America's Civil Death Penalty: The Sexual Offense Registry

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By Guy Hamilton-Smith . . . Oscar Wilde, writing from his cell in the Reading Gaol where he was imprisoned for homosexuality at the end of the nineteenth century, observed that "society reserves for itself the right to inflict appalling punishments on the individual, but it also has the supreme vice of shallowness, and fails to realise what it has done. When the man's punishment is over, it leaves him to himself; that is to say, it abandons him at the very moment when its highest duty towards him begins."

In America, few aspects of law and policy so perfectly embody Wilde's observation of punishment in nineteenth century England as sex offense registries.

Registries and their application embody shallowness in that most courts do not regard them as punishments at all – hence

the title of this piece reflecting their ostensible "civil" nature. If America had a civil death penalty, putting people on sex registries would be it.

While many countries have such registries, few operate as America's do. The basic idea behind them is to broadly publicize the names, faces, and home addresses of anyone who has been convicted of any kind of a sexual offense (or, as some U.S. jurisdictions have done, most any crime at all). Along with placement on sex offense registries comes many legal requirements, such as complex reporting requirements and restrictions on where one is able to live. While these requirements vary from state to state (and sometimes city to city), they generally require strict compliance or else those subject to them run the risk of new prosecution for failing to comply.

In 2003, the United States Supreme Court was faced with the question of whether an Alaskan law that made the names and home addresses of people who had been convicted of sexual offenses public constituted punishment. It was an important legal question because, under the American federal constitution, ex post facto laws (that is, laws which increase the punishment for a crime after the crime has already been committed) are prohibited.

In a 6-3 decision, the Court held that it was "civil" as opposed to criminal, justified in part on the basis of the widely-shared perception that people who had been convicted of sexual offenses shared a "frightening and high" risk of re-offending (a perception that has little bearing in reality).

While these lists are justified on the basis of assumed dangerousness, the same Supreme Court in a separate case concluded that whether or not someone was ***actually*** dangerous was not a relevant question for inclusion on these lists.

Between these two cases, the Court denied critical constitutional protections for hated groups of people, thus giving the green light to laws which have evolved into something exquisitely punitive.Recently, a major court decision lambasted registries as ineffective at promoting public safety, while noting that they rendered those on them "moral lepers" who are forced to reside at the margins of society on the sole basis of a conviction. Another decision, currently on appeal in the United States 10th Circuit Court of Appeals (one step below the United States Supreme Court), called registries cruel and unusual punishments in violation of the Eighth Amendment to the United States Constitution – an almost unheard-of legal conclusion for American courts to reach outside of death penalty litigation.

Though, in my view, it is the right one.

I know, because of the nearly million people on America's sex offense registries, I am one of them.

Read the remainder of the piece at the University of Cambridge Comparative Penology Blog.