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Sex, Shame, and the Law: An Economic  
Perspective on Megan's Law

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# SEX, SHAME, AND THE LAW: AN ECONOMIC PERSPECTIVE ON MEGAN'S LAWS

DORON TEICHMAN\*

## I. INTRODUCTION

The legal system does not function in a vacuum. Different acts that are governed by legal rules are also governed by social norms. These social norms are in many cases enforced by a set of nonlegal sanctions, which include internal sanctions such as guilt, and external sanctions such as refusals to interact with the offender. This article focuses on the general question how should policymakers aiming to minimize the cost of sanctioning utilize legal and nonlegal sanctions when designing a system of criminal sanctions. More specifically, this article will analyze the current trend in different jurisdictions in the United States to publicize the names of convicted sex offenders.

Social norms and nonlegal sanctions have been studied by law and economics scholars for many years. Initially, this inquiry focused on the unique characteristics of nonlegal systems within closely-knit societies and the possibilities of private ordering,<sup>1</sup> and has broadened to issues related to public law.<sup>2</sup> More recently, this literature has turned to develop more general theories as to the origin of social norms,<sup>3</sup> and the relationship between social norms and the law.<sup>4</sup> The combined power of these studies

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<sup>1</sup> See, e.g., Steven N. S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 J. LEGAL STUD. 11 (1973); Robert C. Ellickson, *ORDER WITHOUT LAW* (1991); Avner Grief, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AMER. ECON. REV. 535 (1993); Mark D. West, *Private Ordering at the World's First Future Exchange*, 98 MICH. L. REV. 2574 (2000); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) [hereinafter, Bernstein, *Diamond Industry*]; Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001) [hereinafter, Bernstein, *Cotton Industry*].

<sup>2</sup> See, e.g., Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996); Niva Elkin-Koren, *Copyrights in Cyberspace – Rights Without Laws?* 73 CHI.-KENT L. REV. 1155 (1998).

<sup>3</sup> See, e.g., Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Robert Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 PA. U. L. REV. 1643 (1996); Eric Posner, *LAW AND SOCIAL NORMS* (2000).

<sup>4</sup> McAdams, *id.* at 391-432; Eric Posner, *Law, Economics, and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1725-36 (1996); Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996);

demonstrates the seriousness with which law and economics scholars treat social norms and nonlegal sanctions.<sup>5</sup>

One of the current debates regarding nonlegal sanctions is to what extent should legally induced nonlegal sanctions, such as shaming, be used in order to punish criminals. At one end of this debate, stand scholars such as Massaro and Whitman, who argue that nonlegal sanctions are either ineffective or morally repugnant and therefore should not be used.<sup>6</sup> At the other end of this debate, stand scholars such as Kahan and Eric Posner, who argue that nonlegal sanctions may be an efficient and politically viable sanctioning tool.<sup>7</sup> This Article sides with the later, yet turns to incorporate into this debate additional economic insights. More specifically, it will demonstrate that policymakers cannot substitute legal sanctions with nonlegal sanctions while holding the level of nonlegal sanctions equal, since the level of each of these is expected to affect the other. For example, a reduced legal sanction might cause the public to perceive a certain crime as less severe, and cause a *reduction* in nonlegal sanctions. Thus, tailoring an efficient regime that combines legal and nonlegal sanctions might be more difficult than previously perceived.

A specific example that I will focus my attention on in this Article is the treatment of sex offenders in the United States. Since the 1990s, every state in the country has enacted some form of a Sex Offender Registration and Notification Law (SORNL). These laws create a regime that disseminates to the public information about convicted sex offenders, such as their name and home address. Generally, these laws were enacted in order to assist the public to protect itself from the threat of repeat sex offenders. Nevertheless, ever since their enactment, a large number of commentators have argued that the true effect of these laws is punitive.<sup>8</sup> These scholars focused on the harsh nonlegal sanctions triggered by these laws, which include, among other things, physical attacks on offenders and their property, denial of housing, and termination of employment. Building on the theoretical framework developed in this Article, I will argue that the actual effects of SORNLS are punitive and thus they should be viewed as a

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Cass R. Sunstein, *On the Expressive Function of the Law*, 144 U. PA. L. REV. 2021 (1996); and Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

<sup>5</sup> An overview of the economic analysis of social norms can be found in Eric Posner's study of the issue. See Posner, *supra* note 3.

<sup>6</sup> Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); James Q. Whitman, *What Is Wrong with Inflicting Shame Sanctions?*, 107 YALE L. J. 1055 (1998).

<sup>7</sup> Dan Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591 (1996); Dan Kahan & Eric Posner, *Shaming White-Collar Criminal: A Proposal for Reform of the Federal Sentencing Guidelines*, 42 J. L. & ECON. 365 (1999).

<sup>8</sup> See, e.g., Caroline Lousie Lewis, *The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process*, 31 HARV. C.R. – C.L. L. REV. 89 (1996); Jane A. Small, *Who are the People in your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws*, 74 N.Y.U. L. REV. 1451 (1999)

form of punishment. The second claim I will make is that using SORNLS in order to punish sex offenders might be an efficient way to sanction sex offenders. Adopting the punitive approach towards SORNLS will, however, require a change of attitude towards these laws.

This article is organized as follows: Section II makes the general case for the use of nonlegal sanctions as a punitive tool. It points out the potential efficiencies and inefficiencies of using legal and nonlegal sanctions and presents the potential interactions between the two. Section III turns to the specific case study of sanctioning sex offenders, and will analyze the social phenomena triggered by SORNLS from an economic perspective. In Section IV I will build on my findings regarding the actual effects of SORNLS to make several policy recommendations. Finally, Section V makes some concluding remarks and suggestions for future research.

## II. NONLEGAL SANCTIONS AS AN ALTERNATIVE SANCTIONING TECHNOLOGY

In this Section I will set out the case for the use of nonlegal sanctions as an alternative to costly legal sanctions. I will begin by defining what the nonlegal sanctions I am referring to are, and by exploring some of the forces that explain their existence. Then, I will present the economic case for the use of legally induced nonlegal sanctions, and argue that the arguments made against the use of these sanctions, while important, do not justify forgoing their use. At that point, I will turn to develop a model of combining legal and nonlegal sanctions. The distinguishing factor of this model, when compared to existing models, is that it incorporates the potential effects of changes in the level of legal sanctions on the level of nonlegal sanctions. Finally, I will demonstrate how nonlegal sanctions can affect the level of legal sanctions through the sentencing and plea bargaining processes. Proofs of the claims made in this Section are provided in the Appendix.

### 1. A Theory of Nonlegal Sanctions

In recent years courts and legislatures have turned to inducing nonlegal sanctions as an alternative to imprisonment. The names of patrons of prostitutes are published in newspapers.<sup>9</sup> Individuals convicted of driving under the influence of alcohol are required to use special license plates or bumper stickers.<sup>10</sup> Offenders are ordered to wear t-shirts that announce their crimes.<sup>11</sup> Courts instruct offenders to appear in public and describe the crimes they were convicted of and apologize for them.<sup>12</sup> These measures sanction

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<sup>9</sup> See Courtney Guyton Persons, *Sex In the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons*, 49 VAND. L. REV. 1525 (1996); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 735 n12 (1998).

<sup>10</sup> See Note, *The Bumper Sticker: The Innovation that Failed*, 22 NEW ENG. L. REV. 643 (1988).

<sup>11</sup> Kahan, *supra* note 7 at 632 and references made there.

<sup>12</sup> *Id.* at 633 and references made there; Massaro, *supra* note 6 at 1888-9.

wrongdoers by disseminating information about their past criminal activity. This dissemination is expected to have two distinct adverse effects on the sanctioned individuals. First, it will cause them negative feelings ranging from mild embarrassment to severe shame.<sup>13</sup> This is the *internal* aspect of nonlegal sanctions. Second, it might trigger sanctions that are inflicted to the criminal by other members of the community, such as cutting off relationships, termination of employment, and even violent retaliation. This is the *external* aspect of nonlegal sanctions.

The fact that humans feel discomfort when wrongful acts they committed are revealed to the public is intuitive, and requires little explaining. Yet the tendency of individuals to sanction wrongdoers does require some explaining, since inflicting sanctions is costly,<sup>14</sup> while the benefits created by sanctions, such as deterrence, are enjoyed by the general public.<sup>15</sup> Therefore, individuals will apply a sanction to other individuals only when the personal benefits they gain from applying the sanction exceed the cost of applying the sanction.<sup>16</sup>

The cost of inflicting nonlegal sanctions depends on the kind of sanction. In the context of passive sanctions, such as cutting off the relationship with the wrongdoer, the cost is the forgone opportunity of interacting with the wrongdoer.<sup>17</sup> Once we move into more active sanctions, such as shaming, the costs of sanctioning become more explicit and include, for example, the time and mental resources that are put into sanctioning, and the risk that the sanctioned party will choose to retaliate. More extreme sanctions, such as the use of violence, might generate an additional cost in the form of potential legal liability.

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<sup>13</sup> For an analytical discussion of the distinction among these different feelings *see, e.g.*, June Price Tangney et. al, *Are Shame, Guilt and Embarrassment Distinct Emotions?*, 70 J. PERSONALITY & SOC. PSYCH. 1256 (1996). Although many pages of psychological journals have been dedicated to this distinction it is of little consequence to the discussion here. My focus is on causing disutility to wrongdoers and the specific psychological definition of this disutility will not affect the results of the discussion.

<sup>14</sup> *See* Richard A. Posner, *THE ECONOMICS OF JUSTICE*, 211 (1981) (pointing out that in the absence of compensation an individual must derive utility from a vengeful act in order to be motivated to commit it). It should be noted that some scholars that dealt with the question of the creation of nonlegal sanctions have argued that nonlegal sanctions are created on the basis of a costless mechanism. *See* Richard H. McAdams, *supra* note 3 at 355. In his analysis McAdams focuses on withholding esteem as a costless basis on which nonlegal sanctions are build. Yet since even withholding esteem requires some action on part of the individuals that are doing the withholding it would seem that such a sanction does require the individuals who inflict it to bear at least some costs. Hence, we cannot resolve the cost benefit analysis by assuming that there is no cost.

<sup>15</sup> *See* McAdams, *id.* at 352-53.

<sup>16</sup> As we shall see this benefit can also be in the form of avoiding a harm that will be inflicted on the individual if he does not participate in the act of sanctioning.

<sup>17</sup> To be sure, the termination of long-term relationship might cause the parties significant monetary costs, the most obvious example being divorce.

Turning to the reasons for sanctioning, individuals who inflict nonlegal sanctions incur several distinct benefits. The first is the fulfillment of a preference for sanctioning.<sup>18</sup> More specifically, I am referring to the existence of a preference for reciprocity.<sup>19</sup> The preference for reciprocity has been demonstrated in a long line of experiments of ultimatum games, in which participants willingly endured monetary costs in order to sanction individuals who treated them in a way that they perceived to be unfair.<sup>20</sup> The presence of a preference for reciprocity can be explained by evolutionary models that illustrate why mutants that have a preference for reciprocity have higher reproductive success,<sup>21</sup> and by game theory models suggesting that players can maximize their personal payoffs in repeated games by adopting a strategy based on reciprocity.<sup>22</sup> To be sure, the preference for reciprocity is not limited to the direct victim of the wrongful act. Rather, concrete examples of nonlegal sanctions<sup>23</sup> and stylised experiments<sup>24</sup>

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<sup>18</sup> Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137 (2002) (presenting data supporting the hypothesis that emotions are an important factor behind the act of punishing others).

<sup>19</sup> For a review of the economics of reciprocity *see generally* Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46 EURO. ECON. REV. 687, 689-704 (2002).

<sup>20</sup> The first experiments evaluating behavior in ultimatum games were reported in Werner Guth, Rolf Schmittbeger & Bernd Schwarze, *An Experimental Analysis of Ultimatum Bargaining*, 3 J. ECON. BEHAV. & ORG. 367 (1982). For an updated review of ultimatum game studies *see generally* Werner Guth, *On Ultimatum Bargaining Experiments - A Personal Review*, 27 J. ECON. BEHAV. & ORG. 329 (1995); Richard H. Thaler, *THE WINNER'S CURSE* 21-35 (1992).

<sup>21</sup> Werner Guth & Menahem E. Yaari, *Explaining Reciprocal Behavior in Simple Strategic Games: An Evolutionary Approach*, in: *EXPLAINING PROCESS AND CHANGE – APPROACHES TO EVOLUTIONARY ECONOMICS* 23 (Ulrich Witt ed., 1992); Steffen Huck & Jorg Oechssler, *The Indirect Evolutionary Approach to Explaining Fair Allocations*, 28 GAMES & ECON. BEHAV. 13 (1999).

<sup>22</sup> Robert Axelrod, *THE EVOLUTION OF COOPERATION* 27-54 (1984) (showing how a reciprocal strategy can lead to higher payoffs for a player in a repeated prisoners' dilemma).

<sup>23</sup> Consumer boycotts, at times, serve the purpose of expressing disapproval of wrongful acts that harm others. *See*: Monroe Friedman, *CONSUMER BOYCOTTS* 12-13 (1999). An historical example of such an expressive nonlegal sanction is the Jewish boycott against German goods during World War II. The goal of participating in this boycott was to allow American Jews to take some action, futile as it might be, rather than do nothing. *See*: William Orbach, *Shattering the Shackles of Powerlessness: The Debate Surrounding the Anti-Nazi Boycott of 1933-41*, 2 MODERN JUDAISM 149, 161-66 (1982)). Nevertheless it should be noted that participation in this boycott was driven by other forces as well (*see infra* note 25).

<sup>24</sup> Daniel Kahneman, Jack L. Knetsch & Richard L. Thaler, *Fairness and the Assumptions of Economics*, 59 J. OF BUSINESS, S285, S290-S292 (1986). In the first stage of this experiment participants plaid a variation of the ultimatum game in which the allocator needed to divide between himself and a recipient \$20. The allocator was able to divide the \$20 either equally or by allocating \$18 to himself and allocating \$2 to the recipient. In the second stage of the game participants were asked to choose between receiving a payoff of \$12 that was to be shared equally with a player that chose to allocate \$18 to himself in the first round and receiving a payoff of \$10 that was to be shared equally with a player that chose to allocate \$10 to himself in the first round. Thus, the players in the second round were asked to give up one dollar in order to sanction a player that acted unfairly in the first round towards another individual. The results of the experiment were clear - 74% of the players in the second round chose to sacrifice their monetary well being in order to sanction individuals that treated *other* players unfairly. *See also* Ernst Fehr, Urs Fischbacher & Simon

demonstrate that individuals also hold a preference for sanctioning individuals who treated *other* members of society unfairly.

A second benefit of nonlegal sanctions is that participating in acts of sanctioning can induce positive reactions from others and vice-versa – not participating in acts of sanctioning may trigger negative reactions from others. In other words, in some situations there exists a social norm, which is enforced by a separate set of nonlegal sanctions, that requires one to sanction wrongdoers. For instance, individuals who refuse to participate in a consumer boycott might be sanctioned for their refusal.<sup>25</sup> The existence of a sanctioning norm can be explained by the signaling model of social norms.<sup>26</sup> In this model, individuals are either “co-operators” who care about future payoffs (have a low discount rate), or “cheaters” who care about present payoffs (have a high discount rate). Both types of players are situated in a repeated game in which co-operators maximize their payoffs by interacting among themselves. In order to achieve this goal, co-operators can use costly signals that only individuals who expect the high cooperative payoff can afford to send.<sup>27</sup> Within this framework the cost incurred by the sanctioning party is

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Gächter, *Strong Reciprocity, Human Cooperation and the Enforcement of Social Norms*, 13 HUMAN NATURE - AN INTERDISC. BIOSOCIAL PERSP. 1, 16-17 (2002).

<sup>25</sup> See Sankar Sen, Zeynep Gurhan-Canli & Vicki Morwitz, *Withholding Consumption: A Social Dilemma Perspective on Consumer Boycotts*, 28 J. CONSUMER RESEARCH 399, 401 (pointing out the connection between consumer boycotts and group membership); Dennis E. Garrett, *Consumer Boycotts: Are Targets Always the Bad Guys*, 58 BUS. & SOC. REV. 17, 19-21 (1986) (pointing out the moral problems associated with consumer boycotts). For specific examples see, e.g., Friedman, *supra* note 23 at 136 (describing how the Jewish boycott against German goods during World War II was rigorously enforced by nonlegal sanctions); W. Muraskin, *The Harlem Boycott of 1934: Black Nationalism and the Rise of Labor-Union Consciousness*, 13 LABOR HISTORY 361, 364 (1972) (presenting a case in which the photographs of boycott violators were published in a local newspaper).

<sup>26</sup> The relation between signaling and social norms has been extensively examined and thus I will explain the nature of the signaling model in the text above only briefly. For further analysis see Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998) [hereinafter: Posner, *Symbols*], and Posner, *supra* note 3 at 11-35. It should be noted that the signaling model of social norms is not the exclusive explanation for the existence of a sanctioning norm. Recently, Mahoney and Sanchirico presented a game theoretic analysis of strategies in a repeated prisoners dilemma, which offered an alternative explanation for the existence of a sanctioning norm. In their paper Mahoney and Sanchirico introduce a game strategy – *def-for-dev* (defect-for deviate), which has the practical effect of requiring from parties to sanction defectors, and views those who do not do so as deviators that should be sanctioned. Thus, according to this model, if individuals do not have exceptionally high discount rates they will participate in the act of sanctioning in accordance with the social norm requiring them to do so. See Paul G. Mahoney & Chris W. Sanchirico, *Norms, Repeated Games, and the Role of Law*, UNIVERSITY OF VIRGINIA SCHOOL OF LAW 2002 LAW & ECONOMICS RESEARCH PAPER SERIES, WORKING PAPER NO. 02-3 (2002) at [http://ssrn.com/abstract\\_id=311879](http://ssrn.com/abstract_id=311879).

<sup>27</sup> To illustrate this description it might be useful to view the numerical example presented in Posner, *Symbols*, *id.* at 769-70. In this example the world is divided to “senders” and “receivers” that can interact among themselves. Both senders and receivers are composed out of “co-operators” and “cheaters”. In the game a cooperating receiver needs to decide whether to deal with a sender. The players in Posner’s cooperation game face the following payoffs: If the receiver does not cooperate with the sender the payoff for the sender and the receiver is \$0. If the receiver cooperates and the sender is a cheater the sender will cheat and gain \$2 while the receiver will lose \$2. Finally, if the receiver will cooperate and the sender is a



precisely what makes the infliction of the nonlegal sanction a credible signal. Individuals who do not participate in the act of sanctioning are perceived as non-co-operators, and find it difficult to interact with members of the sanctioning group. Furthermore, since nonlegal sanctions have content, in the sense that they express disapproval of the wrongful act, they might have a cost structure in which signaling is more costly for cheaters. Such a cost structure will render superior signals since it will reduce the amount of resources spent on signaling.<sup>28</sup>

The last force that might bring people to change their attitude towards wrongdoers for the worse is the discovery that the wrongdoer is a type of person who tends to commit wrongful acts. This will be the case if past wrongful acts can serve as a proxy for future wrongful acts. Thus, quite naturally, once members of society learn of the specific risks associated with dealing with the wrongdoer, they will internalise this new information into the decision of how to interact with him in the future. For example, once it is discovered that a business partner has a higher probability of breach than was previously perceived in the marketplace, the value of the contracts offered by this individual will diminish, and from his perspective he will suffer from a nonlegal sanction.

Having identified the three forces driving the creation of nonlegal sanctions, namely, preferences, sanctioning norms, and prevention, I can now introduce an analytical distinction between the different types of nonlegal sanctions. The term nonlegal sanctions is broad and includes any reduction in the welfare of the wrongdoer as result of the discovery that he committed the wrongful act. The term punishment, on the other hand, is narrower and only refers to the reduction in the welfare of the wrongdoer that is associated with achieving a normative goal such as retribution or deterrence.<sup>29</sup> Viewed from this perspective, the first two categories of nonlegal sanctions should be viewed as a form of punishment since they inflict suffering to wrongdoers on account of their past behavior and by doing so they fulfil a societal need for retribution and deterrence. Preventative nonlegal sanctions, however, should not be viewed as a form of punishment. From a reciprocal perspective, such sanctions do not balance past accounts but rather reflect a forward looking decision. From a deterrence perspective, in many

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co-operator they will both gain a payoff of \$6. Posner further assumes that there is some random act, say, saluting the flag, which costs both parties \$3 and that receivers believe that indicates cooperation. Under these assumptions a separating equilibrium may emerge in which the receiver will cooperate with players who salute the flag, and will refuse to deal with players who do not salute the flag. Under such a strategy cheaters will not be able to deal with the co-operator since their payoff of \$2 is insufficient to cover the cost of the signal, and they will prefer not to deal and gain \$0 rather than signal and remain with a net payoff of \$-1. On the other hand co-operators that earn \$6 can afford to send a signal at the cost of \$3.

<sup>28</sup> In the terms of the numerical example presented in the previous note assume that the cost of the signal is still \$3 for cheaters but only \$1 for co-operators. Such a signal is superior since it allows the creation of a separating equilibrium at a lower cost.

<sup>29</sup> In addition, as a practical matter there might be a minimal threshold of welfare loss that is required in order to enter the realm of punishment. Given the legal implications of the definition of punishment such a threshold might be useful in order to prevent litigation surrounding policies that while analytically might be viewed as a punishment do not create a significant burden on the lives of wrongdoers.

cases these sanctions reflect future harms that the wrongdoer might cause, and therefore should not be viewed as part of his punishment.<sup>30</sup>

## 2. Nonlegal Sanctions as a Substitute for Costly Legal Sanctions

At the outset of presenting my argument a clarifying comment as to the scope of this project should be made. This Article deals exclusively with the question *how* should sanctions be inflicted and not *why* they should be inflicted. It is at this point, that economic analysis can make a separate contribution, and point the most efficient sanctioning techniques given any exogenous political decision as to the size of the required sanction. Thus, one might hold a retributionist view towards the goal criminal sanctions and agree with the analysis presented here.

From an economic perspective the basic argument underlying the shift to nonlegal sanctions is the proposition that policymakers should use the most cost effective form of punishment.<sup>31</sup> For instance, economists have been arguing for a long time that policymakers should use fines, which are a cheap punishment, rather than costly non-monetary sanctions such as imprisonment.<sup>32</sup> Similarly, if one can inflict the same amount of pain to the sanctioned individual through imprisonment or through a nonlegal sanction, one should choose to use the sanctioning technology that is cheaper to administer.<sup>33</sup> In fact, budget crises around the nation have led states and counties to realize that they simply cannot afford to continue using imprisonment at the levels they have grown accustomed to.<sup>34</sup>

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<sup>30</sup> For example, after a wrongdoer caused an accident by driving recklessly his insurance premiums might rise. This rise is similar to preventative nonlegal sanctions since it reflects the insurance company reassessing its contractual relationship with the wrongdoer given the new information about the wrongdoer. Yet notice that the rise in premiums reflects precisely (in a competitive insurance market) the rise in expected losses of the wrongdoer. Thus, this additional sanction, while painful from the perspective of the wrongdoer, should not affect the calculation of the optimal sanction.

<sup>31</sup> See Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232, 1236 (1985) (defining the social welfare problem). For an alternative view on shaming sanctions see generally Garvey, *supra* note 9 (presenting an educating model of shaming).

<sup>32</sup> See, e.g., Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 193-98 (1968) (arguing that fines should be used whenever feasible); Richard A. Posner, *Optimal Sentences for White Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980) (arguing that white collar criminals should be sanctioned by fines rather than by imprisonment); Shavell, *id.* at 1236-1241 (arguing that nonmonetary sanctions should be used only after a fine equaling the offender's wealth has been used).

<sup>33</sup> See, e.g., Kahan & Posner, *supra* note 7 at 367-8 (arguing that "shaming could prove to be an efficient alternative to prison for white-collar offenders"); Garvey, *supra* note 9 at 738 (noting that "at a time when the costs of imprisonment consume ever larger shares of state budgets, shame may serve as a politically viable and cost effective way of achieving deterrence, specific and general, as well as of satisfying the legitimate demands of retribution"). Even scholars who raise fierce opposition to the use of shame punishments concede the fact that these sanctions are cheaper than imprisonment. See Toni M. Massaro, *Meanings of Shame Implications for Legal Reform*, PSYCHOL. PUB. POL'Y & L. 645, 649 (1997) (noting that shaming "is plainly cheaper than imprisonment").

<sup>34</sup> See, e.g., V. Dion Haynes & Vincent J. Schodolski, *Strapped States Turn to Prisons Early Releases Among Saving Options*, CHI. TRIB., May 5, 2003, at 8 (reporting that inmates in Los Angeles county were released from jail in order to save \$17 million); Scott Kraus, *100 Inmates Granted Early Release*.

In order to analyze the optimal use of legal and nonlegal sanctions one must have an understanding of the costs of using them. In this Article I assume that the cost of producing both legal and nonlegal sanctions is marginally increasing. In other words, each additional unit of disutility inflicted to offenders will be more costly than the previous unit using one of the two sanctioning technologies. This assumption is quite standard in economic analysis, and is synonymous with social rationality.

More specifically, this assumption is realistic with respect to legal sanctions since when viewing these sanctions we can see how they progress in a manner that reflects increasing marginal costs. Minor criminal activity is in many cases sanctioned by the imposition of fines, which are a socially cheap (if not costless) sanction. More severe crimes are in many cases sanctioned by the imposition of parole and community service, which are more costly. It is only after these cheaper sanctioning modes fail, that governments generally turn to costlier methods of sanctioning, such as imprisonment.

Similarly, inflicting and inducing nonlegal sanctions reflect a picture of marginally increasing costs. With respect to the former, Ellickson's description of the scale of nonlegal sanctions used in Shasta County might serve as a useful illustration. This scale includes nonlegal sanctions that rise from negative gossip, through threats of violence, and end up in the use of actual violence.<sup>35</sup> Arguably, the costs of the sanctions on this scale are marginally increasing. As to the later, first one should notice that despite the fact that one might think that nonlegal sanctions come at no cost to governments, inducing nonlegal sanctions does create costs. In the context of SORNLS, for example, these costs include the costs of setting up notification websites, updating these websites, tracking down offenders, and actively notifying communities.<sup>36</sup> In fact, the current budget crisis in many states has caused some of them to limit the resource they expend on such projects.<sup>37</sup> As to the way states structure the costs of inducing nonlegal sanctions, one can

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*Northampton County Says Crowding, Budget Cuts Led to Move*, ALLENTOWN MORNING CALL, April 12, 2003, at B1 (reporting that 100 inmates in Northampton County were released due to budget constraints); Mark R. Chellgren, *Kentucky to Release Felons Early Move to Help Corrections Department Balance Budget*, EVANSVILLE COURIER & PRESS, Dec. 18, 2002, at B12 (reporting that Kentucky Governor, Paul Patton, decided to release over 550 prison inmates due to the states budget crisis). It should be noted that the Kentucky program, which was probably the most publicized one in the nation, was eventually abandoned after two released inmates were arrested and charged with bank robbery and rape. See AP, *Patton to End Early Release Program*, EVANSVILLE COURIER & PRESS, Feb. 1, 2003, at B3.

<sup>35</sup> Ellickson, *supra* note 1 at 56-9.

<sup>36</sup> See, e.g., Carol L. Kunz, *Toward Dispassionate, Effective Control of Sexual Offenders*, 47 AM. U. L. REV. 453, 480-1 (1997) (assessing the costs of SORNLS); Julia A. Houston, Note, *Sex Offender Registration Acts: An Added Dimension to the War on Crime*, 28 GA. L. REV. 729, 732-3 (1994) (pointing out problems of implementing SORNLS associated with their costs); Alex B. Eyssen, *Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from "Megan's Law"*, 33 ST. MARY'S L. J. 101, 117 (reporting that in Dallas, Texas, more than one hundred officers had spent four days verifying sex offender's addresses).

<sup>37</sup> See, e.g., Scott Milfred, *Jobs that Deal With Sex Offenders Cut; The State Department of Corrections has Eliminated the Positions to Save Money*, THE CAPITAL TIMES & WIS. ST. J., July 13, 2003 at A1 (describing

again see a scale ranging from low cost shaming using bumper stickers and distribution of flyers, to costly measures such as personal notification conducted by officers to every household in a certain area.<sup>38</sup>

Having set out my assumption as to the cost of sanctioning, I can now turn to state the condition for using legal and nonlegal sanctions efficiently. Generally, the cost of sanctioning will be minimized when the marginal cost of inflicting legal sanctions equals the marginal cost of inflicting nonlegal sanctions. To understand why, consider the decision of a policymaker who is trying to achieve a given total sanction. Suppose that initially the policymaker uses only legal sanctions. If the “last” – *marginal* – unit of the legal sanction is very costly, the policymaker can reduce the total cost of sanctioning by replacing this unit with one equivalent unit of nonlegal sanction, and choose the type of nonlegal sanction that is least expensive. The policymaker can continue to reduce the total cost of sanctioning by substituting more units of legal sanctions with units of nonlegal sanctions. As the policymaker continues substituting in this manner, the cost saving will gradually diminish, since the marginal cost of legal sanctions will gradually fall and the marginal cost of nonlegal sanctions will gradually rise. Once the policymaker reaches the point in which the marginal costs of legal and nonlegal sanctions are equal, additional substitutions will only raise the total cost of sanctioning, since the marginal cost of nonlegal sanctions will exceed the marginal cost of legal sanctions. Hence, this point reflects the point in which the costs of sanctioning are minimized.<sup>39</sup>

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job cuts in the Wisconsin program due to budget constraints); Denise M. Bonilla & Joy L. Woodson, *Continuing Debate Over Megan’s Law. Some Question whether Sex Offender List Curbs Crime. The State Statute is Set to Expire Next Year*, L. A. TIMES, Feb. 14, 2003 at B2 (California Attorney General pointing out that verifying registration would cost the state \$15 million to \$20 million which is a “hefty request” given the California budget deficit); Dayton Kevin, *Budget Scenarios Criticized*, HONOLULU ADVERTISER, Feb. 26, 2002, at A1 (noting that the Hawaiian attorney general was considering to eliminate the states sex offender registration program due to budget cuts); Kirk Mitchell, *Bill Revamps Sex-Offender List CBI would be in Charge of Tracking System*, DENV. POST, Jan. 25, 2002, at B1 (reporting that many police departments do not check the addresses of sex offenders due to staffing concerns).

<sup>38</sup> To be sure, nonlegal sanctions are unique in the sense that by using them the government can externalize some of the costs of sanctioning to the public and thus raise the amount of sanctions being inflicted given a governmental budget constraint. This is true both from the perspective of the costs of applying the nonlegal sanctions themselves, which, quite obviously, are born by the sanctioning public, but it is also true with respect to the cost of inducing nonlegal sanctions. For example, in the context of SORNs some states have attempted to externalize the cost of notification to sex offenders. See I.C. § 18-8324 (7) (offender required to pay for news paper ads); IOWA CODE §692A.6.1 (offender required to pay registration fee); LA. REV. STAT. §15:542 D (same). It should be noted that in Louisiana the state has also imposed the responsibility (and costs) of notification on the offenders themselves, see LA. REV. STAT. §15:542 B(1). From an economic perspective all of these costs are part of the social costs of sanctioning and should be accounted for while developing a theory of efficient sanctioning.

<sup>39</sup> To be sure, the problem of minimizing the cost of sanctioning could lead to corner solutions in which the optimal result is to use only one of the two sanctioning technologies. This will occur when one of the technologies has a positive set up cost (*i.e.* its marginal cost at the zero sanction point is positive) that is higher than the marginal cost of the alternative technology when it is the sole producer of sanctions. For the duration of this Article I will only deal with those situations in which a positive amount of both types of sanctions should be used.

A simple numerical example might clarify the argument. Assume that the required sanction to a type of criminals is 1,000.<sup>40</sup> In table 1 I present a possible cost structure of inflicting legal and nonlegal sanctions to such criminals. The first column represents increasing levels of legal sanction units with their corresponding cost (C(LS)). Column three represents amounts of nonlegal sanctions that combine for a total sanction of 1,000, and column four represents their corresponding cost (C(NLS)).<sup>41</sup> Finally, the fifth column represents the total cost of sanctioning (C(TS)).

<b>Legal Sanction</b>	<b>C(LS)</b>	<b>Nonlegal Sanction</b>	<b>C(NLS)</b>	<b>C(TS)</b>
500	100	500	81	<b>181</b>
600	110	400	68	<b>178</b>
700	124	300	58	<b>182</b>

Table 1: The Benchmark Case

When viewing table 1 it becomes apparent that the regime that minimizes the cost of sanctioning is the one in which we combine a legal sanction of 600 and a nonlegal sanction of 400. If a policymaker will choose to deviate from that combination by substituting 100 units of legal sanctions with 100 units of nonlegal sanctions, she will save the marginal cost of inflicting legal sanctions - 10 - yet will have to spend an additional 13 on nonlegal sanctions for a net loss of 3. If, on the other hand, she will choose to deviate by substituting 100 units of nonlegal sanctions with 100 units of legal sanctions, she will save the marginal cost of inflicting nonlegal sanctions - 10 - yet will have to spend an additional 14 on legal sanctions for a net loss of 4. Thus, we can see that the cost minimizing combination is the one in which the marginal costs of legal and nonlegal sanctions are equal.

In sum, from an economic perspective combining legal and nonlegal sanctions is desirable since it can sustain a required level of punishment while creating a social surplus. Yet despite this argument several commentators have raised opposition to such a policy. Massaro, in an influential article laid out the argument that shaming sanctions simply do not work as means to deter crime in modern urbanized societies.<sup>42</sup> According

<sup>40</sup> All the figures in this example and the examples to come reflect measured "disutility units". I am aware of the potential criticism that such units do not exist and that measuring disutility is a difficult task. Nonetheless, this real-world difficulty should not be overstated. Courts and legislatures deal on a daily basis with issues that involve great measurement problems and there is no reason to assume that the case of nonlegal sanctions is unique from that perspective.

<sup>41</sup> Note that the costs of both types of sanctions in the example fulfill the marginally increasing assumption meaning that each additional 100 units of either type of sanction units are more costly than the previous 100 units.

<sup>42</sup> See Massaro, *supra* note 6 at 1921 (arguing that "[t]he cultural conditions of effective shaming seem weakly present, at best, in many contemporary American cities"). See also Norval Morris & Michael

to this argument shaming sanctions might have been useful historically within closely-knit communities, but in modern urban society where people do not know each other and do not care about the way others perceive them, shaming will not work. It would seem, however, that this argument overstates the weakness of shaming sanctions. True, modern society is not as closely knit as traditional societies. It is larger, members hold less information about each other, and the prospect of repeat dealings with random members of the community is quite low. Yet people in modern society continue to live within sub-communities that do hold the characteristics of closely-knit communities. Family, neighbors, and work associates are examples of such sub-communities.<sup>43</sup> Thus, although one might be indifferent whether a stranger on the street is aware of the fact he used the services of a prostitute, one would not want his family members and coworkers to find out about this behavior.<sup>44</sup>

A related argument made against the use of shaming sanctions is that in a diverse society, such as modern America, different groups of society are bound to have different values, and these will lead to different attitudes towards what constitutes a shameful act.<sup>45</sup> Thus, so the argument goes, while shaming sanctions can be effective in cohesive groups, they will not be effective in contemporary America where there is no social consensus as to what a shameful act is.<sup>46</sup> Furthermore, given these differences among groups, there might also be inconsistencies as to what causes people shame.<sup>47</sup> For instance, while members of one group might find cleaning the streets in a unique outfit to be degrading, others might see nothing of it. Yet, again, it would seem that this argument overstates the

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Torny, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENT IN A RATIONAL SENTENCING SYSTEM* 5 (1990) (arguing that sanctions based only on stigma “seem more romantic than real in the urban agglomerations where crime flourishes”).

<sup>43</sup> An extensive literature has been devoted to the importance of nonlegal sanctions in the context of commercial transactions in *modern* America. The initial contribution in this context should be attributed to Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963). For more contemporary studies that dealing with this issue see, e.g., David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 *HARV. L. REV.* 375 (1990); Bernstein, *Diamond Industry*, *supra* note 1; Bernstein, *Cotton Industry*, *supra* note 1.

<sup>44</sup> To be sure, one cannot argue that the nonlegal sanctions that individual face in a modern urban setting are just as severe as those in traditional closely-knit societies. Some anecdotal evidence does in fact point out that sex offenders are moving to urban areas since the harassment they face in those areas is smaller. For example, in Minnesota a disproportionately high number of offenders moved to Minneapolis, which led representatives of the city to try to reshape the local SORN in a way that will force sex offenders out of the city. See Wayne A. Logan, *Jacob's Legacy: Sex Offender Registration and Community Notification Laws, Practice, and Procedure in Minnesota*, 29 *WM. MITCHELL L. REV.* 1287, 1309-11 (2003). Similar concerns were raised in New York City. See Daniel M. Filler, *Making the Case for Megan's Law: A Case Study in Legislative Rhetoric*, 76 *IND. L. REV.* 315, 345 (2001). The point that is made in the text above is that in modern urban settings wrongdoers will still face *some* nonlegal sanctions.

<sup>45</sup> See Massaro, *supra* note 6 at 1922-23.

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

<sup>47</sup> *Id.* at 1923-24.

problems of shaming. Even in a diverse culture such as modern America there continues to exist *some* consensus as to acts that are shameful. As we shall see in more detail below, sex offenses are such an area.

In addition, it has been suggested that criminals, by their very nature, are less susceptible to shame and therefore it is counterproductive to shame them.<sup>48</sup> This argument seems to overstate the weakness of shame based sanctions for two reasons. First, it is not clear what the empirical basis for such a claim is. Second, accepting the premise of the claim, one should still note that it focuses on the internal aspects of shaming sanctions, while neglecting their external aspects. Even the shameless will want to avoid losing central elements of their lives such as family, close friends, employment and housing.

A separate argument made by Whitman focuses on the adverse effects of shaming sanctions on the *sanctioning crowd*.<sup>49</sup> More specifically, Whitman is concerned that the delegation of the act of punishing to the public could stir up public emotions, and create an atmosphere of lynch justice.<sup>50</sup> Yet again, it is not clear that this concern represents a reason to completely abandon shame sanctions. Instead, policymakers should be aware of the possibility that such sanctions will get out of hand and take measures to prevent this from happening.<sup>51</sup> Prosecution of vigilantes, policing of demonstrations against offenders, and harm caused to innocent bystanders, are all costs associated directly with shame sanctions that must be incorporated into the cost-benefit calculus.

An additional problem associated with nonlegal sanctions is that they rely on local communities and their sanctioning norms, rather than on a central government, to punish criminals. Local norms might serve the narrow interests of the community creating them, while being inefficient from a broader social perspective.<sup>52</sup> For example, communities might choose to punish criminals by banishing them.<sup>53</sup> Such sanctions are potentially inefficient since they create a negative externality, namely, the fact that the criminal will

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<sup>48</sup> *Id.* at 1918 (“the people most likely to respond to public shaming sanctions are nonoffender members of the audience, not potential offenders”).

<sup>49</sup> Whitman, *supra* note 6 at 1087-92.

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

<sup>51</sup> Historically, regimes that used shame sanctions were aware of this problem and devoted resources to control the behavior of the sanctioning public. For example, in England during the times when the pillory was used, constables made sure that the event would not deteriorate to wild violence. *See* J. M. Beattie *CRIME AND THE COURTS IN ENGLAND, 1660-1800*, 614-16 (1986).

<sup>52</sup> *See* Posner, *supra* note 4 at 1720-1 (analyzing the potential inefficiencies of norms that generate negative externalities).

<sup>53</sup> This seems to be the current case with respect to sex offenders. *See, e.g.,* Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL L. REV. 885, 908 (1995) (noting that “sometimes the community outrage and rejection forces the offender out of town”). For a review of the nonlegal sanctions suffered by offenders see *infra* Section III 3.

end up in a neighboring community.<sup>54</sup> This again points out that a regime based on nonlegal sanctions will have to expend resources on regulating nonlegal sanctions. For instance, certain sanctions such as housing discrimination might be found to be inefficient since their main goal is to generate negative externalities, and therefore will need to be outlawed.<sup>55</sup>

Another notable argument raised against nonlegal sanctions is that stigmatizing individuals might drive these individuals to commit additional crimes.<sup>56</sup> This argument relies on the insight of criminologists that labeling individuals as deviants might cause them to drift away from society into a life within criminal subcultures or a life of solitary deviance.<sup>57</sup> Alternatively, this argument can build upon recent studies in social psychology that demonstrate the self-fulfilling aspects of stereotypes and stigmas.<sup>58</sup> According to these studies stereotypes might create a psychological burden that will

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<sup>54</sup> See Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition* (2004).

<sup>55</sup> See, e.g., N.J. STAT. § 2C:7-16 5. c. (prohibiting housing discrimination on the basis of registration as a sex offender).

<sup>56</sup> Persons, *supra* note 9 at 1544-45 (pointing out the specific deterrence problems associated with publishing the names of patrons of prostitutes).

<sup>57</sup> See generally Frank Tannenbaum, CRIME AND THE COMMUNITY (1938); W. B. Miller, *Lower-Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. SOCIAL ISSUES 5 (1958) K. T. Erikson, *Notes on the Sociology of Deviance*, 9 SOCIAL PROBLEMS 307 (1962); Howard S. Becker, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (1963).

<sup>58</sup> The initial contribution in this context should be attributed to Steele and Aronson who demonstrated that making African Americans vulnerable to a negative stereotype as to their group's intellectual abilities caused them to perform significantly worse than Whites in a standardized test. See Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797 (1995). Ever since this study was reported its results were duplicated in numerous studies in different contexts. See, e.g., Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AMER. PSYCH. 613 (1997) (reporting on the effects of stereotypes with respect to female performance in standardized math tests); Clark McKeown & Rhona S. Weinstein, *The Development and Consequences of Stereotype Consciousness in Middle Childhood*, 74 CHILD DEV. 498, 506-10 (2003) (reporting an experiment that demonstrated that once children become aware of commonly held stereotypes their cognitive performance is adversely affected); Mara Cadinu et. al, *Stereotype Threat: The Effect of Expectancy on Performance*, 33 EURO. J. SOC. PSYCH. 267 (2003) (reporting on the effects of stereotypes with respect to women in math exams and African Americans in verbal exams); J. C. Croizet & T. Claire, *Extending the Concept of Stereotype Threat to Social Class: The Intellectual Underperformance of Students from Low Socioeconomic Backgrounds*, 24 PERSONALITY & SOC. PSYCH. BULLT. 588 (1998) (showing that low socioeconomic status students under perform on a verbal test if it is framed as a test of intelligence); Jacques-Philippe Leyens et. al, *Stereotype Threat: Are Lower Status and History of Stigmatization Preconditions of Stereotype Threat?*, 26 PERSONALITY & SOC. PSYCH. BULLT. 1189 (2000) (reporting the effects of stereotypes with respect to males in processing affective information); Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERSONALITY & SOC. PSYCH. 1213 (1999) (showing that effects of stereotypes on Whites with respect to athletic abilities). For a review of the literature see S. Christian Wheeler & Richard E. Petty, *The Effects of Stereotype Activation on Behavior: A Review of Possible Mechanisms*, 127 PSYCH. BULLT. 797 (2001).



adversely affect performance in situations subject to the stereotype,<sup>59</sup> or might decrease ones expectations from himself, which in turn might cause actual lower performance.<sup>60</sup>

In economic terms the concern over higher future crime rates among stigmatised individuals can be tied to the concept of marginal deterrence. The theory of marginal deterrence asserts that the law should refrain from inflicting too harsh of a penalty for one crime since such sanctions will stand in the way of deterring additional crimes.<sup>61</sup> The reason for that is that individuals penalized by the harsh sanction will face no effective sanction for additional – marginal - crimes since they already face the extremely high sanction associated with their first crime. For example, if the punishment for robbery were death, then a robber might as well kill the victim since he would lose nothing from doing so and would lower his probability of detection by eliminating a witness.<sup>62</sup>

The potential threat of nonlegal sanctions is inherent to criminal sanctions even without the use of shaming sanctions.<sup>63</sup> Thus, individuals with low social capital face a low potential nonlegal sanction, and are more difficult to deter. Indeed, an abundance of studies point out that such individuals tend to have higher crime rates.<sup>64</sup> Crimes are committed in disproportionately high numbers by unmarried people,<sup>65</sup> individuals with lower social statuses (*e.g.* low socio-economic status, membership in an oppressed minority group),<sup>66</sup> and people who have high residential mobility.<sup>67</sup> In addition,

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<sup>59</sup> Steele, *id.* at 616-7. This explanation has recently been confirmed by studies that quantified both the psychological anxiety and physiological changes that stereotypes cause. See Steven J. Spencer, Claude M. Steele & Diane M. Quinn, *Stereotype Threat and Women's Math Performance*, 35 J. EXP. SOC. PSYCH. 4, 14-21 (1999) (reporting findings that demonstrate that anxiety was related to test performance); Jim Blascovich et al., *African Americans and High Blood Pressure: The Role of Stereotype Threat*, 12 PSYCH. SCIENCE 225, 228 (2001) (finding that when African Americans were under stereotype threat the exhibited higher blood pressure the European Americans while in the absence of stereotype threat the two groups exhibited similar blood pressure levels).

<sup>60</sup> See Charles Stagnor, Christine Carr & Lisa Kiang, *Activating Stereotypes Undermines Task Performance Expectations*, 75 J. PERS. & SOC. PSYCH. 1191 (1998); Cadinu et al., *supra* note 58 at 269-270. *But see* Leyens et. al, *supra* note 58 at 1197 (arguing that it is very unlikely that participants performed less well because they felt helpless and unmotivated).

<sup>61</sup> See, *e.g.*, George J Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526, 527 (1970).

<sup>62</sup> Richard Posner, *ECONOMIC ANALYSIS OF LAW* 222 (6<sup>th</sup> ed., 2003).

<sup>63</sup> See Harold G. Grasmick & Donald E. Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980) (presenting an empirical measurement of the deterrence power of nonlegal sanctions).

<sup>64</sup> For an analysis of the effects of creating social capital on the design of criminal sanctions for repeat offenders see David A. Dana, *Rethinking the Puzzle of Escalating Sanctions for Repeat Offenders*, 110 YALE L. J. 733, 774-5 (2001).

<sup>65</sup> See, *e.g.*, N. T. Wolfe, F.T. Cullen & J.B. Cullen, *Describing the Female Offender: A Note on the Demographics of Arrests*, 12 J. Crim. Just. 483 (1984).

<sup>66</sup> See John Braithwaite *CRIME, SHAME AND REINTEGRATION* 48-49 (1989) and studies cited there.

historical studies demonstrated that extreme nonlegal sanctions led individuals who were subjected to them to a life of criminal activity. For instance, cheek branding, which was used in eighteenth century England as a sanction, caused an unconcealable mark on the body of criminals that deprived them of any opportunity to reintegrate into society, and drove them into a life of habitual crime.<sup>68</sup> Thus, a sanctioning regime should avoid extremely high nonlegal sanctions, since such sanctions might eliminate the deterrence power of nonlegal sanctions with respect to *future* crimes. Rather, we should strive to create a reintegrative shaming regime that is characterized by the reacceptance of criminals into the community after they were shamed.<sup>69</sup>

Finally, several commentators have argued that there is something morally wrong with state sponsored shaming.<sup>70</sup> It would seem, however, that any such argument is unconvincing once framed within a discussion of substituting imprisonment with nonlegal sanctions. Prison is a degrading experience, and it is difficult to see the moral argument that would defend the right of individuals to spend more time incarcerated.<sup>71</sup> Furthermore, this argument becomes even more difficult to defend if the regime adopted would allow criminals to choose between the two forms of sanctioning,<sup>72</sup> since under such a regime criminals will suffer from the lightest sanction from their perspective.<sup>73</sup>

The use of nonlegal sanctions might, on the other hand, raise a different moral concern. Arguably, nonlegal sanctions have a higher variance than legal sanctions. One offender might be subjected to extraordinary harsh nonlegal sanctions, while another offender, committing an identical crime, might suffer a mild nonlegal sanction. From an economic perspective that focuses on the *ex-ante* perspective of sanctioning this is of no

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<sup>67</sup> Studies of the connection between population mobility and crime rates go as far back as the 1930s. See E. S. Longmoor & E. F. Young, *Ecological Interrelationships of Juvenile Delinquency, Dependency, and population Movements: A Cartographic Analysis of Data from long Beach, California*, 41 AMER. J. SOC. 598 (1936). For a more recent study see, e.g., R. D. Crutchfield, M. R. Geerken & W. R. Gove, *Crime Rate and Social Integration: The Impact of Metropolitan Mobility*, 20 CRIMINOLOGY 467 (1982).

<sup>68</sup> Posner, *supra* note 3 at 105-6.

<sup>69</sup> See, Braithwaite, *supra* note 66 at 55. One should note that despite his call for reintegration the initial premise presented by Braithwaite is that shame has an important role in deterring crime and sustaining a free society. *Id.* at 55.

<sup>70</sup> See, e.g., Massaro, *supra* note 6 at 1942-43; Whitman *supra* note 6 at 1090-91.

<sup>71</sup> See, e.g., Garvey, *supra* note 9 at 760 (noting that “evaluating which is more ‘undignified’ – prison or public shaming – will depend on the details”); Kahan, *supra* note 7 at 646 (arguing that “[h]owever cruel shaming is, imprisonment is much worse. It expresses at least as much condemnation, and adds a grotesque variety of indignities that shaming cannot hope to rival”).

<sup>72</sup> This seems to be the current practice in some cases. See, e.g., Jay Mathews, *Freedom Means Having to Say You’re Sorry; Criminal Justice System Tries an ‘Apology Ad’ Program as an Alternative to Prison*, WASH. POST, Nov. 9, 1986, at A3 (reporting a case in which the defendant was allowed to choose to publish an apology in a local newspaper in lieu of jail time).

<sup>73</sup> Kahan, *supra* note \_\_\_ at 647 (noting “it is more than paradoxical – it is either confused or disingenuous – to say that one of the reasons to disregard offenders’ preferences is to spare them from cruelty”).

major consequence, as long as similar offenders face similar sanctions ex-ante. Yet if the base for criminal sanctions is ex-post retribution the use of nonlegal sanctions does raise a serious problem, since similarly situated criminals might suffer from different sanctions. Thus, if nonlegal sanctions do have a higher variance, the argument presented in this Article is more committed to the goal of deterrence than I previously acknowledged.

In this subsection I presented the economic case for the use of nonlegal sanctions, and demonstrated that while the arguments raised against the use of such sanctions do point out some valid concerns, they do not represent a reason to forgo the use of these sanctions. I now turn to present a model of shaming, which incorporates the effects of the law on the shaming behavior of individuals.

### 3. An Endogenous Model of Shaming

My analysis, thus far, assumed that a policymaker could simply reduce legal sanctions without affecting the level of nonlegal sanctions.<sup>74</sup> In this subsection, I will relax this assumption and offer an endogenous model for the combined use of legal and nonlegal sanctions. More precisely, I will argue that depending on the social context, reducing legal sanctions might either lower or raise the level of nonlegal sanctions. Since there is limited empirical data on evaluating this issue, I will present a tentative analysis of both.<sup>75</sup>

*The signaling case* - One plausible assumption as to the relation between legal and nonlegal sanctions is that the demand for inflicting nonlegal sanctions *falls* as the level of legal sanctions diminishes. The causal explanation for this assumption is that legal sanctions may serve as a signal that a wrongdoer deserves to be subject to a nonlegal sanction.<sup>76</sup> Thus, when courts lower the legal sanctions applied to a certain type of offenders, society follows in the same footsteps and lowers the magnitude of nonlegal sanctions (for the purposes of this Article I will refer to this effect as “the signaling effect”). Some empirical support for the signaling effect can be found in Lott’s study of

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<sup>74</sup> Studies focusing on the economic analysis of nonlegal sanctions have generally overlooked the potential effects of the law on nonlegal sanctions. *See, e.g.*, Kahan & Posner, *supra* note 7 (not evaluating the effects of substituting legal sanctions with nonlegal sanctions); Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. LEGAL STUD. 401 (2001) (not evaluating the effects of deducting nonlegal sanctions from damages).

<sup>75</sup> Given the limited data we currently hold on nonlegal sanctions it is not uncommon for scholars to reach tentative conclusions in this field. *See, e.g.*, Kahan, *supra* note 7 at 607 (noting that “the existing gap in empirical knowledge should not discourage informed speculation about how deep-seated public sensibilities shape the opportunities for reform”); Massaro, *supra* note 6 at 1918 (noting that “[t]hese conclusions are subject to an important caveat. No empirical work currently is available with which to test the practical impact of shaming sanctions. What follow, therefore, are provisional hypotheses”).

<sup>76</sup> *See* Braithwaite, *supra* note 66 at 181 (noting that “the levels of punishment the state provides for a particular crime themselves give a message about how shameful that offense is”); Kahan, *supra* note 7 at 603 (presenting an endogenous analysis of the law and moral perceptions).

nonlegal sanctions in the context of larceny and theft in which he found that longer prison sentences are related to lower post conviction income (*i.e.* a higher nonlegal sanction).<sup>77</sup>

Two claims can be made as to the efficient use of legal and nonlegal sanctions in the signaling case. First, the cost of sanctioning in this case continues to be minimized at the point in which the marginal cost of inflicting legal and nonlegal sanctions is equal. The intuition underlying this result follows from the intuition of the benchmark case. As long as a policymaker is not at a point in which the marginal costs of the legal and nonlegal sanctions are equal, she could always lower the cost of sanctioning by shifting to the sanctioning technology with the lower marginal cost. Second, in the signaling case the efficient combination of legal and nonlegal sanctions will have a *higher* level of legal sanctions when compared to the benchmark case. To understand why, consider again a policymaker who is trying to achieve a given total sanction and only uses legal sanctions. Just like in the benchmark case, she begins to gradually substitute legal with nonlegal sanctions. Yet notice that in the signaling case each substitution has two effects. First, as in the benchmark case, each substitution increases the amount of nonlegal sanctions used, and shifts the policymaker to nonlegal sanctions with higher marginal costs. Second, each substitution lowers the level of the legal sanction, which in the signaling case raises the cost of nonlegal sanctions. In other words, in the signaling case each substitution will cause a greater rise in the marginal cost of nonlegal sanctions. Thus, the policymaker will reach the point in which the marginal costs of legal and nonlegal sanctions are equal after substituting a lower amount of legal sanctions.

Again, a simple numerical example might be useful. The signaling effect can be captured as a rise in the cost of inflicting nonlegal sanctions when the legal sanction is reduced. In table 2 I present a possible cost structure for such a case.

<b>Legal Sanction</b>	<b>C(LS)</b>	<b>Nonlegal Sanction</b>	<b>C(NLS)</b>	<b>C(TS)</b>
500	100	500	98	<b>198</b>
600	110	400	77	<b>187</b>
700	124	300	60	<b>184</b>

Table 2: The Signaling Case

As is evident from table 2, the efficient combination of legal and nonlegal sanctions in this case is 700 and 300 respectively, the combination in which the marginal cost of the two is equal. Furthermore, table 2 demonstrates that the rise in the cost of nonlegal

<sup>77</sup> See John R. Lott, Jr., *Do We Punish High Income Criminals too Heavily?*, 30 ECON. INQUIRY 583, 597 (1992). It should be noted that part of the decline in the income of individuals that serve prison sentences could be explained by the fact that they lose part of their human capital during their stay in prison – a factor that is irrelevant in the case of damages. Nevertheless, the data presented by Lott demonstrates that the decline in the income of convicted individuals exceeds any potential loss due to the loss of human capital. *But see* Nigel Walker & Catherine Marsh, *Do Sentences Affect Public Disapproval?*, 24 BRIT. J. CRIMINOLOGY 27 (1984) (presenting data suggesting that in general sentencing has a limited effect on the disapproval of a wrongful act).

sanctions created by the signaling effect shifted the cost minimizing combination to one in which a higher amount of legal sanctions should be utilized.

*The substitution case* – A second plausible assumption regarding the effect of the level of legal sanctions on the level of nonlegal sanctions is that the demand for inflicting nonlegal sanctions *rises* as the legal sanction diminishes. According to this assumption individuals wish to see that offenders suffer from an “appropriate” sanction.<sup>78</sup> Put differently, offenders have a debt that they need to repay to society, and this debt can be discharged of by legal or nonlegal means.<sup>79</sup> Since legal sanctions and nonlegal sanctions produce the same outcome – the infliction of harm to wrongdoers – these two may serve as substitutes (for the purposes of this Article I will refer to this effect as “the substitution effect”).<sup>80</sup> Empirical support for the substitution effect can be found in the crowding out literature. For many years this literature has pointed out that organized regulatory and market institutions might crowd out public motivation to create alternative social mechanisms.<sup>81</sup> Recently, this literature has expanded to the field of sanctioning, and

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<sup>78</sup> It should be noted that this effect could bring about not only nonlegal sanctions, but also nonlegal “remedies” to individuals who have been subjected to what their community perceives to be an excessive legal sanctions. For example, Braithwaite reports that among doctors who were found liable in medical malpractice suits ninety per cent had a negative effects on their practice and eight per cent reported an *improvement* in business after the suit. This later figure is explained by the fact that fellow doctors who felt sorry for the doctors sanctioned by the legal system wished to assist them. *See* Braithwaite, *supra* note 66 at 128 (citing a study conducted by Cressey).

<sup>79</sup> In the context of the nonlegal sanctions being inflicted to sex offenders one can find arguments that offenders have “paid their debt to society” and should not be subjected to further social sanctions. *See, e.g.*, Logan, *supra* note 44 at 1292-3 (referring to comments made by Senator Thomas Neuville of Minnesota); Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community Notification Laws to Juveniles*, 21 CAL. L. REV. 163, 175 (2003) (quoting comments made by North Carolina Representative Watt); Amy L. Van Duyn, *The Scarlet Letter Branding, A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes*, 47 DRAKE L. REV. 635, 659 (1999) (noting that “once offenders are released, they have paid their debt to society and have the constitutional right to re-integrate into society”).

<sup>80</sup> There is a long line of literature that demonstrates that the law has evolved as a substitute for nonlegal sanctions, specifically for revenge based nonlegal sanctions. Perhaps the most famous such claim can be found in Oliver W. Holmes, Jr., *THE COMMON LAW*, 1-38 (1881). In his first lecture on the law Holmes argues that various forms of legal liability developed from the concept of revenge. For a more contemporary analysis of this argument *see* Richard A. Posner, *LAW AND LITERATURE*, 49-60 (2<sup>nd</sup> ed., 1998) (analysing the evolution from revenge to law). For a model of the development from a revenge based society to a legalistic society *see, e.g.*, Geoffrey MacCormack, *Revenge and Compensation in Early Law*, 21 AMER. J. COMP. L. 69, 74 (1973).

<sup>81</sup> *See, e.g.*, A. Ostman, *External Control may Destroy the Commons*, 10 RATIONALITY & SOC’Y 103 (1998) (suggesting that external regulation of common pool resources could diminish the moral obligations of individuals and undermine internal regulation); R. M. Titmus, *THE GIFT OF RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971) (arguing that monetary payments to givers of blood could diminish the amount of blood given voluntarily). Additional support for this effect can be found in Lott’s study of nonlegal sanctions that are applied to individuals convicted in drug related offenses. *See* John R. Lott, Jr., *An Attempt at Measuring the Total Monetary Penalty from Drug Convictions: The Importance of an Individual’s Reputation*, 21 J. LEGAL STUD. 159, 176 (1992). In this study Lott found that individuals with longer prison sentences had higher post conviction income (*i.e.* a lower nonlegal sanctions), though these

preliminary studies have demonstrated that the use of legal sanctions might crowd out nonlegal sanctions.<sup>82</sup> For example, a study conducted in day-care centers in Israel found that the introduction of a fine that was levied on parents who were late to pick up their children caused a *rise* in the number of parents coming in late.<sup>83</sup> This data can be interpreted as an indication that when legal sanctions, such as a fine, move in, nonlegal sanctions, such as guilt and shame, are crowded out. Thus, parents who avoided being late since they were unwilling to endure the nonlegal sanctions associated with being late, were willing to endure the legal sanction that substituted the nonlegal sanction.<sup>84</sup>

Two claims can be made as to the efficient use of legal and nonlegal sanctions in the substitution case. First, as should be clear by this point, the cost of sanctioning in this case is minimized at the point in which the marginal cost of inflicting legal and nonlegal sanctions are equal. Second, in the substitution case the efficient combination of legal and nonlegal sanctions will have a *lower* level of legal sanctions, when compared to the benchmark case. To understand why, consider once again our policymaker. In the substitution case each reduction in legal sanctions will have two effects. First, just like in the benchmark case, it increases the amount of nonlegal sanctions being used, and therefore shifts the policymaker to nonlegal sanctions with higher marginal costs. Second, each reduction lowers the cost of nonlegal sanctions by raising the motivation of individuals to inflict nonlegal sanctions. In other words, in the substitution case each move to nonlegal sanctions will cause a smaller rise in the marginal cost of nonlegal sanctions. Hence, the policymaker will reach the point in which the marginal costs of legal and nonlegal sanctions are equal after substituting more legal sanctions.

Continuing to follow the numerical example presented above, the substitution effect can be captured as a fall in the cost of inflicting nonlegal sanctions when the legal sanction is reduced. In table 3 I present a possible cost structure for such a case.

<b>Legal Sanction</b>	<b>C(LS)</b>	<b>Legal Sanction</b>	<b>C(NLS)</b>	<b>C(TS)</b>
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results were not statistically significant. *See also* Walker & Marsh, *supra* note 77 at 40 (pointing out that “in certain circumstances a severe sentence might even *lower* disapproval”).

<sup>82</sup> *See* Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1 (2000); Juan Camilo Cardenas & John Stranlund, *Local Environmental Control and Institutional Crowding-Out*, 28 WORLD DEVELOPMENT 1719 (2000) (pointing out that the introduction of a regulatory environmental scheme backed by legal sanctions could diminish the tendency of individuals to act according to group interests).

<sup>83</sup> Gneezy & Rustichini, *id.* at 5-8.

<sup>84</sup> Although Gneezy and Rustichini do not state their explanation for their results in the terms used above, they in effect employ a similar explanation. Gneezy and Rustichini hypothesize that the introduction of a fine changes the nature of the transaction since while there exists a norm of not making use of the services of the day care center for free, once a price is set for these services (in the form of a fine) being late no longer violates the norm. *Id.* at 13-4. In their analysis Gneezy and Rustichini offer an additional explanation for the behavior they documented that relies on a model in which parents hold imperfect information as to the type of person the manager of the day-care center is (*i.e.* what kind of sanctions will she inflict to them if they are late to pick up their child). In this model the use of a fine indicates the type of person the day-care center owner is and therefore causes individuals to increase the number of late arrivals. *Id.* at 10-13.

500	100	500	71	<b>171</b>
600	110	400	63	<b>173</b>
700	124	300	56	<b>180</b>

Table 3: The Substitution Case

As is evident from table 3, the efficient combination of legal and nonlegal sanctions in this case is 500 and 500, the combination in which the marginal cost of the two is equal. Furthermore, table 3 demonstrates that the fall in the cost of nonlegal sanctions created by the substitution effect shifted the cost minimizing combination to one in which a lower amount of legal sanctions is being utilized.

#### 4. Endogenous Legal Sanctions

In this subsection I turn to evaluate the way nonlegal sanctions might affect legal sanctions. More precisely, it will be argued that judges, jurors, and prosecutors might adjust legal sanctions, if legislatures choose to enlarge the total sanction by using nonlegal sanctions. Furthermore, it will be shown that high mandatory nonlegal sanctions might lead to the counter intuitive result of *lowering* the aggregate sanction offenders face.

Some of the players in the criminal justice system, such as judges and prosecutors, have a perception of what an appropriate sanction is, and in many cases they hold substantial discretion over the sanctioning process. Thus, if legislatures add nonlegal sanctions at a level that judges or prosecutors perceive to be unfair, they might circumvent this by adjusting the legal sanction using their discretion, or by choosing not to use the nonlegal sanctions added by the legislature. If, however, the supplemental nonlegal sanction is large, in the sense that even on its own it is viewed as excessive, and its application is mandatory, then the only option judges and prosecutors who wish to avoid applying an excessive sanction have is not to convict the offender with an offence that triggers the nonlegal sanction.<sup>85</sup> For example, a prosecutor reluctant to subject a defendant to a severe mandatory shaming sanction that is attached to a certain crime, might agree to plea him to a charge that does not trigger the shaming sanction.<sup>86</sup> This type of behavior has in fact been documented in the contexts of The Federal Sentencing Guidelines and federal supplemental sanctions (such as the ban on holding firearms that is attached to convictions of domestic abuse).<sup>87</sup>

<sup>85</sup> Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2451 (1997).

<sup>86</sup> *Id.* Another example could be jurors who are reluctant to vote to convict. *Id.*

<sup>87</sup> See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-Mistretta Period*, 91 NW.L. REV. 1284 (1997) (discussing the circumvention of the Federal Sentencing Guidelines); Robert A. Mikos, *State Crimes Carrying Federal Penalties: The Law and Economics of Federal Supplemental Sanctions*, (unpublished manuscript, on file with author) (discussing the circumvention of federal supplemental sanctions).

Adding high mandatory nonlegal sanctions to legal sanctions might also affect the plea bargaining process by raising the incentives of defendants to go to trial.<sup>88</sup> If sanctions are mandatory, the only benefit of a plea agreement for defendants is the saving in trial costs, which given a sufficiently high sanction will not justify forgoing the opportunity of acquittal at trial. Eliminating the ability to reach plea agreements regarding offenses with mandatory nonlegal sanction is expected to cause prosecutors, who operate within budgetary constraints and want to encourage plea agreements, to circumvent this sanction by reducing the charges to charges that do not trigger it.

To understand the argument better, one might wish to view the following numerical example.<sup>89</sup> Assume that a prosecutor may charge a defendant with either assault or sexual assault. The maximal sanction for assault is 500 and the maximal sanction for sexual assault is 1,000. Both parties have equal probabilities to win at trial with respect to both charges. Assuming that the prosecutor wishes to maximize the sanction imposed on the defendant she will charge him with sexual assault. At this point the defendant will agree to plea to sexual assault as long as the prosecutor offers him a sanction that is lower than his expected sanction ( $0.5 \times 1,000 = 500$ ). Now assume a world in which a mandatory nonlegal sanction of 1,100 is applied to those convicted of sexual assault, but not to those convicted of assault. The introduction of this sanction eliminated the incentive of the defendant to agree to plea to sexual assault, since the lowest sanction the prosecutor can offer him (the mandatory 1,100), is larger than the expected sanction at trial ( $0.5 \times (1,000 + 1,100) = 1,050$ ). Thus, the only basis for a plea agreement in this case can be an assault charge, which will allow the prosecutor to offer the defendant a sanction that is slightly below his expected sanction at trial ( $0.5 \times 500 = 250$ ). The different payoffs for defendants are compiled in table 4:

	Nonlegal sanctions not added		Nonlegal sanctions added	
	Expected Sanction	Plea Range	Expected Sanction	Plea Range
Charge: Sexual Assault	500	<500	1,050	1,100<
Charge: Assault	250	<250	250	<250

Table 4: Sanctions with and without mandatory supplemental nonlegal sanctions

Furthermore, encouraging defendants to litigate rather than accept plea agreements might *lower* the total sanction that is imposed on offenders.<sup>90</sup> The reason for

<sup>88</sup> Mikos, *id.* (analysing this point in the context of federal supplemental sanctions). This is a general point that holds with respect to mandatory sanctions. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 209 (1993).

<sup>89</sup> The example in the text draws from Mikos, *id.*

<sup>90</sup> Mikos, *id.*



this is that once defendants can credibly threaten to go to trial, prosecutors will either have to agree to plea bargain to lesser charges that do not trigger the supplemental sanction and have a lower legal sanction, or trial a small number of offenders and generate a few large sanctions. Returning to the numerical example above, assume that the prosecutor has a fixed budget of \$20, trials cost prosecutors \$10, plea agreements cost prosecutors \$1, there are 30 potential defendants to prosecute for sexual assault, and prosecutors and defendants have equal bargaining power in the plea negotiation (*i.e.*, they agree on a sanction that is half of the expected sanction). In a world with no supplemental nonlegal sanctions, the prosecutor will be able to reach plea agreements with 20 defendants on sexual assault charges, for a total sanction of 5,000. On the other hand, in a world with supplemental nonlegal sanctions, pleading defendants to sexual assault is no longer an option, thus, the prosecutor has three other options: plea 20 defendants to assault, for a total sanction of 2,500; plea 10 defendants to assault and take one to trial on a sexual assault charge, for a total expected sanction of 2,300; or take two defendants to trial on a sexual assault charge for a total expected sanction of 2,100.

This subsection has demonstrated that the actual legal sanction offenders face might be adjusted once nonlegal sanctions are introduced. This is of importance since at times legislatures might simply add nonlegal sanctions to existing legal sanctions, and assume they succeeded to create higher sanction.<sup>91</sup> It would seem that nonlegal sanctions are susceptible to this type of behavior since legislatures might only account for the cost of inducing nonlegal sanctions, while ignoring the other social costs of sanctioning.<sup>92</sup>

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To sum up, in this Section I have argued that using nonlegal sanctions as a substitute for costly legal sanctions could lower the aggregate cost of sanctioning. Nevertheless, determining the efficiency of such a sanctioning regime depends on the magnitude of the problems associated with the use of nonlegal sanctions that were mapped out. Furthermore, designing a regime that will utilize nonlegal sanctions in an optimal fashion requires taking into account the potential effects of legal sanctions on nonlegal sanctions, and the potential effects of nonlegal sanctions on legal sanctions. These general insights will be employed when I turn now to analyse the way in which sex offenders are being sanctioned.

### III. A PUNITIVE APPROACH TOWARDS SORNLS

In this Section I will begin to evaluate a concrete example of using legally induced nonlegal sanctions as punishment. Namely, I will present a case study of the current practice of publicizing the names of sex offenders. I will begin my analysis by reviewing the current content of SORNLS. I will then turn to point out that SORNLS have questionable value as a crime prevention tool. Rather, I will argue that SORNLS should

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<sup>91</sup> Kahan, *supra* note 7 at 605 (noting that the use of alternative sanctions has caused sanctions to become more severe since they were simply added to preexisting sanctions).

<sup>92</sup> *See supra* note 38.

be viewed as a sanction generating tool. Finally, I will evaluate the potential effects of SORNLS on the future criminal behavior of offenders who are subjected to them and on the legal sanctions that are applied to sex offenders.

### 1. Legal Background: Sex Offender Registration and Notification Laws

SORNLS, commonly known as Megan's Laws, reflect a significant change in the landscape of American criminal law.<sup>93</sup> In general, these laws require convicted sex offenders, who are released into the community, to register as sex offenders, and provide for some level of public notification as to the presence of a sex offender in the community. Currently, all fifty states and the District of Columbia have enacted their own version of a SORNLS.<sup>94</sup>

Undoubtedly, the single event that triggered the overwhelming wave of registration and notification legislation of the late 90s was the brutal murder of Megan Kanka, a seven-year-old girl, on July 29, 1994.<sup>95</sup> Megan was raped and murdered by a neighbor of the Kanka family, who lived across the street and was a convicted sex offender.<sup>96</sup> Following the murder, Megan's parents began a public campaign for the adoption of sex offender registration and notification laws. Just two weeks after the murder, bills providing for sex offender registration and notification were introduced to the New Jersey General Assembly,<sup>97</sup> and by the end of October of that year, after an abbreviated legislative process, the state's SORNLS was enacted.<sup>98</sup> At the same time, other states started to follow in the footsteps of New Jersey, and enacted similar laws.<sup>99</sup>

Politicians in Congress, who were aware of the growing national concern over sex offenders, moved to introduce federal legislation on the matter. The Jacob Wetterling

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<sup>93</sup> In fact, these laws are not limited to the United States and have already crossed the Atlantic to England. See Meghann J. Dugan, *Megan's Law or Sarah's Law? A Comparative Analysis of Public Notification Statutes in the United States and England*, 23 LOY. L.A. INT'L & COMP L. REV. 617 (2001) (comparing American SORNLS with the English equivalent).

<sup>94</sup> *Smith*, 538 U.S. at 90.

<sup>95</sup> *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997). Though this murder triggered the nation wide adoption of SORNLS such laws did exist previously. A prominent example of a state that had such a law since the 1940s is California. See CAL. PENAL CODE § 290 (West 1947). The first state to introduce the concept of public notification was Washington, which in 1990 enacted its Community Protection Act. See WASH. REV. CODE ANN. §§ 4.24.550, 9A.44130 (West 1995 & Supp. 1997). As of 1983 five states enacted some form of sex offender registration law. See *In re Reed*, 33 Cal.3d 914, 925 (Cal. 1983). Nevertheless, until the case of Megan Kanka there was no sign that other states were about to adopt similar regimes.

<sup>96</sup> *E.B.*, *id.* at 1081.

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

<sup>98</sup> *Id.* at 1081-2.

<sup>99</sup> According to one account in 1994 prior to the enactment of any federal legislation on the matter twenty-five states had some form of a SORNLS and sixteen other states were considering similar pieces of legislation. See Houston, *supra* note 36 at 731.

Crimes Against Children and Sexually Violent Offender Registration Act,<sup>100</sup> enacted in 1994, required all states to enact sex offender registration laws. The Jacob Wetterling Act gave states a strong incentive to comply by conditioning federal law enforcement grants.<sup>101</sup> Federal lawmakers decided to go a step further in 1996, and required states to add notification provisions to their laws.<sup>102</sup> Following this amendment, the guidelines issued by the attorney general explicitly stated that information must be disseminated to the general public when needed.<sup>103</sup>

A full comparative analysis of SORNs is beyond the scope of this Article. Nevertheless, some characterization of these laws is necessary in order to further the discussion. With respect to the registration aspects of SORNs, the minimal requirements states must live up to are set out in the Jacob Wetterling Act. Every state is required to have a sex offender registry, which must include the names, addresses, fingerprints, and photographs of all sex offenders.<sup>104</sup> Registration is generally triggered by a conviction of one of the offenses enumerated in the statute.<sup>105</sup> These offenses, in most cases, include all sex crimes notwithstanding the identity of the victim, and several specific crimes, such as kidnapping, that require registration only if the victim of the crime was a minor.<sup>106</sup> Notice that despite the fact that SORNs are perceived and marketed as laws aimed

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<sup>100</sup> 42 U.S.C. § 14071 [hereinafter: the Jacob Wetterling Act].

<sup>101</sup> 42 U.S.C. § 14071(g).

<sup>102</sup> 42 U.S.C. § 14071(e)(2) (stating that “the State shall release the relevant information that is necessary to protect the public concerning a specific person required to register under this section”). Until 1996 federal law did not require states to engage in notification, and it simply indicated that states “may release” information in a way that they found would protect the public safety (42 U.S.C. § 14071(d) (1994)).

<sup>103</sup> The attorney general guidelines provide that:

...a state cannot comply with the Act by releasing registration information only to law enforcement agencies, to other governmental or non-governmental agencies or organizations, to prospective employers, or to the victims of the registrants’ offenses. States cannot comply by having purely permissive or discretionary authority for officials to release registration information. Information must be released to members of the public as necessary to protect the public from registered offenders.

*Megan’s Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended*, 64 FED. REG. 572, 581 (1999) [hereinafter: *The Final Guidelines*].

<sup>104</sup> 42 U.S.C. § 14071 (b). In addition the Jacob Wetterling Act requires states to collect information as to identifying factors, anticipated future residence, offense history, and documentation of any treatment received for mental abnormalities or personality disorders with respect to individuals that are deemed to be sexually violent predators.

<sup>105</sup> 42 U.S.C. § 14071 (a)(1)(A) (basing registration requirements on past convictions). *But see infra* Section IV 5 (discussing registration which is based on *charges* rather than on convictions).

<sup>106</sup> 42 U.S.C. §§ 14071 (a)(1)(A), (a)(3)(A) (registration required of persons convicted of a sexually violent offense or of a criminal offense against a minor, which includes several sexually oriented crimes, kidnapping and false imprisonment).

towards preventing child oriented sex crimes,<sup>107</sup> these laws have an extremely large scope that covers all sex offenders.

Initial registration is conducted upon the conviction of the offender, his release from incarceration, or his moving into a new state.<sup>108</sup> Following this registration, offenders are required to update any change in their personal information, and verify their information on an annual or quarterly basis.<sup>109</sup> As for the duration of registration, the minimal period required by the Jacob Wetterling Act is ten years from the date of release from prison,<sup>110</sup> yet any offender that has been convicted more than once of an enumerated offense, has been convicted of an aggravated offense, or has been found to be a sexually violent predator, must register for life.<sup>111</sup>

Turning to the issue of notification, the Jacob Wetterling Act requires some level of public notification, however it leaves room for diversity as to the details. In fact, states do diverge dramatically on this matter. The predominant way of notification is by the Internet. Currently 39 states and the District of Columbia operate websites that allow visitors to obtain information about registered sex offenders.<sup>112</sup> While all websites include general details such as name, date of birth, physical characteristics, and the offense committed,<sup>113</sup> others include additional information, such as a photo of the offender and a description of the mode of operation of the offender given in plain

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<sup>107</sup> Filler, *supra* note 44 at 355-8 (noting that in most legislative debates surrounding these laws legislatures seem to represent these laws as laws that target sex offenders who victimise children). In his remarks at the signing ceremony of Megan's Law on May 17<sup>th</sup>, 1996 president William Jefferson Clinton made the following remarks:

From now on, every State in the country will be required by law to tell a community when a dangerous sexual predator enters its midst. We respect people's rights, but today America proclaims there is no greater right than a parent's right to raise a child in safety and love. Today America warns: If you dare prey on our children, the law will follow you wherever you go. State to state, town to town.

Today, America circles the wagon around our children.

*Available in* LEXIS, Codes Library, Presdc File.

<sup>108</sup> 42 U.S.C. § 14071(b).

<sup>109</sup> 42 U.S.C. §§ 14071 (b)(1)(A)(ii); (b)(3).

<sup>110</sup> 42 U.S.C. § 14071 (b)(6)(A).

<sup>111</sup> 42 U.S.C. § 14071 (b)(6)(B).

<sup>112</sup> As of 2002 34 States and the District of Columbia had such websites. *See* Brief for the United States as Amicus Curiae in Support of Petitioners at 1(a)-24(a), *Smith v. Doe*, 538 U.S. 84 (U.S. 2003) (No. 01-729). Ever since five additional states have begun to operate such websites: Iowa (*see* <http://www.iowasexoffenders.com/>); Maine (*see* <http://www4.informe.org/sor/>); New Hampshire (*see* <http://www.state.nh.us/safety/nhsp/>); Ohio (*see* <http://www.drc.state.oh.us/search2.htm>); and Oklahoma (*see* [http://docapp8.doc.state.ok.us/servlet/page?\\_pageid=190&\\_dad=portal30&\\_schema=PORTAL30](http://docapp8.doc.state.ok.us/servlet/page?_pageid=190&_dad=portal30&_schema=PORTAL30)), (all last visited January 8, 2004).

<sup>113</sup> The Michigan website offers an example of a rather minimalist one. *See* <http://www.mipsor.state.mi.us/> (last visited January 8, 2004).

terms.<sup>114</sup> This information can be obtained with respect to specific individuals and with respect to specific geographical areas.<sup>115</sup>

Aside from the Internet, states employ an array of notification tools. In California notification is conducted on the basis of calling a 900 number and CD-ROMs that are available at local police stations.<sup>116</sup> Other states require police officers to conduct notification.<sup>117</sup> Perhaps the most intrusive of all are the Louisiana notification provisions. Under the Louisiana SORNL an offender is required to give notice of the crime he has committed, his name, and address to at least one person in every residence or business within a one-mile radius in a rural area and a three square block area in an urban area.<sup>118</sup> In addition, the offender is required to publish at his expense an ad in the official journal or a newspaper, which will include the details of his crime, his name, address, and photo.<sup>119</sup> Louisiana courts may issue additional notification requirements, such as signs, handbills, bumper stickers, or labeled clothing.<sup>120</sup>

Finally, one should note that states differ as to whether an individual risk assessment aimed towards determining the risk that a specific sex offender might re-offend should be conducted prior to notification. Some states, such as New Jersey, Massachusetts and New York, chose to conduct such assessments.<sup>121</sup> In Massachusetts, this program includes a special board that evaluates the offender and categorizes him into one of three risk groups. Based on this risk assessment different levels of notification are conducted.<sup>122</sup> At the same time, other states, such as Alaska, Connecticut and Oklahoma,

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<sup>114</sup> The New Jersey website offers such information. *See* [http://www.njsp.org/info/reg\\_sexoffend.html](http://www.njsp.org/info/reg_sexoffend.html) (last visited January 8, 2004).

<sup>115</sup> *See, e.g.*, the Michigan website, *supra* note 113.

<sup>116</sup> CAL. PENAL CODE §§ 290.4(3), (4).

<sup>117</sup> For example, the Alabama SORNL provides that the chief of police or the sheriff will notify the presence of a sex offender to all persons living within 1,000ft. (in cities), 1,500ft. (in towns), and 2,00ft. (in rural areas) of the residence of the sex offender. *See* ALA. CODE § 15-20-25(a).

<sup>118</sup> LA. REV. STAT. § 542B(1)(a). Subsection (b) continues and requires the offender to notify the superintendent of the school district in which he resides, and subsection (c) requires him to notify the lessor, landlord, or owner of the property in which he resides.

<sup>119</sup> LA. REV. STAT. § 542B(2)(a).

<sup>120</sup> LA. REV. STAT. § 542B(3).

<sup>121</sup> *See* N.J. STAT § 2C:7-8 (instructing the Attorney General to issue guidelines that will enable individual risk assessment); MASS. STAT. § 178K (establishing a board responsible for risk assessment); N.Y. CODE § 168-1 (same).

<sup>122</sup> MASS. STAT. § 178K(2). More specifically, in case of level one (low risk) offenders the law requires notification of law enforcement agencies and prohibits public notification (MASS. STAT. § 178K(2)(a)). With respect to level two (moderate risk) offenders the law requires that the information be disseminated to law enforcement agencies and that this information be accessible to the public (MASS. STAT. § 178K(2)(b)). Finally, with respect to level three (high-risk) offenders the law requires that the police shall actively disseminate the information regarding these offenders to the public (MASS. STAT. § 178K(2)(c)).

do not conduct individualized risk assessments, and use past convictions as the sole criteria for notification.<sup>123</sup>

## 2. The Preventative Approach Towards SORNLS

The main political force driving the enactment of SORNLS was the fear from released sex offenders, and the assumption that they will assist in preventing future sex crimes.<sup>124</sup> The logic of adopting these laws was that sex offenders have exceptionally high recidivism rates, and that once members of communities know of the presence of a sex offender they will be able to protect themselves. This line of thought is problematic for two reasons. First, the assumption of high recidivism rates, as a general phenomenon among all sex offenders, is questionable. Second, even if this assumption is valid, SORNLS supply a poor tool for communities to protect themselves.

Legislatures enacting SORNLS often refer to “exceptionally high” recidivism rates of sex offenders as a reason for their adoption.<sup>125</sup> This has also been an underlying assumption in much of the scholarly work on SORNLS,<sup>126</sup> and reflects the attitude of the general public.<sup>127</sup> Yet a close examination of the studies conducted with respect to sex offenders’ recidivism rates reveals a picture that is more complicated than these unquestioned assumptions. Several reviews of the empirical literature have pointed out that interpreting the recidivism data is a complicated task, and that at least according to

<sup>123</sup> OKLA. STAT. §§ 581-589; CONN. STAT. §§ 54-250–54-261; ALASKA STAT. §§ 12.63.010 - 12.63.100.

<sup>124</sup> See, e.g., Filler, *supra* note 44 at 329-46; Daniel L. Feldman, *The “Scarlet Letter Laws” of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081, 1101-1109 (1997).

<sup>125</sup> See Filler, *id.* at 335-8 (reviewing statistical claims made by legislatures at the time of the enactment of SORNLS). Several legislatures have mentioned high recidivism rates as part of the legislative findings underlying the legislation. See, e.g., ALA. CODE § 15-20-20.1 (“The Legislature finds that the danger of recidivism posed by criminal sex offenders and that the protection of the public from these offenders is a paramount concern or interest to government”); ARK. CODE § 12-12-902 (“The General Assembly finds that sex offenders pose a high risk of re-offending after release from custody”); IDAHO CODE § 18-8302 (“The legislature finds that sexual offenders present a significant risk of reoffense”); NEB. STAT. § 29-4002 (“The Legislature finds that sex offenders present a high risk to commit repeat offenses”).

<sup>126</sup> See, e.g., David S. DeMatto, *Welcome to Anytown U.S.A. – Home of Beautiful Scenery (and Convicted Sex Offender): Sex Offender Registration and Notification Laws in E.B. v. Verniero*, 43 VILL. L. REV. 581, 581, (1998) (stating “[o]ne of the most vexing aspects of sexual predation is the high recidivism rate, especially among sex offenders who target and victimize children”); Houston, *supra* note 36 at 731 (noting that “sex offenders have the highest rates of recidivism of any group of criminals”).

<sup>127</sup> See, e.g., Leonore M. J. Simon, *An Examination of the Assumptions of Specialization, Mental Disorder, and Dangerousness in Sex Offenders*, 18 BEHAV. SCI. & L. 275, 300 (2000) (noting that “[t]he public shares the sentiment of the legislature and fears the repeat sex offender who is incapable of rehabilitation”); Bedarf, *supra* note 53 at 898 (citing a Canadian study indicating public perceptions of high recidivism rates among sex offenders as a group). Similar attitudes rise out of advocacy groups promoting SORNLS. As the website of Klasskids, a foundation dedicated to stopping crimes against children, put it “[s]ex offenders pose a high risk of re-offending after release from custody”. See <http://www.klaaskids.org/pg-legmeg.htm> (last visited Jan. 8, 2004).

some studies sex offenders actually have lower recidivism rates than other groups of offenders.<sup>128</sup> Recently, a Bureau of Justice Statistics study showed that sex offenders generally have a lower rate of re-arrest than other violent offenders, but they do have a substantially higher chance to be re-arrested for a new violent sex offense.<sup>129</sup> These studies raise the question, why should we develop comprehensive registration and notification regimes towards sex offenders when we do not create such a regime for murderers, thieves, and drug dealers?<sup>130</sup>

Nevertheless, pointing out that we might want to adopt similar laws that will apply to other types of criminals, does not demonstrate that we should not adopt such a scheme with respect to sex offenders. A more serious problem of SORNLS is that even if sex offenders do represent a more significant risk when compared to other offenders, SORNLS are simply a problematic crime prevention tool. In the few studies conducted to evaluate the effectiveness of SORNLS researchers could find no statistically significant difference in recidivism rates between offenders who were subjected to notification and those who were not.<sup>131</sup> A study evaluating the prevention potential of the Massachusetts SORNLS,<sup>132</sup> which knowingly made unrealistically optimistic assumptions,<sup>133</sup> found that out of 136 serious sex offenders that were incarcerated only 6 had a good or poor to moderate probability of being notified to their victims (or guardian) before hand.<sup>134</sup> Thus, this study provides an indication of the limited preventative value of SORNLS.<sup>135</sup>

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<sup>128</sup> See, e.g., Bedarf, *id.* at 893-98 (reviewing data regarding recidivism rates and concluding that recidivism “is not as a significant of a problem as [some] claim”); Small, *supra* note 8 at 1456-8 (reviewing and analyzing sex offenders’ recidivism rates); Simon, *supra* note 127 at 301 (noting that “[w]hat is clear is that there is no empirical evidence that predictions of future sex offenses based on convictions for past ones are accurate”). See also Lisa C. Trivits & N. Dickon Reppucci, *Application of Megan’s Law to Juveniles*, 57 AM. PSYCHOLOGIST 690, 698-700 (2002) (reviewing the literature regarding sex offender recidivism rates and emphasizing that juvenile sex offenders have significantly lower recidivism rates).

<sup>129</sup> Lawrence A. Greenfeld, *Sixty Percent of Convicted Sex Offenders Are on Parole or Probation*, Bureau of Justice Statistics News Release, Feb. 2, 1997, available at 1997 WL 53093 (D.O.J.).

<sup>130</sup> Registration statutes that applied to more general categories of criminals date back to the 1930s. See Note, *Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. PA. L. REV. 60, 61-4 (1954); Note, *Criminal Registration Law*, 27 J. CRIM. L. & CRIMINOLOGY 295 (1936-1937).

<sup>131</sup> See Logan, *supra* note 44 at 1337 (citing two unpublished studies). See also Simon, *supra* note 127 at 300 (noting that “there is no empirical evidence that sexual offender registration laws achieve their intended aims”); Trivits & Reppucci, *supra* note 128 at 695 (noting that “there is currently no evidence that the registration and notification statutes have protected children in the community”).

<sup>132</sup> Anthony J. Petrosino & Carolyn Petrosino, *The Public Safety Potential of Megan’s Law in Massachusetts: An Assessment From a Sample of Criminal Sexual Psychopaths*, 45 CRIME & DELINQUENCY 140, (1999).

<sup>133</sup> Petrosino and Petrosino chose for their study only sex offenders who were actually incarcerated. In addition, they assumed perfect compliance with the law, perfect notification by the police, and error-free risk assessment of offenders. Finally, their study focused on sexual psychopaths, rather than felony sex offenders, again most likely overstating the power of the Massachusetts SORNLS. See *Id.* at 145-7.

<sup>134</sup> *Id.* at 150.

Evaluating the way in which SORNLS work demonstrates the difficulties they have in preventing crimes. First, SORNLS depend on sex offenders for information. Given the limited resources that are devoted to verifying registration, and the lack of a central identification system in the United States, it is quite simple for offenders to slip through the cracks of the registration system by not registering. A recent survey conducted by Parents for Megan's Law, a non-profit advocacy organization, found that on average states are unable to account for 24 percent of the sex offenders that are suppose to be listed.<sup>136</sup> In the state of California alone 33,000 offenders are unaccounted for.<sup>137</sup> Furthermore, it would seem reasonable to assume that sex offenders that are engaged in re-offending are disproportionately represented within this group, since other things equal, they have a higher motivation to avoid registration. Thus, states are actually putting efforts into compiling information on those sex offenders who pose a lower risk.

Second, public notification might exacerbate the problem of registration avoidance since the nonlegal sanctions that are triggered by it give offenders a strong incentive not to register.<sup>138</sup> In other words, offenders that would willfully register if their information would only be used for investigative purposes, refuse to register once they realize that the information will be widely disseminated. Thus, public notification might reduce the amount of information law enforcement agencies hold with respect to sex offenders.

Finally, SORNLS do nothing to prevent offenders from traveling to a close by neighborhood, where they are unknown, and committing their crimes there.<sup>139</sup> This issue was not over looked by legislatures during the enactment of these laws. For example, in the debate in the New York assembly over that state's SORNLS one of the assemblymen noted that "[a]ll any pervert has to do who lives on my street is hop on the subway and in five minutes he is in another community where there are children who are going to the store for milk or going to school."<sup>140</sup>

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<sup>135</sup> *Id.* at 154 (concluding that the Massachusetts SORNLS has a limited ability to prevent stranger-predatory sex crimes).

<sup>136</sup> Kim Curtis, *Sex-Offender Registries Flawed Across Nation; Non-Profit Group Estimates that up-to-date Address Lacking for 1 in 4 People who should Appear on List*, AKRON BEACON J. (OHIO), Feb. 7, 2003, at 7. See also Houston, *supra* note 36 at 733 (pointing out claims that only fifty percent of sex offenders have in fact registered).

<sup>137</sup> Curtis, *Id.*

<sup>138</sup> Dugan, *supra* note 93 at 635 (noting that "sex offenders hear about the harassment and decide they would rather not register, despite the risk of getting caught, rather than be harassed by the public"); Bedarf, *supra* note 53 at 909 (noting that "harassment is likely to drive a sex offender to... fail to comply with his community notification duties").

<sup>139</sup> Robert E. Freeman-Longo, *Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV CONFINEMENT 303, 317 (1997) (noting that "[t]here is nothing to stop the sexual abuser who want to molest children or rape women from going into neighboring communities, where he or she is not known, to select a victim").

<sup>140</sup> Filler, *supra* note 44 at 345 (quoting New York assemblyman Sullivan).



In sum, this subsection has demonstrated that despite the fact that SORNLS and their public notification provisions aim to prevent future crimes, their ability to do so is questionable. In fact, given their limited value, voices calling to shift resources from these programs to other social programs are beginning to emerge.<sup>141</sup> In the next subsection I will turn to develop an alternative approach towards SORNLS.

### 3. A Punitive Approach Towards SORNLS

Thus far we have seen that it is unclear whether the preventative value of SORNLS justifies the amount of resources devoted to them. Nevertheless, these laws can fulfill an additional function, namely, to punish sex offenders by inducing nonlegal sanctions. In order to demonstrate the punitive nature of SORNLS I will review the nonlegal sanctions that are triggered by them, and argue that these sanctions are punitive and not preventative, since they are mainly driven by a preference for reciprocity and by a norm of sanctioning sex offenders.

According to the preventative approach towards SORNLS, the nonlegal sanctions induced by these laws can mainly be seen as preventative measures taken by members of society, who wish to minimize the risk associated with living in proximity to sex offenders. Undoubtedly, SORNLS do cause sex offenders to suffer from such nonlegal sanctions. SORNLS have, for instance, caused offenders to lose income opportunities that involve close work with potential victims.<sup>142</sup> Nevertheless, a closer look at the sanctions that are incurred by sex offenders as a result of SORNLS demonstrates that these sanctions are not merely preventative.

First, one can see that sanctions are applied to sex offenders by individuals who agree to do so because they wish to avoid nonlegal sanctions, which are applied to those who refuse to sanction offenders. For example, employers have terminated sex offenders' employment because they were concerned from the reactions of their customers if they would have continued to employ offenders.<sup>143</sup> This kind of behavior is in line with

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<sup>141</sup> See, e.g., Editorial, *Megan's Law: Good Intentions, Impossible Task*, J. & COURIER, Feb. 12, 2003, at 7 (arguing that funds spent on the implementation of SORNLS "could be spent on improved day care for children of poor working parents. It's money that could be spent in the nation's classrooms. It's money that could go toward after-school programs for latchkey kids").

<sup>142</sup> See, e.g., Feldman, *supra* note 124 at 1106 (noting that in California registration and notification managed to detect sex offenders working in positions that might place potential victims at risk).

<sup>143</sup> See Brian D. Gallagher, *Now that We Know Where they are, What Do We Do With them?: The Placement of Sex Offenders in the Age of Megan's Laws*, 7 WIDENER J. PUB. L. 39, 53 (1997) (reporting of a case in which a business rescinded a job offer to released sex offender due to negative public reaction); *Doe v. Pataki*, 940 F.Supp. 603, 610 (S.D.N.Y. 1998) (describing an incident in which a gas station that employed a sex offender was boycotted); Brief of the Office of the Public Defender of the State of New Jersey et al. as Amici Curiae in Support of Respondents at 9, *Smith v. Doe* 538 U.S. 84 (2003) (No. 01-729) [hereinafter: New Jersey Public Defender Amici Brief] (reporting that an offender was refused a job because of publicity concerns of the hiring company) and 17-8 (describing a case in which after the offender's employer acknowledged that "He [the offender] has demonstrated outstanding performance. He has shown his ability to be an excellent worker and I find him to be a highly respected person in our

nonlegal sanctions that are driven by a sanctioning norm, which is enforced by a secondary set of nonlegal sanctions.

An additional characteristic of the nonlegal sanctions generated by SORNLS, which indicates that these sanctions are punitive, is that in a significant amount of cases the sanctions are directed against the family members of the offenders.<sup>144</sup> For example, in a research conducted in Wisconsin two thirds of the offenders reported some kind of negative effects on the lives of their family members.<sup>145</sup> It is difficult to see how ridiculing a son of an offender to the point he chooses to leave his school's football team can be categorized as a preventative measure.<sup>146</sup> Rather, these cases indicate that the sanctioning of sex offenders has become a focal point for a sanctioning norm in those communities.<sup>147</sup> Since norm driven nonlegal sanctions are based on the willingness to engage in costly acts, publicly sanctioning the children of sex offenders can serve just as good a signal as sanctioning the offenders themselves.<sup>148</sup>

A third characteristic of the sanctions that are applied to sex offenders is that they are arbitrary, singeling out specific individuals for no apparent reason.<sup>149</sup> This picture is

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company" the employer nevertheless terminated the offender's employment due to public pressure). Other examples include community members who simply fear to voice opposition to public reactions towards sex offenders. In Texas a resident who voiced an opinion against the local notification policies refused to identify himself to the media out of fear of retaliation. See Tracey-Lynn Claough, *Neighbors Warned About Sex Offender*, DALLAS MORNING NEWS, May 24, 1996, at A1.

<sup>144</sup> See, e.g., *Pataki*, 940 F. Supp. at 609 (noting a case in which members of the family of a sex offender were harassed); Small, *supra* note 8 at 1466 (reporting of a case in which the offenders' sister in law and her children were harassed and even shot at).

<sup>145</sup> Richard Z. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminal or Exactng Further Vengeance?*, 18 BEHAV. SCI. & L. 375, 383 (2000). It should be noted that this number overstates the number of nonlegal sanctions that are aimed towards family members since it includes cases in which family members saw themselves hurt solely by the publication of the offenders' name. See also THE NAT'L CRIM. JUST. ASS'N, SEX OFFENDER REGISTRATION AND NOTIFICATION: PROBLEM AVOIDANCE & BARRIERS TO IMPLEMENTATION, & SEX OFFENDER REGISTRATION & NOTIFICATION COSTS SURVEY RESULTS 32 (1999) [hereinafter: NAT'L CRIM. JUST. ASS'N STUDY] (pointing out that children of offenders are being harassed).

<sup>146</sup> Zevitz & Farkas, *id.*

<sup>147</sup> See Posner, *supra* note 3 at 93 (pointing out that norm based nonlegal sanctions might target relatives of wrongdoers).

<sup>148</sup> To be sure, the sanctioning of the children of sex offenders can also be explained on a rather crude theory of reciprocity. Since inflicting harm to the children of an offender will cause psychic harm to the offender himself, one can view these sanctions as a way to sanction the offender himself.

<sup>149</sup> Richard G. Zevitz & Marry Ann Farkas, *Sex offender Community Notification: Assessing the Impact in Wisconsin*, National Institute of Justice - Research in Brief at 9 (2000) (available at <http://www.ojp.usdoj.gov/nij>). See also Scott Matson & Roxanna Lieb, *Community Notification in Washington State: 1996 Survey of Law Enforcement* (1996) (available at <http://www.wa.gov/wsipp/crime/cprot.html>) (pointing out that communities can be unpredictable in their reactions towards sex offenders).

consistent with nonlegal sanctions that are driven by a sanctioning norm, and not with preventative nonlegal sanctions. As we have seen, sanctioning norms will tend to emerge around focal points of a signaling equilibrium, and these focal points might be determined arbitrarily. On the other hand, one would expect preventative nonlegal sanctions based on a rational thought process to be applied in an apparently logical fashion.

Another repeat theme in the description of the sanctions that target sex offenders is that they are conducted by groups rather than by individuals,<sup>150</sup> and reflect a “lynch-mob attitude”.<sup>151</sup> Group based nonlegal sanctions are an indicator that signaling behavior is at hand. They demonstrate that participation in sanctioning offenders is driven by a need to conform to the norms of the group applying the sanctions, and not by a personal decision aimed at protecting the individual from future harms.<sup>152</sup>

Finally, it should be noted that the acts of violent vigilantism suffered by sex offenders are consistent with punitive, rather than preventative nonlegal sanctions. Since the adoption of SORNs sex offenders have been subjected to acts such as threats,<sup>153</sup> vandalism of their property,<sup>154</sup> physical assaults,<sup>155</sup> and gunshots fired at their houses.<sup>156</sup>

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<sup>150</sup> For example, in one reported case a Wisconsin 60 year old man in a wheelchair was driven out of his house by a demonstration with 100 participants (this was only one of the eight times he was forced to move). See Mary Zahn, *Watching the Offenders*, MILWAUKEE J. SENTINEL, March 29, 1998, at 1; Gallagher, *supra* note 143 at 53 (reporting that community members held a rally to protest the release of a sex offender); New Jersey Public Defender Amici Brief, *supra* note 143 at 8 (reporting on a demonstration with 250 participants near a house of an offender). This reality is true out of the United States as well. See Dugan, *id.* (describing reactions in England).

<sup>151</sup> Amy L. Van Duyn, Note, *The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions In Sex Offender Statutes*, 47 DRAKE L. REV. 635, 650 (1999); Dugan, *supra* note 93 at 618.

<sup>152</sup> Posner, *supra* note 3 at 93 (noting that “[t]he reason people join mobs is that it is better to be a member of a mob than its target”).

<sup>153</sup> Small, *supra* note 8 at 1466 (reporting on death threats made against the sister in law of an offender); New Jersey Public Defender Amici Brief, *supra* note 143 at 8 (reporting that offender received letter spelled out of newspaper cuttings saying “We’ll be watching you asshole”), 9 (reporting that offender was yelled at “Stop fucking little girls. I’m going to kill you” and later was attacked by a man wearing a ski mask and carrying a gun that who told him “If you don’t get out of this neighborhood I’m going to kill you”), and 11-2 (reporting on several incidents of threats that were made to offenders).

<sup>154</sup> See, e.g., Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey’s Megan’s Law*, 3 J. L. & POLY 569, 579 (1995) (reporting on the case of Joseph Gallardo, a Washington sex offender whose house was burned down); Zevitz & Farkas, *supra* note 145 at 383 (describing a case in which the car of the offender was vandalized); Small, *supra* note 8 at 1466 (same); New Jersey Public Defender Amici Brief, *id.* at 12 (describing a series of such incidents including placing human feces on the steps of offender’s home, slashing the tires of offender’s car and destroying offender’s mailboxes).

<sup>155</sup> *Pataki*, 940 F.Supp. at 610 (describing an incident in which an offender was punched in the face); New Jersey Public Defender Amici Brief, *id.* at 9 (describing an incident in which two men broke into the offenders’ residence and attacked a man they mistook for him) and 10-11 (describing an incident in which an offender was struck with a crowbar).

Despite the fact that these acts are relatively rare,<sup>157</sup> they are still a significant sanction from the perspective of potential offenders, since they are very large in those cases in which they are applied.

In sum, the picture arising from the different characteristics of the nonlegal sanctions that are generated by SORNLS is of a social process, which is well beyond communities taking precautionary steps. This conclusion is also supported by the only available systematic study of the nonlegal sanctions incurred by sex offenders as a result of SORNLS. This study reported that 83 percent of offenders were excluded from their place of residence,<sup>158</sup> and over 50 percent were terminated from their place of employment.<sup>159</sup> These large numbers seem to reflect a general sanctioning norm that sex offenders are subject to.

Having argued that SORNLS should be viewed as a punitive tool, the question that remains to be addressed is should they be used as such a tool. Though one cannot offer a definitive answer to this question, one can point out several characteristics of SORNLS that might make them an effective sanction generating tool. SORNLS single out sex offenders as a distinct class of criminals that is subjected to special legal treatment. This is of importance, since in order for a norm of inflicting nonlegal sanctions to emerge, there needs to exist a focal point around which this norm will be formed. The law can create such a focal point since it enjoys moral power and tends to focus public attention.<sup>160</sup> By singling out sex offenders, SORNLS have created a focal point for a signalling equilibrium, in which a norm of sanctioning sex offenders can emerge.

An additional reason policymakers should use shame sanctions only with respect to a limited group of criminals is that the cost of inducing these sanctions will rise as their use becomes common. The explanation for this can be found in the theoretical analysis of nonlegal sanctions presented above. With respect to preference driven nonlegal sanctions, the conventional assumption of marginally decreasing utility points out that over time people will derive less pleasure from sanctioning, and will therefore engage in less of it. As to norm based nonlegal sanctions, since these sanctions are based on signaling, individuals might stop sanctioning once they manage to send a credible signal as to their type.

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<sup>156</sup> Robert Hanley, *Neighbor Admits Firing Gun Into Home of Paroled Rapist*, N.Y. TIMES, Nov. 10, 1998, at 10B (reporting on the case of a shooting at the house of a sex offender in Linden New Jersey); New Jersey Public Defender Amici Brief, *id.* at 8 (describing a shooting incident).

<sup>157</sup> See Zevitz & Farkas, *supra* note 145 at 381 (reporting that in only three percent of the cases did sex offenders report acts of vigilantism); Matson & Lieb, *supra* note 149 at 15 (reporting that 3.5 percent of offenders report cases of harassment).

<sup>158</sup> Zevitz & Farkas, *id.*

<sup>159</sup> *Id.*

<sup>160</sup> For an analysis of the ability of the law to create focal points *see generally* Richard McAdams, *A Third Model of Legal Compliance, Testing for Expressive Effects in Hawk/Dove Games* (2003) (unpublished manuscript on file with author).

Finally, singling out sex crimes is desirable for several reasons. First, from the perspective of offenders, sex is an ideal context to inflict suffering through shame. Psychologically, we are inclined to be shameful of issues that relate to our sexual activity, especially when this activity is considered deviant.<sup>161</sup> This unique characteristic of sex points out that sex offenders will suffer from a substantial *internal* nonlegal sanction when their acts are publicly exposed. Second, from the perspective of the sanctioning public, there exists a cross-cultural consensus over the shameful nature of sex crimes.<sup>162</sup> Despite some potential disagreements as to what constitutes a sex crime,<sup>163</sup> it would seem that this consensus carries on to American society.<sup>164</sup> Even among criminals, sex offenders are considered to be worthy of sanctioning and shaming.<sup>165</sup> This characteristic of sex assures us that the public will unite under the sex offender banner, and inflict *external* nonlegal sanctions to sex offenders. It is for this reason that in England during the days of the pillory this sanction was mainly used to punish sexually oriented crimes.<sup>166</sup> Thus, unlike the arguments presented by some commentators,<sup>167</sup> basing the sanctioning of sex offenders on nonlegal sanctions has significant advantages.

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<sup>161</sup> See Whitman, *supra* note 6 1064-5 and sources cited there (1998) (describing the connection between shame and sex).

<sup>162</sup> See James T. Tedeschi & Richard B Felson, VIOLENCE, AGGRESSION, AND COERCIVE ACTIONS 334 (1994) (pointing out that rape was one of the three most heavily punished crimes in all societies in a survey of 110 societies).

<sup>163</sup> A clear exception to this is the attitude of Americans towards sodomy laws and homosexual acts. As was evident from the public reactions to the recent ruling of the Supreme Court in *Lawrence v. Texas* 123 S.Ct. 2472 (U.S. 2003) which held sodomy laws unconstitutional, there are groups in America that believe that homosexual acts should be criminalized and those who commit them should be shamed, while others believe that such acts should be legal and there is no shame in committing them.

<sup>164</sup> See, e.g., Kunz, *supra* note 36 at 454 (“Few crimes spark as strong or distinctive an aversion as sexual offenses against children”); Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. & CRIMINOLOGY 1167, 1167 (1999) (“Sex offenders are the scourge of modern America”); Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 PSYCHOL. PUB. POL’Y & L. 505, 506 (1998) (“perhaps more than any other group, sex offenders are the pariahs of our society. They deserve this treatment and worse, most people think, and this social consensus is reflected in our present legal rules and practices”); Alison Virag Greissman, Note, *The Fate of “Megan’s Law” in New York*, 18 CARDOZO L. REV. 181, 181 (1996) (“Sexual crimes disgust, anger, and frighten Americans in a way that no other human act does”).

<sup>165</sup> See, e.g., Rob Tripp, *The Bernardo Trial: Fellow Inmates Despise Homolka*, OTTAWA CITIZEN, July 11, 1995, at A3 (“[t]here is an unwritten code that regards sex offenders and child abusers lowest on the prison pecking order”); *The Supreme Court, 2002 Term Leading Cases*, 117 HARV. L. REV. 327, 339 (2003) (“Within the hierarchy of prisons, moreover, sex offenders in general - and child molesters in particular - are considered the lowest of the low”); Gallagher, *supra* note 143 at 63 (quoting a prison inmate describing the harsh treatment child molesters are subjected to in prison).

<sup>166</sup> See Beattie, *supra* note 51 at 464-65. Furthermore, even as the use of the pillory diminished its main use continued to be for sex offenders. Beattie, *id.* at 615 (noting that three out of the five crimes that were punished by the pillory were of a sexual nature).

In sum, this subsection demonstrated that SORNLS are in fact punitive and that using them in order to sanction sex offenders might be a sensible policy. Nonetheless, given the limited information we currently hold regarding the actual effects created by SORNLS, this conclusion is tentative in nature. I now turn to evaluate some of the potential problems using SORNLS as punishment might cause.

#### 4. SORNLS, Stigmas, and Marginal Deterrence

In the general discussion above I argued that sanctioning regimes based on nonlegal sanctions run the risk of raising the crime rate of the criminals that will be subjected to these sanctions.<sup>168</sup> This argument was based both on psychological aspects of stereotypes and stigmas, and on economic aspects of marginal deterrence. In this subsection I shall demonstrate that SORNLS might in fact create such a problem.

There are two reasons to suspect that SORNLS might trigger the psychological process associated with stereotypes and stigmas.<sup>169</sup> First, SORNLS constantly remind offenders of their social status and expected behavior. As one offender put it, ‘It’s hard to, in a manner of speaking, to move on and try to put things behind when you’re constantly reminded by the rules that you are a sex offender and the rules more or less make you feel like it just happened yesterday....The rules don’t let you have a normal life and the rules are a constant reminder that you’re not a normal person.’<sup>170</sup> This state of mind may exacerbate the self-fulfilling aspects of stigmas.<sup>171</sup> Second, SORNLS might cause sex offenders the mental processes that trigger self-fulfilling behavior by lowering their expectation with respect to their own performance,<sup>172</sup> and by creating stress and anxiety.<sup>173</sup>

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<sup>167</sup> See, e.g., Whitman, *supra* note 6 at 1092 (opposing the use of shame sanctions in the context of sex crimes); Bedarf, *supra* note 53 at 912 (arguing that “in the context of sex offenses, where the community’s reaction is highly emotional, and sometimes violent, shaming is inappropriate”).

<sup>168</sup> See *supra* notes 54-67 at accompanying text.

<sup>169</sup> To be sure, it should be noted that to this day the stereotype threat literature has not evaluated whether the stereotypes associated with sex offenders trigger this effect. This is not surprising given the methodological problems of conducting experiments aimed at testing such a hypothesis and the fact that this is a young and emerging line of literature. Nevertheless, the studies of stereotype threat do point out that the mechanism described within them could be applied to any group. See, e.g., Wheeler & Petty, *supra* note 58 at 804 (noting that “a member of any group targeted by negative stereotypes can show stereotype threat effects in the domains relevant to the stereotype”); and Steele, *supra* note 58 at 617 (stating that stereotype threat “affects the members of any group about whom there exists some generally known negative stereotype”).

<sup>170</sup> Zevitz & Faraks, *supra* note 145 at 385.

<sup>171</sup> See Steele & Aronson, *supra* note 58 at 806-8.

<sup>172</sup> See, e.g., Winick, *supra* note 164 at 557 (noting that SORNLS produce “the feeling that improvement or change is hopeless”); Bedarf, *supra* note 53 at 911 n151 (quoting an offender stating that “I got the feeling no one cares about me, so why should I care about myself and what I do?”).

<sup>173</sup> As one sex offender explained “...Well, there is no more pressure than being exploited by media, the people you work with, the people you live with, relatives, and so the pressure is constantly there. And

Turning to the economic perspective, SORNLS seem to create a problem of marginal deterrence, since in many cases they deprive offenders of the opportunity to regain any new social capital. Although SORNLS do not attach a physical mark to sex offenders, as did branding punishments in eighteenth century England or scarlet letter punishments in colonial times, they come as close as possible to such a scheme. SORNLS attach specific information to sex offenders in a way that this information becomes a part of their identity. This information causes detrimental consequences, including loss of housing, disruption of personal relationships, and loss of employment.<sup>174</sup> Thus, sex offenders who are subject to SORNLS find themselves with little to no social capital, and therefore the future nonlegal sanctions of these individuals are eliminated. In fact, it has been reported that some offenders have chosen to return to prison since that is their only housing option.<sup>175</sup> At the extreme, SORNLS could even bring sex offenders to situations in which they literally have nothing to lose. This can be seen in several cases in which offenders committed suicide as a direct result of notification.<sup>176</sup> These cases reflect a potential breakdown of a system of deterrence, since there is perhaps no threat that the law can use in order to deter individuals who are willing to commit suicide.<sup>177</sup>

On the other hand, it should be noted that the registration aspects of SORNLS might have an advantage from a deterrence perspective. A unified database that is at the disposal of law enforcement agencies might raise the probability of detection for past offenders. This would especially be the case in those jurisdictions that require sex offenders as part of their registration scheme to submit DNA samples.<sup>178</sup> Thus, SORNLS might raise the expected sanction facing past offenders, and could therefore deter them from committing future crimes.

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because they're [sex offenders] miserable, then that would put them in that cycle to recommit the offense". Zevitz & Faraks, *supra* note 145 at 388.

<sup>174</sup> See *supra* Section III 3.

<sup>175</sup> Zevitz & Faraks, *supra* note 145 at 382.

<sup>176</sup> See, e.g., AP, *Suicide Is Recalled as Maine Revisits Megan's Law, Released Sex Offender Shot Himself After Neighborhood Notification*, WASH. POST, Feb. 17, 1998, at A2 (reporting on an offender committing suicide just two days after notification); Todd S. Purdum, *Suicide Tied to Megan's Law*, N.Y. TIMES, July 9, 1998 at A16 (reporting about two separate incidents of offenders committing suicide after notification); New Jersey Public Defender Amici Brief, *supra* note 143 at 22-3 (describing numerous incidents of offenders committing suicide as a result of notification).

It should be noted that the problem of individuals that are subjected to shaming sanctions and are driven to suicide is not unique to American culture or to the context of SORNLS. See e.g., Braithwaite, *supra* note 66 at 138 (noting that cases of suicide due to corporate malpractice are common in Japan); J. Beattie, OTHER CULTURES 176 (1964) (relying on work of others to report that shame caused suicide among Tobriand Islanders); Persons, *supra* note 9 at 1527 (reporting on a case of a patron of a prostitute who committed suicide after his name was published in a newspaper as part of a shaming scheme).

<sup>177</sup> See Alan M. Dershowitz, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 29 (2002) (pointing out that in the context of suicide bombers "the usual deterrent strategy of threatening death to the perpetrator will not work").

<sup>178</sup> As of 2003 29 states collected DNA samples from sex offenders. See Terry & Furlong, SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION (2<sup>nd</sup> ed., 2003) III-3-III4.

## 5. Plea Bargaining in the Shadow of SORNLS

In this subsection I turn to evaluate the effects of SORNLS on plea bargaining.<sup>179</sup> The two main predictions of the theoretical framework developed above with respect to plea agreements were that mandatory registration will cause defendants to reject plea offers and opt for trials, and that this position will cause defendants and prosecutors to circumvent SORNLS by pleading defendants to offenses that do not trigger registration.<sup>180</sup> Regretfully, since the enactment of modern day SORNLS no empirical studies have been conducted to evaluate their effects on plea bargain negotiations. Thus, the main evidence presented here will be anecdotal. Nevertheless, this evidence as a whole does present persuasive indications for the validity of the model.

Several indications point out that defendants withdrew from plea agreements upon learning of the registration requirement that will be triggered by a conviction.<sup>181</sup> First, a significant amount of litigation has been dedicated to the question whether defendants may withdraw a plea for that reason.<sup>182</sup> In addition, a similar picture arises from news reports covering sex crime cases. For example, in Maricopa County, Arizona, a defendant withdrew from a plea agreement that capped his prison sentence at three and a half years and opted for a trial that could end up in a prison sentence of over twenty-eight years, under the explicit argument that he was not aware of the registration requirement.<sup>183</sup> In another case, a defendant who was accused of having sex with a teenage girl initially agreed to plead guilty to lewd and lascivious acts with a child younger than 16,<sup>184</sup> yet after he learned of the registration requirements that he will be subjected to, he chose to

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<sup>179</sup> Generally, studies of SORNLS have overlooked their potential effects on plea bargaining behavior. For an exception see Kunz, *supra* note 36 at 476-7 (noting intuitively that SORNLS might result in fewer plea bargains and as a result in fewer sex offenders being punished).

<sup>180</sup> See *supra* Section II 4.

<sup>181</sup> It should be noted that the fact that some defendants were not aware of the registration requirements might lead to some skepticism over the deterrence power of SORNLS. After all, a prerequisite for any punishment to be an effective deterrent is knowledge of the punishment. Nevertheless, one can expect that over time the registration requirements of SORNLS will become common knowledge.

<sup>182</sup> Generally courts have been reluctant to allow such withdraws. See, e.g., *Kaiser v. State*, 641 N.W.2d 900 (Minn. 2002) (denying petition to withdraw a guilty plea); *State v. Anderson*, No. 98074637, 2001 WL 1608560 (Minn. App. Dec. 18, 2001) (same); *State v. Koenig*, 2001 WL 950044 (Minn. App. Aug. 21, 2001) (same); *Ducker v. State*, 45 S.W.3d 791, (Tex. App.-Dallas, 2001) (same); *State ex rel. Chauvin v. State*, 814 So.2d 1, (La. App. 1 Cir. 2000) (same); *People v. Clark*, 704 N.Y.S.2d 149 (N.Y.A.D. 3 Dept. 2000) (same). But see *State v. Wiita*, 744 So.2d 1232 (Fla. App. 4 Dist. 1999) (allowing defendant to withdraw guilty plea due to the potential effects the state's new SORNLS). To be sure, such withdraws do not necessarily reflect cases which ended up going to trial. In some instances it is quite possible that if a withdrawal was allowed the parties could then agree on a lower legal sanction and avoid trial.

<sup>183</sup> Susan Carroll, *Teen out of Plea Deal in Sex Case, Ex-Football Player will Face Jury Trial in Assault on Girl*, THE ARIZ. REPUBLIC, Feb. 15, 2003, at B5.

<sup>184</sup> Brett Barrouquere, *Man may Withdraw Plea of No Content in Sex Case*, SARASOTA HEARLD-TRIB, Aug. 24, 1999, at 1B.



rescind his plea and go to trial.<sup>185</sup> Finally, policymakers influencing sex offender legislation have voiced concerns regarding the tendency of offenders to reject plea agreements as a result of registration.<sup>186</sup>

As to the second prediction, namely, that prosecutors and defendants will attempt to contract around SORNs, a good place to begin the examination is California, which was the first state to adopt a sex offender registration law back in the 1940s. Evidence from California dating back to the 1960s indicates that prosecutors and defendants contracted around the registration requirements imposed by California law by using section 650½ of the California Penal Code,<sup>187</sup> which criminalized “openly outrageous public decency” and did not trigger registration. When the California Court invalidated this piece of legislation, because it found it to be vague, it acknowledged that at the time the main use of section 650½ was to allow persons accused of sex crimes to plead guilty to it so they could avoid the stigma associated with registration.<sup>188</sup> Additional evidence of this practice was pointed out by an empirical study conducted in the county of Los Angeles regarding the enforcement and administration of the sections of the California Criminal Code that regulate adult homosexual behavior.<sup>189</sup> As noted by this study, section 650½ was commonly used to deal with judicial concerns over nonlegal sanctions, such as loss of employment, that could have resulted from registration.<sup>190</sup>

Additional indications for the contracting around hypothesis can be found in media reports. The highly publicized case of Gary Wayne Jackson, a repeat sex offender from Oklahoma, who succeeded in avoiding registration by pleading to nonsexual charges, brought this practice to the attention of the Oklahoma public.<sup>191</sup> Yet Jackson’s case was not unique. According to one newspaper, during the year 2001 forty-seven cases in Tulsa County were identified as cases in which allegations of a sexual nature were

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<sup>185</sup> Brett Barrouquere, *Menard Rescinds Plea in Sex Case*, SARASOTA HEARLD-TRIB., Sept. 9, 1999, at 3B.

<sup>186</sup> As one member of Maine’s Commission to Improve Community Safety and Sex Offender Accountability noted “requiring sex offenders to register for life may make them refuse a plea agreement”. See David Hench, *Recommendation Due on Sex Offender Rules*, PORTLAND PRESS HERALD, Dec. 1, 2003, at 1A.

<sup>187</sup> CAL. PEN. CODE § 650½ (West, 1957).

<sup>188</sup> *In re Davis*, 242 Cal.App.2d 645, 666 n.21 (Cal.App. 2 Dist. 1966).

<sup>189</sup> See *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13 U.C.L.A. L. REV. 647, 771-5 (1966).

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

<sup>191</sup> Bill Braun, *Prison Not Part of Plea Proposal*, TULSA WORLD, Jan. 18, 2002 at 1. A second case that took place in the same time frame and seems to have also affected public opinion on the matter is the case of Cory B. West. West was originally charged with one count of first-degree rape and two counts of sexual battery. He eventually reached a plea agreement with prosecutors according to which he was granted a deferred sentence, which allowed the case to be dismissed with no conviction if West completes a four-year probation. See Bill Braun, *Plea Deal Nets Man no Time in Sex Case*, TULSA WORLD, Feb. 1, 2002, at 13.

pleaded down to a nonsexual charge.<sup>192</sup> A similar picture arises out of a report of a case in Georgia, in which apparently the defendant and the prosecutor cooperated in order to rescind a registration condition even though the Georgia SORNL required registration.<sup>193</sup>

In sum, we can see that there exists evidence that supports the predictions of the theoretical bargaining model. Yet aside from the direct effects on sanctioning, the plea bargaining behavior surrounding SORNLS has unique effects due to the specific context of these laws. First, this behavior might lead law enforcement agencies to have *less* information about sex offenders, since without SORNLS more sex offenders would actually be convicted of *sex* crimes. Arguably, prosecutors might develop bargaining policies that will indicate to them what the actual underlying offense pleaded out of was. For instance, prosecutors in California in the 1960s who used Section 650½ of the California Penal Code as an offense to plead out of registration requirements, were aware of the special nature of a conviction under this section.<sup>194</sup> Nevertheless, this type of policy is more indicative of the existence of a problem than it is of the fact that it can be solved. Such policies are by their very nature local. At best, in the 1960s only California prosecutors might have been aware of the special meaning of a conviction under Section 650½. Second, this behavior might have a detrimental effect on the rehabilitation of sex offenders. Rehabilitation in general requires that offenders acknowledge the acts they have committed, and atone for them as part of an educational process.<sup>195</sup> This process is of specific importance in the treatment of sex offenders,<sup>196</sup> who tend to live in denial as to the wrongfulness of their acts.<sup>197</sup> Pleading sex offenders to nonsexual crimes, however, might exacerbate the denial of sex offenders, and this, in turn, might lower the severity of

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<sup>192</sup> Bill Braun, *State Firm in Registration of Sex Offenders*, TULSA WORLD, Sept. 22, 2002, at A15. *See also* Simon, *supra* note 127 at 301 (describing the case of Richard Allen Davis, a repeat sex offender from California who managed to avoid registration by pleading to nonsexual offenses).

<sup>193</sup> Sandy Hodson, *Convict Must Join Registry for Sex Crime*, AUGUSTA CHRONICLE, Feb. 5, 2003, at A1.

<sup>194</sup> *See* E. A. Riddle, *Compulsory Registration: A Vehicle of Mercy Discarded*, 3 W. CAL. L. REV. 195, 198 n18 (1967) (quoting an interview with members of the San Diego City Attorney's staff).

<sup>195</sup> *See, e.g.*, Stephanos Bibas, *Harmonizing Substantive Criminal Law and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1390 (2003) (noting that "punishment reforms and deters in part by educating the offender and society"); Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1804-29 (1999) (presenting a theory of punishment based on atonement); R. A. Duff, TRIALS AND PUNISHMENT 254-62 (1986) (presenting a theory as to the role of penance and reconciliation within a punitive system).

<sup>196</sup> *See, e.g.*, Bibas, *id.* at 1395-6 (noting the importance of admitting wrongdoing in the treatment of sex offenders); Stefan J. Padfield, *Self-Incrimination and Acceptance of Responsibility in Prison Sex Offender Treatment Programs*, 49 U. KAN. L. REV. 487, 497-8 (2001) (noting that acceptance of responsibility is a key part in the treatment of sex offenders); Judith V. Becker, *The Science of Sex Offenders: Risk Assessment, Treatment, and Prevention*, 4 PSYCHOL. PUB. POL'Y & L. 116, 128 (1998) (noting that within the cognitive therapy approach to treating sex offenders, the most accepted method used at the time, treatment focuses on eliminating offender's denial).

<sup>197</sup> Bibas, *id.* at 1393-4 and references made in note 159.

the act in the eyes of offenders.<sup>198</sup> Hence, quite ironically, SORNLS might cause a rise in recidivism rates.<sup>199</sup>

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In conclusion, in this Section I have argued that SORNLS should be viewed as a punitive tool. Furthermore, I have argued that using SORNLS in order to sanction sex offenders might be justified on economic grounds. Nonetheless, the Section did point out some of the problems that might be associated with using SORNLS as a punitive tool.

#### IV. POLICY IMPLICATIONS

In this Section I will turn to evaluate the policy implications of the punitive approach towards SORNLS with respect to five topics: the retroactive application of SORNLS, the legal limitations on the use of SORNLS as punishment, the rights of sex offenders to a risk assessment hearing prior to public notification, the reintegration of sex offenders, and the plea bargaining behavior created by SORNLS. Generally, the discussion in this Section will focus on notification, and not the registration aspects of SORNLS. This limitation is made since the focus of this Article is on the nonlegal sanctions triggered by notification.

##### 1. The Retroactive Application of SORNLS

An area of law that has generated a substantial amount of litigation with respect to SORNLS is whether these laws violate the ex-post-facto clause of the federal constitution.<sup>200</sup> The ex-post facto clause applies to four different sets of cases.<sup>201</sup> First, laws that criminalize an act that was not previously criminal. Second, laws that make the crime greater than it originally was at the time it was committed. Third, laws that raise the punishment that was attached to the crime. And finally, laws that change the rules of evidence in a way that allows for less or different testimony than that that was required at the time the offense was committed. The argument made by sex offenders falls under the third option, effectively stating that SORNLS create an additional punishment that is inflicted retroactively to sex offenders.

The ex-post-facto doctrine aims to serve three main goals. First, it assures individuals will receive fair warning, allowing them to reasonably rely on the legal

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<sup>198</sup> NAT'L. CRIM. JUST. ASS'N STUDY, *supra* note 145 at 8.

<sup>199</sup> Bibas, *supra* note 195 at 1396-7 (pointing out that denial might result in higher recidivism rates for sex offenders).

<sup>200</sup> U.S. CONST. ART. I, § 10 ("No State shall...pass any...ex post facto law").

<sup>201</sup> The original categorization was set out in *Calder v. Bull* 3 U.S. 386, 390 (U.S. 1798). This categorization is still used both by courts (*see, e.g., Carmell v. Texas*, 529 U.S. 513, 521-22 (U.S. 2000)) and by commentators (*see, e.g., Danielle Kitson, It's an Ex-Post Facto: Supreme Court Misapplies the Ex-Post Facto Clause to Criminal Procedure Statutes*, 91 J. CRIM. L. & CRIMINOLOGY 429, 434 (2001)).

situation at the time during which they act.<sup>202</sup> Second, it acts as a check on the power of government.<sup>203</sup> More specifically, it prevents legislatures from imposing vindictive or arbitrary legislation on unpopular groups or individuals.<sup>204</sup> By doing so, it protects the separation of powers between the legislative and the judicial branches of government.<sup>205</sup> Finally, the court recently recognized an independent fairness interest in having the government abide by the rules that it created.<sup>206</sup> Given this background, I will view the ex-post-facto clause as an exogenous moral constraint on a sanctioning regime, which does not necessarily serve any economic purpose.<sup>207</sup>

Ex post facto claims regarding SORNLS have been brewing within the legal system for a significant amount of time, with courts reaching contradictory results. At the state level, several Supreme Courts reached conflicting conclusions as to the constitutionality of the retroactive provisions of their state's SORNLS.<sup>208</sup> Similarly, federal circuit courts reached conflicting outcomes on the issue.<sup>209</sup> This difference of opinion set the ground for the Supreme Court to take the matter under consideration.<sup>210</sup>

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<sup>202</sup> See, e.g., *Weaver v. Graham*, 450 U.S. 24, 28-9 (U.S. Fla. 1981); *Miller v. Florida*, 482 U.S. 423, 429-30 (U.S. Fla. 1987).

<sup>203</sup> See, e.g., *Weaver*, *id.* at 29; *Miller*, *id.*

<sup>204</sup> See *Weaver*, *id.*; *Calder* 3 U.S. at 390.

<sup>205</sup> See *Weaver*, *id.* at 29 n10; *Calder*, *id.* at 389.

<sup>206</sup> See *Carmell*, 529 U.S. at 533.

<sup>207</sup> From the view point of economic analysis, the ex-post-facto doctrine is quite puzzling. The ex-post facto doctrine applies to legislative increases in the penalty. Yet from an economic perspective the crucial point from the viewpoint of potential criminals is not the magnitude of the sanction but rather the size of the *expected* sanction. Under this analysis potential criminals rely both on the size of the sanction set out by the legislature and on the probability of detection set out by enforcement agencies. For example, when the IRS raised the rate of audits from 1 to 2 percent in 1995 (see Joel Slemrod & Jon Bakija, *TAXING OURSELVES* 152 (1<sup>st</sup> ed., 1996)) it did not raise the actual sanction inflicted to tax evaders, but it did double the expected sanction. Thus, under the economic model of crime we would expect to find a limitation on retroactive increases in the probability of detection as well. Nevertheless, the ex-post facto doctrine does not apply to such increases. Under American law the government has complete discretion to change that probability even in the extreme case in which it completely stopped enforcing a specific law. See *District of Columbia v. Thompson Co.*, 346 U.S. 100, 113-14 (U.S. 1953) (holding that “[t]he failure of the executive branch to enforce a law does not result in its modification or repeal”).

<sup>208</sup> See, e.g., *Kansas v. Meyers*, 923 P.2d 1024. (striking down the Kansas notification provision); *Olivieri v. Louisiana*, 779 So.2d 735, 749-50 (La. 2001) (upholding the Louisiana notification provision); *State v. Cook*, 83 Ohio St. 3d 404 (Ohio, 1998) (upholding the Ohio notification provision).

<sup>209</sup> See, e.g., *E.B. v. Poritz*, 119 F.3d 1077 (3d Cir. 1997) (upholding the New Jersey notification provision); *Doe I v. Otte*, 259 F.3d 979 (9th Cir. 2001) (striking down the Alaska SORNLS).

<sup>210</sup> *Otte v. Doe*, 534 U.S. 1126 (U.S. 2002) (granting cert).

In *Smith v. Doe*<sup>211</sup> the Supreme Court evaluated the constitutionality of the Alaska Sex Offender Registration Act,<sup>212</sup> which is applied to sex offenders retroactively.<sup>213</sup> The Alaska Act is not much different from SORNs of other states. It includes a detailed registration scheme,<sup>214</sup> and sets the ground for Internet based notification.<sup>215</sup> In its opinion, the Court followed its ruling in *Kansas v. Hendricks*,<sup>216</sup> according to which the key distinction is between civil regulations that do not violate the ex-post-facto clause, and punishments that do violate the clause.<sup>217</sup> To distinguish between the two the Court used a two-stage test.<sup>218</sup> If the legislature intended the legislation to be punitive, that ends the analysis, and the law is punitive and unconstitutional. If, on the other hand, the legislature did not have a punitive intent, the court must find that the actual effects of the law are so punitive that they negate any civil intent of the legislature in order to invalidate the law.

As to the first part of the *Hendricks* evaluation, the *Smith* Court found two indications to the non-punitive intent underlying the Alaska Act. First, the Alaska legislature's express comments stated a civil objective.<sup>219</sup> Second, the Alaska Act does not offer any procedural safeguards that are normally associated with the criminal process.<sup>220</sup> Given these findings, the Court reached the conclusion that "the intent of the Alaska Legislature was to create a civil, non-punitive regime."<sup>221</sup> Having reached this

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<sup>211</sup> 538 U.S. 84 (U.S. 2003).

<sup>212</sup> ALASKA STAT. §§ 12.63; 18.65.087 (hereinafter: the Alaska Act).

<sup>213</sup> *Smith*, 538 U.S. at 90.

<sup>214</sup> The Alaska Act requires all sex offenders present in Alaska to register with the department of correction (if they are incarcerated), or at an Alaska state trooper post or municipal police department (if they are not incarcerated) (ALASKA STAT. §§ 12.63.010 (a), (b)). Sex offenders must provide the state with details such as name, aliases, address, anticipated addresses, place of employment, date of birth, driver's license number, information regarding cars the sex offender might have access to, and identifying features (ALASKA STAT. § 12.63.010 (b)(1)). Furthermore, the Alaska Act requires offenders to allow authorities to photograph and fingerprint them (ALASKA STAT. § 12.63.010 (b)(2)).

<sup>215</sup> With respect to notification, the Alaska Act requires the Alaska department of public safety to create a central registry of sex offenders (ALASKA STAT. § 18.65.087 (a)). The registry makes available to the public information such as the offender's name, aliases, address, photograph, description, car information, and conviction information (ALASKA STAT. § 18.65.087 (b)). Alaska chose to use the Internet as the means by which this information is disseminated to the public (*see* <http://www.dps.state.ak.us/nSorcr/asp/>).

<sup>216</sup> 521 U.S. 346 (U.S. 1997).

<sup>217</sup> *Smith*, 538 U.S. at 92.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 93.

<sup>220</sup> *Id.* at 96.

<sup>221</sup> *Id.* In addition the Court dealt with two possible objections to its conclusion. First, the Court dealt with the fact that the part of the act dealing with registration was codified within the Alaska Criminal Procedure

conclusion, the Court turned to evaluate whether the actual effects of the Alaska Act may negate the legislatures' intent. In its effect analysis the Court employed five of the seven *Mendoza-Martinez* factors that it found most relevant to the issue.<sup>222</sup> The Court distinguished the Alaska Act from historical shaming sanctions by pointing out that the program created by it does not display offenders in public for ridicule and shaming.<sup>223</sup> The Court continued and brushed aside the arguments made as to the employment and housing effects of the Alaska Act as mere "conjecture".<sup>224</sup> Finally, the Court found that the Alaska Act is not excessive, given the high recidivism rates among sex offenders and the importance of the goal of promoting public safety.<sup>225</sup> Thus, the Court concluded that the Alaska Act was non-punitive, and could be applied retroactively.<sup>226</sup>

Since its publication, the *Smith* ruling has drawn criticism from legal scholars.<sup>227</sup> This criticism has mainly focused on the displeasure from the outcome of the case, while not providing a comprehensive theoretical argument that would explain its

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Code. Under *Hendricks*, the placement of an act within the state code may indicate the legislative intent underlying the act. *See Hendricks*, 521 U.S. at 361. Nevertheless, the Court pointed out that the Alaska Criminal Procedure Code contains several provisions that do not involve criminal punishment and thus the inclusion of the Alaska Act in it does not indicate that the legislative intent underlying the act was necessarily punitive. *See Smith*, 538 U.S. at 94-5. In addition the Court did not make much of the fact that following the adoption of the Alaska Act the state amended its Rules of Criminal Procedure requiring courts to inform the defendant in writing as to the potential registration requirements, *see* ALASKA RULE CRIM. PROC. § 11(c)(4), and to incorporate the registration requirements into the written judgments of offenders, *see* ALASKA STAT. § 12.55.148(a). The Court found that these facts were not indicative of the legislative intent in this case since informing individuals of adverse effects of convictions is consistent with both civil and criminal policies. *See Smith*, 538 U.S. at 95-6.

<sup>222</sup> *Smith*, 538 U.S. at 97. The factors that the Court found to be most relevant to its analysis were whether the regulatory scheme: "has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose".

<sup>223</sup> *Id.* at 98-9. It should be noted that even within its analysis of the effects of the Alaska Act the Court continued to stress the importance of legislative intent. Thus, when the court distinguished between colonial shaming sanctions and the Alaska Act it found that "[i]n contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of *the objective of the regulatory scheme*". *Id.* (emphasis added). The Court then continued and noted "the *purpose* and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender". *Id.* (emphasis added).

<sup>224</sup> *Id.* at 100.

<sup>225</sup> *Id.* at 102-3.

<sup>226</sup> *Id.* at 105-6.

<sup>227</sup> *See, e.g., The Supreme Court, 2002 Term Leading Cases, supra* note 165 at 334-9 (critically evaluating the court's opinion in *Smith*). *But see* Kimberly B. Willkins, *Sex Offender Registration and Community Notification Laws: Will These Laws Survive?*, 37 U. RICH L. REV. 1245, 1277-8 (2003) (viewing SORNs as aimed towards protecting the public rather than punishing offenders).

problems. Thus, I will now turn to analyze the *Smith* ruling in light of the theoretical framework regarding nonlegal sanctions presented above.<sup>228</sup>

SORNLS represent an intersection between legal and nonlegal sanctions in which the law causes a specific group of people to be subjected to a series of nonlegal sanctions. Thus, when courts analyze the legal status of these laws, they should have a theory as to the nature of nonlegal sanctions in hand. Without such a theory, courts run the risk of developing a body of law that is not in touch with its real world effects. The underlying assumption throughout the Court's analysis of the Alaska Act is that the adverse effects that offenders incur are preventative in nature. For example, the Court finds that "[t]he State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant."<sup>229</sup> Other courts that upheld SORNLS against ex-post-facto challenges also adopted this line of reasoning.<sup>230</sup> Yet this one-dimensional analysis ignores the fact that nonlegal sanctions are driven by three different forces – preferences, norms, and prevention.<sup>231</sup> To assume that SORNLS cause only, or even mostly, preventative nonlegal sanction is problematic. Rather, the evidence presented above demonstrated that SORNLS cause sex offenders to suffer from nonlegal sanctions that have little to do with

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<sup>228</sup> In the text I shall focus my critic of *Smith* on its treatment of nonlegal sanctions as a social phenomenon. Nevertheless, it should be noted that the opinion of the Court in *Smith* raises other difficulties. The Court's overwhelming reliance on legislative intent as the touchstone for judicial constitutional scrutiny is undesirable for several reasons. First, the use of legislative intent in a federal context such as that of SORNLS could create inconsistencies among different jurisdictions. In effect, the *Smith* opinion deals exclusively with the question of the constitutionality of the Alaska Act. Under the holding an identical law adopted by another state that does have a punitive intent will be deemed unconstitutional. Constitutional doctrine does not necessarily have to aim towards consistency. However, in the context of setting out a fairness constraint to a criminal justice system it would seem that creating uniform outcomes is desirable. In addition, the ex-post-facto doctrine is aimed at limiting the power of legislatures. Thus, legal doctrine should be tailored to deal with a legislature that wishes to abuse its power. Under this premise the evaluation of legislative intent through mechanical instruments such as the stated intent of the legislature and the place in which the statute was codified, would only set out a road map for legislatures to immunize legislation from ex-post-facto review. For a general argument for focusing on the effect of SORNLS rather than the underlying legislative intent see Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1725-8 (1996).

Another problem with the *Smith* ruling has to do with the fact that the Court based its conclusion of a non-punitive intent in part on a lack of procedural safeguards in the Alaska Act. This type of reasoning is, at best, problematic. Holding a law constitutional because it *does not* offer defendants rights and protections only gives legislatures incentives not to grant defendants such rights in future cases. It is unclear why courts would want to give legislatures this type of incentives.

<sup>229</sup> *Smith*, 538 U.S. at 101.

<sup>230</sup> *E.B.*, 119 F.3d at 1099-1100 (noting that the dissemination of accurate information when done in furtherance of a legitimate governmental interest cannot be considered to be punishment); *Femedeer v. Haun*, 227 F.3d 1244 (10th Cir. 2000) (stating that dissemination of information about criminal activity "has never been regarded as punishment when done in furtherance of a legitimate governmental interest"); *Cutshall v. Sundquist*, 193 F.3d 466, 475 (6th Cir. 1999) (arguing that the dissemination of information should not be viewed as punishment).

<sup>231</sup> See *supra* Section II 1.

prevention and have much more to do with reciprocity and a norm of sanctioning.<sup>232</sup> Justice Souter, while not using the signaling terminology employed here, understood the social process that might be triggered by creating a focal point surrounding sex offenders, when he noted that:

While the Court accepts the State's explanation that the Act simply makes public information available in a new way, the scheme does much more. Its point, after all, is to send a message that probably would not otherwise be heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning. Selection makes a statement, one that affects common reputation and sometimes carries harsher consequences, such as exclusion from jobs or housing, harassment, and physical harm.<sup>233</sup>

Regretfully, the Court did not incorporate this insight into its holding in *Smith*, and based its ruling on a misconception of the nonlegal sanctions created by SORNLS.<sup>234</sup>

Finally, it should be noted that the ruling of the Court in *Smith* is not aligned with the general approach courts have taken towards disseminating truthful information about past criminal activities. State courts have been dealing for a long period of time with probation conditions that include an element of public notification. Generally, states allow judges to set probation conditions that promote the rehabilitation of offenders and the safety of the community, but forbid them from imposing additional punitive measures.<sup>235</sup> In some jurisdictions proactive judges have tried to use this authority to impose conditions that disseminated to the public information about the crimes committed by offenders. Yet, offenders subjected to such conditions have argued successfully that these conditions are punitive, and therefore are beyond the scope of the court's authority while setting probation conditions.

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<sup>232</sup> See *supra* Section III 3.

<sup>233</sup> *Smith*, 538 U.S. 109 (Justice Souter, concurring in the judgment, internal citation omitted). For a similar view see *Noble v. Board of Parole and Post-Prison Supervision*, 964 P.2d 990, 995 (Or. 1998) (noting that a sex offender has a liberty interest “in knowing when the government is moving against you and why it has singled you out for special attention”).

<sup>234</sup> Interestingly, a few weeks after releasing its decision in *Smith* the Supreme Court released its decision in *Lawrence*, which struck down sodomy laws. One of the points made by the Court in *Lawrence* was that adults engaged in consensual acts of sodomy might be subjected to the adverse affects of SORNLS in at least four states. See *Lawrence*, 123 S.Ct. 2472, 2482. Clearly, if SORNLS only cause reactions that can be associated with precautions the courts' concern is unfounded. Members of communities into which such offenders will move into will understand that they pose no risk, and will not subject them to any kind of undesired treatment. Nevertheless, as the court intuitively realizes, inclusion in a sex offender registry has far more implications.

<sup>235</sup> For example, in Montana the authority of judges to impose conditions at sentencing is limited to those conditions that are “necessary to obtain the objectives of rehabilitation and the protection of the victim and society”. 46-18-202(1), MCA (2003).



For example, in *Montana v. Mohammad*<sup>236</sup> the offender was required by the District Court judge to post on every entrance a sign stating “CHILDREN UNDER THE AGE OF 18 ARE NOT ALLOWED BY COURT ORDER.”<sup>237</sup> Recognizing the potential devastating effect such a sign might have on the life of the offender, the Montana Supreme Court found that it was punitive, and therefore outside of the authority of the district court.<sup>238</sup> This line of reasoning was also followed by the Tennessee Supreme Court in *State v. Burdin*.<sup>239</sup> In *Burdin* the Court evaluated a probation condition that was imposed on a defendant who was convicted of sexual battery of a 16-year-old victim. The condition required the defendant to place in the front yard his residence a four-by-eight foot sign with black letters over a yellow background stating: “Warning, all children. Wayne Burdin is an admitted and convicted child molester. Parents beware.”<sup>240</sup> The *Burdin* Court found that under Tennessee law the primary goal of probation conditions is rehabilitation, and courts cannot impose additional punishments that are beyond that goal.<sup>241</sup> Thus, the court ruled that the district court was unauthorized to set the condition described above.<sup>242</sup> Generally, the *Muhammad* and *Burdin* rulings reflect the majority view among courts on this issue.<sup>243</sup> Furthermore, even states that did find these measures to be lawful did so while acknowledging their punitive nature. For instance, in *Lindsay v. State*<sup>244</sup> the Florida district court of appeals evaluated the legality of a probation condition

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<sup>236</sup> 309 Mont. 1 (Mont. 2002).

<sup>237</sup> *Id.* at 4. This sign is not equivalent to the regime created by SORNLS since on one hand it does not explicitly identify the released offender as a sex offender, while it informs people of a court order rather than a past offense. Furthermore, unlike SORNLS that are mostly based on Internet notification this case involves physical signs. Nevertheless, one can assume that the actual effects of this sign was quite similar to that of SORNLS since its inevitable outcome was to inform the neighbors of the offender about his past sex crimes.

<sup>238</sup> *Id.* at 12 (noting that the condition is “unduly severe and punitive to the point of being unrelated to rehabilitation...the effect of such a scarlet letter condition tend to overshadow any possible rehabilitative potential that it may generate”).

<sup>239</sup> 924 S.W.2d 82 (Tenn.1996).

<sup>240</sup> *Id.* at 84.

<sup>241</sup> *Id.* at 87.

<sup>242</sup> *Id.*

<sup>243</sup> See *Muhammad* 309 Mont. at 12 (noting that the opinion of the court reflects the opinion of most jurisdictions). For additional examples of such rulings see, e.g., *People v. Meyer* 176 Ill. 2d 372 (Ill. 1997) (Illinois Supreme Court held that a probation condition requiring a violent felon to post a 4-foot by 8-foot warning sign that will state with 8-inch high letters “VIOLENT FELON” at each entrance to his property is an unreasonable form of shaming); *People v. Letterlough*, 86 N.Y.2d 259 (N.Y. 1995) (New-York Court of Appeals holding that a probation condition requiring defendant to affix to any car he drove two signs which state in fluorescent, large block letters “CONVICTED DWI” is an unauthorized form of punishment). *But see Ballenger v. State*, 210 Ga.App. 627, 629 (Ga.App. 1993) (upholding a probation condition that required the defendant to wear a pink fluorescent bracelet imprinted with the words “D.U.I. CONVICT”).

<sup>244</sup> 606 So.2d 652 (Fla. App. 1992).

that required a defendant to place an ad regarding his DUI conviction in a local newspaper.<sup>245</sup> The *Lindsay* Court noted that Florida law allows judges to impose punitive probation conditions.<sup>246</sup> Thus, the court found that despite the fact that the condition was punitive, it was valid under Florida law.<sup>247</sup>

While one might argue that these cases deal with sanctions that are harsher than those created by SORNLS, it would seem that the main point of these measures continues to be the dissemination of truthful information regarding past criminal activity. Unlike the *Smith* Court, the rulings reviewed above simply acknowledged the humiliating nature of public notification, and its resemblance to historical forms of punishment.<sup>248</sup>

In sum, applying the punitive approach towards SORNLS leads to the conclusion that these laws should not be applied retroactively. Withholding the application of these laws to a well-defined group of offenders, who committed their crimes prior to the enactment of these laws, seems to be a small price to pay in order to sustain the moral constraint of the ex post facto clause.<sup>249</sup>

## 2. Substantive Limitations on the Use of SORNLS as a Sanctioning Tool

A second line of arguments brought forward by sex offenders against SORNLS challenges their general validity rather than their validity towards a specific group of offenders. The two main arguments made in this context are that SORNLS represent an unconstitutional deprivation of privacy, and that they are a form of cruel and unusual punishment. I will begin by evaluating offenders' privacy claims.

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<sup>245</sup> *Id.* at 654.

<sup>246</sup> *Id.* at 656.

<sup>247</sup> *Id.* (noting that “the idea that this condition of probation is improper simply because it is punitive is belied by both the statute and the cases”).

<sup>248</sup> *See Meyer*, 176 Ill. 2d at 382 (“The sign contains a strong element of public humiliation or ridicule because it serves as a formal, public announcement of the defendant’s crime”); *Muhammad*, 309 Mont. at 12 (viewing a notification condition as a “scarlet letter condition”); *Letterlough*, 86 N.Y. 2d at 266 (“public disclosure of a person’s crime, and the attendant humiliation and public disgrace, has historically been regarded strictly as a form of punishment”).

<sup>249</sup> The distinction between punitive and preventative measures presented in this subsection can also be applied to *legal* sanctions created by SORNLS. Some SORNLS include legal limitations on the lives of sex offenders such as barring offenders from working in schools and childcare facilities (*see* MINN. STAT. §§ 2444.052(sub.3)(k), (sub.4) (1999); OKLA. ST. ANN. § 589 (prohibiting offenders from working in business that provide service to children and schools); ALA CODE § 15-20-26(a) (prohibiting offenders from working within 2,000 feet of a school or a child care facility)), or limiting the places in which offenders may reside (*see* MINN. STAT. ANN. § 244.052 (subd 4a) (b) (prohibiting property owners from knowingly renting a room to level three sex offenders if that owner has an agreement with an agency that provides shelter to victims of domestic abuse); OKLA. ST. ANN. § 590 (prohibiting offenders from residing within a two thousand foot radius of any school or educational institution); ALA CODE § 15-20-26 (establishing a list of limitations on the places in which sex offenders may reside)). Such limitation should not pose any serious problem from an ex post facto perspective as long as they are tailored in a narrow way that reflects the type preventative reactions that the Court assumes in *Smith*.

Generally, offenders have been unsuccessful bringing forward claims based on the privacy argument. The third, sixth, and ninth circuits have all dealt to some extent with privacy arguments made with respect to SORNLS, and all chose to reject them.<sup>250</sup> Of these cases it would seem that the line of cases rising out of the third circuit requires an extended evaluation, given that it offers the most extensive analysis of offenders' privacy claims thus far. *Paul I* and *Paul II* deal with the pre-Internet notification era. The plaintiffs in *Paul I* were classified as tier 2 and tier 3 sex offenders.<sup>251</sup> As such, under New Jersey law at the time, they were subjected to public notification.<sup>252</sup> In dealing with the privacy argument made by the plaintiffs, the Court first found that there is no privacy limitation regarding notifying the public of offenders' criminal records.<sup>253</sup> Nevertheless, the Court did find that offenders have some nontrivial privacy interest in preventing the publication of their home address.<sup>254</sup> Having found this privacy interest, the Court still rejected the offenders' privacy claim due to the compelling governmental interest in preventing future sex crimes.<sup>255</sup> The Court did, however, remand the case to the District Court to determine whether the law in question was applied in such a way that assures that the information was disclosed only to parties who have a particular need for it.<sup>256</sup> This later issue was eventually disposed of in *Paul II*, in which the Court held that New Jersey's guidelines for the implementation of its SORNLS limited notification to those individuals who had a need for the information, and therefore did not violate offenders' privacy rights.<sup>257</sup>

Given the court's decisions in *Paul I* and *Paul II*, which upheld notification based on its limited application, offenders embarked on a new challenge against New Jersey's SORNLS once it shifted to wide ranged Internet notification. Yet in *A.A. ex rel. M.M. v. New Jersey*<sup>258</sup> this challenge met an unsympathetic court. In its decision in *A.A.* the Court emphasized the importance of wide dissemination of information to the general public in order to prevent future crimes,<sup>259</sup> and ruled that the state's interest in expanding notification outweighed any privacy interest of offenders.<sup>260</sup>

<sup>250</sup> See *Paul v. Verniero*, 170 F.3d 396 (3d Cir.1999) (upholding the New Jersey SORNLS against privacy challenges) [hereinafter: *Paul I*]; *Paul v. Farmer*, 227 F.3d 98 (3d Cir. 2000) (same) [hereinafter: *Paul II*]; *A.A. v. New Jersey*, 341 F.3d 206 (3d Cir. 2003) (same); *Cutshall*, 193 F.3d at 480-2 (rejecting privacy arguments made against the Tennessee SORNLS); *Russell v. Gregorie*, 124 F.3d 1079, 1093-4 (9th Cir.1997) (rejecting privacy claims with respect to Washington's SORNLS). But see *Doe v. Otte*, 248 F. 3d 832, 850 note 18 (2001) (limiting the scope of *Russell*).

<sup>251</sup> *Paul I*, 170 F.3d at 399.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 403.

<sup>254</sup> *Id.* at 404.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 406.

<sup>257</sup> *Paul II*, 227 F.3d at 107.

<sup>258</sup> 341 F.3d 206 (N.J. 2003).

Several commentators have criticized the rulings rejecting the privacy arguments made by sex offenders.<sup>261</sup> Generally, these commentators argue that sex offenders, like any other type of offender, have a reasonable expectation to keep their criminal past private so they can embark on a new life upon release from prison.<sup>262</sup> Furthermore, these commentators point out the unclear success of SORNs in preventing future crimes.<sup>263</sup> Thus, they argue that in balancing between sex offender's privacy rights and the states' interest in preventing future crimes the former should prevail.<sup>264</sup>

The punitive approach towards SORNs points out that the debate surrounding offender's privacy rights should take a different direction. Rather than focusing on the appropriate balance between offenders' privacy rights and the states' interest in crime prevention, we should focus on the question to what extent may states infringe on offenders' privacy rights in order to punish them. Once the debate is framed in such a manner, the rulings upholding SORNs against privacy challenges seem to be justifiable. The public has a strong interest in punishing sex offenders that includes fulfilling a societal need for reciprocity and deterring future crimes. Thus, while there might be a limitation on the ability of states to strip individuals of their privacy in order to punish them, given the importance of punishing sex offenders it would seem reasonable to conclude that the interest SORNs serve outweighs the privacy interests of offenders.

Despite the fact that adopting the punitive approach towards SORNs seems to lead to the same conclusion courts have reached, adopting it is of importance for two reasons. First, in order to uphold SORNs some courts are willing to read privacy rights in a narrow way, finding that sex offender's privacy rights were never violated by SORNs.<sup>265</sup> Such a finding is troublesome. The dramatic lowering of search costs for the public, coupled with the computation of information that includes offender's home address does represent an invasion of the most private space of sex offenders, and should be viewed as an invasion of privacy. Second, courts willing to recognize a privacy

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<sup>259</sup> *Id.* at 212.

<sup>260</sup> *Id.* at 213. Interestingly, the Court in *A.A.* cited in this context the Supreme Court's ruling in *Smith*, which had nothing to do with the question whether SORNs violate a constitutional right to privacy (*id.*). This might indicate the fact that the *Smith* ruling has far wider implications than its limited content and that it will serve as a general authority to reject claims made by sex offenders.

<sup>261</sup> See, e.g., Tara L. Wayt, *Megan's Law: A Violation of the Right to Privacy*, 6 TEMP. POL. & CIV. RTS. L. REV. 139, 149-153 (1997) (arguing that the New Jersey Supreme Court misapplied the right to privacy in *Poritz*); Lewis, *supra* note 8 at 96-102 (arguing that SORNs may be unconstitutional on privacy grounds); Houston, *supra* note 36 at 762-4 (arguing that public notification with respect to sex offenders that do not pose a serious risk might be unconstitutional).

<sup>262</sup> Lewis, *id.* at 96-7.

<sup>263</sup> *Id.* at 100-2.

<sup>264</sup> *Id.*

<sup>265</sup> See, e.g., *Cutshall*, 193 F.3d at 480; *Russell*, 124 F.3d at 1093-4.

interest are engaging in a rather limited evaluation of the public interest that supposedly justifies the limitation of that interest, and accept as a given that SORNLS are a key component in preventing future sex crimes.<sup>266</sup> Yet due to the dramatic effects of SORNLS on the privacy of offenders and their questionable preventative value,<sup>267</sup> one would expect a far more rigorous evaluation of the public interest invoked to justify them.

A second argument sex offenders raise challenging the validity of SORNLS is that these laws are unconstitutional since they constitute cruel and unusual punishment.<sup>268</sup> Similar arguments are made by legal scholars, who tend to focus their attention on the vigilante attacks caused by SORNLS.<sup>269</sup> Thus far since the majority of courts have found that SORNLS do not constitute punishment, they have also rejected claims that SORNLS constitute cruel and unusual punishment.<sup>270</sup> From the perspective of the punitive approach towards SORNLS the conclusion that these laws are generally not *cruel and unusual* punishment is desirable. Despite the harsh effects SORNLS bring on offenders there seems to be no reason to view these punitive effects as exceptionally cruel, especially when compared to the alternative sanction, namely, imprisonment.<sup>271</sup>

To be sure, there might be specific types of public shaming that could be viewed as cruel and unusual punishment since they contradict the common moral values of

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<sup>266</sup> See, e.g., *A.A.*, 341 F.3d at 211-13 (recognizing “the State's interest in expanding the reach of its notification to protect additional members of the public”).

<sup>267</sup> See *supra* Section III 2.

<sup>268</sup> The Eighth Amendment provides that “[e]xcessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted”. See U.S. CONST. Amend. VIII.

<sup>269</sup> See, e.g., Andrea L. Fischer, *Florida's Community Notification of Sex Offenders on the Internet: The Disregard of Constitutional Protection to Sex Offenders*, 45 CLEV. ST. L. REV. 505, 523-30 (1997); Bedarf, *supra* note 53 at 936-9 (arguing that SORNLS constitute cruel and unusual punishment because they degrading); Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 NW. L. REV. 788, 820-6 (1996) (arguing that SORNLS constitute cruel and unusual punishment because vigilante acts are a foreseeable result of such laws); G. Scott Rafshoon, *Community Notification of Sex Offenders: Issues of Punishment, Privacy, and Due Process*, 44 EMROY L. J. 1633, 1668-71 (1995) (same). *But see* Houston, *supra* note 36 at 747-756 (arguing that SORNLS are a legitimate way to promote public safety and do not constitute cruel and unusual punishment).

<sup>270</sup> See, e.g., *Cutshall*, 193 F.3d at 477. *But see* *In re Reed*, 663 P.2d 216 (Cal. 1983) (finding that requiring a defendant convicted of soliciting lewd or dissolute conduct to register as a sex offender constitutes cruel and unusual punishment under the California Constitution). Recently, the California Supreme Court overruled *Reed* in *In re Leon Casey Alva*, 92 P.3d 311 (Cal. 2004). Yet one should note that the discussion in *Alva* was limited to the question whether registration constitutes cruel and unusual punishment. *Id.* at 313. Thus, it is still not clear whether the enactment of a widespread notification program will be constitutional under California law.

<sup>271</sup> See *supra* notes 68-69 and accompanying text.

society.<sup>272</sup> Such values are based on a variety of political theories, such as human dignity or the disutility caused to the general public by the humiliation of a fellow member of the community. For instance, one might argue that the provisions of the Louisiana SORNL authorizing courts to order offenders to wear t-shirts and post signs outside their homes that indicate their status as sex offenders represent a type of humiliation that is unacceptable. Evaluating exactly which types of notification should be viewed as unacceptable should therefore be done on a case by case basis, and is beyond the scope of this Article.

In sum, the punitive approach towards SORNLS might be bad news for offenders as to the viability of their arguments relating to the general validity of these laws, since it sees nothing inherently wrong with publicly shaming people in order to punish them. Nevertheless, adopting this approach could be good news for those who wish to protect individual rights, since it does recognize the harsh effects of these laws.

### **3. Procedural Due Process: The Right of Sex Offenders to Risk Assessment Hearings Prior to Public Notification**

A common argument raised by sex offenders is that automatic registration and notification without a prior individual evaluation of the risk of recidivism violates offenders' due process rights under the Fourteenth Amendment.<sup>273</sup> According to this argument, the harsh reputational effects of notification, coupled with the burden of registration, constitute a liberty interest that requires legislatures to give offenders a chance to demonstrate that they represent a low risk of re-offending. As a matter of existing law, the Jacob Wetterling Act does not require individual risk assessments, and states differ on this issue.<sup>274</sup>

Courts have been divided in their treatment of offenders' due process claims. While the majority of courts, at both the state and the federal level, have rejected these claims,<sup>275</sup> several influential decisions have found that SORNLS - and especially their notification provisions - infringe on a liberty interest of offenders, and require a holding

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<sup>272</sup> Courts have generally held that the Eighth Amendment creates a moral limitation on the types of punishments that can be used. *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 100 (U.S. 1958) (noting that the basic principle underlying the Eighth Amendment is human dignity); *Weems v. United States*, 217 U.S. 349, 378 (U.S. 1910) (noting that the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice").

<sup>273</sup> The Fourteenth Amendment provides that "no person shall be deprived of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, §1.

<sup>274</sup> *See supra* notes 116-119 and accompanying text.

<sup>275</sup> *See, e.g.*, *Cutshall*, 193 F.3d at 478-80 (Sixth Circuit upholding Tennessee SORNLS against a due process challenge); *Milks v. State*, 848 So.2d 1167 (Fla. 2d DCA 2003) (Florida appellate court upholding state's SORNLS against a due process challenge); *State v. Wilkinson*, 9 P.3d 1 (Kan. 2000) (The Kansas Supreme Court upholding the state's SORNLS against a due process challenge); *Boutin v. LaFleur*, 591 N.W.2d 711, 718-9 (Minn. 1999) (The Minnesota Supreme Court upholding the state's SORNLS against a due process challenge).

of a risk assessment hearing.<sup>276</sup> At the same time, a vibrant academic debate has evolved on this question.<sup>277</sup> Given the divergence of opinions on the matter, including the difference of opinion between the Second and the Sixth Federal Circuit Courts of Appeal,<sup>278</sup> the Supreme Court recently took the matter under consideration.<sup>279</sup>

On the same day the Supreme Court handed down its ruling in *Smith* it also handed down its ruling in *Connecticut Department of Public Safety v. Doe*.<sup>280</sup> In this ruling, the Court evaluated the constitutionality of the Connecticut SORNL against a procedural due process challenge. The Connecticut SORNL applies to all individuals convicted of several sex crimes and crimes against minors,<sup>281</sup> while generally making no distinctions among different offenders according to their potential risk of re-offending.<sup>282</sup> Given this policy, the Respondent, Doe, argued that since he does not pose a high risk of re-offending, the Connecticut SORNL deprives him of a liberty interest – his reputation – by including his name in a sex offender registry without granting him meaningful opportunity to be heard.<sup>283</sup>

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<sup>276</sup> See, e.g., *Doe v. Department of Public Safety ex rel. Lee*, 271 F.3d 38 (2nd Cir. 2001) (Second Circuit striking down Connecticut's SORNL on due process grounds); *State v. Bani*, 36 P.3d 1255 (Hawaii, 2001) (The Supreme Court of Hawaii finding that the state's SORNL violates the state's due process clause); *Espindola v. State*, 885 So.2d 1281 (Fla. 2003) (Florida appellate court striking down the state's SORNL on due process grounds). In New Jersey the Supreme Court also found that the states SORNL violated offenders' due process rights. See *Doe v. Poritz*, 662 A.2d 367, 417-22 (N.J.1995). In order to uphold the law the Court then read into the law a requirement for a judicial hearing (*id.* at 381-5).

<sup>277</sup> See, e.g., Jennifer G. Daugherty, *Sex Offender Registration Laws and Procedural Due Process: Why Doe v. Department of Public Safety ex rel. Lee Should be Overturned*, 26 HAMLINE L. REV. 713 (2003) (arguing that SORNLS should not be struck down on due process grounds); Logan, *supra* note 164 at 1167 (arguing that sex offenders' due process rights should be guarded); Small, *supra* note 8 at 1451 (concluding that an individual fact specific risk evaluation should be conducted with respect to each offender); Rafshoon, *supra* note 269 at 1671-3 (arguing that offenders subjected to notification should be provided with a hearing).

<sup>278</sup> Compare *Doe*, 271 F.3d 38 with *Cutshall*, 193 F.3d 466.

<sup>279</sup> 535 U.S. 1077 (U.S. 2002) (granting cert).

<sup>280</sup> 538 U.S. 1 (U.S. 2003).

<sup>281</sup> CONN. STAT. §§ 54-251; 54-252. The Connecticut SORNL also applies to felonies committed for a sexual purpose (CONN. STAT. § 54-254), yet Connecticut courts have full discretion regarding the application of the SORNL to offenders who were convicted of such felonies.

<sup>282</sup> The Connecticut SORNL does make some distinctions among offenders. With respect to the length of its application the Connecticut SORNL applies to most offenders for a period of ten years, while those convicted of sexually violent offenses must register for life (CONN. STAT. §§ 54-251; 54-252). In addition, some very specific types of offenders may be exempt by a court from the requirements of the SORNL. For example, an offender convicted of sexual intercourse with a minor aged between 13 and 16 while the offender was no more than two years older than the minor, and provided that the offender was younger than 19, may be exempt from the requirements of the law if a court finds that registration is not required for the protection of the public's safety (CONN. STAT. § 54-251(c)).

<sup>283</sup> *Connecticut Department of Public Safety*, 538 U.S. at 5-6.

In a brief ruling, with no dissenting voices, the Court upheld the Connecticut SORN. The Court opened its analysis by pointing out that “sex offenders are a serious threat” and that they are “much more likely than any other type of offender to be re-arrested for a new rape or sex assault.”<sup>284</sup> Having said that, the Court turned to find that the Connecticut SORN does not deprive registrants of their due process rights since the sole touchstone for registration under it was prior convictions, and it did not categorize all sex offenders as dangerous.<sup>285</sup> Furthermore, as noted by the Court, the notification website operated by the state explicitly stated that the Connecticut Department of Public Safety “has made no determination that any individual included in the registry is currently dangerous.”<sup>286</sup> Thus, since the issue of an individual’s dangerousness is not a relevant factor according to the Connecticut SORN, there is no reason to conduct any kind of hearing prior to registration.<sup>287</sup>

As was the case with respect to *Smith*, the unwillingness of the Court in *Connecticut Department of Public Safety* to face the reality brought about by SORNs leads it to a problematic decision. The Court ignores the fact that the mere inclusion in a sex offender registry creates detrimental effects on the reputation of these individuals. As we have seen, the reaction of communities to inclusion in registries goes beyond taking preventative measures based on the dangerousness of offenders, and reflects punitive acts that are based on the status of sex offenders as such.<sup>288</sup>

The punitive approach towards SORNs offers a far more consistent and persuasive view on the issue of offenders’ right to a risk assessment hearing. This approach recognizes the stigmatizing effect of including individuals in a sex offender registry. Nevertheless, since the focal point of this approach is punishing offenders for their past acts it finds no necessity in evaluating the future dangerousness of a specific offender. Rather, the only relevant hearing from this perspective is the sentencing hearing of the offender after he was found guilty.<sup>289</sup>

Again, as was the case with respect to offender’s substantive due process arguments, the punitive approach towards SORNs does not reflect much optimism as to the viability of the procedural arguments brought forward by offenders. Adopting this approach, however, is of importance since unlike the Court’s reasoning in *Connecticut*

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<sup>284</sup> *Id.* at 4 (quoting *McKune v. Lile*, 536 U.S. 24 (2002)).

<sup>285</sup> *Id.* at 7-8.

<sup>286</sup> *Id.* at 8.

<sup>287</sup> *Id.*

<sup>288</sup> *See supra* Section III 3.

<sup>289</sup> In fact, at least one court has explicitly followed this line of reasoning. *See Wilkinson*, 9 P.3d at 8 (noting that “the only procedural due process to which Wilkinson was entitled was the process required to convict him of the underlying offenses which triggered this non-cruel, non-arbitrary aspect of his ‘punishment’”).



*Department of Public Safety*, it does acknowledge the actual effects of SORNLS. SORNLS *do* represent the awesome power the state holds in stigmatizing a specific group of people, and its use of this power should be limited by procedural safeguards.<sup>290</sup>

#### 4. Reintegrating Sex Offenders

As we have seen above, shame sanctions in general, and SORNLS in particular, might have the perverse effect of increasing the crime rate of the shamed group.<sup>291</sup> Legislatures who accept this result as a given, must evaluate the advantages of creating an efficient regime of general deterrence and the problems of increased criminality among a specific group. One might conjecture that the benefits of general deterrence are far reaching, and outweigh any specific deterrence consideration, yet at the end of the day that is an empirical question. Legislatures, however, should not accept this problem as a given. Rather, they should aim to design a regime that will inflict painful sanctions while minimizing the problems associated with shaming. This goal can be achieved by allowing for the reintegration of offenders into society. In this subsection I will present policy recommendations that will assist to construct such a regime.

A first point of contention regarding the current state of SORNLS has to do with the duration of registration and notification. The Jacob Wetterling Act requires offenders who were convicted of aggravated offences or who were convicted more than once, to register for life, with no possibility of relief from this requirement.<sup>292</sup> Furthermore, since the Jacob Wetterling Act only sets out minimum requirements, some states have created harsher rules, requiring all offenders to register for life with no possibility of relief.<sup>293</sup> This type of sanctioning is undesirable from the perspective of marginal deterrence, since it condemns offenders to a life of stigmatisation with no possibility of gaining new social capital. As one offender put it, before he committed suicide, “I have no hope ... What is left for me? I will be subject to Megan’s Law for the rest of my life.”<sup>294</sup> A policy

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<sup>290</sup> It should be noted that the fact the punitive approach towards SORNLS does not *require* a risk assessment for offenders does not indicate whether such an evaluation is desirable or not. On one hand, clearly a central part of the effectiveness of SORNLS as a sanctioning device is the public perception of high risks that are associated with registered offenders. From that perspective, one might conjecture that risk assessment hearings are a useful tool to generate higher nonlegal sanctions towards offenders. On the other hand, conducting such hearings is costly and will eventually lower the amount of people that are subjected to these laws and thus reduce the use of nonlegal sanctions. Evaluating this tradeoff depends on empirical data that does not exist at this point in time. Yet in any event one should notice that making this tradeoff is a legislative matter that should not raise significant constitutional questions.

<sup>291</sup> See *supra* notes 54-67 and accompanying text and Section III 4.

<sup>292</sup> 42 U.S.C. § 14071(b)(6)(B). The Final Guidelines explicitly state that “[a] state is not in compliance with subsection (b)(6)(B) (i) or (ii) if it has a procedure or authorization for terminating the registration of convicted offenders within the scope of these provisions at any point in their lifetimes”. See The Final Guidelines, *supra* note 103 at 582.

<sup>293</sup> See MO. REV. STAT. § 589.400. 3 (setting out lifetime registration for all offenders); S.C. CODE § 23-3-460 (same).

<sup>294</sup> New Jersey Public Defender Amici Brief, *supra* note 143 at 22.

sensitive to marginal deterrence considerations would allow for the removal of offenders from the registry after a specified period of time that reflects a socially desired level of sanctioning, if they have met certain requirements that will motivate them to refrain from criminal activity, such as having clean police records.<sup>295</sup> Creating a finite registration and notification period will give offenders something to lose, and will enable policymakers to utilise nonlegal sanctions to deter future crimes.<sup>296</sup>

The case for a finite registration and notification period might be phrased in constitutional terms. The Court has yet to make a clear connection between the concept of marginal deterrence and the Eighth Amendment. Nevertheless, reviewing some of the cases in which the Court was willing to strike down punishments demonstrates that marginal deterrence intuitions might be driving at least some of its decisions. This connection can be seen through the way the Court has read a proportionality requirement into the Eighth Amendment's prohibition of cruel and unusual punishment.<sup>297</sup> In *Coker v. Georgia*,<sup>298</sup> for example, the Supreme Court struck down on proportionality grounds a Georgia law that allowed the imposition of the death penalty on rapists.<sup>299</sup> Though the court never used marginal deterrence theory in order to explain its ruling, this decision is in line with such a theory of punishment. Imposing the death penalty on rapists would give rapists an incentive to kill their victims, since by doing so they would be facing the same sanction while the probability of detection given the elimination of the (usually) sole witness to the crime would be reduced.<sup>300</sup> Similarly, some of the concerns of courts regarding three-strike laws can be framed in terms of marginal deterrence. Under these laws offenders convicted for the third time of certain crimes are subject to harsh mandatory sanctions.<sup>301</sup> For instance, In *Solem v. Helm*,<sup>302</sup> the Court evaluated a life

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<sup>295</sup> Some states wanted to opt for such a regime. For example, the Florida SORN provides for judicial review of the registration requirement twenty years after the initial registration. See FLA. STAT. § 943.0435(11). Yet since this provision subjects itself to the limitations made by the Jacob Wetterling Act offenders in Florida cannot currently ask for such relief.

<sup>296</sup> To be sure, the mere fact that the registration comes to an end will not necessarily bring nonlegal sanctions to an end since the community will continue to hold the information that was disseminated by the SORN. Nevertheless, the moment the law stops to operate the offender does at the very least have an opportunity to move to a different community in order to start a new life with no nonlegal sanctions.

<sup>297</sup> *Weems*, 217 U.S. at 378 (“punishment for crime should be graduated and proportioned to offense”).

<sup>298</sup> 433 U.S. 584, 592 (U.S. 1977) (concluding that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment”).

<sup>299</sup> It should be noted that *Coker* does not represent a complete ban on the imposition of the death penalty on sexual crimes that do not involve murder. See *Louisiana v. Bethley*, 685 So.2d 1063 (La. 1996) (upholding a Louisiana statute allowing the death penalty when the victim of a rape was less than twelve years of age); *cert denied Bethley v. Louisiana*, 520 U.S. 1259 (Mem) (U.S. 1997).

<sup>300</sup> The assumption of a reduced probability of detection presupposes that law enforcement agencies devote equal resources to the investigation of rapes that do not involve murder and rapes in which the victim was murdered. In as much as this is not the case and law enforcement agencies increase their investigation efforts in murder cases the rapist might still have an incentive to avoid murdering his victim.

sentence without the possibility of parole imposed on a repeat offender convicted of issuing a no account check for \$100.<sup>303</sup> The Court struck down this punishment, finding that it was completely disproportionate to the crime.<sup>304</sup> Again, despite the fact that the Court did not base its decision on marginal deterrence grounds, one can point out a connection between the theory and the Court's holding. A sanctioning regime, which imposes harsh mandatory sanctions for completely different crimes, erodes marginal deterrence. A two strike offender who faces the same sanction for shoplifting a videotape and for armed robbery might opt for the later, if his expected payoff from that type of crime is higher.

Regretfully, in recent years the Court has limited the scope of the *Solem* ruling to a degree that one can question the viability of Eighth Amendment challenges to any incarceration sanction. For instance, in *Harmelin v. Michigan* the Court upheld a life sentence without the possibility of parole for a first time offender who was convicted of possessing more than 650 grams of cocaine.<sup>305</sup> Given the fact that under such a ruling a state could impose a life sentence without the possibility of parole on sex offenders, it could also, arguably, require life long registration from such individuals. This trend in Eighth Amendment jurisprudence is not necessarily desirable. Punishments that are too harsh are not in the best interest of society, and courts, at times, should intervene and regulate overly zealous legislatures creating such punishments.

A second policy recommendation aimed towards the reintegration of sex offenders is to establish social ceremonies that will reintegrate sex offenders back into society, while sustaining the shame inflicting aspects of SORNLS.<sup>306</sup> Many cultures that rely on shame based sanctions utilize such ceremonies.<sup>307</sup> In addition, sophisticated modern commercial parties that rely on extralegal sanctions often create similar mechanisms.<sup>308</sup> In the context of sex offenders some states are turning towards adopting

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<sup>301</sup> For a comparative description of these laws see John Clark, James Austin, and D. Alan Henry, "Three Strikes and You're Out": A Review of State Legislation, U.S. Dept. of Justice, national Institute of Justice, 6-12 (1997).

<sup>302</sup> 463 U.S. 277 (1983).

<sup>303</sup> *Solem, Id.* at 281-3.

<sup>304</sup> *Id.* at 290.

<sup>305</sup> See *Harmelin v. Michigan*, 501 U.S. 957 (1991). See also *Ewing v. California* 538 U.S. 11 (2003) (upholding a California 25 years to life sentence for stealing merchandise valued at approximately \$1,200); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding a California sentence for two consecutive sentences of 25 to life for two cases of petty theft).

<sup>306</sup> For a general theory of shame and reintegration see Braithwaite, *supra* note 66 at 54-68.

<sup>307</sup> See *Id.* at 74 (describing reintegration ceremonies in Japan); Massaro, *supra* note 6 at 1924 (pointing out the importance of reintegration).

<sup>308</sup> For example, in her case study of the diamond industry Lisa Bernstein points out that one of the possible sanctions that the board of arbitraries of the Diamond Dealers Club is expulsion from the club. Yet as

programs of community meetings in which law enforcement officers guide communities through the process of notification.<sup>309</sup> Such meetings, which arguably do not diminish the shaming of offenders, might assist the reintegration process of offenders.<sup>310</sup>

Finally, legislatures should create legal protections that will assist offenders to establish new social capital. Laws prohibiting discrimination against sex offenders in areas such as employment (aside from cases in which such discrimination reflects a rational preventative measure due to the specific type of work) and housing, might help achieve this goal. Some legislatures have in fact adopted such measures recently.<sup>311</sup>

### 5. Plea Agreements

As we have seen SORNLS might cause prosecutors and defendants to circumvent them by using the plea bargaining process.<sup>312</sup> Recently, some legislatures aware of this behavior have taken steps to prevent it. Upon its enactment in 1991, the Minnesota SORNLS only required that persons convicted of certain enumerated felony offenses register as sex offenders.<sup>313</sup> Yet in 1993, the legislature amended the statute to require that a person register if he was charged with a registerable offense, and was convicted of that offense *or* “another offense arising out of the same set of circumstances”.<sup>314</sup> Despite no clear indication as to the legislative intent behind this amendment, it would seem that it was intended to prevent offenders from pleading out of the registration requirements set out by the law.<sup>315</sup> The adoption of this amendment is a strong indication that at least in Minnesota contracting around SORNLS was a common occurrence.<sup>316</sup>

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Bernstein notes the imposition of such a harsh sanction might create an end game problem. To avoid this problem the laws governing the diamond trade allow for the readmission of expelled members after a period of two years. This provision is quite literally a reintegration provision. It gives members a carrot in the form of potential future membership while giving the Diamond Dealers Club a stick in the form of the threat to withhold future readmission. *See* Bernstein, *Diamond Industry*, *supra* note 1 at 129.

<sup>309</sup> For a description of these meetings *see* Richard Z. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Examining the Importance of Neighborhood Meetings*, 18 BEHAV. SCI. & L. 393 (2000) (reviewing community meetings in Wisconsin); Matson & Lieb, *supra* note 149 at 10-14 (reviewing community meetings in Washington State).

<sup>310</sup> Zevitz & Farkas, *id.* at 405 (noting that community members can assist in the reintegration of offenders and can help prevent crime).

<sup>311</sup> *See supra* note 55.

<sup>312</sup> *See supra* Section III 5.

<sup>313</sup> *See* Boutin v. LaFleur, 591 N.W.2d 711, 715 (Minn. 1999).

<sup>314</sup> MINN. STAT. § 243.166(a)(1).

<sup>315</sup> Boutin v. LaFleur, 1998 WL 8486 (Minn. App. Jan. 13, 1998) at\*2 (noting that the Minnesota legislature “appears to have intended that offenders such as Boutin not be able to avoid registration as a predatory offender by plea bargaining for a lesser or different offense”); Gunderson v. Hvass 339 F.3d 639, 643-4 (8th Cir. Minn., 2003) (“Given the realities of the plea bargaining system, by extending the registration requirements to persons who are charged with a predatory offense, but who plead guilty to a non-predatory charge that arises from the same circumstances, the Minnesota legislature was attempting to

The reactions following the adoption of the Minnesota amendment support the insights of the theoretical model. Since the amendment does not alter the desire of both defendants and prosecutors to contract around SORNLS, one can observe that parties are trying to circumvent the new constraint created by the amendment. One plausible way to do that is by shifting the negotiations to the pre-charge point, before prosecutors become committed to triggering the SORNLS. Another is by developing procedural loopholes that will allow the parties to continue with their contracting practices. In *Gunderson* the defendant was initially charged with a sex offense, yet after the sexual aspects of the allegations made by the victim were found to be inconsistent with the findings of the police investigation, the prosecutor agreed to plea the case to a nonsexual offense.<sup>317</sup> In what would seem to be an attempt of the prosecutor and the defense attorney to bypass the Minnesota amendment the two agreed that the initial complaint be dismissed in its entirety, and that the defendant would plead guilty to a new complaint charging him with third degree assault.<sup>318</sup> This plan worked initially, but less than a year after sentencing Gunderson violated his probation. Soon after, he was informed that he would have to register as a sex offender under the “arising out of the same circumstances” scheme. Gunderson challenged his registration in federal court, but the court found that the non-registered offense does not have to be charged in the same complaint as the registerable offense, only that the conviction arise from the same set of circumstances, and ruled that Gunderson must register.<sup>319</sup>

Undoubtedly, schemes such as the Minnesota amendment can make it more difficult for prosecutors and defendants to reach plea agreements that circumvent SORNLS. Nevertheless, such schemes are undesirable for several reasons. First, as the bargaining model presented above demonstrated, prohibiting such agreements might actually lower the aggregate sanction sex offenders face. Thus, these schemes might have the perverse effect of actually lowering deterrence and creating additional crime. Second, limiting plea bargaining does not deal with the underlying incentives to contract around SORNLS. Thus, prosecutors and defense attorneys will continue to attempt to develop loopholes around these limitations, or circumvent them by shifting negotiations to the pre-charge stage. Third, in some cases such schemes might cause judges to avoid convicting guilty defendants in order to prevent what they perceive to be an excessive sanction. Judges and jurors facing a choice between triggering the SORNLS by any

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insure the inclusion in the registration rolls, of all predatory offenders, including those who take advantage of favorable plea agreements” (quoting the decision of the magistrate judge in the case)).

<sup>316</sup> Other states are also considering amending their SORNLS to deal with the issue. According to one report Maine is considering to allow judges to add to defendant’s records a comment that would indicate the existence of an accusation of a sex crime, despite the lack of a conviction. See Hench, *supra* note 186.

<sup>317</sup> *Gunderson*, F.3d at 641.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 642-3.

conviction and acquitting the defendant might see the later as a lesser evil.<sup>320</sup> Hence, such schemes might reduce the number of defendants found guilty, lower aggregate sanctions, and limit the information we hold about past criminal acts of sex offenders. Finally, in some cases the shift to a lesser offense might not be due to negotiation tactics, but because the case became too difficult, or even impossible, to prove. In *Boutin*, for instance, the prosecutors agreed to drop the sexual charges after the victim recanted the portion of her story in which she alleged the defendant forced her to have sex.<sup>321</sup> From an optimal deterrence perspective, this might not be a bad outcome, since imposing sanctions only when defendants' guilt is proven beyond a reasonable doubt might create a problem of under-deterrence.<sup>322</sup> Nevertheless, those who cherish the presumption of innocence should be concerned about this development.<sup>323</sup>

Legislatures who wish to avoid SORNs being circumvented must realize that no matter what their intent when they enacted these laws was, defendants view these laws as sanctions, and that large mandatory sanctions create circumvention problems. Thus, a more prudent policy would be to grant courts discretion as to the application of the notification aspects of SORNs and allow judges to opt out of the notification periods proscribed by the law.<sup>324</sup> Such a policy would create transparency in the sanctioning process, would allow prosecutors to maximize the deterrence value of their budgets, and

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<sup>320</sup> In other cases, judges might try to circumvent the limitation themselves. In Minnesota, for instance, several Judges have adopted "creative interpretations" of the law in order to avoid what they perceive to be excessive sanctions. *See, e.g.*, In Matter of Welfare of J.L.M., 1996 WL 380664 (Minn. App. Jul. 9, 1996) (finding that requiring registration in two cases in which defendants admitted to nonsexual offenses after being charged with sex offenses is unreasonable and unnecessary and thus exempt defendants from registration); Matter of Welfare of M.A.R., 558 N.W.2d 274, (Minn. App. 1997) (reversing a district court's decision to continue a case without a finding of delinquency beyond the period allowed by law in order to avoid registration); State v. Krotzer, 548 N.W.2d 252 (Minn. 1996) (staying adjudication and declining to accept 19 year-old-boy's third-degree criminal sexual conduct guilty plea in order to avoid registration).

<sup>321</sup> *Boutin*, 591 N.W.2d at 713-4. *See also Gunderson* 339 F.3d at 641 (plea agreement was reached after sexual allegation were found to be inconsistent with forensic evidence).

<sup>322</sup> Keith N. Hylton & V.S. Khanna, *Toward an Economic Theory of Criminal Procedure*, Discussion Paper No. 318, John M. Olin Center for Law, Economics and Business, Harvard Law School, at 20-23 (2001, revised 2004) (*available at* [http://www.law.harvard.edu/programs/olin\\_center/](http://www.law.harvard.edu/programs/olin_center/)).

<sup>323</sup> Judge Randall of the Minnesota Court of Appeals recently voiced a clear opinion on the matter when he stated that:

This is a rare occasion in the history of the United States of America! The presumption of innocence embedded in both the U.S. Constitution and the Minnesota Constitution is swept aside in favor of a "rule" that says you are "guilty" and must register as a predatory sex offender simply because you were "charged" with an offense requiring registration, even though that charge did not stick.

*In re Welfare of J.S.K.*, No. J90150607, 2002 WL 31892086 (Dec. 31, 2002) at\*3 (Randall concurring specially).

<sup>324</sup> This recommendation follows recommendations made by commentators with respect to mandatory sanctions. *See Schulhofer & Nagel, supra* note 87 at 1315-6 (suggesting a reform in federal minimum sentences);

would help deal with problematic individual cases. Furthermore, there is little reason for concern that judges would tend to forgo notification requirements easily since their decision will be constrained by the fear that an offender that they will release from the requirement will re-offend.

## V. CONCLUSION

This Article dealt with the question whether policymakers that aim to minimize the cost of sanctioning should use nonlegal sanctions as a form of punishment. At the end of the day my answer to this question is yes, they should, but they should be careful about it. The reason for this word of caution is two fold. First, designing a regime that is based on legal and nonlegal sanctions requires significant amounts of information with respect to the way each of these affects the other. Without such prior information, policymakers cannot be sure as to the final outcomes of their policies. Second, extreme nonlegal sanctions, like extreme legal sanctions, are a problematic policy tool, and given the lower budgetary constraint nonlegal sanctions create for policymakers they might be tempted to create harsh nonlegal sanctions.

More specifically, this Article evaluated the treatment of sex offenders under public notification laws, and demonstrated that while these programs might have some preventative value, their main effects are punitive. Thus, it was argued that courts should overcome their reluctance, and recognize the true nature of these laws. The recent rulings of the Supreme Court reviewed above, and of other courts that stated explicitly that they would not take into account the full scope of nonlegal sanctions created by SORNs,<sup>325</sup> raise the concern that courts are willing to turn a blind eye towards the actual effects of legislation.

The conclusions of this Article are tentative in nature for the simple reason that there is limited empirical data on the issues discussed here. Thus, this Article should not be viewed as an article attempting to seal the debate over the design of optimal sanctions, but rather as an article that continues this discussion. Additional studies that could assist to further this discussion include: studies that will offer empirical measurements of the way the law effects nonlegal sanctions, studies of plea bargaining behavior surrounding the use of nonlegal sanctions, and studies in specific contexts – such as the context of sex offenders – that will offer us a better understanding of actual nonlegal sanctions.

## APPENDIX

This appendix will demonstrate in general terms the claims set out in Section II.

I use the following notation:

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<sup>325</sup> *Russell*, 124 F.3d at 1092 (noting that “our inquiry into the law’s effects cannot consider the possible ‘vigilante’ or illegal responses of citizens to notification”). See also *W.P. v. Poritz*, 931 F.Supp. 1199, 1211-12 (D.N.J., 1996) (noting that the scope of the analysis of the effects of the law is limited to legal reactions of the public).

LS = legal sanctions

NLS = nonlegal sanctions

$T^*$  = the exogenous level of total sanction set out by the political system

and assume the following continuous convex functions that represent the costs of inflicting legal and nonlegal sanctions:

$C_L = C_L( LS )$ , where  $C_L > 0$ ,  $C_L' > 0$ ,  $C_L'' > 0$

$C_{NL} = C_{NL}( NLS )$ , where  $C_{NL} > 0$ ,  $C_{NL}' > 0$ ,  $C_{NL}'' > 0$

Beginning with the benchmark case, the social optimal combination of sanctions is used when the cost of sanctioning is minimized, thus the social planners' problem can be phrased as:

$$(1) \text{Min}_{L, NL} : C_L( LS ) + C_{NL}( NLS )$$

$$\text{s.t. } T^* = LS + NLS$$

which produces the following first order condition:

$$(2) \frac{\partial C_L}{\partial LS} = \frac{\partial C_{NL}}{\partial NLS}$$

Turning to the endogenous case, this case can be represented by noting that the level of the legal sanction is a variable within the cost function of nonlegal sanctions. The cost-minimizing problem will remain unchanged and can be noted as:

$$(4) \text{Min}_{L, NL} : C_L( LS ) + C_{NL}( NLS, LS )$$

$$\text{s.t. } T^* = LS + NLS$$

The first order condition of this problem is:

$$(5) \frac{\partial C_L}{\partial LS} + \frac{\partial C_{NL}}{\partial LS} = \frac{\partial C_{NL}}{\partial NLS}$$

Note that when  $\frac{\partial C_{NL}}{\partial LS} > 0$  (*i.e.*, the substitution case) the optimal level of nonlegal

sanctions will be higher than in the benchmark case, while when  $\frac{\partial C_{NL}}{\partial LS} < 0$  (*i.e.* the signaling case) the optimal level of nonlegal sanctions will be lower than in the benchmark case.



