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## The Cost of Fear: An Analysis of Sex Offender Registration, Community Notification, and Civil Commitment Laws in the United States and the United Kingdom

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**THE COST OF FEAR: AN ANALYSIS OF  
SEX OFFENDER REGISTRATION,  
COMMUNITY NOTIFICATION, AND  
CIVIL COMMITMENT LAWS IN THE  
UNITED STATES AND THE UNITED  
KINGDOM**

*Kate Hynes\**

INTRODUCTION

“Stranger danger” has become a common phrase in the United States and the United Kingdom.<sup>1</sup> The term has been used as an educational tool to protect children from danger, especially from sexually based crimes.<sup>2</sup> In both countries, highly publicized sex crimes have maintained public focus on the evil nature of sexual

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<sup>1</sup> See National Center for Missing and Exploited Children, [http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en\\_US&PageId=2034](http://www.missingkids.com/missingkids/servlet/NewsEventServlet?LanguageCountry=en_US&PageId=2034) (last visited Jan. 18, 2012)(United States website providing children and parents with information about the danger posed by strangers); Gloucestershire Constabulary, [http://www.goucestershire.police.uk/kids\\_aware/3.html](http://www.goucestershire.police.uk/kids_aware/3.html) (last visited Jan. 18, 2012) (United Kingdom website providing a similar sentiment regarding the dangers that strangers pose to unwitting children).

<sup>2</sup> See Ernest E. Allen, *Keeping Children Safe: Rhetoric and Reality*, 5 JUV. JUST. J. 1, 16 (1998).

crimes and led to reactionary legislation.<sup>3</sup> The two countries have taken different approaches in dealing with the public outcry.

One method of dealing with sex offenders is “keeping a close eye on them.” In the United States, the general public has access to personal information about sex offenders by federal mandate.<sup>4</sup> Yet, worldwide, the public availability of sex offender information is not a widely accepted premise.<sup>5</sup> The vast majority of countries that have created sex offender registries do not allow public access to the records.<sup>6</sup> Like many countries that maintain sex offender registries, the United Kingdom restricts open access to registry information.<sup>7</sup>

A second method of controlling sex offenders is keeping them confined beyond their prison sentence. Civil commitment is the involuntary commitment of a mentally-ill individual for an indefinite period of time.<sup>8</sup> Both the United States and the United Kingdom practice civil commitment, but only the United States has passed specific civil commitment legislation for sex offenders.<sup>9</sup>

Sex offender laws in the United States are detrimental to both the general public and to the offenders themselves. In contrast, the

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<sup>3</sup> See Meghann J. Dugan, *Megan’s Law or Sarah’s Law? A Comparative Analysis of Public Notification Statutes in the United States and England*, 23 LOY. L.A. INTL. & COMP. L. REV. 617, 633 (2001) (noting the high profile murder and sexual assault of eight year old Sarah Payne in the United Kingdom); MEGAN NICOLE KANKA FOUNDATION,

<http://www.megannicolekankafoundation.org/mission.htm> (last visited Jan. 18, 2012) (describing the rape and murder of seven year old Megan Kanka in New Jersey); Benjamin Radford, *Predator Panic: Reality Check on Sex Offenders*, LIVE SCIENCE (May 16, 2006), <http://www.livescience.com/776-predator-panic-reality-check-sex-offenders.html> (explaining that media focus on inaccurate information regarding sex offenders creates a false perception that sex offenders pose a real and present threat at all times).

<sup>4</sup> See 42 U.S.C.A. § 16914(West 2006).

<sup>5</sup> See David Crary, *Human Rights Watch Report Criticizes State, Federal Sex-Offender Laws*, THE ASSOCIATED PRESS (Oct. 12. 2007), <http://www.iht.com/bin/print.php?id=7482413>.

<sup>6</sup> See *id.*

<sup>7</sup> See Dugan, *supra* note 3, at 617.

<sup>8</sup> See BLACK’S LAW DICTIONARY 279 (9<sup>th</sup> ed. 2009).

<sup>9</sup> See generally 42 U.S.C.S. § 16911 (LexisNexis 2006); The Mental Health Act, 1893, c. 4, § 63 (U.K.).

United Kingdom's trend toward protecting the rights of sexual offenders in both case law and legislation is a more appropriate and effective way to handle sex offenders. In Part I, this Comment will outline the diverging trends in the right to privacy for sex offenders that has developed in the United Kingdom and the United States.<sup>10</sup> Part II offers evidence to disprove many common misconceptions regarding sex offenders and the economic consequences of these perceptions.<sup>11</sup> Parts III and IV discuss sex offender laws in the United States and the United Kingdom and the dramatic impact that public opinion has had on such legislation.<sup>12</sup> In Part V, the comment will explore judicial authority regarding issues of sex offender registration, community notification, and civil commitment.<sup>13</sup> Finally, Parts VI and VII will analyze the effectiveness of current sex offender laws in both countries and provide recommendations for the future.<sup>14</sup>

## I. THE RIGHT TO PRIVACY

The United States Constitution does not explicitly reference a right to privacy,<sup>15</sup> but the Supreme Court has recognized privacy as a fundamental right in certain contexts.<sup>16</sup> The Supreme Court has established that the right to privacy is a "penumbra" which is derived from other, more explicit Constitutional protections.<sup>17</sup> Courts have also established that a sex offender's privacy rights remain secondary to maintaining public safety.<sup>18</sup> In the United States, when a right is considered fundamental the government must provide compelling reasons to infringe on the right and must use means that are "narrowly tailored" to achieve its goal.<sup>19</sup> The Supreme Court has

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<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Part II.A, B.

<sup>12</sup> See *infra* Part III, IV.

<sup>13</sup> See *infra* Part V.

<sup>14</sup> See *infra* Part VI, VII.

<sup>15</sup> See generally U.S. CONST.

<sup>16</sup> See Lee Goldman, *The Constitutional Right to Privacy*, 84 DENV. U. L. REV. 601, 605 (2006).

<sup>17</sup> See generally *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

<sup>18</sup> See Kimberly B. Wilkins, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH. L. REV. 1245, 1254-55 (2003).

<sup>19</sup> Goldman, *supra* note 16, at 602.

protected individual decisions in some areas like family life, marriage, and the upbringing of children under the right to privacy.<sup>20</sup>

Instead of a written Constitution the United Kingdom relies on several governing treaties.<sup>21</sup> Like the United States, the United Kingdom's privacy rights are not unequivocally articulated in these governing documents. In 1998, the United Kingdom adopted the European Convention on Human Rights [hereinafter "ECHR"] into law through the Human Rights Act of 1998, making it binding law in the United Kingdom.<sup>22</sup> Article 8 of the ECHR contains a privacy provision: "Everyone has the right to respect for his private and family life, his home and his correspondence."<sup>23</sup> Paralleling the trends in the United States, Article 8 restricts the right to privacy in the interest of public safety.<sup>24</sup>

## II. SOCIAL AND ECONOMIC IMPLICATIONS OF SEX OFFENDER LEGISLATION

### A. Social Implications

The surge of sex offender legislation in the United States and the United Kingdom mirrors the public's fear and opinion toward sex offenders.<sup>25</sup> Studies in each country have shown that the general population's perceptions of sex offenders are often skewed.<sup>26</sup> The

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<sup>20</sup> See 16B AM. JUR. 2D *Constitutional Law* § 944 (2004).

<sup>21</sup> Bradley P. Jacob, *Back to Basics: Constitutional Meaning and "Tradition,"* 39 TEX. TECH. L. REV. 261, 271 (2007).

<sup>22</sup> See *An Introduction to Child Protection Legislation in the UK*, NSPCC (Oct. 25, 2011),

[http://www.nspcc.org.uk/inform/research/questions/child\\_protection\\_legislation\\_in\\_the\\_uk\\_wda48946.html](http://www.nspcc.org.uk/inform/research/questions/child_protection_legislation_in_the_uk_wda48946.html) (last visited Feb. 2, 2012).

<sup>23</sup> R and Thompson v. Secretary of State for the Home Department, [2010] UKSC 17, [2011] 1 A.C. 331, 339 (appeal taken from Eng.).

<sup>24</sup> See *id.*

<sup>25</sup> See Brittany Enniss, *Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences*, 2008 UTAH L. REV. 697, 699 (2008).

<sup>26</sup> See generally Karen Gelb, *Recidivism of Sex Offenders*, SENT'G ADVISORY COMMITTEE (2011),

[http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/recidivism\\_of\\_sex\\_offenders\\_research\\_paper.pdf](http://www.sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/recidivism_of_sex_offenders_research_paper.pdf).

public tends to view strict sex offender laws as necessary to protect the most vulnerable people in the population, children.<sup>27</sup> Moreover, individuals tend to see these laws as legitimate, because they perceive sex offenders as having high recidivism rates.<sup>28</sup> These perceptions often fall far from reality. Studies have indicated that sex offenders have among the lowest recidivism rates when compared to all criminals.<sup>29</sup> Additionally, some of the most dangerous sexual crimes, those involving rape and murder, account for less than three percent of sexual offenses perpetrated in the United States.<sup>30</sup>

The perception that many sex crimes against children are the result of strangers prowling around playgrounds is also a misconception.<sup>31</sup> In reality, ninety-three percent of sex offenders who perpetrate crimes against children know their victims.<sup>32</sup> Children are much more likely to be abused by someone they know and trust, than from an unknown individual holding out candy from a dark sedan.<sup>33</sup> The perpetuated fear of “stranger danger” might actually be giving parents an unwarranted feeling of safety around the people with whom their children are most familiar.

## B. Economic Implications

Penal systems in the United States create large budgetary concerns for both the federal government and the states.<sup>34</sup> Experts indicate that prison systems are the second fastest growing

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<sup>27</sup> See Jill S. Levenson, *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOC. ISSUES AND PUB. POL. 1, 17 (2007).

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See Robert E. Freeman-Longo, *Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem*, AM. PROBATION AND PAROLE ASSOC. (2001), 4 <http://www.appa-net.org/cweb/docs/appa/pubs/RML.pdf>.

<sup>31</sup> See Levenson, *supra* note 27, at 17.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

<sup>34</sup> See Carrie Johnson, *Budget Crisis Forces a New Approach to Prisons*, NAT'L PUB. RADIO (Feb. 15, 2011), <http://www.npr.org/2011/02/15/133760412/budget-crunch-forces-a-new-approach-to-prisons> (the cost to maintain the prison system in the United States is \$50 billion annually).

expenditure in state budgets.<sup>35</sup> Administering additional sex offender programs after the inmate is released from incarceration inevitably adds to the already overinflated penal system budget.<sup>36</sup>

Large registration systems can be nearly impossible for law enforcement to effectively monitor.<sup>37</sup> One police captain in Georgia noted that he needed four police officers working full time just to monitor the sex offender database in one county.<sup>38</sup> As the number of sex offenders on a registry increases, it becomes more difficult for both police and civilians to distinguish between dangerous sexual offenders and non-violent offenders.<sup>39</sup>

Sex offender registration and community notification also has an economic effect on the community where a sex offender resides.<sup>40</sup> One study showed that home prices deflate by approximately nine percent if a sex offender lives within one tenth of a mile of the property.<sup>41</sup> The perception of safety is a considerable factor for many homebuyers.<sup>42</sup>

Civil commitment also carries an enormous financial burden. The Washington Institute for Public Policy determined that the cost of operating facilities to hold sex offenders in 2004 was \$224 million

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<sup>35</sup> See *id.*

<sup>36</sup> Maggie Clark, *States Struggle with National Sex Offender Law*, STATELINE (Jan. 5, 2012), <http://www.stateline.org/live/details/story?contentId=622764>.

<sup>37</sup> See HUMAN RIGHTS WATCH, *No Easy Answers Sex Offender Laws in the US* (Sept. 12, 2007), <http://www.hrw.org/reports/2007/09/11/no-easy-answers-0>.

<sup>38</sup> See Stephanie Chen, *After Prison, Few Places for Sex Offenders to Live*, WALL ST. J. (Feb. 19, 2009), at A16 (explaining that law enforcement are among the most vocal critics of rigid sex offender legislation).

<sup>39</sup> See *Sex Laws Unjust and Ineffective*, THE ECONOMIST, Aug. 6, 2009, at 31. (describing an incident of oral sex that caused a sixteen year old girl to become a registered sex offender).

<sup>40</sup> See Press Release, Longwood University, *Research by Longwood Business Professor Examines Sex Offenders' Effect on Home Sales* (Aug. 06, 2009), [http://www.longwood.edu/2010releases\\_26711.htm](http://www.longwood.edu/2010releases_26711.htm).

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

annually.<sup>43</sup> In New York, the average cost to hold a sex offender in a facility in 2010 was \$175,000.<sup>44</sup>

### III. SEX OFFENDER LEGISLATION IN THE UNITED STATES

#### A. Federal Legislation

In the United States, public fear and outrage have been effective motivators in passing broad legislation regarding sex offenders.<sup>45</sup> In 1994, Congress passed the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act, which required every state to maintain a sex offender registry.<sup>46</sup> The Act was named in honor of an eleven-year old boy who was kidnapped near his home by an unidentified male and is still missing today.<sup>47</sup> The statute provided that sex offenders had to register with the police, but lacked a public notification provision.<sup>48</sup>

In 2006, Congress passed the Adam Walsh Child Protection and Safety Act (“Walsh Act”), which expanded on the prior federal

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<sup>43</sup> See *Involuntary Commitment of Sex. Violent Predators: Comparing State Laws*, WASH. INST. FOR PUB. POL. (Mar. 2005), <http://www.wsipp.wa.gov/rptfiles/05-03-1101.pdf> (civil commitment of sex offenders differs drastically from jurisdiction to jurisdiction, some states have a very large range of offenders who qualify for commitment).

<sup>44</sup> See Rosemary Black, *Treatment for a Sexual Predator Costs a Whopping \$175,000 Per Person Per Year in New York: Study*, N.Y. DAILY NEWS, June 22, 2010, <http://www.nydailynews.com/life-style/treatment-sexual-predator-costs-whopping-175-000-person-year-new-york-study-article-1.181482>.

<sup>45</sup> See *Public Opinion and the Criminal Justice System: Building Support for Sex Offender Management Programs*, CENTER FOR SEX OFFENDER MANAGEMENT (2000), <http://heartland.org/policy-documents/public-opinion-and-criminal-justice-system-building-support-sex-offender-management>.

<sup>46</sup> See 42 U.S.C.A. § 14071(West 2006).

<sup>47</sup> See *id.*

<sup>48</sup> Alisha Powell, A Systematic Review of Surveys on Public Attitudes Toward Community Notification for Sex Offenders, University of Alabama (2010)(unpublished M.S. thesis, University of Alabama) (on file with the University of Alabama Library System)(Under the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act a sex offender is anyone who is convicted of a sex crime, but sexual offences are not limited to crimes that involve the act of sex).

sex offender legislation.<sup>49</sup> The statute's purpose is to "protect the public from sex offenders and offenders against children" by establishing a comprehensive national system for the registration of sex offenders.<sup>50</sup> Under the Walsh Act, a sex offender is required to provide his/her name, social security number, address, place of employment, and license plate number.<sup>51</sup> The statute indicates that this information, as provided by the offender, will be accessible to the public.<sup>52</sup>

In addition, the Walsh Act provides guidance to the states on structuring state sex offender legislation.<sup>53</sup> The Walsh Act mandates that the Federal Attorney General promulgate guidance and regulations for structuring state-specific sex offender databases.<sup>54</sup> The Attorney General's guidelines explicitly state that the Walsh Act establishes the minimum applicable standard for sex offender registration.<sup>55</sup> As a result, states have the authority to create registration requirements that are more comprehensive than the federal legislation.<sup>56</sup>

One example of the direction that the Walsh Act provides to states is the length of time a sex offender will remain on the registry.<sup>57</sup> The length of the registration requirement is dependent on the classification of the sex offender.<sup>58</sup> The Walsh Act sets out the maximum registration for Tier I offenders as fifteen years, Tier II offenders as twenty-five years, and Tier III offenders can be required to register for life.<sup>59</sup> Under the Walsh Act, Tier III offences are those punishable by more than one year in prison and require at least one of the following: a) aggravated sexual abuse or sexual abuse; b)

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<sup>49</sup> See generally 42 U.S.C.A. § 16901 (West 2006).

<sup>50</sup> *Id.*

<sup>51</sup> See 42 U.S.C.A. § 16914(West 2006).

<sup>52</sup> See *id.* § 16918.

<sup>53</sup> See *id.* § 16914.

<sup>54</sup> See *id.* § 16912.

<sup>55</sup> See The National Guidelines for Sex Offender Registration and Notification, 72 Fed. Reg. 30212 (May 30, 2007).

<sup>56</sup> See *id.*

<sup>57</sup> See 42 U.S.C.A. § 16915 (West 2006).

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

abusive sexual conduct with a minor under the age of thirteen; c) kidnapping of a minor; or d) that the offense be committed after the offender becomes a Tier II offender.<sup>60</sup>

Tier II offenses are also punishable by more than one year in prison and include one of the following: a) sex trafficking; b) coercion and enticement; c) transportation with intent to commit sexual activity; or d) committing an offence after becoming a Tier I offender.<sup>61</sup> Each of the previous offences must incorporate either sexual activity with a minor, soliciting a minor for prostitution, or the creation or circulation of child pornography.<sup>62</sup>

Tier I offenses include all sexual offenses not included in Tier II and Tier III, which can include both felonies and misdemeanors.<sup>63</sup> The all-encompassing nature of Tier I offenses shows that an extensive number of crimes can land an individual on the sex offender registry.

The overly-broad guidance provided by the Walsh Act has significant consequences.<sup>64</sup> Many state laws show that a relatively mild offense can cause an individual to become part of the sex offender registry.<sup>65</sup> To illustrate, thirteen states have incorporated public urination into their list of sexual offenses; and twenty-nine states include consensual sex between teenagers.<sup>66</sup>

#### B. State Specific Legislation: A Study of Two States

Currently, under the Adam Walsh Act, every state has developed a sex offender registry and community notification scheme.<sup>67</sup> States have taken different approaches in enacting sex offender legislation and managing sex offenders. The legislation of

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<sup>60</sup> See *id.* § 16911.

<sup>61</sup> See *id.*

<sup>62</sup> See 42 U.S.C.A. § 16911 (West 2006).

<sup>63</sup> See Lori McPherson, *Practitioner's Guide to the Adam Walsh Act*, AM. PROSECUTORS RES. INST., 2007, at 1.

<sup>64</sup> See HUMAN RIGHTS WATCH, *supra* note 37.

<sup>65</sup> See *id.*

<sup>66</sup> See *id.*

<sup>67</sup> See 42 U.S.C.A. § 16912(West 2006).

two states, Vermont and Alabama, highlights the enormous amount of discretion provided by the Walsh Act.<sup>68</sup>

Vermont's Community Notification of Sexual Offenders Statute [hereinafter "Vermont Notification Statute"] does not automatically publicize a convicted sex offender's information.<sup>69</sup> The statute requires sex offenders to provide the information suggested by the federal guidelines in the Walsh Act: name; general physical description; sentence; address; place of employment; nature of the offense; and compliance with treatment recommendations.<sup>70</sup> Instead of making all sex offender information available to the public, the Vermont Notification Statute permits courts to determine whether an individual is a "sexually violent predator."<sup>71</sup> If the court determines a sex offender to be a sexually violent predator by clear and convincing evidence, the offender will be placed on the sex offender registry for life and be subject to community notification.<sup>72</sup> An individual who is adjudged not to be a sexually violent predator will not be subject to community notification.<sup>73</sup>

Alabama's sex offender legislation has taken a different path. In 2011, the Alabama House of Representatives unanimously voted to make the State's sex offender laws stricter through the Alabama Sex Offender Registration and Community Notification Act [hereinafter "Alabama Sex Offender Act"].<sup>74</sup> The statute requires all offenders who have been convicted of a sex offense to join the registry and be subject to public notification of their status.<sup>75</sup> Unlike Vermont's law, Alabama's statute does not distinguish between levels of crimes for purposes of public notification.<sup>76</sup> The statute's definition of a sexual offense broadly encompasses many crimes,

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<sup>68</sup> See generally Vt. Stat. Ann. tit. 13, § 5402 (2009); AL ST § 15-20A-3.

<sup>69</sup> See Vt. Stat. Ann. tit. 13, § 5405 (2009).

<sup>70</sup> See *id.* § 5411.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *House Passes Stronger Sex Offender Bill*, ASSOCIATED PRESS, May 25, 2011, at A12.

<sup>75</sup> See AL ST § 15-20A-3.

<sup>76</sup> See *id.* § 15-20A-5.

ranging from very serious crimes like sexual torture to comparatively minor crimes like indecent exposure.<sup>77</sup>

The Alabama Sex Offender Act further imposes substantial burdens on registered sex offenders for the duration of the registration.<sup>78</sup> For example, sex offenders are required to verify their registration in person every three months.<sup>79</sup> This obligation will be enforced indefinitely in cases where the particular sex offense requires lifetime registration.<sup>80</sup> Homeless sex offenders bear the even greater burden of being required to report in person to local law enforcement every seven days to verify their registration.<sup>81</sup> If an individual does not comply with the verification procedures, he or she may be subject to felony charges.<sup>82</sup>

One of the most striking aspects of the Alabama Sex Offender Act is the electronic monitoring system.<sup>83</sup> The statute compels individuals who were either guilty of a Class A felony or deemed to be a sexually violent predator to comply with electronic monitoring procedures for at least ten years.<sup>84</sup> The monitoring system produces reports, upon request, of a particular sex offender, to determine if he or she was near a crime scene, left an identified area, or violated curfew requirements.<sup>85</sup>

### C. The Diverging State Trends under the Walsh Act

The significant contrast in legislation promulgated in Alabama and Vermont shows the immense discretion provided to states by the Walsh Act.<sup>86</sup> Furthermore, the approaches illustrate two major issues that sex offender legislation addresses: public safety and the human rights of sex offenders. Ideally, such legislation will

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<sup>77</sup> See *id.*

<sup>78</sup> See *id.* § 15-20A-10.

<sup>79</sup> See *id.*

<sup>80</sup> See AL ST § 15-20A-10.

<sup>81</sup> See *id.* § 15-20A-12.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.* § 15-20A-20.

<sup>84</sup> See *id.*

<sup>85</sup> See AL ST § 15-20A-20.

<sup>86</sup> See 42 U.S.C.A. § 16914(West 2006).

balance both issues without allowing fear to tip the scales against preserving sex offender rights.

One positive aspect of the Vermont Notification Statute is that it considers public safety while also acknowledging the rights of convicted sex offenders.<sup>87</sup> An official within the Vermont Department of Justice explained that reducing the number of sex offenders subject to community notification serves two purposes.<sup>88</sup> First, it aids the community in recognizing the offenders that pose a significant threat; and second, it helps sex offenders reintegrate into society.<sup>89</sup>

The first purpose indicated by the Vermont Department of Justice addresses the safety concerns that have been a driving force in the creation of sex offender registration laws throughout the United States. An individual's ability to determine the potential danger posed by an offender can be reduced when a registry has a mixture of violent offenders and non-violent offenders. Vermont's legislation assists with this concern by providing public access to the offenders who potentially pose the largest threat to society.

The second purpose, reintegration, is focused on the rights of sex offenders rather than public safety. Vermont's legislation aids reintegration into the community because it allows sex offenders, who have committed a non-violent offense, to remain anonymous. This anonymity arguably does not have a detrimental effect on public safety because the police still have access to all sex offender information.<sup>90</sup>

In contrast, the Alabama Sex Offender Act infringes significantly on the lives of sex offenders living in the state,<sup>91</sup> and thereby demonstrates the problem with the massive amount of discretionary power provided by the Walsh Act.<sup>92</sup> The Walsh Act lacks provisions regarding reporting requirements and electronic

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<sup>87</sup> See generally Vt. Stat. Ann. tit. 13 (2009).

<sup>88</sup> See HUMAN RIGHTS WATCH, *supra* note 37.

<sup>89</sup> See *id.*

<sup>90</sup> See Vt. Stat. Ann. tit. 13, § 5411 (2009).

<sup>91</sup> See generally AL ST § 15-20A-3.

<sup>92</sup> See generally 42 U.S.C.A. § 16901(West 2006).

monitoring.<sup>93</sup> The Alabama Sex Offender Act states that the purpose of the legislation is public safety, but it fails to provide evidence to show that electronic monitoring or rigid reporting requirements aid the goal of public safety.<sup>94</sup> As a result, the State's ability to implement strict reporting requirements and monitor a private citizen's movements at all times is a strong curtailment of sex offender's privacy without proper justification.

#### D. The Effectiveness of Current Sex Offender Laws

##### 1. *The Effectiveness of Notification Laws*

Several studies have been conducted on the effectiveness of registration and community notification laws. One study examined the effect of notification laws on deterrence by examining data from fifteen states over a period of ten years.<sup>95</sup> The study concluded that an average-sized sex offender registry reduces crime by thirteen percent, with the reduction in crime increasing with the size of the registry.<sup>96</sup> A second study found that public notification laws increase recidivism rates of offenders.<sup>97</sup> The study hypothesized that once sex-offender information becomes public the psychological, social, and financial costs of the information make a crime-free lifestyle less desirable for the offender.<sup>98</sup>

A comprehensive analysis of sex offenders in New Jersey determined that the state's largest decline in sexual offenses occurred before the passage of registration and notification laws.<sup>99</sup> Further, the

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<sup>93</sup> See generally *id.*

<sup>94</sup> See generally AL ST § 15-20A-2 (2006).

<sup>95</sup> See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 1 J.L. ECON 54, 15 (2008).

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See Kristen Zgoba & Karen Bachar, *Sex Offender Registration and Notification: Limited Effects in New Jersey*, NAT'L INST. JUST. (2009), <https://www.ncjrs.gov/pdffiles1/nij/225402.pdf>.

study concluded that notification laws had no effect in reducing the number of sexual offenses or the number of victims.<sup>100</sup>

## *2. The Effectiveness of Civil Commitment*

Currently, there have been no studies conducted to determine the effectiveness of civil commitment in reducing recidivism.<sup>101</sup> One state attempted to reduce the number of offenders held in civil commitment facilities by relaxing the standards for discharge.<sup>102</sup> None of the offenders released committed a new sexual offense.<sup>103</sup> Yet, subsequent media scrutiny caused the legislature to backtrack by strengthening its release standards once again.<sup>104</sup>

## IV. UNITED KINGDOM SEX OFFENDER LEGISLATION

The United Kingdom first adopted sex offender registration with the Sex Offender Act of 1997 (“1997 Act”).<sup>105</sup> Although the 1997 Act requires sex offenders to provide certain information upon release, it does not require as much information as the United States’ legislation.<sup>106</sup> Additionally, the 1997 Act does not allow public access to sex offender data.<sup>107</sup> In fact, European courts have consistently held that sex offender registration data is not to be made public domain.<sup>108</sup> The Sexual Offences Act of 2003 replaced the 1997 Act, with more definitive language.<sup>109</sup>

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<sup>100</sup> See *id.*

<sup>101</sup> See Hollida Wakefield, *The Vilification of Sex Offenders: Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?*, 1 J. OF SEXUAL OFFENDER CIV. COMMITMENT: SCI. AND THE L. 141, 147 (2006).

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See Sex Offences Act, 1997, c. 51 (U.K.); Sexual Offenses Act, 2003, c. 42 (U.K.) (the United Kingdom adopted the Sexual Offences Act of 2003 which replaced the Sex Offender Act of 1997 without significantly altering the sex offender registration requirements from the original act).

<sup>106</sup> See *id.*

<sup>107</sup> See Dugan, *supra* note 3, at 631.

<sup>108</sup> See *id.*

<sup>109</sup> See Sexual Offences Act, 2003, c. 42 (U.K.).

Similar to the United States, a highly publicized crime involving a child created political pressure in the United Kingdom to ensure public safety.<sup>110</sup> However, the United Kingdom refused to create a system of absolute public notification as the United States implemented.<sup>111</sup> Rather, in 2000, the United Kingdom added the Child Sex Offender Disclosure Scheme (“Sarah’s Law”), which allowed victims and their families to be informed about specific perpetrators.<sup>112</sup> The newest version of Sarah’s Law, adopted in 2009, is even more permissive, allowing parents to request the sex offender status of an individual who has regular, unsupervised contact with their children.<sup>113</sup> The provision applies only if the sex offender was incarcerated in excess of one year.<sup>114</sup>

Even though Sarah’s Law does not allow the general public to access sex offender information, there is an obvious potential for an individual’s sex offender status to spread throughout a community.<sup>115</sup> The new law also has the attendant risk of causing sex offenders to resist compliance with registration requirements.<sup>116</sup> The widespread dissemination of sex offender information is supported by the large number of people requesting sex offender records. Statistics

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<sup>110</sup> See *id.* at 617.

<sup>111</sup> See Autumn Long, *Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms*, 18 TRANSNAT'L. L. & CONTEMP. PROBS. 145, 159 (2009).

<sup>112</sup> See *id.*

<sup>113</sup> See Press Release, Home Office, National Rollout of Scheme to Protect Children (Aug. 6, 2010), <http://www.homeoffice.gov.uk/media-centre/press-releases/national-rollout-scheme-protect> (official government statement explaining that Sarah’s Law will help protect children from sexual offences by allowing parents to access the information about potentially dangerous individuals).

<sup>114</sup> See Long, *supra* note 111, at 159.

<sup>115</sup> See Stephen Wright, *Sarah’s Law to go Nationwide: Finally, Parents Win Access to Police Intelligence on ‘Suspects’ in Contact with their Children*, DAILY MAIL (Jan. 25, 2010), <http://www.dailymail.co.uk/news/article-1245680/Sarahs-Law-allowing-parents-carry-sex-offender-checks-rolled-out.html>.

<sup>116</sup> See Daniel Chadwick, *Sarah’s Law*, INSIDE TIME (May 2007), <http://www.insidetime.org/articleview.asp?a=24>.

regarding a pilot version of Sarah's Law indicated that one in fifteen people requested information about potential sex offenders.<sup>117</sup>

Restrictions on public notification in the United Kingdom may be further eroded with the government's proposal of Clare's Law.<sup>118</sup> This new law would provide a mechanism for individuals to inquire about an intimate partner's history of domestic violence.<sup>119</sup> Currently, it is unclear whether the government plans to model the law after Sarah's Law.<sup>120</sup>

#### A. The Proper Balance between Sex Offender Rights and Public Safety

The United Kingdom's method of sex offender registration and community notification is a more reasonable approach. Like the United States, the United Kingdom's legislature had to deal with the public fear emanating from a high profile crime.<sup>121</sup> Rather than succumbing to public sentiment, the adoption of the 1997 Act demonstrated dedication to protecting the public while still maintaining the privacy of sex offenders. The legislation remains focused on public safety because sex offender records are provided to the police. Sex offender information should lie solely in the hands of police for two reasons. First, when citizens are given access to public information there is always the possibility of vigilantism. Second, the responsibility of monitoring dangerous situations should be left to officials who are trained to deal with offenders rather than defenseless citizens.

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<sup>117</sup> See Mark Hughes, *Sarah's Law to be Rolled Out Nationally*, THE INDEPENDENT, Mar. 3, 2010, at 16 (the pilot program of Sarah's law was originally initiated in four cities).

<sup>118</sup> See Press Release, HOME OFFICE, Consultation of 'Clare's Law' Launched (Oct. 25, 2011), available at <https://www.gov.uk/government/news/consultation-on-clares-law-launched>.

<sup>119</sup> See *id.*

<sup>120</sup> See Lucy Reed, *Why Clare's Law Won't Prevent Domestic Violence*, THE GUARDIAN (Jul. 22, 2011), <http://www.guardian.co.uk/society/2011/jul/22/why-clares-law-wont-prevent-domestic-violence>.

<sup>121</sup> See *supra* note 3, at 617.

Unfortunately, the United Kingdom appears to be veering away from its original stance. The adoption of Sarah's Law and the proposal of Clare's Law are a disturbing trend in the United Kingdom. Both laws indicate an erosion of the original privacy protections afforded to sex offenders. If the trend continues, the United Kingdom's system may start to look more like the United States' model.

## V. CASE LAW DEVELOPMENT

### A. Sex Offender Registration and Disclosure

#### 1. *United Kingdom*

In 2010, the Supreme Court of the United Kingdom laid down a significant decision regarding the rights of sex offenders. The court decided *R v. Secretary of State for the Home Department* based on Article 8 of the ECHR.<sup>122</sup> In the case, two sex offenders, who were subject to lifetime registration requirements, appealed to the Supreme Court arguing that the Sexual Offences Act of 2003 violated their right to privacy under Article 8 of the ECHR. They argued that the violation occurred because there was no mechanism within the statute for the courts to review lifetime registration on a case-by-case basis.<sup>123</sup>

The Court reasoned that the government's goal was unmistakably legitimate and that deterrence of sexually related crimes was of "great social value."<sup>124</sup> However, the court focused the discussion on the proportionality of subjecting individuals to notification requirements for life without the ability to obtain judicial review.<sup>125</sup> The court, using a balancing analysis, decided in favor of protecting the victims due to the serious impact of sexual offenses;

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<sup>122</sup> See *R and Thompson v. Secretary of State for the Home Department*, [2010] UKSC 17, [2011] 1 A.C. 331 (appeal taken from Eng.).

<sup>123</sup> See *id.* at 339.

<sup>124</sup> See *id.* at 342.

<sup>125</sup> See *id.*

yet, the Court also acknowledged that the scheme must not effect additional punishment on the offender.<sup>126</sup>

Even though the protection of victims was its primary concern, the Court still reasoned that lifetime registration requirements for sex offenders, without the ability to appeal, interfered with privacy rights pursuant to ECHR Article 8.<sup>127</sup> The registration requirements alone were acceptable to the court because the interference was directed at the “prevention or crime and the protection of rights and freedoms of others.”<sup>128</sup> The court found that the problem was the deprivation of judicial review when an offender was subject to lifetime registration.<sup>129</sup> The court found an interference with privacy rights because the registration information had the potential to reach third parties.<sup>130</sup> The court determined that the risk associated with the likely dissemination of sex offender information gave offenders subject to registration a substantial interest in petitioning removal from the list.<sup>131</sup>

The decision in *R v. Secretary of State for the Home Department* was controversial in the United Kingdom, and many powerful figures in the government disagreed with the ruling. The Prime Minister expressed his disgust, remarking that the decision “seems to fly completely in the face of common sense.”<sup>132</sup> Home Secretary, Theresa May, publicly announced that the Government would make “minimal changes” and that the standards for obtaining an appeal would be set as “high as possible.”<sup>133</sup> The strong government reaction

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<sup>126</sup> See *id.*

<sup>127</sup> See *R and Thompson v. Secretary of State for the Home Department*, [2010] UKSC 17, [2011] 1 A.C. 331 (appeal taken from Eng.).

<sup>128</sup> *Id.* at 348.

<sup>129</sup> See *id.* at 353.

<sup>130</sup> See *id.* at 348-49.

<sup>131</sup> See *id.*

<sup>132</sup> See generally Sophie Lockley, *The Supervision of Sex Offenders in the Community – At What Cost?*, INTERNET J. OF CRIMINOLOGY, [http://www.internetjournalofcriminology.com/Lockley\\_The\\_Supervision\\_of\\_Sex\\_Offenders\\_in\\_the\\_Community\\_IJC\\_Aug\\_2011.pdf](http://www.internetjournalofcriminology.com/Lockley_The_Supervision_of_Sex_Offenders_in_the_Community_IJC_Aug_2011.pdf).

<sup>133</sup> See *Sex Offender Registration Appeals to Go Ahead*, BRITISH BROADCASTING COMPANY (Feb. 16, 2011), <http://www.bbc.co.uk/news/uk-12476979> (the United Kingdom’s sex offender register is not a centrally held

demonstrates that the tension between fear of sexual predators and the civil rights of sex offenders is not a phenomenon unique to the United States.

In the same year, a United Kingdom Court of Appeals considered the disclosure of sex offender information under Article 8 of the ECHR in *H and L v. A City Council*.<sup>134</sup> In that case, a man was convicted of indecent assault of a seven year old boy while he had a pending trial for a similar offense.<sup>135</sup> A local authority determined that his conviction and pending trial would be communicated to several organizations with which he had contact, that the public university would discontinue employing his company, and that he would be asked to leave several community committees of which he was a part.<sup>136</sup> The court reasoned that the need for disclosure must be determined on a case-by-case basis.<sup>137</sup> In this instance, a blanket disclosure to several organizations violated the sex offender's Article 8 privacy rights.<sup>138</sup>

## 2. The United Kingdom's Balanced Approach

The two decisions discussed above are an important step in sex offenders' rights. The cases demonstrate the Court's view that protecting sex offenders' rights does not necessarily diminish community safety. The decision in *R v. Secretary of State for the Home Department* does not reduce safety within the community because it does not encourage the automatic removal of sex offenders from the registry.<sup>139</sup> Rather, the decision simply finds that sex offenders must be able to present the reasons why they believe that they are no longer a danger to the community.<sup>140</sup> Courts are charged with trust and discretion to make decisions on very important issues in many

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database of sex offender information, but rather a notification system used to update the police).

<sup>134</sup> *H and L v A City Council*, [2011] EWCA (Civ) 403, (Eng.)

<sup>135</sup> *See id.* at 4.

<sup>136</sup> *See id.* at 7.

<sup>137</sup> *See id.* at 67.

<sup>138</sup> *See id.* at 29.

<sup>139</sup> *See R and Thompson v. Secretary of State for the Home Department*, [2010] UKSC 17, [2011] 1 A.C. 331, 348-49 (appeal taken from Eng.).

<sup>140</sup> *Id.* at 342.

other areas of law. There should be the same level of confidence in the court to make determinations regarding a sex offender's registration status.

*H and L v. A City Council* follows a similar trend, properly giving courts discretionary power to determine the rights of sex offenders on a case-by-case basis.<sup>141</sup>

Regrettably, the United Kingdom's legislature appears to be moving in the opposite direction, based on its passing and proposing legislation that allows for more community access to sex offender information.<sup>142</sup> The split between the courts and the legislature can likely be explained by the fact that legislative officials are elected into office. A legislative action will often be significantly influenced by public fears and desires. If public perceptions regarding sex offenders remain the same, it is very unlikely that the legislature would adopt a law protecting the privacy rights of sex offenders. The result of this public influence is that the burden of protecting the privacy rights of unpopular groups, like sex offenders, will frequently fall to the courts.

### 3. United States

The Supreme Court of the United States has affirmed the constitutionality of sex offender registration and community notification.<sup>143</sup> In *Connecticut Department of Public Safety v. Doe*, Connecticut's public disclosure of the state's sex offender registry was challenged on procedural due process grounds.<sup>144</sup> Connecticut state law made a sex offender's name, address, photograph, and description of the sexual offence available to the public.<sup>145</sup> Respondent argued that his Fourteenth Amendment rights were violated because he was not provided a hearing to determine his

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<sup>141</sup> See *H and L v. A City Council*, [2011] EWCA (Civ) 403, 67 (Eng.).

<sup>142</sup> See Press Release, Home Office, National Rollout of Scheme to Protect Children (Aug 6, 2010), available at <http://www.homeoffice.gov.uk/media-centre/press-releases/national-rollout-scheme-protect>.

<sup>143</sup> See generally *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

<sup>144</sup> See *id.* at 4.

<sup>145</sup> See *id.*

current level of dangerousness.<sup>146</sup> Respondent claimed that the liberty interest implicated by the Fourteenth Amendment was his “reputation” and his “status under state law.”<sup>147</sup>

The Supreme Court determined that respondent’s claim was meritless because the statutory scheme did not require a showing that the offender was currently dangerous.<sup>148</sup> In essence, respondent had no claim under the Fourteenth Amendment because the statute did not provide for a hearing as required process.<sup>149</sup> The law only required a conviction for an offender to be placed on the public registry.<sup>150</sup> As a result, the court determined that the claim was not relevant to the statutory scheme.<sup>151</sup>

#### 4. Privacy Concerns Under the Walsh Act

Importantly, the court noted that it decided *Connecticut Department of Safety* on procedural due process grounds, and explicitly stated that it held no opinion on whether the state law violated substantive due process rights.<sup>152</sup> Accordingly, the decision left room for further substantive law challenges to be brought before the court. At the time of this publication, no further due process challenges on the Walsh Act’s community notification scheme have been granted certiorari before the Supreme Court.<sup>153</sup> However, the successful privacy challenge against the disclosure of sex offender information in the United Kingdom shows that there is a strong argument to be made that public notification laws are a violation of privacy rights.<sup>154</sup>

The United States has not extended a fundamental right of privacy to sex offenders. However, there is a possibility that the

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<sup>146</sup> See *id.*

<sup>147</sup> *Id.* at 5-6.

<sup>148</sup> See *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 8 (2003).

<sup>149</sup> See *id.*

<sup>150</sup> See *id.* at 7.

<sup>151</sup> See *id.* at 8.

<sup>152</sup> See *id.* at 7-8.

<sup>153</sup> See generally *Smith v. Doe*, 538 U.S. 84, 89-118 (2003) (confirming the constitutionality of community notification laws under the Walsh Act based on an Ex Post Facto challenge).

<sup>154</sup> See *H and L v. A City Council*, [2011] EWCA (Civ) 403, 67 (Eng.).

Supreme Court will consider privacy rights if a substantive claim regarding sex offender registration and community notification is brought before the Court. If the Court determines that sex offenders have a fundamental right to privacy, the government cannot infringe on the privacy right without a substantial interest which is narrowly tailored to meet the goal provided.<sup>155</sup> There is little doubt that community safety is a substantial government interest. In the case of a substantive due process claim, the question before the court will likely be whether registration and community notification are sufficiently tailored to meet the goal of public safety. In such a case, the burden will be on the government to show that community notification actually aids in the goal of keeping the public safe.

### B. Civil Commitment

Civil Commitment of sexual offenders is the involuntary commitment of offenders beyond their prison sentence based on the concern that they are likely to reoffend.<sup>156</sup> The proceeding is considered civil, so it lacks many of the constitutional protections provided during criminal proceedings.<sup>157</sup> Generally, civil commitment actions will not provide protections such as the right to remain silent, jury trials, procedural rights, the guarantee of a speedy process, and bail.<sup>158</sup> The Supreme Court of the United States has considered the constitutionality of statutes allowing for the civil commitment of sex offenders in two cases.<sup>159</sup>

The Supreme Court first considered sex offender civil commitment in *Kansas v. Hendricks*, which involved a defendant who was convicted for taking indecent liberties with two thirteen-year-old

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<sup>155</sup> See generally Griswold v. Connecticut, 381 U.S. 479 (1965) (established the fundamental right to privacy under the United States Constitution by invalidating a statute that banned contraceptive distribution to married couples).

<sup>156</sup> See BLACK'S LAW DICTIONARY 279 (9<sup>th</sup> ed. 2009).

<sup>157</sup> See Eric S. Janus & Brad Bolin, *An End-Game for Sexually Violent Predator Laws: As-Applied Invalidation*, 6 OHIO ST. J. CRIM. L. 25, 27 (2008).

<sup>158</sup> See Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 979 (2011).

<sup>159</sup> See generally U.S. v. Comstock, 130 S. Ct. 1949 (2010); see also *Kansas v. Hendricks*, 521 U.S. 346 (1997).

boys.<sup>160</sup> After the defendant's conviction, Kansas enacted the Sexually Violent Predator Act, creating procedures to civilly commit an individual beyond his or her prison sentence if the individual was deemed likely to commit "predatory acts of sexual violence."<sup>161</sup> Shortly before the defendant's release he was civilly committed pursuant to the Sexually Violent Predator's Act.<sup>162</sup> The defendant appealed his civil commitment claiming a violation of due process.<sup>163</sup>

The Supreme Court held that the civil commitment statute did not violate substantive due process. The decision noted an important restriction on a citizen's right to liberty: "although freedom from physical restraint has always been at the core of the liberty protected by Due Process Clause from arbitrary governmental action, that liberty interest is not absolute."<sup>164</sup> The Court reasoned that involuntary civil commitment does not violate substantive due process if the commitment follows "proper procedures" and "evidentiary standards."<sup>165</sup> The Kansas statute required a previous conviction, finding of "future dangerousness", and a "mental abnormality" or "personality disorder" that made a person unable to control the unwanted behavior.<sup>166</sup> Because the statute limited civil confinement to a sufficiently narrow class of people, only those who were unable to control their dangerous behavior, the Court ruled that the statute did not infringe on constitutionally protected liberties.<sup>167</sup>

The Court also examined the significant procedural safeguards found in the Kansas statute.<sup>168</sup> The procedures included: (1) notification to the prosecutor that a person might have met the statutory requirements sixty days before the inmate's release; (2) forty-five days for the prosecutor to decide whether to file a petition; (3) a determination by a court that probable cause existed to support that a person was a "sexually violent predator;" (4) professional

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<sup>160</sup> See *Hendricks*, 521 U.S. at 353.

<sup>161</sup> *Id.* at 350.

<sup>162</sup> See *id.* at 355-56.

<sup>163</sup> See *id.* at 353.

<sup>164</sup> See *id.* at 356.

<sup>165</sup> See *Hendricks*, 521 U.S. at 357.

<sup>166</sup> See *id.* at 358.

<sup>167</sup> See *id.*

<sup>168</sup> See *id.* at 352-56.

evaluation; and (5) a trial to determine whether the individual was, beyond a reasonable doubt, a “sexually violent predator,” with the state carrying the burden of proof.<sup>169</sup>

Federal civil commitment for sex offenders is addressed in the Walsh Act.<sup>170</sup> Under the Act, the Attorney General, or an individual authorized by the Attorney General, has the ability to identify an individual as a “sexually dangerous person.”<sup>171</sup> Upon this classification, the clerk in the jurisdiction where the individual is confined will receive a certificate and the court will order a hearing to determine if an individual is sexually dangerous.<sup>172</sup> The court then has the discretion to hold an individual in civil commitment, beyond his prison term, if the individual: 1) has “engaged or attempted to engage in sexually violent conduct or child molestation”; 2) “suffers from a serious mental illness, abnormality or disorder”; and 3) “as a result of that mental illness, abnormality, or disorder is sexually dangerous to others.”<sup>173</sup> The evidentiary standard to civilly commit an individual under the Walsh Act is proof by clear and convincing evidence.<sup>174</sup>

In 2010, the Supreme Court considered the constitutionality of a federal civil commitment statute in *United States v. Comstock*.<sup>175</sup> The issue before the Court was whether the Walsh Act was an unconstitutional expansion of congressional powers under Article I.<sup>176</sup> The Court held that civil commitment section of the Walsh Act was constitutional under the Necessary and Proper Clause, Art. I, § 8, cl. 18.<sup>177</sup> The Necessary and Proper Clause permits Congress to “enact laws governing prisons and prisoners” as long as Congress is acting within their enumerated powers.<sup>178</sup> As a result of the Court’s

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<sup>169</sup> *Id.* at 353-54.

<sup>170</sup> See *Generally* 42 U.S.C.S. § 16911(West 2006).

<sup>171</sup> See 18 U.S.C.A. § 4248 (West 2006).

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

<sup>173</sup> See *id.* § 4248.

<sup>174</sup> See *id.*

<sup>175</sup> See U.S. v. Comstock, 130 S. Ct. 1954.

<sup>176</sup> See *id.* at 1955.

<sup>177</sup> See *id.* at 1970.

<sup>178</sup> U.S. CONST. art. I, § 8, cl. 18.

focus on the broad scope of federal power, *Comstock* is often cited for issues of federalism rather than civil rights issues of sex offenders.<sup>179</sup>

Unlike the Court in *Hendricks*, the *Comstock* Court did not consider the procedural due process claim.<sup>180</sup> Consequently, the *Comstock* Court did not spend very much time comparing the federal statute with the state statute found in *Hendricks*. From a procedural standpoint, civil commitment under the Walsh Act is distinguishable from the state statute in *Hendricks*. Under the federal statute, the Attorney General's certification that an individual is sexually dangerous is sufficient to begin commitment proceedings, rather than the factors provided under the statute in *Hendricks*.<sup>181</sup> Further, the burden of proof in the statute in *Hendricks* was beyond a reasonable doubt, while the burden of proof in the Walsh Act was the clear and convincing evidence standard.<sup>182</sup>

### 1. Do Sexually Violent Predators Need Procedural Protections?

The relatively lengthy evidentiary and procedural standards set forth by the statute in *Hendricks* show an attempt by the state legislature to avoid arbitrary decision-making. Because civil commitment can be an indefinite restriction of physical freedom, procedural safeguards are vastly important to ensure that the decision to incapacitate an individual is necessary. In contrast, the lack of certain protections under the Walsh Act should be cause for alarm. The "clear and convincing evidence" standard is a lower burden of proof than the "beyond a reasonable doubt" standard used in criminal prosecutions.<sup>183</sup> This lower standard is troubling because the statute allows individuals to be detained in civil commitment indefinitely.<sup>184</sup>

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<sup>179</sup> See Jeffrey Toobin, *Without a Paddle; Can Stephen Breyer Save the Obama Agenda in the Supreme Court?*, NEW YORKER, Sept. 27, 2010, at 34, 40.

<sup>180</sup> See generally U.S. v. Comstock, 130 S. Ct. 130 S. Ct. 1949 (2010).

<sup>181</sup> See 18 U.S.C. § 4248 (2006).

<sup>182</sup> See Kansas v. Hendricks, 521 U.S. at 353-54; 18 U.S.C.A. § 4248(d) (West 2006).

<sup>183</sup> See 18 U.S.C.A. § 4248 (West 2006).

<sup>184</sup> See *id.*

The Walsh Act does provide a mechanism for review, which includes both continuing psychiatric care and judicial review every six months.<sup>185</sup> The availability of review may provide a false sense of security for individuals detained in civil commitment.<sup>186</sup> Studies have shown that offenders who enter civil commitment generally will never be released.<sup>187</sup>

## *2. The United Kingdom and Civil Commitment*

The United Kingdom's Sexual Offenses Act does not contain a section permitting the civil commitment of sex offenders.<sup>188</sup> However, the United Kingdom does have a general process for detaining certain individuals.<sup>189</sup> The Mental Health Act of 1983 ("The Mental Health Act") was enacted "with respect to the reception, care, and treatment of mentally disordered patients, the management of their property, and other related matters."<sup>190</sup> Section 63 of the Act allows for the compulsory treatment of a patient suffering from a mental disorder.<sup>191</sup> There is no specific provision for the compulsory treatment of mentally ill inmates or sexually violent predators.<sup>192</sup> The act applies to patients generally, rather than targeting a specific group of potentially dangerous individuals.<sup>193</sup>

## *3. Reconsidering Procedural Safeguards for Civil Commitment*

Civil commitment can, in some ways, be more restrictive than incarceration because of the possibility of an indefinite term.<sup>194</sup> The United Kingdom's lack of a civil commitment provision in its sex offender legislation shows that the practice specifically aimed at

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<sup>185</sup> See *United States v. Comstock*, 130 S. Ct. at 1955.

<sup>186</sup> See 18 U.S.C. § 4247 (2006).

<sup>187</sup> See generally Wakefield, *supra* note 101 (describing the government's doctrinal shift from punishing crimes that have already been committed to categorizing individuals who pose a potential threat of committing future crimes).

<sup>188</sup> See Sexual Offenses Act, 2003, c. 42 (U.K.).

<sup>189</sup> See The Mental Health Act, 1893, c. 4, § 63 (U.K.).

<sup>190</sup> *Id.* c. 1, § 1.

<sup>191</sup> See *id.* c. 4, § 63.

<sup>192</sup> See generally The Mental Health Act, 1893 (U.K.).

<sup>193</sup> *Id.*

<sup>194</sup> See Wakefield, *supra* note 101, at 146.

sexual offenders may not be a necessity.<sup>195</sup> If the United States continues with the practice of civil commitment of a sex offender, strong procedural safeguards must be in place. One potential model is the criminal trial. A civil commitment proceeding modeled after a criminal trial would use the “beyond a reasonable double standard.”

#### 4. *Studies Support Reform*

The studies performed in the United States confirm that the United Kingdom has taken a superior approach in creating sex offender laws.<sup>196</sup> Community notification laws have the opposite effect of their intended result, while registration laws only become problematic when the registry grows to be too large to manage. The detrimental effect of notification laws makes sense because ordinary citizens have no way of using the knowledge other than ostracizing the offender. The negative results stemming from community notification indicate that the goal of public safety is not served by these laws.

The lack of any significant research on the civil commitment of sex offenders is problematic. The process denies an individual the ability to freely live his life after he has finished paying his debt to society. In order for such a pervasive restriction on freedom to be worthwhile, there must be significant benefits. Without proper research there is no way to determine whether the indefinite commitment of certain sex offenders is benefiting the public in any real way.

## VI. UNCONVENTIONAL APPROACHES

Several unconventional sex offender programs have been established in some states and the United Kingdom. One such alternative program is Circles of Support and Accountability

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<sup>195</sup> See Sexual Offenses Act, 2003, c. 42 (U.K.).

<sup>196</sup> See Zgoba & Bachar, *supra* note 99; see also Prescott & Rockoof, *supra* note 95.

(“COSA”).<sup>197</sup> COSA involves a group of volunteers who form a “circle” around an offender, who is known as the “core member.” The “circle” essentially provides consistent support for the sex offender’s reintegration into the community.<sup>198</sup> The group serves dual functions: 1) providing a “supportive social network” to the core member; and 2) requiring that the offender take accountability for his future risk to society.<sup>199</sup>

In the United States, several states have implemented a program known as Special Sex Offender Sentencing Alternative (“SSOSA”).<sup>200</sup> SSOSA is offered to certain offenders in lieu of a lengthy jail sentence.<sup>201</sup> Generally, a SSOSA will require a shorter jail sentence followed by treatment and supervision.<sup>202</sup> After analyzing five years of data, the Washington Institute for Public Policy found that the recidivism rates for sex offenders granted SSOSA were lower than offenders not granted SSOSA.<sup>203</sup>

## VII. CONCLUSION AND RECOMMENDATIONS

Public fear and outrage have caused both the United States and the United Kingdom to take action to control the perceived danger presented by sex offenders.<sup>204</sup> The United Kingdom’s legislation has attempted to balance both the interests of sex

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<sup>197</sup> See *Circles of Support and Accountability*, FRESNO PACIFIC UNIVERSITY, <http://peace.fresno.edu/cosa/> (last visited Jan. 18, 2011); see also CIRCLES UK, <http://www.circles-uk.org.uk/> (last visited Jan. 18, 2011).

<sup>198</sup> See *Circles of Support and Accountability*, FRESNO PACIFIC UNIVERSITY, <http://peace.fresno.edu/cosa/> (last visited Jan. 18, 2011); see also CIRCLES UK, <http://www.circles-uk.org.uk/> (last visited Jan. 18, 2011).

<sup>199</sup> See CIRCLES UK, <http://www.circles-uk.org.uk/> (last visited Jan. 18, 2011)(explaining that COSA is a community based approach to solving the problem of sex offender recidivism where the community acts as a unit to aid the offender).

<sup>200</sup> See Wash. Inst. for Pub. Pol., *Sex Offender Sentencing in Washington State: Special Sex Offender Sentencing Alternative Trends* (Jan. 2006), <http://www.wsipp.wa.gov/rptfiles/06-01-1205.pdf>.

<sup>201</sup> See *id.*

<sup>202</sup> See *id.*

<sup>203</sup> See *id.*

<sup>204</sup> See *Public Opinion and the Criminal Justice System: Building Support for Sex Offender Management Programs*, *supra* note 45.

offenders and the interests of the public. In contrast, the legislation promulgated in the United States appears to be based solely on disputed views of the dangerousness of sex offenders in the community.<sup>205</sup>

Several studies have called into question the effectiveness and economic burden of registration and community notification.<sup>206</sup> The dearth of positive results from community notification gives more credence to the possibility that community notification is an inadequate form of protection and possibly unconstitutional. If the Supreme Court adopted a fundamental rights analysis, then there is a significant argument that community notification is not narrowly tailored to the goal of keeping the public safe. Further, the complete lack of research regarding the civil commitment of sexually violent predators is problematic considering the lack of adequate procedural protections and the low burden of proof in the federal statute.

These considerations tip the scale toward reforming sex offender laws in the United States to something more like the United Kingdom's approach. In order to effectuate a positive change, three adjustments need to be made. First, the United States should prohibit community notification. However, registration laws have shown some benefit, so continuing to provide sex offender information to the police should persist. Second, the United States should re-examine the civil commitment provisions in the Walsh Act. Any additions to the Act should ensure that strict procedural standards are in place and create a higher burden proof. Finally, the United States should include some unconventional approaches to future sex-offender legislation. Including these provisions will be beneficial in helping sex offenders reintegrate into society. Without implementing these—or other similar—changes, the United States will continue on the path of blatantly disregarding the rights of many of its citizens.

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<sup>205</sup> See Radford, *supra* note 3.

<sup>206</sup> See WASH. INST. FOR PUB. POL., *supra* note 43.