Perversion of Justice:
A Social Relations Approach to Sex Offender Laws

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Law and Identity
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Fall 2012

In 1990, Washington State enacted a law allowing lawmakers to civilly commit sex offenders at the end of their prison sentences. This marked the beginning of a period of federal and state sex offender laws restricting the liberty of sex offenders after completion of their sentence. Willer analyzes the commonly used strategies and assumptions made about sex offenders since 1990 in federal laws. She argues that the laws are unfair, ineffective, and reflect many misconceived ideas about sex offenders. She asserts that a social relations approach, as conceived by Martha Minow, offers the most beneficial solution to addressing sex offenders because it changes the fundamental structure through which they are viewed by the law. Willer explores how a relational approach would improve current laws governing sexual predators.

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Introduction

In 1990, Washington State passed the *Community Protection Act* allowing sex offenders judged "sexually violent predators" to be civilly committed[1] at the end of their prison sentences. This was the first of many federal and state laws that restrict the liberty of sex offenders after they complete their prison sentences. This type of law was upheld as constitutional in *Hendricks vs Kansas* (1996).[2] The major pieces of federal legislation passed after 1990 are the *Violent Crime Control and Law Enforcement Act of 1994 (Jacob Wetterling Act)*, *Megan's Law*, the *Pam Lychner Sex Offender Tracking and Identification Act of 1996*, and the *Adam Walsh Child Protection and Safety Act of 2006*. The purpose of these laws is to protect the public from the very dangerous, violent sexual predator by increasing the awareness of the community of their existence and separating them as much as possible from the community. However, the effectiveness of these laws intended to improve public safety and reduce the amount of sexual violence is increasingly questioned by scholars. Some have even suggested that these laws might increase the likelihood of sex offenders to reoffend. If scholars are correct, then current laws cause much unnecessary harm to victims, sex offenders, and the families of sex offenders. Therefore, it is imperative that society look more closely at the policies enacted. If the public does not enact laws that effectively reduce sexual violence, it is unjust to all the victims of sexual violence. Society needs to focus on preventing sexual violence from occurring as well as trying to control and punish it after it has occurred. Scholars and lawmakers recommend new programs or modifications to existing laws that increase their boundaries. These and other suggestions, while they may have merit, leave in place the existing structure of how the law approaches sex

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[1] court ordered mental treatment for individuals

[2] Roxanne Lieb, *Washington's Sexually Violent Predator Law: Legislative History and Comparisons with Other States* (Washington State Institute for Public Policy, December 1996), 5.

offenders and therefore the process by which we distinguish sex offenders from others. In short, the way we think about sex offenders needs an alternative approach.

Thesis and Outline of the Paper

A review of the literature, as will be demonstrated below, supports these claims of the failure of the current laws and its approach to create a just and effective system. In this paper, I situate my analysis within this overall scholarship but explore how a social relations approach, as proposed by Martha Minow, would assess and improve current legislation governing sex offenders. I argue that a social relations approach would increase both the effectiveness and fairness of federal laws dealing with sex offenders and that a relational approach is needed because current laws are ineffective in substantially reducing recidivism rates[3] and therefore, do not increase public safety as they were intended. Furthermore, the laws are unfair because they are applied too broadly by not fully acknowledging the specific details of the situation. Using Minow's analysis, I argue that bad public policy results from the wrong view of difference. It is the process of believing that differences are intrinsic that leads to bad policy. The system presently, identifies "dangerous sex offenders" and attempts to separate them from society. A relational approach would make public policy affecting sex offenders more fair and effective. It would dissolve many misconceptions about sex offenders and allow for the creation of effective laws based on the actual reality of sexual violence. Relational approaches motivate people to ask contextual questions, focus on the common humanity that connects everyone, and ask society to consider what it is in our social structure that allows for the continuation of sexual violence.

Eric S. Janus, "Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences," *Behavioral Sciences & the Law* 18, no. 1 (2000): 5–21.
[3] Recidivism relates to the tendency of a criminal to repeat a certain behavior, in this case, to sexually reoffend. A sex recidivist refers to a sex offender who has been convicted of a sexual crime before

I begin my argument in chapter one where I review the current status and treatment of sex offenders. This involves explaining how the law treats sex offenders differently from other criminals and the most common techniques used. In chapter two, I frame the discussion of federal legislation in a historical light. The law has approached criminals, including sex offenders, differently over the years. The development of federal legislation of sex offenders demonstrates this progression. Chapter three begins with a discussion of the acknowledged practical difficulties with current techniques regulating sex offenders. I also review the misconceived assumptions that lawmakers have made about sex offenders and suggest how Minow would view the current system. In the last chapter of this work, I explain the basics of a social relations approach and how it can be applied to the problems of sex offender legislation.

I intend here to demonstrate the general direction federal legislation addressing sex offenders has moved since the 1990s and how this reflects how the law views sex offenders. I do not concentrate on analyzing in detail any one specific federal or state law. I focus on current federal laws because they set the minimal standard states must follow. While it would be worthwhile to analyze in more depth the federal and state criminal justice policies that determine which crimes are considered to be sex offenses, the limitations of space forbid this. I suspect that many of the conclusions I draw from the civil side of the law would also apply to the criminal justice side. My analysis also is limited because I have not attempted to understand or apply Minow's theory to laws outside of the United States. My paper is simply one small contribution to the vast conversation addressing the problem of sexual violence in society.

Chapter One: Current Legal Regulation of Sex Offenders

Sex offenders receive distinctive regulation under the law. Like other convicted criminals, sex offenders are sorted into categories which serve to determine the consequences the

legal system inflicts, but there are many ways in which the law treats sex offenders differently. While most felons are convicted of a crime, serve their sentence, and then are released into society, convicted sex offenders finish serving their due sentence as determined by the court and then continue to be monitored once released into the community. As Eric Janus and Robert Prentky say, these regulatory schemes depart from the "normal 'charge and conviction' paradigm of the criminal justice system."[4]

The difference is that sex offenders are punished by the criminal justice system and then regulated by the civil law system.[5] The three mandated strategies by federal law for control of sex offenders who have completed their sentences are civil commitment, registration, and community notification. Registration and community notification attempt to regulate the behavior of sex offenders released from prison into the community. Sex offenders are required to register their addresses and other information with the police.[6] Community notification requires the police to inform the community and specific institutions of a sex offender's presence.[7] The concept is predicated on the belief that awareness or watchfulness in the community and by police officers will regulate sex offenders' behavior and allow citizens to better protect themselves. Civil commitment differs from registration and notification in that sex offenders, after fulfilling their sentence, are not released into the community. If deemed eligible, society regulates their behavior by committing them to a mental institution in the hope that they will be cured.[8] Even after holding them responsible for their crime and incarcerating them, according to law sexual offenders can then be reincarcerated. The underlying assumption is that "sexual violence—at least in some forms—is different in kind from the common expressions of

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[4] Janus and Prentky, "Sexual Predator Laws," 90.
[5] Janus, *Failure to Protect*, 19.
[6] Janus and Polachek, "Crooked Picture," 152.
[7] Ibid.
[8] Ibid., 149.

antisocial behavior that are the everyday object of the criminal justice system."[9] Sex offenders are seen as beyond the normal level of dangerousness of other criminals in the system. The law continues to control sex offender's behavior after they have served their punishment.

Treatment of sex offenders is also different from other criminals because sex offender legislation has taken on a "preventative" mode. A preventative state is one in which the government is "committed to identifying 'dangerous' people and depriving them of their liberty before they can do harm."[10] Sex offender legislation allows for this preventative mode because registration, community notification, and civil commitment are imposed in order to prevent the offender from committing further sex crimes. It is the future sex crimes of the offender that the law is attempting to stop and the law assumes that sex offenders will continue to reoffend unless regulated. La Fond says, "Sex offenders are seen as so likely to commit many more sex crimes during their lifetimes that everybody believes that special steps must be taken to stop them before they do."[11] The laws are focused on preventing sex crimes of once convicted sex offenders because they are believed to be very likely to reoffend.

The third way in which sex offenders are treated differently than other criminals is the belief that risk is seen to be inherent within a person. The law is therefore concerned with the quantity of risk inside an offender rather than the behavior of a person as being risky. Most regulatory laws are concerned with preventing risky behaviors. For example, there are regulatory laws about drunk driving, speeding, smoking in airplanes and dumping pollutants. However, with sex offenders "risk of harm is conceived as being a condition of the person, rather than

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[9] Janus and Prentky, "Sexual Predator Laws," 90.
[10] Janus, *Failure to Protect*, 93–94.
[11] Fond, *Preventing Sexual Violence*, xiii.

simply a quality of the person's behavior."[12] Regulation, community notification, and civil commitment are applied because the offender himself is risky.

Sex offenders are treated differently than other criminals. The law continues to control them after their prison sentences, focuses on preventing future sex crimes that offenders will commit, and considers the risk to be part of the nature of the offender. It is true that other criminals occasionally are also subject to such types of regulatory legislation, but the extent and frequency other criminals receive this treatment is much smaller. No other broad category of criminals is subject to such regulation after completing their prison sentence. Furthermore, even when this type of regulation is applied to other kinds of criminals the state is concerned with risky behavior, not the intrinsic riskiness of the criminal. It does not try to mathematically calculate how much risk is inherent in an offender in the same way as other criminals.

Commonly Used Techniques Approved By Federal Law

Because the law views sex offenders to be different then other criminals, it applies special laws through the civil law system. At the current time, there are three specific strategies that federal law requires for the regulation of sex offenders after they have finished their jail sentences. As mentioned before, the strategies are registration, community notification, and civil commitment. Enforcement and regulation of the federal laws takes place at the state level, but all fifty states are required to use these three strategies at the minimum level or be willing to give up ten percent of federal crime funds from the Edward Byrne Memorial Justice Assistance Grant Program.[13] This grant is the primary provider of federal criminal justice funding to state and local jurisdictions.[14]

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[12] Janus and Prentky, "Sexual Predator Laws," 92.
[13] Janus and Polachek, "Crooked Picture," 153.
[14] "Edward Byrne Memorial Justice Assistance Grant (JAG) - NY DCJS," *NYS Division of Criminal Justice Services*, n.d., http://www.criminaljustice.state.ny.us/ofpa/jagmain.htm.

All persons convicted of sex crimes are required to register their information with local authorities. A sex offense is defined by federal law as a "criminal offense that has an element involving a sexual act or sexual contact with another."[15] Consensual sexual acts between victims of at least thirteen years of age and persons no more than four years older are not sex crimes.[16] This definition of sex crimes requires some juvenile offenders to register as sex offenders. Persons who need to register are divided into three different tiers. Each tier determines how long and how often a sex offender must update their information in person. According to guidelines, information should be kept current at all times, but there are also requirements when information must be updated in person by the sex offender.

Offenders committing the most serious offenses are labeled tier three sex offenders. They are required to register for life and must update their registry information every three months.[17] Tier III offenses are those crimes punishable by more than one year in prison and comparable to or more severe than aggravated sexual abuse[18]. Tier III crimes also include kidnapping a child when not the guardian, abusive sexual contact with a child under thirteen, conspiracy sexual crimes, and any sex crime occurring after the offender was a tier II offender.[19] There is some provision for reduced registration if a clean record is maintained. Tier III offenders must maintain a clean record for at least twenty-five years and the reduction in registration is equal to how long a clean record has been maintained by the offender.[20]

Tier II sex offenders must register for twenty five years and must update their registry information every six months. Crimes considered as tier II are those that are not tier III offenses

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[15] *No Easy Answers*, 37.
[16] Ibid.
[17] Ibid., 37,42.
[18] An aggravated sexual act is a sexual act with a victim of any age involving penetration through the use of force or threat of violence and any sexual act involving penetration with victims below the age of 12. Ibid., 37.
[19] Janus and Polachek, "Crooked Picture," 154; *No Easy Answers*, 37.
[20] Ibid.

against a minor and any sex offense by a tier one offender.[21] Tier I crimes consist of all other sex crimes not categorized as tier III or tier II. Tier I sex offenders must register for fifteen years and must update their registry information every year.[22] These offenders must have a clean record of ten years to receive a five year reduction.[23]

Another component of registration is that failure to register is considered a federal felony.[24] Sex offenders are required to register their information in jurisdictions where they live, work or are a student.[25] It is mandatory for offenders to provide their name, social security number, description, and license plate number of any cars they drive, address of where they live, and name and address of workplace or school attended.[26] All of the information collected in jurisdictions' registries is also maintained by the state. Every state is required to have a sex offender registry.[27] The FBI also maintains a national sex offender registry.[28]

Federal law provides some minimum requirements for registration, but states also have the freedom to require more from sex offenders for registration purposes. Current sex offender laws do not restrict what states can do beyond federal rules. For example, there are some sexual acts that a state might consider a sex crime that the federal law does not include. In 2007, thirty two states considered the exposure of genitals in public a sex crime.[29] Also in 2007, thirteen

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[21]Tier II crimes must be punishable by imprisonment of more than one year, comparable or more severe to sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, abusive sexual contact, involves the use of a minor in a sexual performance, solicitation of a minor to practice prostitution, and production or distribution of child pornography. *No Easy Answers*, 37; Janus and Polachek, "Crooked Picture," 154

[22] Janus and Polachek, "Crooked Picture," 154; *No Easy Answers*, 37.

[23] *Adam Walsh Child Protection and Safety Act of 2006,* Public Law 109-248, U.S. Statutes at Large 120 (2006): 595.

[24] *No Easy Answers*, 154.

[25] *Adam Walsh Child Protection and Safety Act of 2006,* Public Law 109-248, U.S. Statutes at Large 120 (2006): 593.

[26] Ibid., 594.

[27] Richard G. Wright, "Sex Offender Post-Incarceration Sanctions: Are There Any Limits," *New England Journal on Criminal and Civil Confinement* 34 (2008): 34.

[28] *Adam Walsh Child Protection and Safety Act of 2006,* Public Law 109-248, U.S. Statutes at Large 120 (2006): 596.

[29] *No Easy Answers*, 39–40.

states required registration for public urination.[30] Federal law mandates though that anyone considered a sex offender by the state must be included in the state and national sex offender registry.[31] Therefore, sex offenders are entered into the national sex offender registry even if their offense is not considered illegal by other states or by the federal government. Likewise, some states require increased amounts of registration time. In 2007, seventeen states required lifetime registration for all sex offenders.[32] Lastly, some individual states require sex offenders to provide more information about themselves for registration.[33] The federal laws allow states to determine some of their own rules regarding registration.

The second strategy required by federal law to regulate sex offenders and protect the community is community notification. Community notifications have grown in importance since first established. Once it was solely up to the police to notify the public of the presence of sex offenders in the community, but the internet gives communities access to sex offender information from across the nation. The internet has linked the community notification and registration provision of federal law. Today, states are mandated to put their sex offender registries online for the public's use.[34] Federal law requires state internet registries to be searchable by geographic location and zip code, but states have the discretion to determine what information will be included online.[35] However, federal law does prohibit social security numbers, victim IDs, and arrests not resulting in conviction from being posted.[36] Besides state

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[30] Ibid.
[31] Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, "SORNA," *Office of Justice Programs,* http://www.ojp.usdoj.gov/smart/sorna.htm
[32] *No Easy Answers*, 42.
[33] *Sex Offender Registration and Notification in the United States: Current Case Law and Issues* (US Department of Justice: Office of the Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking, July 2012), 1, http://www.ojp.usdoj.gov/smart/caselaw/handbook_july2012.pdf.
[34] Levenson et al., "Public Perceptions About Sex Offenders and Community Protection Policies," 139.
[35] *Adam Walsh Child Protection and Safety Act of 2006,* Public Law 109-248, U.S. Statutes at Large 120 (2006): 596.
[36] Wright, "Sex Offender Post-Incarceration Sanctions," 34.

internet registries, the public also has access to the National Sex Offender Public Website.[37] This is where the public can access information about sex offenders across the nation. The same requirements of state internet registries are maintained for the national sex offender public website.

Even though a sex offender's information is easily accessible to the public through the internet, certain organizations are also required to be directly notified of a sex offender's presence. Currently, all law enforcement agencies, schools, and public housing agencies are supposed to be notified. This notification applies to any area where a sex offender resides, works or is a student.[38] In addition to these organizations, all agencies responsible for conducting employment-related background checks, social service entities responsible for protecting minors in the child welfare system, and volunteer organizations in which contact with minors or other vulnerable individuals might occur are notified.[39] Individuals, companies, or organizations also have the option of asking for information about sex offenders. The federal law declares that any individual or entity that asks for information about sex offenders may receive that information if not prohibited by the specific jurisdiction.[40] Like registration, states retain some discretion in how much information is revealed, to whom and when. For example, New Jersey has chosen to divulge certain information to specific groups depending on which tier the sex offender is in.[41]

The last strategy that federal sex offender laws use is civil commitment. Under pending release from incarceration, federal law has specified that proceedings can be brought to require that a sex offender be civilly committed. By civil commitment the law means "secure civil

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[37] *Sex Offender Registration and Notification in the United States: Current Case Law and Issues*, 2.
[38] *Adam Walsh Child Protection and Safety Act of 2006,* Public Law 109-248, U.S. Statutes at Large 120 (2006): 597.
[39] Ibid.
[40] *Adam Walsh Child Protection and Safety Act of 2006,* Public Law 109-248, U.S. Statutes at Large 120 (2006): 597.
[41] *No Easy Answers*, 51.

confinement, including appropriate control, care, and treatment during such confinement."[42] The federal government has established a federal civil commitment procedure and has also developed a grant program to assist states in their civil commitment programs.[43] In order to be confined there must be clear evidence that the individual is a "sexually dangerous person." A sexually dangerous person is one who is sexually dangerous to themselves and to other people. As defined by law, a sexually dangerous person is one "who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others." A sexually dangerous person to others is one who "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation."[44] The way for an offender to be released from commitment is also specified in the legislation. If the director of the facility believes the sex offender is no longer a sexually dangerous person or will not be with the right prescription of medical, psychiatric or psychological treatment the offender may be released. However, an offender may be recommitted if they do not follow all the required prescription.[45]

Federal legislation does not specify what is required for an offender to fulfill the definition of a "sexually dangerous person" and be civilly committed. Typically though, in accordance with what courts have mandated as required for general civil commitment of individuals, there are four elements of proof needed.[46] First, there must be a past history of sexually harmful conduct. Secondly, a current mental disorder or abnormality is needed. It has to be demonstrated that a sex offender suffers from some type of mental illness. The third element

[42] *Adam Walsh Child Protection and Safety Act of 2006,* Public Law 109-248, U.S. Statutes at Large 120 (2006): 618.
[43] Terrell G. Sandoval, ed., *Adam Walsh Child Protection and Safety Act: Analysis and Law* (Nova Science Pub Inc, 2010), 84.
[44] Ibid., 619-620.
[45] *Adam Walsh Child Protection and Safety Act of 2006,* Public Law 109-248, U.S. Statutes at Large 120 (2006): 621.
[46] Janus, "Sexual Predator Commitment Laws," 9.

that must be proven is a finding of risk of future sexually harmful conduct. One of the most common tools used is the statistical actuarial test.[47] The last element required brings the last two elements mentioned together. The laws require a demonstration of the connection between the mental disorder and the danger. It does not require proof of lack of control, only proof of a mental disorder which could lead to difficulty of control.[48] It should also be noted that states are not prohibited (as it is not stated) from using different definitions and devices to determine what qualifies someone as risky or what qualifies as a mental disorder. If however, the state's civil commitment program follows or plans to follow all the qualifications specified, then states will receive a large grant for the continued use or establishment of a civil commitment programs.[49]

Other Techniques Used By Individual States

Besides civil commitment, registration, and notification to control sex offender behavior after prison, states have also begun employing additional strategies. These strategies have not been addressed in federal law, but they continue the trend of viewing sex offenders as dangerous in themselves and of regulating sex offenders differently from other criminals. Many states and towns use residency restriction laws to prohibit sex offenders from living within a specified distance from places. The majority of restricted places are those where children congregate like schools and parks; notably, in 2007 only four states had limited their restriction laws to apply specifically to persons convicted of sex offenses involving children. Public officials create "sex offender-free zones" through residency restrictions.[50] In addition, a law relating to the contact of sex offenders with children on Halloween appeared recently. This law prohibits convicted child sex offenders from opening their doors to trick-or-treating children and from decorating the

[47] Fond, *Preventing Sexual Violence*, 56.
[48] Janus, *Failure to Protect*, 32.
[49] Ibid., 618.
[50] *No Easy Answers*, 100-101.

outside of their homes or lawns with Halloween ornaments. Offenders may also be required to post signs on their doors saying "no candy or treats at this residence."[51] Further, some states require child molesters to have pink licenses plates on their cars. The special color is supposed to make child molesters and their cars more easily identifiable for children and it works as a shaming mechanism for offenders. [52] Some states have used a similar strategy with drivers convicted of drunk driving. One last preventative measure that states are using is chemical castration. Chemical castration alters the biology of sex offenders through drugs that reduce the body's production of testosterone thereby curbing a sex offender's deviant sex drive.[53] All of these strategies are ways to regulate sex offenders' behavior after incarceration, reflect a belief that risk is inherent within offenders, and try to limit future sex crimes of convicted offenders.

Foundations and Assumptions of Sex Offender Law

The federal and state laws that have been described so far rely upon a number of basic assumptions about sex offenders and the ability of the law to sort among them. First, these laws are based on the idea that the judicial system will be able to identify who are the extremely dangerous sex offenders and the amount of risk they present to the community. As Janus and Prentky say, sex offender laws "advance the idea that sex offenders—alone among human beings—can be sorted according to their risk, and that the proper way to address the risk is through identification and physical separation."[54] The overall assumption remains that the risk is inherent within the individual and the courts have the ability to identify this risk and then separate this person from society as much as possible.

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[51] "Judge Temporarily Blocks Part of Simi Valley Halloween Sex Offender Law," *Ventura County Star*, n.d., http://www.vcstar.com/news/2012/oct/29/judge-temporarily-blocks-part-of-simi-valley-sex/.
[52] *No Easy Answers*, 52.
[53] Fond, *Preventing Sexual Violence*, 168.
[54] Janus and Prentky, "Sexual Predator Laws," 91.

Secondly, all of these techniques are based on the idea of sexual recidivism[55]. The law assumes that sex offenders will offend again and therefore wants to prevent convicted sex offenders from committing more sex crimes. As stated by Janus, "Recidivism has the more particular meaning that sex offenders continue to commit sex crimes even after they have been caught, convicted, and punished. Recidivists are sex criminals who have not (and perhaps cannot) learn the deterrence lesson intended by criminal punishment."[56]

Furthermore, these laws are focused on preventing sexual violence from strangers or against children. The regulation is meant to stop the stranger hiding behind a car or bush from violently attacking and sexually assaulting a person. It assumes that the majority of sex offenders are "sexually dangerous persons" with a mental disorder, inability to control their sexual desires, and a tendency to target children. The laws treat offenders like they all pose an equal and serious risk.

These assumptions are in fact incorrect, consequently, there are many theoretical and practical problems built into the current strategies of federal laws regarding sex offenders. These laws are not effective in reducing sexual violence or increasing public safety which is why it is imperative that the judicial system change its approach regarding sex offenders. I will discuss the theoretical and practical problems of current sex offender legislation and the need for a new approach in later chapters of this work.

Chapter Two: The Progression of Sex Offender Laws

The legal approach to sex offenders was not always what it is now. It has a history of swinging back and forth between a punitive approach and treatment approach. In fact, the entire

[55] Recidivism relates to the tendency of a criminal to repeat a certain behavior, in this case, to sexually reoffend.
[56] Janus, *Failure to Protect*, 48.

criminal justice system has moved from a heavily focused mental health or rehabilitative system to a system of punitive punishment or "law and order" program.[57] The approach to sex offenders is situated within this movement. Along with these changes in approach, the law and society's determination of what constituted a sexual crime has fluctuated with the changes in understanding sexuality. What society considers socially acceptable sexual behavior has changed dramatically. Such behaviors that were once considered sexually offensive, immoral, or perverse were oral sex, anal sex, multiple sexual partners, sex before marriage, adultery and homosexuality.[58] At one time, participation or community knowledge of such participation would bring dishonor to oneself and one's family and in some cases would make one a social pariah.

From Treatable to Deviant

The most recent progression of sex offender legislation is from therapeutic to more punitive. Until the late 1930s, sex offenders were considered morally blameworthy and capable of refraining from their crimes and therefore were required to be punished for their offences through incarceration.[59] But, in the late 1930s, states began to look at criminals, including sex offenders, in a more therapeutic and treatable light. According to La Fond, "experts believed that crime was largely caused either by external social forces like poverty, or by internal pathology, like mental illness.[60]

Specifically, this paradigm shift in the criminal justice system meant that sex offenders were viewed as sick rather than bad. States believed that sexual offenses were "rooted in mental

[57] La Fond, "The Costs of Enacting a Sexual Predator Law," 472–473.
[58] Zilney and Zilney, *Reconsidering Sex Crimes and Offenders*, 3.
[59] La Fond, "The Costs of Enacting a Sexual Predator Law," 469.
[60] Fond, *Preventing Sexual Violence*, 3.

health issues and therefore required intervention from medical professionals."[61] This caused states to pass legislation known as the sexual psychopath laws. Sexual psychopath laws authorized the involuntary commitment of offenders charged and convicted of sex offenses. Sex offenders found to be dangerous, mentally disordered, and in need of treatment were put into psychiatric facilities for control and treatment.[62] By the late 1960s, more than half of the states passed sexual psychopath laws.[63] Psychopathy proceedings could be initiated before conviction in some states and only after in others, but in all states, individuals were put into mental health facilities rather than being punished in a prison.[64] No convicted sex offenders were civilly confined after incarceration. Society believed in the treatment methods used in civil confinement. It believed that mental health experts could properly identify and treat sexual psychopaths so that they could be released back into the community. Good for the community and the individual would come out of treatment of ill sex offenders.

In the late seventies and eighties though, states began repealing sexual psychopath laws. The public lost confidence in sexual psychopath programs of civil commitment. "By 1985, these statutes existed in only thirteen states, and were regularly enforced in only six states."[65] It became generally acknowledged that experts did not know why sex offenders were committing sex crimes, could not medically identify specific groups of sex offenders, and could not cure sex offenders from committing future sex offenses. "In sum, most experts and policymakers had concluded that sex offenders were not mentally ill and that involuntary, indeterminate treatment

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[61] Zilney and Zilney, *Reconsidering Sex Crimes and Offenders*, 40.
[62] La Fond, "The Costs of Enacting a Sexual Predator Law," 469–470.
[63] Ibid., 470.
[64] Ibid.
[65] Janus and Prentky, "Sexual Predator Laws," 91.

was ineffective in changing their criminal behavior."[66] The rehabilitative approach to sex crimes did not seem to be stopping them.

This move away from rehabilitative approaches to crime also occurred across the entire criminal justice system. As La Fond says, "public policy no longer supported rehabilitation as the primary goal of the corrections system.[67] This movement across the United States is often referred to as the "law and order movement." For sex offenders, this meant that from the 1ate 1970s to the 1990s, they were treated like all other criminals, which included punishment of their crime in prison with a sentence proportionate to the harm of their crime. Sex offenders were considered fully responsible for their crimes.[68] Some states still provided treatment while in prison, but it was not involuntary like it had been before.[69] Also in this period, feminist voices became stronger and substantially impacted sex offender legislation. They were influential in revising rape laws so conviction was easier and in enacting rape shield laws.[70] Rape shield laws protected women's credibility from defense attorneys who tried to use victim's sexual history against them in court.[71] Sex crime sentences also increased. "Between 1985 and 1993, the average time served by convicted rapists in state prisons increased from about three years to five years."[72] Feminists also rejected the belief that rapists were "abnormal, dysfunctional individuals" and instead argued that sexual violence was a learned behavior. They hypothesized that "rape and sexual violence were 'the product of social conditions that normalized sexual

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[66] La Fond, "The Costs of Enacting a Sexual Predator Law," 472.
[67] Ibid., 473.
[68] Fond, *Preventing Sexual Violence*, 5.
[69] Ibid.
[70] Ibid., 4.
[71] Ibid., 5.
[72] La Fond, "The Costs of Enacting a Sexual Predator Law," 474.

violence."[73] Feminist voices were influential in changing both who sex offenders were and how they were prosecuted.

In 1990, the sexual psychopath laws were reiterated due to fear created by media coverage of horrific sex offenses committed by once convicted sex offenders. As mentioned earlier, as part of its 1990 *Community Protection Act*, Washington State enacted a law authorizing civil commitment of individuals found to be "sexually violent predators" at the end of their criminal sentences.[74] This type of law differs from the sexual psychopath laws of the 1930s and is often referred to as a Sexually Violent Predator Law (SVP Laws). Other states and eventually the federal government quickly followed Washington's lead.[75]

Sexually Violent Predator Laws differ in many ways from earlier commitment laws. SVP laws do not require the sex offender "to suffer from a medically recognized serious mental disorder."[76] States are allowed to confine convicted sex offenders if they are believed to be at a high risk of reoffending. Second, they require sex offenders to fulfill their full sentence before seeing if commitment requirements are met.[77] Lastly, not all states that use civil commitment have bona fide treatment programs.

These Sexually Violent Predator laws demonstrate how sex offender laws have moved towards using the criminal justice system and civil law to manage and control sex offenders. The new laws emphasize management, separation, and determination of individual risk. This approach is still in use.

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[73] Janus and Polachek, "Crooked Picture," 145–146.
[74] Lieb, *Washington's Sexually Violent Predator Law: Legislative History and Comparisons with Other States*, v.
[75] Janus and Prentky, "Sexual Predator Laws," 91.
[76] La Fond, "The Costs of Enacting a Sexual Predator Law," 475.
[77] Ibid.

Progression of Federal Sex Offender Laws

Since 1990, Congress passed several major pieces of federal legislation concerning sex offenders. The first federal law passed was the *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act* in 1994. It was passed as a part of the Omnibus Crime Bill of 1994. Jacob Wetterling, an eleven year old, was abducted by a stranger at gun point on October 22, 1989. His brother Trevor, a friend, and Jacob were returning home on their bicycles when a masked gunman stopped and threatened them. He drove off with Jacob and neither Jacob nor his kidnapper's whereabouts are known today.[78] The federal law was named in Jacob's honor and was the first federal law requiring sex offenders to register with law enforcement.

The act required states to form sex offender registries establishing the residency of sex offenders for law enforcement agencies. If states did not construct registries, they would lose ten percent of their money from the federal Edward Byrne Justice Assistance Grant Program.[79] Furthermore, the act determined that people convicted of sexual abuse of children or sexually violent crimes against adults should be required to register for ten years after being released from jail. Those determined to be sexually violent predators were required to register until the court determined they were no longer dangerous.[80] However, the *Jacob Wetterling Act* did not require law enforcement agencies to notify the community of the presence of a sex offender. It allowed local law enforcement agencies to notify the public at their own discretion.[81]

In 1996, two federal sex offender laws passed. The first law is known as *Megan's Law*. *Megan's Law* was named for Megan Kanka, who was seven years old when she was raped and

[78] "New Evidence in Jacob Wetterling Case", n.d., http://abcnews.go.com/US/investigators-dig-evidence-wetterling-case-mom-hopeful/story?id=11075883.
[79] *No Easy Answers*, 36.
[80] Ibid.
[81] Janus and Polachek, "Crooked Picture," 152.

killed by a neighbor. Megan had gone to play with a friend, but the friend could not play so she was on her way home when her neighbor invited her in to see his new puppy. Police eventually figured out that her rapist and murderer was her neighbor Jesse Timmendequas who had been convicted before of sexual attacks against children. He showed police where he buried her body. [82]Megan's parents did not know that their neighbor had a history of sex offenses against children.

Megan's law added a community notification provision to the *Jacob Wetterling Act*. It required state and local law enforcement agencies to release information necessary to protect the public about persons who are required to register under state registration programs.[83] The law did not specify how and when it was appropriate to divulge information to the community. It did however specify that a victim's name was not to be divulged.[84] *Megan's Law* also allowed for the public disclosure of information from states' sex offender registries for any purpose permitted under a state law.[85]

The other federal law passed in 1996 was the *Pam Lychner Sex Offender Tracking and Identification Act of 1996*. Pam Lychner was a victim of attempted sexual assault. She was attacked by William David Kelley while showing a vacant home to a prospective buyer. The arrival of her husband to the house saved her.[86]

The *Pam Lychner Act* established a national database, the National Sex Offender Registry, by which the FBI tracks the location and movements of certain sex offenders.[87] To be

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[82] Fodor, *Megan's Law*, 5,15,20.
[83]Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, "Legislative History," *Office of Justice Programs, http://www.ojp.usdoj.gov/smart/legislation.htm*
[84] *Megan's Law,* 104th Cong., 2nd sess., 1996, H.R. 2137, sec 2.
[85]Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, "Legislative History," *Office of Justice Programs, http://www.ojp.usdoj.gov/smart/legislation.htm*
[86] "The Pam Lyncher Act," *Parents for Megan's Law and The Crime Victims Center,* http://www.parentsformeganslaw.org/newscategories/newsArticles/General/GIVING_THEIR_LIVES_FOR_LAWS/THE_PAM_LYCHNER_ACT/THE_PAM_LYCHNER_ACT; "Notorious Attacker Faces Charge of Failing to Register as Sex Offender", n.d., http://abclocal.go.com/ktrk/story?section=news/local&id=8522020.
[87] "Background," *FBI*, n.d., http://www.fbi.gov/scams-safety/registry/background_nsor.

included in the national registry of offenders were those convicted of "coercive, penetrative sex with anyone, sex with children under the age of 12, recidivists of any sexual offense, and sexually violent predators."[88] It also allowed the FBI to give information they collected to federal, state, and local officials when necessary to protect the public.[89]

The most recent federal legislation regarding sex offenders is the *Adam Walsh Child Protection and Safety Act*. Adam was a six year old abducted from a Florida shopping mall in 1981. Police found his head floating in a canal.[90] Named for Adam, the *Adam Walsh Act* "increased federal sentences for sexual crimes, implementing minimum prison terms of thirty years to life for sexual homicide, aggravated sexual abuse, or sexual exploitation of minors and a minimum of ten years to life imprisonment for coerced sexual acts with minors."[91]

Furthermore, the act governs the minimum standards for registration, community notification, and civil commitment. The majority of information presented about these techniques in the first chapter comes from the requirements of the *Adam Walsh Act*. As described in more detail in chapter one, the Act authorized an online national registry that would incorporate information from every state registry. Individuals now have access to sex offender information from across the country.[92] All states were required to upload their online sex offender databases to the national database by 2009.[93] Also as previously mentioned, the *Adam Walsh Act* created the three tier system used for registration and notification purposes. The *Sex Offender Registration and Notification Act (SORNA)* as a provision of the *Adam Walsh Act*

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[88] *No Easy Answers*, 38.
[89] Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, "Legislative History," *Office of Justice Programs, http://www.ojp.usdoj.gov/smart/legislation.htm*
[90] "John and Reve Walsh Relive Son's Murder", n.d., http://abcnews.go.com/US/adam-walsh-murder-john-reve-walsh-live-investigation/story?id=13037931.
[91] Janus and Polachek, "Crooked Picture," 153.
[92] *No Easy Answers*, 37.
[93] Ibid., 38.

governs the current rules regarding sex offender registration and notification.[94] It required for the first time that juvenile offenders be included in state registries. The original provision of the *Wetterling Act* left it up to the states to determine if juvenile offenders were included.[95] Furthermore, the act made it a federal felony not to register or have current information on file for sex offenders.[96] The *Adam Walsh Act* was also the first federal law that had a civil commitment provision. It sets guidelines for civil commitment programs and provides states with financial incentives to expand their civil commitment system. There had been no civil commitment provision in federal law until the *Adam Walsh Act*. This act is the current sex offender law that guides the use of civil commitment, registration, and community notification, but like the other sex offender laws, it does not limit states from going beyond the federal law.[97] In its entirety, the act broadens the scope, scale, and requirements of sex offender registration community notification and civil commitment programs.

The historical development of sex offender laws demonstrates that legislators continue to use the civil and criminal system and increase management of sex offenders outside of the criminal justice system. Federal laws against sex offenders rely on registration, civil commitment, and community notification. The laws are focused on preventing sexual recidivism and are concerned with the most dangerous of sex offenders. The assumption that legislators have made is that the majority of sex offenders are sexually violent predators.

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[94] Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, "SORNA," *Office of Justice Programs,* http://www.ojp.usdoj.gov/smart/sorna.htm
[95] Wright, "Sex Offender Post-Incarceration Sanctions," 33.
[96] Janus and Polachek, "Crooked Picture," 154.
[97] *No Easy Answers*, 38.

Chapter Three: Inadequacies and Failings of Current Legal Regulations

The strategies used by the law to regulate sex offenders' behavior and increase public safety have a large and negative impact on sex offender's lives. They affect all aspects of an offender's life, not only where and how they make a living, but also to what degree they are able to participate in normal activities and interactions with people. Offenders' lives are altered for a minimum of fifteen years through registration. Furthermore, because of the link between registration and community notification through the internet offenders can be confronted by anyone for at least fifteen years. Consider these three stories of sex offenders living in the community.

A fifty eight year old man, Walter D, in Washington State was released from prison in 1992. In 1986 he had unknowingly solicited an underage prostitute. As mandated by law he is required to register and his name and picture are posted on the state online sex offender registry. Since his release he has had trouble maintaining a residence and a job. He has been fired four times after his colleagues saw his profile on the online registry. Landlords are very reluctant to rent to him and within weeks of moving into an apartment, flyers with his registry profile appear all over his neighborhood. Walter told Human Rights Watch, "I will never be given a second chance. It doesn't matter how long I don't reoffend, I will always be a sex offender in everyone else's eyes."[98] Registration and community notification have made it very difficult for him to find a job, a place to live, and to participate in the community.

This has also been the experience of Dan M who was convicted of statutory rape when he was seventeen. The girl was fifteen years old and sixteen months his junior. They had sex seven weeks after his seventeenth birthday. In his state, he must register every ninety days between the

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[98] Ibid.

hours of eight and five Monday through Friday before the fifteenth of the month. He is worried about adhering to these rules once he begins to work. He will have difficulty getting to the police station unless he works near it, especially since he will probably have to register during his lunch hour. When he visits other states on vacation he has to look up the registration laws of the state he is visiting. For example, in New York, he is required to register if he stays for more than two weeks and in a county in Florida if he is spending more than three consecutive days in the county. His parents moved to Arkansas and because he will be visiting for more than thirty days in a year he has to be fingerprinted and psychologically assessed as to his level of risk to reoffend. When he explained all this in his interview with the Human Rights Watch, he had twenty three more years of registration.[99]

When he was twelve, Paul L performed oral sex on his six year old cousin. He was tried in adult court and pled guilty. He went through an intensive sex offender treatment program, participated in group therapy, and went to individual counseling. Paul is required to register for twenty five years, but in 2007 he was not subject to community notification. Nevertheless, his mother has reported him saying "Mom, I must be a monster. No girl should want to be around me." His mom was worried about what would happen if a residency restriction was passed where they live. She said, "I am worried that if the state that says sex offenders can't be in certain places where children gather, that my child, who is technically a sex offender who molested a child, will no longer be able to go to school, or play with his friends, or go to church."[100]

Stories like these are not uncommon among sex offenders. Sex offender laws, as they were intended, have a tremendous impact upon sex offenders' lives. Community notification, registration, and civil commitment separate sex offenders from the community as much as

[99] Ibid., 74.
[100] Ibid., 67.

possible, but this is not for the better. There are many practical and theoretical problems to the federal laws. Although the intentions of legislators may be sincere, the way the laws attempt to deal with sex offenders is inadequate, and furthermore, the laws were enacted on the basis of many misconceived notions about sex offenders. They are inadequate because they do not significantly reduce sexual violence or increase community safety. They are based on misconceived notions because the statistics about sexual offenders do not back up the preconceived notions of those who proposed the legislation. There needs to be a change of approach, and Martha Minow's ideas from her book *Making All the Difference: Inclusion, Exclusion, and American Law* can give society this new approach.

Practical Problems

There are many practical problems with registration, community notification, and civil commitment. First, the laws that mandate the use of these strategies are inadequate because even though they were enacted to decrease recidivism rates or increase public safety, they have not proven effective in stopping recidivism and even more than simply being ineffective, they have many negative impacts on sex offenders, their families, and the community.

Ironically it was *Megan's Law* that introduced community notification, even though some people in her neighborhood knew of her offender's past history.[101] This and the studies conducted raise the question of whether registration and community notification are effective in reducing recidivism. First, it has been found that recidivism rates of sex offenders are much lower than they are generally assumed to be. In 1998, "a comprehensive review of over sixty recidivism studies, reviewing information on 24,000 sex offenders, researchers found that only 13.4% of convicted sex offenders committed another sexual offense within five years of their

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[101] Janus and Polachek, "Crooked Picture," 157.

release."[102] Furthermore, a study conducted by the United States Department of Justice found that "within three years only 5.3 percent of all sex offenders were arrested, and 3.5 percent convicted, for a new sex crime; 2.2 percent were rearrested for a sex offense against a child."[103] Janus and Polacheck have also noted that "even the most liberal estimate of recidivism show that at least 60% of convicted sexual offenders will not commit another sexual offense."[104]

Recidivism rates of sex offenders are not very high to begin with, but research also shows that registration and community notification are not significantly effective in decreasing recidivism rates. Zilney and Zilney note that consistently "a variety of studies beginning in the early 1990s and continuing to 2008 have found no significant reduction in sexual recidivism rates against either children or adult women due to community notification laws."[105] For example, in 2005, Barnoski compared the rates of recidivism before and after the passage of Washington's registration and notification statue and determined that sexual felony rates decreased from 5% to 1%.[106] Another study in Iowa comparing registered sex offenders and those not required to register as a result of their having been convicted prior to the registration laws did not find any significant differences either. Sex-offense recidivism was at 3% for the registry sample and 3.5% for the pre-registry sample, but these results were not statistically significant.[107] Multi state studies have also shown the same result. In a multi-state time series analysis, there was no significant decline in sex crime after the implementation of Megan's

[102] Ibid., 163.
[103] *No Easy Answers*, 26.
[104] Janus and Polachek, "Crooked Picture," 163–164.
[105] Zilney and Zilney, *Reconsidering Sex Crimes and Offenders*, 127.
[106] Mercado, Alvarez, and Levenson, "The Impact of Specialized Sex Offender Legislation on Community Reentry," 189.
[107] Geneva Adkins, David Huff, and Paul Stageberg, *THE IOWA SEX OFFENDER REGISTRY AND RECIDIVISM* (Iowa Department of Human Rights: Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center, December 2000), 19, http://www.humanrights.iowa.gov/cjjp/images/pdf/01_pub/SexOffenderReport.pdf.

Law.[108] Of the ten states used, five of the ten showed no significant differences (increase or decrease).[109] Of the four states that reported significance, three of the states reported statistically significant decreases in the number of rapes, but another state resulted in a statistically significant increase.[110] The researchers concluded that "the passage of sex offender registration and notification laws have had no systematic influence on the number of rapes committed in these states as a whole."[111]

Sex offenders have also reported that they do not believe that registration and community notification decrease their likelihood of reoffending. One study conducted in 2006, reported that seventy five percent of participants revealed that community notification and registration would not deter them from committing another sex offense.[112] Furthermore, in a questionnaire survey sent to Tier II and Tier III sex offenders in New Jersey "offenders generally disagreed with the notion that they were more willing to manage risk factors because they knew that their neighbors were watching."[113] They also disagreed that they have less access to potential victims because their neighbors know that they are sex offenders or that information listed in the registry would help the public know how to protect themselves.[114] Researchers and participants also noted that there is a lot of inaccurate information on the registries. This suggests that administrative errors

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[108] Mercado, Alvarez, and Levenson, "The Impact of Specialized Sex Offender Legislation on Community Reentry," 189.
[109] Jeffrey T. Walker et al., *THE INFLUENCE OF SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS IN THE UNITED STATES* (Arkansas Crime Information Center, 2005), Discussion and Conclusions, http://ww.ilvoices.com/media/96974ddeccb5afb9ffff82e2ffffe41e.pdf.
[110] Ibid.
[111] Ibid.
[112] Zilney and Zilney, *Reconsidering Sex Crimes and Offenders*, 127.
[113] Mercado, Alvarez, and Levenson, "The Impact of Specialized Sex Offender Legislation on Community Reentry," 189.
[114] Ibid., 198.

on registries may be common, thus further decreasing the effectiveness of registration and notification.[115]

Even if registration seemed to be effective, the difficulties of enforcing it minimize its effectiveness. In 2007, there were over 600,000 men and women listed on sex offender registries.[116] It is impossible for law enforcement to keep track of all of them on top of their other duties. A local police officer said "To be honest, it would be hard to go out and patrol every registrant on the list…We don't really check in on them, unless they failed to register and we have to try and find them."[117] In 2003, California admitted that it had lost track of 44% or 33,000 sex offenders out of 76,350.[118]

Registration and community notification make it more difficult for sex offenders to reintegrate into the community. The effect of registration and community notification is increased mental and physical instability in a sex offender's life, factors that have been shown to correlate with recidivism. The general consensus among researchers is that sexual recidivism is associated with deviant sexual interests, antisocial orientation, and lifestyle instability and Hanson found that "sexual deviancy and antisocial orientation were the major predictors of sexual recidivism for both adult and adolescent sexual offenders."[119] Lifetime instability and stress increase the likelihood of reoffending. Positive community integration is essential for decreasing the rates of recidivism for sex offenders. Community notification and registration actually may decrease public safety by raising the likelihood that sex offenders will reoffend. In a multi-state study of the unintended side effects of these policies the researchers found that "the

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[115] Ibid., 201.
[116] *No Easy Answers*, 45.
[117] Ibid.
[118] Janus, *Failure to Protect*, 67.
[119] R. Karl Hanson and Kelly E. Morton-Bourgon, "The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies," *Journal of Consulting and Clinical Psychology* 73, no. 6 (December 2005): 1154, 1158.

majority of sex offenders reported experiencing psychosocial distress related to public disclosure, such as isolation, shame, embarrassment, and hopelessness. Nearly half expressed that they were afraid for their safety because their sex offender status was known to others."[120] In another study that looked at the experience of level one and two offenders, the researchers found that 52% of respondents reported having lost jobs as a result of notification, 24% had to move out of rented apartments because of a landlord, 48% reported having been physically threatened or harassed, and 27% reported having actually been physically assaulted or injured.[121] This study also showed that the majority of sex offenders experienced shame or embarrassment that kept them from engaging in activities, felt alone and hopeless, and lost friends or people with whom they were in close relationships because of their sex offender status.[122] The labeling of sex offenders within the communities also harms the families of sex offenders. They are also subject to the stigma and instability of the sex offender in their family. One study found that 34% of sex offenders reported "someone who lived with them was threatened, harassed, assaulted, injured or had suffered property damage" because of living with a sex offender.[123]

There are also problems with the current state of civil commitment laws. The purpose of a civil commitment program is to give patients treatment so that they may rejoin the community. According to the terms of the *Adam Walsh Act*, civil commitment programs must provide appropriate treatment to those whom the state determines require confinement.[124] As of 2009, no patients had been released in the eighteen years Minnesota's civil commitment laws had been in

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[120] Levenson, D'Amora, and Hern, "Megan's Law and Its Impact on Community Re-entry for Sex Offenders," 574.
[121] Mercado, Alvarez, and Levenson, "The Impact of Specialized Sex Offender Legislation on Community Reentry," 197.
[122] Ibid., 196.
[123] Ibid., 195.
[124] *Adam Walsh Child Protection and Safety Act of 2006,* Public Law 109-248, U.S. Statutes at Large 120 (2006): 618.

effect. [125] It appears that civil commitment programs are being used more for extended confinement, rather than for treatment. Janus has found that "despite the legislative command for treatment, legislatures and courts have acknowledged that treatment is secondary to the primary purpose of sex offender commitments-the protection of the public…and, the actual performance of states calls into question the genuineness of the treatment purpose.[126] Considering that states only attempt to impose civil commitment when a prisoner is about to be released implies that states are not using civil commitment for mental health treatment, but as another way to keep sex offenders contained. The American Psychiatric Association Task Force Report in 1999 also expressed their concern over the use of civil commitment programs for sex offenders. They found that "legislators have used psychiatric commitment to effect nonmedical societal ends. In the opinion of the task force, this represents an unacceptable misuse of psychiatry."[127]

This type of misuse of civil commitment not only hurts sex offenders committed, but also (according to the American Psychiatric Association Task Force) "threatens to undermine the legitimacy of the medical model of commitment."[128] It will harm those who really do have a serious mental problem and need commitment. "Characterizing repeat offenders as 'mentally ill' and 'dangerous' may create public apprehension towards individuals who are seriously mentally ill. It would not be surprising if the public transposed its diffuse fear and insisted on law reform that makes it easier to commit and retain seriously ill persons."[129] It also takes resources away from those in the mental health system that need treatment through very steep increases in

[125] Janus and Polachek, "Crooked Picture," 151.
[126] Ibid.
[127] Howard V. Zonana, Richard J. Bonnie, and Steven K. Hoge, "In the Wake of *Hendricks*: The Treatment and Restraint of Sexually Dangerous Offenders Viewed From the Perspective of American Psychiatry," in *Protecting Society from Sexually Dangerous Offenders,*ed. Bruce J. Winick and John Q. La Fond (Washington DC: American Psychological Association, 2003), 135.
[128] Ibid.
[129] La Fond, "The Costs of Enacting a Sexual Predator Law," 499.

operating costs due to the increasing number of patients.[130] These resources could be used to help treat patients instead of being used to house certain sex offenders.

Civil commitment programs are very expensive. They require separate treatment programs, buildings, and a large staff. They also require states to create new bureaucracies to keep records of all sex offenders as they progress and to review the file of every sex offender who is due to be released from prison in order to determine who needs to be civilly committed.[131] In 2006, the annual cost of Minnesota's predator commitment law was $30.6 million. When Wisconsin first enacted its predator commitment law in 1993, officials estimated annual operating costs to be $3.6 million. Ten years later, in 2003, operating costs were $26 million a year, with an additional $40 million invested in the physical building.[132] The monetary costs of civil commitment cannot be justified when the programs do not focus on the treatment of sex offenders.

Registration and community notification also have very high monetary costs. Many states have found that updating their registration and community notification programs to the standards of the *Sex Offender Registration and Notification Act* (*SORNA*) of the *Adam Walsh Act* will cost more than forgoing the loss of ten percent of federal funding from the Byrne Justice Assistance Grants. For example, Texas estimates that complying with *SORNA* would cost $38.7 million while losing $1.4 million in federal funds for noncompliance.[133] Part of the reason for such high costs is the number of legal claims brought against the state. Ohio, the first state to comply with

[130] Ibid., 500.
[131] Ibid., 476–477.
[132] Janus, *Failure to Protect*, 62.
[133] Helen Gunnarsson, "Sex Offender Registration Changes: Not Worth the Cost?," *Illinois Bar Journal* 99, no. 10 (October 2011), http://www.isba.org/ibj/2011/10/lawpulse/sexoffenderregistrationchangesnotwo.

SORNA, had to defend itself against more than 7,000 claims of which only two were found to be substantiated.[134]

The effects of registration and community notification are not limited to only the most serious sex crimes; they are applied quite broadly. Recall that under the *Adam Walsh Act* all sexual crimes are categorized into only three levels of tiers and that states retain the right to define sex offenses more harshly. In Oklahoma, any type of public exposure is regarded as a sex offense that triggers ten years on the sex offender registry.[135] It does not matter if the person had a sexual motivation for exposing himself or herself. In 2007, twenty-nine states required registration for consensual sex between teenagers and thirty two states required registration for exposing genitals in public.[136] Furthermore, seventeen states required lifetime registration for all registrants regardless of the offense committed.[137] Federal laws regarding sex offender online registries do not require that the registry indicate the level of dangerousness, thus, the public may have no way of knowing if the sex offender was convicted of raping a child or was convicted of urinating in public.[138] This is reflected in the experience of tier II and III offenders. One study found that there was no difference in the experiences of level II and III sex offenders regarding their negative emotional states and feelings of social isolation.[139] Registration and community notification are not capturing only the most dangerous offenders.

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[134] Ibid.
[135] *No Easy Answers*, 40.
[136] Ibid., 39–40.
[137] The Adam Smith Act does not forbid states to enact longer registration times for sex offenders. *No Easy Answers*, 42.
[138] In 2007, the states of Alabama, Alaska, California, Connecticut, Florida, Georgia, Hawaii, Idaho, Kansas, Louisiana, Maine, Michigan, Mississippi, Missouri, Nebraska, Ohio, Pennsylvania, Tennessee, Utah, Virginia, and West Virginia and Washington DC reflected no understandable indication of the level of dangerousness of offenders. *No Easy Answers,* 55.
[139] Mercado, Alvarez, and Levenson, "The Impact of Specialized Sex Offender Legislation on Community Reentry," 201.

Juveniles are particularly affected by the broad use of registration and community notification. Under the *Adam Walsh Act* "a fourteen-year-old juvenile adjudicated delinquent of the sexual act of intentionally touching an eleven-year-old's genital area, not through the clothing, can be required to register as a sex offender and submit to community notification for the rest of his life. The juvenile would be required to register and submit to community notification even if he viewed the eleven-year-old as a peer who consented to the sexual encounter."[140] The *Adam Walsh Act* makes no distinction between the treatment of juveniles and adults and the majority of states do not either. In 2008, "38 states [included] the registration of juvenile sex offenders in sex offender registries without any restrictions, treating juvenile and adult sex offenders in the same manner."[141] In a national study it was determined that 23% of sexual assault offenders were under the age of eighteen and 16% of these offenders were under the age of twelve.[142] Children cannot see R-rated movies without parental supervision, but at fifteen they may register as sex offenders for what could be the rest of their lives.[143] Juvenile offenders are subject to the same stigma and degradation that adult offenders experience. If a child committed a tier I sex crime at the age of fourteen, the child would have to register as a sex offender until he was twenty-nine years old.

These laws reflect a contradiction between whether we view sex offenders as capable individuals who should be held responsible for their crime or as individuals who are too mentally ill to control their behavior. Individuals are convicted in the criminal justice system so that they are held responsible for their actions, but then when they are to be released the law begins proceedings to determine if they are mentally unstable. The law does not determine that they are

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[140] Bowater, "Adam Walsh Child Protection and Safety Act of 2006," 829.
[141] Janus and Polachek, "Crooked Picture," 161.
[142] Ibid., 159.
[143] Ibid., 161.

mentally ill until after they have finished their prison term for which they have been held accountable for their actions.

Even though studies are showing the inadequacies of the federal laws, much of the public believes these laws and strategies are necessary and effective. "A study in Washington revealed that sixty three percent of public residents surveyed believed these laws encourage released offenders to abide by the law, and seventy eight percent felt safer knowing the whereabouts of sexual offenders."[144] Another study in Florida found that eighty three percent of participants believed that community notification was effective in reducing recidivism and seventy six percent believe that all sex offenders should be subject to notification regardless of the level of offense .[145] Interestingly, seventy three percent indicated that they would likely support community notification even in the absence of scientific evidence that the policy is effective in reducing recidivism.[146] The researchers also found that respondents believed sex offense recidivism rates to be about seventy five percent.[147] While they may be unacknowledged by the public, the concerns of researchers are real; registration, community notification and civil commitment have many practical problems.

Misconceptions

Part of the reason why the laws are ineffective and have many significant negative effects is that they are based on many misconceived notions. The first misconception reflected by law is that the majority of sex offenders are rapists and murderers who are strangers to their victims. In fact, researchers have known for a long time that the majority of sex crimes are committed by

[144] Zilney and Zilney, *Reconsidering Sex Crimes and Offenders*, 126.
[145] Ibid.; Levenson et al., "Public Perceptions About Sex Offenders and Community Protection Policies," 153.
[146] Levenson et al., "Public Perceptions About Sex Offenders and Community Protection Policies," 148–149.
[147] As previously stated, even the most liberal of estimates of recidivism rates show that only forty percent of convicted sex offenders will be rearrested for another sex crime. Most studies find between 3-14%; Janus and Polachek, "Crooked Picture," 163–164; Levenson et al., "Public Perceptions About Sex Offenders and Community Protection Policies," 153.

offenders who knew their victims. One study in the 1980s found that among college students eighty four percent of rapes involved close acquaintances or dates.[148] Furthermore, a survey conducted in 1995-1996 by The National Violence Against Women Survey found that 61.9% of adult women who reported being raped were raped by an intimate partner, 21.3% of adult women victims were raped by acquaintances and 8.5% were raped by relatives. "In this survey of 8000 men and 80000 women, only 28.4% of men and 16.7% of women rape victims were raped by strangers."[149] Published in 1997, the Bureau of Justice Statistics reported that three out of four rape sexual assault victimizations involved offenders who knew their victim and strangers were involved in around twenty percent of sexual offense victimizations when there was only a single offender. Sex offenses against children are also likely to be acquaintances or family members of the child. The Bureau of Justice Statistics also reported that "over 90% of offenders who sexually abused children under the age of twelve were family members or other acquaintances intimately associated with the victim."[150] These acquaintances are not random people on the playground, but significant people in children's' lives like coaches, babysitters, family, and friends. Studies repeatedly show that the majority of sex offenders know their victims, whether they are adults or children.

Another misconception is that the majority of sex offenders are the most likely group of criminals to reoffend. Janus declares that "the vast majority of sexual violence is most likely not committed by released sex offenders. In fact, of the most serious sexual offenders (those who receive prison sentences) only one in seven had a prior conviction for a sex offense."[151] Seventy

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[148] Mary P. Koss, "Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education," in Confronting Rape and Sexual Assault ed. Mary E. Odem and Jody Clay-Warner (Wilmington, Delaware: Scholarly Resources Incorporated, 1998), 65

[149] Wright, "Sex Offender Post-Incarceration Sanctions," 22–23.

[150] Janus and Polachek, "Crooked Picture," 157.

[151] Janus, *Failure to Protect*, 50.

three percent of sex offenses are an offender's first offense.[152] As discussed earlier, even the most liberal of estimates of recidivism rates show that only forty percent of convicted sex offenders will be rearrested for another sex crime. Most studies result in even lower recidivism rates, but even using the highest statistics the majority are not arrested again. [153] Terance Miethe, Jodi Olson, and Ojmarrh Mitchell compared recidivism rates of sex offenders to different types of criminals and found that sex offenders have lower recidivism rates than property offenders, public order offenders, and non-sexual violent offenders.[154] In particular, drug offenders and burglars are much more likely to repeat the same offense and be arrested than rapists and child molesters. In actuality, sex offenders have lower recidivism rates than other criminals, and specialization among sex offenders drops over stages of their criminal careers.[155] Other types of criminals have higher recidivism rates than sex offenders, but regulatory measures like community notification and registration are not used against robbers or drug offenders.

The laws also reflect the assumption that psychologists can accurately predict how dangerous a certain sex offender is to the community. Registration, community notification, and civil commitment are applied to sex offenders depending on the quantity of risk held. The two main approaches used to determine riskiness are the clinical model approach and the actuarial approach. In a clinical model, a professional assesses the quantity of risk after speaking to and studying the offender. The professional relies on the latest scientific findings about sexual offending as well as their own judgment and experience.[156] An actuarial approach identifies the most important factors that indicate risk of reoffense and then empirically calculates a score for

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[152] Jeffrey T. Walker et al., *THE INFLUENCE OF SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS IN THE UNITED STATES*, Discussion and Conclusions.
[153] Janus and Polachek, "Crooked Picture," 163–164.
[154] Miethe, Olson, and Mitchell, "Specialization and Persistence in the Arrest Histories of Sex Offenders A Comparative Analysis of Alternative Measures and Offense Types," Table 1.
[155] Ibid., 204–229.
Ibid., 204–229.
[156] Janus, *Failure to Protect*, 55–56.

each offender based on their unique combination of risk factors.[157] It is generally acknowledged that actuarial methods are more accurate in assessing risk and courts have allowed expert testimony of sexual dangerousness based on actuarial tests to identify the amount of risk to the community the individual holds.[158] The clinical model is more subjective than the actuarial model.[159]

Actuarial methods are better than clinical models, but they still are not close to being one hundred percent accurate. Critics say the problem is that by definition actuarial models provide information about groups rather than the psychological aspect of the individual.[160] Actuarial methods can determine which group with certain risk factors an individual belongs, but it cannot determine the actual risk for an individual or what range of risk within the group the individual falls into.[161] La Fond says that through an actuarial model, "there is no clear basis for determining which individuals will reoffend and which will not."[162]

In addition, there is a misconception that psychologists have distinguished a serious mental disorder specific to sex offenders that requires civil commitment. In 1999 the American Psychiatric Association Task Force determined that "the sexual predator commitment laws establish a nonmedical definition of what purports to be a clinical condition without regard to scientific and clinical knowledge."[163] In reality, psychologists are not clear if there is a real medical mental illness common to all sex offenders. In practice medical health practitioners are forced to use unofficial diagnostic terms to label rapists (*paraphilia-rapism*) and abusers of

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[157] Ibid., 56.
[158] Fond, *Preventing Sexual Violence*, 56.
[159] Janus, *Failure to Protect*, 56.
[160] Fond, *Preventing Sexual Violence*, 53.
[161] Ibid., 34–54.
[162] Ibid., 55.
Janus, *Failure to Protect*, 53.
[163] Zonana, Bonnie, Hoge, "In the Wake of *Hendricks*: the Treatment and Restraint of Sexually Dangerous Offenders Viewed from the Perspective of American Psychiatry, 135.

adolescents (*hebephilia*) in order to meet civil commitment requirements and "provide a mental disorder label that distinguishes these offenders from other sorts of recidivist criminals."[164] *Paraphilia-rapism* and *hebephilia* are not acknowledged medical mental disorders. The reasons that they are pushed to use these unofficial mental health terms are because not all sex offenders fall under an established mental health problem like *pedophilia* or *paraphilia*.[165] Further, although many sex offenders have "personality disorders", this is a characteristic common among many types of criminals.[166] No identified, serious medical illness common to all sex offenders that would lead them to commit sex crimes has been recognized.

Federal laws reflect many misconceptions about who sex offenders are and how they can be identified. It is understandable with so many misconceptions why federal laws prove less effective in reducing sexual violence and have so many practical problems. Lawmakers may have had sincere intentions when they enacted the laws, but they were mistaken in how much scientific progress has been made and in how they understand sexual violence to be occurring in the world.

Theoretical Problems As Perceived By Minow

While there are many practical problems and misconceptions about the reality of sexual violence, Martha Minow, author of *Making All the Difference* and architect of the social relations theory also helps to identify additional problems with the approach of current laws to the sex offender problem. First, differences are viewed as intrinsic to a sex offender. The federal laws attempt to measure how much risk is individually found within a person through an actuarial test and then applies civil commitment, community notification, and a quantity of registration time depending on the level of risk found. The law labels sex offenders as a "different person" and

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[164] Janus, *Failure to Protect*, 52.
[165] Ibid.
[166] Ibid., 53.

separates them accordingly. Minow says, "The assumptions that differences lie within people obscures the fact that they represent comparisons drawn between people, comparisons that use some traits as the norm and confirm some people's perceptions as the truth while devaluing or disregarding the perspectives of others."[167] So in reality "differences between people and between problems and between legal concepts or precedents are statement of relationships; they express a comparison with another person, problem, concept or precedent.[168] Differences are not intrinsic, but embedded within relationships between people.

Using Minow's analysis we can identify the unstated norm that all sex offenders are compared to is "the stranger in the dark" bent on attacking victims unable to control their sexual desire. There is tremendous power behind an unstated norm. As Minow says,

> "To treat someone as different means to accord him treatment that is different from the treatment of someone else…when differences are discussed without explicit reference to the person or trait on the other side of the comparison, an unstated norm remains. Usually, this default reference point is so powerful and well established that specifying it is not thought necessary."[169]

The federal laws never say that they are trying to defend against dangerous, unrestrainable sex offenders, but clearly the writers of the laws operate with this assumption. It does not need to be explicitly named because it is commonly understood. All the laws are named after victims of this type of offender and are supported by a public afraid of sexual predators that attack strangers in the dark. All of the strategies used by the federal laws focus on preventing determined sex offenders from being able to reoffend and trying to keep them separate from the community as much as possible because the assumption is that the majority of sex offenders cannot control

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[167] Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press, 1991), 75.
[168] Ibid., 54.
[169] Ibid., 56.

their sexual deviance. The problem with an unstated norm is that if "difference is knowable by reference to an unstated norm, then the norm itself remains hidden from evaluation.[170] What Minow means by this is that people do not even realize what they consider the norm to be. If it is never stated or realized, then there is no opportunity to ever question it.

Another theoretical problem of legal regulation of sex offenders that Minow allows us to identify is that the status quo or the federal laws in place right now are understood as uncoerced and good. As pointed to earlier, people assume that the federal laws in place will protect the community from sex offenders and will decrease the amount of sexual violence. They believe that the policies are effective and do not in a fundamental way need to be changed. According to Minow, the problem is that "difference may seem salient, then, not because of a trait intrinsic to the person but because the dominant institutional arrangements were designed without that trait in mind."[171] Sex offender policies were designed with the idea of the sexually violent stranger in mind and therefore, cannot accommodate those who are a different type of sex offender.

Minow also points out the limitations and difficulties that come when society tries to talk about rights through abstract principles. The two abstract principles that are in competition within sex offender legislation are public safety and individual liberty. These two positions battle to determine where the line should be drawn with how much the law can attempt to regulate the behavior of sex offenders. The problem is that when two abstract principles converge in a situation they do not tell us where the line should be drawn. Isolated individual principles seem clear, usable, and powerful, but once applied to a situation often conflict with other such principles. They do not provide a way to determine the answer or prioritize which principle is

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[170] Ibid., 74.
[171] Ibid., 70.

most important because each individually is strong and considered sufficient.[172] In the case of sex offenders, it does not tell us when we are no longer protecting the public or when we have infringed too far on a person's liberty.

Minow highlights in her book that "abstractions tend to obscure the ambiguity of the problems and the complex human relationships implicated in both the problems and any solutions to them" and "distract attention from contexts and carry an illusion of uncontroverted answers"[173] She argues that it is within the contexts of the situation that any meaning is given. Without the context, there is no meaning behind the abstractions. The federal laws do not allow for context to be taken into consideration which is why a seventeen year old who has sex with a girl sixteen months his junior is subject to community notification and registration for twenty five years.

Using Minow, we can determine that society employs what she calls the Abnormal-Persons Approach to deal with sex offenders. Sex offenders are viewed as abnormal persons by the law and community. Minow describes the abnormal approach as when people think that "Abnormal persons intrinsically differ from the norm."[174] It is assertions about the inherent nature within an individual that makes a person different. Further, "those with abnormal competence and capacity…can be subjected to legal restraints on their autonomy and denied rights; they need legal protections to guard themselves and others from the effects of their incapacities."[175] Sex offenders are seen as inherently different from others who are the norm. Risk is based on the amount of sexual deviance offenders are thought to have within them. They are considered incapable of controlling their sexual desires and as such they need special rules

[172] Ibid., 314–317.
[173] Ibid., 322.
[174] Ibid., 106.
[175] Ibid.

like community notification, registration, and possibly civil commitment in order to protect individuals within the community and offenders from themselves.

Sex offenders are also treated more like a class of people who share more with each other than with the rest of the community. In an abnormal approach, the defining characteristic is a more important measure of similarity than other factors like religion, age, family, or intentions. Members within a group may be varied, but it is more important that people in the group have less ability to function appropriately in everyday life.[176]

Minow would understand that historically sex offenders are considered abnormal persons. She would fault the approach the law takes as categorizing them this way. The current approach does not understand difference correctly or acknowledge the importance of context. Lawmaker's incorrect approach to difference is why they cannot acknowledge the true reality of sexual violence and cannot enact polices not based on misconceptions. It is impossible for laws to be effective when there are so many problematic reasons for their existence.

Chapter Four: A Social Relations Approach to Sex Offender Laws

No one questions the destructive impact of sexual violence on individuals and society. The law must respond, but its current response is harmful and inadequate because it builds upon incorrect assumptions about sex offenders and sexual violence. Consequently, current law reflects many practical and theoretical problems. Lawmakers must change their approach if they seek to more effectively reduce recidivism, keep relationships intact, and protect the public. If lawmakers continue along the current path, they persist in both unfairness and ineffectiveness. Lawmakers must not remain satisfied with minimally effective strategies that do not begin to combat sexual violence where the majority of it occurs. Sexual violence is horrible, but

[176] Ibid., 107

humiliating and isolating offenders does not make society more secure. The social relations approach effectively addresses the problem of sexual violence.

The social relations approach of Martha Minow suggests that the view of sex offenders as intrinsically different from others must be addressed first. The process the law uses to assess the degree of risk each sex offender presents leads to the ineffective public policies of civil commitment, registration, and community notification. Creating a new identity for an individual who commits a sex offense--the "sex offender"-- that follows him for at least fifteen years of his life, reflects the law's view of him as intrinsically different from other criminals and citizens. This identity marks him as an abnormal or degraded person and treats virtually all offenders regardless of the severity of their crime as sexually dangerous predators. Improving the laws in this area entails implementing a social relations approach that locates difference outside an individual and within the relationships between people. The law's approach to difference requires change.

What is a Social Relations Approach?

A social relations approach is a legal and social approach to understanding and resolving issues that arise from "difference" viewed as inherent within individuals. It would change the existing institutionalized power structure of society by treating differences as a function of relationships. "It assumes that there is a basic connectedness between people, instead of assuming that autonomy is the prior and essential dimension of personhood." [177] It acknowledges that a common humanity links everyone and that this common humanity supersedes any of the differences perceived between and among people. Humans exist as connected beings rather than autonomous individuals. The social relations approach considers how an action taken against or by one person will affect the relationships that this person holds with others. A relational

[177] Ibid., 110.

approach does not treat individuals as if they are isolated, but as individuals within a network of relationships.

Furthermore, as stated by Minow, "The social-relations approach embraces the belief that knowledge is rooted in specific perspectives, and that 'prevailing views' or 'consensus approaches' express the perspectives of those in positions to enforce their points of view in the structure and governance of society."[178] Those groups and individuals who have been in power have had the opportunity to determine the "norms." These norms and labels may seem correct and even natural today because they are deeply embedded in the structure of institutions and society and are taken for granted. Their historical construction as norms disappears from view. Those who have determined "different" did so by contrasts against their own groups. In contrast, a social relations approach argues that since people are in connection with others, differences lie in the relationships held with other people. Minow declares that "'difference' is meaningful only as a comparison…As a relational notion, difference is reciprocal: I am no more different from you than you are from me."[179] One's perspective and action will always have been influenced by the society of which one is a part.

A social relations approach acknowledges the common humanity among individuals and that relationships between people create difference. It also emphasizes attempting to understand the perspectives of those who are labeled different as important as well as looking at the context of the situation to find meaning.

Why A Social Relations Approach is Needed

Because a social relations approach changes the fundamental structure through which the law views sex offenders, it offers an alternative to the structural flaws of the current system.

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[178] Ibid., 111.
[179] Ibid.

Experts propose many solutions to make the laws more effective and fair, and to help correct the public's misconceptions about sex offenders. Previous solutions fall into two general categories: preventative programs and legal reform. Preventative programs seek to reduce the amount of sexual violence and include proposals for treating children with sexually inappropriate behaviors, educating the public about the reality of sexual violence, and educating parents and children about inappropriate sexual behavior.[180] Preventative programs may help decrease sexual violence, but do not change the law to be more fair and effective or to fundamentally change the way humans view difference. Furthermore, they still regard people with different sexual behavior as abnormal persons.

Proposed legal reforms include reform of the sentencing process, state review of sentencing laws to make sure that the laws are proportionate to the harm done and the dangerousness of the offender, post release supervision by police and trained public safety personnel, sex offender courts and risk-based categorical systems rather than offense-based classification. Scholars also suggest that states should develop more accurate empirical tools for assessing risk.[181] These legal solutions and others may make legislation more effective and fair, but they do not help people understand the reality of sexual violence and do not fundamentally change the way the law addresses difference.

A social relations approach changes the way the law views difference. It acknowledges the reality that differences exist between people rather than within them. Unless shaped by a social relations view, education and legal reform solutions will misdirect resources. Undergirded by a social relations approach, legal reform and education can make policy more effective and

[180] Fond, *Preventing Sexual Violence*, 237.
[181] Ibid., 237–242; Levenson et al., "Public Perceptions About Sex Offenders and Community Protection Policies," 156.

fair towards sex offenders and can alleviate misconceptions. A social relations approach provides a truer assessment of the offender and a better long-term solution.

A social relations approach is the only approach that takes into account all the factors that lead to sexual violence. With a social relations approach the laws can become more effective in increasing public safety and reducing sexual violence and can become fairer to sex offenders, their families, and victims of sexual violence. Changing the way we view difference enables us to create better public policy and solve many of the theoretical and practical problems with current sex offender legislation.

A Social Relations Approach to Sex Offenders

We can demonstrate the benefits of a social relations approach by comparing how laws and policies reflecting it respond to the three stories used in chapter three. Recall the stories of Walter D., Dan M., and Paul L. Walter unknowingly solicited an underage prostitute. Because of the community's knowledge of his sex offender status, he has had trouble maintaining a residence and a job. When he was seventeen, Dan was convicted of statutory rape with a women sixteen months his junior. He worries about trying to adhere to his registration requirements while working a full-time job and about juggling the different registration requirements of other counties and states. Paul pled guilty in adult court to performing oral sex on his six year old cousin when he was twelve years old. He considers himself a monster: unfit to be around girls, and his mother is concerned about what will happen if the state passes residency or proximity restrictions for sex offenders. Depending on the laws, her son may not be able to play with his friends or go to school or church. Consider how these stories would be different with the application of a social relations approach.

A relational approach would address sexual violence as a risky behavior rather than considering the individual offender as risky. Sexual violence would no longer be simply a problem of the individual, but would be recognized as problem for the community. The connections among individuals necessitate a response from the community. The burden of reducing sexual crime would no longer sit on the shoulders of an offender alone, but on the shoulders of the community. Reintegration of sex offenders into the community would be of the utmost importance. For Walter and Dan this would mean promoting their ability and opportunity to hold a stable job and residence. Programs would be established to aid offenders in finding a job and residence and making sure that they could maintain them. Dan's registration requirements and work schedule would be flexible and coordinated so that he could accomplish both. In fact, registration and community notification would only be used for perpetrators of the more severe sex crimes. This would change the meaning of the sex offender to apply to fewer people and only those who committed egregious crimes. Social stigma and societal rejection would decrease; landlords and employers would not make it so difficult for offenders to maintain a residence and job. Walter would not be driven from the community or his job because of threatening employees and neighbors. Because the policies will focus on helping sex offenders reintegrate into society, sex offender laws will be more effective. As demonstrated earlier, sex offenders are less likely to sexually reoffend when there is stability in their lives. This makes the community safer and reduces the burden of the justice system.

A relational approach will result in more effective laws by correcting misconceptions about "typical" sex offenders. The most common occurrences of sexual violence occur between people who have a relationship with each other. Because a social relations approach understands that people are fundamentally connected and emphasizes looking at the relationship between

people, the approach is naturally set up to recognize that the majority of sexual violence occurs in relationships rather than dark alleys and stranger's basements. Policies addressing the majority of sexual violence can be enacted that recognize differences among sex offenders. Dan, Walter and Paul will not be treated as if there is only one type of sex offender.

The social relations viewpoint, if enacted, would allow society to focus on preventing sexual violence before it occurred. Social relations approaches force society to ask what it is about the societal structure that allows for so much sexual violence to keep occurring. It is no longer a problem simply of what is inherently inside of a sex offender (no longer that sex offenders are simply deviant, degraded, abnormal people who have gone bad inside), but acknowledges the significance and fundamental role of the social structure. Because sexual violence is not constructed as simply a problem within an individual person, others can work on understanding what fosters sexual violence and begin addressing it. It addresses all the factors that lead to sexual violence, not just one piece of the issue. Addressing the roots of sexual violence is more effective than the current policy because current laws can only deal with sex offenders after they are charged with their first offense.

A social relations approach also fosters fairness in sex offender laws. Requiring a more contextual approach allows people to understand differences among sex offenders. Paul's offense is not the same as a fifty year old performing oral sex on a six year old child, yet the current approach treats them identically. The same applies to Dan and Walter. Dan had sex with a woman sixteen months his junior. If he had had sex with her seven weeks prior to when he did, the law would not categorize him as a sex offender. Walter unknowingly solicited an underage prostitute but is subject to the same social stigma and rejection as Jesse Timmendequas who raped and killed seven year old Megan. Walter's name, picture, and address could appear on the

national sex offender website just as Jesse Timmendequas' information did. A social relations approach would drastically reduce the reliance upon community notification and registration. Walter would not be subjected to twenty five years of registration and community notification. Examining context, as a relational approach requires, allows more situational consequences. Lawmakers looking closely at contexts would see that the Dans, Walters, and Pauls are not the same as Jesse Timmendequas. Applying the laws so broadly unfairly harms many individuals.

A relational approach demonstrates concern for the relationships among sex offenders, their families, and society. The relational approach emphasizes preserving relationships rather than severing connections. Lawmakers should consider the effects of law upon the relationships between the offender and the community and between the family of the offender and the community. Using a relational approach, lawmakers would consider how residency restrictions affect an offender like Paul's relationship with the community. Lawmakers would take into consideration how registration, community notification, and residency restrictions affect his ability to go to church or play with his friends and otherwise reintegrate into the community. Lawmakers would also consider the negative effects on the families of sex offenders of severe and broad registration and community notification requirements. Since a large percentage of family members who live with a registered offender are subject to verbal and physical threats, harassment, and property damage, such attention might stabilize the family system. Current federal and state laws do not consider this impact, but a social relations approach would address the impact upon families and friends of such laws and labels. Unstigmatized, the families of Walter, Dan, and Paul could offer greater support and stability to their family member.

A social relations approach would also address the current inequities experienced by juvenile sex offenders. Though in different relation to their communities than adults, juvenile sex

offenders receive much of the same punishment. A twelve year old like Paul should not be tried in adult court. Juvenile courts were established because lawmakers recognized important differences between juveniles and adults. Paul needs to be taught about relationships and how his actions hurt other people. Even a seventeen year old has a different relationship with society than a fifty year old. A social relations approach acknowledges that juveniles need to be handled differently because their relationship with society is different.

Lastly, laws enacted using a relational approach would have a component of consistency. Dan's fear of a felony charge because he failed to follow the requirements of a state or county with different registration requirements would disappear. The absence of unity across federal, state, and county laws unnecessarily burdens individual sex offenders and negatively affects the offender's relationship with the community. A social relations approach would include consistent policies and reflect the recognition of the importance of the common humanity linking all. The offender is no longer an anonymous stranger, but a connected part of society.

A social relations approach can do much to formulate more effective and fairer policies towards sex offenders. Because it ceases to locate differences within individuals and focuses on the context of situations and relationships between individuals, it treats sex offenders as individuals within a network of relationships rather than isolated deviants. Although a social relations approach requires acknowledgment of the connections and similarities among people, this does not mean that sex offenders should not be held accountable for their actions or simply be forgiven with society turning a blind eye. A social relations approach changes the process lawmakers use to create sex offender legislation. The process of understanding difference as inherent to an individual creates faulty public policy. A social relations approach addresses all the factors of sexual violence, including the psyche of the individual. As Minow says in her

book, *Between Vengeance and Forgiveness,* "saying that context matters is not the end of the analysis. Rather, it is the beginning."[182]

Conclusion

Federal laws for sex offenders aim to isolate sex offenders from the rest of the community. They focus on controlling sex offenders outside of prison though civil commitment, registration, and community notification. Civil commitment supposedly institutionalizes the most dangerous offenders, after they serve their sentences in order to protect the public. Registration and community notification are intended to reduce recidivism rates and increase the public's awareness of the presence of a sex offender. The sex offender is considered a dangerous person rather than someone who participates in unacceptable behavior. This is a flawed approach to battling sexual violence. Minow declares, "In the context of ordinary criminal law enforcement, prosecutions, and punishments that humiliate and isolate offenders rather than reintegrating them do not reduce crime or make the society more secure."[183]

The way to make society more secure is to use a social relations approach to sex offenders. It is only through this approach that difference is no longer perceived as inherently within an individual. The fundamental structure through which the law views sex offenders changes. A social relations approach does not try to use abstract principles to solve a problem, instead the relationships between people and the context of the situation are essential. This is the only way to understand and acknowledge the intricacies and difficulty of situations and the persistence of sexual violence in society.

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[182] Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Beacon Press, 1999), 5.
[183] Ibid., 121.

A social relations approach leads to more effective and fair policy for society, victims, sex offenders and their families. Without using a relational approach, education and legal reform will be misdirected resources. My analysis and research only begins to sketch what can be learned with a social relations approach. A relational approach offers a multiplicity of benefits, and more research and policy should be developed in continuing to improve the system through an interdisciplinary effort. Scholars across disciplines need to participate in learning and understanding why sexual violence exists in our society; it is not a matter of simply that individuals have “gone bad.” Scholars must develop proposals for specific laws and programs that will help lawmakers understand the insights of a social relations approach. Education is the first step to creating more effective and fair public policy so that the public and lawmakers can understand the true realities of sexual violence. Once this is accomplished then a relational approach can be advanced in the legal system. Furthermore, job reentry programs should be established that help offenders acquire skills and obtain and retain a job. Just as important are housing programs that connect sex offenders with landlords who are willing to rent to them. Jobs and homes create stability for sex offenders, and this will likely decrease sexual recidivism rates, thereby increasing community safety. The current system must change because it fails to increase public safety and reduce sexual violence. A social relations approach can help bring society a step further in creating effective and fair public policy, and the overall goal of true justice for all. It can make a difference in any neighborhood and in reevaluation of our own perspectives and treatment of those labeled as sex offenders who are mostly neighbors and as research shows, not “strangers waiting in the dark.”

Bibliography

Adkins, Geneva, David Huff, and Paul Stageberg. THE IOWA SEX OFFENDER REGISTRY AND RECIDIVISM. Iowa Department of Human Rights: Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center, December 2000. http://www.humanrights.iowa.gov/cjjp/images/pdf/01_pub/SexOffenderReport.pdf.

“Background.” FBI. Accessed November 14, 2012. http://www.fbi.gov/scams-safety/registry/background_nsor.

Bowater, Britney. “Adam Walsh Child Protection and Safety Act of 2006: Is There a Better Way to Tailor the Sentences for Juvenile Sex Offenders.” Catholic University Law Review 57 (2008 2007): 817.

“Edward Byrne Memorial Justice Assistance Grant (JAG) - NY DCJS.” NYS Division of Criminal Justice Services. Accessed November 13, 2012. http://www.criminaljustice.state.ny.us/ofpa/jagmain.htm.

Fodor, Margie Druss. Megan’s Law: Protection or Privacy. Enslow Publishers, 2001.

La Fond, John Q. “The Costs of Enacting a Sexual Predator Law.” Psychology, Public Policy, and Law 4, no. 1–2 (March 1998): 468–504.

———. Preventing Sexual Violence: How Society Should Cope With Sex Offenders. 1st ed. Amer Psychological Assn, 2005.

Gunnarsson, Helen. “Sex Offender Registration Changes: Not Worth the Cost?” Illinois Bar Journal 99, no. 10 (October 2011). http://www.isba.org/ibj/2011/10/lawpulse/sexoffenderregistrationchangesnotwo.

Hanson, R. Karl, and Kelly E. Morton-Bourgon. “The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies.” Journal of Consulting and Clinical Psychology 73, no. 6 (December 2005): 1154–1163.

Janus, Eric S. Failure to Protect: America’s Sexual Predator Laws and the Rise of the Preventive State. Cornell University Press, 2006.

———. “Sexual Predator Commitment Laws: Lessons for Law and the Behavioral Sciences.” Behavioral Sciences & the Law 18, no. 1 (2000): 5–21.

Janus, Eric S., and Emily A. Polachek. “Crooked Picture: Re-Framing the Problem of Child Sexual Abuse, A.” William Mitchell Law Review 36 (2009): 142.

Janus, Eric S., and Robert A. Prentky. "Sexual Predator Laws: A Two-Decade Retrospective." SSRN eLibrary (December 2008). http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375043.

Jeffrey T. Walker, Sean Maddan, Bob E. Vasquez, Amy C. VanHouten, and Gwen Ervin-McLarty. THE INFLUENCE OF SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS IN THE UNITED STATES. Arkansas Crime Information Center, 2005. http://ww.ilvoices.com/media/96974ddeccb5afb9ffff82e2ffffe41e.pdf.

"John and Reve Walsh Relive Son's Murder." Accessed October 28, 2012. http://abcnews.go.com/US/adam-walsh-murder-john-reve-walsh-live-investigation/story?id=13037931.

"Judge Temporarily Blocks Part of Simi Valley Halloween Sex Offender Law." Ventura County Star. Accessed November 13, 2012. http://www.vcstar.com/news/2012/oct/29/judge-temporarily-blocks-part-of-simi-valley-sex/.

Koss, Mary P., Christine A. Gidycz, and Nadine Wisniewski. "The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students." Journal of Consulting and Clinical Psychology 55, no. 2 (April 1987): 162–170. doi:10.1037/0022-006X.55.2.162.

Levenson, Jill S., Yolanda N. Brannon, Timothy Fortney, and Juanita Baker. "Public Perceptions About Sex Offenders and Community Protection Policies." Analyses of Social Issues and Public Policy 7, no. 1 (2007): 137–161.

Levenson, Jill S., David A. D'Amora, and Andrea L. Hern. "Megan's Law and Its Impact on Community Re-entry for Sex Offenders." Behavioral Sciences & the Law 25, no. 4 (July 2007): 587–602. doi:10.1002/bsl.770.

Lieb, Roxanne. Washington's Sexually Violent Predator Law: Legislative History and Comparisons with Other States. Washington State Institute for Public Policy, December 1996.

Mercado, Cynthia Calkins, Shea Alvarez, and Jill Levenson. "The Impact of Specialized Sex Offender Legislation on Community Reentry." Sexual Abuse: A Journal of Research and Treatment 20, no. 2 (June 1, 2008): 188–205.

Miethe, Terance D., Jodi Olson, and Ojmarrh Mitchell. "Specialization and Persistence in the Arrest Histories of Sex Offenders A Comparative Analysis of Alternative Measures and Offense Types." Journal of Research in Crime and Delinquency 43, no. 3 (August 1, 2006): 204–229.

Minow, Martha. Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence. Beacon Press, 1999.

———. Making All the Difference: Inclusion, Exclusion, and American Law. Cornell University Press, 1991.

“New Evidence in Jacob Wetterling Case.” Accessed October 28, 2012. http://abcnews.go.com/US/investigators-dig-evidence-wetterling-case-mom-hopeful/story?id=11075883.

No Easy Answers. Human Rights Watch, September 2007. http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf.

“Notorious Attacker Faces Charge of Failing to Register as Sex Offender.” Accessed October 28, 2012. http://abclocal.go.com/ktrk/story?section=news/local&id=8522020.

Odem, Mary E., and Jody Clay-Warner. Confronting Rape and Sexual Assault. Rowman & Littlefield, 1998.

Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. “Legislative History.” Office of Justice Programs. http://www.ojp.usdoj.gov/smart/legislation.htm

Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. “SORNA.” Office of Justice Programs. http://www.ojp.usdoj.gov/smart/sorna.htm

Sandoval, Terrell G., ed. Adam Walsh Child Protection and Safety Act: Analysis and Law. Nova Science Pub Inc, 2010.

Sex Offender Registration and Notification in the United States: Current Case Law and Issues. US Department of Justice: Office of the Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking, July 2012. http://www.ojp.usdoj.gov/smart/caselaw/handbook_july2012.pdf.

Winick, Bruce J., and John Q. LA Fond, eds. Protecting Society from Sexually Dangerous Offenders: Law, Justice, and Therapy. 1st ed. Amer Psychological Assn, 2003.

Wright, Richard G. “Sex Offender Post-Incarceration Sanctions: Are There Any Limits.” New England Journal on Criminal and Civil Confinement 34 (2008): 17.

Zilney, Laura J., and Lisa A. Zilney. Reconsidering Sex Crimes and Offenders: Prosecution or Persecution? Praeger, 2009.

Federal Laws

Adam Walsh Child Protection and Safety Act of 2006. U.S. Statutes at Large (2006) Vol. 109.

Pam Lyncher Sexual Offender Tracking and Identification Act of 1996. U.S Statutes at Large (1996) Vol. 110.

U.S. Congress. House. Megan's Law. 104th Cong., 2nd sess. 1996. H.R. 2137.

U.S. Congress. House. Violent Crime Control and Law Enforcement Act of 1994. 103rd Cong., 2nd sess. 1994. H.R. 3355.