

INTRODUCTION

HUMAN SOCIETIES have long felt a powerful need to identify potentially dangerous individuals in their midst, a need vividly evoked in philosopher Jeremy Bentham's 1843 plaintive query: "Who are you, with whom I have to deal?"¹ *Knowledge as Power* examines this phenomenon, focusing in particular on American laws that require criminal offenders to provide authorities with identifying information, allowing for their continued surveillance after incarceration.

While to most Americans criminal registration laws are a modern phenomenon, originating in the 1990s and eponymously associated with child victims such as Jacob Wetterling and Megan Kanka, in reality the motivating force behind the laws is ancient, and their direct historical antecedents lie in the nineteenth century. One can, for instance, see clear links with predecessor strategies such as "spotting" by police in the 1820s, whereby officers sought to memorize the faces of convicted criminals; use of daguerreotype images in the 1840s, later used to create the first "rogues' galleries" in police stations; Alphonse Bertillon's "signalment" system that measured and stored data on offenders' physical traits starting in the 1880s; and shortly thereafter (and still today), fingerprint analysis. Unquestionably as well, American registration laws share a lineage with prior European efforts to register criminals, indeed entire populations (as in nineteenth-century Germany), and laws in northern and southern states alike in antebellum America requiring that African American freedmen register with authorities.

American criminal registration laws, however, have evolved in a manner distinctly in keeping with developments in the nation as a whole over the past

century. Originating in counties and cities in the 1930s, amid acute public concern over “gangsters” who anonymously traveled within the nation’s increasingly mobile population, the registries had decided advantages over previous strategies, which merely passively collected and stored identifying information on offenders. Registration did this and more; it afforded knowledge of the actual whereabouts of individuals and required that they themselves provide and update such information, threatening criminal punishment if they did not. Registration, as a result, compelled individuals to be complicit in their own ongoing surveillance, perhaps for their lifetimes.

In addition, and critically important, sixty years after their origin, American registration laws in the mid-1990s were complemented by a historically unprecedented strategy: community notification, which rather than providing registrants’ identifying information to police alone, as before, disseminated it to the public at large, to guard against recidivist criminality. With the advent of community notification, there has thus arisen, as Michel Foucault once said of empiricist techniques first taking root in the mid-eighteenth century, “a whole domain of knowledge, a whole type of power.”²

Knowledge as Power explores this empowerment premise through the lens of American criminal registration and community notification laws. Despite being in existence for over seventy years, and today subjecting hundreds of thousands of individuals to ongoing public scrutiny after they have “done their time” and costing millions of dollars to effectuate, registration and notification laws have eluded sustained scholarly attention.

This book seeks to fill the void, providing the first in-depth history and analysis of registration and community notification laws, highlighting their relationship to past efforts to monitor offenders, as well as their distinct motivations, characteristics, and impact on U.S. law, society, and government. With registration, the nation has empowered police with information, creating a universal, location-based identification system—a development vigorously resisted in the past. With community notification, the nation has gone one step further, empowering communities with information, reconfiguring notions of informational privacy and radically transforming traditional understandings of state-citizen relations and social control. Moreover, while distinct because they single out a disdained subpopulation, principally convicted sex offenders, the current nationwide network of registration and notification laws reflects a sea-change in American social and political sensibility, which

while highly significant in itself, lays the foundation for potential future expansion.

The discussion begins with an overview of early intellectual and technological developments giving rise to modern registration and notification laws. While the roots of the anxiety bred by anonymous harm doers are ancient, the laws owe their existence to the more recent recognition that criminal risk is not random; that one-time criminal offenders are prone to commit additional crimes. As Chapter 1 relates, this recognition, combined with rapid population growth and ever-increasing mobility, motivated government efforts to render criminal risk more knowable. While over time fingerprint technology emerged as the worldwide identification method of choice, being prized for its accuracy and superior organizational capacity, registration predated fingerprinting by several decades and its instrumental appeal has persisted over the years. Rather than merely providing a biological basis to assess a criminal match after a criminal event, registries maintained location-related and other identifying information on *potential* recidivists, increasing the investigative and preventive capacity of police. They also, ideally, instilled in registrants a sense that they were being watched, thereby promoting deterrence.

Chapter 2 chronicles the genesis and growth of the first wave of American criminal registration laws, starting in the 1930s when cities and counties rushed to enact laws. While motivated by fear of an increasingly mobile and anonymous breed of professional “gangsters,” the laws in actuality targeted persons with offending histories belying hardened criminal status (a single conviction typically triggered eligibility) and otherwise focused on crimes not typically thought worthy of public safety concern (such as miscegenation). Moreover, the laws swept up newcomer and resident ex-offenders alike, contrary to the ostensible motivating concern over itinerant anonymity. Only later did state governments enact registration laws, with California adopting the nation’s first statewide law in 1947; state interest in registration, however, remained limited and sporadic up through the 1980s.

During the first fifty years of their existence, registration laws scarcely figured in American public life. While press accounts of the day made clear that authorities often favored registration as a get-tough strategy signaling intolerance for potential lawbreakers, providing a basis to jettison ex-offenders to other jurisdictions, registration in reality seemingly had little practical impact. Moreover, the laws themselves were the frequent subject of principled

criticism. To critics, including members of the political establishment and law enforcement community, registration unfairly targeted ex-offenders who had served their time, serving to open “psychic sores,” and was “un-American.” In addition, over time it became clear, as it had to earlier users of registration in Europe, that registries were riddled with errors and that the individuals most inclined to comply were those most likely to remain law-abiding.

This decades-long disinterest, however, quickly evaporated in the early 1990s when registration seized the imagination of Americans anew, with states (not local governments, as before) adopting laws in rapid-fire succession. As Chapter 3 discusses, a key triggering event occurred in Washington State, which in 1990 enacted its first registration law and introduced the concept of community notification. The law was adopted in response to the May 1989 sexual mutilation of a young boy by a convicted sex offender who, despite inspiring great recidivist concern among state officials, was released from prison without the knowledge of community members. Similar tragedies soon prompted other states to enact registration and notification laws targeting persons convicted of sex and child-related offenses in particular. However, unlike Washington (where the child victim’s name was not made publicly known), such laws typically came to be denominated by the names of child victims. New Jersey’s Megan’s Law, enacted in 1994 after the rape and murder of 7-year-old Megan Kanka by a twice-convicted sex offender who anonymously lived nearby, served as the nation’s most significant catalyst, inspiring a torrent of other state registration and notification provisions, quickly enacted often without meaningful debate or consideration. By the late 1990s, registration and notification laws were in effect nationwide, resulting from initiative by individual states or pressure from the U.S. Congress, which starting in 1994 required that states either adopt laws or lose allocated federal funds.

Modern laws, as Chapter 3 makes clear, differ not merely because of their nationwide effect, but also because of their far more onerous quality. Registration today targets a considerably greater expanse of offenses and offenders (including juveniles), requires far more identifying information, mandates frequent verification, and threatens felony-level punishment for noncompliance. In turn, community notification singles out individuals for public scrutiny and disdain, with manifold negative effects for registrants and those with whom they associate, perhaps for their lifetimes. Finally, while modern laws have mainly singled out sex and child offenders, of late the appeal of registra-

tion and notification has inspired state expansions, focusing on such criminal subpopulations as drug offenders and arsonists.

The rapid nationwide embrace of registration and community notification laws is a remarkable story, made all the more so when one realizes that by the late 1980s criminal registration itself was moribund. By the early to mid-1990s, something had changed in American social and political life, creating a fertile environment for its modern proliferation. Not only were criticisms of the unfairness and oppressiveness of registration largely absent, but so too were objections to the far more significant negative personal effects of community notification, which with the advent of the Internet has permitted worldwide “rogues’ galleries.” The shift was also evidenced in the judiciary. In the 1970s and 1980s courts had, upon the rare occasion of entertaining constitutional challenges, tended to find fault with registration alone, even in its then-muted form. In the late 1990s, however, the vast majority of courts condoned not only registration but notification as well, and in 2003 the U.S. Supreme Court agreed, clearing away the limited doubt created by the handful of courts that earlier cast critical judgment.

Chapter 4 examines the chief reasons behind the rapid nationwide resurgence of registration and the genesis of community notification. The foundation for this evolution was laid by “panics” over sex offenders felt in prior decades as well as heightened public concern over child abductions in the 1980s. In the 1990s, however, a variety of other influences converged to account for the how and why of modern laws, including the public taste for punitiveness, which remains with us today.

These foundational elements, however, were augmented by a constellation of other forces that propelled both the quick passage of the laws and their onerous quality. One force in particular concerned the overt personalization of the politics driving the laws, focusing on the innocent victims of abuse and their demonic perpetrators. The personal profiles, backed by vastly overstated assertions of sex offender recidivist tendencies, instilled a sense of exigency (much as with 1930s-era registration laws targeting gangsters) and served to neutralize possible concern over the scope of registration and its ever-expanding array of requirements.

The political success of community notification, coming somewhat later, derived from an even more potent and visceral motivation. Politicians readily acquiesced to their constituents’ sense of informational entitlement,

predicated on the idea that the public was morally entitled to registrants' information in order to self-protect, and that the failure of government to ensure public safety made public dissemination a practical necessity. Finally, not to be overlooked, Congress also played a key role. As a result of federal threats to withhold funds in 1994 (the Jacob Wetterling Act) and 1996 (Megan's Law), not only were registration and notification adopted nationwide by the late 1990s, but the state laws themselves bore the indelible imprint of congressional policy preferences.

Chapter 5 examines the effects and consequences of registration and notification. Remarkably, despite being in effect nationwide for over a decade, the laws have been subject to little empirical assessment. Although premised on empirical certitudes of recidivism, and the expectations that they assist police, deter recidivism, and empower communities with information to self-protect, it remains unclear whether registration and notification actually work as intended. What is known is that modern registries, like their historic forebears, are rife with errors, undercutting their knowledge-based premise. Moreover, there is growing reason to believe that the laws, especially relating to notification, actually might make communities less safe and contribute to recidivism.

The final two chapters attempt to take stock of the broader effects of registration and notification and where they might be headed in coming years. Chapter 6 begins with an examination of the important ways in which the nation's constitutional jurisprudence has been affected, especially as a result of the two 2003 U.S. Supreme Court decisions mentioned above. In both decisions the Court upheld registration and notification against constitutional attack, exhibiting an uncritical judicial blitheness that warrants both precedential concern and worry that the judiciary has abdicated its oversight role in the nation's tripartite separation of powers system.

Attention then shifts to the important ways in which the laws have affected notions of informational privacy. The data contained in registries—such as home and work addresses, conviction histories, and vehicle descriptions—are of course “public” in the strictest sense. Registration and notification, however, compel the collection and updating of such information from individuals, when it otherwise would remain disaggregated, and disseminate it to the public at large. The process and its effects irreducibly impact traditional notions of privacy and figure centrally in an important ongoing national debate over the appropriate contours and limits of disclosure.

This shift in privacy understanding has given rise to a corollary shift in public safety governance, one based on a new triangular relationship. The linchpin of the relationship is registrants themselves, who under pain of punishment are required to provide identifying information to government authorities, making them complicit in their own surveillance, after they have discharged their penal debt to society. The second component part concerns community members, who rather than being passive beneficiaries of police public safety efforts, as in the past, are expected to be active consumers and users of registry information. Armed with such information, they, rather than police, have shouldered paramount responsibility for defending against recidivist criminality and the apprehension of perpetrators. Lastly, government, while still expected to arrest and imprison recidivists, has assumed the principal role of information broker—a role, courts have held, is lacking in causal responsibility for the vigilantism and other negative consequences of community notification because the information conveyed is “public.”

Chapter 6 closes with a discussion of the way in which registration and notification have transformed traditional notions of state-federal relations. As a result of sustained federal pressure, a matter squarely within state police power authority, the community control of ex-offenders, has been driven and defined by Congress and the White House, with major ramifications for the nation’s federalist system of governance.

Chapter 7 considers the likely future evolution of registration and notification. Given the considerable resources required to operate the laws, and the increasing sense that they are either ineffective or even counterproductive, one would expect to soon witness either their sharp limitation or demise. For a variety of reasons, however, neither outcome is likely. Backing limitation or abolition of the laws would carry the political risk of appearing weak on crime or, worse yet, mounting a personal assault on the legacies of victims after whom laws have been named. Similarly, the critical research findings amassed to date, and any published in the future, can be expected to be rebuffed by the intuitive certitude that has always insulated the laws from question, or the common refrain that the laws are justified “if one child is saved.”

Furthermore, until such time as registration and notification adversely affect the politically empowered, indulging them will remain, as Cass Sunstein observed in another context, “costless.”³ And while it is possible that ever-harsher incarnations of registration and notification might result in

reassessment of their constitutionality, on the margin, the firm backing of the U.S. Supreme Court makes it unlikely that the judiciary will intercede and curb state efforts in a fundamental way. Finally, the central role registration and notification have come to play in the modern corrections system make retrenchment even less likely. Along with global positioning system (GPS) technology and similar strategies, they promise community and information-based public safety, at substantial cost savings relative to prison or jail.

Indeed, strong reason exists to conclude that future years will witness expansion of registration and notification. Already, other criminal subpopulations have been targeted, and the political dynamic driving the laws makes it likely that this growth will continue. Whether the line of inclusion will be drawn at persons convicted of crime also remains to be seen; other information, such as civil judgments, is also “public,” presumably warranting similar indulgence. In coming years, this growth might also extend to the international arena, which to date has resisted American-style registration and community notification.

In sum, the effort here will be part genealogical, part sociological, and part legal in orientation. Together, it is hoped, the approaches will afford a comprehensive understanding of the past, present, and perhaps future of registration and community notification laws in America.