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INCEST AND SEX OFFENDER REGISTRATION: WHO IS REGISTRATION HELPING AND WHO IS IT HURTING?

JOCELYN HO*

INTRODUCTION

Branding: as understood today, its purpose is to make things stand out, easier to distinguish, and easier to manage. However, branding exists in many forms aside from the commonly understood physical act of touching a hot metal stamp to an object's body or affixing an easily recognizable logo to a product. Regardless of what form it takes, its purpose is the same: to serve as a red flag.

Nathaniel Hawthorne popularized the notion of branding of humans in *The Scarlet Letter*, a novel in which a New England town forces an adulteress to wear a scarlet letter "A" to signal to everyone that she was an outcast, a social misfit, a deviant, and a sinner.¹ Though one may look back at Hester Prynne's plight and disregard it as an antiquated form of punishment or merely a literary symbol, it is anything but. Scarlet letters take a modern form in sex offender registration and notification acts. While the purpose of these registries is to notify the community of the presence of a deviant and to take necessary precautions, the effects do not stop with the offender. In the area of incest offenses, the victim must suffer the same shame that the offender does once the offender is forced to register, because they often share the same information, the same home, the same name.

This Note will examine incest, its history, and how it evolved into a taboo subject. It will consider the laws developed to restrict incest and punish offenders. The Note will touch on the development of sex offender registration and notification acts, which incorporated incest offenses, and the purposes of registration and notification. A discussion of the psychological, emotional, and social distress of the offense, and how that distress is magnified by sex offender registration and notification, will follow. The Note will argue that incest is an offense different than the other offenses included on most sex offender registration and notification acts, and question its inclusion. Then it will examine the social benefit of registration and notification acts and argue that the inclusion of incest

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¹ NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Penguin Classics 2002) (1850).

does not serve the general purpose of registration. Finally, it will propose alternatives to forcing a sex offender to register his personal information, which may also be the personal information of his victim, in order to prevent needless public embarrassment and violation of the victim's privacy.

WHAT IS INCEST?

The parameters for incest vary by culture, but its general definition is a sexual act committed between people too closely related to marry legally.² Many cultures not only consider father-child, brother-sister, or mother-child acts of sexual intimacy and marriage to be incest but also extend the definition beyond the immediate family.³ Most societies have imposed legal restrictions on marriages and intimate acts between persons related by blood, though these restrictions vary; relationships between first cousins, second cousins—even fourth cousins—can be deemed incestuous, depending on the culture.⁴ The explanation for the fluidity of the definition of incest could be that sanguinity is not the only factor that can be disruptive of the family structure. For example, as California's incest statute shows, the general understanding of incest does not always conform to the legal standards for incest, because the law does not necessarily distinguish between sexual intimacy or romantic feelings between family members related by blood and those related by marriage.⁵

A. A Brief History of Incest

There is no way of telling how far back in time acts of incest first began, but one need look no further than ancient Greek, Roman, Egyptian,⁶ Incan, or Biblical history, to know that it is a very old practice.⁷ In some cultures, it was a practice sanctioned exclusively for royalty, so as to preserve pure bloodlines.⁸ In most cultures, however, it was a reviled, socially stigmatizing practice, evidenced by the multitude of literary tragedies⁹ showing the unenviable demise of those who, even as pawns of fate, engaged in the transgression.

Perhaps the most famous story concerning incest is *Oedipus Rex*, Sophocles' play written in 428 B.C. about a man who attempts to escape his destiny of killing his father and marrying his mother but still does so unwittingly.¹⁰ The punishment

² Dictionary.com, <http://dictionary.reference.com/browse/incest> (last visited March 22, 2008).

³ *See id.*

⁴ Blair & Rita Justice, *The Broken Taboo: Sex in the Family* 37, 39 (Human Sciences Press 1979).

⁵ *See generally* Michelle Murray, *Problems with California's Definition of Incest*, 11 J. CONTEMP. LEGAL ISSUES 104 (2000).

⁶ Some of the most famous incestuous pairings occurred during the XVII and XVIII dynasties of the Ptolemies, of which Cleopatra was part. JUSTICE, *supra* note 4, at 37.

⁷ Chapter 18 of the book of Leviticus in the Bible, for instance, deals with sexual acts considered "unclean" and "abominable."

⁸ *Id.* at 38.

⁹ *See* SOPHOCLES, *OEDIPUS THE KING, OEDIPUS AT COLONUS, ANTIGONE (THE COMPLETE GREEK TRAGEDIES)* (University of Chicago Press 1991).

¹⁰ *Id.*

for his acts of patricide and incest is his mother's suicide, Oedipus' self-inflicted blindness, and his exile from society.¹¹ However, it is not enough that Oedipus and his mother/wife Jocasta suffer. Driving home the point that incest is a deeply unacceptable act, Sophocles shows future generations suffering the ramifications of Oedipus and Jocasta's transgressions. In *Antigone*, Sophocles shows how tragedy befalls Oedipus and Jocasta's daughter because of her parents' sins.¹²

B. How Did Incest Become a Taboo?

Where does this taboo against incest come from? The basis may be rooted in superstition but it may also stem from more pragmatic concerns.¹³ As Blair and Rita Justice explain in their book, *The Broken Taboo: Sex in the Family*:

One basis [for requiring marriage and reproduction outside of the family] was to provide a means for better defense and security of fledgling societies. By requiring members of one family to reach out and marry members of another, a society added to its own strength by the network of alliances that developed. Kinship ties multiplied by incest rules, and people had an investment in the survival of the whole group or society.¹⁴

Reaching out to other families for marriage also served as a way to meet the economic needs of individuals. "Skills from one family were pooled with the strengths of another. The family became an economic organization in terms of producing and consuming."¹⁵ Children were regarded almost as a form of currency, serving as productive agents, "not potential sources of sexual gratification or partners for marriage."¹⁶ Thus it was the survival of societies that largely served as a basis for incest taboos. It could be that the desire to network and broaden the range of skills and manpower available to each family eventually translated from implicitly understood restrictions into formal legislation banning incest.

Though historically social Darwinist concerns permeated incest restrictions, the modern-day concern is biological.¹⁷ Medical practitioners began to recognize

¹¹ *Id.*

¹² After her father has fled the country, the tragic heroine is locked in a cave for defying the new King's order not to bury her brother, who was viewed as a traitor to his kingdom, and hangs herself rather than be buried alive. Her parents' incest wreaks its toll not only on her but also on her two brothers, who both meet premature ends. *Id.*

¹³ "One theory holds that the origin of all incest taboos can be traced to superstition, that anything pleasurable is bad and since incest involves sex and pleasure, it too is bad and must be banned. Incest angers the gods, according to the superstitious view. Other societies have simply regarded incest as unlucky. In ancient times, all sorts of national catastrophies [sic] and social misfortunes were blamed on the existence of incestuous relationships: torrential rains, crop failures in Ireland, sterility among both the women and cattle of Thebes." JUSTICE, *supra* note 4, at 40.

¹⁴ *Id.* at 35-36.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ However, it should be noted that birth defects and genetic disorders cannot serve as the sole or primary justification for the legal ban of incest, since people who have birth defects and genetic

that limiting one's gene pool to the immediate family compounded the incident of damaging recessive traits. Physical, mental, and psychological deformities passed down more readily among those stemming from a limited gene pool.¹⁸ Modern courts will openly state that in addition to "maintaining the integrity of the family unit [and] in protecting persons who may not be in a position to freely consent to sexual relationships with family members," they have a legitimate interest in "guarding against inbreeding."¹⁹ However, ancient societies and colonial Americans did not have the extensive knowledge about genetics and hereditary diseases that we do today. Rather, the early concern with incest was that it would disrupt inheritance, property ownership, family relations, and kinship ties.²⁰ How else to explain the prohibition in colonial America against marrying someone who was only related by marriage?²¹ Scholars have explained that this was because

[a]ffinity is not only a blood relationship, but includes kinship based upon marriage. Marriage was the mainstay of this social system, defining all other relationships. Marrying your wife's cousin by marriage is prohibited not because it would be inbreeding, but because it would confuse an existing, rigidly structured, kinship relationship with your wife's family. Marriage and the legitimacy of children had and continue to have significant consequences for the ownership of property and title to land. Wealth and stature in the community was based upon ownership of land. The marriage of in-laws would confuse the lines of inheritance and ownership and land and had to be prohibited.²²

C. Profiles of Common Incest Offenders

While many assume that sex crimes are perpetrated by strangers, such as the mysterious neighbor who lives down the street, most sex offenses are perpetrated by family members or people who know the victim.²³ However, when sexual offenses occur within the family, the likelihood of obtaining accurate data about the

disorders are not prohibited from marrying. This would be an interference with the fundamental right to marry, as set out in *Loving v. Virginia*, 388 U.S. 1 (1967).

¹⁸ See Joanna L. Grossman, "FindLaw Forum: A genetic report should cause a rethinking of incest laws," *cnn.com*, available at <http://archives.cnn.com/2002/LAW/04/columns/fl.grossman.incest.04.09/> (last visited March 23, 2008).

¹⁹ *People v. Scott*, 54 Cal. Rptr. 3d 674 (C.A. 2007).

²⁰ Leslie B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1531 (1998).

²¹ *Id.*

²² *Id.*

²³ Bruce J. Winick, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, AND THERAPY 213, 218 (Bruce J. Winick and John Q La Fond, eds., 2003) (more than seventy-five percent of reported cases of sexual abuse are perpetrated by someone that the child knows); See also Lori Presser and Elaine Gunnison, *Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?*, in CURRENT PERSPECTIVES ON SEX CRIMES 320, 324 (Ronald M. Holmes and Stephen T. Homes, eds., 2002) ("[I]n nearly 75 percent of sexual assault and rape cases and in 90 percent of those involving children, the victim knew the offender. Forty-three percent of victims under age 12 were assaulted by family members.").

crime is slim.²⁴ A wall of silence has been built up around discussing intimate acts that occur in the privacy of one's own home. Very few families are willing to discuss the presence of sexual abuse openly,²⁵ let alone acknowledge that it exists, because it is an "intensely private and sensitive matter, the exposure of which can shroud the family in feelings of shame, guilt, and embarrassment."²⁶

Although information on incest offenders is lacking due to privacy interests and the reluctance of participants to come forward with information, studies do exist. Experts have noted that some personality traits occur consistently in incest offenders and believe that these traits lead them to commit their offenses. Often, these character and personality traits make it highly unlikely that the offender will commit further sexual offenses with anyone outside his family. Since most incest offenses occur between father and daughter,²⁷ this Note will focus on the personality traits of these offenders. Most fathers who commit incest fall into a "symbiotic personalities" group.²⁸ A father in this group may feel that he never had closeness or love from his family as a child, so he may have an unmet need for "warmth, for someone to be close to, for someone to touch and hold him and in addition, he may "not know how to be close and affectionate in a nonsexual sense or how to meet his needs to belong and have a warm relationship in a non-physical way."²⁹ The symbiotic personality group consists of three subgroups: the introvert,³⁰ the rationalizer,³¹ and the alcoholic.³² There are also less common

²⁴ See Winick, *supra* note 23, at 218.

²⁵ Often, the terms 'incest' and 'sexual abuse' are thought of as interchangeable in sex offender statutes. Though sexually abusing a member of one's family is an act of incest, the common connotation of incest is more related to marriage or consensual sexual acts between family members. Incest is thus seen more as family-focused affinity between blood relations, in contrast to the connotation of sexual abuse as a coercive, manipulative sexual act that is likely to occur within and outside of the family.

²⁶ Winick, *supra* note 23, at 218.

²⁷ Indeed, most of the available case law on incest offenses involves repeated episodes of sexual acts between father and daughter or stepfather and stepdaughter. See *People v. Dobek*, 732 N.W.2d 546 (Mich.App. 2007); *Jones v. Commonwealth*, Nos. 2004-CA-002639-MR, 2005-CA-001790-MR, 2007 WL 288280 (Ky.App. Feb. 2, 2007); *State v. St. Germain*, 153 P.3d 591 (Mont. 2007); and *State v. Jiles*, No. 2006 KA 1206, 2007 WL 466792 (La.App. 1 Cir. Feb. 15, 2007), as recent examples.

²⁸ "Symbiotic personalities" comes from symbiosis, seen by Blair and Rita Justice as the central problem in father-daughter incest cases. Symbiosis refers to a parent turning to his child for the nurturing, love, comfort and succor that he would normally be expected to give to the child. The parent may turn to the child in an attempt to find the care that he feels is lacking in his other relationships. JUSTICE, *supra* note 4, at 62-63.

²⁹ *Id.* at 63.

³⁰ The introvert in the context of incest is someone who has trouble socializing with people outside of his own family. He might feel threatened from the outside world and have very few or no friends. To compensate for this dearth of contact, he increasingly turns to his family for comfort. His family is a shelter from the stress that develops from his isolation from others. The introvert may turn to a daughter to satisfy his needs. He may even view her as a permissible alternative to his wife. *Id.* at 64-65.

³¹ The rationalizer is characterized as a father who might be possessive of his family. He may think that it is better for his daughter to have her first experience sexual experience come from him; indeed, he may think that it is incumbent upon him to show her "what 'love' is." Sometimes this rationalization is bolstered by an elitist attitude. The father may think that he is the only worthy partner for his daughter. *Id.* 67, 75.

³² Though alcohol may play a role in a father's tendency to commit incest, not all of the fathers who commit incest are alcoholics. Approximately twenty-four percent were "drinkers," while ten to

subgroups, such as the pedophilic, the psychopathic, and those who commit incest because it is culturally accepted or considered a rite of passage.³³ Though the specific traits of each subgroup vary, they share the unifying characteristic of an “inability to reach out to others, to establish closeness, [and] to get attention and affection through daily human contacts.”³⁴

INCEST LEGISLATION

The pragmatic concerns over inbreeding might have translated into religious and moral condemnation and superstition. In the United States in 1793, for example, “[i]ncest was a crime grounded in principles of morality, property, and the laws governing inheritance.”³⁵ As such, the law in this country has been defining incest through legislation since the 1600s.³⁶ It is these somewhat archaic laws that are based on the Bible—namely, the book of Leviticus—that seem to serve as the cornerstone for modern-day incest legislation and sex offender registration.³⁷

A. Incest Legislation in America

Though one may think that sex offender registration and notification laws are a modern-day invention, a primitive form of registration—especially as it applied to incest—existed in colonial America. The more subtle public shaming/penance aspect of modern-day registration laws were manifested through almost theatrical displays of punishment in the colonial era. For instance, a 1779 Vermont statute provided that incest offenders be set upon the gallows and whipped, and that “every persons so offending, shall, forever after, wear a capital letter, ‘I,’ of two inches

fifteen percent of the men who committed incest in Justice’s study were alcoholics. The alcoholic father is marked by increased dependent personality traits as compared to a father who may have one or two drinks too many on occasion: “a strong need to be dependent and to have someone take care of him.” For the alcoholic father, the alcohol can serve both as the catalyzing factor in commissioning incest and as a way to deny responsibility for his actions. The alcoholic father can always blame the alcohol if he is consumed by guilt over what he has done. *Id.* at 80-81.

³³ The pedophilic type may not limit his sexual desires to his family. Indeed, the pedophilic type more readily conforms to popular conceptions of how all sex offenders are. However, pedophilic fathers are rare. Men who have pedophilic tendencies tend not to marry and have children because they are more emotionally and sexually like a child and feel comfortable only around small children. *Id.* at 89-90. The psychopathic incestuous type is also very rare. Psychopathic types use sex as a way to express hostility, get-even attitudes and power. Unlike other fathers who commit incest, they are not racked by guilt because they do not have an understanding or appreciation of love. Like pedophilic fathers, psychopathic fathers may not limit themselves to members of their family, because sex is sexual stimulation and nothing else—it is devoid of emotion or meaning to them. *Id.* at 83-89.

³⁴ *Id.* at 64. It should be noted that those fathers who practice incest as a cultural rite may not share these characteristics. *Id.*

³⁵ Bienen, *supra* note 20, at 1504.

³⁶ In 1650, Ludlow’s Code in colonial Connecticut defined the act constituting incest as “carnal copulation.” The penalty for both parties involved was death. Like the other crimes which incest was grouped with—idolatry, blasphemy, witchcraft, murder, bestiality, sodomy, rape, stealing slaves, treason, arson, children who curse or smite their parents, and being a rebellious son—the basis for the law stemmed from the Bible. *Id.* at 1528.

³⁷ *Id.*

long, and proportionable bigness, cut out in cloth of a contrary color to their cloths and sewed upon their garments, on the outside of their arm, or on their back, in open view.”³⁸

The public nature of the punishment “served a social purpose beyond punishing the individuals. Not only are the offenders to suffer personal corporal punishment, pain, and scarring of the body, but the punishment and humiliation is to be witnessed by the community and acknowledged publicly by the offender.”³⁹ These dramatic displays were thought appropriate because “the community was harmed by the offense, and the social fabric must be repaired by a public, theatrical event in which the community participated.”⁴⁰ In much the same way, modern-day registries seek to provide reparation and closure to the community. Carrying over incest to sex offender provisions and registries suggests the modern-day legislatures’ intent to retain the aspect of public penance, embodied in colonial times by branding offenders with a large “I” to notify everyone in their community of their transgressions.

However, unlike modern-day registries, in colonial times, both parties to the offense were punished equally. The attitude toward incest in colonial America was premised on the idea that both parties were complicit and both should bear the shame of their offense. Thus, “both were considered responsible and both were pronounced guilty. The penalty was in part a penalty of shaming.”⁴¹ Between colonial times and present day, a transformation in attitudes toward sex offenses took place, whereby the crime became a “crime against the person: a very personal kind of sexual assault against the body.”⁴² With this change in attitude toward sexual offenses, there were no longer two equally guilty and punishable parties; rather, the general understanding evolved into one where there was an offender who needed to perform penance and a victim who needed to be protected.⁴³ Legal proceedings followed suit, operating under the theory that

sex offenses were to be prosecuted behind closed doors, that family court proceedings were not open to the public, that the names of rape victims were not to be disclosed or published, and that the treatment and terms of

³⁸ VT. STATE PAPERS: BEING A COLLECTION OF REC. AND DOC. CONNECTED WITH THE ASSUMPTION AND ESTABLISHMENT OF GOV'T BY THE PEOPLE OF VT. 1 (William Slade ed., J.W. Copeland) (1823) (a compilation of the early laws of Vermont, which were passed in February, 1779), available at <http://www.rootsweb.com/~vtwindha/vsp/vsp000title.htm>. [hereinafter Vermont State Papers (1779-1786)]

³⁹ Bienen, *supra* note 20, at 1527.

⁴⁰ *Id.*

⁴¹ *Id.* at 1525.

⁴² *Id.* at 1504.

⁴³ This interest might be especially salient with incest cases, because of the disparity in power and leverage in most instances of incest. Because the most common form of incest is father-daughter, the law would have a marked interest in protecting the daughter, who is inferior to the father in the family power structure. It is thus easier to view the daughter as a victim rather than complicit in the transgression.

incarceration for sex offenders were not subject to public review or discussion.⁴⁴

B. The Development of Sex Offender Registration and Notification Acts

A sex offender is defined as someone who has been convicted of any crimes involving sex.⁴⁵ Though the first sex offender registration and notification act was passed in Washington State in 1989, the acts did not become standard in other jurisdictions until 1994.⁴⁶ On July 29, 1994, seven-year-old Megan Kanka of Hamilton Township, New Jersey, was abducted on her way to visit a friend who lived down the street from her.⁴⁷ Her family realized that Megan had disappeared when her sister went to find her at the friend's house and she was not there.⁴⁸ Twenty-three hours after her disappearance, police found Megan's body several miles from the Kanka home.⁴⁹ The police investigation led them to Megan's attacker, Jesse Timmendequas, a thirty-three-year-old convicted sex offender who lived across the street from Megan.⁵⁰ None of the residents in the area had known that Timmendequas had a criminal record, or that he was sharing the house with two other convicted sex offenders.⁵¹

The public outrage over Megan's death was largely premised on the idea that had members of the community known that a sex offender moved into the area, they could have prevented Megan's death.⁵² The Kankas and others pushed for legislation. They wanted to be able to "actively participate in reclaiming the safety

⁴⁴ Bienen, *supra* note 20, at 1527.

⁴⁵ Law.com Law Dictionary, <http://dictionary.law.com/default2.asp?selected=1943&bold=offender|sex|> (last visited Nov. 20, 2007). This definition can include rape, sexual assault, bestiality, incest, kidnapping, or false imprisonment of a minor, soliciting or trafficking prostitutes, possessing child pornography, or child molestation.

⁴⁶ Violent Crime Control and Law Enforcement Crimes Against Children, 42 U.S.C.A. § 14071 (2006). The legislation is also known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program. *See also* Winick, *supra* note 23, at 213.

⁴⁷ Tom "Tad" Hughes, *The Creation of and Considerations Surrounding Megan's Law: The D.A. Can't Get No Relief*, in CURRENT PERSPECTIVES ON SEX CRIMES 135, 136 (Ronald M. Holmes and Stephen T. Holmes, eds., 2002).

⁴⁸ *Id.*

⁴⁹ *Id.* at 137.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *But see* R. Karl Hanson, *Who is Dangerous and When Are They Safe? Risk Assessment with Sexual Offenders*, in PROTECTING SOCIETY FROM SEXUALLY DANGEROUS OFFENDERS: LAW, JUSTICE, & THERAPY 63, 65 (Bruce J. Winick and John Q. La Fond, eds., 2003).

Knowing that someone has committed a sexual offence is insufficient evidence that the offender is high risk. Most sexual offenders are never convicted for a new sexual offence. Consequently, blanket policies targeting all sex offenders—e.g., "one strike" laws—can be expected to expend resources on large groups of sexual offenders who would have stopped offending given even minimal interventions. Nevertheless, the available research evidence suggests that it is possible to identify a small group of high-risk sex offenders for whom the probability of eventual recidivism is greater than fifty percent.

of their neighborhoods, cities and towns.”⁵³ The goal of the campaign was encapsulated in the simple phrase, “the right to know.”⁵⁴ The measure, known as the New Jersey Registration and Community Notification Laws or more informally, “Megan’s Law,” became law just 89 days after Megan’s death.⁵⁵ The fast push to get the legislation into law was based on a need for parents to feel empowered to take action to protect their children.⁵⁶ Legislators reasoned that “[w]ithout such information, parents may experience a sense of powerlessness, a feeling that can create great anxiety and fear. Providing parents with this information, therefore, predictably reduces their level of fear and anxiety and enhances their feeling of control over their environment.”⁵⁷

Megan’s Law enjoyed widespread support not just from concerned parents and community members, but also from law enforcement officials and state prosecutors.⁵⁸ Sex offender registration and notification takes some of the pressure off law enforcement by making the community complicit in discovering potentially dangerous felons and taking preventative measures. Thus, “if a sex offense should be committed by an offender about whom notification has been provided, the tendency of the community to blame the police will be reduced.”⁵⁹ In addition to the positive psychological effect that registration and notification provides for law enforcement, proponents of sex offender registration claim that it makes it easier for police to ferret out suspects when something does happen.⁶⁰ It is also intended to serve as a deterrent for potential and convicted sex offenders from committing sexual offenses because of their highly visible status to the police and within the community.⁶¹

⁵³ Presser and Gunnison, *supra* note 23, at 323, quoting D. Beatty, *Community Notification—It’s the Right Thing to Do*, CORRECTIONS TODAY 59, 20 (1997).

⁵⁴ Hughes, *supra* note 47, at 137.

⁵⁵ Provisions Following Release of Sex Offenders, N.J. STAT. ANN. § 2C:7-1 (2006). See also Hughes, *supra* note 47, at 137. (“The groundswell of support for this initiative was massive. In 1 week, 100,000 signatures were gathered on petitions in support of the law. In just 2 months, 400,000 signatures were collected.”). Indeed, the heated emotions which gave rise to the fast turnaround for the legislation leads critics to note that the law was not as thorough and that the beneficial qualities of the provision were not as well-researched as they should have been. Presser and Gunnison observe that “[n]otification laws were passed hastily, without planning.... New Jersey legislators enacted Megan’s Law without hearings on alternative proposals or even a cursory reconstructive analysis of the events that led to Megan Kanka’s victimization to inform action.” Presser and Gunnison, *supra* note 23, at 326 (internal quotations omitted).

⁵⁶ Winick, *supra* note 23, at 216.

⁵⁷ *Id.*

This psychological value can be explained in terms of what the social cognition literature describes as ‘information control,’ the perception of personal control that results from obtaining information related to stressful situations and events. This information provided by registration and community notification statutes thus can give members of the community a sense of control over a salient and frightening hazard in their environment.

⁵⁸ *Id.* at 217.

⁵⁹ *Id.*

⁶⁰ Hughes, *supra* note 47, at 138.

⁶¹ *Id.*

C. How Sex Offender Registration and Notification Acts Work

Since Megan's Law was put into effect in New Jersey, all forty-nine other states have followed suit and adopted some form of sex offender registration and notification.⁶² Congress has even adopted federal legislation which incorporates many of the characteristics of Megan's Law to protect children from violent crime.⁶³ Though the nuances of registration and notification acts differ by state, generally they follow a similar format: upon release from a court-imposed sentence, a convicted sex offender must register with his state of residence. This includes providing name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, permanent address and any temporary address, date and place of employment, date and place of each conviction and the form of adjudication thereof, indictment number, a brief description of the offense(s), and any other information required by the state attorney general.⁶⁴ The offender must also provide fingerprints and in some instances, a recent photo, blood sample and hair sample.⁶⁵ Because sex offender registration is also governed by federal statute, if the offender wishes to move outside the state of conviction, he must register with his new state of residence at least ten days prior to taking up residence.⁶⁶

Some states require more extreme obligations from the sex offender than registration. Alabama recently toughened up its sex offender laws in response to criticism from the likes of conservative news pundit Bill O'Reilly, who cited Alabama as one of the states "that don't seem to care about this issue at all," especially in regard to crimes involving children.⁶⁷ The Alabama law targets its harsh consequences toward those who committed sex crimes against children twelve and younger. Among the measures enacted are more stringent reporting requirements, so that an offender must not only register his residential and employment addresses but also anywhere he might stay for three consecutive days or at least ten aggregate days a month.⁶⁸ Other drastic measures include an electronic monitoring system or markings on state-issued identification—which convicted sex offenders would be required to carry at all times—that identify them as sex offenders to law enforcement officials.⁶⁹

Louisiana also imposes strict requirements on sex offenders once they serve their jail sentences. In addition to registration, sex offenders in Louisiana must take

⁶² Winick, *supra* note 23, at 213.

⁶³ Violent Crime Control and Law Enforcement Crimes Against Children, *supra* note 46. See also Winick, *supra* note 23, at 213.

⁶⁴ N.J. STAT. ANN. § 2C:7-2 (2007); see also Winick, *supra* note 23, at 214.

⁶⁵ Winick, *supra* note 23, at 214.

⁶⁶ See N.J. STAT. ANN. § 2C:7-2c(3) (2007).

⁶⁷ *The O'Reilly Factor: Factor Investigation: Which States Are Soft on Child Sex Offenders?* (Fox News television broadcast July 11, 2005).

⁶⁸ 2005 Ala. Laws 301 (amending ALA. CODE §§ 13A-5-2, 13A-5-6, 13A-6-69, 13A-11-200, 13A-11-201, 13A-11-202, 14-9-41, 15-18-8, 15-20-20.1, 15-20-21, 15-20-22, 15-20-23, 15-20-24, 15-20-25.1, 15-20-25.2, 15-20-25.3, 15-20-26, 15-20-29, 15-20-31, 15-20-35 (1975)).

⁶⁹ *Id.*

out an advertisement in the local newspaper, listing their past criminal history and their current offense, and mail it to neighbors within a one-mile radius of their residence.⁷⁰ The state prosecutor may also impose other notification obligations on the sex offender, such as affixing a bumper sticker on his car, placing signs in front of his residence, or wearing labels on his clothing.⁷¹

Registration is required for anywhere from ten years to life, depending on the laws governing registration and notification in the state in which the offender resides. The majority of states use a three-tier system to determine how long and how stringent the demands of registration and notification should be on the specific offender.⁷² The tiers account for the likelihood of recidivism by the sex offender and correspond with the length of his registration.⁷³ Tier 1 offenders are considered to carry a low risk of re-offending, and as such, police chiefs are only required to notify local law enforcement.⁷⁴ Tier 2 offenders are moderately potential dangers to the community; thus police chiefs are only required to notify local law enforcement and local community groups—such as schools—of the offender’s presence in the neighborhood.⁷⁵ Tier 3 offenders, however, are likely to be recidivists, and in addition to local law enforcement and local community groups, the general public must be notified.⁷⁶

The determination for classifying offenders as Tier 1, 2, or 3 falls to the county prosecutors, who

[m]ust review the offender’s criminal history and consider whether the offender’s conduct was ‘characterized by repetitive and compulsive behavior’; whether the offender served the maximum prison term of imprisonment; whether the offense was committed against a child; whether the offender had a prior relationship with the victim; whether the offense involved a weapon, violence or serious bodily harm; the number, nature, and recency of prior offenses; the offender’s response to any treatment received; and the offender’s recent behavior, including any recent threats or expressions of intent to commit additional crimes.⁷⁷

The prosecutor must also look at a list of factors which indicate either a low or high risk of recidivism.⁷⁸ “The strongest predictors of sexual offence recidivism are variables related to sexual deviancy, such as deviant sexual preferences, prior sexual offences, early onset of sex offending, and diverse sex crimes.”⁷⁹ There are

⁷⁰ LA. CODE CRIM. PROC. ANN. art. 895(H) (2002); LA. REV. STAT. ANN. § 15: 542 (2002).

⁷¹ Winick, *supra* note 23, at 214.

⁷² In jurisdictions that do not use a multi-tier system, all discharged offenders are treated alike with regard to community notification. *Id.* at 215.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 215.

⁷⁸ Hughes, *supra* note 47, at 138.

⁷⁹ Hanson, *supra* note 52, at 65. However,

also additional factors which predict both general recidivism⁸⁰ and sexual offense recidivism, such as prior criminal history, juvenile delinquency, antisocial personality, age, minority race, and substance abuse.⁸¹ Further, whether the offender consistently attends treatment may play a part in how likely he is to recidivate.⁸²

D. Effects of Sex Offender Registration and Notification Acts on Offenders and Victims: Notification and Punishment... But Not Rehabilitation?

Registration and notification can create social, psychological and emotional tensions in the offender and the community in which he or she lives. The offender is stigmatized in his future endeavors. Neighbors may shun him, not wanting to associate with someone they deem morally deplorable; employers may be unwilling to hire him, fearing public backlash and the possibility of recidivating. Citizens who do attempt to aid the sex offender's transition back into society may also be the target of scorn, for "[n]otification draws a line not only between neighbors and offender, but also between neighbors and anyone who offers the offender much needed support, including relatives, friends, and employers."⁸³

Sex offenders may be the subject of subtle or overt discrimination. Community activism may range from passive displays of disapproval to

organized campaigns to alert the community to the presence of a sex offender. Citizens have also organized protests against the individual, involving a range of activities, both nonviolent and violent. Offenders and their families have been picketed, leafleted, stoned, pummeled with eggs, threatened, or had signs posted outside their residences. A lesser number have been victims of vigilante attacks. These different forms of participating all seek the goal of exiling the offender. Rather than a means to social cohesion, citizen participation is an instrument of divisiveness.⁸⁴

[N]o single factor is strongly enough related to recidivism that it can be used on its own. Consequently, evaluators will want to consider a range of risk factors. There are three plausible ways in which risk factors can be combined: empirically guided clinical judgment, pure actuarial, and adjusted actuarial prediction. In the guided clinical approach, evaluators consider a range of empirically validated risk factors and then form an overall opinion concerning the offender's recidivism risk. Although the accuracy of clinical judgment has been generally impressive, there are several examples in which empirically guided clinical judgments have yielded adequate results. In contrast, the actuarial approach not only identifies the relevant factors but also provides explicit rules for combining risk factors into specific probability estimates.

⁸⁰ General recidivism refers to a tendency to commit any criminal acts, such as robbery or drug abuse. It does not necessarily refer to a child molester committing further acts of child sexual abuse. Thus, a tendency to reoffend through robbery or assault will be referred to as "general recidivism," and the tendency to reoffend as a sexual offender will be referred to as "sexual offender recidivism." *See id.* at 65.

⁸¹ *Id.*

⁸² *Id.*

⁸³ Presser and Gunnison, *supra* note 23, at 328.

⁸⁴ *Id.* at 325. (internal quotations omitted).

The stigmatization follows offenders, because they are required to register in any new community into which they move. In effect, the registration and notification requirements continue punishing offenders long after they have paid their debt to society through a prison term or other form of court-mandated punishment. Indeed, the perpetual registration “indicates that they are not redeemed and not forgiven by the community. They are characterized as deviants and ostracized by the community in ways that may seem impossible to overcome.”⁸⁵

The interwoven, interchangeable nature of notification, punishment and public shaming has become even more evident with the advent of the internet. Sex offender registries have adapted to the technology and in some states, Megan’s Law has gone into cyberspace. The distinction between Tier 1, Tier 2, and Tier 3 is obsolete, since all sex offenders, violent or not, likely to be recidivist or not, now find their names and home addresses plastered on the Web for everyone to see.⁸⁶ Gone are the days when notification was limited to those who “needed to know” about the potential dangers lurking in their immediate neighborhood. Now someone living in Minsk, Belarus, can look up a photograph and home and work address for a convicted sex offender in Missouri. Displaying a criminal’s record for the world to see serves no purpose other than extended punishment and public shaming, even if the original intent of the registries was to notify people in the immediate community to take precautions against a potentially violent sex offender living next door.

The effect of this reversion to antiquated notions of crime and punishment has been to thrust all sex offenders into the spotlight, irrespective of their tendency to recidivate or the privacy concerns of their family or the victims. Though registration and notification are premised on the idea that a community deserves to know when a potentially dangerous convict moves into its neighborhood, it also serves an additional purpose—whether intentional or not—of punishing sex offenders long after they have served their sentences. Rehabilitation of convicted sex offenders is not listed among the goals of sex offender notification and registration acts.⁸⁷ Indeed, registration and notification laws seem to be written with the view that a sex offender will inevitably reoffend. Perhaps this is because the general consensus—regardless of whether it is correct—is that sex offenders’

⁸⁵ Winick, *supra* note 23, at 219.

⁸⁶ See generally Symposium, *Megan’s Law in Cyberspace: Privacy vs. Public Safety*, 25 SETON HALL LEGIS. J. 301 (2001). (Currently, thirteen states allow broad community notification: Arizona, Delaware, Florida, Louisiana, Minnesota, Mississippi, Montana, Nevada, New Jersey, Oregon, Tennessee, Texas and Washington. Of these thirteen, four issue notifications for all sex offenders convicted of specific offenses: Arizona, Delaware, Louisiana and Texas.) WASH. STATE INST. FOR PUB. POLICY, SEX OFFENDER CMTY. NOTIFICATION: A REVIEW OF LAWS IN 32 STATES 2 (1996), <http://www.wsipp.wa.gov/rptfiles/96-04-1101.pdf> (last visited Mar. 8, 2007).

⁸⁷ See, e.g., N.J. STAT. ANN. § 2C:7-2, which does not include efforts at rehabilitation among the duties of a released sex offender.

natures are immutable, and that they do not deserve sympathy or efforts at rehabilitation.⁸⁸

However, psychological studies seem to indicate that many sex offenders do not reoffend.⁸⁹ These studies find that the likelihood of recidivism in sex offenders is less than recidivism for nonsexual offenders.⁹⁰ While the possibility that any subsequent offense occurs is disturbing, the available scientific data seem to contradict public opinion that all sex offenders are all inevitably of the recidivist variety. The discrepancy between popular opinion and scientific findings may be explained by the prevalence of arrests for unrelated criminal activities and informal reports that the convicted offender is reoffending.⁹¹ It may also be explained by the fact that sex crimes are generally underreported, though the extent is unknown.

Of course, community members may question why any person should be so concerned with a convicted sex offender's rights. His crime might be viewed as so egregious that no length of prison sentence or any other demand imposed on him afterwards will be too great. He has, in effect, betrayed the trust of those he knew and his community with his offense. However, singling offenders out and making them visible to the community may have an unintended effect on public safety. Recently, several New Jersey townships enacted a zoning ordinance which barred convicted sex offenders from living within 1,000 feet of day care centers, community centers, places of worship, libraries, and recreational facilities.⁹² Though legislators may think that keeping sex offenders as far away from the public as possible is the best way to prevent further incidents, they are undermining their own mission. Law enforcement in New Jersey and Long Island, New York, where the zoning ordinances are in effect, claim the ordinances make it harder to keep track of sex offenders. Indeed, "[t]he steady march of more and more restrictive regulations... is sending sex offenders into rural territory, which in New Jersey and on Long Island is scarce—or worse, into vagrancy. Now these officials fear that uprooting sex offenders makes them less stable and harder to track."⁹³

⁸⁸ "That is, other life roles that the offender might play—e.g., parent or friend—are discounted. Sex offender becomes a master status; the diversity of behaviors and identities of those persons labeled sex offender are obscured. The master status is difficult to escape, and, most often, the offender must actively seek relief from notification requirements. The label may have lasting effects, as there are no ceremonies to decertify deviance before the community." Presser and Gunnison, *supra* note 23, at 323.

⁸⁹ "Contrary to common opinion, the observed recidivism rate of sexual offenders is relatively low. Based on a review of sixty-one studies involving close to 24,000 sex offenders, only 13.4% recidivated with a new sexual offence within four to five years. Approximately twelve percent of sex offenders recidivated with a nonsexual violent offence—e.g., assault, with rapists violently reoffending more often—twenty-two percent—than child molesters—ten percent. When recidivism was defined as any reoffence, then the rates were predictably higher—thirty-six percent overall." Hanson, *supra* note 52, at 64.

⁹⁰ The overall recidivism rate of sex offenders is, on average, less than the rate for nonsexual criminals. *See id.* at 65.

⁹¹ Hanson, *supra* note 52, at 65.

⁹² Laura Mansnerus, *Zoning Laws That Bar Pedophiles Raise Concerns for Law Enforcement*, N.Y. TIMES, Nov. 27, 2006, at A1.

⁹³ *Id.*

Although the main purpose of incarceration or other forms of court-mandated sentences is punishment, they should also serve a rehabilitative purpose. For instance, a “prison sentence provides offenders an opportunity to reflect on their past and an incentive to undergo change and forsake their antisocial attitudes and behavior patterns.”⁹⁴ The idea is that once they have paid their debt to society by serving their sentences, “[o]ffenders are offered a second chance... and, at least in principle, are eligible for reintegration into the community. The possibility of redemption and forgiveness may be a powerful incentive for the offender to expend the effort needed to achieve rehabilitation.”⁹⁵ However, registries might nullify this “second chance” theory of incarceration. If there is no foreseeable end in sight to the punishment, then what motivation would one have for redeeming oneself?

Because the punishment for a sex offense never seems to end, the sex offender might feel hopeless in his ability to reform himself. Registration and notification may have a negative effect on any gains the offender made in therapy, because once he is back out in the world, he could be ostracized by neighbors and blackballed by employers. As Bruce Winick noted in his article, *A Therapeutic Jurisprudence Analysis of Sex Offender Registration and Community Notification Laws*,

By denying them a variety of employment, social, and educational opportunities, the sex offender label may prevent these individuals from starting a new life and making new acquaintances, with the result that it may be extremely difficult for them to discard their criminal patterns. Furthermore, the continued shaming and stigmatization that the registration and community notification laws impose may produce anger in the discharged sex offender, further norm deviance, and, in extreme cases, even physical violence.⁹⁶

With no hope of becoming a productive member of society again, the sex offender may begin to believe what the community thinks: once a sex offender, always a sex offender.⁹⁷ The psychological toll that continual registration and notification take could be detrimental to not only the offender, but also his community. “To the extent that sex offenders experience a strong measure of uncontrollability concerning their conduct, the continued sex offender label may make them feel that their uncontrollability is causally related to an internal deficit that is stable rather than changeable, producing the feeling that improvement or change is hopeless.”⁹⁸

⁹⁴ Winick, *supra* note 23, at 219.

⁹⁵ *Id.*

⁹⁶ *Id.* at 219-20.

⁹⁷ *Id.* at 220.

⁹⁸ *Id.*

E. Effects on Incest Offenders

All of these concerns are magnified with incest cases. Once the offender's name and home address appears on the registry, the guilty stamp is placed on both. Appearing on a registry is a black mark that affects the convicted offender and the victim. In essence, the "victim" of the crime ceases to be such and becomes equally as guilty as the one tried and convicted of the offense. With his or her home address or family name appearing on a public registry, the victim must share the invasion of privacy and erosion of civil liberties that the offender endures.

Because sex offender registration and notification is premised in part on the community exerting control over the surroundings by taking an active part in identifying and "smoking out" sex offenders, or at the very least, serving as watchdogs, the offenders' moves will be carefully observed and scrutinized. While this could be true of the family of any sex offender that enters the neighborhood, it is especially true and harsh for incest offenders and their victims. In no other sexual offense situation would offender and victim be likely to reside in the same home, to share the same family name, to be as easily identifiable. This creates a tense and unenviable dynamic within the family home. In addition to the prying and judgmental eyes of the community, the victim must also cope with the psychological and emotional trauma of being a part of what is probably an irreparable rift in the family structure. This uncomfortable situation is exacerbated if the victim is a young son or daughter who has no choice but to go back to living at home with his or her convicted incest offender parent. Now the convicted and registered sex offender/victim dynamic is added to the existing parent/child, authority figure/subordinate dynamic.

While some "victims" of incest might be willing participants in the incestuous acts, many are not. Often, the victim is in a subordinate position to the instigator and might not know how to resist the unwanted advances, especially if the first incident of abuse occurs at a very early age, before the victim can comprehend fully what is going on, and continues regularly. In situations such as this, the victim's "choice" whether or not to participate in the incestuous acts is illusory. Indeed,

[w]hen the father makes incestuous advances toward his daughter, he rarely resorts to force or violence—he has no need. There is tremendous psychological coercion built into the father-daughter relationship. Not only has the daughter been taught to obey her father, but she looks to him for moral guidance... [s]o the victim almost always participates in the incest 'voluntarily,' not recognizing the subtle coercion that has taken place.⁹⁹

In *People v. Scott*, the California Court of Appeal for the Fourth Circuit recognized this power dynamic when it struck down the defendant's argument that because incest charges against him criminalized sex between consenting adults,

⁹⁹ Lisa Haberman, *The Seduction of Power: An Analogy of Incest and Antebellum Slavery*, 13 HASTINGS WOMEN'S L.J. 307, 317 (2002).

they violated his Fourteenth Amendment rights.¹⁰⁰ The record showed that the first and only sexual incident between the defendant and his daughter occurred after she had turned eighteen and the defendant had had one too many alcoholic drinks.¹⁰¹ The defendant argued that *Lawrence v. Texas* prescribed broad personal liberties in matters of sex within the privacy of one's own home.¹⁰² The Fourth Circuit dismissed this argument, stating that the Supreme Court specifically limited its holding to sodomy between consenting adults of the same sex, and did not extend the personal liberties to "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."¹⁰³ The Court essentially stated that any consensual element in incest cases is illusory, in that even adult daughters "are typically in positions of vulnerability vis-à-vis their older, and thus more authoritative fathers, in matters pertaining to sex."¹⁰⁴

The Court of Appeals in Kentucky also espoused this viewpoint in *Jones v. Commonwealth of Kentucky*.¹⁰⁵ In *Jones*, the defendant was accused of having sexual intercourse with his stepdaughter starting in 1996 when she was twenty-two, and continuing through 2003.¹⁰⁶ The defendant argued that section 530.020 of the Kentucky Penal Code prohibits sexual intercourse between a stepparent and a stepchild, and thus, the statute does not apply to sexual relations between a stepparent and his adult stepchild who is over the age of eighteen.¹⁰⁷ The court rejected the defendant's statutory interpretation, opting instead to

interpret "stepchild" broadly as meaning a son or daughter of one's wife or husband. Plainly stated, we view the term "stepchild" as encompassing both an adult and minor child of one's wife or husband. This interpretation better comports with the legislative purpose of KRS 530.020—the protection of the family unit. We can find no legal authority that leads us to believe the general assembly intended for incest under KRS 530.020 to be limited to relationships with children under the age of eighteen. It stands to reason that the family unit is equally threatened by sexual relations between a stepparent and adult stepchild as between a stepparent and minor stepchild.¹⁰⁸

By refusing to read the definition of "stepchild" as limited literally to children under the age of eighteen, the Kentucky court implicitly agrees with the California court's belief that no matter what age the victim and offender, the protection of a healthy family dynamic necessitates protection under incest statutes. Emotionally and psychologically, the child or stepchild will always and forever be

¹⁰⁰ *People v. Scott*, 54 Cal. Rptr. 3d 674.

¹⁰¹ *Id.* at 674.

¹⁰² *Id.* at 675 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

¹⁰³ *Lawrence v. Texas*, 539 U.S. at 578.

¹⁰⁴ *People v. Scott*, 54 Cal. Rptr. 3d at 678.

¹⁰⁵ *Jones*, 2007 WL 288280.

¹⁰⁶ *Id.*, at *1.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at *3.

a subordinate to the parent who makes sexual advances, and thus incest statutes should always apply, regardless of whether the victim is of legal age to consent.¹⁰⁹

The psychological ploys exacted on incest victims, especially when those victims are subordinates to their aggressors in the family structure, also make it difficult for them to come forward with their allegations. Their admissions might be greeted with skepticism or outright hostility by a disbelieving parent, relative, or law enforcement official. They might receive veiled threats and fear dire consequences. In *State v. Rennaker*, the victim testified that she was subjected to the defendant's sexual advances for four years but that she never told anyone what was happening.¹¹⁰ Even though she claimed that the defendant never beat or threatened her, still "she was afraid if she told anyone, Rennaker would hit her mother or throw her mother out of the house."¹¹¹ She also testified that "after sex, she would lay there and cry, and that she did not think she had a choice in the matter."¹¹² She said that "she did not tell anyone, and she felt like she did not have anyone she could tell."¹¹³

Because of the shame associated with the incestuous acts, and the likelihood that any admissions will be disregarded, the victim might stay silent, thereby allowing the offenses against her to continue. The victim might also be fully cognizant of the damaging effects that an accusation might have on the family unit. If the abuser is the father and the breadwinner of the family, the victim might feel guilt over turning the father in, not only because it would tear the family apart but also because it would deprive everyone of financial resources. This feeling of helplessness might explain why a father or stepfather making sexual advances toward his child is often referred to as child abuse instead of incest. The term "child abuse" indicates an unwanted act targeted toward a defenseless victim who feels he has no recourse, not complicity in the act.¹¹⁴

¹⁰⁹ In some states, such as Montana, consent is a defense to sexual intercourse with a stepdaughter or a stepson who is over eighteen years old. MONT. CODE ANN. § 45-5-507(2) (2005). However, as illustrated by *State v. Rennaker*, 335 Mont. 274 (2007), this defense can be difficult to prove, especially since evidence comes in the form of "he said/she said" testimony from the victim and the defendant. If the victim testifies that the sexual relationship was not consensual, the victim will still appear more credible to jurors, despite inconsistencies in her previous testimony. In *Rennaker*, the victim claimed that sexual intercourse between her and the defendant—her stepfather—began when she was seventeen while her mother worked long hours at a local car lot, leaving her and the defendant alone for extended stretches of time. However, evidence showed that the victim's mother did not begin working at the car lot until the victim was twenty years old. The victim also misstated that she was five years old at the time the defendant and her mother married, when in fact she was eight. Despite these inconsistencies, the jury and ultimately the court sided with the victim. *Rennaker*, 335 Mont. at 278-79.

¹¹⁰ *Rennaker*, 335 Mont., at 280.

¹¹¹ *Id.*

¹¹² *Id.* at 279-80. It should be noted that *Rennaker* also introduced testimony at trial which hinted at a consensual intimate relationship between him and the victim. His employer testified that they seemed more like "boyfriend-girlfriend" than father-daughter. His neighbor and his sister's friend also testified that *Rennaker* and the victim seemed to have a friendly and happy relationship. *Id.* However, when the jury weighed this information and the credibility of the witnesses, it still decided that the victim did not have consensual sex with *Rennaker*. *Id.* at 278.

¹¹³ *Id.* at 278.

¹¹⁴ As discussed earlier in Section IIA of this Note, the change in terms signals an adjustment in

All of the psychological, emotional and social tensions associated with incest have led some critics to question the necessity of including incest offenders on public registries. Many factors, aside from fears about disrupting the family structure and having no recourse, prevent the victims from coming forward. Even if they choose to disclose the abuse to a family member, they may not want to alert law enforcement because of the fear that they will be subjected to public humiliation. Indeed, public penance for the offender may not be necessary in incest cases. Because of the targeted nature of the offense, it seems unlikely that an incest offender will terrorize the community with his sexual deviancy. In its hearing on the Protection Against Sexual Exploitation of Children Act of 2005 and the Prevention and Deterrence of Crimes Against Children Act of 2005, the Committee on the Judiciary House of Representatives noted that “offenders who were related to victims were the least likely to reoffend.”¹¹⁵ Further, those critical of incest offenders appearing on sex offender registries note that:

[t]hose who commit acts of sexual abuse against their child or spouse may pose no risk or only a minimal risk of victimizing others sexually. To the extent that the sex offender required to register under these statutes has committed an act of sexual abuse against a member of the family, community notification laws may be unnecessary to protect those who are not family members but will be extremely embarrassing to the family and to neighbors who learn of these highly personal family secrets. Sexual abuse within the family is an intensely private and sensitive matter, the exposure of which can shroud the family in feelings of shame, guilt, and embarrassment.¹¹⁶

Because of the low likelihood that an incest offender will seek out others in the community to be objects of sexual offenses, the privacy interests of the offender and his family far outweigh the social value in the community knowing about the offense.

WHAT SHOULD BE DONE?

In remedying a flawed system, especially as applied to incest offenders, the legislature could take several steps: shift the focus away from offenses committed by strangers, which are the least common types of offenses, and focus instead on

attitude from colonial times, when both family members were equally complicit and guilty in the act of incest, to the more modern conception of clearly delineated categories of victim and offender.

¹¹⁵ Protection Against Sexual Exploitation of Children Act of 2005, and the Prevention and Deterrence of Crimes Against Children Act of 2005: Hearing on H.R. 2318 and H.R. 2388 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary H. of Rep., 109th Cong. 109-33 (2003) [hereinafter *Hearing Before the Subcommittee on Crime*] (addressing DEP'T OF REHAB. & CORR, STATE OF OHIO, “TEN-YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASE,” (April 2001)). Tables 14, 16 and 17 in the report indicate that recidivism for sexual crimes committed against family members during a ten year period ranges from zero—for incest with a male child—to 13.4 percent—for incest with a female child, while the recidivism rates for rapists—56.6 percent—and for extrafamilial child molesters—29.2 percent. *Id.* at 122-23.

¹¹⁶ Winick, *supra* note 23, at 218.

offenses committed by those known to the victim by instituting preventative measures through education about common types of sexual offenses; empower the victim to make decisions about sex offender registration and notification that affect her; emphasize therapy and rehabilitation for convicted offenders; institute a gradual reintroduction period between the incest offender and his family, to minimize the chances of recidivism; and commission studies on the effects of sex offender registration and notification acts on victims and offenders. This Note will discuss each of these suggestions in turn and point out their flaws.

A. Shift the Focus Toward Offenses Committed by Those Known to the Victim and Provide Education on the Most Common Types of Sex Offenses

Despite the complicated psychological and emotional issues surrounding incest offenses, and the fact that most sexual abuse occurs at the hand of a relative or someone known to the victim, most states choose to focus on sex offenses perpetrated by strangers. It is these strange and sordid stories that regularly make headlines, like that of twenty-nine year old Neil H. Rodreck II, who had a history of sex offenses, including lewd and indecent proposal to a minor, and posed as a seventh-grade student to gain access to other children.¹¹⁷ The wide publication of these rare but fascinating cases may lead many people to believe that sexual offenses committed by strangers are the most common kinds of offenses. However, the most common and probably also most underreported type of sexual offense occurs between parties who are acquaintances, friends, even relatives.¹¹⁸ It is the last of these types of sexual offenses that is most shrouded in mystery but deserving of the most attention from concerned parents and legislators.

With so much focus on protecting children against stranger offenses—which are rare in the scheme of sex offenses—the legislatures are ignoring the pervasive and damaging problem of sex offenses committed by known parties.¹¹⁹ Though the

¹¹⁷ Associated Press, *Sex Offender Posed as 7th Grader at Two Schools*, Jan. 24, 2007, <http://www.museumofhoaxes.com/hoax/forums/viewthread/2937/>. (Rodreck had met two other convicted sex offenders, Lonnie Stiffler and Robert J. Snow, online and convinced them that he was a twelve-year-old boy. The three of them moved into an Arizona suburb where Stiffler, sixty-one, posed as Rodreck's grandfather and enrolled Rodreck in school. Rodreck had a fake birth certificate and other admissions documents. He shaved regularly and wore pancake makeup to maintain a more youthful appearance. He attended classes and handed in homework but generally kept to himself. However, because of his poor attendance, he was ejected from the school. School administrators conducted a search of Rodreck's birth certificate and found it to be forged. They also discovered that he was a convicted sex offender. Stiffler and Snow were likewise perturbed when they discovered Rodreck was not a twelve-year-old boy. The two were charged with attempted sexual abuse because they believed that they were having sex with a twelve-year-old.) *Id.* See also Associated Press, *Fake 7th grader faces felony molestation charges*, Feb. 6, 2007, <http://www.cnn.com/2007/LAW/02/06/sex.ruse.ap/index.html>; Associated Press, *12-year-old is 29-year-old Sex Offender*, Jan. 19, 2007, http://tbdev.newsvine.com/_news/2007/01/20/529206-12-year-old-is-29-year-old-sex-offender-cnncom.

¹¹⁸ Winick, *supra* note 23, at 218.

¹¹⁹ About twenty percent of sex crimes against children are committed by fathers, twenty-nine percent by stepfathers and eleven percent by other relatives. Thirty percent are committed by acquaintances of the family, while only ten percent are committed by strangers. Leonore M.J. Simon,

trumpeted justification for sex offender registries is protecting children, “[t]argeting the stranger offender misleads the public about the nature and magnitude of the problem and how to prevent sexual victimization of children.”¹²⁰ The myriad of variations on sex offender notification and registration, coupled now with zoning ordinances, promote a false sense of security, rather than offer tangible protection.

Instead of distracting the public with the rare but fascinating stories of sex offenses committed by strangers, the public should receive more education concerning the prevalence of sex offenses occurring within the family or among acquaintances. The state should institute parent education workshops to warn parents to be more vigilant regarding the people with whom their child spends time and to be more receptive to their child’s claims of sexual abuse from a known party. Because sexual abuse from a person known to the victim does not usually occur just once, but rather, continuously, and over an extended period of time, “failure to protect a child from sexual abuse can doom that child to a lifetime of repeat victimization.”¹²¹ And, “since a substantial proportion of molestation crimes are committed by fathers, stepfathers, and brothers... parent education efforts can strengthen parents’ protective instincts and capacities so that they do not negligently or knowingly allow spouses or others to abuse their children.”¹²²

The problem, however, with parent education programs is that their effectiveness is unknown because “few parents attend these sessions, and those who do often have a prior interest or familiarity with the topic.”¹²³ Further, warning parents to be vigilant could fall on deaf ears if the potential offender is the spouse or a sibling. Warning parents to be wary of each other would undermine one of the core values of the family structure: trust. Maintaining a functional family requires trusting each member of the family unit with certain responsibilities, including child care and one-on-one time; thus, the ability to regulate is practically nonexistent. Parents would not feel comfortable harboring suspicions that their spouses were making unwanted sexual advances on their children, or that their children making sexual advances toward each other. The lack of parental receptiveness to these public education programs may impede their effectiveness.

B. Empower the Victim in Matters Concerning Dissemination of Private Information

Aside from preventative measures, legislatures should institute therapeutic measures for the victim. Though society draws a sharp distinction between offender and victim, guilty and innocent, the penal system does not address these

Sex Offender Legislation and the Antitherapeutic Effects on Victims, 41 ARIZ. L. REV. 485, 490-91 (1999).

¹²⁰ *Id.* at 491.

¹²¹ *Id.* at 523.

¹²² *Id.*

¹²³ *Id.*

differences in a pertinent way. The legislature's tunnel vision attitude toward punishing offenders and quelling community fears means that the victims often fall by the wayside. The focus is on how to keep known offenders—with an emphasis on stranger offenders—on the radar rather than prevent future incidents of the more common sexual offenses by people known to the victim. This reflexive attitude toward penalizing sex offenders, with questionably effective results, ignores the needs of many of those whose bodies and minds that have been invaded by unwanted sexual advances. Instead of thrusting incest victims into the spotlight by publicizing their offenders' whereabouts for the community to see, why not restore some of their power over their own destinies that was robbed of them by the coercive and unwanted advances of a family member?

Perhaps the simplest way to restore some form of control to the victim is to give him or her some say over the dissemination of the offender's information. Though the incest offender's surname and address may not necessarily be that of the victim's, it often is, especially since the most common form of incest is father-daughter. A daughter who has experienced the sexual advances of her father might feel locked into her role as a participant if her father's name and offense are plastered on lists and web sites for the world to see. How can she hope to move past the trauma of her youth if the registry exists as a constant reminder? To that end, before imposing the registration and notification requirement on an incest offender, the victim should be allowed to contest it and apply for a waiver or request a hearing. The waiver could consist of an anonymous petition to the court or a letter of support, written and signed by the victim. Considering that the courts can be closed for other proceedings that are private in nature, such as those involving juveniles, allowing private hearings for incest victims would be simple. Most cases involving incest use the victim's initials and do not disclose their full names out of respect for their privacy. Why should the victim's privacy be guarded so strenuously during the adjudicatory phase, only to have it be stripped away after the offender registers? Why shouldn't the privacy rights be equally as assured after the offender has served his sentence? Giving the victim a voice in the dissemination of information would provide her with a measure of control over the situation and provide closure on her unpleasant experience.

Failing to allow a waiver could have adverse consequences, as illustrated in the case of John Doe, a convicted incest offender living in Virginia.¹²⁴ Doe was eleven when he and his sister, four years his junior, began engaging in sexual acts, including intercourse.¹²⁵ The sexual relationship continued until he was 18, when he was caught and brought before a judge.¹²⁶ Because of his young age, Doe was sentenced to ninety days in jail, which would be suspended if obtained counseling

¹²⁴ Jerry Markon, *Sex Registry Lawsuit Rejected; Offender Loses Bid to Keep Name off List*, WASH. POST, Sept. 12, 2006.

¹²⁵ *Id.*

¹²⁶ *Id.*

and refrained from any other lawbreaking activities.¹²⁷ In March 1995, his obligations fulfilled, he was released from probation.¹²⁸ He slowly began rebuilding his life, attending college and obtaining a job as an aquatics director.¹²⁹

In 2003, his state of residence changed its sex offender registration laws to include incest.¹³⁰ In 2006, the law was changed again to make the registration information public online.¹³¹ Suddenly, Doe and his sister found themselves in a sticky situation: despite undergoing rehabilitation and living nearly twelve years without incident, there was a chance of having to unearth old memories. Doe filed suit to keep his name off the registry, arguing that the offense had occurred eleven years ago without any further incidents.¹³² His mother and his sister, who is now married with children of her own, wrote letters in support claiming that Doe was fully reformed.¹³³ Doe's sister asked that her brother to forego the registration and notification requirement, saying that she and Doe now had a healthy, normal brother-sister relationship and that she trusted him alone with her two young children.¹³⁴ Prosecutors scoffed at this, saying that maybe there were no incidents, but maybe there were simply no incidents that anyone knew of.¹³⁵ Both her and Doe's entreaties fell on deaf ears as the judge ordered Doe to register in October 2006.¹³⁶

Though allowing a waiver would restore some power to the victim, it will also raise other issues. Unlike Doe's, many incest cases will not involve parties who are both adults at the time the offender is forced to register. Judges and opposing counsel might question the independent decision-making faculties of the victim if he or she is a minor. Parties might be suspicious that a young, impressionable victim is being forced into submitting a plea on the offender's behalf, especially if the offender is the primary means of economic support in the family. The issues of outside influence or complicity might make the judge regard a waiver as unreliable and unpersuasive. Even additional measures, such as requiring the petitioner to speak to the judge in private, away from parental influence, or signing an affidavit to certify that the decision was hers alone, will not protect against every instance of fraud.

In Doe's case, requiring registration raised even more issues about ex post facto law-making and privacy for both offender and victim than in other incest cases. Often times there will not be a span of nearly twelve years in which the

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Jerry Markon, *Man Loses Suit to Keep Identity off Sex Offender Registry*, WASH. POST, Sept. 12, 2006.

¹³¹ *Id.*

¹³² Theresa Vargas, *Sex Offender Sues Va. to Keep Name Off Web*, WASH. POST, Sept. 11, 2006.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Markon, *supra* note 124.

¹³⁶ *Id.*

parties can undergo therapy, rebuild their lives, and reconcile what happened between them, only to have any gains snatched away from them by compulsory registration. Both Doe, an aquatics administrator, and his sister, a lawyer, had gone on to attend school and established careers. His sister was even married with children. The Virginia law forced them to relive what had happened nearly twelve years before—a series of events from which the two claimed they had moved on. However, the time and distance is probably what made it easier for Doe's sister to submit a letter of support to the judge. One can only speculate how either party would have fared had Doe been forced to register from the beginning. It is possible that because of the public nature of registration, Doe might not have been able to go to his local high school or gain admission to college. Likewise, his sister might never have felt comfortable in her neighborhood because of the stigma attached to her family's name. With Doe's photo, full name and address and the label of incest offender attached to the registration, members of the community would be left to the inevitable conclusion that Doe's sister was the object of his offense.

C. Rehabilitation Through Counseling and Treatment

Though the victim can choose on her own accord to seek counseling, she is no safer if her incest offender reenters her life without having the benefit of even the faintest trace of rehabilitation for his offenses. The penal system will impose incarceration as punishment, but it does not necessarily provide therapy or rehabilitative services concurrent with the prison sentence. Washington State, for instance, offers treatment as a sentencing alternative. These civil commitment laws treat the sex offender's crime as the result of an illness or compulsion. The commitment to a treatment facility is contingent upon three factors:

first...the offender must have committed a...sexually violent predatory offense involving contact against a victim who is not a family member. Second, the offender must have a diagnosed mental disorder, such as pedophilia or antisocial personality disorder. Finally, the offender's mental disorder must make the offender at risk to likely reoffend.¹³⁷

Commitment can last anywhere from one day to life and costs anywhere from \$46,000 to \$125,000 per offender.¹³⁸ Because only a few states have civil commitment as an option, and even fewer states release sex offenders subject to civil commitment, data about the effectiveness of such treatment is questionable.¹³⁹

Aside from being expensive—even more expensive than incarceration—civil commitment in effect makes treatment a substitute for punishment.¹⁴⁰ This is problematic because

¹³⁷ LEGIS. COUNCIL OF VT., SEX OFFENDER SUPERVISION AND CMTY. NOTIFICATION STUDY REP. 14, March 2005, available at <http://www.leg.state.vt.us/reports/05SexOffender/report.pdf>.

¹³⁸ *Id.* at 15.

¹³⁹ *Id.*

¹⁴⁰ Recently, the efficacy of civil commitment has been called into question. In Arcadia, Florida, a civil commitment center for sex offenders was egregiously under-funded and under-managed. The

[t]he availability of treatment to offenders who commit sex crimes at a time when general criminal offenders do not have the option for treatment further reinforces everyone's perception that what occurred is not a real crime.... Consequently, the victim is left with the impression that her victimization was not as serious as it would have been if it were committed by a 'non-mentally ill' stranger.¹⁴¹

Because incest offenders do not meet the three criteria to be eligible for civil commitment, mandatory, indefinite confinement in a treatment facility is not an option for them.¹⁴² However, incest offenders may be treated more leniently in sentencing than other types of sex offenders.¹⁴³ In prisons where treatment and not civil commitment may be available, "there is a preference among treatment providers for incest offenders who are believed to be more amenable to treatment."¹⁴⁴ Washington has a sex offender outpatient treatment sentence, called Special Sex Offender Sentencing Alternative (SSOSA) which boasts the lowest recidivism rates when compared with those sentenced to prison, jail, or community supervision.¹⁴⁵ The reliability of these statistics may be nullified in that those who are sentenced to outpatient programs might not be the most serious offenders, or might be a self-selecting group of individuals who believe that they have done something wrong and truly want to remedy the situation.¹⁴⁶

Proponents of treatment programs will argue that if society is truly serious about preventing future acts of sexual abuse, rehabilitation should be given due

center failed to enforce a strict regiment for treatment or even impose discipline on the offenders. With no end in sight to their confinement, prisoners felt entitled to run amok and staff saw no need to disabuse them of their destructive activities. Despite the failure of many centers in achieving their objective to cure sex offenders, lawmakers are supporting the creation of even more civil commitment treatment centers. See Abby Goodnough and Monica Davey, *A Record of Failure at Center for Sex Offenders*, N.Y. TIMES (Mar. 5, 2007), available at <http://www.nytimes.com/2007/03/05/us/05civil.html>.

¹⁴¹ Simon, *supra* note 119, at 519.

¹⁴² Even if indefinite confinement were an option for incest offenders, most judges probably would not feel compelled to impose it as a sentence. See *Id.*, at 494. The incest offender may very well be the primary breadwinner of the family, and an extended absence would only make the victim's situation worse.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 519.

¹⁴⁵ WASH. ST. INST. FOR PUB. POLICY, SEX OFFENDER SENTENCING IN WASH. STATE: RECIDIVISM RATES 3 (2005), available at <http://www.wsipp.wa.gov/rptfiles/05-08-1203.pdf>.

¹⁴⁶ Indeed, treatment is not a viable option in every case, and the court in its discretion may instead choose to impose consecutive sentences, thus preempting the need for sex offender registration. In *State v. Buchhold*, 727 N.W.2d 816 (S.D. 2007), the Supreme Court of South Dakota chose to impose the maximum sentence. It reasoned:

[T]he circuit court stated that in addition to the evidence presented at trial, it considered the pre-sentence investigation and psychosexual evaluation. This evaluation revealed that Buchhold is in "deep denial" of the molestation he perpetrated against A.B. Instead of accepting responsibility for his acts, Buchhold depicted his daughter as mentally unstable and a habitual liar. As the trial court noted, his continued denial left him unamenable to treatment or the possibility of rehabilitation: "It would appear to me, sir, based on the entire record before me, that there is no prospect of rehabilitation in the foreseeable future in your particular instance and that the only way to protect society is to remove you from society." Thus, in total we conclude the circuit court acted within its discretion by sentencing Buchhold to eleven consecutive sentences.

Id. at 825.

consideration. Even if the treatment is ineffective, there is no additional harm to the family and victim. At best it could help rehabilitate and reform the offender and release some pressure off of the victim and family; at worst, it would maintain the status quo—the state that the offender would have been returned to his family had he not received the benefit of treatment. If protecting future victims from harm is the impetus behind sex offender notification and registration acts, then the legislature should consider other alternatives besides registration and notification that would better achieve these goals.

Opponents of treatment options for convicted sex offenders may cite the mere option of treatment as evidence that sexual crimes within the family are not regarded as seriously as they should be.¹⁴⁷ Further, they may speculate that “the family is likely to be lulled into a false sense of security when the offender is in treatment, which is dangerous if the treatment is not effective.”¹⁴⁸ However, this assumes that the treatment will be ineffective. The fact of the matter is that the few states with treatment programs have not conducted long-term studies as to their effectiveness, and the states that have—such as Washington—have found no statistically significant differences in terms of sexual felony recidivism between those that have undergone treatment programs and those who have not.¹⁴⁹ In a study conducted by the Washington State Institute for Public Policy—WSIPP—in 2004 at the direction of the Washington State Legislature, WSIPP compared sex offenders released between January 1996 and December 1999 who had served at least one year in prison who were willing, but not participating in, treatment programs and those who did participate.¹⁵⁰ WSIPP found that the felony sex recidivism rate for the treatment program participants was approximately two percentage points higher than the comparison group.¹⁵¹ However, WSIPP also noted that the accuracy of the study was difficult to gage because of the self-selecting nature of participation in treatment programs.¹⁵² Furthermore, the study did not break down the study participants by specific offense, such as “rape,” “sexual assault,” or “incest,” but rather by general, more inclusive categories such as “percentage with two or more felony sex sentences” and “percentage with prior child sex conviction.”¹⁵³ To this extent, the WSIPP study cannot be conclusively said to be pertinent to incest offenders, who may benefit from treatment more than an offender who has repeatedly been convicted of violent felonies and child molestation.

¹⁴⁷ Simon, *supra* note 119, at 519.

¹⁴⁸ *Id.*

¹⁴⁹ WASH. ST. INST. FOR PUB. POLICY, SEX OFFENDER SENTENCING IN WASH. STATE: DOES THE PRISON TREATMENT PROGRAM REDUCE RECIDIVISM? 1 (2006), available at <http://www.wsipp.wa.gov/rptfiles/06-06-1205.pdf>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 3.

¹⁵³ *Id.* at 2.

D. Gradual Reintroduction into the Family Structure

As part of the treatment program, the offender should be reintroduced to his family gradually, at a pace which the victim and family feel comfortable. Because the crime of incest could mean that future contact with the offender is inevitable, the legislature and law enforcement should be sensitive to the victim's needs. If the incest offender is not sentenced to an outpatient treatment program, a gradual reintroduction period, instituted before the offender is released from his prison and reenters the family home, could allow both parties to achieve a comfort level with the situation. It would also be a way to test the waters, to make sure it is safe for both offender and victim to have the offender reinstated in the family home.

E. Commission Studies on the Effects of Sex Offender Registration and Notification Acts on Offenders and Victims

Since Doe was ordered to register, he has lost his job at the University of Washington.¹⁵⁴ The school did not comment on the reason for his termination, whether it was voluntary or because of the sex offender registry.¹⁵⁵ Whether Doe has since moved out of the neighborhood he once called home is unclear. What is even more unclear is the impact that registration now has on Doe's parents and his sister. Now that Doe has been "out-ed" as an incest offender, he has reaped negative consequences. Would this revelation into his activities from eleven years before permanently mar his ability to find gainful employment? To achieve lasting relationships? And will his sister face alienation from her husband, her children and her peers when the full impact of what happened all those years ago comes to the fore?

State and federal governments have not been proactive in commissioning studies as to the effectiveness of registration in preventing future sex offenses. They have likewise failed to make inquiries into how these registries affect victims, especially in cases of incest, where the victim and offender often share the same surname and thus the same public shame. While these studies might be time-consuming and expensive, they would be useful tools in establishing a system other than registration and notification which could help prevent sex offenses and needless embarrassment for victims.

CONCLUSION

The sex offender registries, and reflexive and emotionally-charged reactions to public fear and outrage, focus on the punishment and aftermath rather than treatment. In seeking to quell public outcry, the legislature adopted a policy of questionable effectiveness that does more good in calming society's psyche than actually protecting against sex offenders. It is important to note that punishment of

¹⁵⁴ Theresa Vargas, *Name of Nonviolent Sex Offender Is Added to Publicly Available Roll; 'John Doe' Fails in Legal Bid to Remain Off Virginia Web Site*, WASH. POST, Sept. 22, 2006.

¹⁵⁵ *Id.*

offenders should not be the sole focus of sex offender registration and notification acts; the concern should also be on securing the mental, psychological and emotional health of the victim.

Asking for and implementing changes in the current system, especially as it applies to incest offenders, who are less likely to recommit their crimes upon release and whose victims have the greatest potential privacy violation at stake, is a long uphill battle. Sex offender registries and notification procedures have become engrained in the American penal system. The public feels entitled to sex offender information, and the legislature and law enforcement feel an obligation to provide it. In March 2005, upon reviewing its sex offender supervision and notification policies, the Vermont Legislative Council concluded that “the public feels safer knowing it can access sex offender information if it so chooses, and expects to have access to information on sex offenders who may pose a threat to the public.”¹⁵⁶ It is this expectation that registration and notification will be beneficial that leads to their perpetuation and proliferation.

However, a 1995 WSIPP study found that “community notification had little effect on recidivism as measured by new arrests for sex offenses or other types of criminal behavior. However, it may have had an impact on the timing of new arrests,” meaning that arrests of those already on registries occurred faster than for those who were not.¹⁵⁷ Thus, their efficacy with regard to their purpose—to prevent new crimes—is questionable. Instead of offering concrete solutions, “[t]hese laws represent reflexive legislative reactions to public hysteria, not rational policy decisions. They waste not only public resources, but also an opportunity to actually protect the safety and well-being of potential victims of child sexual abuse.”¹⁵⁸ But as ineffective as the current system might be, society is wedded to it, comforted by the false sense of security it provides. The public’s impetus to concern itself with the victim’s privacy rights is slight when compared with its interest in guarding against the rare unknown, shadowy predator that could be lurking in the neighborhood.

Even if the registration and notification acts are not perfect, some will say better an imperfect system than none at all. Those who support sex offender registries will argue fervently for the importance of registries as a deterrent for and punishment of sex offenses, even in the face of a very few—and inconclusive—studies on the effectiveness of sex offender registration and notification laws. Though registries may be minimally helpful for fighting recidivism in certain kinds of sex offenders, for incest offenders and their victims, the stakes are different. Considering that recidivism rates for incest offenders are the lowest for all types of

¹⁵⁶ VT. LEGIS. COUNCIL, SEX OFFENDER SUPERVISION AND COMTY. NOTIFICATION STUDY COMM. REP. 13 (2005), available at <http://www.leg.state.vt.us/reports/05SexOffender/report.pdf>.

¹⁵⁷ DONNA D. SCHRAM AND CHERYL DARLING MILLOY, WASH. ST. INST. FOR PUB. POLICY, COMMUNITY NOTIFICATION: A STUDY OF OFFENDER CHARACTERISTICS AND RECIDIVISM (1995).

¹⁵⁸ Recent Legislation, *Criminal Law—Sex Offender Notification Statute—Alabama Strengthens Restricts on Sex Offenders—Act of July 29, 2004*, Ala. Act No. 2005-31 (to be codified in scattered sections of Ala. Code. Chs. 13A, 14, and 15), 119 HARV. L. REV. 939, 946 (2006).

sexual offenses, the implications of registration for both victim and offender are even more dire.¹⁵⁹ In states that require registration and notification for incest offenders, the victim must also suffer depletion of privacy rights alongside the offender.

The victim—the one who was not prosecuted, not convicted and not sentenced to prison or treatment for the crime—in essence shares the offender's fate, simply for having the same name as the offender. The appearance of the offender's information on a registry necessarily implicates the victim in the crime, harkening back to colonial America when both parties were required to wear the letter "I" on their clothes. But why resort to such crude methods of publicly shaming and warning against these kinds of offenders? Legislatures all over the country now have their very own, sophisticated version of the scarlet letter in the form of sex offender registration and notification acts.

¹⁵⁹ See Hearing Before the Subcommittee on Crime, *supra* note 115; see also Winick, *supra* note 23, at 218.

