1) A clear detailed description of the project, including particular outputs or products, any arguments and ideas the project will put forth, and the need for the project.

Around the US, lawmakers try to outdo each other with tougher penalties and new restrictions on ex-sex offenders, such as public registries, lifetime electronic tagging, indefinite incarceration in mental hospitals, special markings on their homes or car licenses, castration, residency requirements, and what has become in many places a policy of banishment from cities and towns. Until struck down by the US Supreme Court in a 5-to-4 ruling last year – over protests from both major presidential candidates – six state legislatures and Congress had passed laws allowing execution for sex-offenses against minors.

While reflecting legitimate fears about sexual victimization, this focus on sex-offenders also suggests elements of Jim Crow, with the Sexual Revolution as stand-in for the Civil War. In this case, however, the impact is not just regional but national. “[C]ombined since the 1990s with an unprecedented embrace by the American public of harsh punishment, registration and notification laws threaten to transform the practices of criminal justice today,” says Jonathan Simon, of UC Berkeley, noting just one thread of this new legal fabric.1 With the

1 review of Knowledge as Power: Criminal Registration and Community Notification Laws in America; http://www.sup.org/book.cgi?isbn=0804757100

‘Our society is ever increasing with monsters looming amongst us. The Liberals won’t let us kill them, and won’t keep them locked up.’ – reader comment about sex offenders on the Boston Herald website, September 2009
regulation of sexuality and protection of young universal concerns, effects of the US example, unlike Jim Crow, are radiating worldwide. “[America’s] sex-offender laws have grown self-defeatingly harsh,” declared The Economist in a recent editorial. “Other countries... have no excuse for committing the same error.”

The Economist’s concern is not a spark in a vacuum. Over the past few years, human rights, civil liberties, and public policy groups – along with investigative journalists – have paid increasing attention to what’s happening in this area. Human Rights Watch’s (HRW) 2007 report No Easy Answers, a 2007 New York Times series on civil-commitment, and a 2008 critique of registries by the Justice Policy Institute are all notable in this regard. A number of these projects have enjoyed the support of the Soros Foundation.

What I’m proposing here aims to complement these efforts and offers a dimension that I believe is currently under-supplied, a dimension needed both for the overall robustness of this response and for safeguarding the ‘capital’ – the principles and institutional integrity – at last being put to work in this area.

In particular my project focuses on human-rights and sex-offenders (SOs). I seek both to expand the scope and application of human-rights (HR) doctrines to this increasingly dispossessed group, and challenge HR workers to address a peculiarly virulent and increasingly institutionalized form of social-exclusion emerging within the West (which I will characterize as ‘the SO system’). More broadly, I hope to encourage a space of critical dialog about why this area has become such a disproportionate preoccupation in the West. Together with terrorism, laws around sex-crime have been the area of greatest recent legal expansion, novelty, and extremity. This continues unabated despite rates of sex offenses against minors that have fallen dramatically. Yet concern about a sexual danger to minors has shifted from being a topic of episodic flare-ups as throughout the 20th century to becoming a permanent source of inflammation, a dynamo pushing the West in authoritarian directions. In addition to fighting immediate policy battles, there’s need to consider how this came to be and what, long-term, can be done about it.

2 “America’s Unjust Sex Laws,” The Economist, August 6, 2009; http://www.economist.com/opinion/displaystory.cfm?story_id=14165460
4 “[G]overnment figures show the rate of sexual assaults against adolescents between the ages of 12 and 17 plunged 79 percent from 1993 through 2003, and the number of substantiated sex-abuse cases involving children of all ages fell 39 percent in the same period.” Pursuit of Safety: Sex Offender Policies in the US, Vera Institute of Justice (2008), p. 8.
My aim would be facilitating engagement among the following:

- **workers in human-rights** – understood as an evolving body of principles, a frame of reference, and an institutional infrastructure;

- analysts who can provide a broader perspective, such as legal scholars and historians of sexuality, crime, and persecution;

- **professional stakeholders**, such as psychiatrists and psychologists, who increasingly serve as gears in the SO system but who are obliged also to work in accordance with professional codes of ethics;

- a group of activists emerging around this issue as official status as ‘sex-offender’ pushes directly affected individuals and family members into what is taking shape as a new civil-rights movement.

Work products would consist of:

- a **blog** which would aim to become a solar-plexus of discussion about the SO system and human rights. The blog would aim to engage all the groups noted above and be a portal for journalists who were seeking background for stories in this area. The blog would serve as a place to comment on ongoing cases and policy developments, to present interviews with people working in this area, to gather relevant texts (including brief excerpts from books and articles that would put what is happening now in larger perspective) in the service of both encouraging readers to think broadly and developing a bibliography that would be compiled on the site. The blog would serve as both forum and a clearinghouse of resources for thinking and activism around these issues.

- a **summit on the treatment of SOs as human-rights challenge**, engaging a small number of key stakeholders – activists, representatives of HR groups, experts on legal and psychiatric issues – to clarify thinking, rhetoric, and plan for action – including long-term strategies – in this area;

- a **report (~100 pages)** on the **application of HR doctrines to the emerging system of social-exclusion of SOs in the West**. The report would be my own, but informed by the above discussions.

The project is animated by a sense that there are issues not now adequately addressed by institutions on which civil-society relies as part of its ‘immune system’ against severe injustice.
The virulence and extremity of the contemporary West’s response to SOs is well-known, and is one of (particularly the US’s) most distinctive recent legal and cultural developments. Key features are:

- **lifetime public shaming** via public SO registries, covering some 674,000 persons, with more than one out of every 160 adult males in the US registered,\(^5\) with registries disseminating former offenders’ pictures, home addresses, places of work or schooling, etc.

- **systemic violence** against ex-SOs in the community and in prisons, where beatings and killings, sometimes with official complicity\(^6\), are common. One effort at compiling incidents of SOs killed in prison has documented 41 cases in the US from 2003 to present.\(^7\) Information from SO registries are responsible for at least six murders in the US of men living in the community, with some 60 other killings suggestive of vigilante motives.\(^8\) In a survey of SOs in Kentucky, 47 percent reported being harassed in person, a finding replicated in others studies.\(^9\)

- **rhetoric legitimizing violence** against SOs or persons who feel attraction to minors is entrenched. “I still say, we just kill all the pedophiles,” is a typical opinion, posted on the *Des Moines Register* website in September 2006. “I believe it is every citizen’s duty to rid the world of these scum!” the writer goes on. A case of actual killing does not dim those sentiments. Sheldon Weinstein, 64, wheelchair-bound and serving a two-year term for gross sexual assault of a child, was murdered in April 2009 at Maine State Prison in Warren. Appended to an online article in the *Bangor Daily News* about the case, 70 of 76 reader comments expressing an opinion praised the murder.\(^10\) HarryHSnyderII wrote, “That this splendid specimen of human has passed on to his just rewards is not worthy of a single tear, nor a taxpayer funded examination into his death. Put his body out for the Warren trash collector, and forget him.” Mainesurvivor declared: “This man deserved to die. I hope it was a slow, painful death.” Hildebr added: “No big deal. There’s plenty of perverts and it’s just a lucky


\(^7\) “The Consequences, of sex laws, sex crimes and accusations”; http://www.geocities.com/voicism/harm-master.html

\(^8\) ibid.


bonus for us when taxpayer dollar spending comes to a halt like this.” Patom1 said: “Too bad he didn’t get it much earlier.” Such sentiments are expressed as well from those with more official standing. John Walsh, prominent campaigner for harsher laws against SOs who joined President Bush at the White House for the signing of legislation bearing his son’s name, suggested explosives should be planted in the rectums of released offenders to be triggered if they violated parole conditions, and compared SOs to rabid dogs who need to be put down.\(^\text{11}\)

- indefinite **prospective incarceration** of sane persons under civil-commitment laws for sex offenses they might commit in the future.

- routine **long sentences**, frequently for life, for offenses not marked by violence or trauma, including those involving expression (such as possessing pictures or cartoons) and other non-contact crimes, sometimes involving no actual person and/or often deliberately ‘seeded’ by the state via sting operations. The cumulative effect of long sentences is an increasing proportion of US prisoners incarcerated for sex offenses, with rates among states estimated at varying between 10 to 28 percent.\(^\text{12}\)

- novel forms of **degradation**, such as the state requiring ex-SOs to mark their dwellings, to be electronically tagged for life (with ‘bracelets’ and likely soon implanted chips, with some proposing real-time physiological monitoring), to introduce themselves to neighbors as ‘predators’, to live under bridges,\(^\text{13}\) to be chemically or physically castrated (as of 2006 in eight states)\(^\text{14}\).

- **state-imposed banishment** of ex-SOs from cities and towns – often in effect any settled area – forcing them into homelessness and further reducing their ability to find work.

- **private regimens of banishment**, with corporations such as McDonald’s prohibiting SOs from any employment, and others, such the amusement-part operator Six Flags, barring ex-SOs as customers.\(^\text{15}\)

\(^{11}\) cited by Emily Horowitz, “Growing media and legal attention to sex offenders: More safety or more injustice?” *Journal of the Institute of Justice & International Studies*, Number 7, 2007

\(^{12}\) ibid., p. 6

\(^{13}\) ibid., p. 24

\(^{14}\) “Lawmakers crusade against molesters,” Stateline.org, January 24, 2006; http://www.stateline.org/live/details/story?contentId=82700

As biometric tracking becomes commonplace, SOs will face routine exclusion from public accommodations of all kinds on grounds of ‘liability.’

- a patchwork of arbitrary restrictions: banning SOs from parks, libraries, and other public places; restricting their use of computers prohibiting them from living with their families (owing to the location of the dwelling or the presence of minors) or living together; bars on parenthood, with the state seizing children from their parents, in some cases at birth. ¹⁶ Existing and proposed US legislation together with increasingly linked databases will effectively ban SOs from travelling internationally, make domestic travel extremely difficult, and will pressure other countries to join in a globalized SO registry. ¹⁷

- a pattern of collective punishment, whereby a widely publicized crime produces irresistible political pressure for heightened restrictions on existing registered SOs, and heightened penalties all around. Since no society has ever been without sex offenses, this has produced a dynamic of continual escalation. “Every lawmaker who wants to sound tough on sex offenders has to propose a law tougher than the one enacted by the last politician who wanted to sound tough on sex offenders,” The Economist notes. ¹⁸

- expansion of punitive categories and punishments to youngsters, in whose name absolutist policies against SOs are cast in the first place. Some 20,000 juveniles in the US were arrested in 2002 for sex offenses other than forcible rape and prostitution, with more than half being under 15 – more in this age category than for any other crime except arson; an additional 4,700 juveniles were arrested for forcible rape, with 37 percent under 15. ¹⁹ Federal law requires that states, on pain of losing some of their law-enforcement funding, list juvenile offenders as young as 14 on public SO registries, with Texas publicly exposing this way offenders as young as 10. ²⁰ A small industry devoted to treating juvenile offenders uses aversion therapy and other questionable

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¹⁶ “Authorities Seize Sex Offender’s Newborn,” AP, October 21, 2005; http://news.yahoo.com/s/ap/20051021/ap_on_re_us/sex_offender_custody;_ylt=Aronc_Rk_UbrLAvvbgiDU4Cs0NUE;_ylu=X3oDMTA3MjBwMWtkBHNIYwM3MTg


techniques formerly used to try to rid patients of homosexuality. Two psychologists critical of the situation observe, “We have encountered young teenagers (13 to 15) who, as part of their treatment, have been compelled to recite daily lay-outs or creeds including phrases such as ‘I am a pedophile and am not fit to live in human society... I can never be trusted... everything I say is a lie... I can never be cured.’”

The very concept ‘sex-offender’ is partly a function of these developments. Regulating sexuality and protecting the vulnerable are universal societal functions. But there’s hardly a ‘natural kind’ encompassing a serial rapist / murderer, a 16-year-old girl who ‘sexts’ her boyfriend, and a collector of Japanese cartoon anime. Yet increasingly all who run afoul of sex laws get cast as a distinct kind of dangerous person.

The new ‘war’ on sexual deviance – virulent cousin of a finally flagging War on Drugs – now takes forms resembling those understood in the West as iconic injustices. An entrenched public discourse around SOs is marked by explicit, conventionalized expressions of hate that recall the sexual demonization of African-American men under Jim Crow. Restrictions on ex-SOs bear resemblance to South African ‘pass laws,’ or the continually-expanding thicket of regulation faced under the Nazis by targeted groups not yet interned.

“[U]se of public registration of convicted offenders (particularly sex offenders)... makes reintegration into society as a full and equal citizen virtually impossible for many convicted of crimes,” notes Paul Passavant. “[E]ven those who are eventually let out of prison will face a continuing post-prison penalization that has become a way to mark an untouchable and racialized caste that is, in effect, banished from ‘normal’ society.”

Yet the response of HR organizations so far sometimes seems to miss key parts of the picture:

- Human Rights Watch’s landmark 2007 report No Easy Answers focused on SO registries, but said nothing about civil commitment – except to imply that male homosexual offenders, who may show higher recidivism, might be more apt subjects for it. “The focus of sex-offender laws on people who have previously been convicted of

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Sex offenses may originate in the misperception that most if not all of those who have committed sex crimes in the past will do so again,” the report notes. Among the most exceptional of these laws has been the rise of civil-commitment regimes, which incarcerate sane individuals in mental hospitals indefinitely until they are deemed no longer ‘dangerous.’ In fact, HRW notes, “most of those who make public assertions about the recidivism rates of sex-offenders take a ‘one-size-fits-all’ approach; they do not acknowledge the marked variation in recidivism rates among offenders who have committed different kinds of sex offenses....” The report then goes on to assert that men convicted of homosexual offenses involving minors “have the highest measured rates of recidivism of any sex offender.” The report leaves the impression that civil commitment could be reasonable for this population.

Prospectively incarcerating sane people for crimes they might commit in the future is a profound expansion of state power – and intrinsically illimitable. Such a policy turns upside-down any notion of the rule of law in deference to the state, whose means of ‘gerrymandering’ a statistical category to paint someone as likely future criminal far exceeds individuals’ ability to prove they won’t ever commit a crime. Prospective incarceration is the principle behind Guantanamo, and it was introduced in US jurisprudence five years earlier, in 1997, when the Supreme Court established that sane persons can be imprisoned indefinitely for illegal sex they might have in the future – with prospective incarceration applied only later to those seen as terrorists.

In January, HRW asserted in a Boston Globe op-ed that critics of closing of Guantanamo were wrong when they said such a precedent would weaken civil-commitment laws for sex offenders; HRW stated – possibly for the first time – that these laws are ‘deeply flawed,’ but then went on to present a storybook picture of civil-commitment, as about targeting only clearly dangerous individuals and focused on treatment, not punishment. These are claims belied by the expansion of civil-commitment to persons convicted of nonviolent offenses and of crimes involving only expression, and the fact that less than 10 percent of those committed have ever been deemed fit to be released.

In the face of little opposition, the US has vastly expanded civil-commitment: under DoJ guidelines promulgated under the 2006 Adam

23 Human Rights Watch (2007), No Easy Answers: Sex Offender Laws in the US, p. 25


Walsh Act, all federal prisoners – no matter if counterfeiters or drug dealers – are subject to lifetime civil-commitment at the completion of their sentences if they are deemed prone to commit a sex crime in the future.\(^\text{26}\)

- Amnesty International rightly praised a 5-to-4 Supreme Court decision handed down in June 2008 that banned the death penalty for child rape “while acknowledging the serious nature of the crimes targeted by such legislation.”\(^\text{27}\) The ruling was instantly condemned by both major presidential contenders. But the group missed an opportunity to show the full danger of the six state laws that the decision narrowly struck down and the sheer breadth of lawmakers’ intentions. In half those states, defendants could be executed for de facto consensual acts – such as, in Georgia, a 19-year-old girl having oral sex with a 15-year-old boy and then eloping with him. Oklahoma went further and made internet sex chat among adults, where one pretended to be underage, a death-eligible offense in some circumstances.\(^\text{28}\) In one of the two US cases in which a man had indeed been sentenced to death, the offenses in question did not involve penetration – an aspect of the core concept evoked by ‘child rape.’\(^\text{29}\) It was as if the sheer solar glare of that term so flooded the sky that even HR proponents lost sight of a Milky Way’s worth of other implications.

- While HR groups have gotten many details right they’ve missed how a profusion of regulations, each supposedly rationally justified, have ‘gone critical,’ making SO registries the latticework for an emerging parallel legal system. Authorities have gained the power nearly at will, or via the fig-leaf of administrative law, to effect the permanent removal of ex-SOs from society. Central to this system is a tangled web of regulation emanating from federal to local governments to parole authorities. Consider the 55-year sentence handed down recently to James Burt Breeden for failing to update his address with Texas authorities within five days after his birthday.\(^\text{30}\) (At issue was whether living in a car parked at the building where he formerly had an apartment constituted a ‘change of address’; the court ruled it

\(^\text{26}\) ibid.


\(^\text{28}\) Andriette, B. “Iran, Nigeria, Sudan, Saudi Arabia, USA: A divided Supreme Court struck the US off the list of nations where consensual sex can lead to execution The Guide, August 2008; http://www.guidemag.com/magcontent/invokemagcontent.cfm?ID=2F0C0DE2-C82E-47CD-B14592C4F8FFF244

\(^\text{29}\) ibid.

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did.) Likely new travel restrictions will greatly multiply the tripwires. More generally, lifetime parole and mandated therapy means that ex-SOs can be sent to prison for expressing beliefs or having feelings that a therapist feels are inappropriate, and in a situation where non-participation in therapy is itself grounds for imprisonment. As well, SOs on parole (which in some jurisdictions is mandatory for life) or facing civil commitment can be imprisoned for showing the ‘wrong’ physiological responses when given a ‘lie-detector’ test or subjected to a plethysmograph – ‘conviction’ via bodily sign that recalls trials-by-ordeal of pre-modern witch-hunts.

Registries have now been extended to other crimes – such as those involving drugs and arson, or in some jurisdictions, all felons. The threat of civil commitment now looms over all federal prisoners. New categories of marginalized persons are sure to be declared fit for lifetime tagging and chipping. Authorities can be expected to expand indefinite incarceration to new groups, perhaps on a ‘civil’ basis, based on involuntary physiological responses. While the shift throughout the West since the 1970s and ’80s to take sexual assault seriously is one of the great accomplishments of the sexual revolution, that response has also summoned irrational forces that bear comparison to the Red Scare or sexualization of racism following Reconstruction. Squarely facing the force-field where these dangerous precedents first sparked into existence is urgently important not simply for those directly affected but for the health of the body politic.

2) An explanation of how the project builds on existing efforts or charts new terrain.

Not least of the problems working in this area is finding a foothold to counter a now-conventional rhetoric that posits sexual malfeasance, especially involving minors, as the profoundest category of evil. Two major strategies have been used to gain credibility for questioning the need for the strongest possible measures. One approach is pragmatic – shifting the discussion to ‘what works’ when it comes to controlling sex-offenders, and pointing out the ways certain extreme policies ‘don’t work’ – because, say, they force offenders underground, destabilize their lives and so make them more prone to reoffend, or are too costly. Another strategy has been to attack extreme practices at their weakest points – for example, criticizing SO registries from the standpoint of their impact on juveniles, often guilty merely of consensual Romeo & Juliet offenses.


This pragmatism, together with creative legal work, are the kind of tactics that have gained traction for a number of at least partly successful movements – against the Drug War, for gay rights, against the death penalty.

But pragmatics alone is not enough. What has been insufficiently developed in this area, I believe, are a backbone of principles and broader historical and cultural understanding of the factors at play in creating the problem we face now.

Almost any successful social movement can be seen as an ‘ecosystem’ of interests and positions – partly rivals, partly mutualistic. Such internal diversity, history shows, is a source of strength. (The idea applies in other domains: “the most successful presidencies tend to be those that have factional disagreements,’ rather than those whose inner circles march in perfect lockstep,” notes one historian.33) The importance of ‘non-pragmatic’ elements – clear principles and a sense of historical context – can be considered in this light.

For example, the fight against the death penalty has benefitted from pragmatic poking-at-weakest-points in the system – e.g., the Innocence Project’s focus on those wrongfully convicted – and by those pointing out the sheer expense of capital punishment. Others have emphasized the racial and class bias of the death penalty. The abolitionist effort has benefitted as well from those pursuing more purely principled arguments – not least put forth by religious conservatives – against killing.

In the fight to stop the drug war, enormous political traction was gained by those fighting for medical marijuana. But the overall effort gained from an ‘ecosystem’ of other critical positions – pragmatists emphasizing harm-reduction, libertarians urging tolerance for individual choices, and again those emphasizing the human and financial costs.

My contention is that on this issue there has been shortfall in development of principles and understanding of the social and historical context for what is happening now.

This lack is especially keenly felt when the capital expended comes from HR and civil-liberties groups, who are not merely ‘policy players’ but ‘keepers of the flame’ of principles vital to the body politic. The danger of working only pragmatically are perverse policy outcomes

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and the debasement of important ideals.

For example:

- It has been less than a generation that HR groups have taken sexual-orientation seriously in their work around the world. While well-developed in the West, this concept’s status as a universal political and analytical category (as opposed to one deeply entangled with class and culture) is still contested. So it’s notable that HRW cites the homosexual character of a sex offense as a possibly reasonable factor in designating an offender for civil commitment, based on associated claims of recidivism. In the history – not yet written – of sexual-orientation as an idea advancing social justice, this will doubtless be a data point. The worry here is not merely theoretical: in June the state of Virginia proposed lowering the threshold at which SOs coming out of prison would face civil commitment; in particular, lowering the eligible score on Static-99, an assessment instrument, from 4 or 5 points to 3 points. Offenders gain a point each for being under 25, for not having been in a relationship for more than 2 years, for having a male victim, and for having a previous criminal conviction of any kind. “As one can easily see,” notes the Virginia chapter of Reform Sex Offender Laws, “any college-aged, homosexual male, who has not shackled up with anyone for two or more years need only to have a reckless driving misdemeanor conviction and he is currently just one point away from being... locked away for life in an insane asylum.” And if sexual orientation is legitimate as a factor in deriving statistical profiles for determining future dangerousness, on what grounds could, say, race be excluded?

- Resistance inevitably attends the rolling out of harsh new tactics that involve bending or breaking of long-standing legal principles (e.g., prospective imprisonment) or establish new high-water marks of state intrusion (e.g., implanted chips). This resistance is a ‘resource’ that can be used by those opposing the introduction of such measures. But a merely pragmatic strategy of opposition can have perverse consequences. Consider a federally-funded study conducted by Rutgers University looking at the effect of SO registries in New Jersey – where the modern push for them began. Researchers concluded that “Despite wide community support for these laws, there is little evidence to date, including this study, to support a claim that Megan’s Law is effective in reducing either new first-time sex offenses or sexual re-offenses.” If measures that opponents decried as too extreme prove not to work, one response would be to say, indeed, these measures were unjustifiably extreme to begin with. But in an inflamed political context, the take-home message is often the opposite: that the measures didn’t go far.

‘The laws against sexual offenders in the United States have caused an unfortunate, and probably unexpected, effect. Sexual offenses have been placed on a pedestal and have become the gold standard for how evil people can be. No other crimes require this kind of treatment and therefore it can be inferred that no other crimes are as evil. Man’s ability to imagine and execute evil is limitless, so it seems very premature to mark sexual offenses as the pinnacle.’

- online comment posted in reply to ‘America’s Unjust Sex Laws’, The Economist August 6, 2009

34 “Virginia’s homosexual Gitmo,” Reform Sex Offender Laws Digest, 22, June 2009
enough. The latter interpretation is exemplified in the Newark Star-Ledger headline: “Report: Megan’s Law fails to deter sex offenders.”\(^{35}\) The implication seems to be that if registries don’t stop sex criminals, then maybe one-strike-and-you’re-out sentencing or execution would.

In this vein, it’s become almost a cliché for civil-libertarians to oppose restrictions on ex-SOs in the manner the director of the American Civil Liberties Union of Connecticut criticized new requirements in Greenwich banning ex-SOs from being within 300 feet of a school, playground, day-care center, or children’s museum: “If we as a society determine that sex offenders cannot be released as free individuals, then maybe what we need to consider is stiffer penalties in the first go-around and not stigmatize them and prevent them from living as free individuals once released.”\(^{36}\) That very week an Alabama court sentenced 21-year-old Max Hinton to 30 years in prison for consensual sex he had at age 17 with a girl of 15, for keeping a video the two made together of having sex, and for possessing other images of minors he’d obtained online. The girl testified the relationship was consensual, and the girl’s guardian urged leniency for Hinton.\(^{37}\) With 30-year sentences barely remarkable for consensual sex among teenagers – the story received only local notice – how much harsher would the ACLU like to see punishments? No matter how well-intentioned, arguments like this are a perverse use of the political capital civil-liberties groups possess. Such missteps, I’d suggest, are a sign of a response that hasn’t thought clearly enough about principles.

Another factor is that sex offenses in the West have become the key locus of popular outrage at a time when the West is near its peak of economic and technological powers, as well as the center-of-gravity of human-rights discourse. The realpolitik of this situation means that whatever new limits are breached in service of slaking this outrage – routine lifetime incarceration, mutilation, implanted chips, banishment, incarceration based on physiological response – are likelier to become accepted global standards of practice in this and other domains. As a bleeding edge where the world’s most powerful state tests its powers of control, degradation, and vengeance against despised individuals who are fully citizens of the ‘Homeland,’ the treatment of SOs deserves more careful attention than it has received.


36 “How we deal with sex offenders,” Greenwich Time, August 14, 2009; http://www.greenwichtime.com/ci_13092905

Enough well-placed critical voices have emerged to put the discussion of principles on a firmer footing:

• Professionals are reacting to the increasing role they are called on to play in the SO system. For instance, Eric Janus, professor at William Mitchell College of Law in St. Paul, has noted the arbitrary, empirically baseless character of decisions around civil commitment. Psychiatrist Michael First at Columbia University has criticized the equation of behavioral patterns with mental illness.

• At least some in the court system are resisting at the extraordinary new powers the state has gained in the area of sex law. Earlier this year, the Fourth Circuit Court of Appeals struck down the federal civil-commitment provisions of the Adam Walsh Act. (The Eighth Circuit, however, has upheld it, and the US Supreme Court is set to examine the question, with the Obama administration pushing hard to extend federal civil commitment.) In January, Sixth Circuit Federal Court of Appeals Judge J. Merritt dissented in a decision upholding a 17-1/2 year sentence imposed on a disabled 65-year-old former minister on a first offense of porn-possession, saying that such a penalty “borders” on something kin to the “thousands of witchcraft trials and burnings conducted in Europe and here from the 13th to the 18th Centuries....”

• Many voices have emerged within the therapeutic community asserting that demonization of SOs or people with erotic feelings for minors is counterproductive. B4U-Act (B4uact.org) is a non-profit program with funding from Baltimore Mental Health Systems that offers support to people with such feelings, encourages responsible behavior, and works with counselors with the aim of fostering “supportive therapeutic goals, assumptions, and approaches.” In Berlin a program sponsored by Charité Hospital and funded by Volkswagen reaches out to men who feel erotic attraction to the young and encourages them to join support groups before they commit a crime.³⁸ Both efforts are notable for treating people in this category as reasonable human beings who would want to act ethically.

One purpose of this project would be to bring such voices into dialog and focus discussion specifically on how what is happening in the West now intersects HR principles.

As well, ex-SOs and family members have increasingly organized. The most substantial example is ReformSexOffenderLaws.org (RSOL), with dozens of notable signatories to its statement of principles, and a network of state action groups across the US. For this project RSOL would be a significant portal of engagement with grassroots activists,

³⁸ “Preventing new perpetrators,” Deutsche Welle, August 2, 2004; http://www.dw-world.de/dw/article/0,,1281584,00.html
to help them think in HR terms as they stake their claims, to help
them gain access to HR groups for sharing information, and where
appropriate, for applying pressure to act.

The elements are in place to catalyze a bolder, more nuanced, more
adequate response that leverages institutional capacity that has often
seemed to lie fallow.

3) A description of the project’s expected impact and how you
might measure it.

The explosion of law over the past generation carving out sex-offenses
as a zone of legal exceptionalism will be a fixture of the landscape for
generations to come. What’s at issue, rather, is how the near absolute
powers the state has won will be used. What limits and patterns will
emerge as inevitably this regime bureaucratizes, acquires routines,
facing resource constraints? (A ban on the state’s killing of SOs has
emerged, for now at least, as one bright line.)

This project has as its goal assuring that as the SO system becomes
entrenched, HR considerations are put at the fore.

Most broadly that means changing the debate around this issue so that
when, say, questions come up of residency restrictions or imprisonment
based on tests of involuntary physiology, discussion transcends the
usual terms of ‘what works?’ or ‘what’s doable?’, transcends even the
human cost of these measures, and considers that these are matters
with key HR dimensions. This will involve in part getting SO activists
coversant in HR discourse, and in part getting mainline HR groups
more active... active, in particular with regard to helping concretize
what these dimensions are. The time is past when HR groups can
merely wring their hands over the difficulties in this area. It should be
possible to say something clear about the unacceptability of

• prospective punishment
• incarceration of sane people in mental hospitals
• imprisonment based on physiological reactions, sexual orientation, or
  mere beliefs
• imprisonment of youngsters for consensual sexual expression and
  experimentation
• severe, lifetime punishment for crimes with no victims
• forced ‘therapy’ undertaken on pain of imprisonment, with
  imprisonment threatened for honest participation
• forcibly implanting chips in persons, requiring lifetime electronic
tagging, or having the state monitor bodily states moment to moment
• imposition of ‘pass-law’ style crimes of states of location targeting
broad categories of person for long durations
• broad-brush bans on travel and movement
• state-created categories of demonization and anti-citizenship,
  rendering the most basic life activities (living in a place, buying food at
  a grocery store situated near a school) triggers for serious crimes
• ‘civil regulation’ of a subject class imposing lengthy prison terms
  for transgressions that are on the order of paperwork errors or missed
  deadlines
• taking away children from parents who have not mistreated them
• banishment
• collective punishment
• normalized, institutionally supported discourses of violence and
  vengeance

In service of this work, this project would aim to focus thinking and
analysis (via the blog and summit) as well as to establish new channels
of communication between HR groups and activists – so that mainline
groups can better use their bully-pulpit when key or exemplary cases
arise.

Another measure of success would be signs of a mutually respectful
tension between activists and HR groups, as there was with gay groups
in the years leading up to mainline HR organizations addressing
sodomy laws.

4) A detailed account of how you will achieve your goals, including
a communications and/or outreach strategy. Please describe the
specific audiences you hope to reach, your reasons for focusing on
them, and how you intend to influence them.

My sense is it’s early days and that progress first will depend on
a small number of highly motivated discussants. A blog can be an
excellent tool for this.

The first task is to engage people working in this area – legal and
psychological theorists, policy analysts, activists, investigative
journalists, HR workers. People who have written on this subject in
print or online would be the first to solicit. Presumably those who
believe that executing SOs is just, because it ‘sends a message’,
would not feel there’s much to say about the link between HR and the
treatment dealt SOs. But a wide range of positions among those who
do feel there is something to discuss would be welcome, though I’d
want to focus the question on what principles can emerge within a HR
context.

I would aim to draw them into the discussion by invitation and by
simply presenting and commenting on their ideas in relation to current
Sex offenders & human rights

cases, inviting them to respond to posts. Today’s graduate students are among the first cohort growing up with SO registries and the reality of severe sanction for their own adolescent sexual explorations. I would send posters promoting the blog to philosophy / government departments and law schools around the US and Europe, presenting this – as I think it is – as an issue at the cutting edge.

The report I would prepare on HR and the treatment of SOs in the West would aim to both summarize and extend this discussion and the different positions that emerged within it.

The ultimate audience for this project will be those who make and influence policy – lawmakers, legal theorists, journalists, law enforcement – and of course those in whose name policy is made: the (often media-energized) general public.

The breadth of the task at hand underscores the importance of developing the HR perspective. So long as the discussion occurs within the standard frame, in which the sexual lawbreaking is presentable as an undifferentiated zone of evil, so long as debate stays within the hermetic space of its own self-consistent concepts and terms, progress is hard to imagine. But the gains made globally, especially in the US, against the death penalty show the power of HR in addressing even disparaged populations. With its status as a court of appeal higher than the state, with its prestige, with its exceptional legitimacy, a HR-approach is key to breaking out of the box.
7) A project timeline

* **month 1** – Get blog up and running. Assemble an (evolving) annotated bibliography of relevant writings, with full-texts or excerpts where possible, posted on the blog’s ‘background’ section. Use blog as basis to initiate contacts with key workers in this area and HR groups.

* **month 2** – Continue to develop blog. Assemble organizing committee of ~ 6 people and announce summit on SOs and human rights for month 11.

* **month 3** – Continue with blog, soliciting contributions and comments. Meet with representatives of HR groups working in this area.

* **months 4 to 7** – travel, visit OSI offices, blogging
  – Visits to Florida, Alabama, Texas, and California to talk with activists on the frontlines where the SO system is particularly harsh. In California, meet with organizers of the 2007 inmate strike at
Coalinga, the largest institution for civilly-committed SOs in the US.
– Visit to Germany to investigate privately-funded program to reach out to those troubled by their erotic feelings for the young and to find out about the legal infrastructure (such as protections for confidentiality) that underlies such an effort.
– Talk with policymakers and activists in the UK about the ways in which US-style public registries are, or are not, being resisted.
– Begin work on final report, continue with blogging and extending network of contacts.
• months 8 to 10 – Prepare for summit, work on final report, visits to OSI offices.
• month 11 – Summit
• month 12 – Finalize report

8) An explanation of how you might engage with OSI while resident in our office(s). Please specify how these interactions could add value both to OSI and to your project.

Beyond addressing the HR concerns of a group cast beyond their reach, a broader goal of this project is inquiring into the challenge that the ‘SO system’ poses to our hopes for civil society as homeostatic guarantor of a just polity, as insulation against the authoritarian and totalitarian. The SO system has emerged via the workings of civil society: it is tightly geared to, for instance, competitive private media, to identity movements, low entry-barriers to social entrepreneurship, to the ‘rationalization’ of sexual mores under law and away from tradition. Indeed, the ethic of which the sex-offender is anti-token is the ethic of contract theory: of free consensual exchange and the illegitimacy of minors as contractors. From this ideological kernel, the SO system has emerged as a key point of emotional contact between the state and citizenry. At stake, especially in the Anglosphere, is what’s conventionally understood to be the most universally and intensely shared symbol of evil, tropes invoked even in cases falling short of truly serious crimes. The image of evil is conjured in official pronouncements and via the omnipresent SO registry – frequently, the most popular government website – to demonstrate the vigilance and protection that the state and media provide.

Yet if it is a bastard child of contemporary Western civil-society, the SO system now poses, like autoimmune disease, a significant internal threat to civil society. The ‘pedophile’ is the internal counterpart to the ‘terrorist’ for the emerging system of total surveillance in the West, the proving ground for technologies of tracking and control later rolled-out on wider scales (DNA data-banking, registries of identities, tracking

40 “Treatment replaced by turmoil: A state hospital meant for sexually violent predators gets low marks after two years,” Los Angeles Times, November 15, 2007
of location and movement, etc.). But more than that he constitutes the ever-present danger that requires universal suspicion that weakens bonds of community and culture, and especially corroding their means of intergenerational transmittal. Increasing male withdrawal – from school, work, and family – seen across the West may be a symptom of this breakdown. “What we are creating here is mass mutual distrust,” says Jenni Russell, who notes the perils faced by any adult who offers friendship or support to a youngster.\(^4\) The resulting vacuums are greedily filled by depersonalized megascale structures – the state, its bureaucracies, professional expertise, mass media: a disintermediation that is antithetical to healthy civil society, and recalls totalitarianism’s ‘aerosolization’ of fear and suspicion, and its seductive compensatory offer of a protective pseudo-intimacy.

The SO system as an iatrogenic problem for civil society makes it a problem all the more urgent, as it is hard to see solutions other than by bolstering civil society – its internal resources for engagement and resolution. (A simple return to traditional mores or the solidarities possible within ‘Fordist’ industrial society are, for instance, out of the question.)

Unpacking some aspects of the idea of the SO system as iatrogenic threat to civil society illustrates themes I’d be eager to explore with others at OSI.

Intense responses to illicit forms of sexuality – such as the focus in the South of Jim Crow on the danger of black men to white women – involve practices of incitement that invoke, strengthen, and then slake through punishment of a sacrificial perpetrator / victim the very illicit desires they claim merely to simply oppose. The prominence of sex crime in popular news and entertainment suggests this is happening now. But there is a conceit, both popular and academic, that we’ve escaped the thrall of such incitement and now have rock-solid principles by which to ground – morally and empirically – sexual regulation: a sense of solidity that ironically girds our present legal extremism around sex.

It’s noteworthy that sexual regulation in most cultures involves a reticence about sex in general that also functions to prevent destructive whirlwinds of incitement / repression. An unstated assumption of liberal sexual ethics is that sexual incitement (from the omnipresent sexualization in the media, to the successful demands of formerly despised sexual minorities for recognition and celebration, to the widespread availability of porn) comes without recoil. But the rise of

the SO system suggests otherwise.

As a sometimes deliberately cultivated panic over sex crime opens a drain down which pour civil liberties, leaving a residue of social corrosion, doubts must arise about the West’s hubris that it has found in a few simple rules – the rules of the marketplace – the essential universal code for just sexual regulation. There is a parallel here with neoliberalism’s dashed hubris in the now-evident failure of ‘insourcing’ market regulation to the market itself. Policy lacunae gape wide in both cases. How can the dynamism of the free markets be sustained without while keeping them from destructive crashes? How can we preserve the best of the freedoms and protections of a liberal sexual order while reclaiming a decorum that does not provide such ripe opportunities for demonization and lurid demands for sacrificial internal enemies?

These issues touch on the balance between community and the individual, locality and universality, biology and ideology, custom and law that are central to key debates around – and hopes of hundreds of millions for – decent, open societies.