The Victimization of Sex Offenders within the United States Criminal Justice System

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Abstract

In the United States, the criminal justice system is set up in such a way that sex offenders are targeted far greater than those who commit other types of crimes. This perpetuation of sex offenders as monstrous leads to a large-scale bias that is detrimental to their safety during incarceration, their psychological well-being, and their social and community relationships. There is a widespread victimization of sex offenders within the criminal justice system, which creates an unjust victim-oriented environment that hinders due process. This victimization of sex offenders also implies a type of gender politics within the law that is harmful to the integrity of the legal system. This systematic victimization of sex offenders within the criminal justice system is counterintuitive to the idea of rehabilitation, reformation, and decreasing the likelihood of recidivism, which is arguably an essential role that the criminal justice system should play for incarcerated peoples to be released back into society.

Keywords: sex offender, victimization, criminal justice, sex offender registration

La Victimización de los Ofensores Sexuales en el Sistema de Justicia Penal de los Estados Unidos

Resumen

En los Estados Unidos, los ofensores sexuales son un blanco mucho mayor que otros tipos de delincuentes en el sistema penal. Esta perpetuación de los delincuentes sexuales como algo cercano a lo monstruoso implica graves perjuicios para la seguridad de estos ofensores durante su encarcelamiento, así como su bienestar psicológico y sus relaciones sociales y comunitarias. Existe una victimización generalizada de los delincuentes sexuales dentro del sistema de justicia penal, lo que

dificulta el debido proceso. Esta victimización de los delincuentes sexuales también implica un tipo de política de género dentro de la ley que es perjudicial para la integridad del sistema legal. Esta victimización sistemática de los delincuentes sexuales dentro del sistema de justicia penal es contraria a la idea de rehabilitación, reforma y disminución de la probabilidad de reincidencia, lo que podría decirse que es un papel esencial que debe desempeñar el sistema de justicia penal para que los pueblos encarcelados puedan volver a la sociedad.

Palabras claves: delincuentes sexuales, victimización, justicia penal, registro de ofensores sexuales.

Introduction

Criminal justice systems in North America have long prided themselves on their positivist approach to law enforcement and crime control. In particular, the United States and Canada have utilized the law as a means to enforce social order, to create a certain standard of behavior, and to reprimand those who threaten the system by initiating various social harms against other citizens. Although various acts have been criminalized within the jurisdictions of both the United States and Canada, this paper shall focus in particular on sex crimes and sex offenders, and the way in which the criminal justice system handles such offenders. It would seem that in North American society, there is an attitude of revulsion surrounding sex crimes, and an unspoken consensus that the heinousness of sex crimes exceeds the social harm of other types of crime, including murder. That is to say, social norms customarily depict sex crimes as more revolting than the killing of another human being. I would argue that in the United States in particular, the criminal justice system is set up in such a way that sex offenders are targeted far greater than those who have committed other types of

crimes. This perpetuation of sex offenders as somehow more monstrous than other people leads to a large-scale bias that is severely detrimental to their safety during incarceration, their psychological well-being, and their social and community relationships. This paper shall not solely analyze sexual offences, but will consider the treatment of sex offenders within the United States criminal justice system while offering a Canadian perspective for comparison. This paper shall argue that there is a widespread victimization of sex offenders within the criminal justice system, which creates an unjust victim-oriented environment that hinders due process. This victimization of sex offenders also implicates a type of gender politics within the law that is harmful to the integrity of the legal system. Furthermore, this systematic victimization of sex offenders within the criminal justice system is counterintuitive to the idea of rehabilitation, reformation, and decreasing the likelihood of recidivism, which is arguably an essential role that the criminal justice system should play for incarcerated peoples to be released back into society.

Consent: Legal Definitions

Before one can analyze sex offenders from any perspective, what constitutes a sexual offence must be understood. A general understanding of a sex crime in North America would be any sexual act done without the consent of the other party, consent being a complex issue in itself. Consent, being a critical aspect of any sexual act, is defined in the Canadian Criminal Code's section 273.1(1) "as the voluntary agreement of the complainant to engage in the sexual activity in question. Conduct short of a voluntary agreement to engage in sexual activity does not constitute consent as a

matter of law."[1] In the United States, the definition of consent varies based on the state in question, but it is generally similar across all states. For example, section 261.1 of the California Penal Code defines consent as "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."[2] In comparison, New York discusses sexual consent as follows:

> Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in sexual activity. Silence or lack of resistance, in and of itself, does not demonstrate consent. The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.[3]

Both California and New York define consent in a similar manner; however, the aforementioned definition of consent in New York was not implemented into state law until 2015. Despite the fact that definitions of consent vary by state, and definitions of what constitutes a lack of consent vary by state, the abovementioned definitions will be utilized to analyze the United States as a whole as the variation is not significant so as to be detrimental to the purpose of this paper. Although Canada and the United States have different legal systems, the definitions of consent are similar, indicative of the cultural similarities between these two states. This paper shall utilize these definitions of consent to further delve into the issues surrounding sexual

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[1] *Criminal Code*, 1985, s 273.1(1).

[2] *California Penal Code*, s 261.6.

[3] *Enough is Enough*, New York, 2015, available at https://www.nysenate.gov/legislation/bills/2015/s5965.

offences in both states, with particular emphasis on the United States criminal justice system.

In order to accurately analyze the victimization of sex offenders, one must first consider what a sexual offence is. Essentially, a sex crime occurs where there is a lack of sexual consent between victim and perpetrator. One should keep in mind, however, that certain sex crimes exist wherein there is consent between two parties but said consent is not valid. Such an example would be statutory rape under California law. Under section 261.5 (a) of the California Penal Code:

> Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under the age of 18 years and an "adult" is a person who is at least 18 years of age.[4]

By this definition, a sex crime may occur where there is consent, but that consent would not be legally valid and the perpetrator would be found guilty of a crime, varying from misdemeanor to a felony depending on the age of the minor and the age of the perpetrator. Moreover, this consensual act could lead to a requirement for registry as a sex offender. When considering crimes of a sexual nature, many people tend to think of crimes such as: sexual assault, sexual harassment, rape (in United States law), incest, sexual acts against minors, child pornography, and so on. Although these do fall within the realm of sexual offences, often not included in common perception of sexual offences are the lesser acts of a "sexual" nature, such as public nudity (indecent exposure in the United States), public urination, and consensual sexual intercourse in a public area. All should be considered as equally

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[4] *California Penal Code*, s. 261.5 (a).

relevant as in all instances, the suspects and perpetrators of these acts fall into the unforgiving grasp of the highly biased criminal justice systems, especially in the United States, where these crimes could result in said person's name being placed on a sex offender registry, which is accessible to the public. In both the United States and in Canada, a sex offender is any person who has been found guilty of a sex crime under the Canadian Criminal Code, or under specific state legislation where the crime was committed. One must wonder: Why do we worry ourselves with sex offender registries to such an extent that, in the United States, we expect them to be public?

Sex Laws and Gender-based Bias

Within most societies, Western society specifically, sex offenders are viewed as people of a particularly grievous nature who should not be permitted to be among ordinary citizens without some form of monitoring, as they pose a danger to the safety of communities.[5] The problem with that statement is that the term "sex offender" is too vague and encompasses an array of persons accused and charged with different offences. Society's fear of sex offenders has propelled legislative bodies to enact laws with punishments often severe and to the detriment of the perpetrator in question. A guilty person should be held accountable for their actions, but to what extent should we allow the legal system to interfere with the public lives of offenders? One might argue that the legal system ought simply to punish the wrongdoer according to the offence, that is enforce a reasonable and ethical

[5] Kristen Budd, and Christina Mancini, "Public Perceptions of GPS Monitoring for Convicted Sex Offenders: Opinions on Effectiveness of Electronic Monitoring to Reduce Sexual Recidivism," *International Journal of Offender Therapy & Comparative Criminology* 61, no. 12 (2017) p. 1339, available at http://journals.sagepub.com.libproxy.auc.ca/doi/pdf/10.1177/0306624X15622841.

punishment, and that once said punishment is complete, the legal system should no longer be involved. Others may argue that the legal system should continue to monitor offenders after release from incarceration, and that this invasion of privacy of the offender is necessary for the common good of the society. It would be extreme to argue that the legal system ought to condemn a person for years after their sentence is over just so that the public can gain a false sense of security, but that is exactly what is occurring with sex offenders in the United States. Why? Again, because the political and legal systems responsible for punishing such crimes do not want an unruly and unhappy society refusing to re-elect whoever is in power. Surely, no reasonable political body would stay in power if they were easy on crimes that are "for deep-seated cultural and perhaps innately human reasons, considered particularly grave violations of human dignity."[6] With new social movements currently headlining most major news publications, the pressure to eliminate and crack down on assaults and crimes of a sexual nature is only growing stronger and the public has become increasingly aware of the immensity of people (women in particular) who have accounts of various types of sexual abuse. This places an even greater target on the alleged perpetrators, whether or not the allegations are true. People want the government and the legal system to respond, and to respond swiftly. Should a reasonable and democratic society allow social movements to dictate the issues to be emphasized within the judiciary? One could argue that the gender bias within these social movements is incredibly harmful to the integrity of the justice

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[6] Lehrer, Eli, "Rethinking Sex-Offender Registries," *National Affairs* 26, (2016): p. 54, available at https://www.nationalaffairs.com/storage/app/uploads/public/58d/e7c/d9b/58de7cd9b5f94439362513.pdf.

system and to democracy itself, or at least the underlying democratic principle of equality. Of course, what is democracy but an illusion of a common good? A common good cannot exist where people are individuals, and where individuals split into groups and identities all with differing ideas of what ought to be. In terms of gender politics and feminist movements, identity politics will only target sex offenders more heavily than before, and create an even greater bias towards people who have either (1) already finished their sentence and have "paid their dues" so to speak, (2) did not commit the sex crime they are accused of, and (3) remain on registries for unspecified sex crimes so that the public can further scrutinize them for what may in fact be a small, insignificant action (unbeknownst to that same scrutinizing public). This gender bias within the legal system will target males as the most likely perpetrators of sexual offences, and women will continue to be protected more intensely than men. It would seem that this bias in favor of the female population could potentially compromise the integrity of the legal process, and the presumption of innocence owed to all suspects of crimes. Although it is not only the case in instances of alleged sexual offences, oftentimes a person accused of a crime is treated with a heavy presumption of guilt, and I would argue that this is even more so true where a man is accused of a sex crime. Far too often, the notion of rape culture is used as an explanation for female victimization and as a means for feminists to pursue their own agendas, but this is damaging the "justice" in our justice systems. Rape culture "has been a central feature of American feminism…Feminism…is built on believing women's accounts of sexual use and abuse by men."[7] This female

[7] Heather Wilhelm, "The Rape Culture Lie," *Commentary* 139, no. 3 (2015): p. 25, available at http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=101171156&site=ehost-live&scope=site.

favouritism is counterproductive for any legal system who seeks to fulfil its duty to protect innocent people, and to offer accused people a fair and unbiased trial. Furthermore, I am of the opinion that the law should be free of any public or political agenda and ought to remain an unbiased system focused solely on justice. Undoubtedly, this is not the reality of our current justice systems. Still, as KC Johnson mentions in his article pertaining to rape culture on United States' university campuses, the gender politics is still overwhelming:

> In an academy increasingly dominated by the race/class/gender trinity, which sees American society as hopelessly sexist and oppressive of women, a line of defense that often requires the accused student to cast doubt on a woman's truthfulness or good judgment is unlikely to receive a fair hearing. [8]

Quite obviously, men are at a great disadvantage when it comes to defending themselves in allegations of sexual misconduct or crimes of a sexual nature. Again, it is important to reiterate that those guilty of such crimes ought to be punished reasonably under the law, but how can we, as a society, justify a presumption of guilt based on a person's gender? Discrimination exists in all forms, be it racial, gender-based, religious, etcetera, but the United States is a multicultural melting pot of people and the law, in order to be truly just and constitutional, ought to treat all persons as equal and equally protected under the law.[9] Gender discrimination has been demonstrated in studies wherein men are found guilty more often than women

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[8] KC Johnson, "The War on Due Process," *Academic Questions* 28, no. 1 (2015): p. 24, available at http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=101227373&site=ehost-live&scope=site.

[9] U.S Constitution, amend. XIV.

for the commission of crimes of a sexual nature[10] and even an online search of sex offender registries will result in a very high percentage of registered male offenders compared to female offenders.

Sex Offender Registries in the United States

Despite completing prison sentences, probation periods and rehabilitation programs if offered, people remain on a sex offender registry for years and that registry is available to the public. It is a culture of paranoid, imperious surveillance. The requirement that the legal system release information regarding sex offenders to the public began due to a case involving a seven-year-old girl, Megan Kanka, who was murdered and sexually abused in 1994, creating Megan's Law. Megan's Law requires "local and state law enforcement agencies to release relevant information about sex offenders to protect the public…"[11]

As previously mentioned, a person may commit an offense that is non-violent, that does not endanger the public, and still be required to register as a sex offender. Section 290 of the California Penal Code, herein referred to as the Sex Offender Registration Act provides an overly inclusive account of who must be registered on public sex offender registries. The crimes vary from the obvious, such as s.261

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[10] Vera Sigre-Leiros, Joana Carvalho, et al, "Preliminary Findings on Men's Sexual Self-Schema and Sexual Offending: Differences Between Subtypes of Offenders," *Journal of Sex Research* 53, no. 2 (2016): pp. 210-211, available at http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=112573807&site=ehost-live&scope=site.

[11] Mary P. Brewster, Philip A. DeLong, et al., "Sex Offender Registries: A Content Analysis," *Criminal Justice Policy Review* 24, no. 6 (2012): p. 696, available at http://journals.sagepub.com.libproxy.auc.ca/doi/pdf/10.1177/0887403412459331.

pertaining to rape, to more vague offences such as s.311(2) pertaining to obscene matter:

> Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense, guilty of a misdemeanour.[12]

This misdemeanour is in fact sufficient to warrant registry in California despite the vagueness of the definition of what constitutes "obscene matter", leaving far too much room for judicial interpretation. The Penal Code of California defines obscene matter as anything:

> Taken as a whole, that to the average person, applying contemporary state-wide standards, appeals to the prurient interest, that, taken as a whole, depicts or describes sexual conduct in a patently offensive way, and that, taken as a whole, lacks serious literary, artistic, political, or scientific value.[13]

Contemporary state-wide standards? Should we assume now that there is some sort of universal ideal standard that the American people can agree upon? Certainly a group of reasonable persons may be able to agree that some things are obscene while others are not, but more often than not, these "reasonable people" are middle-aged white males who cannot account for the cultural and socioeconomic diversity within the United States. This is a clear indication that the system is not set up in a just manner and most definitely, the vagueness of the law and the people accountable for deciding the law will further hinder the interpretation of the law itself, causing further

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[12] *California Penal Code*, s. 311 (2).

[13] *California Penal Code*, s.311 (a).

grievances for those who are being charged with such an offence; they will be subjected to a type of arbitrary decision-making that is unconstitutional.

Furthermore, because of legislation such as the Sex Offender Act in California, and vaguely written laws, there is an over-representation of people on registries. If the United States' general public want the legal system to monitor sex offenders, how can this monitoring be effective if the registry is so completely inundated with "offenders" who pose no real threat to the community? A quick search reveals thousands of registered sex offenders in one small town in California alone, and whether or not they are dangerous offenders remains unimportant; all of their personal information is there for the world to see: their full name, any aliases they have used, their date of birth, their home address, a photo of them if available, the penal code section correlating to their charge, height, weight, eye colour, hair colour, any identifying marks or tattoos. The Constitution may not directly protect the right to privacy, but this lack of privacy interferes with the unalienable rights within the Declaration of Independence, that is the rights of "life, liberty, and the pursuit of happiness."[14] This claim shall be elaborated on further in this paper, as one could argue that being placed on a sex offender registry not only may cost you your life, but limits your freedom, and limits the possibilities of what you may do in society to truly and freely pursue the illusionary American dream. In order to preserve the veracity of this fundamental claim in the Declaration of Independence, the legal system should reduce the number of people required to be on the sex offender registry, thus diminishing the perpetual victimisation of non-dangerous offenders, and, as will be

[14] *Declaration of Independence*, 1776.

discussed later on, the victimisation of registered "sex offenders" who do not even belong on the registry in the first place. As Eli Leher points out:

> Removing those who do not pose any particular public danger would both remedy the injustices done to them and improve public officials' ability to monitor those who remains. Two groups in particular deserve speedy release from the registries: those convicted of minor, sometimes non-sexual offenses and those whose convictions were handed down by juvenile courts…requiring such offenders to remain on registries wastes public resources, ruins lives, and does nothing to improve public safety.[15]

To reiterate, removing unnecessary offenders from the sex offender registry would actually improve public safety, as monitoring of dangerous persons would be more efficient, and resources could be allocated more appropriately. Many argue that this is not the case, and that sex offender registries have a deterrent effect, as offenders on the registry would be less likely to commit another offense since their personal information would already be recorded in detail.[16] Again, Leher uses the case of Jaycee Dugard not only to disprove this argument, but also to further the claim that the best interest of the public could only be served properly if the registry was more selective about who ought to be included. This famous case involved a young girl who was kidnapped by Phillip Garrido, who kept her and abused her for eighteen years. Phillip Garrido was already on the sex offender registry, and "his home was visited by parole officers…multiple times. But overtaxed by the need to monitor California's more than 83,000 sex offenders, officials never performed the thorough search of his

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[15] Eli Leher, "Rethinking Sex-Offender Registries," *National Affairs* 26, (2016): p. 59, available at https://www.nationalaffairs.com/storage/app/uploads/public/58d/e7c/d9b/58de7cd9b5f94439362513.pdf.

[16] Lisa Murphy, J. Paul Fedoroff, et al, "Canada's sex offender registries: Background, implementation, and social policy considerations," *The Canadian Journal of Human Sexuality* 18, no. 2 (2009): p. 62, available at http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=43748360&site=ehost-live&scope=site.

house that would have located Dugard."[17] This may be slightly presumptuous, but it does well to exemplify the extent of the issue. Having to consistently monitor that incredible number of people places undue strain on resources (professionals, budgets, and so forth) and so resources end up being used on people who do not pose any real threat. For example, in Florida Statutes section 800 pertaining to lewdness and indecent exposure, the law deems it illegal "to expose or exhibit one's sexual organs in public or on the private premises of another, or so near thereto as to be seen from such private premises, in a vulgar or indecent manner, or to be naked in public except in any place provided or set apart for that purpose…"[18] This law includes public urination, and so a person could be placed on a sex offender registry simply for being caught urinating in public. Is it so grave a crime to urinate in public that one should be placed on a crowded sex offender registry? Furthermore, the registry will not specify that the "crime" was public urination but will only go so far as to say that a lewd and lascivious act was committed. This is not only an excessive punishment for the act of public urination, but the vagueness of the law pertaining to lewd acts and indecent exposure mean that it is left to the public's imagination as to what that act might have been, as it could vary from intentional exposure of genitals in the presence of minors, to acts that may not produce harm such as nude sunbathing or urinating in a public place. Karne accurately summarises some of the main issues with registries:

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[17] Eli Leher, "Rethinking Sex-Offender Registries," *National Affairs* 26, (2016): p. 59, available at https://www.nationalaffairs.com/storage/app/uploads/public/58d/e7c/d9b/58de7cd9b5f94439362513.pdf.

[18] *Florida Statutes*, chapter 800.03.

> Seventeen states require life-long registration for all sex offenders, regardless of the crime. The laws also require people who pose no safety risk to remain on the registry for large portions of their lives. Another related problem is that sex offender registries only inform people of a conviction, not the nature of the specific crime.[19]

Sex Offender Registries: Questioning their Constitutionality

Apart from over-representation of people on registries and the vagueness of the laws written surrounding the sex offences that require registry, one could argue that sex offender registries in the United States are inherently unconstitutional in their enduring victimisation of the offenders on these registries. In the United States, "an individual's right to privacy, although not specifically enumerated in the Constitution, has been adjudicated a fundamental right."[20] Constitutionally protected rights that may be violated by sex offender registries also include the right to due process, to equal protection under the law, and the right that persons shall not be subjected to cruel and unusual punishment. Also challenged is the constitutionality of sex offender registries with regard to the ex post facto clause of Article I, section 10, clause 1 of the Constitution, which disallows ex post facto law.[21]

Constitutionality of Sex Offender Laws: Violations of Due Process

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[19] Karne Newburn, "The Prospect of an International Sex Offender Registry: Why an international system modeled after United States sex offender laws is not an effective solution to stop child sexual abuse," *Wisconsin International Law Journal* 28, no. 2 (2010): p. 556, available at https://hosted.law.wisc.edu/wordpress/wilj/files/2011/10/Newburn_Final_8.2.11-ISSUE-28-3.pdf.

[20] Maria Orecchio, and Theresa A. Tebbett, "Sex Offender Registration: Community Safety or Invasion of Privacy?" *Journal of Civil Rights and Economic Development* 13, no. 3 (1999): p. 675, https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1307&context=jcred.

[21] U.S Constitution, article I, section 10.1.

Amendments V and XIV do explicitly protect due process. Amendment V of the Constitution of the United States protects the rights of persons, and states that no person shall be "deprived of life, liberty, or property, without due process of law."[22] Amendment XIV declares that all persons have a right to due process and equal protection: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[23] Both the Fifth and Fourteenth Amendments guarantee that persons have a right to life and liberty, neither of which can be removed without due process of the law. Here one must consider that due process includes a fair trial. A trial may be done in a standardised, legal way, but this does not mean that it is fair. Judges, juries, and preconceptions of the accused are all heavily burdening to the notion of a fair trial, but this may occur at any given trial, thus disrespecting the rule of law. Substantive due process should therefore be recognised as constitutionally protected, and this would include a reasonable right to privacy. In 1999, a man who was required to register as a sex offender challenged the constitutionality of this as a breach of his right to privacy. Unfortunately, in *Kansas v. Stevens* (1999), the court held that Thomas Stevens' right to privacy was outweighed by the state's need to ensure the safety of the public.[24] In this instance, the court felt that Stevens presented a reasonable threat to public safety despite his cooperation throughout; public interest was at the forefront of the court's decision-making. Unfortunately,

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[22] U.S. Constitution, amend. V.

[23] U.S Constitution, amend. XIV.

[24] *Kansas v. Stevens*, KS Ct. App. [1999].

this opinion is widely held, and "courts have neglected to establish a clear and decisive test to determine whether the disclosure of registry information constitutes an actionable invasion of an individual's right to privacy."[25] This has been challenged by some courts, as will be discussed further on. One could understand that during incarceration, a person's right to privacy would be limited not only for their own safety, but for community safety and the safety of officers in charge of their custody, but at this time, the individual in question would reasonably expect their privacy to be limited. The issue at hand is upon release from incarceration and after a person has completed their sentence that their reasonable expected right to privacy ought to be reinstated. This sort of excessive surveillance is not placed upon individuals who were previously incarcerated for other types of crimes; there is no registry for persons previously charged with arson, for embezzlement, or even for murder. If the court feels that persons ought to be registered because they have committed a sex crime and thus pose a danger to society, why is there no registry for murderers who have been released from incarceration? Would they not pose a substantial risk to public safety? It would seem that according to the law and to society, Thomas Stevens, the sex offender who complied with the law and admitted his wrongdoings, is a greater risk to the public than a newly released individual who had been charged with murder, whether it is first degree or otherwise. Registries and "sex offender legislation… offers communities a false sense of security: Communities may think that they know who poses a danger when in reality they may only know the convicted offenders who

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[25] Maria Orecchio, and Theresa A. Tebbett, "Sex Offender Registration: Community Safety or Invasion of Privacy?" *Journal of Civil Rights and Economic Development* 13, no. 3 (1999): p. 688, available at https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1307&context=jcred.

were subject to notification requirements."[26] A false sense of security should not take precedent over the due process rights of citizens, even if these citizens have committed an offence.

> The New Jersey Supreme Court, in *Doe v. Poritz*, determined that an offender has a federally protected liberty interest in his privacy, which is implicated by public disclosure of his home address and other personal information…The Supreme Court of Oregon also held that its state's SORA implicated a federally protected liberty interest.[27]

The Supreme Court of Oregon did in fact declare that "liberty", as intended in the Due Process Clause, was being infringed upon by the state's Sex Offender Registration Act (SORA). The District Court of Appeal of Florida concurred with this in one particular case as well, where the offender declared that registering with SORA violated his due process rights.[28]

Constitutionality of Sex Offender Laws: Ex Post Facto Clause

Questioning the constitutionality of sex offender registries as noted, is not uncharted territory. Two noteworthy cases challenged registries as violating the ex post facto clause of the Constitution of the United States: *Smith v. Doe* and *Doe v. Snyder*. What this means is that no punitive sanction or law can be applied retroactively, that is, no law can require a punishment to be applied to a crime that

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[26] Jane A. Small, "Who are the people in your neighborhood? Due process, public protection, and sex offender notification laws," *New York University Law Review* 74, (1999): p. 1469, available at http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-74-5-Small.pdf.

[27] Jane A. Small, "Who are the people in your neighborhood? Due process, public protection, and sex offender notification laws," *New York University Law Review* 74, (1999): p. 1475, available at http://www.nyulawreview.org/sites/default/files/pdf/NYULawReview-74-5-Small.pdf.

[28] *Ferman Carlos Espindola v. The State of Florida*, District Court of Appeal of Florida, 3D02-1839 [2003].

was committed in the past. The Constitution explicitly protects the implementation of ex post facto law in article 1, section 10. Unfortunately, the decision in *Smith v. Doe* upheld sex offender registration laws as not breaching the Constitution's ex post facto clause because they determined that being required to register as sex offender did not constitute a punishment, but rather the intent of the registry was to establish a "civil, non-punitive regime."[29] However, the Sixth Circuit Court, when analyzing the case of *Doe v. Snyder*, found that sex offender registrations were in fact punitive in nature, since provisions found in Michigan's SORA "inflicted a kind of banishment that has been traditionally regarded as punishment."[30] I would concur with the finding in the case of *Doe v. Snyder*. Although sex offender registration acts often disguise themselves as preventative measures and as a means to decrease recidivism among sex offenders, the reality is that placement on such registries occur as a result of having been charged with an offense. Is this not the definition of punishment? Is it not punitive when the result of registration is psychological, emotional, and even physical harm? Possible housing restrictions, public shaming, vigilantism, restrictions on employment, etcetera, all constitute a type of harm that should be regarded as a further form of punishment that the United States is fully aware of. One particular study done in Kentucky in 2011 found that 47% of registered sex offenders had been

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[29] Shannon C Parker, "Branded for life: the unconstitutionality of mandatory and lifetime juvenile sex offender registration and notification," *Virginia journal of Social Policy & the Law* 21, no. 1 (2014): p. 179, available at http://www.vjspl.org/wp-content/uploads/2012/06/2.20.14-FINAL-LAYOUT-Branded-for-Life_Parker.pdf.

[30] Melissa Hamilton, "Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of *Doe v. Snyder*," *Boston College Law Review* 58, no. 6 (2017): p. 38, available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3557&context=bclr.

harassed specifically because of their registered status.[31] Demonstration that registration for sex offenders is a form of punishment would mean that the court's holding in *Smith v. Doe* was incorrect, and that a violation of the ex post facto clause did occur. Surely, placing a person on a registry knowing that this will subject them to various forms of discrimination, harassment, and possibly even death is sufficient in deeming it punishment. Moreover, since there is no evidence that sex offender registration acts do actually protect society and decrease recidivism, the argument that their purpose is thus seems null.

Canadian Sex Offender Registry: A Brief Comparison

Like the United States, Canada too insists on placing certain offenders on sex offender registries. There are two sex offender registries in Canada: the Ontario Sex Offender Registry (OSOR) and the National Sex Offender Registry (NSOR). Canada did not incorporate sex offender registries into law until 2001 and 2004 (OSOR and NSOR respectively) and thus is several decades behind the implementation of registries in the United States, which first began in California in the 1940s.[32] In Canada, the Sex Offender Information Registration Act (SOIRA) was enacted in response to the sexual abuse and murder of a child, Christopher Stephenson.[33] The law thereafter became

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[31] Catherine Wagner, "The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness," *American Journal of Criminal Law* 48, no. 2 (2011): p. 272, available at http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=61796844&site=ehost-live&scope=site.

[32] Lisa Murphy, J. Paul Fedoroff, et al, "Canada's sex offender registries: Background, implementation, and social policy considerations," *The Canadian Journal of Human Sexuality* 18, no. 2 (2009): 61.

[33] Karne Newburn, "The Prospect of an International Sex Offender Registry: Why an international system modeled after United States sex offender laws is not an effective solution to stop child sexual abuse," *Wisconsin International Law Journal* 28, no. 2 (2010): p. 561, available at https://hosted.law.wisc.edu/wordpress/wilj/files/2011/10/Newburn_Final_8.2.11-ISSUE-28-3.pdf.

known as Christopher's Law, the Canadian equivalent of Megan's Law. Both in the United States and in Canada, the personal information of the offender is detailed so that they can be adequately monitored by the state, however, in Canada, these registries are not available to the public the way they are in available in the United States. The OSOR and the NSOR are available only to law enforcement agencies, and thus, certain challenging aspects faced in the United States, such as invasion of privacy rights, harassment by members of the public, and so forth, are not issues in Canada. The registries, although still intrusive, do not pose such a significant threat to the safety of the offender and the Canadian population is not privy to information that will not actually improve their safety or ease their minds. Far too often, registered sex offenders in the United States are targets of physical assaults, harassment, discrimination, and even murder. I would argue that this is a fundamental way in which the legal system knowingly victimises people on sex offender registries.

> In 2006, a Canadian man shot and killed William Elliot because he was a sex offender. The perpetrator obtained William's information from a public sex offender registry. William was on the sex offender registry because at age nineteen he was convicted of having consensual sex with his fifteen-year-old girlfriend.[34]

Undoubtedly, the age difference between William Elliot and his then girlfriend was problematic; her consent to sexual activity would not be legal because at age fifteen, she was not of legal age to consent despite the fact that she did intend to have a

[34] Karne Newburn, "The Prospect of an International Sex Offender Registry: Why an international system modeled after United States sex offender laws is not an effective solution to stop child sexual abuse," *Wisconsin International Law Journal* 28, no. 2 (2010): p. 549, available at https://hosted.law.wisc.edu/wordpress/wilj/files/2011/10/Newburn_Final_8.2.11-ISSUE-28-3.pdf.

sexual relationship with her boyfriend, William Elliot. Although there is no doubt that a crime occurred in William Elliot's case, there should be a large shadow of doubt cast over whether or not his crime was so grave that he warranted to be placed on a sex offender registry that left him vulnerable to public harassment, and ultimately, his death. I am of the opinion that the registry, and thus the criminal justice system not only victimised William Elliot (and others in similar situations) but failed him entirely. "Sex offenders are the most vulnerable population…they are openly targeted for extreme levels of physical and psychological victimization."[35] Another example demonstrating the shortcomings of the United States' system is the case of Jameel N. Like William Elliot, Jameel N. had consensual sex with his girlfriend, aged fourteen, when he was aged seventeen. With regard to Jameel N., the harassment was extreme:

> He has been offense-free for over a decade, finished his therapy, and that his judge and probation officer have stated that they do not believe he will reoffend… Jameel N. recounts that he has been called a baby rapist by his neighbors; had feces left on his driveway; and had a stone with a note wrapped around it telling him to "watch [his] back" thrown through his window…[36]

Although not unheard of in Canada, these instances of harassment and violence are far less common in Canada and other countries where registries are private, such as the United Kingdom and Australia. The Canadian system, in some respect, although questionable in many facets, allows only law enforcement to access the registries and

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[35] Rosemary Ricciardelli, and Dale Spencer, "Exposing Sex Offenders," *British Journal of Criminology* 54, no. 3 (2014): p. 428, available at http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=95480490&site=ehost-live&scope=site.

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so misinterpretation by the general population is not possible. This results in less violence towards released offenders and a reasonable preservation of privacy rights. As such, it has been demonstrated that people required to comply with registry updates are more likely to do so in Canada than in the United States.[37] Perhaps the United States ought to model their system differently not only to protect the inalienable rights of released offenders, but also to increase compliance with registries, and decrease violence associated with said registries. Rather than suggesting an international sex offender registry modeled after the intrusive, ineffective registry of the United States, there should be more focus on amending the registry in the United States so that, like Canada, the general population is not able to access the personal information of offenders. Moreover, it would be relevant to consider taking a step further, not just in the United States, but in all countries wherein sex offender registries are enacted, that said registries remove all persons who do not constitute a genuine risk to public safety. In this way, the systems would not be so heavily inundated and law enforcement could effectively monitor people who do pose significant danger without subjecting them to significant victimisation by society, and by a biased legal system set up in a way that violates their constitutional rights. The focus of the legal system should always be to protect citizens; one must not forget that citizens include offenders and released offenders, regardless of their crimes.

Conclusion

[37] Robert M. Worley, and Vidisha Barua Worley, "The sex offender next door: deconstructing the United States' obsession with sex offender registries in an age of neoliberalism," *International Review of Law, Computers &Technology* 27, no. 3 (2013): p. 343, available at http://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=91557395&site=ehost-live&scope=site.

Not all courts in the United States will recognize the relevance of reducing the instances of the perpetual victimization of registered sex offenders not only by the public, but by the criminal justice system itself. Those courts that do wish to protect the constitutional rights of registered sex offenders and to focus on the elimination of gender-based bias within the legal system with regard to sex crimes will undoubtedly seek to set precedent that forces a certain level of human respect and dignity. Rather than indulge themselves in the gender politics surrounding sex crimes and attempts to gain the favor of the public, the Constitution will be reasonably interpreted, rather than unjustly interpreted in detriment of the registered sex offender.[38] Furthermore, legislative bodies should seek to reform the very laws that are prejudicing registered sex offenders to begin with. Not only do states need to reconsider the vague interpretation of laws of a sexual nature, but amendments to sex offender registry laws should also be given deep consideration. As it currently stands, even minor sexual acts that do not produce social harm are being penalized in some instances with a requirement to register as a sex offender, causing a barrage of unnecessary persons to be listed on these registries.[39] If the public truly wishes to publically monitor people with past predatory behavior, at the cost of that person's right to privacy, then the very least that can be done is to remove juveniles and persons charged with minor offences from the registries. The fact that "sex offenders

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[38] Melissa Hamilton, "Constitutional Law and the Role of Scientific Evidence: The Transformative Potential of *Doe v. Snyder*," *Boston College Law Review* 58, no. 6 (2017): p. 42, available at http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3557&context=bclr.

[39] Eli Leher, "Rethinking Sex-Offender Registries," *National Affairs* 26, (2016): pp. 59-60, available at https://www.nationalaffairs.com/storage/app/uploads/public/58d/e7c/d9b/58de7cd9b5f94439362513.pdf.

are the most vulnerable population in and outside of prison"[40] speaks to the grave injustices they face due to the lack of adequate protection at the level of the justice system. Is the heavier penalization of one particular group or their discriminatory treatment justice at all? Is this the brand of "equality" that the United States prides itself upon? For the sake of the integrity of the United States legal system, one should hope not.

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