

1-1-2010

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Catherine L. Carpenter  
*Southwestern Law School*

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### Recommended Citation

Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws That Have Swept the Country*, 58 Buff. L. Rev. 1 (2010).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol58/iss1/2>

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# BUFFALO LAW REVIEW

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VOLUME 58

JANUARY 2010

NUMBER 1

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## Legislative Epidemics:

### A Cautionary Tale of Criminal Laws that Have Swept the Country

CATHERINE L. CARPENTER†

#### INTRODUCTION

Epidemic. The word conjures up thoughts of a virus that spreads from one part of the country to the other. It might even be used to describe a sweeping change in social behavior. *But can it be used to describe the passage of laws?* Aided by Malcolm Gladwell's instructive work, *The Tipping Point*,<sup>1</sup> this Article argues that legislation can take hold and

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† Professor of Law, Southwestern Law School. I wish to thank Dean Bryant Garth of Southwestern Law School, Vice Dean Austen Parrish, and Professor Ron Aaronovsky for support of my scholarship. I am grateful for the valuable feedback I received from Professors Karen Smith, J. Kelly Strader, and Dennis Yokoyoma, and for the research assistance of Suzanne Holden, Erika Shao, and Rolland Gutierrez, and for the dedication and personal effort of Jonathan Lamberti, Editor-in-Chief of the *Buffalo Law Review*. I would also like to acknowledge two scholars—Wayne Logan and Corey Rayburn Yung—for their clear and impassioned writing on the concern over the constitutionality of sex offender registration laws. Finally, my heartfelt appreciation to my family for their encouragement of this project.

1. MALCOLM GLADWELL, *THE TIPPING POINT* (2000). This bestselling work on social phenomena has been cited in other legally-related topics. *See, e.g.*, Mary Jane Angelo, *Harnessing the Power of Science in Environmental Law: Why We Should, Why We Don't, and How We Can*, 86 TEX. L. REV. 1527, 1552-69 (2008) (employing “tipping point” analysis to explain why some scientific ideas catch on and others do not); Jean M. Holcomb, *Got Ideas?* 100 LAW LIBR. J. 587, 588-91 (2008) (discussing the “stickiness” of ideas); Leo Martinez, *Tax Policy, Rational Actors, and Other Myths*, 40 LOY. U. CHI. L.J. 297, 318 (2009) (using “tipping point” analysis to discuss whether the public is properly informed about overarching tax policies); Jed S. Ela, Comment, *Law and Norms in Collective Action: Maximizing Social Influence to Minimize Carbon Emissions*, 27 UCLA J.

multiply across the country in much the same way that a medical outbreak becomes a pandemic,<sup>2</sup> or a piece of clothing turns into the “must-have” item of the season.<sup>3</sup>

We have all witnessed the cycle. An issue is identified; there is a rise in public awareness and a ramping up of rhetoric, and then a flurry of legislation is passed to combat the problem.<sup>4</sup>

In this Article, I reconstruct the series of forces, both legal and social, that conflate to produce the “legislative epidemic.”<sup>5</sup> Using Gladwell’s “tipping point” analysis, Part I offers a primer on the epidemiology of an epidemic, in both the medical and social contexts. This part analyzes three factors that generally control an epidemic’s rise: (1) the core group of people who transmit the agent; (2) the nature of the agent itself; and (3) the other causes that contribute to its spread.

But these attributes are not relegated only to the medical or social epidemic. Using the same factors, Part II

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ENVTL. L. & POL’Y 93, 109 nn.56-57 (2009) (using “tipping point” analysis to argue that social norms can shape group behaviors).

2. See, e.g., GLADWELL, *supra* note 1, at 15-19 (examining the syphilis epidemic in Baltimore); AIDS Educational Global Information System, Timeline: A Brief History of AIDS/HIV, <http://www.aegis.com/topics/timeline> (last visited Dec. 6, 2009) [hereinafter AEGIS] (providing the historical development of the outbreak of HIV/AIDS); see also *infra* notes 15-21 and accompanying text (analyzing the 2009 H1N1 medical epidemic).

3. The prominent example Gladwell raises concerns Hush Puppies, a brand of shoes, which increased sales from 30,000 to 430,000 pairs in one year. See GLADWELL, *supra* note 1, at 3-5. For discussion of other “must-have” items, see, for example, Beanie Babies, Bad Fads, <http://www.badfads.com/pages/collectibles/beanie-babies.html> (last visited Dec. 6, 2009), for details of the dramatic rise in sales in the 1990s of “beanie babies,” small stuffed animals; and *infra* note 43, for sources that describe the frenzy connected to Tickle Me Elmo, the “must-have” toy of 1996.

4. See *infra* Part II (exploring the impetus for passage of laws on drinking and drunk-driving, Three Strikes, the duty to rescue, and sex offender registration).

5. See *infra* Part II (examining legislative epidemics in drunk driving, three strikes, and sex offender registration); see also Sana Loue, *Elder Abuse and Neglect in Medicine and Law*, 22 J. LEGAL MED. 159, 172-86 (2001) (tracking the various criminal statutes enacted to combat elder abuse); J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435 (1994) (reviewing the HIV/AIDS criminal transmission statutes that were enacted in response to the AIDS crisis).

deconstructs the legislative epidemic. Showcasing a variety of criminal legislation, including laws on drunk driving, Three Strikes, and sex offender registration, this part explores the core group of people responsible for their passage, the tragic stories that galvanized the public, and the legal and political factors that contribute to their expansion. In some cases, the resulting legislation is a reasoned response to a perceived gap in the criminal law, and its epidemic rise provides a framework of language for a national conversation on the issue. Changes in drunk driving laws during the 1980s,<sup>6</sup> or recent restrictions on cell phone use while driving,<sup>7</sup> demonstrate appropriate legislative reactions to the recognized *tip* of problems.<sup>8</sup>

However, the Article is also a cautionary tale about legislative epidemics fueled by high-profile cases, emotion-laden rhetoric, and inaccurate, but embedded, assumptions about crime and criminals. Part III argues that the same set of forces responsible for the dramatic spread of a law also makes legislative epidemics particularly vulnerable to systemic failures that include runaway legislation, prohibitive costs, and failed execution. And like a medical epidemic whose virology changes over time, legislative epidemics are also susceptible to mutation, where succeeding generations of law prove to be more aggressive than the original legislation. Awareness of these failings sounds a call to action, and this Article offers guidance to lawmakers and courts on their needed responses.

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6. See *infra* Part II (portraying the forces responsible for the change in the laws); see also *infra* notes 65-76 and accompanying text (discussing the changes in laws).

7. Called “Distracted Driving” Laws, fourteen states prohibit texting while driving and other states require “hands-free” use of cell phones while driving. See DrivingLaws.org, Hands Free, Text Messaging, and Cell Phone Driving Laws, <http://www.drivinglaws.org/indexhf.php> (last visited Dec. 6, 2009).

8. Interestingly, there has already been a backlash to the recent spate of “distracted driving” laws. See, e.g., *Feds Look to Curb Texting While Driving*, COLUMBIA MISSOURIAN, Aug. 14, 2009, at 4A (arguing that Distracted Driving Laws are a “cause célèbre”); Myron Levin, *Cellphone Law May Not Make Roads Safer*, L.A. TIMES, Mar. 25, 2008, at A1.

## I. A PRIMER ON TIPPING POINT ANALYSIS

A. *The Epidemiology of an Epidemic*

To understand the fundamental structure of the legislative epidemic, it is helpful to review the epidemiology of any epidemic. *The Tipping Point*,<sup>9</sup> the best selling work by Malcolm Gladwell, provides an instructive comparison. Gladwell writes, “[T]he best way to understand the emergence of . . . trends . . . or any number of the other mysterious changes that mark everyday life is to think of them as epidemics.”<sup>10</sup>

In this regard, the medical epidemic stands as the paradigm. Of it, Gladwell states, “[it is] a function of the people who transmit infectious agents, the infectious agent itself, and the environment in which the infectious agent is operating.”<sup>11</sup> Showcased in the book is Baltimore’s syphilis epidemic that occurred during the 1990s. The author tracks those who were infected and the nature of the infection, but also examines the seemingly unrelated but simultaneous changes of environmental behavior that may have contributed to its spread<sup>12</sup>—in other words, what may have caused the virus to *tip*.<sup>13</sup> “Tipping” is a critical component of an epidemic because it is the “one dramatic moment . . . when everything can change.”<sup>14</sup>

This phenomenon is also seen in the novel 2009 H1N1 influenza epidemic.<sup>15</sup> What began as an influenza that

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9. GLADWELL, *supra* note 1.

10. *Id.* at 7. The author identifies three other elements that comprise an epidemic: contagiousness, the big effect of little causes, and a dramatic moment. *Id.* at 9.

11. *Id.* at 18.

12. *See id.* at 17-18 (identifying the following simultaneous environmental behaviors: (1) the increase in the use of crack cocaine that led to riskier sexual behaviors; (2) a breakdown of medical services for the poor; and (3) the migration of the poor to other parts of town because of limited housing options).

13. *Id.* at 15-19.

14. *Id.* at 9.

15. Initially referred to as the “swine flu” because it was similar to the virus that originated in pigs, this pandemic began in Mexico and spread throughout the world in a relatively short time. *See* Ctrs. for Disease Control & Prevention,

infected people in Mexican rural communities in spring 2009, quickly *tipped*, with the virus spreading throughout the world so rapidly that it was officially recognized as a pandemic by June 2009 by the World Health Organization.<sup>16</sup> This declaration reflected that the new H1N1 virus had spread to more than seventy countries, with 28,774 confirmed cases and 144 deaths worldwide.<sup>17</sup>

The attributes of this pandemic are clear. First is the nature of this particular agent: it spreads easily from person to person so that its contagion factor makes it susceptible to dramatic spread.<sup>18</sup> Second is the likelihood that people with undiagnosed cases who are contagious might be among unsuspecting populations.<sup>19</sup> The final attribute is the ease and accessibility of world travel which accounted for the rapid spread worldwide.<sup>20</sup> With knowledge about the virus still unfolding at the writing of this Article, the H1N1 virus may be more deadly than first assumed.<sup>21</sup>

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H1N1 Flu (Swine Flu) and You, [http://www.cdc.gov/h1n1flu/general\\_info.htm](http://www.cdc.gov/h1n1flu/general_info.htm) (last visited Dec. 6, 2009) [hereinafter CDC] (describing generally the virus).

16. See Caleb Hellerman, *Swine Flu 'Not Stoppable,' World Health Organization says*, CNN, June 10, 2009, <http://www.cnn.com/2009/HEALTH/06/11/swine.flu.who> (reporting that the World Health Organization officially declared the novel H1N1 influenza a global pandemic in June 2009).

17. *Id.* (stating that as of summer 2009 there had been 13,217 confirmed cases and 27 deaths in the United States).

18. See CDC, *supra* note 15 (describing how the virus is transmitted).

19. See *id.* (urging people to stay home if there is a belief they may be infected).

20. Proof that travel increases the likelihood of an epidemic includes multiple community outbreaks and the fact that over seventy countries had registered H1N1 cases by June. See Ctrs. for Disease Control & Prevention, *Novel H1N1 Flu: Background on the Situation*, <http://www.cdc.gov/h1n1flu/background.htm> (last visited Dec. 6, 2009) (providing a daily diary of the progress of the outbreaks throughout the world).

21. See *Swine Flu: H1N1 Virus More Dangerous than Suspected, Except to Survivors of the 1918 Pandemic Flu Virus*, SCIENCE DAILY, July 14, 2009, <http://www.sciencedaily.com/releases/2009/07/090713212231.htm> (arguing that there may be a misunderstanding about the deadliness of this virus); see also Ctrs. for Disease Control and Prevention, *2009 H1N1 Flu: Situation Update*, <http://www.cdc.gov/h1n1flu/update.htm> (last visited Dec. 6, 2009) (reporting that as of fall 2009, twenty-five states reported "widespread" outbreaks of the H1N1 virus with increases in resulting deaths and doctors' visits).

Modernly, the most devastating spread of a disease has been the HIV/AIDS pandemic, which has “claimed the lives of over 25 million people worldwide and infected 40 million more. In the United States alone, 1.2 million are infected with the HIV virus and more than 500,000 have died.”<sup>22</sup> The tipping point of this deadly epidemic came in the 1980s,<sup>23</sup> when there was a lack of understanding on how the virus spread and a lack of adequate medication.<sup>24</sup>

While environmental factors contributed to the HIV epidemic,<sup>25</sup> one other factor impacted the severity of the epidemic: the virus itself changed.<sup>26</sup> Gladwell writes that one important principle of virology is that a strain that circulates at the beginning of an outbreak is not the same strain that circulates at the end of an epidemic.<sup>27</sup> In his classic work *Viral Sex: The Nature of AIDS*,<sup>28</sup> Jaap Goudsmit observed, “It started as a virus causing disease in low frequency after a long period of infection. It emerged as a high-frequency and very speedy killer.”<sup>29</sup>

The principle of mutation is an important theme in this Article. Like medical epidemics whose virology may transform over the course of the spread, legislative epidemics are susceptible to similar change, where

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22. Posting of Lauren Finley to The Aids Pandemic, <http://the-aids-pandemic.blogspot.com/2007/02/history-of-hiv-aids-in-united-states.html> (Feb. 2, 2007) (writing that the apex of the epidemic was in the 1980s).

23. See AEGIS, *supra* note 2 (noting that known deaths from AIDS increased from 31 to 5636 between 1980 and 1986).

24. See Finley, *supra* note 22 (reporting on reasons for the increase in deaths in the 1980s).

25. See generally JAAP GOUDSMIT, *VIRAL SEX: THE NATURE OF AIDS* (1997) (illuminating the nature and origin of this lethal disease).

26. *Id.* at 37-42 (tracking the change in the virus).

27. See GLADWELL, *supra* note 1, at 22.

28. GOUDSMIT, *supra* note 25.

29. *Id.* at 37. The same concern was expressed with respect to the H5N1 strain of avian flu. See Carl H. Coleman, *Beyond the Call of Duty: Compelling Health Care Professionals to Work During an Influenza Pandemic*, 94 IOWA L. REV. 1, 6-7 (2008) (warning that the flu has the capacity to change with each transmission). Today, researchers report that the H1N1 virus has similarly mutated into a more severe strain that attacks the lungs in young people. See *WHO Warns of Severe Form of H1N1 Virus*, FOX NEWS, Aug. 29, 2009, <http://www.foxnews.com/story/0,2933,544262,00.html>.

succeeding generations of laws prove to be more ferocious than the initial legislation. As Part III highlights, some legislative epidemics, like their medical counterparts, also mutate over time, often into more aggressive and ferocious legislation than their early incarnations.

### B. *The Social Epidemic*

Gladwell's theory, of course, extends beyond the examination of a medical epidemic. The premise of the book is that "[i]deas and products and messages and behaviors spread just like viruses do."<sup>30</sup> Gladwell applies the same analysis from medical epidemics to social phenomena to ask: what makes an idea or product *tip* so that it moves from obscurity to fame? Whether it is the trendiness of a piece of clothing, the word-of-mouth that makes a restaurant or movie "hot," or the dramatic rise and fall of crime, his tipping point analysis serves as a framework to help understand dramatic change in behavior. In Gladwell's words, this dramatic change in behavior is the tipping point, "the moment of critical mass, the threshold, the boiling point."<sup>31</sup>

In the analysis of a social phenomenon or epidemic, three factors control its rise: (1) the core group of people who transmit the message; (2) the enduring nature of the message; and (3) an environment that is conducive to spreading the message.<sup>32</sup> There is one additional ingredient that defines an epidemic. That is the speed at which the change in behavior takes place. It is the dramatic change in a short period of time that is the hallmark of an epidemic,<sup>33</sup> or what Gladwell calls the moment "when everything can

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30. GLADWELL, *supra* note 1, at 7.

31. *Id.* at 12. (providing historical context for the origin of the term "tipping point," which first came into use in the 1970s to describe whites leaving for the suburbs when twenty percent or more African Americans had moved into the neighborhood).

32. *See id.* at 18-19 (describing the factors that tip an epidemic).

33. *Id.* (defining a tipping point as a sudden change in behavior); accord Kevin Werbach, *The Centripetal Network: How the Internet Holds Itself Together, and the Forces Tearing it Apart*, 42 U.C. DAVIS L. REV. 343, 410 (2008) (observing that tipping points are "where change suddenly accelerates and becomes difficult to stop").



change all at once.”<sup>34</sup> Professor Cass Sunstein describes the effect as “cascades.”<sup>35</sup> In his work on group deliberations, Professor Sunstein writes, “Social influences can lead groups to go quite rapidly in identifiable directions, often as a result of ‘cascade’ effects involving either the spread of information (whether true or false) or growing reputational pressure.”<sup>36</sup>

But if cascades can form quickly in one direction, they are equally sensitive to sudden shifts in the opposite direction. The reason for the changes is possibly due to an underlying feature of the cascade; conformity of behavior by a large group of people may be the result of a blind adherence to the behavior of others, rather than a choice based on the individual’s personal knowledge.<sup>37</sup> So, once-trendy restaurants can quickly become empty and the “must-have” item of clothing now sits on the bargain rack in the department store.

For the transmission to move into a phenomenon, it also takes a conflation of three additional attributes of change: what Gladwell calls the “Law of the Few,” the “Stickiness Factor,” and the “Power of Context.”<sup>38</sup> The Law of the Few examines the core group of people who are responsible for creating the social or medical epidemic.<sup>39</sup> The Stickiness

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34. GLADWELL, *supra* note 1, at 9.

35. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 77 (2000) (depicting the wave of social action as a cascade); see also David Hirshleifer, *The Blind Leading the Blind: Social Influence, Fads, and Informational Cascades* (UC L.A.: Anderson Graduate Sch. of Mgmt. 1993), available at <http://repositories.cdlib.org/anderson/fin/24-93>. “An informational cascade occurs when it is optimal for an individual, having observed the actions of those ahead of him, to follow the behavior of the preceding person without regard to his own information.” *Id.* at abstract.

36. Sunstein, *supra* note 35, at 77 (analyzing group deliberations and the resulting polarization).

37. See, e.g., Hirshleifer, *supra* note 35, at 5 (recognizing the precarious nature of cascades because they are based on so little information).

38. GLADWELL, *supra* note 1, at 19.

39. *Id.* at 30-88. Other legal academics have used the “Law of the Few” to inform their own work. See, e.g., Eleanor Marie Lawrence Brown, *Outsourcing Immigration Compliance*, 77 FORDHAM L. REV. 2475, 2516-17 (2009) (referring to intermediaries who shape norms as “mavens”); Dennis A. Kaufman, *The Tipping Point on the Scales of Civil Justice*, 25 Touro L. REV. 347, 426-31 (2009) (theorizing that *Lawrence v. Texas*, 539 U.S. 558 (2003), which held

Factor focuses on the message itself and the qualities that make it memorable.<sup>40</sup> Finally, the Power of Context carefully considers the role that environment plays in affecting the change in behavior.<sup>41</sup> Together, these attributes have the potential to produce an epidemic. And it appears not to matter whether the topic is the outbreak of a sexually transmitted disease,<sup>42</sup> the trendiness of a brand of shoes<sup>43</sup> or the “must-have” toy of the Christmas season.<sup>44</sup> In the end, epidemics are transmitted “through social connections and energy and enthusiasm and personality.”<sup>45</sup>

## II. DECONSTRUCTING A LEGISLATIVE EPIDEMIC

If epidemics are indeed transmitted through “social connections and energy and enthusiasm and personality,”<sup>46</sup> can it not also be said that legislation spreads from state to state because of similar connections, energy, and enthusiasm? It is neither new nor radical to suggest that

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unconstitutional the criminalization of sodomy, was shaped by “the Law of the Few”).

40. GLADWELL, *supra* note 1, at 89-132. The term “stickiness” was later the subject of a very interesting book written as a follow-up to *The Tipping Point*. See CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* (2007) (explaining six principles that make some ideas “stick”); see also *infra* notes 131-72 and accompanying text (reviewing these six principles).

41. See GLADWELL, *supra* note 1, at 133-92. Commentators have used the Power of Context in their own work. See Kaufman, *supra* note 39, at 435 (arguing that a changed environment helped the United States Supreme Court to craft new law in *Lawrence v. Texas*, 539 U.S. 558); Kimberly Jade Norwood, *Blackthink’s Acting White Stigma in Education And How It Fosters Academic Paralysis in Black Youth*, 50 HOW. L.J. 711, 734 & n.95 (2007) (contending that, under the Power of Context, children are shaped by the physicality of their environment).

42. See GLADWELL, *supra* note 1, at 19.

43. *Id.* at 3-5 (tracing the dramatic rise of the Hush Puppy).

44. See Olivia Barker, *Meet Top Secret Elmo*, USA TODAY, Feb. 2, 2006, at 6D (describing the pandemonium in 1996 when demand far exceeded the supply of the Tickle Me Elmo, the “must-have” toy that Christmas season). Fast forward to 2006 and the same sense of heightened expectation was brewing over the release of a new Elmo. See Kelly B. Grant, *Desperate for TMX Elmo?*, SMART MONEY, Oct. 20, 2006, <http://www.smartmoney.com/spending/deals/desperate-for-tmx-elmo-20254> (detailing the reasons for the public’s desire for the doll).

45. GLADWELL, *supra* note 1, at 22.

46. *Id.*

law is not an autonomous, hermetically-sealed system. Social theories of law are based on the recognition that law is informed by causes outside the legal system. Theorists recognize that a relationship exists between the legal and social, which is “a kind of network or meshwork through which energy easily flows.”<sup>47</sup> If that is true, then an analysis of social forces best explains “what shapes and molds [the law], what makes it ebb and flow, contract and expand.”<sup>48</sup> In this section, I explore the combination of social forces that coalesce around a legal issue: a small core group of people poised to spread the message (the Law of the Few), the enduring nature of the message (the “Stickiness” Factor), and an environment conducive to allow the legislation to spread (The Power of Context).

A. *The Law of the Few: Forces Behind the Legislation*

Interestingly, in both social and legal epidemics, it is not the number of people, but the nature and makeup of the people involved, that insure whether an idea takes hold and spreads.<sup>49</sup> In its initial phase, an epidemic does not rely on hoards of people to spread the idea or product. To the contrary, the premise of the Law of the Few is that behind each phenomenon is a small group of people who, because of force of personality, connections to others, and knowledge of the issue at hand, have the power to captivate larger numbers of people to change.<sup>50</sup>

What we are speaking about is influence. While one might initially think of government officials or wealthy people as those who control a cascading social phenomenon,

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47. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1580 (1989); see also Russell D. Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1376 (2009) (contending that changes in law and popular culture are informed by each other).

48. Friedman, *supra* note 47, at 1581.

49. For a corroborating take on this phenomenon, see ED KELLER & JON BERRY, *THE INFLUENTIALS: ONE AMERICAN IN TEN TELLS THE OTHER NINE HOW TO VOTE, WHERE TO EAT AND WHAT TO BUY* 29 (2003), who claim that Influentials, because of their strategic placement at the center of the conversation, can accelerate trends.

50. GLADWELL, *supra* note 1, at 33 (noting that social epidemics are heavily dependent on these people); see *id.* at 19 (referencing the 80/20 Principle, where “roughly 80% of the work will be done by 20% of the participants”).

it requires more than a “top down” initiative to have mainstream success.<sup>51</sup> Indeed, the Law of the Few contemplates more than this stereotype. Gladwell observes that several personality types make up the Law of the Few and each is critical to the onset and evolution of an epidemic. This core group of people generally include: *Connectors*, those who know a broad array of people from all walks of life, and who are, therefore, able to spread the word more easily;<sup>52</sup> *Mavens*, who are extremely knowledgeable about a range of topics and are therefore trustworthy in their recommendations;<sup>53</sup> and *Persuaders*, who, with eloquence, enthusiastic presence, and likeability, are able to persuade others of their viewpoints.<sup>54</sup> And, the Law of the Few controls whether one examines the outbreak of a sexually transmitted disease,<sup>55</sup> the trendiness of a particular shoe,<sup>56</sup> the “must-have” toy of the Christmas season,<sup>57</sup> or sweeping criminal reform.<sup>58</sup>

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51. See KELLER & BERRY, *supra* note 49, at 31-32 (describing the demographics of influential trendsetters).

52. GLADWELL, *supra* note 1, at 30-59. Legal scholars have also recognized the value of Connectors. See, e.g., Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 387 (2008) (employing the term ‘Connector’ to define those people who are better able to gather opposition to a stated position); Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591, 638-39 (2009) (acknowledging the role that Connectors play in the spread of ideas).

53. GLADWELL, *supra* note 1, at 59-69 (acknowledging that the term “maven” is derived from Yiddish and means “one who accumulates knowledge”). One of the best known Mavens of recent era is Oprah Winfrey, whose social recommendations—from books to clothing to diet tips—cause those items to skyrocket in popularity. Oprah has been named by *Time* as one of the 100 most influential people of the year for six straight years. See Oprah Winfrey’s Biography, [http://www.oprah.com/article/pressroom/oprahbio/20080602\\_orig\\_oprahbio/10](http://www.oprah.com/article/pressroom/oprahbio/20080602_orig_oprahbio/10) (last visited Dec. 6, 2009) (describing Oprah Winfrey’s honorary achievements).

54. See GLADWELL, *supra* note 1, at 69-74.

55. *Id.* at 19-20 (referencing the small core of infected people who spread gonorrhea in Colorado Springs).

56. *Id.* at 67-68 (theorizing about those responsible for the dramatic rise in the sales of Hush Puppies).

57. See Grant, *supra* note 44 (reporting that only fifty people had seen the new version of the doll and the well-placed quotes of merchandizing experts were designed to generate the buzz about the toy); see also Barker, *supra* note 44 (publishing the reviewers’ statement).

In a powerful example, Gladwell writes of Paul Revere's famous nighttime ride to spread the word that the British were coming. But, as Gladwell notes, there were two riders that evening—Paul Revere and William Dawes. Each was charged with getting the word out to a particular territory and group of people. Yet, William Dawes was not able to command the same attention or followers as Paul Revere.<sup>59</sup> Why, with the same message of urgency, was William Dawes a spectacular failure at his assignment, while Paul Revere was famously successful?

The reason, Gladwell surmises, lies as much in the power of the person conveying the message as it does in the message itself. Dawes did not have Revere's force of personality or connections with the people he approached.<sup>60</sup> Indeed, in the retelling of that fateful night, no one could even remember William Dawes.<sup>61</sup> Paul Revere, by contrast, was outgoing and well-known beyond his immediate circle—in other words, he was a true Connector.<sup>62</sup> And as Gladwell notes, “[w]ord-of-mouth epidemics are the work of Connectors. William Dawes was just an ordinary man.”<sup>63</sup>

So, too, at the heart of legislative epidemics are small groups of people who effectively disseminate the message. Although one might think that elected officials who sponsor the legislation are most closely associated with its spread, interestingly, that is often not the case.<sup>64</sup> Sometimes, as this

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58. See *infra* notes 65-110 and accompanying text (describing those intimately connected with the passage of stricter drunk driving laws, three strikes laws, and sex offender registration schemes).

59. See GLADWELL, *supra* note 1, at 31-33.

60. *Id.* at 30-34, 56-59 (distinguishing between Paul Revere and William Dawes).

61. *Id.* at 58 (citing DAVID HACKETT FISCHER, PAUL REVERE'S RIDE *passim* (1994) (describing what transpired that evening)).

62. *Id.* at 56-58. There are Paul Reveres among us. See, e.g., KELLER & BERRY, *supra* note 49, at 27-28 (showcasing Isabel Milano as a leader in her community to whom people turned).

63. GLADWELL, *supra* note 1, at 59.

64. In an interesting note of political trivia, Assembly Bill 971, a version of the Three Strikes Law, was originally introduced by Bill Jones and Jim Costa, two California state legislators. See JENNIFER E. WALSH, THREE STRIKES LAWS 38 (2007) (tracing the evolution of Three Strikes Law). However, Bill Jones and Jim Costa were not associated with the legislation that ultimately passed. Rather, as

section demonstrates, the catalyst for legislative change turns out to be “average citizens” propelled into the limelight by tragic circumstances. In the case of proposals for stricter drunk driving laws, longer prison sentences, and comprehensive treatment of sex offenders, each proposal was advanced because of the death of loved ones.

1. *Candy Lightner, MADD, and Drunk Driving.* A generation later, it is difficult to imagine that the drunk was a celebrated American image. Yet, back in the 1960s, the three-martini lunch,<sup>65</sup> entertainers who relied on their visibly inebriated personas,<sup>66</sup> and holiday parties where guests routinely drove home drunk were all part of the cultural norm. Thankfully, these once-revered images have given way to others: designated drivers, stricter drunk driving laws, and deeper examination of the problems associated with drinking.

Although a number of factors led to this paradigm shift, this section focuses on one: the contribution of Ms. Candy Lightner, whose thirteen-year-old daughter, Cari, was killed by a drunk driver in 1980.<sup>67</sup> Appalled to learn that the driver, who had prior drunk driving convictions, would probably receive little or no jail time,<sup>68</sup> Ms. Lightner decided to found an organization devoted to strengthening laws against drunk driving.<sup>69</sup> Hence Mothers Against Drunk

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seen later in this Article, non-politicians became closely identified with its passage. *See infra* notes 77-96.

65. *See* Mike Drummond, *What Ever Happened to the 3 Martini Lunch?*, CHARLOTTE OBSERVER, Mar. 14, 2005, at 3D.

66. Dean Martin, a crooner during the 50s and 60s, centered his lounge act on jokes on being drunk. *See* Dean Martin Biography, <http://www.ratpack.biz/dean-martin/biography.htm> (last visited Dec. 6, 2009) (describing Dean Martin with highball always in hand). Foster Brooks, a comedian from that era, also gained notoriety with his drunk routines. *See* Doug Sanders, *Tombstone Tributes: Foster Brooks*, [http://www.wildestwesterns.com/no\\_4/tributes/foster\\_brooks.htm](http://www.wildestwesterns.com/no_4/tributes/foster_brooks.htm) (last visited Dec. 6, 2009) (discussing his famed comedy sketches).

67. *See* Mothers Against Drunk Driving, History, <http://www.madd.org/About-us/About-us/History.aspx> (last visited Dec. 6, 2009) (recounting the beginnings of the organization).

68. Mothers Against Drunk Driving, *Cari Lightner's Story*, <http://www.madd.org/getattachment/ce0aa0e2-82d7-4a79-8a2d-3d20a2ab6a42/Cari-Lightner-s-and-Laura-Lamb-s-Story.aspx> (last visited Dec. 6, 2009).

69. *Id.*

Driving, MADD for short, was born.<sup>70</sup> With little money or clout at inception, the organization ultimately challenged politicians to act and a public to rethink its favorable image of the drunk.

So ingrained was the public's tolerance of the drunk driver that, in California, for example, charges for drunk driving deaths were universally treated as vehicular manslaughter.<sup>71</sup> It was not until 1981 in *People v. Watson* that the California Supreme Court allowed an indictment to proceed for second degree murder in the deaths of two people arising from a drunk driving accident.<sup>72</sup> Indeed, the policy to charge drunk driving deaths as manslaughter was so entrenched in California law that every lower court in *Watson* had dismissed the murder indictment.<sup>73</sup>

However, by 1981, when the California Supreme Court considered *Watson*, there was an environmental shift in attitude concerning drunk driving, a shift for which Candy Lightner was partly responsible. Ironically, one would not have cast her in the role of activist. Before the tragic death of her daughter, Candy Lightner was a divorced mother of three selling real estate in California, not even registered to vote.<sup>74</sup> But the Law of the Few rewards what Gladwell calls "Senders," those Persuaders who effectively communicate "emotion contagion."<sup>75</sup> Candy Lightner was that kind of Persuader. By 1984, MADD had successfully lobbied Congress to raise the national legal drinking age to twenty-

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70. *Id.*

71. See *People v. Watson*, 637 P.2d 279, 290 (Cal. 1981) (Bird, J., dissenting) ("The fact that the Legislature adopted a vehicular manslaughter statute indicates that the Legislature intended that statute to cover these situations." (citation omitted)).

72. *Id.* at 286 (majority opinion) (concluding that a charge of vehicular manslaughter does not preclude a charge of second degree murder on the same facts).

73. *Id.* at 281-82.

74. See Biography of Candy Lightner, <http://www.answers.com/topic/candy-lightner> (last visited Dec. 6, 2009).

75. GLADWELL, *supra* note 1, at 85 (portraying these type of persuaders as highly expressive).

one and numerous states had enacted stricter laws on drunk driving.<sup>76</sup>

2. *Mike Reynolds, Mark Klaas, and Three Strikes.* Consider the passage of the 1993 “Three Strikes” law in California,<sup>77</sup> which had similar beginnings to MADD. In the case of the Three Strikes law, it was the brutal murder of eighteen-year-old Kimber Reynolds in Fresno, California in 1992, and the kidnapping and murder of twelve-year-old Polly Klaas in Petaluma, California, in 1993. Both murders were senseless and tragic, but in that timeframe, there were many senseless and tragic killings. In 1992, for example, 3921 murders were reported in California, and in 1993 that figure increased to 4096.<sup>78</sup>

So what made these two deaths stand out? In no small measure, it was because of their fathers’ responses. The Law of the Few was at work again. In the case of Kimber Reynolds, who was shot and killed during a robbery of her purse,<sup>79</sup> her father, Mike Reynolds, vowed to push for lengthier prison sentences<sup>80</sup> after his daughter’s killer received only nine years as part of a plea agreement.<sup>81</sup> A

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76. See 23 U.S.C. § 158 (2006); see also Mothers Against Drunk Drivers, MADD Milestones, <http://www.madd.org/getattachment/4067cd97-6b8c-40b8-a767-dc26ba74036d/MADD-Milestones.aspx> (reporting MADD’s accomplishments).

77. Named for the law that dramatically lengthens prison sentences upon conviction of a third felony, the Three Strikes Law was upheld by the United States Supreme Court in a 5-4 vote in the companion cases of *Ewing v. California*, 538 U.S. 11 (2003) and *Lockyer v. Andrade*, 538 U.S. 63 (2003). The law was later scaled back by The Substance Abuse and Crime Prevention Act of 2000. See CAL. PENAL CODE § 1210.1 (West Supp. 2009) (providing treatment, rather than prison, to nonviolent drug re-offenders).

78. See The Disaster Ctr., California Crime Rates 1960-2008, <http://www.disastercenter.com/crime/cacrime.htm> (last visited Dec. 6, 2009) (reporting crime statistics for the years 1960-2008).

79. See Michael Baker, ‘Three Strikes’ Convict Charged with Theft, FRESNO BEE, Dec. 13, 2003, at B1 (detailing the events surrounding the murder of Kimber Reynolds).

80. See Three Strikes and You’re Out: Stop Repeat Offenders, <http://www.threestrikes.org/index.html> (last visited Dec. 6, 2009) (discussing the motivation of Mike Reynolds). The slogan “Three Strikes and You’re Out” was coined to summarize in a sticky, yet simple way, this complex set of laws. See *infra* notes 111-72 (describing the Stickiness Factor).

81. See Baker, *supra* note 79 (reporting the plea agreement that the shooter received).



wedding photographer by profession, but fueled by the injustice of the light sentence his daughter's killer received, Mike Reynolds pressed on to put a proposition on the California ballot to increase prison sentences.<sup>82</sup>

Under the Law of the Few, Mike Reynolds was a Connector who had opportunities to work with the legislature. However, a person with an important message and an audience is not enough. William Dawes reminds us of this lesson. Although Mike Reynolds had a compelling story and the legislature's attention initially, his campaign faltered both at the legislative level<sup>83</sup> and at the grass roots level.<sup>84</sup> Attempts to secure the requisite number of signatures to put his proposition on the upcoming ballot failed.<sup>85</sup> Under the Law of the Few, Mike Reynolds was starting to look a lot like a very frustrated William Dawes—he had an important message to share, but few were initially listening.<sup>86</sup>

What Mike Reynolds needed was a Persuader and a stickier message. Enter Marc Klaas. The story of the kidnapping and murder of his twelve-year-old daughter Polly at the hands of Richard Allen Davis is as unforgettable as it is heartbreaking. Polly was kidnapped at night by Davis from her home in Petaluma during a sleepover while her mother and sisters slept in another room. Her body was found two months later in a shallow grave about thirty miles from home. She had been

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82. See WALSH, *supra* note 64, at 38 (describing the early efforts of Mike Reynolds).

83. For an excellent recitation of behind-the-scenes politics of Reynolds's failed initial attempts to pass Three Strikes legislation, see Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 409-18 (1997).

84. See WALSH, *supra* note 64, at 38 (portraying the initial efforts to pass Three Strikes Law as "destined for failure").

85. *Id.* (reporting that initial attempts to gather signatures fell far short of the 400,000 required).

86. See Vitiello, *supra* note 83, at 411 (reporting that, despite the impassioned pleas of Mike Reynolds, the State Legislative Committee soundly rejected the proposed legislation). Even Mike Reynolds recognized that he had not gained the attention of the legislature. See *id.* at 411 n.87 ("They figured they'd listen to me, pat me on the head, say I'm sorry about your daughter, and send me home.").

strangled.<sup>87</sup> Richard Allen Davis was a habitual offender with a lengthy prison rap sheet that dated back to the 1960s and included convictions or plea agreements for burglaries, robbery, kidnapping, and sexual assault.<sup>88</sup>

It is fair to say that the murder of Polly captured the nation's attention in a way that the killing of Kimber Reynolds did not. Dubbed "America's child,"<sup>89</sup> Polly's kidnapping and murder struck a universal chord.<sup>90</sup> A congresswoman during session summed up the national mood when she said, "It is clear that this real life nightmare has sent shock waves through America."<sup>91</sup>

Public outrage only grew as Davis's extensive prison record came to light. And extensive it was: among the crimes were two prior kidnappings and, additionally, he had only served half of the sixteen-year sentence on the last kidnapping.<sup>92</sup> The public asked, "*How could a person with this criminal record have been released from prison?*" It was the same question Mike Reynolds had been demanding to know for some time, but until Polly's death, that question had not yet resonated with the public.

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87. See Polly Klaas Found., Polly's Abduction, <http://www.pollyklaas.org/about/pollys-story.html> (last visited Dec. 6, 2009) (providing a complete description of events the evening that Polly was kidnapped from her home).

88. See Biographicon.com, Richard Allen Davis, <http://www.biographicon.com/view/kh54e> (last visited Dec. 6 2009) (reporting Davis's extensive encounters with law enforcement, including arrests and convictions).

89. See Elizabeth Gleick & Tom Cunneff, *America's Child*, PEOPLE MAG., Dec. 20, 1993, at 84 (airing the details of Polly's death and the background of her assailant). The moniker "America's child" was also used as the title of a book. See BARRY BORTNICK, POLLY KLAAS: THE MURDER OF AMERICA'S CHILD (1995).

90. Polly's kidnapping and murder was the subject of numerous media reports. See C-SPAN, Congressional Chronicle (Nov. 21, 1993), <http://www.c-spanarchives.org/congress/?q=node/77531&id=7880451> (quoting Representative Woolsey's representation of the number of national news stories that had appeared on the crime); Notorious Episode Guide on Biography.com, Free to Kill: The Polly Klaas Murder, <http://www.biography.com/notorious/episodguid e.do?episodeid=167075> (last visited Dec. 6, 2009).

91. C-SPAN, *supra* note 90 (transcribing Representative Woolsey's statement). For a discussion of the public's strong reaction to the kidnapping and murder of Polly Klaas, see Vitiello, *supra* note 83, at 410, who writes, "[The] Three Strikes Law passed without serious rational discourse or legislative compromise because of public panic."

92. See Biographicon.com, *supra* note 88.

Ultimately it was Polly's father, Marc Klaas, who emerged as the central and recognizable face for the fight for longer prison sentences.<sup>93</sup> As one writer noted, Marc Klaas—the Everyman—was the favorite of the news media. “He was photogenic, handsome, articulate, and camera-ready.”<sup>94</sup> There was a marked shift in the political atmosphere as legislators now scurried to support Three Strikes legislation.<sup>95</sup> Both Connector and Persuader, his joining forces with Mike Reynolds to push for the passage of California's Three Strikes Law made the difference.<sup>96</sup> Marc Klaas was Paul Revere.

3. *Jacob, Megan, Adam, and Sex Offender Registration.* In the case of sex offender registration laws, their rise to national prominence followed a similar trajectory. The story also begins with heartbreaking loss, with three families who suffered undeniable tragedy—the murder of their children. Six-year-old Adam Walsh was abducted and murdered in 1981,<sup>97</sup> eleven-year-old Jacob Wetterling was abducted at

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93. Following his daughter's death, Marc Klaas became a child rights advocate, first with the Polly Klaas Foundation and later with KlaasKids which seeks to work for “stronger sentencing for violent criminals.” See KlaasKids Foundation for Children, Our Story, <http://www.klaaskids.org/pg-ourstory.htm> (last visited Dec. 6, 2009).

94. Greg Cahill, The Longest Year, <http://www.metroactive.com/sonoma/klaas95.html> (last visited Dec. 6, 2009) (showcasing Marc Klaas's efforts in the aftermath of Polly's murder).

95. See WALSH, *supra* note 64, at 39-40 (describing a press conference shortly after Davis's arrest where then Attorney General Dan Lungren appeared with Mike Reynolds to endorse the effort to reform the sentencing guidelines).

96. Entitled Proposition 184, voters overwhelmingly approved the law by seventy-two percent in 1994. See Dan Morain & Virginia Ellis, *Tobacco Industry Power May Go Up in Smoke, Foes Say*, L.A. TIMES, Nov. 10, 1994, at A3 (comparing the successful Three Strikes Proposition to the failed Proposition 188, which would have repealed the indoor smoking ban in California). The new law was later codified in CAL. PENAL CODE §§ 667, 1170.12 (West 2008). By many accounts, it was a short-lived union as the Klaas family later appeared to be uncomfortable with the breadth of some provisions in the law. See *infra* note 256 and accompanying text.

97. See National Center for Missing and Exploited Children, The Adam Walsh Story, <http://www.missingkids.com/missingkids/servlet/PageServlet?PageId=1156> (last visited Dec. 6, 2009) (offering the account of Adam's abduction in 1981); see also Rich Phillips, *Police: Drifter Killed Adam Walsh in 1981*, CNN, Dec. 16, 2008, <http://edition.cnn.com/2008/CRIME/12/16/walsh.case.closed> (reporting in 2008 that police have finally closed the case on Adam Walsh's

gunpoint and presumed murdered in 1989,<sup>98</sup> and seven-year-old Megan Kanka was sexually assaulted and murdered in 1994 by a neighbor who, unbeknownst to Megan's family, had prior convictions for sexual assault against children.<sup>99</sup>

None of these families knew each other. The killings of these three children took place several years apart, in different states, and by different killers. But nonetheless, the Law of the Few was in effect. Fueled by impassioned efforts on behalf of their children, these parents galvanized the nation. And as a result of their separate and individual efforts, the issue "tipped," creating an epidemic of legislative actions around the country designed to protect children and communities from registered sex offenders.<sup>100</sup>

As a result, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, which was included in the Federal 1994 Omnibus Crime Bill.<sup>101</sup> The law required the states to adopt sex offender registration laws within three years of the Act's passage in order to receive federal law enforcement funding.<sup>102</sup> In what is known popularly as "Megan's Law,"

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abduction and murder, believing that a drifter, now deceased, was Adam Walsh's killer).

98. See generally Jacob Wetterling Res. Ctr., History, <http://www.jwrc.org/Default.aspx?tabid=128> (last visited Dec. 6, 2009) (describing the abduction of Jacob Wetterling as well as the history and programs of the Jacob Wetterling Foundation).

99. See *State v. Timmenedequas*, 737 A.2d 55, 68-69 (N.J. 1999) (recounting the tragic killing of Megan Kanka).

100. For scholarship that tracks the various legislative actions, see, for example, Catherine L. Carpenter's, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 324-38 (2006), which reviews categories of sex offender registration laws in the country; and Asmara Teckle-Johnson, *In the Zone: Sex Offenders and the Ten Percent Solution*, 94 IOWA L. REV. 607, 617-20 (2009), for a detailed description of state and local laws.

101. See 42 U.S.C. § 14071 (2006) (establishing federal guidelines for state sex offender registration laws).

102. See *id.* § 14071(g). States that did not comply were faced with decreased funding. See *id.* § 14071(g)(2). Although congressional action provided the final impetus for these laws, a few states had passed sex offender registration laws much earlier. See Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 887 n.4 (1995) (noting that Alabama,

Congress amended the Jacob Wetterling Act in 1996 to include community notification statutes.<sup>103</sup> In 2006 Congress passed the Adam Walsh Child Protection and Safety Act, a comprehensive set of regulations, penalties, and punishments for sex offenders.<sup>104</sup>

But what made this issue of sex offender registration *tip*, and why in 1994? Molestation and abuse of children certainly were not new occurrences in 1994 when the Federal Omnibus Crime Bill was passed. Department of Justice statistics highlight that abuse and molestation of children under the age of eighteen were well-documented, serious problems at that time.<sup>105</sup>

As with the genesis of stricter drunk driving laws and the Three Strikes Law, the Law of the Few played an important role in the origins of sex offender registration schemes. Highlighting the need for these laws began with the families of these victims. These parents shared similar backgrounds to Candy Lightner, Mike Reynolds, and Marc Klaas in that, before these tragic events, none were professional advocates for criminal reform. John Walsh, charismatic and articulate, and known to Americans as the host of the long-running television show, *America's Most Wanted*, is the first to admit that being an advocate for

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Arizona, California, Illinois, and Nevada were the first to introduce sex offender registration laws).

103. See 42 U.S.C. § 14071(e)(2) (mandating that the designated state law enforcement agency "shall release relevant information that is necessary to protect the public concerning a specific person required to register under this section"). Indeed, so strong was the public's reaction to the Kanka's call for reform, that within three months of the petition's creation, New Jersey passed the first Megan's Law. See *E.B. v. Verniero*, 119 F.3d 1077, 1081-82 (3d Cir. 1997) (describing the frantic pace at which the New Jersey legislature passed Megan's Law).

104. See 42 U.S.C. §§ 16901-16991 (2006). The Act has been the subject of considerable controversy, with some courts dismissing indictments under it. See Emily A. White, Note, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 WASH. & LEE L. REV. 1783, 1792 nn.64-66 (2008) (collecting cases); see also *infra* Part III (discussing the inherent problems of legislative epidemics).

105. For the executive summary of the report, see LAWRENCE A. GREENFIELD, DEPT OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS (1996), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvvoatvx.pdf>, who highlights the statistics compiled of crimes against children.

missing children was not what he envisioned for his life.<sup>106</sup> Patty and Jerry Wetterling “decided to turn their anger, sadness and fear into a groundswell of action to protect other children.”<sup>107</sup> Megan’s parents, Richard and Maureen Kanka, were resolute in their belief that the public should be made aware of sex offenders who live within their community.<sup>108</sup> But the deaths of their children spurred these parents to act. Indeed, it is fair to say that not everyone is equipped to do this. It takes a certain skill set and strength of personality to persevere in the throes of grief and victimization.<sup>109</sup> That is also the lesson of the Law of the Few.<sup>110</sup>

### B. *The Stickiness Factor: How Enduring is the Message?*

Some slogans or phrases are so “sticky” that they permeate the American psyche to become part of our

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106. See America’s Most Wanted, About John Walsh, [http://www.amw.com/about\\_amw/john\\_walsh.cfm](http://www.amw.com/about_amw/john_walsh.cfm) (last visited Dec. 6, 2009) (“[John Walsh] was a successful businessman, building high-end luxury hotels and building his life. But after Adam’s murder, everything changed.”).

107. See Jacob Wetterling Res. Ctr., *supra* note 98 (explaining the history of the Jacob Wetterling Foundation).

108. See Susan K. Livio & Maryann Spoto, *Report: Megan’s Law Fails to Deter Sex Offenders*, STAR LEDGER (N.J.), Feb. 6, 2009, at 1 (quoting Maureen Kanka’s position regarding Megan’s Law after researchers found the law failed to deter sex crimes). The New Jersey Legislature passed the first iteration of Megan’s Law in 1994. See N.J. STAT. ANN. § 2C:7-1 (West 2005).

109. Persuaders of equal force have contributed to passage of other laws. See, e.g., 154 CONG. REC. S9350-55 (2008) (attributing the passage of the Emmett Till Unsolved Civil Rights Crime Act of 2007 to private citizen Alvin Sykes who “truly made a difference”); Bureau of Justice Assistance, Background Information on the Act and its Amendments, <http://www.ojp.usdoj.gov/BJA/what/2a2jwactbackground.html> (last visited Dec. 6, 2009). Pam Lychner, who survived a vicious attack, promoted an amendment to the Jacob Wetterling Act that would provide law enforcement with greater tracking capability. The bill was later named the Pam Lychner Act after Ms. Lychner who was killed in the explosion of TWA flight 800. Bureau of Justice Assistance, *supra*.

110. Not everyone who is the victim of crime is comfortable in the spotlight. Polly Klaas’s mother, Eve Nichol, for example, so shaken by the tragedy of her daughter’s death, speaks out rarely. See Alex Tresniowski, *Polly, Alive in Memory*, PEOPLE MAG., Sept. 22, 2003, at 187 (describing Eve’s silence in the wake of Polly’s death).

lexicon.<sup>111</sup> Those who remember the 1980s Wendy's commercial, where a grandmotherly actress with a gravelly voice looks at a massive bun without much hamburger, and yells, "Where's the beef?" will also remember *everyone* asking that pointed question—from informal talk to the presidential primary.<sup>112</sup> But sticky messages are found in more than advertising slogans. Casual conversations are also peppered with phrases from movie and television.

Ads with sticky messages are understandable; they are designed to sell products. But, what of legislation that is designed to be sticky? One of the more interesting changes in legislative action over the last two decades has been an emphasis on the marketing of proposed bills. Until the 1990s, criminal laws or procedures rarely had monikers, and if they did, they were generally named for the case that created the rule,<sup>113</sup> the politician that sponsored the bill,<sup>114</sup>

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111. In an interesting exercise, I polled family, friends, and students to see which phrases or slogans "stuck" with them. Interestingly, although the group ranged in age from nineteen to over sixty years of age, the same phrases were mentioned by nearly everyone. In these highly unscientific results, some of the more popular sticky messages were: "Whatever" [Clueless]; Just Do It! [Nike]; "Diamonds are Forever" [KayeWest Jewelers]; "Beam Me Up, Scotty" [Star Trek]; "Where's the Beef" [Wendy's]; "I'll Be Back" [Terminator]; "Whazzzup" [Budweiser]; "Make My Day" [Dirty Harry]; "Houston, we've got a problem" [Apollo 13]; and "Show me the money!" [Jerry Maguire].

112. See Obituary, *Clara Peller, the Actress in 'Where's the Beef?' TV Ad*, N.Y. TIMES, Aug. 12, 1987, at D22 (reporting that the "Where's the beef?" campaign increased annual revenue by thirty-one percent, made the actress Clara Peller a star, and even was used in the 1984 presidential primary by Walter F. Mondale in criticism of his rival, Gary Hart).

113. The "*Miranda* warnings" provides a prime example of a procedure named for the case that produced it. This popular reference to the warnings that police must give a suspect in a custodial interrogation originated from the United States Supreme Court decision of the same name. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

114. The Mann Act of 1910, which prohibited the transportation of women across state lines for prostitution, was named after Congressman James Robert Mann. See Biography of James Robert Mann, <http://law.jrank.org/pages/8422/Mann-James-Robert.html> (last visited Dec. 6, 2009). The Unruh Civil Rights Act, which prohibits discrimination in employment and housing, was named for famed California Legislator Jesse M. Unruh. See BILL BOYARSKY, *BIG DADDY JESSE UNRUH AND THE ART OF POWER POLITICS* 84-89 (2008) (detailing the evolution and passage of the Act).

or the last name of the victim.<sup>115</sup> Legislation was rarely personalized, and it was never known by only the first name of the victim.

1. *Personalized Legislation: Power of a Child's Name.* With the advent of the 1990s, an indelible change occurred. Criminal legislation became personal.<sup>116</sup> Sex offender registration laws and community notification statutes, for example, heralded in a new stickiness: the use of a victim's first name to convey the implicit and urgent need to pass the laws. Through their tragic and untimely deaths, the names "Jacob Wetterling" and "Megan Kanka" became synonymous for the Acts passed in their memory.<sup>117</sup>

What may have begun as a poignant attempt to memorialize the tragic death of two children has, in the ensuing fifteen years, become the common way to market new criminal legislation. Since the passage of "Megan's Law," there has been a marked rise in the use of a child's name associated with enacted legislation. The most comprehensive is the Adam Walsh Act, a federal registration and notification scheme that passed in 2006.<sup>118</sup> And one of the most recognizable and sticky pieces of personalized legislation is the "Amber Alert," a child abduction alert bulletin, in memory of nine-year-old Amber Hagerman, who was murdered after being abducted while riding her bicycle.<sup>119</sup>

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115. The Lindbergh Law, titled the Federal Kidnapping Act, 18 U.S.C. §§ 1201-1202 (2006), grew out of the kidnapping of Charles Lindbergh Jr., the toddler of famous aviator Charles Lindbergh. See Short History of FBI, <http://www.fbi.gov/libref/factsfigure/shorthistory.htm> (last visited Dec. 6, 2009) (recounting how the Lindbergh baby's kidnapping and murder served as a catalyst for the federal kidnapping law).

116. Outside the criminal law, one of the more interesting personalized pieces of legislation is the Ryan White HIV/AIDS Program, which includes compassionate and supportive services and funds named for the eighteen-year-old who died of AIDS in 1990. See Health Res. & Serv. Admin., The Ryan White HIV/AIDS Program, <http://hab.hrsa.gov/livinghistory/timeline/19861990/1986.html> (last visited Dec. 6, 2009) (explaining the passage of the Ryan White Act).

117. See *supra* note 97-104 and accompanying text.

118. 42 U.S.C. §§ 16901-16991 (2006).

119. Iowa Broadcasters Assoc., History of Amber Alert Plan, <http://www.iowabroadcasters.com/ambrhist.htm> (last visited Dec. 6, 2009). The idea of systematic and statewide alerts for child abductions grew out of this heartbreaking tragedy when a listener to a radio station suggested that that the



There have been many other enactments as well. Each personalized title associated with the law honors the life of a young person and memorializes a tragic and brutal event. Among the more notable laws passed in the wake of “Megan’s Law” is “Jessica’s Law,” which originated in Florida in 2005<sup>120</sup> and was named in memory of nine-year-old Jessica Lunsford, who was raped and murdered by John Couey, a previously convicted sex offender.<sup>121</sup> “Jessica’s Law” imposes a mandatory minimum sentence of twenty-five years in prison and lifetime electronic monitoring of sexual offenders convicted of lewd and lascivious acts against a victim under twelve years old.<sup>122</sup> The first national sex offender database was informally named “Dru’s Law”<sup>123</sup> for a college coed who was kidnapped and murdered by a level-three convicted sex offender.<sup>124</sup> “Zachary’s Law,” originally passed in 1994 and updated in 2006, is Indiana’s version of “Megan’s Law,” and was named for ten-year-old Zachary

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Emergency Alert System should be used during child abduction cases. First established as the Dallas Amber Plan, child abduction alert bulletins are now available nationwide. *See id.*

120. *See* H.B. 1877, 2005 Leg., Reg. Sess. (Fla. 2005).

121. *See* Anthony Bruno, *Jessica Lunsford: Death of a 9-Year Old*, TRUTV CRIME LIBRARY, [http://www.trutv.com/library/crime/serial\\_killers/predators/jessica\\_lunsford/1\\_index.html](http://www.trutv.com/library/crime/serial_killers/predators/jessica_lunsford/1_index.html) (last visited Dec. 6, 2009).

122. FLA. STAT. § 800.04(5)(b) (Supp. 2009). A variation of Jessica’s Law was passed by California voters in November 2006 under Proposition 83. *See* Text of Proposition 83, *reprinted in* CAL. ATT’Y GEN., SEX OFFENDERS, SEXUALLY VIOLENT PREDATORS. PUNISHMENT, RESIDENCE RESTRICTIONS AND MONITORING. INITIATIVE STATUTE 127-38 (2006), [http://www.sos.ca.gov/elections/vig\\_06/general\\_06/pdf/proposition\\_83/entire\\_prop83.pdf](http://www.sos.ca.gov/elections/vig_06/general_06/pdf/proposition_83/entire_prop83.pdf). States have adopted variations of Jessica’s Law. The California law is formally known as the Sexual Predator Punishment and Control Act: Jessica’s Law (SPPCA). *See, e.g.*, CAL. PENAL CODE §§ 220, 290, 311.11 (West Supp. 2009). The passage was not without controversy. *See* Jennifer Warren, *Judge Blocks Part of Sex Offender Law*, L.A. TIMES, Nov. 9, 2006, at A32.

123. *See* Adam Walsh Child Protection and Safety Act of 2006 §§ 118-120, 42 U.S.C. §§ 16918-16920 (2006) (establishing a national sex offender registry and Dru Sjodin National Sex Offender Public Website).

124. *See* Bootie Cosgrove-Mather, *Anger, Fear, Pain After Dru Found*, CBSNEWS, Apr. 19, 2004, <http://www.cbsnews.com/stories/2004/04/20/national/main612796.shtml> (reporting on the death of Dru Sjodin at the hands of Alfonso Rodriguez, Jr., a level three convicted sex offender).

Snyder, who was molested and murdered by a neighbor.<sup>125</sup> “Jetseta’s Bill,” signed into law in 2006 and in memory of murdered ten-year-old Jetseta Gage, extends prison sentences and provides for monitoring of released offenders.<sup>126</sup> “Ashley’s Laws,” which are statewide measures for harsher sentences, are named for seven-year-old Ashley Estell, who was murdered.<sup>127</sup> “Carlie’s Law,” a bill introduced in Congress to toughen parole rules for sex offenders,<sup>128</sup> was named in memory of murdered eleven-year-old Carlie Brucia, whose abduction on a street in broad daylight was captured on security camera footage.<sup>129</sup> Finally, “Jenny’s Law,” a congressional bill introduced in 2009, and named for a recent college graduate who suffered a brutal rape, would prevent burial-related benefits and funeral honors for convicted sex offenders who were also military veterans.<sup>130</sup>

2. *Applying Six Principles of Stickiness.* What is so interesting about personalized legislation is just how “sticky” the message can be. In *Made to Stick: Why Some*

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125. See Overview of Zachary’s Law, <http://www.allencountysheriff.org/sexoffender/zachary.html> (last visited Dec. 6, 2009) (providing the background of the passage of Zachary’s Law).

126. *Bush Signs Bill Named After Jetseta Gage*, QUAD-CITY TIMES, July 28, 2006, available at [http://www.qctimes.com/news/state-and-regional/article\\_9699fb70-59b9-561b-8567-6f27046d9e7a.html](http://www.qctimes.com/news/state-and-regional/article_9699fb70-59b9-561b-8567-6f27046d9e7a.html).

127. See *Ashley’s Laws Require Registration, Longer Prison Terms for Sex Offenders*, DALLAS NEWS, Sept. 3, 2003, <http://www.dallasnews.com/s/dw/s/spe/2003/ashleyestell/090403dnwebashleylaws.6f3db545.html> (detailing the parameters of Ashley’s Laws). In an interesting development in the case, new DNA testing cleared Michael Blair who was convicted for the murder and sentenced to death. Stephanie Lucero, *Judge Recommends Exoneration in Ashley Estell Case*, CBS11TV.COM, May 23, 2008, <http://cbs11tv.com/local/Michael.Blair.Ashley.2.731801.html>.

128. H.R. 3107, 109th Cong. (2005).

129. See Cheryl Little et al., *Securing Our Borders: Post 9/11 Scapegoating of Immigrants*, 82 INTERPRETER RELEASES 1161, 1189 (2005). For the heartbreaking account of Carlie Brucia’s abduction, see David Krajicek, *The Abduction of Carlie Brucia*, TRUTV CRIME LIBRARY, [http://www.trutv.com/library/crime/notorious\\_murders/famous/carlie\\_brucia/3.html](http://www.trutv.com/library/crime/notorious_murders/famous/carlie_brucia/3.html) (last visited Dec. 6, 2009). In a horrible twist to this story, police failed to use the “Amber Alert” when Carlie was reported missing by her family because police believed Carlie may have run away. *Id.*

130. Jenny’s Law, H.R. 731, 111th Cong. (2009).

*Ideas Survive and Others Die*,<sup>131</sup> authors Chip Heath and Dan Heath identify six principles for why an idea “sticks”: (1) *simplicity*, which requires that an idea be stripped to its core; (2) *unexpectedness*, which means that an idea should be counterintuitive to generate interest and curiosity; (3) *concreteness*, which demands that an idea be explained in terms of human action using concrete images; (4) *credibility*, which requires that the ideas or their agents carry authority and believability; (5) *emotion*, wherein the idea must tap into a human feeling; and (6) *stories*, which indicates that narratives help people respond quickly and effectively to the message.<sup>132</sup>

Using the six principles outlined above and analyzing one of the personalized pieces of legislation—“Megan’s Law” for example—demonstrate the intrinsically memorable effect of using a child’s name in the title of any criminal legislation.

*Simplicity.* Using a child’s first name is the essence of the first principle. However, one should never confuse a simple sticky message with simple content. Simple messages convey complex ideas in what the authors call “profound compactness.”<sup>133</sup> Core messages have the power to “tap existing memory terrain of [the] audience.”<sup>134</sup> The word “Megan” is profoundly compact because it achieves an essential message about the law it represents: the protection of our children through the notification of the community of the whereabouts of sex offenders in the neighborhood.

There is also a corollary to the principle of simplicity. Using simple terms actually conveys complex ideas more easily. Framing the issue in a familiar way helps the audience relate the underlying complex concepts to other more commonly understood ideas. However, in the case of sex offender registration schemes, the use of familiar schema is both its power and potential undoing. The simple

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131. See HEATH & HEATH, *supra* note 40, at 8 (“By stick, we mean that your ideas are understood and remembered, and have a lasting impact—they change your audience’s opinion or behavior.”).

132. *Id.* at 16-17. For a discussion of these six principles in the library world, see Jean M. Holcomb, *supra* note 1, at 588-91.

133. HEATH & HEATH, *supra* note 40, at 52.

134. *Id.*

underlying message—protect the community with notification—helps frame the complex issue of how notification statutes are constructed.

But, as Part III explores, simple messages are also vulnerable to sweeping generalizations. Here, the simple message is that the community must be protected from the violent sexual predator who lives in the neighborhood. The generalization is clear: each sex offender, no matter the conviction, is painted with the same broad brush as the violent sexual predator who killed Megan. For purposes of this section, however, one can appreciate the value of the stickiness in “Megan’s Law,” which conjures up a host of malevolent images regarding sex offenders.<sup>135</sup>

*Unexpectedness.* At play in this principle is that a message is stickier if it surprises, either in presentation or content, which makes the audience take notice. In the 1990s, it was highly unexpected to speak of a law in an intimate and personal manner. The title was unexpected. The use of Megan’s name grabbed the attention of the public by “increas[ing] alertness and caus[ing] focus”<sup>136</sup> to the issue of community notification.

Unexpectedness also sometimes arises from surprising content, which has the effect of contradicting a preconceived idea of the audience. In *Public Opinion*, political journalist Walter Lippmann described these preconceived ideas as stereotypes,<sup>137</sup> which he explains as “an ordered, more or less consistent picture of the world, to which our habits, our tastes, our capacities, our comforts and our hopes have adjusted themselves.”<sup>138</sup>

Unexpectedness in content surfaces when the message is counterintuitive, when it collides with the public’s preconceived picture of stereotypic presumptions. Two examples stand out. When a fourteen-year-old girl from New Jersey was charged in 2009 with child pornography for

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135. In a very interesting piece on the use of language and images connected to passage of Megan’s Law, see Daniel M. Filler, *Making the Case for Megan’s Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315 (2001).

136. HEATH & HEATH, *supra* note 40, at 16.

137. See WALTER LIPPMANN, PUBLIC OPINION 79-103 (Transaction Publishers 1991) (1922) (describing the role that stereotypes play in making sense of the world in which we live).

138. *Id.* at 95.

posting nude pictures of herself on MySpace,<sup>139</sup> the story was unexpected for two reasons. First, the image of a fourteen-year-old girl does not equate with the public's stereotypic image of a child pornographer. Second, the image of a fourteen-year-old girl posting nude pictures on MySpace collides with the ordered images that the public has of fourteen-year-old girls. This juvenile offender was sticky because she, *and* the activity in which she engaged, were so unexpected.<sup>140</sup>

Outside the context of sexual offenses, the same principle of unexpectedness arose when AIDS legislation was named in memory of Ryan White, a teenager who succumbed to AIDS in 1990. During the 1980s, plagued by fear and ignorance, the public believed that AIDS was a "gay man's" disease.<sup>141</sup> Only when Ryan White, a thirteen-year-old hemophiliac, was diagnosed with the disease, did the public begin to change its perception.<sup>142</sup> The image of a thirteen-year-old was counterintuitive to the preconceived stereotype the public maintained, and consequently, his image generated an unexpected sticky message: HIV/AIDS impacted larger sections of the population than the public believed.<sup>143</sup> Legislation bearing his name<sup>144</sup> continues to be a sticky reminder of disease's vast reach.

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139. See *New Tack in Fight Against Teen 'Sexting'*, NJ.COM, July 21, 2009, <http://www.nj.com/news/ledger/jersey/index.ssf?base/news-14/1248178622297370.xml&coll=1> (describing the charges against the juvenile).

140. One outspoken critic of the pornography charges against the teenager is Maureen Kanka, mother of Megan Kanka. *Megan's Law Mom Criticizes 'Sexting' Charges*, NPR, Mar. 26, 2009, <http://www.npr.org/templates/story/story.php?storyId=102399198>.

141. See Finley, *supra* note 22 ("[HIV/AIDS was] [o]riginally seen as a highly stigmatized disease of the gay community and feared for its mystery and lethality. . .").

142. See Health Res. & Serv. Admin., *supra* note 116 (providing the biography of Ryan White who died of AIDS in 1990 at eighteen years of age); see also AGAINST THE ODDS, HIV CASE STUDY: RYAN WHITE AND ACTIVISM, [http://apps.nlm.nih.gov/againsttheodds/pdfs/ss/HIV\\_case\\_study.pdf](http://apps.nlm.nih.gov/againsttheodds/pdfs/ss/HIV_case_study.pdf) (last visited Dec. 6, 2009) (crediting Ryan White with helping to educate the public about HIV/AIDS).

143. See, e.g., Jack Friedman et al., *AIDS: A Diary of the Plague in America*, PEOPLE MAG., Aug. 3, 1987, at 61. Of course, we now know that the spread of HIV/AIDS affects all parts of the population. See CTRS. FOR DISEASE CONTROL & PREVENTION, HIV: FACT SHEETS (2009), <http://www.cdc.gov/hiv/resources/factsheets/PDF/us.pdf> (detailing demographics afflicted with HIV/AIDS).

*Concreteness.* Messages must also contain concrete images to be remembered. Without the ability to decode expert language, an abstract principle is difficult for a layperson to grasp and remember.<sup>145</sup> Concrete images help the novice bridge the gap in understanding.<sup>146</sup> A community notification statute, with its myriad of regulations and distinctions, may be a subject for lawyers and academics, but hardly concrete for the uninitiated. Yet, the image of Megan walking up to the door of her neighbor, a registered sex offender, to play with a nonexistent puppy is an image that haunts. It is an image that is memorable because it taps into human understanding of an everyday occurrence.<sup>147</sup>

*Credibility.* Messages must be inherently believable for an audience to want to change its behavior. And so, the message must be spoken by one who the public believes is “credentialed” to present it (an academic, a representative from an agency or organization, and yes, a celebrity spokesperson).<sup>148</sup>

As the discussion on the “Law of the Few” demonstrates, credibility to deliver the first community notification statutes did not come from the lawyers who drafted the law or the politicians who presented the bill. Rather, the credibility of the message came from Megan’s parents themselves. Their tragic loss and suffering made them credible spokespersons for the need for community notification statutes. The unadorned statement on their foundation’s website—“If we had been aware of his record, my daughter would be alive today”<sup>149</sup>—provides the kind of

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144. Called The Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990, it provided comprehensive support and services for those afflicted with HIV/AIDS. See Ryan White Comprehensive AIDS Resources Emergency Act of 1990 § 2, 42 U.S.C. § 300ff (2006).

145. HEATH & HEATH, *supra* note 40, at 100.

146. *Id.* at 113-14.

147. See Collin O’Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731, 748 (2000) (“The role of the symbol and the soundbite in our high-speed culture is integral to our processing of information.”).

148. HEATH & HEATH, *supra* note 40, at 132-37 (relating the various kinds of “authority” that might provide credibility to the message).

149. Megan Nicole Kanka Found., Our Mission, <http://www.megannicolekankafoundation.org/mission.htm> (last visited Dec. 6, 2009).

credentialed authority that resonates with the public and their current public statements in defense of the law bolsters its legitimacy.<sup>150</sup>

*Emotion.* It is intuitive that a message that is emotional will stick better than one delivered using abstractions. To evoke an emotional response rather than analytical thought “increase(s) memory for an event’s gist or center.”<sup>151</sup> It also enables the audience to understand the message by connecting with the universal emotion underlying its content.<sup>152</sup> By way of example, Chip Heath and Dan Heath report a study conducted by the Carnegie Mellon University on the ways to create successful fundraising. In it, the researchers concluded that fundraising was more effective when conducted with a personal, rather than global message. A story about one person who needed help was more likely to engender warm supportive emotions that would translate into greater contributions than would a pitch that involved large abstract statistical discussions.<sup>153</sup>

As the principle of “concreteness” reminds, the concrete image is stickier. Evoking an emotional response about a concrete and singular experience enables the audience to

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150. See, e.g., Christopher N. Dela Cruz, *Maureen Kanka Defends Megan’s Law Despite Report Saying It Fails to Deter Pedophiles*, NJ.COM, Feb. 6, 2009, [www.nj.com/news/index.ssf/2009/02/despite\\_new\\_report\\_on-megans\\_1.html](http://www.nj.com/news/index.ssf/2009/02/despite_new_report_on-megans_1.html); Bevin Theodore, *Maureen Kanka, Whose Daughter’s Death Spawned Megan’s Law, to Speak in Lopatcong Twp.*, LEHIGHVALLEYLIVE.COM, Jan. 8, 2009, [http://www.lehighvalleylive.com/phillipsburg/index.ssf/2009/01/post\\_7.html](http://www.lehighvalleylive.com/phillipsburg/index.ssf/2009/01/post_7.html); accord Press Release, Township of Nutley, Maureen Kanka Set to Talk with Nutley Parents on March 5th (Feb. 19, 2008), <http://www.nutleynj.org/ReleaseDetails.aspx?pid=e99e779c-5137-4af8-916b75b13a573f2f>; see also Press Release, Life-Prints, LLC, Voice for Missing Children and Child Safety Advocate Maureen Kanka of Megan’s Law Named Spokeswoman for Life-Prints Child Safety Software (Aug. 1, 2007), <http://www.prweb.com/releases/2007/8/prweb544154.html> (announcing that Maureen Kanka had agreed to be the spokesperson for Life-Prints Child Safety Software).

151. HEATH & HEATH, *supra* note 40, at 301.

152. See LIPPMANN, *supra* note 137, at 13 (“The only feeling that anyone can have about an event he does not experience is the feeling aroused by his mental image of that event.”).

153. HEATH & HEATH, *supra* note 40, at 165-67 (reporting that people were more likely to contribute in response to a plea that centers on one person as a symbol of the need).

connect more deeply.<sup>154</sup> MADD intuitively understood the principle of emotional concreteness when it launched its campaign. The organization knew that statistics on drunk driving deaths would not begin to capture the tragic consequences of drunk driving or the need for law reform the way photographs would. Their presentations and ad campaigns, which included pictures and home movies of those killed by drunk drivers, are credited with spurring the change in the public's attitude about drunk driving.<sup>155</sup>

The media plays a critical role in the delivery of the message. Media reports are generally filled with vivid details about the singular experience, and therefore, they tend to be well-suited to the intimate storyline.<sup>156</sup> It is not surprising, then, that the legislative debates surrounding the passage of "Megan's Law" were filled with anecdotal stories of child abductions and murders.<sup>157</sup> Focusing on the single and heart wrenching account of a high-profile murder case stirs emotion and hence is stickier than a statistic-packed discussion about the rate of recidivism among convicted sex offenders.

In addition to the deep sadness that the public felt in hearing the story about Megan Kanka's murder, there was also growing anger that laws at the time were inadequate to prevent this occurrence.<sup>158</sup> The anger that is witnessed at

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154. *Id.* at 165-203 (discussing the importance of using concrete images to tap human emotion).

155. See Laurie Davies, *25 Years of Saving Lives*, DRIVEN (Mothers Against Drunk Driving, Irving, Tex.), Fall 2005, at 11, available at <http://www.madd.org/getattachment/48e81e1b-df43-4f31-b9a1d94d5b940e62/MA-DD-25-Years-of-Saving-Lives.aspx> (noting Marilyn Sabin, Coordinator for the California Office of Traffic Safety, who reported that before MADD's involvement, she saw several DUI bills fail in California).

156. For a review of the media's role in skewing perception about the commonness of crime, see David M. Zlotnick, *The War Within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L. REV. 211, 243-44 (2004).

157. See Filler, *supra* note 135, at 329-30 (referencing statements made by legislators).

158. See, e.g., Lisa Anderson, *Demand Grows to ID Molesters, States Weigh Children's Safety Versus Offenders' Rights*, CHI. TRIB., Aug. 15, 1994, at 1 (noting that community anger was "the catalyst" for passage of community notification laws); Stephen W. Dill, *A Plea for the Sake of Megan*, PHILA. DAILY NEWS, Aug. 3, 1994, at 4 (describing the grief and anger of communities over the death of Megan Kanka and of rallies that urge the passage of new laws to



the time of the killing of Megan Kanka fuels two general responses: it translates into making the story stickier and it spurs people to promote legislation designed to address the anger.<sup>159</sup> With legislation in place, anger is replaced by feelings of new-found satisfaction and, albeit arguable, safety from registered sex offenders.<sup>160</sup>

Unfortunately, on occasion, emotional stickiness appears to be the goal, even when the proposed legislation fails to match the actual facts of the crime. Consider “Carlie’s Law,” the congressional bill introduced by Representative Katherine Harris (R-Fla.) and named after eleven-year-old Carlie Brucia, who was murdered by a drug addict.<sup>161</sup> The bill was aimed at strengthening laws against convicted sexual predators and human traffickers, however, Representative Harris attached Carlie’s name to the bill even though Carlie’s killer was neither a convicted sex offender nor a human trafficker.<sup>162</sup>

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combat these killing); Joseph F. Sullivan, *Law Makers Get Tough on Sex Offenders*, N.Y. TIMES, Aug. 10, 1994, at B4 (reporting the community anger over the death of young girls at the hands of male neighbors).

159. An excellent example of an emotional message that produced new legislation is the story of Sherrice Iverson, who was killed by Jeremy Strohmeier in a Nevada casino bathroom while his friend, David Cash, may have been aware. See *infra* notes 169-71 and accompanying text.

160. Whether Megan’s Law does, in fact, protect the community is the subject of debate. See, e.g., Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 CAL. L. REV. 163 (2003) (contending that community notification statutes are ineffective as applied to juveniles); Jeffrey C. Sandler, Naomi J. Freeman & Kelly M. Socia, *Does a Watched Pot Boil? A Time-Series Analysis of New York State’s Sex Offender Registration and Notification Law*, 14 PSYCHOL. PUB. POL’Y & L. 284 (2008) (calling into question whether it is efficient to utilize so many resources on repeat offenders when 95% of those arrested are first time offenders).

161. H.R. 3107, 109th Cong. (2005).

162. See Cheryl Little et al., *supra* note 129, at 1189; see also Krajicek, *supra* note 129 (describing the events surrounding Carlie’s abduction and murder by Joe Smith). Carlie’s father acquiesced in naming the bill after Carlie although he conceded that Carlie’s killer did not share the attributes of those targeted in the bill. Crimeshots.com, In Loving Memory of Carlie Brucia, <http://crimeshots.com/CarlieBrucia11.html> (last visited Dec. 6, 2009).

*Stories.* Narratives are the way we fill in the gaps in our perceptions of the world.<sup>163</sup> Indeed, “anecdotal narratives,” particularly stories with dramatic and lurid details, often were the center of the congressional discussion on sex offender registration laws<sup>164</sup> or the foundational storytelling for court opinions.<sup>165</sup>

On several levels—all incredibly sad—the murder of Megan Kanka worked as a sticky story because it provided the nation with information not previously considered. First, it informed the public that a convicted sex offender was able to live in the neighborhood “in plain sight.” Second, the focus on the previous convictions of the offender further informed the public that convicted sex offenders are likely to recidivate. Finally, and most alarming to the public at the time, publicity about Megan’s death led to the dawning realization that law enforcement was not required to notify the public about the presence of the sex offender in the community.

Additionally, as Heath and Heath explain, stories not only provide an audience with knowledge previously unknown to it, good stories can help inspire an audience to act.<sup>166</sup> The story about Megan Kanka’s murder also worked because it motivated people to demand community notification laws, first at the state level<sup>167</sup> and then nationwide.<sup>168</sup>

Another “story” that inspired legislative action concerns the murder of seven-year-old Sherrice Iverson by Jeremy Strohmeier in a Nevada casino bathroom during his

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163. See Robert M. Cover, Foreword, *Nomos and Narrative*, 97 HARV. L. REV. 4, 5 (1983) (“[L]aw and narrative are inseparably related.”).

164. See Filler, *supra* note 135, at 330-32 (reporting that every senator who spoke in favor of the passage of Megan’s Law recounted a vivid and disturbing case of sexual abuse).

165. See, e.g., *State v. Cook*, 700 N.E.2d 570, 573 (Ohio 1998) (opening the decision with the murder of Megan Kanka).

166. HEATH & HEATH, *supra* note 40, at 206.

167. See *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997) (“Public reaction to Megan’s murder was intense, and New Jersey’s governor and legislature responded quickly.”).

168. See Filler, *supra* note 135, at 315-17 (offering an historical look at the passage of Megan’s Law and its aftermath).

attempted molestation of her.<sup>169</sup> But the aspect of the case that captured the public's attention was not about the murderer. Rather, attention focused on Strohmeyer's friend, David Cash, who witnessed at least part of the attempted molestation, but failed to intervene or report the assault to authorities.<sup>170</sup> Incensed to learn that David Cash could not be charged criminally for failing to intervene, the public demanded a change in the laws to require persons to intervene on behalf of a child who is the victim of a violent crime.<sup>171</sup> At its core, this sticky story not only provided the public with information not previously known regarding the lack of criminal penalties for the failure to rescue, the story also inspired legislative action to redress the gap.<sup>172</sup>

### C. *The Power of Context*

In addition to a compelling message and the core people who spread it, all epidemics are triggered by key environmental forces.<sup>173</sup> The term "environmental forces," is broad enough to contemplate a myriad of events and conditions that may impact the spread of an epidemic—however direct or remote that event or condition may be.<sup>174</sup> After all, a central premise underlying the structure of an epidemic is that "little causes can have big effects."<sup>175</sup> In the

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169. See, e.g., *Teen Admits Killing Young Girl in Casino*, NEWSDAY (Long Island), Sept. 9, 1998, at A15 (relating the events surrounding the murder).

170. See Steve Chapman, *Should Doing Nothing About A Crime Be A Crime?* CHI. TRIB., Aug. 27, 1998, § 1, at 23 (reporting that David Cash admitted to seeing Strohmeyer struggle with Sherrice Iverson in the bathroom stall before walking out of the restroom).

171. See, e.g., *Call for Samaritan Law out of Child-Sex Case: Penalties for Witnesses Who Don't Report*, S.F. CHRON., Sept. 10, 1998, at A2; Stacy Finz, *Killing of Girl, 7, in Casino Spurs Good Samaritan Bills*, S.F. CHRON., Dec 9, 1998, at A21 (relating the public's anger over the inability to charge Cash).

172. In response, California and Nevada passed laws criminalizing the failure to intervene. See Sherrice Iverson Child Victim Protection Act, CAL. PENAL CODE § 152.3 (West Supp. 2009); NEV. REV. STAT. ANN. § 202.882 (LexisNexis 2006).

173. See GLADWELL, *supra* note 1, at 133-92 (highlighting a variety of examples to demonstrate the importance of environmental factors to an epidemic).

174. Consider Professor Friedman's excellent analysis of the potential impact of the telephone or the automobile on the law and legal institutions. See Friedman, *supra* note 47, at 1584-86.

175. GLADWELL, *supra* note 1, at 9.

context of legislative epidemics, this section explores several factors that often converge to create an environment ripe for sweeping criminal legislation: the public's changing perception about crime and punishment;<sup>176</sup> the interrelated consideration of the public's fearfulness; and finally, the lack of judicial oversight because of deference to legislative intent. These factors coalesce to create an environment conducive to produce an ever increasing and harsher set of laws—runaway legislation.<sup>177</sup>

1. *Fear and Loathing in Las Vegas*<sup>178</sup> and *Everywhere Else*. Both a cause and effect, the public thirst for harsher punishments stands at the center of a spate of recent legislative enactments.<sup>179</sup> Theorists suggest various factors that have contributed to the shift toward a new penology of retribution and vengeance,<sup>180</sup> but the narrow consideration I wish to examine in this section is the public's perception that it is not safe from strangers residing in their communities. The fear is palpable. Despite downward turns in violent crimes throughout much of the last two decades,<sup>181</sup> opinion polls continue to reflect that the public fears what it

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176. See, e.g., Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997) (exploring why the public favors harsh crimes and punishments in the face of countermanding evidence); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006) (contending that the harsh justice of the 1970s was in response to the "constitutional proceduralism" of the 1960s).

177. See *infra* Part III.A and accompanying text.

178. The title of this section is taken from the 1998 movie of the same name, which was adapted from the 1971 novel by HUNTER S. THOMPSON, *FEAR AND LOATHING IN LAS VEGAS: A SAVAGE JOURNEY TO THE HEART OF THE AMERICAN DREAM* (Second Vintage Books 1998) (1971).

179. See *infra* Part III.A and accompanying text (providing legislative examples of the shift in public attitude on crimes).

180. See, e.g., MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* (2004) (examining various reasons for the shift in penal attitudes).

181. See, e.g., LORI DORFMAN & VINCENT SCHIRALDI, *BLDG. BLOCKS OF YOUTH, OFF BALANCE: YOUTH, RACE & CRIME IN THE NEWS* 3 (2001), <http://www.buildingblocksforyouth.org/media/media.pdf> ("Although violent crime by youth in 1998 was at its lowest point in the 25-year history of the National Crime Victimization Survey, 62% of poll respondents felt that juvenile crime was on the increase.").

perceives to be escalating crime.<sup>182</sup> There is a palpable fear among ordinary citizens that children are vulnerable to sexual abuse by strangers. This is an especially interesting perception, given that nearly eighty percent of sexual abuse of children is committed by family members.<sup>183</sup>

In speaking of what informs our world view, political journalist Walter Lippmann said that we depend on “‘pictures in our heads,’ many of them delivered by the news media, to tell us about the world.”<sup>184</sup> A survey conducted on this point indicates the truth of this proposition. Seventy-six percent of respondents reported that they form opinions about crime from the news rather than from personal experience.<sup>185</sup> If most Americans frame their world view from the media, there is no question that a frightening schema has been created for us: our communities are not safe, our children are not safe, and our laws are weak responses to these dire conditions.<sup>186</sup>

In short, we are panicked and frightened.<sup>187</sup> To historian Philip Jenkins, the “panic” is not only marked by widespread public fear, but “fear that is wildly exaggerated and wrongly directed.”<sup>188</sup> Whether it is the early responses

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182. *Id.* at 9.

183. See Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17, 21-25 (2008) (reporting statistics to support the position that sexual assault by a stranger is an “infrequently occurring event”).

184. DORFMAN & SCHIRALDI, *supra* note 181, at 4 (quoting LIPPMANN, *supra* note 137, at 3).

185. *Id.*

186. For an excellent discussion of the media’s role in creating an alarming picture, see Sara Sun Beale, *The News Media’s Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397 (2006).

187. See generally PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* (1998) (condemning the societal response to sexual offenses as highly disproportionate to the offenses).

188. *Id.* at 6-7; see also John Douard, *Sex Offender as Scapegoat: The Monstrous Other Within*, 53 N.Y.L. SCH. L. REV. 31, 41 (2008/2009) (“[S]ex offenders are the targets of ‘moral panic.’”). On the rampant escalation of sex offender registration laws, see, for example, Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6 (2006), who argues that sex offenders are the recipients of the harshest “punitive zeal.”

to the HIV/AIDS crisis,<sup>189</sup> or the escalating laws against convicted sex offenders,<sup>190</sup> the hallmarks of a societal panic are the same:

When the official reaction to a person, groups of persons or series of events is *out of all proportion* to the actual threat offered, when experts, in the form of police chiefs, the judiciary, politicians and editors *perceive* the threat in all but identical terms, and appear to talk with one voice of rates, diagnoses, prognoses and solutions, when the media representations universally stress sudden and dramatic increases . . . then we believe it is appropriate to speak of a *moral panic*.<sup>191</sup>

What has caused this fear? Today, scholars connect the increase in the media's reporting of crime to the public's belief that crime is rampant.<sup>192</sup> Despite clear evidence that crime has declined,<sup>193</sup> the public believes that crime has escalated,<sup>194</sup> in large measure due to the emphasis on crime

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189. In the context of HIV transmission, the 1980s was the height of societal panic. See Jerry Estell, *Ind. Youth Tells of Fight Against AIDS—and Bias*, PHILA. INQUIRER, Mar. 4, 1988, at A15 (detailing the panicked actions as schools barred HIV infected students from school, homes were firebombed, and families were forced to move); Deborah Hurst, *Houston Boy with AIDS Virus Barred from School*, HOUSTON CHRON., Apr. 23, 1987, at 11 (reporting that a Houston child was barred from school); Herb Michaelson, *School Battles Leave Own Scars*, SACRAMENTO BEE, Nov. 10, 1986, at A20.

190. See *infra* Part III.A and accompanying text.

191. Philip Jenkins, *Failure to Launch: Why Do Some Social Issues Fail to Detonate Moral Panics?*, 49 BRIT. J. CRIMINOLOGY 35, 35 (2009) (quoting STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 16 (1978)).

192. David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 ST. THOMAS L.J. 600, 602-03 (2006) (arguing that the proliferation of crime reports induced the proliferation of sex offender registration laws); cf. Ctr. for HIV Law & Policy, The National Legal Resource and Strategy Center for HIV Advocacy, <http://www.hivlawandpolicy.org/resourceCategories/view/2> (last visited Dec. 6, 2009) (claiming that media coverage which demonized those inflicted with HIV/AIDS influenced a backlash that resulted in the myriad of AIDS criminal legislation).

193. See, e.g., Beale, *supra* note 186, at 409 (referencing Bureau of Justice Statistics that note unprecedented drop in crime).

194. See DORFMAN & SCHIRALDI, *supra* note 181, at 5 (citing a Baltimore survey where, despite declining crime rates, residents believed that crime was on the rise).

by the media.<sup>195</sup> The proliferation of sex offender registration laws has been linked to the increased media coverage of child abuse cases involving previously convicted sex offenders.<sup>196</sup> One additional fact contributes to this perception. Showcasing high-profile, but rare crimes, turns the symbolic into the pervasive in the eyes of the public. The effect is a skewed perception of the likelihood that the crime will be repeated.<sup>197</sup>

There is a corollary to the proposition that media reporting fuels the public's demand for additional criminal laws. Expanding criminal laws also signals to the public that crime must be escalating because of the increased attention and resources spent on promoting the added legislation.<sup>198</sup>

Fear is motivating. The public mood on crime and punishment has undoubtedly changed. Commentators have observed that discourse on punishment has shifted from rehabilitation to vengeance and retribution—or what has

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195. See Beale, *supra* note 186, at 422-23 (noting that crime news stories on the three major networks grew from 557 stories to 2574 in a five-year time frame).

196. See Singleton, *supra* note 192, at 604-05 (tracking the increase in articles on child abductions since 1981).

197. The testimony of the President of the National Center for Missing & Exploited Children who appeared before the Judiciary Committee in March 2009 articulates well the role of high-profile cases:

In recent years, millions of Americans have followed with horror the devastating stories of Jessica Lunsford, Sarah Lunde, Jetseta Gage and others. These tragic cases have generated anger and indignation nationwide, and epitomize an area of great concern: how to effectively track, register and manage the nation's convicted sex offenders. . . . [Sex offenders] evoke unparalleled fear among citizens.

*Sex Offender Registration and Notification Act (SONRA): Barriers to Timely Compliance by States: Hearing Before the H. Subcomm. on Crime, Terrorism, and Homeland Security, 111th Cong. 81 (2009) [hereinafter SONRA]* (statement of Ernie Allen, CEO & President, National Center for Missing & Exploited Children).

198. See, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352 (1997) (“[V]isible efforts by private citizens to protect themselves from crime may convey the message that criminality is rampant.”). Interestingly, the absence of media attention can produce a dearth of legislation, even where legislation is warranted and necessary. See Jenkins, *supra* note 191, at 41 (maintaining that the lack of comprehensive child pornography laws may be due to the lack of media access).

been termed, “populist punitiveness.”<sup>199</sup> Scholar David Garland states in *The Culture of Control*,<sup>200</sup> “[From the late 1970s onward] it became common to regard the core value of the whole penal-welfare framework not just as an impossible ideal, but, much more remarkably, as an unworthy, even dangerous policy objective that was counter-productive in its effects and misguided in its objectives.”<sup>201</sup> Part of the shift away from rehabilitation has occurred because there “is a growing sense that little or nothing can be done to change offenders. The optimism that informed 18th and 19th century penal theorists has been replaced by a pragmatic pessimism that assumes little effectiveness to efforts at transformation.”<sup>202</sup> The modern day mindset, without a belief that rehabilitation can succeed, gravitates toward harsher penalties.<sup>203</sup>

Elected officials serve as interesting aiders and abettors—some might even say symbiotic partners—in the public’s shift in attitude. Eager to please their constituents, politicians stoke the public’s fear and consequential thirst

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199. See Philip Whitehead, *Penal Populism, Sentencing Councils and Sentencing Policy*, 49 BRIT. J. CRIMINOLOGY 430, 432 (2009) (book review) (noting that there is an “atmosphere of populist punitiveness”). For scholarship on the shift in public attitude, see, for example, Paul Almond, *Public Perceptions of Work-Related Fatality Cases*, 48 BRIT. J. CRIMINOLOGY 448, 449 (2008), for a review of research that demonstrates the change in public attitude; Beale, *supra* note 176, at 44-51, for an exploration of why the public favors harsh punishments in the face of countermanding evidence; and Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 69 (2000), for a description of the shift in attitude as the “pendulum effect.”

200. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

201. *Id.* at 8.

202. Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL’Y & L. 452, 454 (1998). With respect to sex offender registration laws specifically, Simon criticizes what he calls the “new penology” which includes a public that is more concerned with management of high risk offenders than rehabilitation and transformation. *Id.* at 454-56.

203. In an interesting swing of the pendulum, rehabilitation is reemerging as a penal goal. Not because the public has gained new-found optimism, but rather because the costs of incarceration can no longer be accommodated in a failing economy. See, e.g., Michael Rothfeld, *The California Fix: Prison Cuts Easier Said than Done*, L.A. TIMES, Aug. 23, 2009, at A1 (describing efforts to reintroduce programs of rehabilitation to drive incarceration costs down).



for more punitive laws with “electoral cycle” legislation designed to appeal to the voters.<sup>204</sup> As one court acknowledged, “[T]he public’s increasing awareness of the dangers posed by sex offenders . . . was accelerated by the occurrence of highly publicized and horrific offenses.”<sup>205</sup> And it is not only the state-elected officials who are speaking out. Criminal matters that would have been left to state and local governments have now moved to the national stage.<sup>206</sup> Federally-elected officials, like their state counterparts, are also eager to respond to the national cry for stricter laws and penalties.

Everyone agrees—fear sells.<sup>207</sup> And supporting populist legislation is compelling. Of that there is little question.

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204. See Lindsay A. Wagner, Comment, *Sex Offender Residency Restrictions: How Common Sense Places Children at Risk*, 1 DREXEL L. REV. 175, 179 (citing NAOMI MURAKAWA, ELECTING TO PUNISH: CONGRESS, RACE, AND THE AMERICAN CRIMINAL JUSTICE STATE 140 (2005)); see also Simon, *supra* note 202, at 455 (“The politicians, bolstered by what is taken to be nearly universal public support, compete to propose ever more severe responses to criminal behavior.”).

205. *Doe v. Poritz*, 662 A.2d 367, 375-76 (N.J. 1995).

206. A proffered rationale for the increased federalization is the belief that a uniform set of laws better protects the citizenry. See Wayne A. Logan, *Criminal Justice Federalism and National Sex Offender Policy*, 6 OHIO ST. J. CRIM. L. 51, 56 (2008) (outlining the wave of federalized criminal laws).

207. See, e.g., 154 CONG. REC. S10,300-01 (daily ed. Oct. 1, 2008) (statement of Sen. Schumer) (“[S]ocial networking web sites . . . [are] potential hotbeds for sexual predators, who can easily camouflage themselves amidst the throng of users on these sites, while furtively pursuing their own despicable designs.”); 154 CONG. REC. S8976-01 (daily ed. Sept. 18, 2008) (statement of Sen. Martinez) (“Public safety is among the highest priorities of Government. Americans should feel—and have a right to feel—safe in their homes, their neighborhoods, and their communities. *Although the national violent crime rate has dropped substantially since 2000, we know any crime is too much crime.* As elected officials, we ought to do what we can to prevent criminal acts.” (emphasis added)); 154 CONG. REC. H6441-42 (daily ed. July 14, 2008) (statement of Rep. Schiff) (urging continued funding for a provision of the PROTECT Act of 2003 that allowed state and local government access to national fingerprint databases for volunteers who work with children, although only six percent of all volunteers tested under the program had serious criminal records); see also Stephanie Chen, *iPhone Apps Help Track Sex Offenders, Spot Crime*, CNN, Sept. 30, 2009, <http://www.cnn.com/2009/CRIME/09/29/iphone.app.fight.crime/index.html> (reporting that the Offender Locator application, which provides the location of sex offenders, has been downloaded more than a million times in the three months since its debut in June 2009 and is among the ten most popular iPod applications).

“The societal pressure for legislation designed to prevent terrible tragedies such as befell Megan Kanka and her parents is hydraulic.”<sup>208</sup> But it is also true that legislation derived from emotionally-based incentives is fraught with dangers in drafting. As Professor J. Kelly Strader observed in writing on HIV criminal legislation, “When faced with the politically risky and intellectually challenging tasks of developing responses to our nation’s crises, our policy-makers often opt for politically safe and intellectually easy approaches.”<sup>209</sup>

An interesting by-product of “ramping up” criminal penalties in one community is its spillover effect. A more aggressive sex offender registration scheme in one jurisdiction, for example, moves offenders out of that community into neighboring communities. It is not a “race to the bottom” as much as it is a “race to the harshest.” Competitive lawmaking inevitably pits jurisdictions against each other as each community tries to create harsher sets of laws, not only to punish those who live within their borders, but to insulate them from criminal actors who might think twice about choosing to reside there.<sup>210</sup>

2. *Role of the Judiciary.* Shifting attitudes and a fearful public help foster an environment conducive to sweeping criminal legislation, but without a complicit judiciary, no epidemic could flourish. At the heart of runaway legislation, therefore, is a judiciary that has allowed it.

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208. *E.B. v. Verniero*, 119 F.3d 1077, 1112 (3d Cir. 1997) (Becker, J., concurring in part, dissenting in part); see also *Artway v. Att’y Gen.*, 81 F.3d 1235, 1243 (3d Cir. 1996) (“[Megan’s Law] was rushed to the Assembly floor as an emergency measure, skipping the committee process, and was debated only on the floor; no member voted against it.”).

209. J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 435-40 (1994) (analyzing the myriad of HIV criminal legislation passed in response to the HIV/AIDS crisis).

210. For a thoughtful discussion of the “jurisdictional competition” model, see Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 OHIO ST. J. CRIM. L. 453, 453-56 (2009). For the impact of the competition model as applied to residency restrictions, see Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 104 (2007), who contends that “the amount of real estate available to sex offenders will continue to decrease and more sex offender communities will emerge.”

In the case of sex offender registration laws, the most influential contextual factor has not been a public clamoring for these laws or even the politicians eager to satisfy their constituents. Rather, it was the United States Supreme Court's acquiescence to the public panic in the form of two decisions: *Smith v. Doe*<sup>211</sup> and *Connecticut Department of Public Safety v. Doe*.<sup>212</sup>

The year was 2003. By that time, sex offender registration laws and community notification statutes had been in effect nationwide for approximately seven years.<sup>213</sup> A variety of challenges had been raised and appeals were winding their way through state and federal courts.<sup>214</sup> A showdown was expected in the United States Supreme Court.

Because sex offender registration laws comprise both civil and criminal characteristics, the critical threshold issue is whether these laws are designed as civil remedies or criminal penalties. Fundamental to the outcome of their characterization are twin propositions: criminal laws, even those labeled as civil remedies, must afford constitutional protections to criminal defendants<sup>215</sup> while civil nonpunitive regulations do not require the same adherence to substantive and procedural safeguards.<sup>216</sup>

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211. 538 U.S. 84 (2003).

212. 538 U.S. 1 (2003).

213. See 42 U.S.C. § 14071(g)(2)(A)-(B) (2006) (mandating that states must comply with provisions or face decreased funding).

214. See, e.g., *Doe v. Pataki*, 3 F. Supp. 2d 456 (S.D.N.Y. 1998) (arguing that registration laws impact protected liberty interests); *Cutshall v. Sundquist*, 980 F. Supp. 928 (M.D. Tenn. 1997) (raising a number of claims including whether the Tennessee Sexual Offender and Registration and Monitoring Act violates double jeopardy, the right to travel, and equal protection); *Helman v. State*, 784 A.2d 1058 (Del. 2001) (questioning whether juveniles should be subjected to these laws); *Doe v. Poritz*, 662 A.2d 367 (N.J. 1995) (challenging whether the newly enacted laws apply to previously convicted sex offenders).

215. See, e.g., *United States v. Ward*, 448 U.S. 242, 248 (1980) ("The distinction between a civil penalty and a criminal penalty is of some constitutional import.").

216. See, e.g., *Kansas v. Hendricks*, 521 U.S. 346 (1997) (concluding that civil commitment requirements were sufficiently tailored to meet nonpunitive purpose); *accord Seling v. Young*, 531 U.S. 250, 263 (2001) (deciding that commitment of sexually violent felons was a civil remedy that did not impact the constitutionality of the statute under ex post facto or double jeopardy).

In the case of sex offender registration schemes, and at each stage, nearly all lower courts agreed that these laws do not infringe on protected liberty interests but are only civil remedial actions designed to protect the community.<sup>217</sup> One leading lower court decision was *Doe v. Poritz*,<sup>218</sup> which was among the first to conclude that “[t]he Registration and Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their children.”<sup>219</sup> The *Poritz* majority wrote:

The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose and only for that purpose, and not designed to punish.<sup>220</sup>

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clauses); *see also infra* note 217 (citing sex offender registration cases that have concluded the laws are civil remedies and not criminal penalties).

217. *See, e.g.*, *Russell v. Gregoire*, 124 F.3d 1079, 1087-88 (9th Cir. 1997) (concluding that these laws were regulatory, not punitive in nature); *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997) (determining that registration and notification provisions did not inflict punishment); *People v. Castellanos*, 982 P.2d 211, 217 (Cal. 1999) (“The sex offender registration requirement serves an important and proper remedial purpose, and it does not appear that the Legislature intended the registration requirement to constitute punishment.”); *State v. Cook*, 700 N.E.2d 570, 578 (Ohio 1998) (“Consequently, we find that the registration and verification provisions are remedial in nature and do not violate the ban on retroactive laws set forth [under the Ohio Constitution].”); *Commonwealth v. Gaffney*, 733 A.2d 616, 621 (Pa. 1999) (finding that registration is not punitive).

218. 662 A.2d 367 (N.J. 1995).

219. *Id.* at 372-73.

220. *Id.* at 372. Other courts have affirmed the power of the legislature to protect its citizenry. *See, e.g.*, *E.B. v. Verniero*, 119 F.3d 1077, 1097 (3d Cir. 1997) (“[W]e found that the legislative purpose of Megan’s Law was to identify potential recidivists and alert the public when necessary for the public safety, and to help prevent and promptly resolve incidents involving sexual abuse and missing persons.”); *Lee v. State*, 895 So. 2d 1038, 1040 (Ala. Crim. App. 2004) (“The Legislature finds that the danger of recidivism posed by criminal sex offenders and that the protection of the public from these offenders is a paramount concern or interest to government.” (quoting ALA. CODE § 15-20-26(a) (1975))); *Fredenburg v. City of Fremont*, 14 Cal. Rptr. 3d 437, 439 (Ct. App. 2004) (“[T]he [California] Legislature further found that the public had a ‘compelling and necessary . . . interest’ in obtaining information about released sex offenders so they can ‘adequately protect themselves and their children from these persons.’” (quoting 1996 Cal. Stat., ch. 908 § 1(b))).

This is not to suggest that registration requirements are inconsequential. Indeed, as courts have often noted, they present serious burdens to the registrant that involve significant intrusions into the individual's privacy interest.<sup>221</sup> Despite their burdensome nature, however, the vast majority of lower courts concluded that sex offender registration laws were remedial and nonpunitive.<sup>222</sup> This position is not unassailable. Some jurists at that time expressed significant concern that registration laws and community notification statutes, with their devastating punitive consequences, were in actuality criminal penalties masquerading as civil remedies.<sup>223</sup>

The stage was set, therefore, when the United States Supreme Court heard *Smith* and *Connecticut Department of*

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221. See, e.g., *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1226 (M.D. Ala. 1999) (characterizing Alabama's registration scheme as "among the . . . most restrictive of such laws in the nation"); *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998) ("[T]he registration provisions of the Act place a 'tangible burden' on plaintiffs, potentially for the rest of their lives."); *Doe v. Dep't of Pub. Safety*, 92 P.3d 398, 409 (Alaska 2004) (reiterating the burdensome nature of Alaska's registration requirements); *State v. Robinson*, 873 So. 2d 1205, 1213 (Fla. 2004) ("We believe the Act imposes more than a stigma."); *State v. Myers*, 923 P.2d 1024, 1041 (Kan. 1996) ("The practical effect of such unrestricted dissemination could make it impossible for the offender to find housing or employment.").

222. See *State v. Bollig*, 605 N.W.2d 199, 205-06 (Wis. 2000) ("Although we recognize that sex offenders have suffered adverse consequences, including vandalism, loss of employment, and community harassment, the punitive or deterrent effects resulting from registration and the subsequent dissemination of information do not obviate the remedial and protective intent underlying those requirements."); accord *State ex rel. Olivieri v. State*, 779 So. 2d 735, 749 (La. 2001) (explaining that any economic burden on the sex offender resulting from the notification scheme is a necessary result of a "well justified system"); *Young v. State*, 806 A.2d 233, 249 (Md. 2002) (concluding that although the sex offender registration statute does place affirmative burdens on the registrants, these burdens are not unreasonable in light of the statute's remedial aims).

223. See, e.g., *Verniero*, 119 F.3d at 1112-29 (Becker, J., concurring & dissenting) (analogizing community notification statutes to shaming punishments); *Doe v. Att'y Gen.*, 686 N.E.2d 1007 (Mass. 1997) (concluding that sex offender registration laws are unconstitutional in the absence of a right to a hearing for a determination of whether actor poses a risk); *Poritz*, 662 A.2d at 424-28 (Stein, J., dissenting) (rejecting the majority's position that the laws were not punitive in nature). This view is gaining hold. See *infra* notes 311-27 and accompanying text (discussing recent decisions that have found sex offender registration laws are punitive in nature).

*Public Safety*. The constitutional challenges were slightly different in each case. *Smith* addressed whether a previously convicted offender could successfully challenge on ex post facto grounds registration laws enacted after his conviction.<sup>224</sup> *Connecticut Department of Public Safety* concerned whether procedural due process demands a hearing to determine the offender's level of dangerousness as a prerequisite to inclusion in the state registry.<sup>225</sup> Yet, central to both cases was whether registration and community notification laws were so punitive in effect that they were actually criminal penalties masquerading as civil remedies.

To be sure, existing law guides the Court on whether a law is regulatory or punitive. The seven-factor test from *Kennedy v. Mendoza-Martinez* is instructive,<sup>226</sup> with two of the seven factors framing the issue. Called the “two-part intent-effects test,” the first factor critically examines the legislative characterization of the statute, asking whether the legislature intended for the law to be a civil remedy. The second part of the “intent-effects” test asks whether, despite the legislature's intent to create a civil remedy, the law is nonetheless punitive in its effect.<sup>227</sup>

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224. *Smith v. Doe*, 538 U.S. 84 (2003).

225. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

226. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). *Kennedy* delineates the following seven factors to determine whether a law is regulatory or punitive in its effect:

- [1] Whether the sanction involves an affirmative disability or restraint,
- [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of *scienter*, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

*Id.* (citations omitted).

227. *See Hudson v. United States*, 522 U.S. 93, 99, 103 (1997) (rejecting double jeopardy claim in administrative hearings following criminal prosecution, deeming them civil under the *Mendoza-Martinez* “intent-effects test”); *see also* *People v. Logan*, 705 N.E.2d 152, 158-60 (Ill. App. Ct. 1998) (employing the “intent-effects” test to determine whether sex offender registration statute was constitutional); *Poritz*, 662 A.2d at 433 (Stein, J., dissenting) (observing the judicial evolution from the *Mendoza-Martinez* seven-factor test to the two-part intent-effects test).

It is axiomatic that great deference is afforded legislative enactments.<sup>228</sup> In the case of whether a law is designed as a criminal penalty or civil remedy, courts afford great deference to clear legislative statements of nonpunitive rationales.<sup>229</sup> Specifically, as applied to sex offender registration laws, courts look to the state's expressed legislative intent that sex offender registration laws are designed with an alternative nonpunitive purpose—the protection of the citizenry.<sup>230</sup> Not surprisingly, most states use very similar introductory language that is intended to signal that the registration scheme is designed “to protect, not to punish.”<sup>231</sup> Key features in the “declaration of purpose” language include identification of the risk that sex offenders pose, the governmental interest in protecting the public, and the determination that protecting the public outweighs the registrant's privacy

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228. See, e.g., *Lambert v. California*, 355 U.S. 225, 228 (1957) (observing the wide latitude given to the legislature's authority to define an offense); *State v. Cook*, 700 N.E.2d 570, 576 (Ohio 1998) (“An enactment of the General Assembly is presumed to be constitutional . . . .” (quoting *State ex rel. Dickman v. Defenbacher*, 128 N.E.2d 59 (Ohio 1955))); *In re Christopher S.*, 776 A.2d 1054, 1057 (R.I. 2001) (“This [C]ourt's evaluation of legislative enactments has been extremely deferential . . . .” (quoting *City of Pawtucket v. Sundlun*, 662 A.2d 40, 44-45 (R.I. 1995) (alteration in original))).

229. See *Hudson*, 522 U.S. at 103 (“It is evident that Congress intended the OCC money penalties and debarment sanctions imposed for violations of 12 U.S.C. §§ 84 and 375b to be civil in nature.”); *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (recognizing clear congressional intent to characterize monetary penalties under the Clean Water Act as civil in nature).

230. See, e.g., *Smith v. Doe*, 538 U.S. 84, 110 (2003) (Souter, J., concurring) (“What tips the scale for me is the presumption of constitutionality normally accorded a State's law. That presumption gives the State the benefit of the doubt in close cases like this one . . . .”); see also *Poritz*, 662 A.2d at 374 (majority opinion) (“Such a legislative determination is beyond judicial review.”).

231. See, e.g., ARK. CODE ANN. § 12-12-902 (2003) (“[P]rotecting the public from sex offenders is a primary governmental interest, [and] that the privacy interest of the persons adjudicated guilty of sex offenses is less important than the government's interest in public safety . . . .”); ME. REV. STAT. ANN. tit. 34-A, § 11201 (Supp. 2007) (“The purpose of the chapter is to protect the public from potentially dangerous registrants by enhancing access to information concerning those registrants.”); MICH. COMP. LAWS ANN. § 28.721a (West 2004) (“The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.”).

interest. Arkansas's declaration of purpose mirrors the language from many other states and serves as a good example:

The General Assembly finds that sex offenders pose a high risk of reoffending after release from custody, that protecting the public from sex offenders is a primary governmental interest, that the privacy interest of persons adjudicated guilty of sex offenses is less important than the government's interest in public safety, and that the release of certain information about sex offenders to criminal justice agencies and the general public will assist in protecting public safety.<sup>232</sup>

In fact, some jurisdictions employ nearly identical language in characterizing the state's sex offender registration scheme as nonpunitive.<sup>233</sup>

It would be inaccurate, however, to suggest that courts have concluded that sex offender registration laws are designed purely with a nonpunitive purpose. Courts recognize that, even though these laws protect the community, they also serve to shame, isolate, and ostracize

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232. ARK. CODE ANN. § 12-12-902 (2003); *see also, e.g.*, IDAHO CODE ANN. § 18-8302 (2004) ("The legislature finds that sexual offenders present a significant risk of reoffense and that efforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sexual offenses are impaired by the lack of current information available about individuals who have been convicted of sexual offenses who live within their jurisdiction. The legislature further finds that providing public access to certain information about convicted sexual offenders assists parents in the protection of their children."); LA. REV. STAT. ANN. § 15:540 (2005) ("[P]rotection of the public from sex offenders, sexually violent predators, and child predators is of paramount governmental interest."); MISS. CODE ANN. § 45-33-21 (West Supp. 2008) ("The Legislature finds that the danger of recidivism posed by criminal sex offenders and the protection of the public from these offenders is of paramount concern and interest to government.").

233. *Compare* NEB. REV. STAT. § 29-4002 (2008) ("The Legislature finds that sex offenders present a high risk to commit repeat offenses. The Legislature further finds that efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information about individuals who have pleaded guilty to or have been found guilty of sex offenses and who live, work, or attend school in their jurisdiction."), *with* N.M. STAT § 29-11A-2 (2004) ("The legislature finds that: (1) sex offenders pose a significant risk of recidivism; and (2) the efforts of law enforcement agencies to protect their communities from sex offenders are impaired by the lack of information available concerning sex offenders who live within the agencies' jurisdictions.").



the convicted offender.<sup>234</sup> And sadly, stigma often draws violence and harassment.<sup>235</sup> One of the fallacies inherent in a registration scheme that broadly paints the sex offender is the public's perception that all registrants are violent sexual predators who reoffend regularly. That is, after all, the value of this particular sticky message. However, contrary to this belief, not all registrants are violent sexual predators. Registerable offenses include consensual sexual activity between teenagers, urinating in public, flashing and streaking, and visiting prostitutes.<sup>236</sup> For those convicted of these offenses, registration, and more specifically community notification, has devastating and far-reaching consequences. As one trial court stated, "[O]nly a person protected by legal training from the ordinary way people think, could say, with a straight face that this terrible consequence of a sex offender's conviction is not punishment."<sup>237</sup> Because registries include violent and nonviolent offenders without separate designations, Internet notification sites create misleading impressions about the offenders listed.<sup>238</sup> Options for employment and

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234. See, e.g., *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) ("We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender."); *Ray v. State*, 982 P.2d 931, 936 (Idaho 1999) ("[R]egistration brings notoriety to a person convicted of a sexual offense [and] does prolong the stigma attached to such convictions."); *Young v. State*, 806 A.2d 233, 249 (Md. 2002) ("Being labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism.").

235. See, e.g., Brandon Bain, *Downside of Registries: Harassment, Vigilantism*, NEWSDAY (Long Island), Oct. 23, 2006, at A31 (recounting numerous examples of vigilantism against registered offenders); see also Carpenter, *supra* note 100, at 301 n.16 (listing reports of harassment and violence against registered offenders).

236. See *Unjust and Ineffective*, ECONOMIST, Aug. 8-14, 2009, at 21 (reporting on registration-worthy offenses); see also Carpenter, *supra* note 100, at 338-70 (questioning whether sex offender registration is appropriate for strict liability statutory rape).

237. *Sigler v. State*, No. 08-CA-79, 2009 WL 1145232, Ohio App. 5 Dist., at \*1 (Ct. App. Apr. 27, 2009) (quoting the trial court, although reversing it).

238. See *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (addressing this central issue in the case).

housing diminish significantly, and the loss of reputation they suffer is real and unending.<sup>239</sup>

And so, where the statute includes both punitive and nonpunitive purposes, the second factor of the *Mendoza-Martinez* test is an important part of the equation: whether the nonpunitive purpose alone could fairly justify the sanction imposed.<sup>240</sup> Though the legislature may intend that the statute serves an alternative civil purpose, the “effects” prong underscores an important point. A statute nonetheless may be deemed a criminal penalty if it is “so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy into a criminal penalty.”<sup>241</sup>

And here is where the battle in the Supreme Court *should have* been fought. Can it be said that sex offender registration schemes are sufficiently tailored to meet regulatory aims but not so punitive in their effect that they are criminal penalties?<sup>242</sup> In 2003, however, legislative intent controlled. Concluding that these laws were based on a significant alternative purpose, the Court determined that sex offender registration schemes withstood the overarching challenge that, under the “intent-effects” test from *Mendoza-Martinez*, they were punitive in nature.<sup>243</sup>

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239. See *supra* notes 221-22 (reporting the hardships registrants face in meeting the requirements).

240. See *Doe v. Poritz*, 662 A.2d 367, 433 (N.J. 1995) (Stein, J., dissenting) (explaining the second part of the “intent-effects” test).

241. *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citations omitted) (recognizing that it is largely an issue of statutory construction whether a punishment is civil or criminal in nature); see also *Artway v. Att’y Gen.*, 81 F.3d 1235, 1263 (3d Cir. 1996) (crafting a three-prong test of (i) actual purpose; (ii) objective purpose, and (iii) effect to determine whether regulation was a civil or criminal penalty).

242. See, e.g., *Smith v. Doe*, 538 U.S. 84, 102 (2003) (“[A] rational connection to a nonpunitive purpose is a ‘[m]ost significant’ factor in our determination that the statute’s effects are nonpunitive.” (alterations in original) (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996))); *Young v. State*, 806 A.2d 233, 250 (Md. 2002) (finding that registration provisions are tailored to protect the public); cf. *Meinders v. Weber*, 604 N.W.2d 248, 260 (S.D. 2000) (concluding that the legislature must be given deference in determining whether a statute is excessive to its alternative purpose).

243. See *Smith*, 538 U.S. at 102-03 (“[T]he Act has a legitimate nonpunitive purpose of public safety which is advanced by alerting the public to the risk of

Since reliance on legislative intent is fundamental to the jurisprudence, the *Smith* Court's reasoning may not give one pause.<sup>244</sup> That is, until it is viewed in juxtaposition with another case decided the same term: *Lawrence v. Texas*,<sup>245</sup> which overruled *Bowers v. Hardwick*<sup>246</sup> to conclude that the state of Texas did not have a rationally-related purpose to criminalize sodomy.<sup>247</sup> So dismissive was the majority in *Lawrence* of the state's purported legislative intent, the analysis represents one sentence in the opinion: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."<sup>248</sup>

Why the difference between *Smith* and *Lawrence* in their approaches to legislative deference? In an interesting take on the Court's shift in *Lawrence*, one commentator applied "tipping point analysis" to argue that the change in environmental factors in the fifteen years between *Bowers* and *Lawrence* compelled the Supreme Court's reversal.<sup>249</sup> So undeniable was the Power of Context, the argument continues, that the *Lawrence* outcome was preordained. By comparison, in the area of sex offender registration laws, 2003 was marked by different environmental factors that impacted the *Smith* analysis, including an angry public, politicians unwilling to apply restraint, and judicial deference to the original legislative intent of a nonpunitive purpose. But, as Part III develops, the environment may have changed since *Smith*. Ever-expanding sex offender

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sex offenders in their communit[y]." (citation omitted) (second alteration in original)); see also *Conn. Dep't of Pub. Safety*, 538 U.S. at 4 (reinforcing the basic premise that Connecticut's registration scheme was "designed to protect its communities from sex offenders").

244. See *Lambert v. California*, 355 U.S. 225, 228 (1957) ("[D]eep in our law, is the principle that of all the powers of local government, the police power is 'one of the least limitable.'" (quoting *Dist. of Columbia v. Brooke*, 214 U.S. 138, 149 (1909))).

245. 539 U.S. 558 (2003).

246. 478 U.S. 186, 189 (1986) (upholding the legislative power to criminalize sodomy), overruled by *Lawrence*, 539 U.S. 558.

247. *Lawrence*, 539 U.S. at 578.

248. *Id.* at 578.

249. See Kaufman, *supra* note 39, at 435 (arguing that the Power of Context was in effect in *Lawrence* in that environmental factors provided the Supreme Court with the impetus to overrule *Bowers*).

registration laws with their increasing punitiveness may have created an environment that encourages our questioning whether sex offender registration schemes still retain their nonpunitive characterization.<sup>250</sup>

### III. THE DARK SIDE OF LEGISLATIVE EPIDEMICS

In the prior section, I reviewed the making of legislative epidemics. In this section, I explore their vulnerability. What is clear in tracking legislative epidemics is that after the euphoria of the *tip* come the realities of application. Some legislative epidemics have made the transition smoothly from pre-passage hype to seamless application and enforcement.<sup>251</sup> However, this is also a cautionary tale about laws created out of haste and emotion-laden rhetoric, where under the bright glare of reflection fault lines are exposed to reveal systemic problems that plague these epidemics.

#### A. *Runaway Legislation: A “Race to the Harshes”*

As Gladwell explains, medical viruses have the capacity to change.<sup>252</sup> So too, does the legislative epidemic. Like the HIV virus that mutated into a different and more virulent form,<sup>253</sup> the legislative epidemic sometimes mutates into a second generation of laws that are harsher than the original legislation. This is certainly the case with sex offender registration laws which, in the years subsequent to *Smith* and *Connecticut Department of Public Safety*, have become what could be fairly described as runaway legislation.

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250. See, e.g., *State v. Pollard*, 908 N.E.2d 1145, 1154 (Ind. 2009) (affirming dismissal of violation of residency restriction); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (rejecting the *Smith* analysis to conclude that, under Indiana’s constitution, the sex offender registration scheme is punitive in nature and thus violates ex post facto law when applied to previously convicted offenders); see also *State v. Wagoner*, No. COA08-982, 2009 WL 2783449, at \*9 (N.C. Ct. App. Sept. 1, 2009) (Elmore, J., dissenting) (advocating that sex offender registration scheme is punitive in nature).

251. See *supra* notes 65-76 and accompanying text (reviewing the changes in the laws on drunk driving).

252. See GLADWELL, *supra* note 1, at 22 (describing the change in the pandemic of 1918).

253. See GOUDSMIT, *supra* note 25, at 37-42.

With a public clamoring for harsher punishments, and a Court that has yet to establish parameters on due process, it is not surprising that this subsequent generation of laws has grown more aggressive. The old adage “give an inch, they will take a mile”<sup>254</sup> comes to mind in thinking of the actions of legislators who, under the guise of a nonpunitive alternative purpose, are imposing increasingly harsh regiments for the convicted sex offender. The second generation of registration schemes includes: residency restriction statutes,<sup>255</sup> GPS (Global Positioning Systems) monitoring of sex offenders,<sup>256</sup> expansion of the list of registerable offenses,<sup>257</sup> and harsher sentences for sex offenses.<sup>258</sup>

And in an interesting twist, Three Strikes Law suffered from runaway legislation *before* the original legislation was finalized. Indeed, in a fairly public dispute, the Klaas family distanced itself from Mike Reynolds and the final version of

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254. CHRISTINE AMMER, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS 247-48 (1997).

255. Over twenty states have residency restriction statutes. *See* Logan, *supra* note 188, at 6-7 (summarizing residency restriction laws). For examination of the legitimacy of residency restrictions, see Douard, *supra* note 188, at 45, decrying residency restrictions as an example of scapegoating; Joseph L. Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 366-67 (2007), who contends that residency restrictions impose a physical restraint under the Mendoza-Martinez test; Logan, *supra* note 188; Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 610-15 (2009), who contends that residency restrictions are ineffective; Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 103 (2007), who analogizes the historical practice of banishment to exclusion zone laws; and Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 562 (2009), who depicts the banishment of sex offenders as the “Geography of Membership.”

256. *See, e.g.*, CAL. PENAL CODE § 3000.07 (West Supp. 2009).

257. *See, e.g.*, CAL. PENAL CODE §§ 220, 290, 311.11 (West 2008 & Supp. 2009). Sometimes a court rejects the application of sex offender status to the crime charged. *See* State v. Robinson, 873 So. 2d 1205, 1217 (Fla. 2004) (disallowing sex offender classification to carjacker who did not know that child was asleep in the car).

258. *See, e.g.*, CAL. PENAL CODE §§ 220, 264, 286, 288(a) (West Supp. 2009).

the Three Strikes Law because of concern over its newfound breadth and scope.<sup>259</sup>

1. *The New Generation of Residency Restrictions.* In particular, residency restrictions, which prohibit convicted sex offenders from residing near designated locations “where children congregate”<sup>260</sup> have grown increasingly harsh. When first introduced in the 1990s, the buffer zone for the restriction was generally 1000 feet or less;<sup>261</sup> but today, more state and local governments have revised, or attempted to revise, their residency restrictions to include buffer zones of up to 2500 feet.<sup>262</sup> In addition, some states have expanded the term “where children congregate” from the traditional—schools, day care centers, and parks—to a much broader view of the term, including: bus stops,<sup>263</sup> video

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259. See Dan Morain, *Proposition 184—Three Strikes: A Steamroller Driven by One Man’s Pain*, L.A. TIMES, Oct. 17, 1994, at A3 (revealing that Mark Klaas was trying to defeat Three Strikes because of its breadth and scope).

260. See, e.g., GA. CODE ANN. § 42-1-12(a)(3)(b) (West Supp. 2009) (prohibiting sex offenders from living within 1000 feet of a school, day care center, or area where minors congregate); 720 ILL. COMP. STAT. 5/11-9.4(b-5) (2002) (barring sex offenders from living within 500 feet of a playground, child care centers, or facilities that offer programs for children).

261. See, e.g., DEL. CODE ANN. tit. 11, § 1112 (Supp. 2007) (preventing sex offenders from living within 500 feet of school property); MICH. COMP. LAWS ANN. § 28.733(f) (West Supp. 2009) (defining student safety zones as “1,000 feet or less from school property”); see also Logan, *supra* note 188, at 6-7 (stating that the average buffer zone in 2006 was 1,000 feet).

262. See, e.g., ALA. CODE § 15-20-26(a) (LexisNexis 2008) (revising buffer zone from 1000 feet to 2000 feet); CAL. PENAL CODE § 3003.5 (West Supp. 2009) (increasing residency restriction to 2000 feet under Jessica’s Law); accord A.C.A. § 5-14-128(a) (2009); OKLA. ST. tit. 57, § 590A (Supp. 2008); see also Press Release, N.J. Assembly Republicans, Casagrande Calls for Immediate Action on Sex Offender Bills following Court Ruling that Invalidates Local Ordinances (May 7, 2009), [http://www.njassemblyrepublicans.com/press\\_release.php?id=748](http://www.njassemblyrepublicans.com/press_release.php?id=748) (reporting on attempts to prohibit high and moderate-risk sex offenders from living within 2500 feet of schools, child care centers, or parks); Kelly Monitz, *Sex Offender Laws Face Challenge*, STANDARD—SPEAKER (Hazelton, Pa.), Apr. 4, 2009, at A1 (discussing Alleghany County’s attempt to prevent sex offenders from living within 2500 feet of schools, parks and child care facilities).

263. GA. CODE ANN. § 42-1-12(a)(3) (West Supp. 2009) (amending law to include bus stops); accord H.R. 4323, 2006 Gen. Assembly, 116th Sess. (S.C. 2006) (prohibiting certain sex offenders from residing within 1000 feet of bus stops).

arcade centers,<sup>264</sup> and libraries.<sup>265</sup> The effect is two-fold. First, larger buffer zones with more points of reference effectively freeze out most sex offenders from any community.<sup>266</sup> Second, the enactment of harsher residency restrictions in one locale creates a domino effect as communities engage in a competitive “race to the harshest” to enact stricter residency restrictions than neighboring jurisdictions.<sup>267</sup> And the fallout of the “race to the harshest” is that communities with less stringent residency restrictions are finding that sex offenders are moving to their neighborhoods simply “because they can find no other place to live.”<sup>268</sup>

Probably the first “sticky message” to capture public attention on the punitive nature of residency restrictions is news of released offenders forced to live in makeshift tents without electricity or heat under the Julia Tuttle Causeway in Miami’s Biscayne Bay.<sup>269</sup> Depicted as “a place so surreal and outlandish,”<sup>270</sup> the news of these living conditions provided a new enduring message of ostracism and isolation sex offenders face.

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264. See LA. REV. STAT. ANN. § 14:91.1(2) (2004) (adding free-standing video arcades to the list of locations).

265. See H.R. 7621, 2006 Gen. Assem., Jan. Sess. (R.I. 2006) (barring child predators from residing within 500 feet of day cares, schools, public parks, playgrounds, and libraries).

266. The stories of ostracized offenders are numerous. See, e.g., Carol DeMare, *Efforts to Protect Kids Often Carry Own Risks*, TIMES UNION (Albany, N.Y.), Sept. 9, 2007, at A1 (describing the travails of one offender who moved and was unable, because of residency restrictions, to find housing of any kind); Catharine Skipp & Arian Campo-Flores, *A Bridge Too Far*, NEWSWEEK, Aug. 3, 2009, at 46 (reporting on displaced persons around the country).

267. See, e.g., Brandon Bain, *What If There’s No Space? Residency Limits on Sex Offenders May Need to be Adjusted*, NEWSDAY (Long Island), Nov. 23, 2006, at A18; John Pain, *Miami Sex Offenders Get OK to Live Under a Bridge*, CHI. TRIB., Apr. 7, 2007, at 4; see also Jill S. Levenson, *Restricting Sex Offender Residences: Policy Implications*, HUM. RTS., Spring 2009, at 21-22 (acknowledging that most residents live in proximity to locations prohibited to sex offenders).

268. Michael Beebe, *Nowhere to Go, Sex Offenders Come Here*, BUFFALO NEWS, Sept. 5, 2007, at A1.

269. See Skipp & Campo-Flores, *supra* note 266, at 48.

270. *Id.* at 48-49.

But that situation, while extreme, is not unique. In Suffolk County, New York, homeless offenders “were crammed into a trailer that periodically moved around until finally settling on the grounds of the county jail.”<sup>271</sup> In California, following the enactment of “Jessica’s Law,” stricter residency restrictions have caused hundreds of offenders to be made newly homeless.<sup>272</sup>

Clearly, the public intends the isolation. It intends to force sex offenders to live anywhere but in their own communities. But there are also unintended consequences to these laws. Forced out of the communities, many offenders are unable to secure the support services which are mandated in their release.<sup>273</sup> Additionally, states with strict residency restrictions have seen a drop in registration. Offenders, fearful that they cannot meet the residency restriction requirements, would rather face the consequences of failing to register than the struggle to find shelter under harsher residency restrictions.<sup>274</sup>

*2. Proposed Legislation.* A review of proposed legislation suggests that we have yet to peak in the proliferation of sex offender legislation. A sample of the bills in Congress includes no parole for sex offenders and sexually violent predators,<sup>275</sup> required notice to foreign countries upon the intended travel of a convicted high-risk sex offender,<sup>276</sup> withdrawal of funding to states that do not have adequate protection against pre-trial release of violent or serious sex crimes,<sup>277</sup> funding for the implementation of the Sex

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271. *Id.* at 49.

272. See Bill Ainsworth, *Law Creates Homeless Parolees, Report Says: Sex Offenders Limited by Residency Rules*, SAN DIEGO UNION-TRIB., Feb. 22, 2008, at A1 (examining the plight of registered offenders to find housing); see also Lyda Longa, *Clusters of Shame: Laws Force Some Sex Offenders into Motels, onto Streets*, DAYTONA NEWS-J., Jan. 11, 2009, 1A (reporting that many sex offenders live in the woods or in their cars).

273. See Barbara R. Keshen, *Sex Offender Residency Limits Don’t Make Kids Safer*, CONCORD MONITOR, Mar. 6, 2009, at A9 (arguing that stricter New Hampshire residency restrictions will have negative implications).

274. See Larry Sandler, *Corrections Officials Speak Against Sex Offender Proposal*, MILWAUKEE J. SENTINEL, June 29, 2007, at 6B (expressing concern over the drop in registration in Iowa).

275. No Parole for Sex Offenders Act, H.R. 1375, 111th Cong. (2009).

276. International Megan’s Law of 2009, H.R. 1623, 111th Cong. (2009).

277. Protecting America’s Children Act of 2009, H.R. 2674, 111th Cong. (2009).



Offender Registration Tips and Crime Victims Center Programs,<sup>278</sup> and withdrawal of burial related benefits and funeral honors for certain convicted sex offenders.<sup>279</sup>

State legislative bills have been equally expansive. In an attempt to curtail sex offenders' activity on the Internet, a New York law has been proposed that would post personal information about convicted offenders on social networking sites such as MySpace and would curtail the amount of time an offender may surf the Internet,<sup>280</sup> and another proposal would prohibit sex offenders from visiting nursing homes or donning Santa's costumes.<sup>281</sup>

### B. *The "Too Sticky" Message*

Emotion-laden rhetoric is one hallmark of a legislative epidemic. It is, of course, the stickiness of this particular style of message that catalyzes a spread. However, this style of communication often resorts to broadly painted generalizations that are less intended for their truths than for their ability to inspire action. In the case of sex offender registration laws, there are several such messages: "all convicted sex offenders are predators," "all convicted sex offenders reoffend," "no convicted sex offender can be trusted to live in our neighborhoods," and "our communities must have these laws to protect us."

But what happens when the sticky message becomes too sticky? What happens when these generalized statements are repeated so often that they become embedded in the jurisprudence without pause for reexamination? One of the more disturbing realities of a legislative epidemic based on this type of rhetoric is that sometimes the underlying "truths" that initially compel the message turn out to be false. Or, they are misleading and inaccurate because they are based on sweeping generalizations. This was the caution sounded by historian Jenkins who wrote that a hallmark of

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278. Sex Offender Registration Tips Program Act of 2009, H.R. 2612, 111th Cong. (2009).

279. Jenny's Law, H.R. 731, 111th Cong. (2009).

280. See Erik German, *Safer Social Networking*, NEWSDAY (Long Island), Jan. 30, 2008, at A7.

281. Kevin McDermott, *The Battle Over Tracking Sex Offenders: Too Tough?*, PANTAGRAPH (Bloomington, Ill.), Mar. 1, 2009, at A1.

a societal panic is “when ‘experts,’ in the form of police chiefs, the judiciary, politicians and editors “perceive the threat in all but identical terms.”<sup>282</sup>

Ultimately, this may have also been the biggest failing of the Court in *Connecticut Department of Public Safety*, which sanctioned Connecticut’s inclusion of all sex offenders in its Internet registry without regard to whether they were dangerous, or whether there was a likelihood of reoffense. In doing so, the Court promoted one of the generalizations: a state could treat all sex offenders alike *because all sex offenders are alike*.

There are potentially other false messages that are so deeply entrenched in sex offender legislation that it will be difficult to lessen their impact or excise the sentiments from the jurisprudence. First is the claim that sex offenders recidivate in larger numbers than other offenders. In *Doe v. Poritz*, the New Jersey Supreme Court endorsed studies that reported recidivism rates of sex offenders at upwards of 40% to 52%.<sup>283</sup> The United States Supreme Court applied the *Poritz* gloss in *Smith* to conclude that recidivism posed by sex offenders generally is “frightening and high.”<sup>284</sup> Yet, Bureau of Justice Statistics for roughly the same timeframe as *Poritz* do not support the conclusion that sex offenders recidivate more than non-sex offenders. “Of the 9,691 male sex offenders released from prisons in 15 States in 1994, 5.3% were rearrested for a new sex crime within 3 years of release.”<sup>285</sup> In fact, sex offenders were “less likely than non-sex offenders to be rearrested for any offense—43 percent of

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282. See JENKINS, *supra* note 187, at 6.

283. *Doe v. Portiz*, 662 A.2d 367, 374-75 (N.J. 1995); see also *E.B. v. Verniero*, 119 F.3d 1077, 1097 n.17 (3d Cir. 1997) (“Heinous crimes have been committed against children after release from incarceration.”); *State v. Druktenis*, 86 P.3d 1050, 1068 (N.M. Ct. App. 2004) (“[S]ex offenders pose a significant risk of recidivism.”); *State v. Sakobie*, 598 S.E.2d 615, 617 (N.C. Ct. App. 2004) (“The purpose of [the state’s sex offender registration law] is to prevent recidivism because ‘sex offenders often pose a high risk of [reoffense] and . . . protection of the public from sex offenders is of paramount governmental interest.” (quoting N.C. GEN. STAT. § 14-208.5 (2003))).

284. *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)).

285. See U.S. Dep’t of Justice, Criminal Offender Statistics, <http://www.ojp.usdoj.gov/bjs/crimoff.htm#> (last visited Dec. 6, 2009).

sex offenders versus 68 percent of non-sex offenders.”<sup>286</sup> And in a separate study detailing 272,111 former inmates who were discharged in 1994, the lowest re-arrest rates were for those previously in prison for homicide or rape, while the highest reoffense rate were for those previously convicted of property crimes.<sup>287</sup>

Why the disparity in statistics? As cautioned by two commentators, “[c]ollapsing all sex offenders together into a single category and making generalizations about this diverse range of offenders . . . is likely to result in substantial mischaracterization regarding the risk of re-offending for many of these individuals.”<sup>288</sup> Yet still, global assumptions about sex offender laws retain their stickiness even in the face of contradicting facts.<sup>289</sup> A local politician’s statement highlights the enduring nature of this message, “I’d rather err on the side of keeping sex offenders as far away from our children as possible than worry about what an expert who doesn’t live in my village has to say.”<sup>290</sup>

In equal doubt is whether sex offender registration laws actually work.<sup>291</sup> Despite the persistent statements that expansive sex offender registration laws are essential tools to protect the community, there may be little truth to these

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286. *Id.*

287. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), *cited with approval in* *Ewing v. California*, 538 U.S. 11, 26 (2003).

288. Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81, 83 (2006).

289. *Id.* (positing reasons to reject blanket statements about sex offenders). In HIV/AIDS legislation, one commentator has questioned whether criminal laws of transmission should be reexamined because the medical nature of the disease has changed. See James B. McArthur, Note, *As the Tide Turns: The Changing HIV/AIDS Epidemic and the Criminalization of HIV Exposure*, 94 CORNELL L. REV. 707 (2009).

290. Erik German, *Sex Offenders Face Tighter Rules*, NEWSDAY (Long Island), Dec. 5, 2006, at A42.

291. The case of registered sex offender Phillip Garrido is instructive. Despite his registration for rape and kidnapping following his conviction in the 1970s, Mr. Garrido nonetheless was able to kidnap eleven-year-old Jaycee Lee Dugard and hold her for eighteen years undetected, all the while fulfilling his registration requirements. See Monica Davey, *Plenty of Data on Sex Offenses, but Registries Are Just a Start*, N.Y. TIMES, Sept. 2, 2009, at A1.

“too sticky” messages. One recent study, for example, found no evidence of reduction in sexual offending since registration schemes were adopted.<sup>292</sup> In fact, the study questions the use of significant resources to track previously convicted offenders when 95% of sex offenses are committed by “first-time” offenders not yet in the system.<sup>293</sup>

With respect to residency restrictions, in particular, one study from Florida found that sex offenders who live closer to schools or day care centers do not reoffend more often than those who do not live in the vicinity.<sup>294</sup> This research underscores the disquieting realization that residency restrictions may offer no purpose other than to placate a fearful public indoctrinated by the message.

### C. *Lofty Goals and Loftier Price Tags*

Sweeping criminal legislation, in itself, is not inherently bad. Witness the change in the 1980s on drinking and drunk driving laws,<sup>295</sup> or the laws to curtail cell phone use while driving.<sup>296</sup> Each was a measured response to perceived problematic behaviors. However, because of hyperbolic and hasty beginnings, certain legislation cannot be characterized as measured responses, and their expansive promises sometimes lead to the inability to fulfill their pre-passage goals.

Herein often lies their undoing, as is true of both sex offender registration laws and California’s Three Strikes Law, neither of which have been able to financially sustain their ambitious beginnings. For California’s Three Strikes Law, there is unprecedented economic fall-out from the sentencing reform it engendered. California’s burgeoning prison population—from 78,000 to 170,000 in twenty years—is attributed in large measure to the longer prison sentences convicted offenders receive as a result of its Three

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292. Sandler et al., *supra* note 160, at 299 (concluding that statistics do not support a positive impact from registration schemes).

293. *Id.* at 297.

294. See Levenson, *supra* note 267, at 21 (reporting studies that find no correlation between where the offender lives and the abuse).

295. See *supra* notes 65-76 and accompanying text.

296. See *supra* notes 7-8 and accompanying text.

Strikes Law.<sup>297</sup> In 2008, more than \$11 billion was spent in California on incarceration, second in general fund expenditure only to education costs for K-12 grades.<sup>298</sup> A 2005 report from the Legislative Analyst's Office estimates that the annual cost of housing all three-strikes inmates is \$500 million, and it is reported that "of the more than 40,000 California inmates incarcerated under three strikes, more than half were convicted of nonviolent felonies."<sup>299</sup> It should have come as no surprise that with a growing prison population and no additional facilities to house it, prison conditions would rapidly deteriorate. Indeed, the Little Hoover Commission wrote, "California's correctional system is in a tailspin."<sup>300</sup>

In 2009, a three-judge panel ruled that prison overcrowding was at such dangerous levels, and the health care so grossly inadequate, that incarceration violates basic constitutional rights.<sup>301</sup> At the heart of the downward spiral of California's prison system, some argue, is the enactment of its expansive Three Strikes Law, whose price tag could not be sustained without significant consequences.<sup>302</sup>

So compelling can be the push, that legislation is sometimes passed without sufficient money to fund it. This is true of the subsequent generation of sex offender registration schemes. Members of Congress, for example, have openly acknowledged that many programs of the Adam Walsh Act have been underfunded or never funded at

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297. Michael Rothfeld, *Prison Cuts Easier Said than Done*, L.A. TIMES, Aug. 23, 2009, at A1 (providing statistics on increase in prison population and the budget for incarceration).

298. Editorial, *Forcing Their Hands: Budget Crisis Pushes Governor and Lawmakers on Prison Reform*, SAN DIEGO UNION-TRIB., May 17, 2009, at F2.

299. Editorial, *A Simple Fix: Paperwork Crimes Don't Warrant Third Strikes*, SAN DIEGO UNION-TRIB., Jan. 20, 2009, at B7 (citing the report to argue for change in which crimes trigger the Three Strikes Law).

300. LITTLE HOOVER COMM'N, SOLVING CALIFORNIA'S CORRECTION CRISIS, at i (2007), <http://www.lhc.ca.gov/studies/185/Report185.pdf>.

301. *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 WL 2430820, at \*115 (E.D. Cal. Aug. 4, 2009). California has been ordered to reduce its incarcerated population up to forty percent within two or three years in order to relieve severe overcrowding. *Id.* at \*116.

302. See Editorial, *Court Order Should Prod State to Begin Prison Reform*, ALAMEDA TIMES-STAR (Oakland, Cal.), Aug. 9, 2009, at A14 (linking California's Three Strikes Law to the worsening prison conditions).

all.<sup>303</sup> In Jessica's Law, GPS monitoring and stricter residency restrictions are facing similar financial constraints. Although GPS monitoring of sex offenders is believed to be an important enforcement tool,<sup>304</sup> some are openly questioning the ability to finance this technology.<sup>305</sup> And stricter residency restrictions have put serious financial strain on governmental agencies unable to find suitable and inexpensive permanent housing for released offenders.<sup>306</sup>

There are other serious drawbacks to sweeping legislation that have financial implications to be sure. The Adam Walsh Act, for example, has drawn sharp criticism from various sectors who contend that states cannot comply with the behemoth set of mandatory obligations.<sup>307</sup> In fact, as of 2009, no state has been able to comply with the Act's requirements—so comprehensive and grand in scale is the Act.<sup>308</sup>

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303. See, e.g., 154 CONG. REC. S9352 (daily ed. Sept. 24, 2008) (statement of Sen. Coburn) ("We promised everybody we would do it, but have barely funded it at all."); accord 155 CONG. REC. E611 (daily ed. Mar. 10, 2009) (statement of Rep. Smith) ("Unfortunately, many of the programs authorized by the Adam Walsh Act . . . have received insufficient or no direct funding from Congress."); 154 CONG. REC. S4588-89 (daily ed. May 21, 2008) (statement of Sen. Hatch) ("Unfortunately, many of the enforcement provisions in the Adam Walsh Act have not been funded . . .").

304. See, e.g., Christian Nolan, *GPS Tracking Gets Cautious Endorsement*, CONN. L. TRIB., Nov. 24, 2008, at 1; Jennifer Sullivan, *Sex Offenders Get Tracking Bracelets*, SEATTLE TIMES, Oct. 2, 2008, at B6 (observing that GPS monitoring will improve public safety).

305. See, e.g., Mark Pitsch, *Eyes on Sex Offenders: Sometimes, or Always?*, WIS. ST. J., Mar. 1, 2009, at A1 (reporting on budget cuts proposed by Wisconsin governor to change nature of monitoring).

306. See Ainsworth, *supra* note 272; see also Paul Eakins, *Offender Law Draws Criticism*, LONG BEACH PRESS-TELEGRAM (Cal.), Mar. 13, 2008, at 1A (quoting an official for the State Department of Corrections and Rehabilitation).

307. See, e.g., SONRA, *supra* note 197, at 52-59 (statement of Emma Devillier, Att'y Gen. of La.).

308. See *id.* at 74-85 (statement of Ernie Allen, President & CEO, Nat'l Ctr. for Missing & Exploited Children); see also Jolynne M. Hudnell, *No State in Compliance with Adam Walsh Act as Deadline Approaches*, ASSOCIATED CONTENT, June 21, 2009, [http://www.associatedcontent.com/article/1831723/no\\_state\\_in\\_compliance\\_with\\_adam\\_walsh\\_pg3.html?cat=17](http://www.associatedcontent.com/article/1831723/no_state_in_compliance_with_adam_walsh_pg3.html?cat=17).

## IV. RESPONDING TO RUNAWAY EPIDEMICS

Sweeping legislation that is built on emotional rhetoric is hard to corral. Legislators are unlikely to champion retrenchment because of election defeats they risk,<sup>309</sup> and courts are hesitant to reign in legislative actions because of a historical deference to legislative intent. Yet, runaway epidemics beg for responses by these two participants.

A. *Judicial Pushback*

In the area of sex offender registration, slowly, there are stirrings of backlash to the judicial endorsement of sex offender registration laws as nonpunitive civil remedies.<sup>310</sup> One recent decision stands out. In a thoughtful examination of the *Mendoza-Martinez* “intent-effects” test, the Indiana Supreme Court in *Wallace v. State* concluded that Indiana’s Sex Offender Registration Act violates the ex post facto clause of the Indiana Constitution.<sup>311</sup> Although acknowledging that the Indiana and United States constitutions are similarly worded,<sup>312</sup> the Indiana Supreme Court applied “an independent analysis”<sup>313</sup> to determine that Indiana’s amended sex offender registration scheme is punitive in nature without a sufficient alternative nonpunitive purpose.<sup>314</sup> In what can only be viewed as a rejection of *Smith* when applied to current sex offender registration laws, the *Wallace* court found that it violates ex

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309. A prime example is the inaction of California lawmakers to respond to the worsening prison crisis, even in the face of reports over the last decade that demanded action. See Editorial, *supra* note 298 (decrying that legislators received five separate reports from the Hoover Commission explaining the deplorable conditions in prison, yet did nothing in response); see also *supra* notes 200-05 and accompanying text.

310. See e.g., *Wallace v. State*, 905 N.E.2d 371, 383-84 (Ind. 2009) (concluding that Indiana’s sex offender registration scheme is punitive in nature); see also Editorial, *Revisit Jessica’s Law*, L.A. TIMES, Jan. 19, 2009, at A16; Eric Russell, *Court to Shape Sex Offender Registry Debate*, BANGOR DAILY NEWS, Feb. 23, 2009, at A1 (commenting on potential changes in Maine’s sex offender registry law to distinguish between violent and nonviolent offenders).

311. *Wallace*, 905 N.E.2d at 379-84.

312. *Id.* at 377-78.

313. *Id.*

314. *Id.* at 383-84.

post facto law to subject previously convicted offenders to the newly-amended and increasingly harsh registration scheme.<sup>315</sup>

Of particular sway was the court's denunciation of a system that does not differentiate among sex offenders.<sup>316</sup> It is the sticky message, upon which this particular legislative epidemic is founded—that all sex offenders, no matter the nature of their conviction, pose a significant risk of recidivism. But this is a message *Wallace* roundly criticizes. Disapproving of this view, the court found that the Indiana registration scheme is fundamentally flawed because it is “so broad and sweeping.”<sup>317</sup> Despite endorsement in *Connecticut Department of Public Safety* to treat all sex offenders alike for purposes of inclusion in the state registry, the Indiana court is not alone in rejecting the underlying premise. Other jurisdictions are also questioning the legitimacy of sweeping sex offender registration schemes that ensnare the violent and nonviolent alike in a “one-size-fits-all” approach.<sup>318</sup>

Also of note is the inconsequential role that legislative intent ultimately played in the court's analysis. Unlike *Smith*, which relied on Alaska's legislative intent to create a civil remedy, the Indiana Supreme Court ruled that, even assuming the legislature had a nonpunitive purpose in drafting the Indiana registration scheme,<sup>319</sup> analysis of the other *Mendoza-Martinez* elements clearly demonstrates that the Act is punitive in nature. Writing for the

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315. *Id.* at 384; see also *Doe v. Schwarzenegger*, 476 F. Supp. 2d 1178, 1179 (E.D. Cal. 2007) (ordering California's Jessica's Law to be applied only prospectively); *Commonwealth v. Cory*, 911 N.E.2d 187 (Mass. 2009) (concluding that retroactive application of Massachusetts statute requiring GPS monitoring of sex offender on probation violates ex post facto).

316. *Wallace*, 905 N.E.2d at 381-82; see also *Dowdell v. City of Jeffersonville*, 907 N.E.2d 559, 562, 571 (Ind. Ct. App. 2009) (finding that, as applied to this defendant, prohibition for this sex offender to enter park violates ex post facto clause of the Indiana Constitution).

317. *Wallace*, 905 N.E.2d at 384.

318. See Russell, *supra* note 310, at A1 (commenting on potential changes in Maine's sex offender registry law to distinguish between violent and nonviolent offenders).

319. *Wallace*, 905 N.E.2d at 379 (“[A]ssuming without deciding that the Legislature intended the Act to be non-punitive, we conclude its effects are nonetheless punitive as to appellant Wallace.”).



unanimous court, Justice Rucker stated, “the Act violates the prohibition on ex post facto laws . . . because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed.”<sup>320</sup>

Ramped-up residency restrictions are facing greater scrutiny as well. In both Indiana and Georgia, increased residency restrictions have been invalidated. In *State v. Pollard*, the Indiana Supreme Court incorporated the analytical structure of *Wallace* to conclude that, as applied to defendant, amended residency restrictions under the Indiana Sex Offender Registration Act violate ex post facto law because of their punitive effect.<sup>321</sup> As in *Wallace*, the court reprobated residency restrictions that were so broadly created that they applied with equal force to those convicted of serious and minor sexual offenses.<sup>322</sup> Echoing the reasoning of *Wallace*, the court wrote, “Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes.”<sup>323</sup>

In *Mann v. Georgia Department of Corrections*, the Georgia Supreme Court faced whether residency restrictions are constitutional under slightly different legal circumstances.<sup>324</sup> The court was presented with a “Takings Clause” challenge by a registered sex offender who was forced to move from his home because a child care facility moved in within 1000 feet of his residence.<sup>325</sup> The court wrote, “[I]t is apparent that there is no place in Georgia where a registered sex offender can live without being

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320. *Id.* at 384.

321. *State v. Pollard*, 908 N.E.2d 1145, 1150-53 (Ind. 2009) (articulating under the *Mendoza-Martinez* test the reasons that Indiana’s residency restrictions were punitive in effect).

322. *Id.* at 1153 (repudiating the application of residency restrictions to those convicted of Class D felonies in the same manner as those convicted of Class A felonies).

323. *Id.*

324. *Mann v. Ga. Dep’t of Corrs.*, 653 S.E.2d 740 (Ga. 2007).

325. *Id.* at 741-42.

continually at risk of being ejected.”<sup>326</sup> Unlike other states, Georgia does not have a “move-to-the-offender” exception where registered offenders are not forced to leave when prohibited facilities move within the restricted area. Consequently, Georgia offenders “face the possibility of being repeatedly uprooted and forced to abandon homes in order to comply with the restrictions . . . .”<sup>327</sup> Although based on a small aspect of residency restrictions—whether the residency restriction is unconstitutional because Georgia does not offer an exception when facilities move to an offender—the broad-based language of the opinion portends other similar results.

### B. *Governmental Action*

So punitive are some new laws that, even without judicial intervention, government officials are redefining parameters to circumvent some of their harshest aspects. In California, for example, immediately following passage of Jessica’s Law in 2006, then-Attorney General Bill Lockyer reported his intention to apply the law only prospectively.<sup>328</sup> By not applying the law retroactively, 90,000 sex offenders would not be forced to relocate because of more expansive buffer zones.<sup>329</sup> It is an informal application of *ex post facto* law, if you will.

The Three Strikes Law also underwent informal and ad hoc revision when it was first enacted. Because the breadth of strike-eligible offenses include more than 500 crimes, many of which are nonviolent, prosecutors and judges alike tried, in an ad hoc manner, to craft ways around the newly enacted law.<sup>330</sup> Consequently, in the first six months after passage, only one in six eligible offenders was sent to prison for the proscribed twenty-five years to life.<sup>331</sup> The unofficial

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326. *Id.* at 742.

327. *Id.* (comparing jurisdictions that have exceptions in their residency restrictions).

328. Denny Walsh, *Sexual Predator Law Again Targeted*, SACRAMENTO BEE, Nov. 17, 2006, at A3.

329. See Editorial, *Lockyer’s Curveball on Prop 83 Baffles Bench*, ALAMEDA TIMES-STAR (Oakland, Cal.), Dec. 3, 2006, at Metro 5.

330. Richard Lee Colvin & Ted Rohrlich, *Courts Toss Curveballs to ‘3 Strikes,’* L.A. TIMES, Oct. 23, 1994, at A1.

331. *Id.*

prosecutorial responses to the newly enacted legislation were formalized in 2000 under the new administration in the District Attorney's Office in Los Angeles as prosecutors were instructed to avoid seeking three strike sentences for minor, nonviolent offenses.<sup>332</sup>

#### CONCLUSION

In theory, legislative epidemics serve an important function in the evolution of criminal jurisprudence. When properly conceived and executed, the epidemic provides a common framework of language for national decisionmaking to address the *tip* of the problem. Such was the case of drunk driving laws, which, over a generation, produced legislation on a variety of fronts to address the problem of drinking and driving.

However, for sex offender registration laws and Three Strikes, it is a cautionary tale of criminal laws created from haste and emotion. Fueled by high-profile cases, emotion-laden rhetoric, and inaccurate assumptions about crime and criminals, these epidemics have proliferated without sufficient check by lawmakers and courts.

The difficulties are apparent, the solution less so. Legislators are disinclined to slow the escalation because of election risks they face, and courts have been hesitant to intervene because of a historical deference they give to legislative intent. But as this Article has demonstrated, both lawmakers and the judiciary—major participants in the spread of legislation—must acknowledge their responsibilities to provide parameters to these popular, yet unbridled, laws.

But seeking retrenchment from the legislature on issues affecting crime may be a foolhardy undertaking—tilting at windmills, perhaps. The deteriorating California prison system offers an excellent example of a legislative epidemic that swelled out of control without hope of intervention by its lawmakers. Despite state-authorized reports about overcrowding and anecdotal stories of the deplorable conditions in the prisons, the California legislature failed to take ameliorative action. Indeed, even armed with this

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332. See Steve Berry, *Cooley's First Year Produces Few Highs or Lows*, L.A. TIMES, Dec. 3, 2001, at B1.

knowledge, California lawmakers continued to sponsor criminal legislation that would further tax an overcrowded prison system.<sup>333</sup> Action could only occur because the court intervened.

Because of the emotionally charged nature of some legislative epidemics, judicial intervention may be the only realistic response. The Indiana Supreme Court's decisions in *Wallace* and *Pollard* are not only dispositive for its state's registration scheme, the opinions also offer instructive guidance to courts in other jurisdictions seeking to craft measured responses to escalating sex offender registration laws.

In the end, however, where the legislative epidemic produces runaway legislation, it may be that judicial response at the state level is insufficient to change the direction of the national conversation. *Lawrence v. Texas*<sup>334</sup> reminds us of this lesson regarding criminalizing consensual sexual conduct. In the case of sex offender registration laws, *Wallace* sounds a clarion call to the United States Supreme Court to review the constitutional parameters of these increasingly harsh laws: to *tip* the epidemic in the other direction.

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333. Editorial, *supra* note 302 (recounting legislative refusal to take ameliorative action while continuing to sponsor measures).

334. 539 U.S. 558 (2003).