

THROWAWAY CHILDREN: THE TRAGIC CONSEQUENCES OF A FALSE NARRATIVE

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INTRODUCTION

Truth be told, we are afraid *for* our children and we are afraid *of* our children. The intersection of these disparate thoughts has produced a perfect storm. We have created increasingly harsh sex offender registration schemes to protect our children from sexual abuse. At the same time, fear of our children ensnares and punishes them under the very same laws that

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were designed to protect them. Yet, as this article argues, what compels action is premised on a false narrative that destroys the potential in children who commit a sex offense.

Yes, we are afraid for our children. We fear their vulnerability to sexual abuse by strangers. The phrase “Stranger Danger” captures it well.¹ Numerous websites using that term are devoted to providing practical tips to parents on the potential danger children face in public.² And of course, we see it in the proliferation of sex offender registration and community notification laws targeted at those who violate children.³

We are also afraid of our children. We can spot the fear in the legislation we draft to compel harsher treatment of juvenile offenders.⁴ We are reminded of it in increasingly punitive charges by prosecutors and equally punitive jury verdicts.⁵ We see its effect in the shift in policies from rehabilitation to retribution and accountability.⁶ And fear of our children

1. See, e.g., *Stranger Danger: Teaching Children About Stranger Danger*, MY CHILD SAFETY, <http://www.mychildsafety.net/stranger-danger.html> (last visited Jan. 23, 2016) (defining “stranger danger” as “the buzz words commonly used to refer to the important topic of teaching children about the inherent dangers they may face as they venture out into the world”).

2. See, e.g., Robin F. Goodman, *Stranger Danger: Helping Children Stay Safe*, EDUCATION, http://www.education.com/reference/article/Ref_Stranger_Danger (last updated July 9, 2010); Allison Chawla, *Practical Tips for Teaching Young Children Safety and Kindness*, HUFFINGTON POST (Oct. 16, 2015, 3:34 PM), <http://www.huffingtonpost.com/new> (providing tips on protecting children from “Stranger Danger”); *Stranger Danger Quiz*, ABOUT, http://pediatrics.about.com/od/parentingquizzes/1/bl_strngdngn.htm (last visited Jan. 23, 2016); *Teaching Children About Stranger Danger*, US ALARM, <http://www.usalarmcompanies.com/stranger-danger> (last visited Jan. 23, 2016).

3. See generally Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1081-101 (2012) (detailing the ever-expanding number of registerable offenses and increased burdens connected to registration and notification schemes).

4. Proposition 21, which passed in California in 2000, is an excellent example of the political move to treat more harshly juvenile offenders. See *California Proposition 21, Treatment of Juvenile Offenders*, BALLOTPEDIA, http://www.lao.ca.gov/ballot/2000/21_03_2000.html (last visited Jan. 30, 2016).

5. See, e.g., *State v. Null*, 836 N.W.2d 41, 54 (Iowa 2013) (outlining increasingly harsh sentences juvenile offenders faced); Carol Robinson, *8-Year-Old Charged with Murder in Beating Death of Birmingham Toddler*, AL (Nov. 10, 2015, 1:14 PM), http://www.al.com/news/birmingham/index.ssf/2015/11/boy_8_charged_with_murder_in_t.html.

6. See, e.g., TEX. FAM. CODE ANN. § 51.01 (West 2015) (noting purpose of the Juvenile Justice Code is “to provide for the protection of the public and consistent with the protection of the public and public safety . . . to promote the concept of punishment for criminal acts”); accord IDAHO CODE § 20-501 (2016) (stating that “the juvenile corrections system will be based on the following principles: accountability; community protection; and competency development”).

has prompted legislation that requires children as young as nine years old to register on adult sex offender registries.⁷

No matter whether the child's sexual transgression is voluntary or coerced – and here the mandatory reach of the regime is underscored – many children face lifetime registration.⁸ In some jurisdictions, the offense is deemed the equivalent of a comparable adult offense under controlling federal or state law.⁹ Under some registry schemes, the tier to which the child offender is assigned automatically requires lifetime registration for the particular offense committed.¹⁰ And in jurisdictions like California, the child is required to register for life because the state has moved to a system that subjects all sex offenders – whether adult or child – to lifetime monitoring.¹¹ Striking in its rigid application, registration in California is

7. See, e.g., NICOLE PITTMAN & QUYEN NGUYEN, DEFENDER ASS'N OF PHILADELPHIA, A SNAPSHOT OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAWS 12 (2011), http://www.njcn.org/uploads/digital-library/SNAPSHOT_web10-28.pdf (reporting that Delaware, for example, had fifty-five children under the age of twelve on the registry, with several as young as nine years old); see also *In re Ronnie A.*, 585 S.E.2d 311, 312 (S.C. 2003) (upholding registration of a child whose offense occurred when he was nine years old); *In re J.R.Z.*, 648 N.W.2d 241, 249 (Minn. Ct. App. 2002) (affirming lifetime registration of an eleven-year-old); *In re J.W.*, 787 N.E.2d 747, 760 (Ill. 2003) (sustaining lifetime registration for a twelve-year-old child who committed a sexual offense).

8. See, e.g., *In re C.P.*, 967 N.E.2d 729, 733-34 (Ohio 2012) (expressing concern at the automatic and mandatory nature of lifetime registration for child offenders who had successfully completed their adjudication requirement); *State ex rel. B.P.C.*, 23 A.3d 937, 947 (N.J. Super. Ct. 2011) (recognizing that the reviewing court was bound by the mandatory nature of lifetime registration for two fourteen-year-olds).

9. On the federal level, see 42 U.S.C. § 16915(a)(3) (2015) (requiring offenders, age fourteen and over, to register for life for certain sexual crimes). For definitional construction, see 42 U.S.C. § 16911(8) (defining the term “convicted” to include “adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense”); and 42 U.S.C. § 16915 (a)(3) (requiring lifetime registration for all tier III offenders). On the state level, see KAN. STAT. ANN. § 22-4906(h) (West 2015) (requiring that an offender over the age of fourteen years shall register for life who is adjudicated as a juvenile offender for an act, which if committed by an adult would constitute a sexually violent crime set forth in KAN. STAT. ANN. § 22-4902(c) (West 2015)); see also *In re J.B.*, 107 A.3d 1, 4 (2014) (describing registration for those who are fourteen or older when they commit listed offenses which, if committed by an adult, would require registration).

10. In most states, the sex offender registry is divided into three tiers depending on the level of dangerousness assigned to the crime committed. See *In re J.R.Z.*, 648 N.W.2d at 248 (“We conclude that the plain language of the registration statute compels appellant’s lifetime sex-offender registration.”); see also PITTMAN & NGUYEN, *supra* note 7, at 44-115 (canvassing juvenile sex offender registration schemes across the country).

11. See, e.g., CAL. PENAL CODE § 290.008 (West 2015) (mandating lifetime registration for juvenile sex offenders who have committed a crime listed in 290(c)). Not only does California have mandatory lifetime registration for all offenders who have committed certain offenses, it also affords a court discretion to impose registration. See CAL. PENAL CODE § 290.006 (West 2015).

mandatory and unwaivable.¹² Bottom line, no matter the legislative path, mandatory lifetime registration devastates a child's life.

Sadly, the public's hunger to punish child sex offenders has not been diminished by reality. Registration and notification for life continue despite significant and compelling research that these laws are not effective deterrents,¹³ or that children who commit sexual crimes pose little danger of recidivism,¹⁴ or that children have the capacity for rehabilitation.¹⁵ The fear is unabated and the practice continues.

Child sex offenders who must register for life are "Throwaway Children." Saddled with onerous registration burdens and facing community notification requirements that will follow them for life, their lives are effectively ruined before they have begun.¹⁶ The Ohio Supreme Court so acknowledged,

For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself.¹⁷

12. See *Johnson v. Dep't of Justice*, 431 P.3d 96, 101 (Cal. 2015) ("Registration is mandatory, and is 'not a permissible subject of plea agreement negotiation.'"). Beyond the scope of this article is the tremendous difficulty registrants have of being removed from the registry. See generally Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219 (2015) (detailing jurisdictional views on the difficulty of registry removal).

13. See *infra* note 103; see also ELIZABETH J. LETOURNEAU, DOES SEX OFFENDER REGISTRATION AND NOTIFICATION WORK WITH JUVENILES? 1, 4 (2009), <https://olis.leg.state.or.us/liz/201311/Downloads/CommitteeMeetingDocument/30406> ("Results from these studies indicate that SORN, as implemented in South Carolina, does not accomplish its intended public safety benefit.").

14. See *infra* Part III (detailing the studies that prove child sex offenders recidivate at low rates); see also ANDREW J. HARRIS ET AL., COLLATERAL CONSEQUENCES OF JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION: RESULTS FROM A SURVEY OF TREATMENT PROVIDERS, SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 1, 6 (2015) [hereinafter COLLATERAL CONSEQUENCES] (canvassing the insights of treatment providers and concluding, "Researchers investigating the public safety impacts of registering juveniles have found no discernible effects of the policies on sexual recidivism.").

15. See *infra* Part III (outlining the Supreme Court's modern jurisprudence on the theme that "children are different").

16. For an excellent examination of the devastating impact that registration has on all children who commit sex offenses, see HUMAN RIGHTS WATCH, RAISED ON THE REGISTRY: THE IRREPARABLE HARM OF PLACING CHILDREN ON SEX OFFENDER REGISTRIES IN THE U.S. 37-38 (2013) [hereinafter RAISED ON THE REGISTRY], http://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf (recounting the heartbreaking accounts of child offenders whose lives have been severely impacted by registration and notification); see also Catherine L. Carpenter, *Against Juvenile Sex Offender Registration*, 82 U. CIN. L. REV. 747, 770-72 (2014).

17. *In re C.P.*, 967 N.E.2d 729, 741-42 (Ohio 2012).

In a previous article on children who commit sex crimes, I traced the tension between the principles underlying the juvenile justice system and those that serve sex offender registration laws.¹⁸ In that article, I argued that the essential principles of rehabilitation and confidentiality of the juvenile justice system are at odds with an adult registration system that publishes the offender's personal information and where there is not much likelihood of removal.¹⁹

In this symposium piece, I explore a more focused point, but no less critical to the discussion of sex offender registration laws. That is, the inherently unfair and deeply flawed practice of mandatory lifetime registration for children who commit sex offenses. Examination reveals two fallacies in a system that condemns children to lifetime monitoring: the breadth of its ensnarement,²⁰ and the presumption of a child's continued sexual predatory behavior.²¹ Both are tightly bound in a fundamentally false narrative that is unnecessary and wholly damaging for the child registrant.

Part I of the article profiles the Throwaway Child – the child who must register for life because of a transgression committed before adulthood. The section explores the devastating impact that mandatory lifetime monitoring has on the child registrant. It was not hyperbole when a court wrote that registration on a child “imposes a disability that is neither ‘minor’ nor ‘indirect,’ but rather severely damaging to former juvenile offenders’ economic, social, psychological, and physical well-being.”²²

With the profile of the Throwaway Child in mind, Part II analyzes the flaws of the current narrative that automatically presumes that each child sex offender poses a continued sexual threat. This section explores the high profile cases and early studies that carried the false message that children

18. Carpenter, *supra* note 16, at 759-64.

19. Carpenter, *supra* note 16, at 754-56.

20. See Carpenter & Beverlin, *supra* note 3, at 1081-86 (tracking the dramatic increase in registerable offenses over the past decade).

21. See *infra* Part II.B (examining early studies on the recidivism rates of juvenile sex offenders). For a criticism of the one-size-fits-all approach to modern day registration schemes, see Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 674-84 (2008) (explaining some of the reasons the one-size-fits-all approach makes for bad policy); Eric J. Buske, Note, *Sex Offenders Are Different: Extending Graham to Categorically Protect the Less Culpable*, 89 WASH. U. L. REV. 417, 418 (2011) (showcasing the intractability of a system that treats equally the eighteen year old who posted a nude picture of his ex-girlfriend and a serial predatory pedophile); State v. Blankenship, No. 2014-0363 (Ohio Nov. 12, 2015) (Pfeifer, J., dissenting) (believing that a mandatory 25-year registration requirement for a non-dangerous statutory rapist was constitutionally flawed because “all similarly situated offenders . . . are punished according to a one-size-fits-all standard”).

22. United States v. Juvenile Male, 590 F.3d 924, 933 (9th Cir. 2010).

who commit sex offenses also reoffend at high rates. Fueled by emotional rhetoric, this narrative took hold.

To reshape the narrative, Part III details the statistical truth about recidivism rates of child sex offenders. Although the current narrative is firmly entrenched in the jurisprudence,²³ studies actually support the opposite conclusion that children do not reoffend at high rates, and certainly not at sufficient rates to warrant lifetime monitoring.²⁴

To underscore the point that lifetime registration is inappropriate for children, Part III also takes lessons from *Graham v. Florida*²⁵ and *Miller v. Alabama*²⁶ to urge individualized treatment for child sex offenders. It integrates the available social science with the Court's reasoning to conclude that children who commit sex offenses should be treated differently from their adult counterparts, not only in sentencing, but also in adjudicating sex offender status. The words from *Miller* ring especially true, "[A] State's most severe penalties on juvenile offenders cannot proceed as though they were not children."²⁷

Yes, we may be afraid for our children, and we may even be afraid of our children. But we must unpack the false narrative created by our fears to reveal the truths inside.

I. PROFILING LIFETIME CHILD REGISTRANTS

Meet J.L., a Throwaway Child. At fourteen, J.L. had voluntary sexual intercourse with his twelve-year-old girlfriend.²⁸ Under the law as written, J.L. committed an aggravated sexual offense.²⁹ This, despite the fact that only fifteen months separated J.L. and his girlfriend.³⁰ The classification of the crime mandated that J. L. register as a sex offender for life.³¹ One justice, disturbed by J.L.'s automatic registration, wrote, "The mandatory disposition of this case appears to have the opposite effect [of encouraging

23. See *infra* Part II.A.

24. See *infra* Part II.B.

25. 560 U.S. 48 (2010).

26. 132 S. Ct. 2455 (2012).

27. *Id.* at 2466.

28. *People ex rel. J.L.*, 800 N.W.2d 720, 721 (S.D. 2011).

29. See S.D. CODIFIED LAWS § 22-22-1 (2015) (defining rape as "an act of sexual penetration accomplished with any person . . . if the victim is less than thirteen years of age").

30. See *id.* Had J.L.'s girlfriend been thirteen years old, J.L.'s act would have been considered a misdemeanor rather than an aggravated felony. See S.D. CODIFIED LAWS § 22-22-7 (2015) (providing that "[i]f the victim is at least thirteen years of age and the actor is less than five years older than the victim, the actor is guilty of a Class 1 misdemeanor").

31. *People ex rel. J.L.*, 800 N.W.2d at 725 (Meierhenry J. concurring specially).

rehabilitation]. Rather than promoting J.L.'s rehabilitation, the State has ensured that J.L. will be labeled as a sex offender for the rest of his life."³²

J.L. is not alone. Children compose between 10% and 20% of a state's registry,³³ and a growing number is required to register for life.³⁴ J.L. was fourteen when he was required to register. But registries are also filled with children much younger than J.L., for whom a transgressive act at nine, ten, or eleven years old defines and destroys their entire future.³⁵

Not only does the registry reflect age disparity, triggering offenses vary as well. Registries are filled with teenagers who, like J.L., engaged in voluntary sexual intercourse.³⁶ But they are not the only ones who committed voluntary acts of sexual transgression. Also swept up are

32. *Id.*; see also *In re J.G.*, 777 A.2d 891, 911 (N.J. 2001) (“[W]e regard as implausible and anomalous the notion that a child ‘sex offender’ such as J.G. should pursuant to Megan’s Law be subject to a lifetime registration requirement merely on the basis of a delinquency adjudication that included no effort to assess his true culpability.”).

33. In an interview conducted with the author, Nicole Pitman, formerly at Human Rights Watch and current Stoneleigh Fellow and Director, Center on Youth Registration Reform at Impact Justice, reports that it was difficult to obtain precise numbers because of the various ways the states count registrants and the crimes they commit. Given that, she estimates that nearly 20% of a state’s registry includes people who went on the registry prior to turning eighteen years of age. For a more conservative view, see COLLATERAL CONSEQUENCES, *supra* note 14, at 5 (estimating that “juveniles may constitute as much as 10% of a given state’s registrants and could account for approximately 3% of the nation’s registered offenders”). As to the number of children who commit sex offenses, see David Finkelhor, Richard Ormrod & Mark Chaffin, *Juveniles Who Commit Sex Offenses Against Minors*, NCJRS 3 (Dec. 2009), <https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf>. (“Juvenile sex offenders comprise more than one-quarter (25.8 percent) of all sex offenders and more than one-third (35.6 percent) of sex offenders against juvenile victims.”).

34. See, e.g., *In re J.R.Z.*, 648 N.W.2d 241, 248 (Minn. Ct. App. 2002) (upholding registration for life of eleven-year-old); *In re J.W.*, 787 N.E.2d 747 (Ill. 2003) (affirming lifetime registration for a twelve-year-old adjudicated delinquent).

35. See, e.g. cases cited *supra* note 34; see also N.C. GEN. STAT. ANN. § 14-208.26(a) (West 2015) (declaring that when “the juvenile was at least eleven years of age at the time of the commission of [one of the statutorily imposed offenses], the court shall consider whether the juvenile is a danger to the community,” and if so, the court may require the juvenile to register); *In re Ronnie A.*, 585 S.E.2d 311, 312 (S.C. 2003) (affirming registration of an eleven-year-old whose sexual transgression occurred when he was nine years old).

36. See, e.g., *In re Maurice D.*, 34 N.E.3d 590, 592 (Ill. App. Ct. 2015) (upholding registration for seventeen-year-old who engaged in consensual activity with fifteen-year-old); *In re A.E.*, 922 N.E.2d 1017 (Ohio Ct. App. 2009) (requiring lifetime registration for fifteen-year-old who had consensual sex with twelve-year-old); see also RAISED ON THE REGISTRY, *supra* note 16, at 37-38. Although not a child, nineteen-year-old Zach Anderson’s voluntary, but illegal sexual encounter with an underage girl prompted national outrage when the public discovered that Zach would have to register as a sex offender for twenty-five years. See Chris James & Lauren Effron, *Zach Anderson, 19-Year-Old Registered Sex Offender Has Sentence Vacated*, ABCNEWS (Sept. 8, 2015, 4:26 PM), <http://abcnews.go.com/US/zach-anderson-19-year-registered-sex-offender-sentence/story?id=32901919> (noting that Zach’s story had gone viral).

teenagers who have engaged in acts of “sexting,”³⁷ conduct which is classified as child pornography.³⁸ And because of a system that presumes future dangerousness based on the conviction,³⁹ these teenagers also face onerous registration burdens.⁴⁰

True, not all child registrants have engaged in voluntary, albeit inappropriate and unlawful, conduct. Some child offenders have used force or coercion to engage in sexual acts against other children.⁴¹ But, even

37. See *United States v. Nash*, 1 F. Supp. 3d 1240, 1241 n.1 (N.D. Ala. 2014) (defining sexting as “the sending of sexually explicit messages or images by cell phone”); see also Judge H. Lee Sarokin, *Every Teenage Boy in America is a Felon*, HUFFINGTON POST (Nov. 13, 2015, 2:33 PM), http://www.huffingtonpost.com/judge-h-lee-sarokin/every-teenage-boy-in-america_b_8545506.html (observing wryly that today’s teenagers are no different than a generation ago except that, instead of sharing a black and white photo, they are sharing photos on their cell phones).

38. See e.g., *Miller v. Skumanick*, 605 F. Supp. 2d 634, 637-38 (M.D. Penn. 2009) (involving teenage girls threatened with charges of child pornography and sex offender registration for having explicit images on their phones); see also Wendy Koch, *Teens Caught ‘Sexting’ Face Porn Charges*, USA TODAY (Mar. 11, 2009, 9:36 PM), http://usatoday30.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm (reporting that in 2009 “police [had] investigated more than two dozen teens in at least six states this year for sending nude images of themselves in cellphone text messages, which can bring a charge of distributing child pornography”).

39. See *Nash*, 1 F. Supp. 3d at 1244 (“Regardless of the appropriateness of engaging in such virtual conversations, the court doubts that this behavior is the kind that Congress was targeting when it passed child pornography laws.”); see also Judith Levine, *The Online-Sex Predator Panic: Laws Against Online Luring Harm Children*, BOS. REV. (Dec. 08, 2015), <http://bostonreview.net/us/judith-levine-luring-sexting-laws> (criticizing the assumption “that Internet communication is fundamentally different from other means of communication. But not just different, the laws suggest. It is more *dangerous*.”); cf. Marsha Levick, *Teen Sexting: The Medium is NOT the Message*, HUFFINGTON POST (Nov. 11, 2015, 9:45 PM), http://www.huffingtonpost.com/marsha-levick/teen-sexting-the-medium-i_b_8538346.html.

40. See, e.g., Greg Barnes, *Fayetteville High School Quarterback Facing ‘Sexting’ Charge*, ABC11 (Sept. 4, 2014), <http://abc11.com/news/high-school-quarterback-facing-sexting-charge/964620> (noting that, if convicted of sexting charge, this seventeen-year-old would be required to register for life). Not all lawmakers have been swept up in punishing sexters as child pornographers. See John Frank, *Recognizing Youthful Folly, Florida House Bill Limits Teen ‘Sexting’ Penalties*, TAMPA BAY TIMES (Mar. 22, 2010, 8:26 PM), <http://www.tampabay.com/news/publicsafety/crime/recognizing-youthful-folly-florida-house-bill-limits-teen-sexting-penalties/1081957>; see also Sam Levin, *New Mexico Teens Can Now Legally Sext Each Other and Exchange Nude Photos*, GUARDIAN (Feb. 26, 2016, 5:12 PM), <http://www.theguardian.com/us-news/2016/feb/26/new-mexico-legalizes-teen-sexting>.

41. See generally Finkelhor, Ormrod & Chaffin *supra* note 33, at 3 (listing the range of illegal sexual behaviors that include “sharing pornography with younger children, fondling a child over the clothes, grabbing peers in a sexual way at school, date rape, gang rape, or performing oral, vaginal, or anal sex on a much younger child”). In specific case settings, see *In re J.G.*, 777 A.2d 891, 894, 900 (N.J. 2001) (involving a ten-year-old who was subjected to lifetime registration for a sexual act against his eight-year-old cousin and five-year-old sister); see also RAISED ON THE REGISTRY, *supra* note 16, at 1-2 (introducing Jacob C. who, at eleven years old, was required to register for life because he touched his sister’s genitals); *id.* at 35-36 (profiling T.T. who was required to register for life because he was found guilty of aggravated sexual assault

where the illegal act has been forced or coerced, experts believe that it is “generally less aggressive, often more experimental than deviant, and occurs over shorter periods of time.”⁴²

Not only do children incur inappropriate adult burdens, they also face sometimes uncomprehending evidentiary hearings. Criticism should be leveled at inquiries that demand that a young child offender understand the full import of his physical acts. This is what happened to J.G., who pled to second degree sexual assault of an eight-year-old cousin and five-year-old sister.⁴³ Of legal significance under the statute in question was whether J.G. had “penetrated” his victims without causing serious personal injury.⁴⁴ Although a transcript of the hearing shows that J.G. responded that he had “penetrated” his cousin and sister, it later became clear in therapy that J.G. did not understand the use of that term or the import of the sexual acts of which he was accused.⁴⁵

No one should be surprised by this revelation considering J.G. was ten years old when he was questioned about this single incident. Further, no one should be surprised that this kind of questioning plays out with impunity as children are examined about sexual acts and terms, with which they often have insufficient familiarity.⁴⁶ Certainly, that was true for Sharon D., who was ten years old when she was convicted of fondling her four-year-old sister.⁴⁷ As an adult, Sharon D. reflected, “I didn’t really understand sex then, or what it meant to be sexually appropriate with someone, to respect their boundaries.”⁴⁸

against his six-year-old half-brother); *id.* at 49 (recounting the story of Gabriel P. who, at ten years old, was required to register for life because of inappropriate contact with a seven-year-old).

42. See RAISED ON THE REGISTRY, *supra* note 16, at 28; see also *In re M.A.H.*, 20 S.W.3d 860, 866, n.1 (Tex. Ct. App. 2000) (per curiam) (observing that the child offender was a “naïve, experimenter offender type”).

43. See *In re J.G.*, 777 A.2d at 894.

44. *Id.* (citing N.J. STAT. ANN. §2C:14–2c(1) (West 2015)).

45. *Id.* at 894-97.

46. See, e.g., *In re Q.N.*, 2006 WL 3491168, at *3-5 (N.J. Sup. Ct. 2006) (concluding that a twelve-year-old was sufficiently aware to understand the nature of the questions posed to him for acts he committed against a six-year-old child); *Shelby Cas. Ins. Co. v. H.T.*, 918 A.2d 659, 660 (N.J. Sup. Ct. App. Div. 2007) (reflecting that juvenile first said that he did not understand that what he did was wrong); cf. *N.L. v. State*, 989 N.E.2d 773, 779-80 (2013) (describing the dangers associated with these hearings).

47. See HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 68 (2007), <http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf>.

48. *Id.*

J.G.'s case also raises another question: In a world of heightened vigilance to sexual abuse, where does "playing doctor" fit?⁴⁹ The difference between child's play and predatory behavior is an important distinction considering that states have ascribed criminal motivation to children as young as nine-years-old.⁵⁰

It also sounds a cautionary note. The failure of system to discriminate between the dangerous and the childish encourages absurd results. The district attorney in Grant County, Wisconsin, for example, charged a six-year-old with a first degree felony for playing "butt doctor" with his five-year-old playmate.⁵¹ When pressed on the legitimacy of the charge, the district attorney allegedly responded, "The legislature could have put an age restriction in the statute if it wanted to. The legislature did no such thing."⁵² Approaching this behavior from a criminal perspective is especially problematic. It disregards what many consider to be normal child sex play,

49. See Andy Smithson, *Questions and Answers About Sex: What Do I Do If I Catch My Child Playing "Doctor"?*, EVERY DAY FAMILY, <http://www.everydayfamily.com/questions-and-answers-about-sex-what-do-i-do-if-i-catch-my-child-playing-doctor> (last visited Jan. 25, 2016) (quoting The National Child Traumatic Stress Network (NCTSN) that stated "'show and tell' or 'play doctor' may continue until the child is ten to eleven years old, when children may start puberty and desire greater privacy").

50. *In re Ronnie A.*, 585 S.E.2d 311 (S.C. 2003) (acknowledging that the eleven-year-old's registration as a sex offender occurred when he was nine years old); see also Leah DuBuc, *So, Who is Leah DuBuc Anyway?*, KALAMAZOO VALLEY CMTY. C., http://classes.kvcc.edu/eng155/21410/ldubuc/all_about_me.htm (last visited Jan. 25, 2016) (describing the incident that occurred with her stepbrothers, age eight and five, when she was ten years old that required she register for twenty-five years).

51. See Jacob Sullum, *Parents Sue D.A. for Charging Their 6-Year-Old Son with a Felony After He Played Doctor with a 5-Year-Old Girl*, REASON: HIT & RUN BLOG (Nov. 23, 2011, 4:38 PM), <https://reason.com/blog/2011/11/23/parents-sue-da-for-charging-their-6-year>; Jonathan Turley, *Family Sues Wisconsin Prosecutor After She Charges 6-Year-Old Boy with First-Degree Sexual Assault After "Playing Doctor"*, JONATHAN TURLEY (Nov. 25, 2011), <http://jonathanturley.org/2011/11/25/family-sues-wisconsin-prosecutor-after-she-charges-6-year-old-boy-with-first-degree-sexual-assault-after-playing-doctor> (emphasizing that if convicted, the six-year-old would have to register as a sex offender when he turns eighteen); see also *Complaint for Injunctive Relief, Declaratory Relief and Monetary Damages, D. v. Kopp*, No. 11CV773 (W.D. Wis. Nov. 15, 2011), <http://media.trb.com/media/acrobat/2011-11/261455600-18135628.pdf> (contending that experts report the child's acts were normal child play).

52. See *id.*; see also Erik Ortiz, *Houston Girl, 10, Faces Sexual Assault Charge After Playing Doctor with 4-Year-Old Girl*, N.Y. DAILY NEWS (Aug. 27, 2013, 12:19 PM), <http://www.nydailynews.com/news/crime/houston-girl-10-faces-sex-assault-charge-playing-doctor-article-1.1438216> (criticizing the aggravated nature of the charge against a ten-year-old for essentially playing doctor).

which involves mutual agreement between children close in age to engage in the exploration of each other's genitals.⁵³

Our preoccupation with punishing children who commit sexual acts has caused a dangerous spillover into the civil arena as well. Children under the age of eight have been accused of committing sexually offensive or harassing acts – conduct normally associated with adult behavior. In Maryland, in a one-year span, three preschoolers, sixteen kindergartners, and twenty-two first-graders were suspended for allegedly sexually harassing conduct.⁵⁴ In Woodbridge, Virginia, a first grade child was charged with violating school policy on sexually offensive touching for slapping a classmate's bottom; the incident is permanently affixed to his record.⁵⁵ And a preschooler in Texas was suspended for pressing his face into his teacher's breasts when he hugged her.⁵⁶

But even where we recognize children who have committed coercive or violent sexual acts, we must pause to assess the inalterable damage done to these children who are forced onto a registry built for adult offenders. And make no mistake, the burdens of registration are devastating to a child. It impacts every aspect of a child's life – from where the child may *not* live, to where the child may *not* go to school, to which jobs or professions the child may *not* seek or secure.⁵⁷ A father of a child registrant described the damage inflicted on his son: “[M]y son dropped out of school, he is afraid to leave the house, and he cannot get a job interview. He has not committed any new crimes yet this is holding him back from becoming a good member of society.”⁵⁸

53. For a description of the bounds of child behavior, see *Genital Play: What's Normal, What's Not*, ASK DR. SEARS, <http://www.askdrsears.com/topics/parenting/child-rearing-and-development/sexuality/genital-play-whats-normal-whats-not> (last visited Jan, 27, 2016).

54. See Brigid Schulte, *For Little Children, Grown-up Labels as Sexual Harassers*, WASH. POST (April 3, 2008), <http://www.washingtonpost.com/wp-dyn/content/story/2008/04/02/ST2008040203589.html>.

55. *Id.*

56. *Id.*

57. See COLLATERAL CONSEQUENCES, *supra* note 14, at 14 (confirming that health care providers report that children are “likely to experience harassment, difficulty in school, and trouble maintaining stable housing”). See generally RAISED ON THE REGISTRY, *supra* note 16 (profiling the detrimental impact of registration on all aspects of a child offender's life).

58. *US: More Harm Than Good: Exempt Youth Sex Offenders from Registration Laws*, HUM. RIGHTS WATCH, 52 (May 1, 2013), <http://www.hrw.org/news/2013/05/01/us-more-harm-good> [hereinafter *More Harm Than Good*] (relating interview with Tony K.); see also *id.* (acknowledging the permanency of the Internet when a registrant's parent stated, “Everyone in the community knew he was on the sex offender registry, it didn't matter to them that he was removed [T]he damage was already done. You can't un-ring the bell.”).

And it is not only the parents who recognize the irreparable harm caused. The Ohio Supreme Court recognized it as well when it wrote, “For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken It will be a constant cloud, a once-every-three-month reminder to himself and the world that he cannot escape the mistakes of his youth.”⁵⁹

Without secure prospects for employment,⁶⁰ education,⁶¹ or a stable living situation,⁶² children labeled as sex offenders are destined to spiral downward.⁶³ It is not a surprising prognosis. Dr. Janis Bremer argues that punitive responses directed at children in the form of isolation and stigmatization “create a negative feedback loop where young people are placed in a one-down dependent position with no hope of regaining a position of equality in society.”⁶⁴

Modern residency and presence restrictions further exacerbate the isolation child registrants experience.⁶⁵ Today, buffer zones are often 2,000

59. *In re C.P.*, 2012-Ohio-1446, ¶ 45, 967 N.E.2d 729, 741-42 (Ohio 2012); *see also* *People ex rel. J.L.*, 2011 S.D. 36, ¶ 18, 800 N.W.2d 720, 725 (“Branding this child a rapist and life-long sex offender almost assures he cannot succeed as a productive juvenile or adult.”).

60. *See, e.g.*, Emily DePrang, *Life on the List*, TEX. OBSERVER (May 31, 2012), <http://www.texasobserver.org/life-on-the-list> (recounting the story of Josh Graven, a child registrant, who, as an adult, estimates that between January and May 2012 he had applied for 250 positions).

61. Leah DuBuc tells a common story of educational difficulties she faces as a registrant for an incident that occurred when she was ten years old. *See* DuBuc, *supra* note 50.

62. *See* RAISED ON THE REGISTRY, *supra* note 16, at 1-2 (telling the story of Jacob C., a child, who was required to live in a group home because he was not allowed to live with his family); *In re J.W.*, 787 N.E.2d 747, 765 (Ill. 2003) (describing a child registrant’s banishment from his neighborhood as a condition of probation); *More Harm Than Good*, *supra* note 58 (detailing a family split up by the child’s registration. “Because of sex offender restrictions my family had to be divided up. I could not live with children. My father stayed in our house with my younger brother. My mother and me moved in with my grandparents two hours away”).

63. *See generally* RAISED ON THE REGISTRY, *supra* note 16 (documenting many stories of child offenders whose lives have been severely impacted by registration and notification).

64. Janis F. Bremer, *Essay: Juveniles Who Engage in Sexually Harming Behavior - A Restorative Justice System*, 32 WM. MITCHELL L. REV. 1085, 1089 (2006).

65. Residency restrictions have an untold chilling effect on an offender’s ability to find housing. *See, e.g.*, Jill S. Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 AM. J. CRIM. JUST. 57 (2009) (reporting that in 2009 in the greater Orlando, Florida metropolitan area, 95% of residential dwellings fall within 1,000 feet of schools, parks, daycare centers and school bus stops, and 99.7% are within 2,500 feet); *see also* *Does v. Cooper*, No. 1:13CV711, 2015 WL 8179498 (M.D.N.C. Dec. 7, 2015) (acknowledging plaintiffs’ concern that “as a practical matter, they cannot go to a variety of places, including ‘libraries, museums, parks, recreation centers, theaters, state or county fairs . . . religious services, movies, or certain private homes’ without violating § 14-208.18”).

feet or more,⁶⁶ and presence restrictions include skating rinks, public gymnasiums, bus stops,⁶⁷ video arcades,⁶⁸ and libraries,⁶⁹ and at least one legislative proposal would ban registrants from fast food restaurants⁷⁰—all the same places where child registrants would usually go. One child sex offender offered this view of life:

Because I can't come in contact with anyone under the age of eighteen, I find myself going to the store on a regular basis at night to make sure there are no minors there. It makes me nervous just because if they wave at you or make some look at you, you know you could potentially get in trouble for that.⁷¹

Beyond the hurdles that child registrants face daily, they face a morass of registration and notification requirements with which they must comply.⁷² One missed step can land a child offender in prison for the

66. See, e.g., ALA. CODE § 15-20A-11 (2015) (banning sex offenders from residing within 2,000 feet of school, childcare facility or resident camp, which restriction is made applicable to juvenile offenders under ALA. CODE § 15-20A-3(c)); OKLA. STAT. tit. 57, § 590(A) (2015). *But see* CAL. PENAL CODE § 3003.5 (West 2015) (enlarging buffer zone to 2,000 feet because of the enactment of Jessica's Law), *invalidated by In re Taylor*, 343 P.3d 867, 869 (Cal. 2015) (holding blanket residency restrictions in San Diego unconstitutional).

67. See, e.g., GA. CODE ANN. § 42-1-12(a)(3) (2015) (including "all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, public libraries, and public and community swimming pools"). For general presence restrictions, see IOWA CODE ANN. § 692A.113(h) (West 2015) (prohibiting sex offenders from loitering "within three hundred feet of the premises of any place intended primarily for the use of minors including but not limited to a playground available to the public, a children's play area available to the public, a recreational or sport-related activity area when in use by a minor, a swimming or wading pool available to the public when in use by a minor, or a beach available to the public when in use by a minor"); *id.* at § 692A.113(1)(g) (including loitering at a public library).

68. LA. REV. STAT. ANN. § 14:91.1(2) (2015) (preventing sex offenders from visiting free-standing video arcades).

69. See *supra* note 67.

70. See *CA State Legislature to Consider Presence Restrictions Bill on Jan. 12*, CAL. REFORM SEX OFFENDER LAWS (Dec. 16, 2015), <http://californiarso.org/2015/12/ca-state-legislature-to-consider-presence-restrictions-bill-on-jan-12> (detailing proposed AB 201 that would ban registrants from fast food restaurants).

71. *True Life: I'm a Sex Offender* (MTV television broadcast Jan. 19, 2012), <http://www.mtv.com/videos/true-life-im-a-sex-offender/1677462/playlist.jhtml>; see also Lee Higgins, *Young Pittsfield Township Man Struggles with Sex Offender Label*, ANN ARBOR NEWS (Dec. 15, 2009, 7:05 AM), <http://www.annarbor.com/news/a-young-man-struggles-with-the-sex-offender-label> (profiling a young man who was on the registry for voluntary sexual intercourse with underage girlfriend and who was charged with violating the residency restriction for living illegally within 1,000 feet of a school).

72. See, e.g., *McGuire v. Strange*, 83 F. Supp. 3d 1231, 1239 (D. Ala. 2015) (describing the 115 felonious ways that a registrant could fail to comply with Alabama's registration rules).

failure to comply.⁷³ A particularly poignant example concerns Josh Gravens,⁷⁴ who was placed on the Texas sex offender registry when he was twelve years old for inappropriate contact with his six-year-old sister.⁷⁵ Because he allegedly did not report quickly enough a residential move, he now faces a twenty-five-year sentence as his case winds through the courts.⁷⁶ Josh's experience is not uncommon. Jacob C. faced similar peril when he moved from Michigan to Florida. He was convicted of the failure to register because he was unable to determine which of Florida's registration requirements applied to his status as a sex offender in Michigan.⁷⁷ His felony conviction subjected Jacob to a prison sentence of between four and ten years in prison.⁷⁸

In a sense, lifetime registration is a second act of victimization for many of these children. In an interesting study comparing juvenile sex offenders with their nonsexual offending counterparts, Michael Seto and Martin Lalumière found that children who commit sex crimes "had higher rates of sexual abuse victimization, exposure to sexual violence, exposure to nonsexual abuse or neglect victimization, social isolation, early exposure to sex or pornography, atypical sexual interests, anxiety, and low self-esteem."⁷⁹ The authors of the study further reported that children who have

73. See, e.g., 18 U.S.C. § 2250(a)(3) (2015) (allowing up to ten years imprisonment for the failure to register or update information. For an example of the difficulties of meshing different state requirements, see *Kvech v. N.M. Dep't. of Pub. Safety*, 987 F. Supp. 2d 1162, 1168-72 (D.N.M. 2013) (detailing the complicated and extraordinary measures undertaken by two states with respect to a misdemeanor offender).

74. This article does not use the full names of children who are required to register unless that child has made his or her full name known to the public.

75. See Stephen Young, *People of 2015: Josh Gravens, Advocate for Outcasts*, DALLAS OBSERVER (June 24, 2015), <http://www.dallasobserver.com/news/people-2015-josh-gravens-advocate-for-outcasts-7340978>.

76. *Id.*; see also Odell Huff, *CSJ Panelist Josh Gravens Arrested in Dallas*, CTR. FOR SEXUAL JUST. (July 24, 2014), <http://www.centerforsexualjustice.org/2014/07/23/cs-j-panelist-josh-gravens-arrested-in-dallas> (writing that Josh was charged with "failure to comply as a registered sex offender, a 3rd degree felony, and itself considered a new sex charge").

77. See RAISED ON THE REGISTRY, *supra* note 16, at 1-2. For a description of the penalties for the failure to comply in Michigan, see MICH. COMP. LAWS ANN. § 28.729 (West 2015).

78. See MICH. COMP. LAWS ANN. § 28.729 (West 2015) (delineating the various penalties for the failure to comply with Michigan's registration requirements).

79. See COLLATERAL CONSEQUENCES, *supra* note 14, at 4; see also Chrysanthi Leon, David L. Burton & Dana Alvare, *Net-Widening in Delaware: The Overuse of Registration and Residential Treatment for Youth Who Commit Sex Offenses*, 17 WIDENER L. REV. 127, 141 (2011) (finding that child sex offenders "witness[ed] sexual abuse and domestic violence at home, whereas the nonsexual offending youth more often reported witnessing neglect at home").

been sexually abused often perpetrate the same kinds of sexual acts they had experienced themselves as children.⁸⁰

Josh Gravens is living proof of these conclusions. Between the ages of six and eight, Josh was repeatedly raped by neighborhood children.⁸¹ As he reflects now, “Everything that I did with my sister came directly from the things I had experienced in the abuse. I was sexually confused, and it started to play out with my sister.”⁸² Same for William Quarles, who went to prison at twenty-three for molesting two boys, ages six and eight-years-old.⁸³ It turns out that William was raped by two teenage boys when he was eleven years old.⁸⁴ Intensive therapy in prison “made him confront how he’d allowed his own abuse to warp his perceptions.”⁸⁵

It is not only child registrants who suffer. Their families suffer as well. Researchers Levenson and Tewksbury report that parents of child registrants express feelings of powerlessness, isolation, and shame.⁸⁶ Families also experience financial and physical hardship, which they believe are directly associated with a loved one’s status as a sex offender.⁸⁷ In declining an interview with CNN, one parent said, “No one understands the threats, harassment, loss of income and dignity. I hope you find someone that can better take the risk. [We] have suffered enough humiliation.”⁸⁸ Children of child registrants describe their own isolation and loss of friendships because they have a parent on the registry.⁸⁹ Although

80. See Michael C. Seto & Martin L. Lalumière, *What Is So Special About Male Adolescent Sexual Offending? A Review and Test of Explanations Through Meta-Analysis* 136 PSYCHOL. BULL. 526, 530 (2010).

81. See DePrang, *supra* note 60.

82. *Id.*

83. See Steven Yoder, *Collateral Damage: Harsh Sex Offender Laws May Put Whole Families at Risk*, ALJAZEERA AM. (Aug. 27, 2015), <http://america.aljazeera.com/articles/2015/8/27/harsh-sex-offender-laws-may-put-whole-families-at-risk.html>.

84. *Id.*

85. *Id.*

86. See Levenson & Tewksbury, *supra* note 65, at 4 (relating the emotional, physical, and financial toil on family members); see also COLLATERAL CONSEQUENCES, *supra* note 14, at 7 (describing the strain on the families in a 2010 study conducted by researchers Comartin, Kernsmith, and Miles).

87. See Levenson & Tewksbury, *supra* note 65, at 4.

88. Emanuella Grinberg, *Mothers of Sex Offenders Share Responsibility, Burden of Label*, CNN (May 12, 2012), <http://www.cnn.com/2012/05/12/living/mothers-sex-offenders>.

89. See RAISED ON THE REGISTRY, *supra* note 16, at 61-62 (detailing a study that found “75 percent of the children of registrants had lost friendships as a result of a parent’s status as a registered sex offender [and] 57 percent reported that other children treated them differently”); accord *State ex rel. C.D.*, No. FJ-19-38-08, 2009 WL 3437836, at *2 (N.J. Super. Ct. App. Div. Oct. 16, 2009) (quoting Dr. Dean DeCrisce who told the court that a juvenile sex offender’s siblings would be ostracized because their friends would be prohibited from coming to the home).

she is the child of an adult registrant, Stephanie's words capture it well. She wrote, "My great life was now devastated. I was ruined and ashamed."⁹⁰

It is not surprising, then, that child offenders' thoughts turn to suicide.⁹¹ Christian W, a lifetime registrant, stated, "I live in a general sense of hopelessness, and combat suicidal thoughts almost daily due to the life sentence [registration] and punishment of being a registrant."⁹² Others concur in feeling desperate and hopeless.⁹³ A young man who was placed on the registry at fourteen years old stated, "[O]ur mistake is forever available to the world to see. There is no redemption, no forgiveness. You are never done serving your time. There is never a chance for a fresh start. You are finished. I wish I was executed because my life is basically over."⁹⁴

This is the life of the Throwaway Child.

II. THE FLAWS OF THE CURRENT NARRATIVE ON CHILD SEX OFFENDERS

A. *Examining the Emotional Rhetoric*

It is true. We are afraid *for* our children and we are afraid *of* our children. Fear that our children will be sexually assaulted by strangers is especially interesting given that only a small percentage of sexual abuse of

90. See *My Dad is a Sex Offender: Stephanie (Elizabeth's) Story – As Featured on HuffPost Live*, LOVELY PROJECT, <http://wearelovely.com/my-dad-is-a-sex-offender-stephanies-story-as-featured-on-the-huffington-post> (last visited Mar. 9, 2016) (expressing a daughter's feelings about the day that her father was arrested).

91. See RAISED ON THE REGISTRY, *supra* note 16, at 52-55 (relating stories of young registrants who were suicidal).

92. *Id.* at 51 (quoting a telephone interview with Christian W); see also *More Harm Than Good*, *supra* note 58 (offering the statements of Dominic G., who was required to register for an offense he committed when he was thirteen: "I'm a ghost . . . No one cares if I am alive. In fact, I think they would prefer me dead").

93. See *More Harm Than Good*, *supra* note 58 (recounting a mother's story of the suicide of her seventeen-year-old son, a child registrant); see also Shannon C. Parker, *Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification*, 21 VA. J. SOC. POL'Y & L. 167, 169 (2014) (profiling Johnny, who faced suicide and bouts of depression because he was a registered sex offender).

94. See RAISED ON THE REGISTRY, *supra* note 16, at 52 (quoting then-16 year old Austin S. from Louisiana); Katie Walmsley, *NJ Case Raises Questions About Meghan's Law*, ABC NEWS (July 27, 2011), <http://abcnews.go.com/US/nj-case-raises-questions-meghans-laws/story?id=14171897> (recounting the tragic story of Justin Fawcett who overdosed at twenty years old after being placed on the sex offender registry at seventeen for statutory rape).

children is committed by strangers.⁹⁵ If this fact is true, how do we account for our fixation on the danger of strangers? Professor Bella August Walker writes, “The notion that evil is embodied in strangers, and not in our family members, is far easier to accept This position leads to sex offender laws that seem sensible on their face, but are driven by unjustified moral impulses, not fact-based analysis.”⁹⁶

No doubt, fear is stoked by sensational and disturbing high profile stranger abuse cases. The visuals haunt us. Jerry Sandusky, former respected Penn State football coach stands out because he preyed on young boys on and off the campus, and all in plain sight of family and the community.⁹⁷ Philip Garrido is also the subject of a parent’s nightmares. A registered sex offender, he abducted an eleven-year-old girl on her way to school and held her captive for seventeen years. This, despite the fact that he was subjected to random spot checks by police because of his status.⁹⁸ So horrifying is Garrido’s story that prosecutors moved to change parole laws because of him.⁹⁹ And finally, the most concerning image of all – Jesse Timmendequas, a convicted (but unregistered) sex offender who lured

95. See, e.g., Bela August Walker, *Locating the Criminal: Civil Sanctions, Sexual Abuse, and the American Family*, 44 SW. L. REV. 562, 565 (2015) (offering statistics that only ten percent of abuse is committed by strangers); Katherine Godin, *The New Scarlett Letter: Are We Taking the Sex Offender Label Too Far?*, 60 R.I. B.J. 17, 19 (2011) (reporting a study that found that “97% of child sex abuse victims up to 5 years old knew the offender [and that] [f]or those victims 6-11 years old, 95% knew the offender previously”).

96. Walker, *supra* note 95, at 566; see also Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1560-62 (2014) (employing the “Scapegoat Theory” to explain why people prefer to enact laws that target strangers rather than intimates).

97. See Joe Drape, *Sandusky Guilty of Sexual Abuse of 10 Young Boys*, N.Y. TIMES (June 22, 2012), http://www.nytimes.com/2012/06/23/sports/ncaafotball/jerry-sandusky-convicted-of-sexually-abusing-boys.html?_r=0 at A1 (recounting the jury’s conviction of former Penn State Assistant Football Coach Jerry Sandusky); see also Maureen Dowd, *American Horror Story*, N.Y. TIMES (June 12, 2012), <http://www.nytimes.com/2012/06/13/opinion/dowd-american-horror-story.html> (describing Sandusky’s ability to seek out vulnerable children without fathers); Malcolm Gladwell, *In Plain View: How Child Molesters Get Away with It*, NEW YORKER (Sept. 24, 2012), http://www.newyorker.com/arts/critics/atlarge/2012/09/24/120924crat_atlarge_gladwell (relaying the ability of molesters to walk among the public because they “ingratiate themselves into the communities they wish to exploit”).

98. See Casey Glynn, *Nancy and Philip Garrido Sentenced for Jaycee Lee Dugard Kidnapping*, CBS NEWS (June 2, 2011, 1:56 PM), <http://www.cbsnews.com/news/nancy-and-philip-garrido-sentenced-for-jaycee-lee-dugard-kidnapping> (following the conviction of Phillip and Nancy Garrido for the kidnapping and rape of Jaycee Lee Dugard).

99. See Gerry Wagschal, *Phillip Garrido’s Release Spurs California DA to Seek Parole Changes*, ABC NEWS (Aug. 2, 2011), <http://abcnews.go.com/US/phillip-garridos-release-spurs-california-da-see-parole/story?id=14213297> (describing the DA’s efforts to change parole laws because Phillip Garrido had been previously convicted of sexual assault).

his neighbor's child, seven-year-old Megan Kanka, into his home and raped and murdered her.¹⁰⁰

These horrific crimes cannot help but affect us.¹⁰¹ They also compel us to act¹⁰² even when, as in the case of sex offender registration laws, action is misguided and ineffective.¹⁰³ As Professor Walker Wilson cautioned, “the desire to exercise control over potential threats is a driving force behind much of human behavior.”¹⁰⁴ Indeed, sex offender registries were born out of the public's need to control the potential threat of stranger abuse.¹⁰⁵

Yet, it is not only the terrifying image of the stalking pedophile that disturbs us. The public has an equally terrifying image of the juvenile offender. It is a marauding juvenile delinquent who is devoid of a moral compass and incapable of rehabilitation.¹⁰⁶

100. See *State v. Timmendequas*, 737 A.2d 55, 66-73 (N.J. 1999) (highlighting that the neighbors did not know about defendant's prior convictions for sexual assault against children).

101. See *How We Began and the Need for Transition*, GUNDERSEN NAT'L CHILD PROTECTION TRAINING CTR., <http://www.gundersenhealth.org/ncptc/jacob-wetterling-resource-center/who-we-are/history> (last visited Feb. 3, 2016) (profiling the Wetterlings, who galvanized the public to create a national sex offender registry in the wake of their son's assumed kidnapping and murder); see also Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country*, 58 BUFF. L. REV. 1, 18-34 (2010) [hereinafter *Legislative Epidemics*] (tracing the catalysts that helped establish sex offender registration laws and community notification statutes).

102. See, e.g., Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, Pub. L. 103-322, §170101, 108 Stat. 2038 (1994) (legislating a comprehensive set of sex offender registration laws); Pub. L. No. 104-145, §2, 110 Stat. 1345 (1996) (establishing community notification statutes); cf. *Legislative Epidemics*, *supra* note 101, at 13-18 (showcasing the social impetus behind California's three strikes law and stricter drunk driving laws). For a critical examination of the impetus for sex offender registration laws, see Vitiello, *supra* note 21 (“Policies are crafted in fearful haste, often as symbolic gestures to honor the crime victims whose suffering has inspired them.”).

103. Even if constitutional, sex offender registration schemes have come under fire for being ineffective. See, e.g., Walker, *supra* note 95, at 565 (citing authority that “these regulations have not reduced recidivism or otherwise improved public safety”); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function*, 54 J.L. & ECON. 207 (2011) (engaging in extensive statistical analysis that concludes sex offender registries are not effective); RICHARD TEWKSBURY, WESLEY G. JENNINGS & KRISTEN ZGOBA, FINAL REPORT ON SEX OFFENDERS: RECIDIVISM AND COLLATERAL CONSEQUENCES 1, 12 (2011), <https://www.ncjrs.gov/pdffiles1/nij/grants/238060.pdf> (concluding that “SORN is not likely to be an effective deterrent for sex offender recidivism”).

104. Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 LA. L. REV. 509, 511 (2013).

105. The tragic murders of three children – Adam Walsh, Jacob Wetterling, and Megan Kanka – spurred legislative action. See Carpenter & Beverlin, *supra* note 3, at 1076-77 (examining their cases and the impetus for legislative action).

106. See generally JOHN J. DILULIO, WILLIAM J. BENNETT & JOHN P. WALTERS, BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS

Scholars theorize that the public's perception of juveniles accounts for the shift in philosophies from rehabilitation to retribution.¹⁰⁷ A new term, "superpredators," was coined by then-Princeton Professor John J. Dilulio to describe a new breed of violent and law-breaking juveniles.¹⁰⁸ The term has been credited with numerous penal changes in the law affecting juvenile offenders.¹⁰⁹ The public embraced the image. It came to believe that juvenile crime continued on the rise and that juvenile courts were ill equipped to deal with it.¹¹⁰

It should be expected then, that the vulnerable child and juvenile delinquent would collide in efforts that both protect and punish children. Indeed, these conflicting images have subjected children who commit sexual crimes to a "dizzying array of increased registration and community

(1996). See also Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fears*, N.Y. TIMES (Apr. 6, 2014), <http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html> (tracing the origins of the public's fear of juvenile offenders); Rosie DiManno, *Where Are the Parents of Juvenile Thugs?*, STAR (Jan. 11, 2008), http://www.thestar.com/opinion/columnists/2008/01/11/where_are_parents_of_juvenile_thugs.html (depicting juvenile offenders as "mini-me malefactors, armed and dangerous, who have taken their schools hostage, slick to the ways of a docile system").

107. See, e.g., Ira M. Schwartz, *Juvenile Crime-Fighting Policies: What the Public Wants, in JUVENILE JUSTICE AND PUBLIC POLICY: TOWARD A NATIONAL AGENDA* (Ira M. Schwartz ed., 1992); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1105 (1991) ("As a consequence of the general disillusionment with rehabilitative penology, the focus of the criminal justice system turned from assessing the social needs of the offender to assessing the social harm that the offender caused—in short, from rehabilitation to retribution.").

108. See *supra* note 106; see also *State v Null*, 836 N.W.2d 41, 54 (Iowa 2013) (describing sentencing practices that were predicated on the belief that juvenile offenders were "super-predators").

109. See, e.g., Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), <http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html> (arguing that the theory about superpredator juveniles led to the change in a number of laws); see *id.* (quoting Professor Dilulio, "America is now home to thickening ranks of juvenile 'superpredators' -- radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders"). Even presidential candidate Bob Dole referenced the term "superpredators" in his 1996 bid for the presidency. See Kelly Luker, *Kids These Days*, METRO SANTA CRUZ (Sept. 18, 1997), <http://www.metroactive.com/papers/cruz/09.18.97/kids-9738.html> ("Unless something is done soon, some of today's newborns will become tomorrow's superpredators-merciless criminals capable of committing the most vicious of acts for the most trivial of reasons.").

110. See, e.g., Schwartz, *supra* note 107, at 69 ("Concerns about the inability of juvenile courts to rehabilitate chronic and violent young offenders, while simultaneously protecting public safety, accompany the growing fear of youth crime."); see also COLLATERAL CONSEQUENCES, *supra* note 14, at 2 ("Over the past two decades, the convergence of three trends—the generalized societal alarm over juvenile violent crime, increased punitive responses to juvenile offenders, and the expansion of social controls over known sex offenders—has produced a range of policies aimed at juveniles who sexually offend.").

notification requirements, the emergence of harshening residency restrictions, and the elimination of individuated risk assessment.”¹¹¹

The contrast in our response to children who commit non-sexual offenses is stunning. If the juvenile were adjudicated for a non-sexual offense (theft, for example) instead of a sexual offense, important differences surface immediately. The adjudication would be cloaked in confidentiality, in stark contrast to the adjudication of a sexual offense where it is likely that the public would be notified of the child’s offense.¹¹² Further, under juvenile proceedings, a child would be afforded the opportunity for rehabilitation,¹¹³ which is not available for the child sex offender who must register for life.¹¹⁴

To jettison established principles regarding the juvenile justice system suggests that we are in the throes of a social panic. Historian Philip Jenkins’ definition of a “social panic” aptly describes the impetus for these laws.¹¹⁵ He defined a social panic as one in which the “fear is wildly exaggerated and wrongly directed.”¹¹⁶ Jenkins offered several hallmarks of a social panic,¹¹⁷ each of which applies to the increasingly harsh focus on

111. Carpenter & Beverlin, *supra* note 3, at 1078. For an examination of the illogical nature of juvenile sex offender registration laws, see *State v. Sapps*, 820 A.2d 477, 479-80 (Del. Fam. Ct. 2002) (questioning the reasoning under Delaware law that makes the same sexual battery a misdemeanor if committed by an adult, but a felony if committed by a juvenile).

112. See *United States v. Juvenile Male*, 590 F.3d 924, 931-32 (9th Cir. 2010) (recounting the differences between the adult and juvenile justice systems); *In re Gault*, 387 U.S. 1, 14 (1967) (stressing that “wide differences have been tolerated—indeed insisted upon—between the procedural rights accorded to adults and those of juveniles”). But see Rebecca Beitsch, *States Slowly Scale Back Juvenile Sex Offender Registries*, ATL. (Nov. 24, 2015), <http://www.theatlantic.com/politics/archive/2015/11/states-slowly-scale-back-juvenile-sex-offender-registries/433473/> (reporting that 38 states add child offenders’ names to adult registries, and of those states, sixteen states publish the child’s name, address, and photo).

113. See, e.g., *People ex rel. Z.B.*, 757 N.W.2d 595, 606 (S.D. 2008) (Sabers, J., dissenting) (“The juvenile justice system is premised on a rehabilitative theory of justice, much unlike the harsher, more punitive adult system.”); Megan F. Chaney, *Keeping the Promise of Gault: Requiring Post-Adjudicatory Juvenile Defenders*, 19 GEO. J. POVERTY L. & POL’Y 351, 354 (2012) (observing that “[t]he first juvenile justice reformers envisioned a safe haven away from the confines and harshness of adult court where less culpable youngsters could be rehabilitated to reenter society as productive, lawabiding adults”).

114. See Beitsch, *supra* note 112 (quoting Nicole Pittman who stated, “[R]egistries are contrary to the concept of juvenile courts, which are based on the premise that children are more capable of change and should be shielded from the harsher consequences of adult court”).

115. See PHILIP JENKINS, *MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA* 6-7 (1998).

116. *Id.* See also John Douard, *Sex Offender As Scapegoat: The Monstrous Other Within*, 53 N.Y. L. SCH. L. REV. 31, 41 (2009) (“[S]ex offenders are the targets of ‘moral panic.’”).

117. Philip Jenkins, *Failure to Launch: Why Do Some Social Issues Fail to Detonate Moral Panics?*, 49 BRIT. J. CRIMINOLOGY 35, 35 (2009) (quoting STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 16 (1978)).

sex offenders: 1) an official reaction that is not proportional to the actual threat;¹¹⁸ 2) leaders in the community who all speak of the threat in identical terms;¹¹⁹ 3) and media who are complicit in stoking the panic.¹²⁰ Consequently, our collective fear of the sexual predator has led to hastily drafted and overbroad registration and notification laws that ensnare equally the rapist and the child who engages in consensual sexual intercourse.

We are not only in the midst of a social panic, we are doomed to repeat its vicious cycle. High-profile cases lead to extensive media coverage, which in turn fuels the public outcry and bolsters its leaders to action, which in turn further stokes the media fires that burn on the topic.

B. Cases and Studies that Carried the False Message

At the heart of mandatory lifetime registration for child sex offenders is the deeply held belief that a child who commits a sexual offense will grow up to be an adult sex offender. This belief appears to be premised on two separate but interrelated grounds. First, that sex offenders recidivate at greater numbers than non-sexual offenders, and second, one who commits a sex crime as a child foreshadows future dangerousness as an adult.

Making sense of a system that subjects children to mandatory lifetime monitoring starts with the current underlying narrative that all sex offenders – adults and children – recidivate in larger numbers than non-sexual offenders. This narrative is entrenched in the courts' jurisprudence,¹²¹

118. *See, e.g., Doe v. Nebraska*, 734 F. Supp. 2d 882, 898 (D. Neb. 2010) (recounting that the sponsoring legislators to Nebraska's expanded sex offender laws "expressed 'rage' and 'revulsion' regarding persons who have 'these convictions'" . . . [and that] "he did not 'buy' the idea of 'rehabilitation' or that 'people could change . . . [i]n [this] area.'"); *Doe v. Pataki*, 940 F. Supp. 603, 621-22 (S.D.N.Y. 1996) (noting that the debate minutes over passage of sex offender registration laws showed Assembly members' "passion, anger and desire to punish" sex offenders); JUSTICE POLICY INSTITUTE, REGISTERING HARM: HOW SEX OFFENSES FAIL YOUTH AND COMMUNITIES 12 [hereinafter REGISTERING HARM] http://www.justicepolicy.org/images/upload/08-11_rpt_walshactregisteringharm_jj-ps.pdf (quoting Florida's then-Attorney General Charlie Crist who stated, "The experts tell us that someone who has molested a child will do it again and again"); *id.* (reporting comments of U.S. Representative Ric Keller (R-FL), "The best way to protect children is to keep child predators locked up in the first place, because someone who has molested a child will do it again and again and again.").

119. *See Nebraska*, 734 F. Supp. 2d at 898; *Pataki*, 940 F. Supp. 603 at 621-22; REGISTERING HARM, *supra* note 118. For a court pronouncement echoing the sentiments, see *Smith v. Doe*, 538 U.S. 84, 103 (2003) (concluding that the rate of recidivism is "frightening and high").

120. *See* Lawrence M. Friedman, *Through a Glass Darkly: Law, Culture, and the Media*, 62 DEPAUL L. REV. 571, 584 (2013) ("Scandals and incidents create public policy, for good and for bad."); REGISTERING HARM, *supra* note 118, at 6 (contending that media reports of sexual offenses increased between 1991 and 1999 even as statistics on those crimes fell).

121. *See, e.g., People v. Mosley*, 344 P.3d 788, 804 (Cal. 2015) (supporting extensive residency restrictions with alleged recidivism rates); *State v. Mossman*, 281 P.3d 153, 160 (Kan.

echoed in legislative preambles to these laws,¹²² parroted by politicians,¹²³ and fueled by media accounts of high profile tragic stories.¹²⁴ The following language from a ballot measure typifies the emotional rhetoric used to justify these regulations: “[S]ex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon” . . . [and] they prey on the most innocent members of our society.”¹²⁵

There is something visceral about the position. *Once a sex offender, always a sex offender.* New York Assemblyman Herbst vocalized it when he stated on the floor of the Assembly, “I don’t know if, when [a sex offender is] released from prison, he will come back, but the statistics . . . have shown that *once a pedophile, always a pedophile.*”¹²⁶

It confirms our darkest fears, and whether or not we verbalize it, it borrows from a sister-belief about serial killers. That position holds that adult serial murderers demonstrate their propensity to violence when they are children.¹²⁷ It is what I call the “Dexter Effect,” the term taken from a

2012) (using the “grave concerns over the high rate of recidivism among convicted sex offenders” to uphold post-release registration requirements); *E.B. v. Verniero*, 119 F.3d 1077, 1097 n.17 (3d Cir. 1997) (“Heinous crimes have been committed against children after release from incarceration.”); *State v. Druktenis*, 86 P.3d 1050, 1068 (N.M. Ct. App. 2004) (“[S]ex offenders pose a significant risk of recidivism.”); *Neal v. Shimoda*, 905 F. Supp. 818, 819 (D. Haw. 1995) (“Research has also shown that the rate of recidivism among untreated sex offenders is high being between 60-80 percent and that incarceration without treatment tends to increase the offenders’ propensity to reoffend.”).

122. *See, e.g., Smith v. Doe*, 538 U.S. 84, 93 (2003) (citing to Alaska Sex Offender Registration Act, 1994 Alaska Sess. Laws, ch. 41) (“Sex offenders pose a high risk of reoffending”); *see also* ARK. CODE ANN. § 12-12-902 (2015) (“The General Assembly finds that sex offenders pose a high risk of reoffending after release from custody”); FLA. STAT. ANN. § 775.21(3)(a) (2015) (“Sexual offenders are extremely likely to use physical violence and repeat their offenses.”); MISS. CODE ANN. § 45-33-21 (2015) (“The Legislature finds that the danger of recidivism posed by criminal sex offenders and the protection of the public from these offenders is of paramount concern and interest to government.”).

123. *See, e.g., B. Drummond Ayres, Jr., California Child Molesters Face ‘Chemical Castration’*, N.Y. TIMES (Aug. 27, 1996), <http://www.nytimes.com/1996/08/27/us/california-child-molesters-face-chemical-castration.html> (quoting California State Assemblyman Bill Hoge, “What we’re up against is the kind of criminal who, just as soon as he gets out of jail, will immediately commit this crime again at least 90 percent of the time.”).

124. *See* Heather Ellis Cucolo & Michael L. Perlin, “*They’re Planting Stories in the Press*”: *The Impact of Media Distortions on Sex Offender Law and Policy*, 3 U. DENV. CRIM. L. REV. 185, 186 (2013) (inviting consideration that the media “has framed our conceptualizations of offenders and influenced resulting legal decisions and legislation”).

125. *See, e.g., C.A. CONST. Prop. 83* (2006); General Ordinance of the Village of Oostburg, WIS. ORDINANCE No. 11-2008 § 2.12 (2007/2008); Zoning and the Village Board of Appeals, WIS. ZONING BOARD OF APPEALS, Title 16, Chap. 1 § (c)(1)(b) (2008).

126. *See Doe v. Pataki*, 940 F. Supp. 603 (S.D.N.Y. 1997).

127. *See, e.g., Serial Killer: Nature vs. Nurture: How Serial Killers Are Born*, AM. ACAD. EXPERTS TRAUMATIC STRESS, <http://www.aaets.org/article213.htm> (last visited Feb. 18, 2016) (reporting that sociologist Arnold Arluke, who compared animal abusers with non-animal abusers,

series of books and television show that portrays an adult serial killer who, as a child, had acted out on his violent tendencies.¹²⁸ Applying the “Dexter Effect” to children who commit sex crimes, this principle would ascribe to a child offender the tendencies to continue sexually violent behavior as an adult. *Just like a serial killer.* Except that, ironically, those convicted of murder who are released from prison are not placed on any registry that tracks and limits their movements.

Consider the case of two fourteen-year-old bullies who held down two twelve-year-old boys and engaged in humiliating acts by “placing their bare buttocks on the faces of the two younger boys, resulting in physical contact between their bare buttocks and the victims' faces.”¹²⁹ Framing the boys' acts as a registration-worthy sex offense rather than a nonsexual battery set the improbable course that followed.¹³⁰ Because the boys were fourteen years old and the two victims were under thirteen, the boys were required to register as sex offenders for the rest of their lives.¹³¹ A New Jersey sex crime defense attorney criticized the sentence, stating, “Punishment for bullying younger kids should be detention Forcing them to register for Megan's law is first beyond the pale and second, cheapens the law.”¹³²

The case serves as an excellent example of the “Dexter Effect” in operation. Here, mandatory registration for life is justified by the legislative position that the boys will continue their sexual bullying tendencies and grow up to be sexual predators. Put another way, having committed a registerable sexual offense,¹³³ these boys are conclusively presumed dangerous.

But is it an accurate belief? The short answer is “no.” As the next section proves, extensively drawn studies indicate that recidivism rates are low among child sex offenders, and therefore, a child's commission of a sex

found those who were animal abusers were “five times more likely to commit acts of violence such as assault, rape, and murder against others”).

128. See JEFF LINDSAY, *DARKLY DREAMING DEXTER* (2004) (fictionalizing a serial killer whose tendencies toward serial violence began at the age of two when he witnessed his mother's brutal killing).

129. *State ex rel. B.P.C.*, 23 A.3d 937, 947 (N.J. Super. Ct. 2011) (“We recognize the severe penal consequences that flow from an adjudication of delinquency based on fourth degree criminal sexual contact.”).

130. *Id.* at 945-47 (deciding that the elements of the sexual crime were met when the boys engaged in the battery).

131. *Id.* at 946 (concluding that the boys' actions against the twelve-year-olds required they register for life under N.J.S.A. 2C:7-2b(2)).

132. See Walmsley, *supra* note 94 (reporting on the sentence meted out to the fourteen-year-old boys).

133. *B.P.C.*, 23 A.3d at 945-47 (focusing on the elements of the statute to determine whether the boys had committed the offense charged).

crime does not predict a child's propensity for future sexually dangerous behavior.¹³⁴

Yet, the belief persists. People who commit sex offenses – whether children or adults – will continue to commit sex offenses. To be sure, this widely held view is not derived solely from an irrational fear. Ostensibly, it is based on studies that tracked recidivism rates of sex offenders,¹³⁵ and made more credible by instrumental court decisions that carried the studies' message. Together, they endorse a picture of sex offenders who are incorrigible and untreatable. It is compelling. And the message has stuck.

Doe v. Poritz is an instrumental court opinion that carried the message.¹³⁶ Although *Poritz* was not the first decision to conclude that sex offenders were more dangerous than non-sexual offenders,¹³⁷ it occupies a unique position as the first state supreme court decision to uphold community notification laws. The year was 1995, and the brutal death of Megan Kanka was fresh in everyone's mind. Indeed, the New Jersey Supreme Court agreed, “[T]he public's increasing awareness of the dangers posed by sex offenders . . . was accelerated by the occurrence of highly publicized and horrific offenses.”¹³⁸

The backdrop to *Poritz* is significant. Legislation, which would come to be called “Megan's Law,” was hastily drafted by the New Jersey legislature and signed by the governor within three months of Megan Kanka's murder.¹³⁹ This complex bill garnered significant criticism

134. See COLLATERAL CONSEQUENCES, *supra* note 14, at 2 (documenting numerous studies that have refuted the assumption of high recidivism rates); *United States v. Juvenile Male*, 590 F.3d 924, 940 (9th Cir. 2010), *vacated*, 131 S. Ct. 2860 (2011) (endorsing studies that show the recidivism rates for juvenile offenders are significantly lower than for adult offenders); cf. Franklin E. Zimring, *An American Tragedy: Legal Responses to Adolescent Sex-Offending*, RES. NETWORK ADOLESCENT DEV. JUV. JUST., <http://www.adjj.org/downloads/4424American%20Tragedy.pdf> (arguing that first time child offenders should never have to register because their reasons for offense are too complicated to conform to a bright line rule of registration).

135. See *infra* notes 149-59 and accompanying text (relating findings from earlier studies). *But see* TEWKSBURY, JENNINGS & ZGOBA, *supra* note 103, at 1 (concluding that “relatively little research has found support” for the legal responses and legal assumptions made in sex offender registration laws).

136. 662 A.2d 367 (N.J. 1995).

137. See, e.g., *State v. Bishop*, 717 P.2d. 261, 265 (Utah 1986) (“It is not unreasonable to impose a minimum mandatory sentence on a person convicted of a crime when the danger to individuals and society is great and the risk of recidivism is high, as it appears to be with child sodomy offenses.”); *In re Michael B.*, 566 A.2d 446, 455 (Conn. 1989) (“The recidivism rate among sexual offenders, older ones, is just incredible.”).

138. 662 A.2d at 375-76.

139. See, e.g., *Artway v. Att’y Gen.*, 81 F.3d 1235, 1243 (3d Cir. 1996) (describing the process for passing [Megan's Law]).

because of the speed with which it was drafted and signed.¹⁴⁰ In fact, the passage of Megan's Law has been described by Professor Wayne Logan as "object lessons in legislative panic."¹⁴¹ The Law was immediately challenged and it made its way unconventionally, and by direct appeal, to the New Jersey Supreme Court.¹⁴² All eyes were on the court as it was asked to determine whether retroactive application of registration and community notification laws was constitutional.¹⁴³

In upholding Megan's Law, the *Poritz* court explained the prevailing view of the dangerousness of sex offenders:

Concerning the basic facts, however, there is no dispute: as far as society is concerned, sex offenses of the kind covered by the law are among the most abhorrent of all offenses; the relative recidivism rate of sex offenders is high compared to other offenders; treatment success of sex offenders exhibiting repetitive and compulsive characteristics is low; and the time span between the initial offense and re-offense can be long.¹⁴⁴

In support of this position, the court cited a number of studies that indicated that recidivism rates of sex offenders were upwards of 40% to 52%.¹⁴⁵ The court bolstered this message when it quoted the legal preamble to the law. It wrote "[a]s a group, sex offenders are significantly more likely than other repeat offenders to reoffend with sex crimes or other violent crimes, and that tendency persists over time."¹⁴⁶

This is a confusing conclusion to have drawn in light of other available statistics at the time. For approximately the same timeframe, the Bureau of Justice Statistics reported an opposite conclusion: "Of the 9,691 male sex offenders released from prisons in 15 States in 1994, 5.3% were rearrested for a new sex crime within 3 years of release."¹⁴⁷ A corollary to these

140. See RONALD K. CHEN, *COURTING JUSTICE: TEN NEW JERSEY CASES THAT SHOOK THE NATION*, 176-77 (Paul Tractenberg, ed., Rutgers Press, 2013) (describing the rushed and unorthodox process of legislative drafting); see also *Artway*, 81 F.3d at 1243 (reporting that "[Megan's Law] was rushed to the Assembly floor as an emergency measure, skipping the committee process, and was debated only on the floor; no member voted against it.").

141. Wayne A. Logan, *Megan's Law As a Case Study in Political Stasis*, 61 SYRACUSE L. REV. 371, 371 (2011).

142. See CHEN, *supra* note 140, at 179; see also Robert Hanley, *Mounting Legal Assault Against Megan's Law*, N.Y. TIMES (Mar. 16, 1996), <http://www.nytimes.com/1996/03/16/nyregion/mounting-legal-assault-against-megan-s-law.html> (describing the political battle that was brewing over the review of Megan's Law).

143. *Id.*

144. *Doe v. Poritz*, 662 A.2d 367, 374, n.1 (N.J. 1995).

145. *Id.* at 374-75.

146. *Id.* at 375.

147. Patrick A. Langan & David J. Levin, U.S. DEP'T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 1994* (2002), cited with approval in *Ewing v. California*, 538 U.S. 11, 26 (2003).

results was a separate study tracking 272,111 former inmates who were discharged in 1994.¹⁴⁸ The study found that the lowest re-arrest rates were for those previously convicted of murder or rape, while the highest recidivism rates were for offenders previously convicted of property crimes.¹⁴⁹

By 2003, when the United States Supreme Court heard *Smith v. Doe*,¹⁵⁰ the first modern challenge to sex offender registration schemes, federally mandated registration schemes had been in existence for a little over eight years.¹⁵¹ The jurisprudence was solidifying around the message that the public needed to protect itself from sex offenders.¹⁵² In a 6-3 decision, the Court upheld Alaska's sex offender registration scheme as a legitimate nonpunitive civil regulation designed to protect the public and its children from convicted sex offenders.¹⁵³

Central to the Court's decision was the belief that the public deserved protection because of "grave concern" that sex offenders recidivate at very high rates.¹⁵⁴ However, in an excellent expose entitled *Frightening and High, The Supreme Court's Crucial Mistake About Sex Crime Statistics*, Professor Ira Ellman and Ms. Tara Ellman shine an unforgiving spotlight on the Court's use of statistics to support this position.¹⁵⁵ The Ellmans test whether Justice Kennedy's use of the phrase "frightening and high" in *Smith v. Doe* accurately describes recidivism rates of sex offenders.¹⁵⁶ The authors delve into the underlying reasons for the Court's statement to

148. *Id.*

149. *Id.*

150. 538 U.S. 84 (2003).

151. The Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act mandated that states adopt sex offender registration laws and community notification statutes was passed in 1994. See Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2006)) (repealed 2006).

152. See, e.g., *Doe v. Pataki*, 120 F.3d 1263, 1276 (2d Cir. 1997) (observing that SORA was established to improve the ability of law enforcement to combat sex crimes); *People v. Malchow*, 739 N.E.2d 433, 437 (Ill. 2000) (stating that "the legislature's intent in requiring registration of sex offenders was to create an additional measure of protection for children from the increasing incidence of sexual assault and child abuse"); *Femedeer v. Haun*, 227 F.3d 1244, 1253 (10th Cir. 2000) ("Considering the tremendous physical and psychological impact sex crimes have upon the victims as well as their harmful societal effects, concerns of recidivism certainly warrant legislatures' attention."); *State v. Haskell*, 784 A.2d 4 (Me. 2001) ("SORNA serves important nonpunitive goals because it is aimed at protecting the public from sex offenders.").

153. See generally *Smith*, 538 U.S. 84.

154. *Id.* at 103 ("The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class.").

155. See generally Ira Mark Ellman & Tara Ellman, "*Frightening and High*": *The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENTARY 495 (2015).

156. *Id.* (quoting 538 U.S. at 103 (citing *McKune v. Lile*, 536 U.S. 24, 34 (2002))).

expose the scant evidence that was used in support of it.¹⁵⁷ They argue that, at least in part, the Court erroneously relied on material that it had cited the previous term in *McKune v. Lile*.¹⁵⁸ The problem with that material? It referenced only one pop-psychology magazine article that itself offered no supporting data to back up the assertion.¹⁵⁹ Still, the material was used in *McKune* to support the Court's claim "that recidivism rate of untreated offenders has been estimated to be as high as 80%."¹⁶⁰ *Smith* adopted the *McKune* sentiment and the phrase "frightening and high" officially became part of the lexicon.¹⁶¹

"Frightening and high" is what authors Chip Heath and Dan Heath would call a "sticky message."¹⁶² In *Made to Stick: Why Some Ideas Survive and Others Die*, the authors offer six reasons for why an idea is remembered and has a lasting impact: 1) *simplicity*, where an idea is stripped to its essential meaning; 2) *unexpectedness*, which means that an idea should be counterintuitive to generate interest and curiosity; (3) *concreteness*, which demands that an idea be explained in terms of human action using concrete images; (4) *credibility*, which requires that the ideas or their agents carry authority and believability; (5) *emotion*, wherein the idea must tap into a human feeling; and (6) *stories*, which indicates that narratives help people respond quickly and effectively to the message.¹⁶³

The term "frightening and high" shares some of the hallmarks the authors attribute to a sticky message. The phrase itself is *simple* and stripped to its core meaning. The use of the word "frightening" stokes the already existing *emotion* of fear that the public has shown on the issue of sex offenders. Finally, the fact that the United States Supreme Court has embraced this powerful message adds *credibility* to the value of the message.

157. *Id.* at 497-500.

158. *Id.* at 497-99 (citing the Court's reliance on *A Practitioner's Guide to Treating the Incarcerated Male Sex Offender* xiii in *McKune*, 536 U.S. at 33).

159. *Id.*

160. *Id.*

161. *Smith v. Doe*, 538 U.S. 84, 103 (2003). It is interesting how quickly a narrative can take hold. Even before *McKune*, courts were relying on limited information to conclude that sex offenders recidivate at alarmingly high rates. *See, e.g., Neal v. Shimoda*, 905 F. Supp., 818, 819 (D. Ct. Haw. 1995) ("Research has also shown that the rate of recidivism among untreated sex offenders is high being between 60-80 percent and that incarceration without treatment tends to increase the offenders' propensity to reoffend.").

162. CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* 8 (2007) ("By stick, we mean that your ideas are understood and remembered, and have a lasting impact—they change your audience's opinion or behavior.").

163. *Id.* at 16-17; *see also Legislative Epidemics*, *supra* note 101, at 26-29 (analyzing the stickiness of the phrase "Megan's Law" under the Heath set of principles).

The term “frightening and high” caught on.¹⁶⁴ Lower courts adopted the term as constitutional support for their expanding sex offender registration schemes.¹⁶⁵ *In re Alva*¹⁶⁶ offers an excellent example. In justifying sex offender registration laws as rationally based civil regulations designed to protect the public, the California Supreme Court stated, “given the ‘frightening and high’ danger of long-term recidivism by this class of offenders, the permanent nature of the registration obligation also is designed to serve legitimate regulatory aims.”¹⁶⁷

Unfortunately, similar faulty research underlying *Smith* and *McKune* may have contributed to the false assumptions affecting children who commit sex offenses. But, in the case of the children, it is not a pop-psychology magazine article as the Court used. Instead, it is flawed methodology that skewed several studies that analyzed the recidivism rates of juvenile sex offenders.¹⁶⁸ One critique by Drs. Leon, Burton, and Alvare revealed that sex abuse researches framed the study improperly. Rather than considering recidivism rates prospectively, sex abuse researchers framed the study retrospectively.¹⁶⁹ Adult sex offenders in treatment responded affirmatively that they had offended as juveniles.¹⁷⁰ Their affirmative responses led the researchers to conclude improperly that if adult offenders reported that they had committed sexual acts as children, the converse was equally true – that child offenders will commit sex crimes when they become adults.¹⁷¹

Criticism also comes from Franklin E. Zimring, noted scholar and researcher. He traced the claim of high recidivism rates among child offenders to a 1993 study conducted by an assembled Task Force that, according to Zimring, included “387 unproven assumptions about

164. Ellman & Ellman, *supra* note 155, at 497 (revealing that “a Lexis search of legal materials found that phrase in 91 judicial opinions, as well as briefs in 101 cases”).

165. *See e.g.*, *State v. Blankenship*, No. 2014-0363 (Ohio Nov. 12, 2015) (using “frightening and high” language to uphold categorical assessment of offender); *State v. Wade*, 757 N.W.2d 618, 626 (Iowa 2008) (incorporating *Smith*’s “frightening and high” reference to conclude that “sex offenders are not similarly situated to other criminal offenders”); *State v. Seering*, 701 N.W.2d 655, 665 (Iowa 2005) (“As numerous authorities have acknowledged, [t]he risk of recidivism posed by sex offenders is ‘frightening and high.’”).

166. 92 P.3d 311 (Cal. 2004).

167. *Id.* at 332.

168. Two noted research articles describe flawed methodology that were the bases of earlier studies. *See* Leon, Burton & Alvare, *supra* note 79, at 146-47 (exposing an improperly used sample); *see also* Zimring, *supra* note 134, at 2 (criticizing a flawed, but influential, study from 1993).

169. *See* Leon, Burton & Alvare, *supra* note 79, at 146-47.

170. *Id.*

171. *Id.*

adolescent behavior, dangerousness, appropriate justice system responses, and the impact of various interventions on long-term development and life opportunities.”¹⁷² Further, and most disconcerting to Professor Zimring, this particular Task Force was devoid of the specialists that would be required for such inquiry. He wrote, the Task Force included “no physicians, no specialists in program evaluation and policy analysis, no experts in juvenile justice, and only one attorney, a former prosecutor.”¹⁷³

III. RESHAPING THE NARRATIVE ON CHILD SEX OFFENDERS

A. *The Statistical Truth About a Child’s Future Dangerousness*

The current narrative on child sex offenders is loud and it overwhelms. Children who commit sex offenses are described as “at significant risk of reoffense, highly resistant to rehabilitation, and bearing more in common with adult sex offenders than with their delinquent peers.”¹⁷⁴

Yet, current studies disprove the earlier flawed results, and with it, the false current narrative. Dr. Michael Caldwell’s extensive research shows that recidivism rates for child sex offenders is under 5%.¹⁷⁵ His results are drawn from a compilation of 91 studies that include 29,734 juvenile sexual offenders and date from the 1940s up to 2014.¹⁷⁶ He found that the weighted sexual recidivism rate is 4.59%, with 40 of the studies showing a recidivism rate below 5%.¹⁷⁷ Although three of the studies produced rates over 15%, those rates are still six times lower than the general recidivism rate of 43%.¹⁷⁸ Dr. Caldwell’s conclusion? “In brief, juvenile sex offenders

172. See Zimring, *supra* note 134, at 2; see also Maggie Jones, *How Can You Distinguish a Budding Pedophile from a Kid with Real Boundary Problems?* N.Y. TIMES (July 22, 2007), http://www.nytimes.com/2007/07/22/magazine/22juvenile-t.html?_r=0 (quoting an expert who admitted that the adult offender models was not good research to determine recidivism rates of juvenile offenders).

173. See Zimring, *supra* note 134, at 2; see also *id.* (contending that “tests used by researchers to identify individuals at risk for recidivism have a false positive rate of more than 80 percent when used with adolescents”).

174. COLLATERAL CONSEQUENCES, *supra* note 14, at 8.

175. See Michael F. Caldwell, *Juvenile Sex Offenders*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE (Franklin E. Zimring & David S. Tanenhaus eds., 2014) (providing empirical data on child sex offenders that refute the presumption of high recidivism rates in this group); see also Sharon E. Denniston & Michael F. Caldwell, *Answering the Call to Study the Effects of Juvenile SORN: Lessons from Two Studies* (Oct. 15, 2015) (updating information regarding the recidivism rates of child sex offenders).

176. See generally Caldwell, *supra* note 175.

177. *Id.* at 59.

178. *Id.*

as a group appear to be no more likely to engage in sexual violence than similar non-sex offending delinquents.”¹⁷⁹

Dr. David Burton similarly concluded in analyzing the results of an extensive database on sex offenders. He wrote, “[Registration schemes] assume that past offenders will be future offenders. But when it comes to sexual offending, several decades of research prove otherwise.”¹⁸⁰ And it is not just Dr. Burton and Dr. Caldwell. Summarized, Zimring’s research found that “juveniles with sexually based police contacts had a high volume of non-sex contacts and a low rate of sexual recidivism during their juvenile careers, and an even lower likelihood of continuing their sexual offending behavior into adulthood.”¹⁸¹ Other researchers have also found that child sex offenders do not recidivate at the rates imagined by the public.¹⁸²

If we accept the premise that recidivism rates are low among children who commit sex offenses – and certainly the statistical proof is overwhelming that this is the case – we are still left to answer the more important question – how to assess the future dangerousness of a child offender? To do so requires that we understand why children commit sex offenses. Professor Zimring contends that it is inaccurate to assume that all children who commit sex offenses are sexual predators.¹⁸³

Predicting future dangerousness requires a more nuanced analysis than the current conviction-based narrative allows. Rather than consider all children who commit sex offenses to be similarly situated, Professor Zimring groups child sex offenders into three general categories: those who engage in force or coercion, but who will generally not reoffend;¹⁸⁴ those who engage in consensual, but unlawful, sexual activity with peers close in age;¹⁸⁵ and “repeat offenders,” only a small percentage of whom will grow

179. *Id.* at 61.

180. *See* Leon, Burton & Alvare, *supra* note 79, at 144-45.

181. Franklin E. Zimring, et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 JUST. Q. 58, 59-60 (2009).

182. *See, e.g.*, Bremer, *supra* note 64, at 1087 (reporting on a study conducted in 1996 of 1,600 child sex offenders that found a recidivism rate of 4%); *see also* PITTMAN & NGUYEN, *supra* note 7, at 6 (citing a study by Dr. Elizabeth Letourneau that found a reconviction rate of less than 1%); *id.* (citing studies compiled by Professor Zimring that reveal over 92% of all individuals who committed a sex offense as a juvenile did not commit another sex offense); *In re* J.B., 107 A.3d 1, 13 (2014) (endorsing a report that “the recidivism rate for juvenile sexual offenders to commit another sexual offense is less than two percent”).

183. *See generally* Zimring, *supra* note 134.

184. *Id.*; *see also* Leon, Burton & Alvare, *supra* note 79, at 143 (noting that “[y]ounger juveniles who sexually offend are more likely situational offenders, acting out on impulses with inappropriate subjects”).

185. *See supra* notes 28-40 and accompanying text (profiling offenders who had committed crimes of statutory rape and sexting).

into sexual predators.¹⁸⁶ Suzanne Meiners-Levy would add another category – what she describes as that group that commit sex offenses because of “opportunity and hormones.”¹⁸⁷

The research conducted by Dr. Elizabeth Letourneau, Harris, and their colleagues confirms this assessment. “[E]merging research has indicated that JSO (juvenile sex offenders) represent a heterogeneous group that is decidedly distinct from the adult sexual offender population.”¹⁸⁸ The United States Supreme Court agrees. In *Miller v. Alabama*, the Court wrote that a child’s youth is far “more than a chronological fact.”¹⁸⁹ Though obvious, this statement sets the stage for a profoundly important set of observations by the Court on the constitutional imperative for sentencing differences between adult and child offenders.¹⁹⁰

The pronouncement that juvenile offenders are different from their adult counterparts derives from a trilogy of cases—*Roper v. Simmons*,¹⁹¹ *Graham v. Florida*,¹⁹² and *Miller v. Alabama*¹⁹³—where the United States Supreme Court held that minors should not be sentenced to death or face life imprisonment without the possibility of parole. Central to the trilogy’s

186. See, e.g., *In re Nick H.* WL5702669 (2015) (delineating numerous facts to suggest that Nick H. may be among the small number of child offenders who will continue to reoffend); B.W. v. State, 909 N.E.2d 471, 474 (Ind. Ct. App. 2009) (describing child offender as “very high risk” to reoffend based on a history of predatory sexual contact with at least 47 people, ranging in age from two to “seniors”).

187. Suzanne Meiners-Levy, *Challenging the Prosecution of Young “Sex Offenders”*: *How Developmental Psychology and the Lessons of Roper Should Inform Daily Practice*, 79 TEMP. L. REV. 499, 506 (2006) (criticizing the assumption that child sexual behavior always portends future dangerousness). Interestingly, this sentiment found later support from the United States Supreme Court in *Miller v. Alabama* when it chastised sentencing schemes that were not sensitive to factors affecting children who offend. See *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (recognizing that a juvenile’s “immaturity, impetuosity, and failure to appreciate risks and consequences” should be considered in sentencing).

188. COLLATERAL CONSEQUENCES, *supra* note 14, at 3; see also Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81, 83 (2006) (“Collapsing all sex offenders together into a single category and making generalizations about this diverse range of offenders . . . is likely to result in substantial mischaracterization regarding the risk of re-offending for many of these individuals.”). In an interesting development to ascertain which child offenders are most likely to reoffend, social scientists are employing artificial intelligence algorithms to develop highly accurate risk prediction measures for juvenile sexual offenders. See KiDeuk Kim, et al., *Emerging Practices in Assessing the Risk of Sexual Recidivism* (Oct. 16, 2015).

189. 132 S. Ct. 2455, 2467 (2012) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

190. *Id.* at 2458 (emphasizing in the Court’s jurisprudence that “children are constitutionally different from adults for purposes of sentencing”).

191. 543 U.S. 551 (2005) (concluding that the death penalty violated the Eighth Amendment if applied to a juvenile convicted of murder).

192. 560 U.S. 48 (2010).

193. 132 S. Ct. 2455 (2012).

holdings was the determination that criminal sentencing practices must account for key distinctions that differentiate adult and child offenders.¹⁹⁴ The *Miller* Court wrote: “[I]mposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”¹⁹⁵

That “children are constitutionally different”¹⁹⁶ shaped the central analysis. Sentencing a juvenile to the harshest of punishments is a mismatch between the culpability of the offender and the severity of the punishment.¹⁹⁷ The reason? Child offenders possess strikingly different attributes from their adult counterparts. They include: “lack of maturity and an underdeveloped sense of responsibility,”¹⁹⁸ vulnerability to negative and external pressures,¹⁹⁹ and the lack of a well-formed character.²⁰⁰ Their attributes deserve individualized assessment to determine legitimacy of the punishment.²⁰¹

These traits apply equally and specifically to children who commit sex crimes. Sexual acts are often based on lack of impulse control and a general lack of maturity.²⁰² According to the Association for the Treatment of Sexual Abusers, “poor social competency skills and deficits in self-esteem can best explain sexual deviance in children, rather than paraphilic interests and psychopathic characteristics that are more common in adult

194. *See id.*

195. 132 S. Ct. at 2458; *see also* Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 9-10 (2013) (reviewing studies that describe the brain’s activity affecting judgment, impulse control, and decision making).

196. Courts have picked up on the phrase, “children are constitutionally different.” *See, e.g., State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (recognizing the message from *Roper*, *Graham*, and *Miller* that “children are constitutionally different”); *accord* *People v. Carp*, 852 N.W.2d 801, 815 (Mich. 2014); *Commonwealth v. Batts*, 66 A.3d 286 (Pa. 2013). Indeed, it could be argued that the phrase “children are constitutionally different” is a sticky message. *See supra* notes 160-61 and accompanying text (describing the characteristics of a sticky message).

197. *See Graham*, 560 U.S. at 79 (categorizing the ban on life imprisonment without the possibility of parole as a “categorical ban”). It is important to note that *Miller* only recognized *Graham*’s categorical ban as a “general principle.” *See Miller*, 132 S. Ct. at 2472, n.11.

198. *Roper*, 543 U.S. at 569.

199. *Id.*

200. *Id.*

201. *Id.*

202. *See, e.g., REGISTERING HARM, supra* note 118, at 20. (“We’re mainly talking about geeky, nerdy, socially immature kids. And so many of the factors that contribute to risk — like where they live or how their families work —are out of their control.”); *In re M.A.H.*, 20 S.W.3d 860, 864, n.1 (Ct. App. Tex. 2000) (describing the child offender as a “naïve, experimenter offender type”); *In re T.T.*, 907 A.2d 416, 417 (N.J. 2006) (quoting T.T. as saying “it was stupid and he should not have done it”); Finkelhor, Ormrod & Chaffin, *supra* note 33, at 3 (“Some of the offending behavior is compulsive, but it more often appears impulsive or reflects poor judgment.”); *In re J.B.*, 107 A.3d 1, 18 (Pa. 2014) (citing with approval the lower court, which endorsed the *Graham/Miller* analysis for child sex offenders).

offenders.”²⁰³ All traits that the Court recognized in demanding different sentencing treatment for juvenile offenders.

Interestingly, not only do the traits of the juvenile delinquent help explain why children commit sex offenses, these attributes also help explain why they do not reoffend. As they age, children exhibit greater control over impulses and general growth in maturity, all of which contribute to better decision-making.²⁰⁴ Similar to juveniles who commit non-sexual crimes, maturation brings self-control. Observed by one court, “[T]he science establishes that for most youth, the qualities [that make them offend] are transient. That is to say, they will age out.”²⁰⁵ Indeed, the research supports the concept of their “aging out.” Dr. Caldwell reports that the highest risk for reoffense – to the extent there is one – occurs immediately after the primary offense, and that it drops off dramatically as the child sex offender enters adulthood.²⁰⁶

Because juvenile offenders possess less culpability, the Court was especially concerned by the finality of the sentence. The *Graham* Court wrote that life imprisonment without the possibility of parole reflects “an irrevocable judgment about [an offender’s] value and place in society.”²⁰⁷ Indeed, the irrevocability of such a sentence is in direct contradiction with the underlying premise of the juvenile justice system, specifically that a child has the capacity for change.²⁰⁸

203. See *Adolescents Who Have Engaged in Sexually Abusive Behavior: Effective Policies and Practices*, ATSA (Oct. 30, 2012), <http://www.atsa.com/adolescents-engaged-in-sexually-abusive-behavior>; see also Seto & Lalumière, *supra* note 80, at 530 (highlighting the various traits of children who commit sex crimes).

204. See *State v. Null*, 836 N.W.2d 41, 55 (Iowa 2013) (recognizing that the attributes of juvenile offenders are “transient”). In a Fifth Amendment context, see *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2397 (2011) (“The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.”).

205. *Null*, 836 N.W.2d at 55.

206. See email between Dr. Caldwell and Catherine Carpenter (Nov. 16, 2015) (on file with author).

207. *Graham v. Florida*, 560 U.S. 48, 74 (2010).

208. See, e.g., *United States v. Juvenile Male*, 590 F.3d 924, 932 (9th Cir. 2009) (observing that the juvenile justice system is “largely confidential and rehabilitative”); *People ex rel. Z.B.*, 757 N.W.2d 595, 606 (S.D. 2008) (Sabers, J., dissenting) (“The juvenile justice system is premised on a rehabilitative theory of justice, much unlike the harsher, more punitive adult system.”); see also IND. CODE § 31-10-2-1(5) (West 2013) (codifying the goals of the juvenile justice system, which are to “ensure that children within the juvenile justice system are treated as persons in need of care, protection, treatment, and rehabilitation”); *In re C.P.*, 967 N.E.2d 729, 746 (Ohio 2012) (stating that “[r]egistration and notification requirements frustrate two of the fundamental elements of juvenile rehabilitation: confidentiality and the avoidance of stigma”).

The admonition regarding the finality of life imprisonment without the possibility of parole also holds for mandatory lifetime registration. Although the context is obviously different, forcing children to register for life is in direct contradiction of the values and tenets of the juvenile justice system, and it also reflects “an irrevocable judgment about [an offender’s] value and place in society.”²⁰⁹

CONCLUSION

Mandatory registration and notification provisions are attractive. Certainly, one can appreciate the administrative efficiency of a post-SORNA conviction-based assessment model, which does not focus on risk assessment to make assumptions about an offender’s future dangerousness.²¹⁰

Unfortunately, as this article has proven, the utility of an overly-simplified, yet efficient system comes with a hefty price tag: the acknowledgement that mandatory lifetime registration captures and shatters the lives of many non-dangerous children. It is a price tag we should no longer be willing to bear. In the face of mounting statistical evidence to the contrary, we must commit to changing the false narrative that children who commit sex offenses are presumed to become sexually dangerous adults. We must commit to replacing it with a narrative that acknowledges that recidivism rates are low and that mandatory lifetime registration is both unnecessary and devastating.

209. *Graham*, 560 U.S. at 74; *cf.* *N.L. v. State*, 989 N.E.2d 773, 777 (2013) (recognizing that juvenile sex offender registration laws are in tension with the values of the juvenile justice system). For a reasoned argument on why *Graham* and *Miller* apply to allegedly civil registration and notification schemes, see Carpenter, *supra* note 16, at 772-93.

210. *See* 42 U.S.C. § 16916(3) (2015) (requiring offenders, age 14 years old and over, to register for life for certain sexual crimes). Not all courts reflexively and automatically apply sex offender status to a child who commits a sex offense. *See J.C.C. v. State*, 897 N.E.2d 931 (Ind. 2008) (rejecting sex offender status for a juvenile where the state had not presented clear and convincing evidence that the child was likely to reoffend). In an adult context, see *Doe v. Sex Offender Registry Bd.*, 41 N.E.3d 1058 (Mass. 2015) (declaring that the state must prove by clear and convincing evidence a sex offender’s tier level status).