Abstract

This submission examines the use of registration and notification schemes as a method of controlling sexual offenders and reducing incidences of sexual offending. It tracks the shift that has occurred in penological systems theory from notions of restorative justice and penal welfarism towards populist punitiveness and "new penology". Specifically, it proposes that sexual offender registration and notification schemes represent a product of this altered penological approach and reject the basic tenets of the previous "modern penology".

However, it suggests that registration and notification schemes are not a holistic and efficacious approach to reducing and preventing sexual violence. It proposes that a restorative justice model premised on reintegrative, as opposed to disintegrative shaming would more effectively tackle the issue of sexual offending and recidivism.

Though it is recognised that such an approach would be antithetical to certain principles of postmodern penological theory, this paper recommends that a conscious effort must be made in Ireland to resist the forces of globalisation and the influence of U.S. notification systems if the issue of sexual offending is to be tackled in the most effective manner possible.

Introduction

In December 2001, Roy Whiting was convicted for the abduction, rape and murder of 7 year old Sarah Payne, who had disappeared from a cornfield near her grandparents' home in Sussex while playing with her siblings.[1] More recently, in Ireland, a 30 year old man has been jailed for luring two young girls away from a children's birthday party and subjecting them to serious sexual assault.[2] Such incidents have generated widespread fear and criticism of the level of protection currently afforded to vulnerable women and children against "fiends, monsters and perverts".[3] Subsequent calls for the implementation of community notification schemes akin to those in the United States serve to highlight the shift that is occurring in penological systems theory. Notions of restorative justice and penal welfarism appear to be giving way to populist punitiveness and what has been described as "postmodern" or "new" penology.[4]

This paper proposes that sexual offender registration and notification schemes represent a product of this altered penological approach and reject the basic tenets of the previous "modern penology".[5] However, it proposes that registration and notification schemes are "not a holistic and efficacious approach to reducing and preventing sexual violence".[6] It suggests that a restorative justice model premised on reintegrative, as opposed to disintegrative shaming would more effectively tackle the issue of sexual offending and recidivism.

Though it recognises that such an approach would be antithetical to certain principles of postmodern penological theory, it suggests that a conscious effort must be made in Ireland to resist the forces of globalisation and the influence of U.S. notification systems if the issue of sexual offending is to be tackled in the most effective manner possible.[7] Thorough education programmes detailing the causes and nature of sexual offending are required to

[1] Jeff Edwards, 'Crimes That Shook Britain – The Murder of Sarah Payne' (*The Mirror*, 10 May 2012) < http://www.mirror.co.uk/news/uk-news/the-murder-of-sarah-payne---crimes-826938> accessed 29 March 2014.
[2] 'Man Jailed for Raping Girls Lured from Birthday Party' (*The Irish Times*, 3 March 2014) < http://www.irishtimes.com/news/crime-and-law/man-jailed-for-raping-girls-lured-from-birthday-party-1.1711050> accessed 29 March 2014.
[3] *News of the World*, 23 July 2000, 6.
[4] Lucken, 'Contemporary Penal Trends: Modern or Postmodern?' (1998) 38 *British Journal of Criminology* 106, 107.
[5] ibid.
[6] Wright, 'Sex Offender Registration and Notification: Public Attention, Political Emphasis, and Fear' (2006) 3 *Criminology & Public Policy* 97, 102.
[7] Hinds and Daly, 'The War on Sex Offenders: Community Notification in Perspective' (2001) 34 *Australian and New Zealand Journal of Criminology* 256.

dispel the postmodern penological perception of offenders as untreatable monsters who cannot be fixed or changed.[8] Ultimately, Irish policy-makers are faced with an important decision. They must choose between a system of notification which would pander to public opinion, and a system of reintegration which can be penologically justified.

Part I of this paper will briefly address the features of "modern penology". Part II will examine the features of "postmodern penology" and "populist punitiveness", considered to be operating in tandem, and discuss the way in which sexual offender community notification schemes fit this model.[9] Part III will explore the efficacy of such schemes in tackling rates of sexual offending, and the negative effects arising therefrom. Finally, Part IV will propose an alternative approach to community notification schemes. Reference will be made to experiences in foreign jurisdictions throughout.

Part I: The Shift Away from Modern Penal-Welfarism

Modern theories of penal welfarism developed in response to dissatisfaction with previous attempts at reformation of offenders through public humiliation. Indeed, Foucault suggests that the past desire to assert the power of the State and sovereign through such spectacles of punishment eclipsed notions of justice and proportionality in sentencing.[10] The offender was viewed merely as an instrument through which such power could be demonstrated. This emphasis on public castigation is exemplified in a Pennsylvanian penal code enacted in 1786, which imposed punishment in the form of hard labour upon chained and shaven prisoners clothed in distinctive garb.[11]

The advent of modern penological theory saw policies and punishments fashioned and imposed by an alliance of penal bureaucrats and the government.[12] Decisions have been increasingly informed by research findings and expert opinions and reflect a desire to normalise and reform offenders, seen as innocent victims of a malfunctioning society.[13] The sanitisation of penal language cast offenders in a humanistic light, rather than branding them

[8] Bandy, 'Sexual Offender Policies in Penal Modernity: New Punitiveness and New Penology' *Paper presented at the annual meeting of the American Sociological Association, Hilton San Francisco & Renaissance Parc 55 Hotel, San Francisco, CA.*, 14 August 2004 <http://www.allacademic.com/meta/p110776_index.html> accessed 29 March 2014.
[9] Simon, 'Managing the Monstrous: Sex Offenders and the New Penology' (1998) *Psychology, Public Policy and the Law* 452.
[10] Foucault, M., *Discipline and Punish: The Birth of the Prison* (London: Penguin, 1977) 48.
[11] Pratt, 'The Return of the Wheelbarrow Men or the Arrival of Postmodern Penality?' (2000) 40 *British Journal of Criminology* 127, 128.
[12] Hinds and Daly (n 7).
[13] Glover, E., *Probation and Re-education* (London: Routledge & Kegan Paul, 1956) 267.

as "hated" "wild beasts".[14] In this way, offenders came to be viewed as individuals deserving of rights and no longer mere instruments of the State. Policy-makers sought to avoid being criticised for over-punishing such offenders and, thus, the severity of sanctions and prison conditions were gradually ameliorated.[15] The prison was removed from public view by relocating and abandoning the visible Gothic architecture of the past.[16] In the context of sexual offenders, mental illness played a prominent role in determining individual sentencing practices.[17] Laws governing those sexual offenders deemed "psychopaths" allowed for further civil commitment of offenders after they had served their criminal sentence, in order that they be rehabilitated, treated and "cured" by experts before being released back into society.[18]

However, it is submitted that the high-profile nature of the aforementioned rape and murder of Sarah Payne, and of other young children such as Megan Kanka and Jacob Wetterling,[19] have contributed to the "structural unravelling"[20] and perceived failure of modern penal welfarism.[21] The extensive media coverage of each of these cases has resulted in a broad-scale collapse in the faith of bureaucrats to provide the "results" that experts once promised.[22] In particular, the News of the World's "naming and shaming" campaign in the U.K., which formed part of the campaign to allow public access to the Sex Offenders Register, publicly denounced the ability of the police to effectively monitor "these perverts".[23]

Developing technologies now transcend geographical borders, facilitating the sharing of information across the world. Thus, risks have become globalised. The threat of one's child being raped and murdered in the same way as Megan Kanka now seems as real to Irish parents as it does to those living in her hometown of New Jersey. This "climate of distrust"[24] has been further exacerbated by emerging studies which have challenged the ability of

[14] Pratt, 'Sex Crimes and the New Punitiveness' (2000) 18 *Behavioural Sciences and the Law* 135, 139.
[15] Pratt (n 11); ibid.
[16] Evans R., *The Fabrication of Virtue* (Cambridge University Press: Cambridge, 1984).
[17] Simon (n 9).
[18] Petrunik, 'Managing Unacceptable Risk: Sex Offenders, Community Response and Social Policy in the United States and Canada' (2002) 46(4) *International Journal of Offender Therapy and Comparative Criminology* 483, 486; Ruggles-Brise, E., *The English Prison System* (Macmillan: London, 1921), 87.
[19] Jones and Newburn, 'Policy Convergence, Politics and Comparative Penal Reform: Sex Offender Notification Schemes in the USA and UK' (2013) 15(5) *Punishment & Society* 439.
[20] Pratt (n 11), 134.
[21] Bandy, 'Measuring the Impact of Sex Offender Notification on Community Adoption of Protective Behaviors' (2011) 10(2) *Criminology & Public Policy* 237, 239.
[22] Pratt (n 14) 144.
[23] *News of the World*, 23 July 2000, 1.
[24] Bandy (n 21) 239.

experts to accurately diagnose and effectively treat sexual offenders with psychological disorders.[25] Petrunik also notes the limited ability of experts to predict rates of recidivism for released offenders, citing the potential for inaccuracy and false positives.[26]

Part II: Notification Schemes as a Product of Postmodern Penality and Populist Punitiveness

Postmodern Penality

Considering the adversarial nature of two-party politics that exists in the U.S., it is unsurprising that federal policy makers began to alter their stance on penal policy in light of the intense public backlash which followed the aforementioned high profile cases. The Jacob Wetterling Act 1994 mandated the establishment of a sex offender register for every U.S. state.[27] This was amended by Megan's Law in 1996, which imposed a general requirement upon State law enforcement agencies to publicly release information about registered sex offenders being released into the community.[28] States have interpreted the duty to release information in varying manners, with some simply making information available online and others taking active steps to inform members of the community, such as going door-to-door to inform local citizens. In light of this fact, the Adam Walsh Child Protection and Safety Act of 2006 established a comprehensive national system for sex offender registration including more proscribed provisions. It required active notification to specific parties such as schools and public housing agencies and broadened the categories of offender subject to registration and notification requirements.[29] The PROTECT Act of 2003 obliges every U.S. state to maintain a website containing sex offender information.[30] In the U.K. and Ireland, public access to the register of sex offenders is limited to very specific circumstances.

It is submitted that the registration and notification requirements imposed by these laws are incompatible with the foundational precepts of modern penological theory. Such requirements appear to correlate with the principles of postmodern penology and populist punitiveness to a far greater degree.

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[25] Bleechmore, 'Towards a Rational Theory of Criminal Responsibility: The Psychopathic Offender: Parts 1 & 2' (1975) 10 *Melbourne University Law Review*, 19-46 and 207-244.
[26] Petrunik (n 18).
[27] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, Pub.L. 103–322.
[28] Megan's Law of 1996, Pub. L. No. 104-145, § 2, 110 Stat. 1345 .
[29] Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.
[30] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub.L. No. 108–21, 117 Stat. 650.

Simon identifies the new penological conception of crime as "a problem of managing high risk categories and subpopulations".[31] The new penology favours "actuarial justice", affords priority to the language of risk, and stresses the importance of having administrative decisions informed by statistically selected risk factors.[32] This approach is clearly reflected in the 3-tier method of risk assessment implemented most recently by the Adam Walsh Act. Under this system, offenders are classified as either Tier 1, 2 or 3 offenders, according to the perceived egregiousness of their crime.[33] Tier 1 offenders, having committed the least serious sex offences, are subject to the least stringent registration and notification requirements. Tier 3 offenders are considered to be the most dangerous and are required to register for life, renewing their registration every three months. Thus, the nature of the offence committed is used to measure the degree of risk that the offender is considered to pose to society.

Cohen notes that the new penology focuses on managing offenders, rather than pursuing treatment or rehabilitation.[34] The perceived failure of treatment processes associated with the modern penological approach to sex offending has reignited a general perception of offenders as incapable of aligning their behaviour and thought processes with social norms. The Kansas Sexually Violent Predator Act,[35] upheld by the U.S. Supreme Court as constitutional in *Kansas v Henricks*,[36] explicitly defines its goal as one of management rather than transformation. Megan's Law is also considered to be premised on the futility of transforming offenders.[37]

The demise of sexual psychopath laws of the 1980's and introduction of the term "sexually violent predator" is also relevant in this regard.[38] Sexual psychopath laws authorised the indeterminate civil commitment of individuals convicted of sex offences who were found to be suffering from a mental disorder. They have been subsequently replaced by laws providing for similar indeterminate commitment of "predators" deemed to suffer from a psychological abnormality or personality disorder.[39] The term "psychopath" describes a person by reference to a mental disorder from which he suffers. Such disorders may be

[31] Simon (n 9), 452.
[32] ibid, 453.
[33] Sample, 'The Need to Debate the Fate of Sex Offender Community Notification Laws' (2011) 10(2) *Criminology & Public Policy* 265–274.
[34] Cohen, S., *Visions of Social Control: Crime, Punishment and Classification* (Oxford: Polity Press, 1985).
[35] Sexually Violent Predator Act, Kan. Stat. Ann. Section 59-29(a)(01) (West Supp. 1994).
[36] *Kansas v Hendricks*, 521 U.S. 346 (1997).
[37] Simon (n 9), 462.
[38] Hinds & Daly (n 7).
[39] See note 35.

treated, if not cured, using a combination of therapy and medication. However, it is submitted that the term "predator" speaks to the whole demeanour of an individual and tends to describe the manner in which he is genetically predetermined to think and behave. A predator, like a wild animal, must be managed and confined. He cannot be programmed to override his natural instincts. Simon warns that the use of such terms may generate a belief that sexual deviance and offending is an inevitable, permanent and unsolvable problem.

New penology is also noted for its abandonment of the priority of the individual in favour of groups, categories and classes.[40] The aforementioned legislative methods of managing sexual offenders conform to this model. One of the stated aims of Megan's Law is to require the release of relevant information necessary to protect the public from sexually violent offenders.[41] Thus, "sexually violent offenders" are classified as one high risk group, from which the public must be protected. Within this class of sexually violent offenders, individuals are grouped further into tiers, according to their perceived dangerousness. As suggested by Bandy, this approach demonstrates a considerable lack of concern for individual culpability or responsibility.[42] For example, Oklahoma treats all forms of public exposure as a sexual offence subject to registration requirements for ten years, regardless of whether the act bore a sexual motivation or intent.[43] Therefore, those who publicly expose themselves, even for the purposes of a prank, are registered and grouped amongst child molesters under the umbrella term of "sex offender".

Indeed, it appears that the previous focus on individualism has shifted from the offender to the victim. Under theories of modern penology, medical intervention and rehabilitative treatments were tailored to meet the needs of individual offenders according to the nature of their crime. In the context of postmodern penological theories, however, the use of such treatments has declined. Individual victims, rather than perpetrators, of sexual crime have instead become the predominant focus. Children such as Megan Kanka, Sarah Payne

[40] Feeley and Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications' (1992) 30 *Criminology* 449; Feeley and Simon, 'Actuarial Justice: The Emerging New Criminal Law' in D. Nelkin (ed) *The Futures of Criminology* (London: Sage Ltd, 1994) 173-201.
[41] SMART Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking, 'Legislative History of Federal Sex Offender Legislation' *Office of Justice Programs* <http://ojp.gov/smart/legislation.htm> accessed 29 March 2014.
[42] Bandy (n 8).
[43] 21 O.S. §1021.

and Adam Walsh have become "commodified" and emerged as the dominant representation of the governable interests of the population.[44]

Postmodern penology is also associated with the 'custodial continuum', reminiscent of the Foucauldian 'carceral archipelago'.[45] This strategy of managing deviance is implemented in accordance with the increased emphasis which new penology places on efficiently controlling internal system processes and achieving practical targets such as properly allocating resources and streamlining case processing.[46] This continuum is unmistakably present in the context of sexual offending. At one end lies the prison, which provides maximum security at a high cost for offenders considered to pose the highest risk. At the opposite end of the continuum, the watchful eyes of the community provide low-cost surveillance of registered offenders who have completed their prison sentence and are deemed to pose a lower risk.[47]

Limiting institutional responsibility to tasks such as resource allocation tends to downplay the significance of rates of sexual offender recidivism. This tactic may serve to insulate policy makers from charges of institutional failure akin to those which have arisen from the aforementioned high profile cases. However, it is submitted that little value should be placed on the efficiency of resource allocation if it fails to reduce rates of sexual offending in the long term. Policy makers' shift in focus to things "they can control" may, on a subliminal level, indicate admission of an inability to effectively tackle sexual offending.[48] Alternatively, it could be construed as a deplorable abdication of their role in this regard.

Populist Punitiveness

Hinds and Daly also refer to postmodern penality as "fashioned from an alliance of the people and the government" and demonstrating "community concerns for public safety that supersede individual rights."[49] The influence of populist punitiveness in the context of sexual offending has given rise to such an alliance with the government, to the exclusion of penal bureaucrats and experts. In implementing legislation such as Sarah's Law in the U.K.

[44] Garland, D., *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago IL: University of Chicago Press, 2001) 143; Garland, 'Megan's Law: Crime and Democracy in Late Modern America' (2000) 25(4) *Law and Social Inquiry* 1111, 1136.
[45] Foucault (n 10).
[46] Kempf-Leonard and Peterson, 'Expanding Realms of the New Penology: The Advent of Actuarial Justice for Juveniles' (2000) 2(1) *Punishment & Society* 66.
[47] Beatty, 'Community Notification – It's the Right Thing to Do' (1997) 59 *Corrections Today* 20.
[48] Feeley and Simon (n 40) 456.
[49] Hinds and Daly (n 7) 26.

and the Walsh Act in the U.S., policy makers have combined managerialism with gestures of identification with public sentiment.[50] However, it is submitted that pandering to public opinion in this manner has hindered the establishment of an effective penal regime. The public, for the most part, is unlikely to have accessed peer-reviewed journals discussing effective techniques for dealing with sex offenders and devising penal policies.

Public campaigns for the introduction of stringent registration and notification requirements have rested on assumptions that such systems will assist citizens in reclaiming the safety of their neighbourhoods[51] and also prevent, or at least reduce, the commission of sexual offences.[52] The following section of this paper questions both of these assumptions. Furthermore, naming legislation after young victims such as Pam Lychner is an explicit nod to the significant influence of public campaigns which have arisen in response to individual suffering. However, referencing such names forces individuals to confront the well-publicised and "sanctified persona of the suffering victim" in considering the legislation.[53] Thus, the cost of political opposition is significantly raised and the benefits of democratic discourse are inhibited.

As Bottoms has observed, notification laws would have been unthinkable policy initiatives during an era when criminal justice policies were informed by the principles of penal-welfarism.[54]

Part III: The Efficacy and Effects of Notification Schemes

After discovering the details of her daughter's demise, Sara Payne publicly stated that her daughters' life could have been saved if she had known of killer Roy Whiting's history of sex offending. It is submitted, however, that even if a public registration or notification scheme had been in place, Sarah's death is unlikely to have been avoided. Although studies have shown that notification tends to instil fear amongst community members,[55] Anderson and Sample note that no significant relationship has been identified between notification and

[50] Simon (n 9).
[51] Moore, M., 'Problem-Solving and Community Policing' in *Modern Policing: Crime and Justice, A Review of Research*, vol. 15 (Chicago: University of Chicago Press, 1992).
[52] Oliver, W., *Community-Oriented Policing: A Systematic Approach to Policing* (Upper Saddle River, NJ: Prentice Hall, 1998).
[53] Garland (2001) (n 44) 143.
[54] Bottoms, A., 'The Politics and Philosophy of Sentencing' in Chris Clarkson and Rod Morgan (eds.) *The Politics of Sentencing* (Clarendon, UK: Oxford Press, 1995).
[55] Caputo and Brodsky, 'Citizen Coping with Community Notification of Released Sex Offenders' (2004) 22 *Behavioral Sciences and the Law* 239.

the adoption of risk-mitigating behaviour.[56] Levenson refers to one study which reported that only 18% of community members in a district admitted to warning their children to be aware of known sex offenders living in the area.[57] Where notification is passive, for example, available to the public online, it has been found that the majority of people fail to access the information.[58] Regrettably, notification laws do not typically make any recommendations as to what protective or preventative behaviours community members should adopt once informed that a known sex offender is living nearby.[59]

Indeed, registration and notification requirements may actually serve to indirectly encourage recidivism. Such measures have been described as "demonising" offenders in a manner inconsistent with the sanitary penal language associated with modern penology.[60] These requirements "poise the community for battle against the offender", creating a sharp divide between "normal" law-abiding members of the community and deviants. [61] The offender may therefore view the community as his adversary and "reject his rejectors" in order to avoid their collective disgust and disapproval.[62] It has been suggested that the heightened sense of isolation which follows is likely to increase the chance of subsequent delinquent or deviant behaviour, as a coping mechanism.[63]

Furthermore, isolation from normal law abiding society may force offenders to associate with those with whom he can relate, namely other, similar offenders.[64] Information available on registers may facilitate networking and communication with fellow offenders. Such fraternisation has the potential to expose offenders to more sophisticated methods of perpetrating sexual crimes, and, in this way, registers may be used for illegitimate purposes.[65] Alternatively, the delinquent identity which can be fostered by societal ostracisation may encourage offenders to retreat underground, avoiding the purview of the community and of

[56] Anderson and Sample, 'Public Awareness and Action Resulting from Sex Offender Notification Laws' (2008) 19 *Criminal Justice Policy Review* 371.
[57] Levenson, 'Sex Offender Policies in an Era of Zero Tolerance : What does Effectiveness Really Mean?' (2011) 10(2) *Criminology & Public Policy* 229, 230.
[58] Anderson, Amy, Evans and Sample, 'Who Accesses the Sex Offender Registries? A Look at Legislative Intent and Citizen Action in Nebraska' (2009) 22 *Criminal Justice Studies* 313.
[59] Presser & Gunnison, 'Strange Bedfellows: Is Sex Offender Notification a Form of Community Justice?' (1999) 45(3) *Crime & Delinquency* 299.
[60] Winick, 'Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis' (1998) 4 *Psychology, Public Policy and Law* 505, 539.
[61] McAlinden, 'The Use of Shame with Sexual Offenders' (2005) 45 *British Journal of Criminology* 373, 379.
[62] Presser and Gunnison (n 59) 309.
[63] McAlinden (n 61) 379.
[64] ibid.
[65] ibid.

law enforcement officials entirely.[66] In this sense, public registration and notification represent "disintegrative shaming" techniques[67] which isolate, stigmatise and "may provoke rebellious and criminal reaction".[68]

It is submitted that public registration and notification also has the undesirable effect of paring the identity of the offender down to just the offence he has committed. The label of sex offender has been described as having "lasting effects".[69] As Braithwaite and Mugford observe, there are no ceremonies to decertify deviance.[70] If an offender is to accept that he is defined by his offence, and that attempts to rid himself of this label will be fruitless, it is unlikely that he will be incentivised to alter his behaviour upon his return to the community.

Indeed, notification provisions often generate an image of sex offenders which does not correlate significantly with the typical sex offender profile. First, by equating knowledge of previous offenders' identities with safety, notification emphasises the concept of 'stranger-danger' and suggests that it is those whose identities remain concealed that pose the greatest risk. This fails to account for the fact that 90% of sexual assault and rape cases on children are perpetrated by individuals known to the child.[71] Secondly, the notion of being able to protect children from known offenders assumes that such individuals are likely to re-offend. In this regard, notification schemes are based on what has been referred to as a "false sense of precision" in the ability to predict the risk of future sexual deviancy posed by past offenders.[72] Sex offenders are cast as "compulsive and repetitive predators", despite the fact that the majority of sex crimes are committed by first time offenders.[73] Indeed, it has been observed that recidivism rates for sex offenders are much lower than for drug and violent offenders.[74]

The introduction of public registration and notification schemes also affords the public a degree of power that stretches beyond merely influencing the development of penal

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[66] Soothill and Francis, 'Poisoned Chalice or Just Deserts? (The Sex Offenders Act 1997)' (1998) 9 *Journal of Forensic Psychiatry* 281, 288-289.
[67] McAlinden (n 61) 373.
[68] Karp, 'The Judicial and Judicious Use of Shame Penalties' (1998) 44 *Crime and Delinquency* 277, 283.
[69] Presser and Gunnison (n 59) 303.
[70] Braithwaite and Mugford, 'Conditions of Successful Reintegration Ceremonies' (1994) 34 *British Journal of Criminology* 139, 141.
[71] Greenfeld, L., *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (Washington DC: Bureau of Justice Statistics, 1997).
[72] Lieb, Quinsey and Berliner, 'Sexual Predators and Social Policy' in Michael Tonry (ed) *Crime and Justice: A Review of Research*, vol. 23 (Chicago and London: University of Chicago Press, 1998) 79.
[73] Levenson (n 57) 230.
[74] Lotke, 'Sex Offenders: Does Treatment Work?' in *Issues and Answers: Research Update (April)* (Washington DC: National Center on Institutions and Alternatives, 1996).

policy. Accessing information pertaining to past offenders facilitates "direct involvement" of the public in imposing their own forms of punishment through vigilantism.[75] Numerous incidents of picketing, leafleting, stoning and harassment of registered offenders have been reported.[76] The burning down of a sex offender's house in Washington shortly after the introduction of Megan's Law represents an extreme example of such vigilantism. In many cases, innocent people mistaken for sex offenders have been assaulted or had their property damaged.[77]

The U.S. Supreme Court, in the case of *Smith v Doe*, held that legislation imposing registration and notification requirements does not violate the rule against double jeopardy, on the basis that the nature of such laws are not punitive.[78] While the requirements imposed by the legislation might not be considered technically punitive, however, it is suggested that the aforementioned examples of extreme vigilantism certainly are. It is submitted that such vigilantism might be considered a reasonably foreseeable consequence of notification, and thus could potentially ground a civil claim for damages in favour of victims of such vigilante behaviour. Prentky deems vigilantism to be the "logical outcome" of informing people that an "evil menace lurks next door".[79]

It is argued that many public registration and notification laws are overbroad in their application. According to legislation in many U.S. states, committing offences such as public urination or exposing oneself in a public place will trigger registration requirements.[80] The federal Adam Walsh Act 2006 expanded the registry to provide for the inclusion of juvenile offenders over the age of 14.[81] It is submitted that the label of "sexual offender" is inappropriate in these instances. The offences of public urination or exposure cannot be said to compromise the safety of children, the reason for which registration and notification schemes were purportedly enacted.

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[75] Pratt (n 11) 131.
[76] Rudin, 'Megan's Law: Can it Stop Sexual Predators – and at What Cost to Constitutional Rights?' (1996) 11 *Westlaw Criminal Justice* 1, 7.
[77] Freeman-Longo, 'Revisiting Megan's Law and Sex Offender Registration: Prevention or Problem?' in Hodgson and Kelley (eds.) *Sexual Violence: Policies, Practices, and Challenges in the United States and Canada* (Praeger, 2001) 223.
[78] *Smith v Doe*, 538 U.S. 84 (2003).
[79] Prentky, 'Community Notification and Constructive Risk Reduction' (1996) 11 *Journal of Interpersonal Violence* 296.
[80] Long, 'Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms' (2009) 18 *Transnational Law and Contemporary Problems* 145.
[81] Terry, 'What is Smart Sex Offender Policy?' (2011) 10(2) *Criminology and Public Policy* 275.

Further, subjecting minors to registration requirements is inconsistent with empirical literature which demonstrates that the majority of juvenile offenders do not go on to commit as adults.[82] Indeed, widening the net of offenders caught by registration and notification requirements tends to compromise any negligible value they may have as indicators of higher risk offenders. Policy makers should be particularly wary of extending their remit in light of the observation that the public tends to label all listed sex offenders as "equally reprehensible".[83]

Thus, the three tier system introduced under the Adam Walsh Act may be of negligible value as a tool for public risk assessment. It is unsettling to imagine that a 15 year old could be included on a sex offender register for a number of years as a result of publicly urinating, and be subject to the same degree of stigmatisation and social segregation as a serial child rapist. Similarly, an individual in a loving, long-term relationship may be included on the register for having sexual intercourse with his underage partner. For these reasons, the degree of risk posed by individuals may be considerably overestimated.[84]

Registration and notification can have further undesirable effects for individuals who are not explicitly implicated by the provisions. Family members of offenders may be treated as tainted by association.[85] In cases of incest or domestic sexual violence, publication of the identity of the offender will necessarily provide clues as to the victim's identity. In addition, landlords renting accommodation to registered individuals may experience difficulty in attracting tenants for nearby properties.[86]

Part IV: Restorative Justice - An Alternative to Public Registration and Notification Schemes?

Bandy argues that public registration and notification laws' lack of utility will be insufficient to justify their demise, on the basis that the victims the purport to shield are those whom society feels most compelled to protect.[87] It is submitted that this argument is ill-reasoned. The vulnerability of such victims is precisely the reason why such ineffective laws

[82] Caldwell, 'Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders' (2007) 19 *Sexual Abuse: A Journal of Research and Treatment* 107.
[83] Tewksbury and Lees, 'Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences' (2006) 26 *Sociological Spectrum* 309, 327.
[84] Van Ness and Strong, *Restoring Justice* (Cincinnati, OH: Anderson, 1997).
[85] Zevitz and Farkas, 'Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?' (2000) 18 *Behavioural Sciences and the Law* 357.
[86] Petrunik (n 18) 500.
[87] Bandy (n 21).

should not be tolerated. It is precisely the reason why more effective methods of tackling sex offending must be implemented.

This paper proposes that an approach akin to the Community Reintegration Project in Canada, rooted in notions of restorative justice, would overcome the flaws inherent in systems of public notification and notification which have been outlined above. It is argued that the material, psychological, and social support which such a system would provide would assist offenders in avoiding cycles of release and re-arrest. Though there have been few evaluations of existing programmes to date,[88] there is empirical evidence to suggest that supervision, accompanied by assistance and treatment in the community, may decrease the risk of recidivism.[89] This analysis will point to the significant benefits which such an approach would afford offenders, victims and the wider society in halting the progression of sexual offending, while balancing the interests of offenders with community safety.

The proposed reintegration project would provide support groups, consisting of volunteers from the faith community, to offenders on completion of their prison sentence. Offenders would voluntarily commit to the support group, agreeing to pursue a prescribed course of treatment and to act responsibly. The model would incorporate elements of the risk-based approach associated with the new penology by holding more regular meetings and prescribing longer and more thorough treatment programmes for those deemed to pose a higher risk, based on the nature of their offence. For those considered to pose the highest risk, a form of electronic surveillance, comparable to an "electronic panopticon", could be used for a set period of time, to monitor proximity to areas such as schools and playgrounds.[90] By avoiding such areas for a certain length of time, until the surveillance has ceased, the offender would be able to establish his self-control and re-earn the trust of the community. The group would also assist the offender with finding housing and employment and avoiding situations that may lead to re-offending.

It is estimated that the majority of offenders signing up voluntarily would be willing to admit to, and appreciate the pain they have inflicted. Thus, they would be afforded the opportunity to apologise to the victim, within the support group, with the victim's consent. All members of the group would be bound by a code of confidentiality, meaning that

[88] Visher, 'Effective Reentry Programs' (2006) 5(2) *Criminology and Public Policy* 299.
[89] MacKenzie, 'Evidence-Based Corrections: Identifying What Works' (2000) 46(4) *Crime and Delinquency* 457.
[90] Maruna and LeBel, 'Revisiting Ex-prisoner Re-entry: A Buzzword in Search of a Narrative' in S. Rex and M. Tonry (eds.) *Reform and Punishment: The Future of Sentencing* (Portland: Willan Publishing, 2002) 158, 164.

volunteers, victims or offenders could not be identified outside of the support group, other than to police officials or treatment providers directly involved in the offender's care.

First and foremost, it is submitted that such an approach would result in reduced rates of recidivism for sexual offenders. Unlike public registration and notification schemes, it would avoid disintegrative shaming and stigmatisation, which tends to isolate individuals from society and compel association with other offenders. Instead, the restorative process facilitates "reintegrative shaming".[91] Though the support group will express disapproval, it is critical to note that their disapproval is directed towards the offence that has been committed, rather than towards the offender himself. Thus, the offender may move beyond the offence, without being perpetually defined by it. This highlights the potential for, and incentivises change. In this way, the support group is a means to achieving social cohesion, rather than division.

Such an approach would also address the needs of the victim.[92] As Scheingold observes, it is ironic that public registration and notification laws are lobbied for by victims, but, in reality, offer them little assistance.[93] Receiving an apology and participating in victim-offender mediation through the medium of the support group can provide the victim with an affirmation of respect and self-worth, which sexual abuse may have significantly eroded.[94] Witnessing the offender's remorse and shame may serve to ameliorate intimacy and trust issues which can arise from sexual exploitation.[95] It has the potential to empower the victim and to rectify the power imbalance between victim and offender.[96] It is likely that recognising the significance of the effect that the offender's actions have had on the victim would further deter future offending.

The code of confidentiality by which participants in the support group are bound would also act as a safeguard against community vigilantism and stigmatisation of family members and victims of offenders. Indeed, this promise of confidentiality may encourage individuals who have committed acts of sexual deviance but evaded conviction, to seek assistance. It has been observed that the majority of sexual offenses go undetected by and unreported to a public agency, and a study conducted by Groth has revealed that

[91] Mcalinden (n 61) 373.
[92] Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottdale, PA: Herald Press, 1995).
[93] Scheingold, Olson and Pershing, 'Sexual Violence, Victim Advocacy, and Republican Criminology: Washington State's Community Protection Act' (1994) 28 *Law & Society Review* 729.
[94] Van Ness and Strong (n 84).
[95] Wright (n 6) 100-101.
[96] McAlinden (n 61).

approximately twice as many sex offenders avoid detection as are apprehended.[97] Rejecting notification in favour of a rehabilitative approach would avoid generating unnecessary widespread fear of the clichéd, yet inaccurate, image of the compulsive and predatory sex offender generated by current laws.

Finally, the assistance the support group would provide in obtaining stable housing and employment would help to maintain the offender's ties with family and community members. Obtaining legal employment has been cited as one of the best predictors of the post-release success of ex-convicts.[98] It has also been posited that employment operates as an informal means of social control. Research conducted by Sampson and Laub has found that ex-convicts who have succeeded in securing a legitimate job are less likely to recidivate than those who have not.[99] Registration and notification laws make no provision for assistance in this regard.

Conclusion

For the reasons outlined above, it is submitted that a global reintegrative and restorative approach to managing sexual offenders would be preferable to the prevalent registration and notification laws. Currently, public access to information on the sex offender registry is only permitted in limited circumstances in the U.K. Only law enforcement officials are permitted to access such information in Ireland, in accordance with the Sex Offenders Act, 2001. Neither jurisdiction imposes notification requirements. However, in light of observations that "U.S. criminal justice policies provide a template for other nations"[100] and that there are "growing similarities in penal policy across Western nations", it is suggested that Irish and U.K. policies regarding sex offending are on track to follow in the footsteps of their U.S. counterparts.[101] Steps have already been taken towards expanding the scope of public access to information regarding sex offenders in Ireland under the Child Sex Offenders (Information and Monitoring) Bill 2012.

[97] Groth, Longo and McFadin, 'Undetected Recidivism Among Rapists and Child Molesters' (1982) 28 *Crime and Delinquency* 450.
[98] Visher, Winterfield and Coggeshall, 'Ex-Offender Employment Programs and Recidivism: A Meta-Analysis' (2005) 1(3) *Journal of Experimental Criminology* 295.
[99] Sampson and Laub, 'A Life-Course Theory of Cumulative Disadvantage and the Stability of Delinquency' in T.P. Thornberry (ed.) *Developmental Theories of Crime and Delinquency* (New Brunswick, N.J.: Transaction, 1997).
[100] Hinds and Daly (n 7) 256.
[101] Jones and Newburn (n 19) 441.

It is accepted that the recognisable postmodern ideology of crime control and risk management which underlies registration and notification legislation may not sit well with the proposed therapeutic response. Though some elements of risk assessment and public involvement can be recognised in the proposed approach, it strikes a significant discord with many of the previously described indicators of postmodern penality and populist punitiveness. It seeks to treat and rehabilitate offenders rather than merely manage them and focuses on the needs of individual offenders rather than treating them according to the class into which they are grouped.

It is vital that both policy makers and the public are informed, through extensive education programmes based on peer-reviewed research, of the nature of sexual offending. As a result, it is hoped that future policy developments in this arena will cease to represent mere "knee-jerk reactions" to isolated incidents and instead take the form of empirically driven social policies.[102] If it is agreed that reducing rates of sex offender recidivism is the goal, then an active decision must be made to reject the influences of postmodern penality and populist punitiveness and to avoid following the same trajectory as U.S. policymakers. Laws require more than a mere "symbolic effect", and must serve as more than an expressive outlet for public disgust, in order to justify the financial cost and resources expended in enforcing them.[103]

[102] Sample and Kadleck, 'Sex Offender Laws: Legislators' Accounts of the Need for Policy' (2008) 19 *Criminal Justice Policy Review* 40, 60.
[103] Sample (n 33) 266.