

# TIMELINE OF A PANIC: A BRIEF HISTORY OF OUR ONGOING SEX OFFENSE WAR

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Emily Horowitz\*

## INTRODUCTION

This paper addresses the origins of our irrational and draconian sex-offense legal regime. Our current sex offense policies are rooted in public opinion and emotion, not sound social science research, data, or evidence. There are nearly 900,000 people now listed on public sex offense registries,<sup>1</sup> suffering from profound consequences including public humiliation and effective banishment. Many more are affected, including partners, parents, and children. These laws impact the rest of us by changing the way we raise our children and interact with our neighbors and communities. This paper seeks to unravel the bifurcation of sex offense realities and sex offense policies, by using a brief timeline of key political events, legal milestones, and research findings. I argue that politicized research was misused by political opportunists to develop laws based on the flawed but pervasive idea that those convicted of sex offenses became incurable and predatory monsters requiring—and deserving—lifetime punishment.

## TODAY (2017): SEX-OFFENSE PANIC IN EVERYDAY LIFE

In May 2017, an “Ask the Pediatrician” column published on a website run by the American Academic of Pediatrics advised parents that children of “any age” should never use a public restroom alone, citing the National

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\* Ph.D., Professor & Chair, Department of Sociology and Criminal Justice, St. Francis College, Brooklyn, NY 11201. This article is based on my keynote address to the 1st Annual Meeting of the Alliance for the Constitutional Reform of Sex Offense Laws at Southwestern Law School (August 2017). I would like to thank Lena Janoda for research and editorial assistance.

1. *Map of Registered Sex Offenders in the United States*, NAT'L CTR. FOR MISSING & EXPLOITED CHILD. (May 24, 2017), [http://www.missingkids.com/en\\_US/documents/Sex\\_Offenders\\_Map.pdf](http://www.missingkids.com/en_US/documents/Sex_Offenders_Map.pdf).

Center for Missing and Exploited Children.<sup>2</sup> Lenore Skenazy, a longtime and noted observer of our ongoing panic about sex offenses and child safety, correctly branded this advice as “not just hilarious and ridiculous [but] also insane.”<sup>3</sup> She outlines how this is part of the continuous effort to sow fear and teach children that sexual predators are lying in wait around every corner.<sup>4</sup> This despite the fact that sexual abuse by strangers in bathrooms is exceedingly rare and almost all child sexual abuse is perpetrated by non-strangers.<sup>5</sup>

The perception that children are in constant danger of sexual abuse by random adults is widespread.<sup>6</sup> Even Cub Scouts hoping to earn promotion badges have to demonstrate awareness about the dangers of sexual abuse.<sup>7</sup> They must answer a set of questions about prevention, such as “What if you are playing in your yard and your neighbor asks you to help carry groceries into his house? What should you do?”<sup>8</sup> (Correct response: “Check first with a parent or other trusted adult before you change plans, go anywhere, or accept anything from anyone.”<sup>9</sup>). Likewise, they are asked what to do if they are in the bathroom and someone tries to touch their “private parts.”<sup>10</sup> (Correct response: “Yell ‘STOP THAT’ as loudly as you can and run out of the room as quickly as possible. (It’s your body and you have the right to say no to anyone who tries to touch you in places covered by your swimming suit or to do things that you think are wrong.)”<sup>11</sup>).

In the early part of the 20th century, however, boy scouts were taught skills to help them survive, such as how to sharpen an axe, build a fire, and do good deeds for the sake of others. A handbook from 1911 notes, “A scout is helpful. He must be prepared at any time to save life, help injured persons, and share the home duties. He must do at least one good turn to

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2. Kathleen Berchelmann, *When Can My Child Use the Public Restroom Alone?*, HEALTHYCHILDREN.ORG, <https://www.healthychildren.org/English/tips-tools/ask-the-pediatrician/Pages/When-can-my-child-use-the-public-restroom-alone.aspx> (last updated Apr. 15, 2017).

3. Lenore Skenazy, “*Children of Any Age Should Not Go into Public Restrooms Alone*,” FREE-RANGE KIDS (June 12, 2017), <http://www.freerangekids.com/children-of-any-age-should-not-go-into-public-restrooms-alone/>.

4. *Id.*

5. *Id.*

6. See BOY SCOUTS OF AM., *HOW TO PROTECT YOUR CHILDREN FROM CHILD ABUSE 2-3* (2005).

7. *See id.*

8. *Id.* at 14.

9. *Id.*

10. *Id.* at 15.

11. *Id.* (emphasis omitted).

somebody every day.”<sup>12</sup> Compare this to today, when scouts are taught to report a neighbor asking for help with groceries.<sup>13</sup> The 1911 handbook also notes,

Besides woodcraft one must know something of camp life. One of the chief characteristics of the scout is to be able to live in the open, know how to put up tents, build huts, throw up a lean-to for shelter, or make a dugout in the ground, how to build a fire, how to procure and cook food, how to bind logs together so as to construct bridges and rafts, and how to find his way by night as well as by day in a strange country.<sup>14</sup>

Compare this also to today, where scouts are warned about the dangers of entering public bathrooms—even when attentive parents are waiting outside!<sup>15</sup>

There are numerous examples of parental panic about stranger sexual abuse, which has been an ongoing theme in our culture since the early 1990s.<sup>16</sup> The danger of public bathrooms is only one recent manifestation of this pervasive hysteria, possibly due, in part, to opposition to gender-neutral bathrooms for transgendered persons on the grounds that young girls will be victimized by men posing as women.

#### J. EDGAR HOOVER (1937) AND THE EARLY POLITICS OF SEX-OFFENSE PANIC

We can look back almost a century to see the origins of this panic. In the 1930s, J. Edgar Hoover stirred up fears about the “sex fiend,” characterizing him as a danger to women and children, and a “dangerous, predatory animal.”<sup>17</sup> Hoover, as head of the FBI, issued a memo in 1937 warning of the pervasive threat posed by sexual criminals, warning that treating their crimes as “petty” sex offenses was a mistake, and that “their every action was a blazing signpost to a future of torture, rape, mutilation and murder.”<sup>18</sup> In his analysis of the “sex-crime panic” due to Hoover, scholar Charles Morris (2002) argues that the FBI director sought to hide his own sexuality during a panic about homosexual men by whipping up fears about them: “a man so dedicated to this scourge of degenerates certainly could not be one.”<sup>19</sup>

12. BOY SCOUTS OF AM., *BOY SCOUTS HANDBOOK 15* (photo. reprint 2016) (1911).

13. BOY SCOUTS OF AM. (2005), *supra* note 6, at 14.

14. BOY SCOUTS OF AM. (1911), *supra* note 12, at 6.

15. BOY SCOUTS OF AM. (2005), *supra* note 6, at 15.

16. Skenazy, *supra* note 3.

17. Charles E. Morris III, *Pink Herring & The Fourth Persona: J. Edgar Hoover's Sex Crime Panic*, 88 Q. J. SPEECH 228, 237 (2002).

18. *Id.*

19. *Id.* at 238.

While this 1937 treatise by Hoover is not the sole or primary origin of the sex panic, it does reveal that there has been a longstanding effort made by political and government figures to do two things: first, to claim that efforts to prosecute and punish those convicted of sex offenses is explicitly an effort to protect women and children (Hoover explicitly refers to “little girls,” “childhood,” and “womanhood” as under attack), and, second, that evildoers of this kind are different from “ordinary” offenders and are destined to reoffend, their crimes invariably growing in seriousness.<sup>20</sup>

Rhetoric today about the sex-offense registry and related laws focuses on the same themes raised by Hoover in 1937: child protection, a pervasive and “predatory” threat, and the idea that those convicted of sex offenses are unlike “ordinary” offenders in terms of recidivism.<sup>21</sup> As of today, though, there was little evidence that extreme punishment was a rational or effective response, or that re-offense was inevitable.

At the same time, sex crime and sexual abuse are problems that have always existed. In the 1930s, even as Hoover was stirring up fears of monstrous and incurable “sex fiends,” there was already a tension between political rhetoric and true research. For instance, social scientists began publishing studies that demonstrate that sex offense treatment is effective and that rates of reoccurrence are low.<sup>22</sup> A 1939 article by Frosch and Bromberg advocates “individualized treatment” and psychotherapy for offenders; the authors suggest that punishing offenders is not a way of decreasing rates of offense.<sup>23</sup> They quote sexologist Norman Haire (1934) to advance their argument that those who commit sex offenses need help and therapy: “To punish these unfortunate people as criminals would be just as iniquitous as to allow them to give full swing to their morbid tendencies at the expense of their neighbors.”<sup>24</sup>

Other studies echo this moderate and reasoned approach. For instance, a 1943 book about boys charged with sex offenses asserts that none of the 256 minors studied ever committed sex offenses as adults.<sup>25</sup> Another study from that year echoed the finding that treatment of juvenile sex offenders is

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20. *Id.* at 234.

21. *Id.* at 237.

22. Jack Frosch & Walter Bromberg, *The Sex Offender—A Psychiatric Study*, 9 AM. J. ORTHOPSYCHIATRY 761, 775 (1939).

23. *Id.* at 773.

24. *Id.* at 775.

25. LEWIS J. DOSHAY, *THE BOY SEX OFFENDER AND HIS LATER CAREER* 172 (Patterson Smith Pub. 1969) (1943).

particularly successful when treated, with very low recidivism rates.<sup>26</sup> In retrospect, the panic driven by Hoover and others seems quaint, as do the studies advocating for treatment and compassion because today, with the public registry and decades-long sentences, the stakes are far more grave.

#### TREATMENT AND COMPASSION FOR SEX OFFENSES IN THE 1950S AND 1960S

Looking back at the research from the 1950s and 1960s, we see a growing interest in psychiatric approaches to sex offense and treatment rooted in compassion and cure. In 1950, the journal *Federal Probation* devoted an entire issue to sex offenses.<sup>27</sup> The introduction notes the aim was partly to promote an “informed and enlightened approach to the preventative and treatment phases of the problem” and emphasizes that the matter requires “rational handling of situations involving deviate sexual behavior.”<sup>28</sup> The articles in the issue examine the psychological origins of most sex offenses and why treatment is superior to simply enacting punitive laws.<sup>29</sup> The latter argument is advanced in a piece written by a police officer.<sup>30</sup> A judge notes that those sentenced for sex offenses must have access to psychiatric treatment in a “therapeutic” facility, and maintains that the court can serve as a “balance wheel” to counteract the “near-hysteria” fomented by J. Edgar Hoover and the media, while mitigating overly liberal tendencies of mental health professionals.<sup>31</sup> Another essay by a magistrate also asserts that laws and courts fail when psychiatry is not utilized in the criminal justice process.<sup>32</sup> An article by a female police captain emphasizes the need to be aware of the harm that is done to both the offender and the victim during court proceedings and in cases covered by the media, and emphasizes the need to seek treatment for both parties.<sup>33</sup> She notes that the handling of victims in the courts creates additional trauma, and expresses sympathy for the accused, observing that even those acquitted of sex crimes suffer humiliation and hostility.<sup>34</sup> A study of offenders at Sing Sing finds prison is not the appropriate setting for this population, and argues that psychiatric help is the only way to treat offenders so that they can return to

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26. *Id.* at 171.

27. Nancy Beatty Gregoire, *This Issue in Brief*, 14 FED. PROB., Sept. 1950, at 1-2.

28. *Id.*

29. *Id.*

30. R.W. Bowling, *The Sex Offender and Law Enforcement*, 14 FED. PROB., Sept. 1950, at 11, 16.

31. Jacob M. Braude, *The Sex Offender and the Court*, 14 FED. PROB., Sept. 1950, at 17, 22.

32. Claud Mullins, *Psychiatry in the Criminal Courts*, 14 FED. PROB., Sept. 1950, at 37, 40.

33. Rhoda J. Milliken, *The Sex Offender's Victim*, 14 FED. PROB., Sept. 1950, at 22, 24-25.

34. *Id.* at 25.

communities; the author, Dr. Abrahamnsen, urges the development of a special institute to study and treat sex offenses.<sup>35</sup>

In the 1950s, we thus start to see a growing faith in psychiatry as the answer to sex offenses, a belief common to its practitioners, the courts and the police. For instance, in a 1952 study in a criminology journal, the author focuses on the motivation of those who commit sex crimes, and argues that the sole treatment is psychoanalysis.<sup>36</sup> The writer notes, “[t]he only method for the successful amelioration of this vast social problem, is the psychiatric understanding of the motives behind the sexual offense and the imparting to the offender of this insight in a manner convincing to him.”<sup>37</sup> There is an emphasis on compassion for the perpetrator, and the author also notes that the reasons for offenses include a lack of self-esteem and fulfillment.<sup>38</sup> Other studies point to the possibility that offenders themselves have been victimized or harmed, and focus on understanding childhood trauma, which they have possibly experienced and has resulted in their insecurity and immaturity.<sup>39</sup>

Some authors explicitly critique policies such as the “sexual psychopath laws” that place those convicted of sex offenses in mental institutions.<sup>40</sup> Guttmacher and Weihofen (1952) observe that draconian laws “neglect preventive work and concentrate efforts on putting people into institutions only *after* they have become seriously abnormal and perhaps incurable, and usually only after they have demonstrated their dangerousness by committing serious crimes.”<sup>41</sup> The authors also suggest that “realistic sex education” could help prevent such situations, in addition to education programs that help children who appear to be at risk for committing sex offenses.<sup>42</sup> Other researchers emphasize that the primary goal of treatment is to help those convicted reenter their communities.<sup>43</sup>

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35. David Abrahamnsen, *Study of 102 Sex Offenders at Sing Sing*, 14 FED. PROB., Sept. 1950, at 26, 31.

36. Nathan Roth, *Factors in the Motivation of Sexual Offenders*, 42 J. CRIM. L. AND POLICE SCI. 631, 635 (1952).

37. *Id.*

38. *Id.*

39. See Manfred Guttmacher & Henry Weihofen, *Sex Offenses*, 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 153, 173 (1952).

40. *Id.* at 171-72.

41. *Id.* at 173.

42. *Id.* at 175.

43. See Ralph Brancale, Albert Ellis, & Ruth R. Doorbar, *Psychiatric and Psychological Investigations of Convicted Sex Offenders: A Summary Report*, 109 AM. J. PSYCHIATRY 17, 21 (1952).

In the late 1960s, we start to see studies on recidivism that utilize more complex statistical measures and others that show the effectiveness of methods such as group therapy.<sup>44</sup> Even prior to sexual liberation movements, researchers recognized the injustice and futility of attempting to address teen sexuality through legislation and punishment.<sup>45</sup> In 1971, we even find an analysis arguing that exposure to pornography is not associated with sexual offenses.<sup>46</sup>

#### THE 1970S – LATE 1980S: THE EMERGENCE OF SEX OFFENSE PROFESSIONALS AND EXPERTS

In the 1970s, sex offenses began to be addressed in a range of specialized journals, a tendency that demonstrates not only growing concern over sex offenses, but also an increased number of academics and experts in the fields of abuse and child welfare.<sup>47</sup> Professionals also start moving towards more punitive approaches, linking studies of prevalence and treatment to the need for legislative responses.<sup>48</sup> The most visible manifestation of this shift is the campaign by feminist activists to criminalize rape and augment penalties against those who commit it; they often utilized research as a way to demonstrate not only the prevalence of sexual violence, but also the long-term impact of sexual crimes.<sup>49</sup>

Additionally, a spate of new journals emerged focusing largely on sexual offenses, abuse and violence in the fields of criminology, psychology journals, and laws. Relevant academic reviews include *Archives of Sexual Behavior* (founded in 1971), *Child Abuse and Neglect* (1977), *Behavioral Sciences and the Law* (1983), *The Journal of Interpersonal Violence* (1986), *Journal of Child Sex Abuse* (1992) and the *Annals of Sex Research* (founded in 1988 and renamed *Sexual Abuse: A Journal of Research and Treatment* in 1993).

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44. Joseph J. Peters et al., *Group Psychotherapy of the Sex Offender*, 32 FED. PROB., Mar. 1968, at 41.

45. Albert J. Reisst, *Sex Offenses: The Marginal Status of the Adolescent*, 25 L. & CONTEMP. PROBS. 309, 333 (1960).

46. Michael Goldstein et al., *Experience with Pornography: Rapists, Pedophiles, Homosexuals, Transsexuals, and Controls*, 1 ARCHIVES SEXUAL BEHAV. 1, 1 (1971).

47. H. Giarretto, *Humanistic Treatment of Father-Daughter Incest*, 1 CHILD ABUSE & NEGLECT 411, 412-13, 416 (1977).

48. See Michael Petrunck, *The Hare and the Tortoise: Dangerousness and Sex Offender Policy in the United States and Canada*, 45 CANADIAN J. CRIM. & CRIM. JUST. 43, 47 (2003).

49. Cf. Jean Bérard, *Can a Patriarchal World Be Corrected by a Criminal Law? Feminist Struggles, Penal Justice and Legal Reform in France (1970-1980)*, 5 LAWS, Mar. 4, 2016, at 1, <http://www.mdpi.com/2075-471X/5/1/12>.

In 1974, a piece titled “Rape Trauma Syndrome” is published in the *American Journal of Psychiatry* by Ann Burgess and Lynda Holmstrom.<sup>50</sup> They outline a specific psychological set of symptoms resulting from rape, which they see as the primary cause of a range of profound and negative long-term effects.<sup>51</sup> The concept of “rape trauma syndrome” had a meaningful impact on the popular consciousness, especially the idea that the trauma resulting from sexual violence is one-dimensional and universal, regardless of the nature or specifics of the experience.<sup>52</sup> While scientific studies have since largely debunked the rape trauma syndrome due to methodological flaws in the research, the idea of a rape “syndrome” in the early 1970s resonated with a public that was only starting to recognize rape as a social problem and a court system just beginning to take rape seriously.<sup>53</sup>

In 1979, in one of the first articles in *Child Abuse and Neglect* on child sexual abuse, an author (Paula Jorné) discussed the need to be compassionate to both offenders and victims.<sup>54</sup> Jorné writes something that would be inconceivable today: compassion “is very important if we are to facilitate the growth of self-esteem in individuals who have already shown themselves to feel inadequate in coping with problems in appropriate ways. Thus, both child and offender need to be reassured that they are not ‘bad people.’”<sup>55</sup> Similarly, a 1977 article in the same journal was called “Humanistic Treatment of Father-Daughter Incest.”<sup>56</sup> From our current perspective, this title seems jarring.

In 1983, in *Behavioral Sciences and the Law*, Burgess published an update on her co-authored 1974 study, which she once again titled “Rape Trauma Syndrome.”<sup>57</sup> In her 1983 version, Burgess explicitly addresses the value of rape trauma syndrome in criminal and civil legal cases and emphasizes that the concept is a valid one useful in court proceedings.<sup>58</sup>

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50. Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 AM. J. PSYCHIATRY 981 (1974) [hereinafter Burgess, (1974)].

51. *Id.*

52. William O’Donohue et al., *Examining the Scientific Validity of Rape Trauma Syndrome*, 21 PSYCHIATRY PSYCHOL. & L. 858 (2014).

53. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177, 189 (1983).

54. Paula Slager Jorné, *Treating Sexually Abused Children*, 3 CHILD ABUSE & NEGLECT 285, 290 (1979).

55. *Id.* at 288.

56. Giarretto, *supra* note 47.

57. Ann Wolbert Burgess, *Rape Trauma Syndrome*, BEHAV. SCI. & L., Summer 1983, at 97 [hereinafter Burgess (1983)].

58. *Id.* at 109-11.

Burgess writes, “As concern is more visibly focused on the rights of the victim, legal reform is having an impact on improving the conviction rate for rapists.”<sup>59</sup> Here we have an example of the shift in the tone of research and the politicization of scholarship in this area, which have gone from therapeutic to legal. In 1974, Burgess and Holmstrom defined the syndrome in a psychiatric journal; in 1983, Burgess outlines the way the syndrome can increase conviction rates.<sup>60</sup>

A recent study shows that while there is scientific consensus that the “rape trauma syndrome” is deeply flawed, it is still used in courts.<sup>61</sup> In the 1983 article, “The Child Sexual Abuse Accommodation Syndrome” published in *Child Abuse and Neglect*, author Roland Summit argues that sexually abused children rarely lie about abuse, and, in fact, retracting allegations of abuse is “normal” and should not be viewed as undermining veracity.<sup>62</sup> Summit writes, “Unless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the ‘normal’ course and retract her complaint.”<sup>63</sup> This study helped lead to some horrific outcomes, including the wrongful convictions of dozens of men and women falsely accused in the 1980s daycare hysteria.<sup>64</sup> Not only were they found guilty on the spurious grounds that children rarely, if ever, lie about sexual abuse, even when improperly questioned,<sup>65</sup> it was even argued that retraction is actually evidence that a child was telling the truth!<sup>66</sup>

Other research, though, continues to emphasize the extent to which punishment and involuntary confinement are failed policy.<sup>67</sup> In 1985, *Federal Probation* publishes a recidivism study that shows that those convicted of sex offenses have an 11.3% recidivism rate.<sup>68</sup>

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59. *Id.* at 109.

60. Compare Burgess (1974), *supra* note 50, with Burgess (1983), *supra* note 57.

61. O’Donohue et al., *supra* note 52.

62. Summit, *supra* note 53.

63. Summit, *supra* note 53, at 188.

64. See Lana Manning, *Nightmare at the Day Care: The Wee Care Case*, CRIME MAG. (Oct. 13, 2009, 10:38 PM), <http://www.crimemagazine.com/nightmare-day-care-wee-care-case>.

65. See Amye R. Warren & Dorothy F. Marsil, *Why Children’s Suggestibility Remains a Serious Concern*, 65 L. & CONTEMP. PROBS. 127, 128-32 (2002).

66. See John E. B. Myers, *Protecting Children from Sexual Abuse: What Does the Future Hold?*, 15 J. CONTEMP. L. 31 (1989).

67. John Monahan & Sharon Kantorowski Davis, *Mentally Disordered Sex Offenders*, in *Mentally Disordered Offenders*, 6 PERSP. L. & PSYCHOL. 191, 204 (John Monahan & Henry J. Steadman, 1983).

68. Joseph J. Romero & Linda M. Williams, *Recidivism Among Convicted Sex Offenders: A 10-Year Follow Up Study*, 49 FED. PROB., Mar. 1985, at 58, 60-61.

In 1986, Browne and Finkelhor published a piece in *Psychological Bulletin* that as of July 2017 has been cited over 3400 times.<sup>69</sup> This study, on the impact of child sexual abuse, is significant because it focuses on long-term psychological effects, including “depression and self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, difficulty in trusting others, a tendency toward revictimization, substance abuse, and sexual maladjustment.”<sup>70</sup> One justification for current laws that punish offenders for life, even in the most draconian ways, is that victims themselves can *never* recover. In 1987, Finkelhor put out another study with similar arguments.<sup>71</sup>

Studies examining the impact of sexual abuse and rape, such as those by Finkelhor and Burgess, are useful for treatment providers and also for those who might dismiss the psychological impact of abuse and harm. They had a major impact, coming when our culture was only beginning to take sexual crimes seriously after having long dismissed or ignored women and children who alleged sexual violence or asserted they had suffered long-term harm. However, the emotional and psychological harm to victims was often uncritically translated into justifications for increasing punishment of perpetrators.<sup>72</sup> While sometimes the researchers themselves engaged in this logic (as Burgess does in her 1983 article), it is often others, such as prosecutors and legislators, who claim that new laws and longer punishments are needed because of evidence of long-term damage to victims—though there is no evidence that severity of sentencing mitigates the impact on victims.<sup>73</sup>

#### FROM VICTIMS’ RIGHTS TO 1996 MEGAN’S LAW: THE STAKES GO THROUGH THE ROOF

In 1988, a conference titled, “When the Victim is a Child,” was sponsored by the Governor’s Council on Victims and the Utah Commission on Criminal and Juvenile Justice.<sup>74</sup> This same year, Roland Summit published another book, *Hidden Victims, Hidden Pain: Societal Avoidance of Child Sexual Abuse*, warning that child sex abuse is an epidemic problem

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69. See Angela Browne & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 PSYCHOL. BULL. 66 (1986).

70. *Id.* at 66.

71. David Finkelhor, *The Trauma of Child Sexual Abuse*, in 2 J. INTERPERSONAL VIOLENCE 348 (Sage Publications, 1988).

72. See Roger N. Lancaster, *Sex Offenders: The Last Pariahs*, N.Y. TIMES (Aug. 20, 2011), <http://www.nytimes.com/2011/08/21/opinion/sunday/sex-offenders-the-last-pariahs.html>.

73. *Id.*

74. Myers, *supra* note 66, at 31.

of which caring adults and professionals must take notice.<sup>75</sup> In the keynote address by law professor John E. B. Myers at this conference about child victimization, Myers states, “We must shake off the complacency that grips us. Ignoring the warning signs of the backlash will have tragic consequences. Thousands, and eventually millions, of defenseless children are at risk. They plead with us to open our eyes and take action. No one else can help them.”<sup>76</sup>

In the keynote address, Myers also notes that child sex abuse is a “hot topic” in the media and that the scholarly attention to the subject has increased.<sup>77</sup> He argues: “It is naive to think that long mandatory prison terms will contribute materially to the solution of child sexual abuse. Eventually, people react negatively to disproportionately cruel punishment, and when that happens the backlash is fueled.”<sup>78</sup> Interestingly, we see today that there is little backlash to long prison terms, and even less awareness that the causes of child sex abuse cannot be addressed by increasing punishment.

The 1990s start a long-term decrease in rates of child sexual behavior; ultimately there is a 62% decline during that decade.<sup>79</sup> A recidivism study published in 1990 in *Annals of Sex Research* finds treatment is effective and recidivism rate is low (this study claims the rate is under 4%).<sup>80</sup> Yet that decade offers ever more research on the impact and extent of child sexual abuse.

In the very first issue of the *Journal of Child Sexual Abuse* (1992) an article appears that claims 50 to 75% of women in counseling “have histories of sexual abuse that have gone unrecognized, unreported, and undiagnosed.”<sup>81</sup> The idea that women have long-term effects from sexual abuse and that half or more women seeking therapy have been sexually mistreated feeds into the growing notion that the impact of such incidents is permanent and thus the punishment should also be everlasting. The other theme that we see here is the purported extent of the phenomenon. Not

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75. See Roland C. Summit, *Hidden Victims, Hidden Pain: Societal Avoidance of Child Sexual Abuse*, in v.100 LASTING EFFECTS OF CHILD SEXUAL ABUSE 39 (Gail Elizabeth Wyatt & Gloria Johnson Powell eds., Sage Publications 1988).

76. Myers, *supra* note 66 at 50.

77. Myers, *supra* note 66, at 38.

78. Myers, *supra* note 66, at 39.

79. David Finkelhor et al., *Updated Trends in Child Maltreatment, 2012*, CRIMES AGAINST CHILD. RES. CTR. (Jan. 2013), <http://www.unh.edu/ccrc/pdf/Updated%20trends%202014.pdf>.

80. Margretta Dwyer & Shepherd Myers, *Sex Offender Treatment: A Six-Month to Ten-Year Follow-Up Study*, 3 ANNALS OF SEX RES. 305, 305 (1990).

81. Robert Geffner, Editor’s Comments, *Current Issues and Future Directions in Child Sexual Abuse*, 1 J. CHILD SEXUAL ABUSE 1, 13 (2008).

only is it claimed that nearly all women who seek therapy have been sexually abused; startlingly, it is alleged that such abuse is at the root of their problems.<sup>82</sup> An article from 1994 that appeared in the *Journal of Consulting and Clinical Psychology* and has been cited over 1200 times since goes even further.<sup>83</sup> It asserts that earlier estimates of sexual abuse were “gross underestimates,” that 1/5 to 1/3 of all women experienced child sexual abuse, even though 38% of women did not recall their experience of sexual abuse.<sup>84</sup> The author advises therapists to be mindful that even women who claim that they have not undergone abuse might have been victims.<sup>85</sup> A year later, in 1995, the journal *Sexual Abuse: A Journal of Research and Treatment* begins publication.<sup>86</sup>

In 1994, Congress passes the Wetterling Act, the first federal law to track those convicted of sex offenses.<sup>87</sup> While registration for sex offenses had existed at the state level in various forms since as early as 1930, the new measure marks the first time federal legislation targets this population.<sup>88</sup> In 1990, Washington State passes the first law requiring community notification of sex offenses.<sup>89</sup> This is a significant moment: never before had a state required that communities be notified of residents with criminal histories.<sup>90</sup> The Washington law was based on the false notion that such offenders have a high rate of recidivism and that the “reduced expectation of privacy because of the public’s interest in public safety . . . will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems.”<sup>91</sup>

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82. *Id.* at 13.

83. Linda Meyer Williams, *Recall of Childhood Trauma: A Prospective Study of Women’s Memories of Child Sexual Abuse*, 62 J. OF CONSULTING & CLINICAL PSYCHOL. 1167, 1173 (1994).

84. *Id.* at 1167.

85. *Id.* at 1173-74.

86. See *Sexual Abuse: A Journal of Research and Treatment*, NLM CATALOG, <https://www.ncbi.nlm.nih.gov/nlmcatalog/9506704> (last visited Sept. 15, 2017).

87. See Jacob Wetterling Act Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 (1994).

88. See Jill S. Levenson & Leo P. Cotter, *The Effect of Megan’s Law on Sex Offender Reintegration*, 21 J. OF CONTEMP. CRIM. JUST. 49, 49 (2005).

89. Wayne A. Logan, *Liberty Interested in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. OF CRIM. L. & CRIMINOLOGY 1167, 1173 n.29 (1999).

90. *Id.*

91. Scott Matson with Roxanne Lieb, *Community Notification in Washington State: 1996 Survey of Law Enforcement*, WASH. ST. INST. FOR PUB. POL’Y (Nov. 1996), [http://pgn-stage.wsipp.wa.gov/ReportFile/1242/Wsipp\\_Community-Notification-in-Washington-State-1996-Survey-of-Law-Enforcement\\_Full-Report.pdf](http://pgn-stage.wsipp.wa.gov/ReportFile/1242/Wsipp_Community-Notification-in-Washington-State-1996-Survey-of-Law-Enforcement_Full-Report.pdf).

When President Clinton signed Megan's Law to much fanfare in 1996, he justified the clear violation of civil liberties inherent in public registration by heralding, "We respect people's rights, but today America proclaims there is no greater right than a parent's right to raise a child in safety and love."<sup>92</sup> Moreover, Clinton restated a myth: "Study after study has shown us that sex offenders commit crime after crime."<sup>93</sup>

#### 1996 – PRESENT: INSTITUTIONALIZING THE SEX OFFENSE LEGAL REGIME

The shift that takes place with community notification and public registry laws represents the extent to which sex-offense law and policy result from popularly held belief and not from evidence. Soon after Megan's Law is passed, *Child Abuse and Neglect* publishes an editorial by a treatment provider warning against the public notification of those convicted of sex offenses.<sup>94</sup> Since the passage of Megan's Law and the implementation of a sex-offense "legal regime"—an apt term coined by civil liberties activist Bill Dobbs—hundreds of studies have appeared evaluating the effectiveness and unintended consequences of draconian punishment-based responses to sex crimes.<sup>95</sup> There is still no evidence that these laws have any meaningful effect on recidivism or curbing sex offenses.<sup>96</sup> Recidivism studies continue to document the low rearrest rates for those with sex-offense convictions.<sup>97</sup> Rates of child sexual abuse continue to decline.<sup>98</sup> Yet a decade after the passage of Megan's Law the U.S. Congress passes the Adam Walsh Act, which adds further penalties for sex offenses—even requiring those convicted as minors to register.<sup>99</sup>

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92. Administration of William J. Clinton, 1996, *Remarks on Signing Megan's Law and an Exchange with Reporters*, 2017 GOV'T PUB. OFF. 763, 763 (1996).

93. *Id.*

94. Robert E. Freeman-Longo, Invited Commentary, *Feel good legislation: Prevention or calamity*, 20 CHILD ABUSE & NEGLECT 95, 96 (1996).

95. Emily Horowitz, *Sex Offenses, Lies, and Politics: The Web of the Registry*, in CAUGHT IN THE WEB OF THE CRIMINAL JUSTICE SYSTEM: AUTISM, DEVELOPMENTAL DISABILITIES, & SEX OFFENDERS 140, 157 (Lawrence A. Dubin & Emily Horowitz eds., 2017).

96. See the characterization of these studies on the Sex Offense Research Information Center's website. Emily Horowitz, *Research on the Registry*, SEX OFFENSE RES. INFO. CTR., [https://sorinfocenter.org/research\\_studies/](https://sorinfocenter.org/research_studies/) (last updated April 7, 2017).

97. See Ron Langevin et al., *Lifetime Sex Offender Recidivism: A 25-Year Follow Up Study*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 531, 533 (2004); Lisa L. Sample & Timothy M. Bray, *Are Sex Offenders Different: An Examination of Rearrest Patterns*, 17 CRIM. JUST. POL'Y REV. 83, 97 (2006).

98. Sample & Bray, *supra* note at 97.

99. Lori McPherson, *Practitioner's Guide to the Adam Walsh Act*, 20 NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE (SPECIAL DOUBLE ISSUE) 1, 1-3 (2007).

In 2006, in a study on the decline in rates of child sexual abuse, authors Finkelhor and Jones cite economic and social factors, as well as advances in psychiatric pharmacology as reasons for the decline—not the registry or other harsh sex-offense laws.<sup>100</sup> Nevertheless, an article published in the journal *Sex Abuse* in 2007 is telling in terms of the careful language used even to suggest that those convicted of sex offenses deserve “human rights”: “[i]t is certainly appropriate to punish sex offenders but punishment should be implemented in a way that respects their moral status as human rights holders and holds out the possibility of reentry into the human community if their potential for inflicting harm on others has been effectively reduced.”<sup>101</sup> In an equally cautious introduction to the piece, the author avers that “restrictions of sex offender’s liberty and privacy rights are done in the interests of preserving the safety of the public,” but then wonders in a tentative tone: “In a climate of increasing restrictions placed on sex offenders, do we need to worry that such restrictions eventually become abusive to the offender?”<sup>102</sup>

In 2008, a study found that Megan’s Law had no effect on reducing the number of sex-offense victims; yet this key study, and the many others just like it, seems to have no effect on public or legislative enthusiasm for creating new laws based on flawed premises.<sup>103</sup>

In a 2012 article about the 60% decline in child sexual abuse since 1992, the *New York Times* notes that those in the field of sex-abuse treatment and advocacy are hesitant to acknowledge the decrease—partly due to the fear that the government funding on which they rely could be reduced as a result.<sup>104</sup> As law professor Marci Hamilton points out in the article, “It is very risky to suggest that the problem you’re involved with has gotten smaller”; and she adds that sex abuse has “lifelong dangerous effects.”<sup>105</sup>

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100. David Finkelhor & Lisa Jones, *Why Have Child Maltreatment and Child Victimization Declined?*, 62 J. SOC. ISSUES 685, 685 (2006).

101. Tony Ward, Theresa A. Gannon & Astrid Birgden, *Human Rights and the Treatment of Sex Offenders*, 19 SEX ABUSE (SPECIAL ARTICLE) 195, 195, 207 (2007).

102. Howard Barbaree, *Introduction to Special Article on Human Rights*, 19 SEX ABUSE 193, 193 (2007).

103. KRISTEN ZGOBA ET AL., MEGAN’S LAW: ASSESSING THE PRACTICAL AND MONETARY EFFICACY, OFF. POL’Y AND PLAN, N.J. DEP’T CORR. 1, 2 (2008).

104. Erica Goode, *Researchers See Decline in Child Sexual Abuse Rate*, N.Y. TIMES (June 28, 2012), <https://mobile.nytimes.com/2012/06/29/us/rate-of-child-sexual-abuse-on-the-decline.html?from=us>.

105. *Id.*

## DISCUSSION AND CONCLUSIONS

The world recognizes that U.S. sex-offense laws violate human rights. In 2016, the UK refused to extradite a man wanted on sexual charges because the possibility of civil commitment would be “flagrant denial” of the European convention of human rights.<sup>106</sup> The widespread registration laws were based largely on the kidnapping and murder of white middle-class children by strangers; in addition to Megan Kanka and “Megan’s Law,” there are also similar federal laws named after Adam Walsh (abducted and murdered by a stranger in a 1981) and Jacob Wetterling (abducted and murdered by a stranger in 1989).<sup>107</sup> While stranger kidnappings are exceptionally rare, numbering about 100 in each of the past 20 years, abductions ending in murders are decreasing; further, about half of these kidnappings involved adolescent girls, not young children.<sup>108</sup> Nevertheless, the specter of these awful cases is so powerful and so embedded in our collective cultural consciousness that it not only drives the way we raise our children, but also ensures support for any law that appears to address this problem.<sup>109</sup>

Sex-offense laws such as registration and community notification, motivated by political opportunism, high-profile crimes, and misleading research about the extent and impact of sexual abuse are not the only measures to have emerged out of emotion rather than evidence. In general, as Jeremy Travis and Bruce Western observe in their analysis of mass incarceration, “[s]ocial science evidence has had strikingly little influence on deliberations about sentencing policy over the past quarter century.”<sup>110</sup> An examination of the implementation of the public registry highlights this tension. Politicians from both sides of the spectrum jump on the bandwagon of these laws, on the grounds that they protect children.<sup>111</sup> Of

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106. *US fails to extradite alleged American pedophile from Britain*, THE GUARDIAN (Feb. 26, 2016), <https://www.theguardian.com/law/2016/feb/26/us-fails-extradite-alleged-american-paedophile-roger-giese-britain>.

107. See Karen J. Terry & Alissa R. Ackerman, *A Brief History of Major Sex Offender Laws*, in *SEX OFFENDER LAWS FAILED POLICIES*, NEW DIRECTIONS 50, 50 (Richard G. Wright ed., 2nd ed. 2015).

108. Janis Wolak et al., *Child Victims of Stereotypical Kidnappings Known to Law Enforcement in 2011*, OJJDP, JUV. JUST. BULL., June 2016, 1, 3-5, 8.

109. Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES OF SOC. ISSUES & PUB. POL’Y 1, 2, 4 (2007).

110. COMM. ON CAUSES AND CONSEQUENCES OF HIGH RATES OF INCARCERATION, NAT’L RESEARCH COUNCIL OF THE ACAD’S, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 1, 37 (Jeremy Travis et al. eds., 2014).

111. Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100 AM. J. OF PUB. HEALTH 412, 418 (2010).

course, no one, politician or not, wants to be perceived as opposing protection of children; likewise, no one will get elected for criticizing overly severe punishment of those with sex offense convictions. While there are a number of reasons for the growth in mass incarceration, one factor is the time served in prison for all crimes.<sup>112</sup> A report by the Sentencing Project (2017) notes the “historic rise” in the use of life sentences, including those without possibility of parole, and argues that about half of the growth in state prisons is due to increasing sentences across the board.<sup>113</sup>

What I argue in my book, *Protecting Our Kids?: How Sex Offender Laws Are Failing Us* (2015) is known far too well by most of those whose lives are being destroyed by these laws: these measures fail to address the commonest forms of sexual abuse of children, which in the vast majority of cases are committed by non-stranger perpetrators or those not on the registry.<sup>114</sup> Further, data show that all kinds of child abuse, including sexual abuse, are highly correlated with poverty.<sup>115</sup> A recent article found that rates of the most severe forms of child abuse are correlated with job losses.<sup>116</sup> Reason and sanity have been removed from the political and public debate about sex offense law and policy, even as research piles up showing the ineffectiveness and devastation these laws leave in their wake. Sex offense laws are rooted in misperceptions about recidivism as well as a small number of flawed research studies that had a disproportionate impact on public perceptions of sexual abuse, and political opportunism. A rational approach to sex offenses is important in the name of justice, human rights, and public safety, and so our children grow and thrive without irrational anxiety about sex and sex offenders.

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112. See Nazgol Ghandoosh, *Delaying a Second Chance: The Declining Prospects for Parole on Life Sentences*, THE SENTENCING PROJECT (Jan. 31, 2017), <http://www.sentencingproject.org/wp-content/uploads/2017/01/Delaying-a-Second-Chance.pdf>.

113. *Id.* at 10.

114. EMILY HOROWITZ, *PROTECTING OUR KIDS?: HOW SEX OFFENDER LAWS ARE FAILING US* (2015).

115. Anika Schenck-Fontaine et al., *Local Job Losses and Child Maltreatment: The Importance of Community Context*, 2017 SOC. SERV. REV. 233, 235 (2017).

116. *Id.* at 254-55.