Creating Sex Offender Registries: The Religious Right and the Failure to Protect Society’s Vulnerable

Steven R Morrison
ARTICLES

Standing Mute at Arrest as Evidence of Guilt:
The "Right to Silence" Under Attack
*Frank R. Herrmann and Brownlow M. Speer*

Creating Sex Offender Registries: The Religious Right and the Failure to Protect Society’s Vulnerable
*Steven R. Morrison*

NOTE

Prosecuting Batterers in the Wake of *Davis* and *Hammon*
*Deirdre Ewing*
Article

Creating Sex Offender Registries: The Religious Right and the Failure to Protect Society’s Vulnerable

By Steven R. Morrison*

Introduction .................................................................................................................. 24
I. America’s Religious Foundation ........................................................................... 29
III. Americans’ View of Sex Offenders and Children .............................................. 43
IV. History of SORNA-type Statutes ...................................................................... 45
V. Violent Crimes Against Children Prior to Kanka ................................................... 48
VI. Media and Congressional Portrayal of Kanka and Wetterling ................................ 53
VII. SORNAS as Ineffective and Possibly Harmful .................................................... 58
VIII. Sex Crimes Do Not Call for SORNAS ............................................................... 62
IX. Sex Crimes vs. Domestic Violence ...................................................................... 67
X. Sex Crime Statutes and Sex Crime Case Law ....................................................... 74
Conclusion .................................................................................................................. 88

* 2007 Juris Doctor, Boston College Law School. M.A. University of Bradford, United Kingdom. B.A. St. Louis University. Mr. Morrison is a criminal defense attorney at the Boston law firm Carney & Bassil, P.C.
Introduction

What do you imagine when you hear the words “sex offender”? It is probably reasonable to assume you think of a person who is most likely a male. Beyond that what else do you picture? Is this person bathed in light, or do shadows obscure his face? Is this person clean or dirty? Clean-shaven or scruffy? Is his mouth smiling, sneering, or frowning? What do his eyes look like? Does he wear a suit, a stained hoodie, or a white t-shirt? Does he smoke?

Beyond his physical appearance, is this person you imagine a habitual criminal? Will he commit crimes again? What types of crimes? Has he abused children or adults? Has he either sought or been compelled into treatment for his problem? Does he even have a “problem,” and if so, what is its nature? Has the treatment been successful? What sorts of relationships does he have? Does he, in fact, have any relationships?

If you are like a large number of Americans, the person you see is deceitful, apparently trustworthy, but actually quite dangerous. When you think of the crimes he has committed, you are outraged and disgusted, and you demonize him. After all, he is a sex maniac and deserves the social ostracism that his pariah status imposes upon him. Sex offenders are, quite simply, not like us and so deserve their exile.

Why should sex offenders be so ostracized? Again, if you are like many Americans, perhaps you think they should be ostracized because they are incurable, resistant to treatment, and all but certain to offend again if left to themselves. In short, “nothing works” to stop these “irredeemable predators,” and so the only solution is absolute expulsion from society.

It is upon this image of sex offenders that all sex offender registry and notification acts, commonly known as “Megan’s Laws,” are based.

4 Id. at 160.
6 Id. at 506.
7 Griffin & West, supra note 3, at 143.
8 Bown, supra note 2, at 208.
10 Id.
11 Id. at 216.
12 Florida’s Megan’s Law, FLA. STAT. § 775.21(3)(a) (2007), states that [r]epeat sexual offenders, sexual offenders who use physical violence, and sexual
And it is a powerful image because there are, indeed, a number of offenders who do seem to be unrepentant, habitual predators. It is these offenders, furthermore, who make the headlines, and so they are the salient images of the archetypical sex offender presented to the public. This image must be confronted and challenged, adopted to the extent it is accurate, and rejected to the extent it is inaccurate. Far from being a perfunctory inclusion to round out this article, the prevailing image of sex offenders must lie at the heart of any article that purports to criticize sex offender laws, as I do here, because this image of sex offenders does not comport with the apparent reality of most sex offenders. As will be shown below, there is ample evidence that sex offenders may have some of the lowest rates of recidivism compared with other types of criminal offenders. Sex offenders, moreover, may respond well to treatment. Most strikingly, many of the crimes to which sex offender registry and notification acts apply do not comport with the image of the sex offender as an uncontrolled, incurable monster who will prey on children given any slight opportunity. These crimes, and some of the cases that consider them, will be discussed in detail below. Finally, sex offender laws did not emerge in the mid-1990s as a result of some high-profile child murders, such as Megan Kanka’s. These laws actually have a history spanning back most of the 20th century, and they were origi-

---

offenders who prey on children are sexual predators who present an extreme threat to the public safety. Sexual offenders are extremely likely to use physical violence and to repeat their offenses, and most sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. This makes the cost of sexual offender victimization to society at large, while immeasurable, clearly exorbitant.

Nebraska’s law, Neb. Rev. Stat. § 29-4002 (2007), states that “[t]he Legislature finds that sex offenders present a high risk to commit repeat offenses.” Ohio’s law, Ohio Rev. Code Ann. § 2950.02 (LexisNexis 2008), states that

[Sex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention, and protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest.

Tennessee’s law, Tenn. Code Ann. § 40-39-201 (LexisNexis 2007), states that

[Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are violent sexual offenders who present an extreme threat to the public safety. Sexual offenders pose a high risk of engaging in further offenses after release from incarceration or commitment, and protection of the public from these offenders is of paramount public interest.

13 Griffin & West, supra note 3, at 143.
many of the most harmful offenders, confusing the public and failing to protect children and other potential victims. This system ensnares harmful and harmless sex offenders because it is designed to ensnare all alternate sexualities. The religious basis of this system is thus directly responsible for its inability to protect potential victims.

In Part One, I discuss the religious foundations of the United States, and in Part Two, I examine the aspects of that foundation that deal with Christian views of sex. Next, in Part Three, I explore further the views that many Americans hold of sex offenders and children. Part Four discusses the twentieth century history of sex offender laws, and in Part Five, I establish the need to contextualize modern-day sex offender laws by discussing some cases prior to Kanka's that are similar to hers, but were not acted upon as was Kanka's. Part Six discusses certain news reports and the Congressional Record surrounding Megan Kanka's murder, as well as the abduction of Jacob Wetterling, Kanka's counterpart who inspired the federal sex offender law. In Part Seven, I identify the many ways that sex offender laws are ineffective and possibly harmful. In Part Eight, I examine recidivism rates and studies on sex offender treatment, and suggest that sex offenders need not be treated any differently than other criminal offenders. In Part Nine, I compare sex crimes to domestic violence. In this section, I argue that Christianity has historically supported societal structures that both repress alternate sexualities and perpetuate or, at least, fail to discourage domestic violence. The laws responding to both types of crime bear this argument out. In Part Ten, I discuss the sex crimes to which sex offender laws apply, as well as some cases that deal with these crimes. This section will demonstrate that sex offender laws work to repress alternate sexualities alongside truly dangerous offenders, regardless of their potential harm to others. In Part Eleven, I approach sex crimes and sex offenders from a rational, secular public-policy perspective with a view to creating a regime which may actually decrease the incidence of harmful sex crimes. I base this section on empirical studies regarding methods that work and suggest some alternatives to sex offender registration and notification.

Two things should be noted here. First, the term "Megan's Law" represents a statutory regime that requires some sex offenders to either register with local law enforcement agencies, or both register and undergo some form of community notification of their crime, their address, and their identity. These statutes differ fundamentally from the sex offender laws that came before them. I wish to separate these laws from their predecessors, and I do not wish to use the term "Megan's Law" because the image of Megan Kanka and her murder is bound intrinsically to the image of the sex offender that I wish to challenge. I therefore use the acronym "SORNA" (Sex Offender Registry and Notification Act) because it includes both the registration and notification functions, and it is the acronym in use in at least one state.²⁶ Second, in discussing Christianity's views of sex and

domestic violence, I acknowledge that within Christianity there resides a vast variety of beliefs that literally span the spectrum of imagination regarding these two issues. To put this assertion most into relief, Mark Toulouse has written of new evangelical congregations composed nearly entirely of gay and lesbian memberships, in which homosexuals can be affirmed in both their sexuality and their conservative faith. 27 It is therefore not my intention to condemn Christianity wholesale, and where it appears that I have painted with a broad brush, I have done so out of necessity and with the acknowledgment that one article cannot tell the whole story. Having noted that, what can be said of “America the Religious”? 

I. America’s Religious Foundation

America is one of the most religious countries in the world, and religion is one of the most important forces in American society. 28 Americans revere religion and support religious freedom, even, sometimes, when that freedom leads to abuse. 29 Andrew King posits America’s status as a secular nation, but he also notes the country’s “strong religious tradition.” 30 Michael Perry calls America’s religiosity “overwhelming.” 31

This view is not new, nor is it that of the politically-extreme right or left. Alexis DeTocqueville wrote in Democracy in America that “Christianity [in America] . . . reigns without any obstacle, by universal consent.” 32 DeTocqueville elaborated on Christianity’s power in America, noting that it had a considerable direct and indirect influence on politics. 33 He wrote that the sovereign authority in America was religious, and that in no other country did Christianity retain greater influence over people than it did in America. 34 In America, he wrote, religion “directs the manners of the community, and by regulating domestic life, it [also] regulates the State.” 35 DeTocqueville saw religion as the “foremost of the political institutions” in America, 36 and there existed an obligation “to profess an ostensibly respect

32 ALEXIS DETOCQUEVILLE, 1 DEMOCRACY IN AMERICA 328 (Henry Reeve trans., D. Appleton & Co. 1904).
33 Id. at 326.
34 Id.
35 Id. at 327.
36 Id. at 329.
for Christian morality and equity."  

Nearly a century later, Eleanor Roosevelt wrote of American democracy’s “roots in religious belief,” and her view that the nation’s future "lay in basing democracy on the Christian way of life." 39 In 1997, Pope John Paul II discussed the “religious and moral convictions upon which the American experiment was founded." 40 He noted that “the vast majority of Americans, regardless of their religious persuasion, are convinced that religious conviction and religiously informed moral argument have a vital role in public life." 41 Senator Joe Lieberman said that absent the biblical traditions of the Ten Commandments and “the compassion and love and inspiration of Jesus of Nazareth … it could never have been written, and wouldn’t have been written, in our Declaration of Independence, ‘We hold these truths to be self-evident, that all men are created equal.’" 42

It should not, therefore, be controversial to posit that religion is the matrix of American culture, that “it structures reality,” and that it thus “encompasses the deepest level of what it means to be human.” 43 “[R]eligion has had a profound impact on law at the level of culture” 44 because Americans fuse the concepts of religion/morality and law. On the one hand, Americans have a “faith-like attitude towards law and legal institutions.” 45 On the other, their mother tongue is that of religion, which they use to communicate their deepest beliefs about justice. 46 Viewed another way, Christianity has, “with its sacred institutions, often legitimized and solidified the State and other parts of the social fabric . . . . It has secured the social order.” 47

One should not ascribe excessive influence to any one force in society. Indeed, commentators vary in their opinions regarding religion’s influence over society and law. On one extreme lies Ursula King, who, as noted above, believes that religion structures all reality. 48 Mary Daly ascribes slightly less power to religion, writing that religion is a “superstruc-

---

37 Id. at 328.
38 Id. at 329.
40 Perry, supra note 31, at 219.
41 Id.
42 Id. at 218-19.
44 Andrew J. King, supra note 30, at 7.
45 Id. at 16.
ture” and a “powerful” source of female oppression, but also just one of many factors in society working against women. I explore Daly’s views on oppression further in later sections. The middle position is claimed by Mary Jo Neitz and Marion Goldman, who believe that “[a]ttempts to define morality are ongoing processes negotiated between religious groups and the dominant society.” Turning to the other end of the spectrum is James Spickard, who writes that “religions are influenced by . . . society, both in their ideas and in their organizations.” J.D. Hunter points out that evangelicalism will continue to make concessions to the wider culture; others believe that churches that fail to adapt to the culture in which they find themselves will eventually wither and die. Douglas Mohrman denies Christianity ascribing any real influence on society, noting that the Bible is “not the leading criterion for moral decisions in American life,” and that it “forms the basis of moral choices for only 13% of American adults.” He writes that “[a]n image of an un-Christ-like twentieth and twenty-first century Church emerges.”

This range of views suggests a controversy in evaluating the extent of religion’s influence on society. This controversy fades a bit, however, when one reads on. Mary Daly wrote that “the Church serves a patriarchal society [which is] at the root of its moral attitude toward women.” Neitz and Goldman note that in American society, religions continue to articulate moral codes that define what is deviant. They go on to say that “[i]n the dominant culture religion continues to articulate norms regarding sexuality.” Religion, for them, is still central to American society. Furthermore, studies show that judges’ religious orientations influence their decision-making. Finally, although white “evangelicals represent only 25% of the U.S. population, their influence on social policy regarding sexuality education, sexual orientation, teen pregnancy, reproduction, and family planning . . . has been significant.”

50 Id. at 60.
51 Id. at 69.
52 Mary Jo Neitz & Marion S. Goldman, Introduction to 5 RELIGION AND THE SOCIAL ORDER 1 (Mary Jo Neitz & Marion S. Goldman eds., 1995).
53 Spickard, supra note 29, at 258.
56 Id. at 19-20.
57 DALY, supra note 49, at 63.
58 Neitz & Goldman, Introduction, supra note 52, at 1.
59 Id. at 6.
61 Stephen M. Feldman, supra note 23, at 44.
62 Susan D. Rose, Christian Fundamentalism: Patriarchy, Sexuality, and Human Rights, in
These observations suggest two things. First, Christianity's influence over American society is strong, whether the currents of influence flow one way or two. Second, Christianity's influence over societal norms is felt most strongly in the realm of sexuality, specifically in regards to establishing a dominant or normative sexuality, as well as alternative, deviant sexualities that exist outside of the norm. It can scarcely be denied that biblical sexual prohibitions have had a major effect on Western law.\textsuperscript{63} It is largely by biblical precepts that society today condemns adultery, male homosexuality, bestiality, and incest.\textsuperscript{64} Moreover, many criminal laws have at least partly religious origins.\textsuperscript{65} No area of criminal law feels Christianity's influence more than that which regulates sexual activity. One need only appreciate the language of morality inherent in sex crime statutes. Words and phrases such as "indecent," "lewd," "obscene," "immoral," and "the infamous crime against nature" indicate a normative morality and Christian history. A review of these statutes follows below. First, however, I discuss Christianity's relationship to sexuality. What will emerge is a view that Christianity has shaped the criminal law and SORNAs to give normative status to sexualities that are heterosexual, marriage-based, procreative, and monogamous.\textsuperscript{66} In contrast, Christianity will be seen to have shaped criminal law and SORNAs to repress or do away with alternate sexualities—sexualities that do not fit the Christian norm.\textsuperscript{67} In doing so, they create laws that fail to protect potential victims.

II. Christianity and Sex

America may be the world's most sex-obsessed country.\textsuperscript{68} If religion and sex are intimately related, and Christianity is powerfully embedded in American politics, then it makes sense that sexuality is bound up with politics and law.\textsuperscript{69} And why not? Human sexuality concerns encounters

\textsuperscript{1} Ilona Rashkow, Sexuality in the Hebrew Bible: Freud's Lens, in 1 PSYCHOLOGY AND THE BIBLE 33, 35 (J. Harold Ellens & Wayne G. Rollins eds., Greenwood Publishing Group 2004).
\textsuperscript{2} Id. at 38.
\textsuperscript{3} Edward L. Rubin, Sex, Politics. and Morality, 47 WM. & MARY L. REV. 1, 41 (2005).
\textsuperscript{5} Kenneth L. Karst, Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion 58 (Yale Univ. Press 1993); Rashkow, supra note 63, at 35; Boris Vejdovsky, "Remember Me": The Wonders of an Invisible World—Sex, Patriarchy, and Paranoia in Early America, in THE PURITAN ORIGINS OF AMERICAN SEX 56, 68 (Tracy Fessenden et al. eds., Routledge 2001).
\textsuperscript{6} Clausen, supra note 20, at xiii.
\textsuperscript{7} Robert Grant, The Politics of Sex, in THE POLITICS OF SEX AND OTHER ESSAYS 88, 88 (St. Martin's Press 2000).
between persons, which concern morals, and morals concern justice. 70 Indeed, sexuality and politics cannot be easily disengaged from one another. 71 Put another way, society imposes its moral judgments about sexual conduct through the law. 72 Today, if not throughout American Christian history, sex and reproduction are the central concerns of religion. 73 This is in part because “[s]exuality is often taken to mark the moral health of the nation . . . A loss of ‘sexual values’ is, thus, tied to the loss of the American nation itself.” 74 The movement for homosexual civil rights, for example, was seen by some religious Americans as demonstrative of the nation’s severe moral decay. 75

Religion in America holds as many viewpoints on sex as one can imagine. Some evangelical churches support gay marriage, 76 others are conservative about issues such as sexuality, abortion, and gender roles, but also criticize the Christian Right for its narrow focus on traditional family values. 77 Some Protestant churches affirm homosexuality, and others adamantly reject it. 78 This divide among Protestant churches applies to sexuality in general: conservative groups such as the Moral Majority and the Christian Right seek to define universal sexual standards based on biblical teachings while mainline Protestants tend to “emphasize individual rights and sexual freedom.” 79 This latter group bases its views of sexuality less on biblical teachings and more on a “subjective interpretation of scripture informed by individual conscience.” 80 In the Catholic Church, there exists the additional muddying-effect of the laity’s beliefs and practices about sex diverging from those of official Church teaching. 81 Church teaching sees any type of nonmarital, nonreproductive, or nonheterosexual sexual practice

70 Id.
75 Toulouse, supra note 27, at 53.
76 Shibley, supra note 54, at 68.
77 Id. at 70.
79 Id. at 245.
80 Id.
as "objectively or intrinsically evil." However, the laity seems to be moving away from this position.

Although Christianity is not a monolith and there are signs that American society is moving away from its more conservative precepts, 22% of Americans are reported to hold absolutist moral beliefs. Certainly 22% of Americans together can form a very influential political lobby, as the Religious Right has done since the 1980s. Moreover, all of American Christianity is founded on a theology of sexuality marked by intolerance and exclusion. At its base is the notion that sex and eroticism are inherent evils. Sex, therefore, had to be allowed in society only to the extent it was necessary. This meant that any sex other than heterosexual, vaginal, monogamous, and marriage-based sex was a breach of a basic divine commandment. Sexual desire, moreover, had to be "tamed... by severe external discipline." This theology has given rise to notions of acceptable and unacceptable sexual behavior, established in law. Given Christianity's fear of sex, it makes sense that the law has traditionally prohibited or repressed sex, often through criminal sanction, without actually trying to understand its place in relationships.

A construct thus arises in which Christianity creates a dominant societal sexuality, which is seen as morally correct, and a deviant sexuality, which is seen as sinful. Religion in America has always influenced the moral codes that define what is deviant, and such definition and the control of deviance may be central to every religion's overall survival. The demonization of sex crimes and sex offenders emerged in part as a result of this definition. Whatever the field of study, however, the Christian sexual in-group is that of the nuclear, heterosexual family. "Lust is forbidden," homosexuality is "immoral and unnatural"; even heterosexual sex is suspect when divorced from its procreative purpose. Public nudity is im-

82 Id.
83 Id. at 205-06.
84 Mohrman, supra note 55, at 7-9.
85 Id. at 8.
86 See Wolfson, supra note 22, at 1050.
87 Backer, supra note 72, at 756.
88 KARST, supra note 67, at 38.
91 Neitz & Goldman, supra note 52 at 1.
92 Neitz & Goldman, supra note 60, at 270.
93 See Griffin & West, supra note 3, at 155 (saying religion demonizes sex crimes and offenders by inclusive labeling and calling sex crimes taboo).
94 Wolfson, supra note 22, at 1044.
95 Id.
moral, and even private nudity is suspect.\textsuperscript{96} The measure of disgust accorded a subject, therefore, is a function of the distance between the dominant form of sexuality and the subject’s sexual conduct or preference.\textsuperscript{97} Put another way, the more one resembles the dominant norm, the more legitimacy and acceptance the person is granted. With greater distance from the norm comes less legitimacy and greater ineligibility for inclusion.\textsuperscript{98} The result today is that the sex that society condemns is the “product of . . . cultural and religious constructs”; society in turn “permits or circumscribes sex and depictions of sex depending on” religious undercurrents.\textsuperscript{99} Christianity has, more specifically, always reacted harshly to sex offenders because of its proscription of the joys of the flesh and focus on female virginity.\textsuperscript{100}

Christianity’s fear and rejection of deviant sexuality began with early Judeo-Christian prohibitions of alternate sexualities such as sodomy and homosexuality.\textsuperscript{101} Later, in the fifth century, St. Augustine articulated a policy on sex which has dominated Christian thought through today, proposing that only marriage-based, procreative sex was acceptable.\textsuperscript{102} This focus on reproduction was stressed by Old Testament cultures, Greek stoicism, New Testament cultures, the patristic writers of the Church in the second through fifth centuries, the Church in the Middle Ages, St. Thomas Aquinas, and Pope Leo XIII in the late nineteenth century.\textsuperscript{103}

The American colonies were also characterized by laws against alternate sexualities.\textsuperscript{104} Puritan sexuality was “idealized as a domestic or familial and reproductive behavior.”\textsuperscript{105} To enforce this ideal, Puritans regulated “sexual practices in ways that conformed to their own [] perceptions of the social and moral order.”\textsuperscript{106} In fact, “the regulation of sexual expression was an integral, even expressive, part of the Puritan commonwealth; sex explicitly became the carrier of social meaning.”\textsuperscript{107} The Puritans viewed their marital, reproductive, familial, and patriarchal order as representative of the “covenantal bonds of marital love between God and His people.”\textsuperscript{108} This control of society and selves was in stark contrast to the

\textsuperscript{96} Id. at 1044-45.
\textsuperscript{97} Backer, supra note 72, at 769.
\textsuperscript{98} Rana Kapur & Tayyab Mahmud, Re-Orienting Law and Sexuality, 48 CLEV. ST. L. REV. 1, 3-4 (2000).
\textsuperscript{99} Wolfson, supra note 22, at 1039-40, 1042.
\textsuperscript{100} Quinn, supra note 9, at 216.
\textsuperscript{102} Id. at 171.
\textsuperscript{103} Cavendish, supra note 81, at 211-14.
\textsuperscript{104} Northrup, supra note 101, at 172-73.
\textsuperscript{105} Fessenden, supra note 21, at 4.
\textsuperscript{106} Id.
\textsuperscript{108} Id.
out-group—the native Americans and immigrant groups with their "seem-
ing sexual omniverousness."\textsuperscript{109} The Puritans are in large part responsible for ascribing an economic and symbolic function to sex that survives to-
day.\textsuperscript{110} Because "unregulated sex . . . signaled communal decline,"\textsuperscript{111} religion and law had to take control of alternate sexualities in order to preserve society, which was symbolized by the dominant sexuality of marriage, reproduction, and patriarchy. To do so, the Puritans engaged in regulation that reminds one of SORNAs today.

They first preached against sexual transgressions,\textsuperscript{112} invoking the same notion of the transgressor that SORNAs call upon today—that of the uncontrolled offender, the person who engaged in the "carnal excess" that threatened the well-being of the community.\textsuperscript{113} The Puritans also notified the community of transgressions, just as SORNAs often require today. In the colonies, sex and accounts of crimes were presented to the public in broadsides, which heightened interest in the proscribed activities.\textsuperscript{114} Public repudiation of these crimes was often "less about individual blame than about ritualizing communal cohesion."\textsuperscript{115} Similarly, SORNAs ostensibly do not exist to punish or blame the offender, but to prepare "the community" for the offender's entry into its midst. This approach reflects Puritan attempts to ritualize communal cohesion by setting up "the community" as "we" law-abiding citizens who must prepare for an entry—or invasion—of "those" sex offenders. The Puritans also had a "papent for staging and recording" public confessions of sex,\textsuperscript{116} and they stressed "being watched" and maintaining close surveillance to ensure moral integrity.\textsuperscript{117} Close surve-

109 Id.
110 Id.
111 Id.
112 Id. at 23–24
113 Id. at 26.
114 Id. at 24.
115 Id.
116 Fessenden, supra note 21, at 9.
117 Ingebretsen, supra note 107, at 22 (emphasis omitted).
118 Northcraft, supra note 89, at 491.
119 Id. at 492.
120 Id. at 492–93.
121 Id. at 493.
great liberalization of sex, which brought with it a “disappearance of [a] social consensus about sex [and the] simultaneous erosion of hegemonic control by white male elites in civil society.”

This loss of control was made even more severe by the civil rights movements of the 1960s and 1970s. The sexual revolution of the 1960s challenged society to accept sexual activity beyond the restrictions of its marriage-based, procreative form. This sexual liberation “tapped into deep-seated anxieties.” It indicated to the old guard a loss of self-control; and because women were seen as wild and uncivilized symbols of nature, not culture, the advancements of sexual liberation and women’s liberation were conflated, and together they indicated a frightening threat to the nation. Women and sex both had to be controlled. By the 1970s, however, sexual freedom had broadened considerably, and the second wave of feminism was well-entrenched. In general, this wave held negative views of religion, family, and traditional sexual morality. Even the Catholic Church was apparently supportive, at least in the 1960s, of gender equality and the eradication of old gender prejudices. This was especially important because the age-old role for women in Christianity had been one of modesty, silence, submission to men, and salvation through childbirth. Women were also “responsible for humanity’s fall into sin.” The post-World War II era, suggested most saliently in the 60s and 70s, represented the “Beginning of the End of Patriarchy.”

However, by the mid-1970s, it was clear to Mary Daly, who had been optimistic about the Church’s response in the 60s, that the Church was and would remain inherently sexist, and that the “primary function of Christianity . . . [had] been to legitimate sexism.” As homosexuality became more visible, churches responded—usually with greater openness—but greater visibility led to deep divides between liberal and conservative religious groups. Furthermore, since the 1970s, gender, alternate sexualitie,
and the sexuality of women have been central topics of debate in organized religions. It is no surprise, then, that these concepts were marshaled by conservatives when they initiated a backlash in the late 1970s.

If you were a religious conservative in the late 1970s, you may have believed that you were living through a major social crisis. Your universal norms of family and sexuality had been challenged openly in society, and the Vietnam War had damaged, perhaps beyond repair, the idea that your government was good and strong because it was hierarchal and patriarchal. Not only did these things seem to be happening, but they seemed to be willfully directed at you by external forces. You, perhaps, felt that you and your way of life were under attack by a tide of secularism. You saw the civil rights movement, antir war protests, women’s liberation, the Pill, individual ability to decide one’s sexuality and familial status, abortion, homosexuality, female labor-force participation, premarital sex, and declines in fertility. You recognized that these forces combined to erode the cultural foundations of obligation, fidelity, and self-sacrifice, and also pushed people “toward an adult-centered, individualistic world where personal fulfillment, sexual freedom, and gender equality were more valued” than children and family. You felt out of control, and so, to regain control and self-determination, you fought back. The best way to do so was to fight sex, because sex was the ultimate “enemy to be fought, subdued, repressed, [and] controlled.”

Since at least the 1980s, the conservative social agenda has legitimized the fear of sex. This fear has found a home in a number of groups. In 1977, James Dobson founded Focus on the Family to respond to this perceived breakdown in culture arising from the antiwar movement, increased divorce rates, and the rise of alternate sexualities. In 1979, the Moral Majority introduced the concept of Fundamentalist Christian political activism, with abortion and “family values” as central issues. The Christian Coalition has found much traction in lobbying government for its positions on “sexual issues, from women’s liberation to family values.” One commentator wrote that the Christian Coalition has had tremendous power in politics based on the following values: male dominance over women;

136 Id.
139 Id. at 29.
140 Robertson, supra note 24, at 239–40.
141 Dana Neașu, Tempest in a Teacup or the Mystique of Sexual Legal Discourse, 38 GONZ. L. REV. 601, 644 (2002/03).
142 W. BRADFORD WILCOX, supra note 138, at 22.
144 Id. at 261–62; Northrup, supra note 101, at 182.
control of all to ensure morality; expansion of the death penalty, possibly to include the "crime" of homosexuality; celebration of white male masculinity; sanctioning of violence against women to ensure they remain in their "proper" place at home; and women's issues regarding the female role in sexual reproduction. Although this pronouncement may be somewhat exaggerated, it is not inaccurate to say that the Christian Right has become part of the political mainstream. It has both influenced the tenor and topics of political speech and inspired specific laws and policies. The Federalist Society, which pushes for religious-rights legislation, challenges to the separation of church and state, and other far right religious action, formed in 1982; its establishment suggests an inclination to legal action by the Christian Right. The work of the Alliance Defense Fund, which "pools millions of dollars to sponsor challenges to the principle of separation of church and state and furthers the legal goals of extreme right religious interests," further indicates the Christian Right's influence, in addition to its organization and effectiveness. The Promise Keepers, founded in the 1990s as a nationwide men's group, focuses on reddedicating men to their families, but also on reasserting men's lost roles as the God-granted, patriarchal heads of their families.

Calls for the revival of civil society and the renewal of family values well-represent the fact that religious political action has shifted from a left to a right orientation. One commentator notes that the central concern for civil society revivalists is the perceived weakening of child-rearing families. The family is seen as the basic "seedbed of virtue," with a governmental preference for a two-parent, marriage-based arrangement. Sexuality itself is at play as well, with revivalists believing that American society, to its detriment, places "less value on restraint in matters of pleasure and sexuality." Civil society revivalists believe that religious institutions should play an important part in this revival. Another commentator writes that this revival is actually about exclusion and a regressive agenda, about rescuing a disappearing way of life. She notes that revivalists

148 Id. at 46.
149 Derogatis, supra note 78, at 251.
150 Sands, supra note 66, at 5.
152 Id. at 310.
153 See id. at 350.
154 Id. at 340.
155 Id. at 305.
identify "divorce and single parenting as the chief agents of family degeneration." For revivalists, marriage is the cure, and underlying this view is the norm of the heterosexual nuclear family.

Because revivalists conflate their own views of morality with the meaning of civil society, they conclude that "dramatic advances by disenfranchised groups have contributed to the moral degeneration of families and other aspects of civic life." In other words, revivalists "tend to balance advances made by women and minorities against the social harms caused by civic disengagement and moral disorder." Jean Bethke Elshtain, a revivalist herself, responds to these commentators, arguing that "[t]here is [ ] something distorted within a culture that makes men and women (especially women) who want to stay home with their infants feel guilty because they are not living out some ideological ideal." She also notes "social scientific evidence concerning the effects on children of growing up in single-parent households." She also cites the dilemma today in which "young men [ ] are told increasingly that they are not needed, not wanted and may as well pack their bags and—quite literally—leave home." Elshtain argues well for revivalists, but continues to imply her preference for the "men, women, and children" model of families, thus excluding from this new civil society homosexuals, women who had the courage to divorce an abusive husband, and others who do not fit the norm of the traditional nuclear family.

Closely related to the civil society movement are calls for the renewal of family values. Sounding as appealing as civil society's revival, the family values movement is actually concerned with reversing the reforms of the civil rights movements. It is an attempt to "reassert[] Christianity as the defining discourse of the nation," and so "family values" means the regulation of homosexuality and the reinstatement of the traditional family structure. Family values talk invokes religion without admitting to its religious basis, and it is tantamount to talk of sexual regulation. Beyond its apparent lack of controversy, family values is actually characterized by a focus on sexuality and reproduction, the gender of one's partner, abortion, sexual issues within marriage, youth abstinence, and the

157 Id. at 575.
158 Id.
159 Id. at 559.
160 Id. at 569.
161 Elshtain, supra note 39, at 600.
162 Id. at 594–95.
163 Id. at 590.
164 Id. at 590. See also id. at 590–92.
165 Jakobsen, supra note 74, at 115–16.
166 Id. at 116.
167 Id. at 115.
168 Id. at 116.
169 Id. at 105–06.
“aesthetic style” of people’s sexual acts. Family values canonizes the traditional, father-headed, heterosexual nuclear family and exacts “vengeance” on feminism and alternate sexualities. Finally, the focus of family values on privacy of the family from government interference means that much, if not most, child sexual abuse may go undetected.

A number of specific incidents since the 1970s have indicated the rise and influence of the Christian Right on issues of sexuality and gender. Most reflective of the rise of the Christian Right was the action taken on the Equal Rights Amendment. It was proposed in 1972, and by 1975, thirty-four of the thirty-eight required states had ratified it. Opposition mounted, however, and by 1982, the ERA had failed. Around the same time, in 1979, President Jimmy Carter established the federal Office for Domestic Violence, which had “a budget to disseminate information and give out grants to programs for victims” of domestic violence. Under President Ronald Reagan in 1981, funding was cut, and the Office was dissolved. The Reagan administration seemed characteristic of the norm of male dominance in things sexual, gendered, and violent. Reagan’s Secretary of the Navy, James Webb, noted that “[m]an is more naturally violent than woman . . . [m]an must be more aggressive in order to perpetuate the human race. Women don’t rape men, and it has nothing to do, obviously, with socially induced differences.” The Religious Right made inroads in the judiciary as well. In 1986, Chief Justice Warren Burger, in his concurrence in Bowers v. Hardwick, wrote with approval that “[c]ondemnation of sodomy is firmly rooted in Judeo-Christian moral and ethical standards.” Furthermore, in the 1980s, criminal sentences that entailed shaming and notification to the public (“publicity sentences”) came back into vogue. Such sentences hearken back to the colonial era, when they were used, in light of the community’s religious beliefs, to combat moral,

170 Sands, supra note 66, at 7.
171 Id. at 13.
172 The Equal Rights Amendment was repeatedly proposed as a constitutional amendment from 1923 to the latest serious push for its passage in 1970. It was meant to ensure that “equality of rights shall not be denied or abridged by the United States or by any State on account of sex.” Barbara A. Brown, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 886 (1971).
174 Id.
176 Id.
177 Karst, supra note 67, at 119, 265-66 n.58.
religious, and legal transgressions. They also anticipate SORNAS, which locate shaming and community notification at their core.

Election year politics have also felt the influence of the Religious Right. Family values, and its focus on gender roles, marriage, family, and sexuality, was prominently featured in the 1988 and 1992 presidential campaigns. Bill Clinton’s campaign promise to reform the military’s anti-gay policies created opposition and led to the still-anti-gay “Don’t Ask, Don’t Tell” compromise. The 1994 Republican victory in Congress saw the Contract with America and Contract with the American Family, in which family values was an implicit focus. These Contracts sought to allow the Right to pursue its agenda of gender and sexual regulation, without naming it as such. Two years later, the Defense of Marriage Act (DOMA) became law, which openly sought to “legislate an exclusively heterosexual definition of marriage.” In that same year came welfare reform; conservative religious groups lobbied for it, including a “provision to promote teen sexual abstinence programs in public schools” in their petitions. The importance of moral values, centered on sexuality (gay marriage, abortion, sexual education, birth control, sexual intercourse, reproduction), has not waned. “Exit polls conducted after the 2004 election revealed that [this constellation of issues] was the single most important factor that determined people’s votes.”

The Religious Right, having risen in the early 1980s, had come to have great political influence by the 1990s. It has succeeded in moving political conversations to the right and winning a number of specific legislative battles. It has done so largely in the field of sex and gender. In 1994, in the midst of the Religious Right’s Decade of Evangelism, Megan Kanka was raped and murdered by a recidivist sex offender. Her murder gave rise—quickly and with little debate—to SORNAS all across the nation and to a federal requirement that states pass SORNAS if they had not already done so. The image that society has of sex offenders and children, of Kanka and her family, and of SORNAS themselves, strongly suggest that SORNAS—much like the ERA, DOMA, the Contracts with America and the American Family, and Don’t Ask, Don’t Tell—emerged as a result of the rise of the Religious Right. SORNAS, therefore, satisfy the Right’s need to reestablish the dominant sexual norm and to repress all alternate sexualities. Because alternate sexualities are not a threat to society per se, SORNAS do not address this threat, nor do they make society safer.

---

180 Massaro, supra note 179, at 1912-13, 1915; Huschka, supra note 179, at 806.
181 KARST, supra note 67, at 1.
182 Valdes, supra note 66, at 227.
183 Jakobsen, supra note 74, at 104-05.
184 Id. at 118.
185 Sands, supra note 66, at 3.
186 Rose, supra note 62, at 12.
187 Rubin, supra note 65, at 2-3.
III. Americans’ View of Sex Offenders and Children

Historically, society has “reacted to the threat of sexual offense with panic and fear.” Americans view sex crimes against children as the most heinous, and offenders are depicted as “outcasts, perverts, or animals, not worthy of the basic human rights our Constitution guarantees.” Americans perceive children as quite the opposite. Maria Grahn-Farley has noted that children are mythologized as immature, and in need of special protection because they are disabled; they are also “straightforward . . . not yet corrupted,” “undamaged,” “naïve, and pure.” She argues, however, that this image, while often true, is just as often not true. Children are, rather, made vulnerable by adults, who fail to protect them. Having been made vulnerable, they are seen as naturally vulnerable. Despite this, adults continue to fail to protect children. Grahn-Farley goes on to argue that there are many mature children, just as there are many immature adults, and “age is not a ‗natural‘ concept.” The image of the innocent child is, instead, “always in the adult’s possession” and is constructed to serve the adult master and the adult master’s law. The child is created as an innocent angel to serve the Religious Right’s law, and the sex offender is created as an object of total fear to serve the same law. This is not to say that adult sexual contact with children is acceptable; it is not. It is to say, however, that the myth of the vulnerable child—and not the child’s actual vulnerability to adult sexual predators—is used as the image of the victim of all sex offenses, no matter the offense. Given this fear of sexual predators, we as a society fail to distinguish between types of sex offenders, and thus, condemn all of them “ wholesale.” Many states fail to distinguish molestation from consensual statutory rape. Where “consent” is merely the predator’s excuse and empty defense, the failure to distinguish is understandable. Where, however, the offender is an 18-year-old, his “victim” is his 17-year-old girlfriend, and they engage in consensual sexual conduct, the failure to distinguish various sex crimes amounts to the failure to distinguish between crimes mala in se and crimes mala prohibite, as with most

---

188 Kunz, supra note 14, at 473.
189 Id. at 454.
191 Id. at 888–89.
192 Id. at 892–93.
193 Id. at 883.
194 Id. at 883, 889.
195 Id. at 894.
196 Id. at 882.
197 Id. at 895.
199 Kunz, supra note 14, at 479.
200 Crimes mala in se are crimes that are said to be intrinsically bad, “bad in themselves,” translated from the Latin, or morally wrong. Such crimes include murder, assault, and theft. Crimes mala
statutory rape statutes. This seems an important distinction to make when one stands to be labeled “sex offender.”

We also attempt to banish and exile sex offenders. This “get tough” attitude toward sex offenders has also led to calls for their chemical castration. Where the law does not adequately deal with these offenders, private citizens often do in the forms of vigilantism, arson, assault, termination of employment, harassment, and ostracism. A number of beliefs regarding sex offenders serve to create their image.

The strongest argument for SORNAs, and, therefore, informing society’s views of sex offenders, is the allegedly high recidivism rate among sex offenders. Closey related to this are the beliefs that sex offenders are incurable, resistant to treatment, and will always lie to stay out of treatment. There is also a belief that offenders may reoffend years after their release from prison. One Congressman has even noted a “plague of child abduction.”

The image of the sexual deviant is thus drawn as an uncontrolled and uncontrollable deceiver. He lives in the shadows, and one never knows where or when he will strike next. He has a coterie of co-offenders, who, together, plague this nation, inflicting high rates of injury and trauma on innocent children. He and all sex offenders are truly sexually violent predators. This is, no doubt, a true description of a small number of offenders, but does not represent a great many people who find themselves labeled “sex offenders,” whether they deserve the label or not. The sex offender is also, however, the Native American and the immigrant that the Puritans see. He is the homosexual, or the liberated woman engaging in premarital sex. He is the antiwar protestor challenging the government patriarchy. He is the outsider, whose very existence threatens to destroy our decent, moral society.

This view is acceptable to the extent that society’s view of sex of-

---

201 Duster, supra note 198, at 724, 774–75.
203 Id. at 751–54.
204 Kunz, supra note 14, at 471.
205 Id. at 475.
206 Quinn, supra note 9, at 222.
207 Griffin & West, supra note 3, at 160.
210 Quinn, supra note 9, at 216.
fenders is correct. The adult who repeatedly preys on children without remorse, who manipulates them into engaging in sexual activity, then calls it "consensual," deserves to be saddled with this view. The reality of most of the sex offender population, however, is quite different from society's prevailing stereotype.\textsuperscript{211} We will see below that sex offenders most likely have the lowest rates of recidivism among all types of criminal offenders. We will also see that sex offenders do respond to treatment, and so, are often "curable." There is also no evidence to suggest that offenders will lie to stay out of treatment. Moreover, sex offenders are probably not sleeper-offenders, as most who recidivate will do so within three years of release from incarceration. Finally, there is no "plague" of child abduction. Instead, there is an "exponential mythical view" that blows the extent of child sexual abuse out of proportion.\textsuperscript{212}

This view of sex offenders, and its truth for a few offenders, does, however, serve the American Christian's need to regard alternate sexualities as deviant and evil. Sex crimes law prohibits a few truly dangerous and incurable offenders from acting, but under the same "sex offense" category, it also outlaws homosexuality, public displays of nudity, obscenity (including pornography), and risqué sexual proposals. Given society's pervasive religious foundation, it is not very hard to convince the public that all of these forms of sexuality are as bad under sex crimes law as was Kanka's rape and murder. Instead of targeting the truly dangerous individuals, sex crimes, and those who commit them, range from the truly dangerous to the utterly harmless. Because of the broad scope, we end up either engendering useless fear or decreasing the possible use and usefulness of SORNAs, or both.

The sex crimes that attach to SORNAs have been on the books for decades, if not centuries, and reflect this country's Christian preference for heterosexual, marriage-based, reproductive sex. A brief history of SORNA-type statutes in the twentieth century will make this orientation more apparent.

IV. History of SORNA-type Statutes

Deborah Denno provides a good synopsis of 20th century sex laws that presaged SORNAs. She writes that in the late-19th and mid-20th centuries, the sex laws that came into being responded to the increasing importance placed on children and families.\textsuperscript{213} These laws concentrated on "potentially destructive trends," including "unrestrained sexuality or sexual excess," "threats to masculinity" based on "women's increasing control and influence," the "blurring of traditional gender roles," and "homosexuality or other indicia of nonprocreative or 'degenerative' sex."\textsuperscript{214} In the 1920s, the

\textsuperscript{211} Griffin & West, supra note 3, at 143.
\textsuperscript{212} Bown, supra note 2, at 200 (discussing James R. Kincaid, Erotic Innocence: The Culture of Child Molesting (Duke Univ. Press 1999)).
\textsuperscript{213} Denno, supra note 16, at 1319.
\textsuperscript{214} Id.
idea of sexual psychopathy emerged out of—among other things—"the erosion of the Victorian ideal of female purity and accompanying changes in gender relations," as well as the weakening of the notion that sexuality was acceptable only in marriage and the family. 213 The birth control movement of that decade hastened the movement toward nonprocreative and premarital sex. 216 In the 1930s, the Great Depression threatened the male authoritative status, and as a result, there emerged two theories of the male sex-deviant: one was the "effeminate homosexual," and the other was the "hypermasculine male—the violent sexual predator." 217 Both came to be viewed as "the Depression era male—an unemployed, nonprocreative, outcast devoid of familial bonds or social controls, defying socially cohesive values." 218

At the same time, writes Robert Jacobson, "Gay men lived under the constant threat of arrest." 219 The nation’s first sex offender registration statute was enacted in California in 1947, and "was created in large part . . . to harass gay men." 220 This statute was designed to "provide local police authorities with the knowledge of the whereabouts of habitual sex offenders and sex deviates." 221 This registry included violent sex offenses, but it also imposed registration requirements for consensual sodomy and misdemeanor indecent exposure. 222 Two years later, the law expanded to include misdemeanor lewd vagrancy, "the solicitation statute that applied to the bulk of gay-related arrests," 223 California’s law spread throughout America and numerous sex offender registration codes "explicitly required registration for [ ] minor gay-related convictions." 224 These statutes "were used primarily to harass ‘undesirables’ through selective enforcement." 225

As these laws were emerging and spreading, the media, citizens’ groups, and law enforcement agencies were the main influence from 1937 through 1957 for the enactment of sexual psychopath laws. 226 They were responding to a "sex crime panic." 227 This was also a time of many "purported threats to marriage, children, and the family": "inroads on masculinity" caused in part by "women’s wartime dominance of work roles," "homosexuals who were among the main anticommunist targets," and "reports of sexual excess, nonprocreative behavior, and degeneracy, exemplified by

213 Id. at 1322–24.
216 Id. at 1328–29.
217 Id. at 1336-38, 1339.
218 Id.
219 Jacobson, supra note 17, at 2433.
220 Id. at 2431.
221 Id. at 2442 (quoting E. A. Riddle, Note, Compulsory Registration: A Vehicle of Mercy Discarded, 3 CAL. W. L. REV. 193, 199 (1967)).
222 Id. at 2442.
223 Id.
224 Id. at 2440.
225 Id. at 2441.
226 Demko, supra note 16, at 1320.
227 Id.
Alfred Kinsey’s studies.” 228 “With the onset of the Cold War came further efforts to promote family and cultural conformity.” 229 Nonconformists, including those engaging in alternate sexualities, were seen as a threat to national stability and security, and anti-homosexual bias was particularly strong. 230 These early sex offender laws attacked alternate sexualities while utterly ignoring the real victimization of vulnerable groups such as children and women.

During the Cold War, in the 1950s and 1960s, California-style registration statutes were believed to be an effective tool to control homosexual behavior, which was important because homosexuals were said to be “prone to commit violent crimes and crimes against children.” 231 Added to the registration were incidents of notification; “newspapers would commonly publish the names of persons arrested . . . intending to ostracize the closeted men and women.” 232 One reporter spoke “ominously” in support of such acts, saying that “the public should know who these people are.” 233 These new legal iterations now purported to protect children, but in fact made homosexuals the scapegoats for crimes perpetrated on children by actual predators.

By the 1980s, these registration systems had fallen into disuse, and much of the information on them was inaccurate. 244 With a few high-profile murders in the 1990s, Kanka’s being perhaps the most influential, “this indifference changed quickly.” 235 SORNA were passed overnight, but they were no different than the laws that preceded them. As such, they protected children as much (or as little) as the laws that preceded them. They require registration even for nonviolent, consensual behavior. They are also often applied as a result of anti-gay, police entrapment and decoy techniques. Police use them to “selectively prosecute gay men while ignoring comparable heterosexual behavior, often using tactics no different from those in earlier decades.” 236 By and large, SORNA, like their predecessors, target a few truly violent and dangerous criminals and a large number of harmless people who merely engage in alternate sexualities. SORNA are, in part, the latest tool the criminal justice system has to enforce the dominant, Christian sexual norm. If crimes like Kanka’s murder, or sex crimes in general, in the 1990s were greater in number or severity than prior incidents, one could argue that SORNA responded to this shift. However,

228 ld. at 1321.
229 ld. at 1369.
230 ld. at 1369–70.
231 Jacobson, supra note 17, at 2442 (quoting Jon J. Gallo et al., The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County, 13 UCLA L. Rev. 647, 738 (1966)).
232 ld. at 2438–39.
233 ld. at 2439 (quoting reporter William J. Tucker, Jr.).
234 ld. at 2444.
235 ld. at 2445.
236 ld. at 2449–50.
between 1993 and 1998, the number of arrests for sex crimes decreased 16%,
and between 1987 and 2007, rates of sexual offenses have remained stable. 
Sadly, Kanka’s rape and murder was not more severe than sex crimes involving children in years prior. The laws that purport to protect children have failed in this and will, if not restructured, continue to fail.

V. Violent Crimes Against Children Prior to Kanka

Most, if not all, of the articles that discuss Megan Kanka’s rape and murder as the event giving rise to SORNAs, are fundamentally ahistoric. This is fine because their focus is largely on the constitutionality or effectiveness of SORNAs, not on the laws’ historical context. Nonetheless, these articles imply that the crime against Kanka was a novel one that shocked the nation to action because the violence visited upon this innocent girl was so severe and never before seen. According to these articles, SORNAs were similarly novel answers to this new form of predation. Kanka’s death led to SORNAs—so goes the claim—but this causal relationship is utterly without context.

To understand the deeper societal conditions that led to the emergence of SORNAs, we need to contextualize them. That is, we need to show that they bear a relationship to the society in which they emerged, and not just to Kanka, who was, if anything, merely one of the many sparks that could ignite SORNAs into existence. It was America’s peculiar form of conservative religiosity that existed in the mid-1990s and which gave rise to SORNAs. This religiosity sought to protect families and their privacy, rather than to protect children. Kanka’s death was her death, but it was also an attack on families and family values. Kanka’s death was not a unique mid-1990s event, as the following cases reveal.

You should be warned that the descriptions of the crimes that follow are particularly disturbing. It was a pleasure neither to research nor to write this section, and I would have preferred to omit some or all of the graphic detail. I feel, however, that its inclusion is necessary in order to show that the crimes against Megan Kanka, although rightfully termed heinous, atrocious, or disgusting, are not unique, and that similarly disturbing crimes against children came before her victimization. If you are satisfied that this is the case, you may wish to move on to the next section.

In 1942, the Missouri Supreme Court reviewed the conviction of James Butts.239

[Butts] was charged with having murdered Mary Margaret

238 Quinn, supra note 9, at 221.
239 State v. Butts, 159 S.W.2d 790 (Mo. 1942).
Maenhoudt, eight years old. The evidence revealed that the little girl had been brutally assaulted and then beaten to death. Her nude body was found in a weed patch where the crime had been committed. The double crime of rape and murder perpetrated upon this little helpless child was most dastardly and atrocious and naturally aroused public indignation.\textsuperscript{240}

The victim had been criminally assaulted, and her skull had been crushed.\textsuperscript{241}

In 1969, George Baxter’s conviction for the 1964 rape and murder of an eleven-year-old child in New York was affirmed.\textsuperscript{242} It was clear that Baxter suffered from some form of severe mental illness, possibly “Schizophrenia, Paranoid Type.”\textsuperscript{243} Although there is no evidence that Baxter was a repeat offender, the trial judge at sentencing stated, “I feel that for matters which obviously you can’t control, it’s for society’s best interests to have you removed from it.”\textsuperscript{244}

In 1978, Gerald McCauley’s conviction in New Jersey for two separate incidents was affirmed.\textsuperscript{245} The first conviction was for assault with intent to rape a fourteen-year-old child and for impairing the morals of a child.\textsuperscript{246} McCauley attacked the girl in order to have sexual intercourse with her. “In doing so he struck her, pulled down her pants and put his hand on her vagina.”\textsuperscript{247} McCauley’s second group of convictions was for the murder of a nine-year-old girl.\textsuperscript{248} The record showed that McCauley sexually molested the girl inside of his apartment, “then took a piece of string from a kitchen drawer, wrapped it around her neck, pulled it tight with all his might, and tied it in several knots, eventually causing her death.”\textsuperscript{249} McCauley was originally sentenced as a habitual sex offender and was civilly committed.\textsuperscript{250}

In the same year, the Florida Supreme Court affirmed the conviction of John Wallace LeDuc for the rape and murder of a nine-year-old

\textsuperscript{240} Id. at 790-91.
\textsuperscript{241} Id. at 791.
\textsuperscript{243} Id. at 458 (Munder, J., and Martuscello, J., dissenting).
\textsuperscript{244} Id. at 460-61.
\textsuperscript{246} Id. at 1118. The Superior Court of New Jersey merged these convictions as having arose out of the same incident; the conviction and sentence for impairing the morals of a minor were vacated. Id. at 1120.
\textsuperscript{247} Id. at 1119.
\textsuperscript{248} Id. at 1118. The Superior Court of New Jersey merged the carnal abuse and assault with intent to rape convictions as having arisen out of the same incident; the conviction and sentence for assault with intent to rape were vacated. Id. at 1120.
\textsuperscript{249} Id.
\textsuperscript{250} Id. at 1118, 1120. After the Superior Court of New Jersey vacated three of McCauley’s convictions and sentences, and affirmed his other counts, McCauley ended up with concurrent sentences for civil commitment and for life imprisonment for murder. Id. at 1120.
girl.\textsuperscript{251} The court noted ""[t]he record [was] replete with evidence suggesting the utter brutality and depravity of the murder, thus amply supporting the trial judge’s finding of an ‘especially heinous (or) atrocious’ crime.\textsuperscript{252}"" LeDuc’s attorney argued that LeDuc was a "‘mentally disordered sex offender.’\textsuperscript{253}

In 1979, defendant Presnell’s case was considered before the Georgia Supreme Court.\textsuperscript{254} His convictions, which concerned two girls, were affirmed for the kidnapping and murder of the younger girl, and kidnapping with bodily injury and rape of the older girl.\textsuperscript{255} His conviction for rape of the older girl was affirmed with direction that he be sentenced for the crime of statutory rape.\textsuperscript{256}

In 1980, Michael Darrell Davis’s conviction of first degree murder of a child under fourteen-years-old—committed while he raped her—was affirmed.\textsuperscript{257} At the time of the murder, Davis was a sixteen-year-old high school student; the victim was a thirteen-year-old, junior high school cheerleader.\textsuperscript{258} Davis "‘choked, raped, and strangled [her] in the bushes of a Long Beach park when she repulsed his advances.’\textsuperscript{259}

In 1985, Theodore Francis Frank’s conviction in California for the horrendous rape, murder, kidnapping, and molestation of a two-and-one-half-year-old girl was affirmed.\textsuperscript{260} An autopsy of the victim revealed that she

\begin{itemize}
  \item had sustained a number of injuries prior to her death. As a result of pressure from a pliers-like instrument, her nipples had been pinched and partially pulled away from her body. She had suffered three blows to her head, knife-like scratches on her chest and abdomen, and ligature marks on her wrist and ankles. The entrance to her vagina was torn and the hymen broken, possibly by insertion of a penis; her anus exhibited evidence of trauma indicating that a foreign object had been inserted there as well. Sperm were discovered in her vaginal area. Her blood had a .03 percent blood alcohol level, which could result if a child of her size had ingested two cans of beer shortly before death. The actual cause of death was strangulation.\textsuperscript{261}
\end{itemize}

Frank was a known recidivist child molester who had been released.

\textsuperscript{251} LeDuc v. State, 365 So. 2d 149, 150 (Fla. 1978) (per curiam).
\textsuperscript{252} Id. at 151 n.6 (quoting Fla. Stat. Ann. § 921.141(5)(b) (LexisNexis 2008)).
\textsuperscript{253} Id. at 150.
\textsuperscript{254} Presnell v. State, 252 S.E.2d 625 (Ga. 1979).
\textsuperscript{255} Id. at 626.
\textsuperscript{256} Id. at 626, 627. His convictions as to the younger girl were affirmed. Id. at 627.
\textsuperscript{257} People v. Davis, 167 Cal. Rptr. 783, 785, 788 (Cal. Ct. App. 1980).
\textsuperscript{258} Id. at 788 (Fleming, J., concurring).
\textsuperscript{259} Id.
\textsuperscript{260} People v. Frank, 700 P.2d 415, 416, 418 (Cal. 1985).
\textsuperscript{261} Id. at 417.
from the mentally disordered sex offender program at a state hospital less than two months before the victim’s disappearance.\textsuperscript{262} The trial court admitted evidence of two other acts of child molestation, both of which were similar in nature, if not severity, to his latest crime.\textsuperscript{263}

In the same year, Judith Ann Neelley’s conviction in Alabama for the murder of a thirteen-year-old girl—committed while kidnapping the child—was affirmed.\textsuperscript{264} In 1982, the victim was taken from the Riverbend Mall in Rome, Georgia. After being brutalized and sexually abused, she was taken to the rim of the Little River Canyon in DeKalb County, Alabama . . . . There, using a needle and syringe, [Neelley] injected the child with six shots of caustic drain cleaner. When these injections failed to kill the teenager, [ ] Neelley shot her in the back with a pistol and pushed her body into the canyon.\textsuperscript{265}

Neelley had, in fact, “lured” the victim, but claimed that her husband “had pointed out [the victim] as ‘the one he wanted.’”\textsuperscript{266} Her defense was that her husband directed her actions,\textsuperscript{267} and that she had been physically beaten and sexually abused by her husband, who had “stole[n] her virginity and later her mind.”\textsuperscript{268} Neelley also claimed that “she was ‘brain-washed’, and reduced to a ‘vegetable’ and an instrument and extension of her husband.”\textsuperscript{269}

In 1988, Mark Anthony Pruitt’s convictions in Georgia of murder, rape, kidnapping with bodily injury, aggravated sodomy, and aggravated assault of a five-year-old girl was affirmed, except for the rape charge.\textsuperscript{270} Pruitt had taken the little girl into the woods, then later exited the woods alone.\textsuperscript{271} When a search party located the girl in the woods, her leg was broken, and she was bleeding out of both ears, her mouth and her nose.\textsuperscript{272} An autopsy revealed that “[h]er anus and vagina had been penetrated by something consistent in size and shape with a [penis].”\textsuperscript{273} Evidence showed she had been struck in the face with a belt buckle; her skull had been fractured in two places.\textsuperscript{274}

\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{265} Id. at 670–71.
\textsuperscript{266} Id. at 676.
\textsuperscript{267} Id.
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Pruitt v. State, 373 S.E.2d 192, 194–95, 200 (Ga. 1988). The trial court merged the rape and aggravated assault convictions during the original proceedings. Id. at 196 n.2.
\textsuperscript{271} Id. at 195.
\textsuperscript{272} Id.
\textsuperscript{273} Id.
\textsuperscript{274} Id.
In 1989, Terry Clark's conviction in New Mexico for the kidnapping and murder of a nine-year-old girl was affirmed. In 1986, Clark "forcibly abducted" the victim, "drove her to his brother's ranch," and there "raped her, shot her three times in the head, and then buried her nude body in a shallow grave." The record showed "Clark had previously been convicted of the kidnapping and criminal sexual penetration of a six-year-old girl..." Pending appeal of that conviction, he was out on bond when he committed the crime against the nine-year-old.

In 1991, Troy Adam Ashmus' conviction in California for murder, rape, sodomy, and "lewd or lascivious" conduct was affirmed. The victim was a seven-year-old girl. Ashmus met her at a park, and took her to a secluded location, where

[H]e raped her and perhaps also penetrated her with some foreign object, making a very large tear through the length of her vagina to within a quarter of an inch of her rectum. He sodomized her, inflicting two small wounds in the anal or rectal tissue. He possibly committed oral copulation by inserting his penis into her mouth. He evidently ejaculated over her body. He stuffed into her mouth and throat material including two plastic bags, a piece of cellophane about six inches long and two to three inches wide, and a pair of red shorts she had been wearing; the bags were wedged side-by-side in separate tight wads deep in her throat with the cellophane in between; the shorts were tightly compressed within her mouth; the bags obstructed her throat and caused her to die by asphyxiation. Covering her naked body with a carpet remnant he had used for a sleeping mat during his stay at Stoner's Pit, he fled the scene.

Ashmus had two prior convictions, including one for assault with intent to commit rape.

Although it would be easier not to mention the lurid details of the cases above, it is, nonetheless, necessary to do so because they show that the criminal events surrounding Megan Kanka's murder were, tragically, not novel. In the annals of violent sexual crimes perpetrated on children, Kanka's case is just one in a long string of crimes running deep into American history. The emergence of SORNAS, therefore, ought not be tied to Kanka's murder; rather, they should be placed in their unique historical context, along with DOMA, the ERA, the Contracts with America and the
American Family, and the rise of the Religious Right. Viewed in this way, we can then turn to Kanka’s murder and the way it was framed by the media and Congress to suggest that SORNAs fit neatly into the Religious Right’s view of family and the Right’s perceived ideal American social and moral structure. This context tells why SORNAs primarily repress alternate sexualities and only secondarily, if at all, protect children and other vulnerable groups. The same discussion regarding Jacob Wetterling’s abduction is also useful to this end.

VI. Media and Congressional Portrayal of Kanka and Wetterling

When the story of Kanka’s murder broke, the media immediately painted a picture of two worlds colliding that should never have met. These were worlds of dark and of light. From the dark came Jesse Timmendequas, and from the light came Megan Kanka. What Jesse was not, and what Megan was, accorded nicely with conservative Christianity’s focus on the nuclear family, middle-class suburban life, and sexual norms. Jesse came into this world and killed Megan, who was then, as her mother said, to rise and smile down upon all.283 Megan was therefore the angel to Timmendequas’ devil.

Jesse Timmendequas was born to a father who allegedly “raped him, beat him and killed animals in front of him to seal his silence.”284 It is also possible that his father “tortured” family pets and even “once raped a neighbor girl in front of” Jesse and his brother.285 According to a court document, the father “had a history of incarceration, drank excessively, engaged in criminal activity, and demonstrated a total disregard for the family, their needs and even their lives.”286 Jesse’s alcoholic mother287 “had 10 children by seven men and ‘continually demonstrated that her lovers were more important than her children.’”288 Jesse’s life was, therefore, marked by a father who was inattentive at times and horribly abusive at others and by a mother whose sexual urges were unrestrained—she fit the mold of the stereotypical welfare-queen. At the time of Jesse’s trial, his parents had probably divorced.289 Jesse lacked any sort of community; he was the exemplar of what the erosion of conservative Christian family values had wrought on America. He came from this world to destroy a family that em-

283 Moon, Smile, Don’t Cry Scores Bid Farewell to Slain 7-Year-Old, PHILADELPHIA DAILY NEWS, Aug. 5, 1994, at 5.
284 Father of Megan’s Killer Says Abuse Allegations are Lies, DALLAS MORNING NEWS, June 14, 1997, at 12A.
285 Id.
286 Emilie Lounsberry, Jury Finds Timmendequas Guilty/Kanka Panel Took 4 Hours; Will Decide Life or Death, PHILADELPHIA INQUIRER, May 31, 1997, at A01.
287 Id.; Dale Russakoff & Elaine Harden, Megan’s Killer Gets Death; Execution Set Aug. 1 for Repeat Sex Offender, TIMES PICAYUNE (New Orleans), June 21, 1997, at A19.
288 Lounsberry, supra note 286 at A01.
289 See Father of Megan’s Killer Says Abuse Allegations are Lies, supra note 284 (discussing, among other things, that Jesse’s father had remarried and had not heard from Jesse’s mother in years).
bodied those very values. Said Megan’s father at sentencing, “Sometimes we don’t know if we will withstand the pain as a family or if we will be a family in the future.”

Megan Kanka represented the world of light, of family values. She had two loving, married parents. At her funeral there were “[h]undreds of grieving relatives, neighbors and friends.” The church was “filled to overflowing.” Megan was “unsuspecting” and “trusting,” a “bubbly girl who loved bicycling and swimming, the color pink and mint-chocolate chip ice cream,” “flowers and playing hopscotch.”

Jesse and Megan were two people who were never supposed to meet. But Jesse sneaked into Megan’s life. Megan lived in a middle-class neighborhood. It was “a quiet neighborhood of neat homes in New Jersey, the kind of place in which neighbors often know one another because of the web of children’s friendships.” “But [ ] they didn’t know [ ] the story of the three men who lived . . . across the street” from the Kankas.

Jesse and two other sex offenders were roommates in “a kind of pedophilia fraternity.” Reporters’ observations of Jesse during trial reflected his image as an enigmatic interloper, existing in a world of light in which he does not belong and feeding off of it. He was described as “an enigma” and “a passive, poorly educated, self-absorbed man with . . . little ability to express emotion.” “His own face [was] always expressionless.” Jesse displayed one or more of the seven deadly sins: “He has, some of the witnesses have said, an unexpected streak of vanity or pride.” He was also a deceiver:

The prosecutors have worked hard to remind the jurors that the man in the open-collar shirt at the defense table looked different back when he lived on Barbara Lee Drive, across from the Kankas. “He was dirty looking,” said the first patrol officer to answer the call of a missing child there. “He had long—

292 Mann: Smile, Don’t Cry Scores Bid Farewell to Slain 7-Year-Old, supra note 283.
293 Id.
295 Megan’s Killer Asks Jury for Mercy, supra note 290.
297 Id.
298 Anna Quindlen, Editorial, Our Children Spark a Passion to Protect, SUN-SENTINEL (Florida), Aug. 14, 1994, at 7G.
299 Id.
300 Id.
301 Glaberson, supra note 291.
302 Id.
303 Id.
At trial, he was “clean shaven and with a short haircut.” Jesse also lacked a community. In court, Jesse had no familial support. Jesse’s “mother [had] not been seen at the courthouse. His father and siblings [had] not been mentioned.” Jesse had “been described as anxious and alone.” One reporter remarked, “No family members or friends have appeared in court on his behalf . . . even on his birthday . . . .” The press was casting him as a loner, and prosecutors were “persistently trying to cast him as malevolent.”

The evil that Jesse represented fed upon the light, upon Megan: he lured her into his house with the promise of showing her his new puppy, where he raped and killed the girl whom her father called “Mom’s little homemaker.”

Even the physical worlds that Jesse and Megan were born into played parts in this story’s construction. Jesse’s origins had all the markings of a dark place, kept at bay from the light. Jesse may never have lived in this location, but his father lived in an “outpost . . . near the Arizona state line, off rocky desert trails that can shred tires.” His father lived in a trailer camp at the end of “15 miles of bad road.” The father “live[d] with his wife, Marie, their 22-year-old son, 11 dogs, chickens, a turkey and a tarantula, all housed in a confusing collection of rundown trailers.” Theirs was one of several encampments “occupied by white separatists with guns who live without running water right next to a Marine bombing range.”

From the chaotic, violent world that this scene depicts, Jesse came into Megan’s Hamilton Township. Hamilton is in many ways a town typifying the American ideal of homeownership, family, and community; the kind of place many Americans aspire to call home. Compared to CNNMoney.com’s top ten places to live for 2006, Hamilton compares nicely. It nearly equals the average annual family income, its average

304 Id.
306 Glaberson, supra note 291; Lounsberry, supra note 286.
307 Id.
308 Lounsberry, supra note 286.
309 Id.
310 Glaberson, supra note 291.
311 Megan’s Slayer Found Guilty, supra note 296.
312 Megan’s Killer Asks Jury for Mercy, supra note 290.
313 Father of Megan’s Killer Says Abuse Allegations are Lies, supra note 284.
314 Id.
315 Id.
316 Id.
home price is slightly below the average for the top ten, but the home price
gain over 2004-2005 exceeded the top ten average by approximately 3%;\textsuperscript{318} crime in Hamilton is quite a bit lower than in all but one of the top ten cit-
ties;\textsuperscript{319} commute time is virtually equal to the average of the top ten cities;\textsuperscript{320} the percent of married people equals the average;\textsuperscript{321} the amount spent on
vacations is roughly equal;\textsuperscript{322} and slightly fewer people in Hamilton are di-
vorced than the average.\textsuperscript{323} Add to these statistics the fact that riding bicy-
cles, playing hopscotch, and eating mint-chocolate chip ice cream were
popular pastimes in a community oriented towards raising children, know-
ing one’s neighbors, and training young girls to be homemakers. The result
is the view of America that informs conservative-Christian calls for family
values.

Two worlds collided. Jesse’s was the world of isolation, broken
homes, promiscuity, and crime. Megan’s was the world of community, hetero-
sexual marriages, two-parent households, fidelity, and safe streets.
When you hear the words “sex offender,” you probably think of Jesse as the
prosecution portrayed him: unshaven, greasy-looking, isolated, and furtive
When you think of the victims of sex offenders, you probably think of
Megan: white, innocent, happy, the product of a stable environment. What
if Jesse’s victim had been a girl living in his father’s white separatist en-
campment, or a sexually active African-American girl living in a city hous-
project? What if Jesse had been Megan’s trusted uncle or older brother?
If these facts were at play, it would have been more difficult to create a
story of good versus evil, of moral degradation versus conservative family
values and sexual morality. Megan’s death would not have had the traction
that resulted. Society’s immediate reaction was a product of who Megan
and her family were, and the town in which she lived. The Congressional
Record speaks to the importance of place in creating an image, as entries
into the Record concerning Jacob Wetterling attest.

Jacob Wetterling was abducted in 1989 from his “small town of St.
Joseph, Minnesota.”\textsuperscript{324} Senator Rudy Boschwitz noted that “[p]eople al-
ways believe that tragedies like this happen in the big city—not in St. Jo-
seph, a town of 3,000. If it can happen in St. Joseph, it can happen any-

\textsuperscript{318} See CNNMoney.com, \textit{MONEY} Magazine: Best Places to Live 2006,
http://cgi.money.cnn.com/tools/bestplaces/compare_tool.jsp?id=CS3429310,&view=b (last visited Mar-
ch 27, 2008).

\textsuperscript{319} See CNNMoney.com, \textit{MONEY} Magazine: Best Places to Live 2006,
http://cgi.money.cnn.com/tools/bestplaces/compare_tool.jsp?id=CS3429310,&view=w (last visited Mar-
ch 27, 2008).

\textsuperscript{320} Id.

\textsuperscript{321} Id.

\textsuperscript{322} Id.

\textsuperscript{323} Id.

The implication here, of course, is that crimes against children are common in the "big city," but not in the small towns, where family values and morality still exist. Senator David Durenberger was similarly shocked at Jacob's abduction, stating that

[O]ne of the crime’s most disturbing aspects is where this crime took place: in St. Joseph, ... a small town of 3,000 located in the heart of Minnesota .... It is a town guided by family values, where people work together, go to church together, and care for each other. It is a town that symbolizes the best virtues of America’s small towns. Crime, as we know it here in Washington, D.C., is nonexistent.326

Because family values and religion are parts of the community of St. Joseph, Jacob's abduction was surprising and appalling. People care for one another where family values and religion reign; in places where these are apparently absent, like the big city, isolation and predation control. If Jacob, or Megan Kanka, had lived in a white separatist camp or the inner city, their victimization would have simply meant less. That they came from bastions of religion and family values made their deaths particularly poignant.

The Wetterling Foundation further suggested this preference for middle-class, family-oriented America. In 1996, it asked Minnesotans to "leave their front porch lights glowing for National Missing Children’s Day."327 A seemingly innocuous symbol, this call actually targeted a specific set of Americans. When you hear the words "front porch lights glowing," what do you imagine? Do you imagine a trailer park along the Arizona state line or in the depressed outskirts of a major city? Do you imagine a housing project in that city? Do you imagine an apartment where an immigrant family resides or a condominium where a divorced man lives alone? Or do you imagine a brightly-colored house on a tree-lined suburban street, children running carefree here and there, and a husband and wife visiting happily inside? When the Wetterling Foundation asked Americans to leave their front porch lights glowing—not just on, but "glowing." The Foundation was asking the family values-centered, religion-oriented, white middle-America to take notice that its children and, more importantly, its way of life were threatened by those who would prey on the young in their neighborhoods. House Representative Sheila Jackson-Lee stated that "[t]he problem of child abduction and exploitation transcends politics, race and socioeconomic status."328 Of the seven children she cited by name as examples, all but one were white.329 Contrary to Representative Jackson-

325 Id.
329 Id.
Lee's pronouncement, child victimization is only viewed as a "problem" when it strikes at communities that represent a conservative, religious outlook on family, gender, and sexuality. Indeed, another House Representative located the threat in harmless alternate sexualities: citing President Clinton's support for SORNAs, House Representative Bob Dornan said that “[Clinton supports] Megan's law, 'to not have sexual predators, way more than 50 percent of them homosexual, being turned loose in a neighborhood.'”

As it was in the early twentieth century, alternate sexualities continue to be blamed for child victimization. This focus on such sexualities leaves our children unprotected. The danger is not homosexuals or cross-dressers who sneak into suburban neighborhoods at night. The danger is parents, relatives, friends, and neighbors in all communities, from inner city housing projects to poor rural towns, and from bastions of liberalism to suburban enclaves of conservative Christianity. Actual sex offenders, who prey on children and vulnerable adults, may look "normal," go to church, or wear a badge. Because our sex crime laws emerged out of a conservative Christian perspective, we define sex offenders as "others": homosexual, cross-dressing, strange. Sex offenders are actually both strange and familiar, and they are part of our communities of light. Sex crimes laws fail to see this fact and, as a result, children are left largely unprotected.

Whether SORNAs emerged as a result of the rise of the Religious Right or spontaneously from Kanka's murder matters little if these laws serve to make society safer. The possibility that SORNAs emerged because Kanka lived in a community focused on children, family values, and religion may also be irrelevant if they respond to threats to people in a measured, effective way. Because SORNAs are a product of the Religious Right and were created as a result of a perceived threat to the conservative Christian way of life, SORNAs fail to make society safer and may actually lead to increased crime. By focusing on repressing alternate sexualities, SORNAs, at best, leave children as unprotected as they would be in the absence of SORNAs. Possibly, SORNAs actually endanger children. This, more than anything, is the tragedy of these laws. The following sections begin to treat SORNAs specifically, revealing that the laws we hastily passed to protect children and other vulnerable people do not actually do so. Instead, they reinforce conservative Christian norms of sexuality, however harmless the prohibited sexualities are.

VII. SORNAs as Ineffective and Possibly Harmful

When assessing the effectiveness of SORNAs, it is important to keep in mind that no study currently exists to determine whether SORNAs are effective in reducing the incidence of sexual victimization in society.331

331 If such a study does exist, it has not come to the attention of this author, despite affirmative
Also, there are few studies indicating that SORNAS are ineffective or harmful to public safety. Therefore, when we speak of the laws’ effect on public safety, we approach the subject from psychological, historical, and sociological points of view—among others—rather than statistics. In these discussions, common sense always plays a major role, whether it leads to founded theories or spurious notions. With that caveat, it is clear that the theories arrayed in favor of SORNAS being ineffective and possibly harmful substantially outweigh those theories supporting the effectiveness of SORNAS.

Most important for the purposes of this article is the argument that SORNAS are overbroad; they snare everyone who has been convicted of a sex crime. In her dissent in Smith v. Doe, Justice Ginsburg suggested as much, writing that Alaska’s SORNA “applies to all convicted sex offenders, without regard to their future dangerousness.” Justice Ginsburg went on to describe the defendant:

He successfully completed a treatment program, and gained early release on supervised probation in part because of his compliance with the program’s requirements and his apparent low risk of re-offense. He subsequently remarried, established a business, and was reunited with his family. He was also granted custody of a minor daughter, based on a court’s determination that he had been successfully rehabilitated. The court’s determination rested in part on psychiatric evaluations concluding that Doe had “a very low risk of re-offending” and is “not a pedophile.”

Doe had pleaded nolo contendere to the charge of sexual abuse of his daughter; the abuse occurred while she was between the ages of nine and eleven years old. To be clear, Doe’s actions were rightfully criminal, morally reprehensible, and unjustifiable. They also almost certainly harmed his daughter to some degree, probably profoundly. Despite this, it is doubtful that Doe’s registration pursuant to SORNA will increase public safety. The person most likely to be victimized by Doe in the future—his daughter—is aware of his past offenses without the aid of SORNA. The victimi-

searches for it.


335 Id. at 117 (internal citations omitted).

336 Id. at 91 (majority opinion).
zation of close, trusting people, as exemplified in Doe, is the norm, and is not thwarted by SORNA s. SORNA s, moreover, snare a large number of other “offenders” who engage in acts that are not nearly as harmful as Doe’s likely was or are not harmful at all. These offenders will be discussed in detail in Part Ten below.

With a potentially large number of sex offenders—the dangerous and the harmless alike—forced to register and subject to community notification under SORNA s, the public is unable to discern which registrants pose a threat and which do not. The public may be pacified and feel safe, but in fact its sense of security is false—this is in part because SORNA s are overinclusive, but also because they are underinclusive. Many sex offenders have not yet been caught or convicted, and so are not subject to registration. Other offenders who are subject to registration simply do not register. Still others opt for plea bargains that allow them to escape registration requirements. Others go underground and do not register (or seek treatment) because of the stigma society bestows upon sex offenders. This stigmatization raises a host of concerns beyond the decreased likelihood that offenders will register or seek treatment.

Primarily, stigmatization of offenders leads to threats, harassment, violence, and discrimination against sex offenders. This creates a group of “itinerant sex offenders” who will not register, nor develop ties to a community, nor maintain relationships, housing, or employment—all of which are important in reducing the possibility of recidivism. Stigmatization may also increase the level of stress felt by sex offenders, which the National Center for Missing and Exploited Children and the Center for Sex Offender Management claim increases the likelihood of recidivism. Labeling sex offenders as incurable monsters may also prevent them from taking responsibility for their actions and, thus, seeking treatment. Where offenders are prevented from making a clean start upon release from incarceration, they may conform to society’s image of them as “brutal, incurable monsters.” SORNA s also lack mechanisms that permit sex offenders to return to conventional society. Society’s degradation and stigmatization of deviants has always included institutions and rituals that have allowed for

---

338 Freeman-Longo, supra note 237.
339 Eyssen, supra note 332, at 114.
340 Powers, supra note 337, at 1066.
341 Id. at 1068.
342 See Boyers, supra note 202, at 751–54.
343 Powers, supra note 337, at 1078; Dr. Beth Huebner et al., Institute of Public Policy, Sex Offender Recidivism in Missouri and Community Correction Options 2 (2006), available at http://www.nicic.org/Library/022469.
344 Eyssen, supra note 332, at 132; Bynum, supra note 15.
345 Powers, supra note 337, at 1069.
346 Kunz, supra note 14, at 477.
the reintegration into society of such individuals. Because SORNA
defenders lack this vital component, offenders remain ostracized from society. Since they have no apparent route to reintegration, they may increasingly reject the legitimacy of laws forbidding harmful sex crimes, and thus be more likely to recidivate.

Another reason SORNA are ineffective is that most victims of sex crimes know their victimizers. This fact leaves children particularly vulnerable to further victimization. SORNA's noble, stated goal of keeping kids safe from adult sexual contact is utterly unmet. Almost "[50%] of all sex offenses are committed by acquaintances or family members," and only 10% of child molesters victimize children they do not know. Unless people are blindly unaware of an acquaintance's arrest, trial, and conviction of a sex offense, the great majority of repeat sex offenses will not be prevented by SORNA. Unless guardians take steps to protect their children from adult sexual contact, such contact will continue, unhindered by SORNA.

Furthermore, SORNA contain misinformation: for example, "as much as one-third of the information available through California's [SORNA] website may be inaccurate." This confuses and misleads the public, and leads, through vigilante justice, to deadly revenge exacted on innocent persons. Even if vigilante justice were performed only on convicted sex offenders, which it is not, the system would remain unstable. Shame sanctions such as SORNA are "at base, a form of officially sponsored lynch justice, meted out by courts that have given up on the obligation of the state both to define what is criminal and to administer criminal sanctions itself." SORNA represent the government's abdication of its "obligation to maintain a monopoly of the means of power [and its]... duty to be the imposer[] of measured punishment," to "a fickle and uncontrolled general populace." SORNA also represent the conservative and Religious Right's interests in smaller government. It is no longer the government that watches and manages sex offenders; that task has been
farmed out to states and communities.

Despite these arguments to the contrary, let us assume for a moment that SORNAs are actually effective in reducing the incidence of harmful sex crimes. There is little question that SORNAs are a unique answer to criminal activity and that they are invasive in ways that are often more burdensome than traditional incarceration in both nature and severity. The question becomes, then, whether sex crimes call for such a unique and severe response. The answer is no.

VIII. Sex Crimes Do Not Call for SORNAs

Society justifies SORNAs based on its perception of sex offenders, described above. Key features of this perception are: sex offenders have a high rate of recidivism; they do not respond to treatment and are therefore " incurable"; they may reoffend often years after release from incarceration; there is a plague of child sexual abuse; all sex offenders are violent predators. With the exception of a very few number of offenders, these perceptions are entirely baseless. SORNAs, therefore, are not justified, at least on the bases heretofore advanced.

This is not to say that the criminal justice system should not respond to harmful sex crimes. Society has a great interest in ensuring that adults are protected from unwanted sexual contact and that children are protected from all adult sexual contact. The resulting harm is often serious and lasting, and we must do what we can to reduce victimization as much as possible. SORNAs, however, are not a good answer. There are better answers, which are discussed in Part XI. Here, I challenge the bases upon which SORNAs rest.

The strongest argument for SORNAs is sex offenders’ high rate of recidivism. 358 Society’s assumption of a high rate, however, is “questionable.” 359 In fact, a number of studies show that sex offenders have lower recidivism rates than burglars or robbers, 360 that rapists have lower recidivism rates than those who have committed other violent crimes, 361 and that “dangerous sex offenders [have] a lower rate of recidivism than the average criminal.” 362 Virtually all studies support these findings, as will be seen.

When examining recidivism rates for sex offenders, it must be kept in mind that due to the nature of many of the crimes involved, many of-
fenses will go undetected. Often the victim will refuse to report, either because he or she is ashamed, because the victimizer is a loved one, or for other reasons. There are, therefore, a certain number of sex crimes that are not reflected in the recidivism numbers. Two sources suggest that the actual number of sex crimes committed by an offender after release may be 2.4 or 2.5 times the number reported. Probably for the same reason, recidivism rates for sex offenses actually reported in the studies can vary widely, from a 2.2% recidivism rate for sex crimes against children, to 40% for child molesters of male victims. These numbers reveal another problem in interpreting recidivism rates: different sex offenses are repeated at different rates. For example, one study shows that exhibitionists may recidivate at a rate of up to 71%. Recidivism of sex offenders is thus an incredibly complex topic, data on which, despite the large number of studies into it, remains inadequate. I do believe, however, that the following studies, considered in light of the possibility that actual offenses may be 2.5 times higher (a number which, itself, may be inaccurate), strongly suggest that sex offenders recidivate at a rate equal to or lower than most other offenders who commit non-sex offenses.

An often-cited study by the Bureau of Justice Statistics followed 9,691 male sex offenders for three years after their releases in 1994. This study found that only 5.3% of sex offenders were rearrested for a new sex crime, and 3.5% were reconvicted. Anywhere from 2.2% to 4.2% of sex offenders were rearrested for a sex offense against a child. For most offenders, the crime for which they were imprisoned, until 1994, was the first sex crime of that type for which they had been imprisoned. For example, 81.7% of the child molesters released had only been imprisoned one time for child molestation. In addition to these low numbers, sex offenders seem to be less prone to habitual criminality than their non-sex offender counterparts. Overall, sex offenders had a shorter criminal history than non-sex offenders. Prior to the arrest for which they were incarcerated until 1994, sex offenders had been arrested an average of 4.5 times for any crime,

364 INSTITUTE OF PUBLIC POLICY, SEX OFFENDER RECIDIVISM, supra note 343, at 6.
366 BYNUM, supra note 15.
367 Id.
368 LAGAN, supra note 365, at 1.
369 For this study, “sex offender” includes perpetrators of the following crimes: forcible rape, statutory rape, object rape, sexual assault, sexual abuse, forcible sodomy, sexual misconduct, criminal sexual conduct, lascivious conduct, carnal abuse, sexual contact, unlawful sexual intercourse, sexual battery, unlawful sexual activity, lewd acts with a minor, indecent liberties with a child, carnal knowledge of a child, incest with a minor, and child molestation. Id. at 3.
370 Id. at 24.
371 Id. at 30.
372 Id. at 12.
whereas non-sex offenders' prior arrest rate averaged 8.9. Moreover, 23.7% of sex offenders had served prior prison sentences, compared to 44.3% of non-sex offenders. Recidivism rates were also lower for sex offenders. Compared to released non-sex offenders, "released sex offenders were four times more likely to be rearrested for a sex crime," but within three years of release from prison, 43% of sex offenders were rearrested for any crime, compared to 68% of non-sex offenders.

The drawback of the Bureau of Justice Statistics study is that it tracked sex offenders for only three years after release. This relatively short period of time may not accurately reflect recidivism rates because three years may not be enough time for recidivists to get caught again. A study published in 2001 by the State of Ohio tracked 14,261 sex offenders for ten years after their releases in 1989. The study defined recidivism as re-incarceration, as opposed to rearrest or reconviction. It found that only 8% of sex offenders returned to prison for a new sex crime. The study cited recidivism rates from other studies, which included rates of: 6% (over a nine-year period); 4% (over a twelve-year period after release); 12% (for rapists over a thirteen-year period); and 13.4% (over four to five years). The Ohio study, therefore, concluded that its low 8% figure tracked well with these other studies. In its report, the department noted that, according to the results of several studies, the sexual recidivism rate of sex offenders is "fairly low," and "a sex offender returning to an Ohio prison for a new sex offense is a fairly unusual occurrence." Surprisingly, the study also found that offenders who only victimized children—as opposed to adults only, or adults and children—were less likely than other sex offenders to return to prison for any reason, including for sex offenses. Finally, this study suggested that sex offenders are not sleeper offenders, who may recidivate decades after their release. Of those sex offenders who returned to prison for a new sex crime, over 50% did so in the first two years after release. Another 13.4% were reimprisoned for a new sex

---

373 Id.
374 Id.
375 Id. at 1.
376 Id. at 2.
378 Id. at 1.
379 Id. at 11.
380 Id.
381 Id. at 15.
382 Id. at 12.
383 Id.
384 Id. at 9.
385 Id. at 14.
386 Id. at 12.
crime in the third year. After that, the numbers drop gradually as time goes on, except for a small spike at year six.

Another study examined the recidivism patterns of adult male sex offenders convicted in Washington State between 1985 and 1991. Over a seven-year period, the rate of rearrest for any crime was relatively low for sex offenders compared to non-sex offenders. At seven years after release, the overall recidivism rate was 23%. Of these, 12% were for sex offenses. Rearrest for another sex offense was highest during the first and third years after release, and there was an overall decline after that. The Twin Rivers study, also conducted in Washington State, found congruous figures. That study followed sex offenders for three years after release. These offenders admitted their guilt and voluntarily requested treatment. The study found that after three years, the recidivism rate for sex offenses was 11% for those offenders who had completed treatment, and 12% for untreated sex offenders. A third study from Washington tracked sex offenders for up to seven years following release. It tracked three groups of offenders: those selected for a treatment program; those eligible for treatment who did not receive treatment; and those ineligible for treatment. The study found sex offense recidivism rates (over the seven years) of 11% for those receiving treatment, 14% for the treatment-eligible group, and 31% for the non-eligible group. The first group was composed mainly of child molesters who had been convicted for the first time. Ninety-one percent of the sample, however, had not previously been convicted of a sex crime, and less than half had any prior felony or misdemeanor conviction.

In 2007, the Washington State Institute for Public Policy revisited the question of sex offender recidivism. This study tracked a number of Washington’s Sexually Violent Predators (SVPs) for six years after their

387 Id.
388 See id. at table 19.
390 Id. at 8.
391 Id.
392 Id. at 10.
393 Id. at 15.
394 Id.
395 Id. at 17.
396 Id. at 1.
397 Id.
398 Id.
399 Id. at 2.
400 Id. at 4.
releases in the early 1990s.402 These offenders consisted of: (1) those who were convicted of or charged with a sexually violent offense; (2) those who suffer “from a personality disorder or mental abnormality which is a congenital or acquired condition affecting the person’s emotional or volitional capacity and predisposes the person to commit sexual acts so that the person is a menace to the health and safety of others”; and (3) those whose mental abnormality makes the person “likely to engage in future predatory acts of sexual violence.”403 These offenders were eligible for involuntary civil commitment, and they represent a very small percentage of the population of released sex offenders.404 Even this group was found to have a relatively low recidivism rate: after six years, 23% were convicted of a new felony sex crime, and 4% were convicted of a misdemeanor sex crime.405

The Missouri sex offender recidivism study, cited above, was published in 2006 and tracked sex offenders and non-sex offenders released in 1998.406 It found that, in Missouri, recidivism rates for any crime—sex-based or non-sex-based—were lowest among sex offenders, which was consistent with national figures.407 Recidivism—again, for any crime—was 19% among sex offenders in Missouri, and recent studies showed this number to be from 10% to 15% nationwide over five years.408 Non-sex offenders were found by the Bureau of Justice Statistics to have rearrest rates of 68% and reconviction rates of 47.8.409 This study reiterated that for crimes in general, rapists and those who had committed other sexual assaults had the lowest rearrest rates.410

In addition to relatively low recidivism rates, there is evidence that treatment programs are often effective in reducing sex offense recidivism. The Center for Sex Offender Management summarized the findings of a number of studies as to the effectiveness of treatment. These various studies found that treatment reduced recidivism by 5%, 8%, 10.4%, and 25%.411 The Center noted that any number of factors beyond treatment could impact these figures, and so it is difficult to conclude that treatment is effective.412 In another publication, however, the Center stated that “treatment programs can contribute to community safety because those who attend [such programs] are less likely to re-offend than those who reject” treatment.413 One reason for this difficulty in analyzing the effectiveness of treatment may be

402 Id. at 1.
403 Id. at 2.
404 Id. at 1.
405 Id. at 4.
406 INSTITUTE OF PUBLIC POLICY, SEX OFFENDER RECIDIVISM IN MISSOURI, supra note 343, at 1.
407 Id.
408 Id. at 5.
409 LANGAN, supra note 365, at 2, 20.
410 Id.
411 BYNUM, supra note 15 (discussing this information in the “Treatment” section).
412 Id.
413 FREEMAN-LONGO, supra note 237.
that facilities used to incarcerate sex offenders offer few treatment options, in part because we as a society "pay little attention to the possibility of their rehabilitation." 414 From the mid-1980s until the early 1990s, for example, only 14% of imprisoned sex offenders reported that their sentence included a court-imposed condition that they receive psychological or specialized sex offender treatment. 415 Although data is lacking, the available information on treatment programs suggests that treatment can work but that it is underused, which contributes to the notion that treatment does not work.

To say that sex offenders have a low rate of recidivism or are susceptible to treatment is not to discount the severity of their offenses or to justify them. Society should reject any sexual activity forced on an unwilling adult or on any child by an adult. The recidivism and treatment studies cited here do, however, suggest that the major justifications for SORNAs are questionable, if not baseless.

The major problem with citing statistics on sex offender recidivism and treatment efficacy is the fact that sex offenses, by their very nature, often go unreported. Any statistic proposing to establish the incidence of sex crimes or recidivism of sex crimes necessarily involves a great deal of guesswork, and thus, is highly likely to be biased. Comparing sex crimes to most other crimes—which are more likely to be reported—is no comparison at all. Comparing sex crimes to domestic violence, however, is a true comparison. Both sets of crimes are underreported; although the rates at which the crimes are underreported are unknown, they are assumed to be high. Underreporting of both sets is the result of the same dynamic: the victims often fail to report out of shame or because their victimizers are intimates and loved ones. Both sets of crimes are also quite personal and can affect the victim in a deeply personal and damaging way for years after the victimization. They are characterized by an often violent and wrenching betrayal of trust, and society’s response to them has a long, legal history fundamentally informed by Christianity’s views of sex, gender, and family. Society’s harsh response to sex crimes, and its historical ignorance and rejection of the existence of domestic violence suggest a religious basis for society’s response to both crimes.

IX. Sex Crimes vs. Domestic Violence

Like the repression of alternate sexualities, the ignorance and denial of the reality of domestic violence has a long history. For centuries, if not millennia, "one of the significant factors contributing to a woman staying in an abusive relationship [has been the] traditional religious belief that the man is to be obeyed." 416 To maintain this power relationship, religion has

414 Winick, supra note 5, at 505-06.
416 Ammons, supra note 28, at 1209.
"explicitly sanctioned violence as a means of keeping the woman in her proper place in the home." 417 This tradition dates back to "the nomadic period of the ancient Hebrews" and the Old Testament, which espoused the subservience of women. 418 A woman who was not "docile, chaste, [or] passive ... was subject to death by mutilation or stoning." 419 In ancient Israel, in other words, women either did not exist or existed only as men's property, to do with as the men liked. 420 This institutionalized domestic violence continued into the times depicted in the New Testament and into the Greek and Roman civilizations: a woman continued to be her husband's property, and therefore subservient to him. 421 The patriarchal form of gender relations influenced early Christianity and continued as the Roman Empire became Christian. 422

Katherine Scheleng provides a succinct summary of recent centuries' treatment of domestic violence. She writes that into the Christian Middle Ages, the Church taught men to control their wives through violence. In the late fifteenth century, Father Cherubino's Rules of Marriage instructed that "when a wife committed an offense against her husband, he should 'scold her sharply, bully and terrify her. And if this still [didn't] work ... take up a stick and beat her soundly ...'" 423 The Church endorsed this view, 424 and it would later influence Blackstone. 425 As a result, under English common law "[a] wife could not ... deny her husband's sexual advances," and the husband was allowed to beat her. 426

In Colonial America, Puritans generally disallowed domestic violence, but excused the husband if the beating could be justified. 427 For example, in 1836, a "New Hampshire court held that ... [a]ny woman who provoked her husband's anger or refused to remain silent deserved any abuse inflicted upon her." 428 Into the twentieth century, domestic violence remained an unseen and unacknowledged crime. 429 Instead of recognizing this abuse, "[t]raditional doctrine concerning the family and proper gender roles was reiterated." 420 Rather than punishing the husband for his vio-

417 Id.
419 Id.
420 Martos & Hégy, supra note 133, at 6-7.
421 Scheleng, supra note 418, at 84-85.
422 Martos & Hégy, supra note 133, at 6, 9-11.
424 Id. at 85-86.
425 Id. at 85.
426 Id. at 86.
427 Id. at 89.
428 Id. at 91.
429 Id. at 94.
430 Id.
lence, courts would assign a case worker who would "offer the wife advice on how to please her husband so she could avoid physical abuse." \(^431\)

With the upheavals in the 1960s came a greater awareness of domestic violence. \(^432\) Since then, opinions vary on the condition of the awareness of domestic violence in America. Schelongo argues that the "contemporary treatment of marital rape and domestic violence" show that the "underlying commitment to female subordination" has not changed. \(^433\) In the mid-1970s, Mary Daly would likely have agreed with that conclusion. \(^434\) On the other hand, recent decades have been called the "Beginning of the End of Patriarchy." Whatever the condition, it is clear that progress has been made, but that much remains to be done. Religions today and throughout the centuries have, no doubt, been working to "eradicate" domestic violence. \(^435\) Even vilified, conservative Christian movements today allow more ideological space to argue against domestic violence than is commonly thought. \(^436\) Members and pastors of these same churches, however, also admit that their churches often fail to recognize and properly address domestic violence. \(^437\) One parishioner said that "[t]he saddest thing about our churches is that we support denial." \(^438\)

Worse than denial, evangelical churches have influenced policy regarding sex education, sexual orientation, teen pregnancy, reproduction, family planning, and economic equity, which has led to the discontinuance of programs that could reduce the rates of violence against women and children. \(^439\) These church actions have developed from the churches' dogma that has long-supported male supremacy, the devaluation of women, and the refusal to recognize women as equals with men. \(^440\) Reverend Katherine Ragsdale cites four points of Christian theology which have supported violence against women. \(^441\) First, there is the belief that God is omnipotent, and therefore, wills the victim's abuse because she deserves it. \(^442\) Second is the "theology that focuses on Jesus' suffering as the key to salvation." \(^443\) By focusing on Jesus' suffering, and not his power, this theology suggests to victims that they should submit to their own suffering. \(^444\) Jesus suffered, and so, the theory goes, should the victim of domestic violence. Third, a

---

\(^431\) Id.
\(^432\) Id. at 95, 96.
\(^433\) Id. at 96.
\(^434\) DALY, supra note 49, at 15.
\(^435\) Hopkins, supra note 175, at 419–20.
\(^436\) Nason-Clark, supra note 137, at 121.
\(^437\) Id. at 120, 123.
\(^438\) Id. at 123.
\(^439\) Rose, supra note 62, at 17.
\(^440\) Ammons, supra note 28, at 1266, 1268.
\(^442\) Id. at 1153.
\(^443\) Id. at 1154.
\(^444\) Id.
"strictly hierarchical understanding of creation" prevails; God rules above all, then the angels, then men, then women, and then children.\textsuperscript{445} "This hierarchy is characterized by domination," implying that men have the divine right to dominate women and children, and those women and children have the divine duty to submit to men.\textsuperscript{446} Fourth, "classical theological precepts tend to have been formulated and disseminated by those in power in an attempt to make sense of, and justify, the world as they saw it and experienced it."\textsuperscript{447} Since patriarchy prevailed, men in power constructed a theology that granted a divine mandate to that patriarchy.\textsuperscript{448}

As a result of this long history, studies today show that abuse of wives and children "is more common among families that adhere to traditional, patriarchal sex role norms."\textsuperscript{449} A combination of politics, law, and religion has also led to the creation of a system that supports male supremacy.\textsuperscript{450} One view among politicians, police, and the public today, for example, is that domestic violence is a private matter and is less serious than similar assaults.\textsuperscript{451} Laws on the books today regarding marital rape further suggest this view. "Twenty states [] grant or imply spousal immunity from sexual offense charges if the spouse-victim is mentally incapacitated or physically helpless."\textsuperscript{452} Three states grant husbands immunity when they themselves administer the drugs or intoxicants that render their wives mentally incapacitated.\textsuperscript{453} "[T]welve states continue to grant spousal immunity for various nonconsensual sexual offenses such as gross sexual imposition, sexual abuse, sexual battery, sexual contact, and sexual misconduct."\textsuperscript{454} In Kansas, marriage can act as a defense for sexual battery, and Hawaii exempts spouses from third-degree sexual assault.\textsuperscript{455} The list of such statutes goes on.

The history of domestic violence resembles that of sex crimes in that both areas of law find the dominant power structure repressing a force that is unlike it and is a perceived threat to its hegemony. In both areas, Christianity has played a central part in justifying, failing to address, and actively encouraging their harmful aspects. The harm that comes with domestic violence further suggests the areas' similarity.

In America, from 1978 to 1982, a woman was assaulted by her partner every fifteen seconds.\textsuperscript{456} By 1993, this made domestic violence the

\textsuperscript{445} Id.
\textsuperscript{446} Id.
\textsuperscript{447} Id. at 1155.
\textsuperscript{448} See id.
\textsuperscript{449} Rose, supra note 62, at 11.
\textsuperscript{450} Ammons, supra note 28, at 1218.
\textsuperscript{452} Id. at 281.
\textsuperscript{453} Id.
\textsuperscript{454} Id.
\textsuperscript{455} Id. at 281–82.
\textsuperscript{456} Schelong, supra note 418, at 80.
greatest cause of injury to women each year.\textsuperscript{457} In the late 1990s, more than 500,000 cases of domestic violence were reported to federal officials each year.\textsuperscript{458} During this time, the U.S. Surgeon General declared domestic violence the nation’s number one health problem.\textsuperscript{459} Outside of the military, the American home was considered this country’s most violent setting.\textsuperscript{460}

“Violence at the hand[s] of a husband or other partner [was] the leading cause of injury to women between the ages of fifteen and forty-four, causing more injuries than assaults by strangers, rapes, and traffic accidents combined.”\textsuperscript{461} Children are hurt as well. Seventeen percent of all pregnant women were abused, resulting in miscarriages, stillbirths, and low birth weights.\textsuperscript{462} “At least half of men who batter their partners also batter their children,” and half of all homeless women and children are on the streets because of domestic violence.\textsuperscript{463} Despite these already high statistics, domestic violence is believed to be “one of the most underreported and underestimated crimes in [America] today.”\textsuperscript{464} In the early 1980s, the number of domestic violence incidents may have been around six million per year.\textsuperscript{465}

Domestic violence causes physical pain and terrifies the victim, “erod[ing]” her “sense of self.”\textsuperscript{466} It has been likened to torture.\textsuperscript{467} Battered women “develop a sense of hopelessness, a sense that their life will never improve and that they can do nothing to change it.”\textsuperscript{468} This hopelessness or fear of a victim’s attacker may be the reason that nearly 70% of victims fail to pursue criminal charges.\textsuperscript{469} Children are also affected by domestic violence, often in invisible ways, which prevents them from receiving the help they need.\textsuperscript{470} Children witness domestic abuse, but there is also significant overlap between spousal abuse and child abuse.\textsuperscript{471}

A large part of domestic violence, like sex crimes, exists unacknowledged because it goes unreported. In addition, the long-term psycho-

\begin{footnotesize}
\textsuperscript{457} Id.
\textsuperscript{459} Id. at 168.
\textsuperscript{460} Id.
\textsuperscript{461} Id.
\textsuperscript{462} Id. at 168–69.
\textsuperscript{463} Id. at 195.
\textsuperscript{464} Scheloneg, supra note 418, at 80.
\textsuperscript{465} Id.
\textsuperscript{466} Hopkins, supra note 175, at 427–28.
\textsuperscript{467} Id. at 434.
\textsuperscript{471} Id. at 1, 8.
\end{footnotesize}
logical damage resulting from domestic violence may be as severe as or more severe than that associated with sex crimes. The damage done by both sets of crime is similar, yet they differ in that domestic violence seems to be much more prevalent in society. Recidivism rates for domestic violence are also probably higher than for sex crimes, and other statistics regarding domestic violence suggest that society’s response is lacking.

One study found that 59.3% of batterers “had a history of one or more prior arrests for domestic violence.”472 Furthermore, 32.6% of batterers were “arrested on a subsequent domestic violence charge within a year after the earlier charge was concluded.”473 Another study examined victim reports of incidents of domestic violence.474 In the first six months after release from incarceration for a prior incident of domestic violence, 26% of offenders caused injury, 41% hit or pushed their victim, and 52% caused fear.475 In the second six-month period, these numbers were 20%, 33%, and 41%, respectively.476 These numbers are probably low because not all new domestic violence incidents were reported, police did not respond to all calls, and police did not consistently identify domestic violence complaints as such.477 Such incidences might be reported, for example, as “trespassing, disorderly conduct, harassment, [or] destruction of property.”478 The clear import of these findings is that recidivism among batterers is high and is most likely much higher than for sex offenders.

Another study on domestic violence recidivism found that 40% of batterers who had participated in community intervention programs nonetheless recidivated.479 Despite this high number, the study did conclude that treatment seemed to result in positive changes in recidivism.480 It also found, however, that being abused as a child made one somewhat more likely to batter as an adult.481 This is in contrast to evidence that being sexually abused as a child does not make one more likely to sexually abuse another as an adult.482

The Massachusetts Trial Court findings, cited above, state that “[43%] of those charged with a violation of a restraining order had more than one victim . . . [and] 16% had three or more victims, consistent with

472 Ventura & Davis, supra note 469, at 9.
473 Id. at 11.
475 Id.
476 Id.
477 Id. at 132.
478 Id.
480 Id. at 438.
481 Id. at 431.
482 See Dymum, supra note 15.
their portrait as high risk violent individuals. Although the Trial Court did find that treatment was effective for batterers, it found that even offenders who completed the Certified Batterer’s treatment program recidivated at a high level; 33.7% were subsequently arraigned for a violent crime, compared with 64.2% who had not completed treatment. An Illinois study was a bit more optimistic, finding a 37% recidivism rate for treatment non-completers, and a 15% rate for treatment completers. The response of law enforcement to domestic violence, as mentioned above, is also lacking. For example, 1989 statistics for the Washington D.C. area showed that over 85% of the domestic violence calls where a woman was found bleeding from wounds did not result in police arresting her abuser.

Sex crimes are similar to domestic violence in terms of the rate of underreported occurrences, the betrayal of intimate trust that is engendered when the victimizers are the victims’ loved ones, and the long-term damage that can be caused to victims and others involved. They differ, however, in that sex offenders tend to have substantially lower rates of recidivism than batterers, and thus, seem to be more “curable” than batterers. Given these comparisons, why do we as a society so vilify and ostracize sex offenders, and at the same time give batterers many breaks? Why do we create SORNA’s requiring sex offenders to declare their utter deviance and virtual sub-humanity—often for life—while law enforcement fails even to answer domestic violence calls or to arrest, prosecute, or commit to incarceration most batterers? Imagine a SORNA-type system that registers and forces batterers to notify their communities and appear on a website detailing their offenses. Would this information help a woman contemplating starting a relationship with a man to determine whether he poses a threat to her or not? Such a system would be as effective as SORNA’s in promoting public safety, if not more effective. The reason there is not such a system is because society’s responses to sex crimes and domestic violence are both grounded in a conservative-Christian morality that represses sex as much as it does women.

As has been seen, sexuality has been repressed throughout Christian history because it was and is seen as dangerous, wild, and out of control. Alternate sexualities—any sexuality that is not heterosexual, monogamous, marriage-based, and procreative—were, and still largely are, viewed as im-

483 Bocko, supra note 468, at 3.
484 Id. at 11–12.
486 Schellong, supra note 419, at 81.
487 Teichman, supra note 359, at 383, asks a similar question: “[W]hy should comprehensive registration and notification regimes be created for sex offenders but not for murderers, thieves, and drug dealers?” Id. I believe that these specific crimes may not be made safer as a result of SORNA-type programs. To address domestic violence, however, a SORNA-type system might be very effective.
moral. Woman represents the same force of moral decay because she is Nature, not Culture; she is wild, where man is civilized. Woman is the symbol of sexual deviance, and this follows in a long Western tradition of linking the female body with filth.\textsuperscript{488} She is “despised as a sexual being,” \textsuperscript{489} and man’s fear of the feminine has historically been associated with his fear of sexuality.\textsuperscript{490} One way to view man’s subordination of women is to view it as a proxy for man’s efforts to repress the feminine in himself, to maintain the projection of power upon which his identity depends.\textsuperscript{491} Two ways to express this power are through rape and wife beating.\textsuperscript{492} Sexuality is, therefore, the site of women’s oppression: sexual violence against women subdues women who might resist patriarchy.\textsuperscript{493} Norms about sexuality are thus norms about women, and the control of sexuality is also the patriarchal control of women.\textsuperscript{494} Control of women is also, therefore, the control of sex. Both are despised in the eyes of Christianity and the patriarchal societies which created and were created by Christianity. Sex offenders are repressed through SORNAS, and women are repressed through failure to adequately address domestic violence.

Our laws’ repression of alternate sexualities and of women is one type of oppression with two areas of expression, which results in leaving the victims of sex crimes and domestic violence unprotected and possibly further endangered. To understand how this repression operates, we need to explore the extent to which SORNAS repress sexuality in general, and alternate sexualities specifically. To do so, we need to discuss specific sex crime statutes and case law that applies them.

X. Sex Crime Statutes and Sex Crime Case Law

The perception of sex offenders described in SORNAS tracks closely the perception held by the larger society. The Florida SORNA, for example, states that

\begin{quote}
[r]epeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Sexual offenders are extremely likely to use physical violence and to repeat their offenses, and most sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. This
\end{quote}

\textsuperscript{488} Jodi Schorb, Uncleanliness Is Next to Godliness: Sexuality, Salvation, and the Early American Woman’s Execution Narrative, in THE PURITAN ORIGINS OF AMERICAN SEX 72, 75 (Fessenden et al. eds., 2001).
\textsuperscript{489} DALY, supra note 49, at 60.
\textsuperscript{490} KARST, supra note 67, at 12.
\textsuperscript{491} Id. at 33.
\textsuperscript{492} Id. at 34.
\textsuperscript{493} Jakobsen, supra note 74, at 107.
\textsuperscript{494} Sands, supra note 66, at 18.
makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant.\footnote{545}

Tennessee’s SORNA contains similar language, stating that sex offenders pose an “extreme threat to the public safety” and “pose a high risk of engaging in further offenses after release from incarceration . . .”.\footnote{546} Nebraska’s SORNA notes “[t]he Legislature finds that sex offenders present a high risk to commit repeat offenses,”\footnote{547} and Ohio’s statute states that “[s]ex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment . . .”.\footnote{548} Sex offenders are perceived to be all but inevitable recidivists, and their crimes are supposed to be among the most injurious. It is also expected that sex offenders will lurk in the dark, and that they and their crimes will go largely undetected. Sex offenders are the modern-day bogeymen, and SORNAs exist to protect the public.\footnote{549}

Certainly a handful of the crimes that SORNAs cover can apply to truly heinous acts. Many, if not most sex crimes, however, apply to both potentially harmful and harmless behavior, and still others regulate acts such as public nudity and propositioning others for sexual activity that may cause affront. Although unconstitutional today, still other laws that outlaw consensual sodomy and homosexual behavior remain on the books and are covered under SORNAs as a symbol of the system’s attempt to prohibit alternate sexualities.\footnote{550} The statutes that follow below are state statutes, and thus, they are not applicable in every state. Most states, however, have comparable statutes, and so the following discussion does not distinguish between the states that have specific statutes and those that do not.

Throughout this discussion, I hope that my opposition to unwanted sexual contact between adults and any adult sexual contact with children is clear and that there is no implication to the contrary.

Crimes such as sexual assault are, of course, registrable under all SORNAs, and they should be dealt with seriously. Even these statutes, however, can be “manipulated” by police officers to fit entrapment methods.\footnote{551} For example, a grandfather in his sixties was arrested at a rest stop in Massachusetts, known as an area for consensual sex between men, after he approached an undercover officer, talked with him for a bit, then placed his hand on the officer’s groin.\footnote{552} For this act, he was forced, under

\footnote{545} Fla. Stat. § 775.21(3)(a) (2007).
\footnote{548} Ohio Rev. Code Ann. § 2950.02 (A)(2) (West 2008).
\footnote{550} Karst, supra note 67, at 58: “If the law remains [on the books], it stands as a symbol of moral condemnation, stigmatizing gay and lesbian citizens; if the law is repealed or held invalid, many citizens will see that act as one more example of a secularized society’s dismissal of their values.”
\footnote{551} Jacobson, supra note 17, at 2456.
\footnote{552} Id. at 2456–57.
SORNA, to register as a sex offender for at least fifteen years. 503

Similar to the grandfather’s conduct are sex crimes that prohibit requesting another to engage in sexual conduct if the person requesting the conduct knows that the request “is likely to cause affront or alarm.” 504 The “victim” may be of any age, and if the victim is a minor, the offense is registrable. Other statutes do include an age limit. In Washington D.C., for example, it is registrable “to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal” to anyone under 18 years of age. 505 Similar crimes make it registrable to expose one’s “private parts” in public “where there are present other persons to be offended or annoyed thereby.” 506 The same statute exposes one to registration who “[p]rocures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency.” 507 It is also registrable to appear in public in a state of nudity three times, 508 or to engage in sexual conduct in public three times, 509 or to expose one’s genitals in someone else’s presence, with “reckless disregard for the offensive, insulting, or frightening effect it may have” if done twice and the victim is under sixteen years of age. 510

For each of these crimes, one can imagine a parade of traumatic conduct: extreme cases of sexual harassment, exposure of oneself to a minor as a precursor to a sexual assault, or a predator enticing a minor to expose himself in a “model artist exhibition” that is actually child pornography. One can also imagine, however, the harmless, if not healthy, behavior that is prohibited. The habitual skinny dipper, the true artist who finds poetic expression in nudity and public performance, the adult at a club who wants to make a sexual pass at another adult. All these people may be prohibited from expressing their sexuality or risk registration. What do the terms “affront or alarm,” “indecent,” “offended or annoyed,” “model artist exhibition,” and “offensive, insulting, or frightening” mean? They mean that the truly dangerous offenders will have to register for their crimes, but they also mean that those who do not wish to hide their sexuality away in bedrooms with closed shades, 511 or those who wish to talk freely about sexuality, or who celebrate nudity, or are at least not ashamed of it, may be

503 Id. at 2457.
504 Mo. Rev. Stat. § 566.095(1) (2008); see also id. § 589.400(1).
505 D.C. CODE ANN. § 22-1312(a) (LexisNexis 2008); id. § 22-4001(7), (8)(e).
506 CAL. PENAL CODE § 314.1 (Deering 2008); id. § 290(c).
507 Id. §§ 314.2, 290(c).
510 ALASKA STAT. § 11.41.460 (2008); id. §§ 12.63.010, 12.63.020.
511 In Kansas, it is registrable to engage in sex “with knowledge or reasonable anticipation that the participants are being viewed by others . . . .” KAN. STAT. ANN. § 21-3508(a)(1) (2006); id. §§ 22-4902, 22-4906. If a couple, when they are having sex at home, prefers to have the shades up, they may find themselves arrested and subject to the state SORNA.
arrested, may have to register, and thus may become sex offenders. The outcome is a SORNA with registration rules that do not distinguish the truly dangerous offenders, and which, therefore, does not contribute to the protection of potential victims of harmful sex crimes.

Any public display of sexuality is illegal unless, of course, the perpetrator acts in accord with his or her “proper” role. In Arkansas, as in other states, it is registrable to expose one’s sex organs in public or “under circumstances in which the person knows the conduct is likely to cause affront or alarm.” 512 There is an exception, however: “A woman is not in violation of this section for breastfeeding a child in a public place or any place where other individuals are present.” 513 There is, therefore, a difference between a woman’s breast and a woman’s nursing breast. The difference is that the former is seen as a sexual object, and the latter as an indication of motherhood. In this way, the law on indecent exposure allows a woman to express her sexuality to the public only if she expresses the conservative-Christian sexuality of motherhood.

SORNAs may even enforce conservative Christianity’s precepts to the explicit exclusion of children’s safety. In at least one state, it is registrable for a guardian of a child to “create a substantial risk to the health or safety of the child.” 514 The statute goes on to note an exception:

It is not a violation of a duty of care, protection, or support under this division when the parent, guardian, custodian, or person having custody or control of a child treats the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body. 515

This hiding away and conservative Christianization of sex also causes many anti-obscenity laws to come under SORNAs. It is registrable, for example, to rent or sell hard-core pornography, which includes “material depicting patently offensive representations of oral, anal, or vaginal intercourse, actual or simulated, involving humans, or depicting patently offensive representations of masturbation, excretory functions, or bestiality, or lewd exhibition of the genitals.” 516 Other states force registration for production, distribution, or exhibition of obscene matter, 517 “promoting obscenity,” 518 or publicly displaying obscenity. 519 Oklahoma makes it registrable to publish, sell, distribute, download on a computer, or create or

513 Id. § 5-14-112(c).
514 Ohio Rev. Code Ann. § 2919.22(A) (LexisNexis 2008); id. §§ 2950.01, 2950.04.
515 Id. § 29129.22(A) (LexisNexis 2008).
517 Cal. Penal Code § 311.2(b)-(d) (Deering 2008); id. § 290(c).
519 Id. § 573.060; id. § 589.400.
prepare in any way any obscene material.\textsuperscript{520} Alabama makes registrable the public display of "any bumper sticker, sign or writing which depicts obscene language descriptive of sexual or excretory activities."\textsuperscript{521}

These anti-obscenity laws do not refer to the age of any "victim," and so are intended to make registrable the trade in pornography and other obscenity. One can certainly argue with some validity that pornography is harmful to people both directly and at a more abstract level. Few, moreover, would disagree that we ought to protect children from exploitation and the harmful effects of pornography. Leaving aside the social value or moral arguments in favor of or against obscenity, however, it is troubling that one can be a sex offender because he or she sells even the most prurient and base pornography. When a pornography business involves only consenting adults from production to retail, then models, producers, and purchasers of such material are willing participants in the exchange. As a result, there exists no "victim" as the term is described in SORNA sex crimes. These anti-obscenity laws serve to further eliminate the presence of sex in civil society. One cannot display a raunchy bumper sticker without risk of arrest and registration nor, some might say, can a trucker legally use mud flaps that display the silhouette of a naked woman. Rather than the protection of children and vulnerable adults, these crimes, and the fact that SORNAs apply to them, suggest both a fear of sex in public and society's willingness to repress that sexuality, even if it means abusing the criminal justice system by enforcing the excessive, ineffective, and unusual punishment of registration.

The conservative-Christian focus of SORNAs is obvious when one reads the anti-sodomy laws. Although these laws against consensual sodomy were deemed unconstitutional in 2003 in \textit{Lawrence v. Texas},\textsuperscript{522} these laws remain on the books, and SORNAs apply to them, even though many SORNAs have been amended since \textit{Lawrence}. Sodomy is described in these statutes as "the infamous crime against nature, committed with mankind or with any animal,"\textsuperscript{523} or "the abominable and detestable crime against nature either with mankind or with any animal."\textsuperscript{524} Georgia law equates sodomy with both anal and oral sex,\textsuperscript{525} which is not an uncommon formulation. These laws apply to all ages, so they claim to proscribe even consensual adult conduct.

SORNAs, therefore, embody the ancient prejudices against nonprocreative sexual activity and continue to do so, even after \textit{Lawrence}. They use virtually biblical language to describe an act the name of which they

\textsuperscript{520} OKLA. STAT. tit. 21, § 1021(A)(3) (2007); id. tit. 57, § 582(A).
\textsuperscript{521} ALA. CODE § 13A-12-131 (LexisNexis 2008); id. § 13A-11-200.
\textsuperscript{522} 539 U.S. 558 (2003).
\textsuperscript{523} IDAHO CODE ANN. § 18-6605 (2008). Idaho could call other crimes by their names, such as "lewd conduct," "indecent exposure," even "incest." Id. §§ 18-1508, 18-4116, 18-6602. It could not, however, bring itself to mention the word "sodomy," instead using the title "crime against nature."
\textsuperscript{524} MICH. COMP. LAWS SERV. § 750.158 (LexisNexis 2008).
\textsuperscript{525} GA. CODE ANN. § 16-6-2 (2007).
can barely utter, if at all. Quite frankly, these laws equate consensual human-with-human sexual conduct with bestiality. Other statutes, separately, make bestiality registrable. If these statutes were concerned with the well-being of animals, then there should exist other statutes prohibiting the slaughter and eating of animals. SORNAs, in fact, are tools for enforcing conservative-Christian norms of sexuality. If these laws were about public safety, one would be hard pressed to show how consensual sodomy between adults, or even bestiality, is a public safety concern as framed by SORNAs. The same question could be posed concerning the Ohio law that makes it registrable to perform an abortion on someone under eighteen years old unless an adult family member is notified or a court has granted approval. Even-assuming-the-fundamental-humanity-of-the-entity-to-be aborted and the possibility that someone under eighteen does not have the capacity to consent, it is difficult to see this SORNA provision as anything other than another attempt to enforce the conservative-Christian view of sexual reproduction through SORNAs. Because such acts are registrable, SORNAs include harmless people on their rolls and, thus, fail to protect potential victims of harmful sex crimes.

The most apparently unassailable SORNA sex crimes are those applying to crimes against children. These crimes are the horror stories we hear on the news, and indeed, they are horrific. Even the more mundane cases are characterized by an adult taking sexual advantage of a child. In many cases, the child may claim to have consented and may believe she consented, when in fact she was manipulated into that belief. Even so, there is a huge amount of sexual activity prohibited by these laws that is likely to either be healthy, not harmful, or no more harmful than many other things that happen to people young and old. Dana Northcraft, for one, laments society’s intent to erase sexuality from the lives of young people, claiming that sexual activity for those under eighteen is normal, and sexual exploration for pre-adults, in a safe way, is vital to the development of a healthy, sexual outlook throughout life. It is without doubt that coercive sexual relationships involving an imbalance of power and exploitation do not promote this healthy development. Child abusers, older persons who “teach” minors about sex in what they have convinced themselves are consensual relationships, and others who prey on the innocence of children for their own selfish, sexual ends, are not objects of sympathy for this article. To the extent that sex crimes and SORNAs serve to hinder these individuals’ conduct, I am in favor of them. The problem with the sex crimes and SORNAs that apply to minors is not that these people are caught and prosecuted. The problem is that truly consensual sexual relationships, including anything from sexual intercourse to manual contact, are rejected wholesale, and the “perpetrators” of such conduct are labeled not only as sex offenders,

526 MO. REV. STAT. § 566.111 (2008); id. § 589.400.1(1).
528 See generally Northcraft, supra note 89.
but as the worst kind of sex offenders simply because children are involved.

Statutory rape laws are the most popular of ways to restrict pre-adult sexual activity. They are, of course, justified when the ages of the offender and victim are different enough such that an imbalance of power is clearly indicated, and therefore, exploitation is highly likely, whatever protestations of “consent” the offender makes. Many statutory rape laws, however, do not deal adequately with the nuanced relationships between “adult” offenders who are just eighteen years old and “child” victims who are almost eighteen. Nor do many of these laws adequately address child-with-child sexual contact. These laws exist in every state. In Arizona, it is registrable if one has engaged twice in “[a]n act of sexual contact” with someone present who is under fifteen years old. 529 In Indiana, an eighteen-year-old may be required to register if he or she engages in sex or “deviate sexual conduct” with a fifteen-year-old. 530 In Oregon, it is registrable to engage in “sexual contact” with anyone under the age of eighteen. 531 In Michigan, it is registrable for an eighteen-year-old to commit “any act of gross indecency” with someone under eighteen years of age. 532 In Minnesota, it is registrable to engage in sexual intercourse with someone under thirteen years of age, where the actor is “no more than 36 months older than the complainant.” 533 In Idaho, it is registrable to engage in lewd conduct with someone under sixteen years of age. 534 This includes sexual intercourse, oral sex, and manual stimulation, and the age of the perpetrator seems to be irrelevant. 535 It is even registrable to “annoy” any child under the age of eighteen. 536

The absent issue among these pre-adult-oriented sex laws is consent. Certainly the law should categorically prohibit sexual contact between one who is clearly an adult (who is appreciably older than eighteen) and one who is clearly a child (one who is somewhat younger than eighteen). Where, however, both parties are near eighteen years old, or both are younger than eighteen, the law provides little or no space for them to be sexual beings. Children are immediately deemed incapable of consenting to sexual activity, no matter the type of activity, or the person with whom they engage in the activity, or their own individual level of maturity. If SORNAS are truly concerned with ensuring public safety, then the pre-adult sex crimes to which SORNAS apply ought to contain strong language providing exceptions for consensual behavior. This is especially so because the victim-class most associated with SORNAS—children—is a victim-class be-

530 Ind. Code Ann. § 35-42-4-9(a) (LexisNexis 2008); id. §§ 11-8-8-5(b)(a)-(C), 11-8-8-7.
533 Minn. Stat. § 609.344(a) (2007); id. § 243.166.1(b)(1)(i).
534 Idaho Code Ann. § 18-1508 (2008); id. § 18-8304.
535 Id. § 18-1508.
536 Cal. Penal Code § 647.6(a)(1) (Deering 2007); id. § 290(c) (Deering 2008).
cause of its members' presumed inability to consent and consequent openness to exploitation. Take away a pre-adult's inability to consent and a person's ability to exploit that pre-adult is removed. If the pre-adult can consent, therefore, there is no need to protect that person with SORNAs, as they relate to age-dependent sex crimes. Again, however, this language of consent should not provide an excuse for an adult to exploit a child. Where the ages of these parties differ appreciably, sexual contact should simply be prohibited.

When dealing with people near the age of eighteen or under, the law might permit some forms of sexual contact, with consent being an important consideration. It would not be difficult to include consent in the analysis because the law has a long history of discerning whether consent exists in a particular context. Virtually every area of law has a well-developed jurisprudence on consent, and perhaps none more so than the criminal law as it deals with rape. The reason we do not apply this legal framework to pre-adult sexual activity is that we are concerned with maintaining the traditional, Christian norm, which views children as innocent, and therefore asexual.\footnote{Norbeck, supra note 89, at 484, 494, 505–06.} This is suggested starkly in a Rhode Island law that makes it registrable to allow a child under eighteen years of age to "be used" in any publication or film "in a setting which taken as a whole suggests to the average person that the child has engaged in, or is about to engage in any sexual act, which shall include, but not be limited to, sodomy, oral copulation, sexual intercourse, masturbation, or bestiality . . . ."\footnote{R.I. GEN. LAWS §§ 11-9-1(b) (2007); id. §§ 11-37-1, 11-37-1-2(e)(4), 11-37-1-3.} This law, of course, serves to prevent minors from participating in child pornography and is, to that extent, a good goal. It also, however, exposes those involved in producing such films as *The Squid and the Whale, Elephant, American Beauty, Kids,* or *American Pie* to registration under SORNA. Pre-adult sexuality is a fact of life, and this Rhode Island law seeks, in theory if not in practice, to deny that sexuality.

Incest is also a widely-legislated sex crime, probably in effect in every state. Like sex crimes involving children, the vital element—consent—is again absent. Consent should, of course, not be considered where exploitative sexual contact between, for example, a parent and a child occurs. Such contact should simply be prohibited because of its inherently exploitative nature. Other aspects of the incest laws, however, cover more than inherently exploitative relationships and suggest a conservative-Christian orientation. In Texas, for example, it is registrable if one engages in sex, including oral sex, with a cousin.\footnote{Tex. Penal Code Ann. § 25.02(a)(6), (b)(1) (Vernon 2007); Tex. Code Crim. Proc. Ann. arts. 62.001(5)(A), 62.051 (Vernon 2007).} In Massachusetts, even manual stimulation between those people who cannot lawfully be married is registrable.\footnote{See Mass. Ann. Laws ch. 272, § 17 (LexisNexis 2008); id. ch. 6, §§ 178C, 178E.} These acts, performed between equals, such as cousins of
similar ages, if consensual, clearly are not public safety issues for the purposes of SORNA. If they are not consensual, they should be repressed, not only because of the lack of consent, but also because of the inherent imbalances of power and betrayal of intimate relationships and trust in nonconsensual, incestuous relationships. Either way, these acts are forbidden under the precepts of conservative Christianity. Claude Lévi-Strauss suggested as much when he wrote that the prohibition of incest is “less a rule prohibiting marriage with the mother, sister, or daughter, than a rule obliging the mother, sister, or daughter to be given to others.”541 Incest, remarked Lévi-Strauss, is prohibited in order to maintain “the cultural role which the biological family is called upon to play. The man should teach his children, and this social vocation . . . is irremediably compromised if emotions of another type develop and upset the discipline indispensable to the maintenance of a stable order between the generations.”542 The prohibition of incest, therefore, maintains the patriarchy.

These sex crimes are symbols of a criminal law that seeks to enforce a conservative-Christian sexuality and prohibit all others. Although most prosecutors may refuse to prosecute a large number of minor acts, the symbol and, more importantly, the threat of prosecution remain. In addition, it is not difficult to find cases in which prosecutors did, in fact, indict and courts took seriously a type of behavior that most of society does not normally view as that of a dangerous sex offender. The Arizona Supreme Court’s holding that mooning the audience during a theatre skit fell within the conduct covered by the indecent exposure statute effectively makes such conduct a registrable offense.543 The Iowa Supreme Court affirmed the conviction of a man under a SORNA-applicable sex crime for selling pornography,544 as did a Missouri Appeals Court.545 Although accompanied by more serious allegations, a Florida man was charged with lewd and lascivious conduct because he kissed the neck of a thirteen-year-old.546 A woman in Louisiana was forced to register because “she pleaded guilty to ‘solicitation of a crime against nature.’”547 The woman was a prostitute whose crime was probably offering oral sex to an undercover officer.548 In Tennessee, a man was convicted of a registrable crime because he was found by an officer in his car, in a park, wearing a t-shirt, fishnet stockings,

541 Claude Lévi-Strauss, The Incest Prohibition, in CULTURE AND HUMAN SEXUALITY: A READER 229 (David N. Suggs & Andrew W. Miracle eds., 1993).
542 Id. at 232.
546 State v. Paul, 934 So. 2d 1167, 1170, 1173 (Fla. 2006) (per curiam).
548 Id.
and a spiked, leather strap wrapped around his penis. The man testified that the car door was open only two to three inches, the interior lights of the car were not functioning, and it was nighttime. Also in Tennessee, a man’s conviction was affirmed based on the fact that two women “saw [him] standing nude in the window of a second-floor apartment.” Later that night, “[o]ne of the women saw the man crouching in the window[] of the same apartment, and as she got closer to the apartment[,] the defendant “stood up and exposed his nude body to her.” The apartment was presumably the man’s residence. The Supreme Court of Nevada affirmed the convictions of a number of men who were arrested in a men’s public restroom during a police stakeout. There had been reports that “homosexual activities” were occurring in the restroom. The court wrote that one of the defendants was observed masturbating while peeking through a hole in the toilet stall, for which he was charged with open and indecent exposure. . . . [H]e was observed masturbating while watching one Ronald Dowler masturbate, and then allowing Dowler to copulate him. As a result, [the defendant] was charged with gross lewdness.

The underlying assumption in a number of these indictments is that there is some commonly-held standard of morality. The Louisiana Supreme Court openly declared this, writing “the phrase ‘perform any sexually immoral act’ in La. R.S. 14:92(7), (contributing to the delinquency of juveniles), was not so vague as to be unconstitutional since the words ‘sexually immoral’ have an accepted meaning that is not susceptible to misunderstanding.” It is the restriction of “immoral” sex that sex crimes and SORNA's have as their goal, not public safety. In South Dakota, for example, a female victim of incest petitioned the court to prevent the listing of incest offenders on the state’s SORNA. She argued that because “incest involves familial relationships, the listing would violate a statutory prohibition against the release of ‘identifying information’ regarding victims.” The South Dakota Supreme Court denied her petition and allowed registra-

550 Id. at 151.
552 Id. at *3.
554 Id.
555 Id. at 339.
556 State v. Hart, 687 So. 2d 94, 96 (La. 1997) (quoting State v. Fulmer, 193 So. 2d 774, 775 (La. 1967)).
557 Doe v. Quiring, 686 N.W.2d. 918, 918 (S.D. 2004).
558 Id.
tion to go forward.\textsuperscript{559}

Consent gets played out in ways that serve the conservative-Christian sexual norm. In Idaho, for example, a man’s conviction for rape and “the infamous crime against nature” (cunnilingus) was affirmed by that state’s Supreme Court.\textsuperscript{560} The man and his female “victim” had “spent a great deal of time together socializing while her husband slept or worked. [The man] and the woman soon began to have sexual intercourse together.”\textsuperscript{561} The woman had “mental disabilities,”\textsuperscript{562} and a key issue in the case was whether these disabilities prevented her from being able to consent to sexual activity with the defendant.\textsuperscript{563} The Court held that her disabilities prevented her from being able to consent.\textsuperscript{564} It noted that

[a]lthough she had previously delivered a child . . . the woman did not understand the potential physical consequences of sexual intercourse, e.g., pregnancy, syphilis, gonorrhea and herpes. While, as a result of these proceedings, she now understands that divorce is a possible consequence of extramarital sexual relations, the record does not demonstrate that she knew this at the time that [the defendant] was having sexual relations with her.\textsuperscript{565}

The court, therefore, found lack of consent in an extramarital sexual relationship, but implied the woman’s ability to consent to sexual activity within her marriage. The court, therefore, was either less concerned with ensuring consent to sexual relations within marriage, i.e., was accepting of marital rape, or seemed to believe that the woman’s capacity to consent was lessened with regards to extramarital sexual activity. Either way, the Court enforced, through a sex crime, the conservative-Christian focus on sexual activity as acceptable only within marriage. Beyond that, the court took from the woman her agency to consent to sexual relations as she saw fit, and placed her agency in her husband’s hands: it was her husband, and not she or any other man, who could determine the sexual activity in which she was legally able to engage.

A review of sex crimes and cases to which SORNA\textsuperscript{s} apply suggests that the law of sex aims at repressing alternate sexualities. These sexualities are those that do not involve reproduction; they accept or celebrate nudity, and they acknowledge that minors are sexual beings; they do not involve strictly heterosexual activity; they refuse to hide sex from the public. The crimes listed above remain on the books as symbols, threats, and actual tools of repression. SORNA\textsuperscript{s} add a coercive layer to these crimes; they re-

\begin{itemize}
\item \textsuperscript{559} Id. at 918-19, 925.
\item \textsuperscript{560} State v. Sours, 796 P.2d 109, 110, 115-16 (Idaho 1990).
\item \textsuperscript{561} Id. at 110.
\item \textsuperscript{562} Id.
\item \textsuperscript{563} Id. at 110, 112.
\item \textsuperscript{564} Id. at 113-14.
\item \textsuperscript{565} Id. at 114.
\end{itemize}
vive these crimes and take advantage of modern technology, such as the Internet, to further ostracize from society those who would engage in alternate sexualities. As they do so, they fail to protect children and vulnerable adults. In addition, SORNAs apply some of the methods of control with which religion is so familiar: shaming, confession, and ostracism. SORNAs, therefore, may satisfy the Religious Right's need to repress alternate sexualities. They do not, however, ensure public safety, and they may expose society to those sex offenders who represent an actual threat to others. The criminal justice system must, of course, continue to address the threat that these people pose. SORNAs are not the answer; empirical studies of recidivism-reduction methods provide some promising answers and can point the criminal justice system in the right direction.

XI. Approaching Sex Crime Recidivism Empirically

In Smith v. Doe, Justice Kennedy wrote that the death of Megan Kanka "gave impetus to laws for mandatory registration of sex offenders and corresponding community notification." Given this, plus the fact that SORNAs are ineffective and rely on a perception of sex offenders as incurable monsters, it is highly likely that the only traditional sentencing goal served by SORNAs is that of retribution. If we are to address sex crimes in a way that actually increases public safety by reducing recidivism, we must forego our desire for revenge. In the realm of sex crimes, as with all crimes, we cannot both maximize the utilitarian goals of rehabilitation and reduction in crime while also punishing the criminal simply because he may deserve it. What can be done to address the real risk that many sex offenders pose?

The relationship between incarceration and recidivism is unclear. Based, however, on the "criminal model" of dealing with sex offenders, as opposed to the "illness model," incarceration as a way to lower recidivism rates should not be quickly discarded. The criminal model "tells [offenders] that they have committed bad acts; that they could have controlled their conduct but chose not to..." On the other hand, the illness model "tells [offenders] that they are largely not responsible for their conduct; it is [rather] their illness that is responsible, because it prevents them from con-

567 SORNAs have been held not to be punishment and registration not an additional sentence. Id. at 105–06. Traditional sentencing goals can, however, be helpful to understanding the stated goals and actual effects of SORNAs.
568 Kevin L. Nunes, et al., Incarceration and Recidivism Among Sexual Offenders, 31 LAW & HUM. BEHAV. 305, (2007). This study concluded that "[n]o significant association between incarceration and recidivism was found regardless of how incarceration was operationally defined, whether sexual or violent (including sexual) recidivism was examined, whether risk was controlled, and whether time at risk was controlled."
569 Winick, supra note 5, at 537–39.
570 Id. at 538.
trolling their actions." 571 Because "[p]eople who attribute their lack of self-control and their antisocial conduct to illness may tend to feel that self-control is not possible," 572 the illness model is probably dysfunctional in reducing rates of recidivism. 573 The criminal model is likely to be somewhat effective, especially because most convicted sex offenders are convicted only once. 574 Treating them as criminals who intentionally and with free will committed crimes drives home the fact that they perpetrated a bad act; jail time makes that fact salient enough to prevent recidivism in some offenders.

Jail time should not, however, be excessively long. At best, longer sentences do not affect recidivism rates, 575 and at worst, may actually increase recidivism. 576 We should, therefore, favor shorter sentences wherever possible. Shorter sentences are possible when the risk of recidivism is low, the probability of successful treatment high, and the need to incapacitate thus lessened. Not only will this free up resources for treatment and other programs, but it will likely reduce recidivism.

Treatment options should be closely studied. It is important that any treatment provided be voluntary, rather than forced. If this treatment is provided in jail or as a condition of parole, it should at least use positive, as opposed to negative, reinforcement. For example, in McKune v. Lile, Justice Kennedy wrote that "[a]cceptance of responsibility is the beginning of rehabilitation. And a recognition that there are rewards for those who attempt to reform is a vital and necessary step toward completion." 577 He also wrote that "offenders who deny all allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity." 578 The problem with McKune is that the Court affirmed a Kansas inmate treatment program that was based, not on rewards for participation, but on punishment for lack of participation. 579 In addition, the Kansas program did "not offer legal immunity from prosecution based on any statements made in the course of" treatment. 580 This contentious issue adds a new wrinkle to the criminal model versus illness model debate. Justice Kennedy wrote that "the potential for additional punishment reinforces the gravity of the participants' offenses and thereby aids in their rehabilitation. If inmates know society will not punish them for their past offenses, they may be left with the false impression that society does not consider

571 Id.
572 Id. at 539.
573 Id.
574 LANGAN, supra note 365, at 26 (reporting that of the sex offenders released in 1994 (having served time for a sex crime) these individuals were 3.3% likely to be rearrested for another sex crime).
575 Id.
576 SONG & LIEB, supra note 389, at 10.
578 Id. at 33 (citing BARRY M. MALETZKY WITH KEVIN B. MCGOVERN, TREATING THE SEXUAL OFFENDER 253–255 (Sage Publications 1991)).
579 Id. at 30–31.
580 Id. at 34.
those crimes to be serious ones." In contrast, Justice Stevens, in dissent, wrote that "the program's rehabilitative goals would likely be furthered by ensuring free and open discussion without the threat of prosecution looming over participants' therapy sessions." Which approach is better is still open for debate. This question, as well as other questions about treatment—voluntary or forced, individualized or uniform, in jail or on release—should be explored in depth. To address offenders' risk of recidivism, we need to be comfortable with varied approaches because each sex offender "has a unique fingerprint of offense, with different triggers," and so will likely respond to different treatment methods.

Upon release from jail—if, in fact, any jail time is served—a whole set of interventions ought to await the sex criminal. These interventions should focus on the early years after release. The first three years after release see the highest rates of recidivism, and so in a system of limited resources, interventions should focus on these years. Obviously the longer after release these programs can be in place, the greater reduction in recidivism society should see. These treatment interventions may take any number of forms, including one-on-one or group counseling, halfway houses, substance abuse programs, or even communal living with other sex offenders. Jesse Timmendequas (Megan Kanka's killer) was said to have lived in a "fraternity" of sex offenders. In fact, shared living arrangements may reduce recidivism by allowing each offender to "hold each other accountable for their actions and responsibilities and notify the appropriate authorities when a roommate commits certain behaviors." Common sense would suggest that such an arrangement would be possible only with low-risk and highly self-aware offenders who have admitted their guilt. It is, at least, an option to explore. Partially-secure halfway houses may offer a middle ground between full incarceration and such shared living arrangements. Intensive treatment may be offered, which costs anywhere from $7,000 to $17,000 less per offender per year than full incarceration (excluding costs of treatment while in prison). If an offender would normally be sentenced to five years of incarceration, the judge might choose to sentence him to three years in prison and two years of probation with close supervision and an intensive treatment program. The shorter jail term coupled with the extensive treatment are likely to reduce the offender's risk of recidivism, and the costs to the state are lower. There is no reason not to try this program with a large number of offenders.

SORNAs may co-exist with these treatment programs. SORNAs,
however, are ineffective, as we have seen, and may actually contribute to increased recidivism rates. “Chaotic” and “antisocial lifestyles,” as well as “sharp mood increases, particularly anger,” contribute to offender recidivism.\textsuperscript{587} Lack of employment also correlates to higher risk of recidivism.\textsuperscript{588} Given that SORNAs contribute to offenders’ ostracization from society, mood elevation—due to vigilante attacks and harassment—and job discrimination, it is highly likely that SORNAs decrease the level of public safety. Even the National Center for Missing and Exploited Children notes that “constant harassment and ostracism . . . may cause serious psychological damage, possibly even causing [a sex offender to] . . . return to his previous, dangerous lifestyle.”\textsuperscript{589} In the absence of any evidence that SORNAs are effective, and in light of the arguments that they are ineffective and dangerous, we ought to find a better way to protect the vulnerable in society.

To do so, we may wish to replace SORNAs with civil commitment programs that require either the state or the offender to prove or disprove dangerousness. These programs currently exist and are more intellectually honest than are SORNAs because they operate to remove from society offenders who are dangerous and release those who are not dangerous. SORNAs uniformly reject the element of dangerousness to determine registration requirements. If SORNAs are concerned with public safety, then an offender’s dangerousness should be of paramount concern. If the offender is dangerous, then he ought not be released from commitment. If, for whatever reason, we choose to retain SORNAs, then we should require hearings to determine a person’s dangerousness. The burden of proof could be shifted depending upon which party we trust and which we do not. The level of proof could be set in accordance with how sure we want to be that all registrants pose a risk versus how comfortable we are with forcing harmless people to register. These are questions that are beyond the scope of this article, but vital to SORNA reform. The ultimate goal is to create a system that protects potential victims of harmful sex crimes.

Conclusion

SORNAs did not simply emerge spontaneously, or only as a result of child homicide cases like that of Megan Kanka. They are a product of a long history of sex statutes that sought and continue to seek to repress alternate sexualities, as well as the result of the rise of the Religious Right in the 1980s and 1990s. As such, they reflect the conservative-Christian require-

\textsuperscript{587} Bynum, supra note 15.
\textsuperscript{588} Id.
ment that sex be limited to heterosexual, marriage-based, monogamous, procreative activity. Not only is this orientation unfortunate for those who find sexual fulfillment in non-traditional sexual expression, but it exposes these people to criminal liability and social ostracization. This hurts the person convicted, and it hurts his or her community.

Beyond that, the conservative-Christian orientation of SORNAs and sex crimes drowns those offenders who truly pose a threat to society in a sea of comparatively harmless sexual alternativists. The children and other vulnerable people that SORNAs purport to protect are left utterly unprotected. SORNAs are bad law made hastily, and they rest upon a conservative-Christian prohibitive norm of sexuality that also makes for bad law. If the criminal law is about public safety, then SORNAs fail the test. If we are to reform sex crimes in America, we must abandon those crimes’ religious orientation and approach them from a perspective that accepts alternate sexualities and bases the law on empirical evidence, not religious dogma. In so doing, we can move toward a system that protects the vulnerable potential victims of harmful sex crimes.