

2017

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Recommended Citation

Rose, Justin P. (2017) "Where Sex Offender Registration Laws Miss the Point: Why a Return to an Individualized Approach and a Restoration of Judicial Discretion in Sentencing Will Better Serve the Governmental Goals of Registration and Protect Individual Liberties from Unnecessary Encroachments," *Mitchell Hamline Law Journal of Public Policy and Practice*: Vol. 38 , Article 2.
Available at: <http://open.mitchellhamline.edu/policypractice/vol38/iss1/2>

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WHERE SEX OFFENDER REGISTRATION LAWS MISS THE POINT: WHY A RETURN TO AN INDIVIDUALIZED APPROACH AND A RESTORATION OF JUDICIAL DISCRETION IN SENTENCING WILL BETTER SERVE THE GOVERNMENTAL GOALS OF REGISTRATION AND PROTECT INDIVIDUAL LIBERTIES FROM UNNECESSARY ENCROACHMENTS

Justin P. Rose*

“Major Strasser has been shot. Round up the usual suspects.”

-Captain Renault, *Casablanca*, 1942

I. Introduction

In September 2016, Danny Heinrich confessed to abducting and murdering Jacob Wetterling.¹ This brought, if nothing else, closure for Jacob’s family, and indeed for Minnesotans and Americans more broadly. Heinrich’s arrest and confession gives a real and terrifying face to one of the darkest fears of parents across the country. At the same time, Heinrich’s image in the news reinforces the cultural narrative of “sex offenders” as violent men who prey in seemingly random ways on children that they have never met.² Available statistics indicate, however, that this image does not accurately reflect the reality of either perpetrators or victims of sexual crime in the United States.³ Yet this narrative lends support to the idea that the current required “sex-offender” registration—registration, which constrains, sometimes extremely, the freedom of over 800,000 individuals—is justified despite growing evidence that registration does not actually do what is intended to do.⁴

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¹ Pam Louwagie & Jennifer Brooks, *Danny Heinrich Confesses to Abducting and Killing Jacob Wetterling*, STAR TRIB. (Sept. 7, 2016, 9:54 AM), <http://www.startribune.com/danny-heinrich-confesses-to-abducting-and-killing-jacob-wetterling/392438361/>.

² See, e.g., Heather Ellis Cucolo & Michael L. Perlin, “*They’re Planting Stories in the Press*”: *The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185, 188 (2013) (stating that, “[a]s a result of...incessant media coverage, the general public has conceptualized what it believes to be the prototype of...monstrous evil—a male who violently attacks stranger young children[.]”).

³ See, e.g., Catharine Richmond & Melissa Richmond, *The Future of Sex Offender Courts: How Expanding Specialized Sex Offense Courts Can Reduce Recidivism and Improve Victim Reporting*, 21 CARDOZO J.L. & GENDER 443, 453 (2015); see also *Sexual Violence Statistics*, NAT’L CTR FOR VICTIMS OF CRIME, available at http://www.victimsofcrime.org/docs/ncvrv2013/2013ncvrv_stats_sexualviolence.pdf?sfvrsn=0 (reporting that “[m]ore than one-half of female victims of rape (51 percent) reported that at least one perpetrator was a current or former intimate partner.”).

⁴ PARENTS FOR MEGAN’S LAW AND THE CRIME VICTIMS CENTER, <https://www.parentsformeganslaw.org/public/meganReportCard.html> (last visited Apr. 8, 2017).

The National Center for Victims of Crime, a victim advocacy group, reports that though nearly 70% of all reported sexual assaults are perpetrated against children of the age of 17 or younger,⁵ “only a small percentage of new child sexual abusers have a prior sex offense record, [making] tracking them...difficult.”⁶ Despite this difficulty, law enforcement agencies across the country ostensibly rely on sex offender registries to attempt to track these types of predators after certain crimes have been committed.⁷ Yet, it seems unlikely that simply requiring more and more Americans to register as predatory offenders is going to solve this tracking problem. In fact, there is growing body of evidence that suggests that over-inclusive registries actually make tracking the most dangerous and violent offenders more, rather than less difficult.⁸ In addition to lacking the efficacy that justifies its existence, this over-inclusive approach severely curtails the constitutional rights of those swept up in the fury of over-inclusive registration laws.⁹

This article argues that the time for reform in the realm of sex offender registration laws is long overdue. Moreover, an individualized approach, which would allow the sentencing judge to make a determination about whether registration is required based on the perpetrator’s unique circumstances, made at pre-detention stage, will yield better results not only in terms of the constitutional rights of individuals convicted of sex crimes, but for the efficacy of registries and their use by law enforcement agencies. An important caveat: This article focuses solely on *registration*, and intentionally leaves the discussion of community notification requirements for other articles.¹⁰ The purpose of this bifurcation is to allow for a

⁵ THE NATIONAL CENTER FOR VICTIMS OF CRIME, <http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/additional-facts-and-resources> (last visited Jan. 7, 2017).

⁶ *Id.* (citing David Finkelhor, *The Prevention of Childhood Sexual Abuse*, available at http://futureofchildren.org/futureofchildren/publications/docs/19_02_08.pdf. See also *Special Report: Female Victims of Sexual Violence, 1994-2010*, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS (Mar. 2013), <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> (“In 2005-10, 78% of sexual violence involved an offender who was a family member, intimate partner, friend, or acquaintance.”).

⁷ See *Sex Offender Registration and Notification Act (SORNA)*, UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna> (last visited Apr. 8, 2017) (defining sex offender registration and stating that registration “provides important information about convicted sex offenders to local and federal authorities and the public, such as offender’s name, current location and past offenses.”).

⁸ See, e.g., Elizabeth Reiner Platt, *Gangsters to Greyhounds: The Past, Present, and Future of Offender Registration*, 37 N.Y.U. REV. L. & SOC. CHANGE 727, 752 (2013) (“As registries expand, they become even less useful to both the public and law enforcement. The vast overinclusiveness of many registries . . . makes it harder for police officers to identify and monitor those offenders who actually pose a public safety risk.”) (citing *No Easy Answers: Sex Offender Laws in the U.S.*, HUMAN RIGHTS WATCH, 9-10 (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>).

⁹ Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 474-75 (2010) (describing the ways in which jurisdictions are “increasingly innovating limitations on the freedoms of sex offenders” in addition to the “well-publicized” restrictions on liberty and dignity to which individuals subject to registration requirements are subject.).

¹⁰ Indeed, the majority of scholarly critiques of registration take the suffix “and community notification” as a given. See, e.g., Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender*

clearer critique of registration—its purported purposes and efficacy—without clouding the issues. Because registration and notification serve *distinct* purposes, and have their own unique justifications, they can and should be evaluated separately.

First, this article gives a brief overview of both federal and state statutory schemes that regulate sex crimes, emphasizing the registration provisions of those schemes.¹¹ Second, this article articulates a few of the key pitfalls of registration laws as they are currently administered. The next section will analyze legal challenges to these laws and why such challenges have been largely unsuccessful to this point.

The final portion of this article examines the potential benefits and efficacy of two different avenues of achieving the primary goals of registration, which are deterrence, investigative efficiency, and public safety. First, it will examine the implementation of the specialized first avenue, “Sex Offender Courts,” as a means of reform. The article ultimately concludes that any further expansion of such courts should be carried out with extreme caution, and paying particular attention to minimizing judicial overreach and systemic biases often attendant to such courts. Ultimately, and especially in light of the significant drawbacks attendant to the sex offender court approach, this article takes the view that a better approach is to take the second avenue: a return to allowing judges to make individualized registration determinations at the sentencing stage. This approach recognizes the errors attendant to the blanket approach, and will restore a level of judicial sobriety to the registration process. This in turn will have the dual benefit of enacting the three goals of registration, while limiting the adverse impact on the individual liberties of registrants.

II. BACKGROUND

A. REGISTRATION LEGISLATION: WHAT THE LAW ACTUALLY REQUIRES OF REGISTRANTS

Beginning the conversation with a workable definition of registration is paramount for understanding its ethos. The United States Department of Justice defines sex offender registration as “a system for monitoring and tracking sex offenders following their release into the community.”¹² Simple and illustrative, this is the definition that this article will use going forward; to the extent that the word “registration” or “registry” is used in the pages and sections below, this is the definition that applies. This definition is helpful because it illuminates a critical feature of the registration process as it is currently employed: it takes effect *after* the affected individual has *served his time* in full, pursuant to conviction or

Registration Laws, 63 HASTINGS L.J. 1071, 1075-76 (2012) (tracing “the growth of sex offender registration laws and community notification statutes after *Smith v. Doe* and *Connecticut Department of Public Safety*.”).

¹¹ While this article doesn’t examine community notification laws in depth, it is worth noting that it is the coupling of registration requirements with attendant community notification requirements that substantially increases the stigma and burdens attendant to these laws in many cases. (See, e.g., J.J. Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 CONN. L. REV. 1035, 1052 (2016) (arguing that many offenders have nothing to lose upon release, and thus these laws do not have any deterrence effect on their behavior, and noting that “[o]n paper, registration obligations track the burdens of parole supervision. Yet, as community notification has taken root, the scope and intensity of many of these burdens has exploded.”).

¹² See *SORNA*, *supra* note 7.

plea for any number of crimes. This temporal element is often lost in the conversation surrounding registration, but it is essential to remember that time spent on a registry comes *after* time served in prison.

The United States is one of only seven countries in the world to have adopted registration requirements for individuals convicted of certain sexual offenses.¹³ Of those seven countries, South Korea is the only country besides the United States that has community notification laws.¹⁴ The following is a brief overview of how sex offender legislation evolved, and specifically mandatory registration and federal registration. Next, there will be a similar overview of registration laws in the state of Minnesota.

This article focuses on the evolution of registration in Minnesota because the state's unique approach to registration put it in something of a unique position for analysis. On one hand, some commentators have lauded Minnesota's "tiered" approach, which assigns a risk level to individuals who are required to register before they are released from confinement, as a bellwether for the individualized approach.¹⁵ However, according to the Minnesota Bureau of Criminal Apprehension ("BCA"), "[a]pproximately 75% of the offenders registered in Minnesota have never been assigned a risk level."¹⁶ The BCA cites various reasons for failure to assign risk levels to offenders including that: risk levels are not assigned to juvenile registrants; registrants released from prisons in other states were not assigned a risk level in Minnesota before July, 2005; and that registrants sentenced to probation do not receive risk levels.¹⁷ It seems then, at least at first glance, heaping praise on a system for taking an individualized approach to registration merely because 25% of registrants are assigned a risk level ignores the larger problem of mandated registration—without consideration of individual circumstances—for large swaths of individuals when their registration is unlikely to achieve even its own stated goals.

In addition, Minnesota state law contains some of the most, if not *the* most, overly broad definitions of what conduct warrants registration in the first place.¹⁸ Minnesota thus serves as a good example of why *even* the "best" registration laws are in serious need of reevaluation, as this article will push back on the

¹³ *Yung, supra* note 9, at 450 n.130 (noting that Australia, Canada, France, Ireland, Japan, and the United Kingdom "have sex offender registration laws, but the period required for registration is usually short and the information remains with the police.") (internal citations and quotations omitted).

¹⁴ *Id.*

¹⁵ *No Easy Answers: Sex Offender Laws in the U.S.*, HUMAN RIGHTS WATCH, 9-10 (2007), available at <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>. [hereinafter "*No Easy Answers*"].) *No Easy Answers* will be fleshed out in more detail later.

¹⁶ *Minnesota Predatory Offender Registration*, MINNESOTA BUREAU OF CRIMINAL APPREHENSION, <https://por.state.mn.us/predatorfaq.aspx> (last visited Jan. 8, 2017) [hereafter "*BCA Predatory Offender Registration*"].

¹⁷ *Id.* There will be a longer discussion surrounding the assignment of risk levels to registrants in the sections below.

¹⁸ One provision that is, as of this writing, unique to Minnesota, can be found in Minnesota Statutes § 243.166, subdiv. 1(b)(1), which lays out the criminal convictions requiring registration, with the caveat that the individual must register, even without a conviction for an enumerated offense, if he is convicted of a different offense "arising out of the same set of circumstances." *Id.* This provision will be addressed in greater depth below.

idea that Minnesota's approach is sufficiently individualized to overcome the problems attendant to over-inclusive registration. Moreover, focusing on how one state approaches registration narrows the scope of this analysis.¹⁹

1. The Jacob Wetterling Act

In 1994, nearly five years after Jacob Wetterling's abduction, the United States Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act.²⁰ The first of its kind, the federal law compelled states to implement registration laws for sexually violent offenders, sexually violent predators, and offenders who perpetrated certain crimes against children.²¹ Though many states—including Minnesota—had already signed sex offender registration requirements into law,²² the Jacob Wetterling Act compelled the remaining states to do so by withholding federal funding for failure to comply with the standards of the act.²³ The Jacob Wetterling Act represents in large part the culmination of the efforts of Jacob's family, and his mother Patty Wetterling²⁴ in particular, to bring the issue of child sex abuse to the attention of both the Minnesota state legislature and the United States Congress.²⁵

The Jacob Wetterling Act was groundbreaking legislation in many ways. For example, under the Jacob Wetterling Act, courts had explicit authority to determine whether a particular individual was a "sexually violent predator."²⁶ Arguably its greatest impact, however, relates to its reinvigoration of the notion that registration could be used as a preventative law enforcement tool.²⁷ Professor Wayne A. Logan, formerly

¹⁹ In addition, the Jacob Wetterling case places Minnesota precisely at the center of the conversation about sex offender policy.

²⁰ Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, tit. XVII, subtit. A, § 170101, 108 Stat. 1796 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)).

²¹ See Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51 (2008).

²² See Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1293 (2003) (noting that in June of 1991, Minnesota became the fifteenth state to sign a registration requirement into law).

²³ Carpenter, *supra* note 10, at 1077 (noting that states had three years to establish registries before losing federal law enforcement funding).

²⁴ Recently, Patty Wetterling has been a vocal opponent of the way in which registration and notification laws have evolved, especially with regard to child registrants. See Sarah Stillman, *The List: When Juveniles are Found Guilty of Sexual Misconduct, the Sex-Offender Registry Can Be a Life Sentence*, THE NEW YORKER (Mar. 14, 2016) <http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes>.

²⁵ See Logan, *supra* note 22, at 1320.

²⁶ 42 U.S.C. § 14071 (a)(2)(A), repealed by Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, tit. I, § 129(A), 120 Stat. 587, 600 (2006).

²⁷ See, e.g., Mary Katherine Huffman, *Moral Panic and the Politics of Fear: The Dubious Logic Underlying Sex Offender Registration Statutes and Proposals for Restoring Measures of Judicial Discretion to Sex Offender*

of William Mitchell College of Law, and currently of Florida State University has written extensively on registration, and issues surrounding sex offender policy more broadly.²⁸ Professor Logan argues that prior legislative efforts “designed to extend the government’s physical control over sex offenders,” through longer prison sentences and civil commitment, “failed to address safety concerns presented by offenders at large in communities.”²⁹ It is out of this “gap-filling need,” according to Logan and others, that registration was reborn.³⁰

2. Megan’s Law³¹

In 1996, Congress amended the Jacob Wetterling Act to include community notification provisions, requiring in various and evolving forms³² the public dissemination of registration information.³³ These amendments came to be known as “Megan’s Law,” named for Megan Kanka, a seven-year old girl who was murdered after being sexually assaulted by a man with two prior convictions for sexual assault against children.³⁴ The type and quantity of information made publicly available under various state statutes implementing Megan’s Law is somewhat staggering; often including information such as the names, addresses, vehicle identification numbers, places of employment of registrants.³⁵ Some jurisdictions, like Washington D.C. go even further, and make the social security numbers of registrants publicly available.³⁶ Megan’s Law also allows states to disclose information from their sex offender registries for any legal purpose under state law, and requires law enforcement to release sex offender registry information when necessary to protect public safety.³⁷

Management, 4 VA. J. CRIM. L. 241, 250 (2016) (“The articulated purpose underlying the sex offender registration statutes generally centers on making criminals convicted of a sex crime more visible to law enforcement and the public, conceivably to improve community safety.”) (internal citations omitted).

²⁸ See generally Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219; Wayne A. Logan, “*When Mercy Seasons Justice: Interstate Recognition of Ex-Offender Rights*,” 49 U.C. DAVIS L. REV. 1 (2015).

²⁹ Logan, *supra* note 22, 1288-89.

³⁰ *Id.* at 1289.

³¹ Because Megan’s Law’s contributions to sex offender legislation are primarily notification rather than registration, its impact is largely beyond the scope of this article. It is included primarily to demonstrate the evolution of the law in this area.

³² For a discussion of the evolution of community notification provisions under various state statutes in accordance with Megan’s Law, See Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. Rev. 295, 336-38 (2006).

³³ See Pub. L. No. 104-145, § 2, 110 Stat. 1345 (1996) (codified as amended at 42 U.S.C. § 14071 (2010)).

³⁴ *State v. Timmendequas*, 737 A.2d 55, 66-73 (N.J. 1999).

³⁵ *Id.* (citing ALASKA STAT. § 18.65.087(b) (2004); FLA. STAT. § 943.0435(2)(b) (2001)).

³⁶ D.C. CODE § 22-4007(a)(2) (2001)

³⁷ 42 U.S.C. § 14071; see also Richmond, *supra* note 3, at 447.

3. The Adam Walsh Act and The 2006 Sex Offender Registration and Notification Act (“SORNA”)

The next formulation of the federal sex offender registration and notification requirements came in 2006, when Congress passed the Adam Walsh Child Protection and Safety Act (“Adam Walsh Act”).³⁸ For many commentators and observers, the Adam Walsh Act represents an important turning point for the administration of sex offender registries.³⁹ For example, Judge Mary Katherine Huffman, a district court judge in Montgomery County, Ohio contends that, “[o]verall, the [Adam Walsh Act] amplifies just about every component of prior federal mandates. It casts a bigger net, imposing its mandate on a wider range of individuals and offenses.”⁴⁰

Imbedded in the Adam Walsh Act is the Sex Offender Registration and Notification Act (“SORNA”).⁴¹ SORNA purports to set minimum standards for sex offender registration and notification, with which states had until 2009 to comply, or risk losing federal law enforcement funding.⁴² But not a single state met the deadline imposed by the statute, which prompted congress to reauthorize the Adam Walsh Act in July 2012.⁴³ The administrative agency that exercises enforcement authority pursuant to the Adam Walsh Act is the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (“SMART”).⁴⁴ SMART and the Justice Department reported that as of April 2014, only seventeen states had implemented registration and notification provisions that its enforcement agency deemed to be in compliance with SORNA.⁴⁵

While relatively few states are in strict compliance with SORNA and the Adam Walsh Act more broadly, this does not mean that accordingly few states have adopted harsh legislation regarding sex offenders. Indeed, SORNA and the Adam Walsh Act represent something of a paradigm shift—both temporally⁴⁶

³⁸ Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911 (2006).

³⁹ See, e.g., Carpenter, *supra* note 10, at 1076-78 (describing the federal laws as a “race to the harshest” in which early sex offender registration requirements were “tame” in comparison to the Adam Walsh act and its progeny).

⁴⁰ Huffman, *supra* note 27, at 268.

⁴¹ 42 U.S.C. § 16901 (2006).

⁴² See, e.g. 42 U.S.C. § 16941(b) (2006).

⁴³ Richmond, *supra* note 3, at 448-49.

⁴⁴ The administrative agency authorized to enforce the Adam Walsh Act is the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (“SMART”). SMART, OFFICE OF JUSTICE PROGRAMS (last visited Oct. 19, 2016), <http://ojp.gov/smart/about.htm>.

⁴⁵ Nat’l Conference of State Legislatures, *Adam Walsh Child Protection and Safety Act*, <http://www.ncsl.org/research/civil-and-criminal-justice/adam-walsh-child-protection-and-safety-act.aspx> (last visited Oct. 23, 2016).

⁴⁶ It is interesting to note that Adam Walsh, the boy for whom the Act was named, was murdered in 1981, some 25 years before the Act’s passage. See Huffman, *supra* note 27, at 248 (noting that when Adam Walsh was abducted, “[t]he offense provoked a mere thirteen newspaper articles at the time of his disappearance” but the death of Jessica

and culturally—in attitudes towards those deemed to be sexually dangerous, with little regard for distinguishing among these individuals. For instance, under the Act, “sex offense” is defined as a “criminal offense that has an element involving a sexual act or sexual contact with another[.]”⁴⁷ In its “No Easy Answers” report, Human Rights Watch notes that this expanded definition does not correspond with public perceptions of sex offenders in the public.⁴⁸ The report observes that

Most people assume that a registered sex offender is someone who has sexually abused a child or engaged in a violent sexual assault of an adult. A review of state sex offender registration laws by Human Rights Watch reveals that states require individuals to register as sex offenders even when their conduct did not involve coercion or violence, and may have had little or no connection to sex. For example: At least five states require registration for adult prostitution-related offenses[.] [a]t least 13 states require registration for public urination[.] Of those, two limit registration to those who committed the act in view of a minor; [a]t least 29 states require registration for consensual sex between teenagers; and [a]t least 32 states require registration for exposing genitals in public; of those, seven states require the victim to be a minor.⁴⁹

At this point the generally accepted goals of registration bear repeating: “detering offenders from committing future crimes; providing law enforcement with an additional investigative tool; and increasing public protection.”⁵⁰ It requires several logical leaps to arrive at any of these stated goals from the starting point of the many statutory schemes set forth above. And though the specific mandates of the Adam Walsh Act and SORNA may not technically have been brought to bear in all 50 states, it’s trickledown effect on state legislation across the country cannot be discounted. As of 2006, all fifty states had enacted registration requirements; with thirty of those states enforcing some form of residency restrictions for registrants living in communities in those states.⁵¹ For these reasons, the Adam Walsh Act represents something of a paradigm shift in the legal and cultural treatment of so-called sex offenders.

4. The Overlap of Federal and State Registration

It is important to remember that on a practical level, registration is primarily handled by the states, at least at the time of this writing. While federal schemes set minimum necessary standards, states implement sex offender registration.⁵² SORNA sought to create, “[t]hrough the cooperative effort of the 50 states,” an

Lunsford in 2005 under similar circumstances in the same state “produced twenty-five hundred newspaper stories[.]”

⁴⁷ 42 U.S.C. § 16911(5)(A).

⁴⁸ *No Easy Answers*, *supra* note 15, at 39.

⁴⁹ *Id.* at 39-40.

⁵⁰ *Sex Offender Registration: Policy Overview and Comprehensive Practices*, CENTER FOR SEX OFFENDER MANAGEMENT, (last visited Jan. 9, 2016), available at: <http://www.csom.org/pubs/sexreg.pdf>.

⁵¹ Cucolo, *supra* note 2, at 232.

⁵² *The National Guidelines for Sex Offender Registration and Notification*, U.S. DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL, at 3, https://www.justice.gov/archive/tribal/docs/fv_tjs/session_3/session3_presentations/Sex_Offender_Guidelines.pdf (2007).

“effective and comprehensive national system of registration . . . programs.”⁵³ To this point, SORNA’s effort to create a uniform monitoring system that spans state lines often relies on individual state statutes. For example, in Minnesota, any offender who “enters” the state and remains for a period of time is required to register in Minnesota.⁵⁴

B. SEX OFFENDER REGISTRATION IN MINNESOTA

Notably, and despite Minnesota’s place in the history of sex offender legislation, SMART has not determined that Minnesota’s statutory scheme complies with SORNA’s mandate.⁵⁵ And while the federal statutory schemes described above provides a useful framework for understanding the scope, purpose, and evolution of sex offender registration and notification laws, the mechanics of these laws play out at the state and local level.⁵⁶ To evaluate the potential efficacy of either sex offender courts or shift to a more individualized, judicially determined approach in Minnesota, an overview of Minnesota’s specialized requirements is necessary.

1. Conduct Requiring Registration in Minnesota

Under Minnesota law, criminal sexual conduct is classified in five categories, and called first through fifth degree criminal sexual conduct.⁵⁷ Generally, first and third degree criminal sexual conduct involve penetration, second and fourth degree involve sexual contact, and fifth degree covers other “lewd conduct.”⁵⁸ Criminal sexual conduct in either first, second, third, or fourth degree are felony-level offenses, while criminal sexual conduct in the fifth degree is a gross misdemeanor.⁵⁹ Minnesota requires any person convicted or adjudicated delinquent of any criminal sexual conduct to register.⁶⁰

⁵³ *Id.* at 5.

⁵⁴ MINN. STAT. § 243.166, subdiv. 1b(b)(2); *see also* *In re Risk Level Determination of G.G.*, 771 N.W.2d 64, 68 (Minn. Ct. App. 2009) (prisoners who are brought into the state involuntarily also need to register pursuant to the statute).

⁵⁵ *Id.*; *see also* *No Easy Answers*, *supra* note 15, at 64 (expressing concern at the notion that Minnesota would have to adjust its current approach in order to be considered compliant with the Adam Walsh Act and SORNA).

⁵⁶ *See Sex Offender Registration and Notification in the United States: Current Case Law and Issues*, U.S. DEPARTMENT OF JUSTICE OFFICE OF JUSTICE PROGRAMS (Dec. 2015), http://www.smart.gov/caselaw/handbook_dec2015.pdf (noting that “[g]enerally speaking, sex offenders in the United States are required to register with local law enforcement in each state, locality, territory, or tribe within which they reside work, or attend school.”).

⁵⁷ *See* MINN. STAT. §§ 609.342–609.3451 (2012).

⁵⁸ *See* Jeffrey Diebel, *Sex Offenders and Predatory Offenders: Minnesota Criminal and Civil Regulatory Laws*, MINNESOTA HOUSE OF REPRESENTATIVES, at 3 (Jan. 2012), *available at* <http://www.house.leg.state.mn.us/hrd/pubs/sexofdr.pdf> [Hereinafter “*Minnesota Regulatory Laws*”].

⁵⁹ MINN. STAT. §§ 609.342–609.3451.

⁶⁰ MINN. STAT. § 243.166, subdiv. 1b(a)(1)(iii).

Requiring registration pursuant to a conviction for any of these offenses is not surprising, and at first blush, unlikely to be controversial. Minnesota's registration statute, codified in Minnesota Statute § 243.166, has existed in its current form since August of 2016.⁶¹ The statute has been updated regularly since first being adopted in 1991, with each successive amendment making the penalties of the statute harsher and the terms of the statute applicable to a wider range of conduct. For example, the statute was amended in 1995 to require that registrants inform authorities of any intended change of residence five days prior to moving, in 1999 to require registration of people convicted of a covered offense but also found mentally ill, and 2002 to require juvenile registration.⁶²

Despite successive amendments making the statute applicable to a wider range of conduct, its requirements are generally straightforward and have been applied that way by Minnesota courts.⁶³ Besides requiring any person convicted of any level of criminal sexual conduct under Minnesota law,⁶⁴ the law requires registration for a wide variety of peripheral conduct.⁶⁵ Conduct that does not fall within the ambit of § 609.342 but may lead to required registration includes: kidnapping, false imprisonment of a minor, soliciting of a minor to engage in sexual contact or prostitution, possession of child pornography, felony indecent exposure, kidnapping, and murder while attempting to commit criminal sexual conduct with force or violence.⁶⁶

It is registration pursuant to this peripheral conduct that has been the source of the majority of the litigation surrounding registration and notification requirements in Minnesota in recent years. Most recently, in *Meyers v. Roy*,⁶⁷ the Eighth Circuit Court of Appeals held that conviction of an enumerated offense is not a necessary predicate for registration under Minn. Stat. § 243.166.⁶⁸ The Court found that simply being charged—and not convicted—with a registerable offense under the statute was enough to require registration.⁶⁹ The Minnesota Supreme Court first upheld this principle in *Boutin v. LeFluer*.⁷⁰ There, the highest Minnesota state court held that the plain meaning of the statute required offenders to register under the statute when either convicted of an enumerated predatory offense or charged with an

⁶¹ MINN. STAT. § 243.166.

⁶² See generally MINN. STAT. § 243.166; Logan, *supra* note 22, at 1293.

⁶³ See discussion of legal challenges to Minnesota's registration statute, discussed below.

⁶⁴ See *Minnesota Criminal Sexual Conduct Laws*, *supra*. Minnesota law also requires registration for violations of “a law of the United States, including the Uniform Code of Military Justice, similar to the offenses described” in Minnesota's criminal sexual conduct laws. MINN. STAT. § 243.166, subdiv. 1b(a)(4).

⁶⁵ See MINN. STAT. § 243.166, subdiv. 1b(a)-(b).

⁶⁶ See Minnesota Regulatory Laws, *supra* note 58, at 8.

⁶⁷ 714 F.3d 1077 (8th Cir. 2013).

⁶⁸ *Id.* at 1079.

⁶⁹ See also *Kaiser v. State*, 621 N.W.2d 49 (Minn. Ct. App. 2001) (holding the same).

⁷⁰ 591 N.W.2d 711 (Minn. 1999).

enumerated predatory offense but convicted only of another offense “arising out of the same set of circumstances.”⁷¹

According to Rule 4 of the Minnesota Rules of Criminal Procedure, criminal complaints must be supported by “probable cause” in order to avoid dismissal.⁷² It bears emphasizing that the burden of proof for a criminal conviction, by contrast, is proof of the alleged action beyond a reasonable doubt.⁷³ Thus, under the plain meaning Minnesota’s registration statute—a meaning that has been uniformly applied and embraced by Minnesota courts—individuals can be required to register, even if the charge of a registerable crime against them was *dropped*, so long as it was brought against them. It is through this mechanism that Minnesotans can be forced to register, even when the government has failed to meet the standard of proof required for a criminal conviction.

More significantly, Minnesota’s statute prohibits courts from modifying a person’s duty to register at a sentencing hearing.⁷⁴ Any modification to that duty is determined instead in a risk level determination proceeding before release from confinement, a process described in more detail below.⁷⁵

2. Mechanics of Registration in Minnesota

Once an individual is subject to § 243.166, he or she must know what exactly is required of them under in order to avoid further criminal penalties for failure to register.⁷⁶ The law requires the court to inform individuals of the duty to register as well as the penalties for failing to do so.⁷⁷ If the court fails to inform the individual, the duty to inform falls to the relevant corrections agent.⁷⁸ After being informed, registrants are expected to comply absolutely with the law’s mandate; a “knowing” or “intentional” violation of the registration statute is a felony under Minnesota law.⁷⁹

⁷¹ *Id.*

⁷² MINN. R. CRIM. P. 4(5)(2).

⁷³ *State v. Bugg*, No. A15–1137, 2016 WL 687486, at *2 (Minn. Ct. App. Feb. 22, 2016).

⁷⁴ MINN. STAT. § 243.166, subdiv. 2; part IV.B. *infra*.

⁷⁵ *See* part II.B.2 below.

⁷⁶ MINN. STAT. § 243.166(b)–(d) (2016).

⁷⁷ *See Minnesota Regulatory Laws, supra* note 58, at 10.

⁷⁸ *Id.*

⁷⁹ MINN. STAT. § 243.166, subdiv. 5 (“For any person who fails to mail the completed and signed verification form to the bureau within ten days after receipt of the form and who has been determined to be a risk level III offender under section 244.052, the bureau shall immediately investigate and notify local law enforcement authorities to investigate the person’s location and to ensure compliance with this section. The bureau also shall immediately give notice of the person’s violation of this section to the law enforcement authority having jurisdiction over the person’s last registered address or addresses.”).

Separate and distinct from the duty to register described above, which is a black and white determination based on whether the relevant section of § 243.166 is triggered and cannot be modified by the court,⁸⁰ is the end of confinement “risk level determination.”⁸¹ When “about to be released from confinement,” prisoners subject to § 243.166 who are under the authority of the commissioner of corrections are subject to a risk level determination.⁸² Whether a soon-to-be registrant is assigned a risk level of I, II, or III depends on a myriad of factors including: The seriousness of the offense; the offender’s prior history, relevant personal characteristics “including response to prior treatment efforts and history of substance abuse,” the registrants potential network of community support, likelihood of re-offense, and “whether the offender demonstrates a physical condition that minimizes the risk of reoffense, including, but not limited to, advanced age or a debilitating illness or physical condition.”⁸³

The primary purpose of this assessment is to monitor the offender beyond the period of his confinement.⁸⁴ The individual is assigned a risk level (i.e., I, II, or III) based on various factors enumerated in the statute.⁸⁵ While level I offenders are considered to be “low risk,” level II and III offenders are considered to be “moderate” and “high” risk respectively.⁸⁶ While those who are considered low risk offenders are subject to less stringent notification requirements than their less lucky levels II and III counterparts,⁸⁷ their registration obligations may not vary significantly:⁸⁸

A person required to register under this section shall continue to comply with this section until ten years have elapsed since the person initially registered in connection with the offense, or until the probation, supervised release, or conditional release period expires, whichever occurs later.⁸⁹

⁸⁰ *Minnesota Regulatory Laws*, *supra* note 58, at 10.

⁸¹ *Id.* at 18-19.

⁸² MINN. STAT. § 244.052.

⁸³ *Minnesota Regulatory Laws*, *supra* note 58, at 18.

⁸⁴ *State v. Lilleskov*, 658 N.W.2d 904, 908 (Minn. Ct. App. 2003).

⁸⁵ MINN. STAT. § 244.502, subdiv. 4 (b)(1)-(3);

⁸⁶ MINN. STAT. § 244.502, subdiv. 3 (e) (“The committee shall assign to risk level I a predatory offender whose risk assessment score indicates a low risk of reoffense. The committee shall assign to risk level II an offender whose risk assessment score indicates a moderate risk of reoffense. The committee shall assign to risk level III an offender whose risk assessment score indicates a high risk of reoffense.”).

⁸⁷ *See No Easy Answers*, *supra* note 15, at 64; MINN. STAT. § 244.052, subdiv. 4(b)-(c); *Minnesota Regulatory Laws*, *supra* note 58, at 19-20 (describing the community notification requirements for offenders of various risk levels).

⁸⁸ A significant exception to this lack of variance is the lifetime registration requirements for those offenders who have prior registerable convictions, murder, and criminal sexual conduct of any degree involving force, a minor (if the perpetrator is over a certain age, and family members. MINN. STAT. § 243.166, subdiv. 6 (b)-(d).

⁸⁹ *Id.* at subdiv. 6(a).

Notable exceptions to the uniformity of registration requirements across risk levels are the residency restrictions for level III offenders.⁹⁰ Because those agencies charged with supervision of Level III offenders upon release “must mitigate the concentration of Level III offenders living in proximity to one another and living near schools,” registration as a Level III offender (as opposed to Level I or II) may present greater difficulty to the registrant.⁹¹

The information that registrants are required to provide is extensive and includes the person’s primary address; all of the person’s secondary addresses in Minnesota, including all addresses used for residential or recreational purposes; the addresses of all Minnesota property owned, leased, or rented by the person; the addresses of all locations where the person is employed; the addresses of all schools where the person is enrolled; and the year, model, make, license plate number, and color of all motor vehicles owned or regularly driven by the person.⁹² Any changes to this information needs to be reported to law enforcement authority within 5 days.⁹³

III. ANALYSIS AND RECOMMENDATIONS

A. SEX OFFENDER REGISTRIES: GENESIS AND JUSTIFICATION

1. Genesis

Popular support for sex offender registration and notification laws arrived at something of a climax in the early 1990s, shortly after Jacob Wetterling disappeared.⁹⁴ Judge Huffman, along with many others, argue that public perceptions of sex offenders are largely responsible for driving overly restrictive sex offender legislation during that period.⁹⁵ Judge Huffman notes that “[i]ndividual fear of the risk posed by sex offenders correlates highly with personal support for restrictions on convicted offenders,” and that “at the expense of constitutional concerns, lawmakers appear to prefer a legislative approach that seeks to identify some predictor for sexual offending and then isolate all potential and known sex offenders from society.”⁹⁶ Moreover, many of these laws were written and implemented with a particular type of offender in mind: the stranger attacker, who violently and surreptitiously preys on young children that they do not personally know.⁹⁷ It has been just 20 years since the first federal registration and notification

⁹⁰ *Minnesota Regulatory Laws*, *supra* note 58, at 23.

⁹¹ MINN. STAT. § 244.052, subdiv. 4(a) also prohibits property managers from renting rooms to Level III offenders and victims of domestic abuse at the same time.

⁹² MINN. STAT. § 243.166 subdiv. 4a(a)(1) – (6).

⁹³ *Id.* at subdiv. 4(b).

⁹⁴ *See generally* Huffman, *supra* note 27, at 255.

⁹⁵ *Id.*

⁹⁶ *Id.* at 257 (emphasis added).

⁹⁷ *See* Heather Ellis Cucolo & Michael L. Perlin, *Preventing Sex-Offender Recidivism through Therapeutic Jurisprudence Approaches and Specialized Community Integration*, 22 TEMP. POL. & CIV. RTS. L. REV. 1, 3 (2012)

requirements were signed into law.⁹⁸ In that brief period, those laws and their state counterparts have impacted the lives of millions of Americans, with the number of total registrants nearly doubling between 2005 and 2016.⁹⁹

2. Justifications

Omitting the argument that one underlying purpose for post-release sex offender registration is to further punish bad behavior post-release, registration laws can be justified on the basis that they purport to satisfy three primary goals: (1) deterring future bad behavior on the part of the individual offender; (2) providing an investigative tool for law enforcement; and (3) protecting the public.¹⁰⁰

The first justification for registration is deterrence: that fewer sexual crimes will take place if the people who have committed similar crimes in the past are on a list available to law enforcement. The Supreme Court has determined that deterrence is a constitutionally permissible aim for registration statutes:

Any number of governmental programs might deter crime without imposing punishment. ‘To hold that the mere presence of a deterrent purpose renders such sanctions “criminal” . . . would severely undermine the Government’s ability to engage in effective regulation.’¹⁰¹

Many, including Justice Ruth Bader Ginsburg,¹⁰² argue quite convincingly that an individual’s past crimes, and *not* his current level of dangerousness are what trigger application of the statute.¹⁰³ As such, the stated purpose of deterrence of future crimes is not furthered by mandatory registration; rather than serving the goal of deterring future crime, the requirements of many registration schemes “resemble historically common forms of punishment[,]” which “call[] to mind shaming punishments once used to mark an offender as someone to be shunned.”¹⁰⁴ Despite these arguments that the line between punishment beyond incarceration and prevention of recidivism is often blurred, preventing recidivism remains a stated purpose of registration statutes.

(arguing that “[s]ex offender civil commitment and community containment laws were developed as reactionary responses to the widely feared but statistically rare, violent, child-directed and stranger-perpetrated sex crime.”).

⁹⁸ See The Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, Pub. L. No. 103-322, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071(g)(2)(A)).

⁹⁹ PARENTS FOR MEGAN’S LAW AND THE CRIME VICTIMS CENTER, <https://www.parentsformeganslaw.org/public/meganReportCard.html> (last visited Oct. 10, 2016) (reporting that as of March 31, 2016 there are 805,781 registered sex offenders in the United States, while reporting just 551,987 total registrants in 2005).

¹⁰⁰ See *Sex Offender Registration: Policy Overview and Comprehensive Practices*, *supra* note 50.

¹⁰¹ *Smith v. Doe*, 538 U.S. 84, 102 (2003).

¹⁰² See *generally id.* at 114-18 (Ginsburg, J. dissenting).

¹⁰³ *Id.* at 116.

¹⁰⁴ *Id.* at 115-16 (noting that the challenged statute’s “scope notably exceeds [the deterrence] purpose).

The next goal of registries is improvement of investigative efficiency; that these lists of offenders to make it easier for law enforcement agencies to do their jobs when crimes of a sexual nature are committed.¹⁰⁵ Therefore, the logic goes, any additional edge that can be given to law enforcement in terms of efficiency in solving crimes of a sexual nature is good, and should be praised.¹⁰⁶ This in turn justifies the blanket determinations¹⁰⁷ regarding the duty to register as a predatory offender. In large part, this justification has been extended to individuals whose presence on the registry is not likely to be of any present or future use to law enforcement, in many cases because the person is unlikely to commit a crime of a sexual nature upon release. Actual recidivism statistics tend to not align with public perceptions of the likelihood that someone convicted of a sex offense will actually commit another sexually motivated offense.¹⁰⁸

In 2003, the United States Department of Justice conducted a study that sought to examine the recidivism rates of nearly ten thousand individuals convicted of sexual offenses (rape, statutory rape, child molestation, and sexual assault), and subsequently released since 1994, across 15 different states.¹⁰⁹ Among the most illuminating results of the study were that the non-sex offenders committed sex crimes post release at a rate of six times of the study's registered sex offenders.¹¹⁰ In terms of rearrests for overall crime, the study found that the recidivism rate of the non-sex offenders was around 37% higher than that of the sex offenders.¹¹¹ While rearrest rates for sex crimes was slightly higher for the sex-offenders than the non-sex offenders, the study found that the recidivism rate of just 5.3% in the first year after arrest, a figure much lower than those relied upon by many courts to this day.¹¹²

Professor Corey Rayburn Yung, a Professor of Law at John Marshall Law School and author of the Sex Crimes Blog¹¹³ has identified two more categories of individuals whose presence on registries seems highly unlikely to help law enforcement investigate future sex crimes.¹¹⁴ The first category includes

¹⁰⁵ See *Sex Offender Registration and Notification Act*, *supra* note 7.

¹⁰⁶ In a recent law review article, Elizabeth Reiner Platt, then a 3L at NYU, explored the justifications for registries of all kinds. In her article, Ms. Reiner quotes a professor of police administration, who at the time was advocating for a national criminal registration system. The professor stated the notion perfectly: “[T]here is much to be said for the detective who, upon learning the details of a crime, takes a chew of tobacco and says out of the corner of his mouth ‘Jones did it.’” Platt, *supra* note 8, at 730.

¹⁰⁸ See Yung, *supra* note 9, at 454-55 (noting that in a 2003 study conducted by the DOJ that the sex offender recidivism rate was almost thirty-seven percentage points lower than the rate for non-sex offenders) (citing Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. DEP’T OF JUSTICE, 1-2 (2003); see also Cucolo, *supra* note 2, at 217 (“[t]he common wisdom is that . . . recidivism rates are near 100% for sex offenders[, but] [t]he valid and reliable research . . . suggests that currently-prevailing legislation ‘may actually increase the amount of risk in a community.’”).

¹⁰⁹ Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, U.S. DEPARTMENT OF JUSTICE, 1-2 (2003).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Available at www.sexcrimes.typepad.com.

¹¹⁴ See Yung, *supra* note 9, at 466-77.

people who have been branded as sex offenders for such crimes as consensual sodomy (under laws that are now unconstitutional), public urination prosecuted as public indecency, prostitution, statutory rape, obscene movie distribution, false imprisonment, and adult incest.¹¹⁵ To include those convicted of these or similar offenses, Rayburn argues, is “horribly overinclusive.”¹¹⁶ The second category, the “innocent bystanders,” includes those who are wholly innocent. Rayburn compares these individuals to those who have had their homes raided pursuant to “plainly incorrect warrants.”¹¹⁷ Rayburn notes further that, “past rehabilitation and reintegration into society are often lost in the discovery of past crimes facilitated by the listings through state registries.”¹¹⁸

The final stated goal of registration is the bolstering of public safety.¹¹⁹ While discussion of the public safety rationale probably relates more logically to a discussion of community notification statutes (as opposed to simple registration), the article will not discuss this rationale in depth. Suffice it to say, for the time being, that public safety provides a vital, stabilizing third leg to the triumvirate of justifications for registration.

B. LEGAL CHALLENGES TO REGISTRATION: AN OVERALL FAILURE TO IMPACT MEANINGFUL CHANGE

As discussed above, sex offender registration legislation has enjoyed overwhelming public support. This in turn makes registries popular with legislators who are afraid of appearing “soft on crime.”¹²⁰ As noted in Judge Huffman’s article, Governor Jay Nixon’s veto of a bill to remove juveniles from Missouri’s public sex offender registry, a bill that passed both legislative houses easily, is a poignant example.¹²¹ The attendant grandstanding by Governor Nixon, the governor of Missouri from 2009 – 2017, is a perfect example of how politicians see support for sex offender legislation as a popular, if empirically lazy, tool for garnering public support:

The leadership of the House may be ready to help violent sex offenders hide from the public and law enforcement, but their victims, and the millions of Missourians who use these websites to help keep their families safe, are not.¹²²

¹¹⁵ *Id.* at 476.

¹¹⁶ *Id.* at 466.

¹¹⁷ *Id.* at 477.

¹¹⁸ *Id.*

¹¹⁹ As noted earlier, relatively little scholarly writing attempts to distinguish between registration and notification. It seems that any discussion of the “public safety” rationale for these laws makes more sense in the context of community notification.

¹²⁰ See, e.g., Huffman, *supra* note 27, at 290 (noting that, “[w]hen lawmakers have sought to modify draconian sex offender registration rules by implementing policies supported by empirical findings, the efforts have been thwarted by resort to the moral panic surrounding sex offenders.”).

¹²¹ *Id.*

¹²² *Id.* (internal citations and quotations omitted).

In the absence of any sort of meaningful opposition to stricter and stricter laws being adopted in the lawmaking arena, impacted individuals and advocates have turned to federal and state courts to challenge these laws post-enactment. A myriad of constitutional arguments have been brought. Most claim violations of the United States Constitution's *Ex Post Facto* Clause or that registries violate procedural and substantive due process. This hasn't prevented creative lawyers and litigants from challenging registration statutes on other grounds, however. For example, claimants have brought claims arguing that the way in which registration statutes are administered offends the Separation of Powers doctrine, and at least two state courts have struck down provisions of state registration statutes on that basis.¹²³ Yet despite these examples, Separation of Powers challenges have been generally unsuccessful, with courts generally giving substantial deference to the authority of the enforcing agencies under the challenged laws.¹²⁴ While the majority of claimants have been unsuccessful in their challenges, a few of the successful efforts to challenge registration laws demonstrate that importance of an independent judiciary as a check on the power of legislatures.

1. *Ex Post Facto* Challenges

In general, the *ex post facto* clause prohibits legislatures from passing laws that subject persons convicted before the statute's passage to punishments not in effect when the individual was convicted.¹²⁵ Shortly after the passage of federal sex offender registration laws, the issue of *ex post facto* application of the law began to arise in district courts throughout the country. Specifically, *ex post facto* issues had arisen regarding retroactivity provisions found in SORNA legislation across the country. SORNA requires that offenders whose "predicate convictions predate the enactment of SORNA or the implementation of SORNA in the jurisdiction" if one of three conditions are met: the offender is (1) incarcerated or under supervision, either for the predicate sex offense or for some other crime; (2) already registered or subject to a pre-existing sex offender registration requirement under the [relevant] jurisdiction's law; or (3) reentering the [relevant] jurisdiction because a subsequent felony conviction.¹²⁶

¹²³ See *State v. Ramos*, 202 P.3d 383 (Wash. Ct. App. 2009) (holding that RCW § 4.24.550 was an improper delegation of authority to classify sex offenders to a county sheriff's office, but not addressing separation of powers concerns with the statute mandating a risk assessment before the End of Sentence Review Committee (ESRC)); see also *State v. Bani*, 36 P.3d 1255, 1261 n.4 (Haw. 2001) (noting that "separation of powers concerns arises when the legislature vests administrative agencies with judicial power but precludes judicial review of the determinations made by the agency exercising its power.").

¹²⁴ See generally *United States v. Samuels*, 543 F. Supp. 2d 699 (E.D. Ky. 2008) (holding that SORNA provisions that give the Attorney General authority to specify whether registration requirements apply retroactively was not an unlawful delegation of authority to the attorney general); *United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir. 2013) (SORNA's retro application provisions do not violate non-delegation doctrine); *United States v. Hall*, 577 F. Supp. 2d 610, 618 (N.D. N.Y. 2008) *aff'd* in part, *rev'd* in part by *United States v. Guzman*, 591 F.3d 383 (2d Cir. 2010) (holding that Congress provided the attorney general with an "intelligible principle" upon which to base determinations regarding retroactive application of registration provisions, and thus did not violate the separation of powers doctrine).

¹²⁵ U.S. CONST. art. I, § 9(3).

¹²⁶ 42 U.S.C. § 16913(d) ("[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular

After roughly a decade of litigation, the United States Supreme Court took up the issue in 2003 in *Smith v. Doe*.¹²⁷ Under scrutiny in *Smith* was an Alaska law that required the plaintiff to register as a predatory offender for an act committed before the law took effect. In an opinion that would render many future constitutional challenges for registration and notification laws to become impotent, the Court rejected the plaintiff's claim.¹²⁸ The Court reasoned that the plaintiff's constitutional claim failed because the challenged statute was regulatory and not "punitive" in nature.¹²⁹ Thus, because the plaintiff did not have an individual fundamental right infringed, the law was subject to deferential rational basis review.

Yet the *Smith* holding has not precluded some state courts from holding that retroactive application of their sex offender registration and notification laws violated their respective state constitutions.¹³⁰ It may seem reasonable to discount the importance of *ex post facto* considerations in analyzing the efficacy and fairness of registration and notification laws in 2017. After all, it is not the 1990s anymore, and most states' statutory frameworks are well-developed to the point that going forward, registrants are unlikely to be able to successfully challenge SORNA statutes on an *ex-post facto* basis.¹³¹ Still, the unwillingness of most courts to accept *ex-post facto* arguments is illustrative of a broader concept: when it comes to sex offenders, courts are less protective of individual, constitutional rights. The reasons for these judicial concessions are beyond the scope of this article, but the reality helps to frame the discussion of the reforms discussed below.

2. Due Process Challenges

The Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution preclude the state from infringing on an individual's life, liberty, or property interests without due process of law.¹³² Challenges to registration requirements on due process grounds have been largely unsuccessful because courts have found that (1) the duty to register does not implicate a liberty or property interest so as to require a hearing; and (2) the duty not to register is not a fundamental right, and thus laws requiring registration are reviewed under the highly deferential rational basis standard.

jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section."); *see also* The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38046 (July 2, 2008).

¹²⁷ 538 U.S. 84 (2003).

¹²⁸ *Id.* at 123.

¹²⁹ *Id.* at 94.

¹³⁰ *See e.g.*, *Doe v. State*, 189 P.3d 999 (Alaska 2008); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *Maine v. Letalien*, 985 A.2d 4 (Me. 2009); *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 40 A.3d 39 (Md. 2013); *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011); *Starkey v. Okla. Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013).

¹³¹ The counterargument to this conclusion is of course that a review of the history of, for example, MINN. STAT. § 243.166 makes clear the fact that the law has applied to increasingly more conduct over the years. *See supra* note 35.

¹³² U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V.

a. Procedural Due Process

In *Paul v. Davis*, the United States Supreme Court formulated the seminal “stigma plus” test as the yardstick by which agency action, such as registration compelled by the BCA is measured.¹³³ The Court held that damage to reputation alone is not sufficient to invoke the procedural protections of the due process clause.¹³⁴ Rather, to be actionable as a protectable property interest, the stigma associated with reputational harm must be coupled with some other tangible element, “such as employment.”¹³⁵

The United States Supreme Court has foreclosed many challenges on this ground with its decision in *Connecticut Department of Public Safety v. Doe*.¹³⁶ In *Doe*, the Court held that automatic registration pursuant to a plea bargain did not violate the Due Process Clause.¹³⁷ Because the determination was made at trial, the Supreme Court reasoned, that proceeding was replete with all of the procedural safeguards necessary to protect procedural due process.¹³⁸

The Minnesota Supreme Court applied the “stigma plus” test to the “arising out of” language of Minn. Stat. § 243.166 in *Boutin v. LaFleur*.¹³⁹ Relying on language from the *Davis* decision, the court “decline[d] to recognize a protectable liberty interest in reputation alone and embrace[d] the federal ‘stigma-plus’ standard.”¹⁴⁰ The court was clear that it did regard Minnesota’s registration requirements as a tangible element sufficient to satisfy *Davis*’ second prong:

Boutin claims that complying with the requirements of the registration statute amounts to the loss of a recognizable interest. This argument fails because there is no recognizable interest in being free from having to update address information. Such a requirement is a minimal burden and is clearly not the sufficiently important interest the “stigma-plus” test requires.¹⁴¹

¹³³ *Paul v. Davis*, 424 U.S. 693 (1976).

¹³⁴ *Id.* at 701.

¹³⁵ *Id.* at 712-13.

¹³⁶ 538 U.S. 1 (2003).

¹³⁷ *Id.* at 6.

¹³⁸ *Id.* at 3-4.

¹³⁹ 591 N.W.2d 711 (Minn. 1999).

¹⁴⁰ *Id.* at 719. The Court also declined to recognize a protectable interest in injury to reputation alone under the state constitution. While the court recognized that it is “not bound to follow interpretations of the Supreme Court in interpreting the Minnesota Constitution” it elected to apply the *Paul v. Davis* federal test in that instance. *Id.* at 719-20.

¹⁴¹ *Id.* at 718.

The court did, however, concede that registration information was available to the general public, and that “being labeled a predatory offender is injurious to one’s reputation.”¹⁴² The court declined to comment on the effect that such a stigma might have on someone, especially in a small community, in the areas of employment, housing, schooling, and myriad other possibilities.

b. Substantive Due Process

Under the doctrine of substantive due process, laws, which infringe a fundamental right, are subject to strict scrutiny by courts, and are likely going to be invalidated unless they are narrowly tailored to a compelling governmental interest.¹⁴³ Laws that do not implicate a fundamental right are subject to deferential rational basis review. Again in *LaFleur*, the Minnesota Supreme Court examined Minnesota’s registration requirements through this lens. While the court recognized the presumption of innocence as a fundamental right, it qualified that presumption by stating, “such a fundamental right only applies to statutes which are punitive, or criminal, in nature.”¹⁴⁴ The court went on to determine that although the legislature was not clear about whether § 243.144 was intended to be punitive, it applied the factors set forth in *Kennedy v. Mendoza-Martinez*,¹⁴⁵ and determined that the statute was regulatory.¹⁴⁶ The court’s reasoning emphasized the fact that registration under § 243.166 did not confine the plaintiff to a particular residence or state, and was not permanent.¹⁴⁷ After so concluding, the court upheld the statute under rational basis review.

This reasoning has precluded numerous challenges on substantive due process grounds in Minnesota.¹⁴⁸

C. SO, WHAT NOW?

If change isn’t going to come through legislatures or the courts, then what exactly can be done to reverse the current course of over-inclusive, ineffective registration? There is a quite a large body of research and scholarly writing that seeks to answer that very question. The following sections seek to synthesize and analyze two of the proposed solutions: (1) The Expansion of so-called “Problem Solving Courts” in the

¹⁴² *Id.*

¹⁴³ *Washington v. Glucksberg*, 521 U.S. 702, 766-67 (1997).

¹⁴⁴ 591 N.W.2d at 717.

¹⁴⁵ 372 U.S. 144 (1963) (factors include: Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.”).

¹⁴⁶ 591 N.W.2d at 717.

¹⁴⁷ *Id.*

¹⁴⁸ See e.g., *Meyers v. Roy*, 2012 WL 28122, Civ. No. 11-291 ADM/TNL (D. Minn. Jan. 5, 2012); *Gunderson v. Hvass*, 2002 WL 31163049, No. Civ. 01-646 ADM/RLE, (D. Minn. Sept. 27, 2002).

realm of sexual crime; and (2) a return to a more individualized approach that would give individual judges the discretion and authority to modify or eliminate registration requirements when taking the individual circumstances of each offender into account.

1. Problem Solving Courts

The proliferation¹⁴⁹ of specialized problem solving courts largely reflects a recognition that the traditional criminal justice system is incapable, for a wide variety of reasons, of being results-oriented. In this way, many advocates of specialized problem solving courts argue, the system cannot do what it purports to do.¹⁵⁰ Problem solving courts, advocates argue, can remedy many of these shortcomings.

The Center for Court Innovation (“CCI”), has identified six guiding principles that underlie problem solving courts across the various disciplines in which they are currently employed: (1) enhanced information; (2) community engagement; (3) collaboration; (4) individualized justice; (5) accountability; and (6) outcomes.¹⁵¹ With respect to sex offender courts, CCI acknowledges that “[s]ex offense cases are among the most challenging for the criminal justice system[,]” and maintains that “[s]ex offense courts respond to the challenges by assessing community needs, identifying gaps in services, and streamlining information.”¹⁵²

Few would doubt the laudability of these goals. Indeed, the six articulated goals align quite nicely with the three previously identified focus areas: “accountability, enhanced information, individualized justice, and outcomes” if achieved would align with the value of deterrence; while “community engagement” and “collaboration” would seem to serve investigative and community safety functions. Still, actually achieving these goals in the complex realm of sex offender criminal justice is no doubt exceedingly more difficult than crafting a clean statement of policy. The next two sections examine the extent to which these guiding principles have been fulfilled in two types of more well-developed problem solving courts: drug courts and domestic violence courts.

a. Evaluating Outcomes

i. Drug Courts

¹⁴⁹ See West Huddleston & Douglas B. Marlowe, *Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States*, NAT’L DRUG CT. INST. (2011), available at <http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF> (stating that “federal funding for Drug Courts increased over 250% from fiscal years 2008 to 2010” and that “state Drug Court appropriations increased by nearly \$63 million (35%) from 2007 to 2009.”).

¹⁵⁰ See, e.g., Paul Holland, *Lawyering and Learning in Problem-Solving Courts*, 34 WASH. U. J.L. & POL’Y 185, 192 (2010) (describing the “vision” of problem solving courts as attempting to “determine whether [a defendant’s] alleged criminal conduct was linked to untreated substance abuse[,]” in an attempt to “reorient” the judicial process.).

¹⁵¹ *Sex Offending Overview*, CENTER FOR COURT INNOVATION, available at <http://www.courtinnovation.org/topic/sex-offending> (last visited Jan. 11, 2016).

¹⁵² *Id.*

Drug Courts provide a compelling test case when considering the potential for a broader implementation of sex offender courts. Professor Yung sees many similarities between the so-called “War on Drugs,” the primary cause of skyrocketing arrest and incarceration rates that began to accelerate in the mid-1980s,¹⁵³ and what he describes as a “nascent criminal war” on sex crimes and sex offenders.¹⁵⁴ This comparison is compelling; especially if one considers the dimensions of a “nascent criminal war on sex offenders” through the lens of the sweeping federal mandates discussed above.¹⁵⁵ These dimensions, as articulated by professor Yung, are the marshaling of resources in the form of a government budget and personal means to address the problem, “myth creation” and demonization of a particular social group, and constitutional exception making, wherein in the interest of addressing the identified problem, the public is led to believe that the ordinary code of conduct can be cast aside in order to serve the higher purpose.¹⁵⁶ All of these dimensions are abundantly visible in much of the sex offender legislation previously discussed.

The first dimension, the marshaling of resources, may even be more pronounced in the current War on Sex Offenders than it was during apex of the War on Drugs. This is due to, Professor Yung notes, the “legal architecture,” e.g. The Adam Walsh Act and SORNA, “far exceed[ing] what was present at the advent of the War on Drugs.”¹⁵⁷ Moreover, federal legislation is supplemented and bolstered by myriad state and local laws, which require participation from state and local law enforcement agencies to enforce.¹⁵⁸ Furthermore, Yung posits that “there is reason to expect SMART’s funding and influence might grow in the future,” just as the DEA’s growth coincided with the expansion of the War on Drugs.¹⁵⁹

The second dimension of the War on Sex Offenders comes in the form of what Professor Yung calls “myth creation.”¹⁶⁰ From a policy standpoint, the analogy between the War on Drugs and the impending War on Sex Offenders is probably the most clear in the realm of myth creation. During the War on Drugs, the government “went above and beyond the traditional crime-fighting techniques when it utilized *propaganda* as part of law enforcement.”¹⁶¹ As for the War on Sex Offenders, constructed myths help to

¹⁵³ See Yung, *supra* note 9, at 436 (noting that the “War on Drugs stands out as the quintessential example of a war on crime in the United States.”).

¹⁵⁴ *Id.*

¹⁵⁵ See section II, *supra* for a discussion of the various federal mandates on sex offender registration.

¹⁵⁶ Yung, *supra* note 9, at 440-46. With regard to the “exception making” prong, Professor Yung analogizes exceptions made regarding the civil liberties of sex offenders in impending war on sex offenders to the “constitutional guarantees of liberty [that] were to be sacrificed when policymakers perceived a threat to national security” in the War on Terror. *Id.* at 445.

¹⁵⁷ *Id.* at 447.

¹⁵⁸ *Id.* at 448-450.

¹⁵⁹ *Id.* at 452.

¹⁶⁰ *Id.* at 453-59; see also part II A, *supra*.

¹⁶¹ *Id.* at 442. A recent example of the kind of constructed myths that were widely disseminated during the war on drugs was an advertising campaign that “stated that purchases of marijuana were facilitating terrorism around the world.” *Id.* (internal citations omitted).

lend legitimacy to increasingly harsh methods of preventing sexual crime.¹⁶² Just some of the myths that have been created about the amorphous and homogenous “sex offender” are that they reoffend at unusually high rates, are all alike in terms of depravity, and dangerousness, and what Professor Yung refers to as the “stranger danger” myth.¹⁶³ Professor Yung notes that “the idea of the rapist lurking in the bushes waiting to attack as the primary rape threat was long ago attacked by feminist rape reformers” and debunked by statistics demonstrating that most sexual assault is perpetrated by somebody known to the victim.¹⁶⁴

In large part thanks to the substantial efforts borne out in the myth creation process, both wars involve a high degree of constitutional “exception making.”¹⁶⁵ This analogy is strongest when considered from a legal, as opposed to a policy or cultural perspective.¹⁶⁶ Whereas the War on Drugs arguably carved out significant exceptions to the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments,¹⁶⁷ the War on Sex Offenders has carved out significant exceptions to the due process clause.¹⁶⁸ As noted previously, sex offender registration legislation is often carried out at the state and/or local level.¹⁶⁹ States and localities often have provisions that are *much harsher* than their federal analogs, and require registrants to cede an astonishing level of personal autonomy to the regulating agency.¹⁷⁰ Harsh residency restrictions, for example, often result in high rates of homelessness for those who have been labeled and forced to register as sex offenders.¹⁷¹

It can be reasonably argued, and this article assumes for the purposes of argument, that the expansion of drug courts represents something of a backlash to the considerable fallout that resulted from the war on

¹⁶² *Id.* at 453.

¹⁶³ *Id.* at 453.

¹⁶⁴ *See id.* (citing Jennifer L. Hebert, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1457 n.31 (2005) (“The 2002 National Crime Victimization Survey revealed that nonstrangers commit 69% of all sexual assaults.”)).

¹⁶⁵ *Id.* at 459.

¹⁶⁶ *See* section III, *supra*. Professor Yung argues in fact, and this article does not dispute, that the infringement on the individual constitutional rights of sex offenders is more egregious than the analogous infringements that take place in the drug war. *See Id.* at 459.

¹⁶⁷ *Id.* at 445.

¹⁶⁸ *See* part III, *supra*; Yung, *supra* note 9, at 466-67.

¹⁶⁹ *See* part II.A.4, *supra*.

¹⁷⁰ Professor Yung provides examples of some of the most severe infringements on the individual liberties of registered sex offenders, including residency and travel restrictions.

¹⁷¹ *See No Easy Answers*, *supra* note 15, at 96.

drugs. Similarly, advocates for the expansion of sex offender courts seek to ameliorate some of the damage that has been done in that realm.¹⁷²

In 1989, the first treatment based¹⁷³ drug courts were established in Miami, Florida.¹⁷⁴ Over the course of the past 26 years, more than 2,500 drug courts and similar diversionary programs for non-violent drug offenders have emerged in all 50 states.¹⁷⁵ Though there is considerable disagreement about the effectiveness of drug courts in preventing recidivism and reducing mass incarceration, the sheer number of drug courts now in existence indicates that their popularity and political appeal can hardly be argued.¹⁷⁶ The drug court “approach receives liberal support because drug courts appear to reintroduce a rehabilitative ideal that had all but disappeared from mainstream American penal practice. Rehabilitation is, however, tempered by a form of ‘tough love’ that makes the court attractive to conservatives.”¹⁷⁷ Drug Courts, it seems, are not going away anytime soon. In fact, their perceived success has led to the creation of a variety of “problem solving” courts, which modeled themselves after the Adult Drug Courts.¹⁷⁸

The basic policy underlying drug courts as an alternative to incarceration is an emphasis on rehabilitation and community-based treatment.¹⁷⁹ Upon being charged, eligible participants are given the option to go through the drug court process by agreeing to the terms of participation, which are often characterized by frequent urinalysis testing and other requirements.¹⁸⁰ In most drug courts, many would-be participants charged with drug offenses are excluded from enrolling if they are also facing ancillary non-drug charges, or if they are being charged with distribution or trafficking (as opposed to simple possession).¹⁸¹ After the

¹⁷² For example, some advocates argue that “Due Process may be equally or more violated in traditional courts than in specialty courts because traditional courts often subject the offender to countless delays and rescheduling.” Richmond, *supra* note 3, at 468.

¹⁷³ Though there were specialized courts dealing specifically with drug offenses in existence as early in the 1970s in New York City, these courts gave no special treatment to drug offenders and were merely in existence to process the overwhelming number of drug offenders being charged as a result of the Rockefeller Drug Laws. See Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1460 (2000).

¹⁷⁴ Seth W. Norman et al., *Drug Court Success*, 51-MAR Tenn. B.J. 16, 17 (2015).

¹⁷⁵ *Id.*

¹⁷⁶ See Huddleston, *supra* note 149 (stating that “federal funding for Drug Courts increased over 250% from fiscal years 2008 to 2010” and that “state Drug Court appropriations increased by nearly \$63 million (35%) from 2007 to 2009.”).

¹⁷⁷ Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 425 (2009).

¹⁷⁸ See generally Huddleston & Marlowe *supra* note 149, at 37 (such courts include juvenile drug courts, family drug courts, DWI courts, mental-health courts, and prisoner-reentry courts).

¹⁷⁹ Douglas B. Marlowe, *Achieving Racial and Ethnic Fairness in Drug Courts*, 49 CT. REV. 40, 41 (2013).

¹⁸⁰ *Id.*

¹⁸¹ Michael M. O’Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL’Y REV. 463, 477 (2009).

eligible participant agrees to participation in either a drug treatment program or regular urinalysis testing, they are released on bond, and typically plead guilty to the charged offense in exchange for a judgment deferral or probation.¹⁸² In order to “graduate” from the treatment program, participants must achieve certain benchmarks, often including: abstinence from alcohol and drugs, sustained for a period of at least six months; satisfaction of treatment and conditions of supervision; payment of fines; and completion of community service and/or restitution.¹⁸³ Though most Drug Court treatment programs last 12 to 18 months, some participants are required to remain under court supervision for much longer in order to satisfy the Court’s requirements.¹⁸⁴

Perhaps the most widely criticized unintended consequence of Drug Courts is what is known as the “net-widening” phenomenon. The term “net-widening” commonly refers to “an expansion in the number of offenders arrested and charged after the implementation of drug court because well-meaning police and prosecutors now believe there to be something worthwhile that can happen to offenders once they are in the system (i.e., rehabilitative treatment instead of prison).”¹⁸⁵ As a result of net-widening, Drug Court critics contend, more people are brought into the criminal justice system at the front end (e.g. the arrest and charging stages), than otherwise would have been in the absence of such a court.¹⁸⁶

ii. Domestic Violence Courts

Drug courts provide an interesting analog to sex offender courts given the historic and contemporary demonization of the targeted groups: sex offenders and drug users. Likewise, individuals that have been labeled sex offenders and those accused of perpetrating domestic violence often have similar kinds of interactions with the justice system, their communities, and their victims.¹⁸⁷ These similarities provide the basis for considering whether to look to domestic violence courts as a potential model for sex offender court expansion.

¹⁸² Hoffman, *supra*, at 1462.

¹⁸³ Huddleston, *supra* note 149, at 7.

¹⁸⁴ *Id.*

¹⁸⁵ O’Hear, *supra* note 181, at 482-83.

¹⁸⁶ See, e.g., Joel Gross, *The Effects of Net-Widening on Minority and Indigent Drug Offenders: A Critique of Drug Courts*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 161, 167 (describing a practice in which “police officers targeted low level drug offenders who were involved in ‘\$10 and \$20 hand-to-hand drug cases that the system simply would not have bothered with before.’”) (citing Nat’l Ass’n of Criminal Defense Lawyers, *America’s Problem-Solving Courts: The Criminal Costs Treatment and the Case for Reform* 42 (2009)).

¹⁸⁷ For example, domestic violence is, by definition something that can only occur between people who are in a relationship with one another. See *What is Domestic Violence*, UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/ovw/domestic-violence> (last visited Jan. 8, 2017). As noted previously, and despite the “stranger danger” myth, available statistics demonstrate the victims and perpetrators of most sexually motivated offenses *know* one another.

The first domestic violence courts began appearing across the United States as early as the 1990s, and there are over 200 domestic courts in existence nationwide.¹⁸⁸ In general, specialized domestic violence courts hear domestic violence “criminal or civil matters or a combination of both” and pay “particular attention . . . to how cases are assigned, the need to screen for related cases, who performs intake-unit functions, what types of services are provided to victims and perpetrators, and the importance of monitoring respondents or defendants.”¹⁸⁹ Like drug courts and sex offender courts, domestic violence courts are problem-solving courts, “modeled on principles of therapeutic jurisprudence,” which purports to take the potential negative side effects that interactions with the “normal” justice system might normally entail.¹⁹⁰ These courts also take into special consideration the fact that domestic violence involves people who are in intimate, personal relationships with one another.¹⁹¹ As such, their goal is to provide a holistic approach that doesn’t emphasize any one aspect of corrections, such as punishment of the offender, over any other.¹⁹² Domestic violence courts seek to accomplish this goal by coordinating with actors outside of the judicial system, like “batterer intervention programs, probation departments, shelters, counseling services for victims, and supervised visitation programs.”¹⁹³

Advocates for the expansion of sex offender courts argue that the principles applied in domestic violence can be successfully translated to sex offender courts. Professors John Q. La Fond and Bruce J. Winick, who have written extensively on sex offender courts see an important parallel in the area of risk level determinations:

When a thorough risk assessment concludes that the risk of reoffending appears to be low, perhaps in a case involving a first-time nonviolent sex offender, the court, in considering the setting of bail, can require the offender to accept treatment as a condition of release on bail. This condition often is applied in the context of domestic violence court, and in appropriate low-risk cases, this same approach can be used by the sex offender reentry court.¹⁹⁴

¹⁸⁸ Kathryn Gillespie Wellman, *Taking the Next Step in the Legal Response to Domestic Violence: The Need to Reexamine Specialized Domestic Violence Courts from a Victim Perspective*, 24 COLUM. J. GENDER & L. 444, 460 (2013).

¹⁸⁹ Julia Weber, *Domestic Violence Courts: Components and Considerations*, 2 J. CENTER FOR FAMILIES, CHILD. & COURTS 23, 26 (2000).

¹⁹⁰ Wellman, *supra* note 188, at 460.

¹⁹¹ *See* Weber, *supra* note 189, at 24-25.

¹⁹² *Id.* at 26 (describing the guiding principles of intervention as (1) enhancing victim safety *and* (2) ensuring batterer accountability).

¹⁹³ Wellman, *supra* note 188, at 462.

¹⁹⁴ John Q. La Fond & Bruce J. Winick, *Sex Offender Reentry Courts: A Proposal for Managing the Risk of Returning Sex Offenders to the Community*, 34 SETON HALL L. REV. 1173, 1196 (2004).

The professors argue that the reentry court model can effectively supplant registration laws as they currently exist, and will be more effective in protecting victims, and rehabilitating offenders.¹⁹⁵ Arguments in support of the expansion of sex offender courts often focus on the individualistic approach, which is seen to be the successful hallmark of domestic violence courts.¹⁹⁶ Professors La Fond and Winick describe how this process would look in the context of sex offender courts:

Risk management practices will allow the court to readjust calculations of individual risk on an ongoing basis in light of new information about the offender, much of it generated through the judge's use of the containment model, which includes periodic polygraph examination, and to adjust and readjust the conditions of control that are imposed. In this way, the reentry court judge will function as a reentry manager and rehabilitation motivator.¹⁹⁷

For these reasons, domestic violence courts provide an interesting case study for a discussion of the expansion of sex offender courts. The next section explores the viability and desirability of such an expansion.

2. In light of these two models, should Specialized Sex Offender Courts Be Expanded?

The sad reality—both for victims of sexual crimes and the more than 800,000¹⁹⁸ Americans who are currently required by either state or federal law to register as predatory offenders—is that registration and notification laws are not doing what they are intended to do.¹⁹⁹ In large part in response to these shortcomings, recent reform efforts include the implementation of sex offender courts, modeled after the drug courts and domestic violence courts discussed above.

As of this writing there are three states—New York, Pennsylvania, and Ohio—that operate specialty sex offense courts.²⁰⁰ Based on the success of these courts, many are advocating for their expansion.²⁰¹ New

¹⁹⁵ *Id.* at 1207-08 (noting that registration “overemphasize[s] the problem of sex crimes committed by strangers, neglecting the well-established fact that the overwhelming majority of sex offense are committed by family members and others known to the victims.”) (citing National Victim Center & Crime Victims Research and Treatment Center, *Rape in America: A Report to the Nation* 4 (1992)).

¹⁹⁶ *Id.* at 1197-98.

¹⁹⁷ *Id.* at 1211.

¹⁹⁸ PARENTS FOR MEGAN’S LAW AND THE CRIME VICTIMS CENTER, <https://www.parentsformeganslaw.org/public/meganReportCard.html> (last visited Oct. 10, 2016) (reporting that as of March 31, 2016 there are 805,781 registered sex offenders in the United States).

¹⁹⁹ See generally Kristen Zgoba et al., *Megan's Law: Assessing the Practical and Monetary Efficacy*, at 41, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf> (concluding that Megan’s law cannot “itself . . . be the cause of the drop [in sex offense rates] in general.”).

²⁰⁰ See <http://www.supremecourt.ohio.gov/JCS/specDockets/sexOffender/> (Ohio); Paula Reed Ward, *Allegheny County’s Court Programs Expedite Cases, Cut Backlog*, (September 8, 2013), <http://www.post-gazette.com/local/region/2013/09/08/Allegheny-County-s-court-programs-expedite-cases-cut-backlog/stories/201309080228;%20Sex%20Offender%20Courts> (reporting on the creation specialty courts in Allegheny County focusing on domestic violence, DUI, mental illness, sex offenders, prostitution and veterans facing criminal charges, and highlighting the reduction in court backlog as attributable to these courts).

York's model serves as a good object of analysis at this point, given that sex offender courts have been operating at a state level there since 2005.²⁰² According to the court website:

Sex Offense Courts in New York State seek to enhance public safety by preventing further victimization. Hallmarks of these courts include early intervention, post-disposition monitoring, consistency and accountability Many organizations come into contact with alleged and convicted sex offenders and victims of sex offenses, including district attorney's offices, departments of probation, defense attorneys, and victim services agencies.²⁰³

As of May 2013, New York has eight sex offender courts and had heard over 4,000 cases.²⁰⁴ Advocates for the expansion of sex offender courts argue that sex offender courts will result in "flexibility in sentencing," which would allow the stakeholders to the sex offender court process to keep certain perpetrators off of registries.²⁰⁵ These same advocates concede, however, that improvements are needed. For example, they note that giving sex offender court judges the ability to absolve individuals from the responsibility of registration "if they complete successful monitoring . . . would be a controversial step and might require advance legislative reforms in light of sex crime registration laws already on the books."²⁰⁶

The model of therapeutic jurisprudence that is applied in problem solving court settings surely has its advantages. For instance, it attempts to allow for more meaningful victim participation and recognizes (more than the current majority approach) the heterogeneity of offenders and victims, and that a blanket approach is unlikely to work effectively for every situation. Yet as advocates recognize, "[r]egistration laws are broad in their coverage and effectively predict that most sex offenders will reoffend over a long period of time."²⁰⁷ As previously noted, however, research indicates that low-level offenders actually pose a very low risk of reoffense in a significant number of cases.

Given these variables, requiring individuals who would be subject to registration to instead participate in a sex offender reentry court, which would likely require them to submit to intrusive levels of supervision,

²⁰¹ See, e.g., Richmond *supra* note 3 (advocating the expansion of sex offender courts on the basis that such courts would increase victim reporting); Kristine Herman, *Sex Offense Courts: The Next Step in Community Management?*, CENTER FOR COURT INNOVATION, <http://www.courtinnovation.org/research/sex-offense-courts-next-step-community-management?url=research%2F14%2Farticle&mode=14&type=article> (asserting optimism "that the Sex Offense Court model will improve case outcomes, including victim and stakeholder satisfaction with the criminal justice system response and will provide for increased accountability of sex offenders[.]").

²⁰² *Problem-Solving Courts, Sex Offense Courts*, NYCOURTS.GOV, http://www.nycourts.gov/courts/problem_solving/so/courts.shtml (last visited Nov. 27, 2016).

²⁰³ *Id.*

²⁰⁴ Richmond, *supra* note 3, at 460 (arguing that the continued expansion indicates a level of success).

²⁰⁵ *Id.* at 471.

²⁰⁶ *Id.* at 473.

²⁰⁷ *Id.* at 1178.

e.g. “periodic polygraph examination,” would seem unlikely to solve registration’s over-inclusivity problem. Simply substituting submission to court control for submission to BCA control does nothing to cure the problems that registration creates in terms of being overly burdensome and an encroachment on individual liberties.

Given the shortcomings²⁰⁸ of Minnesota’s current laws and the problems associated with their administration, Minnesota should be cautious about moving towards adopting specialty sex offender courts to adjudicate certain sex offenses in specialized sex offender courts like those currently operating in New York, Pennsylvania, and Ohio. As this approach seems unlikely to solve registration’s over-inclusivity problems as it is currently employed, the expansion of sex offense courts should be looked upon with caution. For the reasons discussed below, a better approach at this point in time would a return to judicial involvement in the registration process at the sentencing stage.

C. REESTABLISHING JUDICIAL INVOLVEMENT IN SEX OFFENDER REGISTRATION

“The judiciary must not take on the coloration of whatever may be popular at the moment. We are guardian of rights, and we have to tell people things they often do not like to hear.”

-Rose Bird²⁰⁹

The Adam Walsh Act, together with analogous state level registration schemes, have effectively eliminated judicial participation in the registration process.²¹⁰ In Minnesota, “[w]hen a person who is required to register under [the registration statute] is sentenced or becomes subject to a juvenile court disposition order . . . [t]he court *may not modify* the person’s duty to register in the pronounced sentence or disposition order.”²¹¹ This usurpation of judicial discretion has created something of a constitutional quandary, wherein individual liberties are all but ignored. As Alexander Hamilton explained long ago,

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be

²⁰⁸ These shortcomings include over breadth, lack of consideration of individual circumstances, and uniform application.

²⁰⁹ Rose Bird was the first female chief justice of the California Supreme Court, and served in that position for nearly ten years before being voted out after a “vigorous” campaign to defeat her based on her staunchly anti-death penalty views. *See generally*, Patrick K. Brown, *The Fall of Rose Bird, A Career Killed by the Death Penalty*, (2007), available at: http://www.cschs.org/wp-content/uploads/2014/03/CSCHS_2007-Brown.pdf.

²¹⁰ Judge Huffman discusses the “one-size-fits all approach of the Adam Walsh act at length, noting that the Act “ignores the need to address the circumstances underlying sexual offending. Interventions prove most effective when concentrated on offenders who present the most likely risk to reoffend.”). Huffman, *supra* note 27, at 288.

²¹¹ MINN. STAT. § 243.166, subdiv. 2 (emphasis added).

to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.²¹²

To this point this article has analyzed registration through the lens of the three primary governmental interests that it purports to serve: deterrence, investigative efficiency, and public safety. In the sections that follow, I argue that this is only half of the story; simply analyzing registration through the lens of what governmental interests it may or may not serve ignores the costs of registration to those subject to it. The article concludes by positing that the only way to even begin to strike the appropriate balance between these competing goals is a restoration of judicial discretion to the registration process. Because this approach would prevent the kinds of encroachments on individual liberties and alleviate the burdens of registration for more people, it is preferable, at least at this stage, to an unfettered expansion of sex offender courts.

1. Restoring judicial involvement in the registration process better serves the purported goals of registration than either the current method or sex offender courts

a. Bolstering Investigative Efficiency

This article concedes that, of the three goals of sex offender registries—deterrence, public safety, and investigative efficiency—the goal improving investigative efficiency seems to have the most logical connection to the maintenance of registries, at least in theory. The California Sex Offender Management Board, which has the stated vision of “decreas[ing] sexual victimization and increasing community safety,”²¹³ described this logic in a recent report (“CASOMB report”):

The intent of registration was to assist law enforcement in tracking and monitoring sex offenders since they were viewed as the group most likely to commit another sex offense. It was thought that having their names and addresses known to law enforcement and - with the expansion of community notification - also available to the public would dissuade them from committing a new offense, enable members of the public to exercise caution around them, enable law enforcement to monitor them and, if necessary, solve new sex offense cases more readily.²¹⁴

The CASOMB report also describes the costs associated with registration, while acknowledging that “it is very difficult to estimate the actual costs of maintaining the registry and the amount of savings if a different system was adopted.”²¹⁵ Yet it is clear that the financial costs of maintaining a large registry, in California’s case the largest in the country,²¹⁶ are not insignificant, and that “[t]he largest costs are those

²¹² Alexander Hamilton, *The Federalist No. 78*, INDEPENDENT J. SATURDAY, (1788), available at <http://www.constitution.org/fed/federa78.htm>.

²¹³ *Vision*, CASOMB, <http://www.casomb.org/>, (last visited Jan. 6, 2017) [“CASOMB website”].

²¹⁴ *A Better Path to Community Safety: Sex Offender Registration in California “Tiering Background Paper*, CALIFORNIA SEX OFFENDER MANAGEMENT BOARD, at 3, available at: <http://www.casomb.org/index.cfm?pid=231> [hereinafter “CASOMB report”].

²¹⁵ *Id.* at 7.

²¹⁶ CASOMB’s website describes the need for a specialized sex offender management board in California: “Because California is the most populated state in the Union and has had lifetime registration for its convicted sex offenders

incurred by local law enforcement, which must devote *considerable time*, to the actual registration, re-registration and enforcement process.”²¹⁷ In light of these substantial costs, CASOMB concludes that California’s sex offender registration system should direct its limited resources toward individuals who pose the highest risk of committing sexually motivated offenses in the future.²¹⁸ The report notes that because recidivism rates for low risk offenders are consistently low, requiring lifetime registration for *all* convicted sex offenders, which has been California’s policy since 1947, makes little sense in light of the administrative and financial burdens placed on local law enforcement agencies.²¹⁹

Reference to CASOMB’s recommendation that California adopt a tiered approach in light of scant resources leaves open the obvious counterargument that many states, including Minnesota, *already* employ this tiered approach.²²⁰ The CASOMB study is included to demonstrate a larger point: That a one size fits all approach to registration is not an efficient use of law enforcement resources, and that over-inclusive registries are unlikely to improve investigative efficiency.

This conclusion can and should be extended to support the argument that restoring judicial involvement in the process would allow the *sentencing* judge, who “must weigh the competing purposes of sentencing, which include rehabilitation, incapacitation, deterrence, and retribution”²²¹ to function as an initial gatekeeper to whether a particular defendant has to register *at all*. As judge Huffman points out, “[s]entencing courts must . . . assess the *unique* circumstances of each defendant and offense, with the ultimate objective of applying the purposes of sentencing to the individual offender and offense.”²²² Current registration, including that employed in Minnesota, that treats all offenders the *same* at the sentencing stage,²²³ ignores these accepted sentencing principles, that are taken as a given across other sectors of the criminal justice system. Moreover, assigning a “risk level” designation, *after* a period of incarceration is not an efficient use of resources, and makes little sense for many low level offenders.

since 1947, California has more registered sex offenders than any other state with about 88,000 identified sex offenders.” CASOMB website, *supra* note 213.

²¹⁷ CASOMB report, *supra* note 214, at 7 (noting that “[a]n extrapolation based on estimated costs in one large jurisdiction suggests that the statewide costs for registration by local agencies alone is about \$24,000,000 per year.”) (emphasis added) *Id.*

²¹⁸ *Id.* at 13.

²¹⁹ *Id.* at 5. Ultimately, the CASOMB report recommends that lifetime registration should only applied to the most “high risk” sex offenders, and that all misdemeanor sex offenders, the most “low risk” should only be required to register for a period of ten years. *Id.* at 8.

²²⁰ See part I.B.2., *supra* discussing Minnesota’s end of confinement risk level determination process.

²²¹ Huffman, *supra* note 27, at 293.

²²² *Id.* at 293-94.

²²³ See MINN. STAT. § 243.166 (mandating that defendant’s “shall register” if convicted of certain offenses or offenses “arising out of the same set of circumstances” as covered offenses and that court’s “may not modify the person’s duty to register[.]”).

There are about five and half million people living in Minnesota,²²⁴ and approximately 17,500 of those are registered as sex offenders.²²⁵ Furthermore, according to the Minnesota Department of Corrections (“DOC”), the majority (55%) of offenders who are assigned a level at all,²²⁶ are given a risk level I assignment, which *by statutory definition* means that they pose a “low risk of reoffense.”²²⁷

In light of these realities, it becomes more difficult to understand the logic underlying *de facto* registration for certain offenses, and leaves open an important question: Does it make sense to require *everyone*, without any consideration of individual circumstances unique to the offender or the crime, convicted of enumerated offenses to register as an initial matter, and only determine the duration and severity of that registration *after* a period of incarceration? Viewed through the lens of investigative efficiency, the foremost argument for the imposition of registration in the first place, it seems that the answer is likely, no, with a strong argument that registration actually hinders investigative efficiency.²²⁸

b. Deterrence and Public Safety

The CASOMB report discussed above notes that

[L]ittle research has evaluated whether registration and community notification laws make released sex offenders more law abiding than they would be without such laws, and whether these laws do, in fact, increase public safety. More recent research has . . . found limited support for the effectiveness of registration and community notification laws to reduce sex offender re-arrest and reconviction rates.²²⁹

The response to this uncertainty has been to *increase* the reach of registration and apply it uniformly, rather than examine its efficacy with respect to delivering on its goals of decreasing recidivism and increasing public safety.

At least one study, funded by the DOJ and published in 2010 by the University of South Carolina Medical School, concluded that “[r]egistered sex offenders were *not* less likely to recidivate than non-registered sex offenders...[and that] South Carolina’s SORN policy has *no effect* on deterring the risk of sexual

²²⁴ *Quick Facts Minnesota*, UNITED STATES CENSUS BUREAU, available at <http://www.census.gov/quickfacts/table/PST045215/27> (last visited Jan. 5, 2017).

²²⁵ PARENTS FOR MEGAN’S LAW AND THE CRIME VICTIMS CENTER, <https://www.parentsformeganslaw.org/public/meganReportCard.html>. This number is up from 15,000 in 2005. *Id.*

²²⁶ See part II.A., *supra* (discussing the fact that the majority of registered sex offenders in Minnesota are *not* assigned a risk level at all).

²²⁷ MINN. STAT. § 244.502, subdiv. 3(e); Valeria A. Clark & Grant Duwe, *Factors Associated with Sex Offender Concentrations in Minnesota Neighborhoods*, MINNESOTA DEPARTMENT OF CORRECTIONS (July 2015), available at http://www.doc.state.mn.us/pages/files/2814/3767/0983/Sex_Offender_Concentration_-_July_2015.pdf.

²²⁸ See *No Easy Answers*, *supra* note 15, at 9 (concluding that “[c]urrent registration, community notification, and residency restriction laws may be counterproductive, impeding rather than promoting public safety. For example, the proliferation of people required to register even though their crimes were not serious makes it harder for law enforcement to determine which sex offenders warrant careful monitoring.”).

²²⁹ CASOMB report, *supra* note 214, at 5.

recidivism.”²³⁰ Synthesizing numerous recidivism studies across several years, the authors concluded that “with just one exception, the results from group comparison studies failed to support the effectiveness of registration and notification policies in reducing sex crime recidivism rates.”²³¹

Registration’s efficacy in improving public safety seems, at best, just as uncertain as its efficacy in reducing recidivism. At least one study, the *No Easy Answers* report discussed above, concluded that harsh registration requirements that “push former offenders away from the supervision, treatment, stability, and supportive networks they may need to build and maintain successful, law abiding lives[.]” actually decrease public safety.²³² Notably, the *No Easy Answers* report cites law enforcement officials and victim advocates who believe that “millions of dollars are being misspent on registration” that do little to quell public safety concerns.²³³ These unintended consequences of registration play out with particular severity when registration is accompanied by harsh residency restrictions.²³⁴ These restrictions serve to push sex offenders away from their networks of support, families, and communities, social networks that provide psychological support that anybody returning to the community from incarceration needs to be successful.²³⁵

2. Restoring judicial involvement in the registration process has the greatest potential to strike the appropriate balance between the governmental interests in requiring registration and the individual liberties of those subject to the burdens of registration

a. Burdens of Registration

Though this article has made reference to the burdens that registration places on registrants throughout, a review of the depth and breadth of these burdens is essential to round out an analysis of the potential efficacy of a return to judicial involvement in the registration process.

i. Community and Familial Burdens

Even though the courts have determined that registration is not “punishment,”²³⁶ the restrictions attendant to registration statutes are undoubtedly burdensome. According to the University of South Carolina study cited above, “[s]ex offenders surveyed in Florida, Indiana, Connecticut, New Jersey, Wisconsin, Oklahoma, Kansas and Kentucky report remarkably consistent adverse consequences” of registration

²³⁰ Elizabeth J. Letourneau et al., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women*, MED. U. S.C., at 3-4 (Sept. 2010) (emphasis added), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf> [hereinafter “MUSC report”].

²³¹ *Id.* at 15.

²³² *No Easy Answers*, *supra* note 15, at 9-10.

²³³ *Id.* at 10.

²³⁴ Residency restrictions will be discussed in greater length in part IV.C.2.a, *infra*.

²³⁵ *No Easy Answers*, *supra* note 15, at 115-17.

²³⁶ *Doe*, 538 U.S. at 96.

requirements.²³⁷ Independent of the legal consequences, these social consequences are often felt much more deeply by those impacted by them. These social consequences, as reported by individuals subject to registration, include “disruption in residence, loss of employment, property damage, relationship difficulties, threats, harassment, and feelings of stigmatization and ostracism.”²³⁸ These adverse experiences can have a profound effect on these individuals, and much of the available research even indicates that these negative effects can increase the chances that an individual will reoffend, which substantially undermines the public safety argument for registries.²³⁹

These effects are even felt beyond just individual offenders.²⁴⁰ The MUSC study cites a survey of 584 family members of registered sex offenders across the U.S. discovered that family members of registered offenders feel impacted by the laws as well:

Family members living with a [registered sex offender] experienced threats and harassment by neighbors, and some children of registered sex offenders suffered stigmatization and differential treatment by teachers and classmates.²⁴¹

There is even evidence that suggests that registration policies keep some victims, especially victims who are related to the offender, from reporting sexual abuse in an effort to avoid the adverse impact on their families.²⁴²

ii. Residency Restrictions

Of the burdens attendant to registration, residency restrictions, which individual cities and municipalities often implement, can provide some of the greatest practical and logistical difficulties to living life as a registered sex offender.²⁴³ Residency restrictions impede individual liberties of registrants in very real

²³⁷ MUSC report, *supra* note 230, at 9.

²³⁸ Huffman, *supra* note 27, at 266.

²³⁹ *See No Easy Answers*, *supra* note 15, at 10 (anonymously quoting an Iowa sheriff, who when opining on registration and notification statutes declared “[w]hen a sex offender *succeeds* in living in the community, we are all safer.”). *Id.* (emphasis added).

²⁴⁰ Professor Yung notes that the rights of sex offenders are “not likely to be of serious concern to many[,]” and describes the family members of offenders who are adversely affected by registration laws as “innocent bystanders” of the war on sex offenders. *See Yung*, *supra* note 9, at 475-77.

²⁴¹ MUSC report, *supra* note 230, at 9.

²⁴² *See generally* Richmond, *supra* note 3, at 474 (concluding that “[i]f sex offense victims can be persuaded that they and their perpetrators will be treated in a more appropriate, nuanced, and fair manner, it naturally follows that they will be more willing to report sex crimes.”).

²⁴³ For a discussion of the evolution of residency restrictions at the federal and state level, *see* Cassie Dallas, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH L. REV. 1235, 1244 (“[a]s compared to registration and notification requirements, residency restrictions are more burdensome because they have the effect of regulating the movement of sex offenders. Whereas offenders subject to registration and notification programs are free to move where they wish and to live and work as other citizens, residency restrictions limit the ability of offenders to reintegrate into society.”).

ways, and have been challenged on that basis. For example, in *Doe v. Miller*,²⁴⁴ the class action plaintiffs challenged an Iowa statute that prohibited registered sex offenders from residing within two thousand feet of a school or child-care facility.²⁴⁵ The constitutional basis for the complaint was, in part, that it “infring[ed] on the right to family privacy because the law restricts an individual’s ability to associate and live with the family members of his or her choosing.”²⁴⁶ While, the district court found merit in this argument,²⁴⁷ the Eighth Circuit reversed the holding of the lower court, finding that the statute did “not operate directly on the family relationship.”²⁴⁸ Applying rational basis review to the law, the Eighth Circuit found it to be constitutional.²⁴⁹

Unlike many states, Minnesota does not employ any residency restrictions on registered sex offenders at the state level. However, as of December 2015, 34 communities in Minnesota had enacted ordinances restricting where registered sex offenders may live in “in proximity to designated locations.”²⁵⁰ In 2016, the Minneapolis Star Tribune reported that, in light of this “dramatic rise in municipal laws restricting where sex offenders can live after they have served their terms,” Tom Roy, the Commissioner of Corrections for the state, is “very concerned” about the proliferation in these laws.²⁵¹ Despite a report from the Minnesota Department of Corrections, *Residential Proximity & Sex Offense Recidivism*, which concluded that “what matters with respect to sexual recidivism is not residential proximity, but rather social or relationship proximity,” these ordinances seem to be gaining popularity in Minnesota. With increasingly fewer options, registrants are forced to live in isolation, unable to make the social and emotional connections necessary to live and rehabilitate post-confinement.

b. Weighing Governmental Interests and Individual Burdens against Liberties

What is ultimately required is a system that can balance both sides of the equation, and weigh the legitimate governmental interests—which are not being effectuated by current registration policy—with the burdens and infringement on the individual liberties of individuals subject to supervision. I posit that, at this point in time, the best way to striking this balance will be to give the sentencing judge the discretion to require—or *not* require—registration for individual offenders convicted of qualifying offenses. Moreover, the Minnesota legislature should amend § 243.166 by removing the provisions that impede this exercise of discretion.

²⁴⁴ 298 F. Supp. 2d 844, 872-75, *rev’d*, 405 F.3d 700 (8th Cir. 2005).

²⁴⁵ *Id.* at 848.

²⁴⁶ *Id.* at 865.

²⁴⁷ *Id.* at 874.

²⁴⁸ 405 F.3d at 710.

²⁴⁹ *Id.*

²⁵⁰ *Residency Restrictions for Sexual Offenders in Minnesota: False Perceptions for Community Safety*, ASSOCIATION FOR THE TREATMENT OF SEXUAL ABUSERS MINNESOTA CHAPTER (Mar. 2016), available at <https://mnatsa.org/wp-content/uploads/2016/03/MnATSA-Residency-Restrictions-2016.pdf>.

²⁵¹ Maya Rao, *Cities are Rushing to Restrict Sex Offenders*, STAR TRIB. (Apr. 4, 2016), available at <http://www.startribune.com/where-do-offenders-live-cities-scramble/374566221/>.

In contrast to traditional sentencing, wherein judges consider a substantial and diverse amount of information specific to each offender, the mandate of the Adam Walsh Act and Minnesota's "shall not modify" provisions require judges to rely *only* on offense type. This handcuffs judges from taking an evidence based approach to sentencing, and likely results in many more individuals being brought into the sex offender paradigm at the front end than would otherwise become entangled in the registration process if judges were able to conclude that a particular offender, based on his unique circumstances, should not have to register *at all*. As previously noted, the majority (75%) of Minnesota's registered sex offenders have either not been assigned a risk level.²⁵² Of the 25% who do receive a post confinement risk level determination, the *majority* (55%) are considered Level I, or low-risk offenders.²⁵³ Given the sentencing judges unique position to evaluate individual circumstances, they would be in a position to keep individuals with the lowest risk of reoffense off the list from the beginning.

Perhaps more significantly, a sentencing judge's determination that any individual should be required to register could be immediately appealed. In Minnesota, that means that judicial review by an appellate court would take place "to determine whether [registration] is inconsistent with statutory requirements, *unreasonable*, inappropriate, excessive, unjustifiably disparate, or not warranted by the sentencing court's findings of fact."²⁵⁴ Thus, to the extent that an individual judge might be biased against a particular defendant, judicial review of registration is available as a legally guaranteed remedy.

Restoring judicial discretion at the sentencing stage also better aligns with the other side of the equation: effectuating the governmental goals surrounding sex offenses. One of the more fascinating results of the MUSC study, cited frequently above, was the effect of strict, offense-based registration on judicial decision-making.²⁵⁵ The study found that in South Carolina, where registration is offense-based and "permits no judicial discretion," registration "influenced the likelihood that a sex crime charge would result in formal judicial processing."²⁵⁶ Interestingly, the study concluded that South Carolina defendants were *less* likely to be prosecuted for or found guilty of sex crimes, which the study attributed to the "serious effects on judicial decision making" that are an intended consequence of South Carolina's strict offense-based approach.²⁵⁷ The conclusion of the study in this respect was that

South Carolina's SORN policy does exert unintended effects on judicial decision making with respect to adult sex crime cases. An increased number of defendants were permitted to plead to nonsex charges following the onset of South Carolina's SORN policy and following its modification to require online notification. The net effects of this change

²⁵² See *supra* note 16.

²⁵³ See *supra* part II.B.2.

²⁵⁴ MINN. R. CRIM. P. 28.05, subdiv. 2.

²⁵⁵ See MUSC report, *supra* note 230, at 48.

²⁵⁶ *Id.* at 34.

²⁵⁷ *Id.* at 49.

could be to reduce community safety by increasing the likelihood that defendants guilty of sex crimes pleaded to nonsex crimes or were acquitted altogether.²⁵⁸

What these results seem to suggest is that judges, when otherwise handcuffed may go out of their way to help defendants avoid the harsh consequences of a sex conviction. This behind the scenes correcting is surely less desirable than legislation that returns discretionary power to judges so that they can feel confident in addressing the individual needs of defendants, victims, and the public head on. As judge Huffman notes, “[w]ith safeguards in place to check judicial discretion, revised regulations can provide an opportunity for courts to address offenders as individuals and to provide offenders with tools necessary for effective reintegration and rehabilitation, while still addressing the overriding concern of public safety.”²⁵⁹ Blanket requirements, which ignore individual circumstances and preclude judicial discretion create unintended consequences that distort and undermine both the sides of registration equation: governmental interest in public safety and individual liberties.

V. CONCLUSION

Simply put, it is desirable to replace current statutory schemes that uniformly require registration with laws that allow sentencing judges to make individualized, appealable determinations about registration (and notification). At this stage, this approach is better suited to address the complex difficulties presented by sexual crime than specialized sex offender courts. While the therapeutic jurisprudence model employed by specialized sex offender courts is commendable on many levels, the unfettered expansion of these courts is less desirable than restoring sober, judicial discretion to the registration process.

²⁵⁸ *Id.* at 5.

²⁵⁹ Huffman, *supra* note 27, at 292.