In Pursuit of the Pervert: Sexual Dangerousness and the Creep of the Carceral State

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Abstract

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This dissertation examines the growth and development of contemporary sex offense laws, including the sex offense registry and civil commitment for people who have been deemed "sexually violent predators." As a whole, this project finds that sexuality has been an understudied site for understanding the expansion of punitive state power, and in particular, the development of the carceral state. When it comes to sex, the United States has demonstrated a willingness to push the legal and social boundaries of acceptable punishment. To better understand the causes and consequences of this willingness, my dissertation centralizes the role that the punishment and regulation of sexuality has played in the building of the American state, the expansion of its punitive powers, and the development of the carceral state. Drawing on three original datasets, I argue fears of people deemed to be sexually dangerous, or what I call specters of perversion, have driven important expansions to the carceral state—each building on the institutional and policy calcifications of the last. In this way, the state has used the specter of

perversion and conversely, the innocent white victim, to justify massive state building efforts that allow government reach to extend well beyond previously articulated boundaries at the expense of fundamental civil liberties protections. Indeed, these expansions are often the frontiers of developments in state surveillance and control—testing the legal waters for the surveillance and control of other groups. Yet, these expansions, at every stage, have had little return in actually preventing sexual harm.

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A Note on Language

I have consciously chosen to use the term "sex *offense* registry" instead of "sex *offender* registry," as well as "person with a sex offense" or "registrant" instead of "sex offender." There are three primary reasons behind this decision. First, the term "sex offender" is so ambiguous within the law that it is nearly meaningless. "Sex offender" refers to a heterogeneous group of individuals with convictions that range from public indecency--which can include peeing in public—to serious offenses, such as aggravated rape. Second, the term "sex offender" implies that this is a population of people who are *currently* committing crimes, not being listed because of past convictions. Using this term further drives widespread misinformation about risk and recidivism for people with sex offenses. Perhaps most importantly, using the term "sex offender" is not in line with the contemporary movement to implement people-first language, especially in the area of criminal justice. Reform movements have recently been calling for an abandonment of terms like "felon," "inmate," "offender," and "ex-convict." The use of these terms implies that instead of being a person who also happens to have a history of criminal justice involvement, all a person can ever be is their past criminal history. The term "sex offender" implies exactly that.

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Sometimes people say that a life of the mind is a life of solitude. My experience in academia has been the exact opposite. I am in awe of the community of people that have made this dissertation possible. Writing an acknowledgements section that accurately conveys the gratitude I have for that community is a daunting task. But here it goes.

I have been, above all else, blessed with incredible mentors. Going to community college was the best thing that has ever happened to me. My Chicano Studies professor, Mayo de la Rocha, taught me how to be a community organizer and showed me it was possible to be both an academic and a boots on the ground activist. While Mayo is gone, his spirit lives on in the community of rebels he raised at Ventura Community College. Professor Sara Gallaway sparked my life-long love affair with feminist theory. When I graduated from community college, she gifted me a collection of vintage feminist movement buttons, some of which I've passed down to my own students. My global studies professor, Farzeen Nasri, taught me how to be rigorous and disciplined in my research. My photography professor, Bill Hendricks took one look at my obnoxiously artsy photography and told me I'd probably enjoy traveling—something I hadn't really considered before. He sparked in me a love of travel that has taken me all over the world. Professor Deborah Ventura knew me well enough to know that I'd do well at a liberal arts college, and suggested I apply to Occidental College—something I will be forever grateful to her for suggesting.

My time at Occidental College was incredible. Oxy is the kind of college that has classes like "The Phallus" and "Whiteness." At Oxy, for the first time in my life, I was able to read and read and read and think and talk and write about big weird ideas. I was hooked. Oxy has a library that is open 24 hours a day, and I was there most of the time. Above all else in my academic

experience at Oxy, I am grateful for Professor Anthony Chase. He is, in my humble opinion, really fucking cool. A punk rock academic. He was always a good sport when I'd march into his office every week gibbering on about some political theory I had just read. Anthony told me my writing was bad (it was) and he helped me be a better writer. For that, I am eternally grateful. He's part of the reason I decided to pursue a PhD. Applying to PhD programs can be intimidating when you're a first-generation PhD student. Anthony advised me at every step of the way. I am lucky to have had his mentorship, guidance, and later friendship. I cherish the times we spent shooting the breeze at the Silver Lake Dog Park and the Devo concert at the natural history museum.

No one would have thought I'd choose Seattle to do a PhD. I hate the rain and prior to doing a PhD had moved to and then promptly fled London primarily because of the rain. However, I had the opportunity to meet Professor Michael McCann and immediately knew I had to study under him no matter the weather. Michael has a fascinating, beautiful brain. I loved getting to sit in Michael's wall to wall book lined office and listen to him kick around ideas. Every time I left Michael's office I'd leave with a giant list of books to read that would range from 18th century pop novels to obscure works of political theory. Michael is a creative, boundary pushing academic whose love of knowledge is contagious. I never left Michael's office feeling saddled with tasks, but rather excited to explore what we'd discussed. As an advisor Michael has been endlessly supportive—even when I've taken a few left turns (like an ill-fated stint in law school). I have never adjusted to the rain, but I've never for a second regrated moving to Seattle to work with Michael.

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I am also so grateful to have Katherine Beckett as one of my mentors and role models. Katherine is not the kind of academic that simply grows her career on the backs of research subjects without regard to how she can best serve them. Instead, she has dedicated herself to working towards changing the very issues she researches. This involves actively collaborating with the populations most impacted by the topics she studies. She regularly solicits input from

them and is cognizant of what types of research would be most useful for them and their efforts. I've seen her drive to the state capitol to testify at hearings, give media interviews, and speak with legislators. Her commitment to both academia and social justice has resulted in a number of impressive achievements during her career, including her substantial role in challenging the death penalty in Washington State. In a profession that actively de-incentivizes policy work and social justice organizing, her level of involvement and achievement in these areas is truly remarkable. I remain in awe of Katherine and am grateful to know her and learn from her.

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been an endless source of support during this program. He has read so many drafts of my work and given me such detailed insightful feedback. For that I am so grateful. I feel so lucky to have had him in my cohort from day one. It has been such a pleasure to see Sean blossom as an academic. I am also so lucky to have met Grace Reinke on this journey. Grace is kind and cool and always has the best podcast and book recommendations. She's one of my favorite people to bang on capitalism with. Grace has read many drafts of this dissertation and has always given me such useful feedback and encouragement. Thank you for always being game to karaoke 90s country songs with me. And thank you also for being such a great auntie to Betsy. There are so many other people who were with me in the trenches of Gowen who had such an important influence on me: JP Anderson, Erin Adam, Carolyn Dapper, Filiz Kahraman, Travis Nelson, Emma Rodman and Marco Brydolf-Horwitz.

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Finally, my parents, Paul and Lauri Moore, to whom this dissertation is dedicated. From that time in kindergarten when I refused to do the pledge of allegiance because Ms. Quinn couldn't give me a satisfactory reason why we had to do it every day, you have nurtured my independence, curiosity, and (maybe not as intentionally) defiance. Dad, through example you taught me to be scrappy, to be bold, and to never shy away from hard work. You've also humbled me and shown me that intelligence is subjective and comes in many different forms--because while I wrote a dissertation, I still have no idea what to do if my transmission goes out. Mom, you helped me make my first protest sign and didn't even blink when for years me and my smelly punk rock friends took over the kitchen to cook for Food Not Bombs. Through example you instilled in me a strong sense of justice and community service. This dissertation wouldn't have been possible without you both. I love you. Thank you for loving me so well.

DEDICATION

To My Parents, Paul & Lauri Moore

Chapter 1

Introduction: Sexual Dangerousness and the Creep of the Carceral State

A 10-year-old Texas girl was forced to register on the sex offense registry for pulling down the pants of her classmate. Her listing on the public registry cites, "indecency with a child," and includes her name, photo, and address.[1] In Arizona, a man with no prior criminal record was sentenced to 200 years in prison for possessing 20 images of child pornography. There was no evidence that, beyond possessing the images, he physically abused minors.[2] In North Carolina two teenagers were convicted of sexually exploiting themselves and made to register on the sex offense registry for consensually texting each other nude selfies.[3] In Florida, restrictions on where people with sex offenses can live or be are so strict that in some counties people on the sex offense registry are forced to live in shantytowns on the outskirts of cities.[4] An Illinois man has remained incarcerated since 1982 under the state's sexually violent predator civil commitment statute despite never having been charged or convicted of a crime.[5]

At the same time that the practices of civil commitment for people deemed to be sexually violent predators has spread to 20 states as well as the federal government, and the sex offense registry has grown to encompass close to 900,000 people, the #metoo movement has brought to the national conversation what many already knew—that in the United States sexual harm is both

[1] Sarah Stillman, "When Juveniles Are Found Guilty of Sexual Misconduct, the Sex-Offender Registry Can Be a Life Sentence."
[2] Linda Greenhouse, "Justices Decline Case on 200-Year Sentence for Man Who Possessed Child Pornography."
[3] Curt Autry, "Two N.C. Teens Charged for Sexting."
[4] Marcus Thompson, "Inside Miracle Village, Florida's Isolated Community of Sex Offenders."
[5] Max Green, "Illinois Legislators Are Calling for Changes to a Law That Keeps People In Prison Without a Conviction."

alarmingly common place and poorly redressed. According to CDC statistics more than 1 in 3 women and nearly 1 in 4 men have experienced sexual violence.[6] Further, 1 in 6 women in America has been the victim of rape or attempted rape.[7] This means that although the United States is a country that lists, tracks, and publicizes the personal information of people with sex offenses under the auspice of preventing more sexual harm, a country that severely restricts the movement of people on the registry through residency and presence restrictions, and a country that incarcerates people, under sexually violent predator civil commitment statutes, *before* a crime is committed in order to prevent sexual violence, it is also one that continually fails to limit sexual violence. Every 73 seconds someone in America is sexually assaulted.[8]

At the same time as the #metoo movement is gaining momentum, we are also seeing a critical though cautious reevaluation of the development and expansion of the carceral state. These conversations are happening not only in the academy, but at the grassroots, state, and federal levels as well.[9] While these critiques have by no means come close to reversing the gross injustices of the American carceral state, they have set into motion efforts to scale it back. Many states have begun to take steps towards repealing draconian sentencing, reducing prison over-crowding, and addressing racial disparities in the criminal justice system.[10] People are even

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[6] https://www.cdc.gov/injury/features/sexual-violence/index.html=

[7] https://www.rainn.org/statistics/victims-sexual-violence

[8] Ibid.

[9] See: Drakulich and Kirk, "Public Opinion and Criminal Justice Reform." and Nowotny et al., "COVID-19 Exposes Need for Progressive Criminal Justice Reform." Some scholars have argued that while there may be the perception of consensus on the need for reform discourses around crime and punishment have not shifted as dramatically as one may think. See: Beckett, Reosti, and Knaphus, "The End of an Era?"

[10] For a summary of state criminal justice legislation proposed and enacted see: https://www.ncsl.org/research/civil-and-criminal-justice/criminal-justice-databases-and-bill-tracking.aspx

calling for a "softer" war on drugs.[11] Yet, stories like the ones above are not limited to the occasional eyebrow-raising headline. While criminal justice reforms begin to slowly catch on, laws and policies relating to sexual crimes have paradoxically continued to grow with little concern.

Indeed, since the 1980s the American state has initiated and developed a sex offense registry and notification system so large that 1 in 230 men--and 1 in 119 Black men--in the U.S. is currently living on the sex offense registry.[12] The number of individuals on sex offense registries continues to rise, even as the total number of individuals under other forms of correctional supervision steadily falls.[13] Federal law has made the state and national registries public information. With a few easy clicks, anyone with internet access can locate a registrant's photo, home address, and place of employment. Twenty states, plus Washington D.C., and the federal government, have enacted laws that permit the civil commitment of people deemed to be sexually violent predators. Under civil commitment, people with sex offenses who have already served their allotted prison time can face indefinite detention without full criminal procedure protections. Various states have attempted to implement or have implemented permanent GPS tracking and mandatory chemical castration for people with sex offenses. These are only a few examples of the dramatic and strange developments in response to the threat of people who are deemed sexually dangerous. These registries now function as a new arm of the carceral state.

Yet, in spite of the significant growths in punitive state power meant to prevent and redress sexual harm, people are no less likely to experience sexual harm. Indeed, studies have shown that there is no significant correlation between the use of registries and a reduction in

[11] Katharine Q. Seelye, "In Heroin Crisis, White Families Seek Gentler War on Drugs."
[12] Hoppe, "Punishing Sex," 548. Hoppe 2016, 584
[13] Ibid.

sexual crime.[14] Neither is there a significant correlation between the practice of civil commitment for people deemed to be "sexually violent predators" and a decrease in sexual violence.[15] Why, despite this lack of effectiveness, is this expansion in the carceral power of the state via registries so entrenched? Further, why do these registries remain entrenched while the U.S. is experiencing a growing skepticism of the carceral state?

This dissertation analyzes the two interrelated paradoxes that these questions raise and reveals the centrality of these paradoxes to punishment and sexual harm in the United States. *The first:* although the United States has unusually draconian punishments for people convicted of sexual crimes, including public registration and civil commitment, the rate of sexual violence in the United States remains appallingly high. While, conversely, satisfaction with the ways the justice system redresses sexual harm once it occurs is alarmingly low. Despite this public dissatisfaction, the practice of public conviction registries and civil commitment remain more popular than ever. *The second:* there is growing concern regarding mass incarceration in the United States and corresponding efforts to combat the draconian system of laws that led the United States to be number one in the world in incarceration. Yet, the punishments for people with sex crimes have become increasingly punitive, resulting in a net of punishment schemes that is wider and wider— growing the carceral state at the same time that efforts to mitigate it are ostensibly increasing in popularity.

[14] Levenson and D'Amora, "Social Policies Designed to Prevent Sexual Violence."
[15] Levenson, "Policy Interventions Designed to Combat Sexual Violence."

Sex, Punishment, and the Carceral State

As a whole, this project finds that sexuality has been an understudied site for understanding the expansion of punitive state power, and in particular, the development of mass incarceration. Indeed, authors studying the development and perpetuation of mass incarceration have demonstrated the ways in which state institutions both shape and are shaped by identity categories such as race and gender.[16] The scholarship on the political and institutional development of mass incarceration has been particularly attuned to the relationship between race and carceral state-building.[17] This literature has unearthed historical continuities between prior forms of racialized state control and violence and the development of the contemporary system of mass incarceration. These important works have demonstrated the racialized nature of areas such as crime statistics, stricter sentencing, surveillance, and policing. Scholars have also highlighted the detrimental consequences the racist American criminal justice system has had on the rights and political participation of people of color.[18] Given these insights there has been surprisingly little attention to sexuality and punitive state powers.[19]

Resultantly, there is a concerning blind spot regarding punishment for sexual crimes academically, politically, and culturally. In the area of sexual crimes, the uses of increasingly

[16] For a discussion of race see: Francis, *Civil Rights and the Making of the Modern American State*; Lieberman, "Weak State, Strong Policy"; Weir, "States, Race, and the Decline of New Deal Liberalism"; Frymer, "'A Rush and a Push and the Land Is Ours.'" For a discussion of gender see: Skocpol, *Protecting Soldiers and Mothers*; METTLER, "Dividing Social Citizenship by Gender"; Anderson, "Dividing Citizens."
[17] Weaver, "Frontlash"; Alexander, *The New Jim Crow*; Muhammad, *The Condemnation of Blackness*.
[18] For a discussion of rights see: Carbado, "(E)Racing the Fourth Amendment". For a discussion of political participation see: Walker, "Extending the Effects of the Carceral State."
[19] There is one notable exception: Lancaster, *Sex Panic and the Punitive State*. However, much of the literature on sex offenses do not examine the institutional consequences and the impact on the contours of the state.

punitive, invasive, and constitutionally problematic measures, such as the registry and civil commitment, are widely accepted and in many instances celebrated despite their ineffectiveness. Yet, had these developments initially been targeted at other types of crime, for example violent crime, their palatability may not be so high. It is no coincidence that the first massively popular public conviction registries targeted those thought to be sexually dangerous. When it comes to sex, the United States has demonstrated a willingness to push the legal and social boundaries of acceptable punishment.

To better understand the causes and consequences of this willingness, my dissertation centralizes the role that the punishment and regulation of sexuality has played in the building of the American state, the expansion of its punitive powers, and the development of mass incarceration. I argue fears of people deemed to be sexually dangerous, or what I call specters of perversion, have driven important expansions to the carceral state—each building on the institutional and policy calcifications of the last. In this way, the state has used the specter of perversion and conversely, the innocent white victim, to justify massive state building efforts that allow government reach to extend well beyond previously articulated boundaries at the expense of fundamental civil liberties protections. Indeed, these expansions are often the frontiers of developments in state surveillance and control—testing the legal waters for the surveillance and control of other groups. Yet, these expansions, at every stage, have had little return in actually preventing sexual harm.

Institutional Developments: A New Arm of the Carceral State

Throughout the project I analyze these developments in punitive state powers on two fronts. The first is the ways increasingly punitive sex offense laws and policies have developed

and expanded based upon inaccurate narratives about people who commit sex crimes. These narratives are mainly that (1) people who commit sex crimes are strangers in the dark waiting in the bushes to prey on the vulnerable, and that (2) they are incurable and extremely likely to recidivate. These narratives dovetail to create what I have called the specter of the "sex offender." With regards to the inaccuracy of the specter of the "sex offender," peer reviewed research has disproven the idea that people who commit sexual crimes have a high likelihood of reoffending.[20] Further, the majority of sexual harm happens to people who are not strangers to those on the registry. Instead, people are more often than not sexually victimized by someone they know. A Department of Justice study on the sexual abuse of young children found that 93% of juvenile victims knew the perpetrator.[21] Further, 8 out of 10 rapes (including both children and adult victim) are committed by someone the victim knows.[22] These inaccurate narratives about both who commits sexual harm and how it happens has led to policy that is at best ineffective, and at worst, actively harmful to the prevention of sexual violence.[23] Indeed, the specter of the "sex offender" has helped to drive further investments in carceral powers as the solution to sexual harm.

The second analytical front is the impact these expanding punitive powers have had on the people ensnared in the justice system. I analyze both what this means for the daily lives of people with sex offenses, as well as their ability to organize for their rights. Further, I show that

[20] Sexual re-offense rates for people who have prior convictions for sexual crimes is around 5 to 15% and has a steep decline over time. See: Hanson and Bussière, "Predicting Relapse."
[21] Snyder, "Sexual Assault of Young Children as Reported to Law Enforcement," 10. This statistic is for children under 6. In children 6 to 12, 95% know their abuser. And in children 12 to 17 90% know their abuser.
[22] Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016.
[23] Levenson and Cotter, "The Effect of Megan's Law on Sex Offender Reintegration"; Tracy Velázquez, "The Pursuit of Safety: Sex Offender Policy in the United States."

as the practice of public conviction registries have metastasized, rights concerns have expanded out beyond those involved in the justice system because of sexual crimes into people with non-sexual offenses.

I argue that there are three primary areas where we have seen significant expansions of punitive state power through the development of contemporary sex offense laws. The first is in the increasing use of facially punitive criminal sanctions in the civil legal system. The Supreme Court has ruled that both the sex offense registry and the practice of civil commitment for "sexually violent predators" are civil in nature. These rulings have been overwhelmingly premised on the protection of public safety justified through misconceptions about the specter of the "sex offender." The designation of sex offense laws as civil has functionally eroded the distinction between civil law and criminal law and has had dire consequences for civil liberties. For example, in ruling that the sex offense registry and civil commitment for "sexually dangerous predators" is not punishment, the court has insulated these practices from important civil liberties protections afford in the criminal legal system such as ex post facto, double jeopardy, and provisions against cruel and unusual punishment. Further, U.S. Supreme Court rulings that have declared the sex offense registry and civil commitment to be non-punitive have paved the way for increasingly punitive sex offense legislation that is, by nature, also insulated from meaningful legal challenges.

The second area in which there has been an expansion of punitive state power is crime federalization and the related establishment of new federal and state bureaucratic organizations dedicated to managing, tracking, and punishing people with sex offenses. I compile and analyze an original dataset of all federal grants issued through the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Track (SMART Office) at the Department of

Justice from its inception in 2007 to 2017. Through the Spending Power, the federal government has used the SMART Office grants to threaten and entice state and local law enforcement agencies into compliance with increasingly punitive federal sex offense registration and punishment standards. These grants have increased the power of state and local police forces, and strengthened their collaboration with federal law enforcement, established new positions to oversee the registration and management of people with sex offenses, and expanded the scope of existing positions and task forces in order to ensure states are in compliance federal standards. As a whole, federal sex offense registry legislation and the establishment of a federal grant pool dedicated to strengthening state registries was a significant growth in federal power in the area of the criminal legal system and punitive state capabilities.

The third and final area of expansion I examine is the creep of registration trends into non-sexual offenses. Drawing on an original dataset I compiled of registerable offenses in all 50 states, I find that a number of states have begun to expand registration schemes to non-sexual violent and non-violent offenses that range from murder one to manslaughter to drug possession with intent to distribute. In addition, other states have used the model of the sex offense registry to establish, or attempt to establish, other types of public conviction registries for offenses ranging from domestic violence to unpaid child support to animal abuse.[24] Since the establishment of the sex offense registry, federal and state governments have developed and institutionalized the necessary technologies and bureaucracies for registering and tracking millions of people. In light of this, we must carefully consider not only what these developments are currently being used for, but also what they may be used for in the future.

[24] See: https://www.tn.gov/tbi/tennessee-animal-abuse-registry.html

Legal Mobilization at the Margins

The growth of this new arm of the carceral state has not been without contestation. From 2017-2020, I attended five national anti-registry conferences, participated in numerous webinars, meetings, and call-ins, and conducted 20 in-depth semi-structured interviews with activists to understand how a deeply unpopular movement--the anti-registry movement--strategized, organized, and mobilized to further their cause.[25] I find that people in the anti-registry movement experience significant structural, social, and individual barriers to organizing. All of these barriers are both created in part by and exacerbated by the specter of the "sex offender," the myth that all people with sex offenses are depraved strangers with incurable impulses to sexually harm children. Yet, even with the significant structural, social, and individual barriers to organizing and coalition building, anti-registry activists demonstrate formidable tenacity, adaptability, and ability to build much needed networks of support amongst themselves. Most of the activists understood that change does not solely happen in the traditional political arenas, such as the courts and the legislature. Instead, activists also invested a significant amount of energy into supporting each other, by forming non-profits to help people returning from prison, recording weekly podcasts on issues relevant to life on the registry, publishing quarterly magazines specifically for people on the registry to share their joys and interests as people and not just registrants, establishing support groups, and a variety of other activities.

[25] I have chosen to refer to activism to reform and/or abolish the public sex offense registry as the "anti-registry movement." There is some debate over whether or not to abolish the registry entirely or whether to make it only available to law enforcement. However, all instances activists agree that the current publicly available registry should be done away with and are therefore anti-registry.

Methodology and Research Design and Case Selection

I take a multi-method approach, including the compilation and analysis of two original datasets as well as original qualitative data. My first quantitative dataset (n =654) is composed of federal grants distributed through the SMART office from its inception in 2007 to 2017. The second quantitative dataset (n=50) is comprised of the non-sexual registerable offenses in all 50 states. The qualitative data is comprised of in-depth semi-structured interviews with activists working to reform or abolish the sex offense registry (n=20), as well as participant observation with three of the largest sex offense reform nonprofit organizations and archival research.

Dataset on Federal SMART Grants

In order to analyze the allocation and potential impact of federal spending on the registry and civil commitment, I generated a data set of all federal sex offense management grants distributed through the Department of Justice's Office of Sex Offender, Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office) from the inception of the grant program under the Adam Walsh Act in 2007 to 2017.

The dataset codes for the following categories: (1) General identifiers such as year of the grant, award/award amount, awardee, and state. (2) The type of organization that received the money (for example, victim organizations, departments of correction, state departments of justice, police departments, etc.). The awardee type category is then parsed by organization type (law enforcement, state government, local government, non-profit, tribe, etc.). (3) Whether the award focuses on juveniles or adults. (4) Purpose of the award, which is then parsed into two categories "punitive purposes" (including: apprehending, tracking, and punishing) and "non punitive purposes" (including: rehabilitation, education, and victim advocacy).

The data was gathered from the Office of Justice Program's (OJP) Award Data, which provides information on all grants distributed through the OJP's various offices, including the SMART Office. In order to determine whether or not the award was used for punitive or non-punitive purposes, I read through each of the "Award Descriptions" for all 654 grants. Given the Court's insistence that "management" practices such as registration and civil commitment are not punishment, the distinction between what is and is not punitive is not overt. Therefore, I based my interpretation of what is and is not punitive off of the academic literature on sex offense laws.[26] This literature overwhelmingly argues that practices such as registration, residency and presence restrictions, and civil commitment are experienced as overwhelmingly punitive. Therefore, any grant activities that are used towards these measures are coded as punitive, whereas measures such as education and treatment are coded as non-punitive.[27]

Dataset on Registerable Offenses

In order to understand if and how the practice of public conviction registration has spread into other types of offenses, I analyzed the sex offense registry statutes for all 50 states. I coded for all non-sexual offenses required to register in each state's statutes. I parsed these offenses according to the following (1) violent/nonviolent and (2) crimes specifically against juveniles/general crimes. I supplement that dataset with an analysis of committee hearings and

[26] Tolson and Klein, "Registration, Residency Restrictions, and Community Notification."; Harris et al., "Collateral Consequences of Juvenile Sex Offender Registration and Notification."; Bowen, Frenzel, and Spraitz, "Sex Offender Registration and Notification Laws." For a comprehensive overview of this literature see chapter 3.

[27] The coding of treatment as non-punitive could be problematic as some treatment programs are mandatory, and therefore contain an element of coercion. I decided to code treatment as non-punitive despite the potential presence of coercion, because funding treatment programs diverges from the perception of people with sex offenses as incurable, which is the paradigm that supports the funding of management practices.

reports from state legislatures that have either passed or proposed registry expansions, as well as local newspaper stories regarding these developments.

Anti-Registry Movement Data

In order to develop a rich understanding of contemporary movements for the rights of people with sex offenses, I conducted participant observation with the three main national sex offense reform organizations: The Alliance for Constitutional Sex Offense Laws (ACSOL), the National Association for Rational Sex Offense Laws (NARSOL), and Women Against the Registry (WAR). I attended and participated in three annual ACSOL Conferences (2017, 2018, 2019). In addition, I attended and participated in the annual conferences for both WAR and NARSOL in 2018. I have also actively participated in webinars and call-ins for all three of these organizations from 2017 – 2020. During the conferences, webinars, and call-ins I closely analyzed how activists how activists strategized for changed, including whether or not they felt litigation should be the primary approach to changing sex offense laws. In addition to participant observation, I collected and analyzed written (both online and in-print) documents from these organizations including brochures, newsletters, emails, and posters. I also conducted 20 in-depth semi-structured interviews with leading sex offense reform activists around the country.

Chapter Outlines

Chapter two analyzes how widespread fears over sexual dangerousness have worked to expand punitive state power with a focus on crime federalization. I examine how enduring tropes of the specter of perversion and the innocent white victim have historically been used as justifications for the expansion of punitive powers and also as a basis for laws and policies that

ultimately do little to prevent sexual harm. This chapter provides a theoretical and historical basis for understanding how the specter of perversion and the innocent white victim have been persistent elements in state expansion with a particular focus on the connection between two moments in history: the late 1800s/early 1900s and the 1990s/early 2000s, when we see the growth and development of contemporary sex offense laws. I argue the specter of perversion—an amorphous figure that temporarily embodies the sexual fear du jour—and the figure of the ideal crime victim—an embodiment of whiteness and innocence—are evergreen constructions that have historically been used to expand punitive state powers.

Chapter three examines the constitutional development of the legal limbo experienced by people on the sex offense registry and those civilly committed under sexually violent predator laws. I do so by critically analyzing the causes and consequences of two pivotal Supreme Court rulings regarding sex offense laws: *Kansas v. Hendricks* (1997) and *Smith v. Doe* (2003). In these cases, the Supreme Court ruled that civil commitment and registration are non-punitive and therefore civil in nature. I argue that the practices of civil comment and registration blend civil law and criminal punishment in order to circumnavigate important civil liberties protections in the criminal justice system. The Court's continued insistence that these practices are non-punitive and exist to protect public safety insulates the registry and civil commitment practices from meaningful legal challenges. Further, the connection to public safety is largely premised on inaccurate narratives about people who commit sex offenses that are then codified through these decisions. These court decisions have paved the way for significant growth of the carceral state, while simultaneously constructing a narrative that elides these expansions.

Chapter four examines the role the Spending Power has played in the growth of the registry, as well as how the use of conditional federal spending has contributed to the

federalization of crime and the expansion of punitive powers at the federal, state, and local levels. I analyze an original dataset of all federal grants distributed by the SMART Office from its inception in 2007 to 2017. In my analysis I pay particular attention to the ways that the specter of the "sex offender" has influenced what efforts and agencies the SMART Office has decided to fund over the last decade. I find that through the Spending Power, the federal government was able to help shape more punitive registration practices that further developed a new arm of the carceral state aimed at managing and punishing people with sex offenses. By increasing funding streams to state and local law enforcement, the Adam Walsh Act grants have helped to bolster carceral capabilities at state and local levels and institutionalize registration practices, ensuring these massive surveillance and punishment networks continue long after federal money recedes.

Chapter five tracks and examines the registerable offenses in all 50 states. I find that the practice of post-conviction public registration has crept into a range of non-sexual offenses from murder one to manslaughter to possession with intent to distribute. Taken together, these new laws and institutions are on the frontiers of increasing the capacity of state surveillance and control—testing the legal waters for the surveillance and control of other groups.

Chapter six examines how people deemed sexually dangerous have sought to organize for their rights. Through participant observation and 20 in-depth interviews, I find that while many of the activists spoke about constitutional rights and litigation, none seemed to blindly believe in the liberal "myth" of rights—a total investment in rights and litigation as *the* path to change.[28] Activists' skepticism towards rights and litigation is deeply intertwined with their own experiences with the law. Years of judicial gaslighting by rulings such as *Smith v. Doe* have

[28] For a discussion of the myth of rights see: Scheingold, *The Politics of Rights*.

understandably fostered ambivalence towards litigation as a viable strategy and rights as a winning argument. Further, while anti-registry activists had a difficult time coalition-building with related rights movements, the activists demonstrate an impressive ability to build power amongst themselves.

Chapter seven provides a summary of the major findings of this dissertation and offers some concluding thoughts on sexual dangerousness, the expansion of the carceral state, and avenues for challenging those expansions.

Chapter 2

State Expansion, The Innocent White Victim, and The Pervert Du Jour

Introduction

In this chapter I examine how widespread fears over sexual dangerousness have worked to expand punitive state power with a focus on crime federalization. I analyze how enduring tropes of the specter of perversion and the innocent white victim have historically been used as justifications for the expansion of punitive powers and also as a basis for laws and policies that ultimately do little to prevent sexual harm. This chapter provides a theoretical and historical basis for understanding how the specter of perversion and the innocent white victim have been persistent elements in state expansion with a particular focus on the connection between two moments in history: the late 1800s/early 1900s and the 1990s/early 2000s. While there are several examples of state expansion in response to the specter of perversion in the hundred years between the progressive era and the 1990s (where we begin to see an explosion in sex offense laws) I have chosen to focus on these two time periods for their significance in crime federalization. The late 1800s/early 1900s because, despite a general suspicion towards expanding federal powers, several key pieces of legislation written in response to specters of perversion during that era were passed and subsequently expanded federal punitive powers. Further, the expansions to punitive state power that occurred with the passage of federal sex offense legislation beginning in the 1990s is unprecedented and understudied.[29]

[29] Much of the literature on the role of the federal government and crime response is focused on incarceration and sentencing, not other forms of carceral expansion like the sex offense registry. See: Beckett, *Making Crime Pay Law and Order in Contemporary American Politics*., Gest, *Crime & Politics*., Weaver and Lerman, "The Carceral State and American Political Development." Gottschalk does expand her analysis to include other instantiations of the carceral state, including one chapter on the sex offense registry. See: Gottschalk, *The Prison and the*

I first examine the Comstock Act (1873) and the Mann Act (1910), two examples of expansions to federal power in the arena of crime and punishment that occurred prior to the New Deal, an era thought of as notably suspicious of expansions to federal power.[30] I then draw connections between the passage of these two pieces of federal crime legislation and the emergence of contemporary federal sex offense legislation. I argue the specter of perversion—an amorphous figure that temporarily embodies the sexual fear du jour—and the figure of the ideal crime victim—an embodiment of whiteness and innocence—are evergreen constructions that have historically been used to expand punitive state powers. Indeed, the specter of perversion has historically taken on many forms, from smut peddler to foreign trafficker, from gay communist to Satanist, to the contemporary specter of the "sex offender." While the ideal crime victim typically only oscillates between middle class white women and middle-class white children. Even as we see some oscillation between white women and white children as the ideal crime victim throughout American history, the unifying quality in both figures are their intertwined whiteness and innocence. The innocent white woman victim is so infantilized that she becomes almost indistinguishable from a child, leading some feminist scholars to refer to the victim trope not as women and children separately, but as "womenandchildren."[31] The pervert is a specter that continues to haunt the U.S., threatening innocent white victims, and producing laws and policies that not only expand the contours of the carceral state, but are at best ineffective, and at worst, actively harmful to the prevention of sexual violence. Indeed, these developments do nothing to

Gallows, chap. 9. See also: Schenwar, *Prison by Any Other Name*. for a discussion of how popular reforms like GPS monitoring perpetuate the carceral state.

[30] There are, of course, instances of federal expansion prior to the New Deal. However, in general we do not see rapid growth until the New Deal and after. For an account of expansions in response to crises see: Higgs, *Crisis and Leviathan*.

[31] Cynthia Enloe, "Margins, Silences, and Bottom Rungs."

address largescale socioeconomic, racial, and gender inequalities that perpetuate harm but instead fortify those very inequalities.

Early Crime Federalization: The Comstock Act & The Mann Act

Crime response and prevention were traditionally seen as within the purview of state and local governments because their proximity to the population better situated them to make decisions regarding crime.[32] This logic partially undergirds the deliberate near exclusion of crime from the delegation of powers outlined in the Constitution. The founding document only identifies three federal crimes: piracy, counterfeiting, and treason.[33] With few exceptions like the 8th Amendment's cruel and unusual clause, crime prevention and punishment, including decisions about what should be considered a crime, were left up to the states.[34] As Madison writes in Federalist No. 45, the powers of the federal government are "few and defined,"[35] whereas the delegation of powers to the state governments are "numerous and indefinite."[36] Crime, in the early history of America, was no exception. Scholars of crime and punishment have typically portrayed large-scale federal involvement and attention to criminal justice prior to the 1960s as all but non-existent.[37] There are, however, a few notable exceptions to this general truth--many of them initiated after widespread fears of sexually dangerous men and desires to protect middle class white women and children swept the nation. [38]

[32] Gest, *Crime & Politics*.
[33] U.S. Const. art. I, § 8, art. III, § 2
[34] U.S. Const. amend. XIII
[35] James Madison, "The Federalist No. 45."
[36] James Madison.
[37] Beckett, *Making Crime Pay Law and Order in Contemporary American Politics*., Gest, *Crime & Politics*., Weaver and Lerman, "The Carceral State and American Political Development."
[38] Miller, *The Perils of Federalism*, chap. 2.

One well known example is the 1873 Comstock Act, federal crime legislation spearheaded by and named after ardent anti-vice activist Anthony Comstock. The Act criminalized the publication, distribution, and possession of obscene literature or other items of "immoral nature."[39] A person in violation of the Comstock Act was subject to up to 5 years of incarceration with "hard labor" and a fine of up to $2,000.[40] In addition, the Act criminalized the use of the growing U.S. Postal Service to send any obscene or immoral materials and objects or any information/advertisements about the aforementioned obscene materials or objects with the penalty of up to ten years of incarceration with "hard labor" and up to a $10,000 fine.[41] The definition of obscenity and "immoral nature" was capacious by design. It allowed for the criminalization of traditional smutty materials, like pornographic imagines and magazines, but also extended to works of art, literature, and science. In addition, instructional literature on contraceptives, abortion, and general sex education, as well any instruments used for those purposes were also criminalized.

The Comstock Act expanded the rather small pool of federal crimes in existence during the late 1800s. In doing so the legislation extended the punitive powers of the federal government and granted enforcement agents wide discretion in determining what materials were illegal under the Act and who to prosecute. Comstock himself was appointed as a special agent of the U.S. Postal Service and given the power to enforce his namesake legislation. During his 42-year tenure as a special agent Comstock claimed to have prosecuted upwards of 3,600 and

[39] *An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use.* March 3, 1873, ch. 258, § 2, 17 Stat. 599.
[40] *An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use.* March 3, 1873, ch. 258, § 2, 17 Stat. 599.Adjusted for inflation that's close to $43k in 2020.
[41] Adjusted for inflation that's upwards of $219k in 2020.

destroyed 160 tons of obscene literature himself.[42] Prior to the act only a handful of states had obscenity statutes in their criminal codes.[43] By the turn of the century, 24 states had enacted their own Comstock laws in addition to the federal law, adding another layer of criminalization and punitive state power.[44] Federally, the Act continued to be reenacted, upheld by the U.S. Supreme Court, and used to prosecute people well into the 1960s.[45] It wasn't until 1983 that the Supreme Court finally struck down the then 100+ year old criminal statute.[46]

Comstock's campaign to pass the legislation relied on two key figures—the specter of perversion, which in this case took the form of obscene materials, and the innocent white child victim. Obscene materials were presented as objects of Satan placed on earth to "trap" and defile children. [47] In his book, *Traps for the Young,* Comstock wrote, "Vile books and papers are branding-irons heated in the fires of hell, and used by Satan to sear the highest life of the soul. The world is the devil's hunting-ground, and children are his choicest game. All along their pathway the merciless hunter sets his traps, and they are set with a certainty of a large return."[48] Obscene materials haunted the streets, newsstands, and even homes, making it so children could not move through the world without "giving [Satan] the opportunity to defile their pure minds by flaunting these atrocities before their eyes."[49] The protection of children laid at the center of the criminalization campaign. The preservation of children's "pure minds" was linked to the preservation of the nation—the specter of obscenity threatened white children and in turn the

[42] Werbel, *Lust on Trial*.
[43] Lewis, *Literature, Obscenity, & Law,* 7.: Vermont (1821), Connecticut (1834), Massachusetts (1835), PA 1860, and NY 1868.
[44] Lewis, *Literature, Obscenity, & Law*.
[45] *United States v. Zuideveld*, 316 F.2d 873, 875-76, 881 (7th Cir. 1963).
[46] *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983)
[47] Comstock, *Traps for the Young*, 20.
[48] Comstock, 240–41.
[49] Comstock, 20.

future of the nation. In 1873, speaking to the House of Representatives about the Comstock Act, New York Congressman C.L. Merriam opined: "war, pestilence, or famine could leave deeper or more deadly scars upon a nation than the general diffusion of this pestilent literature. The history of nations admonishes us that even our fair Republic will be of but short duration unless the vigor and purity of our youth be preserved."[50] At the time of the Act the country was emerging from the bloody civil war and failing reconstruction, yet sexually explicit literature and information about birth control were framed as more scarring and a greater threat to children's safety. The public largely supported the Comstock Act and the expansions to punitive federal power that came along with it.

The legislation emerged at the end of Reconstruction and during an acceleration of industrialization, a time of massive shifts in race relations and the economy. Historians of sexuality have long argued that while pieces of legislation like the Comstock Act often emerge from the rhetoric of protecting the public from sexual threats, these fears are actually byproducts of major shifts to social and economic structures.[51] In this way, the pursuit of the specter of the perversion du jour is an attempt to preserve existing systems of white supremacy, patriarchy, and economic injustice. During these times of anxiety innocent white "womenandchildren", are upheld as the soul of the nation in need of protection. In doing so, these moments help to fortify existing systems of inequality and exploitation.

For example, while Comstock publicly admonished all obscenity, the subtext of his criminalization campaign was that white men and, in particular, white women should not be the

[50] Cong. Globe, 42d Cong., 3d Sess. App. 168 (1873) (Statement of Rep. Merriam introducing a letter from Anthony Comstock). Cited in Blanchard, "The American Urge to Censor," 748.
[51] For an excellent account that focuses on the nexus of race, the preservation of whiteness, and sexual fears see: Mumford, *Interzones*. See also: D'Emilio, *Intimate Matters*.

subjects of obscene materials and that white children should not be exposed to them. Comstock and his supporters were deeply disturbed by the use of white women in obscene literature, especially as white women are typically seen as embodiments of purity and chastity.[52] After the passage of the Comstock Act, authorities pursued convictions of publishers that used scandalous images of white women. Yet, those same publishers soon learned they could evade prosecution by publishing obscene images of women of color. As Amanda Frisken observes, "nudity of such 'other' women in exotic settings, apparently, did not violate Comstock's standards for lewd pictures; his vigilance shielded from public view some white women's ankles, but not the outlines or even frontal nudity of poor or racially distinct women."[53] Further, the only instances where publishers were allowed to publish images of white women in obscene situations was in depictions of sexual violence committed by Black men against white women. The use of racist stereotypes and imagery of Black men and women of color evaded censorship precisely because it fortified white supremacy and patriarchy at a moment where there were potential challenges to these systems.[54]

Unlike Comstock Laws, other types of congressional attempts to expand the boundaries of federal power, even beyond crime, during this era were met with judicial hostility.[55] Perhaps

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[52] For a discussion of this as it relates to obscenity see: Frisken, "Obscenity, Free Speech, and 'Sporting News' in 1870s America." For a more contemporary example of this persistent trope, see: Irby, "Revealing Racial Purity Ideology.", which explores this ideology in the civil rights era.

[53]Frisken, "Obscenity, Free Speech, and 'Sporting News' in 1870s America," 558–59.

[54] Frisken, 564. For example, Reconstruction threatened white supremacy. And industrialization threatened patriarchy by providing women more opportunities to work outside the home.

[55]See: Civil Rights Cases, 109 U.S. 3 (1883), *United States v. E.C. Knight Co.*, 156 *U.S (1895), & Hammer v. Dagenhart*, 247 U.S. 251 (1918). Interestingly, *Hammer v. Dagenhart* overturned a piece of federal law that banned the shipment of goods produced by child labor across state lines. While, as I have argued, children are often used as justifications for expansions to punitive state power, the focus is typically white middle-class children, not poor children working in factories. In addition, we typically see expansions that focus on combatting spectral threats, not

the most significant attempt is the Civil Rights Act of 1875. This landmark piece of civil rights legislation declared all people, regardless of race, color, and previous conditions of servitude, have access to "the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement."[56] The Act also established that any person denied access to the aforementioned accommodations on the basis of his/her race would be entitled to monetary restitution. The Act was laudable federal civil rights legislation, especially given state and local resistance to the expansion of civil rights during Reconstruction. However, unlike the Comstock Act, the arguably necessary expansions to federal power enacted through the Civil Rights Act, no matter how needed, were met with public and judicial hostility.[57] By 1883 the Supreme Court essentially neutered the legislation when it ruled major portions of the Act unconstitutional on the grounds that it exceeded congressional authority granted in the 13th and 14th Amendments.[58]

Why, during the same era, did the Court allow for expansions to federal power around the criminalization of obscenity and not the protection of recently won and precarious civil rights for people of color? Largely because specters of perversion threatening to corrupt the moral fabric of the nation (white women and children) are more politically salient and easier to address than pervasive structural racism the courts, the legislature, and the public have a history of condoning. Ultimately, Comstock Laws retrenched the racial and economic status quo, whereas the Civil Rights Act of 1875 very well may have upended them. In general, many Progressive Era anti-vice laws and policies aimed at preserving sexual morality such as the Comstock Act and the

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actual threats like the exploitation that happens under capitalism. In this way the *Hammer v. Dagenhart* decision reinforced systems of economic exploitation at the expense of children.

[56] Civil Rights Act of 1875 18 Stat. 335-337.

[57] For a history of the Act and public reaction see: Friedlander and Gerber, *Welcoming Ruin*.

[58] Civil Rights Cases, 109 U.S. 3 (1883).

Mann Act were at heart targeted toward preserving white supremacy and sexual control through punitive state power, which is why many of them enjoyed widespread support.[59] As Lisa Miller argues, "crimes in which the health and welfare of the status quo citizenry has been at stake have been more likely to gain attention than crimes involving victims from disenfranchised, marginalized, or otherwise suspicious groups."[60] This attention has typically translated to not only legislation but also judicial support.[61] Protecting women and children, especially white middle class women and children, from the scourge of obscenity was seen as a legitimate expansion of federal power that had widespread support, whereas protecting the civil rights of Black and Indigenous People of Color was not.

Scholars who study sexuality and politics have noted the ease with which issues pertaining the regulation of sexuality and the protection of the innocent from the sexually dangerous enjoy broad public and political support during times of increased anxiety and changes to society.[62] Gilbert Herdt has termed these moments of widespread societal anxiety around sexual dangerousness "sexual panics." During sexual panics, "through state and nonstate mechanism that impinge on institutions and communities, people become totally overwhelmed by and defined through the meanings and rhetoric of sexual threats and fears."[63] Further, during these moments the object of fear, the "sexual other," is "stripped of rights, and the cultural imagination becomes obsessed with anxieties about what this evil sexuality will do to warp society and future generations."[64] These fears allow the state to take extreme, yet ultimately

[59] For accounts of the ways in which these upheld white supremacy see: Mumford, *Interzones*. See also McCoy, "Claiming Victims."
[60] Miller, *The Perils of Federalism*, 45.
[61] Civil Rights Cases, 109 U.S. 3 (1883)
[62] Lancaster, *Sex Panic and the Punitive State*., Rubin, "BLOOD UNDER THE BRIDGE."
[63] Herdt, *Moral Panics, Sex Panics*, 5.
[64] Herdt, 5.

ineffective, actions such as "tougher laws, moral isolation, [and] symbolic court action."[65] In reality, the laws and policies passed during sexual panics do nothing to address underlying issues of inequality and overwhelmingly preserve the racial, gender, and economic status quo. Gayle Rubin likens the passage of laws regulating sexual behavior to a type of moral and legal sediment wherein "each sex scare or morality campaign deposits new regulations as a kind of fossil record of its passage." [66] Through this lens each expansion can be seen as paving the way for future expansions.

Another example of the lasting impact sex panics have had on punitive federal power is the white slave trade panic and the Mann Act. In 1910 Congress passed the White-Slave Traffic Act (also known as the Mann Act), a piece of legislation aimed at combatting the "white slave trade." By 1910 the specter of perversion du jour had morphed from obscenity to the specter of the foreign trafficker, a man of color who trafficked white women into sexual slavery. In response to those fears, the Act made it a federal felony to engage in interstate transportation of women or girls for "immoral purposes," which included, but was not limited to, prostitution and "debauchery." There is no evidence there was actually widespread sex trafficking of white women.[67] Instead, much like the Comstock Act, the white slave trade panic and the specter of the foreign sex trafficker served as a stand-in for anxieties around industrialization, urbanization, prostitution, immigration, and miscegenation. The architects of the Mann Act were cognizant of judicial and political skepticism of expansions to federal powers. For example, portions of the 1907 Immigration Act had recently been struck down for taking too many liberties with the

[65] Weeks, *Sexuality and Its Discontents*, 45.
[66] Rubin, "BLOOD UNDER THE BRIDGE," 19.
[67] Pliley, *Policing Sexuality*.

Commerce Clause.[68] However, as with the Comstock Act, the desire to protect innocent white victims from the specter of perversion helped to overcome aversions to expansions of federal power. The author of the Mann Act, Congressman James R. Mann reiterated to the public that the problem of the white slave trade was not confined to a single state. Therefore, federal involvement was "needed to put a stop to a villainous interstate and international traffic in women and girls."[69] The specter of the foreign sex trafficker and his white victims ultimately helped to garner wide-spread public support.[70]

Due to the interstate nature of the alleged trafficking, the newly formed Bureau of Investigation (BOI) was the primary entity in charge of enforcing the Mann Act.[71] Prior to the Act's passage the less than 2-year-old BOI had limited jurisdiction. Yet, the Mann Act significantly increased the BOI's jurisdiction over interstate crime especially because the Act's directive was ambiguous and left BOI agents with wide discretion. It made it a felony to engage in interstate or foreign commerce transport of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."[72] Interpretations of what exactly constituted "immoral purpose" varied. In the beginning the BOI used the Mann Act to investigate punish illicit sex ranging from consensual sex between white women and black men, as well as sex with children, cases of interstate prostitution, and sex trafficking. However, following the *Caminetti* decision, which removed restrictions on how the "immoral purposes" clause in the Mann Act can be interpreted, the range of illicit sex the BOI was tasked with policing exploded as did the

[68] Pliley, 66–69.
[69] Pliley, 67.
[70]McCoy, "Claiming Victims."
[71] The BOI would later become the Federal Bureau of Investigation (FBI)
[72] The White Slave Traffic Act of June 25, 1910, c. 395, 36 Stat. 825.

investigatory powers of the BOI.[73] "Immoral purposes" expanded to include interstate cases of incest, bigamy, same-sex intimacy, interracial sex, fornication, rape, as well as seduction and adultery.[74] By the 1920s the BOI's investigations of marital discord, including adulty and seduction, "quickly outpaced investigations into interstate prostitution in terms of special agents' caseloads."[75] In this way, the desire to protect the innocent white women from the specter of the foreign trafficker overcame distrust of federal power and greatly increased the punitive powers of the federal government while fortifying both white supremacy and patriarchy.

These examples of federal expansions to crime jurisdiction in response to specters of perversion are extraordinary because they occurred during an era generally hostile to any expansion of federal power. Prior to the growth in federal power via the New Deal and the 1937 *National Labor Relations Board v. Jones & Laughlin Steel Corporation* Supreme Court ruling, the Court was highly skeptical of federal power grabs in most areas of the law.[76] Yet, the perennial interest in saving innocent white victims from the specter of perversion helped to quell judicial and public skepticism of federal power and made way for increased federal involvement in criminal justice, particularly the powers of the BOI and later the FBI. These efforts did nothing to mitigate the pervasive systems of white supremacy, patriarchy, or economic inequality that significantly threatened the health and wellbeing of the public, including women and children. Instead, these expansions perpetuated structures of inequality and increased the punitive powers of the federal government, arguably exasperating conditions for those the

[73]The *Caminetti* decision expanded interpretation of immoral purposes to include not just material gain, but also extramarital affairs, premarital affairs, and interracial relationships. *Caminetti* v. *United States*, 242 US 470 (1917).
[74] Pliley, *Policing Sexuality*, 131.
[75] Pliley, 131.
[76] See: Civil Rights Cases, 109 U.S. 3 (1883), *United States v. E.C. Knight Co.*, 156 *U.S (1895), & Hammer v. Dagenhart*, 247 U.S. 251 (1918).

legislation sought to protect.[77]

Post New Deal federal attention to crime remained sporadic, even as the overall powers of the federal government continued to grow.[78] Sustained national attention to the issue of crime emerged during the 1960s and has continued to this day.[79] The number of federal crimes has grown to the thousands and to this day continues to expand. Federal criminal justice agencies have also continued to sporadically concern themselves with the haunting of the specter of perversion--from the Lavender Scare in the 50s to the Satanic Panic in the 80s.[80] Yet no sex panic has expanded punitive state powers as much as the panic over the specter of the "sex offender" that began in the late 80s and early 90s. I begin the next section by providing a history of contemporary sex offense registry legislation and then move into an analysis of the ways in which the specter of perversion and the figure of the innocent white victim have been used to justify unprecedented expansions to the carceral state.

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[77] The strong political inclination to justify expansions through specters rather than actual structural issues is underlined in decisions like *Hammer v. Dagenhart* (1918), which overturned federal law that banned the interstate transfer of goods produced by child labor.
[78] For an account of those growths see: Sunstein, "Constitutionalism after the New Deal."
[79] During the Civil Rights Era federal attention to the policies of states morphed into law-and-order rhetoric. This rhetoric emerged in response to debates over what role the federal government should take in the distribution of welfare and protection of civil rights for marginalized communities. Through these debates, discourses about "deserving" and "undeserving" populations increasingly took center stage. "Crimes of the poor" such as street crime, drug addiction, and delinquency were used symbolically to demonstrate the "underserving and dangerous nature" of the poor and people of color. Beckett, *Making Crime Pay Law and Order in Contemporary American Politics*, 11.These symbols were then used to justify federal inattention to issues of structural inequality and to prioritize "social control over social welfare." Beckett, chap. 3. *See also*: Weaver, "Frontlash.", As well as: Murakawa, *The First Civil Right*.
[80] Lancaster, *Sex Panic and the Punitive State*.

Legislating to the Anecdote: The History of Contemporary Sex Offense Laws

In the 1980s and early 90s a series of several high-profile child kidnapping, sexual assault, and murder cases swept the nation. Three cases in particular caught the attention of the public: eight-year-old Adam Walsh who was abducted from a Sears in Florida in 1981, eleven-year-old Jacob Wetterling who was abducted from his hometown in St. Joseph Minnesota in 1989, and seven-year-old Megan Kanka who was abducted in her New Jersey neighborhood in 1994. Although these gruesome sexual assaults and murders happened in relatively small towns, news of them spread quickly. Publications with widespread readership like the *New York Times* picked up the headlines, while nationally syndicated evening news programs projected the faces of the missing and murdered children into living rooms across America. [81] John Walsh, the father of Adam Walsh, appeared on Good Morning America to discuss the growing tragedy of child abduction, including for the purpose of sexual assault. Sexual violence, and in particular, sexual violence committed against children became part of the national conversation. Many of the news stories perpetuated the idea that local, state, and federal law enforcement were ill equipped to deal with the growing problem of children being abducted by strangers for the purpose of sexual exploitation. Sources like *The Christian Science Monitor* cited the fact that federal programs for victims of sexual abuse only existed for persons who had been abused by a family member, not persons who had been abused by strangers.[82] A new specter of perversion emerged, the specter of the "sex offender." Something needed to be done about sexually depraved strangers lurking in

[81] For example, this 1989 New York Times Headline: Small Town is Shaken by a Child's Abduction: Ribbons Saying 'Jacob's Hope' are Tied Everywhere. Dirk Johnson, "Small Town Is Shaken By a Child's Abduction."
[82] Robert M Press, "Child Abduction Problem Recognized, Solutions Sought."

the dark preying on children. The same article ran the following advice from law enforcement: "parents and neighbors need to be more careful in watching children."[83]

State and national politicians began to pass legislation. Just a little over a year after the murder of Adam Walsh, President Reagan signed into law the Missing Children's Act, which mandated that the FBI collect and maintain centralized information on missing children. Both of Adam's parents testified during the congressional hearing for the bill, using Adam's tragedy as evidence for why this legislation was sorely needed.[84] These early legislative efforts focused largely on establishing a federal system to help locate missing children by maintaining and coordinating information on those who were missing. However, focus soon shifted from centralizing information about missing children to identify potential perpetrators.[85] This shift happened in the late 80s after the abduction, sexual assault, and murder of a seven-year-old boy in Tacoma Washington and the abduction of Jacob Wetterling in St. Paul Minnesota. In the aftermath of these tragedies, and at the urging of the victims' parents, both states passed laws requiring people convicted of sexual crimes to register with the police.[86] Washington went even further and became the first state to establish measures to notify the public when people convicted of sexual crimes were released from custody.[87] The legislation also established civil

[83] Ibid.
[84] Missing Children's Act. Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary. House of Representatives, Ninety-Seventh Congress, First Session on H.R. 3781. (November 18 and 30, 1981).
[85] Janus, *Failure to Protect.* Janus' book examines the emergence of the "preventative state" in response to fears around the sexual abuse of children. Janus finds that the preventions that emerge fail to actually protect children and prevent sexual harm.
[86] 1990 Washington state passed the Community Protection Act with the urgence of the Tennis Shoe Brigade, a group co-founded by the mother of a sexual violence victim. 1991 Minnesota also passed a similar law in response to Jacob Wetterling's murder. Jacob's mother, Patty Wetterling, formed the Jacob Wetterling Foundation.
[87] Community Protection Act RCW 71.09.

commitment procedures, authorizing the state to confine someone "potentially indefinitely" on a probable cause basis that they are a sexually violent predator.[88]

Registration and civil commitment laws are not entirely new. States had previously experimented with these laws. Between the years 1937 to 1967, twenty-six states and D.C. enacted civil commitment laws for "sexual psychopaths," though these laws quickly feel out of favor and into relative obscurity.[89] In 1947, California enacted the first sex statewide sex offense registry, which was used primarily to target homosexuals.[90] Under California's registration laws, people with sex offenses had to register with their local authorities. However, their information was solely for law enforcement use and was not made available to the public.[91] By 1969, 52 localities had enacted criminal registration laws, 14 of which explicitly included sexual offenses. These laws represent early, and in many ways less punitive precursors to the current legal and policy landscape. The popularity of these registries was spotty at best. They fell in and out of favor with law enforcement, and often suffered from bureaucratic neglect.[92] Comprehensive federal legislation regarding sex offense registration and civil commitment for those deemed as sexually violent predators was notably absent during this period.[93]

This all changed following the murder of Adam Walsh, Jacob Wetterling, and the young Tacoma boy. After these murders, Congress convened hearings where the parents of victims

[88]The term "potentially indefinitely" comes from Kansas v. Hendricks, 521 U.S. 346 (1997), which upheld civil commitment statutes.
[89] Swanson, "Sexual Psychopath Statutes," 215., cited in Lave, "Only Yesterday," 549.
[90] Leon, *Sex Fiends, Perverts, and Pedophiles*, chap. 1.
[91] Logan, *Knowledge as Power*, 29.
[92] Leon, *Sex Fiends, Perverts, and Pedophiles*, chap. 1.
[93] There were systems in place via the FBI to centralize and share data on criminal history (not just sex offenses) between the federal, state and local law enforcement. However, in the early 90s the database was far from comprehensive. Less than half of all states complied with the reporting standards. See: *Use and Management of Criminal History Record Information*.

testified about the need for creating more comprehensive federal, state, and local systems for sharing criminal history data across the conviction board.[94] The hope was that these comprehensives systems would aid in apprehending wanted criminals. At the time of these hearings John Walsh, the father of Adam Walsh, was also hosting the popular television show, America's Most Wanted. Walsh gave testimony during a Senate Committee on Governmental Affairs hearing on the subject where is friend and colleague Oprah Winfrey was also present.[95] The advocates hoped that, in addition to aiding in the swift capture of perpetrators, a centralized system would also allow judges and prosecutors to identify "career criminals" and sentence accordingly. Marc Klaas, the father of Poly Klaas, a little California girl murdered by a man with a dizzying criminal history who had been recently paroled, testified at the hearing.[96] People wanted to ensure dangerous serial offenders were not let back onto the streets because of bureaucratic oversight.

Although the new centralized systems proposed were comprehensive enough to include people with criminal sexual offense histories, a call for the creation of federally mandated *separate* state databases that would also register and track people with sex offenses emerged. The successful move to establish separate sex offense databases where people were also required to register is perhaps unsurprising. Sexual acts have historically borne a burden of over-signification in the United States.[97] As Susan Sontag once astutely noted, "since Christianity

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[94] Both John Walsh, the father of Adam Walsh, and Mark Klaas, the father of Polly Klaas, testified. US Congress Senate Committee on Governmental Affairs, "Interstate Identification Index."

[95] US Congress Senate Committee on Governmental Affairs.Winfrey had John Walsh on her nationally syndicated talk show. On her talk show she also launched a national "Child Predator Watch List" and offered $100,000 rewards for information that leads to the arrest of fugitives. See: Lancaster, *Sex Panic and the Punitive State*, 81.

[96] Polly's case was the inspiration for California's Three Strikes Law.

[97] Rubin, "Blood Under The Bridge."

upped the ante and concentrated on sexual behavior as the root of virtue, everything pertaining to sex has been a 'special case' in our culture, evoking peculiarly inconsistent attitudes."[98] Even the briefest glance at U.S. history confirms this. Whether it's the centrality of sexual discipline to the governance project of the second great awakening,[99] acts of state violence to uphold the chastity of white women,[100] or the widespread belief during the cold war that homosexuals were even more susceptible to the lure of communism than the average citizen,[101] the sexual acts of citizens have functioned as stand-ins for broader societal concerns.

Case in point, at the time sex offense registration legislation was being passed, the U.S. was in the process of emerging from the "satanic panic," a moral panic that began in the early 80s and centered on a widespread fear that children were being sexually abused during occult and satanic rituals. Most of this abuse was suspected to occur in white suburban daycare centers, where satanic cult members could pose as caregivers in order to obtain easy access to children. During this panic, over seventy people across the nation were wrongfully convicted and later exonerated.[102] The satanic panic of the 80s laid the foundations for the sexual predator panic that inspired sex offense registration and civil commitment laws. Indeed, Rodger Lancaster notes that the sex panic never actually ended, but rather changed its form to focus instead on the "solitary child who…befell a terrible death at the hands of a repeat offender, a certified monster."[103] The fear generated during the satanic panic was funneled into fears of the specter of the "sex

[98] Sontag, *Styles of Radical Will*, 46.
[99] For an account of sex and politics during the second great awakening through to the progressive era see: D'Emilio, *Intimate Matters*, chap. 7.
[100] For a discussion of whiteness, womanhood, and state sanctioned violence see: Feimster, *Southern Horrors*.
[101] Charles, *Hoover's War on Gays*.
[102] Lancaster, *Sex Panic and the Punitive State*, 55.
[103] Lancaster, 68.

offender" and then institutionalized through key pieces of state and federal legislation.

Around the same time federal sex offense legislation was being proposed, then President Bill Clinton had come under scrutiny for instituting Don't Ask Don't Tell, which allowed gay people to serve in the military with the caveat that they remain closeted. Opponents of the policy decried Clinton as being soft on perverts. Supporting a sex offense registry provided an opportunity for Clinton, and the other democrats who supported the policy, to reframe themselves as people who took sexual dangerousness seriously, and were pro-family values.[104] Therefore, when the families of victims professionalized, establishing foundations and lobbying legislatures, they were met with sympathetic ears on both sides of the table.[105] Indeed, during a floor debate on the Adam Walsh Act, Joe Biden acknowledged the strange bedfellows he had in pushing through this legislation. In support of the bill Biden remarked: "Joe Biden and Orrin Hatch [a Republican Senator from Utah] come from different sides of the political spectrum on a lot of things. But I can assure you, not only is this tough, but the civil liberties of Americans are not in jeopardy with this. This is not-this is not-a case where in order to get bad guys we have had to in any way lessen the constitutional protections made available."[106] The remnants of the satanic panic and the shifting norms regarding homosexuality converged to create the ideal political environment for passing draconian sex offense legislation that, despite Biden's assurances, has severely restricted the civil liberties of close to a million people.

The first piece of legislation to be signed into law was the Jacob Wetterling Crimes

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[104] Jenkins, *Moral Panic*, 198–99.
[105] For example, after successfully lobbying the Minnesota legislature to create a sex offense registry, Patty Wetterling and the newly founded Jacob Wetterling Foundation set their sights on Congress.
[106] Us Congress, "Children's Safety and Violent Crime Reduction Act Of 2006. Congressional Record Daily Edition."

Against Children and Sexually Violent Offender Registration Act (the Wetterling Act) as part of the comprehensive Violent Crime Control and Law Enforcement Act of 1994. The Wetterling Act mandated all states create and maintain sex offense registries and established baseline standards for those registries. Although the Wetterling Act contained provisions for discretionary public notification procedures when necessary, it did not mandate that states make their registries available to the public. The original purpose of the act was to create a system of registries available to law enforcement in order to assist investigations. In interviews about her work promoting the passage of the Wetterling Act, Jacob's mom, Patty Wetterling, recounted being struck that such a list did not already exist when Jacob went missing. In addition to mandate private registries, the Wetterling Act established registration protocols. Anyone with a sex offense was required to register their information, including their home address, annually for at least 10 years. The act also established a new category of people with sex offenses called, "sexually violent predators" (SVPs). SVPs, who represented the most risk, were to be held to different registration standards. They were required to register every 90 days for the rest of their lives. Under the new law, failure to register for all classes of people with sex offenses would result in criminal penalties.

Six months after Bill Clinton signed the Wetterling Act into law, Megan Kanka was abducted, raped, and murdered by a man who lived in her neighborhood and who had two prior sexual assault convictions. The public was understandably horrified. The general sentiment was that had Megan's mom known there was a predator living in the neighborhood she would have been able to protect her daughter. Immediately after the murder, the Kanka family initiated a petition to make the sex offense registry public. The petition received 200k signatures within three weeks. Shortly after, the Speaker of the NJ Assembly declared a legislative emergency and

sent the proposal directly to the floor for a vote, bypassing committee debates. Within three months of Megan's murder, the governor of New Jersey signed Megan's law into law. The law mandated that the sex offense registry be made public through community notification.[107] The federal government soon followed step. The first version of federal Megan's law was proposed in July of 1995. By 1996 Megan's Law was officially added to the Wetterling Act.

For the next decade the Wetterling Act/Megan's Law remained the most comprehensive legislation on sex offense registration and notification. Less comprehensive bills were passed with some regularity to strengthen the provisions laid out in the Wetterling Act/Megan's Law or to help states comply with them.[108] Until 2006 when The Adam Walsh Child Protection and Safety Act (AWA) which completely rewrote the federal standards for sex offense registration and notification. The AWA expanded the number of registerable offenses and established stricter baseline standards for registration and community notification. It explicitly mandated that registration be retroactive, meaning that anyone who was convicted for their offense before the establishment of sex offense registries still had to register.[109] Further, the AWA increased the mandatory registration time minimums for a variety of offenses and created a tiered system. Under the AWA the minimum penalty for failure to register is one year in prison. The act also

[107] New Jersey wasn't the first state to make the registry public. Prior to Megan's law 5 states had already adopted community notification provisions. However, Megan's law is the first to *mandate* community notification.

[108] For example, in 2003 the PROTECT Act was passed, which required all states to establish sex offense websites for public notification. Before the internet was widely available in homes, Megan's Law resulted in computer booths at county fairs where people could go type in their address and see how many people with sex offenses lived in their area. The PROTECT ACT brought Megan's Law into the 21st century. See also: The Pam Lyncher Sexual Offender Tracking and Identification Act of 1996; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998; the Protection of Children from Sexual Predators Act of 1998; and the 2000 Campus Sex Crimes Prevention Act.

[109] This was true before the passage of SORNA. However, SORNA codified what had become common and constitutionally approved (see *Smith v. Doe)* practice amongst the states.

expanded registration and notification standards to children who have been convicted of sexual offenses and expanded registry requirements to 212 federally recognized Native American tribes. The AWA also established federal civil commitment procedures. Finally, the AWA established an entirely new federal bureaucracy: The Sex Offender Management Assistance Program (SMART) housed in the Department of Justice, and created a grant pool to be distributed through the SMART office.

The AWA only established baseline minimum standards. States are free to implement tougher sentencing, registration, and notification protocols, and often do. Registration requirements vary by jurisdiction. In Florida you are required to register with the police if you are in the state for longer than 72 hours.[110] Many jurisdictions require you to re-register anytime you change an aspect of your physical appearance, such as shaving or growing a beard or dying your hair. Failure to register will result in a felony and, at minimum, one year in prison. Further, beyond maintaining an up-to-date website, local jurisdictions are free to implement more severe notification laws as they see fit. For example, some jurisdictions require special notification practices during certain holidays. During Halloween registrants in some communities must place signs on their doors warning any potential trick-or-treaters and their parents that: "A Registered Sex Offender Lives Here." Homeless registrants in these jurisdictions are instructed to put signs up on tents and sleeping bags. Counties have also issued "No Candy Laws" that mandate registered sex offenders must turn out their lights and stay in their homes during Halloween. In California, there is "Operation Boo," where police drop by the homes of registrants to ensure they are complying with the lights out/no candy laws.

[110] FS 943.0435

Although not specified in federal law, localities often pass residency and presence restrictions. Residency restrictions prevent people with sex offenses from living within certain distances from places where children are likely to congregate like schools and daycare centers. Many times, these restrictions are in place for all people on the registry, even those whose offenses did not involve children. Presence restrictions prevent people with sex offenses from merely being present in areas where children are likely to be. For example, parks, schools, fast food restaurants and rest stops with play areas. Because of presence restrictions, people on the registry are unable to take their children to school or to the park, or even, in some cases, stop for gas or coffee on a road trip. Both residency restrictions and presence restrictions contribute to homelessness and joblessness amongst people on the registry.[111] In certain counties in Florida, the residency restrictions are so strict that people on the registry are forced to live in makeshift encampments under bridges and in unincorporated areas on the edges of towns.[112] These policies, combined with federally mandated registration laws, severely restrict the civil liberties of those living on the registry.

Legislative Misconceptions About Sexual Harm

These laws are not simply repressive; they also contain both symbolic and productive elements.[113] Each of these new pieces of legislation has helped to produce a specific notion of how sexual violence happens and to whom it happens. Premised on that notion, these laws have provided solutions for how to go about eradicating it. These solutions have involved the use of

[111] Levenson, "Hidden Challenges.", Moghaddam, "Popular Politics and Unintended Consequences."
[112] Ben Wolford, "Village's Success a Surprise Remote Sex Offender Community near Lake Okeechobee Born of Residency Restrictions."
[113] This is similar to the claim that some scholars of the carceral state have made. See: Simon, *Governing through Crime*. See also: Wacquant, *Punishing the Poor*.

established institutions, like the prison industrial complex, and the establishment of new (albeit related) institutions, like the public registry, civil commitment centers, and new federal bureaucracies like the SMART office. These institutions do not merely carry ideas about sexual crimes but are also "*constituted* in part by the ideas that define coalition purposes and the aims of governing officials and institutions."[114] Meaning that each of these laws is built upon certain ideas about sexual dangerousness. These ideas do not emerge from nowhere; they are inculcated in a history of institutional and cultural understandings of sexuality and adapted to their current circumstances. These newly reformed ideas are then used as the basis for building coalitions, like the ones formed by victims' families, who set their sights on wielding the power of governing institutions, like congress and law enforcement agencies, in order to implement their desired policies. These new laws and policies fundamentally shift the political and institutional terrain, and therefore, create new contexts for actors to formulate values and ideas.[115]

The two most prevalent symbols that contemporary sex offense laws produce are the specter of the "sex offender" and the innocent white child victim. Because the basis of these laws has been the most extreme cases of sexual violence and murder, namesake legislation like Megan's Law or the Adam Walsh Act tends to legislate to the anecdote, not the mean. This results in our ideas of how sexual violence happens and to whom it happens to being heavily steeped in misinformation and panic. This misinformation is then codified and used as a basis to justify the expansion of state capacity. In the following sections I examine the two key figures that contemporary sex offense legislation is premised upon.

[114] Smith, "Ideas and the Spiral of Politics," 135.
[115] See Smith's six-stage spiral of politics.

The Specter of the "Sex Offender": A Depraved Stranger in the Dark

All three of the key namesake pieces of federal sex offense legislation are named after young white children sexually assaulted and murdered by serial offenders who were strangers to the victims, and who quite literally snatched the children off of the streets.[116] The media reported these stories as if they were common occurrences. As if every child was seconds away from being kidnaped and murdered. The public largely believed it. Indeed, one only has to look to recent instances of mothers being investigated by the police for letting their children do mundane things like walking the family dog around a suburban block unsupervised to see that the idea of predatory strangers has resonated to this day.[117] The portrait that these stories paint the specter of the "sex offender" as is this: a depraved stranger with incurable impulses to sexually harm children, who prowls places where children are likely to be in order to pick out his next victim. This portrait was supported in Congress during the debates around the passage of these bills. For example, a Judiciary Committee report for an early iteration of the AWA claimed that most "sex offenders" had on average 110 victims and 318 offenses, even if they had only been convicted of one or two.[118] The declaration and purposes section of the AWA lists 17 sexual assault, kidnapping, and murder victims with short descriptions of their cases. All 17 of the victims were targeted by strangers. A number of the descriptions take care to use terms like "career offender" and "repeat sex offender" to describe the perpetrators, reminding us that cases like Megan Kanka's and Polly Klaas' wouldn't have happened had the offenders remained in prison for their

[116] At the time of the passage of the Wetterling Act it was unknown who Jacob's killer was.
[117] John Kass, "What's Shameful Is Fuss over Child's Solo Dog Walk [Corrected 08/25/2018]."
[118] US Congress House Committee on the Judiciary, "Children's Safety Act Of 2005 Part 1. Congressional Report." The statistic from polygraph study conducted on incarcerated people with sex offenses on two or fewer victims. The study has serious methodological issues.

earlier offenses.

The idea that if left to their own devices people with sex offenses will inevitably reoffend is not only proffered by Congress, but it is also bolstered by the Supreme Court on several occasions. In the 2003 case *Smith v. Doe,* which upheld the constitutionality of the registry, Kennedy wrote the following in his Opinion:

> Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislatures findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high."[119]

In this, Kennedy cites a case he authored the prior year where he first used the phrase "frightening and high" to describe the re-offense rate of people with sex offenses. Kennedy goes on to say that the re-offense rate for people with sex offenses is as high as 80%. Where did Kennedy get this statistic? From an article in *Psychology Today,* a non-peer reviewed popular journal you're likely to find at a dentist's office. The author of the article pulls from no supporting study to verify his claim and appears to have pulled the statistic out of thin air. Yet this statistic has now made its way from the highest Court into the opinions of the lower courts and even into the legislatures.[120] It has been used as a basis to justify increasingly strict registration, commitment, and area restriction laws. Ironically, the author of the *Psychology*

[119] The statistic first appeared in McKune v. Lile, 536 U. S. 24, 34 (2002) a case regarding Kansas's Sexual Abuse Treatment Program. A year later Kennedy incorporated the statistic in the seminal registry case *Smith v. Doe,* 538 U.S. 84 (2003).
[120] Ellman and Ellman, "Frightening and High," 495.

Today article has since recanted his claim.

The fact is popular notions about people with sex offenses are largely wrong. Research has shown time and again that the vast majority of sexual abuse does not happen at the hands of predatory strangers in the dark: people are more often than not sexually victimized by people they know. A Department of Justice study on the sexual abuse of young children found that 93% of juvenile victims knew the perpetrator.[121] Of that 34% of perpetrators were family members and 59% were acquaintances.[122] Further, 8 out of 10 rapes (including both children and adult victim) are committed by someone the victim knows.[123] Research has debunked the idea that people who commit sexual crimes have a "frightening and high" likelihood of reoffending.[124] A study of re-offense rates amongst people deemed as "high-risk offenders" found that 20% of those individuals committed a new sex offense within 5 years of release, and an additional 12% of those individuals committed a new sex offense within 15 years. However, no high-risk individual who did not commit a new sex crime within 15 years went on to commit another sex crime—essentially, they had a negligent likelihood of re-offense.[125] In addition, individuals deemed to be low-risk had a 5% re-offense rate before 15 years and 0% after 15 years.[126] These statistics are not unique; they are similar to re-offense statistics for other types of felony crimes.

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[121] Snyder, "Sexual Assault of Young Children as Reported to Law Enforcement," 10. This statistic is for children under 6. In children 6 to 12, 95% know their abuser. And in children 12 to 17 90% know their abuser.
[122] Snyder, 10.
[123] Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016.
[124] This phrase comes from Justice Kennedy's Opinion in *Smith v. Doe.* Kennedy found it in a *Psychology Today* article/advertisement that was promoting sex offender rehabilitation programs. See: Ellman and Ellman, "Frightening and High," 495.
[125] Hanson et al., "The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California," 502–3.
[126] Ellman and Ellman, "Frightening and High," 504.

Finally, most people assume that only the "worst of the worst" sex criminals must register. This is untrue. In 29 states teenagers can be put on the sex offender registry for having consensual sex with other teenagers.[127] 25% of the registry is made up of individuals who committed their crimes while underage.[128] In 6 states you can be forced to register for prostitution related offenses such as soliciting.[129] And in 12 states you can be put on the registry for peeing in public.[130] In fact, California is a public urination state that also has a lifetime non-tiered registry—meaning that a person who was caught peeing in public will undergo the same lifetime registry process as someone who sexually assaulted and murdered a child.[131]

The specter of the "sex offender" as someone who is a stranger with incurable predatory impulses that must be detained, surveilled, and managed largely overlooks the structural factors that contribute to sexual harm. Legislation like Megan's Law and the AWA are incapable of helping society contend with oppressive the structures like patriarchy and inequality that produce the conditions for sexual abuse. Taken at face value, these laws "[see] a society in which sexual violence is rare, recognizable by its physical brutality, and perpetrated by mentally disturbed monsters who strike without warning or reason. This society needs no change, just better tools to control these individuals."[132] This is a historically American way of understanding social issues. The issue is located in the moral failings of the individual, not the broader society. Therefore, the individual must be dealt with accordingly. The transition from viewing punishment as a site for rehabilitation to a site for retribution and detainment has paved the way for viewing harsher

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[127] Sethi, "The ridiculous laws that put people on the sex offender list."
[128] Finkelhor, *Juveniles Who Commit Sex Offenses against Minors*, 3. Further, juveniles account for 36% of all people with sex offenses against juveniles. Finkelhor, 6.
[129] Sethi.
[130] Sethi.
[131] California is now in the process of moving to a tiered registry. SB 384.
[132] Corrigan, "Making Meaning of Megan's Law," 269.

punishment as *the* solution to crime. This has been particularly true for people with sex offenses, who the Court, the legislature, and the media all tell us are incurable. Scholars like Loc Wacquant and Jonathan Simon have demonstrated the ways that the focus on individual moral failings instead of broader societal failings have increased state power and contributed to the rise of mass incarceration.[133] The same can be said of sex offenses.

Constructing Victims: Innocent White Children

In addition to the specter of the "sex offender," sex offense legislation has constructed the figure of the sexual abuse victim as an innocent white child. Further, while the focus has mostly been on white children, infantilized white women have also sometimes appear as a key trope, indicating that while the figure of the victim oscillates between white women and white children, the focus is always on innocence and whiteness, which either figure can embody. As previously mentioned, the AWA begins with a list and description of 17 high profile victims of sexual assault, kidnapping, and murder. Of the 17 victims explicitly named, all but 3 are children. The three that are not children are women. Every single victim is white. A number of the Act's sections are named after the victims. For example the Act uses Sarah Lunde and Jessica Lunsford—two young girls who were tragically murdered—as the namesakes for federal law enforcement grants aimed at assisting in things such as carrying out programs to outfit sex offenders with electronic monitoring units.[134] Beyond using the names of 14 child victims, the act further engrains the connection between sexually violent predator laws and child protection by extending the definition of sexual crimes to include nonsexual offenses against minors such as

[133] Wacquant, *Punishing the Poor*., Simon, *Governing through Crime*.
[134] Sec. 621. Pilot Program for Monitoring Sexual Offenders.

kidnapping and false imprisonment.[135] Headlines from local and national news sources around the time the Act was being passed reflected this fear of dangerous strangers harming children. Headlines consisted of things like: "Fugitive Returned from Florida, Charged with Sex Assault on Girl;"[136] and "Sex Offender Loitered at Day Care."[137]

Through these namesake pieces of legislation that are named mostly after children and exclusively after white victims, the notion of who is at risk and who is worthy of saving becomes deeply intertwined with notions of both childhood and race. As demonstrated in analysis of the Comstock Act and the Mann Act, the linkage between the ideal subjectivity of crime victim and whiteness is not new. Many studies have demonstrated that perpetrators of crime receive harsher punishments when their victims are white.[138] Further, the ideal victim of the sexual predator has traditionally been the figure of the white woman. For example, at the turn of the century white women needed protection from brown foreign traffickers, after reconstruction and to this day, white women are framed as needing protection from the uncontrollable sexual urges of black men.[139] Indeed the most severe punishments for rape go to black men who have raped white women.[140] Even feminist movements to enforce rape laws have upheld the figure of the raped white woman as the ideal crime victim and legal subject.[141]

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[135] Sec. 111.4.B. There is an exception for children who are kidnapped by their legal guardians.
[136] Josh Kovner and Alaine Griffin Courant Staff Writers, "Fugitive Returned from Florida, Charged With Sex Assault On Girl."
[137] Tribune, "Police: Sex Offender Loitered at Day Care."
[138] Curry, "The Conditional Effects of Victim and Offender Ethnicity and Victim Gender on Sentences for Non-Capital Cases."
[139] The horrifying murder of Emmett Till is a striking example of this. See: Feimster, *Southern Horrors*.
[140] Goodwin, "Law's Limits."
[141] See: Gruber, *The Feminist War on Crime*., Gottschalk, *The Prison and the Gallows*., Bumiller, *In an Abusive State*., Grewal, "'Security Moms' in Twenty-First-Century U.S.A."

Today, the ideal crime victim has oscillated from the white woman to the white child. The same year that Adam Walsh was murdered the city of Atlanta was in the midst of one of the largest serial child murder and sexual assault cases in American history. Between 1979 and 1981, 24 black children were sexually assaulted and murdered in the city of Atlanta. Yet, nowhere in any of the congressional documents leading up to the AWA or in the actual text of the AWA is there any mention of these children or their stories. As Kincaid has argued, nested in these laws are implicit assumptions about which children they are meant to protect: white middle class children. Kincaid writes, "it's another matter with children who aren't cute to begin with: poor children and most children of color, fat and skinny and diseased children, children who are simply plain."[142] In this way, this legislation is designed to protect a particular type of ideal victim, not all children. This is clear when one considers the increasingly harsher criminal penalties facing children who have committed crimes in the U.S., and the fact that children of color face harsher criminal penalties than white children. Ironically, nearly one third of convicted sex offenders are juveniles.[143] Despite the *Miller* ruling which made it unconstitutional for children to be automatically sentenced to life without parole, many children face automatic lifetime registry requirements.[144]

It is also clear when you consider the dwindling social support the government provides to impoverished children (and in particular children of color) and their mothers.[145] As Kincaid

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[142] Kincaid, *Erotic Innocence,* 107.
[143] According to one OJP study, juveniles with sex offenses are the most successful at rehabilitation and far less likely to reoffend. Finkelhor, *Juveniles Who Commit Sex Offenses against Minors*.
[144] Carpenter, "Against Juvenile Sex Offender Registration."
[145] This too has significant racial undertones. See: Goodwin, "'Employable Mothers' and 'Suitable Work.'", Kandaswamy, "State Austerity and the Racial Politics of Same-Sex Marriage in the US."

has argued that we "fix our eyes on sexual abuse, a comparatively minor problem, because it pleases us to talk about it."[146] The task of weeding out sexually dangerous bad apples is much more practicable for state actors than tackling the monumental task of dismantling fundamental racial, class, and gendered inequalities. Indeed, "state and national governments…have structural incentives to narrow citizens' concerns to issues that fall into focused and manageable conflicts."[147] Thus, the sprawling issue of both child welfare and unaddressed sexual harm becomes neatly packaged into a stranger-danger paradigm. Conveniently locating these issues in the depravity of select individuals to be weeded out and not in systems of patriarchy, white supremacy, and rampant economic inequality. In this narrative, the state becomes the hero tasked with locating and punishing these identifiable villains to protect the innocent. Unsurprisingly, this narrative exculpates any state involvement in perpetuating oppressive socioeconomic systems that perpetuate sexual violence and imperil the lives of children.

Like the specter of the "sex offender," the figure of the child victim has been used to justify massive growths in state capacity and reach.[148] The figure of the harmed child "provides an alibi or an inspiration for the moralized political rhetorics of the present and for reactionary legislative and juridical practice."[149] We must take care to consider that fact that the institutional arrangements that have resulted from the politicization of this issue will linger well after attention has faded.[150] Further, because these institutional arrangements are premised upon misunderstandings of how and to whom most sexual harm happens, they have contributed to a

[146] Kincaid, *Erotic Innocence*. Emily Horowitz also makes a similar argument. See: Horowitz, *Protecting Our Kids?*
[147] Miller, *The Perils of Federalism*, 8.
[148] Janus, *Failure to Protect.*
[149] Ibid.
[150] Baumgartner, *Agendas and Instability in American Politics*.

legal landscape where there is both increasingly punitive measures taken to prevent and redress sexual harm, and a stunning inability to *actually* prevent and redress sexual harm in the United States.

Conclusion

In this chapter I have demonstrated how the specter of perversion and the innocent white victim, which oscillates between "womenandchildren" are enduring tropes that have helped to expand the punitive powers of the state, while simultaneously fortifying systems of white supremacy, patriarchy, and economic inequality. These moments ultimately do nothing to prevent or redress sexual harm. Instead, they provide carceral solutions to what are at heart social issues. Further, while instances of state expansions in response to specters of perversion have occurred throughout the history of the United States, contemporary sex offense legislation is unprecedented in its scope and impact on the contours of the state.

Chapter 3: The Constitutional Development of a Legal Limbo

Introduction

Terry Allen has spent nearly four decades in an Illinois prison despite never having had a trial, conviction, or sentence. In 1982 Allen, facing sexual assault charges, was offered a deal by his prosecutor: agree to undergo civil commitment, which his attorney assured him would last about six months, or face a full criminal trial that would likely result in a much lengthier prison sentence. Allen chose to be evaluated for civil commitment under Illinois' newly enacted Sexually Dangerous Person Act. During his commitment hearing Allen did not present any defense. After about two hours the judge declared him a sexually dangerous person. Allen was promptly taken to an Illinois prison where he was given clothing and a badge identical to other incarcerated persons at the penitentiary who have been criminally charged, convicted, and sentenced to prison. For close to forty years Allen has been trying to no avail to appeal his indefinite incarceration under Illinois' civil commitment statute.[151] *If* Allen is ever released from prison, he will likely face life on the Illinois sex offense registry, despite having committed his crime prior to its establishment. As a result, his information, including his photo, home address, place of work, email address and internet identifiers will all be made publicly accessible. Allen will face a panoply of restrictions that will all but foreclose his ability to find stable housing, employment, or receive services that would facilitate his leading a law-abiding life.[152]

[151] For more information on Allen's story see: Max Green, "Terry Allen Has Been Locked Up In Prison For 36 Years Without A Criminal Trial." Illinois Sexually Violent Persons Commitment Act.

[152] Studies have shown that stable employment and housing decrease recidivism rates. See: Lutze, Rosky, and Hamilton, "Homelessness and Reentry."

Yet, Allen's indefinite imprisonment and all the restrictions he may face on the sex offense registry are not viewed as punishment by the state. Instead, the Supreme Court has deemed these to be civil regulatory measures, not punitive ones. While this distinction may seem trivial, it carries enormous constitutional implications. This distinction means Allen has limited access to fundamental civil liberties protections such as ex post facto and double jeopardy, as well as Eighth Amendment and due process protections, which makes challenging his indefinite incarceration or potential inclusion on the registry extremely difficult. In partitioning registration and civil commitment from the criminal justice system, the Supreme Court has restricted access to important civil liberties protections typically granted to those facing criminal charges and convictions.

The impact of these rulings is vast. To date, there are close to 900,000 men, women, and children on the sex offense registry and the numbers continue to grow.[153] 1 in 213 men and 1 in 117 black men are currently living on the sex offense registry.[154] There are approximately 5,400 individuals civilly committed under sexually violent predator laws at the state and federal levels.[155] Further, as the number of individuals under correctional supervision steadily declines, the total number of people on the sex offense registry has steadily increased.[156] Yet, the practices

[153] A note on the limitations of this data is in order. There is currently no centralized mechanism for tracking and reporting the number of individuals on sex offense registries. Non-profits such as Parents for Megan's Law and the National Center for Missing and Exploited Children have typically reported the data annually. See: https://www.parentsformeganslaw.org/number-of-registrants-reported-by-state-territory/ However, in their 2011 study Ackerman et al. found discrepancies between the data reported by nonprofits and their independent analysis of data published online by state-run registries. See: Ackerman et al., "Who Are the People in Your Neighborhood?".
[154] Hoppe, "Punishing Sex," 584.
[155] George Steptoe And Antoine Goldet, "Why Some Young Sex Offenders Are Held Indefinitely."
[156] Hoppe, "Punishing Sex."

of post-conviction registration and civil commitment for "sexually violent predators" have been largely absent in recent challenges to and critiques of carceral powers and mass incarceration. This is, in part, due to the Court's continued insistence that these practices are nonpunitive and somehow jettisoned from the criminal legal system.

Given this, I examine the causes and consequences of the Supreme Court's assertion that sex offense registries and civil commitment are non-punitive and, therefore, not subject to the full rights protections granted in the criminal legal system. I argue that these practices are a hybrid area of law that fuses the civil with criminal punishment in order to circumnavigate important civil liberties protections afforded in the criminal justice system.[157] This legal hybridity has increased the punitive powers of the carceral state, while its Court ordained status as "civil" and "non-punitive" has contributed to a narrative that simultaneously elides the punitive nature of these practices. What this essentially means is that a new arm of the carceral state has grown, ensnaring more and more people each year. Yet, I argue that Supreme Court rulings denying the true punitive nature of civil commitment and public post-conviction registries have ensured that these practices remain both obfuscated and insulated from meaningful civil liberties challenges. In this way, the Court has played an integral role in the development and continuation of punitive state power while also denying that power even exists. Further, in my analysis of the primary Supreme Court cases upholding the registry and civil

[157] This is not to say that the protections afforded in the criminal justice system are prefect or absolute. There is a large body of research that demonstrates the ways in which these protections routinely fall short, particularly for marginalized populations. For example, scholars like Devon Carbado have argued that people of color do not have full access to fundamental civil liberties like the 4th Amendment's protections against unreasonable search and seizures. Indeed, Carbado argues that the protections in the 4th Amendment are racially stratified. White people enjoy the protections granted in the 4th Amendment whereas people of color bear the burden of over policing and surveillance without fundamental protections. See: Carbado, "(E)Racing the Fourth Amendment."

commitment of sexually violent predators as "non-punitive," I find that the specter of the "sex offender," or rather, empirically inaccurate narratives about people who commit sex offenses have helped to justify the conclusions of these seminal decisions. Indeed, the construction of an urgent and impending threat to public safety, such as the specter of the "sex offender" has facilitated an unprecedented expansion of state power that avoids public scrutiny.

In what follows, I briefly discuss the discrepancies between civil and criminal law, as well as what Beckett and Murakwa have astutely termed the "shadow carceral state"---meaning the law that exists in the hybrid area of the criminal and the civil and wields the power of the penal apparatus.[158] Building from that, I give an overview of contemporary civil commitment for sexually violent predator laws and conduct a critical analysis of *Kansas v. Hendricks,* a 1997 Supreme Court case that ruled sexually violent predator civil commitment laws are non-punitive. The *Hendricks* ruling remains the most influential Court ruling on sexually violent predator laws to date. I demonstrate how this ruling has obfuscated the true punitive nature of civil commitment and in doing so allowed for the growth and development of punitive state powers. I then provide an overview of contemporary registration and notification laws for people with sex offenses and conduct a critical analysis of *Smith v. Doe,* a 2003 ruling on registration and notification practices for people with sex offenses. I show how this ruling has insulated the registry from meaningful civil liberties protections and has worked to increase the penal apparatus of the state. To conclude, I offer some further thoughts on how these Court decisions have paved the way for increasingly punitive sex offense laws that have quietly yet significantly contributed to the growth and development of punitive state power, while simultaneously limiting important rights protections against that very same power.

[158] Beckett and Murakawa, "Mapping the Shadow Carceral State."

The Civil-Criminal Hybrid

In order to appreciate the inherent dangers of the civil-criminal legal hybrid, it is important to first understand the discrepancies between civil law and criminal law, and the logic behind those discrepancies. The criminal legal system contains the highest standards of rights protections for individuals. In theory, a person facing criminal charges is guaranteed protections such as the right to a trial, the right to reasonably effective counsel, the right to not self-incriminate, as well as safeguards against ex post facto, and a whole other host of other rights protections outlined in the U.S. Constitution and legal system. In addition, once an individual is convicted and sentenced, they are then theoretically protected against things like cruel and unusual punishment, double jeopardy, etc. I have intentionally included the word "theoretically" in both of these examples because, despite being guaranteed these rights and protections on paper, in practice our legal system routinely fails to meaningfully uphold them in practice, particularly for the impoverished and people of color.[159]

The reasoning behind these seemingly robust protections is simple: the consequences of being convicted and punished for a crime are so high—the state, in some cases, may literally take ones' life or confine one for life—that there must be the utmost safeguards against the abuse or arbitrary use of this state power. This is why, if convicted of a crime, the burden of proof must be beyond a reasonable doubt. There can be little to no room for a margin of error.[160]

[159] Beckett and Murakawa.
[160] Of course, the number of people who have been exonerated due to new developments in evidence is a clear indication that there is often a significant and devastating margin of error. See: The National Registry of Exonerations http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year-Crime-Type.aspx

The rights protections of those enmeshed in the civil legal system are much lower. For example, the burden of proof is typically "a preponderance of evidence," which means that something is more likely than not to have occurred. This is significantly less than "beyond a reasonable doubt." Under this system individuals who are indigent are not guaranteed the right to an attorney. In fact, there is no underlying right to trail or a jury of one's peers in the civil legal system. The consequences of civil cases are generally monetary damages or restrictions on what a person can or cannot do. Unlike criminal punishment, the purpose of the consequences doled out in the civil legal system is neither deterrence nor retribution.[161] The logic behind these discrepancies in rights protections is centered on considerations of the severity of punishments employed by each of the systems. Under the civil legal system the punishments are considered to be of relatively low consequence, whereas the consequences employed by the criminal legal system can be devastating in their severity. Because of this fundamental difference, criminal cases must afford a higher degree of rights protections.

Yet, the existence of civil asset forfeiture, coercive detention for pending immigration and asylum cases, legal financial obligations, as well as the sex offense registry and civil commitment indicate that the distinction between civil and criminal is by no means clear cut. Take for example the practice of civil asset forfeiture, a tactic used in the "war on drugs" to seize and retain people's property with low evidentiary standards and little means for redress.[162] A man in Tennessee had $20k in cash seized during a routine traffic stop. The police officer used

[161]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[162] For a summary of the history of civil asset forfeiture and attempts to mitigate it see: Johnson, "Restoring Civility - the Civil Asset Forfeiture Reform Act of 2000.", Moores, "Reforming the Civil Asset Forfeiture Reform Act." In addition, scholars have raised concerns about the reliance of police departments on the income generated through asset forfeiture. See: Worrall, "Addicted to the Drug War."

the mere presence of the cash as evidence that the money was likely to be used for illegal purposes, despite the fact that the man being stopped had documentation that he was on his way to purchase a car for the exact amount of cash he was carrying. No criminal charges were filed, but the police kept all of the man's money.[163] Civil asset forfeiture is possible precisely because it exists in the limbo between the civil and the criminal legal systems. The logic behind civil asset forfeiture is that the property being seized has been accused of participating in a crime. Because it is property being accused, and not a person--though the person may also be charged with a crime as well--there is no need for full criminal legal protections like the evidentiary standard of beyond a reasonable doubt.

The practice of coercive detention for those awaiting decisions for their immigration and asylum cases is another instantiation of a hybrid between criminal and civil. There has been mounting attention to the harmful conditions of Immigration and Customs Enforcement (ICE) detention centers where men, women, and children can languish for indeterminate lengths of time.[164] The practice of pre-hearing detention is understood to be in the realm of immigration law and therefore considered civil. This practice has been constitutionally justified through rulings that the detention is not punishment but rather is a practice necessary for preventing fleeing and protecting public safety.[165] Yet, while the courts have ruled immigration detention to be civil in nature, the experience of being detained is undeniably felt as punitive. Scholars examining the intersections of civil immigration law and criminal punishment have argued that using the term "detention" is itself disingenuous to the realities of being coercively kept at a center while

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[163] "Civil Forfeiture: Last Week Tonight with John Oliver."
[164] Terp et al., "Deaths in Immigration and Customs Enforcement (ICE) Detention."; Collingwood, Morin, and El-Khatib, "Expanding Carceral Markets."; Ryo and Peacock, "Jailing Immigrant Detainees."
[165] Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001)., See also: Cole, "In Aid of Removal."

awaiting a hearing. Instead, the experience is more akin to incarceration or imprisonment.[166] Individuals awaiting hearings are incarcerated in centers that are functionally indistinguishable from prisons yet their access to full criminal protections is limited by the very fact that their detention is not seen as punitive.[167]

Further, the use of civil regulations and restrictions to effectively criminalize statuses like homelessness or impoverishment, as well as racial identities like blackness, also represent the intersection of the civil and criminal. The initial violations, such as failing to pay child support, themselves are not considered crimes. Yet, the failure to pay the fines incurred by such offense is considered to be a crime and is punishable accordingly.[168] This is particularly concerning when considering the inordinate fees that are surreptitiously tacked on to simple things like traffic violations. For example, a routine speeding ticket. The base fee for the violation may cost around $60. However, counties have begun to tack on extra fines like court fees or more ambiguous fees for "processing" and "assessment," which means a speeding ticket can now cost upwards of $250. Failure to pay the initial fines results in not only racking up late charges but can ultimately lead to imprisonment.[169]

Conversely, individuals who have been convicted in the criminal justice system are fined with a myriad of legal financial fees, ranging from charges for a "free" public defender to doctor visits while incarcerated. In addition to being steep in their initial charges, particularly for those who are impoverished, these fees incur a significant amount of interest. This means that

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[166]See: Hernandez, "Abolishing Immigration Prisons."; and Dow, *American Gulag*.
[167] García Hernández, *Crimmigration Law*.
[168] LeBaron and Roberts, "Confining Social Insecurity."; Keesha Middlemass and Jyl Josephson, "Child Support Enforcement, Poverty, and the Creation of the New Debtor's Prison."
[169] This is not just true for traffic and parking violations but also includes things like failure to pay child support. See: Keesha Middlemass and Jyl Josephson, "Child Support Enforcement, Poverty, and the Creation of the New Debtor's Prison."

individuals are often released from confinement with an impossible amount of debt that they are then at risk of being criminally penalized for if they fail to keep up with payments.[170] Researchers and activists have begun to refer to these practices as contemporary instantiations of debtors' prisons.[171] These so-called debtor's prisons are possible precisely because there has been a continuous blurring between civil and criminal regulations and punishments.

Scholars like Beckett and Murakawa refer to this area of law as the "shadow carceral state."[172] They argue that the carceral state has been expanding out to include both criminal and non-criminal institutions, as well as "new civil, administrative, and legally hybrid pathways to punishment."[173] In this way, contemporary practices of civil commitment and the registry are escalations of an already extant trend in the muddling of civil law and criminal punishment for the purpose of circumnavigating important rights protections. Like civil asset forfeiture, "crimmigration," contemporary debtor's prisons, and the de facto criminalization of statuses and identities, these practices have increased the punitive powers of the state, while their status as "civil" has contributed to a narrative that simultaneously obfuscates the punitive nature of those very practices. I argue, in the case of civil commitment and sex offense registries, the Court has played an integral role in the perpetuation of this legal hybridity.

While we have seen critical attention to the practices of pre-hearing detention for non-citizens and Court movement on civil asset forfeiture,[174] the Supreme Court remains steadfast in upholding the assertion that both civil commitment and the sex offense registry are non-punitive. In what follows, I analyze the two primary Court cases responsible for this assertion in order to

[170] For an excellent account of these practices see: Harris, *A Pound of Flesh*.
[171] Sobol, "Charging the Poor."
[172] Beckett and Murakawa, "Mapping the Shadow Carceral State."
[173] Beckett and Murakawa, 223.
[174] Timbs v. Indiana, 139 S. Ct. 682 (2019).

demonstrate how these new criminal-civil hybrid areas of law have greatly contributed to the carceral state, despite their labels as non-punitive. Before analyzing these cases, I first give a brief overview of the types of laws and policies at the heart of each case.

The Legal Landscape of Civil Commitment Laws

The civil commitment of people deemed to be sexual predators is not an entirely new phenomenon. There was a spate of "sexual psychopath" laws enacted in the 1930s and 1940s throughout the United States targeting mostly homosexuals.[175] By the 1980s most states with sexual psychopath laws had either repealed or were not actively using them.[176] However, the practice reemerged in the 1990s as punitive sex offense legislation became more and more popular at the federal and state levels.[177] Today, twenty states plus the District of Columbia practice the civil commitment of people deemed to be "sexually violent predators." The most up to date research shows that there are close to 5,400 people throughout 20 states, plus Washington DC, currently being held indefinitely through civil commitment laws.[178] Of the 21 jurisdictions that practice this type of civil commitment, nearly half do so for juveniles. In Pennsylvania, for example, the practice of civil commitment for sexual crimes is used exclusively for children who

[175] See: Leon, *Sex Fiends, Perverts, and Pedophiles*.; and Freedman, "'Uncontrolled Desires.'"
[176] Leon, "Sex Offender Punishment and the Persistence of Penal Harm in the U.S."
[177] At the federal level, this legislation began with the passage of the Wetterling Act and the subsequent establishment of a mandated sex offense registry in 1993. The registry was then made public in 1994 with the passage of Megan's Law. In 2006, Congress passed the Adam Walsh Act, which, among other increasingly punitive measures, established federal civil commitment provisions. For a summary of contemporary developments with regards to civil commitment see: Leon.
[178] George Steptoe And Antoine Goldet, "Why Some Young Sex Offenders Are Held Indefinitely."

have been convicted of a qualifying sexual crime and are about to age out of the juvenile justice system.[179]

Civil commitment for people deemed to be sexually violent predators is different from involuntary psychiatric hospitalization of people who are suffering from serious mental health issues. These individuals must be deemed to be a danger to themselves or others and are then hospitalized specifically for treatment. They spend time in mental wards, not prisons. The main goal of hospitalization is *treatment*. On the other hand, the main goal of civil commitment of people for sex crimes is categorically not treatment. The logic behind passing special civil commitment laws for people with sex offenses is not only that contemporary involuntary commitment laws are insufficient for capturing people who are dangerously sexually deviant, but also that people with these deviances are, unlike others who suffer from serious mental illnesses, *untreatable*. While some prisons that civilly commit people with sex offenses may offer treatment, the court has been explicit in ruling that treatment need not be the primary objective or even an objective at all.[180]

Civil commitment laws for "sexually violent predators" vary by state. However, there are three common themes that run throughout all of these statutes. First, the person facing civil commitment must have committed a qualifying sexually violent crime. However, each state's designation of a qualifying crime can vary. The second is that the person must be deemed to have a qualifying mental condition. It cannot be enough that the person committed a qualifying sexually violent offense, but the crime must have been driven by an underlying mental

[179] Sex Offender Civil Commitment Programs Network, "Civil Commitment of Sexual Offenders: Introduction and Overview."
[180] Kansas v. Hendricks, 521 U.S. Ct. 346 (1997).

abnormality.[181] Finally, there must be a high probability that the person will go on to commit another sexual crime because of the aforementioned mental condition.[182] Most contemporary practices of civil commitment happen once a person has already served his allotted prison sentence. In practice, this means individuals are continuously detained for crimes they have not committed, but are thought likely to commit if released based on their criminal history. As the Texas Department of State Health Services summarizes: "sexually violent predators are committed not convicted."

Despite these commonalities, the intricacies of what civil commitment procedures look like in practice, and the corresponding levels of due process protections, varies from state to state. For example, not all states require people who are facing civil commitment to have jury hearings. In states like New Jersey, judges have full discretion over whether or not to civilly commit someone.[183] Whereas, states like Florida and Kansas in some instances allow for juries.[184] In addition, standards of evidence also vary. Supreme Court precedent on standards of evidence merely requires states use the "clear and convincing" standard. However, some states like Washington and Kansas have opted to use the "beyond a reasonable doubt" standard--meaning that the state must prove it is beyond a reasonable doubt that an individual is a sexually violent predator, with a mental abnormality, who is likely to commit another sexually violent crime.[185] Other states like New Jersey use the lower standard of "clear and convincing

[181] For a critique of the use and definitions of "mental abnormalities" see: Alexander Jr, "Employing the Mental Health System to Control Sex Offenders After Penal Incarceration."
[182] For a summary of these laws see: Sex Offender Civil Commitment Programs Network, "Civil Commitment of Sexual Offenders: Introduction and Overview."
[183] New Jersey Sexually Violent Predator Act.
[184] Florida Baker Act, Florida Statute 394.451-394.4789; Kansas Sexually Violent Predator Act.
[185]Washington Community Protection Act.; Kansas Sexually Violent Predator Act.

evidence."[186] Further, the party that holds the burden of proof varies from state to state. Kansas places the burden of proof on the state to prove the person is a sexually violent predator who will likely commit another crime.[187] Conversely, the federal government places the burden of proof on the individual to prove that they are unlikely to reoffend, making this the baseline standard for all states.[188]

The Supreme Court has determined that civil commitment is not to be considered a second prison sentence for an initial crime. However, the difference between civil commitment and criminal incarceration is nearly indistinguishable. For example, Washington State uses a decommissioned prison on an island in the Puget Sound to house the 214 individuals the state is currently detaining indefinitely.[189] The Washington State Department of Corrections still holds the title of the land and receives profits from its use as a civil commitment center.[190] Further, similar to the heavy surveillance in traditional prisons, "residents" are subject to compliance checks every hour to ensure they are not violating any of the rules. Other states like Texas also use abandoned prisons to house people who have been civilly committed. Despite prisoners being told to refer to their cells as "rooms," these centers still maintain the look and feel of a prison. Individuals are not free to come and go as they please, their movement is restricted during certain times of the days, and when they enter the facility they are asked to surrender their personal belongings.

[186] New Jersey Sexually Violent Predator Act.
[187] Kansas Sexually Violent Predator Act.
[188] Adam Walsh Act, '§ 4248.
[189] See: https://www.doc.wa.gov/about/agency/history/micc.htm#scc
[190] See: https://www.doc.wa.gov/about/agency/history/micc.htm#scc

Some states like New Jersey actually use functioning prisons to house people who have been civilly committed under sexually violent predator laws. [191] The civilly committed are often housed in separate wings of the prison, and may enjoy more "freedom" than the general population of incarcerated people. This "freedom" can include wearing their own clothes or being able to receive (for a fee) calls on payphones. [192] By contrast, in other facilities, while residential corridors are separate from the general prison population, people who have been civilly committed still mingle with other incarcerated people during mealtimes, on the payphones, or in the yard, and have functionally the same privileges and limitations on freedom as their fellow prisoners.

Kanas v. Hendricks: "Only potentially indefinitely"[193]

Despite the facially punitive nature of civilly committing people in places that actually are or are nearly indistinguishable from prisons, the Supreme Court has repeatedly upheld the constitutionality of these laws on the basis that they are non-punitive and therefore under the purview of the civil legal system. The most significant case to uphold the constitutionality of civil commitment is *Kansas v. Hendricks* in 1997. In the years since the *Hendricks* decision the Court has continuously declined to take up any cases that would challenge the constitutionality

[191]The Supreme Court has ruled that even when individuals are kept in the same facilities as prisoners civil commitment still does not constitute punishment: Allen v. Illinois, 478 U.S. 364, (1986).

[192] For example, Texas and New Jersey both implement this practice. In New Jersey the NJ Department of Corrections is responsible for housing people who have been civilly committed under NJ's Sexually Violent Predator act, and the Department of Health and Human services is responsible for providing treatment. See: https://www.state.nj.us/treasury/purchase/pdf/Sexually_Violent_Predator_RFI.pdf

[193] Kansas v. Hendricks, 521 U.S. 346, 364.

of sexually violent predator laws.[194] The controversy at the heart of *Kansas v. Hendricks* began in 1994 when Kanas passed its Sexually Violent Predator Act. The Act made possible the indefinite civil commitment of individuals who were deemed sexually violent predators because they committed serious violent sexual crimes and were about to, or have already, completed their allotted prison sentences. The Act mandated that in order to civilly commit these individuals they must have some sort of "mental abnormality" or "personality disorder" that led them to commit their initial crime, and would mean that they were likely to commit similar crimes once released. Leroy Hendricks, the petitioner in the case, was the first individual to be involuntarily confined under the statute. Hendricks argued that his continued incarceration under the law's vague definition of "mental illness" constituted a violation of his ex post facto rights and the double jeopardy clause. Hendricks reasoned that, under the double jeopardy clause, civil commitment constituted a second conviction for the same initial crime. Further, Hendricks reasoned that since the Act was passed after his initial crime, his subjection to civil commitment violated the ex post facto rule.

In order for Hendricks' claims to be valid, the purpose of the statute must be punitive; therefore, placing it squarely in criminal law and requiring the slew of rights protections, including ex post facto and double jeopardy, that come with criminal statutes. Since the 1798 ruling in *Calder v. Bull* the court has continuously upheld the assertion that the ex post facto clause applies only to criminal law.[195] During oral arguments the judges pressed the state's attorney with regards to the nature of the law. Justice Kennedy, at one point during the arguments refers to the law as a "hybrid" between a criminal statute and a civil statute. In

[194] For example, Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017).
[195] For a discussion of this interpretation and its pitfalls see: Zoldan, "The Civil Ex Post Facto Clause."

response, the state's attorney tries to reframe this conceptualization as a "hybrid between criminal statute and treatment in lieu of punishment"[196] in order to move away from the idea that the act was at all punitive and required higher standards of rights protections. Ironically, the head of the detention center where Hendricks was being imprisoned had testified during the previous hearing at the Kanas Supreme Court saying that at the time of the case, there were little to no resources available for treatment at the center and Hendricks was indeed not being treated, but rather he was being simply detained for the purpose of public safety.

Yet, instead of looking at the conditions of Hendricks' imprisonment, including the lack of any meaningful treatment program that would eventually help secure his release, the Court chose to focus on the intent of the Kansas legislature during the crafting of the Sexually Violent Predator Act to determine whether or not the law was civil or criminal. The first piece of evidence Justice Thomas who wrote for the majority used to assert that the intent of the legislature was non-punitive, and therefore not subject to criminal procedural protections, was that the law was written under Kansas' civil codes, not criminal codes. In ruling that the statute is civil because the legislature says it is civil, the Court affords an extreme amount of deference to the legislature. This deference borders on tautological: the practice is civil because the Act is civil regardless of the actual impact of the legislation.

The Supreme Court defines punitive as something meant to have a retributive and/or deterrent effect.[197] In his consideration of whether or not the Act was retributive Thomas reasons that it is not retributive, "because it does not affix culpability for prior criminal conduct."[198]

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[196] Kansas v. Hendricks - Oral Argument - December 10, 1996, Pg. 1.
[197] Kansas v. Hendricks.
361-362. See also *Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963)
[198] Kansas v. Hendricks, 362.

Hendricks' most recent spate of incarceration under the civil commitment statute at hand, according to the Majority, cannot be considered retributive because Hendricks was not currently being incarcerated for the crimes for which he had already completed his prison sentence. In other words, at the time of his civil commitment Hendricks had done nothing to enact retribution against because he was not being held for a crime he had already committed. Instead, the past crimes invoked during Hendricks' civil commitment hearing were merely evidentiary. They were used as proof that he was likely to commit more crimes at a later date.

Further, the Court sought to determine whether or not the intent of the act was deterrence. On this consideration, the majority concluded that because there is no way to treat or cure people who suffer from sexual mental abnormalities, individuals suffering from these maladies are "unlikely to be deterred by the threat of confinement."[199] Therefore, because deterrence is not possible, then deterrence could not possibly be the objective of the law. In this way, the logic behind ruling the Act non-punitive not only relies on deference towards the legislature's designation of what the law is, but also hinges on inaccurate assumptions about people who commit sexual crimes: that they are incurable and highly likely to reoffend.[200] Their indefinite detention is, therefore, for the safety of the public.

The use of this reasoning with regards to treatment is noteworthy since the previous major ruling from the Court on the constitutionality of civil commitment for sexually dangerous persons, *Allen v. Illinois*, hinged on the purpose of civil commitment as providing treatment in

[199] Kansas v. Hendricks, 364

[200] In reality re-offense rates are relatively low for people with sex crimes, see: Langan, *Recidivism of Sex Offenders Released from Prison in 1994*.

lieu of punishment.[201] The focus on the treatment and care element of Illinois' program is much more in-line with the Court's support for involuntary hospitalization. Yet, we see a movement away from that reasoning almost a decade later in the *Hendricks* case. According to *Hendricks* states are not necessarily *required* to provide treatment. That they do so is tertiary. The primary concern of the civil commitment statute is for public safety through the incapacitation of sexually dangerous persons. The Majority codified this rationale arguing that incapacitation without treatment is a suitable objective for civil commitment and does not mean that the confinement can or should be interpreted as punitive.[202] Indeed, Justice Thomas likened civil commitment to confining people who have a transmittable illness with no cure. He reasoned, "A state could hardly be seen as furthering a 'punitive' purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease."[203]

The Court, in its acceptance that the Sexually Violent Predator Act is not punitive because sexually violent predators cannot be deterred from committing crime, adheres to empirically false ideas about rehabilitation and recidivism for people who commit sex crimes.[204] In doing so, the Court reifies the belief that pedophilia and "other mental abnormalities" are untreatable and are the most common cause of sexual harm. During oral arguments Justice Sandra Day O'Conner referred to the inefficacy of alternatives to civil commitment for people with sex offences such as prolonged community supervision or the sex offense registry. She

[201] The *Allen v. Illinois* ruling eliminated 5th Amendment protections for people undergoing civil commitment under the logic that Illinoi's civil commitment statute was civil in nature and not criminal.
[202] Kansas v. Hendricks.
[203]Kansas v. Hendricks, 366
[204] Recidivism rates are relatively low for people with sex crimes, see: Langan, *Recidivism of Sex Offenders Released from Prison in 1994*. In addition, there is a misperception that most people who commit sex crimes have incurable mental illness, the actual number of people who suffer from is paraphilias quite low.

stated, “we read about it every day, and I guess we don't have to avoid that kind of general awareness of concern about just saying on a piece of paper, don't go near a schoolyard and don't do this again. It just isn't very effective with someone with this abnormality, is it?” Here Day O’Conner implies not only that these illnesses cannot be treated, but that they are the main cause of the sexual harm.

This is, in fact, far from the case. Research tells us that the origins of sexual harm are rooted more in the socio-cultural environment, than in incurable individual compulsions.[205] Further, people with sex offenses have a relatively low re-offense rate compared to other crimes,[206] and generally respond well to treatment.[207] In “Assessing the Real Risk of Sexually Violent Predators: Doctor Padilla’s Dangerous Data,” scholars Rice and Zimring expose how the California Department of Mental Health suppressed a empirically sound study which found that only 6.5% of untreated “sexually violent predators” re-offended within 4.8 years of release from civil commitment.[208] These findings seriously undermine the logic of the *Hendricks* decision. And yet, the decision holds to this day.

After the *Hendricks* decision was handed down, other states were emboldened to pass sexually violent predator civil commitment laws. Further, the decision gave permission to those states that already had these types of laws to continue to enforce them without having to provide treatment provisions or an array of civil liberties protections. In this way, the Supreme Court has played an integral role in the growth and development of a system of incarceration that exists

[205] For example, feminist sociological literature demonstrates the ways in which sexual harm is rooted more in structures of socioeconomic and gender inequality than in the individual compulsions of “bad men.” See: Sanday, “The Socio-Cultural Context of Rape.”
[206] Langan, *Recidivism of Sex Offenders Released from Prison in 1994*.
[207] Duwe, “Can Circles of Support and Accountability (COSA) Work in the United States?”
[208] lave and Zimring, “Assessing the Real Risk Of Sexually Violent Predators.”

outside of the reach of criminal legal protections, yet actively imprisons people--in many cases inside of actual functioning prisons--for potentially indefinite amounts of time. The existence of civil commitment in the shadows of the carceral state at the nexus of criminal and civil law has meant that lower court challenges to civil commitment, which typically center on due process, have largely been unsuccessful.[209] In this way, the ruling in *Hendricks* has obscured the punitive nature of civil commitment while simultaneously insulating the practice from any meaningful legal challenges. This has also translated to significant growths in the penal apparatus, without widespread recognition that the penal apparatus has grown.

The Legal Landscape of Registration and Community Notification

Since the *Hendricks* decision, a similar trajectory has unfolded for the sex offense registry. In order to understand the causes and consequences of this trajectory, it is important to first understand the contemporary practice of the sex offense registry. All 50 states, plus Washington D.C., the federal government, and 197 federally recognized Indian tribes maintain sex offense registries. As of 2019 there are close to 900,000 men, women, and children on a sex offense registry. In addition to maintaining their own registries, all of these territories submit

[209] Perhaps the most significant lower court case is *Karsjens v. Piper* out of the Eighth Circuit. In the case, the plaintiffs, individuals who had all been confined under Minnesota's Civil Commitment and Treatment Act, sued the state for the violation of their due process rights. In the more than 20 years that Minnesota had been practicing the civil commitment of people deemed to be sexually violent predators, only one person had ever been successfully released. The district court, applying strict scrutiny, ruled in favor of the plaintiffs. The district court also ruled that Minnesota's civil commitment scheme was in fact punitive, and that, therefore, those who had been committed under the statute were to be granted full criminal procedural protections. However, the decision was reversed in the Eighth Circuit, under the grounds that Minnesota needed only to prove they had a rational basis for the law. See: Karsjens v. Piper, 845 F.3d 394 (8th Cir. 2017). For other examples see: United States v. White, No. 19-6181 (4th Cir. 2019); Thomas v. Commonwealth, No 180015 (Va. 2019); and United States v. Comstock, 627 F.3d 513 (4th Cir. 2010).

their data to a centralized registry, the Dru Sjodin National Sex Offender Public Website (NSOPW). The NSOPW, named after a 22-year-old white female college student who was kidnapped and murdered by a person with a previous sex offense in another state, consolidates the information from all of the registries into a single searchable national database. Established in 2005, it is the first public database of its kind. However, the practice of registration is not a new phenomenon. The first state to initiate a statewide sex offense registry was California in 1947, while other states soon followed suit. These early registration laws were primarily used as a means to punish and regulate homosexuality. At the time, there was an overwhelming belief that people who were gay were "prone to commit violent crimes and crimes against children."[210] Registration laws were thought to be not only a way to protect children, but also as an effective deterrent against homosexuality.[211] Yet, in practice, these registries were sparsely maintained.[212] By the 1980s registration laws had largely fallen out of favor and had been either repealed or sat dormant. The contemporary sex offense laws passed during the early 90s differ in both scope and accessibility. This is because of both the increasingly punitive and invasive registry legislation passed in the mid-90s to the mid-00s, as well as increases in information technology.

The widespread proliferation of the internet and search engines such as Google increase the ease with which people can access both someone's criminal records and the sex offense registry. Some have questioned the actual severity of being required to register on the sex offense registry, when ostensibly anyone could access a person's criminal record. Yet, public conviction registries differ from accessing someone's criminal history via court records in several important

[210] Mosk, "The Consenting Adult Homosexual And The Law," 737–38.
[211] Mosk, 737–38.
[212] Leon, *Sex Fiends, Perverts, and Pedophiles*.

ways. First, unlike the sex offense registry there is no free centralized and publicly accessible database where a person's court record is accessible. Gaining access to an individual's criminal court record requires navigating idiosyncratic mazes of individualized court filing systems. In many instances, access to these records may require filing freedom of information act requests, paying for a subscription to online databases, or paying third party agencies to locate the information. Court documents often have not been digitalized and are not available online. Accessing them requires physically traveling to the court and in most cases paying rather steep printing fees.

Second, the information included on court documents is much more limited and dated than the information published on the sex offense registry. In most cases personal information like a home address or vehicle license plate will be redacted in court documents. Whereas federal mandate for sex offense registries requires states collect and publish at minimum: a person's full name and any aliases they use, their current photograph, their home address, their employment address, their registerable offense(s), a physical description of the registrant (age, weight, height, tattoos/scars, etc.), their school address (if applicable), and finally, their vehicle license plate number and description.[213] All of this information must remain current. If something changes with this information, the registrant is required to report the changes within an allotted amount of time, specified by each jurisdiction, or face felony charges.

Finally, in many jurisdictions juvenile court records can be sealed and are not publicly available.[214] Restricting access to a person's juvenile records allows children the opportunity to

[213] VII. A of Final Guidelines Adam Walsh Act
[214] Yet, in practice this is not always the case. See: Jacobs, "Juvenile Criminal Record Confidentiality."

move beyond any mistakes they may have made as a minor.[215] Yet, since the passage of the Adam Walsh Act juveniles who have committed sex crimes are federally required to be placed on the registry. The Department of Justice estimates that there are around 89,000 children on the sex offense registry.[216] Some registrants are as young as 10.[217] In short, while it is possible to access someone's criminal history, it is significantly more difficult and costly than locating someone's history who is on the registry. In addition, the information that is publicly accessible on the registry versus information in court documents is extremely divergent.

While there are severe collateral consequences that come from living with a felony record,[218] the consequences of being on the registry are arguably even more severe. One individual I interviewed likened it to being held in an "open air prison," indicating that having to register is subjectively experienced as continued punishment. Part of this punishment includes heavily restricting and surveilling the movement of the nearly 900,000 people on the registry. An example of this is the expansion of registration practices beyond searchable databases. For example, some states have opted to mark the ID cards and licenses of individuals who are on the registry. In Oklahoma individuals who have been convicted of an aggravated sex crime have "SEX OFFENDER" printed in bold red capital letters on two separate locations on their IDs. Further, since the passage of International Megan's Law, all persons registered for a sexual crime against a minor are required to have a "unique identifier" on their passport indicating that they have been convicted of a sex crime. In addition, all individuals on the sex offense registry must

[215] This is not to say that all jurisdictions automatically seal this information or that even those who say they will do so in practice. Yet the idea still exists.
[216] Finkelhor, *Juveniles Who Commit Sex Offenses against Minors*.
[217] Finkelhor.
[218] Rydberg, "Employment and Housing Challenges Experienced by Sex Offenders during Reentry on Parole."

notify their local jurisdictions at least 21 days before they travel internationally. Once notified this information gets sent to Operation Angel Watch, which is run by the Department of Homeland Security. Operation Angel Watch then determines if the person has a qualifying offense against a minor, and if so, sends the individual's information, by way of the U.S. Marshals Service and INTERPOL-Washington, to the government of the person's destination country.[219] Under International Megan's Law, a registrant can be arrested at the federal level and in some states for failure to report travel or obtain a passport with a unique identifier.[220]

In additional to international travel restrictions, registrants are also subjected to a slew of other constraints on where they can live, work, and simply be present domestically. Although not specified in federal law, localities often pass residency and presence restrictions. Residency restrictions prevent people with sex offenses from living within certain distances from places where children are likely to congregate, which include places like day cares, schools, and even some churches. Many times, these restrictions are in place for all people on the registry, even those whose offenses did not involve children. Presence restrictions prevent people with sex offenses from merely being present in areas where children are likely to be. For example, parks, schools, fast food restaurants and rest stops with play areas. Because of presence restrictions, people on the registry are unable to take their children to school or to the park, or even, in some cases, stop for gas or coffee on a road trip. Both residency restrictions and presence restrictions

[219]For an official summary of International Megan's law from the Office of Sex Offender Sentencing, Monitoring, Apprehending, and Tracking see: https://smart.gov/pdfs/IML-Dispatch-2016.pdf

[220] International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders.

drive homelessness and joblessness among people on the registry.[221] In certain counties in Florida, the residency restrictions are so severe that people on the registry are forced to live in makeshift encampments under bridges and in unincorporated areas on the edges of towns.[222] These policies, intimately tied to federally mandated registration laws, severely restrict the civil liberties of those living on the registry. Like failure to register laws, violations of presence and residency restrictions are considered criminal and are punished accordingly, further reifying the link between civil registration laws and the experience of criminalization and punishment.

In addition, making the personal information of a widely feared and despised group of individuals publicly available fosters vigilantism. Since the inception of the public registry there have been many reports of vigilantes using the information on the registry to assault and murder registrants. In 2005, a man in Washington State looked up addresses on the sex offense website and gained access to the homes of two registrants by posing as an FBI agent investigating vigilantism against people on the registry. After interviewing the individuals on the registry, he murdered them in their own homes.[223] In 2006 in Maine, a 20-year old man, armed with the names and addresses of 34 individuals he had compiled via Maine's sex offense registry, murdered two registrants before finally taking his own life.[224] Another man, who repeatedly stabbed a registrant and tried to burn down a building where a number of registrants lived, was quoted in the Boston Globe saying, "I hope I've done a service to the community. These guys are

[221] Moghaddam, "Popular Politics and Unintended Consequences." For a discussion of how these laws do not reduce reoffending See: Zandbergen, Levenson, and Hart, "Residential Proximity to Schools and Daycares."
[222] For example, the Miracle Village and the Dade encampment in Florida.
[223] C Marshall, "Man Charged in Killings of Sex Offenders, New York Times."
[224] M Clark, "Two Registered Sex Offenders Murdered in Maine."

sexual terrorists."[225] There have been reports of murders, assaults, mob attacks, and arson against registrants across the country. Media outlets often report on these incidences with a concerning level of admiration. A 2019 headline, reporting on the continued harassment against a registrant and his family read: "Constitutional right or crime? Case of alleged harassment of sex offender's family heads to court."[226]

Smith v. Doe: "The sort of information you would put on your application to join Price Club"[227]

Despite the punitive consequences of being on the registry, including the criminalization of violations of "civil" registration schemes as well as the subjective experiences of punishment by registrants, the Supreme Court has remained steadfast in its assertion that the registry is civil, not criminal, in nature. The primary case that sets this precedent is *Smith v. Doe.* The case concerns Alaska's version of Megan's Law, which was enacted in 1994. The two main components of Alaska's Megan's Law are a registration requirement for people with sex offenses and the establishment of a community notification system. Both of these mandates are retroactive, meaning that individuals with applicable sex offenses who have committed their crimes prior to the enactment of the law are still subject to registration and community notification. In addition, inclusion on the registry and community notifications requirements are based on past offenses, not future dangerousness or the likelihood of reoffending. Alaska's law is similar to other versions of Megan's Law passed across the country. By 1996 the federal

[225] Dornin, C. (June 28, 2014) They're Killing Sex Offenders, NARSOL at: https://narsol.org/2014/06/theyre-killing-sex-offenders/
[226] Cassie, S. (April 9, 2019) Constitutional right or crime? Case of alleged harassment of sex offenders family heads to court, Lehighvalleylive.com at: https://www.lehighvalleylive.com/bethlehem/2019/04/constitutional-right-or-crime-case-of-alleged-harassment-of-sex-offenders-family-heads-to-court.html
[227] Roberts, Oral Arguments *Smith v Doe.*

government and all 50 states had all passed their own versions of Megan's Law and a large number of these laws also had retroactive application built into the statutes. Further, many states based their registration and notification requirements off of prior convictions and not assessments of future dangerousness.

The plaintiffs in the case were two John Does who had committed their offenses and completed their prison sentences and community supervision well before the passage of Megan's Law in Alaska. One of the John Does had undergone intensive treatment while incarcerated and successfully gained early release from prison. Once he was released, he went on to remarry, create a successful business, and regain custody of his minor children. He was able to get custody by undergoing a psychiatric evaluation where it was determined that he was not a risk. Yet, because Alaska's law was both retroactive and conviction based, he was ordered to register and participate in community notification or face charges for failure to register. The plaintiffs challenged the law on ex post facto grounds. They argued that the registration requirement constituted retroactive punishment. Therefore, the Court had to decide whether or not the statute was punitive and thus subject to ex post facto restrictions.

The first step the Court took to determine the nature of the statute was to use the precedent established in *Hendricks* to ascertain whether the intent of the legislature was to punish. In the majority opinion the Court grants the legislature a "considerable amount of deference"[228] with regards to what the legislature's stated intent for the law was. This includes looking at both which codes the statute is located in as well as the content of the statute itself. Interestingly, unlike the Sexually Violent Predator Law under review in *Hendricks,* the Alaskan Act under question in *Smith* is written in both the criminal codes and the civil codes. Indeed, in

[228] Smith v. Doe, 93.

Hendricks the Court used the location of the law in the civil codes as primary evidence that the intent of the legislature was non-punitive. Yet, the registration provisions in Alaska are were written by the Alaskan legislature into the Alaskan criminal code, not the civil code. Despite this, the Court asserted that the location of these provisions in the criminal code "do not by themselves transform a civil remedy into a criminal one."[229]

In light of this ambiguity, the Majority then moved to examine whether the consequences of the Act are punitive, therefore making them criminal, by using a three-pronged framework. The first component of the framework was to examine whether or not the consequences outlined in the statute, registration, and community notification have historically been considered punishment. The second component was to determine whether the statute imposes an affirmative disability or restraint on individuals who have committed sex offenses. And the third component was to establish whether or not the statute had a rational connection to a non-punitive purpose.

With regards to the historical inquiry, the lawyers for the Does argued that registration and community notification laws resembled colonial practices of public shamming that were both seen and felt as punishments. Indeed, the National Association for Rational Sex Offense Laws (NARSOL), one of the largest sex offense law reform activist organizations, gives out an annual Hawthorne Award to activists who have made a considerable impact on reforming sex offense laws. This nod to the novel *The Scarlet Letter* encapsulates a sentiment described by many that the registry is a "scarlet letter for our technocratic era."[230] Or put another way, the

[229] Smith v. Doe, 94
[230] Guy Hamilton Smith, "Sex Registries as Modern Day Witch Pyres: Why Criminal Justice Reform Advocates Need to Address the Treatment of People on the Sex Offender Registry."

registry "is what puritan judges would've done to Hester Prynne had laptops been available."[231]

Yet in *Smith* the Court asserted that unlike contemporary public registries, colonial practices "involved more than the dissemination of information."[232] Kennedy reasoned that colonial shaming made "the publicity and the resulting stigma an integral part of the objective [of the laws],"[233] whereas the Alaskan legislature did not make this objective explicit. Instead, "the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public."[234] The Court was explicit in its recognition that the public nature of the criminal justice system "may cause adverse consequences for the convicted defendant."[235] Yet, it also reasoned that so long as those consequences are not an *explicit* objective of the legislature, no matter what codes they are written in, they are not to be considered punitive.

Further, the Court's assertion that the information on the registry is mostly publicly available without the registry fails to consider the discrepancies in the ease of accessing criminal court records through individual public records requests with the appropriate courts and a unified free searchable state (and eventually national) database on the internet. The Court also did not consider the differences in the amount of personal information obtainable through court criminal records and the sex offense registry. As previously discussed, court records often redact personal information and do not keep up to date information on home addresses, appearances, places of

[231] Goetting, N. (January 1, 2015). Moral panic over sex offenses results in cruel and self defeating over-punishment, *CCRC,* at: http://ccresourcecenter.org/2015/01/16/moral-panic-sex-offenses-results-cruel-self-defeating-overpunishment/
[232] Smith v. Doe, 98
[233] Smith v. Doe, 99
[234] Smith v. Doe, 98-99
[235] Smith v. Doe, 99

employment, etc. that the registry mandates be made public.

Instead of recognizing that the intent of the registry is to punish people with sex offenses through public shaming mechanisms akin those used in the colonial era, the majority relied on the notion that the sole purpose of the registry is to promote public safety. The Court drew a direct connection between the need for widespread public access to information via the internet, which makes the registry more "efficient, cost effective, and convenient" than traditional means of accessing criminal records, and thus promotes public safety. In this way, the unique nature of the internet and its impact on information in the public sphere is not seen as something worth considering by the Court. For example, the ubiquity of the internet in everyday life arguably makes contemporary registration laws more akin to the "face-to-face shaming" of colonial punishments that the Court is careful to distance Alaska's Megan's Law from.[236] Indeed, in a world so centered on digital interactions the distinction between face-to-face shaming and online shaming may not be as clear as the Court implies.[237] In short, the Court relies heavily on notions of public safety to exculpate itself from having to engage with the unique nature of the internet. Further, the invocation of public safety overrides any concern for the fact that the individuals placed on the registry experience these practices as punitive, regardless of what the stated intent of the legislature was in drafting the Act. This emphasis on public safety places the lived experiences of those on the registry into the category of a "collateral consequence of a valid regulation"[238] that is fundamentally civil in nature.

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[236] Smith v. Doe, 98

[237] The Court also attempts to distinguish the Act under consideration from colonial practice of banishment, which is inherently tied to public shaming. However, the contemporary existence of residency and presence restrictions, which effectively banish registrants from entire areas of cities and towns, also indicates that the practice of registration and community notification may be closer to colonial practices than the Court recognizes.

[238] Smith v. Doe, 99

The second prong that the Court uses to determine if the statute is punitive is whether or not it imposes an affirmative disability or restraint. Unlike the historical consideration of these practices, this line of inquiry is meant to explicitly consider the lived experiences of registrants. The majority was quick to point out that registration and community notification imposes no actual physical restraints. A registrant is theoretically free to move about as he/she pleases.[239] Because there is no physical restraint imposed, the Court argued that registration does not resemble the traditional punishment of imprisonment and is not a fundamental restriction of liberty in the most traditional sense. In this way, the Majority seemingly codified then attorney John Roberts' assertion during oral arguments that the information provided to the government for the registry is no different than an application to Price Club, and therefor imposes no significant disability restraints.[240] Roberts' comparison has resulted in anti-registry activists not so affectionately referring to him as "Price Club Roberts." Interestingly, the Court did not grapple with the idea, brought up during oral arguments, that registration closely resembles practices of community supervision that have historically been considered to be part of punishment.

In addition, the Court considers whether or not the Act constitutes a significant barrier to life necessities like housing and employment. During the oral arguments the attorneys for the state acknowledge that registrants have "terrible times renting a place to live, getting a job."[241] Yet the Court argued that the absence of formal restrictions on housing and employment indicates that there is no affirmative restraint or disability. They reasoned that the Act imposes

[239] This is of course problematic when we consider things like residency and presence restrictions as well as International Megan's Law.
[240] Smith v. Doe Oral Arguments, 7
[241] Smith v. Doe, Gen. Olson, 16

no more of a restraint than the criminal court records/background checks that employers and landlords already conduct. Thus, the argument that having to be on a separate sex offense registry makes someone unemployable is null. Further, the Court considered whether or not the requirements such as reporting to authorities anytime a registrant changes their facial features (for example grows a beard), seeks psychiatric treatment, or borrows a car are affirmative restraints. On this subject the majority argued that although the Act requires registrants to report anytime they engage in any of the activities outlined in the statute, it does not *require them to seek permission* to do any of these things.[242] Therefore, the Act does not impose an affirmative restraint. In addition, although failure to register with the authorities or failure to report the aforementioned changes with authorities results in criminal charges, the Court argued that these charges are fundamentally separate from the original offense/charges.

The final and most significant prong--according to the majority[243]--the Court considered was whether or not the Act had a rational connection to a non-punitive purpose. The Court found that the primary intent/purpose of Alaska's Megan's Law was "protecting the public from sex offenders," not further punishing people with sex offenses. In order to support the assertion that the registries promote public safety, Kennedy evoked "grave concerns" about the recidivism rate of people with sex offenses and asserted that they are "much more likely than any other type of offender to be rearrested for a new rape or sexual assault."[244] To support this, he cited a study that concludes the risk of re-offense of people with sex offenses is "frightening and high."[245] The study he used puts the re-offense rate of people with sex offenses as high as 80% if they go

[242] Smith v. Doe, 101
[243] Smith v. Doe, 102
[244] Smith v. Doe, 103
[245] Smith, 103, Cited in McKune v. Lile. 536. US. 24. 34 (2002)

without treatment. Kennedy's use of these statistics was necessary in order to bolster the claim that the registries protect public safety and that any additional "punishment" felt by individuals on the registry was at best a tertiary concern.

Yet, in uncovering the origins of the "frightening and high" static, the majority and the State's argument about public safety begins to fray. The origin of Kennedy's alarming statistic was an article in *Psychology Today,* a non-peer reviewed popular journal one is likely to find in the waiting room at a dentist's office. The author of the article does not cite a single supporting study to back up his claim and appears to have pulled the statistic out of thin air. In fact, the author of the article was a therapist practicing experimental treatment for people with sex offenses and had a monetary incentive in promoting the idea that without treatment people with sex offenses would more likely than not go on to reoffend. Despite its unscientific origins, the statistic has now made its way from the highest Court into the opinions of the lower courts and even into the legislatures.[246] It has been used as a basis to justify increasingly strict registration, commitment, and area restriction laws, all of which have had a deleterious effect on the civil liberties of people with sex offenses. Ironically, the author of the *Psychology Today* article has since recanted his claim.[247]

Empirical peer reviewed research has debunked the idea that people who commit sexual crimes have a "frightening and high" likelihood of reoffending.[248] Sexual re-offense rates for

[246]Ellman and Ellman, "Frightening and High," 495..
[247] Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2014.
[248] This phrase comes from Justice Kennedy's Opinion in *Smith v. Doe.* Kennedy found it in a *Psychology Today* article/advertisement that was promoting sex offender rehabilitation programs. See: Ellman and Ellman, "Frightening and High," 495.

people who have prior convictions for sexual crimes is around 5 to 15%.[249] There is a steep decline in re-offense rates over time.[250] These statistics are not unique; they are similar to re-offence statistics for other types of felony crimes.[251] Further, 95% of sex crimes happen by first time offenders—meaning people who are not on the registry.[252] The majority of sexual harm happens to people who are not strangers to those on the registry. Instead, people are more often than not sexually victimized by people they know. A Department of Justice study on the sexual abuse of young children found that 93% of juvenile victims knew the perpetrator.[253] Of that 34% of perpetrators were family members and 59% were acquaintances.[254] Further, 8 out of 10 rapes (including both children and adult victim) are committed by someone the victim knows.[255] This research complicates the assertion that the registry and community notification are intended to promote public safety.

Despite all of the evidence, the Court has yet to significantly re-examine the claim that the registry is *legitimately* connected to promoting the non-punitive goal of public safety. Perhaps one reason for this is also codified into the majority's opinion. Indeed, the majority does not take up issue with the fact that Alaska's Megan's Law does not consider future dangerousness when placing someone on the registry. Instead of measuring the likelihood of an individual with a prior conviction of committing another crime, thus justifying their inclusion on

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[249] Hanson and Bussière, "Predicting Relapse."
[250] Hanson et al., "Reductions in Risk Based on Time Offense-Free in the Community."
[251] Blumstein And Nakamura, "Redemption In The Presence Of Widespread Criminal Background Checks."
[252] Sandler, Freeman, and Socia, "DOES A WATCHED POT BOIL?"
[253] Snyder, "Sexual Assault of Young Children as Reported to Law Enforcement," 10. This statistic is for children under 6. In children 6 to 12, 95% know their abuser. And in children 12 to 17 90% know their abuser.
[254] Snyder, 10.
[255] Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016.

the registry, but rather uses the existence of a prior conviction as reason enough. In doing so, the Act, and later the Court, legitimates the notion that a prior conviction can legitimately be used as a proxy for future dangerousness, even though this is scientifically not the case. Kennedy writes, "the State can dispense with the individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the *Ex Post Facto* Clause."[256]

In this way, a significant reason that the registry was deemed non-punitive in *Smith* is the notion that people with sex offenses are dangerous and likely to reoffend. So dangerous, in fact, that there is no need for individualized assessments of the likelihood of committing future sexual offenses. Ironically, in a companion case heard and announced on the same days as *Smith,* the Court simultaneously ruled that a state legislature need not consider current dangerousness as a justification for imposing registration requirements. In *Connecticut Department of Public Safety v. Doe,* the Court considered whether or not individuals on the Connecticut sex offense registry were entitled under the due process clause to hearings where they could provide evidence that they are not currently dangerous and therefore should not be required to register. In a short unanimous decision the Court ruled that since the law's registration requirement was not based on an individual's dangerousness, but rather on a prior conviction, not providing the opportunity to contest current dangerousness does not violate due process. The Court goes so far as to reason, "even if the respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed."[257] Therefore, "any hearing on current dangerousness is a bootless

[256] Smith v Doe, 104
[257] Connecticut Department of Public Safety v. Doe, 7

exercise."[258]

The Court's willingness to accept that current dangerousness need not be a factor in considering whether or not to put people on a sex offense registry seems to be at odds with the logic in *Smith,* which turns on the notion that the registry is not punishment because it is rationally connected to a non-punitive purpose—public safety. Throughout the decision the majority codifies the connection between previous convictions and future dangerousness over and over again to establish this connection to public safety. Without the belief that people with previous sex offenses are *currently* dangerous, the connection between the registry and the promotion of public safety begins to crumble. And yet, on the exact same day that the Court announced *Smith,* the Court simultaneously eliminates the need to consider future dangerousness when justifying registry laws in *Connecticut Dept. of Public Safety*.

In doing so, these rulings severely restrict any avenues through which individuals with sex offenses can meaningfully combat the assertion that they are currently a threat to public safety and conversely, that their inclusion on the registry constitutes punishment because it is not rationally connected to public safety. Perhaps one of the biggest indications that the rationale behind sex offense registries is not solely to maintain public safety is the practice of states, like Florida, keeping individuals on the registries even after they have died. True, the specter of the "sex offender" has been used to justify increasingly harsh laws and policies. Yet, if we take the assertion that the registry is meant to promote public safety and not to punish seriously, then the practice of keeping individuals on the registry long after they have died seems to indicate that this specter is also literal.

Like the *Hendricks* ruling, the ruling in *Smith* obfuscates the punitive nature of the sex

[258] Connecticut Department of Public Safety v. Doe, 7-8

offense registry and in doing so heavily insolates the registry from any meaningful legal challenges. The registry represents an unquestionable growth in the penal apparatus. The state and federal governments now possess the capabilities to legally register and track what will likely become millions of individuals as well as the power to charge, convict, and incarcerate those individuals who do not or cannot comply with registration requirements. Yet, the Court's insistence that the registry is civil simultaneously denies the punitive nature of these practices.

Conclusion

The Supreme Court's steadfast assertion that sexually violent predator civil commitment laws and sex offense registry laws are fundamentally civil in nature has actively contributed to the expansion of the "shadow carceral state." [259] It has allowed criminal punishments to seep into the realm of civil schemes, while simultaneously legally denying individuals the civil liberty protections that are so central to the criminal legal system. These constitutional developments, largely driven by the *Smith* and *Kendricks* decisions, have created what is effectively a legal limbo that has allowed for increasingly punitive sex offense legislation. In this way, these cases have greatly expanded the punitive powers of the state. Due, in part, to these rulings 20 states and the federal government have the legal means to indefinitely incarcerate individuals who have committed no new crimes. Further, all 50 states and the federal government have now developed a means by which the state can track and monitor what is on track to becoming millions of people. While there has been some sparse success at the state and district court levels in

[259] It should be noted that there has been some movement in the state courts on this issue. The Michigan Supreme Court ruled that its registry was cruel and unusual punishment. See Does v. Snyder, No. 16-13137 (E.D. Mich. Apr. 21, 2017).

recognizing the punitive nature of these laws,[260] the continuous denial by the Supreme Court of the fundamentally punitive nature of these practices has resulted in the state expansion of penal powers while simultaneously legally obfuscating the existence of those very powers and insulating states from meaningful civil liberties challenges.

[260] See for example, Does v. Snyder, No. 16-13137 (E.D. Mich. Apr. 21, 2017). As well as Commonwealth v. Moore, No. 1556 WDA 2018 (Pa. Super. 2019).

Chapter 4

The Specter of the "Sex Offender" & The Spending Power

Introduction

On July 27, 2006, 25 years to the day after the sexual assault and murder of Adam Walsh, President George W. Bush signed the Adam Walsh Child Protection and Safety Act (AWA) into law. The preamble of the Act memorializes 17 other victims of sexual violence and murder, most of whom are children and all of whom are white. Each of the crimes occurred after the passage of Megan's Law, the 1994 piece of federal legislation that required the sex offense registries established in by the Wetterling Act be made public, and many of the perpetrators were repeat offenders. The inclusion of these tragedies in the preamble aligned with growing public and legislative concern that, despite the Wetterling Act and Megan's Law, states and local agencies were unable to effectively track people with sex offenses and were failing to apprehend noncompliant registrants. State registry systems were accused of being haphazardly "patchwork," not the secure net envisioned by federal legislation. A House Judiciary Committee Report estimated that as many as 20% of people with registerable sex offenses were "fugitives" who needed to be apprehended, punished for failing to register, and put on the registry.[261] Throughout the report, the committee described gruesome cases that made the national news cycle and cited shocking statistics about sexual violence. Congress was sending a clear signal: the alleged "patchwork" approach of state registration schemes was not working, and states were going too easy on people with sex offenses, with tragic consequences. Because of this, the federal government stepped in with the AWA--a sprawling piece of federal crime legislation that

[261]United States Congress House Committee on the Judiciary, *Children's Safety Act of 2005*, 23.

expanded federal power and overall carceral capabilities at all levels of government.

The Act made substantial headway in the federalization of crime, which refers to the growing number of federal statutes targeting crimes typically thought to be within the jurisdiction of states and local law enforcement as well as the use of conditional federal grant money to entice and/or coerce states to make changes to their criminal justice systems. The AWA set *minimum* registration standards and allowed for jurisdictions to enact harsher measures.[262] Some of these standards include a tiered conviction-based registry that collapsed *prior* conviction with *future* dangerousness and resulted in a disproportionate number of people being reclassified from lower risk to higher risk.[263] In addition, the AWA made failure to register a federal felony offense punishable by at minimum 1 year of incarceration and mandated states do the same in their own statutes. The Act required retroactive registration and notification as well as the registration of juveniles.[264] The AWA also codified a number of harsher penalties for existing federal crimes and created additional federal crimes. These changes to the federal penal code justified increases in the resources and mandates of federal law enforcement agencies such as the U.S. Marshals Service, the FBI, and the Department of Justice, all of whom began to partner with state and local law enforcement agencies.[265] Further, the AWA extended registration

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[262] The Attorney General's guidelines for the AWA made clear that the intent of the Act is not "to preclude or limit jurisdictions' discretion to adopt more extensive or additional registration and notification requirements…" Office of the Attorney General, "Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification," 7.

[263] This is in a similar vein as the 2003 *Smith v. Doe* and *Connecticut Department of Public Safety v. Doe* rulings. For an analysis of the impact of reclassifications see: Harris, Lobanov-Rostovsky, and Levenson, "Widening the Net," 515.

[264] *34 U.S. Code Ch. 209: Child Protection and Safety*. The AWA left it up to the AG's Office to decide if the act would be retroactive. When the AG's Office released their final guidelines in 2008, they mandated retroactivity. See: Office of the Attorney General, "Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification."

[265] For example, the US Marshals dragnet Operation FALCON (Federal and Local Cops Organized Nationally). As well as Project Safe Childhood, led by the U.S. Attorneys' Offices

requirements to native territories. Since its passage, the registry has grown 66% and now encompasses close to 900,000 people.

The Act passed with bipartisan enthusiasm. The only expressed concerns came from a handful of apprehensive state officials focused on how these new measures would be funded. In anticipation of those concerns, the AWA, drawing on the congressional Spending Power, established a federal grant pool dedicated to aiding jurisdictions in implementing these new standards and a new federal bureaucracy to oversee their distribution: The Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART Office). This chapter examines the role the Spending Power has played in the growth of the registry, as well as how the use of conditional federal spending has contributed to the federalization of crime and the expansion of punitive powers at the federal, state, and local levels. In step with my analysis throughout this dissertation, I pay particular attention to the ways that the specter of the "sex offender" has influenced decisions about both the passage of the AWA and what efforts and agencies the SMART Office has decided to fund over the last decade.

Much of the extant literature on the relationship between the federalization of crime and the expansion of mass incarceration centers the role of the Commerce Clause in increasing federal involvement in state and local crime fighting efforts.[266] Little research has explored or documented the relationship between the Spending Power and the federalization of crime, and

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and the Criminal Division's Child Exploitation and Obscenity Section. Like Operation FALCON, Project Safe Childhood coordinates federal, state, and local law enforcement efforts.

[266] See: Strazzella and American Bar Association Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law*.; BRICKEY, "The Commerce Clause and Federalized Crime"; Weis, "Commerce Clause in the Cross-Hairs"; Demleitner, "The Federalization of Crime and Sentencing."

even less has been written on the Spending Power and the carceral state. [267] While conditional criminal justice grants have been distributed since the 60s, federal sex offense legislation such as Megan's Law and the AWA are two of the first pieces of federal crime legislation to threaten the funding of non-compliant states in addition to offering funding, making them important sites for understanding how conditional grant money has influenced new increasingly punitive developments to the carceral state in the form of sex offense registries and community notification practices. Hence my questions: How has the existence of these federal carrots and sticks influenced state level implementation of standards established by the federal government? Where are these grants being distributed and what are their impact? And finally, what have the consequences been for the federalization of crime and the overall punitive powers of the state?

This chapter uses Ohio, the first state to fully adopt the AWA, as an example. I interviewed the former ranking member of the State's Senate Judiciary committee who championed Ohio's adoption of the AWA to develop a better understanding of the motivation of early adopter states. I examine how, although not all states have fully implemented all provisions of the AWA, after the passage of the Act and increased federal funding, states have passed increasingly punitive registration laws in attempts to move towards compliance. In addition, my study examines the impact of conditional grant spending by analyzing an original dataset that consists of ten years of grant data distributed through the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (the SMART Office) from the inception of the AWA grant program in 2007 to 2017.

[267] One exception is Garnett's 2003 article "The New Federalism, the Spending Power, and Federal Criminal Law." However, the focus of this article is largely on concerns regarding the growth in federal power more broadly and does not have a specific focus on mass incarceration.

My analysis concludes that the passage of the AWA has ushered in increasingly punitive registration laws at the federal, state, and local levels while simultaneously increasing the federalization of crime. Through the Spending Power, the federal government was able to help shape more punitive registration practices that further developed a new arm of the carceral state aimed at managing and punishing people with sex offenses. Conditional grants influenced state registrations schemes in two ways: (1) by enticing and/or threatening some (but not all) states into total or partial compliance with the promise of grant money and the threat of withholding federal criminal justice funding; (2) by making decisions regarding which entities and which efforts to fund in the quest to, as the SMART Office's mission statement reads, "protect[ ] children or other members of the public from sexual abuse or exploitation."[268] I find that the majority of grants issued by the SMART Office have gone to law enforcement agencies at the state and local levels helping them to purchase equipment, increase paid personnel, and establish enhanced systems for tracking and punishing people with sex offenses. By increasing funding streams to state and local law enforcement, the AWA grants have helped to bolster carceral capabilities at state and local levels and institutionalize registration practices, ensuring these massive surveillance and punishment networks continue long after federal money recedes. Further, the specter of the sex offender—a stranger in the dark with incurable impulses—influences decisions about federal grant monies. I find an overwhelming majority of SMART Office funding goes towards punishment rather than treatment or meaningful prevention efforts, indicating that like Supreme Court decisions, congressional spending is influenced by the specter of the "sex offender."[269] This influence guarantees the efforts of the SMART Office are not

[268]See the SMART Office website: https://smart.gov/about.htm
[269] For an overview of the specter of the "sex offender" see Chapter 1 and Chapter 2.

targeted at root causes of sexual harm and makes the prevention efforts of the agency unlikely to succeed. While government over-investment in criminalized approaches in lieu of more comprehensive approaches is not new, the specter of the "sex offender" has allowed the carceral capabilities of the state and federal involvement in state and local efforts to expand beyond previously articulated boundaries.

I begin by briefly exploring the history of conditional federal criminal justice grants as well as Spending Power jurisprudence during the Rehnquist Court (1986 – 2005), a Court known for protecting federalism. I then move to examine how the AWA has influenced state registration schemes. I use SMART Office compliance check data to analyze how certain state registration laws and policies have changed from the passage of the AWA in 2007 to today. I then examine the specific role that federal grant money has played in those changes and what impact federal spending towards the punishment of people with sex offenses has had on the carceral state. Using an original dataset, I analyze the purpose of all 654 SMART Office grants distributed from 2007 to 2017 and assess which state and local government agencies these grants have been distributed to and to what ends they have been used.

A Brief History: The Federalization of Crime and the Spending Power

The emergence of federal conditional spending to state and local governments for crime control began in the 1960s contemporaneously with the widespread national attention to crime.[270] In response to mounting attention, Congress passed the Omnibus Crime Control and

[270] Barry Goldwater's presidential bid in the 1964 election focused heavily on crime. Although his bid was unsuccessful in capturing the presidency, his campaign further drove the national agenda on crime. This attention spurred President Lyndon Johnson to establish the Commission on Law Enforcement and the Administration of Justice. Johnson urged Congress to also take

Safe Streets Act of 1968, which established the Law Enforcement Assistance Administration (LEAA). The LEAA oversaw the distribution of federal crime control grants to states and local jurisdiction and provided them with technical anti-crime assistance and research. The LEAA is an early instantiation of the federalization of crime control through the Spending Power. In its first year LEAA distributed $300 million to state and local agencies. By 1974 the grant pool grew to $1.25 billion.[271] Yet, LEAA's relationship to the states was one of facilitation rather than forceful guidance. One of the expressed purposes of LEAA grants, in line with federalism, was to encourage state experimentation with crime control, not to dictate it.[272] While the LEAA as an agency was phased out in the 1980s, the federal government continued the practice of issuing conditional grant funding to state anti-crime programs. In 1984 the Comprehensive Crime Control Act re-established the federal grant program and began to run grants through the Office of Justice Programs. Early iterations of federal funding towards state and local criminal justice efforts, similar to the LEAA, tended to come with few strings attached. The federal government was happy to support the existing efforts of the states, whatever those may have been.[273]

This funding philosophy is in line with traditional understandings of crime response and prevention, which sees the majority of criminal legal efforts as squarely within the purview of state and local governments. Those jurisdictions are, after all, closer in proximity to the people they govern than the national government, so they are better situated to make decisions regarding

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action on the issue of crime. See: Beckett, *Making Crime Pay Law and Order in Contemporary American Politics*, 90.

[271] Feeley and Sarat, *The Policy Dilemma*, 11.

[272] Heymann and Moore, "The Federal Role in Dealing with Violent Street Crime."

[273] LEAA grants are typically thought of to be "without impact on substantive law and policy." This is largely because the "federal government [was] content to support the states with grants for equipment, planning, and research support," and not necessarily heavy-handed guidance on how to shape their anti-crime efforts. Feeley and Sarat, *The Policy Dilemma*.

crime. This logic partially undergirds the deliberate near exclusion of crime from the delegation of powers outlined in the Constitution.[274] Despite the growing federal attention to and involvement in crime prevention federal criminal justice grant distribution still operated somewhat within the confines of federalism, allowing the states to continue to "serve as laboratories" for local crime fighting efforts.[275]

However, with the emergence of the war on drugs and increased federal commitment to being on the frontlines, the federal government used a heavier hand in its conditional spending—providing increased financial incentives while also attaching more and more strings in an attempt to encourage, or rather to help pressure states to enact federal standards. Many of the conditions and incentives attached to the receipt of federal funding in the large-scale federal crime legislation of the 80s and 90s were used to bring states in line with harsher sentencing practices, which have since been linked to the growth of mass incarceration.[276] In this way, during the late 80s and 90s the Spending Power played an emergent role in the expansion of the carceral state.

For example, the 1994 Crime Bill, which is to date the most comprehensive piece of federal crime legislation, established the Violent Offender Incarceration and Truth-in-Sentencing Grants Program. The program has given upwards of $12.5 billion in grant money to build and/or expand state correctional facilities. Close to 50% of that funding is reserved for states that adopted the increasingly punitive federal "truth-in-sentencing" laws. These conditions enticed states to adopt harsher sentences practices pushed by the federal government. These new laws

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[274] The founding document only identifies three federal crimes: piracy, counterfeiting, and treason.

[275]The laboratories metaphor comes from Brandeis dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[276] One of the biggest examples of this is the implementation of mandatory minimum sentences. For a summary see Beckett, *Making Crime Pay Law and Order in Contemporary American Politics*, 95–95.

decreased parole opportunities particularly for people convicted of violent crimes, and in turn, increased the need for expanding carceral capabilities.[277] After the passage of this Crime Bill, the prison industry boomed. The number of adult correctional facilities increased by 43% from 1990 to 2005.[278] By 2006, the United States with 5% of the world's population, had close to a quarter of all the world's prisoners.[279] Federal grants initiated in the Crime Bill rewarded states that were already expanding their carceral capabilities and incentivized those who had not yet expanded them. A survey conducted by the U.S. Accounting Office of states who had enacted Truth In Sentencing Laws, over 50% of those states reported that the availability of federal money was either a "partial factor" or a "key factor" in the state's decision to adopt tougher sentencing laws.[280]

Despite the role the Spending Power has played in the federalization of crime and the expansion of the carceral state, much of the literature on federal involvement in criminal justice has focused on the Commerce Clause.[281] To be fair, the Commerce Clause has been used as a justification for the growth in the number of federal crimes at the beginning of the republic to the now thousands that exist today.[282] Through the Commerce Clause the federal government has been able to not only enact new federal crimes but also to increase punishment for existing crimes and expand the jurisdiction of federal criminal justice organizations such as the FBI, the

[277] Ibid.
[278] Kirchhoff, "Economic Impacts of Prison Growth," 15.
[279] Walmsey, Roy, World Prison Population List, 8th ed., International Centre for Prison Studies, King's College London, 2008. Cited in Kirchhoff, 9.
[280] GAO Report, "Truth in Sentencing."
[281] See: Strazzella and American Bar Association Task Force on Federalization of Criminal Law, *The Federalization of Criminal Law*.; BRICKEY, "The Commerce Clause and Federalized Crime"; Weis, "Commerce Clause in the Cross-Hairs"; Demleitner, "The Federalization of Crime and Sentencing."
[282] BRICKEY, "The Commerce Clause and Federalized Crime," 28.

U.S. Marshalls, and the Department of Justice.[283] Since the 1960s the number of people incarcerated in the Bureau of Prisons has grown exponentially.[284] However, while the Supreme Court, particularly during the Rehnquist era, began to place restrictions on the Commerce Clause, since the 1987 *South Dakota v. Dole* ruling, the Spending Powers have remained robust.[285]

Many legal scholars speculated that, like the Commerce Clause during the Rehnquist era, the Spending Power would fall victim to the Court's "federalism revolution"—once again reeling in the powers of the federal government.[286] Yet, both the Rehnquist Court and the Roberts Court have largely left the Spending Power untouched beyond the deferential regulations outlined in the 1987 *South Dakota v. Dole* decision. The *Dole* ruling upheld legislation that threatened to revoke 5% of federal highway funding for states that failed to increase the minimum drinking age to 21. The ruling codified five rules to determine if congressional pressures are within the range of the Spending Powers:

1. Must be pursuit of the "general welfare."
2. Conditions for funding must be "unambiguous." This enables "the States to exercise their choice knowingly, cognizant of the consequences of their participation."
3. Illegitimate if unrelated to "the federal interest in particular nations projects or programs."
4. Must not "be used to induce the States to engage in activities that would themselves be unconstitutional."

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[283] As discussed in Chapter 2, and early example of this type of expansion is the 1910 Mann Act which helped grow the power of the FBI. See: Pliley, *Policing Sexuality*.
[284] Bureau of Prisons, "Past Inmate Population Totals."
[285] For limitations on the Commerce Clause see: United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison: 529 US 598 (2000). See also, Printz v. United States: 521 US 898 (1997) regarding limitations of Congress' Necessary and Propper Clause. The notable exceptions to these restrictions is Gonzales v. Raich, which the Court was careful to distinguish from *Lopez and Morrison*. The South Dakota v. Dole sets parameters for the spending power but is not related to crime control.
[286] Bagenstos, "Spending Clause Litigation in The Roberts Court."

5. Must not be coercive in a way that "pressure turns into compulsion."[287]

These rules set a relatively low bar for Congress to use the Spending Power to influence the policies of states. Since the Spending power remains so unregulated by evoking it, legal scholars have argued that "Congress can often accomplish indirectly what it perhaps cannot achieve directly and may pursue regulatory ends that might lie beyond the reach of those specific legislative means enumerated in the Constitution."[288] This has been true for the federal push for states to enact Truth in Sentencing legislation and continues to be true for contemporary sex offense legislation. Since the late 1980s the Spending Power has quietly helped to not only increase the federalization of crime but has also contributed to the growth and development of mass incarceration. In the next section, I examine how conditional grant spending established through the AWA and distributed through the SMART Office has assisted in the growth and development of a new arm of the carceral state aimed at the surveillance and punishment of people with sex offenses.

The Adam Walsh Act and the Spending Power

While there have been no Court cases challenging interpretations of the Spending Power adopted by the AWA, it is clear that the Act would easily pass the first 4 measures of the *Dole* test: the law is ostensibly in pursuit of the general welfare (even if it doesn't necessarily achieve it), it is unambiguous, related to a federal interest, and--in line with Court decisions on the registry and civil commitment--does not make state engage in unconstitutional activities.[289] Yet,

[287] South Dakota v. Dole, 483 U.S. 203 (1987).
[288] Garnett, "The New Federalism, the Spending Power, and Federal Criminal Law," 25.
[289] Koenig explores this question. While he critiques aspects of the use of the Spending Power in Megan's Law, he ultimately finds the uses constitutional. See: Koenig, "Does Congress Abuse

the fifth prong of the Dole test that conditional spending must not be coercive in a way that turns "pressure" into "compulsion" raises potential concerns regarding the AWA. Unlike federal crime bills from the 80s and 90s that used carrots in the form of grant money to encourage states to adopt federal standards, the AWA uses a combination of carrots and sticks. In addition to authorizing a number of enticement grants for states, the AWA also threatened 10% of the federal Byrne Grant money of states that did not comply with the Act. The Edward Byrne Memorial Justice Assistance Grant Program—named after a New York police officer killed in the line of duty—is the largest source of federal funding for state and local criminal justice efforts. Many states rely on this annual grant money to make up budget shortfalls in law enforcement efforts.[290] Further, the withheld money from noncompliant states was promised to be rerouted to compliant states.

Perennial funding precarity for state and local law enforcement, as well as political pressure to protect the innocent from the specter of the "sex offender," muddled state autonomy in their decisions whether or not to adopt the AWA. [291] The monetary enticements and threats outlined in the AWA may have easily constituted compulsion, not just pressure. Since many states have come to rely on federal money to run law enforcement, this likely left states with "little choice" in deciding whether or not to put in a good faith effort to comply with the AWA.[292] This means that it is essentially impossible to infer whether or not "state submission to

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Its Spending Clause Power by Attaching Conditions on the Receipt of Federal Law Enforcement Funds to a State's Compliance with 'Megan's Law'?"

[290] For example, in an interview I conducted with the former Chair of the Ohio Judiciary Committee who sponsored Ohio's version of the AWA cited concerns over budget shortfalls if they lost federal justice funding.

[291] Logan, *Knowledge as Power*, 97.

[292] Ibid.

federal will in return for federal funds permits a clear [ ] state endorsement."[293] However, regardless if the AWA would pass the *Dole* test in the Court or if the *Dole* decision was incorrectly decided,[294] it is clear that the Spending Power was successfully used to push states towards implementing the registration and notification standards of the AWA.

Implementing each of these new practices required states to expend significant funding and resources to become compliant.[295] While congressional records indicate that the biggest motivation for passing the AWA was the desire to appear responsive to high-profile sexual crime cases, it does appear that legislators were at least somewhat aware of the costly burden being imposed onto states.[296] Aware of the burden, legislators drew on the Spending Power to alleviate anxieties and were deliberate in linking the implementation of costly measures to the protection of children from the specter of the "sex offender." During the Senate hearing on the bill supportive senators reiterated that the AWA "authorizes grants to States to implement [the AWA's] important programs, and provides them grants to do so."[297] Further, legislators were

[293] Logan, *Knowledge as Power*, 96.
[294] Some legal scholars have argued that the *Dole* decision went too far in expanding federal power. See: Corbelli, "Tower of Power"; Oliver, "South Dakota v. Dole."
[295] For example, some states were required to fully redesign their classification systems and reclassify every person on the registry.
[296] The history of federal responsiveness to high-profile issues like crime that disregard cost, logistics, and current efforts at the state and local levels is well documented. In a 1999 report to Congress Chief Justice warned that the "pressure in Congress to appear responsive to every highly publicized societal ill or sensational crime needs to be balanced with an inquiry into whether states are doing an adequate job in these particular areas and ultimately, whether we want most of our legal relationships decided at the national rather than local level…no matter how sensational or heinous the crimes may be." Rehnquist, "The 1998 Year-End Report of the Federal Judiciary."
[297] *Children's Safety and Violent Crime Reduction Act of 2006*, H.R. 4472, Congressional Record Volume 152, Number 96 (Thursday, July 20, 2006), S8019. Statement of Senator Cornyn.

careful to link much of the federal funding to horrifying, yet statistically rare, sexual assault and murder cases to further reiterate that, whatever the cost, these programs were necessary to prevent tragedy. For example, the AWA includes the Jessica Lunsford and Sarah Lunde Grant Program, which establishes federal funding to states and local government for GPS tracking programs to monitor people with sex offenses and for hiring more law enforcement officials to carry out those new programs. Jessica Lunsford and Sarah Lund were two young white girls murdered separately by men who had been formerly convicted of sex crimes. During the Senate hearing for the Act, Senator Nelson of Florida, the state where the murders occurred, cites their cases and notes that in order " to be effective, tough laws on sexual predators of children must be properly funded, and I believe these tough laws being passed by Federal and state legislatures are worth properly funding when they will protect our children."[298] Senator Nelson, in citing these cases, evokes the specter of the "sex offender" to justify conditional federal spending as well as state spending. While states may have been partially incentivized to adopt the provisions of the AWA in order to continue to receive and potentially receive more federal funding, states who could not or would not expend money were rhetorically situated as not caring about the protection of children.

These federal spending sticks and carrots appear to have played a role in the decisions of some states to put in good faith efforts to comply—this is particularly true for Ohio, the first state to fully adopt the AWA.[299] I conducted an interview with the former ranking member of the Ohio Senate Judiciary, Marc Dann, who championed Ohio's adoption of the AWA and later went on to help carry out its mandate as Ohio's Attorney General. The former legislator cited the

[298] Ibid, S8022.
[299] In 2007 Ohio passed SB 10, which brought the state into full compliance with all of the provisions of the AWA.

promise of federal grant funds as a major incentive to quickly pass Ohio's version of the AWA (SB 10), especially as the state had faced severe budget cuts that had begun to creep into law enforcement agencies. According to Dann, the local sheriff's offices were keen on receiving federal grant money to help offset their growing budget deficits. In addition, the sheriffs were weary of losing even more money for non-compliance.[300] This is particularly true given that Ohio had not been an early adopter of Megan's Law and had already lost federal law enforcement funding because of their failure to implement. SB 10 was pass in 2007 and was enacted in 2008. With the changes by 2009 Ohio's registry had grown from 13,750 in 2007 to 19,394.[301] The reclassification of registrants into AWA tiers had a significant impact on Ohio's registrants. According to a study, after reclassification 56% of active adult cases in Ohio had shifted into higher tiers.[302] Further, the change was predicted to have placed half of juvenile registrants into the highest tier, potentially mandating life time registration.[303] In September of 2009, the SMART Office announced that Ohio was officially the first state to become AWA compliant.[304] In response to the news Ohio's Attorney General reiterated the connection between this achievement and the protection of children against the specter of the "sex offender" stating, "this marks an important achievements for Ohio's families and children." He went on to note that, "effective tracking and monitoring of sex offenders equips parents with the information they

[300] Marc Dann, interviewed by author, Columbus, Ohio, 6/8/18.
[301] Data gathered from Parents for Megan's Law, who capture the number of people on sex offense registries in each state. For a discussion of some of the limitations of this data see: Ackerman et al., "Who Are the People in Your Neighborhood?"
[302] Harris, Lobanov-Rostovsky, and Levenson, "Widening the Net," 514.
[303] Ibid.
[304] The U.S. Department of Justice, Office of Justice Programs, Office of Sex Offender and Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART), "SORNA Implementation Review State of Ohio."

need to keep their children safe."[305]

From 2007 to 2017 Ohio received eight SMART Office grants amounting to around $2 million. The majority of these grants have gone to the Attorney General's Office, which were then funneled to local law enforcement offices.[306] In addition, some grants were issued cities but were also transferred to local law enforcement agencies. For example, a 2008 award to the City of Mansfield was used to create a Sexual Offender Officer Response Team in the Mansfield Police Department. The intent of the new response team was to conduct sweeps throughout to the city to verify the addresses of registrants and "ensure sex offenders are registered."[307] The grant was also used to purchase BlackBerry cellphones for members of the response team. Other grants were used to implement new technologies to centralize registration schemes amongst jurisdictions and to create partnerships between local and federal law enforcement agencies. For example, a 2010 award was used to create an early warning system that would notify sheriffs when registrants became noncompliant. The award created a pilot program that linked local law enforcement agents, Ohio's Bureau of Criminal Identification and Investigation, and the U.S. Marshals Services in order to "retrieve" tier 3 (the highest tier) who were noncompliant or living out of the state. [308] Building from this a 2012 award hoped to further solidify this relationship and, by the end of the project period, arrest a minimum of 10% of non-compliant people. These arrests would be made by partnering in at least eight sweeps. [309]

[305] Ibid.
[306] OJP SMART Office Grant data.
[307] Ibid.
[308] Ibid.
[309] Ibid.

In the example of Ohio, it is clear that the Spending Powers played a role in the federalization of criminal justice by pressuring the government of Ohio to implement federal standards. These new standards expanded Ohio's registry and made it fundamentally more punitive by, among other things, reclassifying individuals into higher tiers, requiring juveniles to register, and enhancing surveillance/tracking techniques. Further, the grant monies also worked to increase the role of the federal government in local law enforcement by funding pilot projects that fostered collaboration between Ohio's law enforcement agencies and the U.S. Marshals Service that continue to this day.[310]

Not all states were as enticed by the monetary promises and threats of the AWA. A 2010 Texas Senate Criminal Justice Committee formally recommended not to implement the AWA, mainly because of concerns over cost, establishing a conviction-based registry, and the requirement that juveniles register.[311] The committee noted that while the loss of federal criminal justice funding would be $1,404,571, the cost of fully implementing the AWA was assessed at $38,771,924."[312] With this cost benefit analysis, Texas decided to implement some but not all of the AWA standards. For example, as of 2018 Texas is now in full compliance with AWA juvenile registration requirements. However, the state has opted to continue to use a risk assessment, not conviction as the basis for registration guidelines. The Texas legislature noted that the decision to use risk and not conviction was not solely based in cost. Instead, the committee noted that risk is more in line with public safety goals. Texas' refusal to implement portions of the AWA may have impacted their Byrne funding, however it ultimately did not

[310] These collaborations include sweeps and other tracking mechanisms. For example see the Northern Ohio Violent Fugitive Task Force.
[311] Senate Criminal Justice Committee, "Senate Committee on Criminal Justice Interim Report to the 82nd Legislature."
[312] Ibid, 14.

preclude them from receiving SMART Office grants. Since 2007, Texas has received over $1.5million in federal money towards the registry. All of the SMART Office funding that has gone to Texas has been distributed directly to law enforcement. Each of the seven grants have been used wholly or in part to fund sweeps as well as new law enforcement positions tasked with enhancing the registry. For example, a 2009 SMART Grant to Harris County was used to hire two new deputies tasked whose jobs it would be to "target and identify sex offenders ensure that identified offenders are in compliance, apprehend non-compliant offenders and help prevent offenses in the precinct."[313] Another grant to the Austin Police Department was used to create special assignments for law enforcement agents that would conduct quarterly five-day sweeps and 16 field checks per day, five days per week. The intention of these measures was to ensure that detectives visit each person with a sex offense at least four times in a single year. [314]

While Texas has only substantially implemented 13 out of the 19 areas the SMART Office uses to measure compliance, this does not mean that Texas has less punitive registration laws or that their registry is not as all-encompassing as other states who have fully implemented. Texas has fully implemented all the standards related to the offenses and offenders the AWA requires, all of the information sharing measures, and most of the community notification standards. The biggest holdouts for implementation remain the tiering system as well as how Texas conducts their registration and verification. Despite these areas of noncompliance, Texas passed 33 sex offense/AWA related pieces of legislation between 2008 – 2017.[315] Further, the number of individuals on Texas' registry has more than doubled since 2006, growing from

[313]OJP SMART Office Grant data.
[314] OJP SMART Office Grant data.
[315] NCSL AWA Enactments Database: https://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-enactments-database.aspx

44,336 to 91,642 in 2017.[316] The use of federal grant money to hire new law enforcement positions dedicated to registration and massive law enforcement sweeps undoubtably impacted the growth in the number of registrants.

In this way, although many states like Texas have strategically decided to only enact parts of the AWA, federal pressure to conform to national standards through the Spending Power has still been successful in getting states to at least somewhat comply with the AWA. While non-compliant states may lose a portion of their Byrne funding, they still remain eligible for SMART grants, which help to fund AWA compliance and enhancement efforts. To date almost all states have received SMART Office monies.[317] Since the signing of the AWA in 2006, all 50 states have passed pieces of sex offense legislation totaling 1,053 bills enacted across the nation over the last ten years.[318] These bills moved aspects of state registrations systems into compliance with AWA standards and have also helped states enhance their systems beyond the "floor" that the AWA mandates.

For example, in a 2009 survey of 45 states regarding barriers to implementing the AWA the most discussed area of concern was the requirement of juveniles to register. Over half of the participating states marked this as a serious concern. Today 34 states have successfully implemented AWA compliant juvenile registration, and of the 16 states who remain noncompliant, half meet some but not all of the minimum requirements.[319] Further, the second

[316] Data gathered from Parents for Megan's Law, who capture the number of people on sex offense registries in each state. For a discussion of some of the limitations of this data see: Ackerman et al., "Who Are the People in Your Neighborhood?"
[317] The only exception is West Virginia.
[318] NCSL AWA Enactments Database: https://www.ncsl.org/research/civil-and-criminal-justice/sex-offender-enactments-database.aspx
[319] SMART Office, "Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check 2019."

highest area of concern in the survey was implementing retroactive registration.[320] In the ten years since the survey all states but Maine have made their registries retroactive. Other areas such as the information required at registration, which the AWA expanded to include things like information about where a registrant is employed, goes to school, etc. have also seen progressively more implementation. A 2013 SMART Office report found that seven states were not compliant with AWA information requirement standards, since the publication of the report four of the seven states have now become compliant. In fact, all categories the SMART Office evaluated in their 2013 compliance report on jurisdictions have seen some, and in many instances significant, progress towards implementation. The categories also include: the immediate transfer of information to relevant jurisdictions, the offenses that must be included on the registry, offense tiering, public website requirements, community notification practices, and strategies for dealing with registry absconders.

The general movement towards compliance indicates that the registration and community notification schemes of states have overall become more punitive and have grown in their capacity. The majority of states have seen significant increases to their registries since the passage of the Adam Walsh Act, controlling for population changes, states on average have seen a 47% increase in the number of registrants since 2007 and some states have even seen 200 to 300% increases.[321] Further, seven of the ten states that have seen the largest registry increases are

[320] 20 states reported this as a concern see: National Consortium for Justice Information and Statistics, "SEARCH Survey on State Compliance with the Sex Offender Registration and Notification Act (SORNA)."

[321] Data gathered from Parents for Megan's Law, who capture the number of people on sex offense registries in each state. For a discussion of some of the limitations of this data see: Ackerman et al., "Who Are the People in Your Neighborhood?"

AWA compliant states.[322] The three non-compliant states that are in the top ten-- Montana, New Jersey and West Virginia--have all implemented portions of the AWA that ensure there is a large base of registrants ("the offenses and offenders included" on registration schemes) and that registrants remain on the registry ("tracking and penalizing absconders)."[323] In this way, while not all states have or will become fully compliant with the AWA, states have still been motivated to implement portions of the Act, which has contributed the growth and development of punitive registration schemes across all states. Through the Spending Power, non-compliant states have continued to receive AWA funding that has helped these jurisdictions move towards compliance and has enhanced existing registration practices. In the next section I analyze ten years of conditional grant awards distributed by the SMART Office since its inception in 2007 - 2017 to understand what role these grants have played in both the federalization of crime and the growth and expansion of punitive state power.

SMART Office Grants

In order to analyze the impact of federal spending on the federalization of crime and the expansion of punitive state power through enhanced registration schemes, I generated a dataset of all federal sex offense management grants distributed through the Department of Justice's SMART Office from the beginning of the grant program under the AWA in 2007 to 2017. The data was gathered from the Office of Justice Program's (OJP) Award Database, which provides information on all grants distributed through the OJP's various offices, including the SMART

[322] PML Data (NJ, NV, MT, WV, KS, PA, TN, Mo, MS,WY. WV, MT, NJ are not fully compliant. However, there is likely a reporting error in NJ as the registry goes from 11k to 3k and then back up to 12k in 2006 ,2007, 2008.)
[323] SMART Office, "Sex Offender Registration and Notification Act (SORNA) State and Territory Implementation Progress Check 2019."

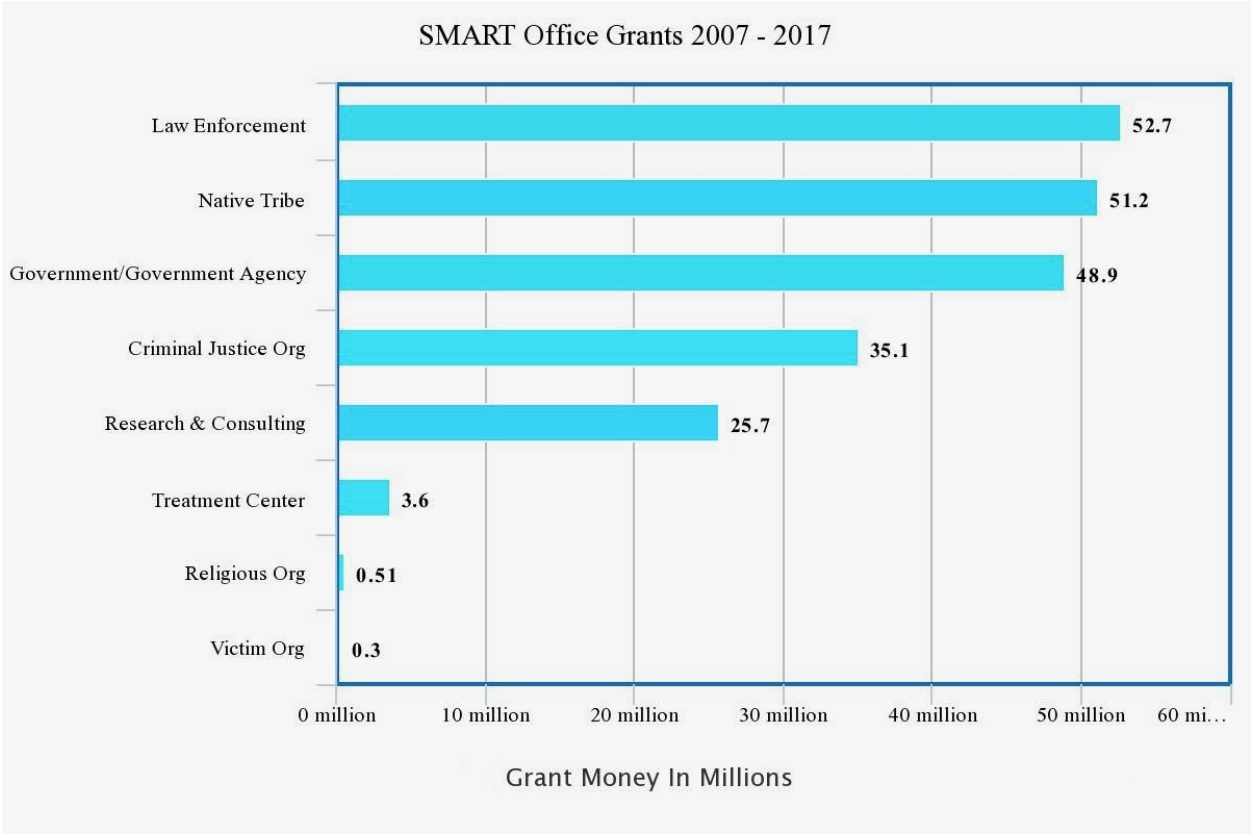
Office. I read through each of the award descriptions for all 654 grants and coded for the following categories: (1) General identifiers such as year of the grant, award/award amount, awardee, and state; (2) The type of organization that received the money (for example, victim organizations, departments of correction, state departments of justice, police departments, etc.). The awardee type category was then parsed by organization type (law enforcement, state government, local government, non-profit, tribe, etc.); (3) Purpose of the award, which was then parsed into two categories "punitive purposes" (including: apprehending, surveilling /tracking, and punishing people who are not compliant) and "nonpunitive purposes" (including: rehabilitation, education, and victim advocacy).[324]

Given the Supreme Court's continued findings that registration is not punishment, the distinction between whether or not the purpose of the grant is punitive or non-punitive is not overt.[325] To make this distinction, I used the academic research on sex offenses and the experience of people with sex offenses living on the registry to sort grants as either punitive or nonpunitive. This research overwhelmingly concludes that people on the sex offense registry experience registration as punishment.[326] Therefore, when considering whether or not to code the purpose of a grant as punitive I coded any funding related to enhancing surveillance and tracking of people with sex offenses, including developing infrastructures, increasing law enforcement personnel, and conducting regular compliance checks/sweeps to try and catch people who are not

[324] Therefore, I based my interpretation of what is and is not punitive off of the academic literature on sex offense laws. This literature argues that practices such as registration, residency and presence restrictions, and civil commitment are experienced as punitive. For an overview of this literature see Chapter 2. See also footnote 66.
[325] For a detailed account of these decisions see Chapter 2.
[326] Tolson and Klein, "Registration, Residency Restrictions, and Community Notification."; Harris et al., "Collateral Consequences of Juvenile Sex Offender Registration and Notification."; Bowen, Frenzel, and Spraitz, "Sex Offender Registration and Notification Laws."

in compliance with registration schemes as punitive. Other prevention efforts that did not enhance surveillance and tracking of people on the registry, such as investments in rehabilitation for people with sex offenses, education efforts, and victim advocacy were coded as nonpunitive.

Over the 10-year period the SMART Office distributed 654 grants totaling over $237 million. As Figure 1 demonstrates, the majority of SMART Office grants went directly to law enforcement agencies across the country. From 2007-2017, the SMART Office awarded 216 grants directly to law enforcement agencies totaling $52,263,196.[327] Further, $11,844,403 total grant money went to other criminal justice related entities such as the Offices of Attorney Generals, Departments of Justice, and superior courts. The majority of the funding



[327] Law enforcement agencies include: police departments, sheriff's offices, and departments of corrections and parole/probation offices.

Figure 1: SMART Office Grant Awardee Distributions

distributed to these organizations were then also funneled to law enforcement agencies. For example, a 2011 SMART grant awarded to South Dakota's Attorney General was used to purchase registration kiosks for local law enforcement agencies.[328] Another grant to the same Attorney General's Office was given to the Division of Criminal Investigation to purchase finger printing technology for law enforcement to link the biodata of registrants to South Dakota's Driver's Licensing database.[329] As previously mentioned, all of the grants awarded to Ohio's Attorney General were then funneled to law enforcement agencies.

Similar to the funding of criminal justice related organizations, the $6,284,544 awarded to state and local governments also overwhelming went to law enforcement/criminal justice agencies. For example, a successful grant application from the state of Alabama proposes to use the money to "increase the amount of sex offenders" on Alabama's registry and cites a spate of budget cuts to law enforcement agencies and the prosecutors as one of the reasons the state is requesting federal funding for expanding Alabama's registry. The application asserts that these budget cuts have caused a high turnover rate of both law enforcement and prosecutors working on sex offense registry issues, which has had a negative impact on the ability of Alabama to effectively implement SORNA. Part of the grant was used to hire a Sex Offender Resource Prosecutor who would be responsible for overseeing the registry and registry related charges in the prosecutor's office. In addition, the new position would also serve as a liaison with law enforcement agencies. The grant also proposes to "enhance the infrastructure of local law enforcement agencies."[330] While the language of what exactly this enhancement may entail is

[328] OJP SMART Office Grant data.
[329] OJP SMART Office Grant data.
[330] OJP SMART Office Grant data.

vague, other states have used the funding to establish/enhance technological capacities for surveillance and tracking of registrants, increase the number of law enforcement personnel overseeing registration issues, hire administrators within the agencies to assist with records keeping and management, and to conduct "absconder" sweeps—many times a combination of all of these.[331]

The most common use of federal grant money given to law enforcement, whether directly or indirectly, was to establish and/or enhance surveillance infrastructures which included: digitalizing, consolidating, and publishing records, establishing systems to collect, analyze, and publish biometric data, creating information sharing networks between law enforcement agencies, and purchasing new technologies to assist in the aforementioned new/enhanced systems. At the time of the AWA, many law enforcement agencies had backlogs of paper records that needed to be digitalized to become compliant with community notification and information sharing mandates of the AWA. Digitalizing records made it feasible for law enforcement agencies to access, store, and share vast amounts of information via easily searchable electronic databases independent of physical location. These electronic records streamlined the maintenance of public registry website and community notification practices.

These new databases also included integrating biometrics. The AWA established enhanced protocols for collecting and publishing searchable biometric data of people with sex offenses such as DNA, palm and fingerprints, and facial photographs in order to identify and arrest noncompliant registrants. For example, the Iowa Department of Safety was granted an award to build a searchable facial recognition program. The four main goals of the new program were to:

[331] OJP SMART Office Grant data.

1) verify registrants with other registry/mugshot images and investigation potential fraud;
2) identify and prevent mistakes made in photo identification;
3) identify predators from prohibited media; and
4) identify criminal suspects in all other events.[332]

The intention of the Iowa Department of Safety was to eventually expand the program's capacity to include performing mobile facial biometric checks, including at emergency disaster shelter locations where shelter managers can easily run a check of every person entering the shelter "to make certain the Shelter Managers separate sex offenders from the general population." [333] In a similar vein, the Colorado Department of Safety used a SMART Office grant to replace its old fingerprint identification system with a new "Automated Biometric Identification System" that collected not only fingerprints but also palm prints and photographs.[334] The new system has been used to capture and transmit the biometric data of people with a range of criminal convictions, not just sexual crimes.

In addition to using grant money to establish new surveillance infrastructure, another common purpose for law enforcement grants was to hire new personnel or to pay for the salary of existing positions. For example, a 2009 award to Harris County, Texas was used to hire two additional law enforcement personnel to head a sex offender unit at the Harris County Precinct, which prior to the grant lacked a dedicated unit.[335] Other grants have been used to hire additional staff personnel to tasks like data collection, records digitalization, and database analysis.[336]

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[332] OJP SMART Office Grant data.
[333] OJP SMART Office Grant data.
[334] OJP SMART Office Grant data.
[335] OJP SMART Office Grant data.
[336] For example, a 2010 award to the Florida Department of Law Enforcement was partially used to hire additional personnel to digitalize records. A 2014 award to Nevada Law Enforcement did the same. OJP SMART Office Grant data.

While others signaled to vaguely worded goals like "enhance[ing] the sex offender registration and other unites,"[337] which likely resulted in hiring additional personnel. Indeed, many grant summaries indicate the need to either hire additional personnel to manage the new systems set up by state efforts to comply with the AWA or to partially fund staff salaries to pivot over to management of the new systems.

In concert with new infrastructure and increased personnel, the other most common use of SMART Office grants for law enforcement agencies were to conduct compliance sweeps. Sweeps involve sending law enforcement agents to the home or work addresses of people with sex offenses to verify the registrants are in compliance with registration laws as well as locating and arresting registrants who are already marked noncompliant. For example, the Michigan Department of State Police used a SMART Office grant to fund to "enhance absconder investigations and sex offender compliance tactics" by conducting four random resident check, warrant request, and arrest sweeps throughout the state.[338] Michigan conducts an annual statewide sweep known as "Operation Verify." In South Dakota the Office of the Attorney General used SMART Office funding to "continue its aggressive pursuit of noncompliant offenders and those who have failed to provide DNA sample." [339] In the case of South Dakota compliance sweeps were used in concert with new biometric databases to locate and punish noncompliant registrants. Whereas in New Hampshire, the Department of Safety used SMART Office funding to pay for staff time to conduct address verifications across the state.[340] Sweeps

[337] OJP SMART Office Grant data, 2008 Chicago PD award.
[338] OJP SMART Office Grant data.
[339] OJP SMART Office Grant data.
[340] OJP SMART Office Grant data.

are often multijurisdictional, and, in many cases, local and state jurisdictions work together with federal agencies such as the U.S. Marshals Service.

SMART Office grants directed to state and local law enforcement agencies expanded federal involvement in criminal justice beyond simply pressuring states into AWA compliance with the promise of federal funding and the threat of withholding federal aid. By funding the creation of new infrastructures for easy data sharing between state, local, and federal agencies the grants helped to facilitate a larger federal role in state and local crime control efforts. The digitalization and biometric data requirements outlined in the AWA also encompassed ensuring that these resources be made available to federal law enforcement agencies, such as the U.S. Marshals Service, to assist with the location and arrest of registry "absconders." Since the passage of the AWA the number of closed U.S. Marshals Service cases related to the registry increased from 340 in 2007 to 3,157 in 2011.[341] These cases are indicative of the growing federal role in criminal justice--all of these investigations have involved collaboration between federal, state, and local agencies and were closed by the Office of the United States Attorneys.

Further, federal involvement in state and local criminal justice through the distribution of grant money has also increased the overall punitive powers available to state actors. The AWA required states enhance and/or develop infrastructures capable of surveilling and punishing tens of thousands of people for longer periods of time. The promise of federal money helped to overcome the startup costs for state and local jurisdictions to create these new institutions and have assisted in the creation of enhanced surveillances systems, new staff positions dedicated to surveilling and punishing registrants, new task forces for enforcing increasingly punitive state

[341] GAO, "Sex Offender Registration and Notification Act: Jurisdictions Face Challenges to Implementing the Act, and Stakeholders Report Positive and Negative Effects."

and federal laws, and has helped to expand the mandates of law enforcement agencies. Essentially, conditional federal grant money established by the AWA helped to institutionalize lasting and more severe surveillance and punishment practices at the state and local levels in collaboration with federal law enforcement agencies. The initial investments into starting up these systems has allowed states to more easily track and punish people with sex offenses for decades and in many cases for lifetimes.

Accordingly, after the passage of the AWA and the initial investments of the SMART Office we should expect to see an uptick in the number of people registered. As Figure 2 demonstrates, after early influxes of SMART Office grant distributions, particularly in 2008, there is an increase in the number of individuals on the registry. In the years since the passage of the AWA the SMART Office grant pool has declined. Yet, as Figure 2 also indicates, there has continued to be a steady increase in the number of people registered. This somewhat paradoxical development is a testament to the durability of the enhanced surveillance systems built by jurisdictions in their efforts to become compliant with the AWA and by federal grant investments into these enhanced systems. Through the AWA and the Spending Power, the federal government has helped to create a sustained and self-reinforcing surveillance and punishment system that continues to grow even as federal investment fades. The new technologies, data sharing practices, and jobs established for the purpose of moving towards AWA compliance do not disappear once federal funding or even federal attention has faded.[342] Instead these new capacities initiated by the AWA have become further entrenched as states and local governments continue to invest in these punitive surveillance systems.

[342] See: Smith, "Ideas and the Spiral of Politics."; Baumgartner, *Agendas and Instability in American Politics*.

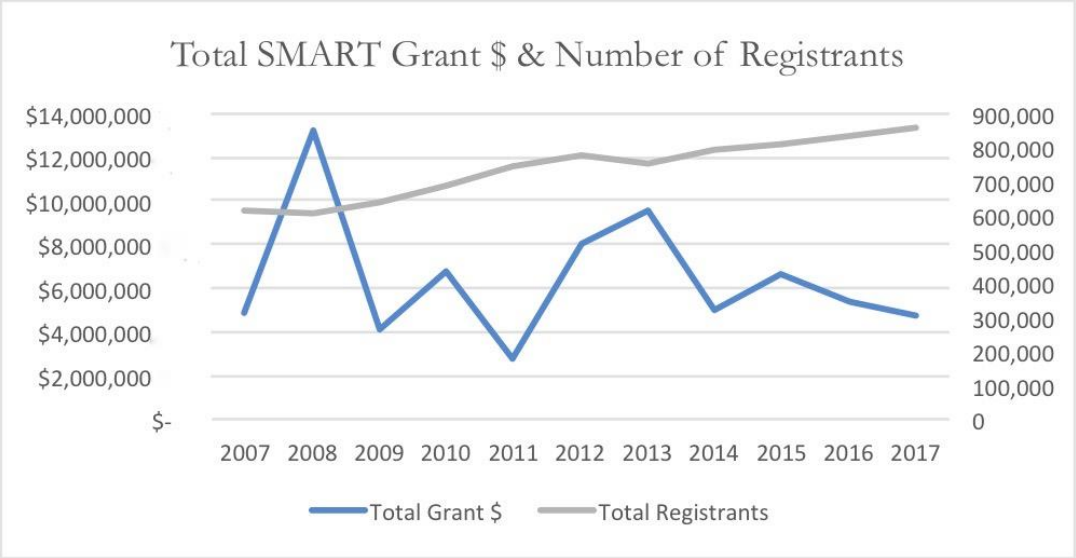

Figure 2: Total SMART Office Grant Funding and Total Number of Registrants

Concerningly, these investments have persisted despite any indication that they are successfully preventing and redressing sexual harm.[343] As discussed in previous chapters, registration and community notification have no known impact on the recidivism rates of people with sex offenses nor the rate of sexual crimes.[344] The failures of these punitive surveillance systems can largely be attributed to the fact that they are aimed at the specter of the "sex offender," a stranger in the dark waiting in the bushes to prey on children, not the actual structural causes that perpetuate sexual harm such as white supremacy, economic inequality, and patriarchy.[345] Yet, the specter of the "sex offender" comprised the bulk of justifications for the passage of the AWA.[346] During testimony senator after senator recounted grueling sexually

[343] Jones, Thomas III, and Wolfe, "Policy Bubbles."; Miller, *The Perils of Federalism*.
[344] Agan, "Sex Offender Registries."; Duwe and Donnay, "The Effects of Failure to Register on Sex Offender Recidivism."
[345] Corrigan, "Making Meaning of Megan's Law."
[346] For a detailed account of the influence of the specter of the "sex offender" and the passage of the AWA see chapter 2.

violent murders by repeat offenders who were strangers to the victims that occurred in their states to solidify why this legislation was necessary. Almost every legislator who testified evoked one or more specific instances of sexual violence and/or murder in their state in graphic detail.

The legislators played to the notion that there are an inordinate number of sexually depraved strangers "lurking in a parking garage or trying to lure young children."[347] Senator Dorgan from North Dakota testified:

> Pull back the curtain and then ask the question: who is it abducting these children? Who are the sexual predators killing these children? This is not some mystery. We know the answer to this. The answer is, in most cases, that these murders and these abductions are done by those who have been in our criminal justice system and who have abducted and murdered before.[348]

Legislators also cited the "fact" that people with sex offenses were untreatable and likely to recidivate. Going so far as to say that "if you look at the statistics…the highest recidivist rate, or the highest repeat offender rate of any crime—even higher than murderers, even higher than armed robbers—is sex offenders."[349] As discussed in previous chapters, these statistics are widely believed but not grounded in data. Most sexual harm happens in the home at the hands of someone known and trusted by the victim.[350] 93% of sexual crimes against children are

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[347] *Children's Safety and Violent Crime Reduction Act of 2006*, H.R. 4472, Congressional Record Volume 152, Number 96 (Thursday, July 20, 2006), S8019
[348] Ibid, S8107
[349] Ibid, S8019
[350] For example, in 8 out of 10 rapes the victim knows the person who raped them. See: Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016.

committed by first time offenders.[351] Further, people with sex offenses have some of the lowest re-offense rates and are highly responsive to treatment.[352] The specter of the "sex offender" and the use of horrific, yet statistically rare, examples locates the harm in individual "bad apples" that need to be located and removed, instead of the true structural origins of sexual harm.[353] It also works to justify involvement even beyond the notion that Congress had to step in because "predators move from state to state."[354]

Once the AWA passed, the federal government perpetuated the specter of the "sex offender" by choosing to funnel the bulk of grant money into punishment instead of nonpunitive efforts such as rehabilitation, education, research, and victim advocacy. As Figure 3 indicates, the vast majority of SMART Office grants have been award towards punitive efforts invested in expanding registration and community notification schemes as well as policing the compliance of these newly enhanced schemes. Over the ten-year period analyzed, the SMART Office distributed a mere $19.68 million in grant money toward nonpunitive purposes. Whereas during the same period the SMART Office distributed $127.09 million towards punitive efforts. Further, the entirety of the $52.2 million granted to native tribes by the SMART Office has also gone towards punitive efforts in lieu of treatment and rehabilitation for people with sex offenses.

[351] Snyder, "Sexual Assault of Young Children as Reported to Law Enforcement," 10.
[352] Ellman and Ellman, "Frightening and High," 504.
[353] Corrigan, "Making Meaning of Megan's Law."
[354] US Congress, "Children's Safety and Violent Crime Reduction Act Of 2006. Congressional Record Daily Edition", H681.

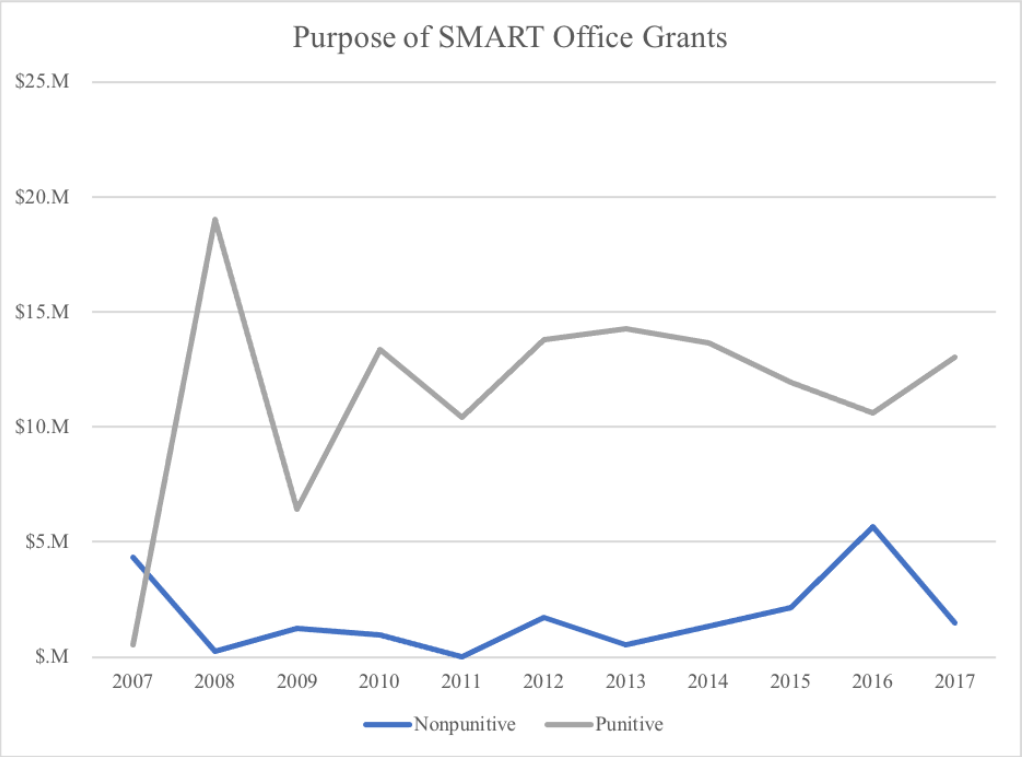

Figure 3: Purpose of Smart Office Grants 2007 - 2017

The choice to overwhelmingly fund punitive efforts as opposed to rehabilitation and treatment reflects the familiar notion that people with sex offenses are untreatable and must therefore either be detained or closely monitored. Investing in treatment is null when sexual crimes are understood to be caused by an innate incurable pathology. From this understanding of the origins of sexual crimes the federal government has chosen to heavily invest in a criminalization approach to preventing sexual harm.

This insistence on over-using criminalization at the expense of other more comprehensive approaches is not new.[355] It is well documented that government spending on the "war on drugs"

[355] See: Wacquant, *Punishing the Poor*.

went overwhelmingly toward attacking supply and decreasing demand through harsh criminal penalties--which effectively meant bolstering law enforcement spending--and not towards treatment and prevention programs.[356] Scholars have also criticized the overuse of law enforcement agencies in dealing with mental health issues, which is linked to the lack of funding for affordable state run mental health treatment facilities.[357] Further, the criminalization of poverty across the United States is well documented.[358] In this way, federal spending on the surveillance and management of people with sex offenses can be seen as part of a broader history of the growth of punitive state powers aimed at addressing various "crises" with origins squarely rooted in the structural socioeconomic realm. As we are now seeing with the opioid crisis, these moments of expansion do very little to meaningfully address the issues they are meant to address. What they have been successful in is increasing the power of law enforcement and the number of individuals who are under correctional supervision.[359]

Yet, while sex offense registries and community notification practices can be seen as part of this broader history, they have also developed and entrenched new robust systems of surveillance and punishment which have been both bolstered by the federal government and have created new avenues for federal involvement. These developments occurred largely because, as has been explored throughout this dissertation, when it comes to sex, the United States has demonstrated a willingness to push the legal and social boundaries of acceptable punishment.

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[356] For an analysis of national spending on drug policy see: Patrick Murphy, "Keeping Score The Fragilities of the Federal Drug Budget."
[357] "Jail Incarceration, Homelessness, and Mental Health."; Sugie and Turney, "Beyond Incarceration."
[358]Gustafson, *Cheating Welfare*.; Wacquant, *Punishing the Poor*.; Beckett, *Banished*.; Edelman, *Not a Crime to Be Poor*.; Gustafson, "The Criminalization Of Poverty."
[359] For a discussion of the increase in governmental power see: Simon, *Governing through Crime*.

This willingness has allowed the federal government to greatly extend its reach into the criminal justice efforts at the state and local levels. Further, the investments of the federal government through the Spending Power have bolstered the punitive power of state and local governments. All of these efforts have contributed to the growth and expansion of a sprawling registration and community notification system that is both unprecedented and ineffective in preventing sexual harm.

Conclusion

In May of 2020 a new piece of legislation aimed at combating child exploitation over the internet was introduced into the Senate and the House. The bill would distribute $5 billion over ten years to federal, state, and local efforts. Similar to the AWA, the bill funds the creation of new positions at federal law enforcement agencies such as the DOJ and the FBI and allots millions of dollars annually to bolster state and local efforts. The bill's sponsor in the Senate, Sen. Ron Wyden, a Democrat from Oregon highlighted the usefulness of the Spending Power in ushering in new criminal justice efforts when he told the New York Times that the best approach to the problem of child exploitation "is to give public servants—prosecutors, investigators and preventative services—dollars and hold them accountable."[360] While the bill makes some allotments for nonpunitive preventative services, the vast majority of the spending will go to law enforcement.[361] The existence of this new legislation indicates that the federalization of crime and the growth of carceral capabilities through the Spending Power, especially with regards to sex crimes, has continued to expand.

[360] Michael H Keller, "A $5 Billion Proposal to Fight Online Child Sexual Abuse."
[361] S. 3629 (116th): Invest in Child Safety Act.

The AWA pushed the boundaries of acceptable federal involvement in state and local efforts while it simultaneously contributing to the expansion of the punitive powers at all levels. Federal spending is an important site for examining the new and pernicious ways the carceral state continues to expand in the form of postconviction registries and community notification practices. It is important to understand what the federal government has decided to invest in and how those investments have impacted the contours of the state. Unfortunately, these expansions, influenced heavily by the specter of the "sex offender," have done little to actually address the origins of sexual harm which are rooted in patriarchy, racial inequality, and economic disparities. Effective approaches to prevention and redress must address the structural causes and consequences of sexual harm. The nearly sole reliance on the carceral state to prevent and redress sexual harm functions only to bolster state power while failing to meaningfully address the large-scale issues at hand.

Chapter 5

The Creep of the Carceral State: The Extension of Public Conviction Registries

Introduction

In Kansas and Montana, the personal information of people with a range of convictions--from murder to drug distribution--is accessible through the state's official sex offense website. Like people with sex offenses, people with other types of registerable offenses in those states have to periodically register with the authorities and update their registration anytime their information changes. Failure to do so could result in incarceration. A Kansas man order to register on the state's "Offender Registry" for a 2008 drug offense was arrested for failing to register a jet ski he had recently purchased as a new vehicle with police. While he faced potential jail time, he ended up receiving three years-probation instead.[362] In Tennessee, a state that has periodically won the not so coveted spot of most methamphetamine production, a person can logon to a publicly available website and access the personal information of people with drug offenses. Tennessee has also implemented a statewide publicly available animal abuse registry. Other states like New York, Washington, and Texas have tried to enact public domestic violence registries. Utah has implemented a public white-collar crime registry to help its large Mormon population avoid affinity fraud, and, in the words of their attorney general, ensure people are able to "curtail a fraudulent investment and save an entire nest egg."[363]

Throughout this dissertation I have argued that when it comes to pursuing the specter of the "sex offender" the United States has demonstrated a willingness to push the legal and social boundaries of acceptable punitive state powers. Since the late 1980s this willingness has

[362] Maurice Chammah, "Convicted of a Drug Crime, Registered with Sex Offenders."
[363] http://www.utfraud.com/Home/Registry

manifested in two significant yet underexplored developments to the carceral state: (1) sex offense registries with their ensuing community notification and residence/place restriction laws; and (2) civil commitment for people deemed to be "sexually violent predators." As I demonstrate in chapter 2, these new modalities for surveillance and punishment have been constitutionally enshrined by the U.S. Supreme Court and, as I demonstrate in chapter 3, have been expanded at the federal, state, and local levels through the Adam Walsh Act and the use of the Spending Power. Yet, these new technologies of surveillance and punishment that developed around sexual crimes have not simply halted at sexual offenses. As the examples I opened with demonstrate, the use of public conviction registries has expanded beyond sex crimes, quietly contributing to the creeping reach of the carceral state. In this chapter I examine how, once established, these new modalities of surveillance and punishment have begun to seep into other types of crime, expanding the carceral state even further beyond its previously articulated boundaries.

In order to understand the causes and consequences of this carceral creep, I analyze an original dataset of all non-sexual offenses in the sex offense registry statutes of all 50 states and Washington D.C. as of 2019. To assemble this dataset, I read through the sex offense registry statutes of all 50 states and Washington D.C. I went through each offense on every registry and identified all of the non-sexual offenses, noted them and tallied them up for a total count of each offense. I then went through the non-sexual offenses and categorized them based on two emergent categories: age specific non-sexual offenses against children and not age specific non-sexual offenses, meaning offenses against anyone regardless of the victim's age. Within the not age specific offense I then went through and broke them into two categories: violent offenses and non-violent offenses. In addition to non-sexual offenses on sex offense registries, I examine the emergence of distinct public conviction registries, such as drug offense and violent offense

registries, that operate similarly to the sex offense registries but are hosted on separate websites. I supplement that with an analysis of committee hearings and reports from state legislatures that have either passed or proposed registry expansions, as well as local newspaper stories regarding these developments.[364]

I argue that the development of new technologies for surveillance and punishment of people with sex offenses increased the capacity of the carceral state and paved the way for these practices to spread into other areas of crime, which, in turn, further contributed to the creep of the carceral state. The existing institutional and ideological arrangements surrounding the use of public registries for people with sex offenses lowered the startup costs for expanding out this practice into a wider range of offenses. The creep of public conviction registries into non-sexual offenses represents a continued investment in ineffective carceral solutions to social problems such as violence and problematic drug use. Since politicians and the public had already invested in and institutionalized the practice of public registration as a carceral solution to sexual harm, it made it likely they would again turn to this approach when confronted with other types of harm, especially those that garnered widespread public attention. I find that many of the new registry expansions happened after highly public tragedies. Similar to sex offenses, the expansion of registration into these new areas with the purpose of preventing future crimes is not evidenced-based and is ineffective; a majority of the non-sexual crimes now on the registries have low re-offense rates and are often not prevented by accessing the personal information of people with

[364] A note on data limitations is in order. It would be useful to gather and analyze descriptive data on who is on these expanded registries, including the person's race, gender, and crime of conviction. Unfortunately, differences in how this type of data is gathered across states makes it virtually impossible to gather this data within the scope and timeframe of a dissertation. For this reason, I have largely focused on statutes, legislative records, and newspaper reporting to analyze the expansion of public registration into other types of offending.

prior convictions.[365] Further, while there is no exact data on the demographics of who is forced to register on these expanded registries, decades of research demonstrating disproportionate rates of incarceration for Black, Indigenous, and People of Color (BIPOC) indicates that these expanded registries are also likely to disproportionately impact BIPOC.[366]

I begin by examining the inclusion of non-sexual offenses on sex offense registries starting with the most common: non-sexual offenses against minors. I discuss the history of the inclusion of things like kidnapping and false imprisonment of minors in federal sex offenses legislation and explore what impact that has on the continued investment in public conviction registries as a means to of "protecting" children from harm. I then move to analyze overall trends in the types of offenses that are not victim age specific which have made their way onto registries across the United States. I draw on examples from states such as Montana, Kansas, Oklahoma, and Indiana, which have all expanded their sex offense registries well beyond sex offenses. I do so in order to highlight the logic behind the decision to adapt the existing structures of registries to different issues such as drug use, violent crimes, and the protection of children. I then move to examine states that have established separate registries that are distinct from the sex offense registries but that use similar infrastructures. I analyze the types of offenses that have been deemed fit to become registries of their own and the logic behind those decisions. Throughout my discussion of these developments, I pay close attention to the role that existing sex offense registries played in paving the way for the expansion of public convictions registries

[365] For example, one of the most common non-sexual crimes on public registries is homicide. Yet, people with homicide offenses, in general, have lower re-offense rates than people with nonviolent convictions. See: Prescott, Pyle, and Starr, "Understanding Violent-Crime Recidivism."

[366] In addition, research into the racial composition of the sex offense registry found that Black people are disproportionately on the registry. See: Hoppe, "Punishing Sex."

and what this has meant for the creep of the carceral state. In addition, I examine what the reliance on new and expanding carceral powers has meant for the likelihood of actually addressing the social problems registries purport to solve.

The Creep: Non-Sexual Crimes Against Children

The first piece of federal legislation to mandate sex offense registries was the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in 1994. The legislation, which was part of the expansive 1994 Crime Control Act, was passed after Jacob's abduction in 1989. The original intent of Act was to create a registry available only to law enforcement, not the general public. Jacob's mom was mobilized by the fact that while looking for Jacob, the authorities did not possess an easily accessible list of the current addresses of people who had been previously convicted of non-sexual child abduction and/or sexual crimes. The assumption, closely aligned to the specter of the "sex offender," is that people with these types of offenses are more likely to harm children. In 1996, Megan's Law added to the Wetterling Act by mandating all states make their registries public. As the Wetterling Act's title indicates, the original Act included non-sexual crimes against children—in particular, non-sexual kidnapping and false imprisonment by someone who is not the victim's guardian--as well as sex offenses against people of all ages.

Despite the inclusion of these two non-sexual offenses against minors in founding federal registry legislation, the public and even many people involved with law making and enforcing are largely unaware that there are non-sexual offenses on most registries. Some states, like Alaska and Utah, have opted to integrate child kidnapping into the titles of their registries in order to clearly mark that a person may be on the registry for a sex offense *or* child kidnapping

offense, or potentially both. However, the vast majority of state registries are simply called "sex offender registries" both colloquially and in statute. Even in states like Alaska where the title of the registry includes kidnapping, the registry is still colloquially known and referred to as the "sex offender registry".[367] Further, people on a sex offense registry for a non-sexual abduction of a minor are assumed to have some sort of underlying sexual motivation. Kidnapping and false imprisonment of a minor align closely with the specter of the "sex offender." Indeed, historical concern regarding abduction, particularly of women and children, have largely focused on sexually motivated crimes that involve kidnapping or imprisonment such as the white slave trade panic. [368] Further, the majority of contemporary namesake sex offense legislation has been based off of crimes involving an element of abduction, albeit sexually motivated. Widespread attention to these crimes has fused kidnapping with sexual motive in the cultural imagination.[369]

Indeed, many not sexually motivated kidnapping and/or false imprisonment cases committed by people who are not the victim's guardian are often less salacious and garner less attention. For example, a New York man carried kidnapped a fellow drug dealer who was also the son of a major drug distributor. At the time he thought the young person was in his 20s; however, he was actually 14. The boy was let go after a day. His kidnapper was arrested and sentenced to 15 years in prison. After being released from prison in 2016, he was forced to

[367] For example, the 2003 *Smith v. Doe* Supreme Court case concerned the Alaskan sex offense registry. Throughout the decision the registry is referred to as the sex offense registry.
[368] For a history of the Mann Act see: Pliley, *Policing Sexuality*. For a discussion of childhood, race, and sexual fears see: Kincaid, *Erotic Innocence*.; and Horowitz, *Protecting Our Kids?*
[369] Perhaps the best example of this the National Center for Missing and Exploited Children (NCMEC). An organization heavily involved in perpetuating the specter of the "sex offender" that works in partnership with law enforcement. On NCMEC's website they provide resources for locating missing children and also resources for things like how to talk to your child about "sexting." See: missingkids.org/HOME

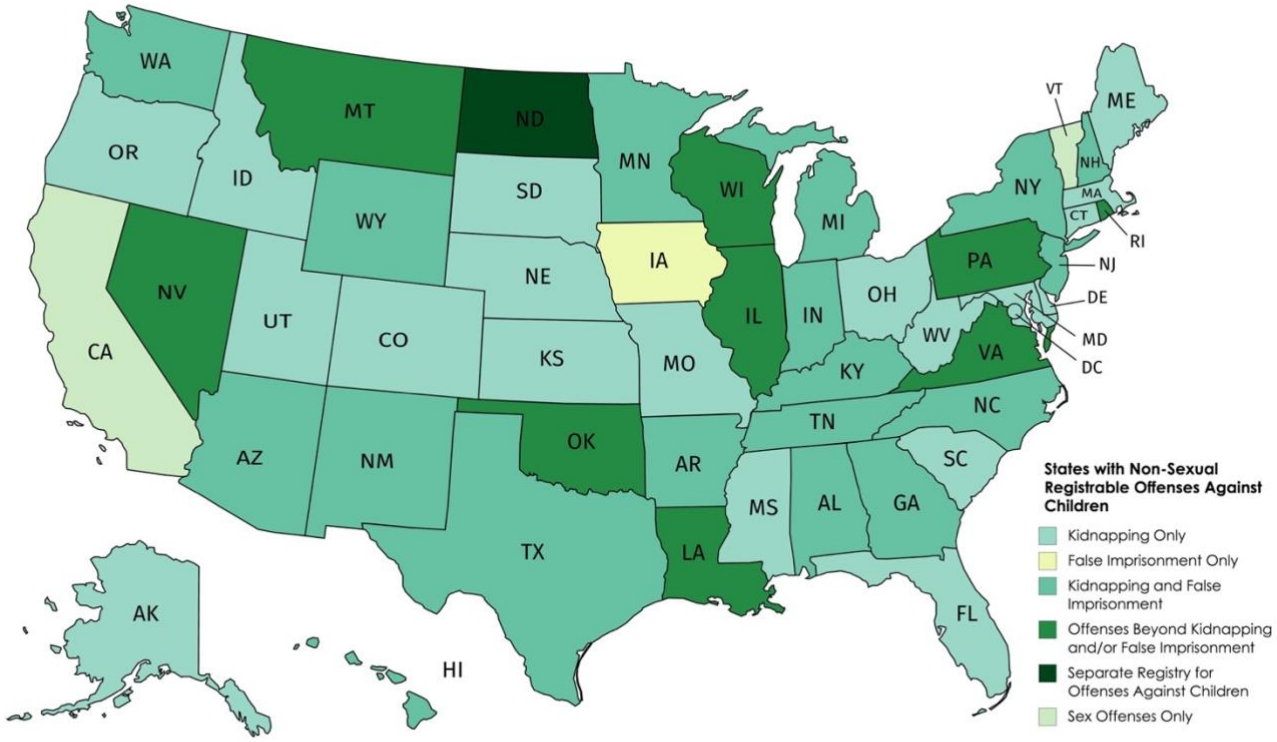
register on New York's sex offense registry.[370] False imprisonment of a minor can be an even more ambiguous conviction to receive than kidnapping. A person could receive this charge if during a robbery they locked a minor in another room and refused to release them.[371]

As figure 1 indicates, the inclusion of non-sexual kidnapping and false imprisonment is common across the U.S. All states but California and Vermont currently include non-sexual kidnapping of a minor by someone who is not their parent/guardian on the sex offense registries. In addition, 25 states require registration for non-sexual false imprisonment of a minor by someone who is not their parent/guardian. For many states non-sexual kidnapping and false imprisonment were included on their original registries.[372] States, especially those that were early registry adopters, that did not include these offenses on their original registries began to do so quickly after the passage of the Megan's Law. For example, Washington, an early adopter, passed their registry legislation in 1990 and did not include non-sexual child kidnapping.[373] However, in 1997 after the passage of both the Wetterling Act and Megan's Law the Washington legislature passed the Registration of Criminals Who Have Victimized Children Act. While the title is sweeping, the Act focuses exclusively on kidnapping/false imprisonment.[374] The Act passed unanimously in both houses and when the bill was up for public comment not a single

[370] The district court eventually ruled he did not have to register because his crime is not rationally related to the purpose of the sex offense registry. Yet, kidnapping remains on New York's registry statute. See: Yunus v. Robinson, 17-cv-5839 (AJN) (S.D.N.Y. Jan. 11, 2019).
[371] See: Ed Pilkington, "'There Was a Lot of Shame': Meet the Sex Offender 'Who Is Not a Sex Offender.'"
[372] For example, Arkansas' original registration bill, which was passed in 1997, included both kidnapping and false imprisonment. Sex and Child Offender Registration Act of 1997, HB 1061., 81st General Assembly, Arkansas, (1997).
[373] For a summary of the law and its history see: Scheingold, Olson, and Pershing, "Sexual Violence, Victim Advocacy, and Republican Criminology."
[374] Registration of Criminals Who Have Victimized Children, SSB 5621, 55th Legislature, Washington, (1997).

person testified in opposition. The fact that the addition of kidnapping and false imprisonment to registries that did not already include them were passed with little fanfare in the state legislatures further indicates just how closely kidnapping and false imprisonment align with the specter of the "sex offender" even when not sexually motivated.

Figure 1



It is virtually impossible to know exactly how many people are currently registered for a non-sexual abduction offense. [375] However, the consequences for those individuals, like the consequences for those on the registry for sexually motivated crimes, are dire. Individuals with these convictions are subject to all of the same restrictions as people with sex offenses. In most jurisdictions this means limits on where a person can live, work, or even simply be present. For

[375] Ackerman et al. study of the registry found that 1% of those registered were registered for kidnapping/abduction. However, they do not make a distinction between sexually motivated or not. Ackerman et al., "Who Are the People in Your Neighborhood?," 152.

example, in New York people on the registry for non-sexual kidnapping cannot be within 300 yards of schools, playgrounds, etc.; but can also not "engage in or participate in any online computer service that involves the exchange of electronic message or establishes sexual encounters or liaisons," or watch/purchase porn or "have an animal (puppies, kittens, etc.)".[376] Further, people registered on the sex offense registry with non-sexual offenses report experiencing the stigma and shame people with sex offenses feel. In an interview with *The Guardian* a New York man on the registry for kidnapping recounted, "There was a lot of embarrassment and shame. Even today I feel that burden. People give me looks –'You're a sex offender, you must have done something.' "[377] Yet, even though they are lumped together on the registry, people with non-sexual kidnapping offenses on sex offenses registries, especially those that do not include kidnapping in their titles, have had some success challenging their requirements in court based on the question of whether or not having them register is rationally related to the purpose of the sex offense registry.[378] Despite a small handful of rulings that have been favorable to the petitioners, [379] the crimes remain in the sex offense statutes and have largely been upheld by the courts.[380]

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[376] See Exhibit C of Yunus v. Robinson, 17-cv-5839 (AJN) (S.D.N.Y. Jan. 11, 2019).
[377] Ed Pilkington, "'There Was a Lot of Shame': Meet the Sex Offender 'Who Is Not a Sex Offender.'"
[378] Yunus v. Robinson, 17-cv-5839 (AJN) (S.D.N.Y. Jan. 11, 2019). As well as: Ohio v. Mosely 2015-Ohio-3597.
[379] In New York and Ohio, where there have been successful cases challenging registration for kidnapping, non-sexual kidnapping still remains in statute.
[380] A 2019 report on current sex offense registry case law from the OJP cited the following cases, which upheld nonparental kidnapping on the registry: "Rainer v. State, 690 S.E.2d 827 (Ga. 2010) (nonparental false imprisonment is registerable); Commonwealth v. Thompson, 548 S.W.3d 881 (Ky. 2018) (attempted kidnapping of a minor is registerable); Moffitt v. Commonwealth, 360 S.W.3d 247 (Ky. Ct. App. 2012) (citing the legislative history of the Wetterling Act to support registration for kidnapping); People v. Knox, 903 N.E.2d 1149 (N.Y. 2009) (nonparental kidnapping and unlawful imprisonment is registerable); State v. Smith, 780 N.W.2d 90 (Wisc. 2010) (nonparental false imprisonment is registerable)." For the full report:

As discussed throughout this dissertation, public registration is an ineffective carceral solution because obfuscates broader structural factors that perpetuate sexual harm.[381] The inclusion of non-sexual kidnaping and false imprisonment is a carceral solution to the issue of missing children. The authors of Washington State's bill expanding the registry to include kidnapping and false imprisonment captured this logic nicely in the preamble of the legislation:

> …offenders who commit kidnapping offenses against minor children pose a substantial threat to the well-being of our communities. Child victims are especially vulnerable and unable to protect themselves. The legislature further finds that requiring sex offenders to register has assisted law enforcement agencies in protecting their communities. Similar registration requirements for offenders who have kidnapped or unlawfully imprisoned a child would also assist law enforcement agencies in protecting the children in their communities from further victimization.[382]

Like the specter of the "sex offender" which perpetuates the idea that the majority of sexual harm is caused by strangers with incurable impulses, the inclusion of kidnapping and false imprisonment on the sex offense registry perpetuates the idea that the most common cause of children going "missing" is that they have been snatched up by a depraved stranger in the dark. With regards to kidnapping, the familiar logic of the registry asserts the way to protect children from going missing is to make potential predators known throughout their communities.

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https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/2-who-is-required-to-register_0.pdf

[381] See also: Lancaster, *Sex Panic and the Punitive State*; Horowitz, *Protecting Our Kids?*; Kincaid, *Erotic Innocence*.

[382] Registration of Criminals Who Have Victimized Children, SSB 5621, 55th Legislature, Washington, (1997).

Yet, parental abduction and children running away of their own volition are far more common ways children go missing than stranger kidnappings.[383] The logic of the registry, which focuses exclusively on "stranger danger" threats does not and cannot comprehend that "the family" can be, and often is, a source of harm for children.[384] According to the logic of the registry, harm is located outside of the home and arming adults in the home with information about who among them in the community are depraved is all that is needed to protect the safety of children. The fact that every single state that has kidnapping on their registry explicitly excludes parental/guardian abduction underlines this point. Further, the registry does nothing to assist children who have fled their homes of their own volition, potentially leaving harmful and abusive situations, or were forced out of their homes by their guardians.[385]

These children are vastly different than the contemporary figure of the ideal crime victim--an innocent white child—which, as discussed in chapter 1, forms a partial basis for contemporary sex offense laws.[386] Youth experiencing houselessness, as opposed to stranger kidnapped youth, are not seen as "innocent" children in need of protection. They are instead subject to criminalization and are more likely to experience state violence.[387] In this way, the inclusion of non-sexual kidnapping and false imprisonment on the sex offense registry represents a further investment in public conviction registries as a carceral solution to issues, like sexual

[383] An OJP report found that around 3% of missing children cases occur because of non-familial kidnapping. Andrea J. Sedlak, David Finkelhor, and Heather Hammer, and Dana J. Schultz, "National Estimates of Missing Children: An Overview," 6.
[384] For a discussion of this see: Kincaid, *Erotic Innocence*.
[385] One prevalent example of this is amongst LGBTQ+ youth who are statistically more likely to experience homelessness. For a discussion of homelessness amongst LGBTQ+ youth see: Robinson, "Child Welfare Systems and LGBTQ Youth Homelessness."
[386] See chapter 2 for a discussion of the white child crime victim.
[387] For a discussion of homelessness, race, and police contact see: Ivanich and Warner, "Seen or Unseen?"

harm and "missing" children, squarely rooted in structural inequality and violence.[388] The widespread inclusion of these offenses on sex offense registries ignores broader structural issues that cause children to go missing. In addition, it places the blame on individual bad apples who compulsively want to steal children and obfuscates the vastly more common state violence that occurs against "missing youth."[389]

The investment in adding non-sexual kidnapping and false imprisonment onto sex offense registries paved the way for future carceral investments in public conviction registries to address other not sexually motivated threats children may face. To date, 7 states have expanded their sex offense registries to include non-sexual crimes specifically against children in addition to kidnapping and false imprisonment. The most common additional registerable offense against a minor that is included on the sex offense registry is murder. Virginia, Rhode Island, Illinois, and North Dakota all have murder of a child that is not sexually motivated on their sex offense registries. Rhode Island only includes registration for murder of a minor if the offense occurred during a kidnapping. Similar to the trajectory of other states that have expanded their registries out to include non-sexual offenses against minors, Rhode Island's initial registry, which was established in 1996, did not include this type of murder. However, in 1999 the legislature passed a bill that, among other things, expanded the number of offenses to include the murder of a minor "in the preparation of or attempted preparation of" kidnapping.[390] Virginia and Illinois

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[388] See: Corrigan, "Making Meaning of Megan's Law." Further, as discussed throughout this dissertation, the carceral approach to social problems extends beyond sexual harm. See: Wacquant, *Punishing the Poor*.; Simon, *Governing through Crime*.

[389] For example, the criminalization of homeless youth. See: Ivanich and Warner, "Seen or Unseen?" In addition, the practice of native boarding schools where the state kidnapped native children and forced them into boarding schools aimed at assimilating the children into white culture is a stark example of state violence against children. See: Adams, *Education for Extinction*.

[390] An Act Relating to Sexual Offender Registry, H 5575, Rhode Island, (1997).

both also expanded their registries to include murder of a minor (any murder of a minor, not just ones that involve kidnapping) after their registries had already been functioning. For example, Virginia established their sex offense registry, The Sex Offender and Crimes Against Minors Registry, in 1994. Virginia's initial registry included non-sexual kidnapping where the victim was a minor. However, in 2005 the Virginia legislature passed a bill that, among other things, expanded registration to murder of a child.

In Illinois the legislature proposed a bill specifically to include people convicted of murder of a minor, even when there was no sexual motivation. The bill was eventually combined with another piece of registry legislation and passed in 1996, almost a decade after Illinois established the first iteration of their sex offense registry.[391] Similar to legislative hearings for federal sex offense legislation, Illinois legislators testifying in support of the addition evoked tragic examples to garner support. In one hearing, a, Illinois House Member cited the murder of a Christopher Myers, a 10-year-old boy to argue in favor of expanding the registry:

> This is a good Bill, I'll tell you what. For all of us that have children and all of us that have grandchildren, if Timothy Buss would have been moving into our area, we'd want to know he was living there. So let's get off the political mumbo-jumbo here in trying to harangue the Sponsor and say, 'do you know how much it costs. Do you know how many are out there? Do you know how many have notified or made the, you know fulfilled the obligation of the law?' Let's get on with the point of business here and let's take care of all the other Christopher Myers' under the age of 18 throughout the state in all of our communities and get on with good public policy and let the laws manage themselves when they get up to the point where they can be taken care of. As I said before, I don't

[391] HB 3449, 89th General Assembly, Illinois, (1996).

> rise very often and try to invoke the emotions of this Body. But this is a very emotional Bill when it comes to hitting your community, as it did ours last summer.[392]

Some House Members, like the one quoted above, disregarded attempting to understand the cost and impact of adding child murder to the sex offense registry in light of the gravity of the crimes this addition was aimed at preventing. However, during the session the Sponsor of the bill was careful to reiterate that the fiscal impact of this bill would be minimal, and that since the registry had already been up and running for people with sex offenses, the addition of people with child murder convictions would not be too burdensome for the registration system.[393] In this way, the political and institutional investment in registration for people with sex offenses paved the way for the sex offense registry to easily creep into other areas of crimes.

The only state that did not closely follow this general trend was North Dakota. North Dakota passed sex offense and "offenders against children" registry legislation separately but concomitantly in 1991.[394] The intention was to have two separate registries. However, the provisions for registration on each of these registries differed greatly. The sex offense registry had mandatory registration for a variety of sexual crimes, similar to the other types of sex offense registry legislation being passed in states during this era. The offender against children registry was not mandatory, it was instead meant to be an additional option for courts at sentencing.[395] Shortly after passage, the registries were combined and registration for crimes

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[392]State of Illinois 89th General Assembly, House of Representatives, Transcription of Debate, April 19, 1996, 31.
[393] In his testimony Rep. Klinger claimed the bill would have "very little fiscal impact": State of Illinois 89th General Assembly, House of Representatives, Transcription of Debate, April 19, 1996, 30. This is especially since the registration requirement was not retroactive.
[394] 1991 N.D. Sess. Laws chs. 124, 136.
[395] 1991 N.D. Sess. Laws ch. 124.

against children is no longer subject to the discretion of the courts but is mandatory.[396] While the idea of registration for sex offenses as well as offenses against children emerged simultaneously, registration for crimes against children has since largely followed the direction of the sex offense registry, indicating that the sex offense registry paved the way for the current state of registration for crimes against children.

To date, North Dakota has the most non-sexual offenses against children written into their registry statute. Beyond murder of a child and kidnapping North Dakota includes registration for the following offenses against a minor: Felony Assault, Aggravated Assault, Terrorizing, Felony Stalking, Felonious Restraint, Removal of a Child for State in Violation of Custody Decree, and Criminal Child Abuse.[397] According to the Attorney General of North Dakota registration for offenses against children is necessary because the crimes included on the registry are "serious enough to warrant public awareness."[398] As of January 2020, there were 182 people on the registry for crimes against children and 1,944 people on the registry for sexual crimes.[399] Child abuse is by far the most common offense on the registry.[400]

There are a handful of other states that have expanded their sex offense registries beyond sex offenses and kidnapping/false imprisonment of a minor but have not included murder of a child. For example, in Louisiana, anyone convicted of the "employment of minors in prohibited

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[396] 1993 Sess. Laws ch. 129, § 3.
[397] Ibid.
[398] Tess Williams, "North Dakota's Child Offender Registry Lurks in the Shadows of Sex-Offender Registry."
[399] The website has you download the PDFs of each registry separately. However, you obtain the PDFs of each registry from the same website. See: https://sexoffender.nd.gov/OffenderWeb/search/publiclist
[400] https://sexoffender.nd.gov/OffenderWeb/search/publiclist For an excellent discussion of early child abuse laws that focused on "evil parents" and not structural socioeconomic factors that can lead to abuse see Horowitz, *Protecting Our Kids?*

occupations" has to register on the sex offense registry. These occupations are not necessarily sexual but include things like being a tightrope or wire walker, wrestler, contortionist, or "acrobat upon any bicycle or other similar mechanical vehicle or contrivance."[401] In addition, Louisiana and Pennsylvania both include the interference with the custody of a child on their sex offense registries. Nevada includes the involuntary servitude of a child on their registry. As will be discussed in the next section, there are also several other states that have expanded their registries to include not sexually motivated crimes that are not victim age specific but still encompass non-sexual crimes against children.

As discussed in chapter 1, the sex offense registry frames sexual violence committed by depraved strangers in the dark as the biggest threat children face. The registry emerged as a carceral solution to that threat by asserting that if parents and guardians are made aware of the dangerous men in their neighborhoods, they can effectively protect their children from sexual harm.[402] In this way, the inclusion of non-sexual crimes against children on the sex offense registry follows a familiar logic: The biggest threat facing children is not only sexual violence committed by strangers but also stranger kidnapping and murder. Placing people who have committed these offenses against minors on the sex offense registry is a politically and institutionally low-cost investment that perpetuates the use of carceral solutions to social problems.[403] The creep of sex offense registries into select non-sexual crimes against minors ignores the myriad of other issues that children face such as gun violence, climate change, police

[401] Louisiana RS 23:§251
[402] This logic ignores how sexual harm typically happens, which is at the hands of someone the victim knows. For example 8 out of 10 rapes are committed by someone known to the victim. See: Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2016.
[403] For a discussion of carceral solutions to social problems see: Wacquant, *Punishing the Poor*. See also: Corrigan, "Making Meaning of Megan's Law."

violence, poverty, etc.[404] Investments in sex offense registries to protect children from a variety of harms both sexual and not sexual further exculpates the state from addressing broader structural causes of harm and obfuscates the state as a major source of harm for children.[405] Like the sex offense registry, these new investments are ineffective at actually preventing and redressing harms against children. In the next section I examine how public conviction registries have crept beyond focusing on non-sexual crimes against children into a variety of offenses ranging from adult kidnapping to murder to drug possession.

The Creep: Non-Sexual Crimes Against Adults

As demonstrated in previous chapters, the specter of the "sex offender," a figure that has traditionally justified pushing the boundaries of acceptable punishment, did the heavy lifting of institutionalizing registration. Once established, this new political and institutional terrain of public conviction registration as a viable solution to crime served as the basis for calls to expand registration to other offenses.[406] Indeed, the logic of public registration locates the source of harm in individual bad apples and the solution to harm in identifying these bad apples, is easily transferred to other types of crime.[407]

While the inclusion of non-sexual child kidnapping in federal sex offense legislation helped to ensure that almost all states would adopt similar statutes, once established for children,

[404] Ebi and Paulson, "Climate Change and Children."; Nordberg et al., "Precarity and Structural Racism in Black Youth Encounters with Police."; Tracy et al., "Community Distress Predicts Youth Gun Violence."
[405] Horowitz, *Protecting Our Kids?*
[406] For a discussion of how ideas (in the case I have chosen the logic of registration) influence politics and institutions see: Smith, "Ideas and the Spiral of Politics."
[407] Simon, *Governing through Crime*; Wacquant, *Punishing the Poor*; Murakawa, *The First Civil Right*; Gottschalk, *The Prison and the Gallows*.

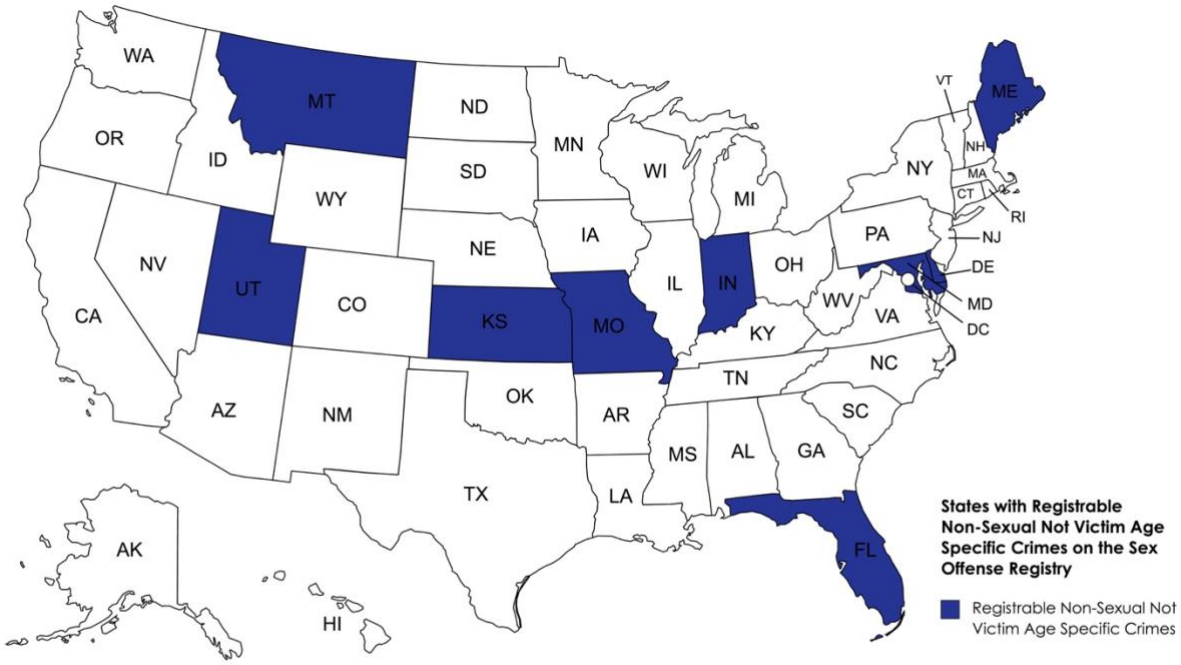
many states have now begun to expand registration out to non-sexual kidnapping of both minors and adults. Indeed, the most common non-sexual offense that does not consider victim age on sex offense registries is adult kidnapping. Seven states currently include non-sexual adult kidnapping on their sex offense registries. The creep of registries into non-sexual not age specific kidnapping in many states happened with very little acknowledgement or political fanfare. The additions in many states were included in bills that contained modifications to various aspects of the registration system, not just additional registerable offenses, and were treated as common sense extensions, not innovative changes.

For example, Utah's registry already included non-sexual kidnapping of a child, when in 2008, Utah's legislature passed their version of the Adam Walsh Act.[408] While not required by the federal AWA, Utah's act added additional non-sexual kidnapping offenses that were not victim age specific and renamed the sex offense registry to the "sex and kidnap offender registry."[409] During floor debates and committee hearings on the bill, there was not a single mention of the adult kidnapping addition.[410] Instead, the addition was taken to be common sense expansion to the registry that raised no concerns or even praise from the legislature. The addition of nonsexual adult kidnapping did garner some attention from the legislature in 2010 after a man who drunkenly entered the home of a family and forced them out of the home at gun point was required to register as a person with a sex offense.[411] However, as of 2020 aggravated

[408] Sex Offender Notification and Registration, HB 492, Utah, (2008).
[409] Ibid.
[410] Ibid.
[411] Utah. Sen. Judiciary, Law Enforcement and Criminal Justice Comm., Feb. 24, 2010 (comments of Representative Bigelow). Cited in: Teresa Welch and Samuel P. Newton, "The History and Problems of Utah's Sex Offender Registry: Why a Move from a Conviction-Based to a Risk Assessment Approach Better Protects Children," 1134.

kidnapping, regardless of age or underlying motivation, remains a registerable offense in Utah.[412] In a 2010 legislative hearing regarding the drunken "kidnapping" incident, a Senator arguing to keep kidnapping on the registry not because it has been proven that kidnapping and sex offenses are intrinsically related, but rather because they possibly "seemed" to be related.[413] The quiet creep of registration into non-sexual kidnapping is unsurprising in this way—headline grabbing tales of horrific kidnapping and sexual violence make it "seem" like the two are always already intrinsically related. The expansion into these types of offenses is taken to be common sense and often goes unremarked.

Figure 2



[412]Utah Code 77-41-106.

[413] Utah. Sen. Judiciary, Law Enforcement and Criminal Justice Comm., Feb. 24, 2010 (comments of Representative Bigelow). Cited in: Teresa Welch and Samuel P. Newton, "The History and Problems of Utah's Sex Offender Registry: Why a Move from a Conviction-Based to a Risk Assessment Approach Better Protects Children," 1134.

The inclusion of non-sexual not victim age specific offenses on sex offense registries has not stopped at adult kidnapping. There are currently three states with multiple non-sexual not victim age specific registerable offenses on their sex offense registries beyond adult kidnapping: Montana, Kansas, and Indiana. For a complete list of offenses on these registries see table 1. In addition, four other states have implemented separate public conviction registries that function similarly to the sex offense registries but are hosted on separate/distinct websites. Oklahoma has a "violent offender" registry that includes 8 violent offenses ranging from Murder 1 to the Use of

Table 1: Non-Sexual Not Victim Age Specific Registerable Offenses on Sex Offense Registries

Kansas	Montana	Indiana
Capital Murder	Deliberate Homicide	Murder 1
Deadly Weapon	Mitigated Deliberate Homicide	Voluntary Manslaughter
Involuntary Manslaughter (Except DIU)	Aggravated Assault	
Murder 1 & 2	Partner/Family Member Assault	
Voluntary Manslaughter	Assault on a Peace Officer	
Aggravated Human Trafficking (Non-sexual)	Assault on a Minor	
Kidnapping	Assault with a Weapon	
Aggravated Kidnapping	Kidnapping	
Possession with Intent to Manufacture Controlled Substance	Aggravated Kidnapping	
Unlawful Manufacture of Controlled Substance	Robbery	
Unlawful Manufacture of Controlled Substance	Arson	
Unlawful Sale or Distribution of Controlled Substance	Operation of a Clandestine Lab	
	Strangulation of a Family Member	

a Vehicle to Facilitate Use of a Weapon. Illinois established a "Murderer and Violent Offender Against Youth" registry, which includes murder of a person who is any age as well as a range of violent offenses against minors. Tennessee now has two separate public conviction registries: one for animal abuse and one for people with drug offenses. Finally, Utah has a White-Collar Crime registry. For a list of offenses on a number of the separate public registries see table 2.

Table 2: Public Post Conviction Registries

Illinois: Murderer & Violent Offender Against Youth	*If the victim is under 18 years of age:* Kidnapping & Aggravated Kidnapping Unlawful Restraint & Aggravated Murder 1 Child Abduction (luring) Involuntary Manslaughter (involving baby shaking) Child endangerment resulting in death Aggravated Domestic Battery Ritualized Child Abuse *Adult victims:* Murder 1
Oklahoma: Violent Offender Registry	Murder 1 & 2 Manslaughter 1 Shooting with Intent to Kill Assault & Battery with a Deadly Weapon Use of a Vehicle to Facilitate Use of a Weapon Assault with Intent to Kill Bombing and Explosive Violations
Tennessee: (1) Animal Abuse Registry and (2) Drug Offender Registry	*Animal Abuse Registry* Felony Animal Fighting Aggravated Animal Cruelty Bestiality and Related Offenses Cruelty to Animals *Drug Offense Registry* All Felony Drug Offenses
Utah: White Collar Crime Offender Registry	Securities Fraud Theft by Deception Unlawful Dealing of Property by Fiduciary Fraudulent Insurance Mortgage Fraud Communications Fraud Money Laundering

Proposing registration as a solution to non-sexual crimes is politically low risk, both because registration has already proven to be popular policy and because adding additional

crimes to the registry comes at very little cost. Fiscal impact analyses by state legislatures for registry expansion proposals tended to mark the legislation as having a negligent fiscal impact. This is largely because registration schemes were already in existence of sex offenses: technology systems had already been developed and set up, personnel had already been hired to handle in-person registration, etc. All that needed to be done was to add new offenses to existing infrastructure. Even states that opted to create distinct registries for nonsexual offenses noted that the start-up costs were minimum and often used the same vendors they used to setup and maintain the sex offense registries.[414] For example, when Tennessee established the Animal Abuse Registry in 2015, the legislature noted that the creation of this distinct public registry would have "no significant fiscal impact" largely because the Tennessee Bureau of Investigation, which runs the sex offense registry and the drug offense registry, can create a new registry with existing staff and infrastructure.[415] Further, states that established law enforcement only non-sexual conviction registries, like California and Ohio, tend to use the same vendors as sex offense registries as well.[416]

Many of the expanded public conviction registries were implemented after high-profile crimes garnered massive public attention and community outrage. In this way, the creep of registries into non-sexual offenses beyond kidnapping followed a similar trajectory to the sex offense registries themselves. However, the prior investment in institutionalizing sex offense registries as carceral solutions to harm lowered the startup costs associated with expanding or

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[414] For example, many of the fiscal notes for bills that proposed extended registries indicate that there is only a small cost associated with the startup and maintenance of the registries, especially since most of those registries are run through the same vendors.

[415] Tennessee Animal Abuser Registration Act, HB 147, Tennessee, 2015. See fiscal note: http://www.capitol.tn.gov/Bills/109/Fiscal/HB0147.pdf

[416] For example, Ohio's arson registry and the sex offense registry are both managed by Louisiana-based Watch Systems.

creating new registration schemes, making the creep into other types of offenses cheaper, easier, and more likely.[417] For example, Indiana established their sex offense registry in 1994, which only included registration requirements for people with sex offenses.[418] However, over a decade later the legislature passed Stephanie's Law, named after Stephanie Wagner, a 16-year-old girl murdered by a co-worker who was on parole. The law required registration for people convicted of murder or voluntary manslaughter and renamed Indiana's registry to the Sex & Violent Offender Registry.[419] The rhetoric around expanding the registry to violent offenses following Stephanie's death closely paralleled the rhetoric that followed the high-profile child murder cases that sparked the emergence of sex offense registries in the early 90s. The familiar reasoning goes like this: had Stephanie and her family, like Megan Kanka (the namesake for Megan's Law) and her family, known that there was a predator living in close proximity to her she would not have been murdered. The sponsors of the bill insisted that, "communities have a right to know if convicted murderers and sexual violent offenders are living in their neighborhoods, working and interacting with their loved ones."[420] And that this knowledge "will provide the protection for other Hoosiers that we failed to provide Stephanie."[421] Further, the rhetoric about people who have committed murder or voluntary manslaughter also parallels the specter of the "sex offender." Both are framed as fundamentally evil and deranged people who cannot be helped and are likely to reoffend. In one interview the co-sponsor of Stephanie's Law remarked that. "the

[417] For a better understanding of the relationship between historical development, cost, and path dependency see: Pierson, "Increasing Returns, Path Dependence, and the Study of Politics."
[418] This was also a piece of namesake legislation, "Zachary's Law," named after a 10-year-old boy who was murdered by a person with a sex offense that lived nearby.
[419] Illinois Code 11-8-8
[420] Dave Kitchell, "Indiana Senate OKs Stephanie's Law."
[421] Ibid.

only thing [the bill] doesn't do is change the character of the people that commit these offenses…those who are not restrained by convention or the law, we want to identify."[422]

In other states with namesake legislation that either expanded the sex offense registry or established new registries for people with violent offenders the same rhetoric was also used. The sponsor of Oklahoma's Marry Rippy law, which established a violent offense registry, commented that "the man purpose of [the bill] is, really, how well do you know your neighbor.?"[423] In Illinois, Andrea's Law was passed after the release of a man who was paroled after serving time for murdering his girlfriend, Andrea Will. Upon hearing of his early release, Andrea's mother lobbied the legislature to pass a murder registry that would make public his information, along with other people with murder convictions.[424] The assumption was that this man was still dangerous and likely to reoffend. The bill's sponsor told the Chicago Sun Times, "it would serve to allow all of our communities to know who resides there, who our family members are associated with, who are children are dating…so that we know where these murderers live, that we are able to track their movement."[425]

Similar to the disconnect between re-offense data and the registration of people with sex offenses, there is a disconnect between the registration of people with violent offenses and re-offense rates for violent offenses. People with violent offenses--and especially homicide offenses--have relatively low re-offense rates.[426] Further, research that re-offense rates drastically

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[422] Ibid.
[423] "Violent offender registry begins Nov. 1". *The Associated Press State & Local Wire.* October 19, 2004
[424] Andrea's Law, HB 0263, Illinois, 97th General Assembly, (2011).
[425] Huffington Post, "Andrea's Law, Creating Murderer Registry, Passes Illinois State House."
[426] Prescott, Pyle, and Starr, "Understanding Violent-Crime Recidivism."

decline after 15 years and that people typically age out of violent crime.[427] Yet, most states with violent offender registration require registration for 10+ years after release. With the onset of truth in sentencing laws and the dramatic increase in sentence lengths, in practice this means after people serve lengthy mandatory minimum sentences for violent crimes, they remain on registries well into old age despite low re-offense rates for that population. This suggests that like the sex offense registry, violent offense registration does not meaningfully prevent and redress violence. Instead, the registration of people with violent offenses represents a new instantiation of registration as an ineffective carceral solution to harm and perpetuates the idea that once someone has committed a crime, they are not able to be rehabilitated.

While homicide and other high violent offenses such as aggravated assault are the most common crimes included on expanded registries, there are currently two states that include drug offenses: Kansas has registration requirements for most felony drug offenses and Montana registers people who are convicted of operating drug labs. A number of other states, like Tennessee, have opted to create entirely separate registries for drug offenses. While Tennessee's registry has grown to include essentially all felony drug offenses, the majority of other states with drug related registries center on methamphetamine.[428] Some of these registries, like Minnesota's Methamphetamine Offender Registry, do not require people with methamphetamine related offenses to register their information—such as current address, employment, etc.—with

[427] The Model Penal Code recommends "second look" provisions after 15 years in recognition of the decrease risk of re-offense. American Law Institute, *Model Penal Code, Sentencing, Proposed Final Draft, (April 10, 2017)*, 568. In addition, studies have found that incarceration beyond 15-years can have a negative impact on a person's rehabilitation. See: Council et al., *The Growth of Incarceration in the United States*.

[428]For a discussion of methamphetamine registries see: Loendorf, "Methamphetamine Offender Registries."

the police, but does make their arrest and conviction data easily searchable and accessible to the public.

Throughout this dissertation I have challenged the misconception that people with sex offenses are incurable and likely to recidivate. I have used data showing that people with sex offenses have low recidivism rates as a partial basis to argue that registries are an ineffective mechanism for preventing sexual harm. This particular line of argument against public registration falls short when considering drug offenses. Indeed, unlike violent offenses and sex offenses, many drug offenses do have high rates of recidivism.[429] Although people with drug offenses are likely to recidivate, the core argument that registries are ineffective carceral solutions to social issues remains the same when thinking about drug offense registries. Indeed, the reason people with drug offenses recidivate is due largely to the fact that the United States has chosen to respond to substance abuse disorder with carceral solutions such as criminalization instead of treatment.[430] Decades of research into the War on Drugs has found criminalization and increased punishment is not an ineffective solution to substance abuse disorder.[431] Further, the War on Drugs has also been disproportionately waged against Black and Indigenous communities of color. While there is no way to know exactly what the demographics of the people are on drug registries, because people of color have typically been disproportionately

[429] According to a Bureau of Justice Statistics people with drug offenses have the second highest re-offense rate after people with property crimes. The study found that nearly 76.9% of people with drug offenses were rearrested within 5 years of release. Durose, *Recidivism of Prisoners Released in 30 States in 2005*.
[430] David Schultz, "Rethinking Drug Criminalization Policies."; Moore and Elkavich, "Who's Using and Who's Doing Time." In addition, for a discussion of drug diversion programs see: Bernard et al., "Health Outcomes and Cost-Effectiveness of Diversion Programs for Low-Level Drug Offenders."
[431] Ibid.

impacted by drug convictions, they are most likely also overrepresented on drug offense registries.

Akin to the expansion of registration into other convictions, the expansion into drugs used the rhetoric of "bad apples"— in this case crazed incurable drug addicts--and the protection of children as justification. As demonstrated in Figure 3, the Meth Free Tennessee campaign, an anti-meth campaign connect to Tennessee's "Drug Offender Registry" included public education about the effects of meth on children and the ways they are "falling victim to this horrible epidemic every day."[432] A core part of the campaign was using stories about children forced to go into foster care because their parents were unable to care for them while in active addiction.[433] This campaign strongly embodies the logic of carceral solutions to social problems that locate

Figure 3: Meth Free Tennessee Campaign

Source: https://www.methfreetn.org/

[432] See: https://www.methfreetn.org/meth101/effects_children.html The Meth Free Tennessee Campaign emerged in 2011, 6 years after the meth offense registry was established, and three years before TN expanded the meth registry to nearly all felony drug offenses.
[433] See: https://www.methfreetn.org/meth101/effects_children.html

issues within the moral failings of the "incurable" individual instead of looking at broader social structures that exacerbate substance use disorder and negatively impact children.[434] Putting parents struggling with substance abuse disorder on a public conviction registry that has been proven to negatively impact a person's ability to find employment, housing, or even their ability to take their children to the park or school, is antithetical to helping protect children or preventing them from going into foster care. [435] Yet, similar to the expansion into non-sexual crimes against children and violent crimes, the inclusion of drug offenses on public conviction registries pose a lower cost to the state than actually investing in treatment programs. Every expansion of Tennessee's drug offense registry has been marked as having no fiscal impact to the state because registration infrastructure already exists through the sex offense registry, making registration a temping solution for politicians who wish to appear to be doing something about Tennessee's widespread issues with substance abuse disorder while in actuality doing nothing.[436]

Conclusion

Throughout this chapter I have documented and analyzed the creep of public post-conviction registration into an array of offenses ranging from kidnapping to animal abuse. In almost all of these cases the expansion of registration came after the establishment of the state's

[434] Thompson et al., "Substance-Use Disorders and Poverty as Prospective Predictors of First-Time Homelessness in the United States."; Garner, Sarri, and Figueira-Mcdonough, "Triple Jeopardy."
[435] Tewksbury, "Collateral Consequences of Sex Offender Registration."; Rydberg, "Employment and Housing Challenges Experienced by Sex Offenders during Reentry on Parole."
[436] See fiscal note for SB 132/HB 1257 (2013) https://www.capitol.tn.gov/Bills/108/Fiscal/HB1257.pdf

sex offense registry. The emergence of these new sprawling registration schemes relied upon the technological infrastructure of the sex offense registries, making them low cost "solutions" to social ills du jour, particularly those that had recently caught media attention. These expansions also relied on similar political logics: the answer to harm is to locate the "bad apples" and make them known to the public. In this way, I have demonstrated how the establishment of sex offense registries cleared the path for the creep of registration into other types of crimes. The growth and development of public post-conviction registration represents a continued investment in ineffective carceral solutions to what are at the core social problems like violence, child welfare and substance abuse disorder.

Chapter 6

The Anti-Registry Movement: Movement Building at the Margins

I've had people look at me and say, 'Wow. That's quite a mountain you're trying to climb!'[437]

Introduction

The summer I traveled from my home in Seattle around the country to attend separate conferences for the three largest national organizations working to either abolish or reform the sex offense registry—The Alliance for Constitutional Sex Offense Laws (ACSOL), The National Association for Rational Sexual Offense Laws (NARSOL), and Women Against the Registry (WAR)—it was 2018 and #MeToo was sweeping the nation. Seemingly every day more and more people were going public with their experiences of sexual harm, exposing just how common place and commonly swept under the rug sexual harm is in the United States. Days before the first conference, Judge Persky--the California judge who sentenced Brock Turner, a white Stanford student, to 6 months in prison for sexual assault and attempted rape--had been recalled for being too lenient in his sentencing. Amidst the national conversation over the unaddressed sexual harm plaguing the nation, hundreds of activists from all over the U.S. gathered in Los Angeles (ACSOL), Columbus, Ohio (NARSOL), and St. Louis, Missouri (WAR) to discuss one of the most sprawling lines of defense the U.S. has invested in to prevent sexual harm: the sex offense registry. The majority of conference attendees were people on the registry themselves or people with loved ones on the registry, but others included: lawyers, mental health professionals, and the occasional ally.

[437] Sarah, interviewed by author

From 2017 – 2019, I attended five national anti-registry conferences, participated in numerous webinars, meetings, and call-ins, and conducted 20 in-depth semi-structured interviews with activists to understand how a deeply unpopular movement, the anti-registry movement, strategized, organized, and mobilized to further their cause.[438] In this chapter I argue people in the anti-registry movement experience significant structural, social, and individual barriers to organizing. Examples include communication bans (which prevent people on the registry from using the internet and/or social media platforms, and in some instances communicating with each other), and, most significantly, stigma, fear of retaliation, and shame. In addition, while many of the people I spoke with see their movement as closely related to both the LGBTQ+ rights movement and the broader movement for criminal justice reform, activists experienced substantial difficulties coalition building with these movements due to the political and social stigma surrounding sex offenses. All of these barriers are both created in part by and exacerbated by the specter of the "sex offender," the myth that all people with sex offenses are depraved strangers with incurable impulses to sexually harm children.[439]

Further, while many of the activists spoke about constitutional rights and litigation, none seemed to blindly believe in the liberal "myth" of rights—a total investment in rights and litigation as *the* path to change.[440] Activists' skepticism towards rights and litigation is deeply intertwined with their own experiences with the law. Years of judicial gaslighting by rulings such as *Smith v. Doe* have understandably fostered ambivalence towards litigation as a viable

[438] I have chosen to refer to activism to reform and/or abolish the public sex offense registry as the "anti-registry movement." There is some debate over whether or not to abolish the registry entirely or whether to make it only available to law enforcement. However, all instances activists agree that the current publicly available registry should be done away with and are therefore anti-registry.
[439] For an in-depth discussion of the specter of the "sex offender" see chapter 2.
[440] For a discussion of the myth of rights see: Scheingold, *The Politics of Rights*.

strategy and rights as a winning argument. Indeed, activists continuously brought up the *Smith v. Doe* ruling—which insulated 8th Amendment and due processes challenges to the registry by asserting the registry is not punishment—and their subjective experience of the registry as inherently *very* punitive. In addition, activists also recognized that despite facts and evidence being on their side, facts and evidence are also not a winning argument. Yet, despite this knowledge it was also evident that for most activists releasing their personal investments in both rights and facts was a painful ongoing process.

Finally, even with the significant structural, social, and individual barriers to organizing and coalition building, anti-registry activists demonstrate formidable tenacity, adaptability, and ability to build much needed networks of support amongst themselves. Most of the activists understood that change does not solely happen in the traditional political arenas, such as the courts and the legislature. Instead, activists also invested a significant amount of energy into supporting each other, by forming non-profits to help people returning from prison, recording weekly podcasts on issues relevant to life on the registry, publishing quarterly magazines specifically for people on the registry to share their joys and interests as people and not just registrants, establishing support groups, and a variety of other activities. The activists I interviewed saw these activities as essential to helping people on the registry overcome their shame so that they can "come out," share their stories and humanize themselves. All activists I interviewed believed that humanizing people with sex offenses is the single most important catalyst of social and political change.

Methods

In order to develop a rich understanding of contemporary movements for the rights of people with sex offenses, I conducted participant observation with the three main national sex offense reform organizations: The Alliance for Constitutional Sex Offense Laws (ACSOL), the National Association for Rational Sex Offense Laws (NARSOL), and Women Against the Registry (WAR). I attended and participated in three annual ACSOL Conferences (2017, 2018, 2019). In addition, I attended and participated in the annual conferences for both WAR and NARSOL in 2018. I also actively participated in webinars and call-ins for all three of these organizations from 2017 – 2020. During the conferences, webinars, and call-ins I closely analyzed how activists strategized for changed. In addition to the participant observation, I collected and analyzed written (both online and in-print) documents from these organizations including brochures, newsletters, emails, and posters.

Finally, I conducted 20 in-depth semi-structured interviews with leading anti-registry activists around the country. In selecting interview subjects I was careful to ensure I had a wide representation of people within the movement—geographically and demographically as well as a mixture of people who are on the registry themselves and people who have family members on the registry. In addition to interviewing grassroots activists from all three of the national organizations, I also conducted several interviews with lawyers working on sex offense registry legal strategies and who were invited to speak at the conferences. However, my main focus was on justice-impacted anti-registry activists. Names have been changed here for the safety and protection of activists.

Organizing with Stigma, Shame, & Fear

The majority of people in the anti-registry movement are registry-impacted, meaning they are either on the registry themselves or are the family member of someone on the registry. As the director of one of the national organizations put it, "I know very few people who have come to this cause willingly."[441] When asked how they became involved in the movement most people responded by citing their own convictions or the convictions of their loved ones. As one interviewee explained, "I came to the cause by way of conviction."[442] Another said, "I got involved because I got convicted of a sex crime."[443] Two interviewees used the phrase "baptism by fire" to describe becoming involved in the movement.[444]

There was a general sense that the anti-registry movement is largely driven by registry-impacted people precisely because sex offenses are so heavily stigmatized and shrouded in the mythology of the specter of the "sex offender." In general, people with sex offenses are not sympathetic subjects, even to people prior to becoming registry-impacted. Almost all of the activists interviewed brought up the fact that prior to becoming registry-impacted themselves, they had no idea the extent to which sex offense laws were unjust. As one interviewee noted, "When it did begin to affect my life, when I got convicted, that's when I began to realize this thing was really bad..."[445] Several activists mentioned that before their personal experience with the registry they had at least casually supported sex offense registry laws themselves. Indeed, only one of the activists interviewed, who prior to his conviction was a republican political strategist, reported having any type of suspicious feelings towards the registry: "I had an idea

[441] Sarah, interviewed by author.
[442] Sean, interviewed by author.
[443] Richard, interviewed by author.
[444] Sarah, interviewed by author and Lauren, interviewed by author.
[445] Richard, interviewed by author.

prior to ever getting in trouble that there was something peculiar about the whole sex registry thing. I wouldn't say I was opposed to it because I had no reason to be. But I always thought of it as kind of a strange tool."[446] Beyond that statement of vague suspicion, none of the advocates I interviewed discussed being critical of stereotypes of people with sex offenses or the registry as a tool to prevent and redress sexual harm, prior to becoming registry-impacted themselves.

Despite the initial realization and shock of how unjust sex offense laws are, most of the people interviewed who were on the registry themselves spoke of an early hesitancy to become involved with the anti-registry movement. For many of them the hesitancy was rooted in both fear and shame. As one interviewee put it:

> Oh my god, Chelsea, I lived in fear…For 20 years I was that way. Just ultimately fearful of anybody finding out about my story… As soon as the title is out, that's it the conversations over. I have lost more family and friends and even people that I was just getting to know over the discovery of that title without even a question. Not even a what happened? or are you okay? Nothing. Just that's it. That relationship is over.[447]

Another interviewee reflected on his experience of shame and empathized with people on the registry who decide not to become involved:

> Essentially the only people doing work in this area are people who are directly impacted one way or another. And for the people themselves, the shame is so intense, and the fear is so intense that coming out and working in this area is so fraught with danger and risk that people don't do it. I get that. I wouldn't' have done it if the choice hadn't been made for me.[448]

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[446] Ibid.
[447] Robert, interviewed by author.
[448] Sean, interviewed by author.

Family members of people on the registry also cited fear and shame as initial reasons they were hesitant to become involved in the movement. One activist, the father of someone currently incarcerated for a sex offense, admitted that while he is now an open advocate who tries to coax others out of their shells into advocacy, that he too "went into [his] shell for a while."[449]

In addition, almost all interviewees said that shame and fear were the biggest hurdle in getting other registry-impacted people involved in the movement. One father of a person with a sex offense who works for a national organization said, "I'm finding how tough it can be to light a fire under people. To motivate people. And especially this issue. Because people are ashamed, and embarrassed, and scared, and devastated." [450] Another activist drew a connection between the culture of sex shame and people's hesitancy to become open advocates for registry reform, "When it comes to sex and shame and culture it is deep. It is deep deep deep. It's in our blood."[451]

Activists also discussed fear of retaliation from community custody officers and other carceral state actors as obstacles to becoming involved in the movement. For example, as one activist pointed out, people on the registry are at the whim of their parole officers and/or the police departments where they register. Many people are justifiably fearful that if they rock the boat, they may face more prison time:

> One of the things that I've noticed is the guys that complete treatment or they finish their sentence or whatever the case may be, most of them disappear. They still may have to register but as far as being visible to the community. The majority of them disappear and I can't blame them. They really don't want to be involved to that degree. I think part of it

[449] Jerry, interviewed by author.
[450] Jerry, interviewed by author.
[451] Sean, interviewed by author.

> is the fourteen years I spent on probation...one of the concerns that the guys have is retribution. If you buck the system at all there's going to be retribution and it could mean going to prison. The therapists and their POs they have all the power and if you irritate them, if you buck the system at all, even if you're in the right, the guys are afraid. So the majority of them don't say anything. That kind of thought process continues on after they're out of the system I think."

The experience of fear and shame for having a criminal conviction is not unique to sexual offenses. Felony convictions in general carry a heavy stigma and people in community custody for any offense run the risk of being sent back to prison.[452] However, as discussed throughout this dissertation, sex offenses carry a particular stigma. Sexual acts, as pioneering queer theory scholar Gayle Rubin has argued, "are burdened with an excess of significance."[453] One the biggest indicators of this excess of significance is the very fact that universal registration for sex offenses and no other types of felony convictions.[454] In addition, the structure of the registry is designed to keep people under community supervision for longer than most convictions, meaning community custody officers and other carceral state actors exercise greater control over the lives of people with sexual convictions—making them more vulnerable to reincarceration.

Further, the complexity of registry laws and the heightened consequences of violating them exacerbate the fear of retaliatory carceral state actors like parole officers and police departments responsible for maintaining registries. As discussed in Chapter 2, registration laws

[452] For a discussion of the stigma of criminal records and recidivism see: Christopher Lewis, "The Paradox of Recidivism."
[453] Rubin, "Thinking Sex", 11.
[454] See chapter 5 for a discussion of the extension of sex offenses into other types of offenses.

are often difficult to navigate and easily violated. Indeed, the most common reason for a person with a sex offense returning to prison is failure to register.[455] Failure to register can include things like failing to report a change in address or a change in vehicle to your local police department within a certain timeframe, often only a day or two.[456] In this way, the complexity of registration laws means that people are understandably fearful that a parole or probation officer could easily find a violation if they felt so inclined. This coupled with the Adam Walsh Act mandate that the minimum penalty for a failure to register violation is one year in prison, makes the consequences for being charged with failure to registry severe. The combined shame and fear of retaliation from carceral state actors function as deterrents for people to become involved in advocacy.

In addition to being at the mercy of community custody officers, many interviewees discussed fear of vigilantism as an obstacle. One activist reflected on the limitations to joining the movement, "There are so few of us that are out and talking about. A lot of it is because we face death threats. We face vigilantism...We face personal violence. We also face state sanctioned violence coming out. The rules and the regulations are so complex and they're so varied state by state."[457] People on the registry, whose location information is easily accessible, face vigilantism. Indeed, it did not take long for the registry--a public list of almost universally hated people and their home and work addresses--to be used by vigilantes to find and kill people on the registry.[458] For example, in 2005 two people living together in Bellingham, Washington

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[455] Levenson, Sandler, and Freeman, ""Failure-to-Register Laws and Public Safety"; Duwe and Donnay, "The Effects of Failure to Register on Sex Offender Recidivism."
[456] For a discussion of failure to register laws see: Levenson, Sandler, and Freeman, "Failure-to-Register Laws and Public Safety."
[457] Kenny, interviewed by author.
[458] There is no comprehensive list of everyone this has happened to. However, for a good summary of well-known cases see:

who were both on the registry were murdered in their home by a man who obtained their address from the public registry and gained entry into their home by posing as an FBI agent investigating threats made against people with sex offenses.[459]

A member of the board of directors for one of the national organizations was himself a victim of vigilante violence. The board member had lived for decades with his conviction without having to register. During that time period he had established a family and a successful business. However, when the registry became retroactive, he was forced to register his information. After having to register, a vigilante randomly found his information on the registry, snuck into his house through the unlocked front door, and tried to murder him.[460] While he survived the experience understandably stuck with him. He no longer left his door unlocked.

Some interviewees noted the irony in people's fear of being public advocates for the anti-registry movement, while also already having their status as someone with a sex offense publicly available and easily accessible. One woman I interviewed who has a son on the registry spoke at length about how difficult and scary it is for people to come out and advocate for themselves: "Two big things that prevent people from getting involve are fear and hopelessness. Fear just from the general perception that there is a target on their back, and perhaps not just a perception but there is some reality to that. and just the hopelessness, because there's no resolution, there's no point at which you're done."[461]After expressing this empathy, so also remarked: "On the other hand you try to be logical. Your picture is already out there, honey. But they're still scared."[462]

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https://www.prisonlegalnews.org/news/2017/may/5/vigilantes-assault-rob-and-murder-registered-sex-offenders/

[459] Ibid.

[460] Julie, interviewed by author.

[461] Lauren, interviewed by author.

[462] Lauren, interviewed by author.

Many of the advocates on the registry I interviewed spoke of experiencing a turning point where they became too fed up not to start advocating for change. For some people, like George, it came from experiencing vigilantism. The director of one of the national organizations, a close friend of George, shared, "Somebody tried to kill George and after that not only did he lock his front door, he closed all the blinds in his house. He was afraid. He was so afraid. He was even afraid to go outside until finally he said what the fuck...A coward dies a thousand deaths a hero dies but one. George got to that point."[463] George went on to write a book about his experiences, which he shared with Julie, who was so moved they went on to form a national organization dedicated to reforming the registry. Another person on the registry, Mitch, also talked about how a threatening phone call made by someone posing as a police officer who got his contact information from the registry sparked him into action:

> After that phony cop phone call, it took me awhile, but I just decided that I was done feeling vulnerable. I was done feeling like a victim. I was going to go on the offensive. In the army they teach you that when you're in an ambush the safest course of action is to run directly into the fire...I've always been, for better or worse, the type of person that runs directly into the fun fire and this was no exception. I was done feeling like a victim and I decided to go on the offensive.[464]

After his decision to become an activist, Mitch began writing and publishing to try to combat common misconceptions about the registry and educate the public. He also joined a national organization and would eventually become part of their administration.

[463] Julie, interviewed by author.
[464] Mitch, interviewed by author.

Like Mitch, other activists on the registry cited the type of person they are as having an influence on their decision to become activists. One activist, Arnold, told me that growing up he'd always wanted to be the heel (also known as the villain) in pro wrestling. Arnold is disclosed he is the kind of activist who prefers a more in your face, direct action approach. He recalled one of his early experiences of advocating for his local city council and the attention he received:

> The city council person who was promoting the thing had his propaganda, 'Oh, this is going to be a great Christmas present for the children of Cincinnati.' Well, if it's a Christmas present you better keep that receipt handy! So, there were 14 people lined up to testify. And aside from an attorney who was a part of one of the ACLU type groups, everybody else was there in favor of the law, but guess who steals the show? I'm the last person of the day that speaks. I didn't give the greatest speech in the world, but I brought all this stuff with me. I had just gone to court on the residency restriction issue. So obviously that created a media frenzy because you know, 'You won't believe who dared show up at the Cincinnati city hall meeting today to oppose these residency restriction laws.' It was in all of the major news networks. It was in the newspaper. It was on the radio.[465]

Arnold also discussed how his public advocacy went on to inspire others, "The interesting thing that happened was there were two more meetings on this topic and the tone changed. All of the sudden people that were showing up to the meetings were people opposing it. It emboldened people. All of the sudden other people that were going to be negatively impacted by it were

[465] Arnold, interviewed by author.

speaking up."[466] Arnold's experience inspiring others demonstrates the importance of being able to find other impacted people to build community and power.

Organizing with Internet Restrictions

Many of the people I interviewed eventually discovered a community to organize with through the internet. In the early stages of the anti-registry movement--just after the passage of Megan's Law and prior to the existence of large national organizations--much of the anti-registry movement and support for people on the registry existed on internet forums.[467] Several of the people I spoke with who were active in the movement in the early 2000s came to the movement by way of the Sex Offender Support and Education Network (SOSEN), which began as a form on Yahoo Groups.[468] SOSEN's forum was private and anyone who wanted to join had to go through a vetting process. The process was a safeguard to ensure the space was safe for people on the registry and their loved ones. Forums like SOSEN provided a forum for impacted people to build community and solidarity across the nation as sex offense registries began to form and grow in every state.

Given the importance of accessing the internet in order to find community support and advocacy organizations, many interviewees also cited internet restrictions as a major barrier for the anti-registry movement. Contemporary registration schemes emerged concomitantly with the ubiquity of household internet access and social media. As discussed in previous chapters, the specter of the "sex offender" and national concern over the safety of children on the internet are

[466] Arnold, interviewed by author.
[467] For a history of the early anti-registry movement see: https://oncefallen.com/history-of-anti-registry-movement/
[468] Ibid.

deeply intertwined.[469] The national panic over children being snatched up by dangerous strangers was not just limited to children being hunted in parks and daycare centers, but also included fears over perverts using the internet to lure in children and sexually harm them.[470] Once sex offense registries were established, states overwhelmingly began to pass legislation to ban people with sex offenses from using social media based on the logic that they could use the websites to harm children.[471]

Some states, like Kentucky, passed legislation that criminalized all use of social media cites, instant messaging, or chat programs for people on the registry.[472] At the time of signing Kentucky's ban, Governor Beshear remarked that the legislation was "a critical step toward protecting Kentuckians from the very real threats that come with 21st century innovations."[473] Yet, like the registry, residence and presence restrictions, social media bans do very little to actually prevent sexual harm. Indeed, a 2006 study on technologically facilitated offenses against minors, 96% were committed by people who were not on the registry.[474]

What social media bans actually do, noted many of the activists, is effectively prevent people with sex offenses from organizing. For example, Sean remarked:

> I watched the Arab Spring happen and Occupy Wallstreet and then later BLM. And the stock response of the government in all these first amendment social media lawsuits is

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[469] See chapter 2. See also: Horowitz, *Protecting Our Kids?*
[470] Internet stings, also known as "net nanny" stings where law enforcement officers pose as young people on adult websites in order to "catch" predators are also a symptom of this. There are also several pieces of federal legislation such as the 2000 Children's Internet Safety Act that are embedded in these fears.
[471] For example, Louisiana, Indiana, Kentucky, North Carolina, Minnesota, New York, and Texas all passed social media bans. See: Hitz, "Removing Disfavored Faces from Facebook."
[472] Guy Padraic Hamilton-Smith, "The Digital Wilderness," 39.
[473] Ibid.
[474] Wolak and Finkelhor, "Are Crimes by Online Predators Different From Crimes by Sex Offenders Who Know Youth In-Person?"

> that there are ample alternatives channels of communication. You can write letters to the editor. Yes, but that's not how the world communicates. Arab Spring wasn't organized by a letter writing campaign. it wasn't organized by everyone calling everyone else. That's not how communication and organization happen in modern society. I think that there's an aspect to the ability to be able to harness this technology to be able to communicate and to be able to organize.[475]

Inspired by these observations, Sean initiated a successful lawsuit in his home state and that forced the state to overturn their social media bans for people with sex offenses. Kenny, also on the registry, noted the difficulty of being able to even find community with internet restrictions: "We're living in a very digital age right now and if you can't access the internet how are you supposed to find these places? You have to do it through word of mouth and if it's already not a very popular thing or mainstream there's no way in hell you're going to find out about it unless know of someone who knows something…"[476]

In 2017, in *Packingham v. North Carolina,* the U.S. Supreme Court ruled that governmental social media bans are unconstitutional. In recognition of the centrality of social media to the contemporary political arena, Justice Kennedy, the author of the majority opinion reasoned:

> To foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—might receive legitimate benefits from these means for access

[475] Sean, interviewed by author.
[476] Kenny, interviewed by author.

> to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives.[477]

While *Packingham* prevents states from passing legislation that blanket restricts people with sex offenses from accessing social media websites, the ruling left untouched the ability of social media companies to enact policies that prevent people with sex offenses from using their platforms. For example, Facebook, Inc.--which owns both Facebook and Instagram—bans people with sex offenses from having accounts and regularly weeds out people with sex offenses who have made accounts anyway.

In addition, to social media restrictions, many states also passed statutes that require people on the registry to register internet identifiers, such as emails, social media accounts, etc. with local police stations. Unlike outright government bans on social media, the requirement of registering internet identifiers remains constitutional. As one activist pointed out, the existence of registration requirements for internet identifiers coupled with private company bans on social media use for people with sex offenses, make it almost impossible to have an account:

> What happens here is if I try to start a Facebook account, which I don't have one, but say I did. Within three days of starting the account I would have to go give that information to the county sheriff, the identifying information. And then what they are going to do is they're going to send that to the FBI and what the FBI is going to do is they're going to provide that to Facebook and what Facebook is going to do is they're going to shut down my account. So it's just sort of a loop. There's no point in me even trying. I might be there for a week and then I'd be gone.[478]

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[477] Packingham, 1737.
[478] Richard, interviewed by author.

Richard also brought up the fact that although *Packingham* may have overturned government social media bans, many people on the registry are still extremely fearful of using the internet and getting in trouble. "A lot of people on the registry, they don't believe it. They literally don't get the fact that they can use social media. So we still have people that we run into routinely who are self-censoring because they simply do not believe that they can safely and legally function in that space so they just avoid it."[479] Given the negative interactions most, if not all, people have had with the legal system and the consequences for violating terms of registration, it may not be surprising that people remain distrustful.[480]

Legal Scholar Hamilton-Smith argues that in addition to impeding people from organizing, internet restrictions (both intentional and de facto) also prevent people on the registry from challenging stereotypes around the specter of the "sex offender." Hamilton-Smith writes, "considered in the context of a group of people who are widely reviled, feared, and misunderstood, the imposition of silence serves to reinforce a narrative that denies basic humanity to those it paints as monstrous…and hamstrings a deeply unpopular struggle for civil and human rights."[481] Indeed, connection through the internet often provides people with an opportunity to humanize themselves beyond just the one-dimensional label of "sex offender."

[479] Richard, interviewed by author.
[480] There is a robust literature on the ways in which interactions with the justice system shape perceptions of government as well as political participation. See: Davis, "Testing Mechanisms"; Walker, "Extending the Effects of the Carceral State"; Davis, "Feeling Politics."
[481] Guy Padraic Hamilton-Smith, "The Digital Wilderness," 32.

Coalition Building When Your Cause is a "Political Hot Potato"[482]

When asked about coalition building and other social justice movements. interviewees believed the anti-registry movement was related to almost all interviewees cited the LGBTQ+ rights movement and the broader movement for criminal justice reform. Activists looked to these movements for tactical guidance and inspiration for their own movement. All activists had attempted to build coalitions and collaboration with both criminal justice reform organizations and LGBTQ+ rights organizations. However, all interviewees had major difficulties in building those relationships and, in fact, almost all were unsuccessful in doing so. There is a significant body of literature demonstrating the ways in which both the LGBTQ+ movement and the criminal justice reform movement have typically focused their reform efforts on the most socially acceptable groups amongst their populations—gay white monogamous couples in the case of the LGBTQ+ rights movement and people with nonviolent drug offenses for the criminal justice reform movement.[483] The specter of the "sex offender" is a figure that haunts the LGBTQ+ and the criminal justice reform movement. For both movements, people with sex offenses are political third rails most activists have tried to distance themselves from for either tactical purposes or personal beliefs and sometimes both.

Almost every activist I interviewed saw the anti-registry movement as related to the LGBTQ+ rights movement for two key reasons. The first reason was that early instantiations of public conviction registries emerged in the 1930s to deliberately target homosexuals and "gender

[482] Mitch, interviewed by author.
[483] For an excellent discussion of hierarchy in coalition building see: Mayo-Adam, *Queer Alliances*. See also: Strolovitch, "Do Interest Groups Represent the Disadvantaged?"

deviants".[484] To this day the registry disproportionately impacts LGBTQ+ people.[485] Second, and related, is that homosexuals were once widely treated as sexually deviant predators who bore the same stigma that people with sex offenses bear today.[486] As one interviewee remarked:

> The LGBTQ community. Look at the struggles they went through and how hard it was and how unpopular they were…So we look at that community not only to build relationships but as a kind of tool. How do you approach if you are a population that is highly controversial and maybe not liked in a lot of places? How do you approach, how do you humanize that? How do you go from being monster, or in their case a moral sexual pervert to a person with dignity? Who is deserving of dignity, even if you disagree with what they did or are doing.[487]

At every conference I attended all organizations evoked Harvey Milk's 1978 call for queer people to "come out" as an example of how change can be achieved. Using Milk as an example, organizational leadership encouraged impacted people to talk to their families, friends, church groups, and neighbors about their status as a person on the registry or their loved one on the registry. The strategy is to show that the nearly 1 million people on the sex offense registry are not monsters, but rather co-workers, neighbors, and friends who at one point in their lives made a terrible decision but have paid their debt to society. Another interviewee noted, "I know it's not a perfect analogy, but there's a parallel. [How] gay rights changed in my opinion is that more and

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[484] Leon, *Sex Fiends, Perverts, and Pedophiles*.
[485] Clark, "Specters of California's Homophobic Past." In addition, things like the Static 99 risk assessment form, which is meant to assess the "risk" of someone recommitting a sex offense automatically gives higher risk scores to people who are homosexual. See the official form: http://www.static99.org/pdfdocs/Static-99R_coding_form.pdf
[486] This is not to say that there is no longer homophobia/discrimination. However, in general there has been more acceptance.
[487] Richard, interviewed by author.

more people know someone who is gay and realized they're not a monster. Well, I think more and more people are going to know someone on the registry, and they're going to be like, 'this is really fucked up, guys.' And I think that's starting to happen."[488]

Interestingly, one activist, Mitch, discussed how the LGBTQ+ rights movement has been both helpful and harmful for the anti-registry movement:

> I believe the LGBTQ movement has done a lot towards promoting social tolerance and has contributed a lot towards demystifying the whole human sexuality part of social panics and morality. So, on one hand I think it's done a lot to help further our cause, but on the other hand I also think it's done some harm to our cause because what it's done is move that line further down the road so that only a very narrow segment of non-normative sexuality gets branded as abnormal.[489]

Mitch's observations pinpoint the limitations of drawing absolute parallels between LGBTQ+ movement and the anti-registry movement. Homosexuality, once seen as a perverse action, has now become a widely accepted, and in many ways protected, immutable identity.[490] Yet, not all sexually deviant actions will become legally protected identities—nor should they.[491] Further, while not everyone on the registry is guilty or has a sex crime where there is a victim who experienced harm, many people on the registry have committed serious harm.[492] That harm may not have happened in the way that the specter of the "sex offender" frames harm as happening

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[488] Sean, interviewed by author.
[489] Mitch, interviewed by author.
[490] For a discussion of the evolution of homosexuality from an act to an identity see: Canaday, *The Straight State*.
[491] For example, sex with young children will likely never become legally or socially acceptable.
[492] As discussed in previous chapters, the registry spans from people with public urination charges, teens convicted of sexually exploiting themselves while sending "sexts", to people with rape convictions.

(e.g. by the an insatiable stranger preying on children) and may not justify the existence of a sex offense registry that in reality does not prevent future harm, yet the harm still exists. The existence of that harm does distinguish the anti-registry movement from the LGBTQ+ movement in important ways.

All activists who tried to make alliances with LGBTQ+ organizations were largely unsuccessful. Many of the activists noted with sympathy that LGBTQ+ organizations have worked hard to move away from the myth that gay people, and in particularly gay men, are pedophiles.[493] Activists understood that making alliances with the anti-registry movement may threaten that work. As Kenny remarked:

> There's this whole myth of gay predation. Gay predators that are hyper sexualized or aggressive. There's this whole myth going on and so with marriage equality and the anti-violence movement that's been going on, they've been framing this narrative around primarily white gay males who are not threatening. They can assimilate. They can get the white picket fence, the two children. The dog. The happy wife, happy life kinda scenario. When we talk about queer criminalization, especially the registries, that completely does not fit in their narrative. It becomes something like, 'oh god, now you're threatening our concept. Now you're going to be threatening what we want to do.' And they've been so reticent because it's threatening what they want to do for their mission.[494]

Another activist, Quinn, observed:

> I mean, privately I think you'll find people that would speak positively about the [anti-registry] movement, but publicly I don't think the gay movement wants to put a face on

[493] Paternotte, "The International (Lesbian and) Gay Association and the Question of Pedophilia."
[494] Kenny, interviewed by author.

> that. I don't think they want to go backwards to the point where everybody thinks that every gay guy is trying to molest young boys. I understand the problem. I do. I just think that's probably the natural group to help in the evolution of people, not accepting child abuse and not accepting sexual offenses but accepting people for people.[495]

While activists have had difficulties making alliances with the LGBTQ+ movement, many people on the registry are LGBTQ+ themselves. In response to being alienated from those communities have begun to build their own networks of support.[496]

In addition to the LGBTQ+ movement, the activists I interviewed also saw their movement as deeply related to the criminal justice reform movement. Yet, within the justice reform community people with sex offenses carry a stigma that other offenses, even arguably people with violent offenses, do not carry. As Ruth, an activist whose son is on the registry, noted the existence of the sex offense registry itself adds to that stigma:

> Before there was a registry there were people who committed sexual offenses, just like there were people who killed other people and people who burned down houses and people who robbed banks. But once they served their sentence and were in the community you didn't know who they were. There was no special stigmatizing landmark that said hey these people are worse than everybody else. And that's what the public registry has done for those who have committed sexual crimes. It's saying, these people are worse than everybody else. IF they weren't why would they be on this registry? Why would they have to be watched all the time?[497]

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[495] Quinn, interviewed by author.
[496] For example, there were LGBTQ+ panels at two of the national conferences. In addition, the organization Black and Pink is a dedicated abolitionist LGBTQ+ organization.
[497] Ruth, interviewed by author.

Other activists also noted the extra stigma sex offenses carry and how that stigma makes coalition building difficult. "I think socially it carries the heaviest stigma. So yes, you can talk about social justice reform, criminal justice reform, reentry reform but the movement you say sex offense people will go to places that are not warranted. And then they just divorce themselves from it. They detach themselves."[498] Sean also spoke to this point, "It's tough [to make alliances] because the thing is most criminal justice reformers don't care about this. They in fact will leave you on the cutting room floor to make advances themselves."[499] Indeed, many recent criminal justice reforms--whether they deal with sentencing, voting, in-prison programming, etc.—explicitly exclude people with sex offenses. As Andy, who is on the registry put it, "They will almost always stop with sex offenders…We're toxic. It's a toxic subject. If you say you are pro sex offender, you are going to be lined up to the nearest bus and pushed under the bus." Other analogies people used to describe the relationship between the anti-registry movement and the criminal justice reform movement included: hot potatoes, red headed stepchildren, lepers, and something people won't touch with a ten-foot pole.[500]

Several activists referenced what Arnold called the "darlings" of criminal justice reform—people with nonviolent drug offenses—when talking about what they believed was the current focus of the criminal justice reform movement.[501] As Arnold recalled:

> I remember a few years ago I went to a second chance summit. They were having them across Ohio, and they were inviting legislators and members of the public to meet at certain places. They had one here back in 2008 at one of the big mega churches. So I

[498] Robert, interviewed by author.
[499] Sean, interviewed by author.
[500] Mitch, Julie, and Jerry, respectively, interviewed by author.
[501] Arnold, interviewed by author.

> went to it and these people who had been there and were invited speakers--I wasn't one of them of course--and here's this women who was like, 'I was just a drug offender, I wasn't a sex offender. It's not like I was a pedophile.' And I was just like, okay well you lost me, you lost one supporter here.[502]

There was a general sentiment amongst activist that one of the major reasons that criminal justice reform organizations are reticent to include people with sex offenses is the specter of the "sex offender." The stereotype makes alliance building difficult whether people involved in justice reform buy into the stereotype themselves, or if they don't believe it themselves, then they instrumentally recognize that most people do. As Mary noted, "Everyone doing this type of work...it's always baby steps. And people sort of get it with the drug stuff, now but they haven't yet bought on to the sex offender stuff. And I think we are the outliers of the extreme, where people still sort of have that vision of the dangerous guy that's going to harm your children. I think that all plays into that for sure."[503]

This is not to say that people with criminal records, and in particular people who have committed violent crimes, do not carry stigma or are not subjected to stereotyping. Much of the tough-on-crime legislation passed over the last 40 years was premised upon racialized stereotypes such as the child super predator, the persistent offender, and the crack feign.[504] Yet there was a general sense that there has been movement, albeit slow movement, on challenging and changing those stigmas—especially with regards to people with less stigmatized offenses like drug offenses, but also a nascent movement for people with more stigmatized offenses like

[502] Arnold, interviewed by author.
[503] Mary, interviewed by author.
[504] All of these specters are heavily racialized. For an account of the fusing of blackness and criminality see: Muhammad, *The Condemnation of Blackness*.

violent offenses. Where there has been less widespread movement in challenging the stigmas associated with sex offenses. Kenny, who is on the registry and who formed his own nonprofit, discussed this in his interview:

> Criminal justice organizations have been fighting for so long for this nonviolent person whose been convicted of whatever conviction they've got but they've been fighting for so long for that it's created this very nonthreatening narrative so now they're tiptoeing into the violent stuff, quote end quote violent, because violent doesn't really mean what people thing it means, but they've been tiptoeing into the violent dichotomy. But the sexual component, because we are such a puritanical society. Gayle Rubin had it right in 1984 when she did the *Thinking Sex* article that we other so much because we don't understand and we don't want to understand.[505]

Yet, other activists worried that the near sole focus on "nonviolent drug offenders" for reform has become too entrenched and is harmful to other causes: "With broader criminal justice reform, everyone wants to talk about drugs and nonviolent offenders....We are robbing Peter to pay Paul. We're basically saying nonviolent drug users, which everyone agrees we shouldn't be putting [those] people in prison, but then we're condemning people [with other offenses]...who deserve a chance, who could make use of that chance."[506]

Interestingly even within the anti-registry movement there is the impulse to draw lines between who is and is not deserving:

> But that's the attitude. I see this within our own movement that's the attitude. The way I describe it is, just imagine that you take everybody on the registry, and you got them to

[505] Kenny, interviewed by author.
[506] Sean, interviewed by author.

> form a single file line from the most petty of offenses to the most terrible things you can think of. So at the front of the line you've got your juvenile playing doctor, maybe child porn offenders, somebody who took nude selfies, public pissers. At the back of the line you've got the pillowcase rapist or somebody and people who molested 200, 300 kids...What you tell people in this movement if you draw an imaginary line right at the point where you no longer feel the person in this line is no longer worth defending, they'll usually draw the line right behind their loved one.[507]

Indeed, the few pieces of registry reform legislation that have been successful often include exclusions for certain types of offenses. For example, while advocating for SB 384--the bill that changed the California registry from lifetime registration with no distinctions between convictions to a tiered registry—ACSOL had to make the difficult decision to continue supporting the bill even when the legislature amended the bill to categorize no contact offenses, such as the possession of child pornography, in the highest tier with lifetime registration.[508]

With regards to making connections with particular organizations, reported that organizations like the ACLU--who are notorious for taking on unsympathetic causes—are reluctant to work with the anti-registry movement.[509] Jerry recalled going to his state capitol at the same time that the local ACLU was having their lobby day and the ACLU went out of their way to tell anti-registry movement to explicitly tell legislators they were not affiliated with the ACLU.[510] Several other activists also discussed reaching out to the ACLU for support, but being

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[507] Arnold, interviewed by author.
[508] California SB 384, 2020.
[509] Most famously the ACLU has worked on cases to protect First Amendment rights for the Klu Klux Klan. Amber Phillips, "A History of the ACLU Defending the Confederate Flag, the Tea Party, the KKK and Rush Limbaugh."
[510] Jerry, interviewed by author.

met with reluctance.[511] Another activist, the executive director of one of the large organizations, talked about her experience attending a Families Against Mandatory Minimums rally, "I went to the FAMM rally and that group... they are proponents of the first step act because it's mainly about drug offenses. I talked to them [the leadership] and they said, 'well we have to get our foot in the door.' That's always the contention. 'We have to get our foot in the door."[512]

Many activists also cited the fact that large organizations like the ACLU and Families Against Mandatory Minimums may risk losing funding if they support sex offense issues. Yet, most activists I interviewed were sympathetic as to why criminal justice reform organizations largely focus on people with less stigmatized offenses. After telling me the story about his local ACLU going out of their way to distance themselves from the anti-registry movement, Jerry said, "In one way I can't stand it. I don't like it. And on the other hand, what good can the ACLU do if they get all their big money pulled from them? They can't do anything. So it's bigger than them just making a decision. It's just a bigger issue and we're going to struggle with it wherever we go."[513]

Nearly all of the activists work to support broader criminal justice reform efforts even when they do not include people with sex offenses. The executive director of one of the national organizations told me about a major justice reform bill in her home state that explicitly excluded people with sex offenses. After discussing the bill, she remarked: "Did we support the bill? Absolutely. We just stood up and said, we support the bill and we're so sorry you left our people out."[514] Many people in the anti-registry movement attend the conferences of large criminal

[511] The one exception is the ACLU of CA provided some office space for ACSOL to conduct meetings.
[512] Sarah, interviewed by author.
[513] Jerry, interviewed by author.
[514] Ruth, interviewed by author.

justice organizations with the hopes of at the very least having conversations with people about sex offense issues. When asked about his relationships with the criminal justice reform movement, Robert an activist on the registry talked about the importance of relationship building even if the organizations are not yet working on sex offense issues, "If I have an audience, it's because I've been there consistently with them in the trenches...They have to see that work too. Not just somebody knocking on the door talking about, can you sign this petition? I don't know who you are! You don't know who I am! So if you're knocking at my door I'm going to be like, no, move on! I don't know you! So the relationship piece has to be there and unfortunately that takes time, that's not an overnight process." In this way, while activists expressed frustration with being unable to build alliances, there was a general sense that criminal justice reform efforts would eventually become more open to sex offense issues.

Finding the Winning Approach: When Facts and Right Don't Really Matter

It's morally wrong. It's unconstitutional. Yada yada yada. And guess what? It's not changing.[515]

The morning plenary speaker for the W.A.R conference in St. Louis, Missouri was local attorney Michael George. George stood in front of a large red and white banner hung by W.A.R that read, "Women Against the Registry: Fighting Against the Destruction of Families." To his right was a folding table turned ad hoc shrine where people had placed photos of their loved ones on the registry with notes and decorations. He opened by asking the audience, "Do you want bullshit, or do you want the truth?" The "truth" according to George was this: "Forget your rights, every one of you in this room is connected to a sex offender. The public doesn't want to

[515] George, interviewed by author.

hear about your rights."[516] While conveyed a bit less colorfully than George, the few lawyers involved in the anti-registry movement that I interviewed for this chapter also had a similar take on rights. A lawyer at the NARSOL conference remarked, "It's painful. I talk to people who say this is unfair. This is not right. And I agree. But as a lawyer there's nothing I can do about it. I have to find what is illegal."[517] Another told me she often has to tell her clients, "I hear you. And I feel you. But this is not a fundamental right according to case law."[518]

The 2003 U.S. Supreme Court decision *Smith v. Doe* looms large in the background of the anti-registry movement.[519] The case insulated the registry from 8th Amendment and due process challenges by ruling that the registry was not a form of punishment. Most of the "rights" people on the registry feel they are entitled to—such as protections against cruel and unusual punishment, double jeopardy, and *ex post facto*—are protections afforded in criminal law, not the civil law where *Smith v. Doe* placed the registry. While most of the activists I interviewed brought up both a concern for their rights and rights as a strategy to further their movement, none of them seemed to blindly believe in the "myth of rights"—a total investment in rights and litigation as *the* path to change.[520]

Activists' skepticism towards rights and litigation is deeply intertwined with their own experiences with the law.[521] Years of judicial gaslighting by rulings such as *Smith v. Doe* which insists the registry is not punishment, that conflict with the lived experience of being on the registry as *very* punitive, have understandably fostered ambivalence towards litigation as a viable

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[516] WAR Conference, 2018.
[517] NARSOL Conference, 2018.
[518] Leah Bickerton, interviewed by author.
[519] For more information on the *Smith v. Doe* case see chapter 3.
[520] Scheingold, *The Politics of Rights*.
[521] For a discussion of experiences with the legal system and rights consciousness see: Merry, "Rights Talk and the Experience of Law."

strategy and rights as *the* winning argument. As one activist on the registry observed: "A lot of people think we need to get a court to argue that it's unconstitutional. There's a great quote from Judge Learned hand and he said that 'I think that people put too much hope in courts.' I don't think it's that we're going to get a court decision, there's no winning legal argument that's going to undo all of this. It's all based on disgust, and fear, and anger." Through their lived experiences most registry-impacted people understand that what is "right" or "moral" has very little to do with the law.[522] Moreover, they understand deeply that legal protections, such as rights, are not insulated from the politics of fear, disgust, and otherness.

Yet, while most activists were not totally enthralled with traditional notions of rights and litigation, many activists continued to use the discourse of rights in an attempt to further their cause. The most common discursive troupe activists used when discussing rights was that the legal erosion of the rights of people with sex offenses was akin to a slippery slope for the rights of other groups. As one activist remarked:

> We are the canary in the coal mine and what I mean by that is we represent an approach to criminal justice and that is a civil regulatory approach to criminal justice which if it's allowed to exist forever, in other words if it doesn't get taken apart, will be very easy for states and governments to expand on and use for all kinds of applications. That's really why it's so critical for the reentry community to focus on what we're doing and listen to what we're saying because, hey, we're the guys that it's easy to do this to now. But hey, it's just a few small statutes, a few small steps in the statutory regulation [from you].[523]

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[522] For a discussion of "legalism" or the "ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." See: Shklar, *Legalism,* 12.
[523] Richard, interviewed by author.

Another activist discussed why she believes people should care about the rights of people with sex offenses: “Once the Constitution starts getting eroded, eventually it's going to affect you…If we're not protecting the least of us then eventually your own rights and the right of other citizens won't be protected too."[524] Several activists I interviewed quoted parts of the “First They Came” poem by Martin Niemöller. The opening stanza of the poem reads: “First they came for the Communist/And I did not speak out/Because I was not a Communist.” The poem then runs through a list of people targeted by Nazi Germany until final it ends with, “Then they came for me/And there was no one left/To speak out for me.” Another activist discussed her tactic for trying to get people to care about the rights of people with sex offenses:

> When I first started out with ‘I'm here to protect the civil rights of registrants’ people would either roll their eyes at me, they would turn away, or some of them almost literally threw up right on the spot. And I'm like, well I'm not getting the reaction I want. How do I get the reaction? I've got to change my elevator pitch. How am I going to do that? What am I going to say? Maybe I was channeling Atticus that day and was like, ‘well, what are we really doing?’ We're protecting the Constitution because the Constitution doesn't say we all have the right to life, liberty, etc. But the fact is that it's for all. It doesn't say except for sex offenders. So go back to the basics. The U.S. Constitution, what does it say?...The minute we start chipping away at anybody's rights, everybody's losing something.[525]

[524] Harold, interviewed by author.
[525] Julie, interviewed by author.

As my interviews indicate, amongst anti-registry activist there was an overwhelming sense that people *should* care about protecting the rights of people on the registry because, according to the activists, the rights of people on the registry are inextricably linked to the rights of others.

The tactical discursive use of rights by activists, even as they may be separate from the letter of the law, supports what scholars like Michael McCann have asserted about the constitutive nature of rights. McCann defines rights as a set of "often defiant forms of practical legal knowledge shared among citizens in society that are not reducible to official legal texts."[526] In this way, the availability of rights as a legal discourse to marginalized groups is predicated on the destabilized, social nature of law, not the actual letter of the law. Further, legal mobilization scholars like McCann have pushed us to think about indirect "effects and secondary tactical uses of legal action in struggle" because "such indirect effects can matter for building a movement, generating public support for new claims, and providing leverage to supplement other political tactics."[527] In this way, while anti-registry activists did not express an utter faith in the letter of the law and litigation they still tactically used the discourse of rights as a way to try and gain support for their cause.

Like rights and litigation, anti-registry activists had a complicated relationship with using facts as a tactic for supporting their cause. In addition to ruling the registry is not punitive, the *Smith v. Doe* decision also codified the mythology surrounding the specter of the "sex offender." In the decision Justice Kennedy asserts that people with sex offenses are "much more likely than any other type of offender to be rearrested for a new rape or sexual assault."[528] To support this, he cited a study that concludes the risk of re-offense of people with sex offenses is "frightening

[526] McCann, *Rights at Work.*
[527] McCann, 10.
[528] Smith at 103.

and high."[529] The study he used puts the re-offense rate of people with sex offenses as high as 80% if they go without treatment.

Yet, the origin of Kennedy's alarming statistic was an article in *Psychology Today*, a non-peer reviewed popular journal one is likely to find in the waiting room at a dentist's office. The author of the article does not cite a single supporting study to back up his assertion and has, ironically, since recanted the claim. [530] As discussed throughout this dissertation, peer reviewed research has disproven the claim that people who commit sexual crimes have a "frightening and high" likelihood of reoffending and have found that people with sex offenses have a relatively low re-offense rate that is similar to those with other felony offenses. [531] Further 95% of sex crimes happen by first time offenders. The majority of sexual harm happens to people who are not strangers to those on the registry. People are more often than not sexually victimized by people they know. A Department of Justice study on the sexual abuse of young children found that 93% of juvenile victims knew the perpetrator. Of that 34% of perpetrators were family members and 59% were acquaintances.[532] Seven out of ten rapes (including both children and adult victims) are committed by someone the victim knows.[533]

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[529] Smith at 103, Cited in McKune v. Lile. 536. US. 24. 34 (2002).
[530] Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2014.
[531]A study of re-offense rates amongst people deemed as high-risk offenders found that 20% of those individuals committed a new sex offence within 5 years of release, and an additional 12% of those individuals committed a new sex offence within 15 years. However, no high-risk individual who did not commit a new sex crime within 15 years went on to commit another sex crime—essentially, they had a negligent likelihood of re-offense. See: Hanson et al., "The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California"; Hanson and Bussière, "Predicting Relapse."
[532] Snyder, "Sexual Assault of Young Children as Reported to Law Enforcement."
[533] Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, National Crime Victimization Survey, 2010-2014.

The truth of how the majority of sexual harm happens disputes the efficacy of the registry—which is premised upon the idea that the majority of sexual harm is committed by strangers in the dark who snatch up children. All that is needed to protect people in that version of how most harm happens is knowledge of where those "bad apples" are. As one ACSOL conference attendee whose daughter was sexually abused by a family member and whose husband is also on the registry for an unrelated offense put it, "The registry told me to look right when I should have been looking left."[534] The participant recalled prior to her husband being placed on the registry she used to search it herself to see who in her neighborhood might be a danger to her daughter. In reality, the danger was inside of her home and was someone with no prior convictions.

Despite knowing that the evidence *Smith v. Doe* hinges on is inaccurate and that research on the efficacy of the sex offense registry has overwhelmingly concluded that it is ineffective, almost all of the activist I interviewed recognized that when it comes to winning people, facts were not all that helpful. As one activist remarked, "People hear what they already believe." A number of the activists came to understand this through trial and error. Four of the activists I interviewed in their early activism had participated in the Minutemen project. The Minutemen project was an early online anti-registry effort where activists were recruited to go to the comments sections of media articles reporting on sex crimes or the registry, post facts about the inefficacy of the registry, and engage with other commentors with the hopes of educating them. While at least one interviewee felt that some of that work may have potentially influenced people to rethink their presumptions, everyone expressed frustration with people's overwhelming resistance to listen to facts. As one interviewee, a former Minuteman who has been involved in

[534] ACSOL Conference, 2018.

the movement for almost two decades remarked, "The current group of trolls, they're just, it's just hatred. You're not going to argue facts and logic. They just don't care about [facts], they just want him to fail because he got convicted of a sex crime. To hell with him. That's pretty much their entire argument. He's a pedophile, screw him."[535]

All five conferences I attended held workshops on strategic messaging. The experts holding these workshops were certainly a bit more delicate in their approach than the "forget your rights" presentations of the legal experts. However, their message was that, in many ways, facts do not matter all that much. When people hear "sex offender" or "sex crime" their (in the words of the strategic message expert) "lizard brains" are triggered. Once that happens it's nearly impossible to engage people's rational thinking brains that are able to take in and evaluate evidence. At the conferences, audience members were very open to these training sessions.

Many people I interviewed had stories about trying to speak to someone from a place of facts and evidence and having that person's eyes glaze over. As one person recalled, "I have seen first-hand that throwing statistics, even if they're scientifically based, at all these people just doesn't do any good. They start to hear statistics and their eyes start to glass over. They want to believe what they want to believe."[536] Another activist admitted, "Facts don't matter. I can talk to them until I'm blue in the face about recidivism. I can talk to them until I'm blue in the face about what the court cases say. I can talk to them until I'm blue in the face about the history and nobody listens. It's absolutely terrible."[537] In the training sessions activist were told that a much more strategic approach to educating people and winning them over is to humanize people on the registry first and foremost. Many of the activists I interviewed, through trial and error, come to

[535] Arnold, interviewed by author.
[536] Jerry, interviewed by author.
[537] Kenny, interviewed by author.

this conclusion themselves. Given this, even when activists did use data, they strategically approached people on a more human level first.

Mutual Support and Movement Building

While all of the anti-registry activists talked about how humanizing people on the registry is the most effective approach to advancing their cause, many activists also remarked how difficult it is to humanize people who are experiencing so much shame they do not want to "come out" to their friends and neighbors to humanize themselves. Many activists discussed how difficult it was at first to talk to people, even friends and family members, about their experience on the registry because of fear people would see them as "monsters." Yet as one activist observed, staying in the shadows makes it much easier for people to continue othering people with sex offenses:

> You should have people who are registrants speaking out and not being afraid to mention that they're on the list. It's easy to dehumanize an unseen enemy. So, if we continue to hide in the shadows then it feeds into the belief that all us sex offenders, we're cockroaches that scurry into the crevices and lurk in the bushes and hide in the shadows to pounce on children. No. I want to have a face to our human misery.[538]

At the conferences and in my interviews many activists shared their journeys from hiding in the shadows to becoming more comfortable approaching people with their stories. One activist, Robert, was an active member in the reentry and criminal justice reform community, at first he did not tell his fellow advocates he was on the registry. He finally decided enough was enough and told his colleagues his story:

[538] Arnold, interviewed by author.

> But you know what I had to do? I had to sit with those people and demonstrate my character and my commitment and my worth. That's the only reason. Because I think that even the folks within that movement [the criminal justice reform/reentry movement] when I initially shared my story were like, 'Whoa, WTF?' And because they saw who I am and continued to be as a person. As committed to the cause, in and out of it. That's what allows them to stand by my side and still ride in the car with me. And some of it is me saying, you know what? I'm not waiting for your approval anymore. I'm going for this.[539]

Other people told me stories of being surprised by how much support they ended up receiving after sharing their stories. One activist, Sean, recalled going to church the day after the news cycle picked up the lawsuit he filed challenging one of Kentucky's registry statutes. He expected to be met with disgust and fear, but instead was warmly welcomed by his parish.

Interviewees shared that once they got comfortable sharing their stories, many of them said they'd talk about the registry just about everywhere with anyone. Kenny told me that one of his main strategies is increasing visibility, "When I got to parties or I go to bars and people asks me what I do. I'm like, well I'm going to need you to sit down for ten minutes because shit is about to get real. We're about to jump into this." Another activist joked that they'd talk to people just about anywhere—in an elevator, a cab, in line at the grocery store. Interestingly, a couple interviewees noted that they were surprised by how many people the talked to also had someone they knew on the registry: "And you know when you talk to people, I can't tell you how many times you hear people say, 'oh yeah, we have somebody in our family that's on the registry.' I mean, one of the ladies that was fixing our banner that had come undone was one. Another lady

[539] Robert, interviewed by author.

at UPS when I was making copies and stuff. Everywhere."[540]Indeed, as the registry grows to close to a million people, many activists predicted that the more people there are on the registry, the more likely it is someone will know someone on the registry and the more open people will be to change.

All of the activists I interviewed recognized the importance of creating spaces for people on the registry to uplift and support each other. All three of the national organizations hold regular support groups for people on the registry. Julie, the founder of ACSOL, told me the story of the first support group they held:

> About 49 of the 50 people walked in looking at the floor. Shoulders slumped forward. Nobody is making eye contact and certainly nobody smiled. I spent 3 hours in the meeting. I'm leading the meeting. I'm talking. We're asking other people to talk. We did this thing we call mill and hug exercise where we actually hug each other or shake hands. Because a lot of the people on the registry don't get much physical contact. People are afraid of them…By the end of the meeting people were walking out with their shoulders back, making eye contact. A couple of them even smiled at me. So, it was like, hey this works! Let's keep repeating it![541]

Since that day, ACSOL has been holding monthly support groups for people on the registry for the last 10 years. In addition, in 2016 NARSOL launched their Fearless program that helps people create their own self-sustaining support groups where they live.

[540] Sarah, interviewed by author.
[541] Julie, interviewed by author.

Yet, establishing support groups can be difficult for reasons related to registration laws and restrictions. For example, one activist, Quinn shared the difficulties he's faced trying to establish a support circle:

> We're trying right now to get at least one or more started and we're even finding that a slow go, trying to identify the people that it might be appropriate for. And then trying to figure out how to get their parole or probation officers permission for them to do that. Some of them are only able to meet with other offenders when they are in the state approved group, although they have them housed together.[542]

Similar to internet restrictions, many people on the registry and especially those who may still be under parole or probation face restrictions on who they may interact with. Many states have restrictions against people who are under community supervision interacting with other people who are under supervision. Violating these provisions means people may face re-imprisonment for attending support groups. In addition, a few interviewees discussed the difficulties they've faced finding physical spaces to hold support groups given the litany of presence restrictions in many states. As well as difficulties finding spaces that are willing to host people with sex offenses in the first place. One activist recalled reserving a meeting space in a well-known California church that was the home of many organizing meetings during the civil rights movement. When the church found out that the meeting would be for people with sex offenses, they declined.[543]

In addition to support groups, people in the anti-registry movement have found other innovative ways to support, uplift, and educate each other. One activist, Andy, in collaboration

[542] Quinn, interviewed by author.
[543] Julie, interviewed by author.

with another person on the registry, started his own podcast—Registry Matters. As of September 2021, Registry Matters is on its' 195th episode. The goal of the podcast is to "reach as many people as possible spreading the word that we are fighting, that you are not alone. That success is being achieved across the country."[544] The podcast covers a range of issues related to the registry, from current court decisions to tips on how to advocate at the legislature and features about people on the registry who have success stories. Neither Andy, nor his co-host, had any experience in podcasts prior to starting theirs. Yet, they were moved to do so because they wanted to reach the 900k+ other people on the registry out there to build power and share triumphs.

Several of the people I interview are contributors to the *LifeTimes* magazine. A quarterly magazine founded by and for people on the registry. The fundamental belief of the magazine is that "everyone, including those who have broken some of our most serious social norms and laws, deserves the chance to find joy and happiness in their lives once they have paid their debt to society."[545] The magazine does include information about local and state advocacy efforts. But it also importantly also shares stories on things like Arts & Entertainment, Food, Intimacy, Home & Gardening, and Religion. Each feature highlights people on the registry "who have prospered in their job, found meaningful relationships, started their own businesses, and found a sense of peace in their lives."[546] In this way, *LifeTimes* provides an opportunity for people on the registry to build power by acknowledging the humanity of people on the registry—giving people space to talk about their hobbies and interests as well as their organizing efforts.

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[544] See: https://www.registrymatters.co/about-registry-matters/
[545] See: https://www.lifetimesmagazine.org/lifetimes.html
[546] See: https://www.lifetimesmagazine.org/lifetimes.html

Conclusion

As I have demonstrated throughout this chapter, the anti-registry movement faces significant structural and social barriers to organizing and coalition building. Many of these barriers are deeply rooted in beliefs about the specter of the "sex offender" that people, even in the criminal justice reform movement and the LGBTQ+ movement, continue to hold. Further, while registry activists sometimes use the language of rights discursively, years of being subjected to the abuses of the legal system make them weary of rights and litigation as *the* path to change. In addition, while activists also strategically use statistics and data to further their cause, they are also acutely aware that alone facts and figures are not going to win over people. All activists believed humanizing people on the registry was the most strategic approach to change. Overall, the anti-registry activists I came to know demonstrated formidable tenacity and resilience in the face of significant adversity. When they were turned away from other movements and spaces, they created their own. When society told them they were monsters, they worked to foster and acknowledge their humanity to each other so they could eventually share it with the world.

Chapter 7

Conclusion

Throughout this dissertation I have centralized the role that the punishment and regulation of sexuality has played in the building of the American state, the expansion of its punitive powers, and the development of mass incarceration with a particular focus on the growth and development of contemporary sex offense laws. As I demonstrate in chapter 2, specters of perversion have driven important expansions to the carceral state—each building on the institutional and policy calcifications of the last. The most recent instantiation of this specter has been the "sex offender." Indeed, since the 1980s the American state has grown and developed a sex offense registry so large that there are now nearly 900,000 people living on the registry. Further, 20 states and the federal government have enacted civil commitment laws for people deemed to be "sexually violent predators"—meaning a person may be incarcerated indefinitely without ever having committed a new crime. All of the examples I draw upon throughout this dissertation signal that when it comes to sex, the U.S. has demonstrated an exceptional willingness to push the boundaries of acceptable punishment and state power.

Further, the Supreme Court's assertion that sexually violent predator civil commitment laws and sex offense registry laws are fundamentally civil in nature has insulated these new punitive expansions from meaningful rights challenges. As I demonstrate in chapter 3, the Supreme Court has actively contributed to the expansion of the "shadow carceral state" by allowing criminal punishments to seep into the realm of civil schemes, while simultaneously legally denying individuals the civil liberty protections that are so central to the criminal legal

system.[547] These constitutional developments, largely driven by the *Smith* and *Kendricks* decisions, have created what is effectively a legal limbo that has allowed for increasingly punitive sex offense legislation.

One of the most notable pieces of punitive federal sex offense legislation is the 2003 Adam Walsh Act (AWA). The AWA pushed the boundaries of acceptable federal involvement in state and local efforts while simultaneously contributing to the expansion of the punitive powers at all levels. As I demonstrate in chapter 4, the Spending Power utilized through the AWA is an essential site for examining the new and pernicious ways the carceral state continues to expand in the form of postconviction registries and community notification practices. It is important to understand what the federal government has decided to invest in and how those investments have impacted the contours of the state. Unfortunately, as I argue, these expansions--influenced heavily by the specter of the "sex offender" --have done little to actually prevent and redress sexual harm. Indeed, the majority of federal spending in the prevention of sexual harm has overwhelmingly gone towards the punishment of people with sex offenses, despite research that shows the most effective approaches to preventing sexual harm are the ones that address the structures of inequality that perpetuate sexual harm.[548] The nearly sole reliance on the carceral state to prevent and redress sexual harm functions only to bolster state power while failing to meaningfully address the large-scale issues at hand.

Perhaps unsurprisingly, the investment in postconviction public registries has crept into other types of crime. As I find in chapter 5, the creep of public post-conviction registration has

[547] It should be noted that there has been some movement in the state courts on this issue. The Michigan Supreme Court ruled that its registry was cruel and unusual punishment. See Does v. Snyder, No. 16-13137 (E.D. Mich. Apr. 21, 2017).
[548] Corrigan, "Making Meaning of Megan's Law."

metastasized into an array of offenses ranging from kidnapping to animal abuse to drug possession. The emergence of these new sprawling registration schemes relied upon the technological infrastructure of the sex offense registries, making them low cost "solutions" to social ills du jour, particularly those that had recently caught media attention. These expansions also relied on similar political logics: the answer to harm is to locate the "bad apples" and make them known to the public. As I demonstrate, the growth and development of public post-conviction registration into a range of offenses represents a continued investment in ineffective carceral solutions to what are at the core social problems like violence, child welfare and substance abuse disorder.

While these expansions of punitive state power have been devastating for the people caught up in contemporary sex offense laws, these expansions have not been without contestation. As I demonstrate in chapter 6, even with the significant structural, social, and individual barriers to organizing and coalition building, anti-registry activists--who are almost exclusively registry-impacted themselves--demonstrate formidable tenacity, adaptability, and ability to build much needed networks of support amongst themselves. Most of the activists I came to know in my three years of research understood that change does not solely happen in the courts and the legislature. Instead, activists also invested a significant amount of energy into supporting each other. They formed nonprofits, recorded podcasts, wrote magazines, and established support groups. Activists saw these activities as essential to helping people on the registry overcome their shame so that they can "come out," share their stories and humanize themselves with the hope of creating change.

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