

Sex Offender Registration and Notification, a Common Sense Approach

Author: Laura A. Ahearn, L.M.S.W.

Executive Director, Parents for Megan's Law and the Crime Victims Center

Fourth Year Juris Doctorate Student, Touro Law Center

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Abstract

Sexual violence is so prevalent in the United States that sadly, it is a common experience among the nation's women and children. In response to a series of high profile child abductions, brutal sexual victimizations and murders, beginning in 1994, Congress passed a series of laws aimed at creating national standards for sex offender registration and community notification, to equip law enforcement and communities with tools to access information about known offenders, deemed to pose a risk to public safety. Some argue that there is little statistical evidence to demonstrate the effectiveness of registration and notification programs, but common sense tells us that when a responsible community member uses a registry, and a victimization does not occur, that cannot be proven, because you cannot prove that a crime did not occur. Promising practices demonstrate reductions in registrants' recidivism, and although researchers argue that registry programs have not been shown to effect a significant reduction in recidivism, it is common sense that any reduction is significant. In addition, current measures of sex offender recidivism rates are not an accurate measure of the actual risk of victimization, because they do not account for unreported and unsolved victimizations, therefore, sex offender registries must be more inclusive, not more exclusive.

Prevalence of Sexual Violence in the United States

“Sexual violence is an affront to human dignity and a crime no matter where it occurs. While rape and sexual assault affect all communities, those at the greatest risk are children, teens, and young women.”¹ There is no greater responsibility that a government and its citizens have than to protect its most vulnerable populations from sexual victimization. The magnitude of the sexual victimization of women and children in the United States is a national disgrace. As many as 1 in 3 girls and 1 in 7 boys will be sexually abused at some point in their childhood.²

Only 12%³ to 30%⁴ of those cases are reported to authorities. Nearly 1 in 5 women, a total of 22 million, in the United States has been raped in her lifetime.⁵ And, similar to child sexual abuse, only 28% of rape and sexual assault is ever reported to police.⁶ Further, only 31% of rapes or sexual assaults that are reported to police result in an arrest.⁷

The Harm Sex Offenders Inflict Upon Women and Children

Sex offenders inflict a terrible toll on this nation and its citizens.⁸ “Adults sexually victimized as children have described their bodies as crime scenes, the evidence of victimization, indelibly imprinted. The memories of the abuse, the mechanisms of coping which developed as a result, and the lifelong consequences of choices made during adulthood to deal with their suffering, are always there as a reminder of the victimization.”⁹ Childhood sexual abuse and adult rape has a lifelong and devastating impact on victims. Sexually abused children can exhibit both short-term and long-term harm, extending far beyond childhood.¹⁰ Most sexually abused children display some post-traumatic stress disorder symptoms, and experience chronic cognitive distortion related to their self-worth and self-efficacy, feeling helplessness and hopelessness, impaired trust, self-blame, and low self-esteem.¹¹ Children often carry this emotional pain into adulthood and experience increased depression, anxiety, and anger.¹² Adults sexually victimized as children commonly experience sleep disturbances or disorders, flashbacks of the victimization, and develop mechanisms of coping with the helplessness they experienced as a child which manifests itself into increased drug and alcohol abuse, dissociative disorders, suicidal ideation, self-mutilating behaviors, and difficulty with intimacy, often engaging in abusive, dangerous situations or relationships.¹³ “Numerous studies suggest that sexual victimization in adolescence significantly increases the likelihood of sexual victimization in adulthood.¹⁴ Studies suggest that sexual victimization in childhood or adolescence increases the likelihood of sexual victimization in adulthood between 2 and 13.7 times.”¹⁵

“There is an average of 237,868 victims (age 12 or older) of rape and sexual assault each year.¹⁶ Every 2 minutes, another American is sexually assaulted.¹⁷ Victims of sexual assault are 3 times more likely to suffer from depression, 6 times more likely to suffer from post-traumatic stress disorder, 13 times more likely to abuse alcohol, 26 times more likely to abuse drugs and 4 times more likely to contemplate suicide.”¹⁸ It is also estimated that there were 17,342 pregnancies as a result of rape in 2012 alone.¹⁹

Sex offenders targeting our most vulnerable, women and children, are not only the cause of physical, psychological and behavior damage to their victims but their crimes have a significant economic impact. In 1996, the United States Department of Justice estimated the aggregate out-of-pocket costs of rape were about \$7.5 billion and when the psychological effects on victims, pain, suffering, and lost quality of life were quantified, the cost of rape was estimated at \$127 billion.²⁰ Using the Consumer Price Index calculator, the cost of rape in 2013 was \$189.23 billion. Because violence against children is one of the least well-documented areas of personal crime, a conservative estimate, using the Consumer Price Index calculator, of the cost of child sexual abuse in 2013 is \$ 34.2 billion. “Sexual abuse has a negative impact on children’s educational attainment, later job performance, and earnings. Sexual violence survivors experience reduced income in adulthood as a result of victimization in adolescence, with a lifetime income loss estimated at \$241,600.”²¹ Women sexually abused as children had a greater than three-fold increase in risk for not completing high school than women who reported no sexual abuse.²² In addition, one study found that 59% of incarcerated women report experiencing some form of sexual abuse during childhood or adolescence.²³

Sexual violence is so prevalent in the United States that sadly, it is a common experience among the nation’s women and children.

Sex Offender Registration and Notification Laws in the United States

In response to a series of high-profile child abductions, brutal sexual victimizations and murders, Congress, beginning in 1994, passed a series of laws aimed at creating national standards for sex offender registration and notification in all 50 states and its territories, to equip law enforcement and the community with a tool to access information about known offenders deemed to pose a risk to public safety. The series began with the passage of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, also known as the Jacob Wetterling Act, which was part of the Omnibus Crime Bill of 1994.²⁴ The Act generally set out minimum standards for state sex offender registration programs. States that failed to comply with these standards would lose a mandatory 10% reduction of formula grant funding under the Edward Byrne Memorial State and Local Law Enforcement Assistance Program.²⁵

On May 17, 1996, President Clinton signed Megan's Law, which amended the Jacob Wetterling Act to require the release of relevant information necessary to protect the public concerning a registered sex offender.²⁶ On October 3, 1996 the Pam Lychner Sexual Offender Tracking and Identification Act was signed into law and required the United States Attorney General to establish a National Sex Offender Registry, mandated certain registrants living in a state without a sufficient sex offender registry program to register with the FBI, authorized the FBI to verify those addresses, and allowed the FBI to disseminate information necessary to protect the public to federal, state and local officials responsible for law enforcement activities.²⁷

The Jacob Wetterling Improvements Act of 1997 was passed as part of the Appropriations Act of 1998 and amended Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, the Pam Lychner Sex Offender Tracking and Identification Act, and other federal statutes by clarifying and strengthening national registration standards and adding additional requirements.²⁸ The law allowed states to broaden their definition of registerable offenses, required registrants to register updated addresses when moving from state to state, required registered offenders to register in the states where they worked or went to school, if those states were different from their state of residence, directed states to participate in the National Sex Offender Registry, required each state to set up procedures for registering out-of-state offenders, federal offenders, offenders sentenced by court martial, and non-resident offenders crossing the border to work or attend school.²⁹

That same year, Congress also passed the Protection of Children from Sexual Predators Act of 1998, which increased the penalties for several sexual abuse offenses, added a repeat offender penalty, and made it a crime to use the mail or other facility of interstate commerce to transmit certain information about minors with an intent to entice any person to engage in sexual activity.³⁰³¹ In addition, the Act directed the, Bureau of Justice Assistance (BJA) to carry out the Sex Offender Management Assistance (SOMA) program to help eligible states comply with registration requirements by awarding eligible states grant funding and prohibited federal funding to programs that gave federal prisoners access to the internet without supervision.³²

In 2000, Congress passed the Campus Sex Crimes Prevention Act as part of the Victims of Trafficking and Violence Protection Act.³³ The Act requires registrants to notify the institution of higher education where the sex offender worked or was a student of his or her status as a sex offender, and to notify the same institution of any change in his or her enrollment

or employment status.³⁴ In addition, the Act requires that the information collected be reported to local law enforcement and institutions of higher education that are obligated to disclose campus security policy and campus crime statistics to also provide notice of how information concerning registered sex offenders could be obtained.³⁵ Three years later Congress enacted the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT ACT).³⁶ The PROTECT Act, increases the minimum and maximum penalty for several sex abuse offenses, created the “Two Strikes and You’re Out” section which requires a life imprisonment sentence for a person convicted of a federal sex offense who had a prior sex offense conviction.³⁷ In addition the PROTECT Act requires states to maintain sex offender registry websites, requires the Department of Justice to maintain a web site with links to each state web site and authorized appropriations to states to help them comply with new federal sex offender registration provisions.³⁸

In an effort to create more uniform sex offender registration and notification standards, Congress enacted the Sex Offender Registration and Notification Act (SORNA), more commonly known as the Adam Walsh Child Protection and Safety Act of 2006.³⁹ SORNA, repealed predecessor sex offender programs under the Jacob Wetterling and Pam Lychner Acts, and significantly strengthened registration and notification laws across the nation by increasing the duration of registration for sex offenders, increasing in-person verifications, requiring sex offender community notification programs, requiring certain juveniles to register, requiring registration for adults convicted of any crime, (even if it is not a sex crime), if they have a prior sex crime conviction that predates Megan’s Law, requiring registration for sex offenders entering the country, creating a federal felony for sex offenders failing to register (maximum penalty of up to 10 years), and providing funding to the United States Marshals to track down those offenders.⁴⁰ The law also increased mandatory minimum sentences for federal sex offenders, increased penalties for Internet crimes against children and strengthened child pornography prevention laws.⁴¹ In addition it created the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), to administer the standards for sex offender notification and registration, administer the grant programs authorized by the Act, and coordinate related training and technical assistance.⁴²

Prior to, and leading up to the passage of SORNA, a national non-profit group, Parents for Megan’s Law and the Crime Victims Center (PFML) provided multiple national sex offender

registration and notification systems survey results to the United States Justice Department to assist them in drafting more uniform national standards. PFML is a New York State-based 501(c)(3) not-for profit organization dedicated to the prevention of child sexual abuse and rape, and the provision of services to all victims of violent crime.⁴³ The agency's founder and Executive Director, Laura A. Ahearn, is a New York State certified social worker and a fourth year Juris Doctorate student at Touro Law Center. The agency currently has twenty-six employees, including twelve retired law enforcement professionals, crime victim advocates, licensed mental health professionals, and child sexual abuse, rape and hate crime prevention educators.

In addition to local direct advocacy services for child and adult victims of sexual assault in the rape crisis center, and significant prevention education initiatives for both children and adults, the agency has staffed the only National Megan's Law Helpline, for fifteen years. The Helpline is designed to provide assistance and advocacy to communities in accessing information about registered sex offenders, assist in effectively and responsibly managing community issues relating to sex offender registration and notifications, and to educate about child sexual abuse and rape prevention and crime victims' rights.⁴⁴ The organization also staffs the Sex Offender Registration Tips Program (SORT) which accepts tips from the community regarding registrants potentially failing to register in accordance with the law, and forwards viable leads to law enforcement. In addition, as part of the Suffolk County Community Protection Act, the agency is contracted by local law enforcement to assist in their efforts at maintaining an up-to-date sex offender registry. A team of seven highly trained retired law enforcement staff are charged with in-person address and other verification duties to ensure that information provided by registrants is up-to-date and accurate. All information regarding potential failures to register are forwarded to the appropriate law enforcement agency for follow-up investigation.

Beginning in 2001, PFML, in response to concerns expressed by parents and community members on the Megan's Law Helpline, conducted national surveys of state registration and notification systems, to evaluate their uniformity across the states and territories. The ultimate goal of the surveys was to gather and report to policymakers, lawmakers and the public about obstacles to accessing information communities were entitled to, the significant lack of uniformity of state laws, the lack of resources provided to states and local law enforcement to implement laws, and the lack of enforcement of sex offender registration and notification laws

across the country. The differences in state laws and implementation policies were so diverse, that where a person lived determined the amount of information that could be accessed under individual state registry laws. At the time, on one hand, lawmakers touted freely accessible information and on the other, state policies and laws restricted accessibility. In one state, a hands-on penal code identified sex crime was purposefully omitted from the state's registration requirements, in violation of federal recommended standards. In that state, an offender who had a previous sex crime conviction involving a child, moved into the home of a family with children and went on to sexually victimize not only their children, but at least five more boys ages 8 to 14 in the neighborhood. Had the offender been registered, law enforcement could have notified the community of his presence and multiple children would have been spared the life-long suffering associated with sexual victimization. In another state, a parent was denied access to registry information she was entitled to under the law, because the registry administrator felt that she did not have "a good enough reason" to access that information. In other states, registries were charging fees to access sex offender registry information. In fairness to the state sex offender registry administrators, at the time, there was little guidance provided on a federal level to support their state and local initiatives.

Prior to, and leading up to the 2006 passage of SORNA, PFML's survey results, which clearly indicated scattered and non-uniform state registration and notification laws, along with victim case-specific information, was shared with the United States Justice Department to assist them in drafting portions of SORNA.⁴⁵ In addition to the surveys, which evaluated issues related to a lack of uniformity, in response to an Associated Press investigation of sex offender registration compliance in California, PFML initiated a national telephone survey of all 50 state sex offender registry administrators, to ascertain whether registrants were failing to register in accordance with their state laws. All state registries were contacted and asked the number of sex offenders registered to date, and what percentage of their registered sex offenders were not in compliance with registration requirements. The results indicated, based upon figures reported by 32 states, that there were at least 77,000 and more likely over 100,000 (using a weighted average for all 50 states) unaccounted-for registered sex offenders. At time, the results were not surprising, because federal mandates left state administrators and police jurisdictions with little to no guidance or funding to implement significant state-wide programs, which required resources that were simply not available.

These results were shared with the United States Justice Department, reported in various media outlets across the nation, including the Associated Press⁴⁶ and Newsweek,⁴⁷ and are accessible through the United States Copyright Office.⁴⁸ Somehow, PFML survey results, over the ongoing objection of PFML, have been and continue to be, mistakenly attributed to the National Center for Missing and Exploited Children (NCMEC) or the U.S. Marshals Service.⁴⁹ Although there were many hearings called which led up to the passage of SORNA, where portions of PFML survey results were often quoted by and attributed to NCMEC, PFML was not called upon by Congress to discuss this survey, or seven years of additional information gathered through surveys and experiences working with the community and law enforcement across the nation, but NCMEC was called upon. It is not surprising that the results of this particular sex offender non-compliance survey, eight years later, would be characterized as an “urban legend,”⁵⁰ because NCMEC could not provide the raw data which they touted as their own. Soon after SORNA passed, NCMEC created their Sex Offender Tracking Program.⁵¹ “NCMEC’s Congressional authorization specifically tasks us with providing training and technical assistance to law enforcement agencies in identifying and locating non-compliant sex offenders. NCMEC created our Sex Offender Tracking Team in 2006.”⁵²

It should also be noted that at the time, survey results were documented and the information that was released by PFML was information provided specifically by registry administrators in each state, who were in the best position to assess their individual compliance rates, and provide the requested information. Eight years later, and long after resources were finally allocated to states’ to attempt to “clean up” their registries, these results were disputed.⁵³

Although the PFML telephone survey was not a longitudinal study conducted by or funded by a major University or team of sex offender recidivism researchers, the results of the survey are certainly not an “urban legend.” All PFML surveys, including the non-compliance survey, were intended to educate the community about the realities surrounding the implementation, and lack thereof, of registration and notification laws. At the time, many policymakers and lawmakers were touting sound registration and notification systems, leading the community into a false sense of security relating to the amount of accurate and up-to-date information they were being provided. This survey demonstrated that states had not yet made the implementation of registration and notification laws a top priority, and more importantly, acted as a national “wake-up call” that much more had to be done to bring registries up-to-date.

State and Federal Challenges to Sex Offender Registration and Notification Laws

State Sex Offender Registration and Notification Law Challenges

On November 13, 2002, as a spectator in the United State Supreme Building courtroom, I observed the first two challenges to state sex offender registration and notification laws. Both arguments were heard by the Court on November 13, 2002 and decided on March 5, 2003.⁵⁴ In *Smith v. Doe*, two Alaska sex offenders, convicted of sexually abusing minors prior to enactment of Alaska's sex offender registration and notification law, and the wife of one of the offenders challenged the constitutionality of the Alaska Act, arguing that the law constitutes retroactive punishment forbidden by the Ex Post Facto Clause in Article I Section 10 clause 1 of the United States Constitution.⁵⁵ The United States District Court for the District of Alaska had granted summary judgment for petitioners, and agreeing with the District Court, the Court of Appeals for the Ninth Circuit determined that the Alaska state legislature intended the Act to be a nonpunitive, civil regulatory scheme.⁵⁶ But the Court of Appeals disagreed with the District Court, and held that despite the legislature's intent, the effects of the Act were punitive, and the Act violated the Ex Post Facto Clause.⁵⁷ The Court reversed the Court of Appeals and held that the Alaska Sex Offender Registration Act was nonpunitive, in that it created a civil regulatory scheme, and its retroactive application did not violate the Ex Post Facto Clause.⁵⁸

In *Connecticut Dept. of Public Safety v. Doe*, the Court reversed the judgment of the Court of Appeals for the Second Circuit which enjoined the public disclosure of Connecticut's sex offender registry, concluding that "such disclosure both deprived registered sex offenders of a 'liberty interest,' and violated the Due Process Clause, because officials did not afford registrants a predeprivation hearing to determine whether they are likely to be 'currently dangerous.'"⁵⁹ The Connecticut statute required the Connecticut Department of Public Safety (DPS) to post a publically searchable sex offender registry on an Internet website and to make the registry accessible to the public in certain state offices.⁶⁰ A disclaimer appeared on the first page of the Website informing the public that the DPS had not made any determination of risk of reoffense or any determination that anyone included in the registry was dangerous.⁶¹ The disclaimer also stated, "Individuals included within the registry are included solely by virtue of their conviction record and state law. The main purpose of providing this data on the Internet is to make the information more easily available and accessible, not to warn about any specific

individual.”⁶² The registrant challenging the law claimed, “[h]e is not a ‘dangerous sexual offender,’ and that the Connecticut law ‘deprives him of a liberty interest-his reputation combined with the alteration of his status under state law-without notice or a meaningful opportunity to be heard.’”⁶³ The Court reasoned that, “any hearing on current dangerousness is a bootless exercise”⁶⁴ because as the disclaimer states, the law's requirements “turn on an offender's conviction alone-a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest.”⁶⁵

Federal Sex Offender Registration and Notification Act Challenges

In 2010, in *Carr v. United States*, petitioner, an Alabama registered sex offender relocated to Indiana prior to SORNA's enactment, and failed to comply with the Indiana's registration requirements.⁶⁶ In 2007, Carr was charged with failing to register, a violation of § 2250 of SORNA, which requires registrants when traveling interstate to update their registration.⁶⁷ Carr appealed the indictment asserting that because he traveled to Indiana prior to SORNA's effective date, it would violate the *Ex Post Facto* Clause to prosecute him under § 2250.⁶⁸ The United States District Court for the Northern District of Indiana, relying upon the underlying purpose of SORNA, denied Carr's motion to dismiss the indictment on the grounds that § 2250 does not require that the defendant's travel postdate the Act.⁶⁹ The Court reversed the judgment of the Court of Appeals, reasoning that if, “[C]ongress intended to subject any unregistered state sex offender who has ever traveled in interstate commerce to federal prosecution under § 2250, it easily could have adopted language to that effect. That it declined to do so indicates that Congress instead chose to handle federal and state sex offenders differently.”⁷⁰ The Court further reasoned that it is, “[r]easonable for Congress to have given the States primary responsibility for supervising and ensuring compliance among state sex offenders and to have subjected such offenders to federal criminal liability only when, after SORNA's enactment, they use the channels of interstate commerce in evading a State's reach.”⁷¹ Because the Court concluded that § 2250 did not extend to preenactment travel, it was unnecessary to, “[c]onsider whether such a construction would present difficulties under the Constitution's *Ex Post Facto* Clause.”⁷²

In 2011, in *United States v. Juvenile Male*, the Court declined to address whether SORNA's requirements violated the *Ex Post Facto* clause on the grounds of mootness.⁷³ The

respondent was a 13-year-old juvenile male who abused a 10-year-old boy for two years on an Indian Reservation in Montana.⁷⁴ In 2005, respondent pleaded true to charges under the Federal Juvenile Delinquency Act, charges which would have been a federal crime if he were an adult.⁷⁵ The District Court sentenced the respondent to detention and supervision until his 21st birthday.⁷⁶ While in detention, Congress passed SORNA which required him to register his home and work address and where he attends school.⁷⁷ The juvenile registration requirement “[e]xtends to certain juveniles adjudicated as delinquent for serious sex offenses...” and, “[a]n interim rule issued by the Attorney General mandates that SORNA’s requirements apply retroactively to sex offenders convicted before the statute’s enactment.”⁷⁸ On appeal to the Ninth Circuit, respondent challenged his supervision condition requiring him to register as a sex offender, but with the appeal still pending, he turned 21 and the order expired.⁷⁹ Over a year later, the Court of Appeals, not addressing the issue of mootness, “[c]oncluded that applying SORNA to juvenile delinquents who committed their offenses ‘before SORNA’s passage violates the Ex Post Facto Clause.’”⁸⁰ The Court reversed the decision of the Court of Appeals on the ground that it lacked the authority under the United States Constitution Article III to decide the case on the merits.⁸¹ The Court reasoned that the juveniles’ challenge was moot because, the duty to register under SORNA was not a consequence of the District Court’s supervision order, but instead was “the respondent’s ‘state law duty to remain registered as a sex offender . . . not contingent upon the validity of the conditions of his federal supervision order.’”⁸² Further, the Court held that, “The capable-of-repetition exception to mootness did not apply because the juvenile had turned 21, and he would never again be subject to an order imposing special conditions of juvenile supervision.”⁸³

In 2012, in *Reynolds v. United States*, the Court reversed the Third Circuit Court of Appeals and held that SORNA’s registration requirements did not apply to a registrant who moved from Missouri to Pennsylvania because although the Act had taken effect, the Attorney General had not yet promulgated a valid rule regarding registration requirements for pre-Act offenders.⁸⁴

In 2013, in *United States v. Kebodeaux*,⁸⁵ respondent, a member of the air force was court martialed, convicted of a federal sex offense, and served his full sentence prior to the enactment of the Sex Offender Registration and Notification Act (SORNA).⁸⁶ SORNA requires “those convicted of federal sex offenses to register in the States where they live, study, and work...”⁸⁷

and . . . “by regulation, the Federal Government made clear that SORNA’s registration requirements apply to federal sex offenders who, when SORNA became law, had already completed their sentences.”⁸⁸ Respondent had moved to Texas and in 2004 registered as a sex offender in the state. In 2006, SORNA was enacted and in 2007 respondent moved to a different city within Texas, failed to comply with registration requirements, and the federal government prosecuted him under SORNA.⁸⁹ The Court assumed that Congress complied with the Constitution’s Ex Post Facto and Due Process Clauses, and addressed, “whether the Constitution’s Necessary and Proper Clause grants Congress the power to enact SORNA’s registration requirements and apply them to a federal offender who had completed his sentence prior to the time of SORNA’s enactment.”⁹⁰ The Court held that SORNA’s registration requirements applied to Kebodeaux, reasoning that at the time of his offense and conviction, he, “[w]as subject to the federal Wetterling Act, an Act that imposed upon him registration requirements very similar to those that SORNA later mandated,”⁹¹ and, “[t]he fact the federal requirements in part involved compliance with state law requirements, made them no less requirements of federal law.”⁹² In addition, the Court held that the SORNA changes as applied to respondent, fell within the scope of Congress’ authority “[u]nder the Military Regulation and Necessary and Proper Clauses.”⁹³ The Court reasoned that, “[T]he Constitution explicitly grants Congress the power to ‘make Rules for the . . . Regulation of the land and naval Forces.’ Art. I, §8, cl. 14. And, in the Necessary and Proper Clause itself, it grants Congress the power to ‘make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers’ and ‘all other Powers’ that the Constitution vests ‘in the Government of the United States, or in any Department or Officer thereof.’”⁹⁴

Although two recent State Supreme Courts, Maryland⁹⁵ and Oklahoma⁹⁶ held that the retroactive application of sex offender registration and notification violated their State Constitution’s Ex Post Facto prohibition, these decisions are contrary to the precedent set by the United States Supreme Court in *Smith v. Doe*.⁹⁷

Do Sex Offender Registration and Notification Programs Reduce the Incidence of Sexual Victimization?

Sex offender registration and notification laws provide parents and community members an opportunity to take necessary precautions to protect themselves and their children from those

that have been determined to pose a risk to public safety and open up a dialogue about sexual abuse prevention. In a United States Supreme Court decision upholding sex offender registration, the Court held that, “The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.”⁹⁸

Sex offender registration and notification programs are one tool of many that community members can utilize to protect themselves and their children from sexual victimization. That threat is not grossly exaggerated as some might argue. The sheer magnitude of the sexual victimization of women and children in the United States is unknown to most Americans. As many as 1 in 3 girls and 1 in 7 boys will be sexually abused at some point in their childhood,⁹⁹ and only between 12%¹⁰⁰ and 30%¹⁰¹ of those cases are reported to authorities. Nearly 1 in 5 women, a total of 22 million, in the United States has been raped in her lifetime,¹⁰² and 31% of those rapes or sexual assaults reported result in an arrest.¹⁰³

Some argue that there is little empirical evidence which demonstrates the effectiveness of sex offender registration and notification programs.¹⁰⁴ The inherent and obvious weakness in proving the effectiveness of sex offender registration and notification programs, which is rarely noted in the research, is that you cannot statistically prove that a registry prevented a sexual victimization, because the sexual victimization did not occur. Opponents of registration often dismiss the “common sense” explanations for the existence of registries. For example, a responsible parent would not allow their children to spend time alone time with a neighbor who had been convicted of sexually abusing a child or raping an adult. This common sense approach does not seem to satisfy researchers seeking statistical evidence. That evidence will never arrive, because when a parent or community member uses the registry responsibly, and prevents their child from developing a relationship with a registrant, there is no longer an opportunity for a sexual victimization to occur, with that offender and that child. The only evidence which exists is anecdotal, and even that cannot unequivocally statistically prove that the registry worked. For example, a parent in Florida had been allowing her minor son to play alone at a neighbor’s house and later discovered, through the Florida sex offender registry that the neighbor had a prior conviction for molesting a minor boy. Would this evidence suffice to satisfy researchers seeking proof? No, because researchers would argue that there would be no way to prove this particular

registrant was intent on molesting that particular boy, and that particular time. I am confident that most of us would agree that a responsible parent, knowing that child molesters targeting males have a 35%¹⁰⁵ recidivism rate over 15 years, would not allow their child to play alone with that offender – that is “common sense.” In another New York case, a mother of minor twins had discovered that she had unknowingly rented an apartment in her home to a man who was a registered sex offender, who had previously been convicted of targeting a minor child. The mother recalled numerous situations where the offender had offered, and she had allowed him to watch her children, while she ran errands. Not surprisingly, even with assurances of confidentiality, neither mother was willing to allow the agency to formally document their experiences because they were concerned that the registrants would somehow cause harm to them or their children.

Even anecdotal evidence cannot satisfy opponents of sex offender registries, as they are often intent on maintaining a focus on the collateral consequences registries have on sex offenders, rather than the common sense value of making this information widely available to the public, as one tool of many, to protect themselves and their children from a lifetime of suffering from sexual victimization. Congress’ legislative intent in all of its enactments was to prevent crime through the provision of information about those deemed to be a risk to public safety. A risk we will soon see is substantially underestimated. In addition, since we cannot prove a negative, meaning we cannot prove that a sexual victimization has not occurred, because it did not, we rely upon our common sense that registry information would motivate a responsible parent or community member to take necessary precautions to prevent a crime from occurring.

Failure to Register is Linked to Recidivism

Evidence has demonstrated that sex offender registration failures are linked to recidivism. Research by the Washington State Institute for Public Policy found that sex offenders with a conviction for failure to register had higher rates of recidivism in all categories when compared to sex offenders without a conviction for a failure to register.¹⁰⁶ Failure to Register (FTR) sex offenders were 54% more likely to be convicted of another felony sex offense compared to non-FTR offenders (4.3% v. 2.8%), 68% were more likely to be convicted of any other felony

compared to non-FTR's (38.5% v. 22.9%) and 68% more likely to be convicted of a violent felony compared to non-FTR offenders (15.8% v. 9.4%).¹⁰⁷

Promising Practices Demonstrate Reduction in Sex Offender Recidivism

In 2012, Parents for Megan's Law and the Crime Victims Center (PFML) was charged with developing and implementing a sex offender management plan for Suffolk County that would promote public safety and; ensure a more updated and accurate sex offender registry through in-person sex offender address verifications and collaboration with law enforcement agencies through the provision of potential felony out-of-compliance investigative leads; educate the community through the provision of prevention education programs and sex offender email alerts, and engage the community in reporting out-of-compliance registrants.

The PFML 8 Point Plan was developed as part of a process beginning nearly two decades ago with the formation of PFML, and establishment of the first and nation's only Megan's Law Helpline. Each component of the plan, beginning with the Helpline and ending with sex offender address verifications, are coordinated functional elements that comprise a comprehensive sex offender management plan. Each element working in unison with the others supports the achievement of the goals and objectives of the program, and is successful in large part due to the ongoing successful collaborations with local, state and federal law enforcement. PFML has demonstrated that implementation of the 8 Point Plan results in the seamless delivery of comprehensive services which promote public safety by 1) supporting, focusing, enhancing and force multiplying law enforcement's efforts to increase sex offender registration compliance 2) engaging and empowering the community by offering easily accessible tools to report registrants potentially out of compliance 3) educating the public through outreach and the delivery of adult and children's prevention programs and 4) providing crime victims support services in the immediate aftermath of victimization to reduce the potential for revictimization and increase the potential for participation in the criminal justice process. Since program inception there have been no arrests of registered sex offenders for contact sex crimes in Suffolk County, New York. In comparison, from 2009 to program start date, May 1, 2013, there were 12 arrests of registered sex offenders for contact sex crimes within Suffolk.¹⁰⁸

Sex Offender Registration and Reducing Sexual Victimization

Sex offender recidivism and re-offense rates vary depending upon a variety of factors, which include the types of offenders studied, the size of the population and the time frame in which offenders are studied. Moreover, sex offender recidivism rates are significantly underestimated because it is well established that most sex crimes against women and children are never reported, and sex offender recidivism rates are typically based upon sex offender re-arrest or conviction, without consideration of unreported or unsolved crimes.¹⁰⁹ Only between 12%¹¹⁰ and 30%¹¹¹ of child sexual abuse is reported and only 28% of rape and sexual assault is ever reported to police.¹¹² Further, since only 31%¹¹³ of rapes or sexual assault result in an arrest when reported to police, sex offender recidivism rates, which are based upon arrests and convictions, are unreliable and cannot be used to justify limiting any convicted registrants information from public view.

Studies indicating that offenders arrested for a sex offense had no prior sex offense conviction do not tell the whole story. For example, one study showed that over 95% of all sexual offense arrests were committed by first-time sex offenders, casting doubt on the ability of laws that target repeat offenders to meaningfully reduce sexual offending.¹¹⁴ “Registry critics argue that, “Most empirical investigations of registration and notification have not detected significant reductions in reoffending. Notably, the two exceptions – studies that have detected a decrease in sex crime recidivism as a result of registration and notification—were conducted in Minnesota and Washington A national analysis examining over 300,000 sex offenses in fifteen states found that while registration with law enforcement appeared to reduce recidivistic sex offenses, public notification did not.”¹¹⁵ “[R]esults support those of prior research and cast serious doubts on the effectiveness of sex offender registries to significantly reduce rates of sexual offending.”¹¹⁶

It must first be noted that it is common sense that any reduction in recidivism is always significant to parents, victims and community members seeking to protect themselves and their children from sexual victimization. And, who determines what is significant enough when attempting to sway national policy related to preventing sexual victimization? Further, because sex offenders typically rely upon secrecy to commit sexual offenses, it is not likely that they will be caught, and if caught it is not likely that they will accurately reveal their prior offenses. “Because offenses are under-reported, it may take years for offenders to get caught. It has been

estimated that, on average, 10 to 16 years elapse between a sex offender's first offense and his first arrest."¹¹⁷ "Perhaps the most pertinent data are provided by retrospective studies which include the self-reports of offenders in addition to official records when tabulating the number of offenses committed since their initial arrests. Barbaree and Marshall found that offenders self-reported that they had committed 2.7 times the number of re-offenses reflected in official records.¹¹⁸ Langevin and his colleagues reported that offenders' self-reported over 25% more re-offenses than found in official records. These studies appear to suggest that under-reporting occurs even after an offender's initial arrest."¹¹⁹

"One study reported that adult sex offenders who were known to have an average of two victims (or a median of one victim) at the time of their arrest subsequently reported having an average of 184 victims (or a median of 26 victims) after taking polygraph tests while in treatment. Another study found that child molesters in treatment eventually report having committed an average of 88 crimes each. [Other researchers have similarly reported in studies of adolescents that the number of sex offenses disclosed by offenders in treatment increased by a factor of three or five following polygraph testing.] Abel and his colleagues reported that adult sex offenders who were guaranteed anonymity disclosed having committed an average of 533 sex offenses over a 12-year-period before being detected. These findings prompted the authors to conclude that "arrest records of paraphiliacs do not provide a reliable indication of the true scope of paraphilic acts". Another study found that rapists, given assurances that their responses would remain anonymous, reported having six times more victims that were identified from official records and, found that each of the child molesters in the study reported having hundreds of previously unknown sexual contacts with children. The authors concluded that there is an "iceberg of undocumented offenses beneath the tip of official records."¹²⁰

The real question is, just how reliable are recidivism rates if they are not capturing actual re-offenses which were not detected by the criminal justice system? "While researchers generally agree that recidivism rates are underestimates of re-offense rates, there is some disagreement about the magnitude of the underestimation. As noted, Barbaree and Marshall suggested that recidivism rates are increased by 170% if one includes the self-reports of offenders in addition to counting officially recorded acts. Also as noted, Langevin and his colleagues reported that offenders self-reported over 25% more re-offenses than found in official records. Others similarly suggest that re-offense rates may be 27-47% higher than recidivism

rates. Hanson and colleagues noted that recidivism rates observed in research studies are “minimal estimates” and suggested that a “reasonable” estimate would be “that actual re-offense rates are at least 10-15% higher than observed rates.”¹²¹

If recidivism rates are not an accurate measure of the threat posed to communities across the nation then sex offender registries need to be more inclusive, but some argue that because sex offender recidivism rates are relatively low, sex offender registries are too inclusive, and should be more selective to include only the “riskiest group of offenders”.¹²² Even without consideration of an acceptable factor to statistically capture the unreported and unsolved crimes sex offenders commit, some argue that the community should not fear 14%, 24% or 27% recidivism rates. “Despite fears that most sex offenders are compulsive and repetitive, research has found that over four to six years, about 14% of 20,000 sex offenders in an international sample were re-arrested for a new sexual crime.”¹²³ A significant underestimation of the number of sexual assault victims in that sample would be 2,800 because it does not include unreported and unsolved crimes. Even so, a recidivism rate of 14% results in 2,800 victims who will suffer from sexual assault. Applying the 24% recidivism rate (not accounting for unreported and unsolved crimes) observed over 15 years would result in 4,800 victims and applying a 27% rate (not accounting for unreported and unsolved crimes) over 20 years would result in 5,400 victims, each of whom will suffer the lifelong and devastating impact of sexual victimization.” In a small sample of 20,000, is that not enough victims to justify broad registration and notification?

A 2004 Harris and Hanson study indicates that over 15 years, rapists have a 24% rate of recidivism, child molesters targeting girls 16%, and child molesters targeting boys, 35%.¹²⁴ According to the Bureau of Justice Statistics, “Compared to non-sex offenders released from State prisons, released sex offenders were 4 times more likely to be rearrested for a sex crime.”¹²⁵

From a community perspective, none of these statistics indicate a low recidivism rate, and who decides what recidivism rate is low enough so as to limit the amount of sex offender registration information currently available through registration and notification programs? Some argue that because offenders are not thoroughly clinically assessed and classified in accordance with certain risk assessment models, the community is somehow being lulled into a false sense of security, being desensitized and somehow being exposed to a greater risk. SORNA attempts to limit information available, based upon a three-tier classification system,

which serves only to restrict valuable information a community can use to make important decisions about prevention strategies. While ensuring any information which could lead to identifying a victim should be excluded from registries, all other details such as modus operandi, the age of the victim(s), and the crime(s) committed, along with educational and prevention material would provide adequate information to the community to make a determination of what prevention strategies must be employed to protect themselves and their children from known registrants. Limiting registration information based on crimes of conviction, categorical classifications, clinical assessments, or any other type of research model is only at its core a “best guess,” chance or likelihood that a registrant will not re-offend. A best guess, likelihood, or chance that an offender will not re-offend is not a risk any of us can take when dealing with the consequences of sexual victimization. Common sense tells us that information is power and restricting information from the community places our most vulnerable at risk of sexual victimization.

Applying an “Unreported and Unsolved Factor” to Sex Offender Recidivism Rates

Even if we were to broadly apply a sex offender recidivism rate of 5.3%,¹²⁶ (which is under the scale ranging from 14% to 27% cited herein) we must also consider that only 28% of rape and sexual assault is reported to police¹²⁷ and of the 28% reported only 31% of those reports are cleared by an arrest.¹²⁸ That means that only 8.68% (28% reported x 31% clearance rate) of sexual offenses committed are calculated in determining a sex offender recidivism rate. In other words, if 100 rapes and sexual assaults were reported to police, only 8.68% of those crimes would count toward determining a sex offender recidivism rate. Moreover, that means that 91.32% of rapes and sexual assaults are not accounted for in calculating sex offender recidivism rates. Surely, all sex offender recidivism studies must account for re-offenses using an unreported factor and unsolved factor to somehow explain how it is that 1 in 4 girls and 1 in 7 boys have been sexually abused and 1 in 5 women have been raped in her lifetime. Sadly, most recidivism rates reported by researchers do not account for a factor of unreported and unsolved victimizations. Sex offender recidivism rates are misleading because they fail to account for re-offenses.

As of August of 2013, there were over 737,000 sex offenders registered in the United States.¹²⁹ Applying a recidivism rate, of 5.3% would yield 39,061 victims of sex crimes.

However, consideration must be given to the fact that sex crimes are highly unreported and as previously noted, of those reported only approximately 31% are cleared by arrest.

Application of a Factor

Applying a 5.3% recidivism rate, with only approximately 28% of sex crimes being reported, and only 31% of those reported being cleared by arrest, the actual estimate of the number of sexual victimizations by registered sex offenders could be projected to be as high as 450,000, (28% reported x 31% cleared by arrest = 8.68%). Only 8.68% of the number of rapes and sexual assaults that are actually committed are being considered when establishing a recidivism rate.

Therefore, if the 5.3% recidivism rate is calculated on only 8.68% of all rapes and sexual assaults, we need to develop a factor which will assist in calculating the actual estimated number of rapes and sexual assaults by offenders. We can arrive at that estimated factor by dividing $100/8.68$, yielding a factor of 11.52 to be applied to determine the estimated number of victims. 737,000 registrants multiplied by the 5.3% recidivism rate multiplied by the “unreported/unsolved” factor yields 449,983 victims of rape or sexual assault.

I am not suggesting that this factor is the one that should be applied to recidivism studies, we can leave that to clinical researchers to come to some agreement as to what formula would fairly capture unreported and unsolved cases when making a determination of accurate re-offense and recidivism rates. Although it is highly unlikely that any such consensus will materialize any time soon, the thought-provoking audacity to put forth such a factor will engender debate and focus attention upon the magnitude of re-offenses and sexual victimization in the United States. Hopefully this discourse will result in the strengthening of the tools offered to those seeking to protect our most vulnerable.

Conclusion

Common sense tells us that sex offender registration and notification laws offer parents and community members valuable information which can be utilized as one tool to protect themselves and their children from known registrants. Parents and community members cannot prove the efficacy of sex offender registries because if the registry is used by a responsible

citizen, and it resulted in limiting contact with a particular registrant, and victimization did not occur, we cannot prove it did not occur, because it didn't.

Communities must not be lulled into a false sense of security just because they know the whereabouts of known convicted offenders. And policymakers and lawmakers must not be lead to believe that a less inclusive registry is somehow more effective because recidivism rates are lower for certain types of sex offenders. Researchers would agree that human behavior is unpredictable, even with the most advanced clinical assessment. It is not likely that anyone would argue that any one assessment is 100% effective and would guarantee that an offender would not re-offend. What we do know for sure is that sex offenders subject our most vulnerable populations to sexual victimization, which has a devastating impact on victims. We also know that sex offender recidivism rates, whether they are 5%, 14%, 24% or 35% represent children being sexually abused, or adults being raped or sexually assaulted. Even at 5.3% recidivism rates are high enough to justify equipping a community with information as one of many tools to prevent sexual victimization. We also know that the recidivism rates being reported are substantially underestimating the potential for re-victimization because they do not account for unreported and unsolved crimes, and because sex offenders are not truthful about their prior victimizations.

It is time we shift the focus back to preventing victimization through the provision of up-to-date sex offender registration information, prevention education and crime victim services. Promising practices in Suffolk County, New York have demonstrated lower recidivism rates for sex offenders in compliance with registration laws. Lawmakers must steer resources toward law enforcement agencies and initiatives across the country to assist them in their efforts of verifying sex offender registration information so ensure that the tool given to communities is up-to-date and accurate.

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²⁴ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, September 13, 1994, 108 Stat 1796.

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