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HOW TO TREAT AMERICA'S LEPPER:

Why Sex Offender Supervision Needs Revision

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I. INTRODUCTION

Most citizens believe that sex offenders re-offend at a significantly higher rate than thieves, drug dealers, or average criminals. In 2003, the United States Supreme Court stated sex offenders' recidivism rates are, "frightening and high."¹ Taking a cue from the Supreme Court itself, attorney Robert C. Montgomery, arguing in support of a North Carolina law banning sex offenders from social media platforms, stated, "This Court has recognized that [sex offenders] have a high rate of recidivism and are very likely to do this again."² A recent *New York Times* article revealed that the Supreme Court's 2003 recidivism statistics were pulled from *Psychology Today*, and

¹ Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. TIMES (Mar. 6, 2017).

² *Id.*

stated that lawmakers and judges would be better served if they based their judgments on facts, not myths.³

Despite these assertions and public opinion, it is much more accurate to describe sex offender's recidivism rate as low. Part I of this article will discuss how we are currently treating and managing sex offenders and how different programs impact sex offender recidivism. Part II of this article will describe how we currently manage sex offenders. Part III of this article will explore the driving forces behind the public misperception of sex offender recidivism rates and what the actual recidivism rates are. Lastly, Part IV of this article will propose various changes to the current management of sex offenders and what programs should be continued based on their reduction of recidivism.

II. SEX OFFENDER MANAGEMENT

A sex offender is "a person who has been convicted of a crime involving sex."⁴ A crime involving sex changes from jurisdiction to jurisdiction, with some jurisdictions including offenses ranging from public urination to child pornography.⁵ In federal court, the average sentence for sexual abuse offenders is 235 months – just shy of 20 years.⁶ The average sentence for child pornography offenders is 132 months – 11 years.⁷ Therefore, an offender sentenced for child molestation receives an average sentence of 235 months, and an offender with child

³ *Id.*

⁴ Merriam-Webster, <https://www.merriam-webster.com/dictionary/sex%20offender> (last visited Sept. 20, 2018).

⁵ Erin Fuchs, *7 Surprising Things That Could Make You a Sex Offender*, BUSINESS INSIDER (OCT. 9, 2013), <http://www.businessinsider.com/surprising-things-that-could-make-you-a-sex-offender-2013-10>.

⁶United States Sentencing Commission, *Quick Facts Mandatory Minimum Penalties* (Sept. 17, 2013), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mandatory_Minimum_Penalties.pdf.

⁷ *Id.*

pornography on their computer will only receive an average sentence of 132 months.⁸

Sex offenders receive different treatment than other criminals. For example, sex offenders have additional programs and requirements to comply with after they are released from prison.⁹ The diverse programs, requirements, and demands placed on sex offenders can broadly be referred to as sex offender management.¹⁰ Sex offender management is also referred to as- Comprehensive Approach to Sex Offender Management (CASOM). CASOM is a wide-ranging method of management that deals with many aspects of a sex offender's life.¹¹ This comprehensive model, which the Department of Justice currently uses, includes a victim-centered approach, supervision, reentry, registration, and community notification.¹²

CASOM works in conjunction with the Adam Walsh Child Protection and Safety Act of 2006 (AWA) and similar state registration programs.¹³ Together, these acts paved the way for the implementation of programs intending to reduce sex offender recidivism.¹⁴ Furthermore, the Center for Sex Offender Management creates the construct of CASOM.¹⁵ The Center for Sex Offender Management, funded by the Department of Justice, has a goal of "enhancing public safety by preventing

⁸ *Id.*

⁹ Kevin Baldwin et al., *Sex Offender Management and Planning Initiative*, U.S. DEPT. OF JUSTICE, 145 (last visited Sept. 20, 2018), https://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 9.

¹⁴ *Id.*

¹⁵ *Id.* at 145.

further victimization through improving the management of adult and juvenile sex offenders.”¹⁶

Furthermore, the goal of CASOM is to prevent recidivism.¹⁷ This is accomplished through multiple programs, conditions, and options for the treatment of sex offenders post-sentence. The most prevalent conditions required during probation (after imprisonment) include: (a) specialized supervision, (b) circles of support and accountability, (c) electronic monitoring, (d) polygraph testing, (e) civil commitment, (f) sex offender registration and notification, and (g) residency restrictions.¹⁸

A. SPECIALIZED SUPERVISION

Specialized intensive supervision is probation tailored to sex offenders.¹⁹ This type of supervision generally involves parole or probation officers specially trained to deal with sex offenders, their problems, and community issues.²⁰ Specialized intensive supervision frequently requires sex offenders to initially submit to a myriad of conditions.²¹ These conditions may include abstaining from alcohol, drugs, internet searches, pornography, or a relationship with any person who has kids under eighteen. Further examples include attending sex offender evaluation and treatment programs, abiding by curfews, submitting and receiving approval for residency changes, informing a probation officer of all significant relationships, reporting contact with a child to their parole or probation officer, and submitting to a DNA test.²² These

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 146.

²⁰ *Id.*

²¹ State of Colorado Justice Department, https://www.courts.state.co.us/userfiles/File/Media/Law_School/060207additionalsexoffendcond.pdf (last visited Sept. 20, 2018).

²² *Id.*

conditions are not exhaustive and many more may be required for intensive supervision programs.²³

Even though it is widely used, numerous expansive studies have shown that specialized intensive supervision probation is only effective when the focus is treatment-oriented, that is, a focus on rehabilitating the offender.²⁴ These studies also revealed that specialized intensive supervision probation is not effective when the primary goal of the supervision is surveillance and solely aimed at reducing recidivism.²⁵ In summary, while supervision directed toward rehabilitation is effective, supervision directed toward surveillance is ineffective.

B. CIRCLES OF SUPPORT AND ACCOUNTABILITY (COSA)

Another spoke in the wheel of sex offender management is Circles of Support and Accountability (COSA).²⁶ COSA is often implemented after the completion of a sex offender's legal supervision.²⁷ Sex offenders participating in COSA are grouped with community volunteers who help hold offenders accountable to their self-monitoring plan.²⁸ Self-monitoring plans include everything from daily routines to avoiding pornographic websites.²⁹ Community volunteers further help

²³ *Id.*

²⁴ Baldwin et al., *supra* note 9, at 146 (citing Aos, S., Miller, M., & Drake, E. *Evidence-Based Adult Corrections Programs: What Works and What Does Not*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY (2006)).

²⁵ *Id.* (citing Petersilia, J., & Turner, S. *Intensive probation and parole*, Crime and Justice: A Review of Research at 17, UNIVERSITY OF CHICAGO PRESS (1993)).

²⁶ Baldwin et al., *supra* note 9, at 149.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

reintegrate offenders into the community by providing them with support and resources.³⁰

A study published by *Sexual Abuse: A Journal of Research and Treatment* articulates that COSA has reduced sexual recidivism with community integration and assistance.³¹ In one study, 90% of sex offenders described participation in COSA as helping prevent them from re-offending.³² Likewise, 68% of community members who participated in COSA felt safer in the community due to their participation.³³

A Canadian study – where COSA is more prevalent than in the United States – compared recidivism rates of 60 COSA high-risk sex offenders and 60 non-COSA high-risk sex offenders in a 4.5-year period after release from legal supervision.³⁴ 5% of the COSA group reoffended while 16.7% of the non-COSA group reoffended.³⁵ As of July 2015, COSA programs have only been implemented in California, Minnesota, and Vermont.³⁶

In conclusion, COSA is a research supported program that diminishes recidivism in sex offenders without the negative consequences associated with other treatment tools.

C. ELECTRONIC MONITORING

Electronic monitoring enables authorities to track sex offender's movements, whereabouts, and activity.³⁷ Recently, in 2015, the Supreme Court case *Grady v. North Carolina* struck down a North Carolina law allowing repeat offenders to be

³⁰ *Id.*

³¹ *Id.*

³² *Id.* (citing Wilson, R.J., Picheca, J.E., & Prinzo, M. *Circles of Support & Accountability*, http://www.csc-scc.gc.ca/text/rsrch/reports/r168/r168_e.pdf).

³³ Baldwin et al., *supra* note 9, at 149.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 153.

subjected to electronic monitoring for the rest of their lives.³⁸ As of 2009, forty-seven states have passed some type of electronic monitoring legislation.³⁹ Despite the enactment of these laws, research plainly shows that sexual recidivism is not reduced by electronic monitoring.⁴⁰ Statistics have also shown that jurisdictions using electronic monitoring do not have lower rates of rape or violent crime.⁴¹ The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking noted that GPS should not be used in a vacuum to reduce recidivism. Instead, GPS should be part of the total strategy to treat sex offenders, The Office of Sex Offender Sentencing supported this by stating that, “[p]olicymakers and the public should not view GPS as a viable alternative to empirically supported supervision models that incorporate treatment.”⁴²

D. POLYGRAPH TESTING

Polygraph testing is a more controversial sex offender management strategy and is performed on sex offenders for a slew of reasons.⁴³ The Supreme Court in the 2002 case of *McKune v. Lile* held that forcing sex offenders to participate in polygraph testing violates the 5th Amendment right against self-incrimination.⁴⁴ Polygraphs are used to gather specific incident information, sexual history information, and maintenance of released sex offenders.⁴⁵ Specific incident examinations focus on a singular occurrence (pre or post-imprisonment). Sexual history examinations delve into the offender’s history of sex

³⁸ *Grady v. North Carolina*, 135 S. Ct. 1368 (2015).

³⁹ Baldwin et al., *supra* note 9, at 149.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 155.

⁴³ *Id.* at 150.

⁴⁴ *McKune v. Lile*, 536 U.S. 24 (2005).

⁴⁵ Baldwin et al., *supra* note 9, at 150.

offenses. Maintenance examinations look to the offender's compliance with their specific treatment.⁴⁶

Polygraphs have also been shown to successfully lead to additional disclosures from sex offenders.⁴⁷ These additional disclosures range from a wide variety of topics such as: the number of victims, number of offenses, offense categories, high-risk behaviors, age of onset, duration of offending, and frequency of offending.⁴⁸ Noticeably, a 2007 study notes that there are no significant differences in polygraphed and non-polygraphed sex offender's recidivism rates.⁴⁹ Therefore, polygraphs do not successfully help sex offenders recidivism rates.

E. CIVIL COMMITMENT

Sex Offender Civil Commitment (SOCC) allows sex offenders to be civilly committed after their prison sentence has ended.⁵⁰ The Supreme Court held this confinement constitutional for "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence."⁵¹ In 2006, with the passing of AWA, Congress provided for the civil commitment of sexual offenders at the federal level.⁵² In 2010, the Supreme Court agreed that Congress is capable of passing a federal law requiring the civil commitment of particularly dangerous sex offenders.⁵³

Generally, for a sex offender to be a civil commitment candidate, they must: (1) have a history of criminal sexual

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Kansas v. Hendricks*, 521 U.S. 346 (1997).

⁵¹ *Id.* at 352.

⁵² 18 U.S.C. § 4248(a) (2006).

⁵³ *United States v. Comstock*, 560 U.S. 126 (2010).

behavior and (2) have a mental abnormality that, if not treated, will induce them to commit more sexual crimes.⁵⁴ These two factors must be proven by clear and convincing evidence if the offender is to be civilly committed.⁵⁵ Civil commitment is reserved for offenders who are still a danger to the community after their prison sentence has been served.

As of 2015, nearly 5,400 people in twenty states were being held indefinitely in civil commitment programs.⁵⁶ California, Minnesota, New Jersey, and Florida civilly commit the most sex offenders with at least 428 committed in each state.⁵⁷ Thirteen of the twenty states allow juveniles convicted of sexual crimes to be civilly committed.⁵⁸ The rates of recidivism within 6 years for those released from civil commitment is higher than that of the average sex offender at a rate of 23%.⁵⁹ These findings suggest that civil commitment is a viable option for particularly dangerous offenders.

F. SEX OFFENDER REGISTRATION AND NOTIFICATION

The Center for Sex Offender Management has articulated that the purpose of the Sex Offender Registration and Notification programs are to deter offenders from reoffending, give law enforcement an investigative tool, and to increase public protection.⁶⁰ In 1994, the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act required sex offender registration systems in

⁵⁴ Baldwin et al., *supra* note 9, at 155.

⁵⁵ Comstock, 560 U.S. at 130.

⁵⁶ George Steptoe and Antoine Goldet, *Why Some Young Sex Offenders Are Held Indefinitely*, THE MARSHALL PROJECT (Jan. 27, 2016), <https://www.themarshallproject.org/2016/01/27/why-some-young-sex-offenders-are-held-indefinitely#.DysrWQKQA>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Baldwin et al., *supra* note 9, at 155.

⁶⁰ *Id.* at 157.

states receiving federal funding for law enforcement.⁶¹ As public disdain for sex offenders became more mainstream, the federal government enacted the AWA, establishing the national sex offender registry.⁶²

Title I of the AWA, the Sex Offenders Registration and Notification Act (SORNA), describes who must register on the national sex offender registry as any “individual who was convicted of a sex offense.”⁶³ Under SORNA, sex offenders must register wherever they reside, work, or go to school.⁶⁴ Sex offenders must also notify the Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking Office (SMART), in person, of any name, resident, employment, or student status change within three business days.⁶⁵ When a sex offender fails to comply with the above requirements, they can be prosecuted federally for the crime of failure to register, carrying a maximum penalty of ten years imprisonment.⁶⁶

Throughout America, states have become laboratories, testing the effectiveness of sex offender management and registration systems. For example, the time frame in which sex offenders have to notify or report to their probation officer of an address change ranges from 24 hours in Maine to every seven days if an offender is homeless in Indiana.⁶⁷

Other differences among states include: who must register as a sex offender, how long the offender must register,

⁶¹ VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2038-42 (1994) (codified at 42 U.S.C. § 14071 (2006)).

⁶² See generally NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *The Adam Walsh Act*, <http://www.ncjfcj.org/adam-walsh-act> (last visited Mar. 2, 2019).

⁶³ 34 U.S.C. § 20911(1) (2017) (formerly cited as 42 U.S.C. § 16911).

⁶⁴ 34 U.S.C. § 20913(a) (2017) (formerly cited as 42 U.S.C. § 16913).

⁶⁵ 34 U.S.C. § 20913(c) (2017).

⁶⁶ 18 U.S.C. § 2250(a) (2016).

⁶⁷ Jane Shim, *Listed for Life*, SLATE (AUG. 13, 2014),

http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/sex_offender_registry_laws_by_state_mapped.html.

and how an offender can get off of the registry.⁶⁸ Some states, including California and South Carolina, require sex offender registration for life, regardless of the type of sexual crime committed.⁶⁹ In Utah, however, offenders may be removed from the registry after ten years.⁷⁰ Although the registry is well-known to the public, many states take an alternative common sense approach to the registry. The states allow sex offenders convicted of less-serious crimes to have shorter registration periods. For example, in Missouri, a “Romeo and Juliet” exception allows an offender under the age of twenty-one having consensual sex with someone older than fourteen to petition for removal from the registry after two years.⁷¹

Some states also have levels of sex offenders, with the level dictating whether the offender is placed on the registry and for how long. In Massachusetts, for example, there are three levels of sex offenders.⁷² The sex offender levels (1-3) are determined by a Sex Offender Registry Board who determines the risk of re-offense and the degree of dangerousness posed to the public.⁷³

In effect, when an offender is labeled Level 1, the board has determined that giving their information to the public will not reduce their recidivism.⁷⁴ When an offender is labeled Level 2, the board has determined the offender is moderately likely to reoffend. Because of this, the public will have access to the offender’s information through the local police department.⁷⁵ When an offender is labeled Level 3, the board has determined have a high risk of re-offense. This means the offender’s

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

information and crime will be actively disseminated throughout the community.⁷⁶

New York has a similar level system.⁷⁷ In New York, the level of the sex offender corresponds with the duration of years an offender must be on the sex offender registration system.⁷⁸ Level 1 offenders must register for 20 years while level 2 and 3 offenders must register for life.

The United States and South Korea are the only countries with public sex offender registration systems in place.⁷⁹ However, statistics show that there is not a significant difference between the rates of sexual violence in countries that have implemented a sex offender system and countries that have not.⁸⁰

For example the South Korean registration system only requires a sex offender to register for five to ten years if they have committed a sexual crime against a child.⁸¹ Further, eighteen countries have enacted sex offender registration laws that are only available to law enforcement: Argentina, Australia, Bermuda, Canada, France, Germany, Ireland, Jamaica, Jersey, Kenya, Maldives, Malta, Pitcairn Islands, South Africa, South Korea, Taiwan, Trinidad and Tobago, and the United Kingdom.⁸² South Africa, Australia, and the United

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, *Global Overview of Sex Offender Registration and Notification Systems*, <https://www.smart.gov/pdfs/GlobalOverview.pdf> (last visited Sept. 20, 2018).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

States rank first, eleventh, and fourteenth respectively in amount of rape incidents per capita.⁸³

Going further, a 2006 and 2009 study shows that there is no change in the rate of sex crimes in United States jurisdictions that have implemented a sex offender registry.⁸⁴ Additionally, the sex offender registration and notification system has been studied to evaluate whether it reduces recidivism in sex offenders.⁸⁵ The majority of studies, including nine separate independent studies, show that the registry and notification system has no impact on the rate of recidivism of sex offenders.⁸⁶ Despite this, the public is in favor of the registry and notification programs which do not reduce recidivism.⁸⁷ Because of this, a very real result is that 40-60% of sex offenders report negative psychological consequences as a direct effect of the sex offender registration and notification system.⁸⁸

G. RESIDENCY RESTRICTIONS

Typical residency restrictions prohibit sex offenders from living approximately 1,000 to 2,500 feet away from schools, daycare centers, public parks, churches, and other places that children may gather.⁸⁹ Twenty-seven states have enacted comprehensive rules dictating where sex offenders can live. Several towns, cities, and counties throughout the United States have also enacted additional restrictions.⁹⁰

Multiple studies have shown that residency restrictions do not reduce the recidivism rate of sex offenders. The studies also show that residency restrictions do not deter sex offenders

⁸³ NATION MASTER, *Rape Rate: Countries Compared*, <http://www.nationmaster.com/country-info/stats/Crime/Rape-rate> (last visited Sept. 20, 2018).

⁸⁴ Baldwin et al., *supra* note 9, at 157.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 159.

⁸⁸ *Id.*

⁸⁹ *Id.* at 162.

⁹⁰ *Id.*

from committing crimes and do not decrease sex crime rates in applicable jurisdictions.⁹¹ To the contrary, the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking has found that negative unintended consequences associated with residency restrictions aggravate rather than mitigate the risk that sex offenders will reoffend.⁹²

As an example, in October of 2014, Milwaukee passed legislation banning sex offenders from living within 2,000 feet of schools, parks, daycare centers, recreational trails, and playgrounds.⁹³ The enforcement of this law left sex offenders in Milwaukee with only 55 addresses where they could legally live in a 100 square mile city.⁹⁴ In less than two years after enactment of this law, the number of homeless sex offenders climbed from 15 to 230.⁹⁵ This shows that residency restrictions have led to increased homelessness, loss of family support, and financial hardship.⁹⁶ Further, the expansion and continuance of residency restrictions is not recommended by sex offender management professionals.⁹⁷

III. PUBLIC MISPERCEPTION OF SEX OFFENDERS & RATES OF RECIDIVISM

The stigma surrounding sex offenders has led to the use of multiple sex offender management programs. These include the creation of national and state sex offender registries and the civil commitment of sex offenders. Further, these were driven by public disdain and a fear of sex offenders that far surpasses

⁹¹ *Id.* at 163.

⁹² *Id.*

⁹³ Jacob Carpenter, *Sex Offender Ordinance Hasn't Worked as Planned, Putting Public at Greater Risk*, MILWAUKEE JOURNAL SENTINEL (Aug. 20, 2016).

⁹⁴ Jen Fifield, *Despite Concerns, Sex Offenders Face New Restrictions*, PEW (May, 6, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/06/despise-concerns-sex-offenders-face-new-restrictions>.

⁹⁵ *Id.*

⁹⁶ Baldwin et al., *supra* note 9, at 163.

⁹⁷ *Id.*

any other type of criminal. The public view of offenders is that they will always re-offend, that they are unable to be rehabilitated, and that they prey on strangers.⁹⁸ These myths “have served as the cornerstones to America’s sex offender policy,” by “support[ing] political efforts to vilify and restrict the liberties of sex offenders even when such policies are ultimately counterproductive.”⁹⁹

A. PUBLIC MISPERCEPTION

Americans believe that the majority of sex offenders are incurable and will reoffend.¹⁰⁰ The basis for this belief is that sexual urges such as pedophilia inhibit sex offenders from being rehabilitated, especially in cases of child molestation.¹⁰¹ A New York pastor has noted that, “sex offenders aren’t like other [criminals] because the public believes they are incurable. To be honest, it would probably be easier for a congregation to accept a former murderer.”¹⁰²

The notion of the reoffending sexual predator is so ubiquitous that many courts, including the Supreme Court and federal appellate courts have relied on inaccurate statistics and made erroneous statements when considering sex offender punishment.¹⁰³ The Supreme Court has called the recidivism rate of sex offenders “frightening and high.”¹⁰⁴ The Eighth

⁹⁸ Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. L. REV. 435 (2010).

⁹⁹ *Id.* at 454.

¹⁰⁰ Deborah Sontag, *Looking for Ways to Treat Sex Offenders*, N.Y. TIMES <http://www.nytimes.com/1992/04/04/nyregion/looking-for-ways-to-treat-sex-offenders.html> (last visited Sept. 20, 2018).

¹⁰¹ Zawn Villines, *Child Molester Rehabilitation Therapy*, GOODTHERAPY, <http://www.goodtherapy.org/blog/child-molester-rehabilitation-therapy-0615126> (last visited Feb. 3, 2017).

¹⁰² Yung, *supra* note 98, at 454 (quoting Eilene Zimmerman, *Churches Slam Doors on Sex Offenders*, SALON.COM (Apr. 26, 2007), http://www.salon.com/life/feature/2007/04/26/sexoffenders_church).

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

Circuit characterized sex offender recidivism as based “between 20 and 25%” on ambiguous findings. The Fifth Circuit also said recidivism was “approximately 70%” misplaced based on the testimony of a probation officer.¹⁰⁵

Despite these unsubstantiated biases, the American public did not pull their views on sex offenders out of thin air. The idea that sex offenders will always reoffend is fueled by the media, politicians, and fear. The heinous nature of many sex offenses cause parents to worry about their children, women not to walk alone at night, and an onslaught of media sources warning of the lurking sex offender. The fact is, there are awful acts perpetuated by sex offenders. But, they almost never occur. This means the rate the alarmist media and politicians make the public believe is vastly inaccurate.

Corey Rayburn Yung in *The Emerging Criminal War on Sex Offenders*, lays out multiple examples of how politicians and the media participate in fear mongering, despite the sex offender’s low recidivism rates.¹⁰⁶ In 2003, Bill Richardson, governor of New Mexico, announced that, “[t]oday, New Mexico is declaring war against sexual predators.”¹⁰⁷ In 2004, John Ashcroft told America that the Patriot Act has been used “to catch predatory child molesters and pornographers.”¹⁰⁸

In 2007, Dallas County Alabama District Attorney, Michael Jackson, stated “[w]e have declared war on child molesters in Dallas County and have sent a lot of them to prison...”¹⁰⁹ Marc Lunsford, father of Jessica Lunsford for whom Jessica's Laws are named, testified before Congress saying that his “job now is to declare war on child sex offenders

¹⁰⁵ *Id.* (quoting *United States v. Emerson*, 231 Fed. Appx. 349, 352 (2007)).

¹⁰⁶ *Id.* at 467.

¹⁰⁷ *Id.* (quoting Chris Vogel, *Gov. Going after Child Rapists*, ALBUQUERQUE JOURNAL, at A1 (Aug. 15, 2003)).

¹⁰⁸ *Id.* at 457 (quoting John Ashcroft, *Press Conference with Attorney General John Ashcroft*, FED. NEWS SERV. (July 13, 2004)).

¹⁰⁹ *Id.* (quoting Alvin Brenn, *Mom Talks about Near-Abduction*, THE MONTGOMERY ADVERTISER (Oct. 16, 2007)).

and predators and to get [Congress] to join [him]. Instead of them stalking our kids, we will stalk them. And instead of them being our wors[t] nightmare we become theirs."¹¹⁰

In 2006, Adam Walsh's father, John Walsh, host of America's Most Wanted, was said to be starting a war on sex offenders.¹¹¹ Furthermore, the television show *To Catch a Predator* on NBC was dedicated solely to exploiting parents' worst fears for their children - sex offenders attempting to molest minors.¹¹²

In summation, "sexual predators are rare, atypical sex offenders. But because of the intense focus of the media and new laws, predators have become archetypical. In the headlines and in these laws, sexual predators have come to symbolize the essence of the sexual violence problem."¹¹³

B. RATES OF RECIDIVISM

In spite of strong biases associated with sex offenders' recidivism rates, statistics paint a very different picture. In 2003, the Department of Justice studied criminal records of 9,691 sex offenders released in fifteen states since 1994.¹¹⁴ The recidivism rate for commission of sex crimes within the first three years of the offenders' release from prison was 5.3%.¹¹⁵ This shows that

¹¹⁰ *Id.* (quoting Mark Lunsford, *Sex Offender Registration*, CQ CONGRESSIONAL TESTIMONY (Mar. 10, 2009)).

¹¹¹ *Id.* (quoting *Hannity & Colmes: Interview with Arthur Aidala* (Fox News television broadcast Apr. 28, 2006)).

¹¹² *Id.* (quoting *To Catch a Predator* (NBC)).

¹¹³ *Id.* (quoting ERIC JANUS, *FAILURE TO PROTECT 3* (2006). Cf. LAWRENCE A. GREENFELD, U.S. DEPT. OF JUSTICE, *SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF RAPE AND SEXUAL ASSAULT* 11 (1997)).

¹¹⁴ *Id.* (quoting PATRICK A. LANGHAN, ET AL., U.S. DEPT. OF JUSTICE, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* 1-2 (2003)).

¹¹⁵ *Id.* at 1.

the recidivism rates numbers from above are blatantly incorrect in the face of this study by the Department of Justice.¹¹⁶

Going further, the 2003 study found that sex offenders have the lowest overall re-arrest rate when looking at crime in general.¹¹⁷ Without looking at the types of crimes committed, sex offenders reoffended at a rate of 43% (4,163 of 9,691).¹¹⁸ Non-sex offenders reoffended at a much higher rate of 68% (179,391 of 262,420).¹¹⁹ These statistics show that the recidivism rate of sex offenders is almost thirty-seven percentage points lower than the rate for non-sex offenders.¹²⁰ The same study also showed that non-sex offenders released from prison committed over six times as many sex crimes as released sex offenders.¹²¹ This supports the theory that released sex offenders do not commit the majority of sexual crimes.¹²² Thus, these statistics fly in the face of beliefs held by many Americans. Therefore, sex offenders do not have higher recidivism rates than other criminals, in fact, they have lower recidivism rates.

IV. SEX OFFENDER MANAGEMENT REVISIONS

SMART published a research brief about the effectiveness of adult sex offender management in July of 2015.¹²³ This brief makes clear that the current programs used to treat/manage sex offenders are not only ineffective, but are also harmful:

Despite the intuitive value of using science to guide decision-making, laws and policies designed to combat sexual offending are often

¹¹⁶ *United States v. Emerson*, 231 Fed. Appx. 349, 352 (2007).

¹¹⁷ Yung, *supra* note 98, at 455. (quoting PATRICK A LANGHAN, ET AL., U.S. DEPT. OF JUSTICE, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1-2 (2003)).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Baldwin et al., *supra* note 9.

introduced or enacted *in the absence of empirical support*. However, there is little question that both public safety and the efficient use of public resources *would be enhanced* if sex offender management strategies were based on *evidence of effectiveness*. . . .¹²⁴

The SMART Office is in effect advocating for the use of empirical studies, statistics, and science to be used when forming and continuing sex offender management programs and policies. Below, each of the previously mentioned sex offender management programs, (a) specialized supervision, (b) circles of support and accountability, (c) electronic monitoring, (d) polygraph testing, (e) civil commitment, (f) sex offender registration and notification, and (g) residency restrictions, are discussed and examined for success, failure, or stagnation. Changes that should be made to each to achieve a more effective sex offender management program are also discussed.

A. SPECIALIZED SUPERVISION

Specialized supervision has proven to be one of the few sex offender management programs that are effective at reducing sex offender recidivism. However, specialized supervision only works when the supervision is treatment-oriented and not surveillance-oriented. In order for specialized supervision to be effective, the primary goal of the supervision must be to treat the offender. Simply put, the focus should be on the person instead of their potential crimes.

Specialized supervision that focuses on the individual has been proven ineffective. By way of example, a probation or parole officer should ask how a sex offender is managing with his job, housing, or relationship. What an officer should not do is inquire about how many children the sex offender has been around solely for the purpose of punishment because

¹²⁴ *Id.* at 146 (emphasis added).

rehabilitative supervision is far more effective than retributive supervision. Therefore, the only type of supervision that is empirically supported is supervision in conjunction with a rehabilitative treatment approach.

B. CIRCLES OF SUPPORT AND ACCOUNTABILITY (COSA)

Circles of Support and Accountability has been shown to reduce recidivism rates of sex offenders by letting sex offenders know that society is invested in them, cares about them, and wants to help them. Furthermore, community members in COSA provide moral support as well as help the offender make invaluable connections with the community they are attempting to re-join. Not surprisingly, community members who participate in these programs feel safer in their communities, because they are able to see sex offenders as people instead of criminals. Therefore, focusing on the person and trying to rehabilitate them equates to reduced recidivism rates. Only six states, California, Colorado, Minnesota, Oregon, North Carolina, and Vermont, have COSA. Given the effectiveness of this treatment program, all 50 states should implement COSA.

C. ELECTRONIC MONITORING

Electronic monitoring does not reduce the recidivism rates of sex offenders. This sex offender management program is an unnecessary, costly burden on law enforcement that does nothing to reduce recidivism rates. The only purpose electronic monitoring serves is to line the electronic monitoring companies' pockets. Electronic monitoring also creates additional hoops sex offenders must jump through. When you combine this absence of reduced recidivism with the detrimental effect on sex offenders, it supports the idea that electronic monitoring should end.

D. POLYGRAPH TESTING

Polygraph testing has proven useful when implemented with treatment oriented specialized supervision. While polygraph testing does not reduce recidivism rates by itself, it

does lead to an increase in information disclosed by offenders. When sex offenders know that they may be given a polygraph test, they are more likely to divulge information that can ultimately assist their probation or parole officer in the offender's treatment. Polygraph testing may lead to increased anxiety for sex offenders, but the testing allows probation or parole officers to use polygraphs to gather more information to better treat the offender. For example, offenders who divulge triggers that lead to them offending, in a polygraph, can be helped to better avoid those triggers by the parole officer. Therefore, polygraph testing balances out the detrimental effects with the potential for gaining information to treat offenders.

E. CIVIL COMMITMENT

The civil commitment of sex offenders has proven to be an effective program for select sexual offenders, and those that are mentally incompetent. The clear and convincing standard by which the dangerousness of the sex offender must be proven, the guarantee of an attorney during the civil commitment proceeding, and the two-prong sexual criminal history and mental abnormality test work to ensure only offenders who will likely reoffend are civilly committed. While civil commitment may be beneficial for sex offenders, they are not in a vacuum. Therefore, any criminal that cannot function in society may benefit from civil commitment.

F. SEX OFFENDER REGISTRATION AND NOTIFICATION

The sex offender registry was enacted in an attempt to protect children and allow communities to safeguard themselves against sex offenders. A driving force behind the sex offender registry is the myth of "stranger danger."¹²⁵ Children are taught to avoid strangers from as early an age as

¹²⁵ NATIONAL CRIME PREVENTION COUNCIL, *What to Teach Kids About Strangers*, <http://www.ncpc.org/topics/violent-crime-and-personal-safety/strangers> (last visited Sept. 20, 2018).

four, based on their parents fear of stranger danger.¹²⁶ The registry had a noble purpose in mind – preventing sex crimes.

Highly publicized cases of strangers victimizing children are the driving force behind sex offender fear.¹²⁷ The fear that children will be accosted by a stranger is also very prevalent, with 72% of parents fearing, “that their child will be kidnapped by a stranger.”¹²⁸ The number one concern of 76% of children in 1987 was the fear of being kidnapped.¹²⁹ The sex offender registry works to combat this fear of stranger danger, but are strangers the ones who parents and children should fear?

In both cases of child molestation and rape, the public by and large believe that sex offenders are strangers, waiting for an opportunity to attack.¹³⁰ Yet, there is clear evidence to the contrary. A 2002 National Crime Victimization Survey revealed that 69% of all sexual assaults are committed by “non-strangers.”¹³¹ The same is true regarding child molestation, specifically, 90% of children are molested by someone that they

¹²⁶ *Id.* See also, Ziba Kashef, *How to talk to your child about interacting with strangers*, BABYCENTER (updated November 2018), http://www.babycenter.com/0_how-to-talk-to-your-child-about-interacting-with-strangers_3657124.bc; and Natasha Daniels, *10 Powerful Ways to Teach your Child the Skills to Prevent Sexual Abuse*, HEY SIGMUND, <http://www.heysigmund.com/are-you-teaching-your-toddler-skills-to-prevent-sexual-abuse/>.

¹²⁷ ERNEST A. ALLEN, *KEEPING CHILDREN SAFE: RHETORIC AND REALITY*, <https://www.ojjdp.gov/jjjournal/jjjournal598/safe.html> (last visited Sept. 20, 2018).

¹²⁸ *Id.* (quoting Gunnar B. Stickler, et al., *Parents’ worries about children compared to actual risks*, CLINICAL PEDIATRICS (1991)).

¹²⁹ *Id.* (quoting L. Feinberg, *Poll of schoolchildren reflects satisfaction, positive attitudes*, THE WASH. POST (Mar. 11, 1987)).

¹³⁰ Yung, *supra* note 98, at 453.

¹³¹ Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, n.31 (2005).

know.¹³² The public's fear of sex offenders is very real – the risk is not.

The uniformity of sex offenders is another faulty pillar on which the sex offender registry rests.¹³³ As 42 U.S.C. § 16911 demands, any “individual who was convicted of a sex offense” must register on the National Sex Offender Registry.

Individuals are labeled as sex offenders for numerous reasons including: public urination, sexting, statutory rape, prostitution, incest, stalking, bestiality, obscene video production, and for many other reasons.¹³⁴ One can deduce that a parent does not care whether someone convicted of public urination moves in next door – but under the current statutory scheme, that person is on the sex offender registry. In short, one size does not fit all. Yung stated this very idea when he said:

The sex offender population is so diverse that treating the population as a monolith, as almost all modern sex offender laws have, is foolish. The one-size-fits-all approach to regulating and punishing sex offenders has been based upon a homogeneity myth that cannot survive even limited scrutiny. Yet the myth has become the touchstone for the complete range of sex offender laws.¹³⁵

Therefore, the sex offender registry is faulty based on its overbroad definition of sex offender and stranger danger. Not only are the sex offenders negatively impacted by community bias, but communities are unable to decipher what offenders pose a real danger to society.

Thus, it should come as no surprise that the public by and large support the sex offender registry and notification

¹³² Yung, *supra* note 98, at 455.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 456.

system because society believes it provides safety for their families. The public also believes the registry makes sex offenders follow the law.¹³⁶ Statistics have further shown that the demographic most likely to visit the sex offender registry are affluent females who have children.¹³⁷

Despite widespread public support of the sex offender registry, affluent females' predilection for information, and the belief the registry makes communities safer, the sex offender registry does not reduce recidivism.¹³⁸ The registry does, however, negatively impact sex offenders who are subject to it.¹³⁹ Sex offenders on the registry undergo severe and debilitating consequences: 8% of sex offenders report being physically assaulted or injured, 14% report property damage, 20% report being threatened or harassed, 30% report job loss, 19% report loss of housing, 16% report a family member or roommate being harassed or assaulted, and 40-60% report negative psychological consequences.¹⁴⁰

If society keeps the registry, the definition of what a "sex offender" is must be narrowed. The term "sex offender" should include only crimes such as rape, sexual assault, child molestation, and the possession/distribution of child pornography. This change would enable offenders convicted of offenses like public urination and sexting to avoid the registry and the harmful consequences associated with it. In summary, the sex offender registry and notification program does not reduce recidivism; instead, it creates unnecessary hardships for

¹³⁶ Baldwin et al., *supra* note 9, at 159.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

sex offenders, preventing them from reintegrating back into society.

G. RESIDENCY RESTRICTIONS

Residency restrictions alone create harsh consequences for sex offenders, especially when considering statistics. As previously stated, research has demonstrated that residence restrictions do not decrease and are not a deterrent for sexual recidivism.¹⁴¹ Research has further shown that residency restrictions have created no significant decrease in sex crimes following their enactment.¹⁴² However, sex offenders are forced to submit to unjustifiable hardship because of residency restrictions.

Residency restrictions do not impact sexual recidivism, but they do impact sex offenders' lives.¹⁴³ Many sex offenders have to move or will have to move, despite having limited housing options, particularly in urban areas.¹⁴⁴ The only practical effect that residency restrictions have on sex offenders are increased homelessness, loss of family support, and financial hardship.¹⁴⁵ Residency restrictions do not decrease sexual recidivism or work to rehabilitate sex offenders, they instead socially isolate offenders and create undesirable consequences.¹⁴⁶

V. CONCLUSION

The outcome of treatment based versus surveillance-based supervision, the detrimental effects of residency restrictions, the sex offender registry and notification system, and the success of COSA all beg the question of punishment versus rehabilitation. In all effective sex offender management

¹⁴¹ *Id.* at 163.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

programs, statistics make the argument for rehabilitation as opposed to punishment.

Treatment-oriented supervision, COSA, polygraph testing, and civil commitment are all programs that have been shown to either reduce recidivism rates or make the lives of treating offenders easier. The sex offender registry and notification system, electronic monitoring, and residency restrictions are ineffective in reducing recidivism rates. The programs also are detrimental to sex offenders because they base their treatment on fear and stigma rather than facts.

Programs like COSA that integrate the offender back into the community need to be utilized at a far greater rate. These programs work not only to help the offender reintegrate into society but also to reduce the stigma associated with sex offenders. Therefore, if society endeavors to reduce recidivism, we must stop doing what is easy and reactionary – punishment. We must start doing what is difficult but more nuanced – rehabilitation.