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## Perpetual Panic

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In his 1998 book *Moral Panic: Changing Concepts of the Child Molester in Modern America*, historian Philip Jenkins described three distinct twentieth-century panics over child sex abuse. In Jenkins' view, what marks a "panic" is not only widespread public fear, but "fear that is wildly exaggerated and wrongly directed."<sup>1</sup> During a panic, "concern over sexual abuse provides a basis for extravagant claims making by professionals, the media, and assorted interest groups, who argue that the problem is quantitatively and qualitatively far more severe than anyone could reasonably suppose."<sup>2</sup> Fearmongering, in turn, produces excessive and ill-considered legislative responses, with lawmakers adopting new policies that "may cause harm in areas having nothing to do with the original problem and that divert resources away from measures which might genuinely assist in protecting children."<sup>3</sup>

Whatever the strength of their furor, however, the American sex crime panics have always been temporary. Thus, Jenkins observed a series of thirty-five-year cycles across the twentieth century. Legislative efforts to control or punish sex offenders peaked in roughly 1915, 1950, and 1985, with public interest in the issue declining markedly in the 1920s and 1960s.<sup>4</sup> Through the first eight decades of the century, panics came and went in a predictable pattern. But then something new happened: the 1990s did not bring a period of relative indifference to sex crimes, as was seen in the wake of earlier peaks of interest, but rather a continued spirit of public alarm, which was exemplified by a proliferation of new civil commitment statutes for so-called sexually violent predators.<sup>5</sup> In retrospect, it seems that we did not hit a true peak in 1985, but a plateau. "The cycle has been broken," Jenkins concluded in 1998, and "the sexual threat to children will likely remain a central social issue."<sup>6</sup>

Nothing in the decade since Jenkins' book first appeared would undermine that conclusion. Truly, we seem to be in a state of perpetual panic, with an endless supply of new laws intended to control or punish sex offenders in new and harsher ways. Within just the past few months, for instance, Congress has enacted the Keeping the Internet Devoid of Sexual Predators Act,<sup>7</sup> which expands sex offender registration and notification requirements, while Missouri adopted a controversial new law that requires sex offenders to "[a]void all Halloween-related contact with children."<sup>8</sup> These statutes follow in the wake of another recent election-year enactment, the 2006 Adam Walsh Child Protection and Safety Act, which adopted new mandatory minimum sentences and restructured many existing federal laws relating to sex offenders.<sup>9</sup> Meanwhile, law-enforcement agencies have devoted increasing resources to Internet sting operations intended to catch adults seeking underage sex partners, resulting in several high-profile prosecutions,<sup>10</sup> while possession of child pornography also remains a matter of great law-enforcement interest.<sup>11</sup>

The present issue of *FSR* documents and critiques some of the most important recent developments in these ongoing efforts to identify, manage, and appropriately punish sex offenders. Although such efforts are by no means limited to pedophiles, they nonetheless seem largely responsive to fears regarding the sexual exploitation and victimization of children. Thus, the account of recent developments that unfolds in these pages may be viewed as yet another chapter in the story of a child sex abuse panic that is now well into its third decade.

In Part I of these Editor's Observations, I identify some of the key themes that emerge from the articles in this issue. In Part II, I suggest some reasons why the sex crime panic has proven so durable, while another panic that also reached a fever pitch in the mid-1980s, the crack cocaine



panic, seems to have subsided. Finally, in Part III, I discuss a lesson that may be drawn from the various American crime panics: while it may be unreasonable to expect legislators to resist the pressure for increasingly punitive responses to problems that arouse widespread public alarm, the harmful effects of excessive or misdirected responses may be contained through the use of sunset provisions when new crimes or mandatory minimum sentences are created. The crack experience demonstrates how slow-moving the political system can be when affirmative enactments are required to undo bad policies, even after a panic subsides. If the burden is reversed, however—if it requires an affirmative act to retain the bad policy—then the legal legacy of panics may prove less durable.

## **I. A Critical Assessment of Recent Developments**

Our authors focus on recent developments in five areas: sex offender registration under the Adam Walsh Act, coerced treatment of sex offenders, civil commitment for sexually violent predators, child pornography sentencing, and capital punishment for sexual assault of a child.

### **A. Sex Offender Registration under the Adam Walsh Act**

Richard Wright offers a detailed description and critique of the Walsh Act, focusing particularly on the sex offender registration and notification provisions of the new law.<sup>12</sup> While sex offender registration was nothing new in 2006, the Walsh Act established a more uniform framework for states to follow, with a potential loss of federal grant aid for states that do not comply by 2009. Among other things, the new framework extends the reach of registration requirements by including juvenile offenders.<sup>13</sup> As Wright points out, registration and the accompanying stigma may undermine efforts to rehabilitate such juveniles,<sup>14</sup> which is normally the overriding objective with young offenders. Wright also observes that the new federal system for classifying registrants is less sophisticated than the risk classification schemes previously adopted by some states,<sup>15</sup> which seems a nice illustration of his claim that “reason and research are secondary factors in the passage of sex offender laws.”<sup>16</sup> More generally, he suggests, the whole emphasis of the Walsh Act on registration and notification seems hard to justify in light of the paucity of research that demonstrates clear crime-reduction benefits.<sup>17</sup>

Joseph Lester echoes Wright’s criticisms of the Walsh Act, but less from the standpoint of whether expanded sex offender registration is cost-benefit justified than whether the new requirements are fair to offenders.<sup>18</sup> Analogizing registration to the “mark of Cain,” Lester argues that we should recognize this form of branding as a punishment in its own right, and not merely as a prospective public-safety measure.<sup>19</sup> From this recognition would flow the full panoply of criminal procedure protections that attend punishment in our constitutional system, in lieu of the Walsh Act’s automatic, indiscriminate imposition of registration duties based on criminal record.<sup>20</sup> Lester thus envisions a world in which juries would decide whether an offender is sufficiently dangerous to warrant registration, prosecutors would exercise discretion over whether to present the question to the jury, and judges would advise defendants at guilty plea hearings of the registration implications of a particular conviction.<sup>21</sup> Lester’s analysis indicates that recent sex offender legislation is at odds not only with research-based approaches but also with core constitutional process values.

Corey Rayburn Yung also identifies tensions between the Walsh Act and traditional constitutional values but focuses more narrowly on the statute’s new federal criminal penalties for failing to register.<sup>22</sup> Drawing on the Supreme Court’s recent Commerce Clause jurisprudence, Yung finds no constitutional basis for Congress’s authority to create the new crime.<sup>23</sup>

Finally, Michael Petrunik, Lisa Murphy, and J. Paul Federoff observe many notable differences between the Walsh Act and Canada’s sex offender registration law, which was adopted in 2004.<sup>24</sup> For instance, Canada’s registry is prospective only (i.e., it includes only offenders convicted after the law came into effect) and is not automatic (i.e., the government must affirmatively seek registration, and the offender has an opportunity to present evidence showing why registration is not warranted).<sup>25</sup> The Canadian system thus resembles what Lester has called for in this country and demonstrates that sex offender registration can be implemented with considerably more care and restraint than has been done under the Walsh Act.

### **B. Coerced Treatment**

Registration requirements reflect a common view that sex offenders have dangerously disordered personalities that render them less susceptible to the normal deterrent effects of criminal law. Apparently, we must keep a much closer eye on sex offenders than murderers, burglars, drug dealers, or any other type of offender. But the perception of a close association between sex offenses and mental

illness suggests an alternative response: treatment. Thus, mandatory treatment has become a pervasive feature of legislative and judicial responses to sex crime. Seventeen states already require treatment by law, while, in others, treatment may be ordered on a case-by-case basis by sentencing judges or corrections officials.<sup>26</sup>

In their contribution to this issue, Mary Ann Farkas and Gale Miller explore the tensions between criminal justice mandates and the professional norms of therapists, which may undermine the efficacy of coerced treatment.<sup>27</sup> For instance, the requirement that therapists report new incidents of abuse that come to light during treatment diminishes the confidentiality of the therapeutic relationship and may impair the development of trust between therapist and client.<sup>28</sup> One wonders, too, to what extent treatment and registration requirements are working at cross-purposes: registration and related restrictions make it difficult for sex offenders to obtain suitable housing and employment, which may greatly diminish the likelihood of successful rehabilitation.<sup>29</sup>

### **C. Civil Commitment of Sexually Violent Predators**

In addition to registration and treatment requirements, the perception that sex offenders are uniquely dangerous also lies behind another common legislative response: civil commitment laws for so-called sexually violent predators. Such “SVP” laws, which provide a mechanism for the authorities to hold sex offenders in custody after the expiration of their prison terms, have been adopted in twenty states since 1990.<sup>30</sup> Although the frequency of new SVP laws has slowed down considerably since 1999, three states and the federal government have adopted SVP statutes since 2006.<sup>31</sup>

In their contribution to this issue, Eric Janus and Robert Prentky suggest that the SVP statutes of the 1990s established a basic framework for thinking about sex offenders (“sex offenders . . . can be sorted according to their risk, and . . . the proper way to address the risk is through identification and physical separation”), which made possible later legislative responses, such as registration requirements and residency restrictions.<sup>32</sup> Janus and Prentky worry about the further spread of this approach to other “dangerous people” outside the sex offense context, such as terrorism suspects.<sup>33</sup>

At first blush, the SVP laws appear far less prone to overbreadth problems than the registration laws. After all, the civil commitment process contemplates the sort of individualized determinations of dangerousness that Lester would like to see for registration. Yet, Janus and Prentky identify a disturbing analytical problem at the heart of the SVP analysis: the failure of the courts to develop any clear standards to govern the determination of which sex offenders in fact suffer from the sort of mental disorder that warrants civil commitment.<sup>34</sup> They argue that the courts have proven too quick to accept dubious new diagnoses that have been developed to support SVP petitions.<sup>35</sup> Ultimately, their analysis suggests that our civil commitment processes are quite a bit less scientific than might first appear.

### **D. Child Pornography Sentencing**

Although recent legislative responses to the sex crime panic have focused primarily on collateral sanctions (like registration) and other adjuncts to conventional criminal punishment (like mandatory treatment and civil commitment), the past decade has also witnessed an extraordinary increase in the length of prison terms for some sex offenses. Perhaps no category of offense has seen a more dramatic change in this regard than child pornography: in federal court, the average sentence for child pornography offenses increased from 36 months in 1994 to 109.6 months in 2007.<sup>36</sup>

In their contribution to this issue, Ian Friedman and Kristina Supler trace the evolution of the Federal Sentencing Guidelines pertaining to child pornography, which have played an important role in driving up the average sentence length. They find that the key changes in the Guidelines have emerged from congressional action, and not the idealized process of objective, research-driven deliberation by the Sentencing Commission.<sup>37</sup> They also find that the Guidelines amendments have been overbroad relative to their purpose: although Congress intends particularly to target mass producers and distributors of child pornography, important Guidelines amendments, such as the enhancement for use of a computer, end up affecting nearly all child pornography defendants, including the vast majority who are not commercial pornographers.<sup>38</sup> As Friedman and Supler observe, Congress’s actions have served to blur the sensible distinctions the Commission has attempted to draw between traffickers and simple possessors.<sup>39</sup>

### **E. Death Penalty for Sexual Assault of a Child**

There is no more dramatic means by which society signals its fear and loathing of criminal offenders than by putting them to death. But the Supreme Court’s Eighth Amendment jurisprudence plainly

takes capital punishment off the table for the overwhelming majority of sex offenders who do not kill. However, certain aspects of the Court's 1977 decision in *Coker v. Georgia* suggested that an exception might be made for sexual assault of a child.<sup>40</sup> That possibility remained largely unexplored until 1995, when—concurrent with the proliferation of SVP and registration statutes—Louisiana adopted the first in a new round of state laws that authorized capital punishment for sexual assault of a child.<sup>41</sup> Despite the doubtful constitutionality of such measures, five other states then followed Louisiana's lead.<sup>42</sup> However, in an unusually controversial 5–4 decision in June 2008, the Supreme Court held that the Constitution does not permit capital punishment for sexual assault of a child when the crime did not result, and was not intended to result, in the death of the victim.<sup>43</sup> This decision in *Kennedy v. Louisiana* marks one of the few instances when the Court has drawn a clear limitation on the power of legislatures to increase the harshness of the sanctions imposed on sex offenders.

Coverage of *Kennedy* rounds out this issue of *FSR*. Mary Graw Leary critiques aspects of the Court's reasoning, finding subtle shifts from other recent Eighth Amendment cases.<sup>44</sup> Perhaps most notably, as Leary observes, the Court laid considerable emphasis on concerns regarding whether the child victims themselves would be ill-served by the new capital punishment statutes.<sup>45</sup>

The argument that victims would actually be harmed by the Louisiana law was developed in an amicus brief, reprinted here, that was submitted on behalf of the National Association of Social Workers and other organizations.<sup>46</sup> They contended, among other things, that the death penalty for child rape would worsen the underreporting of child abuse, increase the incentives for child molesters to kill their victims, and magnify the trauma suffered by child victims while participating in the criminal justice system.

On the other side of the case, we also reprint an amicus brief filed on behalf of Missouri Governor Matt Blunt and Members of the Missouri General Assembly, and another brief filed on behalf of a group of states. These briefs nicely exemplify much of the recent political discourse regarding sex offenses. Governor Blunt's brief, for instance, emphasizes one particular, outrageous case of child sex abuse.<sup>47</sup> Of course, much of the recent sex offender legislation has been driven by intense public concern over a small number of high-profile cases, as indicated by the curious habit of naming the statutes after children whose victimization has elicited widespread public outrage (including the Adam Walsh Act itself).<sup>48</sup> Meanwhile, the states' brief articulates the view of sex offender exceptionalism that has fueled the wave of innovative legislative responses across the past two decades: "Violent child rape is unique. No other crime inflicts comparable damage. And no other crime requires the peculiar depravity manifested by those who rape small children."<sup>49</sup>

#### **F. Still Panicking?**

Jenkins suggested that periods of sex crime panic are marked by legislative responses that "cause harm in areas having nothing to do with the original problem and that divert resources away from measures which might genuinely assist in protecting children."<sup>50</sup> Such would indeed seem to be the pattern in recent years. Society is rightly outraged by the horrific crimes committed against children by notorious sex offenders like Earl Shriner (whose rape and murder of a young boy in 1989 prompted the state of Washington to adopt the first of the recent wave of civil commitment and registration laws<sup>51</sup>), but there is reason to doubt whether the vast outpouring of legislation over the past two decades has actually done much to protect children from sexual violence—which is far more often perpetrated by relatives and acquaintances than by shadowy strangers like Shriner.<sup>52</sup> Laws seeking to protect us from unknown sources of danger in our communities, such as registration and notification laws, divert attention and resources from more important threats to children. And our authors also suggest a number of other ways that recent legislation may prove counterproductive, for instance, measures that stigmatize and marginalize sex offenders may undermine their prospects for rehabilitation, while increased penalties for sex offenses may exacerbate the underreporting of intrafamilial sexual violence. And this is to say nothing of the erosion of constitutional rights, which may prove difficult to contain to the sex crimes area.

Perhaps nothing better illustrates the ironies of the panic-driven response than the Walsh Act's extension of registration requirements to juvenile offenders. Although adopted specifically in order to protect young people,<sup>53</sup> the Walsh Act imposes damaging, long-term stigma on a large class of young people through the expanded registration regime.<sup>54</sup> Research suggests that juvenile sex offenders are very different than the Earl Shriners of the world: recidivism rates are low and rehabilitative prospects are high.<sup>55</sup> But the social marginalization that results from registration seems

unlikely to contribute to the positive long-term prospects for these offenders. Indeed, there seems a real risk that registration will have precisely the opposite effect for some of them, possibly leading to more, not less, sexual victimization over the long run.<sup>56</sup>

## II. Sex Offenses versus Crack Offenses: A Tale of Two Panics

Sex crimes were not the only source of panic in the mid-1980s. Crack cocaine hit many of America's major cities at about the same time, seemingly accompanied by a surge in drug-related violence.<sup>57</sup> By June 1986, when college basketball star Len Bias died of an overdose of drugs—mistakenly reported in the media at the time as a crack overdose<sup>58</sup>—a crack panic was in full swing. Although even the experts understood little about the association between crack and violence,<sup>59</sup> Congress rushed to enact legislation premised on the belief that the crack form of cocaine represented a much greater threat to public safety than the powder form.<sup>60</sup> In their haste, legislators dispensed with hearings and other aspects of the typical legislative process.<sup>61</sup> There ensued a “bidding war” between Democrats and Republicans, and between the House and Senate, over how tough the new crack mandatory minimum sentences would be, with the now-infamous 100:1 ratio emerging from a process characterized by one of the participants as “pulling numbers out of the air.”<sup>62</sup> In all of this, no apparent consideration was given to the possibility that the harsh effects of the new sentencing law would be borne disproportionately by minorities.<sup>63</sup> On the contrary, even Democrats viewed the mandatory minimums as a benefit for minority communities.<sup>64</sup>

Although Congress followed the 1986 mandatory minimums with a new mandatory minimum for simple possession of crack in 1988,<sup>65</sup> signs that the crack panic was receding began to appear within a few years. A 1993 Sentencing Commission study criticized the 100:1 ratio in crack/powder sentencing and demonstrated that it was producing dramatic racial disparities.<sup>66</sup> In 1995, the Commission recommended equalizing the ratio—a position that was initially supported by Attorney General Reno.<sup>67</sup> Although Congress blocked equalization that year, the Commission and the administration continued to support a large reduction in the crack-powder disparity through the late 1990s.<sup>68</sup> Finally, in 2007, the Commission succeeded in amending the crack sentencing guidelines to soften the 100:1 ratio without congressional interference, and, in an unusually strong repudiation of the earlier policy, made the amendment retroactive.<sup>69</sup> Meanwhile, at the state and local level, many jurisdictions have rejected mandatory minimum sentences for drug crimes that were enacted during the panic years of the 1980s and early 1990s,<sup>70</sup> or have otherwise made significant shifts from punitive to treatment-oriented approaches to drug abuse.<sup>71</sup> None of this is to say that crack sentencing in America has become a model of restraint and rationality, but we have clearly come a long way since 1986.

So why has the current sex crime panic proven so much more durable than the crack panic that emerged at about the same time in the 1980s? Many factors have doubtlessly contributed to the different direction of these panics, and identifying and assessing all of them lies well beyond the scope of these Editor's Observations. However, in the remainder of this Part, I would like to suggest three potentially significant differences between the panics, the consideration of which may help to illuminate the current state and future direction of the sex crime panic.

First, there can be no doubt that the history of the crack panic has been heavily influenced by its racial dimensions. African-American politicians initially supported tough sentences for crack offenders because crack-related violence disproportionately affected African-American communities. But then opposition to 100:1 emerged out of a growing awareness in the early 1990s that the tough crack sentences were contributing to dramatic racial disparities in prison populations. As the crack issue became increasingly racialized, it is possible that the nation's racial anxieties—which were at something of a peak in the early 1990s, during the era of the Rodney King trial and the subsequent Los Angeles riots—actually helped to fuel the crack panic in white America. But, given the nation's particular historical and constitutional commitment to racial equality—at least at the level of rhetoric—sentencing laws that produced wide incarceration disparities were bound to become a major source of embarrassment across the racial divide. And perhaps it is no accident that 100:1 was finally softened at almost exactly the same time that Barack Obama emerged as a serious candidate for president: both events speak to real progress in advancing beyond the intense racial polarization of the 1990s. This much, in any event, is clear: the rhetoric of racial justice, which has such powerful resonance in our political culture, served to contain and eventually diminish some of the pernicious effects of the crack panic, but has played no apparent role in the sex crime panic. In time, it is possible that the sex crime issue will also acquire a civil rights dimension—specifically, to the extent that the laws are seen as targeting relatively harmless sexual nonconformists on the basis of orientations

over which they have little control—but it is unlikely that these sorts of objections will ever acquire the force of the racial objections to the crack laws.

Second, in the mid-1990s, as the crack panic began to lose steam, the sex crime panic was reenergized by a new—and, to some, quite threatening—social phenomenon: the increasingly pervasive presence of the Internet. The Internet brought an unprecedented ease of access to sexually explicit materials, including those featuring children, and offered new opportunities for predators to make connections with potential underage sex partners. Fears that the Internet was making sexual exploitation and assault easier and more profitable were no doubt exacerbated in some quarters by a general sense of unease with the new technology—the Internet provided means to circumvent traditional sources of information and authority, rendered old methods of commerce (and the jobs dependent on them) obsolete, facilitated constant communication to and among teenagers outside the watchful eyes of parents, and generally seemed a lawless and disordered space populated by exhibitionists, con artists, outrage-mongers, freaks, geeks, and hardened nonconformists of all sorts. A desire to tame this new Wild West is, I suspect, an important subtext of many recent expressions of the sex crime panic. In any event, there can be no doubt that the Internet/sex crimes nexus has been a special point of legislative and law enforcement focus in recent years. I have already noted, for instance, Internet stings<sup>72</sup> and a crackdown on child pornography that almost exclusively targets those who receive or distribute images by use of a computer.<sup>73</sup> On the legislative front, the Keeping the Internet Devoid of Sexual Predators Act of 2008 requires registered sex offenders to disclose their Internet identifiers and establishes a mechanism for social networking sites to determine which of their users are on the registry.<sup>74</sup> Indeed, as a result of public pressure, MySpace and Facebook.com were already trying to purge registered sex offenders even before passage of the new law.<sup>75</sup> (The recent announcement that 90,000 sex offenders had been purged from MySpace was greeted by one state attorney general in a characteristically alarmist fashion: “Almost 100,000 convicted sex offenders mixing with children on MySpace . . . is absolutely appalling and totally unacceptable. For every one of them, there may be hundreds of others using false names and ages.”<sup>76</sup>) For its part, the Walsh Act also had an Internet focus through provisions that required states to put their sex offender registries online for public use (which might be seen as a symbolic effort to bring social control to the Internet by making it a site for public shaming). All of this suggests that fears of new technology are helping to fuel the sex crime panic, and that the panic may continue for as long as the pace of technological change is perceived to be outstripping the capacity of society to regulate the new forms of communication and commerce.

Third, the current sex crime panic has been intertwined from the start with the victims’ rights movement. The roots of the panic may be traced back to the insistence of feminists in the 1970s that the sexual victimization of girls and young women was far more common and damaging than commonly supposed.<sup>77</sup> Victims, as Jenkins observed, “responded enthusiastically to calls for self-assertion and mobilization.”<sup>78</sup> A politically powerful movement emerged from their demands that the criminal justice system both pursue sexual assaults more aggressively and treat victims with greater sensitivity.<sup>79</sup> The contemporary victims’ rights movement, of course, has a broader focus than just sexual victimization, but the movement’s critique of the criminal justice system likely draws special force from perceptions that the system traditionally treated rape victims in a callous and damaging manner and from the movement’s concomitant ability to sound feminist themes of empowerment. In any event, the current sex crime panic seems to differ from its predecessors in the extent to which victim experiences are emphasized,<sup>80</sup> and there is likely some sort of mutually reinforcing dynamic between public attitudes toward sex crimes and public attentiveness to the needs of crime victims more generally. By contrast, while no one doubts that crack has had a devastating effect on many lives, the mechanisms of victimization are less direct than in the context of sexual assault, and the war on crack does not seem to have drawn any particular force from the victims’ rights movement. Indeed, I have suggested elsewhere that the victims’ rights movement may at some level be antithetical to the philosophical underpinnings of the broader war on drugs.<sup>81</sup> Increasing attentiveness to victim needs may thus draw attention away from drug crime and enhance interest in sexual assault and exploitation as targets of legislative concern.

### III. Responding Appropriately to Panics

Cycles of social panic seem a constant in American culture, from the Salem witch trials to the current anxieties regarding terrorists, child molesters, and illegal immigrants. When an issue becomes a matter of intense public concern, it is unrealistic to expect legislators to await definitive analysis by

experts and lengthy deliberative processes. Laws will be adopted, and some of them will eventually appear excessive or misdirected. Most troubling, given the nature of the liberty interests at stake, is the over-hasty creation of new felony-level crimes and mandatory minimum sentences. Once enacted, it is difficult to repeal such criminal laws, as demonstrated by the stubborn persistence of the 1986 and 1988 crack mandatory minimums against both the great weight of expert opinion and a widespread public recognition of the laws' pernicious racial effects. Getting rid of a bad law normally requires passage of a new statute, and, as scholars of the American legislative process have long recognized, in the absence of inflamed public opinion, it is generally easier for a minority to kill a new legislative proposal than for a majority to secure its adoption.<sup>82</sup> In light of their particular visibility and symbolic importance, it may be even harder to repeal criminal laws than most other types of statutes. For instance, legislative efforts to adjust the 100:1 ratio have been defeated by claims that doing so would send "the wrong message to young people."<sup>83</sup> In a world in which legislative proposals are evaluated based primarily on their symbolic content in either sending a message of toughness or lenience, proposals to repeal or soften mandatory minimums will always face rough sledding.

Legislators who wish to respond to strong public sentiment but who are troubled by the track record of statutes adopted in times of panic should consider a legislative device that reverses the forces of legislative inertia: the sunset provision. When adopted, new criminal penalties can be set to expire within a given period of time. The history of the crack panic, as well as the earlier sex crime panics, suggests that ten years may be an ideal period of time to permit public passions to subside. A decade should also be a good amount of time to permit rigorous evaluation of the effectiveness of new laws. For instance, as Janus and Prentky point out in this issue, the spread of civil commitment laws was rapid in the 1990s but slowed dramatically this decade as the fiscal burdens of commitment became clearer.<sup>84</sup> In the current budgetary climate, one wonders how many state legislatures would now be happy to see civil commitments die out quietly under the terms of a judicious sunset provision.

To be sure, in the panic atmosphere, a sunset provision may be criticized as watering down the legislature's condemnation of whatever class of offense or offenders is being targeted. On the other hand, the adoption of a sunset does not necessarily mean there will be a weakening of the legal response to the subject of current public outrage. Indeed, if public concern remains high over an extended period of time and analysis shows that tough penal responses are helpful, then the imminent expiration of one set of penalties may actually facilitate the enactment of even higher penalties. But, if public concern wanes or penal responses are shown to be ineffective, it should be made as easy as possible to redirect scarce criminal justice resources in more fruitful directions.

Panics seem inevitable, but there may be politically feasible means to minimize their pernicious long-term effects on criminal law. I suggest sunset provisions as just one possibility. Sentencing commissions and guidelines, for instance, may also have a helpful role to play. In any event, the current flowering of legislative activity around the sex offense issue provides a good opportunity to develop and study new mechanisms to achieve a better balance between the need for legislative responsiveness to public outrage and the need for a humane and cost-effective criminal justice system.

## Notes

<sup>1</sup> PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 6-7 (1998).

<sup>2</sup> *Id.* at 7.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 232.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 232-33.

<sup>7</sup> Pub. L. No. 110-400, 122 Stat. 4224 (2008).

<sup>8</sup> Mo. REV. STAT. § 589.426 (2008).

<sup>9</sup> Pub. L. No. 109-248, 120 Stat. 587 (2006).

<sup>10</sup> See, e.g., Tom Kertscher, *Racine Mayor Arrested in Sex Sting*, MILW. J. SENTINEL, Jan. 14, 2009. Wisconsin's Internet Crimes Against Children Task Force, which was formed in 1999, averaged twenty arrests per year over its first six years, but then arrested more than 100 people per year in the most recent three years for which data are available. *Id.*

<sup>11</sup> In Fiscal Year 2007, 1,084 federal defendants were sentenced under § 2G2.2 of the Federal Sentencing Guidelines, which is the basic guideline for possessing or distributing child pornography. U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, 2007, tbl. 17 (2008). This was the eighth most frequently applied Chapter Two Guideline, ranking just below the robbery guideline, and well above the combined totals for the guidelines for murder, manslaughter, and assault.

<sup>12</sup> Richard G. Wright, *From Wetterling to Walsh: The Growth of Federalization in Sex Offender Policy*, 21 FED. SENT. REP. 124 (2008).

<sup>13</sup> *Id.* at 124.  
<sup>14</sup> *Id.* at 128.  
<sup>15</sup> *Id.*  
<sup>16</sup> *Id.* at 127.  
<sup>17</sup> *Id.*  
<sup>18</sup> Joseph L. Lester, *Brandishing the Mark of Cain: Defects in the Adam Walsh Act*, 21 FED. SENT. REP. 107 (2008).  
<sup>19</sup> *Id.* at 109.  
<sup>20</sup> *Id.*  
<sup>21</sup> *Id.*  
<sup>22</sup> Corey Rayburn Yung, *The Sex Offender Registration and Notification Act and the Commerce Clause*, 21 FED. SENT. REP. 123 (2008).  
<sup>23</sup> *Id.* at 123.  
<sup>24</sup> Michael Petrunik et al., *American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness*, 21 FED. SENT. REP. 111 (2008).  
<sup>25</sup> *Id.* at 119.  
<sup>26</sup> Mary Ann Farkas & Gale Miller, *Sex Offender Treatment: Reconciling Criminal Justice Priorities and Therapeutic Goals*, 21 FED. SENT. REP. 78 (2008).  
<sup>27</sup> *Id.* at 81.  
<sup>28</sup> *Id.* at 80.  
<sup>29</sup> Wright, *supra* note 12, at 130.  
<sup>30</sup> Eric S. Janus & Robert A. Prentky, *Sexual Predator Laws: A Two-Decade Retrospective*, 21 FED. SENT. REP. 90, 91, 2 (2008).  
<sup>31</sup> *Id.*  
<sup>32</sup> *Id.*  
<sup>33</sup> *Id.* at 95.  
<sup>34</sup> *Id.* at 93.  
<sup>35</sup> *Id.*  
<sup>36</sup> Ian N. Friedman & Kristina W. Supler, *Child Pornography Sentencing: The Road Here and the Road Ahead*, 21 FED. SENT. REP. 83, 1 (2008) (reporting data compiled by Troy Stabenow).  
<sup>37</sup> *Id.* at 84.  
<sup>38</sup> *Id.*  
<sup>39</sup> *Id.*  
<sup>40</sup> 433 U.S. 584 (1977).  
<sup>41</sup> LA. STAT. ANN. § 14:42 (2007).  
<sup>42</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).  
<sup>43</sup> *Id.*  
<sup>44</sup> Mary Graw Leary, *Kennedy v. Louisiana: A Chapter of Subtle Changes in the Supreme Court's Book on the Death Penalty*, 21 FED. SENT. REP. 98 (2008).  
<sup>45</sup> *Id.* at 102.  
<sup>46</sup> The brief is reprinted at 21 FED. SENT. REP. 139 (2008).  
<sup>47</sup> The brief is reprinted at 21 FED. SENT. REP. 147 (2008).  
<sup>48</sup> The Walsh Act is also dedicated to several other child victims, many of whom have also had their own statutes named after them. Wright, *supra* note 12, at 124.  
<sup>49</sup> The brief is reprinted at 21 FED. SENT. REP. 145 (2008).  
<sup>50</sup> JENKINS, *supra* note 1, at 7.  
<sup>51</sup> ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE 14 (2006).  
<sup>52</sup> See *id.* at 46-47 (discussing data on frequency of different types of sex offenses).  
<sup>53</sup> See, e.g., Wright, *supra* note 12, at 126 ("Plain and simple, this legislation, I can say with certainty will save children's lives." (quoting then-Senator Joe Biden)).  
<sup>54</sup> See Janus & Prentky, *supra* note 30, at 91 ("[T]his [registration] requirement will fall especially heavy on juvenile sex offenders.").  
<sup>55</sup> *Id.*  
<sup>56</sup> Wright, *supra* note 12, at 128.  
<sup>57</sup> TED GEST, CRIME & POLITICS: BIG GOVERNMENT'S ERRATIC CAMPAIGN FOR LAW AND ORDER 118 (2001).  
<sup>58</sup> *Id.* at 119.  
<sup>59</sup> *Id.* at 118.  
<sup>60</sup> *Id.* at 120.  
<sup>61</sup> *Id.* at 119.  
<sup>62</sup> *Id.* at 120.  
<sup>63</sup> *Id.* at 121.  
<sup>64</sup> *Id.*  
<sup>65</sup> *Id.* at 122.  
<sup>66</sup> *Id.* at 126.  
<sup>67</sup> *Id.*  
<sup>68</sup> *Id.* at 127.  
<sup>69</sup> Press Release, U.S. Sent'g Comm'n, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), available at <http://www.uscc.gov/PRESS/rel121107.htm>.

- <sup>70</sup> Daniel F. Wilhelm & Nicholas R. Turner, *Is the Budget Crisis Changing the Way We Look at Sentencing and Incarceration?*, 15 FED. SENT. REP. 42-44 (2002).
- <sup>71</sup> Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 823-37 (2004).
- <sup>72</sup> See *supra* text accompanying note 10.
- <sup>73</sup> See *supra* text accompanying note 38.
- <sup>74</sup> Pub. L. No. 110-400, 122 Stat. 4224 (2008).
- <sup>75</sup> Jenna Wortham, *MySpace Turns Over 90,000 Names of Registered Sex Offenders*, N.Y. TIMES, Feb. 4, 2009.
- <sup>76</sup> *Id.*
- <sup>77</sup> JENKINS, *supra* note 1, at 126-30.
- <sup>78</sup> *Id.* at 234.
- <sup>79</sup> *Id.* at 127.
- <sup>80</sup> *Id.* at 234.
- <sup>81</sup> Michael M. O'Hear, *Victims and Criminal Justice: What's Next?*, 19 FED. SENT. REP. 83, 86-88 (2006).
- <sup>82</sup> WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 66-67 (3d ed. 2001).
- <sup>83</sup> Gest, *supra* note 57, at 127.
- <sup>84</sup> Janus & Prentky, *supra* note 30, at 91.