A Victim-Centred Evaluation of the Federal Sex Offender Registry

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In the author's view, the 2004 Sex Offender Information Registration Act *allowed too many offenders to avoid inclusion in the federal sexual offender registry. This problem was addressed by 2011 amendments, which make registration mandatory upon conviction of a listed sexual offence even if the Crown does not seek it, and eliminates the power of judges to except individual offenders from registration. The author assesses the current statutory regime from the standpoint of women and children, who are the majority of sexual assault victims. She concludes that the 2011 amendments are likely to further both the preventive and investigative objectives of the registry. From an analysis of 155 cases dealing with applications for judicial exception under the pre-2011 regime, she identifies one overriding problem: the infiltration of sexual assault myths and stereotypes into judicial reasoning. She cautions that in hearing challenges to the constitutionality of the registry's provisions as they now stand, appellate courts should not be taken in by arguments premised on unrealistic hypothetical instances of unfairness to the accused. She concludes by calling for further research on how effective the registry is in attaining its goals.*

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Introduction

In December 2004, the federal *Sex Offender Information Registration Act* (*SOIRA*) came into force.[1] This statute created a national registry of individuals convicted of criminal sexual offences. Offenders convicted of a listed offence once *SOIRA* came into force, or who were serving a sentence of imprisonment on that date, can be ordered by a judge to register under the Act. Registration is for a period of 10 years to life, depending on the circumstances, and requires an offender to provide certain personal information to police and to update that information from time to time. The registry is not accessible to the public and is intended to serve as a police investigatory tool.

While registration under *SOIRA* was intended to be mandatory, the Act did contemplate the possibility of judicial exemptions or exceptions from registration,[2] and the possibility that registration might be terminated before the expiry of the statutory term.[3] *SOIRA* applies to offenders who are convicted and also to those found not criminally responsible by reason of mental disorder.[4] It does not apply to young

1. SC 2004, c 10.

2. The term "exemption" is used in s 490.023 to refer to those offenders who were serving a sentence at the time *SOIRA* came into force. *Criminal Code*, RSC 1985, c C-46. In contrast, "exception" was used in the former s 490.012(4) for those convicted and sentenced after the Act's passage. *Ibid*, as amended by *Protecting Victims From Sex Offenders Act*, SC 2010, c 17, s 5. Both sections required the accused to establish gross disproportionality to avoid registration. The terms seem to be used interchangeably by judges and commentators, but the term "exception" is used in this article because the cases discussed deal with the former s 490.012(4).

3. *Ibid*, ss 490.016, 490.026 (it does not appear that the courts have considered any applications for termination).

4. *Ibid*, s 490.012.

offenders who are given a youth sentence, nor does it likely apply to any accused persons who are granted a conditional or absolute discharge.[5]

SOIRA exists alongside the Ontario provincial sex offender registry, which was created in 2000 by *Christopher's Law*.[6] This overlapping but distinct registry continues in effect for offenders who reside in Ontario.[7] Both registries create offences punishable by fine or imprisonment for offenders who fail to meet their registration or reporting obligations.[8] In April 2009, the federal registry contained about 19 000 entries and the Ontario registry about 12 000.[9]

In April 2011, Bill S-2 came into force, amending certain provisions of *SOIRA*.[10] One goal was to give police the authority to use the information in the registry for preventative purposes in addition to

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5. See *ibid* at s 490.011(2) (registration provisions speak of a "person who is convicted"); *R v Dyck*, 2008 ONCA 309 at para 135, 90 OR (3d) 409 [*Dyck* Ont CA] (the Ontario Court of Appeal accepted that this does not include discharges); *R v BAM* (2007), 322 NBR (2d) 308, 829 APR 308 (Prov Ct) (registration not available where accused discharged). But see *DK v R*, 2009 QCCA 987 at para 51, 252 CCC (3d) 332 (the Quebec Court of Appeal held that a conditional discharge and an order for registration are not mutually inconsistent).

6. *Christopher's Law (Sex Offender Registry), 2000*, SO 2000, c 1.

7. Some other provinces appear to maintain less formal databases of high risk offenders (for sexual and non-sexual crimes) but not in a manner that requires offender compliance. See e.g. Government of Alberta, *High Risk Offenders Listing*, online: Government of Alberta Solicitor General and Public Security <https://www.solgps.alberta.ca> [Alberta Database]; Government of Saskatchewan, *Public Notification List*, online: Government of Saskatchewan Corrections, Public Safety and Policing <http://www.cpsp.gov.sk.ca/PN-List> [Saskatchewan Database].

8. *Criminal Code*, *supra* note 2, s 490.031 (establishing a maximum penalty of $10 000 and/or two years imprisonment for conviction on indictment, and a maximum penalty of $10 000 and/or six months imprisonment on summary conviction); *Christopher's Law*, *supra* note 6, s 11 (establishing a maximum penalty of $25 000 and/or one year imprisonment for a first conviction and a maximum penalty of $25 000 and/or two years less a day imprisonment for a second conviction).

9. Library of Parliament, Legislative Summary, *Bill S-2: Protecting Victims from Sex Offenders Act*, No 40-3-S2-E, by Tanya Dupuis (Ottawa: Parliamentary Information and Research Service, 2010) at 3–4.

10. Bill S-2, *Protecting Victims from Sex Offenders Act*, 3rd Sess, 40th Parl, 2010 (assented to 15 December 2010), SC 2010, c 17.

investigative ones.[11] A second goal was to end the exclusion of eligible offenders from registration. The latter was accomplished by eliminating both judicial exceptions from registration and the discretion of prosecutors not to apply for registration.

The passage of the 2011 amendments makes this an opportune juncture to consider how well the federal registry has achieved its objectives in the first several years of its operation. This paper critically considers this question, with a particular focus on the case law on applications for judicial exceptions from registration.

In Part I, I consider the objectives of sex offender registries. I review the catalysts that led to the creation of separate registries and their procedural differences. Three distinct purposes are identified: investigation, prevention and shaming.

In Part II, I put forth two reasons why the federal sex offender registry can be characterized as under-inclusive: prosecutorial omission/discretion and judicial discretion. I first point out the problematic aspects of plea bargaining for sexual offences. I next analyze the case law on applications for judicial exceptions from the registry under the 2004 statutory scheme. These cases, now a closed set given the repeal of the exception provisions by Bill S-2, have generally been overlooked by legal scholars. Yet they provide a window into judicial thinking about the relative seriousness of types of sexual offending, and show that the exercise of judicial discretion in the area of sexual assault is fraught with the persistence of problematic assumptions about what a "real" sex offender looks like. I argue that this decision-making is a largely unacknowledged problem of the sex offender registry and it ought to figure into our assessment of its success, and in any future evaluation of the constitutionality of the recent amendments that remove this discretion.

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11. A detailed criticism of the federal registry and its limitations can be found in a series of articles in Maclean's magazine by Michael Friscolanti. In one article in particular he asserts that the Liberal government in power at the time was openly reluctant to create such a registry. This disinterest was reflected in its refusal to use the more sophisticated software offered by Ontario and the extremely tight restrictions imposed on officers seeking to utilize the registry. Michael Friscolanti, "A National Embarrassment", *Maclean's* (9 January 2008), online: Maclean's <http://www.macleans.ca>.

In Part III, I consider the concept of stigmatization of the sex offender. I emphasize the dangers inherent in a judicial declaration that a particular offender is not a "real" sex offender, and explore whether the self-stigmatization imposed by registration may be an unacknowledged benefit of the registry.

In Parts IV and V, I discuss the recent amendments to *SOIRA* and consider whether their elimination of the exception is defensible. I make reference to the body of case law reviewed, which indicates that the type of gross disproportionality warranting a judicial exception under the former scheme is not evident.

Finally, in Part VI, I consider whether the amendments make *SOIRA* potentially vulnerable to a renewed constitutional challenge, and caution appellate courts on the use of hypotheticals in evaluating such challenges.

Much of the scholarly consideration of *SOIRA* dates from around the time of the registry's creation, comparing it to registries in other jurisdictions.[12] A few subsequent articles have considered particular aspects of the registry's application since its creation.[13] Most of the scholarship in both categories has been critical of the effects of such registries on offenders as well as sceptical about their benefits. While I am cognizant of arguments that focus on the rights of the offender, I want to consider *SOIRA* from a somewhat different perspective. Sexual assault is a gendered crime, and overwhelmingly an act of male violence against women and children that reflects and perpetuates inequality. Their interests ought to be considered when evaluating the sex offender registry. In this article, I ask if *SOIRA*, as it has been interpreted and applied, has furthered or undermined the interests of victims of sexual assault.

12. See e.g. Natalie Cuffley, "Tattooing Sex Offender on His Forehead" (2003) 6 CR (6th) 134; Heather Davies, "Sex Offender Registries: Effective Crime Prevention Tools or Misguided Responses?" (2004) 17 CR (6th) 156.

13. See e.g. Mercedes Perez & Anita Szigeti, "Sex Offender Information Registries and the Not Criminally Responsible Accused: Have We Cast Too Wide a Net?" (2008) 25 Windsor Rev Legal Soc Issues 69.

I. Objectives of Sex Offender Registries

In considering whether sex offender registries are successful or beneficial for actual and potential victims, it is helpful to identify what their goals might be. The federal registry, by providing updated details on an offender's residence, employment and other factors, offers police more information than could be gleaned through a simple criminal record or Canadian Police Information Centre check in cases where the offender is not subject to any other form of supervision (such as probation or a long-term offender designation). The purpose for which that information is being collected, however, can be described in different ways. That imprecision is evident from a brief comparison between the Ontario registry—the first registry in Canada—and its American predecessors.

Sex offender registries have existed in the United States since the 1940s, but became widespread in the 1990s after the passage of the *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act* (*Jacob Wetterling Act*) of 1994.[14] This federal law, named after an eleven-year-old boy who was kidnapped by a stranger at gunpoint and never found, required states to maintain sex offender registries. One of the most high-profile was the registry created in 1996 in New Jersey, under *Megan's Law*, which modified the *Jacob Wetterling Act* and mandated community notification along with registration.[15] The impetus for *Megan's Law* was the sexual assault and murder of a seven-year-old girl by her neighbour, who had previously been convicted of sexual offences against children. Her parents argued that if police had been able to monitor the offender's whereabouts, and had told them of his proximity to their home, they would have been able to protect their daughter from him.

14. 42 USC § 14071 (1994).

15. *Megan's Law* is an informal name given to laws in the United States, passed by all 50 states and the District of Columbia, requiring public notification regarding sex offenders. New Jersey was the first state to enact such a law in 1994. *Megan's Law*, NJ Stat Ann tit 2C §§ 7-1 to 7-11 (West 1994). See also *An Act to Amend the Violent Crime Control and Law Enforcement Act of 1994*, 42 USC § 13701 (1996) (the federal equivalent).

The campaign for sex offender registries soon spread to Canada. Victims' groups and law enforcement agencies lobbied the federal government for the creation of such a registry of Canadian sex offenders, and a particular crime in Ontario served as a catalyst for the creation of the first Canadian registry. Eleven-year-old Christopher Stephenson was sexually assaulted and murdered in 1988 by a convicted sex offender who was out on statutory release. He was held prisoner overnight before he was killed. The Brampton police did not know that the killer was staying in their city and, by the time he was identified as a suspect, Christopher was dead.[16]

The 1993 coroner's inquest into Christopher's death resulted in a jury recommendation to create a national registry of sex offenders that could be used by police, and Christopher's parents began to lobby for the creation of such a registry.[17] *Christopher's Law*, which came into force in 2001, applied to everyone in the province of Ontario who was convicted of a listed sexual offence, or who was serving a sentence for such an offence on or after the date the law came into force.[18] Registration was automatic, and there was no provision for judges to grant exceptions.[19] Failure to register or to update registration was made a provincial offence punishable by up to one year imprisonment. Registration was for a period of ten years to life, depending on the circumstances of the offence. The registry was not made available to the public.

Perhaps because their introduction is often spurred by particular crimes, it is not easy to identify a single or even a dominant purpose of these registries. One way to understand them is as a tool for investigation once an offence has taken place. In other words, where a woman or child reports a sexual assault but cannot identify the assailant, police can structure their investigation to include known sex offenders

16. Paulette Peirol & Murray Hogben, "Child Rapist Killed in Prison", *The Kingston Whig-Standard* (4 Jan 1992) 1.

17. Ontario, Legislative Assembly, Standing Committee on Justice and Social Policy, "Bill 31, Christopher's Law (Sex Offender Registry), 1999" in *Committee Transcripts*, 37th Leg, 1st Sess (28 February 2000).

18. *Christopher's Law*, *supra* note 6, s 2.

19. Offenders granted a pardon for all listed offences are removed from the registry and exempted from future reporting requirements.

in the immediate area. In cases where the offender is identified but his whereabouts are unknown, the registry may provide police with information that can be used to track him down. Even in the most difficult abduction cases in which the abductee is missing and the offender and his whereabouts are unknown, a registry may give police a starting point in identifying potential suspects in the area.

Sex offender registries may also serve a preventative purpose. Collecting information about offenders' residences, vehicles and employment might allow the police to monitor the actions of convicted offenders with a view to preventing further offences, thereby reducing recidivism by some offenders.

If the legislature takes the step of making the registry public, its potential uses expand further. With a public registry, it is argued that members of the public will have information that they can use to better protect themselves and their children from known sex offenders. In addition, individuals contemplating a sexual crime may be deterred by the risk of finding themselves in a public registry. Prevention (in both of these forms) seems to have been the primary motivation for the passing of *Megan's Law* and other similar US registries, as is indicated by the legislative requirement that they be publicly accessible.[20]

Of course, investigatory and preventative purposes are not always separate and distinct. In the case of the crime that acted as the catalyst for *Christopher's Law*, both purposes might have been served to some degree by a sex offender registry. Such a registry is primarily investigative in the sense that its use is triggered by the report of an abduction, but it can also be preventative in that it may allow the police to reach an abducted child before he is seriously injured or killed. Furthermore, apprehending offenders who are unlawfully at large also may prevent them from committing crimes against future victims. The

20. The *Adam Walsh Child Protection and Safety Act* requires American states to collaborate on the creation of a national internet registry of sex offenders. 42 USC § 16901 (2006). The issues that would be raised if the Canadian registries were made public are not considered in detail in this article. Alberta and Saskatchewan do release information on a limited number of high-risk offenders in the community. These notifications are not limited to sexual offences and the information released does not include the offender's address or place of employment. See Alberta Database, *supra* note 7; Saskatchewan Database, *supra* note 7.

current preamble to *Christopher's Law* reflects this dual purpose: "The people of Ontario further believe that a registry of sex offenders will provide the information and investigative tools that their police forces require in order to prevent and solve crimes of a sexual nature".[21]

Sex offender registries are also perceived as a form of shaming. If a registry is public, that shaming function is of course magnified, and may take the form of shunning by the community or of other actions designed to isolate or banish the offender. But even a registry available only to police serves to formally and officially label an offender as a "registered sex offender". As is clear from the cases considering applications for exceptions, the personal stigma of registration is one that many offenders strain to avoid, even if the fact of registration is not made public in Canada.

Against this backdrop of the registry's scope and objectives, we can consider whether it is effective in meeting some or all of those objectives, and whether it helps the women and children who make up the large majority of victims of sexual crimes. This in turn raises two questions about the registry's efficacy. First, concerning its *internal* efficacy, whether all of the offenders that should be registered are registered and whether they comply with the requirements of the law. Second, concerning its *external* efficacy, whether it achieves some or all of its objectives and whether it has unjustifiable negative consequences for victims. To answer these questions I consider both the extent and sources of under-inclusion in the registry. I also consider the available evidence of the registry's harmful and salutary effects.

II. Under-Inclusiveness

A. Plea Bargaining and Failure to Apply for a Registration Order

Before the 2011 amendments in Bill S-2, there were a number of ways for offenders charged with a designated offence to avoid entry into the federal sex offender registry. One such way, not precluded by the amendments, is plea bargaining. If the accused is charged with sexual

21. *Christopher's Law*, *supra* note 6, Preamble.

assault, he may offer to plead guilty to the included offence of common assault instead, thus escaping registration. Other offences may not be open to such a compromise; for example some sexual offences against children do not have any non-sexual included offence. In such cases, the offender might have offered to plead guilty to the sexual offence on the understanding that the Crown would not seek registration. Before the new amendments, the judge was dependent on an application by the Crown for registration of the offender, and could not order it on her own motion.

The incentive to offer a guilty plea to a non-sexual offence exists independently of the registry; the offender may want to avoid a criminal record for sexual offences, which may limit his employment or volunteer activities or open the door to a future designation as a long-term offender. Certainly the registry, with its ongoing reporting requirements, would seem to provide some added incentive for such a plea. It is hard to know how often plea agreements of this sort are reached. The answer may depend in part on Crown policy in particular jurisdictions. A deputy commissioner of the RCMP did publicly identify the practice of plea bargaining as a barrier to the completeness of the registry.[22]

One recent US study has considered the impact of increasingly accessible sex offender registries on judicial and prosecutorial decision-making.[23] Elizabeth Letourneau and her co-authors considered statistical information from South Carolina during three five-year periods: immediately prior to the creation of the registry, during its first years of implementation, and after amendments had provided for public internet access to it. The data indicated that the implementation of the registry and its later publication on the internet were each associated with a significant increase in the probability of charges being reduced from

22. Senate, Standing Senate Committee on Legal and Constitutional Affairs, "Bill S-2, An Act to Amend the Criminal Code and Other Acts (*Protecting Victims From Sex Offenders Act*)" in *Proceedings*, 40th Parl, 3rd Sess, No 4 (21 April 2010) (Inspector Pierre Nezan, Officer in Charge, National Sex Offender Registry) [Legal and Constitutional Affairs]. See also Public Safety Canada, "Strengthening the Sex Offender Registry" (1 June 2009), online: Public Safety Canada <http://www.publicsafety.gc.ca>.

23. Elizabeth J Letourneau et al, "The Effects of Sex Offender Registration and Notification on Judicial Decisions" (2010) 35:3 Crim Just Rev 295.

sexual to non-sexual offences. This practice, the authors noted, raises several concerns. For example, it may reduce the likelihood that an offender will receive appropriate sex-offender treatment.[24] There was also some evidence that, once online notification was instituted, judges were less likely to convict for sexual offences that did go to trial.[25]

While no similar studies exist in Canada, we do know that of all eligible offenders (those convicted of one or more listed offences) only about 58% have so far been ordered to put their names in the federal registry.[26] Only a small portion of that gap is based on judicial exceptions, which are discussed in more detail below. It stands to reason that most of the gap is based on the exercise by Crown counsel of the discretionary power not to seek registration—a power they had until the 2011 amendments. That practice may have been inadvertent, or it may have been a deliberate choice on the part of the Crown. If it was deliberate, it may have been based on Crown counsel's own judgment of the seriousness of the offence, or it may have been a *quid pro quo* for concessions by the accused.

B. Judicial Exceptions

While *SOIRA* provided for the possibility of a judicial exception from registration until 2011, the availability of the exception was drafted in narrow terms:

> The court is not required to make an order under this section if it is satisfied that the person has established that, if the Order was made, the impact on them, including on their privacy and liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigations of crimes of a sexual nature, to be achieved by registration of information.[27]

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24. *Ibid* at 312.

25. *Ibid.*

26. Senate, Standing Senate Committee on Legal and Constitutional Affairs, "Bill S-2, An Act to Amend the Criminal Code and Other Acts (*Protecting Victims From Sex Offenders Act*)" in *Proceedings*, 40th Parl, 3rd Sess, No 3 (14 April 2010).

27. *Criminal Code*, *supra* note 2, s 490.012(4) as amended by *Protecting Victims From Sex Offenders Act*, SC 2010, c 17, s 5.

The federal registry came into force at a time when the constitutionality of the Ontario registry—which did not provide for exceptions—was still in doubt.[28] The language of gross disproportionality echoes the test for when a law violates the principles of fundamental justice under section 7 of the *Charter*.[29]

The balancing process under section 490.012(4) had two parts. The first was a consideration of the effect of registration on the offender's liberty and privacy interests. Since the registry is not public, the effect on the offender came from his having to periodically update his personal information and report travel away from his residence, and more generally from him having to disclose that information to police. It is hard to imagine how that would not affect offenders equally in almost all cases, although in a few cases offenders have argued that their itinerant or remote employment or residence present special hurdles to registration.[30] The other part of the balancing test was a consideration of the social benefit of registration. It was this part of the test that turned out to offer the most fertile ground for judicial interpretation and that resulted in a variety of approaches from judges faced with applications for exceptions.

I examined a total of 155 cases involving applications for exceptions under the now-repealed section 490.012(4) in which judges gave written reasons for allowing or dismissing the application. The period covered is from the registry's inception in December 2004 until April 2011, when the exceptions were eliminated by statute.[31] Taken as a whole, these

28. *Dyck* Ont CA, *supra* note 5 (the constitutionality of the provincial registry was upheld by the Court).

29. *R v Malmo-Levine*, 2003 SCC 74 at para 169, [2003] 3 SCR 571.

30. See *R v Casaway*, 2005 NWTSC 37 (available on QL) (registration ordered for Aboriginal offender who spent time on the land); *R v LS*, 2005 BCPC 353 (available on QL) (registration ordered for offender with itinerant lifestyle in remote locations).

31. This is the point at which Bill S-2 came into force and eliminated the exception. These amendments are discussed below. With the exception of the few cases still in process at the time of the amendments, this set of cases should include all available cases in English and French in which judges made a decision as to whether an exception under the former s 490.012(4) was merited. These include a few cases where the accused did not seek an exception but the judge expressed an opinion on whether the threshold was met regardless. Where cases were appealed, they are treated as one decision and only the final decision is counted, although the trial reasons may be referred to or discussed. I excluded

decisions provide some interesting insight into how judges understand the seriousness of various kinds of sexual assaults and the purpose of the registry. More specifically, they show the way in which rape myths can creep back into judicial decision-making even after conviction and sentencing.

(i) Concerns with Over-Inclusion and the "Predatory Stranger"

The first applications for exceptions, decided in 2005 and 2006, show judges taking a variety of approaches to the new provision. In 2005, there were 38 applications for exceptions from registration in which reasons were produced. Exceptions were granted in 14 cases, or 37% of the time. In 2006, there were 45 applications and 16 exceptions granted (36%). In that time period, courts often considered both the gravity of the offence committed and the degree of risk of recidivism in determining whether the offender should be excepted from registration. Exceptions were frequently granted when the court was of the view that it would be overly harsh to designate the offender as a "sex offender" through formal registration. Courts also expressed concern that registration would heighten stigma and impede rehabilitation.

Significantly, we also see cases in which exceptions were granted on the basis that an over-inclusive registry might actually be less useful to police, or that the particular offender before the court was not the type of person the registry was designed to include. Beginning with *R. v. Have*, an influential Ontario case, a line of decisions found that the aim of the registry was to assist police in the investigation of crimes by "predatory strangers", and offenders who did not fit this model should be excepted.[32]

In *Have*, the offender pleaded guilty to two counts of possession of child pornography after police seized a large quantity of files from his computer. The Crown sought registration on the second count, which involved an offence committed after the coming into force of *SOIRA*. Justice Duncan held that the impact of registration on offenders was

cases that dealt only with constitutional challenges to *SOIRA* or its applicability (rather than the merits of an exception) from this group.

32. 2005 ONCJ 27, 194 CCC (3d) 151.

substantial, given that the information provided was otherwise private, that the registration lasted for ten years and that the obligation was subject to enforcement and prosecution. He also considered that registration was a source of stigma even if the registry was not made public:

> [T]here is substantial stigma attaching to an individual who is subject to registration, even if only in his mind. It may undermine treatment, rehabilitation and re-integration into the community. Finally, I would add that there may be a fine line between the legitimate police "tracking" of offenders and the harassing of them. There is no control against harassment except the judgment and restraint of the local police force.[33]

Justice Duncan was similarly sceptical of the purpose served by the registration of offenders who were convicted of possession of child pornography, noting:

> This information may be useful in the investigation of future sex related crimes by identifying individuals who, by reason of past convictions, may be considered suspect in such crimes. The model is the predatory stranger model who "hunts" from areas close to his home or work. . . . Registration of such persons is valuable in cases of offences committed locally by strangers to the victim. The value of a registry to investigation of other types of sex related offences is less apparent.[34]

He noted that over-inclusion in the registry would dilute its effectiveness and held that the existence of the exception would have no meaning if it was almost impossible for an offender to meet the test. He found the offender's situation to be exceptional because he had not committed an "offence of a sexual nature" against anyone and had established through expert evidence that he had no propensity to commit one in the future.

This reasoning seems to ignore Parliament's conclusion that possession of child pornography is an offence of a sexual nature that causes real harm through the continued victimization of the child. Possession also demonstrates a sexual interest in children and therefore a

33. *Ibid* at para 12.
34. *Ibid* at paras 15–16.

risk of further acts of sexual abuse. Other child pornography cases have rejected the reasoning in *Have* on this point.[35]

However, the reasoning in *Have* on the predatory stranger point was followed in a number of subsequent decisions involving a variety of sexual offences where the offender was known to the victim. Exceptions from registration were granted for these reasons: the offences had taken place many years prior to conviction;[36] the offender was hearing-impaired and had stable intimate relationships with adult females;[37] there was no prior record;[38] the offender was 60 years old;[39] the financial stress that contributed to the offences had been resolved;[40] and the offender had good prospects for rehabilitation.[41]

(a) Development of a Marital Rape Exception

Many of these early cases rely on assumptions about the relative seriousness of various kinds of sexual offences, and about the relative culpability of offenders, which give troubling indications of the continued judicial reliance on myths and stereotypes about sexual assault. For example, in *R. v. B.S.S.* the offender pleaded guilty during trial to the assault and sexual assault of his wife.[42] He had immigrated to Canada from India, and five years later brought his wife to Canada after

35. See *R v Ayoob*, [2005] OJ no 4874 (QL) at paras 13–14 (Sup Ct J) (possession of child pornography held to be a sexual offence); *R v GHK*, 2005 BCPC 618 (available on QL).

36. *R v REM*, 2005 BCSC 698 at paras 72–75 (available on QL) (sexual assault of step-daughter over seven-year period many years prior to sentencing, with child born of assaults).

37. *R v Epp*, 2005 SKPC 71 at para 63, 267 Sask R 191 (sexual touching of teenaged neighbour lured to isolated location).

38. *R v Burke*, 2005 ONCJ 422 at para 57 (available on QL) (grabbing and sexual touching of acquaintance).

39. *R v Vanoirschot*, 2005 CarswellSask 953 (WL Can) (QB) (prostitution of person under 18).

40. *R v MLK*, 2006 SKQB 47, 276 Sask R 294 (the sexual touching of the accused's 13-year-old niece over her clothing was held to be at the low end of assaults, was precipitated by stress over disability benefits and there was no record of sexual offences).

41. *R v CDJ*, 2005 BCPC 645 (available on QL) (accused charged with distribution of child pornography depicting serious sexual assaults of young children).

42. 2006 BCPC 135 (available on QL).

an arranged marriage. The offender had a very serious drinking problem, which he denied, and had been violent in the past. The couple had three children, two of whom had been sent to live in India with relatives because of the offender's behaviour. The offender told the probation officer that his wife should engage in sexual relations with him whenever he wanted and that he would not take "no" for an answer when he was intoxicated. On the day of the sexual assault he had forced his wife to have intercourse despite her continued protests. He was judged as posing a high risk of future violence against his wife.

Judge Baird Ellan granted the accused an exception from registration, following the line of cases that held that the purpose of the registry was to deal with predatory offenders. She said:

> This is an offence which took place in a context where detection and identification of the offender do not raise themselves as primary concerns and I am not of the view that that particular registry was designed to address this kind of offence.[43]

While there was indeed no difficulty in identifying the offender in this case, it is equally clear that he had no insight into what was a very serious offence and was at high risk of reoffending.[44] Judge Baird Ellan seemed to assume that the only person at risk from the offender was his wife, and that *SOIRA* could not be useful in such circumstances. She also assumed that the parties would and should reconcile if the accused brought his drinking under control. In fact, some violent men do aggress sexually against both their own partners and other victims, including strangers, and it was entirely possible that the accused might move on to other targets if he continued to reside separate and apart from his wife. The decision can be read as endorsing a marital rape exception for the sex offender registry, as it is hard to see how, on its reasoning, any case of spousal sexual assault would qualify as the kind of case for which the registry was intended.

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43. *Ibid* at para 82.

44. The judge also sentenced the offender extremely leniently for a forcible rape against a vulnerable victim, giving him a six-month conditional sentence with various treatment requirements. See also *R v Wakunick*, 2006 CarswellOnt 5344 (WL Can) (Ct J) (12-month conditional sentence and exception from *SOIRA* registration for sexual assault and assault causing bodily harm of fiancée).

(b) Assessing Risk of Reoffending

There are many early cases in which registration was refused even though the offender had taken advantage of the victim's vulnerability. For example, in *R. v. Wark*, the offender had digitally penetrated the vagina of a 17-year-old girl, described in the case as a bare acquaintance of the accused, while she was asleep at a house party.[45] Justice Brophy granted an exception from registration because the accused had no record, was drunk at the time of the assault and was a "solid" member of his community.[46] In *R. v. Putrus*, the offender was a tailor who licked the clothed genital area of a customer whom he was fitting for a pair of pants.[47] An exception was granted on the grounds that he had no criminal history, was at low risk to reoffend, and the offence was at the low end with respect to severity. The offenders in both of these cases seem to have been highly predatory, in that each had taken advantage of the woman's position of vulnerability. Yet the judges held that a predatory acquaintance was not the kind of person for whom the registry was intended.

Even where the offender was a stranger to the victim, courts have granted exceptions from registration. In *R. v. Worm*, the accused pleaded guilty to sexual assault and assault with a weapon.[48] He grabbed the complainant's buttocks as she was jogging and threatened bystanders with a knife before running away. The defence argued that the accused was drunk and suicidal over gambling losses. He was assessed at a low to moderate risk of recidivism, with the risk increasing significantly during periods of intoxication. The sentencing judge found that the impact of registration would be grossly disproportionate "having regard to the circumstances and severity of the offence".[49] Here the offender was a so-

45. 2006 ONCJ 197 (available on QL).

46. *Ibid* at para 85. See also *R v GJJ*, 2006 BCPC 170 (available on QL) (despite previous conviction for sexual assault against a 14-year-old girl sixteen years earlier the accused was granted an exception on the grounds that the offence before the court was opportunistic, of a lesser severity and he had suffered head injuries resulting in brain damage since the prior assault).

47. 2006 ABQB 313, 398 AR 18.

48. 2005 ABPC 92 (available on QL).

49. *Ibid* at para 53.

called "predatory stranger" who was armed with a weapon and who fled when confronted, yet the judge still remained resistant to registration.

Similarly, in *R. v. Neganoban,* although the court ultimately ordered registration, Justice Cumming expressed doubt that the accused was the kind of offender for whom registration might serve a useful purpose.[50] Late at night, he entered a donut shop where a female employee was working alone. After she gave him some free food, he attacked and sexually assaulted her causing her serious and lasting injuries. He pleaded guilty to aggravated sexual assault and attributed his actions to drinking and drug use. Justice Cumming noted that while the evidence indicated the offender was a danger to society when intoxicated, it did

> not indicate he is a sexual predator or pedophile, or the like, who acts with premeditation and a predisposition to commit sexual offences, and whose *modus operandi* and presence is such that society will be better protected by the reporting and notification requirements of that Act.[51]

However, because Justice Cumming could not find *gross* disproportionality, he ordered registration.

In *R. v. Randall,* the accused was convicted of internet luring after inviting an undercover police officer, whom he believed to be a 13-year-old girl, to meet with him for sexual activity.[52] The accused showed up at the meeting place with packets of condoms, and was arrested. Judge Williams rejected his patently unbelievable testimony that he had engaged in this conduct in order to warn the girl against such online activities, because he considered her vulnerable to real predators. Despite a presentence assessment that showed the accused was in denial about his behaviour, Judge Williams, following *Have*, granted an exception from registration because the accused was considered at low risk of reoffending and because "his conduct was not predatory but was one of poor judgment. Further, he is not considered a 'hunter' and he has no prior offence of a sexual nature".[53] The judge went on to say that registration would severely affect the accused because he would "carry a

50. [2005] OJ no 1977 (QL) at para 42 (Sup Ct J).
51. *Ibid* at para 43.
52. 2006 NSPC 38, 247 NSR (2d) 205.
53. *Ibid* at para 16.

stigma that would cause him and members of his family grief. His right to privacy would be affected every time there is a sex crime in his neighbourhood and the police choose to interrogate him as this could reveal the fact to his employer and neighbours that he is on the registry".[54]

It is hard to imagine a more "predatory" activity than internet luring of children. In *Randall*, the accused had logged on to the chat room and sought out conversation with the one person online who was identifying herself as thirteen. He insisted on meeting for sex, rejected the "girl's" suggestion that they meet to go shopping instead, and showed up to meet her prepared to act out that plan. This was much more than momentary "poor judgment".

In *R. v. Mwamba*, the accused put his hand up the skirt of a young woman on the street (a stranger) and grabbed her crotch in an attempt to show off to his friends.[55] When she objected and then turned away, he smacked her on the back of the head. The accused was described as remaining defiant throughout the criminal process. An exception from registration was granted on the basis that his act was isolated and not sexually motivated. Justice Fairgrieve did note the comments of Justice Hambly at the Superior Court level in *Dyck*, that judges who had granted *SOIRA* exceptions may have been wrongly "caught up in the intellectual exercise of applying the standard for exemption set out in the legislation and losing sight of basic common sense".[56] Nonetheless, he preferred the narrow approach of Justice Duncan in *Have* with respect to the proper scope of the registry.

In *Vanoirschot*, the accused was convicted of communicating for the purposes of prostitution with a girl under the age of eighteen. Despite the judge's concern that the offender had expressed no remorse, he declined to order registration because

54. *Ibid* at para 15.

55. 2006 ONCJ 374 at para 7 (available on QL).

56. *Ibid* at para 26, citing *R v Dyck*, (2005) 203 CCC (3d) 365 at para 124, 35 CR (6th) 56 (Ont Sup Ct J) [*Dyck* Ont Sup Ct J].

really it's intended to control the activities of predators. People who repeat, who hang around school yards and playgrounds and—or create situations where they can predate young people.[57]

He considered registration to be unhelpful in respect of rehabilitation. An exception was also granted in *R. v. Aldea* where the offender was a priest who had on multiple occasions prostituted underage aboriginal girls in the church rectory, and used them to make pornography.[58] The Court held that the nature of the offender's vocation and his low risk to reoffend justified an exception.[59] Again, these offences were highly predatory and were committed against extremely vulnerable underage victims.

These cases suggest that in the early days of the registry, not only did some courts make a sharp distinction between predators and other sexual offenders, but the category of "predator" was itself extremely narrow and elusive. Even where the victim was a stranger, or where the offender had considerable power over her and sought her out because of her vulnerability, judges still found that these offenders were not of the type for whom the registry was intended.

(c) Class Bias

Some of the early cases where the offender did know the victims also display a class bias that appears to influence the conclusion that the offender is not the "kind of person" for whom the registry was intended. For example in *R. v. M.W.S.*, the offender, a medical doctor, was convicted of two counts of indecent assault and seven counts of sexual assault.[60] The offences occurred over a twenty-year period and were inflicted on female patients under the guise of medical examinations. The offender had retired by the time of trial.

The sentencing judge, Justice Vickers, commented in his reasons that the offender lacked remorse and had little insight into his crimes,

57. *R v Vanoirschot*, *supra* note 39 at para 4.
58. 2005 SKQB 461, 271 Sask R 272.
59. *Ibid* at para 40. *Contra R c Mansour*, [2005] JQ no 17306 (QL) at para 107-08 (CQ).
60. 2007 BCSC 1188, 52 CR (6th) 77.

maintaining that the victims had misunderstood his actions. Nonetheless, Justice Bruce granted a subsequent application for an exception from registration, describing its impact as serious and noting the personal stigma attached to lifetime registration. She concluded that despite the offender's insistence that the assaults were "misunderstandings" on the part of the victims, he was at low risk to reoffend because he was no longer practising medicine. This misses the point that he selected his patients as his victims not because he had a specific sexual interest in medical patients but because of their accessibility and vulnerability. If he did not accept that he had done anything wrong, he could well find other victims over whom he had power in another capacity in the future.[61]

In *R. v. Cook*, a teacher at an elite private boys' school was convicted of sexual assault for touching the penises of two science students who were participating in a mock organ transplant demonstration.[62] The touching took place when the teacher was alone with each student, and he placed a "catheter" on their penises to collect urine. The students did not know he was going to do this and were surprised and distressed. Justice Trafford granted him an exception from registration, for reasons similar to those in *M.W.S.*, noting that he had retired from teaching. Once again, the judge seemed very concerned about the impact of conviction and registration on an offender who was otherwise an upstanding member of the community. At times, the judge made it sound as if the offender was the victim:

> His arrest, prosecution and conviction has had a devastating effect on him. The emotional and financial pressures on him, and those who are closest to him, have been devastating. In some respects the effect is immeasurable. Mr. Cook feels ashamed and embarrassed. There is a potential for him losing the family home and savings. He has lost his job, and his reputation as a teacher. He has required medical assistance to get through each day.[63]

In the result, an exception from registration was granted because, the Court said, there was no risk of reoffending and the consequences of

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61. *R v Stewart*, 2000 BCCA 498, 148 CCC (3d) 68 (accused was originally charged with 78 counts involving 64 different patients, the youngest of whom was nine years old).
62. [2006] OJ no 4675 (QL) (Sup Ct J).
63. *Ibid* at para 18.

registration would prevent the offender "from bringing any finality to this tragic series of events" and delay his "emotional recovery".[64]

The conclusion in *Cook* was based on the judge's insistence that the touching was not done for sexual gratification but to enhance the learning value of the mock transplant demonstration. This seems naive, given that the teacher had already been confronted by the parents of another student who objected to the use of the same device on their son, and that he never sought permission or advice from anyone at the school.[65] Students were given extra marks and advance answers to test questions in exchange for participation in the demonstrations. At trial, the judge found that the complainants were honest witnesses and that the accused had not been truthful in several aspects of his testimony.[66] The judge also seemed to look positively on the fact that the offender had been active in positions of trust in his church. These included the teaching of "self-esteem" to youth, which seems to be exactly the kind of activity that might present a risk of reoffence.

(ii) Rejection of the Predatory Stranger Model in Purpose and Application

The predatory stranger model from *Have* was rejected by the Alberta Court of Appeal in *R. v. Redhead*.[67] The Court held that the impact of registration on the offender was to be assessed on the basis of how the reporting obligations would affect him in particular, and not on the basis of his criminal record or the circumstances of the offence. In the court's view, Parliament did not see the public interest in registration as being limited to predatory offenders who target children and are known to be at risk to reoffend. Rather,

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64. *Ibid* at para 33.

65. *Ibid* at para 10.

66. There was also considerable similar fact evidence from other former students that was not admitted, which suggested that the accused had used relaxation sessions and his position as coach of the swim team as a way to touch students inappropriately and to see them nude. *R v Cook*, [2006] OJ no 4701 (QL).

67. 2006 ABCA 84, 206 CCC (3d) 315.

the absence of such limiting language reflects Parliament's recognition of predictable repetitive behaviour of sexual offenders, and the inordinate consequences of sexual offences for victims of any age.[68]

The Court held that the wording of the subsection suggested that the public interest in registration was effectively the same for all offenders, and the only consideration should be whether the impact of registration on the particular offender would be grossly disproportionate to its impact on other offenders.[69]

Redhead was followed by the British Columbia Court of Appeal in *R. v. B.T.Y.* which rejected the proposition that "predators" necessarily target strangers.[70] Justice Rowles overturned an exception granted to an offender who had sexually abused his daughter over a six-year period. She noted that many listed offences to which *SOIRA* applies are ones in which the offender and the victim could not be strangers, so Parliament's intention could not have been limited to situations where they were. In her view, the distinction between strangers and others was also wrong in principle:

A person who offends repeatedly against a child victim because of proximity to the child is no less a predator than one who offends repeatedly against strangers. An offender who finds methods of gaining access to children, for example, by befriending them or assuming positions of trust is both a predator and an opportunist, as is the offender who committed a "date rape".[71]

In 2008, the Ontario Court of Appeal also rejected the predatory stranger model in *R. v. Debidin*.[72] Indeed, there are a number of early cases in which exceptions were denied, despite the arguments that the offenders did not fit the predatory stranger model.[73] For example, in

68. *Ibid* at para 38.
69. *Ibid* at para 42.
70. 2006 BCCA 331, 210 CCC (3d) 484.
71. *Ibid* at para 40.
72. 2008 ONCA 868 at paras 76–77, 94 OR (3d) 421.
73. See e.g. *R v H (E)*, 2005 ONCJ 196 (available on WL Can) (the Court adopts the reasoning in *R v Have*, *supra* note 32, but distinguishes the result on the ground of the offence committed: sexual touching of the offender's nine-year-old niece); *R v Clarke*, 2005 NSSC 123 at para 32, 197 CCC (3d) 443 (the judge considers sexual touching of a

R. v. C.W.F. the offender pleaded guilty to possession of child pornography after police seized a collection of more than 20 000 photographs.[74] Registration under *SOIRA* was ordered, with the sentencing judge noting that the offender had "bamboozled" his therapists and continued to minimize and rationalize his behaviour as academic research designed to help friends who had been abused.[75]

Over time, this broader approach to the intended scope of the registry appeared to have gained ground, with courts becoming much less likely to look for the elusive predatory stranger before ordering registration. By 2007, far fewer exceptions were being sought than in the first two years of the registry's existence. The year by year figures are as follows:

Year	Applications Made	Exceptions Granted
2007	18	8
2008	17	2
2009	20	4
2010	10	3
2011 (Jan-Apr)	6	2

(iii) Preserving the Exception

Nonetheless, after the Alberta Court of Appeal's decision, some appellate courts expressed the concern that *Redhead* had gone too far in

nine-year-old girl by a first time offender to be at the low end of the spectrum and finds registration to be disproportionate, but not grossly so); *R v JDM*, 2005 ABPC 264 at para 48, 387 AR 353 (impact of *SOIRA* held to be disproportionate, but not grossly so in a case involving the sexual assault of male group home resident by another male resident with significant disabilities who would have difficulty reporting).

74. 2006 BCPC 545 (available on QL).

75. *Ibid* at para 56.

declaring the public interest in registration as being "fixed" regardless of the crime. These courts concluded that failing to consider the nature of the offence and the risk of reoffence in measuring the public interest in registration, and instead focusing only on the exceptional impacts of registration on the accused, could present an insurmountable hurdle to an exception.[76]

R. v. T.C. is a case where the particular facts provided the Saskatchewan Court of Appeal with the basis for an exception from registration.[77] T.C. was convicted of sexually assaulting his former spouse from whom he had recently separated at her request. He entered her home early in the morning, and angrily confronted her with his belief that she had been seeing someone else. He then physically assaulted her in an attempt to force her to have sexual intercourse with him, punching her in the face and biting her hand. He relented only when their two young children woke up. T.C. then called the police himself and reported his own crime. He was extremely remorseful and pleaded guilty. He was an aboriginal man with a history of childhood abuse, had no criminal record, was employed and had been a role model in his reserve community. He had sought counselling and alcohol treatment, and had reconciled with the victim at the time of sentencing.

Describing the case as highly unusual, the Saskatchewan Court of Appeal dismissed the Crown's appeal from the trial judge's refusal to register T.C. under *SOIRA*. The trial judge had held that registration was inappropriate because the offence was not essentially sexual in character, presumably because there had been no sexual intercourse. The Court of Appeal did not endorse that characterization. It also confirmed that registration was not confined to a particular type of offender, nor were exceptions to be granted solely on the basis that the offender was at low risk to reoffend. Nonetheless, the Court concluded that exceptions had to remain available in appropriate cases.

T.C. is a "highly unusual" case in the sense that the offender turned himself in to police and appeared to have made real changes for the better by the time of sentencing. He did, however, commit a very

76. *R v Turnbull*, 2006 NLCA 66 at para 32, 214 CCC (3d) 18; *R v SSC*, 2008 BCCA 262 at paras 79–87, 234 CCC (3d) 365.
77. 2009 SKCA 124, 249 CCC (3d) 1.

serious home-invasion type of assault, motivated by jealousy. He physically assaulted the complainant in an attempt to rape her. There are important public policy reasons for treating seriously the assaults and sexual assaults of women who have separated from their male partners. My concern, once again, is that spousal sexual assault is being treated as less severe than a comparable assault by a stranger.

III. Stigmatization of the Sex Offender

Much of the *SOIRA* jurisprudence identifies two factors that allegedly make registration a significant burden for the offender, beyond the simple administrative requirements of registering. Some courts consider the risk that the offender's status might become known to others—for example, through visits by police whenever there is a report of a sexual assault in the area.[78] In addition, some courts identify the "stigma" of registration as an important aspect of the impact on the offender. This stigma is not the same as the public shaming that might attach to community notification; it is a self-stigmatization that comes from being officially classified as a registered sex offender.[79]

In most cases, these judicial comments about stigma are not meant to suggest that the particular accused has infirmities which make him less mentally able to bear the personal shame of registration.[80] Rather, the claim is that registration imposes a stigma that is not proportionate to what the offender really did. In this way, concern with self-stigma replicates the kinds of judgments about the relative gravity of sexual offences that I call into question above in the context of the exception cases. The courts' analyses in cases such as *Cook* focus heavily on this personalized self-stigma.[81]

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78. See e.g. *R v LKC*, 2006 BCPC 118 at para 28 (available on QL); *R v AGN*, 2005 BCPC 582 at para 23 (available on QL).

79. See e.g. *R v LKC*, *supra* note 78 at para 32; *R v Aberdeen*, 2005 ABPC 203 at para 68, 387 AR 269; *R v Have*, *supra* note 32 at para 12.

80. But see *R v Tylek*, 2006 ABPC 85 at para 46, 392 AR 304 (the Court held that the stigma of registration would impede rehabilitation due to the accused's fragile mental state).

81. *Supra* note 62.

The problem with such reasoning is that formal identification as a sex offender through conviction for a sexual offence is undercut if the judge goes on to confirm the offender's belief that what he did was not a real sexual offence or was just a misunderstanding. There is evidence that sexual offenders tend to minimize their own actions relative to those of other offenders. In one US study of registered sex offenders' perceptions of sex offender registration and notification, Richard Tewksbury and Matthew Lees noted that while most of the offenders they interviewed supported some sort of registration and reporting scheme, almost all felt that they themselves should not be included in it:

> A near universal theme expressed by [registered sex offenders] is the belief that they are different from "those kinds of people" who are—and are generally believed should be—on the sex offender registry. [Registered sex offenders] express a strong desire to distinguish themselves from those whom they see as the "real criminals" and sex offenders who they believe are "dangerous", "vicious" or "sexual predators".[82]

The interviewees in Tewskbury and Lees' study who saw themselves as not belonging in a sex offender registry included one who had been convicted of eleven counts of molesting 12-year-old boys, and a number who had had sexual contact with young girls, including their daughters or stepdaughters.[83] The descriptions these offenders gave of "real" sex offenders, namely "predators" who "stalk a kid at a school yard" and "drag a [five-year-old] off the playground" mirror the kind of reasoning that influenced some of the exception cases critiqued above.[84] Yet the most dangerous sexual offenders may be those who deny and rationalize their behaviour in order to convince themselves that what they are doing is not seriously harmful. In this sense, the self-stigma of registration could be one of the most valuable benefits of the registry, as it may prompt the offender to confront the reality of his actions.

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82. Richard Tewksbury & Matthew B Lees, "Perceptions of Punishment: How Registered Sex Offenders View Registries" (2007) 53:3 Crime & Delin'cy 380 at 395.
83. *Ibid* at 396-97.
84. *Ibid.*

IV. 2011 Amendments to the Registry

Parliament passed significant amendments to the federal registry in Bill S-2, which came into force in April 2011.[85] That registry now follows the model of *Christopher's Law* by making registration automatic upon conviction, with no need for an application by the Crown. In addition, the judicial exception provision is repealed.[86] The intention of those changes seems to be to make the registry much more "airtight", so that all sex offenders will be included.[87] Finally, all offenders who register must provide a DNA sample.[88]

Of course in some cases, plea bargaining to a non-listed offence will still provide an avenue to avoid registration. It also remains to be seen whether the prospect of automatic registration will actually reduce conviction rates; as discussed above, the Letourneau study suggested that conviction rates declined after an internet registry was introduced in South Carolina.

Bill S-2 does not make the Canadian registry available to the public. It does, however, expand the purpose of the registry from facilitating the investigation of sex offences to facilitating the investigation and *prevention* of such offences. Adding prevention to the registry's objectives is likely meant to respond to claims by police that the registry would be more useful if they could "check in" with offenders from time to time to monitor their compliance, even in the absence of an active investigation into a reported crime. The prospect of such proactive contacts by police, together with the requirement to provide a DNA sample may lead judges and juries to see registration as having significantly more onerous consequences for the accused under the post-amendment model. While this cannot justifiably affect conviction rates where the elements of the offence are otherwise proven, it is worth noting that the imposition of more severe penalties for sexual assault has

85. Bill S-2, *supra* note 10.

86. *Ibid*, cl 5.

87. For example, it also extends the registry to include individuals convicted of sexual crimes abroad who enter Canada. *Ibid*, cls 61–62.

88. *Ibid*, cls 3–4.

historically tended to be accompanied by even lower conviction rates than before.[89]

V. Constitutional Challenges to the Registry

The Ontario sex offender registry was the first one in Canada, and it was not long before it was subjected to constitutional challenge in *R. v. Dyck*.[90] Dyck was convicted before the registry came into force, but was required to register because he was still serving his sentence. He argued that it violated the *Charter* in its application to persons convicted before the law came into force, either as a double jeopardy or as a breach of the right to the benefit of the lesser punishment where a law has been amended between commission of the offence and sentencing.[91] More generally, in its application to all offenders, the law was attacked for failing to provide the possibility of an exception from registration, and thus for being overbroad in violation of section 7 of the *Charter*.

At first instance, Justice Hearn held that *Christopher's Law* did violate section 7.[92] He characterized the registry requirement as a serious infringement of liberty, and held that it did not comport with the principles of fundamental justice. He found that it treated all offenders the same without regard to individual circumstances and that the requirements of procedural fairness were not met. He compared the Ontario registry to the federal law, which provided for a hearing, the possibility of exception, a right of appeal and the possibility of early termination.[93]

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89. In adult courts, sexual offences were less likely than other violent crimes to result in a finding of guilt between 2004 and 2007. However, those found guilty were more likely to receive a custodial sentence than those found guilty of other violent crimes. Statistics Canada, *Sexual Assault in Canada: 2004 and 2007* by Shannon Brennan & Andrea Taylor-Butts (Ottawa: Canadian Centre for Justice Statistics Profile Series, 2008) at 10.

90. 2004 ONCJ 103, 25 CR (6th) 113 [*Dyck* Ont Ct J], rev'd *Dyck* Ont Sup Ct J, *supra* note 56, rev'd *Dyck* Ont CA, *supra* note 5.

91. *Canadian Charter of Rights and Freedoms*, ss 7, 11(g)-(i), 12, 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

92. *Dyck* Ont Ct J, *supra* note 90.

93. *Ibid* at paras 106–10.

On appeal to the Superior Court of Justice, Justice Hambly reversed the decision below and upheld the constitutionality of the law.[94] He noted that the offender had presented no reasonable hypotheticals in which the impact on the offender was grossly disproportionate to the public interest in his registration.[95] He also noted that any case in which registration would truly be disproportionate was one in which a discharge would likely be granted.[96]

The Ontario Court of Appeal affirmed this reasoning and agreed that the Ontario registry did not violate section 7 of the *Charter*.[97] While the Court acknowledged an infringement of liberty, it characterized the scope of the liberty interest in much more modest terms than the trial judge had done, and concluded that the law's infringement on liberty was neither overbroad nor grossly disproportionate.

The federal registry has also survived a constitutional challenge in an appellate court. In *R. v. Cross*, decided before the Ontario Court of Appeal decision in *Dyck*, the Nova Scotia Court of Appeal upheld the constitutionality of the federal registry.[98] The latter Court noted specifically that the availability of exceptions and termination of registration satisfied the requirements of fundamental justice under section 7. Leave to appeal to the Supreme Court of Canada was denied.[99]

Overall, constitutional challenges to sex offender registries have so far been entirely unsuccessful at the appellate level in Canada.[100] Courts have decided that registration is not punishment, so constitutional provisions against double jeopardy, cruel and unusual punishment and in favour of imposing the lesser of two possible punishments have no application. While the liberty interest protected by section 7 is engaged by the possibility of imprisonment for non-compliance, and by the infringements on liberty connected with the reporting requirements

94. *Dyck* Sup Ct J, *supra* note 56.
95. *Ibid* at para 102.
96. *Ibid* at para 125.
97. *Dyck* Ont CA, *supra* note 5.
98. 2006 NSCA 30, 241 NSR (2d) 349.
99. *Ibid*, leave to appeal to SCC refused, 31444 (August 24, 2006).
100. *C.f. Smith v Doe*, 538 US 84, 123 S Ct 1140 (2003) (the United States Supreme Court rejected a constitutional challenge to the Alaska Sex Offender Registry).

themselves, no section 7 violation has been found by an appellate court to date.

The question of *SOIRA's* constitutionality may resurface now that the possibility of judicial exceptions has been eliminated by the 2011 amendments. Do those amendments call into question the constitutionality of *SOIRA* as found in *Cross*,[101] or is the reasoning of the Ontario Court of Appeal in *Dyck* still appropriate?[102] The language of gross disproportionality in the (now repealed) exception provisions in the *Criminal Code* was chosen to mirror the requirements of section 7 of the *Charter*. The Supreme Court of Canada has recently confirmed that depriving someone of their liberty in a manner that is arbitrary, overbroad or grossly disproportionate will violate section 7.[103] The deprivation of liberty under the sex offender registry can be understood as the deprivation that comes from the registration requirements, which are fairly routine, or from the possibility of imprisonment for non-compliance, which is exceptional but more severe. It stands to reason that the more detailed and onerous the requirements of the registry becomes for the offender, the more forcefully it will be argued that the infringement of liberty is excessive. In particular, the addition of a preventative function to the registry, and a mandatory DNA sample, make the impact on the offender greater than it was in the pre-2011 version of *SOIRA* at issue in *Cross*.[104]

If the 2011 amendments are subject to a new *Charter* challenge, the Supreme Court of Canada could read the judicial exception back in to the law. For that to be done, however, there would need to be a set of actual facts, or a reasonable hypothetical, which would demonstrate that the effects of registration on a particular offender were so extreme as to be grossly disproportionate to any legitimate government interest. As

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101. *Supra* note 98.

102. *Dyck* Ont CA, *supra* note 5.

103. *Canada (AG) v PHS Community Health Services Society*, 2011 SCC 44 at paras 129–35, [2011] 3 SCR 134. See also *R v Malmo-Levine*, *supra* note 29 at paras 159–62.

104. The constitutionality of the mandatory DNA sample is a separate issue that is beyond the scope of this article. If a court was to find that specific provision unconstitutional, presumably the remedy would be to make the DNA sample discretionary rather than to reinstate the possibility of judicial exceptions from registration.

discussed below, no such disproportionality is evident in the exception cases reviewed. In addition, the retention of the termination provisions might be sufficient to meet the requirements of the *Charter*, as offenders can be removed from the registry if and when they show that they no longer present a risk of reoffending. This has the added advantage that judges need not make speculative predictions of future dangerousness on the basis of the evidence available at the time of sentencing.

VI. Evaluating the Sex Offender Registry

A. Efficacy

Evaluations of the success of sex offender registries in other jurisdictions tend to focus on recidivism rates. Some US studies find no difference between such rates for offenders who were and were not required to register.[105] However, because those studies relate to public registries, they may conflate registration with community notification and may not be pertinent to the non-public Canadian registry. A recent large US study asserts that recidivism against victims known to the offender does decrease with registration, as distinct from notification.[106]

The most important empirical question may be whether the data in the registry have helped police identify and apprehend sexual offenders once an offence has been reported. If the sex offender registry includes certain kinds of information about known offenders, including details that would not be easily available elsewhere, it may well be a logical starting point for police—for example, if a child reports that a man with a snake tattoo took her into the bushes, or if several children report that a man in a red truck tried to get them to go for a ride to find a lost dog.

How often the registry is used in this way is hard to know, especially since the police cannot reveal that information publicly. However, in the context of *SOIRA* applications the Crown has introduced expert

105. See e.g. Michael Petrunik, Lisa Murphy & J Paul Fedoroff, "American and Canadian Approaches to Sex Offenders: A Study of the Politics of Dangerousness" (2008) 21:2 Fed Sent'g R 111; Davies, *supra* note 12.

106. JJ Prescott & Jonah E Rockoff, "Do Sex Offender Registration and Notification Laws Affect Criminal Behaviour?" (2011) 54:1 JL & Econ 161.

evidence from police officers that the registry is used by police in this manner.[107] A police witness at the Senate committee considering Bill S-2 testified that the registry had been useful in tracking known suspects.[108] A 2007 audit of the Ontario registry noted that while the database contained information that could be useful to police, there was little evidence of the effectiveness of registries. The audit also noted that the Ministry of Community Safety and Correctional Services had not implemented any performance measures for the registry beyond an offender compliance rate.[109] The government minister responsible for the Ontario registry stated in 2011 that it was consulted "hundreds of times a day" by officers investigating crimes.[110]

If we go back to the crime that prompted the creation of the first Canadian registry—the abduction and murder of Christopher Stephenson—we can perhaps gain some insights into the effectiveness of the registry. Cases of abduction of children by strangers are very rare, and are not easy to quantify. One Canadian study concluded that there were only five true stranger abductions in Canada in 2000 and 2001, and in all but one of these cases, the abductor turned out to be someone known to the family.[111] In four of the five cases, the victims (all girls) were murdered and all were dead within 24 hours.[112] If there had been a sex offender registry at the time, it could well have played a useful role in one or more of those cases. Such abductions do not happen frequently, but their probable consequences are so horrific that they might in themselves justify maintaining a registry. The usefulness of the registry as a general investigative tool adds to that justification.

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107. See e.g. *R v CWF*, 2006 BCPC 545 at paras 28–29 (available on QL).

108. Legal and Constitutional Affairs, *supra* note 22 (Inspector Pierre Nezan, Officer in Charge, National Sex Offender Registry).

109. Office of the Auditor General of Ontario, *Report of the Auditor General of Ontario to the Legislative Assembly*, ch 3.11 (Toronto: Queen's Printer for Ontario, 2007) at 260.

110. Lauren Carter, "Christopher's Law: 10 Years Later", *The Barrie Examiner* (15 May 2011), online: The Barrie Examiner <http://www.thebarrieexaminer.com>.

111. Marlene L Dalley & Jenna Ruscoe, *The Abduction of Children by Strangers in Canada: Nature and Scope* (1 December 2003), online: Royal Canadian Mounted Police <http://www.rcmp-grc.gc.ca/pubs/omc-ned/abd-rapt-eng.htm>.

112. *Ibid*, Table 5.

If the sex offender registry is not made public, and the requirements for registration are straightforward and manageable, maintaining it seems justifiable. The witnesses who testified before the Senate on Bill S-2 seemed to agree that most offenders did not find the current requirements particularly onerous and that their primary concern was about home visits by uniformed officers.[113] If the registry is made publicly accessible, or if police use it to monitor offenders for prevention purposes in ways that in effect make the offender's status known in his neighbourhood, this may actually decrease the registry's effectiveness, quite apart from increasing the burden it places on offenders. One reason that the compliance rates for the Canadian registries are high is because the requirements they impose on offenders are relatively straightforward. In US states where the conditions accompanying registration and notification are the most oppressive, compliance rates are much lower. It was for this reason that Christopher Stephenson's father opposed a suggestion by the provincial Conservative party in the last provincial election campaign that the Ontario registry be publicly available.[114]

The 2011 amendment that makes registration mandatory without application by the Crown is, in my view, a positive step, and one which seemed to have been supported by almost all witnesses who testified about the proposed amendments. The evidence at hand suggests that orders for registration were previously made in only 58% of eligible cases, and that the omissions in the other 42% were most often the result of administrative lapses by the Crown. The deletion of the requirement of application by the Crown serves to promote uniform application of the registry. The concern that over-inclusion in the registry will hamper

113. House of Commons, Standing Committee on Public Safety and National Security, *Statutory Review of the Sex Offender Information Registry Act* (December 2009) (Mary Campbell, Director General, Corrections and Criminal Justice Directorate, Department of Public Safety and Emergency Preparedness; Clifford Yumansky, Director, Corrections and Community Development, Department of Public Safety and Emergency Preparedness; Inspector Pierre Nezan, Officer in Charge, National Sex Offender Registry, Royal Canadian Mounted Police).

114. Maria Babbage, "Sex Offenders Website in Ontario: Public Protection or Tool for Vigilantes?", *The Canadian Press* (7 June 2011), online: News 1130 <http://www.news1130.com>.

its investigative effectiveness is easily dealt with through sufficiently detailed entries and filtering software that will allow police to narrow their searches as appropriate.

The problem of pleading to non-sexual offences, to the extent that it exists, is magnified but not caused by the registry; it is a separate issue that needs to be addressed through clear Crown policies. It should be recognized, however, that pressure on the Crown to recommend a plea to a non-sexual offence may increase now that the possibility of an exception has been eliminated.

B. Future Constitutional Challenges

I have noted above that on the reasoning of the Ontario Court of Appeal in *Dyck*, the elimination of the judicial exception may not raise constitutional concerns. However, if a constitutional challenge is brought, other courts of appeal or the Supreme Court of Canada may not follow that reasoning. It is therefore worth considering whether there are any examples of potential gross disproportionality in the cases to date where exceptions were sought, or in any reasonable hypotheticals that might be offered. My conclusion from the case law, as explained above, is that the application of the exception provision was problematic, and sometimes demonstrated the persistence of stereotypes about sexual offences and sex offenders. More specifically, the cases provide a window into what some judges have continued to understand as "real" sex offenders—a category they at times define so narrowly as to exclude sexual assaults against victims known to the offender, child pornography users, opportunistic offenders, historic offenders, incest offenders and many others.

All of the offenders in the cases I have reviewed above were "real" sex offenders. Some of the cases presented circumstances that suggested mitigation of sentence (such as *T.C.* where the offender immediately turned himself in to police custody and pleaded guilty[115]) but that does not make the offences committed any less serious. Some of the sexual assaults were of course more serious than others in the extent of the victimization inflicted, but none could be labelled trivial for the victim.

115. *Supra* note 77.

The cognitive distortions of at least some sex offenders risk being fuelled by a finding that they are not the kind of person for whom a sex offender registry was intended.

Courts may be tempted to consider potential fact scenarios in which it might seem excessive to list someone within the registry. However, resorting to hypotheticals that have no basis in reality is unhelpful in this context. Sexual assault, which is based on the definition of assault *simpliciter*, is defined in deliberately broad terms in recognition of the right to bodily integrity. That makes it a particularly dangerous area in which to invent hypotheticals. Fanciful examples of minor contact that could in theory come within the scope of the offence are not helpful because they are not *reasonable* hypotheticals sufficient to ground a constitutional challenge.[116] Moving away from real cases also increases the probability that the examples will unconsciously incorporate myths and stereotypes about sexual assault. In other words, equality concerns under section 15(1) of the *Charter* need to influence the section 7 analysis. The sexual assaults that are in fact prosecuted *are* what sexual assault looks like in the criminal justice system. The history of the application of the former exception provision confirms that it was problematic, and that its elimination will likely further the interests of the women and children who make up the majority of victims of sexual offences.

It is important to remember that the possibility of applying for termination of registration remains in the *Criminal Code*.[117] As was the case with the former exception provision, the onus is on the offender and the standard is one of gross disproportionality. At the stage at which a termination application is made, the judge has much more information about the conduct of the offender post-conviction and (if this is relevant) about the actual impact of registration on the offender. Significant numbers of offenders have not yet become eligible to apply for termination, so there is as of yet no body of case law to consider. It will

116. This may be what the majority is referring to in *R v JA* when it makes reference to the absence of a "constitutional challenge", in the context of a case in which various hypotheticals were raised unsuccessfully in an attempt to justify recognition of advance consent to sexual activity while unconscious. 2011 SCC 28 at para 65, [2011] 2 SCR 440.

117. *Criminal Code*, *supra* note 2, s 490.015(1).

be interesting to observe whether the debates canvassed above will be replicated a few years from now in the context of applications for termination of registration.

If the Supreme Court of Canada does find that an exception from registration in cases of gross disproportionality is constitutionally required at the time of sentencing, hopefully the Court will give clear guidance to sentencing judges on the factors that should and should not inform their analysis. It should also be reaffirmed (in light of Parliament's intent that there be a broad registry of all sexual offenders) that if an exception is needed, it is to be a true exception and not a matter of routine.[118] Alternatively, if the Supreme Court decides that there must be an exception, Parliament could respond by setting out a list of irrelevant factors akin to those found in the *Criminal Code* provisions on the production of third party records in sexual offence prosecutions.[119] Factors irrelevant to whether an exception should be granted could include the following: that the victim knew the offender before the offence; that the act was "opportunistic" rather than "predatory"; that the offender has ceased the occupation or activity that brought him in contact with the victims; that he is of otherwise good character or standing in the community; that he was intoxicated; and that the offence did not involve multiple victims or additional bodily harm.

Conclusion

The sex offender registry should be evaluated, more thoroughly than by simply measuring offender compliance rates, to see if and how it can be made more useful to police in preventing and investigating sexual offences. As well as suggesting that the federal registry imposes a relatively modest burden on offenders, the information we do have indicates that the registry has so far been of limited utility to police, partly because only specially designated officers can access it. This leaves

118. As noted above, it is possible that offenders who receive conditional or absolute discharges may not be subject to registration. If so, it remains to be seen if the number of discharges will increase with the elimination of the exception.

119. *Criminal Code*, *supra* note 2, ss 278.1–278.3.

me with the concern that the registry in its current form has the potential to do more harm than good for sexual assault victims. It gives the appearance that the federal and provincial governments are "getting tough" on sex offenders,[120] but does not address the ongoing major barriers to effective sexual assault prosecution, including the quality of initial police responses to women complainants, the "unfounding" of complaints, the trauma of the trial process, and the comparatively low conviction rates.[121] There is nothing inherently unreasonable about the idea that it could be useful for police to have up-to-date information on the whereabouts and identifying details of men who commit acts of sexual violence. But if Canada remains committed to maintaining a national sex offender registry, it should do so in a manner that acknowledges the realities of sexual assault and the real concerns of the victims whose interests it is supposed to serve.

If we have taken the step of criminally prosecuting someone for his sexual violation of another person, and the court which convicts him is of the view that the case is not so unusual that a discharge is warranted or available, we have already made a judgment that the offender's actions are a serious transgression. We have also recognized that this type of violence is overwhelmingly gendered, and that it represents a major impediment to the equality of women and girls. The sex offender registry should not be populated in a way that reflects discriminatory myths about sexual assault.

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120. A detailed analysis of community notification through public registries and other forms of public communication is beyond the scope of this article. It is worth noting, however, that this problem is magnified if the registry is made public as a further "tough on crime" measure, effectively burdening citizens with the responsibility of preventing sexual assault.

121. See e.g. Teresa DuBois, "Police Investigation of Sexual Assault Complaints: How Far Have We Come Since *Jane Doe*?" in Elizabeth Sheehy, ed, *Sexual Assault Law, Practice and Activism in a Post Jane Doe Era* (Ottawa: University of Ottawa Press) [forthcoming in 2011]; Lise Gotell, "Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-Inspired Law Reforms" in Clare McGlynn & Vanessa E Munro, eds, *Rethinking Rape Law: International and Comparative Perspectives* (Oxford: Routledge, 2010) 209; Melanie Randall, "Sexual Assault Law, Credibility, and 'Ideal Victims': Consent, Resistance, and Victim Blaming" (2010) 22:2 CJWL 397.