

The Color of Community Notification

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Some secrets hide in plain view. The public registries of criminal offenders are among the most transparent aspects of the American criminal justice system, providing citizens detailed information about criminals in their communities and beyond. For curious web surfers and policy analysts alike, a vast catalog of criminals – complete with photos, descriptions of crimes, and addresses – is only a mouse click away. Yet buried in these galleries of rogues is a troubling and heretofore undiscovered fact: community notification schemes, popularly known as “Megan’s Laws”, punish African-Americans more severely than any other racial group.¹ Racial inequality is serious enough, but the problem does not end there. Democratic process itself appears to have been derailed. The racial inequities of Megan’s Laws – among the most significant developments in late twentieth century criminal law – have never been discussed or debated in legislatures,

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¹ In this article, I refer to laws requiring offenders to register and be subject to community notification as “community notification” laws. These laws are described by a variety of names, including most frequently “Megan’s Law” and “sexual offender community notification.” These alternative titles are problematic because they misrepresent the nature of the provisions. The problem with Megan’s Law is that it implies that the provisions are targeted at sexual assault and murder of children unknown to the offender, much as occurred in the case of Megan Kanka. The sexual offender moniker is also inaccurate because it suggests these regulations only address sexual offenders. Neither of these portrayals are accurate. As I discuss, *infra*, these provisions are significantly broader than either of these descriptions. At their narrowest, community notification laws reach a wide range of sexual offenders, including those who victimize both children and adults, as well as certain non-sexual offenders who victimize children. In many states, however, these laws include other offenses, including vice offenses such as prostitution. Nonetheless, for convenience, I used these terms synonymously throughout the article to reference these laws.

courts, the mass media, or even scholarly journals.² For the first time, I lay bare both the racial dimension of community notification and critical legal and policy debates that never happened.

Megan's Laws were the signature legal development of the 1990's. In 1990, Washington became the first state to subject criminal offenders to public exposure, requiring local authorities to alert communities when selected convicts moved in. These laws spread across the nation, gaining momentum in the aftermath of several high profile child abduction murders. By the end of the decade, every state, and the District of Columbia, had created a public registry of selected criminal offenders.

Despite the rush of legislative activity, and extensive discussion in the courts, mass media, and legal journals, race never surfaced as an issue.³ This silence is odd. The racially disparate effects of the nation's criminal justice policies are widely acknowledged,⁴ and commentators criticize this aspect of criminal law frequently.⁵

² See text accompanying notes 119-84, *infra*. These laws are important for a variety of reasons. First, they constituted a legislative tidal wave, adopted in every state, and the District of Columbia, in a ten year period. See text accompanying notes 10-50, *infra*. Second, they regulate a large number of people. Although I have not found a precise number of people subject to notification, in 2001, over 386,000 people were registered in state "sex offender registries). See United States Dep't of Justice, Bureau of Justice Statistics, *Summary of State Sex Offender Registries 2001*, March 2002, at 2. For an ongoing tally of those subject to registration, see KlaasKids Foundation, *Megan's Law in All 50 States*, <http://www.klaaskids.org/pg-legmeg.htm>. Third, these provisions radically change the availability of criminal conviction data, taking advantage of new technology to distribute this information worldwide via the Internet. As of 2001, 29 states made offender information available on the world wide web. See *Summary of State Sex Offender Registries, supra*. States report phenomenal interest in these sites; Florida's web registry, for example, receives approximately 5 million hits per month. See *id.* at 8-12.

³ Race was always present, but in an unacknowledged form. The well-publicized crimes that propelled this movement shared a key trait: they involved white children apparently victimized by white offenders. See text accompanying notes 10-50, *infra*.

⁴ African-Americans accounted for over 28% of all arrests in the United States during 2001, despite representing less than 13% of the overall national population. See United States Dep't of Justice, Federal Bureau of Investigation, *Crime in the United States 2001* at 252. They are incarcerated at a rate of 8.2 times that of whites. See Human Rights Watch, *Punishment and Prejudice in the War on Drugs* (May 2000) (available at http://www.hrw.org/reports/2000/usa/Rcedrg00-01.htm#P149_24292). They also serve heavier sentences for similar crimes. See generally David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 *Stan. L. Rev.* 1283 (1995) (discussion of cocaine sentencing disparities); David C. Baldus, et. al, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal*

Unfortunately, the absence of discussion served to obscure the serious consequences of Megan's Laws.

In this article, I present *new data* showing that African-Americans are grossly over-represented on notification rolls. In some states, an African-American person is over sixteen times more likely to appear on a notification website than a white person. The inequities extend well beyond statistical disparities, however. By including offenders convicted before several landmark anti-discrimination cases, and during periods of documented informal discrimination, registries perpetuate historical racism. Moreover, among African-Americans, and African-American communities, already devastated by the socially damaging consequences of mass incarceration, the side effects of Megan's Laws – shame, social disconnection and exclusion – take a uniquely high toll.

Critics' silence about race inequities is profoundly consequential. Although legislatures routinely pass laws imposing unique burdens on racial minorities, the chief weapon in fighting such laws is open and public discussion of these disparities. When race issues surface in public debates, legislative majorities are more likely to scrutinize the need for new laws and curb unnecessary, or particularly problematic, aspects. Advocates seeking to limit the uneven racial effect of other criminal laws have won several battles after effectively articulating their concerns. For example, they successfully won judicial support for new jury procedures designed to minimize systematic exclusion

Overview, with Recent Findings From Philadelphia, 83 *Corn. L. Rev.* 1638 (1998) (discussion of racial disparities in death penalty.)

⁵ In only the past few months, for example, the *Journal of Law and Contemporary Problems*, one of the academy's most respected faculty-edited journals published a symposium entitled *The New Data: Over-Representation of Minorities in the Criminal Justice System*. This past spring, Columbia University sponsored the "Africana Studies Against Criminal Injustice" conference focused on similar issues. Racial inequity in the criminal justice system has been the subject of innumerable books and articles in both the popular and legal press.

of minorities.⁶ More recently, they effectively used public debate to force reconsideration of racial profiling policies.⁷ Of course, public discussion is no panacea, and advocates for racial equality in criminal law sometimes fail.⁸ But even when they do, racially based advocacy creates active the potential for future improvements. Thus, despite the persistence of racially imbalanced sentencing for cocaine offenses, proposals to rectify this problem surface in each Congressional session.

Why, then, has race remained so invisible in the context of notification? There are several possibilities: the Supreme Court's narrow reading of the equal protection clause; legislatures' failure to collect and distribute data about the laws' racial effects; the political costs of challenging such laws; critical failures in the function of democratic process; and proponents' effective use of a 'white' narrative frame to promote the provisions.

In this article I take a first step towards expanding the debate about community notification, thus unlocking the potential for serious scrutiny of these regulations. I propose specific new doctrinal and legislative moves that would increase the likelihood that the racial impact of Megan's Laws will receive sustained attention. I also suggest new directions for scholars, calling for new work that assists with this broader process.

⁶ See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986) (requiring prosecutors to proffer race-neutral explanation for peremptory challenges when defendant makes prima facie case of discrimination).

⁷ See, e.g., Mike Allen, *Bush Issues Ban on Racial Profiling; Policy Makes Exceptions for Security*, Wash. Post, June 18, 2003, at A14 (describing new federal anti-profiling policy); David Kocieniewski, *Amid Pomp, McGreevey Signs Racial-Profiling Bill*, N.Y. Times, March 15, 2003, at B5 (describing New Jersey anti-profiling policy.)

⁸ In the area of sentencing, critics of racial disparity have had less success. For example, despite substantial criticism of crack and powder cocaine sentencing rules, which punish crack possession and sale more stringently and thus widen racial disparity in incarceration rates, policy advocates have thus far failed in their efforts to alter federal sentencing law. Similarly, despite gathering extensive data proving that race was the single biggest determinant of who receives a death sentence in Georgia, advocates failed to convince the Supreme Court that such race-based capital sentencing was unconstitutional. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

In Part I of this article, I set out the history of community notification provisions. I lay out the series of high profile crimes, perpetrated by white offenders against white children, that formed the groundwork for the swift national adoption of community notification. I also describe the variety of different community notification schemes now in place.

In Part II, I document the racially disparate effects of community notification. First I focus on the statistical impact of these laws. I establish that African-Americans bear the brunt of these schemes. I then explain how community notification disparately affects African-Americans in other ways. These laws perpetuate historical discrimination by relying on convictions more likely tainted by formal and informal racism. They also exacerbate the damage already devastating African-Americans, and their communities, as a result of other racial disparities in the criminal justice system.

Next, in Part III, I document the invisibility of race in criticism of the new laws. I show that the race issue did not surface in courts or legislatures, or among legal commentators. In Part IV, I suggest reasons for the silence. I offer explanations that include courts' narrow application of equal protection, which eliminates the incentive for offenders to develop disparate impact claims, legislatures' failure to collect and distribute race data which might have encouraged comments and further research on the issue, the political difficulty of challenging any law framed in terms of child protection, the effects of certain social phenomena, including moral panics and availability cascades, that short-circuited the deliberative democratic process, and the rhetorical success of advocates framing these laws in terms of white victims and offenders.

Finally, in Part V, I explore methods to focus attention on the racial effects of community notification, and enhance the chances of changing such laws to reduce inequities. I consider new doctrinal approaches, including a rethinking of equal protection jurisprudence; new legislative approaches, including policy changes leading to better transparency on race and procedural changes likely to increase the extent of discussion; and new scholarly directions, including more research on the reasons and dimensions of racial disparity in community notification as well as a more serious look at race in the context of both law and economics and law and sociology scholarship.

I. White Narratives and the History of Community Notification

Megan's Laws were born in an era marked by high profile crimes against children. These brutal offenses stirred public anxiety, and outcry, which provided the impetus for new laws. In this section, I outline these stories, focusing on one aspect – race – which has thus far eluded serious consideration.⁹ I begin with a discussion of how narratives play such a powerful role in the production of new criminal law, then move to a description of the particular stories that led to adoption of community notification.

⁹ Race is not a stable, determinate concept. For example, there is no such thing as an objectively “white” person. People’s racial self-identity, as well as their perception by others, is the product of cultural forces. See, e.g., D. Marvin Jones, *Darkness Made Visible: Law, Metaphor, and the Racial Self*, 82 Geo. L.J. 437, 439-40 (1993) (arguing that “racial categories are neither objective nor natural, but ideological and constructed. In these terms race is not so much a category but a practice: *people are raced.*”) Of course, the fact that people are not objectively “white”, for example, does not mean that people do not behave differently when they see themselves, or others, as white. Because human behavior is based on these perceptions, often to the detriment of people perceived to be of particular minority races, government has understandably created law and doctrine that addresses race in various ways. In trying to capture the disparate racial impact of community notification, this article does suggest that there is some essential nature to race, but merely looks at the impact of these laws on individuals and communities that are perceived to be of particular minority races. In this vein, I use the term African-American because, unlike a racial description, it attempts to capture the historical geographical ties of an individual. For simplicity, I also use the term “white” which is, inevitably, far less precise and also, almost certainly, includes some people who appear, self-identify, and are identified as white, but who nonetheless have some African heritage.

The community notification movement began in the State of Washington after a series of brutal offenses against children.¹⁰ In May 1989, a seven-year old boy who had been abducted and sexually assaulted, was found wandering almost nude in a wooded area of Tacoma, Washington.¹¹ A few days later, Earl Shriner, a white man with a prior record of violent assault, was arrested in the attack.¹² The media reported that Shriner had been planning an elaborate scheme to capture and torture young children.¹³

Washingtonians were further terrified by a fresh series of crimes a few months later, all involving white child victims and white offenders. In September 1989, two brothers – William and Cole Neer, ages 10 and 11, were murdered in suburban Vancouver, Washington.¹⁴ A few weeks later, four year-old Lee Joseph Islei was abducted from a schoolyard, raped and killed.¹⁵ Two weeks after that, Westley Dodd was

¹⁰ While community notification is new, statutes requiring offenders to register with authorities are not. These registration provisions date to the 1930's. "Registration statutes were passed in three waves, in roughly equivalent time periods. California enacted a registration statute for sex offenders in 1944, as part of the first wave of such statutes through 1967. A second wave occurred from 1985 through 1990, followed by a period of intense activity from 1991 through 1996. By 1996, all fifty states registered sex offenders." Roxanne Lieb, et. al, *Sexual Predators and Social Policy*, 23 *Crime & Justice* 43, 71 (1998).

¹¹ See *Ex-Con Arrested in Sexual Mutilation of Young Boy*, U.P.I. Wire, May 22, 1989 (found in Nexis database.)

¹² *Id.* While I have not sought out videotape of these newscasts, the race of Earl Shriner was evident from newspaper reports. See, e.g., Elizabeth Rhodes and Sally Macdonald, *When A Felon Lives Next Door: Who Gets Warned? How?*, *Seattle Times*, May 25, 1989, at 1 (including photo captioned "Earl Shriner, in snapshot of family"); *Outrage in Tacoma*, *Seattle Times*, May 23, 1989, at 1 (including photo of Shriner in profile captioned "Earl K. Shriner hides from photographers as he is led from Pierce County Superior Court.") While there were no photographs of the seven year old child, who was not identified, readers may have concluded that he was likely to be white based on a photo of outraged neighbors, all of whom appeared, in a front-page photo, to be white. See *id.* (including photo captioned "Debbie Grannis, left, was going to display her sign during Earl K. Shriner's arraignment but was told it was not allowed in the courtroom.")

¹³ Shriner apparently told cellmates, during a prior sentence, that he intended to purchase a van and furnish it with chains and cages for this purpose. See Jerry Seper, *Official Defends Not Committing Child Molester*, *Washington Times*, July 24, 1989, at A3. For a detailed description of the media accounts, and public outcry, that followed Shriner's arrest, see David Boerner, *Confronting Violence in the Act and the Word*, 15 *U. Pug. Sound L. Rev.* 525, 525-38 (1992) (describing events as part of history of sexual predator civil commitment statute also adopted by Washington State.)

¹⁴ See *Two Brothers on Outing Found Slain in a Park*, *N.Y. Times*, Sept. 6, 1989, at A17.

¹⁵ See *Dodd Changes Plea to Guilty – Jury to Decide Penalty in Rapes, Killings*, *Seattle Times*, June 12, 1990, at D1.

arrested after abducting a six year-old boy from a movie theater restroom.¹⁶ He was subsequently charged with both the Neer and the Islei murders. Washington media reported that Dodd had an established history of child abduction and molestation dating to his early teens.¹⁷ Meanwhile, the national media, linking this story with an abduction in Minnesota, argued that these cases were creating a “web of fear.”¹⁸ Adding fuel to public fear, the media also reported that, while in prison pending trial for these crimes, Dodd wrote a brochure entitled “When You Meet a Stranger”, a guide to help children avoid abduction. In it, he detailed six of what he claimed were over forty molestations he had attempted over the prior fifteen years.¹⁹

In the aftermath of these incidents, support for new regulation of sexual offenders swelled.²⁰ One vocal advocate for this new bill was Ida Ballasiotes, a white woman, whose adult daughter had been murdered several years earlier by a convicted sex offender.²¹ Although she had been working to create new notification legislation, her efforts went nowhere until the highly publicized child abduction and mutilation cases.²²

¹⁶ *Id.*

¹⁷ See, e.g., *id.*; see also Peter Gillins, *Arrest Made in Three Child Murders*, U.P.I. Wire, Nov. 15, 1989 (found in Nexis Database).

¹⁸ See Vincent Willmore, *Child Kidnappings Leave Web of Fear*, USA Today, Nov. 16, 1989, at 3A.

¹⁹ See *Dodd Changes Plea*, *supra* note 15.

²⁰ See Debera Carlton Herrell, *Legislators Vow Action on Violent Sexual Offenses*, Seattle Post-Intelligencer, Jan. 9, 1990, at A1 (quoting state senate majority leader).

²¹ See Ellen Liang, *Sex Offender Housing Raises Complex Questions*, King5.com, June 10, 2003, available at http://www.king5.com/localnews/specialassignments/NW_060903WABsexoffenders.86ddaf98.html (last visited July 16, 2003) (including photograph of Ida Ballasiotes.)

²² See Jim Simon, *The Predator Bill: The ‘Victim’ Lobby Wins – A Mother’s Outrage Brings Shakeup to Justice System*, Seattle Post-Intelligencer, Feb. 6, 1990, at A1. Because the advocates were often parents of victims, even when the victim was an adult female, the narrative was implicitly framed in child protection terms. Thus, Ida Ballasiotes’s identity as a “victim’s mother” advocating for a new law after the murder of her “child” necessarily framed community notification as “child protection” legislation – even if her daughter’s identity as a child was less in terms of age than familial relationship. On a personal level, perhaps because of her tragedy, and her political activism that followed, Ida Ballasiotes was elected to the Washington state legislature in 1992. See Phil Campbell, *The Rape Revisionist*, TheStranger.com, Feb. 7, 2001, available at <http://www.thestranger.com/2001-02-01/feature-2.html> (last visited July 16, 2003.)

In 1990, Washington adopted the Community Protection Act, the nation's first community notification law, targeting sexual offenders.²³ Washington legislators predicted that this provision would serve as a model for the nation²⁴ and over the next four years, five other states adopted notification provisions.²⁵

During 1993, the nation's attention focused on the case of a white, twelve year old Petaluma, California girl, Polly Klaas.²⁶ Klaas was abducted and murdered by Richard Allen Davis, a white repeat offender.²⁷ Although there was no solid proof he had sexually abused Klaas, circumstantial evidence pointed in that direction.²⁸ Klaas' family, and in particular her father Marc, became activists in the fight against child victimization.²⁹ In 1994, Marc Klaas started the KlaasKids Foundation "to give meaning

A similar story unfolded in the case of Peggy Schmidt, the mother of Stephanie Schmidt, a 19 year old Kansan killed by a convicted sexual offender. See, e.g. *State v. Myers*, 260 Kan. 669, 679 (1996) (explaining that Kansas' notification bill "was passed in the wake of public outcry following the tragic July 1993 murder of Stephanie Schmidt... after the murder, Stephanie's parents helped form an ad hoc task force which proposed (this) legislation.") Stephanie's mother, father, and sister all testified before the Kansas legislature as it considered the notification provision. *Id.* at 679-80. The Schmidts appear to be white as well. See The Stephanie Schmidt Foundation, *Gone But Not Forgotten...Stephanie's Song Continues*, available at <http://www.sos.lawrence.com/> (last visited July 16, 2003.)

²³ See Community Protection Act, ch. 3, 101-1406, 1990 Wash. Laws 12 (1990). This Act included the Sexually Violent Predators Act, which authorized civil commitment of certain convicted offenders. See Christine M. Kong, *The Neighbors are Watching: Targeting Sexual Predators with Community Notification Laws*, 40 Vill. L. Rev. 1257, 1269 (1995). Sexual offender civil commitment provisions were later upheld by the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1997).

²⁴ See Debera Carlton Herrell, *New Sex Offender Law Hailed as National Model*, Seattle Post-Intelligencer, Feb. 28, 1990, at B2.

²⁵ See Scott Matson and Roxanne Lieb, *Megan's Law: A Review of State and Federal Legislation*, Washington State Inst. for Pub. Pol. Doc. 97-10-1101, Oct. 1997, at 3, available at <http://www.wsipp.wa.gov/crime/pdf/meganslaw.pdf>.

²⁶ An image of Klaas appears on the CNN website. See *Jury Recommends Death Penalty in Klaas Murder*, CNN.com, Aug. 5, 1996, available at <http://www.cnn.com/US/9608/05/klaas.sentence/> (last visited July 16, 2003). This same article featured a photo of other family members, both white.

²⁷ See Klaas Jury Hears Taped Confession, at <http://www.cnn.com/US/9605/01/klaas> (May 1, 1996).

²⁸ See Denise Noe, Court TV's Crime Library: Criminal Minds and Methods, *The Killing of Polly Klaas*, available at http://www.crimelibrary.com/serial_killers/predators/klaas/6.html?sect=2 (indicating that although Klaas was found with her skirt hiked up, legs spread, with a condom nearby, decomposition had progressed to the point that physical evidence of sexual contact was unavailable); Michael Dougan, *Prosecutor's Last Pitch in Davis Trial ; Six-hour Closing Focuses on Details that Could Mean Death Penalty* S.F. Examiner, June 11, 1996, at A8 (citing prosecutor's closing argument regarding same facts.)

²⁹ See Tupper Hull, *Marc Klaas Starts Anti-crime Group; Polly's Dad Targets Repeat Offenders*, S.F. Examiner, Sept. 22, 1994, at A6.

to the death of... Polly Hannah Klaas and to create a legacy in her name that would be protective of children for generations to come.”³⁰ Legislative advocacy was an explicit part of Klaas’ agenda, promoting community notification legislation as one solution to child sex crimes.³¹ In one widely reported incident, he interrupted a New York assemblyman’s press conference, demanding that the official support a proposed public registry.³²

At almost the same time as Klaas’ murder, over Labor Day weekend 1993, Ashley Estell, a seven year old white girl, was abducted from a playground in suburban Plano, Texas.³³ Her body was found the next day; prosecutors charged, and ultimately convicted, Michael Blair, a white convicted child molester.³⁴ The story promptly became fodder for the television tabloid shows.³⁵ More importantly, activists cited the narrative as proof of the need for community notification. Florence Shapiro, the Texas state legislator representing Plano, successfully advocated for community notification in Ashley’s name.³⁶

³⁰ See KlaasKids Foundation: About the KlaasKids Foundation For Children, available at <http://www.klaaskids.org/pg-prog.htm> (last visited Aug. 12, 2003).

³¹ Polly Klaas continues to be a symbol for the child abduction prevention movement, and her image is used remind people of her awful demise. See, e.g., *The Polly Klaas Foundation*, available at <http://www.pollyklaas.org/about.htm> (last visited July 16, 2003.)

³² See, e.g., Nicholas Goldberg, *Parent Makes Plea for 'Megan's Law'*, *Newsday*, June 15, 1995, at 18 (describing Marc Klaas bursting in on press conference of New York state legislator demanding passage of Megan’s Law.)

³³ See Diane Jennings, *It Was That Kind of Year: Texas Contributed Its Share to Tabloid News*, *Dallas Morning News*, Dec. 26, 1996, at 49A.

³⁴ *Id.*; Robert Riggs, *DNA Tests Stir Emotions in Child Murder Case*, at <http://wfaa.com/wfaa/articledisplay/0,1002,11473,00.html> (June 21, 2000) (last visited August 27, 2003). Michael Blair was sentenced to death. Recent DNA tests suggest, however, that a hair sample used to tie him to the murder did not come from Blair. See Holly Becka, *Hair Test Can't Link Inmate, Girl; Strand Not That of Ashley Estell or Man; DA Still Unconvinced*, *Dallas Morning News*, Oct. 4, 2002, at 1A. His attorneys are currently seeking to have his conviction, and death sentence, overturned. *Id.*

³⁵ See Jennings, *supra* note 33.

³⁶ See Barbara Kessler, *Sign of the Crimes; More States Alerting Public to Ex-convicts' Sex Offenses*, *Dallas Morning News*, Jan. 9, 1995, at 1A. Shapiro understood how to use real stories to direct public anger. During a state senate committee meeting, she reminded senators that the justice system failed Estell and read a letter from a convicted child sexual offender, on the verge of release, who denied any culpability

These crimes understandably deepened parental anxiety, setting the stage for the crime that would catalyze the national community notification movement. On July 29, 1994, Jesse Timmendequas raped and murdered seven year old Megan Kanka in Hamilton Township, New Jersey. Timmendequas, a neighbor of the Kanka's, had previously been convicted of two child sexual offenses.³⁷ Maureen Kanka, Megan's mother, stated that "if we had known there was a pedophile living on our street, my daughter would be alive today."³⁸ Megan's parents publicly called on New Jersey's legislature to immediately adopt a sexual offender community notification law.³⁹ The term "Megan's Law" quickly gained national currency,⁴⁰ and in her memory, New Jersey adopted "Megan's Law" on October 31, 1994.⁴¹

Other legislatures quickly followed. In late 1994, the United States Congress adopted the Jacob Wetterling Crimes Against Children and Sexually Violent Offenders

because "all his prior victims came to him 'with outstretched arms.'" See Keith S. Hampton, *Children in the War on Crime: Texas Sex Offender Mania and the Outcasts of Reform*, 42 S. Tex. L. Rev. 781, 807 (2001).

³⁷ See Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 Ind. L. J. 315, 315 (2001).

³⁸ See Michelle Ruess, *A Mother's Plea: Pass Megan's Bill*, The Record (Bergen County, N.J.), Sept. 27, 1994, at A1. In an era where small communities were dominant, the identity of any criminal defendant was not only a matter of formal public record; it was a subject of common knowledge. A public trial and conviction inevitably conferred a degree of shame and stigma on the offender. As urban society expanded and developed, public awareness about the day-to-day details of individual citizens, and courts, diminished. Today, with rare exception, the public is generally unaware of individual criminal cases. As a result, though trials are technically open, the only people aware when a person is convicted are courthouse employees (judges, lawyers, and court staff), victims, and those close to the offender. As citizens become detached from this process, they lose a sense of control. Once, everyone in town could identify the local miscreant. Today, the average American harbors a general, unfocused fear of crime and criminals.

³⁹ See Steven W. Dill, *Pink Ribbons Symbolize Drive for Megan's Law*, Record (Bergen County, N.J.), Aug. 3, 1994, at A3,

⁴⁰ Megan's Law gained so much acceptance as a generic name for community notification that it was included as a "new word" in the 1996 Random House Webster's College Dictionary. See Lieb, *supra* note 10, at, 72.

⁴¹ See Joseph F. Sullivan, *Whitman Approves Stringent Restrictions on Sex Criminals*, N.Y. Times Nov. 1, 1994, at B-1.

Registration Act,⁴² demanding that states adopt sexual offender registration schemes.⁴³ In 1996, Congress passed its own “Megan’s Law”, pressing states to implement community notification for selected sexual offenders and child victimizers.⁴⁴ Even before this 1996 mandate, states were moving to adopt offender registries. For example, Texas adopted “Ashley’s Laws” in 1995.⁴⁵ In 1994 and 1995 alone, twenty-one states approved some version of Megan’s Law.⁴⁶ By 1997, 47 states had adopted community notification.⁴⁷

The harrowing narratives nonetheless continued. In 1996, for example, a white nine year old, Amber Hagerman of Arlington, Texas, was abducted and killed.⁴⁸ Her parents, like others, became activists, issuing public calls for new laws, including enhanced notification.⁴⁹ Like Megan Kanka, Amber’s name, and implicitly the story of her abduction, live on in the form of federally mandated Amber Alerts. In March, 1999, New Mexico became the fiftieth state to adopt community notification.⁵⁰

Notification laws are now ubiquitous but their details vary widely from jurisdiction to jurisdiction. Under the terms of the Wetterling Act, as well as the federal

⁴² Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, Publ. L. No. 103-322, 108 Stat. 2038 (1994), codified as amended at 42 U.S.C. §14071 (2001). The Wetterling Act was named after Jacob Wetterling, an eleven-year old boy abducted in October, 1989, in St. Joseph, Minnesota. He was never found. The FBI profile of the assailant suggested he was likely a pedophile.

⁴³ State that failed to adopt such provisions lost ten percent of their federal crime fighting funds. See 42 U.S.C. §14071(g)(2) (2001.)

⁴⁴ Megan’s Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. § 14071(d) (1994)). For the details of this law, see text accompanying notes 51-4.

⁴⁵ See *Sessions Recap*, State Capitals Report, June 16, 1995, available in Nexis News Database.

⁴⁶ See Matson and Lieb, *supra* note 25.

⁴⁷ *Id.*

⁴⁸ See *Body of Kidnapped Texas Girl is Found*, N.Y. Times, Jan.19, 1996, at A18. Based on images in the press, she appears – and certainly would have appeared to concerned citizens – to be white. See Steve Irsay, *New Use of Cold War Technology Helps Rescue Abducted Kids*, CourtTV.com, available at http://www.courtTV.com/news/2002/0802/alert_ctv.html (last visited August 30, 2003). The police have never found Amber’s murderer.

⁴⁹ See Eric Garcia, *Abduction of Amber Struck Home*, Dallas Morning News, Dec. 29, 1996, at 1A.

⁵⁰ See *Roundhouse Roundup*, Albuquerque Trib., March 13, 1999, at D5.

Megan’s Law, a state registration and notification scheme must, at minimum, include those individuals convicted of any sexual offense against a minor⁵¹ or any offense, irrespective of the victim’s age, that includes aggravated sexual abuse⁵² or sexual abuse.⁵³ The law leaves many of the details to the states, but explicitly requires lifetime registration of aggravated offenders and certain recidivists.⁵⁴

State regulations vary in several important respects. First, they differ in the sorts of convictions that trigger notification. Some states follow the federal minimums, limiting public notice to those convicted of serious sexual offenses and those victimizing children. Other states include other somewhat less serious sexual offenses⁵⁵, while still others expand notification to include additional non-sexual violent offenses. Some states include regulatory sexual offenses, such as prostitution, transforming notification laws into anti-vice provisions. In Alabama, for example, second degree prostitution – even if involving adults – is a notification offense.⁵⁶ Despite the inconsistencies, no state has adopted true “sexual offender community notification” because, pursuant to federal law,

⁵¹ The provision outlines a number of child-victim offenses that must be included, among them: kidnapping or false imprisonment of a minor, except by a parent; criminal sexual conduct toward a minor; solicitation of a minor to engage in sexual conduct; use of a minor in a sexual performance; solicitation of a minor to practice prostitution; and any conduct that by its nature is a sexual offense against a minor. See 42 U.S.C. §14071 (a) (3) (a) (2001).

⁵² Aggravated sexual abuse includes offenses where a person compels another to engage in sexual acts through use of force or serious threats, renders another person unconscious and thereby engages in sexual acts, drugs or otherwise impairs another person and thereby engages in sexual acts, or has sex with a child under the age of between 12 and 16 (depending on the age of the offender.) See 18 U.S.C. §2241 (2001).

⁵³ Sexual abuse includes offenses where a person compels another to engage in sexual acts through use of less serious threats or engages in sexual acts where the other person is incapable of appraising the nature of the conduct or incapable of declining participation or communicating unwillingness to participate. See 18 U.S.C. §2242 (2001).

⁵⁴ Congress imposed tougher new rules on states with respect to this group of “sexually violent predators” See 42 U.S.C. 14071(a)(2), (a)(3)(C)-(E), (b)(1)(B), (b)(3)(B), (b)(6)(B)(iii) (Supp. 1999).

⁵⁵ Most states, for instance, include indecent exposure as a notification offense. See Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 Cal. L. Rev. 163, 173 (2003).

⁵⁶ See Ala. Code § 13A-11-200 (1994).

each applies to at least some non-sex offenders.⁵⁷ Similarly, to the extent that the term “Megan’s Law” suggests that laws are targeted at people who victimize children, it is misleading; every state includes some, and often many, offenders who have never attacked children.

Jurisdictions differ in other respects as well. The overwhelming majority of states imposed the notification requirement retroactively, for instance, requiring public notice for offenders convicted prior to adoption of the notification scheme.⁵⁸ A majority of states provide for notice via the Internet,⁵⁹ while others give general notice in community meetings, by flyer, via telephone, or directly to institutions such as schools and day cares.⁶⁰

Community notification laws have now been adopted in every state and, this past term, were approved by the Supreme Court.⁶¹ They are part of the fabric of the twenty-first century American criminal justice regime. The next section discusses the disparate racial implications of these potent new laws

II. The Disparate Racial Effects of Community Notification

Community notification laws, though racially neutral on their face, are not neutral in result. In this section, I show how they punish African-Americans unequally. I

⁵⁷ For example, federal law requires notification for people convicted of child kidnapping.

⁵⁸ See Alan R. Kabat, Note, *Scarlet Letter Sex Offender Databases And Community Notification: Sacrificing Personal Privacy For A Symbol's Sake*, 35 Am. Crim. L. Rev. 333, 341-42, Appendix 1 (1998) (indicating that 41 states provide retroactive application.)

⁵⁹ As of 2001, 29 states made offender information available on the world wide web. See *Summary of State Sex Offender Registries supra* note 2.

⁶⁰ For a state by state review of methods of dissemination, see *id.* at Appendix Table 4. Other important distinctions include the extent to which notification is discretionary, and the process for making this assessment, and whether juveniles are included in notification. For a good discussion of different discretion schemes, as well as important procedural details relating to these mechanisms, see Wayne A. Logan, *A Study in "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. R. 593 (2000). Elizabeth Garfinkle’s thorough review of juvenile notification suggests that most states either expressly, or implicitly, include juveniles in their schemes. See Garfinkle, *supra* note 55, at 177-78.

present new statistical evidence of the over-representation of African-Americans on notification registries. I then show several ways in which these provisions perpetuate historical racism. Finally, I explore how notification exacerbates the damaging social effects of other racial disparities in the criminal justice system.

a. Statistical Disparities

Data establishing the unequal effects of criminal law is the basis of many criminal justice reform proposals. To date, no one has compiled any such information about the racial identity of individuals subject to Megan’s Law. In this section, I describe the study I designed and undertook to remedy this remarkable gap in the literature.

I contacted the fifty states as well as the District of Columbia, to determine the number of people, by racial group⁶² subject to notification. This information proved fairly difficult to obtain.

- Officials in many jurisdictions stated that such data was either non-existent or not legally available for disclosure.⁶³
- Some states provided data regarding registration (not separating those subject to notification) officially; bureaucrats in other jurisdictions offered this information “unofficially”.
- One state, California, had apparently never run such calculations, but did so specifically at my request.

Thirty-nine jurisdictions declined to provide data; I collected it manually from fifteen states’ publicly accessible web sites. I ultimately collected material from twenty-seven

⁶¹ See *Smith v. Doe*, 123 S. Ct. 1140 (2003); *Connecticut Dep’t of Pub. Safety v. Doe*, 123 S. Ct. 1160 (2003).

⁶² I relied on the decisions of state bureaucrats for the purpose of determining individuals’ race. In some states, such as Texas, people with Latino surnames are classified as either “white” or “black.” In other states, such as California, people are formally classified by “ethnicity”, which turns out to include “white”, “black”, “Hispanic” and a wide variety of other specific Asian and Pacific Island ethnicities. Some states were inconsistent about using “Hispanic” as a category. For example, in Alabama, some individuals with Spanish surnames were classified as “white” while others were classified as “Hispanic.” All told, only Alabama, Kansas, Kentucky, Mississippi, California, and Nebraska employed “Hispanic” at all.

⁶³ I do not know whether these officials were accurate in their comments. I discuss problems related to the collection and distribution of data *infra*, at text accompanying note 202.

jurisdictions. My initial discussion focuses only on data regarding individuals actually subject to notification, and I follow with a brief analysis of states for which my data includes all those required to register.

Table 1 - Individuals Subject to Notification By State and Race*

State	% of Registry That Is White	% of Registry That Is African American	% of Registry That Is Native American	% of Registry That is Asian
Alabama	56.6	43.1	0	0.1
Arizona	83.0	9.3	7.5	0.2
Colorado	85.2	14.8	0	0
Georgia	57.5	42.1	0.1	0.2
Kansas	87.4	11.1	1.0	0.3
Kentucky	83.4	15.6	0.1	0.1
Louisiana	54.3	45.5	0	0.1
Michigan	77.9	19.5	0.3	0.2
Mississippi	51.0	47.6	0.6	0.1
Montana	81.3	1.8	16.5	0
Nebraska	80	10.8	2.3	0.8
New York	62.9	31.3	1.3	0.5
N. Dakota	77.9	7.4	13.2	1.5
S. Carolina	56.9	42.6	0.2	0.2
Tennessee	71.5	26.5	0.4	0.1
Texas	81.8	17.9	0	0.2
W. Virginia	94.5	5.1	0	0.1

* Individuals classified as “other” or “unknown” are not included in this table. Their absence, as well as rounding, explains why some states do not total one hundred percent. All notification data was collected in August 2001.

Table 1 shows the racial and geographic background of individuals whose neighbors have been told they are “sexual predators.”⁶⁴ The data tells a story of African-Americans’ omnipresence on the notification lists, especially in the South. For example, in Mississippi, 51% of the notification population was identified as white and 47.6% as African-American. Other southern states had similarly large African-American

⁶⁴ The total number of people subject to notification by state, in Tables 1 and 4, does not always equal one hundred percent. In part this gap is due to rounding, and categories such as “other and

populations on their public registries. Alabama’s roll was 43% African-American, Georgia’s was 42% African-American, South Carolina’s was 42.6% African-American, and Tennessee’s was 26.5% African-American. Northern states often had a far smaller proportion of African-Americans on their registries. Thus, Colorado’s notification list was 14.8% African-American, North Dakota’s 7.3%, and Nebraska’s 10.8%. These numbers, though lower than southern states, were nonetheless well out of line with the percentage of African-Americans in these states’ overall populations.⁶⁵

This data, however, obscures the extent of inequality because it does not tell us the impact of notification on the overall population of whites and African-Americans. Table 2 present these disparities more clearly, showing per capita notification rates. In essence, these numbers reflect the odds that any one person of a given race would be subject to notification. Table 3 then compares per capita representation of minorities with whites.

Table 2 - Per Capita Rates of Notification by State and Race

State	% of White Population On Registry	% of African-American Population On Registry	% of Native American Population On Registry	% of Asian Population On Registry
Alabama	0.0426	0.0888	0	0.0064
Arizona	0.0264	0.0724	0.0360	0.0022
Colorado	0.0028	0.0103	0	0
Georgia	0.0451	0.0749	0.0230	0.0040
Kansas	0.0496	0.0947	0.0521	0.0085
Kentucky	0.0526	0.1213	0.0348	0.0067
Louisiana	0.0449	0.0740	0.0039	0.0037
Michigan	0.1304	0.1843	0.0787	0.0147
Mississippi	0.0450	0.0710	0.0858	0.0107
Montana	0.0223	0.1486	0.0660	0
Nebraska	0.0068	0.0204	0.0201	0.0046
New York	0.0047	0.0100	0.0158	0.0005
N. Dakota	0.0089	0.1277	0.0287	0.0277
S. Carolina	0.0999	0.1704	0.0583	0.0222
Tennessee	0.0147	0.0267	0.0264	0.0018
Texas	0.0904	0.1216	0.0042	0.0052
W. Virginia	0.0457	0.0734	0	0.0106

“unknown.” On the other hand, in some cases – most notably California (on Table 4) – it reflects inconsistent state categorization with respect to Latinos. See discussion in note 62, *supra*.

Table 3 - Comparative Per Capita Rates of Notification

State	African American vs. White	Native American vs. White	Asian vs. White
Alabama	2.08	0	.15
Arizona	2.75	1.36	.08
Colorado	3.68	0	0
Georgia	1.66	.51	0.09
Kansas	1.91	1.05	.17
Kentucky	2.31	.66	.13
Louisiana	1.65	.09	.08
Michigan	1.41	.60	.11
Mississippi	1.58	1.91	.24
Montana	6.67	2.96	0
Nebraska	3.00	2.96	.68
New York	2.13	3.35	.11
N. Dakota	14.35	3.23	3.12
S. Carolina	1.71	.58	.22
Tennessee	1.81	1.79	.12
Texas	1.35	.05	.06
W. Virginia	1.61	0	.23

The data collected in Tables 2 and 3 demonstrate that notification lists in the South are comparatively racially balanced. In Texas, Mississippi, Georgia, Louisiana, and Alabama, the relative over-representation of African-Americans on a per capita basis is 1.4, 1.6, 1.7, 1.7, and 2.1 respectively. That is, an African-American individual is 1.4 times more likely than a white person to be on a Texas' notification list. But, an African-American from North Dakota is *14.4 times more likely* to be subject to notification than a white person. White Montanans are 6.7 times less likely than African-Americans to be put on their state's registry of offenders. In Colorado, African-Americans are announced as "sexual predators" at a rate 3.7 times whites. Overall, the disparity ranged from a low of 1.35 to a high of 14.4, with a median of 1.91. Significantly, African-Americans are over-represented per capita on notification rolls in every jurisdiction I studied.

⁶⁵ According to the 2000 census, Colorado is 82.8% white and 3.8% African-American. North Dakota's population is 92.4% white and 0.6% African-American. Nebraska is 89.6% white and 4%

In some states, I was only able to locate demographic information about individuals subject to registration, including some who might not have borne the additional burden of notification. The percentage subject to notification is not known, and presumably varies by state. Registration data may be only a loose proxy for notification rates by race.⁶⁶

Table 4 - Individuals Subject to Registration By State and Race*

State	% of Registry That Is White	% of Registry That Is African American	% of Registry That Is Native American	% of Registry That is Asian
California ¹	50.0	16.5	0.7	0
Indiana	78.8	18.4	0.2	0.2
Iowa	89.0	9.2	0.9	0.9
Minnesota	77.2	14.7	4.0	2.0
N. Carolina	59.2	37.8	1.2	0.1
Oregon	92.8	5.4	1.1	0.7
Vermont	97.0	1.8	0.8	0.4
Washington, DC ²	7.1	89.9	0	0.3
W. Virginia	94.5	5.1	0	0.1

¹ California maintains what it titles “ethnicity” categories, rather than race, which include “black”, “white” and “Hispanic”, among others. Hispanics account for 29.7 percent of all those subject to Megan’s Law in California. This explains why the total in the state does not approach one hundred percent. I have not created a separate column of “Hispanic” because California is unusual in this method of classification.

² I obtained general statistical data from Washington, DC in November, 2001. Unlike other jurisdictions, it did not include raw numbers. As a result, although the percentages are included here, it is impossible for me to determine per capita rates, and Washington DC is thus not included on Tables 5 or 6.

* Individuals classified as “other” or “unknown” are not included in this table. Their absence, as well as rounding, explains why some states do not total one hundred percent. This data was collected between August and November, 2001.

As with notification, disparity rates for registration vary substantially by state. In every state, African-Americans are over-represented – often quite substantially – on community notification rolls. Table 4 shows, for example, that Indiana’s registration rolls are 18.4% African-American, while African-Americans make up only 8.4% of the

African-American.

overall population. Likewise, African-Americans constitute 14.7% of the state’s registry, but only 3.5% of the state’s population.

Table 5 - Per Capita Rates of Registration by State and Race

State	% of White Population On Registry	% of African-American Population On Registry	% of Native American Population On Registry	% of Asian Population On Registry
California	0.2156	0.6346	0.1812	0.0428
Indiana	0.1801	0.4382	0.1391	0.0355
Iowa	0.1328	0.6111	0.4116	0.0955
Minnesota	0.1732	0.8432	0.7132	0.1402
N. Carolina	0.0654	0.1394	0.0763	0.0079
Oregon	0.3696	1.1390	0.2964	0.0789
Vermont	0.2106	0.7509	0.4132	0.0958
Virginia	0.1143	0.2782	0.0236	0.0165

Table - Comparative Per Capita Rates of Registration

State	African American vs. White	Native American vs. White	Asian vs. White
California	2.94	.84	0.20
Indiana	2.43	.773	0.20
Iowa	4.60	3.10	.72
Minnesota	4.87	4.12	.81
N. Carolina	2.13	1.17	.12
Oregon	3.08	.80	.21
Vermont	3.57	1.96	.46
Virginia	2.43	.21	.14

As with notification, per capita differentials in registration rates are striking. Tables 5 and 6 show these inequalities clearly. Significant disparities are evident in both the Midwest and the West. An African-American in Minnesota is 4.9 times more likely to suffer under Megan’s Law than a white person; an African-American Iowan suffers this fate 4.6 times more often than a white person. Likewise, on a per capita basis, notification

⁶⁶ Discretion and other factors may result in different racial proportions of those subject to

is applied 3.1 times more frequently to African-American Oregonians, and over 2.9 times more often to African-American Californians, as compared to white residents of these states.

This discussion has focused exclusively notification's impact on African-Americans. I also collected data with respect to Native-Americans and Asians.⁶⁷ These statistics indicate that, while some groups are over-represented in some states, the disparities are not generally as severe as those affecting African-Americans.⁶⁸ In a few states – namely, Mississippi and New York – Native Americans are over-represented at per capita rates even greater than African-Americans. These are exceptional states, however. Asians, on the other hand, are under-represented on a per capita basis, as compared with whites, in every jurisdiction I studied, save North Dakota. That is, in almost every state, Asians are less likely to be subject to notification than any other racial group. Although this article does not attempt to address all the racial effects of these registries, commentators must begin to study this data, as well as investigate the effects of Megan's Laws on Latinos.

The data presented here is only a first step in documenting the race effects of Megan's Laws. It is important to keep this data in perspective. It does establish, at a preliminary level, the existence of a racial disparity that results in over-representation of African-Americans among those subject to notification. It does not explain, however, the root of this disparity. Some explanations appear, at first, to be racially neutral and

registration compared to those subject to notification.

⁶⁷ States do not identify Asian-Americans and Asians separately, and like the states themselves, I elide these groups. I have not provided data with respect to Latinos because many states do not identify them as a separate racial group. See discussion in footnote 62, *supra*.

⁶⁸ That is not to diminish the importance of these disparities. Indeed, while they are largely beyond the scope of this work, the relative representation of other groups is a matter worth further research and study.

thus unproblematic. For example, we do not know whether the proportions simply replicate the racial makeup of those convicted of community notification offenses. If they do, the differences may either be appropriate (if for example African-Americans offend at higher rates and Megan's Laws are an effective prevention policy) or inappropriate (either because the sanction itself is uniquely harmful to African-Americans or because the underlying conviction rates are themselves the product of racism.) In essence, we cannot assess the role of either intentional or subconscious racism in these results.

I began this study with the operative assumption that those subject to notification would be equally distributed by race in proportion to population. When racial imbalances occur, particularly among minority groups, this naturally triggers concern and constitutes the basis for further research. Researchers have presented evidence that race differences in arrest and conviction rates result from discriminatory practices. Similarly, the disparities here may reflect these types of bias, or perhaps other biases occurring at the moment states decide who to include in their registries.

b. Replication of Historical Racial Discrimination

I now turn from proof of disparate effect through statistical evidence to explaining why racial effects may occur, and discussing unique structural aspects of notification regimes which engender particular racial harms. Most jurisdictions adopted retroactive notification schemes.⁶⁹ In these states, individuals convicted of specified crimes prior to adoption of notification legislation are nonetheless subject to notification.⁷⁰ Retroactive

⁶⁹ See text accompanying note 58, *supra*.

⁷⁰ This past term, the Supreme Court approved Alaska's retroactive provision, holding that it was not punitive and thus not violate the constitution's *ex post facto* clause. See text accompanying notes 138-40, *infra*.

provisions effectively refresh and reinvigorate old convictions by giving them new force and meaning. Although offenders may have completed their sentences, Megan’s Laws can subject them to new scrutiny and social burdens. More importantly, though, the age of these convictions may also mean that they occurred during an earlier period of American law in which racially discriminatory trial practices were still widespread and tolerated. Because retroactive schemes perpetuate historic racism, they are discriminatory irrespective of their statistical impact.⁷¹ In this section, I consider historical racism in trial procedures, plea bargaining, and juvenile court transfer.

1. Racism in Procedures and Plea Bargaining

Until fairly recently, prosecutors and other court employees operated in ways that expressly supported racial discrimination against African-Americans. For example, during the late 1970’s, jury commissioners in at least one state composed master jury lists to deliberately under-represent African-Americans in the jury pool.⁷² Despite this practice, the Supreme Court did not reverse a conviction flowing from this discrimination until 1988, in *Amadeo v. Zant*.⁷³ As late as 1986, Justice White remarked that “the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread.”⁷⁴ It was only in *Batson v. Kentucky*,⁷⁵ long after the trappings of Jim Crow were theoretically dismantled, that the Supreme Court enforced

⁷¹ In this section, I am not offering explanations for the disparities set out in the prior section. As I suggest, additional research is required to understand the sources of those inequalities. This section identifies aspects of Megan’s Laws that are per se discriminatory, and would be problematic even if the provisions did not have a disparate statistical impact.

⁷² See *Amadeo v. Zant*, 486 U.S. 214, 219 (1988).

⁷³ *Id.*

⁷⁴ See *Batson v. Kentucky*, 476 U.S. 79, 101 (1987) (White, J., concurring.)

⁷⁵ *Id.*

the constitution's ban on discriminatory jury selection by requiring states to justify systematic exclusion of minority jurors.⁷⁶

African-American defendants also suffered informal discrimination. As Sheri Lynn Johnson documents, prosecutors in rape cases, until quite recently, relied on stereotypes of African-American men as sexually ravenous and white women as unwilling to consent to sex with African-American men.⁷⁷ Thus, in a 1989 case, a Louisiana court found no error in a prosecutor's argument that an African-American rape defendant had "gone to a place where he saw a nice white lady" to rape⁷⁸

Discrimination surely still occurs, however older convictions are more likely to be tainted because empirical evidence suggests that conscious racism is in decline,⁷⁹ and because, given decisions like *Amadeo*, *Batson* and *Turner v. Murray*,⁸⁰ courts increasingly hear the message that they must actively combat discrimination at trial.⁸¹ In addition, lawyers are developing increasingly sophisticated approaches to combating the racism that does still surface.⁸² All of this suggests that older convictions of African-Americans, particularly in cases involving sexual offenses, are more likely to be the product of racism.

⁷⁶ See *id.* at 97 (shifting burden to state where defendant makes prima facie showing of discrimination.)

⁷⁷ See Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 Tul. L. Rev. 1739, 1754-55 (1993).

⁷⁸ See *State v. Greene*, 542 So. 2d 156, 158 (La. App. 1989), writ denied, 548 So. 2d 1229 (La. 1989).

⁷⁹ See Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 Cal. L. Rev. 733, 739 (1995) (citing studies).

⁸⁰ 476 U.S. 28 (1986) (allowing voir dire of capital jurors on possible racist beliefs.)

⁸¹ Americans are increasingly sensitive to racial stereotyping, due in part to both the Civil Rights movement and the increase in racial and ethnic diversity – both real, and in media representations – in recent years. See Daniel M. Filler, *Terrorism, Panic and Pedophilia*, 10 Va. J. Soc. Policy & Law 345, 368 (discussing reasons why public hostility to Muslims after September 11 was relatively limited.)

⁸² See, e.g., *id.* (drawing on recent social and cognitive psychology research to develop new approaches for trial lawyers.)

Older plea agreements are similarly more likely to be tainted by racism. For example, African-Americans may have been forced to accept guilty pleas to more serious offenses than whites. These serious offenses are more likely to haunt them today, by subjecting them to notification.⁸³ Studies dating back only a decade or two indicate that African-Americans have fewer charges dropped, and fewer charge reductions in plea bargains, than other defendants.⁸⁴ In a 1980 study, for instance, Gary LaFree concluded that “black men convicted of raping white women receive more serious sanctions than all other sexual assault defendants.”⁸⁵ Although such discrimination is difficult to document in any individual case, it is reasonable to assume that a rational defense attorney representing an African-American defendant would have advised his client to accept a more serious plea bargain in light of the particular risks of going to trial.⁸⁶ Similarly, an African-American defendant’s assessment of the odds of winning at trial were presumably affected by the knowledge that a prosecutor could easily strike other African-Americans from his jury based on race. Assuming that prosecutors and defendants reach

⁸³ Plea bargaining can contain two components: charge bargaining and sentence bargaining. Charge bargaining occurs when a prosecutor voluntarily dismisses a more serious charge in exchange for a plea to a lesser charge. Thus, for example, a defendant suspected of a break-in rape might be charged with both rape and burglary. A plea agreement might call for the defendant to plead guilty only to the lesser offense (typically burglary), while the rape charge might be dismissed.

⁸⁴ See, e.g., Christopher Schmitt, *Plea Bargaining Favors Whites, As Blacks, Hispanics Pay Price*, Dec. 8, 1991, at 22A, cited in, The Sentencing Project, *Selected Articles on Racial Disparity and the Criminal Justice System* (1992) (indicating that in California, a lower proportion of African-American adults charged with felonies later pled to misdemeanors and a lower percentage of African-Americans ultimately sent to state prison were able to have at least one charge dismissed.)

⁸⁵ See Gary LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 *Amer. Soc. Rev.* 842, 852 (1980).

⁸⁶ Since plea bargains are an express attempt to manage risk, the seriousness of both the plea offense, and the sentence, are likely to be related to the reasonably predicable outcome of trial. To the extent that a defendant’s race made conviction more likely, this would presumably have resulted in more serious plea agreements on the part of these defendants. Cf. *McCleskey v. Kemp*, 481 U.S. 279, 321 (Brennan, J., dissenting) (noting that McCleskey might have asked his lawyer whether a jury would sentence him to die, and the lawyer, if candid, would have had to explain he would be likely to face death because of his race.) Indeed, the risk of discrimination is arguably a significant piece of the overall cost of discriminatory policy. See generally, Note, *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 *Harv.*

plea agreements based, in part, on likely trial outcomes, it is likely that African-Americans pled guilty to the most serious charges, while white defendants negotiated pleas to less serious, non-notification offenses.

It is impossible to know how many convictions were the product of such discrimination. Nor are Megan's Laws the only provisions which perpetuate racism. Because courts routinely impose punishment based on an individual's prior record, including offenses that occurred years ago, most sentencing schemes have a similar effect. Unlike the case of community notification, though, commentators have begun to study the ways in which sentences relying on older convictions lead to racially disparate results.⁸⁷

2. Racism in Juvenile Prosecutions

Registries also perpetuate historical discrimination against African-American juveniles charged with crimes. Many states provide notification only for those convicted of triggering crimes in the adult criminal justice system; in those states, children who are adjudicated delinquent as juveniles are not subject to notification.⁸⁸ Unfortunately, the decision of which to transfer to adult court for criminal prosecution appears to have been infected by racism. A 1995 General Accounting Office study showed that African-American children's cases were transferred to adult court at significantly higher rates than similar cases involving white children.⁸⁹ While this disparity may now be abating,⁹⁰

L.Rev. 2098 (2001) (arguing that cases like *McCleskey v. Kemp* undervalue the risk of discrimination as an affirmative form of disparate treatment.)

⁸⁷ Zimring, *Punishment and Democracy: Three Strikes and You're Out in California* 55-58 (2000); Bernard Harcourt, *Actuarial Models and the Criminal Law*, 40 (work in progress) (on file with author).

⁸⁸ For a discussion of the various ways states treat delinquency adjudications, see Garfinkle, *supra* note 55, at 177-82.

⁸⁹ See, e.g., U.S. Gen. Acct. Off., *Juvenile Justice: Juveniles Processed in Criminal Court and Case Dispositions* 59 (1995) (indicating that in states studied, African-American children charged with violent offenses are transferred at 1.8 to 3 times the rate of white children charged with these crimes). But see

retroactive schemes impose notification based on these past disparities. Once, African-American children were serving time in adult prison while their similar white counterparts attended training schools; now those same African-American children are again treated disparately, subject to notification solely because a discriminatory process led them to adult convictions.

c. Exacerbating Social Disconnection

Megan's Laws, by placing offenders in plain sight, subjects them to serious social sanctions within their communities. Because African-Americans are subject to notification at disparate rates, they are inevitably subject to these social costs unequally as well. Unfortunately African-Americans, and African-American communities, are least able to tolerate these added burdens because the existing racial skew of the criminal justice system has already targeted them with crippling collateral social effects.⁹¹

First, African-Americans bear the collateral costs of conviction unequally.⁹² For example, federal law prohibits those with criminal convictions for felony drug offenses to

Jeffrey Fagan, et al, *Racial Determinants of the Judicial Transfer Decision: Prosecuting Violent Youth in Criminal Court*, 33 *Crime & Delinq.* 259 (1987) (acknowledging racially disparate waiver rates but concluding that race only explained disparities with respect to murder cases.)

⁹⁰ This skew may be the product of uncontrolled judicial discretion. See Barry C. Feld, *The Back-Door to Prison: Waiver Reform, Blended Sentencing and the Law of Unintended Consequences*, 91 *J. Crim. L. & Crim.* 997, 1003-04 (2001). Increasingly states are reducing this discretion, treating all juveniles harshly by automatically transferring jurisdiction of serious crimes to adult court. Statutory schemes that appear to eliminate discretion, and thus the possibility of subconscious racism, may not be fully effective. Under automatic transfer laws, any person charged with a given offense is prosecuted in adult court. Prosecutors retain discretion to choose which offenses to charge, however, and race may play a part in the decision whether or not to charge a juvenile with an offense subject to automatic transfer. See Julie B. Falis, Note, *Statutory Exclusion – When the Prosecutor Becomes the Accuser*, 32 *Suff. L. Rev.* 81, 90, fn. 65 (1998).

⁹¹ Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 35 *U.C. Davis L. Rev.* 1005 (2001).

⁹² For a detailed list of formal civil disabilities imposed because of conviction, see U.S. Dep't of Justice, Office of the Pardon Att'y, *Federal Statutes Imposing Collateral Consequences Upon Conviction* (Nov. 2000), available at <http://www.usdoj.gov/pardon/readingroom.htm>; U.S. Dep't of Justice, Office of the Pardon Att'y, *Civil Disabilities of Convicted Felons: A State by State Survey* (Oct. 1996), available at <http://www.usdoj.gov/pardon/readingroom.htm>.

receive food stamps or temporary financial assistance.⁹³ Individuals convicted of possession or sale of drugs lose federal grant, loan, or work-study assistance at colleges and universities for a two year period.⁹⁴ Many jurisdictions limit the ability of a convicted felon to obtain valuable occupational and professional licenses for jobs ranging from architect⁹⁵ to physician assistant,⁹⁶ podiatrist⁹⁷ to taxi driver,⁹⁸ and accountant⁹⁹ to dietician.¹⁰⁰

In addition to these formal barriers to reintegration, mass incarceration also means that African-Americans unequally experience less explicit forms of social disconnection. They have difficulty obtaining employment.¹⁰¹ Their familial relationships are disrupted by the separation of incarceration, and prison also impedes offenders' abilities to establish new social bonds.¹⁰² They often suffer psychological damage from the prison experience.¹⁰³ More generally, they may be stigmatized within the community.

⁹³ See 21 U.S.C. §862(a). States may elect not to impose, or to limit the term of, such disabilities.

See *id.*

⁹⁴ See 20 U.S.C. §1091(r).

⁹⁵ See, e.g., Idaho Code §54-305(1)(d)

⁹⁶ See, e.g., Ga. Code §43-34-107.

⁹⁷ See, e.g., Idaho Code §54-608(1)

⁹⁸ See, e.g., St. Louis Rev. Code 8.98.485 (available at <http://www.slpl.lib.mo.us/cco/code/data/t0898p8.htm>); Evansville, Ind. City Code §11.116.05(C)(4) and (5) (available at http://www.evansville.net/mayor/citycodes/Title_11/116/05.html).

⁹⁹ See, e.g., Ark. Code §17-12-601(a)(5).

¹⁰⁰ See, e.g., Ga. Code §43-11A-15(3).

¹⁰¹ Roberts, *supra* note 91, at 1009.

¹⁰² See, e.g., Mark Mauer, Race to Incarcerate 184 (1999) (discussing difficulty of finding partners.) Some states, for example, consider prior convictions of sexual offenses – both non-consensual and consensual – as well as drug convictions as a factor in determining custodial and visitation rights. See Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. Rev. 737, 763-73 (2000).

¹⁰³ For a discussion of some research on the psychological effects of incarceration, see, e.g., J.C. Oleson, *The Punitive Coma*, 90 Cal. L. Rev. 829, 851-61 (2002).

Many African-American communities suffer as well.¹⁰⁴ Incarceration of an individual family member – often a father – slices household income.¹⁰⁵ Indeed, the large rate of incarceration within African-American communities has dealt these areas a serious financial blow. Children also suffer ripple effects, including psychological and behavioral problems that may perpetuate criminality and disconnection.¹⁰⁶ Felon disenfranchisement dilutes the political voice of the entire African-American community.¹⁰⁷ Alabama, for example, has permanently stripped the vote from 31% of all African-American men.

Even before the rise of community notification laws, African-Americans were far more likely to suffer serious social disconnection as a result of American criminal justice policy. Notification, however, significantly exacerbates an already problematic disparity. Public housing is closed to many people in notification registries.¹⁰⁸ Individuals subject to notification are severely restricted in where they may live or work. In Alabama, individuals subject to notification are prohibited from living or working within 2,000 feet of a school or child care center – a significantly more burdensome requirement for a person living in a high density city than in a rural area.¹⁰⁹

¹⁰⁴ See Roberts, *supra*, note 91, at 1009. For general discussions of third-party effects of criminal convictions, see *id.*; Daryl K. Brown, *Third Party Interests in Criminal Law*, 80 Tex. L. Rev. 1383, 1395-6 (2002). Not all African-American communities will suffer disparately because many of these harms result from the aggregation of punishment within a single neighborhood. More affluent African-American areas, for example, may suffer less of these effects.

¹⁰⁵ See *id.* at 1396.

¹⁰⁶ See *id.*

¹⁰⁷ In addition, in most jurisdictions, those convicted of felonies are also precluded from jury service or public office for some period of time.

¹⁰⁸ See 42 U.S.C. §13663.

¹⁰⁹ This requirement alone may have a significantly disparate racial impact. For example, African-Americans account for 26% of the Alabama population, but make up 74% of the population of Birmingham, the state's largest city. See Jesse McKinnon, *The Black Population:2000, Census 2000 Brief*, Doc. Num. C2KBR/01-5 (Aug. 2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf>.

As if these formal burdens were not enough, the shaming aspect of community notification¹¹⁰ damages other community connections.¹¹¹ Employers, already skittish about hiring ex-offenders, turn their backs on those subject to Megan’s Laws.¹¹² Landlords exclude them as well.¹¹³ Indeed, lacking any state provision banning such discrimination, a landlord’s attorney might recommend such discrimination in order to avoid liability for any crime such an offender might commit. Notification also repels potential mates.¹¹⁴ These costs would be significant for any individual and any

¹¹⁰ While registries are not explicitly designed to impose shame and other social costs on those subject to notification, these effects have been obvious from the very beginning. Legislators and repeatedly noted that those subject to notification might be marginalized and victimized because of these laws, and some supporters were frankly unconcerned and even pleased by these effects. For comments indicating concern about marginalization and victimization, see, e.g., N.Y. Assembly Minutes of A1059C, at 357, 359 (June 28, 1995) (statement of Rep. Glick) (noting that notification would impair reintegration, potentially damaging treatment, and might be victims of vigilantism); N.Y. Senate Minutes of S-11-B at 6618 (May 24, 1995) (statement of Sen. Leichter) (expressing concern about stigma). For an example of proponents response, see, e.g., N.Y. Assembly, *supra*, at 390 (statement of Rep. Wirth) (noting that even if individuals were “abused in their neighborhoods...I don’t care.” Courts have also noted these risks. See, e.g., *E.B. v. Verniero*, 119 F.3d 1077, 1082-90 (3d Cir. 1997).

Commentators referenced Hester Prynne, the shamed protagonist of Nathaniel Hawthorne’s novel, *The Scarlet Letter*, referring to the schemes as “scarlet letter” laws. See, e.g., Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 N.W. U. L. Rev. 788 (1996); Kabat, *supra* note 58.

¹¹¹ Not all shaming sanctions separate individuals from communities. In his landmark work, *Reintegrative Shaming*, John Braithwaite distinguished “reintegrative shaming” from “stigmatic shaming.” Reintegrative shaming condemned the offense, rather than the offender himself. It called for placing an offender back into a community, forcing him to confront the damage he caused the victim and the community by his bad act. Reintegrative shaming rebuilds the bonds between offender and community and could lead to rehabilitation. Stigmatic shaming, which more closely resembles the notification sanction, condemns the criminal himself. One commentator describes them as:

state-sponsored punishments that are aimed at humiliating the offender by degrading the offender's status, that is, by communicating to others that he is a bad type. To realize that aim, shaming punishments occur before the public eye, sometimes with the public's participation.

Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanction Debate*, 54 Van. L. Rev. 2157, 2162-3 (2001).

¹¹² One of the few studies looking at the actual effects of community notification, a study of 30 offenders in Wisconsin, concluded over half of those interviewed had suffered employment problems and exclusion from potential residences. See Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Notification: Managing High Risk Criminals or Exactng Further Vengeance?*, 18 Behav. Sci. & the Law 375, 381 (2000). For those offenders who would otherwise hide their prior record from potential employers, notification may make this task much more difficult. To the extent that employers should be privy to employees’ prior records, this can be seen as a positive result.

¹¹³ See, e.g., *id.* at 381-2 (finding that 83% of offenders had suffered residential exclusion.)

¹¹⁴ See *id.* at 383.

community. Yet because African-Americans are already disproportionately subject to so many collateral costs of the criminal justice system, the additional burden of community notification may exact exponential burdens to this group of offenders.¹¹⁵

Some could argue disparate burdens create a disparate benefit. To the extent that African-Americans do actually commit more of these offenses, and to the degree that notification actually works to reduce future crime, the African-American community benefits disproportionately from notification.¹¹⁶ However, there is little evidence that notification is an effective prevention tool.¹¹⁷ If community notification had been sought by African-American communities as a means of improving safety, we might assume that the positive effects outweigh the costs.¹¹⁸ But there is no evidence that the African-American community sought such laws. Under these circumstances, notification's disparate impact is impossible to justify.

III. The Invisibility of Racial Disparities

The prior section established that Megan's Laws have a disparate impact on African-Americans. In this section, I establish that judges, legislators, and commentators

¹¹⁵ During the presentation of this paper, one commentator suggested that the stigmatic impact of community notification might be relatively lighter in the African-American community because the fact of criminal conviction is more common, and thus less problematic, there. This is possible, of course. Nonetheless, such notification effectively may prevent an individual from re-inventing himself, finding new friends who do not know about his past. In addition, to the extent that notification relates to a child sexual offense, there is no reason to believe that the African-American community is any more forgiving of offenders than any other community. Indeed, based on my experience as a public defender, it appeared that among prisoners, white and African-American, the greatest stigma for an incoming prisoner was that he had committed a child sexual offense. Thus, as long as notification is seen largely as a registry for child sex offenders, stigma is likely to attach across communities.

¹¹⁶ For a discussion of how communities may benefit from greater enforcement of criminal justice policy, see Kate Stith, *The Government Interest in Criminal Law: Whose Interest Is It, Anyway?*, in *Public Values in Constitutional Law* 137, 153 (Stephen E. Gottlieb ed., 1993).

¹¹⁷ See Wayne A. Logan, *Understanding and Managing Sexually Coercive Behavior*, in *Sexually Coercive Behavior: Understanding and Management* (Robert A. Prentky, et. al, eds.) (2003) at 337-51 (discussing paucity of studies and data on efficacy.)

¹¹⁸ See Tracey L. Meares and Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v Morales*, 1998 U. Chi. L. Forum 197, 199-200, 207 (1998) (arguing that Chicago's

ignored the racial implications of these laws.¹¹⁹ The American democratic process relies heavily on public debate and discussion in order to produce good and fair laws. Legislators respond to public pressure; public opinion, in turn, is directly related to the ways that issues are publicly discussed.¹²⁰ Despite claims to the contrary, courts often decide cases based on current trends in public sentiment.¹²¹ The deliberative process is complex and depends on critics coming forward in every venue. Speeches on the legislative floor can transform law directly, by influencing other legislators, or indirectly, but affecting public opinion.¹²² Judicial decisions are usually assumed to be designed to implement law directly, but even opinions that do not themselves change law are sometimes intended to influence public opinion.¹²³ Mass media plainly influence public perceptions of problems, but even legal scholarship can have this effect.¹²⁴ Conversely,

gang ordinance passed with strong support from community most regulated by it suggests that communities value law despite its disparate racial effects.)

¹¹⁹ Of course, I cannot possibly prove that nobody considered these matters or that an a judge or legislator's unarticulated concern about race might not have played a part in her legislative decision-making. For example, an African-American legislator might have voted against community notification out of concern for the racial impact of the law, while remaining silent – or even articulating alternative critiques – during debate. However, to the extent that race issues surfaced nowhere, there is good reason to believe that few decisions were affected by racial considerations.

¹²⁰ See, e.g., Joel Best, *Random Violence: How We Talk About New Crimes and New Victims* 48-71 (1999) (describing how framing of individual crimes as examples of broader trends affects public perception of problem.)

¹²¹ As the Supreme Court's decisions in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003) (holding law criminalizing sodomy unconstitutional) and *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (striking down death penalty for person with mental retardation) indicate, shifts in the opinion of majorities – as reflected by legislation adopted by their representatives – can affect core constitutional interpretations. More problematically, for some, several Supreme Court justices are now seen as being affected more directly by public opinion.

¹²² The rise of C-Span has led to increased visibility of legislators as public policy advocates.

¹²³ This seems to be one possible purpose of a recent federal court decision upholding the federal death penalty while criticizing it for its potential to allow execution of innocent people. See Adam Liptak, *U. S. Judge Sees Growing Signs That Innocent are Executed*, N.Y. Times, Aug. 12, 2003, at A10 (

¹²⁴ Academic work sometimes appears disconnected from the production of new law. In some cases, though, scholarship develops a analytical framework that is later adopted by legislatures and courts. Law and economics scholarship, for example, bubbled to the surface during the Reagan administration, in the form of new efficiency based-laws. See Eleanor M. Fox and Robert Pitofsky, *Introduction: Papers Presented at the Airlie House Conference on the Antitrust Alternative*, 62 N.Y.U. L. Rev. 931, 931 (1987). At other times, legal scholarship can quickly seep into mass culture and make an even more immediate impact on law. Recently, for example, Susan Hamill, a professor at the University of Alabama, published

when everyone fails to discuss a critical issue, policy makers and courts will never take that matter into account in the development, or subsequent review, of new law.

To place this silence in context, it is worth noting the centrality of race-based critiques within the criminal justice policy debate. Many books and articles focus on one or another aspect of race and crime.¹²⁵ Scholars and other policy advocates make powerful attacks on the racial effects of the substantive criminal law,¹²⁶ the treatment of juveniles¹²⁷, sentencing¹²⁸, procedural policy¹²⁹, and even collateral effects of

an article entitled *An Argument for Tax Reform Based on Judeo-Christian Ethics* in the Alabama Law Review. See Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo Christian Ethics*, 54 Ala. L. Rev. 1 (2002). This article triggered national attention in the mass media, including a front page story in the Wall Street Journal. See Shailagh Murray, *Divine Inspiration: Seminary Article In Alabama Sparks Tax-Code Revolt - A Methodist Lawyer's Thesis Cites 'Christian Duty' To Back Fairer System*, Wall St. J., Feb. 12, 2003, at A1; see also Patrick Lackey, *In Alabama They're Asking: 'How Would Jesus Tax'*, Virginia-Pilot and Ledger Star (Norfolk, Va.), Feb. 21, 2003, at B9; Jay Reeves, *Law Professor Summons Jesus As a Witness for Tax Reform*, Wash. Post, Mar. 23, 2003, at A10; Kevin Horrigan, *Alabama Asks Itself WWJT? (What Would Jesus Tax)*, St. Louis Post-Dispatch, Aug. 3, 2003, at B3. This publicity, in turn, played a powerful role in shaping the public debate about taxes in Alabama, pushing a conservative Republican governor to propose a radical new scheme significantly redistributing Alabama's tax burdens towards those with higher incomes. See Horrigan, *supra*.

¹²⁵ See, e.g., David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (1999); Kathryn K. Russell, *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions* (1998); Randall Kennedy, *Race, Crime and the Law* (1997); Michael Tonry, *Malign Neglect: Race, Crime and Punishment in America* 1995); Coromae Richey Mann, *Unequal Justice: A Question of Color* (1993); The Sentencing Project, *Selected Articles on Racial Disparity and the Criminal Justice System* (1992). A landmark review of these issues appeared in *Developments in the Law* issue of the Harvard Law Review in 1988. See *Developments in the Law – Race and the Criminal Process*, 101 Harv. L. Rev. 1475 (1988) (featuring articles on the role of race in policing, prosecution, jury decisions, and sentencing). The Tulane Law Review published a similarly important review of these issues. See *Symposium: Criminal Law, Criminal Justice and Race*, 67 Tul. L. Rev. 1725 (1993).

¹²⁶ Insert

¹²⁷ *Crime and Delinquency* dedicated a special issue to the the ipact of race on juvenile justice. See *Special Issue: Minority Youth Incarceration and Crime*, 33 Crime and Delinquency 171 (1988).

¹²⁸ See, e.g., Gregory D. Russell, *The Death Penalty and Racial Bias: Overturning Supreme Court Assumptions* (1994); David Zucchini, *Racial Imbalance Seen in War on Drugs*, Phila. Inq., Nov. 1, 1992, at A1, 15, (noting that African-Americans are arrested and incarcerated for drugs at disproportionate rate compared to actual rates of use); Shawn D. Bushway and Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 L. & Soc. Rev. 733 (2001); Samuel L. Myers Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment*, 64 U. Col. L. Rev. 781 (1993).

¹²⁹ Racial profiling has received substantial attention, for example. See, e.g., Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. Chi. L. For. 163 (2002); Samuel R. Gross and Debra Livingston, *Racial Profiling Under Attack*, 102 Colum. L. Rev. 1413 (2002); Jeffrey Goldberg, *The Color of Suspicion*, N.Y. Times Magazine, June 20, 1999, at 51; 147 Cong. Rec. S2271-2 (comments of Sen. Feingold). Another issue animating race-based critics of criminal procedure is the use of flight from police as evidence of probable cause. See, e.g., Amy D. Ronner, *Fleeing While Black: Fourth Amendment*

conviction.¹³⁰ Debates about these issues have transformed policy in other areas of the criminal law.¹³¹ The fact that community notification stirred so little concern on this count is both startling and consequential.

a. Invisibility in the Courts

Courts have repeatedly reviewed community notification provisions but have never considered the racial impact of these laws. Offenders raised numerous court challenges to Megan's Laws. These attacks included claims that community notification violated the right to privacy,¹³² the constitution's prohibition on cruel and unusual punishment,¹³³ the guarantee of due process,¹³⁴ the prohibition on double jeopardy and bills of attainder, and the ban on *ex post facto* laws.¹³⁵ A few offenders even raised equal protection claims, although these were not grounded in race.¹³⁶ With very few exceptions, petitioners' claims failed in federal and state courts.¹³⁷

Apartheid, 32 Colum. Hum. Rights L. Rev. 383 (2001); David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 Ind. L.J. 659 (1994).

¹³⁰ See, e.g., Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Conviction*, 6 J. Gen. R. & Just. 253 (2002); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 Case W. R.L. Rev. 727 (1998); Alice E. Harvey, Note, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: A Need for a Second Look*, 142 U. Pa. L. Rev. 1145 (1994).

¹³¹ See text accompanying notes 6-8.

¹³² This claim was grounded in both United States constitutional principles and state law. See, e.g., *Doe v. Poritz*, 662 A.2d 367, 407-8 (N.J. 1995)

¹³³ See U.S. Const. amend. VIII.

¹³⁴ See U.S. Const. amend. V

¹³⁵ U.S. Const. art. I, 9-10.

¹³⁶ See, e.g., *Artway v. Attorney General*, 81 F.3d 1235, 1267 (3rd Cir. 1996) (offender arguing that state's distinction between 'compulsive and repetitive' sex offenders and all other sex offenders was arbitrary and capricious); *State v. Swaney*, 2000 Ohio App. LEXIS 4694, at 7 (2000) (offender arguing that offenders are suspect class); *State v. Ward*, 869 P.2d 1062, 1076-7 (Wash. 1994) (offender arguing that registration deadlines that distinguish between individuals currently under correctional supervision, and those not, violates equal protection.)

¹³⁷ See, e.g., *Roe v. Farwell*, 999 F. Supp. 174, 193 (D. Mass. 1998) (denying eighth amendment claim); *Russell v. Gregoire*, 124 F.3d 1079, 1093 (9th Cir. 1997), cert. denied, 118 S. Ct. 1191 (1998) (denying double jeopardy and ex post facto claims); *Doe v. Pataki*, 120 F.3d 1263, 1285 (2d Cir. 1997), cert. denied, 118 S. Ct. 1066 (1998) (denying double jeopardy and ex post facto claims); *E.B. v. Verniero*, 119 F.3d 1077, 1105 (3d Cir. 1997), cert. denied, 118 S. Ct. 1039 (1998) (denying double jeopardy and ex post facto claims); *Doe v. Kelley*, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997) (denying eighth amendment claim); *State v. Scott*, 961 P.2d 667, 676 (Kan. 1998) (denying eighth amendment claim); *Doe v. Poritz*, 662 A.2d

This past term, the Supreme Court addressed two constitutional attacks on public registries, rebuffing both. First, in *Smith v. Doe*¹³⁸, the Court considered a challenge to Alaska’s notification provision. The plaintiff argued that Alaska’s law, which applied retroactively to those convicted of relevant offenses prior to the law’s adoption, violated the constitution’s *ex post facto* clause.¹³⁹ He argued that the community notification law constituted an *ex post facto* law because it imposed new punishment – namely, notification – for an old offense. The Court rejected this claim, concluding that the law was not punitive – in either intent or effect – and thus could constitutionally be applied retroactively.¹⁴⁰

In *Connecticut Dep’t of Public Safety v. Doe*, an offender challenged Connecticut’s notification law on fourteenth amendment grounds, arguing that he was entitled to an individualized assessment of dangerousness before being subjected to community notification.¹⁴¹ Like many states, Connecticut law provides for public distribution of information about all offenders who have been convicted of enumerated offenses.¹⁴² The offender argued that the state’s decision to provide public notification – even in the presence of a written caveat stating that the listing did not reflect any individualized finding of future dangerousness - burdened his liberty interest.¹⁴³ Thus,

367, 404-5 (N.J. 1995) (denying eighth amendment claim); but see Farwell, 999 F. Supp. At 194 (upholding double jeopardy and ex post facto claims); *State v. Myers*, 923 P.2d 1024, 1043 (Kan. 1996) (upholding ex post facto claim); *Louisiana v. Babin*, 637 So. 2d 814, 817 (La. Ct. App. 1994) (same.)

¹³⁸ 123 S. Ct. 1140 (2003).

¹³⁹ See *id.* at 1146-47.

¹⁴⁰ See *id.* at 1154. While the Court concluded that the laws were not punitive, as a legal matter, they do appear to be punishment in a common sense understanding of the term. See Filler, *Making the Case*, *supra* note 37, at 349.

¹⁴¹ 123 S. Ct. 1160, 1164 (2003).

¹⁴² See *id.* at 1163-4.

¹⁴³ See *id.*

he contended, due process entitled him to a pre-deprivation hearing.¹⁴⁴ The Supreme Court rejected this claim, concluding that the state's scheme based notification decisions solely on whether an individual had a prior conviction, not on their level of dangerousness. Thus, a hearing on the issue of dangerousness would be beside the point, and thus not required.¹⁴⁵

I have found no evidence that any party raised race issues – either individual discrimination or disparate impact –in any challenge to these provisions.¹⁴⁶ In many states, it would have been possible for offenders, or their counsel, to calculate the representation of whites and minorities on these rolls, and to have discovered racial disparity. However, as I discuss *infra*, existing equal protection doctrine rendered such data useless, and offenders had no motivation to bring forward such claims.

b. Invisibility in Legislatures

Another potential site for a discussion about race is the legislatures. Based on my sampling of two major legislative bodies – the United States Congress and the New York state legislature – no such discussion occurred. Legislative debate does not necessarily determine the outcome of a legislative vote, but it can play an important strategic role in developing support for a bill, educating the public, and guiding judicial interpretation of a law.¹⁴⁷ Public support for community notification was widespread.¹⁴⁸ As a

¹⁴⁴ See *id.*.

¹⁴⁵ See *id.* at 1164. The Supreme Court's holding in these cases does not foreclose states from providing citizens greater protection under their own state law. Thus, for example, the Hawaii Supreme Court held that the Hawaiian constitution entitles offenders to notice and hearing prior to public notification. See *State v. Bani*, 97 Haw. 285, 298 (2001).

¹⁴⁶ I canvassed all reported cases in the Lexis database of all state and federal cases to look for any instance where race issues might have surfaced. The search I used was: "megan's law" or (commun! w/s notif!) or (sex! w/s offender w/s (notif! or regis!)) w/p (race or racial).

¹⁴⁷ See Filler, *Making the Case*, *supra* note 37, at 323-4. The importance of debate for purposes of judicial interpretation was made clear in the Supreme Court's decision in *Smith v. Doe*, because there the Court attempted to look at the 'manner of [the law's] codification' to determine whether the intent of the

consequence, legislators did not spend a great deal of time debating the new laws. In several states, the laws were passed unanimously; in other states, the bill passed unanimously in at least one legislative house.¹⁴⁹

In an effort to discover the nature of legislative criticism of community notification, I previously conducted an extensive study of legislative debates in these two bodies.¹⁵⁰ The New York legislature and the United States Congress provide a good window into issues likely to have surfaced in debates over community notification.¹⁵¹ Both of these legislatures represent substantial numbers of African-Americans, both contain representatives of widely diverging political views, and both engaged in extended

bill was punitive. See also *Smith v. Doe*, 123 S. Ct. at 1144. See also *Doe v. Pataki*, 940 F. Supp. 603, 621-22 (S.D.N.Y. 1996), rev'd in relevant part, 120 F.3d 1263 (2d Cir. 1997) (trial court relying on New York state legislative debate to strike down Megan's Law.)

¹⁴⁸ Although collected after formal adoption of these laws, polling data documents the overwhelming support for community notification. A 1997 poll of Washington State residents indicated that 82% supported notification; a Georgia poll in the same year showed 79% agreeing with the statement that "the public has a right to know of a convicted sex offender's past, and that right is more important than the sex offender's privacy rights." See Lieb, *supra* note 10, at 73.

¹⁴⁹ States that approved these provisions unanimously include New Mexico, see *Roundhouse Roundup*, Albuquerque Trib., March 13, 1999, at D5; Virginia, see Filler, *Making the Case*, *supra* note 37, at 317; Illinois, see *id.*; Washington, see *id.*; and Pennsylvania, see *Hot Issues of the Week*, State Capitols Report, Sept. 29, 1995 (discussing Pennsylvania House); *Pennsylvania Senate Adopts Megan's Law as New Jersey Version is Overturned*, Pennsylvania Law Weekly, March 6, 1995, at 3 (discussing Pennsylvania Senate). Research into the vote counts of individual state legislatures is quite difficult. Research on Nexis indicates that many other state houses or senates were unanimous in their support for these laws. See, e.g., *Hot Issues of the Week*, State Capitols Report, Apr. 26, 1996 (Massachusetts House); *Hot Issues of the Week*, State Capitols Report, May 24, 1996 (Michigan Senate); Stephen Olmacher and Matthew Daly, *Tougher Sex Offender Law Passed by Senate*, Hartford Courant, May 26, 1995, at A3 (Connecticut Senate); Ruess, *supra* note 38 (New Jersey Senate); *The Sex Offender Next Door*, St. Louis Post-Dispatch, May 15, 1996, at 6B (Missouri House of Representatives).

¹⁵⁰ The study focused on floor comments in the New York State legislature relating to the Sexual Offender Registration Act, N.Y. Correct. Law §168 (McKinney 2003). It focused on floor comments in both houses of three federal laws: the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Tracking and Identification Act of 1966, Pub. L. No. 103-322, 108 Stat. 2038 (1994) (codified as amended at 42 U.S.C. §14071; Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. §14071(d) (1994)); and the Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (codified as amended at 42 U.S.C. 14072. For a discussion of the precise parameters of my study, see Filler, *Making the Case*, *supra* note 37, at 326-28.

¹⁵¹ A review of legislative debates in two jurisdictions does not foreclose the possibility that race emerged in other state legislatures, but for the reasons set out here, I judged them to be a useful sample.

discussion of these laws – presumably unlike those many jurisdictions that adopted notification unanimously.¹⁵²

Critics of the laws did raise a number of concerns. They focused primarily on issues of procedure, constitutionality, fairness, and efficacy. During the United States House debate over federal Megan’s Law, for example, Representative Melvin Watt of North Carolina spoke out against the bill.¹⁵³ He articulated four concerns about the bill. First, he claimed that the bill improperly punished a person for a crime after he had already served a sentence, and thus paid his social debt.¹⁵⁴ Second, he stated that the law would create a presumption of guilt that every person convicted of a sexual offense was guilty of future offenses.¹⁵⁵ Third, he argued that by mandating state adoption of community notification it trampled on states rights.¹⁵⁶ Finally, he contended that it improperly reached the floor without passing through the judiciary committee.¹⁵⁷

The legislative debate in New York included more extensive critical commentary. For example, one state senator argued that notification would not prevent victimization by friends and family – the most common and least reported form of child sexual assault

¹⁵² An additional reason I chose to study these states was that, as a practical matter, it is often difficult to obtain good records of state legislative debates. In the case of both the United States and New York debates, I was able to obtain extensive records of the floor discussions.

¹⁵³ No other legislator spoke out against community notification in the House debate, and no senator spoke against the provision in the Senate debate – no doubt because of the political cost attached to taking such a position. Representative Watt, as if to inoculate himself from criticism for his opposition to the bill, explicitly noted that constituents would be angry about his position. See 142 Cong. Rec. 11133 (1996) (statement of Rep. Watt.) During the 1998 Congressional debate over the 1998 Child Predator and Sexual Predator Punishment Act of 1998, Republican Representative Ron Paul – a libertarian – noted the powerful political cost to such opposition. He commented, “Who, after all, and especially in an election year, wants to be amongst those members of Congress who are portrayed as soft on child-related sexual crime irrespective of the procedural transgressions and individual or civil liberties one tramples in their zealous approach... Who, after all, can stand on the house floor and oppose a bill which is argued to make the world safer for children with respect to crimes?” See 144 Cong. Rec. H4499 (statement of Rep. Paul.)

¹⁵⁴ See 142 Cong. Rec. H11133 (1996) (statement of Rep. Watt) (discussing Pam Lyncher Sexual Offender Tracking and Identification Act of 1996).

¹⁵⁵ See *id.*

¹⁵⁶ See 142 Cong. Rec. H4456 (1996) (statement of Rep. Watt).

¹⁵⁷ See 142 Cong. Rec. H11133 (1996) (statement of Rep. Watt).

– because it was targeted at assaults by strangers and little-known neighbors.¹⁵⁸ Others worried that notification would be ineffective both because children would likely disobey parental limitations and because it would instill a false sense of security.¹⁵⁹

Constitutional issues surfaced as well. Legislators questioned whether the bill’s retroactivity would violate the *ex post facto* clause.¹⁶⁰ They discussed the possibility, which appeared repeatedly in the media, that these laws would promote vigilantism against offenders.¹⁶¹

Some discussion hinted at race, and at the possibility that African-Americans might benefit less from community notification. One legislator noted that in a high-density city, with easy transit, notification would provide relatively little assistance. Another expressed concern that the safe cover of anonymity available in a city might lead offenders to leave smaller towns and congregate in the city, increasing risk to city residents.¹⁶² This was as close as anyone came to acknowledging the racial dimension of the law.

Race was presumably a silent factor in these debates in another way. The only legislator in the United States Congress speaking against these provisions, Melvin Watt, is an African-American.¹⁶³ Similarly, one of the New York legislators critical of

¹⁵⁸ See Filler, *Making the Case*, supra note 37, at 344.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ See *id.*

¹⁶² Because New York City is a “minority majority” city – white non-Hispanics account for only about 35% of the city’s population, see New York City Dep’t of City Planning, *Population*, available at <http://www.ci.nyc.ny.us/html/dcp/html/census/popdiv.html>, an urban versus suburban critique inevitably implicates race.

¹⁶³ See Congressional Black Caucus Foundation Inc., *African American Members of the 108th United States Congress*, available at <http://cbcfinc.org/Members.html> (last visited Aug. 6, 2003).

notification, state senator David Paterson, is African-American.¹⁶⁴ It would not be surprising, given both their constituencies and their own life experience, if they scrutinized the racial implications of new criminal law with greater vigor. Nonetheless, race did not surface in any express fashion in either the United States or New York legislative debates.

Legislators are constrained by political realities and it is possible that they felt unable to publicly confront the racial implications of these laws. I thus turned to commentators who spoke critically of community notification to see how, if at all, they addressed the potential or real racial dimension of community notification.

c. Invisibility in the Mass Media

Law is produced by legislators and courts, but they act in the greater context of public debate. Media accounts of new law, as well as the need for legislation, can shape public perceptions of a problem. Community notification laws received significant attention in the mass news media. One reason may have been that the decision to report or comment on notification regulations provided media outlets an excuse to repeat, yet again, victim names and the details of the underlying crimes. Despite the silencing power of these narratives¹⁶⁵, mass media commentators did speak out against these laws. Numerous editorial and opinion pieces criticized these laws on a number of bases. Again, however, the potential racial harms of Megan's Laws were simply ignored.¹⁶⁶

¹⁶⁴ See National Black Caucus of State Legislators, *Legislative Directory 2001*, available at <http://www.nbcsl.com/legdirectory/download/Directory.rtf> (last visited Aug. 6, 2003).

¹⁶⁵ See Filler, *Making the Case*, *supra* note 37, at 350-1.

¹⁶⁶ In order to get a sense of news coverage, I searched the Nexis news database extensively. This database has roughly one thousand sources, although most would not be likely to include discussion of community notification. The most important sources, for this research, were the many newspapers included in the database. These include many of the most significant national papers, with the exception of the Wall Street Journal and the Philadelphia Inquirer, which do appear in abstracted form. I selected this source because articles in this database include comments of legislators, policy makers, activists, and

I reviewed hundreds of articles and found that commentators covered many of the other issues identified in other venues. Some authors worried that the shame sanction would be damaging. A Los Angeles Times opinion piece argued that community notification “shames perpetrators and isolates them from the very community that could be a healing force.”¹⁶⁷ CNN featured Hans Selvog, of the National Center on Institutions and Alternatives, saying that community notification “will create more victims because” the community will ostracize not only the offenders but their parents, siblings, and children as well.¹⁶⁸ A USA Today editorial contended that notification might actually diminish reporting of crimes, since most victims are family members and “teen-age girls are less willing to turn in family members who molest them for fear their friends will find out.”¹⁶⁹ Indeed, commentators in the mass media hit on many of the standard critiques of these laws, including, among others, problematic constitutional implications,¹⁷⁰ their

experts, as reported by the media, as well as opinion and editorial pieces. I reviewed materials included in this database from 1989 to 2002. Individuals cited in these sources are in the best position to affect the policy debate about notification. While this source excludes a mass of material – such as trade publications and newsletters – that might have included discussion of race, it does include publications of varied political outlook – the New Republic, the National Review, and the Atlantic, to name a few – as well as a geographically broad sample of newspapers and wire services. One possible critique of this sample is that it includes few publications focusing on particular racial or ethnic viewpoints. Another critique of these sources is that news organizations largely frame issues themselves, excluding coverage of issues or viewpoints that do not fit into the dominant understanding of a story. Nonetheless, because race-based critiques of criminal law are so familiar, and fit within the traditional frame of criminal justice reporting, it seems likely that comments about the racial dimension of notification would have gained traction in some publication covered by this database. Although a much less sensitive search engine, I also conducted numerous searches on the Google web browser. Because of the extensive reach of Google, and its relatively insensitive search parameters, it is difficult to claim that my search of all internet sources was complete. Nonetheless, having reviewed hundreds of hits over the course of 2001-03, I have been exposed to an a large volume of web discussion on these topics.

¹⁶⁷ See Sharon Lamb, *False Remedies Hinder Abuse Prevention*, L.A. Times, June 18, 1997, at B7.

¹⁶⁸ See Burden of Proof (CNN television broadcast Apr. 8, 1997) (transcript available on Nexis.)

¹⁶⁹ Editorial, *Sloppy ‘Megan’s Laws’ Hinder Goal of Boosting Public Safety*, USA Today, May 12, 1998.

¹⁷⁰ See, e.g., Richard Cohen, *Civil Liberties: Campaign Casualty*, Wash. Post, July 11, 1996, at A25; Review and Outlook, *Flawed Law*, Wall St. J., July 9, 1996, at A18; Editorial, *Megan’s Law, Rewritten*, N.Y. Times, July 29, 1995, at 18;

potential to spur vigilante action¹⁷¹ or other damaging consequences¹⁷², and their inefficacy.¹⁷³ However, these multiple critiques, by hundreds of authors, missed the racially disparate impact of notification.

d. Invisibility in the Legal Literature

Scholars and other commentators also missed the issue of race.¹⁷⁴ They did, however, engage in an otherwise full critique of these provisions. Broadly speaking, they articulated concerns about the bills' constitutionality, fairness, efficacy, collateral costs, and effects on particular communities such as juveniles and homosexuals.¹⁷⁵ With respect to constitutional issues, for example, commentators argued that community notification laws constituted unconstitutional double jeopardy, *ex post facto* laws, or

¹⁷¹ See, e.g., Cohen, *supra* note 170 ; Michelle Stevens, *Pitfalls Lurk in Sex Offender Law*, Chi. Sun-Times, Jan. 15, 1996 at 23;

¹⁷² See, e.g., Bernard L. Brock and Pamela D. Schultz, *Megan's Law Could Worsen Child Sex Abuse*, The Record (Bergen County, N.J.), June 27, 1996, at N7.

¹⁷³ See, e.g., *id.*; *The Sex Offender Next Door*, St. Louis Post-Dispatch, May 15, 1996, at 6B;

¹⁷⁴ As with the other research I have described, I was challenged to prove the invisibility of race. I searched the Westlaw journal and law review database for any evidence of such discussion and again came up empty. I searched in the Westlaw journal and law review database from 1989 to 2002. I used this database because I hoped to capture comments of legal scholars, as well as other policy and law experts. In order to determine whether there was any discussion of race in scholarly literature outside the law, I canvassed scholarship in other disciplines utilizing the Ebsco Host Academic Elite database. EBSCO reports that the database includes abstracts from 3,250 different journals. See EBSCO Host Research Databases, *Academic Search Elite, About the Database*, available at http://www.lib.ua.edu:2915/explain.asp?tb=1&_ug=db+1+ln+en%2Dus+sid+786BD891%2D41BB%2D420F%2DABE9%2D3D621B4C9080%40sessionmgr5+8634&_us=dstb+KS+ex+default+gl+default+hs+0+sm+KS+so+b+ss+SO+B7AD&db=Academic+Search+Elite&bk=search.asp [NOTE THAT THIS IS THE CITE FOR UNIVERSITY OF ALABAMA USERS. THIS IS A SUBSCRIPTION DATABASE AND RESEACHERS WILL ACCESS IT BASED ON THEIR OWN INSTITUTION'S ADDRESS.] Unlike the Lexis database, Academic Search Elite does not allow searches for words within a given proximity of each other. Because the search engine is less discerning than Lexis, the accuracy of any search is probably more limited. In addition, the database includes full text of articles from 1,850 of these journals. See *id.* The Academic Search Elite database has an exceedingly broad scope, including "nearly every area of academic study including: social sciences, humanities, education, computer sciences, engineering, physics, chemistry, language and linguistics, arts & literature, medical sciences, ethnic studies and more." See *id.* While the historical reach of the database varies by journal, and older material is available primarily in abstract form, the collection includes publications dating back to 1985 – well before the first notification law was adopted. I found nothing on the subject within this database.

¹⁷⁵ As I discuss further, *infra*, none focused on the impact of these provisions on African-Americans and with the exception of only one or two commentators concerned that community notification would have a disparate impact on Native Americans, none discussed community notification and race.

unconstitutionally cruel and unusual punishment.¹⁷⁶ As courts proved somewhat unsympathetic to these claims,¹⁷⁷ commentators argued that, at minimum, due process compelled a pre-notification hearing.¹⁷⁸ They argued that the laws would not solve the problem of child sexual assaults by offenders known to the victim or her family, the most common case, would not rehabilitate offenders, and might lead to vigilantism.¹⁷⁹ Practical authors pondered the implications of these policies for real estate sales.¹⁸⁰ Other critics argued that the laws were bad juvenile justice policy¹⁸¹ and discriminated against homosexuals.¹⁸² Indeed, in sheer volume, the amount of writing on the topic of community notification is daunting.¹⁸³ Again, on one critical issue – the racial implications of community notification – commentators were silent.¹⁸⁴

For at least two reasons, I anticipated finding at least some serious discussion about the racial impact of community notification. First, the swift rise of notification

¹⁷⁶ See, e.g., Abril R. Bedarf, Comment, *Examining Sex Offender Community Notification Laws*, 83 Cal. L. Rev. 885, 927-39 (1995).

¹⁷⁷ See text accompanying notes 132-7, *infra*.

¹⁷⁸ See Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. Crim. L. & Criminology 1167 (1999).

¹⁷⁹ See, e.g., Kabat, *supra* note 58, at 339-40. This criticism exposes a recurring flaw in critiques of these provisions, focusing on the question of whether notification would solve the problem of child sex offenders. Commentators have not spoken out on the question of whether, for example, there might be efficacy or harm problems related to aspects of these laws that address crimes unrelated to child sexual victimization. For example, no commentator has discussed whether notification is an effective, or desirable, approach to solving prostitution or other crimes set out in the various state notification regimes.

¹⁸⁰ See, e.g., Shelley Ross Saxer, "Am I My Brother's Keeper?": *Requiring Landowner Disclosure of the Presence of Sex Offenders and Other Criminal Activity*, 80 Neb. L. Rev. 522 (2001).

¹⁸¹ See, e.g., Garfinkle, *supra* note 55.

¹⁸² See, e.g., Robert L. Jacobson, Note, "Megan's Laws" Reinforcing Old Patterns of Anti-Gay Police Harassment, 87 Geo. L.J. 2431 (1999).

¹⁸³ For example, a Lexis law review database search with the term "title ("community notification" or "megan's law" or (sex! w/s notif!))" – a concededly over-narrow search – produced 88 hits. That same search of headlines in the Nexis news database produced 2306 hits, although this total admittedly consists largely of news stories about the law.

¹⁸⁴ Sometimes, during my research, I thought I had finally found at least a glancing reference to the issue. Each time, however, the article came close, but never touched on the racial impact of Megan's Laws. See, e.g., Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 Iowa L. Rev. 563 (2002); Vik Kanwar, *Capital Punishment as 'Closure': The Limits of a Victim Centered Jurisprudence*, 27 N.Y.U. Rev. L. & Soc. Change 215, 232

laws was one of the biggest expansions of criminal justice policy in recent history, implicating hundreds of thousands of Americans. The trajectory of these laws was itself remarkable. In a ten year period, the country changed from having zero notification laws to fifty one such provisions. Second, race-based critiques of criminal justice policy have been a central part of critical commentary about criminal law in recent years. Given the massive shift in policy reflected in community notification laws, and a group of scholars and other commentators deeply concerned about the race-effects of criminal law, one might reasonably have expected at least some consideration of race effects. There was none.

IV. Explaining the Invisibility of Race Effects

Race never emerged as an issue in the debate over community notification. Given the centrality of race in criminal justice debates, this is a surprising. In this section, I set out some possible explanations for this silence. These include a lack of judicial remedy through the equal protection clause, an absence of statistical data documenting the race disparities, and several other political, social, and rhetorical justifications. By understanding why race was invisible, I am then able to propose, in the final part, solutions to prevent future debates from being similarly impoverished.

a. Lack of Judicial Remedy

One place in which race could have surfaced was in court. For example, an African-American offender subject to community notification might have sought to strike these laws as contrary to the equal protection clause, presenting evidence of disparate racial impact. Offenders would be highly motivated to make such claims, since legal

(2002); See Richard Tewksbury, *Validity and Utility of the Kentucky Sex Offender Registry*, Fed. Probation, June 2002, at 21, 23.

invalidation could have provided refuge from notification.¹⁸⁵ The courts appear a logical site for such claims since one of their widely agreed upon purposes is protecting minorities from overreaching legislative majorities.¹⁸⁶

Despite the logic of such challenges, they have not been forthcoming, presumably because they are not cognizable under current equal protection doctrine. The Supreme Court has held that equal protection claimants must establish intentional discrimination.¹⁸⁷ In one case, the Supreme Court concluded that disparate impact alone could establish intentional discrimination.¹⁸⁸ In the context of criminal sanctions, however, the Court has rejected disparate impact evidence as independent proof of intent.

In *McCleskey v. Kemp*¹⁸⁹, the Supreme Court solidified its existing approach to disparate impact claims grounded in racially skewed punishment. There the Court upheld Georgia's death penalty scheme, despite evidence that African-Americans were disproportionately subject to the ultimate sanction. The Court was presented with an extensive empirical record establishing that racial differences in the frequency of death sentences could not be explained by the facts of individual cases and the only explanation for these disparities was race itself.¹⁹⁰ The Court assumed the accuracy of this

¹⁸⁵ See text accompanying note 231-2, *infra*.

¹⁸⁶ This sort of activism is precisely the appropriate judicial role identified by the Supreme Court in its famous *Carolene Products* decision. There, Justice Stone noted that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities” and which may require judicial intervention. See 304 U.S. 144, 152 fn.4 (1938) (suggesting that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities” and which may require closer judicial scrutiny.)

¹⁸⁷ See *Washington v. Davis*, 426 U.S. 229, 248 (1976).

¹⁸⁸ See, e.g. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that government that denied permit to operate laundry to every Chinese applicants, while granting to all but one white applicant, violated equal protection clause).

¹⁸⁹ 481 U.S. 279 (1987).

¹⁹⁰ The Baldus study established that the single most likely determinant of whether a person facing death would receive death was the race of the victim and offender and the strongest predictor of a death

conclusion,¹⁹¹ but denied petitioner's equal protection claim. It required petitioner to prove that some person – a prosecutor, for example – intentionally discriminated against him on the basis of race. The Court explained the policy basis for this narrow reading of the equal protection clause, arguing that:

McCleskey's claim, taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system... Thus, if we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.... The Constitution does not require that a State eliminate any demonstrable disparity that correlates with a potentially irrelevant factor in order to operate a criminal justice system.¹⁹²

Thus, the Court took the position that the criminal justice system could not, and need not, defend itself from charges of disparate treatment. Democratically selected legislatures – presumably controlled by majorities – were the sole bodies capable of remedying this sort of racially disparate treatment.¹⁹³

Scholars, criticizing, *McCleskey*, argue that legislatures cannot be counted on to protect minority groups in this fashion and arguing – citing *Carolene Products* - that this is precisely the right site for judicial intervention. Nonetheless, with very limited exceptions,¹⁹⁴ *McCleskey* effectively bars the door to equal protection claims based on evidence of racially disparate treatment. As a result, offenders motivated to challenge these laws in the interest of self-preservation would not have bothered with race

sentence was that the victim was white and the offender African-American. See *id.* at 325-6 (Brennan, J., dissenting). A second, though less powerful, determinant was race of the offender alone. If he was African-American, he was more likely to receive death. See *id.*

¹⁹¹ See *id.* at 291, fn. 7.

¹⁹² *Id.* at 315-9.

¹⁹³ See *id.* at 319.

¹⁹⁴ See, e.g. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that government that denied permit to operate laundry to every Chinese applicants, while granting to all but one white applicant, violated equal protection clause).

claims.¹⁹⁵ At the same time, lacking any effective way to translate data into judicial action, researchers may not have bothered to compile race-based data on community notification.

b. Lack of Data

A second factor that may have caused silence about race was the failure of states, or the federal government, to require the collection and distribution of race data. The mere existence of data about the racial effects of a law or policy provides three powerful impetuses to address any inequities. *First*, it makes it easy for those concerned about the issue to see disparities. Much of the vast literature about racial disparities in the law revolves around those matters for which there is publicly available, publicly produced empirical support: the rates of arrest, conviction, and imprisonment of African-Americans as compared to others.¹⁹⁶ *Second*, it provides easy access to data for advocates concerned about these issues, thus reducing the costs (in time and money) of producing such data. *Third*, it flags for researchers a potentially rich vein of future research justifying further attention.¹⁹⁷

The decision to collect race data is a politically charged. For example, in the aftermath of early attacks on police racial profiling, Representative John Conyers

¹⁹⁵ See Note, *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 Harv. L. Rev. 2098, 2112 (2001) (arguing that “because defendants have the greatest incentive to monitor the system, they are needed as private attorneys general to deter state actors from unconstitutional behavior”)

¹⁹⁶ See, e.g., Michael Tonry, *Malign Neglect*, supra note 125; Samuel Walker et al., *The Color of Justice: Race, Ethnicity, and Crime in America* (1996); Sharon L. Davies, *Study Habits: Probing Modern Attempts to Assess Minority Offender Disproportionality*, 66 Law & Cont. Prob. 17 (2003); David Cohen, *Democracy and the Intersection of Prisons, Racism and Capital*, 15 Nat'l Black L.J. 87 (1997-1998); Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 Mich. L. Rev. 1660 (1996). This is just a small portion of the literature on the issue.

¹⁹⁷ Thus, for example, the distribution of race data on traffic stops in Maryland and New Jersey provided powerful pressure on Congress to adopt federal law requiring collection of such data across the

proposed a law requiring police to collect race data on those individuals stopped.¹⁹⁸ As soon as police advocacy groups learned about this provision, they worked hard to block it.¹⁹⁹ The political aspect of the battle over racial data collection has boiled over in California, where activists successfully placed a referendum on an upcoming ballot amending the state's constitution to make racial data collection virtually impossible.²⁰⁰ Data collection has proven effects. Shortly after Maryland and New Jersey provided data showing wide racial disparities in traffic stops, for example, pressure for Congress to adopt a national data collection requirement increased substantially.²⁰¹

The decision to assemble these statistics is complicated. It requires the collectors to resolve the difficult questions of racial identity: how should people be classified, and who should decide?²⁰² In addition, collection of such data is arguably divisive because it focuses on race as a basis of difference, rather than, for instance, height, religion, or perhaps favorite sport. With respect to incarceration rates, race data serves the dual

country. See David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 Law & Cont. Prob. 71, 77-8 (2003).

¹⁹⁸ See David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 Law & Cont. Prob. 71, 76 (2003).

¹⁹⁹ See *id.* at 77.

²⁰⁰ The provision provides, among other things, that “the state shall not classify any individual by race, ethnicity, color or national origin in the operation of public education, public contracting or public employment...[or] in the operation of any other state operations, unless the legislature specifically determines that said classification serves a compelling state interest and approves said classification by a 2/3 majority in both houses of the legislature, and said classification is subsequently approved by the governor.” With respect to criminal matters, it specifically provides “neither the governor, the legislature nor any statewide agency shall require law enforcement officers to maintain records that track individuals on the basis of said classifications, nor shall the governor, the legislature or any statewide agency withhold funding to law enforcement agencies on the basis of the failure to maintain such records.” The provision does permit data collection if required by federal law or in order to comply with the terms of any federal funding stream. See Proposition 54, proposed amendment to California constitution available at http://www.informedcalifornia.org/initiative_text.shtml (last visited Aug. 8, 2002).

²⁰¹ See *id.* at 77-8.

²⁰² Proposition 54 addresses this problem by providing that the Department of Fair Housing and Employment, which is largely exempt from the provision, “shall not impute a race, color, ethnicity or national origin to any individual.” Presumably this requires the state to record only an individual's racial or ethnic self-identity.

function of informing concerned citizens about deep racial disparities and, to some degree, reconfirming, or even creating, stereotypes of African-Americans as criminals.

On the other hand, while the decision to focus on race has the potential to increase the cultural significance of race, perhaps to the extent of increasing racial hostility,²⁰³ it also facilitates the identification of problematic racial disparities. When presented with data showing that New Jersey police engaged in racial profiling, citizens are more likely to understand the role of race in determining who will be arrested. This recognition may cause discomfort among some citizens, and anger among others. At the same time, by opening the issue to public debate, it forces citizens to decide if these policies are consistent with their moral and political visions. Even without deciding the overall desirability of assembling such information, it seems clear that the failure of governments to collect race data about Megan's Laws obscured real inequalities, increased the cost of discovering these disparities, and reduced the likelihood that any individual commentator would ever notice.

Nonetheless, an absence of data cannot provide a complete explanation for the silence. While the federal government does not compile data in a form that would have allowed legislators or commentators to accurately predict the racial profile of those subject to notification, the data it does collect – such as the demographics of those arrested and convicted for selected sex crimes²⁰⁴ - shows racial disparities. For example,

²⁰³ I use the term 'racial hostility', rather than 'racial discrimination' because, as some critics note, policies that many consider desirable correctives to historical racism – for example, affirmative action – can also be a form of racial discrimination.

²⁰⁴ See, e.g., Department of Justice Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (Feb. 1997). This data does not provide any good prediction of community notification lists because the Department of Justice calculates data by groups of crime, and none of these groups, or groups of these groups, dovetails precisely with the triggering offenses of any state community notification regime.

in 1995, 42% of all individuals arrested for rape were African-American.²⁰⁵ In 1994, 43.7% of all state prisoners incarcerated for rape, and 22.8% of those incarcerated for sexual assault, were African-American.²⁰⁶ Given the various triggering offenses included in notification provisions, and the fact that some of these rape offenses may not even subject a person to community notification, this data does not provide an accurate prediction of the racial impact of notification. Still, it does hint at the likely impact of these laws. Had commentators been guessing their effects in 1997, they would probably have predicted what we now know for certain: community notification has a disparate statistical impact on African-Americans.

c. Political Explanations

Perhaps silence was the product of political pressures. Legislators and commentators may have identified the racial problems with Megan's Laws but concluded that infirmities were either insufficiently important or too costly to discuss. Politicians are unlikely to raise concerns that expose them to unnecessary political attack. This fear probably explains why so few legislators opposed notification at all. Still, some did speak out against the laws on non-racial grounds. They may have seen race-based claims as particularly politically dangerous, in part because advocates' "child protection" frame cast the crime victims as the silenced minority.²⁰⁷

²⁰⁵ See *id.* at 10.

²⁰⁶ See *id.* at 21.

²⁰⁷ To see the power of the "child-victim" frame, one need only compare it to the "woman-victim" frame. In 1976, Susan Brownmiller published *Against Our Will*, a landmark feminist work on rape. See Susan Brownmiller, *Against Our Will: Men Women and Rape* (1976). Within the next few years, several African-American women challenged Brownmiller's account on racial grounds, arguing among other things that rape was very much a racist construction, part of broader effort to oppress African-American men. See, e.g., Alison Edwards, *Rape, Racism and the White Women's Movement: An Answer to Susan Brownmiller* (1980). For a discussion of African-American critiques of the white feminist anti-rape movement, see Sujata Moorti, *Color of Rape: Gender and Race in Television's Public Spheres* 54-62 (2002). These critics were not understood to be sexist, but rather offered a more nuanced understanding of

The legislators most likely to raise race- based critiques might have reserved them for other issues. Race arguments are powerful because they trigger core moral concerns in American society. For that reason, however, they are precious; overuse has the potential to dilute their effectiveness. Liberal legislators may have determined not to waste these arguments on behalf of these particular offenders, generally understood as child sex offenders. Alternately, others might have feared that merely raising the issue required a concession that African-Americans are convicted of sex crimes at a disparately high rate, a fact that some might construe as evidence that African-American men are sexually dangerous.

Political explanations do not seem to provide much of an explanation for the silence among commentators, however. Free of constituents, and often protected by tenure, commentators are relatively free to raise any concerns about new law. Like legislators, some may have feared that the mere utterance of these claims would cast African-Americans in a negative light. Yet that same claim could be made about much of the literature focusing on over-representation of African-Americans within the criminal justice system: in order to make these arguments in the first instance, one has to set out the factual realities that African-Americans are arrested, convicted, and incarcerated in disproportionate numbers.

d. Social and Psychological Explanations

rape. Apparently it has not thus far been possible to offer a more nuanced understanding of community notification because such critiques would presumably be seen as valuing a special interest – African-Americans – over a universal interest, childhood.

The strategic use of this frame was evident in the Supreme Court’s recent decision in *Connecticut Dep’t of Public Safety v. Doe*, upholding Connecticut’s notification scheme, in which Justice Rehnquist, early in his opinion, asserts that most victims of sexual assault are children. See 123 S. Ct. at 1162. It is unclear why Justice Rehnquist highlighted this claim other than to take advantage of the rhetorical power of child protection. The Court, after all, held that the offenders’ demand for a hearing on dangerousness was irrelevant to Connecticut’s decision to post the identity of those convicted of particular crimes.

Another potential reason for the absence of racial critiques is that some aspect of the democratic process – and the ways that people behaved around these issues – made such debates impossible. Community notification was, to a large extent, the product of heightened social anxiety that followed in the aftermath of highly publicized crimes against children. These sorts of crimes often trigger a particular type of social response called a “moral panic.” Behavioral law and economists, on the other hand, explain the public fixation on these high profile, but atypical, incidents by focusing on individual cognitive heuristics and group-think encouraged by “availability cascades.” This section outlines how these analytical lenses help explain silence about race and community notification.

Sociologists argue that public response to child exploitation cases often develops into a “moral panic” - a broad social terror about an issue that is disproportionate to the apparent extent of the underlying problem.²⁰⁸ “The core attribute of a moral panic is the public’s identification and demonization of a particular person or group as a ‘folk devil’, a morally flawed character that is the source of the crisis.”²⁰⁹ Common attributes of moral panics include the existence of a triggering event, heightened concern about a particular group’s conduct, hostility towards this group, broad agreement that the threat is serious, anxiety out of proportion to documentation of the threat, and the production of new laws to address the threat.²¹⁰ Public anxiety over the high profile attacks on Megan Kanka triggered such a panic, which resulted in both the swift adoption of new laws and the

²⁰⁸ See Philip Jenkins, *Moral Panics: Changing Concepts of the Child Molester in Modern America* (1998).

²⁰⁹ Daniel M. Filler, *Terrorism, Panic and Pedophilia*, 10 Va. J. Soc. Prob. & Law 345, 359 (2003).

²¹⁰ See *id.*

minimal debate over them.²¹¹ As a practical political matter, the public would not tolerate substantial dissent over these provisions because, in the surge of moral panic, it became convinced that there was a rash of pedophile attacks and notification would somehow slow or stop them. In this environment, any debate at all was exceedingly difficult. In this view, the debate about race was only one casualty of the broader problem of short-circuited public discussion.

In *Moral Panic*, Philip Jenkins convincingly argued that over the course of the twentieth century, Americans have suffered wave after wave of powerful public fear over questions of child abuse. In the 1990's, this anxiety involved an apparent rash of abductions and rapes of young children. A phalanx of child protection advocates worked tirelessly to frame the issue of child abduction and sex abuse as a massive problem. Experts trooped before television cameras to proclaim that millions of children were victims of this abuse. Even legislators – perhaps seeking to follow constituents concerns, but certainly simultaneously producing these concerns – announced that the problem was massive.

Moral panics engender and strengthen these concerns. Legislators feel pressured to support any legislation that claims to protect children against sexual predators, even though the actual proposals: 1) punished many offenders who did not victimize children;

²¹¹ Scholars debate the triggering mechanism of moral panics. There are three models for how such a panic begins: a grassroots model, that suggests panics are triggered by a groundswell of public concern, see e.g. Kai Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (1966) (describing witchhunts); an interest model, that argues that they are the product of interest groups commandeering these incidents to promote themselves and their agendas, see e.g. Joel Best, *Threatened Children: Rhetoric and Concern About Child-Victims* (1990) (describing interest groups taking advantage of child abduction crisis to build political power); and elite-engineered models that suggest that the triggering mechanism starts from the top, with politicians and other political elites, see e.g., Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (1997) (arguing that politicians seek out issues to inflame public passions). See Jeffrey S. Victor, *Moral Panics and the Social Construction of Deviant Behavior: A Theory and Application to the Case of Ritual Child Abuse*, 41 *Socio. Persp.* 541 (1998). As a practical matter, the

and 2) reached offenders who had never even touched another person. As long as the law was framed in terms of Megan Kanka's case, it became a lightning rod for public concern about child abduction and sexual assault. Speaking against this bill on any basis was politically dangerous and this may explain why many states did not even have a debate or a dissenting vote on their community notification bills.²¹²

Moral panics appear, at first, to be a race-neutral phenomenon. Katherine Beckett has suggested, however, that they may mask underlying racism of "moral entrepreneurs" who stimulate such panics in support of particular issues or groups. Indeed, the fact that the moral panic of child crime arose out of a series of crimes involving white victims suggests, at minimum, that the moral panic that may have triggered community notification had some racial cast.

Sociologists describe the democratic malfunction that follows high profile crimes as moral panic, but they do not ascribe an individual or social psychological explanation for these panics. Behavioral law and economists, on the other hand, attempt to explain irrational behavior by understanding how such "irrationality" really reflects the highly complicated rationality of the human mind. These economists focus on heuristics, mental shortcuts that help individuals make decisions in the face of overwhelming amounts of data.

triggering mechanism does not much matter in this case because the outcome of a moral panic is the fast, unreasoned adoption of new law.

²¹² It is worth noting that moral panics, particularly in an era of 24-hour news cycles and national news networks, vitiate a chief benefit of our federalist system. One virtue of having states pass criminal, and criminal-related, laws independently is that early adopters become laboratories for legislation. But when a story moves across the country so quickly, and when it is framed as a national crisis, legislators at the state level feel tremendous pressure to adopt bills quickly to address the apparent crisis. The state system might once have slowed this process considerably; today, however, the procedural hurdle of fifty-one jurisdictions adopting a law appears remarkably minor.

One important heuristic is “availability.” Individuals attempting to assess the probability of a given event base their judgment not on statistical studies, but rather on how easily they recall examples of the event.²¹³ Thus, for example, an individual’s assessment of the likelihood of a plane crash is based largely on how easily she can recall such an event having occurred. People see the greatest risks in events that receive great public attention; more obscure events, even if common, will not generate the same concern. As Cass Sunstein explains, “for people without statistical knowledge, it is far from irrational to use the availability heuristic.”²¹⁴ The problem, he warns, “is that this heuristic can lead to serious errors of fact, in the form of excessive fear of small risks and neglect of large ones.”²¹⁵

As individuals increasingly gain knowledge of the world through mass media, these heuristics have become deeply problematic. By its nature, mass media tell unusual stories to garner public attention.²¹⁶ For years, journalists have been told to find the “man bites dog” story, because “dog bites man” is not sufficiently interesting to draw readers. Yet, if citizens gain little information about the world outside of the mass media, one or two “man bites dog” stories will generate widespread hysteria about the practice of dog biting. The media will feed on this frenzy, searching for every new story that might be framed as another dog biting. These new stories are compelling reading for a public now terrified of dog biters, and thus draw audiences, but they also serve to reify the

²¹³ See Cass Sunstein and Timur Kuran, *Availability Cascades and Risk Regulation*, 51 *Stanford Law Review* 683, 685 (1999); Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, in *Judgment Under Uncertainty: Heuristics and Biases* 3, 11 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

²¹⁴ Cass R. Sunstein, *Hazardous Heuristics*, 70 *U. Chi. L. Rev.* 751, 752 (2003).

²¹⁵ *Id.*

²¹⁶ See Cass R. Sunstein, *What’s Available? Social Influences and Behavioral Economics*, 97 *Nw. U. L. Rev.* 1295, 1308 (2003) (noting that “gripping instances, whether or not representative, are likely to attract attention and to increase ratings.”)

underlying sense that dog biting is now widespread. In a mass media society, the availability heuristic operates discursively. As the media publicizes atypical stories, the public grows afraid of these stories. The media feeds this fear by finding new, compelling examples, thus providing apparently empirical evidence for the ubiquity of these previously invisible problems.²¹⁷

The rare stranger abduction – the cases of Polly Klaas and Megan Kanka, particularly - captured national attention and became the model case of child victimization. Faced with several of these stories, Americans concluded that stranger abductions were at a crisis level. As these stories were repeated, their frequency becomes exaggerated, and they appeared to be random, generating fear and anxiety that was disproportionate to the actual risk.²¹⁸ In the case of these abductions, public perceptions of risk were distorted. Stranger abductions, while deeply troubling, are in fact quite rare.²¹⁹ But the media, seeking to keep American media consumers engaged in news consumption, searched out, and publicized, any new case that could remotely be classified as a stranger abduction.²²⁰ Ironically, this effort to maintain public interest in the news story served to provide evidence of the apparent accuracy of this heuristic.

²¹⁷ See *id.* at 1308-09.

²¹⁸ See Daniel M. Filler, *Random Violence and the Transformation of the Juvenile Justice Debate*, 86 Va. L. Rev. 1095 (2000).

²¹⁹ See Mona Lynch, Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation, 27 L. & Soc. Inq. 529, 545 (2002) (noting that only 3% of cases of child sex abuse, and 6% of cases of child murder involve strangers); Filler, *Making the Case*, *supra* note 37, at 353-4 (discussing study showing that in 1988 there were between 200 and 400 abductions which lasted a substantial period, involving strangers, in the United States). Far more commonly, children are victimized by their step-fathers or family friends. See Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 Cornell L. Rev. 251, 270-72 (2001) (arguing that the presence of a step-father was strongest correlate of victimization and that victimization of these children comes at the hands of both step-father and other family friends.)

²²⁰ The process of ever expanding what constitutes an example of the original crime is called “domain expansion.” See Daniel M. Filler, *Random Violence and the Transformation of the Juvenile Justice*

The behavioral law and economists argue that the availability heuristic then mixes with a process called “cascading” – the social process by which individuals share these salient stories, both propagating them and, implicitly, vouching for the seriousness of the problem.²²¹ At the same time, for reputational reasons, individuals who doubt the seriousness of the problem may decreasingly share, or hold, this view because it will become socially marginal.²²² Thus, as Sunstein describes it,

Insofar as people refrain from expressing their doubts, uncertainties, and misgivings, public discourse will become impoverished, eventually making people whose perceptions depend on public discourse stop questioning what appears as the conventional wisdom. In other words, the unthinkable ideas of one period can turn into the unthought ideas of a later one. In one period, people with doubts do not speak out; in the next, doubts have ceased to exist.²²³

While sociologists are satisfied to describe moral panics, behavioralists have agenda: they seek to promote greater rationality in the democratic process. Thus, their analyses are driven in part by the desire to identify recognizable, and correctable, sites of malfunction. At core their claim is the same as the sociologists: when really unusual and awful things capture media and public attention, they can create an unstoppable, if irrational, demand for new law. Behavioralists, unlike sociologists, offer prescriptions. They suggest, for example, that government design “circuit breakers” that slow the rush towards these irrational laws.²²⁴ The efficacy of these barriers is doubtful, but they do represent a constructive approach generally towards dysfunctional democratic process. Unfortunately, these circuit breakers – which often turn out to be the delegation of

Debate, 86 Va. L. Rev. 1095, 1105 (2000) (describing how a newspaper expanded notion of “road rage”, initially used to described highway shootings, to include cases of “aggressive driving”).

²²¹ See Kuran and Sunstein, *supra* note 213, at 715-29.

²²² See *id.*

²²³ *Id.* at 731.

substantial responsibility to apparently “rational” bureaucrats – may do little to insure greater consideration of race. After all, if hundreds of legal and political commentators did not think to consider the racial impact of community notification, why would these bureaucrats be any different?²²⁵ Indeed, the behavioralist literature has not yet taken full account of the role of race in these apparent deviations from rational behavior; perhaps these laws have been adopted not out of failed democratic choice but rather because of the majority’s “taste for discrimination.”²²⁶

Despite the compelling argument that community notification was the product of a moral panic or availability cascades that prevented full debate, and even the possibility that panics and cascades were the product of implicit racism, these analyses still do not fully explain the silence about race. The limits to this explanation are two-fold. First, there was some legislative debate over notification. This debate covered many of the same issues that surfaced in the commentary about community notification. Thus, moral panic and availability cascades did not impair all opposition to the laws – only race based criticisms. Second, these theories do not explain the silence of commentators. Critics such as Jonathan Simon,²²⁷ Joseph Kennedy,²²⁸ Cass Sunstein²²⁹ and others, all manage to repel the force of panics and cascades, effectively critiquing the very laws they claim are examples of such democratic malfunctions. It is hard to see how they explain the

²²⁴ See, e.g., Kuran and Sunstein, *supra* note 213, at 761-2.

²²⁵ Some commentators have argued, in fact, that delegation of power away from traditional democratic institutions may have the effect of minimizing the voice of racial minorities. See, e.g., David A. Hoffman, *How Relevant is Jury Rationality*, 2003 U. Ill. L. Rev. 507.

²²⁶ See Gary Becker, *The Economics of Discrimination* 14 (2d ed. 1971).

²²⁷ See, e.g., Jonathan Simon, *Megan’s Law: Crime and Democracy in Late Modern America*, 25 *Law & Soc. Inq.* 1111 (2000).

²²⁸ See, e.g., Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 *Hast. L.J.* 829 (2000).

²²⁹ See, e.g., Kuran and Sunstein, *supra* note 213.

failure of any commentator to critique the racial dimension of notification, particularly after all the legislative battles had ended.

e. The White Narrative Frame

Another possible explanation for the paucity of discussion about race is that the narratives used in support of the laws implicitly suggested that the bills would not have a negative impact on African-Americans. That is, if the lesson of Megan Kanka and others were to be believed, the provisions were designed to regulate white on white crime.

Mass media coverage of political and legal issues are built around frames – words or stories used to describe these issues to the public.²³⁰ The frame used by advocates of notification may have played a powerful role in the ways that people thought about these laws. Advocates for these laws chose to frame their arguments in terms of a few narratives. These were powerful stories, but they only captured a small portion of the overall problem addressed by offender registries. The narratives focused on white child victims, abducted and raped by white men, all strangers. For most people reading or hearing about these proposed laws, these stories formed the basis for their understanding about the laws. This may have led people to assume that the laws would regulate those crimes, and those offenders, featured in the narratives: white victimizers of children. This narrow conception of the laws' implications may have led people otherwise critical of race issues, and otherwise concerned about major expansions of criminal law, to relax their scrutiny of notification. Indeed, given that notification gained the support of strong liberal legislators, a group likely to be suspicious of the effects of new criminal law,

²³⁰ See e.g. Paul R. Brewer, *Framing, Value Words, and Citizens' Explanations of Their Issue Opinions*, 19 *Poli. Comm.* 303 (2002) (showing how words describing issue are components of media frames); Joel Best, *Random Violence: How We Talk About New Crimes and New Victims* 28-47 (1999) (describing how instances of crimes are used to frame broader problem.)

many people may actually have cheered the law as a rare example of the white majority getting tough on itself.

V. Addressing Invisibility

I have suggested that community notification has a disparate racial impact, and that, for a variety of reasons, the democratic process – in the form of legislative debate as well as discussion among commentators – failed to address the racial dimension of these laws. In this section, I set out some proposals designed both to encourage greater consideration of the racial costs of community notification, and to increase the likelihood that courts and legislators will better address these costs in future decisions and legislation. I identify three possible areas for change: doctrine, transparency, and scholarship.

a. Doctrinal Moves: Equal Protection

Judicial remedies do more than merely assure justice; they create incentives for people to act.²³¹ As discussed, *infra*, elected representatives may have felt that discussing the racially disparate impact of community notification was bad politics. There are individuals, however, who do not feel so constrained: offenders themselves.²³² Because the equal protection clause does not offer these offenders a venue for claims about racial impact, they are unlikely to do the work necessary to support such a claim – compile race-based data. Courts might alter existing equal protection jurisprudence in a variety of ways to address this problem.

²³¹ See *Constitutional Risks to Equal Protection in the Criminal Justice System*, 114 Harv. L. Rev. 2098, 2112 (2001) (discussing how equal protection analysis may motivate offenders to act as private attorneys general.)

²³² See *id.*

First, courts could allow equal protection attacks on community notification using disparate impact evidence alone to establish impermissible discriminatory intent.

McCleskey v. Kemp takes an extreme position on the value of disparate impact evidence, holding that such evidence, alone, will virtually never constitute proof that criminal sanctions were the result of improper intentions. The Supreme Court could retain its *Washington v. Davis* requirement that all equal protection claims be grounded in discriminatory intent, but accept that in many cases, disparate impact evidence proves this intent. The problem with this doctrinal solution is that it fails to identify how serious disparity must be before it proves discriminatory intent.

In addition, this solution elides the difficult question of what constitutes “intent.” David Sklansky argues that unconscious racism is “an unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care given as a matter of course to one’s own group.”²³³ In this context, consider felon disenfranchisement laws. Alabama disenfranchises almost one in three African-American men. There is no evidence that legislators desire to disenfranchise black men, yet it seems impossible to imagine that the legislature would adopt any law that disenfranchised one third of all white men. As a matter of both human respect and political reality, the white majority would be very unlikely to tolerate such an infringement on democratic participation. As long as disparities are used only to prove intent, however, courts will be forced to evaluate – with little guidance – when unarticulated, and perhaps sub-conscious or unconscious intent, constitutes legally intentional conduct.

²³³ See David A. Sklansky, *Cocaine, Race and Equal Protection*, 47 *Stan. L. Rev.* 1283, 1307 (1995), citing, Paul Brest, *Forward, In Defense of Antidiscrimination Principle*, 90 *Harv. L. Rev.* 1, 7-8 (1976).

Some commentators have suggested ways to address these issues. Charles Lawrence proposes that courts adopt a cultural meaning test, which “would evaluate government conduct to see if it conveys a symbolic message to which the culture attaches a racial significance.”²³⁴ If a reviewing court determines that a majority of society views the law as having a racial significance, the court would “presume that socially shared, unconscious racial attitudes made evident by the action’s meaning had influenced the decisionmakers.”²³⁵ If so, the law would be subject to strict scrutiny. Such an approach would not be helpful in the context of notification, or other laws that have an invisible racial impact, since a substantial part of the problem is precisely that people have not fully recognized the racial impact of the laws.²³⁶

A more powerful approach would use evidence of disparate impact alone to trigger equal protection scrutiny. Sklansky, for example, suggests that when a neutral law imposes racially disparate burdens, the government could be called on to justify the disparities.²³⁷ Alternately, the Court could follow the approach of the Minnesota Supreme Court in *State v. Russell*.²³⁸ Using the state’s equal protection clause, the court struck down a Minnesota sentencing provision that provided more severe penalties for crack than powder cocaine. The Court employed a more rigorous “rational basis” standard than applicable under current federal doctrine, requiring than a statute meet a three part standard:

²³⁴ See Charles R. Lawrence III, *The Id, The Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 356 (1987).

²³⁵ *Id.*

²³⁶ In fact, one criticism of this approach in modern America is that issues that do have socially evident racial meaning are likely to face scrutiny and public debate over this matter. Although the majorities may nonetheless adopt these laws, they are more likely to be carefully crafted to limit their impact than laws that have an invisible racially disparate impact.

²³⁷ See Sklansky, *supra* note 233, at 1319.

²³⁸ 477 N.W.2d 886 (Minn. 1991).

(1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial, thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.²³⁹

Either of these analyses would empower a court reviewing community notification provisions to consider whether notification provisions are relevant to the purpose of the law. To the extent that legislators are only willing to articulate narrow, and politically popular purposes – for example, child protection – courts could strike down provisions that go outside these narrow goals. Some aspects of community notification might survive under this analysis, even if they hurt African-Americans disparately, but a stringent form of review would allow offenders in to court to make their claims. In addition, by creating an incentive for legislators to be honest about the goals of the bill, and to tailor the bill to those stated goals, the public would at least be treated to a debate that bears a real relationship to the law itself.

There are good reasons to reject such expansions of equal protection. Courts have the capacity to limit damaging legislation, but they are not a panacea. Judges, like legislators, are subject to unconscious racism. And judicially imposed solutions, which short-circuit the public debate leading to broader changes in public attitudes, may effectively impede the ultimate goal of racial equity within society. Nonetheless, commentators must seriously consider the value of doctrinal change in light of this new evidence that the democratic process stumbles because of policies that obscure racially disparate effects.

²³⁹ *Id.* at 888.

As a practical matter, the Supreme Court is unlikely to change its equal protection jurisprudence any time soon. Proposals for doctrinal change are still important for two reasons. First, they provide a roadmap for the future, when the makeup of federal courts may be different. More importantly, however, states may be convinced to join the Minnesota courts and interpret their own state equal protection provisions in a fresh way, addressing the concerns identified here. State courts often provide more robust state constitutional protections than are available under federal law.²⁴⁰ Indeed, in light of how quickly states adopted notification laws, rather than allowing a few states to test them out first, it would be an ironic twist for state courts to scrutinize these laws under state equal protection jurisprudence, thus serving as a laboratory for the United States Supreme Court.

b. Legislative Moves: Transparency, Institutional Opposition and Supermajorities

The courts may never be the ideal way to insure that laws with problematic racial effects become law. While there are good reasons for the judiciary to play a role in evaluating these laws, the *McCleskey* court is surely correct in suggesting that this task is better if handled by the legislature. What can legislatures do to insure both that democratic process functions effectively, and that substantively problematic outcomes – such as laws with unjustified racially disparate impact – are not adopted?

The first step is to adopt a policy of transparency through data collection. For the reasons discussed, *infra*, collection of race data carries risks. Nonetheless, we know that criminal laws have a long history of delivering disparately harsh effects on minority

²⁴⁰ See Mark Strasser, *Equal Protection at the Crossroads: On Baker, Common Benefits and Facial Neutrality*, 42 Ariz. L. Rev. 935, 944 (2000). For a discussion of this phenomenon, see William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977).

communities. Given this history, it makes sense to accept the dangers involved in data collection. Legislators should assume that any new law – whatever the apparent goals and effects – when inserted into the existing criminal justice regime, will deliver racially disparate results. To assure that these results are tolerable, and to insure that these outcomes are actually tolerated after an informed democratic debate, legislatures – or the United States Congress – should adopt a requirement of race data collection.

Legislatures can do more, however. As the notification debate suggests, some issues do not receive a full and fair hearing legislative hearing. Sometimes political pressures make it very difficult for elected officials to articulate reasoned opposition to popular laws. Nonetheless, democracy functions better when criticism of law surfaces, both because it promotes better laws and because it stimulates public debates. One way to insure that politically radioactive issues receive a full hearing would be to appoint “public advocates” akin to public defenders.²⁴¹ As I have suggested previously,

This person would be empowered to participate in legislative debate when a bill has little or no opposition,...might be allowed to participate upon the (possibly anonymous) request of only one legislator, [and]... might argue reasons to oppose a law, challenge claims made by a provision's supporters, or suggest better alternatives to the bill.²⁴²

Finally, as a procedural matter, legislatures could attempt to slow the process of adopting new criminal laws by imposing new procedural requirements. Some scholars have recently argued the benefits of imposing legislative supermajority rules in certain cases. John McGinnis and Michael Rappaport contend that requiring supermajorities may improve the quality of lawmaking “when political passions lead the legislature to

²⁴¹ See Filler, *Making the Case*, *supra* note 37, at 365.

²⁴² *Id.*

behave in a short-sighted or unreasonable manner.”²⁴³ A supermajority requirement could improve legislation in two different ways. First, because a larger portion of the legislature would be required for adoption of a new law, the majority supporting the bill might be forced to consider and include the concerns of minority groups within the legislation. Such rules will likely force greater compromises with minority factions. In the case of community notification, however, this might have little effect since few, if any, legislators appreciated the law’s racial implications.

Such a requirement might help in another way, however. The rare adoption of constitutional amendments, a classic example of the supermajority rule, may be explained partially by an institutional concern about radical change. That is, the supermajority requirement may have the effect of changing legislators’ perception of the gravity of their acts. Today, legislators seem to think nothing of imposing serious new burdens on liberty in the form of new criminal law. At the same time, constitutional amendments – even ones implicating new criminal laws, such as the proposed flag-burning amendment – are viewed as very serious, requiring heightened justification. If legislators decide to impose supermajority requirements on the adoption of criminal laws, this could have similar effect, transforming, for example, community notification from a small criminal issue to a larger question of the proper role of government. This in turn would increase the likelihood that legislators and others would study these bills closely, and that in turn would increase the likelihood that race might surface as a concern.

c. Scholarly Moves: Developing Data on Community Notification and Broadening Democratic Process Critiques With a Racial Lens

²⁴³ See John O. McGinnis and Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 730 (2002).

Scholars can also do more to reduce the problematic effects of community notification, while reducing the risk that future laws will pass with such minimal scrutiny. With respect to community notification, the first step is further research. This article does not purport to provide a full catalog of the racial effects of community notification across the country. There is a need to both compile statistics about the impact of these laws, and to attempt to understand the reasons for statistical disparities. By conducting regression studies, similar to those produced by David Baldus and litigated in the *McCleskey* case, researchers may discover whether the racial disparities in community notification result from discretionary choices, the particular crimes selected for notification, or any of a number of either acceptable or unacceptable causes.

Data collection is not enough, however. Theorists working to improve democratic debate – those studying both moral panics and behavioral law and economics – need to take the race-effects of these phenomena more seriously. Thus far, scholars have focused on the ways in which moral panics and availability cascades, for example, produce “irrational” law. Scholars must look more closely at whether this irrationality is random, or whether it systematically delivers a disparate effect on minorities. It is inadequate to attempt to rationalize a system in ways that ignore racial irrationality.

CONCLUSION

African-Americans bear the costs of Megan’s Laws at a level far in excess of other Americans. Despite the fact that this disparity was reasonably predictable, critics repeatedly failed to discuss the issue of racially disparate impact. This silence stunted democratic debate, and stands as a barrier to serious evaluation and reformation of community notification. As a consequence, African-Americans suffer these inequalities

even in the absence of proof that registries work, or that the specific provisions generating these disparities serve the stated legislative purposes of Megan's Laws. The time has come for courts, legislators and scholars to speak out, and take remedial action. To instigate a conversation about the racial dimension of these provisions, courts must rethink equal protection doctrine. Legislators must implement substantive and structural reforms that make such debates more likely. And commentators must step forward, developing more rigorous analyses and assisting other participants in the larger democratic debate. Silence about race is costly and the price is overwhelmingly paid by African-Americans, and their communities, already impoverished by the overwhelming inequities of American criminal justice.