SUBVERTING THE SYSTEM: REDUCING SEX OFFENDER RECIDIVISM AND AIDING REENTRY THROUGH THE USE OF SPECIALTY COURTS

*by: Jaymes Fairfax-Columbo, Emma Hamilton, Chelsea Jackson, Lia Knox-Hershey & David DeMatteo**

Abstract

Sex offender policy in the United States is predicated on accomplishing risk reduction and increasing public safety via punishment and incapacitation. Theoretically, accomplishing these goals should lessen the risk that sex offenders pose to society. However, an accumulated research base suggests that sex offender policies are ineffective in that they do not reduce recidivism rates, do not diminish children's risk of sexual predation, and produce numerous detrimental collateral consequences. Further, current sex offender policies may actively undermine risk reduction by placing factors known to reduce risk level, such as stable housing, employment, and social support, out of the reach of sex offenders. Protecting victims should be one of the most important goals of sex offender policy, yet these laws have not significantly reduced the prevalence and pain of sexual violence. Despite the obvious shortcomings of sex offender policies in the United States, systemic reform does not appear to be on the horizon. However, this Article seeks to explore a way to work within this reality: subverting the system. Accordingly, it first seeks to outline sex offender policies as they currently stand in the United States, focusing on measures including registration, community notification, and residency restriction, while noting the drawbacks to such measures. Second, it offers explanations for why sex offender policies in the United States appear to be shortsighted, as well as offers explanations based in social science for why this short-sightedness is unlikely to change. Third, it explores previous examples of subverting a restrictive system, those of juvenile specialty courts, adult drug courts, and adult mental health courts. Lastly, it provides a proposal for subverting the system as regards sex offenders in the form of sex offender specialty courts.

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I. Introduction

Each year in the weeks leading up to Halloween, media stories regarding the danger that sex offenders pose to children proliferate. Communities organize trunk-or-treats so that children can collect candy and other goodies under the watchful eyes of their parents,[1] impose curfews that prevent sex offenders from leaving their homes during peak trick-or-treating hours,[2] and publish maps demarcating the residences of sex offenders so that parents can instruct their children to avoid them.[3] Further, state laws may require sex offenders to take measures to dissuade children from knocking on their doors, such as turning off all of the lights outside their homes, not decorating their houses, not dressing in costume,[4] or posting signs that read "no candy at this residence."[5] Further still, some states require sex offenders to attend mandatory education sessions,[6] subject themselves to drug and alcohol screenings, or even submit to unannounced "checkups" by law enforcement officers.[7]

Sound like overkill? To many parents, such measures are completely warranted—anything to avoid their children being victimized on the one night of the year where kids are quite likely to interact with adult strangers. But, statistically speaking, such measures are superfluous. Research indicates that children are at no greater risk of non-familial

1. *See, e.g.*, Emily Horowitz, *Manufacturing Fear: Halloween Laws for Sex Offenders*, HuffPost (Jan. 23, 2014), https://www.huffpost.com/entry/manufacturing-fear-hallow_b_4135793 [https://perma.cc/MY2A-PUG2].

2. *See, e.g.*, Associated Press, *Halloween Curfew for Some SC Sex Offenders*, ABC News 4 (Oct. 29, 2015, at 11:50 CT), https://abcnews4.com/news/crime-news/halloween-curfew-for-some-sc-sex-offenders-10-31-2015 [https://perma.cc/3KQE-AGT2]; Marty Graham, *California Sex Offender Sues over Halloween Sign and Rules*, Reuters (Oct. 15, 2015, at 16:23 CT), http://www.reuters.com/article/2015/10/15/us-halloween-usa-lawsuit-idUSKCN0S92RD20151015#HAotfkWF1KYKODdC.97 [https://perma.cc/KU7M-PGN4].

3. *See, e.g.*, Townsquare Staff, *Before Halloween: Maps of Sex Offenders in New Jersey Towns*, N.J. 101.5 (Oct. 11, 2019), http://nj1015.com/before-halloween-maps-of-sex-offenders-in-every-new-jersey-town [https://perma.cc/5F8U-NLSH].

4. Arielle Pardes, *Are Sex Offenders Unfairly Persecuted on Halloween?*, Vice (Oct. 30, 2014, at 10:30 CT), https://www.vice.com/en/article/its-no-fun-to-be-a-sex-offender-on-halloween-666/ [https://perma.cc/YQF4-TJYE].

5. Associated Press, *"No Candy" Signs at Sex Offenders' Homes*, CBS News (Oct. 11, 2007, at 10:44 CT), http://www.cbsnews.com/news/no-candy-signs-at-sex-offenders-homes/ [https://perma.cc/EHW3-DJ7M].

6. Svati Kirsten Narula, *When Halloween Means a Personal Visit from the Police: Registered Sex Offenders Are Subject to Special Rules on Halloween Night*, Atlantic (Oct. 31, 2013), https://www.theatlantic.com/national/archive/2013/10/when-halloween-means-a-personal-visit-from-the-police/281049/ [https://perma.cc/N8WL-3Z69].

7. *See* Anat Rubin, *Is Halloween Really More Dangerous for Kids? A Lack of Evidence Doesn't Stop Cities from Rounding up Sexual Offenders on the Holiday*, Marshall Project (Oct. 28, 2015, at 07:15 CT), https://www.themarshallproject.org/2015/10/28/is-halloween-really-more-dangerous-for-kids#.t4DtojXtm [https://perma.cc/Q9RJ-AWJU].

sexual predation on Halloween than on any other day of the year;[8] in fact, because of the low incidence of non-familial sexual predation of children on October 31, Halloween might even be termed "the safest day of the year."[9]

Why exactly is it that these Halloween restrictions on sex offenders are implemented despite a lack of evidence that they are needed? While no study to date has examined this question empirically, this phenomenon is strikingly similar to another Halloween phenomenon: Halloween sadism. Halloween sadism is "[t]he practice of giving contaminated treats to children during trick-or-treating."[10] Halloween sadism's beginnings can be traced back to 1974, when eight-year-old Timothy O'Bryan died after his father laced his Halloween candy with cyanide in furtherance of a life insurance scheme.[11] Parents were alarmed at the idea that similar fates could befall their children unless precautions were taken, heralding "an era in which carefree costumed trick-or-treating has given way to X-rayed candy bags and tightly controlled Halloween parties and festivals."[12] Empirically, however, the threat of children dying from eating Halloween candy is minimal to nonexistent. In a continuously updated survey of several metropolitan area newspapers, University of Delaware Professor Joel Best has tracked newspaper reports of Halloween sadism; he follows up on each report to determine if it is substantiated or not.[13] To date, he has failed to substantiate any report that a child was seriously injured or killed as a result of contaminated Halloween candy.[14] Of the deaths that are often attributed to Halloween sadism, each can be attributed to other causes, such as an undiscovered medical condition, foul play on the part of a relative, or a simple misattribution as to the source of a poison.[15]

8. Mark Chaffin et al., *How Safe Are Trick-or-Treaters? An Analysis of Child Sex Crime Rates on Halloween*, 21 SEXUAL ABUSE: J. RSCH. & TREATMENT 363, 366–73 (2009).

9. Lenore Skenazy, *'Stranger Danger' and the Decline of Halloween: No Child Has Ever Been Killed by Poison Candy. Ever.*, WALL ST. J. (Oct. 27, 2010, at 00:01 ET), http://www.wsj.com/articles/SB10001424052702304915104575572642896563902 [https://perma.cc/98ZT-CP3B].

10. JOEL BEST, HALLOWEEN SADISM: THE EVIDENCE 1 (2008), http://udspace.udel.edu/handle/19716/726 [https://perma.cc/EQA6-2UTZ].

11. Mike Glenn & Ruth Rendon, *'Man Who Killed Halloween' Still Haunts Holiday*, HOU. CHRON. (Oct. 29, 2004), https://www.chron.com/news/houston-texas/article/Man-Who-Killed-Halloween-still-haunts-holiday-1971811.php [https://perma.cc/4BAP-PW54].

12. *Id.*

13. BEST, *supra* note 10, at 1–2.

14. *Id.* at 2.

15. *Id.* at 7 (stating that of the five deaths that surveyed newspapers reported to be related to Halloween sadism, one occurred after a father gave his son poisoned candy, one occurred after a child died from ingesting heroin he had found in a relative's house, one occurred as a result of natural causes, and two occurred due to previously undiscovered medical conditions).

Despite these findings, 24% of parents still fear their children receiving poisoned candy from strangers while trick-or-treating.[16] Best attributes this fear to the prevalence of urban legends, or "contemporary, orally transmitted tales that 'often depict a clash between modern conditions and some aspect of a traditional life-style.'"[17] According to sociology, urban legends are "products of social tension or strain" and "express fears that the complexities of modern society threaten the traditional social order."[18] Typically, they center on harm caused by a stranger, either directly or indirectly, and allow people to "express[] their doubts about the modern world."[19] In essence, urban legends allow society to channel its anxiety about dangers that are seemingly beyond its control. Regarding Halloween sadism, three perceived threats coalesced to perpetuate this urban legend: threats to children, fear of crime, and mistrust of others.[20] Halloween sadism represents society's anxiety about protecting its most vulnerable members, stereotypes about criminals as "anonymous, unprovoked assailant[s]," and doubt of the modus operandi of strangers.[21]

Extending the concept of urban legends to fears that sex offenders on Halloween will assault children, it is evident that all three perceived threats underlying the urban legend of Halloween sadism also apply to Halloween sexual assaults. The subject of the threat is still children, who represent society's most vulnerable members. The threat itself, sexual assault, is still a crime. And the perceived perpetrator of that crime, adults who are unknown to parents, are still strangers. It would seem to make sense, then, that increased attention is paid to the threat of sexual offenses against children on Halloween, just as it is paid to the threat of contaminated candy on Halloween.

The major problem lies, though, in the fact that this increased attention towards sex offenders, unlike increased attention towards Halloween sadism, is not restricted to a few weeks.[22] Rather, it is pervasive each and every day and evidenced in the United States' approach to sex offender policy. Control and containment measures such as registration, notification, and residency restrictions are prevalent, restricting the freedoms

16. Safe Kids Worldwide, Halloween Safety: A National Survey of Parents' Knowledge, Attitudes, and Behaviors 3 (2011), https://www.safekids.org/sites/default/files/documents/ResearchReports/halloween-research-report.pdf [https://perma.cc/X99B-U3KF].

17. Joel Best & Gerald T. Horiuchi, *The Razor Blade in the Apple: The Social Construction of Urban Legends*, 32 Soc. Probs. 488, 492 (1985) (quoting Jan Harold Brunvand, The Vanishing Hitchhiker: American Urban Legends and Their Meaning 189 (1981)).

18. *Id.*

19. *Id.*

20. *Id.* at 493–94.

21. *Id.* at 494.

22. Jill S. Levenson, *Halloween & Sex Crime: Myth vs. Reality*, ATSA Blog (Oct. 24, 2014), https://sajrt.blogspot.com/2014/10/halloween-sex-crime-myth-vs-reality.html [https://perma.cc/L4JB-NZZG].

of sex offenders on a daily basis.[23] Yet the accumulated research base indicates that these measures are excessive at best and ineffective and detrimental at worst.[24] In terms of excessiveness, research suggests that sex offender laws do little, if anything at all, to reduce rates of sexual recidivism among registered offenders.[25] Additionally, research suggests that sex offender laws may produce numerous unintended collateral consequences towards sex offenders, including stigmatization, marginalization, and difficulty in obtaining employment;[26] depression, shame, and hopelessness;[27] and increased levels of housing difficulties, transience, and homelessness.[28] Further, sex offender laws have unintended collateral consequences for society more broadly, including increased levels of general recidivism for sex offenders;[29] family members of sex

23. *Id.*

24. *Id.*

25. *See generally* KRISTEN ZGOBA ET AL., MEGAN'S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY *passim* (2008), https://www.ojp.gov/pdffiles1/nij/grants/225370.pdf [https://perma.cc/4KQ4-TP53] (finding that Megan's Law seems not to be effective in reducing sex-crime recidivism); Alissa R. Ackerman et al., *Legislation Targeting Sex Offenders: Are Recent Policies Effective in Reducing Rape?*, 29 JUST. Q. 858, 858 (2012) ("Our research finds no evidence that our current policies reduce the incidence of rape."); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207, 235 (2011) ("The data in these three data sets do not strongly support the effectiveness of sex offender registries."); Elizabeth J. Letourneau et al., *Effects of South Carolina's Sex Offender Registration and Notification Policy on Adult Recidivism*, 21 CRIM. JUST. POL'Y REV. 435, 455 (2010) ("The present study found no evidence that South Carolina's SORN policy effectively reduced sex crime recidivism . . . ."); J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 181 (2011) (finding that notification encourages recidivism); Jeffrey C. Sandler et al., *Does a Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 PSYCH. PUB. POL'Y & L. 284, 299 (2008) ("[I]t is becoming increasingly clear from the growing body of research that registration and community notification laws are not an effective strategy for reducing sexual offenses."); Richard Tewksbury et al., *A Longitudinal Examination of Sex Offender Recidivism Prior to and Following the Implementation of SORN*, 30 BEHAV. SCIS. & L. 308, 323 (2012) ("[I]t is clear that there are limited observable benefits of SORN regarding sex recidivism and general recidivism."); Bob Edward Vásquez et al., *The Influence of Sex Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQ. 175, 188 (2008) ("The empirical finding of this research is that the sex offender legislation seems to have had no uniform and observable influence on the number of rapes reported in the states analyzed.").

26. *See* Jill S. Levenson & David A. D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?*, 18 CRIM. JUST. POL'Y REV. 168 *passim* (2007); Cynthia Calkins Mercado et al., *The Impact of Specialized Sex Offender Legislation on Community Reentry*, 20 SEXUAL ABUSE: J. RSCH. & TREATMENT 188 *passim* (2008); Richard Tewksbury & Elizabeth Ehrhardt Mustaine, *Stress and Collateral Consequences for Registered Sex Offenders*, 15 J. PUB. MGMT. & SOC. POL'Y 215 *passim* (2009).

27. Jill S. Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUST. 49, 52 (2005).

28. *See* Jill Levenson et al., *Where for Art Thou? Transient Sex Offenders and Residence Restrictions*, 26 CRIM. JUST. POL'Y REV. 319, 329 (2015); Paul A. Zandbergen et al., *Residential Proximity to Schools and Daycares: An Empirical Analysis of Sex Offense Recidivism*, 37 CRIM. JUST. & BEHAV. 482, 501 (2010).

29. Prescott & Rockoff, *supra* note 25, at 181.

offenders experiencing increased levels of social isolation, fear, shame, property damage, and forced relocation;[30] instilling in the public a false sense of security;[31] increasing public anxiety;[32] lowering property values in neighborhoods and increasing disorganization in communities where sex offenders reside;[33] and publicizing the identities of victims and decreasing reporting of sex offenses.[34] Further still, sex offender laws are not economical, costing hundreds of thousands of dollars to implement and millions of dollars to maintain, all while producing little benefit for society in the protection of victims.[35]

Unfortunately, even in the face of these stark realities, sex offender laws enjoy widespread public support.[36] Even more unfortunately, changes in policy do not appear likely, despite the fact that sex offender laws are ineffective and may have deleterious consequences both for sex offenders specifically and society more generally. This Article seeks to explore why reform is unlikely and to offer a solution for improving outcomes for sex offenders, decreasing sex offender recidivism, and increasing public safety while working within the confines of the current system—subversion. Part II reviews sex offender policy in the United States, exploring how and why sex offender laws were put into place and how they are ineffective at achieving their stated purpose. Part III explores theoretical reasons, grounded in social science theories, why sex offender policy is unlikely to be reformed. Part IV examines previous efforts to "subvert the system" in the form of juvenile and adult specialty courts. Lastly, Part V proffers a proposal for sex offender specialty courts, highlighting current efforts as well as offering suggestions for how other jurisdictions might replicate and improve upon these examples by incorporating evidence-based practices into their model.

30. *See* Richard Tewksbury & Jill Levenson, *Stress Experiences of Family Members of Registered Sex Offenders*, 27 Behav. Scis. & L. 611, 617–18 (2009).

31. Amy L. Datz, Fla. Dep't of L. Enf't, Sex Offender Residency Restrictions and Other Sex Offender Management Strategies: The Probation Officer Perspective in Florida 12–13 (2009), https://www.fdle.state.fl.us/FCJEI/Programs/SLP/Documents/Full-Text/Datz-Amy-Research-paper.aspx [https://perma.cc/V26M-76QL].

32. Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Assessing the Impact in Wisconsin*, Nat'l Inst. Just., Dec. 2000, at 1, 3.

33. *See* Jaren C. Pope, *Fear of Crime and Housing Prices: Household Reactions to Sex Offender Registries*, 64 J. Urb. Econ. 601, 612 (2008).

34. Robert E. Freeman-Longo, Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem 3, 15 (2001), https://www.appa-net.org/eweb/docs/appa/pubs/RML.pdf [https://perma.cc/8MJA-8VE7].

35. *See* Zgoba et al., *supra* note 25, at 2.

36. *See* Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 Analyses Soc. Issues & Pub. Pol'y 137, 147–48 (2007); Daniel P. Mears et al., *Sex Crimes, Children, and Pornography: Public Views and Public Policy*, 54 Crime & Delinq. 532, 544–46 (2008).

II. Sex Offender Policy in the United States

Sex offender policy in the United States is predicated on accomplishing risk reduction and increasing public safety via punishment and incapacitation.[37] Since the 1990s, most, if not all, jurisdictions in the United States have subjected sex offenders to increased penalties and incapacitation through comprehensive supervision and control.[38] The focus of this Article is on the latter, that is, the stated goal of bolstering public safety through monitoring, supervision, and control of sex offenders even after their release from incarceration. Additionally, this Article restricts its focus to the consequences of such restrictive policies that face sex offenders *in the community*. These formal policies are typically handed down by the judicial decision-maker as an adjunct to sentencing and center around registration requirements (i.e., registering as a sex offender with one's local government), community notification (i.e., making one's presence known to neighbors and community members regarding one's status as a sex offender, either through community meetings, flyers, or online/website notification), residence restrictions, employment restrictions, and impediments to civic involvement (e.g., voting). Further, sanctions that arise separately, indirectly, and often unintentionally from criminal penalties have been termed "collateral consequences" and include distal psychosocial, rather than proximal policy-imposed, incapacitations (e.g., social losses, harassment, discrimination, hypervigilance, and shame).[39] The role of collateral consequences in providing an added layer of behavioral control will be discussed further in subsequent sections. Accordingly, though involuntary civil commitment through Sexually Violent Predator laws certainly counts as a method of incapacitation, it will not be considered here.

Sex offender laws in the United States might most appropriately be viewed as a byproduct of increasing crime control efforts more generally following the 1980s' spike in crime rates.[40] While most offenders were subject only to increased criminal sanctions,[41] the public fear incited by sex crimes in particular resulted in sex offenders being subject not only to increased punishment, but also to a number of community-based policies intended to protect the public-at-large from sexual victimization.[42] Sex crimes are particularly alarming and anxiety-provoking to the public due to the devastating and psychologically traumatic consequences

37. Karen J. Terry, *Sex Offender Laws in the United States: Smart Policy or Disproportionate Sanctions?*, 39 Int'l J. Compar. & Applied Crim. Just. 113, 113–14 (2015).

38. *Id.*

39. Emma Hamilton, *Toward a Focused Conceptualization of Collateral Consequences Among Individuals Who Sexually Offend: A Systematic Review*, 34 Sexual Abuse 3, 16 (2022).

40. *See* Terry, *supra* note 37, at 113–14.

41. *Id.*

42. Levenson et al., *supra* note 36, at 138.

of sexual victimization.[43] These may include depression, anger, anxiety, feelings of depersonalization and dissociation, suicidal ideation, trust issues, difficulty in romantic and other interpersonal relationships, decreased self-esteem, decreased sexual esteem, sexual depression, and body-image issues.[44] The catastrophic harm that can and does befall victims of sexual violence has only further loudened the rally cry for tougher punishments, including monitoring and publicizing the identities of sex offenders through registration and notification, in an effort to prevent the occurrence of future victimization.

Aside from the damage that sex crimes cause to the person, sexual offenses are also viewed differently than other crimes due to society's perceptions about the treatability and dangerousness of sex offenders. Sex offenders are widely believed to be at high risk to reoffend, to be mentally ill, and to be resistant to treatment/untreatable.[45] Additionally, a high number of sex offenders are thought to be strangers to the victim.[46] Taken together, these perceptions generate an archetype of sex offenders as "persons for whom neither punishment nor treatment are considered to be effective controls and whose perceived enduring danger means they must be under the watchful eye of [the] state and community for the rest of their lives."[47] Accordingly, sex offender policies reflect a view of sexual crime as "a problem of managing high-risk categories and subpopulations, not one of normalizing individuals to community norms."[48]

A. *Control/Risk Management Approach: Restrictions on Sex Offenders*

While laws regulating the conduct of sex offenders have been on the books for years, the 1990s marked a notable shift in the legislative attention being paid to this group.[49] Many sex offender laws can be

43. Richard G. Wright, *Sex Offender Registration and Notification: Public Attention, Political Emphasis, and Fear*, 3 Criminology & Pub. Pol'y 97, 100 (2003).

44. *See id.* at 100–01; Fiona Mason & Zoe Lodrick, *Psychological Consequences of Sexual Assault*, 27 Best Prac. & Rsch. Clinical Obstetrics & Gynecology 27, 29–30 (2013); Iain A. McLean, *The Male Victim of Sexual Assault*, 27 Best Prac. & Rsch. Clinical Obstetrics & Gynecology 39, 43 (2013).

45. Levenson et al., *supra* note 36, at 146–55.

46. Timothy Fortney et al., *Myths and Facts About Sexual Offenders: Implications for Treatment and Public Policy*, Sexual Offender Treatment, no. 1, 2007, at 1, 8–11 (2007). As aforementioned, fear of strangers generates anxiety that is channeled in the form of urban legends.

47. Michael G. Petrunik, *Managing Unacceptable Risk: Sex Offenders, Community Response, and Social Policy in the United States and Canada*, 46 Int'l J. Offender Therapy & Compar. Criminology 483, 485 (2002).

48. William Edwards & Christopher Hensley, *Contextualizing Sex Offender Management Legislation and Policy: Evaluating the Problem of Latent Consequences in Community Notification Laws*, 45 Int'l J. Offender Therapy & Compar. Criminology 83, 84 (2001).

49. Terry, *supra* note 37, at 113–14.

categorized as "memorial laws," or laws named after the victim of a particular type of offense.[50] The first of these major laws was the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program Act ("Jacob Wetterling Act"), passed by Congress in 1994.[51] The Jacob Wetterling Act was a response to the abduction of Jacob Wetterling, an 11-year-old boy who was kidnapped while riding his bike home from the store.[52] Neither Wetterling nor his kidnapper was ever found.[53] Under the Jacob Wetterling Act, states are mandated to create registries for sex offenders; failure to create a registry results in a forfeiture of 10% of federal funds from the Omnibus Crime Control and Safe Streets Act of 1968.[54] On paper, these registries should provide a tool for law enforcement agencies to more quickly arrest suspects by keying them in as to the whereabouts of known sex offenders.[55]

The second major piece of legislation targeting sex offenders was Megan's Law, originally passed by the New Jersey state legislature in 1994 and adopted by the federal government as an amendment to the Jacob Wetterling Act in 1996.[56] Megan's Law was enacted following the abduction, rape, and murder of seven-year-old Megan Kanka.[57] Her killer, neighbor Jesse Timmendequas, was a twice-convicted sex offender.[58] Megan's Law extended the Jacob Wetterling Act by allowing the notification of community members about the presence of sex offenders in their community; previous to Megan's Law, only law enforcement agencies were aware as to where sex offenders resided.[59] The rationale behind Megan's Law and community notification is two-fold: (1) it alerts those community members of the potential danger of repeat offenses for proximate sex offenders presumed to be at risk for re-offense,[60] and (2) it increases the meaningfulness of the idea that children will be protected through active identification of individuals in the community who may pose a specific threat.[61]

Congress passed a third impactful piece of legislation, the Adam Walsh Child Protection and Safety Act ("Adam Walsh Act"), also referred to

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50. *Id.* at 114.
51. 42 U.S.C. § 14071 (1994) (repealed 2006).
52. Terry, *supra* note 37, at 114.
53. *Id.*
54. *Id.*
55. Jill S. Levenson et al., *Megan's Law and Its Impact on Community Re-Entry for Sex Offenders*, 25 BEHAV. SCIS. & L. 587, 587 (2007).
56. *See* N.J. STAT. ANN. § 2C:7-1 to -19 (West 1994); 42 U.S.C. § 14071 (1996).
57. David S. DeMatteo, Note, *Welcome to Anytown, U.S.A.—Home of Beautiful Scenery (and a Convicted Sex Offender): Sex Offender Registration and Notification Laws in* E.B. v. Verniero, 43 VILL. L. REV. 581, 583 (1998).
58. Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 315 (2001).
59. Terry, *supra* note 37, at 114.
60. DeMatteo, *supra* note 57, at 588–89.
61. Mary Ann Farkas & Amy Stichman, *Sex Offender Laws: Can Treatment, Punishment, Incapacitation, and Public Safety Be Reconciled?*, 27 CRIM. JUST. REV. 256, 263 (2002).

as the Sex Offender Registration and Notification Act ("SORNA"), in 2006.[62] The Adam Walsh Act was named for Adam Walsh, a six-year-old boy who was abducted from a Florida mall and murdered in 1981;[63] Adam was the son of John Walsh, host of the popular television show *America's Most Wanted*.[64] The Adam Walsh Act standardizes the registration and notification procedures of the 50 states, requiring that sex offenders be classified into three "tiers" determined by the crime they committed and the length of their sentence.[65] Tier 1 consists of sex offenders with misdemeanor convictions and sentenced to less than one year imprisonment.[66] Tier 2 and Tier 3 both include sex offenders with sentences in excess of one year in prison.[67] Tier 2 encompasses offenders with convictions for less severe felony sexual offenses, such as distribution of child pornography, while Tier 3 encompasses offenders with convictions for more severe felony sexual offenses, such as aggravated sexual abuse.[68] Sex offenders' tier designation determines the length of time for which an individual must annually register.[69] Tier 1 offenders are required to register for 15 years, Tier 2 offenders for 25 years, and Tier 3 offenders are required to register for the duration of their lifetime.[70] Like the Jacob Wetterling Act and its Megan's Law amendments, states are mandated to enact all portions of the Adam Walsh Act or forfeit 10% of their Omnibus Crime Control and Safe Streets Act funding.[71] Marsy's Law, aimed at providing further protection to victims of crimes (e.g., the right to be present at sentencing hearings of the defendant), is enacted in a minority of states after the murder of Marsalee ("Marsy") Ann Nicholas by her ex-boyfriend in 1983.[72]

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62. 42 U.S.C. § 16911 (2012).

63. Brittany Enniss, Note, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 701.

64. Lara Geer Farley, Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 480 (2007).

65. Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?*, 21 CRIM. JUST. POL'Y REV. 31, 32 (2010).

66. *Id.*

67. *Id.* at 32–33.

68. *Id.*

69. *Id.* at 33.

70. *Id.*

71. *Id.* at 32.

72. *See About Marsy's Law*, MARSY'S L., https://www.marsyslaw.us/about-marsys-law [https://perma.cc/T4SG-GHY2] (last visited July 6, 2025). One week after Marsy was murdered, her family stopped at a market and ran into her ex-boyfriend, unaware that he had been released on bail. *See Marsy's Story*, MARSY'S L., https://www.marsyslaw.us/marsys-story [https://perma.cc/LQ84-RFYQ] (last visited July 6, 2025). Marsy's Law seeks to give crime complainants co-equal rights with that of the accused, including, but not limited to, the right to refuse an interview or discovery request by the defendant; to be heard at any proceeding; to participate in the parole process; and for the safety of the complainant and their family to be considered when fixing bail, creating release conditions, and making parole decisions for the defendant. CAL. CONST. art. I, § 28(b). Marsy's Law is similarly crime control theater that not only fails to reduce violence but also violates due process by presuming the guilt of a defendant before adjudication. *See* Jeanne Hruska & Holly Welborn, *In Major Threat to Due Process, Marsy's Law Gains*

In addition to the three major "memorial laws," jurisdictions also seek to exercise control over sex offenders by restricting where they can reside. Typically, residence restrictions prohibit convicted sex offenders from living within a certain distance, usually 1,000 to 2,000 feet from areas in which children are likely to spend large quantities of time.[73] These areas include schools, parks, day care centers, and school bus stops.[74] Such restrictions appear to have dutifully carried out the goal of relegating registered offenders to no man's lands, making it increasingly difficult for registered offenders in the community to live with supportive family members or find independent housing. In Orange County, Florida, 95% of all residences were located within 1,000 feet of day care centers, parks, schools, or school bus stops, leaving just 5% meeting minimum criteria for residence for sexual offenders (without considering affordability and whether or not they were available for rent or purchase).[75] An analysis from 2009 found that if residence restrictions were to be implemented in Camden County, New Jersey, 88% of registered offenders would be unable to live in their current homes.[76] In Miami, Florida, and Sacramento, California, sexual offenders were at one point advised to live under state highways and parole offices, as 100% of the geographical area was uninhabitable according to residence restriction laws.[77]

Additionally, some jurisdictions, such as California, prohibit sex offenders from residing in the vicinity of their victims or of witnesses in the case.[78] Such measures aim to prevent potential re-victimization or harassment, as well as provide a sense of security to those affected

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Ground Nationwide, ACLU (Nov. 30, 2018), https://www.aclu.org/news/criminal-law-reform/major-threat-due-process-marsys-law-gains-ground-nationwide [https://perma.cc/MFN7-7XL3]. Victims' rights advocates have also criticized Marsy's Law as having the potential to harm victims by presupposing guilt. *See* Laurie Schipper & Beth Barnhill, *We're Victims' Rights Advocates, and We Opposed Marsy's Law*, Am. Civ. Liberties Union (May 16, 2018), https://www.aclu.org/news/criminal-law-reform/were-victims-rights-advocates-and-we-opposed-marsys-law [https://perma.cc/679E-4KBP]. Victims of domestic violence and sexual assault are too often arrested for self-defense, and most women in prison have survived violence. *Id.* Institutional bias and discrimination result in the arrest of many victims seeking help, particularly women of color and undocumented women. *Id.*

73. Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd?*, 49 Int'l J. Offender Therapy & Compar. Criminology 168, 168 (2005).

74. *Id.*

75. Paul A. Zandbergen & Timothy C. Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restriction Laws Using GIS*, Just. Rsch. & Pol'y, Dec. 2006, at 1, 14–15, 18, 20.

76. Kristen M. Zgoba et al., *Examining the Impact of Sex Offender Residence Restrictions on Housing Availability*, 20 Crim. Just. Pol'y Rev. 91, 98, 105 (2009) (also finding a similar proportion of registered sex offenders and nonoffenders lived in close proximity to a school, day care, park, or church, which casts doubt on theories that propose offenders purposefully live near places where children are likely to be).

77. J.C. Barnes, *Place a Moratorium on the Passage of Sex Offender Residence Restriction Laws*, 10 Criminology & Pub. Pol'y 401, 405 (2011).

78. Levenson & Cotter, *supra* note 73, at 168.

by the crime. Residence restriction laws operate under the objective of keeping identified sexual offenders away from potential child victims to preclude the offender recidivating against a child. The laws in and of themselves generally do not consider potential offending against adult victims, although both offenders who perpetrated against child and adult victims are susceptible to residence restrictions.[79] They also do not take into consideration intrafamilial sexual violence that occurs and goes undetected because of the extreme focus on the risk strangers pose to children in their vicinity.

Finally, sex offender residence restrictions can be counterproductive to public safety. The few housing options available for recently released sex offenders are often far from the very services that prevent recidivism, such as "employment hubs, public transportation systems, social service agencies, and mental health facilities."[80] Registered individuals are often unable to live with their families,[81] and 2–3% of registered sex offenders in the United States are homeless or transient, which is a known risk factor for criminal recidivism.[82] Registration also increases the likelihood the registered person and their families will experience physical and sexual violence,[83] perpetuating cycles of abuse.

B. *Sex Offender Laws as Reactive Policy*

Sex offender policies in the United States may reflect emotionally reactive or "feel-good" legislation—legislation that is based on fear and anger, in this case in response to random acts of sexual violence against children[84]—as opposed to research data.[85] As stated above, sex offender policy in the United States reflects society's perception of sex offenders as being mentally ill strangers who pose a high risk to reoffend and are untreatable.[86] Empirically speaking, the public's "perceptions" of sex

79. *See id.* at 168–69.

80. Jill S. Levenson, *Hidden Challenges: Sex Offenders Legislated into Homelessness*, 19 J. Soc. Work 348, 350 (2018).

81. Deanna Cann & Deena A. Isom Scott, *Sex Offender Residence Restrictions and Homelessness: A Critical Look at South Carolina*, 31 Crim. Just. Pol'y Rev. 1119, 1121 (2020).

82. Levenson, *supra* note 80, at 350.

83. Hum. Rights Watch, Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US 56 (2013) (finding, among the 296 cases reviewed, 52% of youth offenders experienced vigilante attacks or threats against themselves or family members); Elizabeth J. Letourneau et al., *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination*, 24 Psych. Pub. Pol'y & L. 105, 114 (2018) ("Registered children were nearly twice as likely as [n]onregistered children to have experienced an unwanted sexual assault that involved contact or penetration in the past year and were five times as likely to report having been approached by an adult for sex in the past year.").

84. *See* Fortney et al., *supra* note 46, at 2.

85. *See* Freeman-Longo, *supra* note 34, at 1; Jill S. Levenson, Sex Offender Residence Restrictions: A Report to the Florida Legislature 10 (2005).

86. Fortney et al., *supra* note 46, at 8–11; Levenson et al., *supra* note 36, at 146–55.

offenders are better understood as "misperceptions." First, while society estimates that approximately half of sex offenders suffer from severe mental illness, research suggests that the majority of sex offenders do not have any psychopathology aside from their paraphilia.[87] When they do, it tends to come in the form of substance abuse, attention deficit hyperactivity disorder, and mood disorders as opposed to disorders that are typically thought of as severe mental illness, such as psychotic disorders.[88] Further, neither major mental illness nor substance abuse has been shown to be predictive of sexual recidivism.[89] Second, the general public tends to overestimate the number of sexual offenses committed by strangers, estimating that approximately half of sex offenses are committed by individuals unknown to the victim.[90] In actuality, the majority of sex offenses are not committed by strangers but rather by family members or acquaintances.[91]

Further, the efforts originally put in place to inform the community about nearby sex offenders appear to be ineffective insofar as they are underutilized. In fact, community notification practices have a limited reach on citizens' behavior.[92] While a proportion of community members regularly access registry information online in order to increase their family's and their own safety,[93] the majority of community members have never checked their state's sex offender registry.[94] In fact, scholars have purported that the registry is symbolic rather than instrumental in nature, and the symbolic legislative action functions primarily to instill a false sense of security among community members.[95] Indeed, an important assumption underlying registration and community notification is that once equipped with information surrounding local sexual offenders, civilians will be motivated to protect themselves and their families in order to avoid victimization. These protective behaviors are precisely what these laws were created to impact. Studies tend to show no significant relationship between receiving notification about a local sexual offender and the adoption of self-protective behaviors (e.g., avoiding unsafe areas, carrying a weapon).[96] One study did, however, find a modest relationship between notification and the adoption of

87. Levenson et al., *supra* note 36, at 149–54.
88. *Id.* at 154.
89. *Id.*
90. *Id.* at 149–54.
91. Fortney et al., *supra* note 46, at 2. Among child victims, only 7% were victimized by strangers; among adult victims, only 27% were victimized by strangers. *Id.*
92. *See* Lisa L. Sample et al., *Sex Offender Community Notification Laws: Are Their Effects Symbolic or Instrumental in Nature?*, 22 CRIM. JUST. POL'Y REV. 27, 27 (2011).
93. *See* Victoria Simpson Beck & Lawrence F. Travis, III, *Sex Offender Notification and Protective Behavior*, 19 VIOLENCE & VICTIMS 289, 290–91 (2004).
94. *See* Sample et al., *supra* note 92, at 38.
95. *See* Levenson et al., *supra* note 36, at 140–41; Sample et al., *supra* note 92, at 27–28.
96. Amy L. Anderson & Lisa L. Sample, *Public Awareness and Action Resulting from Sex Offender Community Notification Laws*, 19 CRIM. JUST. POL'Y REV. 371, 371–96 (2008); Victoria Simpson Beck et al., *Community Response to Sex Offenders*, 32 J. PSYCHIATRY & L. 141, 141–68 (2004).

protective behaviors undertaken to protect children rather than potential adult victims.[97] These efforts may be misguided, however, as parents may emphasize stranger perpetrators rather than training children to recognize the more common scenario of abuse within the home or in other "safe" places such as school settings. Underutilization of or inattention to registry and notification information by community members, paired with a potentially misleading emphasis on stranger rather than familiar perpetrators, calls into question the efficiency of current registration and community notification policies.

Third, the general public estimates the sex offense recidivism rate to hover around 75%.[98] Realistically, re-offense rates for sex offenders are actually fairly low; estimates hover between 5% and 17%,[99] with an average recidivism rate of 13.7%.[100] The Supreme Court has perpetuated this myth,[101] relying on one 1986 *Psychology Today* article that was written to market the authors' counseling program rather than report peer-reviewed research.[102] In fact, sex offenders are more likely to recidivate *generally* as opposed to sexually, with an average of 36.2% of sex offenders recidivating with a non-sexual offense.[103] Further, sex offenders are actually less likely to recidivate for their index crime than are other groups of offenders, such as individuals who commit robbery or burglary.[104] Lastly, though the general public views sex offenders as resistant to treatment or as untreatable,[105] evidence exists to suggest that sex offenders are amenable to treatment, particularly when applied to higher risk offenders and when the treatment targets dynamic risk factors for recidivism, takes into account the individual characteristics of the offender, and is skills-based.[106]

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97. Rachel Bandy, *Measuring the Impact of Sex Offender Notification on Community Adoption of Protective Behaviors*, 10 Criminology & Pub. Pol'y 237, 237–63 (2011).

98. Levenson et al., *supra* note 36, at 153.

99. *Id.* at 142.

100. R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, J. Consulting & Clinical Psych. 1154, 1156–59 (2005).

101. *See* McKune v. Lile, 536 U.S. 24, 33 (2002) (finding "the rate of recidivism of untreated [sex] offenders has been estimated to be as high as 80%"); Smith v. Doe, 538 U.S. 84, 103 (2003) (finding "[t]he risk of recidivism posed by sex offenders is 'frightening and high'" (quoting *McKune*, 536 U.S. at 34)).

102. Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. Times (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html [https://perma.cc/5AJZ-KZ43]. *See, e.g.*, Nat'l Inst. of Corr., U.S. Dep't of Just., A Practitioner's Guide to Treating the Incarcerated Male Sex Offender, at xiii (Barbara K. Schwartz & H.R. "Hank" Cellini eds., 1988) (identifying the Psychology Today article as the only source alleging an 80% recidivism rate, suggesting the number was exaggerated).

103. Levenson et al., *supra* note 36, at 142.

104. *Id.* at 153–54.

105. *Id.* at 154–55.

106. *See* Pamela M. Yates, *Treatment of Sexual Offenders: Research, Best Practices, and Emerging Models*, Int'l J. Behav. Consultation & Therapy, no. 3–4, 2013, at 89, 89–90 (reviewing the evolution of sex offender treatment in recent years). Dynamic risk factors, also called criminogenic risk factors or criminogenic needs, are those risk

1. Legislative Rhetoric

This disparity between public perception and reality leads many to criticize sex offender laws as draconian, placing unfair restrictions on sex offenders without due cause.[107] But why do current policies not reflect the research data? To answer this question, it is helpful to examine the thought processes of the legislators who enacted such measures. Professor Daniel Filler, currently of the Drexel University Thomas R. Kline School of Law, did just that in 2001. He described and analyzed legislative rhetoric during both the federal and New York state debates over Megan's Law.[108] Filler found that legislators offered three types of arguments in support of Megan's Law: (1) anecdotal stories of child victimization, (2) statistics illustrating the severity of the sex offender conundrum, and (3) strong rhetoric reflecting the dehumanization of sex offenders.[109]

Considering first anecdotal stories of child victimization, at the federal level, legislators limited the stories that they offered to those containing serious sexual abuse, typically committed by a stranger, described in vivid and dramatic detail.[110] While these stories surely do depict a category of sexual offenses, it represents only a small subset of them; as aforementioned, the large majority of sexual offenses in the United States are committed by individuals the victim knows.[111] Additionally, focusing on child victims of serious sexual abuse necessarily excludes other offenses covered under sex offender laws, such as crimes with adult victims or less severe, typically non-contact, sex crimes against children, such as possession of child pornography. Indeed, imposition of sex offender policies appears uniquely generated by such myopic views of sex crimes, as well as heuristics, or cognitive shortcuts used in typically quick and perfunctory decision-making, the impact of which will be discussed in depth in subsequent sections. At the state level, though, storytelling was more balanced in New York debates in that legislators offered less vivid accounts and included some stories that did not involve the victimization of children.[112] However, child-victim stories were still a prominent feature.[113]

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factors that increase risk for recidivism that are "changeable," such as substance abuse or unemployment. Successfully addressing dynamic risk factors in treatment should reduce the risk for sexual recidivism. Reinhard Eher et al., *Stable Dynamic Risk Factors in Child Sexual Abusers: The Incremental Predictive Power of Narcissistic Personality Traits Beyond the Static-99/Stable-2007 Priority Categories on Sexual Reoffense*, Sexual Offender Treatment, no. 1, 2010, at 1, 1 (2010).

107. Erin Miller, Comment, *Let the Burden Fit the Crime: Extending Proportionality Review to Sex Offenders*, 123 Yale. L.J. 1607, 1607–09 (2014).

108. *See* Filler, *supra* note 58, at 322–23.

109. *Id.* at 329–30.

110. *Id.* at 332.

111. Fortney et al., *supra* note 46, at 2.

112. Filler, *supra* note 58, at 332–35.

113. *Id.* at 333.

Regarding statistical claims illustrating the severity of the sex offender problem, legislators at both the federal and the state level cited studies finding that sex offenders recidivated at rates as high as 74%, as well as provided hard data on the number of children victimized each year.[114] Though it is encouraging that legislators sought to support their anecdotal accounts of sexual offenses with research, they, unfortunately, tended to offer only research that supported their argument. With a few notable exceptions in the New York debates, legislators largely ignored studies suggesting that sex offender recidivism rates were actually quite low, as well as ignored evidence that most sexual offenses are not committed by strangers.[115] Further, some legislators greatly overstated research findings. For instance, one congresswoman asserted that it was an undisputed fact that most pedophiles cannot control their urges;[116] research now shows this to be untrue and instead supports that many individuals who offend sexually are amenable to treatment.[117] Tackling lastly the dehumanization of sex offenders, legislators often referred to sex offenders as "predators," "beasts," or "monsters."[118] Inflammatory language such as this suggests that sex offenders are less worthy of humane treatment, which makes persecuting and restricting their rights less morally questionable and more psychologically palatable.[119]

Legislators in Congress and New York also considered the potential benefits of Megan's Law. The primary benefit championed in legislative debates was that Megan's Law would reduce the victimization of children.[120] Many legislators called attention to the specific case of Megan Kanka, asserting that if Megan's Law provisions had been in place prior to her abduction, the tragedy that befell her might have been avoided.[121] Other legislators argued that Megan's Law would empower parents and communities in making efforts to protect themselves, as well as that registries would provide an invaluable tool to law enforcement agencies.[122] Still others suggested that passing Megan's Law would give meaning to Megan's life.[123] In contrast, while there was some discussion of the potential detriments of Megan's Law, the topic was given relatively short shrift at the federal level, amounting to merely a brief discussion on whether Megan's Law violated principles of federalism and due

114. *Id.* at 335–36.
115. *Id.* at 337–38. However, note that several legislators in New York challenged some of the research offered by proponents of Megan's Law, asking to see the recidivism studies as well as presenting evidence that family members commit the majority of sexual offenses. *Id.*
116. *Id.* at 336.
117. *See* Yates, *supra* note 106, at 93.
118. Filler, *supra* note 58, at 338–40.
119. Michelle Maiese, *Dehumanization*, Beyond Intractability (June 2020), https://www.beyondintractability.org/essay/dehumanization [https://perma.cc/7W5L-PA73].
120. Filler, *supra* note 58, at 340–41.
121. *Id.*
122. *Id.* at 341.
123. *Id.* at 342.

process.[124] The congressman who proffered these concerns restrained his criticism, likely due to the recognition that opposing the passage of Megan's Law would be an unpopular move with his constituents.[125] Discussion of the possible detriments of Megan's Law was somewhat more intense in New York, but proponents of the bill still quelled debate by sidestepping concerns over vigilantism and downplaying potential alternatives to Megan's Law.[126]

In summary, legislative rhetoric surrounding Megan's Law, both federally and in New York, centered around three rhetorical strategies: (1) typification, (2) statistical manipulation, and (3) melodrama.[127] Proponents of Megan's Law used anecdotes to paint a picture of sex offenders as child rapists and murderers.[128] They amplified the actual threat that sex offenders posed to children by paying selective attention to statistics indicating that sex offenders recidivate at a high rate while disregarding evidence suggesting the recidivism rate for that population is actually quite low.[129] They dehumanized sex offenders, describing them as "monsters" who were undeserving of the same consideration and rights as the rest of society, making it easier to pass restrictions that, in another context, might appear draconian.[130] And they accomplished the passing of Megan's Law in both jurisdictions—unanimously, for that matter.[131]

2. Social Influences on Legislative Rhetoric

It is unsurprising that legislative debate was biased in favor of passing Megan's Law, given what scholars know about the processes of group decision-making. Two key social influences that often factor into group decision-making will be reviewed here: (1) groupthink, and (2) group polarization.

"Groupthink" refers to groups' desire to achieve harmony in the form of conformity to group values and ethics.[132] Groupthink is most likely when certain antecedents are met: the group is highly cohesive; the group lacks expert representation; the group exerts little effort in searching for and appraising information; the group operates under directed leadership; and the group experiences high levels of stress, with individual dissenters experiencing lacking confidence to voice a

124. *Id.* at 342–43.
125. *Id.* at 342.
126. *Id.* at 344–46.
127. *Id.* at 362–63.
128. *Id.* at 363.
129. *Id.*
130. *Id.* at 330, 336.
131. *Id.* at 316, 362.
132. Marlene E. Turner & Anthony R. Pratkanis, *Twenty-Five Years of Groupthink Theory and Research: Lessons from the Evaluation of a Theory*, 73 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 105, 106 (1998).

better solution to that proposed by the majority.[133] Groupthink can lead to numerous detrimental outcomes in decision making, such as: groups perceiving themselves to be invulnerable, engaging in collective rationalization, or stereotyping outgroups; dissenters showing self-restraint; group members controlling or quelling dissent; the group believing that it has some type of inherent morality; poor collection of relevant information; failure to consider alternatives to what the group is proposing; failure to appreciate possible detriments of the proposal; and selective processing of information.[134]

"Group polarization" refers to a group's tendency to adopt a more extreme position than any individual group member might originally espouse; this shift occurs in the direction in which the group was already gravitating.[135] As it pertains to decisions on risk regulation, group polarization is driven by "availability cascades," or a mechanism "through which expressed perceptions trigger chains of individual responses that make these perceptions appear increasingly plausible through their rising availability in public discourse."[136] Availability cascades are a byproduct of the "availability heuristic," a pervasive cognitive shortcut that people apply in which the perceived likelihood of an event is influenced by how easy it is to bring examples to mind.[137] Availability cascades present in two forms: (1) informational cascades, and (2) reputational cascades. The term "informational cascade" refers to the tendency of individuals, in the face of ignorance or lack of education on a topic, to rely on information provided by others.[138] The term "reputational cascade" refers to individuals' tendency to act in ways that allow them to preserve their reputations, even if it entails failing to express their true opinion.[139] The utilization of availability cascades may result in "availability errors," or "widespread mistaken beliefs" that are grounded in an interaction between the availability heuristic and mechanisms of group decision-making.[140]

In the case of the Megan's Law debates, it is easy to see that groupthink and group polarization likely played some role in the adoption of a policy that did not reflect statistical reality. Concerning groupthink, several antecedents were present during the debates, including a lack of expert representation, high stress levels amid the public outcry over Megan Kanka's death, the group being highly cohesive in the sense that the overwhelming majority of those in attendance supported Megan's

133. *Id.* at 105–06.
134. *Id.* at 106.
135. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE. L.J. 71, 74–75, 85 (2000).
136. Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999).
137. *Id.*
138. Sunstein, *supra* note 135, at 82.
139. *Id.* at 83.
140. Kuran & Sunstein, *supra* note 136, at 685.

Law, and the group exerting relatively little effort to search for and appraise all the relevant empirical information it needed to make the most-informed policy decision that it could. Additionally, several detrimental outcomes associated with groupthink emerged, including the stereotyping of sex offenders as untreatable child rapists and murderers, dissenters showing restraint during the debate, proponents of Megan's Law quelling dissent by side-stepping and downplaying concerns, failure to consider alternative policies to community notification, and failure to consider the possible detriments of community notification.

Concerning group polarization, generally speaking, most legislators were in favor of Megan's Law and community notification, setting the stage for the group to become more polarized in that direction. Due to the lack of experts in attendance, it is likely that many legislators were not fully informed on the state of sex offender research at the time, causing them to utilize availability cascades and to rely on the reports of others who seemed to be in the know regarding the rates of victimization of children and the recidivism rates of sex offenders. Additionally, due to the highly emotional nature of the bill, individuals who supported Megan's Law but had reservations about its implementation restrained themselves from dissenting strongly, lest they lose face with their constituencies and their peers. This phenomenon represents a common theme in both the initiation and maintenance of sex offender policies; no legislator or policymaker wants to be perceived as anything other than tough on sexual crimes, particularly when reputation and re-election are at stake. The end result of the influence of groupthink and group polarization was for legislators to overwhelmingly adopt a policy that research now shows to be ineffective at best and detrimental at worst.

C. *Ineffectiveness of Sex Offender Policies*

Despite the focus on the legislative rhetoric underlying the adoption of Megan's Law, it is not the only sex offender policy in the United States that is misguided. Registration; community notification; and residency, employment, and other state- or jurisdiction-specific restrictions are ineffective because they do not reduce sex offender recidivism, they do not protect children from sexual victimization, and they produce numerous collateral consequences for individuals, families, and society. Each will be discussed in turn below.

1. Sex Offender Policies Do Not Reduce Sexual Offender Sexual Recidivism

Contrary to the general public's perception, recidivism rates for sexual offenders are low[141] and have dropped drastically since the

141. R. Karl Hanson et al., *Long Term Recidivism Rates Among Individuals at High Risk to Sexually Reoffend*, 36 SEXUAL ABUSE 3, 14–15 (2024) (finding 40% of a group

1970s.[142] The United States and Canada diverged in the 1980s as to how each responded to sexual violence—the United States focused on incarceration and retribution, while Canada used intervention- and rehabilitation-based models—but both countries saw the drop in sexual offense recidivism and Canada even more so.[143] Youth have especially low sexual offense recidivism rates,[144] and sexually offending during childhood or adolescence does not reliably predict adult offending.[145] Sexual recidivism rates for sex offenders are also lower than those for general crime.[146] Moreover, sex offender registries are not accurate predictors of recidivism.[147] People are more likely to be overclassified than under-classified, and one study found that 85% of individuals in the highest tier of the registry did not have a conviction for a new sex offense

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of 190 individuals categorized as high risk/high need sex offenders sexually recidivated within a 20-year period); Pauline C. Leung et al., *To Reoffend or Not to Reoffend? An Investigation of Recidivism Among Individuals with Sexual Offense Histories and Psychopathy*, 33 Sexual Abuse 88, 98 (2021) (finding 35% of 111 individuals with a sexual offense history and a high degree of psychopathic traits recidivated either sexually or with a non-sexual violent offense); Mariel Alper & Matthew R. Durose, U.S. Dep't of Just., Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14) 1 (2019) (finding an 8% recidivism rate for people released from state prisons in 2005 after serving a sentence for rape or sexual assault).

142. Patrick Lussier, *Unraveling the Sexual Recidivism Drop in the U.S. and Canada*, 17 Fam. & Intimate Partner Violence Q., Winter 2025, at 51, 58 (finding sexual recidivism rates dropped 40% in the U.S. and 60% in Canada between 1940 and 2019); Patrick Lussier et al., *The Sexual Recidivism Drop in Canada: A Meta-Analysis of Sex Offender Recidivism Rates Over an 80-Year Period*, 22 Criminology & Pub. Pol'y 125, 133, 145 (2022) (finding, across 165 studies reporting 226 recidivism rates, the weighted pooled sexual recidivism rates was "slightly above 10%").

142. Lussier, *supra* note 142, at 54–58.

143. *Id.*

144. Michael F. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22 Psych. Pub. Pol'y & L. 414, 419 (2016) (finding, among 33 studies conducted over the past 15 years, the mean sexual recidivism rate for juveniles is 2.75%, and juvenile sexual recidivism has declined by 73% in the last 30 years); Ashley B. Batastini et al., *Federal Standards for Community Registration of Juvenile Sex Offenders: An Evaluation of Risk Prediction and Future Implications*, 17 Psych. Pub. Pol'y & L. 451, 464 (2011) (finding a sexual recidivism rate of less than 2% in a two-year post-treatment period among 108 juveniles adjudicated for a sexual offense).

145. Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders*, 19 Sexual Abuse 107, 112 (2007) ("These results are consistent with previous findings that the majority of juvenile sexual offenders do not sexually offend as adults, and are much more apt to commit non-sexual offenses.").

146. *See* Caldwell, *supra* note 144, at 418 (finding between 2000 and 2010 the general juvenile recidivism rate was 11 times that of the sexual recidivism rate); Levenson, *supra* note 80, at 352 (finding "criminals with no sex crime history are rearrested for a subsequent sexual offense *more often* than low-risk convicted sex offenders"); Patrick Lussier et al., *A Meta-Analysis of Trends in General, Sexual, and Violent Recidivism Among Youth with Histories of Sex Offending*, 25 Trauma, Violence, & Abuse 54, 58, 61 (2024) (in a meta-analysis of 158 studies and 30,396 adolescent offenders, only 8% of youth sex offenders recidivated sexually, whereas 44% recidivated generally and 18% recidivated with other violent crimes).

147. Batastini et al., *supra* note 144, at 465 (finding "no significant difference in reoffence rates between juveniles who qualified for registration and those who did not" among 108 youth adjudicated for a sexual offense).

after the five-year follow-up period.[148] Black sex offenders are two and a half times more likely to be overclassified on sex offender registries than White offenders,[149] and the arrest rates for sexually-based offenses are also disproportionately higher for Black than White individuals.[150]

Select studies have suggested some level of benefit of sex offender policies on public safety, with important caveats noted. Park and colleagues found a significant deterrence effect attributed to registration following in both 1995 (implementation of registration requirements) and 1999 (internet-based notification implementation).[151] The researchers, however, attribute the majority of the deterrent effect to the original registration policies of 1995, going so far as to suggest a repeal of the 1999 internet-based notification policy due to the negligibility of the effect, drawing upon conclusions from previous research.[152] In one of the only studies to date that demonstrates an unconditional reduction in recidivism following implementation of registration and community notification laws alike, Robert Barnoski found that sexual felony rates decreased 3% during the five-year period following the passage of Washington's registration and notification statute in 1990, and they decreased another 2% following modifications made in 1997 surrounding offender risk classification.[153] It may be more probable, however, that the reduction demonstrated by Barnoski was primarily an effect of the state- and national-level crusade for increased incarceration of sexual offenders throughout the 1990s, which resulted in increased incapacitation of sexual offenders and lower arrest rates.[154]

In contrast, the accumulated empirical evidence base indicates that sex offender policies do not reduce recidivism.[155] To make matters worse, current sex offender policies might actually be *undermining*

148. Bobbie Ticknor & Jessica J. Warner, *Evaluating the Accuracy of SORNA: Testing for Classification Errors and Racial Bias*, 31 Crim. Just. Pol'y Rev. 3, 13 (2020).

149. *Id.* at 14.

150. Alissa R. Ackerman & Meghan Sacks, *Disproportionate Minority Presence on U.S. Sex Offender Registries*, Just. Pol'y J., Fall 2018, at 1, 15 (finding forcible rape arrest rates for White people is 6.78 per 10,000, while that for African Americans is 16.81, and arrest rates for all other sex-based offenses is 27.48 for White people and 45.70 for African Americans).

151. Jin-Hong Park et al., *Examining Deterrence of Adult Sex Crimes: A Semi-Parametric Intervention Time-Series Approach*, 69 Computational Stat. & Data Analysis 198, 198–207 (2014).

152. *E.g.*, Letourneau et al., *supra* note 25, at 435–58.

153. Robert Barnoski, Wash. State Inst. for Pub. Pol'y, Sex Offender Sentencing in Washington State: Has Community Notification Reduced Recidivism? 1, 3 (2005), https://www.wsipp.wa.gov/ReportFile/919/Wsipp_Has-Community-Notification-Reduced-Recidivism_Report.pdf [https://perma.cc/93AD-NEAV].

154. *Id.*

155. *See* Prescott & Rockoff, *supra* note 25, at 192; Sandler et al., *supra* note 25; Richard G. Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration*, 19 Crim. Just. Stud. 193 (2006). *See also* Letourneau et al., *supra* note 25, at 452–53, 455 (finding registration did not reduce sex offender sexual recidivism); Ackerman, *supra* note 25, at 878 (finding registration and notification did not reduce sex offender sexual recidivism rates); Tewksbury et al., *supra* note 25, at 318

those factors that research shows help sex offenders to reintegrate into society and reduce recidivism.[156] Prescott and Rockoff highlighted the dialectic between preventing and facilitating recidivism as a function of sex offender laws in the United States and noted that while a policy that restricts a released offender has the potential to reduce risk for re-offense, if that policy makes the commission of crime less feasible or if it attenuates various risk factors, such a policy also has the potential to increase risk for re-offense if it simultaneously worsens those circumstances known to contribute to reoffending, such as unemployment or unstable housing.[157] A meta-analysis is a popular statistical tool used to gauge the effectiveness of an intervention, and it seeks to provide a quantitative balanced and impartial summary of an existing research base.[158] The most recent 2021 meta-analysis of registration and notification policies reviewed 18 research articles with nearly half a million sex offenders spanning 25 years of data and found that these policies and laws demonstrated *no effect* on recidivism.[159] The findings held true when examining both sexual and non-sexual recidivism and when looking at arrest or conviction as an outcome for recidivism.[160]

Collectively, based on the results of this 2021 meta-analysis and the results of subsequent studies, sex offender policies in the United States do not appear to have an appreciable impact on reducing sex offender sexual recidivism.[161]

(finding registration and notification did not reduce sex offender sexual recidivism rates).

156. Agan, *supra* note 25, at 225–29 (finding registration and notification may produce higher rates of sexual recidivism); Levenson, *supra* note 80, at 349–51 (finding sex offender residence restrictions, for example, increase offenders' risk for homelessness, which is a known risk factor for criminal recidivism).

157. Prescott & Rockoff, *supra* note 25, at 168–70.

158. Iain K. Crombie & Huw T.O. Davies, *What is Meta-Analysis?*, Evidence-Based Med., Apr. 2009, at 1, 1–2 (describing how meta-analysis allows for exploration of an intervention's effectiveness by combining findings from independent studies in order to get a precise estimate of an intervention effect across a particular research base).

159. *See* Kristen M. Zgoba & Meghan M. Mitchell, *The Effectiveness of Sex Offender Registration and Notification: A Meta-Analysis of 25 Years of Findings*, 19 J. Experimental Criminology 71, 89 (2021).

160. *Id.*

161. As a caveat, there is some preliminary evidence to suggest that while registration and notification policies do not reduce rates of sexual recidivism among registered offenders, it does reduce sex crime more generally, suggesting that these policies may have a deterrent effect. However, the studies examining the deterrent effect of registration and notification policies are few in number, suggesting that it may be premature to generalize these results. *See* Steve Aos et al., Wash. State Inst. for Pub. Pol'y, Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates 16 (2006), https://www.wsipp.wa.gov/ReportFile/952/Wsipp_Evidence-Based-Public-Policy-Options-to-Reduce-Future-Prison-Construction-Criminal-Justice-Costs-and-Crime-Rates_Full-Report.pdf [https://perma.cc/ADU6-MPJJ]. In light of the other detriments of registration and notification, the large amounts of money it costs to implement and maintain these policies, and the relative scarcity of studies examining the deterrent effect of registration

2. Sex Offender Policy in the United States Undermines Factors That Are Important for Sex Offender Reintegration into Society

"Forensic risk assessment" refers to the practice of trying to predict future antisocial behavior.[162] Typically, this is done by evaluating an individual for the presence of "risk factors," or factors that increase the likelihood that an individual will engage in future antisocial conduct, and "protective factors," or factors that decrease that likelihood.[163] Risk and protective factors present in two forms: (1) static, and (2) dynamic.[164] Static risk factors are those that are unchangeable; dynamic risk factors are those that can be modified.[165] Dynamic risk factors are alternately referred to as "criminogenic needs," or needs that, if addressed, should reduce an individual's likelihood of future antisocial behavior.[166]

As previously stated, sexual recidivism rates among sex offenders hover around 14%,[167] a low rate compared to other specific types of offenders, such as individuals who commit robbery or burglary, or other types of property crimes.[168] However, sex offenders are much more likely to recidivate generally than sexually, with the rate of general recidivism hovering around 36%.[169] Some commentators attribute this disparity to sex offender notification laws and residency restrictions reducing registered offenders' ability or desire to live a life without crime.[170] They do so by undermining a registrant's social support, ability to obtain employment, and opportunities for stable housing.[171] When absent, all three of these domains are considered dynamic risk factors for re-offending.[172]

Research indicates that notification laws and residency restrictions result in a number of deleterious consequences for registered sex offenders.[173] These impacts can be split into practical consequences and psychological consequences.[174] In terms of practical consequences,

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and notification, commentators are hesitant to label these policies as "effective." *See* ZGOBA ET AL., *supra* note 25, at 36–42.

162. Jerrod Brown & Jay P. Singh, *Forensic Risk Assessment: A Beginner's Guide*, 1 ARCHIVES FORENSIC PSYCH. 49, 50 (2014).

163. *Id.*

164. *Id.*

165. *Id.*

166. JAMES BONTA & D.A. ANDREWS, PUB. SAFETY CAN., RISK-NEED-RESPONSIBILITY MODEL FOR OFFENDER ASSESSMENT & REHABILITATION 4, 5, 13 (2007), https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/rsk-nd-rspnsvty/rsk-nd-rspnsvty-eng.pdf [https://perma.cc/9BTF-UA83].

167. Hanson & Morton-Bourgon, *supra* note 100, at 1158.

168. Levenson et al., *supra* note 36, at 153–54.

169. Hanson & Morton-Bourgon, *supra* note 100, at 1158.

170. J.J. Prescott, *Do Sex Offender Registries Make Us Less Safe?*, REGULATION, Summer 2012, at 48, 50–51.

171. *Id.*

172. *See* BONTA & ANDREWS, *supra* note 166, at 6.

173. *See* Levenson & Cotter, *supra* note 27, at 58; Levenson et al., *supra* note 55, at 594.

174. Levenson et al., *supra* note 55, at 594.

registrants report that after community notification, they are at risk of losing their jobs, getting evicted, harassment by neighbors, or suffering property damage.[175] Additionally, residency restrictions severely limit where sex offenders can live, further narrowing their housing options. Registrants report that, as a result of residency restrictions, they are often forced to move out of their current residence, are unable to live with supportive family members, have difficulty finding affordable housing, and suffer financial hardship.[176] Regarding psychological consequences, registrants report that after community notification, they have a harder time recovering from their offense, have lost social relationships, and feel alone, unsafe, ashamed, embarrassed, and hopeless.[177] In effect, community notification laws and residency restrictions eliminate three key factors that help sex offenders reintegrate into society, and therefore eliminate those factors that help to protect the public from sex offender recidivism. Further, these impediments to reintegration, in turn, simultaneously influence an individual's risk for recidivism, supervision breaches, and registration violations.[178]

3. Sex Offender Policies Generate Collateral Consequences for Society

In addition to the collateral consequences that sex offender laws generate for registered sex offenders, they also generate collateral consequences for sex offenders' families and for society. Concerning implications for families, research indicates that family members of sex offenders often experience similar consequences alongside the offender.[179] These consequences can also be split into practical and psychological consequences. On the practical side, family members of registered sex offenders often report that they are forced to move because of community discomfort or residence restriction, suffer financial strain due to the registered relation's inability to find work, suffer property damage, and feel threatened or harassed by neighbors.[180] On the psychological side, family members of sex offenders often report

175. Levenson & Cotter, *supra* note 27, at 58 tbl. 3; Levenson et al., *supra* note 55, at 594.

176. Levenson & Cotter, *supra* note 73, at 173.

177. Levenson & Cotter, *supra* note 27, at 58 tbl. 3; Levenson et al., *supra* note 55, at 594.

178. *See* Emma Hamilton & Jaymes Fairfax-Columbo, *Predicting Recidivism: Psychosocial Collateral Consequences Among Registered Offenders*, 29 J. Sexual Aggression 160, 161, 163, 166 (2023); Christopher Uggen et al., *'Less Than the Average Citizen': Stigma, Role Transition and the Civic Reintegration of Convicted Felons*, *in* After Crime and Punishment: Pathways to Offender Reintegration 261 (Shadd Maruna & Russ Immarigeon eds., 2004); Bruce Western et al., *Stress and Hardship After Prison*, 120 Am. J. Sociology 1512, 1515–17 (2015).

179. Tewksbury & Levenson, *supra* note 30, at 618–24; Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 Am. J. Crim. Just. 54, 62–66 (2009).

180. Levenson & Tewksbury, *supra* note 179, at 62.

feeling that having a registered relative places significant stress on their life, feeling alone and isolated, feeling shameful and embarrassed, and fearing for their safety.[181]

In terms of broader societal implications, as indicated above, sex offender laws may actually *increase* rates of general recidivism among sex offenders, thereby reducing public safety.[182] These laws encourage vigilantism, subjecting sex offenders to harm that would not befall them absent community notification.[183] They may discourage reporting of sexual offenses committed by family members due to concerns over how public notification will burden the family.[184] This is notable when considering first, that a significant proportion of sex offenses take place in the home between family members, and second, that a similarly large proportion of sex offenses are presumed to be unreported. They may lull communities into a false sense of security, causing worried parents to breathe a sigh of relief when no sex offenders are reported in their neighborhood or increasing their confidence that they can keep their children away from "stranger danger" when the reality is that children are at a much greater risk of being sexually assaulted by an acquaintance or family member.[185] Sex offender policies were predicated on the assumption that, if given access to registrant information via a public database, parents and community members would be more likely to actively utilize such information to protect their children. This is not the case. As mentioned previously, a general decline in registry interest has been observed.

Sex offender policies may drive down property values for close neighbors of sex offenders[186] or interfere with real estate transactions by discouraging potential buyers.[187] In turn, areas wherein sex offenders are permitted to reside tend to be transformed into "transition zones," which, according to social disorganization theory, are characterized

181. Tewksbury & Levenson, *supra* note 30, at 618.

182. Prescott, *supra* note 170, at 50–52.

183. *See* Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 Am. J. Pub. Health 412, 417 (2010); Hum. Rights Watch, *supra* note 83, at 56 (finding, among the 296 cases reviewed, 52% of youth offenders experienced vigilante attacks or threats against themselves or family members); Letourneau et al., *supra* note 83, at 114 ("Registered children were nearly twice as likely as [n]onregistered children to have experienced an unwanted sexual assault that involved contact or penetration in the past year and were five times as likely to report having been approached by an adult for sex in the past year.").

184. Edwards & Hensley, *supra* note 48, at 91.

185. Bonnar-Kidd, *supra* note 183, at 416; Sarah W. Craun & Matthew T. Theriot, *Misperceptions of Sex Offender Perpetration: Considering the Impact of Sex Offender Registration*, 24 J. Interpersonal Violence 2057, 2067 (2009).

186. Leigh Linden & Jonah E. Rockoff, *Estimates of the Impact of Crime Risk on Property Values from Megan's Laws*, 98 Am. Econ. Rev. 1103, 1116 (2008).

187. Erika Davis Frenzel et al., *Understanding Collateral Consequences of Registry Laws: An Examination of the Perceptions of Sex Offender Registrants*, Just. Pol'y J., Fall 2014, at 1, 15, http://www.cjcj.org/uploads/cjcj/documents/frenzel_et_al_collateral_consequences_final_formatted.pdf [https://perma.cc/E8GB-8GVC].

by neighborhood instability, highly mobile residents, and low levels of social cohesion, all of which are risk factors for further disorganization, including increased crime rates within the areas.[188] Policies may also perpetuate racial discrimination and socioeconomic disadvantage, as negative housing outcomes are amplified for registrants of color. That is, non-White sexual offenders are significantly more likely to have been relegated to a socially disorganized neighborhood than White offenders.[189]

Additionally, these restrictions may be an inefficient burden on the public purse, being expensive to implement and maintain while causing numerous deleterious collateral consequences and failing to reduce recidivism.[190] Indeed, the cost for some states to maintain a sex offender registry is nearly insurmountable, particularly given that the federal program itself is underfunded.[191] Further, the shift away from a risk assessment classification system toward the tiered offense system brought high implementation expenses, with little gain in terms of risk identification.[192] High implementation costs of sex offender laws paired with few resources has resulted in a perfunctory state of sex offender registries across the United States.[193] Specifically, examinations into the accuracy of information on sex offender registries have found many instances of incomplete or inaccurate data.[194] Further, significant portions of registrants have been designated as having unknown whereabouts, while a number of "active" registrants were found to be either incarcerated or dead.[195] High levels of missing and erroneous data lead to the conclusion that the registry cannot be considered an effective tool in protecting the safety of the public.

188. *See generally* J.C. Barnes et al., *Analyzing the Impact of a Statewide Residence Restriction Law on South Carolina Sex Offenders*, 20 Crim. Just. Pol'y Rev. 21, 38 (2009); Jaren C. Pope, *Fear of Crime and Housing Prices: Household Reactions to Sex Offender Registries*, 64 J. Urb. Econ. 601, 612–13 (2008).

189. Richard Tewksbury et al., *Sex Offender Residential Mobility and Relegation: The Collateral Consequences Continue*, 41 Am. J. Crim. Just. 852, 852–66 (2016).

190. *See* Freeman-Longo, *supra* note 34, at 4; Zgoba et al., *supra* note 25, at 36–42.

191. Jennifer N. Wang, Note, *Paying the Piper: The Cost of Compliance with the Federal Sex Offender Registration and Notification Act*, 59 N.Y. L. Sch. L. Rev. 681, 681–705 (2015).

192. *See* Bobbie Ticknor & Jessica J. Warner, *Evaluating the Accuracy of SORNA: Testing for Classification Errors and Racial Bias*, 31 Crim. Just. Pol'y Rev. 3, 13 (2020) (finding registrants are more likely to be over- than under-classified, with African Americans being 2.5 times more likely to be over-classified than their White counterparts, and 85% of individuals in the highest, most dangerous, tier did not have a conviction for a new sex offense after the five-year follow-up period).

193. *See generally* Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-Based Sex Offender Registry Reform*, 43 J. Socio. & Soc. Welfare 3, 9, 15–16, 24–27 (2016); Wang, *supra* note 191, at 705.

194. *See generally* Richard Tewksbury & Matthew B. Lees, *Perceptions of Punishment: How Registered Sex Offenders View Registries*, 53 Crime & Delinq. 380, 403 (2007); Richard Tewksbury, *Validity and Utility of the Kentucky Sex Offender Registry*, Fed. Prob., June 2002, at 21, 22–23, 25.

195. *See* Levenson & D'Amora, *supra* note 26, at 181–82.

Punitive sex offender policies are also often justified as justice for victims, but those who experienced a sexual harm are not meaningfully considered by the criminal justice system. Victims are a means to an end in a criminal case, the effect of which can cause lifelong harm. Most people do not report being sexually assaulted, and those who do face the likely risk of retraumatization during police interactions and legal processes. This is in part because victims' narratives must be treated as "suspect" in an adversarial legal system.[196] If their case moves forward, victims may be required to testify at a formal proceeding about their assault. Despite reforms to make the experience of testifying in a courtroom less traumatic, those who testify continue to feel retraumatized by or indifferent to the experience.[197] For some, "testifying can continue an experience of being controlled and dominated" because testimony is necessarily shaped and controlled by legal actors in the courtroom.[198] Stereotypes rooted in sexist and racist perceptions of the ideal victim and offender persist, resulting in a system in which only certain victims matter. For example, police are more likely to find Black victims "uncooperative" and halt an investigation before conducting a suspect interview or referring the case to the prosecutor than White victims.[199] Police are also more likely to label a case unfounded (declaring no crime occurred) when both the victim and offender are White, as compared to when the victim is White and the offender is Hispanic.[200] Prosecutors are more likely to file charges when the victim is White as compared to when the victim is a person of color.[201] Prosecutors are also more likely to charge Black suspects in general with more serious crimes and with felonies, particularly when the victim is White.[202] Relying on police to handle sexual assault allegations also ignores the prevalence of sexual assault and misconduct committed by police officers.[203] While understudied, police officers disproportionately sexually assaulting individuals from marginalized communities is likely a systemic problem.[204] Sex workers, for example, have long identified sexual misconduct by police as pervasive.[205]

196. Sarah Deer & Abigail Barefoot, *The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence*, 28 KAN. J.L. & PUB. POL'Y 505, 514 (2019).

197. Kate Crowe, *Sexual Assault and Testimony: Articulation of/as Violence*, 15 L. CULTURE & HUMANITIES 401, 401–02 (2019).

198. *Id.* at 403.

199. Jessica Shaw & HaeNim Lee, *Race and the Criminal Justice System Response to Sexual Assault: A Systematic Review*, 64 AM. J. CMTY. PSYCH. 256, 271–72 (2019).

200. *Id.*

201. *Id.* at 272.

202. *Id.*

203. Deer & Barefoot, *supra* note 196, at 511.

204. *See id.*

205. Jenavieve Hatch, *Sex Workers in Alaska Say Cops Are Abusing Their Power to Solicit Sex Acts*, HUFFPOST (Aug. 17, 2017, at 12:50 ET), https://www.huffpost.com/entry/sex-workers-in-alaska-say-cops-are-abusing-their-power-to-solicit-

Why, then, in the face of these stark realities, do draconian sex offender policies continue to exist? Though sex offender policies in the United States have long been criticized, and the public has called for reform, these cries and criticisms seem to fall on deaf ears. One reason concerns lawmakers' justifications for such policies; because this topic has been covered in detail earlier in this section, it will not be reiterated here. However, the next section seeks to explain why the public more broadly favors current sex offender policies, utilizing insights from psychology and sociology.

III. Why Systemic Change is Unlikely: Insights from Social Science

Despite the ineffectiveness of sex offender laws, sex offender policy reform has not yet occurred on a wide scale, nor does it look poised to occur in the near future. Sex offender policy in America is based on misperceptions and myths about sex offenders that continue to persist despite a large body of empirical evidence to dispel them. Further, it enjoys widespread public support.[206] To rationalize why this is so, it is helpful to look at insights from social science. Three theories will be reviewed here: (1) heuristics and bias, (2) moral panics, and (3) crime control theater. Additionally, we will explore the historical use of sex crimes as a tool of oppression against minority groups. This historical context is particularly relevant given the disproportionate and amplified impact that sex offender policies have on members of historically marginalized groups, discussed in Part II.

A. *Heuristics and Biases*

According to psychology, a "heuristic" is a "rule of thumb" or a "mental shortcut" utilized to make problem-solving and decision-making easier.[207] Heuristics rely on little information and do not require using large amounts of cognitive resources.[208] While heuristics increase the ease of decision making, that ease often comes with the expense of finding a perfect answer to a question, instead settling for just an adequate answer.[209] "Cognitive biases" are systematic errors in judgment that people make as a result of cognitive limitations, lack of motivation, and/or adaptation to changing environment.[210]

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sex_n_596e1d26e4b010d77673e488?ncid=other_huffpostre_pqylmel2bk8 [https://perma.cc/JWL2-2VCG] (describing police sexual misconduct against sex workers).

206. *See* Levenson et al., *supra* note 36, at 1, 4; Mears et al., *supra* note 36, at 545.

207. Barry Schwartz, The Paradox of Choice: Why More Is Less 57 (2004).

208. *See* Andreas Wilke & Rui Mata, *Cognitive Bias*, *in* Encyclopedia of Human Behavior 531 (2nd ed. 2012).

209. Daniel Kahneman, Thinking, Fast and Slow 98 (2011).

210. Wilke & Mata, *supra* note 208, 531–32.

Psychology provides three heuristics/cognitive biases that might help to explain why America's ineffective sex offender policies are favored: (1) the availability heuristic, (2) the representativeness heuristic, and (3) confirmation bias. The availability heuristic posits that people make judgments about the frequency of an event occurring based on how easily examples of that event come to mind.[211] The more readily an event comes to mind, the more frequently people estimate it to occur.[212] As an example, consider various causes of death. Despite asthma killing 20 times more people than tornadoes do, individuals estimate the reverse—that tornadoes cause more deaths than asthma.[213] Events that are unusual and sensational receive much more media coverage than more mundane events; because the media reports more stories on tornado deaths than on asthma deaths, examples of deaths by tornado are easier for individuals to recall than are examples of death by asthma.[214] The estimate that events that come more readily to mind or more frequent holds for both retrievability and imaginability.[215] "Retrievability" refers to how easily with which an event can be retrieved from memory, and it is influenced both by familiarity with an event as well as the salience of an event.[216] "Imaginability" refers to how easily an event that is not stored in memory can be constructed in the mind.[217] Therefore, events that individuals are familiar with, which are salient, and which can be easily imagined, are judged to be more frequent than events that are unfamiliar, inconspicuous, and difficult to imagine.

According to the representativeness heuristic, individuals estimate the probability of an uncertain event by how similar it is to a notion that they hold or to a stereotype.[218] Though use of the representativeness heuristic often results in more accurate estimates of probability than simple chance guesses, it is also prone to overestimate events that have low base rates.[219] Consider the example of encountering a person reading a law casebook on the train. Now ask yourself this question: Is it more likely that this person is a law student or an undergraduate student? While the law textbook may provide a context clue to suggest that the person is a law student, which would fit in with a stereotype about law students studying relentlessly, it is more probable that they are an undergraduate student who happens to be reading a law

211. Amos Tversky & Daniel Kahneman, *Judgement Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1127 (1974).
212. *Id.*
213. KAHNEMAN, *supra* note 209, at 138.
214. *Id.*
215. Tversky & Kahneman, *supra* note 211, at 1127.
216. *Id.*
217. *Id.*
218. KAHNEMAN, *supra* note 209, at 149–50.
219. *Id.* at 151. The term "base rate" refers to how often an event naturally occurs. For example, 1 out of every 100 people make more than $250,000.00 per year; the base rate, or statistical likelihood, of any particular person making more than $250,000.00 per year is .01.

textbook, as there are many more undergraduate students in the population than law students.

The representativeness heuristic may also lead to the conjunction fallacy, an error that people commit when they estimate the probability of two events in tandem to be more likely than one of the events on its own.[220] Consider the train example again, only now not only is the person reading a law casebook, but she also happens to have an open backpack at her feet which contains a copy of the *Diagnostic and Statistical Manual of Mental Disorder, Fifth Edition, Text Revision (DSM-5-TR)*. Now ask yourself this question: Is it more likely that the individual is a law student or a law student who is also obtaining a doctorate in clinical psychology? Again, context clues might suggest that the person is both a law student and a psychology student, but the base rate of law students is necessarily higher than the base rate of law and psychology students, as the former subsumes the latter category.

Lastly, consider the phenomenon of confirmation bias. "Confirmation bias" refers to individuals' tendency to acquire and interpret evidence in such a way as to support a hypothesis or a belief that they already hold.[221] Alternatively, confirmation bias can be thought of as "one-sided case-building."[222] Generally, confirmation basis comes into play unwittingly, and individuals are not consciously aware that they are constructing a one-sided case.[223] For example, say you are friends with a law student, and you believe that law school is starting to obstruct your ability to spend time together. Confirmation bias suggests that you will pay more attention to interactions with your friend that confirm that hypothesis than interactions with your friend that disconfirm it. When you decide to eventually confront your friend about the amount of time he spends completing law coursework compared to the amount of time he spends with you, you can readily spout off a number of times in which your friend told you that he could not meet up because he had to study. Your friend, taken aback, reminds you that he set aside his studies several times in recent weeks in order to spend time with you, resulting in him staying up late to finish his work. Because you were looking for evidence that your friend was not spending enough time with you because of schoolwork, you overlooked the evidence that suggested he was making time for you—without realizing it, of course.

The availability heuristic, the representativeness heuristic, and confirmation bias were readily observable during the federal and New York Megan's Law debates. Tales of strangers abducting and assaulting children came readily to mind because they were salient and received more coverage and discourse than more common sex offenses, such as sexual

220. *Id.* at 158.
221. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).
222. *Id.*
223. *Id.*

assaults committed by family members or possession of child pornography. Lawmakers focused on the idea of "stranger danger" being prevalent because perpetrators unknown to the victim were more representative of the sex offender stereotype than were sex offenders who were family members and acquaintances of the victim. And lawmakers paid selective attention to studies indicating that sexual recidivism rates among sex offenders were high and to stories suggesting that predatory strangers, like Jesse Timmendequas, posed a significant danger to children.

The same can also be said of the general public. Research indicates that the media tends to portray sex offenders in a very negative light, and that this negative portrayal influences the public's perceptions of sex offenders.[224] It is substantially easier to recall sensational stories about a child being abducted and sexually assaulted than it is to recall mundane stories about an individual being sexually assaulted by a family member. These sensational stories are judged to contain antagonists who fit in with the public perception of sex offenders as mentally ill strangers with a propensity to reoffend and who are nigh untreatable. And the public pays selective attention to these sensational media stories and disregards other more common stories of sexual assault because that is what media coverage dictates; "stranger danger" stories make front-page news, but sex offenses by family members are buried on page eight. As such, these heuristics and biases combine to perpetuate myths and misperceptions about sex offenders and to produce policy that falls in line with these myths as opposed to representing reality.

B. *Moral Panics*

"Moral panics" are sociological phenomena that can be defined as "episode[s], often triggered by alarming media stories and reinforced by reactive laws and public policy, of exaggerated or misdirected public concern, anxiety, fear, or anger over a perceived threat to social order."[225] Moral panics feature five integral factors: (1) concern over a particular type of threatening conduct or event, (2) hostility in which the perpetrators of said conduct are vilified and portrayed as "folk devils," (3) a unified and broad negative societal reaction to the concern, (4) exaggeration of the concern and the threat it poses, and (5) a volatile social situation.[226] The Halloween sadism example in Part I provides an example of a moral panic: (1) society is concerned about the threat that contaminated Halloween candy poses to children; (2) the perpetrators

224. Gabriela Corabian, Collateral Effects of the Media on Sex Offender Reintegration: Perceptions of Sex Offenders, Professionals, and the Lay Public 2–3 (Fall 2012) (Master's thesis, University of Alberta) (on file with author).

225. Charles Krinsky, *Introduction: The Moral Panic Concept*, *in* THE ASHGATE RESEARCH COMPANION TO MORAL PANICS 1, 1 (Charles Krinsky ed., 1st ed. 2013).

226. David Garland, *On the Concept of Moral Panic*, 4 CRIME MEDIA CULTURE 9, 10–11 (2008).

of the conduct, adult strangers, are mistrusted and an urban legend forms; (3) there is broad societal condemnation of Halloween sadism; (4) the threat of Halloween sadism is greatly exaggerated, as evidenced by research suggesting that no child has ever died as a result of contaminated Halloween candy; and (5) a volatile social situation in which panic escalates in the weeks leading up to Halloween. Some commentators argue that moral panics also include two additional and less-tangible factors: (1) introspective soul-searching by society, and (2) an idea that the threatening conduct is symptomatic of a bigger threat to societal values in general.[227]

Moral panics can present in a variety of intensities and durations and can have varying societal impressions.[228] Some moral panics are relatively minor and ephemeral, becoming quickly forgotten once they pass.[229] Others are major and enduring, transforming the social order when they hit.[230] Moral panics can also vary in terms of their development; for instance, moral panics "can be spontaneous, grass-roots events, unselfconsciously driven by local actors and anxieties," or they "can be deliberately engineered for commercial or political gain."[231] Additionally, moral panics can also vary in terms of causal stimulus; however, most causal stimuli share a loose set of conditions that allow for the stimulus.[232] These conditions include: (1) sensationalist media, (2) the revelation of a previously undiscovered or unreported form of deviant conduct, (3) the existence of a marginalized group of outsiders who can act as scapegoats, and (4) a sensitive public audience.[233]

Applying the concept of moral panics to public support for sex offender laws, it is clear that sexual offenses against children generate fear and anxiety among the public.[234] Though public concern over child safety and reactionary policy has existed for the better part of 120 years, panic regarding predatory sexual offenders has intensified in the last two decades.[235] The most recent rekindling of moral panic regarding sexual offenses against children featured stimulating events in the form of salient predatory crimes against children committed by strangers, such as the murders of Adam Walsh and Megan Kanka.[236] The perpetrators of these crimes, adult strangers who were unknown to the victims, were quickly and nearly universally vilified and condemned, portrayed as "unstoppable and untreatable 'predators.'"[237] The threat that sex

227. *Id.* at 11.
228. *Id.* at 13.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.* at 14.
233. *Id.*
234. Kristen M. Zgoba, *Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation*, 17 CRIM. JUST. STUD. 385, 387 (2004).
235. *Id.* at 388.
236. *Id.*
237. *Id.* at 389, 392.

offenders pose to children was greatly exaggerated, with sensationalist media reporting amplifying the minor threat to children that convicted sex offenders actually present.[238] And a volatile social situation in which there is public outcry, to quote Helen Lovejoy, for somebody to "please think of the children," places pressure on lawmakers to quickly pursue restrictive measures that seem facially valid and on the public to support such measures.[239]

While rare and surely representing only a small minority of sexual offenses against children, sexual offenses in which adult strangers abduct and kill children happen with enough frequency to ensure that the general public will not go too long without being reminded that a threat, however minor, still exists.[240] These incidents, along with subsequent sensationalist media coverage, allow fear and anxiety to stay fresh in the public's head—and to perpetuate the moral panic that fuels support for draconian sex offender policies.

C. *Crime Control Theater*

The concept of "crime control theater" originates in the theory of moral panic, but it focuses on government responses to the subject of a moral panic as a way to "generate the appearance, but not the fact, of crime control."[241] Crime control theater suggests that public officials may enact certain policies in response to a seemingly intractable threat not because the policies will alleviate the threat, but in order to acknowledge the highly emotional responses the threat evokes and to demonstrate their commitment to the values that society feels are endangered by the threat.[242] In effect, crime control theater is the government's attempt to enact a "socially constructed solution to a socially constructed and rare—but nonetheless intractable—crime problem."[243] However, such policies, though advertised as "noble, legitimate, and efficacious," often "have outcomes that fall short of, or are detrimental to, their intended goals."[244]

An example of crime control theater can be found in the case of America's Missing Broadcast Emergency Response Alert system ("AMBER Alert").[245] The AMBER Alert system was a memorial policy implemented as a response to the 1996 abduction and murder of nine-year-old Amber Hagerman in Arlington, Texas.[246] Several individuals

238. *Id.* at 390, 393.
239. *Id.* at 391.
240. *Id.* at 391–93.
241. Timothy Griffin & Monica K. Miller, *Child Abduction, AMBER Alert, and Crime Control Theater*, 33 CRIM. JUST. REV. 159, 160 (2008).
242. *Id.*
243. Michelle Hammond et al., *Safe Haven Laws as Crime Control Theater*, 34 CHILD ABUSE & NEGLECT 545, 546 (2010).
244. *Id.* at 548.
245. *Id.*
246. Griffin & Miller, *supra* note 241, at 162.

witnessed the abduction, leading some to suggest that Amber could have been saved if information regarding the abduction had been quickly disseminated to allow citizens the chance to provide tips to law enforcement.[247] The AMBER Alert public notification system was implemented shortly after the crime, predicated on the idea that, due to most abduction and murder victims dying shortly after being kidnapped, rapid police response was essential to save the victim.[248]

Despite the AMBER Alert system being met with initial praise, research soon indicated that the system was not nearly as effective as was hoped. While some AMBER Alerts resulted in success stories in which the child was rescued or returned without being harmed, these successes tended to happen in cases in which there was little risk of death to the child to begin with (such as cases where a family member abducted the child).[249] Additionally, the cases that the AMBER Alert system was intended for, "stereotypical" abductions where a stranger kidnapped the child, were the cases for which the AMBER Alert system was least likely to be effective.[250] In essence, preliminary research suggests that the AMBER Alert system is ineffective at accomplishing its intended goal of protecting children from abduction by dangerous strangers.

The AMBER Alert system has several potential pitfalls that may account for this lack of success. First, in order to minimize the risk that an abducted child might be harmed, the child's disappearance must be reported very quickly; however, people often go hours without learning that a child is missing and may deliberate or undertake a search of their own before reporting the disappearance to law enforcement.[251] Second, in order to be maximally effective, law enforcement authorities, once a report has been made, must quickly make a decision about whether to issue an AMBER Alert.[252] Authorities often do not have sufficient information at the time of the report to determine if the case warrants an alert, and sending out alerts anytime there is a missing child without consideration as to whether an alert is justified runs the risk of crying wolf and burdening the public's attention span.[253] Third, the AMBER Alert system might be operating under the flawed premise that time is the most important factor in whether a child is killed by her abductor or not.[254] In reality, the most important factor is the intention of the kidnapper; if the kidnappers intend to kill their victims, they normally do so quickly and cruelly, preventing any intervention from truly being an effective solution.[255]

247. *Id.*
248. *Id.*
249. *Id.* at 164.
250. *Id.*
251. *Id.*
252. *Id.* at 165.
253. *Id.*
254. *Id.*
255. *Id.*

Viewed in the light of being a legitimate policy that aims to reduce risk for children, the AMBER Alert system seems to be poorly thought out and inefficient. In contrast, viewed in the light of crime control theater as a symbolic policy, the AMBER Alert system starts to make more sense. AMBER Alerts may not be effective at saving children, but they do communicate government solidarity with the public in terms of condemning threats to children.[256] Further, they represent the government's attempt at a good-faith effort to address a salient but virtually unsolvable problem.[257] In essence, it allows the government and the public to *feel* as if they are doing *something*, which is certainly more psychologically palatable than the feeling that society and government can do *nothing*.

Applied to sex offender policies in the United States, the similarities between the AMBER Alert system and registration and notification requirements and residence restrictions are striking. Like the AMBER Alert system, sex offender policies in the United States fail to achieve their stated goal: protecting children from predatory strangers. Like the AMBER Alert system, the low base rate of child sexual victimization by strangers suggests that the problem will be a hard one to tackle, and that if it is not intractable, it is pretty darn close. Like the AMBER Alert system, sex offender policies allow the government to show solidarity with public outrage over horrific crimes like the sexual assault and killing of Megan Kanka. Like the AMBER Alert system, registration and notification requirements and residence restrictions allow the government and the public to feel as if they are doing *something*, even if it is in appearance only. And like the AMBER Alert system, in the case of reducing the danger of sexual victimization to children, attempting to do *something*, even if it is ultimately ineffective (and possibly detrimental), is infinitely more psychologically palatable than doing *nothing*.

Certain attempts have been enacted to offer some type of refuge for offenders deemed low risk to reoffend. While most states allow sexual offenders to petition the courts for removal from the registry, Texas, for example, has implemented a protocol of guidelines for removal, the assumption being that offenders who meet requirements for deregistration can generally do so. The stipulations for deregistration in Texas require that the potential deregistrant: (1) was a first-time offender, (2) committed a non-aggravated offense, (3) was convicted on one charge and one count of sexual misconduct, (4) has registered for a minimum stipulated period, (5) has successfully completed treatment and probation/parole, and (6) was rated low- or moderate-risk via a psychological forensic evaluation that includes results from dynamic and actuarial risk instruments.[258] Based on the final step of the Texas

256. *Id.* at 167.

257. *Id.*

258. Matthew L. Ferrara & Emma Hamilton, *Something Is Wrong with the Sex Offender Registry, and Deregistration Is the Only Tool We Have to Fix It*, VOICE FOR DEF., Sept. 2018, at 20, 24–26.

deregistration process, however, which includes presenting evidence to the original court of conviction in a petition for deregistration, the majority of deregistration applicants have had their petitions denied outright by the original trying judge.[259] As such, although Texas has attempted to streamline a system for relief from registration requirements, courts appear to continue to fall back on heuristics when making judgments about sex offender risk, perhaps born out of a lack of understanding and familiarity with the important aforementioned data that should ultimately drive such decisions.

D. *Sex Offender Policy Functions to Marginalize People of Color and Sexual Minorities*

The myth that draconian sex offender policies are necessary to prevent future offending persists not only because sexual harm invokes moral panic, but also because rape law has been weaponized since its inception against communities of color and sexual minorities. Controlling marginalized populations through criminal law is a longstanding method of maintaining White supremacy and class dominance. Rape law in particular has targeted Black men and LGBTQ+ communities both explicitly and implicitly.

Before the Civil War, rape law in the South was racialized on its face, only recognizing the rape of White women and requiring different penalties depending on the race of the alleged offender.[260] Rape law was used to control enslaved populations by imposing severe punishment, often public executions, on Black men for rape allegations, and not recognizing the rape of Black women such that White men could rape and force them to carry a pregnancy to grow the enslaved workforce.[261] In 1816, Georgia reduced the minimum sentence for White men convicted of raping or attempting to rape a White woman from seven to two years, while it imposed the death penalty on Black men convicted of the same crime.[262] Both Black men and women were hypersexualized to encourage the view that Black men could not be trusted to control their sexuality around White women and that Black women were never forced to have sex; rather, Black women were seen as imposing their sexuality onto White men.[263]

259. *See* Matthew L. Ferrara & Emma Hamilton, Tex. Voices Statewide Conf., "It Was Like Running into Brick Wall After Brick Wall": Removal from the Texas Sex Offender Registry (Oct. 2018).

260. *See* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 Nev. L.J. 1, 8, 13 (2006).

261. *Id.* at 9–10 (One 1662 statute in the American colonies defined a child born from a White man and an enslaved woman as a slave, "creat[ing] an economic incentive for owners to rape their slaves.").

262. *Id.* at 13.

263. *Id.* at 9–10.

After the Civil War, the South maintained an approximation of slavery through the Black Codes and systemic lynching.[264] Between 1880 and 1950, approximately 4,700 to 5,000 people were murdered by lynching, three-quarters of them Black, with the most common justification being to protect White women from Black men.[265] In her courageous and groundbreaking research on lynch law in the South, Ida B. Wells documented 728 lynchings of African Americans between 1884 and 1892, with all but 50 justified by allegations that a White woman was raped, despite the fact that only one-third of those individuals were charged with rape.[266] After 1950, there were few lynchings, but there were more legal executions of Black men for the rape of White women.[267] In *Coker v. Georgia,* the Court held the death penalty was an unconstitutional punishment for the crime of rape alone.[268] However, many states in the 1990s expanded capital sentencing to people convicted of child rape.[269] In 2008, the Court held that imposing the death penalty for cases of child rape not involving murder violated the Eighth Amendment.[270] Today, discriminatory enforcement decisions continue the legacy of leveraging rape law against communities of color. For example, prosecutors are more likely to charge Black suspects with more serious crimes and with felonies, particularly when the victim is White.[271] Police are more likely to find Black victims "uncooperative" and halt an investigation before conducting a suspect interview or referring the case to the prosecutor than White victims.[272] Police are also more likely to label a case unfounded (declaring no crime occurred) when both the victim and offender are White, as compared to when the victim is White and the offender is Hispanic.[273] Prosecutors are similarly more likely to file charges when the victim is White as compared to when the victim is a person of color.[274]

Sex law has generally also functioned to oppress LGBTQ+ populations. Same-sex intercourse has been criminalized in a multitude of ways, and queer people have and continue to be painted as sexual predators. Sodomy was illegal in every state until 1961 when Illinois repealed

264. *Id.* at 14, 23.
265. *Id.* at 23–24.
266. Ida B. Wells, Southern Horrors: Lynch Law in All Its Phases 14 (1892).
267. Pokorak, *supra* note 260, at 25.
268. Coker v. Georgia, 433 U.S. 584, 592 (1977).
269. Lane Kirkland Gillespie & Laura King, *Legislative Origins, Reforms, and Future Directions*, *in* Sexual Victimization: Then and Now 15, 25 (Tara N. Richards & Catherine D. Marcum eds., 2015).
270. Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).
271. Shaw & Lee, *supra* note 199, at 272.
272. *Id.* at 271–72.
273. *Id.* at 272.
274. *Id.*

its sodomy law.[275] Idaho planned to also revise its criminal laws, but legislators repealed the whole package when they found out it included repealing sodomy law.[276] Anti-sodomy laws shifted in the 1970s to target gay people in particular.[277] In 1986, the United States Supreme Court held that the Constitution does not provide a fundamental right to gay people engaging in sodomy in the privacy of their home.[278] This and similar rulings resulted in employment discrimination, hate crimes, and other abuses against gay and lesbian individuals.[279] These sex laws were not concerned with force, rather, they existed "to regulate norm-defying sex—forcible or not."[280] It was not until 2003 that the Supreme Court overruled *Bowers*,[281] holding that a Texas statute that forbid same-sex intimacy was unconstitutional.[282]

Still, queer people continue to face harsher treatment than their cis-gender and heterosexual counterparts when facing sex offense charges. One survey revealed, in a sample size of 964 sex offender registrants, LGBTQ people were more likely than straight cisgender people to be incarcerated in prison for their sex offense, to be incarcerated for sentences of twenty-five years or longer, and 10% of the LGBTQ people who received treatment related to their sex offense reported that it included conversion therapy.[283] Queer youth face particularly discriminatory responses to engaging in sex crimes, including consensual sex or sexting.[284] Leveraging sex offender policy and enforcement against queer people has been particularly advantageous for those advocating for anti-trans legislation.

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275. *Getting Rid of Sodomy Laws: History and Strategy that Led to the* Lawrence *Decision*, ACLU (June 26, 2003), https://www.aclu.org/documents/getting-rid-sodomy-laws-history-and-strategy-led-lawrence-decision [https://perma.cc/QZ3G-UU5F].

276. *Id.*

277. *Why Sodomy Laws Matter*, ACLU (June 26, 2003), https://www.aclu.org/documents/why-sodomy-laws-matter [https://perma.cc/7Z3X-6R6Q].

278. Bowers v. Hardwick, 478 U.S. 186, 195–96 (1986).

279. *Why Sodomy Laws Matter*, *supra* note 277.

280. Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 Stan. L. Rev. 755, 782 (2023).

281. *See generally Bowers*, 478 U.S. at 186 (prior Supreme Court case holding that gay people do not have a fundamental right to sexual intimacy in the privacy of their homes).

282. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

283. Ilan H. Meyer et al., UCLA Sch. of L. Williams Inst., LGBTQ People on Sex Offender Registries in the US 3–4 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/SORS-LGBTQ-May-2022.pdf [https://perma.cc/5GNL-FLUB] (964 people participated in this online, anonymous survey, 80% of whom identified as straight and 20% identified as LGBTQ).

284. Jessica M. Salerno et al., *Give the Kid a Break—But Only if He's Straight: Retributive Motives Drive Biases Against Gay Youth in Ambiguous Punishment Contexts*, 20 Psych. Pub. Pol'y & L. 398, 402, 405 (2014) (In assigning the severity of punishment that should be imposed on youth of similar ages having sex, participants were more punitive toward gay versus straight male youth. Participants were also more punitive toward both the sender (offender) and receiver (victim) of sexting when both youths were male rather than male and female.).

IV. Subverting the System: Specialty Courts

The previous sections of this Article sought to provide the backdrop for the need to "subvert the system" via the utilization of sex offender specialty courts. Despite the proven ineffectiveness of sex offender policies in the United States, misguided legislative rhetoric and social science phenomena have engendered widespread public support for registration requirements, community notification, and residence restrictions and provided a bleak outlook for any possible reform efforts. As such, in order to address the problems that sex offender policies claim they want to address, namely sex offender recidivism and public safety, it is necessary not only to realize and appreciate the societal and legislative roadblocks that block the path, but also to figure out ways to work within the confines of the current system to navigate these roadblocks. This section seeks to explore one example in which the system has been subverted before—specialty courts.

A. *Therapeutic Jurisprudence and the Sequential Intercept Model*

Specialty courts, alternately referred to as problem-solving courts or diversionary courts, are "specialized tribunals established to deal with specific problems, often involving individuals who need social, mental health, or substance abuse treatment services."[285] The foundation of specialty courts is located in the concept of therapeutic jurisprudence, or the idea that the law can be used as a therapeutic agent to influence individuals' well-being.[286] From a criminal justice perspective, therapeutic jurisprudence does not seek to eschew traditional principles of criminal justice, but rather to work within and utilize the currently existing criminal justice framework to more effectively rehabilitate offenders.[287] Therapeutic jurisprudence is interdisciplinary in nature, relying on insights from social science to "study the extent to which a legal rule or practice promotes the psychological and physical well-being of the people it affects,"[288] as well as how social science should be utilized to help shape the development of the law.[289] This interdisciplinary approach can "illuminate how laws and legal processes may in fact support or undermine the public policy reasons for instituting those laws

285. Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 Fordham Urb. L.J. 1055, 1055 (2003).

286. David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 Touro L. Rev. 17, 20 (2014).

287. David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 Wm. & Mary L. Rev. 279, 280 (1993).

288. Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 Psych. Pub. Pol'y & L. 193, 196 (1995).

289. *See* Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 Notre Dame L. Rev. 439, 444 (1999).

and legal processes."[290] A therapeutic jurisprudence analysis can also "reveal important and previously unrecognized considerations on legal issues" and provide guidance on how to "balance them with or against the other meaningful and pertinent legal and social values that drive the enactment and enforcement of laws."[291]

A therapeutic jurisprudence approach to sex offender policy asks whether current sex offender laws are therapeutic and rehabilitative or are anti-therapeutic and non-rehabilitative for sex offenders.[292] More specifically, a therapeutic jurisprudence approach to sex offender laws would ask whether these policies restructure the antisocial thinking patterns that sometimes drive sex offenders' criminal behavior, or whether they promote "psychological dysfunction and criminality?"[293] Further, a therapeutic jurisprudence approach also begs the question of whether sex offender policies are psychologically beneficial for society as a whole.[294]

Answering these questions presents a somewhat equivocal view of sex offender policy in the United States. While registration requirements, community notification, and residence restrictions may produce positive psychological effects for the public and for law enforcement by providing them with a perceived sense of control over sex offenders,[295] research indicates that such control is just that: perceived. Additionally, at the same time that sex offender policies can instill in society feelings of control, notification, in particular, can also engender feelings of fear, anxiety, and hysteria, as well as feelings of inadequacy when children are inevitably victimized despite such policies being in place.[296] Further, as previously discussed, sex offender policies may pose negative therapeutic and psychological consequences on sex offenders.[297] As such, a therapeutic jurisprudence analysis would suggest that sex offender policies are in need of reform or at least in need of some type of alternative intervention.[298]

One such reform effort might be to shift the focus of sex offender policies from *risk prediction* to *risk management.*[299] Whereas a risk prediction approach seeks only to identify sex offenders who are at high risk to reoffend and who the community needs to be protected from,[300] a risk management approach seeks to both identify high-risk individuals and also to find ways to effectively decrease the risk these individuals

290. *Id.*
291. *Id.* at 445.
292. Wexler, *supra* note 287, at 284.
293. *Id.* at 285.
294. *See* Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCH. PUB. POL'Y & L. 505, 552–53 (1998).
295. *Id.* at 553–54.
296. *Id.* at 554.
297. *Id.* at 555–57.
298. *Id.* at 557.
299. *See id.* at 558.
300. *See id.* at 558–59.

pose.[301] This is precisely the goal of specialty courts. Specialty courts are focused on rehabilitation as opposed to punishment while still wielding the threat of graduated sanctions as motivation to engage in treatment.[302] By focusing on the treatment needs of offenders, problem-solving courts seek to reduce offenders' risk factors for recidivism, thereby managing risk and increasing public safety.[303] Problem-solving courts represent a collaborative effort, with judges acting as the head of a multidisciplinary treatment team that includes prosecutors, defense attorneys, court coordinators, case managers, probation officers, law enforcement officials, and treatment providers.[304] Research indicates that, compared to standard prosecution, problem-solving courts represent an effective intervention in the reduction of recidivism.[305]

Specialty courts also have underpinnings in the Sequential Intercept Model ("SIM"). The SIM proposes that along the criminal justice spectrum, there are various "points of interception" at which individuals with behavioral health needs can be diverted down an intervention path.[306] Individuals with behavioral health needs are significantly more likely than individuals without such needs to come into initial and repeated contact with the criminal justice system, yet these individuals often do not receive adequate treatment while incarcerated to address these needs and reduce their risk for future contact with the justice system.[307] The SIM identifies five different intervention points, or "intercepts": (1) law enforcement, (2) initial detention/initial court hearings, (3) jails/courts, (4) reentry, and (5) community corrections.[308] Specialty courts typically factor into Intercept 3,[309] but they may also

301. *See id.* at 560–561.

302. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 L. & Pol'y 125, 125–26 (2001).

303. *Id.* at 127–31.

304. C. West Huddleston, III et al., Nat'l Drug Ct. Inst., Painting the Current Picture: A National Report Card on Drug Courts and Other Problem-Solving Court Programs in the United States 2, 21, 23 (2008).

305. Rachel Porter et al., Ctr. for Ct. Innovation, What Makes a Court Problem-Solving?: Universal Performance Indicators for Problem-Solving Justice 14–16 (2010), https://www.innovatingjustice.org/sites/default/files/What_Makes_A_Court_P_S.pdf [https://perma.cc/6MA7-YJBN].

306. Kirk Heilbrun et al., *The Movement Toward Community-Based Alternatives to Criminal Justice Involvement and Incarceration for People with Severe Mental Illness*, *in* The Sequential Intercept Model and Criminal Justice: Promoting Community Alternatives for Individuals with Serious Mental Illness 1, 5 (Patricia Griffin et al. eds., 2015).

307. *Id.* at 7.

308. GAINS Ctr. for Behav. Health & Just. Transformation, Substance Abuse & Mental Health Servs. Admin., Developing A Comprehensive For Behavioral Criminal Collaboration: Sequential Model 1, https://www.prainc.com/wp-content/uploads/2015/10/SIMBrochure.pdf [https://perma.cc/HAA5-YJZM] (last visited Mar. 14, 2025).

309. Mark R. Munetz & Patricia A. Griffin, *Use of the Sequential Intercept Model as an Approach to Decriminalization of People with Serious Mental Illness*, 57 Psychiatric Servs. 544, 547 (2006).

be present at Intercept 4 in the form of reentry courts, which provide court supervision and monitoring of an individual's parole following release from prison, often including conditions such as participating in treatment, maintaining employment, and conformity of behavior to the law.[310] The sex offender court proposed in Part V borrows insights from problem-solving courts at both intercepts.

B. *Subversion Prototypes: Specialty Court Examples*

Specialty courts have been used to subvert restrictive criminal justice policy symptoms before, to great success. Two examples will be discussed here: (1) juvenile specialty courts, and (2) adult drug courts.

1. Juvenile Specialty Courts

First appearing in Chicago, Illinois, in 1899, the juvenile court is perhaps the precursor to modern-day specialty courts.[311] Juvenile courts sought to address the problem of juvenile delinquency via a rehabilitative approach, as opposed to the punitive approach adopted by the adult criminal justice system.[312] Operating under the guise that the way to treat juvenile offenders was the way "a wise and merciful father handles his own child whose errors are not discovered by the authorities,"[313] rehabilitation-focused juvenile justice proceedings were often conducted informally and produced indeterminate dispositions.[314] This model flourished for approximately six decades[315] but was often criticized as failing to achieve its therapeutic ideals, affording juvenile court justices too much discretion, and being more akin to criminal court proceedings as opposed to rehabilitation-focused proceedings.[316] As such, the juvenile court of the early 20th century began to fall into disfavor by the 1960s.[317] Determined to win juvenile offenders the same constitutional protections as their adult counterparts, juvenile advocates consistently challenged informal delinquency proceedings, setting the stage for the United States Supreme Court's ruling in the case of *In re Gault*.[318]

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310. *See* John Q. La Fond & Bruce J. Winick, *Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community*, 34 Seton Hall L. Rev. 1173, 1189, 1193–94 (2004).
311. Winick, *supra* note 285, at 1056.
312. *Id.*
313. Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 107 (1909).
314. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, Future Child., Fall 2008, at 15, 16–17.
315. *Id.* at 17.
316. Benjamin E. Friedman, Note, *Protecting Truth: An Argument for Juvenile Rights and a Return to* In re Gault, 58 UCLA L. Rev. Discourse 165, 166 (2011).
317. Scott & Steinberg, *supra* note 314, at 17.
318. *Id.*

In re Gault marked a dramatic shift in the operations of the juvenile court.[319] Concerned that juveniles received neither the rehabilitation they were promised nor the constitutional protections that adults were afforded, the Court in *Gault* granted juvenile offenders the same procedural rights as adult offenders, including the rights to notice of charges, legal counsel, confrontation and cross-examination of a witness, and protection from self-incrimination.[320] In *Gault*'s wake, "[s]tates narrowed the jurisdiction of the juvenile courts, exporting thousands of children into adult criminal courts. For those children remaining in the juvenile system, judges exercised less individualized judgment and served up increasingly punitive sentences."[321]

Compounding this narrowing of the juvenile court's jurisdiction was the attack on the juvenile court by conservative politicians in the 1980s.[322] Angered at rising youth crime rates, conservative politicians cited high rates of recidivism to condemn the rehabilitative focus of the juvenile court as a failure.[323] Compounding this narrowing even further was the public attitude toward juvenile offenders, who had increasingly come to be viewed as dangerous super-predators (moral panics, anyone?).[324] Politicians scrambled to implement tough-on-delinquency policies for juveniles, taking the form of the lowering of the age of judicial transfer, increasing the range of offenses for which juveniles could be transferred to adult court, and the creation of statutes that provided for the automatic transfer of juveniles who were accused of certain serious offenses.[325]

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319. Daniel M. Filler & Austin E. Smith, *The New Rehabilitation*, 91 Iowa L. Rev. 951, 959 (2006). *Gault* involved the case of 15-year-old Gerald Gault, an adolescent boy arrested for making lewd remarks to his neighbor by telephone; at the time, Gault was on probation for a previous offense in which he was party to another boy stealing a wallet from a woman's purse. *In re Gault*, 387 U.S. 1, 3–4 (1967). Upon his arrest, Gault was committed to the custody of a children's detention home, with no notification being provided to his parents. *Id.* at 5. A deputy probation officer filed a formal delinquency petition; the petition did not reference any factual basis for which Gault was detained. *Id.* Neither Gault nor his parents were informed about the filing. *Id.* At Gault's initial hearing the next day, the complainant neighbor was not present, no one was sworn in to provide testimony, and no transcript or recording was created. *Id.* at 5–6. The juvenile judge at the hearing reported that Gault admitted to making a lewd statement, and Gault was returned to the juvenile detention home. *Id.* at 6. He was not released until two days later, with no recorded explanation given for why he had been detained or why he was released. *Id.* Approximately one week later, Gault attended another hearing; again, the complainant was not present. *Id.* at 6–7. Whether Gault admitted to making lewd statements at this hearing was somewhat ambiguous; regardless, the juvenile judge ordered Gault to be committed as a delinquent until age 21. *Id.* at 7–8. At the time, Arizona law did not allow for appeals in juvenile cases. *Id.* at 8.

320. *In re Gault*, 387 U.S. at 33–34, 41, 55–56.

321. Filler & Smith, *supra* note 319, at 953.

322. Scott & Steinberg, *supra* note 314, at 17.

323. *Id.*

324. Jesenia M. Pizarro et al., *Juvenile "Super-Predators" in the News: A Comparison of Adult and Juvenile Homicides*, 14 J. Crim. Just. & Popular Culture 84, 84–85 (2007).

325. Scott & Steinberg, *supra* note 314, at 17.

To combat this increasingly punitive approach to juvenile justice policy and to provide juveniles with the rehabilitative services that the juvenile system was intended to provide them, reformers turned to the idea of juvenile specialty courts.[326] This is ironic, given that the stated focus of the overall juvenile court system was and is still to rehabilitate as opposed to punish. Regardless, juvenile justice reformers modeled juvenile specialty courts on the successful prototype of the adult Miami-Dade County Drug Court, creating a number of specialized dockets for juveniles that tackle such issues as drug and alcohol abuse, dependency, truancy, weapons possession, mental/behavioral health issues, violence, and even minor "gateway" offenses (such as shoplifting).[327] Typically, juvenile specialty courts include the following components: comprehensive intake assessments to determine juveniles' rehabilitative needs; a focus on the function of the juvenile and the juvenile's family throughout the judicial process; coordination among the court, treatment providers, schools, and community agencies; active and continuous supervision of the juvenile's treatment progress and case by a judge; and use of immediate and graduated sanctions and incentives to motivate treatment compliance and progress.[328]

Strikingly, the creation of these juvenile specialty courts does not require any legislative action, greatly speeding up the pace of reform and preventing reformers from having to fight a muddy trench war that would likely end up being a losing battle.[329] Rather, it simply involves some funding reallocation/grant applications and collaboration between family courts and law enforcement officials, prosecutors, defense attorneys, social service programs, and bureaucratic agencies.[330] Thus far, juvenile specialty courts appear to be successful, at least for those juvenile special courts that have been more intensely scrutinized and studied, such as juvenile drug courts.[331] In essence, juvenile justice reformers used the concept of specialty courts to navigate around and subvert a restrictive legal and social framework that prevented juveniles from receiving the therapeutic services they needed to desist from delinquent behavior, resulting in a benefit to juvenile offenders and a net benefit to society.

2. Adult Drug Courts

It is no secret that in the United States, drug use and crime are inextricably linked, and the statistics are startling. Among adult offenders,

326. Filler & Smith, *supra* note 319, at 956.
327. *Id.* at 968–69, 982.
328. *Id.* at 976–77.
329. *Id.* at 971.
330. *Id.*
331. *See generally* Jacqueline van Wormer & Faith Lutze, *Exploring the Evidence: The Value of Juvenile Drug Courts*, JUV. & FAM. JUST. TODAY, Summer 2011, at 17 (explaining positive results from studies on juvenile drug courts).

roughly 80% engage in problematic substance use, 60% test positive for illegal substances at the time of arrest, and 50% satisfy diagnostic criteria for a substance use disorder.[332] Further, problematic substance use and antisocial behavior appear to be chronically intertwined, as 95% of drug-involved offenders will relapse and 60–80% will reoffend upon release from custody.[333] The high rate of substance use found in criminal offenders is likely attributable to America's ongoing drug war. Since its commencement, the "War on Drugs" has seen upwards of 37 million people arrested for drug and other related offenses.[334] Further, the annual rate of individuals incarcerated for drug offenses hovers at approximately 500,000 in recent years, compared to only 40,000 per annum in 1980—an astronomical increase of over 1,100%.[335]

In an attempt to corral its drug problem, American drug policy has historically vacillated between two approaches: (1) the public health approach, and (2) the public safety approach.[336] The public health approach views problematic substance use as an illness that requires therapeutic and rehabilitative responses to remedy.[337] In contrast, the public safety approach conceives of problematic substance use as illegal behavior that constitutes a threat to society that can be dispelled through castigation.[338] Unfortunately, neither approach by itself has proven successful.[339] Absent treatment, incarceration fails to reduce drug offender recidivism rates, with 95% of drug offenders relapsing and 70% of drug offenders recidivating within three years after being released from custody.[340] Receiving treatment while incarcerated results in a *slightly* better outcome; however, the vast majority of drug offenders receive no treatment at all while behind bars.[341] Other sanctions or control mechanisms, such as civil commitment or community sanctions, are similarly ineffective or impractical.[342] Treatment-focused approaches do not fare much better. While treatment is associated with

332. Nat'l Ass'n of Drug Ct. Pros., The Facts on Drugs and Crime in America 1, https://www.co.sauk.wi.us/sites/default/files/fileattachments/criminal_justice_coordinating_council/page/1757/facts_on_drug_courts_.pdf [https://perma.cc/EX3R-WH3F] (last visited Mar. 14, 2025).

333. *Id.*

334. Ryan S. King, Sent'g Project, Disparity by Geography: The War on Drugs in America's Cities 4 (2008), https://www.jstor.org/stable/resrep27211 [https://perma.cc/45AU-A3M4].

335. Marc Mauer, Sent'g Project, The Changing Racial Dynamics of the War on Drugs 1 (2009), https://www.jstor.org/stable/resrep27341?seq=4 [https://perma.cc/H6FK-UZBB].

336. Douglas B. Marlowe, *Effective Strategies for Intervening with Drug Abusing Offenders*, 47 Vill. L. Rev. 989, 990 (2002).

337. David DeMatteo, *A Proposed Prevention Intervention for Nondrug-Dependent Drug Court Clients*, 24 J. Cognitive Psychotherapy 104, 105 (2010).

338. *Id.*

339. *Id.*; Marlowe, *supra* note 336, at 990.

340. Marlowe, *supra* note 336, at 997–98.

341. *Id.* at 998–99.

342. *Id.* at 990, 998–99.

decreases in problematic substance use, it is so only when individuals consistently *attend treatment* and *remain in treatment*, ideally for one year.[343] Practically speaking, however, this is almost never the case—conservative estimates suggest that 80% of individuals drop out of treatment before one year, 40% within three months, and 50% fail to even attend their *initial* treatment appointment.[344]

Enter drug courts. Drug courts represent a method to reconcile the public health and public safety approaches to the United States' drug problem. Rooted in the principles of therapeutic jurisprudence, drug courts are diversionary programs that exclusively serve drug-involved offenders.[345] Though drug courts focus on providing rehabilitative services to drug-involved offenders, they do so while wielding the threat of sanctions to provide motivation for the offender to adhere to treatment.[346] Like the example of juvenile specialty courts, drug courts utilize a multidisciplinary approach in which a judge heads a team including prosecutors, defense attorneys, court coordinators, case managers, probation officers, law enforcement officials, and treatment providers.[347] Participation in the drug court program is voluntary.[348] Drug court programs are scheduled to take about 12 to 18 months to complete (but often take significantly longer) and typically include random drug tests; regular status hearings in front of a judge; behavior modification through the administration of rewards or sanctions; and case management services to help participants obtain treatment for comorbid mental health issues, financial planning, housing and education assistance, and family and vocational counseling.[349] Participants are considered to have "graduated" from drug court when they have completed treatment, satisfied all conditions of their supervision, completed community service, and paid any financial obligations they may have.[350]

To date, drug courts have proven to be the specialty court with the most robust evidence base for its efficacy. Drug court participants are significantly more likely to remain in and complete treatment,[351] are significantly less likely to provide a positive urine test,[352] and are

343. Nat'l Inst. on Drug Abuse, Principles of Drug Addiction Treatment: A Research-Based Guide 14 (3d ed., rev. 2018), https://archives.nida.nih.gov/sites/default/files/podat-3rdEd-508.pdf [https://perma.cc/CJJ3-8VQH].

344. Marlowe, *supra* note 336, at 1006–07.

345. Huddleston et al., *supra* note 304, at 2.

346. *Id.* at 21.

347. *Id.* at 2.

348. *See id.* at 2, 22–23.

349. *See id.* at 13, 18, 21–22.

350. *See, e.g.*, Hora et al., *supra* note 289, at 842–44, 492, 498.

351. Steven Belenko, *Research on Drug Courts: A Critical Review*, Nat'l Drug Ct. Inst. Rev., Summer 1998, at 10, 30 [hereinafter Belenko 1]; Steven Belenko, *Research on Drug Courts: A Critical Review: 1999 Update*, Nat'l Drug Ct. Inst. Rev., Summer 1999, at 1, 26 [hereinafter Belenko 2]; Steven Belenko, Research on Drug Courts: A Critical Review: 2001 Update, at 25 (2001).

352. Belenko 1, *supra* note 351, at 37; Belenko 2, *supra* note 351, at 28.

significantly less likely to reoffend (even up to 14 years post-release) than are non-participants.[353] Adult drug courts, like juvenile specialty courts, do not require legislative action to be implemented—they just need funding and the collaboration of resources.[354] Effectively, adult drug courts allow drug policy reformers to navigate and subvert a restrictive legal and social framework in which two singularly ineffective approaches to reducing substance abuse and substance-related crime predominate, again resulting in better outcomes for substance-involved offenders as a population and society as a whole.

V. Sex Offender Courts: A Proposal

This Article's previous sections focused on setting the stage for the need to subvert the United States' restrictive sex offender policy system by reviewing American sex offender policies, offering insights from social science as to why these policies are unlikely to change, and offering previous examples of how specialty courts have been used to subvert constraining systems. Accordingly, this section offers a proposal for how, like juvenile specialty and adult drug courts, sex offender specialty courts can be used to subvert the draconian and constraining sex offender policies that are currently in place to produce better outcomes for sex offenders specifically and society more generally. First, it will briefly discuss the mental health court model and examine factors that help to reduce recidivism and promote reintegration for sex offenders. Next, it will review the efforts of the few jurisdictions that have successfully created sex offender specialty courts. Last, it will make recommendations for improving on existing models.

353. *See* U.S. Gov't Accountability Off., Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes 44–46 (2005); P. Mitchell Downey & John K. Roman, D.C. Crime Pol'y Inst., A Bayesian Meta-Analysis of Drug Court Cost-Effectiveness 29 (2010), https://ntcrc.org/wp-content/uploads/2021/11/A_Bayesian_Meta-Analysis_of_Drug_Court_Cost_Effectiveness.pdf [https://perma.cc/XMH5-3J7E]; Michael W. Finigan et al., NPC Rsch., The Impact of a Mature Drug Court Over 10 Years of Operation: Recidivism and Costs 2 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219225.pdf [https://perma.cc/CD7D-9BM8]; Jeff Latimer et al., Dep't of Just. Can., A Meta-Analytic Examination of Drug Treatment Courts: Do They Reduce Recidivism? 9–10 (2006), http://herzog-evans.com/wp-content/uploads/2014/10/A-meta-analytic-examination-of-DTC-Latimer-et-al.pdf [https://perma.cc/SC4B-MYP7]; Ojmarrh Mitchell et al., *Assessing the Effectiveness of Drug Courts on Recidivism: A Meta-Analytic Review of Traditional and Non-Traditional Drug Courts*, 40 J. Crim. Just. 60, 66 (2012); David B. Wilson et al., *A Systematic Review of Drug Court Effects on Recidivism*, 2 J. Experimental Criminology 459, 468–71 (2006); Susan Turner et al., *Perceptions of Drug Court: How Offenders View Ease of Program Completion, Strengths and Weaknesses, and the Impact on Their Lives*, Nat'l Drug Ct. Inst. Rev., Summer 1999, at lviii, lix (1999).

354. *See* Filler & Smith, *supra* note 319, at 971–72.

A. *The Mental Health Court Model*

If sex offending is to be viewed as both a psychological and behavioral issue, it makes the most sense that a proposed court to subvert the system may best be modeled from the foundations of a mental health court. Mental health courts are problem-solving courts that address the underlying mental health issues of participants that may be driving or contributing to offending behavior, and similarly to the courts discussed in Part IV above, replace the traditional criminal court process with one that is rehabilitation-focused.[355] These courts began in the late 1990s, and today there are over 300 mental health courts in the United States.[356] A participant's eligibility for a mental health court is considered based on a variety of factors: their relevant mental health diagnosis, current charges, criminal history, overall risk level, and other interfering problems such as substance use.[357]

According to experts, there are several important characteristics necessary for mental health courts to prove successful: judicially supervised, community-based treatment plans; regular status hearings where these plans and other conditions are reviewed; and clear criteria defining when and how a participant graduates from a program.[358] Collaboration between agencies (e.g., court actors and community-based mental health providers) is crucial—"along with connecting mental health court participants to existing treatment, officials in criminal justice, mental health, and substance abuse treatment should work together to improve the quality and expand the quantity of available services" to participants.[359]

Informed consent and the voluntariness of mental health courts are in some ways more nuanced than for other types of courts (e.g., drug courts). This is because when considering whether a participant's choice to engage is voluntary, one must consider a defendant's competency (their present ability to understand their legal proceedings) and whether they have the capacity to consent in light of their mental illness.[360] Even when competency is not at issue, defendants must fully understand what their participation in the court would mean, including the legal repercussions of not adhering to court conditions, which includes participation in treatment. For example, participants can be

355. *See* Christine M. Sarteschi et al., *Assessing the Effectiveness of Mental Health Courts: A Quantitative Review*, 39 J. Crim. Just. 12, 13 (2011).

356. *Mental Health Courts*, Council of State Gov'ts Just. Ctr., https://csgjusticecenter.org/projects/mental-health-courts/ [https://perma.cc/YTZ8-UGDR] (last visited Mar. 13, 2025).

357. Christine M. Sarteschi & Michael G. Vaughn, *Recent Developments in Mental Health Courts: What Have We Learned?*, 3 J. Forensic Soc. Work 34, 36–37 (2013).

358. Michael Thompson et al., Council of State Gov'ts Just. Ctr., Improving Responses to People with Mental Illnesses: The Essential Elements of a Mental Health Court, at vii (2008).

359. *Id.* at 3.

360. *Id.* at 5.

dismissed from the court and legally sanctioned for failing to participate in mental health treatment, which is a core requirement of these courts.[361]

The effectiveness of these courts has been demonstrated in some studies. A 2014 study followed offenders in a mental health court and offenders in a traditional criminal court to explore differences in outcomes between the two.[362] The study found that mental health court assignment led to lower overall rates of recidivism and longer times to rearrest than those assigned to traditional court.[363] This result suggests that mental health courts can be effective at reducing recidivism for those with serious mental illness. A 2011 meta-analysis assessing the effectiveness of mental health problem-solving courts across 18 studies found a positive improvement among a limited number of clinical outcomes and called for further research to strengthen the assertion that these courts are effective in reducing recidivism.[364]

One might wonder why we propose a subversion of the system in the creation of sex offender courts when there are hundreds of mental health courts in existence that could address the needs of individuals who either sexually offend due to certain criminogenic risk and needs or due to a paraphilic or other mental health disorder. This is because current mental health courts often do not accept individuals with sex crimes due to the perceived complex nature of these offenses and the potential risks they pose to public safety.[365] While the underlying mental health issues may contribute to the commission of such crimes, the severity and sensitivity of sex offenses raise concerns about the potential for reoffending and the need for strict monitoring and supervision. This circles back to the earlier discussion related to the inflated perceived risk that sex offenders pose, and the "othered" and "dangerous" status sex offenders have that continue to serve as a barrier to effective and rehabilitative methods of addressing their sexual offending.[366] Additionally, courts could be concerned that there may be challenges in adequately addressing the underlying issues and ensuring the safety of the community while providing treatment and rehabilitation for individuals with a history of sexual or extreme crimes. As a result, mental health courts may prioritize cases where the risk to public safety is perceived to be lower or where the potential for successful

361. *Id.*

362. Joye C. Anestis & Joyce L. Carbonell, *Stopping the Revolving Door: Effectiveness of Mental Health Court in Reducing Recidivism by Mentally Ill Offenders*, 65 PSYCHIATRIC SERVS. 1105, 1105 (2014).

363. *Id.*

364. Sarteschi et al., *supra* note 355, at 16–17.

365. COUNCIL OF STATE GOV'TS, A GUIDE TO MENTAL HEALTH COURT DESIGN AND IMPLEMENTATION 35 (2005); *Mental Health Specialty Court*, DEL. CNTY. CT. OF COMMON PLEAS, https://delcopa.gov/courts/specialtycourts/mentalhealthcourt.html [https://perma.cc/U5VR-EDM4] (last visited Mar. 18, 2025).

366. *See supra* Part II.

rehabilitation is deemed to be higher. Some of these sentiments are not entirely wrong. Some sex offenders may have specific treatment needs and related issues that could not be effectively addressed in a court model targeting a different issue, such as drugs or an unrelated primary mental health diagnosis (e.g., schizophrenia).

B. *What Does a Sex Offender Court Need to Address?*

In the field of forensic psychology, the division of psychology concerned with applying "the science and profession of psychology to questions and issues relating to the law and the legal system,"[367] the prevailing approach to risk management and risk reduction is the risk-need-responsivity ("RNR") approach. The RNR approach advocates that a one-size-fits-all course of treatment may not work for every individual, and that treatment should vary depending on an offender's unique presentation.[368] It is based on three titular principles: (1) risk, (2) need, and (3) responsivity.[369] The "risk" principle refers to the idea that the intensity of treatment should vary depending on what risk level an offender presents; this allows treatment to be administered more efficiently, with high-risk offenders receiving more intensive treatment than lower-risk offenders.[370] The "need" principle espouses that treatment should be tailored to the criminogenic needs that an offender presents with; as stated earlier, criminogenic needs are an offender's dynamic, or modifiable, risk factors.[371] Lastly, the "responsivity" principle proposes that treatments should be tailored to the learning style and ability levels of the offender; this makes intervention more accessible and palatable and promotes treatment adherence.[372]

The RNR approach has identified eight key domains in which offenders may have criminogenic needs: (1) history of antisocial behavior, (2) antisocial personality pattern, (3) antisocial cognition, (4) antisocial associates, (5) family and/or marital trust, (6) school and/or work, (7) leisure and/or recreation, and (8) substance abuse.[373] Each need dictates the remedy to be provided; needs and their respective remedies are summarized in the table below:[374]

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367. David DeMatteo et al., *Educational and Training Models in Forensic Psychology*, 3 Training & Educ. Pro. Psych. 184, 185 (2009).

368. Leigh Harkins & Anthony R. Beech, *A Review of the Factors that Can Influence the Effectiveness of Sexual Offender Treatment: Risk, Need, Responsivity, and Process Issues*, 12 Aggression & Violent Behav. 615, 616 (2007).

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 Crime & Delinq. 7, 11 (2006).

374. Kirk Heilbrun et al., *Risk Assessment for Future Offending: The Value and Limits of Expert Evidence at Sentencing*, 53 Ct. Rev. 116, 119 tbl.1 (2017).

Criminogenic Need	Description	Intervention
History of antisocial behavior	Early involvement in varied antisocial activities across varied settings	Promote alternative prosocial behavior
Antisocial personality pattern	Pleasure focused, poor self-control, aggressive	Teach/model problem-solving, anger management, and coping skills
Antisocial cognition	Holding antisocial attitudes, values, and beliefs, such as being supportive of crime	Promote alternative, prosocial thinking; deconstruct criminal identity
Antisocial associates	Association with antisocial others or non-association with prosocial others	Reduce antisocial associations and increase prosocial associations
Family and/or marital problems	Problems with nurturance, caring/ monitoring, and supervision	Conflict reduction, relationship building, improvement monitoring
School and/or work	Poor performance, lack of opportunity, or dissatisfaction with education and work	Education, vocational training
Leisure and/or recreation	Excessive leisure time, few antisocial hobbies/ pursuits, few organized activities	Increase involvement in prosocial pursuits and organized activities to reduce leisure time
Substance abuse	Problematic use of drugs or alcohol	Substance-abuse treatment and education

While all eight domains are important, note that several are directly undermined by current sex offender policies. As indicated in Section II.C.2, registration requirements, community notification, and residence restrictions directly undermine a convicted sex offender's ability to obtain prosocial support (impacting the antisocial associates need) or to obtain and maintain gainful employment (impacting the school and/or work need). Additionally, they directly undermine a sex offender's ability to obtain and maintain stable housing, which, while not considered as a separate domain in the model above, does indirectly impact these domains.

While the term "risk factor" indicates that an offender has a *deficit* in a particular domain, the term "protective factor" suggests that an offender *possesses* a characteristic that makes reoffending less likely.[375] Protective factors may be static, such as intelligence or having had a secure bond with caretakers as a child.[376] They may also be dynamic, such as possessing coping skills; exhibiting self-control; exhibiting motivational attributes, such as a desire to work and engage in organized activities like treatment; and having a strong social network.[377] Like sex offender policies can undermine the ability to successfully address an offender's risk factors, so too can they undermine the protective factors that an individual already possesses or stunt the development of dynamic protective factors that have not yet emerged. For example, being of high intelligence and being motivated to work might suggest that an individual should be successful in the job market; however, this is not likely to be so if the stigma associated with a sex offense conviction prevents them from being hired. Similarly, having strong social supports might suggest that a sex offender will have an easier time transitioning back to society after release from incarceration, but this becomes significantly less likely when the stigma of a sex offense conviction drives others away or puts outside pressures on those individuals who support the offender.

The key for sex offender specialty courts, then, is to provide offenders not only with therapeutic services that reduce their propensity for committing sexual offenses, but also with a way to avoid being convicted of an offense that would trigger registration and subsequent collateral consequences. To focus only on the former would essentially negate any positive treatment gains an offender may make—it is the *conviction* that generates the collateral consequences that make reentry and continued desistance from sexual and general criminal activity significantly more challenging.

C. *Current Status of Sex Offender Courts*

The goal of sex offense courts is threefold: (1) to increase public safety, (2) to rehabilitate individual sex offenders, and (3) to provide improved outreach to victims. Participation is voluntary, and, like other specialty courts, participation is conditional on sex offender courts subjecting themselves to certain conditions.[378] Typically, these conditions include subjecting themselves to risk assessment, judicial status hearings, community monitoring (such as GPS trackers, check-ins with

375. *See* Brown & Singh, *supra* note 162, at 50.

376. Michiel de Vries Robbé & Vivienne de Vogel, *Protective Factors for Violence Risk: Bringing Balance to Risk Assessment and Management*, *in* Managing Clinical Risk: A Guide to Effective Practice 293, 295 (Caroline Logan & Lorraine Johnstone eds., 2013).

377. *Id.*

378. Wilson et al., *supra* note 353, at 461.

law enforcement, and potentially submitting to lie detector tests), and undergoing treatment.[379] Additionally, another key component of sex offense courts is victim outreach, in which victims are notified of a sex offender's release into the community as well as referred to treatment and other social services that may aid them in recovering from victimization.[380] In terms of effectiveness, while no formal and rigorous studies of sex offense courts' impact on recidivism have yet been undertaken, results regarding sex offender treatment more generally suggest that sexual and general recidivism rates are significantly lower for treated versus untreated sex offenders.[381]

Though not widespread, several jurisdictions, namely New York, Ohio, and Pennsylvania, have implemented sex offense courts.[382] In 2004, the Center for Court Innovation worked with the New York State Unified Court System to develop a sex court offender model in the state. The stated purpose was to promote victim safety and "address the unique challenges sex offenders pose to the criminal justice system."[383] The task force that created the court identified specific inefficiencies in the traditional court system for sex offenders: (1) a lack of goals and clarity across the court system, (2) inconsistent processing and adjudication of sex offenders throughout the system, (3) the absence of a specialized docket for sex offenders, and (4) a failure to consistently impose charge-specific conditions on sex offenses.[384] Later, in 2011, Allegheny County in Pennsylvania developed its own sex offender court modeled off of the New York State court. These courts emphasize the importance of a coordinated response to sex offender management and community collaboration.[385] Through this court model, Allegheny County has been able to centralize and implement an expedited specialized docket for sex offense cases that get assigned to one of two judges. This reduces the time to disposition, keeps sexually dangerous offenders off the street, gets them enrolled in treatment more quickly, and reduces delays in the

379. *See* Marlowe, *supra* note 336, at 1010, 1017, 1019; *see, e.g.*, Rebecca Thomforde-Hauser & Juli Ana Grant, Ctr. for Ct. Innovation, Sex Offense Courts: Supporting Victim and Community Safety Through Collaboration 4–9 (2010), https://www.innovatingjustice.org/sites/default/files/Sex_Offense_Courts.pdf [https://perma.cc/J8CM-LVA6].

380. Catharine Richmond & Melissa Richmond, *The Future of Sex Offense Courts: How Expanding Specialized Sex Offense Courts Can Help Reduce Recidivism and Improve Victim Reporting*, 21 Cardozo J.L. & Gender 443, 464 (2015).

381. *See* R. Karl Hanson et al., *First Report of the Collaborative Outcome Data Project on the Effectiveness of Psychological Treatment for Sex Offenders*, 14 Sexual Abuse 169, 181–85 (2002) (finding of untreated sex offenders, approximately 16.8% recidivated sexually and 39.2% recidivated generally, compared to respective rates of 12.3% and 27.9% for treated sex offenders).

382. Richmond & Richmond, *supra* note 380, at 445 n.1.

383. Rebecca Thomforde-Hauser, Ctr. for Ct. Innovation, The Allegheny County Sex Offense Court: Using Evidence-Based Practices to Increase Accountability and Safety 2 (2017).

384. *Id.* at 3.

385. *Id.*

process that could re-traumatize victims.[386] The Allegheny Court reports that recidivism rates have been extremely low—that since the 2011 inception of the court, only four participants (2% of all participants) reoffended within a year of the start of supervision, and four people recidivated with a new sex crime. [387]

However, while the creation of a small number of sex offense courts is certainly promising, these courts, as they currently stand, have one major shortcoming. While sex offense courts may offer some level of flexibility in sentencing, they currently do not solve the problem of mandatory registration.[388] The next section will address both of these shortcomings, as well as offer several other suggestions for improving the model for sex offense courts going forward.

D. *Improving the Existing Model: Five Suggestions*

1. Utilize a Deferred-Prosecution Model or a Deferred-Sentencing Model

One of the major arguments that skeptics of sex offender courts make is that sex offenders are untreatable and a rehabilitative approach will not help to reduce their risk of harm to society. As this Article has argued, that view is misguided—evidence does exist to suggest that sex offenders are treatable and that treatment can reduce both sexual and general recidivism.[389] However, given the degree to which sex offenders are scrutinized, it is likely that, were sex offender courts to become more widespread, any indications of negative or status quo outcomes from sex offender courts will be highlighted. As such, it is important to give these courts the maximum chance at success. As argued in Section II.C.1–2, registration requirements, community notification, and residence restrictions undermine factors that are important for sex offender reintegration into society by producing collateral consequences for sex offenders. Any model in which sex offense court participants are still required to register does not eliminate this reality.

Therefore, sex offender courts would do best to utilize a deferred-prosecution or a deferred-sentencing approach. In a deferred-prosecution approach, prosecutors agree not to move forward in prosecuting a case while an offender is undergoing treatment and complying with the conditions of the specialty court program.[390] If the offender successfully

386. *Id.* at 4–5.
387. *Id.* at 5.
388. Richmond & Richmond, *supra* note 380, at 472–73. Richmond and Richmond acknowledge that being able to avoid mandatory registration after complying with the conditions of the sex offense court would be preferable for some offenders, but they correctly note that legislative reforms would be indicated to make this a reality. *Id.* This will be addressed *infra* Section V.D.
389. *See* Hanson et al., *supra* note 381; Yates, *supra* note 106, at 93.
390. Patricia A. Griffin et al., *The Use of Criminal Charges and Sanctions in Mental Health Courts*, 53 PSYCHIATRIC SERVS. 1285, 1286 (2002).

completes the specialty court program, charges are dismissed.[391] However, the prosecutor reserves the right to pursue charges in the event that the offender fails to satisfy these conditions.[392] In a deferred-sentencing approach, an offender enters a guilty plea to their charges, but the plea is never officially entered and is held in abeyance.[393] Should the offender successfully complete the program, the plea is vacated or withdrawn and the charges are dismissed. Should the offender fail to complete the program, however, the guilty plea stands, and the offender is sentenced. Deferred-prosecution or deferred-sentencing would allow courts to mandate treatment while preventing the collateral consequences associated with registration that undermine treatment gains and successful reintegration into the community.

2. In Treatment, Address Risk Factors for General Recidivism—Utilize the RNR Approach

The RNR approach stresses risk reduction and management by addressing the criminogenic needs of an offender. The RNR approach generates eight domains that are relevant for determining and reducing risk for recidivism among offenders generally; however, not all individuals, regardless of whether they committed the same offense or not, will have the same criminogenic needs, nor will they have needs in all eight domains. Due to the inherent issues with funding that specialty courts face, it is important to employ best treatment practices for the sake of being economical and efficient. Tailoring treatment to the specific needs of each offender is essential in not wasting scarce resources and ensuring that sex offense courts are practical and maximally effective.

Additionally, the Good Lives Model ("GLM") is an oft-used approach to sex offender treatment and utilizes a strength-based framework focusing on enhancing individuals' overall quality of life rather than solely addressing risk factors and reducing recidivism.[394] This model recognizes that individuals may commit sex offenses due to deficits in their ability to pursue and attain positive life goals and experiences. Therefore, treatment within the GLM framework aims to identify and develop these positive goals, such as building healthy relationships, establishing stable employment, and fostering a sense of belonging in the community.[395]

391. *Id.*
392. *Id.*
393. *Id.* at 1286–87.
394. *See* GOOD LIVES MODEL, https://www.goodlivesmodel.com/ [https://perma.cc/S4BF-P2YZ] (last visited Mar. 19, 2025).
395. *See generally* Tony Ward et al., *The Good Lives Model of Offender Rehabilitation: Clinical Implications*, 12 AGGRESSION & VIOLENT BEHAV. 87, 90, 98, 105 (2007).

3. In Treatment, Address Needs That Are Particularly Relevant for Sexual Reoffending

In addition to addressing risk factors in domains that are typically associated with criminality, it is also important to address risk factors that are particularly relevant for sexual reoffending. These include antisocial orientation, sexual deviancy, intimacy deficits, and a sexualized response to stress.[396] While antisocial orientation is covered by the eight RNR domains, the latter three risk factors do not neatly fall into any of the RNR domains. "Sexual deviancy" refers to the holding of deviant sexual interests and sexual preoccupation.[397] "Intimacy deficits" refers to an individual having poor social skills, experiencing negative social influences, experiencing high levels of conflict in intimate relationships, feeling persistently lonely, and identifying emotionally with children.[398] Having a "sexualized response to stress" refers to a sex offender tending to respond to stress "through sexual acts and fantasies . . . thereby creating discrete time periods where they are at increased risk of sexual recidivism."[399]

4. In Treatment and Risk Assessment, Use Evidence-Based Practices and Measures

Again, funding is almost always an issue for specialty courts. Therefore, it is important to be efficient by using treatment practices that have been shown to be effective for the sex offender population specifically, as well as assessment tools that have been normed with sex offender populations. Treatment is most effective for sex offenders who are higher risk; when it targets dynamic instead of static risk factors; and when a cognitive-behavioral, skills-based approach is used to address risk factors specific to the individual.[400] However, though treatment should address dynamic risk factors, it is important not to waste time addressing those factors that are not associated with recidivism for sex offenders, such as denial, having low empathy for a victim, and having low motivation for treatment.[401] While these factors are all things courts look for in determining whether to be lenient because they signify remorse, it is exceedingly difficult to assess "sincere remorse in criminal justice settings" because people generally are hesitant to "completely reveal their faults and transgressions."[402] Further, forcing someone to disclose negative characteristics about themselves, in terms

396. Hanson & Morton-Bourgon, *supra* note 100, at 1158.
397. *Id.* at 1156.
398. *Id.*
399. *Id.* at 1158.
400. *See* Yates, *supra* note 106, at 90.
401. Hanson & Morton-Bourgon, *supra* note 100, at 1159.
402. *Id.*

of treatment, is counterproductive in that it tends to lead to negative social outcomes and poor therapy progress.[403]

Additionally, using assessment measures that have been shown to be predictive of recidivism in sex offender populations is essential in order to properly identify points for intervention. There are a number of specialized instruments designed for and normed on sex offenders that show moderate or strong ability to predict both sexual and general recidivism. For sexual recidivism, these instruments include the following: Structured Anchored Clinical Judgments Minimum, STATIC-99, STATIC-99R, STATIC-2002, STATIC-2002R, Risk Matrix 2000, Sex Offender Risk Appraisal Guide, and the Sexual Violence Risk 20.[404] For general recidivism, these include the following: Structured Anchored Clinical Judgments Minimum, STATIC-99, STATIC-99R, STATIC-2002, STATIC-2002R, Risk Matrix 2000, Sex Offender Risk Appraisal Guide, and the Rapid Risk Assessment for Sexual Offense Recidivism.[405]

It is also important to remember that effective treatments other than psychosocial treatments exist for sex offenders.[406] Sex offenders are sometimes treated with medications that reduce and/or inhibit testosterone production or with antidepressants.[407] Further, the origin of an offender's sexual deviance may dictate whether psychosocial treatment (which can be supplemented with medication) or biological treatment is indicated. For those sex offenders with a diagnosable paraphilia, the former might be preferred; for those sex offenders whose sexual deviance is the result of biological factors (tumors, brain injury, etc.), biological treatments may be indicated.[408] While it may be problematic to compel a sex offender to take medication, medications can be effective treatments should the sex offender desire to try it.

5. Be Patient

Though they are the most successful intervention for reducing substance use and recidivism and the intervention that nearly all other specialty courts are modeled after, even drug courts went through growing pains. For example, drug courts initially cast a wide net in terms

403. *Id.*

404. *See generally* Wineke J. Smid et al., *A Comparison of the Predictive Properties of Nine Sex Offender Risk Assessment Instruments*, 26 PSYCH. ASSESSMENT 691, 691–92, 694–96, 700 (2014) (explaining the nine instruments used to predict occurrence, number of re-offenses, and re-offense latency).

405. *Id.*

406. *See* Fabian M. Saleh & Laurie L. Guidry, *Psychosocial and Biological Treatment Considerations for the Paraphilic and Nonparaphilic Sex Offender*, 31 J. AM. ACAD. PSYCHIATRY & L. 486, 488 (2003).

407. *See* Omer Khan et al., *Pharmacological Interventions for Those Who Have Sexually Offended or Are at Risk of Offending*, COCHRANE DATABASE SYSTEMATIC REVS., no. 2, 2015, at 1, 1.

408. Saleh & Guidry, *supra* note 406, at 488, 491.

of who was referred to treatment; research indicates that as many as 40% of drug court participants do not meet the diagnostic threshold for substance dependence.[409] Despite this, all offenders were assigned to virtually the same standardized treatment.[410] This was potentially problematic, especially given research suggesting that placing individuals who are at varying risk levels for use can produce iatrogenic effects; instead of the low-risk clients being a good influence on the high-risk clients, the opposite often occurs.[411] Researchers sought to remedy this by varying the intensity of drug court treatment based on risk level, finding that high-risk participants fared better when they had more frequent contact with a judge, while low-risk drug court clients performed equally well with fewer hearing as compared to more frequent hearings.[412] This finding suggested that the individual characteristics of the offender needed to be taken into account when formulating an appropriate intervention to address their needs.

Similarly, sex offense courts will also go through their growing pains, as all fledgling interventions do. It is quite possible that, as time passes, it will become evident that sex offense courts might work equally well for high-risk and low-risk offenders, they might work only for high-risk offenders, or they might work only for low-risk offenders. Adjustments will have to be made to keep up with the state of the science; for this reason, sex offense courts should be considered a work-in-progress as opposed to a finished product. Additionally, sex offense courts, like many specialty courts that are not drug courts, are too young to have had an established and robust research base developed to support their effectiveness. To truly gauge whether sex offense courts are effective at reducing recidivism, they must grow in number and popularity enough to warrant a systematic review of their results before any generalizations about their impact are made.

VI. Conclusion

Sex offender policies in the United States are misguided, at least from an empirical point of view. They are based on myths about and misperceptions of sex offenders, myths and misperceptions which are fueled and maintained by a number of social science phenomena. Policies such as registration requirements, community notification, and residence restrictions do little, or nothing at all, to reduce recidivism and to increase public safety. Disconcertingly, their effects may even be

409. *See* DeMatteo, *supra* note 337, at 107.
410. *Id.* at 108
411. *Id.* at 108–09.
412. *See generally* Douglas B. Marlowe et al., *Matching Judicial Supervision to Clients' Risk Status in Drug Court*, 52 Crime & Delinq. 52 (2006) (finding high-risk participants assigned to biweekly hearings had better treatment outcomes than those assigned to usual hearings).

counter to what the laws purport to intend. Additionally, they create numerous collateral consequences for sex offenders that undermine their potential for successful reintegration into society, as well as create numerous collateral consequences for the general public. Unfortunately, due to the continued endorsement of sex offender myths and misperceptions, these policies are unlikely to change. However, it is possible to *subvert* the restrictive system that sex offender policies have created, just as juvenile specialty courts and adult drug courts subverted similarly restrictive systems to great success. Sex offense courts do currently exist, but they are limited in number and fledgling in their development. Nevertheless, utilization is promising, particularly if they incorporate deferred-prosecution or deferred-sentencing approaches, target criminogenic risk factors associated with general and sexual recidivism, and incorporate evidence-based practices into treatment. Despite this optimism, it is important to remember that sex offense courts cannot proliferate overnight. They will need to increase in number and be more readily adopted before their true impact can be known. For now, however, they represent a good alternative for jurisdictions to consider in trying to navigate draconian sex offender legislation.