"THEY'RE PLANTING STORIES IN THE PRESS": THE IMPACT OF MEDIA DISTORTIONS ON SEX OFFENDER LAW AND POLICY

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Introduction

Individuals classified as sexual predators are the pariahs of the community. Sex offenders are arguably the most despised members of our society and therefore warrant our harshest condemnation.[1] Twenty individual states and the federal government have enacted laws confining individuals who have been adjudicated as "sexually violent predators" to civil commitment facilities post incarceration and/or conviction.[2] Additionally, in many jurisdictions, offenders who are returned to the community are restricted and monitored under community notification, registration and residency limitations.[3] Targeting, punishing, and ostracizing these individuals has become an obsession in society, clearly evidenced in the constant push to enact even more restrictive legislation that breaches the boundaries of constitutional protections.[4]

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[1] *See generally* Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective,* 42 HARV. C.R.-C.L. L. REV. 513, 514 (2007); *see also*, Bruce J. Winick, *Sex Offender Law in the 1990's: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL'Y & L. 505, 506 (1998) (discussing that individuals who commit sex offenses against children are probably the most hated group in our society).

[2] *See generally* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L. J. 1071 (2012).

[3] *Id.* at 1078.

[4] Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. U. L. REV. 788, 853–54 (1996); David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. ST. THOMAS L. J. 600, 628 (2006); *See* Corey Rayburn Yung, *One of These Laws Is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 370–71 (2009) (contending that the federal Sex Offender Registration and Notification Act provisions must be amended to meet constitutional muster).

The advancement of technology and mass media communication have spawned a constant influx of information about sexual predators. News headlines and Internet webpages are dedicated to reporting on and highlighting sexual crimes and their infamous perpetrators.[5] There is little disputing that the newest surge[6] in legal attention and efforts to contain sexual predators stems from the mass dissemination of sexual offender media stories available to the general public.[7] Thus, we cannot discuss our national obsession with sexual offenses and offenders without considering how the role of the media has framed our conceptualizations of offenders and influenced resulting legal decisions and legislation.[8]

The public perception of what constitutes a "sex offender" is undoubtedly linked to the media's portrayal of these types of heinous crimes.[9] The media's attention to high profile, violent sexual offenses has been shown to elicit a panic and fear of rampant sexual violence within our communities.[10] This, in turn, places extreme public pressure on legislators to enact more repressive legislation and on judges to interpret such laws in ways that ensure lengthier periods of incarceration for offenders.[11] The media's portrayal of a "largely ineffective" criminal justice system heightens fear;[12] fictionalized portrayals of crime on television dramas may lead viewers to believe that "all offenders are

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[5] *How We Began and the Need for Transition*, Jacob Wetterling Resource Ctr., http://www.jwrc.org/WhoWeAre/History/tabid/128/Default.aspx; *About John Walsh*, America's Most Wanted, http://www.amw.com/about_amw/john_walsh.cfm.

[6] Carpenter & Beverlin, *supra* note 2, at 1078 ("The ensuing years [post the enactment of the Adam Walsh Child Protection and Safety Act] have been marked by a dizzying array of increased registration and community notification requirements, the emergence of harshening residency restrictions, and the elimination of individuated risk assessment."); *see infra* text accompanying notes 164-193, 376-411.

[7] Kristen M. Zgoba, *Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation*, 17 CRIM. JUST. STUD.385, 385 (2004) ("The media frenzy surrounding these publicized cases has created a 'fear factor' among parents and caregivers, begging the question as to whether the incidence of child abduction and molestation has increased or whether the nation's heightened sensitivity is a result of increased media reporting").

[8] On the way that the media frames crime stories in general, *see* SHANTO IYENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES 26-31 (1991).

[9] Clive Emsley, *Victorian Crime*, HISTORY TODAY, (1998), *available at* http://www.historytoday.com/clive-emsley/victorian-crime (arguing that nineteenth-century perceptions owed more to media-generated panic than to criminal realities).

[10] Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race & Crime in the News*, 4 (2001), *available at* http://www.justicepolicy.org/research/2060 (explaining that three-quarters of the public form their opinions about crime based on news reports-more than three times the number of people who form their opinions based on personal experience); Jill S. Levenson et. al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL'Y 1, 2 (2007) (citing L. C. Hirning, *Indecent Exposure and Other Sex Offenses*, 7 J. CLIN. PSYCHOPATHOLOGY & PSYCHOTHERAPY, 105 (1945) ("As early as 1945, academic scholars were commenting on the reactions of the public to sex offenders: '. . . there are periodic so-called sex crime waves often preceded by one or more serious sex offenses which have received wide notoriety in the newspapers. Every sex offender is looked upon as a potential murderer. Emotions run high. There are meetings and conferences; recommendations are made . . . . Meanwhile, sex offenses continue to occur.'"); *see also*, Kate Stone Lombardi, *Fears of Kidnapping Spur Effort on Education*, N.Y. TIMES, March 13, 1994 (reporting on an "educational" video "Street Smart Kids" which shows headlines: "'10-Year-Old Girl Abducted and Sexually Molested' and '11-Year-Old Girl Strangled.' There ensues a scene of an anguished father holding a news conference and pleading for his son's safe return, which is followed by a headline of the child's fate: 'Boy's Severed Head Found in Creek'").

[11] Levenson, *supra* note 10, at 2 ("Sex offenders and sex crimes incite a great deal of fear among the general public and as a result, lawmakers have passed a variety of social policies designed to protect community members from sexual victimization").

[12] Kenneth Dowler, *Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, And Perceived Police Effectiveness,* 10 J. CRIM. JUST. & POPULAR CULTURE 109, 120 (2003).

'monsters' to be feared."[13] The media, in short, shapes and produces the reality of crime,[14] as it influences "factual perceptions of the world."[15]

Our desire to punish, treat and categorize this "abhorrent" population is not a new phenomenon.[16] The notion of a "sex offender" or someone who engages in immoral sexual acts or desires, has been around for centuries.[17] The fear and hatred of individuals who have committed crimes of sexual violence has existed well before the 20th century[18] and well before our current, infiltrative, grand "mass-media" dissemination of information.[19] Our innate disgust at these types of offenses and our emotionally-charged responses appear to be quite natural, given societies' morals, ethics and codes of decency; yet, legislative actions cannot and should not be based solely (or even predominantly) on distorted media depictions (of both offenses and perpetrators).[20]

Prior to the most recent spate of legislative enactments, the sexual psychopath laws had been enacted in order to provide treatment in lieu of punishment on individuals who commit crimes of a sexual nature.[21] But never before our most recent attempts to deal with the population has there been such a moral panic,[22] accompanied by such a massive,

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[13] *Id.* On how fictional television shows focusing on forensic analysis have become icons "for anxieties within the legal system about truth finding and legal outcomes" and raise questions about "the future of the rule of law," *see* Christina Spiesel, *Trial by Ordeal: CSI and the Rule of Law*, in LAW, CULTURE AND VISUAL STUDIES (Anne Wagner & Richard Sherwin eds., 2013) (in press).

[14] Keith Hayward, *Opening the Lens: Cultural Criminology and the Image*, *in* FRAMING CRIME: CULTURAL CRIMINOLOGY AND THE IMAGE 1, 3 (Keith J. Hayward & Mike Presdee eds., 2010).

[15] RAY SURETTE, MEDIA, CRIME AND CRIMINAL JUSTICE: IMAGES, REALITIES, AND POLICIES 102 (1992).

[16] Catharine R. Stimpson, *Foreword* to JUDITH R. WALKOWITZ, *CITY OF DREADFUL DELIGHT: NARRATIVES OF SEXUAL DANGER IN LATE-VICTORIAN LONDON,* at xxii (1992) ("Victorian London was a world where long-standing traditions of class and gender were challenged by a range of public spectacles, mass media scandals, new commercial spaces, and a proliferation of new sexual categories and identities.").

[17] STEVEN ANGELIDES, THE EMERGENCE OF THE PAEDOPHILE IN THE LATE TWENTIETH CENTURY 4 (2005) (positing that "the 'paedophile' was chiefly an outgrowth of social and political power struggles around questions of normative masculinity and male sexuality, but also that homophobia played a central role in this process.").

[18] Helen Gavin, *The Social Construction of the Child Sex Offender Explored by Narrative*, 10 QUALITATIVE REP. 395, 396 (2005) ("Historical evidence to support the existence of a dominant narrative, perceiving the child sex offender to be inherently 'evil' and 'inhuman' can be seen in National Society for the Protection of Children (NSPCC) rhetoric from 1888 which describes child sexual abuse as the 'vilest crime against childhood' and abusers as 'evil'. In addition, common vocabulary used by Victorian parents in response to abusers included 'dirty beast,' 'dirty old man,' and 'dirty devil.'").

[19] *See* Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CALIF. L. REV. 885, 887 n.4 (1995) (noting that Alabama, Arizona, California, Illinois, and Nevada were the first states to introduce sex offender registration laws between 1947 and 1967); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006) (claiming that "constitutional proceduralism" of the 1960s spawned the severe punitive justice of the 1970s).

[20] Dorfman & Schiraldi, *supra* note 10, at 7 (the media's coverage of crime often creates a misleading picture of a nation far more dangerous and violent than it is in actuality).

[21] Raquel Blacher, *Historical Perspective on the "Sex Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill*, 46 MERCER L. REV. 889, 907 (1995); *see generally*, Sarah H. Francis, *Sexually Dangerous Person Statutes: Constitutional Protections of Society and the Mentally Ill or Emotionally-Driven Punishment?*, 29 SUFFOLK U.L. REV. 125 (1995).

[22] BENJAMIN RADFORD, MEDIA MYTHMAKERS: HOW JOURNALISTS, ACTIVISTS, AND ADVERTISERS MISLEAD US 66 (2003) ("The media profit from fear mongering through sensationalized headlines. Nothing gets viewers to tune in to a news program like fear: fear of war, fear of disease, fear of death, fear of harm coming to loved ones."); PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 6 (1998);* Ronald Weitzer & Charis E. Kubrin, *Breaking News: How Local TV News and Real-World Conditions Affect Fear of Crime*, 21 JUST. Q. 497, 503 (2004); *see infra* text accompanying notes 202-204 for a fuller discussion of such panics. This is not to say that these panics have no historical antecedents, *see* Deborah W. Denno, *Life Before the Modern Sex Offender Statutes*, 92 NW. U. L. REV. 1317, 1320 (1998). But the earlier "sex crime panics" did not have the same across-the-board impact on legislation and court decisions that the recent ones have had.

country-wide outcry for retribution and deterrence. Clearly, much of the initial push to contain, confine and monitor offenders, over the last several decades, has, at the least, been *partially* motivated by the availability of mass media information and the media's persistent display and interpretation of shocking and newsworthy sex crimes.[23] It cannot be denied that moral panic is the progenitor of the resulting laws, and therefore the catalyst that spawned the political motivations that led to an outcry for stricter sex offender laws and legislation.[24]

This moral panic has developed primarily due to the media's depiction of a "sex offender " in the news and newspaper articles.[25] The media has focused significantly on the heinous and highly emotionally-charged crimes of individuals such as Earl Shriner, whose crime precipitated the first new generation sex offender law, and Jesse Timmendequas, whose victim is the namesake of Megan's Law.[26] A writer of a *New York Times* op-ed column in 1993 concluded, "There can be no dispute that monsters live among us. The only question is what to do with them once they become known to us."[27] As a result of the incessant media coverage, the general public has conceptualized what it believes to be the prototype of this "monstrous evil" – a male who violently attacks stranger young children[28] -- and has responded by grabbing their pitchforks and lighting their torches[29] in a unified alliance to exterminate and eradicate the beast.[30]

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[23]Television personalities perpetrated much of the media generated panic over child abductions in the 1990's. A prime example is found in Geraldo Rivera. *The Geraldo Rivera Show*: *Lured Away: How to Get Your Child Back; Panelists Discuss Their Horrifying Experiences of Losing Children Through Abductions and Murders; Tips Are Offered on Keeping Children Safe* (Television broadcast Dec. 4, 1997) ("[T]hey will come for your kid over the Internet; they will come in a truck; they will come in a pickup in the dark of night; they will come in the Hollywood Mall in Florida . . . There are sickos out there. You have to keep your children [very] close to you . . . "); *see also*, Jeff Martin, *More Predator Alerts Sent by E-mail: Notifications Delivered When Sex Offender Moves Nearby*, USA TODAY, Dec. 17, 2010, at A3 ("A growing number of law enforcement agencies and states are using e-mail to alert victims and anyone else who wants to know when sex offenders in their area move into the neighborhood, or change jobs or schools").

[24] Dave Goins*, Fear Fuels Sex Offender Legislation*, THE POWER COUNTY PRESS, Feb. 8, 2006, at 4-5 ("There was other cases. But that's a big catalyst . . . after all, that put the national spotlight on Idaho in a way that we really don't appreciate."- Senator Denton Darrington discussing the crimes of William Duncan III and the result of stricter Idaho sex offender legislation); Wendy Koch, *States Get Tougher with Sex Offenders,* USA TODAY, May 23, 2006 ("Public fear of sex offenders is spurring a wave of tougher laws this year, both in Congress and statehouses nationwide.").

[25] Jessica M. Pollak & Charis E. Kubrin, *Crime in the News: How Crimes, Offenders and Victims Are Portrayed in the Media*, 14 J. CRIM. JUST. & POPULAR CULTURE 59, 60 (2007) ("Reality is socially constructed, in large part, through the media, which provide a way for dominant values in society to be articulated to the public."); *Id.* at 64, ("with regards to emotion, newspapers focus on ideas whereas television emphasizes 'feeling, appearance, mood . . . there is a retreat from distant analysis and a dive into emotional and sensory involvement.'").

[26] Earl Shriner's crime provoked Washington State to enact the first of the new generation sex offender laws, and the murder and sexual assault against Megan Kanka by Jesse Timmendequas produced New Jersey's Megan's Law- that served as the "model community notification law" for other states to follow. Both crimes and their cultural and legislative effect will be discussed, in depth, in Part I of this article.

[27] Andrew Vachss, *Sex Predators Can't Be Saved*, N.Y. TIMES, Jan. 5, 1993.

[28] *See generally* Heather E. Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1 (2012); Gavin, *supra* note 18, at 395 ("The dominant narrative construction, in Western societies, concerning child sex offenders identifies such individuals as purely male, inherently evil, inhuman, beyond redemption or cure, lower class, and unknown to the victim . . .").

[29] Compare, in a different context, Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 YALE L.J. 320, 324 (2008) ("Faceless crowds of online tormentors wield virtual pitchforks, carry virtual torches, and hound innocent targets into hiding and out of the online world entirely.").

[30] Gavin, *supra* note 18, at 397 ("Unidentified sex offenders described in the media frequently have identities created to fit a particular stereotype, labeling the strangers as 'beasts,' 'fiends' 'brutes,' and 'animals.' Dehumanization and depersonalization of sex offenders is a common theme in press coverage . . .").

This paper is not the first inquiry into the media's influence on public perceptions and moral panic;[31] the media's influence on sex offender policy, legislation and public opinion has been highlighted in depth throughout much of the literature and academic writings.[32] The other discussions have generally focused on the media's role as a precursor to the enactment of sex offender legislation,[33] the upholding of sex offender laws in the courts,[34] and as a significant influence on the continuation of moral panic.[35] But what has not been looked at significantly, is whether and how the media coverage and presentation of these issues has been transformed over the past two decades, and what effect, if any, this has had on public perception. What if the media has begun to shift away from simply highlighting and describing the feared beast and has begun to focus more on the problematic results of laws and legislation? Would that, in turn, have an effect on public perceptions and inevitably on the formation and enactment of laws and judicial decisions?

Slowly and somewhat recently, it appears that the tone of the media's portrayal of sex offender issues has begun to shift. In addition to highlighting salient and horrific sexually violent offenses and contributing to community outrage, the mainstream media has increasingly begun to report on significant concerns surrounding the conceptualization, treatment and containment of the sex offender population. News articles – published in popular newspapers and media sites – more readily dedicate information to expressing expert opinions (that were previously embedded in articles dedicated solely to describing heinous crimes and community outrage), reporting on statistics that question the factual basis of our perceptions, questioning the efficacy of the laws designed to protect the community, and touching on the cost of human rights violations resulting from our laws.

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[31] *See* BARRY GLASSNER, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS (2010); Franklin D. Gilliam, Jr. & Shanto Iyengar, *Prime Suspects: The Influence of Local Television News on the Viewing Public*, 44 AM. J. POL. SCI. 560, 560 (2000); RADFORD, *supra* note 22, at 66.

[32] Numerous articles have highlighted the intersection between public fears and the demand for harsher punishments. *See* Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 44-47 (1997) (considering the justifications behind the public's demand for harsher criminal penalties); WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 85–108 (2009) (conceptualizing registration schemes in light of political motivations and societal trends).

[33] Singleton, *supra* note 4, at 602–07 (identifying the link between the media's increase in crime reporting and the move for legislative action). Oprah Winfrey provided the initial impetus for the National Child Protection Act in 1991, when she testified before the U.S. Senate Judiciary Committee, urging that a national database of convicted child abusers be established. On Dec. 20, 1993, President Clinton signed the national "Oprah Bill" into law. Associated Press, *President Clinton Signs the National Child Protection Act*, N.Y. TIMES NAT'L, Dec. 21, 1993 ("At the signing of the National Child Protection Act [also known as the "Oprah Bill"], President Clinton invited Oprah Winfrey, a supporter of the legislation, to speak.").

[34] *See infra* footnotes 155-161; *Children's Safety As First Priority Dictates Custody for Sexual Predators*, SUN SENTINEL, Dec. 12, 1996, http://articles.sun-sentinel.com/1996-12-12/news/9612110231_1_mental-abnormality-leroy-hendricks-sexually-violent-crime (Chief Justice William Rehnquist took society's side at oral argument: "'What's a state supposed to do - wait until he goes out and does it again'?"); Krista Gesaman, *Breaking a Law . . . That Doesn't Exist Yet: Why the Supreme Court Should Overturn the Retroactive Application of a Sex-offender Statute,* NEWSWEEK, Feb. 22, 2010 (quoting Professor Corey Rayburn Yung: "'The court isn't sympathetic to criminals, and they're even less sympathetic to sex offenders . . .'").

[35] AARON DOYLE, ARRESTING IMAGES: CRIME AND POLICING IN FRONT OF THE TELEVISION CAMERA 129 (2003) (noting that television creates a passive role for a wider and more diverse audience that is more prone to accept information they are given as truth); Vincent F. Sacco, *Media Constructions of Crime*, 539 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 142 (1995) (official crime statistics indicate that most crime is nonviolent yet the news media suggests just the opposite often creating the perception of an "'epidemic of random violence'"); Robert Reiner et al., *From Law and Order to Lynch Mobs: Crime News Since the Second World* War, *in* CRIMINAL VISIONS: MEDIA REPRESENTATIONS OF CRIME AND JUSTICE (Paul Mason ed. 2003) ("About two-thirds of crime news stories are primarily about violent or sex offenses, but these account for less than 10 percent of crimes recorded by the police.").

This article will consider the role of the media in sex offender issues and further theorize whether the shift in media presentation has affected public perceptions of sex offenders and whether it has had any impact on recent legislation and the future enactment of sex offender laws. As part of this inquiry, we will employ the lens of therapeutic jurisprudence in an effort to assess the broader societal impact of these media depictions.

Part I will offer an overview of the major (media-centered) sex offender laws and legislation, focusing on the media accounts of the crimes upon which they were based. Part II will consider the impact of the media's portrayal of offenders as the pariahs of society in the civil and criminal justice system; Part III will detail the proposed recent shift in media presentation and consider how, if at all, this shift has made an impact on new laws, legislation and court opinions. Part IV weighs these developments in the context of therapeutic jurisprudence, and considers its potential impact on dealing with the aftermath of the first decades of the media's volatile influence on this area of law and policy. We conclude by offering several policy recommendations.

The title of this paper comes, in part, from Bob Dylan's epic song, *Idiot Wind*, a song that one of us has previously characterized as "an angry, coruscating and brilliant polemic,"[36] and as filled with "searing metaphors and savage language,"[37] a song that creates "a perfect milieu for mental disability law analyses."[38] The song is replete with "patches of raw, unalloyed rage,"[39] and can be construed as a "rage against failure;"[40] it "bridges the gap between bitterness and sorrow."[41] It is, in Oliver Trager's words, an "anthem to pain."[42]

The area of law that we are discussing in this paper is surrounded by anger, by "savage language," by "rage" and by "pain." And so much of those emotions flow – directly and inexorably – by the way that the press has focused on the crimes that are at the core of our concerns. The line in question (and the context in which it was written) encapsulates, nearly perfectly, the dilemma we face.

I. THE "PLANTED PRESS STORIES"

A. Introduction

Since the early 1990s, four major legislative acts and one significant court case served as the building blocks of sex offender containment, registration and notification. Public outrage, political pressure, and the emphasis on and distortion of the events preceding these acts in the media, significantly impacted these monumental legislative and legal outcomes.

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[36] Michael L. Perlin, "*The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment,* 82 IOWA L. REV. 1375, 1379 (1997).

[37] Michael L. Perlin, "*What's Good Is Bad, What's Bad Is Good, You'll Find Out When You Reach the Top, You're on the Bottom": Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More than "Idiot Wind?"*, 35 U. Mich. J.L. Reform 235, 241 (2001-02).

[38] Michael L. Perlin, *"Everything's a Little Upside Down, as a Matter of Fact the Wheels Have Stopped": The Fraudulence of the Incompetency Evaluation Process*, 4 HOUS. J. HEALTH L. & POL'Y 239, 243 (2004).

[39] TIM RILEY, HARD RAIN: A DYLAN COMMENTARY 241 (updated ed. 1999).

[40] HOWARD SOUNES, DOWN THE HIGHWAY: THE LIFE OF BOB DYLAN 283 (2011).

[41] CLINTON HEYLIN, BOB DYLAN: THE RECORDING SESSIONS, 1960-1994, 106 (1995).

[42] OLIVER TRAGER, KEYS TO THE RAIN: THE DEFINITIVE BOB DYLAN ENCYCLOPEDIA, 279 (2004).

B. Washington State's Community Protection Act[43]

The first "new generation" law,[44] that was designed to prevent offenders from committing further acts of sexual violence, was enacted in the state of Washington as a response to a heinous crime committed against a young child.[45] Just six years earlier, in 1984, critics had compelled Washington to repeal its sexual psychopath law due to concerns over its constitutionality and effectiveness.[46] Yet the state of Washington, responding to community outrage and mass media coverage, enacted new legislation aimed at enabling post-sentence civil detention for "sexually violent predators."[47]

In 1989, Earl Shriner, a repeat sex offender, raped and sexually mutilated a 7-year-old Tacoma, Washington, boy. A Washington newspaper, *The Spokesman-Review*, reported on the case this way: "The 7-year-old was playing in a vacant lot when sex offender Earl Shriner grabbed him, pulled him into the bushes, raped and sexually mutilated him."[48] The report offered statements by the Tacoma police sergeant who described how Shriner was "well-known" to law enforcement.[49] The police sergeant made specific remarks concerning Shriner and sex offenders in general.[50] Regarding Shriner, the sergeant declared that, "he [Earl Shriner] frequently contacted small children" and that "[h]is fashion [was] to do this sort of thing…[and] Sex Offenders always reoffend."[51] The article went on to detail Shriner's previous crimes (targeting, abducting and abusing children) and the resulting criminal sentences (the last one lasting for only 66 days in county jail).[52]

A month later, another Seattle newspaper, the *Tri-city Herald,* published an article urging stricter sex offender laws.[53] The article called for immediate changes in the

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[43] Community Protection Act of 1990, WASH. REV. CODE ANN. § 71.09 (West 2001).

[44] *See* Brian G. Bodine, *Washington's New Violent Sexual Predator Commitment System: An Unconstitutional Law and an Unwise Policy Choice*, 14 U. PUGET SOUND L. REV. 105 (1990); John La Fond, *The New Sexually Violent Predator Law – America's Unique Sexual Offender Commitment Law* (paper presented at the American College of Forensic Psychiatry's annual conference), April 1992, S.F. Cal.), as cited in Michael L. Perlin, *Pretexts and Mental Disability Law: The Case of Competency*, 47 U. MIAMI L. REV. 625, 637 n.51 (1993); Grant H. Morris, *The Evil that Men Do: Perverting Justice to Punish Perverts*, 2000 U. ILL. L. REV. 1199, 1200 (2000).

[45] Charles Oliver, *Sex Crime and Punishment*, REASON.COM, (Mar. 1993) ("At its heart, the Washington sexual predator law is an emotional reaction to the too-lenient sentences levied on sexual criminals"); *See generally*, Stuart Scheingold et al., *The Politics of Sexual Psychopathy: Washington State's Sexual Predator Legislation*, 15 U. PUGET SOUND L. REV. 809 (1992).

[46] Roxanne Lieb, *State Policy Perspectives on Sexual Predator Laws*, *in* PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, & THERAPY 41, 42 (Bruce J. Winick & John Q. LaFond eds., 2003).

[47] WASH. REV. CODE ANN. § 71.09.02(1) (Supp. 1990). Earl Shriner's crime sparked a push to create a new generation of sex offender laws, thus being the catalyst that began the movement and led other states to enact their own version of sex offender civil commitment and community containment. GOVERNOR'S TASK FORCE ON COMMUNITY PROTECTION, FINAL REPORT, IV-4 (1989).

[48] Keith Eldridge, *Remembering "Little Tacoma Boy" 20 Years Later*, KOMO NEWS (May 20, 2009, 9:33 PM PDT), *available at* http://www.komonews.com/news/local/45571582.html.

[49] Associated Press, *Tacoma Sex Offender Faces Latest Charges in Mutilation of Boy*, The Spokesman-Review, May 23, 1989, *available at* http://news.google.com/newspapers?id=0mRWAAAAIBAJ&sjid=WflDAAAAIBAJ&pg=1133%2C1176933.

[50] *Id*.

[51] *Id.*

[52] *Id*. ("In 1977 Shriner pleaded guilty to assault and kidnapping in the abduction of two 16-year-old-girls in Spanaway after he picked them up hitchhiking. He was sentenced to 10 years in prison after Eastern State Officials determined he was not suited for a sexual psychopath program. Since his release in 1987, Shriner has served 66 days in the Pierce County jail . . . .").

[53] Associated Press, *Toughen Sex Offender Laws, Gardner Urged*, TRI-CITY HERALD, (June, 21, 1989) at A7.

way Washington deals with violent sex offenders and urged Gov. Booth Gardner to call a special legislative session.[54] It included these quotations from a community member spearheading the signing of the petition: "The laws have got to change to protect the public" and "what use is a man who goes around preying on women and children." [55] The article focused on a petition of 10,000 signatures, urging the convening of a special legislative session, and specifically describes how a handful of individuals – who were present at a demonstration in Seattle to promote the petition – clapped when a toddler signed his name with a note saying "Governor, please keep me safe."[56] Included with the article was a picture of organized citizens demanding that public safety be the government's *first* priority.[57]

The Governor responded by convening a special task force in order to reevaluate sex offender sentencing.[58] The Governor's Task Force on Community Protection recommended that the Washington legislature adopt a civil commitment procedure for a select group of offenders.[59] The *Seattle Times* described the event and the public's reaction this way: "When that [the crime committed by Earl Shriner] happened, something snapped in the collective conscience. Every fear ever harbored about predatory strangers was realized in that mutilation. And the state struck back with a punitive law that has drawn national attention."[60]

The bill was enacted as the Community Protection Act by the Washington legislature in 1990,[61] the predecessor of the Sexually Violent Predator Law,[62] which allowed the state to detain a person who had served a sentence for a "sexually violent offense" if it could be shown beyond a reasonable doubt that the person suffered from a mental abnormality or personality disorder which made the person likely to engage in predatory acts of sexual violence.[63] The Community Protection Act also mandated that sex offenders register their whereabouts with police upon release from prison or treatment, and authorized law enforcement to pass along that information to the communities into which they move.[64] Critique of the science and procedures behind these laws continued with the "new generation" statutes[65] and the same questions arose regarding accurate

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[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] Exec. Order No. 89-04, WASH. ST. REG. 89-13-055 (1989), *available at* http://www.governor.wa.gov/office/execorders/eoarchive/eo89-04.htm.

[59] David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 538 (1992).

[60] Linda Keene, *Warning Signs -- A New State Law Alerts Parents to Predators in the Neighborhood and the Struggle to Cope Begins*, THE SEATTLE TIMES, Sept. 15, 1991, *available at* http://community.seattletimes.nwsource.com/archive/?date=19910915&slug=1305581.

[61] Deborah L. Morris, *Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators—A Due Process Analysis*, 82 CORNELL L. REV. 594, 611 (1997); Sarah E. Spierling, *Lock Them up and Throw Away the Key: How Washington's Violent Sexual Predator Law Will Shape the Future Balance Between Punishment and Prevention*, 9 J.L. & POL'Y 879, 892-93 (2001).

[62] WASH. REV. CODE ANN. § 71.09.010 (West 2001) (a "sexually violent predator" has a personality disorder or mental abnormality that is not amenable to treatment, making them likely to engage in sexually violent behavior).

[63] *Id.*

[64] Scheingold et al., *supra* note 45, at 809.

[65] *See generally* Bodine, *supra* note 44.

diagnosis and treatment of this population[66] and the constitutionality of confinement under civil commitment.[67]

Constitutional challenges to the statutes were more often than not unsuccessful.[68] The Washington Supreme Court upheld the Community Protection Act, and found that sexual predator provisions of the state community protection act were constitutional.[69] The Community Protection Act also mandated that sex offenders register their whereabouts with police upon release from prison or treatment, and authorized law enforcement to pass along that information to the communities into which they move.[70]

In the immediate aftermath of the enactment of the Community Protection Act, newspapers reported on the public's fear that drove the passage of the legislation. The Seattle Times reported that 4200 offenders had registered statewide in 1991 with communities being warned about the "most violent."[71] The article describes how "[s]uddenly, real faces have been put on an inhuman crime as predator mug shots stare out from paper bulletins. They have become lightning rods for a long-simmering wrath that reaches back to 1989, when Earl Shriner lured a Tacoma boy from his bike and severed his penis during the assault.[72] The article continued with lengthy quotes from community members, one such individual stating: "I think capital punishment should have been a consideration . . . and I would have no problem being the one to throw the switch," said Ron Wilson, a father of three children who angrily nailed new planks to a fence at his home, in a cul-de-sac accented with American flags.[73] "Someone with a history of sexual assaults against children should never be allowed on the street to re-offend. That's a slap in the face, especially in a neighborhood with lots of children. It's like putting an alcoholic in a tavern and expecting them not to drink." The article quoted University of Puget Sound School of Law Professor, John Q. La Fond, arguing that communities should be protected from predators through tougher prison sentences - not through civil commitment: "This is lifetime preventive detention, solely to prevent possible further crime . . . . The U.S. Supreme Court has never authorized lifetime confinement of someone who is not mentally disabled in some meaningful sense, simply to prevent possible recidivism."[74]

Consider representative additional news headlines from the *Seattle Times* articles covering this law and the containment of sexual predators: *Guest Editorial -- 1990 Act*

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[66] Gary Gleb, *Washington's Sexually Violent Predator Law: The Need to Bar Unreliable Psychiatric Predictions of Dangerousness from Civil Commitment Proceedings*, 39 UCLA L. REV. 213, 215 (1991).

[67] Eric S. Janus, *Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments*, 72 IND. L.J. 157, 158 (1996) ("As the Court decides the sex offender cases, it will likely draw a bright line on the constitutional map of civil commitment.") ((article published prior to the decision in *Hendricks*). A system that compromises our traditional constitutional values cannot last. Sex offender commitment laws confuse too many important values. Obscuring the critical role that mental disorder plays in defining the state's police powers, these laws embrace a dangerous jurisprudence of prevention. We must find other, more truthful and more principled ways to prevent sexual violence.

[68] *In re* Blodgett, 502 U.S. 236 (1992) (upholding statute's constitutionality); *Matter of* Buckhalton, 503 N.W.2d 148 (Minn. Ct. App. 1993) (same); *Matter of* Linehan, 503 N.W.2d 142, 148 (Minn. Ct. App. 1993), *rev'd*, 518 N.W.2d 609 (Minn. 1994) (same) (state failed to prove defendant met statutory standards).

[69] *In re* Young, 857 P.2d 989, 1018 (Wash. 1993); *In re* Haga 943 P.2d 395, 398 (Wash. Ct. App. 1997); *See* Julie Emery, *Rapist Committed as Predator*, THE SEATTLE TIMES, Mar. 8, 1991.

[70] Scheingold et al., *supra* note 45, at 809.

[71] Keene, *supra* note 60.

[72] *Id.*

[73] *Id.*

[74] *Id.*

Helps Guard Against Sex Offenders,[75] *Prosecutor Praises Sex-Predator Ruling -- Law Has 'Constitutional Seal Of Approval*,[76] *Victim's Mother Glad Predators Locked Up -- Special Center Is Only One In U.S.*[77] It would seem likely that the general public – without a significant understanding of the complex constitutional issues involved – would hail the new generation laws as successful by keeping dangerous sex offenders out of their community.[78]

Although the tenor of many of the published news articles seemed to be focused on the danger of sexual offenders and the anger within the community, early 1990's news articles did not ignore some of the concerns over the efficacy of the Act and the containment of violent predators.[79] A 1993 *Seattle Times* article cited Jerry Sheehan, legislative director of the American Civil Liberties Union, who argued that the law creates a false sense of security by focusing on strangers – when, in fact, most sex offenders are family members or acquaintances.[80] The article also offered statistics on the types of offenders, finding that only "4 percent of the 1,058 felonious sexual assaults against children between 1989 and June of [1992] were carried out by strangers. Most, 43 percent, were by teachers, coaches and other acquaintances. Natural parents were the offenders 22 percent of the time, followed by other relatives, 15 percent, and stepparents, 9 percent . . . ."[81] Yet the article continued on and finished with statements from "terrified parents" and issuances by Gov. Mike Lowry, decreeing that "[s]exual predators are (the most) dangerous people as frankly I can think of . . . ."[82]

C. Minnesota's Jacob Wetterling Act[83]

During the same year that Earl Shriner committed his notorious crime in the state of Washington, a small community in Minnesota was outraged over the abduction of Jacob Wetterling who went missing while riding his bike home from a convenience store in the town of St. Joseph.[84] A little over 12 hours after Jacob went missing, reporters

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[75] Robert Shilling, *Guest Editorial – 1990 Act Helps Guard Against Sex Offenders*, THE SEATTLE TIMES, July 22, 1993, *available at* http://community.seattletimes.nwsource.com/archive/ ?date=19930722&slug=1712209.

[76] Tim Klass, *Prosecutor Praises Sex-Predator Ruling – Law Has 'Constitutional Seal of Approval'*, THE SEATTLE TIMES, Aug. 11, 1993, *available at* http://community.seattletimes.nwsource.com/archive/?date=19930811&slug=1715464.

[77] Hal Spencer, *Victim's Mother Glad Predators Locked Up – Special Center is Only One in U.S.*, THE SEATTLE TIMES, May 15, 1994, *available at* http://community.seattletimes.nwsource.com/archive/?date=19940515&slug=1910634.

[78] Monica Davey & Abby Goodnough, *Doubts Rise as States Hold Sex Offenders After Prison*, N.Y. TIMES, Mar. 4, 2007, *available at* http://www.nytimes.com/2007/03/04/us/ 04civil.html?pagewanted=all&_r=1& (Sex offenders selected for commitment are not always the most violent; some exhibitionists are chosen, for example, while rapists are passed over. And some are past the age at which some scientists consider them most dangerous. In Wisconsin, a 102-year-old who wears a sport coat to dinner cannot participate in treatment because of memory lapses and poor hearing.).

[79] Norman J. Finkel, *Moral Monsters and Patriot Acts*, 12 PSYCHOL. PUB. POL'Y & L. 242, 260 (2006) ("Although the print media have written a number of stories and editorials about the legitimacy and effects of community notification and involuntary commitment, it was predominantly the scholarly and scientific press, through law reviews and empirical articles, that took a serious look at what are complex psychological, empirical, normative, and constitutional issues.").

[80] Linda Keene et al., *Legal Dilemma: Rapist's Rights vs. Public's Right to Know*, THE SEATTLE TIMES, July 13, 1993, *available at* http://community.seattletimes.nwsource.com/archive/ ?date=19930713&slug=1710841.

[81] *Id.*

[82] *Id*.

[83] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C.A. § 14071 (1994).

[84] William Plummer & Margaret Nelson, *A Town Prays for a Missing Son*, PEOPLE MAGAZINE, Nov. 20, 1989, vol. 32, no. 21, *available at* http://www.people.com/people/archive/article/0,,20115979,00.html.

swarmed the Wetterling home and the abduction blossomed into a "full-scale media event."[85] One week after, on October 30th, the *New York Times* ran an article in light of the impending holiday of Halloween.[86] The article detailed the fears of the community noting that, "many of the children say they are frightened that the abductor may strike again. They have told teachers they cannot sleep. Few children are expected to go out on Halloween."[87] On the next evening, Peter Jennings and ABC Evening News dedicated a segment to the impact of the crime on the small Minnesota town airing interviews with local parents, Jacob's mother and individuals from Jacob's school.[88] The following night, both NBC Evening News with Tom Brokaw[89] and CBS Evening News with Dan Rather[90] ran segments describing the events of the kidnapping and airing statements by Jacob's parents and other family members. In an article written one month after the abduction, *People Magazine* highlighted how the community had banded together in an effort to find Jacob and prevent any other similar crimes.[91] The article detailed the events leading up to the kidnapping and included statements by Jacob's mother, Patti Wetterling, and other concerned members of the community.[92] One father stated that he "had to help. Every parent sees their children in Jacob. It's terrifying to people to have this happen here."[93]

In 1991, through efforts stemming out of the Jacob Wetterling foundation, the legislature passed the Minnesota Sex Offender Registration Law.[94] In 1994, while Washington State was trying to strengthen and expand the Community Protection Act,[95] Congress passed the federal Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act (SORA),[96] through which the federal government sought to encourage states, through the allocation of federal funding, to establish sex offender registries.[97] The act mandated that offenders who had been convicted of sexual abuse of children or sexually violent crimes against an adult must register their community residential address with local law enforcement for 10 years.[98] Dissemination of

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[85] *Id.*

[86] Dirk Johnson, *Small Town is Shaken by a Child's Abduction*, N.Y. TIMES, Oct. 30, 1989, *available at* http://www.nytimes.com/1989/10/30/us/small-town-is-shaken-by-a-child-s-abduction.html.

[87] *Id.*

[88] *ABC Evening News with Peter Jennings: St. Joseph, Minnesota/ Kidnapping* (ABC television broadcast Oct.. 31, 1989).

[89] *NBC Evening News with Tom Brokaw and Dan Molina: St. Joseph, Minnesota/ Missing Child* (NBC television broadcast Nov.1, 1989).

[90] *CBS Evening News with Dan Rather: St. Joseph, Minnesota/ Missing Child*, (CBS television broadcast Nov. 1, 1989) (segment shows a local woman saying there is "fear in this small town now").

[91] Plummer & Nelson, *supra* note 84.

[92] *Id.* ("'We're sending a message,' says Patty Wetterling, Jacob's mother. 'You can't do this in Minnesota. You can't take our children.'").

[93] *Id.*

[94] The law was later renamed the Predatory Offender Registration law in 1993 and has been amended several times. MINN. STAT. ANN. § 243.166 (1991).

[95] In 1997, after the Kansas civil commitment statute was deemed constitutional and non-punitive in nature, Washington put to rest any concerns as to whether it would abandon its statute. *See* John Q. La Fond, *Washington's Sexually Violent Predator Law: A Deliberate Misuse of the Therapeutic State for Social Control*, 15 U. PUGET SOUND L. REV. 655 (1992).

[96] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, PUB. L. No. 103-322, § 170101, 108 STAT. 1796 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)) (repealed 2006) (establishing federal guidelines for state sex offender registration laws).

[97] *Id.*

[98] *Id.*

information of the offenders' whereabouts in the community was justified as "necessary to protect public safety."[99]

D. New Jersey's Megan's Law[100]

Around the time of the final passage of the Jacob Wetterling Act, a heinous crime in New Jersey exploded in the media and spotlighted the need for increased community awareness of the presence of a convicted sex offender.[101] Seven-year-old Megan Kanka was reported missing from her home in Hamilton Township, New Jersey, in 1994.[102] Early on in the investigation, police identified a nearby residence housing three convicted sex offenders.[103] Jesse Timmendequas, who later confessed to the rape and murder of Megan, resided in that nearby home.[104] The proximity of the predator to his prey spearheaded a campaign to enact legislation in New Jersey that provided community notification about specific sex offenders currently living in or upon release to the community.[105] The New Jersey legislation would eventually become the model for the tool by which the federal government could notify the public of convicted sex offenders residing throughout the country.[106]

On October 31, 1994, the New Jersey Legislature enacted the Registration and Community Notification Laws, also known as "Megan's Law,"[107] and made national news for years to come.[108] Megan's Law devised a three-tier system that placed offenders in

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[99] Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071 (2010)). The act provided that the designated state law enforcement agency "shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section." Similar language originated in Washington's Community Protection Act of 1990, WASH. REV. CODE ANN. § 4.24.550 (West 2011).

[100] 42 U.S.C. § 14071.

[101] Andrew Vachss, *How Many Dead Children are Needed to End the Rhetoric?,* THE NEW YORK DAILY NEWS, Aug. 12, 1994 ("It's not only politicians who fear the media. Prosecutors do, too, especially those prosecutors who are politicians in disguise. How many rapists are allowed to plead guilty to 'burglary'? How many child molesters are allowed to plead to 'endangering the welfare of a child'? How many predatory pedophiles are allowed to serve their sentences for dozens of separate crimes concurrently?").

[102] *Id.*

[103] E.B. v. Verniero, 119 F.3d 1077, 1081 (3d Cir. 1997).

[104] *Id.*

[105] The public's reaction to the Kankas' call for reform prompted New Jersey to pass the first Megan's Law just three months after Megan's murder. *See* id. at 1081–82; *See* also, *Megan's Legacy*, N.Y. TIMES, Aug. 31, 1994 ("Like Megan's family and neighbors, the legislators were properly outraged to discover that Jesse Timmendequas, twice convicted of sexually assaulting young girls, had been living undetected in Megan's neighborhood. But the bills they passed to appease that rage were approved without public hearings. Indeed, two of the bills may be constitutionally shaky.").

[106] For a look at litigation in New Jersey coinciding with the federal enactment *see, e.g.*, Artway v. Att'y Gen. of N.J., 81 F.3d 1235 (3d Cir. 1996), *reh'g denied*, 83 F.3d 594 (3d Cir. 1996) (upholding registration aspects of New Jersey's "Megan's Law," and finding that challenge to notification aspects of law was not ripe); Paul P. v. Verniero, 982 F. Supp. 961 (D.N.J. 1997) (New Jersey statute constitutional); Alan A. v. Verniero, 970 F. Supp. 1153 (D.N.J. 1997) (same); E.B. v. Verniero, 119 F.3d 1077 (3d Cir. 1997) (same); W.P. v. Poritz, 931 F. Supp. 1199 (D.N.J. 1996) (denying motion for preliminary injunction against enforcement of Megan's Law).

[107] N.J. STAT. ANN.§ 2C:7-1 to -11 (1994) (constitutionality upheld in W.P. v. Poritz, 931 F. Supp. 1199 (D.N.J. 1996); notification requirements did not impose "punishment" on sex offenders; law constitutional)); *compare* Doe v. Poritz, 662 A.2d 367 (N.J. 1995) (statute constitutional, but community notification provisions subject to prior judicial review).

[108] Mike Allen, *Girl's Slaying Exposes Limits Of Connecticut 'Megan's Law'*, N.Y. TIMES, Aug. 28, 1998; Julia Sommerfeld*, Megan's Law Expands to the Internet*, MSNBC, Aug. 17, 1999; Peter A. Zamoyski, *Will California's "One Strike" Law Stop Sexual Predators, or Is a Civil Commitment System Needed?*, 32 SAN DIEGO L. REV. 1249 (1995); Christine Kong, *The Neighbors Are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 VILL. L. REV. 1257 (1995).

separate tiers based off of their assessed level of dangerousness and required all tiered offenders to register with local law enforcement.[109] The enactment of "Megan's Law" and legislative modification of the Jacob Wetterling Act allowed Congress to lengthen the federal required registration time period from 10 years to lifetime registration,[110] compel further conformity among the states,[111] and include those offenders who qualify as sex crime recidivists and/or were convicted of "aggravated" sexual violence.[112] News headlines – e.g., *Sexual Attack on Youth Shows "Megan's Law" Limit*[113] – discussed the loopholes in notification and paved the way to nationalize the notification requirement.[114] The media's coverage during the pending amendment of the Act in the House of Representative reported on statements from Rep. Dick Zimmer, R-N.J. – "Today we're putting the rights of children above the rights of convicted sex offenders," and Rep. Charles Schumer, D-N.Y. – "Sexual offenders are different . . . . No matter what we do, the minute they get back on the street, many of them resume their hunt for victims, beginning a restless and unrelenting prowl for children, innocent children, to molest, abuse, and in the worst cases, to kill."[115] Opposition to the Bill – citing constitutional concerns – was easily lost amongst the crusade for children's rights and the vivid description of the prowling predator.[116]

The Megan's Law amendment to the Jacob Wetterling Act was passed in 1996.[117] Also included in the amendment was the authorization of a national registry that would contain information on offenders who were labeled recidivists, deemed sexual violent predators, convicted of coercive, penetrative sex with anyone and/or those offenders who

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[109] N.J. STAT. ANN. § 2C:7-8 (1994).

[110] Department of Justice Office of the Attorney General, "*Megan's Law: Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended*," (Dec. 17, 1998), http://pub.bna.com/cl/19990120/2196.htm (*"Megan's Law"*). Simultaneously enacted was the Pam Lychner Act of 1996, Pub. L. No. 104-236, 110 Stat. 3090-94 (codified as amended at 42 U.S.C. § 14072 (Supp. IV 1998) (1st attempt toward a national registration system)).

[111] If states do not comply with federal registration and community notification laws, they lose 10 percent of their appropriation from the federal Edward Byrne Justice Assistance Grant Program, which provides funding for state and local crime prevention and control programs. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, §170101, 108 Stat. 1796 (1994) (codified as amended at 42 USC. §14071 (2006)); For scholarly analysis see, Kenneth Crimaldi, *"Megan's Law": Election-Year Politics and Constitutional Rights*, 27 RUTGERS L.J. 169 (1995); Kristen Zgoba et al., *Megan's Law: Assessing the Practical and Monetary Efficacy*, 2008 No. 225370 (2006-IJ-CX-0018), U.S. Dept of Justice; Symposium, *Critical Perspectives on Megan's Law: Protection vs. Privacy*, 13 N.Y.L. SCH. J. HUM. RTS. 1 (1996) (comments of John Gibbons, Ronald Chen, Alexander Brooks, Eric Janus, and Patrick Reilly); Jeff Barker, *Upgrade Sex Offender Law or Lose Grant, Md. Told,* BALTIMORE SUN, Nov. 3, 2001.

[112] "*Megan's Law*," *supra* note 110.

[113] John Sullivan, *Sexual Attack on Youth Shows 'Megan's Law' Limit*, N.Y. TIMES, Aug. 1, 1995 (Prosecutors point to the "limits of the state's law requiring community notification of the presence of sex offenders" and "advocates of the law announced an effort to nationalize the notification requirement.").

[114] *Id.*

[115] Carolyn Skorneck, *House Considers Tougher Version of 'Megan's Law'*, ASSOCIATED PRESS, May. 7, 1996; *see also Remembering Megan,* N.Y. TIMES, Nov. 5, 1994 ("Children are more apt to be sexually abused in the home than outside it. Even so, the threat posed by an unknown predator terrifies American families the most. That is the reason for the community-notification provision that is now part of Federal law -- and for the New Jersey bills that inspired it.").

[116] Skorneck, *supra* note 115 ("Rep. Melvin Watt, D-N.C., raised a lonely voice in opposition. 'Our constitution says to us that a criminal defendant is presumed innocent until he or she is proven guilty. The underlying assumption of this bill is that once you have committed one crime of this kind, you are presumed guilty for the rest of your life.'").

[117] Megan's Law, 42 U.S.C. § 14071 (1996).

had sex with children under the age of 12.[118] News articles post-amendment and adoption of Megan's Law reported the public's response.[119] An Associated Press article, *Parents Praise Megan's Law Findings*, quoted one mother's response to the adoption of the legislation: "I know for sure my daughter was saved from having been molested," and included a statement from the Attorney General confirming that "[a]rming law-abiding citizens with information about sex offenders living in their neighborhoods has spared countless children and families from the advances of sexual predators."[120]

States seeking to adopt the federal statute ran news articles with statistics on sex offenses and the benefits of registration: "U.S. Department of Justice figures show that a forcible rape is committed every six minutes. A California study of the effectiveness of registration programs found that most law enforcement agencies believed registration helped them arrest suspected sex offenders . . . . Another California study on recidivism evaluated sex offenders over a 15-year period and found that nearly 50 percent were rearrested, 20 percent for a subsequent sex offense."[121]

By 2005, the national registry was available on the Internet and was linked to all other state online registries.[122] Presently, every state, as well as the District of Columbia, has enacted sex offender community notification and registration requirement statutes.[123]

In addition to community notification and registration, individual states also enacted residency restriction laws.[124] Coinciding with New Jersey's enactment of Megan's Law, residency restrictions sought to ban sex offenders from residing in specifically designated areas.[125]

> [R]esidency restrictions are "likely a response to high-profile media coverage of child abduction cases. It is probably no accident that passage of the first sex offender residency restrictions in 1995 followed on the heels of the Klaas and Kanka murders in 1993 and 1994, respectively. Prior to the Klaas murder, national coverage of such crimes

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[118] Department of Justice (Megan's Law), *supra* note 110 (An aggravated sexual act is defined as "(1) engaging in sexual acts involving penetration with victims of any age through the use of force or the threat of serious violence; and (2) engaging in sexual acts involving penetration with victims below the age of 12.").

[119] Joshua Wolf Shenk, *Do "Megan's Laws" Make a Difference?*, US NEWS AND WORLD REPORT, Mar. 1, 1998 ("Polls bear out changing attitudes about safety: About half of Washington parents, for example, say they're less likely than before the law was passed to leave their kids alone--even with a baby sitter."); In 1997, the Associated Press released an article that retold the horrific crime and further described specifics of the rape and murder in grave detail: Donna De La Cruz, *In Statement, Defendant Says He Eyed Megan Kanka All Summer,* ASSOCIATED PRESS, May 9, 1997 ("Timmendequas told [detectives] he put a belt around her neck after she screamed and tried to run away when he fondled her. He said he choked her with the belt and covered her head with a plastic bag.").

[120] Scott Lindlaw*, Parents Praise Megan's Law Findings,* ASSOCIATED PRESS, Jun. 13, 1998.

[121] *Needed Changes Will Toughen Megan's Law*, THE BALTIMORE SUN, Aug. 17, 1996.

[122] The Pam Lychner Sex Offender Tracking and Identification Act of 1996 is another amendment to the Wetterling Act: Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996) (amending 42 U.S.C. 14071). This act allows the FBI to establish a national database of the names and addresses of sex offenders who are released from prison and requires lifetime registration for recidivists and offenders who commit certain aggravated offenses. The Act is named for Pam Lychner, who became a victims' rights advocate after she narrowly escaped an attack by a repeat sex offender.

[123] Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 325-26 (2006).

[124] Corey Rayburn Yung, *Banishment By a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 122-27 (2007).

[125] *See id.*; Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, & Alternatives,* 86 WASH. U. L. REV. 1397, 1411-14 (2009).

> was comparatively slight. Beginning with the Klaas case, however, media coverage of such crimes exploded. The increased attention to child abduction cases and the public outcry generated thereby likely led to passage of the first restrictions in 1995.[126]

Residency restrictions prevent individuals who have committed sexual offenses, from living within specific proximities to schools, parks and other areas where children congregate.[127] These ordinances are aimed at prohibiting offenders from residing within particular areas and inevitably within particular cities.[128] Residency restrictions range anywhere from 100 feet to 2,500 feet from any designated area in which minors congregate and apply to the individual regardless of the prior crime or offending history.[129] Therefore, someone whose crime did not include children-as-victims and who has no history of interest in or attraction to children is still subjected to ordinances preventing him from living within a specified distance from where children may be.[130] Residency restrictions that banish "undesirable individuals" from the community are premised on the fear and belief that such individuals would, without a doubt, reoffend if not for such residential bans.[131]

Judicial decisions found these laws constitutional.[132] In *Doe v. Miller,* the Eighth Circuit upheld an Iowa Law, prohibiting any person convicted of certain sex offenses involving minors from residing within 2000 feet of a school or registered child care facility.[133]

There can be no doubt of a legislature's rationality in believing that "[s]ex offenders are a serious threat in this Nation," and that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."[134] "The only question remaining is whether, in view of a rationally perceived risk, the chosen residency restriction rationally advances the State's interest in protecting children."[135]

The impact of judicial decisions that upheld these laws in the courts was compounded by the media's attention to concerns of offenders residing near children in community settings. By way of example, a July 2005 episode of the *O'Reilly Factor*

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[126] Singleton, *supra* note 4, at 609-10.

[127] Cobb v. State, 437 So.2d 1218, 1220 (Miss. 1983) (upholding a probation condition requiring the defendant to "stay out of Stone County").

[128] Steven Brown et al., *What People Think About the Management of Sex Offenders in the Community,* 47 HOWARD J. 3 (July 2008), available at http://onlinelibrary.wiley.com/doi/10.1111/ j.1468-2311.2008.00519.x/full (study finding that the public does not necessarily agree with punitive conditions but is insecure in the effectiveness of community containment and concerned about the reality of reintegration).

[129] ALA. CODE § 15-20A-11(a) (2011) (enlarging the state's residency restriction zone from 1000 feet to 2000 feet); CAL. PENAL CODE § 3003.5 (2011) (increasing the state's residency restriction zone to 2000 feet under Jessica's Law); OKLA. ST. ANN. tit. 57 § 590A (West 2011) (2000 feet).

[130] Jim Nichols, *Tossing the Book at Sex Offenders; Officials Target Hundreds Living Too Close to Schools,* THE PLAIN DEALER, Jul. 31, 2005, at B1.

[131] Karen Sloan, *Towns Fear an Influx of Offenders,* OMAHA WORLD-HERALD, Oct. 4, 2005, at 1A; *see also Des Moines Zones out Molesters,* OMAHA WORLD-HERALD, (Oct. 13, 2005) at 2B.

[132] *Doe v. Miller,* 298 F. Supp. 2d 844, 870 (S.D. Iowa 2004), *rev 'd*, 405 F.3d 700 (8th Cir. 2005), *cert. denied*, 546 U.S. 1034 (2005).

[133] *Id.*

[134] Doe v. Miller, 405 F.3d 700, 715 (8th Cir. 2005) (quoting Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2002) (alterations in *Conn. Dep't of Pub. Safety*).

[135] *Id.* The Eighth Circuit reversed the trial court decision, finding the statute to be constitutional, concluding that the Constitution did not prevent Iowa from regulating the residency of sex offenders in order to protect the health and safety of its citizens. *Id.*

named Alabama as a state that did not care about sex offenders.[136] One week after the episode, Governor Bob Riley convened a special session of the legislature to debate reform to Alabama's sex offender laws.[137] Alabama promptly changed its current laws and, among other things, included residency restrictions for convicted sex offenders. [138]

In the next section, we will discuss our final example of legislation enacted as a result of moral panic. We have focused on how the media influenced states' reactions to offenders entering into the community and will now consider how high profile media cases resulted in keeping them out of communities altogether through the enactment of sex offender civil commitment.

E. The Kansas Experience

While the country was focused on monitoring offenders in the community, Kansas was litigating the constitutionality of their sex offender civil commitment law. In 1994, Kansas enacted its Sexually Violent Predator Act (SVPA) that practically mirrored the state of Washington's sex offender containment act.[139] Kansas wanted to commit an existing "small but extremely dangerous group of sexually violent predators…who do not have a mental disease or defect that renders them appropriate for involuntary treatment pursuant to the [general involuntary civil commitment statute]."[140] The SVPA established a separate commitment process for "the long-term care and treatment of the sexually violent predator," statutorily defined as "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."[141] Kansas clearly set forth the definition of a mental abnormality defining it as a "congenital or acquired condition affecting the emotional or *volitional* capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others."[142]

The pivotal case that solidified the constitutionality of the civil commitment of sexual offenders was *Kansas v. Hendricks*.[143] Leroy Hendricks was serving a term of 5-20 years in state prison after being convicted of taking "indecent liberties" with two teenage boys when he clearly stated that he would continue to offend if released to the community.[144] A *Newsweek* article, *Too Dangerous to Set Free,*[145] discussing Hendricks'

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[136] *The O'Reilly Factor: Factor Investigation: Which States are Soft on Child Sex Offenders*? (Fox News television broadcast Jul. 11, 2005).

[137] *Recent Legislation*, 119 HARV. L. REV. 939, 942 (2006).

[138] *Id.* at 941 (Act of July 29, 2005, Ala. Act No. 2005-301 (to be codified in scattered sections of ALA. CODE chs. 13A, 14, and 15) [Sex Offender Act], available at http://arcsos.state.al.us/PAC/SOSACPDF.001/A0003661.PDF. The bill passed unanimously in both houses); *See* Op-Ed., *Safer Children, but How Safe?*, BIRMINGHAM NEWS, Aug. 1, 2005, at 4A; John Davis & Jannell McGrew, *Alabama Lawmakers Line Up Crusades for Next Session* (Online Extra), MONTGOMERY ADVERTISER, Sep. 6, 2005.

[139] KAN. STAT. ANN. § 59-29a01 (2001) (requiring involuntary civil confinement for sexually violent predators with mental abnormalities or personality disorders who are likely to reoffend if untreated).

[140] Kansas v. Hendricks, 521 U.S. 346, 351 (1997).

[141] KAN. STAT. ANN. § 59-29a02(a).

[142] *Id.* § 59-29a02(b) (emphasis added).

[143] *Hendricks*, 521 U.S. at 395-97.

[144] *In re* Care & Treatment of Hendricks, 912 P.2d 129, 130-31 (Kan. 1996), *rev'd*, 521 U.S. 346 (1997); *See also* Jim McLean, *Stovall Preparing to Defend State's Sexual Predator Law for Second Time Before Supreme Court*, TOPEKA CAPITAL-JOURNAL, Oct. 15, 2001, http://cjonline.com/stories/101501/leg_stovall.shtml (discussing the defense of Kansas v. Crane, 534 U.S. 407, 411-13 (2002), [the case that determined whether or not commitment required a complete lack of control], Attorney General Carla Stovall comments on what the effect would be if the

case – then pending in the Supreme Court – along with other terrifying cases of sexual abuse, and made reference to the Megan Kanka murder, but also noted the moral panic generated from the evening news broadcast: "According to the Association for the Treatment of Sexual Abusers [ATSA], the re-offense rate for 'untreated sex offenders who primarily target children' ranges in various studies from 10 percent to 40 percent, not the '80 percent to 90 percent' that many laypeople assume by extrapolating from the 6 o'clock news."[146]

Yet the headlines in other news articles read quite different. An Associated Press article issued an eye-catching title: *Study: Children Were Targets of Most Sex Offenders*.[147] The article inundated its reader with large numbers and various statistics intertwined with quotes from victim advocates groups.[148] One such quote states that: "This high rate of child victims is behind the heightened concern and the growing number of states passing laws that provide for notifying neighborhoods when sexual predators move in [and] [t]he majority of sex crimes are committed against children because they are more helpless, easier targets and easier to intimidate into silence."[149] Embedded within this article was this information: "A third of child molesters had attacked their own child or stepchild. Another half of the molesters were a friend, acquaintance or more-distant relative of their victim. Only one in seven molested a child who was a stranger."[150]

Despite statistics and competing factual information, society continued to respond emotionally to these types of crimes,[151] responses that led to the endorsement of policies that mandated locking sex offenders away indefinitely.[152] In 1997, Associated Press newspaper and broadcast editors voted the debate over the Kansas sexual predator law as the year's top news story.[153] *Sex Predator Biggest Kansas Story*, an 1997 article from the *Topeka Capital-Journal,* ends its report with a quote from John Garlinger – a spokesman for the Kansas Department of Social and Rehabilitation Services, which oversees the sexual predator program – who questioned the selection of the sexual predator decision as the top story of the year: "How you can decide a bunch of perverts are the top story?"[154]

Kansas State Supreme court decision was adopted: "If the Kansas Supreme Court opinion is adopted, the sexual predator program would be obliterated…Hardly anybody, maybe nobody would be committed.").

[145] Jerry Adler, *Too Dangerous to Set Free?*, NEWSWEEK, Dec. 8, 1996, http://www.thedailybeast.com/newsweek/1996/12/08/too-dangerous-to-set-free.html.

[146] *Id.*

[147] Michael J. Sniffen, *Study: Children Were Targets of Most Sex Offenders*, ASSOCIATED PRESS, March 3, 1996.

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Remembering Megan*, N.Y. TIMES, Nov 5, 1994 ("Children are more apt to be sexually abused in the home than outside it. Even so, the threat posed by an unknown predator terrifies American families the most."), *available at* http://www.nytimes.com/1994/11/05/ opinion/remembering-megan.html.

[152] Joan Biskupic, *Court Gives States Leeway in Confining Sex Offenders*, WASH. POST, June 24, 1997, § A, at 1 ("At a time when the nation is focused on preventing convicted child molesters from striking again – through longer prison sentences and community notification laws – yesterday's ruling gives legislators significant new leeway to extend the confinement of such convicts."); *See also* Kevin M. Carlsmith et al., *The Function of Punishment in the Civil Commitment of Sexually Violent Predators*, 25 BEHAV. SCI. & LAW 437 (2007) (finding that when the initial criminal sentence was lenient, respondents strongly supported civil commitment without giving any regard to future risk of repeat or dangerous behavior).

[153] Traci Carl, *Sex Predator Biggest Kansas Story*, THE TOPEKA CAPITAL-JOURNAL, Dec. 26, 1997, http://cjonline.com/stories/122697/new_sexpred.html.

[154] *Id.*; *See, Downtown 20/20: No Escape* (ABC television broadcast, June 18, 2001) (Don Dahler of ABC News states, "It's a no-brainer. Convicted sex offenders are bad people, the lowest of the low, perverts. That is sure what a lot of people think here in Corpus Christi, Texas.").

The United States Supreme Court subsequently accepted review in the case of *Kansas v. Hendricks* and found the Kansas statute to be constitutional,[155] thus solidifying the existence of current sex offender civil commitment law in the United States. An article published in the *New York Times* on December 11, 1996, noted that: "It was evident from the arguments that while the Justices have considerable sympathy for the state's goal, they are troubled by the law's open-ended rationale."[156] Six months later, a brief commentary published in the "Health" section of the Times, strongly criticized the Court's ruling.[157] The author echoed the public sentiment and noted that, "[t]he Court's instinct to want to keep this defendant incarcerated is understandable. It would be hard to imagine a less sympathetic defendant than the person who brought the legal challenge, Leroy Hendricks. He is a 62-year-old pedophile who has said only death would guarantee a change in his behavior."[158] But the article raised the concern of the implications of the ruling: "By upholding Kansas' approach to civil commitment, the Supreme Court has raised the troubling prospect of states imposing indefinite confinement in a mental institution based on a loose definition of 'abnormality' and an unreliable prediction that a person is 'likely' to commit dangerous acts in the future."[159]

Post-*Hendricks*, some media outlets urged states to quickly adopt similar legislation. A Florida newspaper urged the "Florida Legislature to act swiftly to enact a law keeping sexual predators confined indefinitely" and "not delay in offering better protection to all Floridians, and especially children, from these violent criminals."[160] By 1997, seventeen states had enacted some form of sex offender civil commitment legislation that was now constitutionally protected under *Hendricks*.[161] Currently, 20 states in total have enacted some form of a sexual violent predator commitment statute.[162]

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[155] Kansas v. Hendricks, 521 U.S. 346, 350 (1997).

[156] Linda Greenhouse, *Justices Sound Sympathetic but Troubled on Law to Confine Sex Offenders*, N.Y. TIMES, Dec. 11, 1996, http://www.nytimes.com/1996/12/11/us/justices-sound-sympathetic-but-troubled-on-law-to-confine-sex-offenders.html.

[157] *Wrong on Sex Offenders*, N.Y. TIMES, June 25, 2007, *available at* http://www.nytimes.com/1997/06/25/opinion/wrong-on-sex-offenders.html.

[158] *Id.*

[159] *Id.*; *see also* Biskupic, *supra* note 152 ("This law is going to spread like wildfire," said Lynn S. Branham, an Illinois attorney and professor who specializes in sentencing law. "This notion of 'mental abnormality' has the potential to dramatically expand the types of persons who can be confined.").

[160] Editorial, *State Should Act Now on Court Ok to Keep Sexual Predators Confined*, SUNSENTINEL.COM, June 25, 1997 (noting that "[t]he U.S. Supreme Court decision upholding a Kansas law clear[ed] a legal path for Florida to better protect its residents from such violent and repeated sex predators as Howard Steven Ault, charged with killing two young sisters in Broward County").

[161] Although constitutional challenges typically involving due process, ex-post facto, and double jeopardy clauses were raised at the outset of the various state legislation, the likelihood of success on the merits was slim given the United States Supreme Court holdings in Kansas v. Hendricks, 521 U.S. 346, 356-58 (1997) and Kansas v. Crane, 534 U.S. 407, 407 (2002).

[162] "Twenty states (Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin) and the District of Columbia have enacted laws permitting the civil commitment of sexual offenders. In addition, the Adam Walsh Child Protection and Safety Act of 2006 authorized the federal government to institute a civil commitment program for federal sex offenders." *Civil Commitment of Sexually Violent Predators,* Aug. 17, 2010, http://www.atsa.com/civil-commitment-sexually-violent-predators; *see* 42 U.S.C. § 16971 (2006).

F. The Adam Walsh case

Probably one of the most significant crimes in recent history occurred on July 27, 1981, when 6-year-old Adam Walsh went missing during a shopping trip with his mother.[163] The child's ensuing abduction and murder began a twenty-plus year crusade that would inevitably alter media and legislative history.[164] Adam's parents established the Adam Walsh Outreach Center for Missing Children on August 19, 1981 – less than one month after the abduction.[165] Two months later, the couple testified before Congress on behalf of the Missing Children Act and the Missing Children's Assistance Act.[166] As a result of their efforts, both of these bills were passed.[167] In 1993, NBC aired a television film covering the story of the kidnapping and the efforts to pass national child protection laws.[168] On the day that the movie was to be aired on NBC, the *New York Times* ran an article prefacing the movie's content and message[169]:

> The first half of "Adam" focuses on the panic and growing despair of the parents as they discover their helplessness in dealing with authorities outside their own police precinct. State and national agencies do not want the added burden of looking for missing kids. They want the problem kept at narrow local levels. Much of the film's fury is directed at the Justice Department and the F.B.I.[170]

In a continuing effort to enable the capture and prosecution of such criminals, Adam's father, John Walsh, guest-hosted the television show, *America's Most Wanted* in 1988.[171] This also served to increase the publicity surrounding Adam's tragic abduction

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[163] Dan Harris & Claire Pedersen, *Adam Walsh Murder: John and Reve Walsh Re-Live the Investigation*, ABC NEWS, Mar. 2, 2011, http://abcnews.go.com/US/adam-walsh-murder-john-reve-walsh-live-investigation/story?id=13037931#.UV2s7hzabms.

[164] Glenn Collins, *The Fears of Children: Is the World Scarier?*, N.Y. TIMES, May 19, 1988, http://www.nytimes.com/1988/05/19/garden/the-fears-of-children-is-the-world-scarier.html ("IN [sic] an era of homelessness, AIDS, drug abuse and ozone-layer depletion, at a time when preschoolers are taught about child abuse and kidnapping, parents and child-development experts are raising new concerns about children's fears."); Donna Leinwand & Emily Bazar, *Adam Walsh's Murder Had Impact Across USA*, USA TODAY, Dec. 17, 2008, at A3 ("Nearly three decades after Toole allegedly abducted Adam from a suburban Florida mall, the nation has a coordinated response to missing children that includes hotlines, the FBI's database, public broadcasting alerts and special federal law enforcement squads that can respond to the scene.").

[165] John Holland, *Adam Walsh Case is Closed After 27 Years*, L.A. TIMES, Dec. 17, 2008, http://articles.latimes.com/2008/dec/17/nation/na-adam17.

[166] *John Walsh Biographical Information*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/en_US/documents/PressKit_JohnWalsh.pdf (last visited Apr. 1, 2013).

[167] *Id.*

[168] The film aired on Oct. 10, 1983 on NBC and was reportedly seen by an audience of 38 million people. At the end of each broadcast of the film, a series of missing children's photographs and descriptions were displayed on the screen for viewers, and a number was given to call if a viewer had information about them. The 1985 photograph series was introduced by President Ronald Reagan in a pre-recorded message, "[M]aybe your eyes can help bring them home." *See* Associated Press, *Adam Again Draws Callers*, MILWAUKEE JOURNAL, April 30, 1985.

[169] John J. O'Connor, *TV: "Adam" Movie on Missing Boy*, N.Y. TIMES, Oct. 10, 1983, http://www.nytimes.com/1983/10/10/arts/tv-adam-movie-on-missing-boy.html ("According to a nonprofit organization called Find the Children, a Federal Government agency estimates that 1.8 million children will be reported missing this year. About 50,000 will never be seen by their families again.").

[170] *Id.*

[171] *John Walsh Biographical Information*, NATIONAL CENTER FOR MISSING AND EXPLOITED CHILDREN, http://www.missingkids.com/en_US/documents/PressKit_JohnWalsh.pdf (last visited Apr. 1, 2013).

and murder[172] and brought infamous crime and criminals to the living rooms of every American household.[173]

One of the main goals generated by the Walshes' efforts was the need to better track and monitor offenders on a federal level.[174] A convicted sex offender, interviewed by Fox News, agreed that community notification works: "If people know a sex offender is in their area, they should privately tell the felon his identification is known and he will be closely watched . . . . I think all of us have to be known to the public so that the community can keep its eye on us."[175] In 2005, a *USA Today* article posted images of Shasta Groene[176] and Jessica Lunsford[177] but reported the "surprisingly good news" that "[s]ex crimes against children have dropped dramatically in the last decade."[178] The article praised the legislative efforts thus far and suggested that the decrease in crimes could be attributed to online registries, improved screening for risk factors, and treatment of offenders.[179] It spoke of the pending bipartisan bill in Congress to strengthen Megan's Law and noted that states and communities were "not waiting for Congress to act" and implementing residency restrictions,[180] electronic monitoring[181] and longer prison sentences.[182]

In 2006, Congress enacted the Adam Walsh Child Protection and Safety Act (AWA), increasing the pool of individuals required to register as well as the length of time

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[172] *Adam Walsh Act Becomes Law*, AMERICA'S MOST WANTED, July 25, 2006, http://www.amw.com/features/feature_story_detail.cfm?id=1206 (last visited Apr. 1, 2013).

[173] Colleen Long, "*America's Most Wanted" is Still Going Strong*, HUFFINGTON POST, Apr. 8, 2012, http://www.huffingtonpost.com/2012/04/08/americas-most-wanted_n_1411512.html ("There are more than 600,000 monthly visits to the site, and at least 40 captures from online tips.").

[174] Wendy Koch, *Sex-Crimes Bill Poised to Pass; Offenders Would be Tracked in National Database*, USA TODAY, July 20, 2006, at A1 ("The bill aims to help police locate more than 100,000 such offenders who are registered but haven't updated their whereabouts. About 563,000 sex offenders are registered nationwide.").

[175] *When Sex Offenders Do Their Time*, FOXNEWS.COM, Dec. 5, 2003, http://www.foxnews.com/story/0,2933,104890,00.html ("Jeff Goldenflame, who served five years in prison for molesting his 5-year-old daughter, was released from prison in 1991. He said Megan's Law, which requires sex offenders to register with local communities, works.").

[176] Shasta Groene was eight years old when she was kidnapped by a sexual predator. She was found alive six weeks after the kidnapping; her brother and mother were later discovered murdered by the kidnapper. *See* Nicholas K. Geranios, *Videotape Shows Girl, Suspected Abductor*, ASSOCIATED PRESS, July 5, 2005.

[177] Jessica Lunsford's body was found almost a month after she went missing from her Florida home. *See* Mark Memmott, *Girl's Death Raises Questions About Tracking of Sex Offenders; Some Experts Say to Focus on Most Likely Reoffenders*, USA TODAY, Mar. 25, 2005 at A4.

[178] Wendy Koch, *Despite High Profile Cases, Sex Crimes Against Kids Fall*, USA TODAY, Aug. 24, 2005, at A1.

[179] *Id.*

[180] *Id*. ("Binghamton, N.Y., banned moderate- and high-risk sex offenders from living or entering an area within a quarter-mile radius of any school, day care center, playground or park. In June, Miami Beach's Mayor David Dermer banned convicted child molesters from moving within 2,500 feet of such areas, effectively barring them from the city. In July, Brick Township, N.J., set a similar 2,500-foot perimeter for certain pedophiles. Under a new policy, Florida bans certain sex offenders from public hurricane shelters, many of which are in schools. It requires them to seek refuge in prison instead.").

[181] *Id.* ("After the deaths this year of Jessica Lunsford and 13-year-old Sarah Lunde, who was also allegedly molested and killed by a convicted rapist, Florida approved a bill requiring the worst offenders to wear satellite-tracking devices for the rest of their lives. In August alone, Alabama and New Jersey passed laws requiring extensive satellite tracking of high-risk sex offenders. At least three other states — Missouri, Ohio and Oklahoma — approved electronic monitoring this year, and North Dakota, Georgia and New York are considering similar measures.").

[182] *State Statutes Related to Jessica's Law*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Florida's sex-offender law (Jessica's Law) passed in 2006 more than doubles the mandatory sentence for sex crimes against children. Other states are also lengthening prison sentences for sex offenders.), *available at* http://www.leg.state.vt.us/WorkGroups/sexoffenders/ NCSLs_Jessicas_Law_Summary.pdf.

of registration.[183] Title I of the Act, Sex Offender Registration and Notification Act (SORNA) authorized a national registry aimed at creating a database to include information on all sex offenders across all 50 states and required all states to upload their online sex offender databases to the national database by 2009.[184] In order to expand the group of individuals subject to registration, Congress defined a sex offense as a "criminal offense that has an element involving a sexual act or sexual contact with another."[185] Through the expansion of qualifying crimes, this Act was the first to encompass juvenile offenders.[186] The Act mandates three tier levels corresponding to the degree of risk and correlates each to a specific duration of required registration, thus being the first time that Congress considers the specifics of the offense in this line of legislation.[187] Therefore, Tier One, which is the lowest risk, has the least amount of time required to register[188] with Tiers Two and Three following along accordingly. The tiers do not reflect individualized assessments of risk or current dangerousness but merely classify the severity of offenses. After Pennsylvania adopted the requirements of the AWA, a Fayette County Assistant District Attorney told reporters: "Hopefully, by making our laws tougher, we can spare other victims the pain of these kinds of crimes. I think this will bring a heightened awareness about these crimes that might not have otherwise required registration, and there will be increased penalties for people who otherwise prey on children."[189]

In 2007, the issue of retroactive application was resolved, and it was made clear that the AWA applied retroactively in order to be successful in developing a "comprehensive" system that would be effective in protecting the public by widening its

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[183] Adam Walsh Child Protection and Child Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as 42 U.S.C. § 16901 (2006)) (Under the leadership of Republican Congressman Mark Foley (Fl), the Adam Walsh Act was signed into law by President Bush in July 2006, nulling all prior federal registration provisions).

[184] *See* Emanuella Grinberg, *5 Years Later, States Struggle to Comply with Federal Sex Offender Law*, CNN, July 28, 2011, http://www.cnn.com/2011/CRIME/07/28/sex.offender.adam.walsh.act/ index.html?iref=allsearch (Dru's Law, included within the wide-ranging Adam Walsh Child Protection and Safety Act, establishes a nationwide online sex offender database. The database, named "the Dru Sjodin National Sex Offender Public Website," allows the public to search for sex offender information by zip code or geographic radius. Dru's Law is named for Dru Sjodin who abducted in North Dakota, sexually assaulted, and murdered by a repeat violent sex offender.)

[185] Adam Walsh Act, 42 U.S.C. § 16911(5)(A)(i). *See also No Easy Answers: Sex Offender Laws in the U.S.*, HUMAN RIGHTS WATCH, Sept. 12, 2007, http://www.hrw.org/reports/2007/09/11/no-easy-answers-0 (At least 5 states require registration for adult prostitution-related offenses; 13 states require registration for public urination; 29 states require registration for consensual sex between teenagers; and 32 states require registration for exposing genitals in public); Rainer v. Georgia, 690 S.E.2d 827 (2010) (Supreme Court of Georgia upheld a provision of the state's sex offender registry law that requires the registration of certain persons not convicted of sex crimes).

[186] *In re* T.T., 907 A.2d 416, 418-19 (2006) (whether minor's conduct must have a sexual motivation element for application of the Megan's Law registration requirements; remanded to trial court); Doe v. Weld, 954 F. Supp. 425, 437 (D. Mass. 1997) (Massachusetts juvenile statute constitutional); State v. Heiskill, 916 P.2d 366, 367 (Wash. App. 1996) (juvenile registration statute constitutional); *In re* Welfare of C.D.N., 559 N.W.2d 431 (Minn App. 1997), *cert. denied* (1997).

[187] 42 U.S.C. § 16911(2)-(4) (2010).

[188] *Id.* § 16915(a)(1)-(3) (Tier I offenders must register for 15 years, Tier II for 25 years, and Tier III for life).

[189] Jennifer Harr, *Adam Walsh Act Takes Effect Today*, HERALD-STANDARD, Dec. 20, 2012, *available at* http://www.heraldstandard.com/news/courts/adam-walsh-act-takes-effect-today/article_a7d29629-76d6-58dc-ab5b-9cec191d18c5.html. *But see* Phil Ray, *Pennsylvania Prepares for Adam Walsh Act*, ALTOONA MIRROR, Sept. 9, 2012, ("The federal Adam Walsh Act was called a potential 'nightmare' for Pennsylvania's adult parole and probation departments, as these are the agencies that have to register and maintain a watch over [sex offenders]."), *available at* http://www.altoonamirror.com/page/content.detail/id/564065/Pennsylvania-prepares-for-Adam-Walsh-Act.html?nav=742.

scope and including all offenders regardless of when they were convicted.[190] Linda Baldwin, who directs the U.S. Department of Justice office that determines whether states are compliant with the Walsh Act, told *The Washington Examiner*: "We've seen evidence that sex offenders move from one jurisdiction to another because they may not be as closely monitored. [The Adam Walsh Act] was designed to eliminate gaps and loopholes among states' sex offender registration regulations. Gaps and loopholes allow registered sex offenders to fall off the radar."[191]

"The passage of SORNA redefined the landscape."[192] Never before had statutes been enacted that mandated such a degree of sex offender monitoring. Post-SORNA, states have increased their requirements for community notification – including the controversial subset of juveniles[193] -- and retroactive application to those individuals who were otherwise living a law-abiding life in the community.[194] States have struggled to comply with the federal mandates and are overwhelmed with the difficulty of effectively monitoring a huge pool of registrants – often increased by the Adam Walsh Act requirements – while trying to appease the public by making a showing of being "tough on sexual predators."[195]

G. Conclusion

It seems evident that the media has had a crucial impact on the enactment of sex offender legislation. The emphasis on the sex offender epidemic is reflected and reified in fear-driven quotes by politicians and concerned community members. Although the media reported on some of the more problematic issues that arose in newer legislation and on some discussion on the lack of information and factual basis to support the new laws, those reports were lost amongst the pleas for punishment to lead, ostensibly, to safer communities. In the next section, we will discuss the concept of "media criminology" as it relates to sex offenders as the most reviled individuals and how these dynamics impact the judiciary.

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[190] Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8,894 (Feb. 28, 2007) (codified at 28 C.F.R. pt. 72); *see generally* Wayne Logan, *The Adam Walsh Act and the Failed Promise of Administrative Federalism*, 78 GEO. WASH. L. REV. 993, 998-99 (2010).

[191] Freeman Klopott, *Region Resist Fed Sex Offender Rules*, THE WASHINGTON EXAMINER, June 12, 2011, *available at* http://washingtonexaminer.com/article/114982.

[192] Carpenter & Beverlin, *supra* note 2, at 1078.

[193] Associated Press, *Dealing with Child-on-Child Sex Abuse Not One Size Fits All*, USA TODAY (Jan. 7, 2013) ("That public policy includes a federal law, the Adam Walsh Act, with a requirement that states include certain juvenile offenders as young as 14 on their sex-offender registries. Many professionals who deal with young offenders object to the requirement, saying it can wreak lifelong harm on adolescents who might otherwise get back on the track toward law-abiding, productive lives."); Grinberg, *supra* note 184 ("It's always been a difficult decision for the Legislature, the need to register juveniles for public safety versus the idea of confidentiality to rehabilitate juveniles."), *available at* http://usatoday30.usatoday.com/news/nation/story/2012-01-07/child-sex-abuse/52431616/1.

[194] Grinberg, *supra* note 184 (Roy Martin was classified a sexually oriented offender in 1997 which meant he had to register once a year for 10 years after his release. In November 2007 he was reclassified under Ohio's SB 10 as a Tier III offender (in response to Ohio's adoption of the federal mandates) and for the rest of his life, he would have to check in every 90 days with law enforcement to confirm his home address, employer, school address and Internet identifiers and vehicle make. Martin hanged himself in his garage after learning he would be reclassified under Ohio's SB 10.).

[195] *See supra* notes 151-59; Anthony Campisi, *N.J. May Join Wave of States Getting Tougher on Child Sex Criminals,* NORTH JERSEY.COM (Oct. 11, 2012), *available at* http://www.northjersey.com/news/crime_courts/crime_courts_news/NJ_may_join_wave_of_states_getting_tougher_on_child_sex_criminals.html?page=all.

II. THE IMPACT OF THE MEDIA

The media-driven panic over sex offenders has directly influenced judicial decisions – both at the trial and appellate levels – in this area of the law, especially in jurisdictions with elected judges.

In this Part, we will discuss (1) the status of sex offenders as the most despised individuals in the United States, (2) the role of "media criminology" in the way that we view and characterize this cohort of the population, and (3) the susceptibility of the judiciary to public sentiment, both in other aspects of the criminal and civil law, and in this specific area.

A. The Most Despised Citizens

Sex offenders[196] have supplanted insanity acquittees as the most despised segment of the American population.[197] Regularly reviled as "monsters" by district attorneys in jury summations,[198] by judges at sentencings,[199] by elected representatives at legislative hearings,[200] and by the media,[201] the demonization of this population has helped create a "moral panic"[202] that has driven the passage of legislation[203] – much of which has

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[196] On the imprecision and overbreadth of this category, ranging from the stranger pedophiliac rapist to the teenager consensually sending "sexting" pictures of herself to her boyfriend, see Lucy Berliner, *Sex Offenders: Policy and Practice*, 92 NW. U. L. REV. 1203, 1208 (1998) ("Sex offenders do not share a common set of psychological and behavioral characteristics."), or the driver who posts an allegedly-obscene bumper sticker, *see, e.g.*, ALA. CODE § 13A-12-131 (1987) (including displaying such a bumper sticker as a sex offense). *See generally*, Cucolo & Perlin, *supra* note 28, at 21 (current system "bundles statutory rape cases that deal with sexual interactions between teenagers -- interactions that would otherwise be consensual but for the age of one of the partners -- with cases of individuals who have committed violent pedophilic offenses").

[197] Michael L. Perlin, *There's No Success like Failure/and Failure's No Success at All : Exposing the Pretextuality of* Kansas v. Hendricks, 92 NW. U. L. REV. 1247, 1248 (1998) ("If we are no longer focusing on insanity defendants as the most "despised" group in society, it is more likely because there is a new universe of 'monsters' replacing them in our demonology: sex offenders, known variously, as mentally disordered sex offenders, or sexually violent predators, the ultimate 'other.'"); s*ee* Geraghty, *supra* note 1, at 514 ("Sex offenders are arguably the most despised members of our society, and states and municipalities are in a race to the bottom to see who can most thoroughly ostracize and condemn them."); Eric Buske, *Sex Offenders Are Different: Extending* Graham *to Categorically Protect the Less Culpable*, 89 WASH. U. L. REV. 417, 433-434 (2011).

[198] We have yet to find an appellate reversal of a case in which this inflammatory language was used. See, e.g., State v. Henry, 103 So. 3d 424 (La. Ct. App. 2012); Comer v. Schriro, 463 F.3d 934, 960 (9th Cir. 2006), *cert. denied*, 550 U.S. 966 (2007); Jackson v. Ludwick, No. 2:09–CV–11928, 2011 WL 4374281 (E.D. Mich. 2011); People v. Bonner, No. 10–09–00120–CR, 2010 WL 3503858, (Tex. App. 2010); Kellogg v. Skon, 176 F.3d 447, 452 (8th Cir. 1999).

[199] *See, e.g.*, People v. Ball, No. 09-001299-FC, 2011 WL 1086557, at *3 (Mich. Ct. App. 2011).

[200] *See, e.g.*, Timothy Wind, *The Quandary of Megan's Law: When the Child Sex Offender Is a Child*, 37 J. MARSHALL L. REV. 73, 92-93 (2003) (quoting Rep. Mark Green); Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 339 (2001) (quoting Senator Hutchison).

[201] *See* Rachel Rodriguez, *The Sex Offender Under the Bridge: Has Megan's Law Run Amok?* 62 RUTGERS L. REV. 1023, 1031-32 (2010), *quoting* John G. Winder, *The Monster Next Door: The Plague of American Sex Offenders,* CYPRESS TIMES (Nov. 20, 2009, 1:49 PM) ("'There's no such thing as monsters.' We tell our kids that. The truth is that monsters are real. . . . These monsters are called 'Sex Offenders…'"), *available at* http://www.thecypresstimes.com/article/ News/Your_News/THE_MONSTER_NEXT_DOOR_THE_PLAGUE_OF_AMERICAN_SEX_OFFENDERS/25925.

[202] *See, e.g.*, Filler, *supra* note 200, at 317-18; Eric Fink, *Liars and Terrorists and Judges, Oh My: Moral Panic and the Symbolic Politics of Appellate Review in Asylum Cases*, 83 NOTRE DAME L. REV. 2019, 2038-39 (2008); Eamonn Carrabine, *Media, Crime and Culture: Simulating Identities, Constructing Realities*, in THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES (Bruce Arrigo & Heather Bersot, eds.) (2013) (in press) (INTERNATIONAL CRIME). *See generally*, STANLEY COHEN, FOLK DEVILS AND MORAL PANICS 1-2 (3d ed. 2002).

[203] On "legislative panic" in this context, see Wayne Logan, *Megan's Laws as a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 371 (2011); Denno, *supra* note 22, at 1320.

been found by valid and reliable research to be counter-productive and engendering a *more* dangerous set of conditions – and judicial decisions, at the trial, intermediate appellate and Supreme Court levels,[204] all reflecting the "anger and hostility the public feels" about this population.[205] The public is thus devoted to a "predator icon" that drives all our law and policy in this area,[206] a devotion that is augmented by the media's "obsession" on criminal justice issues.[207] The term "sexually violent predator" in itself is an emotionally charged one that conjures up many misleading or inaccurate images.[208] By way of example, correctional officers rate sexual offenders as more "dangerous, harmful, violent, tense, bad, unpredictable, mysterious, unchangeable, aggressive, weak, irrational, afraid, immoral and mentally ill" than other prisoners.[209]

B. "Media Criminology"

1. Introduction

Writing in a death penalty context, Craig Haney defines "media criminology" in this manner:

> Media criminology is a commercial product rather than a body of what is ordinarily considered "real" knowledge. Obviously, it is not based on a collection of systematically deduced theoretical propositions or carefully arrived at empirical truths about the realities of crime and punishment. Its substantive lessons are intended to generate audience share rather than to convey accurate information or provide a valid framework for understanding the nature of crime. [210]

The reporting of crime news has become a "morality play."[211] Emerging from the roots of 19th century views on crime and punishment,[212] it "consistently dehumanizes and demonizes perpetrators and effectively exoticizes their criminality."[213] This reinforcing combination of demonization and sensationalization creates an environment in which the "common wisdom" about sex offenders is distorted through a series of prisms that we will discuss in the remainder of this section: the prism of media rhetoric, the prism of public pressure, and the prism of heuristic decision-making.[214] We will then consider the extent

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[204] On "judicial panic" in the context of same-sex marriage cases, see John Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1146 (1999).

[205] Meghan Gilligan, *It's Not Popular But It Sure Is Right: The (In)Admissibility of Statements Made Pursuant to Sexual Offender Treatment Programs,* 62 SYRACUSE L. REV. 255, 271 (2012).

[206] *See, e.g.*, Ray Surette, *Predator Criminals as Media Icons,* in MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME 131, 140, 147 (Gregg Barak ed. 1995); *see id*. at 132 (discussing how the media has raised the specter of the predator criminal to that of an "ever-present image"); *see also*, SURETTE, *supra* note 15, at 45 (discussing how the media paints a society composed of "predator criminals, violent crime fighters and helpless victims").

[207] *See* Craig Haney & Susan Greene, *Capital Constructions: Newspaper Reporting in Death Penalty Cases*, 4 ANALYSES SOC. ISSUES & PUB. POL'Y 129, 129 (2004).

[208] Cucolo & Perlin, *supra* note 28, at 5-7.

[209] J.R. Weekes et al., *Correctional Officers: How Do They Perceive Sex Offenders?* 39 INT'L J. OFFENDER THERAPY & COMPARATIVE CRIMINOLOGY 55 (1995), as quoted in Kurt M. Bumby & Marc C. Maddox, *Judges' Knowledge About Sexual Offenders, Difficulties Presiding Over Sexual Offense Cases, and Opinions on Sentencing, Treatment, and Legislation,* 11 SEXUAL ABUSE: J. RES. & TREATMENT 305, 306 (1999).

[210] Craig Haney, *Media Criminology and the Death Penalty,* 58 DEPAUL L. REV. 689, 692 (2009).

[211] STUART HALL ET AL, POLICING THE CRISIS: MUGGING, THE STATE , AND LAW AND ORDER 66 (1980 reprint).

[212] Mark Lawrence McPhail, Rachel Lyon & David Harris, *Digital Divisions: Racial (In)justice and the Limits of Social informatics in* The State of Georgia vs. Troy Anthony Davis, 39 N. KY. L. REV. 137, 149 (2012).

[213] Haney, *supra* note 210, at 729.

[214] *See infra* text accompanying notes 248-81.

to which the available research has, in any way, penetrated this miasma of distorted thought and action, and then consider the impact that the bad laws – there is no other way to couch it – have had on individuals and society.

2. Media Rhetoric

The cliché "if it bleeds, it leads" has become the mantra for print journalism's attitude towards crime of all sort,[215] and "encapsulates the media's unrelenting obsession with sensational crimes."[216] It is not the actuality of crime, but its "symbolic display" that has captured the nation.[217] Between 1990 and 1993, crime leapt from the fifth to the first most covered topic on the national evening news.[218] It is the most popular news category.[219] Popular law and order images are attributable largely to the influences of the mass media.[220] Media and the law most regularly intersect at the point of reporting of crime.[221] The resulting over-reporting of crime itself may cause the populace to believe crime runs rampant,[222] resulting in calls for "more punitive responses to crime,"[223] notwithstanding the reality that crime rates have declined.[224] The crimes least likely to occur in real life are the ones most likely to be emphasized by the media.[225]

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[215] *See, e.g.*, RICHARD L. FOX ET AL., TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY 6-7 (2d ed. 2007).

[216] Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 717, 735 (2009); Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness,* 48 WM. & MARY L. REV. 397 (2006); *see also*, Robert Paul Doyle & Craig Haney, Proposition 83, Framing and Public Attitudes Toward Sex Offenders: An Application of Heuristic Models of Social Judgment (Aug. 10, 2009) (working paper), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444688, at 3 ("In modern times, the focus on criminal justice borders on an obsession.").

[217] Hayward, *supra* note 14, at 1.

[218] Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 5 J. GENDER RACE & JUST. 281, 287 (2012).

[219] JAMES T. HAMILTON: ALL THE NEWS THAT'S FIT TO SELL: HOW THE MARKET TRANSFORMS INFORMATION INTO NEWS 82 (2004).

[220] THEODORE SASSON, CRIME TALK: HOW CITIZENS CONSTRUCT A SOCIAL PROBLEM 126 (1995), *citing* ROBERT ELIAS, VICTIMS STILL (1993).

[221] *See, e.g.*, Samuel Gross, *David Baldus and the Legacy of* McCleskey v. Kemp, 97 IOWA L. REV. 1905, 1922 (2012) (citing statistics).

[222] *See* George A. Weiss, *Prosecutorial Accountability after* Connick v. Thompson, 60 DRAKE L. REV. 199, 230 (2011), *discussing* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 6 (2007). Attentiveness to television correlates strongly with fear of crime. SASSON, *supra* note 220, at 3 (citing George Gerbner et al., *The "Mainstreaming" of America: Violence Profile No. 11*, 30 J. COMM. 10 (1980)); *see generally*, Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL'Y 37 (1997).

[223] Dowler, *supra* note 12, at 111.

[224] Catherine Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 BUFF. L. REV. 1, 37 (2010); Beale, *supra* note 216, at 409. "The trends in crime news have been going up as actual crime has declined." W. Lance Bennet, *The Twilight of Mass Media News: Markets, citizenship, Technology, and the Future of Journalism*, in Freeing the Presses: The First Amendment in Action 111, 118 (Timothy Cook ed. 2005), *quoting* Richard Morin, *An Airwave of Crime: While TV Coverage of Murders Has Soared -- Feeding Public Fears – Crime Is Actually Down,* WASH. POST (national weekly edition), (Aug. 18, 1997), at 34. This may, to some significant measure, be because people can "experience crime and criminal justice via the media and come away *with the sensation of actual experience.*" Ray Surette & Rebecca Gardiner-Bess, *Media Entertainment and Crime: Prospects and Concerns*, in INTERNATIONAL CRIME, *supra* note 202(emphasis added).

[225] SURETTE, *supra* note 15, at 34.

Crime reporting is not only superficial, it is also prosecution-biased.[226] By way of example, Michael Tonry places the inspiration for much of the sexual predator legislation on the "national media, especially television, [that] permeate nearly every pore of American life in vivid, repetitive, often hysterical colors, and [on] conservative American politicians [who] have for nearly two decades been playing the crime card and exacerbating public fears and then proposing or enacting repressive legislation in order to allay them."[227] Crime reporting is, also, factually, often simply wrong. A study of crime reporting in Australia, by way of example, concluded that reportage was frequently incorrect as to prevalence of violence, the individuals responsible for violence, and distribution of violence.[228]

This call for more punitive responses is especially so in the area of sex-related crimes with juvenile victims; "the media knows that stories of the most vulnerable amongst us caught up in narratives of sex and violence will capture viewers and readers."[229] The media coverage that focuses disproportionately on violent crime, distorts perceptions of actual criminal offending in multiple ways,[230] "portrays criminal defendants as less than human,"[231] and leads, as will be discussed subsequently in this part, to the enactment of laws that may actually *increase* sex offender recidivism rates.[232]

3. Public Pressure

The media's obsessive preoccupation with the fear of violence leads inexorably to public pressure on legislators to enact more repressive legislation and on judges to interpret such laws in ways that ensure lengthier periods of incarceration for offenders. The mass media "has played a pivotal role in framing the sex-offender crackdown as a domestic 'war.'"[233] Its portrayal of a "largely ineffective" criminal justice system heightens fear;[234] fictionalized portrayals of crime on television dramas may lead viewers

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[226] William R. Montross, Jr. & Patrick Mulvaney, *Virtue and Vice: Who Will Report on the Failings of the American Criminal Justice System?* 61 STAN. L. REV. 1429, 1447 (2009) (attributing this bias, in large part, to changes in the American publishing business); *see also* HERBERT J. GANS, DEMOCRACY AND THE NEWS 21- 55 (2003) (on how market forces distort the news), as discussed in Andrew E. Taslitz, *Fortune-Telling and the Fourth Amendment: Of Terrorism, Slippery Slopes, and Predicting the Future*, 58 RUTGERS L. REV. 195, 231 n. 218 (2005). On how and why the entertainment media's portrayal of crime and justice is "pro crime control," see SURETTE, *supra* note 15, at 39. On the impact of the media and election-year politics on the passage of crack sentencing provisions, see David Angeli, *A "Second Look" at Crack Cocaine Sentencing Policies: One More Try for Federal Equal Protection*, 34 AM. CRIM. L. REV. 1211, 1223-28 (1997).

[227] Michael Tonry, *Rethinking Unthinkable Punishment Policies in America,* 46 UCLA L. REV. 1751, 1786 (1999).

[228] Mark Israel & Rick Sarre, *Defining, Recording and Reporting Crime,* in CONSIDERING CRIME & JUSTICE: REALITIES & RESPONSES 1, 21 (Rick Sarre & John Tomaino eds., 2003, rev. ed.) (CONSIDERING CRIME).

[229] Brian P. LiVecchi, *"The Least of These:" A Constitutional Challenge to North Carolina's Sexual Offender Laws and N.C. Gen. Stat. §14-208.18*, 33 N.C. CENT. L. REV. 53, 54 (2010). On the presentation of sex crime stories on television news in general, see Kenneth Dowler, *Sex, Lies and Videotape: The Presentation of Sex Crime in Local Television News*, 34 J. CRIM. JUST. 383 (2006).

[230] Alice Ristroph, *Criminal Law in the Shadow of Violence,* 62 ALA. L. REV. 571, 572 n. 4 (2011), *discussing* Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 749 (2005).

[231] Lynne Henderson, *Revisiting Victim's Rights,* 1999 UTAH L. REV. 383, 395.

[232] *See, e.g.*, J.J. Prescott & J.E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 54 J. L. & ECON. 161 (2011).

[233] Corey Rayburn Yung, *The Ticking Sex-Offender Bomb*, 15 J. GENDER RACE & JUST. 81, 87 (2012).

[234] Dowler, *supra* note 12, at 120.

to believe that "all offenders are 'monsters' to be feared."[235] The media, in short, shapes and produces the reality of crime,[236] as it influences "factual perceptions of the world."[237]

This is all the more troubling because the complexity of crime-related problems is a topic "about which most citizens have little or no direct experience."[238] So, "the sensational headlines about a notorious sex offender will continue to instill fear in the American public regarding sexual abuse, [leaving] people with a sense of hopelessness and helplessness in addressing the problem."[239] They then turn to the tool of political pressure.[240] And politicians gladly oblige by "inflaming the rhetoric . . . building upon a social fear of sex offenders."[241] Politicians are, of course "experts at directing how the public thinks."[242] This is all further exacerbated by the way that society (1) accepts the stereotype that persons with *mental* illness are evil,[243] and (2) accepts the stereotype that all sex offenders are mentally ill,[244] a conflation sanctioned by the Supreme Court's decision in *Kansas v. Hendricks.*[245]

Much of the "crackdown" on sex offenders "is motivated by a general public hatred of them as a group, which is fueled in great part by sensational media coverage."[246] And this is not new. According to Professor Deborah Denno, earlier sex crime panics – from 1937 to 1940 and from 1949 to 1955 – were similarly fueled by "a vast change in media reports of sex crimes that were independent of the rise or fall of the actual number of reports of sex crimes."[247]

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[235] *Id*. On how fictional television shows focusing on forensic analysis have become icons "for anxieties within the legal system about truth finding and legal outcomes" and raise questions about "the future of the rule of law," see Christina Spiesel, *Trial by Ordeal: CSI and the Rule of Law*, in LAW, CULTURE AND VISUAL STUDIES (Anne Wagner & Richard Sherwin eds. 2013) (in press).

[236] Hayward, *supra* note 14, at 3.

[237] SURETTE, *supra* note 15, at 102.

[238] Haney, *supra* note 210, at 690.

[239] Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 308 (1997).

[240] *See, e.g.*, Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43 (1998); Eric S. Janus, *Closing Pandora's Box: Sexual Predators and the Politics of Sexual Violence*, 34 SETON HALL L. REV. 1233, 1233–50 (2004) (discussing how the effect of politics and public outcry fuels the expansion of sexually violent predator programs).

[241] Yung, *supra* note 233, at 86.

[242] Jeffrey Rachlinski, *Selling Heuristics*, 64 ALA. L. REV. 389, 413 (2012).

[243] *See* Michael L. Perlin, *"She Breaks Just Like a Little Girl": Neonaticide, The Insanity Defense, and the Irrelevance of "Ordinary Common Sense,"* 10 WM. & MARY J. WOMEN & L. 1, 9 (2003) [Perlin, *Neonaticide*] (discussing the stereotype of persons with mental illness as evil); Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 626 (1989-1990) [Perlin, *Myths*] ("[historically], mental illness was tied to notions of religion and traditionally seen as God's punishment for sin"); on the impact of media focus on the reinforcement of stereotypes in vivid cases involving individuals with mental illness, see Matthias Angermeyer & Beate Schulze, *Reinforcing Stereotypes: How the Focus on Forensic Cases in News Reporting May Influence Public Attitudes Towards the Mentally Ill,* 24 INT'L J. L. & PSYCHIATRY 469 (2001).

[244] *See, e.g.*, Fred Cohen, *The Limits of the Judicial Reform of Prisons: What Works; What Does Not*, 40 NO. 5 CRIM. L. BULL. ART. 1 (2004) ("it is erroneous to view all sex offenders as mentally ill or disordered and in need of treatment").

[245] 521 U.S. 346 (1997) (rejecting constitutional challenges to sexually violent predator commitment statute); *see* Perlin, *supra* note 197, at 1271.

[246] Rodriguez, *supra* note 201, at 1057.

[247] Denno, *supra* note 22, at 1344-45, 1346 n. 138 (discussing role of sensationalistic media reports in the 1930s and citing then-contemporaneous sources).

In short, media distortion feeds public panic and anxieties, and leads inexorably to the sort of legislation under consideration in this Article. In the next section, we will discuss *why* the public continues to consciously close its eyes to empirical realities and, rather, chooses to believe, as unquestionable truth, the incessant distortions of reality that are repeated in an endless loop by the media.

C. The Pernicious Power of Heuristics[248]

"Heuristics" is a cognitive psychology construct that refers to the implicit thinking devices that individuals use to simplify complex, information-processing tasks,[249] the use of which frequently leads to distorted and systematically erroneous decisions,[250] and causes decision-makers to "ignore or misuse items of rationally useful information."[251] One single vivid, memorable case overwhelms mountains of abstract, colorless data upon which rational choices should be made.[252] Empirical studies reveal jurors' susceptibility to the use of these devices.[253] Similarly, legal scholars are

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[248] This section is largely adapted from MICHAEL L. PERLIN, A PRESCRIPTION FOR DIGNITY: RETHINKING CRIMINAL JUSTICE AND MENTAL DISABILITY LAW, chapter 2 (2013) (in press), and from 1 MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 2.4 (3d ed. 2014) (in press).

[249] *See, e.g.*, Michael L. Perlin, *Psychodynamics and the Insanity Defense: "Ordinary Common Sense" and Heuristic Reasoning*, 69 NEB. L. REV. 3, 12-17 (1990) [Perlin, *Psychodynamics*]; *see generally* Michael Saks & Robert Kidd, *Human Information Processing and Adjudication: Trial by Heuristics,* 15 LAW & SOC'Y REV. 123 (1980-81); Robert Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices,* 59 S. CAL. L. REV. 329 (1986); Wim De Neys, Sofie Cromheeke & Magda Osman, *Biased but in Doubt: Conflict and Decision Confidence*, *available at* http://www.plosone.org/article/info:doi/10.1371/journal.pone.0015954 (2011).

[250] *See, e.g.*, Saks & Kidd, *supra* note 249; Michael L. Perlin, *Are Courts Competent to Decide Questions of Competency? Stripping the Facade From United States v. Charters*, 38 U. KAN. L. REV. 957 (1990) [Perlin, *Façade*] (arguing that courts' use of heuristic reasoning has led to irrational and erroneous decisions); Michael L. Perlin, Tarasoff *and the Dilemma of the Dangerous Patient: New Directions for the 1990s*, 16 LAW & PSYCHOL. REV. 29, 52–54 (1992) [Perlin, *Dilemma*]; John Carroll & John W. Payne, *The Psychology of the Parole Decision Process: A Joint Application of Attribution Theory and Information-Processing Psychology, in* COGNITION AND SOCIAL BEHAVIOR 13, 21 (John Carroll & John Payne eds., 1976); John Coverdale et al, *A Legal Opinion's Consequences for Stigmatisation of the Mentally Ill; Case Analysis*, 7 PSYCHIATRY, PSYCHOL. & L. 192 (2000) (arguing that the media's oversimplification of facts from a case note of a defendant with a history of mental illness has led to a general stigmatization of those with mental illness).

[251] *See* Perlin, *Façade*, *supra* note 250, at 966 n.46 (quoting Carroll & Payne, *supra* note 250, at 21); Perlin, *supra* note 36, at 1417 (same); Douglas Mossman, *Dangerousness Decisions: An Essay on the Mathematics of Clinical Violence Prediction and Involuntary Hospitalization,* 2 U. CHI. L. SCH. ROUNDTABLE 95, 100 n.32 (1995) (quoting Perlin, *supra* note 44, at 660). *See also*, Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 LAW & HUM. BEHAV. 39, 57 n.115 (1992) [Perlin, *Fatal Assumption*] (Heuristics are "simplifying cognitive devices that frequently lead to . . . systematically erroneous decisions through ignoring or misusing rationally useful information"). For a comprehensive overview, *see* Donald Bersoff, *Judicial Deference to Nonlegal Decisionmakers: Imposing Simplistic Solutions on Problems of Cognitive Complexity in Mental Disability Law,* 46 SMU L. REV. 329 (1992); *see also* Philip Gould & Patricia Murrell, *Therapeutic Jurisprudence and Cognitive Complexity: An Overview*, 29 FORDHAM URB. L.J. 2117 (2002).

[252] *See* Michael L. Perlin, "*His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?,* 42 AKRON L. REV. 885, 892 (2009). *See generally*, David Rosenhan, *Psychological Realities and Judicial Policy* 19 STAN. LAW. 10, 13 (1984). President Reagan's famous "welfare queen" anecdote is thus a textbook example of heuristic behavior. *See, e.g.,* Perlin, *Psychodynamics*, *supra* note 249 at 16 n.59, 20. On the failures of the vividness heuristic as a cognitive device, see Amitai Aviram, *The Placebo Effect of Law: Law's Role in Manipulating Perceptions,* 75 GEO. WASH. L. REV. 54, 73-74 (2006).

[253] *See, e.g.,* Jonathan Koehler & Daniel Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods,* 75 CORNELL L. REV. 247, 264-65 (1990); Perlin, *Psychodynamics*, *supra* note 249 at 39-53; Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions,* 24 U.C. DAVIS L. REV. 1013, 1050 (1991); Joel Lieberman & Daniel Krauss, *The Effects of Labeling, Expert Testimony, and Information Processing Mode on Juror Decisions in SVP Civil Commitment Trials,* 6 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 25 (2009); *see also* Caton Roberts & Stephen Golding, *The Social Construction of Criminal Responsibility and Insanity,* 15 LAW & HUM.

notoriously slow to understand the way that the use of these devices affects the way individuals think.[254] The use of heuristics "allows us to willfully blind ourselves to the 'gray areas' of human behavior,"[255] and predispose "people to beliefs that accord with, or are heavily influenced by, their prior experiences."[256]

Elsewhere, one of us has argued:

> [T]estimony [in mental disability law cases] is further warped by a heuristic bias. Expert witnesses--like the rest of us--succumb to the seductive allure of simplifying cognitive devices in their thinking and employ such heuristic gambits as the vividness effect or attribution theory in their testimony. This testimony is then weighed and evaluated by frequently sanist fact-finders. Judges and jurors, both consciously and unconsciously, often rely on reductionist, prejudice-driven stereotypes in their decision-making, thus subordinating statutory and case law standards as well as the legitimate interests of the mentally disabled persons who are the subject of the litigation. Judges' predispositions to employ the same sorts of heuristics as do expert witnesses further contaminate the process.[257]

Thus, through the "availability" heuristic, we judge the probability or frequency of an event based upon the ease with which we recall it.[258] Through the "typification" heuristic, we characterize a current experience via reference to past stereotypic behavior;[259] through the "attribution" heuristic, we interpret a wide variety of additional information to reinforce pre-existing stereotypes.[260] Through the heuristic of the "hindsight bias," we exaggerate how easily we could have predicted an event beforehand.[261] Through the heuristic of "outcome bias," we base our evaluation of a decision on our evaluation of an outcome.[262] Through the "representative heuristic," we

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BEHAV. 349, 372 (1991) (explaining that jurors' pre-existing attitudes toward insanity defense are the strongest predictor of individual verdicts).

[254] Thomas Tomlinson, *Pattern-Based Memory and the Writing Used to Refresh*, 73 TEX. L. REV. 1461, 1461-62 (1995) (citing Perlin, *Myths, supra* note 243, at 611-12). *But see*, Stephen Ellmann, *What We Are Learning,* 56 N.Y.L. SCH. L. REV. 171, 196-97 (2011/2012) (quoting Brook K. Baker, *Practice-Based Learning: Emphasizing Practice and Offering Critical Perspectives on the Dangers of "Co-Op"tation*, 56 N.Y.L. SCH. L. REV. 619, 628 (2011/2012) (on how "learning in the workplace promotes confrontation of ineffective heuristics and their replacement with genuine understandings")).

[255] Perlin, *Neonaticide*, *supra* note 243, at 27.

[256] Russell Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1381 (2009).

[257] Perlin, *supra* note 44, at 629; Michael L. Perlin, "*They Keep It All Hid": The Ghettoization of Mental Disability Law and Its Implications for Legal Education,* 54 ST. LOUIS U. L. J. 857, 875 (2010).

[258] Perlin, *supra* note 36, at 1417; see also, M. Gregg Bloche, *The Invention of Health Law*, 91 Cal. L. Rev. 247, 278 n.107 (2003), discussed in Covey, *supra* note 256, at 1381 n. 24. On the availability heuristic in general, see Rachlinski, *supra* note 242, at 399-401. On the availability heuristic's "potential for exploitation," see *id*. at 405. On how this substantiates Walter Lippmann's observation that the "pictures in [people's] heads" determine their political choices, see SHANTO IYENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES 135 (1991).

[259] Michael L. Perlin, *Power Imbalances in Therapeutic and Forensic Relationships*, 9 BEHAV. SCI. & L. 111, 125 (1991) (use of the typification heuristic by which a treating doctor slots "patients into certain categories, and prescribes a similar regimen for all.").

[260] *See* Perlin, *supra* note 252, at 892. See generally, Laura Stephens Khoshbin & Shahram Khoshbin, *Imaging the Mind, Minding the Image: An Historical Introduction to Brain Imaging and the Law,* 33 AM. J.L. & MED. 171, 171, 182 (2007). (discussing how we attribute human behavior "to a physical source in the head").

[261] Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of Mitigating Mental Disability Evidence,* 8 NOTRE DAME J. L., ETHICS & PUB. POL. 239, 255 (1994).

[262] *Id. See generally* SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL (1981); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel

extrapolate, overconfidently, based upon a small sample size of which we happen to be aware.[263] Through the heuristic of "confirmation bias," people tend to favor "information that confirms their theory over disconfirming information."[264]

Research confirms that heuristic thinking dominates all aspects of the mental disability law process whether the question is one of involuntary civil commitment law,[265] violence assessment,[266] medication refusal,[267] questions of diagnostic accuracy,[268] the insanity defense,[269] incompetency to stand trial procedures,[270] the relationship between homelessness and deinstitutionalization,[271] the impact of neuroimaging evidence in the

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Kahneman et al. eds., 1982) [JUDGMENT]; RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980) (all discussing heuristics in general); Hal R. Arkes, *Principles in Judgment/Decision Making Research Pertinent to Legal Proceedings,* 7 BEHAV. SCI. & L. 429 (1989) (hindsight and outcome biases); Neal V. Dawson et al., *Hindsight Bias: An Impediment to Accurate Probability Estimation in Clinicopathologic Conferences,* 8 MED. DECISION MAKING 259 (1988) (hindsight bias); Anthony N. Doob & Julian V. Roberts, *Social Psychology, Social Attitudes and Attitudes Toward Sentencing,* 16 CAN. J. BEHAV. SCI. 269 (1984) (vividness effect); Shari S. Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing,* 7 BEHAV. SCI. & L. 73 (1989) (same) Baruch Fischhoff, *Hindsight,, Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty,* 104 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975) (both biases); Harold Kelley, *The Process of Causal Attribution,* 28 AM. PSYCHOLOGIST 107 (1973) (attribution); Dan Russell, *The Causal Dimension Scale: A Measure of How Individuals Perceive Causes,* 42 J. PERSONALITY & SOC. PSYCHOL. 1137 (1982) (same); Saks & Kidd, *supra* note 249 (availability); David Van Zandt, *Common Sense Reasoning, Social Change, and the Law,* 81 NW. U. L. REV. 894 (1987) (typification). In mental health contexts, see, e.g., Harold Bursztajn et al., *"Magical Thinking," Suicide, and Malpractice Litigation,* 16 BULL. AM. ACAD. PSYCHIATRY & L. 369 (1988); David B. Wexler & Robert F. Schopp, *How and When to Correct for Juror Hindsight Bias in Mental Health Malpractice Litigation: Some Preliminary Observations,* 7 BEHAV. SCI. & L. 485 (1989).

[263] *See, e.g.,* Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers,* in JUDGMENT, *supra* note 262, at 23, 24-25, as discussed in Perlin, *supra* note 252, at 898 n. 89.

[264] Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1594 (2006), as discussed in Covey, *supra* note 256, at 1381 n. 22.

[265] Virginia A. Hiday & Lynn Newhart Smith, *Effects of the Dangerousness Standard in Civil Commitment,* 15 J. PSYCHIATRY & L. 433, 449 (1987) (aberrant behavior by small number of patients in sample studied "distort[ed] outcome perceptions;" mental health professionals significantly overstate percentage of involuntary civil commitment cases that began as police referrals and that jeopardized staff safety); *accord* Henry J. Steadman et al., *Psychiatric Evaluations of Police Referrals in a General Hospital Emergency Room,* 8 INT'L J.L. & PSYCHIATRY 39 (1986); R. Michael Bagby & Leslie Atkinson, *The Effects of Legislative Reform on Civil Commitment Admissions Rates: A Critical Analysis,* 6 BEHAV. SCI. & L. 45, 46 (1988).

[266] Jennifer Murray & Mary E. Thomson, *Applying Decision Making Theory to Clinical Judgments in Violence Risk Assessment,* 2 EUR. J. PSYCHOL. 150 (2010).

[267] *See* Perlin, *supra* note 259, at 125 (discussing Watkins v. United States, 589 F.2d 214 (5th Cir. 1979) (doctor prescribed 50-day supply of Valium without taking medical history or checking patient's medical records), Hale v. Portsmouth Receiving Hosp., 338 N.E.2d 371 (Ohio Ct. Cl. 1975) (doctor failed to change prescription following his observation of side-effects and onset of self-destructive behavior on patient's part), and Rosenfeld v. Coleman, 19 Pa. D. & C.2d 635 (1959) (doctor prescribed addictive drugs so as to help patient see nature of his addictive personality)). *See generally*, 3 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL, § 7A-6.4a (2d ed. 2000).

[268] *See also* Arkes, *supra* note 262; David Faust, *Data Integration in Legal Evaluations: Can Clinicians Deliver on Their Premises?,* 7 BEHAV. SCI. & L. 469, 480 (1989) (discussing results found in Robyn Dawes et al., *Clinical Versus Actuarial Judgment,* 243 SCIENCE 1668 (1989); Baruch Fischhoff, *Debiasing, in* JUDGMENT, *supra* note 262, at 422; Sarah Lichtenstein et al., *Calibration of Probabilities: The State of the Art, in* JUDGMENT, *supra* note 262, at 305; Michael Saks, *Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts,* 14 LAW & HUM. BEHAV. 291, 294 (1990).

[269] MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 263-331 (1995); Perlin, *supra* note 36.

[270] Perlin, *Façade, supra* note 250; Perlin, *supra* note 44.

[271] Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness,* 28 HOUS. L. REV. 63 (1991).

criminal trial process,[272] or the scope of a therapist's duty to protect a third party from a tortious act by the therapist's patient or client (the so-called *Tarasoff* obligation).[273] It similarly dominates the public's view of criminal justice policy (animated by a media-driven fear of crime).[274] Additionally, judges – "embedded in the cultural presuppositions that engulf us all"[275] – are as susceptible to heuristics as are all other citizens.[276]

So it is with the development of sex offender law and policy. The media's intense focus on the most heinous sex offenders – making it appear that all persons charged with "sex crimes" share these characteristics – triggers the availability heuristic and the representativeness heuristic, "causing the public to perceive most or all so-called sex offenders as extremely threatening and intractably deviant."[277] By way of example, Daniel Filler has argued that the availability heuristic was significantly responsible for the passage of Megan's Law.[278] James Billings and Crystal Bulges explain comprehensively:

> [T]he representativeness heuristic theory hypothesizes that people judge the likelihood of events by how well they match any previously formed representations of such an event. For example, individuals are more likely to believe all sex offenders are similar to those sex offenders they have already seen. Because most people's readily accessible memories of sex offenders are derived from violent and outrageous media depictions, they are more likely to believe that all sex offenders are like those they see on TV. ..[279] [O]ne of the great dangers of the representativeness heuristic is that it encourages maintenance of these beliefs to the exclusion of other reliable information. Thus, people who come to believe sex offenders are violent predators in this way are very likely to ignore more accurate information that advises toward more realistic beliefs.
>
> [Another] example of psychological theory demonstrating the power of media to portray false images is the availability heuristic. The availability heuristic states that individuals judge the likelihood of events by the availability of similar occurrences in their memory. Under this theory, therefore, if instances of violent sexual offense readily come to mind, individuals will presume their occurrence to be more frequent than it really is. The available memories may also include fiction; if

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[272] Michael L. Perlin, "*And I See Through Your Brain": Access to Experts, Competency to Consent, and the Impact of Antipsychotic Medications in Neuroimaging Cases in the Criminal Trial,* 2009 STAN. TECH. L. REV. 4, 5.

[273] Perlin, *Dilemma, supra* note 250; *see also*, Michael L. Perlin, *"You Got No Secrets to Conceal": Considering the Application of the Tarasoff* Doctrine Abroad, 75 U. CIN. L. REV. 611 (2006). In *Tarasoff v. Regents of the Univ. of Cal*., 551 P.2d 334, 347-48 (Cal. 1976), the California Supreme Court held that therapists have a duty to reveal confidential information about a patient where the patient presents a serious danger of violence to another.

[274] *See, e.g.*, Singleton, *supra* note 4, at 603-04 (discussing the vividness heuristic and the availability heuristic in this context).

[275] MICHAEL L. PERLIN, THE HIDDEN PREJUDICE: MENTAL DISABILITY ON TRIAL 47 (2000) (quoting Anthony D'Amato, *Harmful Speech and the Culture of Indeterminacy,* 32 WM. & MARY L. REV. 329, 332 (1991)).

[276] *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001) (discussing judicial susceptibility to heuristics and biases when making decisions).

[277] Julia T. Rickert, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions*, 100 J. CRIM. L. & CRIMINOLOGY 213, 228 (2010) (citing Doyle & Haney, *supra* note 216).

[278] Filler, *supra* note 200, at 346.

[279] On how the availability heuristic affects the way viewers process TV news in general, see IYENGAR, *supra* note 258, at 130-31.

> someone has just seen a movie about a sex offender, he is more likely to inflate the rate of sex offense he believes to be accurate. The media contribute to this theory by providing the prior instances of sex offense with which to compare current events. This is especially true if the media are presenting more violent sex crime information than nonviolent sex crime information; people will thus overestimate the rate of sex offense in general as well as the incidence of violent sex offense. Because most sex offenses are nonviolent, these media portrayals of violent sex offenses cause people to increase their belief in the prevalence of such crimes.[280]

We believe it is impossible to understand the thrall in which the "sex offender story" has captured the public without understanding the pernicious power of these cognitive-simplifying heuristics.[281]

D. The Impact of the Laws

1. Introduction

There can no longer be any question that sex offender laws were enacted without any consideration being given to the valid and reliable research available to (and accessible by) the lawmakers at the time of enactment, and that, frequently, legislators were never asked questions that would have been "essential to understand whether such legislation would be effective in its goal of community protection."[282] This failure to consider such data calls into question the legitimacy of all such legislation.[283] Sexual offender registration laws were enacted "without any systematic study of their consequences"[284] or of the diagnostic accuracy involved in the classification of such offenders.[285] These diagnostic tools that support confinement and containment continue to be flawed.[286] The available evidence indicates that sex offender residency statutes do not protect children and, contrarily, "might increase the danger to the community."[287]

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[280] James A. Billings & Crystal L. Bulges, *Maine's Sex Offender Registration and Notification Act: Wise or Wicked?* 52 ME. L. REV. 175, 242 (2000) (footnotes omitted). See also, Michael L. Perlin & John Douard, *"Equality, I Spoke That Word/As If a Wedding Vow": Mental Disability Law and How We Treat Marginalized Persons,* 53 N.Y.L. SCH. L. REV. 9, 20 (2008-09) ("Every time Detective Benson or Stabler--on NBC's popular *Law and Order: SVU* program--says, 'There's no cure. And they all do it again,' that speaks to society's [false ordinary common sense] about this topic").

[281] *See* Perlin, *Fatal Assumption*, *supra* note 251, at 57 n.115. *Cf.* Rachlinski, *supra* note 242, at 415 (concluding that reliance on heuristics is "inevitable").

[282] Karen Terry, *Sex Offenders: Editorial introduction*, 3 CRIMINOLOGY & PUB. POL'Y 57, 57 (2003). On the frequent disconnect between research findings and adopted legislative policies, see Michael Tonry & David Green, *Criminology and Public Policy in the USA and UK,* in THE CRIMINOLOGICAL FOUNDATIONS OF PUBLIC POLICY: ESSAYS IN HONOUR OF ROGER HOOD 485, 508-10 (Roger G. Hood et al eds. 2003). On how reliable research is often consciously ignored, see Joan Petersilia, *Policy Relevance and the Future of Criminology*, 29 CRIMINOLOGY 1 (1991).

[283] *See generally* Singleton, *supra* note 4, at 625.

[284] J.J. Prescott, *Do Sex Offender Registries Make Us Less Safe?* 35 REGULATION 48, 48 (Summer 2012).

[285] *See* Michael First & Robert Halon, *Use of DSM Paraphilia Diagnoses in Sexually Violent Predator Commitment Cases,* 36 J. AM. ACAD. PSYCHIATRY & L. 443 (2008). *See also*, Robert Prentky et al., *Sexually Violent Predators in the Courtroom: Science on Trial*, 12 PSYCHOL. PUB. POL'Y & L. 357361 (2006).) (citing twin concerns that "good science" will be unrecognized or misunderstood by the law, and that the pressures of the law will not only use but encourage "bad science").

[286] John Matthew Fabian, *The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators*, 32 WM. MITCHELL L. REV. 81 (2005).

[287] Singleton, *supra* note 4, at 616.

The common wisdom is that – per the television series, *Law and Order: SVU* – recidivism rates are near 100% for sex offenders.[288] The valid and reliable research paints an entirely different picture: Department of Justice statistics make clear that, "not only do few sex offenders get rearrested for committing a new sex crime, but sex offenders are less likely than non-sex offenders to be rearrested for any crime at all."[289] Beyond that, such research also suggests that currently-prevailing legislation "may actually increase the amount of risk in a community."[290]

As we concluded in an earlier article: These laws do little to protect the public; instead, they serve to ostracize, isolate and destroy any hope of integration, and, contrarily, responding to community pressures, potentially increase the likelihood of recidivism and achieve the exact opposite effect intended by the legislatures.[291]

The laws, then, are fatally flawed. The next question that must be considered is this: to what extent is the judiciary – allegedly the bulwark of freedom in the face of oppressive and discriminatory legislation[292] – susceptible to the same heuristic panic? In this next section, we will first consider the extent to which, generally, public opinion and the media affect judicial decision-making, and will then consider briefly three other areas of the law – civil and criminal – in which the impact of the media and public pressure have been clearly demonstrated.

2. The Public and the Courts

Political scientist Thomas Marshall has argued persuasively that the Supreme Court is largely successful as a policy-maker in part because it tends to follow public opinion, more often than not issuing decisions the public will be inclined to support,[293] and that the Court seems particularly likely to issue a majoritarian decision during "'crisis times' – times when public attention is focused closely on an issue."[294] In concluding that the Court's decision in *Kansas v. Hendricks* fit into this metric, Professor Michelle Johnson observed that "well-established constitutional principles may be curtailed in order to maintain public belief in and compliance with government policy,"[295] a belief stemming from the public's "strong opinions about the release of sex offenders from prison."[296]

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[288] *See* Perlin & Douard, *supra* note 280, at 20.

[289] *See* Tamara Rice Lave, *Throwing Away the Key: Should States Follow* U.S. v. Comstock *by Expanding Sexually Violent Predator Commitments?,* 14 U. PA. J. CONST. LAW 391, 396-97 (2012) (citing Patrick A. Langan, Erica L. Schmitt & Matthew R. Durose, Bureau of Justice Statistics, U.S. Dep't of Justice, Pub. No. NCJ 198281, *Recidivism of Sex Offenders Released from Prison in 1994* (2003), at 2).

[290] Alissa Ackerman & Karen Terry, *Faulty Sex Offender Policies*, in FLAWED CRIMINAL JUSTICE POLICIES: AT THE INTERSECTION OF THE MEDIA, PUBLIC FEAR, AND LEGISLATIVE RESPONSE 149, 162 (Frances P. Reddington & Gene Bonham eds., 2012).

[291] Cucolo& Perlin, *supra* note 28, at 5, citing Zgoba et al, *supra* note 111 (authors thoroughly examined efficacy and cost of Megan's Law by tracking 550 randomly selected sex offenders released between 1990 and 2000 and comparing 10 years before and 10 years after the law was enacted; no reduction in reoffending and no reduction in the number of victims found; costs increased exponentially by $3.9 million per year by 2007).

[292] For the historical perspective, see sources cited in Craig Stern, W*hat's a Constitution among Friends?--Unbalancing Article III*, 146 U. PA. L. REV. 1043, 1044 n. 3 (1998).

[293] *See* Michelle Johnson, *The Supreme Court, Public Opinion, and the Sentencing of Sexual Predators*, 8 S. CAL. INTERDISC. L.J. 39, 40 (1998) (citing, inter alia, THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 191-92 (1989)).

[294] *Id.* at 41 (citing MARSHALL, *supra* note 293, at 83); *see also*, David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2070-71 (2010) ("as compared to state judges in appointive and merit selection jurisdictions, judges facing elections, particularly partisan elections, are more likely to decide cases in a manner consistent with majority opinion").

[295] Johnson, *supra* note 293, at 85.

[296] Johnson, *supra* note 293, citing Roy B. Flemming & B. Dan Wood, *The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI., 468, 493 (1997).

Further, archival research has uncovered evidence that Supreme Court justices "have been keenly interested in media portrayals of the Court, or that justices have made various efforts to ingratiate themselves with journalists."[297] This is, perhaps, connected to the findings that positive media coverage increases support for the Court,[298] and that the manner in which the media reports on issues surrounding the judicial branch has a substantial impact on public perceptions of the judiciary.[299]

Judicial elections have become "high-profile political battles."[300] Scholars that have studied the impact of public opinion on judicial decisions in state courts – especially where judges sit for election – have concluded that, as elections approach, judges avoid controversial rulings and become more conservative in deciding criminal cases,[301] and that liberal judges "curb their support" for criminal defendants "in order to avoid opposition from law and order groups."[302] Other judges run for re-election on a "platform" of having "issued rulings to simplify the prosecution of sexual predators."[303] The evidence clearly supports "the widespread belief that judges respond to political pressure in an effort to be reelected . . . ."[304]

Elections have a "chilling effect" on judicial independence,[305] and even, in the cases of appellate judges, on the issuance of dissents from majority opinions.[306] And

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[297] Bradley W. Joondeph, *Judging and Self-Presentation: Towards a More Realistic Conception of the Human (Judicial) Animal Reviewing: Lawrence Baum, Judges and Their Audiences: A Perspective on Judicial Behavior*, 48 SANTA CLARA L. REV. 523, 256 (2008).

[298] Mark D. Ramirez, *Procedural Perceptions and Support for the U.S. Supreme Court*, 29 29 POL. PSYCHOL. 675, 676 (2008).

[299] Rachel Luberda, *The Fourth Branch of the Government: Evaluating the Media's Role in Overseeing the Independent Judiciary*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 507, 515 (2008).

[300] Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 791 (2010).

[301] G. Alan Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, in BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 52, 58 (Keith J. Bybee ed. 2007) (BENCH PRESS).

[302] LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 121 (2006). *See also*, Gregory Huber & Sanford Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?* 48 AM. J. POLI. SCI. 247 (2004) (elected judges will become more punitive as standing for reelection approaches).

[303] Norman Reimer, *Fear Unleashed: Money, Power and the Threat to Judicial Independence*, 34 CHAMPION at 9,10 (Nov. 2010). *See, e.g.,* Tarr, *supra* note 301, at 54 for an account of the impact of advertising on judicial elections. *See also* Devera B. Scott et al., *The Assault on Judicial Independence and the Uniquely Delaware Response*, 114 PENN ST. L. REV. 217, 232-234 (Summer 2009) (discussing how a judge thwarted a campaign for an early retention election by increasing a defendant's controversial sentence from 60 days to a term of three to ten years in jail). The opportunity for political malevolence here is clear:

> A recent advertisement for the Montgomery County Maryland bench featured a mailing with a mug shot of a convicted sex offender who was allowed to return home. The mailing, which went out days before the election stated, "enough is enough," but what the ad failed to mention was that none of the judges who were opponents of the candidate had anything to do with the case.

Nathan Richard Wildermann, *Bought Elections*: *Republican Party of Minnesota v. White*, 11 GEO. MASON L. REV. 765, 784-85 (Summer 2003).

[304] Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 169 (Jan. 2009).

[305] Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions about the Role of the Judiciary,* 14 GA. ST. U. L. REV. 817, 859 (July 1998). There is also valid and reliable research that teaches us that judges facing retention elections tend to decide cases in accord with the ideology of the political party likely to reelect them. *See* Shepherd, *supra* note 304; *See also*, Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decision*?, 72 N.Y.U. L. REV. 308, 310 (May 1997).

judges are not immune from the impact of "moral panics," flowing from "the public's passive acceptance of media and politician-driven images of the nature and extent of crime."[307] Those images, Professor Andrew Taslitz, concludes, "have likewise led the public to believe that judges impose unduly lenient sentences, despite the ever-harsher nature of sentences via mandatory minimum legislation, sentencing guidelines, moral panics, and a host of other mechanisms."[308]

State judicial determinations of the due process rights of sexual predators have been explicitly found to have "the potential to, at the very least, generate contentious and hard fought retention bids."[309] Media accounts of crimes are the source that voters generally use to form their judgments on courtroom sentencing.[310] The problem is abetted by what Mark Obbie calls "results-oriented legal journalism" – "reporting on the outcome of a court case without acknowledging the legal authority that the court cited in reaching that outcome."[311]

Judges perceive these threats in "all but identical" ways to the ways that "police chiefs . . . politicians and [newspaper] editors" perceive them,[312] threats, again, in significant measure due to the increase in the media's reporting of crime.[313] Professor Catherine Carpenter links this explicitly to the question that we are addressing in this article:

> The proliferation of sex offender registration laws has been linked to the increased media coverage of child abuse cases involving previously convicted sex offenders. One additional fact contributes to this perception. Showcasing high-profile, but rare crimes, turns the symbolic into the pervasive in the eyes of the public. The effect is a skewed perception of the likelihood that the crime will be repeated.[314]

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[306] Melinda Gann Hall, *Constituent Influence on State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117, 1117 (Nov. 1987).

[307] Andrew Taslitz, *The Criminal Republic: Democratic Breakdown as a Cause of Mass Incarceration,* 9 OHIO ST. J. CRIM. L. 133, 174 (2011); *see* Singleton, *supra* note 4, at 628 (discussing how the laws in question "pander to the electorate and pass laws driven by community fear and outrage").

[308] Taslitz, *supra* note 307, at 174, citing Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment,* 51 HASTINGS L.J. 829, 860-67 (2000). Interestingly, judges *agree* that their sentences are "too lenient on [sexual] offenders." Bumby & Maddox, *supra* note 209, at 312.

[309] Eric W. Buetzow, *Ignoring the Supreme Court: State v. White, the Civil Commitment of Sexually Violent Predators, and Majoritarian Judicial Pressures,* 58 HASTINGS L.J. 413, 430 (2006). Notes Professor John La Fond succinctly: "Judges in Washington State are paid very well. They are also elected. As a result, judges generally rule in favor of the prosecution on all contested trial issues." John Q. La Fond, *Can Therapeutic Jurisprudence Be Normatively Neutral? Sexual Predator Laws: Their Impact on Participants and Policy*, 41 ARIZ. L. REV. 375, 406 (1999).

[310] Paul Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1982 (2010).

[311] Mark Obbie, *Winners and Losers*, in BENCH PRESS, *supra* note 301, at 159. On how this problem may be exacerbated by the ease of Internet access and a concomitant "new era of crabbed and narrow-minded readership." *See* Dahlia Lithwick, *The Internet and the Judiciary: We Are All Experts Now*, in BENCH PRESS, *supra* note 301, at 178.

[312] Philip Jenkins, *Failure to Launch: Why Do Some Social Issues Fail to Detonate Moral panics?* 49 BRIT. J. CRIMINOL. 35, 35 (2009), citing HALL ET AL, *supra* note 211, at 16. Professor Craig Haney has noted: "Media myths and misinformation substitute for real knowledge for many members of the public who--as citizens, voters, and jurors--participate in setting policy agendas, advancing political initiatives, and making legal decisions." Haney, *supra* note 210, at 690. We believe he could have added easily and accurately added "judges" to the "citizens, voters, and jurors" phrase.

[313] Carpenter, *supra* note 224, at 38.

[314] *Id.*, citing, in part, Singleton, *supra* note 4, at 604-05; *see also*, Johnson, *supra* note 293 (discussing generally the public and media influences on courts and on legislatures to enact laws that deal harshly with convicted sex offenders); Anthony C. Thompson, *From Sound Bites to Sound Policy: Reclaiming the High*

In short, when it comes to the questions we are discussing in this paper, judges are far more *like* members of the general public than they are *unlike* them.

3. Judicial Susceptibility to Outside Influence: Some Examples

A brief look at other areas of both the criminal and civil law reveals that judges are not immune from public pressure and from media assaults. Whether the substantive issue is the death penalty, sentencing or tort reform, the conclusion is the same: courts are susceptible to the press and to the threat of electoral opposition.

a. Death Penalty[315]

Judges are especially responsive to constituent influence in death penalty cases.[316] In three states (Florida, Alabama, and Delaware), judges have the ability to overturn jury sentences in death penalty cases.[317] According to a report done by the Equal Justice Institute, in Florida (a state where judges are elected), there has not been a single judicial override of a jury-imposed death penalty in twelve years; in Alabama (another judicial election state), 92 percent of judicial overrides are to impose death sentences in cases in which jurors recommended life imprisonment; on the other hand, in Delaware (where judges are appointed), no judge has ever imposed a death sentence via judicial override.[318] Importantly, judges override juries to impose the death penalty more often in a judicial election year.[319]

b. Sentencing

A recent Colorado study has concluded that "aggressive media coverage also has had an impact on sentencing decisions by government officials,"[320] a finding that is consistent with the research that consistently finds that "judges are not immune to public opinion – or what they perceive public opinion to be,"[321] a public opinion that is shaped, in significant measure, by the overrepresentation of crimes of violence.[322] This misinformed public opinion leads policymakers (including judges) to be reluctant to use less severe punishments for "fear that would lead to even greater public dissatisfaction with

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Ground in Criminal Justice Policy-Making, 38 FORDHAM URB. L.J. 775, 802 (2011) ("The media's role in shaping prevailing perceptions of crime has policy implications for legislators and judges responsive to shifts in public opinion.").

[315] *See generally,* MICHAEL L. PERLIN, MENTAL DISABILITY AND THE DEATH PENALTY: THE SHAME OF THE STATES 122 (2013).

[316] *See* Melinda Gunn Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*. 54 J. POL. 427, 431 (1992).

[317] Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV. 793,794 (2011).

[318] *See* Sherrilyn A. Ifill, *Using the Death Penalty to Get Re-Elected*, The Root (July 20, 2011,12:55AM), http://www.theroot.com/search/node/Equal%20Justice%20Initiative%20%2526%20Alabama%20%2526%20Ifill; *see generally,* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 48 (2010).

[319] Ifill, *supra* note 318; *see also*, Fred B. Burnside, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017,1037 (giving examples of judges citing their decisions to override jury life sentences in their campaigns or being voted out of office for their failure to impose or uphold death verdicts). *See generally*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

[320] Philip A. Cherner, *Sentencing for Felony and Misdemeanor Convictions-- Time Actually Served*, 30 COLO. LAW. 27, 31 (Feb. 2010).

[321] Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing,* 14 LAW & HUM. BEHAV. 451, 454 (1990).

[322] *Id.* at 452.

sentencing decisions."[323] Such misinformation feeds the voters' "overwhelming . . . desire [for] courts to get 'tough on crime'"; judicial election-campaign pledges to be "tough on crime" (and tough-on-crime adjudications) "are designed to channel that desire into votes."[324] Similarly, a United Kingdom study confirms that "increasing and incessant punitive rhetoric" has had a further important impact on the decisions of sentencers in England and Wales.[325]

c. Tort Reform

In an effort to obtain legislation limiting tort liability, insurance lobbyists created a perception that the tort system overcompensated victims,[326] effectively changing the attitudes of judges "by a corporate public relations campaign targeted at the public in general and at judges in particular."[327] The resultant pro-tort reform media agenda has led to "an increasingly pro-defendant mind-set among judges," reflected in their propensity "to reject liability-expanding claims, to defer to legislatures and regulatory agencies, and to use tort reform reasoning in their opinions and decisions."[328] Scholars have attributed these changes to pro-tort reform propaganda that has occupied such a prominent role in media writings and commentary.[329] Argues Professor Sandra Gavin:

> It is clear that much of today's "truth" about products liability reform is a response to a semantically created political crisis; it is a result of a war of words taking place in the media rather than the courts. Its foundation is in impassioned rhetoric, often funded by the very constituents seeking to profit from its agenda.[330]

Professor Mark Galanter's explanation of how these perceptions came to dominate the system sounds startlingly like the discussion above with regard to the public's views of sex offender cases: "[Tort reformers'] calculating instrumentalism is set within a complex cycle of media distortion, cognitive overestimation, professional aggrandizement, judicial vacillation, and popular ambivalence, embracing and scorning the enlarged possibilities of remedy."[331]

4. Conclusion

In both criminal and civil cases, judges – especially judges who face re-election – are responsive to media influence and constituent pressure. There is no reason to think

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[323] *Id.* at 465 (discussing recommendations made in NORVAL MORRIS & MICHAEL TONRY, BETWEEN PRISON AND PROBATION, INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM (1990)).

[324] Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime" Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 335 (2010).

[325] Tim Newburn, *"Tough on Crime": Penal Policy in England and Wales*, 36 CRIME & JUST. 425, 459 (2007).

[326] Teresa M. Schwartz, *Product Liability Reform by the Judiciary,* 27 GONZ. L. REV. 303, 316 (1991).

[327] Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U.L. REV. 1637, 1719 n.359 (1993) (citing Schwartz, *supra* note 326).

[328] Bruce A. Finzen & Brooke B. Tassoni, *Regulation of Consumer Products: Myth, Reality and the Media*, 11 KAN. J.L. & PUB. POL'Y 523, 539 (2002) (citing, *inter alia*, Schwartz, *supra* note 326, at 330-33); *see also id.* at 524 ("Although the tort reform campaign has been multi-layered, taking place in the courts, legislatures and in Congress, its most effective efforts have been aimed at convincing influential members of the media to champion a reformist vision of civil justice.").

[329] *Id.* at 539.

[330] Sandra Gavin, *Stealth Tort Reform,* 42 VAL. U.L. REV. 431, 459 (Winter 2008).

[331] Mark Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 11-12.

they would be any less responsive to such pressure in cases involving sex offenders – the most despised of all litigants[332] – than in these other cohorts of cases.

E. Conclusion

We agree with Prof. Thomas Zander that "diagnosis should never be a pretext for social control,"[333] and with Dr. Robert Prentky and his colleagues that the courts need to exert "firmer control" over testimony in sexually violent predator hearings that is of "questionable value."[334] But until we take stock of the realities that we have sketched out in this section of the article – the impact of media distortions on legislative policies, the lack of a factual basis for the public's obsessive fears (fears based on "biased recall and unrealistic crime stereotypes"),[335] the ways that such media distortion and public pressures affect judicial decision-making – we are doomed to endlessly play out a "pathological" morality drama.[336] And we do this in spite of the overwhelming empirical evidence that shows that the laws in question have little or no effect on sexual offending rates and recidivism.[337]

In the next section of this article, we will consider whether there may, actually, be some better news ahead, and will discuss the existence and significance of some recent shifts in media attitudes and approaches, mostly in the context of newer legislative initiatives at both the state and local levels.

III. A MEDIA SHIFT

A. Introduction

In Parts I and II, we demonstrated the impact of the media on the formation and sustainability of legislation and judicial decisions involving sex offenders. Over the past decade, there have been countless stories covering the gruesome details of shocking sexual crimes, and reports of public outcries of rage and demands for punishment and retribution.[338] However, more recently, the media has begun to increasingly report on concerns over the effects of these laws and their impact on the realities of community safety.[339] As much as "[t]he media play[s] an important role in the way the public perceives the criminal justice system" and "present[s] the public with 'an increasingly distorted view of sex offending,'"[340] the media can also be viewed as a "messenger" in this

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[332] *See supra* text accompanying notes 196-208.

[333] Thomas Zander, *Commentary: Inventing Diagnosis for Civil Commitment of Rapists*, 36 J. AM. ACAD. PSYCHIATRY & L. 459, 468 (2008).

[334] Robert Prentky et al., *Commentary: Muddy Diagnostic Waters in the SVP Courtroom*, 36 J. AM. ACAD. PSYCHIATRY & L. 455, 455 (2008).

[335] Doyle & Haney, *supra* note 216, manuscript at 24.

[336] *See* William J. Stuntz, *The Pathological Politics of Criminal Law,* 100 MICH. L. REV. 505, 511 (2001).

[337] Logan, *supra* note 203, at 402, citing, inter alia, Elizabeth J. Letourneau et al., *Effects of South Carolina's Sex Offender Registration and Notification Policy on Deterrence of Adult Sex Crimes*, 37 CRIM. JUST. & BEHAV. 537, 550 (2010); Richard Tewksbury & Wesley G. Jennings, *Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories*, 37 CRIM. JUST. & BEHAV. 570, 572 (2010).

[338] *See* Pollak & Kubrin, *supra* note 25, at 63 ("The news media allow for private events, or individual crimes, to become public concerns.").

[339] *See* Jeslyn A. Miller, *Sex Offender Civil Commitment: The Treatment Paradox*, 98 CAL. L. REV. 2093, 2117 (2010).

[340] Marcus A. Galeste et al., *Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers*, 13 W. CRIMINOLOGY REV. 4, 5 (2012).

phenomenon – encouraged to cover the "newsworthy" issues.[341] Regardless of whether the media incites the fear or the fear incites the media to report on the issues in question,[342] the long-view outcome has resulted in judicial decisions and legislation that fail to be effective in the ultimate goal of ensuring safety and removing sexual predators from communities. Although, if the media is, in fact, responsible for distorting the facts and generating fear, then inversely, as it increasingly reports on the defects in legislation and problems with the laws, we would expect to see an impact on the enactment of subsequent legislation if it is similarly designed and implemented.

The media has increased its reporting on the concerns over these laws and the realities of community safety post-enactment.[343] As other academics have noted, concerns with this legislation were raised in the early days of the new generation of sex offender laws,[344] but articles focused upon the problems with these laws and their ineffectiveness have steadily increased in recent years, mostly since the enactment of the AWA.[345] The question to ask, then, is this: what effect, if any, has this had on public sentiment and laws and legislation post 2006?

B. Recidivism Unmasked

News articles have increasingly published pieces on the likelihood of sex offender recidivism – what was previously published as "common truths" about sex offenders is now, finally, openly being questioned and challenged in the mainstream media.[346] An article in the *Wall Street Journal* dispelled prior media reports of re-offense rates and noted past misconceptions as reflected in a quote from a California legislator in 1996 to the *New York Times*: "'What we're up against is the kind of criminal who, just as soon as he gets out of jail, will immediately commit this crime again at least 90 percent of the time,"[347] and a statement from Fox News in 2005: "Not only are they almost certain to continue sexually abusing children, but some eventually kill their young victims."[348] ABC News published information on myths about sex offenders and included statistics (generated from studies in the late 1990s) revealing that "approximately 60 percent of boys and 80 percent of girls who are sexually victimized are abused by someone known to the child or the child's family," and that "[r]elatives, friends, babysitters, persons in positions of authority over the child, or persons who supervise children are more likely than strangers to commit a sexual assault."[349]

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[341] Singleton, *supra* note 4, at 602 ("Americans are preoccupied with fear, particularly fear of crime.").

[342] *See id*. at 603 ("Although researchers may disagree about the cause and effect relationship between media coverage of crime and public perception of crime, there is evidence that the former influences the latter.").

[343] *See infra* text accompanying notes 346-49.

[344] *See generally* Winick, *supra* note 1 (discussing the therapeutic jurisprudence approach to analyze sex offender laws).

[345] This increase in attention to the problems and concerns of sex offender legislation will be shown, considered, and discussed throughout this section of the paper.

[346] Paul Heroux, *Sex Offenders: Recidivism Re-Entry Policy and Facts*, HUFFINGTON POST (Nov. 8, 2011, 2:39 PM) (discussing the realities of re-offense in light of national attention to the Jerry Sandusky case, and suggests that sex offender registries provide a false sense of security), *available at* http://www.huffingtonpost.com/paul-heroux/sex-offenders-recidivism_b_976765.html.

[347] Carl Bialik, *How Likely Are Sex Offenders to Repeat Their Crimes?* THE NUMBERS GUY (WALL ST. J. Blog) (Jan. 24, 2008, 11:35 PM), http://blogs.wsj.com/numbersguy/how-likely-are-sex-offenders-to-repeat-their-crimes-258/.

[348] *Id.*

[349] *Myths About Sex Offenders*, ABC NEWS (Oct. 23, 2008), *available at* http://abcnews.go.com/US/story?id=90200&page=1#.UVNGtFsjqXQ. Some additional myths listed include: "most sex offenders reoffend"; "the majority are caught, convicted and in prison"; "sex offense rates are higher than ever and continue to climb"; "all sex offenders are male"). *Id.*

Not only have media outlets more recently readily reported on previously perceived myths surrounding sex offender recidivism, but, as we will discuss next, news headlines confirmed that there was a "new" type of sex offender targeting our children.

C. The "Sex Offender" in the News

Within the past decade, media stories have increasingly focused on the "new" profile of an offender. We are no longer purely fixated on the "stranger predator" as we were in the 1990s, but are now mesmerized by stories about offenders who had been otherwise considered upstanding members of the community. Countless news stories are dedicated to uncovering the child predators in our "places of worship" – both religious[350] and sports related.[351] This new profile of a pedophile has been found in churches, synagogues, boy scout troops, public schools[352] and universities – to name a few.[353] A *Washington Post* article offered staggering statistics of more than 6,100 accused priests and 16,000 victims since 1950, according to a 2011 analysis by the John Jay College of Criminal Justice in New York City and the latest annual report by the Center for Applied Research in the Apostolate, which tracks statistics of abuse by U.S. Catholic priests.[354] Secrecy in an insular community prevented news reports from listing the numbers of sexual abuse incidents in the ultra-Orthodox Jewish community, but scholars believe that abuse rates are roughly the same as those in the general population; the limited reports stem from the fact that most abuse victims are "fearful of being stigmatized in a culture where the genders are strictly separated and discussion of sex is taboo."[355]

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[350] Dan Gilgoff, *Catholic Church's Sex Abuse Scandal Goes Global*, CNN WORLD (March 19, 2010, 10:23 PM), http://www.cnn.com/2010/WORLD/europe/03/19/catholic.church.abuse/index.html; Neal Conan, *Amidst Church Scandals, Who Still Joins The Priesthood*, NPR: TALK OF THE NATION TRANSCRIPT (Jan. 23, 2013, 1:00 PM) (explaining that a decade after news of the sex abuse scandal in the Boston archdiocese of the Catholic Church broke, reports of abuse continue to emerge), http://www.npr.org/2013/01/23/170085074/amidst-church-scandals-who-still-joins-the-priesthood; *A Guide to Catholic Sex Scandals*, ABC News (Aug. 23, 2010), http://abcnews.go.com/Blotter/slideshow/guide-catholic-sex-scandals-11289279; Barbara Bradley Hagerty, *Abuse Scandal Plagues Hasidic Jews In Brooklyn*, NPR (Feb. 2, 2009, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=99913807.

[351] Kevin Johnson, *Sandusky Sentenced in Penn State Sex Scandal*, USA TODAY, Oct. 9, 2012, http://www.usatoday.com/story/news/nation/2012/10/09/sandusky-sentenced-penn-state-sex-scandal/1609101/; Jesse Mckinley, *Coaches Face New Scrutiny on Sex Abuse*, N.Y TIMES, April 14, 2012, http://www.nytimes.com/2012/04/15/us/new-scrutiny-on-coaches-in-reporting-sexual-abuse.html?pagewanted=all; *see also* An entire CBS News web page is dedicated to "*The Penn State Scandal*" with links to numerous articles discussing the Jerry Sandusky child abuse scandal (Assistant Coach of Penn State's football team who was found guilty on 45 counts of child sexual abuse and convicted of molesting 10 boys over a 15-year period), available at http://www.cbsnews.com/2718-400_162-1332/the-penn-state-scandal/.

[352] Not discussed in this article but necessary to note is the intense media focus on young attractive female schoolteachers who have sex with underage students. *See*, Michael Winter, *Ex-Texas Teacher Guilty of Having Sex With 5 of Her Students,* USA TODAY, Aug. 17,2012, http://content.usatoday.com/communities/ondeadline/post/2012/08/ex-texas-teacher-guilty-of-having-sex-with-5-of-her-students/1#.UU4gIFsjqXQ; *see also The 50 Most Infamous Female Teacher Sex Scandals*, ZIMBIO.COM, http://www.zimbio.com/The+50+Most+Infamous+Female+Teacher+Sex+Scandals (providing a compilation of infamous teachers involved in sex scandals).

[353] *See generally* Thomas G. Plante, *Priests Behaving Badly: What Do We Know About Priest Sex Offenders?*, 10 SEX. ADD. & COMP. 93 (2003); Kathryn A. Dale & Judith L. Alpert, *Hiding Behind the Cloth: Child Sexual Abuse and the Catholic Church*, 16 J. CHILD SEX. ABUSE 59 (2007); Henry A. Giroux & Susan Searls Giroux, *Universities Gone Wild Big Money, Big Sports and Scandalous Abuse at Penn State,* TRUTH-OUT.ORG (Jan. 12, 2012, 3:09 AM).

[354] Cathy Lynn Grossman, *Philadelphia Trial Revives Catholic Church Sex Abuse Crisis*, USA TODAY, June 7, 2012, http://usatoday30.usatoday.com/news/religion/story/2012-06-05/philadelphia-priest-sex-abuse-case/55453208/1.

[355] Sharon Otterman & Ray Rivera, *Ultra Orthodox Shun Their Own for Reporting Child Sexual Abuse*, N.Y TIMES, May 9, 2012, http://www.nytimes.com/2012/05/10/nyregion/ultra-orthodox-jews-shun-their-own-for-reporting-child-sexual-abuse.html?pagewanted=all.

Reports of countless incidents of sexual abuse in the Boy Scouts was revealed after 20,000 pages of documents dating back to the 1920s was obtained after a two-year court battle.[356] Sexual abuse in the world of college sports made media headlines throughout the country after Assistant Coach Jerry Sandusky, of Penn State's football team, was found guilty on 45 counts of child sexual abuse and convicted of molesting 10 boys over a 15-year period.[357]

Yet, the focus on predators in closely-knit religious communities or on NCAA Division I college campuses has not conjured the same image of an offender that would otherwise incite public outrage, political movements and calls for legislative mandates that flowed from the "stranger/pedophile murder" cases.[358] For example, numerous cases of abuse within the Hasidic community have been documented in homogeneous and insular neighborhoods in Brooklyn, New York, and Brooklyn District Attorney Charles Hynes has continually been accused by victims' rights advocates of "going easy" on alleged Hasidic child molesters and rapists who reside in those neighborhoods.[359] Hynes had additionally refused to identify the sexual abusers in the Hasidic community who had been charged with offenses.[360] The author of an opinion piece in the *New York Post* stated: "There exists in this city a group of unparalleled perverts that's wrapped in Teflon . . . ."[361] When the documents detailing suspected abuse in the Boy Scouts were released, concern over violation of privacy, due process and the possibility that named individuals were innocent was noted in a news article.[362] And when evidence surfaced showing that a

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[356] *See Experts Say Posting Boy Scouts' Perversion Files' Online Sends Message Against Protecting Molesters*, FOXNEWS.COM (Oct. 19, 2012), http://www.foxnews.com/us/2012/10/19/experts-say-posting-boy-scouts-perversion-files-online-sends-message-against/; *see also* Michael Martinez & Paul Vercammen, *Attorneys Release Confidential Boy Scout Files on Alleged Child Sex Abusers*, CNN (Oct. 18, 2012, 8:29 PM), http://www.cnn.com/2012/10/18/justice/boys-scouts-sex-abuse-report.

[357] Johnson, *supra* note 351; *see also* Keith Ablow, *Sex Offenders at School and Next Door*, FOXNEWS.COM (Nov. 28, 2011) http://www.foxnews.com/health/2011/11/28/sex-offenders-at-school-and-next-door/; *see also* Nicole Auerbach, *Penn State Abuse Probe is Ongoing*, USA TODAY, Nov. 8, 2011, http://usatoday30.usatoday.com/sports/college/football/bigten/story/2011-11-07/Penn-State-sexual-abuse-investigation-continues/51116880/1.

[358] *See generally,* Johnson *supra* note 351. Noteworthy legislation that occurred after the Jerry Sandusky scandal was a Florida law enacted to encourage universities to report sexual abuse and financially penalize them if they knowingly and willfully fail to. *See, e.g.*, Alyssa Newcomb, *After Sandusky, Florida Passes One of Nation's Toughest Sexual Abuse Reporting Laws*, ABC WORLD NEWS (Oct. 9, 2012), http://abcnews.go.com/US/sandusky-florida-passes-nations-toughest-sexual-abuse-reporting/story?id=17434307#.UU4xclsjqXQ ("The Penn State scandal helped shape a new Florida sexual abuse reporting law that has been called the toughest in the nation, holding universities and individuals financially and criminally liable for failure to report suspected abuse."). *But see, e.g.*, Michelle Boorstein & William Wan, *After Child Abuse Accusations, Catholic Priests Often Simply Vanish*, WASH. POST, Dec. 4, 2010 ("[I]t's up to the individual dioceses how, or whether, they keep tabs on priests who are removed from the ministry or defrocked after sex-related allegations"); *see also* Ted Oberg, *The Former Priest Pedophile Next Door*, ABC 13 (April 21, 2008), http://abclocal.go.com/ktrk/story?section=news/in_focus&id=6095496.

[359] Anderson Cooper, *Hasidic Child Sex Abuse Allegations*, CNN (June 18, 2012, 10:50 PM), http://ac360.blogs.cnn.com/2012/06/18/tonight-on-ac360-child-sex-abuse-scandal/ (reporting that District Attorney Hynes is accused of neglecting the prosecution of abuse in order to appease the Rabbis in order to get their support and keep his position).

[360] Jspace Staff, *DA Withholds Names of Sex Offenders from Hasidic Community*, JSPACE.COM (April 30, 2012, 4:08 PM), http://www.jspace.com/news/articles/da-withholds-names-of-sex-offenders-from-hasidic-community/8770.

[361] Andrea Peyser, *Protecting the Unholiest Sinners*, N.Y. POST, May 24, 2012.

[362] *Experts Say Posting Boy Scouts' Perversion Files' Online Sends Message Against Protecting Molesters*, *supra* note 356 ("In a joint statement, attorneys who worked on the case stated: 'In fact, we are in no position to verify or attest to the truth of these allegations as they were compiled by the Boy Scouts of America,' the statement read. 'The incidents reported in these documents attest to notice of potential child abuse given to the Boy Scouts of America and its affiliates and their response to that notice.'"); *see also* Michael Martinez and Paul Vercammen, *Attorneys Release Confidential Boy Scouts Files on Alleged Sex Abusers,* CNN (October 18, 2012),

beloved and renowned college football coach, Joe Paterno, protected the pedophilic activities of his colleague, assistant coach Jerry Sandusky, the general community was hesitant to express itself as to what action, if any, should be taken.[363] A CNN report noted that, "In the aftermath of Sandusky's arrest, Paterno was treated as a victim, a man who was caught up in something he wasn't aware of. Now we know that was a lie."[364] The *New York Times* reported that even after Sandusky "made admissions about inappropriate contact in the shower room" in 1998 to the Penn State campus police, "[n]othing happened . . . . Nothing stopped."[365]

In the next section, we will look at emerging legislation in the 21st century and consider whether increased media reports citing low recidivism, identifying offenders who were trusted members of the community and acknowledging the rarity of the "stranger" sex crime has had any impact on creating new legislation.

D. Effect on Emerging Legislation

Scandals that have occurred in religious and academic institutions have not evoked the same level of demand for reactive legislation, but they *have* kept the focus on pedophiles and child molesters in the media.[366] That focus continues to incite the public and drive legislators to create or reaffirm legislation after every new, shocking sex offense story highlighting a "stranger sex crime" case.[367] Despite the current focus on "familiar" predators and media accounts pointing to low recidivism and re-offense rates,[368] the Florida Legislature enacted "Jessica's Law" in 2005 after Jessica Lunsford was murdered

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http://www.cnn.com/2012/10/18/justice/boys-scouts-sex-abuse-report ("CNN is not linking to the reports because it hasn't verified the allegations that they contain and because the attorneys admit that they haven't checked the veracity of the allegations.").

[363] *See generally*, Johnson, *supra* note 293; Jessica Tully, *Penn State Students Set Up Paterno Statute Watch*, USA TODAY, July 19, 2012; Jay Jennings, *Was Sandusky Protected by Football Culture*, CNN (June 19, 2012, 3:13 PM), http://www.cnn.com/2012/06/18/opinion/jennings-sandusky-football (discussing how popular sports icons are idolized and "seem immune to the rules that apply to the rest of us").

[364] Roland S. Martin, *Joe Paterno was a Coward*, CNN (July 15, 2012, 11:10 AM) http://www.cnn.com/2012/07/15/opinion/martin-paterno-coward ("The most powerful men at Penn State failed to take any steps for 14 years to protect the children who Sandusky victimized," and "documents show[] Paterno, his family and his legion of supporters lied in order to protect Paterno's name. All he cared about was breaking the all-time record set by Grambling State head coach Eddie Robinson.").

[365] Pete Thamel, *State Officials Blast Penn State in Sandusky Case*, N.Y. TIMES, Nov. 7, 2011.

[366] *See* Aaron Levin, *Penn State Scandal Draws Attention to Child Sexual Abuse,* PSYCHIATRIC NEWS, at 14-16 (Dec. 16, 2011), *available at* http://journals.psychiatryonline.org/ newsarticle.aspx?articleid=181079; *see also* Melissa DiPento, *Following Sandusky Case, Parents Call for More Education on Sexual Abuse in Schools*, NJ.COM (Oct. 10, 2012, 6:48 AM), http://www.nj.com/gloucester-county/index.ssf/2012/10/following_the_sandusky_ case_pa.html; Malcolm Gladwell, *In Plain View- How Child Molesters Get Away with It*, NEW YORKER, Sept. 24, 2012.

[367] *See, e.g.*, Jim Doyle, *Public's Overriding Fear: Will They Do It Again? / Anxiety Remains Despite Low Recidivism Among Many Offenders,* SAN FRANCISCO CHRONICLE, July 12, 2004 (reporting on the release of convicted sex offenders from Atascadaro State Hospital); Chris Cassidy, *Robert A. DeLeo to Review Bill to Publicize Sex Offenders*, BOSTON HERALD.COM (Dec. 10, 2012), http://bostonherald.com/news_opinion/local_politics/2012/12/robert_deleo_review_bill_publicize_sex_offenders ("House Speaker Robert A. DeLeo says he will re-evaluate a stalled Beacon Hill bill that would make the names of even low-level sex offenders public, signing the Bay State on to a national online sex-offender database, after horrifying child sex abuse charges against a Wakefield man last week."); Jonathan Zimmerman, *Sandusky and Sexual Abuse: From Apathy to Panic*, PHILLY.COM (June 27, 2012), http://articles.philly.com/2012-06-27/news/ 32425600_1_sexual-abuse-summer-camp-male-victims (analyzing our current views on pedophilia: "Rather than simply vilifying pedophiles like Sandusky, we might also pause to consider how our shifting views of them have affected American childhood.").

[368] Jenkins, *supra* note 312, at 35.

by a convicted sex offender.[369] The law mandated stiff minimum sentences for child abusers and a version of Jessica's Law – the Jessica Lunsford Act – was introduced at the federal level in 2005, but was never enacted into law by Congress.[370] Without support on a federal level, individuals and organizations began a movement to encourage all states to enact similar legislation. Bill O'Reilly – political commentator and host of "The O'Reilly Factor" on the Fox News Network – created an Internet page to inform and urge all states to "pass Jessica's Law."[371]

The unsuccessful attempt to enact Jessica's Law on a federal level, was overshadowed by the politically significant legislative enactment of the Adam Walsh Act (AWA).[372] The AWA –which was developed in response to a boy's abduction by a stranger sexual predator[373] – was enacted in 2006, despite the wide availability of well-known, researched valid and reliable studies that showed low recidivism and re-offense rates by sex offenders, and despite media articles which exposed the unlikely occurrence of stranger attacks.[374] The goal of the AWA was to uniformly track on a national level sex offenders – of whom the public would otherwise be unaware, in spite of the statistical data demonstrating that 60 percent of boys and 80 percent of girls sexually victimized were abused by someone they knew.[375]

Since the AWA became law, there has been an increase in media reports on its failure to keep communities safe.[376] In 2009, newspapers focused their attention on an expansive study by the New Jersey Department of Corrections and Rutgers University on the effectiveness of Megan's Law.[377] The study found that Megan's law "has failed to deter sex crimes or reduce the number of victims since its passage 15 years ago."[378] The

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[369] Jessica Lunsford Act, H.R. 1505, 109th Cong. (2005); Associated Press, *Fla. Gets Tough New Child-Sex Law*, CBS (Feb. 11, 2009. 7:26 PM), http://www.cbsnews.com/8301-201_162-692465.html.

[370] Jessica Lunsford Act, H.R. 1505, 109th Cong. (2005).

[371] Bill O'Reilly, *What Is Jessica's Law*, THE FACTOR ONLINE, http://www.billoreilly.com/jessicaslaw, ("There is simply no question that Jessica's Law will save lives, and similar laws need to be instituted in every state. Which is why we at The Factor have been putting pressure on Governors.").

[372] Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §16901 (2006).

[373] *Id. See supra* text accompanying notes 163-91.

[374] *See, e.g.*, Lin Song & Roxanne Lieb, *Adult Sex Offender Recidivism: A Review of Studies*, WASHINGTON STATE INSTITUTE FOR PUBLIC POLICY, Jan. 1994, at 1; 30 Kristen M. Zgoba & Leonore M. J. Simon, *Recidivism Rates of Sexual Offenders up to 7 Years Later: Does Treatment Matter?*, CRIM. JUST. REV., Sept. 2005, at 155; *see also* Jill S. Levenson, *Sex Offense Recidivism, Risk Assessment, and the Adam Walsh Act* (unpublished study, Lynn University), *available at* http://www.leg.state.vt.us/workGroups/sexoffenders/AWA_SORNsummary.pdf.

[375] Jenkins, *supra* note 312.

[376] Regarding the concern over juvenile registration, see also Jacob Perryman, *Differing Opinions: Local D.A., opponents of changes at odds*, TIMES OBSERVER (Nov. 14, 2012), http://www.timesobserver.com/page/content.detail/id/560865/Differing-Opinions.html?nav=5006 ("It is tragic that PA will register juveniles as young as 14 years-of-age, potentially for the rest of their lives"); Associated Press, *Dealing with Child-On-Child Sex Abuse Not One Size Fits All*, USA TODAY, Jan. 7, 2012 ("Many professionals who deal with young offenders object to the [Adam Walsh Act] requirement, saying it can wreak lifelong harm on adolescents who might otherwise get back on the track toward law-abiding, productive lives."); Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid with Real Boundary Problems?* N.Y. TIMES, July 22, 2007 ("Community notification makes people feel protected — who wouldn't want to know if a sex offender lives next door? But studies have yet to prove that the law does, in fact, improve public safety."); *see also* ABC 20/20, http://abcnews.go.com/2020/AgeOfConsent/ (last visited Mar. 28, 2013) (dedicating an Internet web page to news articles discussing sex offender laws and "age of consent").

[377] *See* Susan K. Livio, *Report Finds Megan's Law Fails to Reduce Sex Crimes, Deter Repeat Sex Offenders in N.J.*, THE STAR LEDGER, February 7, 2009.

[378] *Id.* (explaining that despite wide community support for these laws, there is little evidence to date, including this study [conducted by the state Department of Corrections and Rutgers University], to support a claim that Megan's Law is effective in reducing either new first-time sex offenses or sexual re-offenses); *see also* David Morgan, *Megan's Law No Deterrent to Sex Offenders,* CBS NEWS (Feb. 11, 2009, 1:36 PM),

study made note of the fact that sex offenses in "New Jersey, as a whole, experienced a consistent downward trend of sexual offense rates, with a significant change in the trend in 1994 (the year Megan's Law was passed)."[379] Media reports also focused on the estimated $5.1 million spent in 2007 in order to assist N.J in carrying out the law.[380] Other news reports highlighted the extensive costs other states were facing when trying to conform their state version of Megan's Law with federal mandates under the AWA.[381] California, which received $135.6 million in its 2009-10 federal allocation, decided the changes – to comply with the AWA – were more costly than the loss of grant money.[382] An article in the *Philly Post* , an online newspaper, echoed the concern for costly implementation and whether the expense was worth the benefit:

> There are pushes and petitions for all sorts of laws based on a single, tragic instance: "Jessica's Law," "The Adam Walsh Act," "Kyleigh's Law," "Tyler's Law," "Judy and Nikki's Law." We're so outraged by the actions of one offender that we determine to punish all persons, down through the ages, who behave like that offender. They're laws born of knee-jerk reactions, of the heart, not the head. They're rarely effectual and rarely even used. But they satisfy our deep, primal urge for punishment and revenge.[383]

An op-ed column in the *New York Times* by *Roger N. Lancaster, a professor of anthropology and author of Sex Panic and the Punitive State,*[384] *asserted that "*sex offender laws are expansive, costly and ineffective — guided by panic, not reason" and suggested a new approach:

> [T]o promote child welfare based on sound data rather than statistically anomalous horror stories, and in some cases to revisit outdated laws that do little to protect children. Little will have been gained if we trade a bloated prison system for sprawling forms of electronic surveillance that offload the costs of imprisonment onto offenders, their families and their communities.[385]

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http://www.cbsnews.com/2100-201_162-4780981.html; Beth DeFalco, *Megan's Law Not a Deterrent*, FOXNEWS.COM (Feb. 6, 2009), http://www.nassaupba.org/public/public_interest/ megans_law/ap-newsbreak-report-finds.shtm (noting a 1999 study that suggested that notification laws are counterproductive and that the fear of exposure may cause offenders to avoid treatment, and may encourage pedophiles to seek out children as a result of adult isolation).

[379] Morgan, *supra* note 378.

[380] Livio, *supra* note 377; *see also* Andy Newman, *N.J. Law; Forecast for Enforcing 'Megan's Law': Complicated, Costly*, N.Y. TIMES, Jan. 14, 1996 (illustrating the fact that the *New York Times* forecasted costly implementation of Megan's Law in 1996).

[381] *See* Emmanuella Grinberg, *5 Years Later, States Struggle to Comply with Federal Sex Offender Law*, CNN NEWS (July 28, 2011, 11:51 AM), http://www.cnn.com/2011/CRIME/07/28/ sex.offender.adam.walsh.act/index.html.

[382] *See* Chuck Biedka, *Tougher Pennsylvania Megan's Law Act May Hit Snag Because of Costs*, TRIBLIVE NEWS, (April 18, 2010), http://triblive.com/x/leadertimes/news/ s_677001.html#axzz2OV9YffzI.

[383] Sandy Hingston, *Do We Really Need Megan's Law? Maybe not, but what legislator would vote against a dead child?*, The PHILLY POST (Oct. 3, 2011), http://blogs.phillymag.com/the_philly_post/ 2011/10/03/need-megans-law/.

[384] *Roger N. Lancaster, Sex Offenders: The Last Pariahs*, N.Y. TIMES, Aug. 20, 2011.

[385] *Id.*

Other more recent news articles blamed the ineffectiveness of Megan's Law on the lack of resources and lack of conformity to the requirements of the AWA.[386]

The increase of media focus on the costs of implementation and ineffectiveness of Megan's Law, has not, to date, led to the repeal of legislation, but may have helped states decide to not conform to the requirements under the federal AWA. States have struggled to reconcile the difficulty of effectively monitoring a huge pool of registrants, a pool often increased by the AWA requirements, and the desire to appease the public and make a showing of being "tough on sexual predators."[387] Public demands on politicians and states facing loss of federal funding has continued to dictate decisions on whether to comply with the Act.[388] As of 2012, only fifteen states were deemed to be in compliance with AWA (seven in full compliance) and a handful of states have decided to openly opt out of federal funding.[389]

Ohio repealed its version of Megan's Law and subsequently enacted its counterpart to the AWA – providing increased obligations and registration requirements to be applied retroactively to previously-registered sex offenders[390] – but the Ohio Supreme Court declared the law to be unconstitutional on the issue of retroactivity and separation of powers.[391] On December 20, 2011, Pennsylvania Governor Tom Corbett signed into law the "Adam Walsh Bill,"[392] in order to bring the Commonwealth into compliance with the

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[386] *See* Tatiana Morales, *Why Megan's Law is Getting an "F",* CBS NEWS (Feb. 11, 2009, 7:25 PM), http://www.cbsnews.com/2100-500168_162-694413.html (discussing the failure of Megan's Law as part of a special series on the Early Show, *Broken Promises*); *see also* Brian Freskos, *Adam Walsh Act Reignites Debate of Sex Offender Policies*, STAR NEWS ONLINE (Feb. 3, 2012, 8:41 AM), http://www.starnewsonline.com/article/20120203/ARTICLES/120209899 (discussing North Carolina's abstention from adopting provisions and loss of federal assistance).

[387] *See, e.g.*, John Caher, *New York Opts Out of Compliance With Adam Walsh Act*, N.Y.L.J. (Oct. 7, 2011) (explaining that The Adam Walsh Act would place additional restrictions on anyone convicted of a sex-related crime; although passed by the U.S. Congress and signed into law in 2006, only seven states (Ohio, Delaware, Florida, South Dakota, Michigan, Nevada and Wyoming) agreed to fully comply with that Act. The state of Ohio subsequently declared the Act to be unconstitutional. California does not comply with this Act); Campisi, *supra* note 195; Sean Murphy, *Federal Sex Offender Laws: Arizona, Many Other States Don't Meet Standards*, HUFFINGTON POST (Oct. 4, 2012. 3:36 PM), http://www.huffingtonpost.com/2012/10/04/states-dont-meet-federal-sex-offender-laws_n_1941060.html ("Some lawmakers determined that the program would cost more to implement than to ignore. Others resisted the burden it placed on offenders, especially certain juveniles who would have to be registered for life.").

[388] *See* Ted Gest, *Feds Begin Penalizing States That Haven't Adopted New Sex Offender Law* (April 12, 2012, 4:37 AM), http://www.thecrimereport.org/viewpoints/2012-04-sorna.

[389] Caher, *supra* note 387.

[390] The Adam Walsh Act & Ohio Senate Bill 10, S.B. 10, 127th Gen. Assemb., Reg. Sess. (Ohio 2008), *available at* http://www.legislature.state.oh.us/BillText127/127_SB_10_EN_N.pdf ; *see also State v. Holloman-Cross*, 2008 WL 1973568 (Ohio Ct. App. 2008) (noting that Ohio's Adam Walsh Act does not violate the ex post facto clause of the U.S. Constitution); State v. Davis, 2012 WL 3222667, at *2 (Ohio Ct. App. 2012) (noting that the appeals court previously reached a similar conclusion in another ruling, *State v. Smith*, 2012 WL 253237 (Ohio Ct. App. 2012), and that prior ruling is in conflict with cases from two other appellate courts: "Until the Ohio Supreme Court issues a definitive ruling on this issue or until it remedies the conflict among the districts, we are bound by precedent of this court. Accordingly, we sustain Davis's assignment of error, reverse his sentence, and remand the matter to the trial court to impose a sentence consistent with Megan's Law.").

[391] *See* State v. Bodyke, 933 N.E.2d 753, 766-67 (Ohio 2010) (holding that reclassification violated separation of powers doctrine because it changed the duties imposed by courts); *see also In re* Bruce S., 983 N.E.2d 350, 353 (Ohio 2012) (noting that Ohio's Adam Walsh Act's classification, registration, and community-notification provisions cannot be constitutionally applied to a sex offender who committed his sex offense between July 1, 2007, and Dec. 31, 2007, the last day before Jan. 1, 2008, the effective date of the classification, registration, and community-notification provisions; application of these Adam Walsh Act provisions to offenses before their effective date violates Section 28, Article II of the Ohio Constitution).

[392] PA SB1183, 2011 Leg., Reg. Sess. (Pa. 2011).

AWA.[393] Pennsylvania's adult parole and probation departments considered the federal Adam Walsh Act a potential "nightmare" and maintained that there was "[no] way" present staff could handle all the background checks and other duties required under the AWA.[394] The press article reporting on these developments noted that the neighboring state of Ohio spent millions of dollars on implementation and the ensuing flood of litigation, only to have its law declared unconstitutional.[395] But few politicians dare to vote against such laws, because if they were to do so, the attack ads would practically write themselves.[396]

Despite the significant problems with the AWA, when a sensational media account detailing a horrific act of sexual violence, politicians – in an effort to appease angry constituents – still look to the AWA as the answer.[397] John Burbine, a convicted sex offender who videotaped himself sexually assaulting children from his wife's unlicensed day care business in Massachusetts, provoked a call for compliance with the AWA.[398] In response though, a local Massachusetts newspaper dedicated an article to addressing the problems that come with enacting the AWA.[399] The article discussed the results from a 10-year study by Jill Levinson and colleagues that found that the AWA tier system significantly failed to predict recidivism.[400] The piece also noted the $ 10.4 million it would take for Massachusetts to come into compliance with the AWA and cautioned that "a bloated registry that treats all offenders the same (even though they aren't) usurps valuable resources that could be allotted to those who truly need to be tracked and monitored."[401] An article from the *Boston Globe* echoed similar cautions – noting the recent research on lack of accuracy in determining risk – though the article's author aptly put forth the counter-argument: "It is easy to understand the emotional appeal of the 'if it just saves one child' argument.'"[402] Despite the fear, "basing public policy on the rare horrific crime committed by one registered sex offender, while ignoring the extensive

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[393] *See PA Sexual Offender Management*, PENNSYLVANIA COMMISSION ON CRIME AND DELINQUENCY, http://www.portal.state.pa.us/portal/server.pt/community/pa_sexual_offender_management/20801 (last visited Mar. 31, 2013).

[394] *See* Phil Ray, *Pennsylvania Prepares for Adam Walsh Act*, ALTOONA MIRROR (Sept. 9, 2012), http://www.altoonamirror.com/page/content.detail/id/564065/Pennsylvania-prepares-for-Adam-Walsh-Act.html?nav=742.

[395] *Pennsylvania Fails to Comply with Adam Walsh Sex Offender Law*, 24-7 PRESS RELEASE (Dec. 14, 2011), http://www.24-7pressrelease.com/press-release/pennsylvania-fails-to-comply-with-adam-walsh-sex-offender-law-252404.php.

[396] *See supra* notes accompanying text 375-94; *America's Unjust Sex Laws*, THE ECONOMIST, Aug. 6, 2009 (arguing that America's sex laws are unjust and are doing more harm than good), *available at* http://www.economist.com/node/14165460.

[397] *See* Crimesider Staff, *John Burbine, Convicted Sex Offender, Allegedly Assaulted Children From his Wife's Daycare Business*, CBS NEWS (Dec. 7, 2012, 2:21 PM), http://www.cbsnews.com/8301-504083_162-57557809-504083/john-burbine-convicted-sex-offender-allegedly-assaulted-children-from-his-wifes-daycare-business/.

[398] *See* Shana Rowan, *The Adam Walsh Act is Not the Answer: USA Families Advocate an Intelligent Sex Offender Registry,* CAPE COD TODAY (Dec. 18, 2012, 5:03 PM), http://www.capecodtoday.com/article/2012/12/18/3664-adam-walsh-act-not-answer ("In the wake of the horrific sex abuse allegations against convicted Level 1 sex offender John Burbine, numerous politicians are calling to bring Massachusetts into compliance with the Adam Walsh Act, which would publicize the identities and addresses of Level 1 and Level 2 sex offenders.").

[399] *Id.*; *but cf.* Shana Rowan, *Low Risk Was Never Meant to Mean No Risk*, CAPE COD TODAY (Jan. 25, 2013, 4:26 PM), http://www.capecodtoday.com/article/2013/01/25/16737-low-risk-was-never-meant-mean-no-risk ("Just as studies have shown that most high-risk offenders will never commit another sex crime, some low risk offenders will.").

[400] *See* Rowan, *supra* note 398.

[401] *Id*.

[402] Shana Rowan, *Punish the Sex Offender- Not the Entire Offender Group,* THE BOSTON GLOBE (Dec. 21, 2012).

research of the entire former sex offender population, does not result in a fair and reasoned criminal justice system."[403]

Although states have been hesitant to adopt the strict and costly restrictions under the federal AWA, they have not been hesitant to enact their own strict mandates, nor have states been scaling back their legislative efforts to restrict and monitor sex offenders.[404] Post-AWA and subsequent to the availability of widespread information citing the ineffectiveness of community notification and monitoring, states have enacted a variety of laws in order to further punish, monitor or restrict sex offenders:

1. Forty-six states have passed laws similar to Jessica's Law that mandates steep minimum sentences for those convicted of sexual crimes against a child;[405]
2. Some states have passed ordinances restricting or monitoring Internet access[406] and online gaming[407] for convicted offenders;
3. A growing number of states that have enacted laws restricting the activities of sex offenders on Halloween; [408]
4. One state attempted to restrict a sex offender's access to a public library;
5. Other states have tried to restrict sex offenders' access to church[409] or other public facilities; [410]
6. States have instructed parole and probation officers to track offenders using Global Positioning Systems (GPS)**[411]** equipment, which the offender is forced to keep on his body at designated times;

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[403] *Id.*

[404] Carpenter & Beverlin, *supra* note 2, at 1089. ("Today, Louisiana's Megan's Law includes one of the most detailed and extensive lists of required information, including palm prints, a DNA sample, and all landline and mobile telephone numbers.") The statute requires sex offenders and child predators alike to provide local law enforcement with detailed information including: the name and aliases used by the offender; physical description of the offender; addresses, including temporary housing, employment, and school; a current photograph; fingerprints, palm prints and a DNA sample; a description of every vehicle registered to or operated by the offender, including license plate number; a copy of the offender's driver's license; and every email address, online screen name, or other online identifiers used by the offender to communicate on the Internet. LA. REV. STAT. ANN. § 15:542(C)(1) (2012).

[405] Campisi, *supra* note 195.

[406] An Indiana law that bans registered sex offenders from using Facebook and other social networking sites that can be accessed by children was found to be unconstitutional. *Doe v. Prosecutor, Marion County*, Indiana, 705 F.3d 694, 695 (7th Cir. 2013); Norimitsu Onishi, *Suit Contests Limits on Online Activites of Sex Offenders*, N.Y. TIMES (Nov. 17, 2012) (Offenders "must inform the authorities of their e-mail addresses, user names, screen names and other Internet handles, as well as report any additions or changes within 24 hours.").

[407] Kevin Collier, *New York Deleted 2,100 Sex Offenders' Online Gaming Accounts*, THE DAILY DOT (Dec. 21, 2012), http://www.dailydot.com/news/new-york-sex-offenders-gaming-accounts-deleted/.

[408] At least ten states and city municipalities have enacted statutes imposing restrictions on the activities of sex offenders on Halloween. The laws seem to fall into one of two main categories: (1) specific restrictions on registered sex offenders, and (2) restrictions on paroled sex offenders, or those on conditional release programs. A California law known as "Operation Boo" allows officials to conduct nighttime checks on the evening of Halloween to make sure some registered sex offenders are insider their homes with the lights out. Nicole Gonzalez, *Parolees Arrested in Operation Boo*, NBC SAN DIEGO (Nov. 1, 2012), *available at* http://www.nbcsandiego.com/news/ local/Four-Parolees-Arrested-in-Operation-Boo-176719141.html#ixzz2TU1vYPBi. Similarly, a New York law known as "Halloween: Zero Tolerance" allows state investigators to make unannounced home visits, curfew checks, and phone calls to enforce the laws. Alv Adair, *National Alert Registry: Prepare for Sex Offenders on Halloween*, YAHOO! VOICES (Oct. 11 2007), http://voices.yahoo.com/national-alert-registry-prepare-sex-offenders-599179.html.

[409] State v. Perfetto, 7 A.3d 1179, 1183 (N.H. 2010).

[410] *Doe v. City of Albuquerque,* 667 F.3d 1111, 1115 (10th Cir. 2012) *(*city failed to show that its ban - restricting access to a public library- was narrowly tailored and that it left other avenues for sex offenders to receive information and ideas from the library.)

7. States have required individuals convicted of certain non-sex crimes to register as sex offenders.[412]

Finally, nothing can compete with the most prevalent and controversial restrictions enacted to keep sex offenders from offending in the community – residency restrictions. As discussed in Part 1, these restrictions were widely adopted and, by 2008, 30 states had enacted residency restrictions for offenders in the community.[413] Although residency restrictions have withstood a vast amount of constitutional challenges,[414] some courts have begun to question the intent of the legislation and render opinions finding certain regulations unconstitutional.[415]

Somewhat in sync with emerging concerns by courts and scholars over the constitutionality and effectiveness of residency restrictions, media articles began to report on the issues that accompanied the legislation.[416] One article noted: "despite research that

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[411] In 2006, as part of the Adam Walsh Act, the federal government offered grant programs and technical assistance to states in order to implement similar electronic monitoring programs: *See* Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, § 621, 120 Stat. 587, 633–34 (2006) (codified as amended at 42 U.S.C. § 16981 (2010)) (authorizing the Attorney General to award grants to states and local governments to carry out programs to outfit sex offenders with electronic monitoring units); Alabama was one of the first states to use GPS, ALA. CODE 15-20A-20 (2011).

[412] Associated Press, *Nebraska High Court Upholds Sex Offender Ruling,* JOURNALSTAR.COM (Jan. 18, 2013), http://journalstar.com/news/state-and-regional/nebraska/nebraska-high-court-upholds-sex-offender-ruling/article_0aa09206-8061-50ca-9d90-ae82118b1190.html (reporting that the Nebraska Supreme Court upheld a law requiring an individual who was *not* convicted of a sex crime to register as a sex offender based off of court records that showed evidence of sexual contact or penetration).

[413] Michelle L. Meloy, Susan L. Miller & Kristin M. Curtis, *Making Sense out of Nonsense: The Deconstruction of State-Level Sex Offender Residence Restrictions*, 33 AM. J. CRIM. JUST. 209 (2008).

[414] Yung, *supra* note 124, at 160 ("Regardless of the reasons for the first restrictions, there can be little doubt that the highly publicized murders of Brucia and Lunsford in 2005 played a significant role in the spate of new sex offender residency restrictions proposed and enacted in 2005 and 2006."). *See generally*, Mann v. State, 603 S.E.2d 283 (Ga. 2004); Thompson v. State, 603 S.E.2d 233 (Ga. 2004); Denson v. State, 600 S.E.2d 645 (Ga. Ct. App. 2004); People v. Leroy, 828 N.E.2d 769; State v. Seering, 701 N.W.2d 655 (Iowa 2005); Weems v. Little Rock Police Dep't, 453 F.3d 1010 (8th Cir. 2006), *cert. den. sub. nom* Weems v. Johnson, 550 U.S. 917 (2007) (residency restriction did not violate constitutional right to travel, ex post facto law, or substantive due process); State ex rel. White v. Billings, 860 N.E.2d 831 (Ohio Com. Pl. 2006) (statute prohibiting a sex offender from residing within 1000 feet of school premises was a civil regulatory measure and thus did not violate Ex Post Facto clause).

[415] Some courts have begun to question strict residency restrictions, and whether such restrictions are unconstitutional in their application. See, e.g., United States v. Rudd, 662 F.3d 1257, 1258 (9th Cir. 2011); see also Doe v. Gregoire, 960 F. Supp. 1478, 1486–87 (W.D. Wash. 1997) (holding that public notification provisions are punitive and violate the Ex Post Facto Clause when applied to offenders convicted of crimes which predate the Washington Act); and similarly, State v. Myers, 923 P.2d 1024, 1043 (Kan. 1996), *cert. denied*, 521 U.S. 1118 (1997) (holding that a law permitting unrestricted public access to a sex offender registry violated the constitutional prohibition against ex post facto laws). Consider also the majority opinion of *Doe v. Baker*, 2006 WL 905368 (N.D. Ga. 2006) (holding that "a more restrictive act that would in effect make it impossible for a registered sex offender to live in the community would in all likelihood constitute banishment which would result in an ex post facto problem . . ."). The appeals court in *Mann v. Georgia Dept. of Corrections* determined that an unconstitutional taking had occurred where an offender was forced to move from his home after a child-care facility opened within 1000 feet of his property. 653 S.E.2d 740, 760 (Ga. 2007). In rendering its decision, the Court considered the economic hardship that occurred as a result of the taking as well as the interference with an individual's reasonable investment-backed expectation when purchasing property for a private residence. The Court additionally assessed the statute and found that it effectively empowered private third parties with the state's police power. *Id*. In 2009, Indiana's Supreme Court, in *State v. Pollard*, held that the residency restriction "violates the prohibition on Ex Post Facto laws…because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed [at the time the] crime was committed." 908 N.E.2d 1145, 1154 (Ind. 2009).

[416] Monica Davey, *Iowa's Residency Rules Drive Sex Offenders Underground*, N.Y. TIMES, Mar. 15, 2006, at A1 (reporting on the consequences of Iowa's residency restrictions and calling into question

shows sex offender residency requirements actually hamper the rehabilitation of offenders, jurisdictions across the country continue to pass them."[417] Despite evidence of their ineffectiveness, new or expanded laws were proposed in twenty states in 2007 and legislators urged the public to "give it time to work."[418] Illinois Attorney General Lisa Madigan defended the newly enacted laws: "We're trying to protect children [and] [w]e're dealing with people raping children. These are horrible crimes."[419]

Further discussed by the media, was the vast amount of resources necessary to enforce residency laws and their effectiveness is questionable given that "90% of children who are abused are victimized by someone they know and trust."[420] But, according to Dr. Jill Levinson, "residency restrictions are one size fits all . . . . Just because someone is designated a sex offender . . . does not necessarily mean that that person is a sexually violent predator or pedophile."[421] The same article quoting Dr. Levinson mentioned the ongoing problems with the Iowa residency restrictions that were the focus of the *Doe v. Miller* case.[422] Since the decision in *Doe*, Iowa has been unable to keep track of the vast number of registered offenders and the restrictions unduly overburdened parole and probation officers. Regardless, Iowa legislators refuse to be seen as "soft on sex offenders" and even after realizing that "they [the legislators who pushed the residency restriction laws] were wrong and that [the laws] should be overturned," they refused to be the ones to do it and instead, passively-aggressively, left it up to the courts to determine if these laws violated the constitution.[423] Importantly, the article noted that "[t]he general public doesn't really care if it's good public policy," pointing to the moral panic that occurs amongst parents when they learn that a convicted sex offender is moving into the neighborhood.[424]

Other courts, taking a different approach than the Eight Circuit in *Doe v. Miller,* began to erode state residency restriction laws finding that the exclusion from areas amounted to banishment[425] and violated offenders' constitutional rights.[426] Local

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the restrictions' effectiveness); Associated Press, *Sex Offenders Living Under Miami Bridge,* N.Y. TIMES, Apr. 8, 2007, at A22.

[417] Paula Reed Ward, *Residency Restrictions for Sex Offenders Popular, But Ineffective*, PITTSBURGH POST-GAZETTE (Oct. 26, 2008), http://www.post-gazette.com/stories/local/region/residency-restrictions-for-sex-offenders-popular-but-ineffective-618411/.

[418] Wendy Koch, *Sex-Offender Residency Laws Get Second Look*, USA TODAY (Feb. 26, 2007), http://usatoday30.usatoday.com/news/nation/2007-02-25-sex-offender-laws-cover_x.htm (statement by Georgia State Rep. Jerry Keen who advocates children's safety before the convenience of sex offenders).

[419] *Id.*

[420] Ward, *supra* note 417.

[421] *Id.*

[422] *Id.*; Doe v. Miller, 405 F.3d 700 (8th Cir. 2005).

[423] Ward, *supra* note 417 (stating, "they're a fearful bunch…they've done such a good job of selling it, they can't turn and go the other way").

[424] *Id.*

[425] Due to the restrictions upheld by the *Doe* court, individuals may be uprooted and forced to move from established residences, be unable to return home after prison, and may be prevented from residing with their own children, thus further disabling the family unit and removing the needed support of family members. *See* Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 54 (2009). The *Doe* court specifically addressed and dismissed the argument of banishment: "While banishment of course involves an extreme form of residency restriction, we ultimately do not accept the analogy between the traditional means of punishment and the Iowa statute. Unlike banishment, § 692A.2A restricts only where offenders may reside. It does not 'expel' the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence." *Doe*, 405 F.3d at 719; *Mann*, 653 S.E.2d at 742 ("Under the terms of [Georgia's sex offender] statute, it is apparent that there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected.); Berlin v. Evans,

communities also began to question whether the expense caused in defending such laws was worth their benefit.[427] Huntington Beach, California "changed its sex-offender park ban after the law's constitutionality was challenged in court" and amended the ordinance to allow authorities to write case-by-case exemptions to the sex-offender ordinance rather than impose a blanket ban restricting all offenders.[428] An ordinance in Montville, Connecticut, was actually repealed before a lawsuit was initiated.[429] Town Council members openly voiced their opinion that the "so-called child and senior safety zone . . . designed to keep registered sex offenders from town-owned and town-leased property . . . was not really enforceable [and] was one of those ordinances that looks good on face value, but it really didn't do anything."[430]

Thus, despite some courts' refusal to uphold the constitutionality of strict residency restrictions and news accounts citing ineffectiveness, the fear of an attack against children continued to be displayed in of the form of ordinances seeking to bar offenders from living in specific areas.[431] For example, in 2012, despite this increase in knowledge and media attention to the ineffectiveness of residency restrictions,[432] Attorney General Kilmartin of Rhode Island praised a Superior Court Justice for her decision for the Court upholding the state's residency restrictions.[433] Ignoring an influx of information dispelling any connection between re-offense rates and proximity to children, Kilmartin felt that "it was eminently reasonable…to set public policy and determine the need to put modest distance between sex offenders and school children."[434] In 2010, New Hampshire

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923 N.Y.S.2d 828, 835 (Sup. Ct. 2011) (acknowledging that the registrant, a tier I offender, was effectively banished from living in Manhattan).

[426] Dana Littlefield*, Court: Law's Restrictions On Sex Offenders Unreasonable*, SAN DIEGO UNION-TRIBUNE (Sept. 15, 2012), http://www.utsandiego.com/news/2012/sep/15/tp-court-laws-restrictions-on-sex-offenders/ (reporting on an appellate court decision upholding a ruling that a state law barring registered offenders from living within 2000 feet of parks and schools is too broad and violates the offenders' constitutional rights).

[427] Sarah De Crescenzo, *Backpedal On Sex Offender Ban Gets Officials' Attention*, ORANGE COUNTY REGISTER (Dec. 7, 2012), http://www.ocregister.com/articles/city-379823-sex-cities.html, ("A sudden about-face by Lake Forest officials on an ordinance barring registered sex offenders from parks is reverberating throughout the county as attorneys and city officials discuss whether the law is worth defending in court.").

[428] Jaimee Lynn Fletcher, *H.B. Changes Sex Offender Ordinances After Lawsuit*, ORANGE COUNTY REGISTER (Jan. 23, 2013), http://www.ocregister.com/articles/ordinance-408906-sex-beach.html.

[429] Izaskun E. Larrañeta, *Montville Rescinds Sex Offender Ordinances*, THE DAY (Jan. 15, 2013, 12:00 AM), http://www.theday.com/article/20130115/NWS01/130119835/1070/NWS1501.

[430] *Id.*

[431] Dan O'Brian, *Sex Offender Case Rekindles Debate on Bans*, THE BOSTON GLOBE (Oct. 18, 2012), http://www.bostonglobe.com/metro/regionals/west/2012/10/17/southborough-sex-offender-case-rekindles-debate-over-bans/xy4EBl8NWCIsRNBEqYtFyI/story.html (reporting that police failed to realize that a registered sex offender was living near a preschool for two years; without making note of the fact that the individual did not reoffend during that time, a community member stated, "When you have these people in an area where there are children, it just heightens their need").

[432] Ward, *supra* note 417 ("Further, studies conducted by the Minnesota Department of Corrections and Colorado Department of Public Safety have not shown any correlation between sex offender recidivism and living near schools or parks."), Eric Zorn, *Restrictions on Sex Offenders Lack sense, Common and Otherwise*, *Restrictions On Sex Offenders Lack Sense, Common and Otherwise*, CHICAGO TRIBUNE (June 21, 2011), http://blogs.chicagotribune. com/news_columnists_ezorn/2011/06/offender.html ("'There was no significant relationship between reoffending and proximity to schools or day cares,' concluded an academic study of such restrictions published last year in Criminal Justice and Behavior, the journal of The American Association for Correctional and Forensic Psychology. 'The belief that keeping sex offenders far from schools and other child-friendly locations will protect children from sexual abuse appears to be a well-intentioned but flawed premise.'").

[433] Press Release, State of Rhode Island Office of the Attorney General, Attorney General Kilmartin Applauds Decision Upholding Sex Offender Residency Restrictions (Nov. 30, 2012), http://www.ri.gov/press/view/18077.

[434] *Id.*

State Sen. David Boutin sponsored a bill to encourage police departments to notify the public when sex offenders are released into a neighborhood.[435] He introduced the legislation to please constituents hoping to banish all the sex offenders from his hometown.[436] Boutin told lawmakers,

> a convicted child sex offender heinously struck again and was charged with felonious sexual assault against a 7 year old [and] [q]uick adoption of this bill and dissemination of notification guidelines to local law enforcement will go a long way towards preventing another sexual assault, with regrettable consequences for the victim, family and community, who all share in the burden of the pain.[437]

Although the bill died on the Senate floor (even in an election year), neighbors of a recently released sex offender in a New Hampshire town started a website and posted the following comments: "You show true restraint by not beating the tar out of this lowlife."; "I hope you guys get rid of the bastard. What a piece of crap."; "This is an incestuous family of whack-jobs and psychopaths, and it makes me feel good to know they are going down."; "Hang 'em high and let the sun set on 'em. Only in a perfect world right? Haha."[438] One of two conclusions can be drawn from the public's continued reaction towards convicted offenders: 1) they are not being exposed to the news reports citing low recidivism, re-offense rates and rarity of stranger sex crimes, or 2) despite new information, they just do not care.

E. Civil Commitment

After *Kansas v. Hendricks*[439], scholars and attorneys aptly predicted that, "[t]his law is going to spread like wildfire."[440] Twenty states[441] and the District of Columbia have enacted laws permitting the civil commitment of sexual offenders.[442] Soon after the decision in *Hendricks,* States' legislators rushed to enact their own civil commitment laws and construct facilities to contain large numbers of sexual predators.[443] As with most other areas of sex offender legislation, media-highlighted sex crimes helped to fuel and support civil commitment. Minnesota's sex offender civil commitment program increased exponentially after the 2003 murder of Dru Sjodin, prompting state prison authorities to

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[435] Chris Dornin, *Sex Offender Laws are Based on Rage and Fear*, CORRECTIONS.COM (March 12, 2012), http://www.corrections.com/news/article/30085.

[436] *Id.*

[437] *Id.* Boutin failed to mention that the case against the offender had been dropped due to lack of evidence.

[438] *Id*; *see also* Steven Brown et al., *What People Think About the Management of Sex Offenders in the Community*, 47 HOWARD J. CRIM. JUST. 259 (2008) (finding that the public does not necessarily agree with punitive conditions but is insecure in the effectiveness of community containment and concerned about the reality of reintegration).

[439] 521 U.S. 346 (1997).

[440] Biskupic, *supra* note 152 (quoting Lynn S. Branham, an Illinois attorney and professor who specializes in sentencing law, "This notion of 'mental abnormality' has the potential to dramatically expand the types of persons who can be confined.").

[441] Association for the Treatment of Sexual Abusers, *Civil Commitment of Sexually Violent Predators* (2010), *available at* http://www.atsa.com/civil-commitment-sexually-violent-predators (listing the twenty state as Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin).

[442] *Id.*

[443] Davey & Goodnough, *supra* note 78 ("Nearly 3,000 sex offenders have been committed since the first law passed in 1990. . . . In Coalinga, Calif., a $388 million facility will allow the state to greatly expand the offenders it holds to 1,500. Florida, Minnesota, Nebraska, Virginia and Wisconsin are also adding beds.").

refer all high-risk offenders for commitment.[444] As years passed, the considerable costs necessary to maintain these institutions drastically dissuaded additional states from enacting their own civil commitment schemes.[445]

New York passed its sex offender civil commitment statute in 2007, notwithstanding numerous concerns of the ineffective treatment and serious financial burdens associated with these laws,[446] per the announcement of State Senator John J. Flanagan that "[w]ith the passage of this legislation, we have the opportunity to save lives, protect our children, and ensure that our communities are safe from sexual predators who roam our streets in pursuit of their next victim."[447] However, an article published soon after enactment reported that in state after state, expectations of the benefits of sex offender civil commitment had "fallen short"[448] and since the United States Supreme Court upheld the constitutionality of these laws…only a small fraction of committed offenders have ever completed treatment to the point where they could be released free and clear.[449] It further reported that, "[t]he cost of the programs is virtually unchecked and growing, with states spending nearly $450 million on them this year [2007]. The annual price of housing a committed sex offender averages more than $100,000, compared with about $26,000 a year for keeping someone in prison, because of the higher costs for programs, treatment and supervised freedoms."[450]

In 2012, the *Seattle Times* ran a four-part series – "*The Price of Protection*" – and revealed the extensive waste of dollars and resources at Washington state's civil commitment center on McNeil Island – a "state of the art" facility that housed about 300 sex offenders on an island across the Puget Sound "behind coils of concertina wire."[451] The articles found that the institution was "plagued by runaway legal costs, a lack of

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[444] *AP IMPACT: Treatment for Sexual Predators Squeezes State Budgets As Programs Grow*, FOXNEWS.COM (June 21, 2010), http://www.foxnews.com/us/2010/06/21/ap-impact-treatment-sexual-predators-squeezes-state-budgets-programs-grow/ [*Treatment Squeezes*]; *see also* Anne Meyer, *Sex Offender's Daughter Speaks Out to Keep Him Locked Up,* KWCH 12 Eyewitness News (Nov. 7, 2011), http://articles.kwch.com/2011-11-07/mental-hospital_30371736 (quoting a daughter who is advocating to civilly commit her sex offender father in Kansas, "I just don't want him getting out and hurting other children. I know I have had to live with what he did to me my whole life, the nightmares it [*sic*] just doesn't ever stop.").

[445] The state of Florida spent an average of $41,835 per committed individual; by contrast, the state spent $19,000 per prison inmate per year. By contrast, Pennsylvania spent $180,000 per year per committed individual and $31,363 per inmate per year. The cost of civil commitment is exponentially higher than prison time. *See* Chart, *A Profile of Civil Commitment around the Country*, N.Y. TIMES (March 3, 2009), *available at* http://www.nytimes.com/imagepages/ 2007/03/03/us/20070304_CIVIL_GRAPHIC.html; Christine Willmsen, *States Waste Millions Helping Sex Predators Avoid Lockup*, SEATTLE TIMES (Jan. 21, 2012), http://seattletimes.com /html/ localnews/2017301107_civilcomm22.html.

[446] *Treatment Squeezes, supra* note 444 ("Some states have steered clear of the civil-commitment system, partly because of financial reasons. In Louisiana, legislation died last year after top lawmakers questioned the cost and constitutional issues. Vermont legislators rejected a similar proposal.")

Of the nearly 3,000 convicted sex offenders sent to civil commitment centers in 18 states from 1990 to 2007, only 50 "graduated" from the courses while 115 have been released due to legal technicality, old age, or terminal health; and even those few who were released wind up living on state prison grounds because communities shun the released. Davey and Goodnough, *supra* note 78; *see also* Monica Davey & Abby Goodnough, *A Record of Failure at Center for Sex Offenders,* N.Y. TIMES (March 5, 2007), http://www.nytimes.com/2007/03/05/us/05civil.html?pagewanted=all.

[447] John J. Flanagan, *Senate Passes Civil Commitment Legislation*, NYSENATE.GOV (Jan. 20, 2006), http://www.nysenate.gov/news/senate-passes-civil-commitment-legislation.

[448] Davey & Goodnough, *supra* note 78.

[449] *Id.*

[450] *Id.*

[451] Willmsen, *supra* note 445.

financial oversight and layers of secrecy."[452] The newspaper reported on the poor management of the institution and overwhelming employee misconduct, including consistent misuse of work computers from staff viewing pornography.[453] One article also discussed the questionable reasoning behind the constitutionality of the law, quoting the superintendent of the McNeil Island facility: "It's a highly controversial law . . . . You are talking about restricting someone's freedom after they have served their prison sentence, not for what they have done, but for what they might do."[454] Furthermore, the article went into depth questioning the reliability of the science used to uphold these commitments – questioning the definition and determination of "high risk,"[455] ability to predict recidivism and the value assessment tools,[456] and the credibility of the experts testifying in these types of cases.[457] Professor W. Lawrence Fitch aptly observed that "no one would ever dare offer to repeal because it's just untenable."[458] Regardless of the cost, "no one wants to be . . . perceived to be soft on sex offenders."[459]

By way of example, State Rep. John Trebilcock advocated for civil commitment in Oklahoma following the abduction of a 2-year old girl by a repeat sex offender.[460] Trebilcock stated: "As we have seen with the Penn State scandal, a single child molester is capable of devastating the lives of countless innocent children . . . . These criminals typically remain a public-safety threat even after completing a prison sentence and it is necessary to ensure they are not allowed to return to the communities they have victimized."[461] The article quoting Trebilcock also notes tragedy follows an international scandal in the Catholic church involving widespread abuse of children by priests.[462] Also, still carved in the public's hearts and minds are the murders of those children who became household names; child-protection laws were created in their memory: Polly Klaas, Adam Walsh, Megan Kanka. Civil commitment laws for pedophiles were born out of the revulsion that followed those and other high-profile sex crimes against children.[463]

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[452] Christine Willmsen, *Troubles Persist on Predator Island*, SEATTLE TIMES, Dec. 15, 2012, http://seattletimes.com/html/localnews/2019912618_mcneilisland16m.html [*Troubles Persist*] ("[T]he state . . . wasted millions of dollars because of lack of oversight, unchecked defense costs and delayed commitment trials. The state spends about $170,000 a year for each of the 297 sex offenders on McNeil Island."); Willmsen, *supra* note 445.

[453] Willmsen, *supra* note 445.

[454] Willmsen, *Troubles Persist*, *supra* note 455.

[455] Willmsen, *supra* note 445 ("Psychologists have no precise way to determine if any specific offender will commit a violent sex crime in the future . . . .").

[456] *Id.* (quoting an offender after hearing testimony at his civil commitment hearing: "It would have been cheaper if they would have hired a gypsy and some fortune tellers . . . I would have had just as much luck.").

[457] *Id.* (citing recycled psychological evaluations and the extensive costs billed by experts).

[458] *Treatment Squeezes, supra* note 444.

[459] *Id.*

[460] Julie Delcour, *Time to Pass Civil Commitment Law for Sexual Predators*, TULSA WORLD (Jan. 8, 2012), http://www.tulsaworld.com/opinion/article.aspx?subjectid=214&articleid=20120108_214_G1_Perhap64553.

[461] *Id.* ("Civil confinement isn't a perfect solution, but what is the solution in a world of Marcus Berrys [the repeat child molester highlighted in the article] or worse?").

[462] *Id.*

[463] *Id.*

The article also considered the following points from a *New York Times* investigation:

- Sex offenders selected for commitment are not always the most violent; some exhibitionists are chosen, for example, while rapists are passed over. And some offenders are past the age at which some scientists consider them most dangerous. In Wisconsin, a 102-year-old who wears a sport coat to dinner cannot participate in treatment because of poor hearing and memory lapses.
- Treatment programs are often unproven, and patients cannot be forced to participate.
- Program costs are virtually unchecked and mushrooming.
- Unlike prisons and other institutions, civil-commitment mental-health facilities often receive little consistent, independent oversight or monitoring.
- Few states have figured out what to do when offenders are "ready" for release from civil commitment facilities.[464]

Nonetheless, it seems evident that other states have been hesitant to pass their own statutes due to the overwhelming financial costs in creating, running and defending the institutions. An Associated Press analysis found "that the 20 states with so-called 'civil commitment' programs will spend nearly $500 million [in 2010] to confine and treat 5,200 offenders still considered too dangerous to put back on the streets."[465]

Although no other "new" states moved to pass sex offender civil commitment statutes, in 2010, a federal civil commitment scheme to encompass federal prisoners who were in the custody of the attorney general or the federal bureau of prisons was upheld in the case of *United States v. Comstock*.[466] *Comstock* involved Section 4248 of the Adam Walsh Act, which gives the federal Bureau of Prisons the power to detain "sexually dangerous" federal prisoners even after they have served out their entire sentences.[467] Rejecting a constitutional challenge raised by individuals who were in federal custody and deemed "sexually violent," the Supreme Court upheld section 4248 and found that Congress had the authority to create legislation under the Necessary and Proper Clause.[468]

Whether or not the Justices writing for the majority were moved or influenced in any way by public sentiment,[469] they supported the notion that it was necessary and proper for Congress to prevent this "dangerous" cohort of individuals from entering society.[470]

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[464] *Id.*

[465] *Treatment Squeezes, supra* note 444 (citing the 65 million per year it costs Minnesota to house and treat sex offenders).

[466] United States v. Comstock, 130 S. Ct. 1949, 1954 (2010).

[467] 18 U.S.C. § 4248 (West 2012). This provision was incorporated into the Adam Walsh Child Protection and Safety Act, 42 U.S.C. § 16901 (West 2012). *See also Predators and the Constitution*, WALL ST. J. (Jan. 19, 2010), http://online.wsj.com/article/SB10001424052748703652104574652392015371328.html ("Sex offenders are the least sympathetic of the legal plaintiffs. Still, we were dismayed last week to see so many Supreme Court Justices during oral arguments apparently willing to let the federal government take over an area of law governing criminals that the Constitution grants to the states.").

[468] *Comstock*, 130 S. Ct. at 1954 (upholding 18 U.S.C. § 4248, the Supreme Court held this federal civil commitment statute, which authorized the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond his regular release date, to be a constitutional exercise of congressional power under the Necessary and Proper Clause.).

[469] *See id.* at 1959-65.

[470] Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventative Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 996 (2011) ("[T]he majority opinion essentially rewrote law surrounding the Necessary and Proper Clause to allow for virtually unfettered federal power in the area of sex offender civil commitment."). The

Thus, the majority accepted the fact that sexual predators pose a high risk of dangerousness and that future risk can be determined.[471] Notably, three of the five persons who were designated "sexually dangerous" in the *Comstock* case were only convicted of possessing child pornography,[472] not of an offense involving sexual touching or penetration.

It is evident that sex offender civil commitment is not going by the wayside. The number of persons in state and federal detention centers dedicated sex offenders has continued to climb.[473]Clearly, the media focus and attention on the costs and corruption surrounding sex offender civil commitment has been ineffective in repealing current statutes or dissuading enactment of federal civil commitment.[474] No doubt it has also had little effect on the general public who are appeased by any method that keeps offenders out of their communities and limited effect on politicians who could never survive the career repercussions of speaking out against it.

Certainly, a case can be made that we have slowed down in our fervent crusade against this monstrous evil, but we are far from taking steps to reverse the ineffective legislation that has been put in place. Possibly the answer is time: "In America it may take years to unpack this. However practical and just the case for reform, it must overcome political cowardice, the tabloid media and parents' understandable fears."[475]

We now turn to the question of therapeutic jurisprudence: Can this discipline provide the tools to allow us to make better sense of this area of the law?

Comstock Court expressly declined to address whether 18 U.S.C. § 4248 or its application denied equal protection, procedural or substantive due process, or any other constitutional rights. 130 S. Ct. at 1965.

[471] Justice Alito's concurring opinion is focused upon the fears of "dangerousness" and "risk" in allowing this population to return to the community and therefore, must support federal intervention; citing evidence of the States' unwillingness to assume the financial burden of containing these individuals, Justice Alito deemed that the burden thus fell upon Congress to prevent these prisoners to enter the community and "present a danger [wherever] they chose to live or visit." *Comstock*, 130 S. Ct. at 1970 (Alito, J., concurring).

[472] *Id.* at 1955.

[473] JOHN Q. LAFOND, PREVENTING SEXUAL VIOLENCE: HOW SOCIETY SHOULD COPE WITH SEX OFFENDERS 145 (Am. Psychol. Assoc. 2005) (referring to the use of civil commitment as a growth industry); WASH. STATE INST. FOR PUB. POLICY, COMPARISON OF STATE LAWS AUTHORIZING INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS: 2006 UPDATE, REVISED (2007), *available* at http://www.wsipp.wa.gov/pub.asp?docid=07-08-1101.

[474] Most of the media accounts of *Comstock* focused more on issues involving the broad powers of Congress and whether these powers were sanctioned by the Constitution's "Necessary and Proper" clause. A *New York Times* article laid out a brief synopsis of the Justices' decisions and quoted Justice Alito: "Just as it is necessary and proper for Congress to provide for the apprehension of escaped federal prisoners," he wrote, "it is necessary and proper for Congress to provide for the civil commitment of dangerous federal prisoners who would otherwise escape civil commitment as a result of federal imprisonment." Adam Liptak, *Extended Civil Commitment of Sex Offenders is Upheld*, N.Y. TIMES (May 17, 2010) (quoting Justice Alito's concurring opinion in *Comstock*, 130 S. Ct. at 1970).

[475] *America's Unjust Sex Laws supra* note 398.

IV. THERAPEUTIC JURISPRUDENCE[476]

One of the most important legal theoretical developments of the past two decades has been the creation and dynamic growth of therapeutic jurisprudence (TJ).[477] Initially employed in cases involving individuals with mental disabilities, but subsequently expanded far beyond that narrow area, therapeutic jurisprudence presents a new model for assessing the impact of case law and legislation, recognizing that, as a therapeutic agent, the law that can have therapeutic or anti-therapeutic consequences.[478] The ultimate aim of therapeutic jurisprudence is to determine whether legal rules, procedures, and lawyer roles can or should be reshaped to enhance their therapeutic potential while not subordinating due process principles.[479] There is an inherent tension in this inquiry, but David Wexler clearly identifies how it must be resolved: "the law's use of mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[480] As one of us has written elsewhere, "[a]n inquiry into therapeutic outcomes does not mean that therapeutic concerns 'trump' civil rights and civil liberties."[481]

Therapeutic jurisprudence "asks us to look at law as it actually impacts people's lives"[482] and focuses on the law's influence on emotional life and psychological well-

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[476] Part IV is largely adapted from the works of Michael L. Perlin. *See* Michael L. Perlin, *Striking for the Guardians and Protectors of the Mind": The Convention on The Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159 (2013) [Perlin, *Guardians*]; Michael L. Perlin, *"John Brown Went Off to War": Considering Veterans' Courts as Problem-Solving Courts*, NOVA L. REV. (forthcoming 2013) [Perlin, *Veterans' Court*]; Michael L. Perlin, *"Wisdom is Thrown into Jail: Using Therapeutic Jurisprudence to Remediate the Criminalization of Persons with Mental Illness*, MICH. ST. U. J. L. & MED. (forthcoming 2013); Michael L. Perlin, *Understanding the Intersection Between International Human Rights and Mental Disability Law: The Role of Dignity* in INTERNATIONAL CRIME, *supra* note 202 .

[477] *See, e.g.*, DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (Carolina Academic Press, 1990); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: RECENT DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (Carolina Academic Press 1996); BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL (Carolina Academic Press, 2005); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17 (2008). Wexler first used the term in a paper he presented to the National Institute of Mental Health in 1987. *See* David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, 16 LAW & HUM. BEHAV. 27, 27, 27-32 (1992).

[478] Michael L. Perlin, *What is Therapeutic Jurisprudence?*, 10 N.Y.L. SCH. J. HUM. RTS. 623, 623 (1993); KATE DIESFELD & IAN FRECKELTON, *Mental Health Law and Therapeutic Jurisprudence, in* DISPUTES AND DILEMMAS IN HEALTH LAW 91 (2006) (providing a transnational perspective).

[479] Michael L. Perlin, *And My Best Friend, My Doctor/Won't Even Say What It Is I've Got: The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735 (2005); Michael L. Perlin, *Everybody Is Making Love/Or Else Expecting Rain: Considering The Sexual Autonomy Rights of Persons Institutionalized Because of Mental Disability in Forensic Hospitals And In Asia*, 83 WASH. L. REV. 481 (2008); Michael L. Perlin, *You Have Discussed Lepers and Crooks: Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 692-97 (2003). On how TJ "might be a redemption tool in efforts to combat sanism, as a means of 'strip[ping] bare the law's sanist façade,'" *see* Michael L. Perlin, *Baby, Look Inside Your Mirror: The Legal Profession's Willful and Sanist Blindness to Lawyers With Mental Disabilities*, 69 U. PITT. L. REV. 589, 591 (2008), *quoted in* Michael L. Perlin, *Things Have Changed: Looking At Non-Institutional Mental Disability Law Through The Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 544 (2003). *See also*, Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 585-86 (2008); Bernard P. Perlmutter, *George's Story: Voice And Transformation Through The Teaching And Practice of Therapeutic Jurisprudence in a Law School Child Advocacy Clinic*, 17 ST. THOMAS L. REV. 561, 599 n.111 (2005).

[480] David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993); *see also, e.g.*, David Wexler, *Applying the Law Therapeutically*, 5 APPLIED & PREVENTIVE PSYCHOL. 179 (1996).

[481] Michael L. Perlin, *A Law of Healing*, 68 U. CIN. L. REV. 407, 412 (2000); Michael L. Perlin, *Where the Winds Hit Heavy on the Borderline: Mental Disability Law, Theory and Practice, Us and Them*, 31 LOY. L.A. L. REV. 775, 782 (1998).

[482] Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 NOVA L. REV. 535, 535 (2009).

being.[483] It suggests that "law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law should attempt to bring about healing and wellness."[484] TJ understands that, "when attorneys fail to acknowledge their clients' negative emotional reactions to the judicial process, the clients are inclined to regard the lawyer as indifferent and a part of a criminal system bent on punishment."[485] By way of example, TJ "aims to offer social science evidence that limits the use of the incompetency label by narrowly defining its use and minimizing its psychological and social disadvantage."[486]

In recent years, scholars have considered a vast range of topics through a TJ lens, including, but not limited to, all aspects of mental disability law, domestic relations law, criminal law and procedure, employment law, gay rights law, and tort law.[487] As Ian Freckelton has noted, "it is a tool for gaining a new and distinctive perspective utilizing socio-psychological insights into the law and its applications."[488] It is also part of a growing comprehensive movement in the law towards establishing more humane and psychologically optimal ways of handling legal issues collaboratively, creatively, and respectfully.[489] These alternative approaches optimize the psychological well-being of individuals, relationships, and communities dealing with a legal matter, and acknowledge concerns beyond strict legal rights, duties, and obligations. In its aim to use the law to empower individuals, enhance rights, and promote well-being, TJ has been described as "[a] sea-change in ethical thinking about the role of law . . . a movement towards a more distinctly relational approach to the practice of law . . . which emphasises psychological wellness over adversarial triumphalism."[490] That is, TJ supports an ethic of care.[491]

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[483] David B. Wexler, *Practicing Therapeutic Jurisprudence: Psychological Soft Spots and Strategies*, *in* PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION 45 (Daniel P. Stolle, David B. Wexler & Bruce J. Winick, eds.2000) (PRACTICING THERAPEUTIC JURISPRUDENCE).

[484] Bruce J. Winick, *A Therapeutic Jurisprudence Model for Civil Commitment, in* INVOLUNTARY DETENTION AND THERAPEUTIC JURISPRUDENCE: INTERNATIONAL PERSPECTIVES ON CIVIL COMMITMENT 23, 26 (Kate Diesfeld & Ian Freckelton eds., 2003).

[485] Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of Plea Agreements*, 13 HARV. LATINO L. REV. 47, 59 (2010).

[486] Claire B. Steinberger, *Persistence and change in the Life of the Law: Can Therapeutic Jurisprudence Make a Difference?*, 27 LAW & PSYCHOL. REV. 55, 65 (2003). The most thoughtful sympathetic critique of Therapeutic Jurisprudence remains Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, PSYCHOL. PUB. POL'Y & L. 193 (1995).

[487] Michael L. Perlin, *Things Have Changed: Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*, 46 N.Y.L. SCH. L. REV. 535, 544-45 (2003).

[488] Freckelton, *supra* note 482, at 576.

[489] Susan Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement, in* PRACTICING THERAPEUTIC JURISPRUDENCE, *supra* note 485, at 465.

[490] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329-30 (2001); *see also*, Bruce J. Winick, *Overcoming Psychological Barriers to Settlement: Challenges for the TJ Lawyer*, in THE AFFECTIVE ASSISTANCE OF COUNSEL: PRACTICING LAW AS A HEALING PROFESSION 342 (Marjorie A. Silver ed., 2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605-06 (2006). The use of the phrase dates to CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

[491] *See, e.g.*, Brookbanks, *supra* note 492; Gregory Baker, *Do You Hear the Knocking at the Door? A "Therapeutic" Approach to Enriching Clinical Legal Education Comes Calling*, 28 WHITTIER L. REV. 379, 385 (2006); David B. Wexler, *Not such a Party Pooper: An Attempt to Accommodate (Many Of) Professor Quinn's Concerns About Therapeutic Jurisprudence Criminal Defense Lawyering*, 48 B.C. L. REV. 597, 599 (2007); Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 607 (2006).

One of the central principles of TJ is a commitment to dignity.[492] Professor Amy Ronner describes the "three Vs": voice, validation and voluntariness,[493] arguing:

> What "the three Vs" commend is pretty basic: litigants must have a sense of voice or a chance to tell their story to a decision maker. If that litigant feels that the tribunal has genuinely listened to, heard, and taken seriously the litigant's story, the litigant feels a sense of validation. When litigants emerge from a legal proceeding with a sense of voice and validation, they are more at peace with the outcome. Voice and validation create a sense of voluntary participation, one in which the litigant experiences the proceeding as less coercive. Specifically, the feeling on the part of litigants that they voluntarily partook in the very process that engendered the end result or the very judicial pronunciation that affects their own lives can initiate healing and bring about improved behavior in the future. In general, human beings prosper when they feel that they are making, or at least participating in, their own decisions. [494]

The question to pose here is this: Does our current sex offender legislation make it more or less likely that Prof. Ronner's vision – of voice, voluntariness and validation – will be fulfilled?[495]

Before we consider this question, it is necessary to reflect on the reasons – that we identified in an earlier article[496] – why the legal system has resisted TJ principles in a criminal law context: fear of being seen as "soft on crime," imperiling the judge's re-election chances;[497] judges' traditional adversity to endorsing or utilizing any intervention that might be perceived as being "touchy-feely";[498] the ways that, like the general public, judges have, by and large, bought into myths about sex offenses and sex offenders;[499] the deep need on the part of judges to convince themselves that the "system works,"[500]

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[492] *See* BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 161 (2005).

[493] Amy D. Ronner, *The Learned-Helpless Lawyer: Clinical Legal Education and Therapeutic Jurisprudence as Antidotes to Bartleby Syndrome*, 24 TOURO L. REV. 601, 627 (2008). On the importance of "voice," *see also*, Freckelton, *supra* note 481, at 588.

[494] Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U. CIN. L. REV. 89, 94-95 (2002); *see generally*, AMY D. RONNER, LAW, LITERATURE, AND THERAPEUTIC JURISPRUDENCE (2010).

[495] On the extent to which current legislation is therapeutic for *victims*, see Leonore M.J. Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485 (1999).

[496] *See* Cucolo & Perlin, *supra* note 28 .

[497] Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N. C. L. REV. 1965, 1990 (2011). *See also, generally*, John Tomaino, *Punishment and Corrections*, *in* CONSIDERING CRIME, *supra* note 228, at 171. Again, as earlier noted, the literature is replete with studies of political campaigns –many of which were successful- that turned on this precise issue; *see* Carrington, *supra*, at 1989-90 (discussing the California Supreme Court election of 1986 that led to the defeat of Chief Justice Rose Bird and two other associate justices perceived in this way); John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 470-72 (1999) (discussing political campaigns aimed at ousting individual judges for being "soft on crime").

[498] *See* Jonathan Lippman, *Achieving Better Outcomes for Litigants in the New York State Courts*, 34 FORDHAM URB. L.J. 813, 830 (2007). This is especially relevant in the context of the emotionally-charged area of sex offender law where any alternative approaches could be construed as condoning or minimizing the underlining offense.

[499] *See, e.g.*, Winick, *supra* note 1, at 552 (discussing the "small" likelihood of a judge ever overruling a prosecutor's discretionary determination in such cases).

[500] *See, e.g.*, Kevin Burke & Steve Leben, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, 44 CT. REV. 4, 21 (2007) (discussing ways in which judges can improve the public's satisfaction with the court system in the United States). Judges typically express great faith in the adversary system, *see* Daniel W. Shuman et al.,

especially in the area of sex offender law where alternative solutions are accompanied by deep analytical inspection of science-based studies and complex sociological elements – clearly outside the realm of the judges' knowledge and role.[501]

As we have discussed in the same earlier article,[502] the origins and development of sex offender law have had a profoundly anti-therapeutic effect.[503] Of especial importance is the way that, "the confrontational adjudicative process of traditional courts encourages advocacy of innocence, discourages acceptance of responsibility, and influences [subsequent acceptance] of treatment once sentenced."[504]

Other scholars have considered the impact of TJ on sex offender law, and have, virtually uniformly, found that our law and practices ignore all of the precepts of TJ.[505] In the most extensive analysis, the late Professor Bruce Winick identified a constellation of factors – impact of labeling effects on treatment outcomes and on the reinforcement of antisocial behavior, impact on clinicians who provide sex offender treatment, impact of sexually violent predator laws on persons with genuine mental disorders[506] – that, in the aggregate, "undermine the potential that sex offenders will be rehabilitated."[507] In this analysis, Prof. Winick concludes – unequivocally – that "sexual predator laws . . . pose significant antitherapeutic consequences for both sex offenders and clinicians involved in the sex predator treatment process."[508] Professor Bill Glaser lists multiple ways that the ethical guidelines governing psychology practice are breached by sex offender laws:

An Empirical Examination of the Use of Exert Witnesses in the Courts – Part II: A Three City Study, 34 JURIMETRICS J. 193, 207 (1994) (reporting on survey results), and their opinions typically express a deep-seated "attachment to commonly held beliefs," *see* Lode Walgrave, *Restoration in Youth Justice*, 31 CRIM. & JUST. 543, 547 (2004), notwithstanding the reality that "subconscious influence can cloud their decisions and impede their legal reasoning," even when "they desire to render a 'fair' decision." Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 3 (2006) ("Consequently, in many circumstances, for judges to be fair, they must be capable of identifying subconscious influences on their behavior and they must neutralize the effects of such impulses.").

[501] *See generally*, Fabian M. Saleh, *Pharmacological Treatment of Paraphilic Sex Offenders*, *in* SEX OFFENDERS: IDENFICATION, RISK ASSESSMENT, TREATMENT, AND LEGAL ISSUES 189 (Fabian M. Saleh et al. eds., 2009); Eric Silver et al., *Multiple Models Approach to Assessing Recidivism Risk: Implication for Judicial Decision Making Criminal Justice and Behavior*, 29 CRIM. J. & BEHAV. 538 (2002).

[502] *See* Cucolo & Perlin, *supra* note 28, at 34.

[503] This is so for many reasons: the presumption in current sex offender laws that there is a "standard" type of sex offender; the presumption that all sex offenders are recidivists; the presumption that most sex offenses are committed by strangers; the presumption that "banishment" laws minimize reoffending and provide incentives for sex offenders to engage in treatment in the community or demonstrate a pro-social lifestyle; the fact that the current universe of sex-offender laws ignores the multiple ways that the court process and the roles played by defense counsel and the prosecution—as is done currently—support cognitive distortions that can be used by sex offenders as ways of justifying sexual offending, and, simultaneously, often provide disincentives for sex offenders to undergo treatment. *See id.* at 34-36.

[504] Astrid Birgden & Heather Ellis Cucolo, *The Treatment of Sex Offenders: Evidence, Ethics and Human Rights,* 23 SEXUAL ABUSE: J. RES. & TREATMENT 295, 300 (2010); *see also* Astrid Birgden & Tony Ward, *Pragmatic Psychology through a Therapeutic Jurisprudence Lens: Psycholegal Soft Spots in the Criminal Justice System,* 9 PSYCHOL., PUB POL'Y & L. 334, 357 (2003) (arguing that offenders will only accept responsibility for their actions if legal actors take a motivational approach towards the offender). On the therapeutic jurisprudence implications of separate "sex offender courts," *see* Kari Melkonian, *Michigan's Sex Offender Registration Act: Does It Make Communities Safer? The Implications of the Inclusion of a Broad Range of Offenders, a Review of Statutory Amendments and Thoughts on Future Changes*, 84 U. DET. MERCY L. REV. 355, 375 (2007).

[505] On ways that TJ can integrate the "health care and social control functions" of the mental health system, *see* Robert F. Schopp, *Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus of Therapeutic Jurisprudence,* 1 PSYCHOL. PUB. POL'Y & L. 161, 166 (1995).

[506] Winick, *supra* note 1, at 538-49.

[507] *Id.* at 548.

[508] *Id.* at 537.

- The primary measure of treatment success is that of the protection of society rather than alleviation of the offender's suffering.
- Treatment, to be effective, must usually be involuntary.
- Effective treatment requires that confidentiality be breached.
- Generally, the offender must not be allowed any choice of therapy or therapist.
- Offenders may be forced to accept therapy from non-clinicians or unqualified staff, and
- Effective therapy requires multiple other infringements on an offender's dignity and autonomy.[509]

Further, Professor John La Fond has argued that sexual offender predator laws are so destructive to individual and community well-being that TJ "must take a normative stance and assert that the law should be repealed or substantially changed assert its primacy and require change regardless of competing values."[510] This insight has led Astrid Birgden to urge that TJ must "provide a framework for setting a limit when the law is anti-therapeutic toward offender rights."[511] She suggests, by way of example, that alternative monitoring strategies that are more likely to have therapeutic outcomes are available through "appropriate case management, interagency cooperation and community engagement."[512]

Reconsider the role of the media in the dissemination of information (and, more pointedly, *misinformation*) about sex crimes and sex offenders, and the impact that this has had on the enactment of legislation (at the Federal, state and local levels) and on judicial decisions.[513] There has been almost no academic literature about the relationship between TJ and the media in any related context, and other than our prior piece on sex offender recidivism and TJ,[514] virtually none, to the best of our knowledge, about the relationship in this context. Only Bruce Arrigo and a colleague have come to grips with this issue:

> The related doctrines of civil commitment and chemical castration of sex offenders suggest that individual citizen well-being, as an important dimension of therapeutic jurisprudence, gives way to other, competing state interests fueled by intense and adverse media scrutiny and/or public clamor for reform, particularly with explosive issues or high profile cases.[515]

Perhaps LeRoy Kondo's suggestion – that mental health court judges reach out to the media as "advocates of therapeutic jurisprudence"[516] – should be taken to heart by scholars and researchers who know, beyond any doubt, that the media misrepresentations

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[509] Bill Glaser, *Therapeutic Jurisprudence: An Ethical Paradigm for Therapists in Sex Offender Treatment Programs*, 4 W. CRIMINOL. REV. 143, 145-46 (2003).

[510] La Fond, *supra* note 309, at 378 .

[511] Astrid Birgden, *Therapeutic Jurisprudence and Offender Rights: A Normative Stance Is Required*, 78 REV. JUR. U.P.R. 43, 51 (2009).

[512] Astrid Birgden, *Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis,* 14 PSYCHIATRY PSYCHOL. & L. 78, 87 (2007).

[513] *See generally* Part I of this article.

[514] Cucolo & Perlin, *supra* note 28.

[515] Bruce A. Arrigo & Jeffrey J. Tasca, *Right to Refuse Treatment, Competency to be Executed, and Therapeutic Jurisprudence: Toward A Systemic Analysis*, 23 L. & PSYCHOL. REV. 1, 44 (1999).

[516] LeRoy Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders,* 24 SEATTLE L. REV. 373, 422 (2000).

(although finally being remediated by more recent, more sober stories) are so much to blame for the current state of affairs. Such affirmative action on the part of those who know how distorted media depictions have traditionally been will also serve to generate new considerations of the significance of procedural justice[517] and restorative justice[518] to these inquiries.

V. CONCLUSION

This article has analyzed how the media and public perception shapes legislation in monitoring, controlling and detaining those individuals classified as sexual violent predators – looking at both the media accounts that shaped our laws, the effect of media criminology on the political and judicial system and the shift in media representation of sexual crimes and sexual predators. The vast amount of information – news articles, scholarly interpretations and media reports throughout the 20 plus years of the "new generation" laws – is impossible to consider fully in a single law review article, and therefore the authors cannot make any definitive statements as to the *total* effect of the media's impact. However, we can offer some theories and tentative conclusions:

1. Media attention to high profile and emotionally reactive sexual crimes incites general fear that there may be an undetected sexual predator lurking near "our own children," ready to attack at any moment. This fear is understandable but irrational in that it is based purely on emotion and usually without any factual basis of such imminent danger.
2. Reaction based on fear is usually directed towards finding feel-good solutions that briefly calm the fear frenzy. Therefore, politicians calling for legislative changes look to promote laws that appear to offer safety and security. Media reports of other jurisdictions and states enacting these "safety" laws, evoke a need to conform one's own community/state's laws in order to do "everything possible" to foster safety – regardless if the measures are effective or not (or if they, are in fact, counterproductive).
3. Courts confronted with these laws are hesitant to strike them down or to modify their scope and/or range in any way, in large part, because of fear of voter retribution.

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[517] *See* Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47, 85 (2010) ("Procedural justice theory generally posits that an individual's evaluation of the fairness of a decision is not based only on the final conclusion reached by decision makers, but also on the process by which the authorities reached that conclusion."); *see generally,* Jonathan D. Casper et. al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483 (1988); Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority,* 56 DEPAUL L. REV. 661 (2007); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

[518] Professor John Braithwaite defines restorative justice as a means by which to restore victims, restore offenders, and restore communities "in a way that all stakeholders can agree is just." John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999). *See also, e.g,* JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 11 (2002) (RESPONSIVE REGULATION) ("Restorative justice is a process whereby all the parties with a stake in the offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."). A consideration of the potential impact of the use of these principles on the resolution of cases involving sex offenders is generally beyond the scope of this article *See, e.g.,* Rick Sarre, *Restorative Justice*, in CONSIDERING CRIME, *supra* note 228, at 31; *see generally*, PERLIN, *supra* note 228, chapter 6.

4. Although it appears that the media has increased its reporting on the failures of sex offender legislation, it cannot combat the power of fear. Statistics, facts and expert opinions supporting low recidivism and familial profile of an offender cannot compete with fear and emotional responses to the perceived threat of the safety of loved ones and innocents. The perniciousness of the vividness heuristic discussed extensively above[519] continues to dominate this area of law and policy.
5. Current legislation continues to exist, regardless of its benefit, purely on the hope – even if it has been proven by valid and reliable research evidence to be a *false* hope – that it will make some small difference and – even more substantially – because of the concern that repealing it will leave communities vulnerable and directly lead to the commission of an untold number of horrific sexual offenses. Alternative solutions that might actually have an impact on sex offending are too complex, too multi-textured, and too time-consuming to be considered by the general public and by legislatures.

Idiot Wind, from which the first portion of the title of this article is drawn, is a song of "towering rage";[520] it depicts the moment "when everything breaks apart."[521] Our sex offenders policies were born in "towering rage" and they have resulted in a state of affairs in which their "corrupt ways had finally made [us] blind."[522] We hope this article helps to remediate the ways that politicians, abetted by the media, have "cover[ed] up the truth with lies."[523]

[519] *See supra* text accompanying notes 252-56.

[520] SOUNES, *supra* note 40, at 303.

[521] Carrie Brownstein, *Blood on the Tracks*, in THE CAMBRIDGE COMPANION TO BOB DYLAN 155, 158 (Kevin J. H. Dettmar ed. 2009).

[522] Bob Dylan, *Idiot Wind*, on BLOOD ON THE TRACKS (Columbia Records 1975), *lyrics available at* http://www.bobdylan.com/us/songs/idiot-wind.

[523] *Id.*