

**The War on Sex Offenders:
Community Notification in Perspective**

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Abstract

This article explores the contemporary phenomenon of ‘naming and shaming’ sex offenders. Community notification laws, popularly known as Megan’s Law, which authorise the public disclosure of the identity of convicted sex offenders to the community in which they live, were enacted throughout the United States in the 1990s. A public campaign to introduce ‘Sarah’s Law’ has recently been launched in Britain, following the death of eight-year old Sarah Payne. Why are sex offenders, and certain categories of sex offenders, singled out as targets of community notification laws? What explains historical variability in the form that sex offender laws take? We address these questions by reviewing the sexual psychopath laws enacted in the United States in the 1930s and 40s and the sexual predator and community notification laws of the 1990s, comparing recent developments in the United States with those in Britain, Canada, and Australia. We consider arguments by Garland, O’Malley, Pratt, and others on how community notification, and the control of sex offenders more generally, can be explained; and we speculate on the likelihood that Australia will adopt community notification laws.

Prologue: The Story of Sarah Payne

On Saturday 1 July 2000 at about 8 pm, eight year-old Sarah Payne disappeared from near her grandparents' home in West Sussex, Britain.¹ A search began immediately, escalating the next day into 'one of the biggest manhunts ever seen in the UK'. Over the next several days, several men were arrested, but then released. Sarah's parents made a televised appeal for the return of their daughter. During the next week, every police force in Britain was enlisted in the search for Sarah. On Tuesday, 11 July the police issued an 'e-fit', a picture of a man believed to be a suspect, based on a sighting of a young girl and a man at a petrol station. And on that day, the police launched a national campaign. The response was overwhelming: they received about 20,000 phone calls. Sarah's parents, Sara and Michael, together with their three other children 'helped keep the campaign alive'.

On 17 July, the police found the naked body of a young girl near Littlehampton, close to where Sarah had gone missing, and the next day, they confirmed that it was Sarah Payne, and launched a homicide investigation.

On Sunday, 23 July, *The News of the World*, as part of a 'name and shame' campaign, published the names, photos, and whereabouts (not exact addresses) of 49 male and female 'convicted paedophiles' in its regular Sunday edition and on its website. The paper's editor, Rebekah Wade, only in the job for two months, headlined the story, 'Everyone in Britain has a child sex offender living within one mile of their home'. The paper's managing editor, Stuart Kuttner, said 'We don't believe there's any room for vigilante action in a civilised society. We're going to call on our readers not to act in any unlawful way. What we're doing ... is warning and alerting, but most definitely not inciting!'. The paper's executive director, Robert Warren, said 'Public opinion is very much on our side', citing a poll of 614 adults that showed that 84 percent thought paedophiles should be named and 88 percent would want to

know if one was living in their area. The paper said it planned to publish information on 110,000 'proven' sex offenders.

How the paper obtained the names is not clear. According to a spokesman for the Association of Chief Police Officers, England's Sex Offenders Register contains about 12,000 names of people convicted for sexual offences: access to the register is restricted to police departments, the probation service, and MPs. News sources estimate that of the 250,000 Britons convicted of a sexual offence, 110,000 have victimised children. The *Sex Offenders Act 1997* mandates registration of offenders convicted after 1 September 1997, and those offenders supervised in the community, cautioned and released from prison on or after that date.

Over the next several weeks, there were vigilante-style attacks on persons named in *The News of the World* (as well as other papers) throughout many parts of Britain, and two suicides were linked to the 'naming and shaming' campaign. Incidents of mistaken identity were reported in South London and Plymouth. The worst violence occurred in Portsmouth. On 3 August, a 'convicted paedophile' left the Portsmouth area after his house was damaged by a mob. Some 150 people threw stones, overturned and torched a car, and damaged a portion of council flats in the Paulsgrove housing estate of Portsmouth. Residents of the Paulsgrove Estate protested for the next seven nights, calling for the removal of sex offenders in their area. Other towns and cities had similar protests.

After publishing the names of 200 'convicted paedophiles', *The News of the World* decided to end its campaign under pressure and criticism from the police and children's charities.

The News of the World has since called for the introduction of 'Sarah's Law' -- similar to Megan's Law in the United States -- which would allow parents to access Britain's Sex Offender Register, more stringent 'vetting' of those people who work with children,

parental review of organisations' vetting procedures in hiring workers, and closing 'loopholes' in the Sex Offender Register. The Association of Chief Police Officers did not initially support the proposed law, but has since changed its mind. The National Association of Probation officers does not support it. Home Secretary Jack Straw, who was originally dismissive of a more open access to the Sex Offender Register, now says that the 'Sarah's Law' proposal will be 'urgently considered'.

On 19 August, a vigil was held by the 'anti-paedophile protestors' from the Paulsgrove estate in memory of children who have been abused or killed by paedophiles. A spokesperson for the group said that it has received support from all over the world and was now setting up its own website.

Sarah Payne was buried in a funeral service on 31 August. At the time of her burial, Sarah's killer remains unknown.

Introduction

Our aim in this paper is to make sense of Sarah's story. Why did people in Britain respond to Sarah's death and the subsequent 'naming and shaming' of sex offenders in the ways they did? Why are sex offenders, and *particular* sex offenders, selected out from all other offenders for public condemnation, and why are particular forms of punishment directed only at them? Why do the laws passed take the form that they do? As we watched the televised scenes of the protestors, including adults and children holding banners saying 'Kill Them', our first reaction was, *could* this happen in Australia? Our second reaction was, *when* will this happen in Australia?

To address these questions, we sketch the historical emergence of sex offender laws in the United States, comparing those of an earlier period (1930s to 60s) with those today

(1990s). We describe the varied forms of legal control and the targets of control. The most recent form of sex offender laws -- community notification -- represents a significant break from previous laws in that its most expansive version gives parents, employers, and other interested parties access to information about sex offenders, where once this information was available only to those in criminal justice agencies². We focus on community notification laws in the United States, surveying the diversity of approaches taken by states, coupled with the expansion of federal powers. Criminal justice policies in the United States have become a template for other nations, including Britain and Australia, and thus, it is likely that Australia will have some version of Megan's Law.³ What now appears to be thinkable only in the exceptionalist United States may soon be thinkable and commonplace to citizens and legislators in other countries. Britain's proposed Sarah's Law, which was modeled on Megan's Law, will have other namesakes in other countries, as citizens demand ways to 'protect our children'.

One focus of this paper, then, is to describe these legal developments and their associated historical contexts in a compact and accessible way. Next, we want to consider why this recent generation of sex offender laws has emerged and taken a particular form. We assess arguments about the new punitiveness and emergent postmodern penal forms (Crawford 1997; Garland 1996; O'Malley 1999; Pratt 1997, 2000), as well as analyses that focus on sex offenders (Simon 1998). We conclude by considering the implications for Australia.

Historical contexts

Prior to the twentieth century, 'sex offences' were not classified separately, nor were 'sex offenders'⁴ differentiated from those convicted of other crimes in the form of punishment to which they were subject (Jerusalem 1995). In the United States, the passage of sexual

psychopath laws during the 1930s and 1940s in many states⁵ was a milestone in the segregation of sex offenders and their crimes. These laws were directed towards 'sexually dangerous offenders' who were considered to be suffering from a mental abnormality: they were to be treated, and when cured, released back into society (La Fond 1998). The enactment of these laws in the United States linked sexual offences with the concept of dangerousness. At the close of the late nineteenth century, dangerousness was initially conceived as linked to habituality⁶. The dangerous offender was the petty and professional criminal who committed primarily property offences (Radzinowicz and Hood 1980). By the 1930s, dangerousness was increasingly associated with violent and sexual offences. It was widely conceived as a typical and consistent characteristic of specific individuals: the personality of the individual offender became the focus of attention (Pratt 1995, 1997).

Sutherland (1950: 143-47) identified three stages in the emergence of sexual psychopath laws in the United States.⁷ First, 'laws are customarily enacted after a state of fear has been aroused ... by a few serious sex crimes. ... The sex murders of children are most effective in producing hysteria'. Next, the fear is mobilised across many sectors: 'people in the most varied situations envisage dangers and see the need of and possibility for their control'. Third, there is 'the appointment of a committee' which attempts to 'determine "facts", studies procedures in other states, and makes recommendations'. Sutherland noted that 'these committees deal with emergencies, and their investigations are relatively superficial'. Nonetheless, the proposed law is touted as 'the most scientific and enlightened method of protecting society against dangerous sex criminals'.

Sutherland decried 'these dangerous and futile laws' (p. 142) as having 'little or no merit' (p. 143). While the law's content lacked any scientific basis, the diffusion of the laws was explicable as a form of 'collective activity'. Sutherland was prescient in tracing the specific content of sex offender laws to the favoured 'social movement' of the day in criminal

justice, the 'treatment policy'. During the 1930s and 40s, the treatment policy was on the ascendant, the sex offender constructed as a 'socially sick person' or 'patient'. Sutherland saw these laws as dangerous in part because they took offenders outside the 'realm of ordinary punishment' in providing for commitments to state mental hospitals for indefinite periods of time. And in part, the laws were dangerous because they rested on false or questionable propositions about sex offending, including 'that most sex crimes are committed by "sexual degenerates", "sex fiends", and "sexual psychopaths"' and that these persons persist in their sexual crimes 'throughout life' and 'that any psychiatrist can diagnose them with a high degree of precision' although they might at some time be 'permanently cured of their malady' (p. 142). He believed that such laws might 'injure the society more than do the sex crimes' because the concept of 'sexual psychopath' was too vague. The laws were futile because the states passing them made 'little use of them' and there were no differences in rates of reported sex crimes in states with and without the legislation.

Today, the *circumstances* that spark the passage of laws to control sex offenders are identical to those in Sutherland's time: a child goes missing, but is found dead and perhaps mutilated, the subject of a murder investigation. However, the laws' *contents* and the *contexts* in which they have emerged have changed dramatically. The *contents* of laws have shifted from a 'treatment' orientation to a 'punitive' policy. The sexual psychopath laws of the 1930s and 40s had an optimistic approach to sex offending: the problem could be solved by the intervention of medical expertise and psychiatric therapy. These laws were seen as an alternative to punishment: sex offenders were involuntarily detained under civil statutes for purposes of treatment and rehabilitation, not as punishment for past criminal behaviour (Washington Institute 1996b). By the 1970s, most states had repealed their sexual psychopath laws. There were concerns for the civil rights of offenders, the ineffectiveness of treatment programs, and the lack of a consistent or scientific basis for identifying and

classifying people as sexual psychopaths. The loss of faith in the ability of experts to cure sex offenders, and to be able to accurately predict future violent behaviour, coupled with the generalised movement away from the rehabilitative ideal during the 1970s, had a profound effect on approaches to punishment of sex offenders (Pratt 1995; La Fond 1998). A quasi-replacement for the sexual psychopath laws of the 1930s and 1940s are the sexual predator laws of the 1990s (more below). The purpose of sexual predator laws is not to treat or rehabilitate; the aim is to confine those considered too dangerous to be released into the community. Sexual predators, though considered sane, are believed to suffer from a mental disorder or abnormality that is not amenable to treatment (Simon 1998).

The *political context* of the laws has shifted. Where once the welfare state and institutions of criminal justice assumed sole responsibility for crime control, during the 1970s and 80s, the neo-liberal state has devolved responsibility for crime control to citizens in 'partnership' with the police. As Pratt (1997: 157) puts it, 'self protection and state protection are to compliment each other, rather than exist ... independently of one another'. And as Garland (1996) argues, individuals are increasingly mustered to adopt a 'responsibilisation strategy': accepting responsibility for their own welfare, not just in the area of crime, but in all areas: health, education, employment, and welfare.

The *social context* of the laws has changed. Whereas in the 1950s, Sutherland referred to 'the agitated activity of the community in connection with the fear [of sex crime]', during the 1980s and 90s commentators detect a more generalised and chronic sense of citizen fear and insecurity. That fear is not just about crime itself, but includes 'a range of more diffuse anxieties about one's position and identity in the world' (Sparks 1992: 14). Pratt (1997: 151) suggests that while neo-liberalism brought new 'possibilities of existence', it also 'create[d] new fears and uncertainties through the dismantling and erosion of traditional support structures', and that this heightened sense of vulnerability was most significantly

experienced by women. Best's (1990) analysis of the 'rise of the child victim' in the 1970s and 1980s suggests, however, that an anxious and fearful citizenry focused its attention on *threats to children*. Such a focus 'offered an outlet for ... anxiety people felt about an uncertain future' (Best 1990: 180). They targeted 'child molesters, kidnappers, and other deviant adults', thinking that if they could be identified and controlled, 'the threats would disappear and the future could be secured'. According to Best, concerns for 'endangered children' encompassed more general 'uncertainties of the future' by all those who felt vulnerable (p. 181).

Legislating against sex offenders in the 1990s

Sex offender laws today take four forms: sentencing enhancements for certain classes of violent or sex offenders, sexual predator laws, registration of sex offenders, and community notification of sex offenders. Whereas sentencing enhancements and sexual predator laws are methods of confining sex offenders for longer periods of time in the interests of community safety, registration laws are used by law enforcement to track or keep an eye on those sex offenders who have served their prison or probation time, but are now living in the community. Community notification take registration a step further by permitting law enforcement to release the names of sex offenders, along with other identifying information, to the general public.

Sentencing enhancements. Some sentencing statutes provide for longer terms of imprisonment for certain classes of dangerous offenders, including predatory sexual offenders and those with previous convictions for sex offences. For just over half of the states in the United States and the federal government, which already have three strikes laws, felony convictions for sex offences would fall under their mandatory sentencing provisions (for review, see Lieb et al 1998: 70-71). One extreme version of incapacitative sentencing

laws for sex offenders is California's 'mandatory castration bill', passed in 1996, and subsequently passed in several other states in the United States. The law has not yet been applied or challenged in court (Lieb et al 1998: 70-71). In Australia, legislative activity in a number of states, including Victoria, Queensland, and Western Australia, have significantly increased maximum penalties for sexual offences in the 1990s. In Victoria, the *Sentencing (Amendment) Act 1993* was passed soon after the election of a new government. The law 'was rushed through Parliament' in response to citizen concerns that sexual and violent offenders were not incarcerated long enough (Freiberg 1997: 151). It permits indefinite sentences and consecutive sentences for 'serious sex offenders', 'provisions ... contrary to the prevailing sentencing culture' but, Freiberg believes, are 'modeled on the failed law-and-order experiments of ... US jurisdictions' (p. 152).

Sexual predator laws. Sexual predator laws authorise the continued detention of sex offenders beyond the time served for a criminal sentence. Because they are only invoked after the offender has served a criminal sentence⁸, they operate as a last resort to confine offenders who cannot otherwise be detained under criminal or mental health laws (La Fond 1998). Unlike the earlier sexual psychopath laws, which were justified as an alternative to incarceration and punishment, sexual predator laws are used to confine a group understood to be 'the worst of the worst' (Lieb et al. 1998: 46) for an indefinite period of time. Unlike sexual psychopath laws, which targeted particular behaviours or personality types for treatment, sexual predator laws attempt to target those who are likely to pose a future threat to community safety. The nature of that threat to community safety is highly specific, however. The term sexual predator *excludes* those whose victims are their own children or intimates; a predator is presumed to target strangers and have multiple victims (Lieb et al. 1998: 43). The terms *psychopath* and *predator* are indicative of the major shifts from an earlier era to the 1990s in imagining who these sex offenders *are*. Psychopath is a term used

in psychology to describe mental disease diagnosed by medical experts. The term predator has no medical definition: predators are not the subjects of scientific expertise and diagnosis, but, as Simon (1998) suggests are monsters conjured from images of evil.⁹

Washington State was the first United States jurisdiction to pass a sexual predator law in 1990. As of 1997, nine states had sexual predator laws (Lieb et al. 1998: 66). While the legal proceeding to deem a person a sexual predator is considered a civil-law commitment to imprisonment, 'the state must prove its case beyond reasonable doubt to a unanimous jury' (Lieb et al. 1998: 67). For those adjudicated a sexual predator, their release is conditioned on a jury finding that it is safe to release them. In the first several years of Washington's law, there was great concern that the new law would incapacitate a large number of offenders (Scheingold et al. 1992). However, from 1990-97, 26 offenders were adjudicated sexual predators.

In 1996, the United States Supreme Court reviewed the constitutionality of sexual predator laws. In *Kansas v. Hendricks* (1996), the Court upheld the law's constitutionality, although in a close five-to-four decision. Those in the majority ruled that as a civil commitment, the intention of the Kansas statute was non-punitive, and that its implementation did not constitute punishment (for an extended analysis, see Simon 1998). Those in the minority found that the statute violated 'the ex post facto clause' because it did constitute additional punishment. So long as courts deem sexual predator laws civil and the intent of incapacitation non-punitive, the constitutional protections normally available under criminal statutes are curtailed (La Fond 1998; Simon 1998). It is clear that in the United States, there is a decisive shift away from concerns for the rights of offenders against the abuses of state power, developed in United States Supreme Court criminal jurisprudence of the 1960s and 1970s. Instead, there is increasing interest to find legal methods of protecting the community from potential threats posed by sex offenders.

In Australia, Victoria passed a law that is analogous to sexual predator laws, although it did not target sex offenders per se. *The Community Protection Act 1990* (Vic) was directed at one individual, Garry David, to secure his continued detention beyond the imposed criminal sentence. Another law, *The Community Protection Action 1994* (NSW), was aimed at the continued detention of one individual, Gregory Kable. Both David and Kable had histories of violence, actual and threatened, although neither had a known history of sexual violence.

Registration of sex offenders. Convicted sex offenders are required to register with the police after release from prison, parole, or probation, and to provide a range of identifying information, including their name, address, date of birth, criminal history, photo, fingerprints, and DNA material. Precisely *who* is a sex offender for purposes of registration varies from country to country. For example, in the United States as of April 1998, Sex Offender Registries (SORs) have been established in 49¹⁰ states and the District of Columbia; there is large variation in the different offences requiring registration, 'the date that "triggers" registration ... and the duration of registration', but a total of over 276,000 sex offenders were then registered. Eight jurisdictions require registration for convictions prior to 1980, and there is pressure by the federal government to 'expand rather than decrease the number of offences covered' (US Department of Justice 1999: 4). In Britain, by contrast, only those sex offenders under supervision, or who are cautioned, convicted, or released from prison on or after 1 September 1997 are required to register.

The idea of sex offender registration is not new: California enacted the first sex offender registration law in 1944. Other states followed, but it wasn't until the 1990s that registration gained popularity in the United States: 38 states enacted registration laws between 1991 and 1996 (Washington Institute 1996a). States' efforts have been overtaken by three federal laws that mandated offender registries: *Jacob Wetterling Crimes Against*

Children and Sexually Violent Offender Registration Act (1994), *Wetterling* as amended in 1996 by the federal Megan's Law, and *Wetterling* as amended in 1996 by the *Pam Lychner Sexual Offender Tracking and Identification Act 1996*.¹¹ The aim of *Wetterling* (1994) was to create a national 'gap-free network' of registration programs so that sex offenders convicted in one state could not escape detection or the requirement to register by moving to another state (US Dept of Justice 1997a). The aim of *Wetterling* as amended by the federal Megan's Law (1996) was to direct states to release information 'that is necessary to protect the public concerning a specific person required to register' (*Wetterling* 170101(d)(3) quoted in US Dept of Justice 1997a). Under *Lychner*, in addition to imposing more stringent registration requirements, the Congress authorised the Federal Bureau of Investigation to develop a National Sex Offender Registry (NSOR), to 'include fingerprint and photo images of registered offenders' (US Dept of Justice 1999: 2). The NSOR was to be in place in mid-1999. State compliance with *Wetterling*, as amended, has been total (with the exception of one state). This is because the federal government threatened to decrease by 10 percent annual federal crime funding to states that did not enact registration laws by September 1997.

In Canada, registration has existed since 1994, although it appears that at the federal level, correctional officials gather the information (that is, offenders are not obliged to supply it), and they decide how it should be disseminated to law enforcement authorities.

In Australia, there have been initiatives to register sex offenders at the state and federal levels. At the state level, the establishment of a sex offender register was recommended by the Victorian Parliamentary Crime Prevention Committee in 1995 and the Wood Royal Commission into the New South Wales Police Service in 1997. The Criminal Law (Sex Offenders Reporting) Bill to establish a sex offender register was tabled in the Queensland Parliament in 1997. The Queensland Crime Commission was established in 1997 to investigate the incidence of criminal paedophilia and to maintain an intelligence

database on paedophile activities. State and Territory governments have agreed to share lists of teachers suspected of paedophile activity to enable applications for employment in the education system to be vetted, and similar vetting procedures for employment in the health care system in New South Wales are being developed (Puplick 1997). At the federal level, a Child Sex Offenders database is currently being developed as part of CrimTrac, a Commonwealth project to establish a new national database for law enforcement. CrimTrac will provide electronic access to data such as DNA, motor vehicle registries, fingerprints and Apprehended Violence Orders, in addition to a child sex offenders database (Minister For Justice and Customs Media Release, November 17, 1998).

Citizens' concern for protection against stranger sex offenders could stop with registration laws, if citizens believed they could rely on law enforcement officials to keep a watchful eye on convicted sex offenders released from prison or probation. Celebrated cases of dead and sexually mutilated children have served to push sex offender registration laws one step further toward community notification.

Community notification. Community notification laws authorise the public disclosure of a convicted sex offender's personal information (e.g., name, address, offence history) to people and organisations in the local community in which the ex-offender resides. In the United States, these laws are justified as a way to increase public safety (via informing citizens about sex offenders who live in their area) and to assist law enforcement in the investigation of sex offences (US Dept of Justice 1997a). Notification takes distinctive forms, ranging from: (1) *general disclosure* to the public of sex offender information (the least restrictive form), to (2) *selective disclosure* of information to particular 'at risk' individuals and organisations (somewhat restrictive), and finally to (3) *limited disclosure* of information on a 'need to know' basis (most restrictive). The Megan's Law amendment to the federal *Wetterling* legislation effectively mandated community notification across all the

states, although it prescribed limited disclosure, at a minimum. In Canada, community notification was introduced in the mid 1990s, and is currently in place in six provinces (Lieb et al. 1998: 98), although the form it takes appears to be limited disclosure. Unlike the United States, Canada has no federal law requiring notification at the provincial level. Unofficial forms of community notification are evident in publications such as the *Australian Paedophile and Sex Offender Index* (Coddington 1997). Compiled from newspaper reports, and checked against court records, each index lists the names, location, offences, and sentences of convicted sex offenders. These indexes are incomplete: not listed are offenders whose names were suppressed by the courts. A number of persons are included by identifying information, such as age, occupation, offence and location, but who are unnamed due to the unavailability of appeal details.

The idea of community notification of sex offenders first emerged in the United States in 1989, following the sexual mutilation of a seven year-old boy by a man with a long history of previous convictions for sex offences. From 1990, when community notification was first enacted in Washington State, to 1996, when endorsed federally, community notification had been the exclusive jurisdiction of states. From 1990 to 1996, 14 states enacted community notification laws. While many states modelled their legislation on Washington's, others adopted different measures. For example, while the Washington law authorised community notification when law enforcement officials believed it was necessary (i.e., limited disclosure), New Jersey's Megan's Law (1994) made notification mandatory and freely available (i.e., general disclosure).¹²

As of August 1998, all US jurisdictions, but one, have community notification: 22 states use the least restrictive, general disclosure method; 14, selective disclosure; and 14, limited disclosure. With the emergence of a NSOR and increasing federal oversight of community notification, more states may opt for the general disclosure method. A summary

of state developments, current as of August 1998, notes these features of states' dissemination of registry information. Of 50 jurisdictions, 28 percent considered their SOR data 'confidential, to be available to law enforcement only and only for law enforcement purposes' (US Dept of Justice 1999: 6). However, in compliance with the federal Megan's Law, the law enforcement agency would share information on an 'as needed for public protection' basis. Public access to SOR data varies. Internet websites were being used by 12 percent of jurisdictions, and websites were being discussed by many others (p. 6). In 60 percent of states, citizens can obtain SOR information by formal request.

For those states authorising general access of sex offender information, states vary in the information they provide, depending on a calculation of an offender's risk of committing another sex offence. In some states, the risk is determined by a court, but in most states, a three-tier system is used to assess an offender's potential risk of committing another sex offence. Typically, the three tiers are (1) level 1: (low risk to re-offend) – information is confined to law enforcement agencies; (2) level 2 (medium risk to re-offend) – information may be disclosed to schools, community organisation; and (3) level 3 (high risk to re-offend) – in addition to disclosure to organisations, general disclosure via press releases, ads in newspapers, and direct mail to residents in the offender's community (Washington Institute 1996a).

Community notification has been subject to legal challenge, at both state and federal levels, on the grounds that it constitutes additional punishment, that it should not be applied retrospectively to criminals who committed offences prior to enactment of notification laws, and that it violates an offender's right to privacy (US Dept of Justice 1997a). While some laws have undergone procedural modifications¹³, most legal challenges have not succeeded (see Lieb et al. 1998: 76-81; Simon 1998).

This review of sex offender laws suggests that, apart from prosecution and sentencing, the most popular approach to control sex offenders is by registration with law enforcement authorities. Registration then shifts to community notification, with varied degrees of restrictiveness in the amount of information provided by officials and how it is provided.

Community notification, especially the general disclosure method, is based on the deceptively simple belief that if you could identify all the 'bad' people, you could protect your loved ones from harm. It is encapsulated in the words of Megan Kanka's mother: 'If I had known that three sex perverts were living across the street from me, Megan would be alive today' (Steinbock 1995: 7).

Limitations and Claimed Benefits of Community Notification

As a method of responding to public fear of crime and outcries over 'protecting our children', community notification laws (and sex offender laws more generally) are explicable in light of changing penal arrangements, among other reasons that we shall consider in the next section. Here we assess their limitations and claimed benefits.

Limitations. A major limitation of community notification laws is that they focus on a relatively rare form of sexual assault. They target strangers who victimise children, when all available evidence shows that child sexual victims are most likely to be victimised by those they know and that the most frequent victims of sexual violence are young adult women. Lieb et al. (1998: 54) suggest four reasons why so much effort has been placed on such a rare harm. First, they argue that it may be easier to obtain political consensus because the crimes are so heinous. Second, they claim that 'intrafamilial offences do not threaten the community, but only the families of offenders'. Third, they say that 'exclusively intrafamilial offenders are easier to supervise than extrafamilial offenders' because (paraphrasing) it is

easier to control access to a smaller pool of potential victims. Finally, they claim that extrafamilial offenders have more victims and 'are more persistent in their offending'.

With the exception of their first reason, these are rather astonishing claims! Lieb et al. (1998) propose that the threat of violence from family members is less important (and potentially less harmful) than that from strangers and that supervision of interfamilial offenders is easier because their victims are more easily known. Their claim that extrafamilial offenders are more persistent offenders, though frequently made in the field, cannot be substantiated. As Annie Cossins (1999) points out in her critique of the *Paedophile Inquiry Report* by the Royal Commission into the New South Wales Police Service (1997), research studies show a far more complex picture of victimisation and offending than the dichotomous extrafamilial/intrafamilial category. In brief, her review finds that offenders move back and forth between victimising family members, others they know, and others they don't know; that when a child is abused by someone they know, the abuse is far more frequent; and that the person 'most likely to abuse both boys and girls is known but unrelated to the child and who may be in a position of authority over the child'. The conclusion reached by Lieb et al. (1998), like that reached by the New South Wales Royal Commission, is based on studies of incarcerated sex offenders, from which it is deduced (inaccurately) that the extrafamilial offender is more persistent, more dangerous, and more likely to re-offend.

A second limitation is that community notification can be a positive disability to offenders' rehabilitation, including the opportunity to secure employment and housing. Not only do sex offenders face probable discrimination by employers due to their criminal records, but when notification involves disclosure to the general public, employers are less likely to employ a sex offender due to fear of loss of business from an informed public (Rafshoon 1995; Lewis 1996). Indeed, community notification may have the effect of

increased offending. The threat of community notification may prevent convicted sex offenders from seeking or maintaining treatment. Fear of reprisals against individual offenders, as well as family members, may mean that offenders deliberately avoid creating new, or contacting existing support networks of family and friends, both of which are considered relevant factors in lowering recidivism (Earl-Hubbard 1996). The threat of community notification may also drive an offender underground in an attempt to hide his identity. Responses to a survey of law enforcement officials carried out in Washington State reveal that offenders subject to community notification frequently leave communities after notification (Washington Institute 1996c).

A third limitation is that not all sex offenders are classified as such: due to police and prosecutorial practices, sex offences may be plea bargained down to lesser, non-sexual offences. For example, community notification would not have helped Polly Klaas. Polly's murderer was not listed in California's registry of convicted sex offenders, despite his record of sexually assaulting women and having spent 15 out of the 20 years prior to his offence against Polly, in prison for sex offences. The sex offence charges had been plea-bargained down to lesser offences, which were exempt from registration (Jerusalem 1995).

Claimed benefits. Among the benefits that have been claimed in the United States for community notification are these:

- It will promote greater inter-agency collaboration by law enforcement.
- It will develop stronger bonds between law enforcement and members of the general community with greater contact in educating the public about sex offenders.
- It can be used to 'force' previously reluctant sex offenders to participate in treatment programs: by their participation, sex offenders can avoid notification by demonstrating rehabilitation.

- Members of the public are better able to protect themselves and their children, when they know a convicted sex offender resides in the neighbourhood.

Taking each of these claimed benefits in turn: for the first, yes it is true that with a state and now, a national SOR database, there will be more cooperation among United States law enforcement agencies, as well as between them and other groups. Toward what end and with what positive impact remains uncertain. For the second, we wonder about the content of the community education that the police will be able to supply, especially with their focus on stranger danger. For the third, we suspect that an unmotivated, or disingenuously motivated offender would be a poor candidate for successful treatment. For the final item, we have a more extended assessment.

Knowing that a convicted sex offender lives next door is similar to knowing that a person convicted of murder or drug dealing or that an HIV carrier is your neighbour. While such knowledge may assist a community to 'feel better', by increasing perceptions of control, there is no evidence that public safety will increase (Prentky 1996). Apart from being prepared to point out where a very small number of sex offenders live and work, the state has not offered other resources to assist communities to effectively deal with those identified. Communities are being left to manage the danger themselves, leading expectably to miscarriages of vigilante justice.

Community notification has precipitated serious attacks on sex offenders, including arson, loss of employment, verbal and physical abuse, and death threats (Turner 1996). The family members and friends of sex offenders have also suffered harassment¹⁴ (Washington Institute 1996c). The house in which a registered child sex offender was about to move was burned to the ground after a public meeting was held regarding the sex offender's presence (Earl-Hubbard 1996). In another incident, two men forced their way into a house and attacked a sleeping man; the address had been notified to the community as that where a

convicted sex offender intended to reside, but the man attacked was not the offender¹⁵ (Martone 1995). Following release from a juvenile treatment centre, a registered child sex offender moved in with his mother; after notices were posted around the apartment block, he and his mother were evicted. He was evicted two more times following campaigns of egg throwing, distribution of notices, and other harassment (Washington Institute 1996a). Although such attacks have been condemned as not the intended outcome of community notification, such behaviour seems to be an inevitable consequence of notification (Rafshoon 1995).

In summary, community notification laws, and the registration systems they depend upon, are narrowly conceived; they are based on popularised stereotypes of predatory strangers who victimise vulnerable children. Such laws will be ineffective in preventing most sexual violence, because they fail to address the structural sources of men's violence against women and children. If these 'dangerous and futile laws' do not address the reality of most sexual violence, why do they exist?

Explaining the War on Sex Offenders

To explain the war on sex offenders, we need to consider several linked, but separate questions. First, why are sex offenders (of certain types) singled out? Second, what explains the modes of control in the 1990s compared with those of the 1930s and 40s in the United States? Third, how do we relate contemporary developments in the United States to those in Britain and Australia? While we can see some parallels across the three nations, the speed and extremity of developments in the United States sets it apart. The question remains whether we can expect Australia to follow, either in whole or in part, the lead of the United States. In addressing these questions, our analytic focus is on the control of sex offenders, not on general developments in penal policy. We agree with O'Malley (1999, 2000) that

contemporary penal policies reflect a combination of 'contradictory governing rationalities' (O'Malley 2000: 163) and that it would be inaccurate to depict developments as moving in one direction or as the result of radical social transformations. We propose that the control of sex offenders offers a case study, in what O'Malley (2000: 163) terms the 'relational politics' of neo-liberalism and conservatism working along side each other.

Why sex offenders? Sex offences, particularly against children, evoke intense reactions in people. Sutherland (1950: 143) suggested that while 'the ordinary citizen can understand .. forcible rape of a woman, he concludes that a sexual attack on an infant or a girl ... must be an act of a fiend of maniac. ... The behaviour is so incomprehensible'. A more recent commentator suggests that these offences 'are almost terroristic, in that they strike people unawares in their own neighbourhoods and provoke distrust, fear and frustration' (*Harvard Law Review* 1994: 791). Despite what we have learned from child victims of sexual abuse -- it is people children *know* who are most likely to harm them -- the focus of legislation in the United States to date has been on identifying and controlling the 'predatory stranger' who harms and sexually violates children.

It is *the supposed protection of children* that lies at the core of sex offender laws. Best (1990) hypothesises that the 'rise of the child victim' in the 1970s and 80s in the United States reflects the fears and anxieties of vulnerable groups, who are concerned about their own lives. By focusing on threats to children, the most vulnerable and innocent members of society, segments of a fearful public address and alleviate more generalised anxieties and threats.

And why the intense focus on strangers? 'Stranger danger' is of course not confined to sex offenders, but one reason, unremarked in the literature to date, is that people, in particular, white people, are less able to use their normal cues in separating 'people like us' (whom we can trust) from 'strangers' (whom we cannot trust). A striking feature of the

demographic profile of men convicted of sexual assault and incarcerated in state prisons in the United States, is that compared to men convicted of other violent offences, they are more likely to be older, generally in their thirties, and more likely to be white¹⁶ (US Dept of Justice 1997c). 'Stranger danger' is therefore of a *white stranger*, upsetting the racial schema that white people, including children and their parents, may use in negotiating safety and danger in their neighbourhoods. For example, the man convicted of murdering Megan Kanka was well known in the neighbourhood; the local children used to play with his puppy in the park (Kong 1995).

Why the modes of control today? There exist two modes of controlling sex offenders today, each displaying different configurations of state power, citizen responsibility, and expert knowledge. Sexual predator laws today are descendants of the sexual psychopath laws of the 1930s and 40s; although they differ greatly in the assumptions made about the potential for an offender's reform, they are similar in relying on expert knowledge (coupled with jury deliberations) to decide on indefinite civil commitments. Sexual predator laws can be viewed as exemplifying a neo-conservative strand in penal politics, where the state re-asserts its power to punish. Although community notification has some precedent (more below), it is unlike any criminal justice policy of the past century in permitting members of the general public to have access to information about convicted persons, and, in its most expansive form (general disclosure) in *requiring* police (or other officials) to post and circulate the information. It reflects governmental concession to 'the people' that they, not the police (or other criminal justice personnel) can more effectively control crime, and thus it is a case study in 'populist punitiveness'¹⁷ (Bottoms 1995: 40). It exemplifies devolved state responsibility for crime and an increasing emphasis on individual and community responsibility (Garland 1996; Crawford 1997), which are associated with a neo-liberal strand in penal politics. The risk classification scheme that officials use to decide the form of

disclosure is indicative of some, but not all, elements of the 'new penology' (Simon 1998; Feeley & Simon 1992).

There is precedent for community notification laws in the 'scarlet letter' conditions in United States sentencing. For example, in California, 1978, a convicted thief was required to wear tap shoes to warn potential victims; in Florida, 1986, a drink driver was required to affix a 'Convicted DUI - Restricted License' sticker to his car; and in Illinois, 1988, another drink driver was ordered to publish an apology, including his photo, in his local newspaper (Brilliant 1990: 1362-67). Branding offenders in this way signifies who should be avoided. Such branding is different from public displays of punishment, exemplified in, for example, the re-emergence of the chain gang in several states in the United States during the 1990s or the Northern Territory's punitive work order, introduced in 1996, in which offenders performing community service must wear a "'protective" black and orange bib' so the public knows who they are (Pratt 2000: 131). The point of these punishments is not only to 'shame the guilty person', as announced in a Northern Territory Ministerial Statement, but also to show the state's ability to punish as a 'sovereign state'; it *can* send 'strong messages' to the community about the effects of lawbreaking, it *can* act to deter others, if only in these symbolic ways.

By comparison, the practice of community notification reflects the inability of the state to control crime and protect citizens from danger. It reflects the government's stepping back from ownership of social problems, including crime and its control, and a shift to a dispersed, decentralised form of control amongst government agencies in partnership with private organisations, community groups, and individuals (Crawford 1997: 25). Sex offender laws, then, can be seen to combine both neo-liberal and neo-conservative strategies of crime control.

There is merit in seeing community notification as unlike anything seen before in modern penalty, and hence indicative of a postmodern penalty. That is to say, it is not merely more punitive, it may reflect a new way of thinking about punishment altogether. Pratt (2000: 142) suggests that modern penalty is fashioned from an alliance of penal bureaucrats and government; it is associated with a degree of shame that comes from overpunishing in a civilised society. Postmodern penalty, by contrast, is fashioned from an alliance of 'the people' and government; it is associated with efforts to directly shame an individual and with community concerns for public safety that supersede individual rights in the criminal process. On Pratt's definition, community notification falls on the postmodern side of the divide with its reliance on public involvement in knowing who and where released sex offenders live.

A central feature of contemporary penalty is its contradictory character: 'the sheer diversity and incoherence' (O'Malley 1999: 180) of responses to crime. Thus, community notification and sexual predator laws, which assume untreatable subjects who threaten to harm again, sit alongside community conferencing legislation, which assumes treatable subjects who can be reintegrated into society. O'Malley argues (1999, 2000) that such incoherence and volatility is better explained by a 'relational politics' that draws on both neo-conservative and neo-liberal strands in crime control, rather than, explanations centred on transformations in governance (Garland 1996) or a shift toward a postmodern penalty (Simon 1995; Pratt 2000). The war on sex offenders suggests that when we focus on the control of just one deviant group, we find combined strategies of state *and* citizen methods of incapacitation and segregation, of decisions made by expert knowledge *and* community sentiment, and of individualised *and* actuarial justice.

Implications for Australia

Can we expect Australia to follow, either in whole or in part, the lead of the United States? It already has to some degree. During the 1990s, sentencing enhancement legislation was passed in several jurisdictions, which provided for indefinite sentences for those convicted of violent offences. Currently, Canada and England register sex offenders, and Australia is moving in this direction. But will Australia adopt the most extreme and novel form of control, community notification? Recall that close to half of United States jurisdictions permit general disclosure to the public; the remainder are split between selective and limited disclosure of information. We expect that when community notification is introduced to Australia, it will be these latter two forms.

Tonry (1999: 1789) says that 'the United States has adopted criminal justice policies that reflective people should abhor and that informed observers from other Western countries do abhor'. He traces these developments to an entrenched intolerance of the United States population toward deviance, including less interest in treating lawbreakers fairly, coupled with 'the processes by which criminal justice policies are set'. He thinks that other countries, including Britain and Australia, have breaks on the 'punitive excesses' of the population because key officials (such as prosecutors and judges) are not politically selected. While Tonry's argument is sensible, recent developments in Britain should offer some salutary lessons for Australia. British government officials and law enforcement, who were formerly opposed to community notification, are now capitulating to community sentiments.

Australia is not immune to shocking sexual murders of children. Today, there are two elements that are likely to facilitate change in the control of sex offenders. First, there exists an infrastructure, a technology, which can be put to service in responding to citizens' demands to protect our children. The national Child Sex Offenders database, part of CrimTrac, is under development. We expect that once CrimTrac is operational, access to the database will be extended beyond law enforcement agencies to a range of organisations,

including federal, state and local government departments and private organisations to vet employees in the education and health systems.

Secondly, due to increasing globalisation, there is a frame of reference available to Australians to 'make sense' of the 'unthinkable' (Chan 2000). In response to news of truly shocking sexual murders of children, we unconsciously 'fill in the blanks' with our worst imaginings of predatory sex 'fiends' conjured from media constructed 'icons of evil' (Surette 1996).

More than the term *Megan's Law* has been imported into Australia: also imported are the term's '...field of associations and references which (lends) meaning and substance to the term' (Hall et al 1978: 27). We 'know' Megan and Sarah. We were invited into Sarah Payne's family to watch home videos of her: we shared the family's pain and wish to keep Sarah's memory alive. As Simon (1998: 463) observes in reference to the seven year-old who died in New Jersey in 1994: "Even to discuss Megan's Law we have to come immediately into the presence of Megan Kanka, her youth, her suffering and her mortality".

Although Australia's crime control policies have been generally more enlightened than those in the United States, some jurisdictions such as Western Australia and the Northern Territory have not been immune to populist and political forces that motivated passage of 'three strikes' style mandatory sentencing legislation. And, as Freiberg (1997) indicates, the new sentencing provisions in Victoria for serious sex offenders are contrary to settled sentencing policy.

There are indications, moreover, of a hardening of attitudes toward sex offenders, and especially paedophiles in Australia. The mood of some sections of Australian society is illustrated by the 1997 acquittal of a New South Wales policeman on trial for murder, after confessing to killing a convicted sex offender who allegedly sexually assaulted two of his relatives, and another schoolgirl (*The Australian Magazine*, Sept 6-7, 1997), and by the 1999

murder acquittal of a man in Queensland over the death of an 85-year old man who had allegedly molested his daughter (*The Courier Mail*, May 11, 1999).

Recent media reporting of convicted paedophiles has been punitive, threatening and de-humanising. For example, a Brisbane editorial, 'Don't fiddle, burn 'em', advocated the curtailment of established principles of legal procedure: 'in such extraordinary cases some risks must be taken, and the strict rules of courtroom evidence and proof of guilt bent to fit the occasion' (*The Courier Mail*, August 31, 1997). Former federal senator, and leader of the Australian Democrats, Don Chipp advocated tattooing the foreheads of convicted paedophiles with the letter P: 'This is simply a device to warn society that this person is not only dangerous, but will remain dangerous' (*The Courier Mail*, August 31, 1997). Unofficial registers such as *The Australian Paedophile and Sex Offender Index* (Coddington 1997), and community groups such as MAKO ('Movement Against Kindred Offenders'), which have undertaken a number of 'citizen-initiated' notification campaigns (*Today Tonight*, Feb 23, 2000), testify to the heightened sensitivity to naming and shaming sex offenders.

It doesn't seem to matter that, as we have witnessed in the United States and Britain, these unofficial activities are also open to error and further community harm. It doesn't seem to matter that communities will be unaware of the identities of most sex offenders, convicted or not. The forces of globalisation and populist punitiveness will test Australia's capacity to resist a seemingly simple and justified response to community fear as that embodied in community notification. The opening salvos in the war on sex offenders have already been fired in Australia.

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Notes

¹ This summary was assembled from the BBC on line news, and these stories:

18 July: 'Sarah Payne: the media's role'
 20 July: 'Timeline: the search for Sarah Payne'
 23 July: "'Paedophiles'" list condemned'
 24 July: 'To name and shame'
 3 August: 'Innocent man branded child abuser'
 4 August: 'Police condemn vigilante violence'
 6 August: "'Sarah's Law'" proposals in full'
 12 August: 'Paedophile protest continues'
 15 August: 'Vigilantes target innocent people'
 19 August: 'Anti-paedophile vigil ends peacefully'
 31 August: 'Final farewell to Sarah'.

We excerpt and paraphrase what was said in the news stories, although we have not put additional quotation marks around all the direct excerpts.

² Parts of this article are sourced from an unpublished MA thesis by L. Hinds, 'Community Notification of Sex Offenders: The Attempted Expulsion of Evil from US Society in the 1990s' (1997).

³ The term *Megan's Law* is used generically to refer to community notification laws in the United States; however, as discussed further, there is wide disparity between state laws and federally. New Jersey's Megan Law (1994) has general disclosure (or least restrictive provisions), whereas the United States federal Megan Law (1996) mandates limited disclosure, at a minimum.

⁴ Many concepts in this article ('sex offenders', 'sexual predators', 'sexual psychopaths') would have quotation marks placed around them to signify their socially constructed character. However, we have adopted a minimalist approach of using quotation marks sparingly, and for some concepts, only for their first appearance in the text.

⁵ Sutherland (1950: 148) discussed a dozen states that had passed sexual psychopath laws in the 1930s and 40s. By 1967, half the states had such laws before they were repealed in the 1970s.

⁶ 'Dangerousness' entered into criminological literature at The Congress of the International Union of Criminal Law at St Petersburg in 1890 (Pratt 1995).

⁷ Lieb et al (1998: 84-87) point out that while legislation in other countries during the twentieth century targeted dangerous offenders and persistent offenders, legislation specifically targeting sex offenders seems to have emerged first in the United States.

⁸ The emergence of these laws may be traced to the elimination of indeterminate sentencing which permitted parole boards to keep certain offenders incarcerated. With determinate sentences, prisoners must be released after a fixed length of time.

⁹ It is perhaps for these reasons that 'psychiatric organisations and prominent psychiatrists' have not supported current sexual predator laws (Lieb et al. 1998: 69). The term *sexual predator* is a confusing one in the literature. It refers to a type of law, and it is also used to refer to a type of person, who is believed to be especially violent and dangerous. Thus, for example, in the proposed federal registry on sex offenders, there is a sexual predator classification for those in the register who are considered the most dangerous.

¹⁰ The exception is New Mexico (Washington Institute 1998).

¹¹ Named for a victims' rights activist killed in the TWA jet crash in July 1996 while taking off from New York (Lieb et al 1998: 73, fn 2.)

¹² Megan's Law was named in memory of Megan Kanka, a seven-year old girl who was sexually assaulted and murdered by a convicted sex offender.

¹³ For example, New Jersey's community notification law was amended to allow for judicial review, upon application by an offender, of a prospective classification (see Brooks 1996 for discussion of *Doe v. Poritz* [1995]).

¹⁴ In Washington State, of the 33 harassment cases recorded, none involved prosecution of the perpetrator of the harassment (Washington Institute 1996c).

¹⁵ The attacked man expressed his views on community notification: 'This law didn't stop no crime. And what if I'd been killed? I got two children of my own. What would Megan's Law have done for them? Nothing' (*People*, March 20, 1995, quoted in Bell 1996: 658).

¹⁶ Drawing on 1994 data, the white share of imprisoned violent offenders was 48 percent; for rape, 52 percent, and for sexual assault 74 percent (US Dept of Justice 1997c: 21). About 6 in 10 sex offenders were convicted of sexual assault; 4 in 10 for rape (US Dept of Justice 1997c: 19). Drawing on 1976-94 data, the white share of offenders in sexual assault murders was 58 percent (US Dept of Justice 1997c: 28). Taking all data sources together (arrest data, court conviction data, and prison admissions), sex offenders are older and more likely to be white than other violent offenders (US Dept of Justice 1997c: iii).

¹⁷ Pratt (forthcoming) argues that 'populist punitiveness' is not irresistible: in Britain post-Payne, broadening of the notification procedures in the *Sex Offenders Act* 1997 beyond authorised police and corrections personnel to the general public has, so far, been resisted by a coalition of academics and professionals, in areas such as social work and corrections, and Labor government ministers.