Punishing Sex Offenders: When Good Intentions Go Bad

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I. INTRODUCTION

Seldom has an aspect of the criminal law changed as dramatically as has the law governing sexual offenders. The past twenty-five years have witnessed two developments, one expanding the scope of rape law, the other increasing criminal penalties and civil disabilities for sexual predators. Largely independent, these developments are now on a collision course, the product of unseen consequences of good intentions.

Let me explain. Today, commentators debate whether the reform of rape law has gone far enough. But the law has changed considerably since the 1970s when women faced practical and legal hurdles. Many hesitated to report rape because of police insensitivity. If the case went to trial, many criminal defense lawyers aggressively cross-examined them on their prior sexual histories, even in cases of stranger rape where consent was at best wildly improbable. Further, the formal elements of rape made prosecution and conviction unlikely in many cases of unwanted sexual intercourse if the

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1. See infra Part II.
2. See infra Part III.
3. See, e.g., Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law, at ix, 10 (1998). Part of the problem is cultural and not legal. That is, even when the criminal law has expanded to allow the conviction of an actor, “[s]ocial attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books.” Id. at 17; see also Joshua Dressler, Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform, 46 CLEV. ST. L. REV. 409, 410 (1998) (“[F]eminists can take legitimate pride in the fact that rape law has undergone significant reform in just the past decade or two, largely as a result of their efforts.”).
5. See Susan Griffin, Rape: The All-American Crime, Ramparts 26 (1971); Vivian Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1, 14 (1977).
woman did not resist with her own sufficient force. Special evidentiary requirements increased the burden on the State to prove rape, for example, by requiring independent evidence corroborating that a rape had taken place. Even the Model Penal Code, largely viewed as a great accomplishment, retained spousal immunity from rape, leaving women victimized by their husbands with little recourse.

Much of that has changed. Many large city police departments have specialized rape units, with officers trained to aid rape victims. Rape shield laws have limited the scope of cross examination in many cases, often protecting a woman from having to reveal her prior sexual history. States have largely abandoned spousal immunity. Legislatures have added various sexual misconduct statutes that protect a woman's autonomy even when the male's conduct would not have amounted to rape under its common law definition. Finally, some courts have expanded the definition of rape through statutory construction, sometimes straining the language to modernize the crime. Many of these reforms are widely recognized as needed.

As developed below, some expansions of rape law are more controversial, making conduct criminal without the same mens rea usually

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8. Cf. DRESSLER, supra note 6, at 33 ("Many criminal law professors treat the Model Penal Code as 'the principal text in criminal law teaching,' because its influence on the law has been so dramatic.").
14. See, e.g., In re M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) (interpreting the statutory element of "physical force" to be satisfied merely by the force "inherent in the act of sexual penetration" and finding, despite the absence of language in the statute, a requirement of "affirmative and freely-given permission to the act of sexual penetration").
required for the conviction of a serious felony.\textsuperscript{15} The justice system might deal with a few minor excesses in the law of rape, but it is unable to compensate for the largely independent development in the law dealing with sexual offenders that has taken place.\textsuperscript{16}

That major development is the host of laws governing sexually violent predators. Megan’s Law and Jessica’s Law are the two most prominent examples.\textsuperscript{17} In addition to severe criminal sentences for the underlying crimes, these laws have added registration requirements, GPS\textsuperscript{18} tracking, and civil commitment.\textsuperscript{19} Legislatures have enacted these laws in response to gruesome crimes, involving young victims and sexual predators with prior histories of child molestation.\textsuperscript{20}

These laws are premised on a view of the sexual predator as incorrigible, unable to control his conduct, and likely to repeat his predatory conduct if released into the public without special monitoring.\textsuperscript{21} It is argued that long

\textsuperscript{15} See discussion infra Part II and accompanying notes.

\textsuperscript{16} Absent the largely independent developments (dealing with sexual predators), the criminal law might adapt to a few excesses through, for example, prosecutorial discretion to avoid unfair prosecutions, jury nullification, or the use of judicial discretion to avoid unfairness. Laws dealing with sexual predators have increased the likelihood that sexual offenders will receive increased punishment and other disabilities and cannot be addressed by the system.

\textsuperscript{17} Both federal versions of these laws fall under the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Program. 42 U.S.C. § 14071 (2000). There are different state provisions for both Megan’s and Jessica’s laws in every state. I focus primarily on the California provisions. California’s sex offender registry provisions are located at California Penal Code section 290.

\textsuperscript{18} Global Positioning Systems (“GPS”) receive signals from satellites and triangulate position based on the perceived distance and location of the satellites. Smithsonian National Air and Space Museum, How Does GPS Work?, http://www.nasm.si.edu/gps/work.html (last visited Mar. 26, 2008). A GPS tracking system systematically records the positional information of the GPS unit and transmits that information to a central database using a modem installed in the GPS unit. Id.


prison sentences and additional civil disabilities are warranted by the special risk created by these monsters.

Who can quarrel with these reforms, both those aimed at protecting women and those protecting children? Most do not argue with the goals of these reforms, but problems result from their breadth. As developed below, some reforms of rape laws and the continued use of some historical offenses (notably statutory rape) allow convictions of offenders with less culpable mens rea than typically required for serious felonies. Further, because reporting and other sexual offender laws are broadly drawn, they often sweep those offenders within their provisions. In addition, the premise justifying these laws, the idea that sex offenders are beyond deterrence and reform, is false in many cases.

As a result, states often impose unnecessary hardship on past offenders, who may be subject to a lifetime of disabilities, which cannot be justified by the likelihood that they will re-offend. Apart from the obvious waste of resources, the added disabilities are unfair and single out a group of offenders for unequal treatment, not justified by any of the purposes for which we impose punishment.

Thus, the expansion of criminal law governing sex offenders is a cautionary tale about good intentions, legislation enacted in the heat of the moment, and the enactment of piecemeal legislation governing criminal sentences. The lessons are especially important for states like California where some of these laws are enacted through an initiative process, leaving less room for deliberation in their enactment.

(1999) (contending that most sex offender registration laws are premised on the purportedly high risk of recidivism and the portrayal of offenders as pedophiles, whereas the scope of the laws is much broader in practice).

22. See discussion infra Part II and accompanying notes.

23. See discussion infra Part III and accompanying notes.

24. For example, the continued need to register leaves former offenders open to new criminal charges for minor technical offenses, such as the failure to reregister. In California, if the underlying crime is a felony, failure to reregister can serve as a strike, and has the potential of sending a felon to prison for life as a third strike. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SUMMARY OF STATE SEX OFFENDER REGISTRIES 11 (2001), http://www.ojp.usdoj.gov/bjs/pub/pdf/sssor01st.pdf

25. See discussion infra Part IV and accompanying notes.


Part II of this Article discusses the expansion of rape and sexual offender laws over the past thirty years, focusing especially on cases that limit offenders' ability to raise a defense of mistake as to consent or the age of the victim. Part III traces the development of sexual predator statutes. Part IV examines the ineffectiveness of sexual offender statutes and the unfairness that can result by imposing stepped-up punishment on various sex offenders. Part V concludes with some thoughts about criminal sentencing reform.

II. THE REINVIGORATION OF STATUTORY RAPE AND THE EXPANSION OF THE DEFINITION OF RAPE

Few commentators would return to the historical limitations on the crime of rape.28 That is in large part because the law of rape made successful prosecution of violent offenders so difficult and provided women with such limited protection, both of their bodies and their autonomy.29 But as developed in this Part, even though reformers' motivations were noble, the expansion of rape laws creates the potential for injustice.30 Further, the reinvigoration of statutory rape raises additional concerns.31

Blackstone defined rape as "carnal knowledge of a woman forcibly and against her will."32 At common law, a husband could not be convicted of raping his wife.33 Apart from statutory rape,34 rape required additional

28. See, e.g., Dressler, supra note 3, at 418 ("Substantive rape law has changed, much of it for the good . . . "). I do not mean to suggest that all commentators agree that we have gone far enough in reforming laws governing sexual misconduct. See, e.g., SCHULHOFER, supra note 3, at 1-2.

29. See Dressler, supra note 3, at 416–17 (indicating that the elemental requirements necessary to support a rape conviction were "weighted against women").


31. See infra notes 112–13 and accompanying text.

32. See BLACKSTONE, supra note 6, at *210.


34. Statutory rape is the offense wherein a male has what would otherwise be consensual sexual intercourse with a minor female. See generally Michelle Oberman, Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape, 48 BUFF. L. REV. 703 (2000) [hereinafter Oberman, Defining a Role for Statutory Rape]; Michelle Oberman, Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law, 85 J. CRIM. L. & CRIMINOLOGY 15 (1994); Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 TEX. L. REV. 387 (1984). Further, some jurisdictions have expanded rape to include intercourse with a woman who was unconscious or asleep. See ARIZ. REV. STAT. ANN. § 13-1401(5)(b) (2001) (defining "without consent" under sexual offense law to include where "[t]he victim is incapable of consent by reason of . . . sleep"); CAL. PENAL CODE § 261(a)(4)(A) (West Supp. 2008).
elements that made its prosecution difficult. In part, to guard against fabricated claims of rape, jurisdictions often required additional elements, like a requirement of prompt reporting, independent corroboration, and perhaps most troubling, a requirement that the woman resist, and in some jurisdictions, to the utmost.

It is important to note, however, that in many jurisdictions rape was a capital offense; and especially in the South in cases of black on white intercourse, the death penalty was enforced. Concerns about proportionality and equality certainly justify limitations on rape as long as it is graded as a capital or otherwise serious felony. Further, the resistance requirement, even if not a formal element of the offense, provides highly relevant evidence of a lack of consent and should rebut a claim of a lack of mens rea in many cases. But, especially in light of the additional difficulties in prosecuting rape cases, the law of rape left women with severely limited protection in many cases that shock us today.

While the Model Penal Code provisions on rape made modest improvements over the historical rules, those provisions were not

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35. As discussed above, other informal factors, like the insensitivity of the police, made successful arrest and prosecution for rape exceedingly difficult. See supra note 4 and accompanying text.

36. See, e.g., SCHULHOFER, supra note 3, at 18; Dressler, supra note 3, at 416 (citing judges' warnings to juries to take special care in evaluating the victim's testimony because "a rape charge 'is easily made and once made, difficult to defend against even if the person accused is innocent'" and indicating that the additional statutory requirements were imposed to counteract this difficulty in rebutting the possibly false charge (quoting State v. Bashaw, 672 P.2d 48, 48 (Or. 1983))).

37. See Dressler, supra note 3, at 416 (citing the restriction of the Model Penal Code, and several jurisdictions, to "bar[] rape prosecutions if the female did not notify public authorities within a brief period of time after her assault").

38. See United States v. Wiley, 492 F.2d 547, 550 (D.C. Cir. 1973) (holding that a person suspected of rape could not be convicted "on the uncorroborated testimony of the alleged victim").


40. James R. Acker, Social Science in Supreme Court Death Penalty Cases: Citation Practices and Their Implications, 8 JUST. Q. 421, 431 (1991).


42. See DRESSLER, supra note 6, at 619 (contending that the death penalty was unequally applied to black defendants found guilty of raping white women).

43. See, e.g., Wiley, 492 F.2d 547.

44. At least one scholar has argued that the law of rape was not concerned with a woman's sexual autonomy. See Anne M. Coughlin, Sex and Guilt, 84 VA. L. REV. 1, 6 (1998).

45. See DRESSLER, supra note 6, at 646-49. Despite its reputation as an enlightened approach to the criminal law, the Model Penal Code's sexual offenses provisions have few
especially influential even in jurisdictions that adopted most of the Code. Instead, significant reforms began in the 1970s, largely in response to efforts of feminist organizations and writers. Those reforms include the elimination of the spousal immunity in many jurisdictions, the elimination of special cautionary instructions and the corroboration requirement, and the elimination of the requirement of resistance or, at least, the elimination of the requirement of resistance to the utmost. Further, and most important for this Article, in some instances reforms expanded the conduct that is criminal and limited the mens rea requirements for rape. Those reforms were sometimes the product of legislative enactment or judicial interpretation of existing rape law.

Legislatures and courts have expanded laws dealing with sexual offenses. A few examples illustrate this alteration within the legal landscape of rape law. After a jury in Florida acquitted a man of committing rape, in large part because the victim wore a provocative outfit, the Legislature enacted a law making inadmissible “evidence presented for the purpose of showing that [the] manner of dress of the victim at the time of the offense incited the sexual battery.” Florida is hardly unique. For example, both California and Pennsylvania responded to controversial judicial holdings by enacting remedial statutes.

enthusiastic supporters. See, e.g., SCHULHOFER, supra note 3, at 20–29 (criticizing the Model Penal Code approach as a flawed reform and citing other critics of its reform efforts).
46. See DRESSLER, supra note 6, at 618.
47. See, e.g., SCHULHOFER, supra note 3, at 29–40 (citing some of the more prominent feminist reforms that took hold in the 1970s including reforms lobbied by a Michigan women’s rights group and the National Organization for Women).
48. See DRESSLER, supra note 6, at 641.
49. See id. at 642–43.
52. See infra notes 84, 98, 106, 112 and accompanying text.
53. See, e.g., MICH. COMP. LAWS SERV. § 750.520b(1)(f) (LexisNexis Supp. 2007).
55. FLA. STAT. ANN. § 794.022(3) (West 2007).
56. In reaction to Boro v. Superior Court, 210 Cal. Rptr. 122, 124–26 (Ct. App. 1985) (prohibiting the prosecution of a doctor who induced a female patient to have sexual intercourse by telling her that such act was necessary to cure a fatal disease), California enacted California Penal Code section 266c. Act of Oct. 2, 1985, ch. 1506, 1985 Cal. Stat. 5556 (amending the rape law by including a new category of offense where consent is procured by fraud or fear). In reaction to Commonwealth v. Berkowitz, 641 A.2d 1161, 1166 (Pa. 1994) (holding that the evidence was insufficient to support the defendant’s rape conviction even though the woman expressly said “no”), Pennsylvania enacted title 18, section 3124.1 of the Pennsylvania
Whether the law has gone far enough is certainly open to debate. But in a few areas, courts have gone too far in eliminating appropriate protections for criminal defendants. The most troubling area relates to the mens rea of rape.

Imagine a case in which acquaintances engage in sexual intercourse. After the act, the woman contends that she did not consent and the man claims that he believed that she did. To make the case even more difficult, imagine too that the woman had at some point said “no” when the man proposed intercourse or when he initiated physical contact. Can both participants in the act of intercourse be right? Surely, a woman’s autonomy has been violated. Some commentators would argue unequivocally that the described conduct should be criminal.

Consolidated Statutes. Act of Mar. 31, 1995, No. 1995-10, § 8, 1995 Pa. Laws 10 (requiring consent to engage in sexual intercourse). While a case like Berkowitz is troubling because the court found that, despite the woman’s express “no,” the offender did not commit rape, one can defend the decision. Lenity justified the court’s interpretation of the statutory provision, “forcible compulsion.” In effect, the court held that the element of force was not met simply by a showing of a woman’s “no,” and that something more than the physical contact inherent in intercourse was needed to meet the requirement of “forcible compulsion.” Berkowitz, 641 A.2d at 1166. Further, the offender was guilty of a lesser offense, indecent assault, for which he served jail time. Id. at 1163. Thus, the offender avoided more severe criminal sanctions not intended to reach him, but the law did not leave the victim entirely unprotected.

These kinds of cases are the most controversial and have produced a significant body of scholarship. See, e.g., Andrew E. Taslitz, Willfully Blinded: On Date Rape and Self-Deception, 28 HARV. J.L. & GENDER 381, 382 (2005) (describing the psychological phenomenon of “self-deception” frequently found among those accused of date rape). “Self-deception occurs when the alleged rapist consciously, but incorrectly, believes that he has the woman’s consent when, at some less-than-fully conscious level, he knows otherwise.” Id. Had the case against National Basketball Association star Kobe Bryant gone to trial, it almost certainly would have presented a classic case of different perceptions about whether the man had consent. See T.R. Reid, Rape Case Against Bryant Is Dropped: Accuser Decided Against Testifying, WASH. POST, Sept. 2, 2004, at A1. For a particularly compelling personal account, see Susan Ager, The Incident, DETROIT FREE PRESS MAG., Mar. 22, 1992, at 17.

The contemporary critique of the law of rape proceeds from the theoretical premise that the prohibition against rape exists to protect female sexual autonomy. Taslitz, supra note 58, at 386-87 (indicating that where the mens rea involved is carelessness or negligence as opposed to intentional misconduct the criminal liability should be lower). Under the Model Penal Code it is not a crime to rape negligently. See MODEL PENAL CODE § 213.1 (1980) (defining rape as sexual intercourse between a man and woman where the man (a) “compels her to submit by force,” (b) impairs her judgment by drugging her, (c) engages her while she is unconscious, or (d) engages a girl less than ten-years-old).
because of the frequency of acquaintance rape or, at least, unwanted intercourse. 60

These kinds of cases seldom arose prior to the 1970s. At a minimum, as long as a woman had to resist physically, one of the formal elements of rape—either resistance or force—was missing from that scenario. 61 While resistance served different purposes 62 it was relevant to proving mens rea and made improbable any claim that the offender did not know that he lacked consent 63.

The kind of case that I have posited did not arise before the 1970s and 1980s because police and prosecutors did not pursue acquaintance rape cases and cases where the woman’s physical injuries were not manifest. 64 As a result, most rape cases involved strangers who used violence against their victims, where any factual disputes concerned the identity of the offender, rather than consent, which would have been improbable in light of the woman’s injuries. 65


61. See, e.g., State v. Alston, 312 S.E.2d 470, 476 (N.C. 1984) (holding that although the evidence established that the act of sexual intercourse was against her will, it was insufficient to establish the element of force to sustain conviction of second-degree rape); Berkowitz, 641 A.2d at 1166 (holding verbal resistance inadequate to establish force element of rape); Starr v. State, 237 N.W. 96, 97 (Wis. 1931) (“We recognize the rule . . . that the woman must resist to the utmost . . . ”).

62. Dressler, supra note 3, at 417 & n.41 (stating that the resistance requirement likely served an evidentiary purpose and also “demonstrated that the victim ‘merited’ the law’s protection”).

63. See People v. Cicero, 204 Cal. Rptr. 582, 590 (Ct. App. 1984) (stating that force plays an evidentiary role and is “necessary only to insure an act of intercourse has been undertaken against [the] victim’s will”); see also Dressler, supra note 3, at 417 (stating that the resistance requirement demonstrates “to the man (and the jury?) that the intercourse was against [the victim’s] will”).

64. See Robert A. Weninger, Factors Affecting the Prosecution of Rape: A Case Study of Travis County, Texas, 64 VA. L. REV. 357, 357–58 (1978) (stating that in the early 1970s, some prosecutors dealt with the practical problems of proof by considering factors such as force or resistance “in deciding whether to bring charges in a particular case”); William H.J. Hubbard, Comment, Civil Settlement During Rape Prosecutions, 66 U. CHI. L. REV. 1231, 1256 n.133 (1999) (stating that from 1950 to 1970 some state courts “strictly required that every material fact testified to by the complainant be corroborated by independent evidence”).

65. See David P. Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1213 (1997) (stating that prosecutors look to availability of evidence and the likelihood of obtaining a conviction when deciding whether to prosecute a rape case); Weninger, supra note 64, at 383 (“[T]he presence of substantial resistance as a general rule increased the probability of indictment, and indictment was most likely if the defendant was a stranger to the victim . . . and least likely if an acquaintance.”).
By the 1980s, acquaintance rape cases had become more common. The textbook case on point arose in Massachusetts. There, a group of doctors pressured a nurse, a co-worker at a Boston hospital, to leave a party with them to go to the home of one of the doctors. Once at the private home, the men disrobed and eventually had intercourse with the victim over her verbal protests. She did not fight because she was physically numbed by the experience. Thus, the case presented a number of cutting-edge issues. Here, a woman had made a verbal protest, but did not otherwise resist. Further, although the various parties' factual accounts differed, even based on the victim's account, a court might submit a mistake of fact defense to the jury, if one were allowed. But the defendants may have overreached by requesting a jury instruction that would have required the jury to "find beyond a reasonable doubt that the accused had actual knowledge of [the victim's] lack of consent," instead of requesting an instruction that would have allowed acquittal based on a reasonable mistake.

The defendants' request was based on a case decided by the House of Lords in 1976. There, a divided panel found that a defendant could not be convicted if he held an honest, even if unreasonable, belief that a woman had consented. The Lords' analysis started with a definition of rape, the "unlawful sexual intercourse with a woman without her consent by force, fear, or fraud." It found that the minimum mens rea was "the intention to do the prohibited act." That act was non-consensual sexual intercourse.

68. Id. at 227.
69. Id.
70. Id. at 226–27.
71. The defendants testified that the victim did not indicate her unwillingness to accompany the men and that she consented to the acts of intercourse. Id. at 227.
72. Whether such a claim would prevail is hardly a foregone conclusion. Many jurors might have had difficulty accepting the idea that three men would believe that a woman would engage in group sex voluntarily. But as chronicled by Gay Talese, sexual mores were in flux during that period of time. See generally GAY TALESE, THY NEIGHBOR'S WIFE (1980).
73. Sherry, 437 N.E.2d at 232–33.
74. Regina v. Morgan, [1976] A.C. 182 (H.L.) (appeal taken from Eng.) ("[W]hen a defendant had had sexual intercourse with a woman without her consent, genuinely believing nevertheless that she did consent, he was not to be convicted of rape, even though the jury were satisfied that he had no reasonable grounds for so believing . . . .").
75. Id. at 198.
76. Id. at 191.
Hence, the offender who believed that he was engaging in consensual intercourse lacked the intent to commit the forbidden act.\textsuperscript{77}

The Massachusetts court rejected that argument and noted that, where American law has recognized a defense of mistake, jurisdictions have required that the defendant “act in good faith and with reasonableness.”\textsuperscript{78} Because the defendants did not request a “reasonable mistake” instruction, the court left unresolved whether Massachusetts would follow other jurisdictions that allowed a reasonableness-mistake instruction.\textsuperscript{79}

Seven years later, the Supreme Judicial Court of Massachusetts rejected the defense.\textsuperscript{80} The court did so in a case in which it might have held simply that, were the jury to believe the victim’s version of the facts, no reasonable jury could have found that she consented.\textsuperscript{81} Had it limited its holding, it would have left open whether in a proper case, a defendant could get a reasonable-good-faith instruction. Instead, the court spoke broadly allowing at least one lower appellate court in Massachusetts to hold that the supreme judicial court rejected the defense even in cases in which the facts, if believed by the jury, supported the defense.\textsuperscript{82} The court found support for its holding in the “analogous rule that a defendant in a statutory rape case is not entitled to an instruction that a reasonable mistake as to the victim’s age is a defense.”\textsuperscript{83} Elsewhere, most American jurisdictions that have considered the question do allow the defense, but require that the defendant acted honestly and reasonably.\textsuperscript{84}

\textsuperscript{77} Id. at 183.
\textsuperscript{78} Sherry, 437 N.E.2d at 233 (“We are aware of no American court of last resort that recognizes mistake of fact, without consideration of its reasonableness as a defense . . . .”).
\textsuperscript{79} Id. (“We need not reach the issue whether a reasonable and honest mistake to the fact of consent would be a defense, for even if we assume it to be so, the defendants did not request a jury instruction based on a reasonable good faith mistake of fact.”).
\textsuperscript{80} Commonwealth v. Ascolillo, 541 N.E.2d 570, 575 (Mass. 1989) (“We have never suggested that, ‘in order to establish the crime of rape the Commonwealth must prove . . . that the defendant . . . did not act pursuant to an honest and reasonable belief that the victim consented.’ . . . We decline to adopt such a rule.” (quoting Commonwealth v. Grant, 464 N.E.2d 33, 36 (Mass. 1984))); see also Clifton v. Commonwealth, 468 S.E.2d 155, 158 (Va. Ct. App. 1996) (“[T]he element to be proven by the Commonwealth is the fact that the intercourse was accomplished against the victim’s will. The accused’s perception . . . is not itself an element of the crime.”).
\textsuperscript{81} Cf. People v. Williams, 841 P.2d 961, 966 (Cal. 1992) (“[The victim’s] testimony, if believed, would preclude any reasonable belief of consent . . . . There was no substantial evidence . . . warranting an instruction as to reasonable and good faith, but mistaken, belief of consent to intercourse.”).
\textsuperscript{83} Id.
\textsuperscript{84} E.g., People v. Stitely, 108 P.3d 182, 208 (Cal. 2005); State v. Smith, 554 A.2d 713, 717 (Conn. 1989); In re M.T.S., 609 A.2d 1266, 1279 (N.J. 1992).
The importance of the legal issue in these cases cannot be overstated. This is true especially in light of other modern developments in rape law, most notably the elimination or lessening of the resistance requirement and the reduction or elimination of the force requirement, found in cases in which perceptions can differ. The offender has subjected the victim to unwanted sexual contact, often despite her explicit protest. Catherine MacKinnon summed up the problem from the victim's perspective: if the male has a reasonable mistake defense, "a woman [was] raped but not by a rapist." MacKinnon is not alone in criticizing the defense. Women's personal accounts often focus on their repeated protests, the man's badgering, and their final acquiescence, often the product of feeling helpless and numb.

Sympathetic observers wonder how men can believe that the woman's acquiescence is "consent" when intercourse takes place. They argue that even if men honestly believe that "no" means "yes," the law should educate them. Further, despite reforms, critics of current rape law can find textbook examples where courts demonstrate remarkable insensitivity to

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85. See, e.g., MICH. COMP. LAWS SERV. § 750.520i (LexisNexis 2003) ("A victim need not resist the actor in a prosecution [for rape]."); People v. Barnes, 721 P.2d 110, 121 (Cal. 1986) (concluding that the legislature's purpose in amending the rape statute was to "release rape complainants from the potentially dangerous burden of resisting an assailant").

86. See, e.g., People v. Cicero, 204 Cal. Rptr. 582, 590 (Ct. App. 1984) ("[T]he law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent. Because the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that 'force' cause physical harm.").


88. See, e.g., Taslitz, supra note 58, at 387-88 (arguing that instead of imposing a lesser punishment on those who rape based on a negligent mistake, the reasonable mistake defense for rape ought to be restricted to nonnegligent mistakes for policy reasons because "male self-deception about whether a woman has consented to sexual intercourse is plausibly widespread and is morally worse than ordinary forms of criminal negligence").

89. See, e.g., Ager, supra note 58 ("For hours . . . he pestered me. Stroked me. Whispered to me first, then argued, then whined . . . . All I know is that he went on forever. Unrelenting. Finally, weary and weepy, I gave up.").

90. See Commonwealth v. Lefkowitz, 481 N.E.2d 227, 232 n.1 (Mass. App. Ct. 1985) (Brown, J., concurring) (""No" must be understood to mean precisely that. Old cultural patterns—no matter how entrenched—must adapt to developing concepts of equality . . . . Surely [we] . . . should understand that sexist stereotypes of "no" meaning "yes" can't justify aggression against women."). (alteration in original) (quoting Alan Dershowitz, New Rape Laws Needed, BOSTON HERALD AM., June 24, 1985, at 19)). The problem is complicated by empirical data suggesting that in some significant number of cases, women do mean "yes" when they say "no." Charlene L. Muehlenhard & Lisa C. Hollabaugh, Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 874 (1988).
victims of aggressive sexual behavior. At a minimum, bad cases maintain pressure to expand the protection of rape law.

Despite MacKinnon’s powerful statement, the same might be said in other areas of the criminal law. That is, a person may experience social harm that a particular crime is designed to prevent. Nonetheless, absent the mens rea, the criminal law provides no redress, leaving the victim at most to tort remedies. A few examples suffice: not all deaths caused by others are actionable under the criminal law. Even beyond accidental deaths, absent some kind of criminal negligence, beyond tort negligence, an actor is not guilty of involuntary manslaughter or negligent homicide. Nor are all offenders who take the property of another guilty of theft. Mistaken belief as to ownership relieves the offender from criminal liability. Destroying the property of another, with the honest belief that the actor owns the property, is not criminal.

Outside the rape context, the criminal law has largely settled the debate. Mens rea is essential to the criminal law and, absent some compelling policies to the contrary, the criminal law should require subjective fault, not negligence, and certainly not merely the standard applicable in torts. Refusing to recognize a mistake of fact defense in cases where a reasonable jury could make such a finding creates what amounts to a strict liability offense: as long as the person engages in sexual intercourse and lacks consent, he is guilty despite the lack of any culpable state of mind. Even in jurisdictions that allow a reasonable mistake defense, the offender may be

92. DRESSLER, supra note 6, at 140.
93. See, e.g., People v. Navarro, 160 Cal. Rptr. 692, 697–98 (App. Dep’t Super. Ct. 1979) (holding that a defendant who took wooden beams from a construction site in the mistaken belief that they had been abandoned had a defense to the charge of theft).
94. See, e.g., Regina v. Smith, [1974] Q.B. 354 (reversing the conviction of a tenant who mistakenly believed that he was the owner of floor boards that he had installed with the landlord’s permission; the criminal statute required intent to destroy property belonging to another).
95. See MODEL PENAL CODE § 2.02 (1985); DRESSLER, supra note 6, at 140–42 (contending that mere tort negligence is not sufficient and that there is some controversy whether criminal negligence should even be sufficient to establish criminal liability).
96. See supra notes 80–84 and accompanying text.
97. In a jurisdiction that has abandoned spousal immunity, the underlying conduct is not even arguably immoral, one of the earlier justifications for not requiring the defense of mistake. See infra note 107 and accompanying text.
guilty of a serious felony (depending on the grading of the offense) based on negligence, not even criminal or gross negligence.\textsuperscript{98}

As mentioned above, the lack of mens rea is especially troubling if a jurisdiction has eroded the other elements of rape.\textsuperscript{99} Thus, in some cases, courts and legislatures have eliminated the requirement of resistance.\textsuperscript{100} Further, at least one court has found that the State has demonstrated sufficient force merely by showing the normal force incidental to sexual intercourse.\textsuperscript{101} Various legislatures have adopted lesser offenses as well, reducing the amount of force required,\textsuperscript{102} thereby increasing the risk of criminalizing a person lacking awareness of the criminality of his conduct.

When judges "modernize" rape law, lessening the formal requirements, they may expose an offender to a much higher penalty than would otherwise be warranted by his conduct. Thus, imagine a statute modeled on the common law definition of rape where a court lessens the requirement of force and resistance in light of the current concern about women's autonomy.\textsuperscript{103} An offender may well be exposed to severe sanctions, designed for a crime of violence, for conduct that does not rise to that statutorily required level, under circumstances where he lacks subjective awareness of facts making his conduct criminal.

\textsuperscript{98} For example, some states only require that the defendant act negligently regarding the victim's capacity to consent. See, e.g., CAL. PENAL CODE §§ 261(a)(3), 262(a)(2), 286(i), 288a (West Supp. 2008).

\textsuperscript{99} See supra notes 85--86 and accompanying text.

\textsuperscript{100} See supra note 85 and accompanying text.

\textsuperscript{101} In re M.T.S., 609 A.2d 1266, 1279--80 (N.J. 1992) (holding that the force required for second-degree sexual assault need not be any more than the penetration itself).

\textsuperscript{102} E.g., ALA. CODE §§ 13A-6-61, -65 (LexisNexis 2005) (classifying rape in the first degree, requiring force, as a felony and the lesser offense of sexual misconduct, requiring only non-consent, as a misdemeanor); FLA. STAT. ANN. § 794.011(3), (5) (West 2007) (classifying sexual battery without consent as a second degree felony, while sexual battery with force is a felony punishable by life in prison); N.Y. PENAL LAW §§ 130.20, .35 (McKinney 2004) (classifying rape in the first degree, requiring force, as a class B felony and the lesser offense of sexual misconduct, requiring only non-consent, as a misdemeanor); 18 PA. CONS. STAT. ANN. § 3124.1 (West 2000) (classifying sexual intercourse without consent as a second degree felony); WASH. REV. CODE ANN. §§ 9A.44.040, .060 (LexisNexis 2004) (classifying first degree rape requiring forcible compulsion as a class A felony and third degree rape requiring only non-consent as a class C felony); MODEL PENAL CODE § 213.1(2) (1980) (classifying the lesser offense of "Gross Sexual Imposition," not requiring force, as a third degree felony).

\textsuperscript{103} For example, the California Supreme Court has held that even where consent is initially given, it can be withdrawn during the act of intercourse, subjecting the male to forcible rape charges. See In re John Z., 60 P.3d 183, 184 (Cal. 2003); People v. Roundtree, 91 Cal. Rptr. 2d 921, 924 (Ct. App. 2000).
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Although there is still debate concerning the expansion of actual enforcement of rape and other sex offender laws, it is clear that rape law, at least at the formal level, has undergone such an expansion. For example, the law now includes many offenders who would not have been guilty of rape at common law and who would not have been charged with any criminal conduct thirty years ago. I have argued above that the law creates the risk of punishing such offenders more severely than warranted by their culpability. As developed in more detail below, that problem is further compounded by the dramatic expansion of sexual offender laws, including numerous “civil” disabilities imposed on sexual offenders.

Before turning to the discussion of those developments, it is important to mention one other troubling area of traditional rape law. Unlike rape, the elements of statutory rape have not undergone recent expansion. That is, historically, most states have not allowed a defense of ignorance or mistake concerning the victim’s age.

Historically, courts justified the lack of a mens rea defense on the grounds that the man knew that the act, fornication, was immoral. Insofar as society criminalized statutory rape based on moral grounds, one might have expected that, even if still on the books, statutory rape prosecutions would wane. That does not appear to be the case. One commentator has

104. See, e.g., Bryden & Lengnick, supra note 65, at 1210–11 (stating that most rape victims “never see their attacker caught, tried and imprisoned,” leading “advocates and scholars to conclude that the criminal justice system discriminates against rape victims”).

105. See supra notes 92–98, 103 and accompanying text.

106. See Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 AM. U. L. REV. 313, 316–17 (2003) (“[T]he idea that a crime may be committed without proof of a criminal mens rea has continued to gain momentum since its introduction, and stubbornly persists in statutory rape. In the majority of states . . . [the] defendant is precluded from mounting the affirmative defense of mistake-of-age to refute the issue of guilt.” (footnotes omitted)).

107. In Regina v. Prince, the defendant was convicted of “unlawfully tak[ing] an[] unmarried girl . . . under the age of sixteen . . . out of the possession and against the will of her father.” [1875] L.R. 2 C.C.R 154. The court denied the defense of mistake of age because “[t]he act forbidden is wrong in itself.” Id. at 174; see also People v. Griffin, 49 P. 711, 712 (Cal. 1897) (“[H]e who engages in such enterprises is committing a moral wrong, for which there can be neither palliation nor excuse. The illegal motive is present, and that illegal motive becomes a criminal intent when the facts, at whose peril he acts, are shown to exist.”); People v. Ratz, 46 P. 915, 916 (Cal. 1896) (“The protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril of the fact, and he will not be heard against the evidence to urge his belief that the victim of his outrage had passed the period which would make his act a crime.”).

108. Alternatively, as argued by Professor Oberman, statutory rape was important earlier in history because a virgin daughter had greater economic value to her father. Michelle Oberman, Girls in the Master’s House: Of Protection, Patriarchy and the Potential for Using the Master’s Tools to Reconfigure Statutory Rape Law, 50 DEPAUL L. REV. 799, 802 (2001). Since few, if
argued that the continuing interest in prosecuting statutory rape is a product of concern about teen pregnancy. Adult males account for a high number of teen pregnancies. Despite the lack of a mens rea as to age and despite the frequency with which minors engage in sexual intercourse that is factually, if not legally, consensual, some jurisdictions impose significant penalties for the crime. Further, at least in some cases, observers have often wondered what has motivated particular prosecutions.

The debate over the scope of sexual offender laws is not likely to end any time soon. Given the special rules governing mens rea, for example,

any, Americans make those kinds of economic calculations today, one would have thought that statutory rape prosecutions would have waned or that states would have added a mens rea defense.

109. Oberman, Defining a Role for Statutory Rape, supra note 34, at 706.
110. Id. at 705.
111. According to a 2002 study by the National Center for Health Statistics, forty-seven percent of females and forty-six percent of males ages fifteen to nineteen reported that they had had sexual intercourse. NAT’L CTR. FOR HEALTH STATISTICS, CTRS. FOR DISEASE CONTROL & PREVENTION, TEENAGERS IN THE UNITED STATES: SEXUAL ACTIVITY, CONTRACEPTIVE USE, AND CHILDBEARING, 2002, A FACT SHEET FOR SERIES 23, NUMBER 24, at 1 (2004), http://www.cdc.gov/nchs/data/series/sr_23/sr23_024FactSheet.pdf.
112. See, e.g., LA. REV. STAT. ANN. § 14:80.1 (2004) (stating that consensual sexual intercourse between a person age seventeen to nineteen and a person age fifteen to seventeen, when the difference between the age of the victim and the age of the offender is greater than two years, is punishable by up to six months in prison); MISS. CODE ANN. §§ 97-3-95, -101 (2006) (stating that sexual penetration of a child (1) at least age fourteen but under age sixteen if the actor is at least thirty-six months older than the child or (2) under age fourteen if the actor is at least twenty-four months older than the child is sexual battery punishable by up to life in prison (depending on the age of the actor)); WIS. STAT. ANN. §§ 939.51, 948.09 (West 2005) (stating that sexual intercourse with a minor at least age sixteen is a class A misdemeanor punishable by up to nine months in prison).
113. For example, Genarlow Wilson, an honors student, star athlete, and homecoming king, was imprisoned for ten years for having consensual oral sex with a fifteen-year-old girl when he was seventeen. Outrage After Teen Gets 10 Years for Oral Sex with Girl, ABC PRIMETIME, Feb. 7, 2006, http://abcnews.go.com/Primetime/LegalCenter/Story?id=1693362&page=1. At a wild New Year’s Eve party, where alcohol was present, a number of teenagers had intercourse and oral sex with one another. Id. On a videotape of the party, it is clear that the defendant had consensual oral sex with a fifteen-year-old girl at the party, but because the age of consent in Georgia is sixteen, authorities charged Wilson with aggravated child molestation. Id. It made no difference that there was only a two-year age difference between the defendant and the victim. Id. The jurors felt they had no choice but to convict based on state law, but were hesitant to do so, and so Wilson faced a mandatory sentence of ten years in prison. Id. Legislators also questioned the prosecution, stating that the intent of the statute was to protect women and children from sexual predators, not to police teen sex. Id.
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rape law creates the possibility of convicting offenders who lack subjective culpability. That runs counter to traditional tenets of the criminal law. Even if the criminal justice system can tolerate the expansion of the law of rape, the picture becomes more troubling when one examines the parallel expansion of criminal and civil sanctions for sexual predators that have spilled over to rape law as well. That is the subject of the next Part.

III. THE CREATION OF NEW SANCTIONS FOR SEXUAL PREDATORS

A young child vanishes from her home. After frantic efforts to locate the child, her body is found, with evidence of sexual assault. Police eventually arrest a convicted sex offender, who lives in her neighborhood. In another episode, police find an abducted child’s severed head. In yet another headline case, the police learn that the perpetrator, another convicted sex offender, buried his victim alive.

Who cannot react with outrage to such stories? Despite the infrequency of such abductions and murders, they command the public’s attention, often staying in the headlines for weeks. Cases like these, although statistical aberrations, have driven America’s policies for dealing with sexual offenders for over a decade.


115. See supra notes 98, 106, 112 and accompanying text.

116. See DRESSLER, supra note 6, at 125–53 (citing the importance of mens rea in determining criminal liability stating “[a]ctus non facit reum nisi mens sit rea, or ‘an act does not make a person guilty, unless the mind be guilty’” (internal parentheses omitted)).

117. This is Megan of Megan’s Law. See Corrigan, supra note 114, at 267.

118. See id.

119. Id.

120. Singleton, supra note 20, at 604 (describing the abduction and decapitation of Adam Walsh).

121. Id. at 606 (describing the abduction and murder of Jessica Lunsford).

122. See LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 27 (1997), http://www.ojp.usdoj.gov/bjs/pub/pdf/soo.pdf (“Since the latter half of the 1980’s, the percentage of all murders with known circumstances in which rape or other sex offenses have been identified by investigators as the principal circumstance underlying the murder has been declining from about 2% of murders to less than 1%.”).

123. See Michael Vitiello, Three Strikes: Can We Return to Rationality?, 87 J. CRIM. L. & CRIMINOLOGY 395, 412–14 (1997) (discussing how the kidnapping and murder of Polly Klaas “created overwhelming popular support for tough anti-crime legislation” eventually leading to the enactment of California’s three strikes laws).
Legislatures around the country have enacted a variety of draconian measures in reaction to highly publicized cases. While specific jurisdictions vary the scope of their laws, many states have increased punishments for sexual offenses, including mandatory minimum sentences. Beyond criminal punishments, states have adopted a variety of other measures aimed at sexual offenders.

In 1994, Congress required states “to create and maintain a sexual offender registry.” Amended in 1996, the Wetterling Act includes provisions commonly referred to as “Megan’s Law.” More recently, legislatures have imposed additional registration requirements on offenders in response to the abduction and murder of Jessica Lunsford.

Legislation varies around the country. A review of California’s various laws provides a sense of the scope of these provisions. California law requires almost any sexual offender to register, whether the offense is a felony or misdemeanor. With a few minor exceptions, the offender must register for the rest of that person’s life, and the requirement applies

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124. See, e.g., id.
126. Mohan, supra note 20, at 706–07.
127. Id. at 707.
128. Id. at 703–04.
129. See BUREAU OF JUSTICE STATISTICS, supra note 24 (providing a summary of sex offender registration laws from all fifty states).
130. See CAL. PENAL CODE § 290(c) (West Supp. 2008) (listing all of the included offenses for which a person must register as a sex offender in California).
131. Id. § 290(b). Included in this requirement are all those who have been convicted in any California, federal, or military court of any of the included offenses since 1944, or any person who has been released, discharged, or paroled from a penal institution where he or she was confined for committing or attempting to commit any of the included offenses since 1944, or determined to be a “mentally disordered sex offender” since 1944. Id. §§ 290(c), 290.004. In addition, any person convicted since 1944 of an offense in any state, federal, or military court must register if that offense would require registration if it had been committed in California. Id. § 290.005(a). Besides the included offenses, any person ordered to register as a sex offender by any court, if the court at the time of conviction or sentencing found that the person “committed the offense as a result of a sexual compulsion or for purposes of sexual gratification” is required to register. Id. § 290.006. Also, if any person would be required to register in the state of conviction for a sex offense, they must also register in California. Id. § 290.005(c). Among those offenses committed out of state, there are a few exceptions which do not require registration in California even if registration would be required in the state of conviction. Id. § 290.005(d). These include indecent exposure, unlawful sexual intercourse, incest, sodomy or oral copulation among consenting adults, or pimping and pandering. Id. § 290.005(d)(1)–(5).
equally whether the offender was a juvenile or adult when he committed his offense.133 The registry includes offenders' records, photographs, and DNA samples.134 Failure to register is a crime: a misdemeanor if the sex offense was a misdemeanor, a felony if the underlying offense was a felony.135

A look at the offenses to which registration applies suggests the breadth of the law. While legislatures have enacted registration laws in reaction to the headline cases involving violent repeat predators,137 they are hardly limited to those kinds of crimes. Noted below is an exhaustive list of the crimes to which registration applies.138 Among those crimes listed are a

132. Although the requirements are gender neutral, the vast majority of registered offenders are male. HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 8 (2000), http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf ("Nearly all of the offenders in sexual assaults reported to law enforcement were male (96%).").

133. BUREAU OF JUSTICE STATISTICS, supra note 24, at 10–11. The subject is the source of a great deal of criticism because there are significantly different probabilities of reoffense among sex offenders. See NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, REPORT OF THE SEX OFFENDER POLICY TASK FORCE 7 (2007), http://www.nacdl.org/sl_docs.nsf/issues/sexoffender_attachments/$FILE/SexOffenderPolicy.pdf (arguing that a “one size fits all approach to sex offenders” is illogical because although the recidivism rate “amongst sex offenders is generally low (compared to other types of offenders) it does vary amongst different types of sex offenders”).

134. See BUREAU OF JUSTICE STATISTICS, supra note 24, at 10.

135. Id. at 11. Failure to register has also been used as the basis for a third-strike imposing a life sentence on the violator. See People v. Carmony, 92 P.3d 369, 371–72 (Cal. 2004). The California Supreme Court noted that the court of appeal found that using a technical violation of failing to register as a sex offender to sentence a man to life in prison for a third strike falls “outside the spirit of three strikes law.” Id. at 373.

136. In California, registration requires that the Department of Justice ("DOJ") collect a signed written statement, fingerprints, and a current photograph of all offenders upon release from incarceration. CAL. PENAL CODE § 290.015(a)(1)-(2) (West Supp. 2008). Among the information collected is the name and address of the person’s employer, the address of the place of work if different from employer’s address, license plate number of any vehicle registered to, owned or regularly driven by the person, and copies of adequate proof of residence (limited to a California driver’s license or identification card, recent rent or utility receipts, printed personalized checks, or banking documents), or a statement that the person has no reasonable expectation of obtaining a residence in the foreseeable future. Id. § 290.015(a)(1)-(5). Any person who changes their address must inform the local law enforcement agency where he or she was last registered of this change within five business days of the move. Id. § 290.013(a).


138. Under California law, those who must automatically register include any person who commits murder, CAL. PENAL CODE § 187 (West 1999), in the perpetration or attempted perpetration of rape, sodomy, § 286, a lewd or lascivious act with a child under age fourteen, § 288, oral copulation, § 288a, or sexual penetration, § 289; kidnapping, §§ 207, 209, with the intent to commit rape, sodomy, § 286, a lewd or lascivious act with a child under age fourteen, § 288, oral copulation, § 288a, or sexual penetration, § 289; assault with the intent to commit
rape, sodomy, oral copulation, rape or sexual penetration in concert, a lewd act with a child, or sexual penetration, § 220; sexual battery, § 243.4; rape, either where the victim is incapable of giving legal consent because of a mental disorder or developmental or physical disability, § 261(a)(1), where it is by force, violence, duress, menace, or fear of bodily injury, § 261(a)(2), where the offender knows or should know that resistance is prevented by intoxication, anesthesia, or a controlled substance, § 261(a)(3), where the victim was "unconscious of the nature of the act," § 261(a)(4), or where the act is accomplished against the victim's will by threatening to retaliate (kidnap, falsely imprison, or inflict extreme pain, serious bodily injury, or death) against another where there is a reasonable possibility the threat will be executed, § 261(a)(6); rape of the spouse if it is accomplished by means of force, violence, duress, menace, or fear of bodily injury and is of the level of force of violence for which the offender is sent to state prison, § 262(a)(1); rape or sexual penetration in concert, § 264.1; luring a minor female into prostitution, § 266; sexual intercourse, sexual penetration, oral copulation, or sodomy induced by false or fraudulent representation when such pretense is made with intent to and actually inducing fear which would cause a reasonable person to act contrary to free will, § 266c; pimping of a minor, § 266h(b); pandering of a minor, § 266i; intentionally providing or offering to provide transport to a minor under age sixteen for the purpose of a lewd or lascivious act, § 266j; abducting a minor for the purpose of prostitution, § 267; rape, rape or sexual penetration in concert, sodomy or oral copulation by force, violence, duress, menace or fear of bodily injury, or sexual penetration with a child under age fourteen where the offender is seven or more years older than the victim, § 269; consanguinity (incestuous marriage), § 285; sodomy, § 286; a lewd or lascivious act with a minor under fourteen, § 288; oral copulation with a minor or with a non-consenting adult, § 288a; contacting a minor with the intent to commit rape, kidnapping, a lewd or lascivious act, oral copulation, sexual penetration, rape or sexual penetration in concert, child abuse, sodomy, oral copulation with a minor or non-consenting adult, knowing solicitation or distribution of explicit material to a minor, forcible sexual penetration, possession or production of child pornography with intent to distribute, knowing employment of a minor for child pornography, or possession of child pornography, § 288.3; continual sexual abuse of a minor, § 288.5; engaging in sexual intercourse, sodomy, oral copulation, or sexual penetration with a child ten years or younger, if the offender is over age eighteen, § 288.7; forcible sexual penetration, § 289; possession or production of child pornography with intent to distribute, § 311.1; commercial and felony non-commercial child pornography, § 311.2; production of child pornography, § 311.3; employment of minor for child pornography, § 311.4; sale or distribution of child pornography, § 311.10; knowing possession of child pornography, § 311.11; child molestation, § 647.6; solicitation of rape, sodomy, or oral copulation by force or violence, § 653f(c); public or indecent exposure, § 314; luring or inducing the delinquency of a minor for the purpose of committing a lewd or lascivious act, § 272; or a second or subsequent conviction for distributing to a minor by phone message, email or other method, harmful matter to arouse or seduce a minor, § 288.2. CAL. PENAL CODE § 290.003 (West Supp. 2008).

Similarly, under Arizona law, mandated registrants include any person convicted of a violation or attempted violation of the following offenses in Arizona or if their conviction in some other state would be a violation of Arizona law: unlawful imprisonment of a victim under eighteen years of age if the person convicted is not the victim's parent, ARIZ. REV. STAT. ANN. § 13-1303 (2001); kidnapping of a victim under fifteen years of age, § 13-1304; sexual abuse of a victim under fifteen years of age, § 13-1404; sexual conduct with a minor, § 13-1405; sexual assault, § 13-1406; sexual assault of a spouse committed before August 12, 2005, § 13-1406.01 (repealed 2005); molestation of a child, § 13-1410; continuous sexual abuse of a child, § 13-1417; taking a child for the purpose of prostitution, § 13-3206; child prostitution, § 13-3212; commercial sexual exploitation of a minor, § 13-3552; sexual exploitation of a minor, § 13-3553; luring a minor for sexual exploitation, § 13-3554; sex trafficking of a minor, § 13-1307; a
variety of crimes where the conduct falls far short of the predatory conduct that gave rise to the registration requirements. For example, included are crimes like sexual battery, a variety of offenses dealing with underage sexual partners even if the conduct is factually consensual, and possession of child pornography, all of which present risks far different from those giving rise to the registration laws. Further, because of the judicial expansion of "rape," and the limited availability of the mens rea defense when an offender claims that he believed he had consent, the statute applies with full force to offenders whose conduct may have at most been negligent, not willful. For most offenses, registration applies across the board, without regard to unique factors relating to the offender. Nor can an offender avoid the registration requirement through a plea bargain. Conviction of most sexual offenses, including oral copulation with a person under the age of sixteen, results in automatic registration. Some offenses, including "statutory rape," do not result in automatic registration, but may result in registration upon a proper finding by the court.

Disabilities imposed on sex offenders are not limited to registration. In some extreme examples, sex offenders may be subject to chemical castration. An offender whom a court finds to be a sexually violent predator must comply with more frequent registration requirements than

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140. Id. § 261.5; see People v. Hofsheier, 129 P.3d 29, 32 n.2 (Cal. 2006) (noting that the underage female's consent was voluntary, i.e., not the product of illegal coercion).
142. See, e.g., In re M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) (reducing the amount of force necessary to commit rape and adding a requirement making the definition of that force turn on the reasonableness of the man's belief that he has consent). In such a situation, a man who is negligent in his belief that he has consent, but who commits no act of force beyond sexual penetration is guilty of a serious felony. Id.
143. See discussion supra Part II and notes 92–98.
144. See CAL. PENAL CODE § 290(b)–(c) (West Supp. 2008) (not providing any limitations or specifications regarding the offender in establishing the automatic registration requirement).
145. Hofsheier, 129 P.3d at 34 ("The duty to register as a sex offender under section 290, subdivision (a), cannot be avoided through a plea bargain . . . .").
146. CAL. PENAL CODE § 290(c). But see Hofsheier, 129 P.3d at 42 (finding the automatic registration requirement for oral copulation with a minor unconstitutional on equal protection grounds); People v. Dulan, 55 Cal. Rptr. 3d 312, 314 (Ct. App. 2007) (same).
148. Id. § 645.
other sex offenders.\textsuperscript{149} An offender convicted of a "registerable sex offense\textsuperscript{150} must submit to GPS monitoring for any term of parole and to pay for it unless the Department of Corrections finds the offender unable to pay for monitoring.\textsuperscript{151} Offenders who must register may not live within 2,000 feet of a public or private school or park where children regularly gather.\textsuperscript{152} Local communities may enact additional residence restrictions.\textsuperscript{153} Finally, the Department of Justice maintains a website that provides extensive data about each registrant and to which the public has free access.\textsuperscript{154}

\textsuperscript{149} See id. § 290.012(a)-(b) (stating that a person who has been adjudicated a "sexually violent predator" must verify his or her registration every ninety days as opposed to being required to register annually).

\textsuperscript{150} A "registerable sex offense" is one that requires registration under California Penal Code section 290(c). Id. § 3000.07.

\textsuperscript{151} Id. § 3000.07(a)-(b).

\textsuperscript{152} Id. § 3003.5(b).

\textsuperscript{153} Id. § 3003.5(c).

\textsuperscript{154} Id. § 290.4; BUREAU OF JUSTICE STATISTICS, supra note 24.

By July 1, 2005, the DOJ was required to make available via the internet the name, known aliases, a photograph, a physical description, gender, race, date of birth, criminal history, prior adjudication as a sexually violent predator, address at which the person resides, and any other information the DOJ deems relevant for those convicted of kidnapping, with the intent to commit rape, sodomy, a lewd or lascivious act with a minor, oral copulation, or sexual penetration, CAL. PENAL CODE §§ 207, 209 (West 1999); rape by threat or force, § 261; rape or sexual penetration in concert, § 264.1; rape, sodomy, sexual penetration, or oral copulation of a minor under fourteen years of age, § 269; sodomy with a person under age fourteen where the offender is more than ten years older or sodomy in concert, § 286(c)-(d); felony lewd or lascivious conduct with a minor under age fourteen or by force or where the offender is more than ten years older than the victim under the age of fourteen, § 288(a)-(c); oral copulation with a minor under age fourteen or in concert, § 288a(c)-(d); felony communication with a minor to commit a number of crimes including kidnapping, child pornography, oral copulation, and sodomy, § 288.3; continual sexual abuse of a minor under age fourteen, § 288.5; sexual penetration by force or on a child under the age of fourteen where the offender is more than ten years the victim's senior, §§ 288(a)-(c), 289(a); sodomy, sexual intercourse, oral copulation, or sexual penetration with a minor ten-years-old or younger, § 288.7; or any person adjudicated a sexually violent predator, CAL. WELF. & INST. CODE § 6600 (West 2006). CAL. PENAL CODE § 290.46(b)(1)-(2) (West Supp. 2008).

Another class of offenders exists: those who commit assault with the intent to commit rape, sodomy, oral copulation, rape or sexual penetration in concert, a lewd act with a child, or sexual penetration, CAL. PENAL CODE § 220 (West 1999); rape, either where the victim is incapable of giving consent because of a mental disorder or developmental or physical disability, § 261(a)(1), where it is by force, violence, duress, menace, or fear of bodily injury, § 261(a)(2), or where the victim was "unconscious of the nature of the act," § 261(a)(4); sodomy where the offender is over twenty-one and the victim under sixteen, where the victim is unconscious of the nature of the act, where the victim cannot give legal consent due to mental disorder or developmental or physical disability, or where the victim is prevented from resisting because of intoxication or some controlled substance, § 286(b)(2), (f), (g), (i); oral copulation where the offender is over twenty-one and the victim under sixteen, where the victim is unconscious of the
nature of the act, where the victim cannot give legal consent due to mental disorder or developmental or physical disability, or where the victim is prevented from resisting because of intoxication or some controlled substance, § 288a(b)(2), (f), (g), (i); or sexual penetration where the offender is over twenty-one and the victim under sixteen, where the victim is unconscious of the nature of the act, where the victim cannot give legal consent due to mental disorder or developmental or physical disability, or where the victim is prevented from resisting because of intoxication or some controlled substance, § 289(b), (d), (e), (i). For these offenders, the internet website makes available the offender’s name, known aliases, photograph, physical description, gender, race, date of birth, criminal history, community of residence, and ZIP code, along with any other information the DOJ deems relevant. CAL. PENAL CODE § 290.46(c)(1)–(2) (West Supp. 2008).

The same information is provided for those convicted of felony sexual battery, CAL. PENAL CODE § 243.4(a) (1999); felony enticement of a minor into prostitution, § 266; felony inducement of sexual intercourse, sexual penetration, oral copulation, or sodomy by fraudulent misrepresentation, § 266c; transporting or providing a child under sixteen for the purpose of causing, inducing, or persuading a child to engage in a lewd or lascivious act, § 266j; kidnapping for the purpose of prostitution, § 267; misdemeanor lewd or lascivious act with a child under fourteen when the offender is at least ten years older, § 288(c); misdemeanor meeting or communicating with a minor with intent to commit a covered offense, § 288.3; a registered sex offender who enters a school building without permission, § 626.81; child molestation, § 647.6; a registered sex offender whose crime was against an elder or dependent adult who then enters, without permission, into the grounds of a day care residential facility where elders or dependent adults are present, § 653c; and any person required to register as a result of an out-of-state conviction unless that crime would be punishable in California, in which case the notification requirement for that crime shall apply. CAL. PENAL CODE § 290.46(d)(1)–(2) (West Supp. 2008).

A person convicted of felony sexual battery or misdemeanor child molestation may apply to the DOJ for exclusion from the website if that is their only conviction. Id. § 290.46(e)(1). Exclusion from the website does not remove the duty to register. Id. A person may apply to be relieved of the duty to register if he or she is able to obtain a certificate of rehabilitation and the offense or attempted offense for which he or she was convicted is not: kidnapping, with the intent to commit rape, sodomy, a lewd or lascivious act with a minor, oral copulation, or sexual penetration, CAL. PENAL CODE §§ 207, 209 (West 1999); assault with the intent to commit rape, sodomy, oral copulation, rape or sexual penetration in concert, a lewd act with a child, or sexual penetration, § 220; sexual battery, § 243.4; rape, either where the victim is incapable to give consent because of a mental disorder or developmental or physical disability, § 261(a)(1), where it is by force, violence, duress, menace, or fear of bodily injury, § 261(a)(2), where the offender knows or should know that resistance is prevented by intoxication, anesthesia, or a controlled substance, § 261(a)(3), where the victim was "unconscious of the nature of the act," § 261(a)(4); rape or sexual penetration in concert, § 264.1; luring a minor female into prostitution, § 266; sexual intercourse, sexual penetration, oral copulation, or sodomy induced by false or fraudulent representation when such pretense is made with the intent to induce and actually results in inducing fear which would cause a reasonable person to act contrary to free will, § 266c; kidnapping a minor for the purpose of prostitution, § 267; rape, rape or sexual penetration in concert, sodomy or oral copulation by force, violence, duress, menace, or fear of bodily injury, or sexual penetration with a child under age fourteen where the offender is seven or more years older than the victim, § 269; sodomy, § 286; a lewd or lascivious act with a minor under fourteen, § 288; oral copulation with a minor or with a non-consenting adult, § 288a; continual sexual abuse of a minor, § 288.5; forcible sexual penetration, § 289; or child molestation, § 647.6. CAL. PENAL CODE § 290.5 (West Supp. 2008). Also, any person who is required to
A few litigants have successfully challenged specific application of these provisions on constitutional grounds. For example, one California court held that the retroactive application of the rules governing residency would amount to an ex post facto clause violation. In another case, the California Supreme Court found that the legislation requiring registration for a person guilty of having oral copulation with an underage female denied the offender equal protection because, had he committed sexual intercourse, he would have been subject to registration only upon a specific finding by the trial court. Those courts have not suggested, however, that the overall scheme of heightened punishment for sex offenders violates the Constitution.

No one doubts the impetus for these heightened sanctions. However, it is important to question whether they are warranted. As discussed below, many commentators have grave doubts about the efficacy, fairness, and wisdom of many of these provisions.

IV. LACK OF COHERENCE AND UNWARRANTED PUNISHMENT: ONE SIZE DOES NOT FIT THE CRIME OR THE CRIMINAL

As developed in the previous Part, many jurisdictions impose substantial disabilities on sexual offenders, beyond those reserved for other criminal offenders. This state of affairs begs the question whether such special treatment is warranted. To make the point, this Part asks why our society imposes punishment generally and why it is punishing and otherwise disabling sexual offenders beyond normal sanctions. Further, it argues that the unequal treatment for many sexual offenders is unjustified.

More specifically, this Part examines whether long prison sentences for sexual offenders are warranted in light of the need to incapacitate particularly dangerous offenders, likely to commit additional crimes upon their release. Further, it discusses whether longer sentences are justified

register under section 290 and who enters the sex offender website is subject to fine or imprisonment. Id. § 290.46(k).

155. See Doe v. Schwarzenegger, 476 F. Supp. 2d 1178, 1181–83 (E.D. Cal. 2007) (holding that the residency requirement would be an unconstitutional violation of the ex post facto clause if applied retroactively).

156. CAL. PENAL CODE § 290 (West Supp. 2008); People v. Hofsheier, 129 P.3d 29, 32 (Cal. 2006); see also People v. Hofsheier, 11 Cal. Rptr. 3d 762, 766 (Ct. App. 2004).

157. In re Alva, 92 P.3d 311, 332, 334 (Cal. 2004) (holding that the sex offender registration requirement is not punishment and thus cannot be held unconstitutional for ex post facto reasons).

158. See discussion supra Part III and accompanying notes.

159. See infra notes 175–178 and accompanying text.
based on offenders' culpability. The Part concludes by raising doubts about the wisdom of many of the recent punishments and disabilities applied across the board to sexual offenders.

The United States experienced a long and deep decline in crime rates for most of the 1990s. Measuring the extent to which incapacitation explains the decline in crime is difficult at best. While some have argued that the decline in the crime rates during the end of the twentieth century was a product of high incarceration rates, both the extent to which it prevents crime and the availability of alternatives to achieve the same results are open topics of debate. Whether incapacitation works with regard to sexual offenders specially is at least as difficult to resolve.

No doubt, the "poster" offenders whose predatory conduct has led to enactment of the protective legislation are real and exceedingly

\[\text{\textsuperscript{160}} \text{ See infra notes 186–95 and accompanying text.} \]
\[\text{\textsuperscript{161}} \text{ See infra notes 196–203 and accompanying text.} \]
\[\text{\textsuperscript{162}} \text{ See FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE, at v–vi (2007) (stating that "[t]he rate of reported crimes . . . dropped each year after 1991 for nine years in a row" and discussing the “character, the causes, and the consequences of the crime decline").} \]
\[\text{\textsuperscript{163}} \text{ See id. at 48–55 (discussing the role of incarceration in preventing crime and acknowledging the “difficulty . . . in estimating the extent to which variations in incarceration rates will cause changes in crime rates”); FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 42, 46 (1995) (discussing the “complicated process” and “difficulty” of estimating the crime prevention benefits of incapacitative imprisonment); Andrew D. Leipold, Recidivism, Incapacitation, and Criminal Sentencing Policy, 3 U. ST. THOMAS L.J. 536, 555–56 (2006) (“[M]ore work is needed to fully understand the links between recidivism, incapacitation, and crime prevention.”).} \]
\[\text{\textsuperscript{164}} \text{ See ZIMRING, supra note 162, at 49 (“Since a huge increase in incarceration was the major policy change in American criminal justice in the last three decades of the twentieth century, one would expect many observers to give this boom in imprisonment the lion’s share of the credit for declining crime in the United States.”); Leipold, supra note 163, at 541 (stating that “incapacitation works” as a method of preventing future crime); Steven D. Levitt, Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not, 18 J. ECON. PERSP. 163, 178–79 (2004) (“[T]he increase in incarceration over the 1990s can account for the reduction in crime of approximately 12 percent for [violent crimes] and 8 percent for property crimes, or about one-third of the observed decline in crime.”).} \]
\[\text{\textsuperscript{165}} \text{ See ZIMRING, supra note 162, at 52 (discussing the “rather modest role” that incapacitation played in the crime decline of the 1990s).} \]
\[\text{\textsuperscript{166}} \text{ For example, as argued by Professor Franklin Zimring, Canada experienced similar declines in crime rates to the United States during the 1990s. Id. at 129. It did so without a similar increase in incarceration. Id. at 107–21.} \]
\[\text{\textsuperscript{167}} \text{ See id. at v (stating that “the great American crime decline” of the 1990s is “a mystery to this day” and that there “is little consensus among experts about what changes in circumstances produced the crime decline or what is likely to happen next”); ZIMRING & HAWKINS, supra note 163, at 166–67 (discussing contemporary policy debates concerning the success of crime prevention by means of incapacitation).} \]
dangerous.\footnote{See Barry M. Maletzky & Gary Field, The Biological Treatment of Dangerous Sexual Offenders, a Review and Preliminary Report of the Oregon Pilot Depo-Provera Program, 8 Aggression & Violent Behav. 391, 392 (2003) (stating that there is a "select group" of sexual offenders that "can be characterized by a predatory pattern; the creation of multiple victims; the commission of more aggressive crimes; often, the presence of attraction to boys; and frequently, the existence of central nervous system (CNS) dysfunction or psychiatric disabilities resulting in deficient impulse control").} As critics have observed, though, legislatures have created broad statutory protections based on an incorrect view of sexual offenders as a homogenous group. In An American Travesty: Legal Responses to Adolescent Sexual Offenders, Professor Franklin Zimring observed,

\begin{quote}
(Policy toward sex offenders is often based on monolithic images of alien pathologies; it is rarely based on facts. The extraordinary heterogeneity of sex offenders and sex offenses is almost never appreciated in the legislative process. Policies are crafted in fearful haste, often as symbolic gestures to honor the crime victims whose suffering has inspired them. The factual foundations for major shifts in policy are often slender; once laws are passed they are rarely evaluated.\footnote{FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING, at xiii (2004).})
\end{quote}

Policies driven by the view of sexual offenders as "a breed apart"\footnote{Id. at xv.} have produced bad results.

Zimring makes a compelling case of bad public policy by focusing on the specific problem of juvenile sexual offenders.\footnote{See id. at 3.} An American Travesty demonstrates the incredible breadth of some statutes aimed at sexual offenders, for example, those dealing with crimes against juveniles.\footnote{Under New Jersey's Megan's laws in the mid-1990s, juvenile sex offenders were classified by the same criteria as adults. \textit{Id.} at 6. In one case, a ten-year-old boy charged with second degree sexual assault of his eight-year-old cousin was classified as a moderate-risk sex offender requiring formal notification to all schools within a two-mile radius. \textit{Id.} at 3–5. His high classification was due in part to the fact that the victim was under thirteen. \textit{Id.} at 6. New Jersey law essentially judged the conduct of a ten-year-old boy with an eight-year-old girl by the same standards as it would a twenty-eight-year-old man with an eight-year-old girl. \textit{Id.}} By lumping juvenile offenders with adult offenders, legislatures ignore developmental aspects of juveniles' unlawful conduct. As a result, such
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legislation fails to assess the risk of juveniles reoffending. Zimring’s review of the data suggests that juvenile offenders are less likely to commit repeated sexual offenses than they are other types of offenses. That is, the unselective use of stepped-up sentences for juvenile sex offenders are hard to justify if the rationale is incapacitation.

Even adult sexual offenders are not the homogenous group assumed by legislatures. Many sex offenders do not suffer from sexual pathologies. Further, although measuring recidivism for sexual offenses is imperfect, “sex offenders are relatively unlikely to commit future sexual offenses, and actually pose a greater risk of committing future non-sexual offenses.” Recidivism among sexual offenders is low and researchers cannot determine the exact extent to which an offender is likely to commit another

173. See id. at 87 (discussing the influential National Task Force on Juvenile Sexual Offending and its “failure to address the developmental aspects of juvenile offending, . . . or the contrast or similarities between juvenile and adult sex offending” leaving it “without a clear rationale guiding its specialized focus”). Zimring also states that a lot of public policy is “based on assumptions of continuity between youthful and adult sex offenders” and that “there is a troubling shortage of data and research” exploring the similarities and differences between the two. Id. at 63.

174. Id. at 58–62 (discussing the results of several studies showing that “[t]he re-arrest rate for all offenses can be quite high in this period of adolescent development . . . but the rate of re-arrest for sex offenses is small”).

175. See id. at 28 (stating that “recent legislation and policymaking” is partly based on the assumption that sex offenders specialize in sex offenses, but that “[m]ost repeat criminals are generalists whose criminal histories comprise a variety of different types of offense[s]”; Eric S. Janus, Legislative Responses to Sexual Violence: An Overview, 989 ANNALS N.Y. ACAD. SCI. 247, 252 (2003) (“[I]t is clear that sexual violence is a ‘complex amalgam of factors’ that only sometimes includes deviant sexuality, and often includes antisocial behaviors and distorted attitudes about women and sexuality. The proper understanding and classification of sexual violence is an ongoing project that ought to be informed by both science and social policy.”); Robert A. Prentky et al., Introduction, 989 ANNALS N.Y. ACAD. SCI. ix, at xi (2003) (“With respect to diversity, we have moved well beyond our earlier focus on impulsive, antisocial criminals serving time in prison for felony sexual assaults on strangers. Sexual coercion and sexual aggression is expressed or manifest in a remarkably wide range of behaviors . . . .”)

176. See ZIMRING, supra note 169, at 29 (“When serious sex offenders are compared with those who commit theft or violent crimes, the prevalence of a distinct pathology is greater among sex offenders, but there is nevertheless substantial heterogeneity in almost every category of severe sex crime.”); John F. Stinneford, Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity, 3 U. ST. THOMAS L.J. 559, 569–70 (2006).

177. Stinneford, supra note 176, at 570. According to a meta-analysis of eighty-two recidivism studies, “[m]ost sexual offenders were not caught for another sexual offense (13.7%); on average, they were more likely to recidivate with a nonsexual offense than a sexual offense (overall recidivism rate of 36.2%).” R. Karl Hanson & Kelly E. Morton-Bourgon, The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1158 (2005).
sexual offense. However, two factors have been found to increase the likelihood of sexual recidivism: paraphilia and an antisocial orientation.

The policy implications of these data are significant. An increasing amount of literature recognizes that criminal justice experts can make accurate risk assessments. That is, sentencing authorities can predict with increasing accuracy whether a particular offender will commit additional crimes. Further, an increasing body of research should allow more targeted use of limited prison resources. As concluded by two social scientists, "the intensity of services and supervision should be matched to the level of offender risk. . . . Failing to match risk with intensity of services can diminish public safety, waste correctional resources, and increase the probability of criminal behavior among low-risk offenders."

Worth underscoring is a concern raised in the social science literature that choosing the wrong intervention for some low risk offenders increases the likelihood that they will commit additional crimes. The proposition is

178. Stinneford, supra note 176, at 571.
179. Hanson & Morton-Bourgon, supra note 177, at 1158 ("Sexual deviancy and antisocial orientation were the major predictors of sexual recidivism for both adult and adolescent sexual offenders."); Stinneford, supra note 176, at 571.
180. See MODEL PENAL CODE: SENTENCING 34 (Tentative Draft No. 1, 2007) ("[A]ctuarial measures of predicting the risk of recidivism posed by individual offenders have become more powerful over time."); ZIMRING, supra note 162, at 162 ("The data collection required for this type of analysis is not complicated."); Hanson & Morton-Bourgon, supra note 177, at 1158–59 (discussing the "predictors" of sexual recidivism); Edward J. Latessa & Christopher Lowenkamp, What Works in Reducing Recidivism?, 3 U. ST. THOMAS L.J. 521, 532–33 (2006) (discussing "four major factors . . . significantly related to recidivism"); Christopher T. Lowenkamp & Edward J. Latessa, Increasing the Effectiveness of Correctional Programming Through the Risk Principle: Identifying Offenders for Residential Placement, 4 CRIMINOLOGY & PUB. POL'Y 263, 270–71 (2005) (finding that an offender’s “risk score demonstrate[s] fair predictive validity” of reincarceration and that "recidivism rates increase substantially with each category of risk"); John Monahan, A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients, 92 VA. L. REV. 391, 406, 408 (2006) ("Recent research . . . indicates that the predictive validity of actuarial [or statistical] instruments has significantly improved in the past twenty years. . . . In the past several years . . . a number of violence risk assessment tools have become available . . . ."); Prentky et al., supra note 175, at xi ("[T]here has been a dramatic increase in the development, validation, and revision of risk assessment procedures during the past decade."); Stinneford, supra note 176, at 570–72 (discussing the factors associated with increased risk of reoffending based on the findings of studies involving nearly 60,000 sex offenders).
181. See Lowenkamp & Latessa, supra note 180, at 264 (discussing “[m]any meta-analytic reviews that have investigated the link between risk level and program effectiveness” and stating that information and data regarding offender risk can “lead to a more effective and efficient use of community corrections’ resources”).
182. Id.
183. See, e.g., id. at 283–84 (finding “substantial” increases in recidivism rates for low and moderate risk offenders admitted into residential treatment programs and discussing the “importance of studying the different effects of programs [on] distinct groups of offenders”).
not counterintuitive. Low-risk offenders have more support available for "pro-social" activity than do high-risk offenders.\textsuperscript{184} Placing low-risk offenders in facilities with high-risk offenders "provides an environment in which individuals who are lower risk learn antisocial behavior that is modeled for them, and form new peer associates."\textsuperscript{185}

Instead of a policy that focuses on individual offenders, states have based sexual offender laws on the stereotype of the sex offender as a "breed apart." That leads to unnecessary incarceration for many sexual offenders who represent a low risk of reoffending. Further, incarceration may even, in fact, increase the risk of their reoffending.

The poor policy choices are especially evident when one examines the expansion of sexual offenders that took place over the past twenty-five years. As discussed above, courts and legislatures have reduced the resistance requirement, increasing the number of cases in which an actor may not know that he lacks consent to engage in intercourse.\textsuperscript{186} Further, jurisdictions have rejected a good faith defense and, at most, have allowed a reasonable mistake of fact defense.\textsuperscript{187} The result is that at least some offenders may have been negligent, but lacked the level of culpability ordinarily required by the criminal law, especially for offenders convicted of serious felonies.\textsuperscript{188} Other offenders may have been mistaken about consent, but a jury might have found the mistake reasonable. Even though this possibility exists, some jurisdictions disallow a defense even in those circumstances.\textsuperscript{189}

While data collected by the Federal Bureau of Investigation does not allow close scrutiny of the particular kinds of sexual offenses other than forcible rape,\textsuperscript{190} the data shows that jurisdictions are incarcerating increasing numbers of sexual offenders who have not committed forcible rape.\textsuperscript{191}

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\textsuperscript{184} Christopher T. Lowenkamp, Edward J. Latessa & Alexander M. Holsinger, The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs?, 52 CRIME & DELINQ. 77, 89 (2006) (stating that "prosocial networks" such as "school, friendships, employment, family, and so on" are the "very attributes" that make some offenders low risk).

\textsuperscript{185} Id.

\textsuperscript{186} See supra notes 50, 85–86, 103 and accompanying text.

\textsuperscript{187} See supra note 84 and accompanying text.

\textsuperscript{188} See supra notes 92–98 and accompanying text.

\textsuperscript{189} See supra notes 80–84 and accompanying text.

\textsuperscript{190} See ZIMRING, supra note 169, at 21, 24 (stating that "[i]nformation on the number of reports by citizens is available for only one offense-forcible rape" and that "[a]rrest volume is a meaningful indicator of the volume of only one of the serious sex crimes-forcible rape"). Zimring further states that "official statistics are not a good indicator of the prevalence or incidence" of other offenses. Id. at 21.

\textsuperscript{191} Id. at 35 (stating that data from 1980 to 1997 show that "[t]he growth rate of persons incarcerated for the 'other sexual assault' category was four times as large as for rape, and 80
Professor Zimring has focused on the special problems when the offenders are juveniles.\textsuperscript{192} This group is likely to include some significant number of offenders who do not fit the stereotype of a sexual deviant or forcible rapist. The most extreme examples are those guilty of statutory rape, where mistake of fact as to the victim's age is seldom a defense in American jurisdictions.\textsuperscript{193} Despite the fact that the perceived conduct (sexual intercourse between consenting adults) now has constitutional protection,\textsuperscript{194} and, at worst, is immoral but legal, an offender may come within the increasingly severe punishment reserved for sexual predators.\textsuperscript{195} Absent a mens rea requirement, one would assume that a portion of offenders are low risk offenders whose punishment is unwarranted if society's goal is the reduction in crime through incapacitation while they are in prison.

The problem with the current approach to sexual offenders is compounded when one considers additional disabilities that flow from the status as a sexual offender. Many statutes create reporting and residency requirements in addition to GPS monitoring.\textsuperscript{196} These requirements oblige both the criminal justice system and individual offenders to bear additional costs.\textsuperscript{197} Recent news stories underscore one of the costs to the offenders.

percent of the 71,200 additional sex prisoners added to U.S. prisons . . . were in the 'other sexual assault' category').

\textsuperscript{192.} \textit{Id.} at vii (stating that his focus is on the small area of penal policy "concerned with the societal response to the juvenile sex offender").

\textsuperscript{193.} See supra notes 106–13 and accompanying text.

\textsuperscript{194.} See Lawrence v. Texas, 539 U.S. 558 (2003).

\textsuperscript{195.} \textit{Zimring, supra} note 169, at 19, 33 (stating that while the criminal prohibitions may not have increased, "the impact of \textit{Lawrence v. Texas} on adultery and fornication prohibitions is unclear" and "the legal apparatus for discovering, punishing, and controlling sex offenders [has] expanded substantially").

\textsuperscript{196.} \textit{Ariz. Rev. Stat. Ann.} \S\S 13-3821 to -3827 (Supp. 2007) (providing the registration requirements for sex offenders); \textit{Cal. Penal Code} \S 3003(g) (West Supp. 2008) (stating that high risk sex offenders "shall not be placed or reside, for the duration of his or her parole, within one-half mile of any public or private school including any or all of kindergarten and grades 1 to 12, inclusive"); \textit{Id.} \S 3003.5(b) ("Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather.").

\textsuperscript{197.} See, e.g., MARCUS NIETO \& DAVID JUNG, \textit{CAL. RESEARCH BUREAU, THE IMPACT OF RESIDENCY RESTRICTIONS ON SEX OFFENDERS AND CORRECTIONAL MANAGEMENT PRACTICES: A LITERATURE REVIEW} 38, 41 (2006), available at http://www.library.ca.gov/crb/06/08/06-008.pdf (stating that it would cost California approximately $88.4 million per year to monitor and supervise high-risk sex offenders); Wayne A. Logan, \textit{Sex Offender Registration and Community Notification: Emerging Legal and Research Issues}, 989 \textit{Annals N.Y. Acad. Sci.} 337, 345 (2003) ("As jurisdictions have painfully become aware, registration and notification, whatever their benefits, are far from cost-free. . . . [I]t is clear that there is no escaping the basic fiscal and resource impacts associated with implementing and maintaining the laws . . . ."); Dan Gunderson, \textit{Corrections Officials Critical of Expanded Sex Offender Monitoring} (Minn. Public Radio broadcast Feb. 22, 2006), available at http://minnesota.publicradio.org/
For example, the media recently reported the case of three offenders forced to live under a highway bridge because they could not find housing that complied with various legal requirements. ¹⁹⁸

The registration requirement poses the risk of additional penalties for the offender. ¹⁹⁹ His failure to register, even under circumstances where the police know of his location and where he may have recently registered, but is now required to reregister, is criminal, exposing the offender to additional criminal sanctions. ²⁰⁰ That is the case despite the view of some courts that the failure to reregister is one of the most passive of all felonies. ²⁰¹

Commentators have suggested some of the problems with these requirements, including the risk that, in order to find housing not within proximity to schools or parks, offenders will be driven into rural communities with fewer law enforcement resources than their big city counterparts. ²⁰² Further, broadly written statutes that lump a wide range of

¹⁹⁸. Isaiah Thompson, Swept Under the Bridge, MIAMI NEW TIMES, Mar. 8, 2007, http://www.miaminewtimes.com/2007-03-08/news/swept-under-the-bridge/full. Residency restrictions often prohibit sex offenders from living within certain distances of schools or childcare facilities. NEITO & JUNG, supra note 197, at 3. Some of the more restrictive statutes do not allow sex offenders within 2,500 feet of any place where children congregate. Id.; see also Doe v. Miller, 405 F.3d 700, 715 & n.4 (8th Cir. 2005) (discussing various statutory requirements imposed on sex offenders); Davey & Goodnough, supra note 197 (“Few states have figured out what to do when they do have graduates ready for supervised release. In California, the state made 269 attempts to find a home for one released pedophile. In Milwaukee, the authorities started searching in 2003 for a neighborhood for a 77-year-old offender, but have yet to find one.”).

¹⁹⁹. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-3821 to -3827 (delineating the requirements imposed upon sex offenders post-conviction); CAL. PENAL CODE § 290 (West Supp. 2008).

²⁰⁰. See, e.g., CAL. PENAL CODE § 290.012(a) (West Supp. 2008) (requiring reregistration within five days of offender’s first birthday following registration); see also People v. Carmony, 26 Cal. Rptr. 3d 365, 381 (Ct. App. 2005) (overturning a twenty-five year sentence for failure to reregister under California’s sex offender registration laws where the state had already been informed of the defendant’s current address).

²⁰¹. See, e.g., Carmony, Cal. Rptr. 3d at 372 (finding the offense of failing to reregister “an entirely passive, harmless, and technical violation of the registration law.”).

²⁰². See NEITO & JUNG, supra note 197, at 23–25 (discussing the unintended consequences of sex offender residency restrictions); Logan, supra note 197, at 343–45 (discussing the negative consequences of notification laws, including “ostracization [and] residential exclusion” and that “poor areas . . . often accommodate a disproportionate number of registrants”); Laurie
offenders representing vastly divergent risks waste these additional resources.\textsuperscript{203}

Much of the previous discussion also suggests why many sentences imposed on sexual offenders are unfair. The courts afford criminal defendants meager constitutional protection. The Supreme Court provides extremely limited protection to those who challenge their sentences as disproportionate.\textsuperscript{204} Equal protection claims seldom prevail.\textsuperscript{205} Further, the Supreme Court has upheld a variety of disabilities imposed on sex offenders as “civil,” despite the additional burden imposed on those offenders.\textsuperscript{206} Nonetheless, our system values proportionality and equality.\textsuperscript{207}

Beyond a few deceptively easy examples,\textsuperscript{208} defining proportional sentences is difficult at best.\textsuperscript{209} Insofar as proportionality is a limiting

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\item O. Robinson, Sex Offender Management: The Public Policy Challenges, 989 ANNALS N.Y. ACAD. SCI. 1, 6 (2003) (stating that some community notification requirements have forced sex offenders to go “underground”); Davey & Goodnough, supra note 197 (noting some of the difficulties in finding homes for released sex offenders).
\item See discussion supra Part III and accompanying notes.
\item See Ewing v. California, 538 U.S. 11, 30–31 (2003) (holding that a sentence of twenty-five years to life for the current offense of theft of three golf clubs is not grossly disproportionate under the Eighth Amendment); Harmelin v. Michigan, 501 U.S. 957, 994, 1001 (1991) (upholding a mandatory sentence of life without parole for possession of more than 650 grams of cocaine imposed on an offender with no prior felony convictions and holding that the Eighth Amendment contains no proportionality guarantee).
\item See NEITO & JUNG, supra note 197, at 44 (“[A]ccording to the courts that have visited the issue so far, residency restrictions do not offend the equal protection clause. They represent a rational legislative determination that excluding sex offenders from areas where children congregate will advance the state’s interest in protecting children.”).
\item The Supreme Court has held that civil commitment laws are “nonpunitive.” See Kansas v. Hendricks, 521 U.S. 346, 363 (1997). In doing so, the Court rejected the notion that civil commitment amounted to double jeopardy or an ex post facto law. See Kansas v. Crane, 534 U.S. 407, 411–12 (2002) (upholding civil commitment statute so long as the offender has difficulty controlling dangerous behavior); Hendricks, 521 U.S. at 363 (upholding the constitutionality of a Kansas civil commitment statute and stating that confinement of “the dangerously mentally ill” is a “nonpunitive governmental objective”).
\item Solem v. Helm, 463 U.S. 277, 286 (1983) (“The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.”); MODEL PENAL CODE: SENTENCING 27 (Tentative Draft No. 1, 2007) (“The goal of proportionality in punishment is ubiquitous in legislative statements of the underlying purposes of criminal sentencing.”); DRESSLER, supra note 6, at 11, 53–69 (discussing proportionality and punishment and stating that criminal law “ought to be fair” and “deal coherently with person charged with crime”).
\item For example, “a life for a life.” The Biblical context of the phrase appears in Deuteronomy chapter 19: “[I]f a man hates his neighbor and lies in wait for him, assaults and kills him, and then flees . . . the elders of his town shall send for him, bring him back from the city, and hand him over to the avenger of blood to die.” Deuteronomy 19:11–12. The chapter ends with the passage, “And thine eye shall not pity; but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.” Deuteronomy 19:21.
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principle, punishment is excessive if it serves none of the other purposes of punishment. As argued above, long prison sentences for all sexual offenders simply cannot be justified based on a need to protect the public from repeat offenders. Absent some evidence that such sentences deter others, incarcerating many sexual offenders is unjustified.

The problem is especially acute for offenders who commit statutory rape and lack any mens rea defense as to the victim’s age. While commentators have argued that such strict liability is unconstitutional, the argument is more theoretical than real given the absence of case law supporting that conclusion. Nonetheless, the argument is powerful: punishing an offender whose mens rea is at most negligent if the jurisdiction allows a reasonable mistake of fact defense, or who is guilty of a felony without evidence of any culpability is unjustified.

209. See Model Penal Code: Sentencing 28 (Tentative Draft No. 1, 2007) (“[I]t is unclear what result is intended when proportionality in punishment conflicts with another statutory goal of sentencing, such as the rehabilitation or incapacitation of [the] offender.”); Dressler, supra note 6, at 53, 58–60 (comparing the utilitarian and retributivist view of proportionality). Proportionality is often included in sentencing codes as a “limit on sentence severity in pursuit of utilitarian objectives,” but some statutes have no language that can be construed as a “proportionality ceiling on punishment severity.” Model Penal Code: Sentencing 29 (Tentative Draft No. 1, 2007).

210. H.L.A. Hart, Punishment and Responsibility 237 (1968) (describing a brand of retributive theory that treats retribution as setting an outer limit for punishment, but determines actual punishment by reference to what is needed to prevent repetition of the crime).

211. See supra notes 173–78 and accompanying text.

212. See Model Penal Code: Sentencing 34 (Tentative Draft No. 1, 2007) (“The feasibility of general deterrence through marginal increases in the severity of criminal punishments is in doubt . . . .”); Zimring, supra note 162, at 53–54 (stating that the possibility that incapacitation deters criminal conduct is “untestable”); Zimring & Hawkins, supra note 163, at 157–58 (discussing the capability of incapacitation to “control rather than influence” criminal behavior and stating that “crime prevention that requires physical control of its subjects lasts no longer than the doors and gates remain locked”).

213. See, e.g., Carpenter, supra note 114, at 299 (“[B]ecause of the convergence of several factors, the sweeping nature of sex offender registration laws creates an impossibly punitive and unconstitutional impact on the strict liability offender.”).

214. The Supreme Court in Powell v. Texas held that there is no “constitutional doctrine of mens rea.” 392 U.S. 514, 535–36 (1968). Today, the majority of states continue to endorse the use of strict liability for statutory rape. Carpenter, supra note 114, at 320. As of 2006, twenty-nine states and the District of Columbia treat statutory rape as a strict liability offense. Id. at 317.

215. E.g., People v. Hernandez, 393 P.2d 673, 677 (Cal. 1964) (“We hold only that in the absence of a legislative direction otherwise, a charge of statutory rape is defensible wherein a criminal intent is lacking.”)

216. In a prosecution for statutory rape under a strict liability framework, the state is not required to prove mens rea. “[C]onsequently, the defendant may not offer an affirmative mens rea defense of mistake-of-age.” Carpenter, supra note 114, at 317; see, e.g., Owens v. State, 724 A.2d 43, 45 (Md. 1999) (holding that due process did not entitle defendant to mistake-of-age
Punishments for sexual offenders are troubling from an equality perspective as well. The various sexual offender statutes have piled assorted punishments and disabilities on sexual offenders.217 These disabilities are not justified based on some special risk of reoffending.218 Many sexual offenders are less likely to commit additional sexual offenses than other offenders are likely to commit new crimes.219 Thus, for many states the difference in treatment for differing categories of offenders is significant. States reserve stepped-up punishments and disabilities for sexual offenders, including lifetime registration requirements.220 By comparison, states do not provide similar disabilities for other offenders.221 For example, legislatures do not single out for stepped-up punishments offenders who commit violent crimes and who represent a significant risk of reoffending.222 Under the current sentencing scheme in many jurisdictions, a sexual offender who has not committed a crime of violence and who may have had a reasonable mistake as to his sex partner's age may receive a long prison sentence and be required to register as a sex offender for life.223 A far more dangerous offender does not face the same disabilities.

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217. See discussion supra Part III and accompanying notes.
218. See supra notes 175–78 and accompanying text.
219. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, supra note 133, at 7 (noting that the likelihood of reoffense among sex offenders is lower than other categories of criminal offenders).
221. The exception is three strikes statutes, which impose heightened punishment for certain recidivists. As I have argued elsewhere, those statutes share similarities with sex offender statutes—they are often the product of the passions of the moment, see Michael Vitiello, California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?, 37 U.C. DAVIS. L. REV. 1025, 1071 (2004), and lead to disproportionate and unequal sentences for many offenders, see Vitiello, supra note 123, at 425–27.
222. See ZIMRING, supra note 169, at 43 (stating that juveniles have a high rate of total burglary arrests, yet, unlike sex offenses, there is no “special liability” for burglaries).
223. Under California law, a person who commits sodomy with a person under the age of eighteen is subject to lifetime registration, even if the offender makes a reasonable mistake as to the victim's age and the offense is committed without violence. See CAL. PENAL CODE § 286(a)-(b)(1) (West Supp. 2008) (“[A]ny person who participates in an act of sodomy with another person who is under eighteen years of age” has committed sodomy which “is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.”); id. §
Finally, modeling sexual offender statutes on the stereotypical sexual predator may have a perverse effect of reducing the effectiveness of the criminal law in some significant number of cases. Most abusers are not strangers to their victims. Many are family members or trusted friends. Imagine the dilemma that family members face when they discover that granddad has been molesting his granddaughter. They may be hesitant to expose granddad, granddaughter, and themselves to public humiliation associated with a prosecution for sexual abuse. Even if they report the crime, they may lose the will to cooperate with the police when they discover the severity of punishment that their family member may face. While family members may favor some state intervention, bringing the full force of current sexual offender statutes to bear may lead the family to lose their nerve.

V. SOME CONCLUDING THOUGHTS AND SUGGESTIONS ABOUT CRIMINAL SENTENCING

The legislative response to sexual crimes is a subset of a larger problem. Legislatures in many states, like California, have responded to each crime

290(c) (including among the persons required to register "[a]ny person who . . . has been . . . convicted of . . . any act punishable under Section 286"). The registration requirement poses additional dangers for the offender. His failure to register, even under circumstances where the police know of his location and where he may have recently registered, but is now required to reregister, is criminal, exposing the offender to additional criminal sanctions. See ARIZ. REV. STAT. ANN. § 13-3824(A) (2001) (stating that the failure to register is a class four felony); CAL. PENAL CODE § 290.018(a)-(b) (West Supp. 2008) (stating that the failure to register is a misdemeanor if the original conviction is a misdemeanor or a felony if the underlying crime was a felony). That is the case despite the view of some courts that the failure to register or reregister is one of the most passive of all felonies. People v. Carmony, 26 Cal. Rptr. 3d 365, 369 (Ct. App. 2005) (remanding the case for resentencing after finding that a recidivist sentence imposed for the failure to meet this purely technical requirement was grossly disproportional to the offense and thus constituted cruel and unusual punishment).

224. SNYDER, supra note 132, at 10 (finding that 86.3% of all sexual assault victims and ninety-three percent of juvenile sexual assault victims knew their offender).

225. Id. (finding that 26.7% of sexual assault victims were abused by a family member).

226. See Logan, supra note 197, at 345 (discussing whether “the significant burdens” of registration laws “might have the perverse effect of discouraging the reporting of sex crimes” and that “[t]his concern would appear especially justified in cases of nonstranger victimizations, incest in particular”).

227. See Bryden & Lengnick, supra note 65, at 1244 (discussing the reasons for a victim’s withdrawal from pressing charges, including wanting to “avoid the ordeal of court” (twenty-four percent of victims studied) and wanting to “avoid sending a person to jail” (fourteen percent of victims studied)).
“du jour” by passing sentence enhancements,228 creating new crimes (like car jacking,229 even though the conduct already violated a number of substantive provisions), and enacting mandatory minimum sentences for a variety of offenses.230 In California, the problem has been compounded when those laws pass through the initiative process,231 especially when legislative reform requires a supermajority.232 This approach to the crime problem over the past decades contributed to massive increases in the number of prisons and prisoners in the United States. For example, “in just thirty years, from 1970 to 2000, the prison population increased more than 500 percent even though the nation’s total population rose only about 35

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228. According to a report by the Little Hoover Commission, over 1,000 crime bills passed in California between 1984 and 1991. LITTLE HOOVER COMM’N, PUTTING VIOLENCE BEHIND BARS: REDEFINING THE ROLE OF CALIFORNIA’S PRISONS (1994), available at http://www.lhc.ca.gov/lhcdir/124rp.html. Many of these statutes imposed sentence enhancements and were introduced in reaction to exaggerated stories in the media. Id.; see also Prentky et al., supra note 175, at xii (“Many of the significant legislative reforms of the 1990s had their beginnings in public outrage over specific instances of sexual violence. Driven far more by public sentiment than science, the reforms have . . . constituted a new public policy characterized by an aggressive, empirically uninformed stance toward sexual violence. This public policy has shaped all aspects of the management of sexual offenders . . . .”).


231. California’s three strikes law is one example. §§ 667, 1170.12. Fueled by public panic, three strikes “sailed through” the Legislature with no “serious rational discourse or legislative compromise.” Vitiello, supra note 123, at 410 (discussing the major propaganda campaign following several high-publicity crimes that resulted in the passing of the initiative). Another example, Proposition 83, was passed in the 2006 California general election. See CAL. SEC’Y OF STATE BRUCE MCPHERSON, OFFICIAL DECLARATION OF THE RESULTS OF THE GENERAL ELECTION HELD ON TUESDAY, NOVEMBER 7, 2006, THROUGHOUT THE STATE OF CALIFORNIA ON STATEWIDE BALLOT MEASURES SUBMITTED TO A VOTE OF ELECTORS, at xviii (2006), http://www.sos.ca.gov/elections/sov/2006_general/sum_amended.pdf. It provides for GPS tracking and changes the existing two-year involuntary civil commitment for sexually violent predators to an indeterminate commitment subject to annual review pursuant to Jessica’s Law. See Shane Goldmacher, Jessica’s Law’s No-Live Zone Is Bone of Political Contention, CAPITOL WKLY., July 13, 2006, available at http://www.capitolweekly.net/search.php (search for article title using the “Title contains” box; then select hyperlink) (arguing that the residency restrictions of Proposition 83 would be problematic in a large city such as San Francisco where there are very few remaining areas available for sex offenders to live and naming this restriction as the source of “a fierce and partisan battle in the Capitol”). There was little statewide opposition to the measure, but Assembly Member Mark Leno, representing San Francisco, argued against the residency restriction preventing convicted sex offenders from living within 2,000 feet of a park or school as “arbitrary, ineffective and unenforceable.” Id.

232. See Vitiello, supra note 123, at 457 (“The primary difficulty with political reform is that alternative legislation will require a supermajority.”).
PUNISHING SEX OFFENDERS

percent. In some jurisdictions, like California, these developments have led to massive and unconstitutional prison crowding.

Perhaps not surprising in light of the breadth of the problem, many commentators across the political spectrum have called for reform. Supreme Court Justice Anthony Kennedy captured the view of many when he declared that "our punishments [are] too severe [and] our sentences [are] too long." The American Bar Association's Justice Kennedy Commission, the Little Hoover Commission, and the Deukmejian Independent Review Panel join a number of other groups and commentators in calling for a variety of reforms to the prison system. In addition, litigation brought on behalf of prison inmates in California has kept the pressure on lawmakers in California to reform its prison system.
Elsewhere, many commentators have advanced proposals for reform. Many of those include the use of a sentencing commission, often modeled on highly successful Commissions in states like North Carolina and Ohio. Not a panacea, a sentencing commission can rationalize the prison resources through smart sentencing practices, based, in part, on the collection of good data. Smart sentencing practices can lead to lower crime rates and more sensible use of prison resources.

crises, the California Legislature passed Assembly Bill 900, increasing spending for prisons. See Assemb. 900, 2007–08 Leg., Reg. Sess. (Cal. 2007).


243. See Michael Vitiello & Clark Kelso, A Proposal for a Wholesale Reform of California’s Sentencing Practice and Policy, 38 LOY. L.A. L. REV. 903, 959–64 (2004); see also MODEL PENAL CODE: SENTENCING introductory cmt. at xxx–xxxi (Tentative Draft No. 1, 2007) (noting the success of comprehensive sentencing reforms in North Carolina and Ohio and recommending that “every state . . . charter a permanent sentencing commission with authority to promulgate sentencing guidelines, using successful state systems as salutary models and avoiding the defects of the federal system”).

244. For example, the Federal Sentencing Commission model is widely criticized as ineffective. See MODEL PENAL CODE: SENTENCING foreword at xiii (Tentative Draft No. 1, 2007) (stating that the federal sentencing guideline system “receives fewer accolades from experts than most state systems”); RUTH & REITZ, supra note 233, at 107 (“The current federal system . . . has many fierce detractors—including large numbers of U.S. District Court Judges who must regularly apply the federal guidelines.”).

245. See MODEL PENAL CODE: SENTENCING introductory cmt. at xxxiii–xxxiv (noting that one advantage of a sentencing commission is “[t]he ability to make accurate predictions of future sentencing patterns, in the aggregate and line-by-line by offense type”); RUTH & REITZ, supra note 233, at 107 (discussing how Sentencing Commissions in several states have “brought new powers of rationality, planning, and oversight to punishment practices” and that they “monitor sentencing patterns to assess how the guidelines are working” and “perform a variety of research tasks”).

246. See MODEL PENAL CODE: SENTENCING introductory cmt. at xxxiii–xxxiv (Tentative Draft No. 1, 2007) (discussing “[t]he advantages of a well-designed commission-guidelines sentencing system” including slower rates of prison growth and credible fiscal-impact forecasting); RUTH & REITZ, supra note 233, at 115 (discussing the “highly accurate” financial projections prepared by some State Sentencing Commissions which influence policy decisions); DON STEMEN, ANDRES RENGIFO & JAMES WILSON, VERA INST. OF JUSTICE, OF FRAGMENTATION
California is proving the cliché that “the devil is in the details” to be true. Both Governor Schwarzenegger and Democratic legislators have endorsed a Sentencing Commission for California.247 Despite the pressure from the federal courts and agreement between the Governor and legislators that California should have a Commission, they are at a stalemate concerning the powers of the Commission.248 In addition, even many Democrats have taken California’s three strikes legislation off the table, if the State adopts a commission model.249 Surprisingly, one opportunity to reach a political compromise passed when Democrats almost unanimously passed Assembly Bill 900, authorizing additional prison construction.250 Some critics of the bill saw it as a chance to enact wholesale reform legislation.251

AND FERMENT: THE IMPACT OF STATE SENTENCING POLICIES ON INCARCERATION RATES, 1975–2002, at 143 (2005), available at http://www.ncjrs.gov/pdffiles1/nij/grants/213003.pdf (“We consistently found that states with the combination of determinate sentencing and presumptive sentencing guidelines have lower incarceration rates than other states . . . . Further, the combination of the two policies was also associated with smaller growth in incarceration rates.”).


Reforming sexual offender provisions should be folded into sentencing reform where that is on the table, as in California. As argued above, sentencing authorities can now make evidence and needs-based sentencing decisions that increase the utility of prison resources. Data demonstrates that many of the resources devoted to sex offenders are unnecessary for social protection. While virtually every legislator fears being labeled as soft on crime, acts of political courage do occur. Reforming the laws that govern sexual offenders is certainly one area where we need politicians (or courts) to show courage to achieve meaningful reform.

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251. See Andy Furillo, Governor Signs Prison Bill, SACRAMENTO BEE, May 3, 2007, available at http://www.sacbee.com/111/story/166239.html ("Opponents of the bill said . . . that the administration missed a chance to incorporate a major sentencing overhaul and parole changes into the package . . . ."). According to California State Senator Gloria Romero, it is "unworkable, untenable and sets us back instead of moving us forward." Id. (quoting Senator Romero).

252. See supra notes 180–182, 245–46 and accompanying text.

253. See supra notes 106–13 and accompanying text.

254. No doubt that this is especially acute in the case of sexual predators. Imagine a politician’s fear that a sexual offender on early release will commit a violent sexual offense against a minor.

255. Oddly, legislators do not seem to take much comfort in studies that show that the public endorses shorter sentences for many offenders. See PETER D. HART RESEARCH ASSOCs., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM: SUMMARY OF FINDINGS 1 (2002), http://www.soros.org/initiatives/justice/articles_publications/publications/hartpoll_20020201/Hart-Poll.pdf ("Support for long prison sentences as the primary tool in the fight against crime is waning . . . . The public now favors dealing with the roots of crime over strict sentencing by a two to one margin, 65% to 32%. ").