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## The Shame Game: Montana's Right To Privacy For Level 1 Sex Offenders

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# ESSAYS

## THE SHAME GAME: MONTANA'S RIGHT TO PRIVACY FOR LEVEL 1 SEX OFFENDERS

Johnna Preble\*

“The days of the far-off future would toil onward, still with the same burden for her to take up, and bear along with her, but never to fling down; for the accumulating days, and added years, would pile up their misery upon the heap of shame.”<sup>1</sup>

### I. INTRODUCTION

In April 2006, Stephen Marshall collected the names and addresses of 34 people from Maine's sex offender registry.<sup>2</sup> Maine publishes photos, names, addresses, and criminal histories of about 2,220 sex offenders on the internet for public viewing.<sup>3</sup> Shortly after acquiring his list, Marshall went to the homes of two of the convicted sex offenders, William Elliott and Joseph Gray, and shot each of them to death.<sup>4</sup> Later that day, while police were attempting to apprehend him, Marshall shot and killed himself.<sup>5</sup> The only link connecting the two victims was their placement on Maine's sex offender registry.<sup>6</sup>

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\* B.A., University of Montana, 2008; J.D., University of Montana School of Law, 2013; I am very grateful to Stacey Gordon for all of her suggestions, editing, and encouragement. I also owe many thanks to Chad Preble for opening my eyes to this issue and supporting me through the writing process.

1. Nathaniel Hawthorne, *The Scarlet Letter* 91 (James Osgood & Company 1876).

2. Gitika Ahuja, ABC News, *Sex Offender Registries: Putting Lives at Risk?* (Apr. 18, 2006) (available at <http://abcnews.go.com/US/story?id=1855771>).

3. *Id.*

4. *Id.*

5. Amy Clark, CBS News, *Sex Offender Murder Suspect Kills Self* (April 17, 2006) (available at <http://www.cbsnews.com/news/sex-offender-murder-suspect-kills-self/>).

6. Ahuja, *supra* n. 2.

One of the victims, William Elliott, was only 24 years old at the time of his murder. His mother considered him a “warm, loving young man” and stated that without the registry “he’d still be alive today.”<sup>7</sup>

For devices intended to fix societal ills, sex offender registries often create as many problems as they attempt to correct. From the vigilante justice enforced by people like Marshall to the difficulties faced by offenders attempting to find jobs, the collateral issues created by sex offender registries often outweigh their use as public safety mechanisms, particularly for lower-level offenders.

Politicians often cite high recidivism rates to justify sex offender registries to the public.<sup>8</sup> However, as with any statistic, recidivism rates can be manipulated.<sup>9</sup> Frequently the rates cited include parole and probation violations, as well as new offenses committed by the offenders that are not sexual in nature.<sup>10</sup> Also, the recidivism rates often cited are those for sexual deviants and not those of low-level sex offenders.<sup>11</sup> By definition, low-level sex offenders are placed in low-level groups because they have a lower likelihood of committing a repeat offense.<sup>12</sup>

Sex offender registries have been challenged federally under the Ex Post Facto, Double Jeopardy, and Due Process Clauses of the U.S. Constitution.<sup>13</sup> Similar challenges to both the sex offender and violent offender registries have been brought in Montana based on the Montana Constitution’s Ex Post Facto and Right to Privacy Clauses.<sup>14</sup> However, an argument targeted specifically towards lower-level designations has never been brought before either the U.S. Supreme Court or the Montana Supreme Court.

The Montana Constitution has an enumerated right to privacy; the U.S. Constitution does not. As a result, the State has a higher burden to overcome when infringing on the right to privacy.<sup>15</sup> Because Level 1 sex offenders, by definition, have a low likelihood to reoffend, the laws requiring

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7. *Id.*

8. Human Rights Watch, *No Easy Answers: Sex Offender Laws in the U.S.* 21, <http://www.hrw.org/reports/2007/09/11/no-easy-answers> (Sept. 11, 2007).

9. *Id.* at 26.

10. Tim Bynum, *Recidivism of Sex Offenders*, <http://www.csom.org/pubs/recidsexof.html> (May 2001).

11. *Id.*

12. Mont. Code Ann. § 46–23–509(2)(a) (2013).

13. Stephen R. McAllister, “Neighbors Beware”: *The Constitutionality of State Sex Offender Registration and Community Notification Laws*, 29 Tex. Tech L. Rev. 97, 100–101 (1998). *See also Smith v. Doe*, 538 U.S. 84, 97 (2003).

14. *See State v. Brooks*, 289 P.3d 105 (Mont. 2012); *State v. Mount*, 78 P.3d 829 (Mont. 2003).

15. *See Brooks*, 289 P.3d at 108.

them to register are arguably unconstitutional in Montana.<sup>16</sup> This article argues that the burden placed on Level 1 sex offenders when they are forced to register far outweighs the public safety interest under Montana's right to privacy.

Part II of this article discusses the history of sex offender registries both federally and in Montana. Part III further explains Montana's heightened right to privacy, describes the sex offender tier designation system in Montana, discusses current sex offender recidivism rates, and further defines some of the policy issues associated with sex offender registries.

## II. BACKGROUND

### A. *The Federal Sex Offender Registration and Notification Act and Right to Privacy*

#### 1. *The History of Federal Sex Offender Registration Laws*

In 1994, in response to the heinous rape and murder committed against seven-year-old Megan Kanka by a repeat sexual predator, New Jersey passed "Megan's Law."<sup>17</sup> Although Megan's Law was not the first state-imposed sex offender registration statute,<sup>18</sup> it has become one of the most well-known. Megan's Law spurred the development of similar laws in many other states.<sup>19</sup>

In 1994, Congress quickly followed suit by enacting the Jacob Wetterling Act.<sup>20</sup> With this Act, Congress created federal guidelines for states to generate their own sex offender registries.<sup>21</sup> The Act also created financial incentives for states that developed these registries.<sup>22</sup> It further indicated which type of crimes a person must have committed to be considered a "sex offender" and the procedures governing the registration process.<sup>23</sup> Finally, Congress set up criminal liability for sex offenders who failed to register and permitted states to develop public notification requirements.<sup>24</sup>

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16. Mont. Code Ann. § 46-23-509 (outlines the different level designations for sex offenders and states that for a Level 1 sex offender "the risk of a repeat sexual offense is low").

17. 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 Nw. U. L. Rev. 788, 789, 795 (1996).

18. California was the first state to enact sex offender registration laws in 1947. State of California Department of Justice Office of the Attorney General, *Sex Offender Registration and Exclusion Information*, <http://www.meganslaw.ca.gov/sexreg.aspx> (2009).

19. *E.g. Smith*, 538 U.S. 84.

20. McAllister, *supra* n. 13, at 101.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

In 1996, the Act was amended to require, rather than just permit, certain public notifications.<sup>25</sup> The Act specifically states that the federal guidelines required for the financial incentives set only a minimum standard for states, and that states may impose any additional restrictions on sex offenders that they see fit.<sup>26</sup>

## 2. *Federal Ex Post Facto and Double Jeopardy Challenges to the Sex Offender Registry*

In *Smith v. Doe*,<sup>27</sup> the U.S. Supreme Court heard challenges to state sex offender registry and notification laws under both the Ex Post Facto and Double Jeopardy Clauses of the federal constitution.<sup>28</sup> Both of these challenges apply only to people convicted of sex offenses before registration and notification laws were passed in their particular state.<sup>29</sup> The crux of both challenges rests in whether the registration and notification laws constitute further punishment for the offense.<sup>30</sup>

Double jeopardy analysis begins with the language of the clause. The Double Jeopardy Clause of the Fifth Amendment states, “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .”<sup>31</sup> The Double Jeopardy Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>32</sup> The Supreme Court has interpreted this clause to apply in three situations: “(1) a second prosecution for the same offense following an acquittal; (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.”<sup>33</sup> Sex offender registration and notification laws only apply to the third situation.<sup>34</sup> The respondents in *Smith v. Doe*, as had other sex offenders who challenged registry laws under the Double Jeopardy Clause in state courts, mainly argued that the dissemination of their personal information constituted additional “punishment” for same offense for which they were already punished.<sup>35</sup>

Like the double jeopardy analysis, the ex post facto analysis begins with the language of the clause. Article I of the U.S. Constitution states,

25. *Id.* at 102–103.

26. McAllister, *supra* n. 13, at 103.

27. *Smith*, 538 U.S. 84.

28. *Id.* at 97; McAllister, *supra* n. 13, at 111.

29. McAllister, *supra* n. 13, at 111.

30. *Id.* at 113–114.

31. U.S. Const. amend. V.

32. U.S. Const. amend. XIV.

33. McAllister, *supra* n. 13, at 112.

34. *Id.*

35. *Smith*, 538 U.S. at 92; McAllister, *supra* n. 13, at 112.

“No Bill of Attainder or ex post facto Law shall be passed.”<sup>36</sup> In Latin, “ex post facto” translates to “after the fact.”<sup>37</sup> Essentially, the Supreme Court has held this clause only applies to punitive laws that disadvantage the person convicted.<sup>38</sup> The Court has held that a constitutionally-prohibited ex post facto law “(1) punishes as a crime conduct that was not criminal when committed, (2) retroactively increases the punishment for a crime after its commission, or (3) deprives a defendant of a legal defense that was available at the time the crime was committed.”<sup>39</sup> Challenges to sex offender registry and notification laws only apply under the second category of prohibited ex post facto laws.<sup>40</sup> The respondents in *Smith v. Doe* again argued that the dissemination of their personal information constituted retroactive, additional “punishment.”<sup>41</sup> Thus, the question at the root of both double jeopardy and ex post facto challenges is whether registration and notification laws constitute “punishment.”<sup>42</sup>

In *Smith v. Doe*, the Court addressed exactly that question.<sup>43</sup> It determined whether Alaska’s registration and notification laws, which applied retroactively, constituted additional punishment under the Ex Post Facto Clause.<sup>44</sup> First, the Court turned to the express and implied intent of the Alaska Legislature in passing the law.<sup>45</sup> Because the Legislature stated that dissemination of sex offender information would help in protecting the public safety, the Court determined its stated intent was not punitive.<sup>46</sup> The Court then analyzed the implied intent of the Legislature.<sup>47</sup> It determined that the location of the statute in the code,<sup>48</sup> as well as the enforcement mechanisms in place,<sup>49</sup> showed that the implied purpose of the Legislature “was to create a civil, nonpunitive regime.”<sup>50</sup> Finally, the Court analyzed the statute using the *Mendoza-Martinez* factors that were first developed in double jeopardy jurisprudence.<sup>51</sup> The Court noted that the factors should be read as “neither exhaustive nor dispositive.”<sup>52</sup> The factors are “whether, in

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36. U.S. Const. art. I, § 9, cl. 3.

37. McAllister, *supra* n. 13, at 113.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 112.

42. *Id.* at 113–114.

43. *Smith*, 538 U.S. at 92.

44. *Id.*

45. *Id.* at 93.

46. *Id.*

47. *Id.* at 93–94.

48. *Id.* at 94–95.

49. *Smith*, 538 U.S. at 95.

50. *Id.* at 96.

51. *Id.* at 97.

52. *Id.* (quoting *U.S. v. Ward*, 448 U.S. 242, 249 (1980)).

its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.”<sup>53</sup> Addressing each factor in turn, the Court determined the statute was not punitive in nature.<sup>54</sup>

Some of the Justices, in their concurring and dissenting opinions for this case, disagreed with the majority, finding the laws punitive in nature.<sup>55</sup> In Justice Souter’s concurring opinion he stated, “This means that for me this is a close case, for I not only agree with the Court that there is evidence pointing to an intended civil characterization of the Act, but also see considerable evidence pointing the other way.”<sup>56</sup> He explained that the Act’s placement within the code and enforcement also can point towards the penal nature of the Act.<sup>57</sup> While discussing the intent of the Legislature, Justice Souter stated, “The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on . . . .”<sup>58</sup> While he saw this as a close case, Justice Souter agreed with the majority opinion because of the presumption of constitutionality afforded to the laws of the states.<sup>59</sup>

Justice Stevens in his dissent, and Justice Ginsburg in a separate dissent joined by Justice Breyer, disagreed with the majority, finding the burdens and stigma placed on sex offenders through registry requirements were clearly punitive and thus violated the Ex Post Facto Clause.<sup>60</sup> In her dissenting opinion, Justice Ginsburg stated, “As Justice STEVENS and Justice SOUTER spell out, Alaska’s Act imposes onerous and intrusive obligations on convicted sex offenders; and it exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism.”<sup>61</sup>

### 3. *The Federal Due Process Challenge*

In *Connecticut Department of Public Safety v. Doe*,<sup>62</sup> the Court determined that state sex offender registries and notification laws did not violate

53. *Id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1962)).

54. *Id.* at 97–106.

55. *Smith*, 538 U.S. at 106–118 (Souter, J., concurring; Stevens & Ginsburg, JJ., dissenting).

56. *Id.* at 107 (Souter, J., concurring).

57. *Id.* at 108 (Souter, J., concurring).

58. *Id.* at 109 (Souter, J., concurring).

59. *Id.* at 110 (Souter, J., concurring).

60. *Id.* at 110–118 (Stevens & Ginsburg, JJ., dissenting).

61. *Smith*, 538 U.S. at 115 (Ginsburg, J., dissenting).

62. *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

an individual's procedural due process rights under the Constitution.<sup>63</sup> The respondent in the case argued that because he was not a dangerous sexual offender, the law "deprive[d] him of a liberty interest—his reputation combined with the alteration of his status under state law—without notice or a meaningful opportunity to be heard."<sup>64</sup> Essentially, the Court held that determination of the current level of danger posed by an offender is not required under the Connecticut statute because the State has chosen to publicize the information of all sex offenders and not just those currently dangerous; thus, the determination is moot.<sup>65</sup> Furthermore, the Court stated that the respondent argued a procedural due process right, so a decision on whether the statute violates a substantive due process right must wait for another day.<sup>66</sup>

*B. The Montana Sex and Violent Offender Registration Act and  
Right to Privacy*

*1. History of the Act*

The Montana Legislature enacted the Sexual Offender Registration Act in 1989.<sup>67</sup> The Act included both registration and notification laws for sex offenders.<sup>68</sup> In 1995, the Legislature amended the Act to include violent offenders and renamed it as the "Sexual and Violent Offender Registration Act" (SVORA).<sup>69</sup> In 1997, the Legislature amended the Act again, this time to make the registration and notification requirements apply retroactively to sex offenders.<sup>70</sup> Also at this time, the Legislature included a preamble to the Act.<sup>71</sup>

The preamble to SVORA includes the concerns that prompted its adoption.<sup>72</sup> The listed concerns are:

- (1) the danger of recidivism posed by sexual and violent offenders and the protection of the public;
- (2) the impairment of law enforcement's efforts to protect communities from lack of information about offenders;
- (3) the prevention of victimization and the prompt resolution of sexual or violent offenses;
- (4) the sexual or violent offender's reduced expectation of privacy because of the public's interest in safety; and
- (5) the furtherance of the primary govern-

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63. *Id.* at 8.

64. *Id.* at 6.

65. *Id.* at 7–8.

66. *Id.* at 8.

67. *Mount*, 78 P.3d at 832.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Brooks*, 289 P.3d at 107.

72. *Id.*

mental interest of protecting specific vulnerable groups and the public in general from potential harm.<sup>73</sup>

## 2. *Statutory Scheme*

The Montana Code Annotated provides the statutory framework for registration and notification of sex offenders under Title 46, which is dedicated to Criminal Procedure. Section 46–23–502 defines a sexual or violent offender as “a person who has been convicted of or, in youth court, found to have committed or been adjudicated for a sexual or violent offense.”<sup>74</sup> Section 46–23–504 requires sexual and violent offenders to register within three days of changing residences.<sup>75</sup> Sections 46–23–506(1) and (3) allow for Level 1 sex offenders to petition the court to avoid the obligation to register if they have met certain requirements. Section 46–23–507 provides that the penalty for failing to register is “imprisonment of not more than 5 years” or a fine of “not more than \$10,000” or both.<sup>76</sup> Section 46–23–508 allows for the dissemination of a Level 1 offender’s address, name, photograph, physical description, date of birth, and offenses for which the offender is required to register.<sup>77</sup> Finally, § 46–23–509 outlines the different level designations for sex offenders and states that for a Level 1 sex offender “the risk of a repeat sexual offense is low.”<sup>78</sup>

## 3. *Montana’s Right to Privacy*

Article II, section 10, of the Montana Constitution states: “The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”<sup>79</sup> The Montana Supreme Court has interpreted this section to provide Montanans with a fundamental right of individual privacy.<sup>80</sup> This right is protected if “(1) the individual had a subjective or actual expectation of privacy and (2) society is willing to recognize that expectation as reasonable.”<sup>81</sup> An infringement on an individual’s fundamental right to privacy is subject to strict scrutiny.<sup>82</sup> The strict scrutiny analysis requires the law to be “narrowly tailored to serve a compelling state interest.”<sup>83</sup>

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73. *Id.*

74. Mont. Code Ann. § 46–23–502.

75. *Id.* at § 46–23–504(1).

76. *Id.* at § 46–23–507.

77. *Id.* at § 46–23–508(1)(b)(ii)(A) through (D).

78. *Id.* at § 46–23–509(2)(a).

79. Mont. Const. art. II, § 10.

80. *Brooks*, 289 P.3d at 105.

81. *Id.* at 108.

82. *Id.*

83. *Id.*

#### 4. *Montana Challenges to the Sex Offender Registry*

The Montana Supreme Court has decided two cases involving the constitutionality of SVORA under the Ex Post Facto and the Right to Privacy clauses of the Montana Constitution. In 2003 the Court decided the first case, *State v. Mount*,<sup>84</sup> under Article II, section 31 of the Constitution.<sup>85</sup> The Ex Post Facto Clause states: “No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the Legislature.”<sup>86</sup> As it has for other criminal cases, the Court used a three-part test to determine whether SVORA constituted an ex post facto law.<sup>87</sup> The Court stated that “a law is ex post facto if it: (1) punishes as a crime an act which was not unlawful when committed; (2) makes punishment for a crime more burdensome; or (3) deprives [a] person charged with a crime of any defense available under the law at the time the act was committed.”<sup>88</sup> In line with the U.S. Supreme Court’s approach in *Smith v. Doe*, the Court assessed SVORA using the *Mendoza-Martinez* factors.<sup>89</sup> The Court found SVORA to be nonpunitive in nature.<sup>90</sup>

The next issue addressed by the *Mount* Court was whether SVORA infringed on the privacy rights of offenders.<sup>91</sup> *Mount* argued, under Article II, section 28 of the Montana Constitution, that when he was discharged, all of his rights should have been restored, including his right to privacy.<sup>92</sup> The relevant section of the Constitution states, “Full rights are restored by termination of state supervision for any offense against the state.”<sup>93</sup> The Court found that although *Mount*’s right to privacy was implicated by the requirement that he register, the state had the compelling interest of protecting public safety in enforcing the laws.<sup>94</sup> The Court also found the laws to be narrowly tailored to meet only those concerns in a reasonable way.<sup>95</sup> Throughout this opinion, the Court did not differentiate between the three levels of sex offenders identified by statute in Montana.<sup>96</sup>

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84. *Mount*, 78 P.3d 829 (Mont. 2003).

85. *Id.* at 833.

86. Mont. Const. art. II, § 31.

87. *Mount*, 78 P.3d at 834.

88. *Id.*

89. *Id.* at 837–841.

90. *Id.* at 841.

91. *Id.*

92. *Id.*

93. Mont. Const. art. II, § 28(2).

94. *Mount*, 78 P.3d at 842.

95. *Id.*

96. *Id.* at 833–842.

In 2012, the Court decided *State v. Brooks*.<sup>97</sup> The *Brooks* Court determined whether requiring a violent offender to register violated his right to privacy under the Montana Constitution.<sup>98</sup> Brooks, while not a sex offender, was required to register under SVORA as a violent offender for his prior conviction of felony arson.<sup>99</sup>

The Court reasoned that in creating the laws requiring sexual and violent offenders to register, the Legislature effectively reduced the expectation of privacy for these types of offenders “because of the public’s interest in safety.”<sup>100</sup> The Court then discussed the strict scrutiny requirement for laws infringing on fundamental rights and the reasoning of *Mount*.<sup>101</sup> Brooks argued that because the recidivism rates of arsonists are less than those of sex offenders, the public safety interest in requiring him to register is less compelling.<sup>102</sup> The Court disagreed, citing the Legislature’s intent as indicated by the specific inclusion of violent offenders in SVORA.<sup>103</sup> Brooks also argued that the laws were not narrowly tailored based on the lack of level designations for violent offenders.<sup>104</sup> The Court rejected this argument because violent offenders are required to release less information through registration laws than sex offenders, thus making level designations unnecessary.<sup>105</sup> The Court added that the laws are even more narrowly tailored for violent offenders because they generally require registration for lesser amounts of time than sex offenders.<sup>106</sup> Ultimately, the Court held that the violent offender registration requirements of SVORA do not violate the Montana constitutional right to privacy.<sup>107</sup> Again, however, the Court mentioned sex offender level designation, but the individual levels were not addressed specifically.

### III. DISCUSSION

#### A. Montana Sex Offender Tier Levels

The Montana Code Annotated designates sex offenders into one of three levels.<sup>108</sup> For Level 1 sex offenders, “the risk of a repeat sexual of-

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97. *Brooks*, 289 P.3d 105.

98. *Id.* at 107.

99. *Id.* at 106.

100. *Id.* at 108.

101. *Id.* at 109.

102. *Id.*

103. *Brooks*, 289 P.3d at 109.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Mont. Code Ann. § 46–23–509(2).

fense is low.”<sup>109</sup> For Level 2 sex offenders, “the risk of a repeat sexual offense is moderate.”<sup>110</sup> For Level 3 sex offenders, “the risk of a repeat sexual offense is high, there is a threat to public safety, and the sexual offender evaluator believes that the offender is a sexually violent predator.”<sup>111</sup> The statute provides that at the time of sentencing, the court reviews “the sexual offender evaluation report, any statement by a victim, and any statement by the offender” to determine the offender’s level designation.<sup>112</sup>

On its website, the Montana Department of Justice (Montana DOJ) further explains the tier-level system of identifying and placing sex offenders on the registry.<sup>113</sup> The Montana DOJ sheds some light on the method used to determine a sex offender’s level designation.<sup>114</sup> Essentially, the website states that the offender’s crime and past behavior are compared to other similarly-situated individuals who have been released from prison and how high of a risk these others posed to public safety.<sup>115</sup> Further, in its statement on the purpose of tier levels, the Montana DOJ states, “Tier levels are a method of assessment to predict the likelihood that a sexual offender will reoffend. Tier levels also assess the threat that an offender poses to public safety.”<sup>116</sup> Although the Montana DOJ claims this method is “scientific,” these guidelines are not codified in any regulation and therefore do not adhere to any transparent public process.<sup>117</sup>

Important information to take from SVORA itself and from the State’s website is that the Montana Legislature made a conscious decision to differentiate between certain types of sex offenders. In creating levels based on the possible public safety threat, the Legislature implicitly acknowledged that not all types of sex offenders recidivate, and thus not all offenders should be treated in the same way. Why then, if someone is classified by the court as a Level 1 sex offender because he poses a low risk of reoffending, would he be required to follow registration and notification requirements making his private information widely available to the public?

A Missoula clinical psychologist and member of the Montana Sexual Offender Treatment Association, Michael Scollati, agrees that the law is

109. *Id.* at § 46–23–509(2)(a).

110. *Id.* at § 46–23–509(2)(b).

111. *Id.* at § 46–23–509(2)(c).

112. *Id.* at § 46–23–509(3).

113. Montana Department of Justice, *Offender Types and Tier Levels*, <https://app.doj.mt.gov/apps/svow/offendertypes.aspx#types> (accessed Apr. 14, 2013).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* See also Admin. R. Mont. 20.7.301–20.7.304 (2013) (these regulations deal only with the qualifications and certification of sex offender evaluators and do not provide insight into the methods used to determine tier levels).

overly broad. In a 2014 interview he stated, “The guy that is 18 years old and has sex with a 15-year-old and gets convicted of statutory rape—he’s way different than the pedophile that’s been grooming and accessing kids for 20 years.”<sup>118</sup> Clearly, as sex offenses vary greatly, so too should the requirements for registration.

### B. Recidivism

Although local statistics are difficult to track down based on sex-offender level designation, national statistics may help fill in the blanks.<sup>119</sup> Statistics often have shortcomings, and certain problems can arise when attempting to determine precise recidivism rates for sex offenders.<sup>120</sup> Because sex crimes often go undetected, an underreporting of incidents may skew recidivism statistics.<sup>121</sup> Also, as discussed above, sex offenders are often grouped together in statistical analyses without accounting for the differences in their crimes and levels of threat to the public.<sup>122</sup> Another major problem with sex offender recidivism statistics is how “recidivism” is defined within any given study.<sup>123</sup> Sometimes recidivism can mean that the offender was arrested or convicted for another sex crime, and sometimes it can just mean the offender had a new, non-sex-crime arrest.<sup>124</sup> The definition of recidivism depends entirely on the researcher’s whim, which makes it difficult to analyze multiple studies together.<sup>125</sup> Finally, recidivism statistics may be skewed because of the differing follow-up methods and periods of various studies.<sup>126</sup> For example, an offender who has not been in prison may have more opportunities to reoffend and thus possess a higher recidivism rate over a five-year period than an offender who spent those five years incarcerated.<sup>127</sup> The issues associated with gathering and presenting recidivism rates suggest those statistics promulgated by various special interest groups and politicians should be closely analyzed and not blindly followed.

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118. Jacqueline Quynh, *Sexual offenders living near Missoula school prompts concern*, KPAX.com, <http://www.kpax.com/news/sexual-offenders-living-near-missoula-school-prompts-concern/> (Feb. 4, 2014).

119. One Montana news article stated the re-offense rate for all level sex offenders in Montana was 2% in 2009, however, the source of this statistic was not provided. *Id.*

120. Lisa Williams-Taylor, *Increased Surveillance of Sex Offenders, Impacts on Recidivism* 53–81 (Marilyn McShane, Frank P. Williams III, eds., LFB Scholarly 2012).

121. *Id.* at 53–54.

122. *Id.* at 54–57.

123. *Id.* at 57–58.

124. *Id.*

125. *Id.*

126. Williams-Taylor, *supra* n. 120, at 58.

127. *Id.* at 60–61.

Although politicians and the media often report outrageous percentages of sex offenders recidivating, frequently in the 80–90% range, some carefully conducted research has found startlingly different information.<sup>128</sup> In 2005, researchers Hanson and Morton-Bourgon conducted a meta-analysis on 82 existing recidivism studies.<sup>129</sup> While they found that 36.2% of sex offenders generally recidivate, only 13.7% of these offenders sexually recidivated and only 14.3% violently recidivated.<sup>130</sup>

Another study found that sex offenders really do not recidivate more than other types of criminals.<sup>131</sup> In 2002, researchers Langan and Levin found that within a three-year period recidivism rates were as follows: burglary, 76%; robbery, 70.2%; drug offenses, 66.7%; and rape, 46%.<sup>132</sup>

Considering that SVORA is based primarily on the theory that sex offenders recidivate at alarming rates, the studies cited above provide a basis for the dismantling of the entire registry and notification scheme. This argument is even stronger when specifically addressing whether Level 1 sex offenders must register, as they present the lowest risk of threat to public safety. In reality, if sex offenders really do not recidivate at high rates, and Level 1 offenders have the lowest likelihood of recidivism, requiring them to register appears to be an infringement on these offenders' privacy rights, as well as a waste of state resources.

### C. *Problems with the Montana Supreme Court's Reasoning*

Montana case law regarding sex offender registry fails to recognize the differences in the levels of sex offenders designated by the Legislature in SVORA. The Court should address the reasoning behind the Legislature's decision to treat different types of sex offenders differently. Particularly, the Court bases its compelling state interest on the need for public safety.<sup>133</sup> However, if the Legislature specifically designated a group of sex offenders who are at a low risk to reoffend and pose a low threat to public safety, that interest is arguably no longer compelling.

Also, without a significant public safety interest, the registration and notification laws as applied to Level 1 sex offenders can no longer be considered narrowly tailored as they no longer specifically accomplish only their intended goals. Instead of promoting public safety through awareness

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128. Human Rights Watch, *supra* n. 8, at 4.

129. Williams-Taylor, *supra* n. 120, at 54.

130. *Id.*

131. *Id.*

132. *Id.* (The sample size for this study included 9,691 sex offenders.).

133. *Mount*, 78 P.3d at 840.

of a sex offender in the neighborhood, the law incites neighbors' fear toward someone who likely poses no threat.<sup>134</sup>

Another interest stated by the Court for requiring registration and notification is to ensure sex offender information is readily available to law enforcement officers in the event a crime is committed.<sup>135</sup> Although this may provide justification for the registration aspect of SVORA, the notification aspect of the law would still not be narrowly tailored. Alerting the public of the location of sex offenders does little to aid police investigations. Also, for policy reasons discussed below, this reasoning may fall flat as well.

Another major problem with the reasoning of the Montana Supreme Court as it applies to Level 1 sex offenders is its reasoning that because a public safety interest exists, a sex offender must give up a part of her privacy right.<sup>136</sup> Again, if the public safety interest is low and the right to privacy in Montana is considered fundamental, the Court lacks justification for abrogating an offender's rights. This argument is particularly salient when paired with the Article II, section 28 argument in *Mount*. If an offender in Montana is entitled to a full restoration of her rights, and the public safety interest is low, then the offender should be entitled to a full restoration of her right to privacy upon the termination of her state supervision.

Although this argument is not directed specifically to ex post facto or double jeopardy concerns with SVORA, a major problem with the Court's rationale in both *Mount* and *Brooks* is its reasoning that registration and notification laws are not intended to punish sex and violent offenders. As stated in Justice Leaphart's *Mount* dissent, as well as by Justices Stevens, Souter, Ginsburg and Breyer in *Smith v. Doe*, the consequences imposed on sex offenders through registration requirements are clearly punitive.<sup>137</sup> As stated by Justice Stevens, "a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment."<sup>138</sup> After all, was Hester Prynne's scarlet "A" not a warning to others but rather a punishment for her bad acts?

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134. See Kidpower, *A Sex Offender Is Living in Our Neighborhood! HELP!*, <http://www.kidpower.org/library/article/sex-offender/> (accessed Apr. 26, 2013).

135. *Mount*, 78 P.3d at 838.

136. *Brooks*, 289 P.3d at 108.

137. *Mount*, 78 P.3d at 842; *Smith*, 538 U.S. at 111, 114–115, 118.

138. *Smith*, 538 U.S. at 113.

*D. Policy*

As noted by Illinois State Representative John Fritchey, “The reality is that sex offenders are a great political target, but that doesn’t mean any law under the sun is appropriate.”<sup>139</sup> Many policy reasons exist for eliminating registries entirely, or at least for those offenders who pose little threat to public safety such as Level 1 sex offenders in Montana. The Human Rights Watch gives only a sampling of the public hostility often directed towards sex offenders:

Former offenders included on online sex offender registries endure shattered privacy, social ostracism, diminished employment and housing opportunities, harassment, and even vigilante violence. Their families suffer as well. Registrants and their families have been hounded from their homes, had rocks thrown through their home windows, and feces left on their front doorsteps. They have been assaulted, stabbed, and had their homes burned by neighbors or strangers who discovered their status as a previously convicted sex offender. At least four registrants have been targeted and killed (two in 2006 and two in 2005) by strangers who found their names and addresses through online registries. Other registrants have been driven to suicide, including a teenager who was required to register after he had exposed himself to girls on their way to gym class. Violence directed at registrants has injured others. The children of sex offenders have been harassed by their peers at school, and wives and girlfriends of offenders have been ostracized from social networks and at their jobs.<sup>140</sup>

Finding a job or a place to live constitutes a major problem faced daily by sex offenders in Montana.<sup>141</sup> Besides simply being rejected by possible employers and landlords who require disclosure of felonies on applications or scan the registry for all applicants, sex offenders on supervision must also adhere to the rules put in place by their parole or probation officers, which frequently limit the neighborhoods in which offenders are allowed to live.<sup>142</sup> The justification for these limitations rests on preventing sex offenders from reoffending by keeping them away from schools and other places where children gather.<sup>143</sup> However, no evidence exists that keeping a sex offender from living or working in the vicinity of children will protect children from becoming victims of sex crimes.<sup>144</sup> Some research even suggests that child molesters often find their victims far from their own homes

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139. Human Rights Watch, *supra* n. 8, at 2.

140. *Id.* at 7.

141. Mary Ann Farkas and Gale Miller, *Reentry and Reintegration: Challenges Faced by the Families of Convicted Sex Offenders*, 20 Fed. Senten. Rep. 88, 89–90 (Dec. 2007).

142. Montana Department of Corrections, *Frequently Asked Questions*, <http://www.cor.mt.gov/Facts/pandp.mcp> (accessed Mar. 17, 2014).

143. Human Rights Watch, *supra* n. 8, at 8–10.

144. *Id.*

to avoid exposure.<sup>145</sup> Additionally, living restrictions on sex offenders may require they move further away from their supervision, treatment, and support networks.<sup>146</sup>

Although part of the justification for sex offender registry and notification laws includes easy accessibility of information to law enforcement officials in the event a crime is committed, the registration system may in fact inhibit police more than help them.<sup>147</sup> When a crime is committed in a certain neighborhood, and the registry is loaded with sex offenders living in that area, many of whom do not pose a significant threat, the police may waste significant time investigating these offenders while the actual culprit remains at large.<sup>148</sup>

Finally, substantial costs exist in maintaining sex offender registries and notifications, as well as arresting, convicting, and incarcerating those who fail to abide by Montana's strict three-day registration requirement. The man-hours expended by updating the online registry are massive. Nationally, registration and notification laws cost tax payers millions of dollars.<sup>149</sup> Rather than requiring low-threat sex offenders to register, this money may be better spent on sex crime prevention, education, awareness, counseling, and treatment.<sup>150</sup>

#### IV. CONCLUSION

Level 1 sex offenders in Montana are placed in an interesting predicament. While the Legislature and the Court formally state that they pose little threat to the public, they are still treated the same as higher-level sex offenders yet differently than other criminal offenders. They are required by the State to surrender some of their privacy right based on the need for public safety when they have been designated a low risk to this same public. They face social ostracism and vigilante justice for crimes for which they were told they had served their time. They have difficulty finding jobs, finding homes, and finding neighbors who will not verbally torment them. Their families are stigmatized. They are notified that they are not allowed to attend their children's school events.<sup>151</sup> All the while, they are told by the Montana Supreme Court that this response is not punishment.

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145. *Id.* at 7.

146. *Id.* at 11.

147. *Id.* at 9–10.

148. *Id.* at 9.

149. Human Rights Watch, *supra* n. 8, at 10.

150. *Id.*

151. Montana City School District Policy, *Community Relations*, <http://montanacity.schoolwires.com/cms/lib7/MT15000323/Centricity/Domain/47/4550.pdf> (accessed Mar. 17, 2014).

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*THE SHAME GAME*

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The story of William Elliot, one of the victims discussed above who was targeted because of his place on Maine's sex offender registry, provides a clear example of why sex offender registry and notification laws are unsuitable for low-level sex offenders. William was convicted of a sex crime and placed on the registry for having sex with his girlfriend.<sup>152</sup> At the time of his offense, he was 20 and his girlfriend was only a few days away from turning 16.<sup>153</sup> Vigilante justice against sex offenders took the life of a young man with a promising future.

“The scarlet letter was her passport into regions where other women dared not tread. Shame, Despair, Solitude! These had been her teachers,—stern and wild ones,—and they had made her strong, but taught her much amiss.”<sup>154</sup>

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152. Ahuja, *supra* n. 2.

153. *Id.*

154. Hawthorne, *supra* n. 1, at 226–227.

