

Reimagining a Lifetime of Punishment: Moving the Sex Offender Registry to a Risk of Re-offense Model

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INTRODUCTION

Sundance Film Festival was taken aback by *Pervert Park*, a documentary by Scandinavian filmmakers Lasse and Frida

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Barkfors.¹ The documentary took an inside look at Florida Justice Transitions, a rehabilitative community for sex offenders in St. Petersburg, Florida.² The community consists of 120 offenders who live in mobile homes and engage in different treatment opportunities on the premises.³ These offenders work toward connecting with the broader community, but are isolated on the outskirts of town because they cannot live within one thousand feet of any place where children congregate.⁴

Pervert Park follows a number of offenders as they share their past, as well as how they ultimately landed at Florida Justice Transitions. The youngest featured offender was Jamie, a college student who was convicted of solicitation at age twenty-two.⁵ He described his instant offense in great detail. One night, while seeking attention from women, Jamie was responding to personal advertisements on Craigslist when he received a message from a woman.⁶ She was thirty years old and expressed interest in seeing Jamie, but after exchanging a few messages, she mentioned the idea of having her teenage daughter join them.⁷ The woman was persistent about this despite Jamie's hesitations, and ultimately, he agreed to the idea.⁸ When Jamie arrived at what he thought was the woman's home, he was shocked to find police waiting for him.⁹ The entire exchange was a sting operation.¹⁰

Jamie was charged with soliciting sex from a minor, even though he had no intention of actually engaging in sexual conduct with the woman's daughter.¹¹ The judge, realizing the situation, gave him a downward departure sentence of only one year and one day incarceration.¹² However, Jamie is now forced to register as a sex

¹ *Pervert Park: Film Description*, PBS, <http://www.pbs.org/pov/pervertpark/film-description/> (last visited Nov. 19, 2016).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *PERVERT PARK* (De Andra & Final Cut for Real Nov. 6, 2014; PBS television broadcast July 11, 2016).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

offender for the rest of his life.¹³ He explained that this one mistake will greatly impact the rest of his life, as he had dreams of earning a Ph.D. in film studies and becoming a professor at a university.¹⁴ He felt foolish that he did not notice this was clearly a set up because of how persistent the woman was about including her daughter in any kind of encounter.¹⁵ As a consequence, Jamie will be forced to comply with housing and employment restrictions for life, as well as face a lifetime of stigma from friends, family, colleagues, and neighbors.

Pervert Park not only illustrates the struggles that sex offenders face on a daily basis, especially as most were themselves victims of sexual abuse, but also serves as a means of humanizing these offenders. The documentary challenges the deeply-rooted fear and monster-like perceptions that society holds regarding sex offenders, shedding light on the isolating circumstances that law enforcement and community members put these offenders in as they attempt to re-enter society.

This situation is not unique to Florida. Sex offenders across the nation face oppression from society—even if they have absolutely no intention of offending again. The current federal law simply uses the offender’s conviction to determine sex offender classification and reporting requirements.¹⁶ This provides no opportunity for offenders to improve their connection to society; instead, it punishes offenders for what may have been a simple mistake in their past. The goal of the sex offender registry is to provide the community with notification of potentially dangerous offenders and prevent further sex crimes,¹⁷ yet this has been lost in execution.

Instead of looking solely at the instant offense, the federal standard should focus on an offender’s risk of re-offense when determining classification and registration requirements. Some states have elected to adopt this in lieu of the current standard and have created a model that allows for a more personalized approach to sex offender monitoring. As offenders work on improving themselves, they can petition to be reclassified as a lower risk of re-offense or for relief

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See* Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901–16991 (2012).

¹⁷ 42 U.S.C. § 16901.

from reporting. Reclassification and relief provide decreased notification requirements and restrictions, which not only improve the lives of offenders, but also allow the system to dedicate the most resources to those offenders who pose the greatest threat to others.

This Note argues that the federal government should classify sex offenders based on their risk of re-offending. Part I begins with a discussion of the federal government's role in creating sex offender registry legislation. The current federal standard for sex offender classification is based solely on the offender's underlying conviction and determines registration requirements based on this classification. While this federal standard was intended for all states to adopt, only about a third of states have implemented it to a satisfactory standard.

Part II discusses the policy reasons supporting a move towards a risk-based model as a strong alternative to the current federal standard. While the current standard somewhat reflects the ultimate goal of protecting the community, it also serves a punitive and retributive function. Sex offenders have lower recidivism rates than the community assumes, creating a societal misunderstanding regarding the actual threat of violence, and thus the overall necessity of the sex offender registry. Allowing judges to use discretion in determining sex offender classification provides an opportunity for decision-making that adequately considers the individual circumstances of each offender. The large amount of sex offender information available on the internet subjects offenders with lengthy registration requirements to stigma and vigilantism from community members. By switching to a risk-based model, offenders have an increased incentive to work towards rehabilitation and reclassification to relieve some of these external pressures.

Part III proposes the sex offender classification system adopted in Oregon as a more appropriate federal standard. Oregon classifies offenders based on their risk of re-offense and provides opportunity for reclassification and eventual relief from reporting. Other jurisdictions have successfully adopted a similar approach to sex offender registration. This method of classifying offenders encourages rehabilitation and better serves the purpose of the sex offender registry by alerting community members to only those offenders who pose the biggest threat.

Overall, this Note focuses on the benefits of using risk of re-offense as the crux of sex offender classification and registration requirements. Focusing on the actual danger these offenders pose to others best serves the original goals of the registry. Furthermore,

encouraging reclassification and relief will provide offenders an opportunity to engage in treatment and other rehabilitative programs, allowing them to become stronger community members.

I

THE FEDERAL SEX OFFENDER REGISTRY

A. History of Federal Sex Offender Management

The federal government has dictated sex offender management for decades. In 1994, Congress created the Jacob Wetterling Act, requiring convicted sex offenders to register with local law enforcement and compelling states to create a sex offender registry system.¹⁸ This legislation was a “memorial to an eleven-year-old boy from Minnesota who was kidnapped by a masked gunman in 1989.”¹⁹ Despite little evidence that the offense was sexually motivated, Congress used the law to focus on reprimanding sex offenders.²⁰ The duty of offenders to register depended on “previous number of convictions, the nature of the offense, and the characterization of the offender as a sexual predator.”²¹

In 1994, seven-year-old Megan Kanka was lured into the home of Jesse Timmendequas, a previously convicted sex offender, where she was then sexually assaulted and murdered.²² In response to this heinous crime, the New Jersey Legislature passed Megan’s Law, requiring sex offender registration, creating a statewide database so offenders could be tracked, and mandating community notification of any offenders moving into the surrounding area.²³ Congress amended the Jacob Wetterling Act in 1996 to include a version of Megan’s Law, requiring community notification of the location of residence of

¹⁸ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. §§ 14071–14073 (repealed 2006).

¹⁹ Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender Management*, 4 VA. J. CRIM. L. 241, 275 (2016).

²⁰ *Id.*

²¹ *Id.* at 276 (quoting Alicia A. Sterrett, Note, *The Case for Kentucky Sex Offenders: Residency Restrictions and Their Constitutional Validity*, 96 KY. L.J. 119, 120 (2007)).

²² *20 Years Later, Megan Kanka’s Legacy Lives On*, 6ABC ACTION NEWS (July 29, 2014), <http://6abc.com/news/20-years-later-megan-kankas-legacy-lives-on/226639/>.

²³ N.J. REV. STAT. §§ 2C:7–1 to 2C:7–11 (1994).

any person convicted of a sexually violent offense after their release from prison.²⁴

B. Current Federal Standard for Sex Offender Registration

In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA) as part of the Adam Walsh Protection and Safety Act.²⁵ The Act was dedicated to Adam Walsh, a six-year-old boy who was abducted from a Sears department store and murdered in the 1980s.²⁶ SORNA greatly enhanced the severity of previously enacted legislation. In general, the Act increased the amount of time that offenders have to register, created a tier classification system, and allowed for more information about sex offenders to be readily available to the public on the internet.²⁷

The Act classifies sex offenders into three different categories, dictated by the severity of the offender's conviction.²⁸ Tier III is the most serious classification, which includes all sexual abuse offenses.²⁹ Examples of this include engaging in a sexual act with another by force or threat of force; engaging in a sexual act with a child under the age of twelve; and engaging in a sexual act with another who has been rendered unconscious or involuntarily drugged, or who is otherwise incapable of appraising the nature of the conduct or declining to participate.³⁰ It also includes offenses against a minor below the age of thirteen and kidnapping of a minor.³¹ Tier II offenders include most sexual abuse or exploitation offenses committed against minors.³² It also includes use of a minor in sexual performance, solicitation of a minor to practice prostitution, and production or distribution of child pornography.³³ Tier I offenders are

²⁴ 42 U.S.C. § 14071 (1996) (repealed 2006).

²⁵ Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901–16991 (2012).

²⁶ *Police: 1981 Killing of Adam Walsh Solved*, NBC NEWS (Dec. 16, 2008, 8:29 PM), http://www.nbcnews.com/id/28257294/ns/us_news-crime_and_courts/t/police-killing-adam-walsh-solved/#.WDC4LDYleRs.

²⁷ See 42 U.S.C. §§ 16911–16962 (2012).

²⁸ *Id.* § 16911.

²⁹ *Id.* § 16911(4); Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *The National Guidelines for Sex Offender Registration and Notification* 24–25 (2008), http://www.smart.gov/pdfs/final_sornaguidelines.pdf [hereinafter SMART].

³⁰ SMART, *supra* note 29.

³¹ *Id.*

³² 42 U.S.C. § 16911(3)(A).

³³ *Id.* § 16911(3)(B).

generally defined as those who do not satisfy the criteria for Tier II or Tier III.³⁴ This includes those whose registration offense is not punishable by imprisonment for more than one year, those whose offense is receipt or possession of child pornography, and those whose offense is sexual contact but not a completed or attempted sexual act.³⁵

An offender's classification determines the amount of time the offender must register as a sex offender. Tier I offenders must register for fifteen years, Tier II offenders must register for twenty-five years, and Tier III offenders must register for life.³⁶ Certain offenders can, however, apply for a reduction in their registration requirement. Tier I offenders can petition for a reduction of five years if they maintain a "clean record" for ten years.³⁷ Additionally, Tier III juvenile delinquency offenders can be relieved of the duty to register if the offender maintains a "clean record" for twenty-five years.³⁸ In order to prove a "clean record," the offender (1) must not be convicted of a felony; (2) must not be convicted of any sex offenses; (3) must successfully complete any periods of supervised release, probation, and parole; and (4) must successfully complete an appropriate sex offender treatment program certified by a jurisdiction or the Attorney General.³⁹ Other than these two situations, no other opportunity exists for relief from registration requirements.

Offenders are required to provide a substantial amount of information to law enforcement when they register as a sex offender in their jurisdiction. This includes the offender's name, internet identifiers, telephone number, social security number, address, employment information, school information, vehicle information, date of birth, physical description, the instant offense, criminal history, a current photo, fingerprints, DNA, and driver's license.⁴⁰ Offenders must also alert law enforcement of any changes in this information.⁴¹ Further, offenders are required to make appearances at varying intervals to update their photograph and confirm that all the

³⁴ *Id.* § 16911(2).

³⁵ SMART, *supra* note 29, at 22.

³⁶ 42 U.S.C. § 16915(a) (2012).

³⁷ *Id.* §§ 16915(b)(2)(A), (b)(3)(A).

³⁸ *Id.* § 16915(b)(2)(B).

³⁹ *Id.* § 16915(b)(1).

⁴⁰ *Id.* § 16914(b).

⁴¹ *Id.* § 16913(c).

information in the registry is correct.⁴² Tier I offenders are required to appear once a year, Tier II offenders must appear every six months, and Tier III offenders must appear every three months.⁴³ Offenders can be charged with another felony if they fail to register or fail to update registration at the appropriate intervals.⁴⁴

Additionally, some of the information that offenders provide to law enforcement may also be accessed on the internet by the public.⁴⁵ The information provided on websites includes the offender's name, address or location, vehicle description and license plate numbers, physical description, sex offense convictions, and a current photograph.⁴⁶ All offenders will have this information made public, regardless of their classification.

C. State Implementation of SORNA

Only about a third of states have implemented the federal standard to the stringent level required by SORNA.⁴⁷ Other states have selected to adopt their own policies, but do so at a price. Failure to comply with the Act results in a ten percent reduction of the state's Byrne Justice Assistance Grant.⁴⁸ The Byrne Justice Assistance Grant is the largest federal grant for various state and local criminal justice activities.⁴⁹ However, many states selected to take this deficit instead of implementing the federal guidelines under SORNA. Some states chose to forgo the program because the cost of adapting their current sex offender laws to the new requirements would be well above the value of the lost funding from failing to switch.⁵⁰ Other states elected

⁴² *Id.* § 16916; SMART, *supra* note 29, at 55–56.

⁴³ 42 U.S.C. § 16916.

⁴⁴ 18 U.S.C. § 2250 (2012).

⁴⁵ 42 U.S.C. § 16918(a).

⁴⁶ SMART, *supra* note 29, at 36–37.

⁴⁷ ANDREW J. HARRIS & CHRISTOPHER LOBANOV-ROSTOVSKY, NATIONAL SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) IMPLEMENTATION INVENTORY: PRELIMINARY RESULTS 5 (2016), <https://www.ncjrs.gov/pdffiles1/nij/grants/250132.pdf>.

⁴⁸ 42 U.S.C. § 16925 (2012).

⁴⁹ See Huffman, *supra* note 19, at 284; *Edward Byrne Memorial Justice Assistance Grant (JAG) – Frequently Asked Questions (FAQs)*, BUREAU OF JUSTICE ASSISTANCE (2017), <https://www.bja.gov/Funding/JAGFAQ.pdf>.

⁵⁰ JUSTICE POLICY INST., WHAT WILL IT COST STATES TO COMPLY WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT? (2008), http://www.justicepolicy.org/images/upload/08-08_fac_sornacosts_jj.pdf.

to take the decrease in funding because they wanted to maintain control of the way sex offenders were supervised in their state.⁵¹

While many states were not convinced to adopt the new federal standards, other states chose to go above and beyond in an effort to crack down on sex crimes. A handful of states chose to implement an even stricter standard than the one laid out in SORNA.⁵² Many states that created stricter laws mandated all sex offenders to register for life, regardless of their classification, with no opportunity for relief.⁵³

Although the federal government attempted to create a uniform standard to deal with the issue of sex offender registries, the implementation has been anything but uniform. While some states subject every offender to a lifetime of registration and public notification, other states crafted their own systems of sex offender registries. While one offender may have an opportunity to receive relief from the reporting requirement after fifteen years, another may be forced to register for life for the same offense. Ultimately, the current SORNA program has been disastrous in providing consistent administration of laws to those who commit sex offenses.

II

POLICY CONSIDERATIONS FAVORING A RISK-BASED MODEL

A. Achieving Goals of the Criminal Justice System

The criminal justice system focuses on four goals: retribution, deterrence, incapacitation, and rehabilitation.⁵⁴ Retribution requires punishment because the criminal deserves it.⁵⁵ The focus is on the equity and proportionality of the crime; similar crimes should be punished the same way, and the punishment should be consistent with the severity of the crime.⁵⁶ Deterrence seeks to reduce crime by creating a fear of punishment amongst others in the community if

⁵¹ See Huffman, *supra* note 19, at 285.

⁵² SMART, *supra* note 29, at 6–7.

⁵³ Margaret Love, *50 State Comparison Relief from Sex Offender Registration Obligations*, COLLATERAL CONSEQUENCES RES. CTR., <http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparison-relief-from-sex-offender-registration-obligations/> (last visited July 15, 2017).

⁵⁴ M. KAY HARRIS, *THE GOALS OF COMMUNITY SANCTIONS* 3–4 (1986), <http://static.nicic.gov/Library/004569.pdf>.

⁵⁵ *Id.* at 4–5.

⁵⁶ *Id.* at 5.

they partake in the same conduct.⁵⁷ Incapacitation focuses on preventing the individual offender's opportunity to commit further crimes by isolating an offender from society.⁵⁸ Rehabilitation involves any kind of programming or treatment that would significantly reduce the offender's probability of committing another crime.⁵⁹ Each of these four goals serves a different purpose in creating criminal justice legislation, and not all four can be found in each piece of legislation.

In the case of sex offender registries, Congress intended to create a means of protecting the community by providing better notification of the dangerous predators in the area.⁶⁰ While this goal is noble in furthering a legitimate state interest, it does not further the goals of the criminal justice system. Courts continue to agree that the sex offender registry is not punishment, but rather a civil remedy.⁶¹ However, these registries unintentionally serve a punitive purpose.⁶²

After being released from serving their time in jail or prison, offenders are met with yet another burden and level of supervision, which may continue for the rest of their lives. This burden only inhibits community reintegration and rehabilitation. Arguably, the sex offender registry is not fulfilling any kind of retributive goal in its form of punishment. By requiring sex offenders to register with law enforcement for decades after completing their term of imprisonment, their punishment is no longer proportionate to the severity of their crime.⁶³ Sex offender registries create such a burden on offenders by limiting their ability to find jobs and housing, isolating them from friends and family, and potentially putting them in danger of vigilantes. The "sentence" offenders face outside the prison walls can be just as devastating as the time they spend locked up.⁶⁴ Many argue that this is just a "well-deserved consequence of a crime,"⁶⁵ but this

⁵⁷ *Id.*

⁵⁸ *Id.* at 6.

⁵⁹ *Id.*

⁶⁰ SMART, *supra* note 29, at 3–4.

⁶¹ Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1101–03 (2012).

⁶² *See id.*

⁶³ *See* Roger N. Lancaster, *Panic Leads to Bad Policy on Sex Offenders*, N.Y. TIMES (Feb. 20, 2013), <https://www.nytimes.com/roomfordebate/2013/02/20/too-many-restrictions-on-sex-offenders-or-too-few/panic-leads-to-bad-policy-on-sex-offenders>.

⁶⁴ *See id.*

⁶⁵ Chloe Wolman, Note, *Putting Reason Before Retribution: Embracing Utilitarian Principles to Reform Contemporary Sex-Offender Registry Laws*, 20 S. CAL. REV. L. & SOC. JUST. 125, 144 (2011).

kind of extra punishment is potentially increasing recidivism rates by ostracizing and isolating offenders.

By adjusting the way sex offenders are classified, the registry can play a more rehabilitative role than it currently does by providing incentives to engage in treatment, community-based programming, and other activities that would be better for both the offender and the surrounding community.

B. Recidivism Rates of Sex Offenders

When Congress initially created the sex offender registry, it intended to prevent sex offenders from committing more sex crimes after being released from jail.⁶⁶ By creating mandatory registration time requirements, Congress decided that some offenders needed to be constantly supervised in order to best protect the community.⁶⁷ However, data show that sex offenders are much less likely to commit another sex crime than the public perceives. One study found that at the five-year mark, only 13%–14% of male sex offenders committed another sexual crime.⁶⁸ Another study found only 14% of offenders charged with rape committed another sexual crime.⁶⁹ Child molesters whose victims were male had the highest rate of sexual recidivism at 23% at the five-year mark.⁷⁰ These numbers are significantly lower than the public believes them to be.⁷¹ By allowing the community access to the offenses and locations of every offender, the government is only fueling this fear. For offenders who are at the lowest risk of reoffending, this poses significant burdens in attempting to reintegrate with the community.

However, the recidivism rate for offenders for any crime was only thirty-six percent at the five-year mark.⁷² This could be due to a number of different factors. Being on the sex offender registry can pose significant challenges for offenders when attempting to secure a

⁶⁶ SMART, *supra* note 29, at 5.

⁶⁷ See generally *id.* at 6–7.

⁶⁸ ROGER PRZYBYLSKI, SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE, CHAPTER 5: ADULT SEX OFFENDER RECIDIVISM 6 (2012), http://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html.

⁶⁹ *Id.* at 7.

⁷⁰ *Id.* at 8.

⁷¹ CTR. FOR SEX OFFENDER MGMT., EXPLORING PUBLIC AWARENESS AND ATTITUDES ABOUT SEX OFFENDER MANAGEMENT: FINDINGS FROM A PUBLIC OPINION POLL 1–3 (2010), <http://www.csom.org/pubs/CSOM-Exploring%20Public%20Awareness.pdf>.

⁷² PRZYBYLSKI, *supra* note 68, at 6.

job and housing. Many states have laws setting restrictions on how close offenders can live to schools and parks, ranging anywhere between 500 and 2000 feet.⁷³ With states passing stricter laws, and communities pushing for protected housing developments, offenders are left with fewer and fewer options for housing.⁷⁴ Additionally, offenders must disclose their status on the registry when applying for jobs.⁷⁵ Employers can potentially discriminate against these applicants when hiring. Because of these limitations on housing and employment, offenders may have to turn to illegal means to survive. Needing a place to sleep or food to eat can lead offenders to engage in behavior that would otherwise be avoidable.

Additionally, failing to register with the sex offender registry or update information can lead to a felony conviction.⁷⁶ This represents the most common recidivism crime for sex offenders.⁷⁷ Without realizing, offenders can easily obtain felony charges because of the strict and frequent requirement to report location information. While offenders should be aware of what kinds of reporting requirements they must face while on the registry, mistakes happen. However, these charges skew the perception of recidivism effects.⁷⁸ Failing to register does not significantly increase the danger to society and does not serve the registry's ultimate goal of protecting society from subsequent sex offenses. These convictions do not present the same type of danger that a burglary, murder, or other sex crime does to the surrounding community. Further, failure to register as a sex offender does not predict sexual recidivism.⁷⁹ So, while these offenders are

⁷³ Jill S. Levenson & Leo P. Cotter, *The Impact of Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49(2) INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 168, 168 (2005).

⁷⁴ Catherine Wagner, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness*, 38 AM. J. CRIM. L. 263, 268–69 (2011).

⁷⁵ *Id.* at 270–71.

⁷⁶ See generally OR. REV. STAT. § 163A.040 (2016).

⁷⁷ See generally Grant Duwe & William Donnay, *The Effects of Failure to Register on Sex Offender Recidivism*, 37 CRIM. JUST. & BEHAV. 520 (2010); Patrick Lussier, Marc LeBlanc & Jean Proulx, *The Generality of Criminal Behavior: A Confirmatory Factor Analysis of the Criminal Activity of Sex Offenders in Adulthood*, 33 J. CRIM. JUST. 177, 184–86 (2005).

⁷⁸ J.J. Prescott, *Do Sex Offender Registries Make Us Less Safe?*, 35 REG. 48, 48–55 (2012), <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2012/8/v35n2-1.pdf>.

⁷⁹ See ELIZABETH J. LETOURNEAU ET AL., EVALUATING THE EFFECTIVENESS OF SEX OFFENDER REGISTRATION AND NOTIFICATION POLICIES FOR REDUCING SEXUAL

collecting charges for failing to register, these charges—and the increase in recidivism rates that they bring—have no relation to an offender’s potential to commit another sex crime. Thus, there is no change to the danger a community faces.

Additionally, forcing sex offenders to register their location and sexual offenses does not present the safety barrier that some in the community believe it provides. The majority of sex crimes occur between people who know one another.⁸⁰ Only nine percent of child sex crimes are committed by a stranger, and only twenty eight of adult sex crimes are committed by a stranger.⁸¹ Because victims are usually familiar with their offender, community notification does not provide the most relevant information needed to protect potential victims of sex crimes. By requiring offenders with the lowest risk of reoffending to report their locations and criminal histories, the community becomes improperly informed regarding their relative safety. In reality, these people should be much more concerned about their own family members and close friends instead of those people they research on the internet. Yet, parents believe that offenders who are posted on the websites are the most dangerous threat their children face in their neighborhood.

Because recidivism rates are not accurate depictions of recurring crime, and because the rates are much lower than many people expect, there is no need for every offender to remain on the sex offender registry for life. By allowing those who do not pose a serious threat to petition for relief from the sex offender registry, courts and supervising boards can devote more energy and resources to those offenders who are most likely to reoffend and create harm to the community. By using risk of re-offense as the basis for classifying offenders, the registry can reflect the statistical reality of recidivism instead of feeding into the public’s perceived risk of danger.

VIOLENCE AGAINST WOMEN 46 (2010), <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf>.

⁸⁰ See generally *Perpetrators of Sexual Violence: Statistics, RAPE, ABUSE AND INCEST NATIONAL NETWORK*, <https://www.rainn.org/statistics/perpetrators-sexual-violence> (last visited July 25, 2017).

⁸¹ *Id.*

C. The Role of Judges and Administrative Boards in Sex Offender Management

Under the current federal guidelines of SORNA, judges and administrative boards have no role in determining the registration fate of those convicted of a sex crime.⁸² Because the instant offense determines offenders' tier, their time on the registry is set, as is the amount of time they are required to register as a sex offender.⁸³ Other than the instant offense, no other factors are considered in the sentencing phase.⁸⁴ Judges and administrative boards become powerless pawns in the realm of sex offenders, serving as neither a resource nor a champion for defendants. By switching the requirement to look at the risk of re-offense, courts and related boards can take responsibility to weigh relevant factors and become a deciding force in the future of sex offenders.

Judicial discretion plays a critical role in allowing defendants to be looked at on an individual basis. By giving judges and administrative boards the power to look at factors, in addition to the conviction, offenders would be more correctly classified based on their danger to the community. Such factors could include an offender's previous criminal history, community ties, participation in treatment and rehabilitative programs, and housing and employment opportunities. Based on these factors, offenders can be classified more correctly on their danger to the community. Both judges and administrative boards have the authority to assess the offender as a whole and determine what amount of time would be the most appropriate to serve on the sex offender registry in order to achieve the goals of the criminal justice system.

Judicial discretion is an increasingly important function of the criminal justice system. In the 1990s, with the implementation of mandatory minimum sentences for virtually every felony charge, judges were left with strict sentencing guidelines that provided little room for input.⁸⁵ While the guidelines serve a retributive goal of requiring a certain amount of incarceration and post-prison supervision for specific offenses, it takes away the power of a judge

⁸² See generally Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. §§ 16901–16991 (2012).

⁸³ *Id.* §§ 16911, 16915.

⁸⁴ *Id.* § 16911.

⁸⁵ See generally Robert Howell, *Sentencing Reform Lessons: From the Sentencing Reform Act of 1984 to the Feeney Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 1069 (2004).

to make adjustments based on extenuating circumstances. This ideology is also seen in the structure of SORNA. Judges are unable to make any choices as to how long an individual should be required to register as a sex offender; the conviction alone dictates this.⁸⁶ However, with the glaring results of mandatory minimum sentences, and resulting mass incarceration that America currently faces, legislators are shying away from the strict adherence to the guidelines and encouraging more individualized sentences and rehabilitative justice.⁸⁷ The sex offender registration guidelines should now follow suit, especially given that registration is an additional requirement following the actual incarceration sentence.

Opponents may argue that putting the burden on judges and administrative boards to determine classifications, as well as the additional number of hearings involved in reclassification and relief petitions, would overburden an already overflowing judicial system. These valid concerns can be addressed by states instead electing to create a board for monitoring sex offenders (or any type of parole and post-prison supervision) and delegate the duty of both assigning an initial classification and determining if an offender has met the burden of proof to be reclassified or relieved of the duty to report. This board can specialize in making these specific determinations, relieving the courts of additional workload. An ideal board would consist of a few different types of members: attorneys, especially those who have special knowledge of parole and post-prison supervision issues; mental health practitioners who have experience in the sex offender treatment field; and community members. By including different perspectives on the board, the interests of the state, the offender, and the community at large can be more adequately represented at the hearings. Further, specialized knowledge in the area of sex offender registries and the treatment process would allow for a better determination of the level of risk that an offender presents and would better serve the ultimate goal of protecting the community from dangerous offenders.

⁸⁶ Huffman, *supra* note 19, at 292.

⁸⁷ See 18 U.S.C. § 3553 (2012); *United States v. Booker*, 543 U.S. 220, 233 (2005) (holding the Federal Sentencing Guidelines were advisory instead of mandatory); Matthew C. Lamb, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126 (2015).

D. Stigma and Vigilantism

The community does not perceive sex offenders to be equals. Rather, they perceive sex offenders as highly dangerous repeat offenders and stigmatize them based on their label.⁸⁸ Sex offender registries make stigmatization even easier. By publicly publishing a variety of personal information, including residence and employment locations, vehicle descriptions, and license plate numbers, community members have easy access to who these offenders are and where they can be found.⁸⁹ This causes community members to feel the need to take matters into their own hands and deliver what they believe to be justice.

Offenders are frequently subject to torment and ridicule.⁹⁰ Even worse, some offenders are subject to physical violence and potentially murder.⁹¹ Those in the community who behave this way believe they are protecting their children from predators because the state is not doing enough to protect the community.⁹² In addition, family members of sex offenders are also exposed to this type of treatment. Eighty-six percent of family members of sex offenders feel stressed as a result of registration restrictions, and forty-nine percent fear for their own safety.⁹³

The stigma surrounding sex offenders is deeply rooted in this nation's perception of criminal behavior.⁹⁴ Playing on fear tactics, the media frequently scares citizens into believing that these people are predatory and extremely dangerous.⁹⁵ The majority of respondents in a survey about public views of sex offenders admitted that their base understanding of sex offenders came from television instead of scholarly sources.⁹⁶

⁸⁸ CTR. FOR SEX OFFENDER MGMT., *supra* note 71; Michael P. Griffin & Desirée A. West, *The Lowest of the Low? Addressing the Disparity Between Community View, Public Policy, and Treatment Effectiveness for Sex Offenders*, 30 L. & PSYCHOL. REV. 143, 155–57 (2006).

⁸⁹ *America's Unjust Sex Laws*, ECONOMIST (Aug. 6, 2009), <http://www.economist.com/node/14165460>.

⁹⁰ *See* Wolman, *supra* note 65, at 137–38.

⁹¹ *Id.*

⁹² Lexi Pandell, *The Vigilante of Clallam County*, ATLANTIC (Dec. 4, 2013), <https://www.theatlantic.com/national/archive/2013/12/the-vigilante-of-clallam-county/281968/>.

⁹³ *Unjust and Ineffective*, ECONOMIST (Aug. 6, 2009), <http://www.economist.com/node/14164614>.

⁹⁴ Huffman, *supra* note 19, at 253.

⁹⁵ *Id.*

⁹⁶ *Id.*

In the 1990s, legislators used this fear to push legislation that imposed harsher punishments on sex offenders.⁹⁷ Even though citizens are aware of their skewed view of sex offenders' roles in society, citizens are still overwhelmingly supportive of severe punishments for offenders.⁹⁸ However, while citizens are supportive of severe punishments, they are extremely unaware of the fact that such severe policies actually accomplish very little to reduce recidivism. Without more education about the effects of the sex offender registry, community members will continue to hold these unsubstantiated beliefs. In the meantime, the best thing legislatures can do is provide an opportunity for those low-risk re-offenders to avoid community notification and protect themselves from the unavoidable stigma resulting from their conviction.

Negative treatment from the community poses a serious hurdle for offenders attempting to reintegrate into society. Those who are recently released from incarceration and trying to put the pieces of their former lives back together need any support they can get. Community support is an important piece in preventing recidivism. Without community support, feelings of anxiety and loneliness dominate, causing offenders to shy away from engaging with others and cease working towards bettering themselves. If offenders who are excited and ready to work on being a functioning member of society are met with strong opposition and resentment, they may become discouraged and lose a desire to change. Additionally, things could become even worse if offenders feel shame and fear from their family and friends; “[c]hronic torment can contribute to feelings of anxiety and resentment, which in some situations may erode restraint.”⁹⁹ Rather than decreasing danger, those who engage in vigilante behavior and negative treatment towards offenders by scaring or physically assaulting offenders are actually creating a higher risk of re-offense. Thus, increasing the danger to their community.

⁹⁷ *Id.* at 254.

⁹⁸ *Id.* at 255.

⁹⁹ Michelle Cohen & Elizabeth L. Jeglic, *Sex Offender Legislation in the United States: What Do We Know?*, 51 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 369, 374 (2007).

III MOVEMENT TO A RISK OF RE-OFFENSE MODEL

A. Current Oregon Sex Offender Standard

Different programs have emerged in the states that implemented their own sex offender registry requirements. In Oregon, legislators recently created a new system similar to the system implemented in Vermont.¹⁰⁰ Under this system, offenders are classified based on their risk of re-offense instead of their instant offense.¹⁰¹ Offenders are provided the opportunity to petition for reclassification, and ultimately relief from reporting, by proving their dedication to treatment and becoming a better community member.¹⁰² The classifications determine the amount of information that is disclosed to the public, as well as the requirements for reporting.¹⁰³ Judicial discretion becomes more important as judges and administrative boards weigh factors to determine initial and subsequent classifications. This system focuses more on the individual offender and the opportunities for rehabilitation than it does punishing offenders for the vast majority of their lives based on a single conviction. By showing the court that their risk of re-offense has decreased, offenders have an opportunity to actively make a positive difference in their own lives and have some say in their course of punishment.

In Oregon and Vermont, sex offenders are classified into one of three levels based on risk of re-offense. Level 1 offenders present the lowest risk of reoffending and require a limited range of notification.¹⁰⁴ Level 2 offenders present a moderate risk of reoffending and require a moderate range of notification.¹⁰⁵ Level 3 offenders present the highest risk of reoffending and require the widest range of notification.¹⁰⁶ This widest range of notification allows authorities to release sex offender information to a person who resides with the offender, a person in a significant relationship with the offender, residential neighbors, schools, churches, parks,

¹⁰⁰ See ROBERT J. MCGRATH & STEPHEN E. HOKE, VERMONT ASSESSMENT OF SEX OFFENDER RISK MANUAL (2001), <http://www.csom.org/pubs/vasor.pdf>.

¹⁰¹ See OR. REV. STAT. § 163A.100 (2016).

¹⁰² See *id.* § 163A.125.

¹⁰³ See *id.* §§ 163A.060, .215.

¹⁰⁴ *Id.* § 163A.100.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

businesses, long-term care facilities, and local or regional media services.¹⁰⁷ Before an offender is released from custody or placed on probation, the Board of Parole and Post Prison Supervision (Board) conducts an assessment of the offender to determine the appropriate classification.¹⁰⁸

Similar to the SORNA requirements, sex offenders are required to provide identifying information to law enforcement in the course of registration.¹⁰⁹ However, only Level 3 offenders and those offenders found to be sexually violent have their information published on the sex offender registry websites.¹¹⁰

Certain offenders are prevented from petitioning for relief from reporting.¹¹¹ This includes offenders classified as Level 3, sexually violent dangerous offenders, and those found guilty except for insanity of first-degree rape, sodomy, sexual penetration, or kidnapping.¹¹²

A person classified as a Level 3 sex offender may petition the Board to be reclassified as a Level 2 sex offender.¹¹³ This petition may be filed no sooner than ten years after the offender is no longer supervised through parole or probation.¹¹⁴ This person cannot later petition their new Level 2 reclassification to be downgraded to a Level 1 classification.¹¹⁵ At the hearing, the Board can enter an order for reclassification to a Level 2 offender if it finds that, after the completion of a new risk assessment, the person presents a low or moderate risk of reoffending and the Board determines that a lower level of notification is sufficient to protect public safety.¹¹⁶

A person classified as a Level 2 offender may petition the Board to be reclassified as a Level 1 offender.¹¹⁷ The person may file the petition no sooner than ten years after the offender is no longer supervised through parole or probation.¹¹⁸ At the hearing, the Board

¹⁰⁷ *Id.* § 163A.215.

¹⁰⁸ *Id.* § 163A.105.

¹⁰⁹ *See generally id.* § 163A.010.

¹¹⁰ *See id.* § 163A.215(2)(a).

¹¹¹ *Id.* § 163A.115.

¹¹² *Id.*

¹¹³ *Id.* § 163A.125(2)(a).

¹¹⁴ *Id.* § 163A.125(2)(e).

¹¹⁵ *Id.* § 163A.125(3)(b).

¹¹⁶ *Id.* § 163A.125(4)(b)(A).

¹¹⁷ *Id.* § 163A.125(2)(c).

¹¹⁸ *Id.* § 163A.125(2)(e).

will enter an order for reclassification if after completion of a new risk assessment, the person has a low risk of reoffending and the Board determines that a low level of notification is sufficient to protect public safety.¹¹⁹

A person classified as a Level 1 offender may petition to be relieved from the obligation to report as a sex offender.¹²⁰ This person may file the petition no sooner than five years after supervision is terminated, or five years after the person was discharged from the jurisdiction of the court.¹²¹ The Board will hold a hearing, at which it can enter an order for relief if it finds by clear and convincing evidence that the person is statistically unlikely to reoffend and does not pose a threat to the safety of the public.¹²²

During all reclassification and relief hearings, the Board can weigh a number of factors to determine if it should grant relief. These factors include: (1) the nature and degree of violence involved in the instant offense; (2) the age and number of victims of the offense; (3) the age of the person at the time of the offense; (4) the length of time since the offense and the time period during which the person has not reoffended; (5) the person's performance during supervision for the offense; (6) whether the person has participated in or successfully completed a court-approved sex offender treatment program or any other rehabilitative programs; (7) the person's stability in employment and housing; (8) the person's community and personal support system; (9) other criminal and relevant noncriminal behavior of the person, both before and after the offense; and (10) any other relevant factors.¹²³ These factors provide a comprehensive look at the situation surrounding an offender and provide a fair assessment of the offender's risk of committing another crime.

B. Benefits of a Risk-Based Model

A risk-based system presents a great reform from the stringent SORNA standard. The sex offender registry can remain in place and maintain some consistency in sex offender sentencing, thus providing a more accessible way for offenders to work toward relief from reporting requirements by engaging in treatment and connecting

¹¹⁹ *Id.* § 163A.125(4)(b)(B).

¹²⁰ *Id.* § 163A.125(1)(a).

¹²¹ *Id.* § 163A.125(1)(c)(A).

¹²² *Id.* § 163A.125(4)(a).

¹²³ *Id.* § 163A.125(5).

positively with the community. Classifying offenders based on risk of re-offense will provide a more accurate assessment of the danger certain offenders pose to the community. Simply ranking offenders based on their conviction does not delve deep enough into the inner workings of offenders and their potential to commit another sex crime. However, offenders that are at the highest risk of committing another sex crime, and thus present the most danger to the community, should be monitored in a way that is effective and fair. Limiting the amount of relief a dangerous offender can receive incentivizes these offenders to engage in treatment and rehabilitation without allowing a level of freedom that could endanger others.

Further, the sex offender registry still, to an extent, serves a state interest in protecting communities from sex crimes.¹²⁴ By notifying the community about the most dangerous sexual predators that have the highest risk of reoffending, society has an improved sense of safety, or at least a better understanding of what dangers are actually present in their vicinity.¹²⁵ Because the community perceives their neighborhood to be safer with the registry in place,¹²⁶ the registry does not necessarily need to be completely abolished. However, the registry does need to be reformed so that the system can fulfill its true purpose of protecting the community. By classifying offenders based on their risk of re-offense, the community has the most accurate understanding of the dangers they face.

Other states have already successfully adopted a similar type of classification system. In Vermont, offenders are given a score based on a number of factors including prior convictions, prior drug and alcohol abuse, prior education and employment, and violence present in the instant offense; the score determines the offender's classification level.¹²⁷ The Vermont legislature found that appropriate sentencing is aided by psychosexual evaluations and specialized presentence investigations, which allow judges to select appropriate incarceration times that best fit the opportunity for rehabilitation.¹²⁸

¹²⁴ Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-based Sex Offender Registry Reform*, 43 J. SOC. & SOC. WELFARE 3, 5 (2016).

¹²⁵ *See id.*

¹²⁶ *See* Jill S. Levenson, et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOC. ISSUES & PUB. POL'Y 137, 139 (2007).

¹²⁷ MCGRATH & HOKE, *supra* note 100, at 9–16.

¹²⁸ VT. LEGISLATIVE COUNCIL, SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION REPORT 21 (2005), <http://www.leg.state.vt.us/reports/05SexOffender/report.pdf>.

Further, the legislature found that sex offenders are best served by community supervision programs that allow for reintegration.¹²⁹

Because other states have successfully implemented a version of a risk-based sex offender registry, Oregon is simply following trend. As society learns more about sex offenders and their potential for treatment, the nation should shift into an individualized approach to sentencing offenders and encourage reintegration into the community.

CONCLUSION

The sex offender registry plays a unique role in society. While it serves to protect communities by notifying members about potentially dangerous offenders, the goal is easily overlooked by how the registry is executed. The registry does serve the goal of alerting communities about the most violent and dangerous offenders, but then takes it a step further by including offenders who may have a prior conviction but do not pose a danger. Statistically, these offenders are unlikely to commit another sex crime, and are even more unlikely to commit a crime against a stranger. The registry creates a second form of punishment for offenders who have already served their time or are on post-prison supervision, and this new punishment can last a lifetime. States have enacted strict laws limiting where an offender can and cannot live, making it challenging for offenders to find housing after being released. Offenders also struggle to find employment due to their registration status. The views the community has of sex offenders plays a devastating role in rehabilitation and reintegration. Because so much of an offender's personal information is available to the public, isolation and violent acts frequently occur.

Much can be improved in the rehabilitation of offenders by changing how courts classify sex offenders. Looking at the risk of re-offense, rather than the instant offense, states can direct more resources and restrictions to those offenders who are the most dangerous. Judges and administrative boards can play a greater role in determining the registration requirement for offenders by looking at all the facts surrounding the offender and make a comprehensive finding on the specific offender's dangerousness. Judges are not bound to certain disproportionate duties to register, especially beneficial in rare cases where bizarre circumstances arise. By providing a method for offenders to be reclassified and ultimately relieved of the duty to report, the sex offender registry would better

¹²⁹ *Id.* at 22–23.

serve its goal of protecting society by alerting community members to only those offenders who pose the most serious danger. Further, offenders could be more motivated to engage in treatment and in their communities in a productive manner. This better serves the goals of the criminal justice system by encouraging rehabilitation instead of forcing retributive ideals to dominate the landscape of sex offender management. Offenders have a chance to prove to society that they want to better themselves and do not want to cause any more damage, earning their way to relief from reporting. Legislatures can and should take advantage of this opportunity to better support both sex offenders and society by adopting a risk-based model for classifying sex offenders.

