Brandishing the Mark of Cain: Defects in the Adam Walsh Act

Branding a person a sex offender is the most damning label available in modern society. No other term evokes such universal disgust. The label sex offender carries a significant burden. All states require those deemed sex offenders to register on a regular basis with local law enforcement so that the community where they live and work can be notified of their presence. They may have to put signs in their yard announcing their new status as outcasts or even have special license plates on their vehicles to further distinguish them from the rest of society. Failure to comply with any of these requirements is a crime, often a felony. On top of that, nearly half of the states have some form of residence and/or employment restrictions that follow those declared sex offenders for as long as they are required to register. So when the government brands someone a sex offender, it is a serious action. Given the severe consequences that flow from having this label, the process by which a person receives it should be scrutinized. There actually ought to be a process, not just an automatic action. In the haste to mark those convicted of sex-related crimes as deviant, the constitutional rights of those individuals are often ignored. Regardless of how we may feel about a person’s actions, he or she is still entitled to protections and processes guaranteed in the Constitution, in particular in the Sixth and Fourteenth Amendments.

This Article will explore how and when the sex offender label is attached. It will consider some alternative methods to accomplishing the governmental objective of providing notice to the community while at the same time respecting individual rights. Because the social stigma is so great, the brush used to mark sex offenders needs to be precise. Not every person convicted of a sex crime should be designated a sex offender. With the passage of the 2006 Adam Walsh Child Protection and Safety Act, the federal government has strong-armed the states into a tier system for classifying sex offenders. The federal government has gone too far in its use of this term. It is more than an identification that requires remedial action. It means more than what this person did. It now refers to who they are and what they will do in the future. It is a mark much like the mark placed on the forehead of Cain by God after he was banished for killing his brother. Except that mark was to tell others to stay away from Cain to protect Cain. The sex offender label is to mark those that society should avoid to protect society. Because once people are marked as sex offenders they are branded dangerous, poisonous, and hopeless. And just like Cain, they are destined to live life as fugitives and vagabonds.

II. Who Gets the Label?

With congressional passage of the Adam Walsh Child Protection Act, the federal government has strong-armed the states into a tier system for classifying sex offenders. While many states already had a tiered system, the new federal guidelines expand who gets the sex offender label and for how long. To avoid the financial penalties of non-compliance, states are scrambling to adopt the provisions of the Act before the 2009 deadline. In their haste to get the law on the books, procedural constitutional concerns are swept under the rug, if not ignored completely.

As written, the Adam Walsh Act requires all individuals convicted of sex-related crimes to be classified into one of three sex offender tiers based on the seriousness of the crime. It does not matter if it is your one and only sex crime. One infraction is enough to become a sex offender.
Once is enough to earn the burden of being labeled a sex offender and to carry that label for a minimum of fifteen years (or ten years with good behavior). Any sex-related crime, even those committed by children fourteen years old, will beget the label. There is no pass given for first-time offenders and no mechanism for negotiating away the label. It even reaches back to cover those whose crimes were committed before the Adam Walsh Act was adopted. Prior offenders are subject to being reclassified not based on their behavior after conviction but because of the crime committed. The label is automatic. The only issue is what tier.

The three tiers set forth the period of time an offender is required to register as a sex offender. Depending on other sex-offender regulations in the state, a person who must register as a sex offender may also be subject to residence and employment restrictions that could severely limit his or her freedom. Tier one, the lowest tier, requires registration and notification for fifteen years. Tier two, the middle tier, requires registration for twenty-five years. Tier three requires lifetime registration. If a tier-one sex offender has a clean record for ten years, then the final five years of the registration may be eliminated. A tier-three offender can, after twenty-five years of having a clean record, reduce his or her labeling to twenty-five years. Other than that, there is no provision for reduction or waiver of the sex offender label. There is no provision for tier-two offenders to reduce their twenty-five-year registration requirement.

If the classifications correlate to punishment, then this would make sense, as more serious crimes are fairly punished more severely than minor infractions. But the sex offender classification is not intended for punishment; it is for regulation. If it were presented as punishment, then it would violate ex post facto laws. If it were punishment, then it would far outpace any other sentence enhancement, punishing misdemeanor crimes as if they were serious felonies. If it were considered punishment, there would be no hesitation to strike it down as cruel and unusual. So it cannot be deemed punishment—not if it is to be constitutional.

The declared purpose of the classification system is for protection from future acts, not punishment for prior acts. In such case, some process of determining the alleged dangerousness of each sex offender should take place. Somehow it has to be determined what risk an individual poses to society. We have to treat consensual encounters differently than nonconsensual ones. We should treat non-violent crimes differently than violent crimes. Yet according to the Adam Walsh Act, all of the above will spend a significant portion of their lives under the yoke of the sex offender label. If we do not take the time to see who really is a danger to society, we are treating all offenders as having the exact same inability to repent. In fact, we are treating those convicted of sex-related crimes as if they will never repent. A one-size-fits-all approach means that we are over-regulating the vast majority of those convicted of sex offenses.

III. How Do They Get the Label?

According to the Adam Walsh Act, the process by which a person is deemed a sex offender is no process at all. He or she is declared a sex offender upon conviction of a designated offense that involves sex, a minor, or both. There is no hearing. No witnesses are called, and no evidence is presented. There is no evaluation. There is no analysis. There is nothing that a defendant can do to avoid receiving the label. It is automatic. There is no process. It is merely a foregone conclusion that all people convicted of a sex crime be labeled as sex offenders. The only question is which tier. Skipping to that step with no process in between puts too many people under the scrutiny of sex offender registration. No one gets to discuss whether a particular defendant should be there at all. The assumption that all people convicted of a sex crime should be branded a sex offender is defective. That defect reveals a fundamental unfairness in the sex offender labeling process of the Adam Walsh Act.

Automatic labeling was not the case in all states prior to the Adam Walsh Act. In fact, there was a lot of variety in determining who got the sex offender label. While most states went with the automatic approach for low-level sex offenders, some states gave the judge the discretion, others the jury, and still others a commission that assessed defendants to determine sex offender rankings. There may have been an opportunity to call and cross-examine witnesses. In most cases, a two- or three-tiered system existed with the distinction typically between a sex offender and a violent sex offender and/or sexual predator. The distinction between being labeled a sexual offender and being labeled a sexual predator and/or sexually violent predator was not significant and related to the time period of registration. In that sense it was similar to what is set forth in the Adam Walsh Act. However, a few states considered civil detention for those placed in the highest tier, such as someone deemed a “sexually violent predator.” There is process for civil commitment. Why not for all sex offender labeling?

The trend, as promoted by the Adam Walsh Act, is to remove any individual assessment. The delineation of tiers based solely on the particular offense of conviction removes any discussion about the facts and circumstances of a particular case. While states are not required to adopt word-for-word the Adam Walsh Act, they are required to substantially comply with it. There does not seem to be any discretion for the states to add process if it opens the possibility that all those convicted of sex crimes would not get branded.

IV. A Better Approach

The sex offender brand is here to stay. It is far too political an issue to just go away. But the way it is allocated should change. It is possible that it could be used to serve a legitimate governmental interest without unduly restricting individual liberty. There is a constitutional need for process.
A better approach for sex offender identification would be based on the premise that the sex offender label is a punishment in and of itself. It carries a stigma, but more important, it is the first step toward future crime not related at all to sex. As punishment, courts would have to treat it just like any other sentence enhancement. Courts would be required to find facts that would indicate a need for enhancement for each particular defendant. Following the requirements of the Apprendi and Booker line of cases, facts would have to be produced for a jury to find a person a tier-two or tier-three sex offender—or better yet, a sex offender at all. The goal of this new process would be to make sure we only label the deviants that deserve the sex offender label.

Being a sex offender should be a crime all its own. A separate charge should have to be made for being a sex offender, much like being a prior or persistent felony offender. That way, the sex offender status could be a tool for prosecutors to use at their discretion. They could use it to label only those who truly deserve the label. It could be negotiated away or not even considered at all in most circumstances. If an accused were found guilty of being a sex offender, then that conviction would serve as a sentence enhancement much like being a persistent felony offender. Being a sex offender would increase punishment by forcing the accused to follow all of the restrictions currently forced on sex offenders. There would be a jury trial for the proof as required by Apprendi and Booker, and the jury would need to find not only that the accused committed a sex crime, but also that he or she is likely to offend again. While not ideal, this approach at least gives a defendant a chance to fight being branded a sex offender.

Also, there should be a notice requirement, in the spirit of Boykin v. Alabama, for those pleading guilty to a sex offense. Courts should be required to put on the record that the defendant will be labeled a sex offender, or subject to being given this label. Courts should be required to detail the ramifications of such labeling, including the length of the branding and the residence and employment restrictions that accompany the label. Such notice should be given so that before a plea is entered, it is clear that the offender is freely and voluntarily accepting this burden. The notice needs to include the fact that the crime they plead guilty to may subject them to the sex offender label in the future, especially if they move to a different state.

V. Obstacles to Change

There are two primary obstacles that hinder change in this area. The first is a refusal at this point to acknowledge that post-conviction, post-probation, post-release restrictions of liberty, like the registration requirements and the residence and employment restrictions that flow from mandatory registration, are punitive and not merely regulatory. Until the post-release restrictions are treated as actual punishments, there will be no judicial relief. So long as the sex offender labeling process is considered regulatory and not punishment, it will remain civil in nature and subject to lower scrutiny. However, courts are beginning to scrutinize the Adam Walsh Act. As more courts look at the issue objectively, they will find problems that should be corrected no matter how politically unpopular it may be to do so.

The second obstacle is the belief that these scarlet letter laws actually make us safer. There is no better example of the politics of fear than the Adam Walsh Act. Listed at the beginning of the act are the names, ages, home states, and years of disappearance of seventeen children who were abducted and killed or are still missing. The fear that sex offenders are prowling after our children motivates this kind of drastic legislation. After all, what politician does not want to protect children? The issue is not whether sex offenders should be punished. But there is no evidence to support the view that these measures actually make us safer. These laws are too broad, too far-reaching, and too expensive for states to adequately follow. What the evidence does show is that these laws have a devastating effect on offenders, making recovery more difficult. If sex offenders cannot assimilate back into society, then we have created a class of outcast outlaws. What else can they do then but reoffend? The politics of fear will push this issue into the courts, where hopefully common sense will prevail.

Notes

1 Some sex offenders may be required to verify their information as often as every ninety days.
3 In Alabama, for instance, the failure to register is punishable by up to ten years and up to a $250,000 fine. Ala. Code § 15-20.26(h) (2008).
6 See, e.g., Peter Hirschfeld, Issues of Cost, Content Arise over State’s Sex Offender Registry, Barre Montpelier Times Argus, Oct. 21, 2008, available at http://www.timesargus.com/apps/pbcs.dll/article?AID=/20081021/NEWS01/810210369/1002/NEWS01. The lower threshold of the Adam Walsh Act will require all 2,400 of the Vermont’s sex offenders to register, whereas previously only 400 were required to do so. Id.
7 See, e.g., In re Gant, No. 1-08-11, 2008 WL 4455589, at *6 (Ohio Ct. App. Oct. 6, 2008) (holding that registration and verification provisions are remedial in nature and do not violate the ban on retroactive laws).
8 Genesis 4:15 (New King James) (“And the Lord set a mark on Cain, lest anyone finding him should kill him.”).
9 Genesis 4:12 (New King James).
12 A sex offender typically will be subject to registration requirements, as well as employment and residence restrictions, for
at least ten to fifteen years, while a second- or third-tier designation increases the registration period to twenty-five years or life.


Failing to report or otherwise violating reporting requirements, residence restrictions or employment restrictions are strict liability crimes that apply only to sex offenders.

See, e.g., Abigail Goldman, New Sex Offender Laws Could Rise Out of Limbo, Las Vegas Sun, Oct. 8, 2008 (reporting that three courts in Nevada have acted to halt proceedings under the Adam Walsh Act as they consider the constitutionality of the law).