

# PUTTING REASON BEFORE RETRIBUTION: EMBRACING UTILITARIAN PRINCIPLES TO REFORM CONTEMPORARY SEX-OFFENDER REGISTRY LAWS

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Currently, there is insufficient evidence to determine whether posting information about sex offenders on the internet is a valuable and effective public safety tool; however . . . the public feels that the internet registry provides important information that can be used to protect families and [the public] expects such information to be a matter of public record.<sup>1</sup>

## I. INTRODUCTION

On August 27, 2009, a young woman named Jaycee Lee Dugard was reunited with her family after being held prisoner for eighteen years.<sup>2</sup> In 1991, eleven-year-old Jaycee was abducted on her way to a bus stop.<sup>3</sup> The police found no trace of the girl or her abductor until, after nearly two decades, a makeshift compound of tents was discovered in the backyard of Phillip Garrido.<sup>4</sup> Jaycee had been living in this hidden, basketball-court-

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<sup>1</sup> VT. STATE HOUSE LEGIS. COUNCIL, SEX OFFENDER SUPERVISION AND COMMUNITY NOTIFICATION STUDY COMMITTEE REPORT 11 (2005), *available at* <http://www.leg.state.vt.us/reports/05SexOffender/report.pdf>.

<sup>2</sup> *Times Topics: Jaycee Dugard*, N.Y. TIMES, Sept. 1, 2009, [http://topics.nytimes.com/topics/reference/timestopics/people/d/jaycee\\_dugard/index.html](http://topics.nytimes.com/topics/reference/timestopics/people/d/jaycee_dugard/index.html).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

sized lot for the majority of her captivity.<sup>5</sup> During this time, she had given birth to two daughters, fathered by the fifty-eight-year-old man accused of kidnapping and raping her.<sup>6</sup> When the police found her, in 2007, Jaycee's daughters were eleven and fifteen years old.<sup>7</sup>

Unsurprisingly, the news media was quick to search for answers, assign blame, and ask the ultimate question: *how could this happen?* This question was particularly poignant in light of several salient facts the media uncovered: Phillip Garrido, a convicted sex offender, was on parole for rape and kidnapping when he abducted Jaycee and fathered her two children.<sup>8</sup> In 1993, he violated parole and returned to prison for five months.<sup>9</sup> He was also charged with rape and acts of child molestation and sexual penetration of a minor,<sup>10</sup> and between 1998 and 2002, he was investigated as a "person of interest" with respect to a number of murders involving women.<sup>11</sup> Moreover, throughout Jaycee's captivity, law enforcement officials had visited Garrido's home on several occasions. A spokesperson for the California Department of Corrections and Rehabilitation indicated that a parole agent had visited Garrido's home a number of times each month in 2009 without witnessing "anything unusual."<sup>12</sup> Law enforcement officers tasked with monitoring sex offenders in the United States visited Garrido in 2008 to confirm his address,<sup>13</sup> but reported nothing unusual during the visit.<sup>14</sup> The local fire department visited Garrido's home at least six times in a single decade after reports of bonfires in the yard;<sup>15</sup> still, these reports did not trigger an investigation thorough enough to discover Jaycee and her children living in the backyard. Even in 2006, when a neighbor called the police with a complaint that Garrido had a "sexual addiction" and had children living in his backyard, a sheriff responded by visiting the home, but failed to search

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<sup>5</sup> Jesse McKinley, *Photographs Offer a Look Inside Life for Captives*, N.Y. TIMES, Aug. 30, 2009, at A9.

<sup>6</sup> *Id.*

<sup>7</sup> *Times Topics: Jaycee Dugard*, *supra* note 2.

<sup>8</sup> *Id.*

<sup>9</sup> Carol Pogash & Solomon Moore, *California Officials Fear Abduction Case May Hurt Efforts on Parole*, N.Y. TIMES, Aug. 30, 2009, at A9.

<sup>10</sup> *Times Topics: Jaycee Dugard*, *supra* note 2.

<sup>11</sup> McKinley, *supra* note 5.

<sup>12</sup> Pogash & Moore, *supra* note 9.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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the house or the backyard.<sup>16</sup> In 2008, a team of investigators showed up unannounced and undertook a larger search of the single-story home; however, they too failed to notice the tents and a shed located behind an eight-foot-high fence, where Jaycee and her children were being held captive.<sup>17</sup>

It was not until August 24, 2009, that events leading to Mr. Garrido's arrest began to unfold.<sup>18</sup> Mr. Garrido was questioned by authorities regarding a religious event he wanted to produce on the University of California, Berkeley campus.<sup>19</sup> He had been on the campus handing out pamphlets with two children who were alarmingly quiet and "robotic," according to campus security.<sup>20</sup> When asked, the children told campus police that they had an "older sister" at home.<sup>21</sup> Suspicious, the authorities contacted Garrido's parole officer,<sup>22</sup> who had never heard of Garrido having any children.<sup>23</sup> Subsequently, Garrido appeared in front of his parole officer with Jaycee, her two young girls, and his wife, Nancy.<sup>24</sup> Though Garrido initially referred to Jaycee as "Allissa," she eventually revealed her true name and history, at which point Garrido was arrested.<sup>25</sup>

Crimes against children have always incited serious public concern. In the wake of Jaycee's discovery, and other similar incidents involving children, lawmakers and special interest groups have sought to address how the law can best protect the most innocent and defenseless members of society.<sup>26</sup> Special interest groups such as the Children's Defense Fund have supported restrictions on sex offenders.<sup>27</sup> In response to these

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<sup>16</sup> *Id.*

<sup>17</sup> Jesse McKinley & Carol Pogash, *Kidnapping Victim Was Not Always Locked Away*, N.Y. TIMES, Aug. 28, 2009, at A1.

<sup>18</sup> *Id.*

<sup>19</sup> McKinley, *supra* note 5.

<sup>20</sup> McKinley & Pogash, *supra* note 17.

<sup>21</sup> *Id.*

<sup>22</sup> McKinley, *supra* note 5.

<sup>23</sup> McKinley & Pogash, *supra* note 17.

<sup>24</sup> McKinley, *supra* note 5.

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., Sarah Tofte, *America's Flawed Sex Offender Laws*, HUMAN RIGHTS WATCH, Sept. 5, 2009, <http://www.hrw.org/en/news/2009/09/05/americas-flawed-sex-offender-laws>.

<sup>27</sup> Children's Defense Fund, *Children's Defense Fund's Priorities for America's Children: What Are President-Elect Barack Obama's Plans to Make Them a Reality?*, Nov. 2008, <http://cdf.childrensdefense.org/site/DocServer/president-elect-obama-plan-cdf-priorities-americas-child.pdf?docID=8961>.

interest groups and to numerous attacks on children in recent years,<sup>28</sup> Congress passed the Adam Walsh Child Protection and Safety Act of 2006 (the “Adam Walsh Act”), which called for the establishment of a national system of registration for sex offenders.<sup>29</sup> Named after the son of John and Revé Walsh, who was abducted in Florida in 1981 and whose remains were later discovered in a canal, the purpose of the Adam Walsh act is to protect the public, particularly children, from sex offenders.<sup>30</sup> It purports to honor the Walshes’ commitment to protecting the safety and well being of children in the United States.<sup>31</sup> To its proponents, the legislation represented a positive step towards protecting the nation’s youth.

Such legislation is no doubt noble in its intent; however, the extent to which the Act, in practice, achieves these goals is questionable. Certainly, legislation of this type—legislation that comes about as a result of a sensational event or case—has the potential to be overly broad at inception on account of the emotionally charged demands for sweeping reforms. The question, then, is how to balance the public outrage with sensible, effective regulations.

This Note addresses some of the many issues resulting from this tension created by laws like the Adam Walsh Act; that is, acts that are overbroad in design but narrow in purpose. This Note primarily analyzes the consequences of the over-inclusive definitions in the Act and other sex-offender registry laws. By applying utilitarian principles to sex-offender registry laws, this Note argues that these laws’ stated goal of “protecting children” can be better achieved by discerning the important difference between certain inconsequential “sex offenses” and other more serious ones. Certain offenders, while their crimes may retain an element of “sexuality” under the broadest, most extreme definition of the word, need not be monitored at all. This Note suggests that, by eliminating the registration requirements for “Tier I” offenders, funds, resources, and monitoring efforts can be more effectively directed towards offenders with higher rates of recidivism, who commit the most serious crimes. Crimes that have only more marginal ramifications on society ought to be treated

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<sup>28</sup> The Act’s declaration of purpose lists seventeen children whose abductions had been widely publicized in recent years. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 102(1)–(17), 120 Stat. 587–91 (codified at 42 U.S.C. § 16901).

<sup>29</sup> Children’s Defense Fund, *supra* note 27.

<sup>30</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 102 (codified at 42 U.S.C. § 16901).

<sup>31</sup> *Id.* § 2(b).

in a manner proportional to their effect. Indeed, by maintaining part of the registry list, the public will have access to information it desires, but without the immaterial categories that are overly broad and confusing, that distort the data and detract from registry laws' important goals. Sex-offender registration requirements will produce the greatest utility when they are narrowly tailored to achieve their intended purpose.

Part II of this Note briefly outlines the history of sex-offender registry laws and the Walsh Act, and identifies criticism that have been directed at the Act. Part III introduces principles of utilitarianism and discusses how these principles can be applied to sex-offender registry laws. Finally, Part IV examines how these utilitarian principles, when considered in concert with the criticisms of sex-offender registry laws, effectively preclude states' compliance with the Act. This Note will discuss the problems of the Adam Walsh Act and explain why the Act needs to be restructured, if not entirely repealed. Ultimately, this Note suggests a compromise solution between those who want radical reform and those who want to keep substantive portions of the Act intact.

## II. HISTORY OF SEX-OFFENDER REGISTRY LAWS

Sex offender registries are not new to the United States.<sup>32</sup> California passed the United States' first registration law in 1944, and Arizona followed in 1951.<sup>33</sup> Gradually, each state adopted similar laws, some requiring any sex offender—juvenile or adult—to register their names, addresses, and other identifying information, like fingerprints and photographs, with state agencies.<sup>34</sup> Others, meanwhile, required registration only for “habitual” sex offenders whose victims were under eighteen years of age.<sup>35</sup> The purpose of the registries was purportedly to protect the community by increasing awareness of these specific types of offenders.<sup>36</sup> In order to establish a more uniform monitoring system, Congress passed the first federal registration law in 1994: the Jacob Wetterling Crimes Against Children and Sexually Violent Offender

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<sup>32</sup> See SCOTT MATTSON & ROXANNE LIEB, *SEX OFFENDER REGISTRATION: A REVIEW OF STATE LAWS 5* (Washington State Institute of Public Policy) (1996), available at <http://www.wsipp.wa.gov/rptfiles/regsrtn.pdf>.

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

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

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

Registration Act (the “Wetterling Act”).<sup>37</sup> Under the law, an individual who commits specific crimes against a minor,<sup>38</sup> or who is convicted of sexually violent offenses, is required to register a current address for a specified time period.<sup>39</sup> The registration requirements under the Act are referred to as “SORNA”: Sex Offender Registration and Notification Act.<sup>40</sup>

In 1996, Congress amended the Wetterling Act by passing Megan’s Law, which required community notification for fifteen years following the release from prison of individuals convicted of sexually violent offenses.<sup>41</sup> Most recently, in 2006, Congress enhanced these laws with the creation of the Adam Walsh Act Child Safety and Protection Act.<sup>42</sup> The new legislation expanded the definition of “sex offender” to include any individual convicted of a criminal offense that has an element involving a sexual act or sexual contact with another.<sup>43</sup> The Act created three tiers under which offenders are categorized.<sup>44</sup> A “Tier I” offender, the lowest possible classification, is someone who is not a Tier II or Tier III offender and whose crime is punishable by less than one year in prison.<sup>45</sup> The classification is thus a catch-all that can include any offense statutorily deemed to be a “sex offense.”<sup>46</sup> In California, for example, an eighteen-year-old who receives a text message, photo, or video of a seventeen-year-old (or younger) significant other “engaging in or simulating sexual

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<sup>37</sup> 42 U.S.C. § 14071 (2006).

<sup>38</sup> *Id.* § 14071(a)(3)(A).

<sup>39</sup> *Id.* § 14071(a)(1)(A).

<sup>40</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 103, 120 Stat. 591 (2006) (codified at 42 U.S.C. § 16902).

<sup>41</sup> JUSTICE POLICY INST., REGISTERING HARM: HOW SEX OFFENSE REGISTRIES FAIL YOUTH AND COMMUNITIES (2008), *available at* [http://www.justicepolicy.org/images/upload/08-11\\_RPT\\_WalshActRegisteringHarm\\_JJ-PS.pdf](http://www.justicepolicy.org/images/upload/08-11_RPT_WalshActRegisteringHarm_JJ-PS.pdf); Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).

<sup>42</sup> *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006).

<sup>43</sup> SCOTT EHLERS, THE ADAM WALSH ACT’S IMPACT ON THE STATES (National Association of Criminal Defense Lawyers) (2008), *available at* [http://www.nacdl.org/sl\\_docs.nsf/issues/sexoffenderwebinar/\\$FILE/Walsh\\_Scott.ppt](http://www.nacdl.org/sl_docs.nsf/issues/sexoffenderwebinar/$FILE/Walsh_Scott.ppt) (last visited May 22, 2011); Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111, 120 Stat. 591–93 (2006).

<sup>44</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111, 120 Stat. 591–93 (2006).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

conduct<sup>47</sup> can be prosecuted under California Penal Code section 311.11.<sup>47</sup> The punishment is limited to a maximum of one year in prison or a few thousand dollars in fines,<sup>48</sup> which means that this eighteen-year-old would be a Tier I offender and would be subject to mandatory registration requirements for at least fifteen years—beyond his or her thirty-third birthday.<sup>49</sup>

Additionally, crimes like indecent exposure or public urination qualify as sex offenses under title 9 of the California Penal Code, and an offender would be classified as a Tier I offender.<sup>50</sup> Bigamy, which is also punishable by fines and up to one year in prison, similarly qualifies for the Tier I registration requirements.<sup>51</sup> Thus, if an individual remarries without understanding that his or her previous marriage has yet to be legally dissolved, he or she will be a Tier I offender.<sup>52</sup> In addition, soliciting individuals to visit a place for the purposes of prostitution—as long as the prostitutes in question are adults—carries a punishment of six months; therefore, individuals convicted of this crime would also be considered Tier I offenders.<sup>53</sup> In more than half of the states, teenagers who engage in consensual sex are guilty of a sex crime classified under Tier I or higher.<sup>54</sup>

More serious crimes are classified as Tier II and Tier III offenses.<sup>55</sup> Offenses punishable by more than one year in prison are automatically designated as Tier II offenses or higher.<sup>56</sup> Offenses involving the use of minors in sexual performances, the solicitation of a minor for prostitution, or any new offense committed by a Tier I offender are all Tier II offenses.<sup>57</sup> Production or distribution of child pornography is also a Tier II offense.<sup>58</sup> Aggravated crimes are considered more severe and are

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<sup>47</sup> CAL. PENAL CODE § 311.11(a) (Deering 2011).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* § 314.

<sup>51</sup> *Id.* § 283.

<sup>52</sup> *See id.* § 281.

<sup>53</sup> CAL. PENAL CODE § 318 (Deering 2011).

<sup>54</sup> *Id.*

<sup>55</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111, 120 Stat. 591–93 (2006).

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

<sup>57</sup> *Id.* § 103.

<sup>58</sup> *Id.* § 111.

classified under Tier III. Crimes such as kidnapping a minor, forcible acts of sexual penetration, and rape are considered Tier III offenses.<sup>59</sup>

Essentially, the Walsh Act applies to everyone convicted of a sex offense, but broadly classifies offenders based on the seriousness of the offense. This can have far-reaching consequences because of the general definition of a “sex offense,” which, according to the Federal Bureau of Investigations, includes all “[o]ffenses against chastity, common decency, morals and the like” and also includes “[a]ttempts.”<sup>60</sup> Thus, Tier I presumably contains the largest number of individuals based on the types of crimes that fall under this broad definition and also meet the minimum standards required under Tier I.

The registration requirements vary according to the tier of the offense. Tier I offenders are subject to a registration period of fifteen years with the possibility of a reduction if the offender maintains a clean record for at least ten years.<sup>61</sup> Registration time periods are extended to twenty-five years for Tier II offenders, and Tier III offenders must register for life.<sup>62</sup> Throughout the registration period, the offender must provide detailed information about his or her residence, place of employment, and vehicle registration to officials managing the state’s registry.<sup>63</sup> Local jurisdictions must keep records of their offenders that include such information as fingerprints, DNA samples, and entire criminal histories with all convictions and dates of arrests.<sup>64</sup> Verification of this information is required on an annual basis.<sup>65</sup>

While the guidelines seem straightforward enough, states have had difficulty complying with the Act.<sup>66</sup> Originally, an implementation

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<sup>59</sup> *Id.* § 111(4).

<sup>60</sup> Federal Bureau of Investigation, Offense Definitions – Crime in the United States 2009, [http://www2.fbi.gov/ucr/cius2009/about/offense\\_definitions.html](http://www2.fbi.gov/ucr/cius2009/about/offense_definitions.html) (last visited May 22, 2011). Presumably, Tier I actual data that delineates the total number of registrants classified under Tier I, Tier II, or Tier III does not appear to exist. From a broader perspective, there is a question of why Tier I offenders need to be registered in lieu of, perhaps, armed robbers or those convicted of burglary or mugging crimes. Toft, *supra* note 26.

<sup>61</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 115, 120 Stat. 595 (2006).

<sup>62</sup> *Id.* § 114.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* § 116.

<sup>66</sup> Kristi Jourdan, *States Struggle to Comply with Sex Offender Database*, WASH. TIMES, July 7, 2009, at A1, available at <http://www.washingtontimes.com/news/2009/jul/07/states-struggle-to-comply-with-sex-offender-databa>.



deadline of July 2009 was set, beyond which states would face losing up to 10% of their Federal Byrne Justice Assistance Grant funds.<sup>67</sup> Although federal funding was on the line, the first-year costs of implementing the Adam Walsh Act actually outweighed the funds that non-compliant states stood to lose.<sup>68</sup> As the date approached, not a single state was prepared to meet the deadline, so the Attorney General extended the date to July 27, 2010.<sup>69</sup> The new deadline came and went without much change<sup>70</sup>: as of July 31, 2010, only three states and two American Indian nations were in compliance with the requirements.<sup>71</sup>

#### A. RETRIBUTION AND PUNISHMENT

##### 1. Official Punishment: Retroactive Application and the Constitution

The Adam Walsh Act's registration requirement may be construed as a form of punishment—defined as forced performance of affirmative duties that are burdensome and punitive—particularly to low-level offenders. While the tiered classifications within the Act appear facially neutral, and the delineation of registration requirements seems logically based on the seriousness of the offenses within each tier, the Act's reach may be limitless. Although one goal of the Act is to protect the public, particularly children, from sex offenders, an overly broad application of these laws may not achieve this goal.<sup>72</sup> Furthermore, placing an individual on a registry list for a crime that has some sexual element and forcing that individual to uphold the registration requirements for lengthy periods of time might border on a type of “double punishment.”

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<sup>67</sup> *Id.* See generally Bureau of Justice Assistance, Edward Byrne Memorial State and Local Law Enforcement Assistance Grant Program, <http://www.ojp.usdoj.gov/BJA/grant/byrne.html> (last visited Jan. 27, 2011) (“[The program] is a partnership among federal, state, and local governments to create safer communities. BJA is authorized to award grants to states for use by states and units of local government to improve the functioning of the criminal justice system—with emphasis on violent crime and serious offenders . . .”).

<sup>68</sup> JUSTICE POLICY INST., *supra* note 41.

<sup>69</sup> *Id.*

<sup>70</sup> Jourdan, *supra* note 66.

<sup>71</sup> Tu-Uyen Tran, *National Sex Offender Registration Struggles to Take Hold*, GRAND FORKS HERALD, July 31, 2010, available at <http://www.grandforksherald.com/event/article/id/170534>.

<sup>72</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 102, 120 Stat. 587, 590 (2006).

In September of 2009, Iowa's Supreme Court upheld a conviction of a teenager charged with knowingly disseminating obscene material to a minor.<sup>73</sup> The case involved "sexting" (sending sexually explicit photos via text message) among teenagers.<sup>74</sup> The defendant, Canal, who was eighteen at the time of the offense, sent a photo of his erect penis to a minor classmate.<sup>75</sup> As a joke, the minor had requested a photo of the defendant's penis a number of times in a phone call because "some of her friends were doing it."<sup>76</sup> The defendant sent a photo, which was later discovered by the minor's parents.<sup>77</sup> Canal was sentenced to jail time and fined \$250, and was required to register as a sex offender and be subject to the monitoring requirements.<sup>78</sup>

Adding individuals like Canal to sex offender registries does little to further the goals of the Adam Walsh Act. While disseminating obscene photos is serious, the circumstances under which this offense occurred mitigate its severity. The reality is that Canal will almost certainly spend the next decade on a registry list, even though a judge thought it sufficient to have him serve only nineteen days in jail.<sup>79</sup> As a result of his conviction, Canal or any member of his household could be prohibited from public housing.<sup>80</sup> Furthermore, Canal could be a registered sex offender well into his thirties; in other words, far beyond his college years, his personal residence information will be available on a public website and databases will carry a sample of his DNA. It is unlikely that having him register will either have a deterrent effect or effectively protect the community from further offenses. Thus, it seems that the purpose of placing Canal on the list is solely punitive.

Defendants younger than Canal are subject to registration requirements.<sup>81</sup> Indeed, under the Act, children as young as fourteen

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<sup>73</sup> State v. Canal, 773 N.W.2d 528, 529 (Iowa 2009).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 529.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 529–30.

<sup>79</sup> *Id.* at 529.

<sup>80</sup> 24 C.F.R. §§ 5.856, 960.404 (2010); 42 U.S.C. § 13663(a) (2006); *see also* Archdiocesan Hous. Auth. v. Demmings, 108 Wash. App. 1035 (2001) (discussing why convicted sex offenders subject to lifetime registration are prohibited from Section 8 and other federally funded housing).

<sup>81</sup> *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111(8), 120 Stat. 587, 593 (2006).

could be required to register for offenses like Canal's.<sup>82</sup> To the extent that monitoring teenage behavior is necessary, continuing to restrict the behavior of a teenager when he or she reaches adulthood borders on the absurd.

Clearly, society does not tolerate Canal's behavior; there is a public law prohibiting the distribution of obscene materials to minors.<sup>83</sup> Laws such as the one under which Canal was convicted may reflect a societal refusal to accept any sexually-charged behavior between teenagers. However, even with an eye towards an extreme interpretation of the societal attitudes underlying sex-offender registry laws, it is inarguable that Canal was punished by his addition to a sex offender registry. In theory, the registry was not designed to be punitive in the sense that it would be merely an extension of sentencing. In practice, however, it has a punitive effect.

The United States Courts of Appeal have recently considered whether the registration requirements of the Adam Walsh Act are punitive. Individuals convicted of sex crimes prior to implementation of the Act are still required to register and are subject to federal penalties if they fail to comply.<sup>84</sup> This has raised questions of whether or not the retroactive nature of the Act's requirements violates the *ex post facto* clause of the United States Constitution.<sup>85</sup>

In *United States v. Husted*, the defendant was convicted in a district court of failing to register as a sex offender when the defendant moved from Oklahoma to Missouri before the passage of the Adam Walsh Act.<sup>86</sup> The Tenth Circuit reversed, holding that the Act did not apply to the defendant retroactively because its legislative history was unclear about whether relevant travel could occur before the Act's passage.<sup>87</sup> SORNA uses the word "travels," which could plausibly indicate that the Act's "relevant travel" provision concerns only travel that occurs after the statute was passed.<sup>88</sup> Equally plausible, however, is Congress's intent to encompass travels made before the Act's passage, as evidenced by a

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<sup>82</sup> *Id.*

<sup>83</sup> See CAL. PENAL CODE § 311.11(a) (Deering 2010).

<sup>84</sup> *Id.*

<sup>85</sup> U.S. CONST. art. I, § 9.

<sup>86</sup> *United States v. Husted*, 545 F.3d 1240, 1242 (10th Cir. 2008).

<sup>87</sup> *Id.* at 1247.

<sup>88</sup> *Id.*

revision to the bill that deleted “thereafter” before “travels in interstate or foreign commerce.”<sup>89</sup>

In contrast, the Seventh Circuit, in *United States v. Dixon*, faced the same issue but decided against following the Tenth Circuit, stating that the Tenth Circuit’s reliance on verb tense could lead to inconsistent results.<sup>90</sup> The Seventh Circuit further interpreted the *ex post facto* clause by relying on *Smith v. Doe*, in which the Supreme Court ruled that an Alaskan registration law was not retroactively punitive when the convictions themselves already subjected individuals to stricter community scrutiny and would be revealed through job and housing background checks.<sup>91</sup> The decision in *Dixon* did not consider whether the affirmative requirements of registration— notifying the community and appearing before law enforcement—are punitive. Rather, it avoided the question entirely by deferring to *Smith*.<sup>92</sup>

One of the two defendants in *Dixon*, Thomas Carr, was granted certiorari. Oral arguments in the case of *Carr v. United States* were heard in the Supreme Court beginning on February 24, 2010.<sup>93</sup> In its opinion, issued on June 1, 2010, the Supreme Court chose not to address the *ex post facto* issue but instead decided that the Act did not apply to pre-enactment travel based on the Act’s text and legislative purpose.<sup>94</sup> To date, there is no Supreme Court decision that addresses the *ex post facto* issue.

While the punitive nature of the Adam Walsh Act remains a contentious and unresolved issue that is beyond the scope of this Note, the

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<sup>89</sup> *Id.* (citing Children’s Safety and Violent Crime Reduction Act of 2005, H.R. 4472, 109th Cong. § 2250(a)(2) (2005)).

<sup>90</sup> *United States v. Dixon*, 551 F.3d 578, 583 (7th Cir. 2008), *rev’d and remanded sub nom. Carr v. United States*, 130 S. Ct. 2229, 2236 (2010) (concluding that “preenactment travel falls outside the statute’s compass”).

<sup>91</sup> *Id.* at 584; *Smith v. Doe*, 538 U.S. 84, 101 (2003). In *Smith*, the Court observed that registrants were not punished by the dissemination of their criminal status via the registry website because landlords could already run ordinary background checks and discover criminal histories that were a matter of public record. *Smith*, 538 U.S. at 101. Justice Souter expressed concern about vigilantism against registered offenders but concurred primarily because he believed that the Court should presumptively defer to the constitutionality of state law. *Smith*, 538 U.S. at 109 (Souter, J., concurring). Justices Stevens, Ginsberg, and Breyer dissented, noting the punitive effects of the retroactive requirements. *Smith*, at 111, 114–15 (Stevens, J., joined by Ginsberg, J., and Breyer, J., dissenting).

<sup>92</sup> *Dixon*, 551 F.3d at 584.

<sup>93</sup> Transcript of Oral Argument, *Carr v. United States*, 130 S. Ct. 2229 (2010) (No. 08-1301), available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/08-1301.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1301.pdf) (follow “oral arguments” then follow “argument transcripts”).

<sup>94</sup> *Carr*, 130 S. Ct. at 2233, 2237, 2241.

Act does at the very least impose regulatory burdens on offenders merely as a consequence of their classification as sex offenders. Even if the Supreme Court had confirmed its decision in *Smith* and resolved that the Act did not violate the *ex post facto* clause by being retroactively punitive, the Court still would have had to address the barriers and affirmative duties that the registration laws impose. Thus, despite deciding that registration requirements were not *punitive*, the Court would have probably considered that *duties* existed. Individuals on the list have a burden to do, or refrain from doing, certain things from which the general public is exempt. The Act's imposition of affirmative duties, divorced from the *ex post facto* constitutional argument, is a criticism of the Act's application.<sup>95</sup>

## 2. Unofficial Punishment: Social Costs and Vigilantism

Punishment or retribution from individual members of the public with access to the registry lists—rather than from the government itself—is an unintended but potentially serious consequence of the Adam Walsh Act.<sup>96</sup> Fear of vigilantism was likely a concern when the Act passed: section 118 requires a registry website to include a warning that any individual who uses the information to harass, injure, or commit a crime against listed sex offenders will be subject to criminal and civil penalties.<sup>97</sup> Despite these warnings, attacks against listed individuals have occurred.

In 2002, before the Adam Walsh Act was enacted, nineteen-year-old William Elliott was convicted in the state of Maine for having sex with his girlfriend, who was a minor at that time.<sup>98</sup> His girlfriend would have turned sixteen within two weeks of the incident, but Elliott's action nonetheless constituted a crime, as the age of consent in the state is sixteen.<sup>99</sup> Similar to what would later be required under the Adam Walsh

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<sup>95</sup> See, e.g., Catherine L. Carpenter, The Constitutionality of Strict Liability in Sex Offender Registration Laws, 86 B. U. L. Rev. 295, 369. (2006) (discussing the balancing of the state's interest in protecting the community versus the burdensome intrusion into registrants' liberty interests).

<sup>96</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 118(f), 120 Stat. 587, 596 (2006).

<sup>97</sup> *Id.*

<sup>98</sup> John R. Ellement & Suzanne Smalley, *Sex Crime Disclosure Questioned: Maine Killings Refuel Debate Over Registries*, BOS. GLOBE, Apr. 18, 2006, at A1.

<sup>99</sup> *Id.*

Act, Maine kept a database of everyone convicted of a sex offense and posted the picture and address of each offender on a public website.<sup>100</sup>

In 2006, Elliott was shot and killed.<sup>101</sup> His murderer, Stephen Marshall, logged on to Maine's sex-offender-registry website and gained information on thirty-four different individuals, including Elliott.<sup>102</sup> Marshall also shot another man whom he found on the list, and then shot himself when confronted by police.<sup>103</sup> It is unknown whether Maine's online registry contained a warning against using its information to harm the listed individuals, but one ultimately wonders if an explicit warning would be any more effective than existing laws prohibiting assault or murder.

Moreover, studies conducted by the Association for the Treatment of Sexual Abusers, in conjunction with the U.S. Department of Justice and the Canadian government, have revealed that between one-third and one-half of all sex offenders who are subject to community notification laws have experienced negative consequences, such as job loss, housing instability, threats of harassment, vigilantism, or property damage.<sup>104</sup> Physical assault occurs in 5 to 16% of cases.<sup>105</sup> Moreover, 19% of sex offenders reported incidents of other members of their households being harassed.<sup>106</sup> Given the prevalence of abusive actions against sex offenders, expecting posted warnings against vigilantism to quell such abuse is likely expecting too much of these warnings.

#### B. TRACKING SEX OFFENDERS AND NOTIFYING COMMUNITIES

Laws that require sex-offender registration lists and community notification are commonly referred to as Megan's Law, named for Megan Nicole Kanka, who, in 1994, was kidnapped, assaulted, and murdered.<sup>107</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> *Suspected Killer Accessed Online Sex Offender Registry, Maine Police Say*, CBC NEWS, Apr. 17, 2006, <http://www.cbc.ca/world/story/2006/04/17/newmaineshooting20060417.html>.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* It appeared as though the website offered Marshall a target. *Id.*

<sup>104</sup> *The Registration and Community Notification of the Adult Sexual Offenders*, ASS'N FOR TREATMENT OF SEXUAL ABUSERS, Apr. 5, 2010, <http://atsa.com/ppnotify.html>.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* Particularly, when individuals as young as fourteen can be listed, the effect on the other members of the household can be severe.

<sup>107</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 102(2),

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These laws, which are required by SORNA, are not new or unique to the Adam Walsh Act. The intent of these laws is to provide the public with access to information about a sex offender's appearance, residence, crime, and occasionally, his or her school or place of business.<sup>108</sup> After an offender registers in his or her jurisdiction, law enforcement officials are responsible for disseminating that information to the appropriate agencies, such as volunteer organizations that deal with children.<sup>109</sup> The information is also posted on a national website.<sup>110</sup> Assuming that members of a community are diligent and check the website, they will know if an offender lives nearby.

Communities often perceive sex offenders as introverted outsiders, but this ignores the reality that 90% of sex crimes against children are perpetrated by family members or individuals whom the victim knows.<sup>111</sup> In 34% of cases involving sex crimes against minors, the victimizers were family members.<sup>112</sup> When the victim is under six years old, nearly 50% of offenders were family members.<sup>113</sup> Thus, while the fear of a Jaycee Lee Dugard-type incident is prominent, and while such incidents are, indeed, sensational and disturbing, their frequency is extraordinarily rare. Children who are kidnapped and sexually assaulted by strangers represent a tiny minority of crimes against children.<sup>114</sup> At best, the registration laws are designed to give a community notice that, for instance, a neighbor, soccer coach, or crossing guard has been previously convicted of a sex offense. Certainly, informing the public that one of these individuals is a potential threat is fundamental to the purpose of the Adam Walsh Act. However, it is unlikely that the national registry list would provide families of convicted sex offenders with information about the individual that those families did not already possess. Moreover, when the offender is part of the victim's household, the victim's information may be

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103, 121, 120 Stat. 587, 590–91, 597 (2006).

<sup>108</sup> *Id.* § 114, 120 Stat. 587, 594.

<sup>109</sup> *Id.* § 121(b), 120 Stat. 587, 597.

<sup>110</sup> *Id.* § 118(a), 120 Stat. 587, 596.

<sup>111</sup> HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 4 (Jamie Fellner ed., 2007).

<sup>112</sup> *Id.* at 24 (citation omitted).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

inadvertently exposed to the public despite the Act's requirement that victims' names not be published.<sup>115</sup>

The high rate of intra-familial crimes is one of the primary concerns over the Adam Walsh Act, and may prevent acceptable degrees of accuracy in a study on the efficacy of registry lists.<sup>116</sup> Public notification is unlikely to successfully deal with sex offenders from within families and close interpersonal relationships.<sup>117</sup> It appears that no reliable data exists regarding sex offense rates both before and after registration laws were implemented. However, in one study that examined the criminal histories of convicted sexual offenders in New England, only 26% met the criteria for registration under pre-Adam Walsh Act requirements.<sup>118</sup> Of that 26%, approximately one-third had committed a predatory sexual act against a stranger.<sup>119</sup> Based on this data, the study hypothesized that only 4.4% of the victims in the entire sample might have been reached by the notification system.<sup>120</sup> Another study compared recidivism rates for sex offenders subject to and not subject to registration laws and found no statistically significant difference.<sup>121</sup> Thus, these limited studies suggest that, in theory, the registration and notification system has only questionable efficacy.<sup>122</sup>

If, however, we accept that community notification and online publication of registries are integral aspects of the Act that the public demands, and even if we accept that the notification requirements have limited efficacy, there are still serious issues with the volume of individuals listed. This is true for two reasons: first, law enforcement officials and others keeping track of the list will be unable to effectively update and monitor the list for accuracy. The National Center for Missing and Exploited Children reports that over 700,000 men and women are on registry lists in the United States.<sup>123</sup> Of those, approximately 100,000

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<sup>115</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248 § 118(b)(1), 120 Stat. 587, 596 (2006).

<sup>116</sup> Richard Tewksbury, *Validity and Utility of the Kentucky Sex Offender Registry*, 66 FED. PROBATION 21, 22 (2002).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, MAP OF REGISTERED SEX OFFENDER IN THE UNITED STATES (2010), [http://www.missingkids.com/en\\_US/documents/sex-](http://www.missingkids.com/en_US/documents/sex-)



offenders are not living where they are listed and, thus, are effectively missing from registry lists.<sup>124</sup> Others have been deported, and a large number are incarcerated on unrelated charges.<sup>125</sup> Florida's registry website even continued to carry the names and information of some offenders for years after their deaths.<sup>126</sup> In Kentucky, before the Adam Walsh Act, a study concluded that 26% of registrants' home addresses could not possibly be accurate—even though the addresses existed, they led to empty lots, used car dealerships, or doctor's offices.<sup>127</sup> In examining various Los Angeles neighborhoods, a search revealed offenders who had been in violation of the registration requirements for years, including one who had been in violation since 1996.<sup>128</sup>

Second, those seeking information on the lists will be overwhelmed by the quantity of data.<sup>129</sup> It is important to note that the online registries for twenty-two states and the District of Columbia have no information detailing the seriousness of the crimes.<sup>130</sup> Other registries that include at least some such information use differing and confusing language to differentiate between non-violent and violent sex crimes.<sup>131</sup> For instance, in a one-mile radius of the University of Southern California Gould School of Law, there are upwards of fifty markers indicating the residence of a sex offender.<sup>132</sup> There is no easy way to determine from the mass of blue indicators which individuals pose an immediate and serious threat and which individuals do not. As a result, there is an overabundance of names and listings, and within those listings there is a lack of description.

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offender-map.pdf.

<sup>124</sup> Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance*, N.Y. TIMES, Feb. 9, 2009, at A1.

<sup>125</sup> James Carlson, *Ghosts in the Machine: Are Dead Sex Offenders Really Dangerous?*, ORLANDO WEEKLY, Nov. 24, 2005, <http://www.orlandoweekly.com/features/story.asp?id=8531>.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> A search of the area surrounding the University of Southern California revealed Ernesto Cruz Chavarria, who, at the time of the search, had no photo and had been in violation since November 27, 1996. There is a notation on the page indicating that “the registrant may have subsequently relocated.” State of Cal. Dep’t of Justice, Office of the Attorney General, California Registered Sex Offender Profile Display, <http://www.meganslaw.ca.gov/cgi/prosoma.dll?searchby=offender&id=18696214A2885&lang=ENGLISH> (last visited May 23, 2011).

<sup>129</sup> HUMAN RIGHTS WATCH, *supra* note 111, at 49–50.

<sup>130</sup> *Id.* at 55–56.

<sup>131</sup> *Id.*

<sup>132</sup> *See supra* note 128.

What does it mean to annoy or molest a child?<sup>133</sup> For the offenders with crimes against children ages fourteen or fifteen, how old were the offenders at the *time* the crime was committed? This information is missing from the registry. Thus, notwithstanding their inaccuracies, many registries are wholly useless due to their unmanageable quantity of data and lack of clear, consistent terminology and relevant information.

Still, proponents of the registry lists, like Maureen Kanka, mother of Megan Kanka, suggest that if she had known about the history of her daughter's killer, she could have taken precautionary steps, such as warning her daughter about the sex offenders in their neighborhood.<sup>134</sup> While this is theoretically ideal, actually using the information on the registry list is confusing and tedious due to the vast number of registrants. The National Society for the Prevention of Cruelty to Children released a study questioning the effectiveness of Megan's Laws, and noting that Vermont severely restricted the number of sex offenders with publicly available information in an effort to make it easier for individuals to identify the offenders who pose the most significant threat to children.<sup>135</sup> Of the 24,000 registered offenders in the state, only the offenders convicted of certain crimes are listed on the public website, leaving a manageable 282 offenders.<sup>136</sup> The state further reported that 97% of offenders were in compliance during the most recent registration period.<sup>137</sup>

Importantly, the Adam Walsh Act denies states the autonomy to alter the registration requirements. This may partly explain why, as of March 8, 2011, only four states have managed to comply with the requirements.<sup>138</sup> If the remaining states comply by the new deadline of

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<sup>133</sup> See State of Cal. Dep't of Justice, Office of the Attorney General, Megan's Law Home, <http://www.meganslaw.ca.gov> (last visited May 23, 2010).

<sup>134</sup> Megan Nicole Kanka Foundation, Our Mission, <http://www.megannicolekanka.com/foundation/mission.htm> (last visited May 23, 2010). While it is optional for states to include information about select Tier I offenders from the website, based on their offense, these offenders must still be managed and monitored just as offenders on other tiers must be managed and monitored. Thus, the exemption is far too limited in scope. See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §118, 120 Stat. 587 (2006).

<sup>135</sup> KATE FITCH, MEGAN'S LAW: DOES IT PROTECT CHILDREN? (2) 32 (Nat'l Soc'y for the Prevention of Cruelty to Children 2006), available at [http://www.nspcc.org.uk/Inform/publications/Downloads/meganslaw2\\_wdf48102.pdf](http://www.nspcc.org.uk/Inform/publications/Downloads/meganslaw2_wdf48102.pdf).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 24, 33.

<sup>138</sup> The states in compliance are Delaware, Florida, Ohio and South Dakota. Foxnews.com, Texas, Other States Facing Deadline to Comply with Federal Sex Offender Database Law, <http://www.foxnews.com/politics/2011/03/08/texas-states-facing-deadline-launch-federal-sex->

July 27, 2011, the vast number of registrants, combined with insufficient information about their threat levels and criminal histories, will reduce the ultimate efficacy of the lists.<sup>139</sup>

### C. REHABILITATION AND PREVENTING RECIDIVISM

#### 1. Rehabilitation

Following their release from prison, many sex offenders undergo various types of therapy and community reintegration.<sup>140</sup> Ideally, these individuals would learn to properly manage their behavior and not reoffend. Indeed, sex offenders who receive no rehabilitative treatment are more likely to reoffend than those who do receive treatment.<sup>141</sup> Being put on a registry list, however, might interfere with the community reintegration aspect of the rehabilitation process.

The threat of vigilantism, difficulties obtaining and maintaining employment, and problems in interpersonal relationships are constant factors in the lives of individuals on the registry lists.<sup>142</sup> Some states, like Virginia, have laws that prohibit sex offenders from working in jobs that involve children, regardless of the offense the individual actually committed.<sup>143</sup> But sex offenders often struggle to find jobs even when the jobs do not involve children. Human Rights Watch provided the account of the struggle faced by one offender who committed a misdemeanor sex offense in 2001.<sup>144</sup> The offender stated that he had given up looking for work because he had been unable to secure a position due to his name appearing on the California Registry list.<sup>145</sup> He expressed despair at

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offender-database/

<sup>139</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248 § 111, 120 Stat. 587, 591 (2006).

<sup>140</sup> See generally ERIC SELEZNOW, TIME TO WORK: MANAGING THE EMPLOYMENT OF SEX OFFENDERS UNDER COMMUNITY SUPERVISION (Ctr. for Sex Offender Mgmt. 2002) (explaining the community integration process for recently released sex offenders and the importance of meaningful employment as a stabilizing influence), available at <http://www.csom.org/pubs/timetowork.pdf>.

<sup>141</sup> VA. CRIMINAL SENTENCING COMM'N, ASSESSING RISK AMONG SEX OFFENDERS IN VIRGINIA, (2001), available at [http://www.vscs.state.va.us/sex\\_off\\_report.pdf](http://www.vscs.state.va.us/sex_off_report.pdf); see also, Tewskbury, *supra* note 116, at 21–22.

<sup>142</sup> HUMAN RIGHTS WATCH, *supra* note 111, at 82.

<sup>143</sup> VA. CODE ANN. § 18.2-370.4 (2006).

<sup>144</sup> HUMAN RIGHTS WATCH, *supra* note 111, at 88.

<sup>145</sup> *Id.* at 84.

having to be repeatedly humiliated when answering potential employer's questions.<sup>146</sup> Indeed, as Justice Thomas noted in *Smith v. Doe*, the dissemination of sex offenders' information is similar to the "shaming" punishments used earlier in American history.<sup>147</sup>

While some make the argument that this is simply a well-deserved consequence of a crime, such consequences prevent former sex offenders from becoming integrated, valuable members of society.<sup>148</sup> Studies have shown that ostracism leads to further problems in rehabilitation and an inability to assimilate.<sup>149</sup> For example, the inability to secure stable housing has been strongly correlated with criminal recidivism in general, though not specifically with sex offenders.<sup>150</sup> But sex offenders often have difficulty finding housing. In Miami, for example, several men were forced to live under a bridge because zoning ordinances restricting residency for sex offenders made it nearly impossible for them to find housing.<sup>151</sup>

Affording an offender an opportunity to obtain employment is foundational to many rehabilitation efforts.<sup>152</sup> Studies by the Center for Sex Offender Management, a project of the U.S. Department of Justice, show that individuals who reoffended were more likely to be unemployed than employed.<sup>153</sup> Furthermore, individuals who found stable employment were 37% less likely to reoffend than those without stable employment.<sup>154</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Smith v. Doe*, 538 U.S. 84, 109, 156 (2003).

<sup>148</sup> John Pain, *Sex-Offender Restrictions Leave 5 Men Living Under Miami Bridge*, WASH. POST, Apr. 8, 2007, at A13.

<sup>149</sup> See HUMAN RIGHTS WATCH, *supra* note 111, at 80–82; Tewskbury, *supra* note 116, at 22 (referring to a study that focuses on the idea that disruptions in housing, employment, and economic opportunities; emotional isolation; and difficulties with psychological adjustment are primary predictors of criminal recidivism: “[though] intended to provide an additional layer of protection for the public, sex offender registries and community notification statutes may actually create conditions that facilitate or encourage sexual reoffending . . . . ‘[W]e cannot dismiss the possibility that some percentage of offenders will reoffend because of the stress and pressure imposed by a hostile, rejectionist community that has branded the offender a pariah.’”).

<sup>150</sup> JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 35 (June 2001), available at [http://www.urbaninstitute.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://www.urbaninstitute.org/UploadedPDF/from_prison_to_home.pdf).

<sup>151</sup> Pain, *supra* note 148.

<sup>152</sup> See SELEZNOW, *supra* note 140, at 1.

<sup>153</sup> *Id.* at 2.

<sup>154</sup> *Id.*

The pressure is not only on the offender—family members and others who reside in the same domicile as registered offenders suffer similar intolerance.<sup>155</sup> Since the Adam Walsh Act applies to children as young as fourteen, it is likely that many of the minors listed on the registry live with parents, guardians, or family members. Most minors do not reoffend; at least one study estimates a juvenile recidivism rate of 4%.<sup>156</sup> The Association for Treatment of Sexual Abusers has found that this likely is because younger offenders offend for different reasons than adults.<sup>157</sup> The vast majority of sex offense crimes by youth are non-violent touching offenses or non-contact, public-exposure offenses.<sup>158</sup> For instance, under the Adam Walsh Act, a fifteen-year-old who makes the mistake of streaking at a sporting event would be classified as a Tier I offender and his or her information, some of which will implicate those who share his or her residence, will be available on the Internet for fifteen years.<sup>159</sup>

Unfortunately, the effects of the registration requirements—ostracism, isolation, depression, and fear of consequences to family members—can make juvenile offenders *more* likely to reoffend.<sup>160</sup> Juveniles in therapy, meanwhile, are very responsive to treatment, perhaps more so than adults.<sup>161</sup> Thus, rehabilitation may be more successful when juvenile offenders, most of whom are convicted of low-tier indiscretions, are subject to treatment but *not* the registration and monitoring requirements.<sup>162</sup>

## 2. Recidivism

One concern that reinforces the presumed need for the Adam Walsh Act is that recidivism rates are high for all sex offenders.<sup>163</sup> There is a fear

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<sup>155</sup> See HUMAN RIGHTS WATCH, *supra* note 111, 93–95.

<sup>156</sup> *Id.* at 9.

<sup>157</sup> *The Effective Legal Management of Juvenile Sexual Offenders*, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, Mar. 11, 2000, <http://www.atsa.com/ppjuvenile.html> [hereinafter ATSA].

<sup>158</sup> HUMAN RIGHTS WATCH, *supra* note 111, at 68.

<sup>159</sup> See Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, §§ 111, 113, 115(a)(1), 120 Stat. 591–95 (2006).

<sup>160</sup> ATSA, *supra* note 157.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See Carl Bialik, *How Likely Are Sex Offenders to Repeat Their Crimes?*, WALL ST. J., Jan. 24, 2008, <http://blogs.wsj.com/numbersguy/how-likely-are-sex-offenders-to-repeat-their->

that sex offenders will continually commit crimes unless they are constantly monitored.<sup>164</sup> However, this supposition is not supported by the available data.<sup>165</sup>

An important consideration when reviewing the recidivism data is the definitions used in particular studies. Thus, the question of sexual offender recidivism is complicated: there is no universally agreed upon definition of a sexual assault, nor is there a consensus on when to consider an act recidivist.<sup>166</sup> For example, extending the definition of sexual assault to the broadest possible meaning, so that it includes any unwanted touching, grabbing, kissing, and even threats, would doubtlessly lead to inclusion of behaviors that are not popularly considered sex offenses.<sup>167</sup> Additionally, the point at which a situation is sufficient to constitute a re-offense differs, which allows for a broader or narrower result.<sup>168</sup> For example, does an offense count for the purposes of recidivism only when it results in a conviction? What about re-arrests without convictions or reports of offenses without arrests?

A study by the U.S. Department of Justice indicates that only one in seven, or about 14%, of violent sex offenders in state prisons had previously been convicted of another violent sex crime.<sup>169</sup> According to that study, 87% of individuals arrested for sex offenses had never been convicted of a sex offense before.<sup>170</sup> A combination of Canadian, American, and United Kingdom studies reveals similar numbers, even when taking into account both reconvictions and re-arrests without reconvictions.<sup>171</sup> The overall recidivism rates after five, ten, and fifteen years were 14%, 20%, and 24%, respectively.<sup>172</sup> The highest rate of recidivism was attributed to child molesters who had offended against

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<sup>164</sup> *See id.*

<sup>165</sup> *See* ANDREW J.R. HARRIS & R. KARL HANSON, *SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION 8* (Pub. Safety & Emergency Preparedness Can. 2004), *available at* [http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/2004-03-se-off-eng.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/2004-03-se-off-eng.pdf).

<sup>166</sup> *Id.* at 2.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> LAWRENCE A. GREENFELD, *SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT* (U.S. Dep't of Justice 1997), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF>.

<sup>170</sup> HUMAN RIGHTS WATCH, *supra* note 111, at 25.

<sup>171</sup> HARRIS & HANSON, *supra* note 165, at 3.

<sup>172</sup> *Id.* at 13.

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male children,<sup>173</sup> individuals who the Adam Walsh Act automatically categorizes as Tier II or Tier III offenders.<sup>174</sup> Overall, the study found that approximately 73% of offenders had not been charged, arrested, or convicted of a second sex offense.<sup>175</sup>

Though the numbers of re-offenses are not insignificant, they are shockingly low when compared to recidivism rates in general. A 1994 federal study found that an average of 67.5% of former prisoners were arrested for a new offense within three years following their release into society, with those arrested for robbery and burglary rearrested at a rate of 70% to 74%.<sup>176</sup> Individuals convicted of motor vehicle theft were rearrested at a rate of 78.8%. Yet there are no registry lists that warn the public where they ought to avoid parking their cars or which neighborhoods contain car thieves.

Notably, a National Institute of Justice study on sex-offender-registry and notification laws, which interviewed post-release sex offenders, found that most offenders believed the registry laws would not have any deterrent effect.<sup>177</sup> Because these offenders were embittered by the treatment they received from their communities and from law enforcement officials, they believed that the registry laws would drive many offenders to reoffend and return to prison.<sup>178</sup>

The Adam Walsh Act contains a provision stating that, should an individual re-offend after that individual has been registered as a Tier I offender, the subsequent offense enhances his or her registration requirements to those of a Tier II offender.<sup>179</sup> Because Tier I offenders are largely convicted of low-severity crimes, yet these offenders make up a significant portion of the data and tend to distort the prevalence of sex

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<sup>173</sup> *Id.* at 7–8.

<sup>174</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111(3)–(4), 120 Stat. 591–92 (2006).

<sup>175</sup> HARRIS & HANSON, *supra* note 165, at 17.

<sup>176</sup> PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT, RECIDIVISM OF PRISONERS RELEASED IN 1994 (U.S. Dep't of Justice 2002), *available at* <http://webharvest.gov/peth04/20041017013633/http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

<sup>177</sup> RICHARD G. ZEVITZ & MARY ANN FARKAS, SEX OFFENDER COMMUNITY NOTIFICATION: ASSESSING THE IMPACT IN WISCONSIN (Nat'l Inst. of Justice 2000), *available at* <http://www.ncjrs.gov/pdffiles1/nij/179992.pdf>.

<sup>178</sup> *Id.*

<sup>179</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248 Pub. L. No. 109-248, §111(3)(C), 120 Stat. 591 (2006).

offenders in a given area, the Act would be more effective if it eliminated the registration requirements for Tier I offenders while still elevating re-offenders to Tier II.<sup>180</sup> For example, in regards to individuals who expose themselves, under a system that removes the registration requirements for Tier I offenders, they will have the opportunity to reintegrate themselves into a community without the negative consequences of registration that may drive them to reoffend. However, if these individuals *do* reoffend, even if the crime is of low severity, they will be required to register under the heightened classification. Thus, even if Tier I is eliminated as a category that requires registration and monitoring, an offender who commits an offense under the Act's Tier I classification will not be able to escape the registration requirements after a second offense.

#### D. COSTS AND NUMBERS

The practicality of the Adam Walsh Act has been challenged as being prohibitively expensive.<sup>181</sup> The federal government threatened to withhold funds from non-compliant states, but this incentive brought about little change. States that did not comply with the Act stood to lose up to 10% of Federal Byrne Justice Assistance Grant funds.<sup>182</sup> The Justice Policy Institute estimated the first-year implementation cost to each state and compared it to the 10% reduction in grant funds.<sup>183</sup> In every single state, the cost of implementation was higher than the loss of funds.<sup>184</sup> Beyond just the implementation costs, maintaining the registry in future years would also be costly—registry violators would require the expenditure of funds for law enforcement personnel, jail and prison space, and court proceedings.<sup>185</sup>

The burden on those monitoring the lists and offenders would also increase significantly. In 2000, the average parole officer in Wisconsin was charged with monitoring between twenty-one and thirty sex

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<sup>180</sup> *Id.*

<sup>181</sup> *See, e.g.*, Abigail Goldman, *Sex Offender Act Might Not Be Worth Its Cost to Nevada*, LAS VEGAS SUN, Feb. 15, 2009 (discussing the problems of prohibitive implementation costs versus loss of Federal Byrne funds), available at <http://www.lasvegassun.com/news/2009/feb/15/sex-offender-act-might-not-be-worth-its-cost>.

<sup>182</sup> Jourdan, *supra* note 66.

<sup>183</sup> JUSTICE POLICY INST., *supra* note 41, at 17–18.

<sup>184</sup> *Id.* at 18, 40.

<sup>185</sup> *Id.* at 16–19.



offenders.<sup>186</sup> With the broader scope of the Adam Walsh Act, either each parole officer will be handling more cases, which would likely lead to incomplete and inaccurate information, or the state will have to hire more parole officers.

### III. UTILITY

In reviewing criticisms of the Adam Walsh Act, it is clear that reform is necessary. And so the question of how society can best protect children from sex offenders remains, but with an implicit nuance: how can society best balance the protection of children from sex offenders with practical, cost-effective solutions that address the real issues? Clearly, a compromise must be instituted. While many media outlets and editorials focus on eliminating the Adam Walsh Act in its entirety, it seems unlikely that the public will be satisfied with the contention that the Act is only marginally effective at best and that there is, as yet, no model for its replacement. In considering an alternative to a total elimination of the Act and the continued public support for such fundamentally flawed legislation, the principles of utility offer a potential framework for reform.

Utility refers to the “Greatest Happiness Principle,” which is a creed “[holding] that actions are right in proportion as they tend to produce happiness, wrong as they tend to produce the opposite of happiness.”<sup>187</sup> John Stuart Mill and Jeremy Bentham theorized this set of moral standards meant to guide behavior and create the greatest good for the greatest number of people in society.<sup>188</sup> For them, the interest of the community could be defined as “the sum of the interests of the several members who compose it.”<sup>189</sup> An action is said to conform to the principles of utility when “the tendency it has to augment the happiness of the community is greater than any it has to diminish it.”<sup>190</sup>

With respect to the legal system and utilitarian principles, Bentham and Mill noted that laws do, or should, have in common the ability to “augment the total happiness of the community” and “to exclude, as far as

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<sup>186</sup> ZEVITZ & FARKAS, *supra* note 177, at 7.

<sup>187</sup> John Stuart Mill, *Utilitarianism*, in *THE ENGLISH UTILITARIANS*, 168, 169 (Basil Blackwell 1949).

<sup>188</sup> *Id.*

<sup>189</sup> 1 JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 4 (1823).

<sup>190</sup> *Id.* at 5.

may be, every thing that tends to subtract from that happiness.”<sup>191</sup> To use punishment for crimes as an example, punishment certainly does not augment the happiness of the individual being punished; however, so long as the punishment excludes the greater evil, punishment of an individual is acceptable.<sup>192</sup> Bentham lists four circumstances when punishment would not be tolerable.<sup>193</sup> First, when it is *groundless*—that is, when punishment is handed down, but the act for which an individual is being punished is not harmful to society.<sup>194</sup> Second, when the punishment is *inefficacious*—when the punishment will not prevent the crime.<sup>195</sup> Third, when the punishment is *unprofitable*—where the crime or “mischief” the punishment would produce would “be greater than what it prevented.”<sup>196</sup> Finally, where the punishment is *needless*—that is, where the act for which an individual is receiving punishment might be prevented in a different way or would cease to occur *without* punishment or “at a cheaper rate.”<sup>197</sup>

Essentially, a balance is required when considering whether punishment or, in this case, treatment following the commission of a crime, is appropriate. By creating this balance in the legal system, society benefits by encouraging desirable behaviors and discouraging undesirable behaviors, but for the latter, only to the extent necessary to increase the overall well-being in society.

#### IV.      APPLYING UTILITARIAN PRINCIPLES TO FIX THE             FAILING SEX-OFFENDER REGISTRY SYSTEM

At its core, the Adam Walsh Act is designed to protect children from those intending to do them harm.<sup>198</sup> Seemingly, creating awareness and

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<sup>191</sup> 2 JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1 (1823). Utilitarianism has a direct relationship to the punishment for crimes. This Note assumes the term “punishment” refers to any treatment that an individual is subject to as a result of a crime. The Supreme Court’s treatment of the term “punishment,” for constitutional purposes, will be dealt with in the next section.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 2–3.

<sup>194</sup> *Id.* at 3.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 102, 120 Stat. 590–91 (2006).

knowledge of these criminals and predators is an ideal solution. Since the registration systems have been active across the United States for so long, it is unlikely that the public will be satisfied if the registration laws are repealed entirely.<sup>199</sup> Nonetheless, whether the registry system is the most effective way to protect children is questionable. Assuming that the registry system is even modestly effective, and that the public would be opposed to doing away with it altogether, the fact remains that these problems require solutions. At present, individuals like Jaycee Lee Dugard's kidnapper, Philip Garrido, and other similar sexual offenders are not monitored sufficiently, and Tier I offenders who committed minor offenses may be subject to needless registration requirements.

The preceding pages outline a number of criticisms that have been leveled against the Adam Walsh Act. Each of these can be ameliorated or fixed entirely by applying utilitarian principles in order to achieve a more balanced approach to monitoring sex offenders.<sup>200</sup> It is first necessary to recognize that for practical, financial, and logistical reasons, preventing all harm is not possible at this time. Thus, society must weigh the possible harm that a number of low-level sex offenders present against the harm of a single high-level sex offender. When considering how these threats affect the community, that is, how devastating a Tier II or Tier III sex offender's crimes can be, a solution will likely err on the side of preventing the one greater harm, and directing fewer resources toward preventing a number of lesser harms. Thus, abolishing the Tier I distinction from registry lists entirely is a pragmatic compromise that better suits society's goals and resources. This compromise is supported by examination of three aspects of the Adam Walsh Act.

First, because the Supreme Court sidestepped the *ex post facto* issue in *Carr*, whether the Adam Walsh Act and its state-based ilk are punitive measures remain an open question.<sup>201</sup> The law has an abundance of examples where an overly burdensome obligation does not comport with the ideals of efficiency in justice.<sup>202</sup> The registry and notification

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<sup>199</sup> See, e.g., Tom Humphrey, *Two Moms Want Youth Sex Offenders on Registry; Foes Say Rehab Possible*, KNOX NEWS, Sept. 23, 2009, <http://www.knoxnews.com/news/2009/sep/23/debate-on-juvenile-sex-offenders>.

<sup>200</sup> See *supra* Part III.

<sup>201</sup> *Carr*, 130 S. Ct. at 2233, 2237, 2241.

<sup>202</sup> See, e.g., *O'Sullivan v. City of Chicago*, 484 F. Supp. 2d 829 (2007) (holding that, in a petition for attorney's fees, billable hours that were inadequately explained or excessive were not compensable); see also *Budd v. New York*, 143 U.S. 517 (1892) (discussing the rights of private individuals to be free from "burdensome and restrictive regulations, which, however

requirements are particularly punitive and burdensome to those on the lowest tier of the offender registry list. For these individuals, the stated requirements are disproportionate to the crimes committed. While registration may or may not be punitive per se, it seems inequitable to require low-level offenders to meet such affirmative requirements as a personal appearance before law enforcement on an annual basis.<sup>203</sup> If the initial punishments—jail time and fines—are inadequate for these offenders as they are currently being applied, perhaps that is an area that requires further examination. If there is a problem with the length of sentencing or the treatment of these types of offenders, then sentencing laws should be reviewed. But an act purporting to protect children should not be used as a backdoor to additional punishment.

Here, the principle of utility that best applies is *needlessness*—”where the mischief may be prevented, or cease of itself, without [punishment].”<sup>204</sup> Bentham notes that when a particular behavior may be stopped or deterred in a simpler, more cost-effective manner—by instruction, for example—that method more effectively serves utilitarian goals and, ultimately, society at large.<sup>205</sup> The Tier I classification encompasses a broad range of crimes: those that did not involve minors or abusive sexual contact and which are punishable by less than one year of imprisonment.<sup>206</sup> If the justice system accepts that these crimes do not warrant more than twelve months in prison, it seems that fifteen years of registration and monitoring is excessive. Routinely, an offender remains registered for upwards of fifteen times the amount of time he or she spends in prison.<sup>207</sup>

According to Bentham, if the magnitude of a punishment, in duration and intensity, does not match the crime itself, society cannot achieve ideal levels of happiness.<sup>208</sup> The consequences for Tier I offenders are particularly disproportionate. In light of vigilantism and the problems offenders face when seeking employment and housing, registry laws are

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common in rude and irregular times, are inconsistent with constitutional liberty”).

<sup>203</sup> Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 116, 120 Stat. 595 (2006).

<sup>204</sup> 2 BENTHAM, *supra* note 191, at 3.

<sup>205</sup> *Id.* at 13.

<sup>206</sup> *Id.*

<sup>207</sup> Pub. L. No. 109-248, § 115.

<sup>208</sup> 2 BENTHAM, *supra* note 191, at 29.

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more punitive than preventative.<sup>209</sup> Regardless of whether these “unofficial” forms of justice are considered punitive under the Constitution and retroactively unacceptable through the *ex post facto* clause, they simply cannot be disregarded as by-products of the registration requirements and natural consequences of committing a misdemeanor that involves only *some* sexual element.<sup>210</sup>

Punitive effects aside, the threat of registration is wielded inappropriately. For example, to take advantage of an individual’s desire to avoid registration, prosecutors may be in a position to strong-arm defendants into plea bargains. Given the option of either going to trial for a low-level sex offense or pleading to a different, non-sexual offense, a wise lawyer might suggest his client take the plea. Thus, a defendant may give up his or her right to a trial in order to avoid registration. While information regarding the occurrence of this practice is not readily available, intuitively, the desire to avoid being branded with the scarlet letter—“sex offender”—is understandable. There is a great risk of such manipulation, particularly for borderline cases, where the definition of the offense is ambiguous.

Abolishing the Tier I registration requirements will not eliminate all of the problems with the Act. Individuals like William Elliott, who was nineteen years old when he was convicted of having sex with his underage girlfriend and who was subsequently murdered because of his appearance on a registry list,<sup>211</sup> may still be affected by overbroad registry laws. However, when the majority of low-risk offenders are not listed, more information about high-risk offenders can be made clearer on the registry list. Thus, facts about Elliott’s crime, his age, and the victim’s age can be made available to the public, allowing commonsense to overcome the blanket fear that the “sex offender” label evokes. For Elliott, the vigilante-imposed death sentence was the punishment for consensual intercourse with his almost sixteen-year-old girlfriend. Perhaps if fewer people were on the registry list, greater information might have been available about Elliott’s crime, and he might still be alive.

Second, the SORNA portion of the Adam Walsh Act does not produce optimal utility because it is *inefficacious*—that is, the punishment

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<sup>209</sup> See JUSTICE POLICY INST., *supra* note 41, at 16–32.

<sup>210</sup> *Id.* at 3.

<sup>211</sup> Libby Lewis, *Murders Put Focus on Sex-Offender Registry Policies*, NPR, Apr. 21, 2006, <http://www.npr.org/templates/story/story.php?storyId=5355980>.

does not prevent the crime.<sup>212</sup> With the sheer volume of registrants, the likelihood that parents will be able to intelligently and effectively use the list to warn their children about the more dangerous offenders is small. This shortcoming of the registry is widely recognized:

Experts say the data disaster is attributable to an unwieldy and ever-growing sex offender registry, one driven more by state politics in recent years than by scientific evidence. Legislators are calling on local police departments to track more sex offenders—many of them low-risk—than ever before, without including the money necessary to do so.<sup>213</sup>

The list, which contains over 700,000 individuals,<sup>214</sup> is nearly useless for a public seeking information. Ideally, a state could review every offender, the individual's offense, and that individual's likelihood of recidivism in order to determine whether he or she ought to be required to follow registration guidelines. This way, only the truly high-risk individuals would be monitored. However, this would be impractical and astronomically expensive.<sup>215</sup> A more financially sound model that integrates the available information about sex offenders must be implemented; otherwise, without eliminating names, the list may be useless in its entirety.

Presumably, most individuals on the list are those designated as Tier I offenders. A Kentucky study conducted prior to the Adam Walsh Act indicated that between 77 and 80% of offenders on the list were registered under criteria for the lowest level of perceived risk.<sup>216</sup> While the criteria for the Kentucky list may not align exactly with those of the Adam Walsh Act, the study indicates that the presumption that most individuals on the list belong to the lowest risk designation is accurate.<sup>217</sup> Removing these individuals from the list would substantially reduce the list's cluttered "data disaster."

Those against abolishing the Tier I registration requirements might argue that Tier I offenders would be free to recidivate repeatedly without consequence. Perhaps this is true; however, as discussed above, the Adam Walsh Act contains a provision that would prevent this by forcing repeat

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<sup>212</sup> 2 BENTHAM, *supra* note 191, at 16–18.

<sup>213</sup> JUSTICE POLICY INST., *supra* note 41 at 19 (quoting the DALLAS MORNING NEWS).

<sup>214</sup> NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, *supra* note 123.

<sup>215</sup> Among other things, the costs would include psychiatric visits, monitoring costs, and legal and administrative costs.

<sup>216</sup> *See* Tewskbury, *supra* note 116, at 22.

<sup>217</sup> *Id.*

offenders to register under the Tier II designation.<sup>218</sup> Without eliminating some of the registrants from the list, many of the more dangerous offenders will continue to go under-monitored simply because the monitors are unable to keep the data current for so many individuals. In the case of Philip Garrido, law officials visited his home numerous times but did not notice anything unusual.<sup>219</sup> Had resources been more efficiently allocated so that high-risk offenders like Garrido were more consistently monitored, Jaycee Lee Dugard might have been found sooner.

Ultimately, one does not have to look to utilitarian ideals to know that “prevent[ing] the happening of mischief, pain, evil, or unhappiness” is a positive goal for a community.<sup>220</sup> That being said, the behaviors that require an offender to register as a Tier I offender do not, on balance, depress society to the same extent as crimes committed by sexual predators like Phillip Garrido, a Tier III offender. The sheer number of individuals classified as offenders under the Adam Walsh Act requires a choice. On the one hand, resources can be allocated to enable society to monitor the far smaller number of offenders who commit serious crimes. On the other hand, society can accept an overwhelmed registry system in which all offenders are subject to such thinly spread scrutiny that all have the opportunity to reoffend. The correct choice is apparent. Indeed, preventing one child from suffering what Jaycee Lee Dugard experienced, at the expense of not preventing several lower level crimes, is consistent with the principles of utility.<sup>221</sup> Bentham himself notes that one must “[s]um up all the values of all the *pleasures* on one side, and those of all the pains on the other” and understand that “[t]he balance, if it be on the side of pleasure, will give the *good* tendency of the act upon the whole.”<sup>222</sup> The balance that Bentham speaks of tips the scales towards preventing the devastating crime, even if it allows for the commission of lesser crimes.

The registry developed by Vermont prior to the enactment of the Adam Walsh Act indicates that listing fewer registrants enables more thorough monitoring and registry information.<sup>223</sup> While Vermont does not provide data on how many low-risk offenders reoffended in this period, the registry list was undoubtedly effective, at least to the extent that it

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<sup>218</sup> See *supra* note 61 and accompanying text.

<sup>219</sup> See McKinley & Pogash, *supra* note 17 and accompanying text.

<sup>220</sup> 1 BENTHAM, *supra* note 189, at 4.

<sup>221</sup> See *id.*

<sup>222</sup> *Id.* at 52.

<sup>223</sup> FITCH, *supra* note 135, at 32–34.

provided accurate information about high-risk offenders, with 97% of those offenders in compliance.<sup>224</sup>

Third, rehabilitation is compromised by the use of registries. This is particularly true in the case of low-level, Tier I offenders. An individual's inability to maintain employment after conviction for indecent exposure is not only disproportionate to the crime but also counterproductive. Bentham described this as a punishment that is *unprofitable*: the punishment produces an effect that is worse for the community than the original crime.<sup>225</sup> This is heartbreakingly true in cases of minors who are classified as Tier I offenders. These young individuals are vulnerable and malleable. With therapy and treatment, so few reoffend that the risk presented by not monitoring them is low. However, if treated as outcasts and dangerous sex offenders, children may live up to society's low expectations by committing more sex offenses. By registering minors, the law may be propagating the undesirable behavior that it seeks to prevent. The predictable outcome is a snowball effect: a young person feels isolated or depressed and commits a sexual offense out of loneliness or curiosity; the community is notified and that individual becomes even more ostracized; the pattern is repeated indefinitely.

The choice, then, is this: society can punish low-level offenders with jail time and monetary fines, then give these offenders a fresh start to become valuable members of society, and in some rare cases, to reoffend; or society can punish these low-level offenders with jail time and monetary fines, and then cast them out to the fringes of their communities, where they are turned away from jobs and housing and where they themselves are vulnerable to crimes of hate. In the first case, parents will be able to protect their children from the most dangerous sex offenders; in the latter case, only the most diligent parents will be able to protect their children, but their children will be protected against all levels of offenders. The utilitarian principles are clear: the more responsible choice for the community is to protect all of its members against the most serious offenders, thereby reducing the total number of devastating crimes committed, and to give low-level offenders an opportunity to turn their lives around.

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<sup>224</sup> *Id.* at 33.

<sup>225</sup> See 2 BENTHAM, *supra* note 191 and accompanying text.



## V. CONCLUSION

Jaycee Lee Dugard was kidnapped and abused by a stranger.<sup>226</sup> The man who kidnapped and murdered Adam Walsh, the Act's namesake, was also a stranger.<sup>227</sup> What is even more intolerable than the abuses that these children suffered is that both of these offenders had been arrested for crimes in the past.<sup>228</sup> Moreover, in both cases, systems were in place to prevent these offenders from recidivating and to inform parents of the risks that these individuals presented. Those systems failed. With a new, harsher, and broader act on the horizon, serious inquiry is required before another costly and ultimately inefficacious system is implemented across the country.

Disturbingly, despite all evidence of the inefficacy of such laws, states are bowing to public pressures.<sup>229</sup> In California, new rules have been implemented as recently as March 2010 that have increased monitoring requirements even amongst low-level offenders.<sup>230</sup> Parole officers must now track the state's approximately 5,000 low-level offenders through ankle-monitoring devices four times per month.<sup>231</sup> This followed a renewed scrutiny of sex-offender registry laws after the discovery of seventeen-year-old Chelsea King's body.<sup>232</sup> The teenager was allegedly murdered by John Albert Gardner III, who was on parole after molesting a thirteen-year-old girl.<sup>233</sup>

While statewide elimination of sex-offender registry lists would be publicly unpopular, a modified version of the Adam Walsh Act would likely satisfy parents and administrators. Using utilitarian principles as a lens through which to review the requirements and policies of the Adam Walsh Act, it is clear that narrowing the focus to include only high-risk

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<sup>226</sup> See *supra* note 2 and accompanying text.

<sup>227</sup> Cindy Adams, 'America's Most Wanted' Celebrates Milestone, Features Appearance By President Obama (Video), THE EXAMINER, Mar. 6, 2010, <http://www.examiner.com/x-1168-Crime-Examiner~y2010m3d6-Americas-Most-Wanted-celebrates-milestone-features-appearance-by-President-Obama-video>.

<sup>228</sup> America's Most Wanted, The Story of Adam Walsh, <http://www.amw.com/fugitives/case.cfm?id=39789> (last visited May 23, 2011).

<sup>229</sup> See, e.g., Tony Barboza, *State to Keep Closer Watch; New Parole Rules Require Increased Supervision of Sex Offenders.*, L.A. TIMES, Mar. 20, 2010, at AA1.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

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offenders who commit more serious crimes is a practical and necessary compromise. This would mean eliminating the registration requirements for Tier I offenders. Doing so would alleviate the punitive effects of the Act on low-level offenders, ameliorate the problems of monitoring and tracking large groups of offenders, assist the rehabilitation efforts to minimize recidivism, and mitigate the financial burden on the states.