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STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

MSC No. 164685
COA No. 327355
LC No. 14-010811-01-FC

CORA LADANE LYMON,

Defendant-Appellant/Cross-Appellee.

BRIEF OF AMICI CURIAE SCHOLARS OF CRIMINAL JUSTICE, ECONOMICS, LAW, PSYCHOLOGY, SOCIAL WORK, AND SOCIOLOGY IN SUPPORT OF DEFENDANT-APPELLANT CORA LADANE LYMON

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STATEMENT OF QUESTIONS PRESENTED

1. DO THE PUBLIC NOTIFICATION PROVISIONS OF MICHIGAN'S SEX OFFENDERS REGISTRATION ACT IMPOSE UNCONSTITUTIONAL CRIMINAL PUNISHMENT?

2. IS THE MICHIGAN SEX OFFENDERS REGISTRATION ACT UNCONSTITUTIONAL ANIMUS-BASED LEGISLATION, EVEN IF PROPERLY CLASSIFIED AS A CIVIL REGUALTION?

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IDENTIFICATION OF AMICI AND THEIR INTEREST[1]

Amici are 17 scholars across six disciplines whose work, as a group, includes empirical studies of the effect of laws, how the law should take account of scientific findings about their effect, and the application of constitutional principles to laws regulating or criminalizing sexual conduct. Amici believe judicial decisions affecting constitutional rights should be grounded on an accurate understanding of empirical facts. Amici wish to provide the Court a summary of the scientific evidence bearing on the accuracy of the factual assumptions underlying Michigan's sexual offense registration and notification laws, and the implications of that evidence in evaluating the law's constitutionality.

The Amici are represented in their individual capacity and not on behalf of any institution. Institutional affiliations are provided for identification only. The Amici are:

> **Alissa R. Ackerman,** Ph.D., is an Associate Professor of Criminal Justice at California State University, Fullerton where her scholarly work focuses exclusively on topics related to sexual violence, including the failures of post-conviction sex crimes policies. She writes extensively on these topics in Op-eds, books and academic journals articles and has published over 20 peer-reviewed journal articles on these topics, to date.
>
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[1] This brief was not authored in whole or in part by counsel for a party, nor did such counsel, a party, or any other person or entity make a monetary contribution intended to fund the preparation or submission of this brief.

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William D. Araiza is the Stanley A. August Professor of Law, Brooklyn Law School. A former clerk for Justice David Souter of the U.S. Supreme Court, he is a widely published expert in Constitutional Law. His recent books include *Enforcing the Equal Protection Clause* (2016) and *Animus: A Brief Introduction to Bias in the Law* (2017), both published by the New York University Press.

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Ira Ellman is Distinguished Affiliated Scholar, Center for the Study of Law and Society, University of California, Berkeley, and Emeritus Professor of Law and Psychology at Arizona State University. A former clerk for Justice William O. Douglas of the U.S. Supreme Court, he is a member of the Editorial Board of *Psychology, Public Policy, and Law,* a research journal published by the American Psychological Association. His empirical studies with social psychologists focused on family policy and laid the groundwork for his 2023 book, *When Laws Seem Fair: The Example of Family Law*. His 2015 article, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, has been widely discussed in both legal publications and in key national media.

Emily Horowitz is Professor of Sociology and Criminal Justice at St. Francis College. She received her Ph.D. in Sociology from Yale University. Her research focuses on the collateral consequences of conviction registries. She is the author of *Protecting Our Kids? How Sex Offender Laws Are Failing Us* (Praeger, 2015), voted an Outstanding Academic Title by the American Library Association, and *From Rage to Reason: Why We Need Sex Crime Laws Based on Facts, Not Fear* (Bloomsbury Academic, 2023).

Eric Janus is President and Dean Emeritus of Mitchell Hamline School of Law, a scholar and expert in sex offender civil commitment laws, author of *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventive State* (Cornell University Press, 2006), co-author (with Robert Prentky and Howard Barbaree) of *The Sexual Predator: Society, Risk and the Law* (Routledge, 2015), and director of the Sex Offense Litigation and Policy Resource Center, established in 2017.

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Jonathan Simon, J.D., Ph.D., is the Adrian Kragen Professor of Law and former Director of the Center for the Study of Law and Society at the University of California, Berkeley. His work focuses on the political dimensions of criminal law and crime policies.

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INTRODUCTION

Cora Lymon frightened his family over the course of a day and night, pointing an unloaded gun in turns at his wife, one of his children, and himself, while ranting complaints about his wife's conduct and confining her and his children to the family room. By morning he apologized and allowed them to leave. He was convicted of torture, unlawful imprisonment, felonious assault, and possession of a firearm during the commission of a felony, and sentenced to a total of 12½ to 22 years' imprisonment for all counts combined. Because his convictions included unlawful imprisonment of a minor, Michigan law also required his placement on the public internet website of the Michigan sex offender registry, even though the state never claimed his conduct included any sexual element.[2] The Court of Appeals affirmed the convictions but reversed this portion of the judgment, holding that his placement on the sex offender registry constituted cruel or unusual punishment. On appeal the state argues that the registry is not punishment at all, but a justifiable civil measure, and that even if punishment, it is not cruel or unusual. Amici believe the Court of Appeals decision is correct on both points, but write in particular support of the Court of Appeals conclusion that a public website providing information about registrants constitutes punishment. Amici also believe that even if considered a civil regulation, the Michigan sex offender registry, as currently constituted, is animus-based legislation that is unconstitutional under applicable Supreme Court precedents.

Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, places registerable offenses in one of three tiers, MCL 28.722. Tier III registrants remain on the registry

[2] Those convicted of a single Tier I offense are not listed on the public website, except for offenses listed in MCL 28.728(4)(c). Mr. Lymon's offense, unlawful imprisonment, MCL 750.349b, is one of these excepted offenses, when the victim is a minor. MCL 28.728(4)(c)(*iii*).

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for life, Tier II registrants for 25 years, and Tier I registrants for 15 years. There is no process by which Tier II or Tier III adult registrants may seek earlier removal. Petitions for removal after ten years are possible for some in Tier I who haven't reoffended and meet other strict criteria, but they are a minor feature of the registry system because only 8% of Michigan registrants are in Tier I.[3] The vast majority (70%) are classified Tier III, with 22% in Tier II.[4] Moreover, a significant percentage (perhaps a quarter) of offense-free Tier I registrants are ineligible to petition because they did not successfully complete their full term of parole or supervised release.[5] The fate of eligible filed petitions rests entirely on the discretion of the court, which may deny them on any ground it believes relevant, MCL 28.728c(11)(h), not limited to evidence bearing on the registrant's likelihood of reoffending. Denial forecloses further claims; second petitions are not allowed. MCL 28.728c(4).

Almost all adult registrants are included on the SORA public website (the SORA site).[6] Twenty years ago in *Smith v Doe*, 538 US 84, 99; 123 S Ct 1140; 155 L Ed 2d 164 (2003), the Court found the Alaska registry website then before it was merely the technological equivalent of "a visit to an official archive of criminal records." But both the purpose and effect of the SORA site design

[3] Class Data Report, ¶ 44, ECF No 123-4, *Does A-H v Whitmer*, 22-cv-10209 (ED Mich) (*Does III*) (Data Rept). These figures are for registrants living in the community (not currently incarcerated). If incarcerated registrants are included in the count, the percentage in Tier I is even smaller.

[4] Data Rept, ¶ 44.

[5] The 2021 statistical report of the Michigan Department of Corrections reported a 25.1 percent "Total Failure" rate within three years for parolees released in 2018. Michigan Department of Corrections, *2021 Statistical Report*, (October 25, 2022), p D-5, available at <https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Statistical-Reports/Statistical-Reports/2021-Statistical-Report.pdf?rev=771589b8a67d4beab1df90d5a359b8a4&hash=6DEAF68B2521637574AE97B2416ADEA7> (accessed November 27, 2023). Successful completion includes completing any required treatment program.

[6] As of January 2023 there were 31,632 registrants in the community listed on the public website, including about half of the 2,692 Tier I offenders then living in the community. Data Rept, ¶ 44-45.

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clearly goes well beyond that. Its stated purpose, as the statute explains, is "to provide…the people of this state with an appropriate, comprehensive, and effective means to monitor" registrants because the "legislature has determined" they are "a serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." MCL 28.721a. To further that statutory purpose, the website offers a host of monitoring tools. A couple of clicks lists all the registrants who live or work within any geographical area the user cares to ask about.[7] A couple more clicks provides not only any registrant's current picture but the exact address of his residence and place of employment, the license plate number and description of any car he drives, and whether he is currently in compliance with all the registration rules.[8] Nor need one check back to keep track of changes in a particular registrant's listing: clicking on the included "track offender" button ensures one will receive regular email alerts of changes. A click on a different button promises an email alert if that registrant moves into any geographical area the user specifies, or begins school or employment there.[9] Information on registrants is kept current by requiring them to pose regularly to update their pictures, MCL 28.725a(5), and to notify the police whenever they move, change employment, enroll at a college, vacation or visit somewhere for more than seven days, change their email address, establish any new internet identifier, or use a phone or vehicle not previously registered. MCL 28.725(1) to (2). Failure to do so is itself a felony. MCL 28.729(1). And the public is invited to help enforce these requirements (or any other law) by just

[7] E.g., Michigan State Police, *Michigan Sex Offender Registry* <https://mspsor.com/Home/MapResults?RadiusAddress=&RadiusCity=lansing&RadiusZip=&RadiusMiles=.25&RadiusCounty=> (accessed November 27, 2023).

[8] E.g., *Michigan Sex Offender Registry* <https://mspsor.com/Home/OffenderDetails?id=a1073600-b05c-4b46-bafb-1846c6d8b751> (accessed November 27, 2023).

[9] *Michigan Sex Offender Registry* <https://mspsor.com/Alerts/Register> (accessed November 27 2023).

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clicking on the "submit a tip" button found on every registrant's listing. To encourage such tips, the site makes clear they may be submitted anonymously.[10]

This is an entirely different kind of regime than the one imagined in *Smith*. It goes well beyond easing access to otherwise public criminal records. Michigan's criminal records are online anyway.[11] But unlike the public SORA site, criminal records, by their nature, are just a snapshot of a past event. They say nothing about where someone with a record now lives, where he now works, what cars he now drives, whether he's now known by another name, or what he now looks like. They don't provide ongoing alerts of any changes in the subject's current life. Nor do they contain an official message like the one unmistakably communicated by the registry website's warning to the public to watch out for these particular individuals. Registrants are the only group Michigan tells the public to monitor; the only group for whom it provides online monitoring tools. Not murderers, not arsonists, not recent purchasers of AK-47's. Registrants are about 9% of the 388,000 to 464,000 Michigan adults with a felony conviction and lower percentage of all those with any conviction.[12] Michigan's message is that, among all those released from custody after

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[10] E.g., *Michigan Sex Offender Registry* <https://mspsor.com/Home/SubmitTip?id=a1073600-b05c-4b46-bafb-1846c6d8b751> (accessed November 27, 2023).

[11] E.g., the Michigan State Police maintain the publicly available ICHAT tool to facilitate public access to criminal records. Michigan State Police, *Internet Criminal History Access Tool* <https://apps.michigan.gov/> (accessed November 27, 2023).

[12] Some registrants are misdemeanants. There are no official tabulations of the number of adults with misdemeanor convictions residing in Michigan. The most careful estimates of the number with felonies are found in Shannon et al., *The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010*, 54 Demography 1795 (2017). The Michigan estimates are taken from the authors' detailed state by state breakdown, found in Table S9 of the Online Resource posted for their article. See the column labeled "Total Lower-Upper Bound" in Table S9, available at <https://dup.silverchair-cdn.com/dup/Content_public/Journal/demography/54/5/10.1007_s13524-017-0611-1/3/13524_2017_611_moesm1_esm.pdf?Expires=1704130559&Signature=KvBclc1I8lk1PMv92Ak-k1n4duwNhk54qDXWiyJaq9MtLfvXicrWTOi6MkOIDTnugvFvYl5Z6RiBgrZ2nCKdbhS4UO1vOq0k9AVEYjRSX8ONOYtPBYrEF55ZYMDj5AP1ud8Tba7O1ZiX2Pz4rv9s3AOj84TTf9~L9ZDaU-

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completing their sentence, these 9% are the ones we all must fear. They are the ones the state tells us all to "monitor" proactively because they are dangerous.

Smith concluded Alaska sought only to make a criminal record search "more efficient, cost effective, and convenient;" it did not "forc[e] an offender to appear in public with some visible badge of past criminality" like placing an offender in stocks. *Smith*, 538 US at 99. But Michigan's registry not only makes *past* criminality visible in public, it goes far beyond that. It effectively tells the world that registrants, alone among all those with a record of "past criminality," are *current* threats—threats pernicious enough to justify providing the entire population with tools for their continuous monitoring. And it does so at least for decades and usually forever, no matter how exemplary a life a registrant lives after release from custody, thus communicating the state's opinion that the registrant has deeply embedded character flaws that put him or her beyond cure or rehabilitation. The threat registrants pose, the state tells the world, requires permanent vigilance. *Smith* emphasized that "the dissemination of truthful information in furtherance of a legitimate governmental objective" is not punishment. *Id.* at 98. That principle may justify rules providing easy access to historical information such as records of convictions, but publicizing "official" warnings that an individual poses a special risk of doing harm in the *future* is a different matter entirely—and far more punishing than placement in stocks to suffer an afternoon's public humiliation before one's local community.[13]

GQ Jl0csekw8MejkM4LR2nzelLHANTktmwzZwIs2Nts6sVdlgfNM6VN7gmqlhWipLUxGJPMgziVa6aa DnVgrzf4E826XNu6YNl4lVFlSCdBSUPC~YpUAa91GLOdiiEDf5ziwmYEvafiFlsDQc~itpncNidxqo7E6 nnmb-OAsW458E8RfA__&Key-Pair-Id=APKAIE5G5CRDK6RD3PGA> (accessed November 27, 2023).

[13] See, e.g., the account of this historical practice in Onslow County, North Carolina. Onslow County, *Stocks and Pillory* <www.onslowcountync.gov/DocumentCenter/View/12627/Stocks-and-pillory> (accessed November 27, 2023).

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The statement of purpose included in SORA may "evince no punitive intent," but that is not dispositive. The Court must still examine whether "the statutory scheme [is] so punitive *in purpose or effect* as [to] negate" the claim of a civil purpose." *Does v Snyder*, 834 F3d 696, 700 (CA 6, 2016) (*Does I*). See also *People v Betts*, 507 Mich 527, 543; 968 NW2d 497 (2021). A law's design may show that its actual purpose is punitive, despite the state's claim of a civil purpose. *Cleburne v Cleburne Living Ctr*, 473 US 432, 450 (1985).[14] The question here is whether the design of Michigan's SORA is consistent with its asserted civil purpose (to protect residents from the "serious menace and danger" posed by those required to register) or instead with a purpose of simply punishing registrants. If the purpose or effect is punishment, the law's application is limited by the Ex Post Facto Clause and the Cruel and Unusual Punishment Clause of the Eighth Amendment, as well as their Michigan Constitutional counterparts.

But in addition, even if considered a civil regulation, a law whose purpose is to punish a small group in the population runs afoul of a broader Constitutional bar on animus-based legislation. Even laws that do not burden a fundamental right or a suspect class, and thus require only a rational relation to a legitimate purpose, invite special scrutiny if they have "the peculiar property of imposing a broad and undifferentiated disability on a single named group." *Romer v Evans*, 517 US 620, 632; 116 S Ct 1620; 134 L Ed 2d 855 (1996). Such laws "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634. That inference is all the stronger here because, as *Does I* recognized, those who have been convicted of a sexual offense are "so widely feared and disdained by the general public" that

[14] The state's claim that the purpose of a zoning ordinance was to control the effects of crowded conditions was rejected because the law's terms were inconsistent with that purpose, leading to the conclusion that the law was in fact motivated by "an irrational prejudice" against the intellectually disabled.

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they are particularly vulnerable to just this kind of unconstitutional targeting. *Does I*, 834 F3d at 705-706.[15] A law cannot be saved by having a rational relationship to its purpose if the purpose itself is constitutionally suspect, and "the desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest," *Romer*, 517 US at 635, quoting *US Dep't of Agriculture v Moreno*, 413 US 528, 534; 93 S Ct 2821; 37 L Ed 2d 782 (1973).[16]

As *Does I* also notes, even if the law's punitive purpose is not evident from the law itself, we may still conclude its purpose is punishment if its *effect* is to punish rather than to further its stated civil purpose. Assessing the law's effect is an empirical inquiry: does the registry in fact reduce sexual offending by registrants or is its impact primarily punishing. Of course, the law may have both effects. It may reduce sexual offending but also have a punitive effect. In that case we are told to ask whether its punitive effects are "excessive" with respect to that purpose. *Does I,* 834 F3d at 701. But of course, if its punitive effects contribute little or nothing to its putative civil purpose of reducing sexual reoffending, they are necessarily excessive.

As explained below, scientific studies clearly establish that public website and notification laws like Michigan's SORA a) do not reduce future sexual offending by registrants; b) that particular features of Michigan's law, adopted despite knowledge of those studies, demonstrate that its purpose is not to prevent future offenses but to punish past offenders after they fully served their lawful sentence; and c) that its effect, as intended, is indeed punishing. There is thus no doubt

[15] The court there observed that the "fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause."

[16] And again, *United States v Windsor*, 570 US 744, 768; 133 S Ct 2675; 186 L Ed 2d 808 (2013), quoting *Romer*, 517 US at 633, agreeing courts need to scrutinize "[d]iscriminations of an unusual character" on an unpopular group. (Quotation marks omitted.) See also Ellman, *When Animus Matters and Sex Crime Underreporting Does Not: The Problematic Sex Offender Registry*, 7 U Pa JL & Pub Affairs (2021).

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that Michigan's SORA imposes punishment, as the Court of Appeals concluded for Eighth Amendment purposes. But in addition, because its actual purpose and effect is to impose harm on a politically unpopular and disdained group, it is animus-based legislation that violates the Equal Protection Clause even if properly classified as a civil regulation. *Windsor*, 570 US at 768; *Romer*, 517 US at 632, 635.

ARGUMENT

1. A clear scientific consensus concludes that public sex offender websites like Michigan's do not reduce sexual reoffending, demonstrating that SORA does not in fact advance the nonpunitive purpose offered to justify it.

The SORA website's purpose is announced in a banner at the top of the website page: "This registry is made available through the Internet with the intent to better assist the public in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." *Michigan Sex Offender Registry* <https://mspsor.com/Home/OffenderDetails?id=a1073600-b05c-4b46-bafb-1846c6d8b751> (accessed November 27, 2023). When public websites listing those convicted of sexual offenses were first adopted in the 1990's, no one could know whether they would protect against future criminal acts. Their adoption, based on a guess they would, was encouraged by a series of tragic and widely publicized assaults on children that created a groundswell of public support for *some* action to prevent them.[17] The establishment of websites like SORA's created the opportunity for scientific studies to determine whether they in fact reduced sexual reoffending. Many studies have now been done and the results have been clear for more than a decade: Sex offender websites like Michigan's do not reduce the incidence of sexual

[17] See the historical account of the adoption of modern laws creating internet sex offender websites in Logan, *Knowledge as Power* (Stanford Law Books, 2009), pp 49-69.

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reoffending.

Research outside the laboratory to measure the real-world impact of an intervention always presents methodological challenges, whether the question is the impact of a public health measure, an educational strategy, an antipoverty or antidiscrimination measure—or a crime control measure. Scholars employ a variety of strategies to meet these challenges, but different research strategies sometimes yield different results, and the conclusions are then unclear. But when multiple sound studies, published in respected peer-reviewed scientific journals, by different researchers employing different methods, all reach the same result, the conclusion is clear and a scientific consensus forms. See *People v Parks*, 510 Mich 225, 249; 987 NW2d 161 (2022) (discussing the "clear consensus" in scientific research regarding late adolescence to determine whether 18-year-olds could constitutionally be subjected to mandatory life without parole). That is precisely what's happened on the question of whether public notification laws, including websites like Michigan's SORA, reduce sexual reoffending. As concluded in a comprehensive review of this work recently published by Cambridge University Press:

> Dozens of studies to date have sought to assess whether and how SORN [Sex Offender Registration and Notification] laws affect sex offense recidivism. Multistate studies—some national in scope—using federal crime data and deploying panel data methods or time-series approaches have found no evidence that notification reduces recidivism and some evidence that it may increase recidivism. In single-state studies, using many different empirical research tools and data sources and examining different measures of sex offense recidivism in different jurisdictions . . . , researchers from different disciplines, working independently, have essentially failed to detect any evidence that notification reduces recidivism.[18]

[18] Agan & Prescott, *Offenders and SORN Laws*, in Logan & Prescott, eds, *Sex Offender Registration and Community Notification Laws: An Empirical Evaluation* (Cambridge University Press, 2021), p 120. A single study, among the dozens they reviewed, did find that a SORN law may reduce sexual reoffending when, unlike Michigan's, it applies to only a narrow subset of sexual offenders who are all individually assessed as high risk.

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Here's just a sample of some of the often-cited studies the Cambridge analysis reviewed:

ARTICLE	NATURE OF STUDY	FINDING
Agan, *Sex Offender Registries: Fear Without Function?*, 54 JL & Econ 207 (2011)	Three separate studies: Regression analysis of FBI data, 1985 to 2003; assessing registry effects with comparative analysis of reoffense rates in states with and without registries; comparing locations of registrants across DC with locations of sex crimes.	Sexual offense rates do not decline after a state adopts registry or public notification; sexual offenders do not recidivate less in states requiring their registration; census blocks with more offenders do not experience higher rates of sexual abuse.
Bouffard & Askew, *Time-Series Analyses of the Impact of Sex Offender Registration and Notification Law Implementation and Subsequent Modifications on Rates of Sexual Offenses*, 65 Crime & Delinq 1483 (2019)	Time-series analysis of sexual offending in large Texas city, 1977-2012, to determine impact of registration and later adoption of public notification.	No effect of registration or notification on the number of sexual offenses committed by repeat offenders or first-time offenders.
Zgoba et al., *An Analysis of the Effectiveness of Community Notification and Registration: Do the Best Intentions Predict the Best Practices?*, 27 Just Q 667 (2010)	Reoffending by NJ registrants prior to public sex offender websites, compared with reoffending by similar group of NJ registrants after the websites established.	No sexual recidivism differences between the groups.
Ackerman et al., *Legislation Targeting Sex Offenders: Are Recent Policies Effective in Reducing Rape?*, 29 Just Q 858 (2012)	Compared rate of forcible rape before and after state's adoption of public sex offender website, with controls for other influences on rape rates during these periods.	No evidence public sex offender websites reduced the rate of rape offenses.

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Sandler et al., *Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law*, 14 Psych Pub Pol'y & L 284 (2008)	Time-series analyses to uncover changes in sexual offense arrest rates before and after the enactment of NY's SORN law, using data from 1986 to 2006	Neither registration nor notification reduced registrant reoffending or first-time sexual offending.
Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 JL & Econ 161 (2011)	Uses data from National Incident Based Reporting System to model the effect of registration and notification including websites.	Notification may cause *more* crime by thwarting rehabilitation.
Tewksbury & Jennings, *Assessing the Impact of Sex Offender Registration and Community Notification on Sex-Offending Trajectories*, 37 Crim Just & Behav 570 (2010)	Compares 5-year reoffense rates of Iowa pre-SORN offenders with Iowa post-SORN offenders	Notification has no effect on overall recidivism rates or on recidivism rates of identifiable subgroups
Letourneau et al., *Effects of South Carolina's Sex Offender Registration and Notification Policy on Adult Recidivism*, 21 Crim Just Pol'y Rev 435 (2010)	6,000 SC men convicted of sex crimes between 1990 and 2004 followed for average of 8.4 years after release.	Registration and notification adopted in 1995 had no effect on reoffending.

The fact that many sexual offenses (and many crimes generally) are not reported to law enforcement casts no doubt on these studies' conclusions that public sex offender websites have no impact on sexual reoffending. These studies typically compare the number of reported sexual offenses between jurisdictions with different laws, or at different times within a jurisdiction that changed its laws. There is no reason to assume that the proportion of sexual offenses that are unreported changes suddenly when a jurisdiction establishes a publicly accessible website listing registrants, or that jurisdictions with such websites systematically experience higher or lower reporting levels than jurisdictions without them. If the reported rate is the same, then while the total number of sexual offenses will be higher if the count could include unreported offenses, it will be higher in the same proportion both with and without the public notification system. That means

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that if public sexual offender websites produce no change in counts of reported offenses, they also produce no change in counts that include unreported offenses.[19]

It is certainly possible to find evidence that a program reduces sexual reoffending when it actually does. Indeed, studies have shown that some programs *do* reduce sexual reoffending.[20] But these programs, unlike public notification through websites and email alerts, do not thwart registrants' efforts to obtain employment, find housing, and re-enter civil society. Instead, they assist registrants seeking to begin anew as law-abiding citizens.[21]

Of course, even a program that is effective in reducing sexual *reoffending* can have only a limited impact on sexual *offending* overall. That's because 95% or more of all those arrested for sexual offenses are first-time offenders necessarily unaffected by any registry regime, as shown in data collected both before and after registry laws existed.[22] This means that even programs

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[19] The fact that many crimes are not reported is sometimes important in thinking about criminal law or policy, but it has no effect on the conclusions of these or other studies evaluating sexual offender registries. See Ellman, *When Animus Matters and Sex Offense Underreporting Does Not: The Sex Offender Registry Regime*, 7 U Pa JL & Pub Affairs 1 (2021), and the papers cited therein. There may be good reason to guess that victims are more likely to report, and police more likely to arrest, perpetrators they know were previously convicted of a sexual offense, but that would be true, if true, whether or not there was a registry. *Id*. at 33.

[20] See, e.g., Hanson et al., *The Principles of Effective Correctional Treatment Also Apply To Sexual Offenders: A Meta-Analysis*, 36 Crim Just Behav 865, 881 (2009); Duwe, *Can Circles Of Support And Accountability (Cosa) Significantly Reduce Sexual Recidivism?*, 14 J Experimental Criminology 463 (2018); Sample et al., *Beyond Circles of Support: "Fearless"—An Open Peer-to-Peer Mutual Support Group for Sex Offense Registrants and Their Family Members*, 62 Intl'l J. Offender Therapy & Compar Criminology 4257, 4261–4262 (2018); Gannon et al., *Does Specialized Psychological Treatment for Offending Reduce Recidivism? A Meta-Analysis Examining Staff and Program Variables as Predictors of Treatment Effectiveness*, 73 Clinical Psych Rev 101752, 101755–101757 (2019) (identifying treatments associated with recidivism reductions).

[21] Factors that reduce the likelihood of reoffending include employment, Denver et al., *A New Look at the Employment and Recidivism Relationship Through the Lens of a Criminal Background Check: Criminal Background Checks and Recidivism*, 55 Criminology 174, 196 (2017), as well as housing and social and family support, Duwe, *supra* n 20.

[22] Craun et al., *Percentage of Named Offenders on the Registry at the Time of the Assault: Reports From Sexual Assault Survivors*, 17 Violence Against Women 1374, 1379 (2011); Sandler et al., *Does a Watched Pot*

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effective at reducing *reoffending* can't have much impact on the incidence of sexual offending *overall* because they focus on the source of only 5% of offenses. Registry laws recall the story of the drunk searching for his keys under a streetlamp. Asked if he's sure that's where he lost them, he replies, "No, I lost them in the park. But this is where the light is." It's politically inviting to shine light on the small and socially ostracized group of prior offenders, but it's a poor strategy for reducing sexual offending. In contrast, there is mounting evidence for the effectiveness of some broader-focused preventative strategies that address the entire universe of sexual offending.[23]

The scientific consensus that sexual offender websites and public notification laws are ineffective and harmful explains their rejection by the American Law Institute and by all other western democracies. The American Law Institute's 1962 Model Penal Code (MPC) was adopted in whole or part by the legislatures in more than half the states, and its text and commentary were taken as persuasive by the courts in many others.[24] In 2022 the Institute completed a ten-year project updating the MPC article on Sexual Assault and Related Offenses.[25] The 1962 MPC, like

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Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law, 14 Psych Pub Pol'y & L 284, 298 (2008).

[23] Primary prevention strategies are challenging to develop and implement, but there is evidence that some do work. DeGue et al., *A Systematic Review of Primary Prevention Strategies for Sexual Violence Perpetration*, 19 Aggression & Violent Behav 346, 352-353 (2014); Senn et al., *Efficacy of a Sexual Assault Resistance Program for University Women*, 372 New Eng J Med 2326, 2332-2333 (2015); Beier et al., *"Just Dreaming of Them": The Berlin Project for Primary Prevention of Child Sexual Abuse by Juveniles*, 52 Child Abuse & Neglect 1, 2 (2016); Mujal et al., *A Systematic Review of Bystander Interventions for the Prevention of Sexual Violence*, Trauma Violence & Abuse 381, 392–93 (2019). See also Anderson & Whiston, *Sexual Assault Education Programs: A Meta-Analytic Examination of Their Effectiveness*, 29 Psych Women Q 374, 381 (2005) (stating that college sexual assault education programs had significant average effect sizes on rape attitudes, rape-related attitudes, rape knowledge, behavioral intent, and incidence of sexual assault).

[24] Kadish et al., *Criminal Law and its Processes: Cases and Materials* (10th ed, 2017), p 157; Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Calif 945, 949 (1999).

[25] For an overview of the project's history, see American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses* <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> (accessed

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all state laws at the time, contained no publicly accessible registries, but the update added the topic. The new provision on registry information, Section 213.11H (reprinted as Appendix), reflects the Institute's conclusion that the registry's only value is to provide a confidential tool for law enforcement personnel, "to aid in the investigation of a specific criminal offense." (Appendix, § 213.11H(1)(a)(i)). Any other disclosure of registry content, unauthorized by Section 213.11H, is a fourth-degree felony. Public listings of registrants, or of any information about them, is barred entirely.[26]

As with all Institute projects, the new MPC provisions are the product of a lengthy deliberative process that ensures "every issue receives a full airing of viewpoints and that the final product will represent the considered scholarship, experience, and judgment of the ALI as a whole."[27] Dozens of expert advisors, including judges, prosecutors, defense attorneys, and scholars, formed the official Advisers and Consultative Groups that met regularly to review drafts. Registry provisions were first presented to them in March of 2013 (Preliminary Draft No. 2), nine years before final adoption. Section 213.11H received especially careful attention. Objections from the Department of Justice, a group of state Attorneys General, and the National Center for Missing and Exploited Children, led to special meetings between all three groups and the Project's Reporter. As explained in the official Reporters' Memorandum:

> None of the objections raised with us was more forcefully pressed than these groups' support for a public website listing persons who have been convicted of

November 29, 2023) (MPC Wesbite). The revised text received final approval in September 2022, and is provided as Appendix.

[26] There are three provisions permitting disclosure of specified information about particular registrants to particular recipients for specific purposes, but under an obligation of confidentiality, enforceable with criminal penalties. (See Appendix.)

[27] American Law Institute, *Frequently Asked Questions* <https://www.ali.org/about-ali/faq/> [click "Who works on ALI projects?"] (accessed November 29, 2023).

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> sexual offense[s] and virtually unrestricted public access . . . . [T]hese discussions offered valuable insight into practical considerations worth taking into account. Yet in the end, the points raised . . . did not persuade us to overturn the previous, considered judgment, based on extensive research and wide consultation with other experts by the Reporters, the Council, and the membership, which has led to our conclusion that these public-access policies are unjust and counterproductive, even in terms of the public-safety goals they purport to serve. [Schulhofer, *Reporters' Memorandum to Model Penal Code: Sexual Assault and Related Offenses Tentative Draft No. 6* (2022).]

The Commentary and Reporter's Notes that accompany the text in Tentative Drafts 5 and 6 set out the research and expert evidence the Council and Membership found persuasive. They will be included in the forthcoming hard copy publication of the new MPC.[28] They reference many of the same studies described above showing that public notification does not reduce reoffending and may make it more likely.[29] The inability of Section 213.11H's opponents to offer contrary evidence was clearly an important reason their position was rejected by the Institute. The same studies also help explain why sex offender websites or other forms of "public access to registry information is virtually unheard of outside the United States." *Tentative Draft No. 5*, p 575. Of course, many other countries have registries to aid law enforcement, but studies by the Institute,[30]

[28] "The Reporter will make conforming changes to the Comments, consistent with the revisions to the black letter, and will prepare the official text of the project. An official text is expected to be published in 2024." MPC Website, *supra* note 25.

[29] American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 6* (2022), pp 69-72 (*Tentative Draft No. 6*); American Law Institute, *Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5* (2021), pp 521-535, 574-580 (*Tentative Draft No. 5*).

[30] *Tentative Draft No. 6*, pp 506-513.

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the U.S. Department of Justice,[31] and scholars here and abroad[32] all find that publicly accessible websites listing registrants are virtually nonexistent outside the United States.

In short, there is no serious dispute about the scientific fact: public notification laws like Michigan's do not reduce sexual offending, the nonpunitive purpose offered to justify the SORA site. Michigan's continued use of such a public site in the face of that evidence, especially given its particular features addressed in the next section, strongly suggests its purpose is punitive rather than preventative. A legislature's guess that public sex offender websites would prevent sexual offending could have been reasonable when SORA was first enacted. So might have been the belief, back when leper colonies were first established, that they were needed to protect the public from a disfiguring disease that evoked fear and disgust.[33] But today that view could not justify such mandatory quarantining given our modern knowledge that the disease is not particularly contagious and can be treated with antibiotics. If a legislature today insisted on keeping old laws isolating lepers, refusing to take account of current medical knowledge, the laws would fall as based on "irrational prejudice"—animus. Registered sexual offenders are effectively today's lepers.

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[31] US Department of Justice, *Global Survey of Sex Offender Registration and Notification Systems* (2016), pp 17-22 (2016), available at <https://smart.gov/pdfs/global-survey-2016-final.pdf> (accessed November 29, 2023).

[32] Thomas, *The Registration and Monitoring of Sex Offenders: A Comparative Study* (Routledge, 2011); Jacobs & Larruri, *Are Criminal Convictions a Public Matter?: The USA and Spain*, 14 Punishment & Soc'y 3, 12-14 (2012); Griffin & Blacker, *Megan's Law and Sarah's Law: A Comparative Study of Sex Offender Community Notification Schemes in the United States and the United Kingdom*, 46 Crim L Bull 987 (2011); Napier et al., *What impact do public sex offender registries have on community safety?* (2018), in Australian Institute of Criminology, *Trends & Issues in Crime and Criminal Justice* (Issue 550, May 2018), available at <https://www.aic.gov.au/sites/default/files/2020-05/ti_what_impact_do_public_sex_offender_registries_have_on_community_safety_220518_0.pdf> (accessed November 29, 2023).

[33] Frost, *Quarantined for Life: The Tragic History of US Leprosy Colonies* (A&E Television Networks, March 31, 2020) <perma.cc/5KHR-7VZT>; Wikipedia, *Leper Colony* <perma.cc/W8XL-29UJ>.

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2. Michigan's registry law is designed to punish past sexual offending, not to prevent future sexual offending.

A program designed to reduce sexual reoffending would focus its efforts on those most likely to reoffend. A program designed to punish past offenses would focus on those whose past offenses seem most deserving of punishment. Michigan's law focuses on the past—the particular registrant's crime of conviction—to the exclusion of any consideration of the future—the particular registrant's likelihood of reoffending. It has maintained and legislatively reaffirmed this approach in the face of the ever-mounting evidence, presented above, that offense-based registries and their public notification provisions do not reduce, and may even increase, sexual reoffending. Moreover, even if the offense of conviction were a good proxy measure of reoffense risk (which it's not[34]), and the registry reduced that risk, longstanding and uncontroverted scientific findings demonstrate that the likelihood of criminal reoffending, including sexual reoffending, declines rapidly with offense-free time in the community after release from custody. That fact leaves no preventative rationale for Michigan requiring lifetime registration for nearly three-fourths of registrants and 25 years for nearly all the rest.

Punishment is the only purpose that can be served by a program that imposes lengthy registration periods, unreviewable and unchangeable, on a small slice of all those convicted of a crime, chosen entirely on the basis of their crime of conviction and entirely without regard to the likelihood of their reoffending. The Legislature's resistance, over repeated legislative sessions, to proposals to repair the law's design flaws, and its indifference to the scientific facts showing the current registry design incapable of serving its purported preventative purpose, is difficult to

[34] Zgoba et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 Sexual Abuse 722 (2016).

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explain without concluding that the registry's punitive design is in fact intended. A court may distinguish between real explanations and pretextual ones. Where neither logic nor facts support the state's explanation for targeting one group with burdens not imposed on others, a court may conclude the burden was in fact imposed as a result of an irrational and unconstitutional animus toward the burdened group. *Cleburne*, 473 US at 450.[35]

There is certainly no doubt that a registry based on individualized risk assessments, rather than the crime of conviction, is entirely feasible. Accurate and cost-effective tools for assessing individual reoffense risk are widely available and are used for at least some tiering decisions by many states.[36] The Static-99R, a nonproprietary test developed by the Canadian government, is the most widely used tool in the world to assess the reoffense risk of individuals convicted of a sexual offense.[37] It consists of ten items tabulating the individual's prior sexual offenses, general criminal history, and demographic attributes, and has been empirically validated for adult males convicted of a contact sex offense.[38] Scientific studies show that an individual's score, at the time

[35] Concluding that where a city's stated concerns about "crowded conditions" and the like could not explain a zoning ordinance that required special permits for group homes for the intellectually disabled, but not for fraternity houses or hospitals, the real reason for this differing treatment was "an irrational prejudice" against the intellectually disabled.

[36] These states include Arkansas, California, Georgia, Massachusetts, Minnesota, Montana, New Jersey, New York, North Dakota, Oregon, Rhode Island, Texas, Vermont, and Washington. See, e.g., Ariz Rev Stat Ann § 13-3825 (2016); Ark Code Ann § 12-12-917 (2016); Cal Penal Code § 290.04 (West 2017); Ga Code Ann § 42-1-14 (2016); Mass Gen Laws ch 6, §§ 178C-178Q (2015); Minn Stat Ann § 244.052 (2017); Mont Code Ann § 46-23-509 (2015); NJ Stat Ann § 2C:7-8 (West 2016); NY Correct Law § 168-l (McKinney 2017); ND Cent Code § 12.1-32-15 (2015); Or Rev Stat §§ 163A.100, 163A.105 (2015); RI Gen Laws § 11-37.1-6 (2016); Tex Code Crim Proc Ann art 62.007 (West 2016); Vt Stat Ann tit 13, § 5411b (2016); Wash Rev Code §§ 72.09.345, 4.24.550 (2017).

[37] Society for the Advancement of Actuarial Risk Needs Assessment, *Static-99R Users* <https://saarna.org/static-99/> (accessed November 29, 2023).

[38] Helmus et al., *Improving the Predictive Accuracy of Static-99 and Static-2002 with Older Sex Offenders: Revised Age Weights*, 24 Sexual Abuse 64, 65 (2012).

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of release from custody, is a good measure of the chance he will be arrested for a new sexual offense. The California Sex Offender Management Board, for example, commissioned several studies that validated the Static-99R's predictive accuracy for adult males on the California registry.[39] Similar tools have been validated for other population groups.[40] Such "structured" risk assessment tools are more accurate predictors than clinical assessments[41] and far more accurate than relying on the offense of conviction. The experience of other states demonstrates that their use is practical and effective.[42]

The Static-99R measures reoffense risk as of the time an individual is released from custody. Assessment of reoffense risk at a later time must consider the individual's postrelease history, as the single most well-established finding in criminology is that for each year at liberty that a former felon does not reoffend, the likelihood of a future reoffense declines.[43] Sex offenses follow the same pattern, as shown in an important paper that traced the trajectory of that decline

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[39] Hanson et al., *The Field Validity of Static-99/R Sex Offender Risk Assessment Tool in California*, 1 J Threat Assessment & Mgmt 102, 104-105, 108 (2014).

[40] Similar instruments have been validated for use with juveniles, see State Authorized Risk Assessment Tools for Sex Offenders (SARATSO), *Risk Assessment Instruments* <https://saratso.org/index.cfm?pid=1360#jsii> (accessed November 27, 2023), and adult men convicted of accessing sexual images of minors, Eke, Helmus, & Seto, *A Validation Study of the Child Pornography Offender Risk Tool*, 31 Sexual Abuse 456 (2019). No instruments exist for female offenders, whose low reoffense rate suggests the entire group is low-risk. Marshall et al., *The Static-99R Is Not Valid For Women: Predictive Validity in 739 Females Who Have Sexually Offended*, 33 Sexual Abuse 631 (2021).

[41] Hanson & Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 Psych Assessment 1, 6–8 (2009).

[42] See, e.g., the various studies conducted by or for SARATSO, the California agency responsible for identifying valid tools for assessing sexual offender reoffense risk, and for providing the training of personnel, including parole officers, in the use of those tools. SARATSO, *Research* <https://saratso.org/index.cfm?pid=1447> (accessed November 27, 2023).

[43] Blumstein & Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 Criminology 327 (2009); Kurlychek et al., *Long-Term Crime Desistance and Recidivism Patterns–Evidence from the Essex County Convicted Felon Study*, 50 Criminology 71, 75 (2012).

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using data collected in 21 prior studies which, in the aggregate, followed 7,740 adult males convicted of a sexual offense for up to 24 years after their release.[44] Because 16 of the 21 studies providing the data for this paper followed individuals in western countries (most often, Canada) that do not have websites or other methods of public notification, the declining reoffense rates cannot be attributed to such measures. Not only were those with lower Static-99R scores less likely to reoffend the longer they were offense-free, reoffense risk declined for those whose initial risk level was high as well as low.

For example, while one-third of those in the highest risk group eventually reoffended, very few reoffended *for the first time* more than 15 years after release. As explained below, those who remained offense-free for 15 years were hardly more likely to sexually offend in the future than a randomly chosen male in the population.[45] Will they *ever* reoffend? One can't say never. But for all practical purposes, the 20-year reoffense rate can be considered the lifetime reoffense rate, because almost no one reoffends *for the first time* after 20 years at liberty, which means the proportion who reoffend within 20 years of release from custody is, for all practical purposes, the same as the proportion who *ever* reoffend.

By using a model based on this data of what actually happened after release from custody, a follow-up study calculated the level of this declining risk of reoffense after release for released offenders at all initial risk levels.[46] This second study (the Hanson study) divided the 7,740 former

[44] Hanson et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J Interpersonal Violence 2792, 2794–95 (2014), available at <https://www.researchgate.net/publication/261069441_High-Risk_Sex_Offenders_May_Not_Be_High_Risk_Forever> (accessed November 29, 2023).

[45] See *infra* at notes 47-52.

[46] Hanson, et al., *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 Psych Pub Pol'y & L 48, 50 (2018).

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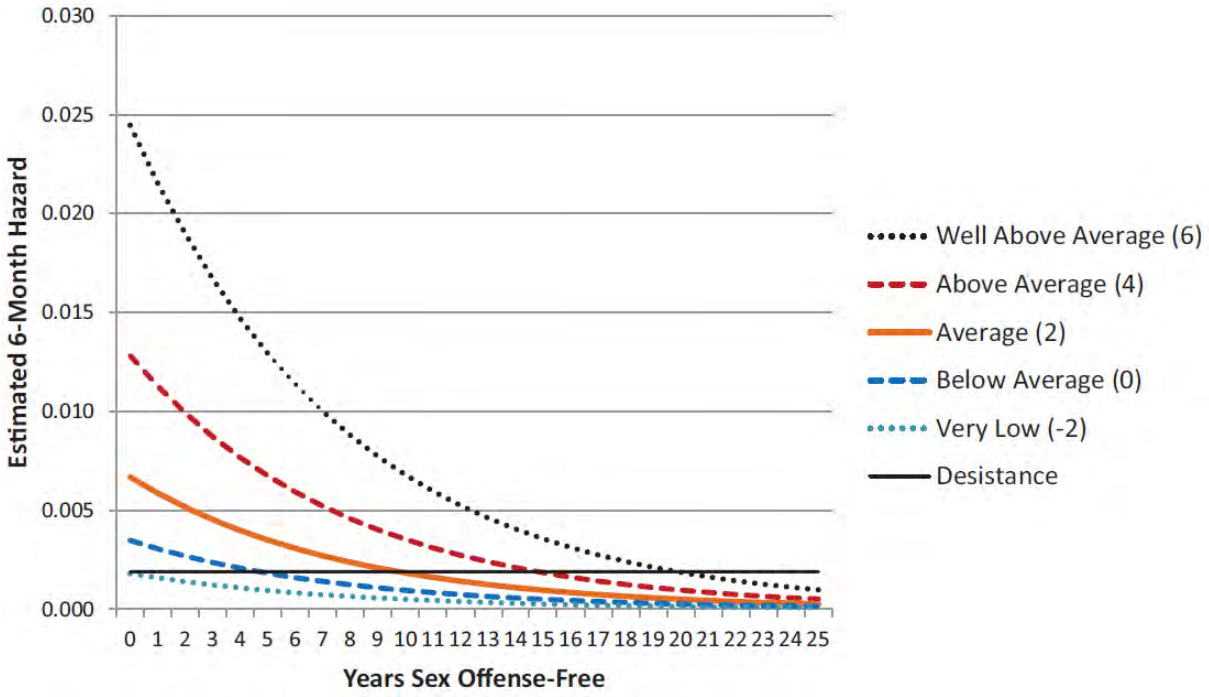
sexual offenders into five risk levels at release ("Very Low" through "Well Above Average") based on their Static-99R scores. It took account of postrelease behavior by recalculating, every six months, the chance that a released offender who was offense-free to that point would reoffend in the future. The Figure below, reproduced from this study, shows this calculated reoffense likelihood (called the "hazard" level) for those within each of the five risk groups over the 25 years after release. It allows one to see, for offenders at any initial risk level, how the reoffense risk they present declines with years at liberty offense-free. One can see, for example, that an individual assessed as average risk at the time of release from custody has a reoffense risk approaching zero 15 years later if he has not reoffended in that time.

FIGURE



But zero isn't really the risk level to ask about. *No* population group, including those who've never committed any crime, presents *zero* risk of sexual offending. The relevant question here is whether those who are placed—or kept—on the registry have an importantly higher risk of

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sexual offending than those who are not. If the registry is designed to prevent sexual offending, then they *should* have a higher risk, because the statute's stated purpose is to focus preventative attention where the risk is.[47] But higher than whom? What group in the population do we look to for the baseline risk level, above which risk becomes importantly "high?" The most obvious baseline would be a population average. We would surely expect that men required to register pose a higher risk of sexual offending than the average man in the population. One recent study estimated the lifetime risk of conviction for a sexual offense by a white male born in 2011 at about 1.5%.[48] Other studies, using different samples and different methods, have found lifetime rates varying between 1 to 5% percent. A leading expert's review of all these sources concludes that a reasonable estimate of the proportion of adult men in the population who are convicted of sexual offense during their lifetime is just under 2%.[49]

An alternative baseline comparison looks at the rate of sexual offending by individuals at liberty after a prior conviction for a nonsexual offense that does not place them on the registry. A review of five studies that followed varying populations of adult males with a prior conviction for a nonsexual offense concluded that within five years of their release from custody, 1 to 2% were convicted of a sexual offense.[50] A 2% rate at five years suggests a lifetime sexual offense rate of

[47] The statute states its purpose is to give the public the means to "monitor" those who the "legislature has determined" pose "a serious menace and danger" to the public, MCL § 28.721a, not to monitor people in general or even convicted felons in general.

[48] Lee, Brankley, & Hanson, *There Is No Such Thing as Zero Risk of Sexual Offending*, Can J Criminology & Crim Just (forthcoming), available at <https://saarna.org/research/> (accessed December 4, 2023). The sample was composed of white males in British Columbia.

[49] Expert Report of Karl Hanson, pp 14-16, ECF No 123-7, *Does III* (Hanson Report).

[50] Kahn et al., *Release from the Sex Offender Label*, 46 Archives Sexual Behav 861 (2017).

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3.8%.[51] Other data shows that the postrelease sexual offense rate is higher for some groups of nonsexual offenders. For example, a Justice Department study following released state prisoners found that 3.4% of those whose most serious prior offense was robbery were arrested within nine years of release for rape and sexual assault.[52] The proportion arrested for *any* sexual offense over their postrelease lifetime would surely be higher. The same study also found that those released after convictions for rape or sexual assault committed significantly *fewer* violent crimes over the next nine years than did those with convictions for offenses other than rape or sexual assault.

The Hanson study chose 2% as a conservative baseline comparison. It is shown as the horizontal black line in the Figure, where it is labelled the "desistance" level. The sexual offense risk presented by registrants at or below that level is not very different than the lifetime risk posed by the average man in the population, and less than that posed by those who have been convicted of nonsexual crimes. There can be no preventative rationale for targeting those at or below this desistance level with the burdens of registration while the vastly greater number of individuals who present the same or greater risk are not so burdened. The question, then, is whether very many registrants fall at or below this desistance level. The answer is that under SORA, most of them do.

[51] Given the normal trajectory of reoffending, a group with a five-year reoffense rate of 2% would be expected to have a 3.8% rate after twenty years—effectively, that group's lifetime rate. See Thornton et al., *Estimating Lifetime and Residual Risk for Individuals Who Remain Sexual Offense Free in the Community: Practical Applications*, 33 Sexual Abuse 3 (2021), available at <https://journals.sagepub.com/doi/epub/10.1177/1079063219871573> (accessed November 29, 2023).

[52] Alper & Durose, *Recidivism of Sex Offenders Released From State Prison: A 9-Year Follow-Up (2005-14)*, Bureau of Justice Statistics of the United States Department of Justice (2019), p 4, available at <https://bjs.ojp.gov/content/pub/pdf/rsorsp9yfu0514.pdf> (accessed November 29, 2023). The study contains no data on postrelease offending, sexual or otherwise, for those convicted of unlawful imprisonment of a minor.

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The current risk level of any registrant is determined by a) the registrant's initial risk at the time of re-entry into the community, and b) the number of years that registrant has lived in the community without reoffending. As shown in the Figure, for example, those assessed as low risk are below the desistance level (the horizontal black line) at the time of their release. While Michigan does not employ the Static-99R to determine a registrant's tier, the Michigan Department of Corrections routinely administers it, for its own purposes, to registrants under its jurisdiction. The distribution of initial risk levels (risk at time of release) of Michigan registrants in the community can be estimated from their data, and has been by expert consultants.[53] Their findings, shown in the following table, are very similar to proportions found in a study of California registrants.[54]

TABLE

Initial Risk Level	Percentage of Michigan Registrants in the Community
Very Low	7 %
Below Average	19 %
Average	43 %
Above Average	22 %
Well Above Average	9 %

The Figure above tells us that those at Very Low risk for reoffending are at the 2% desistance rate from the time of their release, while those assessed as Below Average reach desistance before their fifth year after release. The average-risk group reaches the 2% desistance

[53] Data Rept, ¶ 80.

[54] See Lee et al., *The Predictive Validity of Static-99R Over 10 Years for Sexual Offenders in California: 2018 Update*, p 19 (2018), <http://saratso.org/pdf/Lee_Hanson_Fullmer_Neeley_Ramos_2018_The_Predictive_Validity_of_S_.pdf> (accessed November 29, 2023), prepared for the California Sex Offender Management Board. It found that 33 of a random sample of 371 California adult male registrants (8.8%) had Static 99R scores in the "well above average" risk category. Another 74 (20%) were above average in risk. More than 70% of registrants were in the three lower risk categories, Average, Below Average, and Very Low.

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level before their tenth year. The Table tells us that 69% of Michigan registrants are in one of these three groups, and thus at or below desistance levels no later than their tenth offense-free year at liberty, and often sooner. Another 22%, the Above Average risk group, reaches desistance by their fifteenth year at liberty. So 91% reach desistance at or before their fifteenth year at liberty, yet 70% of all Michigan registrants in the community are on the registry *for life*, and another 22% for 25 years,[55] no matter how exemplary their postrelease life. Even the 8% placed in Tier One have a default registry term of 15 years.[56]

Irrevocable lifetime registration is not defensible for any registrant. While 25% of those assessed as presenting the greatest risk for reoffense—the "well above average" group—will eventually reoffend, virtually all who reoffend do so before they've been at liberty 20 years. That offending group probably receives a lengthy new prison term, and is certainly assigned a new term on the registry. But the 75% still offense-free after 20 years at liberty are no more likely to commit a future sexual offense than is a random male in the population. They are, as the Figure shows, at desistance levels. Data like these show why the newly revised MPC sets a maximum registration term of 15 years.[57] The Reporters' Notes explain, "There is no plausible justification for maintaining the registry obligation for [a longer period] period, without regard to the registrant's subsequent behavior."[58]

[55] Data Rept, ¶ 44.

[56] As noted *supra*, pp 1-2, some are eligible to petition off the registry after ten years, but the process is very discretionary.

[57] Appendix, § 213.11F.

[58] *Tentative Draft No. 5*.

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There is no preventative rationale that can explain keeping people on the registry long after they have ceased to present any heightened risk of sexual offending, but Michigan's law is *designed* to produce that result. It is the necessary consequence of two features. Michigan determines tier level by offense of conviction rather than by individualized risk assessment,[59] even though the offense of conviction is not correlated with likelihood of reoffending.[60] It then compounds that initial mistake by erroneously presuming, without any scientific basis, a permanent, lifetime heightened risk for most of its registrants, and decades of heightened risk for the rest. If the registry's purpose were punishment, Michigan's rules treating sexual offenses harshly would be unremarkable. But registrants have already been punished with sentences fully reflecting Michigan's judgment of just how serious a crime the registrant committed. Their long-term public condemnation on the website is an additional consequence that Michigan explains as a civil measure, yet its announced purpose, enabling the public to avoid those who pose of special threat of sexual crimes, cannot be reconciled with the fact that most registrants pose no such threat.

These conclusions are unaffected by the fact that some proportion of sexual offenses are not reported to law enforcement authorities. Whatever that proportion is, there is no basis for thinking registrants' offenses are more likely to be undetected than are offenses committed by those with no prior sexual offense convictions. Indeed, the opposite supposition is more plausible: offenses committed by those on the registry are more likely to come to police attention, and result in convictions, than are offense committed by those with no sexual offense record.[61] That means

[59] Harris et al., *Widening the Net: The Effects of Transitioning to the Adam Walsh Act Classification System*, 37 Crim Just and Behav 503 (2010).

[60] Hanson Report, ¶¶ 27–28; Zgoba et al., *supra* note 34. See also Data Rept, ¶¶ 30-31.

[61] See Ellman, *When Animus Matters and Sex Offense Underreporting Does Not: The Sex Offender Registry Regime*, 7 U Pa JL & Pub Affairs 1, 25-34 (2021).

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that if we were somehow to include unreported offenses in our counts, they would increase the comparison baseline desistance level, whichever measure of it we employ, by at least as much as our measure of registrant offenses. Registrants at or below the baseline desistance measure would still present no higher sexual offense risk than the average male in the population.[62]

3. The Legislature's complete indifference to the uncontradicted scientific evidence that SORA serves no preventative function as it has entertained and adopted revisions to SORA, and the state's resistance to applying the Sixth Circuit's earlier judgments sustaining legal challenges to it, are evidence that SORA's punitive design is purposeful.

Michigan has been persistently indifferent to facts showing this misfit between the law's announced purpose and its actual design. Given the enormous burden registration imposes on the narrow class of citizens affected by it, this indifference raises "the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected" rather than from a desire to further its purported purpose. *Romer*, 517 US 632. Declarations prepared by participants in the Legislature's consideration of measures affecting SORA explain two ways in which that animosity manifests itself.

There is first the strong emotions felt by legislators themselves, which leads them to treat the scientific facts as irrelevant in their consideration of any legislation. A former prosecuting attorney who has often testified in legislative hearings on the subject observes that "almost all legislators, like the public . . . , have a hatred toward people who have committed sex offenses [and assume] that people who commit such offenses are irredeemable and forever dangerous."[63] He concludes that "legislators don't care about the facts or the science . . . SORA legislation is driven

[62] Lee, Brankley, and Hanson, *supra* note 49.

[63] Declaration of William C. Buhl, ¶ 6, ECF No 123-25, *Does III* (Buhl Declaration).

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not by the facts, but by myths about such offenders."[64] These feelings create an environment in which State officials involved in legislative deliberations feel free to explain they oppose reform measures because registrants do not "deserve relief."[65] For any with that view, it does not matter whether any public purpose is in fact served by the burdens this civil law imposes on its targeted group, because they "deserve" to suffer (above and beyond the criminal sentence they have already served).

There's no doubt, of course, that many legislators are perfectly able to think dispassionately about how to fashion laws about sexual offenders that are rationally designed to further their announced public safety purpose. But legislators are not free to act rationally on this subject, because the *public's* animosity toward sexual offenders renders rational lawmaking politically perilous. A Michigan state senator has observed that "because the public hates people on the registry, legislators are afraid to reform the registry. . . . Politicians want to get reelected, and laws targeting people who commit sex offenses are popular."[66] Registrants are "a demonized group [that is] dispersed and lack any political clout," so "legislators simply do not care about them."[67] The public's animosity toward registrants is thus easily harnessed by the political opponents of any legislator who dares to suggest the law take account of established facts on sexual offending. Pandering to the public's biases against a despised minority is a sadly familiar political strategy, no less pernicious here than in its more familiar racial context. Incumbent legislators who are

[64] Buhl Declaration, ¶ 14.

[65] Declaration of Shelli Weisberg, ¶ 35, ECF 123-24, *Does III* (Weisberg Declaration) (describing a statement by the legal counsel to the Michigan State Police during the deliberations of a bipartisan workgroup considering how the state could respond to the 6th Circuit decision in *Does I*).

[66] Declaration of Jeff Irwin, ¶ 6-7, ECF No 123-26, *Does III* (Irwin Declaration).

[67] *Id.* at ¶ 12.

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themselves capable of rational deliberation on SORA are keenly aware of this potential opposition strategy. They appreciate that SORA is deeply flawed but hope the courts will fix the problem.[68]

Thus, some legislators are driven by their own animus toward anyone convicted of a sexual offense; others by political fear of the public's animus. Either way, animus drives legislative outcomes on this topic.[69] As the Sixth Circuit has observed, "the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause." *Does I*, 834 F3d at 706. The problem invades not only lawmaking but also the law's administration. For years after the Sixth Circuit held portions of SORA to be an unconstitutional violation of the Ex Post Facto Clause, the state stubbornly refused to comply.[70] Of course, Michigan could no longer impose SORA on the named plaintiffs in *Does I*, but insisted it was free to prosecute all others identically situated for failure to comply with the unconstitutional law, forcing new plaintiffs back to court where they eventually obtained an order barring the law's application to them.[71]

There is no one dramatic image, like standing in the schoolhouse door, that captures the history of Michigan's intransigence on SORA, but the essential similarity to Alabama's resistance

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[68] *Id.* at ¶ 10.

[69] "The presence of community animus can support a finding of discriminatory motives by government officials, even if the officials do not personally hold such views." *Avenue 6E Investments, LLC v Yuma*, 818 F3d 493, 504 (CA 9, 2016). See also *Congregation Rabbinical College of Tartikov, Inc v Pomona*, 945 F3d 83, 122 (CA 2, 2019) (despite absence of evidence of their own animus, zoning amendments invalid where they were adopted by local officials who "were responsive to . . . the animus . . . embodied" in the public's comments). These decisions followed *Cleburne*. See the discussion of *Cleburne* in Araiza, *Animus: A Short Introduction to Bias in the Law* 37-39 (New York University Press, 2017).

[70] Weisberg Declaration, ¶ 32.

[71] See *Doe v Snyder*, 606 F Supp 3d 608 (ED Mich 2021) (*Doe II*). The COVID-19 pandemic did force a general suspension of in-person registration for everyone during a portion of the time between the decisions in *Doe I* and *Doe II*.

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to those earlier constitutional judgments is clear enough. No one claims that those convicted of a sexual offense form a suspect class under the Equal Protection Clause, but *Romer*, 517 US at 632, teaches that they are still protected, as we all are, from animus-driven laws singling them out for punishment under the guise of a civil measure that does not advance its purported purpose, in fact or in design.

4. Michigan's registry is punishing in fact as well as design.

Any criminal conviction burdens an individual's efforts to obtain employment and housing and to re-enter civil society after release from custody. But a criminal record memorializes a single event. Its visibility, for those who don't offend again, fades over time, as does its psychological impact on third parties who do learn of it. Some legal rules encourage this process.[72] But time stands still for the small slice of those with criminal records who are labelled "registered sex offender" on a public website. While a criminal record is a statement of something the individual *once did*, the SORA site is a statement of who the individual *currently is.* The constant updating of registrant photographs, addresses, employment, and vehicle information emphasizes the message that the registrant is a *current* risk. That message is further confirmed by the "Compliant" or "Noncompliant" stamp on every registrant's SORA listing, which suggests registrants remain under continuing supervision and surveillance. The registry thus transforms a single historical act into a permanent personal identity, placing the individual into a category, much like a label of race

[72] See, e.g., U.S. Equal Employment Opportunity Commission, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964* (Feb. 4, 1987), which suggests that excluding job applicants on the basis of an old conviction may constitute illegal racial discrimination. A 2015 book noted at least seven states, including California, Texas, and New York, prohibit credit reporting agencies from including convictions whose sentences expired more than seven years earlier. Jacobs, *The Eternal Criminal Record* 78 (Harvard University Press, 2015).

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or gender. The very label "sex offender" communicates that understanding. The label "registered sex offender" shouts it.

"Sex offenders" are feared and despised because of the mistaken public perception they have deeply embedded and largely irreparable character flaws that make them forever dangerous.[73] A "*registered* sex offender" is officially certified as such. Surveys find most people support sexual offender websites, restrictions on where registrants can live or go, and even their castration, *without regard to whether there is evidence such policies reduce sexual offending*.[74] They might also believe these measures have a preventative effect, but they support them whether or not they do. It's not surprising most people are unconcerned about the gratuitous punitive impact of a law that only burdens people they believe irredeemably evil. But that attitude—favoring laws whose only function is to burden those they target—is the very definition of animus. Similar data on potential jurors' views on sentencing makes the same point. The proportion favoring an indefinite term of confinement doubles when the defendant is labelled sexual predator, *as compared to defendants with identical records who are not so labeled*. The label itself heightens perspective jurors' self-reported desire to "get revenge" and to "make the offender pay."[75]

A registry law that publicly pins the sex offender label on registrants for decades, and usually for life, endorses the mistaken view they are irredeemably defective, and thus encourages this irrational animus against them. Indeed, in a pernicious feedback loop, the label itself increases

[73] Mancini & Budd, *Is the Public Convinced That "Nothing Works?": Predictors of Treatment Support for Sex Offenders Among Americans*, 62 Crime Delinq 777 (2016).

[74] Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 Analyses Soc Issues & Pub Pol'y 137, 150 (2007).

[75] Scurich, Gongola, & Krauss, *The Biasing Effect of the "Sexually Violent Predator" Label on Legal Decisions*, 47 Int'l J L & Psychiatry 109, 109 (2016).

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public support for websites identifying those so labeled.[76] The public's animus toward those labelled "sex offenders" thus creates political pressure for the public website that then amplifies that animus.

Modern technology is key to that amplification. Michigan does not publicly report data on the number of people who consult its website each day, or take advantage of its interactive tools, such as signing up for email alerts when registrants move into a neighborhood or change their home or employment address. But the state's contract with the vendor who supplies and maintains the website requires it be capable of handling 10 million public users, and up to 5,000 at any one time.[77] Capacious as that is, the website's opening page provides notice that it may sometimes be unavailable "due to the volume of users." But Michigan does all it can to disseminate the message as widely as it can. Other states erect digital barriers to private businesses seeking to make use of their registrant database, but Michigan does not. It leaves it open to scraping by any private parties' search robots.[78] This, in turn, allows Google to link an individual's name directly to his Michigan

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[76] Harris & Socia, *What's in a Name? Evaluating the Effects of the "Sex Offender" Label on Public Opinions and Beliefs*, 28 Sexual Abuse 660 (2016).

[77] State of Michigan Procurement, Contract 190000001014 between State of Michigan and LexisNexis Copologic Solutions, Inc, p 44, ECF No 126-21, *Does III*.

[78] A simple tactic to thwart such scraping is requiring users who search for individual registrants, or for lists of registrants meeting specified criteria (such as locale), to navigate past a "CAPTCHA" barrier. E.g., California Megan's Law Website <https://www.meganslaw.ca.gov/Disclaimer.aspx> (accessed December 1, 2023). For more on CAPTCHA, see Wikipedia, *CAPTCHA* <https://en.wikipedia.org/wiki/CAPTCHA> (accessed December 1, 2023). Michigan's website imposes no such CAPTCHA search requirement. Other digital barriers to data scraping are also available. See, e.g., Azad, Starov, and Laperdrix, *Web Runner 2049: Evaluating Third-Party Anti-bot Services*, in Bilge et al., eds, *Detection of Intrusions and Malware, and Vulnerability Assessment (DIMVA 2020 Lecture Notes on Computer Science)* (Springer, 2020), pp 135-159, available at <https://link.springer.com/chapter/10.1007/978-3-030-52683-2_7> (accessed December 1, 2023). See the frustrated account of a British reporter no longer able to scrape data from California's site after they adjusted their search tools in response to his sensational but completely erroneous accounts of offender reoffense risk. Boswell, *'It's frightening for society.' Thousands of convicted pedophiles in California are being released from prison in less than a year for horrific acts, including rape,*

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registry listing, bypassing the need to use the search function on the official Michigan registry site. The nature of the algorithms Google employs in ranking search results usually puts a registrant's entry on Michigan's SORA site among the top hits in any Google search using the Michigan registrant's name.[79] In stark contrast, a California registrant's listing on its state website, for example, does not appear at all in a Google search of the registrant's name.[80]

Michigan's policy of facilitating data scraping invites private businesses to capture and republish the website information for profit,[81] and operate their own alert systems using the state's data.[82] These sites also push registrant information to people who never thought to ask for it. For example, someone who goes to https://www.homefacts.com/ to check out the ratings of a particular neighborhood's schools is offered a link to a list of all the sex offenders in the neighborhood as well. Similar results are found for competing businesses such as Homedisclosure.com, City-Data.com, BeenVerified, and Familywatchdog.[83] Because such sites do not regard themselves as Consumer Reporting Agencies, they need not comply with provisions of

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sodomy and sexual abuse of kids under 14, DailyMail.com investigation reveals, DailyMail.com (November 28, 2022) <https://www.dailymail.co.uk/news/article-11453859/Thousands-convicted-pedophiles-California-getting-year-prison-time.html> (accessed December 1, 2023) ("DailyMail.com was unable to conduct the analysis for offenders added to the database since 2019, because the California Department of Justice has added digital blocks on its website to prevent new data being gathered and analyzed.").

[79] Expert Report of Dr. Sarah Esther Lageson, ¶¶ 66-67, ECF No 1-10, *Does III* (Lageson Report).

[80] This statement can be verified by going to the California Megan's Law Website, *supra* note 78, completing the CAPTCHA, searching for registrants in a particular location, and then doing a Google search for any registrant name one finds. The resulting links do not include the registrant's listing on the state's website.

[81] See, e.g., Homefacts, *National Sex Offender Registry* <https://www.homefacts.com/offenders.html> (accessed December 1, 2023).

[82] See, e.g., OffenderRadar, *National Offender Registry and Offender Resource Center* <https://www.offenderradar.com/> (accessed December 1, 2023).

[83] Lageson Report, ¶¶ 52-61.

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the Federal Fair Credit Reporting Act that require, for example, that reporting agencies correct or delete inaccurate, incomplete, or unverifiable information, and bar reporting of negative information that is more than seven years old.[84] So these sites instead warn users their information may not be accurate and should not be used for housing or hiring decisions.[85] But nothing requires users to heed that warning.

Criminal convictions reduce employment opportunities.[86] The particular animus toward those with sexual offense convictions reduces theirs more. A review of the literature reported that most studies find that community notification appears to limit employment opportunities for up to half of registrants.[87] Even nonprofit organizations whose very focus is providing employment for released offenders sometimes exclude registrants.[88] Measures that push the names of registrants on people who never asked for such information will thus add to the burdens on those so identified. Michigan amplifies this potential for harm by including the registrant's employment address on the SORA site. Even employers who believe in second chances may pause before hiring someone when the hire would put their business address on a sex offender website. The impact of this employer reaction is not just punitive: it also thwarts rehabilitation. It is well established that people

[84] See Consumer Financial Protection Bureau, *A Summary of Your Rights Under the Fair Credit Reporting Act* <https://files.consumerfinance.gov/f/documents/bcfp_consumer-rights-summary_2018-09.pdf> (accessed December 2, 2023.

[85] Lageson Report, p 19 n 28.

[86] Larson *et al*., *Felon History and Change in U.S. Employment Rates*, 103 Soc Sci Rsch 102649 (2022).

[87] Levenson & Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 Am J Crim Just 54, 55 (2009).

[88] For example, the well-regarded Delancey Street Foundation serves former felons (their average resident "has a personal history of violence") but excludes "sex offenders" along with anyone "who require[s] psychiatric medication." Delancey Street Foundation, *To Seek Admission* <https://www.delanceystreetfoundation.org/admission.php> (accessed December 2, 2023).

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with convictions are less likely to reoffend in an environment that provides them with better employment opportunities.[89] So putting employer addresses on the SORA website is not merely punitive. It is also *anti*preventative, increasing the likelihood of reoffending by decreasing the registrant's opportunities for employment.

Something similar happens with landlords. Even landlords willing to rent to drug traffickers refuse to rent to those with sex offenses.[90] That housing handicap is first multiplied by SORA's labelling them publicly as sex offenders for decades after their release, creating the sense they are a current threat. It's then multiplied again by Michigan's policy of including the registrant's home address on the public listing. Landlords are not enthusiastic about having their property publicly identified as the residence of registered sex offenders. They would—and probably should—fear that publicity may deter applications from other potential tenants and cause backlash from current tenants. Studies have found that 20–40% of registrants report that they have had to move because a landlord or neighbor became aware of their registration status.[91] The private businesses that scrape the SORA website data certainly assume such animus when they market their products by assuring their customers that their neighborhood evaluations flag the presence of registrants, which

[89] E.g., Schnepel, *Good Jobs and Recidivism*, 128 Econ J 447 (2016) (tracking nearly 2 million offenders released in California between 1993 and 2008 and finding significantly lower reoffense rates for those released from prison during periods with more employment opportunities in low-skill manufacturing and construction); Apel & Horney, *How and Why Does Work Matter? Employment Conditions, Routine Activities, And Crime Among Adult Male Offenders*, 55 Criminology 307 (2017) (histories of individual offenders show lower offense rates during periods in which offender had high-quality employment).

[90] Evans & Porter, *Criminal History and Landlord Rental Decisions: A New York Quasi-Experimental Study*, 11 J Experimental Criminology 21 (2015). Using a classic "tester" methodology to reveal discrimination, the authors found that prospective tenants who revealed a prior conviction for child molestation were significantly more likely to be excluded from consideration than those who revealed a prior felony conviction for drug trafficking.

[91] Levenson and Tewksbury, *supra* note 87.

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is assumed to indicate an undesirable neighborhood.[92] They are, in effect, relying on the information Michigan conveniently provides them to market a product whose value depends upon, harnesses, and builds upon the public's animus toward registrants.

SORA probably has less impact on rentals already considered less desirable, pitched to lower-income tenants with fewer housing options. In that case, the overall effect of the SORA site showing registrants' home addresses is to limit their access to better housing. They are steered toward less desirable housing. The SORA site's listing of home addresses thus fosters informal residential exclusion zones that resemble the formal ones removed from SORA after *Does I*, 834 F3d at 701, concluded they resembled punishment. See also *Betts*, 507 Mich at 548-553. Studies in fact find that registrants listed on public websites like SORA's are likely to reside in less desirable, more socially disorganized neighborhoods than they had lived in when arrested, even 15 years after their initial placement on a registry website.[93] Barriers to better housing are no less punishing when they result from private action that is channeled and encouraged by SORA than when imposed by law directly. Nor does the public listing of registrant home addresses serve any preventative purpose. And as with the publicizing of employer addresses, housing barriers that push registrants

[92] These sites feature tools providing users with the identity and location of registrants in any given neighborhood. E.g., Homefacts, *supra* note 81 (indicating the user can "Get Reliable Neighborhood Information Instantly" and including "Sex Offenders" in the list of information provided); City-Data.com, *Registered sex offenders in the US* <https://www.city-data.com/so/sexoffenders.html> (accessed December 2, 2023) (offering a sex offender locator).

[93] Tewksbury, Mustaine, & Rolfe, *Sex Offender Residential Mobility and Relegation: The Collateral Consequences Continue*, 41 Am J Crim Just 852 (2016). The authors compared registrants' residential neighborhood at the time of arrest with their neighborhood five and fifteen years later, on measures such as percentage of occupied units, average length of residency, percentage owner-occupied, percentage in poverty, and percentage of single parent households, as well as economic measures. (Registrants who were able to return, at release, to their prearrest residence were not included in this comparison.)

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to marginal locations make successful re-entry to civil society less likely, and reoffending thus more likely.[94]

These barriers to stable housing and employment are perhaps the most tangible punishing consequences created by the SORA site, but not the only ones. The registrant knows he might be "outed" at any time, in any social context, with potential for public disparagement and humiliation that could affect his family as well as himself. While that is a concern that might arise for anyone with a criminal conviction of any kind, the SORA site listing makes the registrant far more vulnerable. He is far more likely to be "discovered," and the resulting stigma is clearly worse. Many cope with that vulnerability by withdrawing from unnecessary social interactions.[95] The resulting civic isolation reduces social capital, further compromising employment opportunities as well as other aspects of the registrant's life.

There is surely no doubt that registrants experience their listing on the SORA site as punishment. SORA typically continues their punishing experiences for decades. Their listing serves no nonpunitive public purpose. It is designed to be punishment and is so experienced.

CONCLUSION

The clear scientific consensus is that public sex offender websites like Michigan's do not reduce reoffending by those listed on it, or sexual offending generally. The particular design of

[94] Those living in socially disorganized neighborhoods have less social capital, a disadvantage in all aspects of life including employment and the resources to navigate successfully through difficult personal circumstances. See, e.g., Burchfield & Mingus, *Not in My Neighborhood: Assessing Registered Sex Offenders' Experiences With Local Social Capital and Social Control*, 35 Crim Just Behav 356 (2008); Williams, *The Sex Offender Housing Dilemma: Community Activism, Safety, and Social Justice* (New York University Press, 2018).

[95] Lageson, *Found Out and Opting Out: The Consequences of Online Criminal Records for Families*, 665 Annals Am Acad Pol & Soc Sci 127 (2016).

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Michigan's website—very long registration periods, dominated by lifetime registration; exclusion of any pathway off for those who do not reoffend; offense-based tiering with no consideration of individual reoffense risk; the pubic posting of employment addresses; and the facilitation of scraping by for-profit organizations that republish it—are incompatible with, and cannot be explained by, its published purpose of preventing sexual reoffending. Michigan's SORA is instead consistent with, and can only be explained by, a punitive purpose. The animus motivating SORA's punitive purpose explains the state's persistence in enforcing provisions already held to violate the constitution, its repeated reenactment of gratuitously punitive provisions in the face of these earlier decisions, and the legislative indifference to the uncontroverted evidence that the law did not advance its ostensible nonpunitive civil purpose. The punitive impact of the law cannot be doubted, amplified as it is by including registrants' employment and home addresses on the SORA website, and its facilitating use of the SORA database by private businesses selling it to clients that are motivated by the same irrational fear of and animosity toward registrants that motivated the law's enactment.

A law whose actual primary purpose and effect is to burden and punish the small portion of the population to whom it applies violates the Equal Protection and Due Process Clauses of the Constitution. Michigan's SORA website violates these Constitutional principles, and it cannot stand.

Date: December 5, 2023

Respectfully submitted,



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Statement of Countable Words

This brief contains 12,825 words countable pursuant to MCR 7.312(A) and MCR 7.212(B).

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STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

MSC No. 164685
COA No. 327355
LC No. 14-010811-01-FC

CORA LADANE LYMON,

Defendant-Appellant/Cross-Appellee.

APPENDIX TO BRIEF OF AMICI CURIAE SCHOLARS

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SECTION 213.11F. DURATION OF REGISTRATION REQUIREMENT

(1) *Ordinary Termination.*

(a) Subject to the provisions of subsection (2) of this Section and Section 213.11J, a person required to register under Section 213.11A or under a law of this state that defines a sexual offense not defined by this Article must keep the registration current for a period of 15 years, beginning on the date when the registrant is released from custody after conviction for the offense giving rise to the registration requirement; or if the registrant is not sentenced to a term of incarceration, beginning on the date when the registrant was sentenced for that offense.

(b) At the expiration of that 15-year period, the duty to keep that registration current will terminate, and the person who had been registered will not be subject to any further duties under this Article on the basis of that registration requirement. The person will remain subject to any registration requirement under this Article that arises from conviction of any other Article 213 offense.

(c) In determining whether the 15-year period has been completed, that period shall include any time in which the person was registered in this state or any other jurisdiction, prior to the effective date of Sections 213.11 and 213.11A-J, for the offense giving rise to that registration requirement.

(2) Early Termination. If, during the first 10 years of the period during which a person is required to keep registration information current under Section 213.11E, the person:

(a) successfully completes any period of supervised release, probation, or parole, and satisfies any financial obligation that arises from the conviction for the registrable offense, such as a fine or restitution, other than a financial obligation that the person, despite good-faith effort, has been unable to pay; and

(b) successfully completes any required sexual-offense treatment program; and

(c) is not convicted of, or facing pending charges for, any subsequent offense

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under this Article, or any subsequent sexual offense in this state or any other jurisdiction; then:

the duty to keep that registry information current will terminate; the person who had been registered will not be subject to any further duties associated with that registration requirement; and subsequent access to registry information will be governed by subsection (3).

(3) Access to Registry Information After Termination. When the person's obligation to register and to keep registry information current terminates under subsection (1) or (2), subsequent access to registry information is limited as follows:

(a) Registry information recorded as of the date when termination takes effect must remain available to any government law-enforcement agency seeking disclosure of that information in compliance with Section 213.11H(1)(a).

(b) Except as provided in paragraph (a), no public or private agency may thereafter be permitted access to registry information associated with a registration requirement that has terminated.

(4) Notice of Termination. When a person's duty to register terminates under subsection (1) or (2), the law enforcement agency in the [county] where the person's duty to register arises on the basis of residence, work, or study must:

(a) include in its registry a notice that the person's duty to register and all duties associated with that registration requirement have terminated; and

(b) upon the person's request, notify each law enforcement agency and other authority that has received information about the registrant pursuant to Section 213.11D(5) that the person's duty to register and all duties associated with that registration requirement have terminated and that no public or private agency other than a government law enforcement agency shall thereafter be permitted to have access to that registry information.

(c) upon the person's request, provide the person a certificate attesting that the person's duty to register and all duties associated with that registration requirement have terminated.

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SECTION 213.11H. ACCESS TO REGISTRY INFORMATION

(1) *Confidentiality*

(a) Each law-enforcement agency that receives information from a registrant pursuant to Section 213.11D(5) must exercise due diligence to ensure that this registrant-supplied information remains confidential, except that relevant information about a specific registrant, including but not limited to registrant- supplied information, must be disclosed:

(i) to any government law enforcement agency that requests information to aid in the investigation of a specific criminal offense;

(ii) to any adult victim of the offense that gives rise to the registrant's duty to register and to any parent or guardian of a minor victim of that offense, if the either the victim or that parent or guardian resides, works, or is enrolled in a program of study in the [county] where the registrant resides, works, or studies; provided that such disclosure must be limited to the fact that the registrant resides, works, or is enrolled in a program of study in that [county];

(iii) to the United States Marshal's Service as required by International Megan's Law, Pub. L. No. 114-119, 130 Stat. 15 (2016), when that information involves the international travel plans of a registrant who has been convicted of a sexual offense involving a minor; and

(iv) to the [Department of Public Safety] as appropriate to enable the Department to provide the criminal history background check authorized by [Section xx/yy] of the [Code of Criminal Procedure] to any public or private agency, organization, or individual qualified to receive such a background check on the basis of serving, having access to, or screening others to serve or have access to minors, the elderly, or persons who are disabled or otherwise vulnerable; provided that any disclosure to the Department under this subparagraph must comply with the terms of [Section xx/yy] of the [Code of Criminal Procedure]. See Annex, pp. 82-90, infra.

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(b) Any disclosure pursuant to paragraph (a) must include a warning that:

(i) the agency, organization, or individual receiving the information must exercise due diligence to ensure that the information remains confidential, except as provided in paragraph (a);

(ii) such information may be disclosed and used for the purposes specified in subparagraphs (a)(i)-(iv), but otherwise must not be disclosed to any person or public or private agency, except that any victim or parent or guardian of a victim who receives information pursuant to subparagraph (1)(a)(ii) may lawfully disclose such information to other persons living in the same household;

(iii) such information may not be used to injure, harass, or commit a crime against the registrant or anyone else; and

(iv) any failure to comply with the confidentiality and use-limitation requirements of this Section could result in civil or criminal penalties.

(2) *Unauthorized Disclosure of Registry Information.* An actor is guilty of Unauthorized Disclosure of Registry Information if:

(a) the actor, having received registry information as provided in subsection (1), knowingly or recklessly discloses that information, or permits that information to be disclosed, to any person not authorized to receive it; or

(b) the actor obtains access to registry information by computer trespassing or otherwise in violation of law and subsequently knowingly or recklessly discloses that information, or permits that information to be disclosed, to any other person.

Unauthorized Disclosure of Registry Information is a felony of the fourth degree [five-year maximum].