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# Structuring Relief for Sex Offenders from Registration and Notification Requirements: Learning from Foreign Jurisdictions and from the *Model Penal Code: Sentencing*



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## I. Introduction

Despite recent court rulings that have limited some of the collateral sanctions imposed specifically on those labeled sex offenders,<sup>1</sup> their *sui generis* treatment within the criminal justice system continues. For them post-sentence collateral sanctions abound. Among these sanctions are residence limitations, exclusions from select locations, restrictions on Internet and social media usage, public housing bars, employment restrictions, and registration and public notification.<sup>2</sup> These collateral sanctions are usually mandatory, which means they flow automatically from the conviction. Courts have generally declared them to be civil rather than criminal sanctions, which removes proportionality concerns and allows for their retroactive imposition.<sup>3</sup> Despite their nominally preventive function, offenders and the public alike consider and experience these sanctions as stigmatizing and punitive. This is particularly true for the sex offender registry with its attendant public notification component.

Many of the post-sentence restrictions on sex offenders, including registration and notification, have been based on false assumptions about the ongoing dangerousness of sex offenders.<sup>4</sup> In fact, sex offenders have a lower overall recidivism rate than offenders generally. More importantly, sex offenders generally are very unlikely to commit another sex crime, though statistical probability varies by type of sex offense conviction.<sup>5</sup>

Myths and incorrect suppositions about sexual offenders pervade discourse and inform policy making. As crime generally has declined, so have sex crimes despite national headlines that imply the opposite.<sup>6</sup> Because of high-profile media reports of violent sex crimes and well-known low reporting rates of sexual offenses generally, the decline in sexual offending has been downplayed or treated with disbelief. Punitive and incapacitative responses continue to dominate as sex offenders are deemed incorrigible. Yet sex offender treatment is much more effective than assumed, albeit being time intensive and expensive.<sup>7</sup>

Accurate empirical information should provide the backdrop to the sentencing of sex offenders, including the imposition of narrowly tailored collateral sanctions and their termination. That would allow for the effective

re-integration of sex offenders, rather than their internal banishment, and enhance public safety.

This paper first discusses the scope of sex offender registration and notification under federal and state laws, and contrasts U.S. laws with those in other countries. Part III turns to the prevailing rationales for these laws and tests their empirical validity. It highlights the negative effect of registries and notification on criminal investigations, and the cost they impose on public coffers, public safety, and those labeled sex offenders. Part IV discusses a set of proposals to turn registries, which may serve a limited legitimate function, into more effective law enforcement tools while restricting public notification. This section outlines *ex ante* limitations on such laws, and then turns to mechanisms that would allow individual offenders to petition for their termination. This discussion provides the context for an analysis of the relief provisions set out in the American Law Institute (ALI) Model Penal Code (MPC): Sentencing, Article 7.<sup>8</sup> The article concludes that to enhance public safety and reintegrate sex offenders, the United States would be better served by moving away from public notification, limiting registries, and investing more heavily in prevention and the treatment of convicted sex offenders.

## II. Sex Offender Registration and Notification

Since the 1930s sex offenders have been singled out for special treatment. California was the first to adopt a sex offender registry in 1947, but only a handful of states followed suit in the decades following. In the wake of some high-profile sexually motivated killings of children, between 1994 and 1997 thirty-eight states required sex offenders to register. By the turn of the century almost all states also mandated public notification.<sup>9</sup> The impetus for these laws was the assumption that all sex offenders were highly likely to re-offend, that law enforcement should be able to investigate them more easily, and that the public should be in a position to protect itself from sexual offenders.<sup>10</sup> Some foreign countries have also set up sex offender registries, in some cases following the U.S. model. Yet, so far almost none have adopted U.S.-style public notification.<sup>11</sup> The registries used abroad are largely law enforcement tools. The absence of public notification may reflect the greater

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confidence the citizens of many other Western democracies place in the ability of their police to protect them.

Since the mid-1990s federal legislation has driven many of the legislative changes in the states. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, enacted as a part of the Violent Crime Control and Law Enforcement Act of 1994, required all states to register sex offenders. Megan's Law in 1996 allowed public disclosure of information in sex offender registries and mandated public disclosure if needed to protect the public. The same year, the Pam Lychner Sexual Offender Tracking and Identification Act created the National Sex Offender Registry (NSOR), a national database for law enforcement officials. In the following years, further legislation tightened these rules and responded to the expansion of public Internet access.

The Adam Walsh Child Protection and Safety Act of 2006 brought substantial change to federal standards for sex offender registration and notification.<sup>12</sup> As a result, all U.S. states, the District of Columbia, most federally recognized tribes, and U.S. territories have sex offender registries and require public notification, which extend to sex offense convictions under state, federal, territorial, tribal, and foreign laws, and the Uniform Code of Military Justice. The Department of Justice created the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) to administer the standards set out for registration and notification.

Further legislation followed, albeit of lesser systemic impact. The 2016 International Megan's Law requires registered sex offenders to provide a twenty-one-day advance notice of international travel, information that will be transmitted to the intended destination countries.<sup>13</sup>

Section I of the Adam Walsh Act, The Sex Offender Registration and Notification Act (SORNA), delineates the specific elements states have to implement in exchange for (limited) federal funding through Byrne law enforcement assistance grants, and sets up a national portal to house state sex offender websites.<sup>14</sup> It increases the categories of offenders who have to register, extends registration periods, demands greater verification of the information provided, and details penalty requirements for failure to register. SORNA requires offenders to be classified according to an offense-of-conviction-based three-tier system, with each tier carrying specific registration and notification requirements that include the length of registration, frequency of re-registration, and the type of public notification required.<sup>15</sup> Tier I offenders are subject to an irreducible ten-year registration period, Tier II offenders to twenty-five years, and Tier III offenders to life.

As of December 2017, the SMART office has found merely twenty-one of the fifty-six jurisdictions in compliance, with only eighteen of the fifty states meeting minimum SORNA requirements.<sup>16</sup> A number of states have intentionally rejected the SORNA requirements because the federal financial support provided is insufficient to cover the cost of setting up and keeping current the

required databases, especially in light of the amount and type of information to be compiled. Other states deem a classification system based on the offense of conviction misleading as it fails to categorize offenders based on the danger they represent, but instead stigmatizes offenders whose offenses should not trigger public notification. Consequently, the length of registration for the same offense differs among states, as do the types of crimes subject to registration and notification. Those differences lead to substantial variations among states, resulting in a national patchwork. Even though the opportunities sex offenders have for relief from registration and notification requirements are most limited, there is again great variability among states in the opportunities available, process, and qualification requirements.<sup>17</sup>

For offenders the lack of uniformity proves disorienting. An offender's state of residence and state of work, for example, may have different requirements, seeing the person registered and the public notified in one state but not the other. Also, offenders who move from a less restrictive to a more restrictive state may find the registration and notification statute suddenly covering them (again). Some of them would consider that requirement sufficiently onerous to refrain from moving to the more restrictive state. Easily accessible and accurate information about such a collateral consequence is therefore crucial to individuals who have a criminal record. That need supports the ALI MPC: *Sentencing's* demand that a Sentencing Commission, or similar state entity, serve as a repository of all possible collateral consequences.<sup>18</sup>

The foreign countries that require sex offenders to register also vary in their coverage of offenses and lengths of registration period. In contrast to the usually categorically mandated time periods in the United States, some foreign countries allow a convicted offender to petition for a shortening of the registration period. Canada's registration periods depend on the maximum length of imprisonment for the crime of conviction but can be terminated at half time, or at twenty years for lifetime registration, if the court finds the impact of continued registration to be grossly disproportionate to public protection because it hampers the effective investigation of sex crimes.<sup>19</sup>

In the United States support for sex offender registries is widespread, though their scope is disputed. The notification component, on the other hand, has been subject to more debate, and empirical data appear to indicate that if not downright harmful, it does not serve the public well and has proven onerous to offenders subject to notification.

### III. The Effectiveness and Value of Registries and Public Notification

Registration and notification statutes were adopted to serve a variety of purposes but most importantly public safety. Public safety may be achieved in different ways. Registries may support general deterrence purposes or instead deter convicted offenders from committing another sex crime. They also allow law enforcement agencies to interrogate

convicted sex offenders quickly once a sex crime occurs, either to rule them out as suspects or to investigate them further.

Notification statutes add a preventive function as the public will be able to identify those convicted of a sex crime and therefore protect themselves more effectively, by keeping their distance or alerting law enforcement to potential criminal activity in its early stages. Like the current discourse surrounding legal gun ownership, registries are portrayed as both deterrent and defensive. The public is empowered to intervene should the state fail in its protective function. In the United States it has been difficult to test these different hypotheses empirically because of the overlap between registration and notification, subjecting most sex offenders to both. Yet the public and offenders appear to agree that whether the purpose of these statutes is being served or not, they shame and stigmatize sex offenders.

### A. Risk and Recidivism

The primary purposes of registration and notification are to control risk and prevent recidivism. Some early, but limited, data showed that sex offenses generally decreased with the advent of registration statutes, largely by preventing the first sex offense.<sup>20</sup> That finding supported the general deterrent hypothesis, though it raises concretely one of the perennial questions in sentencing, whether it is legitimate to use a convicted offender to advance general, rather than specific, deterrence. A few studies indicate that registration statutes may deter sex offenders from recidivating. Those findings, however, are limited to a small number of states and may conflate general recidivism data with findings specific to sex offenses. If sex offender registries and notification prevent recidivism generally, does that counsel that broader groups of offenders be subjected to such requirements? Yet other studies indicate no impact on recidivism, especially for low-risk offenders, and some even note a negative effect.<sup>21</sup> At best the studies are contradictory.

Research on registries is surprisingly limited and often employs aggregate data on sex offenders even though studies indicate that specific types of sex crimes have substantially higher recidivism risks. At present registries fail to provide the public with an accurate assessment of the danger an offender presents, and use law enforcement resources ineffectively. In addition, personal factors, such as age, impact how likely it is for an offender to commit another sex crime. As is true for all crimes, the likelihood of recidivating decreases with the length of time since the conviction and release from a sentence. Most researchers have concluded that the offense of conviction alone, therefore, presents a misleading picture of the risk an individual presents.<sup>22</sup>

The tier classifications under the Adam Walsh Act fail to consider any of these additional factors and group crimes without regard to the empirically indicated risk an offender presents. Instead of an inflexible and insufficiently scientifically validated tier system, researchers have suggested

the use of actuarial risk assessments to determine which offenders should be subjected to registration and notification.<sup>23</sup> Such assessments would have the side benefit of allowing low-level offenders who are unlikely to commit another sex crime to re-integrate more effectively into society.

Research also indicates that the current length of registration periods is excessive. With most recidivism occurring within five years of release, registration and notification periods should generally end five to ten years after release, rather than extending for decades.<sup>24</sup> Even though some states have heeded such recommendations, which put them at odds with the SORNA requirements, many continue to employ broad and offense-based registration and notification that negatively impact public safety and the individual offender.

Because of the general fear of sex offender recidivism, failure to register is considered a grave criminal offense. It is usually deemed a serious risk factor for further offending. Research indicates, however, that even though failure to register is correlated with recidivism generally, it is not linked to committing future sexual offenses.<sup>25</sup> Failure to register or to keep the registration current appears also often connected to the shaming and stigma the offender experiences in the community. In contrast to the United States, Canada has a high compliance rate with its sex offender registry, likely because of the absence of a notification component. Many Canadian sex offenders understand and often agree with the purpose of registration but have indicated serious concern about public notification.<sup>26</sup> Registration and notification requirements also impact plea bargaining and sentencing.

### B. Impact on Plea Bargaining and Sentencing

Registration and especially notification requirements have impacted plea bargaining and sentencing. Although many collateral consequences remain relatively unknown, sex offender registration and notification statutes are highly publicized and part of public consciousness. To avoid the sex offender label, with its resulting collateral sanctions, those charged therefore attempt to plead to non-sexual offenses.<sup>27</sup> If such avoidance of a sex crime label is successful, and if it were true that registries and notification discourage offender recidivism,<sup>28</sup> collateral sanctions may ultimately undermine rather than support public safety efforts. If an offender is convicted of a sex crime, some judges factor the impact of sex offender registration and notification statutes into the sentence, as an aspect of the overall punishment imposed;<sup>29</sup> others do not. That disparity may lead to substantial sentence inequities.

Because of the substantial impact of this collateral sanction—which is similar in many respects to deportation—one resulting in internal banishment, the other in exile<sup>30</sup>—defense lawyers and perhaps the court should be obligated to inform the defendant accordingly. So far courts have rejected that suggestion, however, as not constitutionally mandated.<sup>31</sup> Yet, the offender should have the

opportunity to factor registration and notification requirements into the decision whether to accept a plea or proceed to trial. The ALI MPC: *Sentencing* requires the sentencing commission to publish all collateral sanctions as applicable to specific offenses, § 7.02, and requires the court to notify the defendant at sentencing of all applicable collateral consequences under state and federal law, § 7.04, the possibility that they may change over time, and that they may differ in other jurisdictions.<sup>32</sup> The defendant should also be informed of his right to petition for relief from a mandatory collateral sanction when the sentence expires. In addition, if the defendant is found guilty of a registrable offense, it would be helpful if he were informed at sentencing and in writing of the ramifications of non-compliance, as they are substantial.

Monitoring sex offenders and assuring the accuracy of registry information has proven difficult, time intensive, and expensive.

### C. Using Information on Sex Offenders

Broad sex offender registries are costly for law enforcement and probation offices because of the need for enhanced supervision and ongoing (re-)registration, which requires review of the accuracy of the information supplied. Law enforcement is also asked to expend resources on low-level offenders who are unlikely to present a risk of committing further sex offenses. In fact, the Los Angeles District Attorney and a number of other law enforcement officials in California lobbied for low-level sex offenders to be permitted to petition for removal from the registry after ten to twenty years, depending on the offense. Re-registration requirements and the sheer size of the California registry have hampered law enforcement efforts to focus on the most high-risk sex offenders. Starting in 2021, depending on the tier in which they find themselves, those with a criminal record for a sex crime will be able to petition a judge for removal, assuming they have not reoffended for a decade or two upon release. A much smaller group of offenders will continue to be subject to lifetime registration.

Even though the public strongly approves of sex offender notification statutes and is aware of the existence and easy availability of the information on the Internet, little is known how they use it. Anecdotal evidence points to users learning faces of offenders in case they spot them at schools or playgrounds. Large-scale data, however, show the public accessing registries only to a limited extent. More effective safety measures than scanning registries include getting to know the individuals well with whom a child spends unsupervised time, as most sex offenders are not strangers but teachers, coaches, family friends, or relatives who do not have a prior criminal record.<sup>33</sup>

A few Canadian provinces with their own sex offender registries allow for public notification in exceptional circumstances only. A community will receive information once a highly dangerous sex offender moves there. Although that exposes the offender to an unusual level of publicity, if narrowly targeted, such notification may have

a preventive effect. Because of the sheer scale of registries, the U.S. public, however, lacks the tools to focus on the most dangerous sex offenders.<sup>34</sup> Perhaps it understands that notification serves a goal other than public safety.

### D. A Collateral Sanction or a Penalty?

Offenders—and the public—perceive notification, but not registration, requirements as punitive and designed to shame the offender. This perception runs counter to the legal classification of registration and notification as non-punitive civil measures,<sup>35</sup> and appears to be based on a media portrayal of sex offenders as not amenable to change.<sup>36</sup>

The negative impact of notification on registered sex offenders has been widely documented. Public notification has triggered incidents of vigilantism and discrimination against them. In addition to formal limitations on (public) housing and employment,<sup>37</sup> sex offenders find themselves often subjected to social prejudice, which leads to exclusion. Some sex offenders have been unable to rent, leaving them homeless. Many have difficulties finding any employment. The impact has been particularly jarring for individuals whose offenses had long been in the past and for those who had either not been required to register or had come off registries in their home state but then were required to register (again) when moving. In some cases the stress and other socially exclusionary consequences triggered by public notification statutes may have hampered re-integration efforts and contributed to repeat offending.<sup>38</sup>

These results have caused researchers to call for limiting public notification to the most dangerous sex offenders only,<sup>39</sup> perhaps akin to the Canadian provincial model, which allows for public notification of the most dangerous sex offenders. On the other hand, offenders understand the purpose of registration statutes, as assisting police in the investigation of sex crimes and to find the culprit more quickly, which includes ruling out a previously convicted sex offender early in a criminal probe.

Despite the extensive cost and drawbacks of registries and notification, legislators generally remain unwilling to roll them back. In light of the prevailing reluctance to reconsider the treatment of sex offenders, individual relief may be the only possible avenue.

## IV. MPC: Sentencing Article 7 and Beyond: Individual Relief

The sentencing court should impose registration requirements, based on individualized risk assessment, informed by solid research, and limited in length. Group-based judgments are overbroad. The category of sex offenders includes a vastly disparate set of offenders, who pose different threats to the public. Risk-based collateral sanctions would mirror evidence-based sentencing, described in § 6B.09 of the MPC: *Sentencing*, which outlines the development of actuarial instruments to assess an offender's risk to public safety.

Courts that already employ risk assessments when deciding what sentence to impose could extend their application to statutory sex offender notification and registration requirements. Indeed, the law in some states already provides for this.<sup>40</sup> Despite a robust literature critiquing risk-based sentencing, such individualized assessment would still be preferable over the broad registration and notification requirements currently employed. The use of such assessment tools appears more defensible for collateral sanctions than perhaps at sentencing where they are beginning to be used.<sup>41</sup> The management of sex offenders should ultimately correspond to the individual risk they pose.<sup>42</sup>

#### A. Risk-Based Registration and Notification

Thoughtful registration would most likely present a useful law-enforcement tool. As long as the types of offenders on the registry are the most serious, and the terms of registration are limited and tied to years of crime-free life, law enforcement would be expected to monitor only those offenders who pose the greatest risk. Among the group of offenders who should never be subject to registration or re-registration are those who commit non-sex crimes even if they have a prior sex crime on their criminal record, those who commit misdemeanor offenses, and those sentenced to probation.

The Illinois Sex Offense and Sex Offender Registration Task Force, for example, suggested that generally sex offenders would be subject to a ten-year desistance threshold, after which they should come off the registry.<sup>43</sup> Such a requirement may be individualized or more carefully calibrated by offense group. Lower-level offenders may be removed even earlier, which would permit law enforcement to focus their limited resources on higher-level offenders. Shorter registration periods could be combined with a prosecutorial prerogative to file for an extension of the registration period under certain circumstances. Narrowly focused registries would allocate resources smartly and target services and supervision on high-risk offenders to reduce recidivism.

Notification, which is an outlier internationally, should be categorically restricted to the most dangerous offenders. That means public notification should be a very rare occurrence. Alternatively, public notification may never be permitted but instead a select group of employers—healthcare facilities, nursing homes, daycare providers, and similar types of employers, depending on the type of sex crime committed—and school officials, together with law enforcement only, may receive such notifications. Alternatively, states could create systems that would allow these select employers, before making a hiring decision, to query sex offender databases that list the most high-risk offenders or to submit their inquiries to a specific law-enforcement resource officer.

Even though the proposed measures would substantially enhance public safety, they are unlikely to be adopted. For that reason, individuals should have at their disposal

mechanisms to remove collateral sanctions. Such a proposal may be more politically acceptable in an environment that continues to vilify sex offenders.

#### B. Individual Relief

A number of states have moved away from purely offense-based registration and notification to focus on a host of offense- and offender-based characteristics that align with the likely risk an offender poses.<sup>44</sup> Generally such approaches lead to a more limited number of offenders on state webpages. Yet, even the best predictive tools will occasionally under- and overpredict. Registrants should be provided a petition-based judicial or administrative mechanism for removal, available once an individual meets certain markers. Sex offender registration and notification statutes, as currently implemented, run counter to the stated goal of the *MPC: Sentencing* which is to make “collateral consequences consistent with overriding goals of public safety and recidivism prevention.”<sup>45</sup> The application of that standard to registration and notification may lessen the stigma imposed on individuals convicted of a sex offense and improve public safety. Yet, it remains insufficient.

**1. Terminating Collateral Consequences.** It is unclear how the *MPC: Sentencing* interprets the baseline goals referenced above. Empirical research indicates that the vast majority of notification statutes and overly broad registration requirements do not improve public safety. Since they do not add a public safety benefit but rather impede successful reintegration, by definition they should be rescinded. The legislation cited in the Comment to this provision, however, implies a narrower interpretation. The Alabama Code allows courts, by clear and convincing evidence, to relieve sex offenders with terminal illness of residency restrictions if they are not likely to reoffend or perpetrate any future dangerous sexual offense.<sup>46</sup> That statute assumes, a priori, that a residency restriction serves a public safety purpose. That notion remains, however, disputed. The example appears to imply that courts would, or should, accept existing collateral sanctions.

The *MPC: Sentencing* provides that the state sentencing commission should provide guidance on relief from collateral sanctions, though that could also be included in legislation, should a state not have a commission or comparable institution. The section’s guidance includes suggestions that the court consider individual circumstances that impact public safety, including treatment and evidence of rehabilitation.<sup>47</sup> Courts may be assisted by evidence-based assessments, to prevent them from overvaluing the risk someone with a sex crime conviction may constitute going forward. Such risk assessments should account for treatment and evidence of rehabilitation, though the court may still consider both independently.

Whether courts would be willing to terminate collateral consequences for individual sex offenders, either at sentencing or at a later point, remains open to question.

Although some federal courts consider long prison terms for the downloading of child pornography draconian, it is uncertain whether courts more broadly would be willing to terminate sex offender registration and notification even under this provision. After all, the evidence the petitioner presents can never entirely preclude the commission of another offense. Alternatively, the provision may permit a global challenge at least to notification for lower-level sex offenders, especially if courts deem commission of a low-level sex offense a limited risk.

Section 7.04 details that the sentencing judge grant relief only if the defendant has demonstrated by clear and convincing evidence three separate components: the collateral sanction (a) is not substantially related to elements and facts of the offense, (b) is likely to impose a substantial burden on the individual's reintegration, and (c) public safety considerations do not require mandatory imposition.<sup>48</sup> Whether general information would suffice for (b) and (c), or the individual would have to show a substantial and specific individual disadvantage and public safety considerations is unclear. Finally, the first provision may either lead to retention of the current statutory regime or instead allow a broad challenge of registration and notification, at least for low-level offenders. The third possibility is that courts will separate registration from notification, as the two are not necessarily connected. This provision may present a great opportunity at least for some sex offenders, though it remains unclear how courts may interpret it even in light of the guidance presented.

Similarly, § 7.05, applicable to relief for convictions from other jurisdictions, requires that the offender show, by clear and convincing evidence, not only a specific need for such relief but also "that public-safety considerations do not require mandatory imposition of the consequence."<sup>49</sup> For certain low-level offenses—some of which should never carry registration or notification consequences—the offender may not have any difficulty making such a showing. Examples may include public urination or underage consensual sex with someone barely younger than the offender. In other cases, it remains uncertain what types of evidence an offender needs to put forth to defeat public safety considerations. Would a showing of no further convictions after a certain period of time suffice? Would the offender have to indicate that he underwent treatment? Would the absence of sex offense convictions alone allow for removal from a registry? Or might general statistical information on sex offender recidivism also be required? Would they have to specify the type of sex offense underlying the conviction, or might the data have to be jurisdiction specific?

**2. Certificates of Restoration of Rights.** Some sex offenders may continue to be treated as a *sui generis* category, even under the new *MPC: Sentencing* provisions. Section 7.06, which delineates certificates of restoration of rights, for example, indicates that such certificates would be available to felony offenders who have integrated

successfully and led a crime-free life. They should be mandatory for misdemeanor and minor felony offenses once a set period of time has passed without the individual committing another offense, § 7.06(3)(a). For others a preponderance of evidence showing successful reintegration should suffice, § 7.06(3)(b). These provisions, as written, would apply to any offense of convictions.

Yet for more serious felony sex offenders, restrictions on relief set forth in Model Penal Code Article 213 ("Sexual Assault and Related Offenses") could continue to apply under § 7.06(4). The current Article 213 does not include any collateral sanctions, which is not surprising as it was drafted long before such sanctions became widespread in the United States.<sup>50</sup> The ALI is in the process of updating the sexual assault offense provisions of the Model Penal Code, which have become outdated in light of societal and subsequent legal changes. The ALI membership has not (yet) reached agreement on the revised definitions under Article 213, though that provision currently indicates that both forcible and aggravated forcible rape would be "registrable" offenses.<sup>51</sup> The language in § 7.06 therefore seems to defer to the newly drafted and yet-to-be finalized language in the substantive provisions of the Model Penal Code. Whether that deference is appropriate may remain unanswered, though it may be indicative of the ongoing special treatment of sex offenders and the unique challenges surrounding sex offender sentencing. Section 7.06 may still provide some hope for sex offenders as a certificate of restoration of rights may be granted even if one or more mandatory collateral sanctions remain in place.<sup>52</sup>

Whether such certificates will ever be sufficient to overcome stigma and shaming for those convicted of sex offenses remains an open question. The *MPC: Sentencing* does not explicitly allow for expungements or the sealing of convictions. Both allow a record to disappear from public view, with the individual being permitted to deny its existence. To many that approach appears disingenuous as it attempts to erase history and perhaps camouflage a potential public safety problem. The paucity of such instruments at present<sup>53</sup> and their exclusion from the *MPC: Sentencing* may reflect the reality of changed preferences from a model of forgetting to forgiving.<sup>54</sup> Yet, it may be sex offenders more than any other group who would benefit from their offenses being forgotten.

Because of the special nature of sex offenses, jurisdictions may want to consider referring requests for relief or certificates to specialized judges. Sex offender petitions may require the court to be familiar with empirical evidence and the array of sophisticated findings on sex offender recidivism, and with the value and challenges of sex offender registration and notification.

## V. Conclusion

Even the new *MPC: Sentencing* cannot escape entirely the *sui generis* categorization of sex offenders. In some respects it seems hardly designed to change legislative attitudes toward sex offenders, who are after all individuals with

rights, especially after their sentence has expired. Rather than apparently accepting the restriction of offenders' rights and freedoms based on generic, unverified, and in some cases disproven, recidivism and risk concerns, it should have required a showing of an ongoing individual public safety risk before collateral sanctions, and especially strong sanctions like registration and notification, be imposed. Such provisions, however, would present perhaps too dramatic a move away from today's status quo to be broadly acceptable.

Registries are expensive and should be used only for those offenders who pose a distinct threat to the public. Notification should be discarded entirely or merely retained for a very select group of highly dangerous offenders. The resources freed through such changes could be invested in the treatment of sex offenders. Although frequently underappreciated, treatment efforts are effective in decreasing the safety risk an offender poses,<sup>55</sup> and should therefore be actively pursued and sufficiently funded, inside and outside of prison. Yet, at least in the United States, treatment appears to be more an afterthought rather than an essential component to a public safety strategy. Instead this country has invested in an exclusionary and relatively ineffective public safety strategy.

## Notes

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<sup>1</sup> See *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), cert. denied sub nom. *Pennsylvania v. Muniz*, 138 S.Ct. 925 (2018) (holding retroactive life-time registration under state's sex offender registration act in violation of state and federal ex post facto provisions); *People v. Temelkoski*, 905 N.W.2d 593 (Mich. 2018) (holding sex offender registration law unconstitutional on substantive due process grounds as applied to Temelkoski).

<sup>2</sup> See, e.g., Margaret Colgate Love, Jenny Roberts, & Cecelia Klingele, *Collateral Consequences of Criminal Conviction: Law, Policy & Practice* §§ 2:38–2:46 (2d ed. 2016). Even involuntary civil commitment is a possible collateral sanction for (select) sex offenders.

<sup>3</sup> See, e.g., *Smith v. Doe*, 538 U.S. 84 (2003). *But see Muniz*, 164 A.3d 1189 (declaring sex offender registration to be punishment).

<sup>4</sup> The Supreme Court has been criticized for perpetuating the myth of exceptionally high re-offense rates for sex offenders. See *Does #1-5 v. Snyder*, 834 F.3d 696, 704 (6th Cir. 2016), rehearing denied, cert. denied, 138 S.Ct. 55 (2017); Adam Liptak, *Did the Supreme Court Base a Ruling on a Myth?*, N.Y. Times, Mar. 6, 2017, <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-repeat-sex-offenders.html>. Yet courts continue to cite to these alleged data points. See, e.g., *Illinois v. Pepitone*, 2018 IL 122034 (Apr. 5, 2018) (upholding ban on child sex offender's presence in public park on rational basis grounds by declaring only legislature capable of assessing recidivism data), <http://www.illinoiscourts.gov/Opinions/SupremeCourt/2018/122034.pdf>.

<sup>5</sup> See generally Roger Przybyski, U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring,

Apprehending, Registering, and Tracking, *Recidivism of Adult Sexual Offenders* (July 2015), <https://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders.pdf>. See also U.S. Sentencing Commission, *Recidivism Among Federal Offenders: A Comprehensive Overview*, available at <https://www.uscc.gov/research/research-reports/recidivism-among-federal-offenders-comprehensive-overview> (1.9% recidivism rate for rape for all convicted of a federal offense, at Figure 5).

<sup>6</sup> Sex offenses have been trending downward since the mid-1980s, well before most states adopted sex offender registries. The greatest decline occurred prior to 1994, the year in which Megan Kanka was killed and registries became widespread nationally. James Vess, Andrew Day, Martine Powell, & Joe Graffam, *International sex offender registration laws: Research and evaluation issues, based on a review of current scientific literature*, 15(4) *Police Prac. & Res.* 322, 325 (2014).

<sup>7</sup> See, e.g., Anna C. Woodrow & David A. Bright, *Effectiveness of a Sex Offender Treatment Programme: A Risk Band Analysis*, 55(1) *Int'l J. Offender Therapy & Comp. Criminology* 43 (Feb. 2011) (analyzing impact of cognitive-behavioral treatment on sex offender recidivism).

<sup>8</sup> Model Penal Code: Sentencing Article 7 (ALI, Approved Final Draft, 2017) [hereinafter MPC: Sentencing]. The collateral consequences provisions of the MPC: Sentencing are included in the Appendix to this Issue of the *Federal Sentencing Reporter*.

<sup>9</sup> Elizabeth A. Pearson, *Status and latest developments in sex offender registration and notification laws*, in U.S. Department of Justice, Bureau of Justice Statistics, National Conference on Sex Offender Registries: Proceedings of A BJS/SEARCH Conference 45 (Apr. 1998, NCJ-168965), at <https://www.bjs.gov/content/pub/pdf/Ncsor.pdf>; Love et al., *supra* note 2, at §§ 2:38–2:46. For an in-depth discussion of the history of criminal registration and notification laws in the United States, see Wayne A. Logan, *Knowledge As Power: Criminal Registration and Community Notification Laws in America* (2009).

<sup>10</sup> Kimberly Gentry Sperber, Christopher T. Lowenkamp, David E. Carter, & Randy Allman, *A Sheep in Wolf's Clothing or a Wolf in Sheep's Clothing? Ohio Sex Offender Registration and the Role of Science*, 21(4) *Crim. Just. Pol'y Rev.* 500, 501 (2010).

<sup>11</sup> Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *SMART Summary 2016: Global Survey of Sex Offender Registration and Notification Systems* (2016), at <https://smart.gov/pdfs/global-survey-2016-final.pdf>.

<sup>12</sup> Three of these federal laws are named after child victims of abductions and killings. Jacob Wetterling's body was not recovered until 2016. Pam Lynchner was a national advocate for registries and more severe prison terms for sex offenders.

<sup>13</sup> For general information on these legislative developments and links to the relevant acts, see *Legislative History of Sex Offender Registration and Notification*, <https://www.smart.gov/legislation.htm>.

<sup>14</sup> Failure to substantially implement the SORNA requirements will lead to a loss of 10 percent of Byrne grant funding.

<sup>15</sup> The Adam Walsh Act also delineates registration requirements for juvenile offenders. These have become increasingly disputed but are beyond the purview of this article. See, e.g., Robin Walker Sterling, *Juvenile-Sex-Offender Registration: An Impermissible Life Sentence*, 82 *U. Chi. L. Rev.* 295 (2015); Elizabeth J. Letourneau, Dipankar Bandyopadhyay, Debajyoti Sinha, & Kevin S. Armstrong, *The influence of sex offender registration on juvenile sexual recidivism*, 20(2) *Crim. Just. Pol'y Rev.* 136 (2009).

<sup>16</sup> Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Sex Offender Registration and Notification Act (SORNA)—State and Territory Implementation*



- Progress Check* (Dec. 19, 2017), at <https://www.smart.gov/pdfs/SORNA-progress-check.pdf>.
- 17 See, e.g., Restoration of Rights Project, *50-State Comparison Relief from Sex Offender Registration Obligations* (updated Nov. 1, 2017), at <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/>; Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 Wisc. L. Rev. 219 (2015).
- 18 MPC: Sentencing, Art. 7.02(1).
- 19 Lisa Murphy, J. Paul Fedoroff, & Melissa Martineau, *Canada's Sex Offender Registries: Background, Implementation, and Social Policy Considerations*, 18 Can. J. Hum. Sexuality 61, 65–66 (2009).
- 20 Elizabeth J. Letourneau, Jill S. Levenson, Dipankar Bandyopadhyay, Debajyoti Sinha, & Kevin S. Armstrong, U.S. Department of Justice, National Institute of Justice, *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women* 28 (Sept. 2010) (study limited to South Carolina), at <https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf>.
- 21 Sperber et al., *supra* note 10, at 514.
- 22 See, e.g., Sperber et al., *supra* note 10 (evaluating Ohio's registry and finding a mismatch between registration category and risk assessment).
- 23 See, e.g., Letourneau et al., *supra* note 20, at 52–53.
- 24 See, e.g., *id.*, at 54–55.
- 25 Vess et al., *supra* note 6, at 326; Letourneau et al., *supra* note 20, at 46–47.
- 26 Murphy et al., *supra* note 19, at 68.
- 27 Letourneau et al., *supra* note 20.
- 28 See *infra* text at note 21.
- 29 See, e.g., Sam Levin, *Stanford sexual assault: Read the full text of the judge's controversial decision*, *The Guardian*, June 14, 2016, at <https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky>.
- 30 *Padilla v. Kentucky*, 559 U.S. 356 (2010). *But see State v. Trotter*, 330 P.3d 1267, 1271 (Utah 2014) (“[T]he statutory restrictions imposed on sex offenders—and the resulting social consequences—are not akin to the restrictions and consequences faced by deportees.”).
- 31 See, e.g., *Privette v. State*, 2012 WL 6172037, at \*9 (Tenn. Crim. App. 2012) (failure to advise the defendant of sex offender registration did not render the plea constitutionally invalid because “the registration requirements . . . are nonpunitive and . . . are therefore a collateral consequence of a guilty plea.”); *Love et al.*, *supra* note 2, at § 4:7 (discussing Sixth Amendment issues pertaining to collateral sanctions).
- 32 MPC: Sentencing, § 7.04.
- 33 The existing concerns about sex offender registries and public notification should counsel against duplicating such laws for other types of offenders. *But see Karin Brulliard, Animal abusers are being registered like sex offenders in these jurisdictions*, *Wash. Post*, Sept. 13, 2016, at [https://www.washingtonpost.com/news/animalia/wp/2016/09/13/animal-abusers-are-being-registered-like-sex-offenders-in-these-jurisdictions/?utm\\_term=.492262f9d26d](https://www.washingtonpost.com/news/animalia/wp/2016/09/13/animal-abusers-are-being-registered-like-sex-offenders-in-these-jurisdictions/?utm_term=.492262f9d26d).
- 34 Letourneau et al., note 20, at 53.
- 35 See, e.g., *Smith v. Doe*, 538 U.S. 84, 92 (2003) (federal sex offender registration not sufficiently retributive to render it punitive rather than regulatory); *Doe v. Dep't of Pub. Safety and Corr. Servs.*, 430 Md. 535, 600, 62 A.3d 123 (Md. Ct. app. 2013) (“sex offender registration is not punishment, but a collateral consequence of a conviction”).
- 36 Sandy Jung, Meredith Allison, & Erin Martin, *Perspectives of Americans and Canadians on the use and function of sex offender registries*, 52 Int'l J. L., Crime & Just. 106 (2018).
- 37 A panoply of statutes excludes sex offenders from a broad swath of employment. Some of these restrictions are closely related to the convicted offense, others are much broader. There are also limitations on access to public housing and on the location of any housing, which has to be away from schools, daycare centers, and churches.
- 38 See, e.g., J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54(1) J.L. & Econ. 161 (2011); Richard Tewksbury, Wesley G. Jennings, & Kristen Zgoba, National Institute of Justice, *Final Report on Sex Offenders: Recidivism and Collateral Consequences* (Sept. 30, 2011), at <https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf>.
- 39 Letourneau et al., *supra* note 20, at 53–54.
- 40 Cf. Restoration of Rights Project, *supra* note 17.
- 41 Virginia already uses risk assessment to divert select offenders from imprisonment. Its sex offender risk assessment instrument identifies high-risk individuals for whom longer sentences may be appropriate. See Virginia General Instructions 42–46, 47–51. Pennsylvania is currently considering the integration of risk assessment directly into sentencing. Its purpose would be to provide not for more severe sentences but rather for more individually appropriate sanctions. Pennsylvania Commission on Sentencing, Proposed Sentence Risk Assessment Instrument [204 Pa. Code Chapter 305], [http://www.hominid.psu.edu/specialty\\_programs/pacs/publications-and-research/research-and-evaluation-reports/risk-assessment/proposed-draft-of-sentence-risk-assessment-instrument](http://www.hominid.psu.edu/specialty_programs/pacs/publications-and-research/research-and-evaluation-reports/risk-assessment/proposed-draft-of-sentence-risk-assessment-instrument).
- 42 Illinois Sex Offenses and Sex Offender Registration Task Force, *Research Report: Sex Offenses & Sex Offender Registration Task Force Final Report* (Dec. 2017), at <http://www.icjia.state.il.us/articles/sex-offenses-and-sex-offender-registration-task-force-final-report>.
- 43 *Id.*
- 44 See Restoration of Rights Project, *supra* note 17.
- 45 MPC: Sentencing § 7.02, comment (f).
- 46 *Id.* at Reporters' Note (f) (referencing Ala. Code 1975 § 15-20A-23 (2011)).
- 47 *Id.* (“The commission’s guidance to courts considering motions for relief may also take into account a particular defendant’s circumstances that bear on public safety risk, such as other criminal history, age at the time of the offense, time elapsed since the offense, participation in treatment for mental-health or substance-abuse problems, and evidence of rehabilitation.”)
- 48 MPC: Sentencing § 7.04(2)(c).
- 49 MPC: Sentencing § 7.05(3).
- 50 American Law Institute, *Model Penal Code and Commentaries*, Art. 213 Sexual Offenses (text of Model Penal Code as adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962) (1980).
- 51 American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 3* (Apr. 6, 2017), submitted but not approved by the ALI membership in May 2017. None of the drafts presented to or discussed by the membership at ALI Annual Meetings to date have included provisions on collateral sanctions.
- 52 MPC: Sentencing § 7.06(4).
- 53 Several federal circuits, for example, have indicated that they lack the authority to expunge individual criminal records except for extremely rare and extraordinary circumstances or upon Congressional legislation. The others have ruled that they have such equitable power, yet they rarely exercise it. See cases cited in *United States v. Doe*, 110 F. Supp.3d 448, 455 n. 16 (E.D.N.Y. 2015), ordered vacated, 833 F.3d 192 (2d Cir. 2016), reprinted in this Issue at pp. 294–299. See also Nora V. Demleitner, *Judicial Challenges to the Collateral Impact of*

*Criminal Convictions—Is True Change in the Offing?*, 91 N.Y.U. L. Rev. Online 150 (Nov. 2016), <http://www.nyulawreview.org/online-features/judicial-challenges-collateral-impact-criminal-convictions-true-change-offing>. One state has authorized its courts to seal records held by state officials of federal and out-of-state convictions to prevent consequences under state laws. See Ohio Code § 2953.32(A)(1); Michael C. Henneberg, Justin Withrow, & William Summers, *With No Signs of Federal Legislation to Expunge Federal Convictions, State Courts May Provide a Mechanism to Minimize Collateral Consequences*, in *The State of Criminal Justice 2017* 279, 285–86 (Mark Wojzek ed., American Bar Association, Criminal Justice Section, June 2017). That model is unique and limited, though other states may want to consider it to restrict state collateral consequences falling upon individuals for whom the state did not intend them.

<sup>54</sup> In the United States prior information about an individual is forever retained online. Contrast this, however, with the privacy-based approach preferred in the European Union and the Council of Europe. See, e.g., Alessandro Corda, *Beyond Totem and Taboo: Toward a Narrowing of American Criminal Record Exceptionalism*, 30 Fed. Sent'g Rep. 241, 245 (2018); Alexander Novotny, *Being Forgotten on the Internet: How Temporal Contextual Integrity Can Protect Online Reputation* (2016); Muge Fazlioglu, *Forget me not: The clash of the right to be forgotten and freedom of expression on the Internet*, 3(3) Int'l Data Privacy L. 149 (Aug. 1, 2013).

<sup>55</sup> See, e.g., Roger Przybylski, U.S. Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *The Effectiveness of Treatment of Adult Sexual Offenders* (July 2015), <https://www.smart.gov/pdfs/TheEffectivenessofTreatmentforAdultSexualOffenders.pdf>.