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April, 2007

# Megan's Law and the Misconception of Sex Offender Recidivism

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# **Megan's Law and the misconception of sex offender recidivism<sup>1</sup>**

**Debra Patkin**

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<sup>1</sup> I would like to thank Professor Lynn M. LoPucki, Tayler Mayer, and Lesley Patkin for their support, help, and guidance in writing this paper.

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## **I. Introduction**

Legislatures cite the so-called high recidivism rate of sex offenders to implement Megan's Laws to justify laws requiring sex offenders to register and having their information being disseminated to the community. However, whether people convicted of sex crimes actually possess a dangerous risk of recidivism remains doubtful.

This paper will critically question the justification of reliance on recidivism studies by both state and federal legislatures in implementing Megan's Laws. Part II outlines the history of Megan's Laws and presents the claims of recidivisms made by the legislatures. Part III first demonstrates how Megan's laws do not take in account the variation in recidivism rates among studies. It then shows how studies do not represent the actual majority of those convicted of sex crimes. Finally, this part analyzes the harm created by Megan's Laws that outweighs any beneficial value on the community when an offender has a low recidivism rate. Part IV confutes potential opponents' arguments that because sex offenses are underreported, the actual recidivism rates could be higher and that it is better to err on the safe side for children's sake. Part V concludes that the discrepancy of studies suggests that compulsory notification laws are overbroad by assuming high recidivism rates by all sex offenders. Because recidivism rates vary depending on the characteristics of the sex offenders, Megan's Laws are justified only for selected types of offenders who commit particular sex offenses. The heavy burden put on those who pose little risk to society outweighs the usefulness of Megan's Law for the other categories of sex offenders.

#### IV. Sex Offender Legislations and Recidivism

The public and the media contributed to the hasty legislations aimed at reducing the so-called skyrocketing sex offense recidivism. Today, 50 states and the federal government use registration and community notification programs in an attempt to track sex offenders and protect the community.<sup>2</sup>

The federal statutes provide only minimum requirements for registration, database maintenance, and community notification for the states.<sup>3</sup> Each state is free to determine which sex offender must register, what information they must provide and disclose, and the general standards and procedures.<sup>4</sup>

States have either a “compulsory” registry system or a tier system.<sup>5</sup> In the compulsory approach, states require offenders guilty of specific crimes against a minor, violent and nonviolent sexual offense, and felonies committed for a sexual purpose to register.<sup>6</sup> Offenders who commit incidental exposure can be lumped together with offenders who commit rape-murder.<sup>7</sup> The offender’s risk of recidivism is not a material element under law, all it takes to be on the registry is a

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<sup>2</sup> See., e.g., 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, 1177 (2004) (explaining registration and notification laws in the United States).

<sup>3</sup> Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy for a Symbol's Sake*, 35 AM. CRIM. L. REV. 333, 349 (1998) (commenting that federal statutes were passed as an “experiment” and a guide for the states).

<sup>4</sup> Megan's Law; Final Guidelines for the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act, as Amended, Part II, 64 Fed. Reg. 572,582 (Jan. 5, 1999)(outlining basic requirements for registration in different context and guidelines for states).

<sup>5</sup> Kimberly B. Wilkins, Comment, *Sex Offender Registration And Community Notification Laws: Will These Laws Survive?*, 37 U. Rich. L. Rev. 1245, 1250 (2003) (comparing the two types of systems).

<sup>6</sup> Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003) (Finding registration laws constitutional).

<sup>7</sup> *In re Birch*, 515 P.2d 12, 12-13, 17 (Cal. 1973) (offender who urinated outside by a restaurant was convicted of lewd or dissolute conduct in a public place. His conviction was overturned because of lack of notice that pleading guilty would subject him to the state’s registration requirements).

conviction of selected crime.<sup>8</sup> However, the fact that one is registered inevitably makes the public believe the offender is dangerous.<sup>9</sup>

Other states have a system based on risk of recidivism. Often, this system is a three-tier classification system.<sup>10</sup> New Jersey, for example, assesses registered sex offenders' risk of reoffending and places them in one of three tiers: Tier 1 (low risk), Tier II (moderate risk), and Tier III (high risk).<sup>11</sup> In this category of notification laws, an agency or individual is authorized to assess which offender will have to be notified to the community, and in what manner.<sup>12</sup> States vary again in their evaluation of the dangerousness of an offender. Some operate a sophisticated system of assessment, while others leave the discretion to the law enforcement agencies. Some states, such as Massachusetts, have a board of licensed psychologists or psychiatrists (those with specialized knowledge of the forensic mental health system and those with specialized knowledge of sex offenders) and those with specific expertise in areas of criminal justice, probation, victims of sexual abuse.<sup>13</sup> Other states merely allow their law enforcement agencies to assess which tier to put the offenders in.<sup>14</sup> This allows a "broad discretion"

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<sup>8</sup> *Conn. Dep't of Pub. Safety*, 538 U.S. at, 7 (holding that because the requirement to register was based just on conviction, the offender's dangerousness is not relevant to registration).

<sup>9</sup> Jessica Ann Orben, Comment, *Connecticut Department Of Public Safety v. Doe: Sex Offenders' Due Process Under "Megan's Law" And The Effectiveness Of Sex Offender Registration*, 36 U. TOL. L. REV. 789, 804 (2005) (commenting that the portrayal by media and TV shows' of sex offenders as dangerous caused people to believe that once one is registered as a sex offender, s/he is dangerous).

<sup>10</sup> JOHN Q. LA FOND, PREVENTING SEXUAL VIOLENCE 91 (2005) (classifying those laws as "active agency-conducted notification based on individualized risk," the author discusses the role of risk assessment in various states).

<sup>11</sup> *W.P. v. Poritz*, 931 F. Supp. 1199, 1204 (D.N.J. 1996) (explaining New Jersey's statute before holding it to be constitutional); N.J. STAT. ANN. § 2C:7-8 (West 2005) (guidelines for placing a recently convicted sex offender in one of the tiers).

<sup>12</sup> LA FOND, *supra* note 10, at 91 (describing the tier system as one of the four general notification models).

<sup>13</sup> MASS. ANN. LAWS CH. 6, § 178K (Law. Co-op. 2005) (Massachusetts statute outlining the qualifications of the members for the "Sex Offender Registry Board").

<sup>14</sup> WASH. REV. CODE. ANN. § 4.424.550(3)-(4) (West 2005) (Washington statute instructing the local law enforcement agencies on how to deal with offenders at different levels).

on the local law enforcement agencies, which has a high potential of discrepancy of treatment for similar sex offenders across a state.<sup>15</sup>

Based on the arguments made below, the appropriate approach for notification law should be the narrowest one, using mental health and criminal justice professionals to aid in the evaluating the dangerousness of those convicted of sex crimes which have shown high recidivism rates.

**A. *Sex crime and panic***

The Congress' and the states' rush to implement Megan's Laws was fueled by the public's perception that sex offenders are a group of criminals that have an irresistible urge to commit sex crimes over and over again.<sup>16</sup> Indeed, the public believes that the recidivism for sex offenders is the highest of all criminals.<sup>17</sup> The panic may have caused legislatures to select the studies claiming higher recidivism rates and twisting the conclusions to justify applying the harsh requirements of Megan's Laws to all sex offenders.

It is true that sex offenses impose a national social problem. The Bureau of Justice Statistics in 1995 displays that there was over a quarter of a million attempted or completed rapes reported by victims over twelve years old.<sup>18</sup> 95,000 threatened or

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<sup>15</sup> LA FOND, *supra* note 10, at 92.(Describing statues such as Washington which allows local police to decide how offenders will be treated within each community).

<sup>16</sup> See, e.g., Michael J. Duster, Note, *Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders*, 53 DRAKE L. REV. 711, 711 (2005) (Explaining how public's fear and "strong sentiment against sex crimes" have driven the legislatures to create laws to protect the community).

<sup>17</sup> Orben, *supra* note 9, at 806 (inferring from McKune v. Lile, 536 U.S. 24, 33 (2002) which claimed that sex offenders were much more likely to commit a new sex crime.)).

<sup>18</sup> LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT V (1997) v, available at <http://www.ojp.gov/bjs/pub/pdf/soo.pdf>, (basing on self reported victimized surveys showing high rates of sex offenders in United States).

completed sexual assaults other than rape were also reported by those over twelve.<sup>19</sup> Especially alarming is that two thirds of the victims were children between twelve and eighteen years old.<sup>20</sup> More sex offenders are being arrested, the percent of the correctional population that are offenders of sex crimes other than assault has increased by fifteen percent.<sup>21</sup> It is unclear whether those changes are due to the increase in crimes themselves or the increase in awareness of the need to report them.<sup>22</sup>

Regardless of why the numbers have increased, the public has noticed and is very afraid. Many scholarly works observed the relationship between escalating public fear of sex offenders and predators and the increase in sex offender legislation.<sup>23</sup> The vivid images and terrifying news reports from the media has created a strong public demand for strict laws.<sup>24</sup> The news often alerts the public of a monster that claimed his latest young victim, and warns of the preying child molester who seeks subsequent conquests.<sup>25</sup> The public had “a view of crime as a family matter, for it invariably pitted victims of traditional nuclear families against the harrowing images of criminals as antisocial loners and lunatics preying on women and especially children.”<sup>26</sup> People undoubtedly want to

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<sup>19</sup> *Id.* (the biggest age group of victims were teenagers, or 12 to 18 years old).

<sup>20</sup> *Id.* (from self-reports of convicted rape and sexual assault offenders serving time in state prisons).

<sup>21</sup> *Id.* (In general, the average annual growth of the number of prisoners since 1980 has been 7.6%, making this category of sexual assault other than rape the fast growing one compared to other violent crimes).

<sup>22</sup> *Id.* (no attempt to explain this phenomenon).

<sup>23</sup> *See, e.g.,* Duster, *supra* note 16, at 711 (Explaining how public’s fear and “strong sentiment against sex crimes” have driven the legislatures to create laws to protect the community).

<sup>24</sup> *Id.* at 716-717 (explaining the role the news and the entertainment industry have in portraying sex offenders as terrorizing communities by looking for minors); Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 569-570 (2002) (discussing how the public’s demand for more protection for children is shaped by those who have political power and access to the media).

<sup>25</sup> *Id.* (“News accounts of real crime and fictionalized movie and TV stories about sexual offenses have perpetuated a stereotyped view of victims and offenders. The victim is portrayed as a ‘blameless,’ innocent, usually attractive, middle class, and white’ woman or child. The offender, on the other hand, is viewed as unattractive, lower class, compulsively drawn to commit sexual offenses, and often a repeat offender.”).

<sup>26</sup> Elayne Rapping, *Television, Melodrama, and The Rise of the Victims’ Rights Movement*, 43 N.Y.L. SCH. L. REV. 665, 675-676 (1999/2000) (discussing TV’s role, such as the show America’s Most Wanted, in creating public fear of sex offenders).



protect the so-called ideal American family of a father, mother, and their children from being harmed by a monster also known as a sex offender.

As observed so far, a large contributor to the public's panic over sex offenders is the belief that sex offenders are a dangerous group. Indeed, numerous legislative histories cite the supposedly high recidivism among sex offenders as one of the justifications for implementing notification laws such as Megan's Laws.<sup>27</sup> But, with the pressure to appease the terrified public, the government cites high recidivism studies without thoroughly analyzing their factors to rationalize Megan's Laws.

***B. Megan's Laws are largely based on so-called high recidivism***

Because the legislatures acted out of public panic fueled by the belief that sex offenders would commit sex offenses over and over again, these laws carry the presumption that sex offenders are more dangerous than other criminals.<sup>28</sup> While the public may have concluded that sex offenders are more likely to reoffend based on the media, legislatures should not implement laws on similar weak evidence. Nevertheless, some legislature chose to rely on general perceptions rather than scientific evidence. Other legislatures use studies to justify their registration and notification laws, but they misguidedly based their reasoning on a poor interpretation of a wide variety of recidivism studies.

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<sup>27</sup> See, e.g., N.J. STAT. ANN. § 2C:7-1 (West 2005) (Legislature's statement of purpose); WASH. REV. CODE ANN. § 4.24.550 (West 2005) (Historical and Statutory Notes); 139 CONG. REC. H10319-02 (daily ed. Nov. 20, 1993) (statement of Rep. Sensenbrenner at a hearing for a federal sex offender registry: "The reason this bill is so important is because of the high rate of recidivism in persons who have committed crimes against children, and it is not just sex crimes against children but all crimes against children. The recidivism rate is probably higher in this area of our criminal justice system or in violations of the criminal code.").

<sup>28</sup> La Fond & Winick *supra* note 2, at 1173-4 ("Enraged by sex crimes against young children committed by convicted sex offenders, <sup>1</sup> the public has demanded that government do whatever is necessary to prevent sexual recidivism.").

States often cite “sex offenders” and their perceived likelihood of recidivism rates in the purpose sections of their notification laws. Some do without much supporting evidence. The New Jersey legislature explained that the possibility of recidivism among “sex offenders” made them dangerous in the first subsection of the statute’s purpose section:

The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.<sup>29</sup>

This legislature was silent on what data, studies, or evidence showed that sex offenders had such danger of recidivism.

Other states loosely refer to unmentioned studies. The Washington statute’s finding cited protecting the public from sex offenders as a group which was ‘found’ to pose a high risk of recidivism as a “paramount government interest.”<sup>30</sup> While this legislature, like others, may believe the danger is commonly known, the resulting loss of privacy for the offenders are too severe for them to use assumptions without any basis.

Even if studies are relied on, legislatures often overgeneralize them. In numerous statutory purposes, “sex offenders” are usually broadly defined to include rapists, incestuous child molesters, and incident exposure.<sup>31</sup> As displayed later in the paper, studies actually display that the recidivism rate is unique to each category of sex

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<sup>29</sup> N.J. STAT. ANN. § 2C:7-1 (West 2005) (New Jersey’s statute on sex offender registry and notification).

<sup>30</sup> WASH. REV. CODE ANN. § 4.24.550 (West 2005) (Historical and Statutory Notes, quoting Washington legislature’s findings and declaration of policy).

<sup>31</sup> 1994 N.J. LAWS 133 (b)(2)(b)(1) (defining sexual offenders, including those impairing the morals of a child); N.J. STAT. ANN. § 2C:24-4 (West 2005) (listing what sexual conduct qualifies as impairing the morals of a child, including any acts of sexual force and nudity); IDAHO CODE § 18-8304 (Michie 2005) (Idaho statute citing incest and indecent exposure as a sex crime requiring notification).

offenders. Lumping them under one wide category and then discussing their recidivism rates creates the assumption that all sex offenders share similar recidivism rates.

Even courts echo the significant weight the alleged sex offender recidivism studies had on the implementation of its Megan's law without distinguishing sex offenders: "as a group, sex offenders are more likely than other repeat offenders to re-offend with sex crimes or other violent crimes."<sup>32</sup> This court, the New Jersey Supreme Court, also cited the state legislature's reliance on studies from California and Washington showing shockingly high recidivism rates of sex offenders.<sup>33</sup> California's fifteen-year follow up study showed sex offenders being "five times as likely as other violent offenders, and more than six times as likely as all types of offenders, to reoffend with a sex offense. Washington's seven-year follow-up study showed "12% [of released convicted sex offenders] were rearrested for sex offenses and an additional 3% were rearrested for violent offenses"<sup>34</sup> But, the court and the legislature fail to examine just which sex offender or the nature of crime was actually included in these studies.

This court also observed that the New Jersey legislature relied on the following federal study:

A major Justice Department study of state prisoners released in one year showed that 7.7% of released rapists were 10.5 times more likely to be rearrested for rape than were other released prisoners... Likewise, prisoners who had served time for other sexual assaults were 7.5 times more likely than other released prisoners to be rearrested for sexual assault.<sup>35</sup>

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<sup>32</sup> Doe v. Poritz, 662 A.2d 367, 375 (N.J. 1995) (New Jersey Supreme Court citing Response Brief for Attorney General at 8-10).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (court used this study to justify its ruling that N.J.'s notification laws were constitutional even though it treated sex offenders differently).

This study only indicates that rapists and sex assaulters could be considered dangerous. This study does not allow for the conclusion that all other sex offenders have high recidivism rates.

Legislators across the country often throw around numbers to represent the grossly exaggerated but widely accepted high recidivism rate of sex offenders to justify broad and intensive notification laws.<sup>36</sup> In Indiana, a senator proclaimed that the chances of sexual reoffense was 95%, and a California senator gave a similar rate of 90%.<sup>37</sup> A Florida senator echoed the concern by announcing that sexual predators immediately look for their next victim upon release.<sup>38</sup> The senators neglected a crucial element of statistics: no one of them cited an actual study.<sup>39</sup> Even the former Attorney General, Janet Reno, may be guilty of throwing numbers around without identifying her sources when she was quoted saying “convicted child molesters have a recidivism rate as high as 40 to 75 percent.”<sup>40</sup>

The federal notification law provides a better correlation with its requirements and the recidivism rates it relies on. The legislative history of the first federal sex offender legislation included studies reporting that the average child molester had several

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<sup>36</sup> James A. Billings & Crystal L. Bulges, *Maine's Sex Offender Registration and Notification Act: Wise or Wicked?*, 52 ME. L. REV. 175, 243 (2000) (Blaming “emotion and media manipulation” for being the justification of sex offender statutes are passed rather than “rational and empirical data analysis”).

<sup>37</sup> Eric Lotke, *Politics and Irrelevance: Community Notification Statutes*, 10 FED. SENT. R., 64, 64 (1997) (the Indiana senator who proposed a state sex offender registration stated, “[s]tatistics show that 95% of the time, anyone who molests a child will likely do it again”); (the California legislator was cited in Drummond Ayres, *California Child Molesters Face 'Chemical Castration'*, N.Y. TIMES, Aug. 27, 1996, as saying “What we're up against is the kind of criminal who, just as soon as he gets out of jail, will immediately commit this crime again at least 90 percent of the time”).

<sup>38</sup> Charles Elmore, *Castration to Become Legal Punishment*, PALM BEACH POST, May 30, 1997 (“This is a giant step forward in reducing the number of sexual predators who start to look for their next victim as soon as they are released from prison,” said bill sponsor Sen. Anna Cowin, R-Leesburg. ‘Let this be a message that the state of Florida takes sexual crimes seriously.’”).

<sup>39</sup> See Lotke, *supra* note 37, at 64. (Their comments were not based on studies, and the journal author then show how they were not consistent with actual studies).

<sup>40</sup> Jerry Seper, *Reno Backs Notification Law*, WASH. TIMES, Feb. 10, 1995, at A4. (quoting Reno to claim that those figures were based on “some studies”).

similar child sex offenses.<sup>41</sup> Seventy-four percent of imprisoned child sex offenders had previous convictions and that the average child sex offender molested 117 children.<sup>42</sup>

Because the federal law only aims at sex offenders who have minor victims, it appropriately cites a study aiming at child sex offenders. However, it is unclear whether the previous convictions of those 74 percent were for sex crimes or crimes of another nature, and whether they included incest.

To this day, the government still uses numbers, possibly carelessly, to validate the need for stricter sex offense litigation. In the House of Representative's Committee on the Judiciary report on the Children's Safety Act of 2005, sex offenders are portrayed as predators who cannot wait to get their hands on their next victim. The Committee quotes statistics from the 2001 Report by the Center for Sex Offender Management such as:

- Sex offenders recidivism rates are actually 2.4 times higher in unofficial reports than in official reports
- The average offender had offenders had 110 victims and 318 offenses according to unofficial reports.<sup>43</sup>

Among legal scholars, the recidivism of sex offenders is in dispute. Some believe that Megan's Laws are justified due to the purported high recidivism of sex offenders.<sup>44</sup>

Others agree that recidivism is an important element, but caution about the absolute

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<sup>41</sup> 139 CONG. REC. H10,320 (daily ed. Nov. 20, 1993) (statement of Rep. Sensenbrenner citing a National Institute of Mental Health study).

<sup>42</sup> *Id.* (statement of Rep. Sensenbrenner citing the same National Institute of Mental Health study as in previous note).

<sup>43</sup> H.R. REP. NO. 109-218 at (2005), available online (<http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr218p1&dbname=cp109&>).

<sup>44</sup> Jessica R. Ball, Comment, *Public Disclosure of "America's Secret Shame": Child Sex Offender Community Notification in Illinois*, 27 LOY. U. CHI. L.J. 401, 406 (citing Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10-year Follow-up Study*, FED. PROBATION, Mar. 1985, at 58; DAVID FINKELHOR & ASSOCS., A SOURCEBOOK ON CHILD SEXUAL ABUSE 134-36 (1986); Lisa Anderson, *Demand Grows to ID Molesters--States Weigh Children's Safety versus Offenders' Rights*, CHI. TRIB., Aug. 15, 1994, News).

validity of the studies.<sup>45</sup> For example, Carol L. Kunz points out that sex offenses are underreported (which may mean one-time offenders go unreported) and the studies use different factors in their measurement of recidivism.<sup>46</sup> In light of outrageously high (and therefore fishy) numbers along with legislature's lack of solid evidentiary support, Megan's Laws' reliance on high recidivism rates appears suspect, especially when applied to a broad category of sex offenders.

**V. Megan's Laws should not be based on a collection of recidivism studies in which there is no consensus**

Although the numbers relied on by Megan's Laws appear high, the use of those numbers may be inaccurately used. State laws expand the registration and notification requirements to others than only offenders who commit sex crimes against children.<sup>47</sup> Furthermore, they demand that the community be notified of every sex crime against children, even incest.<sup>48</sup> This part describes the three flaws of relying on recidivism studies. Part III.A shows the wide variation among recidivism studies. Part III.B discusses how the studies do not reflect the majority of offenders, who are actually known to their victims. Part III.C concludes that given the great harm of notification laws, the legislatures should ensure that the laws are narrowly tailored to those who really have a high recidivism rate.

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<sup>45</sup> Carol L. Kunz, Comment, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453, 472 (1997).

<sup>46</sup> *Id.* (citing works which focus on the reporting of sex offenders recidivism such as L. Furby et al., *Sex Offender Recidivism: A Review*, PSYCHOL. BULL., Jan. 1989, at 105; Andrew Vachss, *If We Really Want to Protect Our Children*, PARADE, Nov. 3, 1996, at 5).

<sup>47</sup> *See, e.g.*; IDAHO CODE § 18-8304 (Idaho statute citing indecent exposure as a sex crime requiring notification).

<sup>48</sup> *See, e.g.*; 1994 N.J. Laws 133(b)(2)(b)(1) (defining sexual offenders, including those impairing the morals of a child and requiring their registration and notification); ID ST § 18-8304 (Idaho statute citing incest and indecent exposure as a sex crime requiring registration and notification).

### *A. Different studies, different conclusions*

The perceived high recidivism among sex offenders is the key catalyst for justifying the implementation of notification laws or Megan's Laws.<sup>49</sup> However, without factoring in factors such as methodology, types of crime, who the victims or offenders were, and difference in risk assessment models, studies do not appear to be constant. Some studies have shown the recidivism rate to be as high as 65 percent.<sup>50</sup> While other studies do not give an estimate that high, they still portray sex offenders to be dangerous. In contrast to the studies seen earlier in the paper, there are studies indicating that sex offense recidivism rates are significantly lower than believed.<sup>51</sup> First, these rates are not as high as the public thinks.<sup>52</sup> A five year follow-up of sex offenders only found 10 to 15 percent did commit another sex crime.<sup>53</sup> Hanson and Bussiere found the average rate to not be over 40 percent after they carefully searched records and did long follow-up periods.<sup>54</sup>

It appears puzzling that there is such an inconsistency in studies on sex offenders' recidivism. How can one study claim that sex offenders have high recidivism and the other conclude that they have a rate lower than other criminals? Can we justify

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<sup>49</sup> See *supra*, Part II.B. (describing legislatures' reliance on recidivism studies on sex offenders).

<sup>50</sup> David Van Biema, *A Cheap Shot at Pedophilia? California Mandates Chemical Castration for Repeat Child Molesters*, TIME, Sept. 9, 1996, at 60 (giving that figure as an estimate).

<sup>51</sup> Donna Lieberman, *Megan's Law: An Asset or a Quick Fix?*, N.Y. L. J., Jan. 17, 1996, at 2 n.2 (finding that recidivism rates can be as low as 8.5% for sex offenders who receive treatment).

<sup>52</sup> Orben, *supra* note 9, at 806 (discussing cases and legislations that point at the so-called recidivism rates).

<sup>53</sup> James Bonta & R. Karl Hanson, *Gauging the risk for violence: Measurement, impact and strategies for change* (User Report No. 1994-09). Ottawa, Ontario, Canada Department of the Solicitor General of Canada (1994) (1988 study on 800 newspaper articles to detect whether the media appropriately reflects the state of crime in Canada).

<sup>54</sup> R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING CLINICAL PSYCHOL. 348, 351 (1998) (their meta-analysis was based on 61 different studies from six different countries).

implementing laws that are based on conflicting studies? There are several reasons why studies do not agree with each other.

*i. Differ by Methodology*

One source of the disparity in the recidivism rate is that studies do not actually study the same things.<sup>55</sup> They may differ in their methodology of collecting data.<sup>56</sup> The first way to collect data is through official police or court records, which are limited to offenses actually reported.<sup>57</sup> Researchers may use victim surveys to attempt to include unreported crimes.<sup>58</sup> Self-reports by sex offenders are used in some studies and often reveal more sex crimes than the police are aware of.<sup>59</sup>

A so-called follow-up study may look at offenders who have been out in the community for a few years or over a long span of several years.<sup>60</sup> The longer the study, the more chances the offender has to reoffend.<sup>61</sup> Compare a study which suggested that 42% of nearly two hundred child molesters reoffended within fifteen years<sup>62</sup> with another study finding that the recidivism of child molesters after three years was only 11%.<sup>63</sup> Another issue with follow-up studies is that a study that claims a specific length rarely

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<sup>55</sup> Kunz, *supra* note 45, at 472 (discussing the different approaches used by individual studies).

<sup>56</sup> *Id.*

<sup>57</sup> LA FOND, *supra* note 10, at 44-45 (official records reveal when a convicted offender has been rearrested, convicted, or sentenced).

<sup>58</sup> *Id.* (the method of using victim surveys gives some sense of comparing rates among different kinds of offenders).

<sup>59</sup> *Id.* (those reports are often confidential).

<sup>60</sup> Kunz, *supra* note 45, at 472.

<sup>61</sup> CTR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS 4 (May 2001), available at <http://www.csom.org/pubs/recidsexof.pdf> (stating that recidivism studies should have a follow-up period of five years or more).

<sup>62</sup> R. K. Hanson et al., *Long-term Recidivism of Child Molesters*, 61 J. CONSULTING CLINICAL PSYCHOL. 646, 646-52 (1993).

<sup>63</sup> R. A. Lang et al., *Treatment of Incest and Pedophilic Offenders: A Pilot Study*, BEHAV. SCI. L. 239, 239-55 (1988).



has all of the offenders studied in the community for that length.<sup>64</sup> Studies also neglect to describe relevant information, such as whether sex offenders were being treated.<sup>65</sup>

The definition of terms has a great effect on the outcome of a study. Ultimately, recidivism may reflect different concepts. A study may define “offense”<sup>66</sup> or “reoffense” differently from another one.<sup>67</sup> If it means subsequent arrest, the recidivism rate will increase since people are often arrested but not convicted.<sup>68</sup> Subsequent conviction is a more restricting definition for “reoffense”.<sup>69</sup> Subsequent incarceration can be split into incarceration due to a new offense and incarceration due to a parole violation.<sup>70</sup>

Another issue in defining “reoffense” is whether it includes any subsequent crime or only subsequent sex crimes.<sup>71</sup> Basically, studies that claim high recidivism rate for sex offenders often do not limit themselves to subsequent sex crimes.<sup>72</sup> Even failing to register (which is an offense) is considered a subsequent crime in these calculations.<sup>73</sup>

A study involving all subsequent crimes, not just sex, shows how high the numbers can be. 52% of rapists and 48% of all other sex offenders committed new

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<sup>64</sup>CTR SEX OFFENDER MGMT., U.S. DEP’T OF JUSTICE, RECIDIVISM OF SEX OFFENDERS 4 (May 2001), available at <http://www.csom.org/pubs/recidsexof.pdf>. (Explaining that not every individual in a given study has been studied for the same length of time. In fact, in a 10-year long study, some subjects may have been studied for 8 or even 2 years within the given period).

<sup>65</sup> Kunz, *supra* note 45, at 472 (review of studies show absence of information on treatment and calling such information “vital”).

<sup>66</sup> Ball, *supra* note 44 at 408, fn.41 (outlining the different definition of “child molester”).

<sup>67</sup> Kunz, *supra* note 45, at 472 (discussing the different approaches used by individual studies).

<sup>68</sup> CTR SEX OFFENDER MGMT., *supra* note 61, at 2-3 (definitions can cause recidivism rates to change).

<sup>69</sup> *Id.* (studies that used conviction as their definition of recidivism showed lower recidivism rates compared to studies that used arrest as their definition).

<sup>70</sup> *Id.* (incarceration for a new offense is more infrequent than arrests and make the recidivism rate seem lower).

<sup>71</sup> *Id.* (researchers have to determine which crimes make sex offenders recidivists, also have to make determination whether to include both felonies and misdemeanors).

<sup>72</sup> Billings & Bulges, *supra* note 36, at 245 (studies that include general crimes may include subsequent crime of “shoplifting” in their statistics).

<sup>73</sup> *Id.* (Even if failing to register is the offender’s sole subsequent crime, it counts towards the recidivism rate in these studies claiming that sex offenders have a high recidivism rate).

crimes within three years of release.<sup>74</sup> Compare this with another study focusing only on subsequent sex offenses. Out of the all reoffenses done by sexual offenders, only 8% were for a new rape.<sup>75</sup> This reflects the general problem: studies that show higher recidivism rates may include both general crimes and sex offenses.<sup>76</sup>

But even within the scope of general subsequent crimes, results vary somewhat. There are studies showing that someone guilty of a sex crime is not at a higher danger of reoffending than any other convicted offenders. Sources have suggested that sex offenders and other criminals' recidivism rates are similar.<sup>77</sup> Some also suggest that sex offenders' rate of committing new sex crimes is even lower than their general recidivism.<sup>78</sup> Some studies go further and conclude that sex offenders have a lower recidivism rate than other convicted criminals.<sup>79</sup> In fact, a "comprehensive analysis of empirical studies" indicates that offenders who commit pedophilia and rape had recidivism rates lower than the national average for other crimes.<sup>80</sup> A 2002 study showed that the sex offenders have a "shorter criminal histories than nonsex offenders:" sex

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<sup>74</sup> GREENFELD, *supra* note 18, at 26 (1991 study on rapists ad sex assaulters).

<sup>75</sup> Roxanne Lieb, Vernon Quinsey & Lucy Berliner, *Sexual Predators and Social Policy*, 23 CRIM. JUST. 43, 66 (1998) (reoffense rate is just 1% for murder, robbery, and nonsexual assault).

<sup>76</sup> Billings & Bulges, *supra* note 36, at 244-245 (some studies that have higher recidivism rates include all crimes, not just sex crimes).

<sup>77</sup> See, e.g., A.J. Beck & B.E. Shipley, *Recidivism of Prisoners Released in 1983* (United States Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics 1989); Lawrence A. Greenfield, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics 1997); D.D. Schram et al., *Juvenile Sex Offenders: A Follow-up Study of Re-offense Behavior* (1991))

<sup>78</sup> *Id.*

<sup>79</sup> CTR SEX OFFENDER MGMT., U.S. DEP'T OF JUSTICE, MYTHS AND FACTS ABOUT SEX OFFENDERS 3 (August, 2000) available at <http://www.csom.org/pubs/mythsfacts.pdf> (Bureau of Justice Statistics did a study on 108,580 non sex offenders and found that 47 percent was reconvicted).

<sup>80</sup> Kunz, *supra* note 45, at 472 (citing PAUL RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 142 (3d ed. 1996) 142 on a 1989 study from the Bureau of Justice Statistics finding that, among the offenses measured, "only homicide had a lower recidivism rate [than sexual offenses]." (citation omitted))

offenders had an average of 4.5 arrests, in comparison to nonsex offenders' 8.9.<sup>81</sup> These studies were enough for a professor to proclaim, "there is nothing particularly unique about [the recidivism of] sex offenses" to allow for unique rules.<sup>82</sup>

As for subsequent sex offenses, basically, sex offenders do commit more sex crimes than nonsex offenders.<sup>83</sup> The longer history of sex crimes an offender has, the more likelihood he will commit another sex crime.<sup>84</sup> Five percent of released sex offenders compared to three and a half percent of nonsex offenders were rearrested for new sex crimes by three years after release.<sup>85</sup> But some argue that the rate of sex offense recidivism is still lower than the widely believed 40 plus percent figure.<sup>86</sup> Furthermore, a 1998 meta-analysis of 61 sex offender recidivism studies averaged the recidivism rate at 13.4%.<sup>87</sup>

The public remains oblivious to the fact that the actual recidivism rate for sex offenders may be lower than both the presumed figures given by legislatures and the rate of the general prison population.

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<sup>81</sup> PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, DEP'T OF JUSTICE, RECISIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 12 (2003) *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf> (data collected from 9,691 men serving sentences longer than one year at one of the 15 selected prisons and tracked for three years after their release).

<sup>82</sup> RICE, *supra* note 80, at 141-142 n.117 (quoting Professor Thomas Reed).

<sup>83</sup> LANGAN, SCHMITT & DUROSE, *supra* note 81, at 2 (data collected from 9,691 men serving sentences longer than one year at one of the 15 selected prisons and tracked for three years after their release).

<sup>84</sup> *Id.* at 1-2 (study showing that a sex offender arrested for two or more sex crimes are twice as likely to be arrested for a new sex crime compared to those with one prior sex crime arrest).

<sup>85</sup> *Id.* at 2 (only 3.5 percent of the sex offenders were *convicted* though).

<sup>86</sup> *Id.* (study showing that five percent of released sex offenders were arrested for subsequent sex offense, and only 3.5 percent were convicted within three years of release compared to 1.3 percent of nonsex released offenders).

<sup>87</sup> Hanson & Bussiere, *supra* note 54, at 351 (the total amount of sex offenders were 28, 972, the average follow up period was 4 to 5 years, and more specifically, the recidivism rate for 1,839 rapists was 18.9% and the rate for 9,603 child molesters was 12.5%).

**ii. Differ by Crime/Victims/Offender**

Another way to explain the confusion among the studies is that some studies did not distinguish between different types of sex offenders, offenses, and victims, and some did. For example, recidivism for men convicted for incest is very low, and those with extensive history of sex crimes have high risk to reoffend.<sup>88</sup>

Recent findings suggest that a sex offender who commits a certain kind of sexual offense is more likely to reoffend than someone else who is convicted for another type of sexual offense.<sup>89</sup> The Center for Sex Offender Management (CSOM) observed in its May 2001 “Recidivism of Sex Offender” report that sex offenders are

a highly heterogeneous mixture of individuals who have committed violent sexual assaults on strangers, offenders who have had inappropriate sexual contact with family members, individuals who have molested children, and those who have engaged in a wide range of other inappropriate and criminal sexual behaviors.”<sup>90</sup>

A meta-analysis of recidivism studies with an average of four- to five-year follow up period showed that child molesters had an overall recidivism of 12.7% and rapists had a rate of 18.9%.<sup>91</sup> CSOM referred to Prentky, Lee, Knight, and Cerce (1997)’s research which showed that a year after release, rapists appeared to have a higher reoffense rate, at 9 percent compared to child molesters’ 6 percent.<sup>92</sup> The numbers change as time

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<sup>88</sup>See Lucy Berliner, Symposium, *Sex Offenders: Policy and Practice*, 92 NW. U.L. REV. 1203, 1209 (citing a study found in V.L. Quinsey et al., *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 85 (1995)).

<sup>89</sup> CTR SEX OFFENDER MGMT., *supra* note 61, at 2 (discussing studies that compare which sex offenses are linked to high recidivism).

<sup>90</sup> *Id.* (concluding from the report’s observation of different studies with varying factors done on sex offenders).

<sup>91</sup> Hanson & Bussiere, *supra* note 54, at 348 (analyzing 61 studies with a total of 28,972 sexual offenders, with an average follow-up period of 4-5 years, acknowledging that these studies may differ on the definition of “reoffense”).

<sup>92</sup> CTR SEX OFFENDER MGMT., *supra* note 61, at 6-7 (citing a study in Robert A. Prentky, Austin F.S. Lee, Raymond A. Knight & David Cerce, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 L. HUM. BEH., 635, 635-659 (1997) (recidivism was calculated as the

progressed, showing that child molesters had a rate of 52 percent and rapists 39 percent over 25 years.<sup>93</sup>

Sturgeon and Taylor's 1980 study suggested that there may be a difference between the recidivism rate for same-sex child molesters, different-sex child molesters, and incest offenders.<sup>94</sup> Their five-year follow up study revealed that the recidivism rate for sex offenses was 30 percent for same sex child molesters, 25 percent for different sex child molesters, and 11 percent for incest offenders.<sup>95</sup> While making the type of offense consistent, studies may still reflect inaccurate numbers, if they do not control other factors. Some inconsistencies seen in the recidivism rates are seen within each category of sex offenders:

- Incest offenders ranged between 4 and 10 percent.
- Rapists ranged between 7 and 35 percent.
- Child molesters with female victims ranged between 10 and 29 percent.
- Child molesters with male victims ranged between 13 and 40 percent.
- Exhibitionists ranged between 41 and 71 percent.<sup>96</sup>

Clearly, studies that focus only on offense types will not lead to accurate recidivism rates.

While the above studies clearly define the offenders they use, poorly conducted studies do not, subjecting the audience to confusion. One study reported that 19% of prisoners who committed sexual assault, and 24% of prisoner rapists were already on

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proportion of individuals who were rearrested using survival analysis. This analysis considers how often the offender had been labeled as at-risk in the community)).

<sup>93</sup> *Id.* at 7 (using the Prentky, Lee, Knight & Cerce study, *supra* note 91, at 635-659).

<sup>94</sup> Vikki H. Sturgeon & John Taylor, *Report of a Five-Year Follow-Up Study of Mentally Disordered Sex Offenders Released from Atascadero State Hospital in 1973*, 4 CRIM. JUST. 31, 31-63 (1980) (follow up study done on sex offenders releases from a maximum-security psychiatric institution in California that included 68 sex offenders, 57 rapists).

<sup>95</sup> *Id.* (results of the study mentioned in the previous note).

<sup>96</sup> W.L. Marshall & H.E. Barbaree, *An Integrated Theory of the Etiology of Sex Offending*, in HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 363-385 (W.L. Marshall, et al. eds. 1990) (in doing their meta-study on other studies on sex offender recidivism, they noticed the wide variation among some studies).

probation or parole when they committed their offenses.<sup>97</sup> However, it is unclear what kind of crime put them on probation in the first place. Also, it is estimated that more rapists on probation than other kinds of felons get rearrested for a new rape.<sup>98</sup>

### ***iii. Differ by Individual Factors***

In states that adopt the tier system approach, the application of notification laws is based on risk assessment. In other words, each sex offender's risk of recidivism is evaluated.<sup>99</sup> Although studies on general recidivism used to justify Megan's Laws do not take individual factors in consideration, these factors do provide one reason why studies do not have consistent recidivism rates. If states use risk assessment to find each individual's risk, it is logical to evaluate whether individual factors can skew the average recidivism rates which Megan's Law rely on.

The current method of risk assessment considers two types of factors: static and dynamic.<sup>100</sup> Static, or fixed, factors include current age, age of first sex offense arrest or conviction,<sup>101</sup> history of childhood maladjustment or prior offenses.<sup>102</sup> Static factors can show abnormal development or long term tendency of the offender to participate in criminal behavior.<sup>103</sup> Dynamic, or changeable, factors more directly predict

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<sup>97</sup> Billings & Bulges, *supra* note 36, at 178 (the numbers are from a 1991 Bureau of Statistics study done on sex offenders during the first three years of their release from prison).

<sup>98</sup> *Id.* (citing the same study as in previous note).

<sup>99</sup> LA FOND, *supra* note 10, at 91 (mentioning that many states use a guided clinical approach in their risk assessment in which officials use objective scoring instrument that assigns points for each factor).

<sup>100</sup> R. Karl Hanson, *Sex Offenders: Scientific, Legal, and Policy Perspective: The Science of Sex Offenders: Risk Assessment, Treatment and Prevention: What do We Know About Sex Offender Risk Assessment?*, 4 PSYCH. PUB. POL. L. 50, 51 (1998) (explaining risk assessments and the two categories of factors).

<sup>101</sup> *See* CTR SEX OFFENDER MGMT., *supra* note 61, at 5 (static and dynamic factors help in assessing the treatment a particular sex offender should receive upon release into the community).

<sup>102</sup> *See* Hanson, *supra* note 100, at 51 (listing this as one of static factors in assessing sex offenders' dangerousness).

<sup>103</sup> *See id.* (illustrating the assessment models used by states using tier systems in evaluating individual sex offenders' dangerousness and how static factors by themselves are not enough for a full evaluation).

recidivism.<sup>104</sup> Generally, dynamic factors are changeable characteristics, circumstances, and attitudes.<sup>105</sup> This category can be divided into two subcategories: stable and acute factors. Stable factors can change, but usually stay constant over a long period of time, such as deviant sexual preferences or alcoholism.<sup>106</sup> Acute factors change quickly and occur right before sexual crimes, such as sexual arousal or drunkenness.<sup>107</sup> Stable factors are used in predicting success of treatment or response to community supervision, while acute factors are used to estimate when a reoffense will occur.<sup>108</sup>

Most studies relied on by risk assessment models focus only on static factors as they are easily found in case files.<sup>109</sup> CSOM concludes that dynamic factors need to be studied to be able to develop effective interventions, but these factors can also be determinative in showing how recidivism rates are not consistent enough for laws to depend on them.<sup>110</sup> Out of the handful studies on dynamic factors, one suggested that factors of unemployment (especially for rapists), substance problems, less empathy for the victim, belief of little risk of reoffending, lack of avoidance of high-risk situations, and antisocial lifestyles were correlated with those who commit subsequent sex crimes.<sup>111</sup> Those who did not reoffend were more likely to have “positive social influences and were

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<sup>104</sup> *See id.* (discussing tier-system states’ approach in evaluating the dangerousness of each sex offender, and how dynamic factors should be identified along with static factors).

<sup>105</sup> *See* CTR SEX OFFENDER MGMT., *supra* note 61, at 5 (dynamic factors is a major contribution in assessing the treatment a particular sex offender should receive upon release into the community).

<sup>106</sup> *See id.* (comparing dynamic factors).

<sup>107</sup> *See id.* (comparing dynamic factors).

<sup>108</sup> *See id.* (showing how studies focused on stable factors such as employment, substance dependence, and relationships display some correlation with treatment, and reasoning that since acute factors are momentary, they may account for why an offender chose to commit a sex crime at the moment he did).

<sup>109</sup> *See id.* at 7 (explaining while dynamic factors are crucial in assessing risk, most studies done have only considered static factors).

<sup>110</sup> *See id.* (understanding dynamic factors can lower risk through better intervention).

<sup>111</sup> R. KARL HANSON AND A. HARRIS SOLICITOR GENERAL OF CANADA, DYNAMIC PREDICTORS OF SEXUAL RECIDIVISM. OTTAWA (1998) (they studied more than 400 sex offenders who were under community supervision, approximately one-half were recidivists).

more likely to have intimacy problems.”<sup>112</sup> A general meta-analysis identified the following dynamic factors to be correlated with recidivism:

- multiple victims;
- diverse victims;
- stranger victims;
- juvenile sexual offenses;
- multiple paraphilias;
- history of abuse and neglect;
- long-term separations from parents;
- negative relationships with their mothers;
- diagnosed antisocial personality disorder;
- unemployed;
- substance abuse problems; and
- chaotic, antisocial lifestyles.<sup>113</sup>

Another problem in analyzing the studies is that authors may confuse sex offenders and paraphiles.<sup>114</sup> Sex offenders can range from someone who commits incidental exposure<sup>115</sup> to rapists. Paraphiles, on the other hand, suffer from a particular mental disorder, or paraphilia.<sup>116</sup> Paraphilias compromise a general category of mental disorders with the symptoms of repeating intense sexual fantasies, urges, or behaviors with objects.<sup>117</sup> Those symptoms have to occur for over six months or more to be recognized as a disorder.<sup>118</sup> Clearly, this category may seem ambiguous. However, specific paraphilias, such as pedophilia (deviant desire for children) or sexual sadism (sexual pleasure from killing someone) have a clear operational definition allowing

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<sup>112</sup> *Id.* (basing this conclusion on their observation of the study mentioned in the previous note).

<sup>113</sup> CTR SEX OFFENDER MGMT., *supra* note 61, at 12.

<sup>114</sup> Melissa R. Saad, *Civil Commitment and the Sexually Violent Predator*, 75 DENV. U.L. REV. 595 (using both terms interchangeably while discussing offenders who commit sex crimes on children).

<sup>115</sup> Evan Halper, *2 Protestors Arrested After Going Topless*, L.A. TIMES, Nov. 8, 2005, at B4 (two women were arrested for incident exposure by going topless at a political protest against bombs, and may have to be registered in California as sex offenders).

<sup>116</sup> THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, IV-TR, AMERICAN PSYCHIATRIC ASSOCIATION (4<sup>th</sup> ed., text revision, 2000) (hereinafter DSM-IV-TR), at 566-79 (outlining diagnostic criteria for paraphilia).

<sup>117</sup> *Id.* (explaining one of the factors aiding a mental health professional in diagnosing someone as a paraphile).

<sup>118</sup> *Id.* (If it is not for that long, one cannot diagnose someone as a paraphile).



psychiatrists to narrowly diagnose individuals.<sup>119</sup> Mental health professionals believe that only a small percent of sex offenders (in particular, rapists) suffer from chronic and deviant sexual drives as a result of a paraphilia.<sup>120</sup> When the irresistible sexual urges are aimed at children, an offender may be experiencing pedophilia, a recognized and specific mental disorder.<sup>121</sup> Based on their literature and studies, the mental health community recognizes pedophiles and other paraphiles to be at a dangerous risk of committing recurrent child sex abuse.

A study of self-reports by offenders suffering from a paraphilia revealed that the 561 offenders reported that they committed 291,737 “paraphilla acts” against 195,407 victims.<sup>122</sup> This averages 520 sexually motivated acts against 348 victims for each offender.<sup>123</sup> It is not certain if these sex offenders were honest or if this showed the normal trend.<sup>124</sup> La Fond even emphasized that no studies have replicated these findings.<sup>125</sup> Also, those sexually motivated acts are not all illegal. For some, simply gently touching a child’s arm may cause arousal: a paraphilia, but not a crime in itself.<sup>126</sup>

Some argue that sex offenders with a high rate of recidivism have a personality disorder known as psychopathy, or antisocial personality disorder.<sup>127</sup> Psychopaths have a

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<sup>119</sup> *Id.* (Those paraphilias have more detailed criteria aiding the professional in their diagnosis).

<sup>120</sup> See Judith V. Becker & William F. Murphy, *What We Know and Do Not Know About Assessing and Treating Sex Offenders*, 4 PSYCHOL. PUB. POL’Y & L. 116, 118 (outlining the dispute in the mental health community over whether if someone is a rapist, that means he suffers from a paraphilia. They point out that it is agreed that at least a small group of rapists do have a paraphilia).

<sup>121</sup> DSM-IV-TR, *supra* note 117, at 566-79. (“Essential features of paraphilia include recurrent, intense sexual fantasies, urges or behaviors over a six month period involving: (1) nonhuman objects; (2) suffering or humiliation of one’s partner or oneself; or (3) children or other nonconsenting persons.”).

<sup>122</sup> LA FOND, *supra* note 10, at 50 (citing study from GG Abel et al., *Self-Reported Crimes of Nonincarcerated Parahilacs*, 2 J. INTERPERSONAL VIOLENCE 3-25 (1987)).

<sup>123</sup> *Id.* (citing the same study in the previous note).

<sup>124</sup> *Id.* (the author shows some resistance in embracing studies like these).

<sup>125</sup> *Id.* (the author continues to outline his reasons for his resistance).

<sup>126</sup> *Id.* (expressing concern on how these studies define “paraphalic acts”).

<sup>127</sup> *Id.* at 35-41 (defining psychopathy and applying it to sex offenders).

mix of interpersonal, affective, and behavioral deviants.<sup>128</sup> They are known to be very self-centered, manipulative, and not empathic at all.<sup>129</sup> Studies show psychopathy to be a factor that can predict recidivism.<sup>130</sup>

While not all sex offenders have a high recidivism rate, those with a mental disorder, either a specific paraphilia or psychopathy, have been shown to be dangerous. In order to make Megan’s Laws useful, legislatures can narrowly tailor the laws to aim at those with proven high rates. One way is to include diagnosis of mental disorder as a significant factor of recidivism.

***B. Laws justified by recidivism rates of stranger offenders while the majority of victims know their offenders***

As mentioned earlier, Megan’s Laws were implemented after a few highly publicized incidents involving children and strangers. Legislatures, in responding to this, made a rash judgment after looking at some studies and developed Megan’s Laws with the intention to protect the community from stranger dangerous offenders.<sup>131</sup> The “not in my backyard” mentality behind the legislations is flawed in aiming at stranger offenders.<sup>132</sup> The public actually needs to be more concerned about people they know,

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<sup>128</sup> *Id.* at 40 (based on psychological researches).

<sup>129</sup> *Id.* (also based on psychological studies).

<sup>130</sup> *See id.* (these studies show that if one is psychopathic, his likelihood of committing more than one violent sex offense increases).

<sup>131</sup> 137 CONG. REC. S14945 (daily ed. Oct. 22, 1991) (statement of Sen. Durenberger citing an abducted child’s family setting up a foundation to shed light on the problem of child abductions by strangers and to attempt to prevent them as a reason to implement a federal law against sex offenders). Several works have acknowledged the dependence of legislatures on the sex offenders being a strange monster. *See e.g.*: Duster, *supra* note 16 at 717 (“State legislatures’ response to public outcry resulted in laws primarily designed with stranger offenders in mind, despite evidence that individuals known by the victim were more likely to be the offenders of concern.”), Billings & Bulges, *supra* note 36 at 251 (the notation that sex offenders are strangers is “central” to the justification of Megan’s Laws), *see supra* Part II.A (explaining how the public’s panic and perceived belief of the dangerousness of sex offenders influenced legislatures – the public’s fear was based on a few crimes where a stranger sexually attacked a child).

<sup>132</sup> *See e.g.*, Duster, *supra* note 16 at 717 (reasoning that Megan’s Laws was a response to the public’s demand that their children be protected from stranger offenders despite the fact that they should be more afraid of people they know).

who are more likely to commit a sexual assault.<sup>133</sup> A study estimated that 80 percent of female minors sexually abused and 60 percent of male minors sexually abused knew the abuser as a relative or friend.<sup>134</sup> Parents need to be more worried about relatives, friends, babysitters, or people who have some authority over children than complete strangers.<sup>135</sup>

The numbers reflect that there are more adults who know their offenders than those who do not. 76 percent of female victims in a 1998 National Violence Against Women Survey were raped by a romantic partner.<sup>136</sup> Another study by the Bureau of Justice Statistics study concluded that nearly 90 percent of rape or sexual assault occurred between a victim under twelve and someone she knew as a family member, lover, or acquaintance.<sup>137</sup>

Some argue that Megan's Laws have made some people more hesitant to report a sex crime committed by someone familiar to them. If they report, the family becomes victimized all over again in a few ways. In notifying the community about a sex offender, crimes that clearly shows who the victim is, such as incest, unavoidably links the victim to the offender.<sup>138</sup> If the public knows someone is being accused of incest, they will logically infer that the victim is his or her child. The victim is being victimized all over again by losing her/his anonymity<sup>139</sup> Notification laws also may discourage the

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<sup>133</sup> See e.g., *id.* (people that the parents know include "relatives, friends, baby-sitters, and persons in positions of authority who supervise children").

<sup>134</sup> CTR SEX OFFENDER MGMT., *supra* note 77 at 1-2 (citing a study from NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH & TREATMENT CTR., RAPE IN AMERICA: A REPORT TO THE NATION 4 (1992)).

<sup>135</sup> *Id.* (a big myth of sex offender recidivism is the idea that offenders usually are strangers even though studies show otherwise).

<sup>136</sup> PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY (1998) (study included 2,669 women victims, intimate partners included current and former spouses, opposite and same sex cohabiting partners, boyfriends/girlfriends, and dates).

<sup>137</sup> Greenfeld, *supra* note 18, at 11 (based on police-recorded incident data).

<sup>138</sup> See, e.g. Billings & Bulges, *supra* note 36 at 251-252 (discussing the flaws of Megan's Laws as applied to familiar sex offenders).

<sup>139</sup> See *id.* (the authors call this "psychologically damaging").

family from reporting a loved one as an offender to avoid embarrassing both the family member and the victim.<sup>140</sup> Besides, in cases like incest, the family is likely to already know about the offender.<sup>141</sup> For example, New Jersey and Colorado actually show a lower reporting of offenses against children, especially those by family members because the families do not want to expose the child victim.<sup>142</sup> Finally, the family becomes branded by association if a family member is included on the notified registry.<sup>143</sup>

In a sense, the legislature is actually driving up the recidivism rate of familiar sex offenders because the family is too embarrassed to report them. While Megan's Laws may aid in screening which people should not be befriended or be hired as babysitters, it may have the opposite effect on situations involving incest or close family sexual assault.

***C. The great harms of the laws should be narrowly tailored***

Megan's Laws uniquely singles out sex offenders by requiring only this category of criminals to register and notify.<sup>144</sup> This special treatment carries with it special and substantial harms. The harms are too great to be imposed on those who are not likely to reoffend. The laws also create some detriments for the community. It would be wise to minimize the harms caused to both the low-risk offender and the community by restricting who should be subject to notification.

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<sup>140</sup> *Id.* (explaining why some states have seen a decrease in sex crime reporting after implementing notification laws, and calling such "disincentives" "disastrous").

<sup>141</sup> *See* Lotke, *supra* note 37, at 67 ("They do not need the sheriff to go door to door handing out their address").

<sup>142</sup> *Id.* (citing lower amount of reporting of sex offenses against juveniles, including incest).

<sup>143</sup> Billings & Bulges, *supra* note 36, at 252 (giving examples such as the difficulties of helping a child deal with ridicule from classmates and protecting family's property from being ruined).

<sup>144</sup> *See* Kunz, *supra* note 45, at 469 n.119 (noting that those convicted of felonies such as robbery and murder are not required to register).

Once the community discovers that a registered sex offender lives among them, they naturally ostracize the offender.<sup>145</sup> The stigma of being publicly registered affects the offender's ability to find employment and housing.<sup>146</sup> They become harassed by the community.<sup>147</sup> Feeling hopeless and having no one believing that s/he can change; the sex offender may as well offend again.

The notification laws have caused more violence to those who did not even commit sex crimes. Innocent families of sex offenders have been harassed and innocent persons misidentified as a registered offender have been harassed.<sup>148</sup>

Instead of empowering the community, some research show that notification laws actually create community anxiety, as seen in the rush to implement Megan's Law cross the nation.<sup>149</sup> The opposite is also true. A false sense of security causes the community to believe that they can identify and deter any sex offender.<sup>150</sup> A false sense of security is an important concern in situations where an actually dangerous offender may plead guilty for a lesser offense that does not require registration.<sup>151</sup>

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<sup>145</sup> See e.g., Duster, *supra* note 16, at 717-718 (explaining attempts communities take to ban sex offenders from certain areas, such as certain residential areas, schools, or playgrounds).

<sup>146</sup> See e.g., *id.* (some communities have laws restricting where registered sex offenders can live, and require notifying employers and prospective employers about their convictions)

<sup>147</sup> See e.g., Billings & Bulges, *supra* note 36, at 254 (a convicted offender's house was burned down in Seattle, Washington; a dog of a convicted sex offender was beheaded in an Oregon town; a family of a convicted offender suffered a hate mail campaign in Kansas).

<sup>148</sup> See e.g., *id.* (illustrating the following examples: (1) a Kansas family, not the sex offender, was the target of a hate mail attack; (2) a truck driver was severely beaten in New Jersey because his assaulters mistakenly believed that he was a sex offender).

<sup>149</sup> See e.g. *id.* (contributing some of the blame to the media, which notifies parents of registered sex offenders).

<sup>150</sup> See, e.g., *id.* at 253 (citing a few other reasons why a false sense of security is created by notification laws: (1) overbroad statutes includes too many offenders, which hides real dangerous names within long lists; (2) society is mobile, offenders often move without registering).

<sup>151</sup> See e.g., *id.* (explaining that those offenders who pled guilty may be more dangerous than others who are notified to the community).

Registration and notification laws significantly burden the community's finances and time allocation of its resources.<sup>152</sup> Implementation alone is expensive – a state spent two million dollars in 1997.<sup>153</sup> Another state spent about \$1,310 per door to door notification.<sup>154</sup> Police departments across the country suffer even further if their states do not provide extra funds or resources for community notification.<sup>155</sup> Time is also being deprived. Megan Laws take police officers from their other duties.<sup>156</sup> Agencies do not have enough time to keep registries updated.<sup>157</sup> While one may argue that simply having websites which consist of information on offenders are cheap, one must consider the underlying costs in providing accurate data for these websites. Instead of having the police out on the streets preventing crimes, the state has to spend money and time on

- (1) tracking each sexual offender;
- (2) costs associated with community education;
- (3) costs associated with notification that is fulfilled by the county officials;
- (4) Web site maintenance;
- (5) prosecution of noncompliance.<sup>158</sup>

It does not make sense to allot so much time and money towards offenders who may not even have a high recidivism rate. Instead, the laws should narrowly select those who have more certain high recidivism rates to reduce the burden on the agencies.

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<sup>152</sup> See PETER FINN, U.S. DEP'T OF JUSTICE, SEX NOTIFICATION COMMUNITY NOTIFICATION 14, (Feb. 1997), available at <http://www.ncjrs.org/pdffiles/162364.pdf> (even supporters recognize how time-consuming and burdensome the laws are).

<sup>153</sup> LE FOND, *supra* note 10, at 105, (citing NATIONAL CRIMINAL JUSTICE ASS'N, U.S. DEP'T OF JUSTICE, SEX OFFENDER COMMUNITY NOTIFICATION OCTOBER 1997 POLICY REPORT 19 (1997) which concluded that New Jersey spent that much on its 4,392 registered sex offenders as of August 1997).

<sup>154</sup> *Id.* at 104 (Mesa, Arizona police department quit this practice in 2001 and switched to mailing flyers due to the cost).

<sup>155</sup> See Finn, *supra* note 152, at 11 (out of 8 states surveyed in 1996, only two provided additional funding for notification).

<sup>156</sup> See LA FOND, *supra* note 10, at 104 (Mesa, Arizona police officers spend more time arresting sex offenders for failing to register).

<sup>157</sup> *Id.*, at 105, citing National Criminal Justice Ass'n, *supra* note 154, at 19 which showed that New Jersey prosecutor reported that only 70 out of 184 offenders were made known to a particular jurisdiction).

<sup>158</sup> *Id.* (explaining how community would be greatly burdened with the huge amount of data collection for sex offenders).

For states that require risk assessment before notifying the community, assessing dangerousness may be a feasible task. However, the assessment methods need to be more accurate. States that require a sex offender to be assessed as dangerous before notifying the community about her/him do not always appreciate the psychological difficulties involved in the determination. Mental health professionals, not having an appropriate assessing tool, tend to overestimate a sex offender's dangerousness to err on the safe side.<sup>159</sup> The community sees many more names on the public registry than necessary, which may trigger more community anxiety. The financial burden increases due to the need to maintain a large notification registry.

Recidivism studies have only focused on “general,” “rapists,” “sex assaulters,” or “child molesters.”<sup>160</sup> None specifically was done on the possible less dangerous groups who are subject to notification laws in some states, such as offenders of incident exposure. Yet, both the studied and the unstudied categories are required to comply with Megan's laws. While the harms cited above may be justified for those who have displayed high recidivism rates, the laws are overbroad in including the offenders whose rates are unknown at best. To justify the harm on the offender and community, Megan's laws need to be narrowly tailored.

## **VI. Why the justifications for Megan's Laws fail**

Given the wide prevalence of Megan's Laws across the country and the consistent drive to make them harsher, the laws have many allies.

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<sup>159</sup> Billings & Bulges, *supra* note 36, at 248 (studies reveal that there are twice as many “false positives” than “true positives”).

<sup>160</sup> See III.A.ii (discussing studies done on sex offenders who commit different kind of offenses).

Some proponents may argue that statistics show sex offenses being underreported. Because in the cases the victim knows her/his attacker, they may not report the offense.<sup>161</sup> Victims who do not know their attackers are more likely to report than victims who do know their offenders.<sup>162</sup> Three studies done by The National Crime Victimization Surveys in 1994, 1995, and 1998 revealed only 32 percent of sexual assaults against those twelve or older were reported.<sup>163</sup> Another study showed a lower figure: 12% of rapes were reported.<sup>164</sup> There is no current study on the rate of reporting for child sexual assault, but experts agree that these offenses are just as unreported.<sup>165</sup> However, experts have concluded that "from many other sources of evidence that the vast majority of sexual offenses never are reported."<sup>166</sup> Also, inferring from the National Committee for the Prevention of Child Abuse's statistics and the recognized failure to report most child sex offenses, "it is believed that as many as 4 million children are sexually abused each year, though only 405,000 were reported in 1991."<sup>167</sup>

But, giving such special treatment to sex offenders cannot be justified based on the underreporting of these offenses. For starters, crimes in general are underreported. California shows that there is a great disparity between crimes revealed in victimization

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<sup>161</sup> Center for Sex Offender Management, *Recidivism of Sex Offenders*, (May 2001) <http://www.csom.org/pubs/mythsfacts.html> (2000) ("Many women who are sexually assaulted by intimates, friends, or acquaintances do not report these crimes to police.")

<sup>162</sup> *Id.* (also more reported are crimes that involve weapon in applying force and those that results in the victim getting physically injured).

<sup>163</sup> *Id.*

<sup>164</sup> D. Kilpatrick, C. Edmunds, A. Seymour, *Rape in America: A Report to the Nation*, National Victim Center (Arlington, VA, 1992). (A 1992 study estimated that only 12% of rapes were reported.)

<sup>165</sup> Center for Sex Offender Management, *Recidivism of Sex Offenders*, (May 2001) <http://www.csom.org/pubs/mythsfacts.html> (2000)

<sup>166</sup> SANDRA BUTLER, *CONSPIRACY OF SILENCE -- THE TRAUMA OF INCEST* 5 (1985), at 3-4: 12-13.

<sup>167</sup> *Talk Back Live* (CNN television broadcast, Sept. 13, 1994) (reporting National Victims Center statistics).



surveys and official reports.<sup>168</sup> This concludes that more crimes occur than there are reported. The Department of Justice reported in 1999 that about 64 percent of all crimes were unreported.<sup>169</sup> Studies need to determine whether general crimes and sex crimes are underreported at the same rate.

In addition, the recidivism rates are drawn on reported sex offenders, who are more likely to be strangers to the victims. Hence, the studies do not reflect the recidivism of the group more likely to commit a sex offense – the offenders who are familiar to the victim/potential victim. Because this group is underreported, this opens up many possible conclusions. There may be a large number of unreported sex offenders who only offend once. On the other hand, the number of unreported offenders may be lower, but their rates may be the same or higher than the recidivism rates of reported offenders.

The panic that generated the widespread implementations of Megan’s Laws was created out of parents’ desire to protect their children.<sup>170</sup> Because the nature of these crimes was inconceivably disturbing to the public, the legislature wanted to please the public by not being “soft” on crime.<sup>171</sup> As a result, the laws included offenses that had not been shown to have high recidivism.<sup>172</sup> Supporters may argue that it is better to be

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<sup>168</sup> Criminal Justice Statistics Center, Crime in California, April 2001 Report, *available at* <http://caag.state.ca.us/cjsc/publications/misc/cinc/califcrime.pdf> (explaining how the crime data in the report may not be accurate due to victims underreporting crimes and some crimes such as attempted violent crimes and property crimes being more underreported than others).

<sup>169</sup> *Id.* (this is a figure averaged from 56 percent of all violent victimizations and 66 percent of property crimes being unreported).

<sup>170</sup> *See supra* Section II.A. (showing how public panic led to an increase in Megan’s Laws nationwide).

<sup>171</sup> *See id.*; *see also* LaFond & Winick, *supra* note 2 at 1173; 34 Seton Hall L. Rev 1173 at 1173 (“the public has demanded that government do whatever is necessary to prevent sexual recidivism. Victims’ groups mobilized public opinion and politicians rapidly responded the public has demanded that government do whatever is necessary to prevent sexual recidivism. Victims’ groups mobilized public opinion and politicians rapidly responded”)

<sup>172</sup> 1994 N.J. ALS 133(b)(2)(b)(1) (defining sexual offenders broadly by including those impairing the morals of a child); N.J. Stat. § 2C:24-4 (Lexis 2005) (broadly listing what sexual conduct qualifies as impairing the morals of a child, including any acts of sexual force and nudity); ID ST § 18-8304 (Idaho

safe than sorry when it comes to the physical and mental health of the nation's children. The potential harms to children are so substantial that very little may outweigh them.

No one would object that children's interests are unique, given that they are more vulnerable during their formative years. However, this argument is weakened in a few ways. The laws are not limited to the protection of children.<sup>173</sup> They include offenders who have either adult victims or no actual victim (incident exposure may have no actual victims in some situations). Some of those offenses have recidivism rates that are unknown. Some of those offenses, such as incident exposure, cause comparably little harm. To subject those offenders to the substantial harms of notification laws is excessive.

Even with its best intentions, the laws actually aggravate the harms to children in some ways. As discussed earlier, families are less likely to report a loved one who commits a sex offense against their children.<sup>174</sup> The laws were created to make sure the community knows who is potentially dangerous, but in the situation of incest, the family already knows.<sup>175</sup>

The laws are simply too over inclusive. While it is better to be safe than sorry, it is not better to include offenders who commit offenses of unknown recidivism rates against other adults or no one (such as in case of incident exposure). It is definitely not better to include offenses that actually deter families from reporting.

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statute citing incest and indecent exposure (the recidivism rate is unknown) as a sex crime requiring notification).

<sup>173</sup> See e.g. 42 USCS § 14071(a)(1) (requiring anyone who is convicted of a sexually violent offense to register and be subject to community notification. There is no limitation that the offense must include a minor).

<sup>174</sup> See *supra* Section III.B (discussing how families do not want to be victimized all over again by having the community associating a notified registered incest offender

<sup>175</sup> Lotke, *supra* note 37 at 67 ("They do not need the sheriff to go door to door handing out their address").

## VII. Conclusion

Sex offenders comprise people with various backgrounds, personality predispositions, living environments, who commit crimes that range from incidental exposure to rape-murder of children. This fact makes recidivism studies extremely complicated. Furthermore, the unreported offenders cannot be assessed for their risk of recidivism. Numbers are also affected by whether the study goes by arrests or convictions, or whether subsequent crimes include general crimes or not. “The result is a pool of conflicting information that may be manipulated to serve any viewpoint.”<sup>176</sup> Indeed, a proponent of stricter laws for sex offenders may rely on studies focusing on arrests (not convictions) to make the numbers seem higher. An arrest does not translate into beyond reasonable doubt belief of the commitment of an offense like a conviction does. An opponent may use a study that focuses on sex crime recidivism than general crime recidivism to make the numbers seem lower.

Granted, sex crimes are a special concern, especially those against children. This paper does not suggest that all sex offenders should not be subject to notification laws. However, it does suggest that legislatures take the time to review how accurate the studies are, and just which offenders deserve the notification laws.

Few steps need to be taken to improve Megan’s laws, which are largely based on the misinterpretation of recidivism data by the legislatures. First, legislatures should look at studies that use subsequent sex offenses to define recidivism, not studies using any subsequent crimes. This will emphasize the purpose of the laws being prevention of subsequent *sex* crimes. Next, the laws should be tailored more narrowly, based on the weight of individual characteristics and the nature of the crime. Factors that go to the

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<sup>176</sup> Kunz, *supra* note 45 at 472 (discussing different methodologies of studies on sex recidivism).

likelihood of high recidivism, such as offender's age and antisocial lifestyle should be considered. A diagnosis of a paraphilia or psychopathy should carry greater weight towards the risk of dangerousness. However, those factors, especially the dynamic ones and the mental illnesses, impose a challenge that is appropriate only for mental health professionals to evaluate. In addition, the nature of crime plays a role in both recidivism rates and the likelihood that crimes will be reported. The laws should only include crimes that have been shown to have high recidivism rates, such as child sexual abuse or rape. They also should exclude those crimes, like incest, that victims and their family members are unwilling to have the community know about.

Legislatures need to make sure that the laws are not overboard: the heavy burden put on those who otherwise have not been proven to pose a substantial risk to society cannot be justified. A narrowly tailored tier system which has mental health professionals, not law enforcement officers or judges, evaluate offenders who commit crimes that have been linked to high recidivism and place them in the appropriate tier, will better serve the public.