

**THE INVISIBLE MAN:
HOW THE SEX OFFENDER REGISTRY RESULTS IN SOCIAL DEATH**

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ABSTRACT: This Article establishes that overcriminalization serves to marginalize unwanted groups of society, and particularly regarding the sex offender registry, it results in social death. The author relies upon the notion of crime as a social construct to establish that the concept of “sex offense” changes over time as society and culture evolve. From there, the author incorporates the work of Michele Foucault involving the relationship of power, knowledge, and sexuality to show how the trend toward more repressive social controls over sex-related activity is related to a shift in this relationship. The Author identifies three characteristics and the associated traits which arise when overcriminalization exists, and further shows how these characteristics and traits are present with respect to the sex offender registry. This Article offers critical insight into the relationship between overcriminalization and repressive control systems and concludes that overcriminalization exists when repressive governmental controls seize power and render non-existent informal social controls. It follows that the sex offender registry is a repressive governmental control that has concentrated power in the government and criminal laws while shifting power away from informal social controls to result in the social death of those unwanted, those labeled sex offender.

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I. INTRODUCTION.

Frank Rodriguez is socially dead. He died when he was nineteen years old and had sex with his fifteen-year-old girlfriend (consensual sex with a minor is against the law in Texas). Frank Rodriguez died the day he entered a guilty plea to sleeping with his girlfriend and was forced to move from his parents' home because the law did not permit him to live under the same roof as his twelve-year-old sister. From the time of his plea, he has not been allowed to visit pools, parks, or any locations where children are likely to congregate. He is currently married to this same teenage girl, now a woman, and they have four daughters together, but Frank Rodriguez and his family all live on the margins of society. He is still not allowed anywhere children are likely to congregate. This means he cannot coach his daughters' soccer team or even pick them up from school. He is socially dead, and his family is, too.¹

Frank Rodriguez's story is not unique; the irony of the United States' justice system is that crime rates continue to rise in the face of increasingly harsher criminal laws. In fact, the United States "uniquely stands out around the world in both [its] level of incarceration and [its]

¹ http://today.msnbc.msn.com/id/43909060/ns/today-today_people/t/hes-labeled-sex-offender-sleeping-his-own-wife/ (last visited September 20, 2011)

rates of routine violence in the streets and homes.”² Yet despite decades of a “tough on crime” approach, the U.S. criminal justice system remains incapable of lowering the crime rate, much less preventing crime at all.³ Criminologist Elliott Currie observes that “[m]ass incarceration has deepened the historic gaps in life chances between affluent and poor, white and black, and created a vast army of the socially and economically disabled: it fruitlessly sucks up billions of dollars, year after year.”⁴ In other words, overcriminalization is not only resulting in more crime, but it is also contributing to the deterioration of society making it likely crime rates will increase even more.

Beginning in the 1970’s, a conservative movement emerged at the forefront of criminal justice promoting overcriminalization.⁵ The push in favor of overcriminalization has emerged as “one of the largest experiments in social engineering ever undertaken in the United States.”⁶ Jock Young, a British criminologist, has studied this conservative approach and characterized its failures as a “crisis of penalty.”⁷ The crisis of penalty is evidenced by sweeping legislative acts intended to prevent crimes from occurring; anti-crime legislative acts, however, tend to be

² Elliot Currie, *Against Marginality: Arguments for a Public Criminology*. 11 *Theoretical Criminology* 175-190 (May 2007). Also available at <http://tcr.sagepub.com/content/11/2/175> (Last visited on August 22, 2011.) Overcriminalization is responsible for America achieving “the ignominious label of being the country with the most persons incarcerated per capita.” Corey Rayburn Yung, *The Emerging War on Sex Offenders*. 45 *Harv. C.R.-C.L. L. Rev.* 441 (2010).

³ Currie, *supra* note 2.

⁴ *Id.*

⁵ The term “overcriminalization” is subject to many definitions and meanings depending on its context. For example, overcriminalization has been described as consisting of “(1) untenable offenses; (2) superfluous statutes; (3) doctrines that overextend culpability; (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of petty violations.” Erik Luna, *The Overcriminalization Phenomenon*, 54 *Am. U. L. Rev.* 703, 717 (2005). On the other hand, another scholar has written that “the common features of overcriminalization include the following: (1) excessive unchecked discretion in enforcement authorities, (2) inevitable disparity among similarly situated persons, (3) potential for abuse by enforcement authorities, (4) potential to undermine other significant values and evade significant procedural protections, and (5) misdirection of scarce resources (opportunity costs).” Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 *Am. U. L. Rev.* 747, 749 (2005).

⁶ Elliot Currie, *Confronting Crime: An American Challenge*. (Pantheon Books 1985) at 7.

⁷ *Id.*

overly-repressive and function to increase crime rates rather than lower them. Repressive criminal laws, then, are evidence of overcriminalization.

Law exists because society⁸ agrees it exists;⁹ thus, laws change as societies change. “Society” is an abstract term referring to a collective decision-making body, but “[n]ot everybody is part of the collective that makes the decision.”¹⁰ Those who exist on the fringes of society do not enjoy the power to make decisions, and for all intents and purposes they are socially dead. The marginalized, however, can sometimes transition into the normative mainstream and gain a foothold in society to become a part of the decision-making collective. For this to occur, however, requires a fundamental shift in the relationship between those in power and the marginalized of society. The power base must change to make room for the emerging voice of the marginalized group to claim its place in society.

The term “crime” is difficult to define because the concept of what constitutes deviance (i.e. a criminal act) changes as society changes.¹¹ The more repressive or conservative the societal system, the more likely that the “deviance is what officials say it is, and deviants are those so designated by officials.”¹² Definitions of deviance may be strongly tied to deviant

⁸ “Society” is an abstract term referring to a collective decision-making body. “Not everybody is part of the collective that makes the decision. When we say ‘society’ we really mean those who call the tunes and pay the piper; it would be worse than naïve to imagine that everybody’s opinion counts the same, even in a country that is supposed to be democratic. ... This must be clearly understood. The rich and powerful, the articulate, the well positioned, have many more ‘votes’ on matters of definition than the poor, the weak, the silent.” Lawrence M. Friedman, *Crime and Punishment in American History*. 4-5 (1994).

⁹ Cynthia Lee and Angela Harris, *Criminal Law: Cases and Materials*. ed. 2, 1-72 (West 2005).

¹⁰ When we say ‘society’ we really mean those who call the tunes and pay the piper; it would be worse than naïve to imagine that everybody’s opinion counts the same, even in a country that is supposed to be democratic. ... This must be clearly understood. The rich and powerful, the articulate, the well positioned, have many more ‘votes’ on matters of definition than the poor, the weak, the silent.” *Crime and Punishment in American History* 4-5

¹¹ See *supra* note 8 at p. 3. “Crimes ... are forbidden acts ... forbidden in a special way.”

¹² Elliot Currie, *Crimes Without Criminals: Witchcraft and its Control in Renaissance Europe*, 3 L. & Soc. Rev. 1, 28 (1968).

behaviors,¹³ or they may be largely invented.¹⁴ The higher the level of invention in the definition of deviance, the more likely normal standards of procedure and restraint will be taxed.¹⁵

Repressive control systems tend to incentivize, either economically, politically, or otherwise, the prosecution and punishment of deviance.¹⁶ On the other hand, criminal laws in a restrained system are more effective because they are narrowly tailored and paired with strong protections of individual rights.¹⁷ Additionally, the prosecution and punishment of deviance is not incentivized under a restrained societal system. Therefore, under repressive control systems the number of deviants is greater as is the incidence of punishment; that is, repressive control systems result in a greater number of criminals and a higher rate of crime.¹⁸

The sex offender registry¹⁹ is a repressive social control system. Society, through the legislative process, has broadly defined the deviant (i.e. the sex offender²⁰) as well as the deviant behavior (i.e. the sex offense). Although some sex crimes may be defined by the deviant behavior itself, many sex crimes encompassed in the Adam Walsh Act and SORNA are only crimes because the legislature has so designated.²¹ Specifically, sex offenders under SORNA are

¹³ “Definitions of deviance are [not] somehow fixed or inherent in the acts to which they refer, rather than being socially derived. Eskimos define murder differently from Englishmen, and present-day Englishmen define murder differently from medieval Englishmen.” *Id.* at 29.

¹⁴ “While it could be argued that all definitions of deviance, referring to whatever kinds of acts, contain a degree, however slight, of this element of invention, it is certainly true that the degree to which it is present is highly variable.” *Id.*

¹⁵ “To the extent that the element of invention enters into a society’s definition of deviance, there is an open invitation to potentially abusive creativity on the part of systems of control or, particularly in the case of societies with limited systems of control, on the part of individuals or groups peripheral to the control system.” *See supra* note 11 at p. 30.

¹⁶ *See supra* note 11.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The Sex Offender Registration and Notification Act (“SORNA”) is the federal act authorizing the establishment of a sex offender registry. Each state has its own registry, and the federal government offers significant incentives to states to encourage them to adopt sex offender registry laws similar to SORNA.

²⁰ The term “sex offense” is defined broadly in most jurisdictions. Therefore, relatively minor offenses such as urinating in public or consensual sex with an underage person may result in the labeling of a sex offender.

²¹ Some examples include consensual sexual intercourse between minors, urinating in public, and prostitution.

any “individual who was convicted of a sex offense,”²² and a sex offense under SORNA is “a criminal offense that has an element involving a sexual act or sexual contact with another.”²³

As a result, the number of sex offenders committing sex offenses is growing as is the rate of prosecution and punishment for sex offenders.²⁴ Rather than working to prevent sex crimes from occurring, SORNA’s repressive nature will function to increase the incidence of sex-related crimes as well as their punishment.

In this Article, I use Elliott Currie’s work to illustrate how repressive control systems overcriminalize behaviors and result in higher rates of crime, prosecution, and incarceration. Section II of this Article establishes that crime is a social construct and explains how, over time, the definition of what constitutes a crime changes. This section also identifies three characteristics that emerge in a repressive control system: (1) “[i]nvulnerability to restraint from other social institutions”; (2) “[s]ystematic establishment of extraordinary powers for suppressing deviance with a concomitant lack of internal restraints”; and (3) “[a] high degree of structured interest in the apprehension and processing of deviants.”²⁵ In Section III, I examine each of these characteristics in the context of SORNA and propose that each characteristic has emerged in the wake of the implementation of SORNA. Finally, Section IV concludes by predicting crime rates with respect to sex offenses will likely increase as will the rates of prosecution and punishment in the wake of SORNA.

II. CRIME AS A SOCIAL CONSTRUCT.

A. The process of establishing what is a crime.

²² 42 U.S.C. § 16911(1) (2006).

²³ 42 U.S.C. § 16911 (5)(A)(i) (2006).

²⁴ Center for Sex Offender Management, Recidivism of Sex Offenders, available at <http://www.csom.org/pubs/recidsexof.html> (Last visited on August 23, 2011).

²⁵ See *supra* note 11 at p. 16.

Throughout history, criminal laws have been implemented as a method of social control in response to abnormal social behavior that is perceived as a threat.²⁶ Criminal laws function to keep society secure by controlling threats of dangerous behavior, but criminal justice is not the most effective method of behavior control because it is incapable of shaping values.²⁷ It can only function as coercive authoritative power demanding conformity to the social norm; coercive authority, however, is vulnerable to defeat.²⁸ Other social institutions such as schools, churches, and communities create “[s]trong informal controls to keep most people in line.”²⁹ Social institutions are more effective at shaping behavior because they institutionalize values as part of the normative order rather than attempting to exert sheer power over behavior.³⁰

Notably, “the *degree* to which a social control system can influence the character of a deviant behavior system is variable and depends in part on the *kind* of behavior involved and the particular way it is socially defined.”³¹ When criminal laws and social institutions strike an even balance, society is safer and more orderly. Problems arise, however, when these interests are unbalanced.

When the scale tips in the direction of criminal laws, the effect is one of overcriminalization, and when the scale tips in favor of social institutions, the effect is to give license to street justice. As the balance shifts in one direction, the other loses power to influence and control behavior. When the balance tips toward overcriminalization, the shift in power causes social institutions to deteriorate, and crime and punishment rates increase as a result.³²

²⁶ See *supra* note 9; See also *supra* note 8 at p. 8.

²⁷ See *supra* note 8 at p. 8.

²⁸ Orlando Patterson, *Slavery and Social Death* 35.

²⁹ *Id.* at 8-9.

³⁰ See Orlando Patterson, *Slavery and Social Death* 36.

³¹ See *supra* note 11 at p. 8.

³² See *supra* note 3.

Since the fear of criminal punishment is not the strongest deterrence against criminal behavior,³³ informal social controls are crucial to the maintenance of an ordered society.

This is not to say that criminal laws have no place in ordered society. Historically, distinctions have been made between acts that are *mala in se* and *mala prohibita*. An act that is *mala in se* is evil in and of itself (i.e. a deviant act closely tied to the behavior), whereas an act that is *mala prohibita* is a mere offense “against the laws of society”³⁴ (i.e. an act that is more constructed). Generally, society exhibits a more visceral reaction to *mala in se* crimes as opposed to mere regulatory crimes.³⁵ The reaction changes, though, as society moves through the cycle of “criminalizing, decriminalizing, and recriminalizing.”³⁶

This cycle reveals that defining crime is a recursive process in which the law informs cultural norms and cultural norms inform the law.³⁷ Over time, what humans consider to be criminal behavior transforms because beliefs about right, wrong, and the needs of ordered society vary. This pattern of criminalization manifested in the case of witchcraft which was prosecuted vigorously during the Renaissance³⁸ but is not even considered to exist, much less be a crime, by many in the post-modern age. Similarly, the concept of sexual appropriateness has changed over time. For example, as a historical matter, ancient Greek society did not criminalize

³³ “It isn’t fear of jail that keeps most of us from robbing, pillaging, raping, murdering, and thieving.” Crime and Punishment 8.

³⁴ See *supra* note 8 at p. 6. (quoting Blackstone).

³⁵ “Where the deviant act is nonexistent [*mala prohibita*], it is necessarily true that the criteria for designating people as deviant do not lie in the deviant act itself, but in the interests, needs, and capacities of the relevant official and unofficial agencies of control and their relation to extraneous characteristics of the presumptive deviant.” See *supra* note 11.

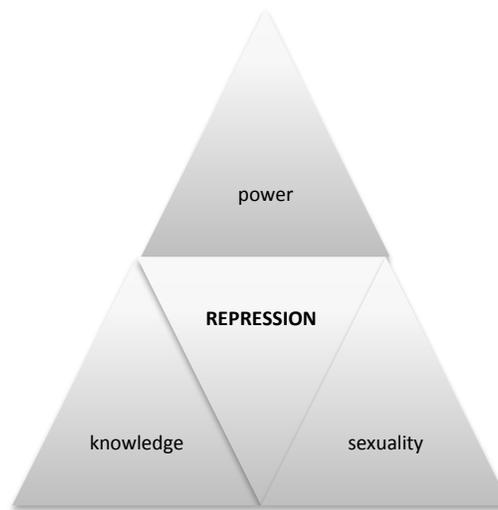
³⁶ See *supra* note 8 at p. 7. “Social change is constantly at work on the criminal justice system, criminalizing, decriminalizing, and recriminalizing.” The concept of crime changes over time and from place to place. For example, some societies have permitted blood feuds and revenge killings while others characterize abortion as murder. “Heretics were burned at the stake in medieval Europe.” “It was a crime during the Second World War to sell meat above the fixed official price; or to rent an apartment at excessive rent.” *Id.*

³⁷ *Id.*

³⁸ “[T]he Catholic Church itself, in the 13th century, explicitly took the position that the belief in witchcraft was an illusion. In no sense were witches considered by ecclesiastical or secular authorities to be a serious problem until the 15th century.” See *supra* note 11 at p. 9.

certain sexual activities like pederasty.³⁹ On the contrary, pederasty was not only part of mainstream culture, it was a revered and desired part of the culture.⁴⁰ In 2011, however, pederasty is considered a crime throughout Western society.

Since at least the Victorian age, the relationship between sex and power has been defined and characterized by repression.⁴¹ French philosopher Michel Foucault writes that repression has “been the fundamental link between power, knowledge, and sexuality since the classical age.” The relationship of these three elements is demonstrated in the following graphic:



The only way to remove the repression is to alter the dynamic of the relationship of the three. The process of removing repression is time-consuming, difficult, and costly. It requires “nothing less than a transgression of laws, a lifting of prohibitions, an irruption of speech, a reinstating of pleasure within reality, and a whole new economy in the mechanisms of power.”⁴² Those who initiate the alteration tend to be the marginalized of society because they are the ones

³⁹ Pederasty is an intimate relationship between a man and an adolescent boy. Black's Law Dictionary (9th ed. 2009).

⁴⁰ To be chosen by the erastes was a sign of status and placed the young boy and his family in an ideal position within the community.

⁴¹ I MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, AN INTRODUCTION 6 (Robert Hurley, trans., Pantheon Books 1st ed. 1978) (1976).

⁴² Id. at 5.

who most suffer from the repression. Their speech erupts when they have reached a point where they can no longer bear the repression. Initially, their message may not be well-accepted by mainstream society because the messengers are marginalized and socially dead. Their message is foreign and may even seem warped or perverted to the social norm. The very eruption of speech, however, represents a threat to the authority of those in power. Because “[a]ll power strives for authority,”⁴³ any threat to the relationship marks defeat and loss of authority. In response, those in power will act to preserve their authority through greater repression of the marginalized members of society. This desperate move to retain power is a feeble attempt to silence the eruption of speech.⁴⁴

In terms of the recursive cycle of criminalization of sex-related acts, the United States is currently engaged in intensive criminalization that is tipping the balance away from social institutions.⁴⁵ This intensive criminalization has coincided with an eruption of speech related to sexuality. This speech has manifested in relation to the Lesbian, Gay, Bisexual, and Transsexual movement, including the political fight to permit same-sex marriage. It has also manifested in relation to the pornography industry that generates billions in revenues each year and also with regard to the overrepresentation of sex in mainstream media.

In response to the eruption of speech, Congress and state legislatures create and enact massive legislation like the Adam Walsh Act and the Sex Offender Registry and Notification Act concentrating power in criminal law and its agents. This Article proposes that specific characteristics arise and are observable in societies where the balance between criminal laws and

⁴³ Orlando Patterson, *Slavery and Social Death: A Comparative Study*, 37 (Harvard University Press 1982).

⁴⁴ “If sex is repressed, that is, condemned to prohibition, nonexistence, and silence, then the mere fact that one is speaking about it has the appearance of a deliberate transgression. A person who holds forth in such language places himself to a certain extent outside the reach of the power; he upsets established law; he somehow anticipates the coming freedom.” *Id.* at 6

⁴⁵ Numerous scholars debate the definition of overcriminalization as well as its very existence.

societal institutions is weighted in favor of the former. When these characteristics emerge, they evidence the existence of overcriminalization which is a form of repression. In addition, undesirable traits that are harmful to the fabric of our social identity develop as a result of the repressive regime. These undesirable traits ultimately result in social death which is the rejection or excommunication of an individual from the community coupled with the denial of any independent social existence.⁴⁶

B. Characteristics of Overcriminalization.

For over three decades, criminologist Elliott Currie has studied and written about the crisis of the criminal justice system in America.⁴⁷ He has warned that crime rates will rise in response to overly-punitive and repressive criminal justice systems.⁴⁸

To illustrate his conclusion, Currie studied the prosecution of witches in Europe during the Renaissance and compared the control systems in continental Europe with those in England.⁴⁹ Fundamental to his ultimate conclusion is the notion that the more invented a crime the greater the potential for abuse and repression.⁵⁰ In Renaissance Europe, the new Christian regime secured its power by causing the social (and actual) death of the liminal pagans. It did so by inventing the crime of witchcraft to eradicate pagan practices that threatened Christianity.

The criminalization of sex offenders is also characterized by varying degrees of invention, particularly in terms of defining the acts of sex offense. For example, the crime of statutory rape generally contemplates a higher level of invention than does the crime of rape. The witchcraft study is helpful in understanding the current cycle of criminalization of sex

⁴⁶ Orlando Patterson, *Slavery and Social Death: A Comparative Study*, 38 (Harvard University Press 1982)

⁴⁷ See School of Social Ecology University of California, Irvine at <http://socialecology.uci.edu/faculty/ecurrie> (Last visited August 22, 2011).

⁴⁸ Currie, *see supra* note 2 at pp. 177-178.

⁴⁹ See *supra* note 11.

⁵⁰ See *supra* note 14.

offenders because it illustrates the extremes to which repression can reach, especially the more invented the crime. This comparative study of the pattern of prosecutions is informative as it relates to the nature of repressive control systems and their potential to cause social death.

Three defining characteristics exist in repressive control systems: (1) “[i]nvulnerability to restraint from other social institutions”; (2) “[s]ystematic establishment of extraordinary powers for suppressing deviance with a concomitant lack of internal restraints”; and (3) “[a] high degree of structured interest in the apprehension and processing of deviants.”⁵¹ Conversely, the defining characteristics of a restrained control system are: (1) “[a]ccountability to, and restraint by, other social institutions”; (2) “[a] high degree of internal restraint, precluding the assumption of extraordinary power”; and (3) “[a] low degree of structured interest in the apprehension and processing of deviants.”⁵² These categories are examined in more detail below.

1. *Invulnerability to restraint from other social institutions.*

The very methods of prosecution between continental Europe and England were distinct. On the Continent, witchcraft was considered heresy while in England witchcraft was considered a felony requiring proof of *mens rea*.

Prosecutions for heresy were initially the responsibility of the Inquisition, but even after its disappearance the secular courts “retained for the most part the methods which the Inquisition had pioneered.”⁵³ The Inquisition method concentrated the powers of accusation, prosecution, and judgment within one official control system (usually a single individual), and the suspect carried a heavy presumption of guilt.⁵⁴ Torture and secret inquiry were common features of

⁵¹ See *supra* note 11 at p. 16.

⁵² *Id.* at p. 20.

⁵³ *Id.* at p. 11.

⁵⁴ *Id.* at p. 12.

prosecutions in this repressive regime, and the concentration of power made the system invulnerable to review by other social institutions.⁵⁵

England, on the other hand, employed an established system of restrained control in the prosecution of witchcraft, and largely avoided becoming a tool of ideological or moral interests.⁵⁶ Trials of persons accused of witchcraft were held before local courts of limited jurisdiction and were subject to review by higher courts.⁵⁷ Rather than the monolithic method employed on the Continent, England utilized a system focused on the rights of the accused⁵⁸ and “separation of the functions of prosecution and judgment.” The accused, therefore, stood on equal ground as the accuser, and the accused also had the power to appeal any adverse verdict to a higher court. As a result, reprieves were common England but not in continental Europe.⁵⁹

2. *Extraordinary Power/Lack of Internal Restraint.*

In addition, continental criminal procedure required “complete proof”⁶⁰ of witchcraft to support a conviction. At first glance, the requirement of “complete proof” may seem to offer complete protection against abuse of power. However, “complete proof” was exceedingly difficult to obtain in cases of witchcraft, which was a thought crime, so there was “tremendous pressure for confession at all costs.”⁶¹ In this way “the procedural safeguard of rigorous proof broke down in practice through the allowance of extraordinary procedures which became necessary to circumvent it.”⁶² Torture became commonplace, and, although it could not be

⁵⁵ *Id.*

⁵⁶ “[T]he common law tradition provided a variety of institutional restraints on the conduct of the witch trials.” *Id.* at pp. 17-18.

⁵⁷ This system represents a “high degree of internal restraint.” *See supra* note 11 at p. 17.

⁵⁸ The accused had a right to trial by jury and to the presumption of innocence. *Id.* at 18.

⁵⁹ *Id.*

⁶⁰ “‘Complete proof’ general implied evidence on the order of testimony of two eyewitnesses to the criminal act or ... written proofs bound by rigorous standards of authenticity.” *Id.* at 13

⁶¹ *Id.*

⁶² *Id.*

repeated after cessation, torture could continue indefinitely even after interruption.⁶³ Other procedural safeguards relaxed as well. For example, individuals who normally were not permitted to bear witness⁶⁴ were allowed to testify in trials against witches, and the suspect was not provided the name of the witnesses.⁶⁵ Witnesses would also be subjected to torture if they recanted or otherwise appeared unwilling to testify.⁶⁶

In prosecutions for witchcraft on the Continent, acquittals were nearly impossible and the court generally held a suspect indefinitely until enough “proof” was established to obtain a conviction.⁶⁷ Suspects were denied the right to counsel.⁶⁸ Proof of guilt was also established through impossible dilemmas. For example,

If the accused was found to be in good repute among the populace, he or she was clearly a witch, since witches invariably sought to be highly thought of; if in bad repute, then he or she was also clearly a witch, since no one approves of witches. If the accused was especially regular in worship or morals, it was argued that the worst witches made the greatest show of piety. Stubbornness in refusing to confess was considered a sure sign of alliance with the Devil, who was known to be taciturn. Virtually the only defense available to accused witches was in disabling hostile witnesses on the grounds of violent enmity; this provision was rendered almost useless through the assumption that witches were naturally odious to everyone, so that an exceptionally great degree of enmity was required.⁶⁹

⁶³ “Few accused witches could maintain a denial of their confession after several [torture] sessions.” *Id.* Other methods of extracting confessions included promising pardon if a suspect confessed, or requiring confession in order to receive the last sacraments and avoid damnation. Notably, promises of pardon were rarely kept.

⁶⁴ “Heretics could testify, which went against established ecclesiastical policy; so could excommunicates, perjurers, harlots, children and others who ordinarily were not allowed to bear witness.” *Id.* at 14.

⁶⁵ “[C]ontrary to established procedure in ordinary continental courts, names of witnesses were withheld from the accused.” *Id.*

⁶⁶ “Witnesses themselves were liable to torture if they equivocated or appeared unwilling to testify.” *Id.*

⁶⁷ “In general, innocence was virtually never the verdict in such cases; the best one could hope for was ‘not prove.’” *Id.* at 15.

⁶⁸ “Legal counsel for the accused under the Inquisition was often prohibited, contrary to ordinary continental procedure.” *Id.*

⁶⁹ *Id.* at 15-16.

Notably, any time torture or confiscation of property were prohibited, the number of witches and witchcraft prosecutions dropped dramatically.⁷⁰ Prosecutions in England did not experience the same pressures as those on the Continent, in part, because the accused was presumed innocent, and as a result, “the English courts did not demand such rigorous proofs of conviction as did the continental courts.”⁷¹ Though it may seem counterintuitive, the English system was fairer to the individual accused than was the continental system. The lack of requirement of proof insulated the English system from the incentives associated with the continental system to obtain confessions, whether or not false. England developed methods of obtaining external evidence through devices such as “pricking,⁷² swimming,⁷³ and watching.”⁷⁴ The result was a quite inefficient process for the prosecution of witchcraft which made it difficult to incentivize witchcraft prosecutions.⁷⁵ As a result, the number of witchcraft prosecutions remained lower in England.

3. *Structured Interest.*

On the Continent, witchcraft prosecution emerged as a “profit-making industry run on bureaucratic lines, which combined nearly unlimited power with pecuniary motive and which gave distinct form to the deviant behavior system in which it was involved.”⁷⁶ Prosecutions on

⁷⁰ “That the prevalence of witches in continental Europe was a reflection of the peculiar structure of legal control is further implied by the fact that when torture and/or confiscation became from time to time unlawful, the number of witches decreased drastically or disappeared altogether.” *Id.* at 23-24.

⁷¹ *Id.* at 18.

⁷² “Pricking was based on the theory that witches invariably possessed a ‘Devil’s Mark,’ which was insensitive to pain.” *Id.* at 19.

⁷³ “Swimming was based on the notion that the Devil’s agents could not sink in water.” *Id.* “The victim was stripped naked and bound with her right thumb to her right toe, and her left thumb to her right toe, and was then cast into a pond or river. If she sank, she was frequently drowned; if she swam she was declared guilty without any further evidence being required.” *Id.*

⁷⁴ “[W]atching reflected on the theory that the Devil provided witches with ... familiars which performed useful services... The familiars could therefore be expected to appear at some point during the detention of the suspected witch.” *Id.* 19-20.

⁷⁵ *Id.* at 20.

⁷⁶ *Id.* at 22.

the Continent promoted a significant economic interest because the court had the power “to confiscate the property of the accused, whether or not he was led to confess.”⁷⁷ Thus, the type of person prosecuted for witchcraft in continental Europe tended to be wealthy because there was an economic interest in obtaining the property, and the ability to prosecute and convict innocent people was sanctioned under the repressive system.⁷⁸

The unfettered torture seen on the Continent furthered this industry in two ways: (1) steady apprehension and prosecution of other witches; and (2) validation and reinforcement of the legitimacy of the trials.⁷⁹ During the torture sessions, suspects were required to denounce any accomplices in the course of their confessions, and their accomplices were in turn apprehended, tortured, and executed. Additionally, the confessions were read at the public execution “recreat[ing] in the public mind the reality of the witchcraft itself.” The probability of obtaining a false confession under these circumstances was quite high, yet the public endorsed the system and supported the prosecution of witches.⁸⁰ Both the economic need for prosecution as well as the public demand (as a result of unwarranted fear) caused a cycle to develop in which more rigorous controls were implemented causing an increase in the rate of deviance which in turn supported even more rigorous control again sending deviant rates higher.⁸¹

On the other hand, in England, those prosecuted for witchcraft tended to be vulnerable individuals such as women and those in the lower class because “English courts did not have the

⁷⁷ *Id.* at 16.

⁷⁸ “A significant proportion of continental witches were men, and an even more significant proportion of men and women were people of wealth and/or property.” *Id.* at 22, 26, 27.

⁷⁹ *Id.* at 13.

⁸⁰ “Several hundred thousand witches were burned in continental Europe during the main period of activity, creating a picture of the tremendous extent of witchcraft in Europe. The large number of witches frightened the population and legitimized ever more stringent suppression.” *Id.* at 22.

⁸¹ *Id.*

power or the motive to systematically stigmatize the wealthy and propertied.”⁸² Economic incentives like those on the Continent did not exist because witches’ property was not confiscated in England, and witch prosecutions were typically initiated by private entrepreneurs who stood to gain economically in some way from the prosecution.⁸³ The danger, of course, was that many entrepreneurs ultimately were accused of witchcraft, as well, because they professed to possess special knowledge of witches.⁸⁴

Therefore, English courts, unlike continental courts, had no interest in creating, nor the power to perpetuate, a systematic prosecution of witchcraft; England therefore, had less witches. Conversely, due to the power and interests vested in continental courts, more witches “existed” in continental Europe than in England. Unsurprisingly then, the number of individuals executed for witchcraft was remarkably lower in England than in continental Europe.⁸⁵

C. Traits of Overcriminalization.

In his research, Currie discovered that the criminal system as it related to witches in continental Europe was considerably more repressive than the system in England; consequently, continental Europe had a greater number of witches as well as a higher rate of prosecution and punishment of witches.⁸⁶ The traits of repressive society emerged in continental Europe as related to the prosecution of witches: mass incarceration, increased rates of incarceration, and little or no investment in reintegration and treatment. Social conditions such as aggravated poverty, stressed families, and eroded communities were exacerbated by overly-punitive laws.⁸⁷

⁸² *Id.* at 27.

⁸³ *Id.* at 25.

⁸⁴ *Id.* at 25-26.

⁸⁵ “Of those indicted for witchcraft, a relatively small percentage was actually executed... In the courts of the Home Circuit, from 1558 to 1736, only 513 indictments were brought for witchcraft; of these, only 112, or about 22 per cent, resulted in execution.” *Id.* at 27.

⁸⁶ *Id.* at 24.

⁸⁷ Currie, *supra* note 2 pp. 177-78.

The people accused of practicing witchcraft were marginalized from society. They suffered from the stigma of their liminal state and eventually experienced both literal and social death. In continental Europe, social conditions deteriorated such that the marginalized were pushed even further to the outer limits of society, crime rates increased, and the cycle of fiercer punishment repeated.⁸⁸

III. THE SEX OFFENDER REGISTRY IS OVERCRIMINALIZATION.

For purposes of this Article, the term “overcriminalization” refers to the phenomenon in which the balance between formal governmental control and informal social control systems shift in favor of governmental control vis-à-vis criminal laws. The sex offender registry represents a repressive control system, and the traits of overcriminalization in the form of social stigma and, ultimately, social death have emerged in the wake of its adoption. The increase in the government’s attempts to control and exert power over sexuality evidences a shift in the balance of power, knowledge, and sexuality. This shift may be the result of the transgression of law and irruption of speech associated with the Lesbian, Gay, Bisexual, Transexual movement and the political debates surrounding same-sex marriage. It may also be linked to the rising voice of the pornography industry or the over-sexed mainstream media. To be sure, it is no coincidence that, simultaneously, even more repressive laws targeted at sex-related activity are being enacted by legislatures throughout the country resulting in the perpetuation of the overcriminalization cycle.

A. The Registry is a Repressive Control System.

Repressive control systems are characterized by (1) “[i]nvulnerability to restraint from other social institutions”; (2) “[s]ystematic establishment of extraordinary powers for

⁸⁸ *Id.* at 176.

suppressing deviance with a concomitant lack of internal restraints”; and (3) “[a] high degree of structured interest in the apprehension and processing of deviants.” All three characteristics exist with respect to the Registry. Therefore, the sex offender registry is a repressive control system.

1. *The Registry is invulnerable to restraint from other social institutions.*

One of the principal criticisms of SORNA is the encroachment by the federal government into an area of law delegated to the States under the Tenth Amendment.⁸⁹ In fact, during the debates the only objections to the passage of these Acts addressed this federal question issue.⁹⁰

The Framers intended for the federal government to be a limited power over the States. They created a system of checks and balances in the form of the legislative, executive, and judicial branches to ensure these limits were obeyed. When Congress oversteps these limits, it necessarily creates a system that is invulnerable to restraint from other social institutions.

Additionally, the requirement to register as a sex offender is the automatic consequence of being designated a sex offender or predator. The designation of sex offender or predator is the automatic consequence of being convicted⁹¹ of a sex crime. In some cases, conviction is not even required, since a verdict of not guilty by reason of insanity may also result in mandatory sex offender registration.⁹² Judges, prosecutors, and other state officials are deprived of the ability to

⁸⁹ Yung, *supra* note 2.

⁹⁰ 144 Cong. Rec. 4491, 4499 (1998). Representative Paul and Congressman Watt both recognized the federal criminal legislation as Congress’ obvious violation of federalism by enacting criminal laws, an area specifically reserved to the States by the Founding Fathers. *Id.* Representative Ron Paul cautioned that creation of a sex offender registry and other federal sex offender laws represent serious violations of federalism and threats to constitutionally-protected freedoms in America. *Id.*

⁹¹ In some jurisdictions, a person may be designated a sex offender without conviction. *See infra* note 83. For instance, a person found not guilty by reason of insanity or mental defect or a person who receives a withhold of adjudication may still be designated a sex offender and required to register under SORNA and the state sex offender registration scheme.

⁹² Although many states require all sex offenders to register only after conviction, twenty-one states require registration where an individual has been found not guilty by reason of insanity or mental defect. MO. REV. STAT. § 589.400 (2010); DEL. CODE ANN. tit. 11, § 4121(a)(2) (2010); 730 ILL. COMP. STAT. ANN. 150/2(A)(1) (LexisNexis

independently evaluate cases and make determinations about the designation of a sex offender and the requirement to register. Hence, the judicial “check” on the legislative and executive branches has been rendered powerless.

The term of registration also presents difficulties. Most jurisdictions do not allow for removal of a sex offender from the registry even though SORNA has some provisions that would permit individuals to apply for removal after a period of time. In addition, an individual designated as a sex offender is required to register in any new jurisdiction where the offender may move, even if the original crime that resulted in the designation would not have resulted in such a designation in the new jurisdiction. So it becomes true in most cases: once labeled a sex offender, always a sex offender.

Congress’ enactment of SORNA not only violates the doctrine of separation of powers, it also evidences that Congress has become a tool of ideological and moral interests. This is particularly evident in sex crimes with significantly invented definitions.

The voting public has demanded tougher legislation with regard to sex offenders, and their demands represent the ideological and moral interests of the social norm. Their interests have both shaped and been shaped by sex offender legislation much in the same way the reading of witch confessions at public executions recreated the existence of witchcraft itself despite the high probability of a false confession. Political need coupled with high public demand for

2010); ARK. CODE ANN. § 12-12-905 (2010); MASS. ANN. LAWS ch. 6, § 178C (LexisNexis 2010); CAL. PENAL CODE § 290.004 (Deering 2009); ALA. CODE § 15-20-21(8) (LexisNexis 2010); FLA. STAT. ANN. § 775.21(4)(d) (2010); HAW. REV. STAT. ANN. § 846E-1 (LexisNexis 2010); LA. REV. STAT. ANN. § 15:541(7) (2010); MINN. STAT. § 243.166(d) (2009); MISS. CODE ANN. § 45-33-25(1)(a) (2010); N.D. CENT. CODE, § 25-03.3-01(8) (2010); N.J. STAT. ANN. § 2C:7-2(a) (2010); WASH. REV. CODE ANN. § 9A.44.130(1)(a) (LexisNexis 2010); N.H. REV. STAT. ANN. § 651-B:1 (LexisNexis 2010); S.C. CODE ANN. § 23-3-430(a) (2009); UTAH CODE ANN. § 77-27-21.5 (n)(ii)(B)(v) (2010); VA. CODE ANN. § 9.1-901(b) (2010); W. VA. CODE ANN. § 15-12-2(b) (LexisNexis 2010); WIS. STAT. § 301.45(1g)(c) (2010);

stricter sex offender legislation is creating a cycle of repression likely to result in the social death of numerous individuals.

Take for example the case of Frank Rodriguez. As recounted in the introduction, he engaged in a sexual relationship with his fifteen-year-old girlfriend when he was a nineteen-year-old high school senior.⁹³ When her mother discovered their relationship, she reported him to the police. He was charged, prosecuted, and convicted for having sex with a minor; he is now required to register as a sex offender. Despite this trauma, though, he maintained a relationship with his high school love, and now they have been married fifteen years. Nonetheless, he has suffered social death in many ways. Frank Rodriguez is not permitted to coach his daughters' soccer team or accompany them to a school dance. He will not be permitted to attend their high school graduations or even help them move into their dormitories when they start college. He cannot take a family vacation without enduring an extensive administrative process that makes traveling barely worth the hassle. He is marginalized and exists in a perpetual liminal state. He is socially dead.

Similar to the prosecutorial system of continental Europe during the Renaissance, SORNA is invulnerable to restraint from other social institutions. Just like a person accused of witchcraft on the Continent was not permitted to present a defense or appeal to a higher authority, a person required to register under SORNA is unable to contest the requirement to register. This feature is unlike many other forms of criminal punishment which are subject to negotiation. For example, under sentencing guidelines an accused may negotiate a lesser sentence by presenting mitigating evidence warranting a departure from the guidelines. The

⁹³ Scott Stump, "He's labeled a sex offender for – sleeping with his own wife." Available at http://today.msnbc.msn.com/id/43909060/ns/today-today_people/t/hes-labeled-sex-offender-sleeping-his-own-wife/ (Last visited on August 22, 2011).

registration requirement, on the other hand, is not subject to negotiation. It is the automatic consequence imposed when an individual is convicted of a sex-related offense. This automatic feature is what renders this system invulnerable to restraint from other social institutions.

Not only is the sex offender registry invulnerable to restraint from other social institutions, but it is actually supported and endorsed by them. This endorsement is similar to the support offered by social institutions for the prosecution of witches in Renaissance Europe. During an execution, the general public would gather and listen to the confessions which were read to reinforce the legitimacy of the prosecutions.⁹⁴ Social institutions endorsed the system despite the fact it was broken because they bought into its legitimacy and feared what would happen without it. Thus, the public demand and reinforcement by social institutions (as a result of unwarranted fear) made the government invulnerable to restraint. This same type of manufactured fear is creating a cycle of reinforcement whereby the public is supporting the use of the sex offender registry despite its failures and inability to protect society. As a result, the registry is invulnerable to restraint from social institutions.

The automatic imposition of the requirement to register also creates symbolic authority over marginalized individuals. Authority is insecure and vulnerable to defeat when it is coerced; only by institutionalizing authority and incorporating it into the normative order can power over another be maintained.⁹⁵ Social institutions must support any repressive regime for the regime to survive.⁹⁶ One way to garner support is through the use of symbols.⁹⁷ Marginalizing individuals while exposing their “strangeness” creates the symbol of social death; through social

⁹⁴ Currie, *Witchcraft* 14.

⁹⁵ Orlando Patterson, *Slavery and Social Death*, 36.

⁹⁶ To establish authority over a slave, the master “needed both the recognition and the support of the nonslave members of his community for his assumption of sovereign power over another person.” Orlando Patterson, *Slavery and Social Death*, 35.

⁹⁷ “[S]ymbols, both private and public, constitute a major instrument of power when used directly or indirectly.” Orlando Patterson, *Slavery and Social Death* 37.

death authority is secured over the individuals ensuring the master's power.⁹⁸ In the case of the sex offender registry, it is both a literal and a figurative symbol. It has been written that the registry is the modern-day Scarlett Letter, and it is a literal symbol of strangeness and marginalization. The registry also creates social death for those required to register; it is a figurative symbol that preserves the repressive relationship between sex, power, and knowledge in the United States.

2. *The Registry is part of a system of extraordinary power for suppressing deviance with a concomitant lack of internal restraint.*

America is fighting an undeclared war against sex offenders.⁹⁹ One of the most powerful tools in the arsenal of any country at war is the ability to use propaganda to create and perpetuate myths in support of the war. Certain myths such as “stranger danger, unusually high post release recidivism, sex offender homogeneity, ... and enemy creation have served as cornerstones to America's sex offender policy.”¹⁰⁰ The fear generated by the myths promotes an environment whereby the general public is happy to relinquish its individual rights to the government for the purpose of advancing the war.¹⁰¹ Once relinquished, however, it is difficult, if not impossible, to regain control over the political machinery waging war.

As Americans saw with the war on drugs, the Fourth Amendment began to lose force because of the “need” for “heavily armed SWAT teams, inter-departmental and inter-governmental coordination, aerial surveillance, and extensive sting operations.”¹⁰² Now, these tactics are relatively commonplace and used in a variety of circumstances outside the context of

⁹⁸ Orlando Patterson, *Slavery and Social Death* 38.

⁹⁹ Yung, *supra* note 2.

¹⁰⁰ *Id.* at 453.

¹⁰¹ *Id.* at 457

¹⁰² *Id.* at 446.

the war on drugs. The alacrity with which Americans have relinquished their constitutional protections to advance the war on drugs is astonishing, and it appears they are prepared to do the same with regard to sex offenders.¹⁰³

Belief in the myths surrounding sex offenders creates fear in the general public just as the public feared witches in continental Europe. Reading false confessions at public executions perpetuated lies and myths about the very existence of witches and engaged the cycle of overcriminalization. The more fear instilled in the public, the greater need for more aggressive control systems. Fear causes the public to willingly sacrifice individual liberty in exchange for security (security the government cannot provide through SORNA or the Adam Walsh Act);¹⁰⁴ the public willingly accepts the repressive control systems because people are more afraid of deviants, even if their fear is unfounded.

One of the most prevalent myths is that sex offenders are homogeneous.¹⁰⁵ As a result, “[s]ex offenders are treated as a uniform population even though they are an incredibly diverse group representing different dangers and risk levels.”¹⁰⁶ The registry itself promotes this myth that all sex offenders are alike because it groups them together into one database with little explanatory information to assist with the processing of the information. A generalized hate toward sex offenders is prevalent, and sex offenders are the targets of hate-motivated crimes such as assaults, batteries, and murders.

¹⁰³ *Id.* at 459. “The most significant constitutional protections that have suffered in sex offender law cases are probably the guarantee against ex post facto punishment, limitations on federal authority under the Commerce Clause, the right to confront the evidence against a defendant, and the due process right to notice of criminal regulation.”

¹⁰⁴ SORNA and the AWA are incapable of preventing sex offenders from committing crimes. The information is not actualized in real-time, and no one knows at any given moment in time where a sex offender may be lurking. Additionally, sex offenders are not confined to their homes. Moreover, since the majority of sex offenders do not recidivate, it is statistically more likely that a person not listed on the registry will commit a sex offense as opposed to someone already on the registry.

¹⁰⁵ *Id.* at 455.

¹⁰⁶ *Id.*

Institutionalized and government-endorsed hatred toward sex offenders is an extraordinary power for suppressing deviance. It leads to a concomitant lack of restraint because it endorses the excessive punishment of sex offenders by both government and laypersons just as the repressive social control system in Renaissance Europe resulted in the excessive punishment of witches in continental Europe. Vigilantes target registered sex offenders for the purpose of harassing and sometimes even killing them, just as the Inquisition targeted and prosecuted “witches” in Renaissance continental Europe.¹⁰⁷

For example, Hugh Edwards, an individual who was not actually a sex offender, was brutally beaten with a baseball bat when his neighbor mistakenly believed he was listed on the registry.¹⁰⁸ In Maine, Stephen Marshall killed two registered sex offenders for the sole reason they were listed on Maine’s sex offender registry.¹⁰⁹ Outside of Seattle, two registered sex offenders were killed in 2005, and law enforcement suspected vigilantism motivated the killing.¹¹⁰ In 2004, Lawrence Trant attempted to murder two registered sex offenders listed on the New Hampshire sex offender registry.¹¹¹ These are only a few examples of the violent crimes committed against registered sex offenders. The lack of governmental restraint and control over vigilantism can be interpreted as an endorsement of this behavior. It further evidences the existence of a repressive control system because the government is providing easily-accessible, accurate vital information about sex offenders thereby facilitating the harassment and murder committed by numerous vigilantes. This behavior is reminiscent of the

¹⁰⁷ See *supra* note 8.

¹⁰⁸ *Id.*

¹⁰⁹ John R. Ellement & Suzanne Smalley, *Sex Crime Disclosure Questioned: Maine Killings Refuel Debate Over Registries*, BOSTON GLOBE, Apr. 18, 2006, <http://pqasb.pqarchiver.com/boston-sub/access/1022521301.html?FMT=ABS&date=Apr+18%2C+2006> (Last visited August 20, 2011).

¹¹⁰ Jonathan Martin & Maureen O'Hagan, *Killings of 2 Bellingham Sex Offenders May Have Been Vigilante, Police Say*, THE SEATTLE TIMES, Aug. 30, 2005, at A1.

¹¹¹ Brian MacQuarrie, *Man Defends Attacks on Sex Offenders Crusader Gets Jail Term*, THE BOSTON GLOBE, Dec. 5, 2004, at A1.

prosecutions in continental Europe where the vulnerable were targeted for prosecution by anyone interested in destroying the accused for whatever reason.

Both the media and politicians have used war rhetoric to call upon the public to take up arms against sex offenders¹¹² Sex offenders have been declared an enemy that must be eradicated, but the tactics employed to accomplish this objective result in the over-punishment of perpetrators of sex-related crimes. There are essentially two modes of representing social death: intrusive and extrusive. “Intrusive” contemplates an individual who does not belong because the person is an outsider,¹¹³ “the product of a hostile, alien culture.”¹¹⁴ “Extrusive” refers to the individual who becomes an outsider because the person does not “(or no longer) belong[s].”¹¹⁵

Although the war rhetoric and declaration of sex offenders as an enemy is reminiscent of the “intrusive mode of representing social death,”¹¹⁶ it is more accurately characterized as extrusive. Sex offenders experience social death because they have fallen from the mainstream due to some perceived “deviant” behavior. Typically, the extrusive mode is used to gain authority and power over an outsider who has “fallen as a result of destitution or criminality.”¹¹⁷ The mainstream has forced the labeled sex offender into submitting to its authority, and this power is extraordinary. Moreover, because the power is largely symbolic and rises from the mainstream, it lacks both internal and external restraints.

3. *The Registry resulted from the high degree of political and economic interest in apprehending and processing sex offenders.*

¹¹² Yung, *see supra* note 2 at 457.

¹¹³ Orlando Patterson, *Slavery & Social Death*, 44.

¹¹⁴ Thomas F. McIlwraith, *Bella Coola Indians* (Toronto: University of Toronto Press, 1948) Vol. I, p. 159 (quoted by Orlando Patterson, *Slavery and Social Death*, 39.)

¹¹⁵ Orlando Patterson, *Slavery & Social Death* 44.

¹¹⁶ Orlando Patterson, *Slavery and Social Death*, 39.

¹¹⁷ Orlando Patterson, *Slavery and Social Death*, 42.

Politicians have a strong interest in appearing tough on crime because voting constituents want to feel safer within their communities. Thus, it is not surprising that strong political incentives surrounded the debates leading to the passage of the Adam Walsh Act and SORNA. Politicians exploited the myth of the “dangerous lurking man” to convince the public that AWA and SORNA not only represented safety for the public, but in fact provide protection from sex offenders. SORNA, therefore, is a symbolic instrument used by politicians to create power and authority within themselves.¹¹⁸

Furthermore, in adopting SORNA, Congress members appeared to focus *primarily* on re-election. Since most registered sex offenders are also disenfranchised convicted felons, politicians do not depend on sex offenders for re-election. Sex offenders are virtually non-existent politically speaking because they cannot exercise the political power to vote. Therefore, to retain their own power, politicians are more likely to ignore the needs of the liminal¹¹⁹ sex offender when adopting legislation like SORNA. As a result, not a single member of Congress had any incentive to denounce SORNA as being utterly ineffective to accomplish its purported purpose of preventing sex crimes from occurring.¹²⁰

Additionally, the passage of SORNA represents an unspoken declaration of war on sex offenders.¹²¹ Yung writes that “[o]ne of the clearest signs that a war has truly begun is that the government provides a substantial budget, seeks to employ persons to fight, and attempts to find

¹¹⁸ Orlando Patterson, *Slavery and Social Death: A Comparative Study*, 37 (Harvard University Press 1982). “[S]ymbols, both private and public, constitute a major instrument of power when used directly or indirectly. Herein lies the source of authority.”

¹¹⁹ “Liminal” is an anthropological term referring to a transition between socially fixed statuses and identities. As used in this Article, it refers to sex offenders’ perpetual existence in “the hem of society, in a limbo.” *Id.* at 46.

¹²⁰ The entire evolution of the various federal Acts targeted at identifying, controlling, and monitoring sex offenders “reveal[s] the discourse of disgust used by U.S. lawmakers to rhetorically sell . . . restrictions and sanctions directed at sex offenders” that are not likely to accomplish any of these purposes. Mona Lynch, *Pedophiles and Cyber-predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 *Law and Soc. Inquiry* 529, 532 (2002).

¹²¹ Yung, *see supra* note 2.

political support for the use of these resources.”¹²² Thus, while wars may deplete the federal budget on the one hand, they also stimulate the economy through the creation of agencies and jobs.¹²³ Implementation of SORNA has caused states to invest millions of dollars into its implementation.¹²⁴

Additionally, fines and fees paid by the convicted sex offender are significant. There exists also the likelihood of a technical re-offense in the form of failure to register or violating a zoning ordinance which would result in the imposition of more fines and fees upon the sex offender. Further removed, but still related, is the fact that sex offenders, because of their status as deviants, are unable to readily obtain and maintain employment. This exclusion of sex offenders from employment opportunities opens up the job market to other members of society who are not designated sex offenders. Hence, the economic advantages to maintaining the sex offender registry are significant.

Similar economic advantages existed to support the prosecution of witches in Renaissance Europe. There was a positive correlation in the number of prosecutions for witchcraft and the economic benefits. Historical studies also reveal “there is growing evidence that the legal redefinition of crime and the resulting increase in penal and public slavery was largely determined by the need to regulate labor.”¹²⁵ The creation of the slave is a social death similar to that currently experienced by sex offenders in the United States. As a result, the

¹²² *Id.* “A recent appropriations bill allocated funds to hire 150 deputy U.S. Marshals who will be solely dedicated to enforcing the Sex Offender Registration and Notification Act (‘SORNA’). *Id.* at 447. SORNA also called for the “creat[ion of] the Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking Office (‘SMART’) ... charged with administering SORNA and issuing guidelines to be used in the implementation of SORNA.” *Id.* at 452.

¹²³ *Id.*

¹²⁴ In Pennsylvania, for example, the state invested approximately \$\$20,165,479 in the implementation of SORNA. Had Pennsylvania chosen to forego the 10% in federal funding that it would have lost had it not implemented SORNA, it would only have cost the state about \$\$764,032. Justice Policy Institute, *What Will It Cost States to Comply with the Sex Offender Registration and Notification Act?* Available at http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf (Last visited on August 23, 2011).

¹²⁵ Orlando Patterson, *Slavery and Social Death*, 45.

economic interests in creating the social death of sex offenders is likely to lead to a rise in the prosecution of sex offenders, irrespective of any actual increase in sex-related crimes.

B. As a Result of the Registry, the Traits of Overcriminalization have Emerged.

1. *The registry is overly punitive and facilitates mass incarceration.*

The purported goal of the sex offender registry is to protect society from dangerous sex offenders.¹²⁶ Nonetheless, legislators have created a net so vast that offenders who are not likely to reoffend are nonetheless required to register.

Despite suggesting the implementation of a tiered system of classification, SORNA does not require states to adopt a tiered approach. As a result, many states broadly label individuals as sex offenders without any real consideration of the act they have committed. Judges do not have discretion to withhold the label once a person is convicted of a sex offense. Additionally, prison sentences associated with sex offenses are usually long because most sex offenses are punished as felonies.¹²⁷ Taken together, then, these two factors result in an increase in the number of incarcerations because more people are being labeled sex offenders. Thus, once labeled sex offender, they are more likely to receive a term of imprisonment.

Another reason the registry leads to a rise in incarceration is because of the prison sentences associated with failure to register. Once designated a sex offender, a person must maintain registration with the state. Each state has its own registration scheme and the

¹²⁶ Society is afraid of the largely mythical “dangerous lurking man.” However, the vast majority of registered sex offenders do not fit the profile of the “dangerous lurking man.” Unfortunately, the law has reacted as if the “media image of violence committed by the stranger lurking in the bushes [is] the most violent and common form of rape.” Richard G. Wright, *Parole and Probation: Sex Offender Post-Incarceration Sanctions: Are There Any Limits?* 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 21-22 (2008); Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, TUL. L. REV 25, 4 (Forthcoming 2010).

¹²⁷ People convicted of sex offenses are punished with prison at a higher rate than other types of offenders. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS NATIONAL CORRECTIONS REPORTING PROGRAM: TIME SERVED IN STATE PRISON BY OFFENSE, RELEASE TYPE, SEX, AND RACE (2009), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2045>. (Last visited August 23, 2011.)

requirements vary from jurisdiction to jurisdiction. Moreover, many states require offenders to register in more than one place to be in full compliance.¹²⁸ In addition, sex offenders are required to periodically update their registration information. Some states require yearly renewal while others require renewal at less than yearly intervals. Registration renewal may also be triggered by a move, change in employment, or some other similar event. Failure to register is a felony in most jurisdictions; it may also be a federal offense under SORNA. Conviction for failure to register nearly always results in an extensive prison sentence due to the underlying offense.

Most jurisdictions follow sentencing guidelines which require the sentencing court to consider the criminal history in imposing sentence. A prior conviction for a sex-related offense nearly always scores high enough on the score sheet to mandate a prison sentence regardless of the reason for the failure to register. Judges have very little discretion to deviate from sentencing guidelines, and the result is an increase in the rate of incarceration directly related to the sex offender registry.

The registry is also overly punitive because it stigmatizes anyone required to register; the stigma itself is a punishment because it creates social death.¹²⁹ Individuals who are socially dead are “utterly anomalous; they ha[ve] the shape of human beings but ha[ve] no human essence whatever.”¹³⁰ Historically, symbols of shame, uncleanliness, and pollution have been used to strengthen the divide between the socially dead and the living. These same symbols are used today to marginalize sex offenders.

¹²⁸ In Florida, for example, sex offenders must register with the Department of Motor Vehicles as well as with the local Sheriff’s Office. Florida Department of Law Enforcement Florida Sexual Offenders and Predators, “Important Information.” <http://offender.fdle.state.fl.us/offender/Important.jsp> (Last visited on August 23, 2011).

¹²⁹ “The essence of slavery is that the slave, in his social death, lives on the margin between community and chaos, life and death, the sacred and the secular.” Orlando Patterson, *Slavery and Social Death*, 51

¹³⁰ Orlando Patterson, *Slavery and Social Death*, 47

Sex offenders are treated like a defeated enemy. They are stripped of their social status and exiled within their own country.¹³¹ Registered sex offenders are considered dirty regardless of the actual nature of the underlying offense. They are separated from mainstream society, and this separation is accepted into the normative social order. In other words, mainstream society supports and reinforces the social death of the sex offender. Sex offenders are essentially non-persons in the eyes of the law. This is a punishment as extreme as execution and perhaps even worse since it is unclear “how ordinary people should relate to the living who are dead.”¹³²

The sex offender registry promulgates “[i]nstitutionalized marginality, the liminal state of social death, [which is] the ultimate cultural outcome of the loss of ... honor and power.”¹³³ Sex offenders exist only on the margins of society, and they are thus liminal.¹³⁴ They have lost all power and fallen so far they are no longer even part of society; they are socially dead. The socially dead, however, require a master for their very existence. They need a master to “mediate between the socially dead and the socially alive.”¹³⁵ In the case of the sex offender, however, there is no master who steps in to mediate. Unlike the slave who had a master to mediate with the living, the sex offender is alone at the hem of society utterly lacking any effective means of connecting to the living world.

2. *The registry creates social stigma and causes social death.*

One of the classic signs of overcriminalization is a lack of effort to assist in the reintegration of convicted criminals into society. For sex offenders, the registry stands in the

¹³¹ Zoning ordinances restrict the areas where sex offenders may live; most sex offenders are unable to find steady employment. CITE

¹³² Orlando Patterson, *Slavery and Social Death*, 45

¹³³ Orlando Patterson, *Slavery and Social Death* 46

¹³⁴ “Liminal” is an anthropological term referring to the members of society that “exist in the hem ... in a limbo, neither enfranchised ... nor true aliens.” Orlando Patterson, *Slavery and Social Death* 44 (quoting Vaughn).

¹³⁵ Orlando Patterson, *Slavery and Social Death* 46

way of reintegration. One way it does this is through residency restrictions; although SORNA itself does not impose residency restrictions as part of the registration scheme, some sort of residency restriction is nearly always involved as local governments often prohibit registered sex offenders from living near schools and other areas where children congregate.¹³⁶ By physically segregating sex offenders from mainstream society through residency restrictions, the government is preventing them from reintegrating into a productive role.

The effect of residency restrictions is that sex offenders find very few places where they may be permitted to live. In Miami, Florida, registered sex offenders are forced to live under a single bridge as it is the only location where they are not violating zoning ordinances. In Orlando, Florida, numerous sex offenders were found camping in the woods because they had no other alternative place to live because of residency restrictions.¹³⁷ The sex offender registry has forced many to become homeless. In Florida, even the Department of Corrections admits that sex offenders are more likely to reoffend when they are not living in a real home – when they are not reintegrated into some social circle.¹³⁸ Nonetheless, no efforts have been made to provide shelter or modify zoning laws so registered offenders may return to live with their families or other loved ones who can provide structure and assistance with reintegration.

Furthermore, the stigma of the shame associated with being a registered sex offender often causes offenders to engage in socially risky behaviors more likely to lead to recidivism or re-offense.¹³⁹ In fact, the dynamics of the registry stigma typically result in creating a feeling of helplessness in the offender and increasing the probability of reoffending.¹⁴⁰ Moreover, from a

¹³⁶ Hamilton, *supra* note 105.

¹³⁷ WFTV.com, “Sex Offenders Living in Orlando Woods.” Available at <http://www.wftv.com/news/20078934/detail.html>. (Last visited on August 22, 2011).

¹³⁸ *Id.*

¹³⁹ Tewksbury, *supra* note 107, at 68.

¹⁴⁰ *Id.* at 69.

psychological perspective, sex offenders who engage in what could be considered sexually deviant behaviors often do so because they are already hovering at the fringe of society. Many have themselves suffered some form of abuse which has not been treated.¹⁴¹ They tend to be individuals who are already isolated and experience feelings of shame. Since shame contributes to the commission of the original criminal act, creating more shame through a registry requirement is counterproductive.

At least two researchers¹⁴² have noted that while some positive benefits may arise because of sex offender registries and notification procedures, the vast majority of sex offenders feel despair, lose the ability to provide for their families, and suffer harassment alongside their entire families.¹⁴³ The stigma goes beyond just the sex offender to include their wives, children, and other family members.¹⁴⁴

Furthermore, the registry interferes with reintegration, rehabilitation, and deterrence of sex offenders because it prevents the building of healthy relationships between the offender and friends and family.¹⁴⁵ The offender is also disadvantaged in maintaining employment and housing within the community.¹⁴⁶ When offenders are unable to return to normal life activities,

¹⁴¹ *Id.* at 62.

¹⁴² Jill S. Levenson and Leo P. Cotter, *The Effect of Megan's Law on Sex Offender Reintegration*. *Journ. of Contemporary Justice* (2005); *see also* Tewksbury, *supra* note 107.

¹⁴³ Levenson & Cotter, *supra* note 115, at 52.

¹⁴⁴ *Id.* For particular examples of the negative effect stigma has on the reintegration of offenders into society, see "Sex Offender Notification and Registration Act (SORNA): Barriers to Timely Compliance by States," Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, U.S. House of Representatives, March 10, 2009, 31-32, http://judiciary.house.gov/hearings/hear_090310_1.html (Last visited June 27, 2011); *see also* Charles Patrick Ewing, *Justice Perverted* at 9 (Oxford Press 2011).

¹⁴⁵ Hamilton, *supra* note 105, at 13.

¹⁴⁶ *Id.* For example, in Miami sex offenders are corralled and forced to live under a single bridge because the zoning ordinances do not permit their presence in any other neighborhood. Allen, Greg, *Sex Offenders Forced to Live Under Miami Bridge*, NATIONAL PUBLIC RADIO, May 20, 2009. <http://www.npr.org/templates/story/story.php?storyId=104150499> (Last visited June 27, 2011.) In addition, Davie, FL considered a proposed law to allow landlords to be jailed or fined for renting to convicted sex offenders. Susannah Bryan, *Davie Law Targets Landlords Renting to Sex Offenders*, SOUTH FLA. SUN-SENTINEL, Jan. 21, 2009, available at http://articles.sun-sentinel.com/2009-01-21/news/0901200422_1_sarah-lunde-offenders-and-predators-landlords.

they are less likely to reintegrate and positively contribute to society.¹⁴⁷ On the other hand, when offenders are able to reintegrate into society, engage in appropriate activities within their communities, and otherwise escape the social stigma, they are less likely to reoffend.¹⁴⁸ These conclusions are consistent with Currie’s theory that failure to invest in the reintegration of convicted criminals is likely to lead to an increase in rates of crime.

The sex offender registry fails to protect the public because it is focused more on isolation and removal of offenders (through creation of stigma and social death) rather than investment in employment and therapeutic opportunities for them. Moreover, statistical data support the conclusion that sex offenders are unlikely to repeat sex-related crimes, and are more likely to recidivate by commission of a non-sex-related crime if they recidivate at all.¹⁴⁹

Opportunities for reintegration and the creation of community and belonging are important to the safety and protection of society as a whole.¹⁵⁰ The general public should prefer integration of sex offenders into the community rather than isolation because isolation enables the commission of crimes; in other words, isolation can increase the rate of crime. What is more, exiling sex offenders from mainstream society is the equivalent of their social assassination. The sex offender registry in fact causes social death to the hundreds of thousands of individuals required to register as sex offenders in the United States.

IV. CONCLUSION

The repressive “tough on crime” approach of the last four decades is “laying the groundwork for another large-scale criminal war” like the war on drugs of the late Twentieth

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Charles McGonagle’s testimony before Congress further supports this conclusion. *Sex Offender Notification and Registration Act (SORNA): Barriers to Timely Compliance by States Hearings Before the Committee on the Judiciary*, 111th Congress (2009) at 157.

¹⁵⁰ Charles Patrick Ewing, *Justice Perverted* at 9 (Oxford Press 2011).

Century.¹⁵¹ The predictable characteristics of a repressive societal control system are present: (1) “[i]nvulnerability to restraint from other social institutions”; (2) “[s]ystematic establishment of extraordinary powers for suppressing deviance with a concomitant lack of internal restraints”; and (3) “[a] high degree of structured interest in the apprehension and processing of deviants.” Thus, the predictable traits are what America can expect to emerge: increased crime rates, increased prosecution rates, mass incarceration, and social death.

As a whole, society would be better served to invest in the re-creation of informal social controls that can institutionalize values within the normative social order. Establishing more criminal laws is a vain attempt to control behavior. Coercive authority is destined to be usurped once the socially dead are pushed to the point where their speech irrupts and all laws are transgressed resulting in the complete restructuring of the relationship between power, sexuality, and knowledge. For this reason, the sex offender registry can never be expected to control sexual behavior, and it can never make society safer.

¹⁵¹ Yung, *supra* note 2.