

Per our discussion last week about sexual crimes, I wanted to discuss a study that was recently published in the International Journal of Epidemiology titled “Sexual Offending Runs in Families: A 37-year Nationwide Study.”¹ The goal of the study was to explore the possible underlying causes of sexual aggression. The study analyzed genetic and environmental factors of sexual crime by overlapping the Swedish crime database and the multigenerational family registers. The study looked at data from 1973-2009. The research team used a database that included 21,566 men convicted of any sexual offense. Of those, 6131 were convicted of adult rape, and 4465 convicted of child molestation.²

The results of the study found “strong familial aggregation of sexual crime” with a confidence interval of 95%.³ The conclusion states, “We report strong evidence of familial clustering of sexual offending, primarily accounted for by genes rather than shared environmental influences. Future research should possibly test the effectiveness of selective prevention efforts for male first-degree relatives of sexually aggressive individuals, and consider familial risk in sexual violence risk assessment.”⁴

This study prompted news headlines like “Sexual Assault Runs in Families: Relatives of Sex Offenders 5 Times More Likely to Commit Sex Crimes,” and “Sex Offending is Written in DNA of Some Men, Oxford University Finds.”⁵

This begs the rather farfetched question: Is our criminal justice system harshly penalizing a genetic disease? This study grabs my attention because (1) it studies sex

¹ <http://ije.oxfordjournals.org/content/early/2015/04/05/ije.dyv029.full>

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ <http://www.medicaldaily.com/sexual-assault-runs-families-relatives-sex-offenders-5-times-more-likely-commit-sex-328818>

crime, which is a taboo subject, and (2) it stipulates, and provides evidence, that sex aggression may be genetic, an even more taboo idea.

I was glad to see this study discussed on several news outlets, because it is something that the public needs to understand. The problem with child porn, sexual assault, and sex-related crimes is their inherent controversial nature. If we can get people to start understanding that some of the problem is genetic rather than by choice, we may garner more support for therapies that can be invoked before sexual aggression appears.

I especially like the second part of the research team's conclusion urging future studies to test the effectiveness of selective prevention programs for male first-degree relatives of sexually aggressive individuals. If we can better predict who is likely to commit a sex crime, we can better provide preventative treatments or therapies to the population. Also, understanding effective therapies and the genetic factors may assist to rehabilitate those convicted of sex crimes. Down the road, with more scientific evidence, perhaps, even genetic alterations can be made to mitigate the likelihood that sex crime will be committed, or that it will be committed for a second time in the context of a person convicted of sexual crimes.

I think exploring the genetic possibilities underlying crime is essential to developing effective therapies and mechanisms to prevent such crime. Understanding that sex crimes may have a genetic link opens the door for more needed research on the issue. It also is a factor that should be considered at sentencing.

Retroactive Registration Requirements: Ohio Supremes and Sixth Circuit Get It Right

Sex offender registries have long been the subject of public criticism; many legal scholars have argued that the lists promote *fear* without efficient *function*. For example, only thirteen states require sex offenders to be registered for life. The majority of states, however, require a minimum registration duration of somewhere between five and thirty years depending on the egregiousness of the sex offense (at which time, the offender may be eligible for removal from the list altogether). Critics argue that unless and until we better understand the root cause of sex offenses (i.e. is it really a mental illness? Is it a byproduct of chemical brain make-up?), registration ought to last for life. That is to say, if pedophilia is incurable, and sex offenders are thought to be a lifelong threat for whom rehabilitation is an unattainable goal, the public ought to be on notice for as long as the offender is in the area. *But see*, [“Sex Offender Registries Not Working With the Hardcore”](#) (detailing state-by-state statistics that registries do little to impact rates of recidivism). While I do not have the answers to many of these outstanding issues, it is important to bring these questions and concerns of state sex offender registration laws to public forums, and to consider how effective sex offender registries truly are in serving the broader goal of public notification and (possibly?) deterrence.

Another aspect of registries which have been the subject of much litigation are retroactive registration requirements. Can states require sex offenders to who committed their felonies prior to the implementation of mandatory state registration laws to sign up? In Ohio, the Supreme Court (5-2) declared this practice unconstitutional. The Ohio Adam Walsh Act (AWA) was created through SB 10 in 2007 and requires that courts must apply a three-tiered offender classification scheme and must include the defendant’s sentence registration and community notification requirements (even prior convictions) consistent with the new, more stringent registration law. The majority held it unconstitutional on the basis that while law enforcement must protect the public from sex offenders, it may not ‘impose new or additional burdens, duties, obligations, or liabilities as to a past transaction.’ The minority argued that in the past, requiring offenders to register has been viewed as a civil sanction, not a criminal penalty. I suppose that one’s view of how registration fits as a collateral consequence within a broader punishment scheme dictates which side you agree with. The Sixth Circuit Court of Appeals affirms the view of the Supreme Court of Ohio’s majority in *Utesch*, citing the Ex Post Facto and Due Process clauses in its reasoning.

Some states have tried to go so far as to require sex offenders (who were convicted prior to the mandatory state registration law), to enroll if they completed *any felony*, even if that felony was not a sex crime. Such a requirement would ‘water down’ the legitimacy of the sex list, muddying the waters with individuals who are perhaps robbers or murderers, but who are not sexually dangerous. Most courts have seen through these efforts by state legislative bodies as nothing more than an ‘end-around’ to evade already-unconstitutional retroactive registration requirements (*See United States v. Reynolds*, 132 S.Ct. 975(2012)(holding that SORNA’s retroactive registration requirements did not apply to pre-Act offenders until the Attorney General so specified).

From every angle, the sex offender registry (and the public shame that accompanies it) is a significant collateral consequence for sex offenders. It presents a fascinating intersection of ‘whos’ – the attorney general, SCOTUS, state judicial bodies, state legislators, the offender themselves, the offender’s families, the immediate public (neighborhood), and the wider community at large. The policy behind sex offender registries strikes a careful balance between protecting the public at large, attempting to rehabilitate and reintegrate the sex offender into society, and still operating consistent with his or her constitutional rights. While I ultimately agree with the Supreme Court of Ohio as well as the Sixth Circuit that registration requirements should not be retroactively applied, I remain convinced that this area of the law demands and deserves a great deal of attention with an eye towards reform. Perhaps the best place to start would be an area that seems easy to lay boundaries for and define: perimeter restriction requirements. While vague drafting and unclear legislation persists, prosecutors and law enforcement (motivated by society to be tough on crime, *especially* tough on *this* kind of crime) are provided with more and more leeway to enforce perimeter restrictions as they see fit. Let’s tackle these kinds of tangible issues before the more uncertain science-based inquiries, such as whether pedophilia is genetic. Query whether or not if pedophilia is determined to be genetic, we automatically sign up brothers, fathers, grandparents, uncles, siblings, etc. Is that practice constitutional? Despite abounding uncertainty, it is clear that it is time to reclassify, rethink, and reconstruct our sex offender scheme, especially in the context of scope, duration, and harshness of mandatory registration laws.