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When Animus Matters and Sex Offense Underreporting Does Not: The Sex Offender Registry Regime

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ABSTRACT

In *Romer v. Evans* the Court drew a constitutional distinction between civil laws enacted for a broad public purpose that justifies "the incidental disadvantages they impose on certain persons," and laws that have "the peculiar property of imposing a broad and undifferentiated disability on a single named group".[2] Laws of the second kind "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[3] The difficulty lies in deciding when the inference properly becomes a conclusion that the law violates the Equal Protection Clause. The more sweeping and unusual the burdens imposed on the targeted group, the more difficult it may be to discern a common policy explaining them other than the forbidden purpose of harming their targets. At some point the animus inference becomes strong enough to require scrutiny of the laws' purported rationale, including whether it has any actual basis in fact.

An astonishingly broad array of burdens are imposed today on anyone ever convicted of almost any sexual offense of any kind or seriousness, including but extending far beyond inclusion in publicized websites listing "sex offenders." No similar regime has ever been imposed on any other group of law-abiding former felons who have fully served the sentence for the crime they committed years earlier. This "registry regime" raises an inference of animus at least as strong as in any of the four cases in which the Court sustained such claims, and the explanation that the laws are justified by the clearly valid purpose of reducing the incidence of sexual offending does not survive the scrutiny of scientific studies which find the registry ineffective and often counterproductive. Nor does the fact that many sexual offenses are never reported to law enforcement authorities cast doubt on the validity of those studies or on the legal or policy analyses that employ them. Much of the registry regime must therefore fall under an Anti-Animus principle.

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[2] Romer v. Evans, 517 U.S. 620, 632, 635 (1996).

[3] *Id.* at 635.

INTRODUCTION

For the past three decades public policies aimed at suppressing criminal sexual conduct have focused particularly on preventing re-offending by those released from custody after having already been convicted and punished for a sexual offense.[4] Its central feature is the sex offender registry. The registration requirement applies to a broad range of offenses: rape, of course, but also non-penetrative sexual contact in various forms, including unconsented touchings, a host of non-contact offenses (such as voyeurism, indecent exposure, and possession of sexualized pictures of minors) and sometimes nonsexual offenses that a court concludes were committed with a sexual motive.[5] All states, encouraged by federal law, require those convicted of the

[4] Allegra M McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. LAW REV. 71 (2014).
[5] Alissa R. Ackerman et al., *Who are the people in your neighborhood? A descriptive analysis of individuals on public sex offender registries*, 34 INT. J. LAW PSYCHIATRY 149–159 (2011); Andrew J. Harris, Jill S. Levenson & Alissa R. Ackerman, *Registered Sex Offenders in the United States: Behind the Numbers*, 60 CRIME DELINQUENCY 3–33 (2014).

covered offenses to register in person at least annually but as often as monthly.[6] In some states the registration obligation continues for life; in other states it may end after ten or 20 years, but only for some registrants.[7] As of December, 2018, there were nearly a million Americans covered by the registration system.[8] As detailed below in Part I, the registration requirement generally triggers other consequences imposing serious burdens on those reached by it, including restrictions on where they may live, go, or work.

Most of those additional burdens did not yet exist (or were not part of the record) when *Smith v. Doe,* 538U.S. 84 (2003) rejected a claim that Alaska violated the Constitution's *ex post facto* clause by applying its new enacted registry law to those convicted before its enactment. The Court concluded the *ex post facto* clause did not apply because the registry was a civil regulation reasonably designed to reduce sexual offending in light of the "frightening and high" re-offense rates of those convicted of sexual crimes. The Court's dramatic but erroneous characterization of this re-offense risk reverberated through the cases that followed over the next decade, underpinning a series of decisions in state and federal courts turning back constitutional

[6] Federal law requires registrants to appear in person to confirm the continued accuracy of registration information annually, semi-annually, or quarterly, depending upon the offense triggering the registration obligation. 34 U.S.C. § 20918. Homeless registrants may be required to reregister much more often. E.g., Calif. Penal Code § 290.011 requires "transients" to reregister every 30 days. Registration obligations arise from a combination of federal and state laws. Federal law requires states to enact sex offender registration laws that meet specified minimum federal standards to avoid penalties in federal funding for law enforcement activities, but most states have chosen to be non-compliant either to save money or because they do not agree with the required federal policy. LISA N SACCO, *Federal Involvement in Sex Offender Registration and Notification: Overview and Issues for Congress, In Brief* 15; Jennifer N Wang, *Paying the Piper: The Cost of Compliance with the Federal Sex Offender Registration and Notification Act*, 59 N. Y. LAW SCH. LAW REV. (2014), published on line at https://digitalcommons.nyls.edu/nyls_law_review/vol59/iss4/4/. Federal law also imposes registration requirements directly on registrants, but provides no federal registration system. Compliance therefore requires registration in the relevant state, which can present difficulties for registrants when federal rules require registrations that their state law does not. See, e.g., Willman v. United States, 972 F.3d 819 (6th Cir. 2020); Dep't of Pub. Safety & Corr. Servs. v. Doe, 94 A.3d 791 (Md. 2014).

[7] Collateral Consequences Resource Center, *50-State Chart on Relief from Sex Offender Registration* (2019), https://ccresourcecenter.org/2019/11/21/updated-50-state-chart-on-relief-from-sex-offender-registration/ (last visited Jul 23, 2020); Westlaw, *50 State Survey of SORA Laws* (2018).

[8] National Center for Missing and Exploited Children, *Registered Sex Offenders in the United States*, REGISTERED SEX OFFENDERS IN THE UNITED STATES AND ITS TERRITORIES PER 100,000 POPULATION (2019), https://web.archive.org/web/20190301234132/http:/www.missingkids.org/content/dam/pdfs/SOR%20Map%20with%20Explanation_10_2018.pdf (last visited Aug 5, 2020).

objections to the registry.[9] But later, and especially after social science scholarship increasingly established both the Court's error, and the very limited or nonexistent contribution to public safety provided by the registry and the additional restrictions triggered by it (the "registry regime"), the tide began to turn. Several state and federal courts concluded that at least parts of the registry regime do constitute punishment, thus barring their retroactive application. These decisions have typically relied in part on social science evidence that the registry regime does not advance public safety, leading to the conclusion that it therefore serves no non-punitive purpose and therefore constitutes punishment.[10]

Part I of this article capsules the harsh and sweeping nature of the restrictions the registry regime imposes on people who have already fully served the criminal sentence imposed on them for their offense, and shows why, under a line of cases that stretch from *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) to *United States v Windsor*, 570 U.S. 744 (2013), they give rise to the inference they are based on unconstitutional animus toward those affected by them and are therefore barred as civil regulations if that inference cannot be overcome. Part II reviews the social science that shows why the existing registry regime does not in fact further the important policy purpose (public safety) offered to justify it, leading to the conclusion that the inference of animus cannot be overcome. Finally, Part III examines a recent reply to that social science evidence advanced by two scholars and as well as a distinguished judge, that the studies are flawed because they rely on official crime statistics which necessarily omit the large proportion of sexual offenses that are not reported to law enforcement authorities.[11] It shows that their argument is grounded on a mistaken understanding of the policy question put by the

[9] Ira Mark Ellman & Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495 (2015).
[10] See the cases cited in nn. 42 and 43, *infra.*
[11] Nicholas Scurich & Richard S. John, *The dark figure of sexual recidivism*, 37 BEHAV. SCI. LAW 158–175 (2019), https://onlinelibrary.wiley.com/doi/abs/10.1002/bsl.2400 (last visited Jul 23, 2020); Belleau v. Wall, 811 F.3d 929 (7th Cir. 2016) (Opinion by Posner, J.).

challenge to the registry regime, as well as of the social science evidence its challengers rely upon. It shows why, when the policy question and the social science evidence are properly understood, the case against the registry regime is almost certainly strengthened, not weakened, by the underreporting phenomenon.

I. The Nature and History of Registry Regime Gives Rise to the Inference That It is Based on Unconstitutional Animus.

Registration, or conviction for a registrable offense, triggers a host of additional consequences. Most registrants are publicly identified as "sex offenders" on official state websites, which are in turn linked to a national system maintained by the federal government intended to allow national searches by anyone.[12] These public listings may include the registrants' address and place of employment.[13] State and local laws often restrict where registrants may live,[14] frequently resulting in their becoming homeless[15] and even causing their forced evictions from nursing homes or hospices.[16] In some states registrants who have completed their sentence may nonetheless be kept in prison because they cannot find a place to live that complies with the state's residency restrictions.[17] They may be forced to move on 30

[12] WAYNE LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 55-62 (2009).
[13] *Id.* at 64.
[14] Joanne Savage & Casey Windsor, *Sex offender residence restrictions and sex crimes against children: A comprehensive review*, 43 AGGRESS. VIOLENT BEHAV. 13, 14–15 (2018), https://linkinghub.elsevier.com/retrieve/pii/S1359178918300259 (last visited Jul 5, 2020).
[15] Deanna Cann & Deena Scott, *Sex Offender Residence Restrictions and Homelessness: A Critical Look at South Carolina*, 31 CRIM. JUSTICE POLICY REV. 1119–1135 (2020), http://journals.sagepub.com/doi/10.1177/0887403419862334 (last visited Jul 27, 2020); Savage and Windsor, *supra* note 14; Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 INDIANA LAW J. 37 (2018); In re Taylor, 343 P.3d 867 (Cal. 2015).
[16] Izzy Kapnick, *Sex Offender Fights Removal From Hospice* (2016), https://www.courthousenews.com/sex-offender-fights-removal-from-hospice/ (last visited Aug 5, 2020).
[17] Johnson v. Superintendent, 36 N.Y.3d 187 (2020); Allison Frankel, *Pushed Out and Locked In: The Catch-22 for New York's Disabled, Homeless, Sex-Offender Registrants*, 129 YALE LAW J. FORUM (November 25, 2019), https://www.yalelawjournal.org/forum/pushed-out-and-locked-in.

days' notice, requiring their children to change schools mid-year, because a new park or child care facility opened that is closer to their home than the minimum distance specified by statute.[18] Separate presence restrictions limit where they may go, with the result that a registrant may be unable to enter a public school to meet his child's teacher or watch his child's performance in a play or athletic event. Indeed, in some states a registrant can commit a crime by entering a public park to fetch his own child.[19] State laws bar registrants from a broad range of occupations, including haircutting, plumbing, selling hearing aids, land surveying, and working in a dialysis facility.[20] Federal law bars registrants from housing programs *permanently*.[21] Their access to computers or smartphones are limited or barred altogether for years after their release, and sometimes indefinitely,[22] which further burdens their ability to find employment or maintain social connections.

When a registrant in one state travels to another state, he must register in that state—within a time period that varies from state to state and is often short enough that weekend visits

[18] Vasquez v. Foxx, 895 F.3d 515 (7th Cir., 2018); Case note, *Seventh Circuit Holds Sex Offender Residency Restriction Does Not Violate Ex Post Facto Clause*, 132 HARV. LAW REV. 2352–2359 (2019). The plaintiff's claim that the forced move would disrupt his daughter's schooling did not avoid dismissal for failure to state a claim on any of the constitutional grounds alleged.

[19] People v. Legoo, , 2020 Ill. LEXIS Ill Lexis 543 (2020); Jacob Sullum, *Two Federal Courts Call BS on Banning Sex Offenders From 'Child Safety Zones*, REASON, 2016, https://reason.com/2016/12/05/two-federal-courts-call-bs-on-banning-se/ (last visited Aug 5, 2020).

[20] After prison, a lifetime of economic punishment, , WASHINGTON POST (2019), https://www.washingtonpost.com/graphics/2019/business/jobs-after-prison-rhode-island-recently-occupational-licensing/ (last visited Jul 27, 2020); Matt Mellema, *Several states ban people in the registry from a bizarre list of jobs.*, SLATE 3 (2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/several_states_ban_people_in_the_sex_offender_registry_from_a_bizarre_list.html; Nerbovig, Ashley, *You Served Your Time. Now You're Told You Can't Cut Hair.*, THE MARSHALL PROJECT (2018), https://www.themarshallproject.org/2018/07/10/license-to-clip (last visited Jul 27, 2020).

[21] 42 U.S.C. § 13663 (2018); 24 C.F.R. §§ 5.856, 960.204(a)(4), 982.553(a)(2) (2018). See also Corinne A Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 UNIV. TOLEDO LAW REV. 545–594, 546 (2005); David Thacher, *The Rise of Criminal Background Screening in Rental Housing: The Rise of Criminal Background Screening in Rental Housing*, 33 LAW SOC. INQ. 5–30, 7, 12–13 (2008), http://doi.wiley.com/10.1111/j.1747-4469.2008.00092.x (last visited Jul 30, 2020).

[22] Jacob Hutt, *Offline: Challenging Internet And Social Media Bans For Individuals On Supervision For Sex Offenses*, 43 N. Y. UNIV. REV. LAW SOC. CHANGE 663 (2019).

can trigger the registration obligation.[23] Simple vacation trips, or even commutes across state lines, can thus become traps for the unwary who inadvertently commit registration offenses that carry the potential for significant prison sentences. Some states routinely require registrants to wear ankle bracelets enabling round-the-clock location monitoring, sometimes for life.[24] Others require the driver's license of registrants to contain a stamp identifying them as sex offenders.[25] The passport of any registrant convicted of an offense involving a minor (including non-contact offenses such as viewing explicit pictures of anyone under 18) must contain a notation identifying him as a sex offender, part of a broader federal program to restrict the international travel of all registrants.[26] Because registrants are denied the right given other citizens to obtain permanent residency status for their family members, their spouse and children who are foreign nationals cannot remain in the United States.[27] One common result is forced separation when registrants cannot follow their evicted family to their foreign home because of the other laws restricting registrants' international travel.[28]

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[23] Shawn M. Rolfe, *When a Sex Offender Comes to Visit: A National Assessment of Travel Restrictions*, 30 CRIM. JUSTICE POLICY REV. 885–905 (2019), http://journals.sagepub.com/doi/10.1177/0887403417742948 (last visited Mar 25, 2021).

[24] Commonwealth v. Feliz, , 119 N.E.3d 700 (Mass. 2018); H.R. v. New Jersey State Parole Bd., 213 A.3d 176 (N.J. 2020).

[25] Carney v. Okla. Dep't of Pub. Safety, 875 F.3d 1347 (2016); Doe v Marshall, , 2018 WL 1321034 (2018).

[26] In addition to the passport stamps, the same laws establish the "Angel Watch" program under which the State Department notifies the destination countries of any planned international travel by any registrants, no matter their offense. The interlocking statutory provisions that combine to produce these results, part of the International Megan's Law, Pub. L. No. 114-119, § 8, 130 Stat. 24 (2016), are codified in various locations as described in Daniel Cull, *International Megan's Law and the Identifier Provision - An Efficacy Analysis*, 17 WASH. UNIV. GLOB. STUD. LAW REV. 181, 185 (2018), https://openscholarship.wustl.edu/law_globalstudies/vol17/iss1/8. See also Jacob Sullum, *Scarlet-Letter Passports Are Unjust and Irrational*, REASON.COM, 2017, https://reason.com/2017/11/01/scarlet-letter-passports-are-unjust-and/ (last visited Mar 12, 2021).

[27] The Adam Walsh Act precludes citizens from petitioning for immediate relative status if they were convicted of a "specified offense against a minor." 8 USC § 1154(a)(1)(A)(viii)(I). An offense against a minor is broadly defined to include "[a]ny conduct that by its nature is a sex offense against a minor." 34 U.S.C. § 20911(7)(I).

[28] Many countries outside of continental Europe refuse admission to anyone with a sex offender passport stamp, or when the U.S. has notified the country of the traveler's sex offense conviction under the Angel Watch program. Registrant International Travel Matrix, , REGISTRANT TRAVEL ACTION GROUP , http://registranttag.org/resources/travel-matrix/ (last visited Mar 12, 2021). For accounts of registrants forced to separate from their families because of these laws, see Welcome to FightAWA – Dedicated to preserving the right of citizens to sponsor their spouse or fiancé into the U.S., https://fightawa.org/ (last visited Mar 12, 2021).

These examples of burdens imposed by law are predictably supplemented by private actions triggered by the identification of registrants on publicized websites as "sex offenders".[29] As noted by the Alaska Supreme Court, "[i]nternet publication of sex offender registration information potentially inflicts grievous harms on sex offenders ranging from public scorn and ostracism to harassment, to difficulty in finding and maintaining employment, to threats of violence and actual violence."[30] Their spouses and children are often ostracized.[31] Their families are more likely to disintegrate, denying them the support important to rehabilitation. Those who try to help them may become targets themselves.[32] Indeed, programs to help released offenders re-integrate into society often exclude them.[33] New crimes becomes more likely when reintegration into civil society as productive citizens becomes more difficult.

The package of burdens imposed by these laws, and the private actions they encourage, is extraordinary in at least two ways. First, no other category of individuals who have completed their criminal sentence, including any term of parole or supervised release, is subject to anything remotely similar. Those once convicted of murder or drug dealing need not usually worry about their registration obligations in every state they enter, or locational bars on where they may go or live, or a stamp on their driver license or passport. And this disparity gets worse as recent criminal justice reforms intended to soften the much smaller group of collateral consequences routinely imposed on former felons typically exclude registrants from their grace. Recent

[29] LOGAN, *supra* note 12.
[30] Doe v. Dep't of Pub. Safety, 444 P.3d 116, 130 (Alaska 2019). See also Doe v. Poritz, 662 A.2d 367, 411 (N.J. 1995); Jill Levenson & Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*, 21 J. CONTEMP. CRIM. JUSTICE 49–66 (2005), http://journals.sagepub.com/doi/10.1177/1043986204271676 (last visited Aug 13, 2020).
[31] Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUSTICE 54–68 (2009), http://link.springer.com/10.1007/s12103-008-9055-x (last visited Jul 27, 2020).
[32] Brandon Stahl, *Well-meaning family takes in sex offender, inciting fear and outrage*, MINNEAPOLIS STAR TRIBUNE, October 1, 2016, at 3, https://www.startribune.com/well-meaning-family-takes-in-sex-offender-inciting-fear-and-outrage/395526731/.
[33] Delancey Street Foundation - To Seek Admission, (2020), http://www.delanceystreetfoundation.org/admission.php (last visited Aug 29, 2020).

examples include reforms that allow other ex-felons to vote[34] or to serve on a jury,[35] but there are others.[36] Second, the American registry regime is an international outlier. Even though many countries maintain sex-offense registries in some form, available to law enforcement personnel, virtually none "permits the prevalent U.S. practice of proactive notification of sex-offense registry information to unlimited community organizations and the general public."[37] After reviewing these practices of other countries, as well as the social science evidence, the Council of the American Law Institute has approved a revision to the Model Penal Code, to be reviewed by the membership in June of 2021, that would eliminate entirely all publicly accessible websites listing "sex offenders", as well as any other forms of general public notification concerning them, and prohibits or limits other collateral consequence currently applied to them alone.

I here refer to those burdened by this registry regime as registrants, whether the burdens in question are triggered by their registration or, as is sometime s true, directly by their prior conviction whether or not they are also listed on the registry. In either case, finite public resources that could be available for other crime control strategies are devoted instead to imposing these unprecedented burdens on them. In 2008 the cost of complying with the then newly enacted federal standards for sex offender registration laws was alone estimated at $59 million in California, $30 million in Florida, and $39 million in Texas, equivalent to $74 million, $37 million, and $49 million in today's dollars,[38] above and beyond the baseline costs these

[34] Florida Statutes Section 98.0751, , 2019 FLORIDA STATUTES (2020), http://www.leg.state.fl.us/statutes/index.cfm?mode=View%20Statutes&SubMenu=1&App_mode=Display_Statute&Search_String=98.0751&URL=0000-0099/0098/Sections/0098.0751.html (last visited Aug 13, 2020).
[35] E.g., Cal. Code of Civil Procedure 203(a)(11) excludes registrants, but not others convicted of a felony who have completed their term of parole or probation, from jury service.
[36] Catherine L Carpenter, *All Except for: Animus That Drives Exclusions in Criminal Justice Reform*, 50 SOUTHWEST. LAW REV. 1–42 (2020).
[37] AMERICAN LAW INSTITUTE, *Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5,* 505-513 (2021). See also Terry Thomas, THE REGISTRATION AND MONITORING OF SEX OFFENDERS: A COMPARATIVE STUDY (2011).
[38] JUSTICE POLICY INSTITUTE, *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 (last visited Aug 29, 2020). Current dollar values calculated using the Bureau of Labor Statistics CPI inflation calculator, CPI Inflation

states already incurred implementing the registry laws they already had in effect. Both the public costs and the private burdens are justified by the premise that registrants pose a distinctively greater threat of sexual offending than do others: if prior offenders commit a large share of sexual offenses, than this regulatory focus on their lives is a more effective strategy for suppressing criminal sexual conduct than other programs government might fund instead. Some policy justification for this selective imposition of serious burdens seems necessary *because* the registry regime is a constellation of *civil* regulations and not punishment. Indeed, the registration regime cannot be justified as punishment for the registrant's sexual offense because its rules do not meet constitutional requirements for imposing punishment, in at least three ways.

First, registry regime rules are often applied to persons whose crimes predate their adoption. This was the case in *Smith v. Doe,* 538 U.S. 84 (2002), in which the Supreme Court upheld the retroactive application of Alaska's newly adopted sex offender registry. But to reach this result *Smith* had to first reject the claim that registration itself constituted punishment, because if it did then its retroactive application would violate the *ex post facto* clause. Alaska prevailed because *Smith* held its registry was a civil regulation, to which the *ex post facto* clause had long been held inapplicable.[39] Second, states and the federal government routinely impose registry regime burdens on individuals on the basis of their conviction in *another* jurisdiction. But if, for example, Texas could require registration as *punishment* for a newly arrived New Yorker who had completed his New York sentence, then it could also add to the New York sentence by sending him to a Texas prison upon arrival if it believed his New York sentence was too short. That is obviously not allowed, which illustrates why such registration requirements are necessarily explained as civil regulations, not as punishment. And finally and most

Calculator, , https://www.bls.gov/data/inflation_calculator.htm (last visited Mar 14, 2021). See also Wang, *supra* note 6.

[39] Calder v. Bull, , 3 U.S. 386 (1798).

fundamentally, punishment is necessarily imposed case by case, following procedures that comply with constitutional Due Process requirements necessary to justify its imposition on the particular individual. The legislature may of course set the range of punishments available to a court to impose on a person duly convicted, as part of each individual adjudication,[40] but it cannot, independently of any judicial process, impose punishment by statute on specified individuals or groups it simply does not like, even if the dislike is understandable.[41]

A state cannot evade the constitutional requirements for imposing punishment by labeling the regulation "civil". Courts can look beyond the label. The test is multi-factor, but the key is whether the legislature in fact intended to punish, or, if not, whether the statutory scheme is nonetheless "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil'".[42] A law's failure to advance any permissible public policy is one indicator of its punitive purpose.[43] And so recently, two federal courts of appeal have held that *Smith* does not control challenges to current registry regime rules that now include burdens going beyond annual registration, because their cumulative impact constitutes punishment that cannot be imposed retroactively.[44] A number of state high courts have reached the same result.[45] Other courts, however, continue to rely on *Smith* to reject challenges to the registry regime, finding them civil regulations not limited by the *ex post facto* clause.[46]

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[40] WAYNE LAFAVE ET AL., CRIMINAL PROCEDURE 1249–1252 (5th ed. 2009).
[41] E.g., U.S. v. Brown, 381 U.S. 437 (1965)
[42] Doe v. Snyder, 834 F.3d 696, 700 (6th Cir. 2016), *cert. den.,* 138 S. Ct. 55.
[43] *Id.* at 703–704.
[44] Doe v. Wasden, 2020 US App LEXIS 38334 (9th Cir. 2020) (reversing trial court dismissal of claims that Idaho registry was punitive and violated *ex post facto* clause); Doe v. Snyder, 834 F.3d 696, 700 (6th Cir. 2016), *cert. den.,* 138 S. Ct. 55 (holding provisions of the Michigan registry law imposed punishment in violation of the *ex post facto* clause).
[45] Doe v. State, 167 N.H. 382, 111 A.3d 1077, 1094-95, 1100 (N.H. 2015); Riley v. N.J. State Parole Bd., 219 N.J. 270, 98 A.3d 544, 558-60 (N.J. 2014); Starkey v. Okla. Dep't of Corr., 2013 OK 43, 305 P.3d 1004, 1025-30 (Okla. 2013); Commonwealth v. Baker, 295 S.W.3d 437, 444 (Ky. 2009); State v. Letalien, 2009 ME 130, 985 A.2d 4, 22-23 (Me. 2009).
[46] E.g., Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016); State v. Yeoman, 236 P.3d 1265 (Idaho 2010); Smith v. Commonwealth, 743 S.E.2d 146 (Va. 2013); Kammerer v. State, 322 P.3d 827 (Wyo. 2014). In addition, one federal circuit concluded that retroactive application of New York's registration amendments to an offender did not violate the ex post facto clause. Doe v. Cuomo, 755 F.3d 105 (2d Cir. 2014).

The challengers' focus on the *ex post facto* question requires them to argue that the registry regime is punishment. But a different way to frame their objection would challenge its validity as a set of *civil* regulations. Success would bar their application prospectively as well as retroactively. When a civil regulation targets and burdens just a small group of individuals, one ought to be able to explain why that targeting furthers the public policy offered to explain its adoption. This contrasts with the burden imposed by punishment following conviction of a crime, which requires no such public policy rationale to explain it. Although punishment may serve utilitarian considerations such as general deterrence, the desire to make the convicted criminal suffer (within the wide boundaries set by the Eighth Amendment's bar on punishment that's "cruel and unusual") is entirely adequate as a constitutional matter. But the state can't target a small group for special burdens just because it wants them to suffer. As the Supreme Court explained years ago in *United States* v. *Moreno*, if "equal protection of the laws means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[47] Targeting a particular group for special burdens requires a rationale that is plausibly connected to a permissible policy purpose.[48]

The *Moreno* principle has not often been invoked. We are far more accustomed to the usual rule that successful Equal Protection or substantive Due Process challenges require a showing that the challenged rule burdens a suspect class or a fundamental (or very important)

[47] United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973).

[48] At the limit, a purportedly civil enactment targeting small groups of people for punishment amounts to a forbidden Bill of Attainder. Some burdens the registry regime places on registrants, such as exclusion from specified vocations, fall squarely within the understood meaning of "punishment" for this purpose. Nixon v. Administrator of General Services, 433 U.S. 425, 474 (1977) (punishment includes "legislative enactment barring designated individuals or groups from participation in specified employments or vocations".) The key question then becomes whether punishment was the legislative purpose. Fleming v. Nestor, 363 U.S. 603 (1960). While the indicators of animus combined with the refusal to take account of evidence that the registry regime does not advance its stated purpose certainly suggests a punitive purpose, the Court has at times applied a demanding standard of proof. *Id.* at 617, 619 ("unmistakable evidence of punitive intent" required). Especially as some important burdens created by the registry regime, such as listing on the public website, may not constitute punishment for Bill of Attainder purposes, claims based on the *Moreno-Romer* line of cases described in the text may be more apt.

constitutional right. *Moreno* stands out because neither prerequisite was present there: the decision struck down a regulation limiting access to food stamps by hippies. But *Moreno* is not a complete outlier. It has had echoes. *City of Cleburne* later made clear that in applying the *Moreno* principle, courts may scrutinize the government's justifications to distinguish real explanations for the challenged rule from pretextual ones. And so *Cleburne* struck down a local zoning ordinance that required special permits for group homes for the intellectually disabled, but not for fraternity houses or hospitals. Because the city's stated concerns about "crowded conditions" and the like could not explain this differing treatment, the Court concluded the real reason was "an irrational prejudice" against the intellectually disabled.[49]

Another label for "irrational prejudice" is "animus", which is the word the Court used in the third case in this line, in which it struck down a state constitutional amendment that barred enactment of anti-discrimination laws protecting gay men and lesbians. No one claimed the state was required to enact such anti-discrimination laws, of course. Indeed, at the time of this 1996 decision, both private and governmental discrimination against homosexuals was common and lawful. But because the "sheer breadth" of the state's constitutional bar on enacting anti-discrimination rules protecting them could not be explained by any legitimate state interests, the Court concluded the initiative was "inexplicable by anything but animus."[50] And animus, at least with respect to civil regulations, is a forbidden legislative purpose. The *Moreno* principle can thus be described as an Anti-Animus principle, as one leading scholar has done.[51]

There's no doubt, as Professor Carpenter has observed, that the Anti-Animus principle is undertheorized.[52] But he makes a persuasive case that it is nonetheless the best explanation not

[49] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448–450 (1985).
[50] Romer v. Evans, , 517 U.S. 620, 635 (1996).
[51] Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUPREME COURT REV. 183–286 (2014), https://www.journals.uchicago.edu/doi/10.1086/676640 (last visited Mar 13, 2021).
[52] *Id.* at 204.

only for *Moreno, Cleburne,* and *Romer*, but for also the Court's later decision in *United States v Windsor*, 570 U.S. 744 (2013). *Windsor* held the federal government could not refuse to recognize a same-sex marriage that New York, the couple's home state, treated as valid. The Court reached that result without holding sexual orientation to be a suspect class, nor by relying on a claim that the federal rule unjustifiably burdened a fundamental right to marry. Nor did it say the federal government may never decline to recognize as valid for federal law purposes a marriage concededly valid under the law of the spouses' home state. It sometimes can.[53] The opinion's avoidance of these more familiar doctrines has led some critics to see it as a muddle.[54] But as Carpenter explains,[55] one thing all the *Windsor* justices agreed upon was that a law driven by animus denies the Equal Protection to those it targets. Where they differed was on whether such animus was in fact shown in *Windsor.* A majority concluded it was, relying especially on *Romer*.[56] We can also look to *Romer* along with *Windsor* for guidance in identifying laws motivated by forbidden animus.

The laws in both *Windsor* and *Romer* had two features the Court found important. The first was the imposition of "discriminations of an unusual character" on an unpopular group.[57] Such unusual tactics invite suspicion.[58] The unusual feature of *Romer* was its erecting a barrier to legislative relief applicable only to one group. In *Windsor* it was the law's singular departure from the strong tradition of federal deference to state policies in domestic matters. The second important feature is the broad scope of the questioned law. *Romer* involved a state constitutional

[53] E.g., as *Windsor* itself observed, 570 U.S. at 765, federal immigration law does not recognize marriages "entered into for the purpose of procuring an alien's admission [to the United States] as an immigrant" despite the fact that the marriage is valid under state-law, which does not ordinarily consider the spouses' reason for marrying relevant to recognizing their marriage's validity. 8 U.S.C. §1186a(b)(1) (2006 ed. and Supp. V).
[54] See articles collected by Carpenter, *id.* at 190, n.8. I freely borrow from Professor Carpenter's analysis of the anti-animus principle in these paragraphs.
[55] *Id.* at 189.
[56] 570 U.S. at 768, 770.
[57] *Windsor*, 570 U.S. at 744, 768, quoting *Romer*.
[58] As Carpenter observes, an "extraordinary and unprecedented act requires an extraordinary and unprecedented justification apart from the self-justifying desire to demean or injure a stigmatized class of people." Carpenter, *supra* note 49 at 217.

amendment that worked a "sweeping and comprehensive change in the legal status" of the narrow group affected by it.[59] The Court detailed dozens of state laws, local ordinances, regulations, and executive actions revoked by the challenged amendment.[60] The law at issue in *Windsor* excised same-sex couples in one fell-swoop from more than a thousand federal statutes and regulations that made marital status relevant to the widely varying questions with which they dealt.[61] It becomes difficult to discern a common thread of public policy tying together the broad swath of issues addressed by such sweeping enactment, other than the intent to harm the small group it burdens. The registry regime of course presents both features. The sweep of rules is breathtakingly broad, and includes numerous burdens never before imposed on any other group of people not currently under the supervision of the criminal justice system.

Sweeping measures imposing an unusually broad array of burdens exclusively on a small and unpopular group ought to raise an inference of animus. Perhaps one could explain away the inference by reference to a permissible public purpose. But explanation is needed. The point is to distinguish laws enacted for a broad public purpose that justifies "the incidental disadvantages they impose on certain persons," and laws that have "the peculiar property of imposing a broad and undifferentiated disability on a single named group".[62] As *Romer* concludes, laws of the second kind "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected."[63] The more sweeping the burdens imposed, and the narrower the targeted group, the more closely one should examine the state's asserted purpose for the law. In both *Romer* and *Windsor* a single law burdened the targeted group across a broad range of contexts. For registrants, the burden comes from the cumulative impact of many laws—

[59] 517 U.S. at 627.
[60] *Id.*
[61] 570 U.S. at 765.
[62] Romer v. Evans, 517 U.S. 620, 632, 635 (1996).
[63] *Id.* at 635.

federal, state, and local—that together impose a startlingly broad set of harms on their common target. There is no reason why the inference of animus should be less in that case. To the contrary, it is if anything strengthened by this piling on, as new restrictions, new methods of public shaming, new harms are added year after year, jurisdiction after jurisdiction.

The history of these laws is also suggestive. As construction of the registry regime began in the 1990's, the narrative surrounding the adoption of laws about sexual offending changed. It became personal, as Logan has noted.[64] Many of the new laws, both federal and state, were named after a victim in one or another well-publicized case, typically involving a particularly disturbing fact pattern—abduction and sexual abuse of a child by a stranger (Megan's Law, Jacob Wetterling Act, Adam Walsh Act are perhaps the best-known examples).[65] Though such cases are atypical (just two percent of reported sexual offenses against children under twelve are committed by strangers, much less strangers who abduct a child[66]) they nevertheless became the understood context in any discussion of them. So strangers committing sexual assaults on children became the image of the laws' intended target even though hardly anyone affected by

[64] LOGAN, *supra* note 12 at 93–94.
[65] *Id.* at 93–94. See also Irina Fanarraga, *What's in a Name? An Empirical Analysis of Apostrophe Laws*, 21 CRIM. JUSTICE 1–30 (2020).
[66]For minors 12 to 17, the comparable figure in 4%. Puzzanchera, C., Smith, J., and Kang, W., *Easy Access to NIBRS Victims, 2016: Victims of Violence* (2018), available at https://www.ojjdp.gov/ojstatbb/ezanibrsdv/. These figures, and all others referenced to this source, are derived from the online data extractor provided by the National Incident Based Reporting System at https://www.ojjdp.gov/ojstatbb/ezanibrsdv/asp/selection_vov.asp. This system collects incidents known to local law enforcement agencies in 38 cooperating states and the District of Columbia and reported by them to the FBI. The most recent available data available through this tool on August 5, 2020, when the statistics provided here were obtained, was for incidents occurring in 2016. The sexual offense data reported in this article were obtained by using the tool to compile all incidents of "rape, sodomy, sexual assault with object, and fondling" broken down by age and the relationship of victim and perpetrator. (These four are the only sexual offense categories separately tabulated; other registerable offenses, such as possession of sexualized pictures of minors or indecent exposure, are aggregated in other categories such as "public order" offenses.) The percentages are calculated excluding from the denominator incidents in which the relationship was unknown.
Murder victims would be tabulated under murder as the most serious charge, and omitted here (even if there was also a sexual offense), but the total number of murders are very small. There were 211 murders of victims under 12 for the entire year, compared to 22,959 sexual offenses. Seven percent of the murders were committed by strangers. There were 174 murders of victims 12 to 17 compared to 28,430 sexual offenses. In this case the relationship was unknown in a large portion (78 of the 174), but the perpetrator was a stranger in 18 percent of the cases in which the relation was known. The victim was a male in 135 of the 174 murders, perhaps suggesting that many were related to gang violence or drugs rather than sexual offending. For victims under 12, 109 of the 211 were males.

these laws had ever committed such a crime. It is therefore not surprising that discussions of the new registry regime laws took on a personal tone not seen in earlier debates over sexual offense laws adopted in prior decades. Registrants were now described as "beasts", "monsters", "animals", and the "human equivalent of toxic waste".[67] The mayor of one city explained it had adopted residency restrictions for registrants that went beyond any imposed by state law in order "to do anything we could to make sex offenders uncomfortable".[68] The popular belief, adopted by legislators, is that all those reached by the registry are threats to commit the horrific stranger attacks against children memorialized by the laws' names, even if some had not yet been caught at it.[69]

What's important here is that registrants were no longer considered as individuals but as members of a despised group all damned by fundamental and probably permanent character flaws that made them likely to engage in evil conduct. The very label "sex offender" applied to registrants encourages that understanding. People may be disinclined to support treatment for those convicted of sex crimes in the belief that it won't work because they cannot be reformed.[70] There's some reason to think that educating people about the facts—that sexual offenders are not all doomed to offend again, that they can reform—might lead to less punitive attitudes. But providing accurate information is not necessarily enough to eliminate animus. For example, one study found potential jurors were twice as likely to commit a felon labelled "sexually violent predator" to an indefinite term of confinement, as compared to others with the identical criminal

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[67] LOGAN, *supra* note 12 at 95.
[68] Dan Boyd, *Two sex offender bills supported by Keller contained differences*, ALBUQUERQUE JOURNAL, November 2, 2017, https://www.abqjournal.com/1087241/two-sex-offender-bills-supported-by-keller-contained-differences.html (last visited Mar 20, 2021). The documentary film *Untouchable*, available for streaming on Amazon Prime Movies, includes interviews with the figure behind Florida's very harsh registry regime laws, who also suggests his goal was to make life for Florida registrants so difficult that they would leave.
[69] Kelly M. Socia & Andrew J. Harris, *Evaluating public perceptions of the risk presented by registered sex offenders: Evidence of crime control theater?*, 22 PSYCHOL. PUBLIC POLICY LAW 375–385 (2016), http://doi.apa.org/getdoi.cfm?doi=10.1037/law0000081 (last visited Jul 22, 2020).
[70] Christina Mancini & Kristen Budd, *Is the Public Convinced That "Nothing Works?": Predictors of Treatment Support for Sex Offenders Among Americans*, 62 CRIME DELINQUENCY 777–799 (2016).

records and risk assessment reports who were not so labeled. It was not that the jurors refused to believe the risk assessment reports, because they agreed the labelled offenders were no more dangerous or likely to reoffend than the unlabeled ones. Nor did demographic variables predict these differing judgments about whether to commit or parole. What was different is that for the labeled offenders, jurors reported a greater desire to "get revenge" and to "make the offender pay".[71]

What such studies suggest is that the public cares less about the practical usefulness or efficacy of sexual offender crime control measures because it believes these laws' burdens fall only on evil people. So even if they are not effective, they are still deserved. The official sex offender label is easily seen as certifying their evil status, thus justifying such attitudes. So it's not at all surprising that surveys find most people support imposing measures like websites publicizing "sexual offender" status, restrictions on where registrants can live or go, and even their castration, without regard to whether there is any evidence such policies reduce sexual offending.[72]

But of course, the label "sex offender" is *not* a psychological diagnosis. It is a legal classification triggered by a single conviction for any crime on a long list that ranges in both nature and seriousness. The evidence that animus toward registrants lies behind the laws that burden them should require scrutiny of whether the burdens in fact further the valid policy purpose offered to explain them. That scrutiny requires a look behind the "sex offender" label, to ask both if most so labeled in fact present a special risk of harm to others, and whether the burdens selectively imposed on them actually suppress sexual offending. Nor, as Carpenter

[71] Nicholas Scurich, Jennifer Gongola & Daniel A. Krauss, *The biasing effect of the "sexually violent predator" label on legal decisions*, 47 INT. J. LAW PSYCHIATRY 109–114 (2016), https://linkinghub.elsevier.com/retrieve/pii/S0160252716301066 (last visited Apr 26, 2021)
[72] Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANAL. SOC. ISSUES PUBLIC POLICY 137–161, 150 (2007), http://doi.wiley.com/10.1111/j.1530-2415.2007.00119.x (last visited Mar 19, 2021).

points out,[73] can that inquiry ignore advances in our understanding of the burdened group. The forced expulsion of lepers to separate colonies was once thought necessary to protect the public from a disfiguring disease that evoked fear and disgust, but today that explanation would not work. Given what we now know about the disease's transmission and treatment with antibiotics[74] exiling lepers from civil society could today be explained only by "irrational prejudice"—animus.

Registrants are today's lepers. The intuition that they threaten grave harm which the registry regime can prevent might have once been plausible, but no longer. It must now yield to the facts established by several decades of studies. Part II capsules that work.

II. Studies Show That Most Registrants Are Unlikely to Reoffend, and that the Registry Regime Contributes Little or Nothing to Reducing Re-offense Risk Anyway.

Three groups of studies have established the registry regime's limited value as a strategy for reducing sexual offending. One group of relevant studies focuses on two particular burdens imposed by these laws: the public identification of registrants as "sex offenders" through tools likes websites and mailings to neighbors, and locational restrictions on where registrants may live or be present. Despite the contrary intuitions of some public officials, the studies find these measures contribute little or nothing to reducing the prevalence of sexual offending.[75] Their

[73] Carpenter, *supra* note 49 at 226.
[74] Natasha Frost, *Quarantined for Life: The Tragic History of US Leprosy Colonies*, HISTORY , https://www.history.com/news/leprosy-colonies-us-quarantine (last visited Mar 25, 2021); Leper colony, , WIKIPEDIA (2021), https://en.wikipedia.org/w/index.php?title=Leper_colony&oldid=1005596663 (last visited Mar 25, 2021).
[75] Amanda Y. Agan, *Sex Offender Registries: Fear without Function?*, 54 J. LAW ECON. 207–239 (2011), https://www.journals.uchicago.edu/doi/10.1086/658483 (last visited Jul 27, 2020); Jeff A. Bouffard & LaQuana N. Askew, *Time-Series Analyses of the Impact of Sex Offender Registration and Notification Law Implementation and Subsequent Modifications on Rates of Sexual Offenses*, 65 CRIME DELINQUENCY 1483–1512 (2019), http://journals.sagepub.com/doi/10.1177/0011128717722010 (last visited Dec 14, 2019); SARAH NAPIER ET AL., *What impact do public sex offender registries have on community safety?* 20 (2018); Savage and Windsor, *supra* note 14; Kristen Zgoba, Bonita M. Veysey & Melissa Dalessandro, *An Analysis of the Effectiveness of Community Notification and Registration: Do the Best Intentions Predict the Best Practices?*, 27 JUSTICE Q. 667–691 (2010), http://www.tandfonline.com/doi/abs/10.1080/07418820903357673 (last visited Jul 27, 2020).

findings do not depend on any assumptions concerning the rate at which registrants commit a new sexual offense after release. Most show simply that the offense rate, whatever it is, is no different with these laws than without them. One study, by the Minnesota Department of Corrections,[76] adopted a different methodology. Minnesota had no statewide law imposing locational residency restrictions on registrants; the study's purpose was to assess whether it should. It reviewed the records for every one of the 224 individuals convicted of a sex offense who was released from a Minnesota prison between 1990 and 2002 and then incarcerated again by 2006 for a new sex offense. It examined the facts of each of the 224 re-offenses to determine how many might have been prevented had Minnesota barred registrants from living within a mile of a school, park, playground, daycare center, or "other location where children are known to congregate." The conclusion: there was not even a single case in which such locational restrictions would have prevented the perpetrator's contact with a juvenile victim.[77]

A second group of studies tells us that even if laws targeting released registrants did have some effect on their re-offense rates, they would not have much effect of sexual offending generally. That's because 95% or more of all those arrested for sexual offenses are first offenders necessarily unaffected by the registry regime rules (and this was the case before there was any registry regime).[78] The registry regime's apparent premise—that a large share of sexual offenses are committed by a small group who offend again after completing a sentence for an earlier sexual conviction—is thus mistaken.[79] One can't have much impact on the overall incidence of

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[76] ST MINNESOTA DEPT OF CORRECTIONS, *Residential Proximity & Sex Offense Recidivism in Minnesota* 30 (2007), www.doc.state.mn.us.
[77] *Id.* at 23–24.
[78] Sarah W. Craun, Catherine A. Simmons & Kristen Reeves, *Percentage of Named Offenders on the Registry at the Time of the Assault: Reports From Sexual Assault Survivors*, 17 VIOLENCE WOMEN 1374–1382 (2011), http://journals.sagepub.com/doi/10.1177/1077801211428604 (last visited Jul 28, 2020); Jeffrey C. Sandler, Naomi J. Freeman & Kelly M. Socia, *Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law.*, 14 PSYCHOL. PUBLIC POLICY LAW 284–302 (2008), http://doi.apa.org/getdoi.cfm?doi=10.1037/a0013881 (last visited Nov 19, 2018).
[79] ANDRA TETEN THARP, *Key Findings: Rethinking Serial Perpetration* (2015), http://nsvrc.org/publications/nsvrc-publications-research-briefs/key-findings-rethinking-serial-perpetration. One arena in which this debate has taken place is the college campus. An analysis of the two largest longitudinal studies of college men's sexual violence,

sexual offenses by concentrating efforts on a group that accounts for less than five percent of them. The law's focus on registrants recalls the classic story of the fellow who tries to help a drunk searching for his keys under a streetlamp. After a while he asks the drunk if he's sure this is where he lost them. "Oh no", is the reply. "I lost them in the park. But this where the light is."[80] If we want to make a real dent in sexual offending rates, we must bring light to the park. Searching harder under the streetlamp won't help. And that is true no matter the overall rate of sexual offending if most offenses are in the park.

And finally, a third group of studies helps explain why prior offenders constitute such a small proportion of those arrested for sexual offenses: their overall re-offense rates are far lower than the Supreme Court, as well as other courts and public officials, have often assumed.[81] There's no doubt that some registrants are more likely than other felons to commit a sexual offense, but in fact most of them never do. This is true whether "re-offense" is defined as a new arrest for a sexual offense, or a new conviction for one. A study by the Criminal Justice Planning and Policy Division of the State of Connecticut reports results typical of such state-conducted studies.[82] The authors tracked all 14,398 men released from Connecticut prisons in 2005, and broke out the 746 among them who had ever served a sentence for a sexual offense (whether or not it was the offense that led to their most recent incarceration). Twenty-seven of these 746

based on interviews with them upon arrival in college and during the four subsequent spring semesters, found that 10.8% of the men reported behavior that met the FBI definition of rape, before or during their college years, but that relatively few repeated the offense in a later year Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATR. 1148 (2015), http://archpedi.jamanetwork.com/article.aspx?doi=10.1001/jamapediatrics.2015.0707 (last visited Aug 10, 2020).. In other words, the campus problem is not so much that a few college men are repeat sexual offenders, as that a disturbingly large percentage have offended at least once. (It is also worth noting that women of college age who are not in college are more likely than college women to suffer sexual assault AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION 154–169 (2020); SORI SINOZICH & LYNN LANGTON, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013* 20 (2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf..

[80] Streetlight effect, , WIKIPEDIA (2020), https://en.wikipedia.org/w/index.php?title=Streetlight_effect&oldid=970822782 (last visited Aug 12, 2020).

[81] Ellman and Ellman, *supra* note 9.

[82] IVAN KUZYK, *Recidivism among sex offenders in Connecticut* (2012).

(3.6%) were arrested and charged with a new sexual offense during the five-year follow-up period, of whom 20 (2.7% of 746) were convicted of a new sexual offense.[83] Of the 13,652 released prisoners with no sexual offense history, 259 (1.9%)[84] were arrested for a sexual offense within five years of release, and 114 (0.8%)[85] were convicted of one.

Similar results were found in a federal study that followed for nine years a sample of men released in 2004 from state prisons in 30 states (accounting for 77% of all those released from state prisons).[86] It found that 7.7% of those who had been incarcerated for rape or sexual assault were arrested for new rape or sexual assault by the end of the nine year period, as compared to the 3.4% rape and sexual assault arrest rate for those whose most serious prior offense was robbery, a 2.5% rate for those whose most serious prior offense was a property crime, and a 2.3% rate for all categories of released prisoners combined, excluding any with a sexual offense convictions before the new arrest,[87] Other studies also find a sexual offense rate around two percent for released felons with no prior sexual offense history.[88]

So while, not surprisingly, those once convicted of a sexual offense are on average more likely to be arrested for one than those convicted of only nonsexual offenses, the difference is not as great as many expect. If more than 90 percent of those burdened by the rules would not reoffend in any event, policymakers ought to reconsider whether the funds spent on their implementation might be better redirected to other strategies. Such redirection is also suggested by the companion finding of the federal study: released felons with no sexual offense history

[83] *Id.* at 29.
[84] *Id*.
[85] *Id.*
[86] Mariel Alper, *Recidivism of Sex Ofenders Released from State Prison: A 9-Year Follow-Up (2005-14)* 35 (2019).
[87] *Id.* at 4, Table 2.
[88] Rachel E. Kahn et al., *Release from the Sex Offender Label*, 46 ARCH. SEX. BEHAV. 861–864 (2017), http://link.springer.com/10.1007/s10508-017-0972-y (last visited Jul 29, 2020).

accounted for 84.4% of all the rape or sexual assault arrests of released prisoners over the nine-year follow-up period it considered[89] (because, of course, there were so many more of them).[90]

It is also important to note a feature common to these and many other re-offense rate studies: they survey new sexual offenses committed by individuals *released from prison*. That means they almost certainly overestimate the re-offense rate of all those convicted of sexual offense because those released from prison are a higher-risk subset of all those convicted of a registerable sex offense. Not everyone convicted of a sexual offense is sent to prison. Some are instead sent to a county jail (because they are given short sentences), or are placed on probation. But repeat offenders, or those regarded by prosecutors or judges as higher risk, are much less likely to receive such relatively lenient treatment. They are more likely to go to prison. This is true for felons generally, not just sexual offenders.[91] That means those with prior offenses, as compared to first offenders, are over-represented in samples of released prisoners. And we know repeat offenders are more likely to offend again, than are those with only one offense. That point is illustrated by the federal study itself, which reports that the smaller group of first offenders

[89] Alper, *supra* note 86 at 11, Table 9. There are of course many more released felons with no conviction for a sexual offense than those with one.

[90] Many arrested for a sexual offense will have had no prior convictions of any kind, much less prison sentences for a sexual offense. There is thus no inconsistency between studies that find 95% of all those arrested for a sexual offense have no prior sexual offense conviction, and this study's finding that 84% of *released prisoners* arrested for a sexual offense had no prior sexual offense conviction. One may also note that the five-year sexual offense re-arrest rate reported in the federal 30-state study was 5.9% (this figure is derived by adding the percentages in years 1 through 5 shown in Table 5 of Alper, supra note 45), higher than the 3.6% rate found in the Connecticut study. A likely reason is that the samples are different: the Connecticut study reports the rate across all persons released from prison after *any* sexual offense, while the federal study is reporting on persons released from prison who had convictions for rape or sexual assault. We can also compare these data to those in a frequently cited study of adult males convicted of "violent" sexual offenses and released in 1994 from a different sample of prisons in fifteen states, PATRICK A. LANGAN, SCHMITT, ERICA L., & DUROSE, MATTHEW R., *Recidivism of Sex Offenders Released From Prison in 1994* (2003). It found that after three years 5.3% had been arrested for a new sexual offense, which compares to 4.4% after three years in the 30-state study (*id*. at note 51 at 26). Here again, the likely explanation for the different rates is differences in the samples.

[91] Leon Neyfakh, *Why Do So Many Ex-Cons End Up Back in Prison? Maybe They Don't, Says a Provocative New Study.*, SLATE MAGAZINE (2015), https://slate.com/news-and-politics/2015/10/why-do-so-many-prisoners-end-up-back-in-prison-a-new-study-says-maybe-they-dont.html (last visited Aug 4, 2020); William Rhodes et al., *Following Incarceration, Most Released Offenders Never Return to Prison*, 62 CRIME DELINQUENCY 1003–1025 (2016), http://journals.sagepub.com/doi/10.1177/0011128714549655 (last visited Jul 30, 2020).

(those with only one sexual offense) among those in the study had a three-year sexual re-offense rate of 3.3%, much lower than the 5.3% overall rate the study found [92].

The distinction between first offenders and repeat offenders is an example of a difficulty that plagues many discussions of "sex offender" re-offense rates. In focusing on an overall "sex offender" re-offense rate, they ignore the heterogeneity of the population reached by the registry regime, and for that reason, one guesses, they also give little attention to the characteristics of the particular population sample for which a re-offense rate is reported in any given study. Their implicit assumption is that the sample's characteristics do not matter very much because all those reached by the registry regime share a common heightened re-offense risk. But they do not. Two easy examples of low-risk registrant populations are female offenders, and males whose only known sexual offense is possession of illicit images of minors. Because there are so few repeat offenders in both groups, it is a difficult challenge for risk assessment experts to sample them in sufficient numbers to identify distinctive traits necessary to develop statistically valid tools for predicting those in either group most likely to offend again.[93] Re-offense risk also varies among men released after conviction for ordinary contact sexual offenses, and widely used and easily administered actuarial tools can measure individual risk.[94] There is, in other words, no basis for treating all registrants as a high risk when a large proportion is not and we can tell who they are.

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[92] LANGAN, SCHMITT, ERICA L., AND DUROSE, MATTHEW R., *supra* note 87 at 26.

[93] Thomas H. Cohen, *Predicting Sex Offender Recidivism: Using the Federal Post Conviction Risk Assessment Instrument to Assess the Likelihood of Recidivism Among Federal Sex Offenders: Predicting Sex Offender Recidivism*, 15 J. EMPIR. LEG. STUD. 456–481 (2018), http://doi.wiley.com/10.1111/jels.12184 (last visited May 26, 2020); Ethan Marshall et al., *The Static-99R Is Not Valid For Women: Predictive Validity in 739 Females Who Have Sexually Offended*, SEX. ABUSE 107906322094030 (2020), http://journals.sagepub.com/doi/10.1177/1079063220940303 (last visited Jul 28, 2020).

[94] R. Karl Hanson et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J. INTERPERS. VIOLENCE 2792–2813 (2014), http://journals.sagepub.com/doi/10.1177/0886260514526062 (last visited Nov 12, 2019); R. Karl Hanson et al., *Reductions in risk based on time offense-free in the community: Once a sexual offender, not always a sexual offender.*, 24 PSYCHOL. PUBLIC POLICY LAW 48–63 (2018), http://doi.apa.org/getdoi.cfm?doi=10.1037/law0000135 (last visited Nov 12, 2019); Seung C Lee, *The Predictive Validity of Static-99R for Sexual Offenders in California:* 27 (2016).

There's also a second important source of variation in registrant re-offense risk that's missed by studies that look only at overall rates for all registrants: the re-offense risk for registrants, just as for all others convicted of a crime,[95] declines rapidly over time at liberty without re-offending. The likelihood that someone released from custody after completing a sentence for a sexual offense will be arrested again for another one is approximately halved for every five years at liberty without a new arrest for a sexual offense.[96] It is not possible to formulate a sensible policy concerning the post-release treatment of sexual offenders, like other offenders, without taking this critical fact into account.

So those convicted of sexual offenses vary considerably in the re-offense risk they present at the time of their release from custody, and then again during the years that follow. These two phenomena—varying risk at the time of release, and reduction in risk with time arrest-free in the community—interact. The lower the initial risk posed by a group of offenders, the sooner after release the risk approaches zero for those who remain arrest-free. That pattern is shown by studies employing the most widely used and validated actuarial tool measuring the re-offense risk for most adult male sexual offenders, the Static-99R.[97]

The importance of these findings is illustrated by a recent California study reporting the distribution of measured risk in a random sample of 371 adult male California registrants released from prison during 2006—2007.[98] Based on their Static-99R scores, the study divided the released registrants into five risk categories, from "Well Above Average" to "Very Low".

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[95] Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327–359 (2009); Megan C. Kurlychek, Shawn D. Bushway & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns-Evidence from the Essex County Convicted Felon Study: Long-Term Crime Desistance and Recidivism*, 50 CRIMINOLOGY 71–103 (2012).

[96] David Thornton et al., *Estimating Lifetime and Residual Risk for Individuals Who Remain Sexual Offense Free in the Community: Practical Applications*, SEX. ABUSE (2019), http://journals.sagepub.com/doi/10.1177/1079063219871573 (last visited Jul 30, 2020).

[97] Hanson et al., *supra* note 91; Hanson et al., *supra* note 91.

[98] SEUNG LEE ET AL., *The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California* (2018), http://saratso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf.

Only 33 of the 371 (8.8%) were in the "well above average" category, with another 74 (20%) classified above average in re-offense risk. More than 70% of registrants were in the three lowest categories, Average, Below Average, and Very Low. The Average group reaches a two percent re-offense risk before their tenth year at liberty. That means that by then, only 2 percent of those still offense-free after ten years will be arrested for a sexual offense in the future. Ninety-eight percent will not. Their two percent re-offense rate is much lower than the 3.4 percent of robbers in the Connecticut study arrested for rape or sexual assault within nine years of release, and less than the 2.3% rate for all released offenders with no prior sexual offense convictions. The Below Average group reaches this two percent re-offense risk before the fifth year after their release, while the lowest risk group is at 2% lifetime risk at the time of their release.

Even if we look only at the riskiest ten percent of these California registrants who had been sentenced to prison, we find that about two-thirds are never again arrested for a sexual offense. More importantly, by the fifteenth year after their release we pretty much know who the law-abiding two-thirds are, because nearly all those who offend again already have.[99] This is important because the burdens imposed by registry regimes typically continue for life for higher risk registrants, and certainly past fifteen years, despite the well-established finding that re-offense risk declines rapidly over time at liberty without re-offending. And while most registry regimes separate registrants into risk levels, their sorting criteria are usually inconsistent with the applicable social science learning, subjecting registrants to the registry regime for periods unjustified by their risk levels.[100]

These studies explain the scholarly consensus that emerges from the dozens of peer-reviewed articles published over the last two decades: the registry regime is not sensible policy

[99] Hanson et al., *supra* note 91.
[100] Kristin Zgoba et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 SEX. ABUSE J. RES. TREAT. 722–740 (2016), http://journals.sagepub.com/doi/10.1177/1079063215569543 (last visited Jul 29, 2020).

because so many registrants do not present the heightened offense risk assumed by many policymakers, because registrants account for less than five percent of known offenses, and because the regime's common strategies, public identification of registrants as "sex offenders" and restrictions on where they may live and go, are now known ineffective in achieving their goal of reducing sexual offending, and may even risk increasing it.[101] At the same time, there's evidence that broader-focused preventative and rehabilitative strategies would be more effective,[102] and these preventative strategies could be expanded if funds spent on the registry were spent instead on them.

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[101] Factors that reduce the likelihood of reoffending include employment, Megan Denver, Garima Siwach & Shawn D. Bushway, *A New Look at the Employment and Recidivism Relationship Through the Lens of a Criminal Background Check: Criminal Background Checks and Recidivism*, 55 CRIMINOLOGY 174–204 (2017) as well as housing and social and family support, Grant Duwe, *Can circles of support and accountability (CoSA) significantly reduce sexual recidivism? Results from a randomized controlled trial in Minnesota*, 14 J. EXP. CRIMINOL. 463–484 (2018), http://link.springer.com/10.1007/s11292-018-9325-7 (last visited Aug 13, 2020). The registry regime makes them all more difficult to achieve. It is thus not surprising that some studies find the registry regime actually increases rather than reduces re-offending, J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. LAW ECON. 161–206 (2011), https://www.journals.uchicago.edu/doi/10.1086/658485 (last visited Aug 12, 2020).

[102] Primary prevention strategies that keep people from offending in the first place are potentially more effective than focusing exclusively on reoffending, which we have seen accounts for only small proportion of all reported offenses. Though challenging to develop and implement, there's evidence that some do work. Sarah DeGue et al., *A systematic review of primary prevention strategies for sexual violence perpetration*, 19 AGGRESS. VIOLENT BEHAV. 346–362 (2014), https://linkinghub.elsevier.com/retrieve/pii/S1359178914000536 (last visited Aug 21, 2020); Charlene Y. Senn et al., *Efficacy of a Sexual Assault Resistance Program for University Women*, 372 N. ENGL. J. MED. 2326–2335 (2015), http://www.nejm.org/doi/10.1056/NEJMsa1411131 (last visited Aug 25, 2020); Klaus M. Beier et al., *"Just dreaming of them": The Berlin Project for Primary Prevention of Child Sexual Abuse by Juveniles (PPJ)*, 52 CHILD ABUSE NEGL. 1–10 (2016), https://linkinghub.elsevier.com/retrieve/pii/S0145213415004639 (last visited Aug 13, 2020); Gabriela N. Mujal et al., *A Systematic Review of Bystander Interventions for the Prevention of Sexual Violence*, TRAUMA VIOLENCE ABUSE 152483801984958 (2019), http://journals.sagepub.com/doi/10.1177/1524838019849587 (last visited Aug 21, 2020); Linda A. Anderson & Susan C. Whiston, *Sexual Assault Education Programs: A Meta-Analytic Examination of Their Effectiveness*, 29 PSYCHOL. WOMEN Q. 374–388 (2005), http://journals.sagepub.com/doi/10.1111/j.1471-6402.2005.00237.x (last visited May 7, 2021) (college sexual assault education programs had significant average effect sizes on rape attitudes, rape-related attitudes, rape knowledge, behavioral intent, and incidence of sexual assault).And there are also promising prevention strategies to prevent re-offending that do not depend on the registry. E.g., R. Karl Hanson et al., *The Principles of Effective Correctional Treatment Also Apply To Sexual Offenders: A Meta-Analysis*, 36 CRIM. JUSTICE BEHAV. 865–891 (2009), http://journals.sagepub.com/doi/10.1177/0093854809338545 (last visited Aug 14, 2020); Duwe, *supra* note 101; Lisa L. Sample, Brooke N. Cooley & Tusty ten Bensel, *Beyond Circles of Support: "Fearless"—An Open Peer-to-Peer Mutual Support Group for Sex Offense Registrants and Their Family Members*, 62 INT. J. OFFENDER THER. COMP. CRIMINOL. 4257–4277 (2018), http://journals.sagepub.com/doi/10.1177/0306624X18758895 (last visited Aug 13, 2020); Theresa A. Gannon et al., *Does specialized psychological treatment for offending reduce recidivism? A meta-analysis examining staff and program variables as predictors of treatment effectiveness*, 73 CLIN. PSYCHOL. REV. 101752 (2019), https://linkinghub.elsevier.com/retrieve/pii/S0272735818303295 (last visited May 7, 2021) (Treatment was associated with offense-specific and general recidivism reductions; programs with consistent input from a qualified psychologist had best results).

It has thus seemed clear for some time that the burdens the registry regime imposes on those reached by it do not serve the policy purposes offered to justify them, while there are other little-used strategies that may. Yet legislatures continue to enact measures imposing and increasing these burdens. That pattern suggests their adoption arises from the kind of animus that was central to the constitutional defects *Moreno, Romer*, and *Windsor* found in the laws targeting hippies and gay people.

III. The High Rates of Unreported Sexual Offenses Does Not Weaken the Conclusion That the Registry Regime Contributes Little to Preventing Sexual Offending, and May Well Strengthen It.

The victims of crimes do not always report them. Getting an accurate count of crimes that were never reported is obviously difficult. The most common method relies on the National Crime Victimization Survey conducted by the Department of Justice.[103] This self-report survey of a nationally representative sample of households asks individuals aged 12 or over about the details of each victimization they have experienced in the prior six months, including whether they reported it to the police.[104] The percentage of victimizations that respondents say they reported is calculated for each crime category. This is the reporting rate most commonly referenced. The most recent available report, tabulating the results of the 2018 survey, found that only 42.6% of all violent crimes were reported to the police,[105] essentially unchanged from the levels found in the 2016 and 2017 surveys.[106] The reporting rate for rape and sexual assault

[103] A study jointly supported by the National Academy of Sciences and the Bureau of Justice Statistics provides a comprehensive overview of the sources of data on sexual crimes. CANDACE KRUTTSCHNITT, WILLIAM D KALSBEEK & CAROL C HOUSE, *Estimating the Incidence of Rape and Sexual Assault* (National Research Council, 2014).
[104] Eligible household members are interviewed every 6 months for three and a half years, initially in person and later in person or by phone. Crimes that occur with such frequency that a victim cannot distinguish details of individual incidents are called series crimes; the victim is asked about details of the most recent incident.
[105] RACHEL E MORGAN & BARBARA OUDEKERK, *Criminal Victimization, 2018*, U.S. Dept of Justice, Bureau of Justice Statistics, NCJ 253043, at p. 8, Table 5 (2019).
[106] RACHEL E MORGAN & JENNIFER TRUMAN, *Criminal Victimization, 2017*, U.S. Dept of Justice, Bureau of Justice Statistics, NCJ 252472, at p. 7, Table 6 (2018).

bounces around more, almost certainly because of the smaller sample size for this narrower crime category.[107] It was 23 percent in 2016, then 40 percent in 2017, and then back to 25 percent in 2018.

It is thus difficult to get a firm figure for the proportion of sexual offenses that aren't reported to the police, but it seems certain that it's substantial. Nor do we have a firm idea of why victims do not report, although there are many plausible possibilities. These include embarrassment, fear of retaliation, or fear that one's account won't be believed. Surveys that ask the victims why they don't report sometimes yield surprising results: one common response in some surveys is a version of "I didn't think it was important enough".[108] The bottom line is that we know many victims of sexual crimes do not report them, but we are less certain of the precise percentage, or of the relative importance of the various possible reasons why they do not report.

But does the reporting rate matter? Appreciating that sexual offending is more prevalent than indicated by the number of arrests helps heighten our desire to combat it. But doesn't say very much about the best combat strategy. Perhaps it suggests efforts to encourage reporting on the plausible assumption that more reporting would lead to more arrests and then more deterrence. But it doesn't say very much about how the law should deal with those who are

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[107] Sharon L. Lohr, *How Many Sexual Assaults are Reported to Police?*, SHARON LOHR (2018), https://www.sharonlohr.com/blog/2018/9/24/how-many-sexual-assaults-are-reported-to-police (last visited Aug 20, 2020).

[108] That is the explanation offered by 59% of the "victims of nonconsensual sexual contact by physical force or incapacitation" who had not reported the incident, in a 2015 survey of college students conducted for the Association of American Universities David Cantor et al., *AAU Climate Survey on Sexual Assault and Sexual Misconduct (2015) | Association of American Universities (AAU)* Table 6-1 (2015), https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015?id=16525 (last visited Jul 30, 2020).. An equivalent explanation ("not important enough to report") was the common reason for not reporting given by sexual assault victims in a victimization survey of the Canadian population conducted 16 years earlier Sandra Besserer & Catherine Trainor, *Criminal Victimization in Canada, 1999*, 20 27, 12 (2000), https://www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x2000010-eng.pdf?st=3vyWcQ4h., although that was equally true for most other categories of crime considered in that survey. The National Crime Victimization Survey also asks women the reason for not reporting a rape or sexual assault. "Fear of reprisal" was the "most important reason" identified by 17%; "Police would not [or could not] do anything to help was the reason identified by 8%. Only 7% said "not important enough", although 23% said they did not report because it was "a personal matter" Michael Planty et al., *Female Victims of Sexual Violence, 1994-2010* 7, Table 9 (2013), http://doi.apa.org/get-pe-doi.cfm?doi=10.1037/e528212013-001 (last visited Aug 26, 2020).. Varying methodologies, samples, and response rates undoubtedly explain the varying counts SHARON L. LOHR, MEASURING CRIME 97–111 (2019)..

arrested and convicted. It's hard to see why, for example, the length of a prison sentence imposed on an individual convicted of a sexual offense should be affected by sexual offense reporting rates rather than the facts of that particular defendant's crime.

The question we address here is whether reporting rates matter in evaluating either the constitutionality or the advisability of the registry regime. At least one federal appeals court has suggested they might. [109] The court considered a Wisconsin statute that required all those convicted of any sexual offense included on very broad list to wear location monitoring ankle bracelets the rest of their life. The question was whether the requirement was an unreasonable search barred by the Fourth Amendment. The court thought a low reporting rate for sexual offenses supported its conclusion that the search was reasonable, because it meant the sexual re-offending was more common than official crime statistics indicated, and so also then was the threat to public safety the rule meant to address. The greater threat was thought to add justification for rules burdening registrants subject to them[110]

A recent article, *The Dark Figure of Sexual Recidivism,*[111] goes further. It argues the social science studies often cited in legal challenges to the registry regime are flawed because they employ official crime statistics that necessarily miss unreported offenses. The article has been cited in litigation in response to parties citing those social science studies.[112] *Dark Figure* focuses on constructing a mathematical model meant to estimate the magnitude of the "missed" offenses. It concludes the proportion of sexual offenses not reported is much higher than the Crime Victimization surveys suggest. It argues that the scholarly consensus about re-offense rates is therefore wrong. While the authors "take no position" on the "propriety" of the

[109] Belleau v. Wall, 811 F.3d 929 (7th Cir. 2016). The opinion was written by Posner.
[110] *Id.* at 933-34.
[111] Scurich and John, *supra* note 11.
[112] E.g., see Reply Brief For Intervenor Office of Attorney General, in Commonwealth v. Torsilieri, 232 A.3d 567 (2020), 2019 Pa S. Ct. Briefs Lexis 1034, at pp. 4-6.

registration regime,[113] they conclude it is "untenable" for researchers to rely on "official crime statistics" and inappropriate for policymakers to employ well-validated actuarial risk assessment instruments that predict only "observed" re-offending.[114]

But what facts about crime rates should policymakers, judges, and scholars rely upon if not the known facts about reported sexual crimes? The authors' implicit answer is that they should instead rely on the estimates of unknown facts offered by their model. That is a bad idea for two reasons. The first is that their model is flawed, so there's no reason to credit their heightened estimates of the number of unreported sexual offenses. That point is well-made in a critique by others[115] which I briefly capsule below. My primary focus, however, is on a threshold question to which neither judges nor the *Dark Figure* analysis gives attention: whether, or how, the sexual offense reporting rate could matter in any legal or policy analysis of the registry regime, even if we knew for certain what it was. I conclude it does not matter, which is the second reason to ignore the *Dark Figure* estimates. We now consider these two reasons in turn.

A. Flaws in the Dark Figure Model Make Its Estimates Misleading

The recent critique by Lave, Prescott and Bridges identifies several critical defects in the *Dark Figure* model: the model assumes the likelihood of a registrant re-offending does not change over the years following release from custody[116] despite ample data showing that each year following release during which a registrant (or any other felon) commits no new known offense reduces the chance he will commit one the following year.[117] It assumes the likelihood of

[113] Scurich and John, *supra* note 11 at 160.
[114] *Id.* at 172.
[115] Tamara Rice Lave, J.J. Prescott & Grady Bridges, *supra* n. 11. A second piece making many of the same observations was written concurrently although published earlier; it is consistent with the analysis of Lave, Prescott, and Bridge. Brian R. Abbott, *Illuminating the dark figure of sexual recidivism*, 38 BEHAV. SCI. LAW 543–558 (2020), https://onlinelibrary.wiley.com/doi/10.1002/bsl.2494 (last visited Dec 4, 2020).
[116] Scurich and John, *supra* note 114 at 167; Lave, Prescott, and Bridges, *supra* note 11 at 11.
[117] Hanson et al., *supra* note 94.

a victim reporting a sex offense is unaffected by their knowledge that the perpetrator has a prior sexual offense conviction, or by the kind of sexual offense,[118] an implausible assumption I develop further below. It does not take account of the fact that those convicted of a sexual offense vary in their propensity to re-offend, even though it purports to.[119] The data fed into the model to produce its estimates of the number of missed offenses are based on a skewed sample of re-offense studies, some of which are misread.[120]

The model also assumes the number of reported offenses committed by an offender does not affect the likelihood of the offender's other offenses being reporting.[121] But it seems more plausible to assume that once the police identify an individual who has committed a sex offense, the probability of their identifying other offenses by that same individual rises. It is also more plausible to assume that the more often an individual commits a crime, the more likely he will be caught and convicted at least once. In that case the missed offenses *Dark Figure* attempts to estimate consist disproportionately of one-time offenders whose apprehension is less important, as a strategy to prevent future offenses, than is catching repeat offenders, (although of course one-time offenders also deserve punishment for their crime).

B. Why the Sexual Offense Reporting Rate Does Not Matter in Any Legal or Policy Analysis of the Registry Regime.

1. Reporting rates can't matter unless they are different for different groups.

The standard estimates of unreported offenses provided by the National Crime Victimization Survey (NCVS) cannot distinguish reporting rates for sexual offenses committed

[118] Scurich and John, *supra* note 11 at 167; Lave, Prescott, and Bridges, *supra* note 114 at 14–17.
[119] Lave, Prescott, and Bridges, *supra* note 115 at 17–20.
[120] It looks primarily at a skewed sample of older studies with small sample sizes while ignoring more recent ones with larger sample sizes, i*d.* at 8, and assumes the reported re-offense rates in studies it uses in constructing the model count only convictions and must therefore be adjusted upward because convictions do not always follow from arrest for actual offenses, when in fact some studies measured re-offending by counting arrests, not convictions, *Id.* at 6.
[121] Scurich and John, *supra* note 11 at 171.

by registrants from reporting rates for sexual offenses committed by others, because survey respondents are not asked whether the perpetrator of the offense they report was a registrant. Nor would respondents necessarily know the answer if asked. The estimates of unreported offenses provided by the *Dark Figure* model reflect that same limitation. The model estimates only *overall* reporting rates; it cannot and does not estimate reporting rates for offenses committed by registrants separately from those committed by others. Nor do the authors consider whether reporting rates differ by the offender's registry status. They thus effectively assume they are the same. But under that assumption the reporting rate can have no effect on the sexual offense rate of registrants *relative to* the sexual offense rate of others. Consider, e.g., the case in which the official offense rate based on reported offenses were the same for both groups. Adjusting both rates to reflect unreported offenses would increase them both, but they would remain the same as one another if we assume the reporting rate is also the same for both groups. Or if the official offense rate for one group was twice as high, it would remain twice as high after adjusting both rates to include unreported offense. This is important because it is the *relative* offense rates that matter in any legal or policy analysis of the registry regime, because the regime's premise is that registrants pose a greater threat of sexual offending than do others not subjected to it—that their rates are importantly higher. But in testing that assumption we can rely on the rate of *reported* offenses, without worry about unreported ones, if we assume—as *Dark Figure* does—that the reporting rate is the same for both groups. That means a key assumption underlying the *Dark Figure* model renders its results irrelevant to questions addressed by the social science studies it purports to cast doubt on.

Consider, for example, the studies showing that about 95% of all reported sexual offenses are committed by those with no prior sexual offense conviction. One would necessarily get the same result if unreported sexual offenses were also counted, if we assume the reporting rate is the same for offenses committed by those with sexual offense priors, and those without them.

Either way only 5% of sexual offenses are committed by registrants. Or consider the studies that show lower re-offense rates for registrants than were historically assumed, such as the federal study of released state prisoners described above.[122] The finding that those with no sexual offense history account for 84% of all rapes and sexual assaults committed by released prisoners, or that released robbers committed such offenses at nearly half the rate of released rapists, is similarly unaffected if the reporting rate for all the groups is the same. Finally, consider first the various studies that assess whether public websites listing registrants, or rules controlling where they may live or go, reduce the rate of sexual offending. Because controlled experimentation is not possible, these studies must rely on naturally arising differences. This typically means comparing outcomes before and after the imposition of a law, or comparing outcomes between otherwise similar jurisdictions with different laws.[123] What's compared is the rate of known sexual offenses with and without the registry regime rule under study. Assume the study finds no difference in the rate of reported offenses with and without the rule. Would it matter if the study also included estimates of unreported offenses in its calculation of rates? Not if the proportion of all sexual offenses that are reported is the same for both groups. The offense rates would still be the same with and without the rule. And that's true whether the reporting rate is 75 percent, 50 percent, or 25 percent, so long as it is the same for both.

If people believe the re-offense rate for registrants is high, doesn't it matter they are even higher when unreported offenses are included in the count? Of course it could. The more often a bad thing happens, the more concern we reasonably have about it. But the question here is the strategy to adopt to combat it, and the underreporting phenomenon can't really affect our assessment of possible strategies unless it differs across groups being compared.

[122] Text at nn. 85-86, *supra*.
[123] E.g., Agan, *supra* note 75; NAPIER ET AL., *supra* note 75; Zgoba, Veysey, and Dalessandro, *supra* note 75; Bouffard and Askew, *supra* note 75.

2. Any meaningful analysis of registrant sexual offense rates requires a comparison benchmark group, and there is no apt comparison group with a zero sexual offense rate.

But still, one might ask, isn't the sexual offense rate of registrants high, and even higher if we count unreported offenses, and doesn't that somehow matter? The problem is that nothing is high or low except in comparison to something else. That's true whether one's talking about blood pressure, interest rates, batting averages, or crime rates. Is an air temperature of 50 degrees high or low? The answer depends on whether the benchmark is the average temperature in January or July. Of course, in casual conversation people often say something is high or low without explicitly identifying a benchmark, but the benchmark is usually implied. Someone who says "public school teacher salaries are low" doesn't mean they're low because brain surgeons earn more, but because other occupations they believe are apt comparisons do. Any debate over teacher salaries necessarily becomes a debate about the apt comparison group.

The silent assumption that often lies behind claims that the sexual offense rate of registrants is high is that the appropriate benchmark against which to compare their offense rate is zero. But the problem with a zero benchmark is that there is no apt comparison group of non-registrants with a zero sexual offense rate because no population group has a zero sexual offense rate. As the Pennsylvania Supreme Court recently concluded when offered the analysis in *Dark Figure*, "the relevant question should not be whether convicted sexual offenders are committing unreported sexual crimes, but rather whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws."[124] That is a key insight. Registrant sexual offense rates must be compared to the sexual offense rate of an apt comparison group that's similarly situated but not subjected to the registry regime.

[124] Commonwealth v. Torsilieri, 2020 Pa Lexis 3290 (2020).

The comparison group employed by leading scholars in this area is released felons with no history of sexual offending (to whom the registry regime is not applied).[125] Useful comparisons must also take account of the fact that registrants are not a homogenous group. Some sexual offenses have lower re-offense rates than others, and within offense categories, individual re-offense likelihood varies in measurable ways.[126] Good empirical studies allow one to separate registrants into groups based on re-offense risk. Nor is the composition of these risk groups static. The re-offense risk of registrants, like that of other released felons, declines rapidly over time at liberty, for those who have not re-offended. Because most registrants are never again arrested for a sexual offense, even those who start out above the benchmark rate when they are released from custody usually fall below it within five or ten years after release.[127] Even if some registry regime rules were effective, there would be no reason to apply them to subgroups of registrants who pose no more risk than do the comparison group.

In sum, both legal and policy analysis of the registry regime must compare the sexual offense rates of particular groups of registrants to the rate of an apt comparison group of non-registrants, not to zero. The proportion of sexual offenses that are reported can have no effect on such comparisons unless the proportions of offenses that are reported differ among the groups being compared. We now consider that possibility.

3. How the Rate of Unreported Sexual Offenses May Vary With the Characteristics of the Offense.

Sexual offenses not reported to law enforcement will not lead to arrest. That means that comparing the arrest rates of two groups is misleading if offenses by one group are reported less

[125] Hanson et al., *supra* note 96.
[126] Text at nn. 92-94, *supra.*
[127] Text at nn. 95-99, *supra.*

often than offenses by the other. If actual offenses committed by registrants were reported at a lower rate than is the case for offenses committed by the comparison group, then registrant *arrest* rates would *understate* the relative offense risk registrants present. On the other hand, if registrant offenses are reported at a *higher* rate than are sexual offenses committed by the comparison group, then comparing the groups' arrest rates would *overstate* the registrants' relative sexual offense risk. The problem is potentially worse if one compares the sexual offense convictions rather than arrests. The additional steps necessary to get from arrest to conviction can also differ across comparison groups. If arrested registrants are less likely to be convicted than are others arrested for a sexual offense, then comparing the two groups' sexual offense convictions will *understate* registrants' relative risk (assuming no difference between groups in the percentage of arrestees who in fact committed the charge crime). But if arrested registrants are *more* likely to be convicted than are others arrested, such comparisons *overstate* their relative risk. They might be convicted at higher rates even though they do not actually offend at higher rates, because their offenses more often lead to conviction. The *Dark Figure* model attempts to estimate actual offense rates by correcting both arrest or conviction rates to include not only offenses committed but unreported, but also reported offenses that really happened but did not lead to conviction. But as previously noted, its estimates are for sexual offenses overall, not sexual offenses broken down by offender groups.

The model thus implicitly assumes (as Lave, Prescott and Bridges observe) that a perpetrator's previous conviction for a sexual offense has no effect on the likelihood that a victim will report the offense, or that the perpetrator will be arrested, prosecuted, or convicted for it.[128] It assumes the gap between offenses actually committed and offenses resulting in an arrest and conviction is the same for both groups. Is this same-gap assumption correct? Because there

[128] Lave, Prescott, and Bridges, *supra* note 11 at 13–14.

is no data on the number of unreported offenses broken down by perpetrator category, we cannot answer that question definitively. Shortly after *Dark Figure* was released this author commented that reasonable inferences about police conduct suggest registrant offenses are more likely to lead to arrest than offenses committed by others.[129] And Lave, Prescott, and Bridges have since explained more fully why the same-gap assumption is almost certainly wrong.[130]

A victim's decision to report a sexual offense cannot be affected by the perpetrator's prior conviction unless the victim knows if the perpetrator has a prior conviction. Where perpetrator and victim are strangers, the victim is unlikely to know. But strangers accounted for only 15.5% of sexual assaults on adult women known to law enforcement authorities in 2016.[131] Most perpetrators are known to their victims because they are current or previous intimate partners, or acquaintances, friends, co-workers, and family members.[132] Victims won't always know about the prior conviction of these groups either, but sometimes they will. There's reason to think such knowledge makes reporting *more* likely. Two common explanations victims give for not reporting are fear they won't be believed, or fear they will be blamed themselves for the assault.[133] Knowledge that the perpetrator has a prior sexual offense conviction may reduce those fears.

Consider next reported offenses that lead to no arrest because no perpetrator is identified. That's obviously more likely when the perpetrator is a stranger whose identification depends

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[129] *Dark Figure* was noted in the widely followed Sentencing Law and Policy Blog shortly after it became publicly accessible on SSRN. The author's observation was part of his comment to that initial blogpost. https://sentencing.typepad.com/sentencing_law_and_policy/2019/02/the-dark-figure-of-sexual-recidivism.html#comments.

[130] Lave, Prescott, and Bridges, *supra* note 115 at 13–14.

[131] Puzzanchera, Smith & Kang, *National Incidents Based Reporting System*, EASY ACCESS TO THE FBI'S NATIONAL INCIDENT BASED REPORTING SYSTEM (NIBRS) VICTIMS: VICTIMS OF VIOLENCE SELECTION PAGE (2020), https://www.ojjdp.gov/ojstatbb/ezanibrsdv/asp/selection_vov.asp (last visited Aug 28, 2020). See the explanation provided for the source of these numbers *supra*, n. 64.

[132] Katrin Hohl & Elisabeth A. Stanko, *Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales*, 12 EUR. J. CRIMINOL. 324–341, 328 (2015), http://journals.sagepub.com/doi/10.1177/1477370815571949 (last visited Jun 25, 2020).

[133] Note 110, *supra*.

upon police investigation. The police effort to identify a perpetrator will surely include looking at lists of local sexual offenders taken from the registry or from police records. Either source will include fingerprints, so that where the perpetrator left a print, those with prior sexual offenses will be identified. Indeed, the increasingly routine collection of DNA samples from those convicted of a crime[134] may allow the police to quickly identify and thus pursue perpetrators in any current case in which DNA evidence is available, again increasing the likelihood that those with prior convictions, but not first offenders, are eventually prosecuted. And finally, successful prosecutions are also more likely where the defendant has a prior conviction.[135] Knowing that, prosecutors are of course more likely to prosecute these cases in the first place.

In sum, it seems reasonable to infer that a) victims are more likely to report sexual offenses committed by perpetrators whom they know have a prior sexual offense conviction; b) police are more likely to follow up on reports by victims who identify the perpetrator as someone with a prior; c) police are more likely to identify and thus arrest perpetrators with prior sexual offenses; d) prosecutors are more likely to file charges and win convictions in cases in which the alleged perpetrator has a prior sexual offense conviction. I know of no data that would allow one to test these inferences, but they certainly seem more plausible than the same-gap assumption silently made by the *Dark Figure* model. And if it the implausible same-gap assumption is wrong, then registrants' sexual offense rates, relative to the rate of comparison groups, are probably *lower* than the studies report.

CONCLUSION

The registry regime regulates the lives of nearly a million Americans who are not in custody, not on parole or post-release supervision of any kind, who have committed no crimes

[134] People v. Buza, 413 P.3d 1132 (Cal. 2018).
[135] Lave, Prescott, and Bridges, *supra* note 11 at 15–16.

since completing whatever sentence was once imposed on them for a crime that may have been committed decades earlier. The collection of rules, federal, state, and local, combine to make it difficult or impossible for registrants to find housing or employment, to travel, to maintain family connections, or to rejoin and contribute to their community. The burdens often extend to the registrants' spouses and children. The regime's debilitating rules are typically imposed for decades, and sometimes for life, without regard to anything a registrant may do to redeem himself. No remotely similar system of civic exclusion applies to people once convicted of any other crime, be it murder, or arson, or violent assault, or drug-dealing. Nor has any other western democracy adopted any similar regime. None of them employ the central feature of the American registry system, a publicly accessible database, searchable by name or locale, allowing anyone to obtain, for any reason or no reason, personal information about those with sexual offense convictions.

Nor does it seem the registry regime can contribute to the broader battle against sexual abuse represented by today's #MeToo movement. A key goal of that movement is recognition that sexual offending is pervasive because it is encouraged by an enabling culture. The solution it seeks requires broader cultural shifts.[136] By contrast, the message of the registry regime, as Eric Janus points out, is that the problem is not us but "them", a small group of deviant men who must be identified, contained, isolated, and ostracized because they have uncontrolled urges that may erupt at any time and account for most sexual offending.[137] Shifting the onus from *us* to *them* means *we* can return to business as usual once we take care of *them*. The animus toward *them*, born of understandable if nonrational fears, may also be a convenient strategy for those resistant to the cultural changes the #MeToo movement seeks. It enlists the disgust and anger

[136] Deborah Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE LAW J. 377–428, 385–387, 401–403 (2019).
[137] Eric Janus, *Preventing Sexual Violence: Alternatives to Worrying About Recidivism*, MARQUETTE LAW REV. In press (2020).

that is easily aroused against individuals associated with a small group of particularly heinous offenses to divert attention from discussion of the larger cultural changes that would affect many more of us. So registry reform is not inconsistent with the goals of the #MeToo movement. To the contrary. Indeed, shifting resources from the ineffective registry regime to sexual abuse preventative strategies studies have found promising would advance the movement's goals.

Registry rules were born of understandable fears, the laws establishing them named for the victims of terrible crimes. But laws that focus such harms on a discrete and widely despised group must be justified by facts, not fears. We have seen that justifying facts are hard to find. Why then does the registry regime persist? As Eula Biss observed, in her study of those who refuse vaccinations, our "fears are dear to us. When we encounter information that contradicts our beliefs, we tend to doubt the information, not ourselves."[138] But as understandable as that is as a matter of human psychology, the law must demand more than fears before inflicting deep harms on the group that elicits it.

[138] EULA BISS, ON IMMUNITY: AN INOCULATION 37 (2014).