

THE INVISIBLE MAN: HOW THE SEX OFFENDER REGISTRY RESULTS IN SOCIAL DEATH

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Frank Rodriguez is socially dead. He died when he was nineteen years old and had sex with his fifteen-year-old girlfriend (consensual sex with a minor is against the law in Texas). Frank Rodriguez died the day he entered a guilty plea to sleeping with his girlfriend and was forced to move from his parents' home because the law did not permit him to live under the same roof as his twelve-year-old sister. From the time of his plea, he has not been allowed to visit pools, parks, or any locations where children are likely to congregate. He is currently married to this same teenage girl, now a woman, and they have four daughters together, but Frank Rodriguez and his family all live on the margins of society. He is still not allowed anywhere children are likely to congregate. This means he cannot

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coach his daughters' soccer team or even pick them up from school. He is socially dead, and his family is, too.

Frank Rodriguez's story is not unique; the irony of the United States' justice system is that crime rates continue to rise in the face of increasingly harsher criminal laws. In fact, the United States stands out from other nations in its level of incarceration and its rates of routine violence. Yet despite decades of a "tough on crime" approach, the U.S. criminal justice system remains incapable of lowering the crime rate, much less preventing crime at all. Overcriminalization is not only resulting in more crime, but it is also contributing to the deterioration of society making it likely that crime rates will increase even more.

Beginning in the 1970s, a conservative movement emerged at the forefront of criminal justice promoting overcriminalization. The push in favor of overcriminalization in the United States has emerged as an enormous experiment in social engineering. The crisis of penalty is evidenced by

sweeping legislative acts intended to prevent crimes from occurring; anti-crime legislative acts, however, tend to be overly-repressive and function to increase crime rates rather than lower them. Repressive criminal laws, then, are evidence of overcriminalization.

Law exists because society agrees it exists; thus, laws change as societies change. “Society” is an abstract term referring to a collective decision-making body, which excludes some people from the makes the decision. Those who exist on the fringes of society do not enjoy the power to make decisions, and for all intents and purposes they are socially dead. The marginalized, however, can sometimes transition into the normative mainstream and gain a foothold in society to become a part of the decision-making collective. For this to occur, however, requires a fundamental shift in the relationship between those in power and the marginalized of society. The power base must change to make room for the emerging voice of the marginalized group to claim its place in society.

The term “crime” is difficult to define because the concept of what constitutes deviance (i.e. a criminal act) changes as society changes. The more repressive or conservative the societal system, the more likely it is that the deviance is designated by officials. Definitions of deviance may be strongly tied to deviant behaviors, or they may be largely invented. The higher the level of invention in the definition of deviance, the more likely normal standards of procedure and restraint will be taxed.

Repressive control systems tend to incentivize, either economically, politically, or otherwise, the prosecution and punishment of deviance. On the other hand, criminal laws in a restrained system are more effective because they are narrowly tailored and paired with strong protections of individual rights. Additionally, the prosecution and punishment of deviance is not incentivized under a restrained societal system. Therefore, under repressive control systems the number of deviants is greater as is the incidence of punishment; that is, repressive control systems

result in a greater number of criminals and a higher rate of crime.

The sex offender registry is a repressive social control system. Society, through the legislative process, has broadly defined the deviant (i.e. the sex offender) as well as the deviant behavior (i.e. the sex offense). Although some sex crimes may be defined by the deviant behavior itself, many sex crimes encompassed in the Adam Walsh Act and the Sex Offender Registration and Notification Act (SORNA) are only crimes because the legislature has so designated. Specifically, sex offenders under 42 U.S.C. § 16911, SORNA, are any “individual who was convicted of a sex offense,” and a sex offense under SORNA is “a criminal offense that has an element involving a sexual act or sexual contact with another.”

As a result, the number of sex offenders committing sex offenses is growing as is the rate of prosecution and punishment for sex offenders. Rather than working to prevent sex crimes from occurring, SORNA’s repressive nature will function

to increase the incidence of sex-related crimes as well as their punishment.

In this Article, I use Elliott Currie's work to illustrate how repressive control systems overcriminalize behaviors and result in higher rates of crime, prosecution, and incarceration. Section II of this Article establishes that crime is a social construct and explains how, over time, the definition of what constitutes a crime changes. This section also identifies three characteristics that emerge in a repressive control system: (1) imperviousness to restraint by other social institutions; (2) an absence of internal restraints on the powerful, systematic oppression of deviance; and (3) institutional focus on apprehending and processing deviants. In Section III, I examine each of these characteristics in the context of SORNA and propose that each characteristic has emerged in the wake of the implementation of SORNA. Finally, I conclude by predicting crime rates with respect to sex offenses will likely increase as will the rates of

prosecution and punishment in the wake of
SORNA.