y 403 (2010).

111. *Id.* at 410.

those victimizing children, to register.¹¹² Today, registration is tied to thirty different crimes, registrants must provide far more information than in the past, and they face felony punishment if convicted of a registration violation.¹¹³ Notification charted a similar political course. Enacted in relatively conservative form in 1995, permitting but not requiring notification and focusing only on child sex offenders, in 1997 all Illinois sex offenders were targeted, and in 1999 notification was made mandatory (via the Internet).¹¹⁴

There have, however, been a few instances of retrenchment worthy of mention. In March 1995, for instance, a bill proposed in Montana to expand eligibility to include adult consensual sodomy was derailed.¹¹⁵ Protesters compared the proposal to the Nazi practice of registering homosexuals and the governor received a flurry of negative calls, including from tourists who threatened to boycott the state if the bill passed.¹¹⁶ In 1996, a similar effort in Kansas was defeated.¹¹⁷

Likewise, in 1994, California, in conjunction with its decision to permit community notification and public access, removed several misdemeanor offenses from its list of registration-eligible offenses.¹¹⁸ Later, in 1997, the state rescinded its consensual sodomy registration requirement and allowed persons with prior convictions to be removed from the registry.¹¹⁹ More recently, as noted above, several states have backed away from registration requirements for "Romeo and Juliet" convictions involving minors who engaged in consensual underage sex.¹²⁰

Viewed in the broader recent history, however, such limits have been aberrations. For evidence of this one need only consider the growth in registry rolls. From April 1998 to February 2001, the number

112. *Id.* at 411.

113. *Id.* at 411-12.

114. *Id.* at 412-13.

115. *Furor in Montana: Anti-Gay Section of Sex-Offender Bill Cut*, ATLANTA CONSTITUTION, Mar. 24, 1995, at A14.

116. *Id.*

117. Peter Freiberg, *Megan's Laws' Bode Ill for Some Gay People*, WASH. BLADE, Apr. 4, 1997, at 17, 21. Congress, meanwhile, resisted an effort in 1997 to prevent adult consensual sodomy from being a registerable offense. See H.R. REP. No. 105-256, at 41-42 (1997).

118. See CAL. PENAL CODE § 290 (West Supp. 1999) (historical and statutory notes).

119. Robert L. Jacobson, Note, "Megan's Laws" Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 GEO. L.J. 2431, 2460-61 (1999).

120. See, e.g., 'Romeos' Can Avoid Sex Offender Status, ST. PETERSBURG TIMES (Fla.), May 3, 2007, at 5B (discussing Florida law exempting juvenile offenders who are no more than four years older than their sexual partner, when the partner is at least fourteen years old, and when a court determines that the encounter was consensual).

of registrants nationwide grew from 277,000 to 386,000¹²¹ and from 2001 to 2007 to over 614,000,¹²² a 221% increase in less than a decade. Today, United States sex offender registries combined contain an excess of 700,000 individuals.¹²³ With the AWA's expanded eligibility requirements as a floor, and states continuing to add their own criteria, the number of registrants should soon easily pass the one-million mark. With increased registration, in turn, will come corresponding increases in community notification, especially if the AWA's conviction-based approach becomes the national norm.

II. POLITICAL CATALYSTS

Today, state, federal, and local politics regarding criminal justice policy are well known for their highly reactive nature, manifesting a predisposition that William Stuntz famously termed "pathological."¹²⁴ Politicians of both main parties typically compete to out-tough one another and operate under sway of what has become a cardinal rule of political self-preservation: never appear "soft" on crime.¹²⁵ The political bias toward toughness has been fed and perpetuated by the 24/7 news cycle, which ensures public attention for victimizations and heightens the political consequences for politicians caught in the media vortex.¹²⁶ Rounding out the political process failure, with criminal justice there typically exists no countervailing political force or lobby that might temper or modify possibly misguided policy measures.¹²⁷

Without question, registration and notification bear the earmarks of

121. DEVON B. ADAMS, U.S. DEPT. OF JUSTICE, SUMMARY OF STATE SEX OFFENDER REGISTRIES, 2001 1 (2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/sssor01.pdf>. The report notes that for 2001 data from Massachusetts was not included, although Massachusetts reported that 17,000 individuals were registration-eligible. *Id.* at 2. Also, 1998 data from Connecticut was omitted. *Id.*

122. The figures cited in the text result from data cited in Adams's Summary. *Id.* For the "Parents for Megan's Law" website, see PARENTS FOR MEGAN'S LAW, <http://www.parentsformeganslaw.org> (last visited Feb. 6, 2011).

123. See Marc Klaas, *Megan's Law Legislation in All 50 States*, KLAAS KIDS FOUNDATION, <http://www.klaaskids.org/pg-legmeg.htm> (last visited Feb. 6, 2011).

124. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

125. See KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 3-6 (1997); Harry A. Chernoff et al., *The Politics of Crime*, 33 HARV. J. ON LEGIS. 527, 531-32 (1996).

126. See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 397-98, 402 (2006).

127. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1079-80, 1082 (1993).

this political dynamic. While as late as the 1970s the American response to crime was defined mainly by a desire to rehabilitate and not punish offenders, starting in the 1980s and accelerating in the 1990s, when registration and notification took shape, American criminal justice became unabashedly punitive.¹²⁸ The 1990s were also marked by an unprecedented desire to get tough on sex offenders, the principal targets of registration and notification and a subpopulation inspiring special hatred and disdain.¹²⁹ Prison terms increased dramatically,¹³⁰ triggering massive increases in sex offender prison populations,¹³¹ and several states adopted laws permitting chemical and surgical castration of sex offenders.¹³² Registration and notification were thus part of a broader shift toward harsh crime control responses, responding to what David Garland called the "sense of a fearful, angry public."¹³³ Registration, a social control strategy that essentially lay dormant for decades, despite myriad criminal depravations in the intervening years, enjoyed new life in the early 1990s, assuming far more onerous form over time. And with it came community notification, as well, with the harsh personal consequences for those it targeted.

As discussed next, however, explanation for the marked political success of registration and notification also lies in several other chief factors, which distinguished it from other punitive social control measures of recent times.

A. Panic Redux

A common framework for conceiving of the recent harsh wave of provisions targeting sex offenders, including registration and

128. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 193-95* (2003).

129. See James F. Quinn et al., *Societal Reaction to Sex Offenders: A Review of the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability*, 25 *DEVIANT BEHAV.* 215, 217-19 (2004).

130. See Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 *IOWA L. REV.* 563, 571-72 (2002).

131. See LAWRENCE A. GREENFELD, U.S. DEPT. OF JUSTICE, *SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 17* (1997), <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF> (noting that from 1980 to 1994, while state prison populations increased 206%, the number of imprisoned sex offenders rose 330%).

132. See, e.g., B. Drummond Ayres, Jr., *California Child Molesters Face 'Chemical Castration'*, *N.Y. TIMES*, Aug. 27, 1996, at A1.

133. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 10* (2001).

notification laws, is that of a “panic.” In his study of state laws enacted in the late 1930s permitting the involuntary commitment of “sexual psychopaths” to psychiatric institutions, sociologist Edwin Sutherland identified the following process at work: first, the “community is thrown into [a] panic by a few serious sex crimes, which are given nation-wide publicity; [next,] the community acts in an agitated manner, and all sorts of proposals are made; [finally,] a committee is . . . appointed to study the facts and to make recommendations.”¹³⁴ In 1972, another sociologist, Stanley Cohen, studied the exaggerated response in England to “Mods and Rockers,” teenage groups who, in the mid-1960s, engaged in a series of minor disturbances.¹³⁵ Cohen observed that “[s]ocieties appear to be subject, every now and then, to periods of moral panic,” resulting in the “moral barricades [being] manned by editors, bishops, politicians and other right-thinking people,” and drastic solutions proffered.¹³⁶ That the actual extent and nature of the disturbances was distorted, and the images of the nefarious youth gangs largely invented, was of no moment; what mattered was that the particular social threat was perceived.¹³⁷

The panic model, while running the risk of unduly downplaying the seriousness of sexual victimization (with its implicit comparison to teenage social hooliganism), nonetheless provides a helpful conceptual model. The panic itself can be traced to the July 1981 disappearance of six-year-old Adam Walsh in Hollywood, Florida that captivated the nation’s attention.¹³⁸ After the boy’s severed head was discovered in a canal, his parents, John and Reve Walsh, initiated a national crusade to address the problem of missing and abducted children.¹³⁹ In testimony before Congress, John Walsh related that “[m]ore than 1.5 million children are reported missing every year” and “we don’t have clues to what happened to over 50,000 of them.”¹⁴⁰

Congress responded by creating the National Center for Missing and Exploited Children, appointing John Walsh as head.¹⁴¹ By 1985, over one hundred agencies, with annual combined funding in excess of

134. Edwin H. Sutherland, *The Diffusion of Sexual Psychopath Laws*, 56 AM. J. SOC. 142, 142 (1950).

135. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS I* (Routledge 3d ed. 2002) (1972).

136. *Id.* at 1.

137. *Id.* at 1, 3.

138. Keith S. Hampton, *Children in the War on Crime: Texas Sex Offender Mania and the Outcasts of Reform*, 42 S. TEX. L. REV. 781, 782-83 (2001).

139. *Id.*

140. *Id.* at 784.

141. *Id.* at 784-85.

\$15 million, were engaged in the campaign against child abductions, increasing public awareness by such efforts as emblazoning milk cartons and cereal boxes with the faces of missing children.¹⁴²

The panic, however, soon lost steam, undercut by claims that abduction rates had been exaggerated¹⁴³ and public focus soon readily shifted to child sexual victimization. The groundwork for this transition was laid in the early 1980s with trials stemming from reported mass child sexual abuse at the McMartin preschool in Southern California and a day care center in rural Jordan, Minnesota, which received sustained media attention and prompted congressional hearings.¹⁴⁴ By 1990, when the National Center for Missing and Exploited Children merged with the Adam Walsh Child Resource Center, child sexual molestation had become a major focus of national concern.¹⁴⁵

Panic, however, accounts for only part of the story. Sex crime panics have beset the nation before. Their net outcome, however, pales when compared to the uniquely severe, comprehensive, and sustained legislative response of the 1990s resulting in today's nationwide network of registration and notification laws. American jurisdictions targeted sex offenders with registration starting in the 1930s, and from the late 1930s through the 1960s, laws permitting the commitment of "sexual psychopaths" were widely adopted.¹⁴⁶ Commitment laws,

142. *Id.* at 785.

143. A key influence was a *Denver Post* 1985 exposé reporting that 330,000, not 1.5 million, children were reported missing annually, and that most of the children were runaways. Moreover, fewer than one thousand children were the victims of homicide, and most were victimized by an acquaintance or relative—not trench-coated strangers. See Diana Griego & Louis Kilzer, *The Truth About Missing Children: Exaggerated Statistics Stir National Paranoia*, DENVER POST, May 12, 1985, at 12A. Other studies raising doubts soon followed. See, e.g., DAVID FINKELHOR ET AL., U.S. DEPT. OF JUSTICE, MISSING, ABDUCTED, RUNAWAY, AND THROWAWAY CHILDREN IN AMERICA v, vi, xv (1990), <http://www.ncjrs.gov/pdffiles1/ojdp/nismart90.pdf> (concluding that in 1988, of the estimated 3,200 to 4,600 nonfamily abductions, only 200 to 300 were "stereotypical kidnappings" and that from 1976 to 1987, an estimated forty-three to 147 "stranger abduction homicides" occurred annually. Furthermore, missing children fell into five categories, with at least four of the categories containing children who "were not literally missing." Rather, their location was known; "the problem was in recovering them."); John Gill, *Missing-Kids Groups Foster Fear Rather than Facts*, NEWSDAY (New York), Apr. 11, 1989, at 65 (discussing 1989 study indicating that only fifty-two to 158 children annually were killed or abducted by strangers).

144. Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479, 495-97 (1997).

145. Brian E. Albrecht, *What's Happened to the Missing Kids?*, PLAIN DEALER (Cleveland, Ohio) Mar. 4, 1990, available at 1990 WL 4606879.

146. See Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 325 (2003).

however, devolved into near non-existence over ensuing decades and registration attracted comparatively little interest.¹⁴⁷ Only in the 1990s did registration—with its predominant focus on sex offenders—combined with notification, fully blossom.

B. Politics of Personalization and Dehumanization

Changes in political modus operandi also played a key role. Like prior harsh laws originating amid panics, registration and notification laws in the 1990s were triggered by gruesome events. Modern registration and notification, however, differed not only in degree but also in kind, drawing political strength from intense focus upon particular victims and their survivors (typically parents). At the same time, the political atmosphere giving rise to the laws was unique for its unprecedented tendency to depersonalize and dehumanize the individuals principally targeted—sex offenders.

The foundation for the victim-centrism aspect was laid in the 1970s when victims' advocates, building on the successes of the women's rights movement,¹⁴⁸ succeeded not only in increasing the role of victims in the criminal justice process,¹⁴⁹ but also in emphasizing the harms they suffered.¹⁵⁰ Registration and notification advocates also learned from the successes of child abuse advocates in the 1980s who skillfully used victim narrative and imagery, especially concerning female and child victims of physical and sexual abuse, to great political effect.¹⁵¹

The emphasis was very evident in Congress. From 1991, when Minnesota Senator David Durenberger invoked the plight of Jacob Wetterling to underscore the need for registration, to 2006, when the federal Adam Walsh Child Protection and Safety Act was enacted,

147. See *id.* at 325-26. Concerns over the vague "psychopath" category, over and under-inclusiveness, statistically unfounded assertions of high sex offender recidivism, and the fallibility of predictive expertise resulted in the laws being ignored or repealed by the 1970s. *Id.* The commitment laws, as Philip Jenkins observed, came to be viewed "as a model example of failed legislation called forth by politicians pandering to ill-focused public fears but that had done nothing to reduce crime or detain the truly dangerous." PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 93 (1998).

148. See generally ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 20-24 (2000).

149. See Shirley S. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 518 (1985).

150. See Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143, 191 (1999).

151. See JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD VICTIMS 46-50, 71 (1990).

stories of individual victims dominated the legislative process. Just one example among many occurred in 1994 when efforts were redoubled in the U.S. House of Representatives to augment registration with notification after Megan Kanka's sexual abuse and murder. Representative Dick Zimmer (R-NJ), a chief advocate, recounted that,

on July 29, 1994, a beautiful little girl named Megan Kanka was lured into the home of a man who literally lived across the street from her. He said that he had a puppy he wanted to show her. He then proceeded to brutally rape and murder this little girl.¹⁵²

In myriad other instances, legislators nationwide recounted in detail the Megan Kanka tragedy, along with other less publicized victimizations, demanding that laws be enacted.

The political strategy proved highly successful. Putting victims' faces on initiatives humanized and rendered more understandable the posited urgent need for policy change. It also inoculated proposed legislation against challenge. Opponents risked being portrayed not only as "soft on crime," but also "anti-victim," or, even more deleterious, "anti-this victim." As Representative William Martini (R-NJ) stressed in urging adoption of the federal Megan's Law in 1996: "We must not allow this little girl's life to be taken in vain."¹⁵³ Representative Zimmer urged that the law was "Megan's legacy . . . her gift to all children whose lives will be saved."¹⁵⁴

The ultimate success of this personalization is manifest in the names of the laws themselves—Megan's Law (U.S. and New Jersey), Zachary's Law (Indiana), Ashley's Law (Texas), or any of the litany of other state laws. The zenith was perhaps recently reached with the federal Adam Walsh Act (AWA) in 2006, which enshrined the law's namesake as well as the names of seventeen other victims in the law's "Declaration of Purpose," along with brief personal descriptions and how they were victimized.¹⁵⁵ The law was enacted "to protect the public from sex offenders and offenders against children, and *in response to the vicious attacks by violent predators against the victims*" specified.¹⁵⁶ Wary of in any way besmirching the memory of prior namesakes, Congress established within the broader AWA "the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program," victims already named in the

152. 142 CONG. REC. H4452 (daily ed. May 7, 1996) (statement of Rep. Zimmer).

153. 142 CONG. REC. E732 (daily ed. May 8, 1996) (statement of Rep. Martini).

154. 142 CONG. REC. H4453 (daily ed. May 7, 1996) (statement of Rep. Zimmer).

155. 42 U.S.C. § 16901 (2006).

156. *Id.* (emphasis added).

list of seventeen.¹⁵⁷

The political personalization of victims, however, was complemented by the almost as potent demonization of their assailants, such as Jesse Timmendequas (convicted of the rape and murder of Megan Kanka). Whereas in the past, such as the 1930s when involuntary commitment laws were enacted by many states and victimizers were most often referenced in laws in clinical terms, Timmendequas and his cohort were referred to as “beast[s],”¹⁵⁸ “monster[s],”¹⁵⁹ and the “human equivalent of toxic waste.”¹⁶⁰

The political logic behind this rhetorical shift is explained by a large academic literature, highlighting the social solidification and harshening effect of semantic demonization.¹⁶¹ Recently, Cass Sunstein applied the model to explain the imperative behind the nation’s post-9/11 responses.¹⁶² As Sunstein points out, recent antiterrorism laws and military campaigns benefited from having concrete antagonists—Osama bin Laden and Saddam Hussein, in particular—upon whom to affix outrage and scorn.¹⁶³ “If a wrongdoer has a clear identity—a face and a narrative—the public is far more likely to support an aggressive response.”¹⁶⁴ Like the character Emmanuel Goldstein in George Orwell’s novel *Nineteen Eighty-Four*, a despised enemy of the state inspiring public fear and disdain, Sunstein sees Osama and Saddam as fueling the nation’s willingness to back harsh measures.¹⁶⁵

A similar “Goldstein Effect” has informed the nation’s ongoing effort to single out antagonists such as Jesse Timmendequas for harsh treatment and public scorn, lending credence to Jeremy Bentham’s observation that social policies informed by antipathy for “individuals who are represented as dangerous and vile, pushes them onward to an

157. *Id.* §16902.

158. 140 CONG. REC. S11301 (daily ed. Aug. 11, 1994) (statement of Sen. Dole).

159. 142 CONG. REC. S8638 (daily ed. July 24, 1996) (statement of Sen. Hutchison).

160. *Doe v. Pataki*, 940 F. Supp. 603, 622 (S.D.N.Y. 1996) (quoting minutes from New York Assembly).

161. *See, e.g.*, MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO (Vail-Ballou Press 1980) (1966); WILLIAM IAN MILLER, THE ANATOMY OF DISGUST (Harvard Univ. Press 1998) (1997); Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 830-31 (2000).

162. Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 507 (2007).

163. *Id.* at 542-43.

164. *Id.* at 543.

165. *Id.* at 542-43.

undue severity.”¹⁶⁶ As Representative Randall “Duke” Cunningham (R-CA) vividly framed the issue in 1996: “perhaps a sexual predator’s life should be just a little more toxic than someone [else’s] in the American citizenry.”¹⁶⁷

C. Risk Aversion and Scientism

Yet another causal factor concerned a shift in modern sensibility: the increasing tendency to conceive of and respond to social challenges and problems in terms of risk, what in 1991 Anthony Giddens saw as a “risk culture” marked by “a calculative attitude.”¹⁶⁸ From the 1990s through the present, as Cass Sunstein has noted, the reigning view has been that “regulators should take steps to protect against potential harms, even if causal chains are unclear and even if we do not know that those harms will come to fruition.”¹⁶⁹ Whereas in the past authorities sought to identify and monitor dangerous individuals, modern policy conceived of danger in aggregate terms: what Malcolm Feeley and Jonathan Simon in 1992 called a “new penology.”¹⁷⁰ Criminal risk came to be understood in aggregate statistical terms and seen as a constant, a social fact to be managed.¹⁷¹ The new penology, Feeley and Simon wrote, “seeks to *regulate* levels of deviance, not intervene or respond to individual deviants or social malformations.”¹⁷²

Registration and notification laws were driven by and reflected this orientation. While personal tragedies and names of victims might have differed among jurisdictions, from the outset, discourse was dominated by assertions that sex offenders were intractably compulsive, predatory, and unusually prone to recidivism. Alarming statistics adduced by political leaders have, in turn, been absorbed by the media¹⁷³ and the

166. Jeremy Bentham, *Principles of Penal Law*, in 1 THE WORKS OF JEREMY BENTHAM 401 (John Bowring ed., 1966) (1843).

167. 142 CONG. REC. H10313 (daily ed. May 7, 1996) (statement of Rep. Cunningham).

168. ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE 3, 28 (1991).

169. CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 4 (2005).

170. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 449 (1992).

171. *Id.*

172. *Id.* at 452 (emphasis in original).

173. See, e.g., David Van Biema et al., *Burn Thy Neighbor*, TIME MAGAZINE, July 26, 1993, at 58 (referring to violent sex offenders as “irredeemable monsters”); David A. Kaplan et al., *The Incurribles*, NEWSWEEK, Jan. 18, 1993, at 48 (emphasizing that recidivism rates for sex offenders are higher than other violent offender subpopulations); Lorraine Woellert, *Virginia Bills Propose Registry for Sex Offenders*, WASH. TIMES, Jan. 27,

public,¹⁷⁴ leading to a self-perpetuating legislative process resulting in today's nationwide network of registration and notification laws.

Perceived statistical risk, however, not only motivated registration and notification laws; it also infused their very nature. A single factor—a conviction—has triggered application of the laws. Today, under the AWA and most state regimes, conviction of an enumerated crime determines the duration of registration and the intervals at which registry information must be updated.¹⁷⁵ And the conviction criterion itself often sweeps up broad offender groups without consideration of particular circumstances, and singles out crimes not known to pose particular risk (such as murder) and non-assaultive crimes (such as peeping).¹⁷⁶ The group-based actuarial emphasis of community notification, especially the dominant conviction-based approach, further manifests this orientation.

The reasons for this state of affairs are, without question, complex and numerous. Two partial explanations, however, lie in the teachings of social psychology—in particular, what is called the “psychometric paradigm” of risk perception and management.¹⁷⁷ Under this view, statistics tend to lack persuasive influence on the public, which interprets life situations in a “richer” manner, assigning importance to such considerations as whether a risk is involuntarily suffered or especially dreaded.¹⁷⁸ On this account, sexual victimizations of women and children qualify as particularly compelling catalysts. This is so despite the reality, discussed below, that the prototypical “stranger danger” circumstances informing public understanding of the threats posed do not statistically warrant equivalent concern.

1994, at A1 (registration of sex offenders is justified “because they have the highest rate of recidivism”).

174. See, e.g., Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES AND PUB. POL'Y 137, 142-43 (2007), available at <http://www.ccoso.org/library%20articles/PublicPerceptions%20ASAP%207.pdf> (reporting survey data from a Florida community reflecting that considerable majorities believe in extremely high sex offender recidivism rates, homogeneity of sex offender population, and extent of sexual abuse committed by strangers).

175. LOGAN, *supra* note 4, at 69-70.

176. *Id.* at 67.

177. See generally Ortwin Renn & Bernd Rohrman, *Risk Perception Research – An Introduction*, in CROSS-CULTURAL RISK PERCEPTION: A SURVEY OF EMPIRICAL STUDIES 11, 17 (Ortwin Renn & Bernd Rohrman eds., 2000); Paul Slovic, *Perception of Risk*, in THE PERCEPTION OF RISK 220, 222 (Ragnar E. Löfstedt ed., 2000).

178. See Baruch Fischhoff et al., *How Safe Is Safe Enough? A Psychometric Study of Attitudes Toward Technological Risks and Benefits*, in THE PERCEPTION OF RISK, *supra* note 177, at 80, 99.

The laws also bear the earmarks of a related construct known as an "availability heuristic," whereby a focal point serves "as a mental shortcut for a more deliberative or analytic assessment of the underlying issues"¹⁷⁹ and drives public perception of risk out of proportion to empirical reality.¹⁸⁰ As Professor Sunstein has summarized the literature:

When people use the availability heuristic, they assess the magnitude of risks by asking whether examples can readily come to mind. For example, "a class whose instances are easily retrieved will appear more numerous than a class of equal frequency whose instances are less retrievable." If people can easily think of relevant examples, they are far more likely to be frightened and concerned than if they cannot.¹⁸¹

The victimizations of Megan Kanka and others by strangers, while not statistically representative, have thus served as highly potent availability heuristics. And like other heuristics, they have exercised a skewing effect on policy, resulting from the ancillary influence of "probability neglect."¹⁸² "The availability heuristic and probability neglect," Sunstein observes, "often lead people to treat risks as much greater than they are in fact, and hence to accept risk-reduction strategies that do considerable harm and little good."¹⁸³ Such has been the case with registration and notification. By focusing on "stranger danger," harsh laws have been adopted and Americans, while optimistically comforted by the notion that danger emanates from unfamiliar others, have been distracted from the troubling reality that the people they should fear most are relatives, friends, and acquaintances.¹⁸⁴

D. Information Entitlement

Another explanatory factor centers on the appeal of community notification itself. While early-generation registration laws reserved information on registrants to law enforcement, and even the prospect that identifying information on ex-offenders would become public was

179. Sunstein, *supra* note 162, at 522, 534.

180. SUNSTEIN, *supra* note 169, at 35-41.

181. Sunstein, *supra* note 162, at 534-35 (quoting Amos Tversky and Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3, 11 (Daniel Kahneman et al. eds., 1982)).

182. SUNSTEIN, *supra* note 169, at 39-41.

183. *Id.* at 222.

184. *Cf.* BARRY GLASSNER, *THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS* xi, xv (1999). See generally Jeffrey Kluger, *How Americans Are Living Dangerously*, *TIME MAGAZINE*, Nov. 26, 2006.

strongly condemned, by the 1990s things had changed. The public demanded that the government release information on registrants and the government readily complied. This transformation chiefly stemmed from a newfound sense of information entitlement. Outraged that authorities possessed information on potentially dangerous individuals, yet failed to make it available, communities insisted on a right to access. As Maureen Kanka stated in a 1996 letter to the House Judiciary Committee during its consideration of what came to be Megan's Law:

If pedophiles are going to be out on the street where they can accost children, then parents have the right to know if they live on their streets. My daughter Megan would be alive today if I had known that my neighbor was a twice convicted pedophile. I had the responsibility to protect my daughter. I have always told my children that I would never let anything happen to them. But I guess I lied. I could not protect my Megan as she was being brutally raped and murdered across the street from my home. I have to live with the fact that she screamed out my name as she was being murdered.¹⁸⁵

In keeping with this sentiment, the Megan Nicole Kanka Foundation website proclaims that “[e]very parent should have the right to know if a dangerous sexual predator moves into their neighborhood.”¹⁸⁶

This asserted entitlement, typically made by parents suffering grievous loss, in itself would likely have accounted for the political success of community notification. It also benefitted, however, from a broader shift in public sensibility over the role of government commencing in the 1990s. As Margaret Canovan has observed, the era witnessed emergence of the “state as a ‘service station,’” marked by a view that citizens were consumers with desires that the state must identify and satisfy.¹⁸⁷ The sentiment assumed especially potent form with respect to public safety. Before 1990, communities privileged and trusted government to protect them against recidivist criminal risk. The damage wrought by Jesse Timmendequas and others shattered this faith. While Washington’s community notification law itself was ostensibly motivated by a neutral goal of achieving greater governmental transparency and accountability,¹⁸⁸ there was no mistaking that it—like

185. *Crimes Against Children and Elderly Persons Increased Punishment Act: Hearing on H.R. 2974 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 104th CONG. 99 (1996) (testimony of Maureen Kanka).

186. *Our Mission*, MEGAN NICOLE KANKA FOUNDATION, <http://www.megannicolekankafoundation.org/mission.htm> (last visited Dec. 5, 2010).

187. See MARGARET CANOVAN, *NATIONHOOD AND POLITICAL THEORY* 85-87 (1996).

188. See WASH. REV. CODE ANN. § 4.24.550 (West 2005) (“Release of information about sexual predators . . . will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems . . .”).

every community notification law enacted since 1990—was driven by this sense of betrayal and lack of trust.

The public, in short, came to feel that it was entitled to registrant information not only as a moral matter but also due to practical necessity. Government had shown that its historic monopoly on information was unjustified; community members needed access to such information so that they could take self-protective measures. As discussed later, whether public disclosure of registrants' information in fact secures personal safety remains unclear. However, from the outset, the assumption that it does affect personal safety has driven legislative efforts, as evidenced in arguments made by political leaders,¹⁸⁹ "findings" in state laws,¹⁹⁰ and websites.¹⁹¹

This sense of entitlement also significantly affected political discourse. To the extent that the benefits associated with notification would unfairly impact convicted criminals, the apparent choice faced by political leaders was really no choice at all. The community's right to information readily trumped any possible registrant concerns. Politicians defiantly cast their lot with communities with numerous state laws explicitly stating that communities' right to have access to information superseded registrants' putative right to privacy in particular.¹⁹²

Moreover, political appeal was augmented by a secondary benefit: shaming. With community notification, as David Garland has observed, society can "simultaneously punish the offender for his crime and alert the community to his danger."¹⁹³ Indeed, use of pejorative terms such as

189. See, e.g., 144 CONG. REC. 22945 (daily ed. Oct. 1, 1998) (statement of Rep. Dunn) (advocating notification because it would allow citizens "to take the necessary precautions to ensure that there are not second, third or fourth victims.").

190. See, e.g., OHIO REV. CODE ANN. § 2950.02(A)(1) (West 2006) ("If the public is provided adequate notice and information . . . members of the public and communities can develop constructive plans to prepare themselves and their children.").

191. See, e.g., *Sex Offender Information*, ARIZONA DEP'T. OF PUBLIC SAFETY, https://www.azdps.gov/services/sex_offender/ (last visited Feb. 6, 2011) ("Furnishing the public with information regarding convicted sex offenders is a critical step toward encouraging the public . . . from potential future attacks.").

192. See, e.g., COLO. REV. STAT. ANN. § 18-3-412(6.5)(a) (West 2003) ("The general assembly finds that persons convicted of an offense involving unlawful sexual behavior have a reduced expectation of privacy because of the public's interest in public safety."); TENN. CODE ANN. § 40-39-101(b)(3) (West 2004) ("[P]ersons convicted of these sexual offenses have a reduced expectation of privacy because of the public's interest in public safety In balancing the offender's due process and other rights against the interest of public security, the general assembly finds that releasing information about sexual offenders . . . will further the primary governmental interest of protecting vulnerable populations from harm.").

193. GARLAND, *supra* note 133, at 181.

“predator” suggests that community notification is about something more than mere record keeping and informational empowerment; so, too, does the staggering number of “hits” to state and federal internet registries that disseminate information on registrants far beyond their communities, which is the geographic region of avowed concern.

E. Federal Government

A final and quite important factor accounting for modern registration and notification laws stems from the policy involvement of the federal government. Historically, criminal justice was regarded as principally a matter of state government concern.¹⁹⁴ Starting in the late nineteenth century, however, what Lawrence Friedman has termed the “culture of mobility,” fostered by the increasing availability of automobiles and railroads, made state boundaries “increasingly porous” for criminal offenders.¹⁹⁵ Believing the states ill-equipped to address this shift,¹⁹⁶ Congress during the first decades of the twentieth century gradually expanded the reach of federal criminal law.¹⁹⁷

Registration and countless other criminal justice undertakings nevertheless remained the focus of state and local governments, and the federal impact on criminal justice matters remained limited and episodic. Crime control, however, has long since been federalized and congressional intrusiveness has likewise been felt with registration and notification policy.¹⁹⁸ While registration was certainly of interest to the states by 1994, when Congress pressured states to create registries by threatening to withhold significant criminal justice funds, and notification was popular in the states by 1996, when Congress mandated it, there is no mistaking that federal pressure drove the current nationwide network of laws and that it was especially instrumental in overcoming initial state ambivalence over notification.

Federal intrusiveness with respect to registration has had two main consequences. First, by conditioning receipt of federal funds on state compliance with its requirements, the federal government compelled those states perhaps not otherwise inclined to adopt registration and notification laws to do so. Second, by tying receipt of federal funds to adoption of federal requirements, the United States modified the

194. See, e.g., *United States v. Morrison*, 529 U.S. 598, 618 (2000) (emphasizing that that crime control “has always been the province of the States”).

195. LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 209-10, 263-67 (1993).

196. *Id.*

197. *Id.*

198. See Logan, *Criminal Justice Federalism*, *supra* note 94, at 53-87.

substantive content of state laws, requiring them to adopt federal minima with respect to such matters as the offenses triggering registration, registration of juveniles, duration of registration, and use of a "conviction-based" classification system. While states have often exceeded the federal "floor," the impact of federal involvement overall has been to make state laws not only more uniform, but also more demanding—to in effect "level up" registration and notification policy.

Moreover, the federal policy preferences imposed have borne earmarks of having originated in a national legislative body that is fundamentally distinct from its state legislative counterparts, especially on cost and practicality concerns. While states very often must balance budgets and temper criminal justice desires with fiscal and real-world constraints, federal policy is developed in an environment largely inured to such concerns,¹⁹⁹ and federal politicians secure major political benefits from their support of harsh laws. State legislatures, in turn, do not relish being accused of failing to secure "free" federal funds and do not wish to look "soft" by renouncing federal minimum requirements relative to the disdained targets of registration and notification. With the door open to amendments, states have added to the minima with ardor.

Finally, federal influence has been manifest in a more subtle but quite important respect. Congress has fostered and sustained a political climate conducive to state registration and notification laws. State legislators, themselves in the C-SPAN audience and acutely aware of the political salience of toughened requirements, have seized the opportunity, enacting provisions with impressive speed. And, as with criminal justice policy more generally,²⁰⁰ registration has been a one-way ratchet, with provisions getting tougher by the year, backed by overwhelming bipartisan political support.

III. STASIS

The foregoing discussion of factors contributing to the origin and evolution of registration and community notification laws has obvious bearing when seeking explanation of how and why the laws have been sustained. Indeed, the same factors go a long way toward explaining the latter. Nevertheless, as the work of political scientist Paul Pierson

199. See Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1303 (2005) (noting the tendency of Congress to enact laws of "the 'feel-good, do-something' variety rather than to seek out the most cost-effective way to address a particular problem.").

200. See *supra* notes 124-127 and accompanying text.

and others establish, the durability of laws, especially in the face of data suggesting adoption of an alternate policy, has a distinct etiology of its own. “Path dependence” and “lock-in,” evidenced in the political world more generally, usefully describe the staying power of registration and community notification laws.²⁰¹

Most fundamentally, dependency and lock-in are evident in the aversion for any reappraisal of the laws’ use in principle. While in the past, concern over the negative “psychic effect” of registration, alone, prompted significant resistance and inspired comparisons to totalitarian regimes,²⁰² registration today—even when combined with community notification—has been readily accepted. There are several reasons for this.

First and foremost, the political cost associated with change would simply be too great. For politicians, when it comes to crime control matters, as Michael Tonry has noted: “Leaving things as they are poses no electoral risks. . . . No one loses elections for failing to lead or support a campaign for repeal of laws that are tough”²⁰³ Indeed, any effort to soften crime policy risks not only sound-bite reprisals from political opponents, with dreaded consequences on election day, but also the condemnation of advocacy groups.²⁰⁴ “Report cards,” issued by watchdog groups, provide state-by-state assessments of the perceived vigor of registration and notification laws,²⁰⁵ and popular media such as “The O’Reilly Factor” add to the political pressure.²⁰⁶ This atmosphere,

201. See PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (2004). The concepts also figure in economic analysis, forcing on the phenomenon of market product choices that are sustained despite available knowledge supporting incorrect knowledge bases on which the initial choices are conditioned. See, e.g., S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-in, and History*, 11 J.L. ECON. & ORG. 205 (1995).

202. See Current Notes, *Criminal Registration Law*, 27 J. CRIM. L. & CRIMINOLOGY 295, 295 (1936).

203. MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 15 (2004).

204. A related example is found in the recent experience of Iowa with its law placing limits on where registrants can live. State legislators there rejected a proposal by law enforcement associations to modify the law, based on its detrimental effects. Editorial, *Who Will Stand Up for Making Kids Safer?*, TELEGRAPH HERALD (Iowa), Dec. 14, 2007, at A4.

205. For instance, the group “Parents for Megan’s Law” has maintained on its website results from annual surveys, with states receiving grades of A-F. See Zachary R. Dowdy, *NY Gets a D on Sex Offender Survey*, NEWSDAY, Apr. 29, 2006, at A12.

206. For instance, after Bill O’Reilly categorized Alabama among the “states that don’t seem to care about this issue at all,” the Alabama Legislature convened a special session to consider tougher registration and community-notification requirements. Recent Legislation, *Criminal Law—Sex Offender Notification Statute—Alabama Strengthens Restrictions on Sex Offenders*, 119 HARV. L. REV. 939, 942 (2006). After the requirements

in turn, is only faintly tempered by critics of the laws. While criminal defense and civil liberties interests have over time sought to beat back the laws, their impact has been limited at best. Meanwhile, registrants themselves, even if not subject to voter disenfranchisement, have like other ex-offenders exercised scant political influence.²⁰⁷

Of equal if not greater importance, politicians are naturally reluctant to question the highly personalized laws. As noted earlier, any effort to dismantle a provision designated as “Megan’s” or “Zachary’s” Law, for instance, would be viewed as more than a mere policy shift. Rather, it would risk being perceived as a personal assault on the victims’ memories and legacies.²⁰⁸

Lack of desire to question the status quo has been evidenced in the notable dearth of empirical scrutiny to which the laws have been subjected. Only very recently has empirical assessment become a priority. For instance, only with the AWA in 2006 did Congress direct the attorney general to assess the “efficiency,” “effectiveness,” and resource consequences of conviction and risk-based classification systems,²⁰⁹ and asked the National Institute of Justice (the research arm of the Department of Justice) to study other aspects of registration and notification.²¹⁰ Remarkably, this action was taken twelve years after Congress first required that states adopt registration (1994), ten years after mandating community notification (1996), and at the same time as the AWA itself confidently prescribed an array of fundamental changes for state registration and notification systems.

Research that has been conducted, however, has not favored the laws’ advocates. Modern registries, like their historic forebears, are rife with errors, undercutting their knowledge-based premise. In 2003, for instance, state officials, on average, could not account for the whereabouts of 24% of registrants, with several states (California and

were enacted, the governor echoed the sentiments of a state senator that “no one can say that Alabama is ‘soft on sex offenders.’” *Id.*

207. See Wayne A. Logan, “Democratic Despotism” and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439, 468-69, 495 (2004) (surveying extensive public choice literature noting the political impotence of ex-offenders).

208. See *supra* notes 153-157 and accompanying text.

209. 42 U.S.C. § 16991 (2006).

210. The Institute is to assess the new law’s effectiveness in (1) increasing compliance with registration and notification requirements; (2) enhancing public safety; and (3) optimizing public dissemination of registrants’ information on the Internet. *Id.* §§ 16990(a)-(b), 16991. The AWA also requires assessment of associated “costs and burdens” and recommendations for increasing the effectiveness of registration. *Id.*

Massachusetts, 44%; Oklahoma, 50%) having especially high rates.²¹¹ Moreover, eighteen states were unable to offer even an estimate of how many registrants were non-compliant.²¹² Such flaws, while to be expected of an honor-based system targeting persons with proven criminal antisocial tendencies, are nonetheless deeply problematic. Without reliable registry information, police cannot monitor and apprehend recidivist registrants; the public cannot assist police and take self-protective measures; and registrants themselves will not be susceptible of police and community surveillance.

Even more problematic, flawed registries give rise to a false sense of informational security, which aggravates the false empiric premises on which the laws are based. Today, we know that most sex crimes are committed by first-time offenders, who by definition are not registered, making registration and notification significantly under-inclusive.²¹³ We also know that the overwhelming proportion of sex offenders targeting children, the main concern of the laws, are related to or otherwise known to victims.²¹⁴ Despite this awareness, registration and notification are motivated by the expectation of “stranger danger” and the need to inform potential victims of unknown risks. Finally, contrary to the view that information on registrants is needed to help their neighbors self-protect, empirical work suggests that recidivists often look beyond their neighborhoods for victims.²¹⁵

The more general public safety value of the laws also remains in doubt. Empirical work typically shows that the laws have little or no effect on sexual offending rates and recidivism.²¹⁶ At the same time,

211. Kim Curtis, *Survey: States Have Lost Track of Thousands of Sex Offenders*, ASSOCIATED PRESS, Feb. 7, 2003, available at <http://www.rentalresearch.com/CaliforniaLoosesSexOffenders.pdf>.

212. *Id.*

213. Bob Edward Vásquez et al., *The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQ. 175, 179 (2008).

214. See Robert Freeman-Longo, *Myths and Facts About Sex Offenders*, CENTER FOR SEX OFFENDER MANAGEMENT, Aug. 2000, <http://www.csom.org/pubs/mythfacts.html>.

215. See, e.g., Grant Duwe et al., *Does Residential Proximity Matter? A Geographic Analysis of Sex Offense Recidivism*, 35 CRIM. JUST. & BEHAV. 484, 500 (2008).

216. See, e.g., Elizabeth J. Letourneau et al., *Effects of South Carolina's Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes*, 37 CRIM. JUST. & BEHAV. 537, 550 (2010); Richard Tewksbury & Wesley G. Jennings, *Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories*, 37 CRIM. JUST. & BEHAV. 570, 572 (2010); Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCHOL. PUB. POL'Y & L. 284, 299 (2008); Richard G. Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration*, 19 CRIM. JUST. STUD. 193, 200-03 (2006); Kristin Zgoba et al., *An Analysis of the Effectiveness of*

registration and community notification impose significant hardships on registrants, including stressors known to hinder crime desistance and community reintegration.²¹⁷ Registrants—and often their families and friends—regularly experience harassment, job terminations and increased difficulty finding employment, housing disruption, depression, loss and diminution of personal relationships, and even physical violence (including homicide).²¹⁸ Community ire has even been directed mistakenly at non-registrants, a not unlikely prospect given registry address inaccuracies. Such negative effects are especially problematic for juveniles, who are often subject to registration and notification, despite their unique developmental stage, distinct treatment responsiveness and offending profiles.²¹⁹

At the same time, empirical work has failed to support the information empowerment predicate that has motivated the laws from the outset. Police, for their part, typically lack the resources and will to monitor compliance, which undercuts the utility of the laws.²²⁰ As for community members, empirical work underscores that community notification, even if based on accurate and comprehensive information, fails to achieve the individual-level effect it is designed to achieve. Registrant information, especially when disseminated via the now-dominant method of government-run internet web sites, is often not received by community members.²²¹ And even among community members who do become aware of the presence of registrants, few

Community Notification and Registration: Do the Best Intentions Predict the Best Practices?, 27 JUST. Q. 667, 690 (2010).

217. See Naomi J. Freeman, *The Public Safety Impact of Community Notification Laws: Rearrest of Convicted Sex Offenders*, CRIME & DELINQ. 1, 22 (May 2009); J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 10 (Nat'l Bureau of Econ. Research, Working Paper No. 13803, 2008).

218. See, e.g., Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54, 56 (2009); Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Laws on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 56 (2005).

219. See, e.g., DAVID FINKELOR ET AL., U.S. DEP'T OF JUSTICE, JUVENILES WHO COMMIT SEX OFFENSES AGAINST MINORS 10 (2009), <http://www.ncjrs.gov/pdffiles1/ojdp/227763.pdf>; Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders*, 19 SEXUAL ABUSE: J. RES. & TREATMENT 107, 108 (2007); Erin B. Comartin et al., *Family Experiences of Young Adult Sex Offender Registration*, 19 J. CHILD SEXUAL ABUSE 204, 206 (2010).

220. See, e.g., Amos Bridges, *Registry for Sex Crimes Lagging*, SPRINGFIELD NEWS-LEADER (Missouri), Apr. 30, 2007, at A1; James Macpherson, *'Monsters in Our Closets' - Officials: Tracking Sex Offenders with Surprise Visits Spotty in Most Cities*, GRAND FORKS HERALD (North Dakota), Apr. 9, 2007, at A1.

221. See, e.g., Sarah W. Craun, *Evaluating Awareness of Registered Sex Offenders in the Neighborhood*, 56 CRIME & DELINQ. 414, 431 (2010).

make substantial modifications in their self-protective behavior.²²²

The laws also have significant fiscal consequences. In California, for instance, in 2003 the attorney general estimated that \$20 million was needed to improve upon the state's error-riddled registry and operate an effective one.²²³ Studies have also shown that the specter of the onerous consequences of the laws can affect justice outcomes, ranging from discouraging guilty pleas (increasing the volume of trials, which carries expense, and exposes victims to the trauma of testifying), to possibly discouraging the reporting of sexual offenses, the latter being especially troublesome because it both avoids criminal accountability and possible treatment and allows for continued victimization.²²⁴

Even more fundamentally, concern exists that the laws themselves are premised on false empirical understandings of sexual offending, in several important respects. First, it is now clear that the recidivism-related premise of sex offender registration, in particular, is well off the mark. Recidivism among sex offenders in general (defined to include recommitting a sex offense) has been shown to range from five percent to fourteen percent over three to six year follow-up periods,²²⁵ and twenty-four percent over a fifteen year follow-up period.²²⁶ Contrary to legislative pronouncements, sex offenders have among the lowest criminal recidivism rates, with robbers, burglars, and persons committing nonsexual assault all recommitting similar crimes at considerably higher rates.²²⁷ In short, even though sexual victimization without question remains a significant concern, and the full extent of victimizations is known to be underreported,²²⁸ it is also clear that the drive for registration and notification has been fueled by vastly overstated understandings of recidivist risk.²²⁹

222. See, e.g., Amy L. Anderson & Lisa L. Sample, *Public Awareness and Action Resulting From Sex Offender Community Notification Laws*, 19 CRIM. JUST. POL'Y REV. 371, 389 (2008); see generally Victoria S. Beck & Lawrence Travis, III, *Sex Offender Notification: A Cross-State Comparison*, 7 POLICE PRAC. AND RES. 293 (2006).

223. *California: Police Need \$20M to Enforce Megan's Law*, 37 CRIME CONTROL DIG. 2, 6 (2003).

224. See generally Elizabeth J. Letorneau et al, *Effects of Sex Offender Registration Policies on Juvenile Justice Decision Making*, 21 SEXUAL ABUSE: J. RES. & TREATMENT 149 (2009).

225. ANDREW J.R. HARRIS & R. KARL HANSON, PUB. SAFETY & PREPAREDNESS CAN., SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION 7-8 (2004).

226. *Id.*

227. TIMOTHY S. BYNUM ET. AL., CENTER FOR SEX OFFENDER MANAGEMENT, U.S. DEPT. OF JUSTICE, RECIDIVISM OF SEX OFFENDERS 3, 5, 7 (2001).

228. Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL'Y REV. 83, 89 (2006).

229. *Id.* at 86.

Second, sex offenders are a markedly heterogeneous criminal subpopulation with respect to recidivist risk. Some sex offenders, such as male pedophiles who victimize non-familial boys and male rapists targeting women, do recidivate at alarmingly high rates.²³⁰ Registration laws, however, manifest a marked tendency to indulge in what social scientists refer to as “overinclusive labeling,” sweeping up individuals convicted of crimes not especially associated with recidivist risk.²³¹

The difficulty of this over-inclusiveness is borne out by a recent study evaluating the effect that imposition of the AWA's conviction-based classification approach on New York's risk-based approach.²³² According to the study's authors, if a conviction-based regime were to be used for individuals classified in Tier 1 (lowest risk) under the AWA's approach were rearrested for both sexual and nonsexual offenses more quickly than Tier 2 (moderate risk) and Tier 3 (highest risk).²³³ The results, the authors concluded, suggested that adoption of the AWA's conviction-based approach “[m]ay give community members a false sense of security. That is, community members may believe they are safe if no Tier 3 offenders are residing in their neighborhood when, in fact, Tier 3 offenders are not at increased risk to reoffend.”²³⁴

Finally, contrary to the “stranger danger” predicate of the laws, most sex offenses are not committed by strangers. Rather, while offender profiles differ depending on the nature of the sex offense, the overwhelming majority of child sexual victimizations are committed by someone known by the victim.²³⁵ For instance, from 1991-1996 only seven percent of reported instances of child sexual victimizations involved strangers—thirty-four percent were victimized by family and fifty-nine percent by acquaintances.²³⁶ Among adults age eighteen to twenty-four, only twenty-four percent of sexual victimizations were

230. *Id.* at 86-87.

231. James F. Quinn et al., *Societal Reaction to Sex Offenders: A Review of the Origins and Results of the Myths Surrounding Their Crimes and Treatment Amenability*, 25 *DEVIANT BEHAV.* 215, 218-23 (2004).

232. See generally Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 *CRIM. JUST. POL'Y REV.* 31 (2010).

233. *Id.* at 41.

234. *Id.* at 43.

235. HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf>.

236. *Id.*

committed by strangers, while the rate among older adults was thirty percent.²³⁷ Moreover, of the estimated 260,000 children kidnapped annually, only approximately 115 were taken by strangers.²³⁸ Even more problematic, the overwhelming majority of strangers committing sex crimes are known to be first-time offenders, with no recorded offending history, a statistic that belies the very premise of the laws.²³⁹

Despite the foregoing, there is reason to be pessimistic over the prospect that registration and notification policy will become more evidence-based and susceptible of change. Recent reaction to the release of two reports highly critical of registration and notification manifests this resistance. In response to the September 2007 publication of a Human Rights Watch study questioning the efficacy of the laws, Laura Ahearn, executive director of Parent's for Megan's Law, retorted that "[y]ou can't prove a negative. You can't prove a child hasn't been sexually victimized because they haven't been."²⁴⁰ Similarly, in response to a May 2007 preliminary study by the State of New Jersey indicating that Megan's Law had no effect on public safety, Maureen Kanka responded by simply reiterating that if she "had known there was a pedophile living across the street, Megan would be alive and well today," and added that she knew "the effectiveness of the law because I get e-mails about it all the time."²⁴¹

Furthermore, it is not hard to imagine how the laws will survive continued criticism that they are based on the false premises of heightened risk of sex offender recidivism and the threat of "stranger danger." This impregnability stems in significant part from the earlier noted influence of an availability heuristic, which causes individuals to mispredict the likelihood of readily imagined events,²⁴² and probability neglect, which encourages individuals to focus on emotionally charged

237. *Id.*

238. Tara Bahrapour, *Discovering a World Beyond the Front Yard: Some Parents Defy Trends, Allow Kids to Roam Unsupervised*, WASH. POST, Aug. 27, 2006, at C1 (citing data from the National Center for Missing and Exploited Children).

239. *See, e.g.*, JEFFREY T. WALKER & GWEN ERVIN-MCLARTY, ARKANSAS CRIME INFORMATION CENTER, *SEX OFFENDERS IN ARKANSAS: CHARACTERISTICS OF OFFENDERS AND ENFORCEMENT OF SEX OFFENDER LAWS 18 (2000)* (stating that 73% of sex offenders in registry sample surveyed were first-time offenders) (on file with author).

240. Angela Rozas, *Sex-Offender Laws Called Ineffective: Study: No Evidence Monitoring Works*, CHI. TRIB., Sept. 13, 2007, at 4.

241. Sam Wood, *N.J. Study Scrutinizes Megan's Law Effect*, PHILA. INQ., May 6, 2007, at B1.

242. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998).

negative occurrences, rather than their empirical likelihood.²⁴³ Resistance, as the above quote from Maureen Kanka makes clear, is also fueled by the common tendency to lend greater credence to information that confirms preexisting beliefs and to ignore conflicting information (confirmation bias).²⁴⁴

In a time when more Americans report being concerned about sex offenders than violent crime in general or even terrorism,²⁴⁵ and registration and notification are thought justified “if one child is saved,” continued support for such measures should come as no surprise.²⁴⁶ As Franklin Zimring has observed, “belief in the effectiveness of a penal statute is rooted in the citizens’ conviction that the law is appropriate. Since the penal measures feel right, they must be working well.”²⁴⁷ This is especially so if, as has been the case to date, empirical work is unable to disentangle recent drops in rates of sexual victimization from the contemporaneous proliferation of registration and community notification laws. Advocates, until data definitively prove otherwise, can assert that, despite growing research on the negative impact of the laws on registrants and others (such as their families), the laws still have possible public safety benefit.

It is also important to recognize that the laws, whatever their impact, will likely remain popular due to their harsh effects on the individuals they target—ex-criminal offenders. To a society increasingly unforgiving and scared of criminal malefactors, especially sex offenders, registration and notification are readily defensible: the fact of a prior conviction standing alone, however inaccurate a proxy of future dangerousness, justifies all personal hardships imposed. As Cass Sunstein recently observed in his book *Laws of Fear*, “if indulging fear is costless, because other people face the relevant burdens, then the mere fact of ‘risk,’ and the mere presence of fear, will seem to provide a

243. See Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62-63 (2002).

244. See Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998) (describing confirmation bias as “the inappropriate bolstering of hypotheses or beliefs whose truth is in question” and a “one-sided case-building process.”).

245. *The JonBenet Ramsey Case: The Greatest Fear*, ECONOMIST, Aug. 24, 2006, at 24, 25 (reporting results of Gallup poll).

246. Testament to this, according to one recent study, seventy-three percent of residents in a Florida locality stated that they would support registration and notification laws even if they were shown to have no crime reduction benefit. Jill S. Levenson et al., *supra* note 174, at 148-49.

247. FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 221 (2001).

justification.”²⁴⁸ When the “other people” are sex offenders the public policy choice will likely continue to be an easy one. This is especially so given that the choice carries the added expressive benefit of condemning targeted individuals with epithets such as “predator.”

For similar reasons, the laws will likely continue to be inured to the persistent criticism that they are over-inclusive and unjustly driven by worry over “false negatives,” that is, individuals who recidivate but about whom the community and police are not warned. Under such a regime, the specter arises that, as Supreme Court Justice Potter Stewart observed in another context, “when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless”²⁴⁹ Yet, over-inclusiveness again raises no principled concern; indeed, it is preferred, even at the likely expense of unhelpfully inundating the public with information (much of it inaccurate or incomplete) on registrants undifferentiated by risk.²⁵⁰

Given that access to criminal history information is now seen as a matter of consumerist entitlement, the hundreds of thousands of “false positives” (persons required to register yet do not reoffend) are readily acceptable to the public. And with the AWA, with its blunderbuss conviction-based classification regime, the normative preference is now national policy. This despite the increasing consensus of experts and even Patty Wetterling (who played a foremost role in the genesis of modern laws) that a more circumscribed regime based on individualized risk assessments has greater promise.²⁵¹

Along these same lines, advocates will have cause to resist claims that the laws wrongly focus on an overstated fear of “stranger danger.” Even accepting the empirical reality that most sex crimes are committed by family members, friends, and acquaintances, registration and community notification could still be said to have value. Presuming that self-protective measures will be taken, notice of dangerous

248. SUNSTEIN, *supra* note 169, at 208.

249. *New York Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

250. *See In re E.I.*, 693 A.2d 505, 508 (N.J. Super. Ct. App. Div. 1997) (“[I]f Megan’s Law is applied literally and mechanically to virtually all sexual offenders, the beneficial purpose of this law will be impeded.”).

251. *See, e.g.*, SCOTT MATSON ET AL., CTR. FOR SEX OFFENDER MGMT., U.S. DEP’T OF JUSTICE, COMMUNITY NOTIFICATION AND EDUCATION (2001), <http://www.csom.org/pubs/notedu.html>; Grant Duwe & William Donnay, *The Impact of Megan’s Law on Sex Offender Recidivism: The Minnesota Experience*, 46 CRIMINOLOGY 411 (2008); Levenson et al., *supra* note 174, at 154; *see also* Dan Gunderson, *Sex Offender Laws Have Unintended Consequences*, MINN. PUB. RADIO (June 18, 2007), <http://minnesota.publicradio.org/display/web/2007/06/11/sexoffender1>.

strangers is beneficial, but so is being told that someone familiar committed a registerable offense, when such prior misconduct was not previously known (an unlikely scenario among family, but quite possible regarding friends and acquaintances). Also, even though strangers commit a comparatively small percentage of registerable crimes, their involvement could be deemed more harmful and fearsome for individuals and communities, justifying the collection and dissemination of information relative to them.²⁵²

A final reason accounting for the likely persistence of registration and notification is that they have assumed an institutional life of their own, ensuring a measure of staying power. As the governmental infrastructure supporting registration and notification has grown over time, pressure from its constituent parts can be expected to exercise a self-perpetuating influence. Much as the increasingly large child-protection bureaucracy has been held safe from political challenge amid decreasing abuse rates, the administrative structure of registration and notification can be expected to resist retrenchment efforts.²⁵³ Equally important, private industry—such as that providing data mining and notification services—also can be expected to press for maintenance of the political status quo.²⁵⁴ In short, again drawing from social science literature on lock-in, we see an endowment effect operative, whereby those who benefit from maintenance of the status quo will defend it, even if policy change would yield greater overall social benefit.²⁵⁵

Even more fundamentally, there is little reason to think that principled objection to the laws, not uncommonly voiced up through the 1980s, will resurface. In 1941, in the shadow of totalitarian oppression abroad, the United States Supreme Court cautioned in *Hines v. Davidowitz* that “champions of freedom for the individual have always vigorously opposed burdensome registration systems,” and noted historic opposition to requirements “at war with the fundamental

252. Indeed, the skewed public fear over strangers is in some sense justified by evidence suggesting that as a class stranger-assailants cause more severe physical harm and death to their victims than non-strangers. MICHELE L. MELOY, *SEX OFFENSES AND THE MEN WHO COMMIT THEM: AN ASSESSMENT OF SEX OFFENDERS ON PROBATION* 22 (2006). Other research, however, points to the especially harmful effects of violent victimization by familiars. See generally Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. 343 (2007).

253. JENKINS, *supra* note 147, at 232-33.

254. For just two of the myriad entities offering web-based information on registrants, see NAT'L ALERT REGISTRY, <http://www.registeredoffenderslist.org/> (last visited Feb. 6, 2011); FAMILY WATCHDOG, <http://www.familywatchdog.us> (last visited Feb. 6, 2011).

255. On the endowment effect more generally, see Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 625-30 (1998).

principles of our free government, in that they would bring about unnecessary and irritating restrictions upon personal liberties of the individual”²⁵⁶ Today, with the Supreme Court having constitutionally condoned onerous registration requirements and notification conditions, and the laws enjoying broad public support, the Court’s words seem a quaint reminder of a distant past.²⁵⁷

Perhaps some future use of registration and notification by a foreign government, an antagonist of the United States, will reawaken and stir political sensibilities against such laws. If this were to occur, however, such a reaction very likely would not be directed against registration, which has become an accepted method of social control, endorsed by such institutions as the *New York Times*.²⁵⁸ Whether some outgrowth or application of community notification, neither known nor imagined today, turns public sentiment against notification remains to be seen. However, given that the public has gone unperturbed by its negative byproducts to date makes such a reaction doubtful.

CONCLUSION

In all, there is strong reason to believe that registration and notification laws are here to stay. Like the massive increases in imprisonment they accompanied in the 1990s, the laws are the product of a significant social and political transformation. However, recent state efforts to curb their massive prison populations (mainly due to cost concerns, not principle) will not likely be paralleled by a decrease in registration and notification. Indeed, given that the social control method promises continued monitoring of the criminally convicted on the relative cheap—when prison populations can no longer be sustained—makes the likelihood of their sustainment all the greater. The added potential of registration and notification dovetailing with recent “techno-correction” strategies, such as global positioning systems²⁵⁹ and sub-dermal “chips”²⁶⁰ that allow for real-time tracking of

256. 312 U.S. 52, 70-71 (1941).

257. See *Smith v. Doe*, 538 U.S. 84, 103-06 (2003) (demonstrating registration and notification non-punitive in character and hence permissible under Ex Post Facto and Double Jeopardy clauses); *Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 3-4 (2003) (denying procedural due process challenge to registration and community notification).

258. See Editorial, *Fine-Tuning Megan’s Laws*, N.Y. TIMES, July 30, 2008, at A16.

259. See Wendy Koch, *More Sex Offenders Tracked by Satellite*, USA TODAY, June 7, 2006, at A3.

260. See Isaac B. Rosenberg, *Involuntary Endogenous RFID Compliance Monitoring as a Condition of Federal Supervised Release—Chips Ahoy?*, 10 YALE J.L. & TECH. 331 (2008). Today, RFID can only monitor individuals physically situated within several feet of radio receivers, and can merely note their presence in a specified location. *Id.* at 340. But

registrants makes this all the more likely. That these developments have occurred, and are occurring, in a period of actual decreasing reported sexual victimization remains a paradox.²⁶¹ For reasons discussed, however, the situation will not likely change any time soon.

as the technology becomes more sophisticated, its appeal will doubtless grow. Registrants themselves might see its appeal, as compared to GPS monitoring, which is visually and physically more obtrusive.

261. See Robert Anglen, *Arrests for Sex Crimes Falling*, ARIZ. REPUBLIC, Nov. 23, 2007, at A1; see also DAVID FINKELHOR & LISA M. JONES, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, EXPLANATIONS FOR THE DECLINE IN CHILD SEXUAL ABUSE CASES (2004), <http://www.ncjrs.gov/pdffiles1/ojjdp/199298.pdf> (noting decrease in child sexual abuse of 50% during 1991-2004); *Crime in the United States, 2006*, U.S. DEP'T OF JUSTICE, <http://www2.fbi.gov/ucr/cius2006/index.html> (last visited Feb. 6, 2011).

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