

State Criminal Justice and the Challenge of Ex-Offender Mobility

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In *Connectedness and Its Discontents*,¹ Dan Markel pays me the distinct honor of critiquing my recent article, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*.² There, I examined the challenges faced by states as they seek to apply their registration and recidivist enhancement laws to ex-offenders who, having discharged their penal commitments, migrate to other states. As I explained in *Interconnectedness*, states employ either an “internal” or “external” approach in seeking continued accountability of such individuals, with a variety of advantages and disadvantages accruing under each regime.

In the preceding pages, Professor Markel, while not “convinced that the external approach is the obviously superior [approach],” takes me to task for having purportedly overestimated its deficiencies.³ Unfortunately, while stated with great eloquence, Professor Markel’s assertions are off the mark. In the brief space available here I will try to address each of his arguments and concerns.

I. HARSHNESS

Professor Markel first disputes that the external approach, compared to its internal approach counterpart, is “unduly harsh.” As he acknowledges, in *Interconnectedness* I note that *émigré* offenders subject to the internal approach very often experience harsher outcomes than they would under the external approach.⁴ Focusing, however, on the reality that the external approach imports what he calls “weird” normative positions of foreign states (e.g., tying registration to “peeping” convictions or enhancing sentences based on low-level drug convictions), Markel counters that “widen[ing] the scope of penalty is not always bad.”⁵ Citing laws codifying what he calls “progressive sensibilities,” such as those outlawing marital rape and enhancing sentences for bias-motivated crimes,⁶ he

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¹ Dan Markel, *Connectedness and Its Discontents: The Difficulties of Federalism and Criminal Law*, 4 OHIO ST. J. CRIM. L. 573 (2007).

² Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005) [hereinafter *Interconnectedness*].

³ Markel, *supra* note 1, at 575.

⁴ See, e.g., *Interconnectedness*, *supra* note 2, at 272–75.

⁵ Markel, *supra* note 1, at 577.

⁶ *Id.*

makes the easy case that states can serve as laboratories of legal pluralism.⁷ *Interconnectedness*, however, does not dispute this commonplace of federalism, with its uneven bag of normative results.⁸ Indeed, as discussed below, a principal shortcoming of the external approach is that it disavows and mutes pluralism and the democratic processes from which it derives.⁹

Professor Markel is thus correct that application of the external approach can cut both ways: what one might consider progressive and/or retrograde norms are potentially imported. However, this misses the two larger points made in *Interconnectedness*. First, that the external approach has a distinctly un-Brandeisian consequence: rather than allowing individual “experiments” to be undertaken in isolation, “without risk to the rest of the country,”¹⁰ it reflexively imports them (without individualized consideration of their normative merits) to drive outcomes in the forum state.¹¹ The second point is that the external approach, by applying both its own registration and enhancement criteria *and* those of other states, ineluctably results in an expansion of governmental social control.¹² A harshening does indeed thus occur, and should prompt concern, but not necessarily for the individualized instances Markel discusses. With adoption of the external approach, a cumulative legal endoskeleton takes shape in the forum as foreign state norms, whether “weird” or not,¹³ are imported *en masse*.¹⁴ Moreover, as I discuss in *Interconnectedness*, this aggregate is temporally and geographically

⁷ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁸ See Lynn A. Baker, *Should Liberals Fear Federalism?*, 70 U. CIN. L. REV. 433, 448 (2002) (“The freedom of sub-national political communities to choose their own visions of the good society, like any other form of ‘diversity,’ predictably results in a mixed bag of results.”).

⁹ See *infra* notes 24–30 and accompanying text.

¹⁰ *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting). Cf. THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961) (identifying as a central benefit of federalism its capacity to allow extreme state policies to remain cabined in their place of origin).

¹¹ To Professor Markel, the external approach promotes intra-state experimentation because a state will at once employ foreign and indigenous norms, allowing for comparative analysis. The point is a fair and perceptive one; however, for reasons discussed below, a variety of compelling reasons support the view that the internal approach, which assesses the impact of prior misconduct through the forum state’s own normative lens, is preferable.

¹² In a footnote, Markel suggests that the external approach might permit states—wishing to discourage “unwanted [ex-offender] migration”—to waive application of the forum’s law and single out newcomers for differential treatment, thereby avoiding legislative changes in the forum that would increase sanctions for newcomer and indigenous populations alike. Markel, *supra* note 1, at 579 n.27; see also *id.* at text accompanying n.36 (arguing similarly). The possibility, however, again ignores democratic pluralism and autonomy considerations, and fails to address broader inequality concerns discussed below.

¹³ For instance, twenty-eight states require registration of individuals convicted of the strict liability crime of statutory rape. See Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 325 (2006).

¹⁴ This aggregate is at once akin to, and builds upon, that which occurs when Congress criminalizes conduct that states do not. *Interconnectedness*, *supra* note 2, at 327 n.371.

contingent, indiscriminately importing aspects of substantive criminal law, penal norms, and procedures across time and space.¹⁵

II. DISPARITY

Professor Markel next disputes my contention that the external approach creates troublesome disparities vis-à-vis both *émigrés* from foreign states and *émigrés* and individuals indigenous to the forum. He does not deny that the external approach creates such disparities but rather asserts that they are not in themselves problematic, advancing two arguments in support.¹⁶ First, Professor Markel maintains that *émigrés* in an external approach state are on notice that their conviction history from their erstwhile home(s) will have mirror-image effect in their new state, thereby dissolving any fairness concern. Markel is correct, as I note in *Interconnectedness*, that notice is a prime benefit of the external approach.¹⁷ It should go without saying, however, that advance notice of an inequity in no way cures its disparate effect.¹⁸

Professor Markel's second argument against what he calls the "vener of unfairness"¹⁹ is somewhat more persuasive. To his mind, when *émigrés* experience a comparative disadvantage due to their foreign state conviction history, this is justified because "[t]he predicate conduct was perpetrated against *different sovereigns* whose democratic institutions may legitimately issue different rules with different consequences."²⁰ While such a statement is of course technically correct, it elides the reality that individuals—in the forum—are subjected to distinct legal regimes resulting in different outcomes. As the Minnesota Court of Appeals observed in applying its internal approach enhancement law to reject consideration of a foreign juvenile conviction, "defendants with similar criminal histories should not receive disparate treatment depending on the age of majority of the state in which they committed prior offenses."²¹

¹⁵ *Id.* at 307–10.

¹⁶ Markel, *supra* note 1, at 578. As I note, the disparities present no basis for actionable equal protection challenge as such, but rather create policy concern. *Interconnectedness*, *supra* note 2, at 311–12.

¹⁷ Whereas the internal approach often requires complex inter-state comparative legal analysis, the external approach is simple and efficient, reflexively transplanting foreign norms and outcomes to the forum. *Interconnectedness*, *supra* note 2, at 288.

¹⁸ *Cf.* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW §§ 14.6, 14.7, 17.4 (3d ed. 1999) (surveying distinctions between substantive and procedural due process).

¹⁹ Markel, *supra* note 1, at 579–80.

²⁰ *Id.* at 579.

²¹ *State v. Thomas*, 374 N.W.2d 586, 588 (Minn. Ct. App. 1985); *see also State v. Bush*, 9 P.3d 219, 222 (Wash. Ct. App. 2000) (rejecting external approach in order "to ensure that defendants with equivalent prior convictions are treated the same way regardless of whether those prior convictions were incurred in Washington or elsewhere."). *Cf. Small v. United States*, 544 U.S. 385

Professor Markel's final assertion on the disparity issue—that the external approach “actually serves the cause of equality because it ensures that similarly situated defendants convicted in the same jurisdiction endure the same kind of consequences regardless if one of the offenders decides to go to another jurisdiction”²²—is equally without merit. It is at once under-inclusive in that it ignores other subject populations²³ and serves to underscore the reality that individuals are in fact being subject to a different *corpus juris* with consequent disparity.

III. STATE AUTONOMY

Next, Professor Markel takes issue with yet another chief concern expressed in *Interconnectedness*: that the external approach, by reflexively bootstrapping the value judgments of other states, functions to abnegate state autonomy. To him, adoption of the external approach actually amounts to an “expression of [state] autonomy, rather than as a denigration of it” because it reflects a crime control strategy predicated on inter-state deference and comity.²⁴ Such a view, however, again ignores a basic functional reality of the external approach: by adopting *en masse* the registration criteria and penal norms of other sovereigns, external approach states surrender their criminal justice authority to others.²⁵ With the external approach, foreign norms are permitted to dictate outcomes in the forum, in disregard of the forum's own democratically specified criminal justice norms,²⁶

(2005) (rejecting consideration of foreign nation conviction to trigger U.S. felon-in-possession law due to other nations' varied substantive laws, punishments and procedural protections).

²² Markel, *supra* note 1, at 580.

²³ In particular, the comparative experience of *émigrés* from different states (not the same state) and *émigrés* and indigenous individuals. *Interconnectedness*, *supra* note 2, at 304–05.

²⁴ Markel, *supra* note 1, at 580.

²⁵ See *State v. Langlands*, 583 S.E.2d 18, 20 n.4 (Ga. 2003) (“A state cannot express its public policy more strongly than through its penal code. When a state defines conduct as criminal and sets the punishment for the offender, it is conveying in the clearest possible terms its view of public policy.” (quoting *State v. Edmondson*, 818 P.2d 855, 860–61 (N.M. Ct. App. 1991)); see also *State v. Clough*, 829 P.2d 1263, 1265 (Ariz. Ct. App. 1992) (“The obvious purpose of [an internal approach recidivist law] is to preclude the enhancement of a sentence if the conduct which led to a conviction in another state has not been judged by our legislature to be so egregious . . . as to justify treating it as a felony.”).

²⁶ As the Alaska Court of Appeals put it, “[t]he effect of a prior criminal conviction . . . on the sentencing of an Alaska offender implicates issues of policy that are uniquely Alaskan in character and have nothing to do with California law.” *Mancini v. State*, 904 P.2d 430, 432–33 (Alaska Ct. App. 1995). See also *People v. Laino*, 87 P.3d 27, 37 (Cal. 2004) (“[T]he profile of the shadow that conviction casts on later events is the business of the state where those later events occur.”) (citation omitted).

forsaking what the Supreme Court has referred to as a foremost “prerogative[] of sovereignty.”²⁷

Professor Markel closes his autonomy-related discussion by advancing what he sees as two additional justifications for adoption of the external approach. The first is that a state might wish “to see its norms adhered to when its offenders migrate to other states.”²⁸ For reasons discussed in *Interconnectedness*, however, scant reason exists to believe that states have any motivation whatsoever to be mindful of how ex-offenders/residents fare in other states; they are simply likely to be glad that they are “out of their hair.”²⁹

Second, Professor Markel posits that states might embrace the external approach because the internal approach allows states to be “free-riders”—“[t]heir laws apply in their own jurisdiction *and* they also have their laws apply to their own former citizens who migrate to external approach states.”³⁰ Markel’s reference to free-ridership is oddly inverted, as it figures as a core criticism of the external approach itself. As I noted in my prior article:

By deferring to the laws of other sovereigns, forum state officials become free riders: they avoid any possible negative political consequences that might attend enforcement of such laws in the first instance in the forum...The external approach thus permits jurisdictions to indulge in a kind of stealth legislation: laws are applied by the forum without having been subject to the debate and compromise common to the legislative process, depriving the public of an important occasion for norm identification and support. While it might be the case that the imported value judgment parallels that of the forum, this is not necessarily so, and the stealth quality of the approach undercuts the consensus-based (or at least majority-approved) value choices a formal law embodies.³¹

Nor, for similar reasons, do internal approach states engage in what Professor Markel refers to as “law hoarding” as a result of having their laws apply in external approach states. As noted above, and as *Interconnectedness* makes clear, hoarding is actually a hallmark of the external approach: states augment their registration and enhancement criteria by bootstrapping the laws of other states.

²⁷ *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (“Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code.”). Cf. Lynn Baker & Ernest Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 134 (2001) (extolling the “negative freedom” of federalism—the right to act autonomously, free of the constraining authority of other governmental units).

²⁸ Markel, *supra* note 1, at 580–81.

²⁹ *Interconnectedness*, *supra* note 2, at 332.

³⁰ Markel, *supra* note 1, at 581.

³¹ *Interconnectedness*, *supra* note 2, at 322–23.

IV. DEMOCRATIC EXPERIMENTALISM AND
JURISDICTIONAL COMPETITION

Professor Markel's final contention is that the external approach best serves the values of experimentalism and diversity ideally associated with federalism. In support, he dwells on a point I acknowledge in *Interconnectedness*—that the deferential quality of the external approach serves to validate and reify other states' norms.³² However, as I make clear, this is only part of the story. For just as adoption of the external approach only superficially serves state autonomy,³³ it does not qualify as a substitute for actual democratic deliberation within the forum on the particular norm in question.³⁴ External approach states, rather than insisting that their policies reflect individually legislated sovereign norms, merely “mimic the value judgments of other states,”³⁵ and thus undermine governmental transparency and political accountability by making it “difficult to ascribe value judgments with geo-political accuracy.”³⁶ Nor is the concern mitigated in any principled way by Professor Markel's assertion that the “proportion of migrant offenders is likely to be small compared to the number of indigenous offenders.”³⁷ Even if his empirical assessment is correct,³⁸ transparency and accountability remain undercut, as legislators in external approach states shirk their sovereign democratic obligations.

Professor Markel next mistakenly asserts that the external approach does not dampen exit rights and offers that “Logan thinks people should be able to commit an offense and then escape (some of) the consequences of that conduct by moving

³² *Id.* at 320.

³³ *See supra* notes 25–27 and accompanying text.

³⁴ *See Interconnectedness, supra* note 2, at 319–21; *see also* Ernest Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 52 (2004) (“[S]tate governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora.”).

³⁵ *Interconnectedness, supra* note 2, at 321.

³⁶ *Id.* at 322.

³⁷ Markel, *supra* note 1, at 581–82.

³⁸ There is some question whether this is so. From March 1999–March 2000, for instance, some eight million individuals in the U.S. general population changed state residences. *See* U.S. CENSUS BUREAU, ANNUAL GEOGRAPHICAL MOBILITY RATES, BY TYPE OF MOVEMENT, 1947–2005 tbl. A-1 (2006), available at <http://www.census.gov/population/socdemo/migration/tab-a-1.pdf>. The number of ex-offenders changing state residences is not currently known. However, it is conservatively estimated that over a quarter of a million individuals subject to ongoing probation or parole conditions live in states other than where their predicate conviction occurred, and hence remain subject to the Interstate Compact on Adult Offender Supervision. *See* Interstate Commission for Adult Offender Supervision, FAQ (March 8, 2007), at <http://www.interstatecompact.org/about/faq/default.shtml>. Given the transience of ex-offenders more generally, the number of individuals “off paper” is likely quite high.

to an 'easier' place to live."³⁹ My article, however, plainly fails to support such an inference. As I wrote, states are surely within their rights to hold migratory offenders accountable for their past wrongs;⁴⁰ the question addressed in *Interconnectedness* is how this should occur: whether by means of express sovereign decision or blind deference to other states' norms.

With the external approach, the latter is operative, and norms embodied in foreign criminal convictions are permitted to inalterably affect future outcomes, creating what I refer to as a "residual legal world,"⁴¹ limiting prospects for exit.⁴² This concern is most pronounced with registration, where the external approach requires that *émigrés* register in the forum if they were required to do so in their erstwhile state residence, even if the forum's eligibility criteria would not require registration for an indigenous offender. There is no mistaking that this method is designed to discourage emigration (i.e., norm-evasion). However, this is precisely the point: a foreign state norm (whether "weird" or not) is permitted to dictate potentially life-long registration (and thus very likely community notification as well),⁴³ triggering a replicating mass of "no-go" zones for individuals seeking to avoid what they see as oppressive registration regimes.⁴⁴ And, because recidivist and registration laws commonly date back many years, individuals become subject to a "frozen in amber" effect that defies change and possible melioration by forum state laws.⁴⁵ Thus, more than merely "weird" state laws travel (as if this were not

³⁹ Markel, *supra* note 1, at 583. Professor Markel adds that while persons who have served their sentence and discharged their conditions of release should be free to migrate, he questions "by what moral rights . . . they merit a free roaming pass *prior to their release from the criminal justice system.*" *Id.* (emphasis added). I must confess to being confused over this, given that *Interconnectedness* principally addresses individuals who have served their time and completed their community release obligations.

⁴⁰ *Interconnectedness*, *supra* note 2, at 260–61.

⁴¹ *Id.* at 307.

⁴² *Id.* at 325 ("If prior convictions constitute indelible matters of record, . . . as is the case with the external approach, geography is permitted to determine destiny—and individuals with such records will naturally be less inclined to move . . . [B]y in effect making laws more uniform, the external approach discourages exit.").

⁴³ For discussion of the onerous consequences of registration and notification, see Wayne A. Logan, *Federal Habeas in the Information Age*, 85 MINN. L. REV. 147, 182–207 (2000). Moreover, because registration is typically tied to other restrictions, for instance limits on where registrants can live, they too will apply in the forum state. See Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1 (2006) (discussing registrant residence exclusion zones enacted in twenty states and dozens of localities).

⁴⁴ See, e.g., *State v. Flowers*, 92 Ark. App. 337 (Ark. Ct. App. 2005) (importing Louisiana's registration requirement for conviction of commercial solicitation of oral sex between adults). The common tendency of states to publicly identify registrants without specifying their qualifying offenses, serving to lump together serious and non-serious offenders, heightens this concern. See, e.g., David Hench, *Panel to Consider Adding Details to Sex Offender List*, PORTLAND PRESS HERALD (Maine), July 23, 2006, at A1.

⁴⁵ *Interconnectedness*, *supra* note 2, at 307–10.

enough); a panoply of basic trappings of state penal norms do as well—again without any individualized normative discernment in the forum.⁴⁶

Moreover, to assert, as Professor Markel does, that the external approach imposes no “penalty” on migration, because it functions to “sustain[] the same legal regime” as one travels from one state to another,⁴⁷ misses the essential promise of exit. As Seth Kreimer has argued, “state-by-state variation leaves open the possibility to each individual of choosing to avoid repression by leaving the repressive jurisdiction.”⁴⁸ By carrying over a registration requirement, an external approach state in effect prices emigration, requiring emigrants to internalize a negative cost (one that does not apply to residents).⁴⁹

It might be that an individual will change state residences in order to take a superior job, despite the specter of having to endure a continued oppressive registration requirement, as Professor Markel hypothesizes. However, this does not justify his conclusion that the emigrant is “indifferent” to the continued oppression.⁵⁰ Such an economically based, rational-choice view ignores the intrinsic value associated with freedom of choice in a decentralized system of government such as ours.⁵¹ Moreover, the view is oblivious to the reality that for some the elimination of a less appealing option can have the opposite effect: they will remain in an oppressive polity. In such situations, opportunity for exit and freedom of choice are demonstrably lessened, as is the political signal potentially sent to the home state by foot voting.⁵²

Professor Markel ends by offering that there exists a “*quid pro quo* among the external approach states—one that Logan appears reluctant to acknowledge.”⁵³ In

⁴⁶ Markel offers that an external state resident, if troubled by the import of a “weird” law, can take comfort in the fact that a similar law from her own state will be exported to other external approach states. Markel, *supra* note 1, at 583. Aside from focusing wrongly on the general citizenry (not emigrant ex-offenders), such a tit-for-tat dynamic highlights the reality that the external approach reflexively enshrines and replicates problematic norms of other states. Markel also reiterates that what he sees as progressive laws also travel. *Id.* However, to the extent this leavening occurs, it neither meliorates external approach deference to “weird” individual laws nor responds to the many doctrinal concerns addressed above.

⁴⁷ Markel, *supra* note 1, at 582.

⁴⁸ Seth Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 71 (2001).

⁴⁹ *Cf.* Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984).

⁵⁰ Markel, *supra* note 1, at 582.

⁵¹ *Cf.* Cynthia Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1385 (1998) (asserting that the “law-as-price” view of economic efficiency “distill[s] all that is important about law and political obligation into economic terms” and “evaporate[es] the moral component of law”); *id.* (observing that “[l]aw in a democracy is more than a price tag.”).

⁵² *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

⁵³ Markel, *supra* note 1, at 584.

fact, I acknowledge no such Golden Rule of reciprocity because none exists. States adopting the external approach show no evidence of having consulted one another in their choice, and the exclusivity of the club is regularly violated when an external approach state is compelled to adopt the distinct norm of an internal approach state.⁵⁴ Moreover, it is not unusual for a given state to adopt the external approach for registration and the internal approach for recidivist enhancement (or *vice versa*),⁵⁵ further belying existence of reciprocity. Nor, finally, does Professor Markel's espoused safety valve for self-replicating oppressive state norms—federal constitutional litigation⁵⁶—hold realistic promise. The Supreme Court has long made clear its reluctance to impose constitutional limits on state substantive criminal law norms⁵⁷ and policies,⁵⁸ including sex offender registration provisions in particular.⁵⁹

V. CONCLUSION

In concluding his critique, Professor Markel offers that the concerns I raise in *Interconnectedness* possibly derive from a “skittishness” over the democratic process vis-à-vis criminal law-making and the “purported crisis of overcriminalization produced therefrom.”⁶⁰ Here, he is substantially correct in his assessment. However, in the final analysis, despite what may be taken as my undue pessimism, *Interconnectedness* makes clear that it is the actual exercise of democratic decision making (demonstrably absent from the external approach) that is the *modus operandi* of choice as the nation grapples with the ongoing challenges posed by emigrant ex-offenders.

⁵⁴ Professor Markel observes that external approach states “worried about the injustices potentially worked by replicating weird laws of other states” can specify that such laws will not be considered. *Id.* at 584. Colorado's external approach recidivist law and California's external approach registration law do just that, for foreign drug convictions and several specified less serious sex offenses (e.g., indecent exposure), respectively. *Interconnectedness*, *supra* note 2, at 276 n.92, 287 n.154. While certainly preferable to the paradigmatic external approach, such offense-specific efforts can never capture the great diversity of state laws implicated, and altogether fail to shield against the vast array of other factors causing concern (e.g., sentencing and procedural variations).

⁵⁵ Compare, e.g., FLA. STAT. § 775.084(1)(e) (2003) (internal approach recidivist law) with FLA. STAT. § 943.0435(1)(a)(2) (2003) (external approach registration law).

⁵⁶ Markel, *supra* note 1, at 584.

⁵⁷ See Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 509 (2004) (noting that it “has become a commonplace that there are no meaningful constraints on [state] criminal substantive criminal law.”).

⁵⁸ See, e.g., *Ewing v. California*, 538 U.S. 11, 28 (2003) (acknowledging the Court's reluctance to sit as a “superlegislature” and “second-guess” state criminal justice policy choices).

⁵⁹ See, e.g., *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003) (rejecting due process challenge to state registration and community notification regime).

⁶⁰ Markel, *supra* note 1, at 584.

