

Sex Offender Registration and Community Notification: Past, Present, and Future[†]

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It's a great honor to be with you here today and to provide the keynote address in this wonderful symposium examining issues relating to probation and parole. The panels have been remarkably rich and informative. That they should occur here in Massachusetts, where probation in particular originated in 1841,¹ makes the proceedings today especially fitting.

Probation and parole, of course, are the epitome of state—indeed, community-based criminal justice. As recognized since the founding era,² and repeatedly acknowledged by the U.S. Supreme Court,³ criminal justice in our federal union is mainly an undertaking of state and local governments, which process the lion's share of criminal offenders and ultimately must accommodate such individuals upon their reentry into society.⁴

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1. See DAVID DRESSLER, PRACTICE AND THEORY OF PROBATION AND PAROLE 11-18 (1959).

2. See, e.g., THE FEDERALIST No. 45, 260-61 (James Madison) (Clinton Rossiter ed., 1961) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people.").

3. See, e.g., United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

4. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.2(b) (4th ed. 2004) (characterizing the federal criminal justice system as a "bit player" compared to its state and local counterparts and citing data in support).

This predominance by the states is surely no less evident with respect to persons convicted of sex offenses. However, with sex offenders, there is a wrinkle: registration and community notification laws require the continued monitoring of the hundreds of thousands of ex-offenders no longer subject to probation and parole. In New York State, for instance, of the 24,300 persons in the state registry, almost 19,000 fall into this category.⁵

There's also a unique federalism twist—in contrast to the broader population of ex-offenders reentering society from state and local penal facilities, as to whom the states and local governments unquestionably call the shots—registrants are also very much the concern of the federal government. It is this parallel involvement that I would first like to address. Later, in the time available, I will comment on what I see as the coming issues and challenges facing registration and community notification laws, now in effect nationwide.

In the U.S., the idea of registering ex-offenders originated with localities in the 1930s and the states soon thereafter.⁶ Concerned that they were being swamped by gangsters who sought anonymous refuge within their growing populations, and traveled about with increasing ease as a result of enhanced means of transportation, state and local governments enacted laws requiring persons convicted of a variety of felonious and non-felonious acts to register.

Over the years the laws proliferated, culminating with a Supreme Court decision in 1957, when a five-member majority in *Lambert v. California*⁷ invalidated on substantive due process/notice grounds Los Angeles's "anti-gangster" registration ordinance. In subsequent years, local registration laws in New Jersey⁸ and California⁹ were invalidated on preemption grounds, on the rationale that state registration laws, when also in effect, occupied the field and hence, trumped local efforts.

While a setback for advocates of registration, the decisions did not condemn use of registration in principle. As the *Lambert* majority noted, registration itself was "but a law enforcement technique designed for the convenience of law enforcement agencies through which a list of the names and addresses of felons then residing in a given community is compiled."¹⁰

5. Elizabeth Benjamin, *Flaws Cited in Sex Cases: Spitzer Asked to Improve Methods of Keeping Track of Released Offenders*, TIMES UNION (Albany, N.Y.), Mar. 8, 2007, at A1.

6. On the history of registration laws more generally, see WAYNE A. LOGAN, *KNOWLEDGE AS POWER: A HISTORY OF CRIMINAL REGISTRATION LAWS IN AMERICA* (Stanford Univ. Press forthcoming 2008).

7. 355 U.S. 225 (1957).

8. *State v. Ulesky*, 252 A.2d 720 (N.J. 1969).

9. *Abbott v. Los Angeles*, 349 P.2d 974 (Cal. 1960).

10. *Lambert*, 355 U.S. at 229; see also *Ulesky*, 252 A.2d at 721 (noting that registration of ex-offenders benefits police by providing "an awareness of individuals whose

Nevertheless, *Lambert's* concern over notice dampened local government interest in registration, and interest among state governments remained modest. Florida, in 1937, became the first state to adopt a registration law, but did so sparingly, only requiring registration of persons convicted of felonies "involving moral turpitude" living in the state's three most populous counties.¹¹ In 1947, California enacted the nation's first registration law of state-wide application, targeting convicted sex offenders. By 1989, however, only twelve states had registration laws.¹²

While it was not uncommon for state and local registration laws to target individuals convicted of sex offenses in particular, this was by no means the exclusive focus. From 1990 onward, however, public policy radically changed when a handful of high-profile sexual assaults of children by ex-offenders inspired legislative attention. In 1990, Washington State enacted the nation's first registration and community notification law, permitting dissemination of identifying information on registrants to communities in which registrants lived. In 1994, New Jersey's rapid adoption of registration and notification, in the wake of Megan Kanka's sexual abuse and murder by a convicted sex offender living nearby, fueled national interest in the social control strategies. The laws quickly swept the nation, with legislatures often adopting in verbatim form one another's legislative findings. These findings stated that the laws were needed to address the radically heightened recidivism risks of ex-offenders that were targeted by the laws.¹³

While registration had first been proposed in Congress in 1991, by Senator David Durenberger (R-MN) in response to the 1989 disappearance of eleven-year-old Jacob Wetterling in rural Minnesota, a federal registration provision did not come to fruition until 1994. In that year, with overwhelming bi-partisan political support, Congress enacted the Jacob Wetterling Act,¹⁴ which directed states to register sex offenders and offenders whose victims were children, and allowed (but did not require) community notification. Congress backed its directive with a threat to withhold ten percent of otherwise allocated federal funding if states did not

prior offenses reveal an added risk").

11. See LOGAN, *supra* note 6, at ch. 3.

12. *Id.*

13. See, e.g., Sex Offenders Registration Act, OKLA. STAT. tit. 57, § 581(B) (2004); Sexual Offender Registration and Monitoring Act, TENN. CODE ANN. § 40-39-101 (1994), repealed by Tennessee Sexual Offender and Violent Offender Registration, Verification, and Tracking Act of 2004, TENN. CODE ANN. § 40-39-201 (2006).

14. See Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, Pub. L. No., 103-322, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2000)).

adopt and implement registration and community notification laws.¹⁵

By November 1995, only four states and the District of Columbia had failed to comply with the federal mandate. One of these states was Massachusetts. In 1996, just before the 1997 date on which funding losses were to occur, Massachusetts became the last state to enact a registration law.¹⁶

Then, as now, federal law specified minimum requirements relative to the types of ex-offenders to be registered, the duration and frequency of registration, and such matters as the types of information to be collected and maintained, and provided states latitude to adopt more ambitious requirements.¹⁷

The states were slow to accept Congress' invitation to implement community notification regimes. As of 1996, only seventeen states allowed for notification, either via public inspection or direct community notification. That year, Congress adopted the federal Megan's Law,¹⁸ and mandated—did not merely allow—that notification occur, still under threat of losing ten percent of federal criminal justice funding.

In 1996, Congress also enacted the Pam Lychner Act,¹⁹ the first step toward a national registration system, allowing for the creation of a federal database to facilitate the tracking of registrants by the FBI and local law enforcement. In 1997, 1998, and 2000 Congress again imposed registration-related requirements on states. In 2003, Congress passed the PROTECT Act,²⁰ which among other things required states to create and maintain Internet sites for the release of registrants' information.

For two years, an uncharacteristic lull occurred as Congress refrained from law-making in the registration arena. In 2005, three separate bills were introduced, each seeking to strengthen registration and notification in various ways. Under the active leadership of Congressman Mark Foley (R-

15. 42 U.S.C. §14071(g)(2)(A) (2000).

16. Doris Sue Wong, *Weld Signs Bill Creating Sex-Offender Registry—Those Convicted Have to Register*, BOSTON GLOBE, Aug. 15, 1996, at B2.

17. For discussion of this phase of the modern evolution of registration and community notification, including federal guidelines providing for state discretion in their content and operation, see Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 BUFF. CRIM. L. REV. 593, 598-602 (2000).

18. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. § 14071(d) (1994)).

19. Pam Lychner Sexual Offender Tracking and Identification Act of 1995, Pub. L. No. 104-236, 110 Stat. 3093-94, (codified as amended at 42 U.S.C. § 14072 (Supp. IV 1998)).

20. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, sec. 401(d)(1), 117 Stat. 650, 688 (codified as amended at 42 U.S.C. § 14071(c)(2) (2003)).

FL), what is now known as the Adam Walsh Act (AWA) eventually gained approval. The expansive bill, eponymously named (as has become common) after a child allegedly victimized by a sex offender,²¹ was signed into law by President Bush in July 2006.²² Intending “to protect the public from sex offenders and offenders against children . . . [and] establish[] a comprehensive national system for the registration of those offenders,”²³ the AWA contains a number of important changes so far as states are concerned.

First, the AWA for the first time makes it a federal felony for individuals to knowingly fail to register or verify their registration information when they move from one state to another.²⁴ Despite failing to make any express legislative findings on the effect such failure might have on interstate commerce, Congress invoked its Commerce Clause authority to federalize registration violations, which heretofore have been state crimes. Nor, for that matter, did the Congressional hearings provide much in the way of support for the need for federal entry into the field, despite vague references by legislators to “state loopholes” that allowed emigrant

21. In 1981, six-year-old Adam Walsh was abducted from a shopping mall in Hollywood, Florida. His father, John Walsh, subsequently became a nationally known advocate for missing and abused children, and the host of the popular television show *America's Most Wanted*. While the boy's remains were eventually found, in a canal some one hundred miles from his home, the background and identity of his assailant remain unknown, and even though his victimization has become synonymous with child sex abuse, it is not known whether such abuse occurred. See Ron Ishoy, *Adam Walsh Murder Case Unsolved, But Tragedy Helped Change U.S. Laws*, MIAMI HERALD, July 28, 1991, at 1A. The same uncertainty surrounds the plight of eleven-year-old Jacob Wetterling, whose disappearance in 1989 prompted registration and community notification legislation in Minnesota and spurred initial federal involvement; his whereabouts remain unknown and no suspect was ever apprehended. Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 WM. MITCHELL L. REV. 1287, 1290-91 (2003).

22. Adam Walsh Child Protection and Child Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (2006). Under the terms of the AWA, the Wetterling Act and other federal registration provisions will cease to be in effect either as of July 27, 2009, or one year after the availability of computer software to be used by the states to implement the AWA, whichever is later. See *United States v. Kapp*, 487 F. Supp. 2d 536, 539 n.4 (M.D. Pa. 2007) (noting same).

23. 42 U.S.C. § 16901 (2006).

24. 18 U.S.C. § 2250(a)(2)-(3) (2006); see also *United States v. Smith*, 481 F. Supp. 2d 846, 849 (E.D. Mich. 2007) (quoting H.R. Rep. No. 109-218, at 36 (2005)) (noting that AWA “created ‘a new Federal crime’ where ‘[s]ex offenders who fail to comply will face felony criminal prosecution.’”). The Wetterling Act, while providing that registration violations would subject individuals to any penalty provided under state law, did not itself impose federal criminal liability upon violators. See *Kapp*, 487 F. Supp. 2d at 538 (noting same).

registrants to evade registration requirements.²⁵

Prosecutions are now being pursued under the AWA in federal court. In the first such prosecution, in the Middle District of Florida, Wilfredo Madera, who moved from New York to Florida and failed to register there, unsuccessfully challenged the AWA registration provision on several bases, including the Commerce Clause.²⁶ He faced ten years in prison and a \$250,000 fine,²⁷ as opposed to the five years and \$10,000 fine threatened under Florida law.²⁸

The question of congressional Commerce Clause authority to criminalize registration violations will very likely come before the Supreme Court. Defendants will justifiably point to *United States v. Lopez*,²⁹ which invalidated a federal law making it a crime to possess a gun near a school, and *United States v. Morrison*,³⁰ which struck down a federal provision allowing victims of gender-motivated violent crime to sue in federal court. They will argue that the federal failure-to-register provision, like the laws in *Lopez* and *Morrison*, intrudes upon the historic police power authority of states and lacks a necessary impact on interstate commerce (and, like the law condemned in *Lopez*, fails to contain any express congressional findings to this effect).

Likewise, defendants will argue that the AWA's failure-to-register provision is distinguishable from other federal criminal laws predicated on interstate travel, which courts have deemed consistent with Commerce Clause authority. In such instances, perpetrators use channels of interstate commerce to facilitate the commission of crime, and federal law expressly targets this intent.³¹ The AWA, however, does not require any such intent—here an intent to evade the registration requirement; rather, an individual need only travel to another state and knowingly fail to register.³²

Cause for defense optimism, however, will be tempered by the Court's more recent decision in *Gonzales v. Raich*,³³ which held that federal criminal law trumped California's effort to allow medicinal use of

25. See, e.g., H.R. Rep. No. 109-218, at 23-4 (2005); 152 Cong. Rec. S8012, S8017-18 (daily ed. July 20, 2006) (statement of Sen. Allen), S8022 (statement of Sen. DeWine), S8030-S8031 (statement of Sen. Frist); 151 Cong. Rec. H7887, H7889 (daily ed. Sept. 14, 2005) (statement of Rep. Green).

26. *United States v. Madera*, 474 F. Supp. 2d 1257 (M.D. Fla. 2007).

27. 18 U.S.C. § 2250(a)(3) (2006).

28. FLA. STAT. § 943.0435(9)(a) (2007).

29. 514 U.S. 549 (1995).

30. 529 U.S. 598 (2000).

31. See, e.g., *United States v. Ballinger*, 395 F.3d 1218, 1227-28 (11th Cir. 2005) (en banc) (upholding federal law criminalizing church arsons facilitated by interstate travel).

32. See 18 U.S.C. § 2250(a)(3) (2006).

33. 545 U.S. 1 (2005).

marijuana, even though it was grown and used solely in California. Suffice it to say, the Court's willingness to indulge federal authority, even when it harms innocents seeking palliative care, does not bode well for unregistered sex offenders. Moreover, unlike *Raich*, where several states urged the Court to defer to California's effort to self-regulate despite contrary federal law, states here will not likely be heard to complain. Every state makes failure to register a crime and federal involvement in tracking down and prosecuting disdained sex offenders has obvious appeal.

Finally, as several lower federal courts have lately concluded,³⁴ the Court could well opt to uphold the federal provision by invoking Congress' Commerce Clause authority based on an alternate rationale identified in *Lopez*, which allows regulation of "persons or things in interstate commerce."³⁵ Under this rationale, as one federal district court concluded, Congress is empowered to "regulate those individuals or things that travel in interstate commerce without regard to the reason for their movement."³⁶

The likely outcome, however, should not be permitted to obscure the broader structural consequences of the AWA. Judicial approval of the failure-to-register law will signal an important shift in what the *Lopez* Court called the "sensitive relation between federal and state criminal jurisdiction."³⁷ Registration compliance has been and remains the primary responsibility of states. Although the U.S. cannot be realistically expected to assume prime responsibility in the area, enforcement efforts by U.S. Marshalls and Attorneys send the opposite message: the federal government will save the day. Nor, finally, can the federalization of registration failures be justified by the two chief policy concerns often advanced in support of federal involvement: externalities and inter-jurisdictional challenges. Unlike with firearms and illegal narcotics, for instance, no evidence exists of state registration laxness contributing to spillover harms in other states.³⁸ Likewise, interstate travel creates no

34. See, e.g., *United States v. Mason*, 2007 WL 1521515 (M.D. Fla. 2007); *United States v. Muzio*, 2007 WL 1629836 (E.D. Mo. 2007); *United States v. Hinen*, 2007 WL 1447853 (W.D. Va. 2007).

35. See *Lopez*, 514 U.S. at 558-59 (identifying categories of regulatory authority over: (1) "the use of channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities that substantially affect interstate commerce").

36. *Mason*, 2007 WL 1521515 at *7.

37. *Lopez*, 514 U.S. at 561 n.3 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

38. See Michael M. O'Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 751-52 (2002).

enforcement barriers, such as those which prompted prior federal efforts to criminalize “deadbeat dads” whose travel confounded effective state-level prosecutions.³⁹ Persons such as Mr. Madera can be and traditionally have been held accountable by state prosecutors under state law.⁴⁰

Frustration over how to handle emigrant sex offenders affords a highly compelling catalyst for increased federal involvement in criminal justice. Given the potent political appeal of law-making in the area, we can expect more from Congress in the coming years.⁴¹ However, this patent intrusion on the historically state-centric domain of criminal justice should raise concern.

A second chief feature of the AWA concerns its registrant classification system. Whereas in the past Congress took no position on the question of whether registration-eligible individuals should be distinguished from one another, except relative to “sexual predator” status, the AWA prescribes a three-tier classification system.⁴² The tiers correspond to the severity of the individual’s prior offense supporting conviction, with tier III including (1) persons convicted of state offenses punishable by imprisonment for more than one year, and comparable to, or more severe than, a list of specified aggravated sexual offenses, or (2) recidivist tier II registrants.⁴³ The tiers determine the time intervals at which registration information must be verified and the duration of registration itself.⁴⁴ The tiers do not, unlike regimes in roughly fifteen states (including Massachusetts), reflect individualized assessments of risk or level of current dangerousness, on which notification eligibility and the extent of notification turn. Under the “offense-based” approach of the AWA, all persons required to register are subject to community notification (via the Internet, at a minimum).⁴⁵

39. Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (1992) (codified as amended at 18 U.S.C. § 228 (2000)).

40. *Cf. Jones v. United States*, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (“The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years, illustrates how a criminal law like this may effectively displace a policy choice made by the State.” (citation omitted)).

41. Notably, section 2250 did not constitute the first federal interest in interstate movement of sex offenders. In 1960, Representative John A. Lafore, Jr. (R-Pa.) introduced a bill “[t]o provide that known sex offenders who travel in interstate commerce shall register as prescribed by the Attorney General.” H.R. 11652, 86th Cong. (1960). If an eligible individual did not register within seven days of “entry into any federal district,” the individual faced a \$1000 fine, a year in prison, or both. *Id.* The bill was sent to the House Judiciary Committee, where it saw no further action. Forty-six years later, a strikingly similar provision (§ 2250) won overwhelming endorsement in Congress.

42. 42 U.S.C.A. § 16911 (West 2006).

43. *Id.* § 16911(4).

44. *Id.* § 16915.

45. *See id.* § 16918 (“[E]ach jurisdiction shall make available on the Internet . . . all

To an extent, this effort by Congress should be taken as a welcome development. To be sure, its new effort to classify is predicated on a single, static factor, prior offense seriousness, and thus risks vast over-inclusiveness compared to the “offender-based” approaches of Massachusetts and other states. In ordaining this approach, Congress presumably felt that the seriousness of the prior offense, in itself, is predictive of recidivism, a probabilistic inference plainly subject to dispute.⁴⁶ However, the AWA’s attempt at differentiation, while modest, is positive inasmuch as it shows some reservation over the prevailing one-size-fits-all approach of sex offender policy.

Moreover, for the first time, Congress has recognized the need to study the question of how best to effectuate registration and notification, requiring, inter alia, that in the coming months the U.S. Attorney General produce a study of the “efficiency and effectiveness” of risk versus offense-based regimes.⁴⁷

Inherent in the AWA, however, is another federalism-based difficulty. In addition to prescribing standards and requirements that conflict with state laws in many respects, for instance subjecting certain adjudicated juveniles to registration and notification, imposing a short three-day window to register, and requiring in-person registration verification, the AWA mandates that states employ its offense-based, tier approach. The majority of states using an undifferentiated offense-based approach will need to enact more refined laws that draw distinctions consistent with the AWA, if

information about each sex offender in the registry.”).

46. If this were so, persons convicted of murder would recidivate at higher rates than persons convicted of other less serious crimes. This, however, is plainly not the case. *See* ELLIOT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* 30 (1998). More to the point, it is well-established that “sex offenders” are not only not an undifferentiated mass when it comes to recidivism, but also that persons convicted of most serious sex offenses do not recidivate at higher rates than those convicted of less serious offenses. *See* Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different? An Examination of Re-Arrest Patterns*, 17 *CRIM. JUST. POL’Y REV.* 83 (2006). This is not to say of course that such offenders never subsequently commit an identical (or equally serious) sexual offense. Congress might well endorse a position of zero tolerance with respect to such offenders, no matter how low the risk; it is not apparent, however, that this is what drives the AWA’s classification scheme. *Cf.* Eric S. Janus & Robert A. Prentky, *Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability*, 40 *AM. CRIM. L. REV.* 1443, 1448-49 (2003) (“[R]isk entails not only the presence of danger but also its probability of occurrence.”).

47. 42 U.S.C.S. § 16991 (LexisNexis 2007). The AWA also directs that the National Institute of Justice assess the new law’s effectiveness in (1) increasing compliance with registration and notification requirements, (2) enhancing public safety; and (3) optimizing public dissemination of registrants’ information on the Internet. *Id.* § 16990(a)-(b). Further, it requires assessment of associated “costs and burdens” and recommendations for increasing the effectiveness of registration. *Id.*

they wish to preserve eligibility for their allotted federal criminal justice funding.⁴⁸ So, too, will the several states that employ risk-based schemes based on individualized evaluation (again, including Massachusetts) need to make changes.⁴⁹

In mandating the comprehensive standards contained in the AWA, Congress did, to its credit, manifest awareness of the sensitive federalism issue at hand. The AWA expressly provides that a state need not adopt the offense-based approach, or any aspect of the AWA, if doing so “would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction’s highest court.”⁵⁰ If such a constitutional conflict does exist, the AWA provides that “the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation” of the law and to “reconcile any conflicts” between the AWA and the jurisdiction’s constitution.⁵¹

Sensitivity and deference to states’ rights and traditions, however, only go so far under the AWA. No respect, for instance, is paid to state legislative determinations as to whether a risk-based individualized approach is warranted as a policy matter. Only a constitutionally commanded position, backed by a holding from the state’s highest court (and seemingly not even a lowly intermediate appellate court), will suffice.

48. The AWA’s specific language on the funding question warrants emphasis: “The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.” *Id.* § 16925(d). Congressional reference to “conditions,” as opposed to demands or requirements, signals sensitivity to the dicey federalism issue at play. *Id.* By characterizing the new standards in such a way, Congress nominally invoked its Spending Clause authority, buttressing its ability to defend against a potential Tenth Amendment commandeering challenge. *Cf.* *New York v. United States*, 505 U.S. 144, 171-72 (1992).

49. The timing of such changes remains in question. The AWA itself prescribes that states have three years from the law’s date of enactment, July 26, 2006, to conform their laws to the AWA. *See* 42 U.S.C.S. § 16924(a)(1) (LexisNexis 2007). The proposed Guidelines, critically important for the detail and guidance they provide on the complex structure entailed in the AWA, however, were not issued by the Attorney General until mid-May 2007. *See* U.S. DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, THE NATIONAL GUIDELINES FOR SEX OFFENDER REGISTRATION AND NOTIFICATION (May 2007), <http://www.ojp.usdoj.gov/smart/guidelines.htm> [hereinafter *Guidelines*]. Presumably, at a minimum, in light of this tardiness the Department of Justice will be obliged to invoke the AWA’s discretionary one-year grace period. *See* 42 U.S.C. § 16924(b) (2006).

50. *Id.* § 16925(b)(1).

51. *Id.* § 16925(b)(2). The AWA Guidelines afford some apparent wiggle room for the Department’s assessment of “substantial compliance,” stating that the standard “contemplates that there is some latitude to approve a jurisdiction’s implementation efforts, even if they do not exactly follow in all respects the specifications” of the AWA and the Guidelines. *Guidelines*, *supra* note 49, at 10.

So, here in Massachusetts, some interesting times lie ahead. As you are well aware, the judiciary has been intensely involved in the nature and application of the Commonwealth's registration and notification laws, with the Declaration of Rights playing a central role in the still evolving jurisprudence.

Under the terms of the AWA, the U.S. will have to "consult" with Massachusetts concerning the interpretation of its own constitution. The proposed Guidelines for the AWA, belatedly released in mid-May 2007, some ten months after the AWA was enacted, promise that the U.S. will "work with the jurisdiction to see whether the *problem* can be overcome"⁵²—surely an unceremonious way to refer to a state-based constitutional right. If a jurisdiction fails to "substantially implement" the AWA in the absence of a legitimate "demonstrated inability to implement" based on domestic constitutional dictate, or otherwise cannot satisfy the U.S. with an accommodation, it will lose its federal funding. Adding insult to injury, the share lost by a jurisdiction will be reallocated to other states that lack such domestic constitutional strictures.

The classification question looms as perhaps the key issue in the years to come. Just as states have begun to reign in the ever expanding scope of registration eligibility—albeit ever so slightly, such as eschewing registration for juvenile consensual sexual encounters—so too are they beginning to express some unease over the use of purely conviction-based registration and notification laws.

As noted, the AWA reflects an understanding of the need to distinguish. It does not go so far, though, as to expressly tie tiers to risk of re-offense and thereby determine the nature and extent of community notification. I suspect that Congress recognized that doing so would quite possibly trigger procedural due process concerns, which are absent in purely conviction-based regimes, in which states refrain from imputing specific risk to offenders, such as the regime upheld in 2003 by the U.S. Supreme Court in *Connecticut Dep't of Public Safety v. Doe*.⁵³

Needless to say, this omission is of scant practical importance, given that the entire enterprise of notification is predicated on the professed need to warn communities of risky individuals in their midst. Individuals subject to community notification, *apriori*, are thought worthy of criminal recidivist concern, even if the state disclaims or omits any specific designation of current dangerousness.

Nevertheless, the approach does benefit from a certain information-based consumerist liberality. Community members, the thinking goes, are merely being provided otherwise publicly available information that they

52. See *Guidelines*, *supra* note 49, at 10 (emphasis added).

53. 538 U.S. 1 (2003).

can use to assess whether registrants warrant concern, and the safety precautions they should undertake.

Moreover, an offense-based registration system, on its face at least, has resource benefits. While its wide application surely has enhanced human costs, for registrants,⁵⁴ it plausibly affords what might be seen as front-end savings. A jurisdiction need not expend the resources necessary to evaluate individual risk, as occurs here in Massachusetts. This apparent savings, however, is illusory, for several reasons.

First, when information on registrants is made available, without reference to individual risk, as the AWA mandates and now occurs in most states, a saturation effect can occur, which can be detrimental to community members. As the Supreme Court observed in an unrelated context, “when everything is classified, then nothing is classified, and the system becomes one to be disregarded by the cynical or the careless.”⁵⁵

Second, over-broad notification might enhance the prospects of recidivism among otherwise law-abiding ex-offenders. While researchers have not yet provided conclusive evidence of the anti-therapeutic effects of community notification, a considerable body of evidence highlights that notification negatively affects various lifestyle considerations shown to lessen the chances of recidivism (e.g., employment, steady residence, and social relationships).⁵⁶ As the North Dakota registry web site acknowledges in explaining why all registrants are not listed, the “public notification on other offenders may have the unintended consequence of making them more risky.”⁵⁷

Third, ironically, offense-based schemes can actually afford less public protection coverage in another sense. With plea bargains the norm in criminal courts, if a conviction-based scheme is used, and the daunting specter of registration and notification looms, an offender has a strong incentive to avoid being tagged. A case-by-case clinical assessment can limit this incentive. It can also potentially afford registrants with a sense of procedural justice, allowing them a process to defend against what they might perceive to be an unjustified and unwarranted intrusion into their

54. For discussion of the range of such manifold negative effects see Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 182-207 (2000).

55. N.Y. Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring). See also *In re Registrant E.I.*, 693 A.2d 505, 508 (N.J. Super. Ct. App. Div. 1997) (“[I]f Megan’s Law is applied literally and mechanically to virtually all sexual offenders, the beneficial purpose of this law will be impeded.”).

56. See Wayne A. Logan, *Sex Offender Registration and Community Notification: Emerging Legal and Research Issues*, in SEXUALLY COERCIVE BEHAVIOR: UNDERSTANDING AND MANAGEMENT 337, 343-44 (N.Y. Academy of Sciences, 2003).

57. See North Dakota Sex Offender Registry, <http://www.sexoffender.nd.gov/FAQ/faq.shtml> (last visited Oct. 2, 2007).

lives.⁵⁸

Despite ultimately coming down on the wrong side of things by advocating an offense-based regime, Congress's avowed desire to assess the merits of the respective approaches is a very welcome development. One of the most striking features of the nation's modern rush to embrace registration and notification is the utter disregard of empiricism. One would be hard-pressed to identify a public enterprise of similar national scope effectuated in utter disregard for its efficacy or impact.⁵⁹ Yet at the same time, registration and notification laws have blanketed the nation precisely because of the perception, repeatedly parroted in legislative findings supporting the laws, that sex offenders recidivate at a far greater rate than other sub-populations.

While we now know this to be untrue,⁶⁰ as we did in the 1950s,⁶¹ the laws still benefit from a patina of rationalism, significantly contributing to their popularity. This same visceral, unempirical response is seen in the wave of residence restriction laws, often tied to registration eligibility, now sweeping the nation.⁶²

At last, more than a decade since registration and community notification seized the nation's attention, policy makers are showing sensitivity to the desirability of evaluating registration and community notification laws.⁶³ In addition to Congress, the New Jersey Legislature, where Megan's Law originated,⁶⁴ has now directed that empirical analysis

58. See Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1211-12 (1999).

59. For an overview of the numerous data-related needs see LOGAN, *supra*, note 56, at 342-45.

60. See, e.g., Center for Sex Offender Management, *Recidivism of Sex Offenders* (2001), <http://www.csom.org/pubs/recidsexof.pdf> (citing and discussing studies showing lower recidivism rates of sex offenders compared to other offender sub-populations).

61. See, e.g., PAUL H. TAPPAN, *THE HABITUAL SEX OFFENDER: REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE HABITUAL SEX OFFENDER*, NEW JERSEY STATE LEGISLATURE 14 (1950).

62. See Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6-8 (2006).

63. Such an *enact first, question later* proclivity is of course not unknown to criminal justice policy, especially at the federal level. For discussion of the proclivity in the context of federal drug policy, in particular, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1294 n.55 (1995).

64. While often incorrectly characterized as the modern day origin of registration and community notification (as noted earlier Washington State enjoys this mantle), New Jersey's Megan's Law, the namesake of the second iteration of federal law, has become synonymous with sex offender registration and community notification. In actuality, however, the Garden State's registration and notification laws were and remain among the

be undertaken.⁶⁵ There is now hope that a critical mass of empirical work will finally take shape, allowing for the possibility of better informed policy judgments.

The foregoing developments give reason to be sanguine that we are nearing a point when the value of registration and notification will no longer be accepted as an article of faith. As befitting a public policy of their nationwide scope—with substantial financial and human consequences—registration and notification will be scrutinized, and despite the unavoidable emotion and pathos sex offenders engender, rational, evidence-based policy decisions hopefully will surface in the coming years.

It might be that the unavoidable imperfections of registration and notification will doom the regimes to failure. There is indeed something odd, after all, about a system that depends on convicted criminals—who have demonstrated their inability or unwillingness to observe the law—to step up and be responsible citizens and provide accurate information on themselves, so that their lives can in turn be made more difficult.

Indeed, each recidivist sex crime by a registrant—whether compliant with registration requirements or not—will understandably shake public confidence in the laws. The public may well be satisfied that *something* is being done—that some social control on the cheap is better than none at all. After all, registration and notification, even if optimally executed with all the expense that it would entail, still represent less costly alternative than extended prison terms. In the meantime, however, if registration and community notification are to endure, and the political landscape likely makes this the case, efforts to empirically assess how the laws are undertaken are absolutely necessary—for law enforcement, ex-offenders, and us all.

most conservative and limited of all enacted by the nation's state legislatures.

65. Sam Wood, *New Jersey Study Scrutinizes Megan's Law*, PHIL. INQUIRER, May 7, 2007, available at http://www.philly.com/inquirer/local/20070506_Study_in_N_J_scrutinizes_Megans_Law.html.