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# Arizona's Sex Offender Laws: Recommendations for Reform

Tamara Rice Lave\*

## INTRODUCTION

In this Article, I consider ways in which Arizona's laws regarding sex offenders should be reformed. I begin by focusing on laws that are designed to deal with the danger posed by convicted sex offenders: registration requirements, residence restrictions, and civil commitment. I contend that the state has overstated the risk posed by convicted sex offenders and that the laws meant to control them may do more harm than good. Next, I turn to police sexual violence. I argue that the state needs to go further in criminalizing this abhorrent conduct in order to promote the rule of law and protect vulnerable persons.

### I. LAWS DESIGNED TO CONTROL CONVICTED SEX OFFENDERS

I start this Part by considering the motive for laws controlling sex offenders: fear. I then discuss studies that show convicted sex offenders actually pose a significantly lower risk of reoffending than most people believe. Finally, I turn to the three primary laws Arizona uses to control sex offenders: registration requirements, residency restrictions, and civil commitment.

#### *A. Fear of Sex Offenders*

Arizonians are scared of sex offenders. Katz and Webb (2006) studied the attitudes of residents in Phoenix.<sup>1</sup> They completed 793 interviews in

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1. Charles M. Katz & Vincent Webb, *Citizen Attitudes About Sex Offenders and Sex-Offender Housing Policy in Phoenix*, in *WHERE DO WE GO FROM HERE? A REPORT ON SEX*

December 2005 and January 2006, and they found that slightly less than 78% of respondents believed that convicted sex offenders were likely to commit future sex crimes.<sup>2</sup> These results are in line with a 2010 national opinion poll, which found that 72% of respondents believed “that at least half, if not most, convicted sex offenders [would] commit additional sex crimes in the future.”<sup>3</sup> The highest court in the land endorses this view. The Supreme Court asserted in *Smith v. Doe* that sex offenders have a “high rate of recidivism,”<sup>4</sup> and Justice Kennedy wrote in his plurality opinion in *McKune v. Lile* that the recidivism rate “of untreated offenders has been estimated to be as high as 80%.”<sup>5</sup>

### B. *Studies on Sex Offender Recidivism*

As it turns out, the commonly held belief that sex offenders have a high rate of reoffending is not supported by the evidence.

#### 1. Arizona Department of Corrections

In 2009, the Arizona Criminal Justice Commission Statistical Analysis Center released a study on the recidivism of male sex offenders released from prison in 2001.<sup>6</sup> They found that 2.4% of the 290 released sex offenders were rearrested for a new sex crime within three years.<sup>7</sup> Breaking those numbers down further, 3.2% of rapists, 2.3% of sexual assaulters, 1.8% of child molesters, and 2.3% of statutory rapists were rearrested for a new sex crime within that same three-year period.<sup>8</sup>

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OFFENDERS AND SEX OFFENDER HOUSING IN PHOENIX, ARIZONA 78 (2006), <https://cvpcs.asu.edu/sites/default/files/content/products/Katz%20Phoenix%20sex%20offender%20study%20with%20cover.pdf> [<https://perma.cc/9SAK-R578>].

2. *Id.* at 79, 86.

3. CTR. FOR SEX OFFENDER MGMT., EXPLORING PUBLIC AWARENESS AND ATTITUDES ABOUT SEX OFFENDER MANAGEMENT: FINDINGS FROM A NATIONAL PUBLIC OPINION POLL 2 (2010), <https://cepp.com/wp-content/uploads/2020/01/15-Exploring-Public-Awareness.pdf> [<https://perma.cc/PGS5-FUB3>].

4. *Smith v. Doe*, 538 U.S. 84, 103 (2003).

5. *McKune v. Lile*, 536 U.S. 24, 33 (2002).

6. ARIZ. CRIM. JUST. COMM’N, RECIDIVISM OF SEX OFFENDERS RELEASED FROM THE ARIZONA DEPARTMENT OF CORRECTIONS IN 2001 (2009), <https://cvpcs.asu.edu/sites/default/files/content/projects/Rodriguez%20stevenson.pdf> [<https://perma.cc/SF2C-AD39>].

7. *Id.* at 16.

8. *Id.* at 16–17.

## 2. U.S. Department of Justice

The United States Department of Justice, Bureau of Justice Statistics (BJS) has done three major studies of sex offender recidivism in the past twenty years with progressively longer follow-up periods. In 2003, the BJS studied the recidivism of 9,691 sex offenders released from prison in fifteen states.<sup>9</sup> Although sex offenders were four times more likely to be rearrested for a sex crime as compared with other types of offenders,<sup>10</sup> the vast majority did not sexually recidivate. Only 5.3% were rearrested for a new sex crime within three years of release.<sup>11</sup> Looking more closely at the numbers, within three years of release from prison, 2.5% of rapists were rearrested for rape<sup>12</sup> and 3.3% of child molesters were arrested for another sex crime against a child.<sup>13</sup>

Interestingly, the 2003 BJS study found that, when considering all crimes, sex offenders were less likely than non-sex offenders to be rearrested.<sup>14</sup> Analysts found that 43% of sex offenders—as opposed to 68% of non-sex offenders—were rearrested for a new crime during the same period.<sup>15</sup>

In 2016, the BJS published a study that had a longer follow-up period. Durose et al. studied 20,422 sex offenders released from thirty states in 2005.<sup>16</sup> Only 5.6% of sex offenders were rearrested for rape or sexual assault within five years of release.<sup>17</sup>

Finally, in May 2019, the BJS released a study that followed sex offenders for an even longer period—nine years. Alper and Durose studied 20,195 sex offenders released from prison in thirty states in 2005.<sup>18</sup> Just 7.7% were rearrested for a new rape or sexual assault within nine years.<sup>19</sup> According to the 2019 study, sex offenders were more than three times as likely to be

9. PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 198281, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, at 1 (2003), <https://www.bjs.gov/content/pub/pdf/rsorp94.pdf> [<https://perma.cc/NR97-JAZ2>].

10. *Id.*

11. *Id.*

12. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 193427, *RECIDIVISM OF PRISONERS RELEASED IN 1994*, at 9 (2002), <https://www.bjs.gov/content/pub/pdf/rpr94.pdf> [<https://perma.cc/KCS4-H85G>].

13. LANGAN ET AL., *supra* note 9, at 1.

14. *Id.* at 2.

15. *Id.*

16. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUST., NCJ 244205, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, at 2 tbl.1 (2016), [https://bjs.gov/content/pub/pdf/rprts05p0510\\_st.pdf](https://bjs.gov/content/pub/pdf/rprts05p0510_st.pdf) [<https://perma.cc/3FAU-WNU6>].

17. *Id.* at 2 tbl.2.

18. MARIEL ALPER & MATTHEW R. DUROSE, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., NCJ 251773, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM STATE PRISON: A 9-YEAR FOLLOW-UP (2005–14)*, at 2 tbl.1 (2019), <https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf> [<https://perma.cc/C3KF-LTAV>].

19. *Id.* at 4 tbl.2.

arrested for rape or sexual assault as compared with other released prisoners (7.7% versus 2.3%).<sup>20</sup> Looking at the 2003 and the 2019 studies side by side, the risk posed by released sex offenders of committing a new sex crime is getting closer to that posed by released non-sex offenders.

### 3. Other Recidivism Studies

Although other studies have found high recidivism rates, none approach the 80% figure from *McKune v. Lile*. Hanson, Scott, and Steffy studied the recidivism of 191 child molesters released from a maximum-security Canadian correctional institution between 1958 and 1974.<sup>21</sup> Of those, 35.1% were convicted for a new sex crime over a fifteen- to thirty-year period.<sup>22</sup> Rice, Harris, and Quinsey followed fifty-four rapists released from a Canadian maximum-security psychiatric hospital.<sup>23</sup> Twenty-eight percent were reconvicted of a new sex crime over an average forty-six month follow-up period.<sup>24</sup> The results from both of these studies are higher than the aforementioned BJS studies, but they are less relevant for two important reasons. First, both studied Canadian offenders released many years ago, and second, the sample sizes were significantly smaller.<sup>25</sup> In addition, the Hanson et al. study includes violent offenses in its definition of recidivism,<sup>26</sup> which means some people may be characterized as committing a new sex offense when they did not actually do so.

### 4. Specific Findings About Risk

Research also demonstrates that there are specific factors that lower people's risk of reoffending. For example, studies show that women have a very low rate of sexual recidivism. A 2010 meta-analysis by Cortoni, Hanson, and Coache analyzed nine studies that reported the sexual recidivism rates of

20. *Id.* at 1.

21. R. Karl Hanson, Heather Scott & Richard A. Steffy, *A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism*, 32 J. RSCH. CRIME & DELINQ. 325, 327, 329 (1995).

22. *Id.* at 333. For an in-depth discussion of the differences between the 2003 BJS study and the Hanson et al. study, see Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?*, 14 NEW CRIM. L. REV. 213, 245-49 (2011).

23. Marnie E. Rice, Grant T. Harris & Vernon L. Quinsey, *A Follow-Up of Rapists Assessed in a Maximum-Security Psychiatric Facility*, 5 J. INTERPERSONAL VIOLENCE 435, 435 (1990).

24. *Id.* at 442; see also Tamara R. Lave & Franklin E. Zimring, *Assessing the Real Risk of Sexually Violent Predators: Doctor Padilla's Dangerous Data*, 55 AM. CRIM. L. REV. 705, 719 (2018).

25. Hanson et al., *supra* note 21, at 328; Rice et al., *supra* note 23, at 437.

26. Hanson et al., *supra* note 21, at 329-30.

2,416 female sex offenders, with recidivism defined as being “arrested, charged, convicted, or incarcerated for a new [sex] offense.”<sup>27</sup> The average recidivism rate was 3.19% over an average follow-up period of 6.5 years.<sup>28</sup> Cortoni et al. identified one of the studies as an outlier, and when it was removed, the average recidivism rate fell to 1.34%.<sup>29</sup> In a different study, Sandler and Freeman studied a sample of 1,466 females convicted of a sex offense in New York State, and they found that just 1.8% were arrested for a new sex offense within five years after conviction.<sup>30</sup>

In addition, just as with other kinds of offenders, as sex offenders age, their risk of recidivating drops. Hanson (2002) used data from ten studies of male sex offenders ages eighteen and above to study the relationship between sexual recidivism and age.<sup>31</sup> In the total sample of 4,673 men, he found “the recidivism rate declined steadily with age.”<sup>32</sup> Prentky and Lee (2007) studied a cohort of 136 rapists and 115 child molesters with multiple priors who were released from a Massachusetts prison in 1959 and followed them for twenty-five years.<sup>33</sup> The recidivism of rapists dropped linearly as a function of age. The recidivism of child molesters followed a different path. It increased from age twenty to forty and then declined slightly at age fifty and more dramatically at age sixty.<sup>34</sup> Other researchers have found a similar age/crime effect with sex offenders.<sup>35</sup>

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27. Franca Cortoni, R. Karl Hanson & Marie-Ève Coache, *The Recidivism Rates of Female Sexual Offenders Are Low: A Meta-Analysis*, 22 *SEXUAL ABUSE* 387, 390, 394 (2010).

28. *Id.* at 393–94.

29. *Id.* at 394–95.

30. Jeffrey C. Sandler & Naomi J. Freeman, *Female Sex Offender Recidivism: A Large-Scale Empirical Analysis*, 21 *SEXUAL ABUSE* 455, 455, 461 (2009).

31. R. Karl Hanson, *Recidivism and Age: Follow-Up Data from 4,673 Sexual Offenders*, 17 *J. INTERPERSONAL VIOLENCE* 1046, 1046 (2002).

32. *Id.* at 1053.

33. Robert Alan Prentky & Austin F.S. Lee, *Effect of Age-at-Release on Long Term Sexual Re-offense Rates in Civilly Committed Sexual Offenders*, 19 *SEXUAL ABUSE* 43, 45–47 (2007). Prentky and Lee’s sample was small and included offenders with a higher base rate of recidivism than those drawn from the general prison population. *Id.* at 57–58.

Although this latter consideration must be regarded as a limitation in terms of generalizability, it may also be seen as a strength of the study. Presumably, using a higher risk sample is a more severe test of the age-crime hypothesis, providing confirmatory support for the rapists and “amplifying” or exaggerating the quadratic blip in Hanson’s (2002) data for child molesters.

*Id.* at 58.

34. *Id.* at 53.

35. See Howard E. Barbaree et al., *Aging Versus Stable Enduring Traits as Explanatory Constructs in Sex Offender Recidivism: Partitioning Actuarial Prediction into Conceptually*

Another protective factor is the amount of time a person has been out of custody. Studies show that people are most likely to reoffend the first year after release, and the rate drops every year after that.

For all crimes (and almost all behaviours) the likelihood that the behaviour will reappear decreases the longer the person has abstained from that behaviour. The recidivism rate within the first two years after release from prison is much higher than the recidivism rate between years 10 and 12 after release from prison.<sup>36</sup>

A similar downward trend was present in the 2003<sup>37</sup> and 2019<sup>38</sup> BJS studies mentioned above. The 2016 study<sup>39</sup> did not provide sufficient information to analyze reoffending over time.

Last, studies show that juvenile sex offenders do not have an elevated risk of committing new sex crimes as compared with other juvenile offenders. In a 2007 study, Caldwell compared the recidivism patterns of a group of 249 juvenile sex offenders (both violent and nonviolent) with 1,780 juvenile non-sex offenders released from custody with a five-year follow-up period.<sup>40</sup> Just seventeen sex offenders (6.8%) were charged with a new sex offense as compared with 101 non-sex offenders (5.7%).<sup>41</sup> In summary, Caldwell wrote the following:

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*Meaningful Components*, 36 CRIM. JUST. & BEHAV. 443, 443, 459, 463 (2009) (“A large body of evidence has recently accumulated indicating that recidivism in sex offenders decreases with the age of the offender at the time of his release . . . .”); Patrick Lussier et al., *Criminal Trajectories of Adult Sex Offenders and the Age Effect: Examining the Dynamic Aspect of Offending in Adulthood*, 20 INT’L CRIM. JUST. REV. 147, 164 (2010) (offering “several explanations as to why older sex offenders represent a lower risk of recidivism”); Patrick Lussier & Jay Healey, *Rediscovering Quetelet, Again: The “Aging” Offender and the Prediction of Reoffending in a Sample of Adult Sex Offenders*, 26 JUST. Q. 827, 838–40 (2009) (finding that the risk of recidivism decreases with age); John Monahan et al., *Age, Risk Assessment, and Sanctioning: Overestimating the Old, Underestimating the Young*, 41 LAW & HUM. BEHAV. 191, 197 (2017) (finding that the Post Conviction Risk Assessment Instrument overestimates recidivism risk among older offenders and arguing that all instruments should better take age into account); Richard Wollert et al., *Recent Research (N = 9,305) Underscores the Importance of Using Age-Stratified Actuarial Tables in Sex Offender Risk Assessments*, 22 SEXUAL ABUSE 471, 471, 484 (2010) (“[E]valuators should report recidivism estimates from age-stratified tables when they are assessing sexual recidivism risk, particularly when evaluating the aging sex offender.”).

36. ANDREW J. R. HARRIS & R. KARL HANSON, PUBLIC SAFETY AND EMERGENCY PREPAREDNESS CANADA, SEX OFFENDER RECIDIVISM: A SIMPLE QUESTION 3 (2004), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/sx-ffndr-rcdvsm/sx-ffndr-rcdvsm-eng.pdf> [<https://perma.cc/HQ56-PQS5>].

37. See LANGAN ET AL., *supra* note 9, at 25.

38. See ALPER & DUROSE, *supra* note 18, at 1 fig.1.

39. See DUROSE ET AL., *supra* note 16.

40. Michael F. Caldwell, *Sexual Offense Adjudication and Sexual Recidivism Among Juvenile Offenders*, 19 SEXUAL ABUSE 107, 109 (2007).

41. *Id.* at 110.

The juvenile sex offenders in this study were not significantly more likely to be charged with a future sexual offense during the follow-up period. Although the sex offenders continued to be charged with other offenses at high rates, they were less likely to be charged with general or felony offenses than the non-sex offending comparison group. In addition, all of the 54 homicides, including the three sexual homicides, committed during the follow-up period were all committed by juveniles with no prior history of sexual offending. Thus, in this study, a sexual offense adjudication did not identify a distinct subgroup of juvenile offenders that were more likely to commit future crimes in general, more likely to commit sexually violent crimes, or more likely to commit sexual homicides.<sup>42</sup>

Other studies have come to similar conclusions.<sup>43</sup> These findings have led the authors of the coding rules for the Static-99R, the most commonly used actuarial instrument to measure sex offender risk, to state that their instrument could only be used with a small subset of juvenile offenders, and even then, it should be used with caution.<sup>44</sup> As they explained,

In comparison to adult sex offences, the sex offences committed by juveniles are more likely to involve peers as co-offenders, lack planning, and lack indicators of deviant sexual interests. Developmental, family, and social factors would be expected to impact on recidivism potential. We have reason to believe that people who commit sex offences only as children/young people are a different profile than adults who commit sex offences.<sup>45</sup>

Now that we know what studies actually show about the danger posed by convicted sex offenders, I will turn to recommendations for reforming the laws meant to control them.

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42. *Id.* at 111.

43. See FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING 119 (2004); Michael F. Caldwell, *What We Do Not Know About Juvenile Sexual Reoffense Risk*, 7 CHILD MALTREATMENT 291, 291 (2002); Mark Chaffin, *Our Minds Are Made Up Don't Confuse Us with the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders*, 13 CHILD MALTREATMENT 110, 110 (2008).

44. AMY PHENIX ET AL., STATIC-99R CODING RULES REVISED-2016, at 14 (2016), [http://www.static99.org/pdfdocs/Coding\\_manual\\_2016\\_v2.pdf](http://www.static99.org/pdfdocs/Coding_manual_2016_v2.pdf) [<https://perma.cc/F9Q4-DZQE>].

45. *Id.*



### C. Registration Requirements

Although Arizona has a sex offender registry,<sup>46</sup> according to the U.S. Department of Justice website as of September 2020, it was not in compliance with federal law.<sup>47</sup> Non-compliance means Arizona gives up 10% of its annual funding from the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG).<sup>48</sup> I argue Arizona should intentionally give up the Byrne JAG funds and focus on reforming its registry.

#### 1. Background

The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994 directed states to create sex offender registries to be used by law enforcement.<sup>49</sup> Two years later, President Clinton signed the federal version of Megan's Law, which amended the Wetterling Act to require states to disseminate information about registered sex offenders to the public.<sup>50</sup> In 2006, Congress passed the Adam Walsh Child Protection and Safety Act,<sup>51</sup> which created a comprehensive, national sex offender registration system in the Sex Offender Registration and Notification Act (SORNA).<sup>52</sup> SORNA created a three-tiered system based on the type of crime, with extensive requirements regarding who must register and for how long.<sup>53</sup> States were given a set period of time to comply, and if

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46. ARIZ. REV. STAT. ANN. § 13-3821 (2020).

47. *SORNA Implementation Status*, OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, <https://smart.ojp.gov/sorna/sorna-implementation-status> [<https://perma.cc/SXR2-CENW>]; see also OFF. OF SEX OFFENDER SENT'G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, *SORNA SUBSTANTIAL IMPLEMENTATION REVIEW: STATE OF ARIZONA* 5 (2015), <https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/arizona-hny.pdf> [<https://perma.cc/6GBJ-SR6G>].

48. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-211, *SEX OFFENDER REGISTRATION AND NOTIFICATION ACT: JURISDICTIONS FACE CHALLENGES TO IMPLEMENTING THE ACT, AND STAKEHOLDERS REPORT POSITIVE AND NEGATIVE EFFECTS* 9 (2013), <https://www.gao.gov/assets/660/652032.pdf> [<https://perma.cc/H5TL-7G9A>].

49. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038-42 (1994), *repealed by* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of the U.S.C.).

50. Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996).

51. Adam Walsh Child Protection and Safety Act.

52. Sex Offender Registration and Notification Act, Pub. L. No. 109-248, §§ 101-155, 120 Stat. 590, 591-611 (2006) (codified at 34 U.S.C. §§ 20911-20932). For a general discussion of SORNA, see Jennifer N. Wang, Note, *Paying the Piper: The Cost of Compliance with the Federal Sex Offender Registration and Notification Act*, 59 N.Y.L. SCH. L. REV. 681 (2015).

53. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 48, at 8.

they did not “substantially implement[ ]” SORNA standards, they would lose 10% of their annual Byrne JAG funding.<sup>54</sup>

## 2. Reasons for Non-Compliance with SORNA

In not complying with SORNA, Arizona is in good company. Only eighteen states and three territories are in substantial compliance.<sup>55</sup> Part of the reason for non-compliance is cost. States estimate that the cost of implementation and annual upkeep of the website well surpasses the lost federal funds.<sup>56</sup> The Justice Policy Institute estimated that it would cost Arizona \$10,281,201 to implement SORNA, and since Byrne JAG funding was only \$3,653,881, the 10% lost (\$365,388) is dwarfed by the implementation cost.<sup>57</sup> And the costs continue even after SORNA is up and running. Virginia, for instance, estimated that the annual cost of SORNA would be \$8,887,000!<sup>58</sup>

Another reason states do not comply is that they think the federal tiered system, which is solely based on the conviction offense, is less effective than one based on risk assessment.<sup>59</sup> Currently, 32% of states use a form of empirically guided risk assessment either alone or in conjunction with factors like the conviction offense or number of convictions.<sup>60</sup> Zgoba et al. compared the efficacy of the SORNA tiered system with actuarial instruments, and they found that actuarial instruments are much more effective at predicting risk:

[N]ot only did existing State classification systems outperform [SORNA] tiers, but also when the [SORNA] tiers were related to re-offending or risk level, offenders assigned to the lower tier (Tier 2) consistently offended at a higher rate and had higher actuarially predicted risk than offenders assigned to the higher tier (Tier 3). . . . Assessment tools and risk classification systems that are not

54. *Id.* at 9.

55. *SORNA Implementation Status*, *supra* note 47.

56. Maggie Clark, *States Still Resisting National Sex Offender Law*, PEW: STATELINE (Oct. 1, 2012), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/10/01/states-still-resisting-national-sex-offender-law> [<https://perma.cc/PJ89-SKMA>]; JUST. POL’Y INST., WHAT WILL IT COST STATES TO COMPLY WITH THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT? (2008), [http://www.justicepolicy.org/images/upload/08-08\\_FAC\\_SORNACosts\\_JJ.pdf](http://www.justicepolicy.org/images/upload/08-08_FAC_SORNACosts_JJ.pdf) [<https://perma.cc/J4C7-ZSY7>].

57. JUST. POL’Y INST., *supra* note 56.

58. *Id.*

59. Donna Lyons, *Down to the Wire*, 2011 ST. LEGISLATURES 26, 27, [https://www.ncsl.org/Portals/1/Documents/magazine/articles/2011/SL\\_0611-SexOffender.pdf?ver=2011-05-20-093635-983](https://www.ncsl.org/Portals/1/Documents/magazine/articles/2011/SL_0611-SexOffender.pdf?ver=2011-05-20-093635-983) [<https://perma.cc/3N79-YULD>].

60. Kristen M. Zgoba et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, 28 SEXUAL ABUSE 722, 724 (2016).

empirically driven offer misinformation to the public and lead to an inefficient distribution of resources, perhaps ultimately undermining the important goal of public safety.<sup>61</sup>

Finally, one of the more controversial parts of SORNA is the requirement that juveniles register. In an article posted on the National Conference of State Legislatures (NCSL) website, Donna Lyons—the director of the NCSL’s Criminal Justice program—explained,

Many states exclude juveniles from registration requirements, particularly information that is made public, or allow a judge to decide whether a juvenile must register. Not only do SORNA provisions conflict with some state laws about confidentiality of juvenile records, they prompt concerns about whether registration requirements are in sync with the goals of rehabilitating juveniles.<sup>62</sup>

### 3. Efficacy

Although registry and notification laws are popular, studies show they have limited effectiveness. Zgoba, Jennings, and Salerno (2018) examined 547 convicted sex offenders who were released before and after the enactment of Megan’s Law.<sup>63</sup> Both groups were followed for an average of fifteen years to see whether they committed a new sex crime.<sup>64</sup> The study found that sex offenders released before the passage of Megan’s Law did not have higher rates of reoffending as compared with those who were released after Megan’s Law.<sup>65</sup> It concluded, “There is much evidence to suggest that [SORNA] legislation for offenders convicted of sexual crimes does not have a demonstrable effect on future offending.”<sup>66</sup> Other researchers have come to similar conclusions.<sup>67</sup>

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61. *Id.* at 737–38.

62. Lyons, *supra* note 59.

63. Kristen M. Zgoba, Wesley G. Jennings & Laura M. Salerno, *Megan’s Law 20 Years Later: An Empirical Analysis and Policy Review*, 45 CRIM. JUST. & BEHAV. 1028, 1033 (2018).

64. *Id.* at 1029.

65. *Id.* at 1041.

66. *Id.* at 1044.

67. See Jeffrey C. Sandler, Naomi J. Freeman & Kelly M. Socia, *Does a Watched Pot Boil?: A Time-Series Analysis of New York State’s Sex Offender Registration and Notification Law*, 14 PSYCH. PUB. POL’Y & L. 284, 284 (2008) (utilizing a time-series analysis to examine the difference in sexual offense rates before and after passage of New York State’s Sex Offender Registration Act and finding no support for the effectiveness of registration and notification laws in reducing sexual offending by rapists, child molesters, sexual recidivists, and first-time sex offenders); Bob Edward Vásquez, Sean Maddan & Jeffrey T. Walker, *The Influence of Sex*

Of particular interest is a 2012 study in which Prescott and Rockoff differentiated between the impact of registration (information maintained by law enforcement) and notification (information disseminated to the public) on criminal behavior.<sup>68</sup> They found that registration laws lowered the frequency of reported sex crimes, especially when the number of registrants was large.<sup>69</sup> It was so-called local victims (acquaintances, neighbors, and victims of known offenders, in addition to possibly family members, friends, and significant others) who benefited from this reduction, but they found no evidence that registration impacted offending against strangers.<sup>70</sup> Prescott and Rockoff found that notification laws, on the other hand, actually *increased* the number of sex crimes with a registry of at least average size.<sup>71</sup> They suggested that the high financial, physical, and psychological damage to offenders and their families that is associated with the notification laws may actually encourage offenders to recidivate.<sup>72</sup>

#### 4. Collateral Consequences

Not only are registry and notifications laws ineffective at reducing sex crimes, but they are also extremely destructive to those on the registry and their families. Tewksbury (2005) surveyed registered sex offenders in Kentucky to determine the collateral consequences of being on the registry.<sup>73</sup> By collateral consequences, he meant “unintended negative outcomes that accompany criminal justice sanctioning.”<sup>74</sup> Tewksbury found that 42.7% of registered sex offenders reported losing a job, 45.3% reported losing or being denied a place to live, 47% reported being harassed in person, and 16.2%

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*Offender Registration and Notification Laws in the United States: A Time-Series Analysis*, 54 CRIME & DELINQ. 175, 188 (2008) (“Taken collectively, the findings reported here indicate that sex offender registration and notification laws may have had little general deterrent effects on the incidence of rape offenses analyzed.”); Kristen Zgoba, Bonita M. Veysey & Melissa Dalessandro, *An Analysis of the Effectiveness of Community Notification and Registration: Do the Best Intentions Predict the Best Practices?*, 27 JUST. Q. 667, 689 (2010) (“[T]he results of the present study suggest that Megan’s Law has not produced a significant effect on recidivism (both sex and non-sex) for sex offenders included within the sample.”).

68. J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161, 163–64 (2011).

69. *Id.* at 192.

70. *Id.*

71. *Id.*

72. *Id.*

73. Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 71 (2005).

74. Richard Tewksbury & Jill Levenson, *Stress Experiences of Family Members of Registered Sex Offenders*, 27 BEHAV. SCIS. & L. 611, 613 (2009).

reported being physically assaulted.<sup>75</sup> Being on the registry is particularly traumatic for juveniles. A 2013 report from Human Rights Watch discussed the harm children suffer from being placed on sex offender registries: “Youth sex offenders on the registry experience severe psychological harm. They are stigmatized, isolated, often depressed. Many consider suicide, and some succeed. They and their families have experienced harassment and physical violence. They are sometimes shot at, beaten, even murdered; many are repeatedly threatened with violence.”<sup>76</sup>

In a related study, Tewksbury and Levenson studied the collateral consequences for family members of registered sex offenders.<sup>77</sup> The reports were stunning: 85.8% reported that sex offender registration and notification (SORN) had caused stress in their life (very often or fairly often); 77.2% said they felt alone and isolated because of SORN (very often or fairly often); 49.9% said they had lost friends or a close relationship because of SORN (very often or fairly often); and 48.8% said they were afraid for their safety because of SORN (very often or fairly often).<sup>78</sup> Other studies have found similar results.<sup>79</sup>

Notification laws are also expensive to maintain. In 2019–2020, the budget for the Sex Offender Notification Unit in the Phoenix Police Department was \$1,980,332, and the projected budget for 2020–2021 increased by \$234,421 to \$2,214,753.<sup>80</sup> As a point of comparison, in 2019 Phoenix spent \$1,530,065 for its Family Investigations-Missing Person Unit (\$1,509,336 allocated for 2020–2021 budget),<sup>81</sup> \$1,957,498 for its Park Rangers-Community and Neighborhood Parks (\$1,720,989 allocated for 2020–2021 budget),<sup>82</sup> and \$1,615,942 for its environmental programs (\$1,429,348 allocated for 2020–2021 budget).<sup>83</sup> Even more troubling is the fact that while Phoenix was spending millions of dollars enforcing a law that does not work, it was letting rape kits languish untested. In 2016, a state task force found there were 4,367 untested rape kits in Maricopa County, of which

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75. Tewksbury, *supra* note 73, at 75.

76. HUM. RTS. WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE US 5 (2013).

77. Tewksbury & Levenson, *supra* note 74, at 614.

78. *Id.* at 618.

79. See, e.g., Ashley Kilmer & Chrysanthi S. Leon, ‘Nobody Worries About Our Children’: Unseen Impacts of Sex Offender Registration on Families with School-Age Children and Implications for Desistance, 30 CRIM. JUST. STUD. 181 (2017).

80. CITY OF PHX., CITYWIDE INVENTORY OF PROGRAMS: 2019–2020 ADOPTED BUDGET & 2020–2021 PRELIMINARY BUDGET 35, 135 (2020), <https://www.phoenix.gov/budgetsite/budget-books/2019-20CitywideInventoryOfPrograms.pdf> [<https://perma.cc/42J4-BR5P>].

81. *Id.* at 35.

82. *Id.* at 44.

83. *Id.* at 39.

2,129 were in Phoenix.<sup>84</sup> As of March 18, 2019, 82% of these rape kits had been analyzed, and testing has led to seven convictions in Phoenix.<sup>85</sup> Although one might think that catching rapists would be a priority for Phoenix and Maricopa County, testing was in fact funded by outside organizations like the Department of Justice and the Manhattan District Attorney's Office.<sup>86</sup>

In Tucson, four detectives are currently assigned to the Sex Offender Registration and Tracking Unit (SORT).<sup>87</sup> Two-thirds of their time is devoted to managing all 1,200–1,300 SORT offenders within the city limits and investigating and issuing felony cases related to SORT violations.<sup>88</sup> The amount expended on these tasks totaled \$377,659 in FY 2020.<sup>89</sup> The city also budgeted \$16,826.38 to pay for the database that tracks all SORT offenders and provides community notification.<sup>90</sup>

## 5. Recommendations for Reform

In 2019, the Arizona House Judiciary Committee voted unanimously in favor of legislation that would have made it easier for certain offenders to be removed from the registry.<sup>91</sup> The bill applied to those who were under the age of twenty-two at the time of the offense and met other requirements, like being at least thirty-five at the time the application for removal was made.<sup>92</sup> Unfortunately, the proposed legislation died in the Senate.<sup>93</sup> Although the

84. ARIZ. SEXUAL ASSAULT EVIDENCE COLLECTION KIT TASK FORCE, ARIZONA SEXUAL ASSAULT EVIDENCE COLLECTION KIT 5, 7 (2016), [https://azgovernor.gov/sites/default/files/sexual\\_assault\\_evidence\\_collection\\_kit\\_task\\_force\\_report\\_09302016.pdf](https://azgovernor.gov/sites/default/files/sexual_assault_evidence_collection_kit_task_force_report_09302016.pdf) [<https://perma.cc/YN9W-7DYT>].

85. *New Grants Allow Arizona Rape Kits To Be Processed*, ALL ABOUT ARIZ. NEWS (Mar. 18, 2019), <https://www.allaboutarizonanews.com/new-grants-allow-arizona-rape-kits-to-be-processed/> [<https://perma.cc/9Q4V-NDVZ>].

86. See Jessica Swarner, *Maricopa County Close To Clearing Out Backlog of 4,500 Rape Kits*, KTAR NEWS (May 24, 2019, 1:30 PM), <https://ktar.com/story/2587721/maricopa-county-close-to-clearing-out-backlog-of-4500-rape-kits/> [<https://perma.cc/X9GM-NQK7>]; ALL ABOUT ARIZ. NEWS, *supra* note 85.

87. See Response to Public Records Request from Lynn Erbe, Bus. Servs., City of Tucson, to Grace Duval, Sandra Day O'Connor College of Law (July 17, 2020) (on file with author).

88. *Id.*

89. *Id.*

90. *Id.*

91. Jeremy Duda, *Committee Passes Sex Offender Registry Bill, Urges Broader Reforms*, AZMIRROR (Feb. 20, 2019, 9:33 PM), <https://www.azmirror.com/2019/02/20/committee-passes-sex-offender-registry-bill-urges-broader-reforms/> [<https://perma.cc/JK65-4AVN>].

92. H.B. 2613, 54th Leg., 1st Reg. Sess. (Ariz. 2019).

93. *Bill History for HB2613*, ARIZ. ST. LEGISLATURE, <https://apps.azleg.gov/BillStatus/BillOverview/72249?SessionId=121> [<https://perma.cc/7H8Z-L9ZB>].

proposed legislation did not go far enough, it is commendable that legislators tried to make the registry more rational and fair. To that end, I would recommend the following reforms:

(i) Arizona should use a risk-based system instead of a tiered system based solely on the conviction offense. A risk-based system, though imperfect, is better at identifying danger.

(ii) Arizona should end community notification for most, if not all, sex offenders. Not only is community notification ineffective at lowering recidivism (and may increase it), but it has enormous collateral consequences for those on the registry and their families.

(iii) Arizona should make it easier to be removed from the registry based on factors that have shown to be associated with lowered risk. Such factors include advanced age of the registrant and the period of time the registrant has gone without reoffending. Successful completion of sex offender treatment should also be considered, as it has been shown to reduce sex recidivism.<sup>94</sup>

(iv) Arizona should remove juveniles from the registry or, at a minimum, dramatically shorten the period of time they must register.

#### *D. Residency Restrictions*

Like most states across the country,<sup>95</sup> Arizona has enacted residency restrictions for certain convicted sex offenders.<sup>96</sup> Although there are some exceptions, Arizona's law prohibits those classified as level 3 offenders from residing within 1,000 feet of a school that serves any combination of kindergarten programs or grades one through eight,<sup>97</sup> a child care facility,<sup>98</sup> or the former victim.<sup>99</sup> Research overwhelmingly shows that residency restrictions do not lower the incidence of sex crimes against children, and for that and other reasons, they should be curtailed or abolished completely.

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94. See Bitna Kim, Peter J. Benekos & Alida V. Merlo, *Sex Offender Recidivism Revisited: Review of Recent Meta-Analyses on the Effects of Sex Offender Treatment*, 17 TRAUMA VIOLENCE & ABUSE 105, 114 (2016) ("The purpose of this study was to review and synthesize meta-analyses of sex offender treatments designed to reduce recidivism. One of the most promising findings is that every meta-analysis in this review found significant recidivism reduction outcomes.").

95. Approximately twenty-nine states had residency restrictions for sex offenders as of 2018. Joanne Savage & Casey Windsor, *Sex Offender Residence Restrictions and Sex Crimes Against Children: A Comprehensive Review*, 43 AGGRESSION & VIOLENT BEHAV. 13, 16 (2018).

96. ARIZ. REV. STAT. ANN. § 13-3727 (2020).

97. *Id.* § 13-3727(A)(1)(a)–(b).

98. *Id.* § 13-3727(A)(1)(c).

99. *Id.* § 13-3727(A)(2)–(3).

## 1. Background

Residency restrictions are aimed at protecting the public, particularly children, from sex offenders.<sup>100</sup> The legislation is premised on the idea that “if potential sex offenders are not in close proximity to suitable targets (i.e., children), they will not have opportunities to commit these crimes, even in the absence of capable guardians.”<sup>101</sup> Furthermore, as Mustaine explains, “[T]hese policies suppose that most sex offenders meet their victims by going to nearby child congregation locations, loitering around, and gaining access to these young strangers by manipulation and coercion.”<sup>102</sup> It follows then that increasing the distance between sex offenders and potential victims should reduce their incidence of offending.<sup>103</sup>

Multiple studies, however, have challenged this rationale. A 2003 study by the Minnesota Department of Corrections found “no evidence in Minnesota that *residential* proximity to schools or parks affects re-offense.”<sup>104</sup> In another study, Colombino, Mercado, and Jeglic (2009) analyzed the archival records of 405 adult sex offenders in New Jersey to determine where the offenders first met their victims and where the offense took place.<sup>105</sup> “Because the majority of the offenders in this sample met their victims in private settings, committed their offenses in private locations, and knew their victims prior to the offense,” they wrote, “data demonstrate that most sexual offenses, and particularly child sexual offenses, stem from social rather than geographic proximity.”<sup>106</sup>

Despite the dubious justification, residency restriction laws have proliferated. Alabama enacted the first such law in 1996,<sup>107</sup> and by 2008,

100. Paul A. Zandbergen & Timothy C. Hart, *Reducing Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restriction Laws Using GIS*, 8 JUST. RSCH. & POL’Y 1, 2 (2006).

101. Elizabeth Ehrhardt Mustaine, *Sex Offender Residency Restrictions: Successful Integration or Exclusion?*, 13 CRIMINOLOGY & PUB. POL’Y 169, 170 (2014).

102. *Id.*

103. Beth M. Huebner, Kimberly R. Kras, Jason Rydberg, Timothy S. Bynum, Eric Grommon & Breanne Pleggenkuhle, *The Effect and Implications of Sex Offender Residence Restrictions: Evidence from a Two-State Evaluation*, 13 CRIMINOLOGY & PUB. POL’Y 139, 140 (2014).

104. MINN. DEP’T OF CORR., LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES: 2003 REPORT TO THE LEGISLATURE 11 (2003), [https://mn.gov/doc/assets/Lvl%203%20SEX%20OFFENDERS%20report%202003%20\(revised%202-04\)\\_tcm1089-272828.pdf](https://mn.gov/doc/assets/Lvl%203%20SEX%20OFFENDERS%20report%202003%20(revised%202-04)_tcm1089-272828.pdf) [<https://perma.cc/G6KV-5U7V>].

105. Nicole Colombino, Cynthia Calkins Mercado & Elizabeth L. Jeglic, *Situational Aspects of Sexual Offending: Implications for Residence Restriction Laws*, 11 JUST. RSCH. & POL’Y 27, 31–32 (2009).

106. *Id.* at 38 (citation omitted).

107. Jeffery T. Walker, *Eliminate Residency Restrictions for Sex Offenders*, 6 CRIMINOLOGY & PUB. POL’Y 863, 864 (2007).



thirty-three states had some form of residency restriction.<sup>108</sup> Some local governments have passed tougher residency restrictions than required by state law,<sup>109</sup> but not in Arizona. The state bars counties, cities, or towns from passing an ordinance that provides for greater distance restrictions than provided by state law.<sup>110</sup> Although SORNA requires states meet sex offender registration and community notification requirements or lose federal funding, there is no federal mandate on residency restrictions.<sup>111</sup> SORNA does not address them in any way.<sup>112</sup>

## 2. Efficacy

Studies consistently show residency restrictions are ineffective at reducing recidivism or decreasing sex crimes. Huebner, Kras, Rydberg, Bynum, Grommon, and Pleggenkuhle (2014) examined the impact of residency restrictions on sex offender recidivism in Missouri and Michigan.<sup>113</sup> Michigan bars offenders from residing, working, or loitering within 1,000 feet of a “student safety zone,”<sup>114</sup> and Missouri bars offenders from living within “1,000 feet of a ‘public or private school up to the 12th grade or state-licensed childcare facility which is in existence at the time of the offender establishing his or her residency.’”<sup>115</sup> Missouri also bans offenders from being present or loitering within 500 feet of a childcare facility,<sup>116</sup> school,<sup>117</sup> public park, swimming pool, or museum.<sup>118</sup> Huebner et al. (2014) found that in Michigan, the implementation of the laws led to a slight increase in recidivism, and in Missouri, there was a slight decrease.<sup>119</sup> “Overall, the findings suggest,” they wrote, “that if residence restrictions have an effect on recidivism, then the relationship is small.”<sup>120</sup> They were unable to analyze the

108. Christina Mancini et al., *It Varies from State to State: An Examination of Sex Crime Laws Nationally*, 24 CRIM. JUST. POL’Y REV. 166, 172–75 (2011).

109. Caitlin J. Monjeau, Note, *All Politics Is Local: State Preemption and Municipal Sex Offender Residency Restrictions in New York State*, 91 B.U. L. REV. 1569, 1583–87 (2011).

110. ARIZ. REV. STAT. ANN. § 13-3727(E) (2020).

111. OFF. OF SEX OFFENDER SENT’G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, SEX OFFENDER REGISTRATION AND NOTIFICATION IN THE UNITED STATES: CURRENT CASE LAW AND ISSUES 13 (2019), <https://smart.gov/caselaw/Case-Law-Update-2019-Compiled.pdf> [<https://perma.cc/RCA7-ZB4U>].

112. *Id.*

113. Huebner et al., *supra* note 103, at 139.

114. *Id.* at 144; MICH. COMP. LAWS §§ 28.733–.735 (2020).

115. Huebner et al., *supra* note 103 at 144; *see* MO. REV. STAT. § 566.147 (2020).

116. MO. REV. STAT. § 566.148 (2020).

117. *Id.* § 566.149.

118. *Id.* § 566.150.

119. Huebner et al., *supra* note 103, at 156.

120. *Id.*

difference in rates of recidivism pre- and post-enactment of the residency restrictions because “[t]he small number of sexual recidivism events was insufficient to detect statistical significance.”<sup>121</sup>

In another study, Nobles, Levenson, and Youstin (2012) studied the impact of Jacksonville, Florida, increasing the residency restrictions for sex offenders from 1,000 to 2,500 feet.<sup>122</sup> They analyzed arrests 2.25 years before and after the change and found no significant effect on sex crimes or sex offender recidivism.<sup>123</sup> They concluded, “Taken broadly, the results presented herein suggest that lawmakers should view residence restrictions neither as an effective method of preventing sexual victimization perpetrated by known sex offenders nor as a general deterrent for sex crimes.”<sup>124</sup> Other studies have also found that residency restrictions have little to no effect on sex offender recidivism.<sup>125</sup>

### 3. Collateral Consequences

As with the residency and notification laws, the unintended consequences of residency restrictions are severe. Levenson and Cotter (2005) studied how Florida’s 1,000-foot statewide exclusionary rule impacted the reintegration of 135 sex offenders following release from prison.<sup>126</sup> They found that 44% reported being unable to live with supportive family members because of the restrictions, and 57% found it difficult to secure affordable housing.<sup>127</sup> Sixty percent reported emotional distress due to housing restrictions.<sup>128</sup> In a later study, Levenson and Hern (2007) surveyed adult male sex offenders in

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121. *Id.*

122. Matt R. Nobles, Jill S. Levenson & Tasha J. Youstin, *Effectiveness of Residence Restrictions in Preventing Sex Offense Recidivism*, 58 CRIME & DELINQ. 491, 492 (2012).

123. *Id.* at 505.

124. *Id.* at 506.

125. See, e.g., J.C. Barnes et al., *Analyzing the Impact of a Statewide Residence Restriction Law on South Carolina Sex Offenders*, 20 CRIM. JUST. POL’Y REV. 21, 39 (2009) (“After careful assessment of the existing literature and the current evidence, the rationale behind residence restrictions for sex offenders appears to be unsound.”); Kelly M. Socia, *The Efficacy of County-Level Sex Offender Residence Restrictions in New York*, 58 CRIME & DELINQ. 612, 612 (2012) (finding county-level residence restrictions were statistically unrelated to recidivist sex crimes against children or adults and to sex crimes against children committed by first time offenders).

126. Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd?*, 49 INT’L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 168, 168 (2005).

127. *Id.* at 173.

128. *Id.*

Indiana.<sup>129</sup> “Housing restrictions,” they wrote, “appear to disrupt the stability of sex offenders by forcing them to relocate, sometimes multiple times, creating transience, financial hardship, and emotional volatility.”<sup>130</sup> Residence restrictions also push them into rural areas where there are fewer employment opportunities, social services, mental health treatment options, and social supports.<sup>131</sup> The effect is worse on young adult offenders, who often cannot live with family members and have particular trouble obtaining affordable housing.<sup>132</sup>

The extreme psychological stress associated with residence restrictions must not be ignored. In an oft-cited study, Hanson and Harris (1998) interviewed community supervision officers and reviewed files of recidivists and non-recidivists.<sup>133</sup> They found “recidivists were generally considered to have poor social supports, . . . antisocial behaviour, [and] poor self-management strategies.”<sup>134</sup> In addition, as compared with non-recidivists, they “showed increased anger and subjective distress just prior to re-offending.”<sup>135</sup> Levenson and Hern pointed to Hanson and Harris’s findings in arguing, “Psychosocial stressors resulting from residence restrictions, such as transience and instability, are likely to challenge the coping skills of some sex offenders, potentially increasing their risk.”<sup>136</sup>

Information was not readily available on the cost of implementing and enforcing residency restrictions in Arizona; however, it is possible to approximate using data from elsewhere. In 2002, Iowa passed a law that prohibited any sex offender who had victimized a child from living within 2,000 feet of a school or child-care center.<sup>137</sup> The estimated cost for enforcing the residency restrictions in Polk County, Iowa, with a population of 604 sex offenders in an overall resident population of 401,567 in 2005<sup>138</sup> was \$2.7

129. Jill S. Levenson & Andrea L. Hern, *Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry*, 9 JUST. RSCH. & POL’Y 59, 64 (2007).

130. *Id.* at 67.

131. *Id.*

132. *Id.*

133. R. KARL HANSON & ANDREW HARRIS, DYNAMIC PREDICTORS OF SEXUAL RECIDIVISM 1998-1, at 1 (1998), <http://www.static99.org/pdfdocs/hansonandharris1998.pdf> [<https://perma.cc/Z2VW-XWYB>].

134. *Id.* at 1–2.

135. *Id.* at 2.

136. Levenson & Hern, *supra* note 129, at 69.

137. Act of May 9, 2002, ch. 1157, 2002 Iowa Acts 511 (codified at IOWA CODE § 692A.114).

138. *Resident Population in Polk County, IA*, FRED, <https://fred.stlouisfed.org/series/IAPOLK3POP> [<https://perma.cc/7ANS-SEF5>] (Mar. 27, 2020).

million.<sup>139</sup> Assuming the price of enforcement in Arizona is the same per sex offender, the cost of enforcing residence restrictions for 3,144 active level 3 sex offenders<sup>140</sup> in Arizona would be \$14 million per year.<sup>141</sup>

#### 4. Recommendations for Reform

A 2017 report by the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking took an exhaustive look at the research on residence restrictions.<sup>142</sup> The verdict was far from positive: “In summary, there is no empirical support for the effectiveness of residence restrictions. In fact, a number of negative unintended consequences have been empirically identified, including loss of housing, loss of support systems and financial hardship that may aggravate rather than mitigate offender risk.”<sup>143</sup>

Arizona should terminate or at least significantly curtail its residency restrictions to only those who have been shown to be at high risk of reoffending. In making that determination, age and time spent without being arrested for a new sex crime should be taken into account. Arizona should then ensure that the few offenders who are impacted by residency restrictions have a stable place to live where they can access the support they need.

#### E. Civil Commitment

Arizona’s Sexually Violent Persons (SVP) law provides for the indefinite commitment of persons deemed to be sexually violent<sup>144</sup> after they complete their maximum prison term. To qualify, a person must have (1) been

139. Erin Randolph, *Separate but Equal: They’re Branded, Demonized and Are Being Pushed Out of City Limits, but Should All Sex Offenders Be Treated Equally?*, CITYVIEW (Nov. 10, 2005), <http://www.dmcityview.com/archives/2005/nov/11-10-05/cover.shtml> [<https://perma.cc/SKY7-WGVP>].

140. Email from Mike, Ariz. Dep’t of Pub. Safety Sex Offender Compliance Unit, to Grace Duval, Rsch. Assistant (July 10, 2020) (on file with author). The Department does not provide surnames, so I have referred to my contact as “Mike.”

141. Level 3 sex offenders are subject to residence restrictions in Arizona. *The Different Levels of Sex Offenders in Arizona*, DM CANTOR, <https://dmcantor.com/blog/levels-of-sex-offenders-in-arizona> [<https://perma.cc/V9VV-TC2G>]. When 2.7 million is divided by 604, it equals \$4,470.20. Thus, \$4,470.20 multiplied by 3,144 equals \$14,054,308.80.

142. See generally OFF. OF SEX OFFENDER SEN’G, MONITORING, APPREHENDING, REGISTERING, & TRACKING, U.S. DEP’T OF JUST., SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE (2017), [https://smart.gov/SOMAPI/pdfs/SOMAPI\\_Full%20Report.pdf](https://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20Report.pdf) [<https://perma.cc/TS32-WKDA>].

143. Christopher Lobanov-Rostovsky, *Sex Offender Management Strategies*, in SEX OFFENDER MANAGEMENT ASSESSMENT AND PLANNING INITIATIVE, *supra* note 142, at 181, 205.

144. ARIZ. REV. STAT. ANN. § 36-3707(B)(1) (2020).

convicted (or found guilty but insane) of a sexually violent offense or charged with a sexually violent offense but deemed incompetent to stand trial, and (2) must currently suffer from a mental disorder that makes him likely to engage in acts of sexual violence.<sup>145</sup> Once adjudicated, a person remains at the Arizona Community Protection and Treatment Center at the State Hospital or is placed in a Less Restrictive Alternative (LRA) Program.<sup>146</sup> The LRA Program has six levels and reintegrates SVPs back into the community in stages.<sup>147</sup> The integration process includes attending substance abuse programs; job searches and interviews; and going on staff-accompanied, GPS-monitored excursions.<sup>148</sup> In level 6, individuals live in community-based housing.<sup>149</sup>

## 1. Background

Twenty states and the federal government authorize involuntary civil commitment of SVPs.<sup>150</sup> In so doing, they allow people to be locked away in a prison-like setting. At the Arizona Community Protection and Treatment Center, razor wire surrounds the buildings and grounds,<sup>151</sup> and there are security cameras and motion detectors on the fences.<sup>152</sup> Commitment is

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145. *Id.* § 36-3701(7).

146. ARIZ. SENATE RSCH. STAFF, ARIZONA STATE SENATE ISSUE BRIEF: ARIZONA SEX OFFENDER REGISTRATION AND NOTIFICATION 1, 3 (2018), <https://www.azleg.gov/Briefs/Senate/ARIZONA%20SEX%20OFFENDER%20REGISTRATIO%20AND%20NOTIFICATION%202018.pdf> [<https://perma.cc/87GJ-QJUH>].

147. *Id.*

148. J. LEG. BUDGET COMM., PROGRAM SUMMARY: DEPARTMENT OF HEALTH SERVICES SEXUALLY VIOLENT PERSONS 1 (2008), <https://www.azleg.gov/jlbc/psdhssvp.pdf> [<https://perma.cc/KE6D-QL22>].

149. *Id.*

150. The states with such laws are Arizona, California, Florida, Illinois, Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin. Tamara Rice Lave, *Throwing Away the Key: Has the Adam Walsh Act Lowered the Threshold for Sexually Violent Predator Commitments Too Far?*, 14 U. PA. J. CONST. L. 391, 409–17 (2011) (providing a detailed discussion of each of these statutes including date of passage and procedural protections). At the federal level, the Adam Walsh Act was passed by both houses of Congress and signed by the President in 2006. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of the U.S.C.) ; *see also* 18 U.S.C. §§ 4247–4248(a).

151. *Farnham v. Brewer*, No. CV-11-01520-PHX-DGC, 2012 WL 2577469, at \*5 (D. Ariz. July 3, 2012).

152. Will Humble, *ACPTC Security Enhancements*, ARIZ. DEP'T OF HEALTH SERVS. (Aug. 12, 2010), <https://blog.devazdhs.gov/acptc-security-enhancements/> [<https://perma.cc/T25E-2LCB>].

usually indeterminate, which means SVPs have no idea whether they will ever be free.<sup>153</sup>

SVP laws are premised on the idea, as the Arizona Legislature put it, that there is a “small but extremely dangerous group of sexually violent predators . . . [whose] likelihood of . . . engaging in repeat acts of predatory sexual violence is high.”<sup>154</sup> The Supreme Court accepted similar claims from the Kansas Legislature in upholding Kansas’s SVP law in 1997.<sup>155</sup> In *Hendricks*, the Court held that to be committed as an SVP, the state must prove that the person’s “‘mental abnormality’ or ‘personality disorder’” makes it “difficult, if not impossible, for the person to control his dangerous behavior.”<sup>156</sup> In *Kansas v. Crane*, the Court clarified that the SVP must be distinguishable from the average sex offender: “[T]he severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.”<sup>157</sup>

## 2. How Arizona Is Different than Other States

Unlike other states, Arizona’s SVP law is not simply an excuse to warehouse sex offenders. “[I]n 2002, Arizona adopted a community reintegration approach” to ensure that only individuals with “serious difficulty controlling their behavior” remain civilly committed.<sup>158</sup> As a result, the number of persons in pretrial detainment and full confinement has gone down since 2001, while the number in the LRA has gone up.<sup>159</sup> Between 2001 and 2008, the percentage of SVPs in the LRA program rose from 17% (23 of 135) to 65% (54 of 83).<sup>160</sup> The number of SVPs in the program overall

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153. David DeMatteo et al., *A National Survey of United States Sexually Violent Person Legislation: Policy, Procedures, and Practice*, 14 INT’L J. FORENSIC MENTAL HEALTH 245, 245 (2015) <https://concept.paloalto.edu/sexually-violent-person-statutes-differ-considerably-throughout-the-united-states/> [<https://perma.cc/YG88-7VTY>].

154. S.B. 1288, 42d Leg., 1st Reg. Sess. (Ariz. 1995).

155. *Kansas v. Hendricks*, 521 U.S. 346, 351 (1997) (quoting KAN. STAT. ANN. § 59-29a01 (1994)) (stating that SVPs are “extremely dangerous” and their “likelihood of engaging in repeat acts of predatory sexual violence is high” while finding that “the prognosis for rehabilitating sexually violent predators in a prison setting is poor [and their] treatment needs . . . are very long term.”).

156. *Id.* at 358 (citing § 59-29a02(b)).

157. 534 U.S. 407, 413 (2002); *Hendricks*, 521 U.S. at 357–58.

158. ARIZ. SENATE RSCH. STAFF, *supra* note 146, at 3–4.

159. J. LEG. BUDGET COMM., *supra* note 148, at 1.

160. *Id.*

dropped from 135 to 83 during the same period, a reduction of 39%.<sup>161</sup> Arizona's commitment to community reintegration is commendable, especially in light of the recidivism data described above. Other states should follow in Arizona's footsteps.

### 3. Recommendation for Reform

As currently written, Arizona's SVP law does not on its face comply with the constitutional standard set forth in *Crane*. Although the Arizona Supreme Court acknowledged in *State v. Ehrlich (In re Leon G.)* that the Arizona SVP Act "does not include an express statutory provision requiring the state to prove an individual has 'serious difficulty in controlling' his or her behavior,"<sup>162</sup> the court still held that the law was constitutional.<sup>163</sup> The court found that because the legislature had intended that "likely" meant "highly probable," the statute met the standard from *Crane*.<sup>164</sup> To ensure that jurors understood the high bar for an SVP commitment, the Arizona Supreme Court required trial judges to give the following instruction in future SVP proceedings:

The State must prove, beyond a reasonable doubt, that the person has a mental disorder that makes it highly probable that the person will engage in future acts of sexual violence. A finding of dangerousness, standing alone, is not a sufficient ground to determine an individual is a sexually violent person. An individual's dangerousness must be caused by a mental disorder which, in turn, causes the person to have serious difficulty in controlling his or her behavior.<sup>165</sup>

The Arizona Legislature should revise the state's SVP Act so that it explicitly complies with the U.S. Constitution. In doing so, it should adopt the language provided by the Arizona Supreme Court. The Act would then be changed to the following:

"Sexually violent person" means a person to whom both of the following apply: (a) Has ever been convicted of or found guilty but insane of a sexually violent offense or was charged with a sexually violent offense and was determined incompetent to stand trial. (b) Has a mental disorder that *makes it highly probable that the person will engage in future acts of sexual violence. A finding of*

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161. *Id.*

162. *State v. Ehrlich*, 59 P.3d 779, 785 (Ariz. 2002).

163. *Id.* at 781.

164. *Id.* at 787–88.

165. *Id.* at 788.

*dangerousness, standing alone, is not a sufficient ground to determine an individual is a sexually violent person. An individual's dangerousness must be caused by a mental disorder which, in turn, causes the person to have serious difficulty in controlling his or her behavior.*<sup>166</sup>

## II. AN EXPANSION OF WHAT CONSTITUTES UNLAWFUL SEXUAL CONDUCT BY A POLICE OFFICER

Arizona is one of just twenty-four states that does the right thing by explicitly criminalizing sex between an officer and a person in custody.<sup>167</sup> Under title 13, section 1412 of the Arizona Revised Statutes, an officer commits the felony offense of unlawful sexual conduct if he “knowingly engag[es] in sexual contact, oral sexual contact or sexual intercourse with any person who is in the officer’s custody or a person who the officer knows or has reason to know is the subject of an investigation.”<sup>168</sup> Although Arizona should be applauded for trying to protect vulnerable people, its law does not go far enough. In this Part, I propose two reforms for Arizona’s law.

### A. *End the License To Sexually Assault During Searches*

As currently written, section 1412 gives the police carte blanche to sexually grope and digitally penetrate someone while conducting a lawful

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166. Suggested new language is italicized. *See id.*; ARIZ. REV. STAT. ANN. § 36-3701(7) (2020).

167. The states are: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Kansas, Maryland, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Texas, Utah, Washington, and Wyoming. *See* Tamara Rice Lave, *Police Sexual Violence*, in THE CAMBRIDGE HANDBOOK ON POLICING IN THE UNITED STATES 392, 418–31 app. 20.1 (Tamara Rice Lave & Eric J. Miller eds., 2019). Note that Albert Samaha, the author of an influential article on BuzzFeed News, classified Wyoming as being a state that does not prohibit sex between an officer and a person in custody. *See* Albert Samaha, *An 18-Year-Old Said She Was Raped While in Police Custody. The Officers Say She Consented.*, BUZZFEED NEWS (Feb. 7, 2018, 5:31 AM), <https://www.buzzfeednews.com/article/albertsamaha/this-teenager-accused-two-on-duty-cops-of-rape-she-had-no> [https://perma.cc/DV44-S32X]. I classified Wyoming differently because it criminalizes sex when “[t]he actor is in a position of authority over the victim and uses this position . . . to cause the victim to submit.” WYO. STAT. ANN. § 6-2-303(a)(vi) (2020). Under Wyoming law, “position of authority” means “that position occupied by a parent, guardian, relative, household member, teacher, employer, custodian, health care provider or any other person who, by reason of his position, is able to exercise significant influence over a person.” *Id.* § 6-2-301(a)(iv). A police officer certainly occupies a “position of authority” under this definition.

168. ARIZ. REV. STAT. ANN. § 13-1412(A) (2020).



search. It states, “This section does not apply to . . . [a]ny direct or indirect touching or manipulating of the genitals, anus or female breast that occurs during a lawful search.”<sup>169</sup>

The problem comes in construing a “lawful search.” *Terry* pat-downs are limited to a frisk of the outer clothing for weapons, which means that a more invasive search would not be considered lawful.<sup>170</sup> But searches incident to arrest are not so limited in scope.<sup>171</sup> Thus, a police officer could argue that since he has probable cause to arrest a suspect, he is allowed to fondle the suspect’s breasts or penis even though doing so does not advance either of the two recognized justifications for a search incident to arrest—recovery of evidence or officer safety. However, one could argue that such touching renders the search unlawful, therefore removing it from the protective umbrella of the statute.

### 1. Recommendation for Reform

The best way to avoid an abusive interpretation of the statute is to explicitly state that the touching must be reasonable. The statute should be changed to read the following: “This section does not apply to . . . [a]ny direct or indirect touching or manipulating of the genitals, anus or female breast that *reasonably* occurs during a lawful search.”<sup>172</sup>

#### *B. Prohibit All Sex Between a Police Officer and a Person in Custody*

Although Arizona has outlawed sexual conduct between a police officer and a person in custody, this prohibition does not apply if the officer is “married to or . . . is in a romantic or sexual relationship with the person at the time of the arrest or investigation.”<sup>173</sup> Although a limited exception is appropriate for a person under investigation, no exception should be made for a person who is under arrest.

### 1. High Rate of Sexual Assault Within Intimate Relationships

Carving out an exception for marriage and those in a romantic relationship ignores the fact that many rapes and sexual assaults occur within these types

169. *Id.* § 13-1412(C).

170. *Terry v. Ohio*, 392 U.S. 1, 8, 29–30 (1968).

171. *See id.* at 29.

172. Suggested new language is italicized. *See* § 13-1412(C)(1).

173. *Id.* § 13-1412(C)(2).

of relationships. According to the National Crime Victimization Survey, in 2018, 26.2% of rapes and sexual assaults occurred within intimate relationships, second only to the 36.5% that were perpetrated by well-known/casual acquaintances.<sup>174</sup> The 2011 National Intimate Partner and Sexual Violence Survey provided a more nuanced look.<sup>175</sup> In 2011, 45.4% of female rape victims had at least one perpetrator who was an intimate partner, and 74.1% of female victims of sexual coercion (the majority of female victims) had an intimate partner as the perpetrator.<sup>176</sup> Men were similarly sexually vulnerable. Twenty-nine percent of male victims of rape were raped by an intimate partner; 54.5% of men who were forced to sexually penetrate someone were made to penetrate an intimate partner; and 69.5% of male victims of sexual coercion had an intimate partner as a perpetrator.<sup>177</sup>

Excluding marriage and romantic relationships from the statute is reminiscent of Arizona's historical reluctance to take spousal rape seriously.<sup>178</sup> It was not until 1988 that Arizona classified spousal rape as a crime, and even then it required the victim to meet a higher burden of proving "force or threatened use of force."<sup>179</sup> Even if the victim overcame that hurdle, marital rape was still just a class 6 felony, which meant that the perpetrator could not do more than a year-and-a-half in custody.<sup>180</sup> An attempt was made to change the law in 2004, but it was shot down.<sup>181</sup> Republican Representative Warde Nichols of Gilbert explained why: "When you enter into a marriage, you enter into a contract for all sorts of different things with your spouse."<sup>182</sup>

174. *Number of Rape/Sexual Assaults by Victim-Offender Relationship, 1993-2018*, BUREAU OF JUST. STAT., <https://www.bjs.gov/index.cfm?ty=nvat> [<https://perma.cc/AGE4-GUMP>] (choose "Custom Tables" from the toolbar; then select "Personal Victimization" and click "Select Victimization Type"; then select "2018" for both years, "Rape/sexual assault" for "Victimization Type," and "Victim-offender relationship" for "First Variable"; then click "Generate Results").

175. U.S. Dep't Health & Hum. Servs., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 CDC MORBIDITY & MORTALITY WKLY. REP. 1, 1, 6 (2014), <https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf> [<https://perma.cc/Z2FR-YTNA>].

176. *Id.* at 6.

177. *Id.*

178. Jana Bommersbach, *Rape Is Rape*, JANA BOMMERSBACH (Sept. 2005), <https://janabommersbach.com/rape-is-rape/> [<https://perma.cc/TU7Y-G65P>].

179. *Id.*

180. *Id.*; see Act of May 16, 1988, ch. 66, § 1, 1988 Ariz. Sess. Laws 196, 196 (codified as amended at ARIZ. REV. STAT. ANN. § 13-701 (1988)).

181. Jim Small, *Farnsworth Accused of Trying To Protect Spousal Rape. Not for the First Time.*, AZMIRROR (Feb. 24, 2020, 8:39 AM), <https://www.azmirror.com/blog/farnsworth-accused-of-trying-to-protect-spousal-rape-not-for-the-first-time/> [<https://perma.cc/H5DN-PXA6>].

182. Howard Fischer, *Legislators Kill Spousal Rape Bill*, ARIZ. DAILY SUN (Mar. 10, 2005), [https://azdailysun.com/legislators-kill-spousal-rape-bill/article\\_e6e2f056-925b-5a35-a85f-e3dd28c37f52.html](https://azdailysun.com/legislators-kill-spousal-rape-bill/article_e6e2f056-925b-5a35-a85f-e3dd28c37f52.html) [<https://perma.cc/R4N3-ZQ5H>].

Finally, in 2005, the legislature enacted Senate Bill 1040, which repealed title 13, section 1406.01 of the Arizona Revised Statutes.<sup>183</sup> Governor Janet Napolitano later signed the change into law.<sup>184</sup>

## 2. Officer-Involved Domestic Sexual Violence

Those who think that sexual assault does not occur in intimate relationships with police officers should think again. The factors that put people at high risk of perpetrating domestic violence in the general population are, as Johnson et al. put it, “conspicuously present” among police officers: exposure to violence, alcohol abuse, and authoritarianism.<sup>185</sup> “[L]aw enforcement officers,” Mennicke and Ropes explained, “are trained to control situations, have increased stress associated with violence perpetration, and have guaranteed access to lethal weapons—a dangerous combination for their partners.”<sup>186</sup>

Making matters worse, victims of officer-involved domestic violence (OIDV) may find it particularly difficult to get help. This vulnerability could be caused by several factors including: awareness that the abuser knows the location of women’s shelters; knowledge that a domestic violence conviction would mean the abuser loses his gun and thus his livelihood, which they might depend on; and familiarity with the so-called “blue wall of silence,” in which officers cover for other officers.<sup>187</sup>

Over the past thirty years, researchers have primarily used self-reporting to assess the incidence of OIDV; the results range from 4.8% to 40% of officers who admit that they have perpetrated domestic violence.<sup>188</sup> The largest of those studies surveyed 853 officers from Florida.<sup>189</sup> It found that 28.6% responded “yes” to the question, “[I]n the past, I have been physically violent with an intimate partner or family member.”<sup>190</sup> Mennicke and Ropes

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183. S.B. 1040, 2005 Ariz. Sess. Laws 598 (2005) (codified at scattered sections of tit. 13).

184. *Id.*

185. Leonor Boulin Johnson et al., *Violence in Police Families: Work-Family Spillover*, 20 J. FAM. VIOLENCE 3, 4 (2005).

186. Annelise M. Mennicke & Katie Ropes, *Estimating the Rate of Domestic Violence Perpetrated by Law Enforcement Officers: A Review of Methods and Estimates*, 31 AGGRESSION & VIOLENT BEHAV. 157, 158 (2016).

187. *Id.* at 158–61; ALEX ROSLIN, POLICE WIFE: THE SECRET EPIDEMIC OF POLICE DOMESTIC VIOLENCE 92 (2d ed. 2017).

188. Mennicke & Ropes, *supra* note 186, at 158–60.

189. Karen Oehme, Elizabeth A. Donnelly & Annelise Martin, *Alcohol Abuse, PTSD, and Officer-Committed Domestic Violence*, 6 POLICING 418, 421 (2012).

190. *Id.* at 422–23.

observe, “Taken together, these findings average to a rate of 21.2%—approximately twice the rate of domestic violence in the general public.”<sup>191</sup>

It is no surprise then that the International Association of Chiefs of Police (IACP) has recognized that domestic violence is a serious problem. In a 2003 statement, the IACP wrote the following:

We recognize that the law enforcement profession is not immune from having members commit domestic violence against their intimate partners. The rate of domestic violence is estimated to be at least as common as that of the general population and limited research to date indicates the possibility of higher incidence of domestic violence among law enforcement professionals. The IACP, while concerned with variations in assessed levels, takes the position that the problem exists at some serious level and deserves careful attention regardless of estimated occurrences.<sup>192</sup>

### 3. Recommendation for Reform

Just as Arizona (in addition to the federal government, the District of Columbia, and the other 49 states) bars sex between a guard and an inmate,<sup>193</sup> so should it prohibit sex between an officer and a person in custody. As every state and the federal government recognize when it comes to incarcerated persons, “just the fact of the person being in custody is enough to constitute coercion and vitiate consent.”<sup>194</sup>

It is appropriate, however, to have a limited exception for persons under investigation as long as two conditions are met: They must not be in custody, and the officer must not be directly involved in the investigation.

Applying those changes, title 13, section 1412(C)(2) of the Arizona Revised Statutes would now read as follows:

This section does not apply to either of the following: An officer . . . who is in a romantic or sexual relationship with the

191. Mennicke & Ropes, *supra* note 186, at 160.

192. INT’L ASS’N OF CHIEFS OF POLICE, DISCUSSION PAPER ON IACP’S POLICY ON DOMESTIC VIOLENCE BY POLICE OFFICERS 2 (2003) (emphasis omitted), [http://ncdsv.org/images/IACP\\_Discussion-paper-on-IACP's-policy-on-DV-by-police-officers\\_7-2003.pdf](http://ncdsv.org/images/IACP_Discussion-paper-on-IACP's-policy-on-DV-by-police-officers_7-2003.pdf) [https://perma.cc/D933-PPAL].

193. Lave, *supra* note 167; *see also* 18 U.S.C. §§ 2241–2245; Margaret Penland, *A Constitutional Paradox: Prisoner Consent to Sexual Abuse in Prison Under the Eighth Amendment*, 33 LAW & INEQ. 507, 510 (2015); NAT’L INST. OF CORRECTIONS, 021387, FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF INDIVIDUALS IN CUSTODY (2013), <https://s3.amazonaws.com/static.nicic.gov/Library/021387.pdf> [https://perma.cc/ETF5-B6VZ].

194. Lave, *supra* note 167, at 406.

person at the time of the . . . investigation *as long as the person is out of custody, and the officer is not directly involved in the investigation.* The following factors may be considered in determining whether the relationship between the victim and the defendant is currently a romantic or sexual relationship:<sup>195</sup>

- a) The type of relationship.
- b) The length of the relationship.
- c) The frequency of the interaction between the victim and the defendant.
- d) If the relationship has terminated, the length of time since the termination.

### CONCLUSION

Sex offenders are one of the most despised groups in society. The public is convinced that they will continue to reoffend, and legislators pander to these fears by passing ever more restrictive laws aimed at controlling them. As it turns out, however, sex offenders do not pose the danger most people believe. Studies overwhelmingly show that most do not recidivate.

In this Article, I have offered several specific recommendations for reforming Arizona's sex offender laws. I first focused on laws aimed at controlling sex offenders: registration and notification laws, residency restrictions, and the sexually violent person law. I argued that the registry should be changed to a risk-based system to be more accurate; juveniles should be removed from the registry because they do not pose the same risks as adults; and it should be easier for registrants to get their name removed if there are objective factors like advanced age that show their risk to society has significantly diminished. Because notification laws and residence restrictions are ineffective at best and counterproductive at worst, I argued that they should be abolished completely. Finally, I contended that Arizona should revise its definition of sexually violent persons to comply with the U.S. Constitution.

I then turned my attention to sex crimes that do not receive enough attention in Arizona: those perpetrated by police officers. I made a specific recommendation for how the legislature could reduce the number of sexual assaults during otherwise lawful searches by revising title 13, section 1412 of the Arizona Revised Statutes. I then argued that Arizona must criminalize

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195. Suggested changes are italicized. See ARIZ. REV. STAT. ANN. § 13-1412(C)(2) (2020).

all sex between officers and persons in custody because a person cannot meaningfully consent when they are in handcuffs.

These changes will save money without sacrificing safety, and they will show that Arizona does not simply pander to irrational fear. Enacting these reforms will also prove that Arizona is willing to protect *all* victims, even if their assailants are wearing blue.

