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RESEARCH ARTICLE

Preventing Sex Crimes In The Usa Federal Sex Offender Laws

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Abstract

The impact of the increased number of sex offenders has put pressure on governments to enact legislation with the aim of preventing those offenders in the USA. Federal law determined minimum standards for the prevention of sexual offences and mandated states that their laws should conform to minimum federal requirements even if they may go beyond the limits of those standards. In doing so, federal law gives states wide discretion to enact harsher legislation to deal with sex offenders. Within this mandatory framework, states have provided alternative approaches to address the concerns about sex offenders, namely sex offender registration, community notification, civil commitment, three-tier system laws and even chemical and/or surgical castration. For these reasons, in this work, the principle issue at stake is to examine and give a general explanation of federal sex offender laws with a view to understanding the aforementioned requirements and conclude that these measures can be implicated into the Turkish Criminal Justice System, if and to the extent that all arrangements are made and all legal requirements are fulfilled.

Keywords

Preventive measures, U.S. federal sex offender laws, Registration, Community notification, Civil commitment, Three-tier system, Criminal justice system

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Introduction

Over the past two decades, the impact of the increased number of sex offenders has put pressure on governments to enact legislation with the aim of preventing those offenders in the USA. When high-profile sexual assaults on children by previously convicted offenders increased significantly,¹ public reaction changed the concept of punishment for sex offenders because it supported the idea that the deterrent effect of a prison sentence is not sufficient to reduce sexual offences.² In response, a number of different and unique initiatives have been introduced by the legislatures in the USA, such as sex offender registration, community notification, civil commitment, and three-tier system laws for the protection of members of the public.³ Currently, sex offender registration, community notification, three-tier system and civil commitment statutes are the primary components of sex offender laws.⁴ Dugan specifies that these regulations have two main purposes: (1) permitting people to protect themselves from violent sex offenders and; (2) preventing or at least decreasing recidivism.⁵ Leora Sedaghati also stresses that the aim of those regulations is not a kind of punishment for sex offenders; it is a protection of society from them.⁶ Even though those measures were initially taken by individual states, such as California (1984), Arizona (1985), Utah (1987) and Oregon (1989)⁷, sexual crimes prevention became a federal goal in the wake of witnessing the emergence of the sex offender act at a federal level

- 1 Richard G Wright, 'Sex Offender Post-Incarceration Sanctions: Are There Any Limits?' (2008) 34 *New England Journal on Criminal and Civil Confinement* 17, 26. However, the statistics on offender recidivism show that these assumptions are faulty, and sex offenders are less prone to re-offend than people convicted of other crimes. For more information, see also, Michelle L Meloy, 'The Sex Offender Next Door: An Analysis of Recidivism, Risk Factors and Deterrence of Sex Offenders on Probation' (2005) 16 *Criminal Justice Policy Review* 211, 227; Lisa L Sample and Timothy M Bray, 'Are Sex Offenders Different? An Examination of Re-arrest Patterns' (2006) 17 *Criminal Justice Policy Review* 83, 98; Terance D Miethe, Jodi Olson and Ojmarh Mitchell, 'Specialization and Persistence in the Arrest Histories of Sex Offenders: A Comparative Analysis of Alternative Measures and Offense Type' (2006) 43 *Journal of Research in Crime and Delinquency* 204, 213; Hollie Matthews and Christopher Calia, 'Recidivism of 2002 Released' (Massachusetts Department of Correction, 2009) 23 <http://www.mass.gov/Eoops/docs/doc/research_reports/recidivism/rec2002.pdf> accessed May 30, 2021. According to Hanson and Bussiere, the empirical realities are the opposite of the assumptions; 'the present findings contradict the popular view that sexual offenders inevitably reoffend. Only a minority of the total sample (...) were known to have committed a new sexual offense'. Karl R Hanson and Monique T Bussiere, 'Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies' (1998) 60 *Journal of Consulting and Clinical Psychology* 348, 357.
- 2 Wayne A Logan, 'Sex Offender Registration and Community Notification: Past, Present, and Future' (2008) 34 *New England Journal on Criminal and Civil Confinement* 3, 5.
- 3 Caroline L Lewis, 'The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Private and Substantive Due Process' (1996) 31 *Harvard Civil Rights-Civil Liberties Law Review* 89, 94. Sex offender registration is a system to register the information of sex offenders with the local authorities to track of their whereabouts and activities. Community notification system gives members of the public access to view the information of sex offenders. Civil commitment process allows a judge to decide whether a sex offender who meets the definition of a Sexually Violent Predator or is alleged to be mentally ill should be required to go to a psychiatric hospital. Three-tier system is a classification system for sex offenders according to their risk to the community based on the severity of the crime committed.
- 4 Tom "Tad" Hughes, 'The Creation of and Considerations Surrounding Megan's Law, *The D.A. Can't Get No Relief*' in Ronald M Holmes and Stephen T Holmes (eds), *Current Perspectives on Sex Crimes* (Sage Publications 2002) 135.
- 5 Meghann J Dugan, 'Megan's Law or Sarah's Law? A Comparative Analysis of Public Notification Statutes in the United States and England' (2001) 23 *Loyola of Los Angeles International and Comparative Law Review* 617, 618.
- 6 Leora Sedaghati, 'Megan's Law: Does It Serve to Protect the Community or Punish and Brand Sex Offenders?' (2001) 3 *Journal of Legal Advocacy & Practice* 27.
- 7 For more information, see, Scott Matson and Roxanne Lieb, 'Sex Offender Registration: A Review of State Laws' [1996] *Washington State Institute for Public Policy* 1, 13-20.

and came to fruition in 1994.⁸ Federal law determined minimum standards for the prevention of sexual offences and mandated states that their laws should conform to minimum federal requirements even if they may go beyond the limits of those standards.⁹ In doing so, federal law gives states wide discretion to enact harsher legislation to deal with sex offenders. Within this mandatory framework, states have provided alternative approaches to address the concerns about sex offenders, namely sex offender registration, community notification, civil commitment, three-tier system laws and even chemical and/or surgical castration. For these reasons, in this work, the principle issue at stake is to examine and give a general explanation of federal sex offender laws with a view to understanding the aforementioned requirements and conclude that these measures can be implicated into the Turkish Criminal Justice System, if and to the extent that all arrangements are made and all legal requirements are fulfilled.

1. Jacob Wetterling Act and Adam Walsh Act

The current federal sex offender law originates in three legislative initiatives regarding registration and community notification systems in the USA. In 1994, Congress passed the Jacob Wetterling Act, which required states to obtain specific information from designated sex offenders and to provide a registration list. Two years later, the Jacob Wetterling Act was amended with Megan's Law and mandated that states notify members of the public of dangerous sex offenders. In 2006, Congress passed the Adam Walsh Act, which replaced the registration and community notification provisions of the Jacob Wetterling Act and redesigned these provisions, creating the civil commitment and three-tier systems. To understand the new and unusual concept of sex offender laws in the USA, this article examines the changes in punishment for sex offences through the evolution of sex offender laws since the 1990s. This examination will be carried out by taking the specific provisions of federal sex offender laws into consideration, such as registration, community notification, civil commitment, and three-tier system provisions.

a. Jacob Wetterling Act

The origins of federal law pertaining to sex offender registration and community notification were founded by the end of the twentieth century. In 1994, Congress passed the Jacob Wetterling¹⁰ Crimes Against Children and Sexually Violent Offender

8 Kimberly B Wilkins, "Sex Offender Registration and Community Notification Laws: Will These Laws Survive?" (2003) 37 University of Richmond Law Review 1245, 1245. In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act was enacted.

9 Wilkins (n 8) 1249-50.

10 On the evening of 22 January 1989, 11-year-old Jacob Wetterling was abducted from a group of 3 boys by an unknown gunman. The gunman told the boys to leave their bikes and lay face down on the ground, and thereafter he told the two of them to run into the woods. When they reached the wooded area, they turned around and the gunman and Jacob were gone.

Registration Act¹¹—signed by President Bill Clinton on September 13, 1994—which encouraged states to require sex offenders' registration as part of the Violent Crime Control and Law Enforcement Act of 1994.¹² This statute served as a child protective statute and received five different amendments: Megan's Law,¹³ the Pam Lychner Sex Offender Tracking and Identification Act of 1996,¹⁴ the Jacob Wetterling Improvements Act of 1997,¹⁵ the Protection of Children from Sexual Predators Act of 1998,¹⁶ the Campus Sex Crimes Prevention Act of 2000,¹⁷ and the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003.¹⁸ In 2006, Congress replaced the Jacob Wetterling Act with the Adam Walsh Child Protection and Safety Act of 2006.¹⁹

The Jacob Wetterling Act established guidelines for states to track sex offenders by confirming their residence after their release from prison into society. Under this legislation, states establish sex offender registries by obtaining specific information from designated sex offenders. For this purpose, the Attorney General should set up guidelines for this registration programme, which requires the following:

- A. a person who is convicted of a criminal offense against a victim who is [a] minor or who is convicted of a sexually violent offense to register a current address with a designated State law enforcement agency for the time period specified in subparagraph (A) of subsection (b)(6); and
- B. a person who is [a] sexually violent predator to register a current address with a designated State law enforcement agency unless such requirement is terminated under subparagraph (B) of subsection (b)(6).²⁰

To date, Jacob has not been found, no arrest has been made, and his case remains open. For more information, see Jacob Wetterling Resource Centre, 'Jacob's Story' <<http://www.jwrc.org/WhoWeAre/History/JacobsStory/tabid/108/Default.aspx>> accessed December 06, 2020.

11 42 U.S.C. 14071 (1994).

12 If states fail to comply with the programme which is designated in this Act, they would lose 10% of the funds for which they are eligible under section 506 of the Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. § 14071(f)(2) (A)

13 Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996), (codified as amended at 42 U.S.C. 14071) hereinafter Megan's Law.

14 Pam Lychner Sex Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (1996), (codified as amended at 42 U.S.C. 14072) hereinafter the Pam Lychner Act.

15 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2461-2471 (1997).

16 Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, 112 Stat. 2985 (1998).

17 Campus Sex Crimes Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1537-1539 (2000).

18 PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 604-606 (2003).

19 Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. 16901 (2006); Pub. L. No. 109-248, 120 Stat. 587-650 (2006), hereinafter the Adam Walsh Act.

20 42 U.S.C. § 14071(b)(6)(B) (1994) discloses the conditions for terminating the registration requirement. The condition is if there is a determination that a person no longer suffers from a mental abnormality or personality disorder, which made that person commit a predatory offence- an act directed at a stranger, or a person with whom a relationship has been established or promoted for the primary purpose of victimisation of a sexually violent offense, the registration requirement must be terminated.

Paragraph (1) of Section 14071(a) cites that states must register two discrete groups of sex offenders. The first group is persons convicted of a sexually violent offence or a criminal offence against a victim who is a minor. The second group consists of sexually violent predators. These groups are defined in paragraph (3):

- A. The term ‘criminal offence against a victim who is a minor’ means any criminal offence that consists of-
 - i. kidnapping of a minor, except by a parent;
 - ii. false imprisonment of a minor, except by a parent;
 - iii. criminal sexual conduct toward a minor;
 - iv. solicitation of a minor to engage in sexual conduct;
 - v. use of a minor in a sexual performance;
 - vi. solicitation of a minor to practice prostitution;
 - vii. an attempt to commit an offense described in any of clauses (i) through (vii), if the State-
 - (I) makes such an attempt a criminal offense; and
 - (II) Chooses to include such an offence in those that are criminal offences against a victim who is a minor for the purposes of this selection.

For the purposes of this subparagraph, conduct that is criminal only because of the age of the victim shall not be considered a criminal offence if the perpetrator is 18 years of age or younger.

- B. The term ‘sexually violent offence’ means any criminal offence that consists of aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code, or as described in the State criminal code) or an offence that has as its elements engaging in physical contact with another person with intent to commit aggravated sexual abuse or sexual abuse (as described in such sections of title 18, United States Code, or as described in the State criminal code).
- C. The term ‘sexually violent predator’ means a person who has been convicted of a sexually violent offence and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offences.

The Jacob Wetterling Act determined the minimum standards for the state registration of sex offenders and mandated that the information collected under this Act and a State registration programme must be exposed to law enforcement agencies and government agencies.²¹ Therefore, the original form of the Jacob Wetterling Act obligated states to register persons convicted of a criminal offence against a victim who is a minor, or convicted of a sexually violent offence, or those who are sexually violent predators. According to subsection (d), a state prison officer or the court must notify the person about the obligation of registration and provide information about the registration programme such as the frequency of informing the authorities about changing the address whether in the same State or to another one. At a minimum level, persons who are required to register must inform the authorised agencies about their addresses and provide fingerprints and photographs of themselves. Moreover, the information of the person who has to register as a result of being a sexually violent predator must include the name of the person, identifying factors, estimated future addresses, offence history, and documentation of any treatment received for mental abnormality or personality disorder.²² According to subparagraph (A) of Subsection (b) (6) of Section 14071, the length of the registration has to be 10 years from the time beyond release from prison, placed on parole, supervised release, or probation.²³

i. Examination of the Registration Requirement

In response to public concern about sex offenders, the registration system was designed to help law enforcement officials track sex offenders after they were released from prison and to deter future crimes.²⁴ However, the debates surrounding the registration system illustrate that, although this system seeks to ensure public safety, it violates the offenders' rights and discourages them from being a part of society.²⁵

The main reason for creating a registration system was so that it could be used to solve the crimes committed by potential offenders who displayed similar behaviours previously. Considering this perception, the registration system was intended to decrease the recidivism rates, prevent sex offenders from reoffending, and protect children from repeat sex offenders.²⁶ Sample and Bray pointed out that because of the prediction of 'once a sex offender, always a sex offender' the legislature enacted

21 42 U.S.C. 14071(d) (1994).

22 42 U.S.C. § 14071(b)(1)(B) (1994).

23 42 U.S.C. § 14071(b)(6)(A) (1994).

24 Cheryl Hanna, 'Living with Risk: The American Experience with Sex Offender Legislation' (1997) 46 University of New Brunswick Law Journal 153, 155.

25 Scott Matson and Roxanne Lieb, 'Sex Offender Registration: A Review of State Laws' (1997) 17 Children's Legal Rights Journal 22, 22-24.

26 Abril R Bedarf, 'Examining Sex Offender Community Notification Laws' (1995) 83 California Law Review 885, 893.

the registration law to address the problem of re-offenders.²⁷ Although the intention of the legislature was supported by members of the public, the empirical research on the recidivism of sex offenders shows that sex offenders are less likely than other offenders to be recidivists.²⁸ The United States Department of Justice research on the re-arrest and recidivism rates of State prisoners released in 1983 shows that, with the exception of murderers, rapists have the lowest recidivism rate of all offenders and they are less likely to be re-arrested for committing any other crimes.²⁹

ii. Criticism of the Registration Requirements

According to Dr Jill Levenson, an expert on sex offender treatment and management, when the recidivism rates and the necessity of sex offender laws are considered, the recidivism rates are not sufficiently high to give rise to those regulations.³⁰ Moreover, another research project on recidivism rates among sex offenders—before and after the implementation of the registration system in Iowa—showed that the difference in recidivism for both groups was just 0.5%, which means that the registration system is not as effective as expected.³¹ However, it can be said that this assumption misstates the facts about the registration system and recidivism rates due to the dark figure (offences that do not come to light because they are not reported to the police by victims) of sexual offences.

Due to the assumption of recidivism and the likelihood of re-offending, some commentators believe that incarceration or any treatment is not effective. Therefore, they argue that other alternatives, such as registration system, should be acceptable. In this sense, the treatment programme for sex offenders can be classified as *non-biological therapies* and *biological therapies*. One of the most common non-biological therapies is ‘cognitive-behavioural therapy’ which provides ‘social skills training, sex education, cognitive restructuring, aversive conditioning, and victim empathy therapy’.³² The biological therapies include surgical castration or pharmacological (drug) therapy, which will be evaluated in the following chapters of this thesis. As Marques points out, when a sex offender, who has never undergone a treatment, commits another offence after release from prison, members of the public call for treatment programmes. However, after receiving treatment, if the same

27 Lisa L Sample and Timothy M Bray, ‘Are Sex Offenders Dangerous’ (2003) 3 *Criminology & Public Policy* 59, 60.

28 Bedarf (n 26) 896.

29 Allen J Beck and Bernard E Shipley, ‘Recidivism of Prisoners Released in 1983’ (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, 1989) 6 <http://blueshift.home.com/recidivism/statistics/bjs/BJS%20-%20Recidivism%20of%20Prisoners%20Released%20in%201983_NCJ-116261.pdf> accessed June 02, 2021.

30 Human Rights Watch, ‘No Easy Answers: Sex Offender Laws in the US’ (2007) 19 *Human Rights Watch* 1, 21 <<http://www.hrw.org/en/reports/2007/09/11/no-easy-answers>> accessed May 30, 2021.

31 Geneva Adkins, David Huff and Paul Stageberg, ‘The Iowa Sex Offender Registry and Recidivism’ (Iowa Department of Human Rights, Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center, 2000) 28 <http://www.humanrights.iowa.gov/cjpp/images/pdf/01_pub/SexOffenderReport.pdf> accessed May 30, 2021.

32 Adam Shajnfeld and Richard B Krueger, ‘Reforming (Purportedly) Non-Punitive Responses to Sexual Offending’ (2006) 25 *Developments in Medical Health Law* 81, 93.

scenario occurred, the harsh sexual offender laws would be preferred and treatment would be placed on the back burner.³³ Proponents of the registration system claim that the failure of rehabilitation can be seen from the recidivism rates. At this point, Furby, Weinrott and Blackshaw cite that after incarceration or clinical treatment, sex offenders tend to reoffend.³⁴ In their research, with an evaluation of their findings, they concluded that

*we can (...) say with confidence that there is no evidence that treatment effectively reduces sex offense recidivism (...) [and] (...) clinical treatment reduces rates of sex offenses in general and no appropriate data for assessing whether it may be differentially effective for different types of offenders.*³⁵

However, some studies have reported more positive conclusions on the effectiveness of sex offenders' treatment. For instance, Marshall and Barbaree reported that 'the treatment goal of reducing deviant sexual desires was achieved'.³⁶ Therefore, rather than spending public funds on registration, it must be directed towards treatment and rehabilitation of sex offenders because the aim of the criminal justice system is to rehabilitate offenders and reintegrate them into society. If there is a chance to accomplish this aim, funds could be better spent on this purpose. At this point, the implementation of pharmacological drug therapy (chemical castration) seems to serve the main purpose of the criminal justice system; however, if it is used as a treatment, not as a punishment.

Another debate over the registration law relates to the suggestion that it provides a legal ground for police officers to arrest or detain registered sex offenders when those offenders are in a suspicious situation.³⁷ For instance, if a police officer becomes suspicious of someone who is around a playground or a school, that police officer can detain that person and investigate his/her criminal record in a short period of time with the help of the registration list. Although the registration law helps authorities and provides a legal ground for their actions, opponents of sex offender registration requirements believe the scope of the registration laws is over-inclusive and the duration of registration is too long.³⁸ Therefore, it could obstruct the aim of these laws

33 Janice K Marques and others, 'Effects of Cognitive-Behavioral Treatment on Sex Offender Recidivism Preliminary Results of a Longitudinal Study' (1994) 21 Criminal Justice and Behavior 28, 29.

34 Lita Furby, Mark R Weinrott, and Lyn Blackshaw, 'Sex Offender Recidivism: A Review' (1989) 105 Psychological Bulletin 3, 3.

35 Ibid 25-27. For other studies that have not supported the treatment, see, Marnie E Rice, Vernon L Quinsey and Grant T Harris, 'Sexual Recidivism Among Child Molesters Released From A Maximum Security Psychiatric Institution' (1991) 59 Journal of Consulting and Clinical Psychology 381; Karl R Hanson, Richard A Steffy and Rene Gauthier, 'Long-Term Recidivism of Child Molesters' (1993) 61 Journal of Consulting and Clinical Psychology 646.

36 William L Marshall and Howard E Barbaree, 'The Long-Term Evaluation of a Behavioral Treatment Program for Child Molesters' (1988) 26 Behavior Research and Therapy 499, 510. For other studies that have supported the treatment, see, Judith V Becker and John A Hunter, 'Evaluation of Treatment Outcome for Adult Perpetrators of Child Sexual Abuse' (1992) 19 Criminal Justice and Behavior 74; Marques and others (n 33).

37 Matson and Lieb, 'Sex Offender Registration: A Review of State Laws' (n 25) 23.

38 Human Rights Watch, (n 30) 3.

because people who should register under the statute but pose no risk to society would burden the authorities and distract or prevent them from monitoring the dangerous offenders.

Furthermore, fiscally and practically, the law enforcement agencies have insufficient resources to track all the registered sex offenders.³⁹ Law enforcement officials complained about the length of the registration, the expansion of the registration laws, the increased number of offenders, and the lack of personnel and equipment.⁴⁰ Therefore, narrowing the scope of the registration law can address the concerns mentioned above. For instance, limiting the number of offenders who are subject to the registration system can be an effective way to ensure public safety, to support sex offenders' reintegration into society and to dispel the concerns about this system.

However, despite the registration laws receiving such criticism, the stories of Polly Klaas and Megan Kanka directed federal legislators—by receiving the support of the public and the media—to extend the scope of the Jacob Wetterling Act. Both of these girls were assaulted and murdered by repeat sex offenders who had been convicted of criminal sexual assault and released from prison.⁴¹ For this reason, these heinous crimes led to the notion that the registration system was not enough to deter sex offenders and that if law enforcement agencies know the whereabouts of previously convicted sex offenders, the public should know about their presence as well.⁴² At this point, in addition to the critiques on registration system, it seems that the main problem is because of the public concerns about sex offenders; governments overreact or react too quickly and pass new regulations or punishments without evaluating the consequences or outcomes rather than improving the existing system and making it more effective.

b. First Amendment: Megan's Law

The continued number of sexual offences prompted the Congress to amend the Jacob Wetterling Act with different types of new requirements.⁴³ Considering the facts, some members of the Congress argued that taking a precaution that informs the public when a previously convicted sex offender moves into their neighbourhood could be

39 Kelsie Tregilgas, 'Sex Offender Treatment in the United States: The Current Climate and an Unexpected Opportunity for Change' (2009-10) 84 Tulane Law Review 729, 733.

40 Human Rights Watch, (n 30) 44-46.

41 Lisa L Sample and Mary K Evans, 'Sex Offender Registration and Community Notification' in Richard G Wright (ed), *Sex Offender Laws, Failed Policies, New Directions* (Springer Publishing 2009) 213.

42 Wright, 'Sex Offender Post-Incarceration Sanctions: Are There Any Limits?' (n 1) 19-20.

43 During the mid-1990s every state passed a Megan's Law, and Congress decided to regulate these requirements with a federal Megan's Law. Jason F Mohan, 'A Community's Response to a Shocking Crime: The Jessica Lunsford Act and the Florida Sexual Offender Registry' (2007) 40 Suffolk University Law Review 703, 707.

an effective remedy.⁴⁴ The first amendment of the Jacob Wetterling Act was Megan's Law⁴⁵, which was enacted in 1996.⁴⁶ This amendment redesignated Subsection (d) of Section 170101, which was about the release of information. Although the original form of the Jacob Wetterling Act stated that the information was to be treated as *private data*, the statute allowed that it could be revealed to law enforcement agencies and to governmental agencies and that some 'relevant information'⁴⁷ could be released for the protection of the public from a definite person. Megan's Law amended the aforementioned subsection and 'eliminated the general requirement that information collected under state registration programmes be treated as private data'.⁴⁸ It provided that the information of a person who was required to register under this Act could be made public for any reason permitted under the laws of the State.⁴⁹ In 1997, the U.S. Department of Justice issued guidelines for the States about the application and the compliance of Megan's Law through a Press Release.⁵⁰ The Press Release clarified two main points about releasing the information requirement, which were focused on the guidelines: (1) the information relating to registered sex offenders must be disclosed not only to law enforcement agencies but also to members of the public 'as necessary to protect the public from registered offenders'; (2) it has to be done without any arbitrary basis. By doing so, any governmental or non-governmental organisations, prospective employers, or the victims of sex offences can access the information of registered sex offenders.⁵¹ As a result, under Megan's Law, the release of information to the public changed the nature of the Jacob Wetterling Act, and after this amendment, the Act was composed of two main components: registration and community notification.⁵²

44 Tracy L. Silva, 'Dial "1-900-PERVERT" and Other Statutory Measures that Provide Public Notification of Sex Offenders' (1994-5) 48 Southern Methodist University Law Review 1961, 1963.

45 In 1994, a seven-year-old girl named Megan Kanka was raped and murdered in New Jersey by a person who was a sex offender. She was convicted twice and had served six years in prison because of a criminal offense against a victim who was a minor, Jesse Timmendequas. Megan was lured into the grasp of her neighbour by offering to show her a puppy. Her body was found in a park near her home. Thereafter, this tragedy triggered a legislative action and an act that came to be known as Megan's Law. For more information, see, Megan Nicole Kanka Foundation, 'Our Mission' <<http://www.megannicolekankafoundation.org/mission.htm>> accessed December 15, 2024.

46 It was modelled after a statute enacted in New Jersey (N.J. STAT. ANN. 2C:7-1-11), in 1994, following the murder of Megan Kanka by a previously convicted sex offender living nearby.

47 Regarding the *relevant information*, federal law gives law enforcement agencies discretionary powers to determine which information can be released. 42 U.S.C. 14071(d)(2) (1996).

48 Department of Justice, Office of the Attorney, 'Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (1997) 62 Federal Register 39009, 39010 <<http://www.gpo.gov/fdsys/pkg/FR-1997-07-21/pdf/97-19047.pdf>> accessed 13 December 2020.

49 42 U.S.C. 14071(d)(1) (1996).

50 U.S. Department of Justice Press Release, 'Justice Department Releases Megan's Law Guidelines' (7 April 1997) <<http://www.justice.gov/opa/pr/1997/April97/140vaw.htm>> accessed December 13, 2020.

51 Department of Justice, Office of the Attorney, 'Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (n 48) 39019.

52 On June 22, 1996, former President Clinton made the following statement about Megan's Law in his weekly radio address: [W]e are fighting for something (...) for freedom to walk around the block at night and feel safe (...) and not worry about your children playing in the yard. (...) we are fighting for our children and their future. (...) we have taken decisive steps to help families protect their children, especially from sex offenders. (...) that's why in the crime bill we required every state in the country to compile a registry of sex offenders, and gave states the power to notify communities about child sex offenders and violent sex offenders that move into their neighbourhoods. (...) last month I signed Megan's law. That insists

Moreover, the Press Release on Megan's Law gave a large discretion to the States: (1) community notification should be applied both to sexually violent offenders and child molesters; and (2) by the phrase 'affirmative approach', States could extend the scope of the community notification and registration requirements by providing open-registration-lists or keeping neighbours informed of the existence of high-risk offenders.⁵³

In accordance with the guidelines, states must provide a registration system for offenders who are convicted after the establishment of the registration system, although registering the information of previously convicted offenders is optional for states.⁵⁴ Thus, under these guidelines, it can be said that if States consider it necessary to impose any new requirements on offenders convicted prior to the amendment of subsection (d) of section 170101, Megan's Law has a retroactive effect.⁵⁵ As can be seen in the States' Acts, 41 states mandated the retroactive application of community notification statutes among the 50 states and the District of Columbia.⁵⁶

i. Examination of Community Notification

The idea of disclosing the information of sex offenders and identifying them in society has gained the support of an overwhelming majority of the public.⁵⁷ Parents, especially, may feel empowered to protect their children from potentially dangerous people, and once an offender has been identified, it would be easy to prevent and control crimes committed by reoffenders, particularly against children, by knowing

that states tell a community whenever a dangerous sexual predator enters its midst. Too many children and their families have paid terrible price because parents did not know about the dangers hidden in their own neighbourhoods. Megan's law (...) will help to prevent more of these terrible crimes (...) The crime bill laid the foundation for this national registry by requiring states to track sexual offenders within their borders. Megan's law makes sure parents get this information so they can take steps to watch out for their children.

'President Clinton's Weekly Radio Address' *CNN* (22 June 1996)

<<http://edition.cnn.com/US/9606/22/clinton.radio/transcript.html>> accessed December 13, 2020.

- 53 U.S. Department of Justice Press Release, 'Justice Department Releases Megan's Law Guidelines' (7 April 1997) <<http://www.justice.gov/opa/pr/1997/April97/140vaw.htm>> accessed December 13, 2024.

Moreover, the guidelines declare that states can make the risk assessment about the offenders and determine the level of their danger and disseminate their information according to their character or the type of the offense that they commit. Department of Justice, Office of the Attorney, 'Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (n 48) 39019.

- 54 [T]o comply with the Megan's Law amendment, a state must establish a conforming information release program[me] that applies to offenders required to register on the basis of convictions occurring after the establishment of the program[me]. States do not have to apply new information release standards to offenders whose convictions predate the establishment of a conforming program[me], but the act does not preclude states from applying such standards retroactively to offenders convicted earlier if they so wish.

Department of Justice, Office of the Attorney, 'Final Guidelines for Megan's Law and the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (n 48) 39019.

- 55 '[T]he Act is not intended to, and does not have the effect of, making states less free than they were under prior law to impose such requirements. Hence, the Act's standards constitute a floor for State program[me], not a ceiling. States do not have to go beyond the Act's minimum requirements.' Department of Justice, Office of the Attorney General, 'Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act' (1999) 64 Federal Register 572, 575 <<http://www.gpo.gov/fdsys/pkg/FR-1999-01-05/pdf/98-33377.pdf>> accessed February 8, 2024.

- 56 Alan R Kabat, 'Letter Sex Offender Databases and Community Notification: Sacrificing Personal Privacy For a Symbol's Sake' (1997-8) 35 American Criminal Law Review 333, 359-61.

- 57 Bedarf (n 26) 906.

who those sex offenders are.⁵⁸ Supporters of community notification laws believe that under public surveillance, sex offenders are less likely to commit another crime; hence,, the laws deter future sex crimes.⁵⁹ As a practical matter, however, there are many debates surrounding community notification laws. Some suggest that they cause a panic in society and expose the identities of victims; offenders would be subject to vigilantism and ostracism and these laws give rise to employment or housing discrimination.⁶⁰ Nevertheless, the proponents of community notification laws support the dissemination of the information. However, the government has problems with the constitutional and practical concerns of this system.⁶¹

Although making the public aware of the presence of sex offenders in their neighbourhoods has the benefit of reducing the risk of victimisation, it leads to a *moral panic* regarding the identifiable threat. Cohen described moral panic as where 'a condition, episode, person or group of persons emerges to become defined as a threat [mostly by the mass media] to societal values and interests'.⁶² In accordance with this description, the stories of assaulted children were reported intensively by the media, and this manipulation led to a high level of public fear and anxiety that sex offenders can attack at any time.⁶³ At this point, according to Goode and Ben-Yehuda, there are five elements of the definition of the moral panic; concern, consensus, hostility, disproportionality and volatility.⁶⁴ In this context, concern points to the sensation and consternation, which are mostly caused by media, and social agitation; consensus refers to being in instant need of help over the extent of the problem; hostility illustrates the reaction of the public towards the roots of the threat; disproportionality indicates the balance between the perceived danger and the real danger; and volatility represents the movements of the persistence panic.⁶⁵

As far as sex offences are considered, the concern can be seen either in social movements or in legislative activity. For instance, after horrible sexual crimes, parents often raise funds to emotionally support other victims and their families or

58 Wilkins (n 8) 1252.

59 Carol L Kunz, 'Comment, Toward Dispassionate, Effective Control of Sexual Offenders' (1997-8) 47 American University Law Review 453, 473.

60 Maureen S Hopbell, 'Balancing the Protection of Children against the Protection of Constitutional Rights: The Past, Present and Future of Megan's Law' (2003-4) 42 Duquesne Law Review 331, 342.

61 Kristen M Zgoba, 'Spin Doctors and Moral Crusaders: The Moral Panic Behind Child Safety Legislation' (2004) 17 Criminal Justice Studies 385, 386. Community notification has been challenged as a violation of the constitution regarding sex offenders' rights. In this sense, the dissemination of the information can violate Equal Protection, Due Process Clause and Privacy Rights, Prohibition of Cruel and Unusual Punishment or Ex Post Facto Clauses guaranteed under the U.S. Constitution. For more information, see also, Simeon Schopf, "'Megan's Law': Community Notification and the Constitution" (1995-6) 29 Columbia Journal of Law and Social Problems 117.

62 Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers*, (3rd edn, Routledge 2002) 9.

63 John Pratt, 'Sex Crimes and the New Punitiveness' (2000) 18 Behavioral Sciences 35, 46; David Finkelhor and Richard Ormrod, 'Kidnapping of Juveniles: Patterns from NIBRS' [2000] Juvenile Justice Bulletin 1 <http://www.ncjrs.gov/html/ojjdp/2000_6_2/contents.html> accessed June 03, 2021.

64 Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Construction of Deviance* (Blackwell 1994) 34-51.

65 Zgoba, (n 61) 389-97.

engage in lobbying activities for harsher laws. As for the legislation aspect, the term *predator*, which is used in sex offender laws and has no legal or psychological basis,⁶⁶ indicates the level of dangerousness of sex offenders and the legislative body intends to depict them as more brutal. From this point of view, the problem is not with the use of this emotive term, which is a metaphor, but with the use of an unfamiliar or non-existing word in a legal context that is a pejorative way of describing sex offenders. In this sense, the use of this term reflects the legislature's concerns and their strong reaction to atrocious crimes.

According to Welch, Price and Yankey, for the members of the public, with respect to moral panic, 'there must exist a widespread belief that the problem at hand is real, it poses a threat to society, and something should be done to correct it'.⁶⁷ In sex offence cases, with media contribution, the social reaction against sexual offences put pressure on governments and resulted in sex offender laws.⁶⁸

Moral panic causes hostility towards sex offenders who harm children.⁶⁹ Dissimilar to other offences, sexual crimes against children are subject to different types of punishments or regulations, which create an assumption that sex offenders are not like other criminals and are much more dangerous than those people.⁷⁰ As seen from the nature of community notification, this system is stricter than the registration requirement and poses a danger to the privacy and safety of sexual offenders. Besides the overbroad scope of the community notification laws—for instance, people who committed a sexual offence long ago can be included on the list—they cause 'public ridicule, ostracism, job discrimination, housing discrimination and other forms of ongoing punishment'⁷¹, which prevents sex offenders from rebuilding a new life.⁷² Due to the stigma and obstruction, most sex offenders move away to places where they hope to be less known and not to be faced with the difficulties of the notification system. Otherwise, because of hostility, they will be harassed, their houses will be vandalised, and they will be attacked by vigilantes or isolated from their living areas.⁷³

⁶⁶ Ibid 390.

⁶⁷ Michael Welch, Eric A Price and Nana Yankey, 'Moral Panic Over Youth Violence: Wilding and the Manufacture of Menace in the Media' (2002) 24 *Youth & Society* 3, 10.

⁶⁸ *ibid*.

⁶⁹ Ibid 11.

⁷⁰ Zgoba (n 61) 391-2.

⁷¹ Hopbell (n 60) 342.

⁷² Lewis (n 3) 92.

⁷³ Alex B Eyssen, 'Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition against Cruel and Unusual Punishment?' A Focus on Vigilantism Resulting from "Megan's Law" (2001-02) 33 *St Mary's Law Journal* 101, 115-6; Tregilgas, (n 39) 736-6.

Disproportionality means that ‘the perceived danger is greater than the potential harm’.⁷⁴ Due to the nature of sex offences, there is a belief that the threat and the damage—emotional, physical, or financial—of these crimes are excessive. However, public anxiety about sexual crimes relies on ‘false or exaggerated claims’.⁷⁵ For instance, there is a notion that sex offenders are mostly strangers and knowing their identities and whereabouts will prevent future crimes. However, according to the empirical evidence, the overwhelming majority of victims of sex offences knew their attackers.⁷⁶ According to Snyder, with respect to the data of victim-offender relationships in sexual assaults in 12 states, 13.8% of children were assaulted by strangers, 26.7% of them were attacked by a family member and approximately 60% of victims were assaulted by an acquaintance.⁷⁷ Therefore, as opposed to the assumption that sex offenders are strangers, it is more likely that although victims know their attackers, they continue to be attacked by them and cannot avoid being abused. At this point, community notification can be a solution to prevent further harassment. However, this issue raises another argument that releasing the information and criminal records of sex offenders—for instance, incestuous relationships—may result in identifying the victims, as well. Although Megan’s Law prohibits disclosing the identity of a victim of an offence, when the notification lists reveal the criminal background of an offender, this may lead to a double victimisation of a victim. Unfortunately, this double victimisation may have other traumatic effects on victims who have experienced trauma because of being a victim of previous sexual assault.⁷⁸ In this sense, although the potential harm is not as great as the perceived danger, the consequences caused by the perceived danger cause another problematic issue for the notification system.

Regarding volatility, the fluctuations and the stabilisation of the degree of panic can be seen in the legislative activity. For instance, early twentieth century sex offenders were treated the same as other criminals and received the same punishments.⁷⁹ In the late 1930s, the fear of sexual crimes intensively increased and the legislatures reflected this fear by enacting specific sex offenders’ statutes with a different

74 Welch, Price and Yankey (n 67) 15.

75 Ibid 16.

76 For more information, see also, Lawrence Greenfeld, ‘Sex Offences and Offenders: An Analysis of Data on Rape and Sexual Assault’ (Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2 July 1997) <<http://www.mincava.umn.edu/documents/sexoff/sexoff.pdf>> accessed May 31, 2021; Lana Stermac, Janice Du Mont and Shelia Dunn, ‘Violence in Known-Assailant Sexual Assaults’ (1998) 13 *Journal of Interpersonal Violence* 398; Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, ‘National Crime Victimization Survey’ (Collection Period 1973-2008) <<http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=245>> accessed May 31, 2021.

77 Howard N Snyder, ‘Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics’ (American Statistical Association, 2000) 10 <<http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf>> accessed May 31, 2021.

78 Richard G Wright, ‘Sex Offender Registration and Notification: Public Attention, Political Emphasis, and Fear’ (2003) 3 *Criminology & Public Policy* 97, 100-1.

79 Rachel Blacher, ‘Historical Perspective of the “Sex Psychopath” Statute: From the Revolutionary Era to the Present Federal Crime Bill’ (1994-5) 46 *Mercer Law Review* 889, 897.

approach.⁸⁰ By 1960, the involuntary civil commitment procedure was considered as a treatment of sex offenders instead of punishing them after conviction.⁸¹ In the 1980s, the legislatures reconsidered the accepted punishments and treatment and ‘shifted [their statutes] from rehabilitating convicted criminals to punishing them in proportion to the severity of their crimes’.⁸² By 1990, the trend of punishing sex offenders was replaced by the registration and notification system after conviction. According to Palermo and Farkas,

because of the media’s focus on sex offenders, pressure is applied on legislators and politicians to support the sex offender laws (...) no politician wants to appear callous or unresponsive to a frightened community worried about their safety and the safety of their children (...) [therefore] these political and social forces [are] the passage of sex offender specific laws in a variety forms.⁸³

Hence, whenever a heinous sex crime occurred, it was highly publicised by the media and it increased the level of panic in the society, due to the fact that the legislators felt deeply responsible to restructure sex offender laws. As a result, without any hesitation, several methods, such as chemical or surgical castration, have been devised to address the problem of dangerous sex offenders. However, it indicates that these restructured sex offender laws overstep their aim of preventing sex offenders from striking again and protecting society from those people and have made the process more complex. As is seen from the consequences of the community notification laws, rather than meeting the needs of society, they caused a great moral panic resulting in distraction from the real problems of victims and sex offenders.

c. Second Amendment: Pam Lychner Act

Only five months after the Megan’s Law amendment, The Jacob Wetterling Act was expanded with the Pam Lychner⁸⁴ Sexual Offender Tracking and Identification Act of 1996. The first step towards a national registration system increased the registration requirement such as the information that the FBI can keep in the national database, registration for life, the submission of the information directly by registrants, and so forth. One of the most important provisions under this amendment was the establishment of the Federal Bureau of Investigation (FBI) database to create

⁸⁰ Ibid 899.

⁸¹ Beth K Fujimoto, ‘Sexual Violence, Sanity, and Safety: Constitutional Parameters for Involuntary Civil Commitment of Sex Offenders’ (1992) 15 University of Puget Sound Law 879, 880.

⁸² Brian G Bodine, ‘Washington’s New Violent Sexual Predator Commitment System: An Unconstitutional Law and An Unwise Policy Choice’ (1990) 14 University of Puget Sound Law Review 105, 113.

⁸³ George B Palermo and Mary A Farkas, *The Dilemma of the Sexual Offender* (Charles C. Thomas Publisher 2001) 154.

⁸⁴ Pamela Sue Rogers –Pam Lychner- was a real estate broker and in 1990 while she was waiting for a customer with her husband, a workman from a cleaning company who had cleaned the house the day before came to the house because of unfinished business. The workman was a convicted rapist and child molester and had been released on early release. That day, he tried to assault Pam Lychner; however, with the help of her husband, he failed. For more information, see, Lisa Gray, ‘After the Crash’ *Houston Press* (Houston, 23 October 1997) <<http://www.houstonpress.com/1997-10-23/news/after-the-crash/>> accessed May 31, 2023.

a national database to monitor the movement of certain sexual offenders: (1) who are child molesters; (2) who are sexually violent predators; or (3) who have been convicted of a sexually violent offence.⁸⁵

The Jacob Wetterling Act before the amendment considered the transmission of conviction data and fingerprints to the FBI necessary and sufficient, and this transmission was to be fulfilled by the State Law enforcement agency.⁸⁶ However, the Pam Lychner Act obliges States' law enforcement agencies to provide all the information prescribed by subsection (b) (1) to the FBI.⁸⁷ According to this new amendment, the FBI database must include the current residence address, if the address is changed; the new address, fingerprints, a photograph, a form—this form declares the duty of the registrant who has to read and sign it⁸⁸-, name of the person, identifying factors, anticipated future residence, offence history, and documentation of any treatment received for the mental abnormality or personality disorder of the person. Moreover, as a precaution, besides the transmission of the information by individual states, the sex offenders should directly register their information under some circumstances. First, if a state has not provided a *minimally sufficient sexual offender registration program*,⁸⁹ certain sexual offenders who are convicted of criminal offences against minors or of sexually violent offences and/or who are sexually violent predators must directly submit their information—a current address, fingerprints, and a current photograph—to the FBI.⁹⁰ Second if those offenders move to another state, they have to directly notify the FBI and state in which their new residence is located, with the current address, fingerprints, and photograph. This notification must be made within 10 days of settling down in his new home.⁹¹ The target of this requirement is to provide public safety when sex offenders move to another state that does not have any registration or notification programme.⁹²

The Act is based on two different types of time period for the registration of a person with the FBI. Apart from the notification and preservation of the information in the state registration database, certain sex offenders are bound to report their information for ten years to the FBI, after their release from prison or when placed on parole or probation.⁹³ If an offender is convicted of the aforementioned offences

85 42 U.S.C. 14072(b) (1996).

86 42 U.S.C. 14072(b)(2) (1996).

87 42 U.S.C. 14072(b)(2) (1996).

88 42 U.S.C. § 14072(b)(2)(A)(v) (1996).

89 The Pam Lychner Act defines the term *minimally sufficient sexual offender registration programme* as a state sexual offender registration programme which has to provide a list of sexual offenders required to register under the Jacob Wetterling Act. 42 U.S.C. 14072(a)(3) (1996).

90 42 U.S.C. 14072(c) (1996).

91 42 U.S.C. 14072(g)(3) (1996).

92 Hanna (n 24) 158.

93 42 U.S.C. 14072(d)(1) (1996).

more than once or *aggravated sexual abuse*⁹⁴ or determined as a sexually violent predator, he has to continue to fulfil the registration requirement for life.⁹⁵ For the state registration programme, the minimum length of registration is 10 years for sex offenders who are child molesters, sexually violent predators, or sexually violent offenders. In addition, if a sexual offender has a previous conviction(s) for one of those crimes, he is subjected to the registration requirement for life.⁹⁶

In relation to providing the community with information, the Pam Lychner Act has the same provision as Megan's Law: the FBI can disclose the information if it is necessary for the protection of the public.⁹⁷ However, the provision about the identity of victims precisely forbids the release of the information of victims by the FBI.⁹⁸

There are two different categories by which the Act has attempted to deal with unregistered sex offenders or unverified information. First, if the address or the location of the person required to register cannot be confirmed by the FBI or the FBI is informed about this situation by a State agency; that person is accepted as in breach of the national registration requirement. Therefore, his name was put on the National Crime Information Center Wanted list.⁹⁹ Secondly, if a person required to register intentionally disobeys the requirement conditions for the first time in the case of committing either one or more than one of the abovementioned offences.¹⁰⁰

94 Aggravated sexual abuse is defined in 18 U.S.C. § 2241;

a. BY FORCE OR THREAT.-Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly causes another person to engage in a sexual act-

1. by using force against that other person; or

2. by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, (...)

b. BY OTHER MEANS.-Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of pursuant to a contract or agreement with the Attorney General, knowingly-

1. renders another person unconscious and thereby engages in a sexual act with that other person; or

2. administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, other similar substance and thereby-

A. substantially impairs the ability of that other person to appraise or control conduct; and

B. engages in a sexual act with that other person;

or attempts to do so, (...)

c. WITH CHILDREN.-Whoever crosses a State line with intent to engage in a sexual act with a person who has not attained the age of 12 years, or in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the Attorney General, knowingly engages in a sexual act with another person who has not attained the age of 12 years, or knowingly engages in a sexual act under the circumstances described in subsections (a) and (b) with another person who has attained the age of 12 years but has not attained the age of 16 years (and is at least 4 years younger than the person so engaging), or attempts to do so, (...)

95 42 U.S.C. 14072(d)(2) (1996).

96 42 U.S.C. 14072(b)(6) (1996).

97 42 U.S.C. 14072(f)(1) (1996).

98 42 U.S.C. 14072(f)(2) (1996).

99 42 U.S.C. § 14072(g)(5)(C)(iii) (1996).

100 At this point, in the first situation, the fine is a maximum of \$100,000, and in the second situation, in addition to the \$100,000 fine, that person is punished by imprisonment for a maximum of 1 year. However, if this intentional infringement occurs more than once, the punishments are 10 years gaol sentence and \$100,000 fine. 42 U.S.C. 14072(i) (1996). The original form of the Jacob Wetterling Act did not determine a specific penalty for purposely fail to register; if a person

i. Examination of Pam Lychner Act

In addition to the debates on Jacob Wetterling Act and Megan's Law, although a national database is an important tool to prevent future sex crimes and an effective way to optimise the notification system, it is not devoid of imperfections. The root of the problem of the national database system is that the information in the national database is provided by state law enforcement agencies and can be incorrect. The risk of inaccurate information in states' databases results from an increased number of sex offenders, over-worked law enforcement agencies, out-of-date information or some false information, and this could harm innocent people.¹⁰¹ While the information is transferred from local databases to the national database, the FBI does not control the validity of the information. Thus, the problems caused by incorrect information in state law enforcement agencies could be easily transferred from the local level to the national level.

As far as the Jacob Wetterling Act and its amendments are concerned, it may be argued that, as the number and the content of the amendments are increased, the requirements for the registration of sexual offenders are getting tougher. In this sense, it is controversial whether the evolution of the Jacob Wetterling Act with several amendments served the main purpose of these regulations and put them in a proper shape regarding people's anxiety or made the situation worse.

The increase in the number of these strict requirements has caused severe debates on rights, privacy, and the safety of society. All the indicated amendments show that the protection of the community and the rights of victims were of considerable importance during the process of the legislation. However, due to the number of amendments, the legislative body dealt with the patchwork of federal law by enacting the Adam Walsh Act. As mentioned above, federal sex offender laws determine the minimum standards for the prevention of sexual offences and states' laws should conform to those standards. Therefore, in the next section, this study will try to evaluate the Adam Walsh Act and the new set of standards regulated under this Act, which are civil commitment and three-tier systems. It should also be noted that the registration system and the community notification requirement, which are examined under the Jacob Wetterling Act, are the basic elements of the sex offender laws and, thus, they will be tersely mentioned within the framework of the Adam Walsh Act.

required to register intentionally fails, he should be punished by criminal penalties. For more information, see also 42 U.S.C. 14071(c) (1994).

101 In California, a 54-year-old man appeared in the state's CD-ROM sex offender database that he had been convicted of child abuse because of a misspelling, and until he realised this error, he received numerous threatening phone calls. Jane A Small, 'Who Are the People in Your Neighborhood?' Due Process, Public Protection, and Sex Offender Notification Laws' (1999) 74 New York University Law Review 1451, 1465. In another case, due to the registration and notification requirements, a convicted sex offender showed her sister-in-law's address as her residence. Even if she did not stay at that address, the sister-in-law received threats because her address was shown as a sex offender residence. For more information, see, Mary Pemberton, 'Sex Offender Law Victimized Innocent Family' *Los Angeles Times* (Los Angeles, 16 November 1997) <<http://articles.latimes.com/1997/nov/16/news/mn-54325>> accessed May 31, 2021.

d. Adam Walsh Act

On July 27, 2006, the Adam Walsh¹⁰² Child Protection and Safety Act was signed by President George W. Bush. With this Act, the federal government's authority is significantly widened regarding sex offender regulations in comparison with the Jacob Wetterling Act.¹⁰³ Essentially, the Adam Walsh Act took the place of the Jacob Wetterling Act in respect of provisions including sex offender registration and notification, which means that these provisions under the Jacob Wetterling Act are no longer in force and has imposed different types of post-incarceration control methods on sex offenders.¹⁰⁴ However, those methods were criticised because 'legislators will often enact and expand sex offender policies regardless of their efficacy and primarily in response to calls from constituents and depictions of horrible sex offenders in the media'.¹⁰⁵ Although guidelines from federal agencies could be important to understand the legislative intent, it can be seen from the Congressmen's speeches that the main motivation for enacting the Adam Walsh Act was mostly and solely to protect society and children from dangerous sex offenders.¹⁰⁶

Apart from these reports, Attorney General Michael B. Mukasey explains the main reason for enacting the Adam Walsh Act in place of the Jacob Wetterling Act in the Final Guidelines June 2008.¹⁰⁷ According to Mukasey, although the Jacob Wetterling Act went through several changes, it was still not sufficient to address the needs of society. With the Adam Walsh Act, those amendments are aggregated with a comprehensive new set of standards for effective public protection. Moreover, it was designed to close the loopholes of the Jacob Wetterling Act, such as the prevention of invalid information of registrants and the registration of fugitive sex offenders.¹⁰⁸

i. Examination of Registration and Community Notification Requirements under the Adam Walsh Act

The new version of the Jacob Wetterling Act 'has raised the bar on sex offender registration'¹⁰⁹ and notification laws by expanding the requirements of sex offender

102 'On July 27, 1981, in Hollywood, Florida, 6-year-old Adam Walsh was abducted at a mall. Two weeks later, some Adam's remains were discovered in a canal more than 100 miles from his home.' 42 U.S.C. § 16901(2)(a) (2006). Moreover, under 42 USC. 16901(2) (2006), the stories of children who were the victims of heinous attacks by sex offenders are listed.

103 Richard G Wright, 'From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy' (2008) 21 Federal Sentencing Reporter 124, 124.

104 These methods are civil commitment, residency restriction, and electronic monitoring. However, due to the scope of this research, this section will only evaluate registration, community notification and civil commitment.

105 Wright, 'From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy' (n 103) 126.

106 For Congressional Records, see, CONGRESSIONAL RECORD, 'Adam Walsh Child Protection and Safety Act of 2006' 152 CONG. REC. H5705 (daily ed. July 25, 2006) <<http://www.gpo.gov/fdsys/pkg/CREC-2006-07-25/pdf/CREC-2006-07-25-pt1-PgH5705.pdf#page=21>> accessed May 31, 2021.

107 Michael B Mukasey, 'The National Guideline for Sex Offender Registration and Notification, Final Guidelines' (U.S. Department of Justice, Office of the Attorney General, June 2008) <http://www.gocepp.maryland.gov/msac/documents/final_sornaguidelines.pdf> accessed May 31, 2021.

108 Ibid 4.

109 Daniel J. Schubert, 'Challenging Ohio's Adam Walsh Act: Senate Bill 10 Blurs the Line Between Punishment and

registration and notification programmes and ‘standardises registration requirements among the states’¹¹⁰. Under the Adam Walsh Act, Title I includes the Sex Offender Registration and Notification Act (SORNA), which designates the duration of registration requirements, definition of relevant phrases, information required in registration lists, access to sex offender information through the Internet, the scope of community notification, and the crime of failing to register.¹¹¹ However, Costigliacci criticises the scope of the Adam Walsh Act considering some created hypothetical scenarios to expose the ‘irrationality of the requirements’.¹¹² For instance, some provisions of the Adam Walsh Act penalise crimes that do not include any sexual or violent element; thus, while the Act aims to protect minors from sex offenders who pose a great risk to society, it oversteps the line and causes harm to individuals who do not present any danger to children.¹¹³ According to Farley, the Adam Walsh Act does not discriminate between sexual and non-sexual offenders and, regrettably, the new registration and community notification requirements under the Adam Walsh Act label non-sexual or non-violent offenders who do not pose any danger to society and tend to reoffend.¹¹⁴ Therefore, due to the over-inclusive requirements, even if there may not be any link between the offence committed and sex, the offenders are required to register as a sex offender.¹¹⁵ At this point, it seems fair to say that the over-inclusive scope of the Adam Walsh Act oversteps the main aim to be achieved. For instance, if a person takes a child without notifying the parents in order to protect the child from parental harassment, as a result of the requirements of the Adam Walsh Act, this conduct should be punished, and this person is registered as a sex offender. Another example is the case of a group of children who are all around the age of 12 and are trying to steal some items from a store. Thereafter, they are captured by a security guard and locked in an office until the arrival of the police officers. However, if the police officers do not find any evidence that the children were shoplifting, the security guard should be registered as a sex offender as a result of the unlawful imprisonment of a minor in accordance with the Adam Walsh Act, even if the security

Remedial Treatment of Sex Offenders’ (2010) 35 University of Dayton Law Review 277, 281.

110 Andrew R. Hodges, ‘Balancing Evils: State Sex Offender Registration and Notification Laws’ (2008) 10 Journal of Law in Society 134, 140.

111 [T]he SORNA reforms are generally designed to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public and to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements to the consequences of registration violations.

Department of Justice, Office of the Attorney General, ‘Applicability of the Sex Offender Registration and Notification Act’ (2007) 72 Federal Register 8894, 8895 <<http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=0lqcmM/2/2/0&WALSaction=retrieve>> accessed May 31, 2021.

112 Steven J Costigliacci, ‘Protecting Our Children from Sex Offenders: Have We Gone Too Far?’ (2008) 46 Family Court Review 180, 184.

113 Ibid 193.

114 Lara G. Farley, ‘The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century’ (2007-2008) 47 Washburn Law Journal 471, 486.

115 Tregilgas (n 39) 732.

guard has reasonable suspicion.¹¹⁶ For this reason, Sample and Bray believe that the excessive expansion of registration and notification requirements to more sex offenders falls short of fulfilling the main purpose of preventing sex offences.¹¹⁷

ii. Classification of sex offenders: the Three-Tier System

It is possible to divide SORNA into two parts: (1) the provisions building up a national registry; and (2) the provisions related to the penalties for registration violations.¹¹⁸

According to the Adam Walsh Act, a person who commits a sex offence and is convicted for this reason will be classified as a sex offender.¹¹⁹ The Act determines three different types of sex offenders using a crime-conviction-based approach. Considering this approach, sex offenders are denominated as Tier I, Tier II and Tier III offenders concerning the severity of a crime. According to this creation, while Tier I offenders embody the least serious offenders and mainly ‘catch-all’¹²⁰ offenders who do not fall under Tier II or Tier III, Tier III represents the most serious offenders.¹²¹ Moreover, there are two exceptional situations that are excluded in terms of sex offence: (1) where there is a ‘foreign conviction’ because of committing a sex crime but does not concur with the conditions under this Act, does not serve the aim of this title and does not provide any protection for fundamental fairness and due process clause; and (2) in the case of an adult victim, if consensual sexual conduct becomes the subject of an offence and the victim is not ‘under the custodial authority of the offender’ or if the victim is over 12 years old and the offender is just a maximum of 4 years older than the victim (the supposed ‘Romeo and Juliet Clause’).¹²² In the first situation, if the foreign conviction is obtained with insufficient protection of fundamental fairness and due process, this conviction will not be accepted as a sex offence conviction. In the second situation, the Romeo and Juliet Clause shows a distinction between a mutual decision and the abusive action of a sex offender. Although an adult-molesting a child is reprehensible, consensual sexual activity between a minimum 13-year-old teenager and a maximum 17-year-old teenager is acceptable.

116 Costigliacci (n 112) 185. As seen from these hypothetical scenarios, the irrationality of the requirements under the Adam Walsh Act has led to an unfair registration practices and an excessive number of registered sex offenders. It can be said that the legislature has gone too far to protect children from those who do not mainly pose any risk to the children’s safety.

117 Sample and Bray, ‘Are Sex Offenders Dangerous?’ (n 27) 77.

118 Corny R Yung, ‘One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions’ (2009) 46 Harvard Journal on Legislation 369, 379.

119 42 U.S.C. 16911(1) (2006).

120 Lori McPherson, ‘Practitioner’s Guide to the Adam Walsh Act’ (2007) 20 Update 1, 2.

121 42 U.S.C. § 16911(2)-(4) (2006).

122 42 U.S.C. § 16911(5)(B), (C) (2006). For more information about “Romeo and Juliet Clause”, see, McPherson (n 120) 3.

The aim of the legislative initiative for establishing a tier system is to determine the level of risk that sex offenders pose and to make the public aware of those risks by disclosing their information.¹²³ However, the controversial point of the three-tier system is that the crime-conviction-based approach is not sufficient to assess the offenders who pose a potential risk because it is based solely on the offences resulting in conviction.¹²⁴ The reason is that even if sex offenders commit the same crime, the risk that they pose can be different due to the other factors, such as gender, age, mental health, stability, support, and victim preference.¹²⁵ At this point, the type of crime committed or the prior conviction history can be one of the components of these factors, but there is not any empirical evidence to show that the reason for conviction is the determining element of recidivism risk.¹²⁶ Moreover, the reason for conviction relies not only on evidence but also on some other facts such as the offender's personality, the trustworthiness of the victim or the ability of the lawyer. Therefore, it may be argued that the reason for conviction and the committed offence do not overlap, and in this sense, a conviction-based approach does not explicitly reflect the risk of recidivism.¹²⁷ Apart from these issues, the research results indicate that the recidivism rate of Tier I offenders is higher than that of both Tier II and Tier III offenders.¹²⁸ Regarding this point, it can be said that a crime-conviction-based approach is not solely adequate to determine the level of recidivism risk. For these reasons, SORNA may cause a 'false sense of security' due to the belief that Tier I offenders do not tend to reoffend.¹²⁹ Although several instruments have been created for the prediction of sexual recidivism among sex offenders, they do not provide a comprehensive assessment to determine the risk level.¹³⁰ Nevertheless, there are two widely known risk assessment instruments called 'Static-99 and MnSOST-R'¹³¹, which have 'moderate predictive accuracy' to make a rational differentiation between sex offenders regarding their risk level to engage in recidivism.¹³² Moreover, Logan

123 Naomi J Freeman and Jeffrey C Sandler, 'The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?' (2010) 21 Criminal Justice Policy Review 31, 33.

124 Brittany Ennis, 'Quickly Assuaging Public Fear: How the Well-Intended Adam Walsh Act Led to Unintended Consequences' [2008] Utah Law Review 697, 705.

125 Tregilgas (n 39) 747; Freeman and Sandler (n 123) 33-34. Sample and Bray argued that sex offenders are not a 'homogenous group' and they pose different levels of risk of recidivism. Sample and Bray, 'Are Sex Offenders Different?' An Examination of Rearrest Patterns' (n 1) 88, 94.

126 Freeman and Sandler (n 123) 34.

127 Ibid 44.

128 Ibid 43.

129 Ibid.

130 Karl R Hanson and David Thornton, 'Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales' (2000) 24 Law and Human Behavior 119, 132; Douglas L Epperson and others, 'Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) Technical Paper: Development, Validation, and Recommended Risk Level Cut Scores' (December 2003) 6 <<http://www.psychology.iastate.edu/~dle/TechUpdatePaper12-03.pdf>> accessed May 31, 2021.

131 For more information about Static-99 and MnSOST-R, see, Hanson and Thornton (n 130); Howard E Barbaree and others, 'Evaluating the Predictive Accuracy of Risk Assessment Instruments for Adult Sex Offenders' (2001) 28 Criminal Justice and Behavior 490; Epperson and others (n 130); Calvin M Langton and others, 'Further Investigation of Findings Reported for the Minnesota Sex Offender Screening Tool-Revised' (2008) 23 Journal of Interpersonal Violence 1363.

132 Freeman and Sandler (n 123) 44-45.

suggests that these risk-based instruments are much more effective than the Adam Walsh Act crime-conviction-based approach due to the individualised assessment.¹³³

Considering these facts, the question can be raised as to which type of sex offender should be required to undergo chemical castration. For instance, if chemical castration is used regarding the determination of the risk of a person to the public under the federal sex offender laws, Tier III offenders, which are the highest risk potential offenders, may undergo this implementation. On the other hand, with the help of chemical castration, laws reduce recidivism and protect society from recidivists. As seen from the aforementioned research results, Tier I offenders are arrested for sexual offences more than Tier 2 and Tier 3 offenders. Thus, it seems plausible to use chemical castration for Tier I offenders to serve the purpose of the legislation. However, in this case, according to the three-tier system, chemical castration may be implemented for all sex offenders without any distinction. In this context, this controversial point will be addressed more thoroughly in the following chapters while examining chemical castration as a state regulation.

iii. Adolescent Sex offenders and the Adam Walsh Act

Juveniles are explicitly within the scope of the Adam Walsh Act.¹³⁴ This means that if an offender is 14 years old or over at the time of the offence which is ‘comparable to or more severe than aggravated sexual abuse’ or ‘was an attempt or conspiracy to be committed’, SORNA will apply to this person.¹³⁵ According to this definition, the Adam Walsh Act regards juveniles as sex offenders within the scope of SORNA, provided that they are Tier III offenders. Nevertheless, the juvenile provisions are the most hypercritical point of the Adam Walsh Act. Some people support the idea that the Act fails to differentiate juvenile offenders from adult offenders¹³⁶ and does not consider the main purpose of the juvenile justice system while punishing juvenile offenders.¹³⁷ It is generally accepted that the basis of juvenile justice relies on the belief that children are innocent, not able to perceive the criminal mind or motive and

133 Wayne A Logan, ‘Criminal Justice Federalism and National Sex Offender Policy’ (2008-9) 6 Ohio State Journal of Criminal Law 51, 87.

134 Enniss (n 124) 703.

135 42 U.S.C. 16911(8) (2006).

136 Human Rights Watch (n 30); Michael F Caldwell, ‘Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders’ (2007) 19 Sexual Abuse, A Journal of Research and Treatment 107; Maggie Jones, ‘How Can You Distinguish a Budding Pedophile from a Kid with Real Boundary Problems?’ *New York Times* (New York, 22 July 2007) <http://www.nytimes.com/2007/07/22/magazine/22juvenile-t.html?_r=1&pagewanted=print> accessed May 31, 2021; Luige del Puerto, ‘Arizona Officials Express concerns Over Federal Sex Registry Law’ *Arizona Capitol Times* (Arizona, 30 November 2007) <http://findarticles.com/p/news-articles/arizona-capitol-times/mi_8079/is_20071130/arizona-officials-express-concerns-federal/ai_n51710061/> accessed May 31, 2021; Lisa Sandberg, ‘Sex Registry Called Too Harsh for Juveniles’ *Houston Chronicle Austin Bureau* (Houston, 17 February 2008) <<http://www.chron.com/disp/story.mpl/metropolitan/5549287.html>> accessed May 31, 2021; Enniss (n 124); Logan, ‘Criminal Justice Federalism and National Sex Offender Policy’ (n 133); Elizabeth J Letourneau and others, ‘Effects of Sex Offender Registration Policies on Juvenile Justice Decision Making’ (2009) 21 Sexual Abuse: A Journal of Research and Treatment 149; Tregilgas (n 39).

137 Tregilgas (n 39) 734.

the consequences of their behaviours, and thus, are different from adults and need protection.¹³⁸ In this sense, the juvenile justice system is an intersection of the idea of child welfare and the criminal justice system.¹³⁹ For this reason, in most jurisdictions, the juvenile criminal justice system has been built on rehabilitation or at least less harsh punishments compared to adults.¹⁴⁰ However, it may be argued that the Adam Walsh Act was enacted without assessing this general assumption because juveniles are subject to the same regulations such as registration and community notification as adults under the Adam Walsh Act. Moreover, it is ambiguous whether they are subject to the administration of chemical castration or not. On July 31, 2007, the Coalition for Juvenile Justice criticised the provisions of the Adam Walsh Act concerning juveniles by writing a letter to Laura Rogers, then the Director of the SMART Office in the Department of Justice in the USA.¹⁴¹ In this letter, the Director of the Coalition of Juvenile Justice argued that SORNA violates the confidentiality requirements; it has detrimental effects on the effectiveness of rehabilitation; and it does not give any opportunity to juveniles to correct their mistakes made in childhood. In this sense, the registration and community notification requirements for juveniles can result in stigmatisation and ostracism.¹⁴² With regard to the statistics of juvenile sex offenders, they have lower recidivism rates and are predisposed to be rehabilitated more effectively.¹⁴³ Nonetheless, if they do not receive the treatment and help they may need, such as supervising their activities and assisting them, this might cause some serious problems in their future lives.

iv. General Requirements for the Registration and Notification Systems regarding the Three-Tier System

A sex offender must register and update the information required for registration in every state where the offender lives, works and attends school.¹⁴⁴ The Act determines

138 Lamar T Empey, 'The Social Construction of Childhood, Delinquency, and Social Reform' in Malcolm W Klein (ed), *The Juvenile Justice System* (Sage Criminal Justice System Annuals, Sage Publications 1976) 37.

139 Robert Harris and David Webb, *Welfare, Power, and Juvenile Justice: The Social Control of Delinquent Youth* (Tavistock Publication, 1987) 9.

140 Howard E Barbaree and William L Marshall, *The Juvenile Sex Offender* (2nd edn, Guilford Press 2006) 2. Some scholars have also emphasised the importance of rehabilitation in the juvenile justice system rather than incarceration. Kimberly Kempf-Leonard and Lisa L Sample, 'Disparity Based on Sex: Is Gender Specific Treatment Warranted?' (2006) 17 *Justice Quarterly* 89; Donna M Bishop, 'Public Opinion and Juvenile Justice: Myths and Misconceptions' (2006) 5 *Criminology and Public Policy* 653.

141 Letter from Nancy Gannon Hornberger to Laura Rogers (31 July 2007) <<http://juvjustice.org/media/fckeditor/SORNA%20Comments.pdf>> accessed April 18, 2021. This letter was written to Laura L. Rogers who is the Former Director of the SMART Office in the Department of Justice in the USA.

142 *ibid*.

143 Department of Justice, Center for Sex Offender Management, 'Understanding Juvenile Sexual Offending Behavior: Emerging Research, Treatment Approaches and Management Practices' (*CSOM*, December 1999) <<http://www.csom.org/pubs/juvbrf10.html>> accessed April 18, 2022; The Association for the Treatment of Sexual Abusers, 'The Effective Legal Management of Juvenile Sexual Offenders' (*ATSA*, 11 March 2000) <<http://www.atsa.com/ppjuvenile.html>> accessed April 18, 2022; National Center on Sexual Behavior of Youth, 'Frequently Asked Questions About Adolescent Sex Offenders' (*Center on Child Abuse and Neglect, University of Oklahoma Health Sciences Center*, 2004) <<http://www.ncsby.org/pages/publications/FREQUENTLY%20ASKED%20QUESTIONS%20ASO.pdf>> accessed April 18, 2022.

144 42 U.S.C. 16913(a) (2006).

precisely which information has to be provided by sex offenders.¹⁴⁵ In addition to revealing the information listed in the Act,¹⁴⁶ the Attorney General can demand extra information.¹⁴⁷ Besides, states have to guarantee some specific information that must be included in the registry lists.¹⁴⁸

The three-tier classification system is the key point of the Adam Walsh Act because of the duration of registration requirement and the frequency of verification of information.¹⁴⁹ The registration period and periodic verification must be in conformity with this system. At this point, the tier status of the sex offenders determines the length of registration and the frequency of appearing in person to update the information.¹⁵⁰ For instance, Tier I offenders should register for 15 years and verify their information annually, Tier II offenders are required to register in person every six months for 25 years, and Tier III offenders must register for life and update their information every 3 months.¹⁵¹ Unlike its predecessor, the Adam Walsh Act requires that in the case of a 'clean record',¹⁵² the length of the registration period must be diminished. For Tier I sex offenders, they must maintain a clean record for 10 years, and for Tier III sex offenders who are adjudicated delinquent of a sex offence, it must be 25 years.¹⁵³ With respect to the clean record provision, after 10 years, Tier I sex offenders will not be required to register. In the case of tier III sex offender adjudicated delinquents, this period is 25 years.¹⁵⁴ At this point, it may be observed that there is a gap in the Adam Walsh Act because there is no possibility of a reduction in time for Tier II sex offenders and they cannot benefit from a reduction in the registration period. Even if this clean record clause is predicated on the potential risk that sex offenders can pose, Tier II sex offenders can be less dangerous than Tier III sex offenders who are adjudicated delinquent of a sex offence, and thus they should have come within the scope of this provision.

145 Hodges (n 110) 141.

146 The information that sex offenders have to provide is; name, social security number, the names and the addresses of their residence, employee and school, and the licence plate number and description of vehicle they own or operate. 42 U.S.C. § 16914(a)(1)-(6) (2006).

147 42 U.S.C. 16914(a)(7) (2006).

148 The information that a state registration list has to contain is; physical description of the registrant, criminal record and the text of the provision of law under which the registrant is convicted, a current photograph, asset of fingerprints and palm prints, a DNA sample, a copy of the registrant's driver's licence or an official identification card. 42 U.S.C. 16914(b) (2006).

149 Logan, 'Criminal Justice Federalism and National Sex Offender Policy' (n 133) 77-78.

150 Charles Doyle, 'Adam Walsh Child Protection and Safety Act: A Sketch' (CRS Report for Congress, 17 April 2007) <http://assets.opencrs.org/rpts/RS22646_20070417.pdf> accessed May 31, 2021.

151 42 U.S.C. 16915, 16916 (2006).

152 Under the Act, if a sex offender is not convicted of any sex offence or incarcerated more than 1 year because of any offense and succeed in accomplishing the probation or parole period or the sex offender treatment programme certified by the state or the Attorney General, it will be accepted that he has a clean record. 42 U.S.C. § 16915(b)(1)(A)-(D) (2006).

153 42 U.S.C. § 16915(b)(2)(A), (B) (2006).

154 42 U.S.C. § 16915(b)(3)(A), (B) (2006).

Besides expanding the ambit of the registration system, it may be argued that SORNA redesigned a comprehensive, uniform and unique community notification system by making the information listed in the registry available via a website or directly providing the information of a sex offender to the establishments prescribed by the law. Considering this fact, there are two different ways to access sex offenders' information by way of a website: (1) Jurisdictions' Internet Site;¹⁵⁵ and (2) National Website.¹⁵⁶ Moreover, according to the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program, officials in states should 'provide the information in the registry' to the Attorney General, law enforcement agencies, schools and public housing agencies or each jurisdiction where sex offenders reside, work or attend school, social services and any organisation, company or individual who demands to receive information about a sex offender.¹⁵⁷ However, the information disclosed under the Adam Walsh Act is limited. The exceptions to the public availability of information are enumerated as 'mandatory exemptions'¹⁵⁸ and 'optional exemptions'.¹⁵⁹ Although the amount of information disclosure varies considerably depending on the particular state law, states should comply with these exemptions and some information must be excluded from the Internet dissemination.

With the aim of creating a national sex offender registry and providing maximal compliance, legislatures impose a burden on offenders by enacting new federal crimes for registration violations.¹⁶⁰ In this respect, federal law determines a federal criminal liability and an obligation that states enforce penalties for violating registration requirements.¹⁶¹ As a matter of state obligation, states must provide a minimum of one year of incarceration for the compliance failure of registration requirements.¹⁶² Moreover, any individual required to register who 'travels in interstate or foreign commerce' and knowingly fails to fulfil the registration obligations should be fined and/or imprisoned for a maximum of 10 years.¹⁶³ However, the problematic point regarding federal criminal liability is the 'men rea requirement'.¹⁶⁴ It is difficult

155 Jurisdictions' Internet Site is the public registry websites of states on which the public can access all information about sex offender in the registry. 42 U.S.C. 16918(a) (2006).

156 National Website, also called the Dru Sjodin National Sex Offender Public Website, is the only national search site that incorporates the information of sex offenders listed on the Jurisdiction's Internet Site and discloses sex offender data nationwide. 42 U.S.C. 16920 (2006).

157 42 U.S.C. 16921 (2006).

158 The mandatory exemptions are the victim's identity, the sex offender's social security number, any action of the sex offender that did not result in conviction and any other information determined by the Attorney General. 42 U.S.C. 16918(b) (2006).

159 The optional exemptions are the information about a tier I sex offender, the sex offender's employer's or school's name and any other information determined by the Attorney General. 42 U.S.C. 16918(c) (2006).

160 Yung (n 118) 379.

161 Logan, 'Criminal Justice Federalism and National Sex Offender Policy' (n 133) 79.

162 42 U.S.C. 16913(c) (2006).

163 18 U.S.C. 2250(a) (2006). Furthermore, individuals who knowingly fail to register and commit a 'crime of violence' should be incarcerated for a minimum of five years and a maximum of thirty years in addition to the punishment for registration violation. 18 U.S.C. 2250(c) (2006).

164 [T]here are two conditions to be fulfilled before penal responsibility can be imposed. The one thing is the doing of some

to identify that an individual fails to register or update the required information ‘knowingly’ and ‘to imagine many fact patterns in which lack of knowledge is a defence since knowledge of the law is presumed under U.S. common law’.¹⁶⁵

v. Examination of Civil Commitment

The new federal phenomenon designed under the Adam Walsh Act is *Civil Commitment*. Civil commitment is a type of civil confinement that consists of ‘control, care, and treatment’¹⁶⁶ mechanisms and ‘supervision, care, and treatment’ after release from such confinement for ‘sexually dangerous people’.¹⁶⁷ The aim of this new control mechanism is to confine convicted sex offenders who are about to be released from incarceration after completing their prison sentence due to the possibility of them posing a risk.¹⁶⁸ However, La Fond criticises this assumption on the ground that civil commitment is not a control mechanism. The main purpose of civil commitment laws is to incarcerate sex offenders who pose a certain danger for recidivism and cannot be imprisoned under the current criminal system for an indefinite period of time.¹⁶⁹ On the other hand, Smith argues that although civil commitment laws are criticised regarding the constitutional protection and financial costs, these laws are supported in a positive way due to the protection of members of the public by the continued confinement of people who are sexually violent predators.¹⁷⁰

Section 4248 of the Act systemises the process of civil commitment: if an individual ‘is in the custody of the Bureau of Prisons’ or ‘has been committed to the custody of the Attorney General’ or is someone ‘against whom all the criminal charges have been dismissed solely for reasons relating to that person’s mental condition’ and certified as a ‘sexually dangerous person’ by the Attorney General, Director of the Bureau of the Prisons or a person authorised by the Attorney General, that individual will be subject to civil commitment by order of the court.¹⁷¹ The court should order a

act by the person to be held *liable*. (...) The other is the *mens rea* or *guilty mind* with which the act is done. It is not enough that a man has done some act which on account of it mischievous results the law prohibits the act, an inquiry must be made into the mental attitude of the doer.

Patrick John Fitzgerald, *Salmond on Jurisprudence* (12th edn, Sweet & Maxwell 1966) 151 (emphasis added).

¹⁶⁵ Yung (n 118) 380.

¹⁶⁶ The sex offender treatment programme is described under the Code that it “will assist the individual in overcoming a psychological or physical dependence or any condition that makes the individual dangerous to others.” 18 U.S.C. 4247(a)(1)(C) (2006).

¹⁶⁷ 42 U.S.C. 16971(e)(1) (2006). A sexually dangerous person means ‘a person suffering from a serious mental illness, abnormality, or disorder, as a result of which the individual would have serious difficulty in refraining from sexually violent conduct or child molestation’. 42 U.S.C. 16971(e)(2) (2006); see also, 18 U.S.C. 4247(a)(5), (6) (2006). According to Barker, the definition of ‘sexually dangerous person’ is ambiguous because the statute does not clarify the meaning of ‘sexually violent conduct’ or ‘child molestation’. Emily Eschenbach Barker, ‘The Adam Walsh Act: “Un”-Civil Commitment’ (2009) 37 Hastings Constitutional Law Quarterly 141, 143.

¹⁶⁸ W Lawrence Fitch, ‘Sex Offender Commitment in the United States’ (1998) 9 Journal of Forensic Psychiatry & Psychology 237, 237.

¹⁶⁹ John Q La Fond, ‘The Costs of Enacting a Sexual Predator Law’ (1998) 4 Psychology, Public Policy, and Law 468, 475.

¹⁷⁰ Douglas G Smith, ‘The Constitutionality of Civil Commitment and the Requirement of Adequate Treatment’ (2008) 49 Boston College Law Review 1383, 1384.

¹⁷¹ Civil commitment has been the subject of a number of cases such as O’Connor v. Donaldson, 422 U.S. 563 (1975), Rennie

hearing for the determination of the offender's mental condition whether that person is sexually dangerous or not.¹⁷² However, there is no requirement in the Act that the hearing must be given within a reasonable time. An individual who has never been convicted of any sex crime or accused of it could be civilly committed at any time 'after the commencement of prosecution and prior to the sentencing of the defendant' or 'after the commencement of probation or supervised release and prior to the completion of the sentence'.¹⁷³ In other words, if a person who was convicted of any other crime such as burglary or homicide and is certified as a sexually dangerous person, that individual can be subject to the civil commitment process.

The certificate that shows that the individual is a sexually dangerous person does not have to include any advice or opinion from a medical, psychiatric or psychological expert. However, the court has discretion to order a psychiatric or psychological examination.¹⁷⁴ If the Attorney General makes an allegation of dangerousness in the certificate without presenting any evidence, it can be an effective certification to stay a person's release from the prison for the inception of the civil commitment process.¹⁷⁵ In this sense, it should be noted that an individual can be labelled as a dangerous sex offender without any examination by a medical, psychiatric or psychological expert. If the allegation of the dangerousness of an individual is found to be 'clear and convincing evidence'¹⁷⁶ by the court, this person should be placed under the custody of the Attorney General.¹⁷⁷ Following this process, with the determination of the individual's mental condition by the court, the release of this person should be stayed for the initiation of the civil commitment process.¹⁷⁸ However, as Barker puts it, the statute does not include any information about the court hearing process of designating an individual as a sexually dangerous person and the scope of the 'clear and convincing evidence'.¹⁷⁹

v. Klein, 462 F. Supp. 1131 (1978), *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *United States v. Comstock*, 560 U.S. ____ (2010). In the case of *United States v. Comstock*, the Supreme Court ruled that "when such a certification is filed, the statute automatically stays the individual's release from prison." 176 L. Ed. 2d 878 at 879 (2010).

172 18 U.S.C. 4248(a) (2006).

173 18 U.S.C. 4241(a), 4248 (a), (d) (2006).

174 18 U.S.C. 4248(a), (b) (2006).

175 18 U.S.C. 4248(a), (d) (2006).

176 Clear and convincing evidence indicates that 'the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials'. Bryan A Garner (ed), *Black's Law Dictionary* (West Publishing 2009) 636. In this sense, clear and convincing evidence must satisfy the court that there is a considerable probability that an individual suffers from a mental illness, abnormality, or disorder.

177 18 U.S.C. 4248(d) (2006). In the case of *United States v. Comstock*, the Supreme Court noted that "if the Government proves its claims by 'clear and convincing evidence', the court will order the prisoner's continued commitment." 176 L. Ed. 2d at 880.

178 18 U.S.C. 4248(a) (2006).

179 Barker (n 167) 144.

In the case of *Kansas v. Hendricks*, the Supreme Court addressed the constitutional concerns with respect to the Kansas Civil Commitment Act.¹⁸⁰ The Supreme Court believed that dangerousness is not sufficient to justify indefinite involuntary civil commitment. In addition to proof of dangerousness, mental disorder, illness, or abnormality has to be considered for civil commitment proceeding to show that an individual suffers ‘from a volitional impairment rendering [that person] dangerous beyond [his/her] control’.¹⁸¹ On the other hand, in *Foucha v. Louisiana*, the Supreme Court held that if a person does not have any mental disorder, illness, or abnormality, but also there is proof that that person would be dangerous to others, in this sense, indefinite detention in a mental facility can be acceptable and does not violate the constitutional rights of the person.¹⁸² As seen from these Supreme Court decisions, it is not clear whether dangerousness, mental disorder, illness, or abnormality should be the basic condition of a civil commitment proceeding.¹⁸³

After individuals are committed to the custody of the Attorney General, they should be released into the appropriate official of the State in which they reside. The authorised State takes the responsibility for ‘custody, care, and treatment’ of individuals; otherwise, they are set up in a ‘suitable facility’ for treatment and stay there until the relevant state accepts responsibility or the individuals are not sexually dangerous or will not be sexually dangerous when released under a proper treatment programme as described in law.¹⁸⁴

The determination of ending the civil commitment process can only be taken by the Director of the facility in which an individual is placed. On the determination of the Director that the person is no longer sexually dangerous, the court should hold a hearing about his release. However, at this point, the court has a wide discretion to consider whether this release should be conditional or unconditional. If it is unconditional, the court should immediately discharge that person. On the other hand, if it is conditional, the court should order a *conditional discharge* and an *explicit condition of release*. The conditional discharge requires that the individual must be released under a ‘prescribed regimen’ of care and treatment, which has been prepared for him by the Director of the civil commitment facility, and the explicit condition of release entails that he complies with these *prescribed regimes*. The court has the authority to change the conditions of discharge or eliminate the conditional release at any time after the main decision.¹⁸⁵

180 138 L. Ed. 2d 501 (1997).

181 138 L. Ed. 2d at 502.

182 118 L. Ed. 2d 437 at 440 (1992).

183 In a similar vein, Fitch and Ortega argued that “whether this mental abnormality must be one for which meaningful treatment is available, however, is not clear.” W Lawrence Fitch and Richard J Ortega, ‘Law and the Confinement of Psychopaths’ (2010) 18 Behavioral Sciences and the Law 663, 676.

184 18 U.S.C. 4248(d) (2006).

185 18 U.S.C. 4248(e) (2006).

The concept of using civil commitment has raised several concerns regarding its context. The supporters of this procedure stand up for the necessity of the civil commitment system for the protection of members of the community from 'a small but dangerous group of individuals' by confining them after they are released from prison.¹⁸⁶ However, as Janus puts it, the overbroad scope of civil commitment comes from the 'intense political pressure' due to the combination of 'legitimate concerns for public safety' with 'sensational media coverage'; not from the necessity.¹⁸⁷ On the other hand, the proponents of this policy believe that civil commitment should be justified by emphasising the importance of dealing with public safety instead of referring to intense political pressure. Besides, civil commitment is a 'constitutionally accepted policy'¹⁸⁸ to protect community members from sexually dangerous people.¹⁸⁹

On the other hand, this policy has been criticised for legal and medical reasons.¹⁹⁰ The common argument is that civil commitment provides treatment after an offender has completed the prison sentence rather than providing a rehabilitative alternative to prison or combining treatment with a prison sentence; thus, the main purpose of this policy is blurred.¹⁹¹ Regarding the American Psychiatric Association's Task Force, the primary purpose of the civil commitment law is not clear. If the main aim is treatment, the commitment process cannot be postponed until the completion of the prison sentence.¹⁹² In this sense, there is a dilemma over sex offenders' mental capacity. That is to say, the offenders are accepted as having mental capacity and held liable for their crimes; however, when they are about to be released from prison, the court takes a dim view of their mental capacity and civilly commits them.¹⁹³ Owing to this fact, the American Psychiatric Association depicts the main aim of

186 Andrew J Harris, 'The Civil Commitment of Sexual Predators: A Policy Review' in Richard G Wright (ed), *Sex Offender Laws: Failed Policies, New Directions* (Springer Publishing Company 2009) 340.

187 Eric S Janus, 'Sex Predator Commitment Laws: Constitutional But Unwise?' (2000) 30 *Psychiatric Annals* 411, 415.

188 See *Seling v. Young*, 531 U.S. 250 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Allen v. Illinois*, 478 U.S. 364 (1986).

189 John Kirwin, 'One Arrow in the Quiver-Using Civil Commitment as One Component of a State's Response to Sexual Violence' (2003) 29 *William Mitchell Law Review* 1135, 1204.

190 The evaluation of debates over the medical concerns is beyond the scope of this article; instead, only brief comments are provided on this issue in connection with civil commitment. In addition, due to the overbroad scope of the constitutional rights of civilly committed individuals, the constitutional concerns raised by the civil commitment of sexually violent predators and their punitive or therapeutic features can be evaluated in another work.

191 See, Fitch (n 168) 238-40; W Lawrence Fitch and Debra A Hammen, 'The New Generation of Sex Offender Commitment Laws: Which States Have Them and How Do They Work?' in Bruce J. Winick and John Q La Fond (eds), *Protecting Society From Sexually Dangerous Offenders* (American Psychological Association 2003) 28; Eric S Janus, 'Treatment and the Civil Commitment of Sex Offenders' in Bruce J. Winick and John Q La Fond (eds), *Protecting Society From Sexually Dangerous Offenders* (American Psychological Association 2003) 119-20; John Q La Fond, 'The Costs of Enacting a Sexual Predator Law and Recommendations for Keeping Them From Skyrocketing' in Bruce J. Winick and John Q La Fond (eds), *Protecting Society From Sexually Dangerous Offenders* (American Psychological Association 2003) 283; Hodges (n 110) 147; Fitch and Ortega (n 183) 663-4.

192 For more information, see, American Psychiatric Association, *Dangerous Sex Offenders: A Task Force Report of the American Psychiatric Association*, (APA 1996).

193 Peter C Pfaffenroth, 'The Need for Coherence: State's Civil Commitment of Sex Offenders in the Wake of *Kansas v. Crane*' (2003) 55 *Stanford Law Review* 2229, 2251.

civil commitment as confinement rather than rehabilitation.¹⁹⁴ Therefore, there is ambiguity over the line between criminal and civil proceedings with respect to civil commitment.¹⁹⁵ It is essential to mention that the real purpose of civil commitment is the preventive detention of dangerous sex offenders by extended confinement. On this issue, it should be noted whether the civil commitment facilities can use chemical castration as a part of treatment or not. With respect to the aim of the civil commitment policy, if chemical castration is implemented under the civil commitment laws, it has to be in accordance with the requirements of treatment and correspond to the aim of treatment in every way. In this sense, while the concept of chemical castration is being evaluated in the following chapters, the treatment/punishment aspect of chemical castration, either aside from other policies or under the requirements of the Adam Walsh Act, will be discussed.

Moreover, another controversial point regarding civil commitment is the cost of implementing this policy. Due to the flexibility of states in adopting this implementation, the probable effects of civil commitment have not been measured and, thus, estimating the costs of the civil commitment procedure considering the Adam Walsh Act seems tough. According to Friedland, the significant cost of civil commitment is derived from the difficulty in treating dangerous sex offenders. He also notes that ‘the available data indicates that the cost of civil commitment will be much higher to a state than the equivalent cost of imprisonment and treatment’.¹⁹⁶ As a potential alternative, Smith believes that increasing the penalties for sex crimes is a way of avoiding the enormously expensiveness of civil commitment. In any case, the costs of greater penalties for dangerous sex offenders will be less than the costs of civil commitment.¹⁹⁷ At this point, the main purpose of this policy should be expressed in clear terms as to what extent (or not) civil commitment provides treatment to sex offenders and rehabilitates them. Otherwise, one can argue that the aim of this policy is explicitly to incarcerate these offenders for as long as possible rather than rehabilitating or treating them.¹⁹⁸

Conclusion and Suggestions for Turkish Law

Although there are various legal approaches to deal with sexually dangerous people, due to the assessment of alternative methods to deter sex offenders, federal sex offender laws in the USA can be analysed in three vital steps. The gist of this observation is that there have been three basic periods and legal regulations of federal

¹⁹⁴ See (n 192).

¹⁹⁵ Pfaffenroth (n 193) 2253.

¹⁹⁶ Steven I. Friedland, ‘On Treatment, Punishment, and the Civil Commitment of Sex Offenders’ (1999) 70 University of Colorado Law Review 73, 130.

¹⁹⁷ Smith (n 170) 1426.

¹⁹⁸ Fond, ‘The Costs of Enacting a Sexual Predator Law and Recommendations for Keeping Them From Skyrocketing’ (n 191) 297.

sex offender laws that have occurred throughout the USA since 1990. The first step was begun with the Jacob Wetterling Act, in 1994 by enacting registration requirements for sex offenders. Subsequently, federal sex offender laws gained acceleration with an amendment in 1996, called Megan's Law, which required states to establish a community notification system and that was the second step of federal intervention. Due to the several amendments to the Jacob Wetterling Act, the legislative body tried to deal with the *patchwork* of federal legislation on sex offenders and, thus, the third step was the Adam Walsh Act. It includes the restructuralisation of registration and community notification systems and has imposed post-incarceration civil commitment of sexually dangerous offenders who suffer from a mental abnormality. In addition, Title I of the Adam Walsh Act, known as SORNA, creates a three-tier system for classifying sex offenders according to their risk to society based on the severity of the offence committed.

With the aim of controlling and managing sexually dangerous people and increasing public safety from them, the federal sex offender laws place emphasis on 'social control mechanisms' together with prolonged confinement rather than on the 'conventional prison sentence'.¹⁹⁹ From this point of view, one could say that it is pivotal that legislation requires punishment in conjunction with treatment for sex offenders since these offenders pose a problematic area for the criminal justice system. As Peters remarks, traditional incarceration alone is not an effective way to prevent sex crime, and releasing from prison with little or no treatment raises concerns about the security of society.²⁰⁰ Therefore, it is reasonable to accept that the criminal justice system can provide alternative solutions. This leads one to suppose that, as far as the improvements of medical science have been considered, the legal response to sex offenders can take an alternative attitude to address the increasing concerns regarding sex offences.²⁰¹ As Berlin puts it, 'if legislation and punishment alone cannot fully solve the problem, medicine and science need to be called into action. Furthermore, if society can be made safer by such means, why not use them?'²⁰²

This article has attempted to analyse the evolution of the registration system, the community notification policy, the classification of sex offenders regarding the level of danger and the civil commitment procedure within the scope of the federal sex offender legislation in the USA. From a more general perspective, it is noteworthy to mention that state laws are those that are passed by the state legislatures and cannot contradict the federal constitution and must not infringe on any federal constitutional

199 Fond, 'The Costs of Enacting a Sexual Predator Law and Recommendations for Keeping Them from Skyrocketing' (n 191) 297.

200 Kimberly A. Peters, 'Chemical Castration: An Alternative to Incarceration' (1992-3) 31 *Duquesne Law Review* 307, 327.

201 Edward A Fitzgerald, 'Chemical Castration: MPA Treatment of the Sexual Offender' (1990-1) 18 *American Journal of Criminal Law* 1, 1-2.

202 Fred S Berlin, 'The Case for Castration, Part 2' (1994) 26 *Washington Monthly* 28, 29.

rights. At this point, it should be noted that medical interventions, including psychological and psychiatric treatments (also known as *pharmacotherapy*), can be an alternative approach provided by some states to address the problem of sexually dangerous people in the USA. Furthermore, federal law mandates states to conform to the minimum requirements of federal sex offender laws. Therefore, the legal arrangements for psychological and psychiatric treatments should meet the minimum requirements of federal sex offender laws and should be made in conformity with the federal constitution.

In this article, the policies under the federal sex offender laws were evaluated to be able to place the administration of these measures in the Turkish Criminal Justice System in a proper context. In addition, the human rights' concerns about these preventive measures must also be examined, but this examination can be done more thoroughly in another work with reference to the effects of federal sex offender laws on human rights.²⁰³ The main argument in this article is, however, to evaluate the regulations for sex offenders in the USA to discuss and understand whether they will be consistent with the Turkish Justice System.

In Turkey, the legislation on sexual crimes has undergone several important reforms in the past two decades. After the Turkish Penal Code of 2005 and the 2014 amendments, in Section Six, under the heading of Offences Against Sexual Integrity, four types of sexual offences against sexual inviolability are regulated, including sexual assault (Art.102); child molestation (Art.103); sexual intercourse between/with persons who have not attained the lawful age (Art.104); and sexual harassment (Art.105).²⁰⁴ However, when the penalties for such crimes are considered, imprisonment is generally adopted as the only punishment, and the punishment for committing such crimes can vary depending on the severity of the crime. Given the general characteristics of such articles, the first paragraphs mostly focus on the basic form of the crime, and the following paragraphs mainly regulate the aggravated form of these offences. For instance, under Article 102;

(1) Any person who violates the physical integrity of another person, by means of sexual conduct, shall be sentenced to a penalty of imprisonment for a term of two to ten years, upon the complaint of the victim. If the said sexual behaviour ceases at the level of sexual importunity, the term of imprisonment shall be from two years to five years.

203 The assessments of the Supreme Courts' decisions on the aforementioned regulations are crucial and should be discussed more thoroughly within the context of rights and liberties. However, due to the scope of this article, such an assessment can be made in another work. For more information about these decisions, see, *Connecticut Dept. of Public Safety v. Doe*, No: 01-1231, 538 U.S. 1, Decided 5 March 2003; *Smith et. al. v. Doe et. al.*, No: 01-729, 538 U.S. 84, Decided 5 March 2003; *Reynolds v. United States*, No: 10-6549, 200 U.S. 321, Decided 23 January 2012; *Nichols v. United States*, No: 15-5238, 200 U.S. 321, Decided 4 April 2016; *Gundy v. United States*, No: 17-6086, 200 U.S. 321, Decided 20 June 2019.

204 For the English version of the Turkish Penal Code, <[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2016\)011-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)011-e)> accessed December 14, 2023.

(2) Where the act is committed by means of inserting an organ, or other object, into the body, the offender shall be punished with a term of imprisonment no less than twelve years. [...]

[...]

(5) Where, as a result of the offence, the victim enters a vegetative state, or dies, a penalty of aggravated life imprisonment shall be imposed.

Different from Articles 102, 104 and 105, Article 103, which regulates the sexual abuse of children, also defines this offence. Under Article 103/1, sexual abuse covers the following acts;

(a) All kinds of sexual attempt against children who are under the age of fifteen or against those attained the age of fifteen but lack the ability to understand the legal consequences of such act,

(b) Sexual behaviours committed against children by force, threat, fraud or another reason affecting the willpower.

However, given that imprisonment by itself is not sufficient to prevent certain offenders or to motivate them to change and to desist from crime, and, in fact, sexual crime against children is a very emergency and a sensitive issue, since this type of crime is linked to paedophilic disorder, it must subject to specific preventive measures in addition to imprisonment. Thus, the measures to prevent sexual crimes in the USA, i.e., sex offender registration, community notification, civil commitment and medical interventions should be embedded into the Turkish Criminal Justice System. The legislation, however, should ensure that these measures are adopted by taking the Turkish legal system and the rights and freedoms of offenders into account, and by making up the deficiencies in accordance with changing and developing these preventive measures. For instance, the Law on the Execution of Penalties and Security Measures (hereinafter, the Law No.5275) is a fundamental law regarding the execution of penalties and security measures, including measures for perpetrators of sexual crimes. Article 107 includes a conditional release clause and, for sexual crimes, Article 107/2 states that;

(d) Those sentenced to term imprisonment for sexual assault (except for article 102, second paragraph), sexual intercourse with minors (except for article 104, second and third paragraphs) and sexual harassment (article 105),

[...]

can benefit from conditional release if they serve two-thirds of their sentence. Although Article 107 provides the opportunity for the sex offenders to have a Get Out of Jail Free Card, certain sexual offences are exempted from the conditional release provision, such as committing sexual assault by means of *inserting an*

organ or other object into the body, committing sexual intercourse against a person *who is under a restraint of marriage*, committing a sexual offence where the offender *provides care for a child prior to adopting the child or the offender is under an obligation to protect, look after or supervise the child under a custodial relationship*. Under Article 108/9, offenders convicted of sexual assault described in Article 26/2 of the Turkish Penal Code, the crime of sexual abuse of children and sexual intercourse with a minor, defined in Article 103 and Article 104/2-3, respectively, had been subject to medical treatment, therapeutic programmes, residency restrictions, work restrictions and bans from certain activities requiring care and supervision obligations about children. However, it was stated under Article 108/9 that these treatments and/or obligations would be ‘decided by the execution judge during the execution of the sentence and within the control period’. On this matter, the Turkish Psychiatric Association brought the Regulation on the Treatment Imposed on Offenders Convicted of Crimes against Sexual Inviolability and other Convicts (hereinafter the Regulation), which was based on the Law No. 5275, before the Council of State on the grounds that this Regulation would lead the administrative organ to excess the power to regulate. According to the Council of State, the definition of treatment under Article 108 of the Law No. 5275 was ambiguous and its scope was indefinite, which would result in the infringement of the bodily integrity of the offenders, which was guaranteed under Article 17 of the Turkish Constitution. Thus, the Regulation was partly cancelled and thus, the execution of treatments for sex offenders indicated was suspended.²⁰⁵ Yet, no new regulation regarding this matter has not been enacted.

Not the treatment itself or the pharmacotherapy programmes that are used to prevent sex offenders but the application of registration and community notification measures in Turkey have been criticised that the disclosure of the offenders over the Internet may have prominent impacts in terms of negatively affecting offenders’ reintegration into society due to stigmatisation and the danger of misuse of information, which may lead to the killing of these offenders for revenge. In addition, any judicial record can be an obstacle for these offenders in the public and private sectors in terms of continuing their lives. Although informing the members of society is a seemingly practical solution, it is not permanent and realistic. On the other hand, it was argued that keeping a separate sexual offence registry in Turkey may have some advantages such as a healthier policy can be used to control sexual crimes considering the statistical information provided by data to be obtained and the scientific evaluations based on it. Such information can greatly facilitate the preventive-administrative and judicial activities of law enforcement forces and can also have a preventive effect on individuals against recidivism. In addition, keeping the offenders’ information up to

²⁰⁵ For more information about the Council of State’s decision, see Council of State, 17 September 2020, Merits No. 2016/12975, Decision No. 2020/3048 <<https://karararama.danistay.gov.tr>> accessed October 3, 2024.

date might have a deterrent effect on them due to the feeling of being watched and the fear of being caught immediately.²⁰⁶

Considering the arguments mentioned above, one can say that it would be more humane and preventive to assess and classify sex offenders psychologically and psychiatrically and to focus on these security measures in conjunction with pharmacotherapy measures. Registration and community notification systems cannot be considered as an effective and permanent solution by themselves for the offenders who need some medical intervention. However, the imposition of pharmacotherapy with a more cautious, controlled and even restructuralised registration and community notification system can contribute to the prevention of such criminals.²⁰⁷

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207 For more information on the use of pharmacotherapy for paedophilic sex offenders, see Zeynep Burcu Akbaba, *Kimyasal Hadım Uygulaması ve Ceza Adaleti Sistemindeki Yeri* (Savaş Publication 2018); Zeynep Burcu Akbaba, *The Permissibility of Pharmacotherapy for Paedophilic Sex Offenders in the Light of the Rights Protected under the European Convention on Human Rights* (University of Leicester, 2015) Unpublished Doctoral Thesis.

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